UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

ROY C. SPEGELE, individually and on behalf of all others similarly situated,	§	
Plaintiff,	§	
v.	§	**Civil No. 5:17-CV-00967-OLG**
USAA LIFE INSURANCE COMPANY,	§	
Defendant.	§	

ORDER

Pending before the Court are Plaintiff's Motion for Class Certification (docket nos. 54 and 55) and USAA Life Insurance Company's Motion to Exclude Expert Declaration of Scott J. Witt (docket no. 59). After consideration of the motions and the record, the Court finds that Plaintiff's Motion for Class Certification should be GRANTED, and Defendant's Motion to Exclude should be DENIED.

STATEMENT OF THE CASE

Plaintiff Roy C. Spegele ("Plaintiff") filed a class action complaint against Defendant USAA Life Insurance Company ("Defendant") for three breach of contract claims and for one conversion claim arising out of a life insurance policy purchased from Defendant in 1992. *See* docket no. 1. Under the terms of Plaintiff's policy, Plaintiff paid a monthly premium, a portion of which was applied to the policy's savings component, or Plaintiff's "cash value." *See id.* The policy permitted Defendant to deduct from the cash value the cost of insurance ("COI Charge"), the monthly policy maintenance charge (fixed at $2.50) ("Maintenance Charge"), and the monthly administrative charge (fixed at $4.17) ("Administrative Charge") that applied only

during the first 12 months of the policy. Docket no. 1-1 at 12. The policy calculates the COI Charge using the cost of insurance rate ("COI Rate"). *Id.*

This case focuses primarily on the proper calculation of the COI Rate, which the policy defines as follows:

> The cost of insurance rates for each Specified Amount are *based on* the insured's age, sex, and rate class. Current cost of insurance rates are *based on* our expectations as to future mortality experience. . . . USAA LIFE guarantees that the cost of insurance rates will never be greater than [an amount defined by the policy].

Id. (emphasis added). The proper interpretation of this provision is the central question of this dispute. In particular, the parties dispute whether "based on" denotes exclusivity or a starting point. In other words, can Defendant calculate the COI Rate based *only* on age, sex, and rate class or based *in part* on age, sex, and rate class, while considering other factors such as expenses and profit.

Plaintiff's first breach of contract claim alleges that Defendant impermissibly inflated the COI Charge by considering unauthorized and undisclosed factors in its calculation of the monthly COI Rate. *See* docket no. 1 at ¶¶ 53-60 ("Count I"). Specifically, Plaintiff argues that Defendant may *only* consider "the insured's age, sex, and rate class," or its mortality expectations. *Id.* Instead, Defendant considered unenumerated factors such as expenses and profit, causing a higher than authorized COI Rate and thus deducting a COI Charge in excess of the amount permitted by Plaintiff's policy ("Policy"). *Id.*

Plaintiff's second breach of contract claim relates to his first. He argues that by considering expenses in its COI Rate calculation, Defendant essentially double charged by also deducting the Maintenance Charge and, during the first 12 policy months, the Administrative Charge. *Id.* at ¶¶ 61-64 ("Count II"). Plaintiff's third breach of contract claim alleges that

Defendant failed to lower the COI Rate even as its mortality expectations improved. *Id.* at ¶¶ 65-69 ("Count III"). Underlying this claim is the Policy's statement that the "cost of insurance rates are based on our expectations as to future mortality experience." Docket no. 1-1 at 12.

Fourth, Plaintiff asserts a conversion claim ("Count IV"). Docket no. 1 at ¶¶ 70-78. Specifically, Plaintiff alleges that he (and the class members) had a property interest in the "cash value," and, by deducting more than contractually permitted from this cash value, Defendant "assumed and exercised ownership over, and misappropriated or misapplied, specific funds held in trust for the benefit of Plaintiff and the class, without authorization or consent and in hostility to the rights of Plaintiff and class members." *Id.* at ¶ 72.

Fifth, and finally, Plaintiff seeks declaratory and injunctive relief against Defendant. *Id.* at ¶¶ 79-83 ("Count V"). Specifically, Plaintiff seeks a declaration of the parties' rights under the Policy, declaring Defendant's alleged conduct as unlawful and in breach of the Policy. *Id.* at ¶ 82. And, Plaintiff further seeks an injunction against Defendant from continuing to breach the Policy and collecting "unlawfully inflated charges." *Id.* at ¶ 83.

In his complaint, Plaintiff contends that the terms outlined above were "not subject to individual negotiation and are materially the same for all policyholders." *Id.* at ¶ 16. His complaint therefore sought certification of the following class:

> All persons who own or owned a life insurance policy issued or administered by Defendant, the terms of which provide or provided for: 1) an insurance or cost of insurance charge or deduction calculated using a rate that is determined based on Defendant's expectations as to future mortality experience; 2) additional but separate policy charges, deductions, or expenses; 3) an investment, interest-bearing, or savings component; and 4) a death benefit.

Docket no. 1 at ¶¶ 16, 43.

In his Motion to Certify presently before the Court, Plaintiff amends the requested class to the following:

> All persons who own or owned a Universal Life 3 and/or a Universal Life 4 life insurance policy issued or administered by USAA Life Insurance Company, or its predecessors in interest, that was active as of March 1999.[1]

See docket no. 55-1. Both the Universal Life 3 and the Universal Life 4 policies ("Class Policies") contain the same standard language outlined above, providing for the deduction of the COI Charge, the Maintenance Charge, and the first-year Administrative Charge from the cash value. *Id.* And, like Plaintiff's policy, the Class Policies define the COI Rate as being "based on the insured's age, sex, and rate class," and the current COI Rate as being "based on our expectations as to future mortality experience." Docket no. 55-3 at ¶ 38.

Because the Class Policies contain the same language and, allegedly, the same breach by Defendant, Plaintiff seeks to certify the above class pursuant to Federal Rules of Civil Procedure 23(b)(2), (b)(3), and/or (c)(4). *See* docket no. 55. In the event the Court finds that the state law of the insured governs the policies, Plaintiff alternatively seeks to certify a class of New York policyholders, Plaintiff's residence when he entered the contract. *Id.*

In addition to its response to the Motion to Certify, Defendant moves to strike Plaintiff's expert—Scott J. Witt. *See* docket no. 59. Witt, an actuary who has served as an expert witness in several similar cases, purports to provide a damages model for Plaintiff's claims. *See* docket no. 55-3. Defendant argues that Witt's damages model is "untethered" to Plaintiff's theory of liability. Underlying this disconnect is Defendant's contention that if it calculated the COI Rate

[1] The proposed class as amended no longer includes Universal Life 1 and Universal Live 2 policyholders. Plaintiff also excludes: USAA; any entity in which USAA has a controlling interest; any of the officers, directors, or employees of USAA; the legal representatives, heirs, successors, and assigns of USAA; anyone employed with Plaintiff's counsel's firms; and any Judge to whom this case is assigned, and his or her immediate family. Also excluded from the Class are policies issued in New Jersey or Montana; UL3 policies issued in Massachusetts; and policies issued by USAA Life Insurance Company of New York.

based *solely* on mortality expectations, then some members of the class would end up paying more than they were charged. *See* docket no. 59. In order to avoid this intra-class conflict, Defendant argues, Witt's model calls for taking the lesser of the COI Rate calculated under Plaintiff's theory or the COI Rate as calculated by Defendant (in alleged breach of the Class Policies). *Id.* Defendant also asserts that Witt's model does not calculate damages under Counts II and III. As a result, Defendant argues Witt's report is unreliable and thus inadmissible under Federal Rule of Evidence 702.

ANALYSIS

As noted above, Defendant moves to strike Witt's expert report from this Court's consideration. Because Plaintiff relies on Witt's analysis in its Motion to Certify, the Court will first consider the Motion to Strike.

I. Motion to Strike

Defendant moves to strike Witt's report under Federal Rule of Evidence 702. Rule 702 permits expert testimony if (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case. Fed. R. Evid. 702. Typically, Rule 702 calls for a *Daubert* inquiry, requiring the Court to play a "gatekeeping" function ensuring that the expert's testimony "is both reliable and relevant." *Curtis v. M&S Petroleum, Inc.*, 174 F.3d 661, 668 (5th Cir. 1999) (citing *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993)).

