IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DIVISION OF MISSOURI WESTERN DIVISION

CHRISTOPHER Y. MEEK, Individually and On Behalf of All Others Similarly Situated,	)	
Plaintiff,	)	
v.	)	Case No. 19-00472-CV-W-BP
KANSAS CITY LIFE INSURANCE COMPANY,	)	
Defendant.	)	

ORDER GRANTING IN PART PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

Pending is Plaintiff's Motion for Class Certification. (Doc. 64.) For the reasons discussed below, the Motion is **GRANTED IN PART**, and the Court certifies a Kansas-only class for Counts I–IV of Plaintiff's Complaint. Additionally, Defendant's Motion to Exclude Plaintiff's damages expert, (Doc. 81), is **DENIED**.

I. BACKGROUND

Defendant Kansas City Life Insurance Company sells life insurance policies. Plaintiff Christopher Meek, a lifelong resident of Kansas, purchased one of Defendant's policies in 1984, (Doc. 67-2 (Plaintiff's policy)), and alleges that a large number of Defendant's policies are materially identical to his. The policies at issue are "universal life insurance" contracts, which combine features of a standard life insurance policy and a savings account: the insured pays premiums each month, and is able to collect interest on the accumulated premiums, which the policies refer to as the "Cash Value" or "Accumulated Value" of the insured's account. Because different people use universal life insurance policies for different purposes, Defendant sells the

policies through independent agents who engage in face-to-face discussions with potential customers and help the potential customers decide which product best fits their needs. (Doc. 91-1, ¶ 102 (Milton Dec.).)

Under the policies, the insurer can sometimes deduct certain charges from the insured's Cash Value. Per the terms of Plaintiff's policy, Defendant reassesses the Cost of Insurance ("COI") "on each monthly anniversary day [] based on the insured's sex, age and risk class." (Doc. 67-2, p. 5.) The policy also includes a table listing the "guaranteed maximum monthly cost of insurance rates per $1,000" of coverage, which are "determined by [Defendant] based on [its] expectations as to future mortality experience." (*Id*.) Defendant then deducts the monthly COI from each insured's account. (*Id*. at p. 6 (defining "Monthly Deduction" as "[t]he amount we deduct on the monthly anniversary day from the cash value to pay the cost of insurance . . . .").) Later in Plaintiff's policy, Defendant provides additional detail about how it calculates the COI. (*Id*. at p. 11.) According to the policy, Defendant defines the COI as equal to Q * (R – S), where "Q" is the COI rate in the table, "R" is the insured's death benefit divided by a certain constant, and "S" is the Cash Value. (*Id*.) The Court refers to the portions of the policies referring to the COI as the "COI provisions."

Plaintiff interprets the COI provisions to prohibit Defendant from basing its insureds' monthly COI on anything aside from the factors listed—the insured's age, sex, policy year, and risk class, which collectively determine the insured's "expectations as to future mortality experience." (Doc. 67, pp. 11–12.) In fact, these factors are the standard mortality factors used throughout the life insurance industry. *E.g., Vogt v. State Farm Life Insurance Company*, 963 F.3d 753, 761 (8th Cir. 2020), *cert. denied*, 121 S. Ct. 2551 (2021) (describing age, sex, and rate class as "so-called 'mortality factors' because they relate to a policyholder's mortality risk, which allows

the insurer to determine the projected mortality estimate of a policyholder based on his specific circumstances").

But according to Plaintiff, Defendant used a number of factors—several of which are unrelated to an insured's mortality risk—to determine its insureds' COI. *E.g.,* Doc. 68-2, pp. 205–10 (Metzler Dep., pp. 204–09) (Defendant assessed insureds' COI "with the intent of accomplishing [] competitive profit," and included assumptions related to "expenses" along with mortality assumptions).) According to Plaintiff's damages expert, the COI Defendant charged was sometimes up to 50% over what the COI would have been had Defendant formulated it based only on mortality-related assumptions. (Doc. 68, ¶ 78 (Witt Dec.).)[1]

Plaintiff also alleges that Defendant's mortality assumptions have improved—that is, it has become less likely that insureds will die—in the past several decades. (*E.g.,* Doc. 68-1 (longitudinal comparison of mortality assumptions).) Despite this, Plaintiff alleges that Defendant has not updated its COI rate tables for many of the policies at issue in years. (*Id.*)

Finally, the policies permit Defendant to deduct a "premium expense charge" from its insureds' Cash Values. (*E.g.,* Doc. 67-2, p. 6.) The premium expense charge takes the form of a percentage of the premium payment, and differs between policies. (*E.g.,* Doc. 67-4, p. 5 (sample policy where the premium expense charge is 9% of the premium).) Plaintiff alleges that, in addition to the premium expense charges, Defendant incorporated "expense"-related charges into the COI—and thereby deducted more than was allowed under the "premium expense charge" portion of the policies from its insureds' Cash Values. (Doc. 8, ¶ 74.)

[1] While Defendant did not broadcast its COI rates, Defendant's practice has been to provide COI scales to agents and current or prospective insureds upon request. (Doc. 91-1, ¶ 110 (Milton Dec.).)

Plaintiff brought this suit in June 2019, advancing five counts against Defendant on behalf of a putative class of insureds:

- Count I alleges that Defendant breached its insurance policies by charging a COI disconnected from the mortality factors discussed in the COI provisions;
- Count II alleges that Defendant breached the insurance policies by deducting expense charges in excess of the amount allowed by the policies;
- Count III alleges that Defendant breached the contract by failing to update its mortality tables in accord with its improved mortality expectations;
- Count IV asserts a conversion claim based on the above conduct; and
- Count V seeks declaratory and injunctive relief.

(*See generally* Doc. 8 (the Amended Complaint).)

