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9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF SAN JOAQUIN

11 Arthur Tener and Alicia Tener, individually,
12 and Arthur Tener, trustee of the Tener Living
13 Trust,

14 Plaintiffs,

15 vs.

16 Harold Hagendorff, XXX-XXXXX,
17 OM Financial Life Insurance Company, American
18 Equity Investment Life Insurance Company,
19 and Does 1 through 20,

20 Defendants.

Case No. CV 030854

21 SECOND AMENDED COMPLAINT
22 FOR:

- 23 1. Violation of Unlawful Competition Law
(B & P Code § 17200 *et seq.*)
- 24 2. Breach of Fiduciary Duty
- 25 3. Conversion
- 26 4. Elder Financial Abuse (W & I §
15610.30)
- 27 5. Negligence
- 28 6. Fraud
7. Rescission

29 **PRELIMINARY ALLEGATIONS**

30 1. At all times mentioned, Arthur Tener and Alicia Tener were natural persons over the
31 age of 18 years. Arthur Tener is the trustee of the Tener Living Trust. Each plaintiff holds some
32 right, title, and interest in the property which is the subject matter of this action and accordingly is
33 the real party in interest pursuant to CCP § 367.

34 2. Defendant Harold Hagendorff is a natural person over the age of 18. Defendant
35 XXX-XXXXX (“XXX-XXXXX”) is a business entity of unknown form. Defendant Harold
36 Hagendorff (“Hagendorff”) is licensed as a life insurance agent by the State of California and holds
37 license 0643285. Defendant XXX-XXXXX is licensed as a life insurance agent by the State of
38

1 California and holds license 0B18012. Defendant OM Financial Life Insurance Company (“F & G
2 Insurance”) is an insurer and holds California company identification number 1626-1 and formerly
3 transacted insurance in California as Fidelity & Guaranty Life Insurance Company. Defendant
4 American Equity Investment Life Insurance Company (“American Equity Insurance”) is an insurer
5 and holds California company identification number 2509-8.

6 3. The true names and capacities of defendants sued as Does are unknown, and
7 plaintiffs will amend this complaint to show their true names and capacities when this information
8 is ascertained. Each such Doe defendant is in some manner responsible for the damages alleged
9 pursuant to each cause of action asserted, either through its own conduct, or vicariously through the
10 conduct of others. All further references in this complaint to any of the named defendants, or to
11 defendants generally, shall include such Doe defendants.

12 4. At all times mentioned, each defendant was an agent, servant, employee, partner, and
13 joint venturer of each and every other defendant and was acting within the course and scope of this
14 relationship. The conduct of each defendant was authorized and ratified by each and every other
15 defendant.

16 5. This court is the proper court in which to bring this action because plaintiffs
17 sustained injury within its jurisdiction, events giving rise to this action occurred here, and at least
18 one defendant is located here.

19 **GENERAL ALLEGATIONS**

20 6. Paragraphs 1 through 5 are incorporated by reference.

21 7. Arthur Tener was born on August 24, 1926 and was at least 78 years old at the time
22 of the events alleged in this complaint. Alicia Tener was born on September 11, 1932 and was at
23 least 73 years old at the time of the events alleged in this complaint. Plaintiffs are a retired and
24 elderly couple of modest means living in Stockton. Alicia suffers from the advanced stages of
25 Parkinson’s disease and diabetes and has undergone brain surgery to mitigate her severe symptoms.
26 Arthur suffers from idiopathic pulmonary fibrosis, a terminal illness, and suffers from various
27 cognitive defects which involve deficits in alertness and attention, information processing, thought
28 processes, and the ability to modulate mood and affect. As a result of these conditions and deficits,

1 both Arthur and Alicia are extremely vulnerable and susceptible to exploitation.

