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5 Attorneys for Plaintiff PROASSURANCE

6 CASUALTY COMPANY

7  
8 **UNITED STATES DISTRICT COURT**  
9 **CENTRAL DISTRICT OF CALIFORNIA**

10 PROASSURANCE CASUALTY  
11 COMPANY,

12 Plaintiff,

13 vs.

14 SHLOMO RECHNITZ; BRIUS  
15 MANAGEMENT COMPANY, INC.;  
16 BRIUS, LLC; VERDUGO VALLEY  
17 SKILLED NURSING & WELLNESS  
CENTRE, LLC; CARL POPULUS; and  
DOES 1 - 50, inclusive,

18 Defendants.

Case No. 2:16-cv-08603

**COMPLAINT FOR RESCISSION,  
RECOUPMENT AND  
DECLARATORY RELIEF**

19  
20 Plaintiff ProAssurance Casualty Company (“ProAssurance”) alleges as  
21 follows:

22 **I.**

23 **THE PARTIES**

24 1. Plaintiff ProAssurance Casualty Company (“ProAssurance”) is a  
25 corporation organized under the laws of the State of Michigan with its principal  
26 place of business in Michigan.

27 2. Defendant Shlomo Rechnitz is a citizen and resident of the State of  
28 California.

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1           3. Defendant Brius Management Company, Inc. is a corporation  
2 incorporated under the laws of the State of California with its principal place of  
3 business in Los Angeles, California.

4           4. Defendant Brius, LLC, is a limited liability company registered under  
5 the laws of the State of California and has its principal place of business in the City  
6 of Los Angeles, California.

7           5. Defendant Verdugo Valley Skilled Nursing & Wellness Centre, LLC  
8 (“Verdugo Valley”), is a limited liability company registered under the laws of the  
9 State of California and has its principal place of business in Montrose, California.  
10 Shlomo Rechnitz, Brius Management Company, Inc., Brius, LLC, and Verdugo  
11 Valley shall collectively be referred to as “Defendants.”

12           6. Defendant Carl Populus is an individual who is a citizen of the State of  
13 California and a resident of the County of Los Angeles. Populus has been named as  
14 a defendant in this Complaint so that he will be bound by any judgment entered by  
15 the Court.

16           7. The true names and capacities, whether individual, corporate, associate  
17 or otherwise, of defendant Does 1- 50, inclusive, are unknown to ProAssurance, and  
18 ProAssurance therefore sues said defendants by such fictitious names.  
19 ProAssurance is informed and believes and thereon alleges that each of the  
20 defendants designated herein as a Doe is legally responsible in some manner to  
21 ProAssurance as it relates to the claims set forth in this Complaint. ProAssurance  
22 will seek leave to amend its Complaint to show the true names and identities of the  
23 Doe defendants when they have been ascertained.

24           8. Each named defendant and each fictitiously named defendant were the  
25 agents, partners, joint venturers, predecessors, successors, parents, subsidiaries,  
26 and/or employees of each of the other defendants and were at all times herein  
27 mentioned acting within the scope and course of such agency, employment or  
28 relationship.

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**II.**

**JURISDICTION AND VENUE**

9. The subject matter of this Court is based upon 28 U.S.C. § 1332 due to the complete diversity of citizenship among the parties, and the amount in controversy exceeds \$75,000, exclusive of interest and costs.

10. Venue is proper in this District pursuant to 28 U.S.C. § 1391(a)(2) because a substantial part of the events or omissions giving rise to the claims that are the subject of this Complaint occurred within this District.

**III.**

**NATURE OF THE ACTION**

11. This action arises out of the tender of defense and indemnity of Defendants to ProAssurance of the action entitled Carl Populus vs. Shlomo Rechnitz, et al., Los Angeles County Superior Court, Case No.: BC 577489 (the “Underlying Action”).

13. ProAssurance accepted the Defendants’ tender of defense of the Underlying Action pursuant to a reservation of rights of the terms and conditions of the LONG TERM CARE PROFESSIONAL LIABILITY INSURANCE AND COMMERCIAL GENERAL LIABILITY INSURANCE POLICY LTC 9410815, effective January 15, 2015 – January 15, 2016, issued by ProAssurance to its named insured, Verdugo Valley (the “ProAssurance Policy”).

