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**United States District Court  
Central District of California**

MICHELLE TRAN,  
Plaintiff,  
v.  
KANSAS CITY LIFE INSURANCE  
COMPANY, a business entity form  
unknown; DOES 1 through 20, inclusive,  
Defendants.

Case № 2:15-cv-09963-ODW (RAOx)

**ORDER GRANTING MOTION FOR  
SUMMARY JUDGMENT [15]**

**I. INTRODUCTION**

This case involves the rescission of Luong Quoc Tran’s life insurance policy for failure to disclose certain details of his medical history. Plaintiff Michelle Tran, Mr. Tran’s widow, is the policy’s beneficiary. Before the Court is Defendant Kansas City Life Insurance Company’s motion for summary judgment. (ECF No. 15.) For the following reasons, the Court **GRANTS** the motion in its entirety.

## II. FACTUAL BACKGROUND

1  
2 Mr. Tran and Plaintiff were married in 2005 and soon after had a son. (Tran  
3 Decl. ¶ 2, ECF No. 16.) Seeking to protect his family, Mr. Tran applied for a  
4 \$300,000 “Flexible Premium Adjustable Death Benefit Life Insurance Policy” with  
5 Defendant on July 27, 2014, at the recommendation of Plaintiff’s parents. (Tran Decl.  
6 ¶ 3; Augustin Decl., Ex. A–B at 17, 36, ECF No. 15.) The application required Mr.  
7 Tran to answer twenty-three questions about his health. (Augustin Ex. A at 10.) One  
8 of the questions asked whether he had been “diagnosed” or “treated” for any disease  
9 or disorder relating to “diabetes, sugar in the urine” in the ten years preceding the  
10 application. (*Id.*) A second question asked whether he had been “diagnosed” or  
11 “treated” for any disease or disorder relating to “blood pressure” in the ten years  
12 preceding the application. (*Id.*) Mr. Tran answered “no” to both questions. (*Id.*) He  
13 also answered “no” to the remaining twenty-one questions about his medical history.  
14 (*Id.*)

15 On the same page, Mr. Tran wrote the telephone number of his doctor, Mary  
16 Tran, and authorized Defendant to contact and obtain records from Dr. Tran.<sup>1</sup> (*Id.*)  
17 Mr. Tran was then subjected to a physical examination. (*Id.*, Ex. E at 125–127.) The  
18 results of the physical examination were unremarkable and showed Mr. Tran to be in  
19 good health. (*Id.*) The underwriting process appears to have been completed on  
20 August 8, 2014.<sup>2</sup> (*Id.*, Ex. B at 74.) The policy was mailed to Mr. Tran on August 22,  
21 2014. (*Id.* at 20.) Mr. Tran acknowledged receipt of the policy on September 6, 2014.  
22 (*Id.*, Ex. C at 75.)

23 Mr. Tran died on March 9, 2015, of a heart attack at age thirty-seven. (Tran  
24 Decl. ¶ 8; Augustin Suppl. Decl., Ex. A at 13, ECF No. 17.) On April 8, 2015,  
25 Plaintiff sought payment under the policy. (Snoddy Decl., Ex. B. at 13–14, ECF No.  
26 15.) At the same time, Plaintiff granted Defendant permission to access her husband’s

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27 <sup>1</sup> The parties seem to agree that Dr. Tran was not contacted before the policy was issued. (Mot. 14,  
28 ECF No. 15; Opp’n 7, ECF No. 16.)

<sup>2</sup> This is the date the policy was printed. (*See* Augustin Decl., Ex. B at 74.)

1 medical records for the purpose of investigating the accuracy of his application. (*Id.*,  
2 Ex. D at 18–19.)

3 Defendant subsequently obtained medical records from Dr. Tran. (Augustin  
4 Suppl. Decl., Ex. A. 13–62.) These records indicated to Defendant that, contrary to  
5 the statements Mr. Tran made in his application, he had been diagnosed and treated  
6 for diabetes and high blood pressure in the ten years preceding his application for life  
7 insurance. (*See* Snoddy Decl., Ex. E at 20.) Accordingly, Defendant sent a letter to  
8 Plaintiff on June 23, 2015, denying her claim on the basis of the misrepresentations in  
9 Mr. Tran’s application. (*Id.*)

10 Plaintiff filed this case in the Superior Court of California, County of Los  
11 Angeles on November 12, 2015, alleging (1) breach of contract, (2) breach of the  
12 implied covenant of good faith and fair dealing, (3) declaratory relief, an (4)  
13 intentional infliction of emotional distress. (Compl. ¶¶ 24–39, ECF No. 1-2.)  
14 Defendant removed the case to federal court on December 30, 2015. (ECF No. 1.)  
15 Defendant filed the pending motion for summary judgment on December 12, 2016.  
16 (ECF No. 15.) The motion is now fully briefed and ready for decision. (*See* ECF  
17 Nos. 16–19.)

