# Edd King et al v. National General Insurance Company et al

2021 | Cited 0 times | N.D. California | June 11, 2021

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF CALIFORNIA

EDD KING, et al.,

Plaintiffs, v. NATIONAL GENERAL INSURANCE COMPANY, et al.,

Defendants.

Case No. 15-cv-00313-DMR

ORDER ON DEFENDANTS MOTION TO DISMISS Re: Dkt. No. 165

Plaintiffs 1

bring this putative class action alleging that Defendants 2

unlawfully overcharged Plaintiffs and the Class members for auto insurance premiums in violation of California law. The

See a third amended complaint, the court ordered the case stayed while the Department of Insurance See . The DOI proceedings have now concluded. As ordered by the court, Plaintiffs filed a fourth amended complaint on January 28, 2021. [Docket No. 163, Fourth Amended Complaint ns of the 4AC. 3 [Docket Nos. 1

Plaintiffs are Edd King, Dierdre King, Elmo Sheen, and Sheila Lee. 2 PEIC 3 -profit, non- See Docket No. 177 at

to decide the issues raised by the motion to dismiss. The motion is therefore denied.

a hearing on the motions on April 22, 2021.

For the reasons stated below, granted in part and denied in part and the motion to strike is denied. I. BACKGROUND

A. Good Driver Discounts Drivers who meet certain criteria are qualified to buy a Good Driver

Discount policy from the insurer of their choice. Cal. Ins. Code §§ 1861.02(b)(1), 1861.025 (listing the criteria to qualify for a GDD policy). The rate charged for a GDD policy l. Ins. Code § 1861.02(b)(2). When multiple insurers have common ownership or operate in California under common management or control, California law requires that representing the insurer shall sell, a good driver discount policy to a good driver from an insurer within that common ownership, management, or . The requirement to cross-offer a policy with the lowest Good Driver rates An insurer within a control group is not subject to the Lowest Rates Rule if it meets the eight

See Cal. Ins. Code § 1861.16(c)(1).

B. Allegations and Claims The following facts are alleged in the 4AC. Defendants are (or, at relevant times, have been) in a control group within the meaning of the Lowest Rates Rule. 4AC ¶ 1. Each of the named Plaintiffs and Class members held insurance policies issued by one or more of the companies in Id. ¶ 5. All Plaintiffs qual entitled to

rates for that coverage. Id. ¶ 7. In violation of the Lowest Rates Rule representatives failed to offer Plaintiffs and Class members the lowest available GDD policy

premiums within their control group. Id. ¶ 44. Specifically, at the time Plaintiffs purchased their policies, PEIC and Sequoia both had GDD policies with lower rates than what Plaintiffs were paying

for substantially similar coverage, but Plaintiffs were never offered those GDD policies. Id. ¶ 44. In addition, Defendants deliberately concealed their wrongful conduct and did not inform policyholders who had been overcharged of their right to be reimbursed for premium overpayments. Id. ¶ 49.

Plaintiffs bring claims for (1) breach of contract; (2) breach of the implied covenant of good faith and fair dealing; (3) declaratory and injunctive relief; (4) fraud and misrepresentation; and (5) et seq.

C. DOI Investigation This is the third round of briefing recurring arguments has been that Defendants PEIC and NGAC - amended complaint, it ordered supplemental briefing on the question of whether the determination

See Docket No. 114. The court did not hold that Super Group status must be decided decision should be made by the Insurance Commissioner through application of the primary

(emphasis in original). It accordingly stayed the case pending a decision by the DOI regarding the Super Group status of NGAC and PEIC. Id.

The DOI issued a decision on November 10, 2020. [Docket No. 163-5 Letter DOI

because the cross-offer requirement only applies to the auto insurance policies defined in Cal. Ins.

Code § 660(a), which does not include policies for recreational vehicles. See id. find that PEIC NKA Premier is no longer entitled to a Super Group Exemption, but the evidence

calls into question Premi Id. at 4. The parties

II. REQUESTS FOR JUDICIAL NOTICE

Federal Rule of Evidence 201 permits a court to take judicial notice of adjudicative facts. court may judicially notice a fact that is not subject to reasonable dispute because it: (1) is

determined from sources whose accuracy cannot reasonably judicial notice Lee v. City of Los Angeles, 250

F.3d 668, 689 (9th Cir. 2001) (citing Mack v. S. Bay Beer Distrib., 798 F.2d 1279, 1282 (9th Cir. 1986)), and the court need not accept as true allegations that contradict facts that are judicially noticed. See Mullis v. United States Bankruptcy Ct., 828 F.2d 1385, 1388 (9th Cir. 1987).

Plaintiffs and Defendants filed respective RJNs with numerous exhibits. See Docket Nos. 166, 170 , 175. two motions. Therefore, both RJNs are otherwise denied as moot.

