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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

JAMES GLENN BARRONS et al.,

Plaintiffs and Appellants,

v.

CHICAGO TITLE COMPANY et al.,

Defendants and Respondents.

G051328

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

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Robert James Moss, Judge. Affirmed.

Catanzarite Law Corporation, Kenneth J. Catanzarite, and Nicole M. Catanzarite-Woodward for Plaintiffs and Appellants.

Fidelity National Law Group, Robert G. Wilson, Howard P. Brody, and Michael J. Veiluva for Defendants and Respondents.

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This appeal arises out of a series of real estate transactions that have spawned extensive litigation both in the trial court and on appeal. The transactions were "1031 exchanges" — i.e., the use of the proceeds of a property sale to buy "like kind" property, which avoids triggering capital gains taxes on the first sale pursuant to Internal Revenue Code section 1031 (26 U.S.C. § 1031). Plaintiffs contend they were misled about the costs associated with the purchase of the like kind property. They claim the fees and costs exceeded 15 percent — the amount they were ostensibly saving by not paying capital gains taxes — but that defendants employed a sophisticated scheme to make it appear the costs were near 6 percent. In particular, the accountants, attorneys, sellers, brokers and others conspired to set the plaintiff's purchase price of the like kind property at an amount above the price negotiated with the seller of the property, and the premium amount was used to pay hidden costs to various defendants.

The plaintiffs in the underlying litigation are James and Linda Barrons, together with two special purpose entities set up to facilitate investments in two separate properties. The defendants are legion and include almost every entity in any way associated with the transactions at issue. This appeal concerns only a narrow slice of the overall litigation. The respondents here are Chicago Title Company, which provided escrow services for the two property transactions at issue, and Chicago Title Insurance Company, which provided title insurance (collectively, the Chicago Defendants). As against the Chicago Defendants, plaintiffs alleged causes of action for breach of contract, statutory, and fiduciary duties, constructive fraud, intentional misrepresentation, negligent misrepresentation, fraudulent concealment, conversion, disgorgement, violation of Business & Professions Code section 17200 (section 17200), aiding and abetting elder abuse, and equitable claims. This appeal is taken from a dismissal following a demurrer sustained without leave to amend. We conclude plaintiffs have failed to state a cause of action against the Chicago Defendants and affirm the judgment.

FACTS

The Parties

Plaintiffs invested $750,000 to obtain tenant in common (TIC) interests in two different properties: the "Aero Vault Property" and the "Eaton Canyon Property." Plaintiffs' purchased their interests through two separate special purpose entities, one for each investment: Aerovault Barrons, LLC and Eaton Barrons, LLC (collectively, the special purpose entities). The special purpose entities are also named as plaintiffs and are also appellants in the present appeal.

There are 23 defendants named in the operative complaint. The principal actors who created the investment and induced plaintiffs' participation were the accountants, including Allen L. Basso and his firm Smith Linden & Basso, LLP; the real estate brokers Allen *A.* Basso and his firm Lee & Associates Commercial Real Estate Services, Inc. – El Toro; and the attorneys, including Merton Davies, Rosemary Lemmis and the firm Davies Lemmis Raphaely Law Corporation (collectively, the advisor defendants). Also named as defendants were the various sellers of the properties, the sellers' brokers, the title insurance companies, and the escrow companies.[1]

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[1] For reasons that are not clear in the record, two entities — Asset Management Consultants, Inc. (AMC) and BH & Sons — that were instrumental in organizing and promoting the investments (and directly profited from the fees about which plaintiffs now complain) are not named as parties. Exhibits attached to the complaint identify these companies, and they are sporadically mentioned throughout the complaint. The complaint names a set of unidentified doe defendants as the "promoter defendants," which, in context, appears to include AMC and BH & Sons. But plaintiffs' failure to specifically identify those entities and distinguish the roles they played introduces significant ambiguity and obscures the structure of underlying transactions.

Key Allegations Concerning Plaintiffs' Investments in the Properties

In 2006, some of the defendants (not respondents) convinced plaintiffs to sell real property they owned so the proceeds could be reinvested in the investment properties at issue in this case. The purchase and sale of the investment properties occurred in two phases. First, the prior owner of the property sold it to BH & Sons, which plaintiffs refer to as a "straw buyer." Plaintiffs, in turn, purchased TIC interests directly from BH & Sons. The transactions occurred more or less in tandem, with the original owner transferring title directly to the special purpose entities, and BH & Sons assigning its contractual rights in the initial purchase and sale agreement to the TIC purchaser.

