

**UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF
CALIFORNIA**

Diversified Restaurant Group, LLC v. Houston Casualty Company

Case No. 25-cv-02344-EMC (N.D. Cal. July 31, 2025) · No. 25-cv-02344-EMC · Decided July 31, 2025

OPINION

Diversified Restaurant Group, LLC v. Houston Casualty Company

PER CURIAM.

1 2 3

4 UNITED STATES DISTRICT COURT

5 NORTHERN DISTRICT OF CALIFORNIA

6 7 DIVERSIFIED RESTAURANT GROUP, Case No. 25-cv-02344-EMC LLC, et al., 8
Plaintiffs, ORDER GRANTING DEFENDANTS'

9 MOTION TO DISMISS

v. 10 HOUSTON CASUALTY COMPANY, et Docket No. 17 11 al., 12 Defendants. 13

14 I. INTRODUCTION

15 Plaintiffs Diversified Restaurant Group (“DRG”), LLC, and Golden Gate Bell (“GGB”), 16
LLC, both California limited liability companies who own and/or operate a number of restaurants,
17 filed suit against Defendants Houston Casualty Company (“HCC”), Pennsylvania
Manufacturers 18 Indemnity Company (“PMIC”) and Manufacturer’s Alliance Insurance
Company (“MAIC”) 19 seeking insurance coverage for the defense of an underlying lawsuit.
Docket No. 16 (“FAC”). 20 Plaintiffs (herein “Insureds”) have been sued for sexual harassment in
the underlying action 21 (“Underlying Action”)1. The plaintiff in Underlying Action (a former
employee who alleges she 22 was sexually harassed and assaulted by her supervisor) asserts
thirteen claims against HCC, DRG 23 and GGB, and was filed in Antioch, California. 24 Through
a package insurance policy, the Insureds contracted with PMIC for general 25 liability insurance,
and with MAIC for workers compensation and employer’s liability policy. 26 1 The complaint of
the Underlying Action, found at Docket No. 26, Exhibit A, was filed in the 27 Superior Court for
the State of California, case No. C23-00634, entitled Jane Doe v. Golden Gate 1 FAC ¶ 24.
Additionally, the Insureds contracted with HCC for employment practices liability 2 insurance.2
The Insureds allege Defendants HCC, PMIC, and MAIC failed to provide insurance 3 coverage
and to defend the Insureds in the Underlying Lawsuit filed by a former employee (herein 4
“Underlying Plaintiff”). The Insureds further allege that this failure constitutes a breach of 5
contract and a breach of implied covenant of good faith and fair dealing. The Insureds seek 6
compensatory and punitive damages against HCC, PMIC, and MAIC and a declaration that the 7
Defendants are obligated to defend and indemnify the Insureds in the Underlying Action. See 8

generally FAC. 9 Before the Court is PMIC’s and MAIC’s motion to dismiss the FAC under Fed. R. Civ. 10 P.12(b)(6). MAIC and PMIC (herein “Insurers”) state that the claims in the Underlying Action are 11 not covered by the general liability policy issued by PMIC (“PMIC Policy” or “PMIC 12 Agreement”), because of the Employment Related Practices Exclusion (“ERP Exclusion”) and/or 13 the Employment Liability Exclusion (“EL Exclusion”). See FAC ¶ 19; Mot. at 9. Insurers also 14 state that the claims in the Underlying Action are not covered by the worker’s compensation and 15 employer’s liability insurance policy issued by MAIC (“MAIC Policy” or “MAIC Agreement”) 16 due to the exclusion under Section C.7 (“C.7 Exclusion”). Id. HCC which provided employer 17 liability insurance to the Insureds has not moved to dismiss. For the reasons below, Insurers’ 18 Motion to Dismiss is GRANTED. 19 . 20

21 II. BACKGROUND

22 A. Procedural Background 23 The Insureds initiated this suit on January 22, 2025. In March 2025, the case was removed 24 from Contra Costa County Superior Court. See Docket No. 1 (Complaint). In May 2025, the 25 Insurers moved to dismiss for failure to state a claim for which relief may be granted. See Docket 26 27 2 HCC’s policy provides coverage for claims involving sexual discrimination and harassment,

1 No. 25. (“Mot.”).

2 3 B. Underlying Action 4 In March 2023, the Underlying Plaintiff lodged a Department of Fair Housing Complaint 5 alleging thirteen claims against the Insureds, DRG, GGB, former employee Rafael Moreno (herein 6 “Underlying Defendant,” or “Moreno”), and DOES 1-50 (agents, employees, and/or joint ventures 7 of, or working in concert with the other Defendants). See FAC ¶¶ 5-7, 24. The Underlying Action 8 includes the following claims: “(1) Negligence, Negligent Hiring, Negligent Retention, and 9 Negligent Failure to Train and Supervise; (2) Workplace Sexual Harassment; (3) Discrimination 10 based on Sex; (4) Violation of the Ralph Civil Rights Act; (5) Violation of the Tom Bane Civil 11 Rights Act; (6) Hostile Work Environment; (7) Failure to Take Reasonable Steps to Prevent 12 Harassment; (8) Failure to Investigate; (9) Retaliation; (10) Failure to Prevent Discrimination; (11) 13 Wrongful Constructive Discharge; (12) Wrongful Termination in Violation of Public Policy; and 14 (13) Failure to Timely Pay Final Wages.” See FAC ¶ 47. 15 The Insureds state that the following relevant allegations in the Underlying Action give 16 rise to coverage under the MAIC Policy and/or the PMIC Policy: 17 a. “On multiple occasions” alleged tortfeasor “cornered Plaintiff [the Employee] into an enclosed room, blocked the door, forcing himself 18 close to Plaintiff, and rubbed his genitals on Plaintiff’s buttocks as she tried leaving the room. Further, Underlying Defendant would 19 frequently brush up against Plaintiff’s breasts when walking past her.” (Compl. ¶ 17) 20 b. When the alleged tortfeasor “cornered” Plaintiff, he “put his hand on her thighs and proceeded to rub her legs” and “laughed and walked 21 away” and “then forced his hands up her shirt and down her pants” and “attempted to unbutton her pants and forcefully kissed her neck” 22 and he “whispered that he would like to have sex with her.” (Id. ¶ 18.) c. The alleged tortfeasor “constantly made sexual remarks about 23