14. ProAssurance alleges that the ProAssurance Policy should be rescinded based upon material omissions and misrepresentations by Verdugo Valley to ProAssurance in the application for the ProAssurance Policy. Had ProAssurance known the true facts, set forth below, it would not have issued Verdugo Valley the ProAssurance Policy.

15. ProAssurance alleges that it has no duty to defend or indemnify Defendants in the Underlying Action based upon the material omissions and misrepresentations in the application for the ProAssurance Policy, as well as in

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1 applications for prior policies, entitling ProAssurance to a rescission of the  
2 ProAssurance Policy.

3 16. Upon Judgment by the Court approving rescission of the ProAssurance  
4 Policy, ProAssurance will promptly return the full premium paid by Verdugo Valley  
5 for the ProAssurance Policy.

6 17. Upon Judgment by the Court approving rescission of the ProAssurance  
7 Policy, and a declaration that ProAssurance has no duty to defend or indemnify  
8 Defendants in the Underlying Action, ProAssurance requests the Court order that  
9 ProAssurance is entitled to recoupment from Defendants of all defense fees and  
10 costs it has paid in their defense in the Underlying Action according to proof.

11 **IV.**

12 **THE UNDERLYING ACTION**

13 18. On April 2, 2015, Carl Populus filed the Underlying Action against  
14 Defendants alleging causes of action for violation of residents rights under Health &  
15 Safety Code § 1430(b), wrongful death (negligence), dependent adult abuse and  
16 neglect (Welfare & Institutions Code § 15600, *et seq.*) and wrongful death  
17 (dependent adult abuse & neglect). The complaint in the Underlying Action is  
18 attached to this Complaint as Exhibit “A.”

19 19. In the Underlying Action, Carl Populus alleges that he is the brother of  
20 James Populus, who was admitted to Verdugo Valley, a skilled nursing facility, on  
21 April 8, 2014, with a diagnosis of pneumonia. Populus alleges that over the next  
22 few months, he made several requests to have his brother James evaluated by a  
23 pulmonologist, as his breathing condition continued to decline. However, the  
24 facility allegedly made no attempt to address these requests and failed to provide  
25 care by having James’ respiratory problems evaluated or treated.

26 20. Carl Populus alleges that James was not seen by a doctor from April 8,  
27 2014, to at least June 2, 2014, and possibly not until the date of his discharge on  
28 August 24, 2014. Carl alleges that on August 24, 2014, at 6:20 a.m. a nurse

1 documented that James was not verbally responsive, was lethargic, congested and  
2 had labored breathing, a weak pulse, and an increased heart rate. The facility did  
3 not call 911 to obtain the necessary emergency medical services until 7:43 a.m.  
4 James was transferred by ambulance to Verdugo Hills Hospital, where he was  
5 intubated and put on a breathing machine. James died on August 30, 2014.

6 V.

7 THE PROASSURANCE POLICY

8 21. The ProAssurance Policy contains the following insuring agreement for  
9 professional liability:

10 The company will pay on behalf of the **insured** all sums  
11 which the **insured** shall become legally obligated to pay as  
12 **damages** and/or **claims expense** because of **bodily injury**  
13 to which this insurance applies arising out of a  
14 **professional incident** in the course of performing  
15 **professional health care services** to a **resident**.

16 22. The ProAssurance Policy contains the following provision regarding  
17 representations by Verdugo Valley in its application for the policy:

18 15. **REPRESENTATIONS:**

19 By acceptance of this policy the **named insured** agrees  
20 that the statements in the Declarations including  
21 Additional Declarations, Supplemental Declarations and  
22 Application Materials are the **named insured's**  
23 agreements and representations, that this policy is issued  
24 in reliance upon the truth and completeness of such  
25 representations and that this policy embodies all  
26 agreements existing between the **named insured** and the  
27 Company or any of its agents relating to this insurance.

28 VI.

THE CITATION

23. On June 11, 2009, the California Department of Public Health issued a  
Class AA Citation to Verdugo Valley based upon violations of California Code of

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1 Regulations Sections 72311(a) and 72515(b) relating to the patient care of Charles  
2 Morrill (the “Citation”). Verdugo Valley was initially assessed a penalty of  
3 \$100,000, which it appealed and was eventually reduced to \$45,000, which it paid.  
4 A copy of the Class AA Citation and the disposition are attached as Exhibit “B.”

