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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

MARTHA D. LYDDON et al.,  
  
Cross-Complainants and Appellants,  
  
v.  
  
HOWARD S. TUTHILL III,  
  
Cross-Defendant and Respondent.

H034945  
(Santa Clara County  
Super. Ct. No. CV132880)

This appeal concerns a dispute over assets held by a family trust created by the late Dorothy Lyddon, whose three surviving children are the trust's primary beneficiaries. The trustees, a bank and an attorney, brought an action seeking to invalidate encumbrances allegedly filed against trust assets by one of the children, Grant Lyddon. He and his sister, Martha D. Lyddon, filed a cross-action asserting in essence that the trustees had conspired between themselves and with respondent Howard S. Tuthill III, the estate planner for the cross-complaints' mother, to gain control of the trust, exploit its assets for their own gain, and ultimately acquire them for their own benefit. The trial court sustained demurrers by all three cross-defendants without leave to amend. Cross-complainants have appealed only as to cross-defendant Tuthill. We have concluded that the cross-complaint fails to attribute any actionable breach of duty to Tuthill, either in his

own right or as a conspirator with his fellow cross-defendants. We will therefore affirm the judgment.

## **BACKGROUND**

### ***A. Formal Deficiencies of Cross-Complaint***

The question presented is whether the cross-complaint, as ultimately amended, states facts sufficient to constitute a cause of action against Tuthill. This inquiry is made exceptionally difficult by the fact that the cross-complaint offends all three of the “rules of pleading” set out in *Green v. Palmer* (1860) 15 Cal. 411, 414. The first is that “ ‘[f]acts only must be stated . . . , as contradistinguished from the law, from argument, from hypothesis, and from the evidence of the facts.’ ” (*Id.* at p. 414.) The cross-complaint offends this principle by alleging, for instance, that cross-defendant Levitt “use[d] his attorney client relationship with Dorothy during her lifetime to generate fees for himself and to boot strap himself into positions of wealth and power with other clients.” Stripped of argument and opinion, this alleges no more than that he profited from his professional relationship with Dorothy, a fact hardly tending to support the imposition of liability. Nor is it intrinsically improper for an attorney to gain new business from his relationship with a client. The quoted allegation is thus exposed as a mere canard or aspersion.

But the cross-complaint’s pervasive incorporation of argumentative matter is the least of its vices. More serious is its being “stuffed full of irrelevant matter” and “filled with recitals, digressions and stories, which only tend to prolixity and obscurity.” (*Green v. Palmer, supra*, 15 Cal. at p. 414.) The inclusion of immaterial and superfluous facts violates the “Second Rule” of pleading, which calls upon the pleader to state “[t]hose facts, and those only, . . . which constitute the cause of action.” (*Id.* at p. 415.) In other words, “nothing should be stated which is not essential to the claim or defense.” (*Id.* at p. 416.) An allegation is “unessential, or what is the same thing, . . . immaterial,” (*ibid*)

and thus susceptible to a motion to strike (see Code Civ. Proc., §§ 435, 436) if it can be excised from the pleading “without leaving it insufficient.” (*Green v. Palmer, supra*, 15 Cal. at p. 416.)

The cross-complaint is heavily laden with information that could be excised without having the slightest effect on its legal sufficiency to state a cause of action. It reaches back to “the early 1900’s” to provide a biographical sketch of cross-complainants’ grandfather—doubtless a figure of historical interest, but having only the most peripheral relation to the present controversy. Similarly, the cross-complaint plods through a minute account of various family trusts bearing only remotely, if at all, on anything here at issue.<sup>1</sup> It is liberally laced with novelistic assertions about the mental processes of various actors.<sup>2</sup> It alludes to conduct by Levitt, which cross-complainants apparently view as improper, going back to 1979.<sup>3</sup> All these digressions and tangents come at a price, of course, if only to the forests: the cross-complaint consumes 48 pages.

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<sup>1</sup> One of these trusts, created in 1936, has some function in the “scheme” cross-complainants seek to challenge. At least two others, including one created for the benefit of Dorothy Lyddon’s sister, have no apparent relevance whatever.

<sup>2</sup> Thus: Grant Stauffer, the grandfather, “did not trust COMMERCE BANK or any corporate trustee.” Dorothy’s sister Sarah, and her husband, “had no interest in investing in the . . . Ranch.” In 1975 Dorothy Lyddon was “recovering” from the deaths of her son and husband. In 2000 Levitt was “emboldened” by a trust amendment. In early 2000 Dorothy’s children were “becoming alarmed.” “Unwittingly,” they “play[ed] into” cross-defendants’ strategy of “foment[ing] disunity” among them in order to justify their own control of the assets. Tuthill made certain representations “to appease Dorothy’s outrage.” Another attorney was “perplexed” by cross-defendants’ “tax scheme.” After Dorothy’s death the beneficiaries “[we]re unaware of the Machiavellian scheme that [wa]s playing out with these fiduciaries.” Martha was “perplexed” and “confused” by reports of Levitt’s “hostile behavior.” A vice president of Commerce Bank told her she was “right to be concerned.” Later the children were “[c]oncerned that their inheritance [was] being allowed to deteriorate and lapse into disrepair and loss.”

<sup>3</sup> Thus it is alleged that in 1979 Levitt persuaded Dorothy to grant a purchase option to a third party for \$100,000; that the third party thereby locked up 115 acres for six years, though the \$100,000 was never received; that he eventually bought the land for

But even this torrent of inessential information is not the cross-complaint's worst vice. After all, matter which is merely superfluous may be ignored. (See Civ. Code, § 3537 ["Superfluity does not vitiate."].) But the cross-complaint's other vices are greatly magnified by its pervasive disregard for the third rule of pleading: "All statements must be concisely made, and when once made, must not be repeated." (*Green v. Palmer, supra*, 15 Cal. at p. 417.) To achieve this, of course, "logical order is necessary." (*Id.* at p. 417.) And logical order is what the cross-complaint most sorely lacks. Its account of events careens wildly from the distant past to the near present and back again, making it quite impossible to follow the flow of events without minute study. The effects of this vice are amplified by the adoption of a most lamentable literary conceit, i.e., the use of the present tense to describe events occurring over the course of four decades. This device first appears in the pleader's account of the creation of the 1975 trust instrument at issue in this matter: "In the drafting LEVITT names himself Independent Trustee after Dorothy's death. He drafts broad powers to himself in this role, in effect granting to himself all incidents of ownership of the property under trust." Nearly all ensuing events—which is to say, all of the events material to cross-complainants' claims—are described in this manner.

