

United States District Court  
Northern District of California

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

EDD KING, et al.,  
Plaintiffs,  
v.  
NATIONAL GENERAL INSURANCE  
COMPANY, et al.,  
Defendants.

Case No. [15-cv-00313-DMR](#)

**ORDER ON MOTION TO DISMISS,  
MOTION TO STRIKE, AND MOTION  
TO FILE SURREPLY**

Re: Dkt. Nos. 39, 40, 53

Plaintiffs<sup>1</sup> are qualified “Good Drivers”<sup>2</sup> who purchased car insurance from the Defendant insurance companies. Plaintiffs now bring a putative class action alleging that Defendants failed to offer Plaintiffs and the putative class members their lowest Good Driver rates, as required by California law. Before the court are Defendants’ motion to dismiss (“MTD”) pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), and motion to strike (“MTS”) pursuant to Federal Rule of Civil Procedure 12(f). [Docket Nos. 40, 39, respectively.] Plaintiffs have also filed a motion for leave to file a surreply to the MTD. [Docket No. 53.] The court held a hearing on the motions on September 10, 2015. For the reasons stated below and at the hearing, the motion to dismiss is **granted in part and denied in part**, and the motion to strike is **denied without prejudice**.

<sup>1</sup> The named Plaintiffs are Edd and Diedre King and Elmo Sheen. Defendants are National General Insurance Company (“NGIC”), National General Assurance Company (“NGAC”), Integon National Insurance Company (“Integon National”), Integon Preferred Insurance Company (“Integon Preferred”), MIC General Insurance Corporation (“MIC”), Personal Express Insurance Company (“Personal Express”), and Sequoia Insurance Company (“Sequoia”).

<sup>2</sup> Section 1861.025 of the California Insurance Code defines criteria for individuals to qualify as “Good Drivers” who may purchase a “Good Driver Discount policy.”

**I. BACKGROUND<sup>3</sup>**

**A. Good Driver Discount Rate**

Plaintiffs all held insurance policies issued by one or more of the Defendants. Plaintiffs allege that they and all members of the putative class are “Good Drivers” as defined by California statute. First Am. Compl. [“FAC,” Docket No. 28] at ¶ 4. California requires insurers providing private passenger automobile insurance (“PPA” policies) to offer a Good Driver discount to qualified drivers. *Id.* at ¶ 24. *See also* Cal. Ins. Code § 1861.025 (defining persons qualified to purchase a “Good Driver Discount policy”); § 1861.02(b)(1) (“Every person who meets the criteria of Section 1861.025 shall be qualified to purchase a Good Driver Discount policy from the insurer of his or her choice.”); § 1861.02(b)(2) (“The rate charged for a Good Driver Discount policy shall comply with subdivision (a) and shall be at least 20% below the rate the insured would otherwise have been charged for the same coverage.”).

**B. Common Control Group**

According to Plaintiffs, if one or more insurers are commonly owned or are operated under common management, California law requires any insurer within that group to offer a qualified Good Driver the policy with the lowest rates for that coverage offered by any of the insurers within the group. FAC at ¶ 24. *See also* Cal. Ins. Code § 1861.16(b) (“An agent or representative representing one or more insurers having common ownership or operating in California under common management or control shall offer, and the insurer shall sell, a good driver discount policy to a good driver from an insurer within that common ownership, management, or control

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<sup>3</sup> When reviewing a motion to dismiss for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6), the court must “accept as true all of the factual allegations contained in the complaint.” *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam) (citation omitted). Defendants also style their motion to dismiss as being a motion to dismiss for lack of subject matter jurisdiction based on Rule 12(b)(1), which in some circumstances permits the court to consider evidence outside the pleadings and does not require the court to presume the truthfulness of the allegations. *See Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004) (“In resolving a factual attack on jurisdiction, the district court may review evidence beyond the complaint without converting the motion to dismiss into a motion for summary judgment. The court need not presume the truthfulness of the plaintiff’s allegations.”) (citation omitted). The information in this section is derived from the allegations in the First Amended Complaint unless otherwise noted.

1 group, which offers the lowest rates for that coverage.”).

2 Plaintiffs allege that Defendants are part of a common control group as defined by  
3 California Insurance Code § 1861.16(b). *Id.* at ¶¶ 1, 15. Specifically, from at least January 1,  
4 2008, “Defendants’ applicable policy form filings, rate filings, rule filings and/or marketing  
5 representations with respect to the offering of the policies at issue and the Good Driver discounts  
6 were all drafted, developed, filed and/or approved for use by each Defendant insurer in the same  
7 or similar manner and by the same managers and personnel.” *Id.* at ¶ 16. Defendants hold  
8 themselves out as a single entity when marketing their insurance products, including offering a  
9 Good Driver Discount policy for California automobile policyholders. *Id.* at ¶ 17. There is actual  
10 or apparent agency among the Defendants with respect to the conduct, marketing of policies,  
11 marketing of Good Driver discounts and the resulting legal and contractual responsibilities of each  
12 of the Defendant companies on behalf of the other named Defendant companies. *Id.*

13 The California Insurance Code provides for exceptions to the general rule that requires any  
14 insurer within a common control group to offer the lowest Good Driver rate of the group. *Id.* at ¶  
15 25 (citing Cal. Ins. Code § 1861.16(c)(1)). Plaintiffs allege that Defendants do not meet the  
16 criteria for any exemption from the rule that insurers within a common control group must offer  
17 the lowest Good Driver rate of any insurer within that group. *Id.* at ¶ 26.

