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CC-Palo Alto, Inc. a Delaware corporation;
Classic Residence Management Limited Partnership,
an Illinois limited partnership; and CC-Development
Group, Inc., a Delaware corporation

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BURTON RICHTER, an individual;
LINDA COLLINS CORK, an individual;
GEORGIA L. MAY, an individual;
THOMAS MERIGAN, an individual;
ALFRED SPIVACK, an individual; and
JANICE R. ANDERSON, an individual; on
behalf of themselves and all other similarly
situated

Plaintiff,

vs.

CC-PALO ALTO, INC., a Delaware
corporation; **CLASSIC RESIDENCE**
MANAGEMENT LIMITED
PARTNERSHIP, an Illinois limited
partnership; and **CC-DEVELOPMENT**
GROUP, INC., a Delaware corporation

Defendant.

Case No.: C 14-00750 HRL

**DEFENDANT CC-DEVELOPMENT
GROUP, INC.'S NOTICE OF MOTION
AND MOTION TO DISMISS CLASS
ACTION COMPLAINT FOR:**

**1. CONCEALMENT;
2. NEGLIGENT MISREPRESENTATION;
3. BREACH OF FIDUCIARY DUTY AND
CONSTRUCTIVE TRUST; 4. FINANCIAL
ABUSE OF ELDERS (CALIFORNIA
WELFARE AND INSTITUTIONS CODE
§§ 15600, ET SEQ.); 5. VIOLATION OF
CALIFORNIA CIVIL CODE §§ 1750, ET
SEQ.; 6. VIOLATION OF CALIFORNIA
BUSINESS AND PROFESSIONS CODE
§§ 17200, ET SEQ.; AND 7. BREACH OF
CONTRACT**

Date: June 3, 2014
Time: 10:00 a.m.
Dept.: 2, 5th Floor
Judge: The Hon. Howard R. Lloyd

Trial Date: Not set.

1 TO PLAINTIFF AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on June 3, 2014 at 10:00 a.m., or as soon thereafter as the
3 matter may be heard in the above-entitled court, located at 280 South First St., Courtroom 2, 5th
4 Floor, San Jose, California, defendant, CC-Development Group, Inc., will move the Court to
5 dismiss this action pursuant to Federal Rule of Civil Procedure 12(b).

6 This motion will be based on this Notice of Motion and Motion to Dismiss, the
7 Memorandum of Points and Authorities, the papers and records on file herein, and on such oral
8 and documentary evidence as may be presented at the hearing on the motion.

9
10 DATED: March 17, 2014

McMANIS FAULKNER

11
12
13 /s/ James McManis

14 JAMES McMANIS
SHARON KIRSCH
HILARY WEDDELL

15 Attorneys for Defendants,
16 CC-Palo Alto, Inc. a Delaware corporation;
17 Classic Residence Management Limited
18 Partnership, an Illinois limited partnership;
19 and CC-Development Group, Inc., a Delaware
20 corporation
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INTRODUCTION

Defendant CC-Development Group, Inc. (“CC-DG” or “defendant”) brings this motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6).¹ This lawsuit arises out of plaintiffs’ displeasure with the terms of the Residency Contracts, and is an attempt to change, rather than interpret, them. Plaintiffs’ allegations utterly ignore applicable laws and the plain wording of the Residency Contracts. Despite their attempt to manufacture a dispute, plaintiffs’ complaint falls hopelessly short of adequately pleading any acts on which a valid claim could rest. As a threshold matter, the complaint relies on mere speculation that there might be future damages, based on a number of unlikely and contingent events. Plaintiffs have not, and cannot, allege that they have suffered any damages as a result of defendant’s alleged conduct. Moreover, all of the claims are grounded in fraud and they have failed to plead with the specificity required by Rule 9(b). Therefore, plaintiffs’ entire complaint should be dismissed for failure to state a claim.

