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

MARIANA NELSON, on behalf of  
himself and all others similarly  
situated,

Plaintiff,

vs.

STANDARD INSURANCE  
COMPANY, an Oregon company;  
COUNTRYWIDE FINANCIAL  
CORPORATION GROUP LONG  
TERM DISABILITY PLAN;  
COUNTRYWIDE FINANAICAL  
CORP., and DOES 1-50, inclusive,

Defendants.

CASE NO. 13cv188-WQH-MDD  
ORDER

HAYES, Judge:

The matter before the Court is the Motion to Dismiss Plaintiff's First Amended Complaint ("Motion to Dismiss"), filed by all Defendants. (ECF No. 34).

**I. Background**

On January 23, 2013, Plaintiff Mariana Nelson initiated this action by filing a Complaint in this Court. (ECF No. 1).

**A. Allegations of the Complaint**

Beginning in January 2004, Plaintiff was employed as a loan officer with Defendant Countrywide Financial Corp. *Id.* ¶¶ 1, 5. Plaintiff received long term

1 disability coverage under the Countrywide Financial Corporation Group Long Term  
2 Disability Plan, policy number 643382 (“Group Policy”), issued by Defendant Standard  
3 Insurance Company (“Standard”). *Id.* ¶¶ 1, 6. The Group Policy provides:

4           DISABILITIES SUBJECT TO LIMITED PAY PERIODS

5           A. Mental Disorders, Substance Abuse, and Other Limited Conditions.

6                       Payment of [long term disability (‘LTD’)] Benefits is limited to 24  
7 months during your entire lifetime for a Disability caused or contributed  
8 to by any one or more of the following, or medical or surgical treatment  
9 of one or more of the following:

- 10           1. Mental Disorders;
- 11           2. Substance Abuse; or
- 12           3. Other Limited Conditions. ...

13                       Mental Disorder means any mental, emotional, behavioral,  
14 psychological, personality, cognitive, mood, or stress-related abnormality,  
15 disorder, disturbance, dysfunction or syndrome, regardless of cause  
(including any biological or biochemical disorder or imbalance of the  
16 brain) or the presence of physical symptoms. Mental Disorder includes,  
17 but is not limited to, bipolar affective disorder, organic brain syndrome,  
18 schizophrenia, psychotic illness, manic depressive illness, depression and  
depressive disorders, anxiety and anxiety disorders. ...

19                       Other Limited Conditions means chronic fatigue conditions..., any  
20 allergy or sensitivity to chemicals or the environment..., chronic pain  
21 conditions..., carpal tunnel or repetitive motion syndrome,  
22 temporomandibular joint disorder, or craniomandibular joint disorder.

23 *Id.* ¶ 8.

24           In April 2007, Plaintiff ceased working due to disability. *Id.* ¶ 9. Standard does  
25 not dispute Plaintiff’s disability under the Group Policy. *Id.* On May 30, 2008,  
26 Plaintiff submitted a claim seeking long term disability benefits going back to April  
27 2007. *Id.* ¶ 10. On July 10, 2008, Standard accepted the claim and paid Plaintiff  
28 disability benefits. *Id.* ¶ 11.

          In January 2010, Standard informed Plaintiff that “LTD benefits have been  
terminated as of December 31, 2009 because [Plaintiff] no longer satisfies the  
Definition of Disability as stated in the Group Coverage.” *Id.* ¶ 12. Plaintiff requested  
that Standard review the termination of benefits. *Id.* ¶ 14. On November 18, 2010,  
Plaintiff sent Standard a letter informing Standard that “she disagreed that her inability

1 to work stemmed from mental illness, but even if it did, Standard’s practice of limiting  
2 her coverage to two years due to mental illness was discriminatory and contrary to  
3 California law.” *Id.* ¶ 17.

4 On October 10, 2011, Standard issued its final decision, denying Plaintiff’s long  
5 term disability claim after its administrative review unit evaluated the December 31,  
6 2009 decision to close the claim. *Id.* ¶ 32. The basis of Standard’s final denial was  
7 solely because “[t]he group policy limits the payment of LTD benefits to a maximum  
8 of 24 months, during your entire lifetime, for certain conditions...” and “[Plaintiff]’s  
9 diagnosis of Major Depression is considered to be a Mental Disorder and is subject to  
10 the 24 month maximum benefit period limitation.” *Id.* Standard concluded,  
11 “[t]herefore, after 24 months we cannot consider [Plaintiff’s] Major Depression or  
12 another mental disorder or another limited condition when determining whether  
13 [Plaintiff] is disabled, even if her Major Depression or other limited condition is still  
14 disabling.” *Id.*