Such a device may be useful to convey a certain narrative immediacy in a video documentary. But a legal pleading is supposed to consist of "[a] statement of the facts constituting the cause of action, *in ordinary and concise language.*" (Code Civ. Proc.,

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\$12.5 million, but within six months "flip[ped]" it for over \$22 million to another buyer; and that the buyer "thereafter double[d] the development density," apparently meaning he developed the land at twice the density contemplated by some unidentified arrangement. It is not suggested how these allegations, which identify no breach of duty by Levitt, and which describe events some 24 years before the cross-complaint was filed, could have any conceivable relevance to any currently viable cause of action. So far as appears, they "subserve no useful purpose, and are only calculated, when read to the jury, to excite prejudice against the defendants." (*Green v. Palmer, supra*, 15 Cal. 411, 414.)

§ 425.10, subd. (a)(1), italics added.) In ordinary language, past events are described in the past tense, present events in the present. Cross-complainants' departure from this convention compounds the difficulty of deciphering their pleading, particularly since its recital of events defies chronological, or any logical, order. Thus it is alleged that in late 2000, "The beneficiaries do not agree to waive their rights . . . . As such COMMERCE BANK and LEVITT now claim that the beneficiaries have failed to agree." The reader is left to puzzle out what "now" is being referred to—the real present (i.e., the time of the pleading), the fictive present invoked so inaptly by the pleader, or both. This conceit also leads the pleader into temporal nightmares like this sentence, apparently intended to describe events six years before Dorothy's death: "LEVITT interjects himself into the estate planning with TUTHILL III because LEVITT now sees TUTHILL III proposing to remove assets from the 1975 trust that LEVITT so carefully put under his control when Dorothy dies."

In sum, the cross-complaint squarely contravenes David Dudley Field's expressed hope that under his approach to pleading, which became the law of this state, " 'we [would] have brevity and substance, and hear no more of long pleadings, unnecessary recitals, or immaterial averments.' " (4 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 378, p. 514, quoting *Green v. Palmer, supra*, 15 Cal. 411, 414, and Code Commissioner's Note to former Code Civ. Proc., § 426.) The cross-complaint exemplifies all of the vices Field meant to eradicate.

Indeed the only way to derive anything resembling a coherent sequence of events from the cross-complaint is to extract its allegations line by line and attempt to construct a chronology of asserted facts and events, using such internal clues as can be found. Given the pleading's inordinate length, this is no easy task. We have nonetheless undertaken it and will now set out a more-or-less chronological account of the facts

alleged in the cross-complaint insofar as they are material to the existence of a cause of action in cross-complainants.

### **B. *General Allegations***

In 1975, Dorothy Lyddon created a trust into which she placed, among other assets, certain real property in Cupertino known as the Seven Springs Ranch (Ranch). The chief beneficiaries of the trust were her three then-living children: Cross-complainants Martha and Grant, and their brother John, who has not joined in this action.<sup>4</sup> The trusteeship was to be shared between an institutional trustee (i.e., a bank or trust company), and an individual, independent trustee. Dorothy herself would be the independent trustee until her death, whereupon Levitt would succeed to that office. The institutional trustee was originally a California bank, but by the time of the events at issue here, that trusteeship had passed to cross-defendant Commerce Bank (Bank), a Missouri corporation. The trust instrument called for the distribution of trust assets to the children following Dorothy's death, "once her debts and taxes were paid."

According to the cross-complaint, Tuthill became involved in 1994 when he was engaged to review Dorothy's estate plan with an eye toward reducing its exposure to estate taxes.<sup>5</sup> He suggested that assets be removed from the 1975 trust. At this point, it is alleged, Levitt "interject[ed] himself into the estate planning," and Tuthill "start[ed] to work with LEVITT." This allegation is followed by a lengthy excursion, of no apparent

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<sup>4</sup> In the interest of readability, we will generally refer to members of the Lyddon family by their first names.

<sup>5</sup> Characteristically, cross-complainants embellish this potentially material fact with the wholly irrelevant detail that Tuthill was brought into the picture by his father, Howard Tuthill II, who had been involved in family business for many years. This digressive allusion to the elder Tuthill apparently impelled the pleader to refer to the son throughout the pleading as "TUTHILL, III," even though he is the only Tuthill having anything to do with this lawsuit.

materiality, into Tuthill's involvement with a trust for the benefit of Dorothy's sister. It is then alleged that in 1996 Tuthill created a limited partnership, with a limited liability company as its general partner, to hold certain assets previously held in the 1975 trust. The general partner in turn was owned about 70 percent by Dorothy, 20 percent by Bank as trustee of an unspecified trust, and 10 percent by the children.<sup>6</sup> The relevance of these entities to any of cross-complainants' claims is far from clear, but the intended suggestion may be that Bank ultimately refused to distribute the shares in these entities to which the children were entitled under Dorothy's will. This suggestion is not pursued, probably because the trust and its administration have long been the subject of judicial proceedings in Missouri, which at least as a matter of comity would tend to preclude litigation of such issues in California.<sup>7</sup>

By 1998, it is alleged, Tuthill was "working in coordination" with Levitt and Bank, "effectively stripping DOROTHY and her children of any control over

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<sup>6</sup> The cross-complaint posits an arithmetic impossibility in the allegation that "Dorothy [wa]s the 70.1% member owner . . . , [with] 20% owner membership in [Bank] and 9.99% owned by [the children] jointly." Presumably Dorothy either owned 70.01 percent, or the children owned 9.9 percent. A similar error appears in the allegation that after refusing to distribute the children's rightful share of this entity to them, Bank stated that it "own[ed] 66.7% with 33.33% combined interest" in the children.

<sup>7</sup> The Missouri proceedings furnished the predicate for the trustees' argument below that the cross-complaint should be dismissed because there was another action pending on the same cause of action. This was one of the grounds cited by the trial court in sustaining the demurrers. But it is debatable whether such a plea could operate in Tuthill's favor, particularly since the Missouri courts have apparently concluded that they lack personal jurisdiction as to him. In any event the plea of another action pending cannot sustain dismissal of an action but instead warrants a *stay* pending resolution of the other action. (5 Witkin, Cal. Procedure, *supra*, Pleading, § 971, pp. 383-385.) Moreover the plea cannot be predicated on the pendency of a suit *in another jurisdiction*. (5 Witkin, Cal. Procedure, *supra*, Pleading, § 1141, p. 566.) In that circumstance the proper remedy is a motion to stay, addressed to the trial court's discretion, on the ground of interstate comity. (See *ibid.*)

DOROTHY's assets on her death.” In 1999, he and Levitt drafted a new will and trust instrument making Levitt the executor and independent trustee, with Tuthill as his successor. Around that same time, it is alleged, Tuthill began to focus his tax planning on “[t]he remaining approximate 42 acres” of the Ranch, whatever that means. He ultimately structured a mechanism, which the cross-complaint describes as a “scam,” under which the land would be held by a limited liability company, Seven Springs Ranch LLC (LLC), to be formed under Virginia law. The proposed arrangement would grant a 10 percent interest in the LLC to each of the children, 67 percent to the 1975 trust, and the remaining 3 percent to a 1936 trust originally formed by Dorothy's father. This latter allocation was crucial, according to cross-complainants, because under Virginia law, a limited liability company cannot be dissolved, or its founding documents amended, “without ‘unanimous consent of all the members.’ ” By placing a share of the LLC in a separate trust administered by Bank, the plan allegedly vested Bank with the power to veto any proposed dissolution of the LLC or alteration of its structure. The result was “a virtual lock out of Dorothy and her beneficiaries from control of the . . . LLC . . . during Dorothy's lifetime.”

