UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

EILEEN-GAYLE COLEMAN, et al.,

Plaintiffs,

v.

UNITED SERVICES AUTOMOBILE ASSOCIATION, et al.,

Defendants.

Case No.: 21-cv-217-RSH-KSC

ORDER:

(1) GRANTING PLAINTIFFS' *EX PARTE* MOTION FOR LEAVE TO FILE SURREPLY;

(2) GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO EXCLUDE; AND

(3) GRANTING IN PART AND DENYING IN PART PLAINTIFFS' RENEWED MOTION FOR CLASS CERTIFICATION.

[ECF Nos. 119, 122, 128]

Following the Court's March 21, 2023, Order denying Plaintiffs' motion for class certification, the Parties filed three motions: (1) Plaintiffs' renewed motion for class certification, ECF No. 119; (2) Defendants' motion to exclude the declarations and testimony of Plaintiffs' experts, ECF No. 122; and (3) Plaintiffs' *ex parte* motion for leave to file a surreply in opposition to Defendants' motion to exclude, ECF No. 128. On

November 30, 2023, the Court held a hearing on the motions with counsel for all parties present. ECF No. 132. For the reasons below, the Court grants Plaintiffs' *ex parte* motion to file a surreply, grants in part and denies in part Defendants' motion to exclude, and grants in part and denies in part Plaintiffs' motion for class certification.

I. BACKGROUND

A. The Parties

USAA is a reciprocal interinsurance exchange composed of several companies. Four of those companies provide auto insurance to members of the military and their families: USAA Casualty Insurance Company, Garrison Property and Casualty Insurance Company, United Services Automobile Association ("United Services"), and USAA General Indemnity Corporation ("GIC"). ECF No. 122-3 ¶ 9. Each of these four companies insures members from different segments of the military. *Id.* Only two of these companies, United Services and GIC, are defendants in this case. ECF No. 49 ¶¶ 11–12. GIC is a wholly owned subsidiary of United Services. *Id.* ¶ 9. Plaintiffs Eileen-Gayle Coleman and Robert Castro formerly served as enlisted military personnel and currently have automobile insurance with collision coverage through GIC. *Id.* ¶¶ 6–7.

B. Auto Insurance Premiums

Auto insurance premiums are calculated in two steps. In the first step, an insurer calculates a "base rate" for a particular type of coverage, which is "the same for each policyholder." ECF No. 122-2 at 2. The base rate "reflects the total annual premium the company must charge all policyholders to cover its projected losses and expenses and obtain a reasonable rate of return." *Spanish Speaking Citizens' Found., Inc. v. Low*, 85 Cal. App. 4th 1179, 1186 (2000) (summarizing calculation of auto insurance premiums). United Services and GIC offer ten different types of coverage, each of which maintains a separate corresponding base rate. ECF No. 122-2 at 4.[1]

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[1] The coverages are bodily injury, property damage, medical payment, uninsured motorist/underinsured motorist bodily injury, uninsured motorist property damage,

In the second step, the base rate is modified by applying various "rating factors" to the policyholder. *See id.* at 2, 5. California insurers are required to apply three rating factors when calculating premiums: driving safety record, annual miles driven, and years of driving experience. *Id.* at 5; Cal. Ins. Code § 1861.02(a)(1)–(3). Insurers are also permitted to apply 15 optional factors.[2] ECF No. 122-2 at 5–6. Each rating factor is "divided into two or more categories which determine whether the policyholder receives a discount or a surcharge." *Low*, 85 Cal. App. 4th at 1187; *see* ECF No. 122-2 at 6. To accomplish these adjustments, each category within a rating factor is given a "relativity," which is a coefficient multiplied against the base rate for each type of coverage. *See id*. at 6–7. "If the base premium were $800, the premium of those in high mileage category would be increased to $1,200 ($800 X 1.5), the premium of those in the low category would be decreased to $400 ($800 X 0.5), and the premium of those in the average category would remain unchanged at $800 ($800 X 1.0)." *Low*, 85 Cal. App. 4th at 1187–88. This process is repeated for all rating factors to arrive at the premium for each type of coverage the policyholder obtains. *Id.* at 1188; ECF No. 122-2 at 2. A policyholder's total premium is the sum of the premiums for each of the types of coverage that the policyholder selects per vehicle. *Id*. An expense fee is then added for each applicable coverage, and—for eligible

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comprehensive, collision, towing and labor, waiver of collision deductible, and rental reimbursement. ECF No. 122-2 at 4.

[2] The optional factors are: (1) type of vehicle; (2) vehicle performance capabilities; (3) type of use of vehicle (pleasure only, commute, etc.); (4) percentage use of the vehicle by the rated driver; (5) multi-vehicle households; (6) academic standing of the rated driver; (7) completion of driver training or defensive driving course by the rated driver; (8) vehicle characteristics (engine size, repairability, etc.); (9) marital status of the rated driver; (10) persistency (years insured by the company); (11) nonsmoker; (12) secondary driver characteristics; (13) multi-policies with the same or an affiliated company; (14) relative claims frequency; and (15) relative claims severity." *Low*, 85 Cal. App. 4th at 1187 (citing Cal. Code Regs. tit. 10, § 2632.5); ECF No. 122-2 ¶ 20. In calculating auto insurance premiums, USAA considers all optional rating factors, except nonsmoker. *Id*. ¶ 22.

policyholders—a good driver discount is applied to the total premium for all coverages. *See id.* at 297.

Since 1989, California insurers have been required to seek approval of their rates from the California Department of Insurance ("CDOI") prior to their use. *See MacKay v. Super. Ct.*, 188 Cal. App. 4th 1427, 1440 (2010) (citing Cal. Ins. Code § 1861.01(c)). To obtain approval from the CDOI, USAA is required to submit a rate application (also known as "filings") for each of the steps outlined above, which include: a "rate filing" containing support for proposed changes to the overall total premium, and a "class plan" containing support for rating factors used to vary premiums for policyholders with differences in expected risk. ECF No. 122-1, Ex. A ¶ 19. These filings for GIC and United Services are publicly available. *Id.* ¶¶ 15, 19.

C. Plaintiffs' Allegations

In their First Amended Complaint ("FAC" or the "Operative Complaint"), Plaintiffs allege that USAA offers insurance to lower-ranking enlisted personnel—military servicemembers on active duty in pay grades E-1 through E-6 (along with veterans who were in those pay grades)—through GIC only. ECF No. 49 ¶ 1. In contrast, higher-ranking current and former military personnel are eligible to obtain insurance through United Services, which offers more favorable premiums. *Id.* ¶ 3.[3] Plaintiffs allege that USAA's practice of separating policyholders between GIC and United Services "discriminates against enlisted military personnel and enlisted veterans by consigning them to its substandard insurance company, [GIC]." *Id.* Plaintiffs also claim that GIC fails to provide the lowest rates to enlisted personnel who qualify for a good driver discount under

[3] Keith Wechsler, USAA's Executive Director of Property and Casualty Product Management, states, "United Services generally insures *higher-ranking* officers and enlisted personnel (E-7 and above), and [] GIC generally insures *lower-ranking* officers and enlisted personnel (E-1 through E-6)." ECF No. 122-3 ¶ 13.

California law, in violation of Section 1861.16(b) of the California Insurance Code.[4] *Id.* ¶ 2. Both named Plaintiffs statutorily qualify for a good driver discount. *Id.* ¶¶ 6–7.

The Operative Complaint asserts four claims against all Defendants. Plaintiffs' first and second claims allege that Defendants engaged in "unlawful" and "unfair" business practices in violation of California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200 *et seq*., by way of violating California Insurance Code § 1861.16(b). ECF No. 49 ¶¶ 70–81. Plaintiffs' third and fourth claims allege discrimination in violation of California's Unruh Civil Rights Act ("Unruh Act"), Cal. Civ. Code § 51(b), and California's Military & Veterans Code § 394(a), respectively. ECF No. 49 ¶¶ 82–103.

Plaintiffs request a range of remedies. Plaintiffs' UCL claims seek restitution and disgorgement of all profits related to the allegedly unfair and unlawful practices, *id.* ¶¶ 74, 81; Plaintiffs' Unruh Act claims seek the greater of three times actual damages or $4,000 per proposed class member, *id.* ¶ 92; and Plaintiffs' Military & Veterans Code claims seek actual damages, *id.* ¶ 103. Plaintiffs demand attorneys' fees and costs as to their Unruh Act and Military & Veterans Code claims. *Id.* ¶¶ 92, 103. Plaintiffs seek an order declaring that Defendants' practices violate UCL § 17200, Unruh Act § 51(b), and Military & Veterans Code § 394(a). *Id.* ¶¶ 74, 81, 92, 103; *id.* at 30. Plaintiffs also seek an injunction "preventing Defendants from continuing to charge discriminatorily high premium rates" to enlisted personnel. *Id.*; *see id.* ¶¶ 74, 81, 92, 103.

D. Plaintiffs' Proposed Classes

During the pendency of Plaintiffs' first class certification motion, the Parties agreed to amend the classes proposed in the Operative Complaint, which the Court approved in its

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[4] Under that provision, "[a]n agent or representative representing one or more insurers having common ownership or operating in California under common management or control shall offer, and the insurer shall sell, a good driver discount policy to a good driver from an insurer within that common ownership, management, or control group, which offers the lowest rates for that coverage." Cal. Ins. Code § 1861.16(b).

March 21, 2023, Order. ECF No. 109 at 6–7, 10. Plaintiffs propose two classes in their renewed class certification motion. ECF No. 119 at 3–4.[5]

Plaintiffs' proposed "Good Driver Class" comprises:

> All enlisted persons who (a) at any time on or after December 28, 2017, purchased or renewed an automobile insurance policy including collision coverage from GIC, (b) qualified as good drivers under Cal. Ins. Code § 1861.025 according to USAA's records, (c) were not offered a good driver discount from United Services, (d) paid more for that policy than they would have paid in United Services, and (e) at any time in which clauses (a) through (d) have been satisfied, garaged vehicles in the State of California.

ECF No. 119 at 3. Plaintiffs assert two UCL claims on behalf of the proposed Good Driver Class. *See id.* at 5–10.[6]

Plaintiffs' proposed "Discrimination Class" comprises:

> All enlisted persons who (a) at any time on or after February 4, 2018,[7] purchased or renewed an automobile insurance policy including

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[5] The class definitions Plaintiffs propose in their renewed class certification motion vary in material ways from the definitions in the October 17, 2022, declarations of Plaintiffs' experts. *See* ECF No. 119-1 ¶ 5 & n.2; ECF No. 119-3 ¶ 15 n.9. Because Plaintiffs have not moved to amend the proposed class definitions again, the Court uses the definitions in Plaintiffs' renewed class certification motion.

[6] The Operative Complaint asserts two UCL claims on behalf of the former proposed Enlisted Policyholders Good Driver Subclass, which resembles the current proposed Good Driver Class. ECF No. 49 ¶¶ 47, 70–81. Plaintiffs' prior filings related to the amendment of the proposed classes do not specify which claims each amended proposed class asserts. *See* ECF Nos. 85, 87, 93. Nevertheless, Plaintiffs' renewed class certification motion treats the proposed Good Driver Class as a replacement for the former proposed Enlisted Policyholders Good Driver Subclass. *See* ECF No. 119 at 5–10. The Court treats the claims accordingly.

[7] Plaintiffs argue that the statute of limitations period for the proposed Discrimination Class should be three years from the filing of their original Complaint on February 4, 2021. ECF No. 119 at 3 n.2. California's three-year statute of limitations applies to "[a]n action upon a liability created by statute, other than a penalty or forfeiture." Cal. Civ. Proc. Code § 338(a). However, "courts are divided as to whether to apply a two- or three-year statute of limitations to Unruh damages claims . . . ." *Montoya v. City of San Diego*, No. 19-cv-54-JM-BGS, 2021 WL 2350927, at *4 & n.4 (S.D. Cal. June 9, 2021) (collecting cases).

> collision coverage from GIC, (b) paid more for that policy than they would have paid in United Services, and (c) at any time in which clauses (a) through (b) have been satisfied, garaged vehicles in the State of California.

Id. at 3–4.[8] Plaintiffs assert the Unruh Act and Military & Veterans Code claims on behalf of the proposed Discrimination Class. *See id.* at 10–15.[9]

The named Plaintiffs purport to be members of both proposed classes. ECF No. 49 ¶¶ 6–7.

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The Ninth Circuit has assumed that "the three-year statute of limitations govern[s] claims under the Unruh Act." *Olympic Club v. Those Interested Underwriters at Lloyd's London*, 991 F.2d 497, 501 n.11 (9th Cir. 1993) (citing Cal. Civ. Proc. Code § 338). This Court is aware of only one decision that has addressed the applicable limitations period for a claim under Military & Veterans Code § 394, and that court applied the three-year limitations period upon agreement of the parties. *See Marion v. Cnty. of Los Angeles*, No. 9-cv-4361, 2009 WL 10670589, at *11 (C.D. Cal. Oct. 8, 2009).

Defendants have not opposed a three-year class period. Because the Discrimination Class's claims are premised on statutory causes of action, this Court concludes that the three-year statute of limitations under California's Civil Procedure Code § 338(a) applies to the Discrimination Class's claims.

[8] Although Plaintiffs slightly modified the definitions of the proposed classes in their renewed motion, the Court analyzes the proposed classes as defined in the renewed motion because the modifications are immaterial, the modifications narrow the proposed classes, and Defendants did not oppose the modifications. *See Bee, Denning, Inc. v. Cap. All. Grp.*, 310 F.R.D. 614, 621 (S.D. Cal. 2015) (finding that courts may analyze "a new class definition that is narrower than the class definition originally proposed, and does not involve a new claim for relief.").

[9] The Operative Complaint asserts the Unruh Act and Military & Veterans Code claims on behalf of the former proposed Enlisted Policyholder Class, which resembles the current proposed Discrimination Class. ECF No. 49 ¶¶ 46, 82–103. Plaintiffs' prior filings related to the amendment of the proposed classes do not specify which claims each amended proposed class asserts. *See* ECF Nos. 85, 87, 93. Nevertheless, Plaintiffs' renewed class certification motion treats the proposed Discrimination Class as a replacement for the former proposed Enlisted Policyholder Class. *See* ECF No. 119 at 10–15. The Court treats the claims accordingly.

E. Procedural History

Plaintiffs filed their original Complaint on February 4, 2021. ECF No. 1. On June 22, 2021, the Court granted in part and denied in part Defendants' motion to dismiss, finding that Plaintiffs failed to state a claim for two UCL causes of action based on an underlying violation of Section 790.03(b) of the California Unfair Insurance Practices Act. ECF No. 22. On November 15, 2021, Plaintiffs filed the operative First Amended Complaint. ECF No. 49.

