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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

ERNEST O. ABBIT, on behalf of  
himself and on behalf of all persons  
similarly situated,

Plaintiff,

vs.

ING USA ANNUITY AND LIFE  
INSURANCE COMPANY,

Defendant.

CASE NO. 13cv2310-GPC-WVG

**ORDER GRANTING IN PART AND  
DENYING IN PART  
DEFENDANT’S MOTION TO  
DISMISS**

[Dkt. No. 6]

On September 25, 2013, Plaintiff Ernest O. Abbit (“Plaintiff”) filed a complaint (“Complaint”) against Defendant ING USA Annuity and Life Insurance Company (“Defendant” or “ING”). (Dkt. No. 1.) On November 25, 2013, Defendant filed a motion to dismiss Plaintiff’s Complaint pursuant to Federal Rules of Civil Procedure 12(b)(6) and a related request for judicial notice. (Dkt. No. 6; Dkt. No. 6-2, “RJN.”) The motion has been fully briefed. (Dkt. Nos. 14, 16.) In addition, Plaintiff has filed objections to Defendant’s request for judicial notice. (Dkt. No. 14-1.) Pursuant to L. Civ. R. 7.1(d)(1), the Court finds the matter suitable for adjudication without oral argument. For the reasons set out below, the Court **DENIES** Defendants’ Motion to Dismiss the Complaint.

1 **I. BACKGROUND**

2 Plaintiff, an 83-year-old retired senior citizen, alleges purchasing an “ING  
3 indexed-annuity with an effective date of September 28, 2010.” (Compl. ¶ 27.)  
4 Plaintiff seeks to bring a Class Action, on behalf of himself and all others similarly  
5 situated, alleging that Defendant unlawfully targets senior citizens by advertising  
6 indexed-annuity<sup>1</sup> contracts that purport to protect retirement savings while hiding an  
7 undisclosed complex embedded derivative structure. (Compl. ¶¶ 1-9.) Plaintiff seeks  
8 to bring this action on behalf of the following class:

9 All persons who, within the applicable statute of limitations of the date  
10 of commencement of this action and while 65 years of age or older, and  
11 a resident of the State of California, purchased one or more ING  
12 indexed-annuities either directly, or through surrender (in whole or in  
13 part) of, or borrowing against, an existing permanent life insurance  
14 policy, annuity, or other retirement savings account.

15 (Compl. ¶ 22.)

16 **A. Indexed-Annuities**

17 An annuity is a contract between an investor and an insurance company in  
18 which the investor pays premiums to the insurance company in exchange for the  
19 insurance company’s promise to return the deposit via periodic payments. (Compl. ¶  
20 29.) Annuity contracts typically undergo two primary periods: the “full  
21 accumulation period,” during which the investor deposits funds with the insurance  
22 company, and the “annuitization period,” during which the investor withdraws  
23 funds in the form of periodic payments. (Compl. ¶ 30.) “Indexed-annuities” are  
24 annuities that “generally earn interest linked-to, or derivative-of the price  
25 movements of, an equity index or other index, such as the S&P 500® Index.  
26 Indexed annuities can also guarantee interest.” (Compl. ¶ 31(c).) Defendant offers  
27 five different index-crediting “strategies” from which indexed-annuity investors

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27 <sup>1</sup>Although Defendant offers other annuity products, Plaintiff purchased, and  
28 challenges in his Complaint, only Defendant’s “Indexed-annuity” products. (Compl.  
¶ 31) (describing also “Fixed Annuities” and “Variable Annuities”).

1 may select.<sup>2</sup> Although Plaintiff chose the “Monthly Cap Index Strategy,” Plaintiff  
2 alleges that he “would have lost retirement savings under any of the strategy  
3 alternatives offered by ING due to the faulty design and execution of the ING  
4 indexed-annuities.” (Compl. ¶ 67.)

5 Under the indexed-annuity contracts with ING, ING promised “protection of  
6 principal” and “Index Opportunities” for Plaintiff and members of the Class.  
7 (Compl. ¶ 3.) However, Plaintiff alleges ING exercised its investment discretion  
8 under the contracts in a manner that ensured that its indexed-annuities did not  
9 protect or build up retirement savings. Plaintiff alleges ING embedded derivatives  
10 into the retirement savings without disclosing them to Plaintiff and members of the  
11 Class. “Embedded derivatives” are described as exotic financial structures that are  
12 complex, opaque, and illiquid market-linked instruments. (Compl. ¶ 5.)

13 In addition, Plaintiff alleges Defendant offered indexed-annuity investors a  
14 five percent (5%) bonus<sup>3</sup> which purportedly added to investors’ total premium at  
15 contract inception as an immediate head start on earnings. (Compl. ¶ 35; Compl. Ex.  
16 A at 5.)

### 17 **B. Plaintiff’s Allegations**

18 Plaintiff alleges Defendant’s false and misleading sales pitch and advertising  
19 materials induced him to purchase an indexed-annuity from Defendant in or around  
20 September 2010. (Compl. ¶ 37.) Plaintiff alleges terminating his Individual  
21 Retirement Account and transferring the \$1,000,000 proceeds to the ING annuity  
22 now at issue via an “IRA rollover.” (Compl. ¶ 37.) Plaintiff alleges that the ING  
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24 <sup>2</sup>The strategies are: (1) “Fixed Rate Strategy;” (2) “Point-to-Point Participation  
25 Index Strategy;” (3) “Point-to-Point Cap Index Strategy;” (4) “Monthly Average Index  
26 Strategy.” (Compl. ¶¶ 66(a)-(e).)

27 <sup>3</sup>Plaintiff’s contract (the “Annuity Contract”), attached to the Complaint as  
28 Exhibit A, defines the “bonus” as “an amount equal to a percentage of the Single  
Premium . . . that we add to the Contracts Accumulation Value on the Contract Date.”  
(Compl., Ex. A at 5.) The contract further states that the “Bonus is elected into the  
Strategies in the same ratio as you elect for the Single Premium.” (Id.)

