2012 WL 8318955 (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; Fitwest, 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 Corporation; 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.
June 25, 2012.

Notice of Demurrer and Demurrer of Defendant Weil & Company, LLC to Plaintiffs' Second Amended Complaint (Reservation No. 1719522)

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, Request for Judicial Notice and Joinder in Defendants' Request for Judicial Notice]

DATE: July 26, 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 July 26, 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' second amended 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: June 25, 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' second amended 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; (3) plaintiffs have failed to plead with the requisite specificity the element of a false representation of a material fact; and (4) plaintiffs have failed to plead the requisite element of reliance by each plaintiff on any purported misrepresentation by Weil & Company.

3. 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, (3) plaintiffs have failed to plead with the requisite specificity a false representation of a material fact; and (4) plaintiffs have failed to plead the requisite element of reliance by each plaintiff on any purported misrepresentation by Weil & Company.

4. The thirteenth cause of action for breach of implied covenant of good faith and fair dealing fails to state facts sufficient to constitute a cause of action because plaintiffs have failed to plead the necessary existence of an agreement or contract between each of the plaintiffs and Weil & Company.

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

DATED: June 25, 2012

GARRETT & TULLY, P.C.

Stephen J. Tully

Tomas A. Ortiz

<<signature>>

TOMAS A. ORTIZ

Attorneys for Defendant Weil & Company, LLP

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATE CASES

MEMORANDUM OF POINTS AND AUTHORITIES

I. *INTRODUCTION*

Plaintiffs Jeffrey Edell, Michael Edell, Ethel Edell and Tim Wilson's second amended complaint ("SAC") is the epitome of the *sham* complaint. Its allegations reworked, not to assert legitimate facts in support of a legitimate claim, but instead to manipulate, undermine and play fast and loose with pleading requirements and this court's earlier rulings, all in hopes of "getting by" the pleading stage and dragging out what is clearly a meritless claim against Weil & Company.

Setting aside the pleading's "sham qualities" which are addressed specifically in Weil & Company's motion to strike, plaintiffs' amended complaint still falls woefully short of curing its predecessors' defects and still does not effectively plead causes of action for fraud, negligent misrepresentation, **elder abuse** and (now) breach of the implied covenant of good faith and fair dealing.

Plaintiffs' new conclusory allegations that Weil & Company, through Mark Walker, somehow attested to the "reliability and security" of Kinberg a year before plaintiffs made their investment remains vague and unspecific as to exactly how and what was attested to by the firm or Mr. Walker, and in what manner, or that anything he did say in "attesting" on behalf of Kinberg or his companies was actually false or a fraud or had anything to do with plaintiffs' investments or their alleged loss.

Plaintiffs also now allege that Weil & Company made "representations" between 2007 and 2010, but fail to anyway describe what those representations were, how they were made and in what context. Plaintiffs continue to allege that Weil & Company

sent them documents and reports, but have and can only identify the one "Kl" tax form received by Michael Edell in 2011, years after the investments were made - - a document plaintiffs have already admitted in pleadings past that they knew was false the moment each of them received it. These are not amended allegations at all but more of the same overwrought and muddled conclusions of so called "fraud," "fraudulent documents" and "misrepresentations," with no facts to plead.

Plaintiffs' new allegations (as with their old) again fail to establish with requisite specificity the fraud they claim they were victimized by in connection with the Kinberg businesses. By their own allegations, it is clear that the reason plaintiffs did not get all of their money back on their deal with Kinberg was because (like so many other businesses did between 2007 and 2010) Kinberg's businesses faced "**financial** difficulties."

Regardless, again, the unavoidable conclusion is that plaintiffs simply do not have a viable claim against Weil & Company and have pushed their facts as far as they can be legally pushed *and beyond,* resulting in what is the epitome of a sham complaint - - but whether a sham or not, the SAC still fails to meet plaintiffs' pleading requirements on their causes of action against Weil & Company. Accordingly, demurrer should be sustained as to all four causes of action against Weil & Company.

