

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

JAMES GLENN BARRONS et al.,

Plaintiffs and Appellants,

v.

LEE & ASSOCIATES COMMERCIAL
REAL ESTATE SERVICES, INC. - EL
TORO et al.,

Defendants and Respondents.

G050326, G050327, & G050665

(Super. Ct. No. 30-2013-00648240)

O P I N I O N

Appeal from judgments of the Superior Court of Orange County, Steven L. Perk, Judge. Affirmed in part, reversed in part.

Catanzarite Law, Kenneth J. Catanzarite, Nicole M. Catanzarite-Woodward, and Eric V. Anderton for Plaintiffs and Appellants.

Fingal, Fahrney & Clark and Richard L. Fahrney II for Defendant and Respondent Lee & Associates Commercial Real Estate Services, Inc. – El Toro.

Liner, Maribeth Annaguey, Kathryn L. McCann, and Dana P. Tykocinski for Defendant and Respondent CBRE, Inc.

Norton Rose Fulbright US, Robert M. Dawson and Tarifa B. Laddon for Defendants and Respondents Cushman & Wakefield, Inc., Cushman & Wakefield of California, Inc., and Cushman & Wakefield of San Diego, Inc.

* * *

The trial court sustained demurrers filed by the five respondents to this appeal. Plaintiffs appeal the ensuing judgments of dismissal. We reverse as to two of the respondents because their demurrers should have been overruled or sustained with leave to amend. We affirm with regard to the other three respondents.

FACTS

This case concerns plaintiffs' failed investments in commercial real estate. Two of the investments were structured as tenancies in common: (1) the "Eaton Canyon Property," sited in Pasadena, California; and (2) the "Aero Vault Property," sited in Kearny Mesa, California. Interests in three other properties were made available in the form of limited partnership investments. These properties are collectively referred to as the "LP Investments."

The Parties

Plaintiffs James Glenn Barrons and Linda M. Barrons, individually and as trustees of the Barrons Family Trust dated August 16, 2006 (collectively, Barrons) invested \$300,000 in the three distinct LP Investments. Barrons, acting through plaintiff Eaton Barrons, LLC, invested \$400,000 in exchange for a tenancy in common ownership interest in the Eaton Canyon Property. Barrons, acting through plaintiff Aerovault

Barrons, LLC, invested \$350,000 in exchange for a tenancy in common ownership interest in the Aero Vault Property.

There are 23 defendants named in the second amended complaint. This appeal does not concern most of the defendants. Excluded from the scope of this appeal are the organizers, promoters, accountants, and attorneys that structured the investments and marketed them to plaintiffs.¹

The respondents to this appeal are real estate brokerage firms: (1) CBRE, Inc. (CBRE), the broker for the seller of the Eaton Canyon Property, as well as the leasing broker for plaintiffs and the other tenants in common following their acquisition of the Eaton Canyon Property; (2) Lee & Associates Commercial Real Estate Services, Inc. – El Toro (Lee), a real estate brokerage firm playing a role in facilitating all of the investments; (3) Cushman & Wakefield, Inc.; (4) Cushman & Wakefield of California, Inc., and (5) Cushman & Wakefield of San Diego, Inc. (collectively, Cushman). Cushman was sued as the successor in interest to Burnham Real Estate Services, which acted as the seller's broker in the Aero Vault Property sale.

¹ Strangely, the two entities — Asset Management Consultants, Inc. (AMC) and BH & Sons, LLC (BH & Sons) — that actually organized and promoted the investments (and directly profited from the fees about which plaintiffs now complain) are not named as parties. The complaint suggests there are unknown promoter defendants, but exhibits attached to the complaint identify these companies. Moreover, plaintiffs' counsel filed a separate suit on behalf of other plaintiffs against AMC, BH & Sons, CBRE, Inc., and other defendants on April 18, 2011. (*AMLAP ST, LLC v. Asset Management Consultants, Inc.* (Super. Ct. L.A. County, 2011, No. BC 459858) (LA Action)). At CBRE, Inc.'s request, the trial court took judicial notice of the complaint in the LA Action.

Key Allegations Concerning Plaintiffs' Investments in the Properties

In the summer of 2006, and on the recommendation of Lee, plaintiffs were put in communication with accountant and promoter defendants. These defendants (not respondents to this appeal) convinced Barrons to invest the \$1,050,000 Barrons had available, including \$750,000 from a recent sale of real estate.

A central purpose of the tenant in common investments was to defer payment of capital gains taxes owed on Barrons' profitable sale of real estate by purchasing a like-kind property. Certain defendants (not respondents), which we shall call the "advisor defendants," asserted that the investments would satisfy all of Barrons' objectives; they were a "tax-advantaged" and "tax deferred vehicle that was suitable, safe, secure and would provide a conservative investment return under management for their long term retirement objectives." The advisor defendants and Lee "would provide all underwriting and due diligence and related investment structuring services for the collective tenant in common purchasers"

Central to plaintiffs' "decision to invest or not in the particular tax-advantaged transaction was whether the up-front costs . . . were true and accurate when balanced against a capital gains tax they sought to defer of 15%" Had plaintiffs been told the up-front costs of their investments exceeded 15 percent of their cash invested, "they would never have considered" the investments.

The advisor defendants represented in writing that investors would pay 6 percent of their gross investment in tenant in common properties as a fee, at the close of escrow on the investments, as well as several other fixed fees for accounting (\$1,500), escrow (\$1,000), and organizational expenses (\$2,500). The disclosure form (included as an exhibit to the operative complaint) also indicated an annual 1 percent fee would be paid for asset management to BH & Sons. These fees were well under the 15 percent capital gains tax plaintiffs sought to defer by their investments.

But there was a secret additional amount extracted from plaintiffs and the other investors, which resulted in the true up-front costs or “sales loads” exceeding 15 percent of the cash investments. According to plaintiffs, this fee was not sufficiently disclosed in the offering memoranda provided to plaintiffs prior to closing.

Unlike the LA Action plaintiffs, plaintiffs here did not invest in the so-called “Amlap Property.” But the operative complaint in this action used documents related to the Amlap Property transaction as illustrations of the alleged scheme perpetrated by defendants in every investment.² The Amlap Property purchase price was represented to plaintiffs as \$34.55 million, with the seller paying the buyers’ real estate commission of \$1.3 million (i.e., 3.76 percent of the stated purchase price).³ But the actual purchase price negotiated from the seller as an initial matter was \$33.25 million. Defendants added \$1.3 million to the purchase price in order to extract extra fees from plaintiffs. In other words, the \$1.3 million was an additional investment fee (or package

² Plaintiffs did not attach the Amlap Property offering memorandum (or any other investment offering memorandum) as an exhibit to the complaint. The LA Action plaintiffs, however, did attach a copy of this memorandum (called a “Property Information Package,” prepared by BH & Sons) to their complaint. The trial court took judicial notice of the LA Action complaint. Thus, our record includes a copy of the Amlap offering memorandum. We will describe its key contents in footnotes to our description of plaintiffs’ allegations.

