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7  
8 UNITED STATES DISTRICT COURT  
9 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
10

11 JOYCE GOERTZEN, an individual,  
12 individually and on behalf of herself all  
similarly-situated persons, by and through her  
power of attorney BEVERLY KRAUS,

13 Plaintiff,

14 vs.

15 GREAT AMERICAN LIFE INSURANCE  
16 COMPANY, and Does 1-50

17 Defendants.  
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Case No. 4:16-cv-00240-YGR

**CLASS ACTION**

**PLAINTIFF'S OPPOSITION TO DEFENDANT  
GREAT AMERICAN LIFE INSURANCE  
COMPANY'S MOTION FOR SUMMARY  
JUDGMENT REGARDING STANDING**

Date: November 29, 2016  
Time: 2:00 p.m.  
Ctrm.: 1  
Judge: Hon. Yvonne Gonzalez Rogers

Action Filed: December 15, 2015  
Removed: January 14, 2016  
Trial Date: Not set

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1 **I. INTRODUCTION**

2 **A. SUMMARY OF ARGUMENT.**

3 Plaintiff Joyce Goertzen suffered real injury as a direct result of the issuance of an illegal  
4 annuity contract by Defendant Great American Life Insurance Company (“Defendant” or “Great  
5 American”). The specific injuries are (i) Great American illegally charged her a “surrender penalty” in  
6 the amount of \$136.88, and (ii) continues to deny Plaintiff access to her own money unless she pays  
7 additional penalties. (SMF #24- 25 and 30.) The cause of those injuries is simple: Great American  
8 issued Plaintiff an annuity policy that violated the Insurance Code. (SMF #26-27). Then, Great  
9 American enforced the illegal policy and collected an illegal withdrawal penalty. Joyce Goertzen  
10 suffered injury directly attributable to the Defendant’s illegal conduct, and seeks judicial redress.  
11 These violations of law easily support standing under *Spokeo*.

12 In its motion, Great American asserts Plaintiff lacks standing because she does not allege  
13 reliance. To build the argument, Great American rewrites the complaint and ignores the law. Plaintiff  
14 does not allege fraud; in fact, the Complaint expressly disclaims any allegations of fraud. (ECF #6-1,  
15 page 13 of 27, at ¶7.) Instead, Plaintiff makes a simple, statutory claim: Great American sold her an  
16 illegal contract and then illegally enforced it by penalizing her for withdrawing her own money - and  
17 will continue to penalize her for withdrawing her own money. (SMF #24-27 and 30.) Those are  
18 statutory violations by Defendant, exactly as Plaintiff alleges in her Complaint. By statutory definition,  
19 Defendant’s practices were illegal and constituted financial elder abuse. Plaintiff’s claims under the  
20 Unfair Competition Law (“UCL,” Bus. & Prof. Code § 17200, *et seq.*) are based on Great American’s  
21 statutory violations, not fraud, so she is not required to show reliance. Notwithstanding on the fact that  
22 there is no reliance requirement for an illegal practice, the client testified<sup>1</sup> had she known that Great

23 \_\_\_\_\_  
24 <sup>1</sup> Several other cases that resulted in certified classes for the sale of deferred annuities to seniors with  
25 similar violations of the insurance code, did not require the plaintiff/purchaser to testify because as is  
26 expected with a class of senior citizens, many of the class members either had passed or had dementia  
27 and their conservator’s or heirs brought the action on their behalf to remedy the illegal practice.  
*Negrete v. Allianz Life Ins. Co. of N. Am.*, 238 F.R.D. 482, 496 (C.D. Cal. 2006) (certifying a California  
class of seniors who purchased fixed and indexed deferred annuities, whose claims included financial

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1 American’s policy carried with it ten years of surrender charges, she would not have accepted the  
2 policy. (SMF #23.)

3 Defendant’s motion for summary judgment must be denied. The motion rests entirely on a  
4 disingenuous interpretation of the Complaint. Contrary to Defendant’s characterization, Plaintiff never  
5 alleges fraud and thus is not required to show reliance. She did have the right to rely on Great  
6 American to issue a legal contract. But Great American did not. Instead, Defendant issued an illegal  
7 contract and enforced an illegal surrender penalty when Ms. Goertzen withdrew her own money. She  
8 certainly has standing to redress her injury.

9 **B. FACTUAL BACKGROUND.**

10 A deferred annuity is a financial insurance product that is often an unsuitable investment  
11 because it has a decades-long maturation period, with surrender charges (a/k/a surrender penalties) if  
12 the owner attempts to “surrender” (to withdraw some or all of the money before maturation). (SMF  
13 #21.) Because of abuses in the sale of annuities to elders, the Legislature mandated, word-for-word,  
14 that a specific disclosure be on the front of the policy. (Cal. Ins. Code § 10127.10.) Further, the  
15 “location of the surrender information” (a detailed description of how to calculate the surrender  
16 penalties) must be disclosed on the cover page of the contract. (Cal. Ins. Code § 10127.13.) The  
17 purpose of Sections 10127.10 and 10127.13 is to ensure that material information regarding surrender  
18 penalties is adequately disclosed and to safeguard senior citizens from abusive practices in the sale of  
19 deferred annuities. The Legislature’s purpose in passing 10127.13 was “to protect vulnerable seniors  
20 through mandatory language stated ‘clearly’ in ‘bold, 12-point print on the cover page of the policy.’”  
21 *Rand v. Am. Nat’l. Ins. Co.*, 717 F.Supp.2d 948, 956 (N.D. Cal. 2010, J. Illston).

