IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

ADVANCE TRUST & LIFE ESCROW SERVICES, LTA, as securities intermediary for Life Partners Position Holder Trust, on behalf of itself and all others similarly situated, Plaintiff, v. NORTH AMERICAN COMPANY FOR LIFE AND HEALTH INSURANCE, Defendant.	)	Case No. 4:18-cv-00368-SMR-HCA ORDER ON MOTIONS

Before the Court are several motions: (1) Plaintiff's Motion for Class Certification, [ECF No. 92]; (2) Defendant's Motion to Exclude the declaration of Plaintiff's expert, Howard Zail, [ECF No. 117]; (3) Defendant's Motion to Exclude the declaration of Plaintiff's expert, Robert Mills, [ECF No. 119]; and (4) Plaintiff's Motion to Strike Four New Witnesses, [ECF No. 128]. Defendant requested oral argument on the Motions, but the Court finds they can be resolved without it. *See* LR 7(c).

I. BACKGROUND[1]

This case involves the calculation of monthly deductions from two universal life ("UL") insurance products[2] ("Class Policies") issued by Defendant North American Company for Life

[1] The facts are taken from the Complaint and the materials submitted by the parties in support of, or in opposition to, Plaintiff's Motion for Class Certification. At the class certification stage, the Court assumes that the facts asserted in the Complaint are true. *In re Prempro*, 230 F.R.D. 555, 561 (E.D. Ark. 2005). The parties have submitted a voluminous record for the Court's review. Any relevant factual disputes between the parties will be noted in this Order.

[2] The two products at issue in this case are Classic Term UL I and Classic Term UL II. [ECF No. 93 at 7] (sealed).

and Health Insurance ("North American" or "Defendant"). [ECF No. 93 at 7] (sealed). Plaintiff Advance Trust & Life Escrow Services, LTA, ("Advance Trust" or "Plaintiff") owns a universal life insurance policy ("Representative Policy") that was issued in Florida by North American. Advance Trust is suing in its capacity as securities intermediary for Life Partners Position Holder Trust.[3]

Universal life insurance is a type of permanent life insurance. Contrasted with standard term life insurance, the Class Policies combine a death benefit with an investment, savings, or interest-bearing component ("Savings Component"). Typically, life insurance policies such as the Class Policies deposit premium payments into the Savings Component and the insurer will deduct policy-authorized monthly charges. The Class Policies are flexible-premium policies, meaning there is no fixed monthly premium the insured must pay to keep their policy active, aside from the specified monthly charges. If the funds in the policy account are insufficient to pay these monthly charges, the policy will go into grace and lapse after the grace period expires.

Among these charges, and the one at issue in this case, is the Cost of Insurance ("COI"). The COI is known in the insurance industry by the term "mortality charge." [ECF No. 29 ¶ 3]. COI charges serve to compensate the insurer for the risk that an insured will die in a particular policy year. Once calculated, the COI charge is deducted from the policy account at the beginning of each month. The formula for calculating the COI is described in the policy:

[3] The Representative Policy was purchased on August 9, 1993. Given the nature of the health information the Court will discuss later in this Order, the original policyholder will be referred to pseudonymously by his initials, D.F. D.F. later sold his interest in the policy to Life Partners, Inc. Life Partners entered into bankruptcy in 2015 and the Life Partners Position Holder Trust was established for the benefit of Life Partners's creditors as part of the bankruptcy reorganization plan. Advance Trust was formed to hold insurance policies and other assets including seven insurance policies obtained by D.F. and sold to Life Partners. The total value of the policies is in excess of $400,000. [ECF No. 116-16–116-22].

> **COST OF INSURANCE**. The cost of insurance for the Insured is determined on a monthly basis. Such cost is calculated as (1) times (2), where:
>
> (1) is the cost of insurance rate as described in the Cost of Insurance Rates section.
> (2) is the net amount at risk, as defined in the Changing Death Benefit Options provision.

[ECF No. 94-12 at 10–11] (sealed).[4] The provision addressing the considerations for calculation of the COI provides:

> COST OF INSURANCE RATES: The monthly cost of insurance rate is based on the sex, attained age, and rating class of the Insured. Policy duration is also a factor in determining the monthly cost of insurance rates . . . Monthly cost of insurance rates are determined by us, based on our expectations as to future mortality experience. Any change in cost of insurance rates applies to all individuals of the same class as the Insured. Under no circumstances are cost of insurance rates for insureds in that standard risk class greater than those shown in the Table of Guaranteed Maximum Insurance Rates.

Id.

Plaintiff's claim is that North American breached the terms of the policies by failing to reduce the COI rates over the span of three decades, despite an improvement in the mortality rate during that same time period, even though the policies provide that COI charges are "calculated using a rate based on expectations as to future mortality."[5] ("EFME") [ECF No. 29 ¶¶ 24–38].

Plaintiff brings one count for breach of contract based on two theories of breach. The first theory asserts that North American violated the policy terms by considering more than just its

[4] Plaintiff alleges that all policies are issued pursuant to a standard, form contract and the terms are not negotiated. The Representative Policy will be used for any citations to specific policy language, it is docketed at ECF No. 94-12. Plaintiff attests that there are some minor, immaterial difference in the language of the policies. [ECF No. 29 ¶ 18 n.2].

[5] "Expectations of future mortality experience" is synonymous in the insurance industry with mortality rates. *See Taylor v. Midland Nat'l Life Ins. Co.*, Case No. 4:16-cv-00140-SMR-HCA, 2019 WL 7500238, at *2 n.4 (S.D. Iowa May 3, 2019).

EFME in setting the COI rates ("Consideration Theory").[6] The second theory is that because COI rates are "based on" North American's EFME, the rates "must be adjusted downward if those expectations improve following any monthly or annual review." *Id*. ¶ 21 ("Improvement Theory"). After an extended discovery period, Plaintiff filed this Motion for Class Certification, which Defendant resists. Both parties also filed motions seeking to strike or exclude witnesses.

II. ANALYSIS

A. Preliminary Matters–Motions to Exclude and Motion to Strike

Before turning to the class certification issue, there are several motions that need to be addressed. After Plaintiff filed its Motion for Class Certification, the parties each filed motions seeking to exclude witnesses. Defendant asks for the exclusion of the expert declarations of Howard Zail and Robert Mills. Plaintiff in turn requests that the Court strike the declarations of four insurance agents offered by Defendant. [ECF No. 128].