1 indexed annuity brochure was false and misleading in the following respects: (1) the  
2 statement that “100% of your premium is put into the contract” was false and  
3 misleading because under the annuity’s complex derivatives structure, Plaintiff  
4 immediately lost over \$100,000 of his retirement savings value on the first day of  
5 his investment; (2) the contract “would not receive interest credited on the full  
6 premium, as represented;” (3) the five percent premium bonus promised by  
7 Defendant was not immediately credited to the annuity; (4) the five percent  
8 premium bonus was not “protected” as promised, and could be “diminished;” and  
9 (5) Plaintiff would not receive compounded interest as set forth in the contract.  
10 (Compl. ¶¶ 36(a)-(e).)

11 According to Plaintiff, Defendant designs its indexed-annuity products to  
12 “systematically deprive ING annuity holders of retirement savings and earnings  
13 potential.” (Compl. ¶ 34.) Plaintiff alleges that subsequent to signing Defendant’s  
14 annuity contract (“the Annuity Contract”), Plaintiff received false and misleading  
15 “year end” and “annual” statements that inaccurately accounted for the bonus and  
16 daily interest credits promised to Plaintiff under the Annuity Contract. (Compl. ¶  
17 45.) Specifically, Plaintiff alleges the following false and misleading representations  
18 on his year-end and annual statements: (1) the “Cash Surrender Value”<sup>4</sup> of the  
19 annuity was materially understated; (2) the “Minimum Guaranteed Contract Value”<sup>5</sup>  
20 of the annuity was materially understated; and (3) the statements falsely claimed  
21 that the Cash Surrender Value included a Surrender Charge. (Compl. ¶¶ 45, 46, 48.)  
22 Plaintiff bases his allegations of understated statement values on allegations that the

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24 <sup>4</sup>Under the Annuity Contract, “Cash Surrender Value” is defined as “the value  
25 available upon full Surrender of the Contract.” (Compl., Ex. A at 5.) “Surrender of the  
26 Contract” provides for a means by which investors may receive the “Cash Surrender  
27 Value” in exchange for forsaking all other rights under the Contract. (Id. at 7.)

28 <sup>5</sup>Under the Annuity Contract, “Minimum Guaranteed Contract Value” is the sum  
of “(a) 87.5% of the portion of the Single Premium elected to the Strategy, less  
Premium Taxes; adjusted for (b) Any Re-elections or Surrenders of Accumulation  
Value; plus (c) Interest credited daily at the applicable Minimum Guaranteed Strategy  
Value Rate.” (Compl., Ex. A at 4.)

1 reported annuity values reflected charges or reductions not provided for by the  
2 contract and did not accurately account for the bonus and daily interest credits  
3 promised under the annuity contract. (Id.)

4 Plaintiff alleges Defendant has “purposefully targeted a vulnerable class of  
5 senior citizens for sale of these derivatives, embedded in ING’s indexed-annuities.”  
6 (Compl. ¶ 50.) Plaintiff further alleges that Defendant concealed material facts  
7 surrounding the annuities’ true asymmetric valuations from investors, (Compl. ¶  
8 51), and failed to train its sales force to either understand, appreciate, or disclose to  
9 consumers the true valuations of the derivatives embedded in Defendant’s annuity  
10 contracts. (Compl. ¶¶ 63, 64)

11 On September 25, 2013, Plaintiff filed a Class Action Complaint alleging  
12 eight causes of action against Defendant: (1) Breach of Contract and Breach of  
13 Good Faith and Fair Dealing; (2) Breach of Fiduciary Duty; (3) Financial Elder  
14 Abuse in violation of California Welfare & Institutions Code section 15600, *et seq.*;  
15 (4) Fraudulent Concealment in violation of California Civil Code section 1710, *et*  
16 *seq.*; (5) Concealment in an Insurance Contract in violation of California Insurance  
17 Code section 332; (6) Unlawful, Deceptive, and Unfair Business Practices in  
18 violation of California Business & Professions Code section 17200, *et seq.*; (7)  
19 Unfair, Deceptive, and Misleading Advertising in violation of California Business  
20 & Professions Code section 17500, *et seq.*; and (8) Failure to Supervise. On  
21 November 25, 2013, Defendant filed a motion to dismiss all causes of action in the  
22 Complaint. (Dkt. No. 6.)

## 23 II. STANDARD

24 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the  
25 sufficiency of a complaint. Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001).  
26 Dismissal is warranted under Rule 12(b)(6) where the complaint lacks a cognizable  
27 legal theory. Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 534 (9th Cir.  
28 1984); see Neitzke v. Williams, 490 U.S. 319, 326 (1989) (“Rule 12(b)(6) authorizes

1 a court to dismiss a claim on the basis of a dispositive issue of law.”). Alternatively,  
2 a complaint may be dismissed where it presents a cognizable legal theory yet fails to  
3 plead essential facts under that theory. Robertson, 749 F.2d at 534. While a plaintiff  
4 need not give “detailed factual allegations,” a plaintiff must plead sufficient facts  
5 that, if true, “raise a right to relief above the speculative level.” Bell Atlantic Corp.  
6 v. Twombly, 550 U.S. 544, 545 (2007). “To survive a motion to dismiss, a  
7 complaint must contain sufficient factual matter, accepted as true, to ‘state a claim  
8 to relief that is plausible on its face.’” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)  
9 (quoting Twombly, 550 U.S. at 547). A claim is facially plausible when the factual  
10 allegations permit “the court to draw the reasonable inference that the defendant is  
11 liable for the misconduct alleged.” Id. In other words, “the non-conclusory ‘factual  
12 content,’ and reasonable inferences from that content, must be plausibly suggestive  
13 of a claim entitling the plaintiff to relief.” Moss v. U.S. Secret Service, 572 F.3d  
14 962, 969 (9th Cir. 2009). “Determining whether a complaint states a plausible claim  
15 for relief will . . . be a context-specific task that requires the reviewing court to draw  
16 on its judicial experience and common sense.” Iqbal, 556 U.S. at 679.

