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

MANUAL LOPES, et al.,)	No. CV-F-06-1243 OWW/SMS
)	
)	MEMORANDUM DECISION GRANTING
Plaintiffs,)	DEFENDANTS DOWNEY BRAND AND
)	GENSKE MULDER'S MOTIONS FOR
vs.)	SUMMARY JUDGMENT AGAINST
)	PLAINTIFF MARIA MACHADO AS
)	TRUSTEE OF THE MACHADO
GEORGE VIEIRA, et al.,)	FAMILY TRUST (Docs. 245 &
)	246)
)	
Defendants.)	
)	
)	

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

Downey Brand seeks summary judgment or adjudication as to the Fourth and Fifth Causes of Action on the ground that Plaintiff's predecessor in interest, Alvaro Machado ("the Decedent"), did not purchase a security; as to the Fourth through

1 Eighth Causes of Action on the grounds that Plaintiff cannot
2 establish that Downey Brand made an affirmative misrepresentation
3 to the Decedent and that Downey Brand owed no duty to disclose to
4 the Decedent; and on the Fourth through Eighth Causes of Action
5 on the ground that Plaintiff cannot establish reliance or
6 causation.

7 Genske Mulder seeks summary judgment or adjudication:

8 A. Fourth Cause of Action for securities
9 fraud in violation of the Securities Act of
10 1934 on the ground that Plaintiff Machado did
11 not purchase Valley Gold LLC's securities or
12 any other securities;

13 B. Fifth Cause of Action for violation of
14 California securities law on the ground that
15 Plaintiff Machado did not purchase Valley
16 Gold LLC's securities or any other
17 securities;

18 C. Sixth Cause of Action for negligence on
19 the grounds that Plaintiff Machado was not a
20 client of Genske Mulder and Genske Mulder did
21 not owe him a duty of care;

22 D. Seventh Cause of Action for intentional
23 misrepresentation on the grounds that
24 Plaintiff Machado did not receive or rely on,
25 any material misrepresentation or omission
26 made by Genske Mulder;

E. Eighth Cause of Action for negligent
misrepresentation on the grounds the
Plaintiff Machado did not receive or rely on,
any material misrepresentation made by Genske
Mulder.

A. GOVERNING STANDARDS.

Summary judgment is proper when it is shown that there
exists "no genuine issue as to any material fact and that the
moving party is entitled to judgment as a matter of law."

1 Fed.R.Civ.P. 56. A fact is "material" if it is relevant to an
2 element of a claim or a defense, the existence of which may
3 affect the outcome of the suit. *T.W. Elec. Serv., Inc. v.*
4 *Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th
5 Cir.1987). Materiality is determined by the substantive law
6 governing a claim or a defense. *Id.* The evidence and all
7 inferences drawn from it must be construed in the light most
8 favorable to the nonmoving party. *Id.*

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

1 52 F.3d 810, 815 (9th Cir.1995). This requires more than the
2 "mere existence of a scintilla of evidence in support of the
3 plaintiff's position"; there must be "evidence on which the jury
4 could reasonably find for the plaintiff." *Id.* The more
5 implausible the claim or defense asserted by the nonmoving party,
6 the more persuasive its evidence must be to avoid summary
7 judgment." *Id.* In *Scott v. Harris*, ___ U.S. ___, 127 S.Ct.
8 1769, 1776 (2007), the Supreme Court held:

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

15 As explained in *Nissan Fire & Marine Ins. Co. v. Fritz Companies*,
16 210 F.3d 1099 (9th Cir.2000):

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

38 A moving party without the ultimate burden of
39 persuasion at trial - usually, but not

1 always, a defendant - has both the initial
2 burden of production and the ultimate burden
3 of persuasion on a motion for summary
4 judgment ... In order to carry its burden of
5 production, the moving party must either
6 produce evidence negating an essential
7 element of the nonmoving party's claim or
8 defense or show that the nonmoving party does
9 not have enough evidence of an essential
10 element to carry its ultimate burden of
11 persuasion at trial ... In order to carry its
12 ultimate burden of persuasion on the motion,
13 the moving party must persuade the court that
14 there is no genuine issue of material fact
15

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

210 F.3d at 1102-1103.

19 B. STATEMENT OF UNDISPUTED FACTS.

20 1. Downey Brand.

