IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

IN RE PFA INSURANCE MARKETING LITIGATION

CASE NO. 4:18-cv-03771 YGR

ORDER GRANTING IN PART AND DENYING IN PART MOTION FOR CLASS CERTIFICATION; ORDER RE: MOTIONS TO SEAL

Re: Dkt. Nos. 181, 182, 195, 196, 199, 207

Plaintiffs Dalton Chen and Youxiang Eileen Wang bring this proposed class action against defendants Life Insurance Company of the Southwest ("LSW") and Premier Financial Alliance ("PFA") for state-law claims arising out of defendants' alleged fraudulent endless chain scheme. Now pending is plaintiffs' motion for class certification under Rule 23(b)(3) and Rule 23(b)(2).

Having carefully considered the pleadings, the record, the parties' briefs, and the argument presented at the hearing held on October 13, 2021, and for the reasons set forth below, the Court **GRANTS IN PART** and **DENIES IN PART** the motion for class certification.[1]

I. MOTIONS TO SEAL

As a preliminary matter, both sides have submitted administrative motions to seal documents or portions of documents offered in support of their class certification briefing. *See* Docket Nos. 182, 195, 196, 207. While the standard for sealing documents in connection with class certification does not require "compelling reasons" as set forth in *Pintos v. Pacific Creditors Ass'n*, 605 F.3d 665, 678 (9th Cir. 2010), the Court nevertheless finds that the sealing requests here are overbroad and good cause has not been established to seal certain documents to the extent requested. The Court has considered the basis offered for sealing, as well as the significance to

[1] PFA filed a motion to remove an incorrectly-filed document. *See* Docket No. 199. The Court **GRANTS** the motion.

the Court's decision of the portions sought to be sealed, in determining which portions to cite or quote in its order herein. The motions to seal are granted only insofar as they are not necessary to the Court's analysis.

Therefore, to the extent that the Court has quoted or recited in this opinion the contents of any specific portion of a document or material subject to a motion to seal, the Court **DENIES** the motion to seal that information for lack of good cause. The motions to seal, Docket Nos. 182, 195, 196, 207, are otherwise **GRANTED** for good cause shown.

II. BACKGROUND

In the Consolidated Class Action Complaint, Docket No. 131, plaintiffs allege as follows.

LSW sells life insurance products through an alleged fraudulent multilevel marketing scheme that is jointly operated by LSW and PFA. The alleged scheme targets immigrants and their families with promises of financial success derived from recruiting people to join PFA and sell "the Living Life Indexed Universal Life Insurance" policy ("Living Life policy") issued by LSW under the trade name National Life Group ("NLG"). *Id.* ¶ 1. The Living Life policy is an indexed universal life ("IUL") insurance policy, meaning that it provides a permanent life insurance benefit, as well as a cash component based on a rate of return tied to a financial index, subject to a cap, floor, and participation rate set by the insurer. *Id.* ¶ 2. Indexed universal life insurance is generally regarded as more complex than other forms of permanent life insurance. *Id.*

Pursuant to the alleged fraudulent scheme at issue, PFA instructed plaintiffs and other PFA "associates" or "agents" to recruit other people to sell the Living Life policy, who, in turn, will be instructed to recruit more people to sell the Living Life policy, and so forth. Prospective PFA agents are exposed to representations indicating that, by recruiting more associates, they will be able to build and maintain their own insurance businesses, but they are not informed that their actual prospects for financial success and advancement within PFA are very low and that only very few make it to the top of the PFA hierarchy. *Id.* ¶ 3. Prospective PFA agents are also exposed to representations indicating that purchasing a Living Life policy will assist them in selling policies to others, in advancing through PFA's hierarchy, and in achieving success and personal wealth. *See, e.g.*, *id.* ¶¶ 28-29, 33-34.

Plaintiffs allege that they would not have joined PFA or purchased Living Life policies if they had known about their true chances of success at PFA. *Id.* ¶¶ 130, 138, 147.

Plaintiffs assert claims for: (1) violations of the Endless Chain Scheme, Cal. Penal Code § 327 and Cal. Civ. Code § 1689, as a predicate for their claim under the unlawful prong of the Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200, *et seq.*; (2) violations of the UCL under the unlawful and unfair prongs as to both defendants, and under the fraudulent prong as to PFA only; (3) violations of the New Jersey Consumer Fraud Act, N.J. Stat. § 56:8-1, *et seq.*; (4) fraud by omission as to PFA only; and (5) civil conspiracy.

III. LEGAL STANDARD

A. *Daubert* Motion Standard

Federal Rule of Evidence 702 permits opinion testimony by an expert as long as the witness is qualified and his or her opinion is relevant and reliable. An expert witness may be qualified by "knowledge, skill, experience, training, or education." Fed. R. Evid. 702. The proponent of expert testimony has the burden of proving admissibility in accordance with Rule 702. Fed. R. Evid. 702, Advisory Committee Notes (2000 amendments). An expert should be permitted to testify if the proponent demonstrates that: (i) the expert is qualified; (ii) the evidence is relevant to the suit; and (iii) the evidence is reliable. *See Thompson v. Whirlpool Corp.*, 2008 WL 2063549, at *3 (W.D. Wash. 2008) (citing *Daubert v, Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589-90 (1993) (*Daubert I*)). At the class certification stage, "the relevant inquiry is a tailored *Daubert* analysis which scrutinizes the reliability of the expert testimony in light of the criteria for class certification and the current state of the evidence." *Rai v. Santa Clara Valley Trans.*, 308 F.R.D. 245, 264 (N.D. Cal. 2015). For scientific opinions, they must be based on scientifically valid principles. *Daubert I,* 509 U.S. at 589.

B. Motion for Class Certification

A class action is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013) (quotations omitted). "Before certifying a class, the trial court must conduct a rigorous analysis to determine whether the party seeking certification has met the prerequisites of Rule 23." *Mazza v.*

Am. Honda Motor Co., Inc., 666 F.3d 581, 588 (9th Cir. 2012) (internal quotation marks omitted). The rigorous analysis that a court must conduct requires "judging the persuasiveness of the evidence presented" for and against certification and "resolv[ing] any factual disputes necessary to determine whether" the requirements of Rule 23 have been satisfied. *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 982-83 (9th Cir. 2011). A "district court must consider the merits if they overlap with the Rule 23(a) requirements." *Id.* (citations omitted).

The party moving for certification first must show that the four requirements of Rule 23(a) are met. Specifically, Rule 23(a) requires a showing that: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a).

The party moving for certification must then show that the class can be certified based on at least one of the grounds in Rule 23(b). *See* Fed. R. Civ. P. 23(b). As relevant here, certification under Rule (b)(3) is appropriate only if "the questions of law or fact common to class members predominate over any questions affecting only individual members" and "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). Certification under Rule 23(b)(2) is appropriate only if "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2).

IV. DISCUSSION

The Court first turns to defendants' *Daubert* motion as to the testimony of plaintiffs' insurance expert, Christopher Snyder, which was included in defendants' oppositions to plaintiffs' class certification motion. *See* Docket No. 196-6 at 23-24; Docket No. 195-6 at 25. The Court then turns to plaintiffs' motion for class certification.

A. *Daubert* Motion as to Christopher Snyder

Defendants move to exclude the testimony of Christopher Snyder under Federal Rule of Evidence 702 and *Daubert*. Christopher Snyder is plaintiffs' expert on insurance. He has thirty-nine years of experience working in the life insurance industry and has been licensed as a life insurance agent since 1981. Snyder Report ¶¶ 1, 6, Docket No. 182-6. He previously created and managed multiple life insurance national marketing programs and wrote and conducted multiple life insurance product training programs for licensed agents. *Id.* ¶ 7. His assignment was to analyze the recruiting, sales, and marketing methods used by LSW to sell insurance through PFA, and to compare them to the sales practices employed by mainstream sales and marketing businesses in the life insurance industry. *Id.* To do so, he relied upon his experience in the life insurance industry and on his review of defendants' documents, including training and marketing materials, and certain deposition testimony listed in Exhibit B to his report. *Id.* ¶ 2.

Snyder's conclusions are as follows: (1) that PFA's multi-level sales scheme focuses heavily on the recruitment of more agents and links the purchase by new recruits of a Living Life policy to participation in PFA's sales scheme, *id.* ¶ 27; (2) that the sales scheme for the Living Life policy falls "well outside industry standards for acceptable and appropriate sales practices" because it involves urging new PFA recruits "to purchase the policy as a necessary step to participation in the 'financial opportunity' sales plan," *id.*; and (3) that his "experience leads [him] to conclude that the purchases by PFA recruits of the Living Life policy are predominantly motivated by the recruits' desire to participate in PFA's financial opportunity sales plan, and are viewed by the recruit as a cost of entry to participate in the sales plan instead of resulting from an examination of factors typically considered by a universal life insurance buyer who is being guided by a professional life insurance agent." *Id.*

Defendants move to exclude four of Snyder's opinions ("opinions at issue"), namely (1) that PFA's selling scheme pressures new recruits to recruit others "in an endless chain of recruitment," *id.* ¶ 27; (2) that recruits "are urged to purchase the policy as a necessary step to participation in the 'financial opportunity' sales plan," *id.*; (3) that urging new recruits to purchase a policy falls "outside industry standards for acceptable and appropriate sales practices," *id.*; and

(4) that "the purchases by PFA recruits of the Living Life policy are predominantly motivated by the recruit's desire to participate in PFA's financial opportunity sales plan," *id.*

Defendants contend that these opinions must be excluded under Rule 702 and *Daubert*. As to the first three opinions at issue, defendants argue that Snyder has not previously provided expert testimony in any case and is not qualified to render them. As to the fourth opinion at issue, defendants argue that it is speculative, lacks any reliable methodology, and is, therefore, unreliable.

