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IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA

MANUEL LOPES AND MARIANA
LOPES, et al.,

Plaintiffs,

vs.

GEORGE VIEIRA, et al.,

Defendants.

No. CV-F-06-1243 OWW/SMS

MEMORANDUM DECISION GRANTING
DEFENDANTS GENSKE MULDER LLP
AND DOWNEY BRAND LLP'S
MOTIONS FOR SUMMARY JUDGMENT
AGAINST PLAINTIFF ANTONIO
ESTEVAM (Docs. 113 & 128)

Defendants Genske Mulder & Company ("Genske Mulder") and
Downey Brand LLP ("Downey Brand") respectively move for summary
judgment or summary adjudication against Plaintiff Antonio
Estevam on the Fourth through Eighth Causes of Action in the
Second Amended Complaint ("SAC").

Genske Mulder seeks summary judgment or adjudication:

A. Fourth Cause of Action for securities
fraud in violation of the Securities Exchange
Act of 1934 on the ground that Plaintiff
Estevam did not purchase Valley Gold LLC's

1 securities or any other securities;

2 B. Fifth Cause of Action for violation of
3 California securities law on the ground that
4 Plaintiff Estevam did not purchase Valley
5 Gold LLC's securities or any other
6 securities;

7 C. Sixth Cause of Action for negligence on
8 the grounds that Plaintiff Estevam was not a
9 client of Genske Mulder and Genske Mulder did
10 not owe him a duty of care;

11 D. Seventh Cause of Action for intentional
12 misrepresentation on the grounds that
13 Plaintiff Estevam did not receive or rely on,
14 any material misrepresentation or omission
15 made by Genske Mulder;

16 E. Eighth Cause of Action for negligent
17 misrepresentation on the grounds the
18 Plaintiff Estevam did not receive or rely on,
19 any material misrepresentation made by Genske
20 Mulder.

21 Downey Brand seeks summary judgment or adjudication as to
22 the Fourth and Fifth Causes of Action on the grounds that
23 Plaintiff Estevam did not purchase a security; on the Fourth
24 through Eighth Causes of Action on the grounds that Plaintiff
25 Estevam cannot establish that Downey Brand made an affirmative
26 misrepresentation and owed Plaintiff no duty to disclose; and on
the Fourth through Eighth Causes of Action on the grounds that
Plaintiff Estevam cannot establish reliance or causation.

27 A. GOVERNING STANDARDS.

28 Summary judgment is proper when it is shown that there
29 exists "no genuine issue as to any material fact and that the
30 moving party is entitled to judgment as a matter of law."
31 Fed.R.Civ.P. 56. A fact is "material" if it is relevant to an

1 element of a claim or a defense, the existence of which may
2 affect the outcome of the suit. *T.W. Elec. Serv., Inc. v.*
3 *Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th
4 Cir.1987). Materiality is determined by the substantive law
5 governing a claim or a defense. *Id.* The evidence and all
6 inferences drawn from it must be construed in the light most
7 favorable to the nonmoving party. *Id.*

8 The initial burden in a motion for summary judgment is on
9 the moving party. The moving party satisfies this initial burden
10 by identifying the parts of the materials on file it believes
11 demonstrate an "absence of evidence to support the non-moving
12 party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325
13 (1986). The burden then shifts to the nonmoving party to defeat
14 summary judgment. *T.W. Elec.*, 809 F.2d at 630. The nonmoving
15 party "may not rely on the mere allegations in the pleadings in
16 order to preclude summary judgment," but must set forth by
17 affidavit or other appropriate evidence "specific facts showing
18 there is a genuine issue for trial." *Id.* The nonmoving party
19 may not simply state that it will discredit the moving party's
20 evidence at trial; it must produce at least some "significant
21 probative evidence tending to support the complaint." *Id.* The
22 question to be resolved is not whether the "evidence unmistakably
23 favors one side or the other, but whether a fair-minded jury
24 could return a verdict for the plaintiff on the evidence
25 presented." *United States ex rel. Anderson v. N. Telecom, Inc.*,
26 52 F.3d 810, 815 (9th Cir.1995). This requires more than the

1 "mere existence of a scintilla of evidence in support of the
2 plaintiff's position"; there must be "evidence on which the jury
3 could reasonably find for the plaintiff." *Id.* The more
4 implausible the claim or defense asserted by the nonmoving party,
5 the more persuasive its evidence must be to avoid summary
6 judgment." *Id.* In *Scott v. Harris*, ___ U.S. ___, 127 S.Ct.
7 1769, 1776 (2007), the Supreme Court held:

8 When opposing parties tell different stories,
9 one of which is blatantly contradicted by the
10 record, so that no reasonable jury could
11 believe it, a court should not adopt that
12 version of the facts for purposes of ruling
13 on a motion for summary judgment.