18 **C. Allegedly Wrongful Behavior**

19 Plaintiffs allege that “[a]cting together in concert and holding themselves out to be a single  
20 entity, [Defendants] have unlawfully overcharged Plaintiffs and other qualified Good Drivers for  
21 automobile insurance” and “failed to provide the lowest Good Driver rates<sup>4</sup> that were legally  
22 required under applicable law, marketed and promised to Plaintiffs and the Class and/or contained  
23 in Defendants’ Control Group regulatory filings.” *Id.* at ¶¶ 1, 33. *See also id.* at ¶ 4 (“Defendants  
24 have systematically and uniformly failed to provide [their lowest] Good Driver premium rates to  
25 Plaintiffs and the Class, instead overcharging Plaintiffs and the Class and thereby engaging in and

26 \_\_\_\_\_  
27 <sup>4</sup> Plaintiffs’ pleading suggests that Section 1861.16(b) requires the provision of the lowest “rate.”  
28 However, as discussed below, the statute itself requires that the insurer shall offer “a good driver  
discount *policy* to a good driver from an insurer within that common ownership, management, or  
control group, *which offers the lowest rates for that coverage.*” (emphasis added).

1 continuing to engage in unlawful, unjust, fraudulent and/or unfair business practices.”); ¶ 27  
2 (“[A]s evidenced by the issuance of policies, Plaintiffs paid their insurance premiums for  
3 automobile insurance as billed by Defendants, which improperly included overcharges and did not  
4 include the lowest available Good Driver rate among companies in their Control Group that they  
5 were entitled to receive.”).

6 Furthermore, Plaintiffs allege that Defendants did not inform policyholders who had been  
7 overcharged of their right to be reimbursed for their premium overpayments, and did not offer to  
8 or make the required reimbursements when overcharges were discovered. *Id.* at ¶ 29. Instead,  
9 “as a Control Group, Defendants maintain and/or maintained substantially uniform and systematic  
10 policies, procedures and practices designed to conceal this wrongful conduct from Plaintiffs and  
11 the Class.” *Id.* Furthermore, “[b]ecause of Defendants’ active concealment and ongoing  
12 fraudulent actions, the Plaintiffs and the Class were not reasonably able to discover Defendants’  
13 wrongful conduct and/or the premium overcharges ...” *Id.* at ¶ 34; ¶ 70

14 **D. Claims**

15 Plaintiffs bring eight causes of action: (1) breach of contract; (2) bad faith and breach of  
16 the covenant of good faith and fair dealing; (3) quantum meruit; (4) declaratory relief; (5) fraud  
17 and misrepresentation; and (6)-(8) violations of California’s Unfair Competition Law (“UCL”),  
18 codified at California Business and Professions Code § 17200 *et seq.*, for unlawful, unfair, and  
19 fraudulent business practices.

20 **II. LEGAL STANDARDS**

21 A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the claims alleged in  
22 the complaint. *See Parks Sch. of Bus., Inc. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995). A  
23 court may dismiss a claim “only where there is no cognizable legal theory” or there is an absence  
24 of “sufficient factual matter to state a facially plausible claim to relief.” *Shroyer v. New Cingular*  
25 *Wireless Servs., Inc.*, 622 F.3d 1035, 1041 (9th Cir. 2010) (citing *Ashcroft v. Iqbal*, 556 U.S. 662,  
26 677-78 (2009); *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001)) (quotation marks omitted).  
27 A claim has facial plausibility when a plaintiff “pleads factual content that allows the court to  
28 draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556

1 U.S. at 678 (citation omitted). In other words, the facts alleged must demonstrate “more than  
2 labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.”  
3 *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 555 (2007) (citing *Papasan v. Allain*, 478 U.S. 265, 286  
4 (1986)); see *Lee v. City of L.A.*, 250 F.3d 668, 679 (9th Cir. 2001), *overruled on other grounds by*  
5 *Galbraith v. Cnty. of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002); *Moss v. U.S. Secret Serv.*, 572  
6 F.3d 962, 969 (9th Cir. 2009) (“[F]or a complaint to survive a motion to dismiss, the non-  
7 conclusory ‘factual content,’ and reasonable inferences from that content, must be plausibly  
8 suggestive of a claim entitling the plaintiff to relief.”).

### 9 III. MOTION TO DISMISS

10 Defendants raise a host of arguments against Plaintiffs’ claims. *First*, Defendants contend  
11 that Plaintiffs have failed to allege that they have been injured by Defendants’ conduct, so that  
12 they do not have standing under Article III of the Constitution to bring this lawsuit. *Second*,  
13 Defendants contend that Plaintiffs’ claims are “regulatory in nature,” such that they should be  
14 handled by the California Department of Insurance (“DOI”) rather than litigated in federal court.  
15 *Third*, Defendants argue that each of Plaintiffs’ claims is insufficiently pleaded. *Fourth*, certain  
16 Defendants argue that they fall within the exemptions to Section 1861.16(b). The court considers  
17 each argument in turn.

#### 18 A. Article III Standing

19 Defendants argue that Plaintiffs lack standing to bring this lawsuit because they have not  
20 plausibly alleged an ‘injury in fact’ to themselves as required to establish Article III standing.

21 The question of standing is “an essential and unchanging part of the case-or-controversy  
22 requirement of Article III [of the U.S. Constitution].” *Lujan v. Defenders of Wildlife*, 504 U.S.  
23 555, 560 (1992). “In essence the question of standing is whether the litigant is entitled to have the  
24 court decide the merits of the dispute or of particular issues.” *Allen v. Wright*, 468 U.S. 737, 750-  
25 51 (1984) *abrogated on other grounds by Lexmark Int’l, Inc. v. Static Control Components, Inc.*,  
26 134 S. Ct. 1377 (2014). To establish Article III standing, a plaintiff must establish injury-in-fact,  
27 causation, and a likelihood that a favorable decision will redress the plaintiff’s alleged injury.  
28 *Lujan*, 504 U.S. 560-61; *Lopez v. Candaele*, 630 F.3d 775, 785 (9th Cir. 2010). To establish an

1 injury in fact, the plaintiff must show that he or she has suffered “an invasion of a legally  
2 protected interest which is (a) concrete and particularized, and (b) actual or imminent, not  
3 conjectural or hypothetical.” *Lujan*, 504 U.S. at 560. A “lack of Article III standing requires  
4 dismissal for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1).”  
5 *Maya v. Centex Corp.*, 658 F.3d 1060, 1067 (9th Cir. 2011).

