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

MARIANA NELSON, on behalf of  
herself and all others similarly situated,  
  
Plaintiff,  
  
vs.  
STANDARD INSURANCE  
COMPANY, an Oregon company;  
COUNTRYWIDE FINANCIAL  
CORPORATION GROUP LONG  
TERM DISABILITY PLAN;  
COUNTRYWIDE FINANCIAL  
CORP., and DOES 1-50, inclusive,  
  
Defendants.

CASE NO. 13cv188-WQH-MDD  
ORDER

HAYES, Judge:

The matter before the Court is the Motion for Judgment on the Pleadings on Count V of Plaintiff’s First Amended Complaint (“Motion for Judgment on the Pleadings”), filed by Defendant Countrywide Financial Corporation Group Long Term Disability Plan. (ECF No. 56).

**I. Background**

On January 23, 2013, Plaintiff initiated this action by filing a Complaint in this Court. (ECF No. 1). On July 17, 2013, the Court granted a motion to dismiss the Complaint filed by Defendants. (ECF No. 23). On October 31, 2014, Plaintiff filed a First Amended Complaint, which is the operative pleading. (ECF No. 31).

1           **A. Allegations of the First Amended Complaint**

2           Beginning in January 2004, Plaintiff was employed as a loan officer with  
3 Defendant Countrywide Financial Corp. *Id.* ¶¶ 1, 4. Plaintiff received long term  
4 disability coverage under the Countrywide Financial Corporation Group Long Term  
5 Disability Plan, policy number 643382 (“Group Policy”), issued by Defendant Standard  
6 Insurance Company (“Standard”). *Id.* ¶¶ 1, 5. The Group Policy provides that  
7 “[p]ayment of [long term disability (‘LTD’)] Benefits is limited to 24 months during  
8 your entire lifetime for a Disability caused or contributed to by ... Mental Disorders.”  
9 *Id.* ¶ 10.

10           In April 2007, Plaintiff ceased working due to disability. *Id.* ¶ 11. On May 30,  
11 2008, Plaintiff submitted a claim seeking long term disability benefits going back to  
12 April 2007. *Id.* On July 10, 2008, Standard accepted the claim and paid Plaintiff  
13 disability benefits. *Id.* ¶ 12.

14           In January 2010, Standard informed Plaintiff that “LTD benefits have been  
15 terminated as of December 31, 2009 because [Plaintiff] no longer satisfies the  
16 Definition of Disability as stated in the Group Coverage.” *Id.* ¶ 13. On June 10, 2010,  
17 Plaintiff requested that Standard review the termination of benefits. *Id.* ¶ 15. On  
18 October 10, 2011, Standard issued its final decision, denying Plaintiff’s long term  
19 disability claim after its administrative review unit evaluated the December 31, 2009  
20 decision to close the claim. *Id.* ¶ 34.

21           In the First Amended Complaint, Plaintiff asserts the following causes of action:  
22 (1) Class Action Claim for Benefits pursuant to the Employee Retirement Income  
23 Security Act of 1974 (“ERISA”), 29 U.S.C. § 1132(a)(1)(B); (2) Class Action Claim  
24 for Equitable Relief pursuant to ERISA, 29 U.S.C. § 1132(a)(3); (3) Class Action  
25 Breach of Fiduciary Duty pursuant to ERISA, 29 U.S.C. § 1104(a)(1); (4) Class Action  
26 Declaratory Relief; and (5) Individual Claim for Benefits pursuant to ERISA, 29 U.S.C.  
27 § 1132(a)(1)(B).

28           **B. Motion for Judgment on the Pleadings**

1 On February 21, 2014, the Court issued an order granting Defendants’ motion to  
2 dismiss Counts 1-4 of the First Amended Complaint and denying the motion to dismiss  
3 Count 5 of the First Amended Complaint. (ECF No. 39).

4 On March 28, 2014, Defendant Countrywide Financial Corporation Group Long  
5 Term Disability Plan (“Defendant”) filed an Answer to Count 5 of the First Amended  
6 Complaint. (ECF No. 43). Neither the Answer nor Defendant’s two previous motions  
7 to dismiss referenced a defense that Plaintiff’s Complaint or First Amended Complaint  
8 was untimely or barred by the limitations provision in the Group Policy.