### 18 19 **III. LEGAL STANDARD**

20 Summary judgment shall be entered in favor of the moving party when “the  
21 pleadings, depositions, answers to interrogatories, and admissions on file, together  
22 with the affidavits, if any, show that there is no genuine issue as to any material fact  
23 and that the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P.  
24 56(c). The moving party initially bears the burden of showing the non-existence of a  
25 material factual dispute. *Celotex Corp. v. Catrett*, 477 U.S. 317, 321 (1986). The  
26 burden then shifts to the non-moving party to “designate ‘specific facts showing that  
27 there is a genuine issue for trial.’” *Id.* (quoting Rule 56(e)). To carry this burden, the  
28 non-moving party “must do more than simply show that there is some metaphysical

1 doubt as to the material facts.” *Matsushita Electric Industrial Co., Ltd. v. Zenith*  
2 *Radio*, 475 U.S. 574, 586 (1986). A dispute about a material fact is genuine if a  
3 reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty*  
4 *Lobby, Inc.*, 477 U.S. 242, 248 (1986).

5 For the purposes of summary judgment, the evidence is viewed in the light most  
6 favorable to the non-moving party, and all justifiable inferences are to be drawn in her  
7 favor. *Id.*, 477 U.S. at 255; *see also Sischo–Nownejad v. Merced Community College*  
8 *Dist.*, 934 F.2d 1104 (9th Cir.1991). Moreover, “[c]redibility determinations, the  
9 weighing of the evidence, and the drawing of legitimate inferences from the facts, are  
10 jury functions, not those of a judge [when] he is ruling on a motion for summary  
11 judgment.” *Anderson, supra*, 477 U.S. at 255.

## 12 13 IV. DISCUSSION

### 14 A. Evidentiary Considerations

15 Before reaching any of the substantive legal issues in this case, the Court must  
16 first resolve several issues of admissibility. Plaintiff argues that the medical records  
17 submitted in support of Defendant’s motion are not admissible because they contain  
18 private personal information in violation of Federal Rule of Civil Procedure 5.2 and  
19 are not properly authenticated by their custodian. (*See* Plaintiff Objections to  
20 Evidence 2–4, ECF No. 16-1.) Plaintiff also argues that Defendant has submitted  
21 documents in “bulk” without pointing to specific facts that support its motion for  
22 summary judgment. (*Id.* at 6.)

23 To begin, the Court notes that Defendant has taken corrective measures in light  
24 of Plaintiff’s concerns about disclosure of personal information and authentication.  
25 Defendant has submitted with its reply an identical set of the medical documents with  
26 Mr. Tran’s private personal information redacted and a declaration from the custodian  
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1 of records at Dr. Tran’s office, Vicki Do.<sup>3</sup> (*See* Augustin Suppl. Decl., Ex. A.)<sup>4</sup> The  
2 Court finds that these measures adequately address Defendant’s concerns and will  
3 consider the medical records.<sup>5</sup>

4 Plaintiff’s objection to “bulk” submissions is unclear. (*See* Plaintiff Objections  
5 to Evidence 6.) Plaintiff does not reference a single case discussing so-called “bulk”  
6 submissions. (*Id.*) While the Court agrees with Plaintiff that the initial burden is on  
7 Defendant to present evidence and facts in support of its motion for summary  
8 judgment, Defendant has done so here. Defendant has highlighted misrepresentations  
9 that it believes warrant rescission of the life insurance policy and has put forth a  
10 statement of uncontroverted facts and conclusions of law to which Plaintiff has  
11 responded. (*See* Mot. 8–9; Memorandum Statement of Genuine Disputes, ECF No.  
12 16-2.)