As to the first three opinions at issue, the Court finds that Snyder is sufficiently qualified to make them in light of his significant experience in the life insurance industry, including in marketing and training, as well as his review and analysis of documents produced by defendants in this litigation.

Defendants argue that Snyder lacks relevant experience because he has never specialized in IUL policies or on compliance issues in particular. The Court finds that Snyder's decades of experience working in the life insurance industry and his familiarity with norms and best practices therein is enough to establish the requisite "minimal foundation" for the first three opinions at issue, because there is a sufficient relationship between his industry experience and the opinions at issue. *See Hangarter v. Provident Life & Acc. Ins. Co*., 373 F.3d 998, 1016 (9th Cir. 2004) (holding that decades of experience in relevant industry is sufficient to satisfy the "minimal foundation of knowledge, skill, and experience required in order to give 'expert' testimony" as to practices and norms in that industry); *United States v. Smith*, 520 F.3d 1097, 1105 (9th Cir. 2008) (holding that expert's "education and experience provided a reliable basis for him to express" opinions related to that education and experience); *cf. In re Novatel Wireless Sec. Litig.*, No. 08CV1689 AJB RBB, 2011 WL 5827198, at *5 (S.D. Cal. Nov. 17, 2011) (excluding expert testimony in part because it "utilizes no specialized knowledge"). Defendants' arguments about Snyder's experience go to the weight of his opinions, not their admissibility.

In addition to being based on sufficient relevant industry experience, Snyder's opinions are also based on his review of documents produced by defendants, whose authenticity and reliability are undisputed. Defendants contend that Snyder's reliance on documents produced in the

litigation was improper and requires the exclusion of his opinions because plaintiffs' counsel selected the documents. This argument is unpersuasive. Any deficiencies as to the selection of the documents that Snyder reviewed goes to the weight to be given to his opinions, not their admissibility. *See Doyle v. Chrysler Grp. LLC*, No. SACV 13-00620 JVS, 2015 WL 353993, at *6 (C.D. Cal. Jan. 21, 2015) ("That counsel identified the relevant record for [the expert's] review is not unusual and does not render the opinion testimony inadmissible as unsupported by sufficient facts or data. Deficiencies related to the failure of an expert to consider portions of the record not identified by counsel can easily be highlighted upon cross-examination of the expert; thus, any such deficiencies in this instance go to weight rather than admissibility.").

That Snyder has not previously served as an expert in litigation does not alter the Court's findings, because prior experience as an expert is not required by Rule 702 or Daubert. *See United States v. Smith,* 520 F.3d 1097, 1105 (9th Cir. 2008) ("That [the expert] had never before testified as an expert witness does not preclude his opining as an expert in this case.").

Accordingly, the Court finds that the first three opinions at issue are not subject to exclusion at this stage of the litigation.

The Court, however, cannot find, on this record, that the fourth opinion at issue, namely that Snyder's "experience leads [him] to conclude that the purchases by PFA recruits of the Living Life policy are predominantly motivated by the recruit's desire to participate in PFA's financial opportunity sales plan," is reliable. Plaintiffs have pointed to no portion of Snyder's report or deposition testimony where he explains how his experience in the life insurance industry could support his opinion as to the motivation for PFA recruits' purchase of Living Life policies. Snyder conducted no surveys and does not claim to have studied consumer behavior in the context of IUL policies or the Living Life policies at issue here. In the absence of any cogent explanation of the basis for the opinion in question, the Court declines to consider it at this stage on the grounds that it is speculative and unsupported. *See Ollier v. Sweetwater Union High Sch. Dist.*, 768 F.3d 843, 861 (9th Cir. 2014) (rejecting expert testimony based on mere "subjective belief or unsupported speculation" as "inherently unreliable").

B. Motion for Class Certification

Plaintiffs move for certification of the proposed California and New Jersey subclasses under Rules 23(b)(2) and 23(b)(3) based on their claims under each of the three prongs of the UCL and the New Jersey Consumer Fraud Act. They argue that defendants run an "endless chain scheme" that involves recruiting new PFA members and training them to recruit new members, who in turn are trained to themselves recruit new members, and so on. The selling point to new recruits is that they will be able to make significant amounts money off the new recruits' recruiting efforts and sales of Living Life policies. Plaintiffs argue that proposed class members joined PFA after being exposed to defendants' representations and omissions emanating from defendants' highly orchestrated training and marketing campaigns, and with the goal of becoming licensed to sell Living Life policies and make life-changing amounts of money as PFA agents. Plaintiffs argue that defendants failed to disclose or otherwise misrepresented to proposed class members their actual chances of making significant amounts of money as PFA agents or in rising within the ranks at PFA. Only a small portion of PFA agents ever make it to the upper echelons of the PFA hierarchy, and many do not ever become licensed agents, which is a prerequisite for earning commissions. Plaintiffs argue that proposed class members would not have joined PFA or purchased Living Policies had defendants disclosed their actual chances of success.

In their class certification motion, plaintiffs seek to certify the following proposed class under Rules 23(b)(2) and 23(b)(3):

> all persons who enrolled as Premier Financial Alliance members and purchased one or more Living Life Indexed Universal Life Insurance policies in California or New Jersey between January 1, 2014, and the present.

Docket No. 182-4 at 16. Excluded from this definition are affiliates, agents, employees and other persons related to the defendants, as well as "all individuals who reached" certain high-level positions at PFA (and, therefore, achieved a relatively high degree of success at PFA). See *id.*[2]

[2] Excluded from the proposed Class are Defendants Life Insurance Company of the Southwest ("LSW") and Premier Financial Alliance ("PFA"), their parents, affiliates, subsidiaries, agents, legal representatives, predecessors, successors, assigns, employees, any entity in which one of these Defendants has a controlling interest or which has a controlling interest in one of these Defendants, and relevant nonparties National Life Insurance Company, NLV Financial Corporation, Mehran Assadi, David Carroll, Jack Wu, Aggie Wu, Rex Wu, Hermie Bacus, Bill

Before analyzing whether the requirements for certification under Rule 23 are satisfied here, the Court first addresses defendants' arguments with respect to the class definition.

First, defendants argue that the proposed class cannot be certified because it includes both California and New Jersey residents in violation of the presumptions against extraterritorial application of state laws. Specifically, defendants contend that California law cannot be applied extraterritorially to the claims of non-California residents, and that New Jersey law cannot be applied extraterritorially to the claims of non-New Jersey residents. Docket No. 196-6 at 13-14.

In their reply, plaintiff do not dispute defendants' assertions that their inclusion of both California and New Jersey residents in the proposed class raises extraterritoriality issues; instead, plaintiffs imply that these issues can be avoided because, as alleged in the operative complaint, they "seek to certify a California subclass with respect to their claims under [California] laws [i.e., the Endless Chain Law and UCL], as well as a New Jersey subclass for violations of the New Jersey Consumer Fraud Act." Docket No. 207-4 at 3 n.2.

The "California Subclass" alleged in the consolidated complaint is:

> All persons who enrolled as Premier associates and purchased one or more Living Life policies within California between January 1, 2014 and the present.

Docket No. 131 ¶ 98.

The "New Jersey Subclass" alleged in the consolidated complaint is:

> All persons who enrolled as Premier associates and purchased one or more Living Life policies within New Jersey between January 1, 2014 and the present.

Id. Both of these proposed subclasses are subject to the same exclusions as the original proposed class.

Hong, and Lan Zhang. Also excluded from the class are the agents, legal representatives, successors, assigns, and immediate family members of Defendants and these relevant nonparties; all individuals who reached the level of Provisional Field Director, Qualified Field Director, Senior Field Director, Regional Field Director, Area Field Director, National Field Director, Executive Field Director or Senior Executive Field Director at PFA; and the judicial officers to whom this matter is assigned and their immediate family members and staff.

Because the two proposed subclasses appear to solve problem that defendants identified with respect to including residents of California and New Jersey in a single proposed class, the Court's analysis of the Rule 23 requirements, below, will be based on these two proposed subclasses instead of the overarching class that plaintiffs initially proposed.

Second, LSW argues that the proposed subclasses are overbroad because they define "Living Life" policies as including LSW's policies branded as "Living Life," "Living Life by Design," "Flex Life," and "Peak Life," even though the operative complaint mentions only the "Living Life" policy.

In their opening brief, plaintiffs attempt to justify their inclusion of the additional policies at issue in the proposed subclass definitions by stating, without more, that all of the policies in question are "co-extensive" with the California and New Jersey subclasses based on paragraph 205 of the operative complaint. *See* Docket No. 182-4 at 16 n.10. The operative complaint does not contain a paragraph 205; the last paragraph number in the operative complaint is paragraph 161. In their reply, plaintiffs imply that the inclusion of the additional policies at issue would be appropriate because defendants have not "point[ed] to any differences" between the "Living Life" policy alleged in the complaint and the other policies that they seek to include in the subclass definitions, other than the fact that each of the policies has different "optional riders." *See* Docket No. 207-4 at 23-24. During the hearing on October 13, 2021, the parties agreed that Living Life by Design is the successor to the Living Life policy alleged in the complaint, and plaintiffs agreed to narrow their subclass definitions to include only these two policies.

The Court finds that narrowing the proposed subclass definitions to include only the Living Life by Design and Living Life policies would be appropriate; the operative complaint provides notice to defendants that the Living Life policy is at issue, and the Court finds that defendants would suffer no prejudice if the class definition includes both the Living Life policy as well as its successor policy, Living Life by Design.