On March 21, 2023, this Court granted in part Plaintiffs' motion to amend their proposed class definitions, denied Plaintiffs' motion for class certification, and denied as moot Defendants' motion to exclude declarations and testimony from Plaintiffs' experts. ECF No. 109. In denying class certification, "[t]he Court conclude[d] that Plaintiffs ha[d] not met their burden to establish predominance []." *Id.* at 19.

Plaintiffs filed their renewed motion for class certification on June 27, 2023, which the Parties fully briefed. ECF Nos. 119 (motion), 123 (opposition), 125 (reply). On July 21, 2023, Defendants renewed their motion to exclude the declarations and testimony of Plaintiffs' experts, which is likewise fully briefed. ECF Nos. 122 (motion), 126 (opposition), 127 (reply), 128-1 (surreply).[10]

II. DEFENDANTS' MOTION TO EXCLUDE

Defendants move to exclude Plaintiffs' actuarial experts, Jonathan Griglack and Allan I. Schwartz. ECF No. 122. While Defendants' challenges go to the weight—not admissibility—of the opinions of Plaintiffs' experts regarding the proposed Good Driver Class, Defendants' challenges are successful regarding the relevance of the opinions of Plaintiffs' experts as to the proposed Discrimination Class. Accordingly, the Court denies in part and grants in part Defendants' motion for the reasons below.

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[10] Plaintiffs moved *ex parte* for leave to file a surreply in support of their opposition to Defendants' *Daubert* motion, which Defendants oppose. ECF Nos. 128–29. The Court grants Plaintiffs' *ex parte* motion.

A. Legal Standard

Federal Rule of Evidence 702 allows "[a] witness who is qualified as an expert by knowledge, skill, experience, training, or education" to testify. Fed. R. Evid. 702. Before admitting expert testimony, a trial court "must make a preliminary assessment of whether the testimony's underlying reasoning or methodology is scientifically valid and properly can be applied to the facts at issue." *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 592–93 (1993). This requires a court to determine if the expert's reasoning or methodology underlying the testimony: (1) is scientifically valid ("the reliability prong"); and (2) can be applied to the facts at issue ("the relevance prong"). *Id.* The party offering an expert bears the burden of establishing qualification, reliability, and helpfulness by a preponderance of the evidence. *Id.* at 592 & n.10. Nevertheless, "Rule 702 should be applied with a 'liberal thrust' favoring admission." *Messick v. Novartis Pharms. Corp.*, 747 F.3d 1193, 1196 (9th Cir. 2014).

First, an expert's testimony is reliable "if the principles and methodology used by an expert are grounded in the methods of science." *Clausen v. M/V NEW CARISSA*, 339 F.3d 1049, 1056 (9th Cir. 2003). To determine if the expert testimony is reliable, a court may examine: (1) whether the theory or methodology can be (and has been) tested; (2) whether the theory or methodology has been subjected to peer review; (3) the known or potential rate of error of the theory or methodology; and (4) whether the theory or methodology is generally accepted in the relevant scientific community. *Daubert*, 509 U.S. at 593–94. Still, this "list of specific factors neither necessarily nor exclusively applies to all experts or in every case." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141–42 (1999). Expert testimony may also rest on personal knowledge, experience, education, or training of the expert. *Id.* at 150; *see Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1018 (9th Cir. 2004). "[T]he law grants a district court the same broad latitude when it decides *how* to determine reliability as it enjoys in respect to its ultimate reliability determination." *Kumho Tire*, 526 U.S. at 141–42. In doing so the court must act as "a gatekeeper, not a fact finder." *Primiano v. Cook*, 598 F.3d 558, 565 (9th Cir. 2010) (citation

and quotation marks omitted). "Disputes as to the strength of [an expert's] credentials, faults in his use of [a particular] methodology, or lack of textual authority for his opinion, go to the weight, not the admissibility, of his testimony." *Kennedy v. Collagen Corp.*, 161 F.3d 1226, 1231 (9th Cir. 1998) (quoting *McCullock v. H.B. Fuller Co.*, 61 F.3d 1038, 1044 (2d Cir. 1995)). "Challenges that go to the weight of the evidence are within the province of a fact finder, not a trial court judge." *City of Pomona v. SQM N. Am. Corp.*, 750 F.3d 1036, 1044 (9th Cir. 2014).

Second, the relevance prong requires the expert's testimony be "'relevant to the task at hand,' i.e., that it logically advances a material aspect of the proposing party's case." *Daubert v. Merrell Dow Pharms., Inc.*, 43 F.3d 1311, 1315 (9th Cir. 1995) [hereinafter, "*Daubert II*"] (quoting *Daubert*, 509 U.S. at 597). Relevance requires opinions that would assist the trier of fact in reaching a conclusion necessary to the case. *See Kennedy*, 161 F.3d at 1230.

Ultimately, "*Daubert* does not require a court to admit or to exclude evidence based on its persuasiveness; rather it requires a court to admit or exclude evidence based on its scientific reliability and relevance." *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 982 (9th Cir. 2011). Nevertheless, "conclusions and methodology are not entirely distinct from one another." *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997). "A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered." *Id.* "Basically, the judge is supposed to screen the jury from unreliable nonsense opinions, but not exclude opinions merely because they are impeachable. The district court is not tasked with deciding whether the expert is right or wrong, just whether his testimony has substance such that it would be helpful to a jury." *Ala. Rent-A-Car, Inc. v. Avis Budget Grp., Inc.*, 738 F.3d 960, 969–70 (9th Cir. 2013). "Shaky but admissible evidence is to be attacked by cross examination, contrary evidence, and attention to the burden of proof, not exclusion." *City of Pomona*, 750 F.3d at 1043–44 (quoting *Primiano*, 598 F.3d at 564).

At the class certification stage, the court considers only whether the expert evidence is "useful in evaluating whether class certification requirements have been met." *Tait v. BSH Home Appliances Corp.*, 289 F.R.D. 466, 495–96 (C.D. Cal. 2012) (citing *Ellis*, 657 F.3d at 982). "Although courts should still evaluate challenged expert testimony in support of class certification under *Daubert*, that analysis must not be dispositive; rather, 'an inquiry into the evidence's ultimate admissibility should go to the weight that evidence is given at the class certification stage.'" *Bally v. State Farm Life Ins. Co.*, 335 F.R.D. 288, 297 (N.D. Cal. 2020) (quoting *Sali v. Corona Reg'l Med. Ctr.*, 909 F.3d 996, 1006 (9th Cir. 2018)). At class certification, "the relevant inquiry is a tailored *Daubert* analysis which scrutinizes the reliability of the expert testimony in light of the criteria for class certification and the current state of the evidence." *Rai v. Santa Clara Valley Trans.*, 308 F.R.D. 245, 264 (N.D. Cal. 2015).

B. Plaintiffs' Experts

In support of their renewed class certification motion, Plaintiffs submitted new declarations and reports from their experts, Griglack and Schwartz. *See* ECF Nos. 119-1, 119-2, 119-3, 119-4. Griglack has worked as an actuary for nearly a decade. *See* ECF No. 58-3, Ex. B (resume) at 268. Schwartz has worked as an actuary for over 46 years. *See* ECF No. 119-3, Ex. A (curriculum vitae) at 1, 4–5. Together, the two developed a model with the purpose of calculating to what degree GIC's insureds would be better off if their auto-insurance policy had been issued by United Services instead. In its simplest form, Plaintiffs' model uses two formulas—one to calculate Variable A (an insured's GIC premium), and another to calculate Variable B (a hypothetical premium for the insured if United Services had issued their policy)—and then calculates the difference between the outputs of both formulas (Variables A and B) at eight sample dates. *See* ECF No. 119-3 ¶¶ 6–10, 15–23. To develop their model, Plaintiffs' experts essentially:

1. Conducted a quality control review of historic data Defendants produced on GIC's insureds;

2. Developed a formula that replicates how GIC calculates premiums using the base rates, rating factors, and relativities from USAA's public rate filing;
3. Applied the formula to Defendants' data on GIC's insureds to calculate their GIC premium (Variable A) on eight sample dates;
4. Adapted the formula to replicate how United Services calculates premiums using the base rates, rating factors, and relativities from GIC's public rate filing;
5. Applied the adapted formula to Defendants' data on GIC's insureds to calculate what their premium would have been (Variable B) on the same eight sample dates, if United Services had issued their policy; and
6. Calculated for each insured the difference between their GIC premium and their hypothetical United Services premium (Difference = Variable A – Variable B) at each of the eight sample dates, to determine if the insured would have been better off with a policy from United Services instead of GIC, and what their damages would have been in various scenarios.

A central premise underlying Plaintiffs' model is the fact that GIC and United Services follow the same set of detailed instructions in USAA's public rate filing when calculating premiums for their policyholders, but they apply base rates and relativities that differ between the companies. *See* ECF No. 122-2 at 51–335; *see also* ECF No. 119-1 ¶¶ 23, 25. Because the set of instructions in USAA's public rate filing—while detailed—does not unequivocally explain every step required to arrive at a premium, Plaintiffs' experts developed a formula based on the instructions. *Id.* ¶¶ 25–31. Plaintiffs' experts used this formula to apply GIC's base rates and relativities to reconstruct a GIC premium for Variable A in steps 2–3 above, and then adapted the formula to apply United Services' base rates and relativities to calculate a hypothetical United Services premium for Variable B in steps 4–5. *Id.*

Importantly, GIC itself maintained data on the premium amount it expected to receive from a policyholder based on their coverage (i.e., the "premium payable"), which GIC included in the data Defendants produced to Plaintiffs for each of the eight sample

dates.[11] But for reasons discussed further below, Plaintiffs' experts did not use these values for Variable A in their model. *See id.* ¶¶ 39–40. Instead, Plaintiffs' experts used the GIC premiums payable data to test the accuracy of their formula, by comparing the reconstructed GIC premiums against the GIC premiums payable included in Defendants' data. *Id.* Plaintiffs' experts found that their formula was able to produce reconstructed GIC premiums that were within 5% (above or below) of the GIC premiums payable for 97% of policies, with 90-to-92% of the reconstructed GIC premiums being within 1% (above or below) of the GIC premiums payable. *Id.* Plaintiffs' experts opine that defects in Defendants' data—gaps or apparent inaccuracies—are largely to blame for their formula's inability to reconstruct all GIC premiums in a way that more closely matches the data on GIC's premiums payable. *Id.* ¶¶ 36–37.

Nevertheless, Plaintiffs' experts further opine that any data defects or missteps in reconstructing the GIC premiums for Variable A will proportionately affect the hypothetical United Services premiums for Variable B, because both are calculated by applying the same formula to the same policyholder data, albeit with different inputs for the base rates and relativities. *Id.* ¶¶ 37, 43. In other words, Plaintiffs' experts claim that if their formula produces a Variable A (reconstructed GIC premiums) that varies slightly from the premiums payable, their formula will produce a Variable B (hypothetical United Services premiums) that varies proportionately. For this reason, Plaintiffs' experts determined that their model would be more accurate if it calculated the difference between Variables A and B, as derived by Plaintiffs' formulas, instead of calculating the difference between the GIC premiums payable from Defendants' data for Variable A, and the hypothetical United Services premiums derived by Plaintiffs' formula for Variable B. *Id.* Therefore, Plaintiffs' experts used the reconstructed GIC premiums calculated by their formula for Variable A in Plaintiffs' model, rather than the GIC premiums payable

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[11] In their briefing, the Parties refer to "premiums payable" as "given premiums" or "quoted premiums."

included in Defendants' data. *Id.* Given that Plaintiffs' model seeks to measure whether, and to what degree, GIC's policyholders would have been better off if United Services had issued their policy, Plaintiffs' experts reason that using the reconstructed GIC premiums—rather than the GIC premiums payable from Defendants' data—ensures that their model measures the difference (or "spread") between Variables A and B more accurately. ECF No. 126 at 11–13 & n.3.

The Court summarizes below each expert's involvement in the above six steps, before addressing Defendants' challenges.

1. Data Quality Control Review

At Plaintiffs' request, Defendants produced data regarding GIC's policyholders on eight sample days: March 31 and September 30 of 2018, 2019, 2020, and 2021. *See* ECF No. 119-1 ¶ 4–5, 7. Upon discovering "defects" in Defendants' data during a quality control review, Griglack first "took various actions" detailed below. *Id.* ¶ 32.

(1) Griglack excluded 0.49% (9,526 vehicles) of the total vehicles because he was unable to rate them due to data defects. *Id.* ¶¶ 32–33. In some instances, Defendants' data listed vehicle indicators of "-" or "UNKNOWN." *Id.* ¶ 34(a). In other instances, the data indicated a "9" for a vehicle's symbol relativity for collision and comprehensive coverages, but GIC's rating manual skips "9" in its section on vehicle symbol relativities. *Id.* ¶ 34(b); *see* ECF No. 122-2 at 185.

(2) Defendants insure enlisted personnel and their spouses, but the putative classes include only enlisted personnel. Although the data identified certain insureds as "WIDOWED," it did not indicate if the widow(er)s were enlisted or not. ECF No. 119-1 ¶ 38(a). After requesting clarification, Plaintiffs claim Defendants provided a separate list of widow(er)s who were not enlisted. *Id.* But the list contradicted the data Defendants previously produced because several of the insureds had marital statuses other than "WIDOWED." *Id.* Thus, Griglack excluded policyholders who were both on the Defendants' list of non-enlisted widow(er)s, and identified as "WIDOWED" in Defendants' data. *Id.*

(3) Griglack found the amount that policyholders were to be charged for a certain type of coverage was accounted for twice in Defendants' data. *Id.* ¶ 38(d). Specifically, the data provided the premium amounts charged to policyholders for "extended benefit" coverage. *Id.* But these "extended benefit" premium amounts were also incorporated into the premium amounts that Defendants' data indicated was for "medical payment" coverage. *Id.* In other words, Griglack found that the premium amount attributed to "medical payment" coverage in Defendants' data was actually a combined total of the premiums charged for both "medical payment" and "extended benefit" coverage. *Id.* Accordingly, he deducted the "extended benefit" premiums from the "medical payment" premiums to ensure Defendants' data accurately stated the premium amount charged to policyholders for "medical payment" coverage. *Id.*

(4) Because Defendants did not include vehicle and trailer age in the data, Griglack reverse calculated them using other values in the data (e.g., trailer premiums, trailer values, policy effective date, and model year). *Id.* ¶ 38(b)–(c).

