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) PARTIALLY GRANTING AND PARTIALLY DENYING PLAINTIFFS' MOTION AND AMENDED MOTION TO AMEND PROPOSED CLASS DEFINITIONS;

(2) DENYING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION;

(3) DENYING AS MOOT DEFENDANTS' MOTION TO EXCLUDE; AND

(4) DENYING DEFENDANTS' MOTION FOR CONSOLIDATED ORAL ARGUMENT

[ECF Nos. 58, 64, 69, 85, 87]

Before the Court are five motions: (1) Plaintiffs' motion to amend their proposed class definitions, ECF No. 85; (2) Plaintiffs' amended motion to amend their proposed

class definitions, ECF No. 87; (3) Plaintiffs' motion for class certification, ECF No. 58; (4) Defendants' motion to exclude the declarations and testimony of Plaintiffs' experts, ECF No. 64; (5) and Defendants' motion for consolidated oral argument, ECF No. 69. For the following reasons, the Court partially grants and partially denies Plaintiffs' motion and amended motion to amend the proposed class definitions, and denies the remaining motions.[1]

I. BACKGROUND

A. Parties

USAA is a financial services group of several companies. Four of those companies provide auto insurance: USAA Casualty Insurance Company, Garrison Property and Casualty Insurance Company, and Defendants United Services Automobile Association ("United Services") and USAA General Indemnity Corporation ("GIC"). Each of these four companies serves a different segment of the military and military family members. ECF No. 65 at 3. GIC is a wholly owned subsidiary of United Services. Plaintiffs Eileen-Gayle Coleman and Robert Castro are enlisted personnel who currently have collision coverage through GIC. ECF No. 49 ¶ 6.

B. USAA Ratemaking Process

USAA auto insurance premiums are calculated in two steps. In the first step, USAA calculates a "base rate" for a particular type of coverage, which is the same for each policyholder. ECF No. 64-2 ¶¶ 8, 10 (declaration of USAA Director of Property & Casualty Pricing and Reserving Actuary describing calculation of premiums). 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'*

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[1] The Court finds that the pending motions are suitable for disposition without oral argument. *See* CivLR 7.1(d)(1). It therefore denies Defendants' request for consolidated oral argument, ECF No. 69.

Found., Inc. v. Low, 85 Cal. App. 4th 1179, 1186 (2000); *see also id.* at 1186 *et seq*. (summarizing calculation of auto insurance premiums). United Services and GIC offer at least ten different types of coverage,[2] which are all associated with a different base rate. ECF No. 64-2 ¶ 16. According to Plaintiffs, the base rates for each type of coverage were consistently higher for GIC insureds than the corresponding base rates applicable to United Services policyholders. ECF No. 58 at 9; *see also* ECF No. 63-1 ¶ 11 (declaration of Plaintiffs' expert stating that "GIC base rates have without exception been larger than the base rates charged for [United Services] throughout the period").

In the second step, the base rate is modified by applying various "rating factors" to the policyholder. Under California law, insurers are required to apply three mandatory rating factors: driving safety record, annual miles driven, and years of driving experience. ECF No. 64-2 ¶ 19; Cal. Ins. Code § 1861.02(a)(1)-(3). Insurers are also permitted to apply 15 optional factors.[3] ECF No. 64-2 ¶ 20. 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; ECF No. 64-2 ¶ 24. To accomplish these adjustments, each category within a rating factor is given a "relativity," which is a coefficient multiplied

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[2] The coverages include bodily injury, property damage, medical payment, uninsured motorist/underinsured motorist bodily injury, uninsured motorist property damage, comprehensive, collision, towing & labor, waiver of collision deductible, and rental reimbursement. ECF No. 64-2 ¶ 16.

[3] 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. 64-2 ¶ 20. In calculating auto premiums, USAA considers all optional rating factors, except nonsmoker. *Id*. ¶ 22.

against the base rate. *Id*. ¶¶ 25-26.[4] This process is repeated for all rating factors to arrive at the final premium and for each coverage the policyholder obtains. *Low*, 85 Cal. App. 4th 1188; ECF No. 64-2 ¶ 9. A policyholder's total annual premium is the sum of premiums for each of the coverages that the policyholder selects. *Id*.[5]

To obtain approval from the California Department of Insurance, USAA is required to submit a "filing" for each of the steps outlined above: 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 individual segments of policyholders. ECF No. 64-1 ¶¶ 18-19. The base rates and relativities for GIC and United Services are available on the California Department of Insurance website. ECF No. 58 at 19.