15 In the original Complaint, Plaintiff asserted the following causes of action: (1)  
16 Claim for Benefits pursuant to 29 U.S.C. § 1132(a)(1)(B); (2) Claim for Equitable  
17 Relief pursuant to 29 U.S.C. § 1132(a)(3); (3) Breach of Fiduciary Duty pursuant to 29  
18 U.S.C. §§ 1104(a)(1), 1132(a)(3); and (4) Declaratory Relief. Each of Plaintiff’s four  
19 claims in the original Complaint arose from her contention that the Group Policy’s  
20 provision entitled, “Disabilities Subject to Limited Pay Periods,” is unenforceable  
21 because Standard has not complied with California Insurance Code section 10144.<sup>1</sup> *See*  
22 ECF No. 1 ¶¶ 53, 59, 67, 73. Plaintiff brought the action on behalf of herself and a  
23 putative class consisting of all California residents who are participants in a group plan

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24  
25 <sup>1</sup> Section 10144 provides:  
26 No insurer issuing, providing, or administering any contract of individual  
27 or group insurance providing ... disability benefits ... shall refuse to insure,  
28 or refuse to continue to insure, or limit the amount, extent, or kind of  
coverage available to an individual, or charge a different rate for the same  
coverage solely because of a physical or mental impairment, except where  
the refusal, limitation or rate differential is based on sound actuarial  
principles or is related to actual and reasonably anticipated experience.  
Cal. Ins. Code § 10144.

1 administered by Standard which contains the same “Disabilities Subject to Limited Pay  
2 Periods” provision as the one in the Group Policy. *Id.* ¶ 33.

3 **B. Order on Motion to Dismiss**

4 On July 17, 2013, the Court issued an order granting Defendants’ Motion to  
5 Dismiss the original Complaint. (ECF No. 23). The Court found that Plaintiff failed to  
6 state a claim upon which relief may be granted because the Complaint “lack[ed] a  
7 cognizable legal theory.” *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th  
8 Cir. 1990). The Court stated:

9 [T]he reasoning of *Monterastelli v. Standard Ins. Co.* [No. CV 12-1669  
10 (AGRx), 2012 WL 8679843 (C.D. Cal. June 12, 2012)] and *Townsend v.*  
11 *Thomson Reuters Group Disability Income Ins. Plan* [867 F. Supp. 2d  
12 1085 (C.D. Cal. 2012)] [is] persuasive. As the Court of Appeals for the  
13 Ninth Circuit stated in the context of a challenge to a similar disability  
14 policy provision under the Americans with Disabilities Act, “[i]nsurers  
15 have historically and consistently made distinctions between mental and  
16 physical illness in offering health and disability coverage.” *Weyer v.*  
17 *Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1116 (9th Cir. 2000)  
(quotation omitted). “[H]ad Congress intended to control which coverages  
had to be offered by employers, it would have spoken more plainly  
because of the well-established marketing process to the contrary.” *Id.*  
Accepting all facts alleged in the Complaint as true, the Group Policy’s  
provision entitled, ‘Disabilities Subject to Limited Pay Periods,’ does not  
violate California Insurance Code § 10144.

(ECF No. 23 at 9). The Court dismissed the original Complaint without prejudice.

18 **C. First Amended Complaint**

19 On October 31, 2013, Plaintiff filed the First Amended Complaint (“FAC”),  
20 which alleges five claims. (ECF No. 31). Claims 1-4 of the FAC re-alleges the theory  
21 underlying Claims 1-4 of the original Complaint that the Group Policy violates  
22 California Insurance Code § 10144. Claim 5 alleges an individual claim for benefits  
23 under 29 U.S.C. § 1132(a)(1)(B), “without regard to the potential applicability of the  
24 provisions of California Insurance Code Section 10144.” (ECF No. 31 ¶ 97). Claim  
25 5 alleges that the “proximate cause of her inability to work, is in fact, some form of  
26 Physical Disease or Injury and not any form of Mental Illness or depression, as defined  
27 by the Group Policy.” *Id.* ¶ 101. Claim 5 alleges:

28 Defendant repeatedly discounted the objective and documented evidence  
of physical injury, condition, or disease as causes of Plaintiff’s inability

1 to work and unreasonably attributed Plaintiff's mental impairments as the  
2 cause of her disability in order to apply the limitation of coverage for two  
3 years. Defendant failed to accept the overwhelming evidence that, but for  
the various sleep disorders, there is no evidence that any mental  
impairment or illness would prevent Plaintiff from working.

4 *Id.* ¶ 114. Claims 1-4 of the FAC are brought on behalf of Plaintiff and a putative class;  
5 Claim 5 is brought on behalf of Plaintiff only.

#### 6 **D. Motion to Dismiss**

7 On November 18, 2013, Defendants filed the Motion to Dismiss Plaintiff's FAC.  
8 (ECF No. 34). Defendants contend:

9 Nelson's entire Amended Complaint is founded on an interpretation of  
10 §10144 that is not legally viable and has been rejected by every court that  
11 has addressed the issue. Nelson fails to state individual and class action  
12 claims for payment of benefits under 29 U.S.C. §1132(a)(1)(B), and for  
breach of fiduciary duty and declaratory relief under 29 U.S.C.  
§1132(a)(3), based on her legally untenable insurance discrimination  
theory, warranting dismissal of the entire First Amended Complaint with  
prejudice.

