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United States District Court, C.D. California.

U.S. TELEPACIFIC CORP.
v.
U.S. SPECIALTY INSURANCE CO.

Case No. CV 18-5083-DMG (AGRx)
|
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Attorneys and Law Firms

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Proceedings: IN CHAMBERS - ORDER RE CROSS-MOTIONS FOR JUDGMENT ON THE PLEADINGS [22, 23]

DOLLY M. GEE, UNITED STATES DISTRICT JUDGE

***1** Before the Court is Defendant U.S. Specialty Insurance Company's ("Specialty") Motion for Judgment on the Pleadings ("Specialty Motion") and Plaintiff U.S. TelePacific Corp., d/b/a TPx Communications' ("TPx") Cross-Motion for Partial Judgment on the Pleadings ("TPx Motion"). [Doc. ## 22, 23.] Both motions are fully briefed. [Doc. ## 27, 28, 29, 30.][1]

I.

FACTUAL BACKGROUND

A. The Policy

TPx purchased a Directors, Officers and Organization Liability Policy ("the Policy") from Specialty. [Doc. # 1-1, Ex. A ("Complaint") at ¶ 6]. The Policy provides that Specialty, as TPx's insurer, "will pay to or on behalf of the Insured Organization Loss arising from Claims first made against it during the Policy Period or Discovery Period (if applicable) for Wrongful Acts." *Id.*, Ex. A ("the Policy") at 18.[2] Attached to the Policy are endorsements modifying provisions of the Policy. Throughout this Order, the Court will cite to provisions as amended by the applicable endorsements. The Policy also enumerates certain coverage exclusions which outline circumstances when "[Specialty] will not be liable to make any payment of Loss." *Id.* at 22. The Court discusses all other relevant portions of the Policy as they arise.

B. The Underlying Actions

On April 7, 2012, Craig Watts filed a class action suit against TPx ("the *Watts* complaint"). Compl. at ¶ 17. On June 13, 2012, Plaintiff Tolanda McKinney filed a separate class action suit against TPx ("the *McKinney* complaint"). *Id.* at ¶ 20.

The *Watts* complaint alleges eight causes of action: (1) failure to pay overtime wages; (2) failure to provide meal periods; (3) failure to authorize and permit paid rest periods; (4) failure to timely furnish accurate itemized wage statements; (5) wages not timely paid upon termination; (6) penalties pursuant to California's Private Attorneys General Act ("PAGA"); (7) unfair business practices; and (8) declaratory relief. *Id.* at ¶ 17. The *McKinney* complaint alleges six causes of action: (1) failure to pay overtime wages; (2) unpaid minimum wages; (3) failure to timely furnish accurate itemized wage statements; (4) wages not timely paid upon termination; (5) penalties pursuant to PAGA; and (6) unfair business practices. On November 2012, these lawsuits were consolidated into one action. *Id.* at ¶¶ 20, 22.

C. The Instant Action

When TPx notified Specialty of the *Watts* and *McKinney* lawsuits, Specialty asserted that both suits were outside the scope of the Policy's coverage. *Id.* at ¶ 23. TPx then requested that Specialty reconsider its decision to deny coverage. *Id.* at ¶ 24. After Specialty did not reconsider, TPx filed suit in California state court, alleging breach of contract and breach of the implied covenant of good faith and fair dealing arising from Specialty's failure to provide coverage under the Policy. On June 8, 2018, TPx removed the case to this Court. [Doc. # 1.] On September 4, 2018, the parties filed their Cross-Motions for Judgment on the Pleadings.

II.

LEGAL STANDARD

***2** Federal Rule of Civil Procedure 12(c) provides that "[a]fter the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings." Fed. R. Civ. P. 12(c). Judgment on the pleadings under Rule 12(c) is properly granted only when, taking all the factual allegations in the pleadings as true, "the moving party is entitled to judgment as a matter of law." *Fairbanks N. Star Borough v. U.S. Army Corps. of Eng'rs*, 543 F.3d 586, 591 (9th Cir. 2008) (quoting *Dunlap v. Credit Protection Ass'n, L.P.*, 419 F.3d 1011, 1012 n.1 (9th Cir. 2005) (*per curiam*)).

