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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

MARY BURDICK, individually and  
on behalf of all others  
similarly situated,

Plaintiffs,

v.

UNION SECURITY INSURANCE  
COMPANY, et al.

Defendants.

CV 07-4028 ABC (JCx)

FURTHER ORDER RE: CROSS-MOTIONS  
FOR SUMMARY ADJUDICATION;  
MOTION TO DECERTIFY THE CLASS;  
MOTION FOR CERTIFICATION OF  
INTERLOCUTORY APPEAL; AND  
MOTION FOR RECONSIDERATION

On April 2, 2009, this Court entered an order granting in part each of the parties' motions for summary adjudication, and granting in part and denying in part Defendant's motion to decertify the class. April 2, 2009 Order (Docket # 150) ("April 2 Order"). The Court left unresolved several issues, however, so that they could be more fully briefed and so the Court could await guidance from the California Supreme Court's then-forthcoming opinion in In re: Tobacco II Cases, 46 Cal. 4th 298 (2009). In addition, several other motions have been filed since the Court's April 2 Order. Those matters all came on for hearing on August 17, 2009. The Court hereby rules as follows on the

1 outstanding issues left unresolved in the April 2 Order, as well as  
2 the additional motions that have since been filed.

3  
4 **I. BACKGROUND**

5 Plaintiff Mary Burdick challenges a Social Security Disability  
6 Insurance Offset provision (the "SSDI Offset") in the Long Term  
7 Disability ("LTD") coverage issued to her by Defendant. Burdick's  
8 policy provided a maximum benefit of \$2,083 per month. After becoming  
9 disabled, Defendant asserted that she was entitled to only \$284 per  
10 month because of the SSDI Offset provision. As a result, Burdick  
11 brought this class action against Defendant for (1) breach of  
12 contract, (2) breach of the covenant of good faith and fair dealing,  
13 (3) violations of California Business and Professions Code §§ 17500,  
14 *et seq.* ("FAL"), (4) violations of California Business and Professions  
15 Code §§ 17200, *et seq.* ("UCL"), and (5) declaratory relief.<sup>1</sup>

16 The Court granted Burdick's motion to certify a class on March  
17 25, 2008. Defendant then brought a motion to decertify the class. In  
18 the April 2 Order, the Court determined that it was appropriate to  
19 consider class certification separately for each claim. See April 2  
20 Order at 31-32. The Court denied Defendant's motion as to the claim  
21 for a declaration that the SSDI Offset provision is unenforceable,  
22 finding that certification was appropriate under Fed. R. Civ. P. 23(a)  
23 and 23(b)(2). See id. at 32-34. The Court granted Defendant's motion  
24 as to the claim for breach of contract, finding that the numerosity

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26 <sup>1</sup> The April 2 Order includes an extensive discussion of the  
27 facts of the case. See April 2 Order at 2-8. The Court will not  
28 repeat those facts here. To the extent that facts relevant to issues  
decided in this order were not addressed in the April 2 Order, the  
Court will address them below as necessary.

1 requirement was not met for that claim. See id. at 35. The Court  
2 deferred ruling on whether class treatment was proper for the claims  
3 for rescission and reformation so that supplemental briefing could be  
4 filed. Id. at 34-35. The Court also deferred ruling on Defendant's  
5 motion to decertify as to the UCL and FAL claims, as well as on the  
6 summary adjudication motions as they related to the UCL and FAL  
7 claims, so that supplemental briefing could be filed. Id. at 11.

8 The April 2 Order also resolved certain issues raised by the  
9 parties in their cross-motions for summary adjudication. Among other  
10 rulings, the Court held that the SSDI Offset provision is  
11 inconspicuous and unenforceable. Id. at 12-20. The Court deferred  
12 ruling on various other matters, however, including whether triable  
13 issues of fact exist with respect to Plaintiffs' UCL and FAL claims.

14 Since the April 2 Order, the parties have filed various  
15 additional motions, which have now been fully briefed. First,  
16 Defendant challenges the Court's subject matter jurisdiction through a  
17 motion to reconsider the April 2 Order to the extent it did not  
18 decertify the declaratory relief class. Def.'s Mot. for Recon.  
19 (Docket # 160). Second, Defendant requests certification of two  
20 issues for interlocutory appeal. Def.'s Mot. to Amend Order to  
21 Provide for Cert. of Interlocutory Appeal (Docket # 155).

22 Moreover, at the August 17, 2009 hearing, Plaintiffs raised  
23 additional arguments for the first time. As Defendant did not have a  
24 proper opportunity to respond to those arguments, the Court allowed  
25 the parties to brief them. See Def.'s Suppl. Brief re: Additional  
26 Cited Authorities (Docket # 194); Pls.' Supple. Brief re: Additional  
27 Cited Authorities (Docket # 195).

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1 **II. THE COURT'S SUBJECT MATTER JURISDICTION OVER THIS CASE.**

2 In briefs filed since the April 2 Order, Defendant attacks the  
3 Court's subject matter jurisdiction to adjudicate Plaintiffs' claims.  
4 First, Defendant argues that the UCL and FAL claims of 109 of the  
5 class members should be dismissed because those class members lack  
6 Article III standing. See Def.'s Brief Re: Tobacco II Cases at 5-13  
7 (Docket # 177). Second, Defendant asserts that those 109 class  
8 members' claims for declaratory relief are not ripe. See Def's Mot.  
9 for Reconsideration at 1-2. Third, Defendant argues that Burdick  
10 lacks standing to bring a claim for rescission on the behalf of the  
11 class. See Def.'s Suppl. Briefing re: Declaratory Relief Remedies at  
12 3-4 (Docket # 157). The Court will address Defendant's jurisdictional  
13 arguments in turn.

14 **A. ARTICLE III ANALYSIS FOR CLASS ACTIONS**

15 Article III of the United States Constitution limits federal  
16 courts to deciding only actual "cases" and "controversies." Allen v.  
17 Wright, 468 U.S. 737, 750 (1984). In determining whether a case or  
18 controversy exists, courts consider the interrelated doctrines of  
19 standing and ripeness. Bova v. City of Medford, 564 F.3d 1093, 1095-  
20 96 (9th Cir. 2009). The Supreme Court has outlined three standing  
21 requirements: (1) the plaintiff must have suffered an injury in fact,  
22 which is an invasion of a legally protected interest which is (a)  
23 concrete and particularized, and (b) actual or imminent; (2) there  
24 must be a causal connection between the injury and the conduct  
25 complained of such that the alleged injury is fairly traceable to the  
26 challenged conduct; and (3) it must be likely that the injury will be  
27 redressed by a favorable decision. Lujan v. Defenders of Wildlife,  
28 504 U.S. 555, 560-61 (1992). "Standing is not dispensed in gross.

1 Rather, a plaintiff must demonstrate standing for each claim he seeks  
2 to press and for each form of relief that is sought." Davis v. Fed.  
3 Election Com'n, \_\_\_ U.S. \_\_\_, 128 S.Ct. 2759, 2769 (2008) (internal  
4 citations and quotations omitted).

5 "While standing is primarily concerned with *who* is a proper party  
6 to litigate a particular matter, ripeness addresses *when* litigation  
7 may occur." Bova, 564 F.3d at 1096 (quoting Lee v. Oregon, 107 F.3d  
8 1382, 1387 (9th Cir. 1997)). "A claim is not ripe for adjudication if  
9 it rests upon contingent future events that may not occur as  
10 anticipated, or indeed may not occur at all." Id. (quoting Texas v.  
11 United States, 523 U.S. 296, 300 (1998)). "That is so because, if the  
12 contingent events do not occur, the plaintiff likely will not have  
13 suffered an injury that is concrete and particularized enough to  
14 establish the first element of standing." Id. (citing Lujan, 504 U.S.  
15 at 560). As with standing, ripeness is determined on a claim-by-claim  
16 basis. See DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 352-53  
17 (2006); see also Pacific Gas & Elec. Co. v. State Energy Resources  
18 Conservation & Development Com'n, 461 U.S. 190, 200 (1983) (challenge  
19 to one statutory provision ripe; challenge to a second provision  
20 unripe).

21 The parties' main focus in addressing these doctrines is on the  
22 claims of absent class members. Defendant admits that Burdick's own  
23 claims are justiciable; it argues that certain absent class members  
24 lack standing or have unripe claims, and must be dismissed from the  
25 case. It appeared from the briefing that Plaintiffs did not dispute  
26 that the standing and ripeness doctrines apply to claims of absent  
27 class members. For the first time at the hearing, however, Plaintiffs  
28 argued that there is no requirement that absent class members meet

1 Article III requirements. The Court gave both parties the opportunity  
2 to submit supplemental briefing on this issue and, having reviewed it,  
3 finds Defendant's position more persuasive.

4 Neither party submitted Ninth Circuit authority specifically  
5 addressing this issue in their supplemental briefing.<sup>2</sup> Defendant  
6 argues that the Supreme Court has provided guidance on this issue. In  
7 Reno v. Catholic Social Servs., Inc., 509 U.S. 43 (1993), immigration  
8 rights groups brought class actions challenging certain I.N.S.  
9 regulations for determining residency status. The Supreme Court held  
10 that only persons who had taken affirmative steps toward legalization  
11 and had been stymied by this policy had claims ripe for adjudication.  
12 509 U.S. at 58-59. In particular, the I.N.S. used a policy known as  
13 "front-desking" by which aliens who disclosed to I.N.S. clerical  
14 workers that they had taken unapproved trips outside the United States  
15 had their applications rejected before they could even be filed. Id.  
16 at 61-62. Thus, "the front-desking of a particular class member is  
17 not only sufficient to make his legal claim ripe, but necessary to do  
18 so." Id. at 66. The Supreme Court remanded so evidence could be  
19 provided as to which class members were subject to the policy  
20 "[b]ecause only those class members (if any) who were front-desked  
21 have ripe claims over which the District Courts should exercise  
22 jurisdiction." Id. at 66-67. On remand, the district court limited

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24 <sup>2</sup> The Ninth Circuit's position on this issue may be revealed  
25 through a pending en banc case. See Dukes v. Wal-Mart, Inc., 509 F.3d  
26 1168, 1189 (9th Cir. 2007) (noting that putative class members who no  
27 longer worked for Wal-Mart when complaint was filed lack standing to  
28 seek declaratory or injunctive relief and may not be proper class  
members, and remanding for district court to determine appropriate  
scope of class), rehearing en banc granted, 556 F.3d 919 (9th Cir.  
2009). The parties have not requested that the Court stay issuing  
this order until the en banc opinion is published.