17 In reviewing a motion to dismiss under Rule 12(b)(6), the court must assume  
18 the truth of all factual allegations and must construe all inferences from them in the  
19 light most favorable to the nonmoving party. Thompson v. Davis, 295 F.3d 890, 895  
20 (9th Cir. 2002); Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1996).  
21 Legal conclusions, however, need not be taken as true merely because they are cast  
22 in the form of factual allegations. Ileto v. Glock, Inc., 349 F.3d 1191, 1200 (9th Cir.  
23 2003); W. Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981).

### 24 III. DISCUSSION

#### 25 A. Judicial Notice

26 Generally, on a motion to dismiss, courts limit review to the contents of the  
27 complaint and may only consider extrinsic evidence that is properly presented to the  
28 court as part of the complaint. See Lee v. City of L.A., 250 F.3d 668, 688-89 (9th

1 Cir. 2001) (court may consider documents physically attached to the complaint or  
2 documents necessarily relied on by the complaint if their authenticity is not  
3 contested). However, a court may take notice of undisputed “matters of public  
4 record” subject to judicial notice without converting a motion to dismiss into a  
5 motion for summary judgment. Id. (citing Fed. R. Evid. 201; MGIC Indem. Corp. v.  
6 Weisman, 803 F.2d 500, 504 (9th Cir. 1986)). Under Federal Rule of Evidence 201,  
7 a district court may take notice of facts not subject to reasonable dispute that are  
8 capable of accurate and ready determination by resort to sources whose accuracy  
9 cannot reasonably be questioned. Fed. R. Evid. 201(b); see also Lee, 250 F.3d at  
10 689.

11 Defendant seeks judicial notice of four documents: (1) a pamphlet published  
12 by the California Department of Insurance entitled “Annuities - What Seniors Need  
13 to Know”; (2) the California Department of Insurance license records for Matthew  
14 D. Copley; (3) a pending action involving Plaintiff’s trust in the Southern District of  
15 New York, Picard, Trustee v. The Ernest Oscar Abbit Living Trust, et al., No. 11-  
16 cv-8770 (S.D.N.Y.); and (4) the historical Standard & Poor’s 500® Index (“S&P  
17 500”) values and basic math calculations set forth in the Declaration of William  
18 Bainbridge (“Bainbridge Declaration”) and Exhibits 1 through 5 of the Bainbridge  
19 Declaration. (Dkt. No. 6-2, “RJN.”)

20 Defendant’s first two requests for judicial notice are properly noticeable. The  
21 California Department of Insurance pamphlet and license record of Matthew D.  
22 Copley are matters of public record and are capable of accurate and ready  
23 determination. In fact, Plaintiff does not object to Defendant’s first two requests for  
24 judicial notice. Finding the pamphlet relevant, the Court takes judicial notice of the  
25 California Department of Insurance pamphlet. (Id.) However, the Court declines to  
26 take judicial notice of the license record of Matthew D. Copley because neither the  
27 Complaint nor Exhibit A to the Complaint mention Mr. Copley. The record is  
28 devoid of any allegations that Mr. Copley sells ING annuity products, much less the

1 indexed-annuity products at issue in this case. As such, the Court does not see the  
2 relevance of Mr. Copley's license record to the present motion to dismiss. See  
3 Adriana Intern. Corp. v. Thoeren, 913 F.2d 1406, 1410 n. 2 (9th Cir. 1990)  
4 (declining to take judicial notice of an action not relevant to the case at issue).

5 Plaintiff objects to Defendant's third and fourth requests for judicial notice.  
6 (Dkt. No. 14-1.) Plaintiff objects to judicial notice of the pending case in the  
7 Southern District of New York on the ground that a court may not take judicial  
8 notice of the truth of any matter asserted in other litigation. (Dkt. No. 14-1 at 3)  
9 (citing Wyatt v. Terhune, 315 F.3d 1108, 1114 (9th Cir. 2003); Boyd v. City of  
10 Oakland, 458 F. Supp. 2d 1015, 1048 (N.D. Cal. 2006)). Defendant offers no  
11 authority to the contrary, and the Court finds the pending litigation irrelevant to the  
12 current matter. Accordingly, the Court declines to take judicial notice of the Picard,  
13 Trustee v. The Ernest Oscar Abbit Living Trust, et al. case. See Adriana Intern.  
14 Corp., 913 F.2d at 1410 n. 2.

15 Defendant's fourth request for judicial notice includes the Bainbridge  
16 Declaration, which seeks to introduce five exhibits. (Dkt. No. 6-3, "RJN,  
17 Bainbridge Decl.") The first three exhibits are documents referenced in the  
18 Complaint and are not objected to by Plaintiff. Accordingly, the Court takes judicial  
19 notice of the Annuity Contract,<sup>6</sup> the ING brochure made available to sales agents,  
20 and the annual statements under Plaintiff's Annuity Contract prepared by ING. (Id.)

21 The Bainbridge Declaration also seeks to introduce calculations of  
22 hypothetical Accumulation Values under different index-annuity rate strategies as  
23 well as of a calculation of the Minimum Guaranteed Contract Value of Plaintiff's  
24 Annuity Contract with Defendant. (RJN, Bainbridge Decl. ¶¶ 5-6.) Plaintiff objects  
25 to judicial notice of the calculations of William Bainbridge on the grounds that

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27 <sup>6</sup>The Court notes Plaintiff's objection that the copy of the Annuity Contract  
28 submitted as "Exhibit 1" to the Bainbridge Declaration is incomplete without the cover  
page and delivery documents properly submitted with the copy of the Annuity Contract  
as "Exhibit A" to the Complaint. (Dkt. No. 14 at 10.)