22 Plaintiff Joyce Goertzen was 80 years old when she was sold a “Safe Return” deferred annuity  
23 policy (hereinafter, the “Great American Policy”) from Great American in 2011. (SMF #22.) The

24  
25 elder abuse); and *Rand v. American Nat’l. Ins. Co.*, 3:09-cv-00639-SI ECF #202 (N.D. Cal. Sep. 22,  
26 2011) (certifying a statewide class of deferred annuity purchasers for settlement after plaintiff’s cross  
27 motion for summary judgment was granted, in part, finding that the defendant violated 10127.13; the  
claims in that case included a cause of action for financial elder abuse).

1 Great American Policy was required to comply with Cal. Ins. Code §§ 10127.10 and 10127.13, by  
 2 including certain disclosures on the cover page of the policy regarding surrender penalties, but it did  
 3 not comply, because it did not include the required disclosures. (SMF #26-27.)

4 Ms. Goertzen made a withdrawal from her policy in 2015, and even though the Great American  
 5 Policy violated Sections 10127.10 and 10127.13, she was assessed a surrender penalty. (SMF #25.) If  
 6 Ms. Goertzen attempts to withdraw additional funds from her policy, she will have to pay additional  
 7 surrender penalties. (*See* SMF #30.)

8 Ms. Goertzen would not have been sold the Great American Policy if she had known that there  
 9 were surrender charges for a ten-year period. (SMF #23.)

## 10 **II. LEGAL ARGUMENT**

### 11 **A. SUMMARY JUDGMENT STANDARD.**

12 Fed. R. Civ. P. 56(c) provides for summary judgment when “the pleadings, the *discovery* and  
 13 disclosure materials on file, and any affidavits show that there is no genuine issue as to any material  
 14 fact and that the movant is entitled to judgment as a matter of law.” *See Anderson v. Liberty Lobby,*  
 15 *Inc.*, 477 U.S. 242, 256 (1986) (moving party bears the initial burden of demonstrating the absence of a  
 16 genuine issue of material fact for trial). “Summary Judgment is appropriate when there is no genuine  
 17 dispute as to material facts and the moving party is entitled to judgment as a matter of law.” *Citizens*  
 18 *for a Better Env’t-Cal. v. Union Oil of Cal.*, 996 F.Supp. 934, 936 (N.D. Cal. 1997). “Material facts are  
 19 those which may affect the outcome of the case.” *Id.*

20 When deciding a summary judgment motion, a court must view the evidence in the light most  
 21 favorable to the nonmoving party and draw all justifiable inferences in its favor. *Anderson*, 477 U.S. at  
 22 255; *Hunt v. City of Los Angeles*, 638 F.3d 703, 709 (9th Cir. 2011). A district court may only base a  
 23 ruling on a motion for summary judgment upon facts that would be admissible in evidence at trial. *In re*  
 24 *Oracle Corp. Sec. Litig.*, 627 F.3d 376, 385 (9th Cir. 2010); Fed. R. Civ. P. 56(c). Where the moving  
 25 party will have the burden of proof at trial, it “must affirmatively demonstrate that no reasonable trier of  
 26 fact could find other than for [\*7] the moving party.” *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978,  
 27

1 984 (9th Cir. 2007); and see *Atkinson v. Urban Land* (N.D.Cal. Oct. 5, 2016, No. 15-cv-03689-YGR)  
2 2016 U.S. Dist. LEXIS 138690, at \*6-8.)

3 **B. PLAINTIFF SUFFERED SUFFICIENT HARM TO ESTABLISH STANDING**  
4 **UNDER BOTH ARTICLE III AND THE UCL.**

5 To have standing, “[t]he plaintiff must have (1) suffered an injury in fact, (2) that is fairly  
6 traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable  
7 judicial decision.” *Spokeo, Inc. v. Robins*, \_\_ U.S. \_\_, 136 S.Ct. 1540, 1547 (2016), citing *Lujan v.*  
8 *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992).

9 **1. Plaintiff suffered economic harm traceable to Defendant, which can be**  
10 **redressed by the Courts.**

11 In the matter at hand, the facts sufficiently point to an identifiable economic injury suffered by  
12 Plaintiff, Ms. Goertzen. Great American collected a surrender penalty from Ms. Goertzen, even though  
13 the Great American Policy violated Cal. Ins. Code §§ 10127.10 and 10127.13. (SMF #25-27.) Ms.  
14 Goertzen hence suffered a concrete injury (\$136.88 was taken from her in violation of the law. (SMF  
15 #25-27).

