

2012 WL 8318914 (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.  
July 26, 2012.

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

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Honorable [Rebecca S. Riley](#).

Dept 40.

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TIME: 8:30 a.m.

DEPT.: 40

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**I. PRELIMINARY STATEMENT**

In opposing demurrer, plaintiffs do not dispute nor address Weil & Company's argument (or the long line of legal authority in support of that argument, including [Oakland v. Oakland-Alameda County Coliseum, Inc. \(2006\) 144 Cal.App.4th 1175](#)) that their fraud and misrepresentation claims were waived in 2010 when each plaintiff entered into modified loan or investment agreements with Kinberg by which they received security in the form of real estate and other collateral.<sup>1</sup> Accordingly, based on plaintiffs' concession on the argument and based on their own allegations as set forth in the second amended complaint ("SAC") and prior pleadings (which clearly reflect a waiver, as a matter of law), Weil & Company's demurrer should be sustained as to plaintiffs' fourth and sixth causes of action for fraud and misrepresentation, respectively, as well as plaintiffs' sixth cause of action for "elder abuse."<sup>2</sup>

Indeed, plaintiffs' remarkable silent concession on the "waiver" argument is reflective of plaintiffs' approach in opposing demurrer and prosecuting this action, refusing to get too caught up with specifics or the facts that make up a rather muddled and confusing narrative regarding the series of transactions each of them had with Kinberg.<sup>3</sup> Unfortunately, plaintiffs do not get the benefit of "liberality" in pleading - - they have alleged claims of fraud and misrepresentation against Weil & Company which have long been held to involve a "serious attack on character," requiring specificity of facts in pleading. A fraud or misrepresentation claim is pleaded not by conclusion or empty contention but by fact - - plaintiffs must be specific as to those facts and by way of fact, and not conclusion, must plead "every element" of fraud and misrepresentation. Plaintiffs must be held to the correct higher pleading standard.<sup>4</sup> A standard they have not met in amending their complaint a second time and clearly cannot meet based on the "facts" and only the facts.

## **II. PLAINTIFFS' ALLEGATIONS OF REPRESENTATIONS FALL SHORT OF PLEADING FRAUD OR NEGLIGENT MISREPRESENTATION**

In opposing demurrer, plaintiffs argue that they pleaded the element of "misrepresentation" with "sufficient specificity," identifying 5 paragraphs in the SAC as the basis for their fraud and misrepresentation claims. (See, Opposition, p. 5, lines 9 through 27.) These, according to plaintiffs, are the *universe of allegations* of misrepresentations they contend were made by Weil & Company. Taking each individually, it is very clear how fatally flawed plaintiffs' causes of action for fraud and misrepresentation truly are:

### ***Allegation of Misrepresentation No. 1***

112. Among other things, Walker as an agent of Defendant Weil & Company represented to Plaintiff Michael Edell 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 had been very satisfied; (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.

(See Opposition, p. 5, lines 12 to 16.)

*Lack of Specificity.* Allegations of fraud must be pleaded with specificity, general and conclusory allegations do not suffice. *Stansfield v. Startey* (1990) 220 Cal.App.3d 59, 74; *Nagy v. Nagy* (1989) 210 Cal.App.3d 1262, 1268. As detailed in the demurrer, these allegations are not sufficiently specific as to what exactly was said by Walker and about what. (See, Demurrer, p. 7-8.) The phrase "amongst other things" is inherently unspecific and evasive as it is cynical in the context of a fraud cause of action.

There are no factual allegations as to what was actually said or how this unspecific and undefined information was presented. Did Mr. Walker describe the "investment vehicles"? What was said about "Kinberg's reliability and security"? Plaintiffs allege Mr. Walker told Michael Edell that "Weil & Company *could* attest to Kinberg's reliability and security" - - did Weil & Company actually "attest" to Kinberg's reliability and security, and if it did what was said or how was it done? Again, 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.

What security was discussed? Was it the same security plaintiffs eventually foreclosed on? If so, was that a misrepresentation? What "Kinberg entities" was discussed? Was the "nature of the investment" discussed?

