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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CALIFORNIA DAIRIES INC.,

Plaintiff,

v.

RSUI INDEMNITY CO.,

Defendant.

1:08-CV-00790 OWW GSA

ORDER RE DEFENDANT'S MOTION
TO DISMISS THE FIRST AMENDED
COMPLAINT (DOC. 26)

I. INTRODUCTION

This case concerns a directors and officers liability insurance policy ("the Policy") issued to Plaintiff, California Dairies, Inc. ("CDI"), by RSUI Indemnity Company ("RSUI"). RSUI denied coverage for claims asserted against CDI in a class action filed in Tulare County Superior Court, *Gonzalez v. CDI*, Case No. 08-226450 ("Gonzalez" or the "Underlying Action"), in which employees and former employees of CDI allege CDI violated various provisions of the California Labor Code ("CLC") concerning wages, hours, and related matters.

RSUI initially denied coverage based on three different exclusionary provisions. Upon the insured's request for

1 reconsideration, RSUI based the denial solely on Exclusion 4 of
2 the Policy, which excludes coverage for "violation of any of the
3 responsibilities, obligations or duties imposed by ... the Fair
4 Labor Standards Act ... or any similar provision of federal,
5 state or local statutory law or common law...." CDI then filed
6 this action seeking declaratory relief regarding coverage under
7 the Policy. The initial complaint was dismissed with leave to
8 amend. Doc. 24, filed Mar. 20, 2009. Plaintiffs filed a First
9 Amended Complaint ("FAC"), adding some new allegations,
10 particularly pertaining to the issues of waiver and the
11 applicability of Exclusion 7. Doc. 25, filed Apr. 9, 2009.
12 Defendant again moves to dismiss. Doc. 26.

14 II. BACKGROUND

15 A. The Underlying Gonzalez Lawsuit.

16 On January 4, 2008, Walter Gonzalez filed a class action
17 complaint against CDI in Tulare County Superior Court. FAC ¶7.
18 The Gonzalez Complaint alleges causes of action for:
19 1) failure to pay minimum wage; 2) failure to pay regular and
20 overtime wages; 3) failure to provide mandated meal periods or
21 pay an additional hour of wages; 4) failure to provide mandated
22 rest periods or pay an additional hour of wages; 5) failure to
23 reimburse employees for costs incurred to acquire and/or maintain
24 company-required uniforms; 6) knowing and intentional failure to
25 comply with itemized wage statement provisions; and 7) failure to
26 timely pay wages due at termination. *Id.* The Gonzalez Complaint
27 also alleges that CDI violated California's Unfair Competition
28 Law, Cal. Bus. Prof. Code § 17200, *et seq.*, as a result of CDI's

1 alleged violations of the CLC. *Id.* No violation of the federal
2 Fair Labor Standards Act ("FLSA") was alleged. *See id.*

3
4 B. The Relevant Terms and Conditions of the Policy.

5 CDI is the named Insured, as the "Insured Organization"
6 under the Policy. FAC ¶5. Under the Policy's Insuring Agreement
7 set forth at Section I(C), RSUI agrees:

8 With the Insured Organization that if a Claim for a
9 Wrongful Act is first made against the Insured
10 Organization during the Policy Period and reported in
11 accordance with SECTION V. - CONDITIONS, C. Notice of
12 Claim and Circumstance of this policy, the Insurer will
13 pay on behalf of the Insured Organization all Loss the
14 Insured Organization is legally obligated to pay.

15 See Defendant's Request to Submit Evidence, Doc. 11, at p. 32 of
16 44 (underlined text is bold in original).¹

17 The Policy does not contain a duty to defend, but instead
18 contains a duty to reimburse defense costs. *Id.* at p. 11 of 44
19 (Advancement of Defense Expenses; Insurer Has No Duty to Defend).

20 "Insured" is defined at Section III(G) of the Policy as "any
21 Insured Organization and/or any Insured Person." *Id.* at p. 34 of
22 44. "Insured Organization" is defined as "the organization named
23 in Item 1 of the Declarations Page...." *Id.* (Section III(H)).

24 "Insured Person" is "any past, present or future director,
25 officer, trustee, Employee, volunteer, or any committee member of
26

27 ¹ Although generally a district court may not consider
28 material beyond the pleadings on a Rule 12(b)(6) motion, a
document to which the complaint specifically refers may be
considered if its authenticity is not questioned. *Inlandboatmens*
Union of Pac. v. Dutra Group., 279 F.3d 1075, 1083 (9th Cir.
2002). Here, as the authenticity of the Policy presented by
Defendants is not questioned, it may be considered.

1 a duly constituted committee of the Insured Organization." *Id.*
2 (Section III(I)). "Employee" is defined as "any past, present or
3 future employee of the Insured Organization..." *Id.* (Section
4 II(D)). "Employment Practices Claim" is "any Claim alleging an
5 Employment Practices Wrongful Act." *Id.* at p. 33 of 44 (Section
6 II(E)).