(5) While Defendants' data indicated when a vehicle maintained "ride-share gap protection" coverage, it did not include the relativity Defendants applied to account for that additional coverage in the policyholder's premium. *Id.* ¶ 38(e). Therefore, Griglack assigned a relativity of 1.07 to the policyholders that maintained this additional coverage, which is the relativity applicable to this additional type of coverage according to GIC's Rating Manual. *Id.*; *see* ECF No. 122-2 at 268.

(6) Griglack reverse calculated car replacement assistance premiums using other values in the data because Defendants did not provide it. ECF No. 119-1 ¶ 38(f).

(7) Although married policyholders receive a discount, Defendants' data sometimes listed "0" for the marital status of some policyholders. ECF No. 122-1 at 223–24. Because Defendants do not explain what a marital status of "0" means, Griglack assumed those

policyholders would not be entitled to a discount and applied a relativity of "1" to them. *Id.*[12]

Finally, Griglack noted several "data entry errors" with the number of at-fault car accidents and traffic violation convictions for certain policyholders. ECF No. 119-1 ¶¶ 35–37. In his report, he provides two examples where Defendants' data lists "8" at-fault car accidents or traffic violation convictions for an insured. *Id.* ¶ 35. Using the data as is, Griglack's formula calculated reconstructed GIC premiums for the two example policyholders that were between 48% and 303% greater than GIC's premiums payable. *Id.* However, by lowering the number of at-fault car accidents or traffic violation convictions to "1," the exact same formula produced reconstructed GIC premiums for both policyholders within 1% of GIC's premiums payable. *Id.* Nonetheless, Griglack did not correct the at-fault car accidents or traffic violation convictions within the data. *Id.*[13] After notifying Defendants of these errors, Griglack claims Defendants addressed the errors in the data for one sample date, but not the other seven. *Id.* Because Griglack did not correct these alleged data entry errors, he claims that they continue to distort the reconstructed and hypothetical premiums. *Id.* When asked at the hearing if the data produced was free of defects, Defendants declined to make such a representation.

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[12] Defendants seem to object to this correction by Griglack, but they do not explain if (or how) this correction is incorrect, whether it is an error in the data, or the degree to which it impacts Plaintiffs' analysis, if at all.

[13] Defendants assert that Griglack is unreliable because he "arbitrarily" modified Defendants' data to lower the number of traffic violation conviction and at-fault car accidents. ECF No. 122 at 9. But his report does not indicate that he corrected these purported errors in Defendants' data. ECF No. 119-1 ¶¶ 35–37. In the portion of his deposition transcript attached to Defendants' *Daubert* motion, Griglack confirmed that he did not correct the data. ECF No. 122-1 at 219. In their opposition brief, Plaintiffs also confirm that Griglack did not make these corrections to the data. ECF No. 126 at 9 ("[H]e lowered points/accidents only to test the possibility that the data was incorrect but used the values for points/accidents in the spreadsheets when performing the analyses.").

2. Replicating GIC's Premium Payable Formula

Under California law, all insurers like GIC must publicly file a group rate and class plan filing with the CDOI, which documents how the insurer calculates premiums for its policyholders. *See* ECF No. 119-1 ¶¶ 11–31. USAA files a single filing for all four of its companies, including GIC and United Services. *See id.*; ECF No. 122-2 at 51–335. This filing has two key components: (1) the "Rule Manual," which outlines step-by-step the process to calculate a premium for USAA policyholders; and (2) the "Rating Manual," which contains the various different inputs each USAA company applies to calculate the premium using the process outlined in the Rule Manual, such as the base rates for each type of coverage, and the relativities assigned to each rating factor. *See id.*; ECF No. 119-1 ¶¶ 11–31. In other words, although GIC and United Services may apply different base rates to the same coverage and may weigh a driver's characteristics differently in quoting a premium, the steps used to calculate that premium are the same for both companies.

Nevertheless, USAA's group rate and class plan filing does not execute itself. Instead, Griglack used USAA's Rule Manual to develop a formula that replicates how GIC calculates premiums payable for its policyholders. *See id.* Griglack input into the formula the various base rates and rating factor relativities from GIC's portion of the Rating Manual. *See id.*

3. Applying The Formula to Derive Variable A

Griglack then applied his formula to Defendants' data, which Griglack corrected as described above. *See id.* This data included the various driver and vehicle characteristics necessary to calculate a premium payable for all GIC policyholders using USAA's Rating Manual during the relevant class period. *See id.* By applying his formula to the corrected policyholder data, Griglack produced a reconstructed GIC premium (Variable A) for each policyholder. *See id.*

However, included in Defendants' data were GIC's premiums payable for each policyholder on the eight sample dates. *See id.* ¶¶ 39–40. These premiums payable were precisely what Griglack's formula sought to reconstruct for Variable A. As such, Griglack

was able to test the accuracy of his formula by comparing his reconstructed GIC premiums to the GIC premiums payable for each policyholder in Defendants' data. *Id.* Griglack found that his reconstructed GIC premiums were within 5% (above or below) of the GIC premiums payable for 97% of policies, with 90-to-92% of the reconstructed GIC premiums being within 1% (above or below) of the GIC premiums payable.. *Id.* ¶ 39. Griglack opined that his formula was unable to reconstruct all GIC premiums payable with 100% accuracy due to the alleged defects in Defendants' data discussed above. *Id.* ¶¶ 36–37, 39–43; *see supra* Part II(B)(1).

4. Adapting The Formula For United Services

Next, Griglack adapted his formula by replacing the various GIC inputs with the base rates and rating factor relativities from United Services' portion of USAA's Rating Manual. *See* ECF No. 119-1 ¶¶ 27–31. Although Griglack claims to have attached to his report examples demonstrating this process, Plaintiffs did not attach those examples. *See id.*

Thus, as the Court understands the representations in Griglack's report, his formula appears to have applied—as an example—the $428.94 base rate premium for bodily injury coverage, as stated in GIC's portion of the Rating Manual. *See* ECF No. 122-2 at 51. But once adapted, Griglack's formula would have applied a $341.72 base rate premium, which United Services' portion of the Rating Manual states was applicable for bodily injury coverage. *See id.* As another illustration of this, Griglack's formula appears to have multiplied a policyholder's bodily injury coverage base rate by the relativity assigned to the number of years of driving experience the vehicle operator has. *See id.* at 294. For a driver with zero years of experience, Griglack's formula appears to have applied the 2.08 relativity from GIC's portion of the Rating Manual when calculating premiums. *See id.* at 228. But once adapted, Griglack's formula would have applied the 2.01 relativity from United Services' portion of the Rating Manual. *See id.* at 224.

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5. Applying The Formula to Derive Variable B

Using the same set of Defendants' data that he used to calculate Variable A above, Griglack applied his adapted formula to produce a hypothetical United Services premium (Variable B) for each policyholder. *See* ECF No. 119-1 ¶¶ 11–31. This value represented what a putative class member's premium payable would have been in a counterfactual world where United Services issued the insured's policy for the exact same coverage. Because Griglack was calculating the premium applicable to the policyholders in a counterfactual world, Defendants' data did not include a United Services premium payable amount (Variable B) that Griglack could use to check the accuracy of his adapted formula, like he did for the GIC premiums payable for Variable A.

6. Calculating The Difference Between Variables A and B

Relying on the results of Griglack's work above, Schwartz calculated for all policyholders across all eight sample dates the difference between their GIC premiums (Variable A) and their United Services premiums (Variable B). *See* ECF No. 119-3 ¶¶ 16–17. For Variable B in the model, Schwartz used the hypothetical United Services premiums calculated by Griglack's adapted formula. *Id.* ¶¶ 6, 16–18.

However, Schwartz had two options to use for Variable A in the model: (1) the GIC premium payable amounts included in Defendants' data; or (2) the reconstructed GIC premiums calculated by Griglack's formula, of which 90-to-92% were within 1% (above or below) of the GIC premiums payable, and 97% were within 5% (above or below) of the GIC premiums payable. *Id.* ¶ 17. Put differently, Schwartz had to decide whether he would compare the hypothetical United Services premiums to either the premium payable amounts that GIC had previously calculated for policyholders on each sample date, or the slightly inaccurate reconstructed GIC premium amounts from Griglack's formula. Schwartz ultimately decided to use the latter reconstructed GIC premiums for Variable A. *Id.* He reasoned that any discrepancies in the reconstructed GIC premiums "could be caused by data reporting issues from the Defendants." *Id.* Therefore, Schwartz decided that using the reconstructed GIC premiums was more accurate because "data reporting issues

would impact both the [reconstructed] GIC and [United Services' hypothetical] premiums for a policyholder and would likely offset each other to a large extent." ECF No. 119-3 ¶ 17.

For his Good Driver Class damages model, Schwartz first calculated the total difference between the United Services and GIC premiums for all insurance policies across the eight sample dates for the proposed Good Driver Class. *See id.* ¶ 6. Schwartz began by subtracting Variable B (the hypothetical United Services premium) from Variable A (the reconstructed GIC premium) for each policy on each sample date. *Id.* ¶¶ 6, 16–18. At each sample date, Schwartz then excluded all instances where a policy's GIC premium was already cheaper than its hypothetical United Services premium (i.e., Variable B, the hypothetical United Services premium, was greater than Variable A, the reconstructed GIC premium). *Id.*[14] Finally, Schwartz totaled the difference between Variables A and B for all of the instances where United Services' premiums were cheaper than GIC's premiums across the eight sample dates, which represented the total amount of money GIC's policyholders would have saved, if their policies had been issued by United Services instead. *Id.* In total, Schwartz calculated $150,401,083 in damages for the proposed Good Driver Class. *Id.* ¶ 5.

For the proposed Discrimination Class, Schwartz developed two damage calculation models: (1) a primary discrimination model, and (2) an alternative discrimination model. *Id.* ¶¶ 7, 19. Under the primary discrimination model, Schwartz subtracted Variable B (the hypothetical United Services premium) from Variable A (the reconstructed GIC premium) for each policy on the sample dates, similar to the Good Driver Class damages model. *Id.*

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[14] The proposed Good Driver Class claims that the Insurance Code required United Services to sell statutory good drivers an insurance policy, only if it was the cheapest policy from the companies within USAA's common ownership. Insurance policies are typically sold for 6-month periods. Therefore, members of the proposed Good Driver Class would be injured only for the policy periods when United Services' premiums would have been cheaper than GIC's premiums for the same coverage.

¶¶ 7–9. Unlike the proposed Good Driver Class damages model, Schwartz did not exclude the instances where a policy's premiums would have been cheaper if issued by GIC instead of United Services for that policy period. *Id.* ¶¶ 8–9.[15] Instead, Schwartz totaled the differences in premiums for each policy across all eight sample dates—including when those differences reduced the total amount of would-be savings for the proposed Discrimination Class because GIC's premiums were cheaper (i.e., when subtracting Variable B from Variable A resulted in a negative number). *Id.* Using the primary discrimination model, Schwartz calculated total damages for the proposed Discrimination Class of $170,145,027 for the Military & Veterans Code claims, and $900,728,251 for the Unruh Act claims. ECF No. 119-3 ¶¶ 5, 13.

Schwartz also developed an alternative discrimination model, which he claims accounts for the fact that the overall total premiums USAA received from both GIC's and United Services' policyholders would have declined if United Services had issued its generally cheaper policies for all of GIC's policyholders. *See id.* ¶¶ 10, 19–23; *see also* ECF No. 85-4 at 282–85, 322. Schwartz states he started by calculating the dollar amount by which USAA's total premiums would decline if United Services had insured all GIC policyholders. *See* ECF No. 119-3 ¶¶ 10, 19–23; *see also* ECF No. 85-4 at 282–85, 322. Next, Schwartz claims that he calculated a percentage by which United Services' total premiums would need to increase to generate enough revenue for USAA to compensate for the decline in GIC premiums resulting from United Services insuring the GIC policyholders, such that USAA's total premiums revenue would remain the same. *See* ECF

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[15] The proposed Discrimination Class claims that Defendants unlawfully discriminated against class members by segregating them into different companies—and thereby subjecting them to different premiums—based on their military employment, position, or status. In contrast to the proposed Good Driver Class, members of the proposed Discrimination Class would be injured only if the alleged discrimination—receiving policies from GIC instead of United Services because of their military position—resulted in more expensive premiums in the aggregate across the entire class period.

No. 119-3 ¶¶ 10, 19–23; *see also* ECF No. 85-4 at 282–85, 322. Schwartz then states that he multiplied this percentage against Griglack's hypothetical United Services premiums to generate a modified Variable B. *See* ECF No. 119-3 ¶¶ 10, 19–23; *see also* ECF No. 85-4 at 282–85, 322. After subtracting his modified Variable B (the modified hypothetical United Services premiums) from Variable A (the reconstructed GIC premiums), Schwartz states that he totaled the difference in premiums for each policy across all eight sample dates. *See* ECF No. 119-3 ¶¶ 10, 16, 19; *see also* ECF No. 85-4 at 282–85, 322. According to Schwartz, he then excluded all policies where the policyholder's total modified hypothetical United Services premiums were more expensive than the total reconstructed GIC premiums (i.e., the policyholder was not damaged because they would have paid more over the lifetime of their policy had it been issued by United Services instead of GIC). *See* ECF No. 119-3 ¶ 10; *see also* ECF No. 85-4 at 282–85, 322. Finally, Schwartz states that he aggregated the total premium differences for all remaining policies. *See* ECF No. 119-3 ¶ 10; *see also* ECF No. 85-4 at 282–85, 322. Based on Schwartz's calculations under the alternative discrimination model, the proposed Discrimination Class's damages total $109,576,928 for the Military & Veterans Code claims, and $797,138,451 for the Unruh Act claims. ECF No. 119-3 ¶ 5.

Despite Schwartz's characterizations about his alternative discrimination model in the preceding paragraph, Plaintiffs have been unable to explain how the goals of this model were applied in practice. For example, even if Schwartz's model is designed to ensure that USAA's total premiums remain the same in the aggregate, Plaintiffs have not accounted for how this model reliably determines liability or damages for each class member. At the hearing on Defendants' *Daubert* motion, the Court provided Plaintiffs' legal team an opportunity to clarify Schwartz's methodology or point to additional material in the record that could. Plaintiffs' counsel candidly stated that they were unable to do either.

C. Analysis

Defendants move to exclude the reports and testimony of both of Plaintiffs' experts under Rule 702. ECF No. 122 at 4. Defendants' challenges to Plaintiffs' experts—like the

opinions of the experts—are so intertwined that the Court addresses Defendants' arguments regarding both experts together below.