1. Plaintiff's Motion to Strike

First, the Court will take up Plaintiff's Motion to Strike. [ECF No. 128]. Citing to the parties' obligations under Federal Rule of Civil Procedure 26, Plaintiff argues that Defendant failed to disclose discoverable information—four declarations filed in support of Defendant's Resistance to Class Certification—which prejudiced its case by preventing it from developing evidence and harming its ability to properly brief its Motion for Class Certification. Defendant responds that the declarations were a direct response to a new theory of breach, disclosed by

[6] Plaintiff abandoned the Consideration Theory in its Motion for Class Certification by expressly stating, "Plaintiff does not seek damages resulting from North American's consideration of profit margins or other factors when it originally set COI rates. Under Plaintiff's damages model, North American retains whatever profits (or losses) it expected at pricing. But if North American's expected mortality improves, as it indisputably has, then the COI rates must at a minimum go down commensurately." [ECF No. 93 at 9 n.6] (sealed).

Plaintiff for the first time at the class certification stage, so the late disclosure was substantially justified or, at a minimum, harmless and unprejudicial to Plaintiff's case. Additionally, Defendant argues that Plaintiff did not attempt to cure its prejudice, instead waiting around to file a motion to strike requesting the "drastic sanction" of excluding the witnesses altogether.

Rule 26 obligates all parties "without awaiting a discovery request, provide to the other parties . . . the name and, if known address and telephone number of each individual likely to have discoverable information . . . that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment." Fed. R. Civ. P. 26(a)(1)(A)(i). After a disclosure has been made pursuant to Rule 26(a), a party "must supplement its disclosure or response" if it learns that the disclosure is incomplete or incorrect and the other party has not been informed of the deficiency. Fed. R. Civ. P. 26(e). If a party does not comply with its Rule 26(a) disclosure obligations, "the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless." Fed. R. Civ. P. 37(e).

The witnesses at issue are four insurance agents who attest they have sold North American Classic Term UL policies to policyholders. [ECF Nos. 116-32–116-34; 116-55] (sealed). In its Motion, Plaintiff claims that it expressly questioned North American's corporate representative, Jeremy Bill, about whether he had knowledge relating to communications from North American or its agents to policyholders regarding the terms of these policies. Plaintiff asserts that it specifically asked about agent communications because counsel for North American had previously used agent declarations to oppose class certification in a prior case before this Court. [ECF No. 129 at 6] (citing *Taylor*, 2019 WL 7500238, at *2, *11). Bill denied any knowledge about such communications. During initial disclosures, Defendant did not list any of the four

insurance agents as witnesses. [ECF No. 130] (Spear Decl.) (sealed). After two years and several deadline extensions, discovery on class certification closed on March 4, 2021. Chief United States Magistrate Judge Helen C. Adams granted a final extension on May 24, 2021 to extend the deadline to file a class certification motion but explicitly told the parties that she would "**not grant either party any further extensions and each party and its counsel should govern themselves accordingly to meet these deadlines**." [ECF No. 96 at 2] (emphasis in original).

Plaintiff says that it averred in its Motion for Class Certification that Defendant had not produced any individualized evidence about contract interpretation, which it based on Defendant not disclosing the identity of any witnesses, as well as Bill's testimony that he had no information about agent communications with policyholders. Defendant then filed the declarations in support of its Resistance to Class Certification, revealing the witnesses for the first time. Plaintiff now moves to exclude.

In response to Plaintiff's Motion to Strike and its accusation of "litigation by ambush," Defendant points the finger back at Plaintiff accusing it of conducting an ambush itself by disclosing a new "Margin Maintenance" theory of breach for the first time in its class certification motion. Defendant argues it was not on notice about this new theory until it was unveiled by Plaintiff in its Motion and the declarations were necessary to rebut it. According to Defendant, the eleventh hour reveal of the "Margin Maintenance" theory means that the declarations were timely and thus not a violation of Rule 26. Alternatively, Defendant maintains that there are no grounds for sanction because Plaintiff has not attempted to cure any prejudice it alleges to be suffering.

Rule 26 requires a party to disclose a witness proactively without waiting for a discovery request. After initial disclosures, parties are obligated to supplement their disclosures when

additional information becomes available. Defendant did no such subsequent disclosure prior to filing its Resistance to Class Certification. One of its affirmative defenses was "class action improper." [ECF No. 122 at 19] (Defs.' Am. Answer). Indeed, the declarations were submitted to support its defense that a class action was improper.

The declarations describe how sales agents held individualized conversations with potential policyholders, speaking with the client about their financial needs, goals, and personal circumstances. [ECF Nos. 116-32–116-34; 116-55]. Defendant relies on the declarations, in part, to illustrate that common questions do not predominate over individual questions and individualized evidence is required to assess liability. *See, e.g.,* [ECF No. 114 at 40] (sealed). Defendant was likely aware that a potential defense based on the "predominance" requirement of Rule 23(b) may have been at issue from the outset of the case. Its explanation that it did not know that it should focus on "the Class Term UL products," the product on which Plaintiff seeks class certification, is unpersuasive. [ECF No. 136 at 11] (sealed). The reason that explanation does not hold is, as Plaintiff points out, the policy owned by Advance Trust is a Classic Term policy. [ECF No. 142 at 2] (sealed). Furthermore, Defendant acknowledges that agent witnesses may have been necessary because it "tried to find agent witnesses for more than eight months prior to Plaintiff's class certification motion." [ECF No. 136 at 12] (sealed). The original complaint was filed in this case on October 30, 2018. An amended complaint was filed on February 25, 2019. Judge Adams adopted the proposed scheduling order and discovery plan on March 6, 2019. Discovery for the class certification motion drug on for years until Judge Adams set a deadline for March 4, 2021, while informing the parties that she did not "anticipate granting further extensions." [ECF No. 74]. Defendant's disclosure of the declarations was plainly untimely.

Defendant's justification that it was unaware of the Plaintiff's "Margin Maintenance" theory is meritless. The declarations do not address any actuarial calculation used by Plaintiff's experts but simply describe their sales process. It is unclear how the relevance of these declarations turns on Plaintiff's theory about how the COI should be properly calculated under the policies. Defendant's use of the declarations in its Resistance is limited to discussion of the "highly individualized" nature of the sales process. It should have been aware of this possibility of individual sales pitches long before class certification briefing began. Finally, the claim that Defendant needed to procure new witnesses after it learned of Plaintiff's "Margin Maintenance" theory in the Motion for Class Certification is belied by its earlier statement that it spent eight months trying to locate agent witnesses.

