UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 10-09198-JVS (RNBx)	Date	December 22, 2017
Title	Joyce Walker, et al. v. Life Insurance Co. Of the Southwest, et al.		

Present: The Honorable	James V. Selna
Karla J. Tunis	Not Present
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Not Present	Not Present

Proceedings: **(IN CHAMBERS) Order Granting in Part and Denying in Part the Parties Motions for Summary Judgment**

Before the Court are two motions for summary judgment.

Plaintiffs Joyce Walker ("Plaintiff Walker"), Kim Bruce Howlett ("Plaintiff Howlett"), and Muriel Spooner ("Plaintiff Spooner"), on behalf of themselves and all others similarly situated, (collectively, "Plaintiffs") moved for partial summary judgement on Plaintiffs' claims for relief pursuant to Federal Rule of Civil Procedure 56.[1] (Mot., Docket No. 843.) Defendant Life Insurance Company of the Southwest ("LSW") opposed the motion. (Opp'n, Docket No. 858.) Plaintiffs replied. (Reply, Docket No. 864.)

LSW also moved for summary judgment on all claims contained in Plaintiffs' Third Amended Complaint ("TAC"). (Mot., Docket No. 844.) Plaintiffs opposed the motion. (Opp'n, Docket No. 859.) LSW replied. (Reply, Docket No. 866.)

For the following reasons, the Court **grants in part** and **denies in part** Plaintiffs' and LSW's motions for summary judgment.

I. BACKGROUND

[1] Plaintiffs also filed a Request for Judicial Notice ("RJN"). (RJN, Docket No. 843-1.) Because the Court does not rely on the sources attached the RJN, the Court denies Plaintiffs' request.

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The general background of this dispute is well-known to the parties and to the Court. For further information, consult this Court's April 14, 2015 "Order Regarding Post-Jury Trial UCL Proceedings." (Order, Docket No. 791.)

Briefly, Plaintiffs are seeking to represent a class of purchasers of indexed universal life insurance policies issued by LSW. (TAC, Docket No. 839 ¶ 1.) The Court previously ruled as a matter of law that Plaintiffs could not predicate California Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code §§ 17200, et seq., claims on California's Illustration Statute, Cal. Ins. Code §§ 10509.950, et seq., because the statute lacks a private right of action. (Order, Docket No. 59.) At trial, a jury heard Plaintiffs' common-law fraud claims, and the Court heard Plaintiffs' UCL claims. (Order, Docket No. 791 at 3.) The jury found LSW not liable on all of Plaintiffs' common-law fraud claims. (Id.) The Court found in favor of LSW on all remaining claims. (Id. at 75.) On appeal, the Ninth Circuit reversed the Court's dismissal of Plaintiffs' UCL claims predicated on violations of the Illustration Statute and clarified that Plaintiffs could sue to enforce the Illustration Statute through UCL claims. Walker v. Life Ins. Co. of the Sw., 681 F. App'x 599, 602, as amended on denial of reh'g (9th Cir. May 5, 2017). The Ninth Circuit otherwise affirmed this Court's judgment. Id. On remand, Plaintiffs filed a TAC alleging that LSW's practices in connection with the marketing and sale of two of its life insurance policies, SecurePlus Provider ("Provider") and SecurePlus Paragon ("Paragon"), violate the UCL's unlawful and unfair prongs. (TAC, Docket No. 839 ¶¶ 83-99.) Specifically, Plaintiffs' claims concern LSW's illustrations, which "provide a brief summary that demonstrates the mechanics of the Provider and Paragon policies with certain, specified 'what-if scenarios.'" (Order, Docket No. 791 at 24.) Plaintiffs' UCL claim is predicated on LSW's alleged violation of various sections of the Illustration Statute. (Id.) Now before the Court are the parties' cross-motions for summary judgment.

II. LEGAL STANDARD

A. Evidentiary Objection to Expert Testimony

Expert testimony is admissible if the party offering such evidence shows that the testimony is both reliable and relevant. Fed. R. Evid. 702; Kumho Tire Co. v. Carmichael, 526 U.S. 137, 147 (1999); Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 590-91 (1993). Federal Rule of Evidence 702 permits expert testimony if "(a) the

expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case." Fed. R. Evid. 702. An expert can be qualified "by knowledge, skill, experience, training, or education." Id.

A trial court has a "gatekeeping" obligation to admit expert testimony only when it is both reliable and relevant. Daubert, 509 U.S. at 589; Kumho Tire Co., 526 U.S. at 147-149. "In Daubert, the Supreme Court gave a non-exhaustive list of factors for determining whether scientific testimony is sufficiently reliable to be admitted into evidence, including: (1) whether the scientific theory or technique can be (and has been) tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) whether there is a known or potential error rate; and (4) whether the theory or technique is generally accepted in the relevant scientific community." Domingo ex rel. Domingo v. T.K., 289 F.3d 600, 605 (9th Cir. 2002). The Supreme Court later held that "a trial court *may* consider one or more" of the Daubert factors in determining the reliability of nonscientific expert testimony. Kumho Tire Co., 526 U.S. at 141 (emphasis in original). Further, the court has "broad latitude" to decide how to determine the reliability of the testimony and whether the testimony is in fact reliable. Mukhtar v. Cal. State Univ., 299 F.3d 1053, 1064 (9th Cir. 2002), overruled on other grounds by Estate of Barabin v. AstenJohnson, Inc., 740 F.3d 457, 467 (9th Cir. 2014); see Kumho Tire Co., 526 U.S. at 142. The "test of reliability is flexible, and Daubert's list of specific factors neither necessarily nor exclusively applies to all experts or in every case." Id. at 142 (internal citations omitted).

B. Motions for Summary Judgment

Summary judgment is appropriate where the record, read in a light most favorable to the nonmovant, indicates "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). Summary adjudication, or partial summary judgment upon all or any part of a claim, is appropriate where there is no genuine dispute as to any material fact regarding that portion of the claim. Fed. R. Civ. P. 56(a); see also Lies v. Farrell Lines, Inc., 641 F.2d 765, 769 n.3 (9th Cir. 1981) ("Rule 56 authorizes a summary adjudication that will often fall short of a final determination,

even of a single claim[.]") (internal quotation marks omitted).

Material facts are those necessary to the proof or defense of a claim and are determined by referring to substantive law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In deciding a motion for summary judgment, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." Anderson, 477 U.S. at 255.[2]

The moving party has the initial burden of establishing the absence of a genuine dispute of material fact for trial. Id. at 256. "If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact . . . , the court may . . . consider the fact undisputed." Fed. R. Civ. P. 56(e)(2). Furthermore, "Rule 56[(a)][3] mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp., 477 U.S. at 322. Therefore, where the moving party carries its initial burden, if a nonmovant does not make a sufficient showing to establish the elements of its claims, a court must grant the motion.