1 the class accordingly. See Catholic Social Servs., Inc. v. Reno, 134  
2 F.3d 921, 923, 924 (9th Cir. 1998). Thus, Reno supports Defendant's  
3 position here.<sup>3</sup>

4 Moreover, other courts have found that class definitions should  
5 be tailored to exclude putative class members who lack standing. For  
6 example, the Second Circuit has concluded that each class member need  
7 not submit evidence of personal standing but, nonetheless, a class  
8 must "be defined in such a way that anyone within it would have  
9 standing." Denney v. Deutsche Bank AG, 443 F.3d 253, 264 (2d Cir.  
10 2006) ("[N]o class may be certified that contains members lacking  
11 Article III standing."); see also, e.g., O'Neill v. Gourmet Sys. of  
12 Minn., Inc., 219 F.R.D. 445, 451-52 (W.D. Wis. 2002).<sup>4</sup> At least one  
13 district court within the Ninth Circuit has recently followed the same  
14 rationale. See Sanders v. Apple, Inc., \_\_\_ F.R.D. \_\_\_, 2009 WL 150950,  
15 at \*10 (N.D. Cal. 2009). The Court finds those cases persuasive.  
16 Indeed, adopting such a rule conforms to the Supreme Court's  
17 instruction that courts be "mindful that Rule 23's requirements must  
18 be interpreted in keeping with Article III constraints." Amchem  
19 Prods., Inc. v. Windsor, 521 U.S. 591, 612-13 (1997); see also Fed. R.  
20 Civ. P. 82 (federal rules "do not extend . . . the jurisdiction of the

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22 <sup>3</sup> The Ninth Circuit addressed ripeness in the class context  
23 recently in Rodriguez v. Hayes, 578 F.3d 1032 (9th Cir. 2009). That  
24 case involved a proposed writ of habeas corpus class of aliens  
25 detained during immigration proceedings for more than six months  
26 without a bond hearing. The government parties argued that class  
27 treatment was improper because not all class members had ripe claims.  
28 See id. at 1045. The Ninth Circuit rejected that argument, finding  
that the class was defined so as to include only class members with  
ripe claims. Id. The Ninth Circuit did not squarely address whether  
class members with unripe claims must be excluded from the class.

<sup>4</sup> There is also contrary authority. E.g., Bzdawka v. Milwaukee  
County, 238 F.R.D. 469, 474 (E.D. Wis. 2006).

1 district courts").

2 Plaintiffs argue for the opposite result, relying primarily on  
3 the Ninth Circuit's statement that, "[i]n a class action, standing is  
4 satisfied if at least one named plaintiff meets the [Article III]  
5 requirements." Bates v. United Parcel Serv., Inc., 511 F.3d 974, 985  
6 (9th Cir. 2007) (en banc) (citing Armstrong v. Davis, 275 F.3d 849,  
7 860 (9th Cir. 2001)). While that statement on its face appears to  
8 support Plaintiffs' argument, the Court does not read it so broadly.  
9 As an initial matter, nowhere in Bates does the Ninth Circuit actually  
10 address whether absent class members are required to have Article III  
11 standing. Instead, the quoted portion of Bates is best understood as  
12 reiterating the settled point of law that a class claim cannot proceed  
13 unless at least one named plaintiff has Article III standing to bring  
14 that claim. See, e.g., Casey v. Lewis, 4 F.3d 1516, 1519 (9th Cir.  
15 1993) (citing O'Shea v. Littleton, 414 U.S. 488, 494 (1974)).<sup>5</sup> The  
16 Court does not read Bates as holding that a class may be defined so  
17 broadly as to include absent class members who, as a matter of law, do  
18 not themselves have justiciable claims.

19 Accordingly, the Court finds Plaintiffs' reliance on Bates  
20 unpersuasive and concludes that those absent class members lacking  
21 justiciable claims under Article III should be excised from the case.

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25 <sup>5</sup> That reading of Bates is supported by its citation to  
26 Armstrong. In that case, the defendants argued, *inter alia*, "that the  
27 named plaintiffs do not have standing to seek prospective injunctive  
28 relief." Armstrong, 275 F.3d at 860. The Ninth Circuit held that,  
"[i]n order to assert claims on behalf of a class, a named plaintiff  
must have personally sustained or be in immediate danger of sustaining  
'some direct injury as a result of the challenged statute or official  
conduct.'" Id. (quoting O'Shea, 414 U.S. at 494).

1           **B.     PLAINTIFFS' UCL AND FAL CLAIMS**

2           Defendants argue that Article III standing is lacking as to the  
3 UCL and FAL claims of the 109 class members who have never applied for  
4 LTD benefits. Because those class members have not been denied LTD  
5 benefits, Defendant argues that they lack the requisite injury-in-fact  
6 for these claims.<sup>6</sup> In their responsive brief, Plaintiffs clarified  
7 the injury alleged with regard to the UCL and FAL claims of absent  
8 class members who have not applied for LTD benefits: "Plaintiffs do  
9 not seek recovery of lost future benefits, but rather for the economic  
10 harm they have incurred by paying for insurance coverage that is  
11 substantially less valuable than what they were promised." Pls.'  
12 Response to Def.'s Brief Re: Tobacco II Cases at 3 (Docket # 183).  
13 Thus, the UCL and FAL claims of these 109 class members are premised  
14 on a "diminished value theory" similar to those rejected by other  
15 courts as insufficient to confer standing under Article III.

16           In particular, the Court finds the analysis in Impress  
17 Communications v. Unumprovident Corp., 335 F. Supp. 2d 1053 (C.D. Cal.  
18 2003) to be instructive. In that case, the plaintiffs alleged that  
19 the defendants defrauded them into buying disability insurance  
20 policies and that the defendants did not intend to provide the  
21 coverage promised in the policies. Id. at 1056. The plaintiffs had  
22 not been denied any benefits or even filed claims under the policies.  
23 Id. at 1055-56. The plaintiffs' claimed injury was based on their

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25           <sup>6</sup> Defendant is correct that, regardless of whether Plaintiffs  
26 state a claim under the UCL or FAL, they must still establish the  
27 Article III standing requirements set forth above. Lee v. American  
28 Nat'l Ins. Co., 260 F.3d 997, 1001-02 (9th Cir. 2001). The Court's  
analysis focuses on Article III considerations. The Court expresses  
no opinion on whether the UCL or FAL standing requirements are met in  
this case.

1 contention that the value of their insurance was diminished by the  
2 defendants' improper claims procedures. Id. at 1057 & n.6.<sup>7</sup> The  
3 defendants moved to dismiss, arguing that the plaintiffs lacked a  
4 legally cognizable injury sufficient to satisfy Article III.  
5 The court rejected the "diminished value theory," concluding that the  
6 injury was too speculative to be considered an injury-in-fact. Id. at  
7 1058-59 (discussing Horvath v. Keystone Health Plan East, Inc., 333  
8 F.3d 450 (3d Cir. 2003) and Doe v. Blue Cross Blue Shield of Maryland,  
9 Inc., 173 F. Supp. 2d 398 (D. Md. 2001)). In particular, the court  
10 found that the plaintiffs "cannot allege that they have been provided  
11 with less disability coverage than they contracted for. Indeed,  
12 Plaintiffs here have never sought any benefits under Defendants'  
13 plans. An allegation that Defendants' administration of the plan  
14 might result in denial of future benefits is purely speculative." Id.  
15 at 1059. The same is true here.<sup>8</sup>

16 Nor is the Court persuaded by any of Plaintiffs' counter-

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19 <sup>7</sup> Plaintiffs here try to no avail to distinguish the harm  
20 alleged in Impress. See Pls.' Response to Def.'s Brief Re: Tobacco II  
21 Cases at 3 & 4 n.4. But the 109 class members' purported harm is  
22 nearly identical to the articulation of the harm in Impress. 335 F.  
23 Supp. 2d at 1057 n.6 ("Plaintiffs allege they received something of  
value, but less than they purchased. There can be no question that  
Plaintiffs are alleging they received 'less' than they paid for. This  
is the essence of a diminished value theory." (internal citations  
omitted)).

24 <sup>8</sup> Even were that not the case, the Court finds that Burdick  
25 could not meet the Rule 23(a) requirement of typicality needed to  
26 maintain these claims as a class action. Typicality exists only when  
27 a named plaintiff is able "to pursue his or her claims under the same  
28 legal or remedial theories as the represented class members." In re  
Paxil Litig., 212 F.R.D. 539, 549 (C.D. Cal. 2003); accord Sweet v.  
Pfizer, 232 F.R.D. 360, 368 (C.D. Cal. 2005). Unlike the absent 109  
class members, Burdick's claim is not premised on a diminished value  
theory.

1 arguments. First, Plaintiffs argue that claims for lost economic  
2 value are sufficient to satisfy Article III. Pls.' Response to Def.'s  
3 Brief re: Tobacco II Cases at 3. But none of the cited cases are akin  
4 to the situation here. For example, Plaintiffs rely on Lozano v. AT&T  
5 Wireless Services, Inc., in which the Ninth Circuit found that the  
6 plaintiff had standing to bring claims based on his assertion that "he  
7 did not receive the full benefit of his contract" with the defendant.  
8 504 F.3d 718, 733 (9th Cir. 2007). But the economic injury alleged in  
9 that case involved the defendant's conduct in actually taking away the  
10 plaintiff's cell phone minutes based on its billing practices: "That  
11 is, Lozano contracted for 400 free 'anytime' minutes. Yet, due to  
12 out-of-cycle billing, he reserved, and therefore lost, a certain  
13 number of those minutes each billing period to account for the late-  
14 billed roaming calls." Id. Thus, Lozano did not deal with a  
15 speculative loss in value based on the defendant's potential future  
16 conduct; but rather a loss already incurred based on the defendant's  
17 prior conduct.

18 Similarly, Plaintiffs' reliance on cases involving defective  
19 products is misplaced. See Cole v. General Motors Corp., 484 F.3d 717  
20 (5th Cir. 2007); Sanchez v. Wal-Mart Stores, Inc., 2:06-cv-2573 JAM  
21 KJM, 2008 WL 3272101 (E.D. Cal. Aug. 6, 2008). Unlike the instant  
22 case, those cases involved the loss in value and loss of usefulness in  
23 physical goods owned and actually used by the plaintiffs. See Maio v.  
24 Aetna, Inc., 221 F.3d 472, 488-89 (3d Cir. 2000) (distinguishing  
25 between tangible property and health insurance contract).

26 Accordingly, the 109 class members who have not sought disability  
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1 benefits from Defendant do not have justiciable UCL or FAL claims.<sup>9</sup>

2 **C. PLAINTIFFS' CLAIM FOR A DECLARATION THAT THE SSDI OFFSET**  
3 **PROVISION IS UNENFORCEABLE**

4 Defendant next argues that those class members who have not  
5 sought LTD benefits do not have ripe claims for a declaration that the  
6 SSDI Offset provision is inconspicuous and unenforceable. In  
7 particular, Defendant asserts that this Court's April 2 Order granting  
8 such relief is inconsistent with the ripeness and standing analysis in  
9 Bova v. City of Medford, 564 F.3d 1093 (9th Cir. 2009).<sup>10</sup> In Bova,  
10 two city employees challenged the city's practice of not providing  
11 health insurance to retired employees. 564 F.3d at 1094. The  
12 plaintiffs sought injunctive and declaratory relief alleging various  
13 federal constitutional and statutory violations, as well as violations  
14 of Oregon law. Id. at 1094-95. Both plaintiffs were eligible for  
15 retirement but had not yet retired; therefore, neither plaintiff had  
16 yet been denied the ability to continue obtaining insurance coverage  
17 through the city. Id. at 1095.