1. Corrections To Alleged Data Defects

Defendants first claim that Griglack corrected defects in Defendants' data on a "completely arbitrary basis," which tainted any subsequent analysis by Plaintiffs' experts. *Id.* at 9. Defendants mischaracterize Griglack's methodology.

Defendants do not argue that the data they produced was free of defects. *See* ECF No. 122-2 (Decl. of USAA Director of Property and Casualty Pricing and Reserving Actuary) at 12 ("USAA does not have a system in place that would have allowed us to quickly and accurately provide the information that Plaintiffs wanted. . . . Since approximately December 2021, we have created numerous iterations of the spreadsheet. Each one improves considerable in terms of accuracy and completeness."). At the hearing on this motion, Defendants conceded there were "a few" errors in the data they produced. Defendants also do not suggest that Griglack's corrections should have been made in a different fashion. *See* ECF No. 122 at 9. Instead, they claim only that Griglack's corrections "could be wrong." *Id.* However, "plaintiffs' expert 'used the best available data, which [came] from the [defendants] [them]sel[ves].'" *Hemmings v. Tidyman's Inc.*, 285 F.3d 1174, 1188 (9th Cir. 2002) (affirming district court's refusal to exclude expert testimony because the data upon which the expert relied was not "so incomplete 'as to be irrelevant.'" (citation omitted)). Defendants' speculative claim that the corrections Griglack made "could be wrong" is an insufficient basis for this Court to deem his entire methodology unreliable. Indeed, such a ruling would place litigants in a Catch-22 where a party could produce defective data, and exclude an expert for either correcting such defects, or failing to make accurate calculations despite such defects. To the extent that Defendants disagree with Griglack's corrections, such criticisms go to the weight of his testimony, not its admissibility. *See Spearman Corp. Marysville Div. v. Boeing Co.*, No. 20-cv-13, 2022 WL 6751797, at *4 (W.D. Wash. Oct. 11, 2022) (denying motion to exclude that argued expert "failed to apply any method to address the known errors in the data and relied on flawed

data"); *Medlock v. Taco Bell Corp.*, No. 7-cv-1314, 2015 WL 10791410, at *5 (E.D. Cal. Dec. 11, 2015) (declining to exclude expert despite defendants' claim that plaintiffs' expert failed to remove over 66,000 data entry errors prior to analysis because such arguments went to the "weight" of the expert's testimony); *Apple iPod iTunes Antitrust Litig.*, No. 5-cv-37, 2014 WL 4809288, at *3 (N.D. Cal. Sept. 26, 2014) (declining to exclude expert where "[t]he dataset consist[ed] of Apple's complete sales records for the models of iPod covered by the class definition and sold during the class period, stripped of obvious outliers (e.g., sales where the price was zero or negative, or many times the listed retail price) and incomplete records.").

2. Reliability of GIC Premiums

Defendants also contend that the opinions of Plaintiffs' experts are unreliable because the values used for Variable A (the GIC premiums) in Plaintiffs' model are incorrect. *See* ECF No. 122 at 9–11, 14–18. Specifically, Defendants take issue with the fact that Plaintiffs' experts used reconstructed GIC premiums because they not only differ from the premiums payable that GIC actually calculated for each policyholder, but they also differ from the premiums policyholders actually *paid* GIC for their policies. *See id.* While Defendants' objections are fertile grounds for cross examination, they do not warrant exclusion of Plaintiffs' experts at the class certification stage.

i. Failure to Use Paid Premiums

In Defendants' view, Plaintiffs' experts err by failing to use for Variable A the premiums policyholders actually paid to GIC, which can differ from GIC's premium payable if a policyholder cancels or makes other mid-policy changes outside of Plaintiffs' eight sample dates. *Id.* at 9–10. By using only eight sample dates, Defendants argue that Griglack does not "account for any changes made by policyholders in the six-month periods between each of the eight snapshot dates (such as adding or subtracting vehicles or coverages, or changing one or more coverage limits, getting into an accident or getting a speeding ticket, or moving to a different address)." *Id.* at 10; *see id.* at 17–18; ECF No. 127 at 6. For example, Defendants' expert economist and statistician Bruce A. Strombom,

Ph.D., compared the named Plaintiffs' premiums paid to GIC against their GIC premiums payable. ECF No. 122-1 at 189–90. While Plaintiff Coleman's GIC premiums payable totaled $10,605.66 across all eight sample dates, she ultimately paid $10,514.56 in premiums, or 0.9% ($91.10) less, due to mid-policy changes and cancellations. *Id.* at 195 (Ex. F-1). While Plaintiff Castro's GIC premiums payable totaled $10,520.33 across all eight sample dates, he ultimately paid $11,474.91 in premiums, or 9.1% ($954.58) more, due to mid-policy changes and cancellations. *Id.* Defendants argue Plaintiffs' model cannot account for such mid-policy changes and cancellations because Plaintiffs never requested policyholder transaction data to calculate the paid premiums. ECF No. 122 at 10.

Even if Plaintiffs did not request transaction-level data, Defendants demand of Plaintiffs' experts something that Defendants' own expert was unable to do. In attempting to compare GIC premiums payable against actual GIC premiums paid to demonstrate the shortcomings of Plaintiffs' model, Defendants' actuarial expert Nancy Watkins noted in her expert report, "[b]ecause we do not have the necessary data on mid-term changes for all policyholders in the class, the impact of omitting this information cannot be reasonably quantified." ECF No. 122-1 at 92 (Ex. C). Indeed, when attempting this analysis using named Plaintiff Castro as an example, Watkins "was not able to perform the actual earned premium calculations for the six months following the 10/1/2021 snapshot for Plaintiff Castro because not all the mid-term transactions in that period were available." *Id.* at 92 n.3. Defendants appear to claim Plaintiffs' model is unreliable for failing to account for data that Defendants themselves do not adequately track. Courts have rejected this argument in other cases. *See Haas v. Travelex Ins. Servs. Inc.*, No. 20-cv-6171, 2023 WL 2347427, at *4 (C.D. Cal. Jan. 10, 2023) (declining to exclude expert whose model calculated insurance premiums using defendants' data and CDOI rate plan, despite defendants' arguments that "Defendants do not store customer data capable of populating every individual rating factor"); *Gutierrez v. Wells Fargo & Co.*, No. 7-cv-5923, 2010 WL 1233810, at *11 (N.D. Cal. Mar. 26, 2010) ("[P]laintiffs cannot be expected to determine, with 100% accuracy, the exact overdraft charge associated with a particular fee reversal

when defendant's own data system did not capture and store this information."). This Court rejects this argument as well.

Regardless, "the requirement of 'sufficient facts or data' does not preclude an expert from making projections based on reliable methodology." *Elosu v. Middlefork Ranch Inc.*, 26 F.4th 1017, 1025 (9th Cir. 2022). "In many cases, a representative sample is 'the only practicable means to collect and present relevant data' establishing a defendant's liability." *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 455 (2016) (quoting *Manual of Complex Litigation* § 11.493, p. 102 (4th ed. 2004)). "'Considerations such as small sample size may, of course, detract from the value of such evidence,' but it is admissible if it is relevant." *E.E.O.C. v. Sun Cab Co.*, No. 3-cv-1230, 2006 WL 1789179, at *3 (D. Nev. June 27, 2006) (quoting *Obrey v. Johnson*, 400 F.3d 691, 695 (9th Cir. 2005)); *see In re NJOY, Inc. Consumer Class Action Litig.*, 120 F. Supp. 3d 1050, 1079–80 (C.D. Cal. 2015) (collecting cases where concerns regarding sample size "go to the weight of evidence, not admissibility."). To the extent that transaction-level data is available to demonstrate any discrepancies between GIC's premiums payable and paid premiums, Defendants may use such data on cross examination to undermine Plaintiffs' sampling methodology, but it is not a basis to exclude Plaintiffs' experts at class certification. *See People v. Kinder Morgan Energy Partners, L.P.*, 159 F. Supp. 3d 1182, 1195 (S.D. Cal. 2016) (declining to exclude expert "for allegedly failing to deduct all direct and indirect development costs" because "these criticisms go to the weight and credibility of [the expert's] opinion."); *see also Buchanan v. Tata Consultancy Servs., Ltd.*, No. 15-cv-1696, 2017 WL 6611653, at *11 (N.D. Cal. Dec. 27, 2017) (declining to exclude expert because his "use of American Community Service [] employment data instead of [defendant's] actual applicant pool was reasonable and [defendant's] criticisms go to weight, not admissibility."). Defendants' "disagreements over the factual basis of [Plaintiffs' experts'] opinions do not make [their] testimony so fundamentally flawed that it would be of no assistance to the jury on the issue of future damages; they bear on the weight of the opinions, not their admissibility, and would be appropriately utilized via cross-examination and presentation of contrary

evidence." *Marketquest Grp., Inc. v. BIC Corp.*, No. 11-cv-618-BAS-JLB, 2018 WL 1756117, at *3 (S.D. Cal. Apr. 12, 2018) (finding arguments that expert's report "ignore[d] relevant factors influencing [Plaintiff's] financial situation," such as "the effect of the falling price of USB drives" and the "negative effect of [Plaintiff's] poor [] business decisions," go to the weight, and not admissibility, of expert's testimony).

The Ninth Circuit case Defendants cite, *Guidroz-Brault v. Missouri Pac. R. Co.*, 254 F.3d 825 (9th Cir. 2001), is inapposite here. That case involved a negligence suit against a railroad company when a train derailed after its track was sabotaged. *Id.* at 831. The Ninth Circuit affirmed the district court's exclusion of the plaintiff's expert who "[w]ithout any factual knowledge of how much displacement in centimeters or inches the saboteurs had achieved, [] opined that the displaced rail created a visible phenomenon that could be seen at 500 feet from the point of derailment[,]" despite "no evidence that there was anything the engineers should have seen." *Id. Guidroz-Brault* has no applicability here, where Plaintiffs' experts are actuaries who have based their analyses on Defendants' data and public filings that Defendants made to the CDOI.

Instead, this action is more analogous to *In re Korean Ramen Antitrust Litig.*, No. 13-cv-4115, 2017 WL 235052 (N.D. Cal. Jan. 19, 2017). There, defendants "oppose[d] certification, arguing primarily that the econometric models used by the [plaintiff's] expert[s] . . . [we]re inherently unreliable and the inputs they use[d] in their models [we]re counter-factual, so their opinions as to classwide injury and damages [we]re without basis and excludable . . . ." *Id.* at *1. Among other things, the defendants' expert argued that the plaintiff's experts' "analysis [wa]s fatally flawed because[] [t]he[y] did not consider the actual price paid by [plaintiff] after discounts and incentives . . . ." *Id.* at *6. The court declined to exclude either of the plaintiff's experts because the "defendants have not shown that the alleged failure of the [plaintiff] to account for discounts/incentives and 'actual price' materially impacts their preliminary classwide showing as to injury (or the utility of their regression model) to such a degree that [plaintiff's experts'] opinion should be excluded under *Daubert* or [their] determination of classwide impact discounted." *Id.* at

*11; *see id.* at *19. The court explained that "[a]s the transaction and discount data is further clarified and reviewed, that revised data can be accommodated by [plaintiff's experts'] model." *Id.* at *11. Of particular import, the court noted "that defendants d[id] not identify any individual [plaintiffs] who were allegedly uninjured . . . . using [plaintiff's] models with the revised price data . . . ." *Id.* at *19 n.37.

Likewise, the two examples Defendants point to here are not uninjured insureds, even when using GIC's actual premiums paid. Griglack calculated a total hypothetical United Services premium for Plaintiff Coleman of $8,143.53. ECF No. 122-1 at 107 (Ex. C-1). Regardless of whether Plaintiffs use Griglack's reconstructed GIC premium of $10,599.78, GIC's premium payable of $10,605.66, or GIC's paid premium of $10,514.56, Coleman would remain an injured member of the putative class. *See id.* at 107, 195 (Ex. F-1). For Plaintiff Castro, Griglack calculated a total hypothetical United Services premium of $9,046.05. *Id.* at 107 (Ex. C-1). Similarly, Castro would remain an injured member of the putative class regardless of whether Plaintiffs use Griglack's reconstructed GIC premium of $11,318.71, GIC's premium payable of $10,520.33, or GIC's paid premium of $11,474.91. *See id.* at 107, 195 (Ex. F-1). Indeed, at the hearing in this case Defendants conceded that they have not identified a single uninjured putative class member, even when using GIC's premiums paid instead of Griglack's reconstructed GIC premiums. Just like the *In re Korean Ramen Antitrust Litigation* defendants, Defendants here have failed to show that Plaintiffs' alleged failure to use GIC's actual paid premiums in their model materially impacts the preliminary classwide injury showing to such a degree that Plaintiffs' experts should be excluded under *Daubert*.

ii. Failure To Use Premiums Payable

Defendants argue Plaintiffs' experts err, alternatively, by failing to use the GIC premiums payable from Defendants' data for Variable A, and instead using Griglack's reconstructed premiums. ECF No. 122 at 14–18. Defendants claim that "courts have consistently excluded expert testimony as unreliable" where an "expert has proposed using

something like Mr. Griglack's inaccurate 'derivation' when he might instead have relied on actual data." *Id.* at 16. The Court disagrees.

Courts in the Ninth Circuit have declined to exclude an expert's methodology that uses an approximation of real world data, instead of the existing real world data itself, when the resulting difference is minor. In *In re Korean Ramen Antitrust Litigation*, also discussed above, the defendants moved to exclude the plaintiff's expert because "he chose not to use actual data" and instead used a "weighted costs series" based on average production costs. 2017 WL 235052, at *12. Although the plaintiff's expert "compared his weighted cost series to actual transaction prices[,]" the transaction price data "was not included in the model, but used only to double-check the accuracy of cost data reported by defendants." *Id.* at *12 n.29. Nevertheless, when the plaintiff's expert used the defendants' experts' "preferred cost series in [plaintiff's] model, the result [wa]s roughly the same[.]" *Id.* at *12. The court declined to exclude the plaintiff's expert because the defendants' criticisms "rest[ed] primarily on disputes of fact and the reasonableness of assumptions made by the experts on both sides." *Id.* at *13.