III. DISCUSSION

A. Evidentiary Objection

LSW objects to the admission of the declaration of Dr. Jason Abrevaya in support of Plaintiffs' opposition to LSW's motion for summary judgment. (Docket No. 866-2 ¶ 5.) Plaintiffs did not file a response to LSW's evidentiary objection, which was submitted with LSW's reply. LSW argues the declaration is inadmissible because Dr.

[2] "In determining any motion for summary judgment or partial summary judgment, the Court may assume that the material facts as claimed and adequately supported by the moving party are admitted to exist without controversy except to the extent that such material facts are (a) included in the 'Statement of Genuine Disputes' and (b) controverted by declaration or other written evidence filed in opposition to the motion." L.R. 56-3.

[3] Rule 56 was amended in 2010. Subdivision (a), as amended, "carries forward the summary-judgment standard expressed in former subdivision (c), changing only one word — genuine 'issue' becomes genuine 'dispute.'" Fed. R. Civ. P. 56, Notes of Advisory Committee on 2010 amendments.

Abrevaya is not an expert with respect to insurance and his "declaration does nothing more than restate and attempt to rehabilitate or vouch for the long-discredited testimony of Dr. Brockett, the expert Plaintiffs relied on at trial." (Id.)

Dr. Abrevaya's area of expertise is econometrics, "a field which lies at the intersection of economics and statistics." (Declaration of Jason Abrevaya ("Abrevaya Decl."), Docket No. 859-42 ¶ 2.) In addition to his research in the field, he has taught econometrics and statistics courses for over twenty years and is currently the Chairperson of the Department of Economics at the University of Texas at Austin. (Id. ¶¶ 1, 3.) Dr. Abrevaya provides testimony "assess[ing] the value of the estimated effects on illustrated values of four different alleged violations of the Illustration Statute on the values of the [Provider] and the [Paragon] policies issued by [LSW] and the materiality of those effects." (Id. ¶ 6.) In paragraphs 21 and 24 of his declaration, Dr. Abrevaya provides testimony about what information would be material to consumers considering the LSW policies. In paragraphs 27 through 34 of his declaration, Dr. Abrevaya also provides testimony about the effects of what Plaintiffs call "full disclosure" in the illustrations on consumer demand for the policies. (See id. ¶¶ 27-34.) Dr. Abrevaya testifies as to how consumers use illustrations of financial products, what choices consumers are likely to make, what comparisons of illustrations and calculations consumers are capable of making, what policies will generate more consumer demand, and the effect on demand and pricing of the LSW policies of full disclosure. (Id. ¶ 28-32.)

However, Plaintiffs have not established that Dr. Abrevaya's testimony regarding consumers in the insurance market is reliable because they have not shown that he has the "knowledge or experience required under Rule 702 to permit him to give expert testimony in this matter." Pyramid Techs., Inc. v. Hartford Cas. Ins. Co., 752 F.3d 807, 817 (9th Cir. 2014); see Fernlund v. Transcanada USA Servs. Inc., No. 1:13-CV-1495-CL, 2014 WL 5824673, at *2 (D. Or. Nov. 10, 2014) (excluding an expert declaration where the purported expert's resume did not "indicate any familiarity with the subject of his proffered expert opinion"). Nowhere in his declaration or his curriculum vitae does Dr. Abrevaya represent that he is an expert, or have any experience whatsoever, in insurance. Expertise in the field of econometrics does not in and of itself assure the Court of the reliability of Dr. Abrevaya's testimony on consumers in the insurance market. However, the Court does find that Dr. Abrevaya's testimony is sufficiently reliable to testify about the estimated valuations of policy illustrations under different factual scenarios.

Additionally, the Court disagrees with LSW that Dr. Abrevaya's other testimony merely "regurgitates" the testimony of another witness. (Docket No. 866-2 ¶ 5.) Dr. Abrevaya relied not only on Dr. Brockett's expert reports, declarations, and trial testimony, but also on several computer files that Dr. Brockett used to prepare his reports. (Abrevaya Decl., Docket No. 859-42 ¶¶ 8-9.) He does not merely restate Dr. Brockett's findings, but rather he evaluates the soundness of Dr. Brockett's methodology and results and conducted his own calculations where necessary. (See, e.g., id. ¶¶ 10-12, 26.) LSW cites In re Imperial Credit Industries, Inc. Securities Litigation, 252 F. Supp. 2d 1005, 1012 (C.D. Cal. 2003), for the position that Rule 702 does "not permit an expert to rely upon excerpts from opinions developed by another expert for the purposes of litigation." In that case, this court excluded expert testimony where the expert, an accountant, "relied upon excerpts from an expert report authored by . . . a purported residual valuation expert." Id. But that case is readily distinguishable from the present case because there "the court was primarily concerned by the accountant's lack of expertise and thus inability to validate the expert report." Gray v. United States, No. CIV. 05CV1893JBLM, 2007 WL 4644736, at *5 (S.D. Cal. Mar. 12, 2007). The Court here is not concerned with Dr. Abrevaya's ability to evaluate Dr. Brockett's use of financial and statistical modeling. And "an expert can appropriately rely on the opinions of others if other evidence supports his opinion and the record demonstrates that the expert conducted an independent evaluation of that evidence." In re ConAgra Foods, Inc., 302 F.R.D. 537, 556 (C.D. Cal. 2014). Therefore, the Court finds Dr. Abrevaya's testimony with regards to the estimated valuations is sufficiently reliable to survive LSW's objection.

The Court only considered admissible evidence in resolving the parties' motions for summary judgment. Where this Order cites evidence to which the parties have objected, the objections is impliedly overruled. Additionally, the Court declines to rule on objections to evidence upon which it did not rely.

B. UCL Standing

The UCL prohibits "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." Cal. Bus. & Prof. Code § 17200. Under the UCL, private standing is restricted to "a person who has suffered injury in fact and has lost money or property as a result of the unfair competition." Cal. Bus. & Prof. Code § 17204. To satisfy this standing requirement, a

plaintiff must: "(1) establish a loss or deprivation of money or property sufficient to qualify as injury in fact, i.e., economic injury, and (2) show that economic injury was the result of, i.e., caused by, the unfair business practice or false advertising that is the gravamen of the claim." Kwikset Corp. v. Superior Court, 51 Cal. 4th 310, 322 (2011).

