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Please note:

This sample document is redacted from an actual research and writing project we did for a customer some time ago. It reflects the law as of the date we completed it. Because the law may have changed since that time, please use it solely to evaluate the scope and quality of our work.

If you have questions or comments, please contact Jim Schenkel at 415-553-4000, or email info@quojure.com.

UNITED STATES DISTRICT COURT
SOUTHWESTERN DISTRICT OF CALIFORNIA

ALAN SMYTHE and TERESA SMYTHE,

Plaintiffs,

vs.

AMERICA’S BEST INSURANCE COMPANY; JOAN GREEN; et al.,

Defendants.

Case No. _____

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO JOAN GREEN’S MOTION TO DISMISS

Date: April 24, 20__
Time: 1:30 p.m.
Dept. 2

FACTUAL ALLEGATIONS¹

Plaintiffs Alan Smythe and Teresa Smythe sued defendants America’s Best Insurance Company (ABIC) and Joan Green for breach of contract and various tort claims after ABIC refused to pay benefits under a life insurance policy issued to Sam Smythe. Plaintiffs allege that Sam Smythe bought a life insurance policy from ABIC through Green, who not only sold the life insurance policy to Sam, but completed the application for him.

On or about September 23, 20__, Sam Smythe was involved in a fatal automobile crash, and was declared dead at the scene. Plaintiffs filed a claim under the policy, but

¹In the interests of brevity, all references to the factual record have been deleted from this sample document.

1 ABIC refused to pay any proceeds under it. It contended that Sam Smythe had made
2 inaccurate responses concerning his medical history on his insurance application, and
3 denied coverage on that basis.

4 The complaint does not only allege claims for breach of contract and breach of the
5 covenant of good faith and fair dealing. It also includes a negligence claim, and a claim
6 for intentional infliction of emotional distress. The alternative claims allege that Green
7 acted either negligently or with a deliberate intent to deceive Sam Smythe when she
8 solicited him to buy the policy and completed the application for him. Based on three of
9 Sam's alleged responses on the insurance application, ABIC refused to pay benefits under
10 the policy after Sam was killed.

11 12 **ARGUMENT**

13 **1. Under Rule 12(b)(6), dismissal is proper only where plaintiff cannot** 14 **possibly state a cognizable claim, and cannot cure a defect in the** 15 **complaint through amendment.**

16 In deciding a motion under Rule 12(b)(6), the court must decide whether the facts
17 alleged, if true, would entitle the plaintiff to some form of legal remedy. Unless the
18 answer is unequivocally "no," the motion must be denied. *Conley v. Gibson*, 355 U.S. 41,
19 45-56 (1957); *De La Cruz v. Tormey*, 582 F.2d 45, 48 (9th Cir. 1978).

20 By expressly stating that leave to amend "shall be freely given when justice so
21 requires," Rule 15(a) severely restricts the court's power to dismiss a complaint. Leave to
22 amend should be denied only if the court determines that "allegations of other facts
23 consistent with the challenged pleading *could not possibly cure the defect.*" *Schreiber*
24 *Distributing Co. v. Serv-Well Furniture Co., Inc.*, 806 F.2d 1393, 1401 (9th Cir. 1988)
25 (emphasis added). Such situations usually arise only where facts are not in dispute, and
26 the sole issue is whether liability arises as a matter of law. See, e.g., *Albrecht v. Lund*,
27 845 F.2d 193, 195-196 (9th Cir. 1988) (amendment to fraud complaint properly denied
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1 where the alleged misstatements “could not be misrepresentations as a matter of law”).