2 8. On November 9, 2001, plaintiffs purchased three deferred annuity insurance policies,
3 issued by American Investors Life Insurance Company, Inc. (“Prior Annuities”) and designated
4 contracts 392310, 392535, and 392779. Contract 392779 contained Arthur’s individual retirement
5 account funds. The value of the three Prior Annuities as of September, 2005, was \$113,490.

6 9. Effective June 17, 1993, XXX-XXXXX was authorized by the Department of
7 Insurance to transact insurance as a life agent in California pursuant to license number 0B18012.
8 The license granted by the Department of Insurance identifies XXX-XXXXX as “XXX-XXXXX,
9 DBA: XXX-XXXXX INSURANCE SERVICES.” The license provides: “XXX-XXXXX
10 INSURANCE SERVICES’ MUST BE USED FOR ALL INSURANCE BUSINESS CONDUCTED
11 IN CALIFORNIA.” Effective March 8, 2000, XXX-XXXXX was appointed as agent for American
12 Equity Insurance pursuant to Insurance Code §§ 35 and 1704. The conduct of XXX-XXXXX
13 alleged in this complaint was within the course and scope of the agency relationship between XXX-
14 XXXXX and American Equity Insurance. Notwithstanding conduct undertaken on behalf of F & G
15 Insurance, XXX-XXXXX was not appointed as agent for F & G Insurance pursuant to Insurance
16 Code §§ 35 and 1704 as required by law.

17 10. Effective February 2, 1988, Hagendorff was authorized by the Department of
18 Insurance to transact insurance as a life agent in California pursuant to license number 0643285.
19 The license granted by the Department of Insurance identifies Hagendorff as “HAGENDORFF
20 HAROLD GEORGE JR., DBA: PROTECTED RETIREMENT INSURANCE SERVICES.”
21 Effective May 15, 2000, Hagendorff was appointed as agent for American Equity Insurance
22 pursuant to Insurance Code §§ 35 and 1704. The conduct of Hagendorff alleged in this complaint
23 was within the course and scope of the agency relationship between Hagendorff and American
24 Equity Insurance. Notwithstanding conduct undertaken on behalf of F & G Insurance, Hagendorff
25 was not appointed as agent for F & G Insurance pursuant to Insurance Code §§ 35 and 1704 as
26 required by law.

27 11. Prior to August 18, 2005, Hagendorff and XXX-XXXXX entered into a scheme
28 whereby they agreed to provide each other with mutual assistance with the objective of marketing

1 annuities to seniors and thereby sharing commissions. The true nature of defendants' relationship is
2 as yet unknown to plaintiffs, who thereupon allege that each defendant authorized the other to act
3 on its behalf and in furtherance of defendants' common sales objective in their capacities as agents,
4 servants, employees, partners, and joint venturers in this common enterprise. The primary goals of
5 defendants' marketing plan were: to create sales opportunities by targeting seniors with invitations
6 to sales presentations disguised as free educational workshops and to overcome reluctance of
7 seniors to attend by promoting the presentations as "educational," "free," offered solely for the
8 purpose of "helping" seniors, and by offering free refreshments; to scare seniors by presenting
9 alarming descriptions of catastrophic illness, financial devastation, and the potential for losing their
10 homes and being institutionalized in expensive and uncaring nursing homes; to scare seniors with
11 the complexity of Medi-Cal and related laws, regulations, and bureaucratic "red-tape" and to
12 convince seniors that they lacked the knowledge, experience, and capacity to protect themselves; to
13 manipulate seniors into believing that defendants were knowledgeable, competent, honest, fair-
14 dealing, and were acting in good-faith and could protect seniors from these threats through arcane
15 methods of "Care Planning & Asset Preservation"; to obtain specific contact information from
16 attendees so that defendants could follow-up with individualized sales presentations in seniors'
17 homes; and to schedule sales appointments at seniors' homes and to travel to seniors' homes for the
18 purpose of meeting with them individually and inducing them to purchase defendants' products. In
19 furtherance of these marketing goals, defendants produced written advertising materials. These
20 materials identified XXX-XXXXX as "XXX-XXXXX Senior Services" in violation of the specific
21 licensing requirements of the Department of Insurance. They also including an announcement for an
22 "Educational Workshop" scheduled for August 18, 2005 at the Oak Park Senior Center in Stockton.
23 In large bold letters, the advertisement headlined: "Attention Seniors: The #1 Educational
24 Workshop in Northern California!" and announced the presentation as: "How To Avoid The
25 Financial Devastation of Catastrophic Illness." It stated that the "workshop" was "Sponsored By
26 XXX-XXXXX Senior Services, Asset Preservation Specialists" and Hagedorff and that
27 Hagedorff was a XXX-XXXXX "Senior Advocate" and could be contacted at the address,
28 telephone number, and website of XXX-XXXXX. The advertisement exhibited defendants' sales