7 An "Employment Practices Wrongful Act" is defined at Section
8 II(F) of the Policy as any actual or alleged:

- 9 1. Wrongful dismissal, discharge or termination
10 (either actual or constructive) of employment,
including breach of an implied employment contract;
- 11 2. Employment related harassment (including but not
12 limited to sexual harassment);
- 13 3. Employment-related discrimination (including but
14 not limited to discrimination based on age, gender,
race, color, national origin, religion, sexual
orientation or preference, pregnancy or disability);
- 15 4. Employment-related retaliation;
- 16 5. Employment-related misrepresentation to an
17 Employee or applicant for employment with the Insured
organization;
- 18 6. Libel, slander, humiliation, defamation or
invasion of privacy (solely when employment related);
- 19 7. Wrongful failure to promote;
- 20 8. Wrongful deprivation of career opportunity,
21 wrongful demotion or negligent Employee evaluation,
including giving defamatory statements in connection
22 with an Employee reference;
- 23 9. Employment related wrongful discipline;
- 24 10. Failure to grant tenure or practice privileges;
- 25 11. Failure to provide or enforce adequate and
consistent organization policies or procedures relating
26 to employment;
- 27 12. Violations of the following federal laws (as
28 amended) including all regulations promulgated
thereunder: a. Family and Medical leave Act of 1993; b.
Americans with Disabilities Act of 1992 (ADA); c. Civil

1 Rights Act of 1991; d. Age Discrimination in Employment
2 Act of 1967 (ADEA), including the Older Workers Benefit
3 Protection Act of 1990; or e. Title VII of the Civil
4 Rights Law of 1964 (as amended) and 42 U.S.C. Section
5 1983, as well as the Pregnancy Discrimination Act of
6 1978;

7 13. Violation of an Insured Person's civil rights
8 relating to any of the above; or

9 14. Negligent hiring, retention, training or
10 supervision, infliction of emotional distress, failure
11 to provide or enforce adequate or consistent
12 organizational policies and procedures, or violation of
13 an individual's civil rights, when alleged in
14 conjunction with respect to any of the foregoing items
15 1 through 13.

16 *Id.*

17 C. The Relevant Exclusions of the Policy.

18 The Policy also contains a number of specific exclusions,
19 two of which are at issue in this case. The Policy provides that
20 the Insurer shall not be liable to make any payment for "Loss" in
21 connection with any "Claim" made against the "Insured":

22 4. For violation of any of the responsibilities,
23 obligations or duties imposed by the Employees
24 Retirement Income Security Act of 1974, *the Fair Labor*
25 *Standards Act* (except the Equal Pay Act), the National
26 Labor Relations Act, the Worker Adjustment and
27 Retraining Notification Act, the Consolidated Omnibus
28 Budget Reconciliation Act, the Occupational Safety &
Health Act, any rules or regulations of any of the
foregoing promulgated thereunder, and amendments
thereto *or any similar provision of federal, state or*
local statutory law or common law; provided this
EXCLUSION shall not apply to Loss arising from a Claim
for employment related retaliation.

7. Brought by or on behalf of any Insured,
except:... (b) an Employment Practices Claim brought by
an Insured Person..."

Id. at p. 35 of 44 (underlined words bolded in original; italic
emphasis added). The Policy defines "Loss" at Section II(K) as

1 follows:

2 Loss means damages (including back pay and front pay),
3 settlement, judgments (including pre- and post-judgment
4 interest on a covered judgment) and Defense Expenses.
5 Loss (other than Defense Expenses) shall not
6 include:... 5. Any amounts owed as wages to any
7 Employee, other than front pay or back pay; 6. Civil or
8 criminal fines or penalties.

9 *Id.* at p. 34 of 44 (underlined words bolded in original).

10 D. Tender of Claim and Response Thereto.

11 On February 15, 2008, CDI tendered the *Gonzalez* action to
12 RSUI pursuant to the Policy. FAC ¶13. On March 3, 2008, RSUI
13 denied coverage, asserting three specific exclusionary
14 provisions. FAC ¶14. RSUI did not assert Exclusion 7 as a basis
15 to deny coverage. *Id.* On May 5, 2008, CDI requested that RSUI
16 reconsider its denial of the claim. *Id.* at ¶15. On May 14,
17 2008, RSUI conceded that two of the previously asserted
18 exclusionary provisions (grounds) would not apply, absent a final
19 and specific adjudication of certain conduct as against CDI. FAC
20 ¶17. The only exclusionary provision RSUI relied on to deny
21 coverage outright for the claim was Exclusion 4. *Id.*

22 E. March 20, 2009 Dismissal With Leave to Amend.

23 In response to Defendant's initial motion to dismiss, Doc.
24 10, the decision examined whether RSUI lawfully relied upon
25 Exclusion 4 to deny coverage, reasoning that Exclusion 4 bars any
26 claim based upon a CLC provision similar to those of the FLSA.
27 Doc. 24 at 11-24. RSUI's motion to dismiss was granted without
28 leave to amend as to the first (failure to pay plaintiffs a
minimum wage as required under CLC §§ 1197, 1194 and 1194.2),

1 second (failure to pay regular and overtime wages in violation of
2 CLC §§ 200, 204, 500, 510, 512, and 1194, and section 3 of
3 Industrial Welfare Commission ("IWC") Wage Order 8), third and
4 fourth (failure to provide meal and rest periods or pay an
5 additional hour of wages based on CLC §§ 226.7 and 512, and
6 Section 11 of IWC Wage Order 8) causes of action in the *Gonzalez*
7 complaint. *Id.* at 25-35. RSUI's motion to dismiss was denied as
8 to the applicability of Exclusion 4 to the fifth (failure to
9 reimburse employees for costs incurred to acquire and/or maintain
10 company-required uniforms in violation of CLC § 2802 and Section
11 9 of Wage Order 8), sixth (failure to comply with the itemized
12 wage statement provisions contained in CLC §§ 226, 1174(d), and
13 1174.5, as well as Section 7 of Wage Order 8), and seventh
14 (failure to pay wages due at termination, a claim founded upon
15 CLC §§ 201, 202, and 203) causes of action in the *Gonzalez*
16 complaint. *Id.* at 35-39.