5 24. At no time prior to the issuance of the ProAssurance Policy did  
6 Defendants advise ProAssurance of this Citation.

7 **VII.**

8 **THE INDICTMENT**

9 25. On June 24, 2011, Verdugo Valley was indicted by the Grand Jury of  
10 the State of California in and for the County of Los Angeles and accused of the  
11 crime of dependent adult neglect resulting in death, in violation of Penal Code §  
12 368(b)(1), a felony. (the “Indictment.”) A copy of the Indictment is attached as  
13 Exhibit “C.”

14 26. The Indictment alleges that on and between January 22, 2009 and  
15 February 28, 2009, in the County of Los Angeles, Verdugo Valley “did, under  
16 circumstances and conditions likely to produce great bodily harm and death,  
17 knowingly and willfully cause and permit Charles Morrill, a dependent adult, to  
18 suffer, and inflicted thereon, unjustifiable physical pain and mental suffering and,  
19 having the care and custody of said person, willfully caused and permitted him to be  
20 placed in the situation in which his health was endangered, and knew and reasonably  
21 should have known that said person, Charles Morrill, was a dependent adult.” The  
22 Grand Jury further charged that Verdugo Valley proximately caused the death of  
23 Charles Morrill.

24 27. At no time prior to the issuance of the ProAssurance Policy did  
25 Defendants advise ProAssurance of the Indictment.

26 **VIII.**

27 **THE SUPERSEDING INJUNCTION**

28 28. On December 2, 2011, the Los Angeles County Superior Court agreed

1 to dismiss the Indictment under Penal Code § 1385 based upon the joint stipulation  
2 for injunctive relief entered into by the State of California and Verdugo Valley.

3 29. On August 1, 2012, the State of California and Verdugo Valley entered  
4 into a Superseding Injunction to replace the Injunction previously issued on  
5 December 2, 2011 (the “Superseding Injunction”). The Superseding Injunction is  
6 attached as Exhibit “D.”

7 30. In the Superseding Injunction, among other things, Verdugo Valley  
8 agreed to the following:

- 9 (a) Comply with all building and fire codes and applicable business  
10 and printing requirements;
- 11 (b) Comply with all abuse reporting requirements;
- 12 (c) Review and revise policies and procedures relating to the  
13 admission of residents;
- 14 (d) Develop and implement in-house service training for appropriate  
15 management of residents with developmental disabilities;
- 16 (e) Certification and approval for a Special Treatment Program in  
17 mental health;
- 18 (f) Take reasonable steps to retain psychiatric technicians and  
19 implement a plan to have at least one psychiatric technician  
20 present at all times;
- 21 (g) Comply with state-mandated staffing requirements;
- 22 (h) Implement a plan within sixty (60) days to have the facility  
23 monitored through video surveillance;
- 24 (i) Appoint a compliance officer;
- 25 (j) Perform internal audits and reviews;
- 26 (k) Choose an independent monitor to monitor compliance with the  
27 Superseding Injunction and make reports to the State of  
28 California on a quarterly basis;

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1 (l) Agree to an expedited procedure for enforcement of the  
2 injunction in the case of violations.

3 31. At no time prior to the issuance of the ProAssurance Policy did  
4 Defendants advise ProAssurance of the Superseding Injunction.

5 **IX.**

6 **THE ARREST**

7 32 As a result of the death of James Populus, the Bureau of Medi-Cal  
8 Fraud and Elder Abuse conducted an investigation of the circumstances surrounding  
9 his death. On September 18, 2014, Anthony Baumgart, Special Agent for the  
10 Bureau of Medi-Cal Fraud & Elder Abuse, arrested nurse supervisor Connie  
11 Policarpio at Verdugo Valley on charges of dependent-adult abuse for her delay in  
12 calling 911 and making false entries in the medical records (the “Arrest”).

13 33. At no time prior to the issuance of the ProAssurance Policy did  
14 Defendants advise ProAssurance that nurse supervisor Connie Policarpio had been  
15 arrested on charges of dependent-adult abuse for her delay in calling 911 and  
16 making false entries in medical records relating to the death of James Populus.