Third, LSW argues that the proposed subclasses are problematic because they exclude "agents" of defendants and, because the members of the proposed subclasses are persons who

"enrolled" as PFA associates, then persons who are supposed to be members of the proposed subclasses will be excluded as "agents" of defendants.

In their reply, plaintiffs do not meaningfully address this issue; they state only that the two named plaintiffs will not be excluded as "agents" of PFA because "[n]either plaintiff is currently a PFA agent," Docket No. 207-4 at 23. During the hearing held on October 13, 2021, plaintiffs agreed to remove the word "agent" from the set of exclusions, arguing that doing so would negate the issue that LSW identified.

Because neither defendant objected during the October 13, 2021, hearing to the removal of the word "agent" from the list of exclusions, the Court will deem the word "agent" to be removed from the list of the exclusions as to both proposed subclasses.

Finally, PFA argues that the "class definition fails" because plaintiffs have not shown that it would be administratively feasible to ascertain which members of the proposed subclasses were injured by defendants' alleged scheme. PFA contends that plaintiffs' proposed exclusion of persons who reached high-level positions within PFA is not sufficient to exclude others who were or are being successful at PFA and, therefore, suffered no injury (as they achieved the success that defendants allegedly marketed). Docket No. 195-6 at 12. The Court is not persuaded. First, the Ninth Circuit has held that Rule 23 "does not impose a freestanding administrative feasibility prerequisite to class certification." *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1126 (9th Cir. 2017) (noting that Rule 23 contemplates assessing the "manageability" of the proposed class as "one component of the superiority inquiry"). Accordingly, PFA's argument, which is premised on the existence of a standalone administrative feasibility requirement, is unavailing. Second, as discussed in more detail below in the context of analyzing the Rule 23(b)(3) requirements, PFA's concerns about the class definition can be addressed by providing the proposed class members with the *option* to rescind their policies to the extent that they wish to do so (this would ensure that no proposed class member who wishes to keep his or her policy will be forced to rescind it), and by requiring any proposed class members who wish to receive this optional rescission to submit an affidavit indicating that they satisfy the criteria for class membership (i.e., indicating, for example,

that they do not hold any of the high-level positions within PFA that are excluded from the proposed subclasses).

A. Rule 23(a)

1. Numerosity

The requirement of numerosity is that the class be so numerous that joinder of all members individually would be impracticable. Fed. R. Civ. P. 23(a)(1). "Although there is no exact number, some courts have held that numerosity may be presumed when the class comprises forty or more members." *See Krzesniak v. Cendant Corp.*, No. 05–05156, 2007 WL 1795703, at *7 (N.D. Cal. June 20, 2007).

a. California Subclass

Plaintiffs contend that this requirement is satisfied as to the California subclass because they estimate that there are over 12,000 PFA members who purchased Living Life policies while residing in California. *See* Girard Decl. ¶ 10 & Ex. B, Docket No. 181-7.

Defendants do not dispute this estimate. Accordingly, the Court concludes that plaintiffs have satisfied the numerosity requirement with respect to the California subclass.

b. New Jersey Subclass

In their motion for class certification, plaintiffs do not specify the number of members of the proposed New Jersey subclass. Defendants contend that plaintiffs' failure to point to evidence to satisfy the numerosity requirement in their motion for class certification requires that the motion be denied as to this subclass. The Court agrees.[3] Because plaintiffs have not shown that the numerosity requirement is met with respect to the New Jersey subclass, the Court **DENIES** the

[3] In their reply, plaintiffs contend, for the first time, that the numerosity requirement is satisfied with respect to the New Jersey subclass because 1,438 Living Life Policies were sold to New Jersey residents from January 1, 2016 to June 24, 2019. *See* Docket No. 207-4 at 23 (citing Supp. Girard Decl., Ex. V at 6, Docket No. 207-12). Even if the Court were to consider this new information even though it was raised for the first time in the reply, the information would be insufficient to satisfy the numerosity requirement. As noted above, the New Jersey subclass is comprised of all persons who enrolled as PFA associates *and* purchased one or more Living Life policies within New Jersey between January 1, 2014 and the present. That 1,438 Living Life Policies were sold to New Jersey residents says nothing about the number of policies that were purchased by persons in New Jersey *who enrolled as PFA associates* during the relevant time period.

motion for class certification **WITHOUT PREJUDICE** as to the New Jersey subclass. The remainder of this order addresses the requirements of Rule 23 with respect to the California subclass only.

2. Commonality

Commonality requires "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). To satisfy this requirement, the common question must be of "such nature that it is capable of class-wide 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*, 564 U.S. at 350. "[F]or purposes of Rule 23(a)(2)[,] even a single common question will do." *Id.* at 359 (internal quotations and brackets omitted).

Here, plaintiffs argue that the commonality requirement is met because, in "[c]laims arising from pyramid schemes," such as here, the "central, common question is whether the sales practices unlawfully take advantage of participants." Docket No. 182-4 at 17. Plaintiffs argue that this common question is sufficient to satisfy the commonality requirement.

The Court finds that several questions that are capable of classwide resolution with common evidence exist, as discussed in more detail in the predominance section. These common questions include: (1) whether defendants' alleged scheme satisfies each of the two requirements for finding an endless chain scheme in violation of California's Endless Chain Scheme Law according to the *Koscot* test; and (2) whether defendants' alleged scheme is unfair under the unfair prong of the UCL because it "offends an established public policy" or is "tethered to some legislatively declared policy."

Defendants contend that commonality is not met because the proposed class members were exposed to varying representations, and because there is no common evidence of classwide reliance on the alleged misrepresentations and omissions at issue. These questions go to predominance, not commonality, and the Court, therefore, addresses these arguments in the predominance section of this order. *See Negrete v. Allianz Life Ins. Co. of N. Am.*, 287 F.R.D. 590, 602 (C.D. Cal. 2012) (holding that disputes over the uniformity of the misrepresentations to which the class members were exposed did not mean that the commonality requirement was not satisfied, because such disputes went to predominance).

In light of the foregoing, the Court finds that the commonality requirement is met.

3. Typicality

"The purpose of the typicality requirement is to assure that the interest of the named representative aligns with the interests of the class." *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1019 (9th Cir. 2011). "The typicality requirement looks to whether the claims of the class representatives [are] typical of those of the class, and [is] satisfied when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability." *Id.* (citation omitted). "Typicality refers to the nature of the claim or defense of the class representative, and not to the specific facts from which it arose or the relief sought." *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992) (internal citation and quotation marks omitted). Typicality may be lacking "if 'there is a danger that absent class members will suffer [because] their representative is preoccupied with defenses unique to it.'" *Id.* (citation omitted).

Plaintiffs argue that this requirement is satisfied because:

> All claims are for the same economic injury in the form of wrongfully imposed premiums and fees and arise out of a common course of sales and marketing conduct. Plaintiffs and the class members were persuaded to pay into the PFA opportunity touting commissions from recruitment; purchased the Policy after being shown standardized presentations promising wealth and containing hyperbolic descriptions of the IUL Policy; and were informed by PFA representatives they needed to buy the Policy to progress, mined for their personal contacts, and pressured to sign up others within 30 days

Docket No. 182-4 at 18-19.

Defendants argue that the claims and experiences of named plaintiff Dalton Chen, who seeks to represent the California subclass, are distinct from those of the members of the proposed California subclass. They contend that Chen, unlike the proposed class members, was licensed to sell life insurance and could earn commissions. Docket No. 196-6 at 22-23; Docket No. 195-6 at 17.

The Court finds that plaintiffs have pointed to sufficient evidence to show that Chen's claims and defenses are typical of those of the Rule 23(b)(3) California subclass. Plaintiffs have

shown that Chen's experience is substantially similar to the members of this proposed subclass, as he had to pay $125 to join PFA; was exposed to the misrepresentations and omissions emanating from defendants' alleged endless chain scheme, both during a PFA seminar and by speaking with PFA agents; and decided to purchase a Living Life policy and recruited others to join PFA because he was told by PFA agents that doing so would help him succeed as a PFA agent. *See* Chen Decl. ¶¶ 3-8, Docket No. 181-1.

That being said, Chen does not appear to have Article III standing to seek *prospective* injunctive relief and, therefore, his claims and defenses are not typical of those of the members of the Rule 23(b)(2) California subclass. To have Article III standing to seek prospective injunctive relief, the threat of injury must be actual and imminent, not conjectural or hypothetical. *Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956, 967 (9th Cir. 2018) (citation omitted). "Where standing is premised entirely on the threat of repeated injury, a plaintiff must show a sufficient likelihood that he will again be wronged in a similar way." *Id.* (internal citations and quotation marks omitted).

Here, as will be discussed in more detail below, plaintiffs seek certification of the proposed California subclass under Rule 23(b)(2), with respect to which they claim to seek prospective injunctive relief. The record testimony suggests that there is no likelihood that Chen will continue to suffer injury as a result of the alleged scheme because he is no longer a member of PFA. The absence of any likelihood that Chen will suffer injury in the future deprives him of Article III standing to seek prospective injunctive relief and, as a result, his claims and defenses would not be typical of those of the proposed injunctive relief class under Rule 23(b)(2).

In sum, the Court finds that, on this record, plaintiffs have satisfied the typicality requirement with respect to Chen as to the Rule 23(b)(3) California subclass, but not as to the Rule 23(b)(2) California subclass. In any renewed motion for class certification, plaintiffs may seek to establish that Chen has Article III standing to seek prospective injunctive relief and that his claims and defenses are typical of those of proposed members of a Rule 23(b)(2) class.