13 (ECF No. 34-1 at 17). Defendants request an award of attorney's fees pursuant to 29  
14 U.S.C. § 1132(g).

15 On December 9, 2013, Plaintiff filed an opposition to the Motion to Dismiss.  
16 (ECF No. 35). As to Claims 1-4, Plaintiff contends that the FAC pleads a violation of  
17 California Insurance Code § 10144. As to Claim 5, Plaintiff contends: "Defendants do  
18 not state any basis for dismissing the fifth count. [Plaintiff] pleads facts alleging a  
19 wrongful denial of coverage. [Plaintiff's] claim is not dependent on Defendants'  
20 violation of Section 10144 to succeed." (ECF No. 35 at 29).

21 On December 17, 2013, Defendants filed a reply in support of the Motion to  
22 Dismiss. (ECF No. 38).

#### 23 **II. Standard of Review**

24 Federal Rule of Civil Procedure 12(b)(6) permits dismissal for "failure to state  
25 a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). Federal Rule of  
26 Civil Procedure 8(a) provides that "[a] pleading that states a claim for relief must  
27 contain ... a short and plain statement of the claim showing that the pleader is entitled  
28 to relief." Fed. R. Civ. P. 8(a)(2). Dismissal under Rule 12(b)(6) is appropriate where

1 the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable  
2 legal theory. *See Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

3 A plaintiff's "grounds" to relief must contain "more than labels and conclusions,  
4 and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl.  
5 Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting Fed. R. Civ. P. 8(a)(2)). When  
6 considering a motion to dismiss, a court must accept as true all "well-pleaded factual  
7 allegations." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). However, a court is not  
8 "required to accept as true allegations that are merely conclusory, unwarranted  
9 deductions of fact, or unreasonable inferences." *Sprewell v. Golden State Warriors*, 266  
10 F.3d 979, 988 (9th Cir. 2001). "In sum, for a complaint to survive a motion to dismiss,  
11 the non-conclusory factual content, and reasonable inferences from that content, must  
12 be plausibly suggestive of a claim entitling the plaintiff to relief." *Moss v. U.S. Secret  
13 Service*, 572 F.3d 962, 969 (9th Cir. 2009) (quotations omitted).

### 14 **III. Discussion**

#### 15 **A. Claims 1-4**

16 Claims 1-4 of the FAC allege claims that are materially the same as the claims  
17 alleged in the original Complaint. To the extent the FAC contains new allegations that  
18 Defendants charged a "higher effective premium rate" (ECF No. 31 ¶¶ 36, 46), the  
19 Court finds that the FAC fails to plausibly allege that Defendants' charged "a  
20 discriminatory premium that ... would run afoul of section 10144." *Chabner v. United  
21 of Omaha Life Ins. Co.*, 225 F.3d 1042, 1048 (9th Cir. 2000). For the reasons stated in  
22 the Court's July 17, 2013 Order, the Motion to Dismiss Claims 1-4 of the FAC is  
23 granted. *See* ECF No. 23.

#### 24 **B. Claim 5**

25 Claim 5 of the FAC expressly alleges a claim "without regard to the potential  
26 applicability of the provisions of California Insurance Code Section 10144." (ECF No.  
27 31 ¶ 97). Defendants have failed to assert any appropriate basis for dismissing Claim  
28 5 of the FAC. The Motion to Dismiss Claim 5 is denied.

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**C. Attorney's Fees**

Defendants request attorney's fees pursuant to 29 U.S.C. § 1132(g). Section 1132(g) provides that a "court in its discretion may allow a reasonable attorney's fee and costs of action to either party." 29 U.S.C. § 1132(g)(1). "In general, a court considering whether to award attorney's fees and costs under ERISA must consider five factors: (1) the degree of the opposing party's culpability or bad faith; (2) the ability of the opposing party to satisfy an award of fees; (3) whether an award of fees would deter others from breaching duties under similar circumstances; (4) whether the party requesting fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA; and (5) the relative merits of the parties' positions." *Cal. Ironworkers Field Pension Trust v. Loomis Sayles & Co.*, 259 F.3d 1036, 1048 (9th Cir. 2001) (citations omitted). After considering the relevant factors, the Court declines to award attorney's fees to Defendants.

**IV. Conclusion**

IT IS HEREBY ORDERED that the Motion to Dismiss Claims 1-4 of the FAC is GRANTED, and the Motion to Dismiss Claim 5 of the FAC is DENIED. (ECF No. 34).

DATED: February 20, 2014

  
**WILLIAM Q. HAYES**  
United States District Judge