Now, Plaintiff has filed a motion for class certification on all of these Counts. (Doc. 64.) The motion asks the Court to certify the following nationwide class:

> All persons who own or owned a Better Life Plan, Better Life Plan Qualified, LifeTrack, AGP, MGP, PGP, Chapter One, Classic, Rightrack (89), Performer (88), Performer (91), Prime Performer, Competitor (88), Competitor (91), Executive (88), Executive (91), Protector 50, LewerMax, Ultra 20 (93), Competitor II, Executive II, Performer II, or Ultra 20 (96) life insurance policy issued or administered by Defendant, or its predecessors in interest, that was active on or after January 1, 2002. Excluded from the Class are: KC Life; any entity in which KC Life has a controlling interest; any of the officers, directors, employees, or sales agents of KC Life; the legal representatives, heirs, successors, and assigns of KC Life; anyone employed with Plaintiff's counsel's firms; and any Judge to whom this case is assigned, and his or her immediate family. Also excluded from the Class are Missouri citizens whose qualifying policy or policies were issued in Missouri.

(Doc. 67, p. 9.) Alternatively, Plaintiff requests the certification of a Kansas-only class. (*Id.*) The motion further requests that Meek be appointed class representative, and Stueve Siegel Hanson LLP and Miller Schirger, LLC be designated class counsel. (*Id.*) Defendant opposes the motion. (Doc. 80.) The Court resolves the parties' arguments below, setting out additional facts as needed.

II. DISCUSSION

A plaintiff must clear a number of hurdles before the Court can certify a class under Federal Rule of Civil Procedure 23. Rule 23(a) provides that certification is warranted only if "the class is so numerous that joinder of all members is impracticable," "there are questions of law or fact common to the class," the putative class representative is "typical" of the class, and the representative "will fairly and adequately protect the interests of the class." In addition to these requirements, the plaintiff must show that the putative class qualifies under one of the categories in Rule 23(b). Here, Plaintiff seeks certification under Rule 23(b)(3), which requires that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action [be] superior to other available methods for fairly and effectively adjudicating the controversy." Defendant raises a number of arguments to oppose Plaintiff's motion for class certification. Because many of the issues depend on the resolution of other matters, the Court addresses the parties' arguments in the order that permits it to most efficiently rule on every salient question.

1. Plaintiff's Ability to Prove Damages

To satisfy the predominance requirement of Rule 23(b), Plaintiff must establish that the alleged "damages are capable of measurement on a classwide basis." *Comcast Corp. v. Behrend*, 569 U.S. 27, 34 (2013). For Plaintiff's damages model to clear this hurdle, the model must "measure only those damages attributable" to the legal theory on which Plaintiff seeks class certification. *Id*. at 35. At the class certification stage, "[c]alculations need not be exact"; instead, the Court's role is to ensure that the model is "consistent with [the plaintiff's] liability case." *Id*. (citation omitted).

Plaintiff has supplied a report by his damages expert, Scott J. Witt, a consulting actuary with extensive experience in the life insurance industry. (Doc. 68, ¶¶ 1–3.) Witt used mortality data and assumptions supplied by Defendant to retroactively calculate Plaintiff's mortality risk during each month since Plaintiff purchased his policy, and compared the "mortality risk COI" to the "actual COI" Defendant charged its insureds. (*Id*. at ¶ 20(d).) Witt then calculated the running total Defendant overcharged Plaintiff, plus interest, resulting in damages of $18,045.81 over the decades that Plaintiff has maintained his policy. (Doc. 67-19 (spreadsheet summarizing Witt's calculations).) Witt opines that he could use the same methodology to calculate damages for each member of the putative class. (Doc. 68, ¶ 20(e).)

Defendant has filed a motion to exclude Witt's testimony, arguing that he has failed to meet the requirements to testify as an expert witness. (Doc. 81.) A proposed expert witness must satisfy the requirements of the Federal Rules of Evidence. Specifically, the witness may offer an expert opinion on an issue if he possesses the requisite "knowledge, skill, experience, training, or education," and if the opinion exhibits four qualities:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.

FED. R. EVID. 702. Under Rule 702(c), courts assess five factors to determine whether an expert's methodology is "reliable": (1) "whether it can be (and has been) tested"; (2) "whether the theory or technique has been subjected to peer review and publication"; (3) "the known or potential rate of error" of the methodology; (4) " the existence and maintenance of standards controlling the technique's operation"; and (5) whether the methodology has attracted "[w]idespread acceptance"

within the relevant scientific community. *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 593–94 (1993).

Defendant offers two main arguments as to why the Court should exclude Witt's testimony under Rule 702. First, it contends that Witt's damages model is not related to Plaintiff's theory of liability. (Doc. 91, pp. 32–36.) Second, it argues that Witt's opinion is unreliable under the *Daubert* framework. (*Id*. at pp. 36–42.) The Court addresses each of these arguments in turn.

a. Relationship to Plaintiff's Theory of Liability

Defendant contends that Witt's damages model is unrelated to Plaintiff's theory of liability, i.e., that under the policies, Defendant was required to calculate the monthly COI rate based only on the insured's mortality risk, rather than on non-mortality-related factors. In calculating the mortality risk COI which he compared to the actual COI Defendant charged, Witt relied on Defendant's internal mortality assumptions, which Defendant provided in response to Plaintiff's interrogatories. (Doc. 68, ¶ 44.) Defendant raises a number of arguments as to why this was improper, all of which the Court rejects. First, Defendant complains that its internal mortality assumptions are not the same as the "expectations as to future mortality experience" discussed in the policies. (Doc. 91, p. 16.) The Court disagrees. This is a factual question related to the merits of Plaintiff's claim which the Court need not resolve at this juncture; but the Court notes that a factfinder could certainly determine that the words "expectations as to future mortality experience" refer to an insured's risk of dying, which is precisely what Defendant's internal mortality assumptions are designed to estimate.