STATEMENT OF FACTS

Plaintiffs attempt to allege causes of action for concealment (first cause of action), negligent misrepresentation (second cause of action), breach of fiduciary duty and for imposition of a constructive trust (third cause of action), financial abuse of elders (fourth cause of action), violation of California’s Consumers Legal Remedies Act (fifth cause of action), unfair competition (sixth cause of action), and breach of contract (seventh cause of action).

The complaint contains the following allegations: Defendant CC-Palo Alto, Inc. (“CC-PA”) owns and operates the Vi at Palo Alto, one of the most desirable retirement communities in the country. Complaint, ¶¶ 2-3. CC-DG is the parent company of CC-PA. Complaint, ¶ 16. Classic Residence Management Limited Partnership (“CRMLP”) is a subsidiary of CC-DG and provides the day-to-day management and operation at Vi at Palo Alto. Complaint, ¶ 17.

¹ All future references to a “Rule” hereinafter made are to the Federal Rules of Civil Procedure unless otherwise specified.

Vi at Palo Alto is a luxury continuing care retirement community (“CCRC”), which provides senior residents housing, meals, housekeeping, recreational and hospitality services, long-term care, and a long-term care financial benefits program for the rest of their lives, in return for payment of an entrance fee and a monthly fee. *See* Complaint, ¶ 6 and Exhs. 5, 7, 9, 11, 13, and 15 at sections 2.1 and 3. Vi at Palo Alto offers a continuum of care, consisting of three levels: a) independent living; b) assisted living, where residents can receive help with activities of daily living such as bathing, grooming, dressing, and medication management; and c) skilled nursing. *See* Complaint, Exhs. 5, 7, 9, 11, 13, and 15 at sections 1, 4, and 7. When residents require assisted living or nursing care they continue to pay essentially the same monthly fee that was paid in independent living, despite the higher actual cost of providing care. *See* Complaint, Exhs. 5, 7, 9, 11, 13, and 15 at section 4.1.

Prior to entry into the community, each resident must sign a Continuing Care Residency Contract (“Residency Contract”) with CC-PA. *See* Complaint, ¶ 4. Plaintiffs allege that they each signed a Residency Contract with CC-PA and currently reside at the Vi at Palo Alto community. Complaint, ¶¶ 24-42. The Residency Contracts require payment of an entrance fee based on the type of apartment. Complaint, ¶ 50. Plaintiffs allege that entrance fees for 2014 range from \$745,500 for a one bedroom apartment to \$4,620,800 for a three bedroom apartment with den. Complaint, ¶ 50. Plaintiffs allege that the entrance fee is characterized as a “loan” to CC-PA, a portion of which is repaid to the resident or the resident’s estate when the contract terminates. Complaint, ¶ 47-49. Residency Contracts terminate upon the resident’s decision to leave the community or their death. Complaint, ¶ 49. Upon termination of the Residency Contract, the repayable portion of the entrance fee is due at the earlier of (a) fourteen days after resale of the resident’s apartment, or (b) ten years after termination. Complaint, ¶ 49. The amount of entrance fee that is repaid is dependent on when the resident entered the community, as the repayable percentage has decreased over time. Complaint, ¶ 48. Plaintiffs allege that the repayable portion of their entrance fees range from 75% to 90%. Complaint, ¶ 47.

The complaint alleges that continuing care providers such as CC-PA are required to maintain a certain level of cash reserves for their repayment obligations or disclose their failure

1 to do so. Complaint, ¶ 51. Plaintiffs allege that the marketing materials for Vi at Palo Alto did
 2 not include any such disclosure and the Residency Contracts “conceal the fact that there is no
 3 cash reserve.” Complaint, ¶ 54. Plaintiffs further allege that the “essence” of CC-PA’s offering
 4 was that it would take care of the residents, “enhance the last chapter of their lives,” and that “Vi
 5 at Palo Alto would be their home.” Complaint, ¶ 57.