The parties dispute whether courts should conduct a full *Daubert* inquiry at the Rule 23 class certification stage. *Compare* docket no. 59 *with* docket no. 71. In support, Defendant cites

Unger v. Amedisys Inc. in which the Fifth Circuit held that a finding of market efficiency in a fraud-on-the-market class action must depend on admissible evidence. *See* 401 F.3d 316, 319 (5th Cir. 2005); *see also Bell v. Ascendant Solutions, Inc.*, 422 F.3d 307, 313 (5th Cir. 2005) (affirming district court's going beyond the pleadings and requiring plaintiffs to do more than merely allege market efficiency). In response, Plaintiff argues that a limited *Daubert* analysis applies at this stage. *See Cone v. Vortens, Inc.*, 2019 WL 4451146, at *2 (E.D. Tex. Sept. 17, 2019) ("While the Fifth Circuit has not explicitly decided this question since *Wal-Mart*, the courts in this circuit appear to follow a limited *Daubert* approach.") (collecting cases). Under this limited *Daubert* approach, the question for the Court is "whether the plaintiffs' expert evidence is sufficient to demonstrate common questions of fact warranting certification of the proposed class, not whether the evidence will ultimately be persuasive." *Turner v. Murphy Oil USA, Inc.*, 2006 WL 91364, at *3 (E.D. La. 2006) (citing *In re Visa Check/Master Money Antitrust Litig.*, 280 F.3d 124, 135 (2d Cir. 2001)). In other words, the Court must consider the relevance and reliability of the expert's opinion to the requirements of class certification. *Cone*, 2019 WL 4451146, at *2.

The Court is persuaded that the limited *Daubert* approach applies at this stage. Indeed, in *Unger*, the case cited by Defendant, the Fifth Circuit cautioned that courts are "not to insist upon a 'battle of the experts' at the certification stage." 401 F.3d at 323, n.6. And, as noted above, several district courts have since applied the limited *Daubert* approach. *See, e.g., Cone*, 2019 WL 4451146, at *2. Moreover, district courts in other circuits have applied the limited *Daubert* analysis in cases with similar claims as this one, including cases in which Witt was the challenged expert. *See, e.g., Bally v. State Farm Life Ins. Co.*, 335 F.R.D. 288 (N.D. Cal. 2020). Still, Defendant cites a previous decision of this Court for the proposition that a full and

conclusive *Daubert* analysis applies. *See* docket no. 59 at 2 (citing *Maderazo v. VHS San Antonio Partners, L.P.*, 2019 WL 4254633 (W.D. Tex. Jan. 22, 2019)). But Defendant mischaracterizes that decision, which found that the expert's "opinions . . . do not assist the Court in determining whether antitrust injury/impact can be shown with evidence common to the class." 2019 WL 4254633, at *7. This finding is in line with the limited *Daubert* approach: The Court must weigh Witt's credentials and determine the relevance and reliability of his report to meeting Rule 23's requirements, rather than performing the gatekeeping function for the jury that typifies a full *Daubert* analysis. Accordingly, the Court will apply this limited *Daubert* approach.

1. Count I

Rather than challenging Witt on his qualifications,[2] Defendant challenges the report as being untethered from Plaintiff's theory of liability. More specifically, Defendant characterizes Plaintiff's theory of liability, at least for Count I, as a breach of contract resulting from calculating the COI Rate with factors other than its mortality expectations. *See id.* at 4. Defendant asserts that Witt's model does not follow this theory of liability, instead selecting "the *lesser* of the hypothetical COI Rate or the rates USAA Life actually charged." *Id.* at 6. In other words, Defendant argues that Witt's damages model does not always apply Plaintiff's interpretation of the contract (that COI Rates be calculated based *only* on mortality expectations) or his theory of liability (that Defendant breached the contract by failing to calculate the COI rate based *only* on mortality expectations). Instead, Witt's calculation uses Plaintiff's "based only on" theory when it generates a lower COI Charge than Defendant's actual charge, but then uses Defendant's "based in part on" interpretation when Defendant's alleged breach undercharged policyholders. Defendant thus argues that Witt's damages model is "ill-fitting" and thus should

[2] Witt's CV shows extensive experience in the insurance industry, and thus the Court finds that he is qualified.

be rejected. *Id.* at 7; *see Boca Raton Cmty. Hosp., Inc. v. Tenet Health Care Corp.*, 582 F.3d 1227, 1233-34 (11th Cir. 2009). In addition, Defendant argues that Witt's model conflates Plaintiff's theory for Count I and Count III, as he stated in his deposition that his model assumes Defendant's obligation to lower its COI rates as mortality expectations improved. *Id.* at 7.

Defendant's objection to Witt's Count I damages model relies in large part on the Supreme Court's decision in *Comcast*. *Id.* at 3. The plaintiffs in *Comcast* sought certification on four theories of antitrust liability. *See Comcast Corp. v. Behrend*, 569 U.S. 27, 28 (2013). The district court, however, only certified the proposed class under one of the four theories. *Id.* at 35. In doing so, the district court relied on plaintiffs' expert's damages model, which was based on all four theories of liability without isolating for each individual one. *Id.* The Supreme Court reversed, reasoning that "a model purporting to serve as evidence of damages in this class action must measure only those damages attributable to that theory. If the model does not even attempt to do that, it cannot possibly establish that damages are susceptible of measurement across the entire class . . . ." *Id.* The Fifth Circuit has interpreted *Comcast* to require "fit between plaintiffs' class-wide liability theory and plaintiffs' class-wide damages theory." *Slade v. Progressive Sec. Ins. Co.*, 856 F.3d 408, 411 (5th Cir. 2017) (citing *Ludlow v. BP, P.L.C.*, 800 F.3d 674, 683 (5th Cir. 2015)).

Given this standard, the Court rejects Defendant's objections to Witt's Count I damages model. Essentially, Defendant and Plaintiff disagree on Count I's theory of liability and how it relates to damages. Defendant argues that it must get credit for when a COI rate based solely on mortality expectations happens to generate a charge less than what it charged. By contrast, Plaintiff urges that its theory of liability is that Defendant breached the contract by charging *in excess* of the amount permitted under the contract, and that these *excessive charges* stemmed

from its consideration of factors outside of its mortality expectations. Regardless of the proper characterization, Defendant's argument is not a basis for striking an expert at the Rule 23 stage, nor is it what *Comcast* and the Fifth Circuit mean by requiring a "fit" between the proposed damages model and the theory of liability.

As noted above, the problem in *Comcast* was that the damages model relied on all four theories of liability, rather than the only theory certified for class resolution. *Comcast*, 569 U.S. at 35. Thus, the plaintiffs' "model does not even attempt to [measure only those damages attributable to the certified theory], [and thus] it cannot possibly establish that damages are susceptible of measurement across the entire class for purposes of Rule 23(b)(3)." *Id.* Defendant cites this statement in its Motion to Strike but appears to ignore the last half of the sentence: the key question is whether the model establishes that damages are susceptible of measurement across the entire class. Witt's model meets this standard.

The Court agrees with the Northern District of California's recent decision in a similar case involving Witt: "The possibility that certain Class members may have been undercharged at certain points according to Witt's model does not negatively impact its reliability." *Bally*, 335 F.R.D. at 300. Indeed, in the event Defendant is entitled to an offset for its undercharges, Witt attests that his model provides an easy adjustment. 71-3 at ¶ 15. Therefore, Defendant's attack on the universality of the overcharges fails to show that Witt's model is unreliable in determining that damages can be shown on a class wide basis. *See Vogt v. State Farm Life Ins. Co.*, 2018 WL 4937330, at *4 (W.D. Mo. Oct. 11, 2018) ("The fact that the rates that State Farm actually charged were not always higher than the mortality rates that Plaintiffs' expert calculated does not mean that Plaintiffs' model does not adequately capture the non-mortality component of the charge.").

