UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	2:20-cv-11518-SVW	Date	August 4, 2022
Title	*LSIMC, LLC v. American General Life Insurance Co.*		

Present: The Honorable	STEPHEN V. WILSON, U.S. DISTRICT JUDGE

Paul M. Cruz	N/A
Deputy Clerk	Court Reporter / Recorder
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
N/A	N/A

Proceedings: **ORDER GRANTING IN PART MOTION FOR CLASS CERTIFICATION [85]**

I. INTRODUCTION

Before the Court is a motion for class certification filed by Plaintiff LSIMC, LLC. *See* ECF No. 93. Plaintiff seeks certification of a class of similarly situated insurance policyholders who hold universal life insurance policies issued by Defendant American General Life Insurance Company ("AmGen" or "Defendant")).

At its core, Plaintiff's complaint alleges that policyholders were under-credited interest on their universal life insurance investment "accounts."[1] Pursuant to each policy, Defendant was required to credit interest at a rate based "only on expectations of future investment earnings." However, Plaintiff alleges that Defendant set the applicable rate too low by improperly considering factors *other* than expectations of future investment earnings, thereby under-crediting interest to thousands of policyholders.

As described in further detail below, Plaintiff offers a damages expert who calculated the amount of interest each policyholder should have received had Defendant paid the correct interest. Nevertheless, because Plaintiff's damages model did not consider that a policyholder's benefit from under-credited interest necessarily depends on a myriad of individual variables, Plaintiff fails to offer a class-wide

[1] The word "account" is a bit of a misnomer: the extent to which the policy creates something resembling a standard cash or bank account is disputed and critical to the Court's holding. However, it provides a helpful term for understanding Plaintiff's allegations.

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method for calculating damages. Plaintiff's theory of liability raises individual questions that predominate over the common questions in this case. The Court therefore concludes that Plaintiff's theory of harm and damages cannot satisfy the predominance requirement of Federal Rule of Civil Procedure 23(b)(3).

However, given the common question of breach of contract liability, which a single proceeding would resolve most efficiently, the Court finds certification of a liability-only class appropriate here pursuant to Rule 23(c)(4). Plaintiff's motion is accordingly GRANTED IN PART.

II. BACKGROUND

A. POLICY MECHANICS

This breach of contract case arises out of a universal life insurance policy issued by Defendant in California (the "Policy"). Generally, life insurance is an insurance product whereby an insured pays premiums to an insurance company for a set period of time. In exchange, an insured receives a lump-sum death benefit to be paid to her beneficiary upon the insured's death.

The universal life insurance policies Plaintiff and other putative class members own derive from this basic insurance framework. However, the policies' mechanics—which are critical for purposes of the motion for class certification—differ from basic life insurance policies in (1) how a policyholder pays premiums; (2) the policies' accumulation value; (3) a policyholder's choice in selecting a death benefit; and (4) the option of purchasing a "guarantee" policy. *See generally* Declaration of G. Harvey ("Harvey Decl."), ECF No. 100-1.

First, as with any insurance policy, a universal life policy requires a policyholder to pay premiums to keep the policy in force. However, the policy does not require a policyholder to make a specified number of payments of a set amount. Instead, so long as the policyholder pays enough to cover the cost of insurance, the policyholder can do so however and whenever she wants.[2] Often, this means that

[2] One exception to this general framework is a guaranteed policy, discussed further below. Guaranteed policies remain in force if a policyholder has already paid a "guarantee amount," which is satisfied if "a) the total amount of premiums paid (net of

policyholders make premium payments based on their personal goals and financial situations: some policyholders pay a lump sum at the outset to keep the policy in force for some set amount of time, while others make either consistent or varying premium payments throughout the life of the policy. *See* Harvey Decl. ¶¶ 6–8.

The policies' second key component is their "accumulation value." When a policyholder makes a premium payment, the payment goes into the accumulation value. After Defendant withdraws the costs of insurance, any excess funds remain in the accumulation value. Defendant is contractually required to credit interest to the accumulation value based on its expectations of future investment earnings (referred to by the parties as "Single-Factor Interest Rate Language").[3] Accordingly, to receive the benefit of the credited interest, a policyholder may wish to make premium payments that exceed the cost of insurance.

Thus, stated differently, the accumulation value refers to funds held by the insurance company in the policyholder's "account." Critically, however, the accumulation value is not a simple cash account, because a policyholder cannot directly withdraw funds from the account as cash. Instead, a policyholder may only "access" the value by doing one of three following things:

(1) Making smaller premium payments that, alone, are insufficient to cover the cost of insurance. Defendant then draws funds from the policy's accumulation value to cover the deficit. *See id.* ¶ 12.
(2) Requesting a partial or full surrender of the policy. *See id.* ¶ 13. Though the policyholder receives their accumulation value in cash when choosing this option, a partial surrender reduces the death benefit, while a complete surrender terminates the policy. *Id.*
(3) Taking a loan against the policy's accumulation value. The policy owner must pay interest on the loan, and any outstanding loan balance reduces the death benefit. *Id.* ¶ 14.

partial surrenders and any policy loan) is equal to or greater than the monthly guarantee premium specified in the policy multiplied by the number of months the policy is in force; or b) the total amount of premiums paid (net of partial surrenders and any policy loan) plus interest at a rate specified in the policy (that is not the credited rate) is equal to or greater than the total monthly guarantee premiums plus interest credited at the specified rate." *See* Harvey Decl. ¶ 31.

[3] The Third Amended Complaint alleges that even though Defendant's expectations of future investment earnings changed over the years, Defendant only credited interest at the policies' minimum rate—3.00%. Accordingly, Plaintiff's theory of liability is that Defendant determined the credited rate based on factors other than expectations of future investment earnings.