14 As explained in *Nissan Fire & Marine Ins. Co. v. Fritz Companies*,
15 210 F.3d 1099 (9th Cir.2000):

16 The vocabulary used for discussing summary
17 judgments is somewhat abstract. Because
18 either a plaintiff or a defendant can move
19 for summary judgment, we customarily refer to
20 the moving and nonmoving party rather than to
21 plaintiff and defendant. Further, because
22 either plaintiff or defendant can have the
23 ultimate burden of persuasion at trial, we
24 refer to the party with and without the
25 ultimate burden of persuasion at trial rather
26 than to plaintiff and defendant. Finally, we
27 distinguish among the initial burden of
28 production and two kinds of ultimate burdens
29 of persuasion: The initial burden of
30 production refers to the burden of producing
31 evidence, or showing the absence of evidence,
32 on the motion for summary judgment; the
33 ultimate burden of persuasion can refer
34 either to the burden of persuasion on the
35 motion or to the burden of persuasion at
36 trial.

37 A moving party without the ultimate burden of
38 persuasion at trial - usually, but not
39 always, a defendant - has both the initial
40 burden of production and the ultimate burden

1 of persuasion on a motion for summary
2 judgment ... In order to carry its burden of
3 production, the moving party must either
4 produce evidence negating an essential
5 element of the nonmoving party's claim or
6 defense or show that the nonmoving party does
7 not have enough evidence of an essential
8 element to carry its ultimate burden of
9 persuasion at trial ... In order to carry its
10 ultimate burden of persuasion on the motion,
11 the moving party must persuade the court that
12 there is no genuine issue of material fact
13

8 If a moving party fails to carry its initial
9 burden of production, the nonmoving party has
10 no obligation to produce anything, even if
11 the nonmoving party would have the ultimate
12 burden of persuasion at trial ... In such a
13 case, the nonmoving party may defeat the
14 motion for summary judgment without producing
15 anything ... If, however, a moving party
16 carries its burden of production, the
17 nonmoving party must produce evidence to
18 support its claim or defense ... If the
19 nonmoving party fails to produce enough
20 evidence to create a genuine issue of
21 material fact, the moving party wins the
22 motion for summary judgment ... But if the
23 nonmoving party produces enough evidence to
24 create a genuine issue of material fact, the
25 nonmoving party defeats the motion.

17 210 F.3d at 1102-1103.

18 **B. STATEMENT OF UNDISPUTED FACTS.**

19 **1. Genske Mulder**

20 **a. Fourth Cause of Action for Federal Securities**

21 **Fraud.**

22 **GMUDF 1. Plaintiff Estevam did not purchase Valley Gold**
23 **securities.**

24 ***Plaintiff's Response: Undisputed.***

25 **GMUDF 2. Plaintiff Estevam did not receive or read the**
26

1 Valley Gold Offering Memorandum.

2 *Plaintiff's Response: Undisputed.*

3 b. Fifth Cause of Action for State Securities
4 Fraud.

5 GMUDF 3. Plaintiff Estevam did not purchase Valley Gold
6 securities.

7 *Plaintiff's Response: Undisputed.*

8 GMUDF 4. Plaintiff Estevam did not receive or read the
9 Valley Gold Offering Memorandum.

10 *Plaintiff's Response: Undisputed.*

11 c. Sixth Cause of Action for Negligence.

12 GMUDF 5. Plaintiff Estevam did not retain Genske Mulder as
13 his accountant.

14 *Plaintiff's Response: Undisputed.*

15 GMUDF 6. Plaintiff Estevam did not know any of the Genske
16 Mulder personnel in the Central Valley Dairy or Valley Gold
17 engagements.

18 *Plaintiff's Response: Undisputed.*

19 d. Seventh Cause of Action for Intentional
20 Misrepresentation.

21 GMUDF 7. Plaintiff Estevam did not receive or read the
22 Valley Gold Offering Memorandum.

23 *Plaintiff's Response: Undisputed.*

24 GMUDF 8. Plaintiff Estevam did not receive any
25 representations from Genske Mulder.

26 *Plaintiff's Response: Undisputed.*

1 GMUDF 9. Plaintiff Estevam did not receive any documents
2 from Genske Mulder.

3 *Plaintiff's Response: Undisputed.*

4 e. Eighth Cause of Action for Negligent
5 Misrepresentation.

6 GMUDF 10. Plaintiff Estevam did not receive any
7 representations from Genske Mulder.

8 *Plaintiff's Response: Undisputed.*

9 GMUDF 11. Plaintiff Estevam did not receive any documents
10 from Genske Mulder.

11 *Plaintiff's Response: Undisputed.*

12 GMUDF 12. Plaintiff Estevam is not able to recall any
13 statement made by Genske Mulder personnel other than a vague
14 statement that "we [CVD] were doing well and were making money."

15 *Plaintiff's Response: Undisputed.*

16 GMUDF 13: When Plaintiff Estevam was not getting paid for
17 his milk, he called Tim Brasil, the President of CVD, who told
18 him that CVD had not been paid.

19 *Plaintiff's Response: Undisputed.*

20 2. Plaintiff Estevam's Statement of Additional
21 Undisputed Facts.