Second, Defendant argues that the policies do not require it to set the COI equal to an insured's calculated mortality risk, or even to base the COI solely on mortality-related factors. (Doc. 91, p. 18.) This is simply a disagreement with Plaintiff's theory on the meaning of the

policies, and as such, is plainly a merits question which the Court need not—indeed, cannot—address at this stage of the litigation. *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*, 133 S. Ct. 1184, 1194–95 (2013) ("Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage."). In other words, this argument does not address whether Witt's testimony properly calculates Plaintiff's damages if Plaintiff prevails on the merits, and hence, is not a reason to exclude his testimony at this stage of the case.

Third, Defendant argues that Witt uses different internal mortality assumptions for different periods of time—for example, he used "Pricing Mortality Rates" for years between the 1980s and 2005, mortality rates used to prepare GAAP financial statements until 2015, and "unismoke" mortality rates—that is, rates which do not differentiate between smokers and nonsmokers—after 2015. (Doc. 91, pp. 19–21.) However, as Plaintiff points out, Witt used the *exact same* mortality assumptions that Defendant used internally in assessing its products. (*See* Doc. 102-2 (Defendant's mortality assumptions, provided to Plaintiff in response to an interrogatory); *see also* Doc. 91-4, p. 213 (Witt Dep., p. 212) (Witt explains that he used unismoke rates to avoid "deviating from what [Defendant] stated" were its mortality assumptions).) Further, to the extent Defendant's disagreements with the mortality assumptions Witt used have any merit, these concerns can be addressed later by requiring Plaintiff to alter the formula appropriately; "factual disputes over which inputs Witt should use in his model, rather than flaws in the model itself, [] do little to undermine the reliability of the model at this stage." *Bally v. State Farm Life Insurance Company*, 335 F.R.D. 288, 299 (N.D. Cal. 2020) (discussing a similar model prepared by Witt in a different lawsuit).[2]

[2] In fact, Witt submitted a supplemental declaration indicating that his model could easily accommodate different inputs. (Doc. 102-7, ¶ 7 (Witt Supp. Dec.).)

Fourth, Defendant contends that Witt improperly ignored all of the months where the actual COI Defendant charged was *lower* than the COI would have been if it were based solely on mortality assumptions. (Doc. 91, pp. 26–27.) Indeed, there appear to be a large number of months where Plaintiff's actual COI is lower than the mortality-exclusive COI that Witt projected. (*See* Doc. 67-19.) Plaintiff responds that Defendant is improperly trying to raise a "damages offset" defense despite not pleading such a defense in its Answer. (Doc. 102, p. 16.)

The Court generally agrees with Defendant. At the class certification stage, *Plaintiff*—not Defendant—bears the burden of showing that there is a method for calculating the classwide damages stemming from Defendant's alleged breach. *Comcast,* 569 U.S. at 34. Plaintiff has chosen to do so through a retroactive, longitudinal comparison between the COI Defendant actually charged and the COI Plaintiff believes it should have charged. While the Court agrees in principle with this approach, a necessary corollary is that the total damages Plaintiff calculates must include the time periods for which Defendant charged *less* than Plaintiff's projections. This is not an affirmative defense, but an application of the basic principle for calculating expectation damages under a breach-of-contract claim—namely, that plaintiffs should receive "a sum that would put them in the *same position as if the defendant had fully fulfilled [its] obligations* under the contract." *Penzel Construction Company, Inc. v. Jackson R-2 School District*, 544 S.W.3d 214, 235 (Mo. Ct. App. 2017) (emphasis added; citation omitted). In other words, to assess the putative class members' damages, Witt should have calculated the total amount of monthly COI payments they actually made, and compared it to the sum they would have paid had Defendant calculated their COI rates according to Plaintiff's interpretation of the policies.[3]

[3] To support its point, Plaintiff cites *Vogt v. State Farm Life Insurance Company*, 963 F.3d 753, 770 (8th Cir. 2020), *cert. denied*, 141 S. Ct. 2551 (2021). But in *Vogt*, following a jury trial, the jury ultimately selected a "damages model" that "included [the insurer's] offset amounts"; the case does not indicate that such a damages model is somehow an affirmative defense, and in fact, appears to suggest that a damages model for this type of case must take

However, the Court does not believe that this warrants excluding Witt's testimony. Plaintiff can easily remedy this defect by modifying Witt's calculations to account for the possibility of negative overcharge rates, so that the total damages are offset by any financial benefit Plaintiff accrued due to Defendant's alleged breach.[4]

Finally, Defendant argues that each of the Counts for which Plaintiff seeks class certification requires a different measure of damages, whereas Witt used only one calculation for damages, a calculation based on Plaintiff's theory under Count I. (Doc. 91, p. 28.) To assess this argument, the Court begins by discusses the damages Plaintiff can obtain if he succeeds under each Count.

Count I alleges that Defendant breached the policies by charging a COI greater than the COI would have been had Defendant considered only mortality-related factors. Witt's methodology directly measures damages for this claim.

Count II alleges that Defendant improperly used the COI charge to deduct "expenses" from insureds' Cash Values. The damages for this claim are necessarily the difference between (1) the "premium expense charge" Defendant was authorized to deduct under the policies, (*e.g.,* Doc. 67-2, p. 6), and (2) the total expense charges Defendant deducted. As Defendant points out, damages under this Count are equal to damages under Count I *only if* 100% of the amount Defendant "overcharged" through its COI deductions is attributable to "expenses." (Doc. 91, p. 29.) That

into account circumstances where policyholders experienced a lower COI than they would have under the plaintiff's proposed COI formula.