Likewise, Defendant's objection that Witt's model improperly conflates Count I with Count III by including Defendant's 2001 and 2005 pricing analyses does not warrant striking his report. Defendant essentially contends that the 2001 and 2005 pricing analyses are being calculated under the wrong count, but, if this is true, Witt attests that he can merely reallocate these damages to Count III without changing the overall damages amount. *See* 71-3 at ¶ 16. Accordingly, the Court rejects this objection to Witt's report.

2. Count II

Moreover, Defendant argues that Witt does not and cannot calculate damages for Count II. In his report, Witt states that Count II damages can be calculated through the "isolation of the percentage of overcharges, which appropriately reflects amounts determined to be in excess of any limit provided by the expense charge provisions." *See* docket no. 55-3 at ¶ 71. In other words, Witt proposes that the damages attributable to Count II are the amounts Defendant (allegedly) overcharged that Plaintiff proves are "expenses," minus the contractually authorized Maintenance Charge and Administrative Charge. *See id.* Defendant argues that this proposal is not enough—that Witt must provide an accounting of what alleged overcharges were attributable to "expenses." *See* docket no. 59 at 8-9. Defendant further claims that in his deposition, Witt testified that his understanding of Plaintiff's theory of Count II is that all overcharges will qualify as "expenses," including profit considerations. *Id.* Defendant argues that no plausible reading of the contract can permit Plaintiff to characterize *all* overcharges, including profit, as "expenses."

Again, the Court rejects these objections as premature, as they do not target the relevance and reliability of Witt's expert report to the Rule 23 certification determination. As Plaintiff points out, Witt shows that damages can be calculated on a class wide basis for Count II. Witt

acknowledges that Count II damages will be subject to what overcharges, if any, Plaintiff is able to prove constitute "expenses." *See* docket no. 55-3 at ¶ 71. Defendant's objections seem to dispute Plaintiff's theory on the merits—that overcharges in excess of the contractually permitted expense charges are not "expenses." But this contention has nothing to do with whether damages, *if proven*, can be established on a class wide basis using Witt's proposal. *See Bally*, 335 F.R.D. at 300 (finding that factual disputes on the merits of claims do not warrant striking an expert's report). And, even if this were a valid objection, Plaintiff and Witt point to at least some evidence suggesting that Defendant characterized its overcharges as "expenses." *See* docket no. 71-3 at ¶ 18 (Policy stating that "[c]urrent cost of insurance rates are intended to cover anticipated mortality, *administration and maintenance expenses*."). Accordingly, the Court rejects Defendant's objections as to Count II.

3. Count III

Similarly, Defendant objects to Witt's report as to Count III because he does not actually calculate the damages, but merely describes what steps he would take. *See* docket no. 59 at 10. Defendant points out that Witt acknowledged in his expert deposition that he had not "rigorously analyzed" the relevant Count III data, even acknowledging that his remaining work would require "some actuarial judgment." Docket no. 59-1 at 50:14-51:12; 83:6-9. Because Witt fails to analyze Defendant's mortality expectations throughout the time period, questions remain, such as whether the mortality expectations worsened for some members of the proposed class. *See* docket no. 59 at 11. Defendant therefore argues this model is too speculative.

Again, the Court denies these objections to Witt's report. Contrary to Defendant's assertion, Witt identifies the relevant documents that will be used to calculate damages under Count III. These documents are Defendant's ten sets of mortality expectations for the UL4

policy, ten for the UL3 policy, and four "mortality assumptions." Docket no. 55-3 at ¶¶ 60, 73. He also testified, as Plaintiff points out, that all mortality expectations between 2005 and 2017 will be considered. *See* docket no. 59-1 at 82:21-24. Moreover, Witt provides the formula that will be used to calculate the damages resulting from Plaintiff's Count III theory. *See* docket no. 55-3 at ¶¶ 72-73. Thus, the Court finds that Witt's proposed calculation is both relevant and reliable to its determination of whether damages can be calculated on a class wide basis using common proof. The mere fact that damages have not yet been calculated class wide does not change this fact.

Accordingly, the Court finds that Defendant's Motion to Strike should be DENIED.

II. Motion to Certify

"The class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011) (quoting *California v. Yamasaki*, 442 U.S. 682, 700-701 (1979)). As a result, the class representative must be part of the class and "possess the same interest and suffer the same injury as the class members." *Id.* (quoting *East Tex. Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977)). Rule 23 does not set forth "a mere pleading standard." *Id.* at 350. Rather, the party seeking class certification must "affirmatively demonstrate his compliance with the Rule." *Id.* The "rigorous analysis" required for class certification entails "some overlap with the merits of the claim," *id.*, but district courts should not engage in a "free-ranging merits inquiries" at the certification stage. *Amgen, Inc. v. Conn. Ret. Plans and Trust Funds*, 568 U.S. 455, 466 (2013). District courts thus analyze the evidence to determine whether common proof will produce a common answer to a common question, rather than to determine the probable outcome on the merits. *Id.*; *Dukes*, 564 U.S. at 351-52.

Rule 23 entails a two-part analysis. First, the class must meet the four prerequisites enumerated in Rule 23(a): numerosity, commonality, typicality, and adequacy. *See* Fed. R. Civ. P. 23(a)(1)-(4). Second, the class must meet at least one of the three requirements of Rule 23(b). *See, e.g., Steward v. Janek*, 315 F.R.D. 472, 479 (W.D. Tex. 2016). District courts enjoy broad discretion in deciding whether a case complies with Rule 23. *See Yates v. Collier*, 868 F.3d 354, 359-60 (5th Cir. 2017). Here, Plaintiff asserts that the proposed class meets Rule 23(a)'s prerequisites as well as the requirements of Rule 23(b)(2), (b)(3), and/or (c)(4).

1. Rule 23(a) Requirements

A. Numerosity

Rule 23(a)'s numerosity requirement mandates that the proposed class be "so numerous that joinder of all members is impracticable." *Ibe v. Jones*, 836 F.3d 516, 528 (5th Cir. 2016). In his Motion, Plaintiff asserts that Defendant issued 80,000 Class Policies nationwide, safely meeting the numerosity requirement. *See* docket no. 55-3 at ¶ 77; *See Twegbe v. Pharmaca Integrative Pharmacy, Inc.*, 2013 WL 3802807, at *2 (N.D. Cal. July 17, 2013) (numerosity usually satisfied when the class comprises 40 or more members) (collecting cases). In its response, Defendant does not challenge that the proposed class meets the numerosity requirement. Accordingly, the Court finds that Plaintiff's proposed class of approximately 80,000 policyholders is sufficiently numerous for the purposes of Rule 23(a)(1).

B. Commonality

Rule 23(a)(2), or commonality, requires a question of law or fact common to the proposed class. *Ibe*, 836 F.3d at 528; Fed. R. Civ. P. 23(a)(2). "The purpose of this requirement is to determine whether 'maintenance of a class action is economical and whether the named plaintiff['s] claim and the class claims are so interrelated that the interests of the class members

will be fairly and adequately protected in their absence'; in short, whether 'all their claims can productively be litigated at once.'" *Steward*, 315 F.R.D. at 480 (quoting *Dukes*, 564 U.S. at 349 & n.5). Commonality can be established by a single common question of law or fact, "so long as resolution of that question will resolve an issue that is central to the validity of each one of the [class member's] claims in one stroke." *Ibe*, 836 F.3d at 528 (quoting *Dukes*, 564 U.S. at 350).

As explained above, Plaintiff asserts three claims of breach of contract and one claim of conversion. *See* docket no. 1. Because these claims arise under state law, Plaintiff addresses the choice of law analysis in his commonality section, arguing that Texas law applies to the claims of the nationwide class. *See* docket no. 55-1. Defendant, on the other hand, does not explicitly challenge commonality in its response, but does argue that the law of the state of each individual class member applies, thus defeating a nationwide class. *See* docket no. 61. Because the choice of law analysis at least touches on whether there are common questions of law, namely whether Defendant's actions constitute breaches of the Class Policies under state law, the Court will first explain why Texas law applies to all claims.