Unless the policyholder does one or more of these things, Defendant retains the accumulation value until the policyholder's death. Whether Defendant then pays the accumulation value to a policyholder's beneficiary depends on the death benefit a policyholder selected.

There are three death benefit options—Option 1, a payment of the face amount of the policy without including any accumulation value; Option 2, a payment of the face amount of the policy plus its accumulation value; or Option 3, a payment of the face amount of the policy plus return of premiums paid, also not including any accumulation value. *See* Harvey Decl. ¶¶ 17–22. Thus, Option 2 is the only option that provides a beneficiary with any of the accumulation value in the policyholder's account.

However, it undisputed that 96% of policyholders in the putative class selected Options 1 and 3, the options that do *not* provide beneficiaries with any of the policy's accumulation value. *See id.* ¶ 20. Therefore, for 96% of policyholders, the beneficiary does not receive any accumulation value at the time of the policyholder's death.[4]

Fourth, as mentioned above, 55% of policies in the putative class are "guaranteed" policies. *See see supra* n. 2; Harvey Decl. ¶ 30. A guaranteed policy allows a policyholder to pay a "total" or cumulative amount that guarantees a policy will not lapse, even if the policyholder cannot pay the costs of insurance later on. *Id.* at ¶ 31. The policyholder may pay this amount at any time—i.e., in one lump sum when purchasing the policy, or by making various periodic payments. *Id.* ¶¶ 30–35. Though the cost of a guaranteed policy is greater, the guarantee provides additional security for the policyholder who wants to ensure that her policy does not lapse in light of increasing policy costs. Thus, the policy remains in force regardless of the amount of funds in the accumulation value.[5]

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[4] Plaintiff's model could plausibly lend support to certifying a limited damages class of those who selected the second death benefit option—the 4% of all Option 2 policyholders.

[5] Moreover, "policy owners cannot access accumulation value by varying their payment amount because only actual payments and interest at a specified rate on those payments are considered for the guarantee requirements. And if these policy owners take out a loan or a partial surrender, these amounts reduce the aggregate amount paid for purposes of determining whether the guarantee requirements have been satisfied." Harvey Decl. ¶ 35. In other words, policyholder have little incentive—if any—to access the funds in their accumulation value.

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B. PROPOSED CLASS

Plaintiff seeks to certify the following class:

> All current and former owners of life insurance policies who have received credited interest on policies issued by American General Life Insurance Company, or its predecessors, in the State of California on policy forms that provide that any redetermination of interest rates will be based "only on expectations of future investment earnings" and that have a guaranteed minimum annual effective interest rate of 3.00%.

See Third Amended Complaint ("TAC") ¶ 69. At least 8,897 California policies include the "expectations of future investment earnings" language, and Defendant's interest rates apply to all class members who have held or currently hold policies with this language. *See* Pl's. Ex. 3, Mills Decl. at ¶ 10; *see also* Mot. at 8–10.

C. DAMAGES METHOLODGY

Plaintiff's damages model is based on the difference between the credited interest rate and the rate that should have been credited, had Defendant set the rate based only on its expectations of future investment earnings. Plaintiff's damages expert, Robert Mills, explains how he calculated this difference for each policy based on AmGen's data. *See* Ex. 3, Expert Declaration of Robert Mills ("Mills Decl."), at ¶¶ 15–41, ECF No. 93-3. Mills created software code using a statistical programming language called R, calculating the credited interest for each policy and the interest that should have been credited, based on rates that reflect AmGen's expectations of future investment earnings. *See id.* Then, accounting for the premium payments deducted from each policy, the policies' accumulation values, and the dates at which AmGen redetermined the interest rates, Mills was able to calculate the aggregate amount each policy was under-credited. For example, Plaintiff's policy was under-credited by $1,847.52. *See* Mills Decl. ¶ 39. Mills performed this calculation for 100 other policies, but asserts that the same methodology can determine damages for all policies within the class. *Id.* ¶¶ 40–41.

III. LEGAL STANDARD

To obtain class certification. Plaintiffs bears the burden of showing that the proposed class meets the four requirements of Federal Rule of Civil Procedure 23(a). *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 979-80 (9th Cir. 2011). The four Rule 23(a) requirements are numerosity, commonality, typicality, and adequacy, i.e., (1) the class is so large that joinder of all members is impracticable (numerosity); (2) there are one or more questions of law or fact common to the class (commonality); (3) the named parties' claims are typical of the class (typicality); and (4) the class representatives will fairly and adequately protect the interests of other members of the class (adequacy). Fed. R. Civ. P. 23(a); *Ellis*, 657 F.3d at 980. The Court must perform "a rigorous analysis [to ensure] that the prerequisites of Rule 23(a) have been satisfied." *Wal-Mart Stores v. Dukes*, 131 S. Ct. 2541, 2551 (2011) (citation and internal quotation marks omitted).

Further, Rule 23(b) requires that "the questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). "While Rule 23(a)(2) asks whether there are issues common to the class, Rule 23(b)(3) asks whether these common questions predominate. Though there is substantial overlap between the two tests, the 23(b)(3) test is 'far more demanding,' and asks 'whether proposed classes are sufficiently cohesive to warrant adjudication by representation.'" *Wolin v. Jaguar Land Rover North America*, 617 F.3d 1168, 1172 (9th Cir. 2010) (quoting *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 623 (1997)).

