UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

ROBERT R. FINE, individually and on behalf of all others similarly situated, Plaintiffs, v. KANSAS CITY LIFE INSURANCE COMPANY, Defendant.	Case No. 2:22-cv-02071-SSS-PDx **ORDER GRANTING MOTION FOR CLASS CERTIFICATION [DKT. 139]**

Before the Court is Plaintiff Robert R. Fine's Motion for Class Certification ("Motion"). [Dkt. 139, Mot. for Class Cert. ("Mot.")]. Fine seeks to certify a class of persons who own or have owned certain permanent life insurance policies issued in California by Defendant Kansas City Life Insurance Company ("KCL"). Fine also seeks to be appointed as the class representative and to have the law firms of Stueve Siegel Hanson LLP and Miller Shirger, LLC be designated as class counsel. KCL opposes. [Dkt. 146, Def. Kansas City Life Ins. Co.'s Opp'n to Pl.'s Mot. for Class Cert. ("Opp'n")]. Having

reviewed the parties' arguments, relevant legal authority, and record in this case, the Motion is **GRANTED**.

I. FACTUAL BACKGROUND

This putative class action is about universal life and variable universal life insurance policies ("Class Policies") issued by KCL in California, and its alleged use of undisclosed, non-mortality factors to calculate cost of insurance ("COI") rates. Since June 1982, KCL has issued 9,381 Class Policies in California. [Dkt. 156, Decl. of Scott J. Witt ("Witt Decl.") ¶ 20]. Fine purchased one of these policies in 1989. [Dkt. 139, Decl. of Scott J. Witt ("Redacted Witt Decl.") Ex. 2]. The Class Policies have a component that allows the insured to invest into an account, commonly referred to as "Accumulated Value." [Witt Decl. ¶¶ 19 & n.1, 22, 24]. Under the terms of these policies, KCL is allowed to make monthly deductions from the Accumulated Value. [*Id.* ¶¶ 22-23, 28]. The two deductions relevant here are the COI charge and the monthly expense charge.

A. The COI Charge

The COI charge is used to compensate KCL for providing pure insurance protection by using the company's COI rate. [*See id.* ¶ 32, Ex. 2 at 8 (defining COI)]. Under Fine's policy, the COI rate is calculated using KCL's future mortality expectations, which are based on Fine's "age, sex and risk class." [*Id.* Ex. 2 at 8, 13-14]. KCL makes a similar promise to calculate COI rates using its future mortality expectations in each of the Class Policies. [*Id.* ¶¶ 34, 63]. KCL has allegedly been calculating its COI rates based on its mortality expectations from 1988, despite significant improvements in its expectations over the past 35 years. [*See id.* ¶¶ 76-77].

B. The Expense Charge

The monthly expense charge is used to compensate KCL for costs associated with administering the Class Policies. [*Id.* ¶ 38]. Fine's policy

allows KCL to deduct a monthly expense charge that would not exceed $5.00 for the first 10 years and would be $0.00 for every year after. [*Id.* Ex. 2 at 5, 8]. KCL makes a similar guarantee in the Class Policies. [*Id.* ¶¶ 22, 28].

C. This Lawsuit

Fine brings this putative class action against KCL alleging it uses undisclosed, non-mortality factors to calculate the COI rates. Fine asserts four claims against KCL. The first three are breach of contract claims for KCL's alleged breach of its promise to use only its future mortality expectations to calculate COI rates (Claim 1); KCL's alleged breach of its promise to not impose any charges beyond the maximum expense charge (Claim 2); and KCL's alleged breach of failing to reduce COI rates to reflect its improved mortality expectations (Claim 3). The fourth is a conversion claim for KCL's alleged wrongful retention of the excess monies paid by the policyholders because of the higher COI rates (Claim 4).

Fine now seeks to certify a class of persons who own or have owned certain life insurance policies issued in California by KCL that were active on or after January 1, 2022.[1] Fine also seeks to be appointed as the class

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[1] The class is defined as follows:

> All persons who own or owned a Better Life Plan, Better Life Plan Qualified, LifeTrack, AGP, MGP, PGP, Chapter One, Classic, Rightrack (89), Performer (88), Performer (91), Prime Performer, Competitor (88), Competitor (91), Executive (88), Executive (91), Protector 50, LewerMax, Ultra 20 (93), Competitor II, Executive II, Performer II, Ultra 20 (96), or Century II VUL life insurance policy issued in California, that was issued or administered by Defendant, or its predecessors in interest, and that was active on or after January 1, 2002.

