2013 WL 8434313 (Cal.Super.) (Trial Motion, Memorandum and Affidavit)
Superior Court of California,
Central Justice Center.
Orange County

Marshall J. STUART, as an individual; Marshall J. Stuart as Trustee of the Stuart Family Trust; and Marshall Stuart Properties, LLC, a Delaware Limited Liability Company, Plaintiffs,

v.

ALLEN MATKINS LECK GAMBLE MALLORY & NATSIS, a California Limited Liability Partnership; James E. McCormick III, an individual; Coldwell Banker Commercial NRT, a wholly owned commercial brokerage of NRT LLC; and James R. Brashier, an individual and Does 1 through 200, inclusive, Defendants.

No. 30200900303239.
July 12, 2013.

**Plaintiffs' Trial Brief**

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Judge Craig Griffin.

Dept. C10 17

Complaint filed: Sept. 17, 2009

Trial date: July 15, 2013

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## I.

## PARTIES

**A.** ***PLAINTIFFS:***

*Marshall J. Stuart, as an individual through his Guardian Ad Litem, Katherine Stuart; Katherine Stuart as Trustee of the Stuart Family Trust; and Marshall Stuart Properties, LLC, a Delaware Limited Liability Company (herein The Plaintiffs)*
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**B.** ***DEFENDANTS:***

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2. *Coldwell Banker Commercial NRT, a wholly owned commercial brokerage of NRT LLC; and James R. Brashier (herein The Brokers*)

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## II.

## SUMMARY OF CASE

This case seeks damages for legal malpractice, professional liability, breach of fiduciary duty and **elder financial abuse**. It is brought by Mr. Marshall Stuart, the Stuart Family Trust and Marshall Stuart Properties, LLP against defendants in connection with the LLP's purchase of a $12,400,000 piece of commercial property in Santa Clarita, California. As a result of defendants' representations, actions and omissions, plaintiffs invested over $6,000,000 in a commercial property occupied by a single tenant, Wickes Furniture. Approximately seven months after the deal closed, Wickes filed for bankruptcy and plaintiffs lost their entire investment.

## III.

## PROCEDURAL HISTORY AND RELATED ISSUES

### A. *LITIGATION HISTORY*

The Brokers filed three demurrers and three motions to strike as well as two Motions for Summary Judgment or Alternatively Summary Adjudication. The Brokers' first motion for summary judgment was denied in August 2011, but the Court sua sponte granted a motion for judgment on the pleadings and ultimately permitted plaintiffs to amend the complaint. The Attorneys' Motion for Summary Judgment on the statute of limitations grounds was heard at the same time and also denied. Thereafter, The Plaintiffs filed a Third Amended Complaint. The Brokers again demurred to that complaint and the demurrer was denied. The Brokers filed another Motion for Summary Judgment heard by the Court on April 9, 2013. The Court ruled that Mr. Stuart, individually does not have standing to assert negligence and breach of fiduciary duty claims against The Brokers because the contract was between The Trust and The LLC, but the Trust and LLC do have standing. The Court also found that Mr. Stuart did have standing to bring the **elder abuse** cause of action, but the LLC does not. Summary judgment/adjudication was denied on all other grounds.

### B. *MR. STUART RULED INCOMPETENT*

On April 29, 2010, The Brokers noticed and conducted a deposition of Mr. Stuart. Approximately one month after his deposition, Mr. Stuart's mental competency was evaluated by Dr. James Spar, a neuro-psychiatrist. On the basis of his extensive evaluation of Mr. Stuart and a review of the deposition testimony, Dr. Spar opined "(a) Mr. Stuart demonstrated significant impairment in his ability to recall remote events and facts in his April 29, 2010 deposition. This impairment was also present during my interview of him on June 7, 2010. (b) Mr. Stuart cannot provide reliable deposition testimony at this time. While he is aware of and will acknowledge his inability to recall some information, in other instances he does not realize his recall is faulty, and provides honest but erroneous answers to questions." Dr. Spar executed a Certificate of Incapacity certifying that Marshall Stuart had cognitive impairment significant enough to render him mentally incapable of handling his property or **financial** affairs. Shortly thereafter, Mrs. Stuart was appointed Guardian Ad Litem on behalf of Mr. Stuart who is now 90 years of age.

The parties have recently stipulated that the transcript from Mr. Stuart's April 29, 2010 deposition will not be used or referred to by any party in these proceedings, and that no party will call Mr. Stuart as a witness in these proceedings.

## IV.

## THE FACTS

### A. *PERTINENT HISTORICAL INFORMATION*

Marshall Stuart (Marshall or Mr. Stuart) and Katherine Stuart (Katherine or Mrs. Stuart) have been married for over 44 years. Mr. Stuart is presently ninety years old and Mrs. Stuart is seventy-one years old, or nineteen years his junior. The Stuarts married in 1969. At the time the Stuarts married, Katherine Stuart was working as an airline flight attendant and Mr. Stuart was running his own aluminum products business (i.e. doors and windows) known as Marshall Aluminum Products. After they married, Katherine Stuart was required to leave her position as an airline attendant [1] . At Marshall's insistence she did not seek other employment and remained at home to oversee the household. Two years later, the Stuarts had their one and only child, Matthew Stuart. With the exception of a small home-based cosmetics business, Katherine has worked exclusively as a stay-at home-wife and mother for most of her life.

The Stuarts shared a very traditional marital partnership. Marshall handled all of the major **financial** decisions for the family. This included all matters related to the operation of Marshall Aluminum Products [2] and all major investment decisions, whether related to real estate or other **financial** investments. He paid all major family bills, including the rent. Katherine was given a generous household allowance and took care of everyday expenses in connection with running the household. In 1973, the Stuarts purchased their first and only home, where they reside to this day.

Mr. Stuart started Marshall Aluminum Products with $2,000 in start-up funds Over the years, he built the business from a one-man operation to a company employing over 250 persons. The business initially was operating out of Irvine, but Marshall later leased a property in Corona when the company needed more space.

In or about 1988, the business started experiencing severe **financial** set backs, losing money at the rate of $500,000 to $750,000 per year. The Stuarts were required to pull cash out of their home to keep the business open. Marshall hired a consultant - John Hall, to help him manage the company's **finances**. The stress of the business took its toll on Mr. Stuart and in 1994, he underwent quintuple cardiac bypass surgery.

After the surgery, Mr. Stuart, who was 71 at the time, decided it was time for him to slow down and find other trusted people he could rely on. He did not renew Mr. Hall's contract and turned over the **financial** management of the business to his then controller Rance Garrett, who he named as his Vice President of **Finance**. [3] He also elevated two other managers to Vice President of Marketing and Vice President of Operations. He reduced his schedule dramatically, coming in around once a week for a few hours to check his mail and have lunch with his management team. He essentially turned over all of the management of the company to his team and relied on them exclusively to make all major decisions in connection with operating the business.

One major decision made by Mr. Garrett was to negotiate a rent reduction for the company. When the lease expired, Mr. Garrett recommended that Marshall purchase a property to rent back to the company, rather than make a loan to the company to pay for tenant improvements at another rental. Marshall followed Mr. Garrett's advice and The Stuart Family Trust purchased a piece of commercial property located at Klug Circle, also in Corona.

Under Mr. Garrett's management, the company grew and needed more space. Mr. Garrett located, with the assistance of a broker, a property located in Corona. Both Mr. Garrett and the broker recommended that Marshall exchange the gains from the Klug property into that property, located at 235 Radio Road, Corona, California, which was a single-tenant commercial property (The Radio Road Property). Marshall followed this recommendation without question. Indeed, by this time, Marshall was relying heavily on Rance Garrett's advice with respect to all **financial** matters affecting the business operations.

As the business grew, so did the threats of competition, particularly from a company known as CertainTeed. By early 2000, Mr. Garrett had taken Marshall Aluminum Products from a $2,000,000/year operation, losing up to $750,000 a year, to a $40,000,000 dollar operation, netting profits in excess of several million dollars a year. Mr. Stuart was now 79-years old. So, when CertainTeed offered to buy the business, Mr. Stuart and Mr. Garrett agreed it would be in the Stuart's best interests to do so. In 2002, Marshall Aluminum Products was sold to CertainTeed which leased the Radio Road property back from The Stuart Family Trust.

