UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 10-9198 JVS (RNBx)	Date	November 9, 2012
Title	Joyce Walker, et al. v. Life Insurance Company of the Southwest		

Present: The Honorable	James V. Selna	
Karla Tunis		Not Present
Deputy Clerk		Court Reporter
Attorneys Present for Plaintiffs:		Attorneys Present for Defendants:
Not Present		Not Present

Proceedings: (IN CHAMBERS)
Order Granting in Part and Denying in Part Plaintiff's Motion to Certify Class (fld 5-14-12) and Order Denying Motion to Strike

This action arises out of Plaintiffs' purchase of a life insurance investment policies from Defendant Life Insurance Company of the Southwest ("LSW").

The named Plaintiffs, on behalf of themselves and others similarly situated, move for class certification pursuant to Federal Rules of Civil Procedure 23(a) and 23(b)(3). (Docket No. 225 & 226 (public redacted version).[1]) Timely Opposition and Reply briefs have been filed. (Docket Nos. 272 ("Opp'n") & 316 ("Reply").) Both sides have filed an extensive factual record. Plaintiffs have filed numerous objections to LSW's evidence, and LSW applied ex parte to strike those objections, but the Court denied that application. (See Docket No. 323). LSW has also filed a Motion to Strike Plaintiffs' expert's declaration, which the Court herein denies. (Docket No. 266).

This matter was heard on September 18, 2012, and thereafter the parties filed supplemental briefing and supporting evidence, which the Court has considered. (Docket Nos. 346 & 348-1.)

As set forth herein, the Court grants in part and denies in part the Motion for Class Certification.

[1] The Notice of Motion and Memorandum in Support thereof are found at Docket Nos. 225 and 226, respectively. Herein, the Court's citation to "Motion" should be understood to refer to the Memorandum in Support of the Motion to Certify.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 10-9198 JVS (RNBx) Date November 9, 2012

Title Joyce Walker, et al. v. Life Insurance Company of the Southwest

I. Factual Background and Claims Asserted

The Court has thrice previously considered challenges to the pleadings in this matter. (See Docket Nos. 59 & 112 (Orders re Motions to Dismiss directed toward the Complaint, the First Amended Complaint ("FAC")); Docket No 203 (Order Granting Leave to File Second Amended Complaint ("SAC").) As the pleading has progressed in this case, Plaintiffs have more thoroughly articulated their legal theories and claims. A review of the current claims and the factual allegations underlying them is in order.

The SAC sets forth only two claims. Those are (1) fraudulent concealment and (2) violation of California's Unfair Competition Law ("UCL"), Business and Professions Code section 17200.

There are three named Plaintiffs, and thus, three potential class representatives. (1) Joyce Walker ("Walker") purchased a Provider Policy[2] from LSW with a policy date of December 27, 2007 (¶ 55);[3] (2) Kim Bruce Howlett ("Howlett") purchased a Paragon Policy from LSW with a policy date of September 26, 2007 (¶ 60); and (3) Muriel Spooner purchased a Provider Policy from LSW with a policy date of October 5, 2007 (¶ 65).

At issue in this action is a product marketed as both a life insurance policy and an investment, generally known as an Indexed Universal Life insurance policy ("IUL") or, because earnings are tied to a stock trading index, an Equity Indexed Universal Life insurance policy ("EIUL").[4] The Policies at issue in this action provide a death benefit if the Policyholder dies while the Policy is in force. (¶ 2.) While the Policyholder is alive, the Policy earns interest that is tied to the Standard & Poor's 500 stock index (S&P). (¶ 2.) Earned interest becomes part of the cash value of the Policy ("Accumulated

[2] The Court refers generically to the two types of policies at issue here as "the Policies." Where necessary, the Court refers to either "the Provider Policy," or "the Paragon Policy."

[3] All otherwise undesignated paragraph references are to the SAC.

[4] A general discussion of the characteristics of this type of policy, as well as its evolution within the insurance industry, is more fully explained in the Brocket Declaration. (See Docket No. 245 at ¶¶ 8-18 (corrected version).)

Value"). (¶ 2.) The Policy is subject to certain monthly costs, deducted from the accumulated value of the Policy each month. (¶ 40.) The Policies are subject to significant surrender charges. (¶ 1.) Overall, and generally speaking, Plaintiffs' claims are based upon LSW's failure to disclose certain fees, failure to disclose certain characteristics of the workings or structure of their Policies, and the significant, unexpected, and adverse effect of the combination of the fees associated with the Policies, the method of crediting guaranteed interest, and market volatility can have on the value of the Policies they purchased.

Prior to purchasing a Policy, each named Plaintiff received a customized Illustration with summary information about values "guaranteed" or not guaranteed to accrue.[5] (See e.g., FAC Ex. E) Each Illustration contained the following language in capital letters and bold font:

> THIS IS AN ILLUSTRATION. AN ILLUSTRATION IS NOT INTENDED TO PREDICT ACTUAL PERFORMANCE. INTEREST RATES, DIVIDENDS, OR VALUES THAT ARE SET FORTH IN THE ILLUSTRATION ARE NOT GUARANTEED, EXCEPT FOR THOSE ITEMS CLEARLY LABELED AS GUARANTEED.

(Id. at 14.)

Although the SAC is detailed and coherent, with the present Motion, Plaintiffs put a finer point on their theories of recovery. Their claims have always rested on the general contention that it is impossible for any policyholder to accurately assess the risks and benefits of the Policies because of certain undisclosed and/or obscured features of the Policies. More specifically, Plaintiffs contend that this impossibility results from the interaction among the undisclosed fees, the undisclosed methods of calculating interest, and natural stock market volatility, as well as undisclosed features of the fee structure, such as rising fees in the face of decreasing accumulated value. All these features (referred to generally by Plaintiffs and by the Court as "lapse accelerators") combine to create an unreasonably high risk of reduction in policy

[5] Both sides have since acknowledged that not all policyholders received such an Illustration. The ramifications of this discovery on class certification are discussed *infra*.

value or policy lapse. (See Brockett Decl. ¶ 45 (opining that the risk of lapse during the expected lifetime of the average policyholder approximates 90% for both types of Policies).) Damages that might be incurred as a result, in addition to the loss of the policyholder's investment and the life insurance coverage, can include the significant tax consequences in the event of a policy lapse while the insured takes advantage of a marketed feature of the Policy: The ability to borrow against the Policy when funds are needed by the insured.[6] With that more generalized view, the Court turns its attention to Plaintiffs' six specifically identified theories of recovery.

Plaintiffs identify six categories of factual allegations underlying their claims and legal theories as set forth below:

A. Legal Theories

(1) Risk of Reduced Value or Lapse Due to Interaction of Policy Design and Natural Market Volatility — "Volatility Defect"[7]

"First, LSW never discloses that the interaction between the Policy design and natural S&P 500 volatility creates a significant risk that the Policy will lapse or suffer reduced value." (Motion at 3.) A number of features of the Policy make it especially susceptible to lapse. (Brockett Decl. (Docket No. 344) ¶¶ 41-43.) In addition, defining policy lapse not as when the accumulated value is zero but when the accumulated value is less than a significant surrender charge, the features of the Policy that make it especially susceptible to lapse include the method of calculating the guaranteed minimum interest rate (see *infra* category (4)), the timing of crediting that interest earned (a retrospective crediting), the failure to credit interest for partial years, and the undisclosed fees imposed each month. (Id.) This risk of policy lapse is exacerbated by its interaction with natural S&P 500 volatility, with low returns in key

[6] Additionally, in a point the Court will not belabor, but which is understood by the parties, such a loan might be taken by the policyholder based less on financial need than on sound financial or tax planning.

[7] Despite the fact that its use may imply factual findings or legal conclusions, the Court adopts some of the Plaintiffs' terminology, such as the description of the "volatility defect." The Court adopts these terms only for ease of discussion, and makes no factual findings or legal conclusions as a result of the mere use of such terminology.

periods, such as the beginning of the Policy, affecting the policy value in an manner that would be unanticipated based on the S&P 500 average rate of return over the life of the Policy. (Id.)

(2) Tax Consequences in the Event of Policy Lapse — "Tax Defect"

"Second, LSW never discloses that the interaction between the loan feature, Policy fees, lapse accelerators, and certain tax laws creates a significant risk that the policyholder will be required to pay substantial taxes (at ordinary income rates) on the outstanding loan, or be shackled to LSW's significant and increasing fees to avoid policy lapse and the resulting adverse tax consequences." (Motion at 3.) This builds on the volatility defect, with the added element of damages in the form of increased taxes in the event of policy lapse.

(3) Illustrations' Failure to Disclose Fees — "Illustrations' Non-Disclosure of Fees and Lapse Accelerators"[8]

"Third, the illustrations do not disclose the many fees that will be deducted by LSW from the Policy value (including the premium expense charge, [cost of insurance], monthly percent of accumulated value charge (for Paragon), and monthly policy fee). LSW conceals these substantial fees by embedding them within the projected earnings." (Motion at 4 (footnote omitted).) This practice is made more deceptive by LSW's statement "in the illustration summary, in oversized, italicized, boldface type, that there is '***One Policy Fee***,' which a reasonable policyholder would understand to refer to the 'Monthly Administrative Charge,' the *only* fee disclosed in the illustration." (Motion at 4 (emphasis in the original).)

[8] Like the Court's use of Plaintiffs' terminology, the Court's use of this uniform description is for ease of reference rather than a determination of the merits.