³ This allegation is confirmed by the memorandum. The summary of the offering identifies the purchase price of the Property as \$34.55 million. As for BH & Sons’ compensation, the memorandum specifies the same 6 percent already identified to plaintiffs. With regard to AMC’s compensation, the summary states: “At closing, AMC will receive a real estate commission of . . . (\$1,300,000) from the Seller. This commission will be distributed in part by AMC to principals and affiliates of [BH & Sons], and/or other parties and entities who have assisted in the purchase of the Property and/or the funding of the Cotenancy. Additionally, AMC will also receive a . . . (\$25,000) fee from the Cotenancy to cover the cost of underwriting and performing due diligence for the Cotenancy. This fee will be shared with other persons and entities that have assisted in this process.”

of fees), not part of the standard real estate commission often paid with the proceeds of a real estate sale at escrow. The true fair market price negotiated with the seller was \$33.25 million not \$34.55 million. Contrary to appearances, the \$1.3 million was not a standard buyer side real estate broker commission, paid by the seller out of the purchase price at escrow. Instead, the buyers of the Amlap Property were actually paying the \$1.3 million (so-called) commission.⁴ “The scheme exploited the conventional and standard practices and procedures in the real estate industry”

E-mails attached to the operative complaint provide additional detail regarding the Amlap Property transaction. A June 2006 e-mail from an employee of AMC to a CBRE employee stated, “[P]lease make the seller aware of our intention to ‘gross up’ the purchase price by \$1,300,000 to cover certain [tenant in common] and startup costs. Buyer will cover any costs which seller may incur as a result of this procedure. This is a normal procedure in our [tenant in common] transactions, and has been acceptable to all other sellers we have dealt with, but wanted to give you and the seller a ‘heads up’ that this price adjustment will appear” A July 2006 e-mail from an attorney for AMC to an attorney for the seller of the Amlap Property stated, “[H]ere is the explanation for the [AMC] fee which was added to the purchase price: [¶] My client has historically organized limited partnerships for its real estate investments, and has a pool of investors. In that context AMC would receive a profit split from the partnership. [¶] Some AMC investors sold other properties and wanted to invest their 1031 proceeds in a tax deferred exchange, but due to the ‘like-kind’ requirements, they must take title as Tenants in Common (TICs) rather than invest in a partnership. [¶] For a long time, there were concerns that the IRS would characterize a group of TICs as a partnership, and then

⁴ The Amlap Property memorandum does not mention the negotiated purchase price of \$33.25 million. Nor does it mention that the \$1.3 million “real estate commission” is not a standard brokerage commission, provided for in the seller’s listing agreement.

disallow the 1031 exchange. . . . Then the IRS issued Rev. Proc. 2002-22, which listed guidelines for TICs to follow that would reduce the chance of being treated as a partnership. [¶] One of the guidelines is that the sponsor (AMC) cannot participate in a profit split. However, it is okay for the sponsor to receive a portion of the purchase price paid by the TIC investors — in fact, some companies actually buy properties as inventory and resell interests to TICs. We have found this to be an easy way to deal with this combination of issues, without any economic [e]ffect to the Seller. Of course, the commission is full[y] disclosed to investors.” The attorney for the seller responded with thanks for the explanation “and confirmation of full disclosure to investors.”

Though no documents pertaining to these transactions are attached to the complaint, much the same story is alleged by plaintiffs with regard to the Aero Vault Property and Eaton Canyon Property. The Aero Vault offering memorandum disclosed the purchase price as \$27.885 million, with a buyers’ real estate commission of \$1.25 million paid by the seller (i.e., 4.48 percent of the stated purchase price).⁵ But in reality, the negotiated purchase price was \$26.6 million, and the tenant in common buyers (including Aero Vault Barrons, LLC) paid the \$1.25 million “commission.” This meant that the true sales load was 18.5 percent, “an amount greater than the capital gains taxes sought to be deferred.”

The Eaton Canyon offering memorandum disclosed the purchase price as \$52.15 million, with a buyers’ real estate commission of \$1.75 million paid by the seller (i.e., 3.35 percent of the stated purchase price). But in reality, the negotiated purchase

⁵ At Cushman’s request, the court took judicial notice of several documents (not including the offering memorandum) concerning the Aero Vault Property acquisition. The purchase agreements indicated the underlying contract price was \$27.885 million. The agreement between the seller of the Aero Vault Property and BH & Sons indicated that “Purchaser’s Advisor shall be entitled to a real estate commission of (\$1,250,000) upon Closing. Seller shall be solely responsible for paying all such commissions to Seller’s Broker and Purchaser’s Advisor through Escrow upon the Closing.”

price was \$50.4 million, and the tenant in common buyers (including Eaton Barrons, LLC) paid the \$1.75 million “commission.” This meant that the true sales load was 16.8 percent, once again “an amount greater than the capital gains taxes sought to be deferred.”

Cushman and CBRE benefitted from this transaction structure because they received commissions based on a higher purchase price and because they were able to keep all of the listing commission rather than sharing it with an actual buyer’s broker. Lee worked with other defendants to assist them in recommending and facilitating the sale of the investments to plaintiffs, despite knowing about the marked up purchase prices, and Lee also received a share of the fees charged to plaintiffs.

“[T]he LP Investments had a similar misrepresentation in that the selling price and who was in fact paying the buyers’ brokers commission was not disclosed.” It was represented to Barrons “that the purchase price of each of the properties acquired . . . was paid to an unaffiliated third party at a set price and that the seller was paying all real estate commissions including commissions payable to the limited partnerships’ real estate broker. It was also represented that no part of the seller-paid commission . . . would be paid out of the LP Investments ‘Offering’ proceeds, including the funds received from Plaintiffs’ investment in the limited partnership units.” The LP Investments’ offering memorandum “disclosed no sales load or commission but instead touted that the general partners would be paid a ‘carried interest’ or ‘back end’ of 50% of the returns realized by management of the real property . . . after the limited partner investors received their money back plus 8% per annum ‘Priority Return.’” But the actual purchase price was less than the price represented to Barrons. “[S]ecret profits” were added to the sales price, and the limited partners (such as Barrons) were actually paying the buyers’ real estate broker commissions. Had Barrons known about these up-front costs, he would not have purchased the LP Investments.