II. *SUMMARY OF RELEVANT ALLEGATIONS AND ISSUES*

Plaintiffs contend that they were each investors in businesses or entities owned and operated by Arthur Kinberg. (SAC, ¶ 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. (SAC, ¶ 30.) 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. (SAC, ¶ 40) Accordingly, plaintiffs allege each invested sizable amounts with Kinberg and his companies amounting to $461,770 collectively. (SAC, ¶ 31.) Plaintiffs allege they made these investments through a series of loans. (SAC, ¶ 31.)

Plaintiffs also contend that in the years that followed after 2007, each received a significant return on those investments - - money that was then reinvested by each with Kinberg. (SAC, ¶ 32.) Moreover, plaintiffs contend Michael Edell was designated as the agent for the rest of the four plaintiffs "in negotiating and managing the plaintiffs' investments with the defendants." (SAC, ¶ 33.) There are no factual allegations that Michael Edell served as the plaintiff group's agent any time before plaintiffs invested their money in 2007 nor are there any allegations that Michael Edell communicated the existence of this agency to anybody, whether it was Kinberg in 2007 or Mr. Walker any time before.

Plaintiffs contend that in early 2010, each learned that Kinberg and his companies were facing **financial** difficulties. (SAC, ¶ 41.) They contend that they demanded return of their investment. (SAC, ¶ 42.) Knowing that Kinberg was facing **financial** difficulties, plaintiffs contend they entered into a modified deal and actual written loan agreements with Kinberg, whereby Kinberg executed a series of promissory notes for the outstanding investment amounts secured by real estate and other assets. (SAC, ¶ 43-50.) Plaintiffs further contend that they eventually foreclosed on that security and collected upwards of $70,000 in "surplus from the sale of the property." (SAC, ¶ 50.)

Plaintiffs allege that Weil & Company were tax accountants for "one or more of the Kinberg entities." (SAC, ¶ 24.) They also allege on "information and belief" that Weil & Company served as "consultant and/or agent," again, to "one or more of the Kinberg entities." (SAC, ¶ 24.) There are no allegations as to what exactly plaintiffs contend Weil & Company actually did for these unidentified Kinberg entities, apart from tax preparation services, or what entities these services were provided.

Plaintiffs *now* allege that Mark Walker spoke with Michael Edell (not the rest of the plaintiffs) in late 2006 about Kinberg. (SAC, ¶ 37.) Plaintiffs allege that Michael Edell "interviewed" Mark Walker not about Kinberg or his companies or for investment advice for himself or any of the other plaintiffs, but "in the context of his search for a new Certified Public Accountant for one of bis businesses." (SAC, ¶ 37.) According to plaintiffs, at some point during this "interview" about something else entirely, Mark

Walker discussed Kinberg and his businesses. (SAC, ¶ 38.) Plaintiffs contend Mark Walker told Michael Edell ("amongst other things") that (a) "Kinberg's investment vehicles were highly secure and reliable," (b) "Weil & Company could attest to Kinberg's reliability and security because it had been involved with Kinberg for over 10 years," (c) "Other Weil & Company clients had likewise invested with Kinberg and the Kinberg entities," (d) "Walker personally invested a significant sum of money with Kinberg and the Kinberg entities," and (e) "Weil & Company performed accounting services for Weil & Company." (SAC, ¶ 39.) There are no factual allegations that any statement was false or untrue at the time plaintiffs contend it was made by Mr. Walker. Plaintiffs admit that they were approached by Kinberg almost a year after Walker discussed the above with Michael Edell. (SAC ¶ 30.)

Plaintiffs continue to allege "on information and belief" that Weil & Company should have known that Kinberg and his companies were conducting "nefarious acts" - - although they do not specify what those nefarious acts were or could have been. (SAC, ¶ 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. (SAC, ¶ 25.)

Plaintiffs contend that throughout the period of 2007 to 2010, Mark Walker and Weil & Company "continuously made false and misleading representations to plaintiffs," but fail to allege what those representations were, when they were made or what was said by either Walker or Weil & Company. (SAC ¶ 65-66.)

