

O

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)

ORDER RE: CROSS-MOTIONS FOR
SUMMARY JUDGMENT OR IN THE
ALTERNATIVE SUMMARY
ADJUDICATION AND DEFENDANT'S
MOTION FOR CLASS
DECERTIFICATION

Pending before the Court are the parties' Cross-Motions for Summary Judgment Or, In The Alternative, For Summary Adjudication ("Motions"). Both Defendant Union Security Insurance Company ("USIC" or "Defendant") and Plaintiffs filed Oppositions and Replies. Upon consideration of the materials submitted, the argument of counsel, and the case file, the Court **GRANTS IN PART** Defendant's Summary Judgment Motion and **GRANTS IN PART** Plaintiffs' Summary Judgment Motion.

Also pending before the Court is Defendant's motion to decertify the class. Plaintiffs opposed that motion and Defendant replied. Upon consideration of the materials submitted, the argument of

1 counsel, and the case file, the Court **GRANTS IN PART** Defendant's
2 Decertification Motion.

3 **I. FACTUAL AND PROCEDURAL BACKGROUND**

4 Plaintiff Mary Burdick challenges a Social Security Disability
5 Insurance Offset provision (the "SSDI Offset") in the Long Term
6 Disability ("LTD") coverage issued to her by USIC.¹ Burdick's policy
7 provided a maximum benefit of \$2,083 per month. After becoming
8 disabled, Defendant asserted that she was entitled to only \$284 per
9 month because of the SSDI Offset provision. As a result, Burdick
10 brought this class action against Defendant for (1) breach of
11 contract, (2) breach of the covenant of good faith and fair dealing,
12 (3) violations of California Business and Professions Code §§ 17500,
13 *et seq.*, (4) violations of California Business and Professions Code §§
14 17200, *et seq.*, and (5) declaratory relief. The Court granted
15 Burdick's motion to certify a class on March 25, 2008.

16 The Court has reviewed the parties' statements of undisputed
17 facts and statements of genuine issues.² Many of the material facts
18 are indeed undisputed; the parties differ primarily over the legal
19 conclusions that must be drawn from the facts.³

21 ¹ The policy was actually issued by Fortis Benefits Insurance
22 Company ("Fortis"). USIC is the successor in interest to Fortis.
Merten Decl. ISO Def's MSJ ("Merten Decl.") Ex. 1 at ¶ 4.

23 ² The Court will cite to the parties' statements of genuine
24 issues of fact frequently as establishing undisputed facts. For ease
of reference, the Court will refer to Defendant's Statement of Genuine
25 Issues In Opposition to Plaintiffs' Cross-Motion for Partial Summary
Judgment (Docket # 123) as "DSGI" and Plaintiffs' Response to
26 Defendant's Proposed Statement of Uncontroverted Facts (Docket # 84)
as "PSGI."

27 ³ Given that the Court defers ruling on several issues, as
28 discussed below, it does not include here all of the facts relevant to

1 Each class member in this litigation obtained LTD insurance from
2 USIC pursuant to Certificates of Insurance governed by USIC's Group
3 Policy No. 110000. DSGI 1. The process by which the class members
4 converted to the contested policy appears to be fairly standardized,
5 though some disputed issues exist. For Burdick, she was notified
6 that, upon leaving her employment, she was eligible to convert the LTD
7 coverage she had through her employer to a new coverage. See PSGI 6.
8 Burdick then obtained an enrollment form and applied for the converted
9 coverage. PSGI 7. In response, USIC sent Burdick a LTD conversion
10 premium facts sheet containing a premium quote. See DSGI 4; PSGI 8.
11 The facts sheet lists inter alia the amount of "Monthly Benefit" and
12 the "Quarterly Premium." USIC 000097 (Burdick Decl. ISO Plfs' MSJ
13 ("Burdick Decl.") Ex. C). For Burdick, the "Monthly Benefit" was
14 listed as \$2,083.00 and the quarterly premium as \$451.72. Id. The
15 facts sheet provides no specific mention of the SSDI Offset provision
16 and no indication that the "Monthly Benefit" is subject to any offset.
17 Id. The facts sheet also includes a statement that it "is not valid
18 unless attached to the 'Facts About Your Conversion Privilege'
19 brochure." Id.⁴

20 On the second through third pages of the "Facts About Your
21 Conversion Privilege" brochure (the "brochure"), it states under the
22 "AMOUNT OF BENEFIT" heading that "[t]he LTD benefit is the applicable

23 _____
24 each issue in the pending motions. It does include, however,
25 background facts and those relevant to the issues decided here.

26 ⁴ Burdick asserts that she did not receive any such brochure
27 with her facts sheet and Defendant disputes that, asserting that its
28 "custom and practice" is to send insureds the brochure. DSGI 8. The
parties also dispute whether brochures were generally sent out to
Plaintiffs with the facts sheet. PSGI 10.

1 rate of benefit multiplied by your covered pre-disability pay, minus
2 the applicable Offset Amount." USIC 002266-67 (Merten Decl. Ex. 7).
3 Further down on the third page, it states under the "OFFSET AMOUNT"
4 heading that "[t]he total of any benefits received from the following
5 sources will be subtracted from the LTD benefit paid: . . . (b)
6 disability benefits from any other employer-sponsored group disability
7 plan; Social Security, including dependent benefits payable because of
8 your disability; state temporary disability benefits; or any other
9 government plan." USIC 002267.

10 Following receipt of the facts sheet and (possibly for some class
11 members) the brochure, Plaintiffs submitted their first premium
12 payment to USIC. See DSGI 13. At that point, USIC issues a
13 Certificate of Group Insurance ("Certificate") to Plaintiffs. DSGI
14 13.⁵ The first page of the Certificate includes overarching, general
15 information such as the Policyholder's name and the policy number.
16 Burdick 152. The second page, entitled "**SCHEDULE**," lists the "Maximum
17 Benefit" amount. Burdick 153. For Burdick, the "Maximum Benefit" was
18 listed as \$2,083. The second page also has an orphaned footnote
19 (i.e., a footnote with no corresponding marker above on the page) that
20 states: "***The amount of insurance and benefit determining factors to
21 the coverage appear on the following pages of this Certificate." Id.
22 The third page, also entitled "**SCHEDULE**," states inter alia that the
23 "Schedule Amount" is "50% of *monthly pay* subject to a maximum Schedule

24
25 ⁵ The parties dispute what exactly constitutes the
26 "Certificate." See PSGI 21. For ease of reference, the Court refers
27 to the document at Exhibit E of the Burdick Declaration (Burdick 152-
28 171) as the "Certificate." Burdick disputes that she was sent the
Certificate as a matter of course, testifying that she was sent a
letter by USIC and had to specifically request that the Certificate be
sent. PSGI 11.

1 Amount of \$4,000 per month. For each day of a period less than a full
 2 month, the Schedule Amount will be 1/30th of the amount determined
 3 above." Burdick 154 (emphasis in original). There is no explicit
 4 mention in the Schedule of USIC's purported ability to offset the
 5 monthly benefits it owes insureds by other benefits received.

6 The next page of the Certificate provides a table of contents,
 7 including the following:

8 LONG TERM DISABILITY INSURANCE.....8
 9 Insurance Provided.....8
 10 Amount of Benefit.....8
 11 Offset Amount.....8
 12 Other Sources.....9
 13 Estimate of Benefits.....9

14 Burdick 155. The table of contents is followed by five pages of
 15 definitions. Burdick 156-60. There is no definition for "offset"
 16 provided. The next page provides information about the termination of
 17 the policy. Burdick 161.