Similarly, in *McClure v. State Farm Life Insurance Co.*, the plaintiffs alleged that their life insurance policy contracts required cost of insurance ("COI") charges to be based on an exclusive set of mortality factors, but that the defendant insurance company assessed inflated COI charges by adding undisclosed fees. 341 F.R.D. 242, 248 (D. Ariz. 2022). To support their motion for class certification, the plaintiffs' actuarial expert "calculate[ed] substitute COI Charge rates based solely on mortality factors using [defendant]'s mortality tables. Comparing the new COI Charge rates to what putative class members were actually charged . . . [to] calculate[e] [] damages for each class member." *Id.* at 254. The defendant moved to exclude the plaintiffs' expert "because the calculations, at times, resulted in higher COI Charge rates than those actually used by [defendant,]" and because he "did not correctly identify 'expenses' by including such costs as taxes and commissions." *Id.* at 257–58. The court rejected both arguments, finding that "[t]his d[id] not show that [the expert's] methodology [wa]s unreliable but only that his calculation may be wrong, which

should be challenged on cross-examination." *Id.* The court reasoned that plaintiffs' expert "explain[ed] how he calculated the Substitute COI Rates. His methodology is an application of mathematical principles that *can be* tested and challenged . . . ." *Id.* at 257.

Here, the methodology employed by Plaintiffs' experts in calculating Variable A is an application of actuarial principles that can be tested and challenged, regardless of whether Defendants agree with their resulting calculations. In his report, Griglack explains that he used Defendants' public CDOI rate filings to develop a formula to calculate GIC's premiums payable, but was unable to reconstruct the GIC premiums with 100% accuracy. *See* ECF No. 119-1 ¶¶ 11–38. Instead, 90-to-92% of Griglack's reconstructed premiums were within 1% (above or below) of the GIC premiums payable, while 97% were within 5% (above or below) of the GIC premiums payable. *Id.* ¶¶ 39–40.[16] Griglack opined that he was unable to accurately reconstruct all GIC premiums payable due to potential defects in Defendants' data. *See id.* ¶¶ 36–37. Thus, based on his actuarial opinion, Griglack decided to use the reconstructed GIC premiums for Variable A. *Id.* ¶¶ 39–40. As he explains in his report, "[t]he effect on [United Services] and GIC premiums because of data defects will always or almost always be directionally the same. . . . Thus, comparing the [hypothetical United Services] premium to the [reconstructed] GIC premium will more accurately identify policyholders who paid more in GIC than they would have paid in [United Services], as opposed to comparing [hypothetical United Services] premium to [] GIC premium [payable]." *Id.* ¶ 43. Put differently, if both the reconstructed GIC premiums (Variable A) and the hypothetical United Services' premiums (Variable B) were calculated using the same formula—albeit with different inputs—any defects in Defendants' data would affect the calculation of Variables A and B equally, but would not affect the "spread" between them. As such, Plaintiffs' use of the reconstructed GIC premiums for Variable A does not render their model unreliable. Rather, it is an intentional decision by Plaintiffs'

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[16] Defendants do not contest these figures. *See* ECF No. 122-1 at 94.

expert based on his actuarial opinion that using the reconstructed GIC premiums results in a more accurate measure of the "spread" between Variables A and B. To the extent that Defendants disagree with Plaintiffs' calculations, they may challenge these calculations on cross examination.

Importantly, like *In re Korean Ramen Antitrust Litigation*, the results of Plaintiffs' model are "roughly the same" when using GIC's premiums payable instead of Plaintiffs' reconstructed GIC premiums. According to Griglack, the difference between the total GIC premiums payable and the total reconstructed GIC premiums across all eight sample dates is no more than 0.3%. ECF No. 119-1 ¶ 43. Defendants agreed with Plaintiffs' calculation at the hearing on this matter. Furthermore, when Defendants' expert Nancy Watkins estimated the "impact of [Plaintiffs'] rating errors on the estimated damages[,]" she found the Good Driver Class damages were overstated by approximately 0.17% (or $261,860) and the Discrimination Class damages were overstated by approximately 0.22% (or $377,679). ECF No. 122-1 at 94–98, 114–15. Such minor discrepancies do not render Plaintiffs' model unreliable, and Defendants are free to challenge them on cross examination.

For these reasons, the Court is not persuaded that Defendants' concerns regarding Variable A in Plaintiffs' model justify excluding Plaintiffs' experts. *See Tawfilis v. Allergan, Inc.*, No. 8:15-cv-307, 2017 WL 3084275, at *6 (C.D. Cal. June 26, 2017) ("Arguments about what factors an expert should have controlled for in conducting a yardstick analysis generally go to the weight, rather than the admissibility, of the expert's testimony.").

3. Reliability of United Services' Premiums

Finally, Defendants claim that Variable B (the hypothetical United Services' premiums) in Plaintiffs' model is invalid because Plaintiffs' experts "propose taking known quantities—the United Services base rates and relativities—and applying them to each GIC policyholder. But this counterfactual world is *impossible and unlawful* as an actuarial and regulatory matter." ECF No. 122 at 19. Defendants claim "rates are always constructed

from a specific risk pool to cover a specific amount of expected claims—and therefore can't be transposed from one risk pool onto another." *Id.* at 21. According to Defendants, "[w]hen insurers seek to change their rates, they must use the Department's formulas to determine the range of permissible rate changes based on the risk profile of the specific group of policyholders." *Id.* at 19. Thus, Defendants assert that Plaintiffs' experts should have "(1) combined all California GIC policyholders (or just a subset, like the statutory 'good drivers') and United Services policyholders into a new company, (2) recalculated the base rates and relativities for that combined insured pool based on that pool's risk factors, and then (3) applied those rates and relativities to calculate a premium for each policyholder." *Id.* at 21. Because the two proposed classes assert different claims seeking varying relief, the Court examines Defendants' argument as to each proposed class below.

i. The Proposed Discrimination Class

The putative Discrimination Class asserts two discrimination claims—one under Section 51(b) of the Unruh Act, and another under Section 394(a) of the Military & Veterans Code. These claims seek to remedy the harm caused by Defendants' alleged discriminatory act of charging different premiums based on the military rank of putative class members.

However, the base rates and relativities an insurer applies to calculate a policyholder's premiums are in part dependent on the historic losses of its corresponding risk pool. *See Low*, 85 Cal. App. 4th at 1186 ("The company first calculates a base rate for a particular type of coverage which is the same for each policyholder and reflects the total annual premium the company must charge all policyholders to cover its projected losses and expenses and obtain a reasonable rate of return."); *id.* at 1188 ("The regulations require that the company's relativities be initially determined through a 'sequential analysis' of the rating factors. Sequential analysis is a complex process which accounts for the fact that different rating factors (e.g., driving safety record and miles driven) may bear on risk in overlapping ways (e.g., the more one drives, the greater the likelihood of an accident)." (citing Cal. Code Regs. tit. 10, § 2632.7)); *see also* ECF No. 122-2 ¶ 12 ("When

Defendants 'United Services' and [GIC] calculate their anticipated losses for purposes of rate setting, each company uses a generalized linear model [] with sequential analysis that relies on three to five years of prior actual loss data from each company's historic book of business. Thus, each company's base rates are tied to its actual historic loss portfolio." (footnote omitted)). If an insurer's rates do not adequately account for potential future losses corresponding to its risk pool, the insurer risks going out of business. *See* Leonard Saul Goodman, 1 *The Process of Ratemaking* pt. 5, 2005 WL 998300 (1998) ("Historically state regulators have required a minimum portion of the earned premium to be shown on the insurance books as a loss reserve. The underlying theory is that policyholders will be adequately protected from insurer insolvency if the portion of the rate covering losses and [loss adjustment expenses] (the so-called pure premium) is reserved.").[17]

Defendants' separation of policyholders based on military rank here is the result of USAA's Placement Rules, which outline the criteria Defendants use to place policyholders in either GIC or United Services. *See* ECF No. 122-3 ¶¶ 12–15. GIC generally has higher base rates because it primarily insures lower-ranking personnel (E-1 through E-6), who in the aggregate have a history of higher losses than United Services' risk pool. *See* ECF No. 122-2 ¶ 13. While United Services generally has lower base rates because it primarily insures higher-ranking personnel (E-7 and above), who in the aggregate have a history of lower losses than GIC's risk pool. *See id.* Given that the discrepancy in premiums is a result of each group's corresponding history of losses, the counterfactual world sought by the

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[17] Consistent with this reasoning, the CDOI may reject an insurer's rates that are not only "excessive," but also those that are "inadequate." Cal. Ins. Code § 1861.05. "[T]he objective is not just to keep insurance rates fair to consumers, but also to keep insurance *available*—which requires that rates be fair to the insurers as well." *State Farm Gen. Ins. Co. v. Lara*, 71 Cal. App. 5th 148, 176 (2021). In this respect, the CDOI's preapproval of rates serves in part to protect an "insurer's legitimate interest in financial integrity[.]" *20th Century Ins. Co. v. Garamendi*, 8 Cal. 4th 216, 245 (1994).

proposed Discrimination Class would require combining the two companies and subjecting all policyholders to new base rates and relativities based on the combined risk pools.[18]

Neither Plaintiffs' primary discrimination model nor their alternative discrimination model adequately address this problem. The primary discrimination model does not address the problem at all, because it merely calculates what the difference in premiums would have been if United Services issued the policies for certain GIC insureds. Plaintiffs have failed to establish that this model is relevant for purposes of *Daubert*, or that this model reliably permits a determination of whether the discrimination that Plaintiffs allege has occurred. As for the alternative discrimination model, Plaintiffs are unable to adequately explain how it works. As best the Court can discern, the alternative discrimination model attempts to balance USAA's total revenue received from premiums by increasing the hypothetical United Services' premiums (Variable B) using a uniform percentage to compensate for the loss in GIC premiums. Although the model seemingly attempts to account for the premium revenue that USAA would need to recoup if it calculated premiums for GIC policyholders using United Services' rates and relativities, Plaintiffs have not satisfied the Court that the model does so in a manner that reliably permits the determination of whether individual class members suffered damages, and if so to what extent. Plaintiffs have not established the reliability or relevance of this alternative model.

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[18] When asked at the hearing whether the proposed Discrimination Class's theory required combining the risk pools of United Services and GIC, Plaintiffs declined to take a position. Plaintiffs claimed combining the two risk pools was not the only way to remedy the alleged discrimination, but did not provide any specific alternative counterfactual. However, Plaintiffs' alternative discrimination model does take a position. By uniformly increasing the hypothetical United Services' premiums to ensure that United Services generates sufficient revenue to compensate for the loss in GIC premiums, Schwartz is necessarily moving the GIC policyholders that comprise the proposed Discrimination Class into United Services.

In short, there is a disconnect between the primary and alternative discrimination models, on one hand, and what the Discrimination Class needs to prove, on the other. For this reason, the Court excludes the portion of the opinions of Plaintiffs' experts regarding the primary and alternative discrimination models.

ii. The Proposed Good Driver Class

With regard to the proposed Good Driver Class, whose claims are based on a violation of a specific Insurance Code provision rather than a more general allegation of discrimination, the analysis is different. The proposed Good Driver Class asserts two UCL claims premised on Section 1861.16(b) of the Insurance Code, which mandates that an "insurer shall sell, a good driver discount policy to a driver *from an insurer within that common ownership, management or control group*, which offers the lowest rates for that coverage. This requirement applies notwithstanding the underwriting guidelines of any of those insurers or the underwriting guidelines of the common ownership, management, or control group." Cal. Ins. Code § 1861.16(b) (emphasis added). Section 1861.16(b) requires USAA to offer a good driver discount policy which offers the lowest rates available for that coverage among USAA insurers. The statute also contains an exception, under which "insurers having common ownership and operating in California under common control are *not* required to sell good driver discount policies issued by other insurers within the common ownership group," if the Commissioner of Insurance determines that the insurers satisfy eight enumerated conditions. *Id.* (emphasis added). There is no indication in the record here that Defendants have sought or received such a determination from the Commissioner.

The Court concludes that the methodology used by Plaintiffs' experts for the Good Driver Class is tailored to and relevant to the requirements of Section 1861.16(b) of the Insurance Code, for purposes of *Daubert*. Defendants' criticisms of the reliability model may be persuasive to the jury, but they do not make the opinions of Plaintiffs' experts so unreliable that they should be excluded under *Daubert* at the class certification stage.

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III. PLAINTIFFS' RENEWED MOTION FOR CLASS CERTIFICATION

A. Legal Standard

Federal Rule of Civil Procedure 23 "provides a procedural mechanism for 'a federal court to adjudicate claims of multiple parties at once, instead of in separate suits.'" *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 663 (9th Cir. 2022). "Under Rule 23, a class action may be maintained if the four prerequisites of Rule 23(a) are met, and the action meets one of the three kinds of actions listed in Rule 23(b)." *Van v. LLR, Inc.*, 61 F.4th 1053, 1062 (9th Cir. 2023).[19]

Rule 23(a)'s requirements are met "only if: (1) the class is so numerous that joinder of all members is impracticable ['numerosity']; (2) there are questions of law or fact common to the class ['commonality']; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class ['typicality']; and (4) the

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[19] The Ninth Circuit does not require courts to apply ascertainability as an independent threshold requirement to class certification. *See True Health Chiropractic, Inc. v. McKesson Corp.*, 896 F.3d 923, 929 (9th Cir. 2018) ("We held that there is no free-standing requirement above and beyond the requirements specifically articulated in Rule 23." (citing *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1125 n.4 (9th Cir. 2017) ("[Defendant-Appellant] cites no other precedent to support the notion that our court has adopted an 'ascertainability' requirement. This is not surprising because we have not."))); *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, No. 13-cv-5693, 2015 WL 4776932, at *7 (C.D. Cal. May 27, 2015) ("At this point, adequately demonstrating that class members can be identified is sufficient for ascertainability because, '[i]n the Ninth Circuit[,] there is no requirement that the identity of the class members . . . be known at the time of certification.'" (quoting *Steven Ades & Hart Woolery v. Omni Hotels Mgmt. Corp.*, No. 2:13-cv-2468, 2014 WL 4627271, at *7 (C.D. Cal. Sept. 8, 2014)); *Mazur v. eBay Inc.*, 257 F.R.D. 563, 567 (N.D. Cal. 2009) ("[T]he class need not be so ascertainable that every potential member can be identified at the commencement of the action." (quoting *O'Connor v. Boeing N. Am., Inc.*, 184 F.R.D. 311, 319 (C.D. Cal. 1998))). "Although there is no explicit requirement concerning the class definition in [Rule 23], courts have held that the class must be adequately defined and clearly ascertainable before a class action may proceed." *Wolph v. Acer Am. Corp.*, 272 F.R.D. 477, 482 (N.D. Cal. 2011). An ascertainable class exists if it can be identified "by reference to objective criteria." *Parkinson v. Hyundai Motor Am.*, 258 F.R.D. 580, 593 (C.D. Cal. 2008).

representative parties will fairly and adequately protect the interests of the class ['adequacy']." *Owino v. CoreCivic, Inc.*, 60 F.4th 437, 443 (9th Cir. 2022) (alterations in original) (quoting Fed. R. Civ. P. 23(a)).