[4] In fact, the Court has done this on its own and calculated that Plaintiff's damages would be approximately $11,000 (exclusive of interest) if he prevails on his theory of liability. (*See also* Doc. 102-7, ¶ 10 (Witt Supp. Dec.) (explaining that even if Witt applied an offset, Plaintiff would still not have negative damages).) The Court therefore rejects Defendant's suggestion that Plaintiff has suffered no damages, or even accrued a net gain, due to Defendant's alleged breach. (*E.g.,* Doc. 106, p. 8.) The calculation Defendant uses to show that Plaintiff suffered negative damages depends on using alternative mortality-based COI rates prepared Defendant's own expert. (*See* Doc. 89, p. 18.) Whether Plaintiff's mortality-based COI rates or Defendant's are the true measure of damages is ultimately a merits question that the Court need not resolve at this stage—and indeed, cannot resolve based on the limited information the parties have provided.

does not appear to be the case—in fact, Witt indicated in his report that it appeared Defendant calculated the COI based on a combination of (1) mortality experience, (2) expenses, (3) risk, and (4) profit. (Doc. 68, ¶ 54.) Thus, at the moment, it does not appear that Witt's methodology reflects Plaintiff's damages under Count II. However, in his supplemental declaration, Witt indicated that he could subtract the amount of the COI overcharge attributable to non-mortality, non-expense factors if needed. (Doc. 102-7, ¶ 11.) Therefore, the Court finds that Witt's model could be used to calculate damages under Count II.

Count III alleges that Defendant overcharged its customers by failing to update its basic mortality assumptions to conform to improved mortality projections over the last few decades. If Plaintiff prevails on Count III, the damages will be the difference between (1) the COI Defendant charged based on the outdated mortality data and (2) the COI Defendant *should have* charged based on updated projections. The first component of this equation—the COI Defendant charged based on the outdated mortality data—necessarily depends on the extent to which the COI Defendant actually charged was based on mortality assumptions, since the evidence tends to show that other factors contributed to the COI as well. Plaintiff admits that Witt "has not provided an independent calculation" of damages under Count III because "Count III is merely a subset of full damages." (Doc. 102, p. 19.) The Court doubts that this is an accurate characterization of the relationship between Plaintiff's claims.[5] However, Witt's supplemental declaration indicates that he can use a similar methodology to calculate these damages. (Doc. 102-7, ¶ 12.)

Count IV alleges that Defendant converted Plaintiff's property. Defendant contends that Witt fails to offer a method to assess Plaintiff's damages under this theory, pointing out that the

[5] For instance, as Defendant points out, Plaintiff could succeed on Count III—that is, prove that Defendant should have updated its mortality assumptions—and lose on his remaining arguments. (Doc. 91, p. 36.)

measure of damages for conversion is the "fair and reasonable market value of the property converted at the time of the conversion." *Wingerson v. Tucker*, 175 Kan. 538, 540 (1954). The Court believes Plaintiff's conversion claim rises or falls with his other claims—that is, if Defendant deducted money from his Cash Value wrongfully (under any of the breach-of-contract theories), Plaintiff can recover the same amount under the conversion claim as he can under the breach of contract theories—and therefore that Witt's methodology can likely measure damages under Count IV.

In sum, Defendant has pointed to a variety of defects in Witt's report and methodology, some of which will need to be corrected if and when this case moves forward. However, as Plaintiff points out, at the class certification stage, the Court's role is to ascertain whether there is a "model . . . [that] measure[s] only those damages attributable to [the plaintiff's] theory," and "establish[es] that damages are susceptible of measurement across the entire class." *Comcast*, 569 U.S. at 35. The Court believes Witt's basic methodology shows that the putative class members' damages can be assessed on a formulaic, classwide basis, and therefore declines to exclude his opinion on this ground.[6]

b. Reliability of Witt's Methodology

Defendant next contends that, regardless of the connection between Witt's model and this litigation, his approach to measuring damages is unreliable under the *Daubert* framework. The standard for assessing expert testimony under Rule 702 is liberal; the Court should exclude expert

[6] This also addresses Defendant's argument in opposition to Plaintiff's motion for class certification that individual issues will predominate because damages are not susceptible to classwide measurement. (Doc. 89, pp. 38–40.) To the extent that Defendant suggests that because Witt's formula may result in a different amount of damages for each class member, individual issues will predominate, the Court disagrees: as long as damages can be calculated for each class member through the same formula, variation in the result of the formula does not defeat predominance. *See, e.g., Cromeans v. Morgan Keegan & Co.*, 303 F.R.D. 543, 559 (W.D. Mo. 2014) (because "[t]he application of [the plaintiff's] model to each class member is merely mechanical," the possibility of "variation does not defeat the common issue of liability and the calculation of damages is [still] based on a single model applicable to all members of the class").

testimony only "if it is so fundamentally unreliable that it can offer no assistance to the jury[;] otherwise, the factual basis of the testimony goes to the weight of the evidence." *Larson v. Kempker*, 414 F.3d 936, 940–41 (8th Cir. 2005) (quotation omitted). An expert's testimony must merely be "reasonably based on" his "knowledge, skill, experience, training, or education," and should be excluded only if it is "wholly incapable of testing or verification." *Weitz Co. v. MH Washington*, 631 F.3d 510, 527 (8th Cir. 2011) (quotations omitted).

Defendant first contends that Witt's opinion is unreliable because he failed to apply "actuarial principles" or adhere to actuarial industry standards in formulating his report. (Doc. 91, pp. 36–37.) The Court disagrees. Witt was not trying to perform an "actuarial pricing exercise," so whether or not he followed the Actuarial Standards of Practice to the letter is irrelevant to the Rule 702 analysis. And Defendant does not meaningfully dispute that Witt's actuarial expertise helped him understand the statistics Plaintiff obtained from Defendant in discovery and draw conclusions about Defendant's practices as an insurer—regardless of whether, in doing so, he was literally acting as an "actuary."

Next, Defendant argues that Witt's methodology has not been subject to rigorous testing and analysis. (Doc. 91, p. 39.) However, Witt's report is essentially pure math, as Plaintiff points out. (Doc. 102, p. 21.) Witt simply took statistics from Defendant's discovery responses[7] and subjected those statistics to a set of relatively simple mathematical steps, each step of which can be easily assessed and replicated. Defendant suggests that Witt only applied his methodology to Meek, rather than to every member of the putative class, but the Court does not believe that there was any need for him to apply his method to every member of the putative class at this stage.