Defendant next argues that the disclosure was substantially justified or harmless. A nondisclosure is analyzed under the *Rodrick* factors to determine if it was substantially justified or harmless. The factors considered are: "(1) the prejudice or surprise to the party against whom the testimony is offered; (2) the ability of the party to cure the prejudice; (3) the extent to which introducing such testimony would disrupt the trial; and (4) the moving party's bad faith or willfulness." *Rodrick v. Wal-Mart Stores E., L.P.*, 666 F.3d 1093, 1096–97 (8th Cir. 2012) (citation omitted). Defendant first claims that Plaintiff suffered no prejudice because it waited three months to file its Motion to Strike, rather than attempting to depose the witnesses. This argument is easily rejected because discovery was closed and the parties had been clearly apprised by Judge Adams that no more extensions would be forthcoming. Deposing the agents would require written discovery about the witnesses and Plaintiff may have been entitled to written discovery and depositions about the other agents, two dozen in Defendant's counsel's recounting, who did not have information to support Defendant's case. The decision to disclose these

witnesses after the close of discovery and after Plaintiff filed its class certification motion was clearly prejudicial.

Defendant has not offered the Court a less severe sanction than the "drastic" sanction of exclusion of the evidence. Exclusion is the "default, self-executing sanction" for a Rule 26(a) violation and the Court does not need to conjure up its own sanction without a motion by Defendant, even if it were so inclined. *Vanderberg v. Petco Animal Supplies Stores, Inc.*, 906 F.3d 698, 705 (8th Cir. 2018) (citing Fed. R. Civ. P. 37(c)(1)(C) ("In addition to or instead of [exclusion], the court, on motion . . . may impose other appropriate sanctions."). None of the four declarations may be used as evidence in this case. Plaintiff's Motion to Strike is GRANTED. [ECF No. 128].

2. Defendant's motions to exclude expert declarations

Defendant moves to exclude both of Plaintiff's experts, Howard Zail and Robert Mills. Zail is an actuary and authored an expert report ("Zail Report") on behalf of Plaintiff, opining on whether a class-wide method of proof is available to determine a breach and ascertain damages. [ECF No. 94-1] (sealed). Mills is an economist and his report ("Mills Report") calculates damages on a class-wide and policy-by-policy basis for the proposed Class Policies based on data from the Zail Report. [ECF No. 94-2] (sealed). Defendant argues that the methodologies of both experts are so flawed that they cannot be relied upon by the Court when considering Plaintiff's Motion for Class Certification.

The United States Court of Appeals for the Eighth Circuit has held that a district court must apply evidentiary scrutiny to a plaintiff's proposed method for calculating class-wide damages when considering whether to certify a class. *In re Zurn Pex Plumbing Prods. Liab. Litig.*, 644 F.3d 604, 610 (8th Cir. 2011) ("*Zurn Pex*"). The *Zurn Pex* standard does not require a full-

scale *Daubert* analysis at the class certification stage but a "focused *Daubert* inquiry." *Id.*; *see also Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). The *Daubert* standard requires a court assess expert evidence prior to its admission to ensure any "scientific, technical, and other specialized knowledge will assist the trier of fact." *Daubert*, 509 U.S. at 588 (quoting Fed. R. Evid. 702)). The *Zurn Pex* Court's rejection of "an exhaustive and conclusive *Daubert* inquiry" was partially based on the "inherently preliminary nature of . . . class certification rulings," but the court also recognized "[t]he main purpose of *Daubert* exclusion is to protect juries from being swayed by dubious scientific testimony. That interest is not implicated at the class certification stage where the judge is the decision maker." *Id*. at 613. Defendant asks the Court to subject both experts' reports to "a full-throated *Daubert* analysis" rather than simply a focused one as required by the case law of this Circuit. [ECF No. 120 at 4 n.3] (sealed). The Court declines the request and will follow Eighth Circuit precedent.

The Court has reviewed the challenged reports. Defendant does not argue that Zail or Mills are unqualified to render their opinions. Both experts provide extensive evidence and data on which they relied in forming their opinions. The experts' methodologies and conclusions are based on evidence in the record. Any deficiencies in their opinions are not so significant to warrant their exclusion for the purpose determining the propriety of class adjudication. For the reasons discussed below, both of Defendant's Motions are DENIED. [ECF Nos. 117; 119].

a. Howard Zail

Howard Zail has filed two declarations outlining his report and responding to arguments from Defendant. [ECF Nos. 94-1; 134-1] (sealed). In his initial declaration, he opines that his Margin Maintenance approach is capable of establishing a breach of contract using common evidence. Zail writes that he was able to calculate the mortality rate for pricing purposes by

"[u]sing the pricing mortality submitted to the state regulator . . . a simple, mechanical process." [ECF No. 94-1 ¶ 98]. He goes on to describe his methodology as identifying the base mortality rate, applying the appropriate scalars, and adding in any necessary adjustments. *See id.* From there, Zail says the current mortality rate can be derived from "selecting the expected mortality rates from the appropriate Cash Flow Testing."[7] *Id*. ¶ 99. In his example, he uses the 2015 Cash Flow Testing Supplemental Workbook which specifies the need to multiply a base table by a set of scalars and adjustments. *Id*. ¶ 100. Zail notes that adjustments may need to be made for "substandard loading," but none were necessary for the Representative Policy, which is the policy he used as a demonstrative example. *Id*. He concludes his example by attesting "[t]his exact same process can be applied in a mechanical fashion to any Classic Term policy in the Class, for any year, using data produced by North American."[8] *Id*. ¶ 102.

Zail writes that based on documents produced from discovery he can identify the potential policies in the class:

> [T]he question as to how EFME is defined and to be used for purposes of COI rate redetermination is a common question for all Class Policies and has a common answer for all Class Policies. Whether the standard actuarial definition that mortality and EFME means expected mortality rates should be applied in redetermining COI rates, or whether North American's current expansive position is required, will have a common result across all policies.

