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5 Attorney for Plaintiff ERWIN J. GUTOWITZ
6 and HOWARD GUTOWITZ, as Representative of
ERWIN J. GUTOWITZ

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IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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11 ERWIN J. GUTOWITZ and HOWARD
GUTOWITZ, as Representative of
12 ERWIN J. GUTOWITZ,

13 Plaintiff,

v.

14

15 TRANSAMERICA LIFE INSURANCE
COMPANY,

16

17 Defendants.

18

19

20 COMES NOW Plaintiffs ERWIN J. GUTOWITZ and HOWARD

21 GUTOWITZ, as Representative of ERWIN J. GUTOWIZ (hereinafter "Plaintiffs")

22 who, by and through their attorneys, for their complaint, allege as follows:

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CASE NO. 2:14-cv-06656-MMM-RZ

COMPLAINT FOR DAMAGES

Request for Jury Trial

Assigned To: Hon. Margaret M. Morrow
Dept. 780

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I.

PARTIES

1. Erwin J. Gutowitz, M.D., is a domiciliary and citizen of the State of California and resides in Ventura, California.

2. Howard Gutowitz is a domiciliary and citizen of the State of New York, and resides in New York, New York. Howard is Dr. Gutowitz' son and holds a durable power of attorney authorizing him to act as Dr. Gutowitz' representative and is also named as Dr. Gutowitz' agent in an Advanced Health Care Directive that Dr. Gutowitz executed on March 24, 2010. Howard is included as a plaintiff solely in this representative capacity and in the event his presence as a party is necessary to effectuate any relief ordered by the Court, and Dr. Gutowitz is the actual party in interest.

3. Defendant Transamerica Life Insurance Company ("Transamerica") was formed under the laws of the State of Iowa, is a domiciliary and citizen of the State of Iowa and has its principal place of business in Cedar Rapids, Iowa.

II.

JURISDICTION AND VENUE

4. This Court has *in personam jurisdiction* over Transamerica because it is present and doing business in the State of California, and has also transacted business herein within the meaning of California's long-arm statute, C.C.P., §410. Among other relevant jurisdictional events, Transamerica has sold and delivered

1 the policy in California and sent representatives to California to investigate both
2 Dr. Gutowitz' health and the facility at issue in this dispute.

3

4 5. Federal subject matter jurisdiction exists under 28 U.S.C §1332(a)
5 because complete diversity of citizenship exists among adverse parties and because
6 the monetary relief sought and the value of the non-monetary relief sought each
7 exceed \$75,000.

8

9 6. Venue is proper because Dr. Gutowitz resides within this District and
10 because some of the events underlying this action occurred here.

11

12

III.

13

FACTS RELATING TO ALL CLAIMS

14

(i) The Policy

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16
17 7. In 1991, Dr. Gutowitz purchased Policy No. 8890530043 (“the
18 Policy”) from Transamerica Occidental Life Insurance Company. The Policy had
19 an effective date of August 16, 1991. In 2008, Transamerica Occidental Life
20 Insurance Company merged into defendant Transamerica Life Insurance Company
21 (“Transamerica,” as defined herein), and Transamerica assumed the obligations
22 under the Policy. The Policy was delivered to Dr. Gutowitz in California. When
23 applying for the Policy, Dr. Gutowitz requested the highest level of long-term care
24 coverage available.

25

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1 8. The Policy specifically covered long term health care costs for
2 Alzheimer’s disease and other forms of dementia. Among the benefits it provided
3 were the costs of nursing homes, the costs of Alzheimer’s care and the cost of
4 “home health care.”

5
6 9. The Policy defines a Nursing Home as:

7
8 A facility, or that part of one, which: (1) is operating under a license issued
9 by the appropriate licensing agency; (2) is engaged in providing, in addition
10 to room and board accommodations, nursing care and related services on a
11 continuing inpatient basis to 6 or more individuals; (3) provides, on a formal
12 prearranged basis, a Nurse who is on duty or on call at all times; (4) has a
13 planned program of policies and procedures developed with the advice of,
14 and periodically reviewed by, at least one Physician; and (5) maintains a
15 clinical record of each patient. It may be a distinct part of a hospital or other
16 institution.

17
18 10. The Policy also states that; “[T]his Policy WILL cover qualifying
19 stays or care resulting from significant destruction of brain tissue with resultant
20 loss of brain function, including, but not limited to, progressive degenerative, and
21 dementing illnesses, including, but not limited to, Alzheimer’s disease.” (Emphasis
22 in original.)