Tuthill explained this arrangement as a mechanism to reduce estate taxes. Cross-complainants allege, however, that it was “not required for tax benefits to go the family,” and that the arrangement “inure[d] solely to the benefit” of Levitt, Tuthill, and Bank “in gaining control over Dorothy's assets.”<sup>8</sup> At some unspecified time, Tuthill wrote Levitt

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<sup>8</sup> This critical allegation is strikingly vague and at least partly contradicted by more specific allegations elsewhere in the pleading. First, it does not assert that any other estate scheme would have resulted in the same or even comparable tax savings; it suggests only that the family might have realized some “tax benefits” without adopting Tuthill's plan. This ambiguity looms large in light of later allegations that “[t]he tax savings structure created by [cross-defendants] was only *partially* designed for the purpose of saving estate taxes” and that the trustees' representations in that regard were “half truths.” (Italics added.) The only untruth attributed to them is a failure to disclose that the arrangement would serve their own nefarious purposes. These allegations are

that placing the Ranch into a limited liability company might best serve Levitt's interests because he would then have " 'no responsibility or liability for management of the Ranch.' " Tuthill wrote Bank that the reason for vesting the 1936 trust with an interest in the LLC was "to insure that Dorothy's three children can't get Dorothy in a weak moment in her declining days and revise the Operating Agreement to remove the Bank as Manager of the LLC following Dorothy's death . . . . By assigning an interest to the [1936] Trust the children can't get the Operating Agreement amended without the consent of [Bank]."

In early 2000 the children became "alarmed by the orchestration by" Tuthill and Levitt. Tuthill "respond[ed] with undermining the children and fomenting disunity among them." In May he began "to undermine the capabilities of the children, ridicul[ing] them and berat[ing] them to Dorothy." He "create[d] [the] perception of and foment[ed] disunity among the children."<sup>9</sup> This worked in his, Levitt's, and Bank's favor "in justifying why they must be in control of Dorothy's assets," i.e., "to resolve disputes

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pregnant with the admission that the promises of tax savings, so far as they went, were entirely true. This reading is reinforced by the recurring assertion that the affected assets should have been distributed when "the tax benefits were realized" due to expiration of the limitations period "on . . . any claim for additional taxes from Dorothy's Trust."

<sup>9</sup> This allegation contains the crucial admission that there was in fact "disunity" among the children. Tuthill is blamed for "fomenting" it, but once again the attempted portrayal of events is cast in at least some doubt by more concrete allegations elsewhere. Shortly after this allegation Dorothy is described as anticipating that some children might "want to retain an interest in the ranch" while others might wish to convert their interest to cash. This of course is a scenario rife with potential for "disunity," since the only way accommodate both desires would be for the would-be keepers to "buy out" the would-be sellers on terms agreeable to all. As Dorothy apparently recognized, such an agreement might not be achievable; thus she directed that a limited time be allowed to "sort out plans" and arrive at buy-out terms—failing which, presumably, the whole Ranch would be sold. In such a case "disunity" would hardly need to be "foment[ed]." It could arise quite naturally from the circumstances.

among the children.” He thereafter ignored Dorothy’s directives that the LLC mechanism, “if used[,] should be a vehicle to transfer ownership of the ranch directly on her death to her children and that they are to be the managers in charge on her death.” Instead he met with Bank “to set up ownership, management and control in LEVITT, COMMERCE BANK and himself as successor Independent Trustee.” On June 18, 2000, he advised Dorothy that Bank was “ ‘willing to assume the responsibility for managing and deciding what to do with the Ranch . . . .’ ”

It is alleged that on June 26, 2000, Dorothy and the children instructed Tuthill “that a proposed operating agreement”—apparently meaning an agreement for operation of the LLC or the ranch, or both, as proposed by the trustees, Tuthill, or all of them— “should direct that [the children], NOT the trustees, be the managers in control of the Ranch and the proposed . . . LLC.” The children, “as managers, were to have 6 years to sort out plans and to buy out any sibling who does not want to retain an interest in the ranch.” Tuthill, “secretly defying Dorothy’s wishes,” proceeded to create the LLC “on his own terms,” i.e., placing Levitt and Bank “in control.” This was accomplished on June 27, by filing the required documents in Virginia. Tuthill and Bank “orchestrate[d] the purchase” by the 1936 trust of a three percent interest in the LLC. No one told Dorothy that this would “turn[] over . . . control” of the LLC to Bank and Levitt.

On August 4, 2000, Tuthill presented Dorothy with a trust amendment, which she presumably signed, vesting “greater power and control over her assets” in Levitt, Bank, and Tuthill. Shortly thereafter he “craft[ed] an assignment” for the children’s signatures. The cross-complaint does not disclose what interests they were asked to assign, but it alleges that by signing the document they would bind themselves to an “operating agreement” for the LLC, which Tuthill had not yet finished, and the terms of which he refused to disclose. He told Martha and Grant that “if they fail[ed] to sign they w[ould] not have any voting rights under the Operating Agreement.” He further told Grant “that

it [was] his mothers [*sic*] wish that he sign.” They were induced “by these threats” to sign.<sup>10</sup>

An operating agreement for the LLC was apparently completed on July 27, 2000. Grant received a copy on August 20. He showed it to Dorothy three days later, drawing her attention to “section[s] 7.1 and 7.7 which grant[ed] to [Bank] and [Levitt] management and control of the . . . LLC on her death. Dorothy [wa]s shocked and state[d]: ‘I have never seen this agreement before.’ Upon reading paragraphs 7.1 and 7.7 she stated ‘This is not what I wanted.’ ” To “appease” her “outrage,” Tuthill “falsely represent[ed] to Dorothy that the ‘unsigned’ Agreement vest[ed] the property in her children because it provide[d] a period within which the children c[ould] agree on the management of the ranch and in the event that agreement could not be reached the manager [was] instructed to sell the ranch, pay the bills and distribute the assets. He falsely assert[ed] that disharmony amongst her children ma[de] control in [Levitt] and [Bank] necessary.” Because of her (obliquely alleged) opposition to the arrangement, Tuthill “pepper[ed] the file with self serving and unilateral statements of Dorothy’s intent to place [Levitt, Bank,] and himself in charge of her assets. He undermine[d] the objections from the children attempting to assure Dorothy that her children [we]re ‘reading things into the LLC provisions that are just not there.’ ” He told the children

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<sup>10</sup> Here the pleader attempts—ineffectually—to cast events in a nefarious light by abusing the English language. Neither of the statements attributed to Tuthill can be properly described as a “threat.” The first is a statement of the legal consequences of failing to assign existing interests to the LLC. Moreover it was probably true: the assignment was presumably the price of admission to the LLC, without which the assignee would not become an member, and thus would have no say in its affairs. Nor can the described representation about Dorothy’s wishes be rationally viewed as a “threat.” It was an assertion of fact. If false it might support a claim of fraud in the inducement, but there is no suggestion that it was false. The statement might indeed suggest that a child who refused to sign ran the risk of Dorothy’s displeasure—but that would be a matter of logical inference, not a “threat” by Tuthill.

that “ ‘the Operating Agreement reflects the management plan for the Ranch that your mother has had in place for many years,’ ” but this was false: “In fact Dorothy had no management plan, her assets were to be distributed to her children on her death.”