22 PEUDF A. Plaintiff Estevam was a member of CVD until June
23 or July, 2005.

24 PEUDF B. In 2004, CVD began paying late for milk that
25 Plaintiff Estevam delivered to Valley Gold.

26 PEUDF C. Plaintiff Estevam continued to ship milk to Valley

1 Gold because he believed that the Valley Gold cheese plant was
2 going to be successful.

3 PEUDF D. Plaintiff Estevam's friends at the other dairies
4 were also having financial problems, but they continued to ship
5 their milk to Valley Gold. Friends like Raymond Lopes and Manuel
6 Lopes said that they still believed the cheese plant was going to
7 be successful. Because they believed in the plant and continued
8 to ship their milk to Valley Gold, Plaintiff Estevam did too.

9 PEUDF E. When Raymond Lopes and Manuel Lopes quit CVD and
10 stopped shipping their milk to Valley Gold, Plaintiff Estevam
11 quit too.

12 2. Downey Brand.

13 DBUDF 1. Downey Brand has never represented Central Valley
14 Dairymen, Inc.

15 *Plaintiff's Response:* Disputed. On February 28,
16 2003, Valley Dairymen LLC was formed. Downey Brand represented
17 CVD in creating that entity, which was a subsidiary of CVD. The
18 Declaration of Plaintiffs' counsel Douglas Applegate, avers that
19 an invoice, dated March 13, 2003, attached as Exhibit X,
20 demonstrates that Downey Brand was hired by CVD's longstanding
21 counsel, Augustine & Colaw, to form an entity called Valley
22 Dairymen LLC and that Mr. Applegate's "research indicates that
23 Valley Dairymen, LLC was formed as a wholly owned subsidiary of
24 Central Valley Dairymen."

25 *Downey Brand's Reply:* In contending that Downey
26 Brand represented CVD in creating Valley Dairymen, Plaintiffs

1 rely on an "unauthenticated, inadmissible" Downey Brand bill sent
2 to Valley Dairymen on March 13, 2003 in care of the law firm,
3 Colaw & Augustine. Downey Brand asserts that Mr. Applegate's
4 averment Colaw & Augustine was CVD's longstanding counsel means
5 that CVD paid for these services is constructed out of thin air.
6 Downey Brand argues that Mr. Applegate's assertion that Valley
7 Dairymen was a wholly owned subsidiary of CVD is speculative
8 hearsay. Even if Mr. Applegate's speculation is accepted as
9 fact, Downey Brand asserts that its client would be the entity to
10 be formed, Valley Dairymen, LLC, not CVD. Downey Brand cites
11 California Practice Guide: Professional Responsibility, §§
12 3:107.2 - 107.4, stating that "out-of-state authorities have
13 reasoned that an attorney-client relationship exists between the
14 attorney and the corporation (not with the individuals)
15 'retroactively' from the time the attorney is retained and the
16 corporation is actually formed (by filing incorporation papers,"
17 § 3:107.2, because "[i]f the person who retains the attorney for
18 the purpose of organizing the corporation is considered the
19 'client,' any subsequent representation of the corporation by
20 that lawyer would automatically amount to dual representation,
21 resulting in the lawyer's possible disqualification." § 3:107.3.
22 Downey Brand also cites *Strasbourger Pearson Tulcin Wolff Inc. v.*
23 *Wiz Technology, Inc.*, 69 Cal.App.4th 1399, 1404 (1999), involving
24 an appeal of the trial court's order disqualifying plaintiff's
25 attorney based on the attorney's having represented plaintiff in
26 connection with a stock offering: "[P]ayment of attorney fees

1 alone does not determine an attorney-client relationship; it is
2 merely a factor."

3 On November 4, 2004, CVD paid a \$15,000 retainer to Downey
4 Brand for Downey Brand's work to convert Valley Gold debt into
5 equity.

6 *Downey Brand's Reply:* Plaintiffs' evidence does
7 not create an issue of fact that Downey Brand ever represented
8 CVD. Downey Brand submits a letter dated November 12, 2004 from
9 Jeffrey Koewler of Downey Brand to Tony Cary regarding "retainer
10 for Valley Gold, LLC:"

11 Enclosed please find check number 013378,
12 which you delivered to Downey Brand, in the
13 amount of \$15,000. The check is made out to
14 Downey Brand on a Central Valley Dairymen
15 bank account. As Chris Delfino stated in his
16 voicemail to you on November 12, 2004, we are
17 returning the check to you because our client
18 is Valley Gold, and the matter which you have
19 asked us to assist you involves Valley Gold
20 and Central Valley Dairymen. To avoid any
21 confusion as to who we represent, we cannot
22 accept a check from Central Valley Dairymen.
23 If Valley Gold would like to retain Downey
24 Brand, please have Valley Gold provide us
25 with the retainer check.

19 Downey Brand notes that the accounting report upon which
20 Plaintiffs rely in asserting that Downey Brand was paid \$15,000
21 by CVD for work in creating CVD has the handwritten notation that
22 the check was not cashed.