The only factual allegation made remains that on April 9, 2011, Michael Edell received a copy of United MHEQ's 2010 Schedule K-1 (Partnership Form 1065) from Weil & Company. (SAC, ¶ 51.) 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. (RJN, FAC, ¶ 43.) They contend they immediately questioned Weil & Company about the schedule and United MHEQ. (RJN, PAC, ¶ 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. (RJN, FAC, ¶ 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, 275; *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. Piller* (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.

Moreover, where a party files an amended complaint following the sustaining of a demurrer, and seeks to avoid the defects of a prior complaint either by omitting the facts that rendered the complaint defective or by pleading facts inconsistent with the allegations of a prior pleadings, the new pleading is considered a sham. The policy against sham pleading permits the court to take judicial notice of the prior pleadings. The court may disregard the inconsistent allegations and adobt those of the superseded

complaint. See *Owens v. Kings Supermarket* (1988) 198 Cal.App.3d 379, 383-384; see also, *American Adv. & Sales Co. v. Mid-Western Transport* (1984) 152 Cal.App.3d 875, 879.

Likewise, judicial estoppel is designed to maintain the purity and integrity of the judicial process by preventing inconsistent positions from being asserted. It enables the court to prevent a litigant from manipulating the litigation process and to protect against litigants playing fast and loose with the court *Furia v. Helm* (2003) 111 Cal.App.4th 945, 957-958; *Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 181-183.

Based on the legal principle of judicial estoppel and on this court's policy against sham complaints, plaintiffs' amended allegations that contradict or are inconsistent with prior allegations should be disregarded.

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

Again, as argued before, 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." (SAC, ¶ 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. *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 Weil & Company, as accountants for one or more of the Kinberg entities (see, SAC, ¶ 26.) - - this too is contrary to the law. 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 a professional employed by a corporation based on a violation of a duty of care owed to the corporation); *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." (SAC, ¶¶ 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 Have Not And Cannot Allege Causes Of Action For Fraud And Negligent Misrepresentation 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 elements of a fraud claim are: (1) a representation of material (or important) 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; See also, *CACI, Judicial Council of California Civil Jury Instructions,* Instruction No. 1900, Intentional Misrepresentation (Fraud or Deceit).

Likewise, negligent misrepresentation is a form of fraud, and as such, must also 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.

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, as with the original complaint, 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.” 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.

Plaintiffs initially made no allegations that Weil & Company had represented anything to the group or to their now purported agent, Michael Edell, in connection with the Kinberg investments before the investments were made. Plaintiffs' story has now changed.

Plaintiffs' now allege representations in what can be distilled into three categories: (1) statements made by Mark Walker more than a year before plaintiffs made their initial investment; (2) statements or information provided between 2007 and 2010; and (3) documents sent by Weil & Company in connection with the Kinberg businesses. None of these three categories are plead with the necessary degree of specificity required in connection with a cause of action of fraud or negligent misrepresentation.

1. Allegations of Statements Made by Mark Walker in Late 2006 Are Not Specific.

As to statements made by Mark Walker, plaintiffs allege that in late 2006, more than a year before plaintiffs invested their money with Kinberg, Michael Edell “interviewed” Mark Walker not about Kinberg or his companies or for investment advice for himself or any of the other plaintiffs, but “in the context of his search for a new Certified Public Accountant for one of his businesses.” (SAC, ¶ 37.) According to plaintiffs, at some point during this “interview” about something else entirely, Mark Walker discussed Kinberg and his businesses, telling Michael Edell (“amongst other things”) that “Kinberg's investment vehicles were highly secure and reliable,” and that “Weil & Company could attest to Kinberg's reliability and security.” (SAC, ¶ 39.)