6 When ruling on a motion to dismiss for lack of standing, the Court “must accept as true all  
7 material allegations of the complaint and must construe the complaint in favor of the complaining  
8 party.” *Warth v. Seldin*, 422 U.S. 490, 501 (1975). Nonetheless, the plaintiff has the burden of  
9 establishing Article III standing. *See Thompson v. McCombe*, 99 F.3d 352, 353 (9th Cir. 1996).  
10 “At the pleading stage, general factual allegations of injury resulting from the defendant’s conduct  
11 may suffice, for on a motion to dismiss [the Court must] presum[e] that general allegations  
12 embrace those specific facts that are necessary to support the claim.” *Lujan*, 504 U.S. at 561  
13 (internal quotation marks and citation omitted). However, “[t]his is not to say that plaintiff may  
14 rely on a bare legal conclusion to assert injury-in-fact or engage in an ingenious academic exercise  
15 in the conceivable to explain how defendants’ actions caused his injury.” *Maya*, 658 F.3d at 1068  
16 (citations omitted). Thus, where a plaintiff concludes that he has been injured but does not allege  
17 how “he personally suffered” the injury, the injury-in-fact requirement is not met. *Chapman v.*  
18 *Pier 1 Imports Inc.*, 631 F.3d 939, 954-55 & n. 9 (9th Cir. 2011) (holding that a plaintiff who did  
19 not allege how the barriers that existed at a store impacted his disability could not establish injury-  
20 in-fact simply by claiming that the store deprived him of “full and fair enjoyment” in violation of  
21 the ADA).

22 Defendants cite four cases purportedly addressing the pleading requirements for injury-in-  
23 fact under Article III. In two cases, courts found that the injury-in-fact requirement was not met  
24 where plaintiffs had alleged only conjectural or hypothetical injuries that they had not or would  
25 not actually suffer. *See Lujan v. Defenders of Wildlife*, 504 U.S. at 558-62 (environmental groups  
26 challenging federal regulations that limited reach of the Endangered Species Act failed to  
27 demonstrate injury-in-fact; claim that regulations “increase the rate of extinction of endangered  
28 and threatened species” failed to show that group members would be “directly affected” by the

1 regulations); *Carrico v. City & Cnty. of San Francisco*, 656 F.3d 1002, 1004 (9th Cir. 2011)  
2 (allegation that municipal ordinance prohibiting landlords from coercing tenant to vacate premises  
3 “was intended to, and does, impact [plaintiffs’] operations as landlords” and “subject[s] [plaintiffs]  
4 to the legal and constitutional infirmities of the municipal ordinance” was insufficient to establish  
5 injury-in-fact, where there was no allegation supporting an inference that landlords intended to  
6 engage in conduct prohibited by ordinance). The third case undermines Defendants’ argument, as  
7 the court concluded that the plaintiffs had sufficiently pleaded an injury-in-fact. *See Gladstone*  
8 *Realtors v. Vill. of Bellwood*, 441 U.S. 91 (1979) (allegations that Fair Housing Act violations by  
9 real estate brokerage firms were depriving plaintiff residents of village of “social and professional  
10 benefits of living in an integrated society” was sufficient to meet injury-in-fact requirement). The  
11 fourth case is inapposite because the court focused on the causation requirement, not the injury-in-  
12 fact requirement. *See In re Schering Plough Corp. Intron/Temodar Consumer Class Action*, 678  
13 F.3d 235, 248 (3d Cir. 2012) (dismissing for lack of standing where plaintiffs “failed to show the  
14 requisite causal relationship between the alleged misconduct and its alleged injury”).

15 Defendants’ standing argument focuses on Plaintiffs’ failure to allege a sufficient factual  
16 basis supporting the allegation that Plaintiffs paid higher rates for car insurance than they should  
17 have. Defendant notes that Rule 11 “creates and imposes upon counsel an affirmative duty of  
18 investigation both as to law and fact before filing.” *Rachel v. Banana Republic, Inc.*, 831 F.2d  
19 1503, 1508 (9th Cir. 1987). But none of the cases cited by Defendants analyzed whether the  
20 plaintiff had alleged or proven a sufficient factual basis for the purported injury-in-fact; instead,  
21 standing analysis focused on the *nature* of the injury, i.e., whether the plaintiff had alleged that he  
22 actually suffered the injury, and whether that injury was sufficiently concrete to meet the standing  
23 requirement. Here, Plaintiffs claim that, as a result of Defendants’ actions, they paid more for  
24 their car insurance than they should have. These are actual and concrete economic injuries, not  
25 speculative or conjectural ones. *Accord Maya*, 658 F.3d at 1069 (“Plaintiffs claim that, as a result  
26 of defendants’ actions, they paid more for their homes than the homes were worth at the time of  
27 sale. Relatedly, they claim that they would not have purchased their homes had defendants made  
28 the disclosures allegedly required by law. We agree with plaintiffs that these are actual and

1 concrete economic injuries” sufficient to meet the injury-in-fact requirement of Article III). The  
2 court therefore finds that Plaintiffs have sufficiently alleged injury-in-fact and **denies** Defendants’  
3 motion to dismiss for lack of Article III standing.

4 To the extent that Defendants argue that Plaintiffs failed to allege a sufficient factual basis  
5 for their purported overpayment of car insurance rates, these are arguments that Plaintiffs have  
6 insufficiently pleaded the merits of their claims, and are therefore better suited to their motion to  
7 dismiss pursuant Rule 12(b)(6) for failure to state a claim, which is analyzed further below.  
8 “*Twombly* and *Iqbal* are ill-suited to application in the constitutional standing context because in  
9 determining whether plaintiff states a claim under 12(b)(6), the court necessarily assesses the  
10 merits of plaintiff’s case. But the threshold question of whether plaintiff has standing (and the  
11 court has jurisdiction) is distinct from the merits of his claim.” *Maya*, 658 F.3d at 1068 (district  
12 court erred by applying Rule 12(b)(6) pleading standard to standing analysis). “A plaintiff may  
13 satisfy the injury-in-fact requirements to have standing under Article III, and ... may be able to  
14 ‘bring a civil action without suffering dismissal for want to standing to sue,’ without being able to  
15 assert a cause of action successfully.” *In re Facebook Privacy Litig.*, 791 F.Supp.2d 705, 712 n. 5  
16 (N.D.Cal.2011) (quoting *Doe v. Chao*, 540 U.S. 614, 624-25 (2004)).