C. Plaintiffs' Allegations

In their operative First Amended Complaint, ECF No. 49, Plaintiffs allege that USAA offers enlisted personnel, defined as military servicemembers on active duty in pay grades E-1 through E-6 (along with veterans who were in those pay grades), collision coverage through GIC only. *Id*. ¶ 1. In contrast, higher-ranking current and former military

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[4] For example, the "annual mileage" rating factor could be divided into "high," "average," and "low" categories. Policyholders in the "high" category would be more likely to be surcharged, those in the "low" category would receive discounts, and those in the "average" category would see no change in their base premiums. The "high" category within the annual miles driven rating factor could be assigned a relativity of 1.5, the "average" category, a relativity of 1.0, and the "low" category, a relativity of 0.5. To properly adjust the premium, the insurer multiplies the relativity applicable to the policyholder against the base rate for each rating factor. If, for instance, the base rate were $800, the premium of those in the 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). *See Low*, 85 Cal. App. 4th at 1187-88.

[5] According to Plaintiffs' expert, Jonathan Griglack, an expense fee is added after multiplying the relativities against the base rate. ECF No. 63-1 ¶ 22. USAA then applies a good driver discount, if the policyholder is eligible, which is another "multiplicative relativity applying to the expense fee." *Id.*

officers are eligible to obtain insurance through United Services, which offers more favorable base rates and premiums. *Id*. ¶ 3.[6] Plaintiffs also claim that GIC fails to provide the lowest rates to enlisted personnel who qualify for a good driver discount under California law, in violation of Section 1861.16(b) of the California Insurance Code.[7] *Id*. ¶ 2. Plaintiffs both qualify for a good driver discount under that statute. *Id*. ¶ 6. Plaintiffs allege that USAA's practice of separating enlisted personnel and officer policyholders between GIC and United Services "discriminates against enlisted military personnel and enlisted veterans by consigning them to its substandard insurance company, [GIC]." *Id*. ¶ 3.

Plaintiffs' first and second claims allege that Defendants violated California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200 *et seq*., by engaging in an "unlawful" and "unfair" business practice, based upon an underlying violation of Section 1861.16(b) of the California Insurance Code. ECF No. 1 ¶¶ 70-81. Plaintiffs also bring two claims alleging discrimination, in violation of Section 51 of the Unruh Civil Rights Act, *id*. ¶¶ 82-92, and Military and Veterans Code Section 394(a), *id*. ¶¶ 93-103.

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[6] Defendants submit the declaration of Keith Wechsler, the Executive Director of Property & Casualty Product Management at USAA, who states that "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. 64-3 ¶ 13 (emphasis in original).

[7] 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."

D. Plaintiffs' Proposed Class

In their class certification motion, Plaintiffs seek to certify a "Discrimination Class" and a separate[8] "Good Driver Class." ECF No. 58 at 11-12. During the pendency of Plaintiffs' class certification motion, however, the definitions of both proposed classes were altered by the Parties' agreement.

On October 12, 2022, Plaintiffs filed a motion to amend the proposed class definitions, which sought to narrow the class period and make additional changes that clarified the scope of the proposed classes. ECF No. 85.

On October 17, 2022, Plaintiffs filed an "Amended Motion To Amend" the proposed class definitions, which removed nine "unnecessary and potentially confusing" words from the class definitions Plaintiffs proposed in first motion to amend. ECF No. 87.

In their briefing on Plaintiffs' motion and amended motion to amend, the parties agreed to narrowing the class period. ECF No. 90 at 6. Plaintiffs, in their reply brief, agreed to retract their remaining proposed amendments to the class definitions. ECF No. 93 at 5-6. As a result, the only change Plaintiffs made to the class definition, to which Defendants consented, was to narrow the class period.[9]

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[8] In the First Amended Complaint, Plaintiffs allege that they are bringing claims on behalf of a class enlisted policyholders and a "subclass" of enlisted policyholders who qualify as statutory good drivers. ECF No. 49 ¶ 5; *see also id*. ¶¶ 6-7, 14, 47-68 (repeatedly referring to a "subclass" of statutory good drivers). But the class definitions Plaintiffs propose in their class certification motion are different from the definitions they proposed in the First Amended Complaint, ECF No. 49 ¶¶ 46-47. Plaintiffs add to the new class definitions date limitations which make the Good Driver Class more expansive in time than the Discrimination class. The Good Driver Class is thus no longer a "subclass," as the First Amended Complaint alleges, but instead a separate class altogether.

