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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

JASBIR SINGH KALSI et al., Plaintiffs and Appellants, v. BIOPHOTAS, INC. et al., Defendants and Respondents.	A138326 (Marin County Super. Ct. No. CIV 1105190)

Twelve years after first investing in defendant TruLight Corp. (TLC), and more than three years after TLC ceased business operations, plaintiffs Jasbir and Karenjit Kalsi sued TLC and 14 other corporations and individuals, seeking to recover their initial investment and other monies allegedly promised as the return on their investment. Plaintiffs' theories and causes of action evolved over the course of four complaints. Ultimately, the trial court sustained the demurrers of three defendants—Kathleen Buchanan, iinnLight Technologies, Inc. (ILT), and David Barth[1]—to plaintiffs' third amended complaint without leave to amend, and entered judgments in their favor.

Plaintiffs appeal from those judgments, contending, as best as we can tell, that their first, second, and third amended complaints all stated viable causes of action against the numerous defendants. On our de novo review, we conclude the trial court properly sustained the demurrers. We further conclude it did not abuse its discretion in doing so without leave to amend. We thus affirm.

[1] Only ILT and Buchanan are respondents here.

PRELIMINARY OBSERVATIONS

We begin with an observation that it is difficult to ascertain precisely what is at issue in the appeal before us. Plaintiffs' opening brief—which is, quite frankly, disorganized and confusing—fails to concisely identify the rulings plaintiffs are challenging. On page one, plaintiffs state they seek to "reinstate their case which was dismissed based on an ambiguous order by the Trial Judge and also on procedural grounds and technicalities . . . ." In the argument section, they address only the nine causes of action in their third amended complaint, with no discussion of the causes of action dismissed from their first and second amended complaints. Yet in their conclusion, they contend that "All of the Rulings on Demurrer, in February 2012, August 2013, and January 2013 should be reversed for a trial on the merits." Generously construing plaintiffs' submissions and giving them the benefit of the doubt, we will assume they intend to challenge the trial court's rulings as to all dismissed causes of actions.

We must also point out that plaintiffs' complaints are, for lack of a better description, a rambling jumble of allegations, opinions, arguments, and conclusions. This has turned what should have been a straight-forward review of 14 causes of action into an exercise in extreme frustration, requiring us to slog through a kitchen sink of muddled "allegations" to ascertain whether plaintiffs have stated a cause of action. This manner of pleading is not to be condoned.

BACKGROUND

First Amended Complaint (FAC)[2]

The FAC was superseded by two subsequent complaints such that many of its specific allegations are irrelevant to the issues before us. The trial court did, however,

[2] Plaintiffs initiated this action in Alameda County Superior Court. On a motion to change venue, the matter was transferred to Marin County Superior Court, and defendants ILT (later known as Biophotas) and Buchanan demurred to the original complaint. Five days later, plaintiffs filed the FAC.

sustain without leave to amend demurrers to one cause of action in the FAC. We thus briefly summarize it, as follows:

In 1999 and 2000, plaintiffs invested $170,000 in TLC, in exchange for which they received shares of TLC common and preferred stock and a promise of $3,000,000 in two years following an anticipated 3-to-1 stock split.

In March 2008, plaintiffs learned they would not be able to recoup any of their investment and TLC's assets would be sold to ILT. They were told, however, that if ILT were able to successfully market TLC's patented technology, "everyone would benefit."

In November 2008, plaintiffs were informed they had royalty rights for their investment, a representation reiterated in 2011.

In the end, plaintiffs never received any compensation for their investment, despite demands for the return of their investment, profits, or royalties.

On November 1, 2011, plaintiffs filed their FAC, naming the following six defendants: (1) TLC; (2) ILT; (3) Barth, "founder, shareholder, officer, representative, employee, promoter, agent, and President and Chief Executive Officer" of TLC; (4) Buchanan, "founder, shareholder, officer, representative, employee, promoter, agent of TLC and Chief Executive Officer of ILT"; (5) Mellen-Thomas Benedict, "founder, shareholder, officer, representative, employee, promoter, agent, and the Chairman and Chief Technology Officer of TLC and Principal Researcher and Technology Developer" of ILT; and (6) Jennie Meehan, "founder, shareholder, officer, representative, employee, promoter, agent and the Vice-President of TLC."

The FAC alleged the following 10 causes of action against all defendants: (1) fraud; (2) common counts; (3) violation of Corporations Code section 25401; (4) violation of Corporations Code section 25403; (5) violation of Corporations Code section 25504.1; (6) intentional infliction of emotional distress; (7) violation of Business and Professions Code section 17200; (8) imposition of equitable lien; (9) imposition of constructive trust; and (10) unjust enrichment. Two additional causes of action—breach of fiduciary duty and breach of contract—were alleged only against TLC and ILT.

Demurrers to the FAC

Buchanan and ILT, on the one hand, and Barth, on the other, demurred to plaintiffs' FAC, which demurrers plaintiffs opposed.[3]

By order dated February 22, 2012, the court sustained the demurrers to all causes of action. The demurrers to the fourth cause of action for violation of Corporations Code section 25403 were sustained without leave to amend. Plaintiffs were granted leave to amend all other causes of action.

