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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

THURMA J. KELLEY, Individually, and on Behalf of the Class,

Plaintiff,

v.

COLONIAL PENN LIFE INSURANCE COMPANY, a Pennsylvania Corporation,

Defendant.

Case No.: 2:20-cv-03348-FLA-E

[Assigned to Hon. Fernando L. Aenlle-Rocha, Courtroom 6B]

REDACTED VERSION OF DOCUMENT PROPOSED TO BE FILED UNDER SEAL

DEFENDANT COLONIAL PENN LIFE INSURANCE COMPANY'S OPPOSITION TO PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

Date: June 9, 2023
Time: 1:30 p.m.
Place: Courtroom 6

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I. INTRODUCTION

This case is one of dozens of class actions manufactured by Plaintiff's counsel which allege strict liability compliance with California Insurance Code Sections 10113.71 and 10113.72 (the "Statutes") pertaining to lapse and notice requirements. At least four federal judges considering virtually identical putative class actions against other insurers have ***already denied*** class certification, finding, among other things, that commonality, typicality, and predominance cannot be decided on a class-wide basis for this type of case. Because there is no private right of action under the Statutes, Plaintiff must establish each requirement of her claims—including breach of contract and declaratory/injunctive relief across the putative class—and she cannot do so. [redacted]. The lapsing of her policy therefore was not caused by any alleged breach of the Statutes, dooming her claims. And she admits she has no damages; she has purchased a new policy, with the same coverage at a lower cost. Colonial Penn will move for summary judgment after certification is resolved.

Plaintiff cannot meet her burden of satisfying the requirements of FRCP 23. *First*, Plaintiff cannot certify a class under FRCP 23(b)(3) because this case involves an overwhelming number of individualized issues. Determining breach, causation, and damages (if any) for each class member would necessarily involve an individualized analysis. As demonstrated by the analysis of Robert Klein, a market research and survey expert, there are many different reasons why putative class members' policies lapsed that have nothing to do with the Statutes. In fact, most members ***intentionally*** lapsed their policies.[1] Furthermore, Plaintiff also cannot show that Colonial Penn's alleged noncompliance with the Statutes can be established with class-wide proof.[2] Colonial

[1] In fact, Klein's survey reveals that a majority of policyholders lapsed because they lacked funds to pay premiums.

[2] Colonial Penn, in fact, has at all relevant times provided at least a 60-day grace period and the ability to designate a third-party beneficiary on its policies.

Penn's affirmative defenses, including the statutes of limitations, also require individualized analysis as Plaintiff seeks to represent class members whose policies lapsed many years ago and under varying circumstances.

Second, class certification would be inappropriate because there is no class-wide methodology of calculating damages. *Third*, Plaintiff cannot certify a class under FRCP 23(b)(2). As held in identical cases, class certification under 23(b)(2) is inappropriate because Plaintiff is primarily seeking money damages. Further, Plaintiff lacks standing to seek declaratory or injunctive relief because she has no risk of future harm—she already obtained a replacement policy at a lower price ***and does not want to un-lapse her Colonial Penn policy***. And Plaintiff (and many class members) lack Article III standing because she has no concrete injury, let alone one caused by Colonial Penn, because she intentionally lapsed her policy. Moreover, injunctive relief is off the table since Colonial Penn has already taken significant steps to comply with the Statutes, is currently taking the final steps to resolve any issues and will be in full compliance by June 2023. There is also no need for any declaratory relief as the Supreme Court in *McHugh* has already declared what the Statutes mean.

Fourth, Plaintiff fails to satisfy the requirements of FRCP 23(a)—specifically, Plaintiff (1) cannot establish commonality because this case involves numerous individualized issues and there is no common injury; (2) is not typical of the class (which involves individuals in different circumstances); and (3) is not an adequate representative (particularly given her lack of knowledge and untoward conduct). *Fifth*, Plaintiff's FRCP 23(b)(4) class should be rejected because the issues referenced by Plaintiff are moot and will not materially advance this case.

II. FACTUAL BACKGROUND

A. Plaintiff's Complaint

On January 1, 2013, the California legislature enacted the Statutes which set forth the following requirements: (a) insurance policies issued in California must contain a 60-day grace period (Compl. ¶ 14); (b) before an individual life insurance policy is

lapsed or terminated for nonpayment, a 30-day written notice must be mailed to the policyholder and any additional person who has been designated by the policyholder to receive such notice, (*id.*, ¶ 15); and (c) the insurer, on an annual basis and during any application process, must notify the policyowner of his or her right to designate additional notice recipients (*id.*, ¶ 16).

When the Statutes were enacted, the California Department of Insurance ("DOI") took the position that the statutes did ***not*** apply to policies issued before the effective date and the Court of Appeal agreed.[3] In 2021, the California Supreme Court in *McHugh v. Protective Life Ins. Co.*, 12 Cal. 5th 213, 220 (2021), rejected the reasoning of the DOI and the Court of Appeal, and held that the Statutes apply to policies in force as of the Statutes' effective date regardless of the date of issuance. The Court also explained the Statutes were enacted to "protect[] people who hold life insurance policies from ***inadvertently*** losing them." *Id.* at 245 (emphasis added).

Plaintiff now attempts to improperly convert the Statutes into strict liability statutes claiming that no lapse or termination is effective unless the insurer strictly complies with the Statutes' provisions. Compl., ¶ 17. Notably, however, the Statutes do not provide for a private right of action. Thus, policyholders, such as Plaintiff here, seek relief under a breach of contract/declaratory judgment theory, arguing that a breach of the Statutes is a *de facto* breach of the policy.

B. The Putative Class

Plaintiff seeks to represent a putative class of more than 34,000 policyholders. Scuglik Decl., ¶ 7. There are dozens of different policy forms, riders, and policy amendments in the class, consisting of individual and group policies, simplified issue policies, graded benefit policies, return of premium policies, and policies with terms ranging from 5 years to 20 years. *Id.* Each policy form contains different terms and conditions. *Id.* Of note, many of the policies in the putative class have lapsed but

[3] *See McHugh v. Protective Life Ins.*, 40 Cal. App. 5th 1166, 1171-72 (2019) (rev'd by 12 Cal. 5th 213) (explaining that "the Department concluded sections 10113.71 and 10113.72 apply only to insurance policies issued after January 1, 2013.").

continue to provide benefits to the policyholders through what is known as a Non-Forfeiture Option ("NFO") provision. *Id.* at ¶ 8. For policies with a NFO provision, the policyholder continues to receive policy benefits including coverage (although at a reduced level) even after the non-payment of premium. *Id.* Out of the more than 34,000 policies potentially in the putative class, at least 14,000 of the policies are in NFO status.[4] *Id.*

C. Colonial Penn's Substantial Compliance with the Statutes

First, at all relevant times, Colonial Penn has provided the 60-day grace period required by the Statutes. Scuglik Decl., ¶ 13. Colonial Penn provides all policies at least a 60-day grace period regardless of what the policy language states with respect to the grace period. *Id.* Additionally, shortly after the Statutes were effective, in February 2013, Colonial Penn implemented a rider providing for a 60-day grace period for policies issued on or after January 1, 2013. *Id.* ¶ 14. As such, Colonial Penn provided a large portion of the putative class members with written 60-day grace periods as required by the Statutes.