17 As to the applicability of Exclusion 7, CDI's argument was
18 rejected that RSUI should be estopped from asserting Exclusion 7
19 to deny coverage, because Exclusion 7 was not mentioned in the
20 insurer's final denial of coverage letter. To demonstrate
21 estoppel:

22 "(1) [T]he party to be estopped must know the facts;
23 (2) he must intend that his conduct shall be acted
24 upon, or must so act that the party asserting the
25 estoppel had the right to believe that it was so
26 intended; (3) the party asserting the estoppel must be
27 ignorant of the true state of facts; and, (4) he must
28 rely upon the conduct to his injury". *Spray, Gould &*
Bowers v. Assoc. Intern. Ins. Co., 71 Cal. App. 4th
1260, 1262 (1990). Application of estoppel in the
insurance context typically arises from some
affirmative, misleading conduct on the part of the
insurer. *Spray*, 71 Cal. App. 4th at 1268. Absent such
affirmative conduct, estoppel may arise from silence

1 when the party has a duty to speak, such as where a
2 legal obligation requires disclosure. *Id.*

3 *Id.* at 40.

4 Although CDI alleged that RSUI violated California's Fair
5 Claims Practices Regulations by failing to articulate all bases
6 for denial of coverage in the final denial letter, *id.* at 40-42,
7 this did not establish estoppel, as it only establishes RSUI's
8 failure to disclose:

9 To establish estoppel, CDI must also demonstrate that
10 it reasonably relied to its detriment on the assertions
11 RSUI made in its final denial of coverage. The
12 Complaint contains no relevant allegations, and RSUI
13 argues that CDI cannot allege reasonable detrimental
14 reliance because RSUI denied coverage from the outset
15 on alternative grounds.

16 *Id.* at 42. CDI requested, and was granted, an opportunity to
17 amend its complaint, to "consistent with Federal Rule of Civil
18 Procedure 11, allege the remaining elements of estoppel." *Id.*
19 At oral argument CDI's counsel acknowledged it was not pursuing
20 an estoppel theory.

21 A footnote also addressed CDI's alternative argument that
22 RSUI's failure to assert Exclusion 7 in its final denial of
23 coverage decision constitutes a waiver of its rights to do so in
24 this litigation:

25 To demonstrate waiver, the insured bears the burden of
26 proof to demonstrate that the carrier intentionally
27 relinquished a right or that the carrier's acts are so
28 inconsistent with an intent to enforce the right as to
induce a reasonable belief that such right has been
relinquished. *Waller v. Truck Insurance Exchange,
Inc.*, 11 Cal.4th 1, 33-34 (1995). The *Waller* Court
held:

holding that an insurer waives defenses not
asserted in its initial denial of a duty to defend
would be inconsistent with established waiver
principles by erroneously implying an intent to
relinquish contract rights where no such intent

1 existed. Such a conclusion would contradict the
2 holdings of the majority of California and
3 sister-state cases addressing the waiver issue.

4 *Id.* at 33. CDI fails to explain how its waiver theory
5 can be reconciled with the holding in *Waller*.

6 *Id.* at 42-43 n.3. Additionally, anti-waiver language is included
7 in the original letter. Doc. 26-2, Ex. B, at 3.

8 In the absence of estoppel or waiver, CDI's argument was
9 rejected that the allegations in the *Gonzalez* complaint
10 concerning denial of mandated meal periods, rest periods,
11 reimbursement for employee uniforms, and wages due at
12 termination, involve "Employment Practices Wrongful Acts" because
13 they "reflect employment misrepresentations to employees that
14 Plaintiff would comply with the law regarding such benefits,"
15 and/or "involve a failure to enforce adequate or consistent
16 organizational polices relating to employment." *Id.* at 45.

17 CDI's assertion that the CLC violations alleged in the
18 *Gonzalez* complaint should be viewed as "employment-
19 related misrepresentations" is a strained
20 interpretation of the Policy language in light of the
21 facts presented. The *Gonzalez* action is limited to
22 allegations based upon the failure to pay wages and
23 related benefits. The *Gonzalez* complaint does not
24 allege any misrepresentations by CDI, nor is
25 misrepresentation a required element of any of the
26 *Gonzalez* causes of action, all of which relate to wage
27 and hour conditions of employment.

28 The same conclusion applies to CDI's argument that the
29 *Gonzalez* allegations involve failures "to enforce
30 adequate or consistent organization[al] polices
31 relating to employment." The underlying complaint does
32 not mention or concern internal organizational policies
33 at CDI. CDI's interpretation of this language in the
34 exception to Exclusion 7 is without limitation, as the
35 Exclusion 7 exception would be triggered for any claims
36 brought by employees against CDI, because any allegedly
37 wrongful act by an employer vis-a-vis an employee could
38 be the subject of an internal organizational policy.
39 This is not what the Policy intended, or it would have
40 included a blanket exception from Exclusion 7 for
41 claims brought by Employees against an Insured.