(4) Guaranteed Accumulated Values Are False Because They Fail to Disclose Interest is Calculated as a Guaranteed Average Rate of Return at the Time of Termination of the Policy and No Interest is Credited in the Event of Policy Lapse — "Illustrations' Failure to Disclose that Interest is Credited Retrospectively"

"Fourth, the 'Guaranteed Accumulated Values' depicted in the illustrations are false because they reflect an annual guaranteed rate of return applied each year, but in fact LSW only credits an average rate of return applied retrospectively." (Motion at 4.) Additionally, by illustrating the payment of interest on a prospective basis, but crediting it only on a retrospective basis (and crediting it not at all in the event of lapse), the fee charged to the insured for cost of insurance, which is based on the amount at risk (defined as the difference between the death benefit and the accumulated value less policy loans) is artificially inflated. (Motion at 4-5; see Brocket Decl. ¶¶ 73-74.) Were the interest credited on a prospective basis, as illustrated, the accumulated value would be higher, and the cost of insurance fee would be less. (Id.)

(5) Reduced Monthly Administrative Charges Are Not Indicated to be Non-Guaranteed — "Illustrations Do Not Match Policy Re Eleventh Year Reduction in Fees"

"Fifth, LSW's illustrations deceptively depict a reduced Monthly Administrative Charge beginning in the eleventh Policy year, but, unlike certain other components of the illustration, nothing indicates that the Monthly Administrative Charge shown in the illustration is not guaranteed." (Motion at 5.) However, the Policy actually provided does not make the provision for the drop in fees in the eleventh year.

(6) Depiction of Reduced Administrative Charge, Annual Account Value Enhancement, and Elimination of the Accumulated Value Charge Artificially Inflate Policy Values — "Illustrations of Reduction in Eleventh Year Fees and Other Eleventh Year Incentive Falsely Represent as a 'Current Basis' Features Not Currently in Use"

"Sixth, . . . LSW's illustrations significantly inflate Policy values based on a reduced Monthly Administrative Charge beginning in the eleventh year (for Provider and Paragon), an annual 'Account Value Enhancement' of 1.25% beginning in the tenth year (for Provider), and the elimination of the Percent of Accumulated Value Charge beginning in the eleventh year (for Paragon), which are represented as 'current' rates and charges even though no policyholder currently receives or has ever received these benefits." (Motion at 5.) This theory is predicated on an argument that the reductions in fees and payment of the enhancement should not be represented as a "current basis" because it is not *currently* paid to any policyholder.

B. Elements of Claims Asserted and Court's Previous Holdings

To state a claim for fraudulent concealment, Plaintiffs must allege "(1) the defendant must have concealed or suppressed a material fact, (2) the defendant must have been under a duty to disclose the fact to the plaintiff, (3) the defendant must have intentionally concealed or suppressed the fact with the intent to defraud the plaintiff, (4) the plaintiff must have been unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact, and (5) as a result of the concealment or suppression of the fact, the plaintiff must have sustained damage." Kaldenbach v. Mut. of Omaha Life Ins. Co., 178 Cal. App. 4th 830, 850 (2009).

Plaintiffs maintain that there is a duty to disclose in light of several provisions of the California Insurance Code, sections 330 and 332. Section 330 defines "concealment": "Neglect to communicate that which a party knows, and ought to communicate, is concealment." Section 332 outlines required disclosures: "Each party to a contract of insurance shall communicate to the other, in good faith, all facts within his knowledge which are or which he believes to be material to the contract and as to which he makes no warranty, and which the other has not the means of ascertaining."

The Court previously held that the named Plaintiffs stated a claim for fraudulent concealment, specifically finding that provisions of the California Insurance Code requires communications all material facts in connection with the making of a contract. (Docket No. 112 at 5-6 (citing Cal. Ins. Code §§ 330 & 332).)

The UCL prohibits "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." Cal. Bus. & Prof. Code § 17200. An act can be alleged to violate any or all of the three prongs of the UCL — unlawful, unfair, or fraudulent. As more specifically detailed below, the Court previously found that Plaintiffs stated a claim under all three prongs.

The UCL prohibits "unlawful" practices that are forbidden by any law. Saunders v. Superior Court, 27 Cal. App. 4th 832, 838 (Ct. App. 1994). The statute "borrows" violations of other laws and treats them as actionable. Cel-Tech Commc'ns v. Los Angeles Cellular Tel. Co., 20 Cal. 4th 163, 180 (1999). The Court previously found that Plaintiffs stated a claim under this prong of the UCL based on the same Insurance Code provisions cited in connection with the fraudulent concealment claim. (Docket No. 59 at 10.)

Unfair conduct is conduct "whose harm to the victim outweighs its benefits." Saunders, 27 Cal. App. 4th at 839. The Court found that Plaintiffs stated a claim under this prong because they alleged that LSW did not disclose all of the material risks that the Policy would not perform as illustrated. (Docket No. 59 at 10.)

To plead a claim under the "fraudulent" prong, a plaintiff must show that a defendant engaged in "fraudulent" conduct such that consumers are likely to be deceived by that conduct. Daugherty v. Am. Honda Motor Co., Inc., 144 Cal. App. 4th 824, 839 (Ct. App. 2006) (finding auto manufacturer did nothing that was likely to deceive the general public under the UCL). The Court previously found that Plaintiffs stated a claim under this prong as well. (Docket No. 59 at 11.)

II. Motion to Strike

LSW moves to strike the declaration of Plaintiffs' expert.

The Court's gatekeeping responsibility regarding expert testimony as

articulated in Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 597 (1993) and its progeny applies at the class certification stage. Ellis v. Costco Wholesale Corp., 657 F.3d 970, 982 (9th Cir. 2011).

LSW challenges the declaration of Patrick L. Brockett, which offers his expert opinions on the functioning of the Policies at issue and the feasibility of calculating damages on a common, formulaic approach. (Brockett Decl. ¶ 6.) The Court has reviewed the Brockett Declaration in its entirety. (See generally id.)

Expert testimony is admissible if the party offering such evidence shows that the testimony is both reliable and relevant. Fed. R. Evid. 702. More specifically, Federal Rule of Evidence 702 permits expert testimony if

> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliability applied the principles and methods to the facts of the case.

Id. A expert can be qualified "by knowledge, skill, experience, training, or education." Id. "The requirement that the opinion testimony 'assist the trier of fact' goes primarily to relevance." Primiano v. Cook, 598 F.3d 558, 564 (9th Cir. 2010).

Relied on by LSW, Daubert imposes upon a trial court the gate-keeping role that is meant to ensure that "an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." 509 U.S. at 597; see also Kumho Tire Co. v. Carmichael, 526 U.S. 137, 147 (1999).

LSW argues that Dr. Brockett speculates regarding what plaintiffs or what a given policyholder understood. (Motion to Strike at 1 (citing Brockett Decl. ¶¶ 28, 40, 64, 67, 72, 77 & 98).) The Court disagrees. To the extent Dr. Brockett discusses what inferences a *reasonable* applicant or consumer is likely to draw from information presented to them regarding an IUL product, he discusses overarching principles of what an objective consumer might consider in evaluating any investment product, risk

and return. Although admittedly he discusses those basic principles as applied to the present factual allegations, his discussion is far from speculative. (See Brockett Decl. ¶¶ 28, 64, 72, 77 & 98.)[9] The Court rejects LSW's challenge based on the argument that Dr. Brockett's testimony is speculative or based on speculation.

LSW also moves to strike "[t]he majority of Brockett's 68-page declaration" as testimony "offered to summarize portions of the factual record." (Motion at 1.) However, LSW makes specific arguments regarding only three paragraphs. (Motion to Strike at 6-9 (citing Brockett Decl. ¶¶ 27, 34 & 40).) There is nothing improper about Dr. Brockett's Declaration. It discusses his opinion and the bases therefor, which includes Plaintiffs' claims and their underlying factual bases. If it did not discuss the foundation for the expert opinion he offers, it would be objectionable on a wholly different ground. To the extent Dr. Brockett's Declaration might be read to offer opinions that overlap with the Court's conclusions of law, it will be disregarded. As a general matter, the Court simply draws its own conclusions of law and will disregard evidence or opinions of any witness, lay or expert, that in substance usurps that role. The Court rejects LSW's challenge based on the argument that large portions of Dr. Brockett's Declaration consists of improper summary testimony.

The Court also rejects LSW's challenge, that Dr. Brockett is not qualified to render actuarial opinions because he is not qualified to serve as an illustration actuary for a life insurance company. Dr. Brockett's extensive qualifications, which the Court does not repeat here, are part of the record. (Brockett Decl. ¶¶ 1-4 & Appdx. A.)

III. Standard for Certifying Plaintiffs' Claims for Class-Wide Adjudication

A. Classes and Sub-Classes

At the outset, the Court notes that the class and five subclasses proposed by Plaintiffs, in addition to being structured based on certain categories of facts (i.e., whether an individual class member received an illustration of values regarding his or

[9] LSW also challenges paragraphs 40 and 67, but these paragraphs reference entirely unrelated topics. (Brockett Decl. ¶ 40 (opining that the potential for abuse of sales illustrations gives rise to a governing board's concern regarding the use of those illustrations) & ¶ 67 (opinion that LSW understood potential for lapse based on reasonable inference from email).)

her Policy, and whether the illustration included an "Optional Report"), are also structured in a manner that acknowledges the difference in the limitations period for UCL claims and fraudulent concealment claims. The UCL is subject to a four-year limitations period, while a claim for fraudulent concealment under California law is subject to a three-year limitations period. Compare Cal. Bus. & Profs. § 17208 (UCL four-year limitations period) with Cal. Code Civ. P. 338(d) (three-year limitations period for claims seeking "relief on the ground of fraud or mistake").

As will be discerned from this Order, the Court's analysis does not precisely track the Plaintiffs' proposed class and subclass definitions. Nevertheless, the Court considers the implications and class certification requirements taking into account the legal theories advanced by Plaintiffs. Generally speaking, and as explained below, the Court separately considers a class and a subclass, distinguishing between those legal theories identified by Plaintiffs as based on "pure omissions" class (based on a wholesale failure to disclose) and an "Illustrations" based subclass (based on material omissions in certain facts disclosed in Illustrations provided to some of the policyholders).