23 *Court's Ruling:* It is UNDISPUTED that Downey Brand
24 never represented CVD. Plaintiffs' evidence does not suffice to
25
26

1 create a genuine issue of material fact.¹

2 DBUDF 2. Plaintiff Estevam did not invest in Valley
3 Gold.

4 *Plaintiff's Response:* Undisputed as phrased. Over
5 several years, CVD withheld sums from Plaintiff Estevam's milk
6 checks, which were placed into a trust to be used for acquiring a
7 cheese plant. CVD ultimately used that trust money to acquire an
8 ownership interest in Valley Gold in CVD's name. Plaintiff
9 Estevam had a beneficial interest in CVD's ownership.

10 *Court Ruling:* Plaintiff provides no evidentiary
11 support for this response. The fact is UNDISPUTED.

12 DBUDF 3. Plaintiff Estevam did not read any of the
13 documents associated with the Valley Gold offering to investors
14 or documents prepared by Valley Gold's accountants.

15 *Plaintiff's Response:* Undisputed.

16 DBUDF 4. Plaintiff Estevam has never retained Downey Brand
17 to represent him nor has he ever spoken to, or heard anything
18 said by, a Downey Brand attorney.

19 *Plaintiff's Response:* Undisputed.

20 4. Plaintiff's Statement of Undisputed Additional
21 Facts.

22
23 ¹In Downey Brand's statement of undisputed facts in support of
24 its amended motion for summary judgment as to Joseph Lopes as
25 Trustee of the Raymond Lopes Family Trust, Downey Brand asserted
26 the same fact. (Doc. 277-2, DBUDF 1). Plaintiff Joseph Lopes as
Trustee of the Raymond Lopes Family Trust responded "undisputed" in
his response to Downey Brand's statement of undisputed facts.
(Doc. 282).

1 PEUDEF A. Plaintiff Estevam was a member of CVD until June
2 or July, 2005.

3 PEUDEF B. In 2004, CVD began paying late for milk that
4 Plaintiff Estevam delivered to Valley Gold.

5 PEUDEF C. Plaintiff Estevam continued to ship milk to Valley
6 Gold because he believed that the Valley Gold cheese plant was
7 going to be successful.

8 PEUDEF D. Plaintiff Estevam's friends at the other dairies
9 were also having financial problems, but they continued to ship
10 their milk to Valley Gold. Friends like Raymond Lopes and Manuel
11 Lopes said that they still believed the cheese plant was going to
12 be successful. Because they believed in the plant and continued
13 to ship their milk to Valley Gold, Plaintiff Estevam did too.

14 PEUDEF E. When Raymond Lopes and Manuel Lopes quit CVD and
15 stopped shipping their milk to Valley Gold, Plaintiff Estevam
16 quit too.

17 C. Fourth Cause of Action.

18 The Fourth Cause of Action alleges securities fraud in
19 violation of the Securities Exchange Act of 1934.²

20 Defendants move for summary judgment on the ground that
21 Plaintiff Estevam's admission that he did not purchase any Valley
22 Gold security precludes relief as to him on this cause of action.
23 *See Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 735-736

24
25 ²The caption of the Fourth Cause of Action is "Securities
26 Fraud: Securities Act of 1934." However, the allegations of the
Fourth Cause of Action make clear that the cause of action is for
violation of the Securities Exchange Act of 1934 and Rule 10b-5.

1 (1975).

2 Plaintiff Estevam conceded at the hearing that Defendants
3 are entitled to summary adjudication in their favor as to the
4 Fourth Cause of Action.

5 Defendants' motion for summary judgment against Plaintiff
6 Estevam as to the Fourth Cause of Action is GRANTED.

7 D. Fifth Cause of Action.

8 The Fifth Cause of Action alleges a claim for violation of
9 California Corporations Code § 25400(d).

10 Defendants move for summary judgment as to this claim in the
11 Fifth Cause of Action on the ground that Plaintiff Estevam's
12 admission that he did not purchase any Valley Gold security
13 precludes relief as to him on this state securities cause of
14 action. See *Kamen v. Lindly*, 94 Cal.App.4th 197, 206 (2001).

15 Plaintiffs does not respond to this ground for summary
16 judgment against Plaintiff Estevam. Because of Plaintiffs'
17 concession that Defendants are entitled to summary judgment as to
18 the federal securities Fourth Cause of Action, Defendants'
19 motions for summary judgment against Plaintiff Estevam is GRANTED
20 as to the Fifth Cause of Action.

21 E. Sixth Cause of Action.

22 The Sixth Cause of Action is for negligence. "The elements
23 of a cause of action for negligence are (1) a legal duty to use
24 reasonable care, (2) the breach of that duty, and (3) proximate
25 [or legal] cause between the breach and (4) the plaintiff's
26 injury." *Mendoza v. City of Los Angeles*, 66 Cal.App.4th 1333,

1 1339 (1998). "The existence of a legal duty to use reasonable
2 care in a particular factual situation is a question of law for
3 the court to decide." *Vasquez v. Residential Investments, Inc.*,
4 118 Cal.App.4th 269, 278 (2004).

