UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

ROBERT WATTS, on behalf of himself individually and all others similarly situated,

Plaintiff,

v.

ALLSTATE INDEMNITY CO., an Illinois corporation, et al.,

Defendants.

_____/

NO. CIV. S-08-1877 LKK/GGH

O R D E R

Plaintiff Robert Watts brings this putative class action against defendants Allstate Indemnity Company, Allstate Insurance Company, and Allstate Property and Casualty Insurance Company (collectively, "Allstate" or "defendant"), alleging (i) breach of contract; (ii) insurance bad faith; (iii) breach of the implied covenant of good faith and fair dealing;[1] (iv) fraud/

[1] As the court has previously recognized, "the second and third causes of action are duplicative of one another." (Order, May 11, 2011, 18:7-8, ECF No. 255.)

misrepresentation; and (v) unfair competition under Cal. Bus. & Prof. Code sec. 17200.[2]

Plaintiff's claims arise from defendant's alleged misconduct in failing to adequately inspect and pay for the replacement of seatbelts damaged in collisions involving insured automobiles. Plaintiff now moves for class certification. Defendant moves to compel appraisal and stay this action.

The motion came on for hearing on January 14, 2013. Having considered the matter, for the reasons set forth below, the court will (i) deny defendant's motion to compel appraisal and stay the action, and (ii) deny plaintiff's motion for class certification.

I. BACKGROUND

A. Factual Background

The following facts are taken from plaintiff Watts's declaration in support of class certification (Declaration of Robert Watts in Support of Plaintiff's Motion for Class Certification ("Watts Dec."), ECF No. 314) and his deposition transcript (Deposition of Robert Watts ("Watts Dep."), Appendix to Defendant's Motion for Summary Judgment Ex. B, ECF No. 202-2).

In 2006, plaintiff Watts was covered by an auto insurance policy purchased from Allstate. (Watts Dec. ¶ 2.) The policy provided that "Allstate will pay for direct and accidental loss to [plaintiff's] insured auto . . . from a collision . . . ." (Allstate Auto Insurance Policy ("Policy") 18, Watts Dec. Ex. A,

[2] The court previously dismissed plaintiff's sixth cause of action for RICO violations. (Order, March 31, 2009, ECF No. 66.)

ECF No. 314-1.) In the event of loss, Allstate could choose to "pay for the loss in money, or [to] repair or replace the damaged or stolen property." (Policy 21.)

On March 29, 2006, plaintiff's 2005 Honda Civic sustained significant damage in a collision. (Watts Dec. ¶ 5.) Plaintiff's wife was driving the Honda, and was accompanied by a passenger. (Id.) Plaintiff had the vehicle towed to Artistic Collision, an auto repair shop of his own choosing. (Watts Dec. ¶ 6; Watts Dep. 40:14-41:5.) Artistic Collision prepared a "visible damage quote" which did not include any amount for inspection, repair, or replacement of the seatbelts. (Watts Dec. ¶ 6; Watts Dep. Ex. 3.) On March 31, 2006, an Allstate adjuster reviewed the visible damage quote and authorized repairs at the cost of $6,534.77. (Watts Dec. ¶ 7.) Allstate's estimate did not include any amount for inspection, repair, or replacement of the seatbelts. (Id.) Artistic Collision repaired the car in accordance with the estimate; the final invoice did not include the cost of inspection, repair, or replacement of the seatbelts. (Watts Dec. ¶ 8.) The bill for these services was paid by Allstate. (Id.)

At some point between the date of the accident and September 2007, plaintiff reviewed the owner's manual for his Honda Civic. (Watts Dep. 75:10-13, 83:1-8.) It provided that seatbelts should be replaced in all vehicles involved in serious collisions. (Watts Dep. 83:6-8.) Plaintiff wrote to Allstate requesting, among other things, that the seatbelt tensioners be replaced in the Honda. (Watts Dec. ¶ 10.) In its response, Allstate refused to cover the

replacement of the seat belts and seat belt tensioners, and directed plaintiff to file a complaint with the California Bureau of Automotive Repairs if he still had concerns. (Watts Dec. ¶ 11.)

In May 2008, after commencing this action, plaintiff had his seatbelts replaced by Elk Grove Honda at a cost of $1029. (Watts Dec. ¶ 12.)

B. Procedural Background

Plaintiff filed an initial complaint on February 29, 2008, and an amended complaint on November 24, 2008. On November 7, 2008, defendant filed a motion to dismiss and a motion to compel appraisal. (ECF No. 53). The court granted the motion to dismiss in part, and denied the motion to compel appraisal (ECF No. 66). On April 20, 2009, plaintiff filed his Second Amended Complaint ("SAC," ECF No. 67), which is the operative complaint in this action.

