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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 and Does 1 through 20,

18 Defendants.

Case No. CV 030854

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN OPPOSITION TO  
DEMURRER OF DEFENDANT  
XXX-XXXXX ENTERPRISES, INC.**

Date: April 11, 2007  
Time: 9:00 a.m.  
Dept: 13

19 **1. Introduction.**

20 Plaintiffs are a retired and elderly couple of modest means living in Stockton. Alicia Tener  
21 is 74 years old and suffers from the advanced stages of Parkinson's disease and has undergone brain  
22 surgery to mitigate her severe symptoms. Arthur Tener is 80 years old and suffers from idiopathic  
23 pulmonary fibrosis, a terminal illness, and suffers from various cognitive deficits which interfere  
24 with his ability to clearly evaluate and recollect events. Both Arthur and Alicia are extremely  
25 vulnerable and susceptible to exploitation.

26 In August, 2005, the Teners received advertising from XXX-XXXXX inviting them to an  
27 "Educational Workshop" entitled "How To Avoid The Financial Devastation of Catastrophic  
28 Illness," to be held at the Oak Park Senior Center in Stockton. The advertisement stated that the

1 seminar was sponsored by XXX-XXXXX Senior Services, through its “Senior Advocate” Hal  
2 Hagendorff, and touted in a large banner headline that it was the “#1 Educational Workshop in  
3 Northern California!” and that XXX-XXXXX and Hagendorff are “California’s Leading Experts In  
4 Long-Term Care Planning & Asset Preservation.” Advertising material repeatedly claimed that  
5 “We’re here to **help** – *Free of charge.*” On August 18, 2005, Arthur attended this “workshop.”  
6 There, Steve Harlan, an officer of XXX-XXXXX, introduced Hagendorff in glowing terms to the  
7 assembled seniors. Hagendorff described the economic and personal devastation which could result  
8 from catastrophic illness and how XXX-XXXXX and Hagendorff could help seniors avoid such  
9 devastation. Arthur was alarmed by what he heard and was impressed with Hagendorff’s  
10 presentation skills and his apparent knowledge, honesty, and credibility. At the conclusion of the  
11 presentation, Hagendorff obtained Arthur’s contact information and made an appointment to visit  
12 Arthur in his home.

13         Shortly thereafter, Hagendorff visited the Teners in their home. Hagendorff asked Arthur  
14 various questions and obtained information about the Teners’ personal and financial affairs.  
15 Hagendorff learned that the Teners were primarily concerned with Alicia’s deteriorating health and  
16 the possibility that she would need care in a skilled nursing facility. He learned that they were  
17 fearful that they would be unable to afford these expenses and that in 2001 they had purchased three  
18 annuities for the purpose of qualifying Alicia for Medi-Cal benefits. Hagendorff considered the  
19 information provided by Arthur and made various representations regarding Medi-Cal benefits and  
20 eligibility. He advised Arthur that Alicia did not currently qualify for Medi-Cal benefits, but that by  
21 surrendering the three annuities and purchasing three replacement annuities from him and XXX-  
22 XXXXX, that Alicia would then qualify. Arthur lacked the knowledge, experience, and capacity to  
23 understand this complex information and could not assess whether replacing the prior annuities with  
24 new annuities would qualify them for Medi-Cal benefits or would be otherwise beneficial.  
25 However, based on Hagendorff’s apparent knowledge, honesty, and credibility and his dogged  
26 insistence that making these changes was critical, Arthur agreed to do as Hagendorff instructed.  
27 Hagendorff presented Arthur with various documents and forms, which Hagendorff instructed  
28 Arthur to initial and sign in various places. Arthur initialed and signed these documents.

1  
2 In September, 2005, Hagendorff arranged for the surrender of the three prior annuities,  
3 which resulted in Arthur and Alicia incurring surrender charges of \$10,622. At the same time,  
4 Hagendorff sold the Teners the three replacement annuities. The replacement annuities had the  
5 effect of increasing and extending the surrender charge periods of the annuities. Hagendorff and  
6 XXX-XXXXX earned commissions on the replacement annuities of \$4,197. Thereafter, Hagendorff  
7 returned to plaintiffs' home for the purpose of convincing them to purchase additional annuities.  
8 Fortunately, plaintiffs' son learned of his plans and no further sales were consummated.