Second Amended Complaint (SAC)

On March 13, 2012, plaintiffs filed a SAC, with 133 pages of exhibits. To the six original defendants named in the FAC, the SAC added two new corporations: Biophotas, Inc. (Biophotas), and Auramere International, Inc. (Auramere), both alleged to be shell corporations used to defraud plaintiffs and other investors. It also added seven new individual defendants: Drew Arvay, Mark Savage, Mark Kelly, Sam Haddad, and Curt Morgan, each of whom was alleged to be "a founder, shareholder, officer, representative, employee, promotor, and agent" and "Executive Officer" of TLC, ILT, Biophotas, and Auramere, and Val DeLeon and Paul Remack, who were alleged to have held those same positions, in addition to being "major shareholder[s]" and trustees of the four companies.

The SAC alleged as follows:

In October 1999, Barth, Benedict, Kelly, Arvay, Savage, Buchanan, and Meehan, acting on behalf of themselves, Buchanan, Arvay, Haddad, and TLC, solicited plaintiffs and others to invest in TLC. They disseminated a business summary and marketing materials to plaintiffs, other potential investors, and the media in California and throughout the United States. The materials represented, among other things, that TLC, "an early stage technology company," had developed "a new paradigm in anti-aging and regeneration technology that can slow down the aging process to a crawl and reverse many of its negative effects . . . ." The materials described a phototherapy technology

[3] Benedict and Meehan were apparently the only other defendants to appear in the case, both having answered plaintiffs' various complaints.

and provided photographs of prototypes claimed to be "the Holy Grail of anti-aging." According to plaintiffs, the materials contained false and misleading representations concerning investment of funds in connection with TLC.

Based on the marketing materials, plaintiffs agreed to invest $105,000 in TLC. In exchange for their investment, they received 48,920 shares of common stock and 300 shares of preferred stock in TLC. In November 1999 and July 2000, plaintiffs executed two subscription agreements memorializing the terms of their investment, which agreements were appended to the SAC. Barth, Benedict, Kelly, Arvay, Savage, Buchanan, and Meehan also represented through the subscription agreements that plaintiffs would receive $3,000,000 within two years through a 3-to-1 stock split.[4]

By letter dated March 12, 2008, Barth, Benedict, Kelly, Arvay, Savage, Buchanan, and Meehan, acting on behalf of themselves, Buchanan, Arvay, Haddad, and TLC, informed plaintiffs they would not be able to recoup any of their investment and TLC would be sold to ILT. The letter further advised that if ILT were able to successfully market TLC's patented technology, "everyone would benefit." Plaintiffs were asked to consent to the transaction, which was memorialized in an asset purchase agreement (APA) appended to the March 12 letter.

The letter—Exhibit 7 to the SAC—was authored by attorney Debra Scheufler, who had been retained to represent TLC in the transaction. In the letter, Scheufler went on to advise: "As you may be aware, Tru Light Corporation has been unable to operate for some time now. . . . [¶] The solution they have arrived upon is that certain of Tru Light's assets . . shall be sold to a new corporation known as iinnLight Technologies, Inc. and iinnLight will continue to develop and commercialize the patented technology. Revenues from the efforts of iinnLight will then be funneled into an account and used to distribute funds to the shareholders and noteholders of Tru Light. Any such funds would

[4] The subscription agreements are, in fact, silent on any alleged $3,000,000 payment or stock split.

be used to pay off tax liabilities, private debt, and then be distributed to noteholders and shareholders."

The APA, also appended to the SAC, provided that payments from ILT to TLC would commence once "net receipts" exceeded $1 million. Per Schedule 2 of the agreement, any funds received from ILT would first be distributed to TLC noteholders, then preferred shareholders, followed by ordinary shareholders.

On November 21, 2008, ILT chief financial officer Marc Kelly informed plaintiffs via email they had royalty rights for their original investment.[5] He advised that ILT was finalizing payment trust documents and, once those were complete, all noteholders and shareholders would receive tax identification confirmation notices. He further advised that ILT had generated over $125,000 in revenue towards the $1 million trigger for the royalty payments and that payments were anticipated to begin in mid-2009.

On May 24, 2011, Kelly confirmed that plaintiffs were royalty recipients. He asked them to desist from pursuing their lawsuit against defendants since they would be receiving royalties from ILT. This representation was false, because ILT had ceased to exist and had been replaced by Biophotas.

In May and June 2011, plaintiffs demanded the return of their investment, as well as payment of profits and royalties, but defendants refused to abide by the terms of the subscription agreements and denied liability.

The SAC also alleged that TLC was the alter ego of all other defendants and was merely a shell through which the other defendants operated. Appended to the SAC was a collection of corporate documents pertaining to TLC, ILT, and Biophotas, purporting to show that the directors, officers, and trustees of TLC (namely, Kelly, Remack, and Buchanan) were "substantially" the same as those of Auramere, ILT, and Biophotas. This, plaintiffs alleged, demonstrated that TLC was not an entity distinct from the other defendants.

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[5] The email was not appended to the SAC, although plaintiffs would attach it to the next iteration of their complaint.