6 Plaintiffs’ complaint alleges that CC-PA has transferred over \$190 million dollars to its
 7 corporate parent, CC-DG, and is now “financially incapable of honoring its debts” when they
 8 become due. Complaint, ¶ 7. Plaintiffs allege that they were not informed that CC-PA intended
 9 to distribute excess cash to its parent company, and CC-DG’s failure to assume responsibility for
 10 CC-PA’s repayment obligation has “impaired the security interest underlying the loans made to
 11 CC-PA.” Complaint, ¶ 8. Plaintiffs’ complaint alleges that “the effect of these practices is to
 12 shift all financial risk of repayment to the resident, which substantially impairs the value of
 13 Plaintiffs’ security interest.” Complaint, ¶ 60.

14 The complaint alleges that in addition to one-time entrance fees, each resident of the Vi at
 15 Palo Alto is required to pay monthly fees. Complaint, ¶ 10. Plaintiffs claim that these monthly
 16 fees “have been artificially inflated” due to three improper charges levied by defendant:
 17 increased property taxes, earthquake insurance costs, and marketing costs. Complaint, ¶ 10.

18 Plaintiffs allege that on or about April 1, 2011, the Santa Clara County Tax Assessor
 19 gave CC-PA notice of its intent to seek an increase in the property tax assessment for the Vi at
 20 Palo Alto community. Complaint, ¶ 64. After hearing by the Assessment Appeals Board, the
 21 community’s property taxes were increased as a result of CC-PA’s distributions of excess cash to
 22 its parent company, CC-DG. Complaint, ¶ 63. The increased tax assessment will amount to an
 23 increase in back taxes in excess of \$12 million and additional tax assessments of \$1.9 million
 24 annually. Complaint, ¶ 65. On or about September 5, 2012, CC-PA filed an action challenging
 25 the increased tax assessment, which is still in a preliminary stage. Complaint, ¶ 65. Defendant
 26 has agreed to pay for the back taxes pending the appeal of the AAB decision, but has indicated
 27 that residents “will bear the ultimate responsibility for those taxes.” Complaint, ¶ 65. Defendant
 28 has also indicated that residents will be charged for the increased taxes going forward.

Complaint, ¶ 66. Plaintiffs further allege that defendant has suspended the crediting to residents of excess amounts in the cumulative operating surplus—which should be used to create an operating reserve or remitted to the residents—to cover the increased cost of property tax.

Complaint, ¶ 66.

Plaintiffs allege that defendant has also improperly allocated earthquake insurance coverage under the Residency Contract. Complaint, ¶¶ 72-73. In the event of an earthquake, CC-PA's insurance coverage would require a deductible of 5% of the replacement value of each "structure" at the time of loss, which plaintiffs claim would be passed on to residents in the amount of approximately \$10 million dollars. Complaint, ¶¶ 69-70. Plaintiffs allege that "the Residency Contract provides that residents' monthly fees are 'intended to pay all costs of operating the community,' including 'the costs of insurance policies,'" but "the same provision limits these costs to 'maintenance, repairs, and replacement of capital items (including furnishings, fixtures and equipment).'" Complaint, ¶ 71. Plaintiffs state that "many" of the buildings are not included as capital items and thus residents should not be charged for the costs of insuring them. Complaint, ¶ 71. Thus, plaintiffs allege that defendant is responsible for the portion of insurance costs attributable to insuring the building, while the residents will pay to insure the community's furniture, fixtures and equipment. Complaint, ¶ 72.

Plaintiffs also allege that defendant has improperly allocated marketing costs under the Residency Contract. Complaint, ¶ 74. The Residency Contract states that residents' monthly fees are "intended to pay all costs of operating the community," including "marketing costs." Complaint, ¶ 74. Plaintiffs allege that they have paid more than \$5.5 million in marketing costs from March 2006 through 2013. Complaint, ¶ 75. Plaintiffs allege that the Residency Contract does not define the term "marketing costs" and CC-PA has "unfairly expanded it to include the funding of [CC-DG's] national advertising program." Complaint, ¶ 74.