1 slogan: “We’re here to **help** – *Free of Charge*.” A true and correct copy of the advertisement is
2 attached as Exhibit A. Plaintiffs believe, and thereupon allege, that defendants shared the cost of
3 printing and distributing the advertisements and otherwise promoting the presentation, the cost of
4 renting the Oak Park Senior Center, the cost of producing contact information forms and related
5 written materials, and the cost of providing refreshments.

6 12. After seeing the advertisement, Arthur attended defendants’ presentation on August
7 18, 2005, together with approximately 30 other attendees. Because Arthur suffers from various
8 cognitive defects, he can not clearly recollect many details and only has a very general recollection
9 of the event and the information presented. The presentation started with an address by a person
10 who identified himself as a representative of XXX-XXXXX Senior Services. The XXX-XXXXX
11 representative distributed to attendees a two page document entitled “XXX-XXXXX Senior
12 Services Asset Preservation Specialists” on which attendees were instructed to write their personal
13 contact information, reasons for attending, and any comments on the presentation. The form also
14 offers to provide attendees with additional information and consultation services which are
15 repeatedly represented as being “free.” A true and correct copy of this form is attached as Exhibit B.
16 The XXX-XXXXX representative also distributed to attendees a booklet entitled “How To Avoid
17 The Financial Devastation of Catastrophic Illness: A Consumers’ Guide on Qualifying for Medi-Cal
18 Entitlements.” The advertising materials contained in this booklet were disguised as a neutral
19 “consumers’ guide” and contained various misrepresentations and false statements and represented
20 that the services of defendants were free. It exhibited in several places defendants’ sales slogan:
21 “We’re here to **help** – *Free of Charge*.” A true and correct copy of the cover of this booklet is
22 attached as Exhibit C. At the conclusion of the presentation, Arthur approached Hagendorff,
23 returned defendants’ information form on which he had written his contact information, and
24 expressed interest in the additional free consultation services. Arthur told defendants that Alicia
25 suffered from Parkinson’s disease, that they were afraid that Alicia might be institutionalized, and
26 were concerned about the economic burden of paying for such care. Hagendorff told Arthur that he
27 could help – free of charge – and scheduled an appointment to meet with plaintiffs in plaintiffs’
28 home on August 24, 2005.

1 13. On August 24, 2005, Hagendorff visited plaintiffs in their home in Stockton.
2 Hagendorff asked plaintiffs various questions about plaintiffs' financial affairs and obtained
3 detailed private financial information. Among other things, Hagendorff learned of the three Prior
4 Annuities. Hagendorff made various representations comparing the value of the Prior Annuities to
5 replacement annuities and advised plaintiffs that it would be in their best interests to surrender the
6 three Prior Annuities and to purchase three replacement annuities. He represented that this would be
7 necessary to qualify Alicia for Medi-Cal benefits and that Hagendorff would arrange this at no
8 expense to plaintiffs. On various dates thereafter Hagendorff returned to plaintiffs' home to
9 continue his sales efforts and repeatedly assured plaintiffs that the services of defendants were free.
10 Plaintiffs lacked the knowledge, experience, and cognitive ability to independently evaluate
11 Hagendorff's statements, and plaintiffs could not evaluate whether replacing the Prior Annuities
12 with new annuities would benefit them nor if it was the least expensive and most appropriate
13 method of qualifying for Medi-Cal benefits. However, based upon Hagendorff's apparent honesty
14 and credibility, his repeated insistence on the importance of making these changes, and his dogged
15 insistence that his services were free and that he was there solely to help them, plaintiffs finally
16 accepted his advice and agreed to do as he instructed.