4. Adequacy of Representation

The requirement of adequate representation requires a showing that the representative parties "will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4).

This requires inquiry into whether the plaintiff and its counsel have any conflicts of interest with other class members, and whether the plaintiff and its counsel will prosecute the action vigorously on behalf of the class. *Staton v. Boeing Co.*, 327 F.3d 938, 957 (9th Cir. 2003).

Plaintiffs argue that Chen and plaintiffs' counsel, Girard Sharp LLP, satisfy this requirement because (1) Chen has made significant contributions to this litigation by participating in strategy and discovery, and (2) there are no conflicts between Chen and Girard Sharp LLP and the proposed class members. Docket No. 182-4 at 19.

Defendants do not dispute the adequacy of Girard Sharp LLP to serve as counsel for the proposed California subclass. Because the Court has no concerns regarding the adequacy of counsel, it finds the adequacy-of-representation requirement satisfied with respect to them.

Defendants argue that Chen is not an adequate representative for the proposed California subclass because his claims and defenses are not typical of those of the proposed class members for the same reasons discussed above in the typicality section. PFA also argues that Chen lacks a basic understanding of the claims at issue in this litigation based on the fact that he could not accurately describe during his deposition certain ways in which PFA members can make commissions. *See* Docket No. 195-6 at 19-20 (citing Chen Dep. Tr. at 35-36).

The Court finds that plaintiffs have shown that Chen is an adequate class representative for a Rule 23(b)(3) California subclass, but not a Rule 23(b)(2) California subclass for the same reasons discussed above in the typicality section. The Court is not persuaded that Chen lacks a sufficient understanding of this litigation based on his deposition testimony regarding PFA's commission structure. Any inaccuracies in that testimony are insignificant and insufficient to find that Chen cannot protect the interests of the proposed Rule 23(b)(3) California subclass.

Accordingly, the Court finds that the adequacy-of-representation requirement is met with respect to the Rule 23(b)(3) California subclass.

B. Rule 23(b)

1. Rule 23(b)(2)

Rule 23(b)(2) permits certification of a class when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or

corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). "Class certification under Rule 23(b)(2) is appropriate only where the primary relief sought is declaratory or injunctive." *Zinser v. Accufix Rsch. Inst., Inc.*, 253 F.3d 1180, 1195 (9th Cir.), *opinion amended on denial of reh'g*, 273 F.3d 1266 (9th Cir. 2001).

Here, plaintiffs contend that they "may maintain a 23(b)(2) class action because they complain of a pattern or practice that is generally applicable to the class as a whole and seek uniform relief from a practice applicable to all of them." Docket No. 182-4 at 20 (citations and internal quotation marks omitted). Plaintiffs do not describe the "uniform" relief they seek under 23(b)(2); they state only that "[a]n order condemning Defendants' course of conduct will protect the class from further harm." Docket No. 182-4 at 21.

Defendants argue that plaintiffs cannot obtain certification under Rule 23(b)(2) because (1) plaintiffs are precluded from seeking Rule 23(b)(2) certification because they also seek monetary relief and such relief is not "incidental"; (2) plaintiffs have not identified the injunctive relief that they seek or how it would apply to the proposed classes; and (3) Chen lacks standing to seek prospective injunctive relief, as he has stopped participating in PFA and has stopped paying premiums on his policies.

Here, plaintiffs are not precluded from seeking certification of a Rule 23(b)(2) class for injunctive relief merely because they also seek certification of a Rule 23(b)(3) class. Indeed, "Ninth Circuit precedent indicates that the court can separately certify an injunctive relief class and if appropriate, also certify a Rule 23(b)(3) damages class." *In re ConAgra Foods, Inc.*, 302 F.R.D. 537, 573 (C.D. Cal. 2014) (rejecting the argument that "the court can certify a Rule 23(b)(2) class only if the monetary relief sought is purely incidental to the injunctive relief").

The Court nevertheless finds that plaintiffs have not satisfied the requirements for certification under Rule 23(b)(2).

First, Plaintiffs have not identified the injunctive relief that they seek on behalf of the proposed Rule 23(b)(2) California subclass. To obtain certification under Rule 23(b)(2), plaintiffs must "describe[] *the general contours* of an injunction that would provide relief to the whole class, that is *more specific than a bare injunction to follow the law*, and that can be given greater

substance and specificity at an appropriate stage in the litigation through fact-finding, negotiations, and expert testimony." *B.K. by next friend Tinsley v. Snyder*, 922 F.3d 957, 972 (9th Cir. 2019) (quoting *Parsons v. Ryan*, 754 F.3d 657, 689 n.35 (9th Cir. 2014)) (emphasis added). Here, plaintiffs do not describe the "general contours" of the injunction they seek; instead, they state only that the injunctive relief they seek will be in the form of an "[a]n order condemning Defendants' course of conduct," which "will protect the class from further harm." *See* Docket No. 182-4. This description does not identify the specific course of conduct that plaintiffs seek to enjoin, nor does it establish that this course of conduct applies to the entire proposed class. At best, the description depicts a "bare injunction to follow the law," which, under *B.K. by next friend*, is insufficient for certification under Rule 23(b)(2). To the extent that plaintiffs seek to enjoin certain policies or practices by defendants, they must, at the very least, identify what they are. *Cf. id.* at 972 (holding the plaintiffs sufficiently described the "general contours of an injunction" for the purpose of their motion for certification under Rule 23(b)(2) because they stated that the proposed injunction would enjoin the "nine policies" to which all proposed class members were subject that were allegedly violating the proposed class members' rights); *see also Broomfield v. Craft Brew All., Inc.,* No. 17-CV-01027-BLF, 2018 WL 4952519, at *8 (N.D. Cal. Sept. 25, 2018) (certifying Rule 23(b)(2) class where the injunctive relief sought was to enjoin defendant's "uniform policy and practice of misrepresenting on its packaging the brewing location of the Kona Beers").

Second, as discussed above, plaintiffs have not shown that Chen has standing to seek prospective injunctive relief, as he must to represent the proposed Rule 23(b)(2) California subclass. *See Broomfield*, 2018 WL 4952519, at *7 ("Where a plaintiff seeks to certify a class under Rule 23(b)(2), such plaintiff must have standing to seek the declaratory and/or injunctive relief sought on behalf of the class."). The bare description of the injunctive relief that is the subject of plaintiffs' Rule 23(b)(2) motion suggests that the relief is prospective in nature. *See* Docket No. 182-4 (noting that plaintiffs will seek relief that "will protect the class from further harm"). To seek prospective injunctive relief, a plaintiff must establish standing to seek it by showing that the risk of future harm to him or her absent an injunction "is sufficiently imminent

and substantial." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2210 (2021). Here, it is undisputed that Chen is no longer a PFA member and is no longer paying premiums on his policies. Chen Decl. ¶¶ 4, 9-10. These undisputed facts negate any likelihood that he will suffer imminent and substantial future injury, which deprives him of standing to seek prospective injunctive relief. A named plaintiff that is not entitled to seek injunctive relief "may not represent a class seeking that relief." *Hodgers-Durgin v. De La Vina*, 199 F.3d 1037, 1045 (9th Cir. 1999).

Plaintiffs' arguments to the contrary are unpersuasive. Plaintiffs argue that Chen has standing to seek injunctive relief because "Defendants' ongoing conduct also may interfere with Mr. Chen's ability to sell insurance in a market unaffected by coercion," Docket No. 207-4 at 29. This argument is unavailing, as plaintiffs do not specify the future harm that Chen could suffer as a result of "Defendants' ongoing conduct," nor do they cite any evidence to support that proposition. Plaintiffs also have cited no authority showing that a named plaintiff in a case involving an alleged endless chain scheme can seek to certify a class under Rule 23(b)(2) where he or she has stopped participating in the alleged scheme and has no intention to continue to participate in the future.[4]

Accordingly, the Court concludes that plaintiffs have not shown that certification of the California subclass under Rule 23(b)(2) would be appropriate.

[4] The authorities that plaintiffs cite in their reply do not support plaintiffs' contention that they have shown that Chen has Article III standing to seek prospective injunctive relief. Plaintiffs cite *TransUnion*, 141 S. Ct. at 2210, and *Cottrell v. Alcon Lab'ys*, 874 F.3d 154, 162 (3d Cir. 2017) only for the general Article III standing requirements. *See* Docket No. 207-4 at 29. Plaintiffs also cite *Campbell v. Facebook, Inc.*, 951 F.3d 1106, 1120 (9th Cir. 2020) for the proposition that a plaintiff can have standing to seek injunctive relief where the "defendant had not ceased all the practices at issue." *Campbell* is distinguishable. There, the plaintiffs obtained certification of an injunctive relief class based on allegations that Facebook had violated their privacy by using links in their private messages without their consent. *Id.* In *Campbell*, the plaintiffs had Article III standing to seek injunctive relief because they remained Facebook users and it was undisputed that some of the challenged practices by Facebook were ongoing. Here, by contrast, Chen has stopped participating in the alleged scheme and has stopped paying premiums. Additionally, during the hearing on October 13, 2021, counsel for plaintiffs admitted that they do not know whether Chen is currently selling policies as a life insurance agent. Accordingly, there is no basis for the Court to conclude that Chen could be affected by defendants' "ongoing" conduct.

For the foregoing reasons, the Court **DENIES** plaintiffs' motion for certification under Rule 23(b)(2).