Plaintiff's butt, such as, 'those pants really fit your ass', 'your ass looks really nice in those', and even told Plaintiff, 'Can you clean all 24 those things so I can look at your ass?' (Id. ¶14.) d. It was reported to a "manager" of the Insureds that the alleged 25 tortfeasor "had a history of inappropriate conduct in the workplace with girls under the age of 18, but [they] did nothing to prevent the 26 harassment from continuing" and that Underlying Defendant "lived with an underage girl." (Id. ¶ 15.) 27 e. Insureds "negligently failed to supervise or provide reasonable supervision of" the alleged tortfeasor. (Id. ¶ 42.) f. Insureds "should have known that" the alleged tortfeasor "was acting 1 inappropriately with employees" and "failed to investigate" and "continued to employ" him "despite evidence that his conduct was 2 inappropriate." (Id. ¶ 39.) g. Insureds "failed to use reasonable care in investigating" alleged 3 tortfeasor and "failed to provide adequate warning to Plaintiff, Plaintiff's families and minors at work" of his alleged "dangerous 4 propensities and unfitness." (Id. ¶ 40.) h. Insureds "failed to take reasonable measures to prevent further sexual 5 abuse." (Id. ¶ 41.) i. Insureds' conduct and the maintenance of "dangerous conditions 6 were a proximate cause of Plaintiff's damages" and Insureds are liable because the alleged tortfeasor was their "agent" and acting "within 7 the course and scope of the agency." (Id. ¶¶ 11, 24, 41, 45.) j. "As a direct and legal result of the acts" of Insureds and the alleged 8 tortfeasor, "Plaintiff has been caused, and did suffer, and continue[s] to suffer severe and permanent emotional and mental distress, and 9 anguish humiliation, embarrassment, fright, shock pain, discomfort and anxiety." (Id. ¶ 25.) 10 k. "As a direct result of the wrongful conduct alleged herein, Plaintiff has suffered and continue[s] to suffer, severe emotional distress, 11 physical manifestations of emotional distress, shock, embarrassment, loss of self-esteem, disgrace, humiliation, powerlessness, and loss of 12 enjoyment of life. Plaintiff has incurred and/or will continue to incur, expenses of medical and psychological treatment, therapy and 13 counseling." (Id. ¶ 46.) l. "The harm to Plaintiff was physical in the sense that it affected her 14 emotional and mental health, rather than being a purely economic harm." (Id. ¶ 29.) 15 FAC. ¶ 49. Additionally, the Underlying Action states that Moreno "occupied a managerial 16 position . . . had direct supervisory authority over [Underlying] Plaintiff, and/or directly 17 supervised [Underlying] Plaintiff within the scope of their employment authority." See 18 Underlying Action at ¶ 51. 19 20 C. PMIC's Insurance Policy and Denial of Coverage 21 DRG and GGB contracted with PMIC for general liability insurance. See FAC. ¶ 26. In 22 December 2022, PMIC initiated defense coverage against the Underlying Plaintiff's claim and 23 continued to provide coverage for about five months. See FAC. ¶ 52-53. In May 2023, PMIC 24 emailed the Insureds a denial letter, which stated that PMIC had no obligation to defend or 25 indemnify the Insureds and withdrew their defense coverage. See FAC. ¶ 54. PMIC's denial 26 letter stated that certain claims in the employee's lawsuit, including claims of negligence, sex 27 discrimination, harassment, and wage/hour claim, were barred by the ERP Exclusion in the 1 parties' insurance contract. See FAC. ¶ 55. Additionally, PMIC stated that the remaining claims 2 were not "occurrences" as defined under the general liability policy. Id. 3 4 D. MAIC's Insurance Policy and Denial of Coverage 5

DRG and GGB contracted with MAIC for workers compensation and employer's liability 6 insurance. See FAC. ¶ 24. MAIC refused to provide coverage taking the position that there was 7 no possibility of coverage. Id. at ¶ 56. MAIC denied insurance defense coverage and indemnity 8 for the underlying suit against DRG and GGB because it stated the Underlying Action was subject 9 to the C.7 Exclusion. 10 11 E. Causes of Action 12 Based on, inter alia, the above allegations, the Insureds have asserted the following causes 13 of action against PMIC, MAIC, and HCC: 14 (1) Breach of Contract 15 (2) Breach of Implied Covenant of Good Faith and Fair Dealing 16 (3) Declaratory Relief 17 (4) Breach of Contract 18 (5) Breach of Implied Covenant of Good Faith and Fair Dealing 19 (6) Declaratory Relief 20 (7) Breach of Contract 21 (8) Breach of Implied Covenant of Good Faith and Fair Dealing 22 (9) Declaratory Relief 23 In the pending 12(b)(6) motion, PMIC and MAIC moves to dismiss outright Counts 4-9. 24 Insureds' Counts 1-3 are brought against HCC (not a party to this Motion). 25