17 14. On September 7, 2005, Hagendorff presented plaintiffs with various documents and
18 forms, which Hagendorff instructed Arthur to initial and sign in various places. Arthur initialed and
19 signed these documents without reading or understanding them. These documents authorized the
20 surrender of the three Prior Annuities and directed that the net proceeds (after deducting surrender
21 charges) be delivered to F & G Insurance and American Equity Insurance. Shortly thereafter,
22 defendants submitted these authorizations and the three Prior Annuities were surrendered. Surrender
23 charges of \$10,622 were deducted from the \$113,490 value of the Prior Annuities and the net
24 proceeds were forwarded to F & G Insurance and American Equity Insurance.

25 15. On October 11 and 15, 2005, the three replacement policies solicited by defendants
26 were issued, designated F & G Insurance annuities L9102607 and L9102608 and American Equity
27 Insurance annuity 578804 (collectively referred to as the "Replacement Annuities"). The
28 Replacement Annuities had the effect of increasing and extending the surrender charge periods of

1 the annuities owned by plaintiffs and otherwise harmed plaintiffs by being expensive, unnecessary,
2 inappropriate, and unsuitable.

3 16. Contrary to the repeated written and oral representations of defendants that their
4 services were free, each defendant in fact received a percentage of plaintiffs' money generated by
5 the surrender of the Prior Annuities and used to purchase the Replacement Annuities. Plaintiffs are
6 informed and believe that defendant XXX-XXXXX received \$1,227.55 and defendant Hagendorff
7 received \$2,969.25.

8
9 **FIRST CAUSE OF ACTION AGAINST ALL DEFENDANTS**
10 **(Violation of Unlawful Competition Law – B & P § 17200)**

11 17. Paragraphs 1 through 16 are incorporated by reference.

12 18. The conduct alleged herein of defendants, and each of them, constitute unfair,
13 unlawful, or fraudulent acts or practices within the meaning of Business & Professions Code
14 sections 17200 *et seq.*

15 19. Specifically, defendants, and each of them, engaged in unfair, unlawful, or
16 fraudulent acts or practices, including but not limited to:

17 (1) Use of deceptive name “XXX-XXXXX Senior Services Asset Preservation
18 Specialists”: XXX-XXXXX advertised, promoted, and introduced itself as “XXX-XXXXX Senior
19 Services Asset Preservation Specialists.” The use of this name was deceptive, misleading, and
20 illegal and violated the specific requirement of the Department of Insurance that XXX-XXXXX
21 disclose to consumers that it was a seller of insurance products by using the name “XXX-XXXXX
22 Insurance Services.” In addition, use of this name and related terms violate Insurance Code § 787.

23 (2) Use of the deceptive phrases “Educational Workshop,” “We’re here to help –
24 Free of Charge,” “Senior Advocates,” and “Consumers’ Guide”: Defendants’ banner on its
25 advertisement states in large font: “Attention Seniors: The #1 Educational Workshop in Northern
26 California!” (Exhibit A.) Defendants’ failure to include the phrase “and insurance sales
27 presentation” is deceptive, misleading, and illegal and violates Insurance Code § 787. The
28 advertisement and other marketing materials repeatedly displayed defendants’ sales motto “We’re
here to **help** – *Free of Charge*”; this statement is patently false as defendants were actually there to

1 sell annuities and earn commissions and is therefore deceptive, misleading, and illegal and violates
2 Insurance Code § 787. The advertisement identifies defendants as “Senior Advocates” and thereby
3 reinforces the deception that defendants are a non-profit organization acting solely in the interests of
4 the seniors for whom they advocate. This deception is further promoted by sales literature which is
5 characterized as a “Consumers’ Guide.” These acts are deceptive, misleading, and illegal and
6 violate Insurance Code § 787.