17 **B. Jurisdiction of the California Department of Insurance**

18 Defendants contend that the DOI has exclusive jurisdiction over Plaintiffs’ claims because  
19 they challenge rates that have been approved by the DOI.<sup>5</sup> The court first describes the process by  
20 which the DOI approves insurance rates and entertains challenges to approved rates; then  
21 describes the rule embodied in Section 1860.1 which gives the DOI exclusive jurisdiction over  
22 challenges to approved rates; and finally considers Defendants’ argument that the DOI should

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23  
24 <sup>5</sup> While Defendants’ argument invokes the “filed rate doctrine,” a judicially-created doctrine that  
25 prohibits lawsuits challenging rates approved by a regulatory agency, California’s statutory  
26 scheme explicitly embodies an analogous prohibition in Section 1860.1 of the California Insurance  
27 Code. All of the relevant cases cited by the parties recognize that the statutes govern this issue.  
28 The filed rate doctrine is relevant, if at all, because it supports courts’ interpretations of the  
statutes. See *MacKay v. Superior Court*, 188 Cal. App. 4th 1427, 1448 (2010) (“[T]he filed rate  
doctrine is analogous to the scheme explicitly embodied in the Insurance Code and, to the extent it  
is relevant at all, is consistent with our interpretation of the statutory provisions at issue in this  
case.”) (citation omitted).



1 have exclusive jurisdiction over Plaintiffs' claims.

2 **1. DOI Approval of Insurance Rates**

3 Prior to the passage of Proposition 103 in 1998, "California was a so-called 'open rate'  
4 state, that is, rates were set by insurers without prior or subsequent approval by the Insurance  
5 Commissioner. The Commissioner was empowered to prohibit an insurance rate only if a  
6 reasonable degree of competition did not exist in the area and the rate was found to be excessive,  
7 inadequate or unfairly discriminatory." *Walker v. Allstate Indem. Co.*, 77 Cal. App. 4th 750, 752  
8 (2000) (citations and formatting omitted). "The passage of Proposition 103 made numerous  
9 fundamental changes in the regulation of automobile and other types of insurance." *Id.* (quotation  
10 omitted). Notably, now a California casualty insurance company "cannot charge a rate unless the  
11 rate is part of a rate plan which has been approved in advance by the [DOI]." *MacKay*, 188 Cal.  
12 App. 4th at 1431. *See also* Cal. Ins. Code § 1861.01(c) ("[I]nsurance rates subject to this chapter  
13 must be approved by the commissioner prior to their use.").

14 The procedure for obtaining the approval of the DOI for a proposed insurance rate is as  
15 follows: "(1) an insurer who desires to change a rate files a rate plan application with the  
16 commissioner (Cal. Ins. Code § 1861.05 (b)); (2) the commissioner gives notice to the public of  
17 the application (Cal. Ins. Code § 1861.05 (c)); (3) a consumer may request a public hearing, or the  
18 commissioner may decide on his or her own motion to hold one [*id.*]; and (4) the rate is deemed  
19 approved unless the commissioner disapproves it [*id.*]." *MacKay*, 188 Cal. App. 4th at 1440.  
20 "Judicial review of the commissioner's decision, including the decision not to hold a hearing, is  
21 available." *Id.* (citing Cal. Ins. Code § 1861.09).

22 "After a rate has been approved by the commissioner, it is still possible for an insured to  
23 challenge it." *Id.* "The Insurance Code provides specific administrative remedies which may be  
24 pursued in order to challenge a rate as illegal, even after the rate has been approved," namely, an  
25 aggrieved person can file a written complaint with the DOI requesting the Insurance  
26 Commissioner "review the manner in which the rate, plan, system, or rule has been applied with  
27 respect to the insurance afforded to that person. In addition, the aggrieved person may file a  
28 written request for a public hearing before the commissioner, specifying the grounds relied upon."

1 Cal. Ins. Code § 1858(a). “If, after a hearing, the commissioner finds a violation, the  
2 commissioner shall order that the insurer discontinue the violating practice, and may also order  
3 necessary and proper corrective action.” *MacKay*, 188 Cal. App. 4th at 1441 (citing Cal. Ins.  
4 Code, § 1858.3 (a)). “Any finding, determination, rule, ruling or order made by the commissioner  
5 under this chapter shall be subject to review by the courts ....” Cal. Ins. Code § 1858.6.

6 **2. Challenges to Approved Rates Are Within Exclusive Jurisdiction of**  
7 **DOI**

8 Section 1860.1 of the California Insurance Code states that “[n]o act done ... pursuant to  
9 the authority conferred by this chapter shall constitute a violation of or grounds for prosecution of  
10 civil proceedings under any law of this State heretofore or hereafter enacted which does not  
11 specifically refer to insurance.” However, a different section of the Insurance Code provides that  
12 “[t]he business of insurance shall be subject to the laws of California applicable to any other  
13 business, including, but not limited to ... unfair business practices laws.” Cal. Ins. Code §  
14 1860.03(a).

