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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

RIVKA OFIR, Ph.D.,

Plaintiff,

v.

TRANSAMERICA PREMIER LIFE
INSURANCE COMPANY,

Defendant.

Case No.: 17cv1544-MMA (JMA)

**ORDER GRANTING DEFENDANT'S
MOTION TO DISMISS
PLAINTIFF'S FIRST AMENDED
COMPLAINT**

[Doc. No. 18]

On December 22, 2017, Plaintiff Rivka Ofir (“Plaintiff”) filed a First Amended Complaint (“FAC”) against Defendant Transamerica Premier Life Insurance Company (“Transamerica”) alleging several causes of action arising out of Transamerica’s refusal to pay Plaintiff accidental death benefits for the accidental death of her spouse, Moshe Ofir (“Moshe”). Doc. No. 14 (“FAC”), ¶ 8. Defendant moves to dismiss Plaintiff’s FAC under Federal Rule of Civil Procedure 12(b)(6). See Doc. No. 18-1 (“MTD”). Plaintiff opposes dismissal of all claims [Doc. No. 19 (“Oppo.”)] and Defendant replies that dismissal is warranted [Doc. No. 20 (“Reply”)]. The Court found the matter suitable for determination on the papers and without oral argument pursuant to Civil Local Rule 7.1.d.1. Doc. No. 23. For the reasons set forth below, the Court **GRANTS** Defendant’s motion to dismiss.

BACKGROUND¹

1
2 On or around August 1, 2014, Transamerica and Plaintiff entered into a written
3 insurance agreement, which replaced Plaintiff’s then-existing written insurance
4 agreement with The Hartford Accident and Life Insurance Company (“Hartford”) for
5 group Accidental Death and Dismemberment (“AD&D”) insurance coverage. FAC, ¶¶ 3,
6 7-8. Plaintiff alleges she “was never given any opportunity to convert her coverage under
7 T[he] H[artford] group AD&D plan to individual coverage” and that the Transamerica
8 group AD&D plan “was a standardized contract drafted solely” by Transamerica. FAC
9 ¶ 7.

10 Plaintiff learned of the Transamerica insurance agreement on March 10, 2014,
11 when Transamerica sent Plaintiff a letter along with a certificate of insurance
12 (“Transamerica Certificate”). *Id.* The letter indicated that “[t]he change from The
13 Hartford will not interrupt your AD&D coverage” and that Transamerica’s plan will
14 continue to insure Plaintiff “for similar AD&D coverage using [Transamerica’s] standard
15 provisions, definitions, [and] filed language” *Id.* The letter also stated that the
16 Transamerica Certificate “fully describes all benefits, exclusions, limitations, reductions
17 of benefits, and terms of coverage under the [Transamerica] plan” *Id.* However,
18 Plaintiff alleges the Transamerica Certificate states that it only “summarizes certain
19 provisions of the Group Policy” *Id.*

20 Plaintiff alleges that the Hartford policy and Transamerica policy are not “similar”
21 and that Transamerica failed to notify her of the differences between the two policies.
22 FAC, ¶ 7. Specifically, Plaintiff alleges that the Transamerica policy “eliminates a
23 \$3,000 non-contributory benefit which was part of [the Hartford policy],” adds a
24 definition and exclusion based on sickness which was not contained in the Hartford
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26
27 ¹ Because this matter is before the Court on a 12(b)(6) motion to dismiss, the Court must accept as true
28 the allegations set forth in the operative complaint. *See Hosp. Bldg. Co. v. Trs. of Rex Hosp.*, 425 U.S.
738, 740 (1976).

1 policy, and broadens the aviation exclusion in the Hartford policy. *Id.* Because
2 Transamerica failed to disclose these differences, Plaintiff alleges the insurance contract
3 is unenforceable. *Id.* Plaintiff also alleges the aviation exclusion is unenforceable
4 because it is not plain, clear, or conspicuous and also is unconscionable. *Id.*

5 Plaintiff further alleges Transamerica was acting as Affinion Group Benefits'²
6 ("Affinion's") agent when it sent the March 10, 2014 letter, giving rise to a fiduciary
7 relationship between Plaintiff and Transamerica. FAC, ¶¶ 3, 15. Accordingly, Plaintiff
8 claims Transamerica had a fiduciary duty to specifically disclose to Plaintiff differences
9 between the Transamerica policy and the Hartford policy. FAC, ¶ 15. Because
10 Transamerica failed to do so, Plaintiff alleges Transamerica breached its fiduciary duty,
11 causing the denial of benefits for Moshe's accidental death. FAC, ¶¶ 15-16.

12 On July 14, 2015, the aircraft Moshe was piloting crashed. FAC, ¶ 7. The
13 "aircraft was seen to be flying as if it was out of control." *Id.* It was a clear day and an
14 examination of the aircraft revealed "that there was no mechanical problem which caused
15 the aircraft to crash." *Id.* Moshe suffered from health problems, including a heart
16 problem and loss of vertigo. *Id.* As such, Plaintiff alleges upon information and belief
17 that the injuries Moshe suffered on July 14, 2015, including his death, were "injuries
18 'resulting from' . . . the sudden manifestation of a health problem . . . which prevented
19 [Moshe] from being able to control the aircraft." *Id.* Plaintiff concedes, however, that
20 Moshe "died accidentally as a result of injuries he suffered when the aircraft he was
21 operating crashed." FAC, ¶ 15. After Moshe's accidental death, Plaintiff claimed
22 accidental death benefits in the amount of \$150,000. FAC, ¶ 8. On December 12, 2016,
23 Transamerica refused to pay Plaintiff the death benefits pursuant to the aviation
24 exclusion. FAC, ¶¶ 3-8.

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28 ² Plaintiff alleges that Affinion was the third party plan administrator for the Hartford policy and that
Transamerica was Affinion's agent from at least March 10, 2014 until July 31, 2014. FAC, ¶ 3.

1 Accordingly, Plaintiff asserts the following causes of action: (1) breach of contract;
2 (2) tortious breach of the implied covenant of good faith and fair dealing (bad faith); (3)
3 breach of fiduciary duty; and (4) fraud via negligent misrepresentation and concealment.
4 *See generally*, FAC.

5 LEGAL STANDARD

6 A Rule 12(b)(6) motion to dismiss tests the legal sufficiency of the complaint.
7 *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). A pleading must contain “a short
8 and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R.
9 Civ. P. 8(a)(2). However, plaintiffs must also plead “enough facts to state a claim to
10 relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007);
11 Fed. R. Civ. P. 12(b)(6). That is, the pleadings must contain factual allegations
12 “plausibly suggesting (not merely consistent with)” a right to relief. *Twombly*, 550 U.S.
13 at 557. The plausibility standard thus demands more than a formulaic recitation of the
14 elements of a cause of action, or naked assertions devoid of further factual enhancement.
15 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 555, 557).
16 Instead, the complaint “must contain sufficient allegations of underlying facts to give fair
17 notice and to enable the opposing party to defend itself effectively.” *Starr v. Baca*, 652
18 F.3d 1202, 1216 (9th Cir. 2011).

19 In reviewing a motion to dismiss under Rule 12(b)(6), courts must assume the truth
20 of all factual allegations and must construe them in the light most favorable to the
21 nonmoving party. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996).
22 The court need not take legal conclusions as true merely because they are cast in the form
23 of factual allegations. *Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987).
24 Similarly, “conclusory allegations of law and unwarranted inferences are not sufficient to
25 defeat a motion to dismiss.” *Pareto v. FDIC*, 139 F.3d 696, 699 (9th Cir. 1998) (citing *In*
26 *Re Syntex Corp. Sec. Litig.*, 95 F.3d 922, 926 (9th Cir. 1996).