1 The Gonzalez Complaint contains no allegations related
2 to any misrepresentations, failures to provide and/or
3 enforce company rules, negligence, or civil rights
4 violations. The exception for "Employment Practices
5 Wrongful Acts" provided under Exclusion 7 does not here
6 apply. Accordingly, Exclusion 7 bars coverage for all
7 of the CLC claims in the Gonzalez lawsuit, as they are
8 between Insureds and do not qualify as "Employment
9 Practices Wrongful Acts."

10 *Id.* at 45-46. RSUI's motion to dismiss based on the application
11 of Exclusion 7 was granted with leave to amend.

12 Finally, the eighth cause of action in *Gonzalez*, which
13 alleges that CDI violated the Unfair Competition Law ("UCL") as a
14 result of the failure to comply with various provisions of the
15 CLC, was dismissed with leave to amend. *Id.* at 47-48. Because
16 the UCL "borrows" violations from other laws by making them
17 independently actionable as unfair competitive practices, *Korea*
18 *Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1144
19 (2003), any "Loss" under the UCL would "necessarily result from
20 any underlying CLC violations." As RSUI was absolved of the
21 responsibility to provide coverage for the other causes of action
22 in the *Gonzalez* lawsuit, no UCL claim could exist. *Id.*

23 III. STANDARD OF DECISION

24 A motion to dismiss brought under Federal Rule of Civil
25 Procedure 12(b) (6) "tests the legal sufficiency of a claim."
26 *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). To survive
27 a motion to dismiss, a complaint must "contain sufficient factual
28 matter, accepted as true, to 'state a claim to relief that is
plausible on its face.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937,
1949 (May 18, 2009) (quoting *Bell Atl. Corp v. Twombly*, 550 U.S.

1 544, 570 (2007)).

2 A claim has facial plausibility when the plaintiff
3 pleads factual content that allows the court to draw
4 the reasonable inference that the defendant is liable
5 for the misconduct alleged. The plausibility standard
6 is not akin to a "probability requirement," but it asks
7 for more than a sheer possibility that defendant has
8 acted unlawfully. Where a complaint pleads facts that
9 are "merely consistent with" a defendant's liability,
10 it "stops short of the line between possibility and
11 plausibility of 'entitlement to relief.'"

12 *Id.* (citing *Twombly*, 550 U.S. 556-57). Dismissal also can be
13 based on the lack of a cognizable legal theory. *Balistreri v.*
14 *Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). In
15 deciding whether to grant a motion to dismiss, the court "accept
16 [s] all factual allegations of the complaint as true and draw[s]
17 all reasonable inferences" in the light most favorable to the
18 nonmoving party. *TwoRivers v. Lewis*, 174 F.3d 987, 991 (9th Cir.
19 1999); see also *Rodriguez v. Panayiotou*, 314 F.3d 979, 983 (9th
20 Cir. 2002).

21 IV. ANALYSIS

22 A. Equitable Estoppel.

23 In response to Defendant's first motion to dismiss, CDI's
24 argued that RSUI should be estopped from asserting Exclusion 7 as
25 a basis for denying coverage, because Exclusion 7 was not
26 mentioned in the insurer's final denial of coverage letter. To
27 demonstrate estoppel:

28 "(1) [T]he party to be estopped must know the facts;
(2) he must intend that his conduct shall be acted
upon, or must so act that the party asserting the
estoppel had the right to believe that it was so
intended; (3) the party asserting the estoppel must be
ignorant of the true state of facts; and, (4) he must
rely upon the conduct to his injury". *Spray, Gould &*
Bowers v. Assoc. Intern. Ins. Co., 71 Cal. App. 4th
1260, 1262 (1990). Application of estoppel in the
insurance context typically arises from some

1 affirmative, misleading conduct on the part of the
2 insurer. *Spray*, 71 Cal. App. 4th at 1268. Absent such
3 affirmative conduct, estoppel may arise from silence
when the party has a duty to speak, such as where a
legal obligation requires disclosure. *Id.*

4 Doc. 24 at 40. CDI's allegations that RSUI violated California's
5 Fair Claims Practices Regulations by failing to articulate all
6 bases for denial of coverage in the final denial letter, *id.* at
7 40-42, are legally insufficient to establish estoppel:

8 To establish estoppel, CDI must also demonstrate that
9 it reasonably relied to its detriment on the assertions
10 RSUI made in its final denial of coverage. The
11 Complaint contains no relevant allegations, and RSUI
argues that CDI cannot allege reasonable detrimental
reliance because RSUI denied coverage from the outset
on alternative grounds.

12 *Id.* at 42. CDI requested, and was granted leave to amend its
13 complaint, to, "consistent with Federal Rule of Civil Procedure
14 11, allege the remaining elements of estoppel." *Id.* Plaintiff's
15 counsel concedes that no estoppel-related allegations are
16 contained in the FAC. Defendants are not estopped from advancing
17 Exclusion 7 as a defense to coverage.

18
19 B. Implied waiver.

20 The FAC contains new allegations that Defendant impliedly
21 waived its right to rely on Exclusion 7. Defendant maintains
22 that this defense fails as a matter of law.

23 Waiver exists when:

24 To demonstrate waiver, the insured bears the burden of
25 proof to demonstrate that the carrier intentionally
26 relinquished a right or that the carrier's acts are so
27 inconsistent with an intent to enforce the right as to
28 induce a reasonable belief that such right has been
relinquished. *Waller v. Truck Insurance Exchange,*
Inc., 11 Cal. 4th 1, 33-34 (1995)[:]

1 holding that an insurer waives defenses not
2 asserted in its initial denial of a duty to defend
3 would be inconsistent with established waiver
4 principles by erroneously implying an intent to
5 relinquish contract rights where no such intent
6 existed. Such a conclusion would contradict the
7 holdings of the majority of California and
8 sister-state cases addressing the waiver issue.