LEGAL ARGUMENT

I. LEGAL STANDARD FOR A MOTION TO DISMISS UNDER RULE 12(b).

Even though state law determines whether state law claims are viable in a diversity action, the manner in which such claims are stated is evaluated under the Federal Rules. *See e.g.*

1 *Taylor v. United States*, 821 F. 2d 1428, 1433 (9th Cir. 1987). A complaint may be dismissed
 2 pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief
 3 can be granted. A motion to dismiss under Rule 12(b)(6) “tests the legal sufficiency of a claim.”
 4 *Navarro v. Block*, 250 F. 3d 729, 732 (9th Cir. 2001). The Court must decide if the facts alleged,
 5 if true, would entitle the plaintiff to some form of legal remedy. *Conley v. Gibson*, 355 U.S. 41,
 6 45-46 (1957).

7 A complaint filed in federal court must contain “a short and plain statement of the claim
 8 showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). A complaint will satisfy
 9 this requirement if it gives the defendant notice of what the claim is and the basis for that claim.
 10 *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Plaintiffs’ complaint must be
 11 supported by factual allegations. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The facts alleged
 12 must contain more than mere conclusions and must constitute more than mere
 13 speculation. *Twombly*, 550 U.S. 544 at 555, 570-572.

14 In addition to providing fair notice of the claim, the complaint must also show that the
 15 plaintiff is entitled to relief. Fed. R. Civ. P. 8(a)(2). This showing is made by alleging sufficient
 16 facts to state a plausible claim for relief. *Twombly*, 550 U.S. 544 at 570.

17 **II. DEFENDANT’S MOTION TO DISMISS SHOULD BE GRANTED BECAUSE**
 18 **PLAINTIFFS LACK STANDING.**

19 Defendant CC-DG hereby incorporates by reference the argument that plaintiffs’ lack
 20 standing to bring this suit set forth in defendant CC-PA’s Motion to Dismiss. Because plaintiffs’
 21 complaint fails to set forth a legally cognizable injury in fact, the entire complaint must be
 22 dismissed for lack of standing.

23 **III. DEFENDANT’S MOTION TO DISMISS SHOULD BE GRANTED BECAUSE**
 24 **PLAINTIFFS’ CLAIMS ARE NOT RIPE FOR ADJUDICATION.**

25 Defendant CC-DG hereby incorporates by reference the argument that plaintiffs’ entire
 26 complaint should be dismissed because their claims are not ripe as set forth in defendant CC-
 27 PA’s Motion to Dismiss.

28 ///

///

IV. DEFENDANT'S MOTION TO DISMISS SHOULD BE GRANTED BECAUSE PLAINTIFFS FAIL TO PLEAD WITH THE SPECIFICITY REQUIRED BY RULE 9(b).

Defendant CC-DG hereby incorporates by reference the argument that plaintiffs' entire complaint should be dismissed for failure to plead with the specificity required by Rule 9(b) set forth in defendant CC-PA's Motion to Dismiss.

V. DEFENDANT'S MOTION TO DISMISS SHOULD BE GRANTED BECAUSE PLAINTIFFS FAIL TO SET FORTH GROUNDS FOR THE COURT'S SUBJECT MATTER JURISDICTION.

Defendant CC-DG hereby incorporates by reference the argument that plaintiffs' entire complaint should be dismissed for failure to set forth grounds for the court's subject matter jurisdiction as set forth in defendant CC-PA's Motion to Dismiss.

VI. THE FIRST CAUSE OF ACTION FOR CONCEALMENT FAILS TO STATE A CLAIM.

Defendant CC-DG hereby incorporates by reference the argument that plaintiffs' concealment cause of action should be dismissed for failure to state a claim as set forth in defendant CC-PA's Motion to Dismiss. If plaintiffs have failed to allege sufficient facts against CC-PA, they have necessarily failed to state the cause of action against CC-DG. Thus, plaintiffs' claim for concealment against CC-DG should be dismissed for failure to state a claim.

