2012 WL 8318922 (Cal.Super.) (Trial Motion, Memorandum and Affidavit)
Superior Court of California.
Ventura County

Jeffrey EDELL, an individual; Michael Edell, an individual; Ethel Edell, an individual, and Tim Wilson, an individual, Plaintiffs,

v.

ADK, LLC, a California Limited Liability Company; M.H. Holdings, Inc., a California Corporation; United MHEQ, a California Limited Partnership; Fltwest, Inc., a California Corporation; Pottery ETC, a Limited Liability Company, a California Limited Liability Company; Vintage Storage, Inc., a California Corporation; Infinite Acceleration, Inc., a California Corporation; "A" Enterprises, Inc., a California Corporaiton; Weil & Company, a California Limited Liability Partnership; Miguel Ochoa, an individual; Fitness 29 Sixty Minute Workout, a California Corporation, and Does 1 to 50, Defendants.

No. 56-2011-00407657-CU-BC-VTA.
January 20, 2012.

Notice of Demurrer and Demurrer of Defendant Weil & Company, LLC to Complaint (Reservation No. 1662234)

Stephen J. Tully, SBN 112390, (stully@garrett-tully.com), Tomas A. Ortiz, SBN 188873, (tortiz@garrett-tully.com), Garrett & Tully, P.C., 225 S. Lake Avenue, Suite 1400, Pasadena, CA 91101-4869, Telephone: (626) 577-9500, Facsimile: (626) 577-0813, Attorneys for Defendant Weil & Company, LLP.

Honorable Rebecca S. Riley.

Dept. 40

[Filed concurrently with Motion to Strike]

DATE: February 28, 2012

TIME: 8:30 a.m.

DEPT.: 40

Action Filed: December 1, 2011

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on February 28, 2012 at 8:30 a.m., or as soon thereafter as the matter may be heard in Department 40 of the above-entitled court located at 800 S. Victoria Avenue, Ventura, California 93009, defendant Weil & Company, LLP will, and hereby does, demurrer to plaintiffs' complaint.

This demurrer is brought pursuant to California Code of Civil Procedure section 430.10(e) on the ground that each of the purported causes of action asserted by plaintiffs against Weil & Company fails to set forth a claim upon which relief can be granted, as more fully set forth in the attached memorandum of points and authorities.

This demurrer is based on this notice, the attached memorandum of points and authorities, the complaint on file herein, the motion to strike filed concurrently herewith, and on such other oral and documentary evidence and argument as may be introduced at or before the time of the hearing.

DATED: January 20, 2012

GARRETT & TULLY, P.C.

Stephen J. Tully

Tomas A. Ortiz

<<signature>>

TOMAS A. ORTIZ

Attorneys for Defendant Weil & Company, LLP

DEMURRER TO COMPLAINT

Defendant Weil & Company, a California Limited Liability Partnership, ("Weil & Company") demur to plaintiffs' complaint and to each cause of action therein, pursuant to Section 430.10(e) of the Code of Civil Procedure, on the following separate and distinct grounds:

1. The third cause of action for **elder abuse** under Welfare and Institutions (Code Section 15610.30) fails to state facts sufficient to constitute a cause of action because (1) Code Section 15610.30 does not in and of itself create an independent cause of action; and (2) there are no facts pleaded that Weil & Company directly engaged in any purported fraudulent conduct or "**financial abuse**" towards Ethel Edell.

2. The fourth cause of action for fraud and intentional misrepresentation fails to state facts sufficient to constitute a cause of action because (1) plaintiffs have failed to allege fraud with the requisite specificity; (2)plaintiffs have not and cannot allege the requisite element of a duty owing to plaintiffs by Weil & Company; and (3) plaintiffs have failed to plead the requisite element of reliance by each plaintiff on any purported misrepresentation by Weil & Company.

3. The fifth cause of action for negligence fails to state facts sufficient to constitute a cause of action because (1) plaintiffs have not and cannot allege the requisite element of a duty owing to plaintiffs by Weil & Company; (2) as a matter of law, defendants cannot be held liable for negligence in connection with accounting services to persons who were not defendants' clients; and (3) plaintiffs have failed to plead the requisite causal link between any purported negligence by Weil & Company and the damage purportedly incurred by each of the plaintiffs.

4. The sixth cause of action for negligent misrepresentation fails to state facts sufficient to constitute a cause of action because (1) plaintiffs have failed to allege negligent misrepresentation with the requisite specificity; (2) plaintiffs have not and cannot allege the requisite element of a duty owing to plaintiffs by Weil & Company; and (3) plaintiffs have failed to plead the requisite element of reliance by each plaintiff on any purported misrepresentation by Weil & Company.

5. The seventh cause of action for breach of fiduciary duty fails to state facts sufficient to constitute a cause of action because plaintiffs have not and cannot allege a factual basis for the existence of a fiduciary relationship between plaintiffs and Weil & Company.