9 *Id.* at 33.

10 Doc. 24 at 42-43 n.3 (emphasis added).² The cases cited by CDI
11 articulate the doctrine in similar terms. See Doc. 32 at 5
12 (citing, e.g., *Ins. Co. of the West v. Haralambos Beverage Co.*,
13 195 Cal. App. 3d 1308, 1321 (1987), overruled on other grounds,
14 *Vandenberg v. Superior Court*, 21 Cal. 4th 815 (1999)).

15 CDI's implied waiver argument relies heavily, if not
16 exclusively, on the California Fair Claim Practices Regulations
17 ("CFCPRs"), 10 Cal. Code Regs. § 2695.1 et seq. 10 Cal. Code
18 Regs. § 2695.7(b)(1) provides:

19 Where an insurer denies or rejects a first party claim
20 in whole or in part, it shall do so in writing and
21 shall provide to the claimant a statement listing all
22 basis for such rejection or denial and the factual and
23 legal basis for each reason given for such rejection or
24 denial which is then within the insurer's knowledge.

25 ² CDI suggests that any reliance on *Waller* is misplaced,
26 because the insured in *Waller* did not argue implied waiver. Doc.
27 32 at 8-9. CDI is incorrect that *Waller's* general articulation
28 of the requirements for an implied waiver is dicta. Whether an
insured impliedly waived grounds not advanced in its denial
letter was squarely at issue in *Waller*. See 11 Cal. 4th at 31-
32. CDI also complains that the insured in *Waller* did not argue
that waiver arose as a result of the insurer's failure to comply
with California's Fair Claim Practices Regulations ("CFCPRs").
Although the CFCPRs were not raised in *Waller*, this does not
undermine *Waller's* articulation of the general rule "that waiver
requires the insurer to intentionally relinquish its right to
deny coverage and that denial of coverage on one ground does not,
absent clear and convincing evidence to suggest otherwise,
impliedly waive grounds not stated in the denial." *Id.* at 31.

1 Where an insurer's denial of a first party claim, in
2 whole or in part, is based on a specific policy
3 provision, condition or exclusion, the written denial
4 shall include reference thereto and provide an
5 explanation of the application of the provision,
6 condition or exclusion to the claim. Every insurer that
7 denies or rejects a third party claim in whole or in
8 part, or disputes liability or damages shall do so in
9 writing.

6 (emphasis added). Here, it is alleged that RSUI failed to
7 include Exclusion 7 in its final denial letter. FAC at ¶23.
8 Assuming the truth of the allegations in the FAC, it must be
9 accepted for purposes of this motion that Defendant did not
10 comply with the CFCPRs, which impose upon an Insurer a duty to
11 articulate all bases for denying coverage in writing. The issue
12 is whether, under the facts alleged, violating³ the CFCPRs
13 constitutes an implied waiver of any bases for denial of coverage
14 not articulated in writing to the insured?

15 CDI first cites a series of cases that stand for the
16 unremarkable proposition that an insurer's violation of the
17 CFCPRs is evidence that the insurer breached its duties to the
18 insured. For example, *Shade Foods, Inc. v. Innovative Products*
19 *Sales & Marketing, Inc.*, 78 Cal. App. 4th 847, 916 (2000), held
20 that a violation of California Insurance Code § 790.03, which is
21 the statute implemented by the CFCPRs, "may evidence the

22
23 ³ The CFCPRs promulgated "certain minimum standards for
24 the settlement of claims which when knowingly violated on a
25 single occasion or performed with such frequency as to indicate a
26 general practice [] constitute[s] an unfair claims settlement
27 practice..." 10 Cal. Code Regs. §2695.1(a)(1). An insurer
28 violates the CFCPRs whenever it "knowingly" commits an act which
breaches one of the regulations. "Knowingly committed" means
"performed with actual, implied or constructive knowledge,
including but not limited to, that which is implied by operation
of law." 10 Cal. Code Regs. § 2695.2(1).

1 insurer's breach of its duty to its insured and any implied
2 covenant of good faith and fair dealing....” See also *Rattan v.*
3 *United Services Auto Assoc.*, 84 Cal. App. 4th 715, 723-24 (2000)
4 (holding that a violation of the CFCPRs “may be used by a jury to
5 infer a lack of reasonableness by the insurer”). But, this does
6 not necessarily mean a CFCPR violation constitutes a waiver of
7 those grounds not articulated as required by the regulations.

8 CDI next cites *Spray, Gould & Bowers v. Associated*
9 *International Insurance Co.*, 71 Cal. App. 4th 1260 (1999), in
10 which the insured sued his business interruption insurer for
11 breach of contract, bad faith and declaratory relief after the
12 insurer denied coverage for an earthquake loss that occurred two
13 years earlier. *Id.* at 1264. The trial court granted summary
14 judgment in favor of the insurer, based on the one year statute
15 of limitation period set forth in the policy, rejecting the
16 insured's argument that the insurer should not be entitled to
17 rely on the statute of limitations defense because the insurer
18 failed to properly notify the insured of this limitation, as the
19 insurer was required to do under the applicable CFCPR. *Id.* at
20 1264-65.