16 Furthermore, in satisfaction of the second requirement for standing, the injury suffered by Ms.  
17 Goertzen is directly traceable to the actions of the Defendant, when they unilaterally took the surrender  
18 penalty of \$136.88 in violation of the law, SMF #25-27). Lastly, and equally important, the injury  
19 suffered by Ms. Goertzen can be redressed by a favorable decision of the Court, wherein a judgment  
20 can be rendered against Defendant, in favor of Ms. Goertzen. The allegation that unlawful fees were  
21 assessed and paid (SMF #25-27) is sufficient to establish standing for Article III and the UCL. *Ellis v.*  
22 *J.P. Morgan Chase & Co.*, 950 F.Supp.2d 1062, 1086 (N.D. Cal., June 13, 2013).

23 **2. Plaintiff suffered additional economic harm through Defendant’s**  
24 **threatening actions.**

25 Having issued Ms. Goertzen a policy in violation of the Insurance Code, and having no legal  
26 right to collect surrender penalties, Great American proceeded to bully Ms. Goertzen into not  
27

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1 withdrawing the rest of her money by threatening to (unlawfully) collect surrender penalties should she  
 2 withdraw her funds before age 90. (SMF #22 and 30.) That has been identified from the beginning of  
 3 this lawsuit as an illegal business practice. (Complaint, ECF #6-1 at page 22 of 37, ¶52(c).)

4 Again, asserting the three-part test for standing set forth above in Section B.1., Ms. Goertzen is  
 5 suffering an ongoing concrete and particularized injury, specifically the inability to access her funds  
 6 held by Great American. (SMF #30.) The injury is based on the direct actions of the Defendant,  
 7 through their threatening and bullying of Ms. Goertzen to paralyze her from withdrawing her funds  
 8 based on their illegal surrender penalty policies. *Id.* And lastly, the injury can be redressed by a  
 9 favorable decision (injunctive relief ordering Defendant not to threaten or collect illegal surrender  
 10 penalties). (*See* SMF #30.) Ms. Goertzen has successfully pled that the actions of Defendant have  
 11 caused a direct injury.

12 Inability to access her own funds now is as an immediate and ongoing injury, sufficient to  
 13 support standing under Article III and the UCL. *Rubio v. Capital One Bank*, 613 F.3d 1195, 1204 (9th  
 14 Cir. 2010). In *Rubio*, Raquel Rubio alleged that she lost access to a line of credit because it would have  
 15 required her to pay a higher APR. *Id.* That was deemed sufficient injury for Article III and UCL  
 16 standing. *Id.* Here, Ms. Goertzen is not merely alleging that she lost the opportunity to borrow  
 17 someone else's money, she is alleging that access to her own funds has been blocked, which is a much  
 18 more serious and direct harm. (SMF #30.)

19 Inability to access her own funds also represents the threat of future harm, in the form of future  
 20 surrender charges, the threat of which is also sufficient to convey standing. Potential future harm can  
 21 be sufficient to establish Article III standing. In *Krottner*, a laptop containing personal information of  
 22 97,000 Starbucks employees was stolen by an unknown person, who might never misuse that  
 23 information. *Krottner v. Starbucks Corp.*, 628 F.3d 1139, 1141-1142 (9th Cir. 2010). Starbucks even  
 24 told its employees that it had "no indication that the private information has been misused." *Id.* This  
 25 still represented a credible threat of real and immediate harm, and was not "conjectural," so it was  
 26 sufficient to support Article III standing. *Id.* at 1143.

1 Here, Great American has stated that it will continue to collect surrender charges for  
 2 withdrawals from Ms. Goertzen's policy according to a specific formula. (SMF #5 and 30.) Great  
 3 American's threat is credible, real, immediate, and not conjectural. Every person who purchases an  
 4 annuity has their funds held hostage to the threat of surrender penalties. They are experiencing an  
 5 ongoing injury and a credible threat of future injury that is real and immediate, even if they have not  
 6 (yet) been assessed a surrender charge. Economic injury sufficient to establish UCL standing "may be  
 7 shown where plaintiff 'surrender[s] in a transaction more, or acquire[s] in a transaction less, than he or  
 8 she otherwise would have.'" *Ellis v. J.P. Morgan Chase & Co.*, 950 F.Supp.2d 1062, 1086 (N.D. Cal.,  
 9 June 13, 2013), quoting *Kwikset Corp. v. Sup. Ct. (Benson)*, 51 Cal.4th 310, 323 (Cal. 2011). By  
 10 issuing the annuity to Ms. Goertzen, Great American took her money and gave her a financial product  
 11 that was worth less than she otherwise would have had, because she gave up the right to access her  
 12 funds without penalty. (SMF #30.) Both the ongoing injury and the threat of future injury are, by  
 13 themselves, sufficient for Article III standing. All seniors who purchase deferred annuities, and have  
 14 their funds subject to, and held hostage to, unlawful surrender penalties, experience harm sufficient to  
 15 establish standing, because those surrender penalties (by reason of being unlawful) mean that the senior  
 16 acquires in the transaction less than she otherwise should have (*i.e.*, a policy free of unlawful surrender  
 17 charges). *See id.*

18 **C. Great American's Unlawful Issuance of the Policy was a Direct Cause of Plaintiff's**  
 19 **Harm.**

20 **1. For this motion, Great American does not deny that its policies violated Cal.**  
 21 **Ins. Code §§ 10127.10 and 10127.13.**

22 Counsel agreed that this motion for summary judgment would be based on one narrow issue  
 23 only: whether Ms. Goertzen has standing, under Article III of the United States Constitution and the  
 24 UCL.<sup>2</sup> Great American does not dispute, in this motion, that its actions violated the law. (See SMF

25 <sup>2</sup> In fact, defense counsel has permission to bring this motion based on only Section II-A of its letter,  
 26 regarding standing for the UCL claims, but expanded the scope of this motion to include challenging  
 27 Plaintiff's standing to bring elder abuse claims, raised in Section II-C of its letter. *See* ECF #32.