On April 8, 2011, defendant filed a motion for summary judgment. (ECF No. 201.) The court initially granted the motion in its entirety. (ECF No. 255.) Plaintiff then filed a motion for reconsideration, claiming excusable neglect for failing to cite to the declaration of expert witness Sandy Browne, and arguing that the contents of this declaration created a genuine issue of material fact. (ECF Nos. 260, 266.) On March 30, 2012, the court granted plaintiff partial relief from summary judgment, while leaving unaltered the portion of its previous order holding that the "insurance policy did not [in terms] require Allstate to replace plaintiff's undamaged seatbelts following the collision."

(ECF No. 290.)

On May 4, 2012, defendant moved to strike the class allegations in the SAC. (ECF No. 297.) The court vacated the hearing on this motion, and instead ordered plaintiff to bring a motion for class certification according to a briefing schedule set by the court. (ECF Nos. 303, 308.)

Now pending before the court is plaintiff's motion to certify a class of all persons:

> (1) Who were issued, in California, by Allstate, an automobile insurance policy that included insurance coverage;
>
> (2) Who made a claim to Allstate for benefits under the policy as a result of a loss to their covered vehicle;
>
> (3) Whose policy was in full force and effect at the time of the loss;
>
> (4) Whose loss occurred from February 24, 2004 through the present;
>
> (5) Whose loss involved a collision of sufficient severity to damage the seat belt systems in occupied seating positions; and
>
> (6) Whose seat belt systems Allstate did not pay to replace. (Plaintiff's Motion for Class Certification, ECF No. 322.)

If certified, the class may include up to several hundred thousand individuals, as, according to plaintiff's counsel Wendy York, 867,026 California policyholders submitted auto collision repair claims to Allstate in the 2004 - 2009 period, of which only 1.2% resulted in the replacement or repair of seatbelts or seatbelt components. (Declaration of Wendy C. York in Support of Plaintiff's Motion for Class Certification ¶¶ 29-31, ECF No. 332.) Allstate

opposes class certification. (ECF No. 335.)

The following motions are also pending before the court:

- Allstate's request for an evidentiary hearing on factual disputes relating to class certification between plaintiff's and defendant's expert witnesses. (ECF No. 335.)
- Allstate's motion to strike and objections to the declaration of plaintiff's proposed expert Sandy Browne. (ECF No. 388.)
- Allstate's motion to strike and objections to the declaration of plaintiff's proposed expert Reed F. Simpson. (ECF No. 350.)
- Allstate's motion to strike and objections to the declaration of plaintiff's proposed expert James Mathis. (ECF No. 351.)
- Plaintiff's motion to strike and objections to the declaration of Allstate's proposed expert Tony Passwater. (ECF No. 362.)
- Plaintiff's motion to strike and objections to the declaration of Allstate's proposed expert Omar Menifee. (ECF No. 363.)
- Plaintiff's motion to strike and objections to the declaration of Allstate's proposed expert Daniel Davee. (ECF No. 370.)
- Plaintiff's motion to strike and objections to the declaration of Allstate's proposed expert Robert C. Lange. (ECF No. 371.)
- Allstate's motion to compel appraisal and stay the action. (ECF No. 352.)
- Allstate's request to seal certain documents. (ECF No. 328.)

As defendant's motion to compel appraisal would stay this action if granted, it must be considered before turning to plaintiff's motion for class certification.

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II. DEFENDANT'S MOTION TO COMPEL APPRAISAL AND STAY THE ACTION

Plaintiff's insurance contract contains the following appraisal provision:

> Right to Appraisal. Both [the policyholder] and Allstate have a right to demand an appraisal of the loss. Each will appoint and pay a qualified appraiser. Other appraisal expenses will be shared equally. The two appraisers, or a judge of a court of record, will choose an umpire. Each appraiser will state the actual cash value and the amount of loss. If they disagree, they'll submit their differences to the umpire. A written decision by any two of these three persons will determine the amount of the loss. (Policy 21.)

The policy does not explicitly state that appraisal is a precondition to suit, but an accompanying policy endorsement specific to California insureds provides: "Action Against Allstate. No legal action can be brought against us under this coverage unless there is full compliance with all the policy terms." (Id., Policy Endorsement at 8.)

Allstate claims that it invoked the appraisal provision by letter to plaintiff's counsel dated April 30, 2008. (Dec. Martin, Ex. A., ECF No. 336-1.)