1 Defendant improperly seeks to introduce work product and conclusions; that the  
2 Bainbridge Declaration constitutes improper lay opinion and lacks foundation; and  
3 that the conclusions set forth in the exhibits attached to the Bainbridge Declaration  
4 are subject to dispute. (Dkt. No. 14-1 at 2-3.) The Court agrees that the charts  
5 submitted by Defendant fail to provide proper support for the calculations and are  
6 subject to dispute. Accordingly, the Court declines to take judicial notice of the  
7 calculations at this stage of the litigation. Cf. Miller v. Federal Land Bank, 587 F.2d  
8 415, 422 (9th Cir. 1978) (district court should have taken judicial notice of  
9 mathematical calculations when deciding a motion for *summary judgment*).

## 10 **B. Motion to Dismiss**

11 By the present motion, Defendant moves to dismiss Plaintiff's Complaint in  
12 its entirety for failure to state a claim. (Dkt. No. 6.) Defendant argues the documents  
13 referenced in the Complaint, on their face, defeat the plausibility of Plaintiff's  
14 claims. (Dkt. No. 6-1 at 9-13) (citing Newbeck v. Washington Mut. Bank, No. C 09-  
15 1599 CW, 2010 WL 3222174 at \*4 (N.D. Cal. Aug. 13, 2010); Spiegler v. Home  
16 Depot U.S.A., Inc., 552 F. Supp. 2d 1036, 1045 (C.D. Cal. 2008); Baymiller v.  
17 Guar. Mut. Life Ins. Co., No. SA CV 99-1566 DOC AN, 2000 WL 1026565 (C.D.  
18 Cal. May 3, 2000)).

19 Defendant's cited authorities are distinguishable from the present case. In  
20 Newbeck and Spiegler,<sup>7</sup> the courts dismissed the respective plaintiffs' complaints  
21 based solely on the language of the contracts at issue because the plaintiffs failed to  
22 identify false or misleading representations made by the defendants. See Newbeck,

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23  
24 <sup>7</sup>Defendant also cites Baymiller v. Guar. Mut. Life Ins. Co., No. SA CV 99-1566  
25 DOC AN, 2000 WL 1026565 (C.D. Cal. May 3, 2000), claiming that the court in  
26 Baymiller dismissed "contract and fraud related claims where contradicted by the  
27 express contract terms." (Dkt. No. 6-1 at 9.) The Court disagrees with this  
28 characterization of the court's holding. While the Baymiller court's May 3, 2000 Order  
dismissed Baymiller's contract claims on the ground that the contract terms at issue  
were unambiguous and contained an express integration clause, the court dismissed  
Baymiller's fraud claims based on failure to allege justifiable reliance. The court did  
not find, as Defendant asserts, that the documents on their own defeated the plausibility  
of Baymiller's legal theory.

1 2010 WL 3222174 at \*4; Spiegler, 552 F. Supp. 2d at 1045. Here, Plaintiff makes  
2 multiple allegations of false or misleading representations that allegedly induced  
3 Plaintiff to enter into the Annuity Contract, (Compl. ¶¶ 36(a)-(e)), as well as  
4 allegations of false and misleading representations in annual and year-end  
5 statements that misstated the amounts due to Plaintiff under the Annuity Contract.  
6 (Compl. ¶¶ 45, 46, 48.) Accordingly, the Court declines to dismiss Plaintiff’s  
7 Complaint for failure to state a claim based solely upon review of the documents  
8 attached to the Complaint.

9 In addition, Defendant argues Plaintiff fails to plead specific elements of each  
10 alleged cause of action. (Dkt. No. 6-1 at 13.) The Court will thus determine whether  
11 Plaintiff has sufficiently stated each of Plaintiff’s eight claims for relief.

12 **1. First Cause of Action - Breach of Contract, Good Faith & Fair Dealing**

13 Plaintiff’s first cause of action alleges Defendant breached the parties’  
14 contract and the implied covenant of good faith and fair dealing by: abusing  
15 Defendant’s investment discretion; acting contrary to Defendant’s marketing and  
16 sales materials; failing to properly credit the annuities owned by Plaintiff; charging  
17 expenses through undisclosed means; and by issuing false and misleading periodic  
18 statements. (Compl. ¶¶ 102-10.)

19 **a. Breach of Express Contract**

20 Defendant moves to dismiss Plaintiff’s breach of express contract claim on  
21 the ground that Plaintiff fails to identify specific provisions of the Annuity Contract  
22 allegedly breached by Defendant. (Dkt. No. 6-1 at 13) (citing Constr. Protective  
23 Servs., Inc. v. TIG Speciality Ins., 29 Cal. 4th 189, 198-99 (2002)). Defendant  
24 appears to abandon this argument in its reply papers, arguing instead that the  
25 express contract terms defeat Plaintiff’s claims for breach of express contract. (Dkt.  
26 No. 16 at 1-3.) Specifically, Defendant argues that: (1) the “Minimum Guaranteed  
27 Contract Value” (“MGCV”) does not include the promised bonus as defined under  
28 the Annuity Contract, so Defendant did not breach the contract by failing to credit

1 the bonus to the MGCV; and (2) although Plaintiff alleges the contract fails to  
2 compound interest daily when calculating the MGCV, the contract provides only for  
3 daily crediting rather than daily compounding. (Id.)

4 In regard to Plaintiff's allegation that Defendant failed to credit the promised  
5 bonus to the MGCV, the Court agrees that this allegation appears contradicted by  
6 the express terms of the Annuity Contract. Specifically, Plaintiff claims that "the  
7 Contract and periodic statements show that the 5% bonus is part of the 'Single  
8 Premium elected to the Strategy' and thus part of the MGCV." (Dkt. No. 14 at 11.)  
9 However, "Single Premium" is a defined term in the Annuity Contract, defined as  
10 "the single payment you make to us for this Contract." (Compl., Ex. A at 6.) As  
11 such, the "Single Premium elected to the Strategy" portion of the MGCV does not,  
12 under the Annuity Contract, expressly include the promised Bonus. Accordingly,  
13 the Court GRANTS Defendant's motion to dismiss Plaintiff's breach of contract  
14 claim based on allegations of improper bonus crediting.