The Eaton Canyon Property investment was a total loss because the lender foreclosed on an unspecified date. The Aero Vault Property investments were “virtually a total loss because the anchor tenant . . . has indicated it will not renew its lease for the specialized building.” The status of the LP Investments was not alleged, but Barrons would not have acquired them had they known about the hidden fees.

Allegations Pertaining to Statutes of Limitations

Plaintiffs invested in 2006. Any harm allegedly caused by respondents was suffered immediately upon their investments. The allegedly unfair fees were paid upon the close of escrow on the various investments, when plaintiffs purchased something they would not have had they known the stated purchase price had been inflated by disguised investment syndication fees. The initial complaint was not filed until May 2013, more than six years later. Thus, plaintiffs attempted to demonstrate they did not discover facts putting them on notice of wrongdoing until shortly before the filing of their complaint.

“At the time of the respective property offerings, a reasonable investigation would not have revealed the underlying misrepresentation because the offerings were sold as private placement offerings with the only sources of information being from the parties to the conspiracy making the respective offerings and participating in the fraud. Indeed a reasonable investigation would show only that the false purchase price was used in escrow as if the true purchase price, used in determining the amount for title insurance, reported . . . to the local taxing authority for property tax purposes, used to calculate all customary prorations and used annually in the accountings provided and tax reporting of the [tenant in common] interests. There was never a disclosure of the Actual Purchase Price to Plaintiffs.” “[T]he defendants controlled the original property purchase negotiations and related source documents that would have disclosed the fraud and then hid behind the fake double escrow that cut the Plaintiffs and other tenant in common investors off from receiving accurate information.”

Plaintiffs never received information before March 2013 that would have led them to suspect that defendants had structured the investments in the manner that they had. The fact that, prior to March 2013, the investment properties suffered difficulties in leasing to tenants and foreclosures did not provide notice to plaintiffs of the wrongdoing they allege in this case. The overall problems in the economy and real estate market were convenient excuses for the failure of plaintiffs' investments.

Plaintiffs did not discover "defendants' fraud and deceit" until March 2013. "Plaintiffs first learned of facts which made them suspicious when contacted by counsel [in the Los Angeles Action]. The Plaintiffs could not with diligence have discovered the fraud and deceit . . . until on or about this date because the true facts were known only to defendants, further, Plaintiffs reasonably believed [defendants'] representations of the purchase price for the respective real estate interest[s] and that the seller was paying the commissions to buyers' broker."⁶

DISCUSSION

The operative complaint contains a lengthy list of claims, many of which are alleged against respondents. All defendants (including respondents) are charged with: intentional misrepresentation, negligent misrepresentation, fraud by concealment, negligence, and unfair business practices under Business and Professional Code section

⁶ Even though the same law firm represents plaintiffs in this case and the Los Angeles Action plaintiffs, there is no explanation in the operative complaint here as to how and when plaintiffs in the Los Angeles Action learned of the "true facts" that enabled them to file their complaint on April 18, 2011. Like this case, it was alleged in the Los Angeles Action that the disclosure documents "misrepresented that the \$1.3 million alleged commission to be paid by the Property seller to AMC and [other defendants] was not a commission at all but instead an illegal and secret mark-up of the Property purchase price in which the defendants conspired to inflate the price to hide the fact the Property could have been purchased for \$33,250,000."

17200 (section 17200).⁷ As against CBRE and Lee, breach of fiduciary duty of real estate brokers, constructive fraud, and elder abuse are also alleged. Finally, as against Lee only, plaintiffs bring several securities law claims (Corp. Code, §§ 25401, 25504.1, 25505).

Demurrers to prior complaints filed by parties other than respondents were sustained with leave to amend. The court sustained respondents' demurrers to the second amended complaint (the first time respondents demurred) on numerous grounds, including the running of applicable statutes of limitations. The court entered judgments of dismissal as to each of the respondents.

Our review is de novo with regard to the court's decision to sustain the demurrers. (*WA Southwest 2, LLC v. First American Title Ins. Co.* (2015) 240 Cal.App.4th 148, 151 (*WA Southwest*)). "As a general rule in testing a pleading against a demurrer the facts alleged in the pleading are deemed to be true, however improbable they may be. [Citation.] The courts, however, will not close their eyes to situations where a complaint contains allegations of fact inconsistent with attached documents, or allegations contrary to facts which are judicially noticed." (*Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604.) We review for an abuse of discretion the court's denial of plaintiffs' request for leave to amend. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) "If we find that an amendment could cure

⁷

Plaintiffs separately label causes of action for an accounting and for restitution and unjust enrichment against all defendants. These purported causes of action do not allege any additional legal duties or misconduct, however, and are properly viewed as alternative or inapplicable remedies unnecessarily listed as separate causes of action. (See *Munoz v. MacMillan* (2011) 195 Cal.App.4th 648, 661 ["There is no freestanding cause of action for 'restitution' in California"]; *Teselle v. McLoughlin* (2009) 173 Cal.App.4th 156, 179 ["A cause of action for an accounting requires a showing that a relationship exists . . . that requires an accounting, and that some balance is due the plaintiff that can only be ascertained by an accounting"].) We agree with the ruling sustaining Cushman's and Lee's demurrers as to these causes of action without leave to amend.

the defect, we conclude that the trial court abused its discretion and we reverse; if not, no abuse of discretion has occurred.” (*Ibid.*)

Statutes of Limitations

Boiled down to its essence, plaintiffs claim is that they overpaid for the various properties at issue. Had the negotiated prices not been “grossed up” to extract additional fees, the purchase prices would have been lower. And had defendants disclosed what they were actually doing to obtain their additional fees, plaintiffs would not have invested.

The common defense of all respondents is that the applicable statutes of limitations have run as to all claims. The relevant investments were made in 2006 and the initial complaint was not filed until 2013. Plaintiffs concede that any applicable statutes of limitations have run if they began accruing in 2006. But plaintiffs claim the discovery rule rescues their lawsuit. The discovery rule “postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action.” (*Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 807.) “The discovery rule only delays accrual until the plaintiff has, or should have, inquiry notice of the cause of action.” (*Ibid.*)

This case is *almost* identical to a recent opinion of this court, *WA Southwest, supra*, 240 Cal.App.4th 148. Both cases feature concern real estate investments, in which investors sought to defer payment of capital gains taxes by investing in tenant in common interests in real property marketed by investment firms. In both cases, the investors lost their money and (represented by the same law firm) sued seemingly every entity or individual with any connection whatsoever to the investments, claiming they would not have invested had they known about hidden fees which increased the sales load above the capital gains tax rate. And in both cases, the trial court

sustained demurrers and entered judgment for certain defendants based on, among other things, the applicable statutes of limitations.