Id. ¶ 70. Zail acknowledged there "may be some dispute" about how to interpret the historical documents, but any such dispute will not implicate individualized questions. This is because "the

[7] He describes cash flow testing as requirement of state insurance regulators that "involves performing a set of actuarial projections of future assets and liabilities to ensure the adequacy of the insurer's reserves." [ECF No. 94-1 ¶ 53].

[8] Zail says he ascertained the original pricing assumptions from a 1989 New Jersey regulatory filing. [ECF No. 94-1 ¶ 86].

pricing mortality rates for any given class member do not depend on anything other than objective characteristics (gender, issue age, duration, underwriting class, smoking status, and band) of that class member's policy, which are maintained in the policyholder data" held by North American. *Id*. ¶ 75.[9]

Defendant first argues that Zail's method does not fit with Plaintiff's Consideration Theory which it pled in the Complaint. According to Defendant, Plaintiff's pleading of the Consideration Theory requires that the breach of the life insurance contracts arise from a failure to determine COI rates exclusively according to future mortality rates. This would require North American to "'strip out' any mortality margins" and set COI rates equal to the assumed future mortality rates. [ECF No. 118 at 10–11] (sealed).[10] Defendant claims that the failure of the Zail Report to address the Consideration Theory requires its exclusion because it is irrelevant in assisting the trier of fact in ascertaining damages which will result in "individual damage calculations . . . overwhelm[ing] questions common to the class." *Comcast Corp. v. Behrend*, 569 U.S. 27, 34 (2003).

Defendant is incorrect and the Zail Report need not be excluded because it does not address the Consideration Theory. What Defendant advances is a "theory of the case" argument, also known as the theory-of-the-pleadings doctrine, but the doctrine was abolished by the federal rules long ago. *Johnson v. City of Shelby*, 574 U.S. 10, 12 (2014) ("The federal rules effectively abolish the restrictive theory of the pleadings doctrine, making it clear that it is unnecessary to set out a

[9] North American says that its "knowledge of its mortality assumptions before roughly the year 2000 is derived exclusively from the documents it has collected and produced in this case." [ECF No. 94-1 ¶ 74].

[10] Oddly, Defendant cites to another case multiple times noting that counsel for Plaintiff here was counsel for the plaintiff in the other case. Defendant provides no argument how different clients with the same counsel are precluded from advancing different theories of liability in apparently similar cases. Therefore, the Court will not consider the argument.

legal theory for the plaintiff's claim for relief."); *Webb v. Hiykel*, 713 F.2d 405, 407 (8th Cir. 1983) ("It is well settled that the 'theory of the pleadings' doctrine . . . has been effectively abolished under the Federal Rules of Civil Procedure"); *Nord v. McIlroy*, 296 F.2d 12, 14 (9th Cir. 1961). *Comcast* does not help Defendant either because that case did not pertain to *Daubert*. The issue in *Comcast* was whether the district court that certified the class was required to "entertain arguments against [the proposed] damages model that bore on the propriety of class certification, simply because those arguments would also be pertinent to the merits determination." *Id*. at 34. The *Comcast* Court held a district court must consider a proposed damages model, if challenged, because damages implicate Rule 23(b)(3)'s predominance requirement. *Id*. The damages model at issue in *Comcast* was devised based on an aggregation of four distinct theories of liability pled by the plaintiff in its complaint. However, the district court only certified a class based on one of the theories. *Id*. at 32. Because the district court did not require the plaintiffs to "tie each theory of [liability]" to a calculation of damages, the Supreme Court held that the class was improperly certified because "any model supporting a 'plaintiff's damages case must be consistent with its liability case." *Id*. at 35 (citation omitted). That is not the issue here. Defendant's argument is an attempt to resurrect the long-buried theory-of-the-pleadings doctrine, which the Court will not apply here.

Defendant's second basis for excluding the Zail Report is its reliance on historical account values. Defendant says such data would require North American to have a time machine to prospectively adjust COI rates to reflect information that can only be known retrospectively. Averring it does not have access to a time machine or a crystal ball, North American argues the account values cannot be relied upon to determine if they breach the policies. [ECF No. 118 at 11] (sealed). Plaintiff responds that it is not required to ascertain damages to the jot and tittle but only

provide a "rational estimate of damages." *Vogt v. State Farm Life Ins. Co.*, 963 F.3d 753, 769 (8th Cir. 2020) (quoting *Randy Kinder Excavating, Inc. v. J.A. Manning Constr. Co., Inc.*, 899 F.3d 511, 520 (8th Cir. 2018)).

Plaintiff points to the Mills Report to illustrate the immateriality of Defendant's argument to reject the use of historical data. Mills also calculated class-wide damages using similar Net Amount at Risk[11] data, but used data from the beginning of the year rather than the backwards looking data that Defendant asserts is improper. Damages from the Mills Report differ by only four percent from the Zail Report. [ECF No. 134-3 ¶ 25] (sealed). Plaintiff argues this minor deviation from either method of calculation is not grounds for exclusion under *Daubert*. The Court agrees.

Defendant next argues that the pricing assumptions used by Zail are based on inaccurate facts and data. At the center of this dispute is a pricing binder containing a document and floppy disks with spreadsheets from a defunct software program named Lotus123. *Id*. These spreadsheets were apparently sent to Jeremy Bill, a North American actuary, via email in 2004 from previous North American actuaries and they match the Lotus123 spreadsheets contained in the Classic Term UL pricing binder and match the profit projections in hard copy in the pricing binder. *Id*. at 14. Defendant asserts "[t]here is no question that the Lotus123 spreadsheets were the original pricing assumptions for the Classic Term UL products." *Id*. According to Defendant, Zail "does not want to use the Lotus123 spreadsheets as the original pricing assumptions . . . [because] it shows massive *undercharges* to the class." *Id*. (emphasis in original). Thus, Zail "unilaterally" chose to use the

[11] Zail defines "Net Amount at Risk" as "the amount risked by the insurance company in the event the insured were to die and the company would have to pay out the Death Benefit." [ECF No. 94-1 ¶ 23] (sealed).

1989 New Jersey regulatory filing as the original pricing assumptions. *Id*. Defendant seeks the exclusion of the Zail Report on the basis that the underlying data is contested.

