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ADT SECURITY SYSTEMS, and TIM MAHER  
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**FILED**  
LOS ANGELES SUPERIOR COURT

OCT 04 2007

JOHN A. CLARKE, CLERK  
BY RUGENA LOPEZ, DEPUTY

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
9 FOR THE COUNTY OF LOS ANGELES

11 WILLIAM FRIEDKIN, SHERRY  
LANSING and ROES 1 through 100,  
12 Plaintiffs,  
13  
14 v.  
15 ADT SECURITY SERVICES, INC., TIM  
MAHER and DOES 1 through 50,  
16 inclusive,  
17 Defendants.

Case No. BC376717  
[Assigned to Judge Conrad R. Aragon]  
**NOTICE OF HEARING ON  
DEMURRER AND DEMURRER TO  
COMPLAINT; MEMORANDUM OF  
POINTS AND AUTHORITIES**  
Date: November 5, 2007  
Time: 8:30 a.m.  
Dept: 49

18 **TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:**

19 **NOTICE IS HEREBY GIVEN** that on November 5, 2007, at 8:30 a.m., or as soon  
20 thereafter as this matter may be heard in Department 49 of the above-referenced court,  
21 located at 111 North Hill Street, Los Angeles, California 90012, defendants ADT  
22 SECURITY SERVICES, INC., and TIM MAHER will bring on for hearing their demurrer  
23 to the Complaint of William Friedkin and Sherry Lansing (plaintiffs).


CI/CASE: BC376717 LEA/DEF#:   
RECEIPT #: CCH4772807D  
DATE PAID: 10/04/07 02:54:27 PM  
PAYMENT: \$640.00  
RECEIVED: 0310  
CHECK: 640.00  
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1 Defendants demur generally to the Complaint on the following ground: The  
2 Complaint does not state facts sufficient to state a cause of action, *Code of Civil Procedure*  
3 Section 430.10(e). Specifically, plaintiffs do not allege sufficient facts to establish (1) that  
4 either defendant owed them a fiduciary duty, or (2) that there is a basis for holding  
5 defendant Maher personally liable for his employer's alleged unfair business practices.

6 This demurrer is brought pursuant to California *Code of Civil Procedure* section  
7 430.10(e), and is based upon this notice and demurrer, the attached Memorandum of Points  
8 and Authorities filed in support thereof, upon the pleadings, papers and records on file with  
9 the court herein, and upon such other and further evidence as may be presented at the  
10 hearing on this demurrer.

11  
12 Dated: October 3, 2007

HAIGHT, BROWN & BONESTEEL, L.L.P.

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14 By:   
15 Kevin Crisp  
16 J. Alan Warfield  
17 Attorneys for Defendants  
18 ADT SECURITY SERVICES, INC.,  
19 TIM MAHER  
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1 MEMORANDUM OF POINTS AND AUTHORITIES

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3 **1. Introduction and Statement of Alleged Facts.<sup>1</sup>**

4 Plaintiffs are Bel-Air homeowners who purchased a premium security system from  
5 ADT, which included 24 hour armed response. [Complaint, p. 2, paras. 2, 5.] They chose  
6 ADT over its competitors because of ADT’s advertising claims, and the representations  
7 made by one of its employees, Security Specialist Tim Maher. [Complaint, p. 2, paras. 3-  
8 4, 21-22.] Mr. Maher told them that ADT’s Bel-Air Patrol would respond to an alarm  
9 signal “within minutes” of the alarm being triggered, and immediately notify plaintiffs  
10 and/or an emergency contact and the local police department. [Complaint, p. 5, para. 19(d-  
11 e).]

12 On December 29, 2006, while the plaintiffs were vacationing outside the country, a  
13 forced entry triggered the ADT alarm system at their home. [Complaint, p. 6, paras. 26-  
14 27.] Rather than arriving “within minutes,” however, ADT’s patrol car did not arrive for  
15 approximately one hour and forty-five minutes. [Complaint, p. 6, para. 29.] Moreover,  
16 upon his arrival at the residence, the ADT patrolman did not perform an adequate  
17 investigation and consequently did not find any signs of a break in, and did not notify  
18 either the plaintiffs or the police of the alarm activation. [Complaint, p. 7, paras. 34-35.]  
19 No further action was taken until approximately 8:15 a.m., when the plaintiffs’  
20 housekeeper arrived and discovered evidence that the house had been burglarized.  
21 [Complaint, p. 8, para. 37.] Plaintiffs’ most significant loss was the jewelry they kept in  
22 their house. [Complaint, p. 9, para. 44.]

23 Other homes in the Bel-Air area were robbed in the past year and plaintiffs believe  
24 that a disproportionate number were secured by ADT. [Complaint, pp. 9-10, para. 46.]  
25 Plaintiffs surmise that robbers intentionally target ADT homes in the Bel-Air area because

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1 All of the facts herein are taken from the allegations in plaintiffs’ complaint.