In *WA Southwest*, we affirmed the judgments of dismissal, holding that the plaintiffs were on inquiry notice of their injury at the time of their investments because of detailed disclosures in the private placement memoranda they received prior to investing. (*WA Southwest, supra*, 240 Cal.App.4th at pp. 157-158.) The disclosures in *WA Southwest* revealed that the negotiated purchase price of the property was \$11.6 million, but \$13.17 million was being raised so that other expenses could also be paid, including a \$505,000 fee payable to an investment organizer/promoter company. (*Id.* at pp. 153-154.) The disclosures did not suggest the seller of the property was paying the \$505,000 fee or any of the other expenses making up the difference between the negotiated purchase price and the total investment cost. (*Ibid.*)

In the instant case, however, plaintiffs allegedly were never told about the negotiated purchase price of the various properties at issue (the Eaton Canyon Property, the Aero Vault Property, or the LP Investments). Instead, defendants grossed up the purchase price paid to the seller so that an additional fee could be extracted by AMC and BH & Sons. As suggested by the investment documents put before the court in various requests for judicial notice, the fee itself was disclosed to plaintiffs (at least in the tenant in common transactions), but it was stated that the fee was paid by the seller. The disclosures arguably implied the fee was paid in the typical manner of real estate brokerage fees, i.e., out of the negotiated purchase price. In reality, the fee was not provided for in the seller's listing agreement; it was really paid by plaintiffs because the negotiated purchase price of the property was grossed up to pay the fee. In essence, plaintiffs allege defendants hid a kickback in plain sight by calling it a real estate fee and stating it was a seller paid commission. Plaintiffs' allegations suggest they were unaware of any basis for inquiring into whether defendants had hidden an extra fee in the price of the properties. *WA Southwest, supra*, 240 Cal.App.4th 148 is not on all fours with this

case; the disclosures here did not clearly put plaintiffs on inquiry notice like those made in *WA Southwest*.

Defendants nonetheless contend plaintiffs did not adequately describe ““(1) the time and manner of discovery and (2) the inability to have made earlier discovery despite reasonable diligence.”” (*E-Fab, Inc. v. Accountants, Inc. Servs.* (2007) 153 Cal.App.4th 1308, 1319; *id.* at p. 1324 [plaintiffs required to “allege ‘facts showing the time and surrounding circumstances of the discovery of the cause of action upon which they rely’”].) ““The purpose of this requirement is to afford the court a means of determining whether or not the discovery of the asserted invasion was made within the time alleged, that is, whether plaintiffs actually learned something they did not know before.”” (*Id.* at p. 1324.) “[T]he uniform California rule is that a limitations period dependent on discovery of the cause of action begins to run no later than the time the plaintiff learns, or should have learned, the *facts* essential to his claim. [Citations.] It is irrelevant that the plaintiff is ignorant of his legal remedy or the legal theories underlying his cause of action.” (*Gutierrez v. Mofid* (1985) 39 Cal.3d 892, 897-898.)

As to the time and manner of discovery, the LA Action plaintiffs informed plaintiffs of defendants’ alleged wrongdoing in March 2013. Details are absent, however, as to how the LA Action plaintiffs discovered this alleged malfeasance, allowing them in turn to inform plaintiffs of the wrongdoing. Indeed, the LA Action complaint is also vague as to how the LA Action plaintiffs were able to discover the alleged scheme. The LA Action plaintiffs reference an investigation into the tax consequences of the foreclosure on the Amlap Property, but do not state when they received new factual materials that allowed them to conclude they had been wronged.

Plaintiffs add in their reply brief that they could amend the operative complaint to specifically allege they were informed in March 2013 of the actual purchase price of the Amlap Property (which presumably led them to suspect that the actual purchase price of the Aero Vault Property and LP Investments were lower than the price

represented to plaintiffs). Plaintiffs point to exhibit G of their complaint, a list of broker sales in which the sales price of the Amlap Property was represented as \$33.25 million. Plaintiffs also claim the appraised price of the Amlap Property was \$33.25 million on August 16, 2006, days before the offering memorandum was provided to plaintiffs. It seems the LA Action plaintiffs (and their agents) took a closer look at the deal and somehow figured out that the \$1.3 million fee was added to the sales price of the Amlap Property (rather than being costless to plaintiffs). Perhaps the LA Action plaintiffs obtained the documents now referenced by plaintiffs.

At the time of making their investments, plaintiffs knew the total amount of money they were paying for their interests in the properties and the total amount of money that was going to AMC and BH & Sons. Plaintiffs thus knew the amount of money the promoters of the investments were taking out of the deals (the alleged harm), even if they did not know the precise way in which the details were structured (grossing up the negotiated sales price, rather than demanding the commission as part of the negotiated price or simply having the investors pay the commission directly to AMC and BH & Sons).

Defendants argue plaintiffs were on inquiry notice as a result of everything they admittedly knew. They should have asked more questions about the million dollar fees at the time of their investments or soon thereafter. By this line of reasoning, anyone investing millions of dollars in commercial real estate should be sophisticated enough to know that requiring a seller to pay a \$1 million commission may well have affected the price at which they were willing to sell. Plaintiffs' reference to an appraisal prompts one to question why plaintiffs did not review the appraisal at the time of their investment.

We conclude, however, that the court improperly sustained the demurrers on statute of limitations grounds. (See *Fuller v. First Franklin Financial Corp.* (2013) 216 Cal.App.4th 955, 965 [reversing dismissal on statute limitations grounds, based in part on "failure to disclose a hidden kickback in the closing costs that increased plaintiffs'

payment”]; *id.* at pp. 966-968.) At this stage of the proceedings, we accept as true the allegation that some of the defendants intentionally misled plaintiffs in such a way that plaintiffs were not on inquiry notice of the deception. “[A] defendant cannot hinder the plaintiff’s discovery through misrepresentations and then fault the plaintiff for failing to investigate.” (*Weatherly v. Universal Music Publishing Group* (2004) 125 Cal.App.4th 913, 919; *id.* at p. 920 [songwriter’s right to conduct audit of royalty reports “is not dispositive of diligence where there is evidence that the plaintiff was ‘hindered’ from discovering the breach by defendant’s misrepresentations”].) Of course, our ruling does not mean that plaintiffs will ultimately prevail in their assertion of the discovery rule as a means to avoid the applicable statutes of limitations. (*Fuller*, at p. 966 [“it may be that evidentiary facts will ultimately demonstrate the untimeliness of plaintiffs’ delayed discovery”].)⁸

The only ground upon which CBRE demurred was the statute of limitations. Thus, the judgment of dismissal in favor of CBRE is reversed. We must consider alternative arguments raised by Cushman and Lee to see if the judgments in their favor should also be reversed.