23
24 11. The Policy purchased by Dr. Gutowitz is a “Long-term care
25 Insurance Policy” and is neither a “Nursing Facility and Residential Care Facility
26 Only Policy” nor a “Home Care Only Policy.”

1 (ii) **Dr. Gutowitz' Diagnosis**

2
3 12. In September 2103, Dr. Gutowitz was diagnosed with Alzheimer's
4 disease.

5
6 (iii) **Aegis Living of Ventura**

7
8 13. Aegis Living of Ventura is part of Aegis Living, LLC, which operates
9 a total of 30 senior care facilities in California, Washington state and Nevada.
10 These facilities provide assisted living and memory care services. Aegis Living of
11 Ventura is licensed by the state of California as a Residential Care Facility for the
12 Elderly ("RCFE").

13
14 14. In late 2013 Dr. Gutowitz was accepted as an inpatient at Aegis
15 Living of Ventura, a residential care facility for the elderly.

16
17 15. Aegis Living of Ventura includes, among its specialties, the treatment
18 of Alzheimer's disease.

19
20 16. Aegis Living of Ventura meets the definition of "nursing home"
21 provided in the Policy.

22
23 17. Aegis Living of Ventura also provides "care for . . . Alzheimer's
24 disease," within the meaning of the Policy.

1 18. The staff at Aegis Living of Ventura includes a health services
2 director, who is a licensed nurse, other licensed nurses, medications managers and
3 care managers.

4
5 19. In addition to room and board accommodations, Aegis Living of
6 Ventura provides, on a formal prearranged basis, a nurse who is on duty or on call
7 at all times; provides nursing care and related services on a continuing inpatient
8 basis to approximately 70 individuals; has nurses on call or on duty 24 hours per
9 day; has a planned program of policies and procedures for each resident which was
10 developed with the advice of a physician; and maintains a clinical record of each
11 patient.

12
13 20. The care Dr. Gutowitz is receiving at Aegis Living of Ventura is the
14 most medically appropriate given his diagnosis.

15
16 (iv) **Transamerica’s Refusal to Pay Nursing Home or Alzheimer’s**
17 **Care Benefits**

18
19 21. Plaintiffs have complied with all of the terms and conditions
20 contained in the Policy, including the payment of all premiums due and providing
21 notice of claims to Transamerica.

22
23 22. From December 2013 through the end of July 2014, Dr. Gutowitz has
24 incurred in excess of \$40,000.00 in expenses for long-term care at Aegis Living of
25 Ventura, all of which have been paid by Dr. Gutowitz.

1 23. Dr. Gutowitz, through his representative (Howard Gutowitz) and his
2 attorney, has submitted claims to Transamerica for the amounts paid to Aegis
3 Living of Ventura, as well as proof of loss.

4
5 24. Transamerica has refused to pay the benefits to which Dr. Gutowitz is
6 entitled to under the Policy, and has denied coverage for the costs of Dr. Gutowitz'
7 residential care at Aegis Living of Ventura.

8
9 (v) **Transamerica's Bad Faith and Oppressive Conduct**

10
11 25. Transamerica has refused to pay either nursing home benefits or
12 Alzheimer's care benefits unless Dr. Gutowitz' representative and family agree to
13 confine him to a facility that Transamerica deems acceptable. However, none of
14 the facilities Transamerica has deemed suitable provides medically appropriate
15 care, and having Dr. Gutowitz confined any of those facilities would be
16 detrimental to his health and well-being.

17
18 26. By refusing to pay either nursing home or Alzheimer's care benefits
19 unless Dr. Gutowitz is confined to a facility that would be detrimental to his health,
20 Transamerica is attempting to force Dr. Gutowitz' representative and family to
21 forego benefits that he is entitled to under the Policy, rather than having him
22 confined to an inappropriate facility.

1 IV.

2 **CLAIMS FOR RELIEF**

3 **FIRST CLAIM**

4 **Declaratory Judgment (Nursing Home Benefits)**

5
6 27. Paragraphs 1 through 26 are repeated and realleged as if set forth fully
7 herein.

8
9 28. The Federal Declaratory Judgment Act, 28 U.S.C. §2201, provides
10 that “in a case of actual controversy within its jurisdiction [irrelevant exceptions
11 omitted] any court of the United States, upon the filing of an appropriate pleading,
12 may declare the rights and other legal relations of any interested party seeking such
13 declaration, whether or not further relief is or could be sought.”