2. Rule 23(b)(3)

Under Rule 23(b)(3), a plaintiff must show that "the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

a. Predominance

Rule 23(b)(3) requires the Court to determine whether "questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). "An individual question is one where 'members of a proposed class will need to present evidence that varies from member to member,' while 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 Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453 (2016) (citation omitted). The "predominance inquiry asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues." *Id.* (quoting 2 W. Rubenstein, Newberg on Class Actions § 4:49 (5th ed. 2012)). "When 'one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members.'" *Id.* (quoting 7AA C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 1778 (3d ed. 2005)).

"Considering whether 'questions of law or fact common to class members predominate' begins, of course, with the elements of the underlying cause of action." *Erica P. John Fund, Inc., v. Halliburton Co.*, 131 S. Ct. 2179, 2184 (2011) (citation omitted).

Plaintiffs argue that the predominance requirement is satisfied with respect to their claims under the UCL and the New Jersey Consumer Fraud Act. Below, the Court considers whether plaintiffs have satisfied the predominance requirement based on the elements of the UCL only, as

the proposed New Jersey subclass cannot be certified based on the current record, for the reasons discussed above.

i. Unlawful Prong of the UCL and Endless Chain Scheme Law

In the operative complaint, plaintiffs allege violations of California's Endless Chain Scheme Law ("ECL"), Cal. Penal Code § 327, which provides:

> Every person who contrives, prepares, sets up, proposes, or operates any endless chain is guilty of a public offense, and is punishable by imprisonment in the county jail not exceeding one year or in state prison for 16 months, two, or three years.
>
> As used in this section, an "endless chain" means any scheme for the disposal or distribution of property whereby a participant pays a valuable consideration for the chance to receive compensation for introducing one or more additional persons into participation in the scheme or for the chance to receive compensation when a person introduced by the participant introduces a new participant. Compensation, as used in this section, does not mean or include payment based upon sales made to persons who are not participants in the scheme and who are not purchasing in order to participate in the scheme.

Plaintiffs allege that defendants operate an endless chain scheme in violation of the ECL because PFA agents pay valuable consideration for the chance to receive compensation for introducing one or more additional persons into participation in the scheme or for the chance to receive rewards when a person introduced by the participant introduces a new participant. Docket No. 131 ¶ 109.

The violations of the ECL that plaintiffs allege in the complaint serve as the predicate for plaintiffs' claim under the unlawful prong of the UCL. *Id.* ¶ 117. In other words, the alleged violations of the ECL are actionable in this civil action only because the UCL makes them independently actionable. *See Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 180, (1999) ("By proscribing any unlawful business practice, section 17200 borrows violations of other laws and treats them as unlawful practices that the unfair competition law makes independently actionable.") (citation and internal quotation marks omitted).

Plaintiffs seek recission based on the alleged violations of the ECL. *See* Docket No. 131 ¶ 112. Because the alleged ECL violations are actionable pursuant to the UCL, the requested

remedy of recission must be issued pursuant to the UCL, Cal. Bus. & Prof. Code § 17300, and not the ECL.

Plaintiffs contend, and defendants do not dispute, that the elements that the Court must consider for the purpose of determining predominance as to plaintiffs' claim under the unlawful prong of the UCL are those described in *Webster v. Omnitrition Int'l, Inc.*, 79 F.3d 776, 781 (9th Cir. 1996). In that case, the Ninth Circuit held that the definition of an endless chain scheme under the ECL is "equivalent, if not identical" to the Federal Trade Commission's test for identifying a pyramid scheme as set forth in *In re Koscot Interplanetary, Inc.*, 86 F.T.C. 1106, 1181 (1975), *aff'd. sub nom. Turner v. FTC*, 580 F.2d 701 (D.C. Cir. 1978) ("*Koscot*"). *Id.* Under the *Koscot* test, a pyramid scheme is "characterized by the payment by participants of money to the company in return for which they receive (1) the right to sell a product and (2) the right to receive in return for recruiting other participants into the program rewards which are unrelated to sale of the product to ultimate users." *Webster*, 79 F.3d at 781.

Plaintiffs argue that common evidence exists to establish the two prongs of the *Koscot* test, and that this warrants a finding that the predominance requirement is satisfied with respect to their claim under the unlawful prong of the UCL. The Court agrees.

As to the first prong, which requires the payment by participants of money to the company in return for the right to sell a product, the Court finds that it can be established via common proof, because PFA admitted in its briefs, as well as during the hearing on October 13, 2021, that it required new PFA members to pay a $125 fee as a requirement for PFA membership and as a condition for being able to sell policies as PFA agents. *See* Docket No. 195-6 at 6 ("When people register with PFA in the hope of becoming a member, they are required to pay a one-time $125 'Technology Fee'"). Because PFA membership is a condition for selling policies as a PFA agent, then the $125 fee, which is required to become a PFA member, is a precondition for selling policies as a PFA agent. Indeed, counsel for PFA admitted during the October 13, 2021, hearing that a person who did not pay the $125 fee would not be able to sell life insurance policies as a PFA member. Further, Plaintiffs have shown that payment of this fee gives new members access

to "PFA's marketing systems," email system, and other tools that are "vital" in helping a new agent "build" a "successful team with FPA." *See* Supp. Girard Decl., Ex. 79, Docket No. 208-24.

Defendants argue that evidence of the requirement to pay $125 cannot satisfy the first prong of the *Koscot* test for two reasons. First, defendants argue that the $125 fee was a "technology fee" paid to PFA's third-party vendor, and not PFA, to cover the costs of PFA website-related expenses, and for that reason, it was not a fee that was paid to defendants as required by the *Koscot* test. The Court is not persuaded. Plaintiffs have pointed to common evidence in the form of training materials showing that this fee was to be collected by PFA agents. *See, e.g.*, Girard Decl., Ex. 3, PFA000016, Docket No. 181-21 (instructing PFA agents to "collect the check" after making an initial presentation to a recruit).[5] These training materials, which Defendants have not acknowledged, much less refuted, do not state that the $125 fee would go to a third party instead of PFA or that the recruits would be told or would otherwise learn that the $125 fee would go to a third party instead of PFA. *See id.* Plaintiffs also have pointed to PFA's website, which mentions the payment of $125 in the context of "join[ing] PFA" and gaining access to "PFA's marketing systems, the exclusive PFA team e-mail system and invaluable P-Trac business monitoring system"; PFA's website does *not* mention that the $125 fee would go to anyone other than PFA. *See* Supp. Girard Decl., Ex. 79, Docket No. 208-24; *see also Join PFA*, Premier Financial Alliance, https://pfaonline.com/join-pfa-info.php (last visited Nov. 2, 2021). The common evidence just described implies that the $125 fee would go to PFA, at least in the first instance. This common evidence is, therefore, sufficient to find that the first prong of the *Koscot* test is capable of resolution with common proof.[6]

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[5] The training materials state that the procedures discussed therein were to be "duplicated" by the trainee as well as by any recruits that originated from that trainee (i.e., by the trainee, the trainee's recruits, the recruits of the trainee's recruits, and so forth), suggesting that the procedures described in the training materials were intended to be implemented widely within PFA. *See* Girard Decl., Ex. 3 at PFA000006 ("This process is now duplicated to any new recruit he or she trains").

[6] Defendants filed declarations by PFA agents that state, conclusorily, that PFA recruits were required to pay the $125 fee *directly* to the third-party vendor. *See, e.g.*, David Carroll Decl. ¶ 12 (CEO of PFA, declaring that "[w]hen people register with PFA in the hope of becoming a member, they are required to pay a one-time $125 'Technology Fee' to a third-party company called P-Trac."); Michael Andaya Decl. ¶ 4 (PFA member declaring that he "paid a $125

Defendants next argue that the $125 fee is irrelevant to the *Koscot* analysis because it did not give new PFA agents the right to sell policies, as only PFA agents who were licensed to sell insurance could sell policies, and the payment of the $125 fee did not make a person licensed to sell policies. This argument also does not persuade. As noted above, the $125 was a precondition for PFA membership, which in turn was a prerequisite for selling polices as a PFA agent. The Court finds that this is sufficient to support a finding that the first prong of the *Koscot* test can be resolved with common proof. Additionally, plaintiffs have pointed to common evidence showing that the payment of the $125 fee gave new PFA recruits the right to participate in the sale of policies and to receive compensation for such sales, even if they were not yet licensed, which also supports a finding that the first prong of the *Koscot* test can be established with common proof.

The training materials to which plaintiffs point, which defendants have not acknowledged, show that PFA agents were told to encourage new recruits to set up "training sales" for other PFA agents to execute so that the new recruits' commission on their eventual sales (once they became licensed) would be higher and so that the new recruits could earn promotion points. *See, e.g.*, Girard Decl., Ex. 21 at PLT001721, Docket No. 181-39; Girard Decl., Ex. 21 at PLT001711, Docket No. 181-39 (describing training sales as "life insurance or annuity sale[s], set up by the new recruit, and closed by a Certified Field Trainer (CFT) with the presence of the new recruit observing the sales process. CFT earns the commission, not the new recruit."). Recruits do not need to be licensed to sell life insurance policies in order to set up and participate in these

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Technology Fee directly to P-Trac on the PFA website"). These declarations, however, (1) do not provide any factual support for the conclusory assertions that the $125 fee was paid *directly* from the recruit to the third-party vendor instead of to PFA; and (2) ignore and contradict the PFA training materials and PFA webpage discussed above, which do *not* state that the $125 fee would be paid to any entity *other* than PFA and imply, instead, that the $125 fee would go to PFA. Accordingly, for the purpose of the class certification analysis, the Court finds that the persuasive value of these declarations is significantly outweighed by the PFA training materials and PFA webpage discussed above, which Defendants have not acknowledged. Accordingly, these declarations do not impact the Court's finding that Plaintiffs have shown, by pointing to the unchallenged common evidence discussed above, that the first prong of the *Koscot* test is capable of resolution with common proof. At trial, a jury could find or not find that the $125 was paid to the third-party vendor instead of PFA, but the fact that this question could go either way *at trial* does not affect the Court's finding that Plaintiffs have sufficiently shown, at the class certification stage, that the first prong of the *Koscot* test can be established with common evidence.