1 of ADT's allegedly deficient home security services and response times. [Complaint, pp.  
2 9-10, para. 46.]

3 **2. Causes of Action Asserted.**

4 Plaintiffs asserted six causes of action, including fraudulent misrepresentation and  
5 omission (first), gross negligence (second), breach of fiduciary duty (third), unfair business  
6 practices (fourth and fifth), and rescission (sixth). [Complaint, pp. 10, 12-14, 16, 19.]

7 This demurrer is directed to the third, fourth, and fifth causes of action.

8 The objectionable causes of action subject to demurrer are breach of fiduciary duty  
9 (third), and unfair business practices (fourth and fifth), which plaintiffs asserted against  
10 both ADT and its employee, Mr. Maher. Plaintiffs have failed to allege sufficient facts to  
11 state a cause of action for breach of fiduciary duty (third) against either defendant.

12 Moreover, plaintiffs have failed to allege sufficient facts to state a cause of action for  
13 unfair business practices (fourth and fifth) against ADT's employee, Mr. Maher.

14 **3. Plaintiffs Have Not Stated Sufficient Facts To Establish the Existence of**  
15 **a Fiduciary Duty Owed by Either ADT or Mr. Maher.**

16 A fiduciary relationship is "any relation existing between parties to a transaction  
17 wherein one of the parties is in duty bound to act with the utmost good faith for the benefit  
18 of the other party." *Wolf v. Superior Court* (2003) 107 Cal.App.4<sup>th</sup> 25, 29. Inherent in the  
19 fiduciary relationship "is the duty of undivided loyalty the fiduciary owes to its  
20 beneficiary, imposing on the fiduciary obligations far more stringent than those required of  
21 ordinary contractors." 107 Cal.App.4<sup>th</sup> at 30.

22 Traditional examples of fiduciary relationships are trustee/beneficiary, business  
23 partners, joint adventurers, and agent/principal. *Wolf v. Superior Court* (2003) 107  
24 Cal.App.4<sup>th</sup> 25, 30. Notably, the relationship between an alarm company or a security  
25 company and its customers has *never* been defined in California's decisional authority as  
26 being fiduciary in nature.

27 Plaintiffs assert that because they trusted defendants enough to employ them to  
28 provide home security services, defendants owed them a fiduciary duty. [Complaint, p. 13,

1 para. 65.] However, this is not the test for the existence of a fiduciary duty. “Every  
2 contract requires one party to repose an element of trust and confidence in the other to  
3 perform. For this reason, every contract contains an implied covenant of good faith and  
4 fair dealing, obligating the contracting parties to refrain from “doing anything which will  
5 have the effect of destroying or injuring the right of the other party to receive the fruits of  
6 the contract.”” 107 Cal.App.4<sup>th</sup> at 31.

7 The existence of a fiduciary duty is a question of law for the court,<sup>2</sup> and a court may  
8 determine at the demurrer stage that no fiduciary duty exists. See *Wolf v. Superior Court*,  
9 107 Cal.App.4<sup>th</sup> at 27. In *Wolf*, the Court of Appeal held that the mere fact that one party  
10 to the contract had reposed in the other party complete control of future revenue, and  
11 trusted that party to pay royalties, did not make the “trusted” party a fiduciary. *Ibid.* The  
12 appellate court held that “other indicia of a confidential relationship” giving rise to a  
13 fiduciary duty were not present. *Ibid.*

14 In *Wolf*, as here, the contract was at arms length. There was no alleged “unequal  
15 relationship” between the parties – no “overmastering influence” on one side or  
16 “vulnerability” on the other. See *Persson v. Smart Inventions, Inc.* (2005) 125 Cal.App.4<sup>th</sup>  
17 1141, 1162. “The vulnerability that is the necessary predicate of a confidential relation,  
18 and which the law treats as ‘absolutely essential’ usually arises from advanced age, youth,  
19 lack of education, weakness of mind, grief, sickness, or some other incapacity.” (Citations  
20 omitted.) *Richelle L. v. Roman Catholic Archbishop* (2003) 106 Cal.App.4<sup>th</sup> 257, 273.  
21 Plaintiffs have not alleged, and are unable to allege, facts establishing that their home  
22 security contract with ADT gives rise to a fiduciary duty. Therefore, they have failed to  
23 state a cause of action for breach of fiduciary duty, and both defendants’ demurrer to the  
24 third cause of action should be sustained.

25 As if the absence of facts giving rise to a fiduciary duty were not enough, Defendant  
26 Maher has an additional ground upon which his demurrer should be sustained. Even if

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28 <sup>2</sup> *In re Marriage of Leni* (2006) 144 Cal.App.4<sup>th</sup> 1087, 1093; *Pittelman v. Pearce*  
(1992) 6 Cal.App.4<sup>th</sup> 1436, 1441.