14
15 29. Transamerica has failed to pay claims due under the Policy for long-
16 term care provided by Aegis Living of Ventura during the period from December
17 2013 through July 2014.

18
19 30. Dr. Gutowitz contends that he is entitled to nursing home benefits
20 under the Policy for the accommodations and services provided by Aegis Living of
21 Ventura.

22
23 31. Transamerica denies that Dr. Gutowitz is entitled to nursing home
24 benefits under the Policy for the accommodations and services provided by Aegis
25 Living of Ventura.

1 32. An actual and justiciable controversy has arisen and now exists
2 between Dr. Gutowitz and Transamerica concerning the construction and
3 interpretation of the Policy in relation to Dr. Gutowitz' claim for nursing home
4 benefits.

5

6 33. Dr. Gutowitz is entitled to a declaratory judgment that he is entitled to
7 nursing home benefits at Aegis Living of Ventura under the Policy.

8

9

SECOND CLAIM

10

Declaratory Judgment (Alzheimer's Care Benefits)

11

12 34. Paragraphs 1 through 33 are repeated and realleged as if set forth fully
13 herein.

14

15 35. Transamerica has failed to pay claims due under the Policy for long-
16 term care provided by Aegis Living of Ventura during the period from December
17 2013 through July 2014.

18

19 36. Dr. Gutowitz contends that he is entitled to Alzheimer's care benefits
20 under the Policy for the accommodations and services provided by Aegis Living of
21 Ventura.

22

23 37. Transamerica denies that Dr. Gutowitz is entitled to Alzheimer's care
24 benefits under the Policy for the accommodations and services provided by Aegis
25 Living of Ventura under the Policy.

26

27

28

1 38. An actual and justiciable controversy has arisen and now exists
2 between Dr. Gutowitz and Transamerica concerning the construction and
3 interpretation of the Policy in relation to Dr. Gutowitz' claim for Alzheimer's care
4 benefits.

5
6 39. Dr. Gutowitz is entitled to a declaratory judgment that he is entitled to
7 Alzheimer's care benefits at Aegis Living of Ventura under the Policy.

8
9 **THIRD CLAIM**
10 **Breach of Contract**

11
12 40. Paragraphs 1 through 39 are repeated and realleged as if set forth fully
13 herein.

14
15 41. Dr. Gutowitz has performed all terms and conditions of the Policy.

16
17 42. Dr. Gutowitz detrimentally relied on the promises by Transamerica set
18 forth in the Policy.

19
20 43. Transamerica's refusal to pay nursing home benefits at Aegis Living
21 of Ventura is a material breach of the Policy.

22
23 44. Transamerica's refusal to pay Alzheimer's care benefits at Aegis
24 Living of Ventura is a material breach of the Policy.

25
26 45. There is no legal excuse for these breaches of the Policy.

1 46. As a result of Transamerica’s breaches, Dr. Gutowitz has suffered
2 damages in the form of out-of-pocket payments to Aegis Living of Ventura, a loss
3 against which the Policy specifically insures him.
4

5 47. Dr. Gutowitz is entitled to an award of money damages to reimburse
6 the losses he has incurred to date and those he will incur up to the trial of this
7 action, and an order that his long-term health care costs, including those incurred
8 by reason of his residence at Aegis of Ventura or any similar facility, be paid by
9 Transamerica.
10

11 48. Dr. Gutowitz is entitled to attorney’s fees and costs for having to
12 enforce the terms of his insurance Policy.
13

14 **FOURTH CLAIM**

15 **Breach of the Implied Covenant Of Good Faith And Fair Dealing**
16

17 49. Paragraphs 1 through 48 are repeated and realleged as if set forth fully
18 herein.
19

20 50. The Policy purchased by Dr. Gutowitz was subject to an implied
21 covenant of good faith and fair dealing present in all insurance contracts.
22

23 51. At the time he purchased the Policy, Dr. Gutowitz reasonably
24 expected that it insured him against the cost of accommodations and services
25 which met the definition of “nursing home” as set forth in the contract, without
26 regard to future changes in California’s statutory and/or regulatory definitions of
27 nursing home.
28

1 52. At the time he purchased the Policy, Dr. Gutowitz reasonably
2 expected that it insured him against the cost of accommodations and services of the
3 type, nature and character of those provided by Aegis Living of Ventura.

4
5 53. Any interpretation of the Policy to exclude coverage for amounts paid
6 to Aegis Living of Ventura would violate Dr. Gutowitz' reasonable expectations at
7 the time he purchased the Policy.