21 DBUFD 1. Downey Brand has never represented Central Valley
22 Dairymen, Inc.

23 *Plaintiff's Response:* Although Plaintiff did not
24 respond specifically to this fact, in responses by other
25 Plaintiffs to Downey Brand's motions for summary judgment,
26

1 Plaintiffs disputed this fact, asserting that, on February 28,
2 2003, Valley Dairymen LLC was formed. Downey Brand represented
3 CVD in creating that entity, which was a subsidiary of CVD. The
4 Declaration of Plaintiffs' counsel Douglas Applegate, avers that
5 an invoice, dated March 13, 2003, attached as Exhibit X,
6 demonstrates that Downey Brand was hired by CVD's longstanding
7 counsel, Augustine & Colaw, to form an entity called Valley
8 Dairymen LLC and that Mr. Applegate's "research indicates that
9 Valley Dairymen, LLC was formed as a wholly owned subsidiary of
10 Central Valley Dairymen."

11 *Downey Brand's Reply:* In contending that Downey
12 Brand represented CVD in creating Valley Dairymen, Plaintiffs
13 rely on an "unauthenticated, inadmissible" Downey Brand bill sent
14 to Valley Dairymen on March 13, 2003 in care of the law firm,
15 Colaw & Augustine. Downey Brand asserts that Mr. Applegate's
16 averment Colaw & Augustine was CVD's longstanding counsel means
17 that CVD paid for these services is constructed out of thin air.
18 Downey Brand argues that Mr. Applegate's assertion that Valley
19 Dairymen was a wholly owned subsidiary of CVD is speculative
20 hearsay. Even if Mr. Applegate's speculation is accepted as
21 fact, Downey Brand asserts that its client was the entity to be
22 formed, Valley Dairymen, LLC, not CVD. Downey Brand cites
23 California Practice Guide: Professional Responsibility, §§
24 3:107.2 - 107.4, stating that "out-of-state authorities have
25 reasoned that an attorney-client relationship exists between the
26 attorney and the corporation (not with the individuals)

1 'retroactively' from the time the attorney is retained and the
2 corporation is actually formed (by filing incorporation papers,"
3 § 3:107.2, because "[i]f the person who retains the attorney for
4 the purpose of organizing the corporation is considered the
5 'client,' any subsequent representation of the corporation by
6 that lawyer would automatically amount to dual representation,
7 resulting in the lawyer's possible disqualification." § 3:107.3.
8 Downey Brand also cites *Strasbourg Pearson Tulcin Wolff Inc. v.*
9 *Wiz Technology, Inc.*, 69 Cal.App.4th 1399, 1404 (1999), involving
10 an appeal of the trial court's order disqualifying plaintiff's
11 attorney based on the attorney's having represented plaintiff in
12 connection with a stock offering: "[P]ayment of attorney fees
13 alone does not determine an attorney-client relationship; it is
14 merely a factor."

15 Plaintiffs also asserted that, on November 4, 2004, CVD paid
16 a \$15,000 retainer to Downey Brand for Downey Brand's work to
17 convert Valley Gold debt into equity.

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

23 Enclosed please find check number 013378,
24 which you delivered to Downey Brand, in the
25 amount of \$15,000. The check is made out to
26 Downey Brand on a Central Valley Dairymen
bank account. As Chris Delfino stated in his
voicemail to you on November 12, 2004, we are
returning the check to you because our client

1 is Valley Gold, and the matter which you have
2 asked us to assist you involves Valley Gold
3 and Central Valley Dairymen. To avoid any
4 confusion as to who we represent, we cannot
5 accept a check from Central Valley Dairymen.
6 If Valley Gold would like to retain Downey
7 Brand, please have Valley Gold provide us
8 with the retainer check.