In addition to the four Rule 23(a) factors, "plaintiffs must show that the class fits into one of three categories" under Rule 23(b). *Olean*, 31 F.4th at 663. Here, Plaintiffs seek class certification under Rule 23(b)(3), which requires "the court find[] that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). To make these findings, the Court must take into account: "(A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action." *Id.*

"[P]laintiffs must prove the facts necessary to carry the burden of establishing that the prerequisites of Rule 23 are satisfied by a preponderance of the evidence." *Olean*, 31 F.4th at 665. Although "a court's class-certification analysis must be 'rigorous' and may 'entail some overlap with the merits of the plaintiff's underlying claim,' Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage." *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 465–66 (2013) (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011)). "Merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Id.* "A court, when asked to certify a class, is merely to decide a suitable method of adjudicating the case and should not 'turn class certification into a mini-trial' on the merits." *Edwards v. First Am. Corp.*, 798 F.3d 1172, 1178 (9th Cir. 2015) (quoting *Ellis.*, 657 F.3d at 983 n.8). "'Neither the possibility that a plaintiff will be unable to prove his allegations, nor the possibility that the later course of the suit might unforeseeably prove the original decision to certify the class

wrong, is a basis for declining to certify a class which apparently satisfies' Rule 23." *Sali*, 909 F.3d at 1004–05 (quoting *Blackie v. Barrack*, 524 F.2d 891, 901 (9th Cir. 1975)).

B. Proposed Class Definitions

As a threshold matter, Defendants contend that Plaintiffs' proposed classes are impermissibly defined as "fail-safe" classes. ECF No. 123 at 8 n.1 (incorporating ECF No. 65 at 24–25). A fail-safe class "is one that is defined so narrowly as to preclude[ ] membership unless the liability of the defendant is established." *Johnson v. City of Grants Pass*, 72 F.4th 868, 888 (9th Cir. 2023) (quoting *Ruiz Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1138 n.7 (9th Cir. 2016)). By defining their proposed classes as comprising certain individuals who "paid more for [a GIC] policy than they would have paid in United Services," Defendants argue that "the only way for a policyholder to be in the proposed classes is to have already proven that she is injured." ECF No. 65 at 25.

The definitions of Plaintiffs' proposed classes are not fail-safe. "A 'fail-safe class' [] ensures that a defendant cannot prevail against the class, because if the defendant prevails, the class will not exist." *In re ConAgra Foods, Inc.*, 302 F.R.D. 537, 567 n.102 (C.D. Cal. 2014) (quoting *Boucher v. First Am. Title Ins. Co.*, No. 10-cv-199, 2011 WL 1655598, at *5 (W.D. Wash. May 2, 2011)). As the Seventh Circuit has explained, fail-safe classes "raise[] an obvious fairness problem for the defendant: the defendant is forced to defend against the class, but if a plaintiff loses, she drops out and can subject the defendant to another round of litigation." *Mullins v. Direct Digit., LLC*, 795 F.3d 654, 660 (7th Cir. 2015).

Here, membership in both of Plaintiffs' proposed classes can be determined by objective criteria—whether they paid more for a policy from GIC than they would have paid under United Services' rates—without a final determination on the merits of Plaintiffs' claims. Even if this Court were to find that charging military personnel different auto insurance premiums based on their rank does not qualify as discrimination under the Unruh Act or the Military & Veterans Code, the proposed classes would continue to exist.

The case Defendants cite, *Kevari v. Scottrade, Inc.*, No. 18-cv-819, 2018 WL 6136822 (C.D. Cal. Aug. 31, 2018), is not analogous. In *Kevari*, the court found a proposed class definition of "female managers who were paid less than male managers for males performing jobs that are substantially equal in actual job performance and substance, despite their title" to be fail-safe because their Equal Pay Act claim required proving "an employer pa[id] an employee wages at a rate less than it pa[id] an employee of the opposite sex for equal work under similar conditions . . . ." *Id.* at *9. But the class definition in *Kevari* went beyond merely calculating a difference in pay, and required the court to adjudicate a central element of the plaintiffs' Equal Pay Act claims—whether the class members occupied jobs that were "substantially equal in actual job performance and substance" to those of an undefined group of male managers. Consequently, if the *Kevari* court determined that the class members were not performing "equal work under similar conditions," the class of female managers "performing jobs that are substantially equal in actual job performance and substance" would cease to exist.

Instead, this case is similar to *King v. Nat'l Gen. Ins. Co.*, No. 15-cv-313, 2021 WL 2400899 (N.D. Cal. June 11, 2021). There, the court found that a class definition comprising drivers who paid premiums "in excess of the lowest rate Good Driver discount policy available for that coverage from another insurance company within Defendants' California-licensed common ownership, management or control" was not fail-safe because "class membership d[id] not rely on Defendants' liability." *Id.* at *14. The proposed class definitions here do not rely on Defendants' liability either. A member of the proposed class would have paid less in premiums under United Services' rates than under GIC's rates, regardless of whether that discrepancy in premiums violates the UCL, Insurance Code, Unruh Act, or Military & Veterans Code. The proposed class definitions here are not fail-safe.

C. Rule 23(a) Requirements

Defendants, again, do not dispute that Plaintiffs satisfy the requirements of Rule 23(a). *See* ECF No. 123. Instead, Defendants challenge various aspects of the Rule 23(b)(3)

requirements, which the Court discusses further below. *Id.* Nevertheless, the Court examines Plaintiffs' renewed motion below, and finds that Plaintiffs again meet the Rule 23(a) requirements.

1. Numerosity

A class may be certified only if "the class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). "When considering numerosity and the impracticability of joinder, it is unnecessary for the class representatives to either identify each particular member of a class, or to state the exact number of persons in a class." *Ikonen v. Hartz Mountain Corp.*, 122 F.R.D. 258, 261 (S.D. Cal. 1988). "The numerosity requirement requires examination of the specific facts of each case and imposes no absolute limitations." *Gen. Tel. Co. of the Nw. v. Equal Emp. Opportunity Comm'n*, 446 U.S. 318, 330 (1980). "As a general rule, classes of 20 are too small, classes of 20–40 may or may not be big enough depending on the circumstances of each case, and classes of 40 or more are numerous enough." *Ikonen*, 122 F.R.D. at 262. "A further consideration in determining numerosity is whether or not prosecution of individual cases would severely burden the judiciary." *Id.*

Here, Plaintiffs claim each proposed class "contains about 200,000 members." ECF No. 119 at 16. Plaintiffs' experts identified approximately 197,180 putative Good Driver Class members. ECF No. 119-3 at 9. For the proposed Discrimination Class, Plaintiffs' experts identified approximately 207,224 putative members using the primary discrimination model, and 193,799 putative members using the alternative discrimination model. *Id.* Defendants do not dispute these numbers. *See* ECF No. 123. Both proposed classes satisfy the numerosity requirement because joinder of all potential parties would be impracticable.

2. Commonality

To achieve commonality, a plaintiff must "demonstrate that they and the proposed class members have suffered the same injury and have claims that depend on a common contention capable of class-wide resolution." *Willis v. City of Seattle*, 943 F.3d 882, 885

(9th Cir. 2019). "[A] perfect identity of facts and law is not required; relatively 'minimal' commonality will do." *Ries v. Ariz. Beverages USA LLC*, 287 F.R.D. 523, 537 (N.D. Cal. 2012) (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998)). The "common contention need not be one that 'will be answered, on the merits, in favor of the class.'" *Alcantar v. Hobart Serv.*, 800 F.3d 1047, 1053 (9th Cir. 2015) (quoting *Amgen*, 568 U.S. at 459). Rather, "[c]apable of class-wide resolution '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.'" *Id.* (quoting *Wal-Mart Stores*, 564 U.S. at 350).

Plaintiffs argue this case presents multiple common questions that will be capable of class-wide resolution. As to the two UCL claims premised on Insurance Code violations, Plaintiffs argue examples of common questions, among others, include: Are GIC and United Services insurers having common ownership or operating under common management or control? Did USAA assign all Good Driver Class members to GIC? Was USAA required to sell the Good Driver Class members "good driver" discount policies at United Services' rate rather than GIC's rate? *See* ECF No. 119 at 5–10. As to the Unruh Act and Military & Veterans Code claims, Plaintiffs contend examples of common questions, among others, include: Are GIC and United Services "business establishments" under the Unruh Act? Is the military status of enlisted personnel a substantial motivating factor in USAA's conduct? Did Defendants have a legitimate, non-discriminatory reason for insuring personnel and officers through separate companies? *See id.* at 10–15. Defendants do not challenge the commonality requirement. *See* ECF No. 123. The Court concludes that both proposed classes present common questions capable of class-wide resolution, and commonality is satisfied here.

3. Typicality

"To demonstrate typicality, Plaintiffs must show that the named parties' claims are typical of the class." *Ellis*, 657 F.3d at 984 (citing Fed. R. Civ. P. 23(a)(3)). "The test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class

members have been injured by the same course of conduct." *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992). "Typicality focuses on the class representative's claim—but not the specific facts from which the claim arose—and ensures that the interest of the class representative 'aligns with the interests of the class.'" *Just Film, Inc. v. Buono*, 847 F.3d 1108, 1116 (9th Cir. 2017) (quoting *Hanon*, 976 F.2d at 508.). "[R]epresentative claims are 'typical' if they are reasonably coextensive with those of absent class members; they need not be substantially identical." *Id.* (quoting *Parsons v. Ryan*, 754 F.3d 657, 685 (9th Cir. 2014)).

Plaintiffs assert that their claims are typical of the proposed Good Driver Class because the named Plaintiffs purchased GIC auto insurance and would have paid lower premiums if they had received good driver discount policies issued by United Services. ECF No. 119 at 17–18; *see* ECF No. 49 ¶¶ 40–44. Likewise, because the named Plaintiffs allege that Defendants' practices violated the Unruh Act and the Military & Veterans Code, Plaintiffs argue that their claims are typical of the proposed Discrimination Class. ECF No. 119 at 17–18; *see* ECF No. 49 ¶¶ 40–44. Defendants do not contest Plaintiffs' typicality. *See* ECF No. 123. Given that the named Plaintiffs allege the same injuries and assert the same claims as the proposed classes, the Court concludes that typicality is satisfied here.

4. Adequacy

A class action may be certified only if "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). "The named plaintiffs and their counsel must have sufficient 'zeal and competence' to protect the interests of the rest of the class." *Alcantara v. Archambeault*, 613 F. Supp. 3d 1337, 1348 (S.D. Cal. 2020) (quoting *Fendler v. Westgate-California Corp.*, 527 F.2d 1168, 1170 (9th Cir. 1975)). "Determining whether representation is adequate requires the court to consider two questions: '(a) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (b) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?'" *Sali.*, 909 F.3d at 1007 (quoting *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 462 (9th Cir. 2000)).

Plaintiffs and their counsel contend they have no conflicts of interest with any members of the proposed classes, and will vigorously litigate the case on behalf of the proposed classes. ECF No. 119 at 18. The Court has reviewed the declarations attesting to these facts, which Plaintiffs' counsel and the named Plaintiffs previously submitted in support of class certification. ECF No. 58-10 at 846–63; ECF No. 58-12 at 865–71. Defendants do not contest adequacy. *See* ECF No. 123. As such, the Court finds that Plaintiffs and their counsel are adequate representatives of the proposed classes, because they have no conflicts of interest with the proposed classes and will prosecute this action vigorously on behalf of the proposed classes.

D. Rule 23(b)(3) Requirements

Next, certification under Rule 23(b)(3) requires a showing of predominance and superiority. Fed. R. Civ. P. 23(b)(3). First, the predominance test of Rule 23(b)(3) consists of two parts: (1) a plaintiff must show that common questions of law and fact predominate over individual questions; and (2) a plaintiff must present a model of damages that identifies damages stemming from the defendant's alleged wrongdoing, and is "susceptible of measurement across the entire class." *Comcast Corp. v. Behrend*, 569 U.S. 27, 34–38 (2013). Second, superiority requires that a class action be superior to other methods available for adjudicating the dispute. Fed. R. Civ. P. 23(b)(3).

Plaintiffs argue that they satisfy both predominance and superiority under Rule 23(b)(3). *See* ECF No. 119 at 4. Defendants challenge both requirements. *See* ECF No. 123 8–25. The Court agrees with Plaintiffs in part, as explained below.

1. Predominance

"The Rule 23(b)(3) predominance inquiry asks the court to make a global determination of whether common questions prevail over individualized ones." *Ruiz Torres*, 835 F.3d at 1134. "An individual question is one 'where members of a proposed class will need to present evidence that varies from member to member,' while a common question is one where 'the same evidence will suffice for each member to make a prima facie showing [or] the issue is susceptible to generalized, class-wide proof.'" *Id.* (quoting

Tyson Foods, Inc., 577 U.S. at 453). "[M]ore important questions apt to drive the resolution of the litigation are given more weight in the predominance analysis over individualized questions which are of considerably less significance to the claims of the class." *Id.* "The main concern of the predominance inquiry under Rule 23(b)(3) is 'the balance between individual and common issues.'" *Sali*, 909 F.3d at 1008 (quoting *Wang v. Chinese Daily News, Inc.*, 737 F.3d 538, 545–46 (9th Cir. 2013)).

The Court's analysis "begins, of course, with the elements of the underlying cause of action." *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 809 (2011). Plaintiffs "must establish that essential elements of the cause of action . . . are capable of being established through a common body of evidence, applicable to the whole class." *Olean*, 31 F.4th at 666 (internal quotation marks and citation omitted). In this case, Plaintiffs assert two claims for each proposed class.

i. The Good Driver Class's Claims

California's UCL prohibits "unfair competition." Cal. Bus. & Prof. Code § 17200. "The UCL creates a cause of action for business practices that are (1) unlawful, (2) unfair, or (3) fraudulent. Each 'prong' of the UCL provides a separate and distinct theory of liability." *Swafford v. Int'l Bus. Machines Corp.*, 408 F. Supp. 3d 1131, 1151 (N.D. Cal. 2019) (quoting *Lozano v. AT&T Wireless Servs., Inc.*, 504 F.3d 718, 731 (9th Cir. 2007)). The proposed Good Driver Class asserts two UCL claims here, each of which the Court examines below. ECF No. 49 ¶¶ 70–81.