Motions under Rule 12(c) are "functionally identical" to motions under Rule 12(b). *Lyon v. Chase Bank USA, N.A.*, 656 F.3d 877, 883 (9th Cir. 2011) (citing *Dworkin v. Hustler Magazine Inc.*, 867 F.2d 1188, 1192 (9th Cir. 1989)). A plaintiff need not allege " 'specific facts' beyond those necessary to state his claim and the grounds showing entitlement to relief." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A pleading is insufficient, however, if it offers mere "labels and conclusions" or "a formulaic recitation of the elements of a cause of action." *Id.* at 555. A cause of action may be dismissed when it asserts a legal theory that is not cognizable as a matter of law, or it fails to allege sufficient facts to support an otherwise cognizable legal claim. *SmileCare Dental Group v. Delta Dental Plan of California, Inc.*, 88 F.3d 780, 783 (9th Cir. 1996).

As with a motion to dismiss, upon granting a motion for judgment on the pleadings, the court will grant leave to amend unless it "determines that the pleading could not possibly be cured by the allegation of other facts." *Knappenberger v. City of Phoenix*, 566 F.3d 936, 942 (9th Cir. 2009).

III.

DISCUSSION

Whether Specialty breached the Policy or the covenant of good faith and fair dealing arising from the Policy depends on whether Specialty was obligated to provide coverage for any of the claims asserted in the Underlying Actions. Specialty argues that the Policy contains three provisions—(1) Exclusion L, (2) the definition of "Loss," and (3) Exclusion F—that preclude coverage for each cause of action in the *Watts* and *McKinney* Complaints. Specialty Motion at 11. The Court will consider each in turn, but turns first to the applicable general rules of insurance policy interpretation and the coverage standard that applies to the Policy.

A. Applicable Standards

1. Rules of Insurance Policy Interpretation

In this diversity action, the law of the forum state, California, governs the Policy's interpretation. *Bell Lavalin, Inc. v. Simcoe and Erie Gen. Ins. Co.*, 61 F.3d 742, 745 (9th Cir. 1995). Under California law,

> [i]nterpretation of an insurance

> policy is a question of law and follows the general rules of contract interpretation. The fundamental rules of contract interpretation are based on the premise that the interpretation of a contract must give effect to the mutual intentions of the parties at the time the contract is formed. Under statutory rules of contract interpretation, the mutual intention of the parties at the time the contract is formed governs interpretation. Such intent is to be inferred, if possible, solely from the written provisions of the contract. The clear and explicit meaning of these provisions, interpreted in their ordinary and popular sense, unless used by the parties in a technical sense or a special meaning is given to them by usage controls judicial interpretation. A policy provision will be considered ambiguous when it is capable of two or more constructions, both of which are reasonable. But language in a contract must be interpreted as a whole, and in the circumstances of the case, and cannot be found to be ambiguous in the abstract.

***3** *MacKinnon v. Truck Ins. Exch.*, 31 Cal. 4th 635, 647-48 (2003) (internal citations and quotations omitted).

In insurance coverage actions, "the insured has the burden to prove that the claim falls within the basic scope of coverage." *Pan Pac. Retail Properties, Inc. v. Gulf Ins. Co.*, 471 F.3d 961, 970-71 (9th Cir. 2006) (*citing Collin v. Am. Empire Ins. Co.*, 21 Cal. App. 4th 787, 803, (1994)). But provisions about insurance coverage are to be "interpreted broadly so as to afford the greatest possible protection to the insured." *Id.* (internal citations and quotations omitted). This is especially true "when the coverage portion of the insurance policy would lead an insured to reasonably expect coverage for the claim purportedly excluded." *Id.*

Clauses that exclude certain conduct or events from coverage, on the other hand, must be interpreted narrowly and must be clearly written to be effective. *Id.* at 647-48 ("As we have declared time and again any exception to the performance of the basic underlying obligation must be so stated as clearly to apprise the insured of its effect .... The exclusionary clause must be conspicuous, plain and clear."); *Haynes v. Farmers Exch.*, 32 Cal. 4th 1198, 1204 (2004) (The exclusionary clause must be "stated precisely and understandably, in words that are part of the working vocabulary of the average layperson."). The "burden rests upon the insurer to phrase exceptions and exclusions in clear and unmistakable language." *MacKinnon*, 31 Cal. 4th at 648.