9 Alicia would have qualified for Medi-Cal benefits without surrendering the prior annuities,  
10 and defendants were prohibited from selling replacement annuities to plaintiffs pursuant to Ins.  
11 Code §§ 781 and 789.9. Moreover, the purpose of XXX-XXXXX and Hagendorff (far from being  
12 "here to **help**" and their services being "*Free of charge*") was to earn commissions on the sale of  
13 new annuities to plaintiffs regardless of whether this was in the Teners' best interests or might harm  
14 them by causing them to incur unnecessary surrender charges. Based on these facts, plaintiffs assert  
15 the following causes of action: (1) Violation of Senior Insurance Sales Practices (Ins. Code §  
16 789.8); (2) Violation of Senior Insurance Sales Practices (Ins. Code § 789.9); (3) Illegal Twisting  
17 (Ins. Code § 781); (4) Breach of Duty of Good Faith (Ins. Code § 785); (5) Breach of Fiduciary  
18 Duty and Undue Influence; (6) Elder Financial Abuse (W & I § 15610.30); (7) Negligence; and (8)  
19 Fraud.

20 **2. Defendants' demurrer is without merit and therefore should be overruled.**

21 Defendants now demur to plaintiffs' First Amended Complaint on the following bases:

22 (1) That plaintiffs have no right to sue defendants for their numerous violations of the Senior  
23 Insurance Sales Practices Act (Ins. Code §§ 785 *et seq.*) nor to recover the damages sustained by  
24 plaintiffs which resulted from those violations;

25 (2) That a cause of action for breach of fiduciary duty and undue influence cannot be based  
26 upon the parties' relationship because such a claim requires an allegation of "intimacy"; and

27 (3) That defendants did not commit elder financial abuse because they did not "take . . .  
28 property of an elder."

1 As more fully described below, this demurrer is without merit and therefore should be overruled.

2 **3. For the purposes of this demurrer, all of the facts alleged in the complaint must**  
3 **be accepted as true, and no extrinsic evidence may be considered.**

4 In considering a demurrer, all material facts pled must be accepted as true and the entire  
5 complaint, read as a whole, must be given a reasonable interpretation. (*Speegle v. Board of Fire*  
6 *Underwriters* (1946) 29 Cal.2d 34, 42.) Thus, a demurrer challenges only defects that appear on the  
7 face of the pleading (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318), and no extrinsic evidence can be  
8 considered (*Ion Equip. Corp. v. Nelson* (1980) 110 Cal.App.3d 868, 881). Accordingly, the ruling  
9 on this demurrer must be based solely on the allegations of the complaint and not upon any extrinsic  
10 matters.

11 **4. The Senior Insurance Sales Practices Act (Ins. Code §§ 785 et seq.) was enacted**  
12 **to protect seniors from precisely the type of conduct perpetrated by defendants.**

13 The Senior Insurance Sales Practices Act (Chapter 1, Article 6.3, Ins. Code §§ 785 to  
14 789.10, hereafter referred to as the Act) was enacted in 1990 (Stat. 1990, c. 1454, § 1) and has been  
15 referred to as the “Code of Conduct” for agents and insurers seeking to sell insurance to seniors  
16 (California Bill Analysis, S.B. 1721 Assem., 6/18/1996). The problems addressed by the Act were  
17 described by Department of Insurance Commissioner John Garamendi as follows.

18 “The Department of Insurance is aware of a number of unlawful marketing schemes  
19 designed to accomplish the sale of annuities principally to senior citizens through the use of  
20 misrepresentation of identity and/or purpose. The initial approach to clients may be to solicit  
21 senior citizens at ‘seminars,’ purportedly to educate participants about the benefits of living  
22 trusts, retirement planning, long term nursing care and explanations of Medicare Part D. The  
23 approach may be through mass mailing, telemarketing, door-to-door solicitation, or even  
24 while providing entertainment at senior related functions. Sometimes high CD rates or  
reverse mortgages are offered in newspaper ads or in banks in a classic bait and switch.  
Regardless the initial area of interest to the senior, the senior is eventually sold an annuity.  
Seniors characteristically perceive the agent as a legal advisor or estate planner and not as an  
insurance agent because the representatives misrepresent themselves as experts in the initial  
subject area. They gain the trust and confidence of the senior, and then misuse that trust to  
sell an annuity that is oftentimes unsuitable for the senior.