In diversity jurisdiction cases, courts must apply the choice of law rules of the forum state, in this case Texas. *See Klaxon v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 496 (1941); *Mayo v. Hartford Life Ins. Co.*, 354 F.3d 400, 403 (5th Cir. 2004). As an initial matter, Texas courts generally enforce contractual choice of law provisions in contract disputes. *Smith v. EMC Corp.*, 393 F.3d 590, 597 (5th Cir. 2004). Here, Defendant argues the Policy contains a valid and enforceable choice of law provision, specifically: "This policy is subject to the laws of the state where the policy is delivered. If part of the policy does not follow that law, it will be treated as if it does." Docket no. 1-1 at 6. Plaintiff, on the other hand, counters that this provision is merely a

"conformity of laws" provision, as it is entitled in the Policy, designed to ensure validity should a particular provision conflict with local state law. *See* docket nos. 55-1 at 13-14 & 81 at 11.

Neither the Texas Supreme Court nor the Fifth Circuit have addressed whether these provisions are valid choice of law provisions. In support of his position, Plaintiff cites several cases finding that similar provisions do not choose the governing law. Docket no. 55-1 at 13-14. For instance, a recent Southern District of Florida case found a nearly identical provision did not on its face "manifest a clear and unambiguous intent for the parties to be bound by the laws of the state where the policy was [delivered]." *Wilmington Trust, N.A. v. Lincoln Benefit Life Co.*, 2018 WL 6308687, at *3 (S.D. Fla. Sept. 20, 2018). In doing so, the court cited the significant number of courts finding that these clauses are not choice of law provisions. *Id.*; *See also AEI Life LLC v. Lincoln Benefit Life Co.*, 892 F.3d 126, 134 (2d Cir. 2018) ("Most courts to consider the issue have held that a conformity clause does not determine the applicable law."); *Crisler v. Unum Ins. Co. of Am.*, 233 S.W.3d 658, 661 (Ark. 2006) ("No specific state is mentioned, and a reasonable construction of this provision is simply that any illegal provisions are void to the extent that they deviate from the law of the state in which the policy is delivered."); *DeCesare v. Lincoln Benefit Life Co.*, 852 A.2d 474, 482 (R.I. 2004) (noting that "the term 'subject to' is not nearly as explicit or unambiguous as the choice of law language this and other courts routinely recognize.").

Defendant counters that these cases do not interpret the provision as a matter of Texas law. *See* docket no. 51 at 25-26. Instead, Defendant cites to *Lincoln Benefit Life Co. v. Manglona*, in which the Southern District of Texas held that a similar provision operated as a choice of law clause. 2014 WL 3608893, at *1-4 (S.D. Tex. July 3, 2014) (construing the clause "This policy is subject to the laws of the state where the app[lication] was signed. If any of the

policy does not comply with the law, it will be treated by [Lincoln] as if it did" to "select the law of the place where the insured applied for the Policy as the law governing any contractual disputes."). Defendant then cites to several cases finding that "subject to" is typical of a choice of law clause. *See* docket no. 61. Relying on these cases, Defendant argues that the provision chooses the insured's state of domicile as the policy's governing law.

The Court agrees with Plaintiff. As detailed above, most courts to consider similar provisions have found that they are not choice of law clauses. Instead, this language ensures that the agreement conforms with the laws of the insured's state, thereby negating any need for Defendant to customize its contracts for 50 different sets of insureds. *See AEI Life*, 892 F.3d at 132-33 (citing *Lawrimore v. Progressive Direct Ins. Co.*, 627 Fed. App'x 253, 254 (4th Cir. 2016) (per curiam)). Defendant cites to scant authority suggesting that form contracts have choice of law clauses subjecting the interpretation of the entirety of the contract to 50 different sets of laws. Indeed, the cases Defendant cites for its proposition that "subject to" signals a choice of law are distinguishable, as each clause specifies a single state's law.[3] *See, e.g., Jimenez v. Sun Life Assur. Co. of Canada*, 486 Fed. App'x 398, 406 (5th Cir. 2012) (applying *federal* choice of law rules to a provision stating "[t]his Policy is delivered *in Texas* and is subject to the laws of that jurisdiction."); *Aerosmith Penny II, LLC v. Global Financial & Leasing, Inc.*, 2018 WL 1394028, at *1 (S.D. Tex. March 20, 2018) (finding choice of law clause where agreement "will be subject to the laws of *the State of Oregon*, USA, and venue will be therein."). Specifying a single state negates the possibility that the clause is a conformity of laws provision. By contrast, the Class Policies do not specify a single state, instead purportedly "choosing" the laws

[3]Although *Manglona*, referenced above, finds a similar provision to operate as a choice of law clause, it appears that this issue was uncontested, with the opposing party instead arguing that the policy and the facts of the case necessitated the application of a different law. 2014 WL 3608893, at *1-4. Accordingly, the Court finds this case unpersuasive considering Plaintiff's arguments.

of 50 states. *See* docket no. 1-1 at 6; *see also AEI Life*, 892 F.3d at 133 (holding in part that because conformity with laws provision did not specify a single state's law, it was not a choice of law clause). Defendant also objects to Plaintiff's characterization of the clause as a "Conformity with Laws" clause. *See* docket no. 61 at 25. But Plaintiff didn't invent that title—he lifted it from the policy, as drafted by Defendant. *See* docket no. 1-1 at 6 (titling the clause at issue "Conformity with Laws"). *See AEI Life*, 892 F.2d at 133 ("If the parties intended this provision also to act as a choice-of-law clause, we would expect it to bear a title that indicated it was serving both purposes."). Because the clause does not specify a single state and can be naturally read as a conformity with laws provision, the Court finds that the Policy does not call for the application of the insured's state's law.

Absent a valid choice of law clause, Texas generally applies the "most significant relationship" test, found in the Restatement (Second) of Conflict of Laws ("Restatement"). *See Conestoga Trust v. Columbus Life Ins. Co.*, 759 Fed. App'x 227, 233 (5th Cir. 2019). Under the Restatement, Defendant argues that Section 192 governs this case, as it establishes a rebuttable presumption for insurance contracts that "the local law of the state where the insured was domiciled at the time the policy was applied for" should apply. *See id.* at 233. This presumption applies "unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the transaction and the parties, in which event the local law of the other state will be applied." *Id.* (quoting Restatement § 192).[4]

Plaintiff emphasizes this exception to Section 192's general rule applying the law of the insured's domicile. Specifically, Plaintiff highlights Section 192's comments, which state that

[4] While Section 192 references Section 6, the Section 6 factors are incorporated in the most significant relationship test for both torts (Section 145) and contracts (Section 188). *See* Restatement §§ 145(2) & 188(2).

"the rule does not apply to questions involving details of performance which are governed by the local law of the state where the performance either has taken, or is to take place (see § 206)." *Id.* cmt. a. As an example, Comment A states that the local law of the state where the insurance premium is to be paid applies to that payment. *Id.*

With this exception in mind, the Court agrees with Plaintiff that Section 192 does not require applying the law of the insured's domicile. Rather, the legal question here is whether Defendant's performance, specifically the COI Charges and the deductions from Plaintiff's cash value, breached the contract, and it is undisputed that Defendant set the COI Rates and deducted the COI Charges in Texas. *See* docket no. 63 at 12. Accordingly, the performance at issue occurred in Texas, rebutting Section 192's presumption.

Moreover, Texas has the most significant relationship to whether Defendant's COI Charges were in excess of the amount contractually permitted. Section 6 calls for the consideration of the following factors: the needs of the interstate systems; the relevant policies of the forum; the relevant policies of other interested states and the relevant interests of those states in the determination of the particular issue; the protection of justified expectations; the basic policies underlying the particular field of law; certainty, predictability, and uniformity of result; and ease in the determination and application of the law to be applied. Restatement § 6. For contract claims, Section 188 emphasizes the following contacts in applying the above principles: (a) the place of contracting, (b) the place of negotiation of the contract, (c) the place of performance, (d) the location of the subject matter of the contract, and (e) the domicil, residence, nationality, place of incorporation and place of business of the parties. Restatement § 188.

Here, the Class Policies were entered into in Texas. *See* docket no. 55-15 at 1. Defendant, a Texas citizen, drafted the policies in Texas, and the payments were received in Texas. *Id.* at 7.