2. Duty to Defend and Duty to Advance Costs

The parties disagree over whether the Policy requires Specialty to provide coverage only for actually covered claims, or whether it covers "potentially covered" claims as well. Under California law, an insurer may have a duty to defend or a duty to indemnify, or both. *Buss v. Superior Court*, 16 Cal. 4th 35, 45-46 (1997). While the duty to indemnify "runs to claims that are actually covered" by a given policy "in light of facts proved," the duty to defend "runs to claims that are merely potentially covered, in light of facts alleged or otherwise disclosed." *Id.* (duty to indemnify arises "only after liability is established," but duty to defend "arises as soon as tender is made."). Thus, while insurers must indemnify insureds only for proven claims, when an insurer has a duty to defend, the broader "potential for coverage" standard applies. *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008); *Horace Mann Ins. Co. v. Barbara B.*, 4 Cal. 4th 1076, 1081 (1993) ("[T]he duty to defend is broader than the duty to indemnify; an insurer may owe a duty to defend its insured in an action in which no damages ultimately are awarded.").

But the duty to defend is a creature of contract—if a given insurance policy disclaims it, no such duty will be imposed on the insurer. *See Buss*, 16 Cal. 4th at 47 ("The duty to defend is contractual."); *Jeff Tracy, Inc. v. U.S. Specialty Ins. Co.*, 636 F. Supp. 2d 995, 1003 (C.D. Cal. 2009) ("*Unless the terms of the policy provide otherwise*, California law imposes upon the insurer a duty to defend the insured if the underlying complaint asserts claims for damages potentially covered under the policy.") (emphasis added). In fact, "D & O [Directors & Officers] policies generally do not obligate the carrier to provide the insured with a defense." *Pan Pac. Retail Properties, Inc. v. Gulf Ins. Co.*, 471 F.3d 961, 970 (9th

Cir. 2006) (quoting *Helfand v. Nat'l Union Fire Ins. Co.*, 10 Cal. App. 4th 869, 879 (1992)).

***4** Furthermore, a policy may also create a duty to advance defense costs, which is distinct from a duty to defend. *See* *Gon v. First State Ins. Co.*, 871 F.2d 863, 867-68 (9th Cir. 1989). Therefore, even if a contract's language eliminates the duty to defend, a contract could still require an insurer to advance defense costs under the "potential for coverage" standard. Like with the duty to defend, courts look to the language of the policy and its endorsements to determine whether this duty applies. *See* *Waller v. Truck Ins. Exch., Inc.*, 11 Cal. 4th 1, 18 (1995).

Specialty argues the "potential for coverage" standard does not apply here because: (1) the Policy explicitly states that Specialty has no duty to defend; and (2) imposing a "potential for coverage" standard would be generally inconsistent with the Policy's language. Specialty Motion at 15; Opp. to TPx Motion ("Specialty Opp.") at 10-11 [Doc. # 28]; Specialty Reply at 10-12 [Doc. # 29].[3] Conversely, TPx argues that even if a duty to defend does not apply, courts still apply the "potential for coverage" standard as it relates to a duty to advance defense costs. TPx Opp. to Specialty Motion ("TPx Opp.") at 9-12 [Doc. # 27].

In this case, the Policy expressly disclaims any duty to defend. The cover sheet of the declarations and endorsement states in bold, capital letters: "**THE INSURER HAS NO DUTY UNDER THE POLICY TO DEFEND ANY INSURED**." Policy at 36. Condition (D)(1) also states that "[t]he Insurer will have no duty under this policy to defend any Claim[,]" and further provides that "[t]he Insureds must defend any Claim against them." *Id.* at 38. In addition, Condition (D)(3) specifically allocates "Loss" payments in a manner where the insurer will only pay "those amounts or portions of Loss allocated to *covered* matters claimed against Insured." *Id.* at 28 (italics added). Other courts interpreting policies with similar provisions have found no duty to defend. *See, e.g.*, *Jeff Tracy, Inc.*, 636 F. Supp. 2d at 1003-04; *Commercial Capital Bankcorp. Inc. v.* *St. Paul Mercury Ins. Co.*, 419 F. Supp. 2d 1173, 1182 (C.D. Cal. 2006). Based on the clear and unambiguous Policy language, the Court concludes that the disclaimers are sufficient to eliminate Specialty's duty to defend TPx.

By the same token, using the "potential for coverage" standard to analyze Specialty's duty to advance defense costs would be contrary to the Policy's more general terms. Condition (D)(2) provides that "[t]he Insurer will advance Defense Costs *for which this Policy provides coverage.*" Policy at 40 (emphasis added). Condition (D)(2) also explains that "if it is finally determined that any Defense Costs paid by the Insurer are not covered under this Policy, the Insureds *agree to repay such non-covered Defense Costs to the Insurer.*" *Id.* (italics added). Furthermore, under Condition (D)(3), "[t]he Insurer will be obligated to pay only those amounts or portions of Loss"—which is defined to include "Defense Costs"—that are "allocated to *covered matters* claimed against Insured." *Id.* at 28 (emphasis added).