Second, as to designating third parties to receive notices, at all relevant times Colonial Penn has provided all policyholders the ability to designate third parties to receive notices in connection with their policies. Scuglik Decl., ¶ 15.[5] *Third*, as to

[4] Policyholders whose policies have a Non-Forfeiture Option provision should not be in the class; their policies did not "lapse." *See* Scuglik Decl., ¶ 8. NFO policyholders continued to receive policy benefits although the coverage was reduced. *See id.* Out of an abundance of caution, we address NFO policyholders. Moreover, the majority of insureds in the putative class are still alive and therefore could not be owed any death benefit. *Id.* at ¶ 9. For those who have deceased, Plaintiff has not set forth any damages model. And even if they did, Plaintiff has not explained—nor could she—how deceased class members were harmed if they intentionally lapsed their policies, which constitutes the overwhelming majority of the putative class.

[5] Any policyholder that would like third parties to receive notices in connection with their policy can simply notify Colonial Penn (*via* phone, e-mail or letter) and Colonial Penn will honor the request. Scuglik Decl., ¶ 15. In addition, in February 2013, shortly after the statutes were effective, Colonial Penn also added a form in policy packets for new policies that allowed policyholders to identify third parties to receive notices in connection with their policy. *Id.* ¶ 16. Accordingly, a significant portion of the putative class members received a third-party designation form. *See id.* The form was provided in policy packets because many of Colonial Penn's policies are sold over the phone and without underwriting, and thus, it was not feasible to provide a written form to applicants during the application process. *Id.* ¶ 17. Further, in 2019, Colonial Penn

notices of pending lapses, Colonial Penn has sent all policyholders ***at least three notices*** before lapsing any policies for nonpayment of premium both before and after enactment of the Statutes. Scuglik Decl., ¶ 19.[6] The third notice states: "URGENT! YOUR VALUABLE COVERAGE WILL BE CANCELLED IF YOUR PREMIUM PAYMENT IS NOT RECEIVED." *Id.* Colonial Penn is also taking steps to resolve any issues with respect to its technical compliance with the Statutes and will be in full compliance by June 2023. Scuglik Decl., ¶¶ 22-25.[7]

D. There Are Numerous Reasons Why a Policy May Lapse; The Survey

Plaintiff's theory of this case—that Colonial Penn's alleged noncompliance with the Statutes caused policies to lapse—is utterly wrong. Colonial Penn's counsel engaged Klein, a market research and survey expert with more than fifty-years' experience in designing and conducting surveys, to conduct a survey of policyholders whose policies lapsed for nonpayment of premium. Klein designed, conducted, and analyzed a survey of the class to obtain data about why policies of putative lapsed (the "Survey"). Klein Decl., ¶¶ 2-4. The Survey confirms the multitudinous reasons why putative class members policies lapsed. And virtually all of the putative class members' policies lapsed for reasons entirely ***unrelated*** to the Statutes. *Id.*, ¶¶ 8-10.

The Survey contains both "open-ended" questions where respondents provide their own answers, and "close-ended" questions where respondents are given potential answers or reasons and are asked if they apply to them, and to what degree. Respondents were asked, in an open-ended question (all data below is for non-NFO policyholders), "[w]hat was the main reason why you didn't pay the premium and let the policy end."

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added a statement on application forms that notified applicants of their right to designate third parties to receive notices. *Id.* ¶ 18.

[6] Specifically, Colonial Penn sends notices to the policyholder (and any third-party designee identified by the policyholder) (1) 17 days prior to the due date, (2) 17 days after the due date, and (3) 45 days after the due date. *Id.* at ¶ 20.

[7] Specifically, Colonial Penn has taken or is taking steps to ensure that (a) all policies have a written grace period of at least 60 days, (b) all policyholders are given an opportunity to designate third parties to receive notices during the application process and on an annual basis, and (c) all policyholders are provided with a notice of pending lapse 30 days before the lapse date. Scuglik Decl., ¶¶ 22-25. Colonial Penn's compliance work as to the Statutes is scheduled to be complete by June 2023._*Id.*

Their answers are instructive. Nearly 38% said that they lacked funds to pay; 9.8% said they were not happy with Colonial Penn; 12.5% wanted to go with another insurance company; 9.8% mentioned price or financial reasons; 10.7% said they no longer needed the policy; and only ***1.8%*** said they forgot to pay. Survey, Table 3. Hence, the vast majority of policyholders lapsed intentionally and have no claim.[8]

The data shows that very few lapses, if any, were caused by a lack of notice. All policyholders received multiple notices their policies would lapse if premiums were not paid (Scuglik Decl., ¶¶ 19-20), and thus the Survey, not surprisingly, disproves any causal link between the notices and non-payment. Indeed, in the open-ended questions, only ***1.8%*** said they forgot to pay the premiums (and as to those, there is no indication their forgetfulness was due to lack of notice).

Moreover, 51.8% of respondents reported purchasing new insurance policies after the lapse. Survey, Table 27. More than a third of the respondents (36.2%) said that the premiums on their new policies was the same or less than their lapsed policies, and 77.6% of respondents said their replacement policies were still in force, so they must be happy with them. Survey, Tables 29 & 31. And 41.1% said that they did ***not*** want to designate a third party to receive notices that their policies would lapse if they didn't pay premium, for varied reasons. Survey, Tables 23 & 24. Klein concludes, figuring out why each policyholder's policy lapsed cannot be done without highly individualized inquiries[9]; there is no common causal connection with respect to Colonial Penn's alleged non-compliance with the Statutes and the lapses of policies. Survey, Tables 3-5; Klein Decl. ¶ 12.

[8] The answers to the close-ended questions (non-NFO) confirmed this: 44.6% remember receiving a notice that their policy would lapse because of non-payment, but they didn't pay anyway; 52.7% of survey respondents lacked funds to pay premiums; 32.1% of the respondents regretted buying their policies in the first place and made a decision to lapse for that reason; 42% of the respondents thought the policy was too expensive and found less expensive policies (like Plaintiff did); 17% of the respondents' medical or financial condition changed and they no longer wanted or needed the policy; and so on. Survey, Tables 2 & 5.

[9] Plaintiff agrees. She testified that the putative class members are individual people, and you would have to ask each of them individually how they have been harmed. 11/21 Kelley Tr., 182:18-25.

E. Plaintiff's Unique Circumstances

[redacted].[10] [redacted]. Huang Decl., Ex. A (11/22/22 Tr. of Dep. of Pl. ("11/21 Kelley Tr.")) at 166:13-17; 171:13-19. Remarkably, when shown a document with her counsel's name on it, Plaintiff said she was unfamiliar with her own counsel. *Id.*, Ex. B (2/21/23 Tr. of Dep. of Pl. ("2/21 Kelley Tr.")) at 360:16-361:18. Plaintiff is not even familiar with the basic theory of this case, believing it's about advertising.[11]

Plaintiff's Policy. [redacted]. *See* Scuglik Decl., ¶ 3; 11/21 Kelley Tr., 42:2-23. Plaintiff's Policy had a 30-year term, which would expire in 2032, and the premiums owed under the policy increased at specified ages. *See* Scuglik Decl., ¶ 3. Plaintiff was provided with a 60-day grace period. *Id.*, ¶ 13. [redacted].[12] [redacted]. 11/21 Kelley Tr. at 64:11-16.