[Mot. at 3].

representative and to have the law firms of Stueve Siegel Hanson LLP and Miller Shirger, LLC designated as class counsel.

II. LEGAL STANDARD

Class certification is governed by Federal Rule of Civil Procedure 23, which contains two separate sets of requirements under Rule 23(a) and 23(b). *Moyle v. Liberty Mut. Ret. Benefit Plan*, 823 F.3d 948, 964 (9th Cir. 2016). Under Rule 23(a), the party seeking class certification must show there are sufficiently numerous parties, common questions of law or fact, typicality of claims or defenses, and adequacy of representation. Fed. R. Civ. P. 23(a)(1)-(4); *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013). A court must conduct a rigorous analysis to determine whether Rule 23(a)'s requirements are satisfied. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350-51 (2011). If Rule 23(a)'s threshold requirements are met, the moving party must then demonstrate that the class action can be maintained under one of the categorical requirements under Rule 23(b). *Id.*; Fed. R. Civ. P. 23(b)(1)-(3). A plaintiff bears the burden of proving Rule 23's requirements are satisfied by a preponderance of the evidence. *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 665 (9th Cir. 2022).

III. DISCUSSION

A. Rule 23(a)

Naturally, the Court begins with Rule 23(a)'s threshold requirements.

1. Numerosity

First, Fine must prove "the class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). There is no numerical threshold to satisfy Rule 23(a)(1), but courts have generally found numerosity is "satisfied when a class includes at least 40 members." *Rannis v. Recchia*, 380 F. App'x 646, 651 (9th Cir. 2010).

Fine argues numerosity is satisfied and offers in support of his argument a declaration from his actuary expert, Scott J. Witt, who attests to the following: KCL has issued 9,381 Class Policies in California during the class period. [Witt. Decl. ¶ 20]. Each of these policies have a component that allows the insured to invest into the Accumulated Value. [*Id.* ¶ 19 & n.1, 22, 24]. KCL deducts a monthly COI charge from the Accumulated Values and promises that the COI rates will be determined based on its mortality expectations. [*Id.* ¶ 34]. According to Witt, however, KCL has also been using undisclosed, non-mortality factors to calculate its COI rates, which have resulted in the insureds paying a higher COI charge than they should have been. [*See id.* ¶¶ 76-77]. The Court finds this evidence sufficient to show by a preponderance of the evidence that joinder of the potentially large number of policyholders is impracticable.

KCL nevertheless argues Witt's declaration is inadequate to prove numerosity. It contends Witt's declaration does not prove numerosity because he never declares that the relevant COI language is identical in the putative Class Policies. Although KCL again fails to explain why identical COI language is important for numerosity purposes in its opposition, [*see* Opp'n at 7], it clarified at the hearing that because there is some variation in the factors that KCL can consider in the COI language, then the Class Policies cannot be lumped together into a single group comprised of 9,381 policyholders. [*See* RT at 10:6-11, 10:19-11:24].

This argument is not persuasive. Despite the slight variations in the COI language among the Class Policies, Witt attests that the policies "contain *materially identical* 'Cost of Insurance' provisions," [Witt Decl. ¶ 31 (emphasis added)], and that "there are no material differences among the Class Policies as to the mechanics of how the COI Charge . . . [is] calculated," [*id.* ¶ 39 (citing *id.* Ex. 18)]. At this stage, this is enough to show that the COI provisions are

identical in all material aspects such that the Class Policies can be aggregated into a single group of 9,381 potentially different policyholders.

KCL also contends that Witt fails to account for those policies that have lapsed, were surrendered, are inactive, contain no-lapse guarantees, and those where the policyholders have selected Death Benefit Option A or B. It also argues that Witt never declares that the relevant COI language is identical in the Class Policies. What KCL neglects to do is explain in its opposition why these details are relevant for numerosity purposes and failed to do so when given the opportunity at the hearing. [*See* Opp'n at 7; Dkt. 162, Rep.'s Tr. of Proceedings ("RT") at 10:6-11, 10:19-11:24, 12:1-13:15, 15:16-17:3].