17 **X.**

18 **THE APPLICATION FOR THE PROASSURANCE POLICY**

19 34. The application for the ProAssurance policy, attached as Exhibit “E,”  
20 asked the following questions:

21 Section III – Claims/History

22 If you answer yes to questions 1 and 2 below, attach a  
23 detailed explanation on Appendix A; if you answer yes to  
24 question 3 below, attach a detailed explanation on  
appendix B.

25 ...

26 2. Have you been the subject of investigatory or  
27 disciplinary proceedings or reprimanded by an  
administrative or governmental agency or  
professional association?

28 3. Are you aware of any claims or suits brought

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1                                    against you or any circumstances which may result  
2                                    in a claim or suit being made or brought against  
3                                    you?  
4                                    Verdugo Valley answered “No” to the above questions, concealing the Class AA  
5                                    Citation, the Indictment, the Superseding Injunction, and the Arrest set forth above.

6                                    35.     ProAssurance issued prior policies to Verdugo Valley, effective  
7                                    January 15, 2013 – January 15, 2014 and January 15, 2014 – January 15, 2015. The  
8                                    applications for these policies contained the same questions set forth above and  
9                                    Verdugo Valley provided the same answers. At no time prior to the issuance of the  
10                                   ProAssurance Policy did Defendants advise ProAssurance of the Citation,  
11                                   Indictment, the Superseding injunction, or the Arrest described above.

12                                   36.     The application for the ProAssurance Policy contained a Sexual  
13                                   Misconduct Coverage Supplemental Application that asked the following question:

14    2.     Has the applicant or any employee, volunteer, or  
15    other person working for the applicant ever been arrested  
16    or convicted of a crime? If yes, provide full details:

17                                   Verdugo Valley answered this question “No,” failing to disclose the arrest of the  
18                                   supervising nurse in connection with the treatment and death of James Populus.

19    **FIRST CAUSE OF ACTION**  
20    **( Rescission )**

21                                   37.     ProAssurance hereby incorporates and realleges the allegations in  
22                                   paragraphs 1 – 36 of this Complaint as if fully set forth herein.

23                                   38.     In its application for the ProAssurance Policy, Verdugo Valley  
24                                   represented that it had not been the subject of an investigatory or disciplinary  
25                                   proceeding or reprimanded by an administrative or governmental agency or  
26                                   professional association. Defendants failed to disclose to ProAssurance the Citation,  
27                                   the Indictment, the Superseding Injunction, and the Arrest, as set forth above. These  
28                                   were material omissions and misrepresentations by Defendants to ProAssurance. If  
ProAssurance had known that the California Department of Public Health had issued  
the Citation, had assessed an initial \$100,000 penalty, and that Verdugo Valley had

1 paid a final penalty of \$45,000, had been Indicted by the State of California and had  
2 agreed to the Superseding Injunction, and that a supervising nurse had been arrested  
3 in connection with the death of James Populus, ProAssurance would not have issued  
4 the ProAssurance Policy.

5 39. In its application for the ProAssurance Policy, Verdugo Valley  
6 represented that it was not aware of any claims or suits brought against it or any  
7 circumstances which might result in a claim or suit being made or brought against it.  
8 Defendants failed to disclose to ProAssurance the Citation, Indictment, the  
9 Superseding Injunction, and the Arrest, as set forth above. These were material  
10 omissions and misrepresentations by Defendants to ProAssurance. If ProAssurance  
11 had known that the California Department of Public Health had issued the Citation,  
12 had assessed an initial \$100,000 penalty, and that Verdugo Valley had paid a final  
13 penalty of \$45,000, had been Indicted by the State of California and had agreed to the  
14 Superseding Injunction, and that a supervising nurse had been arrested in connection  
15 with the death of James Populus, ProAssurance would not have issued the  
16 ProAssurance Policy.