Moreover, Plaintiff and the proposed class were allegedly injured in Texas, as Defendant calculated the COI Rates and deducted the COI Charges from the cash values in Texas. *See* docket no. 55-6. As Plaintiff points out, Defendant's miscalculation of the COI Rates was uniform, regardless of where the insured lived. *See* docket no. 55-3 at ¶¶ 20-43.

By contrast, Defendant argues that the law of insured's home state should apply, thereby calling for the interpretation of a form contract in potentially 50 different ways. This argument fails the principles outlined in Section 6 and ignores the place of the performance at issue here. Contrary to Defendant's assertion, the insured's home state's interest in allowing for a "just recovery for its citizens" does not call for the application of the laws of 50 different states. As noted above, the calculation of the excess charges is likely a straightforward difference between what Defendant charged and what Defendant's mortality expectations suggest it should have charged. *See* 55-3 at ¶ 19(d). Because these damages are calculable regardless of which law applies, the interest of the insured's home state is low. *See* docket no. 88-2. By contrast, Texas's interest, as Defendant's home state, is high. Thus, any conflict between the insured's home state and Texas is outweighed by the significant difference in their interests. *See* Restatement § 6(2)(c) ("[weigh] the *relative interests* of those states in *the determination of the particular issue*."). Nevertheless, as Plaintiff points out in reply, Texas and the other 50 states' laws do not actually conflict with respect to the calculation of damages. *See* docket no. 88-2. Rather, the dispute in this case is a "false conflict." *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 816 (1985) ("There can be no injury in applying Kansas law if it is not in conflict with that of any other jurisdiction connected to this suit."). The Court therefore rejects Defendant's argument that the most significant relationship test requires the application of 50 different sets of laws. Instead, because Defendant is in Texas and conducted the relevant performance and alleged breach in

Texas, Texas has the most significant relationship to the outcome of this case. *See In re Great S. Life Ins. Co. Sales Practices Litig.*, 192 F.R.D. 212, 218 (N.D. Tex. 2000).

The same analysis applies for Plaintiff's conversion claim. For tort law claims, Section 145 calls for the consideration of the following factors: (a) the place where the injury occurred, (b) the place where the conduct causing the injury occurred, (c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and (d) the place where the relationship, if any, between the parties is centered. Restatement § 145. The last two factors are at best split between Texas and the insured's home state. However, both (a) and (b) weigh heavily towards Texas. Again, the injury—the alleged improper deductions from the insured's cash value—occurred in Texas.[5] And, the conduct causing that injury—Defendant's improper calculations of the COI Rate—also occurred in Texas.[6] Accordingly, Texas has the most significant relationship to Plaintiff's conversion claim.

Applying Texas law, the Court finds that questions of law and fact are common throughout the class. First, the legal questions are common throughout the class. With respect to Count I, the question of whether the consideration of factors outside of Defendant's mortality expectations in calculating the COI Rates constitutes a breach is common to all Class Policies. So too is the question of whether the Class Policies' Maintenance and Administrative Charges prohibit Defendant from deducting further expense charges. Likewise, the question of whether

[5] Defendant argues that the alleged injury occurred in the insured's home state, because they lived in those states when they discussed their purchase, filled out their applications, and wrote checks from local banks. *See* docket no. 61 at 31. None of these acts, however, relate to the injury. These checks were received in Texas, and then Defendant, acting in Texas, deducted a COI Charge allegedly exceeding the amount permitted by the Policy.

[6] Likewise, Defendant claims this factor is "inconclusive," because the insured reviewed marketing materials and spoke with Defendant's representatives in their home state. *See* docket no. 61 at 31. It's unclear how these facts relate, if at all, to the conduct that caused the alleged injury.

Defendant is required by the Class Policies to lower the COI Rates as mortality expectations improve is common to all class members. *See* docket no. 55-1 at 16.

Second, this case contains questions of fact common to all class members. Specifically, whether Defendant used factors outside those enumerated in the Class Policies to determine its COI Rates will rely on the same evidence throughout the class. Moreover, whether Defendant's mortality expectations improved since it priced or repriced the Class Policies is also common throughout the class. *See id.* at 16-17. These questions, among others, are common throughout the class, and Defendant does not challenge these contentions, at least in the commonality context. *See* docket no. 61. The Court therefore finds that Plaintiff and the proposed class satisfy Rule 23(a)(2)'s commonality prerequisite.

C. Typicality

The next prerequisite is typicality, which requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). Typicality "focuses on the similarity between the named plaintiffs' legal and remedial theories and the theories of those whom they purport to represent." *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 625 (5th Cir. 1999). The test is designed to "limit the class claims to those fairly encompassed by the named plaintiffs' claims." *General Telephone Co. v. EEOC*, 446 U.S. 318, 330 (1980). A unique and individualized defense, however, will preclude a finding of typicality. *See Warren v. Reserve Fund, Inc.*, 728 F.2d 741, 747 (5th Cir. 1984).

As discussed, Plaintiff's Policy and the Class Policies are materially identical, and Defendant's alleged breach of these policies was uniform for both Plaintiff and the proposed class. In this sense, Plaintiff's claims are typical of the proposed class. On the other hand, Defendant argues that a unique defense precludes typicality: statute of limitations. Specifically,

Defendant points out that each class member would be subject to litigating their awareness of improving mortality over the same time that their COI Charge was rising. *See* docket no. 61 at 16. In support, Defendant cites to Plaintiff's deposition, in which he testified that he was "generally knowledgeable" that mortality had improved over the term of his policy. *Id.* At the same time, Plaintiff knew that his COI Charge was increasing.

The Court is not persuaded by Defendant's argument. As Plaintiff points out, his testimony regarding generally improving mortality expectations does not signify that he was aware that Defendant's mortality expectations were improving, nor that its expectations *for him* were improving. This lack of awareness is because Defendant does not disclose its COI Rates or its mortality assumptions to its policyholders. Rather, Plaintiff, and other members of the class, may have had awareness that their COI Charges were increasing, but, as Plaintiff explains, this increase is consistent with the fact that he was aging. *See* docket no. 81 at 6-7 (citing docket no. 67-1 at 8). Indeed, other courts facing the same challenge have rejected this argument based on exactly this reasoning. *See Vogt v. State Farm Life Ins. Co.*, 2018 WL 1747336, at *7 (W.D. Mo. Apr. 10, 2018) ("The mere fact that COI charges were increasing also could not have 'tipped' [plaintiff] off to the alleged overcharges, because COI charges increase as the insured ages, because of mortality expectations."). Defendant counters that the merits of this statute of limitations defense as to Plaintiff should not factor in to whether the class should be certified, because the defense would still need to be litigated as to each member. But, again, Defendant points to no evidence that it disclosed its mortality expectations or its COI Rates to any policyholders. Plaintiff's lack of awareness of Defendant's mortality studies and the COI Rates are thus "typical" of the proposed class. Accordingly, the Court finds that typicality has been satisfied.

D. Adequacy

Finally, Plaintiff must establish "adequacy," both as to him as a lead plaintiff representing the class and as to his counsel acting as lead counsel. Adequacy requires that Plaintiff show he will "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). Importantly, Plaintiff must have no conflict of interest with the class and be willing to play an active role in the litigation. *Feder v. Elec. Data Sys. Corp.*, 429 F.3d 125, 129-30 (5th Cir. 2005).

Defendant contends that there are three intra-class conflicts, thereby precluding a finding of "adequacy." First, Defendant, as noted above in its Motion to Strike, argues that recalculating COI Rates based solely on mortality expectations will result in a "significant percentage of the proposed class" paying higher charges. Docket no. 61 at 11. In other words, if Plaintiff prevails on the merits, some of the class members will be worse off. Second, Defendant argues Plaintiff is an inadequate class representative because he abandoned the UL1 and UL2 policy holders—nearly 30 percent of his complaint's proposed class—at the class certification stage. *Compare* docket no. 1 at ¶ 43 *with* docket no. 55-1. Defendant posits that abandoning such a large portion of the originally proposed class without leave of Court is enough to preclude certification. *See* docket no. 61 at 15. Finally, Defendant challenges Plaintiff's adequacy on the statute of limitations grounds raised and rejected in the typicality context.