Accordingly, Fine has adequately shown by a preponderance of the evidence that joinder of the potentially large number of putative class members is impracticable.

2. Commonality

Second, Fine must prove there is at least a single question of law or fact common to the class. Fed. R. Civ. P. 23(a)(2); *see also Dukes*, 564 U.S. at 359 (noting a *single* common question of law or fact satisfies the commonality requirement); *Stockwell v. City and Cnty. of S.F.*, 749 F.3d 1107, 1111 (9th Cir. 2014) ("Rule 23(a)(2) requires a single significant question of law or fact") (cleaned up). Commonality requires Fine to demonstrate that the class members "have suffered the same injury." *Dukes*, 564 U.S. at 349-50 (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 (1982)). This does not mean he may merely allege the putative class members suffered a harm under the same provisions of the law. *Id.* at 350. Instead, Fine must show the claims depend on a common contention that is "capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity" of the three breach of contract claims and the conversion claim. *Id.* Commonality is construed permissively and is "less rigorous than the

companion requirements of Rule 23(b)(3)." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998), *overruled on other grounds by Dukes*, 564 U.S. 338.

Fine argues there are questions of law and fact common to the class. According to his expert, Witt attests KCL issued materially identical life insurance policies and routinely used undisclosed, non-mortality factors to calculate COI rates for nearly all policy owners, which violated the terms of the policies. [Mot. at 10 (citing Witt Decl. ¶¶ 65-74)]. Fine contends the following questions of law and fact are common for all putative class members:

- Is KCL limited to using only its mortality expectations when calculating COI rates?
- Did KCL use undisclosed, non-mortality factors not specified in the policies to calculate COI rates?
- Is KCL allowed to deduct undisclosed charges in addition to the fixed amounts provided by the insurance policies' monthly expense charge provisions?
- Is KCL required to lower COI rates when its mortality expectations improve?
- Has KCL's mortality expectations improved since it priced or repriced the policies?
- Did KCL take more money from policy owners' Accumulated Values than it was authorized to take?

Common evidence, Fine argues, will provide answers to each of these questions. For example, Fine explains that common evidence will show KCL breached the terms of the Class Policies by using undisclosed, non-mortality factors to calculate the COI rates, in violation of the COI and monthly expense provisions (Claims 1 and 2). Fine further highlights that common evidence will establish KCL breached the terms of the Class Policies by not using updated mortality expectations that would have lowered the COI rates (Claim 3).

Finally, Fine explains that common evidence will show KCL unlawfully converted the excess monies paid from the increased COI charges in violation of their rights (Count 4). The Court is persuaded by these arguments and finds Fine has carried his burden of proving there are questions of law and fact common to the class.[2]

Accordingly, Fine has proven commonality by a preponderance of the evidence because there exists at least one question of law or fact common to the class.

3. Typicality

Third, Fine must also establish that his claims or defenses are typical of the class. Fed. R. Civ. P. 23(a)(3). To show typicality exists, Fine must demonstrate that the putative class members have the same or similar injury as him, that KCL's misconduct is not unique to him, and that the putative class members have been injured by the same course of misconduct. *Id.*

Fine argues his breach of contract and conversion claims are typical of the class. He contends these claims arise from materially identical life insurance policies issued by KCL that contained identical promises to use the company's mortality expectations to calculate COI rates. KCL allegedly breached this promise by using undisclosed, non-mortality factors that caused the putative class members to pay higher COI charges. The Court finds these facts sufficient

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[2] KCL makes several arguments in response that follow the same premise: individualized inquiries into the riders, the ambiguity in the COI language, and whether the policyholders are entitled to the Accumulated Value all preclude a finding of commonality. [*See* Opp'n. at 9-11]. Though styled as commonality arguments, they are truly disputes about predominance. To provide some distinction between these two requirements, the Court addresses these arguments below in its discussion on predominance. *See* discussion *infra* Section III.B.1.

to establish that the breach of contract and conversion claims are typical to the class.