The SAC reasserted the 11 remaining causes of action from the FAC, alleging them against all defendants, except for the cause of action for violation of Corporations Code section 25401, which was alleged only as to TLC, Auramere, Biophotas, ILT, Barth, Benedict, Meehan, Buchanan, Kelly, Arvay, and Haddad. It also added two new causes of action: "unqualified offers and sales of securities" in violation of Corporations Code section 25110 (alleged against TLC, Auramere, Biophotas, iinnLight, Barth, Benedict, Meehan, Buchanan, Kelly, Arvay, and Haddad) and "dissemination of untrue and misleading statements" in violation of Business and Professional Code section 17500 (alleged against all defendants).

Demurrers to the SAC

ILT, Buchanan, and Barth again demurred to all causes of action, and plaintiffs opposed the demurrers.

On August 15, 2012, the trial court entered an order sustaining the demurrers to all causes of actions. As to the causes of action for violation of Corporations Code sections 25110, 25401, and 25504.1, the court concluded that to the extent they were based on the 1999 and 2000 stock purchases, they were barred by the statute of limitations. And to the extent they were based on the claimed right to royalties conveyed in 2008 and 2011, even if the royalties could be considered securities, defendants did not "offer to sell" anything and plaintiffs did not purchase anything. The court also sustained the demurrers to the cause of action for intentional infliction of emotional distress without leave to amend, concluding plaintiffs "have not and cannot allege outrageous conduct." As to all remaining causes of action, plaintiffs were granted leave to amend to allege viable claims not barred by the statute of limitations.

Third Amended Complaint (TAC)

On August 24, 2012, plaintiffs filed their TAC, this time adding no new defendants. To the allegations in the SAC, the TAC added the following:

Plaintiffs were not aware that the assets and stock of TLC had been transferred to ILT, Biophotas, or Auramere, until November 2011, when they received a copy of a September 28, 2011 final judgment in *People v. Tru-Light Corp. et al.*

(Super. Ct. Monterey County, No. M112396), which imposed civil penalties, costs, and a permanent injunction against some of the defendants prohibiting them from engaging in certain business practices. Until that time, "plaintiffs received numerous conflicting messages, e-mails and letters from defendants stating there had been asset [*sic*] purchase, and later that there had been stock [*sic*] purchase, and later that plaintiffs' funds would be converted to Royalty payments."

Plaintiffs also alleged that defendants' dissemination of false information continued in July 2008, November 2008, August 2010, and May 2011, based on a series of communications from defendant Kelly to plaintiffs. Specifically:

On July 29, 2008, Kelly represented to plaintiffs they would receive royalties for their preferred and common stocks. Plaintiffs relied on this representation to their detriment, because at that time, they had offers from third parties to purchase their stock but they declined to sell because of the promise of royalties in ILT.

On November 21, 2008, Kelly reiterated that plaintiffs would receive royalties. Plaintiffs had "intended to put a lien on the $105,000 to recoup their funds with defendants," but in reliance on Kelly's representation, they did not do so because they believed defendant would raise the $1 million to trigger the royalty payments from ILT. Kelly reiterated his claim regarding royalty payments in August 2010.

Based on this series of representations from Kelly, plaintiffs alleged their last transactions with defendants occurred in 2008 and 2011, a theory they expressed in various ways, including the following:

-- Plaintiffs' last "payment/investment" in TLC, ILT, and Biophotas was made in between July 2008, November 2008, and May 2011, "[b]y way of conversion of their $105,000 investment into royalty rights in [ILT] when plaintiffs agreed to receive royalty rights in lieu of their shares being transferred from [TLC] to [ILT]."

-- In "2008 and 2011, Buchanan, [ILT], Biophotas, Barth, Benedict, Arvay, DeLeon, Remack and [TLC] *fraudulently* offered to sell royalties to plaintiffs, which plaintiffs accepted and which turned out to be fraudulent."

-- In July 2008, November 2008, August 2010, and May 2011, defendants acknowledged their indebtedness for plaintiffs' original $105,000 investment, and also promised plaintiffs would receive $3,000,000 within two years due to a stock split.

-- In July 2008, November 2008, August 2010, and May 2011, defendants "in writings, telephone calls and via e-mails, offered to sell royalties in the amounts of $105,000 and $3000000 if plaintiffs will accept such royalties in lieu of the their investments and profits in [TLC's] assets and shares, which plaintiffs accepted to buy in March 2008 and also in May 2011."

The TAC asserted nine causes of action against all 15 defendants: "dissemination of untrue and misleading statements" in violation of Business and Professions Code section 17500; unfair competition in violation of Business and Professions Code section 17200; fraud; common counts; breach of fiduciary duty; imposition of equitable lien; imposition of constructive trust; unjust enrichment; and breach of contract.

Demurrers to the TAC

Once again, ILT, Buchanan, and Barth demurred, and plaintiffs filed opposition.[6]

The matters came on for hearing on January 16, 2013. On January 30, the court entered an order sustaining the demurrers without leave to amend. It concluded plaintiffs could not overcome the statute of limitations bar to any claims arising out of the original stock purchases. As to plaintiffs' theory that they purchased royalties in 2008 and 2011, the court concluded that the allegations did not support their claim that a purchase of securities occurred. Finally, it concluded that many of the causes of action were incurably defective for several additional reasons.

The court dismissed the complaint as to ILT, Buchanan, and Barth, and entered judgments in their favor.