It is apparently intended to be alleged that on September 5, 2000, Levitt prepared a another trust amendment—the last—in which Tuthill was nominated as successor independent trustee.<sup>11</sup> The next day, Tuthill attempted to, and apparently did, secure Dorothy’s signature to a letter “stat[ing] that until agreement is reached amongst her children no child will be permitted to take up residence at the ranch or engage in the everyday running of the ranch.” It is alleged that on September 16 the children reached an accord “meeting the contingency of ‘agreement’ for their control.” The terms of the accord were “(1) that the family will manage the ranch, (2) that the three beneficiaries can buy other beneficiaries out within 6 years, (3) management decisions will be made by 2/3rds of the three of them, and (4) Martha, Grant, and John will be responsible for its day to day operations and management.”

It is alleged that Tuthill was “unhappy with the [children’s] agreement” and told unspecified persons that “ ‘disharmony’ ” among the children was “ ‘one of the strongest argument[s] we have for the viability of the LLC (from an estate tax perspective),’ ” and that “ ‘removing this disharmony’ ” would “ ‘leav[e] us with an LLC that would appear to be created only for tax purposes.’ ” Another attorney engaged by the family around this time—Robert Katz—apparently disagreed; he was “perplexed by the [Tuthill/Levitt] tax scheme,” and found “ ‘unconvincing’ ” Tuthill’s reasons for Trustee management of the ranch.

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<sup>11</sup> This is alleged in the following tortured manner: “By the September 5, 2000 Amendment . . . , [Levitt] is emboldened by his affiliation with [Bank] and . . . [Tuthill,] who[m] [Levitt] drafts to be his successor independent trustee . . . .”

Yet another attorney, Robert Wood, was “hired by Dorothy and the family . . . to assist them in the review and correction of the agreement.” He drafted an amendment to the LLC operating agreement “placing Dorothy’s children as managers and eliminating control in [Bank, Levitt, and Tuthill].” On September 23—about a week before Dorothy’s death—she and the children signed this amendment. At around this same time, Dorothy told Tuthill by phone that “ ‘she was very happy that her children were coming together and wanted [him] to do anything they wanted.’ ” But Tuthill and Levitt “ignore[d] her wishes and undert[ook] a plan to nullify [the children’s] Agreement.” They demanded “their own management agreement” from the children. Wood drafted a new management agreement, which the children signed on September 24. By so doing, it is alleged, the children had “complied with Dorothy’s condition of agreement and as such should [have been] placed in control of the SSR, LLC property.” However, Levitt and Tuthill “refuse[d] to acknowledge the validity of the beneficiaries[’] agreement and instead contrive[d] a new condition for the beneficiaries to sign before control of the property [would be] given to them.” That condition consisted of requiring the children to “ ‘indemnif[y] the TRUSTEES from all liability in connection with Ranch management.’ ”

Also apparently at this time, Bank wrote to the children stating “that what they ha[d] signed [was] only a draft and [that Bank] require[d] a ‘standard management agreement’ appointing the three of them as ranch managers.” Tuthill wrote to Levitt that they must “get on the property shortly following Dorothy’s death so we can go through all the records before [the children] do any more damage.” He advised Levitt to have his “litigation group” consider “what actions we would need to bring to remove the three of them from the property and take control as Manager of the LLC.” The writing of this letter or message—on September 28, 2000—is the last act attributed specifically to

Tuthill in the cross-complaint, although he apparently also drafted, at around the same time, two agreements later presented to the children, as described below.

Dorothy died on September 30, 2000. It is alleged that Tuthill, Levitt, and Bank “immediately move[d] to secure their control and take a stand adverse to the interests of their beneficiaries.” They refused to meet with the children and “tr[ie]d to undermine their alignment and agreement . . . .” On the day of Dorothy’s funeral, “ignoring the existence of the beneficiaries agreement,” they presented the children with “a management agency agreement and indemnity agreement,” apparently prepared by Tuthill, “for their signature.” Under the proposed agreements the trustees would be empowered to cancel at any time; all prior agreements would be merged and nullified; the trustees would be declared the rightful managers; and the children would indemnify them. One or both of these documents would later be found by an arbitrator, in a preliminary award, to have been drafted by Tuthill for the benefit of the trustees rather than the beneficiaries.

### ***C. Enumerated Causes of Action***

The foregoing allegations, which consume 36 pages, are followed by four enumerated causes of action. In the first, entitled “Breach of Fiduciary Duty—Fraud,” it is alleged that at unspecified times, Tuthill, together with Levitt and Bank, represented “that [they had] set up the Seven Springs Ranch LLC purportedly as a mechanism for avoiding estate taxes providing a vehicle for the beneficiaries to manage the Ranch.” They further represented, “when they assumed their obligations as fiduciaries,” that they “would comply with the law applicable to fiduciaries and the terms of the trust documents.” These representations—or at any rate “the representations made by the trustees”—were known by them, when made, to be false. In truth, it is alleged, “[t]he tax savings structure created by LEVITT and TUTHILL III and approved by COMMERCE BANK was only partially designed for the purpose of saving estate taxes. The

representations of the trustees were veiled half truths as the trustees put in motion a scheme to defraud the beneficiaries out of their property.”

In the second cause of action, entitled “Breach of Fiduciary Duty—Conflict of Interest and Self Dealing,” it is alleged that Tuthill, Levitt, and Bank “engaged in a scheme to take the decedent’s property for their own purposes” instead of “representing the interests of Dorothy and her beneficiaries to effect her distribution of assets to her children.” This consisted of 12 enumerated instances of conduct that included promulgating a plan and imposing conditions adverse to the rights and interests of Dorothy and the children, “transferr[ing] interests in assets to themselves,” failing to distribute the trust assets after a challenge by taxing authorities had become barred by the statute of limitations, “generat[ing] fees beyond the time when their administration should have been concluded,” “using those fees as a means of extortion to force payment as a condition of distribution,” “orchestrat[ing] a scheme to force a sale of the . . . LLC . . . contrary to the interests or wishes of the beneficiaries,” and attempting to shift to the beneficiaries the LLC’s obligations to pay taxes, insurance, and maintenance costs of the Ranch. This conduct is alleged to “constitute a form of self dealing . . . in violation of their fiduciary duty.”