21 The Court of Appeal reversed, holding that an insurer's
22 direct violation of regulations issued by the California
23 Insurance Commissioner may provide a basis for asserting estoppel
24 against an insurer's assertion of a contract limitation defense.
25 *Id.* at 1268-69. The Court of Appeals reasoned that “mere silence
26 will not create an estoppel, unless there is a duty to speak,”
27 and found that the CFCPRs impose such a duty:

1 The regulation imposes on insurers an unmistakable duty
2 to advise its claimant insureds of applicable claim
time limits....

3 *Id.* at 1269. *Spray* also reiterated that to establish equitable
4 estoppel, the insured must establish more than the existence of a
5 the duty to speak and the failure to comply with that duty:

6 Four elements must ordinarily be proved to establish an
7 equitable estoppel: (1) The party to be estopped must
8 know the facts; (2) he must intend that his conduct
9 shall be acted upon, or must so act that the party
asserting the estoppel had the right to believe that it
was so intended; (3) the party asserting the estoppel
must be ignorant of the true state of facts; and, (4)
he must rely upon the conduct to his injury.

10 *Id.* at 1268 (internal quotations and citations omitted).

11 As discussed above, CDI has not alleged ignorance and/or
12 detrimental reliance. Although *Spray* supports the application of
13 equitable estoppel where all four elements are present, it does
14 not support the existence of a per se waiver whenever the CFCPRs
15 are violated. CDI provides no legal support for its assertion
16 that an insured's failure to assert a particular defense results
17 in a waiver, absent establishment of all the other elements of
18 equitable estoppel.

19 Finally, CDI argues that its allegations satisfy the implied
20 waiver standard articulated in *Waller*, which requires conduct "so
21 inconsistent with an intent to enforce the right as to induce a
22 reasonable belief that such right has been relinquished." The
23 FAC alleges:

24 18. At the time RSUI made its final decision to deny
25 coverage it was aware that, with respect to the
26 handling and adjustment of claims in the state of
27 California, it was obligated to comply with the
28 mandatory provisions of the California Fair Claim
Practices and Settlement Act, 10 C.C.R. §2695.1, et
seq.

1 19. Upon information and belief, CALIFORNIA DAIRIES
2 alleges that at the time RSUI made its final decision
3 to deny coverage, it was aware that the California Fair
4 Claims and Settlement Practices Regulations,
5 specifically 10 C.C.R. §2695.7(b)(1) required RSUI to
6 set forth in writing to CALIFORNIA DAIRIES a statement
7 listing all bases for such denial, which would include
8 reference to any and all potentially applicable
9 coverage provisions of its policy.

6 20. Upon information and belief, CALIFORNIA DAIRIES
7 alleges that at the time RSUI made its final decision
8 to deny coverage, it was aware that under 10 C.C.R.
9 §2695.6(b), it was required to provide thorough and
10 adequate training regarding the California Fair Claims
11 and Settlement Practices Regulations to its agents
12 involved with the handling and adjustment of claims so
13 that they would be fully and completely familiar with
14 all provisions of the regulations.

11 21. Upon information and belief, CALIFORNIA DAIRIES
12 alleges that because of the mandatory provisions
13 provided by the California Fair Claims and Settlement
14 Practices Regulations, RSUI trained its representatives
15 involved with the handling and adjusting of claims,
16 that the failure to set forth specifically all coverage
17 provisions potentially applicable as a basis for
18 denying coverage, in the written denial letter mandated
19 by the California Insurance Regulations, would and
20 could constitute a waiver of RSUI's right to
21 subsequently assert additional coverage provisions as a
22 basis to deny coverage.

17 22. Upon information and belief, CALIFORNIA DAIRIES
18 alleges that based on the mandatory provisions of the
19 California Insurance Regulations, RSUI trained its
20 representatives involved with the handling and
21 adjustment of insurance claims, that it would be
22 inconsistent with RSUI's understanding of the
23 regulations and RSUI's rights, for RSUI to attempt to
24 assert a denial of coverage on a basis which RSUI knew
25 or should have known at the time it issued its final
26 written denial letter, but which RSUI failed to assert
27 or identify at the time it issued its final written
28 denial letter.

24 Assuming, *arguendo*, the truth of these allegations, if RSUI
25 trained its representatives that failure to include all
26 potentially applicable coverage provisions in a denial letter
27 could constitute a waiver of RSUI's right to subsequently assert
28 any omitted bases for denying coverage, RSUI's failure to include

1 Exclusion 7 in the final denial letter arguably constitutes
2 conduct "so inconsistent with an intent to enforce" Exclusion 7
3 so as to "induce a reasonable belief that such right has been
4 relinquished."

5 RSUI rejoins that CDI could not have reasonably believed
6 that RSUI intended to relinquish its right to assert Exclusion 7
7 because the denial letter specifically states that "nothing in
8 this letter nor any action taken by us in connection with this
9 matter should be construed as an admission of coverage or waiver
10 of any right RSUI might have at law or under the policy." See
11 Doc. 26-2, Ex. B, at 3.