VII. THE SECOND CAUSE OF ACTION FOR NEGLIGENT MISREPRESENTATION FAILS TO STATE A CLAIM.

Defendant CC-DG hereby incorporates by reference the argument that plaintiffs' negligent misrepresentation cause of action should be dismissed for failure to state a claim as set forth in defendant CC-PA's Motion to Dismiss. If plaintiffs have failed to allege sufficient facts to state a cause of action against CC-PA, they have necessarily failed to state the cause of action against CC-DG. Moreover, although the heading of the cause of action states that the claim is against "all defendants," plaintiffs do not include any allegations that CC-DG negligently misrepresented facts. See Complaint, ¶¶ 56-60, 104-110. The only allegations provided by plaintiffs in support of their claim is one marketing letter that was sent by CC-PA. See Complaint, ¶ 56, 106. Thus, plaintiffs' claim for negligent misrepresentation is devoid of facts

alleged against CC-DG and plaintiffs' second cause of action against CC-DG should be dismissed.

VIII. THE THIRD CAUSE OF ACTION FOR BREACH OF FIDUCIARY DUTY FAILS TO STATE A CLAIM.

Defendant CC-DG hereby incorporates by reference the argument that plaintiffs' breach of fiduciary duty cause of action should be dismissed for failure to state a claim as set forth in defendant CC-PA's Motion to Dismiss. If plaintiffs have failed to allege sufficient facts to state a cause of action against CC-PA they have necessarily failed to state the cause of action against CC-DG. In addition, CC-DG is not a party to the Residency Contracts on which plaintiffs rest their claim of fiduciary duty. *See, e.g.*, Complaint, ¶ 45, 114. Because plaintiffs have not alleged facts against CC-DG sufficient to give rise to a fiduciary duty, plaintiffs' third cause of action should be dismissed.

IX. THE FOURTH CAUSE OF ACTION FOR FINANCIAL ELDER ABUSE FAILS TO STATE A CLAIM.

Defendant CC-DG hereby incorporates by reference the argument that plaintiffs' cause of action for financial elder abuse should be dismissed for failure to state a claim as set forth in defendant CC-PA's Motion to Dismiss. If plaintiffs have failed to allege sufficient facts against CC-PA for financial elder abuse, they have necessarily failed to state the cause of action against CC-DG. Thus, plaintiffs' claim for financial elder abuse against CC-DG should be dismissed.

X. THE FIFTH CAUSE OF ACTION FOR VIOLATION OF THE CONSUMERS LEGAL REMEDIES ACT FAILS TO STATE A CLAIM.

Defendant CC-DG hereby incorporates by reference the argument that plaintiffs' cause of action for violation of the Consumers Legal Remedies Act ("CLRA") should be dismissed for failure to state a claim as set forth in defendant CC-PA's Motion to Dismiss. If plaintiffs have failed to allege sufficient facts against CC-PA, they have necessarily failed to state the cause of action against CC-DG because CC-DG was not a party to the Residency Contract. Therefore, there is no "transaction" with CC-DG under the CLRA. *See* Cal. Civ. Code § 1770(a) (prohibiting unfair or deceptive acts undertaken by a person in a *transaction*). Accordingly, plaintiffs' fifth cause of action should be dismissed.

XI. THE SIXTH CAUSE OF ACTION FOR VIOLATION OF BUSINESS AND PROFESSIONS CODE SECTION 17200 FAILS TO STATE A CLAIM.

Defendant CC-DG hereby incorporates by reference the argument that plaintiffs' cause of action for violation of California's unfair competition law should be dismissed for failure to state a claim as set forth in defendant CC-PA's Motion to Dismiss. If plaintiffs have failed to allege sufficient facts against CC-PA, they have necessarily failed to state the cause of action against CC-DG. Thus, plaintiffs' sixth cause of action should be dismissed.