**B.** ***THE SALE OF THE RADIO ROAD PROPERTY***

The Stuart Family Trust owned the Radio Road Property. In 2007, the managing trustee was Marshall Stuart, who was 84-years-old at the time. Toward the end of the CertainTeed Lease, Mr. Stuart had reason to believe that CertainTeed would not renew its lease and he would be left with a large empty building not producing any rents. He entered into a listing agreement with his realtor/advisor Bill Garrett to either release the premises or sell it. The property was sold to Master Development Corp., and escrow closed on the sale on January 31, 2007, producing net proceeds in excess of $6,000,000. Prior to closing, Mr. Stuart met with his accountant, Lee Haight, who informed him that The Stuart Family Trust would pay in excess of $1.3 million in capital gain taxes unless Marshall did an "IRC 1031 Exchange" and rolled over the gains from the sale into the purchase of other commercial investment property. Pursuant to IRC 1031 regulations, the Stuarts had 45 days from the closing of escrow of the Radio Road property to identify possible exchange properties. They had 180 days from the close of the Radio Road sale to close on the new property. Marshall informed Katherine that if a suitable property could not be located, he would pay the tax and turn over the balance of the proceeds to their investment advisor, Sam Davidson, to invest in income-producing tax-free bonds.

**C.** ***THE PURCHASE OF THE SANTA CLARITA/WICKES PROPERTY***

Mr. Stuart began to look for a new commercial property. Seeking to avoid the same risks he faced at Radio Road, he wanted a multi-tenant property. He asked Rance Garrett to explore that possibility, but without success. He asked his agent, Bill Garrett, to locate some appropriate options, who found little that he would recommend.

In mid to late February 2007, Mr. Stuart was introduced by a neighbor to James Brashier, a real estate agent with Coldwell Banker, as an agent who might be able to help Mr. Stuart locate a replacement property for the Radio Road proceeds. Brashier represented himself as having extensive experience serving as an agent in the sale and/or acquisition of high-end investment commercial real estate. Marshall explained to Brashier that he was interested in a multi-tenant commercial property to exchange the Radio Road proceeds into, if a suitable one could be located. Brashier understood that The Trust had a limited period of time (45 days from day of closing of Radio Road Property) to identify potential replacement properties and 180 days from date of closing of Radio Road to close on an exchange property.

Brashier showed Mr. Stuart marketing materials for three properties. Two properties were located at the Ontario Mills Marketplace, occupied by a furniture company and mattress company. The third was for a new project in Santa Clarita being marketed with an executed lease to Wickes Furniture as its single tenant, as well as a pre-approved loan from Merrill Lynch Mortgage Lending (MLML). All three properties were identified with Mid-Exchange as potential "up leg" exchange properties. Brashier represented that the Santa Clarita/Wickes Property was a great investment, with pre-approved loan **financing** at competitive rates and with a sold tenant.

On March 1, 2007, Marshall Stuart, on behalf of the Trust, executed a Standard Buyer/Lessee Agency Agreement for Purchase or Lease of Real Property with Coldwell Banker Commercial NRT (Agency Agreement) through its agent James Brashier. The Agreement, specifically tailored to the Wickes transaction, provided for *The Stuart Family Trust* to pay Coldwell Banker and Mr. Brashier 1.25% of the total purchase price as commission. Mr. Stuart also executed an Agency Disclosure Agreement. Brashier testified during his deposition that (1) Mr. Stuart did not read the forms but only skimmed them; (2) he did not tell Mr. Stuart that he was limiting any of his obligations to Mr. Stuart and (3) did not advise Mr. Stuart to seek independent counsel or any other advice prior to executing the document.

The same day that Mr. Stuart executed the Agency Agreement, Brashier prepared a written Letter of Intent ("LOI") for Mr. Stuart's signature in connection with the Trust's purchase of 26520 Carl Boyer Drive, Santa Clarita, California ("The Property"). Brashier had warned Mr. Stuart there were three other interested buyers for The Property and that he should act promptly and transmit the LOI before even seeing The Property, and Mr. Stuart complied. A week later, Brashier presented Mr. Stuart with an income property analysis for The Property, showing a first-year tax free gain of $527,069.00 or an 8.2% return on this investment as well as other significant returns. On March 14, 2007, the seller submitted a counter-proposal. During this time, Mr. Stuart raised the subject of obtaining Wickes' **financials** as a condition of closing. The seller's agents told Brashier and Marshall that the seller did not have copies of Wickes' **financial** statements. After receiving assurances from Brashier that the **financial** statements for Wickes would be obtained during the due diligence period, Mr. Stuart accepted the counter-offer on behalf of The Trust.

After acceptance of the counteroffer, Brashier then referred Mr. Stuart to his long time friend, attorney James "Kimo" McCormick of Allen Matkins Leck Gamble Mallory & Natsis (Allen Matkins, McCormick or Attorneys), for assistance in connection with the legal aspects of the transaction and lease. Brashier and McCormick's wives were friends (both of whom had worked as real estate agents at Coldwell Banker) and the Brashiers and McCormicks frequently socialized together. Mr. Stuart met McCormick in McCormick's office, and Brashier was also there. They discussed the pending transaction and McCormick's qualifications to represent the Stuarts. In a subsequent telephone call, Mr. Stuart told McCormick that he would retain the firm but that he was leaving for a trip to Hawaii.

McCormick prepared the engagement agreement whereby Mr. Stuart and The Stuart Family Trust retained The Attorneys to represent him individually and as Trustee of The Stuart Family Trust and describing the scope of the engagement as follows:

> "(i) the purchase of improved real property located at 26250 Carl Boyer Drive, Santa Clarita, California (the 'Property'), (ii) the **financing** of the purchase of the Property; and (iii) a review of the existing lease with Wickes Furniture Company, Inc. with respect to the Property, and (iv) other prospective real estate and business ventures."

The Attorneys did not limit the scope of their representation in any manner whatsoever, whether in writing or verbally. Indeed, the March 2007 engagement agreement is very broad, intending to cover almost any issue that could arise in connection with an acquisition of any new property *and* "future real estate and business ventures."

On March 22, 2007, Marshall and his wife Katherine left on a previously-planned trip to Hawaii. On March 25, 2007, Brashier traveled to Hawaii to meet personally with Mr. Stuart to purportedly assist him with his review and execution of the Disposition Agreement in connection with the purchase of The Property. The Stuarts did not invite Mr. Brashier to come to Hawaii, but when Brashier insisted he wanted to come, they invited him to stay with them. Brashier stayed with them for three days and two nights. On one night, he took them to dinner, at his expense. When McCormick was asked at deposition if it was unusual that Brashier traveled to Hawaii to meet with Stuart to review the Disposition Agreement, McCormick admitted it was "not ordinary" and also admitted he did not discourage Brashier from going. Brashier testified he traveled to Hawaii to "push the deal through."

On or about March 25, 2007, Mr. Stuart signed The Attorneys' engagement agreement. On March 26, 2007, McCormick faxed and emailed a redlined draft of the seller's proposed Disposition Agreement to Mr. Stuart and Brashier in Hawaii. In a telephone call, McCormick discussed various aspects of the proposed Disposition Agreement with Mr. Stuart while Mr. Brashier was present with him in Hawaii. The subject of Wickes' **financial** statements came up and Brashier again assured Marshall that the statements would be obtained before closing, that Wickes would be an excellent tenant, and he would get the deal done.

The Attorneys opened three files for the matter: File # S9813-002 (Purchase of Property), S9813-003 (Loan **Financing**) and S9813-004 (Lease Review). During the course of the transaction, the lender, Merrill Lynch Mortgage Lending (MLML) insisted that the borrower/buyer of the Property be a new Delaware limited liability company. The Attorneys formed Marshall Stuart Properties LLC ("MSP LLC") for that purpose and The Attorneys opened File #S9813-005 for the work in forming MSP LLC. A new retainer was not required for these services.

On or about April 1, 2007, Brashier presented Mr. Stuart with a document entitled Lease Abstract, outlining the salient points of the lease terms and **financial** arrangements that Wickes had with the sellers. They also discussed the rent schedule. McCormick, as required by the lender, created The Marshall Stuart Properties, LLC (MSP LLC) to be the ultimate title holder of The Property. The Stuart Family Trust is the sole member of the LLC. As long as they both are living, Katherine and Marshall are the sole beneficiaries of the Stuart Family Trust.

On April 5, 2007, Mr. Stuart executed a revised Disposition Agreement on behalf of the LLC. This revised version of the draft Disposition Agreement that he had previously reviewed with Brashier and McCormick when he was in Hawaii, did not require the seller to provide Wickes' **financial** statements as a condition of closing nor did it make any representations with regard to Wickes current and/or future **financial** condition. Mr. Stuart was not informed that these conditions and representations were not part of the agreement he signed. Instead, he was advised by Brashier he had thirty days to conduct his due diligence, including obtaining copies of Wickes' **financial** statements and that the due diligence period would expire on May 7, 2007.