25 “Because of this perception that the salesperson has their best interests in mind, seniors may  
26 conclude that they need not totally understand what the pros and cons of an annuity are for  
27 their specific situation. They may not be told, or if told, they may not understand, the impact  
28 of surrender penalties on their net worth, or far-off annuitization dates on their liquidity, or  
the sale of an annuity or other investment to buy the annuity offered on the taxes they will  
owe.” (California Insurance Bulletin Notice November 18, 2005.)

1 The Act both prohibits agents from engaging in various unfair sales tactics and requires  
2 various affirmative disclosures to prospective buyers of insurance. Among other things, the Act:

- 3
- 4 (1) Imposes a duty on agents of honesty, good faith, and fair dealing to seniors;
  - 5 (2) Prohibits agents from using deceptive business names;
  - 6 (3) Prohibits agents from using deceptive advertising terms such as “seminar,” “class,” or  
7 similar terms without also disclosing that the agent’s purpose is to sell insurance;
  - 8 (4) Prohibits other forms of deceptive advertising;
  - 9 (5) Prohibits misrepresentations of relationships between cooperating agents;
  - 10 (6) Requires disclosure of attempts to follow-up on sales leads;
  - 11 (7) Requires delivery of notice at least 24 hours before making a sales presentation in the  
12 senior’s home;
  - 13 (8) Requires delivery of a statutory notice to prospective purchasers of annuities for Medi-  
14 Cal purposes;
  - 15 (9) Prohibits the sale of annuities to seniors who would already qualify for Medi-Cal; and
  - 16 (10) Allows the Commissioner of Insurance to impose additional administrative penalties.

17 Plaintiffs contend that defendants violated the provisions of the Act in the following ways:

- 18 (1) Deceptive and misleading advertising prohibited by Ins. Code § 787.

19 (a) Use of deceptive name of “XXX-XXXXX Senior Services”: The Act specifically  
20 prohibits agents from using deceptive or misleading names to hide their true purpose of selling  
21 insurance. (Ins. Code § 787(a).) It also prohibits the use of terms which are so similar to those used  
22 by non-profit, charitable, or senior support organizations so as to have the “capacity or tendency to  
23 mislead the public.” (Ins. Code § 787(c).) The name “XXX-XXXXX Senior Services” clearly has  
24 the capacity or tendency to mislead the public, particularly seniors, because it implies that  
25 defendants are offering some form of support services to seniors, akin to those which seniors may  
26 already be receiving from county or non-profit community organizations. It is clear that defendants  
27 chose this name precisely for the reasons the statute prohibits them: to mislead seniors into  
28 believing that defendants are providing no cost senior support services rather than selling annuities  
for gain.

(b) Use of the deceptive phrases “Educational Workshop,” “We’re here to help –  
Free of Charge,” “Senior Advocates,” and “Consumers’ Guide”: The Act prohibits agents from  
using untrue, deceptive, or misleading advertisements and specifically requires that if terms such as  
“seminar,” “class,” “informational meeting,” or any substantially equivalent term is used, then the  
advertisement must also include “immediately following those terms in the same type size and font”

1 the words “and insurance sales presentation.” (Ins. Code § 787(k).) Defendants’ banner on its  
2 advertisement states in large font: “Attention Seniors: The #1 Educational Workshop in Northern  
3 California!” (Complaint, Exhibit A.) Its failure to include the phrase “and insurance sales  
4 presentation” violates the Act. The advertisement and other marketing materials repeatedly display  
5 defendants’ sales motto “We’re here to **help** – *Free of Charge*”; this statement is patently false as  
6 defendants were actually there to sell annuities and earn commissions. The advertisement identifies  
7 defendants as “Senior Advocates” and thereby reinforces the deception that defendants are a non-  
8 profit organization acting solely in the interests of the seniors for whom they advocate. This  
9 deception is further promoted by sales literature which is characterized as a “Consumers’ Guide.”  
10 This is precisely the type of deceptive advertising referred to by Commissioner Garamendi as used  
11 by agents to gain the trust and confidence of seniors and then misuse that trust to sell them  
12 annuities.