Disputes about the factual foundation of an expert's opinion bears on the credibility, not the admissibility, of the testimony. *Meridian Mfg., Inc. v. C & B Mfg., Inc.*, 340 F. Supp. 3d 808, 850 (N.D. Iowa 2018) (citing *United States v. Finch*, 630 F.3d 1057, 1062 (8th Cir. 2011)). If an expert's underlying assumptions are inaccurate or doubted by the factfinder, "then the factfinder will discount his ultimate conclusions or rely on his alternate calculations which account for different [assumptions]." *Zurn Pex*, 644 F.3d at 615; *see also Structural Polymer Grp., Ltd. v. Zoltek Corp.*, 543 F.3d 987, 997 (8th Cir. 2008) ("As a rule, questions regarding the factual underpinnings of the expert's opinion affect the weight and credibility of her testimony, not its admissibility."). If Defendant believes that Zail's underlying factual assumptions are unreliable, the issue should be raised and resolved by a fact-finder guided by a vigorous cross-examination, not by exclusion of his report.[12]

Finally, Defendant alleges the Report uses averaging to mask uninjured class members and "nonsensical" COI rates, thus necessitating its exclusion. [ECF No. 118 at 15] (sealed). In a reply declaration, Zail rejects the accusations of Defendant's experts that his Margin Maintenance model redistributes overcharges. He writes that adjustments from the Pricing COI to Current COI is uniform across the class. Zail responds that Defendant's attempt to discredit his approach stems from their experts applying only half of his model (Phase I) and one expert in particular, Jack Gibson, calculates undercharges which are "nonsensical and irrelevant" because they are only

[12] Defendant makes a brief argument at the conclusion of its Motion to exclude the Zail Report because the scalars are "highly volatile." [ECF No. 118 at 18] (sealed). This is also not a basis to exclude his Report but Defendant may certainly cross-examine Zail at trial regarding his methodology.

interim COI rates. [ECF No. 134-1 ¶ 16]. The over- and undercharges identified by Defendant's experts are only a portion of the picture because they do not examine the averaged rates. Zail explains that certain models produce outlier results occasionally but are averaged to produce a proper calculation. Averaging is the calculation of pooling risks which is the very purpose of insurance. *Id*. ¶ 21. "The only averaging that occurs in this methodology is averaging to determine the relative change in the cost of insurance rate. Such averaging is consistent with standard actuarial practice." *Id*. ¶ 25.

Defendant responds to this second declaration by pointing to its experts' findings that averaging "has the effect of hiding facially excessive overcharge claims." [ECF No. 138 at 3] (sealed). The dispute between the two parties on this issue essentially asks the Court to make a summary determination between a battle of experts. That is not the role of the Court when deciding class certification. *Blades v. Monsanto Co.*, 400 F.3d 562, 567 (8th Cir. 2005) (holding disputes between experts should be addressed at class certification only to the extent "necessary to determine the nature of the evidence that would be sufficient, if the plaintiff's general allegations were true, to make out a prima facie case for the class."). Defendant's Motion to Strike the Zail Report is DENIED. [ECF No. 117].

b. Robert Mills

Defendant filed a second Motion to Strike seeking exclusion of Plaintiff's other expert, Robert Mills. In support of its Motion to Strike the Mills Report, Defendant asserts that the Report is inadmissible because Mills does not provide any independent analysis; it is inconsistent with prior expert opinion he has offered in previous cases; and the Report yields unreasonable results. Plaintiff resists the Motion, claiming that Defendant's arguments are baseless and do not pertain to the issue of class certification.

Defendant's first justification to strike the Mills Report is its assertion that the Report does not offer any independent analysis or opinion but "parrots" the opinions of Zail. North American points to another case where a district court excluded Mills's testimony for failing to offer an independent opinion. *See Realtime Data, LLC v. Actian Corp.*, Civ. Action No. 6:15-CV-463-RWS-JDL, 2017 WL 11661896 (E.D. Tex. Mar. 24, 2017). Defendant contends the same reasoning applies here too—the unreliability of another expert (Zail) on which Mills relied requires the exclusion of his Report. [ECF No. 139 at 2] (sealed).

That case is distinguishable. First, the *Realtime* Court's analysis concerned the admissibility of expert testimony at trial, not on a class certification motion. *See id.* Second, the reason for striking Mills's opinion was because his calculations relied on another expert whom the court deemed unreliable. *Realtime Data*, 2017 WL 11661896 at *5 ("Dr. Keller[] . . . is not qualified to provide an ultimate opinion with respect to damages . . . this means Mr. Mills cannot simply rely on the technical value Dr. Keller ascribes to the infringing features of the accused products in determining a proper apportionment value."). Further, the Court has already determined that the Zail Report is admissible for purposes of this Motion, so that reasoning cannot prevail as predicate to exclude the Mills Report.

The second argument for striking the Mills Report can also be disposed of quickly. Defendant claims that the Mills Report is inconsistent with models that Mills has applied in other COI cases. According to Defendant, this makes his Report in this case unreliable and unhelpful. Plaintiff rejects Defendant's premise that there is any daylight between Mills's methodology here and in other cases. It also responds that Defendant's experts have similar shortcomings of consistency. Either way, these are issues which are ripe for impeachment of the respective experts

(if either party's premises are true) but it is not grounds to exclude an expert opinion under *Daubert*.

Defendant's last swing at striking the Mills Report is a rehash of its argument for exclusion of the Zail Report—that it yields unreasonable results. This is a merits question, and not a basis "for striking an expert at the Rule 23 stage." *Spegele v. USAA Life Ins. Co.*, 336 F.R.D 537, 545–46 (W.D. Tex. 2020). The Eighth Circuit requires district courts to inquire into whether an expert's opinions must be excluded because they are "fundamentally unsupported," not because the adversarial party believes the results are contestable. *Zurn Pex*, 644 F.3d at 615 (citation omitted). Defendant's Motion to Strike is DENIED. [ECF No. 119].

B. Class Certification

1. General principles

Plaintiff moves to certify a plaintiff class defined as: "All current and former owners of Classic Term UL I or II issued or insured by North American Company for Life & Health Insurance, or its predecessors, during the Class Period." (the "Proposed Class") [ECF No. 92 at 1]. The Proposed Class excludes North American itself, its officers and directors, family members or heirs of the officers or directors, among others.

A motion for class certification pursuant to Rule 23 requires a two-part analysis. First, the proposed class must satisfy all of the elements of Rule 23(a) which consists of requirements for "numerosity, commonality, typicality, and fair and adequate representation." *Luiken v. Domino's Pizza, LLC*, 705 F.3d 370, 372 (8th Cir. 2013). Second, the proposed class must meet at least one of the three requirements of Rule 23(b). *Comcast*, 569 U.S. at 33.