III. MOTION TO DISMISS

A. Legal Standard for Rule 12(B)(6) Motions A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the claims alleged in the complaint. See Parks Sch. of Bus., Inc. v. Symington, 51 F.3d 1480, 1484 (9th Cir. 1995). When Erickson v. Pardus, 551 U.S. 89, 94 (2007) (per

curiam) (citation omitted), and may dismiss Shroyer v. New Cingular Wireless Servs., Inc., 622 F.3d 1035, 1041 (9th Cir. 2010) (citing Ashcroft

v. Iqbal, 556 U.S. 662, 677-78 (2009); Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001)) that allows the court to draw the reasonable inference that the defendant is liable for the misconduct

Iqbal, 556 U.S. at 678 (citation omitted). In other words, the facts alleged must of action will not Bell Atl. Corp. v. Twombly, 550 U.S. 554, 555 (2007) (citing Papasan v.

Allain, 478 U.S. 265, 286 (1986)); see Lee v. City of L.A., 250 F.3d 668, 679 (9th Cir. 2001), overruled on other grounds by Galbraith v. Cty. of Santa Clara, 307 F.3d 1119 (9th Cir. 2002).

on a Rule 12(b)(6) motion. Lee, 250 F.3d at 688 (citation and quotation marks omitted). However, id. at 689 (citing Mack v. S. Bay Beer Distrib contents are alleged in a complaint and whose authenticity no party questions, but which are not

physically att into a motion for summary judgment. Branch v. Tunnell, 14 F.3d 449, 454 (9th Cir. 1994), overruled

on other grounds by Galbraith, 307 F.3d at 1125-26.

B. Discussion Defendants raise a host of arguments attacking the 4AC, including that (1) PEIC and NGAC should be dismissed because the DOI found that those Defendants are exempt from the Lowest Rates Rule; (2) Plaintiffs have not adequately alleged that Defendant insurers are liable for any violations of section 1861.16(b) committed by their agents/representatives; (3) Plaintiffs have not adequately pleaded that all Plaintiffs and putative Class members would be eligible for the lower rate policies or would have accepted such policies even if they were eligible; (4) Plaintiffs do not allege that any Defendants refused to sell a lower rate policy; (5) Defendants that did not allegedly have lower rates to offer should be dismissed; (6) NGIC, Integon National, and MIC should be dismissed because they were prohibited from cross-offering ; and (7) none of

1. Super Group Exemptions According to Defendants, the DOI found that NGAC and PEIC were at all relevant times entitled to the Super Group Exemption from the Lowest Rates Rule. MTD at 6. They assert that these two Defendants should therefore be dismissed. Id. at 8.

to NGAC, the DOI stated:

Plaintiffs allege NGAC should have cross-offered insurance rates from its recreational vehicle insurance program, but the Commissioner finds that Rule as a matter of law.

DOI Letter at 3. The DOI explained that the Lowest Rates Rule applies only when an insurance

Code § 660(a). It concluded that NGAC does not issue any such policies through its RV program Id. Plaintiffs asserted in their papers and at the hearing that its allegations never involved s irrelevant. MTD Opp. at 6. Defendants respond that the DOI did not just find that the Lowest Rates Rule is inapplicable to RV program; it also determined that NGAC received a Super Group Exemption for its (non-RV) private passenger automobile insurance program a program for which NGAC partnered with MetroMile. MTD Mot. at 7; MTD Reply at 4; see DOI Letter at 3 (stating that the DOI granted NGAC a Super Group Exemption with respect to the MetroMile program on June 2, 2014). The DOI declined to m

At the hearing, the court asked if Plaintiffs were making any allegations as to MetroMile. Plaintiffs represented that the MetroMile program is still at issue. They point to a letter they wrote AC is not MetroMile but the way Docket No. 152-1 at 27. 4

Plaintiffs asserted at the hearing that the DOI misunderstood their contention about MetroMile and since the DOI did not make specific findings about MetroMile, their claims as to MetroMile This

argument is not compelling. As an initial matter, the parties were before the DOI for almost four years. It is not credible that in that time, given the extent of the their position on MetroMile. Additionally

MetroMile in their opening brief and Plaintiffs did not respond on that point. See MTD Mot. at 2- 7. contention that the DOI somehow misunderstood their argument was raised for the

4 The court references the page numbers as generated by ECF given that this exhibit has multiple filings with different numbering.

Plaintiffs relied on documents they filed in November 2020 in connection with their motion to lift

the stay in this case. See Docket No. 152. They did not attach these exhibits to the 4AC or their o raise issues relating to MetroMile constitutes waiver of the argument.

However, Plaintiffs assert that NGAC did not apply for its Super Group Exemption until October 28, 2013, even though it allegedly has been part of the control group since at least the beginning of the class period. MTD Opp. at 6. They argue that the DOI did not make any findings 5

Id. Plaintiffs are correct that the DOI findings with respect to NGAC only relate to its RV program and its current entitlement on conduct before it achieved Super Group status.

For PEIC, the DOI on July 18, 2014. 6

DOI Letter at 5. After it completed its investigation, the DOI stated: The Commissioner does not presently find that PEIC NKA Premier is no longer entitled to a Super Group Exemption, but the evidence calls into

Id. applied for the investigation that establishes Premier has operated in a manner inconsistent with the Super Group

out the possibility that the way in which Premier has conducted itself over the last several years may have crossed any line that would affect Premier Id. at 7-8. The DOI monitor a

5 allegation that NGAC is no longer entitled to Super Group status is purely speculative. 6 In their opposition, Plaintiffs wrote Plaintiffs clarified at the hearing that this was a typo and PEIC applied for the Super Group Exemption on May 5, 2014.