***5** All of these provisions indicate that Specialty's duty to advance defense costs applies to actually covered matters rather than potentially covered matters. A contrary interpretation would "fail[ ] to apply the plain, unambiguous language of the policy," and would effectively rewrite these provisions of the policy. *See* *Rosen v. State Farm Gen. Ins. Co.*, 30 Cal. 4th 1070, 1073 (2003). Because the policy does not impose a duty to defend, and the duty to advance defense costs applies only to covered claims, the Court declines to apply the "potential for coverage" standard.

B. Coverage of Underlying Claims

1. Exclusion L

Exclusion L states that Specialty "will not be liable to make any payment of Loss in connection with a Claim ... [:]

> for any actual or alleged violation of any provision of the Fair Labor Standards Act other than the Equal Pay Act, the National Labor Relations Act, the Worker Adjustment and Retraining Notification Act, the Consolidated Omnibus Reconciliation Act of 1985, the Occupational Safety and Health Act, any workers compensation, unemployment insurance, social security or disability benefits law or any amendments thereto, *or any other similar provisions of any federal,*

> *state or local statutory or common law or any rules and regulations promulgated under any of the foregoing ....*

Policy at 24 (emphasis added). Specialty argues that, due to Exclusion L, it need not provide coverage for the first five causes of action in the *Watts* Complaint and the first four causes of action in the *McKinney* Complaint because those claims allege violations of California Labor Code ("CLC") provisions that are "similar" to provisions of the Federal Fair Labor Standards Act ("FLSA"). Specialty Motion at 17 to 20. TPx maintains that all of the relevant CLC provisions are different. TPx Opp. at 22-27. Specialty's argument has merit, but only with respect to some of the causes of action—the failure to pay overtime, minimum wage, and meal and rest break claims.

The "similarity" analysis turns on whether the CLC provisions giving rise to the *Watts* and *McKinney* plaintiffs' claims "have characteristics in common" with FLSA provisions. *California Dairies Inc. v. RSUI Indem. Co.*, 617 F. Supp. 2d 1023, 1039 (E.D. Cal. 2009).

a. Failure to Pay Overtime Wages

Both the *Watts* and *McKinney* Complaints assert that TPx violated CLC sections 510 and 1198 by failing to pay overtime wages. *See* Compl. at ¶¶ 122-25, 154-55 (*Watts* Compl. at ¶¶ 34-45; *McKinney* Compl. at ¶¶ 44-52). Section 510(a) establishes that "work in excess of eight hours in one workday and any work in excess of 40 hours in any one workweek" must be compensated at an overtime rate of no less than one and one-half times the employee's rate. Cal. Lab. Code § 510. Section 1198 makes it unlawful for an employee to work longer than the maximum hours set forth in the applicable Industrial Welfare Commission ("IWC") Wage Order. Cal. Lab. Code § 1198.

Specialty argues that those sections share enough characteristics with 29 U.S.C. sections 207 and 216(b) to be "similar," since the CLC and FLSA both control "how much overtime must be paid and what remedies are available when an employer fails to comply." Specialty Motion at 18. Section 207, in relevant part, states that:

> [N]o employer shall employ any of his employees ... for a workweek longer than forty hours ... unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

***6** 29 U.S.C. § 207(a)(2). In addition, under section 216(b), any employer who violates section 207 "shall be liable to the employee or employees affected in the amount of their unpaid overtime compensation." *Id.* at § 216(b).

TPx argues that the CLC and FLSA are not similar because the CLC mandates overtime payments for work exceeding 8 hours in a single day or 40 hours in a workweek, while the FLSA only mandates overtime payment for work exceeding 40 hours per week. TPx Opp. at 26. But the FLSA's omission of the 8-hour-per-day requirement does not change the fact that the CLC and FLSA provisions share core characteristics. They both cap regular weekly hours at 40 and both ensure that employers compensate employees who work beyond their normal hours with increased pay. Despite some "distinctions" between the CLC and FLSA overtime provisions, the two statutes have sufficient "characteristics in common" to be similar under Exclusion L. *See* *California Dairies*, 617 F. Supp. 2d at 1042-43 (holding under similar facts that CLC section 510 and IWC Wage Order section 3 are similar to FLSA section 207 and that "[i]t is irrelevant that the period of overtime worked and amounts of compensation may differ" between these statutes). Thus, the overtime claims fall outside the Policy's coverage because the CLC provisions are sufficiently similar to the FLSA provisions to fall within Exclusion L.