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

13 *Court's Ruling:* It is UNDISPUTED that Downey Brand
14 never represented CVD. Plaintiffs' evidence does not create a
15 genuine issue of material fact.¹

16 DBUDF 2. The Decedent did not invest in Valley Gold LLC.

17 *Plaintiff's Response:* Undisputed as phrased. Over
18 several years, CVD withheld sums from the Machado dairy's milk
19 checks, which were placed in a trust to be used for acquiring a
20 cheese plant. CVD ultimately used that trust money to acquire an
21 ownership interest in Valley Gold in CVD's name. The Decedent
22 thus had a beneficial interest in CVD's ownership.

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

25 DBUDF 3. The Decedent did not read any of the documents

26 ¹In Downey Brand's statement of undisputed facts in support of
its amended motion for summary judgment as to Joseph Lopes as
Trustee of the Raymond Lopes Family Trust, Downey Brand asserted
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 associated with the Valley Gold offering to investors or
2 documents prepared by Valley Gold's accountants.

3 *Plaintiff's Response: Undisputed.*

4 DBUFD 4: The Decedent has never retained Downey Brand to
5 represent him nor has he ever spoken to, or heard anything said
6 by, a Downey Brand attorney.

7 *Plaintiff's Response: Undisputed.*

8 2. Genske Mulder.

9 a. Fourth Cause of Action for Federal Securities
10 Fraud.

11 GMUFD 1. The Decedent did not purchase Valley Gold
12 securities.

13 *Plaintiff's Response: Undisputed.*

14 GMUFD 2. The Decedent did not receive or read the Valley
15 Gold Offering Memorandum.

16 *Plaintiff's Response: Undisputed.*

17 b. Fifth Cause of Action for State Securities
18 Fraud.

19 GMUFD 3. The Decedent did not purchase Valley Gold
20 securities.

21 *Plaintiff's Response: Undisputed.*

22 GMUFD 4. The Decedent did not receive or read the Valley
23 Gold Offering Memorandum.

24 *Plaintiff's Response: Undisputed.*

25 c. Sixth Cause of Action for Negligence.

26 GMUFD 5. The Decedent was not a client of Genske Mulder.

1 *Plaintiff's Response: Undisputed.*

2 GMUDF 6. The Decedent's claim of duty is merely because he
3 was a member of Central Valley Dairymen.

4 *Plaintiff's Response: Not supported by the*
5 *evidence cited by Genske Mulder.*

6 *Court Ruling: Genske Mulder relies on the*
7 *Decedent's response to Genske Mulder's Interrogatory No. 6, Set*
8 *One:*

9 Interrogatory No. 6. State the dates during
10 which YOU engaged Genske-Mulder to provide
11 YOU 'accounting, and consulting, management
12 advisory and investment services' as
13 described in paragraph 38 of the [SAC].

14 Response to Interrogatory No. 6

15 When I became a member of CVD cooperative.
16 Given that Plaintiff concedes that he was never a client of
17 Genske Mulder, this fact is UNDISPUTED.

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

20 GMUDF 7. The Decedent did not receive any representation
21 made by Genske Mulder, but received representations by Central
22 Valley Dairymen to continue to supply Valley Gold with milk
23 despite non-payment.

24 *Plaintiff's Response: Undisputed.*

25 GMUDF 8. The Decedent could not identify any Genske Mulder
26 personnel who were involved with CVD or Valley Gold.

Plaintiff's Response: Undisputed.

 GMUDF 9. The Decedent did not receive any documents from

1 Genske Mulder.

2 *Plaintiff's Response: Undisputed.*

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

5 GMUDF 10. The Decedent did not receive any representations
6 from Genske Mulder.

7 *Plaintiff's Response: Undisputed.*

8 GMUDF 11. The Decedent's only claim is for omissions.

9 *Plaintiff's Response: Disputed and not supported*
10 *by the evidence cited by Genske Mulder.*

11 *Court Ruling: Genske Mulder relies on the*
12 *Decedent's responses to Genske Mulder's Interrogatories Nos. 11-*
13 *15, Set One:*

14 Interrogatory No. 11.

15 State all facts on which YOU allege that
16 Genske-Mulder intentionally made
17 misrepresentations to YOU or intentionally
18 withheld material information from YOU in
19 face of a duty of disclosure as alleged in
20 paragraph 158 of the SAC.