"A consumer's burden of pleading causation in a UCL action should hinge on the nature of the alleged wrongdoing rather than the specific prong of the UCL the consumer invokes." Durrell v. Sharp Healthcare, 183 Cal. App. 4th 1350, 1363 (2010). "Where a case is 'is [sic] based on a fraud theory involving false advertising and misrepresentations to consumers,' or material omissions, the plaintiff 'must demonstrate actual reliance on the allegedly deceptive or misleading statements, in accordance with well-settled principles regarding the element of reliance in ordinary fraud actions.'" Davis v. RiverSource Life Ins. Co., 240 F. Supp. 3d 1011, 1017 (N.D. Cal. 2017) (quoting Kwikset, 51 Cal. 4th at 326-27); see also In re Tobacco II Cases, 46 Cal. 4th 298, 306 (2009) ("We conclude that a class representative proceeding on a claim of misrepresentation as the basis of his or her UCL action must demonstrate actual reliance on the allegedly deceptive or misleading statements, in accordance with well-settled principles regarding the element of reliance in ordinary fraud actions."); Kissel v. Code 42 Software, Inc., No. 15-1936-JLS (KESx), 2016 WL 7647691, at *8 (C.D. Cal. Apr. 14, 2016) ("Where a UCL claim sounds in fraud, regardless of the specific UCL prong invoked by the plaintiff, the 'as a result of' language 'imposes an actual reliance requirement on plaintiffs prosecuting a private enforcement action.'" (quoting Durrell, 183 Cal. App. 4th at 1363)); Kwikset, 51 Cal. 4th at 326 & n.9 (finding that a plaintiff must demonstrate actual reliance when the "theory of the case is that [the defendant] engaged in misrepresentations and deceived consumers").

Here, LSW argues that Plaintiffs must demonstrate causation in the form of actual reliance. (Mot., Docket No. 844-1 at 9.) In response, Plaintiffs argue that they do not need to demonstrate reliance because the "Illustration Statute plainly sounds in more than just fraud." (Opp'n, Docket No. 859-1 at 16.) In support of their argument, Plaintiffs point to the statutory section regarding legislative intent:

> It is the intent of the Legislature in enacting this chapter to ensure that illustrations do not mislead purchasers of life insurance and to make illustrations more understandable by providing illustration formats, prescribing standards to be

> followed when illustrations are used, and specifying the disclosures that are required in connection with illustrations. Insurers should, as far as possible, eliminate the use of footnotes and caveats and define terms used in the illustration in language that is understandable by a typical person within the segment of the public to which the illustration is directed.

Cal. Ins. Code § 10509.950. Plaintiffs argue that "no reliance requirement applies to those of Plaintiffs' claims that are based on the consumer understanding objective of the statute." (Opp'n, Docket No. 859-1 at 16.) In response, LSW argues that "Plaintiffs cannot sidestep the application of a reliance requirement by noting that the legislative intent behind the Illustration Statute includes ensuring illustrations are understandable and fostering consumer education." (Reply, Docket No. 866 at 6.) LSW argues that "application of a reliance requirement depends not on the requirements of the statute allegedly violated, but on the nature of Plaintiffs' claim of injury," which in this case is misrepresentation. (Id.) The Court agrees. See Davis, 240 F. Supp. 3d at 1017 (stating that even when a plaintiff attempts to disavow "any claim based on fraud" in the complaint, the plaintiff still must establish reliance where "the gravamen of the claim is based on alleged misrepresentation").

The Court finds that Plaintiffs must demonstrate actual reliance given that the gravamen of Plaintiffs' TAC is based on LSW's alleged misrepresentations. Plaintiffs claim that they purchased and overpaid for life insurance policies because of LSW's statements and omissions. (See generally TAC, Docket No. 839.) For example, in the FAC, Plaintiffs assert:

> (1) "LSW's illustrations make the Policies appear extremely attractive financially, and capable of providing the policyholder with significant yearly income for life." (Id. ¶ 22.)
>
> (2) "LSW's illustration does not disclose or identify the cost of buying and maintaining the Policies, but instead conceals very substantial Policy charges within the projected earnings of the Policies." (Id. ¶ 24.)
>
> (3) "As a result of LSW's incomplete illustration, policyholders invest

substantial assets in the Policies, in many cases by cashing out their retirement accounts or selling their homes." (Id.)

(4) "LSW's failure to describe the cost of the Policies makes the Policies appear to be more attractive investments than they are in reality." (Id. ¶ 30.)

(5) "Although LSW knows that policyholders will not receive a true annual guaranteed interest rate, it fails to disclose this material information to policyholders in the illustration." (Id. ¶ 34.)

> (6) LSW "violates Section 10509.955(b)(2), which prohibits using or describing nonguaranteed elements 'in a manner that is misleading or has the capacity or tendency to mislead,' and Section 10509.955(b)(3), which makes it unlawful to 'state or imply that the payment of nonguaranteed elements is guaranteed.'" (Id. ¶ 35.)
>
> (7) "By not disclosing all fees, not disclosing the calculation of the guaranteed interest feature, not disclosing that the illustrated fee reductions are not guaranteed, and illustrating Current Basis Values that are higher than permitted under the Illustration Statute, LSW provides policyholders with illustrations that obfuscate the nature and economic terms of the Policies." (Id. ¶ 88.)
>
> (8) "Plaintiffs and the members of the Class purchased Policies that were overpriced relative to the actual value of the Policies, which is far less than the value of the Policies as presented in the illustrations." (Id. ¶ 97.)
>
> (9) "Were the Policies sold by LSW sold pursuant to an illustration that met the letter and spirit of the Illustration Statute, the prices (in the form of policy charges) commanded by those Policies in the marketplace would have been substantially lower than the prices Plaintiffs and members of the Class paid to LSW." (Id.)

While Plaintiffs attempt to frame their alleged harms as based on a lack of consumer understanding, it is clear that the TAC is premised on the theory that LSW misrepresented the terms of the policies to the detriment of consumers. Whether the conduct alleged takes the form of omitting, concealing, or misrepresenting material information provided to consumers, such claims sound in fraud and are subject to the actual reliance requirement.

A plaintiff may establish reliance by showing that "the plaintiff 'in all reasonable probability' would not have engaged in the injury-producing conduct" but for defendants' misrepresentations or omissions. Tobacco II, 46 Cal. 4th at 326 (quoting Mirkin v. Wasserman, 5 Cal. 4th 1082, 1110-11 (1993)); see also Goertzen v. Great Am. Life Ins. Co., No. 16-cv-00240-YGR, 2017 WL 2378047, at *5 ("Where the claim is based upon omission of information required to be disclosed, rather than an affirmative misrepresentation, reliance can be shown if the plaintiff proves that,

'had the omitted information been disclosed[,] one would have been aware of it and behaved differently.'" (quoting Mirkin, 5 Cal. 4th at 1093)). Plaintiffs are not required to prove that the fraudulent conduct was the only, predominant, or even decisive factor in influencing their conduct, but they must show that it "played a substantial part, and so had been a substantial factor" in influencing the decision. Tobacco II, 46 Cal. 4th at 326, 328 (quoting Engalla v. Permanente Med. Group, Inc., 15 Cal. 4th 951, 976-77 (1997)) ("[W]hile a plaintiff must allege that the defendant's misrepresentations were an immediate cause of the injury-causing conduct, the plaintiff is not required to allege that those misrepresentations were the sole or even the decisive cause of the injury-producing conduct.").