b. Failure to Pay Minimum Wage

McKinney's second cause of action for violations of CLC sections 1194, 1197, and 1197.1 due to TPx's failure to pay the minimum wage. *McKinney* Compl. at ¶¶ 53-57. Section 1197 states that "[t]he minimum wage for employees fixed by the commission or by any applicable

state or local law, is the minimum wage to be paid to employees, and the payment of a lower wage than the minimum so fixed is unlawful." Cal. Lab. Code § 1197. Specialty argues, and TPx does not dispute, that this provision is similar to 29 U.S.C. section 206, which provides that "[e]very employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates: ..." 29 U.S.C. § 206 (setting forth rates). Since both provisions establish a minimum wage that must be paid, they have characteristics in common. The CLC sections, therefore, are similar enough to be excluded from coverage. *See* *California Dairies*, 617 F. Supp. 2d at 1040 (holding that CLC section 1197 and FLSA section 206 are similar).

c. Failure to Provide and Pay for Meal and Rest Breaks

The *Watts* Complaint's second and third causes of actions allege that TPx failed to provide all required meal breaks and all required rest breaks in violation of CLC sections 226.7 and 512. *Watts* Compl. at ¶¶ 46-70. Under section 226.7, "[a]n employer shall not require an employee to work during a meal or rest or recovery period mandated pursuant to an applicable statute, or applicable regulation, standard, or order of the [IWC]." Cal. Lab. Code. § 226.7(b). Furthermore,

> [i]f an employer fails to provide an employee a meal or rest or recovery period in accordance with a state law, including, but not limited to, an applicable statute or applicable regulation, standard, or order of the [IWC,] the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each workday that the meal or rest or recovery period is not provided.

***7** Cal. Lab. Code. § 226.7(b). Section 512 also provides that the length of the meal break is based on the number of hours worked. Cal. Lab. Code § 512.

According to Specialty, while 29 U.S.C. sections 206 and 207 "more broadly address[ ] minimum working standards," the implementing regulations of the FLSA, such as 29 C.F.R. sections 785.18-19, contain similar meal and rest break requirements. Specialty Motion at 18-19. TPx argues, however, that because "the C.F.R. is not part of the FLSA and has no bearing on whether Exclusion [L][4] applies," the FLSA does not contain any provision similar to the CLC. That is an unreasonable reading of the exclusion. Exclusion L, after all, applies to:

> any actual or alleged violation of any provision of the *Fair Labor Standards Act* other than the Equal Pay Act, the National Labor Relations Act, the Worker Adjustment and Retraining Notification Act, the Consolidated Omnibus Budget Reconciliation Act of 1985, the Occupational Health and Safety Act ... or any other similar provisions of any federal, state or local statutory or common law *or any rules and regulations promulgated under any of the foregoing* ....

Exclusion L (emphasis added). Plainly read, the phrase "or any rules and regulations promulgated under any of the foregoing," modifies the entire list of statutes that precedes it. As such, Exclusion L encompasses any of the FLSA's interpreting regulations, including those set forth in the Code of Federal Regulations.

A nearly identical provision in an insurance coverage exclusion was at issue in *California Dairies.* There, the Court considered portions of 29 C.F.R. sections 785.18-19 and concluded that the CLC And C.F.R. are similar "[a]lthough the expanded state meal and rest benefits are not identical to the FLSA, as no such expanded benefits are prescribed by federal law, both the FLSA and state law provide some form of meal and rest benefits." *California Dairies*, 617 F. Supp. 2d at 1044. The Court sees no reason to depart from that reasoning here. Sections 226.7 and 512 are therefore sufficiently similar to the FLSA to fall within Exclusion

L.

2. Definition of "Loss"

Specialty also argues that because the relief Watts and McKinney seek does not constitute a "Loss" as defined by the Policy, Specialty has no obligation to provide coverage. Specialty Motion at 20-21. This argument has merit as it relates to the causes of action for failure to timely pay wages upon termination.