Id. at 8. The Commissioner invited the court to invoke

the primary jurisdiction doctrine

Id. Defendants a entitled to the Super Group Exemption and so therefore the claims against PEIC should be

t explicitly -8. Plaintiffs argue that since

the DOI did not make a definitive determination that PEIC has been compliant with the Super Group for resolution on a motion to dismiss. MTD Opp. at 13.

The court disagrees with Plaintiffs . The DOI conducted a years-long investigation While the DOI recognized the theoretical

possibility that PEIC may have, at some point, fallen out of compliance, Plaintiffs do not identify any evidence or arguments that the DOI did not already consider during its investigation. Thus, is no longer entitled to Super Group status is purely speculative. See Twombly, 550 U.S. at 555. was approved on July 18, 2014. PEIC allegedly joined the control group in April 2013. 7

4AC ¶ 55. Therefore, there was just over a year during which PEIC was a member of the control group and not

7 At the hearing, Defendants asserted that PEIC did not join the control group until April 2014, which they said the DOI confirmed during its investigation. This argument is not convincing. While it is not clear that PEIC only became part of the control group by virtue of its acquisition by Integon National. Further, this statement appears to be background information that is not material to the DO

the DOI Letter conclusively establishes when PEIC became a member of the control group.

entitled to the Super Group Exemption. Defendants do not explain why PEIC would not be liable for conduct that pre- Exemption is only relevant to part of the timeframe at issue in this case. The court therefore does

not dismiss PEIC on the basis that it later acquired a Super Group Exemption. In sum, the DOI found that NGAC and PEIC both acquired Super Group status in 2014. This is precisely the issue for which this court invoked the primary jurisdiction doctrine, and court holds that NGAC and PEIC were not subject to the cross-offer obligation after their respective

applications for a Super Group Exemption were approved by the DOI. 8

However, the DOI did not make any findings as to whether NGAC and PEIC were subject to the Lowest Rates Rule prior to achieving Super Group status. The court therefore denies D D that these Defendants violated the Lowest Rates Rule before they received a Super Group

Exemption.

2. Agents/Representatives overcharges and did not include the lowest available Good Driver rate among companies in their

iled to provide the lowest Good Driver policy from either Defendants Personal Express Insurance Company or Sequoia Insurance Company

that was available to be sold to Plaintiffs at a lower premium rate with the same or substantially - o dismiss those prior versions of the complaint, the court noted that the plain language of the Lowest Rates Rule

8 At the hearing, Plaintiffs acknowledged that if the court found that the DOI confirmed NGAC and uper Group Exemption, that their claims would be limited to challenging unlawful conduct by these defendants prior to the time they acquired Super Group status.

places the duty to cross- agent or representative within a control group, and not on insurers themselves. Cal. Ins. Code § 1861.16(b) (emphasis

added); see Order on First MTD at 13; Order on Second MTD at 13. Because Plaintiffs only alleged actions taken by Defendant insurers, and not actions taken by their agents or representatives, the court det s [d] the cross-offer requirement on the wrong

-offer discounted policies. Instead, they bring suit only against the

The 4AC lays out Defendants

in Cal. Ins. Code Section 1861.16(b), and whom Defendants controlled, that had the lowest Good 4AC ¶ 37. The 4AC specifically alleges that each of the four named Plaintiffs were issued policies that were offered by - See 4AC ¶¶ 39 (Edd and Dierdre King), 41 (Elmo Sheen), 43 (Sheila Lee). Defendants argue that the 4AC still inappropriately attempts to hold -offer. MTD at 8. They point out that the 4AC does not name the agents or representatives who allegedly failed to cross-offer. Id. at 9. They also assert that duty of their agents and representatives to cross-offer cannot be imputed to Defendant insurers in this context. Id. at 10.

second motion to dismiss, court explained This pleading defect was fatal since an insurance broker is not an agent of, and cannot Id. In other words, brokers do not have a duty to cross-offer and so if Plaintiffs purchased their policies through brokers, there would be no way to impute liability to Defendant insurers. The 4AC sentatives rather than through brokers.

Defendants next argue that the actions of their agents/representatives cannot be imputed to them,

citing Shultz Steel Co. v. Hartford Accident & Indem. Co., 187 Cal. App. 3d 513 (1986). Shultz dealt with the fiduciary duty owed by insurers to their insured. The duty to cross-offer under section 1861.16(b) is a statutory duty, not a fiduciary duty, and so the reasoning of Shultz does not apply here. Further, the legislative history of section 1861.16(b) makes clear that the statute was intended to regulate insurers through their agents/representatives, not just impose liability on individual agents/representatives:

This bill, an urgency measure, requires, with specified exceptions, automobile insurers to: [m]ake available for eligible good drivers responsibility requirements, and to offer such coverage at the lowest rate available from the insurers or their subsidiaries. Pltf. RJN, Ex. 1 at 105 (Assembly policy committee analysis of Assembly Bill No. 2737 9

(emphasis added). 10

Accordingly, while Plaintiffs must plead that the failure to cross-offer came through

insurers are not liable for the actions of their agents/representatives.