As described above, the court previously denied defendant's motion to compel appraisal and stay this action. (Order, March 31, 2009 ("Appraisal Order"), ECF No. 66.) In considering the motion, the court treated the Allstate appraisal provision as an arbitration agreement, and determined that the provision was unconscionable under California law, and therefore, unenforceable under the Federal Arbitration Act. Defendants now contend that reconsideration of this order is called for by the Supreme Court's

ruling in AT&T Mobility v. Concepcion, 562 U.S. __, 131 S. Ct. 1740 (2011) (holding that the Federal Arbitration Act preempts the California Supreme Court's ruling that class waivers in many consumer arbitration agreements are unconscionable, and therefore, unenforceable).

If unconscionability had been the sole ground for denying the motion, there is little doubt that reconsideration would be warranted in light of Concepcion.

But the court had another basis to deny Allstate's motion to compel appraisal:

> A second factor also suggests the stay is inappropriate. The appraisal process rests on the possibility that a difference as to cost of repair is at the heart of the dispute. Plaintiff's allegations, however, make no such claim. Rather, plaintiff alleges that defendant has a policy of never assessing whether repair of the seatbelts is appropriate, and pressuring repair shops so that they do not estimate the cost of replacement. It seems clear that both these allegations are outside the appraisal provisions, and therefore, would appear to render that provision irrelevant to plaintiff's lawsuit. (Appraisal Order at 30.)

The allegations referred to in this passage appeared in plaintiff's First Amended Complaint, (ECF No. 51), and are reiterated in the operative Second Amended Complaint (ECF No. 67). Accordingly, reconsideration of the previous order denying appraisal is warranted only if, first, plaintiff's motion for class certification is based on allegations different from those in the complaint, and second, an appraisal of the cost of repair is relevant to the new allegations.

Plaintiff seeks to certify a class of Allstate insureds

"[w]hose loss involved a collision of sufficient severity to damage the seat belt systems in occupied seating positions" and "[w]hose seat belt systems Allstate did not pay to replace." (Memorandum of Law in Support of Plaintiff's Motion for Class Certification at 3, ECF No. 322) Plaintiff is alleged to be typical of the putative class because he is:

> an Allstate policyholder who claims that his seatbelts were damaged in a major collision; who asserts that Allstate failed to meet its contractual obligation to restore his vehicle to its pre-loss condition by paying to replace the seatbelts; and who asserts that Allstate committed insurance bad faith and fraudulent and unfair business practices by engaging in claims adjusting practices that lead to non-payment for seatbelt replacements. . . . (Id. at 23) (internal citations omitted).

It appears that the class allegations are consistent with the individual allegations in the SAC, and therefore, do not warrant a modification of the court's previous order declining to compel an appraisal.

In reaching this conclusion, the court explicitly disagrees with defendant's repeated contentions that, "At its core, this case challenges the amount that Allstate paid to settle an automobile physical damage claim." (Opposition to Motion for Class Cert. at 23, ECF No. 335; see also Memorandum of Points and Authorities in Support of Motion to Compel Appraisal and Stay Action at 2, ECF No. 352.) This lawsuit challenges Allstate's practices in failing to properly inspect, identify, and repair damaged seatbelts, alleging that these failures constitute breach of contract, insurance bad faith, fraud, and unfair business practices. While

it likely would have cost Allstate more to inspect and replace plaintiff's seatbelts than otherwise, these additional expenses would have been incurred only if Allstate practices would have found that the seatbelts were damaged. An appraisal would not address the substance of plaintiff's claims.

Accordingly, defendant's motion to compel an appraisal and stay the action is denied. The court will next consider the admissibility of the expert declarations.

III. DECLARATION OF SANDY BROWNE

Plaintiff has submitted proposed expert Sandy Browne's declaration in support of its motion for class certification. ("Browne Dec.," ECF No. 331.) Allstate has filed objections and moves to strike portions of the declaration. (ECF No. 388.) Plaintiff has also submitted a reply declaration from Browne ("Browne Reply Dec.," ECF No. 368.) Allstate objects to and moves to strike portions of this declaration as well. (ECF No. 388.)

A. Standard

In determining whether the declaration of a proposed expert is admissible under Federal Rule of Evidence 702,[3] the court must apply the standards developed in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999), and their progeny. See Wal-Mart Stores, Inc. v. Dukes, 564 U.S. __, 131 S. Ct. 2541, 2553-4 (2011) (expressing doubt that Daubert does not apply to expert testimony

[3] Hereinafter, the term "FRE" refers to the applicable Federal Rule of Evidence.

at the certification stage of class-action proceedings); see also Ellis v. Costco Wholesale Corp., 657 F.3d 970, 982 (9th Cir. 2011) ("In its analysis of [defendant's] motions to strike, the district court correctly applied the evidentiary standard set forth in Daubert.").