9 On June 16, 2014, Defendant filed the Motion for Judgment on the Pleadings.  
10 (ECF No. 56). On July 7, 2014, Plaintiff filed an opposition. (ECF No. 59). On July  
11 14, 2014, Defendant filed a reply. (ECF No. 60).

## 12 **II. Discussion**

### 13 **A. Standard of Review**

14 Judgment on the pleadings is proper pursuant to Federal Rule of Civil Procedure  
15 12(c) “when , accepting all factual allegations in the complaint as true, there is no issue  
16 of material fact in dispute, and the moving party is entitled to judgment as a matter of  
17 law.” *Chavez v. United States*, 683 F.3d 1102, 1108 (9th Cir. 2012) (quotation  
18 omitted). “Analysis under Rule 12(c) is substantially identical to analysis under  
19 [Federal] Rule [of Civil Procedure] 12(b)(6) because, under both rules, a court must  
20 determine whether the facts alleged in the complaint, taken as true, entitle the plaintiff  
21 to a legal remedy.” *Id.* (quotation omitted). Dismissal under Rule 12(b)(6) is  
22 appropriate where the complaint lacks a cognizable legal theory or sufficient facts to  
23 support a cognizable legal theory. *See Balistreri v. Pacifica Police Dep’t*, 901 F.2d  
24 696, 699 (9th Cir. 1990). “To survive a motion to dismiss, a complaint must contain  
25 sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on  
26 its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v.*  
27 *Twombly*, 550 U.S. 544, 570 (2007)). “When there are well-pleaded factual allegations,  
28 a court should assume their veracity and then determine whether they plausibly give rise

1 to an entitlement to relief.” *Id.* at 679.

2 **B. Contentions of the Parties**

3 Defendant contends that Plaintiff’s claim for benefits in Count 5 of the First  
4 Amended Complaint is time-barred by the terms of the Group Policy. Defendant  
5 contends that the Group Policy’s provision for Time Limits on Legal Actions  
6 establishes a three-year limitations period beyond which Plaintiff was barred from filing  
7 suit. Defendant contends that the three-year limitations period commenced on May 30,  
8 2008, when Plaintiff alleges she submitted a Proof of Loss under the Group Policy, and  
9 expired on May 30, 2011. Defendant contends that the Complaint, filed on January 23,  
10 2013, and the First Amended Complaint, filed on October 31, 2014, are untimely.  
11 Defendant relies upon *Heimeshoff v. Hartford Life & Accident Insurance Co.*, 134 S.  
12 Ct. 604 (2013), wherein the Supreme Court held that “a participant and a plan may  
13 agree by contract to a particular limitations period, even one that starts to run before the  
14 cause of action accrues, as long as the period is reasonable.” *Id.* at 610. In so holding,  
15 the Supreme Court abrogated *Price v. Provident Life & Accident Insurance Co.*, 2 F.3d  
16 986 (9th Cir. 1993), which held that a plan provision requiring suit within three years  
17 after proof-of-loss deadline is not enforceable. *See Heimeshoff*, 134 S. Ct. at 610.  
18 Defendant contends that Plaintiff is not entitled to equitable tolling of the contractual  
19 limitations period because Plaintiff failed to diligently pursue her claims. Defendant  
20 requests judgment on the pleadings and an award of attorneys’ fees pursuant to 29  
21 U.S.C. § 1132(g). Alternatively, “[i]f the Court determines that the contractual  
22 limitation defense should ... be included in the [Defendant]’s Answer,” Defendant  
23 requests leave to amend the Answer pursuant to Federal Rule of Civil Procedure 15.  
24 (ECF No. 60 at 8).