Cushman – Fraud Allegations

Cushman is accused of intentional misrepresentation, negligent misrepresentation, fraudulent concealment, and section 17200 violations based on the conduct outlined above. In their reply brief, plaintiffs clarify that the complaint primarily describes fraudulent conduct by “others not party to this appeal.” Plaintiffs concede that “the sole basis of liability against Cushman . . . is vicarious liability.” Plaintiffs claim Cushman conspired with and/or aided and abetted other defendants.

⁸

The facts in the complaint and exhibits attached thereto are sufficient to communicate the points plaintiffs offer to make explicit in an amendment. We conclude amendment is unnecessary for purposes of the applicable statutes of limitations.

Fraud and negligent misrepresentation must be pled with particularity, with facts showing “““how, when, where, to whom, and by what means the representations were tendered.””” (*Small v. Fritz Companies, Inc.* (2003) 30 Cal.4th 167, 184; see also *Charnay v. Cobert* (2006) 145 Cal.App.4th 170, 185, fn. 14.) Where fraud is the alleged object of a conspiracy, the claim must be pleaded with particularity. (*Favila v. Katten Muchin Rosenman LLP* (2010) 188 Cal.App.4th 189, 210-212.)

“Liability may . . . be imposed on one who aids and abets the commission of an intentional tort if the person (a) knows the other’s conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so act or (b) gives substantial assistance to the other in accomplishing a tortious result and the person’s own conduct, separately considered, constitutes a breach of duty to the third person.’

[Citations.] Mere knowledge that a tort is being committed and the failure to prevent it does not constitute aiding and abetting. [Citation.] ‘As a general rule, one owes no duty to control the conduct of another’ (*Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1325-1326.) Plaintiffs must plead facts showing “actual knowledge of the specific primary wrong . . . substantially assisted.” (*Casey v. U.S. Bank Nat. Assn.* (2005) 127 Cal.App.4th 1138, 1145 (*Casey*).) Aiding and abetting liability “necessarily requires a defendant to reach a conscious decision to participate in tortious activity for the purpose of assisting another in performing a wrongful act.” (*Howard v. Superior Court* (1992) 2 Cal.App.4th 745, 749.)

“Conspiracy is not a cause of action, but a legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration. [Citation.] By participation in a civil conspiracy, a coconspirator effectively adopts as his or her own the torts of other coconspirators within the ambit of the conspiracy. [Citation.] In this way, a coconspirator incurs tort liability co-equal with the immediate tortfeasors.” (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 510-511.) “By its

nature, tort liability arising from conspiracy presupposes that the coconspirator is legally capable of committing the tort, i.e., that he or she owes a duty to plaintiff recognized by law and is potentially subject to liability for breach of that duty.” (*Id.* at p. 511.) “““The elements of an action for civil conspiracy are the formation and operation of the conspiracy and damage resulting to plaintiff from an act or acts done in furtherance of a common design.”” (*Ibid.*) “The conspiring defendants must also have actual knowledge that a tort is planned and concur in the tortious scheme with knowledge of its unlawful purpose.” (*Kidron v. Movie Acquisition Corp.* (1995) 40 Cal.App.4th 1571, 1582.)

Plaintiffs identify several specific paragraphs in the operative complaint as providing sufficient factual specificity of Cushman’s knowledge and wrongful conduct (as successor to the actual seller’s broker in the Aero Vault Property transaction). We extensively quote these paragraphs (omitting unnecessary emphasis provided by plaintiffs) so as to fairly communicate the level of particularity provided by plaintiffs.

“[T]he Defendants’ scheme necessarily included the sellers and sellers’ brokers, who conspired to aid and abet a material misrepresentation of the ‘Purchase Price’ of the properties . . . to Plaintiffs. They all joined together after agreeing to sell the properties at one price and increased the price to Plaintiffs and other unsuspecting tenants in common purchasers . . . in order to hide the actual ‘up-front costs’ or ‘sales loads’ such that the investors would not learn those critical costs or loads actually exceeded 15% of the Plaintiffs’ cash investments and that they were otherwise involved with self dealing fiduciaries. The scheme exploited the conventional and standard practices and procedures in the real estate industry”

“Seller listed its property for sale with a broker and signed a cooperative listing agreement, where the commission is required to be shared with the buyer’s real estate broker.” “Seller and Professionals reach an agreement on the purchase price for the property, the ‘Actual Purchase Price.’ The Actual Purchase Price is never disclosed to the tenants in common including the Plaintiffs.” “After agreement on the Actual

Purchase Price, the Professionals, sellers and seller's broker agree and, acting in concert, aid and abet one another to accomplish their illegal objective, add a new secret additional amount falsely described as a 'Seller paid' commission to the Actual Purchase Price, the 'Markup' . . . which increased price is then misrepresented in documentation to the tenant in common investors as the 'Purchase Price' with the further misrepresentation that seller is paying all real estate commissions."

The promoter defendants' attorney encouraged "the sellers, sellers' broker[s] and sellers' counsel to participate" in the scheme. By way of example, in the July 2006 email referenced above, the attorney described "the scheme as the PROMOTER Defendants taking a 'profit split' at closing of each property purchase from the unsuspecting TIC investors, masking the fraud by suggesting the same is in order to circumvent the Internal Revenue Service Section 1031 prohibitions that sponsors 'cannot participate in a profit split' in the future because the TIC investors cannot be partners. . . . While [the attorney] knows he has described this as a 'fee' to be paid by the seller to his client AMC he represents that it has 'no economic [e]ffect' of course because the purchase price of the property has been increased by the buyer by a like amount."

Cushman, with respect to the Aero Vault Property, was "aware of the distribution process and the material misrepresentations concerning the purchase price and who was paying the buyers' brokers real estate commission contained in the respective TIC Interests Offering Memorandums and breached their duty to Plaintiffs by taking no action to alert Plaintiffs of the misrepresentations or otherwise terminate their involvement as a willing participant in the false statements and part of the sales apparatus."⁹

⁹ This paragraph followed several paragraphs explaining that *other* defendants had prepared and distributed to plaintiffs the offering memoranda in which the alleged misrepresentations appear. Plaintiffs do not allege anywhere in the complaint that Cushman assisted in the preparation of (or even received a copy of) the offering memorandum for the Aero Vault Property.