Plaintiffs' first claim is under the "unlawful" prong of the UCL. *Id.* ¶¶ 70–74. The UCL's "unlawful" provision "borrows violations of other laws and treats them as unlawful practices that the [UCL] makes independently actionable." *Davis v. HSBC Bank Nev., N.A.*, 691 F.3d 1152, 1168 (9th Cir. 2012) (quoting *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co.*, 20 Cal. 4th 163, 180 (1999)). "[V]irtually any state, federal or local law can serve as the predicate for an action under section 17200." *Id.* (alteration in original) (quoting *People ex rel. Bill Lockyer v. Fremont Life Ins. Co.*, 104 Cal. App. 4th 508, 515 (Cal. App. Ct. 2002)). In this case, Plaintiffs base their first UCL claim on an underlying violation of

Insurance Code § 1861.16(b), which states: "An agent or representative representing one or more insurers having common ownership or operating in California under common management or control shall offer, and the insurer shall sell, a good driver discount policy to a good driver from an insurer within that common ownership, management, or control group, which offers the lowest rates for that coverage." Cal. Ins. Code § 1861.16(b).[20]

Plaintiffs argue that common evidence and questions will predominate across the proposed Good Driver Class. *See* ECF No. 119 at 5–10. Plaintiffs point to two central questions that require class-wide answers: whether GIC and United Services are "insurers having common ownership or operating in California under common management or control," *id.* at 5; and whether Insurance Code § 1861.16(b) requires USAA to sell the proposed class members a good driver policy from United Services rather than from GIC, if United Services offers the lowest rates for that coverage, *id.* at 8–9. Likewise, Plaintiffs point to three common pieces of evidence that all proposed class members will rely on. Defendants' data will establish both whether members of the proposed class were eligible for a good driver discount and whether USAA assigned those class members to GIC. *Id.* at 5–6. Using this data, Griglack will determine if GIC charged members of the proposed class more for their policies than United Services would have charged for the same

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[20] Section 1861.16(b) does not apply if the California Insurance Commissioner finds that: "(A) The business operations of the insurers are independently managed and directed. (B) The insurers do not jointly develop loss or expense statistics or other data used in ratemaking, or in the preparation of rating systems or rate filings. (C) The insurers do not jointly maintain or share loss or expense statistics, or other data used in ratemaking or in the preparation of rating systems or rate filings . . . . (D) The insurers do not utilize each others' marketing, sales, or underwriting data. (E) The insurers act independently of each other in determining, filing, and applying base rates, factors, class plans, and underwriting rules, and in the making of insurance policy forms. (F) The insurers' sales operations are separate. (G) The insurers' marketing operations are separate. (H) The insurers' policy service operations are separate." Cal. Ins. Code § 1861.16(c)(1)(A)–(H). Neither party claims that the Insurance Commissioner has found that USAA and its affiliates meet these requirements. *See* ECF No. 22 at 3 n.2.

coverage. *Id.* at 6. Using the same data, Schwartz will calculate the resulting damages to all members of the proposed class. *Id.* at 9.

Plaintiffs assert a second claim under the UCL's "unfair" prong. ECF No. 49 ¶¶ 75–81. Unlike the "unlawful" prong of the UCL, "[a]n 'unfair' business practice is actionable under the [UCL] even if it is not 'deceptive' or 'unlawful.'" *Holt v. Noble House Hotels & Resort, Ltd*, 370 F. Supp. 3d 1158, 1163 (S.D. Cal. 2019) (quoting *Buller v. Sutter Health*, 160 Cal. App. 4th 981, 990 (Cal. App. Ct. 2008)). "[A] business practice is 'unfair' if (1) the consumer injury is substantial; (2) the injury is not outweighed by any countervailing benefits to consumers or competition; and (3) the injury could not reasonably have been avoided by consumers themselves." *Rubenstein v. The Gap, Inc.*, 14 Cal. App. 5th 870, 880 (Cal. App. Ct. 2017) (quoting *Klein v. Chevron U.S.A., Inc.*, 202 Cal. App. 4th 1342, 1376 (Cal. App. Ct. 2012)).

Plaintiffs' renewed class certification motion treats the proposed Good Driver Class's first "unlawful" UCL claim as their only UCL claim. *See* ECF No. 119. Plaintiffs do not articulate any argument in their renewed motion about their second claim under the "unfair" prong of the UCL. *See id.* Given that Plaintiffs bear the burden of demonstrating that class certification is appropriate, the Court declines to certify the proposed Good Driver Class's second "unfair" UCL claim. *See, e.g.*, *Manigo v. Time Warner Cable, Inc.*, No. 16-cv-6722, 2017 WL 5149225, at *3 (C.D. Cal. Apr. 4, 2017) (denying class certification motion where "Plaintiffs' opening brief failed to address the elements and proof necessary to establish their claims on a classwide basis" and "failed to show how [the pertinent legal] standard could be satisfied through common proof").

The Court now turns to Defendants' arguments against predominance as to the Good Driver Class's "unlawful" claim under the UCL. Defendants largely re-assert the concerns regarding Plaintiffs' model from their *Daubert* motion to argue that Plaintiffs cannot establish predominance. *See* ECF No. 123 at 12–25.

The Court rejects those arguments for the same reasons expressed earlier in this Order. *See supra* Part II(C); *see also Day*, 2022 WL 16556802, at *3–5, 8–9 (certifying

class over defendant's argument that Schwartz's methodology was "inconsistent with California's insurance ratemaking regulations and that when the law conflicts with actuarial principles, the law controls."); *In re Korean Ramen Antitrust Litig.*, 2017 WL 235052, at *11 (certifying class where "defendants have not shown that the alleged failure of the [plaintiffs] to account for discounts/incentives and 'actual price' materially impacts their preliminary classwide showing as to injury . . . to such a degree that [plaintiffs' expert]'s opinion should be excluded under *Daubert* or his determination of classwide impact discounted."); *id.* at *13 (certifying class despite "Defendants' criticisms as to [plaintiffs' expert]'s costs, and the role they play in setting his but-for price, rest primarily on disputes of fact and the reasonableness of assumptions made by the experts on both sides. There is nothing in [plaintiffs' expert]'s approach that fatally undermines the reliability of his methodology or model such that [plaintiffs' expert]'s opinion should be excluded under *Daubert* or his determination of classwide impact significantly discounted."); *Gutierrez*, 2010 WL 1233810, at *11, 14 (declining to decertify class where plaintiffs' expert could not "determine, with 100% accuracy, the exact overdraft charge associated with a particular fee reversal when defendant's own data system did not capture and store this information" because "the various limitations inherent in [defendant]'s transaction data . . . and the fact that proving actual injury if suits were brought individually would still require the same types of assumptions made by [plaintiffs' expert] in his report, this order finds that plaintiffs have presented sufficient class-wide proof of actual injury to survive defendant's motion for decertification.").

Most importantly for the Court's determination of predominance, Defendants have not identified any individual that Plaintiffs' experts identify as a class member, who was not in fact injured. *See* ECF No. 123. Instead, Defendants focus their argument on inaccuracies in Plaintiffs' premium calculations that do not materially affect Plaintiffs' showing of classwide injury. Defendants note that the GIC premiums actually paid by named Plaintiffs Coleman and Castro differed from GIC's premiums payable by -0.9% and 9.1% respectively, but the Court explained earlier in this Order that both named Plaintiffs

remain injured under Plaintiffs' model, even when accounting for these discrepancies. *See supra* Part II(C)(2)(i). Similarly, Strombom's analysis of a sample of 400 policies across the class period found the total net difference between Griglack's reconstructed GIC premiums and GIC premiums paid was only 2.5% (or $48,334.46). ECF No. 122-1 at 204. Yet, Strombom did not identify any uninjured class members. Likewise, Watkins estimated the "impact of [Plaintiffs'] rating errors on the estimated damages" were overstated for the Good Driver Class by approximately 0.17% (or $261,860) and were overstated for the Discrimination Class by approximately 0.22% (or $377,679). *Id.* at 94–98, 114–15. Watkins, too, failed to identify any uninjured class members. Therefore, Defendants' concerns regarding the alleged inaccuracies in Plaintiffs' model are seemingly so immaterial that they affect only the degree to which a class member was injured, and not whether a class member was injured at all. However, even if Defendants did identify some uninjured class members, "such fortuitous non-injury to a subset of class members does not necessarily defeat certification of the entire class, particularly as the district court is well situated to winnow out those non-injured members at the damages phase of the litigation, or to refine the class definition." *Ruiz Torres*, 835 F.3d at 1137.

The cases Defendants cite do not counsel otherwise, because they are not analogous. In *Lara v. First National Insurance Co. of America*, a putative class of plaintiffs alleged that the defendant insurance company underpaid them for the value of their totaled vehicles, which Washington state law required to be the "actual cash value" of the vehicle. 25 F.4th 1134, 1136–37 (9th Cir. 2022). The plaintiffs claimed that the insurance company's "actual cash value" valuations were generated by a separate company that improperly applied a downward adjustment. *Id.* The district court denied class certification because of a lack of predominance. *Id.* at 1138. The Ninth Circuit affirmed because a class action would require "looking into the actual pre-accident value of [each] car and then comparing that with what each person was offered, to see if the offer was less than the actual value." *Id.* at 1139. However, *Lara* is distinguishable from this case. Not only did the plaintiffs in *Lara* not have any expert or model by which to determine injury classwide,

but the nature of the plaintiffs' claims also required discerning the actual value of an already totaled vehicle for each potential class member to determine if the respective class member was injured. *Id.* Here, in contrast, Plaintiffs have already developed a classwide model capable of identifying injured class members.

In *Bowerman v. Field Asset Services., Inc.*, the Ninth Circuit reversed a district court's class certification order, finding that "individual inquiries clearly predominate[d] over the common questions in the case, and the district court abused its discretion in holding otherwise." 60 F.4th 459, 469 (9th Cir. 2023). However, *Bowerman* presented the unique circumstance where "the plaintiffs withdrew their expert after the district court 'raised questions about the reliability of his data and opinions concerning an aggregate damages model.' Lacking any sort of representative evidence, the class members were left relying on individual testimony to establish the existence of an injury and the amount of damages." *Id.* As a result of the lack of classwide evidence, the trial required "eight days to determine damages for only eleven of the 156 class members." *Id.* at 470. The same issue is not present here.

Because Plaintiffs advance a classwide method for identifying injured class members using common evidence, the Court concludes that Plaintiffs satisfy predominance here as to the Good Driver Class.

ii. The Discrimination Class's Claims

The proposed Discrimination Class advances two claims, which the Court jointly examines below because they involve largely the same elements. ECF No. 49 ¶¶ 82–103.

Plaintiffs first assert a putative class claim under Unruh Act § 51(b). *Id.* ¶¶ 82–92. The Unruh Act provides that all persons are "free and equal," and are entitled to "full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." Cal. Civ. Code § 51(b).[21] "To state a claim for

[21] The Act lists fourteen different types of prohibited discrimination, none of which includes military status or ranking, but "this list is illustrative rather than restrictive, and

discrimination under the Unruh Act, a plaintiff must allege that: 1) he or she was denied full and equal accommodations, advantages, facilities, privileges, or services in a business establishment; 2) that his or her protected characteristic was a motivating factor for this denial; 3) that defendant's denial was the result of its intentional discrimination against plaintiff; and 4) that the defendant's wrongful conduct caused him to suffer injury." *Correll v. Amazon.com, Inc.*, No. 21-cv-1833-BTM, 2022 WL 5264496, at *4 (S.D. Cal. Oct. 6, 2022); *see* Judicial Council of California Civil Jury Instructions ("CACI") § 3060 (2023).

Plaintiffs assert a second putative class claim under Military & Veterans Code § 394(a). ECF No. 49 ¶¶ 93–103. This provision states:

> A person shall not discriminate against a member of the military or naval forces of the state or of the United States because of that membership. A member of the military forces shall not be prejudiced or injured by a person, employer, or officer or agent of a corporation, company, or firm in terms, conditions, or privileges with respect to that member's employment, position or status or be denied or disqualified for employment by virtue of membership or service in the military forces of this state or of the United States.

Cal. Mil. & Vet. Code § 394. Although courts have almost exclusively applied Military & Veterans Code § 394(a) in the employment context, this Court interprets the provision, for purposes of this class certification motion, to require that a plaintiff at least establish that: (1) the plaintiff served in the military; (2) the plaintiff was harmed; (3) the defendant's conduct was a substantial factor in causing plaintiff's harm; and (4) the plaintiff's current or past service in the military was a substantial motivating reason for the defendant's conduct that caused plaintiff's harm. *See* CACI § 2441 (2023) (providing employment discrimination specific jury instruction);[22] *see also Correa v. Pac. Mar. Ass'n*, No. 2:17-

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the Act's protection against discrimination is not confined to these enumerated classes." *Javorsky v. W. Athletic Clubs, Inc.*, 242 Cal. App. 4th 1386, 1394 (Cal. Ct. App. 2015) (citing *Marina Point, Ltd. v. Wolfson*, 30 Cal. 3d 721, 736 (1982)).

[22] CACI § 2441 requires a plaintiff bringing a claim under Section 394(a) of the Military & Veterans Code to establish that: (1) plaintiff was an employee of defendant, (2)

cv-3060, 2018 WL 3816719, at *6 (C.D. Cal. June 12, 2018) (analyzing employment discrimination claim under Military & Veterans Code § 394(a)).[23]

Plaintiffs argue that common issues and evidence will predominate when proving the proposed Discrimination Class's two claims. Plaintiffs posit that the following questions need to be resolved on a class-wide basis for both claims: whether Plaintiffs were injured by Defendants' business practices; whether Defendants' conduct was a substantial factor in causing Plaintiffs' harm; and whether Plaintiffs' military status was a substantial motivating factor for Defendants' conduct that caused the harm. *See* ECF No. 119 at 11–13. Plaintiffs also point to Griglack's and Schwartz's reports and testimony as common evidence that the proposed Discrimination Class will rely on to establish that Plaintiffs were injured by paying higher premiums, that Defendants' conduct was a substantial factor in causing Plaintiffs' harm because Defendants separated Plaintiffs into separate insurance companies, and that Plaintiffs' military status was a substantial motivating factor for Defendants' conduct because Defendants separated insureds based on military status. *See id.* at 11–15. However, the Court granted in part Defendants' *Daubert* motion and excluded the testimony and reports of Plaintiffs' experts regarding the primary and alternative discrimination models. *See supra* Part II(C)(3)(i). As a result, individual issues will

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plaintiff served in the military, (3) defendant discharged plaintiff, (4) plaintiff's [current/past] service in the armed forces (or need to report for required military [duty/training]) was a substantial motivating reason for defendant's decision to discharge plaintiff, (5) plaintiff was harmed, and (6) defendant's conduct was a substantial factor in causing plaintiff's harm. CACI § 2441 (citing *Haligowski v. Super. Ct.*, 200 Cal. App. 4th 983 (Cal. Ct. App. 2011) (analyzing whether supervisors may be held personally liable for discrimination under Section 394, without discussing the other elements of a Section 394 claim)).