1 Where dismissal is appropriate, a court should grant leave to amend unless the
2 plaintiff could not possibly cure the defects in the pleading. *See Knappenberger v. City*
3 *of Phoenix*, 566 F.3d 936, 942 (9th Cir. 2009).

4 **REQUEST FOR JUDICIAL NOTICE**

5 Transamerica requests the Court judicially notice three documents in support of its
6 motion to dismiss: (1) the Hartford Certificate of Insurance , Policyholder SDCCU,
7 Policy Number ADD-12208, insured persons Rivka Ofir and Moshhav Hatzeva; (2) the
8 March 10, 2014 letter from Doug Smith to Rivka Ofir; and (3) the Transamerica
9 Certificate of Insurance, Policyholder National Monument Credit Union Group Insurance
10 Trust C/O SDCCU, Group Policy Number MZ0926738H0050F, insured members Rivka
11 Ofir and Moshhav Hatzeva. Doc. No. 18-2 (“RJN”) at 2-3. Transamerica claims
12 Plaintiff references the documents in her FAC and cannot reasonably question their
13 authenticity. *Id.* Moreover, Transamerica asserts that the Court previously judicially
14 noticed these documents in its prior order dismissing Plaintiff’s original complaint. *Id.*
15 Plaintiff objects to the Court judicially noticing the first and third documents. *Oppo.* at
16 29-30. However, Plaintiff does not oppose the Court judicially noticing the letter. *Id.*

17 In determining the propriety of a Rule 12(b)(6) dismissal, courts generally may not
18 look beyond the complaint for additional facts. *United States v. Ritchie*, 342 F.3d 903,
19 907 (9th Cir. 2003). “A court may, however, consider certain materials—documents
20 attached to the complaint, documents incorporated by reference in the complaint, or
21 matters of judicial notice—without converting the motion to dismiss into a motion for
22 summary judgment.” *Id.* at 8; *see also* Fed. R. Evid. 201; *Lee v. City of Los Angeles*, 250
23 F.3d 668, 688 (9th Cir. 2001), *overruled on other grounds by Galbraith v. Cnty. of Santa*
24 *Clara*, 307 F.3d 1119, 1125-26 (9th Cir. 2002). “Even if a document is not attached to a
25 complaint, it may be incorporated by reference into a complaint if the plaintiff refers
26 extensively to the document or the document forms the basis of the plaintiff’s claim.”
27 *Ritchie*, 342 F.3d at 908 (internal citations omitted). A court “may consider a document
28 the authenticity of which is not contested, and upon which the plaintiff’s complaint

1 necessarily relies.” *Parrino v. FHP, Inc.*, 146 F.3d 699, 706 (9th Cir. 1998), *superseded*
2 *by statute on other grounds in Abrego v. Dow Chem. Co.*, 443 F.3d 676 (9th Cir. 2006);
3 *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007). The Court may take judicial
4 notice of matters that are either “generally known within the trial court’s territorial
5 jurisdiction” or “can be accurately and readily determined from sources whose accuracy
6 cannot reasonably be questioned.” Fed. R. Evid. 201(b).

7 The Court **GRANTS** Defendant’s request and judicially notices the March 10,
8 2014 letter marked as exhibit “B” to Defendant’s request for judicial notice, as Plaintiff
9 does not dispute its authenticity. *See* RJN, Exhibit B; *see also* Oppo. at 29-30. However,
10 the Court **DENIES** Defendant’s request to judicially notice the Transamerica Certificate
11 of Insurance. RJN, Exhibit C. Plaintiff attached a different Certificate of Insurance to
12 her FAC and incorporates it by reference. FAC, Exhibit 1. While Transamerica claims
13 the two documents are copies, a comparison reveals a different letterhead. *See* RJN,
14 Exhibit C; FAC, Exhibit 1. Accordingly, the Court will rely upon the Transamerica
15 Certificate incorporated by reference into the FAC. Finally, the Court **DENIES**
16 Defendant’s request to judicially notice the Hartford certificate of insurance. *See* RJN,
17 Exhibit A. The Court finds judicial notice of this document is unnecessary for the instant
18 purposes, as the Court finds disposition of the motion is proper without reference to this
19 document. *See Ruiz v. City of Santa Maria*, 160 F.3d 543, 548 n.13 (9th Cir. 1998)
20 (stating that judicial notice is inappropriate where the facts to be noticed are not relevant
21 to the disposition of the issues before the court).

22 DISCUSSION

23 **1. Breach of Contract**

24 Plaintiff alleges Transamerica breached the insurance contract by refusing to pay
25 \$150,000 in accidental death benefits to Plaintiff following Moshe’s accidental death.
26 FAC, ¶ 8. Specifically, she contends: (1) the aviation exclusion is unenforceable because
27 it is not plain, clear, and conspicuous and is unconscionable under California Civil Code
28 § 1670.5; and (2) Transamerica failed to “specifically disclose to Plaintiff the differences

1 in the replacement policy,” including differences regarding the sickness and aviation
2 exclusions and the elimination of a \$3,000 non-contributory benefit. FAC, ¶ 7.

3 **A. Whether the Aviation Exclusion is Plain, Clear, and Conspicuous**

4 Plaintiff first alleges the aviation exclusion is unenforceable because it is not plain,
5 clear, or conspicuous. FAC, ¶ 7. Transamerica contends the aviation exclusion is
6 enforceable because it is plain, clear, and conspicuous. MTD at 11-14. As Transamerica
7 notes, “Plaintiff does not argue [in her opposition] that the language of the aviation
8 exclusion, upon which Transamerica relied upon to deny her claim, was not plain, clear
9 and conspicuous.” Reply at 9; *see* Oppo.

10 “Provisions [of insurance contracts] which purport to exclude coverage or
11 substantially limit liability must be set forth in plain, clear and conspicuous language.”
12 *Thompson v. Occidental Life Ins. Co.*, 9 Cal. 3d 904, 921 (1973) (citing *Gray v. Zurich*
13 *Ins. Co.*, 65 Cal. 2d 263, 273 (1966)). To be plain, clear, and conspicuous, coverage
14 exclusions and limitations must meet two separate tests: (1) the exclusion must be
15 conspicuous, meaning it “must be placed and printed so that it will attract the reader’s
16 attention[;]” and (2) the exclusion “must be stated precisely and understandably, in words
17 that are part of the working vocabulary of the average layperson.” *Haynes v. Farmers*
18 *Ins. Exchange*, 32 Cal. 4th 1198, 1204 (2004).

19 **1. Conspicuousness**

20 “[T]he California Supreme Court [has] held an exclusion clause conspicuous as a
21 matter of law when it was found in a section under the bold face heading “Exclusions,” in
22 printing the size and intensity identical to the rest of the policy.” *Doyle v. Safeco Ins. Co.*
23 *of Am.*, No. CV F 08-1587 LJO GSA, 2008 WL 5070055, at *4 (E.D. Cal. Nov. 26, 2008)
24 (citing *Na’l Ins. Underwriters v. Carter*, 17 Cal. 3d 380, 384-85 (1976)). Additionally, a
25 California Court of Appeal has explained that exclusions are conspicuous as a matter of
26 law where they were divided so as not to be a dense pack, even though density of
27 verbiage alone does not make a clause inconspicuous. *Cal-Farm Ins. Co. v. TAC*
28 *Exterminators, Inc.*, 172 Cal. App. 3d 564, 578 (Ct. App. 1985) (citing *Ponder v. Blue*

1 *Cross of S. Cal.*, 145 Cal. App. 3d 709, 722 (Cal. Ct. App. 1983)). Transamerica asserts
2 the aviation exclusion is conspicuous as a matter of law because it is contained in a
3 section entitled “EXCLUSIONS,” which is titled in all capital letters and bold print and
4 includes eight exclusions separately enumerated, indented, and identified by bullet points.
5 MTD at 13. Moreover, Transamerica asserts the font of the aviation exclusion is the
6 same size and typeface as the other policy provisions. *Id.* The Transamerica Certificate
7 incorporated by reference into the FAC provides:

8 **EXCLUSIONS**

9 We will not pay a benefit for a Loss which is caused by, results from, or
contributed to by:

- 10 • suicide, attempted suicide or intentionally self-inflicted injury,
11 while sane or insane (in Missouri and Colorado while sane).
12 • declared or undeclared war or any act of war.
13 • full-time military service.
14 • participating in a riot; committing an assault or felony.
15 • Sickness or its medical or surgical treatment, including diagnosis.
16 • operating or riding in any aircraft except as a fare-paying passenger
on a regularly scheduled commercial flight or as a passenger in a
17 transport plane operated by the Air Mobility Command (AMC) of
the United States of America.
18 • alcohol intoxication, as defined in the state where the accident
causing the injury occurred.
19 • taking of any drug, medication, narcotic, or hallucinogen, unless as
prescribed by a Physician.