IV. DISCUSSION

A. NUMEROSITY

First, a putative class may be certified only if it "is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). "Impracticability does not mean impossibility, but only the difficulty or inconvenience of joining all members of the class." *Allen v. Hyland's Inc.*, 300 F.R.D. 643, 660 (C.D. Cal. 2014) (cleaned up). Here, joinder is impracticable because at least 8,897 California policies include the "expectations of future investment earnings" language. The parties do not dispute that the numerosity requirement is satisfied.

B. COMMONALITY AND PREDOMINANCE

Second, the commonality requirement is satisfied if "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). Rule 23(b)(3)'s predominance requirement further demands that common questions predominate over questions affecting only individual members. Fed. R. Civ. P. 23(b)(3). The Court addresses commonality and predominance as a single inquiry.

A common question "must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart*, 564 U.S. at 350. "By contrast, an individual question is one where members of a proposed class will need to present evidence that varies from member to member." *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 663 (9th Cir. 2022) (citing *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453 (2016)). To satisfy Rule 23(b)(3), Plaintiff must show by a preponderance of the evidence that the "common question relates to a central issue in its claim," which requires establishing that the "essential elements of the cause of action…are capable of being established through a common body of evidence, applicable to the whole class." *See Olean Wholesale Grocery*, 31 F.4th at 665–66 (citing *Wal-Mart*, 564 U.S. at 349–50).

"Considering whether questions of law or fact common to class members predominate begins, of course, with the elements of the underlying cause of action." *Id.* (cleaned up). The elements for a breach of contract action under California law are: (1) the existence of a contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) damages to plaintiff as a result of the breach. *King v. Nat'l Gen. Ins. Co.,* 129 F. Supp. 3d 925, 939 (N.D. Cal. 2015).

As to the first three elements of breach of contract, there is little doubt that "common body of evidence, applicable to the whole class," would generate common answers for all class members. *See Olean Wholesale Grocery*, 31 F.4th at 666. Specifically, the litigation will turn on Defendant's expectations of future investment earnings, the interpretation of identical policy language within standard form contracts, the interest rate Defendant credited, and the interest rate Defendant should have been crediting. Resolving these common questions would provide a common answer for the class as a whole. *See* Mot. at 13.

Therefore, the crux of the parties' dispute lies in the fourth breach of contract element: harm and damages. Plaintiff quantifies the harm to the class as the difference between the credited interest rate and the rate that should have been credited had Defendant set the rate based only on its expectations of future investment earnings. Plaintiff's expert, Mills, opines that this difference can be calculated for each policy based on AmGen's data. *See* Mills Decl. ¶¶ 32–41.

While Defendant does not dispute Mills' mathematical calculations, which the Court assumes are correct for purposes of this motion, Mills' damages model does not provide a common method for calculating damages on a class-wide basis for two reasons. First, whether particular putative class member suffered harm from under-crediting of interest depends on an individual policyholder's choice of how to fund the policy and whether and how to access the accumulation value. Second, and relatedly, Plaintiff cannot present a common model of damages that is consistent with its theory of liability, as required by *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013). The Court considers each in turn.

1. Policyholder Harm

At the outset, a discussion of the Ninth Circuit's recent decision in *Olean Wholesale Grocery* is instructive. An antitrust case arising out of a price-fixing conspiracy between various tuna suppliers, the class of direct purchasers was required to establish that it "suffered antitrust impact" because of the conspiracy. *Olean Wholesale Grocery*, 31 F.4th at 670. To do so, the class presented an expert who created a regression model indicating that all direct purchasers suffered an antitrust impact in the form of being "overcharged by the same uniform percentage (10.28 percent)." *Id.* at 677.

On appeal, the tuna suppliers argued it was "fundamentally impossible to show common proof of injury" via the class's regression model because "the tuna market is characterized by individualized negotiations and different bargaining power among the purchasers[.]" *Id.* However, the court disagreed, explaining that "it is both logical and plausible that the conspiracy could have raised the baseline prices for all members of the class by roughly ten percent." *Id.* at 678. Even if a jury could conclude that certain class members were unharmed, "the district court did not abuse its discretion" in finding that "each member of the class [could] rely on Dr. Mangum's model to show antitrust impact of any amount." *Id.* at 679.

Moreover, the defendant's expert argued that the plaintiff's 10 percent overcharge theory incorrectly assumed that all purchasers were harmed, even though it did not account for individual differences in each purchaser's transactions. *See id.* at 673. The defendant's expert concluded that the overcharge for individual class members did "not show a positive, statistically significant impact for some 28 percent of the class." *Id.* However, the district court concluded that even those purchasers for whom Defendant's expert did not show a statistically significant impact "could still rely on the plaintiff's regression model as evidence of the conspiracy's impact on similarly situated class members." *Id.* at 675. Thus, the Ninth Circuit affirmed certification of the direct purchaser class.

Unlike in the antitrust context, Plaintiff need not establish "common impact" as an independent element of the breach of contract alleged herein. In other words, in contrast to an antitrust case, "impact" and "damages" here are subsumed within the same breach of contract inquiry. *See id.* at 666 ("Damages are measured only after each plaintiff has demonstrated that the defendant's conduct caused the plaintiff to suffer an antitrust injury."). This is important because *Olean's* holding was confined to the antitrust impact prong, rather than damages: the defendants did not argue that damages calculations precluded class certification. *See id.* at 681 ("Tuna Suppliers have not argued that the complexity of damages calculations would defeat predominance here[.]"). Here, by contrast, Defendant argues that individual damages calculations defeat predominance.

Thus, the question before the Court is whether it is "logical and plausible" that Plaintiff's proposed methodology of calculating harm—the difference between the interest that should have been credited and the interest that actually was—could establish harm and damages on a class-wide basis. *See Olean*, 31 F.4th at 667–68 ("[I]f 'each class member could have relied on [the plaintiffs' evidence] to establish liability if he or she had brought an individual action,' and the evidence 'could have sustained a reasonable jury finding' on the merits of a common question, then a district court may conclude that the plaintiffs have carried their burden of satisfying the Rule 23(b)(3) requirements as to that common question of law or fact.") (quoting *Tyson Foods*, 577 U.S. at 668)).