At trial, the Daubert inquiry focuses on whether a jury should be permitted to rely on a proposed expert's testimony in making its findings of fact. In the class certification context, the inquiry addresses whether the court may rely on the expert's testimony in deciding if Federal Rule of Civil Procedure 23's requirements have been met.[4]

Supreme Court decisions emphasize the need for courts to conduct a "rigorous analysis" of class certification requirements under FRCP 23. General Telephone Co. of Southwest v. Falcon, 457 U.S. 147, 161 (1982); Wal-Mart, 131 S. Ct. at 2551. The Ninth Circuit has recently determined that, to the extent that merits claims overlap with the class certification issues, as part of the consideration of class certification, district courts must consider the merits of class members' substantive claims, rather than deferring such consideration to trial. Ellis, 657 F.3d at 981. Evaluation of the merits may even require the court to decide a "battle of the experts" as to certification issues. Id. at 982. Accordingly, to the extent that an expert's opinion may come into play in deciding whether to certify a class, the court must ensure

[4] Hereinafter, the term "FRCP" refers to the applicable Federal Rule of Civil Procedure.

that the expert's testimony passes muster under FRE 702 and Daubert.[5]

Under FRE 702:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (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.

The proponent of expert testimony has the burden of establishing that these requirements for admissibility are met by a preponderance of the evidence. Fed. R. Evid. 702, Advisory Committee's Note to the 2000 Amendments. FRE 702 "does not distinguish between scientific and other forms of expert testimony. The trial court's gatekeeping function applies to testimony by any expert." Id. (citing Kumho Tire, 526 U.S. at 141).

Under Daubert, the court exercises its gatekeeping function through conducting a two-step assessment: first, it determines

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[5] It is difficult to know what exactly the district court should do, since Ellis also provides that "Rule 23 does not authorize a preliminary inquiry into the merits . . . for purposes other than determining whether certification was proper. To hold otherwise would turn class certification into a mini-trial." Ellis, 657 F.3d at 983 n.8 (internal citation omitted). See Ellis v. Costco Wholesale Corp., 285 F.R.D. 492 (N.D.Cal. 2012), in which Judge Chen, attempting to comply with the circuit's ruling, perceived it necessary to engage in the very analysis which would be applied at trial.

whether the proposed expert's testimony is reliable, and second, whether it is relevant. Daubert, 509 U.S. at 592-593. Daubert provides a non-exclusive set of factors for district courts to consider in determining reliability:

> (1) whether the expert's technique or theory can be or has been tested – that is, whether the expert's theory can be challenged in some objective sense, or whether it is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability;
>
> (2) whether the technique or theory has been subject to peer review and publication;
>
> (3) the known or potential rate of error of the technique or theory when applied;
>
> (4) the existence and maintenance of standards and controls; and
>
> (5) whether the technique or theory has been generally accepted in the scientific community.

Fed. R. Evid. 702, Advisory Committee's Note to the 2000 Amendments. Some courts have identified additional factors relevant to the reliability inquiry, such as:

> (1) Whether [the expert is] proposing to testify about matters growing naturally and directly out of research [he has] conducted independent of the litigation, or whether [he has] developed [his] opinions expressly for purposes of testifying . . . .
>
> (2) Whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion . . . .
>
> (3) Whether the expert has adequately accounted for obvious alternative explanations . . . .
>
> (4) Whether the expert is being as careful as he would be in his regular professional work outside his paid litigation consulting . . . . [; and]
>
> (5) Whether the field of expertise claimed by the expert is known to reach reliable results for the type of

opinion the expert would give . . . .

Id. (internal citations and quotations omitted).

District courts have great flexibility in choosing which of these factors, if any, to apply in assessing the admissibility of expert testimony. "[T]here are many different kinds of experts, and many different kinds of expertise." Kumho Tire, 526 U.S. at 150. "We can neither rule out, nor rule in, for all cases and for all time the applicability of the factors mentioned in Daubert, nor can we now do so for subsets of cases categorized by category of expert or by kind of evidence. Too much depends upon the particular circumstances of the particular case at issue." Id.

Nevertheless, "nothing in either Daubert or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." General Electric v. Joiner, 522 U.S. 136, 146 (1997). The court may conclude that "there is simply too great an analytical gap between the data and the opinion proffered." Id.

Ultimately, district courts have considerable discretion to admit or exclude expert testimony. See id.