Here, Plaintiffs argue that the Court should apply a "more generous" standard than the traditional "substantial factor" reliance standard articulated in Tobacco II. (Opp'n, Docket No. 859 at 23.) Plaintiffs cite no law for this position. And it is not immediately clear that Plaintiffs argue for a standard readily distinguishable from the "substantial factor" test. Regardless, the Court will not deviate from the only standard applied by the California Supreme Court.

A presumption of reliance "arises wherever there is a showing that a misrepresentation was material." In re Tobacco II, 46 Cal. 4th at 327 (quoting Engalla, 15 Cal. 4th at 976-77). "A misrepresentation is judged to be 'material' if 'a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question.'" Id. (quoting Engalla, 15 Cal. 4th at 976-77). Materiality is generally a question of fact. Id. However, "[e]vidence of materiality only establishes a presumption of reliance, and a presumption cannot survive if the evidence establishes an actual lack of reliance." Lanovaz v. Twinings N. Am., Inc., No. C-12-02646-RMW, 2014 WL 46822, at *3 (N.D. Cal. Jan. 6, 2014).

LSW argues that the presumption of reliance is inapplicable here because "the evidence establishes a lack of actual reliance." (Mot., Docket No. 844-1 at 10 n.3 (quoting Lanovaz, 2014 WL 46822, at *3).) The evidence shows that Plaintiffs did not review the final, "batch" illustrations they received with their policies. (Order, Docket No. 791 at 32, 39.) And, when Plaintiff Walker applied for her policy, she certified that she had not received an illustration of the policy for which she applied. (Docket No. 859-1 ¶ 63.) The illustration she had received used a rate lower than the

maximum illustration rate, while her policy would not be artificially constrained. (Id.) Plaintiffs Howlett and Spooner "decided that they wanted to 'move forward'" with applying for their policies before seeing an illustration. (Order, Docket No. 791 at 38; Docket No. 859-1 ¶ 73.) Regardless, Plaintiff Walker reviewed at least two illustrations prior to applying for her policy, and Plaintiffs Howlett and Spooner each reviewed an illustration before applying for their policies. ((Docket No. 859-1 ¶¶ 62, 74.) Accordingly, LSW has set forth no evidence to demonstrate a lack of actual reliance.

Additionally, LSW argues that "Plaintiffs cannot prove that alleged omissions from the illustration were material where the information was indisputably disclosed in Policies." (Mot., Docket No. 844-1 at 10 n.3.) LSW cites no law for this position. Plaintiffs are not required to show that the illustrations were "the sole or even the decisive cause of the injury-producing conduct." In re Tobacco II, 46 Cal. 4th at 328. Plaintiffs argue that the omissions are material as a matter of law and as a matter of fact. (Opp'n, Docket No. 859 at 20-21.) The Court is not persuaded that the omissions are material as a mater of law, but the Court finds that Plaintiffs show the existence of a genuine dispute of material fact as to the materiality of the omissions. Plaintiffs argue that "LSW's failure to comply with the Illustration Statute cause[d] the value of the policies as represented in the illustrations to overstate the actual Policy values by very large amounts . . . ." (Id. at 21 (citing Docket No. 869-3 ¶¶ 5-6, 9-10, 17-18, 25-26).) In support of their argument, Plaintiffs cite portions of Dr. Abrevaya's declaration that the Court has found to be admissible. (See Abrevaya Decl., Docket No. 859-42 ¶¶ 22-23, 25-26.) Accordingly, Plaintiffs set forth sufficient evidence to establish a genuine dispute of material fact. If a finder of fact concludes that the omissions were material, Plaintiffs are entitled to a presumption of reliance. See In re Tobacco II, 46 Cal. 4th at 327.

However, with respect to claims arising out the depiction of the Monthly Administrative Charge, the Ninth Circuit stated that "[a]lthough LSW may not have made any express disclaimer or guarantee of the charges' reduction or disappearance, there is no realistic possibility that this depiction was a 'substantial factor' that influenced the Plaintiffs' decision to purchase their policies." Walker, 681 Fed. App'x at 602. This conclusion forecloses a finding that Plaintiffs in any way relied on the depictions of the Monthly Administrative Charge. Thus, the depictions of the Monthly Administrative Charge were not a substantial factor influencing Plaintiffs'

purchasing decisions. Therefore, Plaintiffs' claims arising out of the depictions of the Monthly Administrative Charge in the illustrations must fail for lack of reliance.

In sum, the Court **grants** LSW's motion for summary judgment on lack of reliance with regards to the Monthly Administrative Charges. Accordingly, the Court also **grants** LSW's motion for summary judgment and **denies** Plaintiffs' motion for summary judgment as to all of Plaintiffs' claims arising out of the Monthly Administrative Charges. However, the Court **denies** LSW's motion for summary judgment on lack of reliance with regards to the remaining claims.

C. Unlawful Prong Claims

1. Incomplete Disclosures

Section 10509.955(b) of the Illustration Statute provides:

> When using an illustration in the sale of a life insurance policy, an insurer or its producers or other authorized representative shall not do any of the following:
>
> . . .
>
> (6) Provide an applicant with an incomplete illustration.

Cal. Ins. Code § 10509.955(b)(2)-(3).

The parties dispute the meaning of the term "incomplete" as used in the Illustration Statute. Plaintiffs' construction of the term would require LSW to disclose in an illustration all fees and charges applicable to the underlying policy and to identify the time period to which the minimum guaranteed interest rate provision applied. (Mot., Docket No. 843 at 10, 13.) LSW's construction of the term would require only that "an applicant must receive an illustration in its entirety, and not only a portion of it, so as to ensure that the information specifically required to be included in an illustration is actually provided." (Mot., Docket No. 844-1 at 12.**)**

Under California principles of statutory construction, courts must "'ascertain

the intent of the Legislature so as to effectuate the purpose of the law' by looking first to the words of the statute." Credit Suisse First Boston Corp. v. Grunwald, 400 F.3d 1119, 1126 (9th Cir. 2005) (quoting State Farm Mut. Auto. Ins. Co. v. Garamendi, 32 Cal.4th 1029, 1043 (2004)). The ordinary meaning of a word in a statute controls, unless the Legislature has defined the term. Id. When the plain meaning of a statute is clear, that meaning must be followed. Id. But courts must "examine the entire substance of the statute in order to determine the scope and purpose of the provision, construing its words in context and harmonizing its various parts." Alford v. Superior Court, 29 Cal. 4th 1033, 1040 (2003). If the language of a statute is "reasonably susceptible of two constructions," courts must adopt the "one of which in application will render it reasonable, fair and harmonious with its manifest purpose." Pitney-Bowes, Inc. v. State of California, 108 Cal. App. 3d 307, 313-14 (1980) (quoting City of L.A. v. Pac. Tel. & Tel. Co., 164 Cal. App. 2d 253, 256-257 (1958)) (internal quotation marks omitted). An interpretation which renders any part of a statute superfluous should be avoided. Wells v. One2One Learning Found., 39 Cal. 4th 1164, 1207, as modified (Oct. 25, 2006).