20 FAC, Exhibit 1. Based upon the Transamerica Certificate provided by Plaintiff, the
21 exclusions are conspicuous as a matter of law because they are appropriately labeled,
22 located exactly where one would expect to find it (under a bold title “EXCLUSIONS”),
23 and are divided so as not to be in a dense pack. Nothing suggests the exclusions are
24 inconspicuous, particularly in consideration of Plaintiff’s failure to challenge this
25 argument. *See* *Oppo.*; *see also Doyle*, 2008 WL 5070055, at * 5.

26 2. *Plain and Clear Language*

27 Transamerica also contends the aviation exclusion language is plain and clear.
28 MTD at 12. To be plain and clear, exclusions must be “stated precisely and

1 understandably, in words that are part of the working vocabulary of the average
2 layperson.” *Dominguez v. Fin. Indem. Co.*, 183 Cal. App. 4th 388, 396 (Ct. App. 2010)
3 (internal citation and quotation marks omitted). Thus, courts find limiting language to
4 not be plain and clear where the provision is ambiguous, uses complicated words not
5 within the knowledge of average laypersons, or where the language is confusing.
6 *Haynes*, 32 Cal. 4th at 1211-12 (finding exclusion not plain and clear because the
7 exclusion used ambiguous terms that were not obvious on their face, involved cross-
8 references between multiple definitions and documents not in the insured’s possession,
9 and used “confusing language surrounding and introducing the actual text of the”
10 exclusion); *see also Ponder*, 145 Cal. App. 3d at 723 (Cal. Ct. App. 1983) (holding that
11 clause excluding coverage for “temporomandibular joint syndrome” without a definition
12 for that disease was not plain and clear because it is a “technical medical term”). Courts
13 have also held limiting language to be plain and clear if it “clearly applies.” *Travelers*
14 *Prop. Cas. Co. of Am. v. Superior Court*, 215 Cal. App. 4th 561, 578 (Ct. App. 2013)
15 (finding language conspicuous, plain, and clear where “the exclusion clearly applie[d]”).

16 Here, the exclusion specifically states that Transamerica “will not pay a benefit for
17 a Loss which is caused by, results from, or contributed to by: . . . operating or riding in
18 any aircraft except as a fare-paying passenger on a regularly scheduled commercial flight
19 or as a passenger in a transport plane operated by the Air Mobility Command (AMC) of
20 the United States of America.” FAC, Exhibit 1. The term “loss” is defined as “the death
21 of the Covered Person or any physical impairment, incurred expense, or other benefit
22 covered under the terms of the Group Policy and any attached Riders.” *Id.* The
23 exclusion and corresponding definition are not ambiguous. The language does not use
24 any undefined term of art, and the exclusion and corresponding definition do not use
25 complicated words that are not in “the vocabulary of lay persons.” *Ponder*, 145 Cal.
26 App. 3d at 578. In addition, the language of the exclusion is simple and not “confusing.”
27 *Haynes*, 32 Cal. 4th at 1211. Plaintiff also does not dispute that the aviation exclusion
28 unambiguously applies to Moshe’s accidental death. *See* FAC, ¶ 15 (stating that Moshe

1 “died accidentally *as a result of* injuries he suffered when the aircraft he was operating
 2 crashed”) (emphasis added); *see also* FAC, Exhibit 1 (stating that Transamerica will not
 3 pay a benefit “for a Loss which . . . *results from* . . . operating or riding in any aircraft . . .
 4 .”). As such, the aviation exclusion is plain and clear.

5 3. Conclusion

6 The Court finds the aviation exclusion to be conspicuous, plain, and clear. *See*
 7 *Marentes v. State Farm Mut. Auto. Ins. Co.*, 224 F. Supp. 3d 891, 909-10 (N.D. Cal.
 8 2016) (finding an exclusion to be plain, clear, and unambiguous at the summary
 9 judgment stage); *Doyle*, 2008 WL 5070055, at * 5 (finding an exclusion conspicuous at
 10 the motion to dismiss stage); *Pinnacle Brokers Ins. Solutions LLC v. Sentinel Ins. Co.*,
 11 *Ltd.*, No. 15-cv-02976-JST, 2015 WL 5159532, at *4 (N.D. Cal., Sept. 2, 2015) (granting
 12 Defendant’s motion to dismiss in part because the exclusion was plain, clear, and
 13 conspicuous as it “clearly and unambiguously communicates” the limitation).

14 **B. Whether the Aviation Exclusion is Unconscionable**

15 Plaintiff also alleges the aviation exclusion is unconscionable because the contract
 16 is an adhesion contract and because Transamerica misled Plaintiff because it knew it
 17 “added a sickness exclusion and broadened the scope of [the] aviation exclusion without
 18 specifically notifying Plaintiff.” FAC, ¶ 7.

19 Unconscionability is a defense to the enforcement of an entire contract or
 20 particular contractual provisions. Cal. Civ. Code. § 1670.5(a). “[U]nconscionability has
 21 generally been recognized to include an absence of meaningful choice on the part of one
 22 of the parties together with contract terms which are unreasonably favorable to the other
 23 party.” *A & M Produce Co. v. FMC Corp.*, 135 Cal. App. 3d 473, 486 (Ct. App. 1982)
 24 (internal alterations omitted) (citing *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d
 25 445, 449 (D.C. Cir. 1965)). In other words, unconscionability has both a procedural and
 26 a substantive element. *Id.* The procedural element focuses on oppression and surprise
 27 due to unequal bargaining power, and the substantive element focuses on the fairness of
 28 the terms of the agreement and whether they are overly harsh or one-sided. *Pinnacle*

1 *Museum Tower Ass’n. v. Pinnacle Mkt. Dev. (US), LLC*, 55 Cal. 4th 223, 246 (2012).
2 Contracts or provisions of contracts found to be substantively unconscionable are often
3 described as “unduly oppressive, so one-sided as to shock the conscience, and
4 unreasonably favorable to the more powerful party.” *Grand Prospects Partners, L.P. v.*
5 *Ross Dress for Less, Inc.* 232 Cal. App. 4th 1332, 1347 (Ct. App. 2015) (internal
6 quotation marks omitted) (citing *Sonic-Calabasas A, Inc. v. Moreno*, 57 Cal. 4th 1109,
7 1145 (2013)). “The elements of procedural and substantive unconscionability need not
8 be present to the same degree because they are evaluated on a sliding scale.
9 Consequently, the more substantively oppressive the contract term, the less evidence of
10 procedural unconscionability is required to conclude the term is unenforceable, and vice
11 versa.” *Id.* (internal citations omitted).