Plaintiff *Knowingly* Caused Her Policy to Lapse *And Doesn't Want to Un-Lapse it.* Plaintiff is not the type of person the Statutes are intended to protect. [redacted]. 11/21 Kelley Tr. at 104:14-22; 108:7-11; 137:10-139:21. [redacted]. 11/21 Kelley

[10] Huang Decl., 11/21 Kelley Tr. at 166:13-17; 171:13-19; 2/21 Kelley Tr. at 360:16-361:18, 363:14-364:8; 392:21-394:22; 398:2-6.

[11] [redacted]. 11/21 Kelley Tr., 160:24-161:10, 165:3-14, 165:21-166:12. Of course, that is not what this case is about.

[12] Scuglik Decl., ¶¶ 6, 13; 11/21 Kelley Tr., at 83:2-22, 93:1-25, 97:10-16, 103:2-6, 103:13-104:12, 107:3-17, 108:7-22, 110:25-111:4, 114:2-11, 116:2-7, 120:9-13, 121:23-122:9, 137:10-139:21.

Tr. at 108:7-11. [redacted].[13] [redacted]s. *See* Scuglik Decl., Exs. E-J. [redacted] (11/21 Tr. 141:12-17), [redacted] (*see id.*, 140:9-19). [redacted]. 11/21 Kelley Tr. 108:1-117:3. [redacted]. *See* 11/21 Kelley Tr. 86:2-18; 94:1-14; 97:18-21; 98:12-16; 105:4-8; 108:1-16; 111:6-15; 115:2-15. But she did not lay blame on a purported lack of notice that premiums were due and that the policy would lapse. S[redacted]. 11/21 Kelley Tr. at 83-115. [redacted].[14] [redacted]. Plaintiff testified that she does not know whether she would have wanted to designate a third party to receive notices. 2/21 Kelley Tr. at 325:2-15.

[13] *See* 11/21 Kelley Tr., 83:2-22, 93:1-25, 97:10-16, 103:2-6, 103:13-104:12, 107:3-17, 108:7-22, 110:25-111:4, 114:2-11, 116:2-7, 120:9-13, 121:23-122:9, 122:22-123:8, 127:5-129:6; 137:10-139:21.

[14] [redacted]. 11/21 Kelley Tr. at 18:10-22. [redacted]. 11/21 Kelley Tr. at 18:23-19:5. [redacted]. 11/21 Kelley Tr. at 209:20-210:21; 212:1-14.

[redacted].[15] 11/21 Kelley Tr. at 271:12-273:12. [redacted]. 11/21 Kelley Tr. at 275:10-17. The lower cost of her new policy is a reason why she would not want her Colonial Penn policy un-lapsed.[16] 11/21 Kelley Tr. at 276:12-16. So, Plaintiff does not want the relief purportedly sought by the putative class—the definition of atypical. Also, just as she misrepresented her payment history in her Complaint, Plaintiff made false statements on her application to Foresters, which may constitute insurance fraud.[17]

III. LEGAL STANDARD

A class action is an "exception" to the way cases ought to be litigated. *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013); *see also Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011). A plaintiff thus carries a heavy burden of showing no material differences exist among class member claims. It is not enough to raise so-called "common questions" because although "any competently crafted class complaint literally raises common questions . . . [w]hat matters . . . [is] the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation." *Dukes*, 564 U.S. at 350.

Courts must conduct a "rigorous analysis" to ensure FRCP 23's requirements

[15] Plaintiff's premiums under the Foresters policy are $53.62 per month, which is lower than the $59.45 monthly premium she was paying to Colonial Penn when her policy lapsed. 2/21 Kelley Tr., 314:2-25; Huang Decl. Ex. C, p. 3; Scuglik Decl., Ex. A, p. 6. Further, as Plaintiff conceded, the Foresters' policy premium will be locked through January 7, 2033, whereas, the premium for her Colonial Penn policy would have increased several times, up to $192.45 per month before its expiration date on November 1, 2032. 2/21 Kelley Tr., 315:1-11, 322:10-323:14.

[16] Plaintiff also conceded that her Foresters policy only has a 31-day grace period, and even though she is suing Colonial Penn for allegedly not providing a written 60-day grace period, the 31-day grace period in her Foresters policy does not bother her. 2/21 Kelley Tr., 316:9-319:12.

[17] Plaintiff admitted the listed income of $25,000 and her occupation of "caregiver" on the application (which Plaintiff signed in two places) are false. 2/21 Kelley Tr., 352:15-356:16. [redacted]. 11/21 Kelley Tr., 18:10-22, 18:23-19:6, 21:21-22:5, 22:6-12, 67:22-24, 69:5-10.

have been satisfied. *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001). The class action device is not suited for resolving disputes where minitrials would be necessary for addressing individualized issues.[18] And class actions are unsuitable to resolve disputes that may hinge on the class members' "state of mind," as class members will invariably have different mindsets. *See e.g.*, *Schwartz v. Upper Deck Co.*, 183 F.R.D. 672, 680 (S.D. Cal. 1999). This case is particularly ill-suited for class treatment, given that individualized issues going to the heart of the case—why absent class members lapsed their policies and what was the result of the lapse—would necessarily require endless minitrials that would focus on each policyholder's state of mind and unique circumstances.

IV. ARGUMENT

A. Courts Have Rejected Class Certification in Identical Cases

Not surprisingly, courts—even without the benefit of the survey Colonial Penn proffers here, which demonstrably proves that most policyholders lapsed ***intentionally*** for many different reasons—have repeatedly rejected class certification in identical cases. For example, in *Nieves v. United of Omaha Life Ins. Co.*, the plaintiff brought class claims based on the defendant's alleged non-compliance with the Statutes. 2023 U.S. Dist. LEXIS 53397, at *4 (S.D. Cal. Mar. 28, 2023). The court denied class certification and found that "Plaintiff's common evidence is overrun by individual questions," including questions about (1) "each members' intent regarding the lapse and/or termination of their policy," (2) "whether each class member was given a 60-day grace period in practice," and (3) "the specific terms of each class member's policy." *Id.* at 22.[19]

[18] *See e.g.*, *Ponce v. Medline Indus.*, LP, 2023 U.S. Dist. LEXIS 5475, at *15 (C.D. Cal. Jan. 10, 2023) ("Class certification is not an appropriate vehicle to adjudicate a theory of liability that would necessitate thousands of minitrials") (citation omitted).

[19] The court also recognized that multiple other courts in "case[s] involving alleged violations of the Statutes have found that similar individual issues predominate." *Nieves v. United of Omaha Life Ins. Co.*, 2023 U.S. Dist. LEXIS 53397, at *22. The court further found that certification under Rule 23(b)(2) would be inappropriate because, among other things, Plaintiff had a claim for monetary damages. *Id.* at *18.