6. The eighth cause of action for accounting fails to state facts sufficient to constitute a cause of action because (1) plaintiffs have not and cannot allege a factual basis for the existence of a fiduciary relationship between plaintiffs and Weil & Company; and (2) plaintiffs have failed to allege any factual basis to establish Weil & Company's ability to provide accounting of money that is not alleged to have been given to it.

7. The tenth cause of action for conspiracy to defraud fails to state facts sufficient to constitute a cause of action because (1) plaintiffs have failed to plead the requisite elements of the purported fraud; and (2) plaintiffs have not and cannot allege the requisite element of a duty owing to plaintiffs by Weil & Company.

WHEREFORE, defendant Weil & Company prays that its demurrer be sustained in its entirety without leave to amend.

DATED: January 20, 2012

GARRETT & TULLY, P.C.

Stephen J. Tully

Tomas A. Ortiz

<<signature>>

TOMAS A. ORTIZ

Attorneys for Defendant Weil & Company, LLP

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MEMORANDUM OF POINTS AND AUTHORITIES

I. *INTRODUCTION*

Defendant Weil & Company are tax accountants. As plaintiffs admit on the face of their pleading, all of the claims asserted against Weil & Company are based upon tax services the firm provided to "one or more" of the entities owned and run by Arthur Kinberg. Plaintiffs Jeffrey Edell, Michael Edell, Ethel Edell and Tim Wilson allege they invested thousands of dollars with Kinberg and his various entities. They contend they were defrauded by Kinberg and are seeking reimbursement of their investment. Plaintiffs contend "on information and belief that Weil & Company had knowledge or should have had knowledge of Kinberg's so-called "nefarious acts" and "on information and belief" had an obligation to protect plaintiffs in the firm's capacity as "a certified public accounting firm."

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The duty of a professional to an entity runs solely to the entity. None of the four plaintiffs were clients of Weil & Company. Weil & Company owed no duty to plaintiffs relating to whatever services the firm was providing to “one or more” of the Kinberg entities or the transactions at issue in this lawsuit. Thus, plaintiffs' causes of action for negligence, fraud, negligent misrepresentation and conspiracy fail as a matter of law.

Likewise, plaintiffs have failed to allege any basis for the existence of a fiduciary relationship between each of the plaintiffs and Weil & Company. Again, plaintiffs were not clients of Weil & Company and, under California law, there is no basis for holding an accountant to a fiduciary standard, absent special circumstances that are not present here, and as such plaintiffs' breach of fiduciary duty cause of action also fails.

Plaintiffs' fraud and misrepresentation claims (both intentional and negligent) also fail because of the lack of duty of care flowing from Weil & Company to each of plaintiffs. Also, plaintiffs are required to plead these causes of action with specificity - - plaintiffs conclusory allegations “on information and belief” are not enough to meet this heightened pleading requirement. Moreover, the only thing plaintiffs claim Weil & Company actually did was the preparation of a K-1 tax schedule on behalf of one of Kinberg's entities, United MHEQ, in 2011 - - *almost four years after plaintiffs made their initial investments.* Plaintiffs could not have relied on the document or on anything Weil & Company purportedly did in agreeing to invest and then loan thousands to Arthur Kinberg. Accordingly, on this basis as well, plaintiffs' causes of action for fraud, negligent misrepresentation and conspiracy to defraud fail as a matter of law.

Lastly, plaintiffs' accusations of **elder abuse** by Weil & Company are despicable and completely without merit. There are no allegations that Weil & Company took or misappropriated any money from Ethel Edell - - nor are there any allegations that Weil & Company contacted, interacted or in any way was involved with Ethel either in connection with her investments or otherwise. These are serious accusations that cannot be presented in such a cavalier fashion - - “on information and belief” and conclusory factually devoid allegations of what purportedly happened. Plaintiffs' claim of **elder abuse** as to Ethel Edell fails as a matter of law.

Accordingly, Weil & Company requests that its demurrer be sustained in its entirety without leave to amend.

II. *SUMMARY OF RELEVANT ALLEGATIONS AND ISSUES*

Plaintiffs contend that they were each investors in businesses or entities owned and operated by Arthur Kinberg. (Complaint, ¶ 17-18.) Plaintiffs contend that each were approached in October, 2007 by Arthur Kinberg to invest in these businesses, which Kinberg had described as being involved in exercise equipment leasing. (Complaint, ¶ 29.) Plaintiffs allege that Kinberg made numerous representations to plaintiffs collectively about the investment, its return and solidity of the businesses involved - - all “in order to induce” each plaintiff to invest their money. (Complaint, ¶ 31.) Accordingly, plaintiffs allege each invested sizable amounts with Kinberg and his companies amounting to $461,770 collectively. (Complaint, ¶ 30.) Plaintiffs allege they made these investments through a series of loans. (Complaint, ¶ 30.)