Courts generally utilize dictionaries to determine the ordinary meaning of a word in a statute. Scott v. Cont'l Ins. Co., 44 Cal. App. 4th 24, 29 (1996). The dictionary definition of the word "incomplete" is "not complete." Merriam-Webster.com, https://www.merriam-webster.com/dictionary/incomplete (last visited Dec. 6, 2017); dictionary.com, http://www.dictionary.com/browse/incomplete (last visited Dec. 6, 2017). Complete is defined as "having all necessary parts, elements, or steps," Merriam-Webster.com, https://www.merriam-webster.com/dictionary/complete (last visited Dec. 6, 2017), or "having all parts or elements; lacking nothing; whole; entire; full," Dictionary.com, http://www.dictionary.com/browse/complete (last visited Dec. 6, 2017). As such, the dictionary definition of "incomplete" is susceptible to either Plaintiffs' or LSW's constructions of the word. Under Plaintiffs' understanding, a policy illustration could lack a part or element because it omitted costs, fees, and the time period during which minimum guaranteed interest is calculated. But, under LSW's construction, a policy illustration could lack a part or element, and therefore not be whole, because it omitted pages.

Because the plain meaning of the term is susceptible to multiple

constructions, the Court must look at the whole statute to construe the term in "harmon[y] with its manifest purpose." See Pitney-Bowes, 108 Cal. App. 3d at 313-14. The intent of the Legislature was "to ensure that illustrations do not mislead purchasers of life insurance and to make illustrations more understandable," in part by "specifying the disclosures that are required in connection with illustrations." Cal. Ins. Code § 10509.950. In section 10509.956, the statute enumerates what specifically a "basic illustration" must include.[4] Id. § 10509.956(b). Nowhere in that section does the statute state that a basic illustration must include all costs and fees or the time period during which minimum guaranteed interest rates are calculated. If the Legislature intended to require insurers to provide that information, it could have specifically listed that information in this section. See Gikas v. Zolin, 6 Cal. 4th 841, 852, 863 P.2d 745, 752 (1993) ("The expression of some things in a statute necessarily means the exclusion of other things not expressed."). Instead the statute contemplates that an insurer may provide additional information, not disclosed in a basic illustration, in a "supplemental illustration."[5] See id. § 10509.953(h)(2). By providing that insurers may disclose additional information in an optional, supplemental illustration, the statute implies that each and every policy feature need not be included in a basic illustration. Rather, the statute states that a basic illustration must provide only a "brief description of the policy being illustrated" and a "brief description of any policy features, . . . shown in the basic illustration." Id. § 10509.956(a)(1)-(2). Taken together, these sections suggest that the construction of the term "incomplete" contemplated by the statute does not require an insurer to provide information about all costs and fees associated with the underlying policy or information pertaining to the time period over which the minimum interest rates are calculated. Instead, LSW's construction of "incomplete," meaning not missing any pages of the illustration, fits more soundly with the entire substance of the statute.

The Court does not agree with Plaintiffs that LSW's construction of

[4] A basic illustration is defined as "a ledger or proposal used in the sale of a life insurance policy that shows both guaranteed and nonguaranteed elements." Id. § 10509.953(h)(1).

[5] A supplemental illustration is defined as "an illustration furnished in addition to a basic illustration." Id.

"incomplete" in section 10509.955(b)(6) would render section 10509.955(b)(4) superfluous. (See Opp'n, Docket No. 859 at 6.) Under LSW's construction of section 10509.955(b)(6), insurers would be under a substantive obligation to not provide portions of an illustration without providing all pages of that illustration. Section 10509.955(b)(4) merely prohibits the "[u]se [of] an illustration that does not comply with the requirements of this chapter." As such, the use of an illustration lacking pages would violate both sections. However, the use of an illustration lacking terms Plaintiffs deem essential would also violate both sections. This canon of interpretation lends no support to Plaintiffs' argument because both constructions could render another section of the Illustration Statute superfluous.

Additionally, other sections of the statute specifically bolster LSW's construction of section 10509.955(b)(6). Section 10509.956(b)(2) requires that each page of an illustration "shall be numbered and show its relationship to the total number of pages in the illustration." This suggests that the Legislature intended for consumers to be aware of the complete length of each illustration and intended for insurers to provide a complete illustration, meaning one in which each page was included. Any construction of the term "complete" that would require insurers to provide more information than that specifically designated in section 10509.956 would conflict with the statutory language that a basic illustration is to be "brief" and "understandable." See Cal. Ins. Code § 10509.950. If more than what is required by section 10509.956 is included in a basic illustration, a likely outcome is that the basic illustrations will no longer be brief and understandable.

Therefore, the Court concludes that the proper construction of section 10509.955(b)(6) prohibits insurers from providing illustrations that lack all pages. Accordingly, the Court **grants** LSW's motion for summary judgment with respect to Plaintiffs' claims that LSW violated section 10509.955(b)(6) by failing to include all costs and fees and the time period during which the minimum guaranteed interest rate was calculated. The Court **denies** Plaintiffs' motion as to the same claims.

2. Nonguaranteed Elements

Section 10509.955(b) of the Illustration Statute provides:

> When using an illustration in the sale of a life insurance policy, an insurer or its producers or other authorized representative shall not do any of the following:
>
> . . .
>
> (2) Use or describe nonguaranteed elements in a manner that is misleading or has the capacity or tendency to mislead.
>
> (3) State or imply that the payment or amount of nonguaranteed elements is guaranteed.

Cal. Ins. Code § 10509.955(b)(2)-(3). Additionally, the Illustration Statute mandates that "[i]f the illustration shows any nonguaranteed elements . . . [t]hese elements shall be clearly labeled nonguaranteed." Cal. Ins. Code § 10509.956(a)(7).