7 (3) Failure to prominently disclose attempts to follow-up by agent: Defendants failed
8 to prominently disclose in their advertisements that defendants would attempt to follow-up on sales
9 leads. This conduct was deceptive, misleading, and illegal and violates Insurance Code § 787.

10 (4) Failure to disclose representative capacity of defendants: Defendants’
11 advertisement exhibits a photograph of defendant Hagendorff and implies in the text that he is an
12 employee or principal of defendant XXX-XXXXX. XXX-XXXXX and Hagendorff now contend
13 that they have no such relationship. This conduct was therefore deceptive, misleading, and illegal
14 and violates Insurance Code § 787.

15 (5) Failure to provide the disclosure notice required by Ins. Code § 789.8:
16 Defendants failed to provide plaintiffs with the statutory notice required by Insurance Code § 789.8.

17 (6) Sale of prohibited annuities to plaintiffs pursuant to Ins. Code § 789.9: Plaintiffs
18 already would have qualified for Medi-Cal benefits without surrendering the Prior Annuities nor
19 purchasing the Replacement Annuities, and therefore defendants were prohibited from selling these
20 annuities to plaintiffs pursuant to Insurance Code § 789.9.

21 (7) Breach of duties of honesty, good faith, and fair dealing pursuant to Ins. Code §
22 785: The conduct of defendants was illegal in that it violated the duties of honesty, good faith, and
23 fair dealing required by Insurance Code § 785.

24 (8) False and misleading advertisements: Defendants created, produced, and
25 disseminated in California advertisements containing statements which were false, misleading, and
26 deceptive, including but not limited to claims that their services were free and that a community
27 spouse could only retain assets in excess of the Community Spouse Resource Allowance if it can be
28 shown that exceptional circumstances exist that are the cause of extreme financial duress. Such

1 advertising violates Business & Professions Code §§ 17200 *et seq.*

2 (9) Illegal twisting pursuant to Insurance Code §§ 781 and 10509.8: Defendants
3 made various misleading statements to plaintiffs, both orally and in writing, including but not
4 limited to: that requests to increase the community spouse resource allowance are exceptions and
5 are not routinely granted; that petitions to increase the Community Spouse Resource Allowance
6 pursuant to Probate Code § 3100 are only granted under exceptional circumstances of extreme
7 financial duress; that it was necessary for plaintiffs to surrender the Prior Annuities and purchase
8 the Replacement Annuities to become eligible for Medi-Cal benefits; and that it was advantageous
9 and desirable for plaintiffs to surrender the Prior Annuities and purchase the Replacement
10 Annuities, all of which violates Insurance Code § 781.

11 (10) Sale of F & G Insurance annuities by defendants violated Insurance Code §
12 1704: The solicitation and sale of the F & G Insurance annuity to plaintiffs by defendants was
13 illegal because defendants were not appointed as agents for F & G Insurance in violation of
14 Insurance Code § 1704.

15 20. As a direct result of defendants unfair, unlawful, or fraudulent acts or practices,
16 plaintiffs sustained injuries in that plaintiffs lost money and property, namely surrender charges of
17 \$10,622, commissions of \$4,197, and related damages.

18 21. As a further direct result of defendants unfair, unlawful, or fraudulent acts or
19 practices, plaintiffs are entitled to recover not less than the amount of \$14,819.

20 22. Plaintiffs seek injunctive relief against further acts and practices by defendants
21 constituting unfair competition in violation of Business & Professions Code § 17200.