8
9 54. Transamerica has violated the implied covenant of good faith and fair
10 dealing by unreasonably interpreting the Policy to exclude coverage for the
11 amounts paid to Aegis Living of Ventura.

12
13 55. Transamerica has further violated its obligation of good faith and fair
14 dealing by insisting on an interpretation of the Policy which violates the tenets of
15 contract construction and which has been rejected by the courts.

16
17 56. Transamerica has further violated its obligation of good faith and fair
18 dealing by failing to provide a reasonable explanation for its refusal to pay Dr.
19 Gutowitz' claims, and by failing to provide a definitive response to the claims in a
20 timely fashion.

21
22 57. Dr. Gutowitz has suffered damages as a result of Transamerica's
23 breach of the covenant of good faith and fair dealing.

24
25 58. Dr. Gutowitz is entitled to an award of money damages in order to
26 redress Transamerica's breach of the covenant of good faith and fair dealing.

1 **FIFTH CLAIM**

2 **Tortious Breach of the Implied Covenant of Good Faith**
3 **and Fair Dealing: Bad Faith Denial of Insurance Benefits**
4

5 59. Paragraphs 1 through 58 are repeated and realleged as if set forth fully
6 herein.

7
8 60. California common law recognizes that insurance contracts may be
9 enforced by means of tort claims, in addition to ordinary contract actions, because,
10 unlike other contracts, a policyholder who is wrongfully denied a claim cannot, by
11 definition, obtain a substitute policy in the market place (since once it is known
12 that the insurable loss has occurred, the insured will not be able to obtain insurance
13 for that loss).

14
15 61. California common law makes punitive damages available for the bad
16 faith denial of an insurance claim because the relationship of the insurer and the
17 insured in is inherently unbalanced. The purpose of punitive damages is to redress
18 the adhesive nature of insurance contracts which places the insurer in a superior
19 bargaining position.

20
21 62. California common law recognizes that the lack of available market
22 substitutes for the insured, the insurer's superior bargaining position and the
23 adhesive nature of insurance contracts are particularly acute in long-term disability
24 and long-term care insurance cases where the very risks insured against presuppose
25 that, if and when a claim is made, the insured will be disabled and in distressed
26 financial circumstances and, therefore, particularly vulnerable to oppressive tactics
27 on the part of an insurance company.

1 63. Transamerica has acted unreasonably and in bad faith in denying Dr.
2 Gutowitz' claim for nursing home benefits and Alzheimer's care benefits, in
3 failing to promptly investigate his claim, in delaying the determination of his claim
4 and by relying on meritless grounds in denying the claim.

5
6 64. Transamerica acted willfully and with specific intent in denying Dr.
7 Gutowitz' claim despite its knowledge that the claim is fully meritorious and that
8 no legitimate basis exists for denying the claim. Transamerica's willful and
9 intentional disregard for its obligations to Dr. Gutowitz and for Dr. Gutowitz'
10 rights under the Policy is part of a conscious course of conduct, firmly grounded in
11 Transamerica's routine business practice, as confirmed by review of publicly-filed
12 available pleadings, deposition transcripts, documentary evidence and decisions in
13 several lawsuits which beneficiaries of long-term care policies have been forced to
14 file against Transamerica in order to recover the benefits due to them.

15
16 65. Transamerica employs statisticians and actuaries. On information and
17 belief, it also employs medical professionals who are knowledgeable about the
18 best practices in the treatment of Alzheimer's disease.

19
20 66. On information and belief, Transamerica is aware that the most
21 medically appropriate care for Alzheimer's is that provided by Aegis of Ventura as
22 directed by Dr. Gutowitz' neurologist, and by other similar facilities which are
23 designed specifically for the patients who share Dr. Gutowitz' diagnosis and
24 prognosis.

1 67. On information and belief, Transamerica's is fully aware that the life
2 expectancy of an Alzheimer's patient from the time of diagnosis is approximately
3 ten years.

4
5 68. On information and belief, Transamerica is also aware that
6 confinement of an ambulatory Alzheimer's patient, such as Dr. Gutowitz, in a
7 facility which accommodates numerous patients who are non-ambulatory and/or
8 suffering from extreme degrees of physical incapacitation, would be deleterious to
9 his health and reduce his life expectancy.

10
11 69. Transamerica is aware that a substantial portion of the holders of its
12 long-term care policies will submit claims under its Alzheimer's provisions.