Between April 5, 2007, and close of escrow, Brashier undertook efforts to obtain copies of Wickes' **financial** statements as well as assist with other due diligence issues. By April 15, 2007, Brashier knew that Mr. Stuart was not sophisticated and did not have extensive experience transacting sales and purchases. On April 15, 2007, Brashier wrote Mr. Stuart a letter which contained a list of due diligence items that remained to be completed, which included obtaining the Wickes' **financial** statements In the letter, Brashier acknowledged to Mr. Stuart how the documentation could seem *"overwhelming and never-ending, particularly to someone unaccustomed to the process."* The letter also stated when the process was over *"you will be more than elated with the purchase of the Wickes furniture building."*

On May 7, 2007, the Disposition Agreement was amended to extend the inspection period by one week to May 14$^{th}$, 2007. On May 10, 2007, the seller's agent represented by email that it did not have Wickes' **financials** in its files. McCormick e-mailed counsel for the seller, stating, *"The response from your client is that there are no **financials** in its Wickes' file. Does that mean that the **financials** might be in other files, or does it mean that the seller never received or reviewed any **financials** from Wickes before or after it entered into the lease with Wickes? We're going to need to review the Wickes' **financials** before we can remove our contingencies. I know that you will understand this requirement and will concur that it is reasonable."* On May 14, 2007, Mr. Gabrio responded that the seller had no **financials** of Wickes in their file.

In the interim, concerned the deal would fall apart, Brashier purchased a copy of a Hoovers' Dun & Bradstreet Small Business Solutions Report on Wickes. He emailed a copy to The Attorneys and asked McCormick to review the report and provide a copy to attorney Susan Graham (a partner in the firm) for review. McCormick told Brashier "there is not much there." On or about May 11, 2007, Brashier met with Mr. Stuart to go over the D&B Report with him, using portions of the report to assure Mr. Stuart of Wickes' financial stability. Despite the fact that Brashier had no evidence that the lender (MLML) had Wickes financial statements or what they had relied on in approving the loan, he advised Mr. Stuart that Wickes' financial condition was approved by MLML and therefore Wickes' financials must have been adequate. [4]

On May 14, 2007 McCormick sent a Termination Notice to the sellers as a formality, but continued to work on the deal because it was understood that the transaction "would be put back together again." On May 15, 2007, the seller provided a certified Operating Statement reflecting rents received from Wickes between January 2007 and April 2007. Despite repeated requests for Wickes' financials from the seller, Wickes, and MLML, neither McCormick nor Brashier were able to obtain copies of Wickes' financials prior to closing of the escrow. Attorney Graham also attempted to get the financials and stated in an email it was very unreasonable not to be provided those financials with a single tenant acquisition. Brasier and McCormick both testified that the everyone's refusal to provide these financials to a buyer in a 12.5 million dollar transaction raised no "red flags" at all. And, neither Brashier or McCormick warned either Mr. Stuart, or Mrs. Stuart as Co-Trustee of the Stuart Family Trust, that closing the deal without financials would create a substantial risk of loss of their investment. Instead, Mr. Stuart was repeatedly assured, without a basis for doing so, that Wickes was a solid company. No effort was made by Brashier to investigate Wickes' reputation among other landlords. No effort was made to investigate the ownership history of Wickes since it had previously filed for bankruptcy. And Brashier made no effort to pursue a parallel deal with one of the other properties he identified to Mid Exchange as a potential "up leg" exchange property.

On June 22, 2007, a Second Amendment to the Disposition Agreement was executed by Mr. Stuart and the sellers, retroactive to May 14, 2007, reinstating the Original Disposition Agreement, and representing and warranting to the Trust the sellers' Operating Statement for January-April 2007, of the Wickes Store was true, complete and accurate, and fairly presented the income and expenses properly allocated to the Property for the period indicated, and setting the close of escrow date for June 29, 2007.

Prior to resurrecting the transaction, neither McCormick nor Brashier provided Mr. Stuart with any written analysis or written warning of the risks of closing the transaction without the financials of Wickes, the sole tenant occupying the property, or advised against closing the deal. Neither McCormick nor Brashier advised Mr. Stuart in writing, or otherwise, that under the circumstances, he should consult with his own accountant or financial advisors regarding the investment. Instead, they assured Mr. Stuart it was common for private companies to refuse to disclose financials, notwithstanding Ms. Graham's stated position that it was unusual and unreasonable for the seller to refuse to provide tenant financial information. In fact, both Ms. Graham and McCormick recognized the risk to Mr. Stuart to close the transaction without evidence of the financial stability of Wickes.

Notwithstanding the fact that the financials could not be obtained, Mr. Stuart was persuaded to close escrow on June 29, 2007, based on Brashier's assurances that Wickes was a solid tenant because the Dun & Bradstreet report was "clean" (which was not true) and that MLML's approval of the loan meant Wickes was financially sound. Neither Brashier or McCormick warned Mr. or Mrs. Stuart in writing or otherwise that the purchase was extremely risky without financial statements. Rather they both pushed to close the deal by the end of June 2007 to meet IRC 1031 exchange conditions.

Upon closing, title was taken by Marshall Stuart Properties, LLC, and Coldwell Banker was paid a commission of $154,375.00.

**D.** ***POST CLOSING EVENTS***

On or about July 2, 2007, The Attorneys prepared a letter of introduction on behalf of MSP LLC to Wickes, informing Wickes that contact information for the new Landlord under Paragraph 28 of the Lease would be MSP LLC and James E. McCormick III, Esq. of Allen Matkins, et al. The letter also referred the tenant to The Attorneys in connection with insurance issues. On or about August 2, 2007, Mr. McCormick sent Mr. Stuart a letter dated August 1, 2007, enclosing the purchase binder for the purchase transaction and The Attorneys' August 2, 2007 invoice. On September 28, 2007, Susan Graham expended .5 hours of her time reviewing loan documents with regard to interest issues raised by Merrill Lynch. The time for that work ($247.50) was billed to Mr. Stuart in an invoice dated October 8, 2007. Thereafter, Matt Stuart began to manage the Wickes property and was in contact with McCormick regarding various issues in connection with rents and insurance.

On or about February 3, 2008, Wickes Holdings, LLC and Wickes Furniture Company filed for Chapter 11 Bankruptcy Protection in the United States Bankruptcy Court, District of Delaware, Case No. 08-10212. MSP LLC was listed as a landlord and creditor. Wickes owed MSP LLC over $96,000. As of the Petition Date, Wickes Furniture's books and records reflect that it had approximately $190 million in total assets and $208 million in total liabilities.

The Attorneys continued to represent the LLC in the bankruptcy proceedings. The Attorneys prepared a draft new engagement agreement in connection with the bankruptcy services but there is no signed copy of the letter in the file or any evidence that the LLC ever received it. The only document signed by the LLC was a conflict waiver allowing The Attorneys to represent two other Wickes' creditors concurrently with the LLC to keep costs down. The Attorneys opened a fourth matter file for the bankruptcy work.

The Attorneys represented the LLC in the bankruptcy proceedings, preparing many pleadings as well as a draft creditor's claim for unpaid rents exceeding $90,000. The Attorneys never submitted the claim, did not file a withdrawal as counsel in the bankruptcy proceeding, never told the LLC to file a creditors claim and never terminated their relationship with Stuart, the Trust or the LLC. The Attorneys never informed Mr. Stuart that The Attorneys were no longer their attorneys in connection with The Property. The LLC never filed any documents in the bankruptcy proceedings without the assistance of The Attorneys or local Delaware bankruptcy counsel hired by The Attorneys. The LLC never retained any other attorneys to represent it in the bankruptcy proceedings. Mr. Stuart, the Stuart Trust and the LLC relied on The Attorneys exclusively for all of these matters. Indeed, previous to, during and following The Attorneys active involvement in the bankruptcy proceedings, McCormick remained intimately involved and continued to provide advice and counsel to the Stuarts regarding locating a suitable replacement tenant.

The Attorneys' representation continued ;until at least September 24, 2008, when Mr. Stuart asked for the return of their files. A substantial portion of the files were returned in October 2008, but not all. The Attorneys' own internal records show that The Attorneys did not close its files with respect to all legal services provided to The Plaintiffs until July 21, 2009. Plaintiffs' complaint was filed September 16, 2009.

## V.

## LEGAL AND FACTUAL ISSUES IN DISPUTE

### A. *THE ATTORNEYS*

#### *1. The Attorneys' Statute of Limitations Defense*

The Attorneys filed a Motion for Summary Judgment asserting a statute of limitations defense pursuant to California Code of Civil Procedure (CCP) Section 340.6. The motion was denied. CCP §340.6 provides in pertinent part as follows:

> "An action against an attorney for a wrongful act or omission, other than actual fraud, arising in the performance of professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission... except that the period shall be tolled during the time that any of the following exist: (1) The plaintiff has not sustained actual injury; (2) The attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred...."

The Attorneys contend (a) that their initial representation regarding plaintiffs' purchase of the property and lease with Wickes ended on September 28, 2007, (b) that their subsequent representation regarding the Wickes' bankruptcy or lease-related matters did not involve the same specific subject matter as their initial representation, and (c) that, in any case, their subsequent representation ended on May 16, 2008, because they did nothing further in the bankruptcy after that date and Plaintiffs did not file this complaint until more than a year later on September 16, 2009.