The purpose of these transactions, in addition to profit, was to defer payment of capital gains taxes owed on plaintiffs' profitable sales of real estate by purchasing a like kind property — i.e., a 1031 exchange. The advisor defendants asserted that the investments would satisfy all of these objectives; they were "tax-advantaged, tax deferred passive investments" that were "suitable, safe, secure and would provide a conservative investment return . . . for [plaintiffs'] long term retirement objectives."

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.

Plaintiffs received a document entitled "Explanation of Fees" stating that investors would pay 6 percent of their gross investment in TIC properties as a fee at the close of escrow on the investments, as well as several other fixed fees for accounting, escrow, and organizational expenses. 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 upfront costs or "sales loads" exceeding 15 percent of the cash investments. In particular, the purchase and sale agreement between BH & Sons and the original seller provided that the seller would pay a large commission to BH & Sons' broker, AMC. That cost was secretly shifted to plaintiffs however, by marking up the purchase price beyond the negotiated price, in an amount sufficient to cover the commission. In the case of the Aero Vault Property, the negotiated price was $26,600,000, and the stated commission to AMC was $1,250,000, but the purchase price disclosed to plaintiffs was $27,885,000.[2] In the case of the Eaton Canyon Property, the negotiated price was $50,400,000, and the stated commission to AMC was $1,750,000, but the purchase price disclosed to plaintiffs was $52,150,000. In effect, therefore, plaintiffs were paying the fee to AMC, rather than sellers. The actual negotiated price was never disclosed to plaintiffs, and plaintiffs were never told that a portion of the purchase price was in fact a fee being paid by plaintiffs.

Plaintiffs allege that their investment in the Aero Vault Property is "virtually a total loss because the anchor tenant . . . indicated it will not renew its lease . . . ." The investment in the Eaton Canyon Property is a total loss due to foreclosure.

The Chicago Defendants did not directly participate in any of the foregoing alleged fraudulent activity. Instead, plaintiffs allege the Chicago Defendants aided and abetted, and conspired with, the advisor defendants. In particular, the Chicago Defendants knew about the scheme to mark up the purchase price, and used a "fake double escrow" to mislead the plaintiffs about the true purchase price.

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[2] We note that this markup is slightly more than the $1,250,000 needed to cover the AMC commission. The complaint does not explain the excess.

Also, they sent allegedly misleading final closing statements. The complaint attaches four final closing statements regarding the Amlap Property, which, though not a property at issue here, the complaint describes as an illustrative example. The first is a statement sent to the seller, which describes the "total consideration" as $34,550,000 but includes a separate line item for a $1,300,000 commission to AMC. The same statement also indicates the title insurance policy issued "based on $33,250," which plaintiffs interpret as an indication that Chicago Title Company knew the actual value of the property was $33,250,000. The second is a "Master Statement" sent to Amlap Venture, L.P., which was apparently a buyer controlled by defendant Allen L. Basso and the promoter defendants. That statement contains extensive line items indicating various fees being paid, though it does not specifically mention the AMC commission.[3] The third and fourth statements were sent to TIC investors, and they list only the consideration paid by that particular investor and a few line items that give no indication as to the actual negotiated purchase price.

Finally, plaintiffs allege the escrow companies knew that the mark up was being paid out to an unlicensed real estate broker, which violated the escrow companies' duty under Business and Professions Code section 10138.

Plaintiffs filed the present lawsuit in May 2013. At issue here is the second amended complaint, in which, as against the respondents in this appeal, plaintiffs alleged causes of action for "breach of contract, statute, and fiduciary duties," constructive fraud, intentional misrepresentation, negligent misrepresentation, fraud by concealment, conversion, negligence (which is duplicative with the negligent misrepresentation claim), unfair business practices (§ 17200), and aiding and abetting elder abuse. Plaintiffs also sought an accounting and restitution for unjust enrichment.

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[3] The Master Statement contains a line item stating, "CLTA owners addl cost above $33,250" for $780.00. It is unclear to us what that is or whether that would have tipped the TIC purchasers off to the actual negotiated price.

The Chicago Defendants demurred, and the court sustained the demurrer without leave to amend. The court held that all of the claims were barred by the statute of limitations. It also found the claims lacked merit. The court noted that "[t]he escrow holder's obligation is limited to escrow instructions, unless there is clear evidence of fraud." As to the misrepresentation causes of action, the court held the "Second Amended Complaint fails to allege with specificity the who, what, where, etc. which is necessary for alleging fraud . . . ."