13 (c) Failure to prominently disclose attempts to follow-up by agent: The Act requires  
14 agents to “prominently disclose” in any advertisement that the agent will attempt to follow-up on  
15 sales leads. (Ins. Code § 787.) Defendants failed to comply with this requirement by placing this  
16 disclosure in small font at the bottom of the advertisement.

17 (d) Failure to disclose representative capacity of defendants: The Act prohibits  
18 agents from misleading seniors as to the representative capacity of any entity or person. (Ins. Code  
19 § 787(a).) Defendants’ advertisement exhibits a photograph of defendant Hagendorff and implies in  
20 the text that he is an employee or principal of defendant XXX-XXXXX. Defendants now claim that  
21 no such relationship exists between them.

22 (2) Failure to provide the disclosure notice required by Ins. Code § 789.8.

23 The Act requires that an agent who offers to sell any insurance product to a senior on the  
24 basis of its treatment under Medi-Cal must provide the senior with the detailed statutory notice  
25 entitled “NOTICE REGARDING STANDARDS FOR MEDI-CAL ELIGIBILITY” set forth in Ins.  
26 Code § 789.8(d). The notice must be printed in a least 12-point type, must be clearly separate from  
27 any other document, and must be signed by the prospective purchaser and the purchaser’s spouse.  
28 Defendants failed to provide plaintiffs with this notice.

1           (3) Sale of prohibited annuities to plaintiffs pursuant to Ins. Code § 789.9.

2           The Act prohibits the sale of an annuity for Medi-Cal purposes to any senior who would  
3 otherwise already qualify for Medi-Cal benefits. (Ins. Code § 789.9(a)(1)(B).) Plaintiffs already  
4 qualified for Medi-Cal benefits, and therefore the Act prohibited defendants from selling these  
5 annuities to plaintiffs.

6           (4) Breach of duties of honesty, good faith, and fair dealing pursuant to Ins. Code § 785.

7           In addition to common law duties of honesty, good faith, and fair dealing owed by agents to  
8 anyone who actually purchases insurance, the Act extends these duties to seniors who may be only  
9 prospective purchasers. (Ins. Code § 785(a).) Defendants breached these duties by, among other  
10 things, misleading plaintiffs as to the necessity of purchasing the replacement annuities.

11           **5. Defendants have not, and cannot, provide any authority that its numerous**  
12 **violations of the Senior Insurance Sales Practices Act do not permit injured seniors to enforce**  
13 **its provisions.**

14           Defendants' marketing and sales tactics are precisely the activities described by  
15 Commissioner Garamendi as being the illegal conduct which the Act seeks to protect seniors  
16 against. Notwithstanding their wholesale disregard for these statutory protections, defendants now  
17 seek to avoid accountability by claiming that the Act is purely regulatory, that it confers no direct  
18 rights on seniors, and thus may only be enforced by the government. Defendants have not, and  
19 cannot provide any authority that plaintiffs are prohibited from enforcing its provisions. To the  
20 contrary, the provisions of the Act confer direct rights on seniors, and in any event, the objectives of  
21 the Act would be frustrated if seniors were not permitted to enforce them.

22           Defendants are correct that no reported decision expressly addresses the question of whether  
23 the Act creates private causes of action. (This may largely be a result of no insurance agent ever  
24 having succeeded on such a claim at the trial court level.) Defendants argue that because the Act  
25 includes penalties and administrative disciplinary sanctions against licensees who violate its  
26 provisions, that it therefore also necessarily prohibits private parties from claiming its protection.  
27 Defendants' argument is unsupported by the text of the Act.

28           The Act clearly establishes both affirmative duties on, and consequences for, the conduct of

1 life agents with regard to the selling of insurance to seniors. The Act provides that these duties are  
2 owed *directly* to seniors. For example, Ins. Code § 785 provides:

3 “All insurers, brokers, agents and others engaged in the transaction of insurance owe a  
4 prospective insured who is 65 years of age or older, a duty of honesty, good faith, and fair  
dealing.”

5 Thus, the statute is clear that this duty is owed directly to seniors. Similarly, Ins. Code § 786  
6 provides for a 30 day examination period during which:

7 “. . . the applicant may return the contract. The return shall void the policy or certificate  
8 from the beginning, and the parties shall be in the same position as if no contract had been  
issued. All premiums paid and any policy or membership fee shall be fully refunded to the  
9 applicant by the insurer or entity in a timely manner.