**a. The Initial and Subsequent Representations Constitute Continuous Representation Because They Are Related**

"Code of Civil Procedure section 340.6 does not expressly state a standard to determine when an attorney's representation of a client regarding a specific subject matter continues or when the representation ends, and the legislative history does not explicitly address this question." (*Nielsen v. Beck* (2007) 157 Cal.App.4th 1041, 1048-1049; *Gonzalez v. Kalu* (2006) 140 Cal.App.4th 21, 28, 43.) However, the legislative purpose is to allow a client to delay filing a legal malpractice lawsuit until the lawyer has had the opportunity to correct or minimize his mistake. (*Nielsen v. Beck, supra,* 157 Cal.App.4th 1041, 1048; *Gonzalez v. Kalu, supra,* 140 Cal.App.4th 21, 28.) Thus, case law has interpreted "specific subject matter" liberally to mean that if the matters are related, they constitute continuing representation even if they occur in different forums and involve different parties. (See, *e.g.*, *Jocer Enterprises, Inc. v. Price* (2010) 183 Cal.App.4th 559, 571; *Nielsen v. Beck, supra,* 157 Cal.App.4th 1041, 1052-1054; *Crouse v. Brobeck, Phleger & Harrison* (1998) 67 Cal.App.4th 1509, 1528.)

The appellate court in *Crouse v. Brobeck, Phleger & Harrison, supra,* 67 Cal.App.4th 1509, 1529, stated: "In *O'Neill v. Tichy* (1993) 19 Cal.App.4th 114, the client alleged that his attorneys committed malpractice in advising him in 1977 in connection with a business reorganization. The reorganization resulted in NLRB proceedings against the client, which were resolved adversely by an administrative law judge's 1982 determination, affirmed in 1988 by the NLRB.... Under *O'Neill,* when advice or action on a business transaction is negligent, and the attorney continues representing the client to defend or further the positions based on the original advice or action, the continuing representation involves the same specific subject matter."

The appellate court in *Nielsen v. Beck, supra,* 157 Cal.App.4th 1041, 1053, quoted the pivotal language from *Crouse v. Brobeck, Phleger & Harrison, supra,* 67 Cal.App.4th 1509, 1528, as follows: "The continuing representation tolling provision 'is not applicable when there is a continuing relationship between the client and the attorney involving *only unrelated* matters. [Citations.]' "

The appellate court in *Jocer Enterprises, Inc. v. Price, supra,* 183 Cal.App.4th 559, 571, succinctly stated the rule: "an attorney may also provide continuous representation to clients by acting in different, but related actions."

In *Nielsen v. Beck, supra,* 157 Cal.App.4th 1041, a corporation hired lawyer Paul A. Beck to conduct its bankruptcy proceedings. Attorney Beck advised the corporation to stop paying rent to its landlord and then defended the corporation in the landlord's subsequent unlawful detainer action. On March 23, 2004, the bankruptcy court entered an order closing the case. The attorney was substituted out in the unlawful detainer on August 26, 2004, and the substitution form was filed with the Superior Court on September 3, 2004. However, that same month, the attorney had three subsequent telephone conversations with the client regarding negotiation strategy with the landlord. The action against the attorney, claiming legal malpractice in his handling of the bankruptcy, was filed on September 2, 2005. Thus, if the bankruptcy and unlawful detainer actions were deemed related, the action was timely filed because of the three telephone conversations which had occurred after September 3, 2004. But if the bankruptcy and unlawful detainer actions were deemed to be unrelated, then the legal malpractice action would have been untimely filed on September 2, 2005, because that was more than a year from the time the bankruptcy case was closed on March 23, 2004. The trial court granted the lawyer's motion for summary judgment. On appeal from the judgment, the Court of Appeal reversed "because there [were] triable issues of fact as to whether the representation regarded the same specific subject matter." (*Id.* at p. 1053.) The court reasoned as follows:

"The legal representation [in the bankruptcy case and in the unlawful detainer proceedings] could be seen to have arisen from the same event. The advice given by Beck in the bankruptcy case resulted in the unlawful detainer proceeding. Beck advised ... to stop paying ProLogis. [Citations omitted.] Thus, even though the bankruptcy case was in a different forum than the unlawful detainer proceedings and involved different parties, from the above stated facts, a trier of fact could conclude that the representation ... with regard to the unlawful detainer action involved the same specific subject matter as the bankruptcy action." (*Id.* at p.1054.)

In this case, The Attorneys were initially retained regarding the purchase of a commercial parcel of property occupied by a single tenant, Wickes Furniture. That representation included all issues related to the acquisition, including all issues related to the Wickes lease. The scope of the representation was not limited in any way, but rather was quite broad, and even included creation of an LLC and post-closing advice. When Wickes filed a bankruptcy proceeding, The Attorneys continued to represent The Plaintiffs in the Wickes' bankruptcy proceedings.

The representation regarding the lease did not cease with the rejection of the lease. The Attorneys devoted time to assist the plaintiffs to recoup lost rent and other loses by making appropriate filings, assisting them with locating a new tenants, and reviewing a listing agreement with a new broker. They prepared a draft creditor's claim. They calendared bar dates. They remained of record in the bankruptcy action, never notifying the bankruptcy court or plaintiffs they were no longer representing the LLC. In fact, until Mr. Stuart asked for his files, both The Attorneys and the plaintiffs reasonably understood that The Attorneys were still their counsel in connection with lease-related issues. Thus, the legal representation of the plaintiffs in the acquisition of property in which Wickes was a tenant, in Wickes' subsequent bankruptcy, and in assisting in the location of a new tenant, arose from the same event.

**b. The Attorneys' Representation Of Plaintiffs Continued Until At Least September 24, 2008**

The Attorneys will argue that their representation of MSP LLC in the bankruptcy matter was completed by May 16, 2008, the last date that The Attorneys billed for work in connection with the bankruptcy proceedings. First, this position is legally incorrect because there is no evidence of the termination of legal services by The Attorneys prior to the plaintiffs terminating The Attorneys' services on September 24, 2008. Secondly, The Attorneys' position that their representation ended on May 16, 2008, constitutes admission that The Attorneys abandoned plaintiffs in connection with the bankruptcy proceedings.

As acknowledged in the Wickes' bankruptcy docket, MSP LLC was listed as a creditor owed $96,464.25 in the schedules filed by Wickes on or about March 2008. When the bankruptcy court approved the rejection of the Wickes lease, MSP LLC was obligated to file a claim for its losses, *as confirmed by The Attorneys' invoices* which discloses that The Attorneys, anticipating that the bankruptcy court would approve the rejection of the lease, began working on a proof of claim and charged for same.

"An attorney's representation of a client ordinarily ends when the client discharges the attorney or consents to a withdrawal, the court consents to a withdrawal, or upon completion of the tasks for which the client retained the attorney." (*Gonzalez v. Kalu, supra,* 140 Cal.App.4th 21, 28.)

In this case, there is no evidence that plaintiffs ever discharged The Attorneys or consented to their withdrawal, prior to requesting their files on September 24, 2008. There is no evidence that the bankruptcy court consented to The Attorneys' withdrawal. The Attorneys never filed a Notice of Withdrawal or Substitution with the bankruptcy court. The Attorneys never finalized a proof of claim and filed it on behalf of the plaintiffs. The Attorneys admit that they did no further work for The Plaintiffs regarding the Wickes bankruptcy after May 16, 2008, and that the only communication regarding the matter was a July 7, 2008 letter discussing paying a vendor. In other words, The Attorneys have admitted to abandoning the client regarding the bankruptcy on or about May 14, 2008, without notice. *But this does not cease the tolling of the statute of limitations because defendants did not communicate their cessation of work to plaintiff.* In *Gonzalez v. Kalu, supra,* 140 Cal.App.4th 21, 30, the Court of Appeal reversed the granting of a motion for summary judgment in a legal malpractice case, explaining:

> "Absent a statutory standard to determine when an attorney's representation of a client regarding a specific subject matter ends, and consistent with the purposes of the continuing representation rule, we conclude that the purposes of Code of Civil Procedure section 340.6, subdivision (a)(2), in the event of an attorney's

> unilateral withdrawal or abandonment of the client, the representation ends when the client actually has or reasonably should have no expectation that the attorney will provide further legal services. [Citations omitted.] That may occur upon the attorney's express notification to the client that the attorney will perform no further services, or, if the attorney remains silent, may be inferred from the circumstances. Absent actual notice to the client that the attorney will perform no further legal services or circumstances that reasonably should cause the client to so conclude, a client should be entitled to rely on an attorney to perform the agreed services.... After a client has no reasonable expectation that the attorney will provide further legal services, ... the tolling should end. [¶] ... Whether the client actually and reasonably believed that the attorney would provide further legal services regarding a specific subject matter is predominantly a question of fact for the trier of fact, but can be decided as a question of law if the undisputed facts can support only one conclusion."