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[6] Plaintiffs also filed two requests for judicial notice, the first seeking notice of the court's August 8 order on the demurrers to the SAC, the second of the February 22 order on the demurrers to the FAC. Plaintiffs state in their opening brief that the trial court's failure to rule on the requests for judicial notice was "fatal to the final order of the Judge." The court need not take judicial notice of the records in the case before it, including its own orders.

This timely appeal followed.

DISCUSSION

Standard of Review

"It is well established that a demurrer tests the legal sufficiency of the complaint. [Citations.] On appeal from a dismissal entered after an order sustaining a demurrer, we review the order de novo, exercising our independent judgment about whether the complaint states a cause of action as a matter of law. [Citations.] We give the [complaint] a reasonable interpretation, reading it as a whole and viewing its parts in context. [Citations.] We deem to be true all material facts that were properly pled. [Citation.] We must also accept as true those facts that may be implied or inferred from those expressly alleged. [Citation.] We may also consider matters that may be judicially noticed, but do not accept contentions, deductions or conclusions of fact or law. [Citation.]" (*City of Morgan Hill v. Bay Area Air Quality Management Dist.* (2004) 118 Cal.App.4th 861, 869–870; see also *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *Bock v. Hansen* (2014) 225 Cal.App.4th 215, 226.) And as particularly relevant here, "If the allegations in the complaint conflict with the exhibits, we rely on and accept as true the contents of the exhibits." (*SC Manufactured Homes, Inc. v. Liebert* (2008) 162 Cal.App.4th 68, 83; accord, *Holland v. Morse Diesel Internat., Inc.* (2001) 86 Cal.App.4th 1443, 1447 ["If facts appearing in the exhibits contradict those alleged, the facts in the exhibits take precedence."].)

Since a demurrer tests only the legal sufficiency of the pleadings, it should go without saying that neither we nor the trial court makes any factual determinations. We point this out because plaintiffs claim the trial court "made several factual findings," repeatedly insisting that it "ruled on the alter ego rule and that each defendant was an alter ego of the other." The trial court made no "factual findings," and neither will we.

All Claims Arising Out of the 1999 and 2000 Stock Purchases Are Barred By the Statute of Limitations

The first ground on which the trial court sustained the demurrers was that the claims were barred by the statute of limitations. Plaintiffs alleged that in 1999 and 2000,

they invested $105,000 in TLC, in exchange for which they received 48,920 shares of common stock and 300 shares of preferred stock. They also alleged that defendants represented they would received $3,000,000 within two years as a result of a 3-to-1 stock split. Plaintiffs knew by 2002 they did had not received their $3,000,000 windfall, yet they did not file their original complaint until 2011—9 years later. This was clearly outside the statute of limitations for all of the causes of actions asserted. (See, e.g., Corp. Code, § 25507, subd, (a) [two years after violation of Corp. Code, § 25110 or one year after discovery of the violation]; Corp. Code, § 25506, subd. (b) [five years for violation of Corp. Code, §§ 25401, 25504.1]; Code Civ. Proc., § 335.1 [two years for intentional infliction of emotional distress]; Bus. & Prof. Code, § 17208 [four years for violation of Bus. & Prof. Code, § 17200]; Code Civ. Proc., § 338, subd. (d) [three years for fraud]; Code Civ. Proc., § 337, 339 [two or four years for common counts]; Code Civ. Proc., § 343 [four years for breach of fiduciary duty, imposition of equitable lien, constructive trust]; Code Civ. Proc., § 337 [four years for breach of written contract].)

In an effort to circumvent the statute of limitations bar, plaintiffs pleaded a new theory in their SAC and TAC: that defendants engaged in conduct between 2008 and 2011, including advising plaintiffs that they had royalty rights in ILT's technology, that supported plaintiffs' numerous causes of action. This new theory fails to rescue plaintiffs claims.

Cause of Action Dismissed in the FAC

Violation of Corporations Code Section 25403

Corporations Code section 25403 provides that any person who "indirectly controls and induces" another individual to violate a provision of the Corporate Securities Law of 1968, or assists an individual in doing so, is in violation of that provision. (Corp. Code, § 25403, subd. (a), (b).) No private right of action exists under section 25403. (*Apollo Capital Fund, LLC v. Roth Capital Partners, LLC* (2007) 158 Cal.App.4th 226, 255.) Despite this, plaintiffs theorize they can assert a private cause of action for violation of Corporations Code section 25403 "because they were

initiation [*sic*] a Derivative Action as minority shareholders." This theory lacks any authority. The trial court correctly sustained the demurrers to this cause of action without leave to amend.

Causes of Action Dismissed in the SAC

Violation of Corporations Code Sections 25110, 25401, and 25504.1

In their SAC, plaintiffs alleged violations of Corporations Code sections 25110, 25401, and 25504.1. The first two make it unlawful to engage in the sale of securities unless the security has been qualified or is exempt from qualification (§ 25110) or to do so in a fraudulent manner (§ 25401). And section 25504.1 provides for joint and several liability for violations of various Corporations Code provisions, including sections 25110 and 25401. These causes of action fail for multiple reasons.