Here, the parties dispute whether the guaranteed minimum interest values idenfied in the illustrations are actually guaranteed, and thus, whether or not LSW has complied with the statutory requirements regarding nonguaranteed elements. The Provider illustrations state that "[t]he interest rate used in the calculation of guaranteed values is 2.00%." (Docket No. 866-1 at 90.) The Paragon illustrations provide that "[t]he interest rate used in the calculation of guaranteed values is 2.50%." (Id. at 90-91.) Plaintiffs argue that the Provider and Paragon policies "do not in fact guarantee these minimum interest rates," and for this reason "LSW was required by Section 10509.956(a)(7) to clearly label the 2.00% and 2.50% interest rates as nonguaranteed." (Mot., Docket No. 843 at 17.) On the other hand, LSW argues that the illustrated guaranteed values "are a guarantee, just not one credited annually." (Mot., Docket No. 844-1 at 16.) Additionally, LSW also points out that the Court already found that the policies do guarantee such minimum interest rates. (Opp'n, Docket No. 858 at 13.) In the Court Order Regarding Post-Jury Trial UCL Proceedings, the Court made the following findings of fact:

> Provider and Paragon . . . provide that, over a certain period of time, the policy's cash value will be credited a certain minimum amount of interest. This minimum guarantee is calculated and credited retrospectively on a look-back basis. In the case of Provider, the guaranteed accumulation

> provides that if a policyholder's cash value has not accumulated by at least two percent per year compounded over a five-year period, upon surrender of the policy, or upon the death of the insured, LSW will credit an additional amount to the policy as necessary to ensure at least two percent per annum compounded growth. In the case of Paragon, the guaranteed accumulation provides that if a policyholder's cash value has not accumulated by at least two-and-a-half percent per year compounded upon surrender of the policy or the death of the insured, LSW will credit an additional amount to the policy as necessary to ensure at least two-and-a-half percent per annum compounded growth. This retrospective method of crediting guaranteed interest is standard in the industry for IUL products.

(Order, Docket No. 791 at 15.) Therefore, the Court finds that the issue of whether the minimum interest values of 2.00% and 2.50% are guaranteed is foreclosed upon by the Court's prior Order.

The Court already determined that the minimum interest values depicted in the illustrations are guaranteed elements. Thus, there can be no statutory violation of section 10509.956(a)(7) for failure to label nonguaranteed elements as nonguaranteed. Similarly, there can be no violation of sections 10509.955(b)(2) and 10509.955(b)(3) because the requirements in both of these sections relate to nonguaranteed elements. Accordingly, the Court **grants** LSW's motion for summary judgment as to Plaintiffs' claims for violations of Sections 10509.956(a)(7), 10509.955(b)(2), and 10509.955(b)(3) regarding the guaranteed minimum interest values in the illustrations. The Court **denies** Plaintiffs' motion as to the same claims.

3. Definitions

i. Failure to Define Column Headings and Key Terms

Section 10509.956(b)(4) of the Illustration Statute mandates that a "basic

illustration" include "[i]dentification and a brief definition of column headings and key terms used in the illustration." Plaintiffs argue that LSW violated this statutory provision because it failed to provide definitions for the terms "Guaranteed Values at 2.00%" in the Provider illustration, "Guaranteed Values at 2.50%" in the Paragon illustration, "Current Basis A Values," and "Current Basis B Values." (Mot., Docket No. 843 at 18.) In contrast, LSW argues that it does define these terms in the illustrations. (Mot., Docket No. 844-1 at 22; Opp'n, Docket No. 858 at 15.) Both the Provider and Paragon policy illustrations contain a "Definitions of key terms and column headings" section. (Declaration of Joyce Walker ("Walker Decl.") Ex. A, Docket No. 843-19 at LSW00002332; Declaration of Kim Bruce Howlett ("Howlett Decl.") Ex. A, Docket No. 843-24 at LSW00001213.) As Plaintiffs point out, definitions of these terms are not included under this section. (Mot., Docket No. 843 at 18.) However, elsewhere in the illustrations are the following statements:

> (1) "The Guaranteed Basis uses an interest rate and maximum monthly deductions guaranteed by the Company. It is the most conservative basis used for the calculation of illustrated values."
>
> (2) "The policy as illustrated using Current Basis A will provide coverage for 23 policy years based on the Current Basis A interest rates and the current charges by the Company. Coverage will then terminate unless a higher premium is paid."
>
> (3) "The policy as illustrated using Current Basis B will provide coverage for the lifetime of the insured based on the Current Basis B interest rates and the current charges by the Company."

(Walker Decl Ex. A, Docket No. 843-19 at LSW00002334; Howlett Decl. Ex. A, Docket No. 843-24 at LSW00001216-1217.) Unlike the definitions in the "Definitions of key terms and column headings" section, these statements are not preceded by a specific term identifying them as a definition of that term. Nonetheless, upon reading statements (2) and (3), it is apparent that these statements define the terms "Current Basis A Values" and "Current Basis B Values" as they appear in the illustrations. Moreover, the terms "Current Basis A" and "Current Basis B" appear in statement (2) and (3), which indicate to a reader

that they are explaining the respective terms. However, it is not apparent that statement (1) defines the terms "Guaranteed Values at 2.00%" in the Provider illustration and "Guaranteed Values at 2.50%" in the Paragon illustration. The term "Guaranteed Values" does not appear in statement (1), and while the statement may provide an explanation of sorts for the term, it does not satisfy the statutory requirement that a definition of the key term be provided. Thus, the Court finds that LSW provided sufficient definitions to satisfy Section 10509.956(b)(4)'s requirements with regards to the terms "Current Basis A Values" and "Current Basis B Values" and failed to provide sufficient definitions for the terms "Guaranteed Values at 2.00%" and "Guaranteed Values at 2.50%." Accordingly, the Court **grants** Plaintiffs' motion for summary judgment for violations of Section 10509.956(b)(4) as to the terms "Guaranteed Values at 2.00%" and "Guaranteed Values at 2.50%" and **grants** LSW's motion for summary judgment as to the terms "Current Basis A Values" and "Current Basis B Values."

ii. Failure to Define Terms in Language that Is Understandable to a Typical Consumer

Section 10509.950 of the Illustration Statute contains the statement of legislative intent and provides that "[i]nsurers should, as far as possible, eliminate the use of footnotes and caveats and define terms used in the illustration in language that is understandable by a typical person within the segment of the public to which the illustration is directed." Plaintiffs argue that the illustrations violate section 10509.950 because LSW fails to define the terms "Guaranteed Values at 2.00%," "Guaranteed Values at 2.50%," "Current Basis A Values," "Current Basis B Values," and "Monthly Administrative Charge" in language that a typical consumer would understand. (Mot., Docket No. 843 at 21-22.) The Court finds that as a matter of law section 10509.950 does not impose a mandatory statutory requirement which an insurer can violate. The legislative intent section merely uses precatory language to set forth the goals and policy objectives of the statute. Section 10509.950 uses the nonmandatory language "should, as far as possible," which does not put insurers on fair notice of what steps they must take to comply with these statutory objectives. Because section 10509.950 does not impose requirements in addition to those contained within the other provisions of the Illustration Statute, LSW could not have violated this statutory section.

Accordingly, the Court **grants** LSW's motion for summary judgment as to Plaintiffs' claims for violations of Section 10509.950 and **denies** Plaintiffs' motion for summary judgment as to the same claims.