10 “. . .

11 “(b) [Where the contract is returned] the applicant shall receive interest on the paid premium  
12 at the legal rate of interest on judgments as provided in Section 685.010 of the Code of Civil  
Procedure.”

13 This section clearly affects the rights and remedies *directly* between these parties. For example, a  
14 dispute might arise between a senior and an insurer as to whether a policy was returned within the  
15 examination period such that the senior would be entitled to the return of the premium together with  
16 interest at the legal rate. If the senior proves that the policy was timely returned, the statute directs  
17 that the “return shall void the policy,” that “the parties shall be in the same position as if no contract  
18 had been issued,” and that all premiums “shall be fully refunded” to the senior. Thus, the statute  
19 directly affects the contract rights and obligations between the insurer and the senior. The principle  
20 that where there is a right there is a remedy (*Ubi jus ibi remedium*; *Blumberg v. Birch* (1893) 99  
21 Cal. 416, 418) is codified in CC § 3281.

22 “Every person who suffers detriment from the unlawful act or omission of another, may  
23 recover from the person in fault a compensation therefore in money, which is called  
damages.”

24 Ins. Code § 786 creates the right of a senior to the return of his premium with interest; the  
25 corresponding remedy is a judgment in favor of the senior for the amount of the premium with  
26 interest. Here, plaintiffs have suffered detriment from the many unlawful acts and omissions of  
27 defendants; accordingly, CC § 3281 provides that plaintiffs are entitled to recover compensation  
28

1 from defendants in the form of damages.

2           Nevertheless, defendants argue that only the Department of Insurance, the Attorney General,  
3 or the local District Attorney may assert the provisions of the Act; in other words, that the  
4 government must bring an action as the senior’s surrogate to obtain a judgment against the insurer  
5 and in favor of the senior. (In the instant case, plaintiffs would now be forced to name the  
6 government as a defendant to assert such rights.) Such an interpretation ignores the rights of seniors  
7 expressed in the Act and would render these sections inoperative. That an agent’s violation of the  
8 Act might also result in a public administrative penalty against him should not affect the senior’s  
9 ability to enforce the protections clearly provided by the Act.

10           Other provisions of the Act similarly support this position. Ins. Code § 789(b) provides:

11           “Upon a showing of a violation of this article in *any civil action*, a court may also assess the  
12 penalties prescribed in this chapter.” (Emphasis added.)

13 The expansive phrase “in any civil action” is not limited to those disciplinary proceedings which  
14 might be initiated by the Department of Insurance or other public entity and includes civil actions  
15 brought by the persons to whom the Act clearly provides rights.

16           The question of whether a regulatory statute also creates a private right of action depends on  
17 legislative intent. (*Moradi-Shalal v. Firemen’s Fund* (1988) 46 Cal.3d 287, 292, 304-05.) In  
18 determining legislative intent, the text of the statute must be given its ordinary meaning such that no  
19 term is rendered meaningless or inoperative. (*Hassan v. Mercy American River Hospital* (2003) 31  
20 Cal.4th 709, 715-16.) In *Goehring v. Chapman University* (2004) 121 Cal.App.4th 353, three law  
21 students sued their law school seeking to recover tuition based upon the school’s failure to make  
22 certain disclosures required by Business & Professions Code § 6061. This section is included in  
23 Article 4 – Admission To The Practice Of Law – and is part of the statutory scheme regulating law  
24 schools. It does not expressly provide for a private of cause of action; however, it does provide that  
25 if any school does not comply with the disclosure requirements, “it shall make a full refund of all  
26 fees paid by students.” The court held that the statute creates a private right of action stating:

27           “Since in enacting section 6061 the Legislature unquestionably intended to bestow students  
28 or former students with individual monetary claims, it must have intended to give them  
private rights of action to pursue such claims.” (*Ibid.* at 377-78.)

1 The right to a premium refund provided by Ins. Code § 786 is identical to the right to tuition refund  
2 provided by B & P § 6061. That is, the Legislature intended to bestow on seniors the refund of  
3 premiums on timely returned policies, and therefore it must have intended to give them the private  
4 right to pursue such claims. To hold otherwise would render these provisions meaningless and  
5 inoperative – so too with the other provisions of the Act.