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In the Court's view, Plaintiff's model fails to establish a class-wide or individual model of damages: even if Plaintiff could establish that Defendant under-credited interest by relying on factors other than its expectation of future investment earnings, any policyholder's harm varies widely based on that individual's years- or decades-long course of conduct over the time period that the individual held the policy.

Unlike the class in *Olean*, Plaintiff has not presented evidence establishing that its under-credited interest model is a viable or cognizable model of harm. Instead, Plaintiff asserts that this is a merits inquiry inappropriate to perform at the class certification stage.[6] Plaintiff is mistaken, because the Court does not go so far as to determine that, on the merits, certain class members did not suffer harm as a factual or legal matter, or that Plaintiff's model could not potentially account for harm to some class members.[7] Rather, the Court holds that individual questions as to the nature and extent of the harm overwhelm common questions as to the breach of contract. In light of the limits on a policyholder accessing accumulation value, Plaintiff's theory of liability ultimately proves untethered from its theory of harm and damages.

On these bases, the Court denies class certification.

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The individualized nature of a policyholder's harm is best illustrated with an example. Take a policyholder who purchases a policy and funds it with an amount slightly over what is needed to cover

[6] Even if construed as a "merits" inquiry, the Court must inquire into the merits to the extent that doing so is necessary to determine whether Rule 23's requirements are satisfied. *See Olean*, 31 F.4th at 667; *see Ellis v. Costco Wholesale Corp*., 657 F.3d 970, 983 n. 8 (9th Cir. 2011) (The court examines the merits of the underlying claim "only inasmuch as it must determine whether common questions exist; not to determine whether class members could actually prevail on the merits of their claims....To hold otherwise would turn class certification into a mini-trial.").

[7] As noted above, Plaintiff's model could plausibly lead support certification of a limited damages class of those who selected the second death benefit option—4% of all policyholders.

costs. After Defendant withdraws costs of insurance and interest accrues, the policyholder has a balance in her account that is insufficient to cover the next period of costs.[8]

At this point, a policyholder must fund his policy to prevent a lapse in coverage (assuming that the policy is not a guaranteed policy). Some policyholders would not fund their policy because of personal choice. *See, e.g.*, Harvey Decl. ¶¶ 4–6 ("Some policy owners fund their policies with a lump sum that is projected to keep the policy in force either for a specified number of years or through maturity."). If a policyholder fails to fund her policy, the policy will lapse, and the policyholder will forfeit the policy's accumulation value.

Accordingly, if a policyholder intended to let her policy lapse regardless of the amount of funds in the accumulation value, Plaintiff's theory as to the difference in accumulation value cannot meaningfully quantify the harm to the policyholder. For example, if a policyholder's goal was to "hav[e] the policy remain in force through the achievement of a certain life milestone, such as a child graduating from college," the policyholder presumably would have forfeited the balance in the accumulation value either way. Though it is possible that a policyholder may not have allowed her policy to lapse if the accumulation value was higher, resolving this question would not only be highly speculative, but would require a highly specific inquiry as to the individual policyholder.

Similarly, if a policyholder died before she was able to fund her policy, the policyholder's beneficiary would receive the death benefit selected by the policyholder. But 96% of policyholders selected a death benefit option that would not lead to any payout of the accumulation value. For these policyholders, too, Plaintiff's damages model would need to account for an *individual* policyholder's choice in selecting a different death benefit option had that individual had a higher accumulation value.

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[8] For example, the policyholder purchases a policy that she funds with $100. This value accrues interest at 3.00%, or $3.00, though Plaintiff alleges that the value should have been accruing at interest at 4.00%. The hypothetical cost of insurance for the period is $50.00. Thus, after Defendant withdraws the policyholder's cost of insurance, the accumulation value decreases from $103.00 to $53.00. Had the correct rate been credited, the value should have been $54.00. After another hypothetical cycle of accruing interest and subsequent withdrawal of costs, the accumulation value is at $4.59, when it should have been $6.16—a difference of $1.57.

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Third, a policyholder may choose not to fund a policy if the policy is a guaranteed policy; as mentioned, guaranteed policies are 55% of those in the class. Assuming that the initial payment was sufficient to satisfy the cumulative guaranteed minimum, the policyholder would have no economic incentive to continue to fund the policy: she would be guaranteed coverage regardless of whether she paid any subsequent policy costs. In that case, Defendant would also retain the accumulation value, unless the policyholder chose to access it in some way, as discussed below.

The Court next considers those who would have funded their policies. One policyholder funds her policy with the bare minimum to prevent lapse. Theoretically, if it were possible to establish that this policyholder would only fund her policy with the bare minimum regardless of the amount in her accumulation value, Plaintiff's damages methodology could potentially quantify the harm to this policyholder. In other words, had her accumulation value been higher, Plaintiff's calculated difference would quantify the amount that she need not have paid into the policy. Yet again, answering this question requires a highly individualized inquiry into the circumstances of that individual policyholder.

A second policyholder funds her policy with more than the bare minimum, meaning that, after costs are withdrawn, the accumulation value is always greater than zero. But as the accumulation value builds in the account, the policyholder can't simply withdraw it as cash. Instead, she has three options to "access" or use those funds: make smaller premium payments, partially or totally surrender her policy, or take a loan against the accumulation value.