KCL argues its statute of limitations defense precludes a finding of typicality because an individualized inquiry is needed to determine when the limitations period began for each putative class member, which will depend on when each member discovered KCL's alleged misconduct. This argument misses the mark. As noted above, typicality focuses on whether Fine's claims and defenses are typical of the class. Fed. R. Civ. P. 23(a)(3). It follows that class certification may be inappropriate if Fine "'is subject to unique defenses which threaten to become the focus of the litigation.'" *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992) (quoting *Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 176, 180 (2d Cir. 1990)). A statute of limitations defense unique to the named representative *alone* can defeat typicality. *See, e.g.*, *Nguyen v. Nissan N. Am., Inc.*, 487 F. Supp. 3d 845, 859-60 (N.D. Cal. 2020); *Vizzi v. Mitsubishi Motors N. Am., Inc.*, No. SACV 08-00650-JVS (RNBx), 2010 WL 11515266, at *3 (C.D. Cal. Feb. 22, 2010). But typicality can still exist where a statute of limitations defense applies to both the named representative *and* the putative class members. *See, e.g.*, *Corcoran v. CVS Health*, No. 15-cv-03504-YGR, 2019 WL 6250972, at *5 (N.D. Cal. Nov. 22, 2019); *Schofield v. Delta Air Lines, Inc.*, No. 18-cv-00382-EMC, 2019 WL 955288, at *4 (N.D. Cal. Feb. 27, 2019); *W. States Wholesale, Inc. v. Synthetic Indus., Inc.*, 206 F.R.D. 271, 276-77 (C.D. Cal. 2002).

Contrary to KCL's position, its statute of limitations defense is typical of the class because, as KCL has conceded, it is applicable to Fine *and* the putative class members. [*See* Opp'n at 13; *see also* Dkt. 132, Answer to Second Am. Class Action Compl. at 13 (asserting statute of limitations defense against Fine and some or all putative class members)]. Even if the statute of limitations

defense is unique to Fine alone—which it is not—KCL's argument is also flawed because it neither explains nor offers any evidence to show that Fine would be so preoccupied litigating the statute of limitations issue that doing so would "'threaten to become the focus of the litigation.'" *Hanon*, 976 F.2d at 508 (quoting *Gary*, 903 F.2d at 180); *see also Kihn v. Bill Graham Archives, LLC*, 445 F. Supp. 3d 234, 247 (N.D. Cal. 2020) ("Here, the Court does not reach the merits of the [statute of limitations] defense[], but finds that defendants have not demonstrated the affirmative defenses particular to the [named representatives] would threaten to become a focus of litigation and defeat class treatment."), *rev'd on other grounds by* No. 20-17397, 2022 WL 18935 (2022).

Accordingly, for the above reasons, Fine has proven by a preponderance of the evidence that his claims and KCL's statute of limitations defense is typical of the class.

4. Adequacy

Finally, Fine and his counsel must show they "will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). The purpose of this requirement is to "uncover conflicts of interest between named parties and the class they seek to represent." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997). Two questions comprise the adequacy inquiry: "(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Hanlon*, 150 F.3d at 1020.

The parties neither dispute that Fine would vigorously prosecute this case on behalf of the class, nor that Fine's counsel has the requisite experience to litigate this class action in a manner that would adequately protect the interests of the class. Rather, their disputes center around whether Fine and his counsel have conflicts of interest with the putative class members.

i. Fine's alleged conflict of interest

KCL argues a conflict of interest exists between Fine and the putative class members because many policyholders benefit from KCL's continued application of calculating COI rates using undisclosed, non-mortality factors. KCL offers in support of its argument a declaration from its actuary expert, Timothy C. Pfeifer, who attests that if Fine is successful in this lawsuit and forces KCL to calculate its COI rates solely on its mortality expectations, COI rates would increase for many policyholders. [Opp'n at 14 (citing Dkt. 151, Decl. of Timothy C. Pfeifer ¶ 72)]. In reply, Fine contends no conflict of interest exists for two reasons. The first reason is relatively confusing: Fine argues KCL has confirmed it can "use something different if it was more favorable to the policyholders," and raising any rates remains within KCL's discretion. [Dkt. 147 at 7]. In addition, Fine argues KCL's argument is nonsensical because if KCL stopped using undisclosed, non-mortality factors to calculate COI rates, the monthly charges would reduce.