XII. THE SEVENTH CAUSE OF ACTION FOR BREACH OF CONTRACT FAILS TO STATE A CLAIM.

Defendant CC-DG hereby incorporates by reference the argument that plaintiffs' breach of contract cause of action should be dismissed for failure to state a claim as set forth in defendant CC-PA's Motion to Dismiss. Although the heading of the cause of action states that the claim is against "all defendants," plaintiffs do not include any allegations that would support a claim for breach of contract against CC-DG. *See* Complaint, ¶¶ 154-160. Moreover, CC-DG is not a party to the Residency Contracts (*See, e.g.*, Complaint, ¶ 45) and therefore cannot be liable for breach of contract. *See Reichert v. General Ins. Co.*, 68 Cal.2d 822, 830 (1968) (the first element for breach of contract is a contract). The Residency Contracts specifically state that CC-PA is the only entity responsible for the repayment obligation and for providing services under the contract. *See* Complaint, Exhs. 5, 7, 9, 11, 13 and 15 at recital D ("The Provider [(CC-PA)] is solely responsible for providing services to You under this Contract.... Neither Stanford nor any entity related to either Provider or [CRMLP] is responsible for the performance of this Contract or payment of any obligation to You under this Contract or any other agreement related to it."). Because plaintiffs cannot make out a cause of action for breach of contract against CC-DG, plaintiffs' seventh cause of action against CC-DG for breach of contract must be dismissed with prejudice.

XIII. PLAINTIFFS CANNOT IMPUTE LIABILITY TO CC-DG BY INCLUDING CONCLUSORY ALLEGATIONS OF CONSPIRACY, AIDING AND ABETTING, AND ALTER EGO.

Plaintiffs have asserted each of the seven causes of action in the complaint against CC-DG. Because plaintiffs have not made out any of the causes of action as to CC-DG directly,

1 plaintiffs attempt to hold CC-DG liable by alleging that it entered into a conspiracy with CC-PA
 2 and CRMLP (Complaint, ¶ 18), that CC-DG “aided and abetted the other Defendants in their
 3 commission of the wrongful acts alleged in this Complaint,” (Complaint, ¶ 19), and that CC-PA
 4 “acted as the alter ego” of CC-DG (Complaint, ¶ 20) . Plaintiffs, though, have failed to
 5 sufficiently plead any of these allegations as to CC-DG, and, therefore, CC-DG must be
 6 dismissed as a party to this lawsuit.

7 A. Plaintiffs Have Failed to Adequately Plead Facts to Support a Conspiracy.

8 “The elements of an action for civil conspiracy are the formation and operation of the
 9 conspiracy and damage resulting to plaintiff from an act or acts done in furtherance of the
 10 common design.” *Applied Equip. Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal.4th 503, 511 (1994).
 11 “Conspiracy is ... a legal doctrine that imposes liability on persons who, although not actually
 12 committing a tort themselves, share with the immediate tortfeasors a common plan or design in
 13 its perpetration.” *Id.* at 510-511. “In civil conspiracy actions, courts insist upon a higher level of
 14 specificity than is usually demanded of other pleadings. This insistence upon a higher level of
 15 specificity may result from the frequent presence of fraud as a part of plaintiff’s claim, which
 16 brings the complaint under [Federal Rule of Civil Procedure] 9(b).” *Alfus v. Pyramid Technology*
 17 *Corp.*, 745 F.Supp. 1511, 1521 (N.D. Cal. 1990); *Wasco Products, Inc. v. Southwall*
 18 *Technologies, Inc.*, 435 F.3d 989, 991 (9th Cir. 2006) (when alleging a fraud based civil
 19 conspiracy claim, given “the plain language of Rule 9(b), ... a plaintiff must plead, at a
 20 minimum, the basic elements of a civil conspiracy if the object of the conspiracy is fraudulent.”).
 21 In this case, because the gravamen of plaintiffs’ complaint is fraud, the heightened pleading
 22 standard required by Rule 9(b) is applicable not only to the allegations related to fraud, but also
 23 to the allegations related to the claim that there was a conspiracy. Plaintiffs have not met their
 24 burden of pleading the elements of a civil conspiracy against CC-DG.