In considering the issue of subclasses, the Court notes that the standard for certifying subclasses is not relaxed; to the contrary, certification of subclasses must satisfy all the elements of the same standard required of certification of the class as a whole. Rule 23(c)(5) of the Federal Rules of Civil Procedure provides that "[w]hen appropriate, a class may be divided into subclasses that are each treated as a class under this rule." Fed. R. Civ. P. 23(c)(5). As declared by the Ninth Circuit, in a case that district courts continue to apply today: "[E]ach subclass must independently meet the requirements of Rule 23 for the maintenance of a class action. A failure to do so will either require the dismissal of the action with respect to the subclass or force the action to proceed with regard to the members of the subclass on an individual basis." Betts v. Reliable Collection Agency, Ltd., 659 F.2d 1000, 1005 (9th Cir. 1981) (applied in Beal v. Lifetouch, Inc., CV 10-8454-JST MLGX, 2012 WL 3705171, at *4 n.2 (C.D. Cal. Aug. 27, 2012); Keegan v. Am. Honda Motor Co., Inc., 838 F. Supp. 2d 929, 945 n.51(C.D. Cal. 2012)); see also Xavier v. Philip Morris USA Inc., 787 F. Supp. 2d 1075, 1089 (N.D. Cal. 2011) (finding no ascertainability in light of lack of "an objective, reliable way to ascertain class membership" in a class of heavy smokers and where, as a result, the "preclusive effect of final judgment would be easy to evade").

Thus, Court first considers a class based upon the first two theories of recovery, which do not depend upon any type of Illustrations provided to Plaintiffs, and instead consist of "pure omissions," not disclosed anywhere, to any applicant or policyholder.

B. Standard for Class Certification

A motion for class certification involves a two-part analysis. First, Plaintiffs must demonstrate that the proposed class satisfies the requirements of Rule 23(a): (1) the members of the proposed class must be so numerous that joinder of all claims would be impracticable; (2) there must be questions of law and fact common to the class; (3) the claims or defenses of the representative parties must be typical of the claims or defenses of absent class members; and (4) the representative parties must fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a).

Second, a plaintiff must meet the requirement for at least one of the three subsections in Rule 23(b). Here, Plaintiffs assert that the putative class meets the requirements for Rule 23(b)(3), which provides that a class may be maintained where common questions of law and fact predominate over questions affecting individual members and where a class action is superior to other means to adjudicate the controversy.

Plaintiffs bear the burden of demonstrating that Rules 23(a) and (b) are satisfied. See Zinser v. Accufix Research Inst., Inc., 253 F.3d 1180, 1186 (9th Cir. 2001), amended by 273 F.3d 1266 (9th Cir. 2001). Although a court must rigorously analyze whether the prerequisites of Rule 23 are met, Gen. Tel. Co. v. Falcon, 457 U.S. 147, 161 (1982), Rule 23 nevertheless confers upon the district court "broad discretion to determine whether a class should be certified, and to revisit that certification throughout the legal proceedings before the court." Armstrong v. Davis, 275 F.3d 849, 872 n.28 (9th Cir. 2001).

The district court need only form a "reasonable judgment" on each certification requirement "[b]ecause the early resolution of the class certification question requires some degree of speculation." Gable v. Land Rover N. Am., Inc., 2011 U.S. Dist. LEXIS 90774, *9 (C.D. Cal. July 2011) (quoting In re Citric Acid Antitrust Litigation, 1996 U.S. Dist. LEXIS 16409 at * 2 (N.D. Cal. Oct. 1996)); see also Blackie v. Barrack, 524 F.2d 891, 901 n.17 (9th Cir. 1975). The court must take the substantive

allegations of the complaint as true, "thus necessarily making the class order speculative in the sense that the plaintiff may be altogether unable to prove his allegations." Gable, 2011 U.S. Dist. LEXIS 90774, at *9. The district court may consider the merits of the claims asserted to the extent they are related to the Rule 23 analysis. See Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551-52 & n.6; Vinole v. Countrywide Home Loans, Inc., 571 F.3d 935, 947 n.15 (9th Cir. 2009).

"Unlike evidence presented at the summary judgment stage, evidence presented in support of class certification need not be admissible at trial." Amalgamated Transit Union Local 1309, AFL-CIO v. Laidlaw Transit Services, Inc., 72 Fed. R. Serv. 3d 900 (S.D. Cal. 2009); cf. Eisen, 417 U.S. at 156 (1974) (describing a court's determination of class certification as based on "tentative findings, made in the absence of established safeguards" and describing a class certification procedure as "necessity . . . not accompanied by the traditional rules and procedures applicable to civil trials").

IV. Application of Rule 23(a) & Rule 23(b)(3) Factors as to a Pure Omissions Class — Categories (1) The Volatility Defect & (2) The Tax Defect

A. Rule 23(a)

1. Numerosity

Rule 23(a)(1) requires that a class be sufficiently numerous that it would be impracticable to join all members individually. LSW does not challenge the numerosity requirement. Nor can it do so successfully. LSW sold over 37,000 of the two types of Policies at issue here, a great majority of them during the relevant class period. (Dinglasan Decl. ¶ 9.)

Accordingly, the Court finds that the numerosity requirement is met.

2. Commonality

Rule 23(a)(2) requires that questions of law or fact be common to the class. A common question "must be of such a nature that it is capable of classwide resolution — which means that the determination of its truth or falsity will resolve an issue that

is central to the validity of each of the claims in one stroke." Dukes, 131 S. Ct. at 2551.

LSW argues that the disclosures made to policyholders were subject to the discretion of the individual agents who sold the Policies. (Opp'n at 26 ("Independent agents have discretion regarding disclosure.").) The Court nevertheless concludes that there are multiple common issues of law and fact.

The most fundamental and obvious common question is exactly how the Policies operate, and more specifically, whether those Policies possess the undisclosed and/or obscured lapse-accelerating features described by Plaintiffs, including undisclosed or obscured monthly fees.

For instance, there is a common question of whether the Policies are subjected to fees that are disclosed, if at all, by being embedded into non-guaranteed projected income, and whether those embedded fees may ever be ascertained without reference to and/or use of commercially unavailable software controlled or used by LSW. There is a common question of whether the fee structure interacts with natural (and expected) market volatility in a manner that would be unexpected and unascertainable. There are common questions of whether the guaranteed interest is credited retrospectively, whether any credit is given for partial years, and whether the guaranteed rate is applied at all in the event of policy lapse. There is also the common question of whether those lapse-accelerating features, assuming they exist, combine with the marketed loan feature and tax laws to create the risk described by Plaintiffs of forcing the unpleasant choice between the high costs of policy lapse (and associated tax consequences) or paying ever-increasing fees.

The Court concludes that the commonality requirement is met.

3. Typicality

Rule 23(a)(3) requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Under the "permissive standards" of this Rule, "representative claims are 'typical' if they are reasonably co-extensive with those of absent class members; they need not be substantially identical." Hanlon v. Chrysler Corp., 150 F.3d 1011, 1020 (9th Cir. 1998). The danger against which

this requirement is meant to guard is whether "absent class members will suffer if their representative is preoccupied with defenses unique to it." Ellis, 657 F.3d at 984. To meet the typicality requirement, Plaintiffs must show that: (1) "other members have the same or similar injury"; (2) "the action is based on conduct which is not unique to the named plaintiffs"; and (3) "other class members have been injured by the same course of conduct." Id.

LSW argues against typicality based on individualized disclosures made to the named Plaintiffs, related to taxes, fees, and rates of return, and the Plaintiffs' individualized reliance (or lack of reliance) thereon. Regarding the individualized disclosures made to the named Plaintiffs, the effect of the individualized disclosures, that is, the Illustrations provided to each, are discussed more fully, *infra*, in connection with the Illustrations subclass. In this initial inquiry, the Court considers only the first two theories of recovery, which do not implicate the Illustrations provided to the policyholders. Regarding reliance, also as discussed *infra* in connection with the Illustrations subclass, reliance can generally be presumed when materiality is found.

LSW also points to certain individualized defenses it contends renders the claims of the named Plaintiffs atypical. For instance, LSW challenges the named Plaintiffs' typicality by claiming that they in fact received disclosures regarding the possible tax consequences regarding policy lapse. However, an examination of the record[10] reveals the named Plaintiffs received no information regarding how the combination of the presence of lapse accelerators increased the risk of policy lapse, and thus, the risk of incurring additional taxes.

The evidence cited by LSW regarding Plaintiff Walker establishes only a disclosure, in the nature of a disclaimer, that her Policy might be a "Modified Endowment Contract" under the Internal Revenue Code and that, as a result, loans and withdrawals could be subject to tax and a penalty and that she should seek

[10] LSW's citation to Ex. O of the Shapiro Declaration on this point is befuddling. Exhibit O is an excerpt from a book, authored by Douglas R. Andrew and published in 2005, entitled Missed Fortune 101: A Starter Kit to Becoming a Millionaire, and more specifically from the chapter therein entitled "Access Your Money Tax Free at Retirement". Although nominally related to the topic at hand, the Court can discern no relevance to the issue of whether these named Plaintiffs were apprised of the specific risk related to the Policies they purchased.

independent tax advice. (Shapiro Decl. (Docket No. 265) Ex. W at 7; see also id. Ex. X at JW002595 (similar disclaimer).)