26 III. LEGAL STANDARD

27 A. Failure to State a Claim (Rule 12(b)(6)) 1 statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). A 2 complaint that fails to meet this standard may be dismissed pursuant to Rule 12(b)(6). See Fed. R. 3 Civ. P. 12(b)(6). To overcome a Rule 12(b)(6) motion to dismiss after the Supreme Court's 4 decisions in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544 (2007), a plaintiff's "factual allegations [in the complaint] 'must . . . suggest that the 6 claim has at least a plausible chance of success.'" *Levitt v. Yelp! Inc.*, 765 F.3d 1123, 1135 (9th 7 Cir. 2014). The Court "accept[s] factual allegations in the complaint as true and construe[s] the 8 pleadings in the light most favorable to the nonmoving party." *Manzarek v. St. Paul Fire & 9 Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). But "allegations in a complaint . . . may not 10 simply recite the elements of a cause of action [and] must contain sufficient allegations of 11 underlying facts to give fair notice and to enable the opposing party to defend itself effectively." 12 *Levitt*, 765 F.3d at 1135 (quoting *Eclectic Props. E., LLC v. Marcus & Millichap Co.*, 751 F.3d 13 990, 996 (9th Cir. 2014)). "A claim has facial plausibility when the Plaintiff pleads factual 14 content that allows the court to draw the reasonable inference that the Defendant is liable for the 15 misconduct alleged." *Iqbal*, 556 U.S. at 678. "The plausibility standard is not akin to a 16 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted 17 unlawfully." Id. (quoting *Twombly*, 550 U.S. at 556). 18 19 B. Duty to Defend 20 To determine whether an insurer owes a duty to defend, a court must "compar[e] the 21 allegations of the complaint with the terms of the policy." *Montrose Chemical Corp. v. Superior 22 Ct.*, 6 Cal. 4th 287, 295 (1993). Under California law, the duty to defend is determined by 23 comparing the allegations of the complaint and the terms of the policy. *Hartford Casualty Ins. Co. 24 v. Swift Distribution, Inc.*, 59 Cal. 4th 277, 287 (2014). "An insurer's duty to defend is broader 25 than its duty to indemnify." Id. at 286. The duty to defend exists if there is any potential for 26 coverage under the policy, while the duty to indemnify exists only if the insured's conduct is 27 actually

covered. Id. at 295. “A complaint must be ‘liberally construed’ in favor of potential 1 defend may still be imposed where the precise causes of action pled by the third-party complaint 2 falls outside of the policy coverage, and under the known or reasonably inferable facts alleged, the 3 complaint could be “fairly amended to state a covered liability.” Hartford Casualty Ins. Co. v. 4 Swift Distribution, Inc., 59 Cal. 4th 277, 287 (2014). The insurer’s duty to defend is “not 5 extinguished until the insurer negates all facts suggesting potential coverage.” Id. Thus, “an 6 insurer may be excused from a duty to defend only when the third party complaint can by no 7 conceivable theory raise a single issue which could bring it within the policy coverage.” Id. 8 (internal quotations omitted). However, the duty to defend is not “not unlimited; it is measured by 9 the nature and kinds of risks covered by the policy.” Id. at 288. 10 11 C. Insurance Coverage Interpretation 12 Under California law, “[i]nterpretation of an insurance policy is a question of law and 13 follows the general rules of contract interpretation.” MacKinnon v. Truck Ins Exch., 31 Cal. 4th 14 635, 647 (2003), as modified on denial of reh’g (Sept. 17, 2003). “While insurance contracts have 15 special features, they are still contracts to which the ordinary rules of contract interpretation 16 apply.” Another Planet Ent., LLC v. Vigilant Ins. Co., 15 Cal. 5th 1106, 1135 (2024). Therefore, 17 “the mutual intention of the parties at the time the contract is formed governs interpretation. If the 18 policy language is clear and explicit, it governs.” Id. “The ‘clear and explicit’ meaning of these 19 provisions, interpreted in their “ordinary and popular sense,’ unless ‘used by the parties in a 20 technical sense or a special meaning is given to them by usage,’ controls judicial interpretation.” 21 Waller v. Truck Ins. Exchange, Inc., 11 Cal.4th 1, 18–19 (1995). “A policy provision will be 22 considered ambiguous when it is capable of two or more constructions, both of which are 23 reasonable.” Id. 24 “In determining whether a claim creates the potential for coverage under an insurance 25 policy, ‘we are guided by the principle that interpretation of an insurance policy is a question of 26 law’ [and] the mutual intention of the parties at the time the contract is formed governs 27 interpretation.” Jon Davler, Inc. v. Arch Ins. Co., 229 Cal. App. 4th 1025, 1033 (2014), as 1 potential coverage.” Michaelian v. State Comp. Ins Fund, 50 Cal. App. 4th 1093, 1106 (1996). 2 “However, the Insureds may not speculate about unpled claims in the third-party claims to 3 manufacture coverage”, and the Insureds has “no duty to defend where the potential liability is 4 ‘tenuous and farfetched.’” Id. “The ultimate question is whether the facts alleged ‘fairly appraise’ 5 the insurer that the suit is upon a covered claim. Id. 6

7 IV. DISCUSSION

8 The parties dispute whether the Insureds have a valid claim to coverage under the 9 interpretation of the two insurance contracts.³ The Insurers, PMIC and MAIC, argue that the 10 Insureds’ Complaint should be dismissed because the injuries alleged in the Underlying Action are 11 precluded from coverage by the PMIC Agreement due to the ERP Exclusion and the EL 12 Exclusion, and further, that coverage is precluded by the MAIC Agreement due to the C.7 13 Exclusion. See Mot. at 11. The Insurers also contest whether the Underlying Action is covered 14 under the PMIC Agreement at all, contesting whether the claims are “occurrences.” The Insureds

15 argue that the alleged conduct in the Underlying Action falls within both PMIC and MAIC 16 insurance agreements, and therefore the Insurers had a duty to defend and indemnify damages 17 arising from the suit. See FAC ¶¶ 11, 93, 94, 112. 18 19 A. PMIC’s Employment-Related Exclusion (ERP Exclusion) 20 The PMIC Agreement includes two separate coverage sections: Coverage A – Bodily 21 Injury and Property Damage Liability, and Coverage B – Personal and Advertising Injury 22 Liability. See Docket No. 16-2 at 45-46 (PMIC Agreement). Coverage A is subject to two 23 exclusions: the EL Exclusion and the ERP Exclusion. Coverage B subject to only the ERP 24 Exclusion. 25 Coverage A of PMIC’s Policy provides, in pertinent part: 26 3 The parties do not dispute that California law governs the Court’s interpretation of the two 27 Agreements because California is the forum state in this diversity action. See Encompass Ins. Co.