The court previously addressed another issue with r pleadings. The court

the following example:

defendants that have been named here. is not offered the lowest rate for that coverage by a member of the controlled

with the lowest rate; is that defendant responsible? How so? How do we assess damages? Who is responsible? How do we peg that to the complaint?

9 The court takes judicial notice of this document as the legislative history of a state statute. See Louis v. McCormick & Schmick Rest. Corp., 460 F. Supp. 2d 1153, 1155 n. 4 (C.D. Cal. 2006) nder Rule 201 of the Federal Rules of Evidence, the court may take judicial notice of the records of state courts, the legislative history of state statutes, and the records of state administrative agencies 10 court cites the page numbers generated by ECF.

[Docket No. 91, Transcript of Proceedings held on February 11, 2016 at 17:13-25.] With respect to this concern, it would not be sufficient to allege generally that Plaintiffs purchased their policies Defendant is liable for the actions of some unidentified agent/representative who is not alleged to

represent that particular Defendant. However, the 4AC adds additional allegations on this point. Specifically circumvent the statutory mandates by concealing and intentionally not disclosing to their agents,

representatives and brokers the applicability of the requirements of Cal. Ins. Code Section Under this theory, Defendants acted in concert to ensure that none of their agents/representatives were aware of their duty to cross-offer, which resulted in the agents/representatives injuries. that Defendants acted in concert as a control group to prevent any of their agents/representatives from cross-offering within the control group adequately explains how each is not a question that can be resolved at the pleadings stage. Accordingly, the court finds that Plaintiffs have -offer in violation of their statutory duties; that such failure can be imputed to Defendant insurers through an agency

3. Eligibility and Acceptance Defendants argue that Plaintiffs have failed to allege a violation of section 1861.16(b) because they have not adequately alleged that all Plaintiffs and putative Class members were eligible for lower rate GDD policies within the control group or that they would have accepted the lower rate policies for which they are eligible.

Defendants and to qualify for and obtain the applicable Good Driver coverage at the lowest rate Although Defendants assert that Plaintiffs have not made similar allegations for the putative Class members, the Class by definition only includes individuals that qualified for a GDD policy. Id. ¶ 3. In any case, the 4AC does actually allege that putative Class members qualified for lower rate GDD policies. See id. ¶ 37. Defendan and that such an inquiry is too individualized for class treatment, goes to the propriety of class

certification and not to the a With respect to whether each Plaintiff and Class member would have accepted a lower rate policy, there is nothing in the statutory language that says or implies that a violation of section 1861.16(b) only occurs when an insured would have accepted a lower rate policy. Thus, although whether any given Class member would have accepted a lower rate policy may be relevant to their entitlement to damages, there is no indication that Plaintiffs are required to allege acceptance in order to plead a violation of section 1861.16(b).

4. Refusal to Sell

[in a control group] shall offer, and the insurer shall sell, a good driver discount policy to a good

Defendants argue that Plaintiffs do not adequately plead that any insurer refused to sell a lower rate policy. MTD at 14. This is nonsensical. Plaintiffs allege that they were never offered a lower rate policy, so by extension, Defendants never had the opportunity to refuse to sell such a a violation of section 1861.16(b) if its agents/representatives actually did offer a lower rate policy

and the insurer then refused to sell it. As explained above, Plaintiffs adequately plead that Defendants, through their agents/representatives, violated section 1861.16(b) by failing to offer lower rate policies in the first place. Accordingly, they do not have to plead that Defendants failed to sell policies that Plaintiffs were never offered.

5. Defendants Without Lower Rate Policies The 4AC alleges that, during the relevant time period, Defendants PEIC and Sequoia had agents/representatives failed to offer these lower-rate policies. See 4AC ¶ 40. Defendants argue to cross-

section 1861.16(b) indicates that duty to cross-offer falls on the agents/representatives of all insurers within a control group. Cal. Ins. Code § 1861.16(b). Thus, the agents or representatives of every Defendant were obligated to

See id. Whether or not those Defendants themselves had lower rates is immaterial.

The court therefore declines to dismiss any Defendants on the basis that they did not have a lower rate GDD policy.

6. Group Plans issue any insurance coverage on a group plan, without restriction as to the purpose of the group, occupation or type of group. § 1861.12. Defendants refer to these group insurance plans represent

that such plans are sold only to individuals who fall within a specific group, such as the employees of a single employer. MTD at 17. According to Defendants, Integon National, NGIC, and MIC offered group PPA plans that were only available to certain groups. MTD at 17. Because only members of a Integon National, NGIC, and MIC had no obligation to (and in fact were legally prohibited from)

offering their group plans to individuals outside the group. Id.

This argument fails. Defendants cite no authority that supports the position that group policies are wholly exempted from the obligation to cross-offer. Nor is such a position logically compelled by the language or purpose of section 1861.16(b). For example, the 4AC explicitly alleges that the and/or rating factors and resulting materially different premiums for Group Drivers) for which the 11

4AC ¶ 34. Defendants do not explain why they would not be

11 Class members were eligible for their plans, there is a dispute of fact that cannot be resolve at the

obligated to cross-offer available rates for which Plaintiffs are eligible just because they are group policies. Additionally, Plaintiffs assert that Integon National, NGIC, and MIC had non- suring individuals not within a group. MTD Opp. at 11. It is unclear whether

Defendants dispute this allegation, but in any case, it is neither necessary nor appropriate to resolve that factual question on a motion to dismiss. Because Defendants have failed to offer authority to support their arguments with respect to group insurance plans, the court declines to dismiss Integon National, NGIC, and MIC on the basis that they offered group plans.