18 The Ninth Circuit held that subject matter jurisdiction was  
19 lacking because the plaintiffs' claims were not ripe for adjudication.  
20 As the Ninth Circuit explained, "a claim is not ripe for adjudication  
21 if it rests upon contingent future events that may not occur as  
22 anticipated, or indeed may not occur at all." Id. at 1096. "That is

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23 <sup>9</sup> Since that leaves only a handful of class members with UCL and  
24 FAL claims, the Court finds class certification of those claims  
25 improper and hereby **GRANTS** Defendant's motion to decertify the class  
as to those claims.

26 <sup>10</sup> Bova was initially issued as a memorandum disposition on  
27 March 6, 2009, but was modified and superseded on denial of rehearing  
28 on May 4, 2009. The Court finds it appropriate to analyze Bova vis-a-  
vis a motion for reconsideration of the Court's April 2 Order. See  
Civil Local Rule 7-18.

1 so because, if the contingent events do not occur, the plaintiff  
2 likely will not have suffered an injury that is concrete and  
3 particularized enough to establish the first element of standing."  
4 Id. (citing Lujan, 504 U.S. at 560). The Ninth Circuit found that the  
5 possibility that health insurance would not be extended to the  
6 plaintiffs at some future time was not an injury that is sufficiently  
7 concrete or particularized, given that it was contingent on two  
8 intervening events, namely the plaintiffs' retirement and the city's  
9 decision not to extend health insurance to them. Id. at 1096-97. The  
10 Ninth Circuit similarly rejected as not "sufficiently tangible or  
11 definite" the plaintiffs' argument that their claim was ripe because  
12 the potential lack of future health insurance through the city could  
13 impact their current decisions about when to retire or whether to find  
14 a different job or the like. Id. at 1097. As a result, the Ninth  
15 Circuit held that the plaintiffs' federal claims should have been  
16 dismissed as unripe.

17 The situation presented in Bova is different than that presented  
18 here. The Bova plaintiffs had the full protection of their health  
19 insurance at the time of filing suit but worried that the city would  
20 not extend health insurance benefits to them upon retirement. Upon  
21 retirement, presumably they would be able either to challenge the  
22 city's practice or seek health insurance from another provider.  
23 Hence, unlike Plaintiffs here, Bova did not involve a dispute as to  
24 the current coverage provided by an insurance policy governing the  
25 parties. Plaintiffs here risk being provided with a de minimus  
26 monthly disability benefit from Defendant under their current coverage  
27 in the event they become disabled. This injury is more immediate and  
28 concrete than that at issue in Bova.

1 Other courts have found similar claims ripe for adjudication.  
2 For example, in Yue v. Conseco Life Insurance Co., the plaintiff  
3 brought a breach of contract claim alleging that her life insurance  
4 provider decided that it would raise costs associated with its life  
5 insurance policies in 2016. No. CV 08-1506 AHM (JTLx), 2008 WL  
6 5158869, at \*1-2 (C.D. Cal. Dec. 8, 2008). The defendant argued that  
7 the claim was not ripe because any injury was contingent on future  
8 events. Id. at \*4-5. Among other arguments, the plaintiff noted that  
9 "Policyholders purchase life insurance to plan for the future, not to  
10 face the insecurity of a possible precipitous surrender or lapse late  
11 in life, when securing alternative life insurance will be cost-  
12 prohibitive and highly uncertain because life insurance is much more  
13 expensive to obtain in later years." Id. at \*5. Despite the fact  
14 that the costs had not yet increased, the Court concluded that the  
15 claim was ripe for review:

16 Although Plaintiff may decide before 2016 to abandon the  
17 Policy for reasons unrelated to this lawsuit, and her mother  
18 may pass away before then, those possibilities do not negate  
19 the fact that Plaintiff must decide now whether to continue  
20 funding her policy at the current rate, to increase her  
21 monthly payments, or to seek alternative life insurance  
22 coverage. These are important and difficult decisions.  
23 They are "ripe" in the practical sense.

24 Id. Similarly, the Court has noted on several occasions that  
25 "[p]eople buy insurance in part for the peace of mind rather than  
26 because they expect the insured-against event actually to occur. It  
27 would be absurd if insurance companies could deny the justiciability  
28 of suits against them by arguing that the insured is foolish to be

1 worrying about 'going bare.'" Wisconsin Power & Light Co. v. Century  
2 Indem. Co., 130 F.3d 787, 793 (7th Cir. 1997). One practical  
3 consequence of a declaratory relief ruling, in advance of a covered  
4 and contingency incident, is that a ruling against coverage will  
5 induce the insured to seek new coverage or take some other legal  
6 action. See Neely v. Benefits Review Bd., 139 F.3d 276, 280 (1st Cir.  
7 1998). Based on that reasoning, the declaratory relief claim is ripe  
8 for those class members currently insured by Defendant. Thus, the  
9 Court's April 2 holding that the SSDI Offset provision is  
10 unenforceable applies to these class members.

11 Not all class members are currently insured, however. Roughly 50  
12 class members no longer have LTD insurance with Defendant. Def.'s  
13 Response to Pls.' Brief Re: Tobacco II Cases at 3 (Docket # 184)  
14 (citing Pls.' Opp'n to Def.s' Mot. to Decertify at 8 (Docket # 126)).  
15 As to those class members, the above reasoning is wholly inapplicable.  
16 Accordingly, the Court finds that it lacks subject matter jurisdiction  
17 over the declaratory relief claims of the class members who are no  
18 longer insured by Defendant.<sup>11</sup>

#### 19 **D. Plaintiffs' Rescission Claim**

20 In their summary judgment briefing, Plaintiffs contended that  
21 they are entitled to elect to either rescind or reform their policies  
22 as a remedy implicit in their declaratory relief claim. See, e.g.,  
23 Pls.' MSJ at 14-16 (Docket # 107); Opp'n to Def.'s MSJ at 22-23  
24 (Docket # 81). The Court previously held that claims for such relief

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26 <sup>11</sup> The remaining Plaintiffs' claims for a declaration that the  
27 SSDI Offset provision is unenforceable remain susceptible to class  
28 treatment. See April 2 Order at 31-34. As to the numerosity of the  
class, the Court believes the number of class members is sufficient.  
See, e.g., Oregon Laborers-Employers Health & Welfare Trust Fund v.  
Philip Morris, Inc., 188 F.R.D. 365, 373 (D. Or. 1998).

1 could be added to this case pursuant to Fed. R. Civ. P. 53(c). See  
2 April 2, 2009 Order at 20-21. The parties now agree that reformation  
3 is unnecessary given the Court's declaration that the SSDI Offset  
4 provision is inconspicuous and unenforceable, leaving at issue only  
5 rescission. Defendant argues that Burdick lacks standing to represent  
6 the class on this claim because she has expressly disavowed any  
7 intention to seek rescission herself. The Court agrees.

8 While both Burdick and those class members seeking rescission  
9 allege injuries stemming in part from the same wrongful conduct -  
10 Defendant's inclusion of an inconspicuous offset provision into the  
11 policy - their injuries and respective remedies are different.  
12 Burdick has filed a claim for LTD benefits, which Defendant reduced by  
13 invoking the SSDI Offset provision. The injury she seeks to remedy is  
14 the improper reduction of her benefits. As a result, she does not  
15 seek rescission at all but, rather, to enforce her policy (absent the  
16 SSDI Offset provision) so that she can receive LTD benefits without  
17 any reduction. The vast majority of the absent class members,  
18 however, never applied for LTD benefits. The injury they seek to  
19 remedy through rescission is their entry into the policy based on  
20 misinformation or a lack of information. See, e.g., April 2 Order at  
21 22 (discussing bases for rescission). These purported class members  
22 seek rescission, allowing them to extinguish their policies ab initio  
23 so that they may recover restitution based on premiums previously  
24 paid. See Imperial Casualty & Indemnity Co. v. Sogomonian, 198 Cal.  
25 App. 3d 169, 184 (1988). Because Burdick's injury and remedy is  
26 qualitatively different than those of the class members seeking  
27 rescission, she lacks standing to press the rescission claim on their  
28 behalf. Traylor v. Avnet, Inc., 257 F.R.D. 521, 526 (D. Ariz. 2009);

1 see also Sosna v. Iowa, 419 U.S. 393, 403 (1975) (class representative  
2 "must be a member of the class which he or she seeks to represent").<sup>12</sup>

3 Plaintiffs attempt to remedy this deficiency by offering to have  
4 a new class representative intervene to seek rescission. See Pls.'  
5 Response to Def.'s Suppl. Brief re: Declaratory Relief Remedies at 1-3  
6 (Docket # 169).<sup>13</sup> To prevail on that request, Plaintiffs must  
7 establish "good cause" for amending the complaint because the deadline  
8 for joining additional parties has long since passed. See Johnson v.  
9 Mammoth Recreations, Inc., 975 F.2d 604, 607-08 (9th Cir. 1992); see  
10 also Scheduling Order (Docket # 18) (setting January 14, 2008 deadline  
11 for joining additional parties). The good cause inquiry looks both to  
12 the diligence of the party seeking the amendment and the prejudice to  
13 the opposing party. See Coleman v. Quaker Oats Co., 232 F.3d 1271,  
14 1294-95 (9th Cir. 2000).

15 The Court concludes that Plaintiffs were not diligent and  
16 granting their request would prejudice Defendant. Therefore,  
17 Plaintiffs have failed to establish good cause to amend their  
18 complaint. Plaintiffs make their request to amend long after this  
19 case was filed and after the close of discovery. Plaintiffs' request  
20 comes this late in the proceedings not as the result of an unexpected  
21 ruling by the Court or factual development, but rather as the result

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22  
23 <sup>12</sup> These issues overlap significantly with the class  
24 certification analysis, including the requirements of typicality and  
25 adequacy of representation. See Traylor, 257 F.R.D. at 526 n.2.  
26 Were the Court to address the Rule 23 requirements, the same concerns  
27 would cause the Court to decline certification of the class. See id.  
28 (adequacy); Gartin v. S & M NuTec LLC, 245 F.R.D. 429, 435 (C.D. Cal.  
2007) (typicality).

27 <sup>13</sup> Plaintiffs propose adding the widow of William Moreau as the  
28 new class representative. The Court's analysis would apply equally to  
any plaintiff seeking amendment to the complaint.

1 of the haphazard fashion in which Plaintiffs have sought rescission.  
2 Plaintiffs first raised the possibility of a claim for rescission in  
3 the reply brief for their class certification motion. See Pls.' Class  
4 Certification Reply at 9-10 (Docket # 52). But Plaintiffs did not  
5 actually request that rescission be considered a remedy in this case  
6 until the summary judgment phase of the litigation, when they argued  
7 that rescission was properly before the Court pursuant to Fed. R. Civ.  
8 P. 53(c). See, e.g., Pls.' MSJ at 14-16. Under these circumstances,  
9 Plaintiffs have not shown diligence. For that reason alone,  
10 Plaintiffs' request fails. Coleman, 232 F.3d at 1295 (where diligence  
11 is lacking, "the inquiry should end"). Moreover, granting Plaintiffs'  
12 request would prejudice Defendant as it would require reopening  
13 discovery and further delaying this case. Such prejudice supplies an  
14 additional reason for denying the request. Id. (citing Lockheed  
15 Martin Corp. v. Network Solutions, Inc., 194 F.3d 980, 986 (9th Cir.  
16 1999)).

