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

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

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Plaintiff,

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vs.

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

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Defendants.

CASE NO. 13cv188-WQH-MDD
ORDER

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HAYES, Judge:

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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).

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I. Background

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

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A. Allegations of the Complaint

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

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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 10144.¹ *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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25 ¹ 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