Here, the Court need not address the merits of their arguments because both parties overlook an important aspect of the conflict-of-interest inquiry. As a leading treatise on class action provides, "[a] conflict must be *manifest* at the time of certification rather than dependent on *some future event or turn in the litigation that might never occur*." 1 William B. Rubenstein, *Newberg and Rubenstein on Class Actions* § 3:58 (6th ed. 2023) (emphasis added). Applying that rule here, there is nothing in this record to show there is a manifest conflict between Fine and the putative class members. And simply pointing to some future events that might never occur, as KCL does here, is not enough to show a manifest conflict. At this stage, the Court cannot conclude a manifest conflict of interest exists between Fine and the putative class members. *See also Vogt v. State Farm Life Ins. Co.*, 963 F.3d 753, 767 (8th Cir. 2020) (rejecting as merely

conjecture and speculation the insurance company's argument that if plaintiff's damages theory was successful, then it may result in increased COI rates).

ii. Class counsels' alleged conflict of interest

KCL also argues the law firms of Miller Schirger, LLC and Stueve Siegel Hanson LLP have a conflict of interest with the putative class members. According to KCL, counsel currently represents other putative and certified classes against KCL in at least four cases, including this one, for the same alleged misconduct. KCL asserts that if any of these plaintiffs are successful at recovering damages from the limited funds of $220 million, then it *may* jeopardize its ability to benefits in the *future* to its policyholders. [Opp'n at 15 (citing Dkt. 146-2, Decl. of Mark Milton ¶ 17)]. As such, KCL contends Fine's counsel would be unable to adequately represent the interests of these putative class members when it has clients with competing interests in the other class action cases.

Although Fine raises several arguments in response, the Court again finds that the parties did not address whether this is a *manifest* conflict of interest. There is certainly a concern regarding counsel's ability to fairly and adequately protect the class's interests where it represents plaintiffs in concurrent class action cases against the same defendant based on materially similar facts and misconduct. *See Lou v. Ma Labs., Inc.*, No. C 12–05409 WHA, 2014 WL 68605, at *2 (N.D. Cal. Jan. 8, 2014). This concern is amplified when recovery for one set of plaintiffs in one forum would inherently conflict with recovery in the case before another court. *See also id.* (finding conflict of interest existed between class counsel and putative class members where defendants had an incentive to settle all cases at once "thereby creating opportunities for counsel to manipulate allocation of settlement dollars"). But as is true with any conflict of interest, it must be "presently manifest—rather than merely trivial, speculative, or contingent on the occurrence of a future event[.]" Rubenstein, *supra*, § 3:75.

Here, KCL did not provide any evidence and did not offer any compelling arguments at the hearing to show a manifest conflict of interest presently exists between Fine's counsel and the putative class members. Given the status of these cases, the purported conflict of interest between Fine's counsel and the putative class members is merely trivial, speculative, and contingent on the success or settlement of those cases—none of which are presently manifest.

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Accordingly, Fine has proven that he and his counsel will fairly and adequately protect the interests of the class.

B. Rule 23(b)(3)

Having satisfied Rule 23(a)'s prerequisites, the Court must decide next whether this class action can be maintained under Rule 23(b)(3). To maintain a class action under Rule 23(b)(3), Fine must demonstrate that common questions of law or fact predominate over ones affecting only individual members (i.e. predominance), and that a class action is the superior method to fairly and efficiently adjudicate the issues (i.e. superiority). Fed. R. Civ. P. 23(b)(3). Rule 23(b)(3) tests whether the proposed class is "sufficiently cohesive to warrant adjudication by representation." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997). The Court addresses predominance first, then it will turn to superiority.