In their opposition, plaintiffs suggest Weil & Company provided “information about an investment opportunity,” but that is not what is being alleged. (Opp., p. 7:13-15.) This specific allegation discusses very generally that Mr. Walkertold MichaelEdell about Kinberg and Mr. Walker's own past dealings with Kinberg and his investments - - there is no exchange of information (statistics, numbers, etc.) or reference to an “investment opportunity.” Again, the allegation is not specific as to what information was provided and as to what “investment vehicle” or if it had anything to do with the investment the plaintiff group was approached by Kinberg with almost a year later. Again, as pleaded by plaintiffs, Mr. Walker discussed past investments, past experiences, there were no details or information regarding any future or upcoming “investment opportunities.” This is precisely why specificity of pleading is so important and required as a matter of law - - as pleaded there is absolutely no lucid narrative as to what exactly was said, relied on or actually false.

*No Factual Allegations Regarding Falsity of Statement.* 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). Plaintiffs must “plead facts showing” that these representations were false or untrue. *Wilhelm v. Pray, Price, Williams & Russell* (1986) 186 Cal.App.3d 1324, 1331.

Here, 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.<sup>5</sup> Was it false that Weil & Company “could attest” to Kinberg's reliability or security in late 2006? Was it false that as of 2006, when Mr. Walker purportedly made these broad, sweeping statements, Kinberg's past investments had been reliable? (In fact, plaintiffs admit they did receive a return on their investment, only to reinvest that money - - where is the false statement?) Was it false that as of 2006, Weil & Company clients, and Walker himself, had invested “significant sums of money with Kinberg”? Was it false that Weil & Company performed accounting services for Kinberg?

Simply put, where is the misrepresentation? Where is the fraud?

*No Facts Pleaded as to Causation or 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<sup>th</sup> 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 broad statements of potential “attestation” regarding past dealings without any detail whatsoever - - considering it took Kinberg “several meetings and telephone conversations” (as plaintiffs themselves contend) to explain the investment opportunities he had in mind for plaintiffs in 2007. There are no allegations that the “investment vehicles” Mr. Walker mentioned in 2006 were the same Kinberg approached plaintiffs with in 2007.

Again, this is precisely why specificity in pleading is so critical. There is no factual allegation tying anything Mr. Walker is alleged to have said to the investment opportunity Kinberg ultimately brought to plaintiffs more than a year later. 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 - - Michael Edell was not there to discuss investment advice or investment opportunities, but rather to interview Mr. Walker for something else entirely - - and the timing of those statements, again, made more than a year later.<sup>6</sup>

In opposing demurrer, just as they did in opposing Weil & Company's prior demurrer, plaintiffs 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. 7.) This court did not agree with plaintiffs then and there is no reason that it should agree with plaintiffs now - - 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 fails woefully short of plaintiffs' burden in pleading claims arising in fraud or misrepresentation.

#### ***Allegation of Misrepresentation No. 2***

113. Among other things, Weil & company repeatedly falsely represented to Plaintiffs that they were partners in UNITED MHEQ, even though they had never consented to joining such a partnership.

*Lack of Specificity or Reasonable Reliance.* There is no specificity as to the how, what, when and where required to effectively plead a cause of action for fraud or misrepresentation. Plaintiffs' allegation is vague and unspecific as to exactly how it alleges an actual misrepresentation when there are no facts reflecting actual reliance by any of the plaintiffs since they all allege and concede they knew they were not partners in UNITED MHEQ and had never agreed to such an arrangement. The allegation speaks for itself.

#### ***Allegation of Misrepresentation No. 3***

114. Furthermore, on several occasions (including in writing on April 9, 2011 (Exhibit "F")), Defendant Weil & Company misrepresented to Plaintiffs that their loan to the Kinberg Entities was manifest as an equity investment in Defendant United MHEQ's company.