Given that the May 9, 2008 and June 1, 2008 invoices informed the plaintiffs that The Attorneys were preparing a rejection of lease damages claim, and given that The Attorneys never terminated their representation of them, the plaintiffs reasonably concluded that The Attorneys continued to represent them until at least September 24, 2008 when *they* terminated The Attorneys' services. Therefore, the complaint was timely filed on September 17, 2009.

**c. The Cause of Action for Elder Abuse Is Governed by a Four-year Statute of Limitation**

The Attorneys contend that Mr. Stuart's cause of action for **elder abuse** is governed by section 340.6 of the Code of Civil Procedure and is, therefore, also barred. Marshall Stuart contends that the cause of action is governed by the four-year statute of limitations set forth in Welfare and Institutions Code, section 15657.7.

As discussed below, (a) the legal issue upon which the ultimate determination of which statute of limitations applies is predicated upon the preliminary issue of whether Mr. Stuart's **elder abuse** cause of action was time barred on January 1, 2009, when the four-year statute went into effect, (b) but the issue need not be decided if the Court concludes that the one year statute of limitations did not expire prior to the filing of this action.

Welfare and Institutions Code section 15657.7 was enacted in 2008. Since it was not enacted as an urgency measure, the statute went into effect on January 1, 2009. (Cal. Const., Art. IV, § 8, subd. (c).) In *Andonagui v. May Dept. Stores, Inc.* (2005) 128 Cal.App.4th 435, 440, the Court of Appeal succinctly stated the applicable rule:

> "A new statute that enlarges a statutory limitations period applies to actions that are not already barred by the original limitations period at the time the new statute goes into effect. (*Douglas Aircraft Co. v. Cranston* (1962) 58 Cal.2d 462, 465, ...; *Mudd v. McColgan* (1947) 30 Cal.2d 463, 468....)"

Therefore, the preliminary legal issue to be decided is what statute of limitations applied to Mr. Stuart's **elder abuse** cause of action on January 1, 2009, when the new four-year statute of limitations went into effect. Then, the factual issue of whether the claim was barred on January 1, 2009, under the then-applicable statute, governs whether the new four-year statute applies.

Mr. Stuart contends that *prior* to January 1, 2009, the applicable statute of limitations for **Elder Abuse** Claims was section 335.16 which is two years. Assuming for the sake of argument that Mr. Stuart's damages occurred on April 21, 2008, it is clear that the time period between April 21, 2008 and January 1, 2009 is less than one year. Therefore Mr. Stuart's **elder abuse** cause of action was not barred by section 335.1 on January 1, 2009, when the new four-year statute went into effect, and, therefore the new four-year statute applies. Additionally, the case was filed (September 16, 2009) within the two year statute of limitations, commencing on April 21, 2008.

The Attorneys contend that the one year statute of limitations pursuant to Section 340.6 applies to the **elder** **abuse** cause of action. However, applying the *Andonagui* analysis to The Attorneys' position yields the identical result: (a) that on January 1, 2009, the applicable statute of limitations was section 340.6, which is one year if no tolling provisions apply, (b) that the damage occurred on April 21, 2008, (c) that the time period between April 21, 2008 and January 1, 2009 is less than a year, (d) then Mr. Stuart's **elder** **abuse** cause of action was not barred by section 340.6 on January 1, 2009, when the new four-year statute went into effect, and, therefore, (e) the new four-year statute applies.

The Attorneys will argue that because the statute of limitations was part of an overall substantive change of the **elder** **abuse** law, the above-quoted well-established law set forth *in Andonagui v. May Dept. Stores, Inc., supra,* 128 Cal.App.4th 435, 440; *Douglas Aircraft Co. v. Cranston, supra,* 58 Cal.2d 462, 465, and *Mudd v. McColgan, supra,* 30 Cal.2d 463, 468, should be ignored. In support of their position they will cite to *Das v. Bank of America, N.A.* (2010) 186 Cal.App.4th 727.) But that case does not contradict the above established case law.

Statutes of limitation are procedural. (*Sznyter v. Malone* (2007) 155 Cal.App.4th 1152, 1161; *Aronson v. Superior Court* (1987) 91 Cal.App.3d 294, 297.) Thus, consistent with all of the established precedent discussed above, the appellate court in *Das v. Bank of America, N.A., supra,* 186 Cal.App.4th 727, emphasized that only the substantive portions of the 2008 amendments to the **elder** **abuse** statutes were not retroactive: "(See *ARA Living Centers-Pacific, Inc. v. Superior Court* [(1993)] 18 Cal.App.4th [1556] at pp. 1560-1562, [substantive amendments to **elder** **abuse** statute were not retroactive in effect, absent a clear expression of legislative intent.])" (*Das v. Bank of America, N.A., supra,* 186 Cal.App.4th 727, 737.) But, *ARA Living Centers-Pacific, Inc. v. Superior Court, supra,* explained that *procedural* statutes are given retroactive effect, relying on and discussing *Tapia v. Superior Court* (1991) 53 Cal.3d 282. In *Tapia,* the Supreme Court dealt with the retroactive effect of Proposition 115, the "Crime Victims Justice Reform Act," which contained both procedural and substantive provisions and held that those portions addressing the conduct of trials, being procedural rather than substantive, *could be applied to trials committed before the initiative's effective date. (Id.* at p. 289, 279.) Accordingly, there is no merit to The Attorneys argument that because the 2008 amendments to the **elder** **abuse** statutory scheme included both substantive and procedural changes, the new statute of limitations did not apply to **elder** **abuse** causes of action which were not time barred when it took effect on January 1, 2009.

Finally, The Attorneys will contend that even if *Welfare & Institutions Code* §15657.7 is generally applicable, CCP §340.6 nevertheless applies because they are attorneys. The Attorneys anticipated reliance on *Vafi v. McCloskey* (2011) 193 Cal.App.4th 874, 880 is not persuasive. First, the case involved the cause of action of malicious prosecution. Thus, the court was determining whether section 340.6 or section 335.1 applied to a malicious prosecution cause of action alleged against an attorney. The court's holding relied upon the general rule of statutory construction that "the more specific statute of limitations under section 340.6 overrides the general catch-all statute provided by section 335.1." (*Id.* at p. 881.) However, *Welfare & Institutions Code §* 15657.7 is not a general catch-all statute of limitations. It states as follows:

> "An action for damages pursuant to Sections 15657.5 and 15657.6 for **financial** **abuse** of an **elder** or dependent adult, as defined in Section 15610.30, shall be commenced within four years after the plaintiff discovers or, through the use of reasonable diligence, should have discovered, the facts constituting the **financial** **abuse**."

Therefore, *Welfare and Institutions Code, §* 15657.7 is more specific than CCP §340.6, and, as such, applies to the case at bar.

***2. The Attorneys Failed in Their Duty of Care to Plaintiffs***

The Attorneys will not dispute that they represented all of the named plaintiffs. However, they will argue that Mr. Stuart was a sophisticated businessman, who was still running a successful business and who had extensive real estate investment experience. These arguments will prove to be unsupported. McCormick testified at deposition he did nothing to ascertain Mr. Stuart's actual prior experience as a real estate owner or investor. Instead, was making assumptions. He believed Mr. Stuart ran his business until the Radio Road Property sold. He surmised Stuart handled some prior 1031 exchanges himself as well as the sale of his business. When probed as to what he based these beliefs on he could only refer to Brashier. He admitted he never asked Mr. Stuart anything about his prior work, real estate or investment experiences and had no understanding of the percentage of the Stuart Family Trust's net worth being invested into the Wickes property. He had no idea that Mr. Stuart had been basically retired since 1995 and sold the business in 2002. He had no idea that the only other 1031 exchange Stuart was involved in (sale of Klug and purchase of Radio Road) was overseen by Rance Garrett. He had no idea that Mr. Stuart was risking at least 40% of Trust's worth on a high risk investment, monies which would be difficult to recapture at his age.

The Attorneys will similarly argue they did not agree to engage in any **financial** due diligence of Wickes. This argument will also fail. The Attorneys entered into a very broad engagement agreement with the plaintiffs which did not limit the scope of their engagement in any manner, and The Attorneys never subsequently limited the scope of their engagement in any manner, either orally or in writing.