17 For these reasons, the Court finds that Burdick lacks standing to  
18 represent the class on the proposed rescission claim and that amending  
19 the complaint to add a new class representative is improper.  
20 Accordingly, the request for rescission is no longer relevant to this  
21 case.

### 22 23 **III. UCL AND FAL ISSUES LEFT UNRESOLVED BY THE APRIL 2 ORDER.**

24 Having decided that class treatment is not proper for the UCL and  
25 FAL claims, the only UCL and FAL claims before the Court are the  
26 individual claims of Burdick. Both parties moved for summary  
27 adjudication on Burdick's UCL and FAL claims. For the reasons  
28 discussed below, the Court **GRANTS** Burdick's motion as to her UCL claim

1 but **DENIES** her motion as to FAL claim. The Court **DENIES** Defendant's  
2 motion as to both claims.

3 **A. STATUTE OF LIMITATIONS**

4 Defendant raises several defenses to Burdick's UCL and FAL  
5 claims. Defendant first argues that Burdick's UCL claims are time-  
6 barred. Def.'s MSJ at 12 (Docket # 78). Burdick filed suit April 30,  
7 2007. Burdick's UCL claim is subject to a four-year statute of  
8 limitations. Cal. Bus. & Prof. Code § 17208. Burdick's FAL claim is  
9 subject to a three-year statute of limitations. See Cal. Civ. Proc.  
10 Code § 338(a). The Court discusses the timeliness of each claim in  
11 turn below.

12 **1. UCL Claim**

13 Defendant argues that the statute of limitations for Burdick's  
14 UCL claim began running when Burdick converted her LTD policy in the  
15 spring of 2001. Def.'s MSJ at 12-14. Burdick counters that, inter  
16 alia, her cause of action did not accrue until she had her benefits  
17 reduced by Defendant's invocation of the SSDI Offset provision. See  
18 Pls.' Opp'n to Def.'s MSJ at 8-12. The Court agrees with Burdick that  
19 her cause of action did not accrue until Defendant wrongfully reduced  
20 her benefits.

21 The UCL's statute of limitations begins to run when a cause of  
22 action accrues. See Cal. Bus. & Prof. Code § 17208. Causes of action  
23 generally accrue as follows:

24 Generally, a cause of action accrues and the statute of  
25 limitation begins to run when a suit may be maintained.  
26 Ordinarily this is when the wrongful act is done and the  
27 obligation or the liability arises, but it does not accrue  
28 until the party owning it is entitled to bring and prosecute

1 an action thereon. In other words, a cause of action  
2 accrues upon the occurrence of the last element essential to  
3 the cause of action.

4 Howard Jarvis Taxpayers Ass'n v. City of La Habra, 25 Cal. 4th 809,  
5 815 (2001) (citations and quotations omitted); see also County of  
6 Santa Clara v. Atlantic Richfield Co., 137 Cal. App. 4th 292, 316  
7 (2006) (same for case involving statute of limitations challenge to  
8 UCL claim). In contrast to the accrual analysis outlined in Howard  
9 Jarvis, Defendant focuses on the date of the "allegedly wrongful  
10 conduct that plaintiff claims gave rise to liability." Def.'s MSJ at  
11 13. As the case law makes clear, however, the date of the misconduct  
12 is not necessarily controlling. Private suits may be filed under the  
13 UCL only upon a showing of an injury in fact and the loss of money or  
14 property as a result of unfair competition. See Cal. Bus. & Prof.  
15 Code § 17204. Thus, the UCL cause of action does not accrue (and the  
16 statute of limitations does not begin to run) until there has been an  
17 injury in fact and loss of money or property. See City of Vista v.  
18 Robert Thomas Securities, Inc., 84 Cal. App. 4th 882, 886 (2000)  
19 ("When damages are an element of a cause of action, the cause of  
20 action does not accrue until the damages have been sustained.")

21 Following oral argument, Defendant urged the Court to adopt a  
22 different accrual date because the UCL did not include an injury  
23 requirement prior to the passage of Proposition 64. See Def.'s Suppl.  
24 Brief re: Additional Cited Authorities at 11 n.5. Proposition 64 was  
25 passed and became effective in November 2004, and the California  
26 Supreme Court subsequently applied it to all pending actions even if  
27 they were filed prior to November 2004. See Californians For  
28 Disability Rights v. Mervyn's, LLC, 39 Cal. 4th 223, 227, 232-33

1 (2006). In light of the timing of Proposition 64's passage and the  
2 holding in Mervyn's, Defendant is wrong in asserting that "Plaintiff  
3 could have maintained her suit . . . anytime after she received  
4 coverage in spring 2001." Def.'s Suppl. Brief re: Additional Cited  
5 Authorities 11 n.5. Had she filed her suit between 2001 and November  
6 2004, it would have been subject to dismissal under Mervyn's if  
7 pending at that time. Had she brought her suit after November 2004,  
8 but prior to the running of Defendant's suggested four-year  
9 limitations period, it would have been subject to dismissal under  
10 Proposition 64 itself. The Court is unwilling to hold that Burdick's  
11 claim accrued in 2001 under those circumstances.<sup>14</sup>

12 Burdick's injury occurred when Defendant wrongfully reduced her  
13 LTD benefits in May 2005. See Burdick Decl. ISO Pls.' MSJ Ex. O  
14 (Docket # 108). Hence, Burdick's UCL claim accrued less than two  
15 years prior to her filing the instant action and her UCL claim is not  
16 barred by the statute of limitations. Accordingly, the Court **DENIES**  
17 Defendant's motion for summary judgment as to Burdick's UCL claim on  
18 this ground and further finds that Burdick is not prevented from  
19 prevailing on her motion for summary judgment on her UCL claim on  
20 statute of limitations grounds.

## 21 2. FAL Claim

22 Defendant also moved for summary judgment on Burdick's FAL claim  
23 on statute of limitations grounds. Unlike the four-year statute of  
24 limitations applicable to UCL claims, FAL claims are subject to a  
25 three-year statute of limitations. See Cal. Civ. Proc. Code § 338(a).  
26 Assuming that all of the elements of Burdick's FAL claim existed at or

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27  
28 <sup>14</sup> The parties do not discuss this nuance. The Court did not  
locate any case law addressing accrual under these circumstances.

1 about the time of conversion in the spring of 2001,<sup>15</sup> Burdick asserts  
2 that her claim is timely based on the delayed discovery rule and the  
3 continuous acts doctrine. The Court **DENIES** Defendant's motion for  
4 summary judgment as to Burdick's FAL claim on statute of limitations  
5 grounds because it failed to show no genuine issue of fact as to these  
6 doctrines.

7 First, there is a question of fact as to the delayed discovery  
8 rule. "At least in the context of unfair competition claims based on  
9 the defendant's allegedly deceptive marketing materials and sales  
10 practices, which is simply a different legal theory for challenging  
11 fraudulent conduct and where the harm from the unfair conduct will not  
12 reasonably be discovered until a future date, . . . a section 17200  
13 cause of action starts to run only when a reasonable person would have  
14 discovered the factual basis for a claim." Broberg v. Guardian Life  
15 Ins. Co. of Am., 171 Cal. App. 4th 912, 920-21, review denied  
16 (2009).<sup>16</sup> "When a plaintiff reasonably should have discovered facts  
17

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18 <sup>15</sup> The Court's analysis of the UCL claim's accrual is not  
19 entirely applicable to Burdick's FAL claim because, given an accrual  
20 in spring 2001, the FAL limitations period ordinarily would have  
21 expired prior to the passage of Proposition 64. The Court need not  
22 make a definite ruling on that issue, however, in light of the finding  
23 that genuine issues of fact exist regarding the applicability of the  
24 delayed discovery rule and continuing acts doctrine, precluding  
summary judgment for Defendant on this issue. Moreover, unlike her  
UCL claim, Burdick failed to meet her initial burden of demonstrating  
a lack of genuine issues of fact as to the substantive elements of her  
FAL claim. See Section III.E. Thus, the Court does not reach whether  
Plaintiff has shown no genuine issue of fact that her claim is timely.

25 <sup>16</sup> While Broberg applies the UCL, the parties generally analyze  
26 the UCL and FAL statutes of limitations without differentiation. See,  
27 e.g., Pl.'s Opp'n to Def.'s MSJ at 11; Def.'s MSJ Reply at 2-6. Thus,  
the Court assumes the cited case law applying the UCL also applies to  
FAL claims.

28 The Court is well aware of earlier holdings that the discovery  
rule does not apply to UCL claims. See, e.g., Karl Storz Endoscopy

1 for purposes of the accrual of a cause of action or application is  
2 generally a question of fact, properly decided as a matter of law only  
3 if the evidence . . . can support only one reasonable conclusion."  
4 Id. at 921. Defendant failed to persuade the Court that there is no  
5 issue of fact as to whether Burdick knew or should have known of her  
6 FAL claim more than three years prior to filing suit. More  
7 specifically, the Court finds unpersuasive Defendant's assertion that,  
8 as a matter of law, Burdick should have earlier learned of the  
9 inconspicuous SSDI Offset provision by reading the Certificate or  
10 Master Group Conversion Insurance Policy, or contacting one of  
11 Defendant's representatives. See Broberg, 171 Cal. App. 4th at 922  
12 (refusing to conclude that inconspicuous provision put plaintiff on  
13 notice of UCL claim as a matter of law); see also Haynes v. Farmers  
14 Ins. Exchange, 32 Cal. 4th 1198, 1210-11 (2004). Thus, whether the  
15 discovery rule applies to Burdick's FAL claim is a question of fact  
16 for the jury.<sup>17</sup>

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18 Am., Inc. v. Surgical Techs., Inc., 285 F.3d 848, 857 (9th Cir. 2002)  
19 (UCL limitations period began to run "on the date the cause of action  
20 accrued, not on the date of discovery" for claim related to trademark  
21 infringement). In 2007, however, the California Supreme Court and the  
22 Ninth Circuit indicated that whether the discovery rule applies to the  
23 UCL is an open question. See Grisham v. Philip Morris U.S.A., Inc.,  
24 40 Cal. 4th 623, 635 n.7 (2007); Betz v. Trainer Wortham & Co., 236  
25 Fed. Appx. 253, 256 (9th Cir. May 11, 2007) ("It is an open question  
26 under California law whether the discovery rule applies to unfair  
27 business practices claims.") The California Court of Appeal then  
28 issued Broberg, which makes clear that the discovery rule does apply  
at least to circumstances similar to those here.

<sup>17</sup> Defendant also contends that Burdick may not rely on the  
discovery rule because there are no allegations in the complaint  
identifying the (1) time and manner of her discovery and (2) Burdick's  
diligence in discovering her cause of action. See Def.'s MSJ Reply at  
3 (quoting Wasco Prods., Inc. v. Southwall Techs., Inc., 435 F.3d 989,  
991 (9th Cir. 2006)). Defendant's argument is premised on dicta that  
"plaintiffs seeking to toll the statute of limitations on various

1 Second, Plaintiff has raised questions of fact regarding her  
2 contention that the continuous acts doctrine applies. Under that  
3 doctrine, a claim is not barred by the statute of limitations if the  
4 alleged wrongs are "multiple, continuous acts," some of which occurred  
5 within the limitations period. See Suh v. Yang, 987 F. Supp. 783, 795  
6 (N.D. Cal. 1997); see also Betz, 236 Fed. Appx. at 256. Burdick  
7 provided evidence that Defendant sent her misleading quarterly  
8 statements asserting that her monthly benefits would be \$2,083 during  
9 the limitations period. See Burdick Decl. ¶ 15, Ex. F. Moreover,  
10 Defendant reduced her benefits pursuant to the SSDI Offset provision  
11 during the limitations period. Id. at Ex. O. Thus, there is a  
12 question of fact for the jury whether Defendant's alleged wrongs are

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14 grounds must have included the allegation in their pleadings; this  
15 rule applies even where the tolling argument is raised in opposition  
16 to summary judgment." Wasco, 435 F.3d at 991. The Court finds that  
17 dicta not controlling here for the reasons identified recently in  
Grisham v. Philip Morris, Inc., \_\_ F. Supp. 2d \_\_\_, 2009 WL 4019366,  
at \*4 (C.D. Cal. Oct. 7, 2009).

18 Burdick's evidence is properly before the Court. Defendant seeks  
19 to prevail on this issue on technical grounds despite taking discovery  
20 on the very issues it claims were improperly pled. For example,  
21 Defendant has highlighted frequently that Burdick did not read the  
22 Certificate and did not request the Brochure despite a disclaimer in  
23 the Fact Sheet pointing to it. See, e.g., Section III.D.2.a & b.  
24 Defendant also long ago discovered the time and manner in which  
25 Burdick discovered the SSDI Offset provision. See, e.g., Merten Decl.  
26 Ex. 4 at 119 (Docket # 79) (February 2008 deposition of Mary Burdick  
27 in which she testified that, upon receiving a November 2004 letter  
28 from Defendant, she was "flabbergasted" and "shocked" because she  
"never knew anything about this before"). Moreover, although exactly  
when Defendant became aware that Burdick would rely on this theory is  
unclear, it was before the close of discovery. See Pl.'s Opp'n to  
Def.'s MSJ at 9-10 (asserting theory on October 23, 2008). Under  
these circumstances, the Court finds the issue properly before it.  
Cf. Coleman v. Quaker Oats Co., 232 F.3d 1271, 1292-93 (9th Cir. 2000)  
(plaintiffs could not oppose summary judgment on an unpled theory  
because it would prejudice defendants as it was revealed only after  
close of discovery and further discovery would be necessary); see also  
Grisham, 2009 WL 4019366, at \*5-6.

1 multiple, continuous acts, some of which occurred during the  
2 limitations period.

3 Accordingly, the Court finds that Defendant is not entitled to  
4 summary judgment on Burdick's FAL claim on the ground that it was  
5 untimely filed.

6 **B. ERISA PREEMPTION**

7 Defendant next contends that the UCL and FAL claims are preempted  
8 by the Employee Retirement Income Security Act of 1974, 29 U.S.C. §  
9 1001 *et seq.* ("ERISA") because they relate to the process of  
10 converting Burdick's insurance coverage. See Def.'s MSJ at 15.  
11 Neither party disputes that the Group Plan offered by Burdick's prior  
12 employer, and in which Burdick was a participant, qualifies as an  
13 ERISA plan. Neither party contends that the converted policy under  
14 which Burdick claimed LTD benefits is an ERISA plan. Thus, the  
15 dispute is whether claims arising out of alleged misrepresentations as  
16 to the coverage provided by the latter policy are preempted by ERISA  
17 because such misrepresentations were made during the process of  
18 converting from an ERISA-covered policy. The Court finds that such  
19 claims are not preempted.

20 "ERISA contains one of the broadest preemption clauses ever  
21 enacted by Congress." Greany v. W. Farm Bur. Life Ins. Co., 973 F.2d  
22 812, 817 (9th Cir. 1992) (quoting PM Group Life Ins. v. W. Growers  
23 Assur. Trust, 953 F.2d 543, 545 (9th Cir. 1992)). Indeed, ERISA  
24 preempts all laws that "relate to" an employee benefit plan. See 29  
25 U.S.C. § 1144(a) (Section 514(a)). While Section 514(a)'s "relate to"  
26 language is construed expansively, "the preemptive power of ERISA is  
27 not without limit." Campbell v. Aerospace Corp., 123 F.3d 1308, 1311  
28 (9th Cir. 1997). The Supreme Court has instructed that Section

1 514(a)'s "relate to" language should be construed in light of ERISA's  
2 objectives, which include the "central objectives" of protecting  
3 employee interests and providing administrative ease for employers.  
4 See Waks v. Empire Blue Cross/Blue Shield, 263 F.3d 872, 875 (9th Cir.  
5 2001) (citing N.Y. State Conf. of Blue Cross & Blue Shield Plans v.  
6 Travelers Ins. Co., 514 U.S. 645, 656 (1995) and Ingersoll-Rand Co. v.  
7 McClendon, 498 U.S. 133, 137 (1990)).

8 Defendant argues that the Court need not evaluate the "relate to"  
9 language in light of those objectives, however, because the issue here  
10 is controlled by Ninth Circuit authority. Defendant relies almost  
11 exclusively on Greany, 973 F.2d 812. In that case, the plaintiff had  
12 changed jobs and was in the process of converting his insurance  
13 coverage from the ERISA plan provided by his former employer. The  
14 insurer incorrectly stated the date that the ERISA plan's coverage  
15 would terminate. The plaintiff's wife went into premature labor  
16 before the termination date provided by the insurer but after the  
17 correct termination date. The plaintiff then brought suit under state  
18 law to recover uncovered expenses from his prior employer's ERISA  
19 plan, arguing that the employer was negligent in providing an  
20 inadequate conversion benefit. The Court held that "the individual  
21 conversion benefits are part of the ERISA plan and are thus governed  
22 by ERISA" because the prior employer's ERISA plan "provides for the  
23 conversion benefit" whose scope was at issue. Id. at 817. As  
24 explained by a later Ninth Circuit panel, "Greany held only that the  
25 conversion right, not the conversion policy, was subject to ERISA."  
26 Waks, 263 F.3d at 877.

27 Greany does not control here. Most notably, the Greany plaintiff  
28 was attempting to recover benefits from the ERISA plan, while Burdick

1 is attempting to recover benefits solely from the converted plan.  
2 Similarly, the Greany plaintiff was alleging that the defendant made  
3 erroneous statements as to the temporal scope of his benefits under  
4 the ERISA plan, while Burdick is alleging that Defendant  
5 misrepresented the benefits provided in the converted plan. As Waks  
6 makes clear, the preemption analysis is different where the  
7 plaintiff's claims are not brought under an ERISA plan and are not  
8 claims for conversion rights under such a plan. 263 F.3d at 877.  
9 Burdick's UCL and FAL claims are not brought under an ERISA plan and  
10 are not claims for conversion rights under an ERISA plan. Thus, prior  
11 Ninth Circuit law has not settled the issue before the Court.

12 Defendant attempts to avoid any factual distinctions between  
13 Greany and this case by stretching the holding of Greany as providing  
14 that "**any** alleged wrongful conduct that occurred during the process of  
15 converting from an ERISA plan to individual coverage is governed by  
16 ERISA." Def.'s MSJ Reply at 8 (Docket # 89) (emphasis in original).  
17 Greany made no such holding. Moreover, accepting Defendant's argument  
18 would run afoul of other Ninth Circuit law. In Dishman v. UNUM Life  
19 Insurance Company of America, the defendant terminated the disability  
20 benefits the plaintiff had been receiving under an ERISA plan. 269  
21 F.3d 974, 978-79 (9th Cir. 2001). The plaintiff brought suit not only  
22 for the termination of his benefits under ERISA, but also for damages  
23 under California's privacy laws based on the manner in which the  
24 defendant investigated the plaintiff's disability. Id. at 979. The  
25 defendant argued that the state law claim must "relate to" the ERISA  
26 plan, "because but for the plan's relationship of insurer and insured,  
27 [the defendant] would have had no need to investigate [the  
28 plaintiff's] claim of disability." Id. at 983-84. The Ninth Circuit

1 emphatically rejected that argument as "smack[ing] of the 'uncritical  
2 literalism'" eschewed by the Supreme Court. Id. at 984. The Court  
3 similarly rejected the defendant's argument that preemption must exist  
4 because the alleged misconduct occurred during the course of the  
5 defendant's administration of the plan. Id. ("The fact that the  
6 conduct at issue allegedly occurred 'in the course of [the  
7 defendant's] administration of the plan' does not create a  
8 relationship sufficient to warrant preemption.") "[T]he objective of  
9 Congress in crafting Section 1144(a) was not to provide ERISA  
10 administrators with blanket immunity from garden variety torts which  
11 only peripherally impact daily plan administration." Id.

12 Although the claims in Dishman differ in some respects, the same  
13 rationale applies here. That Defendant's alleged misconduct with  
14 respect to a non-ERISA plan occurred during the conversion process is  
15 insufficient to find Burdick's claims preempted. Any connection  
16 between the ERISA plan and Burdick's claim is too tenuous, remote and  
17 peripheral for preemption to occur. See id.

18 Nor does the Court find that the objectives of ERISA weigh in  
19 favor of a finding of preemption here. To the contrary, the policy of  
20 protecting an employee's interest weighs strongly against preemption.  
21 Moreover, Defendant has provided no argument as to how allowing claims  
22 for misrepresentations related to a converted policy interferes with  
23 the desire for nationally-uniform administration of employee benefit  
24 plans. As the conduct alleged in this case has only a tangential  
25 relationship to the ERISA plan, the Court finds that it does not  
26 interfere with that goal.

27 Accordingly, the Court rejects Defendant's argument that the UCL  
28 and FAL claims are preempted by ERISA.

1           **C.     MORADI-SHALAL**

2           Defendant next argues that Burdick brought her UCL claim as an  
3 improper end-run around Moradi-Shalal v. Fireman's Fund Insurance  
4 Companies, 46 Cal. 3d 287 (1988). See Def.'s Opp'n to Pls.' MSJ at 21  
5 (Docket # 122). In that case, the California Supreme Court held that  
6 the Unfair Insurance Practice Act ("UIPA"), Insurance Code §§ 790 et  
7 al., did not create a private cause of action against insurers for  
8 violations of Ins. Code § 790.03(h). Moradi-Shalal, 46 Cal. 3d at  
9 304-05. Following Moradi-Shalal, several courts have rejected efforts  
10 by plaintiffs to circumvent the barrier to or prohibition of private  
11 UIPA claims by relabeling them as claims brought under the unfair  
12 competition statute. See, e.g., Maler v. Superior Court, 220 Cal.  
13 App. 3d 1592, 1598 (1990).

14           But Burdick has not simply relabeled a claim for UIPA violations  
15 as one under the UCL. Instead, she asserts a UCL claim based on the  
16 violation of a host of other statutory and regulatory provisions.  
17 California courts have consistently held that Moradi-Shalal does not  
18 prevent a plaintiff from bringing a UCL claim for unlawful business  
19 practices predicated on a provision other than those in the UIPA even  
20 if the conduct at issue may also be a UIPA violation. Manufacturers  
21 Life Ins. Co. v. Superior Court, 10 Cal. 4th 257, 283-84 (1995)  
22 (Moradi-Shalal did not preclude UCL cause of action predicated on  
23 violation of the Cartwright Act even though the alleged conduct may  
24 also violate the UIPA); Zhang v. Superior Court, 178 Cal. App. 4th  
25 1081, 100 Cal. Rptr. 3d 803, 807-09 (Oct. 29, 2009) (same for UCL  
26 claim based on fraudulent misrepresentations and misleading  
27 advertising); AICCO, Inc. v. Insurance Co. of N. Am., 90 Cal. App. 4th  
28 579, 596-97 (2001) (same for UCL claim based on violation of Insurance

1 Code § 1457); State Farm Fire & Casualty Co. v. Superior Court, 45  
2 Cal. App. 4th 1093, 1105-08 (1996) (same for UCL claim based on common  
3 law fraud and breaches of the implied covenant of good faith),  
4 abrogated on other grounds by Cel-Tech Communications, Inc. v. Los  
5 Angeles Cellular Telephone Co., 20 Cal. 4th 163 (1999); see also  
6 Chabner v. United of Omaha Life Ins. Co., 225 F.3d 1042, 1048-50 (9th  
7 Cir. 2000) (Moradi-Shalal did not preclude UCL cause of action  
8 predicated on violation of Insurance Code § 10144 despite argument  
9 that conduct was regulated by UIPA). Indeed, the California Supreme  
10 Court explained that the UIPA "neither creates new private rights *nor*  
11 *destroys old ones*" and that the UIPA "preserves *any* preexisting civil  
12 or criminal liability which the insurer might face under *other*  
13 *statutory or decisional law.*" Manufacturers Life, 10 Cal. 4th at 279-  
14 80 (emphasis in original). Based on that view of the UIPA,  
15 Manufacturers Life affirmed the court of appeal's holding that, while  
16 a "plaintiff could not plead around [Moradi-Shalal] by relying on  
17 conduct which violates *only* the UIPA as the basis for a [UCL] cause of  
18 action," a UCL cause of action could be maintained based on conduct  
19 violating the UIPA if it was also predicated on a violation of the  
20 Cartwright Act. Id. at 283 (emphasis added). Given that Burdick's  
21 UCL claim is predicated on the violation of laws other than the UIPA,  
22 she is not simply relabeling a UIPA claim as a UCL claim.

23 Defendant relies principally on Textron Financial Corporation v.  
24 National Union Fire Insurance Company of Pittsburgh, 118 Cal. App. 4th  
25 1061 (2004) in arguing for the contrary result. The Textron opinion  
26 contains sweeping language that allegations of "the type of activities  
27 covered by the UIPA" cannot give rise to a UCL claim. As an initial  
28 matter, the Court notes that very recent California Court of Appeal

1 authority expressly rejects Textron. Zhang, 100 Cal. Rptr. 3d at 806,  
2 808-09. Thus, to the extent Textron stands for the proposition that  
3 conduct that falls within the UIPA can never give rise to a UCL  
4 violation, the Court finds it contrary to the great weight of  
5 authority and declines to follow it for the reasons expressed in  
6 Zhang. Moreover, the Court finds that allowing Burdick to pursue her  
7 UCL claim is not necessarily inconsistent with Textron when taken in  
8 context. It appears that the Textron plaintiffs had merely repackaged  
9 a UIPA claim as a violation of the UCL's "unfair" prong. See 118 Cal.  
10 App. 4th at 1070-71. The court rejected such relabeling, concluding  
11 that "merely alleging these purported acts constitute unfair business  
12 practices under the unfair competition law is insufficient to overcome  
13 Moradi-Shalal." Id. Thus, Textron did not squarely address whether  
14 the plaintiff could predicate a UCL claim on other statutes or  
15 regulations.<sup>18</sup> Rather, the plaintiffs simply relabeled claims that  
16 would otherwise fall within the UIPA as "unfair" business practices.  
17 That concern is not present in this case.

18 Accordingly, the Court concludes that Burdick's UCL claim is not  
19 barred by Moradi-Shalal.<sup>19</sup>

20 **D. WHETHER ISSUES OF FACT EXIST AS TO BURDICK'S UCL CLAIM.**

21 Burdick also moved for summary adjudication on her UCL claim. As

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23 <sup>18</sup> Indeed, the Textron court acknowledged that the California  
24 Supreme Court had held that violations of the Cartwright Act are  
25 actionable under the UCL even if the alleged conduct also violated the  
26 UIPA. See id. at 1071, 1072.

27 <sup>19</sup> Defendant also makes this argument with respect to Burdick's  
28 FAL claims. See Def.'s Opp'n to Pls.' MSJ at 21. Defendant has  
provided no separate discussion of the impact of Moradi-Shalal on FAL  
claims. For the reasons discussed above, the Court concludes that  
Burdick is not precluded from asserting an FAL claim even if the  
conduct at issue might also violate the UIPA.

1 predicates giving rise to a UCL violation, Burdick proposed numerous  
2 instances of "unlawful" conduct, as well as asserting that Defendant's  
3 conduct is actionable as unfair and fraudulent. Pls.' MSJ at 17-26.  
4 Defendant denied that Burdick is entitled to summary adjudication that  
5 its conduct was unlawful, unfair and/or fraudulent. Def.'s Opp'n to  
6 Pls.' MSJ at 22-30. Defendant also raised myriad preliminary  
7 arguments as to why Burdick's claim fails, which the Court will  
8 address below before it reaches whether Burdick is otherwise entitled  
9 to summary adjudication on this claim.

10 **1. Whether Burdick's UCL Claim Is Sufficiently Pled.**

11 Defendant asserts that Burdick cannot establish a UCL claim based  
12 on many of the proposed predicates because the Complaint does not  
13 plead them with sufficient particularity. See id. at 24-30.  
14 Defendant relies on case law applying Fed. R. Civ. P. 9(b), such as  
15 Vess v. Ciba-Geigy Corporation USA, 317 F.3d 1097, 1102-05 (9th Cir.  
16 2003), and those purporting to apply a heightened pleading standard  
17 for UCL claims, such as Khoury v. Maly's of California, Inc., 14 Cal.  
18 App. 4th 612, 619 (1993). As an initial matter, the California  
19 Supreme Court has held that, "contrary to the suggestion . . . that  
20 the court may require fact-specific pleading [for UCL claims], the  
21 well-settled rule is otherwise except in pleading fraud." Quelimane  
22 Co. v. Stewart Title Guaranty Co., 19 Cal. 4th 26, 46-47 (1998); see  
23 also Burrows v. Orchid Island TRS, LLC, No. 07CV1567-BEN (WMC), 2008  
24 WL 744735, at \*5 (S.D. Cal. Mar. 18, 2008). Thus, it is not entirely  
25 clear that any heightened pleading standard applies to some of  
26 Burdick's purported UCL predicate violations.

27 Even assuming heightened pleading standards apply here, however,  
28 Defendant cannot prevail on this argument because it objects to the

1 sufficiency of the Complaint's detail too late. Defendant did not  
2 challenge the particularity of the complaint until opposing Burdick's  
3 motion for summary judgment. As Burdick pointed out, the cases relied  
4 upon by Defendant involve challenges to the pleadings made through  
5 motions to dismiss. That is not surprising given that the reason for  
6 subjecting certain claims to heightened pleading standards is to  
7 assure that defendants are apprised of the allegations against them in  
8 sufficient detail to frame an adequate responsive pleading. See  
9 Todaro v. Orbit Int'l Travel, Ltd., 755 F. Supp. 1229, 1234 (S.D.N.Y.  
10 1991). Objections to the sufficiency of the pled allegations raised  
11 after the responsive pleading has been filed are waived. Id.; Davsko  
12 v. Golden Harvest Prods., Inc., 965 F. Supp. 1467, 1474 (D. Kan. 1997)  
13 ("a Rule 9(b) objection is waived unless made as a separate motion  
14 prior to or concurrent with the filing of a responsive pleading"). As  
15 a result, parties may not raise such a challenge on summary judgment.  
16 See, e.g., Davsko, 965 F. Supp. at 1474; Burton v. R.J. Reynolds  
17 Tobacco Co., 181 F. Supp. 2d 1256, 1262 n.5 (D. Kan. 2002)); United  
18 Nat'l Records, Inc. v. MCA, Inc., 609 F. Supp. 33, 38-39 (N.D. Ill.  
19 1984). The Court likewise concludes that it is not proper for  
20 Defendant to raise this argument at this late stage of the litigation.

21 Moreover, no point would be served in accepting Defendant's  
22 argument at this point. Courts generally do not dismiss claims with  
23 prejudice for failing to plead with sufficient specificity. See Vess,  
24 317 F.3d at 1108. Given that discovery is closed in this case, the  
25 practical effect of accepting Defendant's argument would be that  
26 Burdick would be permitted to amend her complaint and a new summary  
27 adjudication motion could be filed raising identical arguments based  
28 on the evidence already before the Court.

1 Accordingly, the Court rejects Defendant's argument that the  
2 factual predicates to the UCL claim have not been pled with sufficient  
3 particularity.<sup>20</sup>

4 **2. Insurance Code § 330 et seq.**

5 Having determined that the factual predicates to Burdick's  
6 alleged predicate UCL violations were sufficiently pled, the Court now  
7 turns to the substance of those allegations. Burdick first argues  
8 that Defendant failed to comply with California Insurance Code § 330  
9 et seq. California law places "heavy burdens of disclosure upon both  
10 parties to a contract of insurance." West Coast Life Ins. Co. v.  
11 Ward, 132 Cal. App. 4th 181, 187 (2005). Every party to an insurance  
12 contract must "communicate to the other, in good faith, all facts  
13 within his knowledge which are . . . material to the contract . . .  
14 and which the other has not the means of ascertaining." O'Riordan v.  
15 Federal Kemper Life Assur., 36 Cal. 4th 281, 286 (2005) (quoting Cal.  
16 Ins. Code § 332). "Materiality" is determined by "the probable and  
17 reasonable influence of the facts upon the party to whom the  
18 communication is due." Id. (quoting Cal. Ins. Code § 334). When a  
19 party has engaged in "concealment" - which is defined as the  
20 "[n]eglect to communicate that which a party knows, and ought to  
21

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22 <sup>20</sup> Defendant also asserts that Burdick raised new theories on  
23 summary judgment without previously alleging their "factual  
24 predicates" in violation of Coleman v. Quaker Oats Co., 232 F.3d 1271  
25 (9th Cir. 2000). The Court only addresses here two of the UCL  
26 predicates on which Burdick relies, Insurance Code § 330 et seq. and  
27 10 Cal. Code Regs. § 2536.2(a)(1). Defendant does not argue that the  
28 former is barred by Coleman. See Def.'s Opp'n to Pls.' MSJ at 22-23.  
Moreover, the Court finds that the Complaint sufficiently provides  
notice for both of the "factual predicates" relevant to those alleged  
violations. See, e.g., Compl. ¶ 60(b) (alleging that Defendant  
violated the UCL by "[m]isrepresenting to policyholders the amount of  
monthly disability payments that will be paid under the policy").

1 communicate" - even unintentional concealment is actionable. Id. at  
2 286-87 (quoting Cal. Ins. Code §§ 330, 331).

3 A violation of these provisions constitutes "unlawful" conduct  
4 giving rise to a UCL claim. See Pastoria v. Nationwide Ins., 112 Cal.  
5 App. 4th 1490, 1496-97 (2003).<sup>21</sup> Burdick asserts that Defendant did  
6 not comply with those provisions because it failed to provide Burdick  
7 material information about the SSDI Offset provision.

8 **a. Relevant Communications**

9 To determine whether Defendant failed to communicate information  
10 about the SSDI Offset provision to Burdick, the Court must first  
11 determine what communications were made to Burdick. It is undisputed  
12 that Defendant sent Burdick the Certificate and the Facts Sheet. See  
13 April 2 Order at 3-6. The parties disagree, however, on whether  
14 Burdick received the "Facts About Your Conversion Privilege" Brochure.  
15 Burdick testified that she did not receive the Brochure with her Fact  
16 Sheet. Defendant contends that a triable issue of fact exists on that  
17 point because its "custom and practice" is to send the Brochure to its  
18 applicants. See Def.'s Statement of Genuine Issues ("DSGI") at 8  
19 (Docket # 123). The Court holds that Defendant failed to raise a  
20 triable issue of fact regarding whether Burdick received the  
21 Brochure.<sup>22</sup>

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22  
23 <sup>21</sup> Dicta in recent authority casts some doubt that violations of  
24 these provisions constitutes "unlawful" conduct for UCL purposes.  
25 United Guar. Mortg. Indem. Co. v. Countrywide Financial Corp., \_\_\_ F.  
26 Supp. 2d \_\_\_, 2009 WL 3199844, at \* 22 (C.D. Cal. Oct. 5, 2009).  
27 Defendant failed to raise this argument, however.

28 <sup>22</sup> The Court previously noted that Burdick asserts that she  
never received the Brochure and Defendant disputed that by asserting  
that its "custom and practice" is to send it to applicants. April 2  
Order at 3 n.4. The Court did not decide, however, whether  
Defendant's evidence was sufficient to create a triable issue of fact.

1 At her deposition, Burdick gave specific testimony affirmatively  
2 asserting that she did not receive the Brochure with the Facts Sheet.  
3 In particular, after reviewing a copy of Defendant's Brochure at her  
4 deposition, Burdick testified as follows:

5 Q. Have you ever seen a document like this before?

6 A. Yes.

7 Q. When did you see this document?

8 A. After my attorney gave it to me after he had received it  
9 from you, I believe.

10 Q. . . . Did you receive a document like this at any time  
11 prior to initiating your lawsuit?

12 A. No.

13 Q. Is it possible that you received this document but you  
14 just don't remember right now?

15 A. No, because I remember looking at this document and  
16 reading down to the bottom, "This Facts Sheet is not valid  
17 unless attached to the 'Facts About Your Conversion  
18 Privilege' brochure." And I looked for the conversion  
19 privilege brochure in the envelope and there wasn't one.  
20 And I remember thinking what does this mean it's not valid  
21 if there isn't a brochure, but here's the information, fine.  
22 I remember thinking they should have sent the brochure, but  
23 I didn't get it.

24 Burdick Dep. 77:11-78:7 (Merten Decl. ISO Def.'s MSJ Ex. 4 (Docket #  
25 79)). Accordingly, Burdick provided detailed testimony specifically  
26 and affirmatively asserting that she did not receive the Brochure  
27 until after the litigation was commenced.

28 Burdick's deposition testimony is sufficient to meet her burden

1 of showing that there is no genuine issue of fact that she did not  
2 receive the Brochure. Thus, the burden shifts to Defendant to "come  
3 forth with specific facts to show that a genuine issue of material  
4 fact exists." Hansen v. United States, 7 F.3d 137, 138 (9th Cir.  
5 1993). "When the nonmoving party relies only on its own affidavits to  
6 oppose summary judgment, it cannot rely on conclusory allegations  
7 unsupported by factual data to create an issue of material fact." Id.  
8 Defendant has presented precisely that type of conclusory declaration,  
9 attempting to counter Burdick's specific testimony with a declaration  
10 stating in general terms that: "The Conversion Brochure is a document  
11 Union Security sends to all its applicants . . . It is Union  
12 Security's custom and practice to send a Conversion Brochure and  
13 Premium Sheet to all applicants." Thames Decl. at ¶¶ 6-7 (Merten  
14 Decl. in Opp'n to Pls.' MSJ at Ex. 17 (Docket # 125)).<sup>23</sup> In light of  
15 Burdick's specific and affirmative testimony to the contrary,  
16 Defendant's declaration fails to create an issue of fact as to whether  
17 Burdick received the Brochure.

18 Moreover, the case law relied upon by Defendant does not warrant  
19 a contrary result. See DSGI 8 (citing Hansen, 7 F.3d 137, Tinder v.  
20 Pinkerton Security, 305 F.3d 728 (7th Cir. 2002), and I.V. Servs. of  
21 Am., Inc. v. Inn Dev. & Mgmt., Inc., 182 F.3d 51 (1st Cir. 1999)).  
22 Defendant is correct that the cited cases held that no triable issue  
23 of fact existed that a document was sent and/or received. But those  
24 cases involved (1) an assertion that the purported recipient did not  
25 "recall" receiving the document and/or (2) specific, detailed evidence

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26  
27 <sup>23</sup> Burdick objected to these paragraphs of the declaration on a  
28 variety of grounds. Pls.' Objections to Def.'s Evidence at 8-9  
(Docket # 131). As the Court finds the paragraphs insufficient to  
create a triable issue of fact, the objections are overruled as moot.

1 from the sender that the document was actually sent. For example, the  
2 Ninth Circuit held that no triable issue of fact existed that an IRS  
3 notice was sent to the defendants where the IRS presented a computer-  
4 generated report specifically indicating that the notice was sent on a  
5 particular date, while the defendants provided only a conclusory  
6 assertion that they did not receive it. Hansen, 7 F.3d at 138.  
7 Similarly, the Seventh Circuit held that no triable issue of fact  
8 existed that an ERISA-related brochure was sent to the plaintiff  
9 because the defendant submitted two affidavits providing specific  
10 details indicating that the brochure was sent to the plaintiff, while  
11 the plaintiff simply testified that she did not recall receiving it.  
12 Tinder, 305 F.3d at 732, 735-36. The situation in those cases is  
13 markedly different from the situation here where Burdick has provided  
14 detailed testimony about not receiving the Brochure and Defendant has  
15 responded with only a generalized declaration stating that its custom  
16 is to send it.

17 Accordingly, the relevant communications between the parties  
18 include the Certificate and the Facts Sheet, but not the Brochure.

19 **b. Was There a Violation?**

20 Defendant was required to communicate to Burdick facts material  
21 to her LTD insurance. Defendant first contends that it did  
22 communicate such facts to Burdick because it "clearly, plainly and  
23 conspicuously" disclosed the SSDI Offset provision in the Certificate  
24 and Brochure. As to the Brochure, the undisputed facts reveal that  
25 Burdick never received it. That leaves Defendant relying only on the  
26 Certificate, and the Court has already held that the SSDI Offset  
27 provision was inconspicuously placed. An inconspicuous provision does  
28 not constitute adequate disclosure of the fact of its existence.

1           Moreover, the existence and nature of the SSDI Offset provision  
2 was material information. The inquiry on materiality is a subjective  
3 one; the critical question is the effect disclosure of the concealed  
4 facts would have had on the particular insured. See West Coast Life  
5 Ins., 132 Cal. App. 4th at 187. Burdick provided unrebutted testimony  
6 that she would not have bought the LTD insurance from Defendant had  
7 she known that her benefits would have been reduced so significantly.  
8 See, e.g., Burdick Decl. ¶ 31 & Ex. P. Burdick also stated that the  
9 amount of monthly LTD benefits, along with the test for determining  
10 disability, were the "most important things to me about my LTD  
11 insurance." Burdick Decl. ¶ 14. No reasonable jury could find that  
12 Defendant's failure to disclose the offset provision was not  
13 subjectively material to Burdick.

14           Defendant next argues that even if it failed to disclose the SSDI  
15 Offset provision, it cannot be held to violate these insurance  
16 provisions because Burdick could have ascertained the information  
17 herself and/or neglected to make sufficient factual inquiries to  
18 obtain the information. Def.'s Opp'n to Pls.' MSJ at 22-23 (citing  
19 Cal. Ins. Code §§ 333, 336). The Court finds neither argument  
20 persuasive.

21           Section 333 provides that neither party must communicate facts  
22 when, "in the exercise of ordinary care, the other ought to know" of  
23 the facts. Defendant argues that Burdick should have discovered the  
24 inconspicuous SSDI Offset provision by reading the Certificate in its  
25 entirety. Def.'s Opp'n to Pls.' MSJ at 23. The Court finds that  
26 argument unpersuasive. See Haynes v. Farmers Ins. Exchange, 32 Cal.  
27 4th 1198, 1210-11 (2004). Defendant alternatively argues that Burdick  
28 did not exercise reasonable care because she should have inquired

1 about the missing Brochure given that the Facts Sheet said that it was  
2 "not valid unless attached to the 'Facts About Your Conversion  
3 Privilege' brochure." Had the Facts Sheet provided a significant  
4 basis for suspecting the existence of the SSDI Offset provision,  
5 Defendant might have a plausible argument. But the Facts Sheet  
6 provides no hint of any such provision and, to the contrary, states  
7 "Monthly Benefit: \$2,083.00." It stretches "ordinary care" too far to  
8 contend that it was Burdick's duty, in the face of Defendant's failure  
9 to send her what it considers to be relevant materials, to hunt down  
10 additional documents because they are referenced in the materials that  
11 she actually received.

12 Defendant's parallel argument made under Section 336 similarly  
13 fails. Section 336 provides that a party's "neglect to make  
14 inquiries" concerning material facts may constitute a waiver if those  
15 facts "are distinctly implied in other facts of which information is  
16 communicated." Section 336 does not mean that the least hint will  
17 necessarily require further inquiries, however. Instead, a waiver is  
18 found only where the fact is "distinctly implied," such as where a  
19 party did not follow up on "obvious leads" about the undisclosed  
20 information. See Old Line Life Ins. Co. v. Superior Court, 229 Cal.  
21 App. 3d 1600, 1606 (1991); see also Walbrook Ins. Co. v. Spiegel, CV  
22 91-1206 SVW, 1993 WL 580759, at \*5 (C.D. Cal. Aug. 6, 1993)  
23 ("'Distinctly implied' means very strongly implied."). Defendant  
24 contends that Burdick should have made further inquiries based on the  
25 SSDI Offset provision in the Certificate itself. But the Court has  
26 found as a matter of law that Defendant placed that provision in the  
27 Certificate in an inconspicuous manner. Therefore, it cannot serve as  
28 the basis of an assertion of waiver.