B. Analysis

1. Effect of admitting Browne's previous declaration

Plaintiff begins by arguing that, because Browne's prior declaration was deemed admissible under FRE 702 and Daubert for the purposes of deciding Allstate's motion for summary judgment (Order, March 30, 2012 ("MSJ Order"), ECF No. 290), it follows that her declarations herein must be admissible for the purposes of

determining class certification. (Plaintiff's Amended Opp. to Mot. to Strike Browne Dec. at 3-8, ECF No. 394.)

Allstate counters that Browne's prior testimony was deemed admissible because it was based in part on a fact-specific analysis of the collision in which plaintiff's vehicle was involved, a matter on which she was deemed qualified to opine. By contrast, Allstate argues, Browne's opinions herein go beyond her demonstrated expertise, knowledge, experience, and training. (Allstate's Amended Mot. to Strike Browne Dec. at 2-7, ECF No. 388.)

The court's previous Order provided that, "Plaintiff offers Browne's testimony in order to prove that Allstate was contractually obligated to pay for the replacement of the seat belts following the collision because the seat belts were 'deemed damaged' and could not have returned to [their] original condition." (MSJ Order at 15.) The question at issue in the summary judgment motion was whether Allstate had to replace plaintiff Watts's seatbelts following the collision, not whether Allstate must replace seatbelts after all sufficiently-serious collisions (the question presented by the instant motion for class certification). Browne's testimony was only deemed admissible on the first, narrower question. As stated in the Order: "The court now analyzes whether Browne's expert testimony **on this point** is reliable and relevant under the framework set forth in Daubert . . . ." (Id.) The Order further provided: "the Browne testimony [is] reliable and relevant. Ms. Browne's experience and

training in biomechanics and engineering is vast, and her conclusions are relevant to **a core issue** in this case," namely, whether Allstate had to replace plaintiff's seatbelts.

The court's ruling on the summary judgment motion relied heavily on portions of Browne's declaration describing her review of accident and medical records from the Watts auto collision. (MSJ Order at 17.) While the court took into account Browne's opinion that a seatbelt involved in an accident of sufficient severity will stretch and not return to its original elasticity (id. at 14, 16), it did so in reaching the conclusion that there was a "triable issue on the factual question of whether the Watts' seatbelts were damaged following the collision," (id. at 17), and that summary judgment in Allstate's favor was therefore inappropriate.

The previous determination of admissibility does not mean that Browne's present declarations are admissible on the issue of class certification. The court's admission of Browne's prior declaration at summary judgment has some bearing on the admissibility of her subsequent testimony going forward. Nonetheless, the issues presented by class certification in this case are sufficiently different from those presented by the summary judgment motion so as to require a new determination of admissibility.

2. Browne's qualifications

Browne's statement of her qualifications (Browne Dec. ¶¶ 1-12) is virtually identical to that in her previous declaration. (Declaration of Sandy Browne in Opposition to Defendants' Motion for Summary Judgment ¶¶ 1-12, ECF No. 232.) The court earlier

summarized these qualifications as follows:

> Ms. Browne is a former accident investigator with the National Transportation Safety Board and the National Highway Traffic Safety Administration. She has completed approximately 2000 hours of training in accident investigation through the University of Southern California, Stanford University, the Department of Transportation, and the National Transportation Safety Board. That training included course[s] on seat belt systems, and their construction, their performance, their testing requirements, their failures, their inefficiencies, and the biomechanical result of lap belts. She has published dozens of articles on automobile accidents, including on the performance of lap and shoulder belts in car accidents, and has provided numerous trainings on car accidents to the California Highway Patrol, including on restraint systems. In the course of her experience as an investigator and as a consultant in seat belt safety, Browne has personally inspected dozens of seat belts that have been involved in car accidents. (MSJ Order at 15-16) (internal citations and quotations omitted).

In her reply declaration, Browne adds that, while she received most of her official training between 1970 and 1990 (the period in which seatbelt research was allegedly at its peak), she has since "continuously kept [her]self abreast of the latest developments and research in [the] field." (Browne Reply Dec. ¶ 17, ECF No. 331.)

3. Browne's opinions

Browne offers the following expert opinions in her declaration in support of class certification:

1. Allstate's Next Gen and Legacy systems[6] contain

[6] Next Gen and Legacy are computer systems used by Allstate in processing auto insurance claims; as their names suggest, Legacy is the older of the two systems. While there is disagreement among the parties' proposed experts as to the nature and reliability of the data captured in these systems, those disputes need not be resolved in determining the present issue as to the admissibility of Browne's declaration.

information sufficient to conclude that the Allstate policyholders in the [proposed] class experienced a "collision of sufficient severity to damage the seat belt systems in occupied seating positions," as stated in the class definition . . . . Allstate should have paid to replace all such systems.