As to Plaintiffs Howlett and Spooner, Defendants point only to an illustration that notes that "loans are income tax free as long as the Policy is kept in force," which applies only to Plaintiff Howlett and which in any event fails to advise him of the increased risk of tax liability in light of the Policy's design and operation. ((Sealed) Shapiro Decl. (Docket No. 275) Ex. Y at 1308.) On this point, the Court agrees with Plaintiffs that none of the "generic information" provided to the named Plaintiffs "about the tax consequences of lapse" did anything "to alert . . . them to the significant risk of tax liability given the Policy design." (Reply at 17.) These generic disclaimers do not detract from the typicality of Plaintiffs' claims.[11]

Defendants contend that the details of the relevant fees were in fact disclosed to Defendant Walker, but the record belies any meaningful disclosure directed toward the specific claims asserted here. (See generally Ex. V.) The same is true of Defendants' contention that the details of the relevant fees were disclosed to Plaintiffs Howlett and Spooner. (See Ex. Y at LSW 1302.)

The remaining issue raised by LSW is that Plaintiffs Howlett and Spooner mortgaged their homes to finance payment of the premiums, which they failed to disclose when asked for the sources of funding,[12] and which would have triggered further disclosures by LSW. However, LSW doesn't specify what further disclosures would be triggered, and in the absence of a disclosure that would be triggered by this disclosure that directly addresses the concerns raised by Plaintiffs' claims here, the Court finds no detraction from Plaintiffs' typicality of claims based on this purported failure to disclose.

Nor does the Court view individualized defenses as detracting from the

[11] Moreover, to the extent that LSW used generic disclaimers widely, they would reinforce rather than detract from typicality.

[12] The evidence on this is lacking: Plaintiff Howlett ambiguously specifies the source of funding for payment of his premiums, and Plaintiff Spooner's application does not appear to be part of the record. (Shapiro Decl. Ex. J (Howlett lists source of funds as "OTHER INVESTMENTS"); cf. (Sealed) Shapiro Decl. (purporting to, but failing, to attach Exhibit II).)

typicality of the named Plaintiffs' claims. Whatever personal circumstances may have occurred that made it difficult or impossible for any named Plaintiff to continue his or her Policy in force, these facts do not detract from a determination of whether or not they may assert valid claims under the UCL or for fraudulent concealment based on actions that occurred before these personal circumstances occurred, at the time they acquired the Policies.

Here, the named Plaintiffs have shown that they present claims that are typical of the class. The named Plaintiffs have suffered an injury similar to the injury suffered by the remaining class members, and the class have, as a whole, been injured by the same type of non-disclosures made by LSW.

4. Adequacy of Representation

Rule 23(a)(4) requires that the representative party "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). "This requirement is grounded in constitutional due process concerns: 'absent class members must be afforded adequate representation before entry of a judgment which binds them.'" Evans v. IAC/Interactive Corp., 244 F.R.D. 568, 578 (C.D. Cal. 2007) (quoting Hanlon, 150 F.3d at 1020). Representation is adequate if (1) the named plaintiffs and their counsel are able to prosecute the action vigorously and (2) the named plaintiffs do not have conflicting interests with the unnamed class members. Lerwill v. Inflight Motion Pictures, Inc., 582 F.2d 507, 512 (9th Cir. 1978). The named plaintiffs and their counsel must have "the zeal and competence" necessary to prosecute the action. Fendler v. Westgate-California Corp., 527 F.2d 1168, 1170 (9th Cir. 1975). Proposed class representatives have a conflict of interest with the absent putative class members if they do not have standing to or refuse to assert certain claims that may be available and advantageous to the absent putative class members. See Lierboe v. State Farm. Mut. Auto Ins. Co., 350 F.3d 1018, 1022-23 (9th Cir. 2003) (finding that class representatives must have standing to bring all claims held by the putative class to which they belong and which they purport to represent).

Other than arguments regarding the subclass, which the Court addresses by considering separately the Rule 23 analysis as applied to the subclass, LSW argues only that the named Plaintiffs "are unfit class representatives" based on their lack of specific knowledge regarding the present litigation. Despite LSW's concern, the

Court discerns no requirement under Rule 23(a)(3) that to be an adequate class representative, a named Plaintiff know the name or gender of the judicial officer presiding over her case, nor that she know the city in which that officer presides. (See Opp'n at 28.) Nor does Plaintiff Spooner's apparent contentment to rely upon counsel to look out for the fair treatment of the class give the Court pause. (See id.) The important aspect of the named Plaintiffs' adequacy rests on their lack of conflict of interests. Amchem Products, Inc. v. Windsor, 521 U.S. 591, 625 (1997) ("The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent."). The Court discerns no such conflicts of interest.

The requirement that the class be fairly represented in the sense that their interests are not lost amid the complexity of the present litigation falls more squarely upon the shoulders of Plaintiffs' counsel, and LSW does not challenge counsel's adequacy. To date, counsel have given the Court no reason to doubt their adequacy. Moreover, the Court is delegated its own role of protecting the due process rights of absent class members. See, e.g., Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985) (discussing the court's role in assuring procedural due process requirements to bind absent class members are met, including notice, the opportunity to be heard, the opportunity to opt out, and adequate representation). Thus, the Court will continue to police the due process rights of the absent class members associated with the adequacy of representation throughout the remainder of these proceedings.

The Court finds that the adequacy of representation requirement has been met.

B. Rule 23(b)(3)

Plaintiffs seek certification of a Rule 23(b)(3) class. Rule 23(b)(3) has two parts, requiring both that common questions of law or fact predominate over individualized questions, and that a class action is a superior method of adjudicating the controversy at hand. Fed. R. Civ. P. 23(b)(3). The Court fully explores both.

1. Predominance

Relevant to the issue of predominance, Rule 23(b)(3) requires that "the court find[] that the questions of law or fact common to class members predominate over any questions affecting only individual members." Id.

"The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." Amchem Products, Inc. v. Windsor, 521 U.S. 591, 623 (1997). It "focuses on the relationship between the common and individual issues." Local Joint Executive Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc., 244 F.3d 1152, 1162 (9th Cir. 2001). Stated otherwise, "[w]hen common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than on an individual basis." Hanlon, 150 F.3d at 1022. "Implicit in the satisfaction of the predominance test is the notion that the adjudication of common issues will help achieve judicial economy." Zinser, 253 F.3d at 1189 (internal quotation marks and citation omitted).

The Court must rest its examination on the legal or factual questions of the individual class members. Hanlon, 150 F.3d at 1022. "To determine whether common issues predominate, this Court must first examine the substantive issues raised by Plaintiffs and second inquire into the proof relevant to each issue." Jimenez v. Domino's Pizza, Inc., 238 F.R.D. 241, 251 (C.D. Cal. 2006) (citation omitted).

"There is no definitive test for determining whether common issues predominate, however, in general, predominance is met when there exists generalized evidence which proves or disproves an [issue or] element on a simultaneous, class-wide basis, since such proof obviates the need to examine each class members' individual position." Galvan v. KDI Distrib., SACV 08-0999 JVS (ANx), 2011 WL 5116585, at *8 (C.D. Cal. Oct. 25, 2011) (internal quotation marks and citation omitted).

Here, in a previous section, the Court noted common questions, all generally related to the failure to disclose the lapse accelerating features of the Policies. The factual allegations relating to a uniform failure to disclose these Policy features are subject to common adjudication. From this, the Court finds that a number of common

issues predominate, and a number of elements of Plaintiff's claims are subject to common proof. These include whether the UCL's unfair prong was violated by this uniform failure, whether the UCL's fraudulent prong was violated by this uniform failure because it resulted in conduct likely to deceive consumers, and whether the two of five elements of the fraudulent concealment claim have been met.[13]

LSW makes arguments in three categories that are relevant to the present class who assert claims that do not depend upon any omissions made material or relevant by the provision of an Illustration. The Court considers each. In doing so, the Court also addresses certain claim-specific issues implicated by class treatment of Plaintiffs' pure omission theories of recovery. See Erica P. John Fund, Inc. v. Halliburton Co., 131 S. Ct. 2179, 2184 (2011) ("Considering whether 'questions of law or fact common to class members predominate' begins, of course, with the elements of the underlying cause of action.").

First, LSW makes arguments related to the duty to disclose. (Opp'n at 20.) LSW contends that under the UCL, the parameters of such a duty is "highly contextual," in that, due to the varying reasons for purchasing the Policies, what may be material to one consumer may, or may not be, material to the next consumer. (Id. at 20.)

Of course, as to the present class, at issue is a wholesale failure to disclose, or omission, rather than a misleading partial disclosure, so the focused issue is whether (and under what circumstances) LSW has a duty to disclose that which it is accused of

[13] The remaining elements do not sufficiently detract from this finding. Fraudulent concealment consists of five elements, very briefly stated here as (1) an omission, (2) a duty to disclose, (3) intent to defraud, (4) plaintiff's ignorance of this fact and reliance on omission, and (5) resulting damages. The first and third elements predominate in this case. The Court makes legal conclusions regarding the second element, the duty to disclose, in this Order; thus, it is subject to common adjudication, and therefore does not detract from the predominance requirement. The fourth element, reliance, is discussed more fully, *infra*, in connection with arguments raised by LSW. Individualized assessments of the final element, damages, are generally held to be irrelevant to a Court's determination regarding predominance. See Yokoyama v. Midland Nat. Life Ins. Co., 594 F.3d 1087, 1094 (9th Cir. 2010) (noting that individualized "damage calculations alone cannot defeat certification," and that "the amount of damages is invariably an individual question and does not defeat class action treatment") (internal quotation marks, alteration marks, and citation omitted).

omitting. It is tautological to observe that one does not act unlawfully when one fails to disclose that which one is under no legal duty to disclose. (Cf. Reply at 15 (incorrectly contending that "no duty to disclose is required under the UCL").)

Under the UCL, to be actionable, an omission must either be (1) "contrary to a representation actually made by the defendant" or (2) a "fact the defendant was obligated to disclose." Daugherty, 144 Cal.App.4th at 835-36. Here, at issue is the second category.