12 1. *Procedural Unconscionability*

13 Plaintiff contends the procedural element is met because the aviation exclusion is
14 part of an adhesion contract. *Oppo*. at 22. Plaintiff alleges that the Transamerica
15 Certificate is an adhesion contract because Transamerica was in a position of superior
16 bargaining strength and Plaintiff was not given an opportunity to negotiate terms of the
17 Transamerica Certificate. FAC, ¶ 7. Moreover, Plaintiff alleges the Transamerica
18 Certificate is a “standardized contract drafted solely by [Transamerica].” *Id.*

19 Under California law, procedural unconscionability can be established by showing
20 the contract is one of adhesion. *The McCaffrey Grp., Inc. v. Superior Court*, 224 Cal.
21 App. 4th 1330, 1349 (Ct. App. 2014). The California Supreme Court defines “contract of
22 adhesion” to mean a standardized contract imposed and drafted by the party of superior
23 bargaining strength that provides the subscribing party only the opportunity to adhere to
24 the contract or reject it. *Armedariz v. Found. Health Psychare Servs., Inc.*, 24 Cal. 4th
25 83, 113 (2000) (citing *Neal v. State Farm Ins. Cos.*, 188 Cal. App. 2d 690, 694 (Ct. App.
26 1961)).

27 However, California courts “recognize that showing a contract is one of adhesion
28 does not always establish procedural unconscionability.” *Grand Prospect Partners*, 232

1 Cal. App. 4th at 1348 n.9; *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1281 (9th Cir.
2 2006). To determine whether a contract of adhesion is procedurally unconscionable,
3 California courts consider several factors, including: (1) the relative bargaining power
4 and sophistication of the parties, (2) the complaining parties' access to reasonable market
5 alternatives, and (3) the degree to which an offending provision of a contract is "buried in
6 a lengthy . . . agreement." *See, e.g., Roman v. Superior Court*, 172 Cal. App. 4th 1462,
7 1470 n.2, 1471 (Ct. App. 2009) ("When bargaining power is not grossly unequal and
8 reasonable alternatives exist, oppression typically inherent in adhesion contracts is
9 minimal."). Additionally, California courts consider whether the agreement arose from a
10 "situation[] where adhesion contracts are oppressive, despite the availability of
11 alternatives," such as when "a sick patient seek[s] admittance to a hospital" or when an
12 employee is presented with an employment contract. *Morris v. Redwood Empire*
13 *Bancorp*, 128 Cal. App. 4th 1305, 1320 (Ct. App. 2005).

14 Here, Plaintiff alleges that Transamerica was in a position of superior bargaining
15 strength and drafted the contract and that Plaintiff was elderly when she entered into the
16 agreement. FAC, ¶ 7. On the other hand, Plaintiff asserts that she has a Ph.D, which
17 shows some level of sophistication. *See* FAC, ¶ 1. Additionally, Plaintiff argues that had
18 she been "informed specifically" about the sickness and aviation exclusions, she "would
19 have taken note . . . and would have acted to obtain additional insurance," indicating that
20 she could have found meaningful and available alternatives. FAC, ¶¶ 7, 15; *See*
21 *Nagrampa*, 469 F.3d at 1282-833. Moreover, the Court has already found that the
22 exclusion was conspicuously placed and was not "buried in a lengthy . . . agreement."
23 *See Roman*, 172 Cal. App. 4th at 1471. Finally, the agreement did not arise from a
24 situation where the agreement is oppressive regardless of the availability of alternatives.
25 *See Morris*, 128 Cal. App. 4th at 1320. Plaintiff received the March 10, 2014 letter
26 sometime in March. FAC, ¶ 7. That letter indicated that coverage under the Hartford
27 Certificate would end July 31, 2014 and coverage under the Transamerica Certificate
28 would become effective August 1, 2014. FAC, ¶ 7; RJN, Exhibit B. Accordingly,

1 Plaintiff had several months to decide whether or not to accept coverage with
2 Transamerica and was not under immediate pressure to make that decision. *See* RJN,
3 Exhibit B; *see also Morris*, 128 Cal. App. 4th at 1320. Based on these factors, “the
4 evidence of procedural unconscionability appears minimal, [but] it is sufficient to require
5 [the Court], under California law, to reach the second prong of the unconscionability
6 analysis.” *Nagrampa*, 469 F.3d at 1284.

7 2. Substantive Unconscionability

8 Plaintiff contends the aviation exclusion is substantively unconscionable because
9 the result is deprivation of accidental death benefits for her husband’s death. Compl., ¶ 7.
10 In support, Plaintiff alleges Transamerica’s letter misled her into believing the
11 Transamerica Certificate provided similar coverage to the Hartford Certificate, when in
12 fact Transamerica’s aviation exclusion is broader. *Id.* Substantive unconscionability
13 focuses on whether an agreement’s actual terms provide overly harsh or one-sided
14 results. *See Pinnacle Museum Tower Ass’n.*, 55 Cal. 4th at 246 (the substantive element
15 of unconscionability “pertains to the fairness of an agreement’s actual *terms* and to
16 assessments of whether they are overly harsh or one-sided”) (emphasis added). Thus, the
17 fact that Plaintiff relied on a letter indicating that the Hartford Certificate and
18 Transamerica Certificate are similar does not make the aviation exclusion’s terms
19 substantively unconscionable. *See id.* Plaintiff’s only remaining allegation with respect
20 to substantive unconscionability is that the aviation exclusion “if enforced, would cause
21 an unconscionable result, namely the deprivation of benefits Plaintiff would otherwise
22 have received” FAC, ¶ 7.

23 Plaintiff urges the Court to permit her to develop facts supporting substantive
24 unconscionability because “[w]here facts are in dispute, a motion to dismiss does not lie
25 even if a judge might believe a Plaintiff might not ultimately prevail based on those
26 disputed facts.” *Oppo.* at 24. While the Court must construe facts in the light most
27 favorable to Plaintiff on a motion to dismiss, the Court cannot supply Plaintiff with
28 factual allegations supporting her claims for relief. *See Cahill*, 80 F.3d at 337-38.

1 Plaintiff has only provided a conclusory allegation that the aviation exclusion's result is
2 unconscionable because she did not receive accidental death benefits due to the policy's
3 limitation. *See* FAC, ¶ 7. However, "[a]n insurance company has the right to limit the
4 coverage of a policy issued by it and when it had done so, the plain language of the
5 limitation must be respected." *Con'l Cas. Co. v. Phoenix Const. Co.*, 46 Cal. 2d 423
6 (1956); *Nat'l Ins. Underwriters v. Carter*, 17 Cal. 3d 380, 386 (1976); *see also Trishan*
7 *Air, Inc. v. Federal Ins. Co.*, 635 F.3d 422, 429 (9th Cir. 2011). Plaintiff fails to plead
8 any facts pertaining to the harshness or one-sidedness of the terms contained within the
9 aviation exclusion. *See* FAC, ¶ 7. For this reason, Plaintiff has failed to allege any
10 substantive unconscionability.³ *See id.*

11 3. Conclusion

12 Plaintiff pleads only a minimal amount of procedural unconscionability and
13 insufficiently pleads substantive unconscionability. As both procedural and substantive
14 unconscionability are required to render a contract provision unenforceable Plaintiff fails
15 to plead that the aviation exclusion is unconscionable. *See Armendariz*, 24 Cal. 4th at
16 114 (explaining the sliding scale between procedural and substantive unconscionability).

17 **C. Whether the Notice of Change of Insurance Coverage was Plain, Clear,** 18 **and Conspicuous**

19 Plaintiff contends that Transamerica's March 10, 2014 letter notifying her that she
20 would be covered by Transamerica failed to sufficiently notify her of changes to her
21 insurance coverage. FAC, ¶ 7. Specifically, Plaintiff alleges Transamerica did not
22 disclose the addition of a sickness exclusion, a broader aviation exclusion, and the
23 omission of a \$3,000 non-contributory benefit. *Id.*

24
25
26
27 ³ The Court notes that it previously allowed Plaintiff leave to amend her original Complaint to
28 sufficiently allege substantive unconscionability, however Plaintiff failed to cure the deficiency in her
FAC. Doc. No. 13 at 14; *see also* Oppo.; FAC, ¶ 7.