1. Predominance

The predominance requirement is demanding and compels courts to scrutinize whether the common questions of law or fact predominate over the individual, non-common ones. *See Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453 (2016); *Comcast*, 569 U.S. at 34. The predominance analysis begins with identifying the elements of the breach of contract and conversion claims. *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 809 (2011). Because this Court sits in diversity, it applies California law. *See Sonner v. Premier*

Nutrition Corp., 971 F.3d 834, 839 (9th Cir. 2020). To prevail on a breach of contract claim under California law, Fine must prove (1) the existence of a contract; (2) his performance or excuse for nonperformance; (3) KCL's breach; and (4) damages. *Oasis W. Realty, LLC v. Goldman*, 250 P.3d 1115, 1121 (Cal. 2011). To prevail on a conversion claim, Fine must establish (1) ownership or right or right to possession of the excess monies paid toward to the COI charges; (2) KCL's conversion of the money by a wrongful act or disposition of property rights; and (3) damages. *Lee v. Hanley*, 354 P.3d 334, 344 (Cal. 2015).

With this legal framework in mind, Fine must show common questions of law or fact that are central to his claims predominate over individual questions. *Olean*, 31 F.4th at 665. "[A] common question is one where 'the same evidence will suffice for each member to make a prima facie showing [or] the issue is susceptible to generalized, class-wide proof.'" *Tyson*, 577 U.S. at 453 (quoting 2 William B. Rubenstein, *Newberg on Class Actions* § 4:50 at 196-97 (5th ed. 2012)). By contrast, "[a]n individual question is one where "members of a proposed class will need to present evidence that varies from member to member[.]" *Id.*

Here, there is no meaningful dispute that Fine has proven there are several questions of law and fact consistent with his claims that are common to the putative class members. *See* discussion *supra* Section III.A.2. The parties' main disagreements are about whether individualized inquiries are needed to resolve any purported contractual ambiguity regarding the COI language and for calculating damages will preclude a finding of predominance.[3]

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[3] KCL makes two additional arguments. First, it contends that "it is well recognized that riders also trigger individualized circumstances for policyholders who obtain them, and can render class certification inappropriate." [*See* Opp'n at 10]. Second, it contends that the common questions of law and fact as to Fine's conversion claim do not predominate

i. Contractual ambiguity

KCL argues that because the policies' language is ambiguous about what factors it may consider when calculating COI rates, individualized evidence is needed to determine its construction. [Opp'n at 9]. KCL's argument relies on a single line from the Court's prior order on KCL's motion to dismiss, in which it stated in full: "In the absence of such an express permission, the agreement is ambiguous as to whether non-mortality factors may be used to calculate COI, and it cannot be said that Plaintiff's interpretation is unreasonable. [Dkt. 93 at 6].

But KCL's reliance on this single sentence is misplaced. This argument presumes the Court made an express factual finding that the COI language is ambiguous. But it did not and expressly noted that it was not necessary at the motion to dismiss stage to make the finding about whether the COI language is ambiguous. [Dkt. 93 at 6 ("But the Court *does not and need not* [determine whether the COI language could be interpreted to exclude all other factors from the COI calculation] at the motion to dismiss stage and only finds that the agreement is not unambiguous regarding whether non-mortality factors may be used to calculate COI.") (emphasis added)]. Until this happens, the Court cannot conclude individualized evidence will be needed to determine the

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because "[d]etermination of a policyholder's purpose for paying premiums cannot be answered class-wide, as policyholders obtain life insurance for different reasons, with different expectations, and by securing different benefits." [*Id.* at 11].

KCL again fails to explain why these particular distinctions matter for class certification—namely, predominance or even commonality—let alone why they are relevant to the underlying claims. The Court thus declines to consider these arguments.

construction of the COI language such that the common questions of law and fact will not predominate.

ii. Methodology for calculating damages

The parties also dispute whether Fine's expert's proposed methodology for calculating the COI overcharges can be made on a classwide basis. As part of the predominance showing, Fine must establish commonality of damages by presenting a methodology for calculating damages consistent with his theory of liability that is "susceptible of measurement across the entire class[.]" *See Comcast*, 569 U.S. at 35-38. Without such a methodology, "[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class." *Id.* at 34.