7. Adequacy of Claims

a. Breach of Contract The elements for a breach of contract action under California law are: (1) the existence of a damages to plaintiff as a result of the breach. Buschman v. Anesthesia Bus. Consultants LLC, 42 F.

Supp. 3d 1244, 1250 (N.D. Cal. 2014) (citing CDF Firefighters v. Maldonado, 158 Cal. App. 4th 1226, 1239 (2008)).

parties. 4AC ¶¶ 84-103. Specifically, Plaintiffs allege that each of their contracts included express

FINANCIAL RESPONSIBILITY

When this policy is certified as future proof of financial responsibility, this policy shall comply with the law to the extent required. 4AC, Ex. A at 4 (Policy for Edd and Dierdre King).

CONFORMITY WITH FINANCIAL RESPONSIBILITY LAWS

When we certify this policy as proof of financial responsibility, it will comply with the law to the extent of the coverage required. 4AC, Ex. B at 13-14 (Policy for Elmo Sheen). FINANCIAL RESPONSIBILITY REQUIRED

When this policy is certified as proof of financial responsibility, this policy will comply with the law to the extent required. You must

pleadings stage.

reimburse us if we make a payment that we would not have made if this policy was not certified as proof of financial responsibility. 4AC, Ex. C at 8 (Policy for Sheila Lee). Defendants allegedly breached these provisions by failing to comply with the Lowest Rates Rule. 4AC ¶ 95. In moving to dismiss this claim, Defendants first argue that their alleged failure to comply with section 1861.16(b) occurred prior to the formation of the contracts and any pre-formation conduct cannot be construed as a breach of contract. MTD at 20-21. This argument is addressed below in connection with Plaintiffs claim for breach of the implied covenant of good faith and fair dealing. Defendants next argue that the terms cited by Plaintiffs clearly certify conformity with that require drivers to carry minimum coverage. Id. at 21; see California Vehicle Code §§ 16000 et seq. Defendants assert that these terms cannot reasonably be read to certify compliance with the law generally or with section 1861.16(b) specifically. Plaintiffs respond that a typical, nonlawyer insured would reasonably interpret the language of those terms to mean that Defendants will comply with all applicable laws expectations are controlling. MTD Opp. at 17-18. Plaintiffs s. Even assuming that a typical layman would not understand the When we

. Further, those terms appear in the sections of the policies that discuss the

exclusions, and limits of liability. See 4AC, Ex. A at 2-4; id., Ex. B at 7-14; id., Ex. C at 3-8. It strains credulity to think an insured would not understand that the terms in those sections address terms specific to coverage, especially since each contract contains a separate section addressing general rights and duties. See 4AC, Ex. A at 24-27; id., Ex. B at 43-50; id., Ex. C. at 24-27. Bank of the W. v. Superior Ct. fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties. 2 Cal. 4th 1254, 1264 (1992). his rule [of contract interpretation], as applied to a promise of coverage in an insurance policy, protects not the subjective beliefs of the insurer but, rather, the

objectively reasonable expectations of the insured. Id. at 1265 (cleaned up). Bank of the West

an insurer reasonably t could

refer to statutory claims as well as the common law tort of unfair competition. Id. at 1264-65. However, the court then ruled against peared. Id. at 1265. Specifically, that term Id.

As explained above, the context of the policies as a whole makes clear that the disputed terms are coverage responsibilities rather than their general duties under the contract.

Jauregui v. Mid-Century Ins. Co. 1 Cal. App. 4th 1544 (1991) vague to meet the stringent obligation of an the court was specifically examining whether an insured could reasonably be expected to know that

the reference to financial responsibility laws was in fact a limitation on the coverage provided for permissive drivers i.e., persons other than the named policyholder who used the car. See id. at 1547- Id. at 1549. Id. In this case, by contrast, the

liability coverage. An insured could reasonably be expected to understand that terms appearing in general obligations under the contract, particularly given that general obligations are covered in a separate section. Thus, Jauregui

backed up by the caselaw.

be read to represent that

Defendants will comply with all applicable laws. Accordingly, Plaintiffs fail to plausibly plead that the contracts contained an express term that Defendants breached by not complying with the Lowest im for breach of contract is therefore dismissed.

b. Breach of the Implied Covenant of Good Faith and Fair Dealing

Herskowitz v. Apple, Inc., 301 F.R.D. 460, 473 (N.D. Cal. 2014) (quoting Carson v. Mercury Ins. Co., 210 Cal. App. 4th 409, 429 (2012)). In order to state a claim for breach of the implied covenant of good faith and fair dealing, a plaintiff must

obligations under the contract; (3) any conditions precedent to the defendants performance occurred; (4) the defendant unfairly interfered with the plaintiffs rights to receive the benefits of the contract; and (5) the plaintiff was harmed by the defendant Rosenfeld v. JPMorgan Chase Bank, N.A., 732 F. Supp. 2d 952, 968 (N.D. Cal. 2010). Courts turn to the duty of good faith Foley v. Interactive Data Corp., 47 Cal. 3d 654, 684 (1988) (quoting Summers,