5 1. GENSKE MULDER.

6 Genske Mulder moves for summary judgment on the ground that
7 Plaintiff Estevam cannot establish that Genske Mulder owed
8 Plaintiff Estevam a duty of care.

9 In *Bily v. Arthur Young & Co.*, 3 Cal.4th 370 (1992), the
10 California Supreme Court held that an accounting firm can be held
11 liable for general professional negligence in conducting an audit
12 of financial statements only to the person or entity contracting
13 for the accountant's services, and, in that case, the accounting
14 firm's sole client was the company.³ The Supreme Court stated:

15 [W]e hold that an auditor's liability for
16 general negligence in the conduct of an audit
17 of its client financial statements is
18 confined to the client, i.e., the person who
contracts for or engages the audit services.
Other persons may not recover on a pure
negligence theory.

19 3 Cal.4th at 406. The Supreme Court noted, however:

20 In theory, there is an additional class of
21 persons who may be the practical and legal
22 equivalent of 'clients.' It is possible the
23 audit engagement contract might expressly
24 identify a particular third party or parties
so as to make them express third party
beneficiaries of the contract. Third party

25 ³The California Supreme Court further held that an accountant
26 may be held liable for negligent misrepresentation to third parties
who are known to the accountant and for whose benefit the audit
report was rendered.

1 beneficiaries may under appropriate
2 circumstances possess the rights of parties
3 to the contract ... This case presents no
4 third party beneficiary issue. Arthur Young
5 was engaged by the company to provide audit
6 reporting to the company. No third party is
7 identified in the engagement contract.
8 Therefore, we have no occasion to decide
9 whether and under what circumstances express
10 third party beneficiaries of audit engagement
11 contracts may recover as 'clients' under our
12 holding.

13 *Id.* at 406 n.16.

14 Because it is undisputed that Plaintiff Estevam never
15 retained Genske Mulder as his accountant or obtained professional
16 services from Genske Mulder and, Genske Mulder asserts, there is
17 no evidence that Genske Mulder is legally responsible for CVD's
18 failure to pay Plaintiff Estevam for his milk, Genske Mulder
19 contends that it is entitled to summary judgment as to the Sixth
20 Cause of Action.

21 Plaintiff Estevam responds that the fact he was not a client
22 of Genske Mulder does not compel summary judgment in favor of
23 Genske Mulder: "The law is not, and never has been, that rigid."

24 Plaintiff Estevam cites no case authority for this
25 proposition. However, in Plaintiffs' opposition to the motion to
26 dismiss the First Amended Complaint, Plaintiff Estevam cited
Murphy v. BDO Seidman, LLP, 113 Cal.App.4th 687 (2003), as
authority that liability for negligence does not depend on a
contractual or professional relationship.

In *Murphy*, scores of stockholders filed an amended complaint
alleging negligent and intentional misrepresentation against two

1 accounting firms for issuing financial statements overstating the
2 value of two corporations in the process of merging upon which
3 the stockholders relied in approving the merger, buying stock in
4 one or both of the corporations. Following the merger, the
5 corporation went bankrupt causing the stockholders to lose their
6 investments. The trial court sustained the accounting firms'
7 demurrers without leave to amend. On appeal, the accounting
8 firms argued that their liability for the inaccuracies in their
9 financial statements was only to their clients, the two
10 corporations, and therefore no duty of care was owed to third
11 parties. The Court of Appeal disagreed:

12 *Bily* imposes on respondents a duty of care to
13 more than just their clients. Respondents
14 owed a duty to anyone whom they (1) should
15 have reasonably foreseen would rely on their
16 intentional misrepresentations, or (2) knew
17 with substantial certainty would rely on
18 their negligent misrepresentations. (*Bily*,
19 *supra*, 3 Cal.4th at pp.413-415.) The
20 complaint alleges respondents knew the
21 proposed merger of WIN and Struthers would
22 induce investors in Struthers to rely on
23 financial statements about WIN in
24 anticipation of the two companies becoming
25 one. In addition, the complaint alleges
26 respondents knew Struthers investors would
rely on WIN's financial statements in
deciding whether to approve the merger
itself. The complaint therefore alleges a
duty from respondents to Struthers'
shareholders, making respondents liable to
those shareholders for their
misrepresentation.

Plaintiff Estevam also cited *Cabanas v. Gloodt Associates*,
942 F.Supp. 1295, 1308-1309 (E.D.Cal.1996), *aff'd*, 141 F.3d 1174
(9th Cir.1998), in their opposition to the motion to dismiss the

1 First Amended Complaint. At issue in *Cabanas* was whether an
2 appraiser, when conducting an appraisal of a going concern, owes
3 a duty to the manager or owner of the property not to negligently
4 harm its interests. The District Court noted that the "general
5 rule against recovery for negligent interference with contract or
6 prospective economic advantage is subject to one exception: where
7 there is a 'special relationship' between the parties." *Id.* at
8 1308. The District Court stated:

9 Whether such a special relationship exists is
10 determined by examining six factors:

11 (1) the extent to which the
12 transaction was intended to affect
13 the plaintiff;

14 (2) the foreseeability of harm to
15 the plaintiff;

16 (3) the degree of certainty that
17 the plaintiff suffered injury;

18 (4) the closeness of the connection
19 between the defendant's conduct and
20 the injury suffered;

21 (5) the moral blame attached to the
22 defendant's conduct; and

23 (6) the policy of preventing future
24 harm.