Plaintiffs contend that in early 2010, each learned that Kinberg and his companies were facing **financial** difficulties. (Complaint, ¶ 32.) They contend that they demanded return of their investment. (Complaint, ¶ 33.) In order to assuage their fears, plaintiffs contend Kinberg executed a series of promissory notes for the outstanding amounts secured by real estate and other assets. (Complaint, ¶ 34-39.) Plaintiffs further contend that they eventually foreclosed on that security and collected upwards of $70,000 in “surplus from the sale of the property.” (Complaint, ¶ 40-41.) There are no allegations that Weil & Company were in anyway involved in any communications between Kinberg and each of the plaintiffs either before the initial 2007 investment or the subsequent execution of promissory notes in 2010. There are no allegations Weil & Company received or handled any money invested or loaned to Kinberg or any of this companies. Weil & Company is only alleged “upon information and belief to be accountants for “on or more of the Kinberg entities.” (Complaint, ¶ 24.) Plaintiffs allege “on information and belief that Weil & Company should have known that Kinberg and his companies were conducting “nefarious acts.” (Complaint, ¶ 25.) Plaintiffs

also allege (again, "on information and belief) that Weil & Company as a certified public accounting firm somehow had an obligation or duty to protect the interests of each of the plaintiffs as investors in Kinberg's companies - - even those Weil & Company had no contact with such as Ethel Edell and Tim Wilson, (Complaint, ¶ 25.) They also allege "on information and belief" that Weil & Company somehow "acted in concert" with Kinberg and his entities by supplying plaintiffs with "fraudulent documents." (Complaint, ¶ 44-45.)

Indeed, the only factual allegation not made "on information and belief is that on April 9, 2011, Michael Edell received a copy of United MHEQ's 2010 Schedule K-1 (Partnership Form 1065) from Weil & Company. [1] (Complaint, ¶ 42.) Plaintiffs contend that the Schedule K-1 was not consistent with their understanding of the nature of theIR investment - - they contend they were not familiar with United MHEQ and had never consented to becoming partners in such an entity. (Complaint, ¶ 43.) They contend they immediately questioned Weil & Company about the schedule and United MHEQ. (Complaint, ¶ 43.) Plaintiffs contend (again, "on information and belief" that Weil & Company knew or should have known that the monies invested by each of them were in the nature of a loan and not a partnership investment. (Complaint, ¶ 43.) There are no allegations that plaintiffs incurred any damage as a result of the K-1 prepared by Weil & Company.

III. *LEGAL ARGUMENT*

A. *Defendants' Demurrer Should Be Sustained Without Leave To Amend*

A demurrer tests the sufficiency of a complaint by raising questions of law. *Seidler v. Municipal Court* (1993) 12 Cal.App.4th 1229, 1233; *Johnson v. County of Los Angeles* (1983) 143 Cal.App.3d 298, 306. If a complaint fails to state facts sufficient to constitute a cause of action, the demurrer must be sustained. Code of Civil Procedure §430.10 (a) and(e); *Stevenson v. San Francisco Housing Authority* (1994) 24 Cal.App.4th 269, 215; *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.

It is a cardinal rule of pleading that every statement of fact must be direct and certain and not by way of inference. *Butler v. Wyman* (1933) 128 Cal App. 736, 740. In pleading, material facts must be alleged directly and essential facts upon which a determination of the controversy depends are to be stated with clearness and precision so that nothing is left to surmise. *Ankeny v. Lockheed Missiles and Space Co.* (1979) 88 Cal.App.3d 531, 537. Thus, allegations of material facts which are ambiguous or left to surmise are subject to demurrer for uncertainty. Code Civ. Proc. §430.10(f); *Bernstein v. Filler* (1950) 98 Cal.App.2d 441, 443 - 444. As a matter of law, conclusory allegations, without facts to support them, are ambiguous and uncertain. *Ankeny, supra,* 88 Cal.App. 3d 531, 537.

A demurrer may be properly sustained without leave to amend where facts are not in dispute, and the nature of plaintiffs claim is clear, but no liability exists under the law. *Routh v. Quinn* (1942) 20 Cal.2d 488, 493; *Berkeley Police Association v. Berkeley* (1977) 76 Cal.App.3d 931, 942.

Plaintiffs have the burden of proving that there is a reasonable possibility the pleading defects can be cured by amendment. *Blank v. Kirwin, supra,* 39 Cal.3d at 318.

B. *Weil & Company Owed No Duty To Plaintiffs*

Necessary to any claim of liability, whether arising in tort or otherwise, is the existence of a duty and the breach of that duty. *See, Friedman v. Merck & Co.* (2003) 107 Cal.App.4th 454, 463. Here, plaintiffs allege "on information and belief" that Weil & Company were the accountants for "one or more of the Kinberg entities." (Complaint, ¶ 24.) There are no allegations (nor can their be) that either Jeffrey Edell, Michael Edell, Ethel Edell or Tim Wilson, individually or as a group, engaged, retained or hired Weil & Company as their accountants or in any other capacity.

Inasmuch, as none of the four plaintiffs were ever its clients, Weil & Company owed plaintiffs no duty at all.[2] *Bily v. Arthur Young* (1992) 3 Cal.4th 370, 401-402 (accountant's duty of care *runs solely to client, not third parties*).