12 "Whether there has been a waiver is usually regarded as a
13 question of fact to be determined by the jury...." *Old Republic*
14 *Ins. Co v. FSR Brokerage, Inc.*, 80 Cal. App. 4th 666, 679 (2000).
15 In deciding whether to grant a motion to dismiss, the court
16 "accept [s] all factual allegations of the complaint as true and
17 draw[s] all reasonable inferences" in the light most favorable to
18 the nonmoving party. *TwoRivers*, 174 F.3d at 991. RSUI is
19 correct that a court is not "required to accept as true
20 allegations that are merely conclusory, unwarranted deductions of
21 fact, or unreasonable inferences." See *Sprewell v. Golden State*
22 *Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). Here, however, it
23 is not unreasonable to infer from the allegations of the FAC that
24 a waiver occurred. Although the allegations are not particularly
25 robust, as they are on information and belief, the complaint
26 "contain[s] sufficient factual matter, accepted as true, to
27 'state a claim to relief that is plausible on its face.'" *Iqbal*,
28 129 S. Ct. at 1949.

1 Defendants' motion to dismiss the claim for coverage based
2 on waiver is DENIED.

3
4 C. Employment Practices Wrongful Acts.

5 CDI revisits the prior ruling on Exclusion 7's
6 applicability. CDI's previous argument was rejected that the
7 allegations in the *Gonzalez* complaint concerning denial of
8 mandated meal periods, rest periods, reimbursement for employee
9 uniforms, and wages due at termination, involve "Employment
10 Practices Wrongful Acts" because they "reflect employment
11 misrepresentations to employees that Plaintiff would comply with
12 the law regarding such benefits," and/or "involve a failure to
13 enforce adequate or consistent organizational polices relating to
14 employment." *Id.* at 45.

15 CDI's assertion that the CLC violations alleged in the
16 *Gonzalez* complaint should be viewed as "employment-
17 related misrepresentations" is a strained
18 interpretation of the Policy language in light of the
19 facts presented. The *Gonzalez* action is limited to
20 allegations based upon the failure to pay wages and
related benefits. The *Gonzalez* complaint does not
allege any misrepresentations by CDI, nor is
misrepresentation a required element of any of the
Gonzalez causes of action, all of which relate to wage
and hour conditions of employment.

21 The same conclusion applies to CDI's argument that the
22 *Gonzalez* allegations involve failures "to enforce
23 adequate or consistent organization[al] polices
24 relating to employment." The underlying complaint does
25 not mention or concern internal organizational policies
26 at CDI. CDI's interpretation of this language in the
27 exception to Exclusion 7 is without limitation, as the
28 Exclusion 7 exception would be triggered for any claims
brought by employees against CDI, because any allegedly
wrongful act by an employer vis-a-vis an employee could
be the subject of an internal organizational policy.
This is not what the Policy intended, or it would have
included a blanket exception from Exclusion 7 for
claims brought by Employees against an Insured.

1 The *Gonzalez* Complaint contains no allegations related
2 to any misrepresentations, failures to provide and/or
3 enforce company rules, negligence, or civil rights
4 violations. The exception for "Employment Practices
5 Wrongful Acts" provided under Exclusion 7 does not here
6 apply. Accordingly, Exclusion 7 bars coverage for all
7 of the CLC claims in the *Gonzalez* lawsuit, as they are
8 between Insureds and do not qualify as "Employment
9 Practices Wrongful Acts."

10 *Id.* at 45-46. The basis for this ruling was the complete lack of
11 evidence that RSUI ever made any such "misrepresentations" or
12 that it had any such company rules.

13 CDI now argues that the Policy provides a "blanket exception
14 to Exclusion 7 for claims brought by employees against
15 Plaintiff." Doc. 32 at 10. CDI misreads the Policy language,
16 which provides, at Exclusion 7, that the Insurer shall not be
17 liable to make any payment for "Loss" in connection with any
18 "Claim" made against the "Insured":

19 7. Brought by or on behalf of any Insured,
20 except:... (b) an Employment Practices Claim brought by
21 an Insured Person..."

22 This is a blanket exclusion for claims brought "by or on behalf
23 of any Insured," which includes present and former employees,
24 unless the claim is an "Employment Practices Claim," a term of
25 art that is specifically defined as "any Claim alleging an
26 Employment Practices Wrongful Act." *Id.* at p. 33 of 44 (Section
27 II(E)). An "Employment Practices Wrongful Act" is defined at
28 Section II(F) of the Policy as any actual or alleged:

- 29 1. Wrongful dismissal, discharge or termination
30 (either actual or constructive) of employment,
31 including breach of an implied employment contract;
- 32 2. Employment related harassment (including but not
33 limited to sexual harassment);
- 34 3. Employment-related discrimination (including but
35 not limited to discrimination based on age, gender,

1 race, color, national origin, religion, sexual
orientation or preference, pregnancy or disability);

2 4. Employment-related retaliation;

3 5. Employment-related misrepresentation to an
4 Employee or applicant for employment with the Insured
organization;

5 6. Libel, slander, humiliation, defamation or
6 invasion of privacy (solely when employment related);

7 7. Wrongful failure to promote;

8 8. Wrongful deprivation of career opportunity,
9 wrongful demotion or negligent Employee evaluation,
including giving defamatory statements in connection
with an Employee reference;

10 9. Employment related wrongful discipline;

11 10. Failure to grant tenure or practice privileges;

12 11. Failure to provide or enforce adequate and
13 consistent organization policies or procedures relating
to employment;

14 12. Violations of the following federal laws (as
15 amended) including all regulations promulgated
thereunder: a. Family and Medical leave Act of 1993; b.
16 Americans with Disabilities Act of 1992 (ADA); c. Civil
Rights Act of 1991; d. Age Discrimination in Employment
17 Act of 1967 (ADEA), including the Older Workers Benefit
Protection Act of 1990; or e. Title VII of the Civil
18 Rights Law of 1964 (as amended) and 42 U.S.C. Section
1978, as well as the Pregnancy Discrimination Act of
1978;

19 13. Violation of an Insured Person's civil rights
20 relating to any of the above; or

21 14. Negligent hiring, retention, training or
22 supervision, infliction of emotional distress, failure
to provide or enforce adequate or consistent
23 organizational polices and procedures, or violation of
an individual's civil rights, when alleged in
24 conjunction with respect to any of the foregoing items
1 through 13.