25 *Id.*

26 Here, there is no evidence that Plaintiff Estevam relied on
any representations made by Genske Mulder; rather, the evidence
is that Plaintiff Estevam relied on the opinions of his friends,
such as Plaintiffs Raymond Lopes and Manuel Lopes, that the
cheese plant was going to be successful, in continuing to ship

1 milk to CVD for Valley Gold. There is no evidence as to the
2 basis of his friends' opinions or what they told Plaintiff
3 Estevam. Nor is there evidence the accountants had notice or
4 foresaw that Valley Gold investors would provide opinions to
5 their friends who were also milk suppliers to CVD.

6 Plaintiff Estevam cites *Lovejoy v. AT&T Corp.*, 92
7 Cal.App.4th 85 (2001), which addresses the concepts of indirect
8 misrepresentation and indirect reliance:

9 It is true that California courts recognize
10 the principle of indirect misrepresentation,
11 under which a knowingly false statement is no
12 less actionable because it was made to an
13 intermediary who then conveyed it to the
14 party ultimately injured ... However, this
15 doctrine requires that the defendant intend
16 or has reason to expect that it will be
17 '*repeated and acted upon by the plaintiff.*'

18 ...

19 ... Under the principle of indirect reliance,
20 a fraudulent misrepresentation is actionable
21 if it was communicated to an agent of the
22 plaintiff and was acted upon by the agent to
23 the plaintiff's damage. A classic example of
24 indirect reliance would be a drug
25 manufacturer's misrepresentation to
26 physicians about the safety of its drug. A
27 patient injured by the drug is permitted to
28 sue the manufacturer for fraud without proof
29 that his doctor repeated the falsehood to
30 him, under the theory that the doctor was
31 acting as the plaintiff's agent.

32 92 Cal.App.4th at 94. Plaintiff Estevam argues that Genske
33 Mulder may be liable under the theory of indirect
34 misrepresentation and indirect reliance. However, Plaintiff
35 Estevam presents no evidence that Genske Mulder intended or had
36 reason to expect that any misrepresentation concerning Valley

1 Gold would be repeated and acted upon by a person who did not
2 invest in Valley Gold and presents no evidence that Plaintiff
3 Estevam's friends such as Manuel Lopes was acting as Plaintiff
4 Estevam's agent.

5 Plaintiff Estevam asserts that Genske Mulder is subject to
6 negligence liability under the derivative claim asserted on
7 behalf of Valley Gold.

8 Plaintiff Estevam concedes that he did not purchase a Valley
9 Gold security, i.e., that he was not a shareholder of Valley
10 Gold. A derivative action must be brought by the shareholders on
11 behalf of the corporation. See California Corporations Code §
12 800(b); Rule 23.1, Federal Rules of Civil Procedure. Therefore,
13 he cannot base his claim of negligence against Genske Mulder on
14 derivative liability.

15 Plaintiff Estevam further argues that the "whole range of
16 facts is much more damaging" than Genske Mulder will admit:

17 As the cheese plant faltered and lost money
18 in the first six months, Paul Anema from
19 Genske Mulder prepared a chart for a planned
20 meeting showing that Valley Gold was selling
21 its cheese at about half the established
22 market rate. Mr. Vieira objected, and Mr.
23 Anema complied, and he hid the chart from the
24 light of day. Genske Mulder every month
25 reconciled CVDs [sic] accounts and processed
26 its bills, and saw every month the bills for
27 Mr. Vieira's criminal attorneys. Those bills
28 leave no doubt that Mr. Vieira was actively
29 negotiating a plea deal, was planning on
30 going to prison, and was guilty of securities
31 fraud in the operation of a cheese plant in
32 Manteca, California. (See Plaintiffs'
33 Exhibits N through V.).

None of these representations were made by Genske Mulder to

1 Plaintiff Estevam. The evidence is undisputed that Plaintiff
2 Estevam never received or read the Valley Gold Offering
3 Memorandum, that he did not receive any documents from Genske
4 Mulder and did not receive any representations from Genske
5 Mulder.

6 Genske Mulder's motion for summary judgment against
7 Plaintiff Estevam as to the Sixth Cause of Action is GRANTED.

8 2. Downey Brand.

9 Downey Brand moves for summary judgment as to the Sixth
10 Cause of Action on the grounds that Plaintiff Estevam cannot
11 establish an affirmative misrepresentation made by Downey Brand
12 to Plaintiff Estevam and that Downey Brand owed no duty to
13 disclose to Plaintiff Estevam.