A plaintiff seeking class certification "must affirmatively demonstrate [their] compliance" with Rule 23 and "be prepared to prove that" its requirements are "*in fact*" met. *Wal-Mart Stores,*

Inc. v. Dukes, 564 U.S. 338, 350 (2011). District courts have broad discretion when determining whether a class should be certified. *Rattray v. Woodbury Cnty.*, 614 F.3d 831, 835 (8th Cir. 2010). But a class may only be certified "after a rigorous analysis," where the district court finds, "that the prerequisites of [Rule 23] have been satisfied." *Dukes*, 564 U.S. at 350–51 (citation omitted). Courts are not permitted "to conduct a preliminary inquiry into the merits of a suit at class certification unless it is necessary to determine the propriety of certification." *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 466 (2013).

2. Rule 23(a)

a. Standard

The four prerequisites for class certification under Rule 23(a) are:

> (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). Defendant does not dispute the numerosity element is met. Even though Rule 23 differentiates between the commonality, typicality, and adequate representation elements in subsection (a), the Supreme Court has recognized that in certain cases there is little distinction between the points of inquiry. In *General Telephone Company of the Southwest v. Falcon*, the Court observed:

> The commonality and typicality requirements of Rule 23(a) tend to merge. Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence. Those requirements therefore also tend to merge with the adequacy-of-representation requirement, although the latter requirement also raises concerns about the competency of class counsel and conflicts of interest.

457 U.S. 157 n.13. Adequacy of representation extends to both the named plaintiff and class counsel. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 626 n.20 (1997). Rule 23(a)'s essential inquiry is whether the named plaintiff is an appropriate class representative.

Defendant argues that Plaintiff is not a suitable representative because its claim is subject to certain individualized defenses not implicated in the claims of other class members such as: its theory of breach is foreclosed under Florida law; the Representative Policy was fraudulently procured; and Plaintiff failed to assert its legal rights in a timely fashion. Plaintiff resists this argument, claiming that Defendant is trying to jump directly to the merits stage. Plaintiff suggests that any individualized issues are minor and can be easily managed going forward in the litigation.

b. Rule 23(a) analysis

Defendant maintains Plaintiff cannot satisfy the elements of Rule 23(a) because it insists that its theory of breach is foreclosed under Florida law. Recently, the United States Court of Appeals for the Eleventh Circuit considered whether an insurance contract that provided a COI rate calculation was "based on" a series of factors must be calculated solely pursuant to those factors. *Slam Dunk I, LLC v. Conn. Gen. Life Ins. Co.*, 853 Fed. App'x 451, 454 (11th Cir. Apr. 22, 2021). The plaintiff's theory of breach in *Slam Dunk* was the defendant had a "duty to adjust the COI rate . . . exclusively on expectations of future mortality experience . . . [it] could not consider any other factors." *Id.* The Eleventh Circuit held this was a flawed interpretation of the contract because the plaintiff isolated a single sentence and "incorrectly read[] exclusivity into the phrase 'based on.'" *Id*. The Court rejected such a reading, which would require rates to be "determined by [the insurer] based ***only*** on its [EFME]; or based on its [EFME] ***and nothing else***." *Id.* (internal quotations omitted) (emphasis in original).

Defendant insists that the policy language at issue in *Slam Dunk* is indistinguishable from the language in the Representative Policy. Plaintiff responds that Defendant's argument is an improper attempt to adjudicate the merits at the class certification stage. *Vogt*, 963 F.3d at 766 ("[A] failure on the merits does not affect a class member's individual standing.") (citing 1 Steven S. Gensler & Lumen N. Mulligan, Federal Rule of Civil Procedure, Rules and Commentary, Rule 23 (2020)). Furthermore, it argues that *Slam Dunk* would simply preclude most of the claims for the class but the case's holding is not a reason to deny certification entirely. Plaintiff also points out that *Slam Dunk* does not implicate its Improvement Theory but only addresses its now-abandoned Consideration Theory.

Next, Defendant argues that its affirmative defenses vis-à-vis Plaintiff renders its claim atypical and makes it an inadequate representative. The first defense is *in pari delicto*. Defendant alleges that the Representative Policy, which was purchased by D.F. in 1993, was fraudulently procured because D.F. had been diagnosed as HIV positive four years earlier but did not disclose the diagnosis to the company. D.F. had undergone extensive medical treatment in the year prior to submitting the application, but answered in the negative to a series of questions about his recent medical history and treatment, including a direct question whether he had ever been diagnosed with AIDS or AIDS related complex. [ECF No. 116-6] (sealed). He also stated that he only owned one other life insurance policy but Defendant claims he had at least four others in force. Defendant alleges that Plaintiff was at minimum on notice of D.F.'s fraud, if it did not outright participate, because the two parties had extensive dealings and, in 1996, he indicated on a Life Partners's application that he had been HIV-positive since 1988 with AIDS related complex since 1991. [ECF No. 116-7].

Defendant also argues that it has a laches defense because D.F. and his successors did not assert their claims for years despite knowledge that North American had not changed its COI rates. *See Med. Lien Mgmt. v. Frey*, No. 8:13-cv-486-T-33TGW, 2013 WL 4028191, at *6 (N.D. Fla. Aug. 7, 2013) ("The assignee steps into the shoes of the assignor and is subject to all equities and defenses that could have been asserted against the assignor had the assignment not been made."). According to Defendant, this failure by D.F. or Life Partners to assert their rights prejudiced North American's defense.

In response to Defendant's contentions, Plaintiff argues that typicality is not defeated by the availability of certain defenses unless the defenses will be a "major focus" of the litigation. The Supreme Court has expressly blessed the certifying of a class even if some affirmative defenses may be present because there are mechanisms available to address individualized affirmative defenses including subsequent proceedings after trial. *See Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453–54 (2016) (predominance requirement is satisfied "even though other important matters will have to be tried separately such as . . . some affirmative defenses peculiar to some individual class members.").