15 However, Plaintiff's remaining breach of contract allegations based on "daily  
16 crediting" sufficiently states a claim for breach of contract to survive a motion to  
17 dismiss. To state a breach of contract claim under California law, a plaintiff must  
18 plead: (1) the existence of a contract between the parties; (2) the plaintiff's  
19 performance or excuse for nonperformance; (3) the defendant's failure to perform;  
20 and (4) resulting damages. Harris v. Rudin, Richman & Appel, 74 Cal. App. 4th  
21 299, 307 (1999). Here, the parties dispute the meaning of the contract term "daily  
22 crediting," and whether Defendant's failure to compound interest daily constituted  
23 Defendant's failure to perform its obligation of "daily crediting" under the Annuity  
24 Contract. Construing the Complaint's allegations in the light most favorable to the  
25 nonmoving party, the Court finds that Plaintiff has sufficiently alleged breach of  
26 contract based on Defendant's failure to credit Plaintiff's annuity daily.  
27 Accordingly, the Court DENIES in part Defendants' motion to dismiss Plaintiff's  
28 breach of contract claim.

1                                   **b. Breach of Implied Covenant of Good Faith & Fair Dealing**

2           Plaintiff’s first cause of action also alleges breach of the implied covenant of  
3 good faith and fair dealing based on California common law and Defendant’s  
4 obligations under California Insurance Code section 785(a).<sup>8</sup> (Compl. ¶ 104.) Under  
5 California law, “[t]here is implied in every contract a covenant by each party not to  
6 do anything which will deprive the other parties thereto of the benefits of the  
7 contract.” Harm v. Frasher, 181 Cal. App. 2d 405 (1960). A “breach of a specific  
8 provision of the contract is not a necessary prerequisite” to establishing a breach of  
9 the implied covenant of good faith and fair dealing. Carma Developers (Cal.), Inc.  
10 v. Marathon Deb. Cal., Inc., 2 Cal. 4th 342, 373 (1992). However, “[t]he implied  
11 covenant will not apply where no express term exists on which to hinge an implied  
12 duty, and where there has been compliance with the contract’s express terms.”  
13 Berger v. Home Depot U.S.A., Inc., 476 F. Supp. 2d 1174, 1177 (C.D. Cal. 2007).

14           Defendant moves to dismiss Plaintiff’s good faith and fair dealing allegations  
15 on the grounds that: (1) the covenant cannot impose substantive duties or limits on  
16 the contracting parties beyond those incorporated in the agreement, (Dkt. No. 6-1 at  
17 14) (citing Guz v. Bechtel Nat’l, Inc., 8 P.3d 1089, 1110 (Cal. 2000)); and (2)  
18 Defendant took no actions inconsistent with the Annuity Contract and cannot be  
19 held liable for exercising discretion expressly allowed under the contract. (Dkt. No.  
20 6-1 at 14-15) (citing Storek & Storek, Inc. v. Citicorp Real Estate, Inc., 100 Cal.  
21 App. 4th 44, 55 (2002); Third Story Music, Inc. v. Waits, 41 Cal. App. 4th 798  
22 (1995)). Plaintiff fails to oppose Defendant’s arguments with contrary legal  
23 authority. Accordingly, the Court GRANTS Defendant’s motion to dismiss

24 \_\_\_\_\_  
25           <sup>8</sup>The statute states that: “[a]ll insurers . . . and others engaged in the transaction  
26 of insurance owe a prospective insured who is 65 years of age or older, a duty of  
27 honesty, good faith, and fair dealing.” Cal. Ins. Code § 785(a). Plaintiff has not  
28 demonstrated that section 785(a) gives rise to a private right of action, so the Court  
construes Plaintiff’s claim as a common law claim for breach of good faith and fair  
dealing. See In re Nat’l Western Life Ins. Deferred Annuities Litig., 467 F. Supp. 2d  
1071, 1088 (S.D. Cal. 2006) (Miller, J.).

1 Plaintiff's breach of implied covenant of good faith and fair dealing.

2 **2. Second Cause of Action - Breach of Fiduciary Duty**

3 Plaintiff's second cause of action alleges Defendant abused a confidential  
4 position of trust with Plaintiff, thereby breaching Defendant's fiduciary duty to  
5 Plaintiff. (Compl. ¶¶ 111-19.) Defendant moves to dismiss Plaintiff's breach of  
6 fiduciary duty cause of action on the ground that no fiduciary duty existed between  
7 Plaintiff and Defendant as a matter of law. (Dkt. No. 6-1 at 15-16.) Defendant  
8 argues annuities create a debtor-creditor rather than a trust relationship. (*Id.*) (citing  
9 Nationsbank of N.C., N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251, 259  
10 (1995)). Defendant further argues that Plaintiff fails to allege sufficient facts to give  
11 rise to a special relationship between Plaintiff and Defendant. (*Id.*) (citing In re  
12 Conseco Ins. Co. Annuity Mktg & Sales Practices Litig., Nos. C-05-04726 RMW,  
13 C-06-00537 RMW, 2007 WL 486367 (N.D. Cal. Feb. 12, 2007)).

14 Under California law, the relationship "between an insurer and a prospective  
15 insured is not a fiduciary relationship." Cal. Serv. Station & Auto. Repair Ass'n v.  
16 Am. Home Co., 62 Cal. App. 4th 1166, 1173 (1998). However, an insurer-insured  
17 relationship may give rise to a fiduciary duty where other acts or representations  
18 form a fiduciary relationship. In re Conseco Ins. Co. Annuity Mktg & Sales  
19 Practices Litig., 2007 WL 486367 at \*7 (citing Solomon v. N. Am. Life & Cas. Ins.  
20 Co., 151 F.3d 1132, 1138 (9th Cir. 1998)). For example, a fiduciary relationship  
21 may arise where "one holds himself out as acting in a position of trust, such as an  
22 agent or stockbroker." *Id.* As such, "[w]hether a fiduciary relationship exists in any  
23 given situation is a question of fact." Negrete v. Fidelity and Guar. Life Ins. Co.,  
24 444 F. Supp. 2d 998, 1003 (C.D. Cal. 2006) (citing Michelson v. Hamada, 29 Cal.  
25 App. 4th 1566, 1575-76 (1994)).