With respect to Defendant's argument that some class members will be worse off under Plaintiff's theory, this intra-class conflict could potentially apply in both the past and in the future. For instance, Defendant argues some class members were charged less under the allegedly improper COI Rate than they would have been under Plaintiff's theory (a COI Rate calculated solely on mortality expectations). And, Defendant argues that Count V, the forward-

looking injunctive and declaratory relief, will result in some class members being charged more in the future. This argument is essentially related to the Motion to Strike—either Witt's report is unreliable because Plaintiff's damages theory is untethered from his liability theory, or Plaintiff's liability theory creates a fatal intra-class conflict.

The Court rejects these contentions. Essentially, Defendant confuses Plaintiff's theory of liability with whether it results in damages. Throughout the complaint, and under each Count, Plaintiff alleges that Defendant breached the contract by deducting a COI Charge in excess of the amount permitted by the Class Policies. *See, e.g.*, docket no. 1 at ¶¶ 57-58. For instance, for Count I, Plaintiff contends that Defendant "impermissibly causes [the COI Rates] to be higher for the Policy and the Class Policies," causing Defendant to "deduct cost of insurance charges from the cash values of Plaintiff and the class *in amounts greater* than those authorized by the policies." *Id.* The same is true for Counts II, III, and IV. *See id.* at ¶ 62 ("Defendant impermissibly deducts maintenance charges . . . in amounts *in excess* of the fixed and maximum maintenance and administrative charges."); ¶ 67 (Defendant "failed *to lower* monthly cost of insurance rates for the Policy and Class Policies."); ¶ 71 ("Plaintiff and the class had a property interest in the funds Defendant deducted from their cash values *in excess* of the amounts permitted by the terms of the Policy and Class Policies."). Even Count V, the declaratory and injunctive relief, seeks to enjoin future "unlawfully *inflated* charges." *Id.* at ¶ 81.

In sum, Plaintiff's theory of liability does not call for a damages model that requires the class members who were "undercharged" to retroactively make up the difference to Defendant. To do otherwise, Plaintiff asserts that Defendant needed to plead an offset, an affirmative defense which it has never asserted. *See* docket no. 81 at 4. Defendant, on the other hand, denies that an offset is necessary, instead contending that it is basic damages law in breach of contract

claims to put the non-breaching party in the same position they "would have been had there been no injury or breach." *See* docket no. 79 at 4. However, if Defendant breached the contract by charging amounts in excess of what was contractually permitted, then those who were "undercharged" were not injured. In other words, should Plaintiff successfully prove his claims on the merits, both his and the proposed class members' damages will be the excess charges unauthorized by the Policy and the Class Policies. *See Bally*, 335 F.R.D. at 303 ("[T]o the extent that Witt's model generates higher COI charges than were actually charged for certain months, that would affect calculation of damages, not determination of liability."). And, any favorable injunctive relief will only require Defendant to stop charging improperly "inflated" COI Charges. *See Vogt*, 2018 WL 4937069, at *3 (W.D. Mo. Oct. 11, 2018). The Court therefore rejects the argument that there is an intra-class conflict undermining adequacy.

Likewise, the Court does not find Plaintiff an inadequate representative merely because he dropped the UL1 and UL2 policyholders from his proposed class. Defendant does not elaborate on its theory that excluding the UL1 and UL2 policyholders renders Plaintiff an inadequate representative of the UL3 and UL4 policyholders. Instead, Defendant seems to assert a general proposition that a difference between the proposed classes in the complaint and the Motion to Certify suggests that the Plaintiff is not an adequate representative. But this position is untenable. Plaintiff conducted discovery and learned that UL1 and UL2 policyholders did not belong in the class. *See Caldera v. Am. Med. Collection Agency*, 320 F.R.D. 513, 518 (C.D. Cal. 2017) ("[Plaintiff] appropriately decided to narrow the class definition after conducting additional discovery."). Perhaps Plaintiff is not an adequate representative of UL1 and UL2 policyholders, but without more explanation from Defendant, this fact has no bearing on his

adequacy in representing the UL3 and UL4 policyholders, which are the only members he is seeking certification to represent. Accordingly, the Court rejects this argument.

Having rejected Defendant's challenges, the Court finds Plaintiff meets the adequacy requirement. Plaintiff's Policy is materially the same as the Class Policies, and his theory of liability would apply throughout the class. *See* docket no. 55-1 at 18. Defendant was uniform in its conduct that allegedly breached the Policy and the Class Policies. *Id.* Accordingly, their interests are aligned. Moreover, Plaintiff has diligently prosecuted this lawsuit and he has a personal monetary interest at stake, suggesting that he will continue to adequately protect the interests of the proposed class members. *See* docket no. 55-3 at ¶ 83. Additionally, Plaintiff's counsel—Stueve Siegel, Miller Schirger, and Girard Sharp—have extensive experience in these kinds of lawsuits, and Defendant does not challenge their adequacy as class counsel. *See* docket nos. 55-59 – 55-62. Accordingly, Plaintiff meets the adequacy requirement and satisfies the Rule 23(a) prerequisites.

2. Rule 23(b)(3)

Having satisfied the Rule 23(a) prerequisites, Plaintiff's proposed class must also meet one of the Rule 23(b) classes. *See, e.g., Steward*, 315 F.R.D. at 479. Plaintiff first seeks to certify the class under Rule 23(b)(3), which requires that "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 effectively adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). The rule calls for a two-element test: predominance and superiority. *See Castano v. Am. Tobacco Co.*, 84 F.3d 734, 744 (5th Cir. 1996). The Court finds that both are satisfied.

A. Predominance

Predominance requires a more rigorous inquiry than Rule 23(a)(2)'s commonality requirement. *Steering Committee v. Exxon Mobil Corp.*, 461 F.3d 598, 603 (5th Cir. 2006) (citing *Unger*, 401 F.3d at 320 (5th Cir. 2005)). It "requires courts to carefully scrutinize the relationship between common and individual questions in a case." *Crutchfield v. Sewerage and Water Bd. of New Orleans*, 829 F.3d 370, 376 (5th Cir. 2016) (citing *Tyson Foods, Inc. v. Bouaphakeo*, 136 S.Ct. 1036, 1045 (2016)). If individual questions overwhelm the questions common to the class, predominance is not satisfied. *Amgen*, 568 U.S. at 469. "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 . . . susceptible to generalized, class-wide proof." *Tyson Foods*, 136 S.Ct. at 1045. This determination requires an inquiry into how the case will be tried, which "entails identifying the substantive issues that will control the outcome, assessing which issues will predominate, and then determining whether the issues are common to the class." *Ibe*, 836 F.3d at 529. Individualized damages, however, do not preclude a finding of predominance. *Id.* (citing *Tyson Foods*, 136 S.Ct. at 1045)).

Plaintiff asserts that his claims are capable of consideration on a class wide basis. It is undisputed that the Class Policies are form contracts, and as noted above, they are subject to interpretation under Texas law for the purposes of Plaintiff's claims. Indeed, the performance at issue—the calculation of the COI Rates and the deduction of excessive COI Charges—is identical throughout the class. The provisions that Defendant's uniform performance allegedly violate are also materially identical throughout the class. Given these factors, the Court is persuaded that common questions predominate over individualized questions, as other district courts analyzing similar lawsuits have held. *See Bally*, 335 F.R.D. at 304 ("The major portion of the evidence on the claims for breach of contract, conversion, and declaratory judgment is

capable of consideration on a class wide basis. The terms of the Policy are the same for all class members. State Farm has not suggested that the determination of COI Rates varied on a case-by-case basis. Thus, common questions predominate."); *Fleisher v. Phoenix Life Ins. Co.*, 2013 WL 12224042, at *13 (S.D.N.Y. July 12, 2013) (predominance satisfied where policies were substantively identical throughout the class); *Feller v. Transamerica Life Ins. Co.*, 2017 WL 6496803, at *13 (C.D. Cal. Dec. 11, 2017) (holding predominance satisfied where "claims are premised on Transamerica's uniform policy language and uniform conduct."); *Hanks v. Lincoln Life & Annuity Co. of New York*, 330 F.R.D. 374, 382-83 (S.D.N.Y. 2019) (predominance satisfied where neither contract provision nor defendant's conduct varied by individual class member).