Under the Policy, "Loss means Defense Costs and any damages, settlements, judgments, back pay awards and front pay awards or other amounts ... that an Insured is legally obligated to pay as a result of any Claim." Policy at 20. But the Policy also makes clear what is not a "Loss." Specifically, "Loss will not include (1) wages, fines, taxes or penalties or matters which are uninsurable under the law pursuant to which this Policy is construed ...." *Id.* Therefore, Specialty claims, to the extent the *Watts* and *McKinney* plaintiffs seek relief in the form of wage reimbursement and waiting time penalties, their claims fall outside of the Policy's definition of "Loss."

***8** Both the *Watts* and *McKinney* plaintiffs allege that TPx failed to timely pay wages upon termination in violation of CLC sections 201 and 202. *Id.* at 131-32; 15-59 (*Watts* Compl. at ¶¶ 82-88; *McKinney* Compl. at ¶¶ 65-70). They allege those violations entitle them to recovery under to CLC section 203, which provides that:

> [i]f an employer willfully fails to pay, without abatement or reduction, in accordance with Sections 201 ... [and] 202 ..., any wages of an employee who is discharged or who quits, the wages of the employee shall continue *as a penalty* from the due date thereof at the same rate until paid or until an action therefor is commenced; but the wages shall not continue for more than 30 days.

Cal. Lab. Code § 203 (emphasis added). The statute's language clearly classifies the relief that the *Watts* and *McKinney* plaintiffs seek as a "penalty."[5]

TPx points out that "Loss" includes "Defense Costs" *and* "any damages, settlements, judgments or other amounts that an Insured is legally obligated to pay as a result of any Claim." It argues that because the provision does not specify whether Defense Costs refer to only "covered" claims, the Policy covers all "Defense Costs" incurred from the lawsuit, regardless if the claims are actually covered. TPx Opp. at 27-29. But, as discussed above, such an interpretation would be inconsistent with other aspects of the Policy.

Under California law, "[t]he meaning of a contract must be derived from reading the whole of the contract, with individual provisions interpreted together, in order to give effect to all provisions and to avoid rendering some meaningless." *Maples v. SolarWinds, Inc.*, 50 F. Supp. 3d 1221, 1228 (N.D. Cal. 2014) (quoting *Zalkind v. Ceradyne, Inc.*, 194 Cal.App.4th 1010, 1027, 124 Cal.Rptr.3d 105 (2011)). Condition (D)(2) clearly states "[t]he Insurer will advance Defense Costs *for which this Policy provides coverage.*" Complaint at 20 (emphasis with italics added). Going a step further, Condition (D)(2) also requires that "[i]f it is finally determined that any Defense Costs paid by the Insurer are not covered under this Policy, *the Insureds agree to repay such non-covered Defense Costs to the Insurer. Id.* (emphasis in italics added). Lastly, Condition (D)(3) makes clear "[t]he Insurer will be obligated to pay only those amounts or portions of Loss," including Defense Costs, "allocated to *covered matters* claimed against Insured." *Id.* at 28 (emphasis in italics added). These conditions, when read together with the entire contract, and the definition of "Loss" in particular, make clear that Specialty was only intended to pay for "Defense Costs" covered by the Policy. It would be inconsistent with the Policy's other provisions to hold that Specialty intended to pay for Defense Costs associated with any claim, even those claims which its Policy does not cover.

In sum, the Policy does not cover the claims for failure to timely pay wages because the Policy's definition of "Loss" excludes the "penalties" TPx seeks to recover under section 203.

3. Exclusion F

***9** Lastly, Specialty argues that the causes of action in the *Watts* and *McKinney* Complaints fall outside the Policy's coverage because, under Exclusion F, they are claims brought by an "Insured Person." Specialty Motion at 11-14. TPx counters that the causes of action are covered

under the "Employment Practices Wrongful Act" exception to the Exclusion F. TPx Opp. at 12-20.

Exclusion F states that the Policy does not cover claims "brought by or on behalf of, or in the name or right of, ... any Insured Person." Policy at 79. The parties do not dispute that Watts and McKinney are "Insured Persons" under the Policy or that Exclusion F applies to them.[6] Specialty Motion at 11-12; TPx Opp. at 13.