In the third cause of action, entitled “Breach of Fiduciary Duty—Duty of Loyalty,” it is alleged that the “the Trustees have taken positions adverse to the beneficiaries they are to serve,” thus violating their duty of loyalty, in nine enumerated respects, including threatening the beneficiaries with lawsuits if they do not sign documents benefiting the trustees, “orchestrating a takeover of the trust assets through a scheme of fraud,” “failing to terminate the . . . LLC when the tax benefits were realized and instead prolonging [it] for 4-1/2 years,” attempting to shift operating expenses to the beneficiaries, pursuing “their claims in arbitration well beyond any benefit to the trust or its beneficiaries and solely in their own interest,” and filing actions for quiet title and

unlawful detainer against the beneficiaries in order “to promote the Trustees’ determination to sell the property that otherwise should have been and should be distributed to the beneficiaries.”

In the fourth cause of action, entitled simply “Injunction,” it is alleged that Bank and Levitt have used their controlling position “to extort and pressure the beneficiaries . . . into waiving rights against them as a condition of their distribution,” and “to force them to agree to unreasonable and unjust fees charged by the trustees.” It is then alleged that Tuthill conspired with them in this conduct, i.e., all three cross-defendants “engaged and continue to engage in a plan and conspiracy to benefit themselves by the generation of unjustified and unwarranted fees and costs in an effort to coerce the beneficiaries to forfeit their inheritance in exchange for a release of the remaining assets of their trust. Their continuing unpermitted, assertion of ownership of the SSR, LLC and unlawful generation of fees in the pursuit of the litigation is designed solely for the purpose of taking the beneficiaries property for themselves.” On this basis, cross-complainants “seek a preliminary and permanent injunction, ordering said cross[-]defendants to cease their unlawful hold over of the administration of the 1975 trust property, to prohibit Cross Complainants from selling or otherwise pledging or disposing of the Ranch, to compel the distribution of the [LLC] to the rightful owners, and to refrain from interfering with MARTHA and GRANT’s ownership rights in the RANCH.” Under the Prayer portion of the cross-complaint it is further requested that the injunction “order[] cross defendants to distribute to Martha and Grant Lyddon their 100% ownership interest in the . . . LLC and RANCH.”

#### ***D. Proceedings***

Bank and Levitt brought this action, as trustees, against all three children. The gist of the complaint was that Grant had clouded title to various trust assets by filing liens or other encumbrances against them. Grant and Martha answered and cross-complained,

eventually filing the amended cross-complaint described above. Bank and Levitt demurred jointly, arguing among other things that the cross-complaint was barred by the statute of limitations and by res judicata based upon a judgment confirming an arbitration award largely in their favor. Tuthill joined in their demurrer and filed one of his own, arguing additionally that as to him, cross-complainants had failed to allege any breach of a fiduciary duty, because he had never been a trustee but only a designated successor whose trusteeship had never come into being.

The trial court sustained the demurrers and entered judgment for cross-defendants, stating that (1) cross-complainants' claims were barred by the judgment confirming the arbitration award, and (2) there was another action pending in Missouri on the same cause of action. Cross-complainants filed a motion for new trial, which the trial court denied. Cross-complainants filed a timely notice of appeal.<sup>12</sup> In their opening brief they state that they "have elected not to pursue an appeal against [Bank] and Levitt," against whom they are proceeding in Missouri, but that they continue to prosecute this matter against Tuthill, over whom the Missouri courts have disclaimed personal jurisdiction.

### ***I. Duty as Attorney to Trust or Settlor***

Tuthill contends that the cross-complaint fails to attribute to him any conduct that breached a duty he owed to cross-complainants. Cross-complainants' attempt to answer this contention brings them up against the incoherence of their own pleading. They fail to identify any allegations attributing an actionable breach of duty to Tuthill.

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<sup>12</sup> The notice of appeal was filed some 71 days after notice of entry of judgment, which would ordinarily make it late by 11 days. (See Cal. Rules of Court, rule 8.104(a)(1).) However, cross-complainants' motion for new trial operated to extend the time to appeal until 30 days after the clerk mailed notice of entry of the order denying that motion. (Cal. Rules of Court, rule 8.108(b)(1)(A); see 8 Witkin, Cal. Procedure, *supra*, Attack on Judgment in Trial Court, § 23, pp. 605-606; *Carney v. Simmonds* (1957) 49 Cal.2d 84, 91 [new trial motion proper to challenge order sustaining demurrer].) The notice of appeal was filed on the 30th day.

The gravamen of the cross-complaint is breach of fiduciary duty. The pleading attributes three arguable fiduciary roles to Tuthill: (1) “attorney to [Dorothy’s] 1975 Trust”; (2) “successor Independent Trustee under [that] Trust”; and (3) estate planning attorney for Dorothy. The first attribution is chimerical because no one can be an “attorney to [a] Trust.” A trust, properly speaking, “is not an entity separate from its trustee, and cannot independently do anything—it cannot sue or be sued; it cannot enter into agreements.” (*Presta v. Tepper* (2009) 179 Cal.App.4th 909, 911; see *id.* at pp. 913-914.) It “is simply a fiduciary relationship . . . , by which one person or entity owns and controls property for the benefit of another.” (*Presta, supra*, at p. 911; see Rest.3d, Trusts, § 2, quoted in 13 Witkin, Summary of Cal. Law (10th ed. 2005) Trusts, § 1, p. 566 [defining “trust” as “ ‘a fiduciary relationship with respect to property’ ”].) As such it cannot *act* at all, any more than a marriage, guardianship, or conservatorship can act. Rather it is the trustee who carries out, or fails to carry out, trust affairs. If the trustee consults an attorney with respect to the matters entrusted to him, it is the trustee, “*qua* trustee,” who “becomes the attorney’s client” (*Moeller v. Superior Court* (1997) 16 Cal.4th 1124, 1130.) The attorney “ ‘represents only the trustee.’ ” (*Wells Fargo Bank v. Superior Court* (2000) 22 Cal.4th 201, 212, quoting *Fletcher v. Superior Court* (1996) 44 Cal.App.4th 773, 777.)

In view of these principles it is legally meaningless to describe Tuthill as “attorney to [the] Trust.” Nor can the cross-complaint be understood to allege that he ever acted as attorney to a trustee. It is alleged that he provided *estate planning services* to Dorothy Lyddon at a time when she was still a trustee to the trust, but in securing and following his advice she was manifestly acting as the settlor of the trust, not its trustee. She was not carrying out any function arising from the trusteeship when she contemplated the amendment of the governing instruments, or any of the other arrangements of her affairs described in the cross-complaint. The proof of this lies in the fact that no advice Tuthill

might have given her with respect to the trust could have led her to violate any duty she owed to anyone. As settlor, she had expressly reserved the right to revoke the trust.<sup>13</sup> She could do whatever she wished with her estate, including the trust assets, and any advice or representation Tuthill might have provided in that regard was manifestly rendered to and received by her in her own right and not in her capacity as trustee.