1 #26-27.) Great American only argues: assuming that it violated the Insurance Code, and illegally  
 2 collected millions of dollars of surrender penalties from the Class and Subclass, it should not face any  
 3 consequences, because Ms. Goertzen supposedly lacks standing to hold it accountable.

4 **2. Issuing policies that violate a statutory provision is an unlawful business**  
 5 **practice.**

6 Every business practice that violates a statutory provision, must naturally be in violation of the  
 7 “unlawful” prong of the UCL:

8 "A business act or practice may violate the UCL if it is either 'unlawful,' 'unfair' or  
 9 'fraudulent.'" *Rubio v. Capital One Bank*, 613 F.3d 1195, 1204 (9th Cir. 2010) (internal  
 10 citation omitted). "Each of these three adjectives captures a separate and distinct theory  
 11 of liability." *Id.* (citation and quotation omitted). . . . If the conduct is alleged to be  
 "unlawful," a plaintiff must plead the specific statutory provision that the conduct  
 violates. *Khoury v. Maly's of California, Inc.*, 14 Cal.App.4th 612, 619, 17 Cal.Rptr.2d  
 708 (Cal. Ct. App. 1993).

12 *Vaccarino v. Midland Nat'l Life Ins.*, 2012 U.S. Dist. LEXIS 52499 \*27-28, 2012 WL 1247137 (C.D.  
 13 Cal. Apr. 13, 2012).

14 Issuing policies with language that contravenes Cal. Ins. Code §§ 10127.10 and 10127.13 is  
 15 unlawful, and is hence, an unlawful business practice. Great American does not dispute that if a policy  
 16 is issued without the disclosures required by 10127.10 and 10127.13, that would be an unlawful  
 17 business practice.

18 Hence, Ms. Goertzen has already met the “unlawful” prong of the UCL as it relates to Great  
 19 American’s actions in the underlying Complaint, as she has plead the specific statutory provisions that  
 20 Great American has violated, specifically Cal. Ins. Code §§ 10127.10 and 10127.13.

21 **3. Plaintiffs are not required to show proof of reliance under the “Unlawful”**  
 22 **prong of the UCL.**

23 Defendant has erroneously asserted that Plaintiff must plead causation and reliance as part of  
 24 her claim under the UCL. Plaintiff’s claims are entirely straightforward statutory violations: Defendant  
 25 was supposed to put certain disclosures on the front of its deferred annuity contracts to California  
 26 seniors regarding surrender penalties; Defendant failed to do so; *having failed to do so*, Defendant was  
 27

1 not allowed to collect the penalties; Defendant collected the penalties anyway, and continues to collect  
 2 them in violation of the Insurance Code. (SMF #25-28 and 30.) Notwithstanding the fact that reliance  
 3 is not required for claims involving an illegal practice, Plaintiff alleges that she did rely on Defendant's  
 4 omissions. Ms. Goertzen has testified that she would not have purchased the annuity had she known  
 5 about the ten-year penalty period for withdrawals. (SMF #23) That is, she relied on the deficient,  
 6 noncompliant disclosure in the policy when she purchased it. (SMF #23) Irrespective of that fact,  
 7 however, the courts hold that it is not necessary to plead causation or reliance where there is an  
 8 unlawful practice under the Code. *Vaccarino v. Midland Nat'l Life Ins.*, 2012 U.S. Dist. LEXIS  
 9 52499 \*27-28, 2012 WL 1247137 (C.D. Cal. Apr. 13, 2012); *Medrazo v. Honda of North Hollywood*,  
 10 205 Cal.App.4th 1, 12 (Ct. App. 2012). Collecting money in violation of the Insurance Code is an  
 11 unlawful business practice. *Vaccarino*, 2012 U.S. Dist. LEXIS 52499 at \*31. Any time an unlawful  
 12 charge is imposed, "that directly causes harm to the victim," it is not necessary to show reliance in  
 13 order to demonstrate causation. *Medrazo*, 205 Cal.App.4th at 12.

14 In *Medrazo*, the defendant violated a Vehicle Code provision requiring that hanger tags on  
 15 motorcycles for sale disclose dealer-added charges. *Id.* at 4. Under the Code, if the hanger tag were  
 16 not attached, or if the dealer-added charges were not disclosed on the tag, the dealer was not allowed to  
 17 collect the charges. *See id.* The plaintiff class in *Medrazo* lost money when the dealer charged, and the  
 18 class members paid, the undisclosed, extra charges. *Id.* at 13-14. There was no allegation whatsoever  
 19 that plaintiffs had relied on the nondisclosure when they purchased their motorcycles. The statutory  
 20 violation itself made the extra fees illegal. When the purchasers paid those fees, they were harmed, and  
 21 they were entitled to bring suit under the statute. *Id.* at 13-14.