*Lack of Specificity or Reasonable Reliance.* Again, there is no specificity as to the how, what, when and where required to effectively plead a cause of action for fraud or misrepresentation. Plaintiffs' allegation of representations made over "several occasions" is unspecific and is a clear attempt by plaintiffs to downplay the only true fact alleged - - the receipt of the 2010 K1 tax form in 2011 by Michael Edell (a fact this court has already ruled does not amount to fraud). As with plaintiffs' predecessor complaints, it remains unclear how the plaintiff group could have relied on the K1 tax form to enter into the Kinberg investments, when the tax form was prepared and only received by Michael Edell years after the investments were made and more than a year after the plaintiff group realized that Kinberg's businesses were in trouble and demanded their money back - - a form that plaintiffs have alleged in prior pleadings they knew was false the moment the form was received. Indeed, it is plaintiffs' contention that they lent money to Kinberg (or so it appears) and thus any document that reflected an equity investment in a company they knew nothing about could not possibly have been relied on by any of the plaintiffs, since, again, as they themselves have pleaded in prior pleadings, they understood the true "nature" of their investment with Kinberg. Regardless, whatever the "nature" of the investment, this was not the cause of their loss - - they lost money, because Kinberg began having business problems and because they were not able to recover enough on security and collateral they agreed to accept in lieu of payment in 2010.

#### ***Allegation of Misrepresentation No. 4***

122. Upon information and belief, Weil & Company was knowledgeable fo the true nature of the Plaintiffs' investment, but fraudulently misrepresented the nature of the investment's nature in numerous documents, including those attached hereto as Exhibit "F."

*Lack of Specificity or Reasonable Reliance.* Again, there is no specificity as to the how, what, when and where required to effectively plead a cause of action for fraud or misrepresentation. Plaintiffs' allegation of representations made through

“numerous documents” is unspecific and only references one actual document - - the one and only 2010 K1 tax form received by Michael Edell in 2011 - - no other document is identified, referenced or attached as an exhibit. Again, as this court has already ruled, plaintiffs cannot establish the necessary element of reasonable reliance on a document received by only one of the plaintiffs years after the investment was made and more than a year after the plaintiff group realized that Kinberg's businesses were in trouble and demanded their money back - - a “document” plaintiffs have alleged in prior pleadings they knew was false the moment the form was received. This remains the only fact alleged by plaintiffs with any degree of specificity - - this court has already ruled that fact is not enough to establish a proper cause of action for fraud.

### ***Allegation of Misrepresentation No. 5***

96. Accordingly, as set forth hereinabove, Weil & Company and one or more of the Kinberg Entities misrepresented the nature of Ethel Edell's investment to her agent Michael Edell and refused to return her investment monies to her.

*Lack of Specificity or Reasonable Reliance.* Again, there is no specificity as to the how, what, when and where required to effectively plead a cause of action for fraud or misrepresentation. There is no specificity as to what or how or when “the nature of Ethel Edell's investment” was “misrepresented” to Ethel Edell or anybody else. Indeed, it is unclear how Weil & Company could have misrepresented the “nature” of Ethel Edell's investment, when plaintiffs contend they knew exactly what that investment (a loan) was and how it was to be handled by Kinberg. There are no facts of reasonable or actual reliance on anything said or communicated by Weil & Company on the part of Ethel Edell - - as to anything, much less the “nature” of her investment, whatever that was represented to be.

Moreover, again, as argued on demurrer and not disputed by plaintiffs in their opposition, there are no facts substantiating Michael Edell's agency in connection with plaintiffs' claims for fraud. 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 Ethel Edell or the other two 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 Ethel Edell, an **elderly** woman, or the other two plaintiffs. In fact, plaintiffs' own allegations confirm that Michael Edell met with Mr. Walker, not to discuss investment on behalf of Ethel or the rest of the plaintiff group, but to interview Mr. Walker for a potential accounting engagement with Michael Edell's own business. (SAC, ¶ 37.)

### **III. 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 adequately 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. Plaintiffs concede that the legal authority says what it says but contends that somehow Weil & Company “knew plaintiffs would rely on the information they were providing” - - unfortunately there are no factual allegations in support of this position.