1 “Under California law, changes to insurance coverage must be in a clear and
2 conspicuous writing.” *Casey v. Metro. Life Ins. Co.*, 688 F. Supp. 2d 1086, 1095 (E.D.
3 Cal. 2010). “The rule is and should be: Deletions or exclusions from a renewal group
4 policy should be communicated and explained to the subscriber by a plain, clear and
5 conspicuous writing.” *Fields v. Blue Shield of Cal.*, 163 Cal. App. 3d 570, 583 (Ct. App.
6 1985). In other words, unless the notice of reduction in coverage is conspicuous, plain
7 and clear, the insurance company is “bound by a greater coverage in an earlier policy
8 when a renewal policy is issued.” *Allstate Co. v. Fibus*, 855 F.2d 66, 663 (9th Cir. 1988);
9 *Casey*, 688 F. Supp. 2d at 1095 (indicating that any notice of changes resulting in
10 reduction in coverage must adequately bring such changes to the members’ attention). If
11 notice of a new exclusion is inadequate, the exclusion is ineffective. *Davis v. United*
12 *Servs. Auto Ass’n*, 223 Cal. App. 3d 1322, 1332 (Ct. App. 1990).

13 Plaintiff alleges the Hartford Certificate contained an aviation exclusion “which
14 was single spaced and in smaller type than that which appears [in the FAC] and which
15 appeared on the backside of one of the double sided pages of that document.” FAC, ¶ 3.
16 According to Plaintiff, the exclusion contained the following language:

17 **EXCLUSIONS:** This policy does not cover any loss resulting from 1.
18 Intentionally self-inflicted injury, suicide or attempted suicide, whether sane
19 or insane; 2. war or act of war whether declared or undeclared; 3. Injury
20 sustained while full-time in the armed services of any country or international
21 authority (Coverage will be provided for Injury resulting from non-military or
22 non-combat activity with the U.S.); 4. Injury sustained while riding On any
23 aircraft except a Civil or Public Aircraft, or military transport aircraft; 5.
24 Injury sustained while riding On any aircraft: a) as a pilot, crew member, or
25 student pilot; b) as a flight instructor or examiner; or c) if it is owned, operated,
26 or leased by, or on behalf of the Policyholder, or any employer or organization
27 whose eligible persons are covered under the Policy; 6. Injury sustained while
28 voluntarily taking drugs which federal law prohibits dispensing without a
prescription including sedatives narcotics, barbiturates, amphetamines, or
hallucinogens unless the drug is taken as prescribed or administered by a
licensed physician; 7. Injury sustained while committing or attempting to
commit a felony; 8. Injury sustained as a result of being legally intoxicated
from the use of alcohol.

1 FAC, ¶ 3. Plaintiff also alleges that she would have received accidental death benefits
2 under the Hartford policy because the aviation exclusion “is not plain, is not clear, and is
3 not conspicuous, and was never specifically disclosed to Plaintiff.” FAC, ¶ 7.

4 Transamerica’s aviation exclusion does not result in a reduction of coverage. *See*
5 *Allstate*, 855 F.2d at 663. Plaintiff apparently does not dispute that the language in the
6 Hartford’s aviation exclusion, if enforced, would preclude recovery of an accidental
7 death benefit for Moshe’s death. *See* FAC, ¶ 7 (stating that “benefits would not be
8 excluded under THE HARTFORD certificate. . . because [the aviation exclusion] is not
9 plain, is not clear, and is not conspicuous and was never specifically disclosed to
10 Plaintiff”). Moreover, Hartford’s aviation exclusion appears enforceable. First, based on
11 Plaintiff’s FAC, the language was conspicuously placed and is plain and clear. *See* FAC,
12 ¶ 3; *see also Doyle*, 2008 WL 5070055, at *4 (finding an exclusion conspicuous where it
13 was under the bold heading “Exclusions,” and was in printing the size and intensity
14 identical to the rest of the policy); *Nat’l Ins. Underwriters*, 17 Cal. 3d at 384-85 (same);
15 *Cal-Farm Ins. Co.*, 172 Cal. App. 3d at 578 (noting that density of verbiage does not
16 make a clause inconspicuous); *see also Ponder*, 145 Cal. App. 3d at 578 (clauses
17 containing technical terms without definition are not plain and clear); *Haynes*, 32 Cal. 4th
18 at 1211 (exclusions are not plain and clear if they are ambiguous, not obvious, involve
19 cross-referencing between multiple definitions, and use confusing language); *Travelers*,
20 215 Cal. App. 4th at 578 (finding language conspicuous, plain, and clear where “the
21 exclusion clearly applie[d]”). Second, Plaintiff provides no support for the contention
22 that exclusions must be specifically disclosed to an insured when entering into the
23 insurance agreement that is not a renewal. *See Cont’l Cas. Co.*, 46 Cal. 2d at 432 (stating
24 that insurance companies have a right to limit the coverage of a policy).

25 Accordingly, Transamerica’s aviation exclusion did not result in a reduction of
26 coverage for Plaintiff because she would not have received a benefit for Moshe’s
27 accidental death under either policy. As such, Plaintiff insufficiently pleads the aviation
28

1 exclusion is unenforceable because Transamerica failed to provide adequate notice of the
2 reduction in coverage.⁴

3 **D. Conclusion**

4 Based on the foregoing, Plaintiff insufficiently pleads that the aviation exclusion is
5 unenforceable, and therefore, fails to sufficiently plead that Transamerica breached the
6 insurance contract by refusing to pay accidental death benefits to her. In addition,
7 Plaintiff fails to adequately plead breach of contract based on Transamerica’s allegedly
8 inadequate notice of change in coverage. As a result, the Court **GRANTS**
9 Transamerica’s motion and dismisses Plaintiff’s breach of contract claim.

10 **2. Bad Faith**

11 In her second cause of action, Plaintiff alleges Transamerica “unreasonably and
12 tortiously breached the implied covenant of good faith and fair dealing . . . by continuing
13 to refuse to pay Plaintiff the \$150,000 in benefits owed to Plaintiff . . . after being
14 informed by Plaintiff’s counsel of information showing that the aviation exclusion on
15 which [Transamerica] relied on is unenforceable against Plaintiff.” FAC, ¶ 12.
16 Transamerica contends this cause of action must be dismissed because Plaintiff
17 insufficiently pleads a breach of contract claim. MTD at 20-21.

18 “There is implied in every contract a covenant by each party not to do anything
19 which will deprive the other parties thereto of the benefits of the contract.” *Harm v.*
20 *Frasher*, 181 Cal. App. 2d 405, 417 (Ct. App. 1960). A “breach of a specific provision of
21 the contract is not a necessary prerequisite” to establishing a breach of the implied
22 covenant of good faith and fair dealing. *Carma Developers (Cal.), Inc. v. Marathon Dev.*
23

24
25 ⁴ Plaintiff also contends Transamerica failed to disclose the new sickness exclusion and that the policy
26 did not contain a non-contributory benefit of \$3,000. FAC, ¶ 3-7. However, Transamerica did not deny
27 Plaintiff a benefit under the sickness exclusion and Plaintiff does not claim she is entitled to a non-
28 contributory benefit. *See id.* Accordingly, even if Transamerica failed to adequately notify Plaintiff of
these changes, her breach of contract claim would still fail, as they did not result in the denial of death
benefits, and therefore did not cause the alleged breach. *See Davis*, 223 Cal. App. 3d at 1333 (stating
that if notice of a new exclusion is inadequate the exclusion is ineffective).