The sellers' brokers knew about the tax deferral and sales load aspects of the investments. The sellers' brokers (including Cushman) also knew that other defendants "were not disclosing" the actual purchase price to investors and would not do so because the investors would refuse to invest if they knew the actual sales load.¹⁰ The sellers' brokers (including Cushman) marked up the purchase price "to accommodate and pay for the 'seller paid' commission from Plaintiffs' investment funds."

When the Aero Vault Property seller and Cushman "agreed to participate in the foregoing transaction [they] were familiar with the offering and that the TIC investors were the true buyers of the Aero Vault Property, knew that the purchase price was misrepresented to the TIC investors and knew of the seller paid commission misrepresentation. [Cushman] substantially assisted [other defendants] by providing property information for use in the Aero Vault Offering Memorandum and executing the sale of the Aero Vault Property with knowledge of the fraudulent representations."

We now turn to our analysis of whether sufficient facts have been alleged by plaintiffs with regard to Cushman. "[E]ven 'ordinary business transactions' . . . can satisfy the substantial assistance element of an aiding and abetting claim if [Cushman] actually knew those transactions were assisting the customer in committing a specific tort." (*Casey, supra*, 127 Cal.App.4th at p. 1145.) Certain defendants (and nonparties AMC and BH & Sons) misrepresented and concealed the truth about the \$1.2 million fee to plaintiffs in the offering memorandum. Plaintiffs, not the seller of the Aero Vault Property, were actually paying the \$1.2 million fee to the promoters. Cushman, acting as

¹⁰ These allegations do not describe *how* Cushman knew about the lack of a disclosure. Again, there is no allegation that Cushman (actually, its predecessor in interest) ever received a copy of the Aero Vault Property offering memorandum. Nor is there an allegation that a promoter defendant represented to Cushman, orally or in writing, that the initial negotiated purchase price would be hidden from plaintiffs and that the fee would be disguised as a real estate fee. Indeed, the e-mails attached to the complaint concerning the Amlap Property suggest that sellers and sellers' brokers were actually told the fee would be fully disclosed to investors.

the seller's broker, facilitated the transaction, just as it would any other real estate deal. Cushman provided information to the buyers' representatives about the Aero Vault Property. Cushman did not do anything wrong as such. But, by helping to close the sale of the Aero Vault Property on the terms acceptable to the seller (Cushman's client) and the apparent representatives of the buyers (AMC, BH & Sons, and others), Cushman was one necessary cog in the alleged fraud perpetrated upon plaintiffs. For the most part, plaintiffs have pleaded with sufficient particularity the fraud that allegedly occurred¹¹ and Cushman's role in the fraud.¹²

However, "[k]nowledge is the crucial element" for imposing vicarious liability on parties that perform legitimate services which aid fraudulent conduct. (*Casey, supra*, 127 Cal.App.4th at p. 1145.) Plaintiffs must allege Cushman "had actual knowledge of the specific wrongful act that constituted the breach of [tort] duty it purportedly aided and abetted." (*Id.* at p. 1147.) The specific wrongful act was not the payment of the \$1.2 million fee out of escrow. Rather, it was the way in which AMC and BH & Sons disclosed the extra fee in the offering memorandum. If plaintiffs had been clearly informed of the actual way in which the transaction had been structured, there would be no arguable fraud. It follows that if Cushman was not actually aware of the pertinent contents of the offering memorandum, then they were not aware of the tort.

¹¹ One glaring exception is plaintiffs' refusal to name AMC and BH & Sons as the entities making the alleged misrepresentations. Plaintiffs also deserve criticism for a 110 page operative complaint (plus exhibits), made unnecessarily long by frequent repetition, circuitous organization, and unnecessary characterization (rather than mere recitation) of the facts.

¹² The parties extensively brief the question of Cushman's duty (or lack thereof) to plaintiffs. There is certainly merit in much of what Cushman says with regard to its relationship (or lack thereof) to plaintiffs, as well as the limits of the duty a seller's broker has to the buyer in a real estate transaction. But everyone is duty bound to avoid committing intentional torts against others, including fraud. (*Fuller, supra*, 216 Cal.App.4th at p. 967.)

Thus, Cushman’s knowledge of the particular representations being made (and not made) to plaintiffs in the private placement memorandum is the key to imposing vicarious liability. Rather than focusing on the essential issue, the complaint departs into vague and conclusory assertions that Cushman knew about the misrepresentations. Such “general allegation[s]” (*Casey, supra*, 127 Cal.App.4th at p. 1152) and “‘kitchen sink’ allegation[s]” do not sufficiently assert Cushman had actual knowledge of the fraud alleged in this case (*id.* at p. 1153). Nowhere do plaintiffs allege that Cushman was provided with a copy of the Aero Vault private placement memorandum. Nowhere do plaintiffs allege that Cushman was otherwise informed about the precise disclosures made to plaintiffs in the offering memorandum. Plaintiffs instead assert that Cushman somehow knew about misrepresentations, despite the fact that the exhibits to the complaint suggest that the promoter defendants and their representative told brokers that the structure of the transactions would be fully disclosed to plaintiffs (at least in the Amlap transaction).

We are left asking *how* Cushman knew about the alleged fraud being perpetrated against plaintiffs. In the context of the fraud allegations in this case, the question of how must be answered, both at the pleading stage and to obtain a judgment against Cushman. For example, in a section 17200 case concerning an internet scam, allegations of knowledge were sufficient against two payment processors because the complaint alleged they visited the offending Web site, recognized that it was an illegal lottery and/or pyramid scheme, but nevertheless facilitated orders. (*Schulz v. Neovi Data Corp.* (2007) 152 Cal.App.4th 86, 88-89, 94.) But the complaint was insufficient as to two other payment processors, as to whom the complaint offered only conclusory allegations that they “knew the site was an illegal lottery” or “knew of . . . unlawful operations.” (*Id.* at p. 97.) “This does not sufficiently allege [these defendants’] knowledge of the alleged illegal lottery” (*Ibid.*)

In sum, the court properly sustained the demurrer to the fraud and section 17200 causes of action. The court also correctly sustained Cushman’s demurrer without leave to amend as to the negligent misrepresentation cause of action. “Negligent misrepresentation is narrower than fraud. While a person can be held liable for fraud for the ‘[t]he suppression of a fact, by one who is bound to disclose it or who gives information of other facts which are likely to mislead for want of communication of that fact,’ [citation], negligent misrepresentation requires a false statement of a past or existing material fact [citation].” (*Shamsian v. Atlantic Richfield Co.* (2003) 107 Cal.App.4th 967, 984.) California law requires “something more than an omission” to establish negligent misrepresentation, “even as against a fiduciary.” (*Byrum v. Brand* (1990) 219 Cal.App.3d 926, 941; *id.* at p. 942 [“for a cause of action for negligent misrepresentation, clearly a representation is an essential element”].) Moreover, the lack of deceitful intent is what distinguishes negligent misrepresentation from deceit. (*Hensley v. McSweeney* (2001) 90 Cal.App.4th 1081, 1085.) Negligent misrepresentation is the “assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true.” (Civ. Code, § 1701, subd. (2).) Plaintiffs cannot rely on a nonsensical *vicarious* theory of liability for their negligent misrepresentation cause of action. Where the allegations are insufficiently particular to show actual knowledge of false representations being made to plaintiffs, *a fortiori*, they are insufficiently particular to show that Cushman had knowledge the untrue representations were being made without reasonable grounds for believing them to be true.