25 Plaintiff contends that Defendant has waived any right to assert any limitations  
26 defense because the defense was not raised in either motion to dismiss or the Answer.  
27 Plaintiff contends that she complied with the Group Policy’s contractual limitations  
28 provision because the three-year limitations period began to run in March of 2011 when

1 Plaintiff submitted her final “Proof of Loss” related to the claim at issue. Plaintiff  
2 contends that the contractual provision as interpreted by Defendant is unenforceable  
3 because the time for filing suit expired five months before Defendant issued its final  
4 decision denying Plaintiff’s claim. Plaintiff contends that, as of May 30, 2011 (the date  
5 Defendant contends that the limitations period expired), Plaintiff’s cause of action had  
6 not yet accrued under binding Ninth Circuit authority. Plaintiff contends that Defendant  
7 should be barred from raising the contractual limitations defense by the doctrines of  
8 waiver and estoppel based upon Defendant’s failure to cite the limitations provision in  
9 its correspondence to Plaintiff. Plaintiff contends that the contractual limitations period  
10 should be tolled based upon California law. In the event the motion is granted, Plaintiff  
11 “requests leave to amend the [First Amended Complaint] to present facts sufficient to  
12 negate Defendant’s statute-of-limitations defense.... This may also require the  
13 re-inclusion of other defendants whose presence in the litigation was no longer thought  
14 necessary.” (ECF No. 59 at 29).

15 **C. Waiver**

16 Plaintiff contends that Defendant waived the right to assert any defense based  
17 upon the contractual limitations provision because Defendant did not raise the defense  
18 in the motions to dismiss or the Answer.

19 The Court of Appeals for the Ninth Circuit has “liberalized the requirement that  
20 defendants must raise affirmative defenses in their initial pleadings. A defendant may  
21 thus raise an affirmative defense for the first time in a motion for judgment on the  
22 pleadings, but only if the delay does not prejudice the plaintiff.” *Owens v. Kaiser*  
23 *Found. Health Plan, Inc.*, 244 F.3d 708, 713 (9th Cir. 2001) (quotations omitted). The  
24 Ninth Circuit has held that there is no prejudice to a plaintiff where the belatedly-raised  
25 defense was dispositive of the claim as of the filing of the complaint. *See id.*  
26 (“Appellants may not demonstrate prejudice based solely on the untimely assertion of  
27 res judicata because this affirmative defense would have been dispositive had Kaiser  
28 asserted it when the action was filed.”) (citing *Wyshak v. City Nat’l Bank*, 607 F.2d 824,

1 826 (9th Cir. 1979) (holding that plaintiff was not prejudiced by assertion of statute of  
2 limitations defense in amended answer because the defense would have been “effective  
3 at the outset of [plaintiff’s] suit”).

4 The Court finds that Plaintiff has failed to demonstrate prejudice due to  
5 Defendant’s assertion of the contractual limitations defense for the first time in the  
6 Motion for Judgment on the Pleadings.

7 **D. Contractual Limitations Provision**

8 “[C]ontractual limitations provisions [in ERISA plans] ordinarily should be  
9 enforced as written,” unless a court “determine[s] either that the period is unreasonably  
10 short, or that a controlling statute prevents the limitations provision from taking effect.”  
11 *Heimeshoff v. Hartford Life & Acc. Ins. Co.*, --- U.S. ----, 134 S. Ct. 604, 612 (2013)  
12 (quotation omitted). In *Heimeshoff*, the Supreme Court enforced a three-year  
13 contractual limitations provision that began to run at the time proof of loss was due,  
14 despite the fact that the plaintiff’s cause of action under ERISA had not accrued at the  
15 time the limitations provision began to run. *See id.* at 610 (“Absent a controlling statute  
16 to the contrary, a participant and a plan may agree by contract to a particular limitations  
17 period, even one that starts to run before the cause of action accrues, as long as the  
18 period is reasonable.”). The Court held that there was no controlling statute which  
19 prevented application of the three-year limitations provision, and the provision was not  
20 tolled during internal administrative review. The Court stated that, “in the rare cases  
21 where internal review prevents participants from bringing [ERISA] actions within the  
22 contractual period, courts are well equipped to apply traditional doctrines that may  
23 nevertheless allow participants to proceed. If the administrator’s conduct causes a  
24 participant to miss the deadline for judicial review, waiver or estoppel may prevent the  
25 administrator from invoking the limitations provision as a defense. To the extent the  
26 participant has diligently pursued both internal review and judicial review but was  
27 prevented from filing suit by extraordinary circumstances, equitable tolling may apply.”  
28 *Id.* at 615 (citations omitted).