Obviously, plaintiffs' use of the phrase “amongst other things” is unspecific and inherently evasive of factual allegation. Plaintiffs simply cannot hide behind that phrase in asserting a cause of action for fraud or misrepresentation. Setting that aside, the remaining allegation of Mr. Walker's so called “representations” are equally unspecific as to what was actually represented to Michael Edell and how it was represented, in what context, and for what purpose. Plaintiffs' allegations state quite clearly that Michael Edell was not meeting Mr. Walker for investment advice or any thing other than to interview him with the prospect of engaging him in the future as a tax accountant for one of his other businesses. (SAC, ¶ 37.) There are no allegations that Mr. Walker requested or solicited advice or comment regarding investment opportunities for himself or for anybody else. There are no factual allegations as to what was actually said or how this information was presented - - were these actual representations of fact, or where they opinion, remarks made off hand at the end of the interview? Did Mr. Walker provide substantive information? Was he asked for substantive information? How was this so called “attestation” by Weil & Company presented? And, what exactly do plaintiffs mean by “could attest to Kinberg's reliability and security”? Indeed, the term “attest” carries with it very different implications in the world of accounting than it does in other industries - - a term of art implying extensive review and reporting, including audits and reviews.

More importantly, there are no allegations as to how did this attestation of Kinberg from years past in anyway related to plaintiffs' own investment in the Kinberg business or amounted to fraud in connection with what happened years later, when plaintiffs finally invested their money and years after that when they entered into modified secured arrangements with Kinberg.

Plaintiffs admit that they did not invest in Kinberg's business until more than a year later after Kinberg "approached" each of them and had a "series of meetings and telephone conversations" with each of them about the investment opportunities. How were Mr. Walker's statements in 2006 at all related to the investment opportunities Kinberg approached plaintiffs with more than a year later? Plaintiffs provide no specifics about anything Mr. Walker said in 2006.

2. Lack of Specificity as to Alleged Representations Made Between 2007 and 2010.

Plaintiffs also allege in conclusory fashion that Weil & Company continued to make representations to plaintiffs during the period of 2007 and 2010, but do not identify what those representations were or how those representations were made or to whom and by whom they were made at Weil & Company. 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 plaintiff's 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. Plaintiffs cannot simply say there were representations made during a period of time without further specificity and pleading of actual facts. Plaintiffs must plead the facts, the *how, what, when and where required* to effectively plead a cause of action for fraud or negligent misrepresentation against Weil & Company. *Ibid.*

3. Plaintiffs' Allegations of Documents Are Also Unspecific and Insufficient.

Plaintiffs continue to allege in conclusory fashion that they received "**financial** statements," but fail to identify any documents other than the 2010 Schedule K-1 (Exhibit F to the Complaint) sent to Michael Edell - - which plaintiffs contend was false and admit that they new was false the moment they received it. (SAC, ¶ 42-45; RJN, FAC, ¶ 43.) Plaintiffs provide no specifics as to these other documents or "**financial** statements" they purportedly received from Weil & Company. Plaintiffs' allegations of a fraudulent 2010 K-1 and conclusory allegations of ghost documents and "**financial** statements" 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.* 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.

D. *Plaintiffs Fail to Plead Facts Showing Representations Were False or Untrue.*

A fraud or negligent misrepresentation requires not only that a representation be made but that the representation be false or untrue. *Stansfield, supra,* 220 Cal.App.3d at 72-73; See also, *CACI, Judicial Council of California Civil Jury Instructions,* Instruction No. 1900, Intentional Misrepresentation (Fraud or Deceit). Here, plaintiffs contend that at some point during Michael Edell's "interview" of Mark Walker about something else entirely, Mark Walker discussed Kinberg and told Michael Edell ("amongst other things") that (a) "Kinberg's investment vehicles were highly secure and reliable," (b) "Weil & Company could attest to Kinberg's reliability and security because it had been involved with Kinberg for over 10 years," (c) "Other Weil & Company clients had likewise invested with Kinberg and the Kinberg entities," (d) "Walker personally invested a significant

sum of money with Kinberg and the Kinberg entities," and (e) "Weil & Company performed accounting services for Weil & Company." (SAC, ¶ 39.)