[9] The Parties agree to narrow the class period so that it begins on December 28, 2017, rather than February 4, 2017. ECF No. 58 at 11. But Plaintiffs' motion to amend proposed another revision that the parties did not thereafter address. Both proposed class definitions now require that policyholders "purchased or renewed" a policy within the class period in order to be a class member, whereas the earlier definitions Plaintiffs proposed in their class

Plaintiffs' proposed Discrimination Class comprises:

> All (a) "enlisted" persons, (b) who at any time on or after February 4, 2018,[10] purchased or renewed an automobile insurance policy including collision coverage from GIC, (c) who paid more for that policy than they would have paid in USAA, and (d) who, at any time in which clauses (a) through (c) have been satisfied, garaged vehicles in the State of California.

Plaintiffs' proposed "Good Driver Class" comprises:

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

ECF No. 93 at 8-9.

E. Plaintiffs' Experts

In support of their class certification motion, Plaintiffs submitted the declarations of Jonathan Griglack, ECF No. 63-1,[11] and Allan Schwartz, ECF No. 58-4.

Griglack proposes a method for calculating two snapshot values: the premiums GIC policyholders paid and their hypothetical United Services premiums (*i.e.*, the premium GIC policyholders would have paid if they were subject to United Services rates) on ten days:

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certification motion only required that policyholders "had" a policy. This change is immaterial to the disposition of Plaintiffs' class certification motion.

[10] In a footnote in their class certification motion, Plaintiffs state that the start date for the Discrimination Class should be February 4, 2019, if the Court finds that the applicable limitations period is two years. The Court need not rule on the statute of limitations issue in addressing Plaintiffs' class certification motion.

[11] Plaintiffs submitted Griglack's declaration along with their class certification motion, ECF No. 58-3. Approximately six weeks after filing their motion, Plaintiffs filed Griglack's amended declaration. ECF No. 63-1.

April 1 and October 1 of 2017, 2018, 2019, 2020, and 2021. ECF No. 63-1 ¶ 3. Griglack calculated these premiums by taking policy data provided by Defendants – which, at the time of Griglack's declaration, had only been produced with respect to October 1, 2019 – and applying the publicly available base rates and relativities for GIC and United Services in effect on that date. *Id*. ¶ 24-25, 29. Griglack found that 92.3% of GIC policies with collision coverage were subject to higher premiums than they would have under United Services base rates and relativities. *Id*. ¶ 35. Griglack also found that 91.7% of GIC policies with collision coverage subject to a good driver discount paid more than they would have under United Services base rates and relativities. *Id*. ¶ 34.

Schwartz proposes calculating class damages by subtracting the "required premium," which is the "premium necessary to comply with the applicable law," from the "actual charged premium" for each individual GIC policy and then calculating the total sum of the differences. ECF No. 58-4. ¶ 17. Schwartz states that the "required premium" can be calculated by simply applying the United Services base rates and relativities to the GIC policyholder data provided by Defendants – the same method that Griglack applied in his declaration. *Id*. ¶ 20. In other words, Schwartz proposes taking Griglack's two snapshot valuations of GIC and hypothetical United Services premiums and measuring the difference to calculate damages. Schwartz also proposes an alternative method for calculating the "required premium," which is "based on the combined experience of the Defendants GIC and United Services." *Id*. ¶ 19. Under this alternative proposal, Schwartz proposes to apply to the hypothetical United Services premium "a numerical factor that would increase the dollar amount of [United Services] premium by the dollar amount of decrease in premium for GIC, thereby balancing against each other." *Id*. ¶¶ 21-24. In other words, under this alternative method, Schwartz would uniformly reduce the calculated differential between GIC and hypothetical United Services premiums to account for the shortfall in total premiums USAA would receive if GIC had charged the "required premium." Applying this numerical factor would therefore reduce damages for each policyholder and provide a more conservative estimate of damages. ECF No. 67 at 9.