1 *Cal., Inc.*, 2 Cal. 4th 342, 373 (1992). However, “[t]he implied covenant will not apply
2 where no express term exists on which to hinge an implied duty, and where there has
3 been compliance with the contract’s express terms.” *Berger v. Home Depot U.S.A., Inc.*,
4 476 F. Supp. 2d 1174, 1177 (C.D. Cal. 2007) (citations and quotation marks omitted).

5 The Court has already found that Plaintiff insufficiently pleads that the aviation
6 exclusion is unenforceable. Accordingly, Plaintiff also fails to plead that Transamerica
7 breached the covenant of good faith and fair dealing by refusing to pay accidental death
8 benefits due to the aviation exclusion. “The covenant of good faith and fair dealing does
9 not impose on [Defendant] duties beyond its contractual obligations.” *Neng-Guin Chen*
10 *v. Citibank (West), FSB*, No. 11-CV-01189 H (NLS), 2011 WL 3739535, at *3 (S.D. Cal.
11 Aug. 24, 2011) (citing *Raeth v. Nat’l City Bank*, 755 F. Supp. 2d 899, 906 (W.D. Tenn.
12 2010)). Accordingly, the Court **GRANTS** Transamerica’s motion and **DISMISSES**
13 Plaintiff’s breach of the implied covenant of good faith and fair dealing cause of action.

14 **3. Breach of Fiduciary Duty**

15 In her third cause of action, Plaintiff alleges she and Transamerica, acting as
16 Affinion’s agent, were in a fiduciary relationship from March 10, 2014 to July 31, 2014.
17 FAC, ¶ 15. According to Plaintiff, Transamerica owed a fiduciary duty to Plaintiff as an
18 agent of the plan administrator to disclose “specifically the differences between the
19 renewal coverage being offered by [Transamerica] and Plaintiff’s existing insurance
20 under [the Hartford], including the new sickness exclusion and the broader and different
21 aviation exclusion.” *Id.* Thus, Transamerica breached its fiduciary duty by telling
22 Plaintiff the plans were similar. *Id.* Additionally, Plaintiff alleges Transamerica
23 breached its fiduciary duty to Plaintiff by falsely representing that “Plaintiff need take no
24 further action to have her accidental death benefits insurance coverage continue other
25 than to agree to allow the premium for the new replacement policy to be deducted
26 automatically from her account with [SDCCU].” FAC, ¶ 15. Plaintiff alleges
27 Transamerica’s breach of fiduciary duty “caused Plaintiff not to obtain [AD&D]
28 insurance covering her husband for his piloting activities and covering him under his then

1 existing health condition” *Id.* Transamerica argues Plaintiff’s breach of fiduciary
2 duty cause of action must be dismissed because Plaintiff has not sufficiently established a
3 fiduciary relationship. MTD at 21-22.

4 Under California law, a breach of fiduciary duty claim requires “the existence of a
5 fiduciary relationship, its breach, and damage proximately caused by that breach.”
6 *Pierce v. Lyman*, 1 Cal. App. 4th 1093, 1101 (Ct. App. 1991). The California Supreme
7 Court has observed that the relationship between the insurer and the insured is not a “true
8 ‘fiduciary relationship.’” *Vu v. Prudential Prop. & Cas. Ins. Co.*, 26 Cal. 4th 1142, 1150-
9 51 (2001) (citing Croskey et al., Cal. Practice Guide: Insurance Litigation (The Rutter
10 Group 2000) § 11:150, 11-31). Additionally, the relationship “between an insurer and a
11 prospective insured is not a fiduciary relationship.” *Cal. Serv. Station & Auto. Repair*
12 *Ass’n v. Am. Home Co.*, 62 Cal. App. 4th 1166, 1173 (Ct. App. 1998). Thus, “as a matter
13 of California law, no true fiduciary duty arises from the insurer-insured relationship and
14 an insured therefore cannot maintain a claim for breach of fiduciary duty based solely on
15 the insurer-insured relationship.” *In re Conseco Ins. Co. Annuity Mktg. & Sales*
16 *Practices Litig.*, Nos. C-05-04726 RMW & C-06-00537 RMW, 2007 WL 486367, at *7
17 (N.D. Cal. Feb. 12, 2007); *accord Solomon v. N. Am. Life & Cas. Ins. Co.*, 151 F.3d
18 1132, 1138 (9th Cir. 1998) (holding that an insurer owes no fiduciary duty to its insured
19 under California law). However, an insurer may be charged with a fiduciary obligation to
20 its insured if it “knowingly undertake[s] to act on behalf and for the benefit of
21 [Plaintiff].” *City of Hope Nat’l Med. Ctr. v. Genentech, Inc.*, 43 Cal. 4th 375, 386 (2008)
22 (“before a person can be charged with a fiduciary obligation, he must either knowingly
23 undertake to act on behalf and for the benefit of another, or must enter into a relationship
24 which imposes that undertaking as a matter of law”).

25 Plaintiff alleges that Transamerica was acting as Affinion’s agent in sending the
26 March 10, 2014 letter, and therefore was acting as a plan administrator. FAC, ¶¶ 3-4.
27 Plaintiff argues that a plan administrator is in a fiduciary relationship with an insured.
28 *Oppo.* at 13. Assuming Transamerica was acting as Affinion’s agent, Plaintiff’s breach

1 of fiduciary duty claim fails. In support of Plaintiff’s argument that a fiduciary
2 relationship exists between a plan administrator and an insured under an AD&D group
3 insurance plan, Plaintiff cites to cases stating that a trust relationship exists between
4 pensioner-beneficiaries and the trustees of pension funds who administer retirement
5 benefits. *Id.* (citing *Marzec v. Public Employees’ Retirement System*, 236 Cal. App. 4th
6 889, 895-97 (Ct. App. 2015); *Lix v. Edwards*, 82 Cal. App. 3d 573, 578 (1978)).⁵ The
7 Court finds these cases inapposite as they deal with the relationship of trust between
8 pensioner-beneficiaries and the trustees of pension funds who administer retirement
9 benefits, whereas this case deals with an accidental death and dismemberment group
10 insurance plan. Thus, the Court cannot agree with Plaintiff based on the cases she cites to
11 that “[u]nder California law[,] a plan administrator of a non-ERISA group plan such as
12 the one at issue in this case is a fiduciary.” *Oppo.* at 13.

13 Further, Plaintiff does not allege any facts suggesting that Transamerica knowingly
14 undertook to act on behalf of and for the benefit of Plaintiff. *See City of Hope Nat. Med.*
15 *Ctr.*, 43 Cal. 4th at 386. Plaintiff merely alleges that Affinion was the administrator of
16 the Hartford Plan and that Transamerica sent a letter indicating that the Hartford and
17 Transamerica plans were similar, without specifically disclosing the differences between
18 the two, and that Transamerica “held itself out to be of superior knowledge and expertise
19 to Plaintiff in matters of insurance and in particular in the matter of whether Plaintiff
20 should agree to enter into a proposed insurance contract with [Transamerica]” *FAC*,
21 ¶¶ 15.

22 A review of the March 10, 2014 letter also does not indicate that Transamerica was
23 acting on behalf of and for the benefit of Plaintiff. *See RJN*, Exhibit B. The letter states
24 that Transamerica “will be the new carrier for [Plaintiff’s AD&D] coverage,” and that the
25

26
27 ⁵ Plaintiff also cites to *Fields*, 163 Cal. App. 3d at 579-83, however, *Fields* does not discuss a breach of
28 fiduciary duty or a relationship of trust and confidence. *See Oppo.* at 13 (citing *Fields*, 163 Cal. App. 3d
at 579-83).