Plaintiffs base their "unlawfulness" UCL claim on two underlying provisions of California law. First, Plaintiffs contend that provisions of the California Insurance Code provide the obligation to disclose. The provisions upon which Plaintiffs rely, sections 330 and 332, when read in conjunction with 334, require an insurer to disclose terms of a contract of insurance that are or that he believes to be material. Cal. Ins. Code §§ 330, 332, & 334.

Because the unlawful prong of the UCL borrows another statute, the materiality of the omission depends upon a the related statutory definition, which has been held to be subjective, not objective. See Cal. Ins. Code § 334 ("Materiality is to be determined not by the event, but solely by the probable and reasonable influence of the facts upon the party to whom the communication is due, in forming his estimate of the disadvantages of the proposed contract, or in making his inquiries."); see, e.g., Pringle v. Water Quality Ins. Syndicate, 646 F. Supp. 2d 1161, 1170 n.6 (C.D. Cal. 2009) (noting that § 334 "materiality" is a subjective, not objective, inquiry); Imperial Cas. & Indem. Co. v. Sogomonian, 198 Cal. App. 3d 169, 181 (Ct. App. 1988) (same). Accordingly, the Court concludes that to the extent that the alleged unlawfulness of LSW's actions is based on the cited provisions of the California Insurance Code, variations among class members actual subjective perceptions of materiality preclude a finding of predominance as to either the volatility defect or the tax defect.[14]

[14] The provision also requires disclosure of facts that are "believe[d] to be material" which could be commonly adjudicated if there was evidence that LSW "believed [the omissions] to be material." Cal. Ins. Code § 334. At the hearing, Plaintiffs argued that "materiality" could be established with reference to LSW's subjective beliefs but offered no evidence supporting this argument. (Tr. at 5.) Instead, Plaintiffs attempt to shift the burden to LSW to prove the absence of its subjective belief of materiality. (Id.) First they note the absence of evidence that LSW believed that the omissions would be

The same is not true of the "unlawfulness" UCL claim to the extent it is premised on Cal. Civ. Code § 1572. (See ¶ 90.b.; Sept. 18, 2012 Hearing Transcript ("Tr.") at 4.) The predominance of common issues regarding that portion of the "unlawfulness" UCL claim is subject to the Court's analysis, sets forth below, regarding the unfair and fraudulent prongs. Accord Tietsworth v. Sears, 720 F. Supp. 2d 1123, 1147 (N.D. Cal. 2010).

The § 1572 UCL claim, as well as those claims based on the unfair and fraudulent prongs of the UCL, are untethered to the specific subjective measure of materiality of the cited provisions of the California Insurance Code, and as to these claims, the Court disagrees with LSW's contention regarding the necessity of individual assessments.

Here, Plaintiffs allege that the Policies contain a number of undisclosed features that combine in a manner and react to generally expected market volatility in a manner that gives the Policy a greatly increased possibility of lapse. Plaintiffs allege that the increased risk is impossible to ascertain without access to LSW's software, and places at risk the loss of thousands of dollars for the policyholders, or absent that, at least a significant portion of their investment. The Court concludes that whether such undisclosed and undiscernable risk is material is subject to common adjudication. This type of information bears directly on the inherent value of a policy at purchase, as determined by market forces and by policy features, the latter of which should be disclosed and ascertainable.

Indeed, under the UCL, California law unequivocally does not require individualized proof of "deception, reliance and injury." In re Tobacco II Cases, 46 Cal.4th 298, 320 (2009). Recently, applying In re Tobacco II Cases, the Ninth Circuit reversed a district's court's denial of a class certification motion on a UCL claim based on the district court's determination that "individual issues predominated . . .

---

material to some plaintiffs but not to others. (Id.) Next, they describe the difficulty with such a position, with reference to an objective standard of what a reasonable consumer would believe. (Id.) Stated otherwise, Plaintiffs contend that LSW must have subjectively believed the omissions to be material because a reasonable consumer would have objectively believed them to be material. Accepting this argument would have the practical effect of impermissibly transforming the subjective standard to an objective one.

because individualized proof of reliance and reliance would be required." Stearns v. Ticketmaster Corp., 655 F.3d 1013, 1020 (9th Cir. 2011). In doing so, the court noted that "the district court did not have the benefit of In re Tobacco II Cases . . . when it ruled, and that case makes all the difference in the world" on the issue of differentiating common-law fraud from California's UCL. Id.

Thus, the Court concludes that common issues predominate as to UCL claims asserted under all three prongs by the pure omissions class. Accord Yokoyama, 594 F.3d at 1089 (reversing district court order denying class certification and holding that reliance could be commonly adjudicated under a Hawaii law similar to the UCL which prohibits conduct "likely to mislead consumers").

Next, as to the fraudulent concealment claim, LSW makes two arguments. (Opp'n at 23-24.) LSW contends that materiality differs because its policyholders purchased their Policies for varying reasons. (Id. at 24.) Because the nature of the specific omissions at issue, with their inherent tendency to effect the value of the Policy under the simplest of laws of economics, the Court rejects this argument. See In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Products Liab. Litig., 754 F. Supp. 2d 1145, 1190 (C.D. Cal. 2010) (applying California law and defining materiality in the context of a fraudulent concealment claim by stating "[i]nformation is material when, had the omitted information been disclosed, the reasonable consumer would have been aware of it and behaved differently") (internal quotation marks and citation omitted).

LSW also contends that individualized determinations of justifiable and actual reliance will necessarily vary among policyholders. (Opp'n at 23.) In doing so, LSW implicitly recognizes Plaintiffs' point that reliance may be presumed where materiality is found. This presumption is well established, especially in connection with material omission cases. Recently, a district court considering the predominance factor discussed this presumption as to a number of California "fraud-based claims":

> Defendants argue that Plaintiffs cannot sustain classwide claims on their fraud-based claims because they must demonstrate individual reliance on the alleged concealment. However, courts have recognized that this element, which is often phrased in terms of reliance or

> causation, may be presumed in the case of a material fraudulent omission. . . . The Supreme Court has held, in cases involving primarily a failure to disclose, positive proof of reliance is not a prerequisite to recovery. . . . Rather, all that is necessary is that the facts withheld be material, in the sense that a reasonable person might have considered them important in making his or her decision.

Tietsworth v. Sears, 720 F. Supp. 2d 1123, 1147 (N.D. Cal. 2010) (considering fraud claims under California Consumer Legal Remedies Act, UCL, and common law fraudulent concealment theories) (internal quotation marks, alteration marks, and citations omitted).

Nevertheless, LSW argues that to the extent Plaintiffs might be able to avail themselves of this presumption of reliance, LSW is entitled to rebut the presumption,[15] which is an individualized inquiry. (Id. at 24.) Although the Court recognizes that such evidence to rebut this presumption is likely to be individualized in nature, the Court does not find that it detracts sufficiently from the predominance of the other common issues to warrant a refusal to certify the class. Moreover, the logic of LSW's position would eviscerate the effect of such a presumption in class certification analysis.

Finally, LSW challenges whether Plaintiffs have demonstrated that all class members suffered some injury, which it contends is necessary to establish Article III standing. (Opp'n at 21-22.) Relying on Mazza v. Am. Honda Motor Co., Inc., 666 F.3d 581, 594 (9th Cir. 2012), which declares that "no class may be certified that contains members lacking Article III standing," LSW argues that Plaintiffs have failed to demonstrate that every class member was injured, and thus, that every class member has standing. However, application of Mazza precludes LSW's argument. Plaintiffs allege that had they been given full disclosure regarding the Policies, they would not have purchased them or would not have paid as much for them. (SAC

[15] As the rebuttable presumption moniker implies, LSW must be given this opportunity. See Engalla v. Permanente Med. Group, Inc., 15 Cal. 4th 951, 977 (1997) (noting that the presumption would provide a sufficient inference in their favor to save them from summary judgment "absent evidence conclusively rebutting reliance").

¶ 93.) There is no reason to think otherwise regarding the class members. Inherently, an evaluation of risk and return regarding a particular investment product is necessary to arrive at the equilibrium price.

Where undisclosed features adversely increase the investment's risk and/or decrease the investment's return, it is entirely consistent with basic rules of economics that they would be overpriced in the marketplace. The Mazza Court stated it more succinctly: "To the extent that class members were relieved of their money by Honda's deceptive conduct — as Plaintiffs allege — they have suffered an 'injury in fact.'" Mazza, 666 F.3d at 595. This case also alleges that Plaintiffs were "relieved of their money" by a defendant's "deceptive conduct," and the Court here concludes, like the Mazza court, that the standing of the class members is not an impediment to class certification. While the degree of monetary harm may vary, all class members suffered harm by purchasing a Policy which they would not have purchased or would have paid less for had full disclosure been made to them.

Thus, as set forth herein, the Court finds that Plaintiffs have met the predominance requirement of Rule 23(b)(3). The Court therefore considers the superiority requirement.

2. Superior Method of Adjudication

Relevant to the issue of superiority, Rule 23(b)(3) requires that " the court find[] . . . that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Id. This requirement is broken down into non-exclusive factors that include:

> "(A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action.

Fed. R. Civ. P. 23(b)(3)(A)-(D).

A class action is the superior method for managing litigation where common issues will reduce litigation costs and promote great efficiency, and where no realistic alternative to class resolution exists. Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1234-35 (9th Cir. 1996). This superiority inquiry requires a comparative evaluation of alternative mechanisms of dispute resolution. Hanlon, 150 F.3d at 1023.

Even where there is a common nucleus of fact regarding a defendant's conduct, "[i]f each class member has to litigate numerous and substantial separate issues to establish his or her right to recover individually, a class action is not 'superior.'" Zinser, 253 F.3d at 1192.

Only Plaintiffs address the four factors set forth in Rule 23(b)(3) regarding superiority. The Court agrees that all four factors support certification.