"training sales." Notably, the training materials to which plaintiffs point state that recruits who set up these "training sales" could still receive some compensation for setting them up, even if they were not yet licensed, in the form of a $750 reimbursement from the PFA agents who closed the training sales. *See* Girard Decl., Ex. 21 at PLT001721, Docket No. 181-39 ("Training sales commission is paid to CFT only. The CFT will then use his/her paid commission to reimburse $750 to new associate (see appendix tor complete terms and conditions). The exception to this rule occurs when a new recruit is already licensed prior to joining PFA. In this situation, training sales commission will be split between the trainee and the CFT and NO $750 reimbursement will apply[.]").

As to the second prong of the *Koscot* test, which requires that participants in the scheme get the right to receive rewards unrelated to sale of the product in return for recruiting other participants into the scheme, the Court finds that it also can be established with common evidence. Plaintiffs point to common proof in the form of training materials showing that PFA agents would be rewarded with increases to their commission level and with promotion points *for recruiting* other participants. For example, the training materials state that PFA agents could earn thousands of promotion points and that their potential commission level could increase to 45% if they set up three training sales *and three new recruits* within the first thirty days of their PFA membership; or that they could earn thousands of promotion points and their potential commission level could increase to 55% if, within the first thirty days of their membership, they set up five training sales and *five new recruits*. *See, e.g.,* Girard Decl., Ex. 21 at PLT001721, Docket No. 181-39. The training materials also state that a PFA agent could derive financial rewards from recruiting as opposed to his or her own sales; the reasoning stated in the training materials is that, if an agent focuses on recruiting and on encouraging his or her recruits to also focus on recruiting, then the agent will be able to achieve financial success without having to make ongoing sales his or herself. *See, e.g.*, *id.* at PLT001727 ("If you run the system the RIGHT way, you will only need to find [~5] sales on your own in your entire PFA career because after that, you will get sales from your team!"); Girard Decl., Ex. 4 at PFA000304 ("1. RECRUIT WIDE 2. RECRUIT DEEP 3. Don't Stop 1 & 2."); Girard Decl., Ex. 15.

Defendants argue that the second prong of the *Koscot* test cannot be resolved with common proof because PFA agents are rewarded only in the form of commissions on sales, and they are not rewarded for recruitment alone. This argument does not persuade, because it ignores the common evidence discussed above, which shows that PFA agents would be rewarded for recruiting others in the form of increases to their commission *levels* and in the form of promotion points. Thus, although defendants do not "pay" PFA members for recruiting others, the common evidence discussed above shows that defendants do "reward" PFA members for doing so, which is the relevant inquiry under the second prong of the *Koscot* test.

Defendants next argue that the predominance requirement is not met because individual questions regarding exposure and reliance predominate over common questions. For example, defendants argue that (1) the proposed class members were exposed to varying oral representations and, therefore, there is no classwide exposure; and (2) the proposed class members joined PFA and purchased Living Life policies for a variety of reasons and, therefore, there is no evidence that the PFA memberships and Living Life policy purchases of the proposed class members were obtained in reliance of defendants' alleged representations and omissions.

These arguments are unavailing. Defendants have not shown that exposure and reliance are elements of an ECL claim or a claim under the unlawful prong of the UCL that must be considered in the context of class certification.[7] Moreover, even if it were the case that variance existed among the proposed class members with respect to exposure and reliance, such variance would be insufficient to defeat predominance here, because the important questions for determining the existence of an endless chain scheme under the ECL (i.e., the two prongs of the *Koscot* test) can be resolved with common evidence, as discussed above. The most important

[7] For any UCL claim, a named plaintiff seeking to represent a proposed class must show that he or she has standing under the UCL, which requires, among other things, showing that he or she suffered economic injury as a result of the alleged unfair business practice at issue (i.e., reliance). *See Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 322 (2011) (a plaintiff asserting a UCL claim must "(1) establish a loss or deprivation of money or property sufficient to qualify as injury in fact, i.e., economic injury, and (2) show that economic injury was the result of, i.e., caused by, the unfair business practice or false advertising that is the gravamen of the claim"). A showing of UCL standing is not required for absent class members. *See In re Tobacco II Cases*, 46 Cal. 4th 298 (2009).

questions are given more weight in the predominance analysis. *See Ruiz Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1134 (9th Cir. 2016) ("Predominance is not, however, a matter of nose-counting . . . Rather, more important questions apt to drive the resolution of the litigation are given more weight in the predominance analysis over individualized questions which are of considerably less significance to the claims of the class.").

Defendants' other arguments go to the merits of plaintiffs' claims and are, therefore, irrelevant to the resolution of the present motion.[8] For example, defendants argue that their practices are compliant with applicable laws and their compliance manuals and, therefore, no illegal endless chain scheme exists. Whether plaintiffs will ultimately be able to show at trial that the alleged scheme is, in fact, illegal under the ECL and UCL does not impact the present class certification analysis. *See id.* at 1136–37 (noting that disputes about defendants' liability are "not appropriate for resolution at the class certification stage").

In sum, because the two prongs of the *Koscot* test can be satisfied with common evidence, and because it is undisputed that these prongs address the essential features of an endless chain scheme under the ECL, the Court finds that the predominance requirement is satisfied with respect to plaintiffs' UCL unlawful prong claim, which is based on alleged violations of the ECL.

ii. UCL's Unfair Prong

Plaintiffs allege violations of the UCL's unfair prong based on allegations that defendants' operation of the alleged endless chain scheme at issue violates California's public policy as

[8] Defendants argue, in passing and without citing any evidence or authority, that "there are defenses" that will defeat predominance. *See* Docket No. 196-6 at 19. Even if it were the case that affirmative defenses as to certain class members would require individual inquiries, that would be insufficient to defeat predominance where, as here "one or more central issues in the action are common to the class" and predominate, namely those relating to defendants' liability under the ECL and UCL. *See Tyson Foods*, 136 S. Ct. at 1045 ("Defenses that must be litigated on an individual basis can defeat class certification. Yet [w]hen one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as . . . some affirmative defenses peculiar to some individual class members.") (internal citations and quotation marks omitted).

declared in the ECL, which prohibits endless chain schemes. Docket No. 131 ¶ 120. Plaintiffs seek restitution and a permanent injunction as a remedy for these alleged violations. *Id.* ¶ 132.

The unfair prong of the UCL "creates a cause of action for a business practice that is unfair even if not proscribed by some other law." *Cappello v. Walmart Inc.*, 394 F. Supp. 3d 1015, 1023 (N.D. Cal. 2019). "The UCL does not define the term 'unfair' . . . [and] the proper definition of 'unfair' conduct against consumers 'is currently in flux' among California courts." *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1143 (2003) (citations omitted). California courts have employed a variety of tests to determine whether conduct is "unfair" under the UCL. Some courts apply a balancing test, under which "an unfair business practice occurs when it offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." *Bardin v. DaimlerChrysler Corp.*, 136 Cal. App. 4th 1255 (2006) (internal quotation marks omitted). Other California courts apply a "tethering" test under which the "unfairness must be tethered to some legislatively declared policy or proof of some actual or threatened impact on competition." *Lozano v. AT&T Wireless Servs., Inc.*, 504 F.3d 718, 735 (9th Cir. 2007) (internal quotation marks omitted).

Neither party has proposed a particular test to guide the Court's analysis here. The Court finds, however, that the predominance requirement could be satisfied with common evidence under either test. The questions of whether defendants' alleged scheme "offends an established public policy" (balancing test) or is "tethered to some legislatively declared policy" (tethering test) can be answered by reference to California's public policy of protecting the public from endless chain schemes, as reflected in the ECL. Additionally, the question of whether defendants' alleged scheme constitutes an endless chain scheme under the ECL based on the *Koscot* test can be established with common proof, as discussed above. Because these questions are the most important in determining liability under the unfair prong of the UCL, these common questions would predominate over individual ones.

Accordingly, the Court concludes that the predominance requirement is met with respect to plaintiffs' claim under the unfair prong of the UCL.

iii. UCL's Fraudulent Prong

Plaintiffs allege violations of the UCL's unfair prong based on allegations that defendants made fraudulent representations and omissions as part of the alleged endless chain scheme that led proposed class members to believe that becoming a PFA member and purchasing a Living Life policy would result in personal wealth. Docket No. 131 ¶¶ 126-28. Plaintiffs aver that defendants failed to disclose that only very few PFA agents at the top of the hierarchy ever achieve financial wealth at PFA. *Id.* Plaintiffs further aver that, but for the alleged fraudulent misrepresentations and omissions, they would not have joined PFA or purchased a Living Life policy. *Id.* ¶ 130. Plaintiffs seek restitution and a permanent injunction as a remedy for these alleged violations. *Id.* ¶ 132.