22 The instant case is similar to *Medrazo*. Plaintiff is not required to demonstrate causation or  
 23 reliance. The fact that Great American violated the UCL by issuing policies with noncompliant  
 24 disclosures regarding surrender penalties, and charged those penalties to Plaintiff, is enough. Plaintiff  
 25 has standing to bring her suit under the statutes.

1           These two statutes, Cal. Ins. Code §§ 10127.10 and 10127.13 do not merely prohibit an  
2 insurance company from issuing policies without the required warnings. They prohibit an insurance  
3 company that has failed to give such warnings from collecting surrender penalties. The Legislature's  
4 purpose in passing these statutes was to protect seniors. *Id.* at 956. To give effect to that purpose, the  
5 statutes must not be read narrowly:

6           *See Westinghouse Elec. Corp. v. Pacific Gas & Elec. Co.*, 326 F.2d 575, 580 (9th Cir. 1964)  
7 "Remedial statutes should be liberally construed and should be interpreted (when that is  
8 possible) in a manner tending to discourage attempted evasions by wrongdoers."); *Leader v.*  
9 *Cords*, 182 Cal.App.4th 1588, 1598, 107 Cal.Rptr.3d 505 (2010) ("A remedial statute 'must be  
liberally construed to effectuate its object and purpose, and to suppress the mischief at which it  
is directed.'" (internal citations omitted).

10 *Rand*, 717 F.Supp.2d at 956-957. 10127.10 and 10127.13 both impliedly prohibit the collection of  
11 surrender penalties that have not been disclosed as required by those statutes. The entire purpose of  
12 those laws is to prohibit insurance companies from collecting penalties without first disclosing them.  
13 *Vaccarino*, 2012 U.S. Dist. LEXIS 52499 at \*31 (C.D. Cal. April 3, 2012) ("plaintiffs' allegations  
14 concerning Insurance Section 10127.13 do not sound in fraud and therefore do not require plaintiffs to  
15 plead causation and reliance. Instead, that Section is based upon a public policy requiring a clear and  
16 conspicuous warning to seniors concerning surrender penalties.")

17           Defendant admits that the two *Tabares* orders are unpublished opinions, and therefore  
18 completely lack precedential value. Defendant misleadingly omits that both *Tabares* unpublished  
19 opinions are superseded by an appellate decision, and therefore, should not be cited for any purpose.  
20 *Medraza* reiterates the bright-line rule that it is not necessary to show reliance when bringing a claim  
21 under the "unlawful" prong, because any time an unlawful charge is imposed, that directly causes harm  
22 to the victim—hence it is not necessary to show reliance in order to demonstrate causation. *Id.* It is only  
23 necessary to show reliance for a claim based on the "fraud" prong of the UCL, because "reliance is the  
24 causal mechanism of fraud." *Id.*, quoting *Tobacco II*, 46 Cal.4th at 326.

25           Additional support for the above is the Court's ruling in *Vaccarino*, where the Court found that  
26 because the Plaintiffs had stated their claim as a violation of the "unlawful" prong of the UCL, exactly  
27

1 as Ms. Goertzen is doing in the present action, that it did not require Plaintiffs to plead causation and  
 2 reliance. The Court instead found that Section 10127.13 is based upon a public policy requiring a clear  
 3 and conspicuous warning to seniors concerning surrender penalties. *Id.* at 31. It is clear, as interpreted  
 4 by the Courts, that there is a public policy consensus that supports claims to move forward under the  
 5 “unlawful” prong without needing to offer evidence relating to causation and reliance.

6 Much like the *Vaccarino* matter, Ms. Goertzen in her complaint expressly disclaims that any  
 7 claim is based on fraud. (ECF #6-1, page 13 of 27, at ¶7.) The mere fact that Defendant’s conduct runs  
 8 the risk of defrauding seniors does not mean that the specific claims Plaintiff has chosen to bring sound  
 9 in fraud.

10 Further, Ms. Goertzen’s harm is directly attributable to Great American’s lawbreaking because  
 11 the policy would not have been issued to her if she had known it had ten years of surrender penalties.  
 12 (SMF #23.) Great American can only offer speculation that if it had given proper notice, she would  
 13 have gone ahead with the transaction anyway. In a similar vein, Great American’s reliance on the  
 14 Court’s ruling in *Orcilla v. Big Sur, Inc.*, 244 Cal.App.4th 982, 1013 (Ct. App. 2016) (quoting *Jenkins*  
 15 *v. JPMorgan Chase Bank, N.A.*, 216 Cal.App.4th 497, 522 (Ct. App. 2013), that a plaintiff lacks  
 16 standing to assert a claim under the UCL for unlawful conduct if he or she “would have suffered the  
 17 same harm whether or not a defendant complied with the law,” has no bearing on the case at bar. If in  
 18 fact, Great American would have complied with the law, Ms. Goertzen would absolutely not have  
 19 suffered the same harm.