Fine argues that such a calculation can be done. In support of this assertion, Fine offers Witt's declaration in which he outlines his methodology for calculating the damages arising from the alleged COI overcharges. Witt's methodology boils down to the following: KCL has produced information, materials, and data to Witt from which he can identify the actual monthly COI charges each policyholder made during the class period ("Actual COI Charges"). [Witt Decl. ¶¶ 79, 84]. Using this information, Witt can also ascertain what the agreed upon COI rate should have been had KCL only used its mortality expectations ("Agreed Upon COI Rate"). [*See id.* ¶¶ 80, 82]. Witt's methodology holds certain policy details unchanged, does not alter any components of the Accumulated value, and keeps all other transactions that have already occurred the same. [Witt Decl. ¶¶ 80, 83]. Witt can then recalculate the COI charges by subtracting the Agreed-Upon COI Rate from the Actual COI Charges. [*Id.*]. The value that remains, Witt attests, represents the amount KCL overcharged the policyholders based on its use of the undisclosed, non-mortality factors. [*See id.* ¶¶ 79-82]. Witt attests this is a "straightforward mechanical process" and can be used to calculate damages with slight

modifications on a classwide basis for the three breach of contract claims and the conversion claim. [*Id.* ¶¶ 79-82, 89, 94-100, 101-05, 118]. At this stage, the Court finds this methodology sufficient to demonstrate that damages can be calculated on a classwide basis.

KCL maintains Witt's methodology is flawed, raising a number of assertions. [*See* Opp'n at 17-20]. However, the Court struggles to understand how any of these arguments matter for predominance because KCL fails to provide a clear and cohesive explanation why each of these assertions demonstrate Witt's methodology is flawed. And to make matters more confusing, KCL argued at the hearing that Witt's methodology is flawed by referring to aspects of the policies that were never mentioned in its opposition. [*Compare* RT at 39-42 (referring to cash flow testing, DAC unlocking, and smoker and nonsmokers), *with* Opp'n at 17-20 (discussing premiums, a policyholder's right to accumulate value, a policyholders' entitlement to accumulated value, etc.)]. The Court declines to entertain an argument on which KCL lacks a firm grasp and where it has failed to provide any helpful guidance for this Court.

Accordingly, Fine has proven that common questions of law and fact predominate over any individual questions.

2. Superiority

The superiority requirement tests whether Fine can show that a class action is the superior method to fairly and efficiently adjudicate the issues. Fed. R. Civ. P. 23(b)(3). Four factors guide the superiority determination: (1) "the class members' interests in individually controlling the prosecution or defense of separate actions"; (2) "the extent and nature of any litigation concerning the controversy already begun by or against class members"; (3) "the desirability or undesirability of concentrating the litigation of the claims in the particular

forum; and (4) "the likely difficulties in managing a class action." Fed. R. Civ. P. 23(b)(3)(A)-(D).

Fine argues a class action is the superior method to fairly and efficiently adjudicate this case. This case will be manageable, Fine contends, because it involves form life insurance policies based on KCL's repeated use of undisclosed, non-mortality factors to calculate COI rates. Fine asserts it is desirable to keep this litigation in California because all the putative class members were issued their policies in California. According to Fine, a class action allows those policyholders who were harmed to secure a just adjudication of their rights against KCL. KCL disagrees, raising the same individualized inquiry arguments discussed above. Despite KCL's general objections, the Court finds Fine's arguments persuasive and finds a class action is the superior method of adjudicating this case.

IV. CONCLUSION

For the above reasons, the Motion is **GRANTED.** The Court **CERTIFIES** the following class:

> All persons who own or owned a Better Life Plan, Better Life Plan Qualified, LifeTrack, AGP, MGP, PGP, Chapter One, Classic, Rightrack (89), Performer (88), Performer (91), Prime Performer, Competitor (88), Competitor (91), Executive (88), Executive (91), Protector 50, LewerMax, Ultra 20 (93), Competitor II, Executive II, Performer II, Ultra 20 (96), or Century II VUL life insurance policy issued in California, that was issued or administered by Defendant, or its predecessors in interest, and that was active on or after January 1, 2002.

Additionally, Fine is **APPOINTED** as the class representative, and the law firms of Stueve Siegel Hanson LLP and Miller Shirger, LLC are **DESIGNATED** as class counsel.

The parties are **ORDERED** to meet and confer to discuss the issue of notice by **November 24, 2023**. Following that conference, Fine's counsel is

ORDERED to prepare a notice to the class and submit the proposed notice and a distribution plan to the Court by **December 8, 2023.**

IT IS SO ORDERED.

Dated: November 6, 2023

SUNSHINE S. SYKES
United States District Judge