Likewise, in *Pitt v. Metro. Tower Life Ins. Co.*, the court denied class certification in a similar case and found, among other things, that individual issues would predominate at trial and that "[v]iolation of one of the several requirements contained in the Statutes does not by itself establish all the elements of a claim for breach of contract." 2022 U.S. Dist. LEXIS 233896, at *2 (S.D. Cal. Dec. 1, 2022). The court explained there were various reasons why a policyholder might cancel their policy that had nothing to do with the Statutes, e.g., "[O]ne policyholder in the putative class called [defendant] expressly to indicate her plan to cancel the policy," "[A]nother policyholder . . . no longer wished to continue coverage," etc. *Pitt*, 2022 U.S. Dist. LEXIS 233896, at *21.[20]

The court reached the same result in *Moriarty v. Am. Gen. Life Ins. Co.*—another class action case regarding compliance with the Statutes. 2022 U.S. Dist. LEXIS 175474, at *9 (S.D. Cal. Sep. 27, 2022). The court denied class certification and found that the proposed class "raises too many individual questions," that plaintiff could not represent a class comprised primarily of policyholders seeking equitable relief (most class members were still alive and therefore had no damages) given that plaintiff was seeking damages, and "[i]t would be misguided to certify a damages class where most class members have no damages." *Moriarty*, 2022 U.S. Dist. LEXIS 175474, at *9-11. The court further found that certification under Rule 23(b)(2) would be inappropriate "because Plaintiff's primary claim is for damages." *Id.* at *8.[21]

[20] The court also explained that establishing damages was not possible on a class-wide basis because most class members were still alive and "the assessment of whether those individuals suffered damages as a result of the breaches will likewise be individualized." *Id*

[21] And in *Siino v. Foresters Life Ins. & Annuity Co.*, which also involved similar claims, the court reached the same result. 340 F.R.D. 157, 160 (N.D. Cal. 2022). There, the court held that a class could not be certified because the plaintiff could not show that "damages… [can] feasibly and efficiently be calculated once the common liability questions are adjudicated." *Id.* at 164. The court found the plaintiff had no method of calculating damages for the policyholders that were still alive and failed to explain how "the Court would calculate 'restitution of the money or property acquired' by [defendant] on a *classwide* basis, including both policyholders who died and those who were still alive." *Id.* at 166. The court also held that a Rule 23(b)(2) class could not be certified because the plaintiff sought money damages. *Id.* at 161. This case is just more of the same from Plaintiffs' counsel, and class certification should likewise be denied.

B. Plaintiff Cannot Certify a Rule 23(b)(3) Class

The predominance inquiry under FRCP 23(b)(3) "is even more demanding than" the commonality requirement and requires Plaintiff demonstrate that no individual question is more prevalent or important than common questions. *Comcast*, 569 U.S. at 34; *see also Amchem Prods. v. Windsor*, 521 U.S. 591, 624 (1997) ("the predominance criterion is far more demanding" than the commonality requirement). Courts have denied certification of identical class actions brought by Plaintiff's counsel under the Statutes for lack of predominance.[22]

i. Colonial Penn's Alleged Non-Compliance With the Statutes Is Not Subject to Class-Wide Proof

Plaintiff argues her claims can be proven on a class-wide basis because Colonial Penn "admittedly refused to provide all the protections mandated by The Statues." Mot. 17:18-20. This simply ignores the numerous individualized issues of law and fact that courts have already found predominate over any common issues. Given that Plaintiff's putative class encompasses a broad range of policies, with varying provisions and riders, Plaintiff cannot show that Colonial Penn's alleged failure to comply with the Statutes is subject to common proof.

And, at all relevant times, Colonial Penn provided all policyholders with a 60-day grace period, and beginning February 2013, Colonial Penn included a rider setting forth a written 60-day grace period for all new policies. Scuglik Decl., ¶¶ 13-14. Further, Colonial Penn had a longstanding practice of sending all policyholders at least ***three notices*** before any lapse for nonpayment of premium—such that policyholders would have been well aware of any pending lapse. *Id*., ¶¶ 19-20.[23] At a very minimum,

[22] In *Pitt*, for example, the court held individualized issues would "predominate at trial," 2022 U.S. Dist. LEXIS 233896, at *21. Likewise, in *Moriarty*, the court held that "common questions d[id] not predominate" because "[t]he proposed class covers policies that have not even been terminated yet and certainly includes policy holders who have known for years that [the insurer] terminated their policies." 2022 U.S. Dist. LEXIS 175474 at *9-10. The proposed class "raise[d] too many individual questions." *Id.* The same result should follow here; the Survey proves that.

[23] Likewise, as to the third-party designation requirements, Colonial Penn has a longstanding practice of permitting policyholders to designate third parties to receive

Colonial Penn substantially complied with the Statutes and provided even ***more*** notice than required. *Huijers v. Demarrais*, 11 Cal. App. 4th 676, 684 (1992) ("[s]ubstantial compliance with a statute is" generally sufficient).

Plaintiff also cannot show that Colonial Penn's alleged noncompliance creates actionable claims as to the entire putative class. But "[v]iolation of one of the several requirements contained in the Statutes does not by itself establish all the elements of a claim for breach of contract." *Pitt*, 2022 U.S. Dist. LEXIS 233896, at *21. Plaintiff ignores that many lapses are ***intentional***, not inadvertent. "In such situations, the termination of the policy might be due to the policyholder's request rather than to nonpayment of premiums; or Defendant's performance under the contract might be excused." *Id.* This raises a host of individualized issues as to whether many class members suffered any injury, and one caused by an alleged non-compliance with the Statutes. As noted in the Survey, most policyholders lapsed due to lack of funds, though there are a mosaic of intentional reasons offered by policyholders for lapsing.

As to Plaintiff's breach of contract claim, each proposed class member must prove (1) the existence of a contract, (2) their own performance or excuse therefrom, (3) Colonial Penn's breach, and (4) damages resulting from that breach. *Troyk v. Farmers Group, Inc.*, 171 Cal. App. 4th 1305, 1352 (2009). As to the fourth element, California requires any damages to be "proximately caused" by the breach. *Id.* at 1352; *Campion v. Old Republic Home Prot. Co., Inc.*, 272 F.R.D. 517, 532 (S.D. Cal. Jan. 6, 2011) (a "causal link between defendant's business practice and the alleged harm" is required).[24]

To establish a breach of contract or a UCL claim on a class-wide basis, Plaintiff must show causation and injury that does not "require an individualized determination for each plaintiff." *Lara v. First Nat'l Ins. Co. of Am.*, 25 F.4th 1134, 1138 (9th Cir. 2022). But Plaintiff cannot show that each class member's alleged injury can be

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notices, added a form on this subject in policy packets for policies issued on or after January 1, 2013, and beginning in 2019, included a statement in applications regarding the ability to designate third parties. Scuglik Decl., ¶¶ 15-18.

[24] The same is true for Plaintiff's UCL claims. *Wilson v. Frito-Lay N. Am., Inc.*, 961 F.Supp.2d 1134, 1145 (N.D. Cal. 2013).

established on a common basis. Indeed, Plaintiff cannot even show that ***she*** was injured due to Colonial Penn's alleged noncompliance with the Statutes.[25]

As in *Pitt* and *Moriarty*, individualized factors overwhelm this case, including but not limited to (1) the individual policy terms, (2) whether the policyholder received a 60-day grace period rider or third-party designation form, (3) whether the policyholder would have wanted to designate a third party (e.g., Plaintiff did not necessarily want to designate one), (4) the reasons for the lapse (e.g., whether it was intentional), (5) whether the policyholder was aware that their policy was going to lapse (as all policyholders received at least three separate notices before any lapse), (6) whether the policyholder continues to receive benefits via NFO statutes, and (7) whether the policyholder suffered any damages (e.g., because an insured is still alive or obtained alternative coverage at a cheaper price elsewhere). *See Pitt*, 2022 U.S. Dist. LEXIS 233896, at *2. Thus, the elements of Plaintiff's claims and the fact inquiries involved therewith cannot be resolved on a class-wide basis.