14 Downey Brand asserts that Plaintiff Estevam cannot point to
15 an affirmative misstatement made by Downey Brand to Plaintiff
16 Estevam. Downey Brand quotes *Anixter v. Home-Stake Production*
17 *Co.*, 77 F.3d 1215, 1225 (10th Cir.1996), a case addressing a
18 primary liability claim under § 10(b): "Reliance only on
19 representations made by others cannot itself form the basis of
20 liability." "[F]or a cause of action for negligent
21 misrepresentation, clearly a representation is an essential
22 element."

23 Plaintiff Estevam cites *Lovejoy v. AT&T Corp.*, *supra*, 92
24 Cal.App.4th at 94, addressing the concepts of indirect
25 misrepresentation and indirect reliance. Plaintiff Estevam
26 argues that Downey Brand may be liable under the theory of

1 indirect misrepresentation and indirect reliance. However,
2 Plaintiff Estevam presents no evidence that Downey Brand intended
3 or had reason to expect that any misrepresentation concerning
4 Valley Gold would be repeated and acted upon by a person who did
5 not invest in Valley Gold and presents no evidence that Plaintiff
6 Estevam's friends such as Manuel Lopes were acting as Plaintiff
7 Estevam's agent.

8 Downey Brand also moves for summary judgment on the ground
9 that it did not have a duty to disclose running to Plaintiff
10 Estevam.

11 As explained in *Fox v. Pollack*, 181 Cal.App.3d 954, 960
12 (1986):

13 With certain exceptions, an attorney has no
14 obligation to a nonclient for the
15 consequences of professional negligence -
16 this is, the attorney is not burdened with
17 any duty toward nonclients merely because of
18 his or her status as an attorney. The
19 existence of such a duty is a question of law
20 dependent upon 'a judicial weighing of the
21 policy considerations for and against the
22 imposition of liability under the
23 circumstances ...' ... The imposition of a
24 duty of professional care toward nonclients
25 has generally been confined to those
26 situations wherein the nonclient was an
intended beneficiary of that attorney's
services, or where it was reasonably
foreseeable that negligent service or advice
to or on behalf of the client would cause
harm to others. '[T]he determination whether
in a specific case the [attorney] will be
held liable to a third person not in privity
is a matter of policy and involves the
balancing of various factors, among which are
the extent to which the transaction was
intended to affect the plaintiff, the
foreseeability of the harm to him, the degree
of certainty that the plaintiff suffered

1 injury, the closeness of the connection
2 between the [attorney's] conduct and the
3 injury, and the policy of preventing future
4 harm ...'....

5 Downey Brand notes that Plaintiff Estevam concedes he was
6 not a client of Downey Brand, but pleads that Downey Brand
7 represented CVD and Valley Gold. Downey Brand cites *La Jolla
8 Cove Motel and Hotel Apartments, Inc. v. Superior Court*, 121
9 Cal.App.4th 773, 784 (2004):

10 In representing a corporation, an attorney's
11 client is the *corporate entity*, not
12 individual shareholders or directors, and the
13 individual shareholders or directors cannot
14 presume that corporate counsel is protecting
15 their interests.

16 Rule 3-600(E), State Bar Rules of Professional Conduct, provides:

17 A member representing an organization may
18 also represent any of its ... members,
19 shareholders, or other constituents, subject
20 to the provisions of rule 3-310. If the
21 organization's consent to the dual
22 representation is required by rule 3-310, the
23 consent shall be given by an appropriate
24 constituent of the organization other than
25 the individual or constituent who is to be
26 represented, or by the shareholder(s) or
organization members.

Downey Brand asserts that Plaintiff Estevam concedes there was no
agreement by either CVD or Valley Gold that Downey Brand
represent Plaintiff Estevam.

Downey Brand asserts that it did not represent CVD.
Plaintiff responds that Downey Brand did not "exit the scene"
after the Offering:

Rather, on November 4, 2005, Downey Brand
accepted a \$15,000 retainer paid by CVD which
was then owed \$30 million in unpaid milk, and

1 it then used that retainer to prepare an
2 agreement to try to cram down the conversions
3 of milk debt for equity, despite the lack of
4 necessary consensus or corporate formalities.

5 However, the evidence is that Downey Brand was not paid by
6 CVD and that the \$15,000 check was returned by Downey Brand to
7 CVD uncashed because Downey Brand's client was Valley Gold, not
8 CVD. Plaintiff Estevam presents no contrary evidence.

9 Downey Brand further argues that, even if it did represent
10 CVD, a cooperative corporation is distinct from its members,
11 citing *Schuler v. Meschke*, 435 N.W.2d 156, 162 (Minn.App.1989):

12 An incorporated cooperative is a legal
13 entity, separate and apart from its members.
14 18 Am.Jur.2d *Cooperative Associations*, § 3,
15 page 263. North Dakota law governing
16 cooperatives recognizes a distinction between
17 a cooperative and its members ... Minnesota
18 has similar laws.

19 Although Downey Brand represented Valley Gold, no duty to
20 Plaintiff Estevam arises from this fact, Downey Brand contends,
21 because Plaintiff Estevam did not purchase any Valley Gold
22 security.