As noted, in their SAC, plaintiffs alleged a new theory in an attempt to circumvent the statute of limitations bar: that from March 2008 through May 2011, defendants "offered to sell *royalties* to plaintiffs based on assets of [TLC] that have been transferred to [ILT] and Biophotas." The alleged March 2008 offer stems from the March 12, 2008 letter from attorney Scheufler in which she advised that TLC had been "unable to operate for some time," that ILT was going to purchase certain of TLC's assets, and that "everyone will benefit" if ILT was able to market TLC's patented technology. In November 2008, ILT chief financial officer Kelly informed plaintiffs they had royalty rights for their original investment, and that ILT had generated over $125,000 in revenue towards the $1 million trigger for the royalty payments. And in May 2011, Kelly confirmed that plaintiffs were royalty recipients. But plaintiffs' claim that these communications constituted an offer to sell royalties is contradicted by the communications themselves and the APA.

Pursuant to Corporations Code section 25017, subdivision (b), an "offer to sell" a security "includes every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security for value." The exhibits to the SAC undermine plaintiffs' claim that defendants offered the royalties for value. Kelly informed plaintiffs they would receive royalties, the terms of which were spelled out in the APA. Schedule 2 to

the APA provided that TLC stockholders were to receive payment once revenue targets were hit and certain priorities (e.g., noteholders were paid) were fulfilled. And plaintiffs expressly pleaded that they would only receive payments if ILT met the $1 million trigger, a concession inconsistent with their theory that plaintiffs offered to sell them the royalty rights. Further, plaintiffs' own allegations are inconsistent with this theory, as they alleged elsewhere in the SAC that the royalties were "promised," that they "were informed" that they had royalty rights, and that their status as royalty "recipients" was "confirmed." Plaintiffs' repeated insistence that this transaction consisted of an offer to sell securities simply does not make it so.

While plaintiffs present no argument on these causes of action in the "arguments" section of their opening brief, they do claim in the "procedural history" to be "appeal[ling] this finding." As they explain it there, "[Plaintiffs] exchanged their interests in the assets of Trulight in exchange for the royalties payments by iinnlight. We must remember that they are all alter egos of each other. According to The Living Webster Encyclopedic Dictionary of the English Language, (1977 ed.) at page 838, 'royalty' is a compensation or portion of proceeds paid to the owner of a right, as an oil right or patent for the use of it. To Miriam-Webster Dictionary, 'royalties' entail: **a share of the product or profit reserved by the grantor especially of an oil mining lease *or* a payment to an author or composer for each copy of a work sold or to an inventor for each item sold under a patent.** [¶] We must remember that [plaintiffs] were investors in the startup corporation named Trulight owned and controlled by defendants. When defendants offered [plaintiffs] *in lieu* of [plaintiffs'] investment and stockholding in trulight and in innlight, defendants traded in stock. Letters contained at pages CTA 168, 169 [March 2008 Scheufler letter] and 170-4 [May 2008 letter to TLC shareholders], and 432-439 [November 2008 Kelly email] show that as of 2008–2011, [plaintiffs] were offered royalties in lieu of their stockholding in trulight whose assets were taken over by iinnlight." This argument—unsupported by any authority—is not persuasive that giving conditional royalty rights in one company to owners of worthless stock in another company constitutes an offer to sell anything.

Plaintiff's Corporations Code claims fail for another reason: plaintiffs did not allege a 2008 or 2011 transaction involving securities. Corporations Code section 25019 provides an exhaustive list of what constitutes a security.[7] That lengthy list does not include royalties. And nowhere in the communications and APA is there any suggestion that the potential royalties were securities.

Acknowledging this fact themselves, plaintiffs *expressly* pleaded that royalties are not securities. As noted, in addition to their Corporations Code claims, plaintiffs also asserted claims for violations of Business and Professions Code sections 17200 and 17500. But those sections do not apply to securities transactions. (*Bowen v. Ziasun Technologies, Inc.* (2004) 116 Cal.App.4th 777, 788.) Accordingly, in their attempt to allege section 17200 and 17500 violations, plaintiffs asserted in their TAC, "Royalties are *not* securities . . . ." This concession defeats their Corporations Code causes of action.

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[7] The list includes "any note; stock; treasury stock; membership in an incorporated or unincorporated association; bond; debenture; evidence of indebtedness; certificate of interest or participation in any profit-sharing agreement; collateral trust certificate; preorganization certificate or subscription; transferable share; investment contract; viatical settlement contract or a fractionalized or pooled interest therein; life settlement contract or a fractionalized or pooled interest therein; voting trust certificate; certificate of deposit for a security; interest in a limited liability company and any class or series of those interests (including any fractional or other interest in that interest), except a membership interest in a limited liability company in which the person claiming this exception can prove that all of the members are actively engaged in the management of the limited liability company; provided that evidence that members vote or have the right to vote, or the right to information concerning the business and affairs of the limited liability company, or the right to participate in management, shall not establish, without more, that all members are actively engaged in the management of the limited liability company; certificate of interest or participation in an oil, gas or mining title or lease or in payments out of production under that title or lease; put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof); or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency; any beneficial interest or other security issued in connection with a funded employees' pension, profit sharing, stock bonus, or similar benefit plan; or, in general, any interest or instrument commonly known as a 'security'; or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing."

In short, plaintiffs did not allege facts demonstrating an offer to sell a security, and their causes of action for violations of Corporations Code sections 25110 and 25401 fail. So, too, must their section 25504.1 claim, as it is derivative of the others. (See, e.g., *Lubin v. Sybedon Corp.* (1988) 688 F.Supp. 1425, 1453 [cause of action provided for in section 25504.1 is derived from section 25401].)

