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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 CLASSIC RESIDENCE  
MANAGEMENT LIMITED  
PARTNERSHIP'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, 5<sup>th</sup> 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, Classic Residence Management Limited Partnership, will  
5 move the Court to 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, Request for Judicial Notice served and filed herewith,  
8 the papers and records on file herein, and on such oral and documentary evidence as may be  
9 presented at the hearing on the motion.

10  
11 DATED: March 17, 2014

McMANIS FAULKNER

13  
14 /s/ James McManis

15 JAMES McMANIS  
SHARON KIRSCH  
HILARY WEDDELL

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

Defendant Classic Residence Management Limited Partnership (“CRMLP” or “defendant”) brings this motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6).<sup>1</sup> 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-Development Group, Inc. (“CC-DG”) is the parent company

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

of CC-PA. Complaint, ¶ 16. CRMLP is a subsidiary of CC-DG and provides the day-to-day management and operation at Vi at Palo Alto. Complaint, ¶ 17.

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

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

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

Plaintiffs allege that on or about April 1, 2011, the Santa Clara County Tax Assessor gave CC-PA notice of its intent to seek an increase in the property tax assessment for the Vi at Palo Alto community. Complaint, ¶ 64. After hearing by the Assessment Appeals Board, the community’s property taxes were increased as a result of CC-PA’s distributions of excess cash to its parent company, CC-DG. Complaint, ¶ 63. The increased tax assessment will amount to an increase in back taxes in excess of \$12 million and additional tax assessments of \$1.9 million

1 annually. Complaint, ¶ 65. On or about September 5, 2012, CC-PA filed an action challenging  
2 the increased tax assessment, which is still in a preliminary stage. Complaint, ¶ 65. Defendant  
3 has agreed to pay for the back taxes pending the appeal of the AAB decision, but has indicated  
4 that residents “will bear the ultimate responsibility for those taxes.” Complaint, ¶ 65. Defendant  
5 has also indicated that residents will be charged for the increased taxes going forward.  
6 Complaint, ¶ 66. Plaintiffs further allege that defendant has suspended the crediting to residents  
7 of excess amounts in the cumulative operating surplus—which should be used to create an  
8 operating reserve or remitted to the residents—to cover the increased cost of property tax.  
9 Complaint, ¶ 66.

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

23 Plaintiffs also allege that defendant has improperly allocated marketing costs under the  
24 Residency Contract. Complaint, ¶ 74. The Residency Contract states that residents’ monthly fees  
25 are “intended to pay all costs of operating the community,” including “marketing costs.”  
26 Complaint, ¶ 74. Plaintiffs allege that they have paid more than \$5.5 million in marketing costs  
27 from March 2006 through 2013. Complaint, ¶ 75. Plaintiffs allege that the Residency Contract  
28



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

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

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

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

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

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

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

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

Defendant CRMLP 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 CRMLP 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 CRMLP 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 CRMLP as plaintiffs do not allege that CRMLP concealed any information. Thus, plaintiffs' claim for concealment against CRMLP should be dismissed for failure to state a claim.

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

Defendant CRMLP 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 CRML as plaintiffs do not include any allegations that CRMLP 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. Plaintiffs' claim for negligent misrepresentation is devoid of facts alleged against CRMLP and thus plaintiffs' second cause of action against CRMLP should be dismissed.

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

Defendant CRMLP 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 CRMLP. In addition, CRMLP 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 CRMLP 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 CRMLP 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 CRMLP. 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 CRMLP 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 CRMLP because CRMLP was not a party to the Residency Contract. Therefore, there is no "transaction" with CRMLP 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 CRMLP 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 CRMLP. 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 CRMLP 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. Plaintiffs do not include any allegations that would support a claim for breach of contract against CRMLP. *See* Complaint, ¶¶ 154-160. Moreover, CRMLP 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 CRMLP, plaintiffs' seventh cause of action against CRMLP for breach of contract must be dismissed with prejudice.

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**XIII. PLAINTIFFS CANNOT IMPUTE LIABILITY TO CRLMP BY INCLUDING CONCLUSORY ALLEGATIONS OF CONSPIRACY AND AIDING AND ABETTING.**

Plaintiffs have asserted each of the seven causes of action in the complaint against CRLMP. Because CRMLP is mentioned only in connection with the breach of fiduciary duty cause of action (*See* Complaint, ¶¶ 76 and 117), and plaintiffs have not made out any of the causes of action as to CRMLP directly, plaintiffs attempt to hold CRMLP liable by alleging that it entered into a conspiracy with CC-PA and CC-DG (Complaint, ¶ 18) and that CRMLP “aided and abetted the other Defendants in their commission of the wrongful acts alleged in this Complaint” (Complaint, ¶ 19). Plaintiffs, though, have failed to sufficiently plead either the conspiracy or aiding and abetting allegations as to CRMLP and, therefore, CRMLP must be dismissed as a party to this lawsuit.