As to the first, Plaintiffs contend that the first factor weighs in favor of certification based on the sheer number of separate trials required. The Court is inclined to agree. Although this is not the typical case of thousands of class members with very low amounts in controversy such as the cost of the repair of a defective minivan liftgate at issue in Hanlon, 150 F.3d at 1023, neither does the average amount of potential recovery suggest to the Court that each class member has a greater interest in pursuing individual claims. (See Brockett Reply Decl. (Docket No. 322) ¶ 54 (noting average total premiums paid on each Provider Policy is approximately $4,000 and the same average for each Paragon Policy is approximately $11,500).

As to the second factor, Plaintiffs represent that no other litigation has commenced regarding the relevant Policies. (Brosnahan Decl (Docket No. 227) ¶ 30.)

As to the third factor, the Court agrees that because of the common factual and legal issues regarding LSW's uniform practices, it is desireable to concentrate those cases in a single forum. This practice promotes judicial efficiency and permits a single adjudication regarding the lawfulness of a number of the relevant Policies' features.

As to the fourth factor, Plaintiffs rely on authority which they contend supports the proposition that this factor, related to the difficulties likely to be encountered in class litigation, generally weighs in favor of class certification satisfied when the

predominance requirement is met. (Motion at 30 (In re Napster, Inc. Copyright Litig., C MDL-00-1369 MHP, 2005 WL 1287611 (N.D. Cal. June 1, 2005).) However, this authority simply doesn't support Plaintiffs' assertion.

Nevertheless, In re Napster is helpful to a determination of the issue at hand. In an understated manner, the In re Napster court expressly acknowledged that adjudicating tens of thousands of claims, however similar those claims might be, "will present logistical difficulties." Id. From there, the In re Napster court correctly observed, as the Court does here, that "the case management problems that may arise upon certification of the class must be compared to the alternative method of adjudicating the parties' claims: that is, thousands of actions by individual class members." Id. Thus, this Court also concludes that "[w]hen viewed from this perspective, a class action is clearly the most efficient and in all likelihood the most equitable method for resolving the parties' dispute." Id.

The Court concludes the superiority requirement is met.

C. Ruling re Categories (1) The Volatility Defect & (2) The Tax Defect

As set forth herein, the Court certifies a class consisting of all Provider and Paragon Policies who purchased their Policies on or after September 24, 2006. This class may assert claims pursuant to the UCL's unlawfulness prong (to the extent this claim is premised on Civil Code § 1572), the UCL's unfairness prong, and the UCL's fraudulent prong. The members who purchased their Policies on or after September 24, 2007 may also assert a claim for common-law fraudulent concealment under California law.

V. Application of Rule 23(a) & Rule 23(b)(3) Factors of an Illustrations-Based Subclass— Categories (3) Illustrations' Non-Disclosure of Fees and Lapse Accelerators, (4) Illustrations' Failure to Disclose that Interest is Credited Retrospectively, and (5) "Illustrations Do Not Match Policy Re Eleventh Year Reduction in Fees"

A. Implicit Requirements — Definable and Ascertainable Class

LSW contends that records are incomplete regarding which policyholders were

given Illustrations before they purchased their Policies, or that their "policy files offer conflicting evidence of whether an illustration was used," and that these difficulties in proof lead to the lack of an ascertainable class. (Opp'n at 29-30.) This issue was heavily contested at the hearing on this matter, and the parties' supplemental briefing address this issue. After consideration of the issue at length, and as set forth herein, the Court determines that concerns regarding subclass ascertainability do not counsel against its certification.

In addition to more precisely articulated provisions of Rule 23(a) and (b), there are additionally the implied prerequisites to class certification that the class must be sufficiently definite and ascertainable. Xavier, 2011 WL 1464942, at *12 (finding that it was impossible to ascertain a class of long-term smokers who smoked only Marlboro cigarettes for "twenty pack years"). The court explained the purpose of the ascertainability requirement:

> Ascertainability is needed for properly enforcing the preclusive effect of final judgment. The class definition must be clear in its applicability so that it will be clear later on whose rights are merged into the judgment, that is, who gets the benefit of any relief and who gets the burden of any loss. . . . Indeed, courts of appeals have found class certification to be inappropriate where ascertaining class membership would require unmanageable individualized inquiry.

Id. (internal citations omitted). Accordingly, this Court may certify the class only if Plaintiffs demonstrate that the class definition is sufficiently definite and the members of the putative class may be ascertained without "unmanageable individualized inquiry." Id.

At oral argument, defense counsel framed this issue in a slightly different way. Simply put, LSW contends that the Court's tentative conclusions regarding class certification failed to consider an implicit "first step in a Rule 23 analysis in a disclosure case." (Tr. at 37.) Specifically, LSW contends that the Court failed "to ask were the class members ever told the information [alleged to have been omitted] in the first place[.]" (Id.) It appears that counsel sees this issue as somewhat different than that of ascertainability. (Id.) Case law upon which counsel relies discusses the issue as relating to predominance, and to a lesser extent, ascertainability. The Court discusses it here, and believes it is as related to ascertainability as any other factor in

the Rule 23 analysis.

Depending on whose characterization of the factual record on this point one credits, the issue of ascertainability is either "hopelessly intractable," (Tr. at 27) or it is "not difficult to determine whether any given policy received a sales illustration . . . before the date of policy application" and documentary evidence is ambiguous only 5% of the time (Tr. at 5-6). Before exploring the factual record on this issue, the Court examines the legal significance of this point, based on the legal authority cited by LSW.

Clearly, the issue raised by LSW at the hearing impacts upon the certification question as to the Illustrations-Based Subclass. For a policyholder to be left with the type of actionable misleading impression allegedly left by the use of sales Illustrations to sell LSW's Policies, that policyholder must have been *actually* exposed to a partial disclosure or misleading disclosure. Ninth Circuit case law considering class certification has considered the issue in the unique context in which it is presented here.

Most recently, the Ninth Circuit in Mazza held that the district court abused its discretion in certifying a class where a "small scale . . . advertising campaign" was the source of the class members' exposure of certain allegedly misleading representations. Mazza, 666 F.3d at 594. There, alluding to class definition (and thus, to class ascertainability), the court noted that "[i]n the absence of [a] massive advertising campaign . . . , the relevant class must be defined in such a way as to include only members who were exposed to advertising that is alleged to be materially misleading." Id. In Mazza, certification of the class was an abuse of discretion because the class "almost certainly include[d] members who were not exposed to, and therefore could not have relied on [the] allegedly misleading advertising material." Id. at 596.

Before that, but nevertheless quite recently, the issue was discussed in Stearns v. Ticketmaster Corp., 655 F.3d 1013, 1020 (9th Cir. 2011). There, the Ninth Circuit observed that class certification of a UCL claim could well be precluded where "there [is] was no cohesion among the members because they were exposed to quite disparate information from various representatives of the defendant." Id. In making this observation, the Ninth Circuit relied on a California appellate court case that LSW finds particularly illuminating on this issue.

In Kaldenbach v. Mut. of Omaha Life Ins. Co., 178 Cal.App.4th 830, 849 (2009), the court below, under a standard similar to that employed by the federal courts, denied a motion for class certification, and the Court of Appeal affirmed. There, a policyholder purchased a whole life insurance policy with a vanishing premium component. Id. at 835. The policyholder alleged that the illustrations failed to advise him of certain inherent risks associated with the policy features. Id. at 836. The trial court found that the policyholder could not show class ascertainability in light of the difficulties in determining which policyholders had received illustrations during the sales presentation. Id. at 841. The Court of Appeals found no abuse of discretion in the trial court's refusal to certify the class, relying in part on the lack of uniformity of the sales presentations in which the class members participated. Id. at 849-50.

In doing so, the Court of Appeal contrasted the facts before it from previous decisions that resulted in class certifications, in that they involved more uniform practices: a national tobacco advertising campaign about the lack of adverse health effects of tobacco use and the plan of an insurance company to reduce its discretionary dividend. Id. at 849. Specifically, the Court of Appeal observed:

> But here there is no such uniformity. Although Kaldenbach claimed Mutual's presentations relating to [the vanishing-premium policies] were uniform and that it utilized standardized training methods, materials, and scripts to which agents were required to adhere, the evidence showed the opposite. Mutual's policies were sold by independent agents, and during the class period, they were not required to attend training or utilize any given sales materials. Agents were not required to adhere to a scripted sales presentation. Indeed Meyerson, who sold Kaldenbach his policy, testified at his deposition he did not use a scripted sales presentation or any training materials in making the sale to Kaldenbach.
>
> Thus, separate from whether any individual purchaser relied on alleged misrepresentations, or suffered injury as a result, here the determination of what business practices

> were allegedly unfair turns on individual issues. The trial court could properly conclude there was no showing of uniform conduct likely to mislead the entire class, and the viability of a UCL claim would turn on inquiry into the practices employed by any given independent agent such as whether the agent involved in any given transaction took Mutual's training and read Mutual's manuals or used the training and materials in sales presentations, and what materials, disclosures, representations, and explanations were given to any given purchaser. The trial court did not abuse its discretion in concluding those issues predominated and could not be proven on a class-wide basis.

Id. at 849-50 (emphasis added).

With the observations made by these cases in mind, the Court looks to the evidence on the feasibility of determining class membership based on the receipt of sales Illustrations. In doing so, the Court notes that the precise issue before it is not so much the uniformity of the Illustrations provided to the policyholders as it is the question of *which* policyholders were given sales Illustrations prior to their purchase of the Policies. The original record and the supplemental briefing both bear on this discussion.