It will be undisputed that McCormick undertook to obtain Wickes' **financials** and acknowledged to his client that he was doing so. Once undertaken, of course, The Attorneys were obligated to act competently and inform their client of any issues and concerns such efforts disclosed. The Attorneys never informed the plaintiffs that their efforts to obtain Wickes' **financials** was somehow outside of the scope of their engagement. Indeed, McCormick and his colleague, attorney Susan Graham, acknowledged in writing how important obtaining those **financials** were in a single-tenant transaction. There is no evidence whatsoever of any of The Attorneys ever informing the plaintiffs that such due diligence was outside the scope of their employment. Even when representation is expressly limited, the attorney still has a duty to alert the client to reasonable apparent problems and to advise the client to seek other assistance. *Nichols v. Keller* (1993) 15 Cal.App. 4th. 1672, 1684. In this instance, The Attorneys did not limit the scope of their obligations to the plaintiffs and made no any effort to warn Mr. Stuart or Mrs. Stuart regarding going forward with the transaction given the unwillingness of the seller, lender or tenant to disclose Wickes' **financials**. In fact, McCormick expressly admits giving no such advice.

"A trained attorney is more qualified to recognize and analyze legal needs than a lay client, and, at least in part, this is the reason a party seeks out and retains an attorney to represent and advise him or her in legal matters. *Nichols v. Keller, supra,* 15 Cal.App.4th 1672, 1686 (citing 2 Mallen & Smith, Legal Malpractice, §§ 19.5, 19.28, pp. 159-162, 229-233.) "The standard of care may be breached where the attorney fails to fully inform a client about his or her rights and the alternatives available under the circumstances." *Considine v. Shadle, Hunt & Hagar* (1986) 187 Cal.App.3d 760, 765.

McCormick's conduct in this case fell below the standard of care and was reckless. He was operating under a clear conflict of interest. He and Brashier (and their wives) had a preexisting friendship, the depth and breadth of which was not disclosed to Mr. Stuart prior to the retention. McCormick remained silent upon learning that Brashier was traveling to Hawaii to "push the deal through." McCormick knew that Brashier obtained a Dun & Bradstreet Report of Wickes in an effort to assure Stuart that Wickes was **financially** solid. McCormick was asked by Brashier to review the report and comment on it. McCormick informed Brashier he did not think the report said much, but never advised Mr. Stuart either orally or in writing that it should not be relied on as a substitute for the Wickes **financials** as proof of Wickes **financial** solvency. Notwithstanding the many red flags of warning flying around the refusal by the seller, lender and Wickes to provide Wickes' **financials**, McCormick failed to warn and protect his clients from the risks posed by these red flags. [5]

**B. *THE BROKERS***

***1. The Brokers' Duties Were Not Limited***

The Brokers will argue that Paragraph 8 of the "Standard Buyer Lessee Agreement" absolved them of any duty to investigate the **financial** effects of the transaction or to determine **financial** soundness of the transaction notwithstanding Brashier's assistance in gathering such information. This is incorrect.

 

"Real estate brokers are subject to two sets of duties: *those imposed by regulatory statutes,* and those arising from the general law of agency." *Carlton v. Tortosa* (1993) 14 Cal.App.4 th 745, 755. "The existence and extent of the duties of the agent to the principal are determined by the terms of the agreement between the parties, interpreted in light of the circumstances under which it is made, except to the extent that fraud, duress, illegality, or the incapacity of one or both of the parties to the agreement modifies it or deprives it of legal effect." *Id.* The contractual language does not relieve defendants of their duties of honesty and good faith. Stated another way, an agent cannot mislead his client into purchasing a property through improper assurances, reap the benefits of a sale that would not have otherwise occurred, and then claim that his client had no justification for believing him.

The very same contract provides at page 1, paragraph 2.3 as follows: "Agent shall comply with ... the Rules of Professional Conduct of the Society of Industrial and *15* Office Realtors." Accordingly, all of the duties contained in those Rules were incorporated into the Agency Agreement. These "Rules of Professional Conduct" are actually titled, "Code of Ethical Principles and Standards of Professional Practice." The pertinent Standards follow:

Standard of Practice 2.1 provides that: "Adherents will avoid exaggeration, misrepresentation, withholding, or concealment of pertinent facts relating to property, transaction, or matter in which they are involved in a professional or business capacity."

Standard of Practice 2.4 provides that: "Adherents will not be a party to any act that: (a) involves the knowing falsification of information; (b) attempts to deceive; (c) attempts to defraud; (d) attempts to mislead; or (e) involves a breach of faith, trust or fiduciary duty."

Standard of Practice 3.5 provides that: "Adherents will exercise good faith and due care in actions affecting their client, customer, principal, or other party with whom they have a legally recognized professional or business relationship, and will conduct themselves in a manner consistent with the confidence, trust, and reasonable expectations of such party."

Standard of Practice 4.1 provides that: Adherents will not place their rights in, or entitlement to, a fee or commission before the interests of their client, customer, principal, or other party with whom they have a legally recognized professional or business relationship. This does not mean that Adherents must forgo their claim to compensation to which they are legally entitled. However, Adherents must not allow their entitlement to compensation to take precedence over the interests of such parties in their conduct."

Standard of Practice 10.4 provides in pertinent part that: "... [T]he representations that Adherents make in the context of real estate-related professional and business activities will be honest, accurate, and complete. Adherents will identify, with reasonable clarity, information that is subjective, speculative, or otherwise conditioned on facts or circumstances that are not known. Adherents will clearly identify the source or basis of all empirical information. Adherents will not withhold pertinent facts and information of which they are aware, and will keep each relationship party reasonably informed of any facts, conditions, or information that might affect or assist such party."

When Brashier downplayed the substantial and unreasonable risks of proceeding with the purchase without **financial** statements of the sole tenant, and gave unwarranted assurances of the continuing viability of the sole tenant without a basis for doing so, he violated each of the above-referenced standards, *i.e.:* exaggeration, breach of fiduciary duty, failure to conduct themselves in a manner consistent with the confidence, trust, and reasonable expectations of their client, allowing defendants interests in receiving a commission to take precedence over the interests of their client, and failing to identify, with reasonable clarity, information that was subjective, speculative, or otherwise conditioned on facts or circumstances that were not known.

### *2. The Brokers' Contract Did Not Supersede Their Common Law Fiduciary Duties*

While it is true that a contract can limit the scope of an agent's duties, *once the agent chooses to perform those duties, he must do so with reasonable care and in accordance with his duties of good faith.* Exaggeration and unsupported statements are inconsistent with such fiduciary duties. Mere disclosures of such information without sufficient explanation to enable the buyer to make an informed choice does not satisfy the agent's duty. Such matters include verification of economic information. *Ford v. Cournale* (1973) 36 Cal.App.3d 172, 182.

The Brokers were experienced real estate professionals. Plaintiff's expert will testify that the Brokers should have known at least the following:
a. The **financial** stability of the sole tenant of a large commercial parcel of property is crucial to an evaluation of whether the buyer's investment will be a sound or unreasonably risk.

b. The failure of the sole tenant to produce its **financial** reports could likely be evidence that the tenant is NOT **financially** sound. At the very least, experienced real estate professionals know that, without having the tenant's **financial** statements, there can be no basis in fact for a representation that the investment was sound or that a property will never go vacant.

c. A Dun & Bradstreet report is not a substitute for detailed **financial** statements and is not proof of **financial** stability.

d. A lender's decision to approve a loan is not proof of the soundness of an investment for a buyer without obtaining copies of the **financial** statements purportedly relied on by the lender in giving its approval.

e. The agent/broker owes a fiduciary duty to the client to make representations that are accurate and to clearly identify when their statements are subjective, speculative or otherwise conditioned on facts or circumstances that are not known.

f. It is a breach of fiduciary duty and bad faith for an agent/broker to intentionally represent to a client that the investment is sound without a basis in fact to do so. There was no basis for the agent/broker to have assured the buyer that the investment was sound and, in doing so, the agent/broker breached a fiduciary duty and acted in bad faith in encouraging the buyer to complete the transaction.

g. Because the buyer's agent was over the age of 80, and the tenant's **financial** statements had not been produced, the agent/broker owed him the additional duty, *i.e.,* was required under the circumstances, to discourage him from completing the transaction. The reason for this requirement is the well-known fact that many persons of that age can be more easily influenced to make unwise investment decisions. Whether the buyer in this transaction did or did not suffer from any age-related mental infirmities is irrelevant. It is also irrelevant whether the agent/broker had reason to suspect any specific age-related mental infirmities (although in this case he admitted he did). The reason that these things are irrelevant is because an agent/broker representing an **elderly** buyer in a multi-million dollar transaction must assume the age-related mental infirmities exist and take extra precaution to protect his interests.

***3. The Cause of Action for Negligent Misrepresentation Against the Brokers Is Meritorious***

The Brokers will assert that they cannot be sued for negligent misrepresentation because Plaintiffs closed escrow knowing they were doing so without having received any relevant **financial** information about Wickes and they did not justifiably rely on any misstatements of defendants. Plaintiffs will establish that the claim for negligent misrepresentation is based on Brashier's affirmative overstatements of the **financial** worthiness of Wickes without any basis for doing so. It was these affirmative statements that Mr. Stuart relied on. Further, Brashier's intentions are not a necessary element of this cause of action. Civil Code Section 1710(2); *Quality Wash Group V, Ltd. v. Hallack* (1996), 50 Cal.App.4th 1687.