The General Duty of Good Faith Its Recognition and Conceptualization, 67 Cornell L. Rev. 810, 812 (1982)). In evaluating an implied covenant claim, the court must consider whether a partys to the contract Carma Developers (Cal.), Inc. v. Marathon Dev. California, Inc., 2 Cal. 4th 342, 373 (1992). However, the covenant may not be read to contradict the express terms of an agreement. Id. at 374. Plaintiffs allege that Defendants breached the covenant of good faith and fair dealing by (1) failing to offer, through their agents/representatives Case 4:15-cv-00313-DMR Document 183 Filed 06/11/21 Page 18 of 28 from the Defendant is claim fails because

the alleged wrongful conduct preceded the formation of the contract and because Plaintiffs have not alleged breach of any express term of the contracts.

ss the issue of timing. In other words, it is not clear from the language of the statute when the duty to cross-offer terminates. Defendants do not point to other authorities, such as legislative documents, that indicate whether the Lowest Rates Rule only applies before an insured enters into an insurance contract or whether insurers have an ongoing obligation to offer their insureds the lowest rate GDD policies

See 4AC ¶ 114, MTD Opp. to collect inflated, illegally charged premium amounts, including conduct during renewals while the

The reply does not respond to this argument. In addition, it is particularly unclear when the duty to cross offer terminates in the context of insurance contracts that renew. Accordingly, Defendants have not persuasively argued that a breach of covenant claim is precluded because the alleged wrongful conduct occurred prior to the formation of the contract.

Defendants also assert that the breach of covenant claim fails because Plaintiffs have not adequately alleged that they breached any express term of the insurance policy contracts. MTD at 22. This argument misses the point of a breach of covenant claim, which is explicitly not predicated breaching an express contract term. Brehm v. 21st Century Ins. Co., 166 Cal. App. 4th 1225, 1236, (2008), as modified (Oct. 6, 2008) ( [B]reach of a specific provision of the contract is not a necessary prerequisite to an action for breach of the implied covenant of good faith; were it otherwise, the

covenant would have no practical meaning, for any breach thereof would necessarily involve breach of some other term of the contract Carma Devs. (Cal.), Inc. v. Marathon Dev. California, Inc., 2 Cal. 4th 342, 373 (1992)) Case 4:15-cv-00313-DMR Document 183 Filed 06/11/21 Page 19 of 28

c. Declaratory and Injunctive Relief Defendan Plaintiffs have not adequately pleaded a violation of section 1861.16(b). The court found above that

ntatives failed to comply with the Lowest Rates Rule. Accordingly, the court declines to dismiss this claim.

d. Fraudulent Misrepresentation (1) the defendant represented to the plaintiff that an important fact was true; (2) that representation was false; (3) the defendant knew that the representation was false when the defendant made it, or the defendant made the representation recklessly and without regard for its truth; (4) the defendant intended that the plaintiff rely on the representation; (5) the plaintiff reasonably relied on the representation; (6) the plaintiff was harmed; and (7) the plaintiff's reliance on the defendant's representation was a substantial factor in causing that harm to the plaintiff. Damner v. Facebook Inc., No. 20-cv-05177-JCS, 2020 WL 7862706, at *8 (N.D. Cal. Dec. 31, 2020) (citation omitted). A party alleging fraud must stituting fraud or of the circumstances constituting fraud, including identifying the statements at issue and setting

forth what is false or misleading about the statement[s] and why the statements were false or In re Rigel Pharm, Inc. Sec. Litig., 697 F.3d 869, 876 (9th Cir. 2012). See also Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106-07 (9th Cir. 2003) (court adequate notice of the charges being brought so they can defend against them, and to deter the filing

Orchard Supply Hardware LLC v. Home Depot USA, Inc., 967 F. Supp. 2d 1347, 1365 (N.D. Cal. 2013) (citing In re Stac Electronics Securities Litigation, 89 F.3d 1399, 1405 (9th Cir. 1996)).

Although it is not obvious from their briefing, Plaintiffs clarified in the hearing that their

PEIC knowingly misrepresented to the DOI that they were entitled to a Super Group Exemption

when they in fact were not. For several reasons, these allegations are not sufficient to support a fraud claim. Plaintiffs did not identify any specific misrepresentations Defendants made in their rate filings. also runs headlong into are entitled to Super Group Exemptions. As explained above, the court will not allow the parties to

re-litigate the same issues it referred to the DOI under the primary jurisdiction doctrine. Finally, based on Defendant

Group status, much less that Plaintiffs relied on those representations.