25 In addition to the pleading requirements, one cannot be a co-conspirator unless that
 26 defendant is legally capable of committing the tort charged, “i.e., that he or she owes a duty to
 27 plaintiff recognized by law and is potentially subject to liability for breach of that duty.” *Applied*
 28

1 *Equip.*, 7 Cal.4th at 511. Plaintiffs' complaint fails as to all of these requirements. Plaintiffs' only
 2 allegation of a conspiracy can be found in paragraph 18 of the complaint:

3 Defendants entered into a conspiracy in furtherance of the wrongful acts
 4 alleged in the Complaint. Each Defendant was aware that the other
 5 Defendants planned to commit these wrongful acts. Each Defendant
 agreed with the other defendants, and intended that these acts be
 committed.

6 Complaint, ¶ 18. All alleged acts of CC-DG are merely catch-all allegations that are conclusory
 7 and nonspecific, making them insufficient to plead the existence of an agreement to participate in
 8 the conspiracy. Plaintiffs fail to allege how CC-DG became involved in the alleged conspiracy,
 9 how the conspiracy operated, that CC-DG had any "mutual understanding" to accomplish a
 10 common plan with its co-defendants, or that there was ever any agreement by CC-DG to achieve
 11 any of the alleged wrongful acts set forth in the complaint.

12 Plaintiffs also have failed to plead any facts to support a claim that CC-DG would,
 13 independently, be liable for any of the causes of action asserted in the complaint. CC-DG is not a
 14 party to the contract, and plaintiffs do not allege facts that CC-DG made any misrepresentations
 15 to plaintiffs, or had a duty to disclose certain facts. Plaintiffs' claims also fail as they have not
 16 been able to articulate a concrete harm as a result of CC-DG's allegedly wrongful acts.

17 Furthermore, as a matter of law, no liability can attach to CC-DG as to the negligent
 18 misrepresentation and breach of contract causes of action under a civil conspiracy allegation. As
 19 to the negligent misrepresentation claim, the court in *Koehler v. Pulvers* noted:

20 While the negligent misrepresentation claim incorporates an allegation of
 21 civil conspiracy among all defendants, this basis of liability appears
 22 unavailable. Unlike actual fraud, the tort of negligent misrepresentation
 23 does not include the elements of knowledge of false statement with intent
 24 to deceive. The act of conspiracy requires two or more persons agreeing to
 commit intentionally a wrongful act. This court is unaware of California
 25 decisional law imposing liability for conspiring to commit negligence. The
 26 allegation of civil conspiracy appears inherently inconsistent with the
 27 allegation of an underlying act of negligence.

28 606 F.Supp. 164, 173, n.10 (S.D. Cal. 1985) (emphasis added). Likewise, under California law,
 there is no cause of action for civil conspiracy to breach a contract. *See Mintel Learning Tech.,*
Inc. v. Beijing Kaidi Educ., No. C-06-7541, 2007 WL 2288329, at *5 (N.D. Cal. Aug. 9, 2007),

1 citing *Applied Equip.*, 7 Cal.4th at 513-18. Thus, no amendment can cure the deficiency and, at
 2 minimum, CC-DG must be dismissed with prejudice as the second and seventh causes of action.

3 B. Plaintiffs Have Failed to Adequately Plead Facts to Support Liability for Aiding
 4 and Abetting.

5 Like conspiracy, aiding and abetting is not a separate cause of action, but a method of
 6 holding a party liable for acts committed by another. “Liability may also be imposed on one who
 7 aids and abets the commission of an intentional tort if the person (a) knows the other’s conduct
 8 constitutes a breach of duty and gives substantial assistance or encouragement to the other to so
 9 act or (b) gives substantial assistance to the other in accomplishing a tortious result *and* the
 10 person’s own conduct, separately considered, constitutes a breach of duty to the third person.”
 11 *Saunders v. Superior Court*, 27 Cal. App. 4th 832, 846 (1994) (emphasis added). “This standard
 12 requires that the defendant ‘have *actual knowledge* of the *specific primary wrong* the defendant
 13 substantially assisted.’” *Simi Mgmt. Corp. v. Bank of Am. Corp.*, No. C-11-05573, 2012 WL
 14 259865, at *4 (N.D. Cal. Jan. 27, 2012) (emphasis in original) (internal quotations omitted). As
 15 discussed above, the requirements of Rule 9(b) also apply to the aiding and abetting allegation
 16 because the alleged causes of action are grounded in fraud.