Defendant, however, makes several objections to predominance. First, Defendant disputes that Plaintiff can prove breach of contract (Counts I-III) on a class wide basis, because it will be permitted to introduce extrinsic evidence related to how individual class members interpret the relevant provisions. Specifically, Defendant argues that individualized sales presentations to the class members are relevant in determining the insured's understanding of the provisions at issue. Though much of this argument rests on Defendant's assertion that 50 different states' laws apply, which this Court has already rejected, Defendant suggests that this rule applies to Texas breach of contract claims. *See* docket no. 61 at 18-19 (citing *Great Am. Ins. Co. v. Primo*, 512 S.W.3d 890, 894 (Tex. 2017); *Hallmark Cty. Mut. Ins. Co. v. Ace Am. Ins. Co.*, 283 F. Supp. 3d 559, 567-68 (W.D. Tex. 2017)). However, as Plaintiff points out, Texas law does not permit the consideration of extrinsic evidence when the provision at issue is unambiguous. *See Sharp v. State Farm Fire & Cas. Ins. Co.*, 115 F.3d 1258, 1261 (5th Cir.

1997).[7] And, more importantly, permitting consideration of individualized extrinsic evidence would run counter to the terms of the Class Policies, which specifically state: "Only an Officer of USAA Life has authority to waive or change a provision of this policy, and then only in writing." Docket no. 55-15 at 5. Because any changes to the Class Policies would require amending the terms in writing, individual understandings would not change the meaning of the provision. *See Bally*, 335 F.R.D. at 302, n.4 (rejecting life insurer's argument that individualized sales presentations prevented certification based in part on policy's language limiting amendment to the insurer's officers). This understanding is in line with the Restatement (Second) of Contracts, which states that form contracts should be "interpreted wherever reasonable as treating alike all those similarly situated, without regard to their knowledge or understanding of the standard terms of the writing." Restatement (Second) of Contracts § 211(2); *see Bally*, 335 F.R.D. at 302; *see also MMR Int'l Ltd. v. Waller Marine, Inc.*, 2013 WL 3864271, at *4 n.2 (S.D. Tex. July 24, 2013) (applying Restatement (Second) of Contracts under Texas law). Notably, Defendant fails to respond to these arguments in its response. *See* docket no. 61. Accordingly, the Court finds that extrinsic evidence of individualized interpretations of the Class Policies will not defeat predominance.[8]

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[7] Even if the Policy and the Class Policies were deemed ambiguous, it is at best unclear if extrinsic evidence would be admissible. The two Texas cases that Defendant cites do not state that form contracts should be interpreted using individualized extrinsic evidence. And, several cases applying Texas law to ambiguous insurance contracts hold that ambiguous provisions must be construed against the drafter, in this case Defendant. *See, e.g., Wellington Underwriting Agencies, Ltd. v. Houston Exploration Co.*, 267 S.W.3d 277, 283 (Tex. App.—Houston [14th Dist.] 2008, pet. granted), *aff'd* No. 08-0890 (Tex. Aug. 26, 2011) ("We thus construe an ambiguous insurance policy strictly against the insurer and liberally in favor of the insured.") (citing *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa v. Hudson Energy Co.*, 811 S.W.2d 552, 555 (Tex. 1991)); *See also Barnett v. Aetna Life Ins. Co.*, 723 S.W.2d 663, 666 (Tex. 1987).

[8] The Court further notes the inherent inconsistency of Defendant's position that its form contracts be subject to individualized interpretations based on extrinsic evidence. The Court agrees with Plaintiff—this position that its form contracts are subject to the insured's individualized interpretations based on sales presentations appears to be a *post hoc* contention aimed solely at defeating class certification. Defendant calculated its COI Rates uniformly, without taking into consideration any individualized sales

Defendant's last two challenges to predominance relate to the statute of limitations and the purported inability to prove either fraudulent concealment or the discovery rule on a class wide basis. *See* docket no. 61. Plaintiff uses these two theories to toll the statute of limitations for both his breach of contract and conversion claims on a class wide basis. *See* docket no. 1 at ¶¶ 40-42. With respect to fraudulent concealment, Plaintiff alleges that Defendant had superior knowledge of the factors it considered in calculating the COI Rates, that it was aware that each class member did not know about the allegedly improper deductions, and that despite this awareness, it sent the class members annual statements which fraudulently concealed the improper considerations. *Id.* at ¶ 41. Plaintiff alternatively alleges the discovery rule: That because Defendant did not disclose its mortality expectations or the components that comprise its COI Rates, he and the class members could not have discovered that Defendant was breaching the contract. *Id.* at ¶¶ 40, 42. As a result, Plaintiff asserts that the statute of limitations was tolled until he discovered the breach in July of 2017, after consultation with actuarial experts and counsel.

Defendant first challenges Plaintiff's fraudulent concealment contention, arguing that the Court will need to consider the individualized question of whether each class member can use the doctrine. *See* docket no. 61 at 20 (citing *Piggly Wiggly Clarksville, Inc. v. Interstate Brands Corp.*, 100 F. App'x 296, 301 (5th Cir. 2004)). For instance, Defendant points out the evidence in the record that its agents recall disclosing that factors other than mortality expectations would be considered in the COI Rate calculation, and thus some portion of the class was aware of the alleged breach. *Id.* Moreover, Defendant asserts that fraudulent concealment requires class wide

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presentations and the impact they might have on how it may permissibly calculate the COI Rates. Indeed, Defendant offers no evidence that it considered such presentations in calculating its COI Rates. *See* docket no. 61 at 17-18.

proof that all members relied on Defendant's annual statements, which did not disclose the components of the COI Rates. *Id.* at 22 (citing *Krot v. Fid. Nat'l Title Co.*, 2015 WL 7464084, at *4 (Tex. App. Ct. Dec. 31, 2014)).

The Court rejects both arguments. Reliance is not an element of fraudulent concealment under Texas law. *BP Am. Prod. Co. v. Marshall*, 342 S.W.3d 59, 67-69 (Tex. 2011). Rather, all that is required is a showing of "an underlying wrong, and that 'the defendant actually knew the plaintiff was in fact wronged, and concealed that fact to deceive the plaintiff.'" *Id.* at 67 (quoting *Earle v. Ratliff*, 998 S.W.2d 882, 888 (Tex. 1999)). Upon this showing, Plaintiff and the class toll the statute of limitations until the fraud is discovered or could have been discovered with reasonable diligence. *Id.* As noted above, because Defendant did not disclose how it calculated its COI Rates, and it calculated these rates on a uniform basis, these elements are subject to common proof on a class wide basis.[9]

Likewise, Defendant's assertion that individual presentations by its agents defeat class certification of the discovery rule and fraudulent concealment is wrong. Upon review of the record, the Court finds scant and unpersuasive evidence that individualized sales presentations impact the discovery rule or fraudulent concealment, let alone defeat predominance. Defendant cites the declarations and depositions of four employees who claim that they disclosed the actual factors, including profits and expenses, that comprised the COI Rates. *See* docket nos. 61-9 - 61-16. However, not one of the employees can identify a single policyholder who received these disclosures. *See id.* And, as Plaintiff points out in his Motion to Certify, discussions with policy holders are recorded and documented in call notes, yet Defendant cannot locate any evidence

[9] Defendant cites *Taylor* for the proposition that fraudulent concealment requires individualized showings. Docket no. 61 at 21. However, *Taylor* was applying Iowa law, which it found required a showing of reliance. *See Taylor v. Midland Nat'l Life Ins. Co.*, 2019 WL 7500238, at *12-13 (S.D. Iowa. May 3, 2019).

that UL3 and UL4 policyholders were in receipt of these disclosures. *See* docket no. 55-51 at 22:15-23:1, 56:4-11; Docket no. 55-54 at 31:8-9, 82:14-19; Docket no. 55-68; Docket no. 55-69. Nor did Defendant respond to this point in its response. *See* docket no. 61. Interestingly, Plaintiff specifically and repeatedly requested these communications with policyholders in his interrogatories, but Defendant objected to producing them as overly broad and unduly burdensome. *See, e.g.,* docket no. 55-69 at 3. Now, Defendant wishes to rely on those individualized communications to defeat class certification, again without producing them. Without more, the Court rejects this argument. *See Torres v. S.G.E., Mgmt., L.L.C.*, 838 F.3d 629, 645-46 & n.74 (5th Cir. 2016) (quoting *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S.Ct. 2398, 2412 (2014) ("That the defendant might attempt to pick off the occasional class member here or there through individualized rebuttal does not cause individual questions to predominate.")); s*ee also Bally*, 335 F.R.D. at 304 ("State Farm does not adduce any evidence to show that 'policyholder[s] would have been on notice that State Farm was considering unlisted variables in calculation [of] the COI.'"); *Vogt*, 2018 WL 1955425, at *6 (finding in a COI litigation that "there is nothing to indicate that individual statute-of-limitations issues would predominate so as to make class certification impractical or inappropriate.").