DISCUSSION

Because of the extensive litigation spawned by the property transactions at issue, we have already addressed some of the issues raised in this appeal. In particular, we have analyzed plaintiffs' claim that the discovery rule tolled the statute of limitations, rendering their complaint timely. We concluded that plaintiffs adequately pleaded the discovery rule. (*See Barrons v. Lee & Associates Commercial Real Estate Services, Inc.* (Feb. 9, 2016, G050326) [nonpub. opn.].) We do not repeat that analysis here. Instead, we address the merits of plaintiffs' claims and affirm the trial court's finding that plaintiffs failed to state a cause of action.

We review the sustaining of a demurrer de novo. (*WA Southwest 2, LLC v. First American Title Ins. Co.* (2015) 240 Cal.App.4th 148, 151.) "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 the court's denial of plaintiffs' request for leave to amend for abuse of discretion. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.)

The Causes of Action for "Breach of Contract, Statute, and Fiduciary Duties" and Constructive Fraud

We begin by observing a major flaw in plaintiffs' complaint: their failure to attach the escrow instructions or describe in detail what they contain. "In delimiting the scope of an escrow holder's fiduciary duties, . . . we start from the principle that '[a]n escrow holder must comply strictly with the instructions of the parties. [Citations.]' [Citation.] On the other hand, an escrow holder 'has no general duty to police the affairs of its depositors'; rather, an escrow holder's obligations are 'limited to faithful compliance with [the depositors'] instructions.' [Citations.] Absent clear evidence of fraud, an escrow holder's obligations are limited to compliance with the parties' instructions." (*Summit Financial Holdings, Ltd. v. Continental Lawyers Title Co.* (2002) 27 Cal.4th 705, 711 (*Summit*).) In *Summit* our high court specifically rejected the notion that "an escrow holder can be liable to strangers to the escrow for injuries allegedly caused by the escrow holder following its principals' instructions." (*Id.* at pp. 712-713.) As to tort duties more generally, the *Summit* court affirmed "'the general rule that an escrow holder incurs no liability for failing to do something not required by the terms of the escrow or for a loss caused by following the escrow instructions.'" (*Id.* at p. 715.)

These principles undermine the sixth cause of action for "breach of contract, statute, and fiduciary duties" and the seventh cause of action for constructive fraud, which is based on a fiduciary duty. Plaintiffs allege the Chicago Defendants employed "the use of double escrows to hide the true facts of the <u>*Actual* Purchase Price</u> and hence the true '<u>up-front costs</u>' and '<u>sales loads</u>' in each of the TIC ***Interests*** transactions." However, setting aside the conclusory allegations about the Chicago Defendants' intent, the complaint does not articulate the portions of the escrow instructions relevant to the issue of dual escrows. Given that there were two transactions — the seller to BH & Sons, and BH & Sons to plaintiffs — the existence of dual escrows does not seem particularly troubling, and certainly is not "clear evidence of fraud" such

that the Chicago Defendants would be required to depart from their instructions. (*Summit, supra*, 27 Cal.4th 705 at p. 711.) Plaintiffs go on to allege the Chicago Defendants "had an express contractual duty to use Plaintiffs' funds, combined with the other tenant in common purchasers, to purchase 100% of the interests in the respective real property at the *Actual* Purchase Price." But again, we are not told what the instructions actually said, and thus this allegation is a mere legal conclusion. Finally, plaintiffs contend the Chicago Defendants had a duty to disclose the actual purchase price to plaintiffs, but absent a requirement in the escrow instructions, plaintiffs have not provided any legal basis for such a requirement.

Plaintiffs also allege that Chicago Defendants breached their duty under Business and Professions Code section 10138, pursuant to which it is a misdemeanor crime for an escrow holder to pay compensation to a real estate broker "who is not known to be or who does not present evidence to such payor that he is a regularly licensed real estate broker at the time such compensation is earned." (*Ibid.*) Plaintiffs allege the Chicago Defendants breached this duty "by the fake double escrow." It is unclear to us how a double escrow is relevant to the duty to verify the licensure of a real estate broker. Moreover, the complaint does not even allege what entity, in particular, the commission was paid to. Exhibits to the complaint indicate the commission was paid to AMC, yet there is no allegation that AMC was an unlicensed broker. Finally, even if the Chicago Defendants had breached such a duty, plaintiffs were not harmed by the breach. The commission paid to AMC came from the seller, not plaintiffs. So even if the Chicago Defendants had made the determination that AMC was unlicensed, presumably the money would simply have been returned to the seller, and plaintiffs still would have overpaid for the property. In other words, the alleged harm to plaintiffs really had nothing to do with the escrow services performed. The harm was from plaintiffs' own representatives failing to disclose the alleged hidden fee.