2. Allstate engages in a series of uniform practices that are unsound from an engineering standpoint, and that prevent Allstate from detecting or recording its policyholders' seatbelt damage. These practices are: (1) limiting seatbelt inspection and replacement to cases of airbag deployment; (2) adopting a "Write Only What You Can See" process that cannot detect latent damage such as webbing stretch; (3) failing to adopt adequate seatbelt system inspection procedures or to adequately train its personnel to perform such procedures; (4) failing to require adjusters to consult and adhere to vehicle manufacturer recommendations regarding post-collision seatbelt inspection and/or replacement; and (5) failing to include appropriate fields in its claim processing system, Next Gen, to detect and record seatbelt damage. As a result of these practices, in the majority of cases, Allstate has not paid to replace its policyholders' damaged seatbelts.

3. For future claims handling, Allstate should be required to collect and maintain additional data points

relevant to capturing latent seatbelt damage, detecting and recording discernible seatbelt damage, and replacing Allstate's policyholders' damaged seatbelt systems. (Browne Dec. at 32-33.)

4. Admissibility of Browne's first opinion

Browne makes the following assertions in support of her first opinion, *supra*:

1. Federal Motor Vehicle Safety Standards require automobile seatbelt systems in the United States to stretch to a specified extent when subject to specified forces. (Browne Dec. ¶¶ 38 - 43.)
2. "Once stretched, seatbelt webbing never fully returns to its original length." (Browne Dec. ¶ 35.)
3. "Once the webbing is stretched, its capacity to protect the occupant is compromised." (Browne Dec. ¶ 35.)
4. "The seatbelt webbing will stretch in an accident . . . if the seatbelt is loaded with a sufficient degree of force. 'Loaded' is a technical term meaning the occupant's body contacted the restraint system (specifically, the webbing) and applied pressure to the restraint system during speed deceleration." (Browne Dec. ¶ 44.)
5. "Whether the loading caused the webbing to stretch in a given collision depends on two factors: (1) the type of collision, which indicates the principal **direction** of force; and (2) the degree of damage to the vehicle,

which shows the **amount** of force to which the seatbelt was subjected." (Browne Dec. ¶ 44) (emphasis in original).

6. "For a head-on collision resulting in major damage to the vehicle, I can state with certainty that the seatbelts loaded, that the webbing stretched, and that the seatbelt system is therefore damaged . . . . I can also state with certainty that seatbelt damage occurs in other types of collisions . . . [because] the **direction** of force, combined with the degree of damage (**amount** of force), necessarily results in seatbelt loading and therefore damaged seatbelt webbing. It happens because of the uniform laws of physics controlling all collisions, and because of the uniform properties of all seatbelt webbing . . . ." (Browne Dec. ¶ 47) (emphasis in original).

7. "If one's goal is to restore a vehicle to its pre-accident condition, then the entire seatbelt system must be replaced. It is not possible to repair the webbing, nor is it possible to replace only the webbing in a seatbelt system. Rather, the entire system, including the webbing, must be removed and a new system installed." (Browne Dec. ¶ 36.)

8. "I have carefully reviewed screen shots showing the fields of data collected by [Allstate's Legacy and Next Gen computer systems]." (Browne Dec. ¶ 48.) "Attached

> [to my declaration are matrices] that I prepared based on my review of screen shots . . . . [These matrices identify] the fields of data that, when pulled from the [Legacy and Next Gen computer systems] by a computer technician, will yield a list of claims involving collisions in which the seat belt systems were damaged." (Browne Dec. ¶ 49, 56.)

All of these assertions must pass muster under Rule 702 and Daubert in order for Browne's first opinion to be admissible as expert testimony.

Given Ms. Browne's training and experience, I would find that the first seven assertions — that a loaded seatbelt subjected to sufficient force in a particular direction in an auto collision will stretch and not return to its original shape, thereby rendering it unsafe for future use; that head-on collisions causing major damage to vehicles and certain other types of collisions subject loaded seatbelts to the requisite force; and that to restore such seatbelts to safe condition, one must replace the entire seatbelt system, rather than just the webbing — are admissible.

This leaves Browne's assertion that, based on a review of screen shots of Allstate's Legacy and Next Gen computer systems, she can identify the "fields of data that . . . will yield a list of claims involving collisions in which the seat belt systems were damaged." (Browne Dec. ¶ 49, 56.) In other words, Browne claims that she can infer from Allstate's computer record of a collision

whether the seatbelts were irreparably damaged in that collision. According to Browne, certain fields in Allstate's systems ("Degree of Damage" and "Was a case or report created?" in the Next Gen system; "Was the asset damaged in this loss?," "Calculated Degree of Damage," and "Was a report filed?" in the Legacy system) indicate the amount of force, while other fields ("Loss Type" and "Detailed Loss Type" in the Next Gen system; "Loss Facts/Auto," "Insured Vehicle Action," and "Insured Vehicle Road Type" in the Legacy system) indicate the direction of force.[7] (Browne Dec. ¶¶ 51, 52, 58.)