Intentional Infliction of Emotional Distress

In *Bock v. Hansen, supra,* 225 Cal.App.4th 215, we recently considered plaintiffs' appeal from an order sustaining a demurrer to, among other things, their claim for intentional infliction of emotional distress. We summarized the law governing this claim as follows:

" 'A cause of action for intentional infliction of emotional distress exists when there is " ' " '(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct.' " ' " [Citation.] A defendant's conduct is "outrageous" when it is so " ' "extreme as to exceed all bounds of that usually tolerated in a civilized community." ' " [Citation.] And the defendant's conduct must be " ' "intended to inflict injury or engaged in with the realization that injury will result." ' " [Citation.]

" 'Liability for intentional infliction of emotional distress " 'does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.' [Citation.]" [Citations.] . . . .

" 'With respect to the requirement that a plaintiff show severe emotional distress, this court has set a high bar. "Severe emotional distress means ' "emotional distress of such substantial quality or enduring quality that no reasonable [person] in civilized society should be expected to endure it." ' " ' " (*Bock v. Hansen, supra,* 225 Cal.App.4th at pp. 232-233.)

In their intentional infliction of emotional distress cause of action, plaintiffs alleged that defendants intentionally misled them into investing in TLC[8] and did so with the intention of injuring them. According to plaintiffs, majority shareholders should protect minority shareholders, but instead they used their "economic and financial clout to perpetrate fraud on plaintiffs"—who were immigrants—by misleading them about the legal effect of a document and coercing them into being liable for sums of money. This, plaintiffs alleged, was extreme, outrageous, and beyond human decency. Since any claim based on the 1999 and 2000 investments would be time barred, plaintiffs' claim must derive from the communications in 2008 to 2011. The allegations concerning defendants' conduct during that time do not rise to the level required for an intentional infliction of emotional distress claim.

Per the exhibits to plaintiffs' SAC, in 2008, counsel for TLC informed plaintiffs that certain of TLC's asserts were to be sold to ILT, which would continue to develop the patented technology. Revenues from ILT efforts would then be distributed according to the terms of the APA, which provided that payments from ILT to TLC would commence once "net receipts" exceeded $1 million. Per Schedule 2 of the agreement, any funds received from ILT would first be distributed to TLC noteholders, then preferred shareholders, followed by ordinary shareholders. In November 2008, Kelly confirmed that ILT had generated over $125,000 in revenue towards the $1 million trigger for the royalty payments. Nothing in this series of communications or transactions can be construed as conduct so outrageous that it exceeds the bounds of human decency.

We have surveyed cases in which courts have found allegations of outrageous conduct to be sufficient. These cases confirm that such conduct can occur in a wide variety of circumstances. (See, e.g., *Plotnik v. Meihaus* (2012) 208 Cal.App.4th 1590, 1613–1614 [jury's finding of intentional infliction of emotional distress was supported by evidence that defendant confronted plaintiff, made rude comments, expressly threatened

[8] Plaintiffs specifically alleged that defendants "misled [them] to sign the Straight Note without disclosures and while misleading" them. Nowhere else in the SAC did plaintiffs define or even refer to this "Straight Note."

him and his dog, and made a veiled threat against his wife]; *Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.* (2005) 129 Cal.App.4th 1228, 1259-1260 [defendant's website entries targeting employee of animal testing lab for illegal activity and threatening her safety could support cause of action for intentional infliction of emotional distress]; *Angie M. v. Superior Court* (1995) 37 Cal.App.4th 1217, 1226 [allegations of eight-month sexual relationship initiated by physician with minor, including mutual oral copulation and use of alcohol and controlled substances, showed sufficiently outrageous conduct to send case to jury]; *KOVR-TV, Inc. v. Superior Court* (1995) 31 Cal.App.4th 1023, 1030 [television reporter's interviewing three young children on camera, with no adult present, concerning murder of two playmates who lived next door, about which children were then unaware].) We are unaware of any case, however, recognizing allegations of a bad business investment as sufficient to state a claim for intentional infliction of emotional distress.

Plaintiffs disagree, arguing they alleged outrageous conduct, as follows: "It is outrageous to sell the corporation and its assets under plaintiffs' noses and register several sham corporations to transfer plaintiffs' investments and shield the assets and monies obtained from investors from plaintiffs and other investors in a brazen manner while disobeying all regulations and laws under the Corporations Code amounts to outrageous conduct. Nobody expects his fellow majority shareholders to use their powerful majority shareholders to oppress and cheat the minority shareholders to whom they owe duties of fair-dealing and utmost good faith. the [*sic*] These fraudulent acts are completely outrageous and out of bounds of decency and civility for the officers and majority shareholders to use chicaneries against minority investors. The position of business partners is one of confidence and trust." Plaintiffs' characterization of a purportedly fraudulent business transaction are, however, contradicted by the exhibits to the SAC.

Lastly, we note that a corporate entity is incapable of committing an intentional infliction of emotional distress. (*Brown v. Allstate Ins. Co.* (S.D. Cal. 1998)

17 F.Supp.2d 1134, 1139.) Thus, plaintiffs' claim against ILT for intentional infliction of emotional distress fails on this ground as well.