13
14 70. Transamerica understands that it stands to save at least \$1 million
15 dollars per claimant by denying coverage for medically appropriate care for
16 Alzheimer's patients, as it is attempting to do in Dr. Gutowitz' case.

17
18 71. On information and belief, in this case and in numerous similar cases,
19 Transamerica is attempting to exploit the reluctance of the policyholder's family to
20 have the policyholder confined in a facility that accommodates a large number of
21 patients who are non-ambulatory or suffering from extreme degrees of physical
22 incapacity, and thereby force the policyholder and his or her family to forego
23 substantial benefits due to them under Transamerica's policies.

24
25 72. Transamerica knows that placement in facilities such as Aegis Living
26 of Ventura will extend the average life of the policyholders who seek coverage for
27 Alzheimer's care, and that, in turn, the lengthier life expectancy will increase the

1 amount of benefits Transamerica will be required to pay out under long-term care
2 policies.

3

4 73. On information and belief, Transamerica's refusal, in this and other
5 cases, to allow coverage for facilities that are appropriate for ambulatory
6 Alzheimer's patients is not based on the language or meaning of the policies, or the
7 reasonable expectations underlying them, but, instead, is an effort to avoid paying
8 out billions in benefits legally due to its policyholders by systematically denying
9 coverage for medically appropriate treatment for Alzheimer's disease and forcing
10 the policyholders and their families to incur often prohibitive legal costs in
11 challenging the denial of coverage in the courts.

12

13 74. On information and belief, given the vast amounts of money involved,
14 Transamerica's policy of systematically denying coverage for medically
15 appropriate treatment for Alzheimer's disease, has been approved by and is being
16 implemented at the highest levels of its management.

17

18 75. On information and belief, the upper echelon of Transamerica's
19 management has adopted a policy of systematically denying meritorious claims
20 under policies similar to that held by Dr. Gutowitz because Transamerica has been
21 required to increase its reserves for this class of policies which, in turn, has caused
22 securities analysts to downgrade Transamerica's stock and has depressed its stock
23 price.

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1 WHEREFORE, Plaintiffs' demand judgment as follows:

2
3 1. On the First Claim: an order declaring that the Policy requires
4 Transamerica to pay the amounts that Aegis Living of Ventura has charged to Dr.
5 Gutowitz to date, and additional amounts which will be charged in the future; and
6 further declaring that the accommodations and services provided by Aegis Living
7 of Ventura, or any similar facility, satisfy the definition of Nursing Home in the
8 Policy.

9
10 2. On the Second Claim: an order declaring that the Policy requires
11 Transamerica to pay the amounts that Aegis Living of Ventura has charged to Dr.
12 Gutowitz to date, and additional amounts which will be charged in the future; and
13 further declaring that the accommodations and services provided by Aegis Living
14 of Ventura, or any similar facility, are within the meaning of care for Alzheimer's
15 disease as set forth in the Policy.

16
17 3. On the Third Claim: compensatory damages in an amount to be
18 determined at trial but in any event no less than \$75,000.00, and an order requiring
19 Transamerica to pay the additional amounts that Aegis Living of Ventura will
20 charge in the future.

21
22 4. On the Fourth Claim: compensatory damages in an amount to be
23 determined at trial but in any event no less than \$75,000.00, and an order requiring
24 Transamerica to pay the additional amounts that Aegis Living of Ventura will
25 charge in the future.

1 5. On the Fifth Claim: compensatory damages in an amount to be
2 determined at trial but no less than \$75,000.000 and punitive damages in an
3 amount to be determined at trial and in an amount to deter similar conduct in the
4 future.

5 - and –

6
7 6. Taxable costs, interest and attorneys’ fees as allowable by law.

8
9 DATED: September 30, 2014 **By:** _____

10 **Barry P. Goldberg**
11 **bpg@barrygoldberg.com**

12 Attorney for Plaintiff ERWIN J. GUTOWITZ
13 and HOWARD GUTOWITZ, as Representative of
14 ERWIN J. GUTOWITZ

15 **DEMAND FOR JURY TRIAL**

16
17 Plaintiff hereby demands a jury trial as provided by Rule 38(a) of the
18 Federal 38(a) of the Federal Rules of Civil Procedure.

19
20 **By:** _____

21 **Barry P. Goldberg**
22 **bpg@barrygoldberg.com**

23 Attorney for Plaintiff ERWIN J. GUTOWITZ
24 and HOWARD GUTOWITZ, as Representative of
25 ERWIN J. GUTOWITZ