21 Response to Interrogatory No. 11.

22 We were never informed by GM of any CVD
23 investment in VG. We were never informed
24 about the nature of George Vieira's criminal
25 involvement with Supreme Specialties. We
26 were not informed of George Vieira's use of
CVD funds for his own purposes (for example,
to pay his attorneys). At all stages, GM
acted to protect George Vieira.

Interrogatory No. 12.

State all facts on which YOU allege that
Genske-Mulder intended to cause damage to
YOU, and intended to obtain benefits for

1 itself at YOUR expense as alleged in
2 paragraph 165 of the SAC.

3 Response to Interrogatory No. 12.

4 See response to interrogatory eleven.

5 Interrogatory No. 13.

6 State all facts on which YOU allege that acts
7 of Genske-Mulder constitute malice,
8 oppression, and/or fraud as alleged in
9 paragraph 165 of the SAC.

10 Response to Interrogatory No. 13.

11 I would have been given information and
12 choices about my 'VG investments' had GM not
13 been trying to hide something.

14 Interrogatory No. 14.

15 State all facts known by Genske Mulder to be
16 false, or which were withheld but that Genske
17 had a duty to disclose, as alleged in
18 paragraph 169 of the SAC.

19 Response to Interrogatory No. 14.

20 (1) All information regarding CVD investment
21 in VG

22 (2) GM's role in transactions and their
23 relationship with George

24 Interrogatory No. 15.

25 State all the facts by which Genske Mulder
26 knew the 'matters they misrepresented were
27 false' and that the 'matters they withheld
28 was [sic] material information that they had
29 a duty to disclose' as alleged in paragraph
30 169 of the SAC.

31 Response to Interrogatory No. 15.

32 I feel that there are two ways to look at the
33 situation. Either (1) GM lied about being
34 experts in the dairy/agribusiness accounting
35 consulting field and the statements, reports
36 and opinions that they provided were terrible

1 guesses; or (2) GM knew what they were doing
2 and instead of providing us with the actual
3 facts, lied, withheld or misrepresented those
4 facts in order to take our money.

5 These discovery responses establish that the Decedent's claim for
6 negligent misrepresentation is based on the alleged omissions by
7 Genske Mulder described in the Decedent's response to
8 Interrogatory No. 11. UNDISPUTED.

9 3. Plaintiff's Statement of Additional Undisputed
10 Facts.

11 PUDF A. The Decedent was a member of CVD until June or July
12 of 2005.

13 PUDF B. In 2004, CVD began paying late for milk that the
14 Decedent delivered to Valley Gold.

15 PUDF C. The Decedent continued to ship milk to Valley Gold
16 because he believed that the Valley Gold cheese plant was going
17 to be successful.

18 PUDF D. The Decedent's friends at the other dairies were
19 also having financial problems, but they continued to ship their
20 milk to Valley Gold. Friends like Raymond Lopes, Manuel Lopes
21 and Antonio Estevam said that they still believed the cheese
22 plant was going to be successful. Because they believed in the
23 plant and continued to ship their milk to Valley Gold, the
24 Decedent did too.

25 PUDF E. When Raymond Lopes and Manuel Lopes quit CVD and
26 stopped shipping their milk to Valley Gold, the Decedent quit
too.

1 C. FOURTH AND FIFTH CAUSES OF ACTION.

2 Plaintiff concedes that Downey Brand and Genske Mulder are
3 entitled to summary judgment as to the Fourth for securities
4 fraud in violation of the Securities Exchange Act of 1934² and
5 the Fifth Causes of Action for violation of California
6 Corporations Code § 25400(d) because the Decedent admits that he
7 did not purchase any Valley Gold security. Summary judgment as
8 to the Fourth and Fifth Causes of Action is GRANTED as to Downey
9 Brand and Genske Mulder against Plaintiff Maria Machado as
10 Trustee of the Machado Family Trust

11 D. SIXTH CAUSE OF ACTION.

12 The Sixth Cause of Action is for negligence.

13 1. Downey Brand.