Causes of Action Dismissed in the TAC

Violation of Business and Professions Code Section 17500

Business and Professions Code section 17500, California's false advertising law, "prohibits advertising property or services with untrue or misleading statements or with the intent not to sell at the advertised price." (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 52; see also *People v. Dollar Rent-A-Car Systems, Inc.* (1989) 211 Cal.App.3d 119, 128 [section 17500 "prohibits the use of any untrue or misleading statement in selling real or personal property or personal services"].) Advertising in the context of a section 17500 claim has typically been construed as "widespread promotional activities directed to the public at large." (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1277, fn. 9.) Plaintiffs asserted no allegations with respect to the 2008 through 2011 communications that fell within this definition. Their allegation that defendants made "promises by e-mails and letters and telephone calls that defendants would issue royalty rights to plaintiffs and others" is insufficient.

Plaintiffs argue a new theory on appeal: that "[d]efendants falsely advertized [*sic*] that Schmidt & Associates De Leon, Remack would work with plaintiffs and other investor [*sic*] to make sure that they receive royalty payments for their investments in Tru-Light, while at the same time defendants were using undisclosed sham corporations to ferret Trulight's assets through iinnlight's alter egos—Auramere and biophotoas which had already stolen Trulight's assets." But plaintiffs once again run into the problem that the exhibits to the TAC contradict their allegations.

Finally, as noted above, Business and Professions Code section 17500 does not apply to securities transactions. (*Bowen v. Ziasun Technologies, Inc., supra,* 116 Cal.App.4th at p. 788.) Thus, to the extent the 2008–2011 communications involved securities—as plaintiffs alleged in the Corporations Code-based cause of action—no unfair advertising claim will lie.

Violation of Business and Professions Code Section 17200

Business and Professions Code section 17200, California's unfair competition law, prohibits any "unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising . . . ." (Bus. & Prof. Code, § 17200.) Plaintiffs alleged defendants engaged in an unfair business practice, which has been defined as "one that offends established public policy, that is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers, or that has an impact on the victim that outweighs the defendant's reasons, justifications, and motives for the practice." (*Jolley v. Chase Home Finance, LLC* (2013) 213 Cal.App.4th 872, 907.) Other courts have required "that the public policy which is a predicate to a claim under the 'unfair' prong of the UCL must be tethered to specific constitutional, statutory, or regulatory provisions." (*Ibid.*) As to the events of 2008 to 2011, defendants' conduct, as alleged and as detailed in the TAC's exhibits, did not fall within the scope of any of these forbidden practices.

Specifically, plaintiffs alleged in the TAC that "[d]efendants engaged in unfair competition by making false promises and false advertisements about exchanging Trulight's shareholders' ownership for royalty rights." But, as we have said, the communications appended to the TAC show that counsel for TLC informed plaintiffs TLC had ceased operations and its patented technology would be sold to ILT, with royalties paid to TLC's shareholders if ILT's revenue hit the $1 million mark. Nothing in those communications can be construed as an unfair business practice.

Additionally, plaintiffs do not allege they "suffered injury in fact and lost money or property" as a result of defendant's purportedly unfair conduct. (Bus. & Prof. Code, § 17204.) Plaintiffs do allege that they invested $105,000 in 1999/2000 and did not receive any return on their investment, but they allege no loss of money or property in 2008 and beyond. The communications and APA advised that plaintiffs would receive royalty payments if certain conditions were met. There is no suggestion those conditions were satisfied.

Fraud

"The elements of fraud, which give rise to the tort action for deceit, are (a) misrepresentation; (b) knowledge of falsity; (c) intent to defraud, i.e., induce reliance; (d) justifiable reliance; and (e) damage." (*Jolley v. Chase Home Finance, LLC, supra,* 213 Cal.App.4th at p. 892; see also *Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638.) The TAC attempted to allege fraud based on both the 1999/2000 investments and the 2008 to 2011 communications. Both attempts fail.

As to the 1999/2000 investment, plaintiffs sought to circumvent the statute of limitations bar by alleging delayed discovery. They alleged that it was not until November 2011, when they received a copy of the final judgment in *People v. TLC* (Super. Ct. Monterey County, 2011, No. M112396), that they discovered defendants' claims and representations regarding TruLight's devices "were not approved by federal or state authorities." Learning that the statements were not approved does not mean plaintiffs learned at that time that the representations were false, nor have plaintiffs alleged facts showing they lacked the means of obtaining knowledge of falsity through the exercise of reasonable care. (3 Witkin, Cal. Procedure (5th ed. 2008) Actions, § 659, pp. 870-871.) And, despite four iterations of their complaint, plaintiffs have never identified the representations they contend were false.

As to the events in 2008 through 2011, plaintiffs' allegations that defendants made misrepresentations with the intent to defraud them and that they relied on any misrepresentations to their detriment are contradicted by attachments to the TAC, including the March 2008 Scheufler letter, the APA, and Kelly's emails.