1 The Group Policy contains the following provision entitled, “Time Limits on  
2 Legal Actions”:

3 No action at law or in equity may be brought until 60 days after you have  
4 given us Proof Of Loss. No such action may be brought more than three  
years after the earlier of:

- 5 1. The date we receive Proof Of Loss; and
- 6 2. The time within which Proof Of Loss is required to be given.

7 (ECF No. 56-2 at 32).<sup>1</sup> The Group Policy states: “You must give us Proof Of Loss  
8 within 90 days after the end of the Benefit Waiting Period. If you cannot do so, you  
9 must give it to us as soon as reasonably possible, but not later than one year after that  
10 90-day period.... Proof Of Loss means written proof that you are Disabled and entitled  
11 to LTD Benefits.” *Id.* at 30-31. The Group Policy defines the “Benefit Waiting Period”  
12 as “the period you must be continuously Disabled before LTD Benefits become  
13 payable,” which is listed in the Group Policy as 180 days. *Id.* at 13, 34.

14 Defendant contends that the First Amended Complaint “alleges that [Plaintiff]  
15 provided her Proof of Loss on May 30, 2008,” and the “contractual time limits expired  
16 three years later on May 30, 2011.” (ECF No. 56-1 at 13 (citing ECF No. 31 ¶ 11)).  
17 The cited paragraph of the First Amended Complaint states: “On May 30, 2008, Ms.  
18 Nelson submitted a claim for long term disability benefits, seeking benefits going back  
19 to April 2007.” (ECF No. 31 ¶ 11). The First Amended Complaint does not use the  
20 phrase, “Proof of Loss,” and the cited paragraph does not allege that, on May 30, 2008,  
21 Plaintiff submitted “written proof that [Plaintiff was] Disabled and entitled to LTD  
22 Benefits.” (Group Policy at 19, ECF No. 56-2 at 30). The First Amended Complaint  
23 alleges two dates on which Plaintiff submitted documentation in support of Plaintiff’s  
24 claim that she was disabled, November 18, 2010 and March 7, 2011. (ECF No. 31 ¶¶  
25 18, 30). Based upon the allegations of the First Amended Complaint, the Court cannot

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27 <sup>1</sup> The unopposed request for judicial notice of the Group Policy is granted. *See*  
28 *Knieval v. ESPN*, 393 F.3d 1068, 1076-77 (9th Cir. 2005) (holding that a court may  
consider documents “whose contents are alleged in a complaint and whose authenticity  
no party questions, but which are not physically attached to the [plaintiff’s] pleading.”)  
(quotation omitted).

1 determine the date on which the contractual time limitation was triggered under the  
2 Plan. *Cf. Mogck v. Unum Life Ins. Co. of Am.*, 292 F.3d 1025, 1029 (9th Cir. 2002)  
3 (“[I]n order to determine when the contractual limitation period began, we must first  
4 determine when [defendant] asked [plaintiff] for a ‘request for the proof,’ or a ‘proof  
5 of claim.’ ... [B]ecause [defendant] drafted certain terms [in the policy] regarding the  
6 time limits on legal actions, but did not utilize those terms at all in its correspondence  
7 with [plaintiff], the policy’s time limitation provision was never rendered operative.”).

8 Even if the Court could determine as a matter of law from the First Amended  
9 Complaint that the contractual limitation period began on May 30, 2008, in order to  
10 grant judgment on the pleadings in favor of Defendant, the Court would be required to  
11 find that the contractual limitations period is not unreasonably short. *See Heimeshoff*,  
12 134 S. Ct. at 612 (“We must give effect to the Plan’s limitations provision unless we  
13 determine ... that the period is unreasonably short...”). A limitations provision is  
14 unreasonably short where it “leav[es] [a] claimant[] with little chance of bringing a  
15 claim *not* barred.” *Id.* Plaintiff contends that, based upon the facts alleged, Plaintiff’s  
16 cause of action had not accrued as of May 30, 2011, the date Defendant contends the  
17 limitations period expired. Defendant contends that Plaintiff’s cause of action accrued  
18 on February 16, 2011, “with more than three months remaining before the contractual  
19 Time Limits expired on May 30, 2011.” (ECF No. 56-1 at 15).