Notwithstanding the lack of specificity as to what was actually said, there are no factual allegations indicating that any of the above "representations" were in fact false or untrue at the time (late 2006) they were made by Mr. Walker or that Mr. Walker knew the statements to be false, as required for a claim of fraud. Plaintiffs' own allegations suggest that for some time after they made their investments or loans (years after Mr. Walker made these supposed statements), things were fine with Kinberg and plaintiffs were getting a return on their investment only to then "reinvest" with Kinberg, by no fault or representation of either Mr. Walker or Weil & Company. (SAC, ¶ 32.) Again, none of these facts in anyway suggest that Mr. Walker's so-called statements (as unclear as plaintiffs' allegations are concerning those statements) were in anyway false; quite the opposite, in fact.

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

Whether pleaded as negligence or fraud, actual and justifiable reliance arc essential components of plaintiffs' burden to plead causation in each of their causes of actions against Weil & Company. *Smolen v. Deloitte, Haskin & Sells* (9th 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, plaintiffs' allegations of statements made by Mr. Walker to Michael Edell a year before any of the plaintiffs were approached by Kinberg regarding investment opportunities in one of his business, are unspecific as to what exactly was said, but it is hard to understand how these statements made by Mr. Walker were in anyway related to the investment opportunities Kinberg approached plaintiffs with more than a year later. Plaintiffs provide no specifics about anything Mr. Walker said. How could plaintiffs have relied on these broad statements of "attestation" without any detail whatsoever -- considering it took Kinberg "several meetings and telephone conversations" to explain the investment opportunities he had in mind for plaintiffs. There are no allegations that the "investment vehicles" Mr. Walker mentioned in 2006 were the same Kinberg approached plaintiffs with in 2007. Its unclear how plaintiffs could have reasonably relied on Mr. Walker's statements given the context or "out of context" manner they were given to Michael Edell almost a year before Kinberg approached them to invest with him -- Michael Edell was not there to discuss investment advice or investment opportunities, but rather to interview Mr. Walker for something else entirely. Without more facts, Weil & Company is left to guess how there could have been any kind of reliance whatsoever.

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). (SAC, ¶ 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. (SAC, 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. (RJN, FAC, ¶ 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* (9th 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.*

1. Plaintiffs' Allegation of Michael Edell's Agency is Insufficient to Plead Reliance by the Other Plaintiffs.

In a suspicious turn of pleading, plaintiffs now contend that although nobody at Weil & Company spoke or communicated with either Ethel Edell, Jeffrey Edell or Tim Wilson, they are entitled to recover

under theories of fraud and negligent misrepresentation based on representations made or documents received by Michael Edell, an individual plaintiffs allege in conclusory manner was their designated agent in "negotiating and managing the plaintiffs' investments" with Kinberg. (SAC, ¶ 33 - 34.) These allegations of agency are insufficient to plead reliance by or allow recovery by the other plaintiffs based on representations made to Michael Edell.

In order for a defendant to be liable for fraud, he must intend that a particular representation be relied upon by a specific person or persons. Restatement 2d, Torts, *section 533*. Here, there are no allegations that Michael Edell ever held himself out to be agent for the other three plaintiffs whether to Mark Walker, Weil & Company or anybody else. There are no factual allegations reflecting knowledge or understanding by Mark Walker or Weil & Company that whatever Mr. Walker was telling Michael Edell was going to then be told to the other three plaintiffs. In fact, plaintiffs' own allegations confirm that Michael Edell met with Mr. Walker, not to discuss investment on behalf of the plaintiff group, but to interview Mr. Walker for a potential accounting engagement with Michael Edell's other business. (SAC, ¶ 37.)