17 The complaint does not allege sufficient allegations to show CC-DG “substantially
 18 assisted” CC-PA or CRMLP, much less that CC-DG had *actual knowledge* of the *specific*
 19 *primary wrong*. Moreover, as discussed above, plaintiffs have not alleged any harm. Plaintiffs
 20 have not established the second method of imposing aiding and abetting liability as articulated in
 21 *Saunders* because there are no specific allegations that CRMLP had a duty to plaintiffs or gave
 22 substantial assistance or encouragement. As such, there is nothing in the complaint that would
 23 sustain liability against CC-DG through the aiding and abetting allegations.

24 C. Plaintiffs Have Failed to Adequately Plead Facts to Support Liability Under an
 25 Alter Ego Theory.

26 Plaintiffs allege that defendant CC-PA acted as the alter ego of defendant CC-DG and
 27 that CC-PA was so controlled by CC-DG that it ceased to exist as a separate entity. *See*
 28 Complaint, ¶ 20. A two-line, conclusory allegation, in and of itself, is not enough to find that

1 CC-DG is liable for its subsidiary's alleged breach of contract or other acts. Moreover, the
2 complaint is void of any factual allegations that would support the alter ego theory.

3 The alter ego doctrine is a "drastic remedy and disregard the corporate form only
4 reluctantly and cautiously." *Hillside Drilling, Inc. v. Goldman Sachs, Group*, No. C09-1896,
5 2009 WL 2246215, at *4 (N.D. Cal. July 27, 2009). Accordingly, plaintiffs must allege facts
6 sufficient to establish: "(1) that there is such unity of interest and ownership that the separate
7 personalities [of the two entities] no longer exist and (2) that failure to disregard [their separate
8 identities] would result in fraud or injustice." *Id.* In determining whether to apply the alter ego
9 doctrine, courts look to factors such as "inadequate capitalization, commingling of funds and
10 other assets of the two entities, the holding out by one entity that is liable for the debts of the
11 other, identical equitable ownership in the two entities, use of the same offices and employees,
12 use of one as mere conduit for the affairs of the other, disregard of corporate formalities, lack of
13 segregation of corporate records, and identical directors and officers." *Id.*

14 The allegations in paragraph 20 of the complaint that CC-PA "acted as the alter ego" and
15 "was so controlled by [CC-DG] that it ceased to exist as a separate entity" are conclusory and
16 wholly lacking in facts to show a unity of interest and ownership. However, even assuming that
17 the bare allegation in paragraph 20 were sufficient, plaintiffs have not alleged any facts to meet
18 the second prong—that failure to apply the doctrine of alter ego would defeat the rights and
19 equities of plaintiffs.

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1 **CONCLUSION**

2 As discussed above, none of the causes of action have been properly plead as to CC-DG.
3 Moreover, plaintiffs cannot hold CC-DG liable for any of the alleged causes of action under a
4 conspiracy, aiding and abetting, or alter ego allegation as they, too, have not been properly set
5 forth in the complaint. As the complaint fails to set out a cause of action as to CC-DG, and fails
6 to set forth any allegations that would attach liability to it based on the actions of CC-PA or
7 CRMLP, the complaint must be dismissed in its entirety as to CC-DG.

8
9 DATED: March 17, 2014

McMANIS FAULKNER

10
11 /s/ James McManis

12 JAMES McMANIS
13 SHARON KIRSCH
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