The UCL prohibits any "unlawful, unfair or fraudulent business act or practice." Cal. Bus. & Prof. Code § 17200. To certify a class under the UCL's fraudulent prong, "it is necessary *only* to show that members of the public are likely to be deceived." *Stearns*, 655 F.3d at 1020 (quoting *In re Tobacco II Cases*, 46 Cal. 4th 298 (2009)) (emphasis added). This is in contrast to a claim for common law fraud, which requires actual falsity and reliance. *Id.* The "likely to be deceived" standard is governed by whether a "reasonable consumer" is likely to be deceived. *Freeman v. Time, Inc.*, 68 F.3d 285, 289 (9th Cir. 1995) ("[T]he false or misleading advertising and unfair business practices claim must be evaluated from the vantage of a reasonable consumer.") (citation omitted). "'Likely to deceive' implies more than a mere possibility that the advertisement might conceivably be misunderstood by some few consumers viewing it in an unreasonable manner. Rather, the phrase indicates that the ad is such that it is probable that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled." *Lavie v. Procter & Gamble Co.*, 105 Cal. App. 4th 496, 508 (2003).

Plaintiffs argue that, in light of the reasonable consumer standard that governs their UCL fraudulent prong claim, certification of this claim would be appropriate. Docket No. 182-4 at 23-24. Plaintiffs contend that defendants' failure to disclose to PFA agents information about their actual chances of financial success and advancement at PFA satisfies the reasonable consumer standard for likelihood of deception, because this information "is material to a reasonable consumer who paid into PFA hoping to achieve financial success." *Id.* at 19.

Defendants do not respond to plaintiffs' assertion that the certification of their UCL fraudulent prong claim turns on a reasonable consumer standard, or plaintiffs' assertion that, based on that standard, the representations and omissions at issue satisfy the standard for likelihood of deception.

Defendants argue, instead, that plaintiffs' fraudulent-prong claim cannot be certified because (1) there is no evidence that the entire proposed California subclass was exposed to the same representations, as there is no evidence showing that every member of the proposed subclass attended the standardized trainings, meetings, and presentations to which plaintiffs point, and that some class members joined PFA because of conversations they had with individual PFA agents, whose statements varied; and (2) there is no common evidence that proposed class members relied on defendants' allegedly fraudulent misrepresentations when joining PFA and purchasing Living Life policies. Neither argument has merit.

First, LSW relies on *Berger v. Home Depot USA, Inc.*, 741 F.3d 1061, 1068 (9th Cir. 2014), *abrogated on other grounds by Microsoft Corp. v. Baker,* 137 S. Ct. 1702 (2017), for the proposition that the proposed subclass cannot be certified because not every member was exposed to the same representations. *Id.* (holding that "[c]lass certification of UCL claims is available only to those class members who were actually exposed to the business practices at issue" and holding that the district court did not abuse its discretion by finding that the predominance requirement was not met where representations made to proposed class members varied over time and across locations).

The Court is not persuaded that certification is inappropriate here for lack of classwide exposure. Here, and unlike in *Berger*, common evidence suggests that defendants' marketing and training activities were highly orchestrated and centrally controlled. Based on this common evidence, the Court can infer that the proposed class members were exposed to the same misrepresentations and omissions that flowed from defendants' centrally controlled marketing and training activities. Specifically, plaintiffs have pointed to common evidence showing that PFA agents were trained to follow, without any significant deviation, the same marketing and recruiting strategy described in PFA's marketing and training materials. *See, e.g.*, Supp. Girard Decl., Ex. S,

Carroll Dep. Tr. at 53, 90, 94, 183, 206 (PFA CEO testifying that PFA agents were trained to "go by the presentations" and the "brochures" and that "everybody" who is trained "goes through the same system"); Girard Decl., Ex. 2 at PFA000035 ("Run the system"); *id.*, Ex. 4 at PFA000179 (mandating "rapid relentless repetition of these six simple recruiting steps"); *id.* at PFA000237 (stating "this cookie-cutter exactness must be duplicated throughout your team" as "the speed and exactness with which you copy the system will in large part determine your success"). Plaintiffs have also pointed to common evidence showing that PFA agents are trained to train their own recruits to follow the same marketing and recruiting strategy that they themselves are told to implement. *See, e.g.*, Girard Decl., Ex. 3 at PFA000001, PFA000003, PFA0000020 (instructing Certified Field Trainer operatives to "Become a Master Duplicator and Replicator" so the "new recruit will run his business, talk about his business and build his business just like you do" and to ensure that the same process is "followed exactly" by new recruits); *id.*, Ex. 4 at PFA0000237. Additionally, plaintiffs have shown that PFA exerted control over PFA agents' messaging to potential recruits and clients; PFA required its associates to use "existing PFA content" rather than create their own, and to pre-clear any agent-created sales or promotional materials and social media with PFA. *See* Girard Decl., Ex. 29 at PFA0000164-65 (PFA compliance manual stating "[a]ssociates are urged to use existing PFA content that has been developed and approved rather than creating new content that must be edited and approved" and "[i]n order to be effective, internet marketing must be properly targeted to the right demographic market; which is why all advertising and marketing materials must be preapproved, for use, as well as content.").

That defendants' marketing and training activities were highly uniform and centrally controlled is sufficient for the Court to infer that these activities had the effect of making it highly likely that members of the proposed subclass heard or saw or were otherwise exposed to the same representations or omissions. *See Makaeff v. Trump Univ., LLC*, 2014 WL 688164, at *8, 13 (S.D. Cal. Feb. 21, 2014) (inferring, in light of "evidence that the [defendant's] multi-media promotional campaign was uniform, highly orchestrated, concentrated and focused on its intended audience," that the "effect of this campaign was to make it highly likely that each member of the putative

class was exposed" to the same misleading representations and omissions, and finding that the exposure requirement for certifying a claim under the UCL was, therefore, satisfied).

Second, defendants' argument regarding the lack of classwide reliance is unsupported. Defendants have not pointed to any authority indicating that a showing of classwide reliance is necessary to obtain certification of a UCL fraudulent prong claim. Nor could they, as the relevant authorities are consistent in holding that a showing of classwide reliance is *not* required to state a claim or certify a class under the fraudulent prong of the UCL. *See, e.g.*, *Daugherty v. American Honda Motor Co., Inc.*, 144 Cal. App. 4th 824, 838 (2011) ("Unlike common law fraud, a Business and Professions Code section 17200 violation can be shown even without allegations of actual deception, reasonable reliance and damage. Historically, the term 'fraudulent,' as used in the UCL, has required only a showing that members of the public are likely to be deceived.") (citation omitted). Accordingly, the Court rejects defendants' argument that the proposed California subclass cannot be certified for lack of evidence of classwide reliance.

Having rejected all of defendants' arguments, the Court now turns to the question of whether plaintiffs have met their burden to show that the predominance requirement is satisfied with respect to their claim under the fraudulent prong of the UCL. While it is undisputed that the certification of this claim turns on the reasonable consumer standard for likelihood of deception, plaintiffs have not pointed to any common evidence that can be used to establish that a reasonable consumer is likely to be deceived by the alleged misrepresentations and omissions at issue. Plaintiffs simply state, without citing to any evidence, that the reasonable consumer standard can be satisfied because "what Defendants failed to disclose is material to a reasonable consumer who paid into PFA hoping to achieve financial success." Docket No. 207-4 at 18-19. In light of plaintiffs' failure to point to common evidence showing that "a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled," *Lavie*, 105 Cal. App. 4th at 508, which is the standard for establishing likelihood of deception, or to any authority showing that likelihood of deception can be established here as a matter of law, the Court cannot conclude that the predominance requirement is satisfied with respect to this claim.

iv. Remedies

Plaintiffs argue that optional recission is the appropriate remedy for their claims under the UCL. Plaintiffs request that, if they prevail on their claims at trial, proposed class members be given the *option* to rescind their Living Life policies, and that any proposed class member who chooses to rescind his or her policy receive a refund of premium payments paid, minus any offsets for benefits or commissions received. Plaintiffs argue that the calculation of refunds can be done without much difficulty using LSW's transactional data, which includes information as to commissions paid by LSW to PFA agents, and because LSW already has rules and procedures in place to rescind policies. LSW itself admits that it has procedures in place for cancelling policies and issuing refunds. *See* Docket No. 196-6 at 9 (LSW admitting that it "has mechanisms in place to address customers who are unhappy with the sales process and want to cancel their policy. . . . If a policy is rescinded, LSW will then undertake a second individualized inquiry to determine whether it will charge back (recoup) the commissions paid to the agent or agents, depending on specific factors such as the agent's conduct and the length of time the policy was in place").

LSW argues that plaintiffs may not seek rescission under the UCL because they did not request it in the operative complaint and because "rescission is not a proper remedy under the UCL." Docket No. 196-6 at 14. The Court disagrees. First, plaintiffs *did* request rescission in the operative complaint. *See* Docket No. 131 ¶ 112. Second, courts have held that rescission followed by restitution can be an appropriate remedy under the UCL, because the UCL "authorizes orders that are necessary to prevent practices that constitute unfair competition and to make 'orders or judgments . . . as may be necessary to restore' to persons in interest any money or property acquired by unfair competition." *Cortez v. Purolator Air Filtration Prod. Co.*, 23 Cal. 4th 163, 176 (2000) ("*Cortez*") (quoting Cal. Bus. & Prof. Code § 17300). In *People v. Superior Court (Jayhill)*, 9 Cal. 3d 283, 286 (1973), the California Supreme Court stated that "the opportunity to *rescind* his contract, return the products, and obtain a refund" was within the court's equitable powers under the UCL. *Id.* (emphasis added). The California Supreme Court cited *Jayhill* with approval in *Cortez*, 23 Cal. 4th at 177, when stating that the court has the

equitable power to approve "the return of money acquired from an individual to that individual[.]" These opinions can be read as authorizing rescission as a remedy for UCL violations.