Exclusion F makes explicit, however, that it does not cover any claims by an Insured Person unless it is "for an actual or alleged Employment Practices Wrongful Act." Policy at 79. An Employment Practices Wrongful Act, in turn, includes "Workplace Harassment" or any actual or alleged "Workplace Tort," which includes "misrepresentation," "negligent evaluation," or "negligent training or supervision." *Id.* at 21. Since the *McKinney* Complaint alleges in a single sentence that TPx "falsely represented to Plaintiff and class members that they were properly classified" as exempt managers, and both the *Watts* and *McKinney* Complaints assert that TPx "disseminated inaccurate wage statements to employees," TPx argues these allegations could provide a basis for employment-related misrepresentation and negligence claims. TPx also claims that allegations relating to the meal break and rest break claims could support a workplace harassment claim. TPx Opp. at 7-11. Therefore, TPx contends, at least some of the underlying causes of action meet the requirements of the Employment Practices Wrongful Act exception and trigger Specialty's obligation to provide coverage. *See* TPx Opp. at 13-15; TPx Motion at 16-20.

This interpretation of the *Watts* and *McKinney* Complaints stretches the Policy and the underlying claims too far. TPx contorts the word "for" in the phrase "for an actual or alleged Employment Practices Wrongful Act" to argue that "for" actually means " 'by reason of,' 'on account of,' or 'because of' the enumerated wrongful acts." TPx Opp. at 18.[7] TPx argues that, under this definition, the Policy not only covers claims that Watts and McKinney actually made, but also any claims that *could* arise "by reason of, on account of, or because of" the Complaints' allegations. The Policy's other provisions, however, read in proper context, belie that construction.

***10** Some of the Policy's exclusions apply to claims "arising out of, based upon or attributable to facts or circumstances alleged," while others are limited to claims "for [the/any/an] actual or alleged violation." *See* Policy at 22-25. This dichotomy suggests that the Policy, and thereby the parties, contemplated when exclusions or exceptions should apply to broad or narrow sets of circumstances. Describing claims "arising out of, based upon or attributable to facts or circumstances alleged" connotes intentionally broad coverage, especially when juxtaposed with the other provisions that describe claims merely "for [the/any/an] actual or alleged violation." Replacing the word "for" with TPx's suggested broader construction would effectively widen coverage under the "for" provisions to have the same scope as the "arising out of, based upon or attributable to facts or circumstances alleged" provisions. This would drastically change the meaning of the policy and run counter to the maxim that Courts must not "rewrite any provision of any contract, including an insurance policy, for any purpose." *Rosen*, 30 Cal. 4th at 1073 (*quoting* *Certain Underwriters at Lloyd's of London v. Superior Court*, 24 Cal. 4th 945, 968 (2001).

Simply put, the Policy does not cover claims brought by Insured Persons unless those claims are *for* Employment Practices Wrongful Acts. And the *Watts* and *McKinney* Complaints make no claims for an Employment Practices Wrongful Act. Whether or not certain allegations could theoretically form the basis for other hypothetical claims, the underlying Complaints seek relief for wage and hour violations—failure to pay proper wages, provide meal and rest breaks, provide accurate wage statements, and failure to pay separation wages—none of which are Employment Practices Wrongful Acts as the Policy defines them. *Gunderson v. Fire Ins. Exch.*, 37 Cal. App. 4th 1106, 1114 (1995) ("the insured may not speculate about unpled third party claims to manufacture coverage").

Thus, even if the Court did not find that Exclusion L excludes coverage of the overtime, minimum wage, and meal/rest break claims, Exclusion F also bars coverage of those claims. Moreover, Exclusion F excludes coverage for the *Watts* and *McKinney* Complaints' remaining claims for failure to provide accurate wage statements and failure to timely pay separation wages.

IV.

CONCLUSION

In light of the foregoing, the Court makes the following

conclusions:

> 1. Exclusion L bars coverage for the *Watts* Complaint's first (overtime wages), second (meal periods) and third (rest periods) causes of action and the *McKinney* Complaint's first (overtime wages) and second (minimum wage) causes of action because the CLC provisions giving rise to those claims are "similar to" analogous FLSA or C.F.R. provisions;
>
> 2. The Policy's definition of "Loss" bars coverage for the *Watt*s Complaint's fifth cause of action and the *McKinney* complaint's fourth cause of action for failure to pay wages upon termination because, under the Policy, "Loss" explicitly excludes the penalties available under CLC section 203;
>
> 3. Exclusion F bars coverage for all of the aforementioned wage and hour claims, including the *Watts* Complaint's fourth cause of action and the *McKinney* Complaint's third cause of action for failure to provide accurate wage statements because Watts and McKinney are "Insured Persons" and did not bring claims for "Employment Practices Wrongful Acts"; and
>
> 4. The remaining causes of action in the *Watts* complaint, for penalties pursuant to PAGA, violations of California's Business and Professions Code, and declaratory relief, are derivative—they seek relief for the same conduct giving rise to the claims discussed above—and therefore are also not covered under the Policy. *See* *California Dairies*, 617 F. Supp. 2d at 1050–51. The *McKinney* Complaint's remaining causes of action, for penalties pursuant to PAGA and for violations of California's Business and Professions Code, are similarly derivative and are not covered for the same reasons.