With each of these options, the policyholder's harm depends on the subsequent choice she makes. For example, if the policyholder made the same periodic payments until her death, she'd ultimately forfeit her accumulation value (assuming that she, like 96% of other policyholders, selected the Option 1 or Option 3 death benefit). At that point, quantifying her harm would require finding that she would have exercised one of several options, as described above—i.e., by making smaller payments somewhere along the line, or selecting a different death benefit—had she received the correct amount of interest. Otherwise, as with 96% of the putative class members, her accumulation value would be forfeited at death.[9]

[9] Citing an unpublished Third Circuit opinion, Plaintiff contends that "[a]ccepting [AmGen's] argument would mean that an insurance company could simply confiscate the funds of a policy owner at will, so long as the policy was paid up and the owner

Alternatively, the policyholder could decide to partially surrender her policy or take a loan against her accumulation value to access "cash" from the policy. As discussed, a partial surrender reduces the death benefit a policyholder receives, meaning that the increased economic value to the policyholder is actually offset by a decrease in that value at death. Though the upfront cash may be more valuable to the policyholder based on her personal preferences and the time value of money, this value again depends entirely on that policyholder, rather than any motive attributable to the class as a whole. Less than 3% of policyholders have taken partial surrenders since policy inception. *See* Harvey Decl. ¶ 13.

Similarly, if a policyholder would have taken a loan against the accumulation value, Plaintiff's theory of liability again requires determining whether the policyholder would have either taken a loan when she previously had not—or taken a larger loan than the one she took—had she been credited the correct interest. Only approximately 4.6% of policyholders have taken policy loans since policy inception. *Id.* ¶ 14. This policyholder would have then had to pay greater interest on the loan, and any unpaid principal would offset the death benefit she received.

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The above example accounts only for a fraction of the choices that policyholders would have had to make over the many years they've held the policies at issue. But these choices are wholly intertwined with any inquiry into the class's harm, which in turn depends entirely on an individual's choices in funding her policy. Plaintiff presents no common damages method to incorporate all these differences and permutations.

Moreover, though Plaintiff's expert Robert Mills initially opined that Plaintiff's theory feasibly quantified damages, Defendant's counsel asked him how a policyholder would benefit from increased

did not have to pay any additional premiums to fund the policy." *See* Reply at 3 (citing *Prusky v. Aetna Life Ins. and Annuity Co.*, 2006 WL 952320, at *1 (3d. Cir. Apr. 13, 2006)). However, this overlooks a distinction between the question of establishing *any* harm (as the *Prusky* court seemed to consider it), and the question at issue here—the inability to establish harm via a class-wide model. Because *Prusky* was not a class action, the extent to which a diminution in value model fit one plaintiff's harm presents an entirely different question than in this case, which includes a putative class of thousands of plaintiffs.

accumulation value. *See* Declaration of Nancy R. Thomas ("Thomas Decl."), Ex. A, Mills Depo. at 95:12–15, ECF No. 100-2. Mills stated that an increased accumulation value (1) "would increase the surrender value of the policy[,]" *id.* at 95:18–19; (2) "would increase [] the borrowing capacity associated with the policy[,]" *id.* at 95:20–21; (3) "would result in even more interest being credited in the future," *id.* at 95:21–23; (4) could lead to decreased policy costs, *id.* at 95:24–96:2; and (5) could extend the life of the policy, *id.* at 96:12–18.

In other words, Plaintiff's expert agreed with Defendant's argument—that the benefit to a policyholder from increased accumulation value is not the difference between the correct and incorrect credited rate, but the option to surrender the policy for more money, take a larger loan, or hold a policy for more time. The value of this benefit depends on the options exercised by an individual policyholder. For example, if considering all policyholders who died and received a level death benefit, there is no common question as to whether the under-crediting had previously caused them to pay more premiums or otherwise monetize their accumulation value.

In response, Plaintiff relies on a number of insurance cases. The first is an Eight Circuit case, *Vogt v. State Farm Life Ins. Co.*, 963 F.3d 753 (8th Cir. 2020), *cert. denied*, 141 S. Ct. 2551 (2021). *Vogt* was a class action based on an allegation similar to Plaintiff's—that the defendant State Farm "impermissibly included non-listed factors in calculating Cost of Insurance (COI) fees assessed on life insurance policies." *Id.* at 761. In doing so, State Farm "deducted from the monthly premium payments more than what the policy stated would be included in the COI fees." *Id.* On appeal, however, State Farm argued that the plaintiff's damages models were insufficient to support the jury's award of damages for the class because the models "improperly included policyholders who received all the benefits to which they were entitled." *Id.* at 770.[10]

[10] The court also noted that State Farm failed to file a *Daubert* motion or object at trial, waiving any argument regarding evidentiary admissibility. *Id.* at 769. Here, Defendant does not contest Mills' reliability via a *Daubert* motion. However, "[c]ourts have frequently found that expert evidence, while otherwise admissible under *Daubert*, was inadequate to satisfy the prerequisites of Rule 23." *See Olean*, 31 F.4th at 666.

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State Farm argued that a policyholder who had been paid a death benefit had no remaining interest in his account value—and therefore, *no* harm—because, there, like here, the payout of a death benefit did not include any payout of the account value. *Id.* The court disagreed, stating:

> [W]e see no reason to limit damages merely because death benefits have been paid for a policyholder; that policyholder still suffered a depleted account value during his lifetime due to State Farm's overcharges of COI fees. Vogt's damages models, which measure the lost account value for all policyholders during the period in which they held the policies, provide the most reasonable basis for measuring the harm that was incurred during the life of the policyholders.

Id.