### 13 **B. Breach of Contract**

14 Defendant asserts that Plaintiff’s breach of contract claim must fail because  
15 there is no enforceable contract between the parties—in other words, that Mr. Tran’s

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16 <sup>3</sup> While the submission of new evidence is not typically allowed in conjunction with a reply,  
17 evidence that is merely responsive to issues raised in an opposition may be considered. *PSM*  
18 *Holding Corp. v. Nat’l Farm Fin. Corp.*, No. CV0508891MMFMFOX, 2013 WL 12080306, at \*4  
19 (C.D. Cal. Oct. 8, 2013) (cumulating cases in support of this proposition). Here, the new evidence is  
20 responsive to issues raised for the first time in Plaintiff’s opposition and thus the Court will consider  
21 the evidence.

22 <sup>4</sup> In a set of evidentiary objections filed after Defendant’s reply, Plaintiff argues that the corrective  
23 measures are insufficient because Vicki Do’s declaration “cannot be clearly related to the documents  
24 that are attached, as there is nothing about the declaration that confirms the records presented are the  
25 actual records referred to, or that they are full and complete.” (Objection to Supplemental  
26 Declaration 4, ECF No. 20.) Plaintiff is grasping at straws. Ms. Do’s declaration states that her  
27 “office produced a copy of the medical records *attached hereto as Exhibit A.*” (Do Decl., ECF No.  
28 14 (emphasis added).) The medical documents immediately follow the declaration and are labeled  
“Exhibit A.” (Augustin Suppl. Decl., Ex. A.) Plaintiff’s argument that these records are incomplete  
is also without foundation. (Objection to Supplemental Declaration 4.) Plaintiff has not explained  
why she believes that the records are incomplete and a review of the records does not give rise to  
any such suspicion.

<sup>5</sup> The Court notes that the insurance application remains unredacted. (Augustin Decl. Ex. A.)  
However, the Court finds that striking the application from the evidentiary record is too extreme a  
measure under the circumstances. For the protection of Mr. Tran’s privacy, the Court will seal the  
Augustin Declaration and its exhibits.

1 misrepresentations rendered any contract void *ab initio*. (Mot. 8); *see also* Cal. Ins.  
2 Code § 359. Therefore, Defendant has the burden to show that it rightfully rescinded  
3 Mr. Tran’s policy on the basis of his material misrepresentations. *Salkin v. United*  
4 *Servs. Auto. Ass’n*, 835 F. Supp. 2d 825, 831 (C.D. Cal. 2011), *aff’d sub nom. Salkin*  
5 *v. USAA Life Ins. Co.*, 544 F. App’x 713 (9th Cir. 2013).

6 As a general matter, California law “permits an insurer to rescind a policy when  
7 the insured has misrepresented or concealed material information in connection with  
8 obtaining insurance.” (*TIG Ins. Co. of Michigan v. Homestore, Inc.* 137 Cal. App. 4th  
9 749, 755–756 (2006); *see also Trinh v. Metro. Life Ins. Co.*, 894 F. Supp. 1368, 1372  
10 (N.D. Cal. 1995) (“Material misrepresentations on an insurance application are  
11 grounds for the [life] insurance company to rescind the policy.”). Indeed, California  
12 Insurance Code Section 331 could not be clearer: “concealment, whether intentional  
13 or unintentional, entitles the injured party to rescind insurance.” These statements are  
14 consistent with California’s long-held policy that an insurance company has “the  
15 unquestioned right to select those whom it will insure and to rely upon him who  
16 would be insured for such information as it desires as a basis for its determination to  
17 the end that a wise discrimination may be exercised in selecting its risks.” *Am. Gen.*  
18 *Life Ins. Co. v. Green*, No. 2:06-CV02048MCEKJM, 2008 WL 2096833, at \*4 (E.D.  
19 Cal. May 16, 2008) (quoting *Robinson v. Occidental Life Ins. Co. of Cal.*, 131 Cal.  
20 App. 2d 581, 586 (1955)).

21 Courts have generally applied a three-part test to determine whether an  
22 insurance company may rescind a life insurance policy based on material  
23 misrepresentations in the application. *See Casey By & Through Casey v. Old Line*  
24 *Life Ins. Co. of Am.*, 996 F. Supp. 939, 944 (N.D. Cal. 1998) (citing *Trinh*, 894 F.  
25 Supp. at 1372). The three elements of the test are: (1) whether the applicant made a  
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1 misrepresentation; (2) whether the misrepresentation was material; and (3) whether  
2 the applicant knew that he made a material misrepresentation.<sup>6</sup> *Id.*

3 **1. Whether Mr. Tran Made Misrepresentations and Knew of His Ailments**

4 Defendant argues that the medical records indicate, “among other things,” that  
5 Mr. Tran was diagnosed with diabetes on July 23, 2011, and with hypertension on  
6 August 20, 2011. (Mot. 9.) Defendant also argues that the medical records indicate  
7 he was prescribed medicine for these ailments on August 20, 2011. (*Id.*) The Court  
8 agrees, finding the medical records submitted by Defendant contain evidence that Mr.  
9 Tran was diagnosed and treated for diabetes and hypertension in the ten years  
10 preceding his application for life insurance and that he knew of these ailments.

11 i. *Evidence of Diabetes*

12 The medical records obtained from Dr. Tran span a roughly three-year period  
13 from June 5, 2010 to April 23, 2014. (Augustin Suppl. Decl. Ex. A at 14–61.)  
14 Proceeding chronologically, the first relevant record is from Mr. Tran’s July 23, 2011  
15 visit to Dr. Tran. This record indicates a diagnosis for “DM II,” medical shorthand for  
16 diabetes mellitus type 2.<sup>7</sup> (*Id.* at 44.) Directly underneath this diagnosis is a note to  
17 “Repeat FBS,” medical shorthand for the Fasting Blood Sugar test.<sup>8</sup> (*Id.*)

18 On August 13, 2011, Mr. Tran had laboratory tests done. (*Id.* at 19–22.) The  
19 corresponding laboratory report shows glucose levels consistent with diabetes and  
20 includes a stamp on the final page indicating that someone from Dr. Tran’s office  
21 called Mr. Tran regarding the results. (*Id.* at 20, 22.) A record from Mr. Tran’s  
22 August 20, 2011 visit to Dr. Tran indicates a diagnosis of “DM II.” (*Id.* at 43.) This

23 \_\_\_\_\_  
24 <sup>6</sup> The third element is not about whether the misrepresentation itself was intentional or unintentional,  
25 it is about whether the applicant knew or “appreciated” that he had the undisclosed condition. *See*  
26 *generally Casey*, 996 F. Supp. at 949.

27 <sup>7</sup> *See Medical Abbreviations*, Taber's Online, [http://www.tabers.com/tabers\\_online/view/Tabers-Dictionary/767492/0/Medical\\_Abbreviations](http://www.tabers.com/tabers_online/view/Tabers-Dictionary/767492/0/Medical_Abbreviations) (last accessed January 2, 2017); *see also Gonzales v. Comm’r of Soc. Sec. Admin.*, No. CV 14-0078-JPR, 2015 WL 685347, at \*4 n.5 (C.D. Cal. Feb. 18, 2015) (citing Taber’s as authority for medical abbreviations).

28 <sup>8</sup> *See Medical Abbreviations*, Taber's Online, [http://www.tabers.com/tabers\\_online/view/Tabers-Dictionary/767492/0/Medical\\_Abbreviations](http://www.tabers.com/tabers_online/view/Tabers-Dictionary/767492/0/Medical_Abbreviations) (last accessed January 2, 2017).

1 record also appears to include a notation relating to a drug prescription that begins  
2 with the prefix “gluco.”<sup>9</sup> (*Id.*)

3 Next, a record from Mr. Tran’s April 13, 2013 visit to Dr. Tran indicates a  
4 diagnosis of “DM II” and that Mr. Tran was “off meds” for “DM II.” (*Id.* at 42.) That  
5 same day, Mr. Tran had additional laboratory tests done. (*Id.* at 17.) The  
6 corresponding report shows hemoglobin a1c levels “consistent with diabetes.” (*Id.*)  
7 This report also includes a stamp on the final page indicating that someone from Dr.  
8 Tran’s office called Mr. Tran regarding the results. (*Id.* at 18.) A record from Mr.  
9 Tran’s May 5, 2013 visit to Dr. Tran also indicates a diagnosis of “DM II.” (*Id.* at  
10 41.) Finally, a record from Mr. Tran’s April 23, 2014 visit to Dr. Tran indicates a  
11 diagnosis of “DM II” with the related notation “not take meds.” (*Id.* at 40.)

12 ii. *Evidence of Hypertension*

13 The first medical record referencing Mr. Tran’s high blood pressure is from  
14 June 5, 2010. (*Id.* at 38.) A record from Mr. Tran’s visit to Dr. Tran on that day has a  
15 note indicating “↑BP.”<sup>10</sup> (*Id.*) Next, a record from Mr. Tran’s August 20, 2011 visit  
16 to Dr. Tran indicates a diagnosis of “HTN,” medical shorthand for hypertension.<sup>11</sup>  
17 (*Id.* at 43.) Finally, a record from Mr. Tran’s April 13, 2013 visit to Dr. Tran, also  
18 indicates a diagnosis for “HTN” and that he is “off meds” for the ailment. (*Id.* at 42.)

19 iii. *Conclusions*

20 In summary, Dr. Tran’s records show five occasions on which she diagnosed  
21 Mr. Tran with diabetes (including July 23, 2011) and at least two occasions on which  
22 she diagnosed Mr. Tran with hypertension (including August 20, 2011). The records  
23 also support Defendant’s argument that Mr. Tran at one time took medication for  
24 these ailments (presumably if he was “off meds” for the ailments, he was at one time

25 \_\_\_\_\_  
26 <sup>9</sup> The Court is unable to read the remainder of the word due to the poor quality of the reproduction.

27 <sup>10</sup> The abbreviation “BP” is a medical common shorthand for blood pressure. *See Medical*  
28 *Abbreviations*, Taber’s Online, [http://www.tabers.com/tabers\\_online/view/Tabers-Dictionary/767492/0/Medical\\_Abbreviations](http://www.tabers.com/tabers_online/view/Tabers-Dictionary/767492/0/Medical_Abbreviations) (last accessed January 2, 2017).

<sup>11</sup> *See Medical Abbreviations*, Taber’s Online, [http://www.tabers.com/tabers\\_online/view/Tabers-Dictionary/767492/0/Medical\\_Abbreviations](http://www.tabers.com/tabers_online/view/Tabers-Dictionary/767492/0/Medical_Abbreviations) (last accessed January 2, 2017).



1 “on meds” for the ailments). Therefore, the Court finds that Mr. Tran made  
2 misrepresentations in conjunction with his life insurance application when he  
3 indicated that he had not been diagnosed with, or treated for, a disease or disorder  
4 relating to diabetes or blood pressure in the previous ten years.

5 Further, evidence supports the conclusion that Mr. Tran knew about his ailment.  
6 Both ailments appear to have been diagnosed more than once and to have existed over  
7 a multi-year period. *Philp v. Jackson Nat’l Life Ins. Co.*, 107 F.3d 878 (9th Cir. 1997)  
8 (finding applicant appreciated or knew of ailment where he had a “long medical  
9 history” of ailment). Additionally, Mr. Tran appears to have been contacted about  
10 laboratory test results that showed glucose and hemoglobin a1c levels consistent with  
11 diabetes. (Augustin Suppl. Decl. Ex A at 18, 22.) Moreover, as discussed above, the  
12 records suggest that Mr. Tran took medication for the two ailments. *Freeman v.*  
13 *Allstate Life Ins. Co.*, 253 F.3d 533, 537 (9th Cir. 2001) (finding where applicant had  
14 ailment for several years and was taking medication for it, she “must have realized”  
15 she had the condition).

16 The Court finds that Defendant has not put forth sufficient evidence to create a  
17 genuine dispute of material fact as to these two prongs of the test. Plaintiff has  
18 offered her own declaration and the declaration of David Burgess, an independent  
19 insurance underwriter, as evidence that Mr. Tran did not make a misrepresentation. In  
20 Plaintiff’s declaration she alleges that Mr. Tran did not have diabetes or high blood  
21 pressure from 2012 until he applied for life insurance in July 2014. (Tran Decl. ¶ 4–  
22 5.) First, Plaintiff, as a layperson, is not qualified to make medical assessments or  
23 diagnoses.<sup>12</sup> See Fed. R. Evid. 701(c); see also *Clark v. Thomas*, No. 2:09-CV-02272-  
24 JAD, 2014 WL 2573738, at \*7 (D. Nev. June 6, 2014) (“The Ninth Circuit recognizes  
25 that lay witnesses (i.e., people who are not qualified medical-care providers) may not  
26 provide any medical diagnosis because ‘medical diagnoses are beyond the competence

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27 <sup>12</sup> While Plaintiff may properly offer her personal observations about Mr. Tran’s symptoms,  
28 disposition, or appearance, she does not offer those insights here; Plaintiff offers her own diagnoses.  
See Fed. R. Evid. 701(a).

1 of lay witnesses to make.”) Second, her declaration does not discuss the period from  
2 2011 to 2012 during which Mr. Tran appears to have been diagnosed with both  
3 diabetes and hypertension. (*See* Augustin Suppl. Decl., Ex. A at 43, 44.)

4 Plaintiff also presents the declaration of David Burgess, an independent  
5 insurance underwriter, who argues that Mr. Tran may have been confused by the  
6 diabetes question and that he may have answered the question truthfully because  
7 diabetes is neither a disease nor a disorder, “it is a condition.” (Burgess Decl. ¶¶ 11–  
8 12, ECF 16-4.) First, it does not matter whether the question was confusing or not  
9 because the misrepresentation need not be intentional; an unintentional  
10 misrepresentation may still be grounds for rescission. *See* Cal. Ins. Code § 331;  
11 *Barrera v. State Farm Mut. Automobile Ins. Co.*, 71 Cal.2d 659, 665–666, fn. 4 (1969)  
12 (finding that an insurer may rescind a policy for material misrepresentation “even  
13 though the insured’s misstatements were . . . the product of innocence.”). Second, the  
14 Court does not agree that the question is in any way confusing. Burgess argues that  
15 the question is confusing because it reads “diabetes (sugar in urine)” making it seem  
16 like only a specific subset of diabetes is at issue. (Burgess Decl. ¶ 12.) The problem  
17 is that the question *does not* read like that; the actual question reads “diabetes, sugar in  
18 urine?” (*See* Augustin Decl., Ex. A at 10.) As actually written, with the comma and  
19 without the parenthesis, there is no doubt that the question is asking whether Mr. Tran  
20 had a disease or disorder relating to diabetes *or* sugar in his urine. (*Id.*) Additionally,  
21 even if the question was confusing and this confusion qualified as grounds for  
22 nullifying the answer, that still does not address the misrepresentation Mr. Tran made  
23 about whether he suffered from a disease or disorder related to blood pressure.  
24 Finally, Burgess is not qualified to make statements regarding whether diabetes is a  
25 disease, disorder, or a condition. While Burgess may qualify as an expert in the  
26 context of insurance underwriting, he is a layperson for the purpose of making  
27 medical determinations. *See* Fed. R. Evid. 701(c). In conclusion, the Court finds that  
28

1 Defendant has met its burden with regard to elements one and three of the rescission  
2 test. *See Casey*, 996 F. Supp. at 944.

### 3 **2. Materiality**

4 “The materiality of a misrepresentation is a question of law.” *Id.* (quoting  
5 *Merced County Mut. Fir. Ins. Co. v. State*, 233 Cal. App. 3d 765, 772 (1991)). There  
6 are two tests for materiality. *Casey*, 996 F. Supp. at 948. Under the first test, any  
7 answer to a specific question in an application for insurance is material: “[t]hat the  
8 insurer puts questions in writing and asks for written answers has itself been deemed  
9 proof of materiality.” *Trinh*, 894 F. Supp. at 1373 (quoting *Taylor v. Sentry Life Ins.*  
10 *Co.*, 729 F.2d 652, 655 (9th Cir.1984)). Under the second test “[m]ateriality is  
11 determined by the probable and reasonable effect that truthful disclosure would have  
12 had on the insurer in determining the advantages of the proposed contract.” *Id.* In  
13 other words, a court must ask whether the insurer’s decision to issue the relevant  
14 policy would have been affected by having access to the correct information. *Lunardi*  
15 *v. Great-W. Life Assurance Co.*, 37 Cal. App. 4th 807, 828 (1995) (“Essentially, [a  
16 court] must decide whether the insurer was misled into accepting the risk or fixing the  
17 premium of insurance.”) (internal quotations omitted). Because this test is subjective,  
18 a declaration from the insurer’s underwriter indicating that coverage would not have  
19 been offered but for the misrepresentation is typically sufficient to satisfy the test.  
20 *Nieto v. Blue Shield of California Life & Health Ins. Co.*, 181 Cal. App. 4th 60, 77  
21 (2010) (“This is a *subjective* test; the critical question is the effect truthful answers  
22 would have had on [the actual insurer] . . .”) (emphasis in original) (quoting *Imperial*  
23 *Casualty & Indemnity Co. v. Sogomonian*, 198 Cal. App. 3d 169, 181 (1988)); *see*  
24 *also Trinh*, 894 F. Supp. at 1373 (citing declarations as sufficient).

25 Defendant has easily satisfied the first test for materiality. Defendant asked  
26 specific questions about Mr. Tran’s medical history on the application for life  
27 insurance. (*See Augustin Decl. Ex. A.*) This is by itself sufficient to establish  
28 materiality.

1           However, Defendant also prevails under the second test. Defendant submits the  
2 declaration of its chief underwriter Michael Augustin indicating that had Mr. Tran  
3 completed the application “truthfully and accurately” he “would not have been able to  
4 provide evidence of insurability to Kansas City Life satisfactory to offer coverage as  
5 issued.” (Augustin Decl. ¶ 19.) While this statement is certainly not as clear as it  
6 could be, the Court takes it to mean that Defendant would not have offered Mr. Tran  
7 the policy it did with knowledge of his true medical history. The Court finds it  
8 reasonable that an insurer would consider previous diagnoses for diabetes and  
9 hypertension material in deciding whether to offer a life insurance policy. Because  
10 this test is “subjective” and the insurer that issued the policy to Mr. Tran would not  
11 have done so with the correct information, the Court finds that Defendant has  
12 established materiality under the second test.<sup>13</sup> In conclusion, Defendant has met its  
13 burden to show materiality regardless of which of the two tests is applied.

### 14 **C. Defenses to Rescission**

#### 15 **1. Waiver**

16           Plaintiff argues that Defendant waived the right to rescind Mr. Tran’s policy  
17 when it failed to adequately investigate the accuracy of his application before issuing  
18 the policy. (Opp’n 3–5.) However, in California “an insurer has no independent duty  
19 to investigate facts in an insurance application.” *Philp*, 107 F.3d 878 (citing *S.F.*  
20 *Lathing Co. v. Pennsylvania Mut. Life Ins. Co.*, 300 P.2d 715, 719 (Cal. Ct. App.  
21 1956)). Put even more succinctly, “an insurer may rescind an insurance contract for  
22 material misrepresentations even if the insurer issued the policy without investigating  
23 the applicant’s medical history.” *Id.* (quoting *Cohen v. Pennsylvania Mut. Life Ins.*

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24 <sup>13</sup> Plaintiff’s expert David Burgess speculates that Defendant would have issued Mr. Tran the same  
25 policy at the same price even if he had disclosed his true medical history. (Burgess Decl. ¶ 25.)  
26 However, the Court need not resort to speculation where Defendant’s chief underwriter has  
27 expressly indicated under penalty of perjury that Mr. Tran *would not have qualified for the policy* if  
28 he had disclosed his true medical history. (Augustin Decl. ¶ 19.) As the test is subjective, and is  
focused solely on the impact the misrepresentation would have had on the particular insurer in  
question, the Court finds the declaration of Defendant’s underwriter is completely dispositive on this  
issue. *Nieto*, 181 Cal. App. 4th at 77.

1 Co., 312 P.2d 241, 245 (Cal.1957) and *Old Line Life Ins. Co. v. Superior Court*, 229  
2 Cal. App. 3d 1600, 1606 (Ct. App. 1991)).

3 Waiver of the right to rescind for misrepresentation is only appropriate in the  
4 rare instance that the insurer is actually aware of a misrepresentation in the application  
5 and chooses to enter into the contract anyway. *DiPasqua v. Cal. W. States Life Ins.*  
6 *Co.* 106 Cal. App. 2d 281, 284–285 (1951). It is undisputed that Defendant did not  
7 have actual knowledge of Mr. Tran’s true medical history before issuing the policy.  
8 Therefore, Defendant did not waive the right to rescind based on an initial failure to  
9 obtain Mr. Tran’s medical records.<sup>14</sup>

## 10 **2. Post-claim Underwriting**

11 Plaintiff also argues that Defendant cannot rescind the policy based on  
12 information, in this case medical records, it acquired after the policy became effective.  
13 However, as Defendant points out, post-claim underwriting is not a defense to  
14 rescission in the life insurance context. (Mot. 11.) Life insurers in California, unlike  
15 health insurers, may engage in post-claim underwriting during the policy’s contestable  
16 period. *Salkin*, 835 F. Supp. 2d at 834 (finding life insurers are exempt from  
17 prohibition on post-claim underwriting); *Salkin*, 544 F. App’x at 715 (agreeing with  
18 district court that life insurers are exempt from prohibition on post-claim  
19 underwriting).

20 Courts have repeatedly allowed so-called post-claims underwriting in the event  
21 that a policy holder dies within their life insurance policy’s contestable period.  
22 *Freeman*, 253 F.3d at 537 (affirming a district court decision in favor of insurer that  
23 rescinded life insurance based on a misrepresentation in the application that was  
24 discovered during contestable-period investigation); *Salkin*, 835 F. Supp. 2d at 835

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25 <sup>14</sup> Even if there was a requirement to investigate the veracity of an applicant’s answers in an  
26 application for insurance, Defendant conducted a reasonable investigation by subjecting Mr. Tran to  
27 a physical examination. (See Augustin Decl. Ex. E at 125–127.) Because the physical examination  
28 revealed no diseases or disorders of consequence, it is hardly surprising that Defendant would have  
ended its investigation before requesting health records from Dr. Tran.

1 (granting summary judgment in favor of insurer that rescinded life insurance based on  
2 a misrepresentation in the application that was discovered during contestable-period  
3 investigation). Indeed, at least one court has gone so far as to term such investigations  
4 “standard” procedure. *Yang v. Peoples Benefit Ins. Co.*, No. CIV F 06-458 AWIDLB,  
5 2007 WL 1555749, at \*2 (E.D. Cal. May 25, 2007) (referring to contestable period  
6 investigation that involved obtaining medical records for the purpose of evaluating  
7 potential misrepresentations in a life insurance application as “standard.”) Here, it is  
8 undisputed that the records were obtained with Plaintiff’s permission during the  
9 policy’s two-year contestable period. Thus, Plaintiff’s post-claims underwriting  
10 defense fails. As there is no issue of material fact and Defendant has proven as a  
11 matter of law that it properly rescinded Mr. Tran’s life insurance policy, the Court  
12 **GRANTS** its motion for summary judgment as to the breach of contract claim.

#### 13 **D. Remaining Claims**

14 Plaintiff’s claims based on the breach of the implied covenant of fair dealing,  
15 declaratory relief, and intentional infliction of emotion distress all fail because her  
16 breach of contract claim fails. As Defendant points out, where there is no breach of  
17 contract there can be no breach of the implied covenant of good faith and fair dealing.  
18 *See San Diego Housing Comm’n v. Indus. Indem. Co.*, 68 Cal. App. 4th 526, 544  
19 (1998) (“Where a breach of contract cannot be shown, there is no basis for finding a  
20 breach of the covenant.”). Likewise, because the Court finds that the contract was  
21 properly rescinded, it cannot declare that a valid contract presently exists between the  
22 parties. As such, the claim for declaratory relief fails. Finally, the emotional distress  
23 claim fails because Defendant’s actions were not “extreme and outrageous” in  
24 rescinding Mr. Tran’s life insurance policy. *See Nichols v. Nw. Mut. Life Ins. Co.*, 487  
25 F. App’x 339, 342 (9th Cir. 2012) (citing *Christensen v. Superior Ct.*, 54 Cal.3d 868,  
26 903 (1991)); *see also Hailey v. California Physicians’ Serv.*, 158 Cal. App. 4th 452,  
27 476 (2007) (“a plan does not subject itself to liability for intentional infliction of  
28 emotional distress by attempting in good faith to assert its perceived legal right to

1 rescind a [insurance] contract, even if it is likely the subscriber will suffer emotional  
2 distress.”) To summarize, the Court **GRANTS** Defendant summary judgment on the  
3 breach of implied covenant of good faith and fair dealing claim, the declaratory relief  
4 claim, and the intentional infliction of emotional distress claim.<sup>15</sup>

5 **V. CONCLUSION**

6 For the above reasons, the Court **GRANTS** Defendant’s motion for summary  
7 judgment in its entirety. The Clerk of Court shall dismiss the action.

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9 **IT IS SO ORDERED.**

10 January 5, 2017

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13 **OTIS D. WRIGHT, II**  
14 **UNITED STATES DISTRICT JUDGE**

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<sup>15</sup> The Court also notes that Plaintiff failed to make any mention her declaratory relief or intentional  
infliction of emotional distress claims in her opposition to summary judgment.