Plaintiffs admit they never hired Weil & Company to do anything, whether it was accounting work or providing advice on investment opportunities. Plaintiffs admit that Mr. Walker's statements, whatever information was provided then, were made in passing during an interview for accounting work on other business and that these statements were made more than a year before Kinberg independently approached them about investing with his businesses. There is no specificity as to what exactly was said by Mr. Walker. Thus, it is difficult to imagine how this exchange or any relating to the K1 tax form, which was specifically prepared for United and not intended to be relied upon by anybody other than possibly the IRS, could possibly create a duty between plaintiffs and Weil & Company whether under the Restatement or the Supreme Court's ruling in *Bily v. Arthur (1992) 3 Cal.4th 370* - - the suggestion is as remote as it is absurd. The argument is conceded as to the Supreme Court's ruling in

*Bily v. Arthur Young* and thus conceded by plaintiffs that as alleged in this case, no duty existed. On this basis as well, each of plaintiffs' causes of action against Weil & Company fail as a matter of law.

#### **IV. PLAINTIFFS' CAUSE OF ACTION FOR ELDER ABUSE FAILS**

As conceded by plaintiffs, [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. [Das v. Bank of America \(2010\) 186 Cal.App.4th 727, 744](#).

#### **V. PLAINTIFFS CONCEDE WAIVER OF THEIR FRAUD AND MISREPRESENTATION CLAIMS**

Again, as discussed in the demurrer, under California law, a party to a contract which, after discovery of a purported 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](#).

In opposing the demurrer, plaintiffs do not dispute this authority. Again, 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, 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.

Based on plaintiffs' own allegations, as has been argued by co-defendants in different ways, plaintiffs' allegations go to Kinberg's failure to meet his obligations under the 2010 arrangement (a simple breach of contract claim). Whatever loss they suffered is tied, not to anything said in 2006 or a tax form prepared by Weil & Company in 2011, but instead tied to plaintiffs' failure to collect on their security, on the collateral they agreed to accept in lieu of their investment money, whether a result of bad due diligence on their part (or that of their so-called agent, Michael Edell) or simply a bad economic turn, turned worse after 2010.

## VI. CONCLUSION

Plaintiffs have pushed their facts as far as they can be legitimately pushed and beyond. For the foregoing reasons, defendant Weil & Company respectfully submit that its demurrer an be sustained without leave to amend.

DATED: July 26, 2012

GARRETT & TULLY, P.C.

Stephen J. Tully

Tomas A. Ortiz

<<signature>>

TOMAS A. ORTIZ

Attorneys for Defendant Weil & Company, LLP

### Footnotes

- 1 Plaintiffs' loss is tied not to the failure to recover a return on their investment with Kinberg, which they admit they did do over the course of years, but rather on their failure to properly "secure" their investment, once Kinberg's business began to fail and they demanded all of their money back. (SAC, ¶ 32.) Plaintiffs admit they received a return on their investment only to then "reinvest" with Kinberg.
- 2 Likewise, plaintiffs do not dispute that their thirteenth cause of action fails to plead a proper claim for breach of implied covenant.
- 3 Plaintiffs' opposition is almost a "note for note" rehashing of their opposition to Weil & Company's demurrer to the first amended complaint - - so much so that plaintiffs include an argument defending their conspiracy claim that was not included in the SAC. Plaintiffs' same old argument that "conclusory" allegations are enough to plead the elements of fraud simply because they argue that they are enough is contrary to the law and contrary to this court's ruling on Weil & Company's two prior demurrers.
- 4 These are not "machinations" invented by Weil & Co, as suggested by plaintiffs, but the law on pleading a cause of action for fraud or negligent misrepresentation - - "every element of the cause of action for fraud must be alleged in full, factually and specifically." *Wilhelm v. Pray, Price, Williams & Russell* (1986) 186 Cal.App.3d 1324, 1331; *Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 216.
- 5 To the extent these statements were attestations of Kinberg's investments, 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.) Moreover, plaintiffs admit they were able to collect on security held by Kinberg - - they were just not able to collect enough. 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.
- 6 In prior pleadings, plaintiffs alleged that they each relied on statements made by Kinberg over the course of "several meetings and telephone conversations" - - there are no facts pleaded as to how or on what specifically reliance by each of the plaintiffs was based. Again, as argued on demurrer and not addressed by plaintiffs in their opposition, Michael Edell's fortunate agency is not enough to establish the necessary link for recovery of fraud as to any of the other individual plaintiffs. (See, Demurrer, p. 7-13.)