15 “The weight of authority in this district and the California Court of Appeals harmonizes  
16 Sections 1860.1 and 1860.03(a) by narrowly construing the Section 1860.1 immunity .... As  
17 harmonized, challenges to the reasonableness of an approved rate fall within the exclusive ambit  
18 of the chapter and are exempt from the requirements of other laws.” *Ellsworth v. U.S. Bank, N.A.*,  
19 908 F. Supp. 2d 1063, 1082 (N.D. Cal. 2012). *Accord MacKay*, 188 Cal.App.4th at 1448  
20 (“Insurance Code section 1860.1 precludes a challenge to an approved rate brought under laws  
21 outside the Insurance Code.”); *Walker*, 77 Cal. App. 4th at 755, 760 (Section 1860.1 has “been  
22 interpreted to provide exclusive original jurisdiction over issues related to rate-making to the  
23 commissioner”); *Donabedian v. Mercury Ins. Co.*, 116 Cal. App. 4th 968 (2004) (acknowledging  
24 that actions challenging ratemaking authority of DOI fall within Insurance Commissioner’s  
25 exclusive jurisdiction because of Section 1860.1, but concluding that that provision did not apply  
26 because plaintiff’s claim did not involve ratemaking); *Wahl v. Am. Sec. Ins. Co.*, No. C 08-0555  
27 RS, 2010 WL 4509814, at \*2 (N.D. Cal. Nov. 1, 2010) (same). Thus, where a plaintiff’s claims  
28 challenge the reasonableness of an approved rate, courts have found those claims to be precluded

1 by Section 1860.1. *See Walker*, 77 Cal. App. 4th at 760 (dismissing putative class action where  
2 plaintiffs sought damages or disgorgement of allegedly excessive premiums that were authorized  
3 by the DOI, because “explicit statutory authority precludes any further civil challenges to those  
4 [the DOI’s ratemaking decisions] to recoup premiums charged pursuant to approved rates”).

5 However, while Section 1860.1 precludes litigation against acts done pursuant to the  
6 DOI’s ratemaking authority, “[i]t does not extend to insurer conduct not taken pursuant to that  
7 authority.” *MacKay*, 188 Cal. App. 4th at 1449. Thus, where the plaintiff’s claim does not  
8 involve a challenge to a rate approved by the DOI or DOI’s ratemaking authority, the claim does  
9 not fall within the exclusive jurisdiction of the DOI and the plaintiff may bring the claim in court  
10 in the first instance. *See id.* (“[I]f the underlying conduct challenged was not the charging of an  
11 approved rate, but the application of an unapproved underwriting guideline, Insurance Code  
12 section 1860.1 would not be applicable.”); *Donabedian*, 116 Cal. App. 4th at 995 (permitting UCL  
13 claim challenging insurer’s practice of using lack of prior car insurance as factor in determining  
14 eligibility for Good Driver rate); *Ellsworth*, 908 F. Supp. 2d at 1082-1083 (where plaintiff  
15 borrower challenged mortgage lender’s practice of force placing flood insurance at cost to the  
16 borrower and receiving kickbacks from the insurer, breach of contract, unjust enrichment, and  
17 UCL claims were not precluded by Section 1860.1 because they challenged the lender and  
18 insurer’s conduct, not the premiums charged); *Wahl*, 2010 WL 4509814 at \*3 (where insured  
19 challenged insurer’s practice of force placing insurance coverage even when it would be  
20 duplicative of other coverage, UCL claim was not precluded by Section 1860.1 because it was  
21 “directed at [the insurer’s] allegedly unfair conduct and not at the Commissioner’s rate”).

22 Defendants contend that each of Plaintiffs’ claims “are inextricably intertwined with  
23 Defendants’ approved rate filings, seeking an adjudication challenging the DOI Commissioner’s  
24 decisions, and requiring extensive interpretation and enforcement of the DOI’s rulings and  
25 approvals.” MTD at 11. At the hearing, Defendants noted that the Second Circuit has recently  
26 issued a case touching on these issues. *See Rothstein v. Balboa Ins. Co.*, 794 F.3d 256 (2d Cir.  
27 2015). *Rothstein* is distinguishable. There, the plaintiffs were borrowers who failed to buy hazard  
28 insurance on their mortgaged properties. The mortgage lender defendants force-placed hazard

1 insurance policies on the borrowers' behalf and required the borrowers to pay for them. The  
2 borrowers alleged that the lenders purchased expensive policies but secretly received kickbacks or  
3 rebates from the insurer. The borrowers sued the lenders and the insurer on the theory that the  
4 billed amounts were inflated because they did not reflect the kickbacks, which in effect functioned  
5 as a discount on the rate. *Id.* at 260. The Second Circuit noted that the "theory behind the claims  
6 is that Plaintiffs were overbilled when they were charged the full [policy] rates (which were  
7 approved by regulators) instead of lower rates" that discounted the amount of the kickback. *Id.* at  
8 262. "That theory can only succeed if the [kickback arrangement] should have been treated as part  
9 and parcel of the [policy] transaction and *reflected in the [policy] rates.*" *Id.* (emphasis in  
10 original). The court found that the filed-rate doctrine barred its consideration of such a theory:  
11 "[W]hether insurer-provided services should have been reflected in the calculation of [cost of the  
12 force-placed insurance] is not for us to say; under the nonjusticiability principle, the question is  
13 reserved exclusively to the regulators." *Id.* at 263. Here, Plaintiffs do not advance a theory based  
14 on the premise that the rates approved by the DOI were incorrect. Instead, they argue that  
15 Defendants failed to offer the statutorily-required policy (from among policies approved by the  
16 DOI). In any event, *Rothstein* is not binding on this court, and other courts from this district have  
17 considered scenarios like those of *Rothstein* and arrived at the opposite conclusion. *See Ellsworth*,  
18 908 F.Supp.2d at 1082-83 ("Ellsworth does not challenge the rates or the premiums he paid but  
19 instead challenges the alleged kickbacks. ASIC's argument that he really is challenging the  
20 premiums is unpersuasive. Just because the damages are based on increased costs incurred as a  
21 result of the alleged kickback scheme does not transform a challenge to conduct and practices into  
22 a challenge to the premiums.").