Accordingly, Plaintiffs fail to state a claim for fraudulent misrepresentation.

e. UCL establishes three varieties of unfair competition acts or practices which are unlawful, or unfair, or

Cel Tech Communications, Inc. v. Los Angeles Cellular Telephone Co., 20 Cal. 4th 163, 180 (1999). In order to state a claim under the unlawful prong, a plaintiff must allege facts or conduct which can be characterized as a business practice violates the law, meaning any civil or criminal, federal, state or municipal, statutory, regulatory, or court-made law. California v. McKale, 25 Cal.3d 626, 632 (1979). Conduct is of the public. , 180 Cal. App. 4th 1213 n. 8 (2010). Whether a whether (i) there exists substantial consumer injury, (ii) the injury is not outweighed by

countervailing benefits to consumers or competition, and (iii) the injury was not reasonably avoidable by the consumer. Camacho v. Auto. Club of So. Cal., 142 Cal. App. 4th 1294, 1403 (2006).

defectively plead [sic] § 1861.16(b) violation and thus, fail to properly plead the predicate

adequately alleged that Defendants violated section 1861.16(b), this argument fails.

usiness practices relies on the same allegations of fraud that the court previously found insufficient. Accordingly, that claim is dismissed.

C. Conclusion part. and PEIC are dismissed to the extent that they allege wrongful

breach of contract, fraud, and fraudulent business practices are dismissed as inadequately pleaded.

Given that Plaintiffs have had two prior opportunities to amend their complaint following dismissal,

IV. MOTION TO STRIKE

A. Legal Standard for Motions to Strike A matter is

no essential or important relationship to the claim for relief or the defenses

Fantasy, Inc. v. Fogerty, 984 F.2d 1524, 1527 (9th Cir. 1993), Fogerty v. Fantasy, Inc., 510 U.S. 517 (1994). The function of a Rule 12(f) motion to strike is to avoid the expenditure of time and money that arises from litigating spurious issues by dispensing of those issues before trial, and such a motion may be appropriate where it will streamline the ultimate resolution of the action. Fantasy, 984 F.2d at 1527 28. motion to strike should be granted if it will eliminate serious risks of prejudice to the moving party,

Lee v. Hertz Corp., 330 F.R.D. 557, 560 (N.D. Cal. 2019) (citing Fantasy, 984 F.2d at 1528).

importance of pleadings in federal practice and because they are often used solely to delay Capella Photonics, Inc. v. Cisco Sys., Inc., 77 F. Supp. 3d 850, 858 (N.D. Cal. 2014) (quotation omitted). stricken Platte Anchor Bolt,

Inc. v. IHI, Inc., 352 F. Supp. 2d 1048, 1057 (N.D. Cal. 2004). Amini

Innovation Corp. v. McFerran Home Furnishings, Inc., 301 F.R.D. 487, 489 (C.D. Cal. 2014) (citations omitted).

B. Discussion Defendants argue that several portions of the 4AC should be stricken under Rule 12(f), including (1) Exhibit D to the 4AC and all references class allegations; and (4) the Class period. 12

1. Exhibit D Attached to the 4AC as Exhibit D is an email dated October 6, 2015 from Joel Laucher, the Deputy Commissioner for the Rate Regulation Branch at the DOI. See 4AC, Ex. D. Plaintiffs allege insurance plans, Super Group Exemptions, and the Lowest Rates Rule. Id. ¶ 32. Relevant here, Laucher makes the following statements:

the requirements imposed upon an insurer to comply with Section 1861.16. All insurers writing affinity group insurance plans must also write a separate, non-group rate that is used for insuring insureds who are not in the affinity group. That is, an insurer with a group rate or rates must include a group), and both rates are subject to the requirements of California Insurance Code section 1861.16. . . . Exhibit 19 is a form that must be included in a filing by an insurance 12 Defendants also argue that the court should strike NGAC and PEIC from the 4AC because of the

company to assert such facts as the insurer represents will qualify the insurer for the so- he restrictions of Section 1861.16 that are placed upon an insurer that operates within a Control Group (one of multiple companies having common ownership or operating in California under common management or control). The filing of an Exhibit 19 is not a certification that an insurer actually qualifies for the so-called

4AC, Ex. D. Plaintiffs appear to rely on Exhibit D to support their arguments regarding group policies and Defendants Id. ¶ 33. They Id. Defendants move to strike the exhibit on the basis that the statements contained therein are an incomplete chain. MTS at 4-7.

arious legal conclusions about the operation of the Lowest Rates Rule. To the extent that Plaintiffs purport to

pleaded in a complaint. Iqbal, 556 U.S. at 678 tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. concern that the email

contains inaccurate statements of the law is therefore moot. The motion to

strike Exhibit D is denied on that basis.

2. Class Definition The 4AC defines the putative class as follows:

California law to purchase a Good Driver Discount policy who, from

defined in Cal. Ins. Code section 660), in excess of the lowest rate Good Driver discount policy available for that coverage from another insurance -licensed common ownership,

4AC ¶ 3. Defendants move to strike the class definition on the basis that it defines an impermissible -

A fail-

Kamar v. RadioShack Corp. 36 (9th Cir. 2010). See id.

Defendants argue that the class definition in the 4AC is

D

The court disagrees. While the class is defined to only include individuals who were ered one, liability in this case does not solely depend on whether Defendants violated section 1861.16(b). Plaintiffs are not directly bringing a claim under that statute, which has no private right of action. Instead, breach of the covenant of good faith and fair dealing and violations of the UCL. See supra. These claims require Plaintiffs to establish elements that are not iability. Further, Defendants do not point out any issues in identifying class members for the purpose of sending class notices.