1 Hartford's coverage will end August 1, 2014, while Transamerica's coverage will begin
2 August 1, 2014, so that coverage will not be interrupted. *Id.* The letter requests that
3 Plaintiff review the enclosed Transamerica Certificate "carefully," as "the benefits
4 provided under the new plan may be different than under [Plaintiff's] current plan," even
5 though the letter provided that Plaintiff will "continue to be insured for similar AD&D
6 coverage." *Id.*

7 Even further, Plaintiff fails to allege that her accidental death benefits insurance
8 coverage was interrupted between July 31, 2014 and August 1, 2014. *See* FAC, ¶¶ 3, 7
9 (indicating that Plaintiff and Moshe were insured by the Hartford "through July 31,
10 2014," would "terminate effective August 1, 2014" and coverage by Transamerica was
11 "effective no later than August 1, 2014"). As such, Plaintiff cannot show breach of
12 fiduciary duty for Transamerica's allegedly false representation that her insurance
13 coverage would be uninterrupted. *See* FAC, ¶ 15. Additionally, Plaintiff has not shown
14 how Transamerica's alleged failure to disclose the sickness exclusion and elimination of
15 the non-contributory benefit damaged her. *See* FAC, ¶ 15-16 (indicating she suffered
16 damages in the amount of \$150,000 and "severe emotional distress" as a result of
17 enforcement of the aviation exclusion). Finally, Plaintiff has not sufficiently alleged that
18 Transamerica's alleged failure to disclose the differences between Hartford's aviation
19 exclusion and Transamerica's aviation exclusion caused her damage because Plaintiff has
20 not sufficiently alleged she would be entitled to accidental death benefits under either
21 policy. *See id.*

22 In summation, the letter and Plaintiff's allegations do not plausibly show that
23 Transamerica affirmatively represented it would act on behalf and for the benefit of
24 Plaintiff, despite the Court identifying the same deficiency in the original Complaint. *See*
25 Doc. No. 13 at 17-20. Therefore, Plaintiff fails to adequately plead the existence of a
26 fiduciary relationship between herself and Transamerica. *See City of Hope Nat. Med.*
27 *Ctr.*, 43 Cal. 4th at 386. Even assuming Plaintiff had sufficiently alleged a fiduciary
28 relationship, she insufficiently pleads damages caused by Transamerica's alleged breach.

1 As such, the Court **GRANTS** Transamerica’s motion and dismisses Plaintiff’s breach of
2 fiduciary duty cause of action.

3 **4. Fraud**

4 Plaintiff alleges in her fourth and final cause of action that Transamerica’s March
5 10, 2014 letter fraudulently represented that Transamerica’s coverage was “similar” to
6 the Hartford’s coverage.⁶ FAC, ¶¶ 18-21. Plaintiff alleges Transamerica knew that “the
7 aviation exclusion provision and sickness exclusion provision were different from the
8 coverage provided” by the Hartford policy, and the Transamerica policy did not have a
9 \$3,000 non-contributory benefit that existed in the Hartford policy. FAC, ¶¶ 19-20.
10 Plaintiff explains she justifiably relied on Transamerica’s false representations and
11 permitted Transamerica to deduct premiums from her SDCCU account, which ultimately
12 caused Transamerica to deny Plaintiff accidental death benefits for Moshe’s death. FAC,
13 ¶19. Plaintiff explains she did not learn of and could not have reasonably learned of
14 these misrepresentations until Transamerica denied her claim for benefits. FAC, ¶¶19-
15 20. Plaintiff contends her allegations support two theories of fraud—negligent
16 misrepresentation and concealment. FAC, ¶¶ 19-21.

17 **A. *Negligent Misrepresentation***

18 Under California law, the elements of negligent misrepresentation are: “(1) a
19 misrepresentation of a past or existing material fact, (2) without reasonable grounds for
20 believing it to be true, (3) with intent to induce another’s reliance on the fact
21 misrepresented, (4) ignorance of the truth and justifiable reliance thereon by the party to
22 whom the misrepresentation was directed, and (5) damages.” *Fox v. Pollack*, 181 Cal.
23
24
25

26 ⁶ Plaintiff also alleges that Transamerica falsely represented that Plaintiff’s coverage would continue
27 uninterrupted on August 1, 2014 if she agreed to allow premiums to be deducted automatically from her
28 SDCCU account. FAC, ¶ 18-21. This claim fails because Plaintiff has not alleged that her coverage
was interrupted. *See* FAC. Accordingly, the Court declines to address Plaintiff’s fraud claims based
upon uninterrupted coverage.

1 App. 3d 954, 962 (Ct. App. 1986); *see also Century Sur. Co. v. Crosby Ins., Inc.*, 124
2 Cal. App. 4th 116, 122 (Ct. App. 2004).

3 Transamerica argues that Plaintiff has not alleged it made a misrepresentation by
4 stating that the policies were similar. MTD at 23. Plaintiff contends she adequately
5 alleges a misrepresentation because she states that Transamerica falsely represented that
6 the two policies were similar, when in fact “the aviation exclusion provision and sickness
7 exclusion were different” from the Hartford’s coverage and the Transamerica policy did
8 not contain a \$3,000 non-contributory benefit. FAC, ¶ 19.

9 The plain meaning of the word “similar” is “[r]elated in appearance or nature; alike
10 though not identical.” THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH
11 LANGUAGE 1622 (4th ed. 2000); *see also* MERRIAM-WEBSTER, *available at*
12 <https://www.merriam-webster.com/dictionary/similar> (defining similar as “having
13 characteristics in common”). Thus, the fact that the Transamerica policy contained
14 broader language in its aviation exclusion than the Hartford policy does not make the two
15 policies dissimilar. Likewise, the fact that the Transamerica policy added a sickness
16 exclusion and omitted a \$3,000 non-contributory benefit does not make the policies
17 dissimilar. Accordingly, Transamerica did not make a material misrepresentation by
18 stating that the two policies are “similar.”

19 Even if use of the word “similar” were a material misrepresentation, Plaintiff could
20 not show justifiable reliance. Transamerica asserts that Plaintiff’s reliance on the
21 Transamerica letter was not justifiable because the language of the letter itself states that
22 benefits may be different than the actual coverage issued under the Hartford policy.
23 MTD at 24-25. Plaintiff contends she sufficiently alleges justifiable reliance because she
24 “believed [Transamerica’s representations] were true” and entered into an agreement with
25 Transamerica based on those representations. Plaintiff contends she “read the letter”
26 dated March 10, 2014 in its entirety, and “relied on the statements of that letter” when she
27 decided to allow premiums to be deducted from her SDCCU account, thereby entering
28 into an agreement with Transamerica. FAC, ¶ 7. That letter provides in relevant part:

1 Under the [Transamerica] plan, you will continue to be insured for similar
2 AD&D coverage using [Transamerica's] standard provisions, definitions,
3 filed language, and forms, and your beneficiary remains the same as you
previously elected.

4 Please review the enclosed [Transamerica] Certificate of Insurance carefully.
5 The amount of your AD&D coverage under the new plan with [Transamerica]
6 is the same as under your current plan. Please note that the benefits provided
under the new plan may be different than under your current plan.

7
8 RJN, Exhibit B.

9 California courts are “unwilling to impose on the insured so onerous a burden as
10 would automatically defeat any agent’s liability for misrepresentation.” *See Bock v.*
11 *Hansen*, 225 Cal. App. 4th 215, 231 (Ct. App. 2014) (citing *Clement v. Smith*, 16 Cal.
12 App. 4th 39, 45 (Ct. App. 1993)). However, an insured that received some notice or
13 warning is not able to rely on an agent’s representations of coverage without
14 independently verifying the accuracy of those representations. *See id.* at 232 (citing
15 *Clement*, 16 Cal. App. 4th at 45) (“[a]bsent some notice or warning, an insured should
16 be able to rely on an agent’s representations of coverage without independently verifying
17 the accuracy of those representations by examining the relevant policy provisions”).
18 Here, even though Transamerica stated the two policies were “similar,” it also notified
19 and warned Plaintiff that “the benefits provided under the new plan *may be different* than
20 under your current plan.” RJN, Exhibit B (emphasis added). As such, Plaintiff’s reliance
21 on the representation that the policies were “similar” is not justifiable when the entire
22 language of the letter is taken into context.