This raises the question whether the cross-complaint states a cause of action against Tuthill for breaching duties he owed to Dorothy as her attorney. We need not puzzle over this question long because any claim based upon such a breach would unquestionably be time-barred. The basic rule of limitations for “[a]n action against an attorney for a wrongful act or omission, other than . . . actual fraud,” is that the action must be brought “within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first.” (Code Civ. Proc., § 340.6, subd. (a).) The last specific act attributed to Tuthill in the cross-complaint is the sending of a letter to Levitt opining that it was “very important for us to get on the property shortly following Dorothy’s death so we can go through all the records before they [the children] do any more damage.” This occurred on September 28, 2000, two days before Dorothy died. Tuthill was also involved in the promulgation of two documents presented to the children for signature on the date of Dorothy’s funeral.

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<sup>13</sup> Cross-defendants asserted below that any attempt by Dorothy to revoke the trust “require[d] LEVITT’s consent.” They cited a proviso in the trust instrument that “no . . . amendment or revocation shall take effect until it has been consented to by the Independent Trustee by an instrument in writing, signed and acknowledged by the Independent Trustee.” But under the terms of the trust, Levitt would only become the independent trustee when Dorothy herself “cease[d] to act” in that capacity—a condition that apparently came into being only upon her death. He was powerless to prevent revocation or amendment of the trust while she herself was acting as trustee.

The cross-complaint against him was not filed until March 2009, more than eight years later.

Cross-complainants have made no attempt to plead either delay in the accrual of the cause of action or tolling on any of the grounds set out in the statute. (See Code Civ. Proc., § 340.6, subs. (a)(1) – (a)(4).) So far as the cross-complaint reveals, any wrongful act by Tuthill in the course of providing legal services to Dorothy should have been discovered no later than when the children’s demands for control of trust assets were refused on the basis of the estate plan he had drawn up. As discussed in more detail below (see pt. III(D), *post*), it is plain from the face of the cross-complaint that this discovery was or should have been made soon after Dorothy’s death on September 30, 2000. Within two months of that event, it is alleged, the trustees had demanded the children’s accession to agreements inconsistent with Dorothy’s intentions, had made such accession a precondition of access to the Ranch, and had proclaimed themselves to be “running the show.” Within that same period a bank vice president allegedly warned Martha that Levitt had already stated that he would be “the one to sell the ranch.” Shortly thereafter, the trustees seized the Ranch and locked the children out.

It is impossible to see how such events could have failed to put the children on notice that Tuthill’s estate plan did not grant them the control they claim to be entitled to. There is no hint of any later discovery adding anything of consequence to cross-complainants’ knowledge of his contribution to their troubles. Any claim predicated on his legal services for Dorothy is, on the face of the cross-complaint, barred by the statute of limitations.

We conclude that no actionable breach of duty is attributed to Tuthill as attorney to the trust or to Dorothy.

## II. *Duty as Successor Trustee*

Nor can any duty be attributed to Tuthill as “successor Independent Trustee” under the 1975 trust. If he had actually become a trustee, successor or otherwise, he would of course be under a fiduciary duty. But it is apparent from the cross-complaint itself, as well as the trust instrument, that Tuthill never become a “successor trustee” because his appointment to that position was conditioned upon a contingency that had never come into being.

The last restated and amended trust instrument, which cross-complainants placed before the court in opposition to the demurrers, provides, “If I [, Dorothy,] cease to act as a Trustee, then I appoint ALVIN T. LEVITT as a successor Trustee, and *if ALVIN fails or ceases to act, I appoint HOWARD S. TUTHILL III* of Ridgefield, Connecticut, as successor Trustee.” (Italics added.) Since there is no indication that Levitt has ever “cease[d] to act” as trustee, Tuthill has never been in a position to assume the trusteeship. His appointment to that office has never taken effect, he has never been in a position to accept it, and the duties attending it have never fallen upon him.

Mere *nomination* as a trustee does not, without more, engender any fiduciary duty on the part of the nominee. A person so nominated may refuse the trusteeship unless and until he accepts it. (Rest.3d, Trusts, § 35, com. a [“A person who has not accepted the office cannot be compelled to act as trustee.”]; see *McCarthy v. Poulsen* (1985) 173 Cal.App.3d 1212, 1217-1218 [settlers could not be compelled to accept trusteeship even if no other person was willing to accept].) Acceptance may ordinarily be accomplished either formally in writing (Prob. Code, § 15600, subd. (a)(1)) or by “[k]nowingly exercising powers or performing duties under the trust instrument” (*id.*, subd. (a)(2)). At common law, however, a person nominated only conditionally, as a successor trustee, can probably succeed to that office only by formal acceptance. (See Bogert, Trusts and Trustees (rev. 2d ed. (1979) § 150, p. 77, fn. 18 [“It would seem that a successor trustee,

though named in the trust instrument, must expressly accept in order to take the trust”], citing *Matter of Goldowitz’ Estate* (1932) 259 N.Y.S. 900 [145 Misc. 300].)

Cross-complainants do not acknowledge, let alone address, any of these difficulties. They simply assert without elaboration that “Tuthill voluntarily accepted his role as successor trustee.” It may be true that he acceded to—and he certainly acquiesced in—his *nomination* to that office. But he never accepted the office itself, most obviously because he could not do so until the stated precondition was satisfied—something that has never occurred. The duties cross-complainants seek to attribute to him flow from the office, not the nomination to it.

Cross-complainants cite the very general proposition that one who voluntarily accepts a position of trust or confidence may thereby assume the duties of a fiduciary. (See *Tri-Growth v. Silldorf, Burdman, Duignan & Eisenberg* (1989) 216 Cal.App.3d 1139, 1150.) But this merely introduces a circularity. Nothing in the cross-complaint establishes that Tuthill ever assumed a position of trust or confidence towards the children. It is true that he accepted a position of trust *as attorney to Dorothy* when he undertook to advise her with respect to her estate plan. But we have already dismissed the idea that he could be called to account on that basis more than eight years after her death and many years after the supposedly pernicious effects of his estate plan became obvious.

In sum, the allegations of the cross-complaint cannot sustain the suggestion that Tuthill breached a duty imposed upon him as “successor independent trustee.”