26 Here, Plaintiff alleges Defendant targets senior citizens with products that  
27 falsely promise security. (Compl. ¶ 50.) Plaintiff alleges Defendant promises  
28 investors continued commitment, thanking them for ongoing trust and confidence in

1 Defendant as their “preferred financial services provider.” (Compl. ¶¶ 38, 39, 116.)  
2 Plaintiff further alleges Defendant drafted all contractual materials and structured  
3 pricing parameters, (Compl. ¶¶ 115, 117), taking advantage of Defendant’s superior  
4 knowledge and bargaining power. (Compl. ¶¶ 59-60.)

5 On these facts, taking all allegations as true and construing them in a light  
6 most favorable to Plaintiff at this stage of the proceedings, the Court finds that  
7 Plaintiff’s factual allegations and reasonable inferences from those allegations  
8 plausibly suggest a claim entitling Plaintiff to relief. See Moss v. U.S. Secret  
9 Service, 572 F.3d 962, 969 (9th Cir. 2009); see also Comm. on Children’s  
10 Television, Inc. v. General Foods Corp., 35 Cal. 3d 197, 222 (1983) (“[I]n an  
11 exceptional case a court might be able to find that a close and trusting relationship  
12 between buyer and seller, in which the buyer relied on the seller and the seller  
13 recognized that reliance, justified imposing fiduciary duties.”). Accordingly, the  
14 Court DENIES Defendant’s motion to dismiss Plaintiff’s breach of fiduciary duty  
15 claim. See In re National Western Life Ins. Deferred Annuities Litig., 467 F. Supp.  
16 2d 1071, 1087-88 (S.D. Cal. 2006); Negrete, 444 F. Supp. 2d at 1003-04.

### 17 **3. Third Cause of Action - Financial Elder Abuse**

18 The Complaint’s third cause of action alleges financial elder abuse in  
19 violation of California Welfare and Institutions Code section 15657.5, *et seq.*, as  
20 defined in section 15610.30. Under section 15610.30, “financial elder abuse” occurs  
21 when a person or entity

- 22 (1) Takes, secretes, appropriates, obtains, or retains real or personal  
23 property of an elder or dependent adult for a wrongful use or with  
intent to defraud, or both.
- 24 (2) Assists in taking, secreting, appropriating, obtaining, or retaining  
real or personal property of an elder or dependent adult for a wrongful  
use or with intent to defraud, or both.
- 25 (3) Takes, appropriates, obtains, or retains, or assists in taking,  
26 secreting, appropriating, obtaining, or retaining, real or personal  
property of an elder or dependent adult by undue influence, as defined  
27 in Section 15610.70.

28 Cal. Welf. & Inst. Code § 15610.30. Plaintiff alleges Defendant abused a

1 confidential position of trust to wrongfully take retirement savings from Plaintiff.  
2 (Compl. ¶ 122.) Defendant moves to dismiss Plaintiff’s financial elder abuse claim,  
3 arguing Plaintiff cannot establish “intent to defraud” or “bad faith.” (Dkt. No. 6-1 at  
4 16-17) (citing Kennedy v. Jackson Nat’l Life Ins. Co., No. C 07-0371 CW, 2010  
5 WL 4123994 (N.D. Cal. Oct. 6, 2010); O’Brien v. Cont’l Cas. Co., No. 5:13-cv-  
6 01289 EJD, 2013 WL 4396761 (N.D. Cal. Aug. 13, 2013)).

7 Plaintiff responds that bad faith is not required under section 15610.30;  
8 allegations of deceptive annuity sales practices suffice to state a claim for elder  
9 abuse. (Dkt. No. 14 at 17-19) (citing Johnston v. Allstate Ins. Co., No. 13-CV-574-  
10 MMA (BLM), 2013 WL 2285361 (S.D. Cal. May 23, 2013) (Anello, J.); Negrete v.  
11 Allianz Life Ins. Co. of N. Am., 927 F. Supp. 2d 870, 890-93 (C.D. Cal. 2013)). The  
12 Court agrees. Under the plain language of the financial elder abuse statute, plaintiffs  
13 may allege taking of property “for a wrongful use or with intent to defraud, or  
14 both.” Cal. Welf. & Inst. Code § 15610.30. The statute defines “wrongful use” as a  
15 taking of property where the person or entity “knew or should have known that this  
16 conduct is likely to be harmful to the elder.” Id. § 15610.30(b). The Court finds that  
17 Plaintiff’s Complaint includes numerous allegations that plead “wrongful use” as  
18 statutorily defined. (See, e.g. Compl. ¶¶ 6-9, 11, 12, 18, 21, 23.) Accordingly, the  
19 Court DENIES Defendant’s motion to dismiss Plaintiff’s third cause of action for  
20 financial elder abuse.

#### 21 **4. Fourth Cause of Action - Fraudulent Concealment**

22 Plaintiff’s fourth cause of action alleges fraudulent concealment in violation  
23 of California Civil Code section 1710. (Compl. ¶¶ 126-131.) Under California law,  
24 a claim for fraudulent concealment requires “knowing concealment or non-  
25 disclosure by a defendant with the intent to defraud, which induces justifiable  
26 reliance and causes injury to the plaintiff.” 625 3rd St. Assoc., L.P. v. Alliant Credit  
27 Union, 663 F. Supp. 2d 1040, 1050 (N.D. Cal. 2009) (citing Hoey v. Sony Elec.,  
28 Inc., 515 F. Supp. 2d 1099, 1104 (N.D. Cal. 2007)). Defendant argues a

1 concealment claim requires Plaintiff to allege Defendant acted with intent to  
2 defraud. (Dkt. No. 6-1 at 16) (citing Linear Tech. Corp. v. Applied Materials, Inc.,  
3 152 Cal. App. 4th 115, 131 (2007)). Defendant moves to dismiss Plaintiff's  
4 fraudulent concealment claim on the ground that ING's disclosure of the  
5 information pertinent to the subject of supposed fraud negates specific intent to  
6 defraud. (Id.) (citing Kramer v. Time Warner, 937 F.2d 767, 778 (2d Cir. 1991)).