20 Defendant incorrectly relies on a string of California cases for his argument that plaintiff lacks  
 21 standing. The first case is *Kwikset Corp. v. Superior Court*, 51 Cal.4th 310 (Cal. 2011), construing  
 22 Proposition 64 as it affected the UCL. There, the court held that plaintiff did not have standing to bring  
 23 his false advertising claim under the UCL for a mislabeled padlock. The Court noted that plaintiffs in  
 24 UCL unfair practice cases must show (i) economic injury and (ii) that the injury was the result of the  
 25 unfair practice. *Kwikset*, 51 Cal.4th at 322. In the instant case, Plaintiff satisfies the *Kwikset*  
 26  
 27

1 requirements: she has sustained economic injury and she has demonstrated that the injury was the  
2 result of an illegal surrender penalty provision in her annuity contract.

3 Similarly, the court in *Peterson v. Cellco Partnership*, 164 Cal.App.4th 1583 (Ct. App.  
4 2008) held that plaintiffs failed to show economic injury when they sued defendant for an insurance  
5 code violation. Plaintiffs could not demonstrate any economic harm at all; the cellphone insurance they  
6 paid cost the same as any competitor's coverage even though the vendor had violated the statute.  
7 *Peterson* is completely irrelevant to the instant case: Plaintiff was charged a surrender penalty that was  
8 in and of itself illegal and has clearly suffered an economic injury with the unlawful penalty of \$136.88  
9 from her withdrawal in violation of the statutes. The economic loss is direct and continuing in the  
10 present case.

11 Likewise, *Turcios v. Carma Laboratories*, 296 F.R.D. 638 (C.D. Cal. 2014) does not apply to  
12 Plaintiff's case. In *Turcios*, plaintiff claimed deceptive packaging by the defendant. It was a fraud case  
13 and therefore the court required a showing of reliance. The court however specifically observed that  
14 UCL actions not based on fraud did not require reliance. *Turcios*, 296 F.R.D. at 645, citing *In re*  
15 *Tobacco II*, 46 Cal.4th 298 (2009); and *Medrazo*, 205 Cal.App.4th at 205.

16 Her claims rests on a statutory violation and her injury was a direct result of the enforcement of  
17 an illegal contractual provision. It is in the very nature of failing to give a required warning that the  
18 senior is much less likely to be aware of the danger. Great American cannot know that it would not  
19 have made a difference. Because the proper disclosures would have decreased the likelihood of exactly  
20 the type of harm that occurred, the harm is attributable to Great American's violations of the law.

21 **4. This is not a false advertising case, but it is a statutory violation matter.**

22 Defendant relies on *Kwikset*, *Tobacco II* and *Kosta*, which are two false advertising cases. The  
23 case at bar is not a false advertising case.

24 *Kwikset* sold locks with components that were made primarily outside of the United States, but  
25 falsely labeled them as being "Made in the U.S.A." *Kwikset Corp. v. Sup. Ct. (Benson)*, 51 Cal.4th  
26 310, 317 (Cal. 2011). *Kwikset* was "based on a fraud theory involving false advertising and  
27

1 misrepresentations to consumers.” *Kwikset*, 51 Cal.4th at 327, quoting *In re Tobacco II Cases*, 46  
2 Cal.4th 298, 325, fn.17 (Cal. 2009).

3 Defendant’s reliance on *In re Tobacco II Cases*, 46 Cal.4th 298 (Cal. 2009) is also misplaced.  
4 *Tobacco II* is a false advertising case. Plaintiffs there were required to demonstrate reliance on the  
5 misleading and deceptive advertising campaign waged by defendants. Ms. Goertzen is not claiming  
6 Great American waged a false advertising campaign against her and other seniors. Her claim is simply  
7 that Great American violated the law in issuing the annuity contract they issued to her and then  
8 enforcing an inadequately disclosed provision in it to her economic loss. *Tobacco II* does not apply.  
9 Defendant also erroneously relies on *Orcilla v. Big Sur, Inc.*, 244 Cal.App.4th 982 (Ct. App. 2016),  
10 where in fact the Court found that plaintiffs had standing to assert a UCL claim against a bank for  
11 unfair practices which led to foreclosure on plaintiff’s home.

12 In *Kosta*, Del Monte was selling tomatoes in violation of the law, in that its advertising violated  
13 the Federal Food, Drug, and Cosmetics Act (“FDCA”) and California’s Sherman Law. *Kosta v. Del*  
14 *Monte Foods, Inc.*, 308 F.R.D. 217, 219-220 (N.D. Cal. 2015). Plaintiff claimed that he and others  
15 similarly situated were harmed by food labels that did not comply with certain consumer protection  
16 laws. It was a false advertising case in the realm of *Kwikset*. The court observed that plaintiffs in  
17 consumer deception cases need show reliance on the deception in order to bring suit. Plaintiff here  
18 does not claim fraud or deception or deceit.

19 In this case, unlike *Kwikset*, *Tobacco II* and *Kosta*, Great American’s unlawful business  
20 practices all happened after Ms. Goertzen application’s to purchase the annuity was submitted. Once  
21 Hollender submitted her application for the annuity, Great American delivered to Ms. Goertzen a policy  
22 that unlawfully omitted required disclosures, then prevented access to Ms. Goertzen’s own funds by  
23 holding them hostage to undisclosed surrender penalties, and then took the undisclosed surrender  
24 penalties when Ms. Goertzen made a withdrawal. Because all of the unlawful business practices  
25 happened after the policy was sold to Ms. Goertzen, this case is just not analogous to false advertising  
26 cases like *Kwikset* and *Kosta*.