25 *Id.* A claim brought by an Insured employee against an Insured
26 employer is only covered by the Policy if that claim falls within
27 the definition of an Employment Practices Wrongful Act.

28 CDI also revisits the prior ruling on the application of the

1 Employment Practices Wrongful Act definitions. First, CDI
2 suggests that "if it is determined that [CDI] is liable to
3 plaintiffs in the underlying action, it will necessarily result
4 from the situation of the employees not being paid in accordance
5 with standard company policies and procedures relating to the
6 employment of the individual," thereby triggering Section
7 II(F) (14), which provides coverage for claims of "failure to
8 provide or enforce adequate or consistent organizational policies
9 and procedures ... when alleged in conjunction with respect to
10 any of the foregoing items 1 through 13." This argument was
11 directly addressed and rejected by the March 20, 2009 Decision:

12 The underlying complaint does not mention or concern
13 internal organizational policies at CDI. CDI's
14 interpretation of this language in the exception to
15 Exclusion 7 is without limitation, as the Exclusion 7
16 exception would be triggered for any claims brought by
17 employees against CDI, because any allegedly wrongful
act by an employer vis-a-vis an employee could be the
subject of an internal organizational policy. This is
not what the Policy intended, or it would have included
a blanket exception from Exclusion 7 for claims brought
by Employees against an Insured.

18 Doc. 26 at 46. CDI alleges no new facts or authorities that
19 warrant reconsideration of this ruling.

20 The FAC also alleges:

21 Plaintiff GONZALEZ was hired pursuant to an employment
22 contract promising, implicitly or explicitly, pay in
conformance with the terms of the contract and
California wage and hour requirements.

23 FAC ¶9. CDI alleges that by virtue of this allegation, the
24 Underlying Action should be deemed to "include allegations that
25 [CDI] made misrepresentations to its employees relating to the
26 terms, conditions and circumstances of their employment with
27 [CDI]," FAC ¶10, thereby triggering Section II(F) (5) of the
28

1 policy, which requires coverage for actions based upon
2 "[e]mployment-related misrepresentation to an Employee or
3 applicant for employment with the Insured organization." This
4 argument was also rejected by the March 20, 2009 Decision:

5 CDI's assertion that the CLC violations alleged in the
6 *Gonzalez* complaint should be viewed as "employment-
7 related misrepresentations" is a strained
8 interpretation of the Policy language in light of the
9 facts presented. The *Gonzalez* action is limited to
10 allegations based upon the failure to pay wages and
11 related benefits. The *Gonzalez* complaint does not
12 allege any misrepresentations by CDI, nor is
13 misrepresentation a required element of any of the
14 *Gonzalez* causes of action, all of which relate to wage
15 and hour conditions of employment.

16 ***

17 The *Gonzalez* Complaint contains no allegations related
18 to any misrepresentations, failures to provide and/or
19 enforce company rules, negligence, or civil rights
20 violations. The exception for "Employment Practices
21 Wrongful Acts" provided under Exclusion 7 does not here
22 apply. Accordingly, Exclusion 7 bars coverage for all
23 of the CLC claims in the *Gonzalez* lawsuit, as they are
24 between Insureds and do not qualify as "Employment
25 Practices Wrongful Acts."

26 Doc. 24 at 45-46. As to Employment Practices Wrongful Act No. 5,
27 the misrepresentation must be specific and it must be made to an
28 existing or prospective employee. Federal Rule of Civil
Procedure 9(b) requires allegations specifically describing the
allege misrepresentation(s), and when, by, and to whom it was
made. After an opportunity to amend, Plaintiff has not alleged a
particular or sufficient misrepresentation to an existing or
prospective employee. Nothing in the FAC or CDI's opposition
justifies a different conclusion here. The mention in the
Underlying Complaint of the existence of employment contracts
does not transform the causes of action in the underlying
complaint into ones arising out of an employment-related

1 misrepresentation.

2 Defendants motion to dismiss the assertions of Employment
3 Practices Wrongful Act exceptions No. 5 and 14 to avoid the
4 applicability of Exclusion 7 is GRANTED.

5
6 V. CONCLUSION

7 For the reasons set forth above, Defendant's motion to
8 dismiss is GRANTED IN PART AND DENIED IN PART. Exclusion 7
9 applies to bar coverage for all of the claims in the Underlying
10 Action. Nothing in the First Amended Complaint warrants
11 reconsideration of that ruling. Similarly, Plaintiff has failed
12 to allege the elements of estoppel. However, Plaintiff has
13 sufficiently alleged that RSUI, by failing to mention Exclusion 7
14 in its final denial letter, may have waived its right to assert
15 Exclusion 7 to deny coverage in this case. This claim alone
16 survives.

17 Defendant shall submit a form of order consistent with this
18 memorandum decision within five (5) days of electronic service.

19
20 SO ORDERED

21 Dated: August 11, 2009

22 /s/ Oliver W. Wanger
23 Oliver W. Wanger
24 United States District Judge
25
26
27
28