1 SECTION 1 – COVERAGES

COVERAGE A – BODILY INJURY AND PROPERTY

2 DAMAGE LIABILITY

1. Insuring Agreement

3 a. We will pay those sums that the insured becomes legally obligated to pay as damages because of ‘bodily injury’ or ‘property 4 damage’ to which this insurance applies. We will have the right and duty to defend the insured against any ‘suit’ seeking those damages. 5 However, we will have no duty to defend the insured against any ‘suit’ seeking damages for ‘bodily injury’ or ‘property damage’ to 6 which this insurance does not apply. b. This insurance applies to ‘bodily injury’ and ‘property damage’ 7 only if: (1) the ‘bodily injury’ or ‘property damage’ is caused by an ‘occurrence’ that takes place in the ‘coverage territory’ ... 8 FAC. at 31, (“Coverage A”). 9 Exclusions [under Coverage A – Bodily Injury and Property 10 Damage Liability] This insurance does not apply to: 11 * * * e. Employer’s Liability 12 “Bodily injury” to:

(1) An “employee” of the insured arising out of and in the course of:

13 (a) Employment by the insured; or (b) Performing duties related to the conduct of the insured’s 14 business; or*** This exclusion applies whether the insured may be liable as an 15 employer or in any other capacity and to any obligation to share damages with or repay someone else who must pay damages 16 because of the injury. 17 FAC. at 32, (EL Exclusion). 18 Coverage B of PMIC’s Policy provides, in pertinent part:

COVERAGE B – PERSONAL AND ADVERTISING INJURY

19 LIABILITY

Insuring Agreement 20 We will pay those sums that the insured becomes legally obligated to pay as damages because of “personal and advertising injury” to 21 which this insurance applies. We will have the right and duty to defend the insured against any ‘suit’ seeking those damages. 22 However, we will have no duty to defend the insured against any ‘suit’ seeking damages for ‘personal and advertising injury’ to 23 which this insurance does not apply.” 24 FAC. Exh.2 at 36, (“Coverage B”). 25 14. “Personal and advertising injury” means injury, including consequential “bodily injury”, arising out of one or more of the 26 following offenses: a. False arrest, detention,

or imprisonment; 27 1 ERP Exclusion applies to Coverage A and Coverage B to exclude coverage, in relevant 2 part:

3 EMPLOYMENT-RELATED PRACTICES EXCLUSION

This endorsement modifies insurance provided under the following:

4 COMMERCIAL GENERAL LIABILITY COVERAGE PART

The following exclusion is added to Paragraph 2., Exclusions of 5 Section I – Coverage A – Bodily Injury And Property Damage Liability: 6 This insurance does not apply to: “Bodily injury” to:

(1) A person arising out of any:

7 (a) Refusal to employ that person; (b) Termination of that person’s employment; or 8 (c) Employment-related practices, policies, acts or omissions, such as coercion, demotion, evaluation, reassignment, discipline, 9 defamation, harassment, humiliation, discrimination or malicious prosecution directed at that person; or . . . 10 * * * This exclusion applies: 11 (1) Whether the injury-causing event described in Paragraphs (a), (b) or (c) above occurs before employment, during employment or 12 after employment of that person;

(2) Whether the insured may be liable as an employer or in any other 13 capacity; and

(3) To any obligation to share damages with or repay someone else

14 who must pay damages because of the injury.” 15 The following exclusion is added to Paragraph 2., Exclusions of Section I – Coverage B – Personal and Advertising Injury Liability: 16 This insurance does not apply to: “Personal and Advertising Injury” to: 17 (1) A person arising out of any: (a) Refusal to employ that person; 18 (b) Termination of that person’s employment; or (c) Employment-related practices, policies, acts or omissions, such 19 as coercion, demotion, evaluation, reassignment, discipline, defamation, harassment, humiliation, discrimination or malicious 20 prosecution directed at that person; or*** * * * 21 This exclusion applies: 22 (1) Whether the injury-causing event described in Paragraphs (a), (b) or (c) above occurs before employment, during employment or 23 after employment of that person;

(2) Whether the insured may be liable as an employer or in any other 24 capacity; and

(3) To any obligation to share damages with or repay someone else

25 who must pay damages because of the injury.” 26 Docket No. 16-2 at 67-68 (ERP Exclusion); Mot. at 13-14. 27 The Underlying Action alleges that Moreno harassed Underlying Plaintiff by “(a) regularly 1 [Underlying] Plaintiff inappropriately . . .; and (c) inappropriately touching [Underlying] 2 Plaintiff.” See Underlying Action ¶ 50. Additionally, the Underlying Action alleges employment- 3 related “omissions,” including Insureds’ negligent hiring, retention, training, and supervision of 4 Moreno. Id. at 7. Underlying Plaintiff alleges that she informed a manager about Moreno’s 5 repeated sexual harassment, and the Insureds “failed to use reasonable care in investigating . . . 6 [and] further failed to take reasonable measures to prevent further sexual