23 Downey Brand's motion for summary judgment against Plaintiff
24 Estevam as to the Sixth Cause of Action is GRANTED.

25 F. Seventh Cause of Action.

26 The Seventh Cause of Action is for intentional
27 misrepresentation. "The necessary elements of fraud are: (1)
28 misrepresentation (false representation, concealment, or
29 nondisclosure); (2) knowledge of falsity (scienter); (3) intent
30 to defraud (i.e., to induce reliance); (4) justifiable reliance;

1 and (5) resulting damage.' " *Alliance Mortgage Co. v. Rothwell*,,
2 10 Cal.4th 1226, 1239 (1995).

3 1. Genske Mulder.

4 Genske Mulder argues that Plaintiff Estevam is unable to
5 establish that Genske Mulder made any misrepresentations to
6 Plaintiff Estevam or that he justifiably relied on any false
7 representation, concealment or nondisclosure. Genske Mulder
8 notes that it is undisputed that Plaintiff Estevam has never
9 spoken with anyone at Genske Mulder, has never received any
10 documents from Genske Mulder, is unable to identify any Genske
11 Mulder personnel involved in the CVD/Valley Gold professional
12 relationship, and is unable to state any material
13 misrepresentation or omission made by Genske Mulder.

14 Plaintiff again relies on the doctrine of indirect
15 representation. See *discussion supra*. For the reasons stated
16 above, there is not factual or legal basis to support this claim.
17 Genske Mulder's motion for summary judgment as to the Seventh
18 Cause of Action is GRANTED.

19 2. Downey Brand.

20 Downey Brand argues that summary judgment is appropriate as
21 to the Seventh Cause of Action because there is no evidence that
22 Downey Brand made any misrepresentation to the Plaintiff. The
23 Plaintiff never read the Valley Gold Offering Memorandum or any
24 other document prepared by Downey Brand. Downey Brand was not
25 involved in the Milk for Equity transaction. Plaintiff's only
26 evidence to the contrary is the assertion Plaintiff relied on the

1 opinion of friends, two of whom invested in Valley Gold, in
2 deciding to continue to ship milk to Valley Gold. However, for
3 the reasons stated above, this evidence is insufficient to create
4 a genuine issue of material fact as to the Seventh Cause of
5 Action. Downey Brand's motion for summary judgment as to the
6 Seventh Cause of Action is GRANTED.

7 G. Eighth Cause of Action.

8 The Eighth Cause of Action is for negligent
9 misrepresentation, the elements of which are (1) a
10 misrepresentation of a past or existing material fact, (2)
11 without reasonable grounds for believing it to be true, (3) with
12 intent to induce another's reliance on the fact misrepresented,
13 (4) ignorance of the truth and justifiable reliance thereon by
14 the party to whom the misrepresentation was directed, and (5)
15 damages. *Fox v. Pollack*, 181 Cal.App.3d 954, 962 (1986).

16 1. Genske Mulder.

17 Genske Mulder moves for summary judgment on the ground that
18 Genske Mulder made no representations to the Plaintiff.

19 The tort of negligent misrepresentation requires a positive
20 assertion; an implied assertion or misrepresentation by omission
21 is not enough. *Diediker v. Peelle Financial Corp.*, 60
22 Cal.App.4th 288, 297-298 (1997). In *Byrum v. Brand*, 219
23 Cal.App.3d 926, 942 (1990), the Court of Appeals held that a
24 financial advisor's failure to disclose material facts concerning
25 a land investment did not constitute negligent misrepresentation.

26 Because Genske Mulder made no representations Plaintiff

1 Estevam, Genske Mulder's motion for summary judgment as to the
2 Eighth Cause of Action is GRANTED.

3 2. Downey Brand.

4 Downey Brand moves for summary judgment as to the Eighth
5 Cause of Action on the ground that Downey Brand made no
6 representations to Plaintiff Estevam.

7 Plaintiff never read the Valley Gold Offering Memorandum or
8 any other document prepared by Downey Brand. Downey Brand was
9 not involved in the Milk for Equity transaction. Plaintiff's
10 only evidence to the contrary is the assertion that Plaintiff
11 relied on the opinion of friends, two of whom invested in Valley
12 Gold in deciding to continue to ship milk to Valley Gold.
13 However, for the reasons stated above, this evidence is
14 insufficient to create a genuine issue of material fact as to the
15 Eighth Cause of Action. Downey Brand's motion for summary
16 judgment as to the Eighth Cause of Action is GRANTED.

17 CONCLUSION

18 For the reasons stated:

19 1. Downey Brand and Genske Mulder's motions for summary
20 judgment against Plaintiff Antonio Estevam on the Fourth through
21 Eighth Causes of Action in the Second Amended Complaint ("SAC")
22 are GRANTED;

23 2. Counsel for Defendants shall prepare and lodge a form of
24 order consistent with this Memorandum Decision within five (5)
25 court days following service of this Memorandum Decision.

26 ///

1 IT IS SO ORDERED.

2 **Dated: September 27, 2010**

/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE

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