Moreover, to the extent plaintiffs are suggesting that as "investors in the Kinberg entities" they were owed a duty of care by Well & Company, as accountants for one or more of the Kinberg entities (see, Complaint, ¶ 26.) - - this too is contrary to the law.[3] Whether plaintiffs are investors or partners in any of the Kinberg entities, Weil & Company's duty of care again runs solely to the client entity, not to either its partners, shareholders or purported investors. *See Goodman v. Kennedy* (1976) 18 Cal.3d 335, 344 (the duty of a professional providing services to an entity runs solely to the entity); *Skarbrevik v. Cohen* (1991) 231 Cal.App.3d 692, 703-707 (a shareholder cannot assert a claim against aprofessional employed by a corporation based on a violation of a duty of care owed to the corporation).

In *Skarbrevik,* for example, a minority shareholder brought a negligence claim against an attorney representing a closely held corporation. Recognizing that "[a] key element of any action for professional malpractice is the establishment of a duty by the professional to the claimant," the court held that an attorney representing a corporation "does not become the representative of its stockholders merely because the attorney's actions on behalf of the corporation also benefit the stockholders .... [the professional's] direct duty is to the client corporation, not to the shareholders individually, even though the legal advice rendered to the corporation may affect the shareholders." *Id.* at pp. 700, 704.

Similarly, in *Goldberg v. Frye* (1990) 217 Cal.App.3d 1258, 1269 the court held:

> It would be very dangerous that the attorney, through performance of his services to the administrator and by way of communication to estate beneficiaries, subjects himself to claims of negligence from the beneficiaries. The beneficiaries are entitled to even-handed and fair administration by the fiduciary. They are not owed a duty directly by the fiduciary's attorney.

See also, Levine v. Higashi, (2005) 131 Cal.App.4th 566, 585-568 (accountant for partnership owes no duty to individual partners); *Bily v. Arthur Young, supra,* 3 Cal.4th 370, 401-402 (accountant's duty of care runs solely to client, not to third parties); *Kapelus v. State Bar* (1987) 44 Cal.3d 179, 191-192 (no duty to individual partners.)

Plaintiffs admit that Weil & Company only acted as the tax accountants for "one or more of the Kinberg entities." (Complaint, ¶¶ 24, 25 and 26.) Even if plaintiffs were able to allege that they were partners or investors in any one of the Kinberg entities, this would not create a duty of care on the part of Weil & Company to the plaintiffs individually. In the absence of such a duty, each of plaintiffs' causes of action fails.

C. ***Plaintiffs' Cause Of Action For Negligence Fails As A Matter Of Law***

To establish a cause of action for negligence, a plaintiff must plead: (1) a legal duty to use due care; (2) a breach of that duty; and (3) damages proximately caused by the breach. *Toomey v. Southern Pac. R. Co.* (1890) 86 Cal. 374, 381; *Federico v. Superior Court* (1997) 59 Cal. App. 4th 1207, 1211. As explained above, Weil & Company owed plaintiffs no duty of care with respect to the services and alleged wrongs at issue in this case. *Bily v. Arthur Young, supra,* 3 Cal.4th 370, 401-402 (accountant's duty of care runs solely to client, not to third parties) Accordingly, plaintiffs cannot establish the requisite element of duty, and as such, plaintiffs' fifth cause of action for negligence fails as a matter of law.

D. ***Plaintiffs Have Failed To Allege the Existence Of A Fiduciary Duty Or Relationship Between Plaintiffs And Weil & Company***

In order to plead a cause of action for breach of fiduciary duty, a plaintiff must allege facts showing the existence of a fiduciary relationship, its breach, and damage proximately caused by that breach. *Pierce v. Lyman* (1991) 1 Cal.App.4th 1093, 1101; *Apollo Capital Fund v. Roth Capital Partners, LLC* (2007) 158 Cal.App.4th 226, 244. The absence of any one of these elements is fatal to the cause of action. *Id.*

Again, as stated above, Weil & Company owed no duty of care to any of the plaintiffs in that the firm's duty of care ran solely to its clients or alleged clients, the Kinberg entities. *Bily v. Arthur Young, supra,* 3 Cal.4th 370, 401 -402.

The existence and scope of a fiduciary duty is a question of law, as is the existence of any legally recognized fiduciary relationship. *GAB Business Services, Inc. v. Lindsey & Newsom Claim Services, Inc.* (2000) 83 Cal.App.4th 409, 420-421, overruled on other grounds by *Reeves v. Hanlon* (2004) 33 Cal.App.4th 1140. Before a party can be charged with a fiduciary obligation, the party "must either knowingly undertake to act on behalf" and for the benefit of another, or must enter into a relationship which imposes that undertaking as a matter of law. *Apollo Capital Fund, LLC v. Roth Capital Partners, LLC* (2007) 158 Cal.App.4th 226, 245-246; *Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 221. A fiduciary duty cannot be established "inadvertently," nor can it be unilaterally imposed without a conscious assumption of the duties that are created by a fiduciary relationship. *Ibid.*

No California court has ever held that an accountant-client relationship creates a fiduciary duty. Allegations by a plaintiff of trust and confidence, or an agreement to communicate one's knowledge, or to exercise special knowledge and professional skill, are legally insufficient. *Zumbrum v. University of Southern California* (1972) 25 Cal.App. 3d 1, 13. As a matter of law, it takes something more than confidence in the professional skill and the integrity and truthfulness of another to establish a fiduciary relationship. *Wilson v. Zorb* (1936) 15 Cal.App. 526, 532.