22 **SECOND CAUSE OF ACTION AGAINST ALL DEFENDANTS**
23 **(Breach of Fiduciary Duty)**

24 23. Paragraphs 1 through 22 are incorporated by reference.

25 24. Defendants induced plaintiffs to surrender the Prior Annuities and to purchase the
26 Replacement Annuities. XXX-XXXXX was appointed to place insurance with 18 insurers and
27 Hagendorff was appointed to place insurance with 23 insurers. Defendants selected F & G
28 Insurance and American Equity Insurance and did not discuss with plaintiffs the terms or

1 availability of policies offered by other insurers. Accordingly, defendants were agents of plaintiffs
2 pursuant to *Eddy v. Sharp* (1988) 199 Cal.App.3d 858 and thereby owed plaintiffs fiduciary duties
3 of the utmost good faith and fidelity.

4 25. As a result of plaintiffs’ advanced age, lack of education, weakened mental and
5 physical condition, sickness and other incapacities, plaintiffs were vulnerable to exploitation and
6 manipulation by defendants. This vulnerability empowered defendants to exploit and manipulate
7 plaintiffs through sales tactics designed to confuse, alarm, and otherwise unfairly induce plaintiffs
8 to purchase defendants’ products. This empowerment was solicited and accepted by defendants
9 through their advertisements, workshop presentation, written materials, individual consultation,
10 repeated assertions that “We’re here to **help** – *Free of Charge*,” and related sales tactics. The
11 vulnerability of plaintiffs to exploitation and manipulation resulted in plaintiffs reposing trust in
12 defendants and prevented plaintiffs from effectively protecting themselves from defendants’ sales
13 tactics. Pursuant to *Richelle L. v. Roman Catholic Archbishop* (2003) 106 Cal.App.4th 257, a
14 confidential relationship existed between plaintiffs and defendants. As a result of the confidential
15 relationship between plaintiffs and defendants, defendants owed plaintiffs a fiduciary duty of the
16 utmost good faith and fidelity which prohibited defendants from profiting or otherwise taking
17 advantage of plaintiffs pursuant to *Herbert v. Lankershim* (1937) 9 Cal.2d 409.

18 26. Defendants took advantage of plaintiffs and profited from defendants’ conduct by
19 earning commissions on the sale of the Replacement Annuities and thereby breached their fiduciary
20 duty of the utmost good faith and fidelity. The existence of defendants’ fiduciary duty, together with
21 the profiting of defendants, raises the presumption that defendants exercised undue influence over
22 plaintiffs pursuant to *Stevens v. Marcos* (1956) 147 Cal.App.2d 357 and places the burden of proof
23 on defendants pursuant to Evidence Code § 606 to prove that the purchase of the Replacement
24 Annuities did not result from undue influence.

25 27. As a direct result of defendants’ breach of this fiduciary duty of the utmost good
26 faith and fidelity, plaintiffs sustained damages in an amount of not less than \$14,819.

27 28. Defendants’ wrongful conduct constituted oppression, fraud, and malice and
28 plaintiffs are entitled to recover damages for the sake of example and by way of punishing

1 defendants pursuant to Civil Code § 3294.

2 29. Plaintiffs are entitled to recover treble damages pursuant to Civil Code § 3345.

3 **THIRD CAUSE OF ACTION AGAINST ALL DEFENDANTS**
4 **(Conversion)**

5 30. Paragraphs 1 through 29 are incorporated by reference.

6 31. The Replacement Annuities were owned by plaintiffs, who therefore had the right to
7 possess them.

8 32. Defendants arranged for the surrender of the Replacement Annuities and the
9 purchase of the Replacement Annuities and thereby came into possession of a portion of plaintiffs'
10 property. Plaintiffs suffered from various cognitive defects involving deficits in alertness and
11 attention, information processing, thought processes, and the ability to modulate mood and affect.
12 These deficits significantly impaired plaintiffs' ability to understand and appreciate the
13 consequences of their actions with regard to decisions relating to these transactions, and plaintiffs
14 thereby lacked capacity pursuant to Probate Code § 811 to enter into these agreements.
15 Accordingly, plaintiffs could not, and did not consent to the agreements whereby defendants came
16 into possession of a portion of plaintiffs' property.