[7] Defendant also repeats its argument that Witt improperly relied on Defendant's internal mortality assumptions when formulating the mortality risk COI with which he compared the actual COI. (Doc. 91, p. 41.) The Court rejects this argument once again: Witt was entitled to rely on Defendant's own mortality assumptions, the ones it used in formulating its products, to compute a COI based solely on mortality-related factors.

In sum, the Court finds that Witt's expertise aided him in preparing his report, and that his methodology is reasonably sound and likely to be helpful to a factfinder. In reaching this conclusion, the Court joins a host of other courts which have considered Witt's methodology as applied in other cases and found that it satisfies Rule 702's requirements—at least at the class certification stage. *E.g., Bally*, 335 F.R.D. at 299; *Whitman v. State Farm Life Insurance Company*, 2021 WL 4264271, at *9–10 (W.D. Wash. Sept. 20, 2021); *Vogt v. State Farm Life Insurance Company*, 2018 WL 4937330, at *3–6 (W.D. Mo. Oct. 11, 2018), *aff'd*, 963 F.3d 753, 769 (8th Cir. 2020); *Spegele v. USAA Life Insurance Company*, 336 F.R.D. 537, 546 (W.D. Tex. 2020). Therefore, Defendant's Motion to Exclude Witt's testimony, (Doc. 81), is **DENIED**.

2. Choice-of-Law Issues

Defendant next contends that choice-of-law issues preclude class certification because each class member's claim is governed by the laws of her home state. (Doc. 89, p. 28.) Plaintiff maintains that Missouri law governs all class members' claims. (Doc. 67, p. 23.) This issue bears on at least two aspects of the class certification analysis: Meek's adequacy and typicality as a class representative (because Defendant argues that his claims are governed by Kansas law, and consequently time-barred), and whether common or individual questions predominate (because Defendant asserts that variations in state law tilt the balance in favor of individual questions). (*See* Doc. 89, pp. 23–25, 26–30.)

A federal court exercising diversity jurisdiction applies the choice-of-law rules of the state in which it sits—here, Missouri. *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 496 (1941). The parties agree that Missouri courts apply the "most significant relationship" test from the Restatement (Second) of Conflicts of Law to assess which law governs both contract and tort claims, although the test applies slightly differently depending on the type of claim. *Dorman v.*

Emerson Elec. Co., 23 F.3d 1354, 1358 (8th Cir. 1994). Section 6 of the Restatement comprises a list of factors for courts to consider in assessing which state has the "most significant relationship" with a claim; the factors are:

> (a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied.

RESTATEMENT (SECOND) CONFLICT OF LAWS § 6.

Other sections of the Restatement provide additional factors specific to the claim at issue. With respect to breach-of-contract claims, the Restatement provides that the Court should consider:

> (a) the place of contracting, (b) the place of negotiation of the contract, (c) the place of performance, (d) the location of the subject matter of the contract, and (e) the domicile, residence, nationality, place of incorporation and place of business of the parties.

RESTATEMENT (SECOND) CONFLICT OF LAWS § 188. With respect to tort claims, the Restatement lists the following factors:

> (a) the place where the injury occurred, (b) the place where the conduct causing the injury occurred, (c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and (d) the place where the relationship, if any, between the parties is centered.

RESTATEMENT (SECOND) CONFLICT OF LAWS § 145.

Finally, several sections of the Restatement provide "default" choice-of-law rules for different subjects. Section 192 of the Restatement provides that in most cases, "the validity of a life insurance contract issued to the insured upon his application *and the rights created thereby* are determined . . . by the local law of the state where the insured was domiciled at the time the policy was applied for . . . ." RESTATEMENT (SECOND) CONFLICT OF LAWS § 192 (emphasis added).

Comment a to § 192 provides that the default rule "does not apply to questions involving details of performance which are governed by the local law of the state where the performance either has taken, or is to take place," and references § 206 of the Restatement. Comment b to § 206, in turn, contrasts examples of "details of performance" and more substantive issues. According to Comment b, matters such as "the amount that must be paid under a contract" are governed by the default rule, while questions like "the kind of currency in which payment shall be made" are governed by the place of performance.

After reviewing the parties' arguments, the Court finds that under the Restatement, the law of each insured's domicile when he or she purchased the life insurance policy governs his or her breach-of-contract and conversion claims. With respect to the breach-of-contract claims, the Court agrees with Defendant that § 192 governs this case. (Doc. 89, p. 29.) In reaching this conclusion, the Court rejects Plaintiff's argument that the case concerns a "detail of performance" and therefore the law of the place of performance should govern under § 206. (Doc. 116, p. 18.) The issue in this case is "the amount that must be paid under a contract"—specifically, how much the putative class members paid or should have paid under the COI provisions of the policies—which § 206 explicitly provides is not a "detail of performance." Thus, under § 192, there is a strong presumption that the law of the insured's home state applies.

The factors in § 188 support, rather than rebut, this conclusion. The "place of performance" and "location of the subject matter of the contract" are both the insured's home state: an insured makes premium payments under the insurance policy from her home state, and if she were to die, presumably her estate would receive compensation under the policy in her home state as well. Defendant has also introduced evidence that at least for many putative class members, the policies were negotiated and signed in their home states. (Doc. 89-1, ¶ 118 (Milton Dec.).) Missouri

courts—and federal courts applying Missouri law—have repeatedly reached the same conclusion, namely, that the law of an insured's domicile governs the interpretation of the life insurance policy. *E.g., Sheehan v. Northwestern Mut. Life Ins. Co.*, 44 S.W.3d 389, 396 (Mo. Ct. App. 2000) ("The law of the insured's domicile generally controls issues arising under a life insurance policy because a state has a strong interest in protecting its own citizens."); *Buck v. American States Life Ins. Co*., 723 F. Supp. 155, 160 (E.D. Mo. 1989); *Moss v. National Life & Acc. Ins. Co.*, 385 F. Supp. 1291, 1295 (W.D. Mo. 1974).