14 Downey Brand moves for summary judgment as to the Sixth
15 Cause of Action on the grounds that Plaintiff cannot establish an
16 affirmative misrepresentation made by Downey Brand to the
17 Decedent and that Downey Brand owed no duty of disclosure to the
18 Decedent.

19 "The elements of a cause of action for negligence are (1) a
20 legal duty to use reasonable care, (2) the breach of that duty,
21 and (3) proximate [or legal] cause between the breach and (4) the
22 plaintiff's injury." *Mendoza v. City of Los Angeles*, 66
23 Cal.App.4th 1333, 1339 (1998). "The existence of a legal duty to

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

4 Downey Brand asserts that Plaintiff cannot point to an
5 affirmative misstatement made by Downey Brand to the Decedent.
6 Downey Brand quotes *Anixter v. Home-Stake Production Co.*, 77 F.3d
7 1215, 1225 (10th Cir.1996), a case addressing a primary liability
8 claim under § 10(b): "Reliance only on representations made by
9 others cannot itself form the basis of liability." "[F]or a cause
10 of action for negligent misrepresentation, clearly a
11 representation is an essential element."

12 Plaintiff cites *Lovejoy v. AT&T Corp.*, 92 Cal.App.4th 85
13 (2001), which addresses the concepts of indirect
14 misrepresentation and indirect reliance:

15 It is true that California courts recognize
16 the principle of indirect misrepresentation,
17 under which a knowingly false statement is no
18 less actionable because it was made to an
19 intermediary who then conveyed it to the
20 party ultimately injured ... However, this
21 doctrine requires that the defendant intend
22 or has reason to expect that it will be
23 'repeated and acted upon by the plaintiff.'
24 ...

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

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acting as the plaintiff's agent.

92 Cal.App.4th at 94. Plaintiff argues that Downey Brand may be liable under the theory of indirect misrepresentation and indirect reliance. Plaintiff argues:

Certainly, the defendants knew that the members of ... CVD were a tight-knit group that would share information among themselves. And although the Machado dairy did not invest in Valley Gold, it was a member of CVD; and Mr. and Mrs. Machado talked about the plant and its operations with their friends, including plaintiffs Raymond Lopes, Manuel Lopes and Antonio Estevam. (Decl. Mary Machado at ¶ 4.) And because these friends believed what they had been told and continued to ship milk to Valley Gold, so too did the Machado dairy. (Decl. Mary Machado at ¶¶ 4-5.)

The situation is thus not unlike a small investor who relies upon Warren Buffet's investment decisions and mimics them on a smaller scale. If Warren Buffet is misled by a false prospectus, so too is the small investor - even without receiving the misleading document.

The defendants certainly knew that the non-investing members of CVD would be heavily influenced by the decisions of those who *did* invest. Indeed, they relied upon it; for the Offering Memorandum stated that Valley Gold would 'purchase from CVD all of the Company's milk requirements used in the manufacture of the Company cheese products.' (Index of Exhibits, Exhibit 1 at page 8, last sentence.) The defendants did not just have to convince the investors to invest; they also had to convince the other members of CVD to supply Valley Gold with milk. And they accomplished that task by convincing the core group of investors with incomplete and misleading statements, knowing that the core group would convince the other members of CVD to participate indirectly - by shipping their milk to CVD.

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

7 Downey Brand also moves for summary judgment on the ground
8 that it did not have a duty to disclose running to the Decedent

9 As explained in *Fox v. Pollack*, 181 Cal.App.3d 954, 960
10 (1986):

11 With certain exceptions, an attorney has no
12 obligation to a nonclient for the
13 consequences of professional negligence -
14 this is, the attorney is not burdened with
15 any duty toward nonclients merely because of
16 his or her status as an attorney. The
17 existence of such a duty is a question of law
18 dependent upon 'a judicial weighing of the
19 policy considerations for and against the
20 imposition of liability under the
21 circumstances ...' ... The imposition of a
22 duty of professional care toward nonclients
23 has generally been confined to those
24 situations wherein the nonclient was an
25 intended beneficiary of that attorney's
26 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
injury, the closeness of the connection
between the [attorney's] conduct and the
injury, and the policy of preventing future
harm ...'