LSW relies on *Nelson v. Pearson Ford Co.*, 186 Cal. App. 4th 983, 1018 (2010), an opinion by the California Court of Appeal, for the proposition that rescission is not permitted under the UCL. In *Nelson*, the Court of Appeal stated, "[w]e have found no authority supporting the remedy of rescission in a UCL action." *Id.* The Court declines to follow *Nelson* because the Court of Appeal in that case did not acknowledge, much less distinguish, *Jayhill* or *Cortez* when discussing rescission in the context of a UCL action. *See West v. American Telephone & Telegraph Co.*, 311 U.S. 223, 237 (1940) (holding that a federal court may disregard an interpretation of state law by a state appellate court if it is "convinced by other persuasive data that the highest court of the court of the state would decide otherwise"). Courts in this circuit have declined to follow *Nelson* for that very reason, and have instead relied on *Jayhill* and *Cortez* to hold that recission followed by restitution "can be an appropriate remedy" under the UCL. *See, e.g.*, *Spann v. J.C. Penney Corp.*, No. SA CV 12-0215 FMO, 2015 WL 1526559, at *6 (C.D. Cal. Mar. 23, 2015).

Defendants next argue that plaintiffs' request for rescission does not fit plaintiffs' theory of liability, because some members of PFA who purchased Living Life policies did so because they needed it or wanted it, and not because they were victims of the alleged scheme at issue. Docket No. 195-6 at 12. Defendants further contend that this overbreadth in the class definition will result in rescission being forced upon "individuals who do not need it and, more importantly, do not want it." *Id.*

The Ninth Circuit has rejected similar arguments to those that defendants make here, reasoning that they are insufficient to defeat predominance. In *Ruiz Torres*, 835 F.3d at 1136–37, the Ninth Circuit held that the inclusion in a proposed class of some class members who were exposed to an injurious course of conduct but nevertheless suffered no injury is not a "fatal flaw that may defeat predominance" so long as the "class definition is reasonably co-extensive with Plaintiffs' chosen theory of liability." *Id.* The Ninth Circuit further held that arguments about the scope of the defendants' actual liability are "not appropriate for resolution at the class certification

stage[.]" *Id.* Here, the proposed subclass is reasonably co-extensive with plaintiffs' theory of liability, because it includes people who were members of PFA and were therefore exposed to the alleged misrepresentations and omissions at issue by virtue of defendants' highly orchestrated marketing and training activities, and purchased a Living Life policy within the relevant time period after being exposed to these alleged misrepresentations and omissions. Under *Ruiz Torres*, the fact that some proposed class members may have purchased a Living Life policy for reasons other than the alleged misrepresentations and omissions to which they were exposed does not defeat predominance. Moreover, the risk that any proposed class member will be "forced" to rescind his or her Living Life policy is non-existent, as the remedy that plaintiffs request here is *the option* to rescind. Proposed class members who do not wish to rescind their policies will not be required to do so.

Defendants next contend that the individual calculation of any amounts that proposed class members' will be refunded if they choose to exercise the option to rescind their Living Life policies would overwhelm the common questions discussed above, because rescission would result in "the complicated unwinding of long-term insurance contracts, with offsets for commissions, policy loans, and other benefits received by class members." Docket No. 196-6 at 15; Docket No. 195-6 at 24.

The Court finds that plaintiffs have adequately shown that LSW's transactional data, and LSW rules and procedures currently in place, can be employed to effectuate any requests for rescission in a manner that would not defeat predominance. The Court finds *Walker v. Life Ins. Co. of Sw.*, No. CV1009198JVSRNBX, 2018 WL 3816716, at *1 (C.D. Cal. July 31, 2018), *aff'd sub nom. Walker v. Life Ins. Co. of the Sw.*, 953 F.3d 624 (9th Cir. 2020) to be instructive. There, as here, the plaintiffs sued under the unlawful prong of the UCL over alleged deceptive practices with respect to life insurance policies issued by LSW, and sought an order giving the proposed class members the option to rescind the policies and "a partial refund that restores to Plaintiffs their premiums paid, plus interest, but subject, as in the case of rescission, to offset for any surrender payments, withdrawals, or outstanding loans and the value of death protection received." *Id.* at *8. The court held that the request for optional rescission and partial refunds would not

defeat predominance because (1) "plaintiffs' entitlement to rescission can be determined based on common" evidence, as the entitlement depended on uniform deceptive practices and not "on the circumstances of the individual transactions;" and (2) "each class member's refund can be calculated based on reference to evidence in spreadsheet[s]" that LSW produced in the litigation. *Id.* at *9. *Walker* supports a finding that, even where, as here, individual calculations may be required to determine the amounts owed to the proposed class members, after any necessary offsets, such individual calculations do not defeat predominance where the defendant's data and existing procedures can be employed to do so.

Defendants do not cite any binding authority that compels a different conclusion. *See, e.g.*, Docket No. 196-6 at 20.

For these reasons, the Court concludes that plaintiffs have met their burden to show that effectuating the remedy of optional rescission would not defeat predominance.

b. Superiority

Rule 23(b)(3) requires a court to consider whether a class action would be a superior method of litigating the claims of the proposed class members by taking into account (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).

Plaintiffs argue that a class action is superior to other available methods of litigating the claims of the proposed class members because (1) the amounts that each proposed class member can recover are not significant and are small relative to the high costs of individual litigation; (2) the proposed subclass contains many non-English speakers who are unlikely to have access to counsel and the legal system; and (3) judicial economy would be promoted and the litigation of the claims would be made more efficient and practical.

In their briefs, Defendants argue that the superiority requirement is not satisfied based on the same arguments they made with respect to the other requirements for certification, which the

Court has considered and rejected. During the hearing held on October 13, 2021, defendants also argued that a certification should not be granted because identifying the members of the proposed class would be difficult and time-consuming, if not impossible, because neither defendant has records showing whether a PFA member ever reached one of the positions within PFA that would result in their exclusion from the class.

The Court finds that a class action would be a superior method of litigating the claims of the members of the proposed California subclass in light of the great efficiencies and judicial economy that would be achieved by litigating their claims in a single litigation, and in light of the difficulties, financial and otherwise, that could preclude proposed class members from litigating their claims individually. That identifying the proposed class members could require some effort and time does not mean that a class action is not a superior method of litigating the action, particularly where, as here, the difficulties in identifying class members appear to be largely the result of defendants' failure to maintain adequate records. *See In re Myford Touch Consumer Litig.*, No. 13-CV-03072-EMC, 2016 WL 7734558, at *8 (N.D. Cal. Sept. 14, 2016) (holding that, "[i]f [defendant] failed to maintain proper records, this should not be held against Plaintiffs" when it comes to class certification); *Melgar v. CSk Auto, Inc.*, No. 13-CV-03769-EMC, 2015 WL 9303977, at *8 (N.D. Cal. Dec. 22, 2015) (same); *see also Thurston v. Bear Naked, Inc.*, No. 11-CV-2985-H BGS, 2013 WL 5664985, at *3 (S.D. Cal. July 30, 2013) ("If class actions could be defeated because membership was difficult to ascertain at the class certification stage, there would be no such thing as a consumer class action.") (citation and internal quotation marks omitted).

Moreover, "courts in this circuit have found proposed classes ascertainable even when the only way to determine class membership is with self-identification through affidavits." *Krueger v. Wyeth, Inc.*, 310 F.R.D. 468, 476 (S.D. Cal. 2015) (citations omitted). Here, members of the proposed California subclass who wished to rescind their policies could be required to submit an affidavit attesting that they do not hold any of the positions at PFA that are excluded from the proposed subclass and that they otherwise satisfy the requirements for inclusion in the subclass.

The Court, therefore, finds that the superiority requirement is met.

V. CONCLUSION

For the foregoing reasons, the Court **GRANTS IN PART** and **DENIES IN PART** plaintiffs' motion for class certification.

The Court **GRANTS** the motion with respect to the proposed Rule 23(b)(3) California subclass as to plaintiffs' claims under the unlawful and unfair prongs of the UCL. Consistent with the Court's rulings, above, the California subclass is comprised of:

> All persons who enrolled as Premier associates and purchased one or more Living Life or Living Life by Design policies within California between January 1, 2014 and the present.[9]

The Court otherwise **DENIES** the motion **WITHOUT PREJUDICE**. This order terminates Docket Numbers 181, 182, 195, 196, 199, 207.

The Court **SETS** a Case Management Conference for November 29, 2021, at 9:00 a.m.

IT IS SO ORDERED.

Dated: November 3, 2021

YVONNE GONZALEZ ROGERS
UNITED STATES DISTRICT COURT JUDGE

[9] Excluded from the proposed Class are Defendants Life Insurance Company of the Southwest ("LSW") and Premier Financial Alliance ("PFA"), their parents, affiliates, subsidiaries, legal representatives, predecessors, successors, assigns, employees, any entity in which one of these Defendants has a controlling interest or which has a controlling interest in one of these Defendants, and relevant nonparties National Life Insurance Company, NLV Financial Corporation, Mehran Assadi, David Carroll, Jack Wu, Aggie Wu, Rex Wu, Hermie Bacus, Bill Hong, and Lan Zhang. Also excluded from the class are the legal representatives, successors, assigns, and immediate family members of Defendants and these relevant nonparties; all individuals who reached the level of Provisional Field Director, Qualified Field Director, Senior Field Director, Regional Field Director, Area Field Director, National Field Director, Executive Field Director or Senior Executive Field Director at PFA; and the judicial officers to whom this matter is assigned and their immediate family members and staff.