17 40. The failure of Defendants to disclose to ProAssurance the Citation and  
18 penalty, the Indictment, the Superseding Injunction and the Arrest were material to  
19 ProAssurance's decision to renew and issue the ProAssurance policy. If  
20 ProAssurance had known that the California Department of Public Health had issued  
21 the Citation, had assessed an initial \$100,000 penalty, and that Verdugo Valley had  
22 paid a final penalty of \$45,000, had been Indicted by the State of California and had  
23 agreed to the Superseding Injunction, and that a supervising nurse had been arrested  
24 in connection with the death of James Populus, ProAssurance would not have issued  
25 the ProAssurance Policy effective January 15, 2015 – January 15, 2016.

26 41. Based upon Defendants' material misrepresentations and concealment,  
27 set forth above, the ProAssurance policy is void *ab initio* as of the date of its inception,  
28 January 15, 2015.

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1 42. ProAssurance is entitled to a judgment rescinding the ProAssurance  
2 policy *ab initio*, as of the date of its inception January 15, 2015.

3 43. Upon Judgment by the Court approving rescission of the ProAssurance  
4 policy, ProAssurance will promptly return the full premium paid by Verdugo Valley  
5 for the ProAssurance policy.

6 44. Upon Judgment by the Court approving rescission of the ProAssurance  
7 policy, ProAssurance is also entitled to a Judgment declaring that it has no duty to  
8 defend or indemnify Defendants in the Underlying Action.

9 **SECOND CAUSE OF ACTION**

10 **(Recoupment of Defense Fees and Costs)**

11 45. ProAssurance hereby incorporates and realleges the allegations in  
12 paragraphs 1 - 44 of this Complaint as if fully set forth herein.

13 46. Upon Judgment by the Court approving rescission of the ProAssurance  
14 policy, and Judgment declaring that ProAssurance has no duty to defend or  
15 indemnify Defendants in the Underlying Action, ProAssurance is entitled to recoup  
16 from Defendants all defense fees and costs it has paid in their defense in the  
17 Underlying Action according to proof.

18 **THIRD CAUSE OF ACTION**

19 **(Declaratory Relief)**

20 47. ProAssurance hereby incorporates and realleges the allegations in  
21 paragraph 1- 46 of this Complaint as if fully set forth herein.

22 48. There is at present an actual controversy between ProAssurance and  
23 Defendants concerning their respective rights and obligations under the  
24 ProAssurance policy and ProAssurance’s request for rescission of that policy based  
25 upon concealment and material misrepresentations in the application,  
26 ProAssurance’s duty to defend and/or indemnify Defendants in the Underlying  
27 Action, and ProAssurance’s right to obtain recoupment of all defense fees and costs  
28 paid on behalf of Defendants in the Underlying Action should the Court rescind the

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1 ProAssurance policy. Pro Assurance contends that:

2 a. The ProAssurance policy should be rescinded *ab initio*, based  
3 upon Defendants’ misrepresentation and concealment of facts relating to the  
4 Citation and \$45,000 penalty, the Indictment, the Superseding Injunction and the  
5 Arrest, as set forth above;

6 b. If the ProAssurance Policy is rescinded *ab initio*, ProAssurance  
7 has no duty to defend or indemnify Defendants in the underlying action;

8 c. If the ProAssurance Policy is rescinded *ab initio*, ProAssurance  
9 is entitled to recoup all defense fees and costs paid on behalf of Defendants in the  
10 Underlying Action.

11 49. ProAssurance requests this Court declare the rights and obligations of  
12 the parties with regard to ProAssurance’s request to rescind the policy *ab initio*,  
13 ProAssurance’s duty to defend and indemnify Defendants in the Underlying Action,  
14 and ProAssurance’s right to recoup all defense fees and costs paid in the Underlying  
15 Action.

16 WHEREFORE, ProAssurance prays for Judgment against Defendants as  
17 follows:

18 1. That the Court declare that the ProAssurance policy is rescinded and  
19 *void ab initio*;

20 2. That the Court declare that ProAssurance has no duty to defend or  
21 indemnify Defendants in the Underlying Action;

22 3. That the Court order that ProAssurance is entitled to recoupment of all  
23 defense fees and costs paid in the defense of Defendants in the Underlying Action  
24 according to proof;

25 4. That the Court adjudicate the rights and obligations of Does 1-50 with  
26 respect to the matters set forth in the Complaint;

27 5. That the Court award ProAssurance its attorney’s fees and costs in this  
28 action, as applicable and provided by law;