23 The court finds Defendants' position unpersuasive. Plaintiffs do not challenge the  
24 reasonableness of any particular insurance rate, nor do they attack acts done pursuant to the DOI's  
25 rate-making authority. Instead, Plaintiffs challenge Defendants' allegedly wrongful application of  
26 the approved rates, i.e., the conduct and practices that result in Plaintiffs being offered a policy  
27 with a higher DOI-approved rate when they should have been offered a policy with a lower DOI-  
28 approved rate. Thus, neither Section 1860.1 nor the filed rate doctrine precludes Plaintiffs from

1 litigating their claims in this court, and Defendants’ motion to dismiss on this basis is **denied**.<sup>6</sup>

2 **C. General Sufficiency of Allegations of Injury**

3 All of Plaintiffs’ claims stem from the same alleged act of wrongdoing: Defendants’ failure  
4 to offer Plaintiffs the policy with the lowest Good Driver rate offered by any Defendant. Plaintiffs  
5 read Section 1861.16(b) to impose this requirement on Defendants. That statute states:

6 An agent or representative representing one or more insurers having  
7 common ownership or operating in California under common  
8 management or control shall offer, and the insurer shall sell, a good  
9 driver discount policy to a good driver from an insurer within that  
common ownership, management, or control group, which offers the  
lowest rates for that coverage.

10 Cal. Ins. Code § 1861.16(b).

11 There are two problems with Plaintiffs’ allegations that Defendants did not meet the  
12 requirements of this statute. *First*, under the plain language of the statute, a Good Driver seeking  
13 an automobile insurance policy must be *offered a policy* from an insurer within a common control  
14 group that offers the lowest rates for that coverage. But Plaintiffs’ allegations do not track to the  
15 statutory language, and instead make it appear that that it is an individual insurer’s obligation to  
16 *match the rate* offered by another insurer in the common control group. For example, Plaintiffs  
17 alleged that Defendants “failed to provide the lowest Good Driver rates that were legally required  
18 under applicable law” and “improperly included overcharges and did not include the lowest  
19 available Good Driver rate among companies in their Control Group that they were entitled to  
20 receive.” FAC at ¶¶ 33, 27. This does not appear to be what the statute requires. Plaintiffs’  
21 allegations also fail to address the “lowest rates *for that coverage*” language of the statute, i.e.,  
22 whether the lower-rate insurance policies that Defendants should have offered (but allegedly did  
23 not offer) had the same or different coverage than the policies that Plaintiffs were actually offered.

24  
25 \_\_\_\_\_  
26 <sup>6</sup> This portion of the court’s order refers only to Defendants’ argument that this *entire case* falls  
27 within the exclusive jurisdiction of the DOI. The court noted at the hearing its concerns about  
28 whether *some* aspects of its case may fall within the jurisdiction of the DOI—e.g., the  
determination of whether the Super Group exemption under Cal. Ins. Code § 1861.16(c)(1) applies  
to any Defendant, or whether a Defendant’s approved rates apply only to certain enumerated  
“affinity groups.” However, neither party raised this argument in their briefs, and the court  
declines to consider in this order issues not raised by the parties.

1           **Second**, Defendants contend that Plaintiffs’ allegations that they were actually charged a  
2 higher rate for car insurance than they should have been charged are conclusory and insufficient to  
3 meet the pleading standards required by Rule 12(b)(6). The court agrees. The allegations in the  
4 FAC are bare and conclusory. *See* FAC at ¶ 40 (Plaintiffs were “overcharged for their premiums  
5 ... [because] they were charged more than the lowest Good Driver rates available from the  
6 companies within Defendants’ control group”; ¶ 27 (Plaintiff’s insurance premiums “improperly  
7 included overcharges and did not include the lowest available Good Driver rate among companies  
8 in their Control Group that they were entitled to receive”). What was the Good Driver rate that  
9 Plaintiffs were actually charged? Which of the Defendants had a policy with a lower Good Driver  
10 rate that was not offered to the Plaintiffs? What was that lower rate? These basic facts are  
11 missing from the FAC. Plaintiffs have therefore failed to plead the factual content that would  
12 “allows the court to draw the reasonable inference that the defendant is liable for the misconduct  
13 alleged.” *Iqbal*, 556 U.S. at 678. Instead, they have pleaded “bare assertions ... amount[ing] to  
14 nothing more than a formulaic recitation” of injury. *Id.* at 681 (citation omitted). Such assertions  
15 “do nothing more than state a legal conclusion—even if that conclusion is cast in the form of a  
16 factual allegation.” *Moss*, 572 F.3d at 969.

17           The gist of Plaintiffs’ response is that their conclusory allegation—that policies with lower  
18 Good Driver rates existed—is sufficient at the pleading stage, and that the information that will  
19 permit them to substantiate the allegation will emerge during discovery. *See* Opp. to MTD  
20 [Docket No. 48] 6 (“Plaintiffs have no means to ascertain [whether a lower rate of insurance was  
21 available] at the pleadings stage.”); 2 (“Discovery will prove the accuracy of that assertion [that a  
22 lower Good Driver rate does or does not exist]”); and 13 (“Plaintiffs could reasonably suspect that  
23 an insurer failed to offer the lowest rate, but could not know underlying facts without discovery.”).  
24 But this is neither factually accurate nor a correct statement of the law. First, Plaintiffs concede  
25 that Defendants’ rate filings are public documents; indeed, their insurance expert relied on those  
26 filings in reaching his conclusions in the affidavit attached to Plaintiffs’ objection to Defendants’  
27  
28

1 Request for Judicial Notice.<sup>7</sup> *See generally* Nash Aff. Plaintiffs acknowledge that with “the  
2 specialized expertise of an actuary,” it would be possible to determine “whether they qualified for  
3 [a certain] rate or whether it would have been acceptable.” *Id.* at 13. Second, while a plaintiff is  
4 not expected to have full knowledge of the facts before filing a lawsuit, he or she nonetheless has  
5 “an affirmative duty of investigation both as to law and fact before filing.” *Rachel v. Banana*  
6 *Republic, Inc.*, 831 F.2d 1503, 1508 (9th Cir. 1987). The Rule 12(b)(6) pleading standard “is not  
7 akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant  
8 has acted unlawfully.” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557). Yet Plaintiffs’  
9 bare suspicion that Defendants withheld a policy with a lower Good Driver rate offers only the  
10 sheer possibility of Defendants’ wrongdoing.