abuse.” Id. ¶¶ 39, 41. 7 The Insureds argue that the Insurers have a duty to defend and indemnify because the 8 Underlying Action (1) asserts plausible claims of sexual assault and false imprisonment which are 9 not excluded; (2) includes a simple negligence claim for which Insureds have not established 10 coverage; and (3) that the remaining claims do not fall within the ERP Exclusion. See Opp. at 11- 11 14. 12 13 1. All Claims of the Underlying Action “Arise out of” Employment-Related 14 Practices (ERP) 15 As noted above, claims covered under Coverage A and/or Coverage B are subject to the 16 ERP Exclusion. There is no question the claims pled in the Underlying Action (or the claims that 17 could have been pled) “arise out of” “employment-related practices” subject to the ERP Exclusion. 18 Insurers rely on *Guillon*, which is particularly on point, and illustrates that the ERP 19 Exclusion bars coverage for the Underlying Action—including potential claims of false 20 imprisonment and sexual assault claims—because they all “arise out of” an employment-related 21 context. In *Guillon*, the Ninth Circuit Court of Appeals held that the underlying defendant’s 22 alleged conduct, including “wrongful termination, sexual harassment, retaliation, unequal pay, 23 [and] less desirable scheduling and shifts, all due to their gender,” fell within an identical ERP 24 exclusion even though some of the alleged conduct occurred outside of the workplace. *Guillon v. 25 AMCO Ins. Co.*, No. 20-CV-07926-CRB, 2021 WL 254264 (N.D. Cal. Jan. 26, 2021), *aff’d*, No. 26 21-15297, 2021 WL 6102174 (9th Cir. Dec. 22, 2021). The court in *Guillon* applied the following 27 two-factor test introduced by the California Supreme Court in *Low v. Golden Eagle Ins. Co.* to 1 “practices, policies, acts or omissions:” 2 “(1) the nexus between the allegedly defamatory statement (or other tort) at issue and the third party plaintiff’s employment by the 3 Insureds, and (2) the existence (or nonexistence) of a relationship between the employer and the third party plaintiff outside the 4 employment relationship.” Id. at 1. The court held that the underlying defendant’s conduct was employment-related because 5

(1) each claim alleged conduct that occurred at —or because of employment with—the insureds, 6 and (2) the parties did not have a non-employment relationship. Id. 7 In the case at bar, the *Low* factors demonstrate that all of the potential claims are 8 employment related. As to the first factor, all of the alleged conduct occurred while Underlying 9 Plaintiff was employed by the Insureds and was perpetrated by an assistant manager, an 10 Underlying Defendant, while on the job. All of the alleged actions took place on the Insureds’ 11 premises. There is a clear nexus between the conduct at issue and the Underlying Plaintiff’s 12 employment with the Insureds. 13 Here the nexus is especially closely related because the alleged conduct was perpetrated by 14 the Underlying Plaintiff’s supervisor who was vested with authority over her by the Insureds. 15 Though Insureds argues Underlying Defendant’s supervisory duties were limited (he was not e.g. 16 the general manager), he did have control over hiring and scheduling of workers, including that of 17 the Underlying Plaintiff. See [Uncertified] Transcript of Oral Argument at 5. Critically, the 18 Underlying Action alleges that Underlying Defendant then used this control over Underlying 19 Plaintiff to further his actions: he purposefully scheduled her to work with him on the same

shift to 20 continue the harassment/assault took place. See Underlying Action. ¶ 16-17. 21 As to the second factor, there is no indication that the Underlying Plaintiff and Moreno had 22 a non-employment relationship. Id. 23 Further, the Underlying Action includes facts regarding managerial knowledge of 24 Moreno's "history of inappropriate conduct in the workplace with girls." See FAC ¶ 49. Despite 25 the Insureds' "knowledge of this history of improper behavior," the Insureds' managerial staff 26 tolerated Moreno, and allowed Moreno to switch to the same shift as Underlying Plaintiff where 27 1 discriminatory conduct were motivating reasons and/or factors in [Insureds'] decisions to subject 2 Plaintiff to the aforementioned adverse employment actions," and the Insureds "violated FEHA by 3 retaliating against [Underlying] Plaintiff, removing her from the schedule and terminating 4 [Underlying] Plaintiff's employment." See Underlying Action ¶¶ 126, 129. The challenged 5 conduct thus transcends Moreno and reaches into culpable conduct of the Insureds qua employer. 6 Therefore, the ERP Exclusion bars coverage for the Underlying Action's claims against the 7 Insureds for all counts because the Underlying Action's claims arose out of employment. This 8 includes: Count One for "negligent hiring, negligent retention, and negligent training and 9 supervision"; Count Two for "workplace sexual harassment . . . on the basis that DRG and GGB 10 had 'direct supervisory authority over Doe'"; Counts Three, Seven, Eight, Nine, and Ten for 11 violations of California Fair Employment and Housing Act (FEHA). See Mot at 16; Underlying 12 Action at ¶¶ 51, 107, 117, 129, 138. Additionally, Count Four, which states "the conduct of which 13 [the Insureds] subjected [Underlying] Plaintiff by virtue of her employment," is a violation of the 14 Ralph Rights Act of 1976 (Civil Code section 51.7). Id. Count Five violated the Underlying 15 Plaintiff's civil rights by subjecting her to Moreno's employment-related sexual harassment;" 16 Count Six asserts that the Insureds permitted a hostile work environment as a result of Moreno's 17 acts; and Count Eleven through Thirteen "seek damages for Doe's alleged termination, which . . . 18 constitutes an employment-related practice." Id. That the alleged conduct by Moreno and the 19 Insureds implicate laws like FEHA which govern the employment relationship underscores the 20 claim in the Underlying Action are employment related and fall within the scope of the ERP 21 Exclusion. 22 The Insureds do not really contest application of the ERP Exclusion to most of the 23 Underlying claims, but focus their arguments on the false imprisonment, sexual assault and simple 24 negligence claims. But like all the other claims, these claims clearly arise from the employment 25 relationship. There is no meaningful distinction, for instance, between sexual harassment and 26 sexual assault when committed on the premises by a supervisor while the employee was on the 27 job. Nor does the supervisor's act of physically detaining the employee (i.e. false imprisonment) 1 because of the severity of the conduct. As further discussed below, there is persuasive precedent 2 on point. 3 The ERP Exclusion encompasses the Underlying Action's negligence claims because the 4 Insureds' liability was facilitated by their negligence. The negligence claim that the Insureds refer 5 to in the Underlying Action is inextricably tied up with the alleged employment-related "negligent 6 hiring, negligent retention, and negligent training,