### **III. *Conspiracy to Breach Fiduciary Duty of Another***

#### **A. *Introduction***

Cross-complainants’ main argument on appeal is that whether or not Tuthill personally owed them any fiduciary duty, they have sufficiently alleged a cause of action against him for conspiring with Levitt and Bank to breach *their* fiduciary duties. Under

this theory, they contend, the trustees' breaches of duty are imputed to Tuthill, and he is derivatively liable for their torts. (See *Richard B. LeVine, Inc. v. Higashi* (2005) 131 Cal.App.4th 566, 578-579.) Given the failure to successfully charge him with any fiduciary duty to the beneficiaries, the viability of this theory is cast in doubt by authorities suggesting that one who conspires to breach another's fiduciary duty can only be liable if he himself owed the plaintiff a fiduciary duty. (See *Kidron v. Movie Acquisition Corp.* (1995) 40 Cal.App.4th 1571, 1597 [distributor owing no fiduciary duty to plaintiff could not be liable for conspiring in breach of fiduciary duty by plaintiff's partner; "A non-fiduciary cannot conspire to breach a duty owed only by a fiduciary."]; *Everest Investors 8 v. Whitehall Real Estate Limited Partnership XI* (2002) 100 Cal.App.4th 1102, 1104, fn. omitted ["If the nonfiduciary is neither an employee nor agent of the fiduciary, it is not liable to the plaintiff on a conspiracy theory because a nonfiduciary is legally incapable of committing the tort underlying the claim of conspiracy (breach of fiduciary duty)."].) Other decisions cast doubt on such a categorical rule. (E.g., *City of Atascadero v. Merrill Lynch Pierce, Fenner & Smith, Inc.* (1998) 68 Cal.App.4th 445, 464, fn. 14.) The result is a large area of uncertainty in our law—as one court put it, “fruit salad where there should be separate stacks of apples and oranges.” (*Everest Investors, supra*, 100 Cal.App.4th at p. 1109.) Rather than seeking to sort out these difficulties, we will assume for purposes of analysis that Tuthill could be liable for conspiring with the trustees to breach their fiduciary duties, even if he himself did not owe such a duty. We therefore turn to the question whether the allegations of the cross-complaint are sufficient to state a cause of action on this theory.

The elements of a claim predicated on tortious conspiracy are “(1) the formation and operation of the conspiracy, (2) the wrongful act or acts . . . pursuant to the conspiracy, and (3) the resulting damage.” (5 Witkin, Cal. Procedure, *supra*, Pleading, § 922, p. 336; see *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th

503, 511; *Thompson v. California Fair Plan Ass'n* (1990) 221 Cal.App.3d 760, 767.)

The “formation” of the conspiracy consists of the conspirators’ *agreement* to engage in the wrongful injurious acts of which the plaintiff complains. The “operation” of the conspiracy is simply the fact that the wrongful acts alleged were undertaken in furtherance of the agreement. The wrongful acts themselves, and the resulting damage, are alleged as in any other tort case.

A civil conspiracy is not sufficiently pleaded by “bare legal conclusions, inferences, generalities, presumptions, and conclusions.” (*Nicholson v. McClatchy Newspapers* (1986) 177 Cal.App.3d 509, 521; see *Schessler v. Keck* (1954) 125 Cal.App.2d 827, 833.) A “naked allegation of conspiracy” is not sufficient by itself, but may become so if “aided by other allegations which elaborate on the mutual understanding arrived at by defendants” so as to “sufficiently apprise[] defendants of the character and type of facts and circumstances upon which [the plaintiff is] relying to establish the conspiracy.” (*Schessler, supra*, at p. 833; see *State ex rel. Metz v. CCC Information Services, Inc.* (2007) 149 Cal.App.4th 402, 419 [allegations that named and unnamed defendants “conspired to conceal their improper loss valuations” amounted to “bare legal conclusions”].)

Cross-complainants assert that they have “specifically alleged that Tuthill . . . conspired and colluded with the trustees to violate . . . their statutory duties as trustees.” We see no allegation corresponding to this description. Indeed, beyond a single use of the word “conspiracy,” discussed immediately below, no allegation to that effect can be found in the cross-complaint. The question is whether that single use, in light of the pleading as a whole, “sufficiently apprise[d]” Tuthill “of the character and type of facts and circumstances upon which [cross-complainants are] relying to establish the conspiracy.” (*Schessler, supra*, 125 Cal.App.2d at p. 833.)

### **B. *The Cost Conspiracy***

Cross-complainants have described, or attempted to describe, two quite distinct conspiracies: One in the cross-complaint, and a different one in their answers to the underlying complaint. The one in the cross-complaint, which might be labeled the cost conspiracy, appears only in the last cause of action, entitled “Injunction.” There cross-complainants allege that Bank, Levitt, and “their successor in interest,” Tuthill, “have engaged and continue to engage in a *plan and conspiracy to benefit themselves by the generation of unjustified and unwarranted fees and costs* in an effort to coerce the beneficiaries to forfeit their inheritance in exchange for a release of the remaining assets of their trust.” (Italics added.)

This language describes an attempt to exploit the trust’s assets and, apparently, to eventually appropriate them, for the trustees’ own use and benefit. But the cross-complaint sets forth no facts from which it could be found that Tuthill would in fact benefit from such a conspiracy. On the contrary, so far as the cross-complaint shows such a scheme would be inimical to any interest he might have in the matter. According to the cross-complaint, his only interest after the death of Dorothy Lyddon was as the contingently nominated successor to Levitt, the independent trustee. Tuthill might hope to gain something from his eventual succession to that office, but so far as this record shows he would gain nothing unless that happened. His only apparent hope of advantage therefore lay in prolonging the existence of the trust, and preserving its assets, until he could succeed to Levitt’s position. But the conspiracy described in the cross-complaint had a contrary objective: to exhaust the trust assets and ultimately appropriate them to the trustees’ own use and benefit. To the extent such a conspiracy was carried out, Levitt and Bank would realize its entire benefit at Tuthill’s expense. Presented with such a proposal his rational response would have been not to join in its execution, but to actively oppose it.

To baldly charge Tuthill with joining a conspiracy that appears detrimental to his interests does not satisfy the authorities cited above. None of the facts alleged “elaborate on” any “mutual understanding arrived at” between him and the other cross-defendants with respect to the alleged conspiracy. (*Schessler v. Keck, supra*, 125 Cal.App.2d at p. 833.) On the contrary, the facts alleged cast grave doubt on the claim of conspiracy, or at least on the claim that Tuthill was involved in it. Indeed the facts alleged would support a strong *defense* to such a claim—an unanswerable one, it would seem, without new and additional facts to support the claim. Under the authorities cited above, such facts, if believed to exist, should have been set forth in the pleading. As it is, the record presents no basis to suppose that they might exist. A factfinder presented with only the facts alleged in the cross-complaint would have no choice but to conclude that Tuthill had nothing to offer such a scheme, nothing to gain from it, would stand to gain more by opposing it, and therefore was not involved in it. It follows that the cross-complaint fails to plead a conspiracy sufficiently to impute liability to Tuthill.

### ***C. The Control Conspiracy***

Cross-complainants have also described, though not in the cross-complaint, an earlier conspiracy. This scheme, which might be called the control conspiracy, appears only in cross-complainants’ answers to the underlying complaint. On the extremely indulgent premise that cross-complainants omitted these allegations from their cross-complaint by mistake, or that the cross-complaint might in any case have been amended to include them, we will consider their sufficiency to charge Tuthill with liability.