The Brokers may argue that Wickes' **financials** were not a material factor in the Stuart's decision to complete the transaction. This will be easily refuted by the very efforts undertaken by Brashier and McCormick to obtain the **financials** and the assurances Brashier admitted giving to Mr. Stuart regarding Wickes' **financial** worthiness without any basis in fact for doing so. Indeed, Brashier repeatedly assured Mr. Stuart that the fact that the lender approved the loan was evidence of Wickes' **financial** worthiness. Accordingly, it is because of these affirmative misrepresentations that plaintiffs closed escrow despite not having obtained any financial information from Wickes. Stated another way, plaintiffs' closing of escrow, despite not having obtained any financial information from or about Wickes, is consistent with the causal connection between the affirmative misrepresentations of Brashier and resulting damages.

The holding in *Jue v. Smiser* (1994) 23 Cal.App.4th 312 is controlling in this case. In *Jue,* the subject property was represented to buyers to have been designed by a well-known architect, which compelled buyers to make a full price offer on the property. After signing all closing documents, but before actual close of escrow, buyers learned the representations could not be confirmed, but nevertheless closed escrow and later sued sellers and their agents for damages on various theories, including negligent misrepresentation. Respondents moved for summary judgment, which the trial court granted, finding that plaintiffs' claims for misrepresentation and fraud were "barred as a matter of law because it was "undisputed" that the Jues had actual knowledge of all material facts before the close of escrow, yet still elected to proceed with the purchase in the face of such facts, so there was no justifiable reliance. *Id.* at 315. The appellate court *reversed* in favor of Jue, holding that when a party learns he has been defrauded, he may, instead of rescinding, elect to stand on the contract and sue for damages, and, in such case his continued performance of the agreement does not constitute a waiver of the action for damages (*Jue, supra* at 315 citing to *Bagdasaria v. Gragnon* (1948) 31 Cal.2d 744, 750). Furthermore, the Court held that the relevant issue was whether or not appellants relied on respondent's alleged misrepresentations when the purchase agreement was struck. If the Court was to adopt a contrary rule, a buyer of real property who learns of a misrepresentation or potential misrepresentation after a purchase contract is struck but before escrow closes would be faced with an extraordinarily difficult choice of (a) consummating the purchase and waiving damages or (b) rescind and deal with the consequences of that choice which may include failure to obtain return of good faith deposit monies, loss of money spent to secure a loan and risk of being sued by seller. *Jue v. Smiser* (1994) 23 Cal.App.4th 312, 319.

From March 2007, until several days before closing in late June 2007, multiple Disposition Agreements and amendments were executed. The June 22, 2007 Disposition Agreement was simply an amendment of an earlier version and specifically incorporated earlier versions. Throughout this time, Mr. Stuart relied on the assurances of Brashier regarding Wickes being a sound tenant and did so before executing each and every amendment. By the time it became evident that the financials would not be forthcoming, it was much too late for Mr. Stuart to locate another property or cancel the transaction without financial consequences. No effort was made by the Brokers to pursue another property at any time. Furthermore, neither The Brokers nor The Attorneys warned Mr. Stuart of the risks of the transaction, thereby enforcing his belief that Wickes would be a solid tenant. Therefore, notwithstanding Mr. Stuart's right to rescind the transaction, he had a right to rely on the assurances of his fiduciaries that the purchase transaction constituted a solid and safe investment.

### C. *THE EVIDENCE SUPPORTS THE FIFTH CAUSE OF ACTION FOR FINANCIAL ELDER ABUSE*

#### 1. *Generally Speaking*

It is well known that many people, whether over the age of 65 or not, can and have been swindled by aggressive salesmanship and/or by being unduly influenced to enter into a deal. These are people who also make the mistake of not getting professional advice to guide them in these decisions.

Folks over the age of 65 are especially vulnerable to financial abuses, especially more subtle ones that come in the form of representations being made which have no basis in fact by someone who is a good salesperson. It is not relevant whether the elderly person was once a successful business person and/or investor. They are all the largest targets of potential financial predators. The California Legislature has recognized the indiscriminate nature of abuse of elders, notwithstanding one's socioeconomic status, gender, race and educational background. Indeed, financial elder abuse accounts for more than 40 percent of all forms of reported abuse against seniors. [6]

The phrase "financial elder abuse" is misunderstood by many, including the attorneys for the defendants in this case who have focused on Mr. Stuart's *apparent* mental capacity at the time of the acts which took place in this case in 2007. But California's financial elder abuse law (past or present) does not raise the issue of mental or physical capacity as a prerequisite to being the victim of elder abuse. If a person is 65 or older and incurs financial loss due to fraud or other bad faith conduct, he or she is the victim of elder abuse and that person or someone acting on his behalf may bring a claim under Welfare & Institutions Code section 15610.30. Financial elder abuse is defined in the applicable code section (in effect in 2007) as occurring when "a person or entity takes, secrets, appropriates, or retains (or assists in taking, secreting, appropriating or retaining) real or personal property of an elder or dependent adult to a wrongful use or with the intent to defraud or both." It covers again appropriation or retention of property made in bad faith. Someone is deemed to have acted in bad faith if he or she knew or should have known that elder had a right to possess the property. [7]

Defendants have expended extraordinary effort on trying to establish that Mr. Stuart had his full faculties at the time of the transaction. But this misses the point. The legislature has recognized the special vulnerability of elders regardless of capacity. Advanced age by itself renders people vulnerable to financial elder abuse, irrespective of whether they are legally mentally sound. *Welfare & Institutions Code* §15600.

Defendants committed financial elder abuse by their actions and omissions which resulted in Mr. Stuart going forward with the purchase of a high risk single tenant property, placing at least 40% of the family's wealth at risk. Mr. Stuart, who had been a successful business man, never would have closed this deal if he had the same sound judgment he enjoyed when he was much younger and was not subject to undue influence. His age impaired his judgment and defendants took advantage of it and failed to meet their fiduciary obligations to him. These defendants simply did not abide by their duty to this client and pushed him to close the deal rather than cancel it.

***2. The Brokers***

The Elder Abuse Cause of Action is based on *Welfare & Institutions Code* § 15610.30. In pertinent part, the 2007 statute provided that financial abuse of an elder occurred when a person or entity takes, appropriates or retains personal or real property of an elder adult for a wrongful use or with intent to defraud, or both. Subdivision "b" thereof provides that "A person or entity shall be deemed to have taken, secreted, appropriated, or retained property for a wrongful use if, among other things, the person or entity takes, secretes, appropriates or retains possession of property in bad faith."

The fundamental issue, therefore, is whether a real estate agent who breaches a fiduciary duty to an elder-client, acts in bad faith, and thereby receives a commission, is liable for financial elder abuse. An act of bad faith can satisfy the element of a taking for a wrongful use. *Teselle v. McLoughlin* (2009) 173 Cal.App.4th 156, 174. If there is a fiduciary duty owed by an agent or broker who owes a duty of good faith, a breach of the fiduciary duty constitutes bad faith.

A real estate agent or broker becomes a fiduciary in relation with the principal and assumes the duties, obligations, and high standards of good faith imposed on a person in a fiduciary relationship. *Realty Co. of America v. Burton* (1958) 160 Cal.App.2d 178, 191; *Loughlin v. Idora Realty Co.* (1968) 259 Cal.App.2d 619, 629. "The broker as a fiduciary has a duty to learn the material facts that may affect the principal's decision. He is hired for his professional knowledge and skill; he is expected to perform the necessary research and investigation in order to know those important matters that will affect the principal's decision, and he has a duty to counsel and advise the principal regarding the propriety and ramifications of the decision." *Field v. Century 21 Klowden-Forness Realty* (1998) 63 Cal.App.4th 18, 25. As described above, the duty of good faith owed by a broker requires that he "counsel and advise the principal regarding the propriety and ramifications of the decision." *Id.* Accordingly, the failure to perform that fiduciary duty of good faith is, by definition, an act of bad faith. *Chodur v. Edmonds* (1985) 174 Cal.App.3d 565, 572.