11 Rule 12(b)(6) requires more than what Plaintiffs have pleaded. Plaintiffs’ failure to  
12 sufficiently plead their basic allegation of wrongdoing—that policies with lower Good Driver  
13 rates were available from insurers within Defendants’ alleged common control group, and that  
14 Defendants did not offer Plaintiffs those policies—inflicts each of their claims. The court  
15 considers each claim below.

16 **D. Sufficiency of Allegations of Each Claim**

17 **1. UCL Claims**

18 **a. Legal Standards**

19 Section 17200 prohibits unfair competition, which is defined as, *inter alia*, “any unlawful,  
20 unfair or fraudulent business act or practice.” Cal. Bus. Prof. Code § 17200. Because Section  
21 17200 “is written in the disjunctive, it establishes three varieties of unfair competition—acts or  
22 practices which are unlawful, or unfair, or fraudulent . . . .” *Cel-Tech Communications, Inc. v.*  
23 *Los Angeles Cellular Telephone Co.*, 20 Cal. 4th 163, 180 (1999). In order to state a claim under  
24 the unlawful prong, a plaintiff must allege facts that show that a defendant’s business practice—or  
25 conduct which can be characterized as a business practice—violates the law, meaning any civil or  
26 criminal, federal, state or municipal, statutory, regulatory, or court-made law. *California v.*

27 \_\_\_\_\_  
28 <sup>7</sup> Rate filings can be viewed and downloaded from the Department of Insurance website. *See*  
<https://interactive.web.insurance.ca.gov/warff/index.jsp>

1 *McKale*, 25 Cal.3d 626, 632 (1979). Conduct is “fraudulent” if it is likely to deceive any member  
2 of the public. *Weinstat v. Dentsply Int’l., Inc.*, 180 Cal. App. 4th 1213 n. 8 (2010). Whether a  
3 business practice is “unfair” requires an analysis of whether (i) there exists substantial consumer  
4 injury, (ii) the injury is not outweighed by countervailing benefits to consumers or competition,  
5 and (iii) the injury was not reasonably avoidable by the consumer. *Camacho v. Auto. Club of So.*  
6 *Cal.*, 142 Cal. App. 4th 1294, 1403 (2006).

7 **b. Analysis**

8 Plaintiffs allege that Defendants engaged in a variety of unlawful, unfair, *and* fraudulent  
9 business practices. The unlawful practices are Defendants’ alleged violations of Cal. Ins. Code §  
10 1861.02 and 1861.025. FAC at ¶¶ 78-79. Defendants’ allegedly unfair practices are “the  
11 wrongful charging of excessive insurance premiums and the making of false representations about  
12 the premiums charged.” *Id.* at ¶ 84. Plaintiffs also allege that Defendants acted fraudulently “by  
13 failing to disclose material facts concerning their automobile insurance rates, including that their  
14 rates violated Cal. Ins. Code and by represented that they provided to statutory Good Drivers the  
15 lowest rates within their control group.” *Id.* at 88.

16 For the reasons stated in Section III.C, the court finds that Plaintiffs have insufficiently  
17 pleaded that Defendants committed the allegedly wrongful acts that form the underlying basis for  
18 Plaintiff’s unlawful and unfair UCL claims, and therefore **grants** Defendants’ motion to dismiss  
19 those claims. The motion is also **granted** as to Plaintiff’s UCL claim premised on Defendants’  
20 allegedly fraudulent behavior, because the allegations of fraud are insufficient for the reasons  
21 stated in Section III.D.5.

22 **2. Breach of Contract**

23 In the breach of contract claim, Plaintiffs allege that “Defendants entered into standard-  
24 form personal lines automobile insurance contracts with Plaintiffs and the Class members they  
25 seek to represent.” FAC at ¶ 38.<sup>8</sup> Plaintiffs allege that they “reasonably expected that Defendants  
26

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27 <sup>8</sup> Plaintiffs “do not have complete copies of their policy contracts,” and have requested them  
28 from Defendants, who have refused to provide complete copies. FAC at ¶ 39. Partial copies of  
the policy contracts are attached to the FAC as Exhibits A and B.



1 would comply with California law and regulations by offering the lowest Good Driver rates  
2 available in Defendants’ Control Group for each Class member policyholder eligible for the  
3 discount.” *Id.* However, “Defendants materially breached these contracts by failing to offer the  
4 lowest rates that were available from the companies in Defendants’ Control Group for the Good  
5 Driver discount, resulting in the overcharges to the Plaintiffs and the members of the Class for  
6 their automobile insurance.” *Id.* at ¶ 42.

7 The elements for a breach of contract action under California law are: (1) the existence of a  
8 contract, (2) plaintiff’s performance or excuse for nonperformance, (3) defendant’s breach, and (4)  
9 damages to plaintiff as a result of the breach. *Buschman v. Anesthesia Bus. Consultants LLC*, 42  
10 F. Supp. 3d 1244, 1250 (N.D. Cal. 2014) (citing *CDF Firefighters v. Maldonado*, 158 Cal.App.4th  
11 1226, 1239 (2008)).

12 Plaintiffs’ breach of contract theory rests on the allegation that Defendants failed “to offer  
13 the lowest rates that were available from the companies in Defendants’ Control Group for the  
14 Good Driver discount.” FAC at ¶ 42. For the reasons stated above, Plaintiffs failed to plausibly  
15 allege the existence of policies with lower Good Driver rates that Plaintiffs should have been  
16 offered.<sup>9</sup> For this reason, Plaintiffs’ breach of contract claim is **dismissed**.