Significantly, as Klein's Survey demonstrates, a substantial number of putative class members' policies were ***intentionally terminated by the owner***. Survey, Table 3. The vast majority of policyholders lapsed because they lacked the funds to pay premiums, regretted purchasing the policy in the first place and decided to get rid of it, or wanted to purchase a different policy or invest funds elsewhere. *Id.* None of those Survey respondents, all of whom Plaintiff want in the class, have viable claims. Notably, surveys are valuable tools commonly accepted and relied on by courts.[26] They are commonly relied on in class certification motions.[27] The Survey here makes absolutely

[25] "An essential element of a claim for breach of contract are damages resulting from the breach." *St. Paul Fire & Marine Ins. Co. v. Am. Dynasty Surplus Lines Ins. Co.*, 101 Cal. App. 4th 1038, 1060 (2002). Where a class member ***intended*** for their policy to lapse, Colonial Penn's alleged noncompliance by failing to provide a written 60-day grace period or an opportunity to designate a third party caused no harm.

[26] The federal Manual for Complex Litigation advises courts that "[a]cceptable sampling techniques, in lieu of discovery and presentation of voluminous data from the entire population, can save substantial time and expense." Manual for Complex Litigation, Fourth § 11.493 (2002).

[27] *See Li v. A Perfect Day Franchise, Inc.*, 2012 U.S. Dist. LEXIS 83677, at *39 (N.D. Cal. June 14, 2012); *Burdette v. Vigindustries, Inc.*, 2012 U.S. Dist. LEXIS

clear that there are no common answers to common questions, and there are numerous different reasons why people lapsed their policies and otherwise acted in different ways. Klein Decl., ¶ 12. This renders the class action device unsuitable here.

Colonial Penn's affirmative defenses also involve individualized questions. *Siino*, 340 F.R.D. at 162. Many of the policyholders in the class may be subject to statutes of limitations defenses. A policyowner who knew their policy lapsed but refused an opportunity to reinstate it might have their claim barred by the doctrine of waiver.[28] Class members who knew of the lapse yet failed to take reasonable steps to mitigate their harm by applying for replacement coverage would be susceptible to a defense of failure to mitigate.

C. Plaintiff Fails to Offer Any Class-Wide Damages Model

Rule 23 requires a viable class-wide damages model that Plaintiff cannot and has not even attempted to provide. Plaintiff cannot establish a damages model that is consistent with her theory of liability or capable of measurement across the entire class.[29] *First*, Plaintiff does not even attempt to offer a damages model for living insured class members. Plaintiff cannot show that any of the proposed class members whose policies insure someone who is alive have even been damaged.[30] Plaintiff likewise cannot show how putative class members are damaged if they ***chose*** to lapse their policy (which as the Survey shows is the vast majority of putative class members), or if they obtained a replacement policy.[31]

15412, at *19-24 (D. Kan. Feb. 8, 2012); *Young v. Nationwide Life Ins. Co.*, 183 F.R.D. 502, 509 (S.D. Tex. 1998); *Grimes v. Invention Submission Corp.*, 2005 U.S. Dist. LEXIS 46198, at *5-6 (W.D. Okla. March 8, 2005); *Cook v. Rockwell Int'l Corp.*, 580 F. Supp. 2d 1071, 1126-29, 1139 (D. Colo. 2006).

[28] *See Whitney Inv. Co. v. Westview Dev. Co.*, 273 Cal. App. 2d 594, 603 (1969) ("When the injured party with knowledge of the breach continues to accept performance from the guilty party, such conduct may constitute a waiver ….").

[29] *See Samet v. Proctor & Gamble Co.*, 2019 U.S. Dist. LEXIS 244829, at *23-24 (N.D. Cal. Jan. 15, 2019). "If the model does not even attempt to do that, it cannot possibly establish that damages are susceptible of measurement across the entire class for purposes of Rule 23(b)(3)." *Comcast*, 569 U.S. at 34–35.

[30] Nor can Plaintiff show that living insured class members who still possess life insurance coverage under a NFO provision have been damaged.

[31] To the extent Plaintiff intends to argue that diminished policy value or refunded policy premiums is a measure of damages or restitution under the UCL, this would be

Second, Plaintiff also cannot establish a viable damages model for policies where the insured has died.[32] Plaintiff merely concludes that for policies where the insured has died, the measure of damages is "simply the unpaid benefit." Mot. 17:27-18:3. This oversimplified approach ignores class members who deliberately allowed lapse, surrendered their policies for cash, or took out loans against the cash value of their policies.[33] What's more, deceased policyholders would still need to prove causation. Individual inquiries would need to be made in every situation—did the deceased policyholder choose to lapse or not? There are no common answers to these common questions, regardless of whether the policyholder is alive or deceased. Courts have denied class certification in similar class actions for this precise reason.[34]

D. Plaintiff and Many Putative Class Members Lack Standing

A plaintiff who lacks standing to seek the relief alleged cannot represent a class seeking similar relief. *See Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 n.6 (2016). Mere statutory violation is insufficient injury to confer standing, undermining class certification.[35] The Supreme Court also requires that "[e]very class member . . . have

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untenable. Although Plaintiff claims putative class members' policies were wrongfully lapsed, she cannot reasonably claim the putative class received nothing of value—the lapse would not have rendered the policies worthless while in force. The premiums paid were in consideration for coverage that was ***already received***. Further, this would inherently require individualized inquiries into each policy's value. Courts routinely hold that the value of a life insurance policy is highly dependent on a number of factors (such as the insured's current health and life expectancy, premiums required to be paid, and many others). *See Schwab v. Comm'r*, 715 F.3d 1169, 1179 (9th Cir. 2013) (explaining there is no "one-size fits all" methodology for ascertaining the fair market value of a life insurance policy).

[32] Nor can Plaintiff, who is alive and has no damages, represent such putative class members.

[33] This oversimplified approach also does not deduct premiums that policyholders would owe for the period between lapse and an insured's death, which could ostensibly exceed the actual policy value.

[34] In *Siino*, the court held that "the absence of a methodology for calculating damages on a classwide basis" defeats class certification, reasoning that the plaintiff had no methodology for calculating damages for policyholders that were still alive and failed to explain how "the Court would calculate 'restitution of the money or property acquired' by [defendant] on a *classwide* basis, including both policyholders who had died and those who were still alive." 340 F.R.D. at 166.

[35] *See Patel v. Facebook, Inc.*, 932 F.3d 1264, 1270 (9th Cir. 2019) (even where defendant "has violated a right created by a statute[,] [the court] must still ascertain whether the plaintiff suffered a concrete injury-in-fact due to the violation."). *See also Nunley v. Cardinal Logistics Mgmt. Corp.*, 2022 U.S. Dist. LEXIS 182820, at *12 (C.D.