1 This is a simple and straightforward case of a business collecting an illegal fee. When a  
 2 business does that, it is not necessary to show that the customer relied on something misleading—only  
 3 that the fee itself was illegal. *Vaccarino*, 2012 U.S. Dist. LEXIS 52499 at \*31 (C.D. Cal. April 3,  
 4 2012); *Medraza*, 205 Cal.App.4th at 12.

5 **D. Great American’s Collection of an Unlawful Fee Was a Direct Cause of Plaintiff’s**  
 6 **Harm.**

7 It is not only an illegal business practice to issue annuities that violate the Insurance Code, it is  
 8 also an illegal business practice to *collect surrender penalties* for annuity contracts that, at the time of  
 9 issue, failed to disclose surrender penalties in violation of the Insurance Code. *Vaccarino*, 2012 U.S.  
 10 Dist. LEXIS 52499 at \*31 (“Indeed, in [another case], the court noted it would constitute a violation of  
 11 the ‘unlawful’ prong of the UCL if [the insurance company] were to collect surrender penalties without  
 12 meeting the disclosure requirements of Section 10127.13.”).

13 Great American does not even acknowledge the possibility, in its moving papers, that collecting  
 14 surrender penalties is an unlawful business practice—even though it was identified as such in the  
 15 Complaint and in Plaintiff’s three-page letter. ECF #6-1, page 23 of 37, at ¶52(d) and ECF #33  
 16 (“Collecting money in violation of the Insurance Code is an unlawful business practice”).

17 When an insurance company illegally collects a penalty (illegally takes money from a customer)  
 18 the violation of the law (illegally collecting the money) is the same as the harm (that the customer has  
 19 money taken away). Proving that the violation (taking money) is causally related to the harm (having  
 20 money taken away) is simple, because they are literally one and the same. Causation does not get any  
 21 more direct. And because causation is direct, it is not necessary to show reliance on a misrepresentation  
 22 in order to prove causation—to establish a UCL or elder abuse claim based on illegal fees, it is not even  
 23 necessary that there be a misrepresentation, only that there be an illegal fee.

24 The Complaint identifies collecting insufficiently disclosed surrender penalties as an unlawful  
 25 business practice. ECF #6-1, page 23 of 37, at ¶52(d). Plaintiff’s three-page letter of October 13, 2016,  
 26 identifies collecting insufficiently disclosed surrender penalties as an unlawful business practice. ECF  
 27

1 #33, pages 1-2. Yet even though Plaintiff repeatedly and prominently raised this argument, Great  
 2 American completely ignores this unlawful business practice in its moving papers! Great American  
 3 never attempts to show that *this* unlawful business practice did not directly cause Ms. Goertzen's harm.

4 **E. Collecting undisclosed surrender penalties violates the “unfair” prong of the UCL**  
 5 **because utility is outweighed by harm.**

6 A plaintiff can establish that a practice violates the “unfair” prong of the UCL, if the plaintiff  
 7 can demonstrate that the utility of the practice is outweighed by harm to consumers. *Rubio v. Capital*  
 8 *One Bank*, 613 F.3d 1195, 1205 (9th Cir. 2010). Having failed to disclosed the penalties to its senior  
 9 customers, of course it is “unfair” to collect those penalties.

10 Here, the harm (taking millions of dollars of surrender penalties that were never properly  
 11 disclosed) far outweighs the utility to Great American of collecting undisclosed surrender penalties.  
 12 Great American cannot identify any utility to collecting undisclosed surrender penalties, given how  
 13 easy it would have been for Great American to properly disclose the surrender penalties as required by  
 14 law. The harm outweighs the utility, so the business practice of collecting undisclosed surrender  
 15 penalties violates the “unfair” prong of the UCL.

16 **F. Plaintiff Relied on Great American's Unlawful Omissions in the Issuance of This**  
 17 **Annuity.**

18 The Great American Policy would not have been issued to her, had she known that the policy  
 19 had surrender penalties lasting ten years. (SMF #23.) The type of misrepresentations and statutory  
 20 violations made by Defendant are the type that would mislead seniors into buying annuities that they  
 21 otherwise would refuse to purchase (or would surrender within 30 days of issuance). The statutes were  
 22 passed to prevent exactly this type of misleading sales tactic. Therefore, Ms. Goertzen has sufficiently  
 23 shown that she relied on the language that violated 10127.10 and 10127.13. *Id.*

24 “[A] ‘plaintiff is not required to allege that [the challenged] misrepresentations were the sole or  
 25 even the decisive cause of the injury-producing conduct.’” *Kwikset*, 51 Cal.4th at 327, quoting *In re*  
 26 *Tobacco II Cases*, 46 Cal.4th at 328.

1 Moreover, a presumption, or at least an inference, of reliance arises wherever there is a showing  
2 that a misrepresentation was material. [Citations.] A misrepresentation is judged to be `material'  
3 if `a reasonable man would attach importance to its existence or nonexistence in determining his  
choice of action in the transaction in question' [citations], and as such materiality is generally a  
question of fact . . . .