18 The provisions that form the crux of this dispute come on the
 19 eleventh and twelfth pages of the Certificate (numbered pages 8 and
 20 9). They provide in relevant part:

21 **Amount of Benefit**

22 The amount of benefit we will pay is the Schedule Amount
 23 minus the Offset Amount. However, if the Schedule Amount
 24 plus the amount of benefits and payments from Other Sources
 25 is more than 70% of your *monthly pay*, your benefit will be
 26 further reduced by the excess.

27 **Offset Amount**

28 If you are eligible for any of the following benefits, the

1 total of all monthly benefits plus the pro-rated amount of
2 any lump sum payments will be subtracted from the Schedule
3 Amount:

4 . . .

- 5 • disability benefits from the United States Social
6 Security Act, including dependent benefits, payable
7 because of your *injury*, sickness, or pregnancy.

8 . . .

9 **Estimate of Benefits**

10 If you:

- 11 • are eligible for benefits from any of the above sources
- 12 or
- 13 • would be paid such benefits if you had applied for them
- 14 or had applied for them on time;

15 we will figure your monthly benefit as though you are
16 receiving these other benefits, even if you are not.

17 We will:

- 18 • estimate the amount of your Social Security benefit;
- 19 and
- 20 • offset that amount as described above;

21 until we receive notice of a denial of such benefits at the
22 first level of appeal after an initial denial.

23 Burdick 162-63 (bolding and italics in original). Burdick did not
24 read the above-quoted provisions. See PSGI 25. The Certificate then
25 provides eight more pages of terms and provisions. Burdick 164-71.

26 When a plaintiff is approved for LTD benefits by Defendant, USIC
27 decides whether to request that the insured apply for SSDI benefits.
28 PSGI 36. If Defendant determines that the insured should apply, it

1 requests that they do so. PSGI 37. The parties dispute what USIC
2 generally does next. See DSGI 22-27. In Burdick's case, after she
3 applied for LTD benefits, she received a letter from USIC claims
4 representative Dee Wyatt on November 2, 2004 informing her that USIC
5 had approved her claim for LTD benefits. DSGI 28. In the letter,
6 Burdick learned for the first time that she would be subject to the
7 SSDI Offset provision, including that (1) she would have to apply for
8 SSDI benefits and sign a Reimbursement Agreement ("RA") for any SSDI
9 benefits she received, absent which - within three months - USIC would
10 begin to reduce her LTD benefits by \$1,607, the amount of SSDI
11 benefits it estimated she would receive had she applied, and (2) USIC
12 intended to reduce her LTD benefits by the amount of any SSDI benefits
13 she received. See DSGI 28.

14 Defendant provided Burdick with the RA, which states that she:
15 understand[s] the provisions of Group Long Term Disability
16 Policy No. G-110000/5110439/1/1 [sic] permits Fortis
17 Benefits Insurance Company ('the Company') to subtract from
18 my monthly disability payment an amount equal to the value
19 of any Social Security Disability benefits received by me or
20 by others for me, and benefits received by or on behalf of
21 my eligible dependents with respect to my disability. . . .
22 Although I have made a claim for Social Security Disability
23 benefits . . . no decision has been made with respect to
24 that claim. I have, therefore, requested that the Company
25 waive its assumption of an estimated amount of Social
26 Security Disability benefits and continue to pay me Long
27 Term Disability benefits until such time as a decision has
28 been made with respect to any claim for Social Security

benefits . . .

In exchange for the Company's agreement to continue such payments pending the earlier of these dates, I hereby agree to reimburse the Company in full immediately for any resulting overpayment in the event that I or my dependents are found to be eligible for Social Security Disability benefits.

USIC 000170 (Burdick Decl. Ex. I). Burdick told Defendant's representative that she believed the SSDI Offset provision and the RA were unenforceable, but later signed the RA. Merten Decl. Ex. 4 at 125; Burdick Decl. ¶ 21. A few months later, when she became eligible for SSDI Benefits, Burdick repeated that assertion to Defendant. Hoq Decl. ISO Opp'n to Def's MSJ ("Hoq Decl.") Ex. Q; Hoq Decl. Ex. D at ¶ 30.

At least four class members, including Burdick, have received LTD benefits from USIC since May 22, 2003.⁶ Each of them has had their benefits reduced significantly as a result of USIC's invocation of the SSDI Offset provision:

<u>Plaintiff</u>	<u>Pre-Offset Amount</u>	<u>Post-Offset Amount</u>
Burdick	\$2,083	\$284
A70655	\$900	\$195
C09313	\$1,000	\$50
D94687	\$1,000	\$50

See DSGI 34. Thus, USIC reduced the LTD benefits of these four claimants by 86.4%, 78.3%, 95% and 95%, respectively.

⁶ At least five insureds received LTD benefits under the policy, but one of them died prior to May 2003. See Merten Decl. Ex. 11 at 42:3-44:6.

II. LEGAL STANDARD

Summary judgment shall be granted where "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party has the burden of demonstrating the absence of a genuine issue of fact for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986).

If the moving party has the burden of proof at trial (the plaintiff on a claim for relief, or the defendant on an affirmative defense), the moving party must make a showing sufficient for the court to hold that no reasonable trier of fact could find other than for the moving party. See Calderone v. United States, 799 F.2d 254, 259 (6th Cir. 1986) (quoting W. Schwarzer, Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact, 99 F.R.D. 465, 487-88 (1984)). This means that, if the moving party has the burden of proof at trial, that party "must establish beyond peradventure all of the essential elements of the claim or defense to warrant judgment in [that party's] favor." Fontenot v. Upjohn Co., 780 F.2d 1190, 1194 (5th Cir. 1986).

If the non-moving party has the burden of proof at trial, the moving party has no burden to negate the opponent's claim. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The moving party does not have the burden to produce any evidence showing the absence of a genuine issue of material fact. Id. at 325. "Instead, . . . the burden on the moving party may be discharged by 'showing' -- that is, pointing out to the district court -- that there is an absence of evidence to support the nonmoving party's case." Id. Once the moving

1 party satisfies this initial burden, "an adverse party may not rely
2 merely on allegations or denials in its own pleading; rather, its
3 response must . . . set out specific facts showing a genuine issue for
4 trial." Fed. R. Civ. P. 56(e)(2) (emphasis added).

5 A "genuine issue" of material fact exists only when the nonmoving
6 party makes a sufficient showing to establish the essential elements
7 of that party's case, and on which that party would bear the burden of
8 proof at trial. Celotex, 477 U.S. at 322-23. An issue of fact is a
9 genuine issue if it reasonably can be resolved in favor of either
10 party. Anderson, 477 U.S. at 250-51. "[M]ere disagreement or the
11 bald assertion that a genuine issue of material fact exists" does not
12 preclude summary judgment. Harper v. Wallingford, 877 F.2d 728, 731
13 (9th Cir. 1989). "The mere existence of a scintilla of evidence in
14 support of the plaintiff's position will be insufficient; there must
15 be evidence on which the jury could reasonably find for the
16 plaintiff." Anderson, 477 U.S. at 252.

17 "[A] district court is not entitled to weigh the evidence and
18 resolve disputed underlying factual issues." Chevron Corp. v.
19 Pennzoil Co., 974 F.2d 1156, 1161 (9th Cir. 1992). The evidence of
20 the nonmovant is to be believed, and all justifiable inferences are to
21 be drawn in favor of the nonmovant. Anderson, 477 U.S. at 255. "On
22 the other hand, the movant's uncontradicted factual allegations
23 ordinarily are accepted." John v. City of El Monte, 515 F.3d 936, 941
24 (9th Cir. 2008). Furthermore, the court must view the evidence
25 presented "through the prism of the substantive evidentiary burden."
26 Anderson, 477 U.S. at 254.