Article III standing in order to recover individual damages." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2208 (2021). And under *TransUnion*, Article III standing requires not just an actual injury, but a showing that Defendant ***caused*** actual injury.[36] Moreover, "[s]tanding is an ongoing inquiry, and '[t]he need to satisfy these three [Article III standing] requirements persists throughout the life of the lawsuit.'" *Trump v. Twitter Inc.*, 602 F. Supp. 3d 1213, 1225 (N.D. Cal. 2022).

Here, Plaintiff lacks standing to pursue her claims because Colonial Penn's purported noncompliance with the Statutes did not cause her any damage. [redacted]. Causation is nonexistent. She obtained a policy with the same death benefits for a lower cost and [redacted]. Many putative class members will be in the same position. These individualized standing issues, and Plaintiff's own lack of standing, precludes certification.

E. Plaintiff Fails to Satisfy the Requirements for a Rule 23(b)(2) Class

i. The Primary Relief Plaintiff Seeks Is Monetary Relief

"Class certification under Rule 23(b)(2) is appropriate only where the primary relief sought is declaratory or injunctive." *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 986 (9th Cir. 2011); *see also Dukes*, 564 U.S. 338 at 362 (stressing "that individualized monetary claims belong in Rule 23(b)(3)," not in Rule 23(b)(2)).[37] The primary relief Plaintiff seeks is money damages.[38] The declaratory relief referenced in

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Cal. Oct. 5, 2022) (no standing because plaintiff failed to "demonstrate[e] a concrete harm beyond procedural violations…").

[36] *See e.g, Pivonka v. Allstate Ins. Co.*, 2022 U.S. Dist. LEXIS 226276, at *7 (E.D. Cal. Dec. 15, 2022) (no injury-in-fact because plaintiffs failed to show that defendants' conduct "caused them financial harm")

[37] *Dukes*, 564 U.S. at 367 ("We now hold that [claims for monetary relief] may not [be certified under Rule 23(b)(2)], at least where (as here) the monetary relief is not incidental to the injunctive or declaratory relief.").

[38] Plaintiff's Complaint alleges: "Plaintiff as well as the class and sub-class have suffered direct and foreseeable economic damages, including loss of policy coverages and benefits." Compl. ¶ 71. Further, "Plaintiff, the general public, and the members of the Class and sub-class are entitled to restitution of the money or property . . . [which] include un-refunded premiums, withheld benefits, and diminution of value of policies." *Id*. ¶ 79; *see also* ¶ 90 (seeking compensatory damages, reasonable attorney's fees and costs); ¶ 91 (punitive damages); and Prayer for Relief (Nos. 4-8) (confirming that

the Complaint is merely incidental to Plaintiff's primary claim for money damages. And the declaratory relief itself seeks money damages, as that claim at core seeks to transfer money from Defendant to Plaintiff and the class through un-lapsing policies. Rule 23(b)(2) certification should thus be denied, as in *Siino*, *Moriarty*, and *Pitt*.[39]

ii.No Standing to Seek Injunctive or Declaratory Relief

"A Rule 23(b)(2) class can only be certified if the named plaintiff shows that she herself is subject to a likelihood of future injury." *Peacock v. Pabst Brewing Co., LLC*, 2022 U.S. Dist. LEXIS 106778, at *4 (E.D. Cal. June 15, 2022). [redacted]. Moreover, Colonial Penn is resolving any issues with respect to its compliance with the Statutes and will be in full compliance by June 2023. Scuglik Decl., ¶¶ 22-25. As such, Plaintiff is not "realistically threatened by a *repetition* of the violation." *In re Intel Laptop Battery Litig.*, 2011 U.S. Dist. LEXIS 144209, at *7 (N.D. Cal. Apr. 7, 2011).

Numerous courts assessing identical claims have determined that plaintiffs suing on lapsed policies do not have standing to seek injunctive relief. *See, e.g., Siino*, 2020 U.S. Dist. LEXIS 178709, at *25 ("Siino 'has failed to show a very significant possibility or real threat of future re-injury,' given that her Policy was terminated in 2018.").[40] And where plaintiff lacks standing to seek a particular form of relief for herself, she cannot represent a class seeking that relief, and a Rule 23(b)(2) class cannot

Plaintiff seeks monetary damages through her claims).

[39] In *Siino*, the court denied certification of a Rule 23(b)(2) class, finding that the plaintiff's "claims for monetary damages" prevented it from doing so. 340 F.R.D. at 161. Similarly, in *Moriarty*, 2022 U.S. Dist. LEXIS 175474, at *8, the court found that the plaintiff was precluded from representing a Rule 23(b)(2) class because she sought monetary damages. In *Pitt*, 2022 U.S. Dist. LEXIS 233896, at *24, the court found that the primary relief plaintiff sought was damages—the amount payable under her insurance policy and denied certification under Rule 23(b)(2).

[40] *See also Small v. Allianz Life Ins. Co. of N. Am.*, 2022 U.S. Dist. LEXIS 119369, at *3 (C.D. Cal. Mar. 29, 2022) (insurer "cannot, again, breach the [previously lapsed] Policy by, again, failing to give sufficient notice for non-payment of premiums or failing to provide a grace period…"); *Bentley v. United of Omaha Life Ins. Co.*, 2016 U.S. Dist. LEXIS 195183, at *19 (C.D. Cal. June 22, 2016) ("Because the Policy has lapsed, there is no ongoing need for injunctive relief").

be certified.[41] Furthermore, putative class members who intentionally lapsed their policies or whose policies lapsed for reasons unrelated to Colonial Penn's compliance with the Statutes also lack standing to seek injunctive or declaratory relief.

Plaintiff's request for "a declaration or judgment that Sections 10113.71 and 10113.72 applied as of January 1, 2013, to Colonial Penn's California policies in force as of or at any time after January 1, 2013, including the Subject Policy" (*see* Compl., ¶ 58) is moot because the California Supreme Court resolved that issue in *McHugh*.[42]

F. Plaintiff Cannot Even Satisfy The Basic Requirements of Rule 23(a)

Commonality. Commonality is an essential requirement for class certification and requires that there is an issue "central to the validity of each one of the claims" that can be resolved "in one stroke." *Dukes*, 564 U.S. at 338. Plaintiff "must show . . . the essential elements of the cause of action . . . are capable of being established through a common body of evidence, applicable to the whole class." *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 665 (9th Cir. 2022). This means Plaintiff must "demonstrate that the class members 'have suffered the same injury.'" *Dukes*, 564 U.S. at 349-50. As discussed above, however, the elements to Plaintiffs' claims here are not subject to common proof, and class members have not suffered the same injury (and many, including Plaintiff, have suffered no injury).

Typicality. Plaintiff must show that her claims are "typical" of the class she proposes to certify. *See* FRCP 23(a)(3). Typicality ensures that Plaintiff's interests are

[41] *See Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 n.6 (2016); *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037, 1045 (9th Cir. 1999) (en banc) ("Unless the named plaintiffs are themselves entitled to seek injunctive relief, they may not represent a class seeking that relief"); *see also Peacock*, 2022 U.S. Dist. LEXIS 106778, at *6-7 (rejecting a proposed 23(b)(2) class because the plaintiff "lack[ed] the real and immediate threat of repeated injury to establish standing").