Our Supreme Court has held, "the key factor in the existence of a fiduciary relationship lies in *control* by a person over the property of another" and not mere advice. *Vai v. Bank of America National Trust and Savings Association* (1961) 56 Cal.2d 329, 338 (emphasis added); *Recorded Picture Company (Productions) Ltd. v. Nelson Entertainment, Inc.* (1997) 53 Cal.App.4th 350, 370 ("[a] fiduciary relationship is created where a person reposes trust and confidence in another and the person in whom such confidence is reposed obtains control over the other person's affairs" (emphasis added); *McCullum v. Friendly Hills Travel Center* (1985) 172 Cal.App.3d 83, 91. In the *McCollum* case, the court stated that the "Chief Characteristic" of a fiduciary duty is, "the authority to act for and in the place of the principal for the purpose of bringing him or her into legal relations with third parties." 172 Cal. App.3d at 91.

Plaintiffs have not alleged any facts showing a fiduciary relationship with plaintiffs. Instead, they simply conclude that Weil & Company "maintained a fiduciary duty towards the plaintiffs." (Complaint, ¶ 105.) This is inadequate. First, none of the plaintiffs are Weil & Company's clients. Second, the mere fact that Weil & Company performed tax preparation services for "one or more of the Kinberg entities" does not create a fiduciary duty to the Kinberg entities, let alone non-clients, such each of the plaintiffs.

Plaintiffs have not and cannot allege that defendants exercised any control over plaintiffs' property or businesses, or had any authority to enter into contracts or transactions on plaintiffs' behalf. In the absence of any factual allegations showing control or the ability to act on behalf of plaintiffs, there is no fiduciary relationship and, *a fortiori,* there can be no breach of a fiduciary duty. Thus, plaintiffs' breach of fiduciary cause of action fails as a matter of law.

Moreover, to the extent plaintiffs are suggesting some sort of secondary liability through the conduct of the Kinberg entities, this too fails as a matter of law.

In *Doctors' Company v. Superior Court* (1989) 49 Cal.3d 39, 45, the California Supreme Court circumscribed the right to sue attorneys of a fiduciary for conspiring in the fiduciary's alleged breach of trust, holding that attorneys for an insurer may not be held liable to a third party for conspiring to breach a duty owed only by the insurer where the attorneys have acted, "merely

as agents of the insurer and not as individuals for their individual advantage." *Id.* at 45. In fact, all courts that have considered the issue "have held uniformly that the legal representation" of a company, partnership, or limited liability company, "standing alone, does not impose upon the attorney a fiduciary obligation" to the shareholders, partners or members. *Id.*

Here, plaintiffs must plead and ultimately establish either an independent duty or a pecuniary interest in the subject transactions. *Id.* Neither is alleged--neither can be alleged. Thus, on this basis as well, plaintiffs' cause of action for breach of fiduciary duty fails as a matter of law.

E. *Plaintiffs Have Not And Cannot Allege Their Fourth And Sixth Causes Of Action For Fraud And Negligent Misrepresentation Respectively With The Requisite Particularity*

Allegations of fraud must be pleaded with specificity, general and conclusory allegations do not suffice. *Stansfield v. Starkey* (1990) 220 Cal.App.3d 59, 74; *Nagy v. Nagy* (1989) 210 Cal.App.3d 1262, 1268. As stated by our Supreme Court: "Accordingly, the rule is everywhere followed that fraud must be specifically pleaded." *Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 216. "The effect of this rule is twofold: (a) General pleading of the legal conclusion of fraud is insufficient; the facts constituting the fraud must be alleged, (b) Every element of the cause of action for fraud must be alleged in the proper manner (*i. e.,* factually and specifically), and the policy of liberal construction of the pleadings ... will not ordinarily be invoked to sustain a pleading defective in any material respect." *Ibid.*

The elements of a fraud claim are: (1) a representation, usually of fact, (2) which is false, (3) knowledge of its falsity, (4) intent to defraud, (5) justifiable reliance, and (6) damage resulting from that justifiable reliance. *Stansfield, supra.,* 220 Cal.App.3d at 72-73.

Negligent misrepresentation is a form of fraud, and as such, must be pleaded with the same particularity as a cause of action for fraud. *Continental Airlines, Inc. v. McDonnell Douglas Corp.* (1989) 216 Cal.App.3d 388, 403-404. The elements of that cause of action are (1) a misrepresentation of a past or existing material fact, (2) without reasonable grounds for believing it to be true, (3) with intent to induce another's reliance on the fact misrepresented, (4) ignorance of the truth and justifiable reliance thereon by the party to whom the misrepresentation was directed, and (5) damages caused thereby. *BLM v. Sabo & Deitsch* (1997) 55 Cal.App.4th 832, 834.