23 In addition, Plaintiff inadequately pleads the remaining elements of negligent
24 misrepresentation. For example, she alleges Transamerica “had no reasonable ground for
25 believing” the alleged misrepresentations and “knew, or should have known,” that the
26 Transamerica policy contained an exclusion based on sickness which did not exist in the
27 Hartford policy and that the language in the aviation exclusions were different. FAC, ¶
28 19. She also alleges Transamerica “made these misrepresentations with the intent to

1 defraud Plaintiff and induce Plaintiff to enter” into the insurance contract “and to not
2 purchase alternative insurance which Plaintiff could have done if she had been told the
3 truth.” *Id.* These allegations are conclusory and are merely recitations of the elements of
4 negligent misrepresentation devoid of factual enhancement. *See Iqbal*, 556 U.S. at 678.

5 Because Plaintiff inadequately alleges a material misrepresentation and justifiable
6 reliance, and because the remaining negligent misrepresentation allegations are
7 conclusory, the Court **GRANTS** Transamerica’s motion and dismisses Plaintiff’s
8 negligent misrepresentation claim.

9 ***B. Concealment***

10 ““The required elements for fraudulent concealment are (1) concealment or
11 suppression of a material fact; (2) by a defendant with a duty to disclose the fact to the
12 plaintiff; (3) the defendant intended to defraud the plaintiff by intentionally concealing or
13 suppressing the fact; (4) the plaintiff was unaware of the fact and would not have acted as
14 he or she did if he or she had known of the concealed or suppressed fact; and (5) plaintiff
15 sustained damage as a result of the concealment or suppression of the fact.”” *Hambrick*
16 *v. Healthcare Partners Med. Grp., Inc.*, 238 Cal. App. 4th 124, 162 (Ct. App. 2015)
17 (quoting *Graham v. Bank of America, N.A.* 226 Cal. App. 4th 594, 606 (Cal. Ct. App.
18 2014)).

19 Transamerica argues Plaintiff’s concealment cause of action must be dismissed
20 because it did not conceal or suppress any material facts. MTD at 26. Plaintiff alleges
21 that Transamerica “concealed the following facts it was bound to disclose:” (1) the
22 differences between Transamerica’s aviation exclusion and The Hartford’s aviation
23 exclusion; and (2) Transamerica’s sickness exclusion which was not an exclusion under
24 the Hartford policy. FAC, ¶ 20; *see also* Oppo. at 16. In addition, Plaintiff alleges
25 Transamerica “concealed that, in order for Plaintiff to have the same coverage Plaintiff
26 had under [The Hartford] group AD&D policy, Plaintiff would have to purchase different
27 insurance.” *Id.*

28

1 However, Plaintiff also alleges that Transamerica “sent Plaintiff a certificate of
2 insurance relating to the [Transamerica] group AD&D plan” with the March 10, 2014
3 letter. FAC, ¶ 7. “Plaintiff read the letter sent to her by [Transamerica],” which indicated
4 that benefits under the Transamerica policy may be different than benefits under the
5 Hartford policy, and notified her that she should review the attached Transamerica
6 Certificate. FAC, ¶ 7; *see also* RJN, Exhibit B. Based on these allegations,
7 Transamerica could not have concealed that “in order for Plaintiff to have the same
8 coverage” she would have to purchase different insurance because Transamerica
9 disclosed to Plaintiff that the plans may be different. *See* FAC, ¶ 20; *see also* RJN,
10 Exhibit B. Moreover, while Plaintiff alleges that she did not compare the Transamerica
11 Certificate to the Hartford Certificate, she does not allege that she did not read the
12 Transamerica Certificate. FAC, ¶ 7. As discussed herein, the Transamerica Certificate
13 specifically lists the sickness and aviation exclusions. FAC, Exhibit 1. As a result,
14 Plaintiff cannot contend that Transamerica concealed the exclusions or their differences
15 because the letter informed her there may be differences between the policies and the
16 Transamerica Certificate specifically disclosed the exclusions at issue. FAC, Exhibit 1.

17 Further, Plaintiff’s concealment allegations are a conclusory, formulaic recitation
18 of the elements of fraudulent concealment. *See Iqbal*, 556 U.S. at 678. Plaintiff’s
19 concealment cause of action states in relevant part:

20 [Transamerica] concealed . . . [t]he terms of THE INSURANCE
21 CONTRACT, including the sickness exclusion and the aviation exclusion
22 provision, were different from the provisions of certificate of insurance issued
23 to Plaintiff by THE HARTFORD and which THE INSURANCE
24 CONTRACT replaced [and] that, in order for Plaintiff to have the same
25 coverage Plaintiff had under THE HARTFORD AD&D policy, Plaintiff
26 would have to purchase different insurance which was not offered by
27 [Transamerica]. [Transamerica] concealed these facts with the intent to
28 defraud Plaintiff and to induce Plaintiff to enter into THE INSURANCE
CONTRACT and not to purchase other insurance. Plaintiff was unaware of
the concealed facts alleged herein and would have as an individual purchased
an equivalent amount of insurance covering the possible accidental death of
her husband resulting from his activities as a pilot and his existing health

1 condition if she had known the concealed facts. Plaintiff did not learn of, and
2 could not reasonably have learned of, the [concealed] facts . . . until December
3 12, 2016 when Defendant TRANSAMERICA denied Plaintiff’s claim for
4 accidental death benefits for Moshe Ofir’s death and based its denial on the
aviation exclusion in THE INSURANCE CONTRACT.

5 FAC, ¶ 20. In summation, Plaintiff’s concealment cause of action is inadequate. As a
6 result, the Court **GRANTS** Transamerica’s motion and dismisses Plaintiff’s concealment
7 cause of action.

8 **LEAVE TO AMEND**

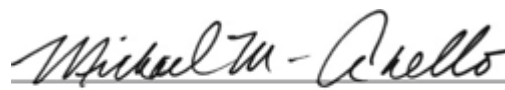
9 Federal Rule of Civil Procedure 15(a) states that “‘leave to amend shall be freely
10 given when justice so requires.’” *See Schmidt v. PNC Bank, NA*, 591 Fed. App’x 642,
11 643 (9th Cir. 2015) (quoting *Carvalho v. Equifax Info. Servs., LLC*, 629 F.3d 876, 892
12 (9th Cir. 2010)). While liberally granted, “leave to amend is not automatic.” *Id.* It is
13 within the discretion of district courts to deny leave to amend based on various factors,
14 including futility of amendment and repeated failure to cure deficiencies by amendments
15 previously allowed. *Id.*; *Star Patrol Enters. v. Saban Entm’t, Inc.*, 129 F.3d 127 (9th Cir.
16 1997). Here, based on the nature of the deficiencies, amendment appears futile. Further,
17 Plaintiff has failed to correct the deficiencies noted by the Court previously when it
18 allowed Plaintiff leave to amend her original Complaint. Accordingly, the Court declines
19 to allow Plaintiff further amendment.

20 **CONCLUSION**

21 For the foregoing reasons, the Court **GRANTS** Defendant Transamerica’s motion
22 to dismiss and **DISMISSES** Plaintiff’s claims with prejudice and without leave to amend.
23 *See Knappenberger*, 566 F.3d at 942. The Clerk of Court is instructed to enter judgment
24 accordingly and to close this case.

25 **IT IS SO ORDERED.**

26 Dated: March 6, 2018

27 

28 Hon. Michael M. Anello
United States District Judge