4. Persistency Bonuses

Section 10509.956(e)(3) provides that "[n]on-guaranteed elements may be shown [in an illustration] if described in the contract." Plaintiffs argue that both the Provider and Paragon illustrations depict certain "persistency bonuses" in violation of sections 10509.956(e)(3).[6] (Mot., Docket No. 843 at 21.) In the Provider illustration, the element that Plaintiffs refer to as a persistency bonus is a 1.25% Account Value Enhancement that begins in the tenth policy year. (See Walker Decl. Ex. A, Docket No. 843-19 at LSW00002336; Walker Decl. Ex. C, Docket No. 843-21 Ex. C at LSW00002391.) The illustration states that "[t]his illustration reflects an annual 1.25% Account Value Enhancement starting in policy year 10. The Account Value Enhancement is not guaranteed." (Id.) Plaintiffs also maintain that the "Paragon illustration implicitly shows the elimination of the . . . the Monthly percent of Accumulated Value Charge beginning in the eleventh policy year because [it is] applied in the calculation of the current basis values." (See Docket No. 859-3 ¶ 24; Docket No. 866-2 ¶ 24.) Plaintiffs identify the elimination of the Monthly percent of Accumulated Value Charge as the other persistency bonus.

LSW argues that these elements are not "non-guaranteed elements" as defined in the Illustration Statute. (Mot., Docket No. 844-1 at 19.) The statute provides that "'non-guaranteed elements' means the premiums, benefits, values, credits or charges under a policy of life insurance that are not guaranteed or not determined at issue." Cal. Ins. Code § 10509.953(m). LSW argues that persistency bonuses are not premiums, benefits, values, credits or charges and therefore are not non-guaranteed elements. (Mot., Docket No. 844-1 at 19.) Instead, LSW argues that they are only a factor that may impact the amount of

[6] Plaintiffs do not move for summary judgment on their related claims arising out of purported violations of sections 10509.955(b)(5), 10509.960(c)(5), and 10509.960(e), but LSW does move for summary judgment on these claims. (See Mot., Docket No. 843 at 5 n.2; Mot., Docket No. 844-1 at 1921.)

certain non-guaranteed elements. (Id.) The Court agrees, in part. Plaintiffs maintain that the 1.25% Account Value Enhancement is a "credit." (Reply, Docket No. 864 at 22.) The Court finds that the *amount* credited to account values annually based on certain interest rates are "credits" under the statute. But the variation in the interest rate used to calculate the amount credited is not separately a credit for purposes of determining which policy elements are "non-guaranteed." Rather, as LSW explains, the 1.25% account value enhancement in the Provider illustration is an "input" in determining the amount credited. Therefore, the 1.25% Account Value Enhancement is not a non-guaranteed element under the Illustration Statute.

At the hearing on the motion, Plaintiffs argued that even if the 1.25% Account Value Enhancement is not a separate "credit," the illustration of the interest credited annually is still deficient under the Illustration Statute. Plaintiffs maintained that the Provider policy gives an insufficient description of the interest crediting strategy because the 1.25% Account Value Enhancement is not also explained in the description. But section 10509.956(e)(3) states only that non-guaranteed elements must be "described" in the policy. There is no genuine dispute[7] that the interest crediting strategy is described in the policy. (See Declaration of Timothy Perla ("Perla Decl."), Docket No. 844-13, Ex. 8 at 28-31.) Accordingly, the non-guaranteed element—the interest credited—is described in the policy and does not violate the Illustration Statute.

However, the elimination of the Monthly percent of Accumulated Value Charge reflected in the Paragon policies is a "charge." LSW concedes that the Monthly percent of Accumulated Value Charge is plainly a "charge." (Reply, Docket No. 866 at 21 n.20.) Accordingly, the elimination of that charge is also a charge for purposes of determining whether such a charge is guaranteed. The charge is not guaranteed when it is eliminated. So replacing a figure that represents the Monthly percent of Accumulated Value Charge with a zero makes

[7] Plaintiffs represent in their Response to LSW's Statement of Uncontroverted Facts and Conclusions of Law that this fact is in dispute. (Docket No. 859-1 ¶ 119.) But they set forth no evidence other than the contract proffered by LSW, and the Court disagrees. (See id.) Furthermore, Plaintiffs do not include this "dispute" in their Statement of Genuine Disputes in Opposition to LSW's Motion for Summary Judgment. (See Docket No. 859-3.)

the charge a charge of zero. Therefore, the elimination of the Monthly percent of Accumulated Value Charge is a non-guaranteed element under the Illustration Statute.

LSW's use of the term "non-guaranteed" to describe the persistency bonuses supports the Court's conclusion. In its Response to Interrogatory No. 15, LSW characterizes the Account Value Enhancement and the reduction in the Percent of Accumulated Value Charge as "non-guaranteed policy elements." (See Declaration of Brian B. Brosnahan ("Brosnahan Decl."), Docket No. 859-38, Ex. 33 at 9.) In her declaration in opposition to Plaintiffs' motion to file a TAC, Elizabeth MacGowan refers to account value bonuses and policy fee reductions in other National Life insurance policies as "non-guaranteed elements." (See id., Docket No. 859-36, Ex. 31 ¶ 5; Declaration of Elizabeth MacGowan ("MacGowan Decl."), Docket No. 387 ¶ 5.) And, testifying at trial and in a deposition, Craig Smith referred to the reduction in the Monthly Administrative Charges as "non-guaranteed elements." (See Brosnahan Decl., Docket No. 859-13, Ex. 9 at 170:16-19; Brosnahan Decl., Docket No. 859-25, Ex. 20 at 162:15-21.) Though LSW's use of a term is not a concession that the persistency bonuses are non-guaranteed elements as specifically defined and contemplated by the Illustration Statute, it shows that LSW considered these charges non-guaranteed elements.

LSW also moves for summary judgment on Plaintiffs' claims that the illustrations violated sections 10509.960(c)(5) and 10509.960(e). Under section 10509.960(c)(5), an illustration actuary must:

> Disclose in the annual certification whether, since the last certification, a currently payable scale applicable for business issued within the previous five years and within the scope of the certification has been reduced for reasons other than changes in the experience factors underlying the disciplined current scale. Nonguaranteed elements illustrated for new policies that are not consistent with those illustrated for similar in force policies shall be disclosed in the annual certification. Nonguaranteed elements illustrated for both new and in force policies that are *not consistent* with the nonguaranteed elements actually

> being paid, charged or credited to *the same or similar forms* shall be disclosed in the annual certification.

Cal. Ins. Code § 10509.960(c)(5) (emphasis added). Under section 10509.960(e), "[i]f an illustration actuary is unable to certify the scale for any policy form illustration the insurer intends to use, the actuary shall notify the board of directors of the insurer and the commissioner promptly of his or her inability to certify." Cal. Ins. Code § 10509.960(e).