The defenses identified by Defendant are not likely to be central to the case and are insufficient to defeat class certification. North American's affirmative defenses could be decided pre-trial as a matter of law, such as the requirements of the *in pari delicto* defense or Plaintiff's knowledge relative to a laches defense. *See Earth Trades, Inc. v. T&G Corp.*, 108 So. 3d 580, 583 (Fla. 2013) (holding *in pari delicto* defense requires the parties to participate in the same wrongdoing); *Memorex Corp. v. Int'l Bus. Machines Corp.*, 555 F.2d 1379, 1382 (9th Cir. 1977) (distinguishing "unclean hands" from *in pari delicto* whereas the former "refers to the plaintiff's wrongdoing against a third party with respect to the subject matter of the suit" and the latter "refers

to the plaintiff's participation in the same wrongdoing as the defendant."); *Van Meter v. Kelsey*, 91 So. 2d 327, 331 (Fla. 1956) (holding a laches defense requires evidence a plaintiff had "knowledge or notice of the defendant's conduct").

Besides, it appears the affirmative defenses identified by North American are peripheral to the case, unlike the cases it cites. *In re Milk Prods. Antitrust Litig.*, 195 F.3d 430 (8th Cir. 1999) (sole remaining class representative had sold their business and ownership over the antitrust claim was unresolved); *TBK Partners v. Chomeau*, 104 F.R.D. 127, 132 (E.D. Mo. 1985) (putative class representative had direct conflict of interest with other class members); *J.H. Cohn & Co. v. Am. Appraisal Assocs.*, 628 F.2d 994, 998–99 (7th Cir. 1980) (rejecting a petition for a writ of mandamus directing a district court to certify a class). In particular, the *in pari delicto* defense does not generally consume the merits of a case. Whether the parties engaged in "same wrongdoing" can only be determined after the underlying wrongdoing is established. *See Honorable v. Easy Life Real Estate Sys., Inc.*, 182 F.R.D. 553, 560 (N.D. Ill. 1998).

Defendant's final argument is that Advance Trust has no economic interest in the litigation and has nothing to gain from the outcome because it has not paid any COI charges. This argument is without merit. Advance Trust submitted signed endorsements identifying it as the policy owner and beneficiary of the policy. [ECF Nos. 134-14–134-16]. Defendant does not cite to any case holding that a security intermediary cannot serve as a class representative and this argument was rejected by a federal court previously. *Advance Tr. & Life Escrow Servs. v. Sec. Life of Denver Ins. Co.*, Case No. 1:18-cv-01897-DDD-NYW, 2020 WL 8186476, at *3 (D. Colo. Apr. 13, 2020) (*Sec. Life*). North American's assertion that Advance Trust has no stake in the litigation is "difficult to square" with documents from North American itself identifying it as the owner of the policy. Plaintiff satisfies all the requirements of Rule 23(a).

3. Certification under Rule 23(b)(3)

In addition to satisfying the threshold requirements of Rule 23(a), a proposed class must also comply with at least "one of the three subsections of Rule 23(b)." *Webb v. Exxon Mobil Corp.*, 856 F.3d 1150, 1155 (8th Cir. 2017) (quoting *Ebert v. Gen. Mills, Inc.*, 823 F.3d 472, 477 (8th Cir. 2016)). Plaintiff seeks class certification under Rule 23(b)(3). Subsection (b)(3) requires that Plaintiff establish that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). This requirement is similar but "more demanding" than the related commonality requirement of Rule 23(a). *Amchem Prods.*, 521 U.S. at 624. "The predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation" and "calls upon courts to give careful scrutiny to the relation between common and individual questions in a case." *Tyson Foods*, 577 U.S. at 453. "When one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately." *Id*. (quoting 7AA C. Wright, A. Miller, & M. Kane, Fed. Prac. & Proc., § 1778, pp. 123–24 (3d ed. 2005)). A determination whether common questions predominate requires the Court to conduct a preliminary inquiry by looking behind the pleadings. *See Blades*, 400 F.3d at 566. The preliminary inquiry should not extend any further than determining "whether, given the factual setting of the case . . . common evidence could suffice to make out a prima facie case for the class." *Id*. Admittedly, this may require resolution of fact disputes that are "enmeshed" with "plaintiff's cause of action." *IBEW Local 98 Pension Fund v. Best Buy Co., Inc*, 818 F.3d 775, 783 (8th Cir. 2016) (quoting *Dukes*, 564 U.S. at 351)).

Defendant objects to certification pursuant to Rule 23(b)(3) emphasizing that the Court would need to interpret the policies at issue under laws of 49 different states. Defendant asserts the multitude of state laws—particularly relating to the statutes of limitation and admissibility of extrinsic evidence—will "swamp any common issues and defeat predominance." [ECF No. 114 at 25] (sealed) (quoting *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 741 (5th Cir. 1996)).

The Court was confronted with the same issue in *Taylor*, which also related to a dispute over "Cost of Insurance" charges for universal life insurance policies. In that case, the Court found that the plaintiff did not provide an "extensive analysis of state law variations" to carry his burden of demonstrating compliance with Rule 23(b)(3). *Taylor*, 2019 WL 7500238, at *7. This was required as part of the plaintiff's burden because "[i]n a diversity class action . . . inherent in the predominance inquiry is a determination of which states' substantive laws will apply to the claims." *Id.* (quoting *Cole v. Gen. Motors Corp.*, 484 F.3d 717, 724 (5th Cir. 2007)). The involvement of multiple states' laws, and any variation between those laws, will necessarily "impact whether common issues of law and fact predominate among class members." *Id.* The plaintiff in *Taylor* did not analyze the variations between state laws and asserted that Iowa law "appl[ied] to all class members' claims because there are no material differences amongst the laws of the class members' states." *Id.* (citation and internal quotations omitted). The Court rejected this argument noting that federal courts apply the choice of law rules of the forum state, citing long-settled Supreme Court precedent. *See Klaxon Co. v. Stentor Elect. Mfg. Co.*, 313 U.S. 487, 496 (1941).

The Court then turned to the choice of law rules for Iowa, noting that the Iowa Supreme Court regularly relies on the Restatement (Second) of Conflict of Laws ("Restatement"). *Id.* (quoting *Washburn v. Soper*, 319 F.3d 338, 342 (8th Cir. 2003)). After a detailed analysis of

section 192 of the Restatement, the Court held that the law of the state where the policyholder was domiciled, the "Issue State," applied in the context of the insurance contracts because no other state had a more significant relationship to the transaction or the parties pursuant to the principles described in section six of the Restatement. *Id*. Both parties agree the same analysis applies to the policies at issue here. [ECF Nos. 93; 114].