1 defendant ADT owed plaintiffs a fiduciary duty by virtue of its contract with them to  
2 provide home security, which it certainly does not, “[t]he right to sue . . . agents, or  
3 employees of a fiduciary for participation in the fiduciary’s breach of trust has been  
4 circumscribed by the California Supreme Court.” *Pierce v. Lyman* (1991) 1 Cal.App.4<sup>th</sup>  
5 1093, 1104.<sup>3</sup> In *Doctors’ Co. v. Superior Court* (1989) 49 Cal.3d 39, the Supreme Court  
6 explained that no cause of action could be stated against noninsurers (i.e. an insurance  
7 company’s employees or its attorneys) for conspiracy to violate a statutory duty imposed  
8 only on the insurer. 49 Cal.3d at 45-46. As a mere employee of ADT, who is not alleged  
9 to be a party to the home security contract, Mr. Maher cannot be held liable for breaching a  
10 fiduciary duty, even if one was owed by his employer. Therefore, the demurrer should be  
11 sustained in favor of Mr. Maher on this ground as well.

12 **4. Plaintiffs Have Not Stated Sufficient Facts To State a Cause of Action**  
13 **Against Mr. Maher Personally for His Employer’s Alleged Unfair**  
14 **Business Practices.**

15 The “essential test” for what constitutes an unfair competition or unfair business  
16 practice is “whether the public is likely to be deceived.” *People v. Toomey* (1984) 157  
17 Cal.App.3d 1, 16. The misrepresentations must have been made “before the public” to  
18 induce “the public to enter into any obligation.” *Ibid.* Here, the only allegations against  
19 Mr. Maher are that he made certain misrepresentations directly to plaintiffs. He is not  
20 alleged to have created or disseminated ADT’s promotional material or other advertising.  
21 In fact, he is not alleged to have spoken to anyone other than plaintiffs. Therefore,  
22 plaintiffs have failed to assert that Mr. Maher’s alleged misrepresentations were made  
23 “before the public” or were intended to induce the public to enter into an obligation.

24 At best, plaintiffs have alleged a cause of action against Mr. Maher for  
25 misrepresentation solely as to plaintiffs themselves. There are no facts that support the  
26 imposition of personal liability on Mr. Maher for the allegedly unfair business practices of

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28 <sup>3</sup> Superseded by statute on other grounds as stated in *Pavicich v. Santucci* (2000)  
85 Cal.App.4<sup>th</sup> 382, 396

1 his employer. Therefore, Mr. Maher's demurrer to the fourth and fifth causes of action for  
2 unfair business practices should be sustained.

3 **5. Conclusion.**

4 No appellate court in California has ever held that an alarm company or security  
5 company is a fiduciary of its customers, and plaintiffs have failed to allege sufficient facts  
6 to give rise to such a duty. Therefore, the demurrer to the third cause of action should be  
7 sustained as to both defendants. And certainly, Mr. Maher did not owe, and could not have  
8 breached, a fiduciary duty merely by virtue of his employment with ADT. This is an  
9 independent ground upon which his demurrer to the third cause of action should be  
10 sustained.

11 Finally, while discovery is necessary to resolve whether plaintiffs can support a  
12 cause of action for unfair business practices against ADT, it is clear from the face of the  
13 complaint that such cause of action cannot be asserted against Mr. Maher. He is only  
14 alleged to have misled plaintiffs through his personal interaction with them. Plaintiffs  
15 have not alleged that Mr. Maher personally engaged in practices that would have misled  
16 the public. Therefore, Mr. Maher's demurrer to the fourth and fifth causes of action should  
17 be sustained.

18 Dated: October 3, 2007

HAIGHT, BROWN & BONESTEEL, L.L.P.

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21 By: 

Kevin Crisp  
J. Alan Warfield  
Attorneys for Defendants  
TYCO INTERNATIONAL (US) INC.,  
ADT SECURITY SERVICES, INC., and  
TIM MAHER

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PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA )  
COUNTY OF LOS ANGELES ) ss.:

*WILLIAM FRIEDKIN, et al. v. ADT SECURITY SERVICES, INC., et al.*  
*BC376717*

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 6080 Center Drive, Suite 800, Los Angeles, CA 90045-1574.

On October 4, 2007, I served on interested parties in said action the within:

NOTICE OF DEMURRER AND DEMURRER TO COMPLAINT;  
MEMORANDUM OF POINTS AND AUTHORITIES

by placing a true copy thereof in sealed envelope(s) addressed as stated below.

Mr. Eric M. George  
Mr. Keith J. Wesley  
BROWNE WOODS & GEORGE LLP  
450 North Roxbury Drive, Seventh Floor  
Beverly Hills, California 90210-4231  
Telephone: (310) 274-7100  
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*(Attorneys for Plaintiffs William  
Friedkin and Sherry Lansing)*

I am readily familiar with this firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California, in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

Executed on October 4, 2007, at Los Angeles, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Julie Dekhtyar  
(Type or print name)

  
(Signature)