State Farm's argument that a policyholder suffered no harm upon payout of a death benefit is not the argument Defendant makes here. The Court agrees that a policyholder has some interest in her account value while she was alive, even if she later passed away and received no death benefit payout. *See id.*; *see also ATLES v. ReliaStar Life Ins. Co.*, 2022 WL 911739, at *13 (D. Minn. Mar. 29, 2022) (disagreeing with the defendant's argument that "the proposed class impermissibly includes uninjured members who lack standing…[because] [e]ven policies that have been paid in full may have suffered damage to their account values by paying excess COI charges."). But Plaintiff's damages model cannot quantify the value of that harm: because the benefit to a policyholder depends entirely on that policyholder's individual circumstances, evaluating harm here would require an individualized inquiry for policyholder. These individual inquiries predominate over the class-wide common questions, precluding certification.

Moreover, *Vogt* only considered the damages question insofar as it relates to the sufficiency of the evidence—not predominance under Rule 23(b)(3).[11] *See id.* at 770. It also does not appear that issues about a policyholder's choices in accessing the account value were before the court.

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[11] The district court addressed the issue in discussing commonality, but its analysis was limited, stating that "even if a death benefit ultimately was paid on a policy, the holder might well have been injured by unauthorized deductions from her Account Value. In short, even deceased policyholders may have been injured by potentially unauthorized deductions from the Account Value." *See Vogt v. State Farm Life Ins. Co.*, No. 2:16-CV-04170-NKL, 2018 WL 1955425, at *4 (W.D. Mo. Apr. 24, 2018).

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Accordingly, based upon the record discussed in *Vogt*, the Court cannot read into the Eight Circuit's statement that the "damages models, which measure the lost account value for all policyholders during the period in which they held the policies, provide the most reasonable basis for measuring the harm that was incurred during the life of the policyholders." *Id.* Without more, the case is only of limited persuasive value.[12]

Next, Plaintiff also relies on *Vida Longevity Fund, LP*, which rejected a defendant's arguments as to lack of standing and predominance. *See Vida Longevity Fund, LP v. Lincoln Life & Annuity Co. of N.Y.*, 2022 WL 986071, at *2–4 (S.D.N.Y. Mar. 31, 2022). Discussing standing, the court disagreed with the argument that class members were uninjured when the insurance company retained the policy's cash value upon payment of the death benefit because "[o]ne can suffer harm — here, the injury-in-fact — where damages are minimal or de minimis." *Id.* at *2. As the Court's example indicates, this is not controversial: accepting Plaintiff's allegations, policyholders suffered harm when they lost the option to take action with knowledge of the correct accumulation value.

The defendant in *Vida Longevity* then argued that the need to determine how policyholders intended to use the amount in their cash value account precluded a finding of predominance. *Id.* at *4. But the court disagreed, stating:

> Whether or not the policyholders planned to use the cash value is of no consequence to the central issue in this matter—the breach of contract. A policyholder could have planned to invest the cash value at a later point in life, while another holder could have planned to surrender the value to

[12] Though the economics underlying the allegations in *Vogt* are similar to Plaintiff's allegations, they are not identical. Vogt alleged that his account's value was too low because his insurance costs were impermissibly high; Plaintiff alleges that its value was too low because Defendant did not credit enough interest. *See Vogt*, 963 F.3d at 761. Despite the economically similar result, there is a closer causal nexus between the amount a policyholder is charged and the amount that policyholder pays (as in *Vogt*) than there is between the amount of interest credited to an account and the amount a policyholder must later pay (as Plaintiff alleges here). Thus, a model calculating diminution in account value more aptly describes the situation in *Vogt*: funds actually paid by a policyholder to keep the policy in force.

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> Defendant upon payment of the benefit. As discussed above, Defendant's failure to abide by its contractual obligations is an injury-in-fact.

Id.

Based upon the conclusory paragraph above—which was the extent of the court's analysis—it is clear that *Vida Longevity* did not include any analysis of the policies' economic realities. The Court disagrees with the conclusion that whether class members planned to use their accounts' value is of "no consequence." The economic value of a plaintiff's harm is critical to calculating contractual damages. *See, e.g., Copenbarger v. Morris Cerullo World Evangelism, Inc.* 29 Cal. App. 5th 1, 9 (2018) ("[I]n the law of contracts the theory is that the party injured by breach should receive as nearly as possible the equivalent of the benefits of performance.")

Moreover, like in *Vogt*, the defendant in *Vida Longevity* argued that class members lacked standing because they suffered no injury-in-fact if they died or otherwise did not "access" their accumulation value. This is not what Defendant argues here. But *Vida Longevity* appears to have conflated the standing question with the Rule 23(b)(3) predominance inquiry—referring to standing in the predominance section of its analysis. *See id.*

As stated above, the Court agrees that class members may well have been injured by virtue of having a lower accumulation value than they should have had. The problem with Plaintiff's model is that it cannot account for the various individual damages questions that will inevitably arise as to a policyholder's use of her accumulation value. Though Plaintiff analogizes this case to that of a bank deducting unlawful fees from a checking account, a person may freely withdraw and access funds from a checking account. Here, because a policyholder's accumulation value is restricted and illiquid, focusing on the balance in the accumulation value overlooks any distinction between liquid and illiquid assets (known generally as a "liquidity premium"). Thus, though Mills' calculations might reflect damages to a bank account or brokerage account based on a clear dollar value, Mills' damages methodology does not reflect the accounts' economic value here.