6 The language of the Act and the objectives of the Legislature would be defeated if the  
7 provisions of the Act could not be enforced by seniors. Accordingly, defendants’ demurrer to counts  
8 one, two, and four should be overruled.

9  
10 **6. Defendants have not, and cannot, provide any authority that its violation of Ins.  
11 Code § 781 (Twisting) does not permit injured seniors to enforce its provisions.**

12 Count three alleges that defendants also violated Ins. Code § 781, which prohibits the  
13 abusive insurance sales practice known as twisting. Defendants demur to count three, asserting the  
14 same argument that the provision may only be enforced by a public entity. Defendants’ demurrer to  
15 this count must fail as well.

16 Twisting is a very common practice of insurance agents by which they encourage consumers  
17 to replace existing annuities with new ones so that the agent may earn a new commission. This is  
18 harmful to the consumer because not only does he incur surrender charges on the prior annuity and  
19 pay a commission on the replacement annuity, but the surrender schedule on the replacement  
20 annuity increases the penalty and extends its duration. (This is precisely what happened to plaintiffs:  
21 they incurred surrender charges of \$10,622, the penalty increased from 9 percent to 17.5 percent,  
22 and the penalty schedule was extended from seven years to 17 years.) The practice of twisting has  
23 become so widespread that the Legislature specifically prohibited it in Ins. Code § 781. Section 781  
24 applies to all consumers and not just to seniors. Nevertheless, seniors remain the primary targets of  
25 such wrongful conduct, principally because they are so vulnerable to exploitation by unscrupulous  
26 agents. Defendants again argue that no private right to enforce Ins. Code § 781 exists. However, the  
27 only reported decision addressing this issue (*Kentucky Century Life Ins. V. LeDuc* (N.D. Cal. 1992)  
28 814 F.Supp. 832) determined that a private right does exist. For the same reasons discussed above,

1 defendants' demurrer should be overruled.

2 **7. Whether a confidential relationship existed between plaintiffs and defendants is**  
3 **clearly a question of fact, and therefore the demurrer to count five should be overruled.**

4 A confidential relationship arises where one person is dependent upon the honesty and  
5 fidelity of the other and reposes confidence in him. Confidential relationships arise in a variety of  
6 settings and may be founded on domestic, personal, social, or moral bases. (*Richelle L. v. Roman*  
7 *Catholic Archbishop* (2003) 106 Cal.App.4th 257, 271.) Confidential relationships which are  
8 formally recognized in the law are called fiduciary relationships. (*Stevens v. Marco* (1956) 147  
9 Cal.App.2d 357, 374.) Thus, all fiduciary relationships are confidential, but only formally  
10 recognized confidential relationships are called fiduciary relationships. (See Frankel, *Fiduciary Law*  
11 (1983) 71 Cal.L.Rev. 795, cited by *Richelle L. v. Roman Catholic Archbishop* (2003) 106  
12 Cal.App.4th 257, 271.) Fiduciary relationships may be either consensual or non-consensual, such as  
13 between guardians and wards, conservators and conservatees, and agents and principals.  
14 Nevertheless, the essence of all such relationships is that the parties do not deal on equal terms;  
15 rather, the person in whom trust and confidence is reposed and who accepts that trust and  
16 confidence is in a superior position to exert unique influence over the dependent party. (*Barbara A.*  
17 *v. John G.* (1983) 145 Cal.App.3d 369, 382.)

18 The essential elements of a confidential relationship have been enumerated in the following  
19 terms:

20 "1) The vulnerability of one party to the other which 2) results in the empowerment of the  
21 stronger party by the weaker which 3) empowerment has been solicited or accepted by the  
22 stronger party and 4) prevents the weaker party from effectively protecting itself." (*Richelle*  
*L. v. Roman Catholic Archbishop* (2003) 106 Cal.App.4th 257, 272.)

23 A confidential relationship can arise in any interaction in which all of its elements are  
24 present and is always a question of fact.