Browne's assertion that she can identify vehicles whose seatbelts ought to have been replaced from the information in Allstate's computer systems is critical to the certification inquiry. Plaintiff seeks to certify a class of individuals, among other things, "whose loss involved a collision of sufficient severity to damage the seat belt systems in occupied seating positions." The only means plaintiff offers to ascertain these individuals' identities is by selecting the appropriate fields in Allstate's computer systems. Browne's opinion is critical to establishing that the class members' seatbelt systems were damaged in the identified collisions, because absent her opinion, there is no way to correlate Allstate's claims data with the extent of

[7] Each of these fields record descriptive categories of information, such as "Minor," "Moderate, "Major," and "Possible Total Loss" in the "Degree of Damage" field or "Changing lanes," "Head-on collision," "Insured hit a fixed object," etc. in the "Detailed Loss Type" field. (See Browne Dec. Exs. B, C.)

damage to the vehicles.

FRE 702(c) requires that, to be admissible, expert testimony must be "the product of reliable principles and methods." But both of Browne's declarations in support of this motion lack any description of the principles or methods she uses to deduce the degree of damage to seatbelt webbing from the fields in Allstate's computer systems. There is simply no presentation of her methodology at all.

In her initial declaration, Browne claims that she is able to identify the affected Allstate policyholders having "carefully reviewed screen shots showing the fields of data collected by each system." (Browne Dec. ¶ 48.) She later adds that she has reviewed the declaration of Omar Menifee, a defense witness, which "confirms that [her] reliance on the 'Degree of Damage' field is appropriate." (Browne Dec. ¶ 55.)

In her reply declaration, Browne justifies her interpretation of the data in the Allstate systems by citing her professional opinion, *e.g.*, "I have selected the fields and menu options that, in my professional opinion, demonstrate that the principal **direction** of force and the **amount** of force involved in the collision resulted in seatbelt loading and webbing stretch" (Browne Dec. ¶ 58) (emphasis in original). In her reply declaration, Browne adds:

> [M]y selection of the data fields for my matrices is based on the thousands of real-world collisions that I have examined and evaluated in my career. I am an expert in accident reconstruction. I have performed thousands of accident reconstructions. It is precisely because of

> my extensive experience as an accident reconstructionist that I can testify that that information on the type of incident in which the vehicle was involved, and information on the type of damage the incident caused to the vehicle, are highly relevant facts from which I can draw conclusions sufficient to reconstruct the general principal direction and approximate degree of the forces involved. Allstate's databases contain facts sufficient for this purpose in its "Degree of Damage," "Calculated Degree of Damage," "Loss Facts," "Insured Vehicle Action," "Insured Vehicle Road Type," "Was a case or report created," "Loss Type," and "Detailed Loss Type" data fields. (Browne Reply Dec. ¶ 86.)

Later, she states, "The fields of data I have selected from Allstate's Legacy and NextGen systems contain reliable information of the kind routinely relied on by accident reconstructionists who are trying to piece together an accident after the fact." (Browne Reply Dec. ¶ 87.)

But beyond these conclusory assertions, Browne simply fails to explain how she derives her conclusions about which collisions led to unsafe seatbelt stretching from the fields in Allstate's systems. An expert is not forbidden from relying on her experience. But "[i]f the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably related to the facts." Fed. R. Evid. 702, Advisory Committee's Note to the 2000 Amendments. Browne's declarations fail to meet this standard. While it may be true, as Brown avers, that by experience she can determine that the fields reflect particular types of real-world accidents, she does not take the next, necessary step of relating that conclusion to degrees of damage to seatbelt systems.

Moreover, none of the factors identified by Daubert and Kumho Tire as indicia of reliability for expert testimony are present in Browne's testimony. There is nothing to indicate that Browne's methodology "can be (and has been) tested." Daubert, 509 U.S. at 593. Browne does not indicate that she has examined Allstate-insured vehicles involved in collisions and attempted to correlate the degree of seatbelt stretching to the fields in Allstate's database. Granting that it would have been difficult to obtain sample vehicles for such a study in discovery (*e.g.*, for reasons of consumer privacy), Browne does assert that "the type of incident in which the vehicle was involved, and information on the type of damage the incident caused to the vehicle, are highly relevant facts from which I can draw conclusions sufficient to reconstruct the general principal direction and approximate degree of the forces involved." (Browne Reply Dec. ¶ 86.) In other words, she is arguing that generic information about "the type of incident in which the vehicle was involved" and "the type of damage the incident caused to the vehicle" is sufficient to determine seatbelt stretching. This suggests that she should be able to conduct real-world tests of accidents to see whether her categories of "type of incident" and "type of damage" correlate with seatbelt damage. But not only does she fail to describe testing of her methodology by herself or others, she does not even describe her methodology.