1 III. DEFERRAL OF ADJUDICATION OF MOTIONS AS TO
2 UNFAIR COMPETITION AND FALSE ADVERTISING CLAIMS

3 Both parties moved for summary judgment as to Plaintiffs' claims
4 brought pursuant to the False Advertising Law ("FAL"), Cal. Bus. &
5 Prof. Code §§ 17500 et seq., and Unfair Competition Law ("UCL"), Cal.
6 Bus. & Prof. Code §§ 17200 et seq. Additionally, Defendant moved to
7 decertify the class for those claims. As noted in the briefing,
8 important issues of state law directly applicable to these causes of
9 action are currently pending before the California Supreme Court in In
10 re: Tobacco Cases, Case S147345. The Court understands that oral
11 argument was held in that case on March 3, 2009. Accordingly, the
12 Court defers ruling on any of the issues raised by the parties'
13 motions as to the FAL or UCL claims pending resolution in Tobacco
14 Cases. Plaintiffs are ORDERED to inform the Court within seven days
15 of the issuance of a decision in Tobacco Cases. The parties should
16 confer with one another at that time and inform the Court whether they
17 intend to request supplemental briefing.

18 IV. SUMMARY JUDGMENT ANALYSIS

19 A. PLAINTIFFS' CLAIM FOR DECLARATORY RELIEF.

20 On their motion for summary judgment, Plaintiffs seek a
21 declaration that the SSDI Offset provision is inconspicuous and/or
22 ambiguous, and unenforceable as a result. Plaintiffs also assert that
23 Plaintiffs are entitled to elect either to rescind or reform their
24 policies. Conversely, Defendant seeks summary judgment on that claim
25 because inter alia it asserts that the provision is conspicuous and
26 clear, and that it is enforceable even if inconspicuous and/or
27 ambiguous. Defendant also raises a variety of arguments as to why
28 Plaintiffs' claims otherwise fail.

1 1. Availability of Declaratory Relief.

2 As a threshold matter, Defendant asserts that the Court should
3 not exercise its discretion to adjudicate the requested declaratory
4 relief because it "can serve no useful purpose." Opp'n to Plfs' MSJ
5 at 13. The Court disagrees. As the Court found in its order
6 certifying the class, Defendant's insureds would benefit from knowing
7 whether this SSDI Offset provision is enforceable even if they have
8 never applied for LTD benefits: "People buy insurance in part for
9 peace of mind rather than because they expect the insured-against
10 event actually to occur. It would be absurd if insurance companies
11 could deny the justiciability of suits against them by arguing that
12 the insured is foolish to be worrying about 'going bare.'" (Docket #
13 60 at 4) (quoting Wisconsin Power & Light Co. v. Century Indem. Co.,
14 130 F.3d 787, 793 (7th Cir. 1997)). The Court went on to note that
15 "'the practical consequences of a declaratory relief ruling, in
16 advance of an incident,' include that 'a ruling against coverage will
17 induce the insured to seek new coverage or take some other legal
18 action.'" Id. (quoting Neely v. Benefits Review Bd., 139 F.3d 276, 280
19 (1st Cir. 1998)). None of Defendant's arguments raised here compel a
20 different result.

21 2. Conspicuousness of the SSDI Offset Provision.

22 Having found that declaratory relief would serve a useful
23 purpose, the Court considers the parties' substantive arguments.
24 Plaintiffs' claims are premised mostly on their assertion that the
25 SSDI Offset provision is inconspicuous. Where no dispute surrounds
26 material facts, interpretation of an insurance policy presents solely
27 a question of law. Haynes v. Farmers Ins. Exchange, 32 Cal.4th 1198,
28 1204 (2004) (citing State Farm Mut. Auto. Ins. Co. v. Partridge, 10

1 Cal.3d 94, 100 (1973)). Haynes reiterated the well-established
2 principles governing that analysis:

3 In the insurance context, we begin with the fundamental
4 principle that an insurer cannot escape its basic duty to
5 insure by means of an exclusionary clause that is unclear.
6 As we have declared time and again any exception to the
7 performance of the basic underlying obligation must be so
8 stated as clearly to apprise the insured of its effect. . .
9 [T]o be enforceable, any provision that takes away or limits
10 coverage reasonably expected by an insured must be
11 conspicuous, plain and clear. Thus, any such limitation must
12 be placed and printed so that it will attract the reader's
13 attention.

14 Id. (internal citations and quotations omitted). The insurer bears
15 the burden of establishing that limitations are conspicuous, plain and
16 clear. Id. In determining whether the insurer met that burden, the
17 court reads the policy "as a layman would read it and not as it might
18 be analyzed by an attorney or an insurance expert." Id. at 1209
19 (quoting Crane v. State Farm Fire & Cas. Co., 5 Cal.3d 112, 115
20 (1971)).

21 In Haynes, the Court addressed the enforceability of a limitation
22 on permissive user coverage in a car insurance policy. The 39-page
23 policy provided a declarations page that stated that the "COVERAGES"
24 were \$250,000 per person and \$500,000 per occurrence for bodily
25 injury, and \$100,000 for property damage. Id. at 1202. The
26 declarations page did not include any explicit indication of a
27 permissive user limitation, but rather included the alphanumeric code
28 of "S9064," which was listed as an "ENDORSEMENT." Id. A few pages

1 later, the policy included a table of contents for such entries as
2 "Coverage," "Exclusions," "Limits of Liability" and "Other Insurance."
3 The table provided no reference to permissive users or limitations on
4 permissive user coverages. Id. On the policy's tenth page (in the
5 "LIABILITY" section), the policy included a subheading "Other
6 Insurance" followed by the statement that for an "insured person,
7 other than you or a family member," coverage is provided "up to the
8 limits of the Financial Responsibility Law only." Id. at 1203.

9 Endorsement S9064 appeared on the policy's 24th page and included
10 19 lines of various amendments under the title "PART I-LIABILITY-
11 PERMISSIVE USER LIMITATION." Id. In lines 11 and 12, the provision
12 purports to delete the above "Other Insurance" provision from the
13 tenth page, while lines 15 through 17 purport to replace it with the
14 following: "We will provide insurance for an Insured person, other
15 than you, a family member or a listed driver, but only up to the
16 minimum required limits of your state's Financial Responsibility Law
17 of \$15,000 per person and \$30,000 per occurrence for bodily injury,
18 and \$5,000 for property damage." Id. Following an automobile
19 accident implicating the permissive user limitation, the insurer
20 attempted to limit the coverage vis-a-vis this endorsement.⁷

21 The Haynes Court held that the endorsement provision was not
22 conspicuous. The Court focused first on the failure to provide any
23 indication on the declarations page of the limitation. Id. at 1206-

24
25 ⁷ The insurer conceded that the "Other Insurance" provision on
26 the tenth page of the policy was unenforceably inconspicuous. Id. at
27 1205 ("There is nothing in the heading to alert a reader that it
28 limits permissive user coverage, nor anything in the section to
attract a reader's attention to the limiting language.") Thus, the
Court focused its analysis on the endorsement.

1 07. That failure is particularly important given that the
2 declarations page is "where one would expect an insured to look to
3 determine the policy limits." Id. at 1206. Rather than provide that
4 information on the declarations page, the reader was first alerted to
5 it on the 24th page of the policy. Id. at 1207. Moreover, the court
6 was troubled by the fact that the limiting language was not bolded or
7 otherwise differentiated from the rest of the text. Id. That
8 deficiency was not cured by the fact that the title of the endorsement
9 referred in capital letters to "PERMISSIVE USER" because that term was
10 nowhere defined and its significance could "escape the average lay
11 reader notwithstanding the capitalization." Id. As a result, the
12 court concluded that the limitation was not conspicuous. Id.