20 The First Amended Complaint alleges that, on February 15, 2011, Defendant  
21 wrote Plaintiff and “required the reasoned award from a Social Security Disability  
22 Claim in order to finalize its decision, and extended [Defendant]’s written decision  
23 upon completion of review for another 30 days to Mach 16, 2011.” (ECF No. 31 ¶ 29).  
24 The First Amended Complaint alleges that Plaintiff provided the reasoned award from  
25 the Social Security Administration on March 7, 2011, and Defendant next corresponded  
26 with Plaintiff on September 28, 2011, when Defendant apologized for the delay and  
27 indicated that a decision would be sent no later than October 10, 2011. *Id.* ¶ 33. The  
28 First Amended Complaint alleges that Defendant issued its “final decision” denying

1 Plaintiff's disability claim on October 10, 2011. *Id.* ¶ 34.

2 Even if, as Defendant contends, Plaintiff's cause of action accrued on February  
3 16, 2011,<sup>2</sup> Defendant cites no legal authority holding that a period of approximately 100  
4 days (i.e., from February 16, 2011 to May 30, 2011) constitutes a reasonable period in  
5 which to file suit in a case such as this one, where the plan administrator had not issued  
6 a final decision prior to the expiration of the limitations period. A "protracted review  
7 process," such as what is alleged in this case, may "render [a limitations] provision  
8 unreasonable." *Hansen v. Aetna Health & Life Ins. Co.*, No. CIV. 98-949-HA, 1999  
9 WL 1074078, at \*4 (D. Or. Nov. 4, 1999) ("Defendants propose that this court construe  
10 the imposition of a [contractual] two-year suit limitation period against plaintiff as  
11 reasonable, despite the fact that Aetna's internal review process of plaintiff's claims has  
12 consumed that entire period.... Enforcement of a two-year suit limitation in this case,  
13 after plaintiff has diligently pursued her appeals rights in a protracted internal review  
14 process, would render that provision unreasonable in practical terms."). At this stage  
15 in the proceedings, the Court cannot determine that Plaintiff's cause of action accrued  
16 a reasonable time prior to May 30, 2011, the date on which Defendant contends that the  
17 contractual limitations period expired.

18 Even if 100 days constitutes a reasonable period in a case such as this, the Court  
19 would be required to consider extrinsic evidence to evaluate Plaintiff's claim that  
20 equitable estoppel prevents assertion of the contractual limitations provision by  
21 Defendant, which is not permitted at this stage in the proceedings. *See* Fed. R. Civ. P.  
22 12(d); *cf. LaMantia v. Voluntary Plan Administrators, Inc.*, 401 F.3d 1114, 1119 (9th  
23 Cir. 2005) ("[A] defendant will be estopped from setting up a statute-of-limitations  
24 defense when its own prior representations or conduct have caused the plaintiff to run

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26 <sup>2</sup> *But see Wise v. Verizon Commc'ns, Inc.*, 600 F.3d 1180, 1188 (9th Cir. 2010)  
27 ("[A]n ERISA claim accrues either at the time benefits are actually denied, or when the  
28 insured has reason to know that the claim has been denied. A claimant has a reason to  
know under the second prong of our accrual test when the plan communicates a clear  
and continuing repudiation of a claimant's rights under a plan such that the claimant  
could not have reasonably believed but that his or her benefits had been finally  
denied.") (quotation omitted).

1 afoul of the statute and it is equitable to hold the defendant responsible for that result.  
2 Estoppel may apply not only against a party asserting a statute of limitations defense,  
3 but also against a party asserting a contractual limitations defense based on a specified  
4 time period in an ERISA disability plan.”) (quotation omitted).

5 The Motion for Judgment on the Pleadings is denied. Defendant’s request for  
6 attorneys’ fees is denied. Any request by either party to amend a pleading must be  
7 made by noticed motion. *See* S.D. Cal. L.R. 7.1; *see also* Fed. R. Civ. P. 15.

8 **III. Conclusion**

9 IT IS HEREBY ORDERED that the Motion for Judgment on the Pleadings is  
10 DENIED. (ECF No. 56).

11 DATED: August 26, 2014

12   
13 **WILLIAM Q. HAYES**  
14 United States District Judge

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