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

6 In representing a corporation, an attorney's
7 client is the *corporate entity*, not
8 individual shareholders or directors, and the
9 individual shareholders or directors cannot
10 presume that corporate counsel is protecting
11 their interests.

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

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

24 Downey Brand asserts that Plaintiff concedes there was no
25 agreement by either CVD or Valley Gold that Downey Brand
26 represent the Decedent.

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

1 However, the evidence is that Downey Brand was not paid by
2 CVD and that the \$15,000 check was returned by Downey Brand to
3 CVD uncashed because Downey Brand's client was Valley Gold, not
4 CVD. Plaintiff presents no contrary evidence.

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

8 An incorporated cooperative is a legal
9 entity, separate and apart from its members.
10 18 Am.Jur.2d *Cooperative Associations*, § 3,
11 page 263. North Dakota law governing
 cooperatives recognizes a distinction between
 a cooperative and its members ... Minnesota
 has similar laws.

12 Although Downey Brand represented Valley Gold, no duty to the
13 Decedent arises from this fact, Downey Brand contends, because
14 the Decedent did not purchase any Valley Gold security.

15 Downey Brand's motion for summary judgment against Plaintiff
16 as to the Sixth Cause of Action for negligence is GRANTED.

17 2. Genske-Mulder.

18 Genske Mulder moves for summary judgment on the ground that
19 Plaintiff cannot establish that Genske Mulder owed the Decedent a
20 duty of care.

21 In *Bily v. Arthur Young & Co.*, 3 Cal.4th 370 (1992), the
22 California Supreme Court held that an accounting firm can be held
23 liable for general professional negligence in conducting an audit
24 of financial statements only to the person or entity contracting
25 for the accountant's services, and, in that case, the accounting
26

1 firm's sole client was the company.³ The Supreme Court stated:

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

9 3 Cal.4th at 406. The Supreme Court noted, however:

10 In theory, there is an additional class of
11 persons who may be the practical and legal
12 equivalent of 'clients.' It is possible the
13 audit engagement contract might expressly
14 identify a particular third party or parties
15 so as to make them express third party
16 beneficiaries of the contract. Third party
17 beneficiaries may under appropriate
18 circumstances possess the rights of parties
19 to the contract ... This case presents no
20 third party beneficiary issue. Arthur Young
21 was engaged by the company to provide audit
22 reporting to the company. No third party is
23 identified in the engagement contract.
24 Therefore, we have no occasion to decide
25 whether and under what circumstances express
26 third party beneficiaries of audit engagement
contracts may recover as 'clients' under our
holding.

17 *Id.* at 406 n.16.

18 Because it is undisputed that the Decedent never retained
19 Genske Mulder as his accountant or obtained professional services
20 from Genske Mulder and, Genske Mulder asserts, there is no
21 evidence that Genske Mulder is legally responsible for CVD's
22 failure to pay the Decedent for his milk, Genske Mulder contends
23 that it is entitled to summary judgment as to the Sixth Cause of

24
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 Action.

2 Plaintiff responds that the fact the Decedent was not a
3 client of Genske Mulder does not compel summary judgment in favor
4 of Genske Mulder: "The law is not, and never has been, that
5 rigid."

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

12 In *Murphy*, scores of stockholders filed an amended complaint
13 alleging negligent and intentional misrepresentation against two
14 accounting firms for issuing financial statements overstating the
15 value of two corporations in the process of merging upon which
16 the stockholders relied in approving the merger, buying stock in
17 one or both of the corporations. Following the merger, the
18 corporation went bankrupt causing the stockholders to lose their
19 investments. The trial court sustained the accounting firms'
20 demurrers without leave to amend. On appeal, the accounting
21 firms argued that their liability for the inaccuracies in their
22 financial statements was only to their clients, the two
23 corporations, and therefore no duty of care was owed to third
24 parties. The Court of Appeal disagreed:

25 *Bily* imposes on respondents a duty of care to
26 more than just their clients. Respondents
owed a duty to anyone whom they (1) should