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For these reasons, the analyses in *Vogt* and *Vida Longevity* are not persuasive. Other than *Vida Longevity*'s brief two-sentence discussion of the issue, no case cited by Plaintiff considered the mechanics of how the accumulation value functions. *See, e.g., Feller v. Transamerica Life Ins. Co.,* No. 216CV01378CASAJW, 2017 WL 6496803, at *13 (C.D. Cal. Dec. 11, 2017); *Spegele v. USAA Life Ins. Co.*, 336 F.R.D. 537, 546 (W.D. Tex. 2020); *Bally v. State Farm Life Ins. Co.*, 335 F.R.D. 288, 300 (N.D. Cal. 2020). Plaintiff's reliance on these cases is unavailing.

Accordingly, the Court finds that individual questions of harm overwhelm the common questions as to Defendant's liability. For these reasons, the Court declines to certify Plaintiff's proposed class as a damages class.

2. Damages Methodology

Defendant also challenges Plaintiff's damages model under *Comcast*. Though "[t]he presence of individualized damages cannot, by itself, defeat class certification under Rule 23(b)(3)[,]" *Leyva v. Medline Indus., Inc.*, 716 F.3d 510, 514 (9th Cir. 2013)), "'plaintiffs must be able to show that their damages stemmed from the defendant's actions that created the legal liability.'" *See Vaquero v. Ashley Furniture Indus., Inc.*, 824 F.3d 1150, 1154 (9th Cir. 2016) (citing *Pulaski & Middleman, LLC v. Google, Inc.*, 802 F.3d 979, 987–88 (9th Cir. 2015)).

Here, however, Plaintiff has failed to show "that 'damages are capable of measurement on a classwide basis,' in the sense that the whole class suffered damages traceable to the same injurious course of conduct underlying [Plaintiff's] legal theory." *Just Film, Inc. v. Buono*, 847 F.3d 1108, 1120 (9th Cir. 2017) (quoting *Comcast*, 569 U.S. at 34).

In *Comcast*, the Supreme Court held that a plaintiff must offer a class-wide damages model consistent with its theory of liability. *See Comcast*, 569 U.S. at 33. There, the plaintiffs asserted four theories of antitrust violations, but the district court certified only one theory to proceed as a class action: that Comcast's activities had an antitrust impact because they reduced the level of competition from "overbuilders," companies that build competing cable networks in areas where an incumbent cable company already operates. *Id.* at 31.

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The plaintiff's expert did not "isolate damages resulting from any one theory of antitrust impact," but instead "assumed the validity of all four theories of antitrust impact initially advanced by [the plaintiffs]." *Id.* at 36. The Court held that the expert's failure to "translat[e] [] the *legal theory of the harmful event* into an analysis of the economic impact *of that event*" precluded a finding of predominance. *Id.* at 38 (emphasis in original) (citing Federal Judicial Center, Reference Manual on Scientific Evidence 432 (3d ed. 2011)).

Plaintiff's model here fails for the same reason. Though Plaintiff contends that its damages model is tied its theory of liability, the damages Plaintiff seeks do not and cannot quantify the economic impact of Defendant's breach. Thus, Mills fails to translate Plaintiff's legal theory of breach into an analysis of the breach's economic impact. *See id.*

As stated by Defendant, "although the existence of individualized damages and any attendant difficulty calculating them cannot defeat certification, the absence of a methodology for calculating damages on a class-wide basis can." *Siino v. Foresters Life Ins. & Annuity Co.*, 340 F.R.D. 157, 163 (N.D. Cal. 2022). Though Plaintiff argues that it is unlike the *Siino* plaintiff, who failed to present any theory for calculating damages, Plaintiff's theory fails to present a methodology that would enable the jury to calculate damages on a class-wide basis. *See id.* (citing *Leyva*, 716 F.3d at 514 ("Medline's computerized payroll and time-keeping database would enable the court to accurately calculate damages and related penalties for each claim."); *Pulaski & Middleman, LLC v. Google, Inc.*, 802 F.3d 979, 989 (9th Cir. 2015) ("Pulaski's principal method for calculating restitution employs Google's Smart Pricing ratio, which ... set[s] advertisers' bids to the levels a rational advertiser would have bid if it had access to all of Google's data...")).

For these reasons, the Court finds that Defendant's *Comcast* argument also precludes certification.

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3. Liability-Only Class[13]

Federal Rule of Civil Procedure 23(c)(4) states that "[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues." Federal Rule of Civil Procedure 23(c)(4). Courts should use Rule 23(c)(4) "only where resolution of the particular common issues would materially advance the disposition of the litigation as a whole." *See Rahman v. Mott's LLP*, 693 F. App'x 578, 580 (9th Cir. 2017) (citing *Jacob v. Duane Reade, Inc.*, 293 F.R.D. 578, 589 (S.D.N.Y. 2013)); *see also Green v. Wolf Corp*., 406 F.2d 291, 301 (2d Cir. 1968) ("We see no sound reason why the trial court…cannot order separate trials…on the question of damages, if necessary. The effective administration of 23(b)(3) will often require the use of the 'sensible device' of split trials.").

Here, resolution of the common liability question would certainly advance the disposition of the litigation: if Plaintiff established Defendant's breach were established, "damages of individual class members can be readily determined in individual hearings, in settlement negotiations, or by creation of subclasses[.]" *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 801 (7th Cir. 2013); *see also Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161, 1167 (9th Cir. 2014) (relying on and approving of *Butler*). Moreover, "[Defendant's] failure to perform a contractual duty is, in itself, a legal wrong that is fully distinct from the actual damages." *Sweet v. Johnson*, 169 Cal. App. 2d 630, 632–633 (1959). As noted above, Defendant's liability for breach of contract—based on its expectations of future investment earnings, the interpretation of the language within each of the identical standard form contracts, and the interest rate Defendant should have been crediting—is common across all policies.