With respect to the conversion claim, the most important factors appear to be the place where the wrongful conduct occurred and the place where the injury occurred, and "[w]here the place of conduct and the place of injury occur in two different states, Missouri choice of law rules dictate that the place where the act takes harmful effect or produces the result complained of is the more significant contact." *Birnstill v. Home Sav. of America*, 907 F.2d 795, 977 (8th Cir. 1990). Here, the alleged wrongful conduct occurred in Missouri, where Defendant is headquartered and maintains its operations, but the alleged harmful *effect* occurred where each insured lost money—i.e., her home state. *See American Guarantee and Liability Ins. Co. v. U.S. Fidelity & Guar. Co.*, 668 F.3d 991, 997 (place of injury is where "an insured feels the economic impact" of the wrongful conduct). Moreover, § 145 provides that the Court can consider "the place where the relationship, if any, between the parties is centered" in assessing which law governs a tort claim, and for the reasons discussed above, the relationship between a life insurance company and its policyholders is centered in the policyholders' state of domicile.

For these reasons, the Court finds that under Missouri's choice-of-law rules, the law of the insureds' domicile governs both the conversion and breach-of-contract claims. The Court will address the implications of this conclusion below.

3. Rule 23(a) Requirements

a. Numerosity

Rule 23(a) requires that a class be so numerous that joinder of all parties is impracticable. Plaintiff has supplied evidence that Defendant issued over 80,000 life insurance policies of the types identified in the class definition. (Doc. 68, ¶ 21 (Witt Dec.).) There are no "rigid rules regarding the necessary size of classes." *Emanuel v. Marsh*, 828 F.2d 438, 444 (8th Cir. 1987). Instead, to determine whether a class is sufficiently numerous, "a court must make a practical judgment based on the specific facts of each case." *Sondel v. Northwest Airlines*, 1993 U.S. Dist. LEXIS 21252, at *20–21 (D. Minn. Sept. 30, 1993). Here, given the high number of potential claimants, the Court finds that Plaintiff has satisfied the numerosity requirement.

b. Commonality

Rule 23(a) also requires that there be at least one issue of law or fact common to all class members. For a question to satisfy the commonality requirement, it must be one for which the "determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). Plaintiff contends that all of the policies at issue used similar language, and that interpreting the material terms of those policies is a question of law common to all class members. (Doc. 67, p. 17.) Defendant responds that because Plaintiff seeks the certification of a 49-state class, variations in state laws might result in different interpretations of the policies depending on the state in which the putative class members reside. (Doc. 89, p. 26.) As mentioned above, the Court will not certify a 49-state class, but will certify a Kansas-only class whose members' claims are governed by Kansas law. And clearly, the interpretation of the policies under Kansas law is a legal question

common to a Kansas-only class. The Court therefore finds that Plaintiff has satisfied the commonality requirement.

c. Adequacy and Typicality: Christopher Meek as Class Representative[8]

Under Federal Rule of Civil Procedure 23(a)(3), in order to certify a class, the Court must ensure that the class representative's claims are typical of the class claims. This requirement "is fairly easily met so long as other class members have claims similar to the named plaintiff." *DeBoer v. Mellon Mortg. Co*., 64 F.3d 1171, 1174 (8th Cir. 1995). Additionally, Rule 23(a)(4) requires the Court to ensure that the "representative parties will fairly and adequately protect the interests of the class." The purpose of this requirement is to "uncover conflicts of interest between named parties and the class they seek to represent"; thus, a named plaintiff whose interests conflict with other class members is inadequate under Rule 23(a)(4). *Amchem Prods. v. Windsor*, 521 U.S. 591, 625 (1997).

Plaintiff contends that Meek satisfies both requirements, because his claims are similar to those of other class members—in that they both depend on the legal theory that Defendant wrongly calculated COI rates—and because Meek's interests in the case align with other class members. (Doc. 67, pp. 19–21.) Defendant offers three responses. First, Defendant contends that Meek's interests conflict with the other class members because some class members would actually pay *higher* insurance premiums under Plaintiff's interpretation of the insurance contract. (Doc. 89, p. 22.) Indeed, as discussed above, for certain periods of time, Meek himself paid lower premiums using Defendant's COI formula than he would have using his own COI formula. As a result, Defendant contends that any injunctive or declaratory relief that would require Defendant to

[8] The adequacy requirement also requires the Court to consider the adequacy of the attorneys representing the putative class. Plaintiff's attorneys are experienced and qualified, and have prosecuted many similar cases in the past; indeed, Defendant does not suggest that Plaintiff's counsel is inadequate. Therefore, the Court finds that Plaintiff has satisfied this portion of the adequacy requirement.

employ the COI formula Plaintiff proposes would harm some class members—and therefore, there is a conflict among the class on those forms of relief. (Doc. 89, p. 22.) In reply, Plaintiff characterizes this as a "setoff" argument which, he argues, must be pled as an affirmative defense. (Doc. 116, p. 8.) Plaintiff also contends that he seeks declaratory and injunctive relief only to stop Defendant from "*overcharging* policyholders," and so a favorable declaration or injunction would "require [Defendant] to *lower* its contractually noncompliant COI rates—no rates will be raised because of this action." (Doc. 116, p. 10.)

The Court agrees with Defendant. Plaintiff has proposed an alternative mechanism for calculating COI rates, a mechanism which indicates that over the lifetime of his policy, he and some other class members were overcharged. That mechanism is the logical extension of Plaintiff's legal theory, namely, that the life insurance policies at issue required Defendant to consider *only* mortality-related factors in calculating the COI. Defendant has presented evidence that an injunction or declaration *requiring* Defendant to apply Plaintiff's proposed mechanism in the future would harm some class members (and presumably benefit others), resulting in a conflict among the class. Plaintiff's suggestion that the Court could issue an injunction requiring Defendant to apply Plaintiff's proposed mechanism except where it would harm class members is unavailing—that would be the equivalent of issuing an injunction telling Defendant "stop breaching the contract, except in circumstances where it benefits Plaintiff," and there is no legal basis for such an injunction.