Moreover, the heightened pleading standard requires the plaintiff to 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. *Tarmann v. State Farm Mutual Automobile Insurance Co.* (1991) 2 Cal.App.4th 153, 157.

Here, most of plaintiffs' allegations regarding Weil & Company and its involvement in the investments with the Kinberg entities are conclusory, void of any real facts and for the most part qualified "on information and belief." (Complaint, ¶¶24, 25, 26, 43, 44, 45, 46 and 47.) An allegation "on information and belief" is insufficient to meet the heightened pleading standard required for a cause of action of fraud or negligent misrepresentation.

Noticeably, plaintiffs fail to allege any factual allegation of misrepresentations actually made by Weil & Company to any of the plaintiffs regarding their individual investments in 2007 or the loans plaintiffs contend they later made to Kinberg and his entities in 2010. The only representations purportedly relied upon by plaintiffs in making their investments were those they admit were made, not by Weil & Company, but by Arthur Kinberg. [4] (Complaint, ¶ 31.)

The only act Weil & Company is specifically alleged to have done in connection with this so-called scheme to defraud is the alleged "supplying" of so-called "fraudulent documents" - - specifically, United's 2010 Schedule K-1 (Exhibit F to the Complaint) - - which plaintiffs contend was false. (Complaint, ¶ 42-45.) United's K-1, however, was sent to Michael Edell on April 9, 2011, *four years after* Michael Edell and the other plaintiffs allegedly made their individual investments in October

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of 2007 (Complaint, ¶ 29), and *one year after* plaintiffs entered into loan agreements with Arthur Kinberg, MH Holdings, Inc. and ADKLLC. (Complaint, ¶35.)

It is difficult to follow how it is that United's K-1 supplied in 2011 could have induced plaintiffs to invest their money with Arthur Kinberg in 2007 and then later in 2010. It is even more difficult to follow how plaintiffs could have relied on the so-called "fraudulent" K-1, when each plaintiff admits that they knew immediately that the K-1 was wrong and questioned Weil & Company about it. (Complaint, ¶ 43.) Moreover, it is also difficult to follow how Ethel Edell, Jeffrey Edell and Tim Wilson relied on a K-1 statement sent specifically to Michael Edell. In fact, there are no allegations that Weil & Company in anyway communicated with any of the other three plaintiffs.

Plaintiffs' allegations of a fraudulent 2010 K-1 and conclusory allegations of knowledge and involvement "on information and belief" are insufficient and not the how, what, when and where required to plead a cause of action for fraud or negligent misrepresentation against Weil & Company. *Ibid.*

The Court in *Wilhelm v. Pray, Price, Williams & Russell* (1986) 186 Cal.App.3d 1324 rejected the same types of generic allegations. There too, the plaintiff alleged that the defendant knowingly made misrepresentations with the intent to defraud plaintiff. *Id.* at 1331. Relying on the rule that "every element of the cause of action for fraud must be alleged in full, factually and specifically", the court held that the complaint was defective based on plaintiffs failure to plead facts showing how defendant "knew" the alleged representations to plaintiff were false. *Ibid.*

Plaintiffs are required to allege sufficiently specific facts to allow defendants the opportunity to defend themselves. Not only have plaintiffs failed to allege specific facts, they rely on such ambiguous and subjective terms that defendants can only speculate as to what they are being accused of. Allegations of fraud involve a serious attack on character, and fairness to the defendants demands that they should receive the fullest possible details in order to prepare their defense. *Committee, supra,* 35 Cal.3d at 216.

Accordingly, plaintiffs fraud causes of action are legally defective, and it is apparent that they cannot be cured by amendment. Accordingly, defendants' demurrer should be sustained without leave to amend.

F. *Plaintiffs Fail To Plead The Requisite Element Of Causation And Justifiable Reliance*

Whether pleaded as negligence or fraud, actual and justifiable reliance are essential components of plaintiffs' burden to plead causation in each of their causes of actions against Weil & Company. *Smolen v. Deloitte, Haskin & Sells* (9 th Cir. 1990) 921 F.2d 959, 963-964; *Wilhelm v. Pray, Price, Williams and Russell,* supra, 186 Cal.App.3d at 1331-32; *Bily v. Arthur Young, supra,* 3 Cal.4th at 408; *Stagen v. Stewart-West Coast Title Company* (1993) 149 Cal.App.3d 114, 119-20.

Here, again, the only act Weil & Company is specifically alleged to have done is the alleged "supplying" of so-called "fraudulent documents" - - specifically, United's K-1 (Exhibit F to the Complaint). (Complaint, ¶ 42-45.) United's K-1, however, was sent to Michael Edell on April 9, 2011, *four years after* Michael Edell and the other plaintiffs allegedly made their individual investments in October of 2007, and *one year after* plaintiffs entered into loan agreements with Arthur Kinberg, MH Holdings, Inc. and ADK LLC. (Complaint, ¶ 29, 30 and 35.) United's K-1 could not have induced plaintiffs or been relied on by plaintiffs in investing their money with Arthur Kinberg three years before the K-1 was prepared and sent to Michael Edell.