When an application is submitted to LSW for underwriting, the application includes a box to be checked (or left unchecked). (McDonald Decl. (Docket No. 262) ¶ 5.) By checking the box, the applicant and agent certify that no sales illustration "of the policy applied for" was provided. (Id.) That application and supporting documents, but not "every single documents that [was] provided to a potential policyholder" are made part of LSW's records. (Id. ¶ 7.) This is because the file is intended to contain "only the administrative information LSW needs to determine whether to issue a policy," including information relevant to the underwriting process. (Id.)

LSW also asks agents to submit an Agent's Report, which asks the agent for a "description . . . of 'any sales materials, including illustrations, used relating to the new application.'" (Id. ¶ 8.)

When there is doubt as to whether a sales illustration for the policy applied for was provided to the applicant prior to the issuance of the Policy, LSW generates a new one, and requires that the policyholder sign, date, and return a copy of the illustration. (Id. ¶ 18; cf. Tr. at 10 (referring to such an Illustration as a "batch Illustration" to differentiate it from a "sales Illustration".) That is because although an Illustration is not required to be given to an applicant *before* an application is submitted, LSW requires that an illustration be provided no later than the date of the issuance of the Policy. (McDonald Decl. ¶ 18.) A batch Illustration is generated where (a) the application did not contain a copy of the sales Illustration for the policy applied for; and/or (b) where there was such a sales Illustration, but it was unsigned by the applicant; and/or (c) a sales Illustration submitted with the application does not match the policy as issued; and/or (d) there was an unchecked box on the application, which indicated a lack of certification of the applicant's receipt of a sales Illustration for the policy applied for. (Id. ¶ 17.)

In the original and supplemental briefing, the parties argue at length regarding how the various indicia of sales Illustration receipt should be interpreted, and whether that interpretation yields an ascertainable class. The Court's examination of the issues and the evidence leads to a number of guiding principles.

First, if the box on the application is checked, the agent and applicant have both certified that an Illustration matching the Policy was provided to the applicant. This is the surest indication of membership in the Illustrations based subclass, and it is made more certain in those cases in which the Agent's Report also contains a notation that an Illustration was used.

Second, if the Agent's Report indicates that an "Illustration" or "Ill." was used, this also establishes subclass membership.[16] The possibility that the Illustration

[16] Other shorthand references to LSW's software fall into this category as well. (See Dinglasan Supp'l Decl. (Docket No. 339-1) ¶ 6 (describing Agents' Reports with notations of "ICS" and "IC Solutions" and identifying the "ICS" acronym as LSW's software).) By the same token, use of the "quick calc" generated by the same software also falls into this category. (See id.) Although perhaps intended for use only by agents, this document nevertheless appears to the Court to generate the same forecasts as the sales Illustrations themselves, and thus are subject to the same defects. Thus, an Agent's Report noting that "ICS", "ICS Solutions" or "quick calc" shows that an illustration was produced by LSW's software and shown to the applicant.

provided might not match precisely the Policy obtained does not lead the Court to conclude that subclass membership is not established. The defects in the structure of the policy and the manners in which the Illustrations fail to depict these defects are unchanged, although certain resultant values may differ.[17]

Third, whether an Illustration is found in the Policy file, if it is signed by the applicant or on a date that pre-dates the Policy issuance, that would establish class membership. A closer question is whether an unsigned Illustration or an Illustration that bears a signature but no date indicating the date of the signature would establish class membership. Although the Court agrees that the presence of such an Illustration tends to suggest subclass membership, it presents a much closer question than the other examples discussed above, and does not by itself establish subclass membership.

On this basis, a review of the Policy file by a court-appointed special master or a class administrator could identify approximately two-thirds of the members of the class as subclass members. (Cf. Dinglasan Supp'l Decl. Ex. C (Docket No. 339-2).) Of Plaintiffs' review of the files, approximately 250 of 400 of the sample fell into one or more of these categories described by the Court.[18] Of the remaining approximately one-third of the members of the class, their subclass membership could be ascertained by the use of a questionnaire.[19]

---

[17] By way of simplistic example, if a scale is miscalibrated to overstate a weight by 20%, it would misstate a 10 pound weight as 12 pounds, while it would overstate a 5 pound weight as 6 pounds. The nature of the defect in the operation of the scale, and thus the nature of the defect in the scale's output, is unchanged by the value of the input. Although the value of the output changes based on input, the distorted or defective algorithm which produces that value does not.

[18] Even more may be subject to identification. Plaintiffs contend that the presence of any sales Illustration in a Policy file establishes its use. The Court's parameters for establishing subclass membership based on the presence of a sales Illustration in the Policy file are more closely circumscribed, so the Court has disregarded Plaintiffs' data on this point for purposes of the present Motion. However, it is possible that many of the Policy files contain sales Illustrations that are dated and signed by the policyholder prior to Policy issuance. In such a case, the sales Illustration would establish subclass membership, even if the Illustration was not a precise match with the Policy issued.

[19] Plaintiffs argue in favor of such a questionnaire. (Reply at 5.) Specifically, they argue that "courts routinely find classes ascertainable by allowing" the use of a questionnaire and the requirement that class members submit any documents in their possession. (Id.) They rely on several recent opinions

Thus, the Court concludes that the use of a carefully crafted, response-required class notice will alleviate any concerns regarding ascertainability of the subclass as to those members whose subclass membership cannot be ascertained from a simple file review.[20]

The Court might take a different view if a questionnaire were the only means for ascertaining subclass members. The use of questionnaires in the absence of documentary proof of the use of Sales Illustrations in some instances prevents minor manageability concerns here. See footnote 21, *infra*.

The Court pauses here to note that any difficulties in this approach to ascertainability are ameliorated by the fact that the present class is a subclass compromised of policyholders who received a sales Illustration. This is not to say that the Court has relaxed the requirements in considering whether certification is proper; to the contrary, as noted previously, such an approach is prohibited by Rule 23(c)(5). Rather, the Court notes that the purpose of the implied ascertainability requirement — the need for certainty as to whom the resulting class judgment is binding and preclusive — takes on less importance when considering a subclass.

Where there are no insurmountable ascertainability difficulties associated with the class itself, generally, and certainly in this instance, a judgment resulting from the claims asserted by the class will necessarily have a res judicata effect on the claims

---

of district courts within the Ninth Circuit, all of which support this proposition to some degree. (Id. at 5 n.18. (collecting cases).) Indeed, the Ninth Circuit itself has, at least in theory, strongly suggested that use of questionnaires to effectively and efficiently identify and manage class litigation is permissible. Vinole, 571 F.3d at 947 (noting that the decision to use "innovative procedural tools" suggested by plaintiffs, "such as questionnaires, statistical or sampling evidence, representative testimony, separate judicial or administrative mini-proceedings, [and] expert testimony" rested within the discretion of the district court).

[20] This decision is in accord with the recent Sixth Circuit decision of Young v. Nationwide Mut. Ins. Co., 693 F.3d 532, 539-40 (6th Cir. 2012), in which the court found that extensive review of a defendant's files to ascertain class membership should not preclude class certification. Id. (referring to the possibility of "additional, even substantial, review of files" and collecting cases). This same case also rejected the notion that identification of class members must be "100% accura[te]" and instead held that the class must be "discerned with reasonable accuracy." Id. at 539.

asserted by the subclass. This is so because claims asserted by both the class and the subclass are based on material omissions in connection with the purchase of the Policies. Thus, although they differ as to whether they are based on a wholesale omission or a less-than-full disclosure, both types of claims are premised on the same factual predicate, and as such, would be barred from re-litigation. See Hesse v. Sprint Corp., 598 F.3d 581, 590 (9th Cir. 2010) (noting the res judicata effect of a class-action settlement and judgment as to claims that not presented in the class action). As such, mere membership in the class would bar re-litigation of the claims asserted by the subclass herein.[21]

B. Rule 23(a)

1. Numerosity

LSW does not challenge numerosity, and the Court finds that the numerosity requirement is met.

2. Commonality

As noted previously, LSW argues that the disclosures made to policyholders were subject to the discretion of the individual agents who sold the Policies. (Opp'n at 26 ("Independent agents have discretion regarding disclosure.").) However, commonality requires only that the class members have common questions that are "capable of classwide resolution — which means that the determination of its truth or falsity will resolve an issue that is central to the validity of each of the claims in one stroke." Dukes, 131 S. Ct. at 2551. Even accepting LSW's contention that agents have discretion regarding disclosure, Dukes does not suggest to the Court the absence of commonality. Dukes focused on multiple discretionary decisions by multiple decisionmakers on issues related to hiring, firing, promotion, and human resource management, all allegedly in connection with overall corporate culture promoting gender bias. Id. at 2554. In contrast, the claims asserted here focus on the common

[21] It is in this manner that the Court notes its agreement that this particular ascertainability issue tends to resemble more a manageability issues. (Cf. Ptlfs.' Supp'l Brief (Docket No. 339) at 8.) As set forth *supra*, manageability issues are measured by a relative standard, in that they must be compared to possible alternative methods of adjudication.

issues presented by the use of similar sales Illustrations.

In Dukes, the Supreme Court discussed how the testimony of plaintiffs' expert that Wal-Mart's corporate culture made it vulnerable to gender bias did not lead to common questions or law or fact regarding thousands of employment decisions. Id. The Supreme Court noted that the expert could not quantify the effect of such a culture of bias, specifically noting that the expert's testimony that he could not say whether half a percent or ninety-five per cent of the employment decisions at Wal-Mart might be determined by gender bias. Id. Thus, the Supreme Court rejected the notion that evidence established that Wal-Mart "operated under a general policy of discrimination." Id. (internal quotation marks omitted).

Here, however, the Court examines the commonality of claims asserted on misrepresentations and partial representations as generated by the same computer software, which necessarily employs the same calculations and algorithms each time it is put through its paces. Human beings are not so constrained. Thus, the Supreme Court's observations regarding the expert's failure to quantify the effect of a culture of gender bias on an employer's decisions have limited applicability here. The variations in human decisionmaking processes and the influences (or lack thereof) of the environment in which those decisions are made on those processes have limited applicability to the internal ruminations of LSW's software, which lacks free will or independent thought processes.