7 The Court disagrees. Although California fraudulent concealment law  
8 requires allegations of "intent to defraud" in transactions which "do not involve  
9 fiduciary or confidential relations," Linear Tech. Corp., 152 Cal. App. 4th at 131,  
10 Plaintiff here alleges Defendant owed Plaintiff a fiduciary duty. "Fraud or deceit  
11 may consist of the suppression of a fact by one who is bound to disclose it or who  
12 gives information of other facts which are likely to mislead for want of  
13 communication of that fact." Hoey, 515 F. Supp. 2d at 1104 (citing Outboard  
14 Marine Corp. v. Superior Court, 52 Cal. App. 3d 30, 37 (1975)). As such, the Court  
15 DENIES Defendant's motion to dismiss Plaintiff's fraudulent concealment cause of  
16 action.

### 17 **5. Fifth Cause of Action - Concealment in an Insurance Contract**

18 The fifth cause of action in Plaintiff's Complaint alleges concealment in an  
19 insurance contract in violation of California Insurance Code section 332. (Compl.  
20 ¶¶ 132-139.) Under section 332, "[e]ach party to a contract of insurance shall  
21 communicate to the other, in good faith, all facts within his knowledge which are or  
22 which he believes to be material to the contract and as to which he makes no  
23 warranty, and which the other has not the means of ascertaining." Cal. Ins. Code §  
24 332. Defendant argues the annuity contract is not a contract of insurance, so section  
25 332 does not apply to the Annuity Contract at issue. (Dkt. No. 6-1 at 17.) In the  
26 alternative, Defendant argues the Insurance Code contains an express waiver,  
27 whereby failure to "make inquiries as to such facts, where they are distinctly  
28 implied in other facts of which information is communicated." Cal. Ins. Code § 336.

1 Plaintiff fails to respond to either argument. As Defendant’s motion to dismiss  
2 Plaintiff’s fifth cause of action remains unopposed, the Court GRANTS Defendant’s  
3 motion as to Plaintiff’s fifth cause of action.

4 **6. Sixth and Seventh Cause of Action - Statutory Unfair Competition**

5 California’s Unfair Competition Law (“UCL”) generally prohibits any  
6 “unlawful, fair, or fraudulent business act or practice.” Cal. Bus. & Prof. Code §  
7 17200, *et seq.* Specific to advertising, the California False Advertising Law  
8 (“FAL”) prohibits any “unfair, deceptive, untrue, or misleading advertising.” Cal.  
9 Bus. & Prof. Code § 17500, *et seq.* “Any violation of the false advertising law . . .  
10 necessarily violates the UCL.” Williams v. Gerber Prod. Co., 552 F.3d 934, 938 (9th  
11 Cir. 2008) (citing Kasky v. Nike, Inc., 27 Cal. 4th 939, 950 (2002)) (internal  
12 quotation marks omitted).

13 The sixth and seventh causes of action in Plaintiff’s Complaint allege  
14 violations of both California Business & Professions Code sections 17200 and  
15 17500. (Compl. ¶¶ 140-55.) Plaintiff alleges Defendant’s sales materials and  
16 standardized annuity contract deceived and misled Plaintiff as to the “ability of the  
17 ING indexed-annuities they purchased from Defendant to protect retirement savings  
18 and offer income benefits as compared to alternative investments.” (Compl. ¶ 148.)  
19 Plaintiff alleges Defendant made these representations with the intent to induce  
20 purchase of Defendant’s indexed-annuity products. (Compl. ¶ 152.)

21 Defendant moves to dismiss Plaintiff’s false advertising claim<sup>9</sup> on the ground  
22

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23 <sup>9</sup>While Defendant also moves to dismiss Plaintiff’s UCL claim on the ground  
24 that Plaintiff lacks standing to assert a UCL claim, the Court finds that Defendant’s  
25 argument is based on a misreading of Korea Supply Co. v. Lockheed Martin Corp., 29  
26 Cal. 4th 1134, 1149-50 (2003), and declines to dismiss Plaintiff’s UCL claim for lack  
27 of standing. (See Dkt. No. 6-1 at 19-20) (“As in Korea Supply, Plaintiff’s ‘expectancy’  
28 is not a ‘vested interest’ for purposes of the unfair competition laws, and he has  
incurred no other ‘losses.’”). Although the Korea Supply Co. court held that the UCL  
does not authorize non-restitutionary disgorgement, the court distinguished  
restitutionary disgorgement as a valid remedy under the UCL. 29 Cal. 4th at 1148  
 (“Under the UCL, an individual may recover profits unfairly obtained to the extent that  
these profits represent monies given to the defendant or benefits in which the plaintiff

1 that Plaintiff has failed to identify non-generalized or specific assertions actionable  
2 under the FAL; Defendant claims any alleged misstatements constituted mere  
3 puffery. (Dkt. No. 6-1 at 21) (citing Shroyer v. New Cingular Wireless Serv., Inc.,  
4 622 F.3d 1035, 1043 (9th Cir. 2010); Annunziato v. eMachines, Inc., 402 F. Supp.  
5 2d 1133, 1139 (C.D. Cal. 2005)). Plaintiff responds that the focus of misleading  
6 advertising claims is not on whether Plaintiff was actually deceived but on whether  
7 members of the public are likely to be deceived by Defendant’s statements. (Dkt.  
8 No. 14 at 21) (citing Comm. On Children’s Television v. Gen. Foods Corp., 35 Cal.  
9 3d 197, 211 (1983)).