25 "[T]he existence of a confidential relationship is a question of fact. There thus does not  
26 appear to be any requirement that it be objectively reasonable for the plaintiff (or the one  
27 who asserts the existence of the confidential relationship) to have reposed trust and  
28 confidence in the other: the question is only whether the plaintiff actually reposed such trust  
and confidence in the other, and whether the other 'accepted the relationship.' For this  
reason it is not possible to articulate rules about when confidential relationships may be said  
to arise: they may not arise where one might think they would (as between family members

1 and relatives), and they may arise where one might think they would not (as between an  
2 adult and someone she had met only once or twice.)” (Emphasis added. *Richelle L. v.*  
*Roman Catholic Archbishop* (2003) 106 Cal.App.4th 257, 272, at footnote 6.)

3 The vulnerability that is a predicate of a confidential relationship often arises from advanced  
4 age, youth, lack of education, weakness of mind, grief, sickness, or some other incapacity. (*Richelle*  
5 *L. v. Roman Catholic Archbishop* (2003) 106 Cal.App.4th 257, 272.) Advanced age in particular,  
6 coupled with a weakened mental and physical condition, often renders an elder easily manipulated  
7 and incapable of fully comprehending the implications of a transaction which is being urged upon  
8 the elder. (*Stenger v. Anderson* (1967) 66 Cal.2d 970, 979; *O’Neil v. Spillane* (1975) 45 Cal.App.3d  
9 147, 153; *Kent v. First Trust & Savings Bank* (1951) 101 Cal.App.2d 361, 370.)

10 Paragraph 44 of the complaint alleges:

11 “As a result of plaintiffs advanced age, lack of education, weakened mental and physical  
12 condition, sickness and other incapacities, plaintiffs were vulnerable to exploitation and  
13 manipulation by defendants. This vulnerability empowered defendants to exploit and  
14 manipulate plaintiffs through sales tactics designed to confuse, alarm, and otherwise unfairly  
15 induce plaintiffs to purchase defendants’ products. This empowerment was solicited and  
16 accepted by defendants through their advertisements, workshop presentation, written  
17 materials, individual consultation, repeated assertions that ‘We’re here to **help** – *Free of*  
*Charge,*’ and related sales tactics. The vulnerability of plaintiffs to exploitation and  
18 manipulation resulted in plaintiffs reposing trust in defendants and prevented plaintiffs from  
19 effectively protecting themselves from defendants’ sales tactics. Pursuant to *Richelle L. v.*  
*Roman Catholic Archbishop* (2003) 106 Cal.App.4th 257, a confidential relationship existed  
20 between plaintiffs and defendants.

21 Whether these allegations of the complaint are true is clearly a question of fact. For the purposes of  
22 this demurrer, these allegations must be accepted as true, and if true, they entitle plaintiffs to relief.

23 Defendants acknowledge that a confidential relationship gives rise to fiduciary duties but  
24 contend that there must also be an allegation of “intimacy.” While an intimate relationship often co-  
25 exists with a confidential relationship, it is not required, and defendants offer no authority  
26 supporting their contention. To the contrary, the court in *Richelle L. v. Roman Catholic Archbishop*  
27 (2003) 106 Cal.App.4th 257 clearly enumerated the elements giving rise to a confidential  
28 relationship, and no such requirement of intimacy is included.

Where an insurance agent represents several insurance companies and selects the company  
with which to place the insurance, the insurance agent is regarded as the agent of the insured. (*Eddy*  
*v. Sharp* (1988) 199 Cal.App.3d 858, 865.) And where the agency relationship exists, there is not

1 only an obligation to use due care in selecting the insurer but a fiduciary duty to the insured as well.  
2 (*Ibid.* citing 1 Witkin, *Summary of Cal. Law* (8th ed. 1973) Agency and Employment, §§ 84-85, pp.  
3 704-705.) Defendant Hagendorff is appointed to place insurance with 23 insurance companies;  
4 defendant XXX-XXXXX is appointed to place insurance with 18 insurance companies. Defendants  
5 selected F & G Life Insurance as the insurer to issue plaintiffs’ replacement annuities and did not  
6 discuss with plaintiffs the terms of policies offered by other insurers. (Plaintiffs contend that  
7 defendants selected F & G because of the high commission it offered and not because it offered a  
8 policy with terms most favorable to plaintiffs.) Accordingly, defendants were agents of plaintiffs  
9 and owed them a fiduciary duty on this basis as well.