Accordingly, the Court is persuaded that certification of a liability-only class is appropriate here. A class action is the most efficient method of resolving the liability claim at issue. Though Plaintiff fails to show that damages "could feasibly and efficiently be calculated once the common liability questions are adjudicated[,]" *Levya*, 716 F.3d at 514, Plaintiff's showing is more than sufficient to allow the Court to conclude that resolution of the common issues would materially advance this case's disposition as a whole. *See, e.g., Rahman*, 693 F. App'x at 580.

[13] Given its certification of a liability-only class, the Court need not resolve the parties' argument as to whether statute of limitations questions for certain policyholders defeat predominance; the dispute may be more efficiently resolved at a later date.

For these reasons, as well as those discussed in the Court's analysis of superiority requirement in Rule 23(b)(3), the Court hereby certifies a liability-only class of policyholders, as defined by Plaintiff.

C. TYPICALITY

Typicality exists if "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 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." *Rodriguez v. Hayes*, 591 F.3d 1105, 1124 (9th Cir. 2010) (internal quotation marks and citation omitted). "The requirement is permissive, such that representative claims are typical if they are reasonably coextensive with those of absent class members; they need not be substantially identical." *Just Film, Inc. v. Buono*, 847 F.3d 1108, 1116 (9th Cir. 2017) (internal quotation marks and citation omitted). However, "[a] court should not certify a class if there is a danger that absent class members will suffer if their representative is preoccupied with defenses unique to it." *Id.* (internal quotation marks and citation omitted).

Here, Plaintiff's claim is "reasonably coextensive" with putative class members. Defendant's conduct in reviewing and redetermining rates is uniform as to all policies within the class, *see* Ex. 1, Harvey Depo. at 27:5–7, meaning "each class member's claim arises from the same course of events[.]" *See Rodriguez*, 591 F.3d at 1124. Further, each class member makes the same "legal arguments to prove the defendant's liability." *Id.* Defendant makes no argument that typicality cannot be satisfied here. As a result, the Court finds that Plaintiff makes a sufficient showing of typicality pursuant to Rule 23(b)(3).

D. ADEQUACY OF REPRESENTATION

"To determine whether named plaintiffs will adequately represent a class, courts must resolve two questions: '(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?' " *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 985 (9th Cir. 2011) (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998)).

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	2:20-cv-11518-SVW	Date	August 4, 2022
Title	*LSIMC, LLC v. American General Life Insurance Co.*		

Here, there are no apparent conflicts of interest between Plaintiff and any other class members; Plaintiff's liability claim will equally further the claims of other class members. Second, Plaintiff has prosecuted the action vigorously through its experienced counsel Susman Godfrey, which has been appointed as class counsel in a number of similar cases. *See* Mot. at 16. Defendant makes no argument to the contrary. Consequently, the Court finds the adequacy requirement of Rule 23(a)(4) satisfied.

E. SUPERIORITY

Rule 23(b)(3) also requires that Plaintiff demonstrate that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). Rule 23 lists the following factors that Courts should consider in making this determination: "(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." *Id.*

Plaintiff has made the requisite showing here. As to the first factor, it would make little economic sense for class members to seek their own legal redress for Defendant's actions: Plaintiff's estimated damages for its only $1,847.52 before prejudgment interest. In light of the time and money required to litigate this case, "the realistic alternative to a class action is not [ten thousand] individual suits, but zero individual suits[.]" *See Butler*, 727 F.3d at 801 (citing *Carnegie v. Household Int'l., Inc.*, 376 F.3d 656, 661 (7th Cir. 2004)).

Second, Plaintiff indicates that it is neither aware of any similar individual action, nor of any putative class member who has indicated interest in individually managing their own litigation. This too weighs in favor of a finding of superiority. *See Moore v. Ulta Salon, Cosmetics & Fragrance, Inc.*, 311 F.R.D. 590, 625 (C.D. Cal. 2015) (superiority satisfied when there were "only two individuals—out [of] thousands of putative class members" decided to initiate their own litigations).

Third, in light of the common legal and factual questions underlying the liability question, a single forum would best advance interests of efficiency and judicial economy. Defendant does not contest that

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common evidence will satisfy any question as to its liability. A class action would also guard against the possibility of inconsistent results in various different forums.

Fourth, there are no anticipated difficulties in managing this action as a class action.

Ultimately, "[w]here classwide litigation of common issues will reduce litigation costs and promote greater efficiency, a class action may be superior to other methods of litigation," and is certainly superior "if no realistic alternative exists." *In re Snap Inc. Sec. Litig.*, 334 F.R.D. 209, 230 (C.D. Cal. 2019) (quoting *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234-35 (9th Cir. 1996)). No realistic alternative to a class action exists here. For these reasons, a class action is the superior method of litigating the breach of contract claim at issue.

V. CONCLUSION

For the above reasons, the Court hereby ORDERS as follows:

1. This action is certified to resolve the question of Defendant's liability pursuant to Rule 23(c)(4), with the question of damages to be resolved separately.

2. The class shall consist of (the "Investment Earnings Only California Class"):

> All current and former owners of life insurance policies who have received credited interest on policies issued by American General Life Insurance Company, or its predecessors, in the State of California on policy forms that provide that any redetermination of interest rates will be based "only on expectations of future investment earnings" and that have a guaranteed minimum annual effective interest rate of 3.00%.

Excluded from the class are (a) Defendant, its officers and directors, members of their immediate families, and the heirs, successors, or assigns of any of the foregoing; (b) all judges presiding in this case and their chambers staff; and (c) all counsel of record in this case.

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3. Plaintiffs LSIMC, LLC is appointed as the Class Representative.

4. Susman Godfrey L.L.P. is appointed as Class Counsel.

IT IS SO ORDERED.

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