Because none of the causes of action in the *Watts* and *McKinney* Complaints give rise to coverage obligations under the Policy, Specialty did not breach the Policy by denying coverage. Thus, TPx's first cause of action for breach of contract and third and fourth causes of action for declaratory relief fail as a matter of law. And since Specialty did not breach the contract, TPx's second cause of action for breach of the implied covenant of good faith and fair dealing also fails. *See* *Am. Med. Int'l, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 244 F.3d 715, 719–20 (9th Cir. 2001) ("there can be no action for breach of the implied covenant of good faith and fair dealing because the covenant is based on the contractual relationship between the insured and the insurer."); *Waller v. Truck Ins. Exch., Inc.*, 11 Cal. 4th 1, 36 (1995) (When the insurer "was under no obligation to defend or indemnify ... it did not breach the implied covenant of good faith and fair dealing.").

***11** Accordingly, the Court **GRANTS, with prejudice,** Specialty's Motion for Judgment on the Pleadings and **DENIES** TPx's Cross-Motion for Partial Judgment on the Pleadings. Because the parties agree on the facts of the case, and there is no indication that TPx has additional factual allegations it could plead that would change the outcome of these motions, the Court determines that "the pleading could not possibly be cured by the allegation of other facts" and **DENIES** leave to amend the Complaint. *Knappenberger*, 566 F.3d at 942. All scheduled dates and deadlines are VACATED.

IT IS SO ORDERED.

All Citations

Slip Copy, 2019 WL 2590171

Footnotes

1 While these motions were pending, Specialty submitted a Notice of Supplemental Authority ("Notice") on May 2, 2019. [Doc. # 35.] TPx filed a Request to Strike the Notice [Doc. # 36], and Specialty opposed that request [Doc. # 37]. Because the Court need not rely on the additional authority to reach its conclusion, it has not taken Specialty's Notice into consideration. TPx's Request to Strike is therefore **DENIED as moot**.

2 All page references herein are to page numbers inserted in the header of the document by the CM/ECF filing system.

[3] Each party has filed three briefs in connection with the Cross-Motions (an opening motion, an opposition to the other party's motion, and a reply to the other party's opposition). Most of the arguments and responses are consistent throughout all six documents. To prevent confusion, for the remainder of this order, the Court will cite to Specialty's Motion, TPx's Opposition, and Specialty's Reply when referencing the arguments each party makes. If there is an argument which does not appear in the aforementioned papers, the Court will cite to the documents in which they appear.

[4] Although TPx's papers reference Exclusion F with respect to this argument, the Court assumes TPx meant Exclusion L since Exclusion L is the provision focused on statutes' similarities.

[5] TPx attempts to draw a distinction between "civil penalties" and "statutory penalties" in order to argue that the Policy's failure to distinguish between them creates an "ambiguity that must be resolved in TPx's favor." TPx Opp. at 24. The Court disagrees. A plain reading of the provision indicates that "Loss" excludes penalties, no matter what type.

[6] The policy defines "Insured Person" as "any past ... Employee of the Insured Organization." Policy at 20. In turn, "Employee" is defined as "any individual whom the Insured Organization compensates by salary, wages and/or commissions and whose labor or service is engaged by and directed by the Insured Organization, including seasonal, volunteer and part-time employees." *Id.* at 19. Thus, both Watts and McKinney qualify as Insured Persons.

[7] TPx supports this definition with a dictionary and a case from 1913. *See id.* at 13-14. But these sources are unpersuasive. Even though the "examination of various dictionary definitions of a word will no doubt be useful, such examination does not necessarily yield the 'ordinary and popular' sense of the word *if it disregards the policy's context.*" *MacKinnon*, 31 Cal. 4th at 649 (emphasis added); *Impac Mortg. Holdings, Inc. v. Houston Cas. Co.*, 634 F. App'x 614, 615 (9th Cir. 2016) ("Impac's interpretation flies in the face of the California Supreme Court's warning not to elevate possible dictionary meanings over context in interpreting language in insurance policies.").