Breach of Fiduciary Duty

To plead a cause of action for breach of fiduciary duty, plaintiffs must allege the existence of a fiduciary relationship, its breach, and damages proximately caused by that breach. (*Brown v. California Pension Administrators & Consultants, Inc.* (1996) 45 Cal.App.4th 333, 347–348.) Plaintiffs' breach of fiduciary duty claim is premised on allegations that defendants were the majority shareholders in TLC, ILT, Auramere, and Biophotoas and owed plaintiffs duties of "loyalty, fair dealing and utmost good faith

. . . ." They breached this duty, plaintiffs contend, by "caus[ing] the assets of trulight to be transferred to sham corporations such as Auramere and Biophotas—corporations that were mere shells and conduit for draining the funds and assets of Trulight. As a result, the assets of trulight were lost and all the funds of trulight were siphoned through these conduit corporations."

Skipping over the question of whether plaintiffs adequately alleged the existence of a fiduciary relationship between plaintiffs and any defendant, there can be no doubt that plaintiffs failed to allege facts demonstrating a breach of any fiduciary duty. Once again, plaintiffs' claim hinges on the 2008 communications, alleging that in March of that year, "the majority shareholders of Trulight and iinnlight corporations caused the assets of trulight to be transferred to sham corporations such as Auramere and Biophotas—corporations that were mere shells and conduit for draining the funds and assets of Trulight. As a result, the assets of trulight were lost and all the funds of trulight were siphoned through these conduit corporations." But, as previously observed, the exhibits to the TAC depict a starkly different scenario, one that does not give rise to a breach of fiduciary duty claim.

Breach of Contract

"The essential elements of a breach of contract claim are: '(1) the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to plaintiff.' [Citation.]" (*Hamilton v. Greenwich Investors XXVI, LLC* (2011) 195 Cal.App.4th 1602, 1614.) The TAC failed to allege the existence of a contract, let alone the breach of one.

In the TAC, plaintiffs alleged that communications appended to the TAC—specifically, the July and November 2008 emails from Kelly to plaintiffs' then attorney and an August 2010 letter from a different attorney for plaintiffs to Kelly—constituted a written contract between plaintiffs and defendants "wherein, Defendants offered to convert Plaintiffs' $105,000 investment into royalty rights, which plaintiffs accepted in July 2008, November 2008, August 2010 and in May 2011." Plaintiffs allegedly performed their obligations by agreeing to take royalty rights for their initial investment,

but defendants breached their contractual duties by failing to issue the royalty payments. The referenced communications and the APA do not evidence a written contract— plaintiffs do not identify any consideration— nor have plaintiffs alleged a breach of the APA.

Common Count

"To prevail on a common count for money had and received, the plaintiff must prove that the defendant is indebted to the plaintiff for money the defendant received for the use and benefit of the plaintiff." (*Rutherford Holdings, LLC v. Plaza Del Rey* (2014) 223 Cal.App.4th 221, 230.) For all the reasons detailed above, plaintiffs have not alleged facts demonstrating that defendants are indebted to them.

Imposition of Constructive Trust

To assert a cause of action for imposition of a constructive trust, "Plaintiff must plead fraud, breach of fiduciary duty, breach of promise to buy property for the plaintiff, or repudiation of unenforceable express trust, etc." (5 Witkin, Cal. Procedure, *supra*, Pleading, § 840, p. 255.) "Because a constructive trust is a remedy to compel transfer of specific property, title to which is in the defendant, the complaint must show the existence of that property." (*Id.*, pp. 255–256.) Plaintiffs do not contend defendants are in possession of specific property belonging to them, nor have they asserted a supporting cause of action such as fraud or breach of fiduciary duty. As such, this claim fails.

Imposition of Equitable Lien

"An equitable lien is a right to subject property not in the possession of the lienor to the payment of a debt as a charge against that property. [Citation.] It may arise from a contract which reveals an intent to charge particular property with a debt or 'out of general considerations of right and justice as applied to the relations of the parties and the circumstances of their dealings.' [Citation.] 'The basis of equitable liens is variously placed on the doctrines of estoppel, or unjust enrichment, or on the principle that a person having obtained an estate of another ought not in conscience to keep it as between them; and frequently it is based on the equitable maxim that equity will deem as done that which ought to be done, or that he who seeks the aid of equity must himself do equity.'

[Citation.]" (*Farmers Ins. Exchange v. Zerin* (1997) 53 Cal.App.4th 445, 453.) Plaintiffs have not identified any property on which a lien might be imposed, nor have they alleged a debt owed them by defendants.

Unjust Enrichment

Unjust enrichment is neither a cause of action or a remedy. (*Rutherford Holdings, LLC v. Plaza Del Rey, supra,* 223 Cal.App.4th at p. 231 [unjust enrichment is a general principle underlying numerous legal doctrines and remedies].) That defect aside, no cause of action remained to support a claim for unjust enrichment.

The Trial Court Did Not Abuse Its Discretion in Sustaining the Demurrers Without Leave to Amend

Where a trial court has sustained a demurrer without leave to amend, we review that ruling for abuse of discretion. (*Blank v. Kirwan, supra,* 39 Cal.3d 311, 318.) The burden falls on plaintiffs to identify facts they could plead to state a cause of action if allowed the opportunity to amend their complaint. (*Id.* at p. 318.) Plaintiffs have not alleged any new facts that would give rise to a cause of action against defendants. We therefore conclude the trial court did not abuse its discretion in sustaining the demurrers without leave to amend.

DISPOSITION

The judgments of dismissal are affirmed.

Richman, J.

We concur:

Kline, P.J.

Brick, J.*

* Judge of the Alameda County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.