1 Accordingly, the Court finds that Defendant failed to communicate  
2 material facts to Burdick in violation of Insurance Code § 330 et seq.  
3 Thus, there is no triable issue of fact that Defendant engaged in  
4 unlawful conduct in violation of the UCL.

5 **3. 10 Cal. Code Regs. 2536.2**

6 Burdick also argues that Defendant failed to comply with the  
7 regulations promulgated by the California Insurance Commissioner. For  
8 example, she points to a regulation prohibiting the use of misleading  
9 advertising:

10 No advertisement shall omit information or use words,  
11 phrases, statements, references or illustrations if the  
12 omission of such information or use of such words, phrases,  
13 statements, references or illustrations has the capacity,  
14 tendency or effect of misleading or deceiving purchasers or  
15 prospective purchasers as to the nature or extent of any  
16 policy benefit payable, loss covered or premium payable.  
17 The fact that the policy offered is made available to a  
18 prospective insured for inspection prior to consummation of  
19 the sale or an offer is made to refund the premium if the  
20 purchaser is not satisfied, does not remedy misleading  
21 statements.

22 10 Cal. Code Regs. § 2536.2(a)(1). As the guideline explains, Section  
23 2536(a) prohibits "words, phrases or illustrations which create  
24 deception to the reader by omission or commission." Guideline 10 Cal.  
25 Code Regs. § 2536.2(a)(1). The term "advertising" is construed  
26 broadly to include "[d]escriptive literature and sales aids of all  
27 kinds . . . including . . . circulars, leaflets, booklets, depictions,  
28 illustrations and form letters." 10 Cal. Code Regs. § 2535.3(a).

1 Moreover, the guideline specifies that an advertisement extends "to  
2 the use of all media for communication to specific members of the  
3 general public." Guideline 10 Cal. Code Regs. § 2535.3(a).

4 While the parties do not cite to any authority applying Section  
5 2536, the Court finds that Defendant violated its plain language. The  
6 materials that Defendant sent to Burdick omitted reference to the SSDI  
7 Offset provision and used words that had the effect of misleading her  
8 regarding the extent of any policy benefits payable. For example,  
9 Defendant sent Burdick a Facts Sheet stating that the policy provided  
10 a "Monthly Benefit: \$2,083" and omitted any reference to the SSDI  
11 Offset provision. See Burdick Decl. Ex. C. Burdick was not disavowed  
12 of that belief until she applied for LTD benefits with Defendant.  
13 Burdick Decl. ¶ 19. At the very least, the Fact Sheet had the  
14 capacity of deceiving Burdick into believing she would receive \$2,083  
15 per month in benefits in the event that she became disabled.

16 Accordingly, the Court finds that Defendant did not comply with  
17 10 Cal. Code Regs. § 2536.2(a)(1). Thus, there is no triable issue of  
18 fact that Defendant engaged in unlawful conduct in violation of the  
19 UCL.<sup>24</sup>

#### 20 **4. Causation and Injury**

21 Burdick has also established causation and injury pursuant to the  
22 standards outlined in In Re: Tobacco II Cases, 46 Cal. 4th 298 (2009).  
23 The California Supreme Court held that the UCL's causation requirement  
24 imposes an actual reliance requirement on plaintiffs prosecuting

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25  
26  
27 <sup>24</sup> Because the Court finds that Defendant's conduct is  
28 "unlawful" for purposes of the UCL based on the above Insurance Code  
provision and Insurance Code regulation, the Court declines to address  
the other grounds for a UCL violation asserted by Plaintiff.

1 private actions under the UCL's fraud prong. Id. at 326.<sup>25</sup> Actual  
2 reliance is proven through a showing that a misrepresentation or  
3 nondisclosure "was an immediate cause of the injury-producing conduct,  
4 [but] the plaintiff need not demonstrate that it was the only cause."  
5 Id. A presumption of reliance arises upon a showing of materiality.  
6 Id. at 327. As noted above, the Court has already made a finding of  
7 materiality. See Section III.D.2.b, supra. Indeed, Burdick provided  
8 un rebutted testimony that she would not have bought the LTD insurance  
9 from Defendant had she known that her benefits would have been reduced  
10 so significantly and that the amount of benefits was one of the most  
11 critical terms to her. Defendant has not rebutted that showing.  
12 Accordingly, there is no material issue of fact as to causation.

13 Moreover, Burdick suffered an injury in fact in having her LTD  
14 benefits wrongly reduced by Defendant.

##### 15 **5. Appropriate Relief**

16 Having established a UCL violation, the Court turns to the  
17 appropriate relief to be awarded to Burdick. Defendant argues that  
18 the relief sought in the Complaint goes beyond "restitution" and,  
19 thus, is not recoverable here. Def.'s MSJ at 32. It appears to the  
20 Court that Burdick herself claims restitution in the form of  
21 Defendant's payment of all offsets it has taken for SSDI benefits in  
22 the past based on its reliance on the SSDI Offset provision. See  
23 Pls.' MSJ at 29; Pls.' Brief re: Tobacco II Cases at 13 (Docket #  
24 176). Such relief constitutes restitution and is recoverable.

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25  
26 <sup>25</sup> Tobacco II Cases established the causation requirements for  
27 claims arising under the UCL's "fraud" prong and the Court noted that  
28 other types of UCL claims may have different standards. See 46 Cal.  
4th at 325 n.17. Nonetheless, the Court finds those standards  
instructive here.

1 Accordingly, the Court hereby **AWARDS** Burdick restitution in the amount  
2 of the reductions to her LTD benefits taken by Defendant as offsets  
3 pursuant to the SSDI Offset provision. The Court further awards  
4 prejudgment interest on such restitution. See Irwin v. Mascott, 112  
5 F. Supp. 2d 937, 956 (N.D. Cal. 2000).

6 Burdick also seeks injunctive relief. The basis for injunctive  
7 relief is generally irreparable injury and inadequacy of legal  
8 remedies. See Alaska Wilderness Recreation & Tourism Ass'n v.  
9 Morrison, 67 F.3d 723, 723 (9th Cir. 1995).<sup>26</sup> Burdick has not made  
10 such a showing. Accordingly, her claim for injunctive relief is  
11 denied.

#### 12 **E. VIOLATION OF THE FAL**

13 Burdick also moved for summary adjudication on her FAL claim.  
14 One element of an FAL cause of action is that the defendant knew or  
15 should have known that its advertising was false or misleading. See  
16 Cal. Bus. & Prof. Code § 17500; Churchill Village, LLC v. General

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17  
18 <sup>26</sup> Burdick's briefing relies heavily on federal authority. See,  
19 e.g., Pls.' MSJ Reply at 24. At oral argument, she asserted that  
20 California law applies in determining whether to award injunctive  
21 relief but did not articulate how California law differs from federal  
22 law. At any rate, Burdick has not established a right to injunctive  
23 relief under California law. "[I]n order to grant injunctive relief  
24 under section 17204 [of the UCL] . . . there must be a threat that the  
25 wrongful conduct will continue. Injunctive relief will be denied if,  
26 at the time of the order of judgment, there is no reasonable  
27 probability that the past acts complained of will recur, i.e., where  
28 the defendant voluntarily discontinues the wrongful conduct." Colgan  
v. Leatherman Tool Group, Inc., 135 Cal. App. 4th 663, 702 (2006);  
Feitelberg v. Credit Suisse First Boston, LLC, 134 Cal. App. 4th 997,  
1012 (2005) (the UCL's "injunctive remedy should not be exercised in  
the absence of any evidence that the acts are likely to be repeated in  
the future"). Defendant represented that it has ceased applying the  
SSDI Offset provision in light of the April 2 Order and Burdick does  
not assert otherwise. Burdick has not made a sufficient showing that  
there is a reasonable probability Defendant will invoke the SSDI  
Offset provision against her in the future.

1 Elec. Co., 169 F. Supp. 2d 1119, 1132 (N.D. Cal. 2000). While Burdick  
2 acknowledges that scienter requirement, see Pls.' MSJ at 25, she has  
3 not articulated grounds on which the Court could find no genuine issue  
4 of material fact as to this element of her claim. Since Burdick had  
5 the initial burden of showing no material issues of fact exist, her  
6 motion is **DENIED** as to the FAL claim.

#### 7 8 **IV. DEFENDANT'S MOTION FOR CERTIFICATION FOR INTERLOCUTORY APPEAL**

9 Defendant asks this Court to certify for interlocutory appeal two  
10 holdings of the April 2 Order: (1) that the SSDI Offset provision is  
11 inconspicuous and (2) that the reasonable expectations of insureds is  
12 determined based on the language in the policy. Because of the  
13 additional rulings made above and the changed posture of the case, the  
14 Court defers ruling on Defendant's motion for certification so the  
15 parties may consider their options.

16 Specifically, it appears to the Court that the only remaining  
17 claims to be adjudicated may be Burdick's claims for breach of  
18 contract and for violation of the FAL.<sup>27</sup> The remedies sought under  
19 those causes of action appear to be superfluous to the relief already  
20 granted by the Court in this Order and the April 2 Order. In the  
21 interest of litigating this matter expeditiously and efficiently, the  
22 Court believes it is both in the parties' best interest and consistent  
23 with the Federal Rules, Fed. R. Civ. P. 1 (rules should be  
24 administered to "secure the just, speedy, and inexpensive  
25 determination of every action and proceeding"), for the parties to

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26  
27 <sup>27</sup> It is also possible that some absent class members might seek  
28 to intervene to have their claims adjudicated, such as the UCL claims  
of those absent class members who applied for LTD benefits.

1 stipulate to final judgment to allow the immediate appeal of all  
2 issues in this litigation. The parties are ordered to meet and confer  
3 within 20 days to discuss how to resolve this matter.

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5 **V. CONCLUSION**

6 For the foregoing reasons, the Court hereby rules as follows:

- 7 • The Court lacks subject matter jurisdiction over the UCL and FAL  
8 claims for class members who have not applied for LTD benefits.  
9 • The Court decertifies the class as to the UCL and FAL claims.  
10 • The Court lacks subject matter jurisdiction over the declaratory  
11 relief claims of class members who have terminated their LTD  
12 insurance with Defendant. The Court has subject matter  
13 jurisdiction over the declaratory relief claims of class members  
14 who have not terminated their LTD insurance with Defendant.  
15 • The Court finds class treatment inappropriate for Plaintiffs'  
16 claim for rescission.  
17 • Burdick is entitled to summary adjudication on her UCL claim and  
18 is entitled to restitution in the amount by which her benefits  
19 have previously been offset as a result of Defendant's invocation  
20 of the SSDI Offset provision, as well as prejudgment interest.  
21 • Burdick is not entitled to summary adjudication on her FAL claim.

- 1 • The parties must meet and confer, and to file a status report  
2 with the Court within 20 days of the issuance of this order.  
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4 **IT IS SO ORDERED.**<sup>28</sup>

5 **DATED: December 9, 2009**



7 **AUDREY B. COLLINS**  
8 **UNITED STATES DISTRICT CHIEF JUDGE**

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27 <sup>28</sup> Myriad evidentiary objections were filed with the Court. To  
28 the extent the objections are inconsistent with this ruling, they are  
overruled. See Gates v. Deukmejian, 987 F.2d 1392, 1400 (9th Cir.  
1992).