We review the court’s refusal to provide leave to amend for an abuse of discretion; it is plaintiffs’ burden “to show what facts he could plead to state a cause of action if allowed the opportunity to replead.” (See *Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 890.) Addressing how they would amend if given the opportunity in their appellate briefs and at oral argument, plaintiffs reverted to the same generalities that are already alleged against Cushman. But a party like Cushman may not

be held liable for fraud in connection with an investment transaction merely because they participated in a legitimate aspect of the transaction. Nor is it enough to suggest that Cushman could have anticipated that the grossing up procedure might provide an opportunity for AMC and BH & Sons to deceive plaintiffs. Cushman, the seller's broker, did not have a duty to ferret out wrongdoing by some of the parties on the buyer's side of the transaction against other buyer-side parties. Plaintiffs' knowledge allegations cannot rely on the notion that Cushman "should have" known that misrepresentations would be provided to plaintiffs. The court did not abuse its discretion by refusing plaintiffs leave to amend as to Cushman.

Lee – Fraud and Breach of Fiduciary Duty Causes of Action

Lee is similarly accused of fraudulent misrepresentation, fraudulent concealment, negligent misrepresentation, elder abuse, securities law violations, and section 17200 violations. In addition, Lee is accused of breach of fiduciary duty and constructive fraud, based on Lee's more direct role interacting with plaintiffs.

The key issues are the same as those addressed above for Cushman. Have plaintiffs adequately alleged the fraud and the role played by Lee in that fraud? Have plaintiffs adequately pleaded Lee's knowledge of the harmful activities alleged? To answer these questions, we describe in detail the sections of the operative complaint cited by plaintiffs in opposition to Lee's arguments.

Lee is a real estate brokerage that employed individual defendant Allen A. Basso, a licensed real estate broker. Lee and Basso were the Barrons' broker before they made the investments at issue. They introduced Barrons to Basso's father, who described the proposed investments and engaged the promoter defendants on behalf of plaintiffs. Lee was engaged by Basso's father "to provide real estate broker services" to investors, including plaintiffs. Lee was a "conduit" between other defendants and plaintiffs, and allegedly received a share of the marked up fees. Lee and other defendants "worked in

concert with [the sellers] in recommending and facilitating the purchase of investment real estate as tenants in common.”

Lee and its agent Basso “knew that their clients would be the true buyers of the AeroVault Property, knew that the purchase price was misrepresented to the TIC investors and knew of the seller paid commission misrepresentation.” Lee substantially assisted other defendants “by providing supporting information for use in the Amlap Offering Memorandum.” Lee did the same thing with regard to the Eaton Canyon Property.

Lee and other defendants “drafted the portions of the TIC Interests respective Offering Memorandum which represented to Plaintiffs those purchase prices described above. [Lee and other defendants] in fact knew that the purchase and sale agreement and disclosure documents they were giving the Plaintiffs and other tenant in common investors falsely represented both the Actual Purchase Price as well as who was paying the buyers’ side commission.” Lee knew plaintiffs would not have additional information available about the marked up purchase price.

In sum, the allegations against Lee differ from those made against Cushman. Plaintiffs are somewhat more specific in their allegations that Lee (which worked on plaintiffs’ side of the property acquisitions rather than the sellers’ side) had knowledge of the wrongful misrepresentations to (and concealments from) plaintiffs. Indeed, it is alleged (in a paragraph listing numerous defendants) that Lee actually assisted in drafting the offering memoranda provided to plaintiffs. Despite awareness of these facts, Lee participated in these transactions for the sake of earning additional fees.

Plaintiffs have come close to pleading enough to survive a demurrer on the fraud causes of action and related causes of action. We affirm the court’s order sustaining the demurrer, however, because additional particularity is required. Plaintiffs need to identify AMC and BH & Sons in the complaint. Plaintiffs need to clarify the relationship of Lee to those promoter entities and to plaintiffs. And plaintiffs need to

clarify allegations pertaining to Lee's knowledge of and/or participation in the specific alleged misrepresentations to plaintiffs.

Similarly, with regard to breach of fiduciary duty, plaintiffs' complaint is too imprecise. Certainly, a real estate broker owes a fiduciary duty to its own clients. (*Field v. Century 21 Klowden-Forness Realty* (1998) 63 Cal.App.4th 18, 25 ["a broker's fiduciary duty to his client requires the highest good faith and undivided service and loyalty"].) But the complaint as currently constituted is vague in defining the precise role played by Lee and whether there was any agreement between plaintiffs and Lee designating Lee as a broker for plaintiffs in any of the property acquisitions at issue. It is unclear from the complaint whether Lee was working for plaintiffs or working for some other party on the buyers' side of the property acquisitions. As discussed above, it was not necessary that a contractual relationship exist between Lee and plaintiffs for Lee to have defrauded plaintiffs. But a fiduciary duty to plaintiffs cannot be foisted upon a broker who did not even represent plaintiffs. Plaintiffs should be allowed an opportunity to amend their fiduciary duty claim to clarify the relationship between Lee and plaintiffs.

Negligence Cause of Action

Plaintiffs' cause of action for negligence alleges that all defendants owed plaintiffs a duty of care to not misrepresent facts about the fees involved in the transaction to plaintiffs. Defendants allegedly breached this duty when they failed to accurately determine this information and communicate it to plaintiffs. In short, there is no distinct conduct alleged in the negligence cause of action. Basically, plaintiffs recast the same allegations regarding negligent misrepresentations into a boilerplate negligence action against all defendants, without specifying the differing roles of the numerous defendants. (See *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 407 [negligence and negligent misrepresentation are distinct torts; the latter has its basis in "the tort of deceit"].)