Thus, the Court finds all who received Illustrations before or when they applied for their Policies share common questions.

Plaintiffs offer evidence, not controverted by LSW, that LSW set the default settings for the software used in generating the Illustrations, and although LSW represents that many variations among the Illustrations are possible, the evidence it offers is mixed regarding whether the default settings can be changed in ways that implicate Plaintiffs' claims. (Compare Reply at 5 n.20 (LSW set default settings on Illustrations software) with Opp'n at 8-9 (description of variations).) Specifically, some evidence suggests that agents could change default settings related only to an applicant's state of residence and the type of product. (Richardson Depo. (Docket No. 317-3) at 55.) Other evidence suggests greater alteration of the default settings are possible. (See MacGowan Decl. (Docket No. 264) ¶¶ 33-44.).) Nevertheless, other

than the issue regarding whether the Optional Report and the cover pages bearing the "One Policy Fee" language, none of these differences address Plaintiffs' claims.

Thus, because the alleged misrepresentations are necessarily tied to internal workings of the software as expressed by the Illustrations produced by that software, the uniform application of that software results in the uniform type of misrepresentation that forms the basis of this action. In this way, the Illustrations uniformly fail to disclose the fees and lapse accelerators and uniformly fail to disclose that interest is credited retrospectively. Therefore, although differing values may have been produced based on individual circumstances such as amount of insurance desired or amount of investment available from each individual policyholder, all indications are that the defects alleged by Plaintiffs to be present in the Illustrations are present in all Illustrations produced.

Accordingly, the Court concludes that the commonality requirement is met.

3. Typicality

The Court also concludes that the typicality requirement is met. As noted previously, to meet the typicality requirement, Plaintiffs must show that: (1) "other members have the same or similar injury"; (2) "the action is based on conduct which is not unique to the named plaintiffs"; and (3) "other class members have been injured by the same course of conduct." Id.
Ellis, 657 F.3d at 984. Here, the named Plaintiffs have shown that they present claims that are typical of those of other class members. They base their claims on and suffered injury as a result of misrepresentations expressed in Illustrations produced by the same software (and thus, the same misrepresentations) as were the Illustrations given to class members.

4. Adequacy of Representation

The Court's discussion of the adequacy of representation requirement in connection with the pure omission claims, section IV.A.4 *supra*, applies with equal force to the two Illustrations categories. Thus, the Court concludes the adequacy of representation requirement is met as to the Illustrations categories as well.

C. Rule 23(b)(3)

1. Predominance

The main difference between the pure omissions class and the Illustrations class is that, while the former relies on a complete lack of information, the latter relies on the misleading nature of partial disclosures. This distinction is of little consequence. See Keegan, 838 F.Supp.2d at 939 (C.D. Cal. 2012) (defining a material omission under California law as including both "when the defendant had exclusive knowledge of material facts not known to the plaintiff" and "when the defendant makes partial representations but also suppresses some material facts").

The major obstacles to predominance are whether materiality and reliance are individualized issues, or whether they are subject to common adjudication. If they are individualized issues, then they predominate, and class certification is improper. However, as set forth below, except as to the unlawful prong of the UCL claim, the Court concludes that both materiality and reliance is subject to common adjudication and with that conclusion, it becomes clear that common issues predominate.

Materiality

As acknowledged previously, under the UCL unlawful prong, the duty to disclose is controlled by the definition of "materiality" of Cal. Ins. Code § 334, which is a subjective standard of materiality, not amenable to common adjudication. However, as also observed previously, the same is not true of the "unlawfulness" UCL claim to the extent it is premised on Cal. Civ. Code § 1572, and this portion of the "unlawfulness" UCL claim is subject to the same analysis as are the claims under the UCL unfair and fraudulent prongs.

Those claims, as the Court concluded previously in connection with the pure omissions class, as to the unfair and fraudulent prongs, the definition of "materiality" is not constrained in the same manner as it is under the California Insurance Code, and "materiality" under the unfair and fraudulent prongs, as well as the unlawfulness prong to the extent it is premised on § 1572, is amenable to common adjudication. As noted in connection with the pure omissions class, what is alleged in this case is that the Policies contain a number of undisclosed features that combine in a manner and

react to generally expected market volatility in a manner that gives the Policy a greatly increased risk of reduction in policy value and increased possibility of lapse. Plaintiffs allege that, even with the benefit of the Illustrations, this increased risk is impossible to ascertain without access to LSW's software. As it did with the pure omissions class, the Court concludes that the issue of materiality as to this undisclosed and undiscernable risk is subject to common adjudication.

Thus, the materiality element for the fraudulent concealment claim is likewise common to the class for the reasons set in section IV.B.1., *supra*.

Reliance

As noted *supra* section IV.B.1, where materiality is found, reliance is presumed, especially when what is at issue is an omission. Thus, reliance is subject to common adjudication.

Therefore, as set forth herein, the Court finds that Plaintiffs have met the predominance requirement of Rule 23(b)(3). Accord Yokoyama, 594 F.3d at 1094 (specifically holding that common issues of materiality and reliance predominated over individual issues in an action that asserted a consumer fraud-based claim premised on alleged misrepresentations in brochures regarding IUL policies); but see In re Countrywide Fin. Corp. Mortg. Mktg. & Sales Practices Litig., 08MD1988 DMS WMC, 2011 WL 6325877, at *9 (S.D. Cal. Dec. 16, 2011) (holding that Plaintiffs failed to establish predominance where sales of mortgages with "teaser" rates were tied to both uniform written documents and other non-uniform written documents and oral discussions).

2. Superior Method of Adjudication

The Court's discussion of the superiority requirement in connection with the pure omission claims, section IV.B.2. *supra*, applies with equal force to the two Illustrations categories. Thus, the Court concludes the superiority requirement is met as to the Illustrations categories as well.

D. Ruling re Illustrations-Based Subclass — Categories (3) Illustrations' Non-Disclosure of Fees and Lapse Accelerators, (4) Illustrations' Failure

to Disclose that Interest is Credited Retrospectively & (5) Illustrations Do Not Match Policy Re Eleventh Year Reduction in Fees

As set forth herein, the Court certifies a class consisting of all Provider and Paragon Policies who purchased their Policies on or after September 24, 2006, and who were provided a policy Illustration at or before Policy application. This class may assert claims pursuant to the all three prongs of the UCL. The members who purchased on or after September 24, 2007 may also assert a claim for common-law fraudulent concealment under California law.

VI. Category (6) — "Illustrations of Reduction in Eleventh Year Fees and Other Eleventh Year Incentive Falsely Represent as a 'Current Basis' Features Not Currently in Use"

Neither the class nor the subclass discussed in the previous sections include Plaintiffs' sixth theory of recovery. As the Court understands this claim, it is based on the manner in which the Illustrations depict certain decreased charges and certain increased returns (collectively referred to herein by the Court as "eleventh year incentives") that are ostensibly granted to a policyholder in the eleventh year of the Policy. (See Motion at 5 (referring to a "reduced Monthly Administrative Charge," an "Account Value Enhancement," and elimination of a "Percent of Accumulated Value Charge").) In the Illustrations, these are represented to be part of the "current basis" of the Policy, even though they are not currently, nor have they ever been paid, to any policyholder. (See SAC ¶ 12 ("The Current Basis A and Current Basis B policy values depicted in LSW's Illustrations are false and misleading because certain of the rates and charges upon which they are based are not part of LSW's current rates and charges because they are not currently applied to any policyholder's account. They are entirely fictional.").

The Court formerly held that claims based on this representation were not futile; however, in retrospect, and on closer examination, that conclusion appears to the Court to be in error.[22] (See Docket No. 203 at 5.) The characterization of the eleventh

[22] As noted previously, courts are not precluded from considering merits issues in connection with a class certification motion; to the contrary, courts should consider merits-related issues where necessary to resolve a class certification motion. The district court may consider the merits of the

year incentives as a "current basis" in an Illustration necessarily implies, at a minimum, the following representation: "This Policy is currently designed to adjust certain fees downward, and/or to provide an additional return on investment (collectively referred to as "incentives") beginning in the eleventh year the Policy is in force." For Plaintiffs' claim to succeed, it would also have to imply, in a misleading manner, the more detailed statement: "We have issued Policies of the type we are illustrating for you today that have been in force for more than ten years, and once those Policies reached their eleventh year, we began paying the incentives identified on your Illustration."

The Court does not agree that by stating that the eleventh year incentives are part of the "current basis" implies this additional statement. Absent the lack of intent to make good on those representations, similar to a claim for promissory fraud,[23] the Court cannot conclude the characterization of the eleventh year incentives as a "current basis" leads to an actionable misrepresentation. Thus, the Court likewise cannot conclude Plaintiffs' claims based on sixth theory of recovery are amenable to class treatment. As to this sixth theory of recovery, the Court denies the Motion for Class Certification.

VII. Conclusion

As set forth herein, the Court grants in part and denies in part the Motion for Class Certification. The Court denies the Motion to Strike.

IT IS SO ORDERED.

claims to the extent that they are related to the Rule 23 analysis. See Dukes, 131 S. Ct. at 2551-52 & n.6; Vinole, 571 F.3d at 947 n.15.

[23] See, e.g., Lazar v. Superior Court, 12 Cal. 4th 631, 638 (1996) ("where a promise is made without [an] intention [to perform], there is an implied misrepresentation of fact that may be actionable fraud."). The Court does not imply Plaintiffs may assert such a claim on the facts presented here.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 10-9198 JVS (RNBx) Date November 9, 2012

Title Joyce Walker, et al. v. Life Insurance Company of the Southwest

00 : 00

Initials of Preparer kjt