10 The complaint alleges in detail the factual bases of this claim. It alleges all of the elements  
11 of a confidential relationship and that defendants acted as insurance agents and placed these  
12 annuities for plaintiffs. It alleges that defendants owed plaintiffs a fiduciary duty and a duty of care  
13 and that defendants breached these duties. It is a question of fact whether these allegations are true;  
14 accordingly, these claims can not be disposed of by demurrer.

15 **8. The complaint clearly alleges that defendants took plaintiffs’ property and**  
16 **therefore states a cause of action for Elder Financial Abuse.**

17 Elder Financial Abuse is defined as the taking of real or personal property of an elder “to a  
18 wrongful use or with intent to defraud.” (W & I Code § 15610.30(a).) Count six of the complaint  
19 alleges that defendant made various misrepresentations with the intent to defraud plaintiffs and  
20 further alleges:

21 “These misrepresentations allowed defendants to obtain the signatures of plaintiffs on  
22 various documents authorizing the surrender of the Prior Annuities and resulted in the  
23 delivery of a percentage of the net proceeds to defendants in the form of commissions. The  
24 placing of plaintiffs’ signatures on these documents and plaintiffs’ delivery of these  
25 documents to defendants constituted the taking of property rights of plaintiffs. In addition,  
26 the payment of a percentage of the net proceeds of the Prior Annuities to defendants  
27 constituted a taking of property of plaintiffs. By engaging in this conduct, defendants took,  
28 secreted, appropriated, and retained the property of plaintiffs, elders, to a wrongful use and  
with the intent to defraud within the meaning of Welfare & Institutions Code § 15610.30.”  
(First Amended Complaint, paragraph 51.)

27 Thus, the complaint alleges that defendant took signed documents from plaintiffs by which  
28 defendants were able to accomplish the surrender of the prior annuities and purchase the

1 replacement annuities. These signed documents were just as much plaintiffs’ property as would be a  
2 deed of conveyance, an automobile pink slip, a bill of sale, or a piece of jewelry. Similarly, the  
3 payment of a portion of plaintiffs’ proceeds of the surrender of the prior annuities to defendants also  
4 constitutes the taking of property.

5 Defendants apparently argue that because the money was first paid to a third party (the  
6 insurance company) who in turn paid a portion of it to defendants, that the taking of plaintiffs’  
7 property has somehow not occurred. Not only do defendants offer no authority for this argument, it  
8 defies logic. For example, two people agree to take an elder’s watch; one distracts the elder while  
9 the other takes the watch from a nightstand. The person who takes the watch sells it to a shop and  
10 receives half of the proceeds. The other perpetrator thereafter goes to the shop and receives the  
11 other half of the proceeds. Defendants would argue that the second perpetrator did not “take  
12 property of the elder” because he was not the one who removed it from the nightstand and then only  
13 received payment through a third party. However, defendants offer no authority for such a restricted  
14 interpretation of the term “taking of property.” (In an unpublished decision, the First District held  
15 that for the purposes of the Elder Financial Abuse statute, a broad characterization of the word  
16 “property” should be applied. In this decision, the court decided that inducing an elder to name the  
17 perpetrator as beneficiary of a will constituted the taking of property even where the will was  
18 quickly revoked and no other property was passed. See *Abernathy v. County of Marin* (1st Dist.  
19 2006) 2006 WL 418486.) Clearly, the complaint alleges the taking of plaintiffs’ property, that is:  
20 the signed documents authorizing the surrender of the prior annuities, the loss of the surrender  
21 charges, the signed documents for the purchase of the replacement annuities, and the commissions  
22 earned by defendants. While defendants are obviously entitled to dispute these factual allegations, it  
23 would be improper to dispose of these claims as a matter of law by demurrer. Accordingly, the  
24 demurrer to count six should be overruled.

25 **9. Conclusion.**

26 For the foregoing reasons, plaintiffs respectfully submit that defendants’ demurrer should be  
27 overruled. However, if the court is inclined to sustain any portion of defendants’ demurrer, plaintiffs  
28 respectfully submit that plaintiffs be granted leave to amend.

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Dated: \_\_\_\_\_

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Steven Riess  
Attorney for plaintiffs