Of course, particularity is not required to plead negligence. It certainly was pleaded elsewhere in the complaint that Cushman and Lee knew about the gross up procedure whereby fees were extracted by some of the defendants. The real issue for purposes of demurrer is whether Cushman or Lee had a duty of care to plaintiffs in connection with the transactions and grossed up fees. (See *Castellon v. U.S. Bancorp* (2013) 220 Cal.App.4th 994, 998 [negligence cause of action requires “duty of care, breach of that duty, and proximate cause resulting in injury”].)

Cushman was not a professional hired by plaintiffs. As a seller’s broker, Cushman had a duty to disclose known material information to the buyers, such as “substantial structural defects.” (See *Cooper v. Jevne* (1976) 56 Cal.App.3d 860, 866; see also *Loken v. Century 21-Award Properties* (1995) 36 Cal.App.4th 263, 269-270 [seller’s broker has duty to conduct reasonable inspection of residential property and disclose material facts to prospective purchasers].) But plaintiffs can point to no common law or statutory duty of a seller’s broker to (1) examine fees paid by buyers to their own representatives, or (2) ensure buyers are being dealt with fairly by their own representatives. We will not create such an open ended duty in the first instance. (See *Bily v. Arthur Young & Co.*, *supra*, 3 Cal.4th at pp. 396-398; *id.* at p. 397 [discussing factors to consider in imposing duty, including “the closeness of the connection between the defendant’s conduct and the injury suffered”].) The court correctly sustained Cushman’s demurrer to the negligence cause of action without leave to amend.

Plaintiffs note allegations that Lee was on the buyer’s side of the deal and point to the alleged fiduciary relationship of Lee to plaintiffs in support of the negligence cause of action. (See *Field v. Century 21 Klowden-Forness Realty*, *supra*, 63 Cal.App.4th at p. 25.) As already explained above, the allegations of the complaint are insufficient with regard to the actual relationship between plaintiffs and Lee. Thus, we conclude the court correctly sustained the demurrer to the negligence cause of action with

regard to Lee, but plaintiffs should be offered the opportunity to amend to clarify Lee's role in the transactions.¹³

Standing

The court also sustained Cushman's and Lee's demurrers on the grounds that plaintiffs are not the real parties in interest and therefore lack standing to pursue this lawsuit. (Code Civ. Proc., § 367)

Part of the confusion on this issue may stem from plaintiffs' operative complaint. The only plaintiffs named on the caption page of the complaint are Barrons. But the allegations of the complaint itself name as plaintiffs Aerovault Barrons, LLC and Eaton Barrons, LLC. The complaint alleges these entities were created by defendants to facilitate the tenant in common investments by plaintiffs. Plaintiffs put their money into these entities, which purchased the actual tenant in common shares. References to "plaintiffs" in the complaint were meant to refer to both the individual plaintiffs and the entity plaintiffs.

There is still room for debate as to the proper plaintiff or plaintiffs for each of the causes of action. (See *PacLink Communications Internat., Inc. v. Superior Court* (2001) 90 Cal.App.4th 958, 965-966 [fraudulent conveyance action was properly brought

¹³

We note that to the extent plaintiffs are trying to impose vicarious liability on Cushman and Lee for others' negligence, it does not appear that such a cause of action is theoretically possible. It is true that, in some circumstances, principles of conspiracy or aiding and abetting can support holding a secondary participant liable for negligence. (See, e.g., *Navarrete v. Meyer* (2015) 237 Cal.App.4th 1276, 1285-1293 [passenger in vehicle encouraged driver to operate car at unsafe speed].) But, in many other situations, courts have held "that parties cannot conspire to commit a negligent or unintentional act and such a conspiracy is a legal impossibility." (*Id.* at p. 1293.) Logically, this latter rule would seem to apply here. It makes no sense to suggest that Cushman or Lee somehow encouraged or agreed that other defendants would issue *negligent* statements to plaintiffs. With regard to vicarious liability, there is no daylight between fraud and no liability under the circumstances of this case.

as derivative, not individual claim]; but see *Sutter v. General Petroleum Corp.* (1946) 28 Cal.2d 525, 531-532 [“fraud was practiced on Sutter in the first instance and he was induced to form the corporation . . . and invest his money by reason of that fraud”].) But even assuming some or all of plaintiffs’ claims can only be brought by the entities that formally made the investments (rather than the individuals who were allegedly misled into funding the entities that formally made the investments), these entities are named as plaintiffs. Thus, it is difficult to understand why the court ruled that none of the plaintiffs have standing.

The complaint references potential problems with the entities’ capacity to sue. “Suspension of corporate powers results in a lack of *capacity* to sue, not a lack of *standing* to sue.” (*Color-Vue, Inc. v. Abrams* (1996) 44 Cal.App.4th 1599, 1603-1604.) Nothing on the face of the complaint conclusively establishes that plaintiffs lack capacity to sue. Moreover, a lack of capacity to sue can be remedied by a plaintiff (e.g., by paying back taxes). (*Id.* at p. 1606.)

With regard to Lee’s demurrer, the court observed there was no allegation of a “broker agreement” between plaintiffs and Lee, and that Lee was a “referring broker’ nothing more.” These points seem better addressed to the merits of Lee’s liability rather than the question of standing. It is undisputed that plaintiffs lost a great deal of money; at least some of them (putting to one side the question of individuals versus entities) have standing to make the claims they have made.

We need not address Cushman’s argument regarding standing as we have concluded the Cushman demurrer should have been sustained without leave to amend on other grounds.

In sum, the court erred by sustaining Lee’s demurrer without leave to amend for lack of standing. Plaintiffs should make clear (in the caption of an amended complaint and elsewhere in an amended complaint) that the entity plaintiffs are plaintiffs in their own right.

DISPOSITION

The judgment of dismissal pertaining to Cushman (i.e., Cushman & Wakefield, Inc.; Cushman & Wakefield of California, Inc.; and Cushman & Wakefield of San Diego, Inc.) is affirmed. Cushman shall recover its costs incurred on appeal.

The judgments of dismissal as to CBRE and Lee are reversed. The order sustaining CBRE's demurrer is reversed; CBRE's demurrer should have been overruled in its entirety. As to Lee only, we affirm the order sustaining its demurrer without leave to amend with regard to restitution and an accounting. With regard to the remaining causes of action alleged against Lee, the court properly sustained the demurrers but plaintiffs must be allowed leave to amend. Plaintiffs' request for judicial notice is granted. In the interests of justice, plaintiffs, CBRE, and Lee shall pay their own costs on appeal.

IKOLA, J.

WE CONCUR:

O'LEARY, P. J.

FYBEL, J.