F. Procedural History

Plaintiffs filed the original Complaint on February 4, 2021. ECF No. 1. On June 22, 2021, the Court partially granted and partially denied Defendants' motion to dismiss the Complaint, 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, to which Defendants answered, ECF No. 50.

Plaintiffs filed their motion for class certification on April 14, 2022. ECF No. 58. It is fully briefed. ECF Nos. 65 (opposition); 67 (reply).

On June 3, 2022, Defendants filed a motion to exclude the declarations and testimony of Griglack and Schwartz, ECF No. 64, which is likewise fully briefed, ECF Nos. 68 (opposition); 70 (reply).

On June 30, 2022, Defendants filed a motion seeking consolidated oral argument on Plaintiffs' class certification motion and Defendants' motion to exclude. ECF No. 69. In that motion, Defendants noted that Plaintiffs did not oppose the request. *Id*. at 2.

Finally, on October 12, 2022, Plaintiffs filed their motion to amend the class definition, ECF No. 85, and their amended motion to amend, which purported to supplement rather than supersede the original motion to amend, ECF No. 87. Defendants filed a response to the amended motion to amend, ECF No. 92, and an opposition to the original motion to amend, ECF No. 90. Plaintiffs also submitted a reply brief in support of their motion to amend. ECF No. 93.

II. LEGAL STANDARD

Before certifying a class, the Court must be "satisfied, after a rigorous analysis" that the prerequisites of Rule 23(a) and (b) are satisfied. *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 663 (9th Cir. 2022). Plaintiffs seeking class certification "must actually *prove*—not simply plead—that their proposed class satisfies each requirement of Rule 23 . . . ." *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S.

258, 275 (2014). "[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 664.

The Court may certify a class "only if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(1)-(4).

Additionally, "plaintiffs must show that the class fits into one of three categories" under Rule 23(b). *Olean*, 31 F.4th at 663. Under Rule 23(b)(3), the Court may certify a class if "the court finds 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." Pertinent to these findings are: "(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).

III. PLAINTIFFS' MOTION AND AMENDED MOTION TO AMEND CLASS DEFINITIONS [ECF No. 85]

As discussed above, the parties agree to Plaintiffs' request to narrow the class period, and Plaintiffs have withdrawn their remaining proposed revisions to the class definitions. The Court therefore partially grants and partially denies Plaintiffs' motion and amended motion to amend the class definitions. The proposed class definitions are set forth above, *supra* Section I.D.

IV. PLAINTIFFS' MOTION FOR CLASS CERTIFICATION [ECF No. 58]

Defendants do not dispute that Plaintiffs have satisfied the requirements of Rule 23(a). Defendants, however, contend that Plaintiffs have not established that common issues predominate over individual issues, as required by Rule 23(b)(3). Because the Court agrees, Plaintiffs' class certification motion is denied.

A. 23(a) Requirements

1. *Numerosity*

A class may only be certified if "the class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). "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). According to Plaintiffs, based on the limited data Defendants have produced, the Discrimination Class and Good Driver Class each have over 100,000 members as of October 10, 2019, alone. ECF No. 58 at 23. Defendants do not dispute this number or raise any arguments challenging numerosity. The Court finds that the proposed class is sufficiently numerous. *See, e.g.*, *Jordan v. Los Angeles Cnty.*, 669 F.2d 1311, 1319 (9th Cir.) (noting in dicta that court "would be inclined to find the numerosity requirement . . . satisfied solely on the basis of the number of ascertained class members, i.e., 39, 64, and 71 . . . ."); *Slaven v. BP Am., Inc.*, 190 F.R.D. 649, 654 (C.D. Cal. 2000) ("[O]ther District Courts have, however, enacted presumptions that the numerosity requirement is satisfied by a showing of 25-30 members.").

2. *Commonality*

Certification is only appropriate if "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). "Commonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury.'" *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349-50 (2011) (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 (1982)). The class members' "claims must depend upon a common contention . . . [and t]hat common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that

is central to the validity of each one of the claims in one stroke." *Id*. at 350. Among other questions, Plaintiffs argue that there are legal defenses asserted by Defendants that are capable of class-wide resolution. ECF No. 58 at 16-17. Defendants do not dispute the commonality requirement. The Court concludes that commonality is satisfied. *Wal-Mart*, 564 U.S. at 359 ("We quite agree that for purposes of Rule 23(a)(2) [e]ven a single [common] question will do.") (internal quotation marks omitted).