3. Class Allegations has the authority to grant a motion to strike class claims at the pleading stage, Lee, 330 F.R.D. at 562. Numerous courts within this district because a motion for class Covillo v. Specialtys Café, No. 11-cv-00594-DMR, 2011 WL 6748514, at *6 (N.D. Cal. Dec. 22, 2011) (quoting Hibbs-Rines v. Seagate Tech., LLC, No. 08-cv-5430-SI, 2009 WL 513496, at *3 (N.D. Cal. Mar. 2, 2009) (quotation omitted)); see also Astiana v. Ben & Jerry's Homemade, Inc., Nos. 10-cv- 4387-PJH, 10-cv-4937-PJH, 2011 WL 2111796, at *14 (N.D. Cal. May 26, 2011) (stating that a motion to strike cla as a class action without actually considering a motion for class certification Case 4:15-cv-00313-DMR Document 183 Filed 06/11/21 Page 25 of 28 Inc. v. Ubiquiti Networks, Inc., No. 13-cv-1803-EMC, 2014 WL 1048710, at *3 (N.D. Cal. Mar. 14, 2014) (denying motion to strike class allegations on the basis that Rule 12(f) is not the proper vehicle to dismiss class allegations). questions of law are clear and not in dispute, and that under no set of circumstances could the claim

Parducci v. Overland Sols., Inc., No. 18-cv-07162-WHO, 2019 WL 3220282, at *4 (N.D. Cal. July 17,

2019) (quoting In re iPad Unlimited Data Plan Litig., No. 10-cv-2553- RMW 2012 WL 2428248, at *2 (N.D. Cal. June 26, 2012)).

Despite the overwhelmingly negative view of such motions in this district, Defendants argue

ions to track the language of the statute involves highly individualized inquiries that are inappropriate for a class action, including whether

(1) each class broker; (2) Defendants agent/representatives failed to cross-offer a GDD policy with lower rates to

every class member; (3) each class member was qualified for a lower rate policy; (4) each class member would have accepted a lower rate policy; (5) each Defendant refused to sell each class member a lower rate policy; and (6) lower rate policies were actually available for each class member. MTS Reply at 5.

This court recently examined the propriety of striking class allegations at the pleadings stage. See Mason v. Ashbritt, Inc., No. 18-cv-07181-DMR, 2020 WL 789570 (N.D. Cal. Feb. 17, 2020). Mason ven if the issues in this case would or will require individual examinations that are inappropriate for a class action, it is still necessary to establish whether this analysis should be undertaken in a Rule 12(f) motion rather than at class certification. Id. at *9. The court extensively reviewed the the weight of the authority in this district leans against striking class allegations on a Rule 12(f) motion. Id. at *10. One court in this district has went so far as to say that the sufficiency of class allegations should be

In re Wal-Mart Stores, Inc. Wage and Hour Litigation, 505 F. Supp. 2d 609 (N.D. Cal. 2007) (Armstrong, J.). Mason also specifically addressed the contrary caselaw Defendants rely on here and found that those decisions were perfunctory and did not adequately explain why the existence of individualized inquiries should be addressed through a motion to strike rather than at class certification. See 2020 WL 789570 at *9 (examining Sanders v. Apple Inc., 672 F. Supp. 2d 978 (N.D. Cal. 2009) and Tietsworth v. Sears, 720 F. Supp. 2d 1123, 1134 (N.D. Cal. 2010)). at issue is a conspicuous omission, particularly given that Plaintiffs cited Mason in their opposition.

See MTS Opp. at 7 n. 1.

4. Class Period The 4AC defines a class period from January 1, 2008 to the present. 4AC ¶ 3. Defendants raise several arguments that the alleged class period is improper. First, they assert that the class on the grounds that Plaintiffs only allege that PEIC and Sequoia had lower rates that could have been offered but these two entities were not members of the control group until April 2013. MTS at 17-19. Second, they argue that the class period is improp is four years. Id. at 19. Finally, Defendants contend that Plaintiffs are not entitled to argue that the

statute of limitations for any of their claims has been tolled due to the discovery rule. Id. at 19-23.

The court declines to reach any of these arguments. The purpose of Rule 12(f) is to permit Civ. P. 12(f); see also Whittlestone, Inc. v. Handi-Craft Co., 618 F.3d

970, 973 (9th Cir. 2010) (holding district court erred in striking damages claim under Rule 12(f) be stricken by [defendant] Defendants do not explain how any of the matters pleaded with respect to the class

these issues on a motion to strike.

A Case 4:15-cv-00313-DMR Document 183 Filed 06/11/21 Page 27 of 28 their arguments at an appropriate stage of the litigation.

C. Conclusion

V. CONCLUSION

insofar as Plaintiffs allege that NGAC and PEIC violated the Lowest Rates Rule after they received Super Group Exemptions. It is also granted as to raudulent business practices under the UCL. Defendants shall answer the 4AC as to surviving claims by July 2, 2021. The discovery stay is lifted.

The court will hold a further case management conference on August 4, 2021 at 1:30 p.m. The parties shall file an updated case management statement by July 28, 2021.

IT IS SO ORDERED. Dated: June 11, 2021 _____ Donna M. Ryu United States Magistrate Judge