Plaintiffs argue that LSW violated those sections because "it filed false illustration actuary certificates stating that '[i]llustrated non-guaranteed elements for new and in force policies subject to this regulation are consistent with the nonguaranteed elements actually credited or charged to the same or similar forms,' when in fact no similar forms existed." (Opp'n, Docket No. 859 at 14.) Plaintiffs' claims are based on their allegation that "LSW's inclusion of the Persistency Bonuses in its disciplined current scale was not consistent with the nonguaranteed elements actually being paid, charged, or credited to the same or similar forms." (TAC, Docket No. 839 ¶ 60.) In the TAC, Plaintiffs concede that no similar forms exist. (Id.; see also Docket No. 859-3 ¶ 31.) But section 10509.960(c)(5) requires insurers to disclose where their illustrations are inconsistent with their crediting history on the same or similar policies. If the same or similar forms do not exist, there can be no inconsistencies. Therefore, LSW did not violate sections 10509.960(c)(5) and 10509.960(e).

Finally, LSW moves for summary judgment as to Plaintiffs' claims that LSW violated section 10509.955(b)(5). The section provides that insurers cannot "[u]se an illustration that at any policy duration depicts policy performance more favorable to the policy owner than that produced by the illustrated scale of the insurer whose policy is being illustrated." Cal. Ins. Code § 10509.955(b)(5). In its prior Order, the Court found that the "disciplined current scale" is "determined by the past average annual growth of the stock market index as filtered through the policy's participation rates and earnings cap." (Order, Docket No. 791 at 26.) There is no additional requirement limiting the disciplined current scale based on the prior crediting history of a policy. If this were the case, an insurer could never illustrate newly introduced policy features or a new policy because no actual

crediting history would exist.[8]

Accordingly, insofar as Plaintiffs' claims under the unlawful prong are predicated on violations of 10509.955(b)(5), 10509.960(c)(5), and 10509.960(e), LSW's motion for summary judgment is **granted**. LSW's motion is also granted for violations of section 10509.956(e)(3) predicated on the illustration of the 1.25% Account Value Enhancement. But, LSW's motion is denied and Plaintiffs' motion is granted as to violations of section 10509.956(e)(3) based on the illustration of the elimination of the Account Value Enhancement Charge.

D. UCL Unfairness Prong Claims

As the Court stated in its prior Order, the legal standard applied to "unfair" UCL claims is unsettled. Yanting Zhang v. Superior Court, 57 Cal. 4th 364, 380 n.9 (2013) (declining to resolve conflicting lower court opinions). A number of tests have been applied by California courts. The first test focuses on whether the challenged conduct violates a public policy that is tethered to specific constitutional, statutory, or regulatory provisions. Id. (citation omitted). A second test balances the impact of the act or practice on victims against reasons, justifications, and motives of the alleged wrongdoer. Id. (citation omitted). A third test applies the same balancing test of the second, but also examines whether the practice offends established public policy or is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers. Id. (citation omitted). The final test is the test set forth in Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co., 20 Cal. 4th 163, 182-83 (1999), which requires that (1) the consumer injury must be substantial; (2) the injury must not be outweighed by any countervailing benefits to consumers or competition; and (3) it must be an injury that consumers themselves could not reasonably have avoided. Zhang, 57 Cal. 4th at 380 n.9 (citation omitted).

[8] Plaintiffs argue that an insurer could describe new non-guaranteed elements in illustrations without including them in the calculation of the current basis values in the illustrations. (Opp'n, Docket No. 859 at 14.) But the purpose of illustrations is to provide consumers with depictions of policy features, not descriptions of policy features they can find in the policy or discuss with agents or brokers. See Cal. Ins. Code § 10509.93(h) (defining illustrations as the "presentation or depiction that includes nonguaranteed elements of a policy of life insurance over a period of years").

Contrary to LSW's argument, the Court's prior Order does not dispose of Plaintiffs' unfairness claim. (See Mot., Docket No. 844 at 23.) First, Plaintiffs have shown that LSW's conduct violates the UCL unfairness prong under the public policy test because LSW violated sections 10509.956(b)(4) and 10509.956(e)(3). Therefore, LSW's conduct violated a public policy tethered to a specific statutory provision. And LSW sets forth no evidence other than the Court's prior Order to show that Plaintiffs fail to satisfy the other tests for unfairness. However, Plaintiffs' prior unfairness claims did not contemplate LSW's conduct in violation of the Illustration Statute. (See Order, Docket No. 791 at 62-66, 68-71.) Accordingly, the Court's conclusions as to the prior unfairness claims are not binding on this motion. In conclusion, LSW fails to satisfy its Celotex burden, and the Court **denies** its motion for summary judgment as to Plaintiffs' UCL unfairness claims.

E. Balance of the Equities

Finally, LSW argues that the balance of the equities weighs against awarding Plaintiffs equitable relief. (Mot., Docket No. 844 at 24.) "[E]quitable defenses may not be asserted to wholly defeat a UCL claim since such claims arise out of unlawful conduct." Cortez v. Purolator Air Filtration Prod. Co., 23 Cal. 4th 163, 179 (2000). Still, equitable considerations may "guide the court's discretion in fashioning equitable remedies" authorized by the UCL. Id. But "[t]he UCL imposes strict liability when property or monetary losses are occasioned by conduct that constitutes an unfair business practice." Id. at 181. And "the plaintiff need not show that a UCL defendant intended to injure anyone through its unfair or unlawful conduct." Id. Accordingly, any equitable defenses may not foreclose Plaintiffs' UCL claims. However, equitable considerations may shape any relief awarded by the Court.

LSW's primary evidence in support of its argument is that the Court previously found that LSW acted in good faith. (Mot., Docket No. 844 at 24-25.) In its prior Order, the Court concluded that "[t]he evidence does not show that LSW acted with anything other than good faith in dealing with its consumers. The uncontroverted testimony is that LSW believed that its illustrations and other disclosures complied with California law." (Order, Docket No. 791 at 65 (citations omitted).) However, the Court did not unequivocally find that LSW violated the

Illustration Statute in good faith. The Court did not previously consider Plaintiffs' claims arising out of violations of the Illustration Statute. The Court is not now persuaded that its prior Order conclusively resolved this issue.[9] Though the Court also noted that other "economic difficulties" drove Plaintiffs to get out of their policies and seek the return of their premiums, and that Plaintiff Walker sought a "loophole" to get her money back, the Court does not believe that LSW has provided enough evidence to show that there is an absence of a genuine dispute of material fact as to the balance of the equities. (See Order, Docket No. 791 at 32, 24, 39.) Accordingly, the Court **denies** LSW's motion for summary judgment as to equitable remedies available under the UCL.

IV. CONCLUSION

For the foregoing reasons, the Court **grants in part** and **denies in part** Plaintiffs' and LSW's motions for summary judgment.

IT IS SO ORDERED.

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[9] The Court does not address Plaintiffs' other arguments relating to the omissions in exemplar illustrations provided to the Department of Insurance because the Court granted summary judgment to LSW as to all claims arising out of the persistency bonuses. (See Opp'n, Docket No. 859 at 28.)