3. *Typicality*

Plaintiffs may bring claims on behalf of a class, only if "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). "The purpose of the typicality requirement is to assure that the interest of the named representative aligns with the interests of the class." *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1175 (9th Cir. 2010) (quoting *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992)). "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*, 976 F.2d at 508. "[C]lass certification should not be granted if 'there is a danger that absent class members will suffer if their representative is preoccupied with defenses unique to it.' *Id*. (quoting *Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 176, 180 (2d Cir.1990)). "[R]epresentative claims are 'typical' if they are reasonably coextensive with those of absent class members; they need not be substantially identical." *Staton v. Boeing Co.*, 327 F.3d 938, 957 (9th Cir. 2003) (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998)).

Plaintiffs argue that their claims are typical of the class because they are both enlisted policyholders who purchased GIC auto insurance, received good driver discount policies, and would have paid lower premiums if they had been charged United Services rates. ECF No. 58 at 17. Defendants do not contest Plaintiffs' typicality. The Court thus finds that typicality is satisfied.

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). "Class representation is inadequate if the named plaintiff fails to prosecute the action vigorously on behalf of the entire class or has an insurmountable conflict of interest with other class members." *Hesse v. Sprint Corp.*, 598 F.3d 581, 589 (9th Cir. 2010). Plaintiffs argue that they have no conflicts of interest with any class members, and their counsel have demonstrated they will vigorously litigate the case. Defendants do not contest Plaintiffs' adequacy as class representatives. The Court finds that Plaintiffs are adequate representatives.

B. Predominance Under Rule 23(b)(3)

"While Rule 23(a)(2) asks whether there are issues common to the class, Rule 23(b)(3) asks whether these common questions predominate. Though there is substantial overlap between the two tests, the 23(b)(3) test is 'far more demanding' . . . and asks 'whether proposed classes are sufficiently cohesive to warrant adjudication by representation.'" *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1172 (9th Cir. 2010) (internal citations omitted). "What matters to class certification . . . is not the raising of common 'questions'—even in droves—but rather, the capacity of a class-wide proceeding to generate common *answers* apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers." *Wal-Mart*, 564 U.S. at 350 (citation omitted). The predominance factor is not met where "non-common, aggregation-defeating, individual issues" are more prevalent or important than "common, aggregation-enabling, issues in the case." *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453 (2016). An individual issue is one where "members of a proposed class will need to present evidence that varies from member to member." *Id.* (citation omitted).

1. Claims and elements

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 omitted); *see also Bowerman v. Field Asset Servs., Inc.*, 60 F.4th 459, 470 (9th Cir. 2023) (reversing certification order where "the common evidence here speaks only to some elements of the class members' claims" and plaintiff could therefore not establish predominance). Plaintiffs' motion for class certification does not address the elements of any of Plaintiffs' claims.

Plaintiffs bring two discrimination claims under the Unruh Act and Section 394(a) of the Military and Veterans Code. 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). 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 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 (Ct. App. 2015) (citing *Marina Point, Ltd. v. Wolfson*, 30 Cal. 3d 721, 736 (1982)). "To state a claim for 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. 3:21-CV-01833 BTM, 2022 WL 5264496, at *4 (S.D. Cal. Oct. 6, 2022); *see also* Judicial Council of California Civil Jury Instructions ("CACI") § 3060 (2022); *Harris v. Cap. Growth Invs. XIV*, 52 Cal. 3d 1142, 1175 (1991) ("[A] plaintiff seeking to establish a case under the Unruh Act must plead and prove intentional

discrimination in public accommodations in violation of the terms of the Act.").[12] Section 394(a) of the California Military and Veterans Code provides that "[n]o member of the military forces shall be prejudiced or injured by any person, employer, or officer or agent of any corporation, company, or firm with respect to that member's employment, position or status." *See also* CACI No. 2441.[13]