17 33. As a direct and proximate cause of defendants' conversion of plaintiffs' property,
18 plaintiffs have been deprived of property in an amount not less than \$14,819.

19 34. Defendants' wrongful conduct was intentional and constituted oppression, fraud, and
20 malice, and plaintiffs are entitled to recover damages for the sake of example and by way of
21 punishing defendants pursuant to Civil Code section 3294.

22 **FOURTH CAUSE OF ACTION AGAINST ALL DEFENDANTS**
23 **(Elder Financial Abuse)**

24 35. Paragraphs 1 through 34 are incorporated by reference.

25 36. Defendants acted wrongfully and illegally by: (1) using deceptive names in violation
26 of Insurance Code § 787; (2) using deceptive phrases and advertising in violation of Insurance Code
27 § 787; (3) failing to prominently disclose attempts to follow-up by an agent in violation of
28 Insurance Code § 787; (4) failing to disclose the representative capacity of defendants in violation

1 of Insurance Code § 787; (5) failing to provide the disclosure notice required by Insurance Code §
2 789.8; (6) selling plaintiffs annuities in violation of Insurance Code § 789.9; (7) breaching duties of
3 honesty, good faith, and fair dealing pursuant to Insurance Code § 785; (8) disseminating false and
4 misleading advertisement in violation of Business & Professions Code § 17200 *et seq.*; (9) engaging
5 in illegal twisting pursuant to Insurance Code §§ 781 and 10509.8; (10) engaging in insurance
6 transactions in violation of Insurance Code § 1704; and (11) knowingly and intentionally
7 misrepresenting to plaintiffs, both orally and in writing, that requests to increase the Community
8 Spouse Resource Allowance are exceptions and are not routinely granted, that petitions to increase
9 the Community Spouse Resource Allowance pursuant to Probate Code § 3100 are only granted
10 under exceptional circumstances of extreme financial duress, that it was necessary for plaintiffs to
11 surrender the Prior Annuities and purchase the Replacement Annuities to become eligible for Medi-
12 Cal benefits, and that it was advantageous and desirable for plaintiffs to surrender the Prior
13 Annuities and purchase the Replacement Annuities. These misrepresentations were made by XXX-
14 XXXXX in the written booklet entitled “How To Avoid The Financial Devastation of Catastrophic
15 Illness: A Consumers’ Guide on Qualifying for Medi-Cal Entitlements” given to plaintiffs by XXX-
16 XXXXX and by Hagendorff in his oral statements to plaintiffs. These misrepresentations allowed
17 defendants to obtain the signatures of plaintiffs on various documents authorizing the surrender of
18 the Prior Annuities and resulted in the delivery of a percentage of the net proceeds to defendants in
19 the form of commissions. The placing of plaintiffs’ signatures on these documents and plaintiffs’
20 delivery of these documents to defendants constituted the taking of property rights of plaintiffs. In
21 addition, the payment of a percentage of the net proceeds of the Prior Annuities to defendants
22 constituted a taking of property of plaintiffs. By engaging in this conduct, defendants took, secreted,
23 appropriated, and retained the property of plaintiffs, elders, to a wrongful use and with the intent to
24 defraud within the meaning of Welfare & Institutions Code § 15610.30.

25 37. Defendants, and each of them, through these misrepresentations and other conduct in
26 furtherance of their common enterprise, assisted each other in the taking, secreting, appropriating,
27 and retaining of the property of plaintiffs, elders, to a wrongful use and with the intent to defraud
28 within the meaning of Welfare & Institutions Code § 15610.30.

1 an amount of not less than \$14,819.