The gist of this theory is that Levitt and Tuthill “conspired with each other to impose upon Dorothy and her family a scheme in which Tuthill, Levitt, and Commerce Bank would wrest control of the RANCH away from Dorothy’s beneficiaries and

interfere with their use and enjoyment of the RANCH after Dorothy's death.”<sup>14</sup> In contrast to the cost conspiracy discussed above, this theory receives at least some support from the surrounding circumstances. Assuming Levitt and Bank were to be compensated for their activities in administering the trust and its assets, then they stood to gain from prolonging the life of the trust and their own control over its assets. As the designated successor to Levitt, Tuthill might hope to partake of these benefits if the trust outlived Levitt's service in that role. As we have noted, his interest in such a scheme would be purely contingent; he might never realize any advantage in fact. But at least he would be in a position where he *could* eventually benefit, and the hope of such gain would provide some basis to infer a willingness on his part to join in such a conspiracy—in contrast to the cost conspiracy, which would appear destructive of any such hope.

But assuming the control conspiracy were incorporated into the cross-complaint, any claim based on it would appear to be barred by the statute of limitations. Cross-complainants assert that the applicable statute of limitations is provided by Missouri law, by virtue of a choice-of-law provision in the 1975 trust instrument. This assertion raises

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<sup>14</sup> As it appears in Martha's answer, and is echoed in Grant's with inconsequential variations in language, this theory is alleged as follows: “In the spring of 2000, Tuthill began to collaborate with Levitt on Dorothy's estate planning work with regards to the RANCH. In late July, Dorothy fell ill, was hospitalized, and was diagnosed with terminal cancer. . . . [¶] . . . [W]hile Dorothy was hospitalized and within days of her discharge, Tuthill and Levitt conspired with each other to impose upon Dorothy and her family a scheme in which Tuthill, Levitt, and Commerce Bank would wrest control of the RANCH away from Dorothy's beneficiaries and interfere with their use and enjoyment of the RANCH after Dorothy's death. . . . [T]he plan included Levitt making Tuthill his/Levitt's successor trustee and thus aligning Tuthill's interests with Levitt's interests and against Dorothy's beneficiaries. . . . [T]he purpose of this plan [was] to wrest control of the RANCH from the family's management, control, and retention to serve the interests of Levitt, Tuthill, and Commerce Bank and to interfere with and frustrate Dorothy's intent and purpose that the RANCH remain in the family and be managed by her beneficiaries upon her death.”

difficult choice-of-law questions which neither side adequately addresses.<sup>15</sup> However we need not resolve them, because even accepting cross-complainants' legal premise, the claim of a conspiracy to "wrest control" of the Ranch from cross-complainants is barred on the face of the cross-complaint.

Cross-complainants rely on the Missouri statute governing actions for fraud, which allows suit to be brought within five years of "the discovery by the aggrieved party, at any time within ten years, of the facts constituting the fraud." (Mo. Ann. Stat., § 516.120, subd. (5).) Under this language, the critical question is when did the plaintiff discover "the facts constituting the fraud." In their reply brief cross-complainants assert that they "only discovered the fraud at or around the time of filing-of the Cross-Complaint, and could not have discovered the fraud until then because the final pieces of the fraudulent scheme were only then put in place." But nothing like this is alleged anywhere in the cross-complaint, and this depiction is not consistent with the facts that are alleged.

The control conspiracy does not appear to sound in fraud—fiduciary or otherwise—but in breach of the trustees' duty to manage the trust for the benefit of the settlor and beneficiaries. The object of the conspiracy, as described in the answers, was

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<sup>15</sup> Choice-of-law provisions in a *contract* raise difficult enough problems when a foreign limitations statute is invoked. (See, e.g., *Hambrecht & Quist Venture Partners v. American Medical Intern., Inc.* (1995) 38 Cal.App.4th 1532 [standard choice of law provision in contract incorporating "laws" of sister state subjected plaintiff's claim to shorter limitations period of that state]; *id.* at p. 1543 [noting California's rejection of "traditional" approach distinguishing procedural from substantive laws]; *Ashland Chemical Co. v. Provence* (1982) 129 Cal.App.3d 790 [application of substantially longer foreign limitations period would violate California policy against entertaining stale claims]; *North American Asbestos Corp. v. Superior Court* (1986) 180 Cal.App.3d 902, 907 [application of shorter period would offend California policy].) Here we have the additional threshold question whether the trust clause in question, which subjects the "administration" of a trust to foreign law, should be interpreted to incorporate that jurisdiction's statute of limitations for tort actions against the trustee.

to “wrest control of the RANCH away from Dorothy’s beneficiaries and interfere with their use and enjoyment of the RANCH after Dorothy’s death.” So far as the pleadings show, that object was achieved when she died on September 30, 2000, with Tuthill’s estate plan in place. It was this plan, according to cross-complainants, that made it possible for the trustees to retain control over the Ranch in defiance, supposedly, of Dorothy’s intentions. Yet the discovery of this plan, and its effect, cannot have come long after her death. On the day of her funeral, according to the cross-complaint, Levitt and Bank delivered to the beneficiaries of the trust “a management agency agreement and indemnity agreement for their signature,” which agreements “ignore[d] the existence of the beneficiaries agreement,” and “impose[d] on [them] onerous and unacceptable waivers of their rights.” Shortly thereafter, Levitt allegedly wrote to the children telling them that they must accept these agreements by October 20, 2000, “or ‘you are out,’ ” adding that the terms were “ ‘nonnegotiable.’ ” In early November, it is alleged, the children were told that if they did not sign the agreements they would not be allowed on the Ranch. On November 16, 2000, Levitt reportedly told attorney Wood, “ ‘I am running the show . . . I am in control now. I am the trustee!’ ” On the next day, a vice president for Bank told Martha, “ ‘[Y]ou and your brothers are right to be concerned about Al Levitt because he has already told me he is going to be the one to sell the ranch.’ ” On November 21, Levitt and Bank “seize[d] the property,” meaning the Ranch. They “change[d] the security codes,” such that the children were “forced off the property and locked out of their family home.”

Assuming the “fraud” consisted of the trustees’ concealment of an intention to “wrest control” of the Ranch from the children, the facts just described would have plainly notified the children of that intention within two months of Dorothy’s death. Any lingering uncertainty must surely have been dispelled in July 2002, when the trustees brought an action for “Interference with Contract, Trespass, Injunction and Damages to

keep [the children] out of their family home.” Early the next year the trustees’ initiated an arbitration proceeding, manifestly to the same effect. Yet cross-complainants did not file the present cross-action until March 2009—nearly six years later.

We conclude that even if the control conspiracy were alleged in the cross-complaint, that pleading would fail to successfully charge him with liability as a conspirator. Since he is not otherwise charged with the breach of any duty to cross-complainants, the cross-complaint fails to state facts sufficient to constitute a cause of action against him. Accordingly, the trial court did not err by sustaining his demurrer.

**DISPOSITION**

The judgment is affirmed.

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RUSHING, P.J.

WE CONCUR:

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PREMO, J.

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ELIA, J.