However, this reasoning clearly does not apply to Plaintiff's request for monetary damages, which is purely retrospective. At worst, a putative class member for whom the COI Defendant actually charged was consistently less than a mortality-based COI would be entitled to no damages, but this does not create a conflict among the class. For these reasons, the Court concludes that

Plaintiff's request for injunctive and declaratory relief creates conflicts among the putative class, and therefore that a class seeking such relief cannot be certified,[9] but a class seeking only monetary damages creates no such conflict.

Next, Defendant contends that Meek suffered no damages under his theory of liability. (Doc. 89, p. 23.) The Court disagrees for the reasons explained in the section discussing Plaintiff's damages computation. (*See supra* n.4.)

Finally, Defendant contends that Meek's claims are time-barred, rendering him atypical. (Doc. 89, pp. 23–26.) However, Defendant also contends that *all* putative class members who live in Kansas have similarly time-barred claims. (Doc. 89, pp. 42–43.) For reasons discussed below, the Court will not certify a nationwide class, but will certify a Kansas-only class, as Plaintiff proposes in the alternative. And under Defendant's argument, Meek is *precisely* typical of that class, because if his claims are barred by the Kansas statute of limitations, then the same is true of all members of the class. Therefore, the Court finds that Meek is not atypical in this respect, and that whether the class's claims are time-barred under Kansas law is an issue suitable for class treatment. Moreover, the Court declines to decide whether Meek's claims are time-barred under the Kansas statute of limitations, because this is a merits issue—one apparently common to all members of the Kansas class—and the Court may not "engage in free-ranging merits inquiries at the certification stage." *Amgen Inc*, 133 S. Ct. at 1194–95. Instead, the Court agrees with Plaintiff

[9] By the same token, the Court agrees with Defendant that Plaintiff cannot certify a class under Rule 23(b)(2), as Plaintiff requests in the alternative. (*See* Doc. 67, pp. 40–41.) For one, Rule 23(b)(2) applies only where "the primary relief sought is declaratory or injunctive." *In re St. Jude Med., Inc.*, 425 F.3d 1116, 1121 (8th Cir. 2005). Here, the putative class members' request for monetary damages is at least as important as their request for declaratory and injunctive relief. More importantly, "class claims" under Rule 23(b)(2) "still must be cohesive," *id*., and for the reasons discussed above, the Court finds that a 23(b)(2) class would not be cohesive because the members might have competing interests with respect to declaratory or injunctive relief.

that this issue is best addressed in the context of a motion for summary judgment, along with Defendant's other arguments about the merits of Plaintiff's claims. (*See* Doc. 116, pp. 13–15.)

4. Rule 23(b) Requirements

In order to certify a class under FED. R. CIV. P. 23(b)(3), a plaintiff must show that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." The parties focus most of their attention on the predominance requirement.

a. Predominance

Defendant's primary argument against class certification is that because the law of each insured's home state governs that person's policy, variations among the state laws at issue defeat predominance. (Doc. 89, pp. 33–38.) Plaintiff's only response is that Missouri law governs all of the claims. (Doc. 116, pp. 18–25.) The Court rejects this response for the reasons discussed above.

The Court also agrees with Defendant that in a 49-state class, common issues do not predominate. Initially, Plaintiff, as the party seeking class certification, has the burden to show that the states' bodies of law are similar enough that common issues predominate; Plaintiff has not attempted to meet that burden. Moreover, Defendant has identified several legal questions on which different states take different approaches. For example, different states apply different statutes of limitations, and those differences may affect whether putative class members have viable claims. In Kansas—whose law applies to Meek's claims— a breach of contract "action accrues when the contract is violated and not at the time when the plaintiff learns that it has been violated," *Law v. Law Co. Bldg. Associates*, 289 P.3d 1066, 1076 (Kan. 2012), whereas in Missouri, a cause of action accrues only when "[t]he damage [is] actually sustained and capable

of ascertainment." *Nettles v. American Tel. and Tel. Co.*, 55 F.3d 1358, 1062 (8th Cir. 1995) (applying Missouri law). Similarly, Kansas does not recognize the "fraudulent concealment" doctrine, under which the statute of limitations is tolled against a party that has tried to conceal its breach, *e.g., Freebird, Inc. v. Merit Energy Co.*, 883 F. Supp. 2d 1026, 1035 (D. Kan. 2012) (analyzing Kansas law), whereas Missouri recognizes the doctrine under some circumstances. *DeCoursey v. American General Life Ins. Co.*, 822 F.3d 469, 475 (8th Cir. 2016) (applying Missouri law). Because many putative class members have, like Meek, held their life insurance policies for years or decades, the statute of limitations issues that this case will likely present are complex and may constitute Defendant's main line of defense. Applying 49 separate statutes of limitations—and the various doctrines associated therewith—would be unmanageable. Therefore, the Court finds that individual issues would predominate over common ones in a 49-state class.[10]

In the alternative, Plaintiff requests that the Court certify a similar class, but for only individuals who were domiciled in Kansas when they signed their insurance policies. (Doc. 67, pp. 41–42.) This class consists of about 6,000 people, so it readily satisfies numerosity, (*see* Doc. 68, ¶ 21), and for the reasons discussed above, also satisfies the other Rule 23(a) requirements because Meek is a member of the class and an adequate, typical representative. Moreover, a

[10] Notably, this would remain true even if the Court agreed with Plaintiff that Missouri law governs the substance of his—and all putative class members'—claims. This is because Missouri has a borrowing statute, which provides that that "whenever a cause of action has been fully barred by the laws of the state . . . in which it is originated, said bar shall be a complete defense to any action thereon, brought in any of the courts of this state." MO. REV. STAT. § 516.190. This statute applies alongside the traditional choice-of-law analysis; that is, "where section 516.190 applies, it preempts the resolution of the statute of limitations issue by traditional conflicts analysis." *Thompson by Thompson v. Crawford*, 833 S.W.2d 868 (Mo. 1992) (en banc). As a result, even though Missouri law may govern the substance of the putative class members' claims, each class member may be subject to a different statute of limitations depending on her location. "[F]or cases involving a purely economic injury . . . a cause of action originates where the plaintiff is financially damaged." *Great Plains Trust Co. v. Union Pacific R. Co.*, 492 F.3d 986, 993 (8th Cir. 2007). Here, all putative class members suffered the alleged loss in their home states, because it is there that they "felt the cash flow crunch" resulting from Defendant allegedly overcharging them on their COI rates. *Id*. (quoting *Rajala v. Donnelly Meiners Jordan Kline, P.C.,* 193 F.3d 925 (8th Cir. 1999)). Therefore, even if the Court believed that Missouri substantive law applies to all putative class members, Missouri's borrowing statute means that individual issues would predominate in a 49-state class.