2 **SIXTH CAUSE OF ACTION AGAINST ALL DEFENDANTS**
3 **(Fraud)**

4 46. Paragraphs 1 through 45 are incorporated by reference.

5 47. The statements and other representations which defendants made to plaintiffs
6 regarding the nature, value, and appropriateness of these transactions were false and misleading.

7 48. The false and misleading statements of defendants were material to plaintiffs'
8 decision to surrender the Prior Annuities and to purchase the Replacement Annuities. Plaintiffs
9 justifiably relied on these misrepresentations, which resulted in the surrender of the Prior Annuities
10 and the purchase of the Replacement Annuities.

11 49. Defendants knew that these statements were false and misleading and that plaintiffs
12 would rely upon them to their detriment, and defendants thereby intended to defraud plaintiffs.

13 50. As a direct and proximate result of defendants' wrongful conduct, plaintiffs
14 sustained damages in an amount of not less than \$14,819.

15 51. Defendants' conduct constituted oppression, fraud, and malice, and plaintiffs are
16 entitled to recover damages for the sake of example and by way of punishing defendants pursuant to
17 Civil Code § 3294.

18 52. Plaintiffs are entitled to recover treble damages pursuant to Civil Code § 3345.

19 **SEVENTH CAUSE OF ACTION AGAINST ALL DEFENDANTS**
20 **(Rescission)**

21 53. Paragraphs 1 through 52 are incorporated by reference.

22 54. Plaintiffs suffered from various cognitive defects involving deficits in alertness and
23 attention, information processing, thought processes, and the ability to modulate mood and affect.
24 These deficits significantly impaired plaintiffs' ability to understand and appreciate the
25 consequences of their actions with regard to decisions relating to these transactions, and plaintiffs
26 thereby lacked capacity pursuant to Probate Code § 811 to enter into these agreements. As a result
27 of plaintiffs' lack of capacity, the agreement to purchase the Replacement Annuities is voidable
28 pursuant to Civil Code § 1689.

1 55. Alternately, the consent of plaintiffs to the purchase of the Replacement Annuities
2 was obtained through duress, menace, fraud, or undue influence, and therefore the agreement to
3 purchase the Replacement Annuities is voidable pursuant to Civil Code § 1689.

4 WHEREFORE, plaintiffs pray for judgment against defendants as follows:

5 1. Violation of Unlawful Competition Law (B & P § 17200):

- 6 a. Compensatory damages according to proof;
- 7 b. Punitive damages according to proof;
- 8 c. Treble damages pursuant to CC § 3345;
- 9 d. For preliminary and permanent injunctive relief prohibiting defendants from
10 engaging in further acts of unfair competition;

11 e. Reasonable attorney's fees and costs according to proof;

12 2. Breach of Fiduciary Duty:

- 13 a. Compensatory damages according to proof;
- 14 b. Punitive damages according to proof;
- 15 c. Treble damages pursuant to CC § 3345;

16 3. Conversion:

- 17 a. Compensatory damages according to proof;
- 18 b. Reasonable attorney's fees and costs according to proof;

19 4. Elder Financial Abuse (W & I Code § 15610.30):

- 20 a. Compensatory damages according to proof;
- 21 b. Reasonable attorney's fees and costs according to proof;
- 22 c. Punitive damages according to proof;
- 23 c. Treble damages pursuant to CC § 3345;

24 5. Negligence:

- 25 a. Compensatory damages according to proof;

26 6. Fraud:

- 27 a. Compensatory damages according to proof;
- 28 b. Punitive damages according to proof;

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- c. Treble damages pursuant to CC § 3345;
- 7. Rescission:
 - a. The return of all property relinquished by plaintiffs;
- 8. Interest pursuant to CC §§ 3287 and 3288;
- 9. Costs pursuant to CCP § 1032; and
- 10. For such further relief as the court may deem just.

Dated: _____

Steven Riess
Attorney for plaintiffs