Plaintiff attempts to avoid this shortcoming by attaching to its Motion a fifty-state survey describing how different jurisdictions ascertain whether a contract term is ambiguous, and how to deduce its meaning if it is ambiguous. [ECF Nos. 92-5–92-8]. They have included a similar fifty-state survey addressing statutes of limitation issues. [ECF No. 92-10]. For contractual ambiguities, the survey divides states into two "stages" and groups within those "stages." At "stage 1," there are three groups of states. The first group only considers the language found within the four-corners of the contract for any potential ambiguity. The second group will consider objective extrinsic evidence from the time the contract was made, along with the text of the contract. And the third group will apply objective extrinsic evidence from both pre- and post-contract formation along with the text of the contract.

If an ambiguity is found in the contract, "stage 2" addresses how to decipher the meaning of the ambiguous term. These states are also divided into three groups. One group automatically applies the rule of *contra proferentem*. The next group of states applies *contra proferentem* but considers extrinsic evidence when ferreting out a definition. And the final group of states will only apply *contra proferentem* as a last resort and allows the use of extrinsic evidence. Plaintiff emphasizes that other courts have accepted these surveys, describing them as manageable and not tending to undermine the predominance of common issues. *See Sec. Life*, 2021 WL 62339, at *8 (finding "extrinsic evidence will be common to the class as the policies at issue are form

contracts."); *Feller v. Transamerica Life Ins. Co.*, Case No. 2:16-cv-01378-CAS-AJW, 2017 WL 6496803, at *6 (C.D. Cal. Dec. 11, 2017) ("[M]inor variations in state law with respect to breach may be handled at trial by grouping similar state laws together."); *Hanks v. Lincoln Life & Annuity Co. of N.Y.*, 330 F.R.D. 374, 384 (S.D. N.Y. 2019) (holding that use of extrinsic evidence may addressed through the use of special interrogatories to the factfinder or the court "may always sub-classify the putative class or consider de-certification.").

Common questions and common answers predominate. This is the case because "[t]he relevant contract term was uniform." *Cent. Payment Co.*, 984 F.3d at 601. When relevant differences "measures only the damages to individual class members," it will not defeat a motion for class certification because "[a]t worst, this requires individual proof at the damages phase, which the [Supreme Court has] approved." *Id.* (citing *Tyson Foods*, 577 U.S. at 453–54). Furthermore, "[s]light variation in *actual damages* does not defeat predominance if there are common legal questions and common facts." *Id.* at 602 (emphasis in original).

Defendant argues that some class members suffered no injury, so they lack constitutional standing. Plaintiff disputes this assertion claiming, "it relies on an imaginary theory of breach not at issue." [ECF No. 131 at 16] (sealed). Nevertheless, "[t]he fact that some plaintiffs may be unable to succeed on their claim does not necessarily mean that they lack standing to sue." *Stuart v. State Farm Fire and Cas. Co.*, 910 F.3d 371, 377 (8th Cir. 2018). Defendant's argument that class certification will create winners and losers fares no better because Plaintiff need only show that common evidence could make a "prima facie case for the class" not whether a different methodology should be applied to assess whether a breach occurred. *Zurn Pex*, 644 F.3d at 618.

This "winners and loser" argument was also addressed by Judge McMahon of the Southern District of New York in another COI case, where she observed, "the refusal to certify a class

[because some policyholders prefer the insurer's construction of contractual terms] suggests that a policyholder has a right to have his rates adjusted in an illegal or extracontractual manner, simply because such a wrongful adjustment redounds to his personal benefit . . . no policyholder has a right to an illegal or extracontractual adjustment to his COI." *Fleisher v. Phoenix Life Ins. Co.*, 11 Civ. 8405 (CM), 2013 WL 12224042, at *12 (S.D. N.Y. July 12, 2013). The winners and losers argument is not especially relevant in this context because Plaintiff seeks damages for past breaches, not prospective relief to adjust the COI rates, which would implicate potential "losers" of such a new construction of the policies. *Id*. "Whether some plaintiffs are unable to prove damages . . . is a merits questions, and [a] district court has the power to amend the class definition at any time before judgment." *Stuart*, 910 F.3d at 377.

4. Class counsel

Once a class is certified, the certifying court must appoint class counsel. *See* Fed. R. Civ. P. 23(g)(1). Plaintiff requests that the Court appoint Susman Godfrey as class counsel. Considerations for appointment of class counsel include: (1) identification and investigation of the potential claims by class counsel; (2) counsel's experience in litigating class actions and similar litigation; (3) knowledge of the applicable law; and (4) resources counsel will commit in representing the class. Fed. R. Civ. P. 23(g)(1)(A). It is also proper for the Court to "consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(g)(1)(B). At bottom, class counsel must be willing and able to "fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(g)(4).

Defendant does not oppose appointment of Susman Godfrey as class counsel, and the Court finds that Susman Godfrey satisfies the requirements of Rule 23(g). Submissions in support of Susman Godfrey's appointment as class counsel reveals the firm's extensive experience litigating

class actions, including class actions very similar to this case. [ECF No. 92-4]. Substantial time, years in fact, has already been expended on this case investigating potential claims in this case during discovery. The Court therefore appoints Susman Godfrey as class counsel for Plaintiffs.

III. CONCLUSION

For the foregoing reasons, Plaintiff's Motion for Class Certification is GRANTED. [ECF No. 92]. Both of Defendant's Motions to Strike are DENIED. [ECF Nos. 117; 119]. Plaintiff's Motion to Strike is GRANTED. [ECF No. 128]. Accordingly:

1. The Court certifies a class consisting of all current and former owners of Classic Term UL I or II issued or insured by North American Company for Life & Health Insurance, or its predecessors, during the Class Period. This Class shall not include Defendant North American, its officers and directors, members of their immediate families, and the heirs, successors or assigns of any of the foregoing; anyone employed with Plaintiff's counsel's firms; and any Judge to whom this case is assigned, and his or her immediate family.

2. The Court appoints Plaintiff Advance Trust & Life Escrow Services, LTA, as class representatives.

3. The Court appoints attorneys from Susman Godfrey as class counsel.

IT IS SO ORDERED.

Dated this 22nd day of March, 2022.

STEPHANIE M. ROSE, CHIEF JUDGE
UNITED STATES DISTRICT COURT