Indeed, plaintiffs admit that Michael Edell knew immediately that the K-1 was wrong and questioned Weil & Company about it. (Complaint, ¶ 43.) Reliance that is manifestly unreasonable in light of a plaintiff's own intelligence or own information is not justifiable. *Seeger v, Odell* (1941) 18 Cal.2d 409,414-415; see also, *Smolen, supra,* 921 F.2d at 965 (it is manifest that reliance on information from an accountant which the plaintiff has reason to believe is not accurate is as a matter of law unjustified and non-actionable); *Atari Corporation v. Ernst & Whinney* (9 th Cir. 1993) 984 F.2d 1025, 1030. Accordingly, even if Michael

Edell were able to traverse time and receive the K-1 before investing in the Kinberg entities, he could not contend he relied on the document since he admits he immediately knew upon reading the document that it was wrong. *Ibid.*

Moreover, neither Ethel Edell, Jeffrey Edell and Tim Wilson allege facts regarding their reliance on the K-1 statement sent to Michael Edell or any other document "supplied" by Weil & Company. In fact, there are no allegations that Weil & Company in anyway communicated with any of the other three plaintiffs - - how were they induced into investing by Weil & Company? [5]

Accordingly, plaintiffs' causes of action for fraud, negligence and negligent misrepresentation fail on this basis as well.

G. *Plaintiffs Have Not Alleged Facts Sufficient To Support Their Cause Of Action For Conspiracy*

There is no separate tort of civil conspiracy, and there is no civil action for conspiracy to commit a recognized tort unless the wrongful act itself is committed and damage results therefrom. *Short v. Nevada Joint Union High Sch. Dist.* (1985) 163 Cal. App. 3d 1087, 1101. Thus, a claim for civil conspiracy requires evidence of wrongful conduct in furtherance of the alleged conspiracy. *Id.;Unruh v. Truck Insurance Exchange* (1972) 7 Cal.3d 616, 631. [6]

Plaintiffs allege that Weil & Company along with the "Kinberg entities" conspired "to defraud the plaintiffs of their over $450,000 investment." (Complaint, ¶ 117.)

As set forth above, allegations of fraud must be pleaded with specificity and particularity: general and conclusory allegations do not suffice. *Stansfield v. Starkey, supra* 220 Cal. App. 3d at 74.

In their fraud cause of action, plaintiffs rely on purely conclusory allegations on "information an belief" of Weil & Company's involvement and knowledge regarding the so-called fraud and fail as a matter of law for lack of specificity. Since plaintiffs cannot assert a fraud claim, their cause of action for conspiracy to defraud, which is dependent on a fraud claim, necessarily fails as a matter of law.

Moreover, even if plaintiffs had managed to satisfy the heightened pleading requirements for the necessary underlying tort, they cannot sustain a cause of action for conspiracy because Weil & Company owed no duty to them related to the Kinberg entities.

A civil conspiracy does not, *per se,* give rise to a cause of action unless a civil wrong has been committed. *Unruh v. Truck Insurance Exchange, supra,* 7 Cal.3d at 631. In that regard, a cause of action for civil conspiracy may not arise if the alleged co-conspirator, though a participant in the alleged agreement underlying the injury, was not personally bound by the duty violated by the wrongdoing. *Doctors' Company v. Superior Court* (1989) 49 Cal.3d 39, 44-45.

As a matter of law, a civil conspiracy to commit tortious acts can be formed only by parties who owe a legal duty of care to the plaintiff, the breach of which will support tort liability against the parties individually. *Ferris v. Gatke Corp.* (2003) 107 Cal.App.4th 1211, 1225. ("Put another way, where a plaintiff asserts the existence of a civil conspiracy among the defendants to commit tortious acts, the source of any substantive liability arises out of an independent duty running to the plaintiff and its breach; tort liability cannot arise vicariously out of participation in the conspiracy itself.")

As explained above, plaintiffs have not and cannot allege facts establishing that Weil & Company owed them any duty relevant to the subject matter of this lawsuit. Accordingly, plaintiffs conspiracy claims fail for this additional reason.

H. *Plaintiffs Fail To Properly Plead A Cause Of Action For Accounting Against Weil & Company*

Again, as asserted above in Section D, no fiduciary relationship existed between any of the four plaintiffs and Weil & Company, such that accounting would be required. Moreover, there are no allegations to suggest that Weil & Company would have access

or the capacity to provide an accounting of money paid and still owing to any of the four plaintiffs by the Kinberg entities. Accordingly, plaintiffs' cause of action for accounting against Weil & Company fails as a matter of law.

I. ***Plaintiffs' Cause Of Action For Elder Abuse Fails As A Matter Of Law***

Welfare and Institutions Code section 15610.30 does not create an independent cause of action. *Perlin v. Fountain View Management Inc.* (2008) 163 Cal.App.4th 657, 664-666. Accordingly, plaintiffs' cause of action for **elder abuse** fails as a matter of law in that without establishing a corresponding basis for liability - - i.e. fraud - - plaintiffs cannot plead the claim. As state above, plaintiffs fail to plead a claim for fraud.