10 The Court first notes that the parties’ arguments do not necessarily conflict;  
11 generalized statements constituting “mere puffery” are not actionable under section  
12 17500 precisely because “no reasonable consumer relies on puffery.” See Stickrath  
13 v. Globalstar, Inc., 527 F. Supp. 2d 992, 998 (N.D. Cal. 2007) (quoting Williams v.  
14 Gerber Prods. Co., 439 F. Supp. 2d 1112, 1115 (S.D. Cal. 2006) (Miller, J.)). That  
15 said, taking Plaintiff’s allegations as true, the Court finds Plaintiff has sufficiently  
16 pled misrepresentations to state a claim under the FAL and UCL. In particular,  
17 Plaintiff alleges that Defendant stated the annuity returns would provide “protection  
18 for principal” and contain “minimum guarantees.” (Compl. ¶¶ 3, 35.) Plaintiff  
19 further alleges Defendant falsely advertised that Defendant’s annuities offered “a  
20 5% premium bonus at the inception of your contract” and that “100% of your  
21 premium is put into the contract.” (Compl. ¶¶ 36, 36(a).) The Court finds that these  
22 allegations are sufficiently specific to state a claim for violation of the California  
23 FAL and UCL. Accordingly, the Court DENIES Defendant’s motion to dismiss  
24 Plaintiff’s FAL and UCL claims as non-actionable puffery.

25 //

26 \_\_\_\_\_  
27 has an ownership interest.”). Plaintiff’s sixth cause of action plainly seeks  
28 disgorgement of ill-gotten gains as restitution for the money and property allegedly  
wrongfully acquired by Defendant. (Compl. ¶ 145.)

1           **8. Eighth Cause of Action - Failure to Supervise**

2           Plaintiff’s eighth cause of action seeks to hold Defendant liable for failure to  
3 train and supervise sales agents responsible for selling Defendant’s indexed-  
4 annuities. (Compl. ¶ 158.) Defendant moves to dismiss Plaintiff’s failure to  
5 supervise claim on the ground that “[i]ndependent agents offer ING USA annuities .  
6 . . [and] Defendant had no obligation to train or control any independent agent.”  
7 (Dkt. No. 6-1 at 22.) Plaintiff responds that the Complaint alleges sales agents acted  
8 as agents of ING, (Dkt. No. 14) (citing Compl. ¶¶ 20, 34), and that the existence of  
9 an agency relationship is ordinarily a question of fact not properly decided on a  
10 motion to dismiss. (*Id.*) (citing Violette v. Shoup, 16 Cal. App. 4th 611, 619  
11 (1993)).

12           While Defendant’s claim that ING’s “sales agents” were in fact “independent  
13 agents” may be true, Defendant’s argument is not properly raised in a motion to  
14 dismiss. See Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 534 (9th Cir.  
15 1984) (dismissal is warranted under Rule 12(b)(6) where the complaint lacks a  
16 cognizable legal theory or fails to plead essential facts under a cognizable legal  
17 theory); see also Thompson v. Davis, 295 F.3d 890, 895 (9th Cir. 2002) (court must  
18 assume truth of all factual allegations and construe inferences from them in the light  
19 most favorable to the nonmoving party). As alleged in Plaintiff’s Complaint, the  
20 sales agents undertaking to transact business on behalf of Defendant did not receive  
21 sufficient training, supervision, or information regarding Defendant’s indexed-  
22 annuities. (Compl. ¶ 158); see Violette, 16 Cal. App. 4th at 621 (“An agent is  
23 anyone who undertakes to transact some business, or manage some affair, for  
24 another, by authority of and on account of the latter, and to render an account of  
25 such transactions.”) (internal quotation marks omitted). Defendant has not  
26 demonstrated that Plaintiff’s allegations, as asserted in the Complaint, fail to state a  
27 claim for failure to supervise. Accordingly, the Court DENIES Defendant’s motion  
28 to dismiss Plaintiff’s eighth cause of action.

1 **CONCLUSION**

2 Based on the foregoing, the Court hereby GRANTS in part and DENIES in  
3 part Defendants' Motion to Dismiss. (Dkt. No. 6.) Specifically, the Court

- 4 1. GRANTS in part, without prejudice, and DENIES in part Defendant's  
5 Motion to Dismiss Plaintiff's Breach of Express Contract claim;  
6 2. GRANTS Defendant's Motion to Dismiss Plaintiff's Breach of Implied  
7 Covenant of Good Faith and Fair Dealing claim WITHOUT PREJUDICE;  
8 3. DENIES Defendant's Motion to Dismiss Plaintiff's Breach of Fiduciary  
9 Duty claim;  
10 4. DENIES Defendant's Motion to Dismiss Plaintiff's Financial Elder Abuse  
11 claim;  
12 5. DENIES Defendant's Motion to Dismiss Plaintiff's Fraudulent  
13 Concealment claim;  
14 6. GRANTS Defendant's Motion to Dismiss Plaintiff's Concealment in an  
15 Insurance Contract claim WITHOUT PREJUDICE;  
16 7. DENIES Defendant's Motion to Dismiss Plaintiff's California Unfair  
17 Competition Law, Cal. Bus. & Prof. Code § 17200, *et seq.*, claim;  
18 8. DENIES Defendant's Motion to Dismiss Plaintiff's False Advertising Law,  
19 Cal. Bus. & Prof. Code § 17500, *et seq.*, claim; and  
20 9. DENIES Defendant's Motion to Dismiss Plaintiff's Failure to Supervise  
21 claim.

22 Plaintiff shall be granted leave to file an amended complaint within thirty (30)  
23 days from the date of this Order.

24 **IT IS SO ORDERED.**

25 DATED: February 25, 2014

26   
27 HON. GONZALO P. CURIEL  
28 United States District Judge