and negligent supervision.” ¶¶ 32-36. Though 7 the Insureds argue negligence is not explicitly mentioned in the ERP Exclusion, (though arguably 8 it is covered by “omissions” stated in the Exclusion), the list of excluded acts is not exclusive. *Jon 9 Davler, Inc. v. Arch Ins. Co.*, 229 Cal. App. 4th 1025, 178 Cal. Rptr. 3d 502 (2014), as modified 10 (Sept. 15, 2014) (the phrase “such as” is “illustrative and not limitative,” “nonexclusive,” and “is 11 not a phrase of strict limitation but is a phrase of general similitude indicating that there are 12 includable other matters of the same kind which are not specifically enumerated.”). 13 And finally, although Insureds attempt to impose a new carve-out to the “arising out of” 14 phrase in the ERP Exclusion, arguing that only claims between an employee and an employer (as 15 opposed to harassment between two co-employees) are “employment related,” the Insureds fail to 16 cite to any case that imposes such an exception. Instead, courts have repeatedly construed “arising 17 out of” broadly, even when it is present in an exclusion. See, e.g., *Jon Davler, Inc. v. Arch Ins. 18 Co.*, 229 Cal. App. 4th 1025, 1035 (2014) (holding that false imprisonment claims were covered 19 under the ERP Exclusion because “[a]n average layperson person would understand that the 20 exclusion applies to a category of claims: those arising in the employment setting”); *Guillon v. 21 AMCO Ins. Co.*, No. 20-CV-07926-CRB, 2021 WL 254264 (N.D. Cal. Jan. 26, 2021), *aff’d*, No. 22 21-15297, 2021 WL 6102174 (9th Cir. Dec. 22, 2021) (construing “arising out of” broadly in a 23 similar ERP exclusion to apply to conduct deemed “employment-related” under the Low factors). 24 “Arising out of” “does not import any particular standard of causation or theory of liability into an 25 insurance policy. Rather, it broadly links a factual situation with the event creating liability and 26 connotes only a minimal causal connection or incidental relationship.” *Davler* at 1035.4 The 27 1 nexus to employment required under Low may obtain regardless of whether the harasser is a co- 2 worker or a managing agent of the employer. As noted herein, employer liability under laws like 3 FEHA is not limited to situations where the harasser is a manager; employers have responsibilities 4 to address and prevent sexual harassment by co-workers as well as by supervisors. See, e.g., *Holly 5 D. v. California Inst. of Tech.*, 339 F.3d 1158, 1176-79 (9th Cir. 2003) (explaining an employer’s 6 affirmative defense of “reasonable care” under Title VII). 7 Because all alleged conduct in the Underlying Action against Moreno falls under the ERP 8 Exclusion coverage, the Insureds have failed to establish any potential coverage under the PMIC 9 Agreement and thus have failed to state a claim for breach of contract with PMIC. 10 11 2. The False Imprisonment and Sexual Assault Claims are subject to the ERP 12 Exclusion 13 As noted above, the Insureds argue that the potential claims of sexual assault or false 14 imprisonment are not subject to the ERP Exclusion. Although these claims are not expressly pled 15 in the Underlying Action, this “does not excuse the duty to defend where, under the facts alleged, 16 17 at 15. Neither case is on point. In *HS Service*, the underlying plaintiff was terminated and 18 informed vendors that the insured was experiencing financial difficulty and was a candidate for bankruptcy. *HS Servs., Inc. v. Nationwide Mut. Ins. Co.*, 109 F.3d 642, 644 (9th Cir. 1997). In 19 response, the insured’s manager circulated a memo informing its sales representatives on how to respond to inquiries

regarding the company's financial status, which stated "[The underlying 20 plaintiff] was terminated by [the insured] for acts involving dishonesty." Id. The court held that 21 the insured's alleged defamation was not employment-related because "the purpose of the remarks was to protect [the insured] in the marketplace," and the relationship between the remarks and the 22 underlying plaintiff's employment "was too indirect and attenuated." Id. at 644-646. Here, as noted above with the Low factors, there is a direct link between Moreno's acts and Underlying 23 Plaintiff's employment. The conduct at issue occurred after termination of the employment relationship and arose in the context of business competition between the parties. Reference to the 24 prior employment situation was incidental. 25 Plaintiffs also attempt to rely on Partridge for a narrower interpretation of "arising out of." In 26 Partridge, the court interpreted an exclusion under an insurance agreement broadly for a specific set of facts regarding a "Concurrent Causes Doctrine," yet Plaintiffs fail to argue how that doctrine 27 applies to the instant case. *State Farm Mutual Automobile Insurance Co. v. Partridge*, 10 Cal. 3d 1 reasonably inferable, or otherwise known, the complaint could fairly be amended to state a 2 covered liability." *Hartford Casualty Ins. Co. v. Swift Distribution, Inc.*, 59 Cal. 4th 277, 287 3 (2014). Thus, the question is whether the facts alleged "could fairly be amended to state a covered 4 liability." Id. The Underlying Action alleges that Underlying Defendant (and employee) Moreno 5 "cornered [Underlying] Plaintiff [another employee] into an enclosed room, blocked the door, 6 forcing himself close to [Underlying] Plaintiff, and rubbed his genitals on [Underlying] Plaintiff's 7 buttocks as she tried to leave the room." See Underlying Action ¶17. 8 As noted above, the alleged acts arose out of the employment relationship. To support 9 their argument to the contrary, Insureds rely on Perkins, an unpublished memorandum, in which 10 the Ninth Circuit reversed a district court's finding that the ERP Exclusion barred coverage for an 11 employee's false imprisonment claim, holding it was unclear if false imprisonment was similar 12 enough to the "employment-related" listed examples. *Perkins v. Md. Cas. Co.*, 388 F. App'x 641, 13 643 (9th Cir. 2010). However, in 2014, the Second Appellate District of California Court 14 interpreted the ERP Exclusion similar to that at issue here as unambiguous, to include false 15 imprisonment. *Jon Davler, Inc. v. Arch Ins. Co.*, 229 Cal. App. 4th 1025 (2014). The court 16 applied the two-factor test from Low and held that the false imprisonment arose out of 17 employment-related practices because the employees acted on "a directive from a supervisor at 18 their place of employment" under threat of job loss and the parties did not have a relationship 19 beyond employment. Id. The court held that false imprisonment, as the "unlawful violation of the 20 personal liberty of another," "shares general similitude with several of the matters specifically 21 enumerated in the employment-related practices exclusion, such as coercion, discipline, and 22 harassment." Id. at 1034. "False imprisonment involves coercion, by force, threat, or otherwise 23 [and]. . .workplace harassment can include false imprisonment, and employment actions often 24 involve both claims." Id. 25 In the Underlying Action, Moreno allegedly changed schedules to work directly with 26 Underlying Plaintiff, and then "cornered [Underlying] Plaintiff into an enclosed room, blocked the 27 door,