[23] Plaintiffs concede that they must establish these four elements—which mirror four of the elements of Plaintiffs' Unruh Act claim—for their claim under Military & Veterans Code § 394(a). *See* ECF No. 119 at 11. Defendants neither contest this claim, nor offer any analysis specific to the Military & Veterans Code in their briefing. *See* ECF No. 123.

predominate because Plaintiffs will not be able to answer these common questions through common evidence. Thus, the Court declines to certify the proposed Discrimination Class.

2. Damages

The second component of the Rule 23(b)(3) predominance factor requires plaintiffs to present a damages model that is consistent with their liability case. *See Just Film, Inc.*, 847 F.3d at 1120. "[P]laintiffs must be able to show that their damages stemmed from the defendant's actions that created the legal liability." *Pulaski & Middleman, LLC v. Google, Inc.*, 802 F.3d 979, 987–88 (9th Cir. 2015) (quoting *Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 514 (9th Cir. 2013)). "To satisfy this requirement, plaintiffs must 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 the plaintiffs' legal theory." *Just Film, Inc.*, 847 F.3d at 1120 (quoting *Comcast Corp.*, 569 U.S. at 34). But "[c]alculations need not be exact." *Comcast Corp.*, 569 U.S. at 35. Indeed, the Court need not "decide the precise method for calculating damages at this stage," but rather must find "that calculation of damages will be sufficiently mechanical that whatever individualized inquiries need occur do not defeat class certification." *Jordan v. Paul Fin., LLC*, 285 F.R.D. 435, 466 (N.D. Cal. 2012); *see Chavez v. Blue Sky Nat. Beverage Co.*, 268 F.R.D. 365, 379 (N.D. Cal. 2010) ("it is not necessary to show that [this] method will work with certainty at this time."). To comport with due process, the court must "preserve" the defendant's right "to raise any individual defenses it might have at the damages phase." *Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161, 1168 (9th Cir. 2014). However, "damage calculations alone cannot defeat certification." *Yokoyama v. Midland Nat. Life Ins. Co.*, 594 F.3d 1087, 1094 (9th Cir. 2010); *see Leyva*, 716 F.3d at 514 ("[T]he presence of individualized damages cannot, by itself, defeat class certification under Rule 23(b)(3).").

In addition to their concerns above regarding the accuracy of Plaintiffs' model, Defendants argue that the model is not connected to Plaintiffs' theory of liability because it fails to calculate new base rates and rating factor relativities based on a combined risk pool of GIC's and United Services' policyholders for Variable B. *See* ECF No. 123 at 21–

24. This argument is unavailing as to the proposed Good Driver Class. As stated earlier in this Order, Plaintiffs' model is relevant to the Insurance Code violation that the Good Driver Class must prove. *See supra* Part II(C)(3)(ii). Section 1861.16(b) does not require GIC and United Services to combine their insureds into one risk pool. *Id.*

Plaintiffs have proposed a damages model that is consistent with the proposed Good Driver Class's liability case. By way of Section 1861.16(b) of the Insurance Code, Plaintiffs assert a claim under the "unlawful" prong of the UCL, which authorizes restitution damages. *Pulaski & Middleman, LLC*, 802 F.3d at 986. The proposed Good Driver Class's model seeks to calculate the difference between the putative class members' GIC premiums (Variable A) and what their premiums would have been if issued by United Services (Variable B). As such, Plaintiffs' model measures damages across the proposed classes in a manner consistent with their theory of liability.

Indeed, Plaintiffs' model closely resembles the one used as a basis for class certification in *McClure v. State Farm Life Ins. Co.*, 341 F.R.D. at 254. As explained earlier in this Order, *McClure* involved a putative class alleging that their life insurance policy contracts required cost of insurance ("COI") charges to be based on an exclusive set of mortality factors, but that the defendant insurance company assessed inflated COI charges by adding undisclosed fees. *Id.* at 248. In analyzing the predominance factor, the court found predominance was met because

> Plaintiff's damages model can identify the amount each putative class member was allegedly overcharged. Plaintiff's expert [] calculates these amounts by calculating substitute COI Charge rates based solely on mortality factors using State Farm's mortality tables. Comparing the new COI Charge rates to what putative class members were actually charged will result in a calculation of damages for each class member. Furthermore, this model is susceptible of measurement across the entire class because the substitute COI Charge rates calculated by Plaintiff's expert can be applied on a class-wide basis to calculate damages for each individual policyholder in the class.

Id. at 254. Plaintiffs' model here operates largely in the same way by measuring the amount each putative class member was allegedly overcharged by being sold a policy from GIC instead of United Services. Accordingly, Plaintiffs have demonstrated that damages are calculable on a classwide basis.

3. Superiority

Rule 23(b)(3) requires a court to find that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." The pertinent considerations include:

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

Fed. R. Civ. P. 23(b)(3)(A)–(D). The superiority requirement tests whether "classwide litigation of common issues will reduce litigation costs and promote greater efficiency." *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996).

Plaintiffs argue that all four Rule 23(b)(3) elements demonstrate that a class action is superior to other available methods for adjudicating this case. ECF No. 119 at 15. Plaintiffs claim that the putative class members have no interest in individually controlling the litigation of their claims—as evidenced by the fact that no class member has brought an individual action—because the average amount of damages for a class member is under $1,000. *Id.* In contrast, this case is already at an advanced stage of litigation, with Plaintiffs' counsel having spent around $500,000 on litigation costs. *Id.* Plaintiffs also note the desirability of concentrating the litigation of the Good Driver Class's claims in this forum, given the large number of military veterans that live in the Southern District of California, which houses several large military bases. *Id.* at 16 (citing ECF No. 58-14 (2017 California Legislative Analyst's Office Report) at 7 ("San Diego County has the second-most veterans of any California county (approximately 230,000)."). Finally, Plaintiffs argue that the

common questions of law and fact that exist across the proposed class will make it unlikely that there will be any difficulties in managing this case as a class action. ECF No. 119 at 16.

Defendants do not rebut any of Plaintiffs' arguments concerning the four Rule 23(b)(3) factors. Instead, Defendants argue that a class action is not a superior method of adjudicating this case because the Insurance Code authorizes Plaintiffs to seek relief from the CDOI by intervening or initiating a rate proceeding. ECF No. 123 at 8–12 (citing Cal. Ins. Code §§ 1858(a), 1861.10(a)). Defendants assert that when such a comprehensive regulatory regime exists, courts often find that a class action is not superior to adjudicating such disputes before the corresponding administrative agency. *Id.* at 10. Defendants claim for this reason, the Western District of Washington recently dismissed a similar lawsuit against USAA, *Epstein v. USAA Gen. Indem. Co.*, 636 F. Supp. 3d 1260 (W.D. Wash. 2022).

The availability of administrative relief is not one of factors enumerated in Rule 23(b)(3), but it is a factor a court may consider in evaluating superiority. *See Kamm v. Cal. City Dev. Co.*, 509 F.2d 205, 212 (9th Cir. 1975). Nevertheless, the Court is not persuaded that this factor outweighs the other factors that favor Plaintiffs. Administrative review of rates may be available to Plaintiffs, but individual administrative actions are not necessarily superior to a class action. *See Johnson v. Serenity Transp., Inc.*, No. 15-cv-2004, 2018 WL 3646540, at *16 (N.D. Cal. Aug. 1, 2018) ("[I]ndividual lawsuits or a series of DLSE hearings are not superior because they would unnecessarily burden the judiciary and an administrative agency and be a less efficient method of resolving the claims."), *aff'd*, 802 F. App'x 250 (9th Cir. 2020); *Pena v. Taylor Farms Pac., Inc.*, 305 F.R.D. 197, 222 (E.D. Cal. 2015) ("although the defendants point to one potential class member's effective use of California administrative remedies[], this lone success does not show administrative remedies are appropriate for the putative class at large."); *Krzesniak v. Cendant Corp.*, No. 5-cv-5156, 2007 WL 1795703, at *20 (N.D. Cal. June 20, 2007) ("courts have not hesitated to certify class actions for wage and hour claims simply because California law provides

for administrative relief."). This is especially true where—as is the case here—the size of the proposed class is large and the anticipated damages per putative class member are relatively small. *See United States ex rel. Terry v. Wasatch Advantage Grp., LLC*, 327 F.R.D. 395, 419 (E.D. Cal. 2018) (finding a class action was superior over proposed administrative agency action where individual damages of less than $2,239 were "quite low" and joinder was impracticable because of a potential class of 150 members); *Kurihara v. Best Buy Co.*, No. 6-cv-1884, 2007 WL 2501698, at *11 (N.D. Cal. Aug. 30, 2007) ("The availability of administrative hearings for the relatively small amounts at issue on behalf of each individual class member does not dissuade this court from determining that a class action is superior overall to other forms of relief.").[24]

Finally, the *Epstein* case Defendants cite in support of their argument is inapposite. The ruling in *Epstein* did not involve class certification, but rather granted USAA's motion to dismiss by applying Washington state's rate-file doctrine. 636 F. Supp. 3d at 1266. The district court in *Epstein* expressly referred to this Court's earlier order denying Defendants' motion to dismiss, and noted that this case was distinguishable because "Epstein's claims [] turn exclusively on Washington law." *Id.* As this Court articulated in its prior order on

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[24] The cases Defendants cite are distinguishable because other factors, beyond the availability of administrative review, counseled against finding superiority. *See* ECF No. 123 at 10 (citing *Pattillo v. Schlesinger*, 625 F.2d 262, 265 (9th Cir. 1980) (declining to find superiority where there were "ongoing administrative proceedings"); *Shasta Linen Supply, Inc. v. Applied Underwriters, Inc.*, No. 2:16-cv-1211, 2019 WL 358517, at *4 (E.D. Cal. Jan. 29, 2019) (declining to find superiority where "the individual damages at stake in th[e] litigation [we]re large" and putative class members had already brought 100 arbitrations, lawsuits, and CDOI appeals); *Rowden v. Pac. Parking Sys., Inc.*, 282 F.R.D. 581, 585–87 (C.D. Cal. 2012) (declining to find superiority where proposed class was not ascertainable and the named plaintiff asserted a claim for $15 million); *Lanzarone v. Guardsmark Holdings, Inc.*, No. 6-cv-1136, 2006 WL 4393465, at *5 (C.D. Cal. Sept. 7, 2006) ("[I]t appears that absent class members actually oppose Plaintiff's suit and thus have an interest in controlling their own claims. In addition, because Plaintiff's claims each present questions requiring individual and therefore voluminous evidence concerning liability and remedies, a class action here will not be manageable.")).

Defendants' motion to dismiss, California's rate-file doctrine, as codified in Section 1860.1 of the Insurance Code, does not bar this action. ECF No. 22 at 7–9.

The Court concludes that a class action is a superior means of adjudicating this case. Therefore, the Court grants in part Plaintiffs' motion for class certification under Rule 23(b)(3), and certifies the Good Driver Class's "unlawful" UCL claim. The Court denies Plaintiffs' class certification motion as to the remaining claims.

E. Appointment of Class Representatives and Class Counsel

Named Plaintiffs Castro and Coleman meet the commonality, typicality, and adequacy requirements of Rule 23(a). As such, the Court appoints them as class representatives. *See In re Bridgepoint Educ. Inc. Secs. Litig.*, No. 12-cv-1737-JM-JLB, 2015 WL 224631, *8 (S.D. Cal. Jan. 15, 2015) (noting Rule 23 governs whether a plaintiff should be appointed as class representative).

A court that certifies a class must also appoint class counsel. Fed. R. Civ. P. 23(g)(1). A court must consider the following factors when appointing class counsel: "(i) the work counsel has done in identifying or investigating potential clams in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsels' knowledge of the applicable law; and (iv) the resources that counsel will commit to represent the class." Fed. R. Civ. P. 23(g)(1)(A). A court may also "consider any other matter pertinent to counsel's ability to fairly and adequately represent the interest of the class." Fed. R. Civ. P. 23(g)(1)(B).

Here, Plaintiffs' counsel have expended significant resources and actively litigated this case through discovery, mediation, a motion to dismiss, and now a second motion to certify class. Plaintiffs' law firms, Consumer Watchdog, Mehri & Skalet, PLLC, and Mason LLP, also have significant prior experience litigating class actions, including insurance-related class actions. *See* ECF No. 119 at 19 (incorporating ECF No. 58 at 24–25). Defendants do not challenge the appointment of Plaintiffs' attorneys as class counsel. Accordingly, the Court appoints Consumer Watchdog, Mehri & Skalet, PLLC, and Mason

LLP as class counsel to the Good Driver Class pursuant to Federal Rule of Civil Procedure 23(g).

IV. CONCLUSION

For the reasons above, the Court:

1. **GRANTS** Plaintiffs' *ex parte* motion for leave to file a surreply in opposition to Defendants' motion to exclude, ECF No. 128.

2. **GRANTS IN PART** Defendants' motion to exclude [ECF No. 122] as to the portion of the declarations and testimony of Plaintiffs' experts regarding the primary and alternative discrimination models, and **DENIES** the motion in all other respects.

3. **GRANTS IN PART** Plaintiffs' renewed motion for class certification [ECF No. 119], and **CERTIFIES** the following class and claim:

   a. The "unlawful" UCL claim asserted on behalf of the Good Driver Class, which comprises:

   > All enlisted persons who (a) at any time on or after December 28, 2017, purchased or renewed an automobile insurance policy including collision coverage from GIC, (b) qualified as good drivers under Cal. Ins. Code § 1861.025 according to USAA's records, (c) were not offered a good driver discount from United Services, (d) paid more for that policy than they would have paid in United Services, and (e) at any time in which clauses (a) through (d) have been satisfied, garaged vehicles in the State of California.

The Court **DENIES** the renewed motion in all other respects.

4. **APPOINTS** named Plaintiffs Castro and Coleman as class representatives, and Consumer Watchdog, Mehri & Skalet, PLLC, and Mason LLP as class counsel to the Good Driver Class.

IT IS SO ORDERED.

Dated: December 22, 2023

Robert S Huie

Hon. Robert S. Huie
United States District Judge