[42] In *Park v. AXA Equitable Life Ins. Co.*, the court addressed these exact same issues and found (1) plaintiff's request for a declaration that the Statutes apply to all of defendant's life insurance policies was rendered moot by *McHugh*, and (2) the plaintiff lacked standing to seek a declaration that defendant's violation of Insurance Code provisions because "[a]llegations of past injury alone are not sufficient to confer standing to pursue a declaratory judgment." 2023 U.S. Dist. LEXIS 6227, at *14 (C.D. Cal. Jan. 11, 2023). The court in *Pitt* found the same. *See Pitt*, 2022 U.S. Dist. LEXIS 233896, at *27 (S.D. Cal. Dec. 1, 2022).

aligned with those of the class.[43] That is not the case here. [redacted]. *See* Section II.E, *supra.* In contrast, Plaintiff seeks to represent insureds (1) who may have died and may have a claim for death benefits, (2) who voluntarily allowed their policies to lapse and could not have suffered injury, (3) whose policies may have been involuntarily terminated but want their policies un-lapsed, (4) whose policies were involuntarily terminated but do not want their policies un-lapsed, (5) who may or may not have wanted to designate a third party to receive notices. And, as Klein's Survey demonstrates, there is a mosaic of reasons why policyholders lapsed, and what they did afterwards (like seeking reinstatement or purchasing a new policy). Typicality is impossible here given all the factors at play.[44]

Further, where, as here, defenses "unique" to the named plaintiff's claims are likely to "preoccup[y]" the litigation, class certification should be denied. *Hanon*, 976 F.2d at 508. Plaintiff's unique circumstances promise to preoccupy this proposed class action and preclude typicality. [redacted]. This precludes certification.[45]

Inadequate Representative. Plaintiff's unique circumstances preclude her from serving as an adequate representative *See* FRCP 23(a)(4).[46] Plaintiff is also an

[43] *See Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992); *see also Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 984 (9th Cir. 2011) (typicality precludes class certification if a proposed representative complains of conduct unique to them or putative class members lack the "same or similar injury").

[44] Plaintiff had a 5-year level term life insurance policy to age 80. This differs from the numerous putative class members with different policy terms, different policy types (e.g., whole life, convertible, graded benefit), who may have NFO policies, or whose policies came with various riders (e.g., the 60-day grace period rider).

[45] *See, e.g.*, *Pitt*, 2022 U.S. Dist. LEXIS 233896, at *13 (where part of putative class involved policies with living insureds, there were differing, atypical questions of causation and damages); *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996) (rejecting certification where named plaintiffs did not suffer from one of the most serious harms alleged and therefore "suffered different injuries").

[46] Plaintiff does not share an interest with many of the putative class members, including deceased policyholders. [redacted]

inadequate class representative because she does not understand the claims she purports to assert. Certification where named plaintiff's counsel is "acting on behalf of an essentially unknowledgeable client . . . risk[s] a denial of due process to the absent class members." *Burkhalter Travel Agency v. MacFarms Int'l*, 141 F.R.D. 144, 154 (N.D. Cal. 1991). [redacted].[47] Even worse, Plaintiff admitted to making false statements in her application to Foresters. Courts have repeatedly rejected class certification where, as here, the class representative lacks credibility.[48]

G. Plaintiff Cannot Certify a Rule 23(b)(4) Issue Class

Plaintiff perfunctorily contends that this Court should certify an issue class under Rule 23(b)(4) if it determines not to certify a (b)(2) or (b)(3) class. Specifically, Plaintiff seeks certification of two issues: (1) whether "[t]he Statutes apply to Defendant's policies in force as of January 1, 2013," and (2) whether "Colonial Penn's admitted failure to comply with The Statutes rendered its lapses or terminations ineffective." *See* Mot. 20-21. Certification of an issues class under Rule 23(c)(4) is appropriate only if it "materially advances the disposition of the litigation as a whole." *Rahman v. Mott's LLP*, 693 F. App'x 578, 580 (9th Cir. 2017). A (c)(4) class would hardly do that; in fact, it would be meaningless.[49]

[redacted].

One of the primary fiduciary duties of the class representative is to ensure that class counsel does not have unchecked and unfettered control over the litigation. McLaughlin on Class Actions, § 4:27 ("Instead of 'blind reliance upon even competent counsel by uninterested and inexperienced representatives,' 'a class is entitled to an adequate representative, one who will check the otherwise fettered discretion of counsel…'). Here, plaintiff has handed the keys to the case over to her lawyers, some of who she has never spoken with. That disqualifies her from serving as a class representative. *See e.g.*, *In re Cal. Micro Devices Sec. Litig.*, 168 F.R.D. 257, 275 (N.D. Cal. 1996) ("the only adequate class representative under FRCP 23(a) is a class member who is well-informed about the action and independent of its counsel.").

[48] *Briggs v. OS Rest. Servs., LLC*, 2020 U.S. Dist. LEXIS 200333, at *47 (C.D. Cal. Aug. 26, 2020) ("Plaintiff is not an adequate class representative. His conduct undermines his credibility.").

[49] Plaintiff seeks to use Rule 23(c)(4) to circumvent Rule 23(b)(3)'s predominance requirement. But "Rule 23(c)(4)(A) does not permit a court to bypass the requirements of Rule 23(b)(3) entirely simply by defining the issues for certification narrowly enough." *Sepulveda v. Wal-Mart Stores, Inc.*, 237 F.R.D. 229, 250 (C.D. Cal. 2006) *aff'd in part*, 275 F. App'x 672 (9th Cir. 2008) *opinion vacated on reh'g*, 464 F. App'x

The first issue has been addressed by the California Supreme Court in *McHugh* and is thereby moot. *See, e.g.*, *Pitt*, 2022 U.S. Dist. LEXIS 233896, at *28 (denying issue class as mooted by *McHugh*); *Siino*, 340 F.R.D. at 160 n.1 (same). As to the second issue, Colonial Penn has not admittedly failed to comply with the Statutes as a whole. *See* Section II.C, *supra*. Moreover, Plaintiff ignores the individualized issues addressed above, including breach, causation and damages, that preclude certification of a putative class, and which cannot be ignored by merely certifying the issue. *See* Section IV.B.i, *supra*. Indeed, after certifying a (c)(4) class, what comes next? Plaintiff does not say because, inevitably, providing any meaningful relief to the putative class would require delving into a myriad of highly individualized issues.

H. The Class Definition Improperly Includes Time-Barred Members

Plaintiff's proposed class improperly includes claims which are barred by the four-year statute of limitations. *See* Cal. Civ. Proc. Code § 337 (contract); Cal. Bus. & Prof. Code § 17208 (UCL); Cal. Welf. & Ins. Code § 15657.7 (financial elder abuse). Because Plaintiff filed her Complaint on April 9, 2020 (ECF No. 1), any claim that accrued prior to April 9, 2016, is time barred, and any class member whose coverage ended prior to that date cannot state a claim. *See e.g.*, *Solomon v. N. Am. Life & Cas. Ins. Co.*, 151 F.3d 1132, 1138 (9th Cir. 1998) (finding that action on life insurance policy "accrued when [the] policy was terminated"). Even if Plaintiff sought to invoke the discovery rule to toll the statute of limitations, this would require individualized inquiries into each of the putative class members' individual circumstances. *See Bally v. State Farm Life Ins. Co.*, 536 F.Supp.3d 495, 515 (N.D. Cal. 2021); *Lucas v. Breg, Inc.*, 212 F. Supp. 3d 950, 971 (S.D. Cal. 2016) (applying the discovery rule to resolve "statutes of limitation issues w[ould] involve individualized, fact-intensive inquiries").[50]

636 (9th Cir. 2011) and *aff'd*, 464 F. App'x 636 (9th Cir. 2011). Indeed, in affirming the denial of class certification under Rule 23(b)(2), the Ninth Circuit found it "no longer necessary or possible for the district court to consider" issue certification under Rule 23(c)(4). *Sepulveda*, 464 F. App'x 636, 637 (9th Cir. 2011).