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

“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 the common design.” *Applied Equip. Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal.4th 503, 511 (1994). “Conspiracy is ... 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.” *Id.* at 510-11. “In civil conspiracy actions, courts insist upon a higher level of specificity than is usually demanded of other pleadings. This insistence upon a higher level of specificity may result from the frequent presence of fraud as a part of plaintiff’s claim, which brings the complaint under [Federal Rule of Civil Procedure] 9(b).” *Alfus v. Pyramid Technology Corp.*, 745 F.Supp. 1511, 1521 (N.D. Cal. 1990); *Wasco Products, Inc. v. Southwall Technologies, Inc.*, 435 F.3d 989, 991 (9th Cir. 2006) (when alleging a fraud based civil conspiracy claim, given “the plain language of Rule 9(b), ... a plaintiff must plead, at a minimum, the basic elements of a civil conspiracy if the object of the conspiracy is fraudulent.”). In this case, because the gravamen of plaintiffs’ complaint is fraud, the heightened pleading standard required by Rule 9(b) is applicable not only to the allegations related to fraud, but also

1 to the allegations related to the claim that there was a conspiracy. Plaintiffs have not met their  
2 burden of pleading the elements of a civil conspiracy against CRMLP.

3 In addition to the pleading requirements, one cannot be a co-conspirator unless that  
4 defendant is legally capable of committing the tort charged, “i.e., that he or she owes a duty to  
5 plaintiff recognized by law and is potentially subject to liability for breach of that duty.” *Applied*  
6 *Equip.*, 7 Cal.4th at 511. Plaintiffs’ complaint fails as to all of these requirements. Plaintiffs’ only  
7 allegation of a conspiracy can be found in paragraph 18 of the complaint:

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

11 Complaint, ¶ 18. In fact, CRMLP is specifically mentioned only three times in the entire thirty-  
12 eight (38) page complaint. *See* Complaint, ¶ 17 (CRMLP sets its budgets with input from CC-  
13 DG), ¶ 76, (the listed duties ascribed to CC-PA also extend to CC-DG) and ¶ 117 (Plaintiffs and  
14 the Class were harmed by CC-PA’s and CRMLP’s violation of their duty of undivided loyalty).  
15 These catch-all allegations are merely conclusory and nonspecific, making them insufficient to  
16 plead the existence of an agreement to participate in the conspiracy. At no point does the  
17 complaint allege how CRMLP became involved in the alleged conspiracy, how the conspiracy  
18 operated, that CRMLP had any “mutual understanding” to accomplish a common plan with its  
19 co-defendants, or that there was ever any agreement by CRMLP to achieve any of the alleged  
20 wrongful acts set forth in the complaint.

21 Plaintiffs also have failed to plead any facts to support a claim that CRMLP would,  
22 independently, be liable for any of the causes of action asserted in the complaint. CRMLP is not  
23 alleged to be a party to the contract, nor do plaintiffs allege that CRMLP made any  
24 misrepresentations to plaintiffs or concealed any information from them. Similarly, there is  
25 nothing in the complaint to support any contention it took, secreted, appropriated, obtained  
26 and/or retained money belonging to plaintiffs. As a result, there is nothing in the complaint that  
27 demonstrates that CRMLP had any duty to plaintiffs recognized by law.

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

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

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

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

Like conspiracy, aiding and abetting is not a separate cause of action, but a method of holding a party liable for acts committed by another. “Liability may also 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.” *Saunders v. Superior Court*, 27 Cal. App. 4th 832, 846 (1994) (emphasis added). “This standard requires that the defendant ‘have *actual knowledge* of the *specific primary wrong* the defendant substantially assisted.’” *Simi Mgmt. Corp. v. Bank of Am. Corp.*, No. C-11-05573, 2012 WL 259865, at \*4 (N.D. Cal. Jan. 27, 2012) (emphasis in original) (internal quotations omitted). As discussed above, the requirements of Rule 9(b) also apply to the aiding and abetting allegation because the alleged causes of action are grounded in fraud.



1 The complaint does not contain a single specific allegation that shows CRMLP  
 2 “substantially assisted” CC-PA or CC-DG, much less that CRMLP had *actual knowledge* of the  
 3 *specific primary wrong*. Moreover, as discussed above, plaintiffs have not alleged any harm.  
 4 Plaintiffs have not established the second method of imposing aiding and abetting liability as  
 5 articulated in *Saunders* because there are no specific allegations that CRMLP had a duty to  
 6 plaintiffs or gave substantial assistance or encouragement. As such, there is nothing in the  
 7 complaint that would sustain liability against CRMLP through the aiding and abetting  
 8 allegations.

### 9 CONCLUSION

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

16  
 17 DATED: March 17, 2014

McMANIS FAULKNER

18  
 19 /s/ James McManis

20 JAMES McMANIS  
 21 SHARON KIRSCH  
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