Accordingly, even if this court were to hold that plaintiffs allegations are remotely specific enough to meet pleading requirements, any claim for fraud or negligent misrepresentation must be limited to Michael Edell and not the remaining plaintiffs. See *Lewis v. McClure* (1932) 127 Cal.App. 439, 447 (one cannot sue for false representations unless they were made to him with intent that he should act thereon, or were made under such circumstances that the speaker must have anticipated that plaintiff would hear and act upon them"); See also, *Christiansen v. Roddy* (1986) 186 Cal.App.3d 780, 787, citing Witkin, Summary of California Law (8th ed. 1974), pages 2729-2730 as to *negligent misrepresentation* (the class of persons entitled to rely upon the representations is restricted to those to whom or for whom the misrepresentations were made).

F. *Plaintiffs Waived Their Fraud Claim by Modifying Their Arrangement with Kinberg.*

Under California law, a party to a contract which, after discovery of apurported fraud, enters into modifications or new arrangements concerning the subject matter of the contract, is deemed to have waived and is estopped to assert any claim for damages on account of the fraud. *Oakland Raiders v. Oakland-Alameda County Coliseum, Inc.* (2006) 144 Cal.App.4th 1175, 1186; *Alhino v. Mason-McDuffie Co.* (1980) 112 Cal.App.3d 158, 168.

Plaintiffs contend that in 2010 they discovered that the Kinberg entities were facing **financial** difficulties. (SAC, ¶ 41.) As a result of that discovery, plaintiffs demanded their money back, did not get it and then modified their arrangement with Kinberg, entering into written loan agreements with Kinberg, including having Kinberg execute promissory notes and provide security in real estate and other assets. (SAC, ¶ 43-50.) Again, as described above, it is difficult to decipher what exactly was represented to Michael Edell by Weil & Company regarding Kinberg and his companies, but to the extent it had anything to do with Kinberg's **financial** condition or his lack of vulnerability (or "invincibility") to **financial** difficulties in the future or his ability (or reliability) to pay back investments or loans, any fraud claim based on any such representation has been waived by plaintiffs.

In March of 2010, with full knowledge of Kinberg's "**financial** difficulties" and his inability to refund plaintiffs' investment money upon request, plaintiffs proposed and entered into written loan and security agreements which modified and changed their original arrangement with Kinberg. (SAC, ¶ 43-50.) As a matter of law, plaintiffs' conduct in modifying and changing that arrangement after discovery of Kinberg's "**financial** difficulties" and his inability to refund plaintiffs' investment money upon request constitutes a waiver, and estops plaintiffs from asserting any claims of fraud or misrepresentation associated with any representation as to Kinberg's **financial** condition or his ability to pay off investments and/or loans.

G. *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. 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 tiling plaintiffs contend Weil & Company did was the preparation and delivery of United's K-1 to Michael Edell. (SAC, ¶ 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.

Indeed, even if plaintiffs' allegations of agency between Ethel and Michael Edell are sufficient or remotely factually accurate, it is hard to understand how, with Michael acting as her agent, fiduciary and caretaker, she could possibly have a claim for "**elder abuse**" when everything (every statement, representation and document) she relied on in making her decision to invest with Kinberg went through and was handled by Michael. The policy behind **elder abuse** statutes is to protect the unrepresented, the unprotected, not to create another source of recovery based on nothing more than the technical criteria of age.

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.

H. *Plaintiffs' Cause of Action for Breach of Implied Covenant Fails as a Matter of Law.*

It is well-settled under California law that an action for breach of the implied covenant of good faith and fair dealing requires an underlying agreement. *Racine & Laramie, Ltd. v. Department of Parks & Recreation* (1992) 11 Cal.App.4th 1026, 1031-1032, 1033 n.4; *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 349-350; See also, CACI Jury Instruction, 325. Here, plaintiffs have not pleaded an agreement or contract between each of them and Weil & Company.

IV. *CONCLUSION*

For the foregoing reasons, defendant Weil & Company respectfully submits that its demurrer be sustained in its entirety without leave to amend.

DATED: June 25, 2012

GARRETT & TULLY, P.C.

Stephen J. Tully

Tomas A. Ortiz

<<signature>>

TOMAS A. ORTIZ

Attorneys for Defendant Weil & Company, LLP

End of Document