Browne similarly neglects to mention whether her methodology "has been subjected to peer review and publication." Id., 509 U.S. at 593. While publication "does not necessarily correlate with

reliability" and is "not [a] dispositive consideration in assessing the scientific validity of a . . . methodology," id. at 593-4, the absence of such citation suggests that Browne's methodology is personal, rather than generally-accepted. This absence is particularly striking given her statement that "[t]he fields of data [she has] selected from Allstate's Legacy and NextGen systems contain reliable information of the kind routinely relied on by accident reconstructionists who are trying to piece together an accident after the fact." (Browne Reply Dec. ¶ 87.) There is nothing, however, describing these routine techniques and their reliability, and then relating them to seatbelt damage. Similarly, Browne fails to cite any "standards controlling [her methodology's] operation," id. at 594, among the accident reconstruction community.

Finally, there is no description of the "known or potential rate of error" in Browne's methodology. Id. at 594. As the Supreme Court has noted, when considering "experience-based testimony[, i]n certain cases, it will be appropriate for the trial judge to ask, for example, how often an engineering expert's experience-based methodology has produced erroneous results . . . ." Kumho Tire, 526 U.S. at 151. There is no requirement that Browne's methodology must be infallible in order to pass muster for reliability under Rule 702. But it is difficult to assess her methodology's reliability without some sense of the number of false positives, if any, it is likely to include.

Ultimately, Browne is asking the court to make an inferential

leap from the data in Allstate's computer systems to the alleged degree of damage to seatbelt systems based solely on her experience, without any explanation of her methods or justification for their reliability. Accordingly, the court is left to conclude that "there is simply too great an analytical gap between the data and the opinion proffered" by Browne to allow its admission. Joiner, 522 U.S. at 146. Or as the Ninth Circuit put it, "We've been presented with only the experts' qualifications, their conclusions and their assurances of reliability. Under Daubert, that's not enough." Daubert v. Merrell Dow Pharmaceuticals, Inc., 43 F.3d 1311, 1319 (9th Cir. 1995) ("Daubert II").[8]

In sum, Browne has failed to provide any basis for determining that the methodology she uses to identify collisions that require seatbelt replacement, based on the data in Allstate's computer systems, is reliable. Therefore, the opinion she advances that is based on this methodology - that "Allstate's Next Gen and Legacy systems contain information sufficient to conclude that the Allstate policyholders in the class experienced a 'collision of sufficient severity to damage the seat belt systems in occupied seating positions'" (Browne Dec. ¶ 95) - is also inadmissible for purposes of deciding the motion for class certification. As this opinion is the basis of the class that plaintiff seeks to certify,

[8] The court wishes to be clear. It may be that some or indeed many of the cars identified by the plaintiff have had seat belt impairment. The problem is, given the expert's reticence, it is impossible to identify which cars may have been subject to that loss, and which cars may have been free of that loss.

it follows that the court must deny the motion for class certification.

Given the court's disposition of the motion, the court need not further examine Browne's conduct relative to a failure to cite the article from which she took about ten (10) paragraphs of her declaration, making it appear that she was the author of the material. It suffices to say such conduct is unacceptable.

IV. CONCLUSION

Accordingly, the court hereby orders as follows:

[1] Defendant's motion to compel appraisal and stay this action is DENIED.

[2] Defendant's objection under Federal Rule of Evidence 702 to the admissibility of the declaration of Sandy Browne is SUSTAINED.

[3] Plaintiff's motion for class certification is DENIED without prejudice.

[4] Defendant's request for an evidentiary hearing is DENIED as moot.

[5] Defendant's motions to strike and objections to the declarations of plaintiff's proposed experts Reed F. Simpson and James Mathis are DENIED as moot.

[6] Plaintiff's motions to strike and objections to the declarations of defendant's proposed experts Tony Passwater, Omar Menifee, Daniel Davee, and Robert C. Lange are DENIED as moot.

[7] Allstate's request to seal documents stands SUBMITTED,

and an appropriate order will issue.

IT IS SO ORDERED.

DATED: January 16, 2013.

LAWRENCE K. KARLTON
SENIOR JUDGE
UNITED STATES DISTRICT COURT