1 have reasonably foreseen would rely on their
2 intentional misrepresentations, or (2) knew
3 with substantial certainty would rely on
4 their negligent misrepresentations. (*Bily,*
5 *supra*, 3 Cal.4th at pp.413-415.) The
6 complaint alleges respondents knew the
7 proposed merger of WIN and Struthers would
8 induce investors in Struthers to rely on
9 financial statements about WIN in
10 anticipation of the two companies becoming
11 one. In addition, the complaint alleges
12 respondents knew Struthers investors would
13 rely on WIN's financial statements in
14 deciding whether to approve the merger
15 itself. The complaint therefore alleges a
16 duty from respondents to Struthers'
17 shareholders, making respondents liable to
18 those shareholders for their
19 misrepresentation.

20 Plaintiff also cited *Cabanas v. Gloodt Associates*, 942
21 F.Supp. 1295, 1308-1309 (E.D.Cal.1996), *aff'd*, 141 F.3d 1174 (9th
22 Cir.1998), in their opposition to the motion to dismiss the First
23 Amended Complaint. At issue in *Cabanas* was whether an appraiser,
24 when conducting an appraisal of a going concern, owes a duty to
25 the manager or owner of the property not to negligently harm its
26 interests. The District Court noted that the "general rule
against recovery for negligent interference with contract or
prospective economic advantage is subject to one exception: where
there is a 'special relationship' between the parties." *Id.* at
1308. The District Court stated:

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

- (1) the extent to which the
transaction was intended to affect
the plaintiff;
- (2) the foreseeability of harm to
the plaintiff;

1 (3) the degree of certainty that
2 the plaintiff suffered injury;

3 (4) the closeness of the connection
4 between the defendant's conduct and
5 the injury suffered;

6 (5) the moral blame attached to the
7 defendant's conduct; and

8 (6) the policy of preventing future
9 harm.

10 *Id.*

11 Here, there is no evidence that the Decedent relied on any
12 representations made by Genske Mulder; rather, the evidence is
13 that the Decedent relied on the opinions of his friends, such as
14 Plaintiffs Raymond Lopes and Manuel Lopes, that the cheese plant
15 was going to be successful, in continuing to ship milk to Valley
16 Gold. There is no evidence as to the basis of his friends'
17 opinions, what they told the Decedent, that Genske Mulder knew
18 of the existence of the friends, or that would be reading and
19 relying on financial statements or projections.

20 Plaintiff cites *Lovejoy v. AT&T Corp.*, *supra*, 92 Cal.App.4th
21 at 95 (2001), which addresses the concepts of indirect
22 misrepresentation and indirect reliance. Plaintiff argues that
23 Genske Mulder may be liable under the theory of indirect
24 misrepresentation and indirect reliance. However, Plaintiff
25 presents no evidence that Genske Mulder intended or had reason to
26 expect that any misrepresentation concerning Valley Gold would be
repeated and acted upon by a person who did not invest in Valley
Gold and presents no evidence that the Decedent's friends were

1 acting as the Decedent's agent.

2 Plaintiff asserts that Genske Mulder is subject to
3 negligence liability under the derivative claim asserted on
4 behalf of Valley Gold.

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

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

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

23 None of these representations were made by Genske Mulder to
24 the Decedent. The evidence is undisputed that the Decedent never
25 received or read the Valley Gold Offering Memorandum, that he did
26 not receive any documents from Genske Mulder and did not receive

1 any representations from Genske Mulder.

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

4 E. SEVENTH CAUSE OF ACTION.

5 The Seventh Cause of Action is for intentional
6 misrepresentation.

7 "The necessary elements of fraud are: (1) misrepresentation
8 (false representation, concealment, or nondisclosure); (2)
9 knowledge of falsity (scienter); (3) intent to defraud (i.e., to
10 induce reliance); (4) justifiable reliance; and (5) resulting
11 damage.'" *Alliance Mortgage Co. v. Rothwell*,, 10 Cal.4th 1226,
12 1239 (1995).

13 1. Downey Brand.

