UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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JOSEPHINE LOGUIDICE and EMILIE NORMAN,

Plaintiffs,

20 CV 3254(KMK)

-vs-

BENCH RULING

GERBER LIFE INSURANCE COMPANY,

Defendant.

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United States Courthouse
White Plains, New York

September 27, 2024

** VIA TELEPHONE **

B e f o r e: THE HONORABLE KENNETH M. KARAS,
United States District Judge

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THE COURT: Good morning.

THE DEPUTY CLERK: Hi, Judge. This is Loguidice versus Gerber Life Insurance Company, 20-cv-3254.

Counsel for plaintiff, can you please state your appearance?

MS. TOOPS: Good morning. Lynn Toops, Cohen & Malad, for plaintiffs.

MS. LYONS: Good morning. Natalie Lyons, Cohen & Malad, for plaintiffs.

MR. STRANCH: Good morning. Gerard Stranch for plaintiffs.

MS. ROSENBERG: Good morning. Amanda Rosenberg for plaintiffs.

THE DEPUTY CLERK: Counsel for defendants, can you please state your appearance?

MR. RICHARDSON: Good morning, Your Honor. This is Eric Richardson. I am joined by Joe Brunner, Emily St. Cyr, Brent Craft, and Petra Bergman, all on behalf of Gerber Life.

THE COURT: All right. Anybody else?

All right. So we are sort of continuing the argument that we started the other day. I say it with all sincerity, but with a little bit of trepidation, is there anything anybody else would like to add to what was already said and/or briefed?

MS. TOOPS: Nothing further for plaintiff, Your Honor.

MR. RICHARDSON: Nothing further for defendant, Your

Honor.

THE COURT: And the transcript never reflects tongue-in-cheek tone so I will just note that for the record in terms of my question.

All right. So the motion -- the most salient motion that is pending is plaintiffs' motion for class certification, appointment of class representative, and appointment of counsel, and then there are, to varying degrees, related motions to strike each side's experts.

In terms of the sort of background, obviously, the Court is going to assume familiarity of the factual and procedural history, especially among the caliber of counsel on this case. So the only thing I am going to do is supplement the procedural history to the extent it's relevant to the instant motions.

So, obviously, after the Court resolved the motion to dismiss, the parties engaged in discovery. There's been the substitution of a party. That was briefed back in 2022 into 2023. The Court ultimately granted the motion to substitute a new plaintiff, and then that was followed by briefing with respect to the pending motions with regard to class certification and the experts, and that briefing has gone well into 2024.

Now, in terms of the class certification, what plaintiffs seek is a class certification pursuant to Rule 23 in

connection with their GBL and fraud claims, and specifically, they moved for certification for all individuals who, within the applicable statute of limitations preceding a filing -- up to the filing of this action, and -- excuse me -- to the filing of the, yes, to this action all of those who purchased the Gerber Life Grow-Up Plan, as well as those who purchased the Gerber Life College Plan; and what plaintiffs contend is that, obviously, they claim that they meet all of the Rule 23 requirements. Of course, the defense opposes this on a number of grounds, which I will get into in a minute.

In terms of the experts, I think the most important expert dispute that needs to be resolved relates to Barrett because Barrett is plaintiff's main expert with respect to the damages, and so to the extent that Barrett's report would be stricken, I think that would be very problematic for plaintiffs because it would really, I think, make it very difficult for them to claim any sort of damages claim. So that's the one I want to focus on now because it seems to me that's the one expert, as I said, that's kind of indispensable with respect to the certification motion.

So we all know what Rule 702 provides. I'm not going to read it. You all know what it is and what it says.

So although it is the role of the jury to determine the credibility of an expert witness, it is the role of the Court to serve as the gatekeeper to ensure that the expert

testimony is reliable and relevant before it's presented to a factfinder. And that's, of course, from *Kumho Tire*, 526 U.S. 137 at 147, and *Daubert*, 509 U.S. at 597. "The proponent of expert testimony has the burden of establishing by a preponderance of the evidence that the admissibility requirements of Rule 702 are satisfied." That's from *I.M. vs. United States*, 362 F.Supp.3d 161 at 191, quoting the Second Circuit's decision in *U.S. vs. Williams,* 506 F.3d 151 at 160.

Now, the trial judge has broad discretion in the matter of the admission or exclusion of expert evidence, said the Supreme Court in *Salem vs. United States Lines Co.*, 370 U.S. 31 at 35.

Now, the focus on Barrett doesn't seem to be his qualifications, and in reviewing Barrett's qualifications, that's not surprising because Barrett has a long history, not only as an accountant, but in the insurance industry; and so I think he has sufficient qualifications to testify as is discussed in the *Hughes* case, 317 F.R.D. at 341. So in terms of reliability, that's where the contest is.

And in evaluating reliability, district courts "must undertake a rigorous examination of the facts on which the expert relies, the method by which the expert draws an opinion from those facts, and how the expert applies the facts and methods to the case at hand." *Scott vs. Chipotle Mexican Grill*, 317 F.R.D. 33 at 43; quoting the Second Circuit's decision in

Amorgianos vs. National Railroad Passenger Corp., 303 F.3d 256 at 267. District courts may consider other non-exhaustive factors bearing on reliability such as "whether a theory or technique had been or could be tested, whether it had been subjected to peer review, what its error rate is, and whether scientific standards existed to govern the theory or technique's application or operation." That's *Nimely vs. City of New York*, 414 F.3d 381 at 396. "A minor flaw in an expert's reasoning or a slight modification of an otherwise reliable method will not render an expert's opinion, per se, inadmissible." Also from *Amorgianos* at page 267. Rather, evidence should only be excluded "if the flaw is large enough that the expert lacks 'good grounds' for his or her conclusions." And that's also from *Amorgianos* at page 267. This limitation on the exclusion of expert evidence is consistent with "the liberal admissibility standards of the federal rules and recognizes that our adversary system provides the necessary tools for challenging reliable, albeit debatable, expert testimony." Same case, same case number.

Now, I have reviewed several times now the papers that have been submitted in connection with Mr. Barrett, and in his report, Barrett proposes four damages theories. The first one proposes a full refund. That is, a return of premiums paid by members of the putative classes, minus payments made to policy holders such as death benefits and policy loans.

The second theory is a proposal where there was a return of all premiums paid, minus the cost of mortality protection.

In the third theory Barrett proposes returning all premiums paid, minus the cost of mortality protection and Gerber Life's non-marketing acquisition and maintenance costs.

And the final and fourth theory is a proposal that pays the class members a sum equal to Gerber Life's marketing costs.

The first proposal of a full compensatory damages model under which consumers would receive, "a full return of premiums paid in excess of cash values or net policy proceeds." So if a plaintiff proves that defendant is liable for advertising a product that is valueless, then a plaintiff may be entitled to all of the money back. And this is something that has been recognized in other cases. Among these is *In re: Scotts EZ Seed Litigation*, 304 F.R.D. 397 at 412. Courts have recognized this as a reasonable methodology in calculating damages, assuming that a plaintiff received no benefit from the purchase. And that's specifically discussed at page 412 of the *Scotts litigation* where the court there certified a class in part on a full compensatory damages model where consumers would receive a full refund for their purchases on the proposed theory that they received no benefit whatsoever from the product. Similarly, recognized in the Southern District of California, a

case called *Makaeff vs. Trump University*, 309 F.R.D. 631 at 636-640, where the Court there actually went through a pretty extensive explanation of why a full refund was appropriate in situations where consumers were deprived of the essence of what they were promised. So the Court finds that that theory is reliable, and that Mr. Barrett's methodology supports that reliability.

The second and third damages theories, in my view, are also reliable, as they match the methodology in the first theory, but subtract the monthly mortality protection plaintiffs might have received and/or acquisition and maintenance costs of the plan that are not associated with the deceptive marketing -- the alleged deceptive marketing and advertising. This is discussed at page 12 of Barrett's report. In other words, the theories account for any benefits conferred on plaintiffs.

Regarding the fourth theory, however, the Court is not convinced by the report, in spite of, I think, plaintiffs' valiant efforts to try to support the methodology. Not only, in my view, is there a lack of any indicia of any sort of method that's reliable in Mr. Barrett's report, but I think plaintiffs just don't establish any -- excuse me -- they don't cite any case law supporting this methodology. So the Court finds that this method is not reliable. And it's in support of that the Court notes that the decision in *Allegra vs. Luxottica Retail North America*, 341 F.R.D. 373 at 450, where the court there

excluded methodology of calculating damages where the damages expert's "conclusions lacked key 'indicia of reliability' that justified its admission."

Now, just to address Gerber's argument that Mr. Barrett doesn't support the price premium theory, you know, that's not required in the Second Circuit's decision in *Orlander*, which is obviously briefed, and the full cite is *Orlander vs. Staples, Inc.*, 802 F.3d 289, a Second Circuit decision from 2015. The Second Circuit specifically held, "Defendant argues that New York courts have recognized the payment of a plaintiff's purchase price as a Section 349 injury only when the plaintiff paid a 'price premium.' But there is no such rigid 'price premium' doctrine under New York law. Rather, the cases on which defendant relies all involve the purchase of consumable goods." And that's, obviously, not what we are talking about here. And really, there is no other case law that has been cited that applies that concept to the type of service or product that's at issue in this case, which is obviously not a consumable good.

To the extent that there is an argument that Mr. Barrett didn't rely on facts and circumstances of this case, and this is discussed in the defense brief at pages 13 to 16, in the Court's view, the report and Mr. Barrett's deposition testimony I think amply demonstrate that in developing his damages theories, he did understand the allegation and

circumstances of this case, specifically pages 9 to 26 of the report, and the deposition page 26, lines 19 to 24, where he said "My general understanding is that [the inappropriate marketing] relates to the aspects of the policies involving, specifically, the cash value and the suitability of the products for various purposes, such as investment or savings." And then at page 129, he said -- actually, that was a quote from the report; and then also in his deposition he described how he developed the damages calculation methodologies based specifically on the facts and circumstances on this case.

So the Court's conclusion is that the criticism at best goes to weight, but not to admissibility.

Now, there is also the argument discussed at pages 16 to 21 in the defense memorandum of law that Barrett's testimony isn't relevant because it doesn't really assist the trier of fact. Respectfully, the Court disagrees. The relevance of the testimony I think is apparent. The question for class certification is whether plaintiffs have proposed a damages model consistent with their theories of liability, and the entire purpose of Mr. Barrett's report is to propose such models based on the facts and circumstances of this case, and so I think that makes it entirely relevant.

And a similar conclusion was reached in a case called *In re: Kind, LLC "Healthy & Natural" Litigation*, 337 F.R.D. 581 at 606; where in that case the court found that damages

expert's report was relevant because the expert proposed damages models that were consistent with plaintiff's theories of liability.

So the Court denies the motion to strike Mr. Barrett's report.

Now, in terms of the motion to certify the class itself, obviously, "A plaintiff seeking certification of a class must demonstrate that the proposed class action fulfills the four requirements of Federal Rule of Civil Procedure 23(a)." That's from *Alves vs. Affiliated Care of Putnam, Inc.*, 2022 WL 1002817 at *19. Those requirements are: Numerosity, commonality, typicality, and adequacy. Same case, same page number.

"In addition to the four factors enumerated in Rule 23(a), there is an implied requirement that the membership of the class is identifiable and ascertainable." That's from *In re: Aphria, Inc. Securities litigation*, 342 F.R.D. 199 at pages 203 and 204. It's a Southern District decision from 2022.

Furthermore, aside from satisfying the prerequisites of Rule 23(a), class certification must also be appropriate under of three subdivisions of Rule 23(b) before it can be certified, discussed not only in the rule, but also in the Second Circuit's decision in *Waggoner vs. Barclays PLC*, 875 F.3d 79. "Because plaintiffs seek to certify this class under Rule 23(b), certification requires an additional showing that

common issues of law or fact predominate over any questions affecting only individual members, and that a class action is superior to other methods of adjudication." That's from *Erickson vs. Jernigan Cap, Inc.*, 692 F.Supp.3d 114.

"Plaintiffs must demonstrate that they satisfy each factor by a preponderance of the evidence." That's from *Oliver vs. American Express Co.*, 2024 WL 100848 at *14.

The Court addresses each of the factors because ascertainability is the threshold requirement. That's where the analysis begins. "The Second Circuit has recognized an implied requirement of ascertainability in Rule 23." That's discussed in *Oliver* at page 14, quoting the Second Circuit's decision in *Petrobras*, 862 F.3d at 260. "Ascertainability is a modest threshold requirement for class certification that requires that the proposed class is defined using objective criteria that establish a membership with definite boundaries." And that's from *Oliver*. This requirement, "will only preclude certification if a proposed class definition is indeterminate in some fundamental way." *In re: LIBOR-Based Financial Instruments Antitrust Litigation*, 299 F.Supp.3d 430 at 463; also quoting *Petrobras* at 269.

Now here, the plaintiffs seek to certify two classes: People who, within the applicable statute of limitations, preceding the filing of the suit to the date of class certification, purchased one of the two plans at issue;

obviously, one for the Grow-Up Plan and one for the College Plan. This is discussed at page 20 of the plaintiffs' memorandum of law. In the Court's view, this criteria is both subjective -- it's both objective and definite in that plaintiffs provide a specific period of time in which a certain set of individuals purchased the specific product. That's exactly what the court noted in *Aphria* at page 205. "A class is sufficiently ascertainable where it includes persons who acquired specific securities during a specific time period in domestic transactions because these criteria -- securities purchased identified by subject matter, timing and location -- are clearly objective."

Moreover, plaintiffs' class definitions allow "the Court to determine who is in the class without having to answer numerous individual questions." That's *Collins v. Anthem, Inc.*, 2024 WL 1172697 at *13. In fact, "The proposed class is not defined by any subjective requirements like state of mind that would render class members unascertainable." *In re: Deutsche Bank AG Securities Litigation*, 328 F.R.D. 71 at 85, a Southern District's decision from 2018 that held that ascertainability was satisfied there where the class was defined by all persons who purchased specific securities within a specific time period.

To the extent the defense argues that the classes are overbroad because they may include individuals who understood and wanted their policies and were not deceived or misled or by

the Gerber Life's advertising, such an argument ultimately is not persuasive under the case law. "Those factual determinations are not necessary to ascertain if someone is a class member." That's from *Kurtz vs. Kimberly-Clark Corp.*, 321 F.R.D. 482 at 538, where the Eastern District there rejected a defendant's argument that the class was not ascertainable because a minitrial would have to be held for each class member to determine if each class member was part of the class based on the purchasing motivations and experiences of those who bought the product because such considerations are not necessary to determine if someone is part of a class.

Also, specifically with respect to the Grow-Up Plan, the defense argues that the policy ownership transfers at the death of the owner or when the insured child turns 21 impacts who had the right to litigate the asserted claims. That's discussed at page 22 of the opposition memorandum.

So according to the defense, there are many policies that were purchased by one person but now owned by another person, which creates, from the defense's view, obstacles to identifying the proper members of the so-called Grow-Up Plan class. Same page.

I just don't think that argument carries the day because, as plaintiffs point out, this case challenges allegedly deceptive ads that sold the plaintiffs something that they were not, and so to the extent there is any injury, it would be to

those who initially purchased the plans. So that the injured parties are those who did purchase it and not who later became owners of a plan through subsequent transfer. So the transfer of the ownership, in the Court's view, does not create a hurdle to ascertain the class members because, again, it's really focused on the purchasers of the plans, and as I said, that can be easily ascertained by objective measures and methods.

So the Court concludes that plaintiffs have satisfied ascertainability.

So next up is the Rule 23(a) factors, including numerosity, commonality, typicality, and adequacy. To certify a class, the putative class must be so numerous that joinder of all the members is impracticable. Quoting the Second Circuit, "Numerosity is presumed to be satisfied when the putative class has more than 40 members." That's from *Oliver* at page 15, quoting the Second Circuit's decision in *Jin vs. Shanghai Original, Inc.*, 990 F.3d 251 at 263, footnote 20. Here, the proposed class does get over the 40 member bar, and what plaintiffs say is that Gerber Life issued 1,950,781 Grow-Up Plan policies nationwide from April 25, 2014 through October 21, 2021, and 37,269 College Plan policies nationwide from April 25, 2014, through again October 21 of 2021. So the 40-plus is satisfied, and therefore, the Court concludes numerosity is also satisfied.

Turning to the commonality, this inquiry requires that

there be questions of law or fact common to the class. This inquiry depends upon there being "a common contention...of such a nature that it is capable of class-wide resolution -- which means that 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." That's from the Supreme Court's decision on *Wal-Mart Stores, Inc. vs. Dukes*, 564 U.S. 338 at 350. What matters to class certification is not the raising of common questions...but rather the capacity of the class-wide proceeding to generate common answers apt to drive the resolution of the litigation." *Barrows vs. Becerra*, 24 F.4th 116 at 131, a Second Circuit decision from 2022 quoting *Wal-Mart* at page 350. So for purposes of Rule 23(a)(2), for example, even a single common question will suffice. That's in *Wal-Mart Stores* at page 359.

Now GBL 349 prohibits "deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state." GBL 350 prohibits "false advertising in the conduct of any business, trade or commerce or in the furnishing of any service in this state." To assert a claim under either section, "a plaintiff must allege that a defendant has engaged in: One, consumer-oriented conduct that is; two, materially misleading; and three, the plaintiff suffered injury as a result of the allegedly deceptive act or practice." That's *Orlander* at page 300. Deceptive acts are

defined objectively as acts likely to mislead a reasonable consumer acting reasonably under the circumstances." That's from the Second Circuit decision in *Spagnola vs. Chubb Corp.*, 574 F.3d 64 at 74, quoting from the Second Circuit's decision in *Boule versus Hutton*, 328 F.3d 84 at 94.

So here, whether or not a reasonable consumer was misled by the alleged advertising of the plan presents a single "unifying thread among the members' GBL claim," and that's a quote from *Ackerman vs. Coca-Cola Company*, 2013 WL 7044866. That's at *8. Similar ruling in *Hasemann vs. Gerber Products Company*, 331 F.R.D. 239 at 274, where the Eastern District held "the potentially common question of whether a given product's advertising set is misleading can be measured under an objective standard: Whether it was likely to have misled a reasonable consumer acting reasonably under the circumstances."

Now, with respect to the fraud claim, the common question that plaintiffs proffered is whether defendant defrauded purchasers by marketing the plans as something they are not. And that's typically how fraud claims are positioned in this context. So noting in the Second Circuit's decision *In re: Foodservice, Inc. Pricing Litigation*, 729 F.3d 108 at 118, "fraud claims based on uniform misrepresentations to all members of a class are appropriate subjects for class certification."

So the focus of defense's view on this is more -- it's as the defense says in their opposition brief at page 17,

footnote 15, that the commonality arguments that they make are really subsumed in the discussion of predominance under Rule 23(b)(3). So I will go ahead and just pause on that, and then we will get to predominance in a minute. And then I think, you know, taking defense's cue, we will resolve both issues.

For now, I think the plaintiff has satisfied -- so I will get to predominance in a moment, but in terms of commonality, I think the plaintiffs have demonstrated that the question of whether the advertising was misleading under 349 and 350 to a reasonable consumer is common to the classes, and is capable of class-wide resolution because it really, for example, doesn't depend on questions of reliance, unlike the fraud situation, which I will discuss in a minute.

In terms of typicality, this is satisfied when each class member's claim arises from the same course of events and each class member makes similar legal arguments to prove the defendant's liability. That's from *In re: Namenda*, 331 F.Supp.3d at 202, quoting a Second Circuit decision in *Marisol A. vs. Giuliani*, 126 F.3d 372 at 376. "Typicality, however, does not require a showing that the named plaintiff's claims are identical to those of the class members." That's *Passman*, 671 F.Supp.3d at 441. "Since the claims only need to share the same essential characteristics, and need not be identical, the typicality is not highly demanding." That's also from *Passman* at page 441.

Here, typicality, in the Court's view, is satisfied because plaintiffs have "alleged a common pattern of wrongdoing related to the defendant's representations regarding the plans and will present the same evidence based on the same legal theories to support the claims of plaintiffs and the class members." Specifically, plaintiffs have put forward not only their theory, but have substantiated the theory with evidence that their claims do arise from the same course of events as to all class members based on the fact that plaintiffs were exposed to sort of a consistent theme of deceptive advertising and subjected to the same material omissions regarding one or both of the plans.

So, for example, what plaintiffs have done is they've cited specific examples where all the advertising had the same trusted Gerber baby label; that they used the same deceptive plan names; that they were -- they contained materially uniform messaging required by Gerber Life policy and the so-called style guide and the same material omissions. So, for example, that the Grow-Up cash value, that there's no actual cash value for the first three to four years, when 50 percent of the policies lapsed, and the messaging was the same no matter how the plans were purchased, and that was by design. All of this was a specific effort by defendants to sort of unify or to make as a standard practice the advertising, which would include not only the material misrepresentations, but also the omissions.

Now, of course the defense takes a different view and argues that there are -- that the claims arise from a different course of events. So, for example, the defense says that there were different ads with different messages that ran at different times in different places; and that there were different ways to purchase both plans, and this is discussed at page 18 of the memorandum of law.

And also, the defense contends, for example, that Norman and Loguidice purchased their policies in different manners and therefore neither plaintiff's experience is typical. But this argument I just don't think is persuasive because as a general matter, the courts have consistently held in consumer fraud cases that the plaintiffs may have been exposed to different advertisements or labels, they purchased different amounts of products, but that doesn't defeat typicality. That's the specific holding in the *Passman* case at page 441.

Also, in *Hasemann* at page 269 where the court held, "named plaintiffs' idiosyncrasies -- and the idiosyncrasies of their purchasing decisions," including, among other things, who purchased the product, how they purchased them, who purchased them from -- who they purchased them from, after exposure to which, or no, ads are "irrelevant to the typicality of the named plaintiffs with respect to the materiality of the challenged advertising." Also *In re: Sumitomo Copper Litigation* case, 182 F.R.D. 85 at 94, the court there collected cases to support that

the court's conclusion in that case, that in a commodities fraud case, "the simple fact that class members may have purchased and sold coppers futures at different times for different purposes does not make plaintiffs atypical." And that's because, as the *Passman* court noted at page 442, "This is because the core question of consumer fraud cases is whether the allegedly false statement caused the class members an injury."

So to the extent that also defense argues that plaintiffs are subject to unique defenses which they do argue at pages 18 and 19 at the memorandum of law, that argument doesn't carry the day, either. Now, a specific claim is, "plaintiffs are subject to unique defenses, including lack of reliance for the fraud claim, for the failure to read their policies, or in Norman's case, for the pre-purchase, the New York-specific disclosures." Page 19. Defense also asserts that, "Norman's receipt of disclosures prior to her initial policy payment, and Loguidice's continued payment of premiums even after filing this action, subject them to the voluntary payment doctrine, which bars recovery of payments voluntarily made with full knowledge of the facts."

Of course, class certification is inappropriate where a putative class representative is subject to unique defenses which threaten to become the focus of the litigation. That's discussed in the Second Circuit's decision in *Gary Plastic Packaging Corp. vs. Merrill Lynch*, 903 F.2d 176 at 180. But the

relevant inquiry is not whether a unique defense ultimately will succeed on the merits, but rather, courts consider whether any unique defenses will unacceptably detract from the focus of the litigation to the detriment of absent class members." That's from *de Lacour vs. Colgate-Palmolive Company*, 338 F.R.D. 324 at 338, a Southern District decision from 2021. But if the proffered defenses seem to rest on little more than, you know, speculation, the Court doesn't have to consider them in the Rule 23(a) analysis. That's discussed in the decision in *Bowling*, 2019 WL 1760162 at *4.

And I think on this point it's important to note that, as I said, first of all, the plaintiffs' theory here is that there was a common method of marketing these two plans; that this was done on purpose. This was by design. This was sort of corporate policy. Again, everything from the Gerber baby to the plan names, et cetera, are following the style guide.

With respect to Norman, Norman testified that the print and TV ads and the website information she viewed before the purchase had the common messages that plaintiffs do cite, so that the plans, for example, provide a financially secure future for their children; you know, the kids will be safe and secure and financially set; that the plans save money for the child to go to college. All of this is discussed in her deposition, page 59, lines 1 to 5; page 61, lines 3 and 4; page 66, lines 13 to 21; page 69, lines 12 to 15; page 349, line 7 to 11;

page 350, line 23 to page 351, line 4.

And Loguidice repeatedly testified that the Gerber ads she says misled her to believe that the plan was a nest egg and savings for the child and not life insurance plans, and this is discussed in Loguidice's deposition page 84, line 2 to 6; page 48, lines 5 to 11; page 56, lines 20 to 23; page 57, lines 12 to 15; page 93, lines 3 to 9; page 104, lines 6 to 13; page 127, lines 7 to 15.

Now, with regard to the fraud claim, what the defendants contend is that plaintiffs are atypical due to their failure to read their policies or pre-purchase disclosures, which would subject them to a lack of reliance defense. The Court is not persuaded by this because the plaintiffs' theory here is that they are claiming that the plaintiffs relied on the deceptive advertisements themselves, both in terms of the material misrepresentations and the omissions, and that that's what led them to purchase the product that was advertised and which plaintiffs claim these are products that were not as advertised. So, for example, plaintiffs testified that they did rely on the false representations that the plaintiffs provided a financially secure future and nest egg, as I mentioned, and not a death payout; and the Court doesn't read Gerber Life's cases to support a duty to read policies in a claim over pre-purchase misrepresentations. So, for example, the *Jin Chai-Chen* case that's cited, that's a breach of contract case, and in *Pludeman*

vs. Northern Leasing, an appellate division decision, the court there said there was no duty to read pre-purchase and the post purchase policies in a challenge to pre-purchased ads.

So whether or not the named plaintiffs read their policies or pre-purchased disclosures really doesn't have anything to do with whether they relied on the alleged false advertisements. To be sure, the cases the defense cites, and the courts here really, as I said, don't deal with common law fraud, nor do they discuss the lack of reliance defense in terms of the context of a failure to read a policy document. So the Court is not persuaded that this defense will unacceptably detract from the focus of the litigation. What's more is that "the rule barring certification of plaintiffs subject to unique defenses is not rigidly applied in the Second Circuit; in fact, a representative may satisfy the typicality requirement even though that party may later be barred from recovery by a defense particular to him or her that would not impact other class members." That's from *Lapin vs. Goldman Sachs*, 254 F.R.D. 168 at 179.

Now, with respect to the voluntary payment doctrine, the voluntary payment doctrine can bar recovery of payments voluntarily made with full knowledge of the facts. That's from *Kurtz*, 321 F.R.D. at 531.

Now, plaintiffs, you know, say that Gerber Life withheld and obscured facts, so that Norman and Loguidice did

not have full knowledge of the facts, and that's in their reply memorandum at page 4. What's more, it's not entirely clear that this defense will be atypical. It's possible that other class members were in receipt of disclosures prior to their initial policy payment, and/or continued to make payments of premiums even after filing the action. So in the Court's view, this defense doesn't threaten to become the focus of the litigation such that the two named plaintiffs could not act in the best interest of the absent class members, which is how it was framed in the *Scotts EZ Seed Litigation* at page 406.

So the Court finds that the named plaintiffs' claims arise from the same course of events and will make similar arguments to either class members, and so the Court concludes that the typicality requirement has been satisfied.

In terms of adequacy, that requires the representative parties fairly and adequately protect the interests of the class. Courts have to ensure that, "members of the class possess the same interest and that no fundamental conflicts exist among members." That's from *Charron vs. Wiener*, 731 F.3d 241 at 249. "Adequacy is a two-step process: One, the proposed class representative must have an interest in vigorously pursuing the claim for the class; and two, must have no interest antagonistic to the interests of other class members." That's *Mujo vs. Jani-King International, Inc.*, 2019 WL 145524 at *6. It's a District of Connecticut decision.

So the first argument from defense is that plaintiffs are inadequate because they both lack familiarity with the litigation and their role as class representatives. That's at page 20 of the opposition memorandum of law. And in support of this, defense cites testimony where the plaintiffs had indicated they hadn't read the amended complaint; hadn't followed the case; that they weren't aware of the costs incurred in the case; that they weren't aware they had to pay any costs, and they were not able to identify their counsel of record.

And so these arguments, you know, go after representatives' ignorance, which are generally disfavored. *In re: Flag Telecom Holdings Limited Security Litigation*, 574 F.3d 29 at page 42, it's a Second Circuit decision. To be sure, "There are cases where the named plaintiff is so ignorant of his or her claims and so detached from the litigation that the plaintiff cannot adequately represent the interests of the class." That's *Vergara vs. Apple REIT Nine, Inc.* 2021 WL 1103348 at *3. It's an Eastern District decision. However, disqualifying "deficiencies in knowledge...must either pertain to issues central to the plaintiffs' case or must be so substantial that they threaten to undermine the plaintiffs' case as a whole." That's *Vergara* 2021 -- excuse me -- *Vergara* at page 3. But in the Court's view, those deficiencies don't exist in this case.

In fact, the record reflects that plaintiffs

understand the lawsuit is about fraudulent and deceptive advertising. This is discussed at page 5 of the reply memorandum, and also lines up with the decision in the *Allegra* case at page 400 where the court held that plaintiffs were adequate class representatives where they had a baseline familiarity with the complaint and possessed a general understanding of the basis of the lawsuit. What's more, there is evidence in the record that plaintiffs have actively participated in the lawsuit by responding to numerous discovery requests, sitting for seven-hour depositions and staying updated on the case, which is another factor that courts have relied on, and one court in particular, the *Scotts EZ Seed Litigation* noted at page 406, "Lead plaintiffs have each demonstrated their commitment to pursuing these claims by responding to extensive written discovery requests and sitting for lengthy depositions." Similar ruling in *Belfiore* at page 65.

Now, there is also the contention that plaintiffs are inadequate representatives to the extent they are electing statutory damages for the classes in lieu of their actual damages because that creates a conflict, also discussed at page 20 in their memorandum of law. The particular claim is that if plaintiffs do elect statutory damages, it would harm half of the Grow-Up Plan class and nearly all of the College Plan class because their alleged damages exceed the statutory amounts. But in their reply memorandum, plaintiffs clarify that

they have not elected statutory damages over actual damages, stating that they have provided several actual damages models, noting statutory damages are available if actual damages are less. So given that representation, the Court concludes that the plaintiffs' interests are not antagonistic to the interests of the other class members, and therefore conclude that plaintiffs have demonstrated that they are adequate class representatives.

In terms of class counsel, I don't think there is any disputing counsel's expertise in this area, and I don't really think I need to belabor the point or inflate the ego of plaintiffs' counsel.

All right. With respect to Rule 23(b)(3), this authorizes class certification when questions of law or fact common to class members predominate over any questions affecting only individual members, and a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

So predominance is a main source of disagreement. This inquiry "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." That's from *Hasemann* at page 272. This requirement is satisfied "if resolution of some of the legal or factual questions that qualify each class member's case as a genuine controversy can be achieved through generalized proof, and if these particular

issues are more substantial than the issues subject only to individualized proof." That's from *Roach vs. T.L. Cannon Corp.* 778 F.3d 401 at 405, Second Circuit decision from 2015. Although predominance is a "far more demanding inquiry into the common issues which serve as the basis for class certification," than commonality, it "does not require a plaintiff seeking class certification to prove that each element of her claim is susceptible separate to class-wide proof." That's from the Second Circuit's decision in *Sykes vs. Mel S. Harris & Associates LLC*, 780 F.3d 70 at page 81.

Now, again, plaintiffs' contention here is that there are common questions than will predominate and will be answered by common proof. This is all discussed at page 26 of the memorandum of law. This is where the defense I think launches its main challenge.

So one claim is discussed at page 23, and that's in the opposition memorandum of law, is that the GBL doesn't apply to all class members, and the specific argument is that no part of the transaction at issue: The ads, the purchase of the policies took place -- the review of the ads, excuse me -- or the purchase of the policies took place in New York with respect to non-New York residents, so that the non-New York residents really don't have a claim under the GBL, and therefore, there are no common legal issues that predominate over the putative nationwide classes.

Now, the plaintiffs' counterpoint is -- and it discusses the Court's previous holding with respect to the motion to dismiss -- is that plaintiff Loguidice, who is a Floridian, had GBL standing at the time of the purchase, and I am not changing my view of that.

Now the New York consumer protection statutes do have territorial limitations prohibiting deceptive acts or false advertising conduct "in this state," but the Second Circuit has made clear that a deceptive transaction in New York will fall within the territorial reach of Sections 349 and 50, as long as "some part of the underlying transaction occurs in New York state." That's the decision in *Cruz*, and that's 720 F.3d. 115, 123 to 124. "The appropriate test under the GBL is not where the alleged deception took place or where the parties reside, but instead the location of the transaction, and in particular the strength of New York's connection to the allegedly deceptive transaction." That's *Fishon vs. Peloton Interactive, Inc.*, 2021 WL 2941820 at *3. So certainly, as defense notes, you know, a substantial portion of Gerber Life's operations take place in Michigan in terms of, you know, a bunch of their operations relating to fulfilling, you know, the purchase of the policies. That doesn't really, in the Court's view, count as a strong connection between New York and the deception at issue in this case. Gerber is headquartered in New York; and the ads at issue contained its New York address; and the marketing and compliance

teams are located in New York, as plaintiff noted in the reply memorandum, plaintiffs' reply memorandum on pages 5 and 6. And many ads call New York their home office, and so New York's interests are more than implicated in a case where, such as this, there is a New York address that's used to send and receive misleading correspondence related to a marketing scheme. And that's a -- you know, that's exactly what was at issue in *Cruz*. So from plaintiffs' perspective, the deception here is the ads themselves that were created and distributed by marketing and compliance in New York. And so I think that the GBL argument for the defendants just -- it falls short. And to be more specific, you know, what plaintiff cites here is that Gerber Life's internal policies mandate uniformity in ads in requiring consistent language, images, fonts, colors. There is the whole method that Gerber uses, so all of that is created in New York, and then that is the heart of what plaintiff alleges -- plaintiffs allege is the deception and the fraud in this case.

Now, another argument that the defense makes is that there are not common issues of state law that predominate. So the argument is: Even if the GBL does apply, the Court still has the very complicated choice-of-law analysis to do, which will ultimately demonstrate, from the defense's perspective, that the Court cannot uniformly apply New York law with respect to the GBL claim in this case.

So, of course, because this is a diversity case, the Court has to apply the choice-of-law rules of the forum state, which is New York. That's all discussed in the Second Circuit's decision in *Thea vs. Kleinhandler*, 807 F.3d 492 at 497, citing the Supreme Court's decision in *Klaxon*, 313 U.S. 487 at 496. As New York is the forum state, "the first step in the choice-of-law analysis is to determine whether an actual conflict exists between the laws of the jurisdictions involved," and that's from *Martin Hilti Family Trust vs. Knoedler Gallery, LLC*, 137 F.Supp.3d 430 at 456. Where such a conflict exists, "New York courts seek to apply the law of the jurisdiction with the most significant interest in or relationship to the dispute." And that's also from the *Martin Hilti Family Trust* case at page 456.

Here, assuming that there are material variations in the consumer protection statutes across all the states in the land, which is what defense argues in pages 25 and 26 of their opposition memorandum, the Court applies New York's interest test to determine which state law applies. That's all discussed in *National Gear & Piston, Inc. vs. Cummins Power Systems, LLC*, 975 F.Supp.2d 392 at 399, where the Court held, "where there is an actual conflict, New York has adopted an 'interest analysis' approach to choice-of-law questions intended to give controlling effect to the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties, has

the greatest concern with the specific issue raised."

Now, the defense contention is that, in applying this interest test, the Court has -- should conclude that the class's claims are governed by the law of the state where each putative class member had purchased their policy; that is, the location of the transaction and the last event necessary to cause the purported injury, which would be all the states in the country. The counterargument is that that's superseded by New York's substantial interest in policing the deceptive insurance marketing schemes by the companies headquartered here, and the fact that, from the plaintiffs' perspective, these ads were designed, and a whole marketing strategy was designed in New York. And this is really where we had the battle over the *Licci* case and the *AXA* case. Let me discuss those.

So in *Licci vs. Lebanese Canadian Bank*, which we are going to call *Licci II*, the Second Circuit noted the following: "The New York Court of Appeals has consistently explained..." excuse me -- "has consistently explained that...the law of the jurisdiction where the alleged tort occurred will generally apply because that jurisdiction has the greatest interest in regulating behavior within its borders. This is because where the defendant's exercise of due care is at issue, the jurisdiction in which the allegedly wrongful conduct occurred will usually have a predominant, if not exclusive, concern. In the ordinary tort case, both the wrong and the injury take place

in the same jurisdiction. But where they do not, it is the place of the allegedly wrongful conduct that generally has superior interests in protecting the reasonable expectations of the parties who relied on the laws of that place to govern their primary conduct and in the admonitory effect that applying its law will have on similar conduct in the future." That was 739 F.3d 45 at page 50.

Now, *In re: AXA Equitable Life Insurance Company Litigation*, the Court said the following, and this is a Southern District decision, 595 F.Supp.3d 196 at 239:

"Assuming without deciding that an actual conflict does exist, the court concludes that New York has the greater interest in adjudicating the plaintiffs' relevant claims. To be sure, plaintiffs are California residents and the insurance policy was issued in California. But AXA is a New York company headquartered in New York, and New York has a compelling interest in regulating the conduct of insurers based here. AXA's sole argument to the contrary is that, for fraud-based claims, the locus of the tort is generally deemed to be the place where the injury was inflicted -- typically where the plaintiff is located -- rather than where the fraudulent act originated. In *Licci II*, however, the Second Circuit considered at length and ultimately rejected the view that the law of the place of injury ordinarily or always governs where conduct-regulating rules are involved. Put differently, at a

minimum, where the loss was suffered is not conclusive and does not trump a full interest analysis."

So applying those cases here, the Court concludes that New York does have the greatest interest in adjudicating plaintiffs' claims. For example, "the marketing and compliance teams who develop and approve" -- this is a quote from a case involving a claim against the *New York Times* -- "the marketing and compliance teams who develop and approve the ads are in New York; the challenged ads contain the New York address; and...billions of ads are transmitted [from New York] directly to consumers across the country." And that's plaintiffs' specific argument, and so that was not a quote from the *New York Times* case. The *New York Times* case is a Second Circuit case. *Kinsey vs. New York Times*, 991 F.3d 171 at 178. Despite the fact that plaintiff lived in Maryland, and that the incident took place in his city of employment, the District of Columbia, the District Court correctly decided that New York was the jurisdiction with the most significant interest in the litigation. As its name suggests, the *Times* is domiciled in New York and the alleged defamatory statement emanated from New York." So that quote directly supports plaintiffs' specific claim that I quoted in their reply brief.

Again, just to repeat it, that the wrong here, from plaintiffs' perspective -- and they've got evidence that substantiates their theory of the wrong -- originated in New

York. All of the ads, all of the marketing scheme, the marketing planning all was done in New York. So the fact that the processing of the plans may have been in Michigan; the fact that the purchases of these plans were made throughout the country, in the Court's view doesn't change the interest analysis relying on the *Licci II* and the *AXA* case and the *New York Times* case I just cited.

Now, there is other cases that have been introduced into the discussion. So there's the *Elmaliach* case, 971 N.Y.S.2d 504. It's an Appellate Division decision. That was explicitly rejected in the *Licci II* case. You know, and the Second Circuit in *Licci* specifically noted it was bound by appellate -- New York appellate interpretations of New York law, but it emphasized that "the New York Court of Appeals had already prescribed the choice-of-law rules applicable to the case at bar in *Schultz v. Boy Scouts of America*, 480 N.E.2d 679," which explained that the law of jurisdiction with the greatest interest in the litigation would apply.

And so what the Second Circuit said about the *Bank of China* case is that it was, "not a statement of an unsettled or ambiguous rule, but rather an application of a previously established rule. Because we are persuaded that it is a mistaken application, we decline to follow it."

So the "last event" theory here that I think is consistent with *Bank of China* and what defense is pushing here,

is not what drives the interest analysis, and there is plenty of other cases that note that. Among them, *Thomas H. Lee Equity Fund V, L.P. vs. Mayer Brown, Roew & May LLP*, 612 F.Supp.2d 267 at 284, a decision from this District, "where the loss was suffered is not conclusive and does not trump a full interest analysis."

Now, the defense argues that *Licci II* and *AXA* really don't apply here. This is discussed at page 27 in their memorandum of law. With respect to *Licci II*, the argument is that the case doesn't concern the GBL or fraud claims, and that unlike the bank in *Licci*, which administered banking services in New York, Gerber administers its policies out of Michigan. Of course, it's true that *Licci II* didn't concern GBL or fraud, but the choice-of-law analysis is, I think, spot on, and the principle that it espouses has nothing to do with the specific underlying wrong that's at issue because the point is that there is a connection between the locus of the wrong, whether it's a GBL or some other tort and the interest the state has in governing that conduct. And so while it may very well be that Gerber administers its policies in Michigan, the marketing activities are what's at issue here; it's not the administration of the policies that is the heart of this case. And so it's the New York-based marketing activities that are -- it's not only the theory of the case, but what generates the New York interest in having its laws apply to that conduct.

With respect to *AXA*, there certainly are some differences factually, you know. The California residents in that case brought claims against the New York insurance company regarding policies that were issued in California. So the choice-of-law analysis that says that the place of injury doesn't trump an interest analysis I think is relevant and highly instructive here. And so I don't think that that's a difference that actually makes *AXA* so highly applicable to this case.

So the Court concludes that New York law applies to plaintiffs' claims, and the choice-of-law analysis does not defeat predominance.

Now, the other sort of theme here to predominance is undermined by individual issues regarding the extent to which the various class members might have been exposed to the alleged representations and omissions, which is discussed at page 28 of their opposition brief. And the particular argument is that the GBL and fraud claims are not susceptible to class-wide proof because there is no uniform or consistent representation or omission in Gerber Life's advertising. Right? So there is a bunch of arguments how, you know, the plaintiffs have cherry-picked, you know, some of the ads or some of the statements that are a small percentage of the total marketing efforts related to these plans. And in my view, as I have -- I have already addressed this, I think plaintiffs have countered this, and it's

backed up by more than sufficient evidence to establish the preponderance test here is that there is a common plan -- and I'm not going to repeat everything I said with respect to the earlier analysis regarding typicality -- and, again, it's an objective analysis with respect to the GBL claims as to whether the marketing campaign was going to deceive, you know, reasonable consumers. And in terms of the fraud analysis and reliance, I have already sort of addressed that as well, not only with respect to these particular plaintiffs, but in terms of the plaintiffs' theory of the case.

But just to draw down a little bit more, again, you know, what I noted with respect to 349 to 350 cite of the *Hasemann* case, there is an objective analysis. You know, whether an alleged act or omission is likely to mislead a reasonable consumer acting reasonably under the circumstances. So, obviously, that doesn't require any reliance whatsoever, and, you know, the New York courts have been clear on that. *Koch Vs. Acker, Merrall & Condit*, 944 N.Y.S.2d 452 at 453. And what hasn't been said is, "when reliance is not an issue, the individual reason for purchasing the product becomes irrelevant and subsumed under the reasonable consumer standard." So because there is no reliance requirement, there is no reason that the class members can't make the generalized proof to make out their claims regarding deception, and falsity, and omission, et cetera, et cetera.

And what the courts have said is that objective standards like this are well-suited to generating common questions. That's exactly what *Hasemann* said. Also, *Kurtz* at page 249, the Court there found predominance was met because if the products at issue -- "if the products at issue are found to not be [what the representation said], then all consumers were injured by being overcharged," and such a "question predominates." Same holding in *Scotts EZ Seeds Litigation* at page 409.

Also, the defense claims that individual injury issues predominate because the class contains uninjured class members. "The Supreme Court and the Second Circuit have recognized that the existence of uninjured plaintiffs does not bar class certification." That's from *In re: Restasis Antitrust Litigation*, 335 F.R.D. 1 at page 16. "In *Tyson Foods*, the Supreme Court affirmed certification of a class under the Fair Labor Standards Act that contained over 200 uninjured class members." And that's from the same case.

So here, the fact that some consumers were satisfied with the product does not in any way bar certification. "It is not necessary for all of the plaintiffs to have had a uniform experience with respect to the product." That's *Belfiore* at page 62. And that's because the purpose of 349 is to punish companies that sell products using advertising that misleads the reasonable consumer. Also from *Belfiore*. And so the fact that

some consumers may not have been misled does not defeat a reason to -- does not defeat plaintiffs' theory here as to why predominance has been satisfied.

And then there is the issue of reliance. So the argument is in page 37 is that individual reliance issues predominate for the fraud class. But "there is no blanket rule in the Second Circuit that 'a fraud class action cannot be certified when individual reliance will be an issue.'" That's from *Rodriguez v. It's Just Lunch International*, 300 F.R.D. 125 at 139. "Certification may be appropriate as long as plaintiffs can prove reliance through common evidence (that is, through legitimate inferences based on the nature of the alleged misrepresentations at issue)." Also from *Rodriguez* at page 139, according to the Second Circuit's decision in *In re: Foodservice Inc. Pricing litigation,* 279 F.3d 108 at 120; also in *Ge Dandong vs. Pinnacle Performance Limited*, 2013 WL 5658790 at *9 -- another court in this District -- how, "the Second Circuit has made clear that fraud-based claims are not entirely beyond the reach of Rule 23, and that where each plaintiff can prove reliance through common evidence (that is, through legitimate inferences based on the nature of the alleged misrepresentations at issue), certification may well be appropriate."

So as in other class actions involving fraud claims, the common question here is whether defendant defrauded

purchasers by marketing plans as something they were not. And courts have routinely granted certifications under like circumstances. I have cited some. Some other cases include *Ebin*, 297 F.R.D. at 565. That had to do with fraud claims regarding oil as a hundred percent pure olive oil. And I mentioned the *Foodservice Pricing Litigation* case. That's a Second Circuit decision where the Circuit said, "fraud claims based on uniform misrepresentations to all members of a class are appropriate subjects for class certification."

And then there is the question of damages, and the defense argument is that the individual issues predominate as to damages. "To satisfy the predominance requirement, plaintiffs must propose a damages model consistent with theory or theories of liability." That's from the *Scotts EZ Seeds Litigation* at page 412. "Damages are measured at a difference between what the plaintiff paid and the value of what the plaintiff received." Also *Scott EZ* at page 412. "Plaintiffs therefore have to propose damages models that take into account the value of the product plaintiffs received and the amount they paid for the plan."

So as discussed earlier, Dr. Barrett first proposes a full compensatory damages model under which the consumers are going to receive a full refund for their purchase of either of the plans. This model matches the first theory of liability -- that they didn't receive any value from the insurance product

that they bought. That's a theory that's been recognized by the courts. One decision is *Brazil*, 2014 WL 2466559 at *15 where the court there noted that a full refund model was based on the assumption that the consumers received no benefit from the product. "The full compensatory damages model satisfies *Comcast* because it measures damages properly if the plans are valueless." That's *Scotts EZ Seeds Litigation* at 412.

Now, the other -- the second and third damages models also satisfy *Comcast* because they propose a refund of the premiums plaintiffs paid, minus any benefits that they actually received, such as mortality protection, and the non-marketing acquisition and maintenance costs. This is discussed at Barrett's report at page 12. These damages calculation methods also correspond to the plaintiffs' theories regarding -- because they provide for the same damages as in the first scenario except they account for any value plaintiffs might have derived from the plan. So assuming it's proven that these are the only benefits plaintiffs received from the plans, then providing a full refund minus the value of these benefits matches the alternative liability theories.

So the Court concludes that plaintiffs have satisfied *Comcast* with respect to their damages methodologies, the three of the four. I already mentioned why the fourth doesn't work.

In terms of superiority, a proposed class has to satisfy the superiority requirement which necessitates the

finding that "a class is superior to other available methods for fairly and efficiently adjudicating the controversy." In making this determination, the Court considers a number of non-exclusive factors: The class members' interest in individually controlling the prosecution or defense of separate actions; the extent and nature of any litigation concerning the controversy already begun by or against its class members; the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and the likely difficulties in managing the class action.

Here, the members of the class, which would include, you know, hundreds of thousands, if not plus, you know, seven figures' worth of people, there is no reason to believe, and there is no evidence to believe they are just going to bring individual actions given that many don't have the resources to do so, and because of the potentially small amount of recoverable damages that might be available on the individual actions. So the size of the class and the circumstances of the members of the class make a class action, in the Court's view, a better method. That's what the court held in the *Scotts EZ Seeds Litigation* 304 F.R.D. at page 415.

So the Court is not aware of any other litigation concerning these claims that have been commenced against the defendant, and there is no reason why the litigation shouldn't be concentrated here in this court. Also, the fact that

plaintiffs have already been pursuing this case for several years now make the concentration of the litigation of these claims in this forum desirable, and that's discussed in the *Allegra* case at page 462.

And any concerns about the manageability really come down to a theory that the Court has already rejected; that innumerable individualized inquiries will swallow the common ones, and the Court was not persuaded that that's likely to happen here.

So the Court concludes that class action is superior to other available methods for fairly and efficiently adjudicating this controversy. So for those reasons, the motion for class certification is granted, and I will issue an order to that effect.

Anything else from plaintiffs?

MS. TOOPS: Nothing further. Thank you, Your Honor.

THE COURT: From defense?

MR. RICHARDSON: Your Honor, I had one question. Per the Court's prior ruling in June of '22, we were to submit a briefing schedule on summary judgment, I believe within one week from the Court's decision. My question was: With regard to the *Daubert* motions that have been filed, does the Court wish for us to renew those *Daubert* motions in connection with summary judgment or will the Court consider what's been pending for purposes of the entirety of the case?

THE COURT: So the answer to your question is: There is no need to submit new briefing. From an administrative standpoint, what I am going to do is deny the motions without prejudice, and then basically, in connection with summary judgment, you can refer to the *Daubert* briefing you've done on the experts. Does that make sense?

MR. RICHARDSON: I believe so, Your Honor. So to the extent the Court thinks it's relevant, you might consider a *Daubert* motion that's already been filed at that point; is that right?

THE COURT: Yes. Right. Because my view is that those motions still need to be resolved, and I had always assumed that if we got past the class certification, right, because if I'd said no to class certification, then that leads us down one trail. If I say yes to class certification, then we go down the summary judgment path, and the *Daubert* motions become very real in connection with that motion, but there is no need for you to re-brief or to submit new briefing. You can just in your summary judgment briefing refer to the briefs, and then, obviously, when I address the summary judgment motion, that's where I will resolve the *Daubert* motions that haven't been resolved yet. Okay?

MR. RICHARDSON: All right. Thank you, Your Honor.

One other question: Can we get a copy of the transcript as well, Your Honor?

THE COURT: Yes, you can reach out to the court reporter and order the transcript.

MR. RICHARDSON: Thank you, Your Honor.

THE COURT: Do you really think you can get your briefing in in a week? Because if you want more time, I am all ears.

MR. RICHARDSON: Oh, for summary judgment, the Court's order was that the parties need to simply provide a letter to the Court with a proposed schedule on summary judgment, yes, and not the actual briefing, Your Honor.

THE COURT: I get it. Because I was -- I'm glad I was wrong in my interpretation. I hoped that the associates whose weekends are going to be ruined will also not stand by that, and of course, by all means feel free to adopt a schedule within the holiday framework.

MR. RICHARDSON: Thank you, Your Honor.

THE COURT: All right. So again, thank you, counsel, for your advocacy. The briefing was outstanding, and I hope you all have a pleasant weekend. We are adjourned.

MS. TOOPS: Thank you, Your Honor.

MR. RICHARDSON: Thank you, Your Honor.

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