Kansas-only class avoids the predominance concerns that result from attempting to wrangle with 49 separate bodies of law; the claims of all individuals who were domiciled in Kansas when they signed their insurance policies are governed by Kansas law, and the claims are otherwise susceptible to common proof.[11]

Defendant contends that even for a Kansas-only class, individual issues predominate. (Doc. 89, pp. 42–43.) The Court disagrees. Some of the issues Defendant cites are not only not individual, but expressly classwide; for example, Defendant contends that "*all policyholders* [in Kansas] . . . purchased their policies more than 10 years ago, and thus no policyholders have timely claims." (*Id*. (emphasis added).) Whether the statute of limitations is tolled due to one of the theories Plaintiff suggests—the discovery rule, for example, or the doctrine of fraudulent concealment—is also a common issue. Defendant suggests that the Court would need to consider "extrinsic evidence" to assess "each policyholder's understanding of the COI language in his or her policy," (*id*.), but the Court disagrees. The relevant language is the same across all the policies at issue, and to the extent that the language is ambiguous, Kansas courts consistently interpret form insurance "strictly [] against the party who drafted the provision." *Liggatt v. Employers Mut. Cas. Co.*, 46 P.3d 1120, 1126 (Kan. 2002) (quoting *Shelter Mut. Ins. Co. v. Williams*, 804 P.2d 1374 (1991)). Because a large number of consumers "entered into a contract identical or substantially similar to the one entered into by the" class representative, this is a "classic case for treatment as a class action," in that all of the putative class members' claims depend on an interpretation of the same contractual language. *McKeage v. TMBC, LLC*, 847 F.3d 992, 999 (8th Cir. 2017) (citation omitted); *see also id*. ("Claims arising from interpretations of a form contract appear to present the classic case for treatment as a class action."). For these reasons, the Court finds that Plaintiffs

[11] For instance, damages can be proven through Witt's calculation.

have established that common issues predominate for a Kansas-only class, but not for a 49-state or nationwide class.

b. Superiority

Defendant's argument as to why class adjudication is not superior to individual adjudication is intertwined with its argument about predominance. (*E.g.,* Doc. 89, p. 33.) Because the Court finds that common issues predominate in a Kansas-only class, it also finds that class treatment is a superior way to resolve Plaintiff's claims.

III. CONCLUSION

For the foregoing reasons, Plaintiff's Motion for Class Certification, (Doc. 64), is **GRANTED IN PART**. The Court certifies a class of

> All persons who own or owned a Better Life Plan, Better Life Plan Qualified, LifeTrack, AGP, MGP, PGP, Chapter One, Classic, Rightrack (89), Performer (88), Performer (91), Prime Performer, Competitor (88), Competitor (91), Executive (88), Executive (91), Protector 50, LewerMax, Ultra 20 (93), Competitor II, Executive II, Performer II, or Ultra 20 (96) life insurance policy issued or administered by Defendant, or its predecessors in interest, that was active on or after January 1, 2002, and purchased the life insurance policy while domiciled in Kansas. Excluded from the Class are: KC Life; any entity in which KC Life has a controlling interest; any of the officers, directors, employees, or sales agents of KC Life; the legal representatives, heirs, successors, and assigns of KC Life; anyone employed with Plaintiff's counsel's firms; and any Judge to whom this case is assigned, and his or her immediate family.

This class is certified as to only Counts I–IV, which seek monetary damages; it is not certified as to Count V, which seeks injunctive and declaratory relief. Christopher Meek is appointed as class representative, and Stueve Siegel Hanson, LLP is appointed as class counsel.

The Court recognizes that this case presents a variety of unsettled legal questions. Because the Court believes that this order resolves several "controlling question[s] of law"; that there is "substantial ground for difference of opinion" on some of those questions, especially the choice-of-law and borrowing statute issues; and that an immediate appeal could "materially advance the

ultimate termination of the litigation," the Court exercises its discretion to certify this order for an immediate interlocutory appeal under 28 U.S.C. § 1292(b).

The parties are directed to meet and confer to determine whether either party wishes to attempt to immediately appeal this order. If either party wishes to attempt to immediately appeal this order, the parties are invited to file a motion staying either the case or any upcoming deadlines accordingly.[12] However, if both parties decide not to avail themselves of this option, the parties should meet and confer to propose a mechanism for giving notice and the opportunity to opt out to class members.

IT IS SO ORDERED.

/s/ Beth Phillips
BETH PHILLIPS, CHIEF JUDGE
UNITED STATES DISTRICT COURT

Date: February 7, 2022

[12] After the motion for class certification was fully briefed, but before this Order was issued, Plaintiff moved for an extension of various pretrial deadlines, including the dispositive motion deadline and the expert discovery deadline. (Doc. 113.) Defendant opposed the motion, arguing that the parties have already met the relevant deadlines, and so there was no reason to extend them. (Doc. 125.) The Court is unsure which parties have undertaken which actions by this point. Therefore, the motion is **DENIED WITHOUT PREJUDICE**. The parties are directed to meet and confer on whether any further scheduling issues exist or need to be addressed by the Court.