14 Downey Brand argues that summary judgment is appropriate as
15 to the Seventh Cause of Action because there is no evidence that
16 Downey Brand made any misrepresentation to the Decedent. The
17 Decedent never read the Valley Gold Offering Memorandum or any
18 other document prepared by Downey Brand. Downey Brand was not
19 involved in the Milk for Equity transaction. Plaintiff's only
20 evidence to the contrary is the assertion that the Decedent
21 relied on the opinion of friends, two of whom invested in Valley
22 Gold in deciding to continue to ship milk to Valley Gold.
23 However, for the reasons stated above, this evidence is
24 insufficient to create a genuine issue of material fact as to the
25 Seventh Cause of Action as to Plaintiff Maria Machado as Trustee
26 of the Machado Family Trust. Downey Brand's motion for summary

1 judgment as to the Seventh Cause of Action is GRANTED.

2 2. Genske Mulder.

3 Genske Mulder moves for summary judgment as to the Seventh
4 Cause of Action on the ground that Plaintiff admits that Genske
5 Mulder made no representations to the Decedent. Genske Mulder
6 argues:

7 Mr. Machado's testimony and discovery
8 responses disclose that merely because Genske
9 Mulder provided professional services to CVD
10 and/or Valley Gold, Genske Mulder should have
11 informed him of Mr. Vieira's criminal
12 prosecution and the infeasibility of the
13 Valley Gold cheese production ... Most
14 importantly, Mr. Machado's discovery response
15 assert *Ipsi Dixit* that because Genske Mulder
16 provided professional services to CVD and/or
17 Valley Gold, Genske Mulder should have
18 advised him (a non client) not to sell his
19 milk to CVD, who ultimately sold his milk to
20 Valley Gold.

21 Genske Mulder asserts that the Decedent's discovery responses
22 fail to establish that the Decedent relied on any representation
23 or omission made by Genske Mulder and that this evidence fails to
24 establish that Genske Mulder had an intent to defraud the
25 Decedent.

26 Plaintiff again relies on the doctrine of indirect
representation. See *discussion supra*. For the reasons stated
above, Genske Mulder's motion for summary judgment as to the
Seventh Cause of Action is GRANTED.

F. Eighth Cause of Action.

The Eighth Cause of Action is for negligent
misrepresentation, the elements of which are (1) a

1 misrepresentation of a past or existing material fact, (2)
2 without reasonable grounds for believing it to be true, (3) with
3 intent to induce another's reliance on the fact misrepresented,
4 (4) ignorance of the truth and justifiable reliance thereon by
5 the party to whom the misrepresentation was directed, and (5)
6 damages. *Fox v. Pollack*, 181 Cal.App.3d 954, 962 (1986).

7 1. Downey Brand.

8 Downey Brand moves for summary judgment as to the Eighth
9 Cause of Action on the ground that Downey Brand made no
10 representations to the Decedent.

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

21 2. Genske Mulder.

22 Genske Mulder moves for summary judgment on the ground that
23 Genske Mulder made no representations to the Decedent and
24 contends that Plaintiff cannot rely on the alleged omissions
25 described in the Decedent's discovery responses.

26 The tort of negligent misrepresentation requires a positive

1 assertion; an implied assertion or misrepresentation is not
2 enough. *Diediker v. Peelle Financial Corp.*, 60 CalApp.4th 288,
3 297-298 (1997). In *Byrum v. Brand*, 219 Cal.App.3d 926, 942
4 (1990), the Court of Appeals held that a financial advisor's
5 failure to disclose material facts concerning a land investment
6 did not constitute negligent misrepresentation.

7 Because Genske Mulder made no representations to the
8 Decedent and the Decedent's discovery responses establish that
9 his claims against Genske Mulder are based on alleged omissions,
10 Genske Mulder's motion for summary judgment as to the Eighth
11 Cause of Action is GRANTED.

12 CONCLUSION

13 For the reasons stated:

14 1. Downey Brand and Genske Mulder's motions for summary
15 judgment against Plaintiff Maria Machado as Trustee of the
16 Machado Family Trust on the Fourth through Eighth Causes of
17 Action in the Second Amended Complaint ("SAC") are GRANTED;

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

21 IT IS SO ORDERED.

22 Dated: September 27, 2010

/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE