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Attorney for PLAINTIFF
EDWARD B. FOSTER

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT, SAN JOSE DIVISION

| | | |
|-------------------------------------|---|---------------------------------|
| EDWARD B. FOSTER, |) | CASE NO. C03 02644 JW |
| |) | |
| Plaintiff, |) | DECLARATION OF JOHN A. |
| |) | SHEPARDSON SUPPORTING |
| v. |) | MOTION FOR LEAVE TO FILE |
| |) | AMENDED COMPLAINT |
| METROPOLITAN LIFE INSURANCE, |) | |
| COMPANY, and Does 1-100, inclusive, |) | DATE: September 20, 2004 |
| |) | TIME: 9 A.M. |
| Defendants. |) | CTRM: 8 |
| _____ / |) | JUDGE: Hon. James Ware |

I, John A. Shepardson, Esq., declare:

1. I have personal knowledge of the following facts and circumstances, and would and could competently testify thereto, if called as a witness.
2. I am Plaintiff's attorney of record.
3. Plaintiff filed suit in state court against Defendant Metropolitan Life Insurance Company (Hereinafter "MetLife") for Breach of Contract and Bad Faith, arising out a wrongful cancellation of his policy.
4. MetLife removed the action to Federal Court.
5. The parties exchanged initial disclosures, formal discovery, and completed a nonbinding arbitration.

6. MetLife brought a Motion for Summary Adjudication, and supplemented its Initial disclosure with additional documents, well after the discovery cutoff, and just 4 days before serving the motion.
7. The court granted summary adjudication as to the Bad Faith cause of action, and certain issues.
8. The court invited further cross-motions on the remaining Breach of Contract cause of action.
9. I have reviewed these supplemental documents, and after going through the arduous process of opposing the Summary Adjudication Motion, have determined that the factual record supports Plaintiff amending his complaint for the following reasons to: 1) To provide a better chronology of the relevant facts; 2) To incorporate the waiver and estoppel grounds into the Breach of Contract action; and 3) To add a Declaratory Relief action, which may have the same resource saving effect, as the cross-motions that this court has already suggested.
10. No trial date has been set.
11. There is no prejudice to MetLife by allowing leave to amend, and its own actions caused Plaintiff to seek leave.
12. Plaintiff will stipulate to reasonable discovery on the new allegations.
13. Facts incorporated into the complaint focus on MetLife's own conduct in failing to comply with policy provisions in terms of sending out notices.
14. The following is the proposed First Amended Complaint:

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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT, SAN JOSE DIVISION

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| EDWARD B. FOSTER, |) | CASE NO. C03 02644 JW |
| |) | |
| Plaintiff, |) | PROPOSED FIRST AMENDED |
| |) | COMPLAINT: BREACH OF |
| v. |) | CONTRACT; DECLARATORY |
| |) | RELIEF |
| METROPOLITAN LIFE INSURANCE, |) | |
| COMPANY, and Does 1-100, inclusive, |) | |
| |) | |
| Defendants. |) | |
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GENERAL ALLEGATIONS

1. Edward B. Foster (“Plaintiff”) is an individual residing in the Santa Clara County, California.
2. Metropolitan Life Insurance Company (“MetLife”) was and is a foreign Corporation doing business in Santa Clara County, California.
3. Plaintiff was employed by “SRI” (Stanford Research Institute) beginning in 1978, and worked on governmental and commercial projects. In connection with his work, he obtained top-secret clearances with the CIA, NSA, and NATO.
4. He was promoted to SRI’s director of Information Systems Engineering Center, and supervised 120 people. He developed information storage and retrieval systems. He led the team that developed the first artificial intelligence system.

7. Mr. Foster's SRI employment benefits included a group life insurance policy, with \$520,000 of coverage, provided through MetLife.
8. In 1988 Mr. Foster divorced Mary L. Foster. In the marital settlement, Mr. Foster agreed to maintain her as a beneficiary on his policy, with \$150,000 of coverage, until he reached age of 65, and thereafter if she chose to pay for the premiums for \$150,000 of his total coverage, she could maintain her beneficiary status.
9. In 1995/96 MetLife assumed responsibility for providing benefits under the SRI group plan, including Plaintiff's life insurance coverage. Plaintiff was not issued a new certificate of coverage by MetLife or SRI.
10. In 1998 Mr. Foster retired from SRI. His policy was converted from a group plan, to an individual one, with the same premium schedule. Plaintiff was not provided with a certificate or a policy describing either his premium schedule or his individual benefits.
11. On August 23, 1999, he made a quarterly \$1,144.86 premium payment, making his coverage paid up through October 1999, and which created a \$25.05 credit for November.
12. On October 13, 1999 Plaintiff sent a letter to Johnson & Higgins, (hereinafter "JH") MetLife's administrator, regarding Mary Foster's interest in his policy. MetLife has claimed it did not receive a copy of this letter.
13. The insurance certificate produced by MetLife in this litigation (Plaintiff has yet to receive a copy of the master policy pursuant to which the certificate was issued) provides in pertinent part under its "Grace Period" provision:

"If you are not paying under the Payroll Deduction Plan and if the Cash Value on any monthly anniversary is less than the Monthly Deduction for that month, there will be a Grace

Period of 60 days after that anniversary to pay an amount that will cover the Monthly deduction. **We will send you a notice of the Grace Period.** ” (emphasis added)

14. Plaintiff's \$25.05 November 1, 2000 credit balance was far less than the premium owed for the month; thus, according to the policy language cited above, he had 60 days from November 5, 1999 (monthly anniversary on the 5th of each month) to pay his premium, before coverage would lapse.

15. Plaintiff did not make payment in November or December. As of January 5, 2000, the 60-day grace period had lapsed; however, he did not receive a warning notice, nor did he receive a notice of cancellation.

16. With the end of the coverage period approaching, Plaintiff called JH on January 26, 2000, and asked for more time to make payment, as he had mistakenly failed to pay earlier. His request was granted, without objection, for an additional 14 days. Nothing was said to Plaintiff about a lapse as of January 5, 2000, and he then paid the November-January premium.

17. In February 2000 no billing was sent.

18. In March 2000 no billing was sent.

19. As of April 5, 2000 the contractual 60-day grace period would have run if invoices had been timely sent.

20. MetLife did not cancel the policy, and Plaintiff is informed and believes, and thereon alleges that on or about April 5, 2000, the carrier sent a bill for premiums for the present coverage period, February-April 2000, and the following one, May-July 2000.

21. In early April 2000 Plaintiff became employed with Telegis Networks with a \$150,000/yr salary. He then received a \$17,575.80 TIAA pension check, and

deposited it on April 28, 2000. He had ample funds in his account to make the insurance payments.

22. On April 27, 2000, 3 days before the end of the coverage period, JH received Plaintiff's \$1,068.42 premium check, which brought him current on the February through April 2000 coverage period.

23. Plaintiff is informed and believes and thereon alleges that MetLife failed to send any grace period notices in April, May or June, 2000, prior to canceling his policy.

24. On June 8, 2000, with 52 days remaining in the May-July coverage period, Mr. Foster issued check no. 1234 in the sum of \$1,068.42 to MetLife. He entered the check on his register. He placed the check in an envelope with first class postage, addressed to it to JH, and then placed it in his post box, for pickup by the U.S. Postal Service.

25. The checks he wrote both before and after check no. 1234 promptly cleared Plaintiff's account.

26. On or about July 10, 2000 Plaintiff received a JH notice stating that his policy had been cancelled. Plaintiff contacted JH and informed it that there must have been an error in cancellation, since he had sent a check.

27. JH then changed its prior course of dealing of allowing payments at the end of the coverage period, and insisted on strict compliance with policy provisions, and told him the policy would remain cancelled. The company rejected Plaintiff's offers to make payment by credit card, or check by phone.

28. Plaintiff contacted his bank, and was told his check had not cleared his account. The check was never negotiated, nor did the Postal Service return the payment envelope for want of postage or lack of delivery.

29. Mr. Foster requested a copy of his policy, and documentation demonstrating proper cancellation notice. Initially, MetLife stated it did not have any record of insuring him, and then did admit coverage, and yet still did not produce his policy.

30. A friend alerted plaintiff that he could make a complaint to the California Department of Insurance (Hereinafter referred to as "DOI"), and so on January 9, 2003, Mr. Foster sought assistance from the agency. The DOI sent a complaint letter to MetLife, and the company responded on April 15, 2003. The DOI conducted a limited investigation, and then closed the matter, apparently because it was lead to believe that grace period notices had been sent.

FIRST CAUSE OF ACTION

(BREACH OF CONTRACT)

31. MetLife had contract obligations to: 1) Keep coverage in force if Plaintiff made a timely and complete premium payment; and 2) To provide a grace period and cancellation notice before terminating coverage.

32. MetLife breached the contract by terminating it even though Plaintiff timely deposited in the mail the full premium payment due; and by failing to provide proper grace period and cancellation notice before termination.

33. Plaintiff performed all conditions, except as otherwise waived and/or excused. MetLife is barred by the doctrines of waiver and/or estoppel from denying coverage on the basis that Plaintiff did not make timely payment. MetLife's practice of extending the time for making payment, to the end of the coverage period, waived the contractual 60 day grace period notice, and led Plaintiff to believe he had until July 30, 2000, the end of the May-July coverage period, to make payment. Moreover, MetLife violated of Insurance Code 17589.3

by failing to maintain any records of its April-June 2000 grace period notices, which it purports to have sent.

34. On July 12, 2004, Plaintiff sent via Fed Ex to MetLife a \$21,096.92 check for all back premiums on said policy, and MetLife rejected the tender.

35. As a result of said conduct, Plaintiff has incurred loss of life insurance coverage (which he cannot obtain elsewhere because of his age, and deteriorating health condition), attorney fees and costs incurred herein, and with his ex-wife, and emotional distress.

SECOND CAUSE OF ACTION

(DECLARATORY RELIEF)

35. Plaintiff refers to and incorporates by reference each and every foregoing allegation.

36. A controversy exists between Plaintiff and MetLife concerning their rights and duties, as Plaintiff contends he fully performed the acts necessary to keep his policy in force, and that MetLife did not properly cancel it. MetLife contends Plaintiff did not timely make a premium payment, and that it properly cancelled his policy.

37. A judicial determination is necessary so Plaintiff may ascertain his rights and duties under said policy, and the present unsettled state of affairs, has caused him significant attorney fees and costs, and created a controversy with his ex-wife that can be resolved through a successful prosecution of this action.

PRAYER

Wherefore, Plaintiff prays for damages and relief from MetLife as follows:

- 1) General;
- 2) Special;

- 3) Consequential;
- 4) Pre- and post-judgment interest;
- 5) Attorney fees and costs pursuant to statute and/or case law;
- 6) A determination by the court that Plaintiff's MetLife policy remains in force and effect.
- 7) Such other relief as is proper; and

Dated: _____

JOHN A. SHEPARDSON, ESQ. FOR
PLAINTIFF

I declare under U.S. law that the foregoing is true and correct.

Dated: _____

JOHN A. SHEPARDSON, ESQ. FOR
PLAINTIFF