Even assuming arguendo that an independent cause of action can be pleaded, the allegations of the complaint do not state a proper claim for **elder abuse** against Weil & Company.

First, the allegations fail to establish that Weil & Company directly engage in **financial abuse**. Section 15610.30 provides that **financial abuse** occurs when an entity "takes, secretes, appropriates, or retains real and personal property of an **elder**...to a wrongful use or with intent to defraud, or both." There are no allegations that Weil & Company contacted, communicated or had any interaction with Ethel Edell. There are no allegations that Ethel gave Weil & Company any money or property of any kind or that Weil & Company took or appropriated any money or property from Ethel. Again, the only thing plaintiffs contend Weil & Company did was the preparation and delivery of United's K-1 to Michael Edell. (Complaint, ¶ 42.) Nothing in the complaint suggests that Weil & Company, in issuing United's K-1 to Michael Edell, was acting with the requisite intent to defraud Ethel Edell in an effort take or misappropriate Ethel's money. *Das v. Bank of America* (2010) 186 Cal.App.4th 727, 744.

Second, the allegations fail to establish that Weil & Company assisted in **financial abuse** by a third party. Section 15610.30 provides that **financial abuse** occurs when an entity *"assists* in taking, secreting, appropriating, or retaining real or personal property of an **elder**...to a wrongful use or with intent to defraud." Courts have defined "assists" in the context of the **elder abuse** statute to mean "knowingly assisted" - - that is a party can only be held liable where it assisted a third party in committing or effectuating **elder abuse**, with full knowledge that the third party was committing **elder abuse**. *Id.* at 744-745. Here, there are no factual allegations that Weil & Company knew that any third party, the Kinberg parties included, was defrauding Ethel, committing **elder abuse** under California law or taking Ethel's money for an improper purpose.

Again, there are no allegations that Weil & Company did anything or was in any way involved with Ethel, either directly or indirectly, or with investments in 2007 or her loan to Kinberg and his entities later in 2010. On this point alone, plaintiffs' cause of action for **elder abuse** fails as a matter of law.

IV. ***CONCLUSION***

For the foregoing reasons, defendant Weil & Company respectfully submit that its demurrer an be sustained without leave to amend.[7]

DATED: January 20, 2012

GARRETT & TULLY, P.C.

Stephen J. Tully

Tomas A. Ortiz

<<signature>>

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Footnotes

1 Plaintiffs also contend that they were collectively introduced to Kinberg by Weil & Company, but there are no allegations regarding the context or the relevance of that introduction - - again, plaintiffs admit that it was Kinberg who approached them about the initial investments and it was Kinberg who made representations regarding the nature of the investment and its purported return. (Complaint, ¶ 42, 29, 30 and 31.)

2 Indeed, the only factual allegation against Weil & Company is that the accounting firm prepared and "supplied" Michael Edell with United MHEQ's Schedule K-1 in 2011 - - the implication is that Weil & Company's only alleged involvement in the investments (not couched or qualified "on information and belief" was providing tax preparation services to one of Kinberg's entities years after the investments were made. (Complaint, ¶ 42.) This is a stretch to say the least.

3 The complaint contends "on information and belief that Weil & Company "in its capacity as a certified public accounting firm, owed an obligation to protect the interests of the Plaintiffs, as investors in the Kinberg entities." (Complaint, ¶ 26.) The contention is not a factual allegation but a conclusion of law improperly proposed "on information and belief and contrary to long standing legal authority cited above.

4 It should be noted that as to those representations, there are no factual allegations that what plaintiffs claim they were told by Arthur Kinberg was in fact false at the time he told them. There are no factual allegations that Kinberg or his entities actually participated in "nefarious acts" - - in fact, considering the notes and security involved in the transaction, it is difficult to follow how Kinberg could be viewed as acting nefariously. Was this a fraudulent scheme or simply an investment that went bad. like so many did between 2006 and 2010?

5 The complaint seems to imply that it was Michael who communicated the virtues of the Kinberg investment to the rest of the plaintiffs, which creates a very clear conflict within the plaintiff group. Did the rest rely on Michael or something actually communicated to them?

6 The elements of a claim for civil conspiracy are (1) formation and operation of the conspiracy (an agreement to commit wrongful acts), (2) wrongful act or acts done pursuant thereto (commission of the wrongful acts), and (3) damage resulting therefrom. *Mosier v. Southern California Physicians* (1998) 63 Cal App. 4th 1022; *People v. Beaumont Investment, LTD.* (2003) 111 Cal.App.4th 102, 137.

7 It is very clear that plaintiffs have pleaded all they can with regard to Weil & Company's involvement. As it is, their claims against the accountants teeter on the brink of "bad faith" - - their claims of fraud and **elder** **abuse** are serious accusations with real world implications. Plaintiffs must held accountable for their pleading and cannot be allowed to proceed on these claims based solely on qualified allegations "on information and belief."

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