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3 **2. Plaintiffs have stated proper tort claims against Green for negligence**
4 **and intentional misconduct.**

5 In *Macey v. Allstate Property and Casualty Ins. Co.*, 220 F.Supp.2d 1116 (N.D.
6 2002), the court explained that, under several theories, an insurance agent could be held
7 directly liable for misconduct toward an insured. One was the “dual agent” theory and
8 another was the existence of a special relationship between the agent and the insured
9 through the agent’s voluntary assumption of a duty toward the insured. *Id.* at 1120-1121.
10 It is inappropriate to rely on *Lippert v. Bailey*, 241 Cal.App.2d 376 (1966) (as Green
11 does) since *Lippert* based its determination that a carrier’s agent had no duty to an insured
12 on concepts developed in the law of res judicata—not on the kind of analytical framework
13 California courts generally use to determine whether a particular category of defendants
14 has a duty sounding in tort law to a particular category of plaintiffs. See *Cedars-Sinai*
15 *Med. Ctr. v. Superior Court*, 18 Cal. 4th 1, 8 (1998) (court weighs relevant policy
16 considerations to determine whether or not to impose a tort duty); *Summit Financial*
17 *Holdings, Ltd., v. Continental Lawyers Title Co.*, 27 Cal. 4th 705, 715 (2002) (whether to
18 impose a duty is a matter of policy involving balancing of various factors).

19 Generally, a person is not liable for his or her mere nonfeasance, that is, his or her
20 failure to protect or assist others who become imperiled by circumstances through their
21 own actions or those of a third party. *Tarasoff v. Regents of University of California*, 17
22 Cal.3d 425, 435 fn. 5 (1976); see Civ. Code § 1714. Thus, a person will not be liable for
23 failing to take affirmative action that would have benefitted another unless the person
24 became obligated to act under a preexisting legal duty. *Stout v. City of Porterville*, 148
25 Cal.App.3d 937, 942 (1983).

26 Even in those instances in which the relationship between two persons would not
27 ordinarily give rise to a duty of care on the part of one to aid or protect the other, one who
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1 voluntarily undertakes to do so is under a duty to exercise due care in the performance
2 and will be liable if (1) the failure to exercise due care increases the risk of harm to the
3 other, or (2) harm is suffered because of the other's reliance on the undertaking. *Williams*
4 *v. State of California*, 34 Cal.3d 18, 23 (1983). The RESTATEMENT states this rule of
5 assumed duty as follows:

6 One who undertakes, gratuitously or for consideration, to render services to
7 another which he should recognize as necessary for the protection of the
8 other's person *or things*, is subject to liability to the other for physical harm
9 resulting from his failure to exercise reasonable care to perform his
10 undertaking, if

11 (a) his failure to exercise such care increases the risk of harm, or

12 (b) the harm is suffered because of the other's reliance upon the undertaking.

13 RESTATEMENT (SECOND) OF TORTS, § 323, at 135 (emphasis supplied).

14 Although the voluntary-undertaking doctrine is most often applied in cases involving a
15 plaintiff's physical injury, the RESTATEMENT makes clear that the rule applies to
16 protection of the plaintiff's property as well.

17 This complaint alleges that Green not only solicited plaintiffs' decedent to buy a
18 policy of insurance, but instructed and/or assisted him in completion of the application
19 form. The complaint alleges that the basis for ABIC's denial of the claim was alleged
20 inaccuracies in the insured's answers about his medical history, which were irrelevant
21 when the cause of his death was an automobile accident. If the complaint is found
22 deficient in allegations supporting the notion that Green owed Sam Smythe and his
23 beneficiaries a duty of care, plaintiffs are entitled to amend their complaint to cure that
24 defect by adding additional facts to their complaint.

1 **CONCLUSION**

2 Defendant Green seeks dismissal of the claims against her by hiding behind the
3 cloak of agency. Although that role will insulate her from liability on the contractual
4 claims, it does not shield her from liability for her personal misconduct, either negligent
5 or intentional, under the tort claims plaintiffs have asserted in their complaint. Plaintiffs
6 therefore respectfully request that the court deny defendant Green’s motion to dismiss.

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8 Dated:

Respectfully submitted,

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Attorneys for Plaintiffs

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