Finally, Defendant challenges predominance specifically for Count III on the grounds that individual inquiries will be required to determine when class members became aware that mortality was improving. *See* docket no. 61 at 22-23. Defendant argues that awareness of generally improving mortality puts policyholders on notice that their still-increasing COI Charges were allegedly in breach of the Class Policies, and that awareness is fundamentally individualized and thus requires too many case-by-case hearings for common issues to predominate. *Id.* As an initial matter, the Court notes that the Fifth Circuit case law Defendant

cites found class certification improper due *in part* to individualized statute of limitations issues. *See Seligson v. Devon Energy Prod. Co.*, 761 F. App'x 329, 339 (5th Cir. 2019) (remanding because of insufficient evidence duty could be proven on a class wide basis *and because* district court *did not consider* the impact of the statute of limitations); *Johnson v. Kansas City S. Ry. Co.*, 208 F. App'x 292, 296-97 (5th Cir. 2006) ("individual issues, e.g., statute of limitations, *deed interpretation, and center-line theory*, predominate over the common ones" (emphasis added)). Moreover, even assuming awareness of generally improving mortality varied on an individual basis, other courts to consider this issue have rejected the argument that such awareness puts class members on notice of the alleged breach of contract. *See Vogt v. State Farm Life Ins. Co.*, 963 F.3d 753, 765 (8th Cir. 2020) (finding that statements showing rising COI Charges did not put plaintiff on notice of his potential claims as increase could "reasonably [be] assumed [to be due to his] increasing age and less favorable mortality outlook, rather than State Farm's inclusion of additional factors in the COI fees."); *Vogt*, 2018 WL 1747336, at *7 (W.D. Mo. Apr. 10, 2018) ("The mere fact that COI charges were increasing also could not have 'tipped' [plaintiff] off to the alleged overcharges, because COI charges increase as the insured ages, because of mortality expectations."). As stated above in the context of Plaintiff's individual awareness of improving mortality, the Court is persuaded by this case law, and finds that mere awareness of generally improving mortality does not put Plaintiff or any class member on notice of these claims.

Accordingly, the Court finds that common issues predominate over individual issues.

B. Superiority

In addition to predominance, Plaintiff must show that a class action is superior to other methods of adjudication. A superiority determination must consider: (a) the class members'

interests in individually controlling the prosecution of separate actions; (b) the extent and nature of any litigation concerning this controversy already commenced by potential class members; (c) the desirability of concentrating the litigation of the claims in this forum; and (d) the difficulties likely to be encountered in managing a class action. Fed. R. Civ. P. 23(b)(3). This analysis must encompass "the whole range of practical problems that may render the class action format inappropriate for a particular suit." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 164 (1974).

Here, the Court finds that a class action is the superior method for resolving Plaintiff's and the class members' claims. As Plaintiff highlights, the proposed class members share a common interest in ascertaining whether Defendant overcharged them in violation of the Class Policies. *See* docket no. 55-1 at 32. Moreover, separate actions would be impracticable, as litigation costs could exceed the individual damages to policy owners. *See id.* The Class Policies are materially identical for all class members, and Defendant's alleged breach was common to all class members. And, as explained above, Texas law applies to the question of whether Defendant's COI Rate calculations constituted a breach of the Class Policies, and thus a nationwide class is just as manageable as any other method. Considering these facts, and Defendant's lack of opposition on superiority grounds, the Court finds that superiority has been met. Accordingly, Plaintiff's Motion to Certify is GRANTED as to a Rule 23(b)(3) class.

2. Rule 23(b)(2)

Plaintiff also seeks to certify the class for Count V under Rule 23(b)(2). Rule 23(b)(2) classes are appropriate when the defendant "has acted or refused to act on grounds that apply generally to the class, so that . . . corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). "Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class." *Dukes*, 564 U.S. at

360. However, Rule 23(b)(2) does not apply when "monetary relief is not incidental to the injunctive or declaratory relief" or "when each class member would be entitled to an individualized award of monetary damages." *Id.* at 360-61.

As Plaintiff points out, the merits of Counts I-IV correspond directly to the merits of Count V, as Count V merely seeks a declaratory judgment and injunctive relief against Defendant's alleged breach under Counts I-IV. *See* docket no. 1. In response, Defendant makes three objections to Rule 23(b)(2) certification. First, Defendant argues again that there is an intra-class conflict between some policyholders and Plaintiff, an argument this Court rejected above. Second, Defendant argues that this case is largely seeking monetary relief, making it inappropriate for Rule 23(b)(2). Third, and finally, Defendant argues that notice and an opportunity to opt-out of the class is necessary here, relief that is unavailable to Rule 23(b)(2) class members. However, both arguments ignore that Plaintiff is only seeking Rule 23(b)(2) certification for Count V, not Counts I-IV. *See* docket no. 55-1. For Count V, Plaintiff and the proposed class are only seeking declaratory and injunctive relief. *See* docket no. 1. Thus, Plaintiff seeks a "divided certification," certifying the damages claims under Rule 23(b)(3) while certifying the injunctive relief under 23(b)(2). *See Lemons v. Int'l Union of Operating Eng'rs, Local No. 139*, 216 F.3d 577, 581 (7th Cir. 2000) (divided certification "avoids the due process problems of certifying the entire case under Rule 23(b)(2) by introducing the Rule 23(b)(3) protections of personal notice and opportunity to opt out for the damages claims."); *See Bland v. PNC Bank, NA*, 2016 WL 10520047, at *23 (W.D. Pa. Dec. 16, 2016). Indeed, at least one other court considering a COI Charge class certification has granted this divided certification. *See Vogt*, 2018 WL 1955425, at *7-8 (certifying Rule 23(b)(2) class only for declaratory relief count and a Rule 23(b)(3) class for counts seeking monetary relief). Accordingly, class certification of

Count V under Rule 23(b)(2) is appropriate. *See Yue v. Conseco Life Ins. Co.*, 282 F.R.D. 469, 480 (C.D. Cal. 2012). Plaintiff's Motion to Certify is GRANTED.

CONCLUSION

IT IS THEREFORE ORDERED that Plaintiff's Motion for Class Certification (docket nos. 54 & 55) is **GRANTED**. **IT IS FURTHER ORDERED** that Defendant's Motion to Exclude Expert Declaration of Scott J. Witt (docket no. 59) is **DENIED**.

IT IS FURTHER ORDERED that the following class is certified as to Counts I-IV, pursuant to Federal Rule of Civil Procedure 23(b)(3), and as to Count V, pursuant to Federal Rule of Civil Procedure 23(b)(2):

All persons who own or owned a Universal Life 3 and/or a Universal Life 4 life insurance policy issued or administered by USAA Life Insurance Company, or its predecessors in interest, that was active as of March 1999.[10]

It is so **ORDERED**.

SIGNED this 23 day of September, 2020.

ORLANDO L. GARCIA
CHIEF UNITED STATES DISTRICT JUDGE

[10] Excluded from the Class are: USAA; any entity in which USAA has a controlling interest; any of the officers, directors, or employees of USAA; the legal representatives, heirs, successors, and assigns of USAA; anyone employed with Plaintiff's counsel's firms; and any Judge to whom this case is assigned, and his or her immediate family. Also excluded from the Class are policies issued in New Jersey or Montana; UL3 policies issued in Massachusetts; and policies issued by USAA Life Insurance Company of New York.