The Misrepresentation Causes of Action

We turn next to the various misrepresentation causes of action: intentional misrepresentation (eighth), negligent misrepresentation (ninth), fraud by concealment (tenth), negligence (because it simply repeats the negligent misrepresentation allegations) (twelfth), section 17200 (thirteenth), and aiding and abetting elder abuse (seventeenth)[4].

The complaint does not allege the Chicago Defendants made a misrepresentation. Instead, the crux of plaintiffs' claim is that the Chicago Defendants are liable because they performed otherwise lawful services but knew the promoter defendants were defrauding plaintiffs. Fraud must be pleaded with particularity, however, and plaintiffs do not allege any specific facts indicating who knew about the fraud or how they came by such knowledge. Instead, plaintiffs attempt to, essentially, bypass the particularity requirement by alleging in generic and conclusory terms that defendants knew about the fraud. We conclude below that such allegations are inadequate.

Fraud and negligent misrepresentation must be pleaded 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 *Charnay v. Cobert* (2006) 145 Cal.App.4th 170, 185, fn. 14.) The reason for this rule is "that allegations of fraud involve a serious attack on character, and fairness to the defendant demands that he should receive the fullest possible details of the charge in order to prepare his defense." (*Committee On Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 216, superseded on another ground by Prop. 64

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[4] Welfare & Institutions Code section 15610.30 defines financial abuse of an elder as the taking of an elder's property "with intent to defraud." To that end, plaintiffs alleged that the advisor defendants employed the mark up scheme "with intent to defraud." Our high court has held that elder abuse claims must be pleaded "with particularity" (*Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, 790), which is particularly appropriate where, as here, the claim is based on fraud.

amending Bus. & Prof. Code, § 17204.) "The pleading of fraud . . . is also the last remaining habitat of the common law notion that a complaint should be sufficiently specific that the court can weed out nonmeritorious actions on the basis of the pleadings. Thus the pleading should be sufficient '"to enable the court to determine whether, on the facts pleaded, there is any foundation, prima facie at least, for the charge of fraud."'" (*Committee On Children's Television*, *Inc.*, at pp. 216-217.) 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 the defendant 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.) """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.)

Under either theory, "[k]nowledge is the crucial element" for imposing liability on parties that perform legitimate services which aid fraudulent conduct. (*Casey*, *supra*, 127 Cal.App.4th at p. 1145.) "'[S]uspicion and surmise do not constitute actual knowledge.'" (*Id.* at p. 1147.) Plaintiffs must allege the Chicago Defendants "had actual knowledge of the specific wrongful act that constituted the breach of [tort] duty it purportedly aided and abetted." (*Ibid.*)

Here, the specific wrongful act was *not* the payment of the commission out of escrow. If plaintiffs had been clearly informed of the actual way in which the transaction had been structured, there would be no fraud. Rather, it was the failure of the advisor defendants to disclose the extra fee.

Thus, the Chicago Defendants' knowledge of the representations being made (and not made) to plaintiffs is the key to imposing vicarious liability. Rather than providing any specific factual allegations on the essential issue, however, the complaint offers no more than vague and conclusory assertions that the Chicago Defendants knew about the misrepresentations. In view of the heightened pleading standard for fraud, such "general allegation[s]" (*Casey*, *supra*, 127 Cal.App.4th at p. 1152) and "'kitchen sink' allegation[s]" do not sufficiently assert the Chicago Defendants had actual knowledge of the fraud alleged in this case (*id*. at p. 1153). Nowhere do plaintiffs allege which individuals at the escrow company knew about the fraud, nor how they came about such

knowledge. (*See Lazar v. Superior Court* (1996) 12 Cal.4th 631, 645 [“A plaintiff’s burden in asserting a fraud claim against a corporate employer is even greater. In such a case, the plaintiff must ‘allege the names of the persons who made the allegedly fraudulent representations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written’”].) And escrow companies would not, as a matter of course, be aware of all of the representations being made between accountants, attorneys, brokers, and their clients. Because plaintiffs failed to plead specific facts on *the* crucial element for imposing liability on the Chicago Defendants, they failed to adequately state claims for intentional misrepresentation, fraudulent concealment, violation of section 17200 (which simply incorporates the fraud allegations), and aiding and abetting elder abuse (which is also based on the fraud allegations).