4 *In re Tobacco II Cases*, 46 Cal.4th at 327, quoting *Engalla v. Permanente Medical Group, Inc.*, 15  
5 Cal.4th 951, 976-977 (Cal. 1997). Had she understood the extent of the surrender penalties, she would  
6 not have submitted the application. (SMF #23.) And had she understood, within 30 days of the policy  
7 being delivered to her, the extent of the surrender penalties and her right to return it penalty-free, she  
8 would have returned it for a refund. *Id.* Had Great American made proper, code-compliant disclosures  
9 about this material fact, she would not have suffered the financial harm that she did. *Id.*

10 Michel Hollender's claims about selling annuities to Ms. Goertzen are not believable. He is not  
11 a reliable witness. He pressured an elderly woman to purchase unsuitable annuities, and then "lost" the  
12 file he kept on Ms. Goertzen. (SMF #29.)

13 Further, had the Great American Policy not been issued, she would not be suffering the type of  
14 harm that she suffered (extraction of a surrender penalty) and continues to suffer (inability to access her  
15 funds due to the threat of additional surrender penalties). (SMF #25 and 30.) Therefore, there is a  
16 direct causal relationship between the statutory violation and the harm she suffered. Even if Defendant  
17 could portray this lawsuit as sounding in fraud—which it does not—Ms. Goertzen can demonstrate that  
18 she has standing under the UCL to seek redress.

19 **G. Collecting undisclosed surrender penalties is a wrongful taking in violation of the**  
20 **elder abuse statutes.**

21 Great American only had permission to bring this motion based on Section II-A of its letter  
22 (regarding UCL claims) and not based on Section II-C of its letter. (*See* ECF #32.) Even though it  
23 does not have permission to do so, Great American nonetheless challenges Plaintiff's standing to bring  
24 elder abuse claims. (MSJ issue #3.) California prohibits wrongfully taking an elder's funds as  
25 "financial elder abuse." Welf. & Inst. Code § 15610.30, and see CACI 3100. A taking is for a  
26 wrongful use if the defendant "knew or should have known" that it was not entitled to take the funds.  
27

1 *Id.* A claim for financial abuse can be based on a “wrongful use” or, alternatively, based on fraud. *Id.*  
 2 Here, Plaintiff expressly stated that her elder abuse claims were based on taking for a “wrongful use,”  
 3 not based on fraud. (See ECF #6-1 at ¶59 – omitting statutory language regarding fraud, to show that  
 4 her claims were based only on wrongful taking.)

5 Where elder abuse is in the form of wrongfully taking a senior’s money, no showing of reliance  
 6 is required, only that there was a wrongful taking. *Sakai v. Merrill Lynch Life Ins. Co.*, 2008 U.S. Dist.  
 7 LEXIS 69420 at \*14 (N.D. Cal. 2008). See, e.g., *In re Conseco*, 2007 U.S. Dist. LEXIS 12786, 2007  
 8 WL 486367 at \*5 (N.D. Cal. 2007); *Negrete v. Fidelity and Guaranty Life Ins. Co.*, 444 F.Supp.2d 998,  
 9 1002-03 (C.D. Cal. 2006); *Das v. Bank of America, N.A.*, 186 Cal.App.4th 727 (Ct. App. 2010) (finding  
 10 that an illegal lottery scam was an illegal taking of property under the elder financial abuse statute).  
 11 Defendant did not cite a single case to the contrary. Defendant argues that causation is an element for  
 12 an elder abuse cause of action (of course it is!) but does not even attempt to describe Plaintiff’s burden  
 13 to establish causation. As shown above, Plaintiff’s burden is only to show that money was taken for a  
 14 “wrongful use,” with no need to show the Plaintiff’s state of mind or reliance. *Id.* That burden is easily  
 15 met here, where Great American knew or should have known that it needed to comply with Cal. Ins.  
 16 Code §§ 10127.10 and 10127.13.

17 Great American knew that it needed to comply with 10127.10 and 10127.13. (SMF #31.) Great  
 18 American knew, or should have known, that it was not complying with 10127.10 and 10127.13. (SMF  
 19 #32.) It had actual knowledge that the policy cover page did not match the language of 10127.10, and  
 20 it should have recognized that the 10127.13 language identified the wrong section of the contract. (*Id.*)  
 21 As such, Plaintiff’s elder abuse claim is valid and viable.

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1 **III. CONCLUSION**

2 For the foregoing reasons, Plaintiff requests that this court deny Defendant's motion for  
3 summary judgment.

4  
5 DATED: November 8, 2016

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7   
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EVANS LAW FIRM, INC.

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the PLAINTIFF'S OPPOSITION TO DEFENDANT GREAT AMERICAN LIFE INSURANCE COMPANY'S MOTION FOR SUMMARY JUDGMENT REGARDING STANDING was filed electronically and served by U.S. Mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing system or by facsimile to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the court's EM/ECF System.

Dated: November 8, 2016

/s/ INGRID M. EVANS  
INGRID M. EVANS

EVANS LAW FIRM, INC.

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