Plaintiffs also bring two UCL claims alleging that Defendants engaged in an unfair and unlawful business practice, based upon an underlying violation of California Insurance Code Section 1861.16(b). ECF No. 1 ¶¶ 70-81. The California UCL prohibits "unfair competition," which includes "any unlawful, unfair or fraudulent business act or practice." Cal. Bus. & Prof. Code § 17200. "By proscribing any unlawful business practice, section 17200 borrows violations of other laws and treats them as unlawful practices that the unfair competition law makes independently actionable." *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 180 (1999) (internal quotation marks omitted). California Insurance Code Section 1861.16(b) states that: "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

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[12] In *Munson v. Del Taco, Inc.*, 46 Cal. 4th 661, 665 (2009), the California Supreme Court held that *Harris* was partially abrogated by statute, in that plaintiffs who establish an ADA violation need not prove intentional discrimination.

[13] CACI No. 2441 requires a plaintiff bringing a claim under Section 394(a) of the California Military and Veterans Code to establish that: (1) plaintiff was an employee of defendant, (2) 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 No. 2441 (citing *Haligowski v. Super. Ct.*, 200 Cal. App. 4th 983 (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)).

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."[14]

The UCL also prohibits an "unfair" business practice, even if that practice is otherwise lawful. *Cel-Tech*, 20 Cal. 4th at 180. Whether a business practice is "unfair" requires an analysis of whether (i) there exists substantial consumer injury, (ii) the injury is not outweighed by countervailing benefits to consumers or competition, and (iii) the injury was not reasonably avoidable by the consumer. *Camacho v. Auto. Club of So. Cal.*, 142 Cal. App. 4th 1394, 1403 (Ct. App. 2006).

2. *Common and individual evidence*

Plaintiffs have not endeavored, for any of their four cases of action, to "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.[15] Plaintiffs' failure to conduct this analysis favors denial of their certification motion. *See, e.g.*, *Manigo v. Time Warner Cable, Inc.*, No. 2:16-CV-06722-JFW (PLAx), 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

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[14] 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).

[15] For purposes of analyzing predominance, Plaintiffs do not appear to distinguish between their four causes of action, as applied to either the putative Discrimination Class or the putative Good Driver Class.

their claims on a classwide basis" and "failed to show how [the pertinent legal] standard could be satisfied through common proof").

Plaintiffs' discussion of predominance begins by noting that the base rates and relativities for both GIC and United Services are available on the website of the California Department of Insurance. ECF No. 58 at 19. Plaintiffs argue that their actuarial expert, employing these publicly available rates, has developed a model that can be used to ascertain injury and damages—namely, whether a GIC insured overpaid, and if so, by how much. *Id.* at 21.[16] Plaintiffs explain that their expert Schwartz's "calculations will rely exclusively on common evidence—primarily Defendants' publicly available filings with [the California Department of Insurance] and other documents concerning the amount of premium realized by GIC and [United Services], and the calculations performed by [Plaintiff's expert's firm] from the spreadsheets that Defendants have produced in this case." *Id.*

The crux of Plaintiffs' predominance argument is that they have created a *model* or *methodology* that will produce relevant answers on injury and damages for each member of the putative class. Plaintiffs argue that common questions "usually predominate" when individual factual determinations can be made by "computer records" and "objective criteria," rendering unnecessary an evidentiary hearing on each claim. ECF No. 58 at 21.[17] For this proposition, Plaintiffs rely on *Perez v. Leprino Foods Co.*, No. 1:17-CV-00686-

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[16] As discussed above, Plaintiffs offer two alternative models of damages; they state, "[t]he Court should not decide now which model is appropriate; that is a merits question." ECF no. 58 at 21.

[17] Plaintiffs' argument relies upon a statement of law in a District Court order that is in turn quoting a treatise regarding class actions. But the principle cited is not determinative of Plaintiffs' class certification motion. Regardless of whether common questions "usually predominate" where facts can be determined based on objective criteria, Plaintiffs have failed to meet their burden of demonstrating predominance is satisfied in this particular case.

AWI-BAM, 2021 WL 53068 (E.D. Cal. Jan. 6, 2021). In that case, the district court found the predominance requirement satisfied in a wage and hour lawsuit, where the plaintiff claimed his employer had "uniform policies" requiring employees to work off the clock and be on call during breaks; and where the plaintiff "presented evidence establishing that all putative class members are required to complete the same pre- and post-shift activities." *Id.* at *15-17. In other words, class members were "uniformly subject to a policy in a way that gives rise to consistent liability across the class." *Id.* at *16. The court in that case addressed common class-wide evidence, rather than an expert's methodology that promised answers for each class member.