13 Applying these principles, the Court finds the SSDI Offset
14 provision is inconspicuous. First, nothing in the two-page "Schedule"
15 alerts the reader that a significant limitation to coverage applies.
16 Instead, the first page of the Schedule states the "Maximum Benefit,"
17 which was listed as \$2,083 for Burdick. Burdick 153. Nowhere is the
18 reader put on alert that the benefits would likely be reduced
19 drastically through the SSDI Offset provision. That undercuts
20 Defendant's position that the provision is conspicuous.

21 Nor are Defendant's arguments to the contrary persuasive.
22 Defendant relies on Farmers Alliance Mutual Insurance Co. v. Miller,
23 869 F.2d 509 (9th Cir. 1989) in asserting that the Schedule page need
24 not include any reference to the SSDI Offset provision. But Miller
25 applied Montana law, id. at 510, and was expressly rejected on this
26 point by the Montana Supreme Court. Hardy v. Progressive Speciality
27 Ins. Co., 67 P.3d 892, 897 (Mont. 2003). At any rate, Miller is
28 inconsistent with California law. Haynes, 32 Cal.4th at 1206.

1 The Court also finds unpersuasive Defendant's contention that the
2 first page of the Schedule provides notice of the SSDI Offset
3 provision because an orphaned footnote states that "[t]he amount of
4 insurance and benefit determining factors for this coverage appear on
5 the following pages of this Certificate." Defendants' reliance on
6 Merrill & Seeley, Inc. v. Admiral Insurance Co., 225 Cal. App. 3d 624
7 (1990), for that proposition is misplaced. In Merrill, the court
8 ruled that a retroactivity limitation was conspicuous because the
9 declaration page included both (1) the retroactive date of the policy
10 and (2) a statement that the claim coverage was "as per form
11 attached." Id. at 631. The retroactive date listed on the
12 declaration page was identical to the first date of the policy period,
13 which was also listed on the declaration page. Id. Thus, the reader
14 was put on notice that "there is nothing retroactive about this
15 particular policy." Id.; see also Haynes, 32 Cal.4th at 1210
16 (distinguishing Merrill). By contrast, there is no specific
17 information provided on the Schedule in this case regarding the SSDI
18 Offset provision. The general statement that the benefits will be
19 calculated according to the terms of the policy does not put the
20 reader on notice of a significant reduction to the benefit amount.
21 See, e.g., Haynes, 32 Cal.4th at 1210, 1211.⁸

22 Rather than provide notice of the significant offset in the
23 Schedule, the reader is not alerted to it until roughly half-way
24

25 ⁸ Defendant also asserts that the use of the modifier "maximum,"
26 should have alerted the reader to the offset provision. See Def's MSJ
27 at 19. The Court finds this argument unpersuasive, especially given
28 that the next page of the Schedule establishes that the monthly
payment amount would be lessened for any days in the month during
which the insured did not qualify for benefits. See Burdick 154.

1 through the Certificate (at the eleventh page). Between the Schedule
2 and the eleventh page are the table of contents, five pages of
3 definitions (none of which define "Offset Amount"), and a page
4 entitled "ELIGIBILITY AND TERMINATION PROVISIONS." Burdick 155-161.
5 The eleventh page (numbered page 8) is labeled generically as "LONG
6 TERM DISABILITY INSURANCE," followed by "Insurance Provided," "Amount
7 of Benefit," and then "Offset Amount." The first hint that the
8 benefits under the policy could be substantially reduced comes under
9 "Amount of Benefit," which states that "[t]he amount of benefit we
10 will pay is the Schedule Amount minus the Offset Amount." Burdick
11 162. The "Offset Amount" subsection then lists a series of amounts
12 that could offset the payable benefits, beginning roughly one-third
13 down the eleventh page and continuing through roughly half of the
14 following page. Burdick 162-63. The identification of "disability
15 benefits from the United States Social Security Act" is toward the
16 bottom of the eleventh page. Burdick 162.

17 The language of the SSDI Offset provision is not "bolded,
18 italicized, enlarged, underlined, in different font, capitalized,
19 boxed, set apart, or in any way distinguished" from the rest of the
20 Certificate. Haynes, 32 Cal.4th at 1207. The only differentiation in
21 the relevant text comes with the bolding of the subtitle "Offset
22 Amount." But the policy must be read as a layperson would read it,
23 and the Court is not convinced that a layperson would understand the
24 term "offset." Cf. Zubia v. Farmers Ins. Exchange, 14 Cal. App. 4th
25 790, 795 (1993) (finding conspicuous a provision requiring
26 reimbursement to insurer for amounts recovered from third parties
27
28

1 listed under heading of "Our Right to Recover Payment").⁹ As a result,
 2 the significance of the heading could well escape the average reader,
 3 especially since "Offset Amount" was not defined in the Certificate.
 4 See Haynes, 32 Cal.4th at 1207 (finding provision inconspicuous
 5 despite title of "PERMISSIVE USER" in all capital letters).

6 While this case presents a closer question on conspicuousness
 7 than that in Haynes, the Court nonetheless finds the SSDI Offset
 8 provision to be inconspicuous as a matter of law based on the above
 9 factors.^{10, 11}

10 3. Enforceability of the Offset Provision.

11 A finding of inconspicuousness alone does not result in the
 12 unenforceability of a provision. Rather, the provision is
 13 unenforceable only if it contradicts the reasonable expectations of
 14 the insured. See Haynes, 32 Cal.4th at 1204, 1213; Jauregui v. Mid-
 15 Century Ins. Co., 1 Cal. App. 4th 1544, 1552 (1992). The Court's

17 ⁹ For the same reason, the inclusion of "Offset Amount" in the
 18 table of contents does not provide notice to the reader of the likely
 19 substantial reduction to her benefits.

20 ¹⁰ Because the Court finds that the SSDI Offset provision is not
 21 conspicuous, it need not reach the issue of ambiguity. See, e.g.,
 22 Thompson v. Mercury Cas. Co., 84 Cal. App. 4th 90, 98 (2000) (holding
 that a provision is unenforceable based solely on its
 inconspicuousness).

23 ¹¹ The Court rejects Defendant's argument that the SSDI Offset
 24 provision must be conclusively presumed enforceable pursuant to Cal.
 25 Ins. Code § 10291.5(k). Defendant has consistently maintained that
 26 Burdick's insurance arose out of a group disability policy, see, e.g.,
 27 Reply ISO Def's MSJ at 13, and the presumption outlined in section
 28 10291.5(k) does not apply to group policies, see Cal. Ins. Code
 § 10270.95. Conversely, were the Court to find Burdick to have had an
 individual policy, then it is questionable whether benefit offsets
 would be permissible at all. See Hoq Decl. Ex. A at 4 (Department of
 Insurance opinion letter casting doubt as to permissibility of offset
 provisions in individual policies).

1 review of the insured's reasonable expectations is limited, however.
2 Jauregui, 1 Cal. App. 4th at 1548. On summary judgment, the Court
3 does not determine whether issues of fact exist regarding the
4 expectations of the insured, id., but rather assesses as a matter of
5 law the reasonable expectations created by the language in the policy,
6 id. at 1552 & n.1. Put simply, the Court will not "speculate on the
7 policyholder's abstract expectations, but rather [] consider[s]
8 reasonable expectations defined by the insurer's policy language."
9 Haynes, 32 Cal.4th at 1214 (quoting Jauregui, 1 Cal. App. 4th at 1552
10 n.1); see also Spangle v. Farmers Ins. Exchange, 166 Cal. App. 4th
11 560, 569 (2008) ("The best indicator of an insured's reasonable
12 expectation of coverage is, of course, the language of the insurance
13 policy.")¹² To wit, in affirming summary judgment that an insurance
14 provision was unenforceable, Jauregui made clear that "glaring"
15 triable issues of fact would have existed were the insured's
16 subjective expectations relevant. 1 Cal. App. 4th at 1548.

17 The Certificate at issue created a reasonable expectation that
18 the LTD benefits would not be drastically offset. The Certificate's
19 Schedule lists the "Maximum Benefits" and provides no mention of the
20 drastic offset imposed here. As discussed above, the use of the
21

22 ¹² As such, the Court rejects Defendant's reliance on Stewart v.
23 Bohnet, 101 Cal. App. 3d 978 (1980) for its assertion that
24 enforceability cannot be determined on a classwide basis because
25 Defendant is entitled to present evidence as to each class member's
26 potential knowledge of the SSDI Offset provision. Stewart held that
27 the "reasonable expectations" of the insured were not inconsistent
28 with a purportedly inconspicuous provision because the insurer
presented testimony that the insured had actual knowledge and
understanding of that provision. Id. at 989-90. While Stewart has
not been expressly overruled, it is inconsistent with more recent case
law focusing on the language of the policy itself to determine
reasonable expectations as a matter of law.

1 modifier "maximum" on the schedule does not negate the reasonableness
2 of believing that Plaintiffs would receive that amount. Similarly,
3 the table of contents and section headings failed to alert the reader
4 to the offset. And, contrary to Defendant's assertion, the fact that
5 "express terms" providing for the offset appear later in the
6 Certificate does not negate a finding that the Certificate created a
7 reasonable expectation that the LTD benefits would not be
8 significantly reduced. Given the Court's finding that those terms
9 were inconspicuous, they were insufficient to put Plaintiffs on notice
10 of the offset.

11 Accordingly, the Court rules that the SSDI Offset provision
12 contravenes the reasonable expectations of Plaintiffs and is
13 unenforceable.

14 4. Plaintiffs' Request to Elect Rescission or Reformation.

15 Plaintiffs contend that, because the SSDI Offset provision is
16 unenforceable, they may elect either to reform or rescind their LTD
17 coverage. The Complaint does not state that Plaintiffs seek
18 reformation and/or rescission of their policies. Nonetheless,
19 pursuant to Fed. R. Civ. P. 53(c), "[s]o long as a party is entitled
20 to relief, a trial court must grant such relief despite the absence of
21 a formal demand in the party's pleadings." In re Bennett, 298 F.3d
22 1059, 1069 (9th Cir. 2002); see also First State Ins. Co. v. Callan
23 Assocs., Inc., 113 F.3d 161, 163 (9th Cir. 1997). Courts have refused
24 to entertain newly-raised remedies, however, when doing so results in
25 prejudice to the opposing party. See, e.g., Seven Words LLC v.
26 Network Solutions, 260 F.3d 1089, 1098 (9th Cir. 2001). Defendant
27 contends that it has been prejudiced in having to "weather[] twenty
28 months of litigation." See Opp'n to Plf's MSJ at 18. But regardless

1 of whether reformation or rescission is allowed, Defendant would still
2 have had to engage in this litigation, given the other pending claims.
3 Thus, the request for reformation and rescission appears to be
4 properly before the Court.

5 a. Whether Grounds for Reformation Exist.

6 Reformation is available when a written contract does not truly
7 express the intent of the parties due to (1) fraud, (2) mutual
8 mistake, or (3) the mistake of one party, which the other party knew
9 or suspected at the time of contracting. Cal. Civil Code § 3399.
10 Some California courts have also found that reformation is available
11 when there has been a negligent misrepresentation. See Rail Servs. of
12 Am. v. State Comp. Ins. Fund, 110 Cal. App. 4th 323, 333 (2003). The
13 party seeking reformation must prove by clear and convincing evidence
14 at trial that it is entitled to that relief. See, e.g., Dictor v.
15 David & Simon, Inc., 106 Cal. App. 4th 238, 253 (2003).

16 Plaintiffs make no meaningful effort to establish that those
17 elements exist based on the undisputed facts. Rather, they rely on
18 the argument that such relief is proper because "Plaintiffs did not
19 bargain for and were not properly informed about the SSDI offset
20 provisions." See Plfs' MSJ at 16. Here, it is clear that there was
21 no mutual mistake; so, reformation is only appropriate if Plaintiffs
22 can show that Defendant knew or suspected that Plaintiffs were
23 mistaken when they purchased the LTD insurance or that there was
24 fraud. See Spiegler v. Home Depot U.S.A., Inc., 552 F. Supp. 2d 1036,
25 1055 (C.D. Cal. 2008).

26 Plaintiffs state in broad terms that Defendant does not deny that
27 it knew or suspected that class members mistakenly believed that the
28 coverage was greater than it actually was, but they present no

1 evidence to that effect. See Reply ISO Plfs' MSJ at 8. Because
2 Plaintiffs bear the burden of proof on this issue at trial, they must
3 make a showing sufficient for the Court to hold that no reasonable
4 trier of fact could find other than for the moving party. See
5 Calderone, 799 F.2d at 259. Plaintiffs have not made such a showing.
6 As such, the Court concludes that there are triable issues of fact as
7 to Plaintiffs' entitlement to reformation.

8 Because the Court finds that issues of material fact preclude
9 Plaintiffs' motion for summary judgment on reformation, the Court does
10 not address Defendant's other arguments regarding reformation.¹³

11 b. Whether Grounds for Rescission Exist.

12 Although Burdick herself disclaims any attempt to rescind her
13 policy, Plaintiffs assert that they are entitled to elect rescission
14 if they so choose. California law allows rescission under a variety
15 of circumstances, including where: (1) the rescinding party consented
16 to the agreement by mistake or through fraud; (2) the consideration
17 for the obligation of the rescinding party fails; and (3) an insurer
18 conceals, intentionally or unintentionally, material information from
19 the insured. See Cal. Civil Code § 1689; Cal. Ins. Code §§ 330, 331.

20 As was the case with their request for reformation, Plaintiffs
21 fail to articulate how these basic requirements are met here for all
22
23

24 ¹³ Although the parties did not brief the issue, it appears that
25 the Court's finding of unenforceability may moot Plaintiffs' request
26 for reformation. Given that the parties are required to submit
27 supplemental briefing as to the ability to seek rescission and
28 reformation on a class-wide basis, see infra at Section V.B. and n.18,
the parties are also instructed to brief whether the Court's finding
of unenforceability provides the same relief as Plaintiffs would
otherwise receive if they prevail on their request for reformation.

1 of the class members.¹⁴ Simply asserting that Plaintiffs did not
2 receive what they bargained for is not class-wide proof that they can
3 rescind their agreements. Whether any class member is entitled to
4 rescission will necessarily depend on the facts specific to her
5 transaction. For example, the Court cannot say on a class-wide basis
6 that all class members consented to the policy by mistake. Some may
7 have read and understood the SSDI Offset provision. Thus, material
8 issues of fact exist as to the availability of rescission.

9 Because the Court finds that issues of material fact preclude
10 Plaintiffs' motion for summary judgment on rescission, the Court does
11 not address Defendant's other arguments regarding rescission.

12 5. Defendant's Waiver Defense.

13 Defendant contends that Burdick is barred from bringing an action
14 challenging the SSDI Offset provision because she purportedly waived
15 the ability to do so when she signed the RA. See Def's MSJ at 33.¹⁵
16 "Waiver is the intentional relinquishment of a known right after full
17 knowledge of the facts and depends upon the intention of one party
18 only . . . Thus, the pivotal issue in a claim of waiver is the
19 intention of the party who allegedly relinquished the known legal

20
21 ¹⁴ Plaintiffs do not provide authority that rescission may be
22 granted as a matter of law based on the interpretation of the policy
23 alone. Thus, while the Court can find a provision unenforceable as a
24 matter of law based on the policy itself, Plaintiffs have not
25 established that the Court can grant rescission based on the policy
26 itself (rather than based on the facts surrounding the entry into the
27 policy). Nor do Plaintiffs provide authority that rescission follows
28 as a matter of law upon a finding that a provision is unenforceable.

¹⁵ Plaintiffs do not expressly move for summary judgment as to
Defendant's waiver defense, but it is implicit in their request for
summary judgment. Indeed, Defendant raises it as a defense in
opposing Plaintiffs' cross-motion. See Opp'n to Plfs' MSJ at 1 n.1.
Thus, the Court treats Plaintiffs' motion as a cross-motion for
summary judgment on the waiver defense.

1 right." Old Republic Ins. Co. v. FSR Brokerage, Inc., 80 Cal. App.
2 4th 666, 678 (2000) (internal citations and alterations omitted). A
3 waiver may be implied upon a showing that a party's acts are so
4 inconsistent with an intent to enforce the right as to induce a
5 reasonable belief that such right has been relinquished. Waller v.
6 Truck Ins. Exchange, Inc., 11 Cal. 4th 1, 33-34 (1995). The party
7 raising waiver has the burden of establishing it at trial by clear and
8 convincing evidence that does not leave the matter to speculation, and
9 doubtful cases will be decided against a waiver. DRG/Beverly Hills,
10 Ltd. v. Chopstix Dim Sum Café & Takeout III, Ltd., 30 Cal. App. 4th
11 54, 60 (1994). Although waiver is usually a question of fact, it can
12 be decided as a matter of law where the underlying facts are
13 undisputed or the evidence is susceptible to only one reasonable
14 conclusion. Oakland Raiders v. Oakland-Alameda County Coliseum, Inc.,
15 144 Cal. App. 4th 1175, 1191 (2006).

16 The undisputed facts here make clear that Burdick did not waive
17 her right to challenge the SSDI Offset provision by signing the RA.
18 The RA is not an express waiver of rights. To the contrary, there is
19 no mention of a "waiver" or "release" anywhere in it. Moreover, the
20 sentences in the RA relied upon by Defendant are insufficient to
21 establish waiver because they are ambiguous. See Kacha v. Allstate
22 Ins. Co., 140 Cal. App. 4th 1023, 1034 (2006). A writing is ambiguous
23 if it is susceptible to more than one reasonable interpretation. Id.
24 Based on the Court's review of the RA, the statements relied upon by
25 Defendant are susceptible to more than one reasonable interpretation.

26 First, Defendant argues that the RA "acknowledges that Union
27 Security is permitted 'to subtract from [Burdick's] monthly disability
28 benefit an amount equal to the value of any Social Security Disability

1 benefits received' . . ." Def's MSJ at 33 (emphasis added). But the
2 RA does not clearly state that Defendant is entitled to subtract the
3 SSDI benefits. It states that the "provisions of [the policy]
4 permit[]" Defendant to make such deductions. USIC 000170. It is
5 reasonable to interpret that language as only acknowledging what the
6 provisions of the policy actually say. Under that interpretation,
7 Burdick's signing of the RA would not be taking any position as to
8 whether the SSDI Offset provision is enforceable; but rather simply
9 acknowledging the existence of that language in the Certificate.

10 Similarly, Defendant relies on the RA statement that Burdick
11 would reimburse Defendant for "overpayments" resulting from her
12 recovery of SSDI benefits. That provision could reasonably be
13 interpreted to mean that Burdick did not have to reimburse Defendant
14 for any SSDI benefits received in the event that the SSDI Offset
15 provision is unenforceable because, in that case, there would have
16 been no "overpayment" to Plaintiff.

17 Defendant nonetheless asserts that Burdick impliedly waived her
18 right, relying on Raiders, 144 Cal. App. 4th at 1191. The Raiders
19 court found an implied waiver based on the unique facts of that case.
20 In executing agreements committing the team to play football in
21 Oakland for 16 seasons, the Raiders purportedly relied on fraudulent
22 representations that the luxury boxes were completely sold out for the
23 upcoming season. Id. at 1181. The Raiders became aware that the
24 statement was false in 1995. Nonetheless, in 1996, the Raiders
25 executed a new agreement with the same party that incorporated and
26 supplemented the prior agreement. Id. It expressly provided that:

27 Except as otherwise specifically supplemented, interpreted
28 or modified by this Supplement, all terms and provision of

1 the [prior] Agreements shall remain unmodified and in full
2 force and effect.

3 Id. at 1182 (emphasis in original). Not only did the supplemental
4 agreement expressly ratify the terms of the prior agreement, but the
5 Raiders obtained "significant monetary and nonmonetary concessions by
6 virtue of the new contract." Id. at 1193 (one such concession alone
7 saved the Raiders \$109 million). The concessions were obtained by the
8 Raiders by concealing from the other party that the Raiders knew of
9 the basis for its fraud claim. Id. Hence, the concealment was a
10 means to "induce [the other party] to change its position, to [its]
11 detriment." Id. The Raiders court stated that the key distinguishing
12 feature between the case before it and others where no waiver was
13 found, was the combination of the "Raiders' conduct in obtaining
14 additional benefits and ratifying the earlier contract." Id. at 1192
15 (emphasis in original).

16 This case does not share those hallmarks. Rather than conceal
17 her position, Burdick informed Defendant of her belief that the SSDI
18 Offset provision and the RA were unenforceable shortly before she
19 signed the RA. Merten Decl. Ex. 4 at 125; Burdick Decl. ¶ 21. She
20 repeated that assertion to Defendant a few months later. Hoq Decl.
21 Ex. Q; Hoq Decl. Ex. D at ¶ 30. That fact alone clearly distinguishes
22 Raiders.¹⁶ Indeed, although not cited by the parties, the California
23 Court of Appeals has reversed a finding of waiver under similar
24 circumstances. See Kacha, 140 Cal. App. 4th at 1034-35. In Kacha,
25 the plaintiff's attorney supposedly waived a jurisdictional challenge

26 ¹⁶ Moreover, unlike the case in Raiders, the RA does not provide
27 an express ratification of the underlying policy. Nor does it appear
28 that Burdick "induced" Defendant into giving her substantial benefits
(to Defendant's detriment) like those at issue in Raiders.

1 through a written statement to an appraisal panel. However, noting
2 that the attorney later consistently objected on the supposedly waived
3 grounds, the Court found no waiver. Id. Accordingly, the Court
4 concludes that Burdick did not waive her rights to challenge the
5 enforceability of the SSDI Offset provision.

6
7 B. DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON PLAINTIFFS'
8 BREACH OF CONTRACT AND OF THE COVENANT OF GOOD FAITH AND
9 FAIR DEALING CLAIMS.

10 Defendant also moved for summary judgment as to Plaintiffs'
11 claims for breach of contract and breach of the covenant of good faith
12 and fair dealing. Plaintiffs did not cross-move as to these claims.

13 1. Claims of Class Members Who Have Not Sought LTD Benefits.

14 Defendant seeks summary judgment on the breach of contract and
15 the covenant of good faith and fair dealing claims of the 109 class
16 members who have not sought LTD benefits. Def's MSJ at 24. Defendant
17 asserts that these breach of contract claims are really claims for
18 "anticipatory breach," which are not viable under California law. Id.
19 Similarly, as to the breach of the covenant of good faith and fair
20 dealing claims, Defendant asserts that the alleged conduct underlying
21 that claim is only applicable to those Plaintiffs who actually applied
22 for LTD benefits. Id. at 26-27. Plaintiffs essentially concede this
23 point. See Opp'n to Def's MSJ at 23-24. The Court agrees that these
24 claims are not viable.

25 For the breach of contract claim, the 109 class members have not
26 claimed an entitlement to LTD benefits. "[I]t is legally impossible
27 to breach a contract by refusing to pay benefits which have not yet
28 accrued under the terms of the policy." Austero v. Nat'l Cas. Co., 84
Cal. App. 3d 1, 24 (1978), disapproved on other grounds by Egan V.

1 Mutual of Omaha Ins. Co., 24 Cal.3d 809 (1979). Thus, those 109 class
2 members do not have a viable claim for breach of contract.

3 For breach of the covenant of good faith and fair dealing,
4 Plaintiffs' claims are based on conduct related to the denial of
5 benefits pursuant to the SSDI Offset provision. Such conduct is not
6 relevant to the claims of the 109 class members who have not sought
7 LTD benefits.

8 Accordingly, the Court grants Defendant summary judgment on the
9 breach of contract and breach of the covenant of good faith and fair
10 dealing claims of the 109 class members who have not sought LTD
11 benefits.

12 2. Whether the Remaining Claims for Breach of the Covenant of
13 Good Faith and Fair Dealing Are Viable.

14 Defendant also moved for summary judgment as to the claim for
15 breach of the covenant of good faith and fair dealing as to the
16 Plaintiffs who have sought LTD benefits, as well as to certain
17 remedies sought thereunder. To prevail on a claim for breach of the
18 covenant of good faith and fair dealing, Plaintiffs must establish (1)
19 benefits due under the policy were withheld and (2) the reason for
20 withholding the benefits was unreasonable or without proper cause.

21 Guebara v. Allstate Ins. Co., 237 F.3d 987, 992 (9th Cir. 2001).

22 Defendant contends that the latter element cannot exist here because
23 there is a "legitimate debate" as to the enforceability of the SSDI
24 Offset provision. See Def's MSJ at 27. Plaintiffs' only response is
25 that "there is no reasonable dispute as to whether the offset
26 provision is conspicuous or clear." Opp'n to Def's MSJ at 24.

27 The Court agrees with Defendant. While the Court finds above
28 that the SSDI Offset provision is inconspicuous and unenforceable, the

1 inconspicuousness of the SSDI Offset provision is not so clearly
2 established that the Court can conclude that Defendant's denial was
3 unreasonable or without proper cause.¹⁷ Accordingly, the Court grants
4 Defendant summary judgment as to Plaintiffs' claim for breach of the
5 covenant of good faith and fair dealing.

6 3. Statute of Limitations for Remaining Breach of Contract
7 Claims.

8 Defendant also seeks summary judgment as to the four unnamed
9 class members who have sought LTD benefits on the grounds that their
10 claims are barred by the statute of limitations. Def's MSJ at 14.
11 Breach of contract claims are governed by a four-year statute of
12 limitations. Cal. Civ. Pro. Code § 337(1); Krieger v. Nick Alexander
13 Imports, Inc., 234 Cal. App. 3d 205, 220-21 (1991).

14 Plaintiffs argue that these claims cannot be barred in their
15 entirety because the policy is a continuing contract for periodic
16 installment payments and the failure to make monthly payments on it is
17 a continuing breach that accrues anew each month. Opp'n to Def's MSJ
18 at 13. For this proposition, Plaintiffs rely largely on Nikaido v.
19 Centennial Life Ins. Co., 42 F.3d 557, 560 (9th Cir. 1994), which held
20 as a matter of California law that a "rolling" accrual applied to the
21 ERISA claims before it. As Defendant points out, however, Nikaido was
22 expressly overruled in Wetzel v. Lou Ehlers Cadillac Group Long Term
23 Disability Ins. Program, 222 F.3d 643 (9th Cir. 2000) (en banc), in
24 several ways. First, the Ninth Circuit held that, although
25 California's statute of limitation applies to ERISA claims, federal

26
27 ¹⁷ Nor does the Court believe that the SSDI Offset provision is
28 so ambiguous that denying benefits based on the provision constitutes
bad faith.

1 law applies to determine the accrual date. Id. at 649. The Ninth
2 Circuit further held, as a matter of federal law, that Nikaido's
3 "rolling" accrual did not apply. Id. ("We hold that under federal
4 law, an ERISA cause of action accrues either at the time benefits are
5 actually denied or when the insured has reason to know that the claim
6 has been denied." (internal citations omitted)). However, while
7 Wetzel overrules Nikaido in significant respects, it does not hold
8 that a "rolling" accrual rule is inapplicable under California law.

9 Nor does the other case law cited by Defendant compel the Court
10 to follow Wetzel. In Dillon v. Board of Pension Com'rs of City of Los
11 Angeles, for example, a widow was outrightly denied pension benefits
12 for which she applied following her husband's suicide. 18 Cal.2d 427,
13 429 (1941). The California Supreme Court found that "[t]he right to
14 receive periodic payments under a pension is a continuing one and any
15 time limitation upon the right to sue for each instalment necessarily
16 commences to run from the time when the instalment actually falls
17 due." Id. at 430 (internal citation omitted). But the court
18 distinguished the case before it on the grounds that the plaintiff had
19 never established any right to receive benefits at all. Id. ("Before
20 plaintiff can claim these period payments, however, she must establish
21 her right to a pension.") In those circumstances, the plaintiff's
22 claim was "distinct from an action to recover instalments." Id. As
23 such, the court ruled that her cause of action accrued at the time of
24 her husband's death. Id.

25 Dillon does not undermine Plaintiffs' position. Here, Defendant
26 does not deny that these particular Plaintiffs are entitled to recover
27 periodic payments, unlike the plaintiff in Dillon. The issue is
28 solely how much those payments should be. Thus, there is no

1 indication that the claims here would not fall under the "rolling"
2 accrual doctrine explicitly endorsed by Dillon for receipt of periodic
3 payments.

4 Because Defendant has cited no California law establishing that
5 California would follow the federal rule announced in Wetzel rather
6 than the rule announced in Nikaido, the Court rejects Defendant's
7 argument on this point. Accordingly, these Plaintiffs' claims are not
8 time-barred as to payments within the four years prior to the filing
9 of their Complaint. Plaintiffs have not established a basis to make
10 timely their claims with respect to payments made prior to that
11 period, though, so the Court grants Defendant's motion as to any such
12 claims.

13 V. CLASS DECERTIFICATION ANALYSIS

14 Defendant also moved to decertify all of Plaintiffs' claims. A
15 district court's decision to decertify a class is committed to its
16 sound discretion. See Knight v. Kenai Peninsula Borough School Dist.,
17 131 F.3d 807, 816 (9th Cir. 1997). The standard used in reviewing a
18 motion to decertify is the same as the standard used in evaluating a
19 motion to certify. A district court "must conduct a 'rigorous
20 analysis' into whether the prerequisites of Rule 23 are met."
21 Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1233 (9th Cir. 1996)
22 (citing In re American Medical Sys., 75 F.3d 1069, 1078-79 (6th Cir.
23 1996)).

24 The Court finds that it is appropriate at this stage of the
25 litigation to consider class certification separately for each claim.
26 See, e.g., Fed. R. Civ. P. 23(c)(4); Society for Individual Rights,
27 Inc. v. Hampton, 528 F.2d 905, 906 (9th Cir. 1975) (trial court has
28 discretion to limit issues in class action to those that lend

1 themselves to "convenient use of the class action motif"). In
2 opposing class certification previously, Defendant had requested that
3 some claims be certified and not others. The Court rejected that
4 suggestion because Defendant's arguments went to the merits of the
5 claims. (Docket # 60 at 8 n.3.) Now that the Court has adjudicated
6 some of those arguments through the summary judgment aspects of this
7 Order, the Court finds it appropriate to analyze the propriety of
8 certification separately as to each claim.

9 A. CLAIM FOR DECLARATORY RELIEF.

10 Class treatment of a claim for declaratory relief is appropriate
11 when all of the requirements of Fed. R. Civ. P. 23(a) are met, along
12 with the requirements of 23(b)(2). Rule 23(a) requires that each of
13 the following four elements is satisfied: (1) the class is so numerous
14 that joinder of all members is impracticable; (2) there are questions
15 of law or fact common to the class; (3) the claims or defenses of the
16 representative party are typical of the claims or defenses of the
17 class; and (4) the representative will fairly and adequately protect
18 the interests of the class. Defendant does not dispute that there are
19 questions of law or fact common to the class; therefore, its arguments
20 are limited to the other three requirements.

21 Defendant first asserts that the numerosity requirement is not
22 met here because the class members are not geographically dispersed,
23 class members can be readily identified, class members will have the
24 ability and interest in filing individual suits, and future class
25 members need not be counted in the analysis. See Mot. to Decertify at
26 10. The Court disagrees. As the Court ruled in the Class
27 Certification Order, the Ninth Circuit has found classes of far fewer
28 than 100 persons sufficiently numerous to render joinder

1 impracticable. See, e.g., Jordan v. Los Angeles County, 669 F.2d
2 1311, 1319 (9th Cir.), vacated and rem'd on other grounds, 459 U.S.
3 810 (1982) (expressing inclination to "find the numerosity requirement
4 in the present case satisfied solely on the basis of the number of
5 ascertained class members, i.e., 39, 64, and 71"). Given the number
6 of class members here (over 100), the Court finds joinder
7 impracticable without considering the separate factors identified by
8 Defendant. See, e.g., Oregon Laborers-Employers Health & Welfare
9 Trust Fund v. Philip Morris, Inc., 188 F.R.D. 365, 373 (D. Or. 1998)
10 (declining to consider factors other than class size for class
11 consisting of 50 members).

12 Defendant also argues that Burdick is not a typical or adequate
13 class representative. Typicality requires the Court to determine
14 "whether the named plaintiffs' circumstances markedly diverge or
15 whether the legal theories and claims differ as to defeat the purposes
16 of maintaining a class." Von Colln v. County of Ventura, 189 F.R.D.
17 583, 591 (C.D. Cal. 1999). Adequacy of representation "depends on the
18 qualifications of counsel for the representative, an absence of
19 antagonism, a sharing of interests between representatives and
20 absentees, and the unlikelihood that the suit is collusive." In re
21 N.D. Cal. Dalkon Shield IUD Prods. Liab. Litig., 693 F.2d 847, 855
22 (9th Cir. 1982).

23 Defendant asserts that neither typicality nor adequacy exists
24 here because Burdick is subject to unique defenses. Mot. to Decertify
25 at 12. First, Defendant contends that Burdick is subject to a unique
26 defense related to her failure to read the Certificate. That argument
27 is not relevant to the declaratory relief claim. See Haynes, 32
28 Cal.4th at 1210-11. Second, Defendant contends that Burdick is

1 subject to the unique defense of waiver. As the Court ruled above,
2 however, that defense fails as a matter of law. Accordingly, as to
3 the claim for declaratory relief, the Court finds that typicality
4 exists and that Burdick is an adequate class representative.

5 Given that the requirements of Rule 23(a) are met here, the Court
6 turns to Rule 23(b)(2). That rule permits class treatment if "the
7 party opposing the class has acted or refused to act on grounds that
8 apply generally to the class, so that final injunctive relief or
9 corresponding declaratory relief is appropriate respecting the class
10 as a whole." Fed. R. Civ. P. 23(b)(2). The provision does not
11 require that every class member be injured in the exact same way by
12 the defendant's conduct. Rather Rule 23(b)(2) is met when "[a]ction
13 or inaction is directed to a class . . . even if it has taken effect
14 or is threatened only as to one or a few members of the class,
15 provided it is based on grounds which have general application to the
16 class." Id. at Advisory Committee's Note.

17 That is the case here. The SSDI Offset provision is incorporated
18 into the policies of all of the class members. The Court's finding
19 that the SSDI Offset provision is unenforceable based on
20 inconspicuousness applies generally to the class. Thus, Rule 23(b)(2)
21 is satisfied.

22 Accordingly, the Court denies Defendant's motion to decertify the
23 class as it pertains to Plaintiffs' claim for declaratory relief.

24 B. REQUEST FOR RESCISSION AND REFORMATION.

25 The Court finds that it requires further briefing on whether and
26 how the request for rescission and reformation can be adjudicated as a
27 class action. In light of the Court's decision to analyze class
28 certification separately for each claim, the parties are instructed to

1 brief whether a class (or subclasses) for rescission and reformation
2 is appropriate. The Court is particularly concerned as to whether
3 class treatment is appropriate given Plaintiffs' argument that each
4 class member may "elect" either remedy.¹⁸

5 C. BREACH OF CONTRACT CLAIM.

6 For the reasons addressed above, only Burdick and a handful of
7 unnamed Plaintiffs retain a viable breach of contract claim. One of
8 the basic requirements to maintain a class is that the class be
9 numerous enough that "joinder of all members is impracticable." Fed.
10 R. Civ. P. 23(a)(1). Accordingly, the Court concludes that class
11 treatment of the breach of contract claim is inappropriate.¹⁹

12 VI. CONCLUSION

13 For the foregoing reasons, the Court hereby GRANTS IN PART
14 Defendant's Summary Judgment Motion and GRANTS IN PART Plaintiffs'
15 Summary Judgment Motion. More specifically, the Court grants
16 Plaintiffs' motion for summary judgment that the SSDI Offset provision
17 is inconspicuous and unenforceable, and denies Defendant's cross-
18 motion on that claim. However, the Court denies Plaintiffs' request
19 for rescission and/or reformation as an implicit remedy in their
20 declaratory relief claim. The Court grants Defendant's motion for
21 summary judgment as to the breach of the covenant of good faith and
22 fair dealing claim, and as to the breach of contract claim of any

24 ¹⁸ The parties are instructed to confer and stipulate to a
25 briefing schedule on this issue, as well as the briefing required by
26 footnote 13, supra.

27 ¹⁹ Because the Court grants Defendant's motion for summary
28 judgment as to Plaintiffs' claim for breach of the covenant of good
faith and fair dealing, its motion to decertify as to that claim is
denied as moot.

1 class members who have not sought LTD benefits from Defendant. The
2 Court denies Defendant's motion for summary judgment as to the breach
3 of contract claims that accrued within four years of the date the
4 Complaint was filed for those class members who have sought LTD
5 benefits. The Court defers ruling on the parties' cross-motions as
6 they relate to Plaintiffs' claims under the FAL and UCL.

7 Defendant's Motion to Decertify the Class is GRANTED IN PART.
8 More specifically, the Court denies Defendant's motion as it pertains
9 to Plaintiffs' claim for declaratory relief. The Court grants
10 Defendant's motion as it pertains to Plaintiffs' claim for breach of
11 contract. The Court denies as moot Defendant's motion as it pertains
12 to Plaintiffs' claim for breach of the covenant of good faith and fair
13 dealing. And the Court defers ruling on Defendant's motion as it
14 pertains to Plaintiffs' request for rescission and reformation, and as
15 to their claims under the FAL and UCL.²⁰

16
17 IT IS SO ORDERED.

18
19 DATED: April 2, 2009



20
21 _____
22 AUDREY B. COLLINS
23 UNITED STATES DISTRICT CHIEF JUDGE
24

25
26 ²⁰ Both parties filed myriad evidentiary objections with respect
27 to the pending motions. The Court has considered these objections in
28 reaching the conclusions herein and the objections are overruled to
the extent that they are inconsistent with this ruling. See Gates v.
Deukmejian, 987 F.2d 1392, 1400 (9th Cir. 1992); Truck Terminals, Inc.
v. C.I.R., 314 F.2d 449, 454 (9th Cir. 1963).