Schulz v. Neovi Data Corp. (2007) 152 Cal.App.4th 86 illustrates the point. There, plaintiff alleged he was the victim of an internet scam that operated an illegal lottery, which he claimed was an illegal business practice within the meaning of section 17200. (*Schulz*, at p. 88.) He sued four credit-card payment processors as aiders and abetters. (*Ibid.*) As to two of the payment processors, the complaint alleged they had reviewed the Web site, recognized it as an illegal Web site, but nonetheless permitted the website to display the logo of the payment processors. (*Id.* at p. 94.) The court held this allegation adequately pleaded knowledge of the tort for purposes of aiding-and-abetting liability. (*Ibid.*) As to the other two payment processors, however, the complaint alleged in general terms that they knew about the illegal activity, aided and abetted it, and profited from it. The court held these allegations were inadequate, and affirmed the trial court’s ruling sustaining the demurrer without leave to amend. (*Id.* at p. 97.) Here, plaintiffs’ general and conclusory allegations as to the Chicago Defendants resemble the inadequate allegations in *Schulz*. And here there is even greater reason to deem them inadequate, as, unlike *Schulz*, plaintiffs’ allegations sound in fraud and thus must be pleaded with greater specificity.

The court also correctly sustained the Chicago Defendants' demurrer to the negligent misrepresentation cause of action and the negligence cause of action (which is based on a negligent misrepresentation). "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 the 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; see *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, § 1710, subd. (2).)

It is not entirely clear what plaintiffs have in mind here; the actual statement of the cause of action is boilerplate. Did the advisor defendants intentionally misrepresent the purchase price and the Chicago Defendants negligently contribute to the transaction? That theory is a nonstarter on the legal principles articulated above: knowledge is the crucial element for imposing liability for aiding and abetting. Did the advisor defendants negligently misrepresent the purchase price and the Chicago Defendants lend their services knowing about the inadvertent misrepresentation? That would seem to boil down to a claim that the Chicago Defendants had a duty to police the claims of other defendants, but our high court definitively rejected any such duty in *Summit, supra*, 27 Cal.4th at page 711. And in any event, as we concluded above,

plaintiffs failed to adequately plead the Chicago Defendants' knowledge. However sliced, plaintiffs failed to state a cause of action.

The Remaining Causes of Action

The remaining causes of action are conversion (eleventh), accounting (fourteenth), and "restitution & unjust enrichment" (fifteenth). Plaintiffs make no attempt in their opening brief to defend the conversion cause of action, and thus we need not address the issue. (*See Plotnik v. Meihaus* (2012) 208 Cal.App.4th 1590, 1615 ["Since [defendant] does not address the issue, we treat it as abandoned"].) The causes of action for accounting and restitution do not allege any additional legal duties or misconduct 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"].) Because plaintiffs have failed to otherwise plead a cause of action against the Chicago Defendants, there are no grounds for an accounting or for restitution.

Chicago Title Insurance Company

Although plaintiffs have lumped the Chicago Defendants into a single unit of defendants, the complaint makes no allegations whatsoever concerning activities of Chicago Title Insurance Company. For that reason, in addition to all of the reasons stated above, the complaint fails to state a cause of action against Chicago Title Insurance Company.

Leave to Amend

Finally, 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.) We find no abuse of discretion. Plaintiffs' failure to attach or plead the substance of the escrow instructions, and the lack of specificity as to the fraud claims, were the subjects of the Chicago Defendants' demurrer to the *first* amended complaint. Plaintiffs were given an opportunity to amend, but failed to fill in the gaps. And while plaintiffs assert on appeal that they can amend and attach the escrow instructions, they also contend that "liability against Chicago Title Company is based not on a breach of an express term of the escrow instructions, but, rather, on the implied promise not to pay commissions to unlicensed persons as discussed above." In other words, plaintiffs have tacitly conceded the Chicago Defendants complied with the relevant instructions. Granting leave to amend would, therefore, be futile. Accordingly, the court did not abuse its discretion.

DISPOSITION

The judgment is affirmed. Respondents shall recover their costs incurred on appeal.

IKOLA, J.

WE CONCUR:

O'LEARY, P. J.

FYBEL, J.