*Welfare & Institutions Code* §15610.30 also sets forth the existence of a duty *not to* engage in certain conduct. The evidence raises serious issues of statutory violations by the conduct of The Brokers. For example, The Broker defendants would receive a commission only if the transaction closed. Mr. Brashier took extraordinary measures, *e.g.*, following the Stuarts to Hawaii to get Mr. Stuart's agreement to the purchase. Further, Mr. Brashier knew that the process was overwhelming "particularly to someone unaccustomed to the process" and knew Mr. Stuart became easily confused. Despite The Brokers' knowledge of the importance that the Wickes' **financial** statements be examined and without factual basis, Brashier repeatedly assured his **elderly** client that Wickes would be a good tenant, *e.g.*, "you will be more than elated." He never performed his fiduciary duty to counsel and properly advise Mr. Stuart regarding the propriety and ramifications of purchasing the property without the Wickes' **financial** statements.

Having established The Brokers' bad faith fiduciary breach, as required by the statute, the final question is whether the receipt by The Brokers of a commission constitutes the taking, etc., that is also required by the statute. The Brokers will argue that a contractual fee can not constitute a wrongful taking. The law is otherwise. The issue was addressed in *Wood v. Jamison* (2007) 167 Cal.App.4th 156, 165. In that case, Jamison, an attorney, facilitated a fraudulent sale of an **elder's** property and received a finder's fee at close of escrow. The trial court found that the receipt of the finder's fee by Jamison constituted a taking of the **elder's** property under the **elder financial abuse** statute. The Court of Appeal affirmed. In the case at bar, The Brokers breached their fiduciary duties in order to receive a commission which was paid by The Plaintiffs. This so-called "contractual fee" was a taking of the property of an **elder** through bad faith, which equates to the statutorily-defined wrongful use.

### *3. The Attorneys*

The Attorneys aided and abetted The Brokers' bad faith conduct by failing to look out for the interests of their **elder** client first and foremost. It is obvious that the close friendship between McCormick and Brashier (and their wives) clouded McCormick's judgment and divided his loyalties. Indeed McCormick failed to recognize this potential conflict from the onset, failing to disclose the relationship and obtaining Mr. Stuart's informed written consent to his representation notwithstanding the friendship with Brashier. McCormick should have informed both Brashier and the Stuarts that it was not necessary for Brashier to fly to Hawaii to "push the deal through." McCormick should have warned Mr. Stuart of closing the deal without the Wickes' **financials** in writing, advised him how unusual it was for a seller not to provide those and urge him *in writing* not to proceed. McCormick should have warned Mr. Stuart that simply because the lender approved the loan does not translate to the tenant being **financially** sound. Having properly warned and advised Mr. Stuart, McCormick should have communicated these concerns to Mrs. Stuart, as co-Trustee of the Stuart Family Trust, if Mr. Stuart was failing to appreciate the significance of the risk. McCormick never told Brashier to step out of the room while he gave advice to Mr. Stuart. Mr. McCormick did not do any of this because doing so would be at odds with the interests of his friends, the Brashiers, and because he failed to acknowledge and understand his higher duty to an **elder** person.

### *4. All Defendants Are Liable for Punitive Damage Claims*

In *Alhino v Starr* (1980) 112 Cal.App.3d 158, liability for punitive damages was imputed to a broker for the conduct of its sales agent for fraudulently assuring a seller of the **financial** worthiness of the buyer. The Court in *Alhino* rejected the real estate defendants' contentions that there was insufficient substantial evidence of fraud and affirmed a finding of liability against broker for its salesperson's conduct. With respect to whether the sales agent's acts were ratified by the broker, the Court found that ratification was apparent from the record because the agent informed his supervisor of the details of the transaction. The Court further found that prior to trial, the agent was re-employed by the broker, and defended at the trial by the broker's attorney, the assertion of which alone demonstrates ratification of the employee's conduct. *Id.* at 173 (citing *Hale v. Farmers Ins. Exch.,* 42 Cal.App.3d 681, 698, disapproved on other grounds in *Egan v. Mutual of Omaha Ins. Co.* (1979) 24 Cal.3d 809, fn. 5 at p. 822). [Emphasis added]. The agent's supervisor was deemed to be an officer, director, or managing agent of the company which was sufficient to impute ratification or authorization.

In *White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, the Court evaluated what constitutes a "managing agent" under Section 3294(b) finding that an assistant manager of a convenience store was a managing agent based on his broad discretionary powers and exercise of substantial discretionary authority.

 

In the context of an insurance corporation, the court in *Egan v. Mutual of Omaha Ins. Co.* (1979) 24 Cal.3d 809, 823 explained, "When employees dispose of insureds' claims with little if any supervision, they possess sufficient discretion for the law to impute their actions concerning those claims to the corporation."

In *Major v. Western Home Ins. Co.* (2009) 169 Cal.App.4th 1197, the court found that substantial evidence supported the jury's finding that an individual insurance adjuster was a managing agent. In *Major,* a couple sued their insurance company, which retained an outside firm to handle a significant aspect of its business: its claims handling functions. *Id.* at 1220-21. The court identified as the most important factor that the individual claims representative, although employed by the third party firm, personally assumed handling the plaintiffs' claim. *Id.* The *Major* Court explained that the "critical inquiry" is whether the degree of discretion the employees possess in making decisions will ultimately determine corporate policy." *Id.,* 169 Cal.App.4th at 1219. The court found that the claims representative was a managing agent for the insurer and, as such, that the insurer was liable for punitive damages. *Id.* at 1220-21.

In this case, Brashier's supervisor testified he or his assistant were required to review all pending transactions and created policy for the local office. Brashier confirmed this in his deposition, confirmed he has continued to work for Coldwell Banker and that Coldwell Banker was paying for his defense in this case. Given the foregoing, and the holding in *Alhino* and the other above-cited cases, liability for punitive damages can be imputed to Coldwell Banker for the conduct of Brashier for fraudulently assuring Mr. Stuart of the **financial** worthiness of Wickes and "pushing through the deal."

Similarly, it is undisputed that McCormick was working for Allen Matkins at the time the events which give rise to this dispute took place. It is also undisputed that Allen Matkins is paying for McCormick's defense. Indeed Allen Matkins has never denied ratifying McCormick's conduct or asserted a lack of responsibility for his acts and omissions.

### D. *THE LACK OF CAUSATION ARGUMENT WILL FAIL*

Plaintiffs expect that both sets of defendants will argue that plaintiffs' damages were caused by the failing economy in 2008, not by breach of duty of care to plaintiffs. In the Brokers last Motion for Summary Judgment, the Brokers cited to dicta in the cases of *Professional Engineers in Cal. Government v. Schwarzenegger* (2010) 50 Cal.4th 989 and *American Physicians and Dentists v. Brown* (2011) 195 Cal.App.4th 691, 694 in support of this defense, but the cases themselves raise many issues regarding the state of the economy and the retail furniture business in California in 2007. More importantly, these cases address the State of California governor's authority to issue furloughs to deal with the state's **financial** crises and are factually inapt. The holdings bear no relevancy to an attorney and/or real estate agent's duties to an **elder** client. In fact, the evidence will establish that plaintiffs were very cautious and conservative investors. They have lived in the same home since 1973. Their investment advisor will testify that he was given responsibility to manage their portfolio with the admonition to invest in low risk products. In fact, over 80% of the Stuart's portfolio is in tax free government bonds paying out an average of 4 percent. Witnesses will testify as to how conservative Mr. Stuart was when he was still managing his business, following such time honored principals as "measure ten times, cut once" and "you never get hung by what you don't buy".

## VI.

## DAMAGES

The net proceeds from the closing of the Radio Road Property was $6,414,957. If this money had not be exchanged for the Wickes' investment, plaintiffs would have paid $1,321,259 in capital gain taxes, leaving them a net cash balance of $5,093,698. The Stuarts were generally conservative investors and if they did not locate a suitable replacement property, they intended to invest the proceeds in municipal bonds, with an expected average yield of 4%. Applying this rate of return on the proceeds from January 2007 through the present, The Stuart's total loss exceeds approximately $6,500,000 and plus future losses on this money through Katherine's life expectancy, of more than $2,000,000. In addition to these amounts, plaintiffs sustained **financial** losses in the form of money that had to be paid in mortgage interest, real estate taxes and other property-rated expenditures.

 

Dated: May 1, 2013

BLUMBERG LAW CORPORATION

Attorney for Plaintiffs

By: <<signature>>

JOHN P. BLUMBERG

SINDEE M. SMOLOWITZ

Footnotes

1 In those days married women were not permitted to keep their jobs as flight attendants.

2 At some point, Katherine because the corporate Secretary, but in name only.

3 He also hired Sam Davidson to manage all of the Stuart's personal/non-real estate investments.

4 In fact, the Wickes' bankruptcy schedules fail to even mention providing MLML with **financial** statements.

5 Had proper due diligence been undertaken or advised, the professionals would have learned that the Wickes family sold off the company to an investment company, which was pulling back from infusing capital into the businesses to keep the company afloat. Several stores had already closed.

6 **Elder Financial Abuse** Task Team Report *to the California Commission on Aging (June 2007)*

7 Welfare & Institutions Code section 15610.30(a) and (b)