Plaintiffs cite three additional district court decisions for the proposition that "damages calculations do not defeat predominance for classes challenging insurance companies' premium charges." ECF No. 58 at 21-22. The issue, however, is not whether Plaintiffs' expert methodology here *defeats* the predominance requirement; since Plaintiffs have the burden of proof, the issue is whether that methodology is sufficient to *establish* predominance in the first place. Thus, Plaintiffs cite *Bally v. State Farm Life Ins. Co.*, 335 F.R.D. 288, 303-04 (N.D. Cal. 2020), to argue that, in Plaintiffs' words, predominance is "not undermined" by such a proposed model. Likewise, they cite *Feller v. Transamerica Life Ins. Co.*, No. 2:16-CV-01378-CAS-AJW, 2017 WL 6496803 (C.D. Cal. Dec. 11, 2017), in which the district court—having already determined that predominance was satisfied as to liability issues—concluded that the plaintiffs' methodology for determining damages did not defeat predominance, because as "rote arithmetic" it was "sufficiently tethered" to the plaintiffs' theory of liability. *Id.* at *11. Finally, Plaintiffs cite *Vaccarino v. Midland Nat. Life Ins. Co.*, No. 2:11-CV-05858-CAS, 2014 WL 572365 (C.D. Cal. Feb. 3, 2014), as another case ruling that "predominance [was] not undermined" by the plaintiffs' damages model. ECF No. 58 at 22. In that case, the district court had previously ruled that the plaintiffs had established "all of the Rule 23 requirements for certification with regard to liability," but had denied certification based on the plaintiffs' failure to offer a plausible classwide method for proving damages. *Vaccarino*, 2014 WL 572365 at *4.

Addressing a renewed motion for certification that adopted a new damages model, the district court concluded that the plaintiffs had now "sufficiently tied" their damages model to their theory of liability. *Id.* at *8-9.

The Court concludes that Plaintiffs have not met their burden to establish predominance here. This is not a case where the common evidence—the publicly available set of rates and relativities offered by United Services and GIC—itself establishes any of the elements of injury or damages. As proffered by Plaintiffs, those rates and relativities are only relevant to the extent that they provide inputs that are used by Plaintiffs' experts in developing a methodology for determining injury and damages for each of the putative class members. Plaintiffs' briefing seems to suggest that those methodologies establish predominance and warrant class certification in a way that is self-evident: "This case fits the paradigm for a suit in which common issues predominate to a tee." ECF No. 58 at 19. It is not self-evident. Plaintiffs have not undertaken to address to what extent their methodologies will establish common, class-wide answers to the questions posed by the elements of Plaintiffs' claims. As the party bearing the burden of proof, it does not suffice for Plaintiffs to assert that "Plaintiffs are unaware of any individualized question related to either liability or remedies," ECF No. 58 at 22; every question related to liability and remedies is individualized unless and until Plaintiffs establish that those questions are susceptible to common proof.

The Court is not ruling that Plaintiffs are not capable of meeting the burden of establishing predominance, only that they have not done so. The Court therefore denies Plaintiffs' class certification motion.

Defendants' motion to exclude the declarations and testimony of Griglack and Schwartz, ECF no. 64, is denied as moot for purposes of the class certification motion, without prejudice to resubmitting the motion for purposes of summary judgment or trial.

V. CONCLUSION

For the foregoing reasons, the Court **ORDERS** that:

1. Plaintiffs' motion to amend the proposed class definitions, ECF No. 85, and amended motion to amend the proposed class definitions, ECF No. 87, are **PARTIALLY GRANTED AND PARTIALLY DENIED**;

2. Plaintiffs' motion for class certification, ECF No. 58, is **DENIED**;

3. Defendants' motion to exclude, ECF No. 64, is **DENIED AS MOOT** for purposes of class certification, without prejudice to resubmitting a motion to exclude for purposes of summary judgment or trial; and

4. Defendants' motion for consolidated oral argument, ECF No. 69, is **DENIED**.

IT IS SO ORDERED.

Dated: March 21, 2023

Robert S Huie

Hon. Robert S. Huie
United States District Judge