

2012 WL 8318917 (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.
April 24, 2012.

Reply Brief in Support of Demurrer of Defendant Weil & Company, LLC to Plaintiffs' First Amended Complaint

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Honorable [Rebecca S. Riley](#).

Dept. 40

DATE: May 1, 2012

TIME: 8:30 a.m.

DEPT.: 40

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I. PRELIMINARY STATEMENT

In opposing demurrer, plaintiffs miss entirely the distinction between pleading facts and pleading general or conclusory allegations and the requirement of pleading the former in pleading a fraud or misrepresentation based cause of action. Whether by design or otherwise, plaintiffs simply gloss over the glaring deficiencies of their amended complaint, which are identical to those suffered by its predecessor pleading, and assert without much more that they have done enough. However, nothing has changed from their defective original complaint, the facts have remain the same - - as succinctly stated by co-defendants Vintage Storage, Inc. and United MHEQ in connection with their respective demurrers, "*plaintiffs have pled no new facts.*" With no new facts, this is the same pleading, with the same deficiencies on which this court sustained Weil & Company's earlier demurrer.

The opposition fails in any way to provide a persuasive of substantive argument why Weil & Company's demurrer to the amended complaint should not be sustained as with the original complaint. Plaintiffs have now been given two opportunities to plead their claims and have done nothing to cure what are fatally unspecific and factually deficient claims.

Unfortunately for plaintiffs, in that their claims against Weil & Company are all based on fraud and misrepresentation, plaintiffs do not enjoy the benefit of "liberal construction" and must plead the facts - - again, here, plaintiffs amended complaint provides *no new facts*¹ and as this court has already determined, the facts already pleaded fall woefully short of pleading proper claims for fraud, negligent misrepresentation, conspiracy and **elder abuse**.

Setting aside the rhetoric and conclusory language of plaintiffs both in pleading their claims and in opposing demurrer, the facts alleged against Weil & Company are fairly simple - - plaintiffs allege that Weil & Company in providing tax preparation services for "one or more" of the Kinberg run companies prepared and distributed a Schedule K-1 (Partnership Form 1065) on behalf of United MHEQ, which was sent and received by Michael Edell (*and only Michael Edell*) on April 9, 2011. As this court has already ruled, this is simply not enough to plead a cause of action arising in fraud or misrepresentation.

Based on plaintiffs' attempt to amend or "fix" their original complaint and their opposition to this and other demurrers, it is quite clear that plaintiffs simply do not have the facts to support their claims for fraud, negligent misrepresentation, **elder abuse** and conspiracy against Weil & Company. Accordingly, Weil & Company respectfully requests that its demurrers be sustained without further leave to amend - - there is no reasonable justification for this clearly meritless matter to continue against Weil & Company.

II. PLAINTIFFS HAVE FAILED TO ALLEGE FRAUD AND NEGLIGENT MISREPRESENTATION WITH THE REQUISITE SPECIFICITY

Again, 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.

Plaintiffs must plead ultimate facts (not conclusions or arguments) that show when, where, to whom, and by what means the misrepresentations were made. *Lazar v. Superior Court* (1996) 12 Cal.4th 631,645.

Again, 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.

Each of these elements must be pleaded with specificity.² *Ibid*. Here, they have not.

Indeed, plaintiffs have made absolutely no attempt to plead fraud or negligent misrepresentation with any degree of specificity or particularity whatsoever, even after this court sustained Weil & Company's earlier demurrer.

In fact, the concept of specificity seems to be missed by plaintiffs entirely. In opposing demurrer and arguing "particularity" of facts, plaintiffs cite, not to actual factual allegations (which have remained the same verbatim from original to amended complaint), but to paragraphs that are void of any actual facts (ultimate or otherwise) and contain nothing but conclusions and argument. (Opposition, p. 3 - 5, citing FAC ¶s 76, 77, 78, 81, 83, 84 and 85.)

For example, plaintiffs actually suggest they have properly pleaded "justifiable reliance" by simply asserting "Plaintiffs reasonably and actually relied on the misrepresentations by the Kinberg Entities and Weil & Company providing said

monies.” (Opposition, p. 4.) *How is this remotely specific and particular or in anyway factual?* This allegation, like so many others asserted by plaintiffs, is nothing but a conclusory argument or contention that is completely void of any fact or factual support and falls woefully short of plaintiffs' burden in pleading claims arising in fraud or misrepresentation.

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. (FAC, ¶ 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 (FAC, ¶ 29), and *one year after* plaintiffs entered into loan agreements with Arthur Kinberg, MH Holdings, Inc. and ADK LLC. (FAC, ¶ 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. (FAC, ¶ 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 claim arising in fraud or misrepresentation against Weil & Company. *Ibid.* Thus, each of their causes of action, including **elder abuse** and conspiracy which are based on allegations of “fraudulent conduct,” fail as a matter of law.

III. PLAINTIFFS FAIL TO PLEAD THE REQUISITE ELEMENT OF CAUSATION AND JUSTIFIABLE RELIANCE

“Whether pleaded as negligence or fraud (or in this case **elder abuse** and conspiracy based in 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* (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, 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). (FAC, ¶ 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. (FAC, ¶ 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.

Plaintiffs admit that Michael Edell knew immediately that the K-1 was wrong and questioned Weil & Company about it. (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.

Thus, 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?

Accordingly, each of their causes of action, including **elder abuse** and conspiracy which are based on allegations of “fraudulent conduct,” fail as a matter of law on this basis as well.

IV. PLAINTIFFS CONCEDE WEIL & COMPANY OWED NO DUTY TO PLAINTIFFS

As argued by Weil & Company, and incorporated herein by way of reference, 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 fail to in anyway address the clear lack of duty owed by Weil & Company to the plaintiffs in the context of any of the four causes of action asserted by plaintiffs against Weil & Company. Accordingly, the argument is conceded by plaintiffs - - no duty existed and thus, on this basis as well, each of plaintiffs' causes of action against Weil & Company fail as a matter of law.

V. PLAINTIFFS HAVE NOT ALLEGED FACTS SUFFICIENT TO SUPPORT THEIR CAUSE OF ACTION FOR CONSPIRACY

Again, 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.

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

As set forth above, 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*, 1 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 in the demurrer, 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.

VI. 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.³

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. (FAC, ¶ 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, as this court held in sustaining Weil & Company's first demurrer, 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. Nothing has changed in the way of factual allegations. Again, plaintiffs' cause of action for **elder abuse** fails as a matter of law, accordingly.

VII. CONCLUSION

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

DATED: April 24, 2012

GARRETT & TULLY, P.C.

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<<signature>>

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Footnotes

- 1 In their opposition, plaintiffs suggest that there are other facts that exist in support of their claims against Weil & Company. Yet, for whatever reason have decided not to identify what those facts might be or provide a reason as to why those facts have not been alleged thus far - - the only reasonable inference that can be drawn is that the facts don't exist and plaintiffs are reaching in an attempt to keep alive meritless claims that should have never been filed against Weil & Company.
- 2 Likewise, 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.
- 3 Plaintiffs cannot avoid the pleading requirements for fraud by framing the claim as one for **elder abuse**.

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