[50] *See also*, *In re Pharm. Indus. Average Wholesale Price Litig.*, 252 F.R.D. 83, 102

I. *Farley* Is Inapposite and Erroneous

Plaintiff will undoubtedly rely on *Farley v. Lincoln Ben. Life Co.*, 2023 U.S. Dist. LEXIS 68482 (E.D. Cal. Apr. 19, 2023), to argue for certification of a 23(b)(2) class. There, the plaintiff (represented by the same counsel) disavowed her claim for money damages at the class certification hearing, contrary to her own pleadings and motion, and the court certified a 23(b)(2) class for a declaration "invalidating the lapse" of the policies at issue. The *Farley* decision is erroneous and factually distinguishable because 98% of the putative class there supposedly wanted declaratory relief invalidating the lapses of their policies and plaintiff also sought to un-lapse her policy. The defendant was also taken by surprise at the hearing with plaintiff's withdrawal of her damages claim and was not able to fully brief the issue.

There are numerous reasons why Plaintiff cannot obtain Rule 23(b)(2) certification by relinquishing her claim for damages. *First*, it is well established that a Rule 23(b)(2) class is improper where, as here, the equitable relief being sought is effectively equivalent to a claim for money damages because it imposes substantial costs on the defendant. For example, in *Stockinger v. Toyota Motor Sales, U.S.A., Inc.*, the court rejected certification of a Rule 23(b)(2) class for injunctive relief because the injunction requested was almost indistinguishable from the plaintiff's claim for damages: "an injunction requiring Defendant to extend warranty coverage, honor all repair claims associated with HVAC odor, and provide evaporator assembly cleanings and install charcoal filters is almost indistinguishable from Plaintiffs' request for benefit-of-the-bargain damages." 2020 U.S. Dist. LEXIS 49943, at *44 (C.D. Cal. Mar. 3, 2020). Likewise, in *Jones v. Lubrizol Advanced Materials, Inc.*, the court rejected Rule 23(b)(2) certification because "the monetary relief or costs associated with any injunction or declaration of rights applying to all consumers would not be incidental to

(D. Mass. 2008) (stating that "separate trials would be necessary . . . to determine when the statute of limitations began to run under the discovery rule); *O'Connor v. Boeing N. Am., Inc.*, 197 F.R.D. 404, 409 (C.D. Cal. 2000) (referring to the statute of limitations analysis as "highly individualistic [in] nature").

such a remedy, instead mandating substantial expenditures." 583 F. Supp. 3d 1045, 1059 (N.D. Ohio 2022). Other courts have similarly found that Rule 23(b)(2) certification is improper where the equitable relief is merely a "foundational step" for seeking money from the defendant.[51] The same is true here. A declaration that all policies should be treated "in force" and un-lapsed would result in substantial expenditures for Colonial Penn and is effectively equivalent to seeking money damages. Saying this case is not about money damages, no matter any late verbal amendments to the Complaint, doesn't hold water.

Second, Rule 23(b)(2) certification is inappropriate because, as set forth above, there are a myriad of reasons why the policies of putative class members lapsed, and therefore the class is not cohesive. "Where a class is not cohesive such that a uniform remedy will not redress the injuries of all plaintiffs, class certification is typically not appropriate."[52] The putative class here is overrun by individual issues and a uniform remedy of a declaration that policies should be un-lapsed would not redress the injuries of the class. Indeed, a large percentage of putative class members—[redacted]—do not actually want their policy back. "[I]ndividual questions predominate over the common questions, and therefore the cohesiveness requirement for Rule 23(b)(2) class certification is not met here." *Lewallen v. Medtronic USA, Inc.*, No. C 01-20395 RMW, 2002 U.S. Dist. LEXIS 20153, at *10-11 (N.D. Cal. Aug. 28, 2002).[53] And a class-wide declaration that policies didn't lapse could seriously ***harm*** those policyholders who had intentionally lapsed their policies, who would now owe a lot of back premiums to their insurers. It would bankrupt Plaintiff.

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[51] *See Algarin v. Maybelline, Ltd. Liab. Co.*, 300 F.R.D. 444, 459 (S.D. Cal. 2014) ("Certification is improper where, as here, the request for injunctive and/or declaratory relief is merely a foundational step towards a damages award which requires follow-on individual inquiries to determine each class member's entitlement to damages.").

[52] *Kartman v. State Farm Mut. Auto. Ins. Co.*, 634 F.3d 883, 893 n.8 (7th Cir. 2011); *Sweet v. Pfizer*, 232 F.R.D. 360, 374 (C.D. Cal. 2005) ("a class under Rule 23(b)(2) must not be overrun with individual issues.").

[53] Moreover, Colonial Penn's defenses, including "the availability of the statute of limitations defense as to certain class members undermines both the homogeneity and cohesiveness of the proposed classes." *Daly v. Harris*, 209 F.R.D. 180, 197 (D. Haw. 2002).

Third, Plaintiff cannot seek Rule 23(b)(2) certification because she has no standing to seek declaratory or injunctive relief (an issue not addressed in *Farley*). As stated in *Nieves*, "[u]nless the named plaintiffs are themselves entitled to seek injunctive relief, they may not represent a class seeking that relief." *Nieves*, 2023 U.S. Dist. Lexis 53397, at *17 (citing *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037, 1045 (9th Cir. 1999) (*en banc*).[54] Here, Kelley cannot seek declaratory or injunctive relief [redacted] and has already secured another policy. And Colonial Penn makes Article III standing issues based on *Transunion* that were not addressed in *Farley*.

Fourth, as set forth above, Plaintiff fails to satisfy the typicality, adequacy, and commonality requirements, all of which are prerequisites to certification of a Rule 23(b)(2) class. *See* Section IV.F, *supra*. Significantly, *Farley* ignored the fact that many of the prior decisions denying a (b)(2) class were based on a lack of typicality, not just on the basis that declaratory relief was incidental to money damages claims.[55]

V. CONCLUSION

Colonial Penn respectfully requests that the Court deny class certification.

DATED: April 21, 2023

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[54] *See also Siino v. Foresters Life Ins. & Annuity Co.*, No. 20-cv-02904-JST, 2020 U.S. Dist. LEXIS 178709, at *25 (N.D. Cal. Sep. 1, 2020) (granting motion to dismiss claim for injunctive relief because plaintiff "failed to show a very significant possibility or real threat of future re-injury, given that her Policy was terminated in 2018"; "'Because the Policy has lapsed, there is no ongoing need for injunctive relief.'").

[55] And the plaintiff in *Farley* was not plagued with the numerous issues Kelley faces, including her total detachment from the case, her brazen misstatements in her Complaint concerning her payment history, her intentional lapse, her disavowing any desire to un-lapse her policy, and her apparent insurance fraud. If she is an adequate representative, the adequacy requirement is meaningless.