forcing himself close to [Underlying] Plaintiff, and rubbed his genitals on [Underlying] 1 the claims of false imprisonment and sexual assault “share[] general similitude with several of the 2 matters specifically enumerated in the employment-related practices exclusion, such as coercion, 3 discipline, and harassment.” Jon Davler, 229 Cal. App. 4th 1025 at 509. Applying the Low two- 4 factor test, the conduct occurred at work during shifts, was perpetrated by a supervisor who had 5 some control over the victim employee, and the underlying parties had no relationship other than 6 the employment relationship. The potential claims of sexual assault and false imprisonment are 7 therefore closely intertwined with the workplace harassment claim.⁵ “[T]he fact an underlying 8 claim was not [expressly] listed [in the policy exclusion] . . . does not make the exclusion 9 ambiguous.” Id. at 1038; see also Frank & Freedus v. Allstate Ins. Co., 45 Cal. App. 4th 461, 471 10 (1996) (holding that an ERP Exclusion broadly precludes coverage for employment-related 11 wrongful termination and defamation). Therefore, the potential claims for false imprisonment and 12 sexual assault are employment-related and are precluded from coverage due to the ERP Exclusion. 13 The Court need not address Insurers’ argument contesting whether the claims of the 14 Underlying Action are “occurrences” within the scope of coverage under Coverage A: whether or 15 not they are “occurrences,” they would still be precluded by the ERP Exclusion. 16 17 B. Coverage A is subject to the EL Exclusion 18 Even if the ERP Exclusion did not bar coverage, coverage for the Underlying Action is 19 also barred by the Employer’s Liability (EL) Exclusion under Coverage A. Insureds counsel 20 admitted this at the hearing on the motion. See [Uncertified] Transcript of Oral Argument at 106 21 5 Following the hearing on the present motion, Plaintiff filed a Motion for Leave to submit 22 supplemental material. See Docket No. 30. The Court GRANTS Plaintiff’s Motion for Leave. In the supplemental material, Plaintiff presents a recent development, that Underlying Defendant 23 recently pled “‘no contest’ to a charge alleging that he penetrated Ms. Maeda’s body.” Docket No. 30-1. Plaintiff argues that this shows the facts are still being developed regarding the severity 24 of Underlying Defendant’s conduct and that this Motion to Dismiss is premature. But as the Court stated at the hearing, it does not make sense that sexual harassment would be covered by the 25 exclusion but the more severe form of harassment – i.e. sexual assault – is not when all the surrounding facts about the nexus to employment are the same. 26 6 THE COURT: But the bodily injury -- you would agree, then, that's subject to the employer exclusion – 27 MR. DAVIS: I do. 1 (agreeing that all claims are subject to the EL Exclusion, but arguing that false imprisonment is 2 not) 3 As discussed above, the EL Exclusion under Coverage A states that insurance “does not 4 apply to “Bodily injury” to [a]n “employee” of the Insureds arising out of and in the course of (a) 5 [e]mployment by the Insureds or (b) [p]erforming duties related to the conduct of the Insured’s 6 business.” See EL Exclusion. The term “bodily injury” is defined as “bodily injury, sickness or 7 disease sustained by a person, including death resulting from any of these at any time.” Id. The 8 PMIC Agreement defines “Bodily Injury” to include mental anguish which arises from the 9 covered bodily injury, sickness, or disease. Id. The Underlying Action alleges that as a “direct 10 and legal result of the

acts and omissions of [the Insureds] . . . [the Underlying Plaintiff] has been 11 caused [to], and did suffer and continue to suffer severe and permanent emotional and mental 12 distress, and anguish, humiliation, and embarrassment, fright, shock, pain, discomfort and 13 anxiety.” See Underlying Action ¶ 25. The Insureds’ liability is based in part upon their negligent 14 hiring, negligent retention, and negligent training and supervision which enabled the sexual 15 harassment committed by Moreno resulting in the Underlying Plaintiff’s bodily injuries. See 16 Underlying Action ¶¶ 31-46. The causal relationship required under the EL Exclusion obtains. 17 For the reasons stated herein, PMIC’s EL Exclusion also precludes coverage for 18 Underlying Plaintiff’s bodily injury which arose out of and in the course of her employment by the 19 Insureds. 20 21 C. Coverage B is subject to the ERP Exclusion 22 Coverage B of PMIC’s Policy provides, in pertinent part:

“COVERAGE B – PERSONAL AND ADVERTISING INJURY

23 LIABILITY

Insuring Agreement 24 We will pay those sums that the insured becomes legally obligated to pay as damages because of “personal and advertising injury” to 25 which this insurance applies. We will have the right and duty to defend the insured against any ‘suit’ seeking those damages. 26 However, we will have no duty to defend the insured against any ‘suit’ seeking damages for ‘personal and advertising injury’ to 27 which this insurance does not apply.” 1 14. “Personal and advertising injury” means injury, including consequential “bodily injury”, arising out of one or more of the 2 following offenses: a. False arrest, detention, or imprisonment; 3 FAC. Exh.2 at 45. 4 The Insureds argue that a potential false imprisonment liability claim– one of the 5 enumerated offenses contained in the definition of “personal and advertising injury”– would be 6 covered under Coverage B for “personal and advertising injury,” and thus would not be subject to 7 the EL Exclusion of Coverage A. See Opp. at 26. Insureds argument fails because, as noted 8 above, Coverage B is still subject to the ERP Exclusion. Thus, even if there were coverage for a 9 potential false imprisonment claims under Coverage B, the coverage would still be precluded by 10 the ERP Exclusion. 11 12 D. MAIC’s Agreement 13 The MAIC Agreement provides coverage for: “bodily injury by accident or bodily injury 14 by disease.” See FAC. ¶ 25. “Bodily injury” means “physical injury, including resulting death.” 15 Id. The bodily injury must arise out of and in the course and scope of the injured employee’s 16 employment by you.” Id. MAIC’s Policy also obligates MAIC to: 17 pay all sums that you legally must pay as damages because of bodily 18 injury to your employees, provided the bodily injury is covered by the Employment Liability Insurance. Id. The damages we will where 19 recovery is permitted by law, include damages:

1. For which you are liable to a third party by reason of a claim or

20 suit against you by that party third party to recover damages against such third party as a result of injury to your employee – 21 4. Because of bodily injury to your employee that arises out of and in the course of employment, claimed against you in a capacity other 22 than as employer. FAC. Exh. 1 at 35. 23 The MAIC Policy contains the C.7 Exclusion which states: 24 “This

insurance does not cover: 25 7. damages arising out of coercion, criticism, demotion, evaluation, reassignment, discipline, defamation, harassment, humiliation, 26 discrimination against or termination of any employee, or any personnel practices, policies, acts or omissions.” 27 FAC. Exh. 1 at 35. 1 In response to the Seventh, Eighth, and Ninth Causes of Action against MAIC, MAIC 2 argues the Underlying Actions are subject to C.7 Exclusion. See Mot. at 20. The Insureds raise 3 two arguments against C.7 Exclusion: (1) the same argument raised against the PMIC Agreement 4 that “arising out of” should be construed narrowly to not include the Underlying 5 Plaintiff/Defendant; and (2) that any claims for sexual abuse or assault are not plainly barred by 6 the C.7 Exclusion’s listed matters (“damages arising out of coercion, criticism, demotion, 7 evaluation, reassignment, discipline, defamation, harassment, humiliation, discrimination against 8 or termination of any employee, or any personnel practices, policies, acts or omissions”). 9 As to the first argument, as discussed above, California courts construe “arising out of” 10 broadly. Even without a broad construction, the “arising out of” element of the C.7 Exclusion 11 applies here. 12 As to the second argument, in *Rice Enterprises, LLC*, the Third Circuit court found that an 13 identical C.7 Exclusion precluded coverage for “sexual misconduct,” including sexual assault, 14 because the damages arose out of the insured’s personnel practices, policies, acts or omissions, 15 specifically in “hiring [underlying defendant] despite his sexual misconduct history, . . . failure to 16 adequately train . . . and take action following the observation and/or reports of [underlying 17 defendant]’s misconduct.” 705 F. Supp. 3d 460, 470 (W.D. Pa. 2023), *aff’d*, No. 24-1880, 2025 18 (3d Cir. Apr. 30, 2025). Though the insured asserted coverage by arguing the underlying 19 defendant was not the employer (and instead only an employee), the court interpreted “arising out 20 of” broadly, to preclude coverage due to the causal connection between the employment practices 21 and the underlying action. See *id.* at 469-70. The exclusion turned on the nature of the conduct 22 and whether it was related to employment, not the particular identity or status of the perpetrator. 23 As in *Rice*, the potential liability for sexual assault arose from “personnel practices, acts, and 24 omissions.” The Underlying Plaintiff alleges that the manager had received reports that Moreno 25 “had a history of inappropriate conduct in the workplace with girls under the age of 18, but they 26 did nothing to prevent the harassment from continuing.” See FAC ¶ 49d. Additionally, 27 Underlying Plaintiff alleges that the Insureds failed to train Moreno “how to act appropriately with 1 Therefore, C.7 Exclusion applies to preclude MAIC’s coverage for all claims of the 2 || Underlying Action, including a potential claim of sexual assault arising out of “personnel 3 practices, policies, act, or omissions.” 4 5 || E. Breach of Implied Contract and Breach of the Implied Covenant of Good Faith and 6 Fair Dealing 7 “A bad faith claim is subject to dismissal if the insurer shows a genuine dispute as to 8 coverage.” *Feldman v. Allstate Ins. Co.*, 322 F.3d 660, 669-70 (9th Cir. 2003). Here, given that 9 ERP Exclusion and EL Exclusion of the PMIC Agreement and C.7 Exclusion of the MAIC 10 || Agreement apply to exclude coverage to DRG and GGB, the Insurers’ denial to continue defense 11 and indemnification under its policy was reasonable and legally justified. As such, the Insureds 12 || cannot maintain a statutory bad

faith claim against Insurers for its refusal to defend and indemnify. 13 Accordingly, the claims for breach of implied contract and claim for breach of the implied 14 || covenant cannot proceed against MAIC or PMIC.

a 16 V. CONCLUSION

3 17 For the reasons above, Defendants PMIC's and MAIC's motion to dismiss is GRANTED. 18 Defendants PMIC and MAIC are hereby DISMISSED. 19 20 21 IT IS SO ORDERED. 22 23

Dated: July 31, 2025 24 25

EDWAR . CHEN

26 United States District Judge 27 28