### 17 3. Breach of the Implied Covenant of Good Faith and Fair Dealing

18 Plaintiffs contend that Defendants breached the implied covenant of good faith and fair  
19 dealing in the following ways: “[a] failing to offer rates and calculate premiums in compliance  
20 with their contractual obligations and/or rate filings made by Defendants’ California licensed  
21

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22 <sup>9</sup> The court dismisses Plaintiffs’ breach of contract claim because of this fundamental failure, and  
23 declines to reach Defendants’ alternative arguments for dismissal. However, the court notes that  
24 Plaintiffs’ theory for breach of contract is difficult to follow because Plaintiffs do not clearly  
25 explain how any contract term was breached. Plaintiffs note that the partial contracts attached to  
26 the FAC show that Plaintiffs were promised a “Good Driver Discount.” *See* FAC, Exs. A-B. But  
27 that is all the partial contracts say. There is no description of the amount of the Good Driver  
28 Discount, nor any promise that the Good Driver Discount is the lowest of the rates offered by any  
insurer within a control group. In other words, there is no allegation that any Defendant failed to  
perform any of the explicit terms of any contract. Plaintiffs argue that “it is an *implied* term of any  
contract [] that the contracting parties will follow the law,” *Opp. to MTD* at 20 (emphasis added).  
Even the phrasing of this argument suggests that the more appropriate vehicle for this theory is a  
claim for breach of an *implied* covenant, not a claim for breach of contract.

1 companies within Defendants’ Control Group; [b] overcharging the Class by not offering the  
2 lowest rate for the coverages within their Control Group, failing to disclose the overcharges and  
3 withholding payment without proper cause; and [c] failing to disclose and/or actively concealing  
4 material information concerning the rates charged to Plaintiffs and the Class.” FAC at ¶ 47(a)-(c).

5 Every contract possesses an implied covenant of good faith and fair dealing in which  
6 “neither party will do anything which will injure the right of the other to receive the benefits of the  
7 agreement.” *Foley v. Interactive Data Corp.*, 47 Cal.3d 654, 684 (1988). In other words, the  
8 “implied covenant imposes upon each party the obligation to do everything that the contract  
9 presupposes they will do to accomplish its purpose.” *Chateau Chamberay Homeowners Ass’n v.*  
10 *Associated Int’l Ins. Co.*, 90 Cal. App. 4th 335, 345 (2001). The obligations imposed by the  
11 implied covenant are not those set out in the terms of the contract, but are obligations governing  
12 the manner in which contractual obligations must be discharged. *See Gruenberg v. Aetna Ins. Co.*,  
13 9 Cal. 3d 566, 574 (1973) (implied covenant imposes obligations “under which the insurer must  
14 act fairly and in good faith in discharging its contractual responsibilities”). The scope of the  
15 implied covenant depends on the purposes and express terms of the contract. *Carma Developers,*  
16 *Inc. v. Marathon Development California, Inc.*, 2 Cal.4th 342, 373 (1992). “[A]s a general matter,  
17 implied terms should never be read to vary express terms” of a contract. *Id.* at 374. *See also*  
18 *Tollefson v. Roman Catholic Bishop*, 219 Cal.App.3d 843, 853-854 (1990) (the covenant of good  
19 faith and fair dealing “cannot be used to imply an obligation which would completely obliterate a  
20 right expressly provided by a written contract”) (*disapproved on other grounds in Scott v. Pacific*  
21 *Gas & Electric Co.*, 11 Cal.4th 454, 474 n. 5 (1995)).

22 In the context of an insurance contract, the implied covenant is often invoked by insureds  
23 against insurers who allegedly acted unfairly or in bad faith in denying coverage or compensation,  
24 or mishandling a third party’s claim against the insured (e.g., by refusing to settle within policy  
25 limits or unreasonably refusing to provide a defense). *See Waters v. United Servs. Auto. Assn.*, 41  
26 Cal. App. 4th 1063, 1070 (1996) (“‘First party bad faith lawsuits’ involve an insured’s claims  
27 against the insurer under coverages written for the insured’s direct benefit under a first party  
28 policy. The gravamen of a first party lawsuit is a breach of the implied covenant of good faith and

1 fair dealing by refusing, without proper cause, to compensate the insured for a loss covered by the  
2 policy, or by unreasonably delaying payments due under the policy. ‘Third party bad faith  
3 lawsuits’ ... generally involve an insured’s suit against his liability insurer arising out of the  
4 insurer's mishandling of a third party claim against its insured, such as by unreasonably refusing to  
5 settle within policy limits or unreasonably refusing to provide a defense in a third party action.”).

6 Defendants argue for dismissal for the implied covenant claim for several reasons, all of  
7 which miss the mark. First, Defendants contend that “no bad faith claim can be maintained absent  
8 an underlying breach of contract.” MTD at 21. This is not an accurate statement of the law. “It is  
9 well established [that] a breach of the implied covenant of good faith is a breach of the contract,  
10 and that breach of a specific provision of the contract is not a necessary prerequisite to a claim for  
11 breach of the implied covenant of good faith and fair dealing.” *Carson v. Mercury Ins. Co.*, 210  
12 Cal. App. 4th 409, 429 (2012) (citations omitted). In other words, a breach of the implied  
13 covenant is a breach of contract because the implied covenant imposes contractual obligations, but  
14 the plaintiff need not demonstrate that the defendant breached a specific contract term to bring a  
15 claim for breach of the implied covenant. The cases cited by Defendants do not support their  
16 argument, because both stand for the proposition that a first party bad faith claim requires an  
17 insured to show that he was owed benefits under the contract. *See Waller v. Truck Ins. Exch., Inc.*,  
18 11 Cal. 4th 1, 35 (1995), *as modified on denial of reh’g* (Oct. 26, 1995); *Love v. Fire Ins. Exch.*,  
19 221 Cal. App. 3d 1136, 1153 (1990). That proposition is clearly not relevant to Plaintiffs’ implied  
20 covenant claim, which is not based on a first party bad faith claim.

21 Defendants’ second argument also relies on the mistaken assumption that Plaintiffs are  
22 asserting a first party bad faith claim. Defendants argue that “a ‘bad faith’ cause of action is  
23 limited to the failure to pay benefits due under a policy and whether the insurer withheld payment  
24 of an insured’s claim unreasonably.” MTD at 21. That is *one* type of bad faith claim, but not the  
25 only type, and it is not the bad faith claim asserted by Plaintiffs .

26 Third, Defendants argue that “Section 17200 cannot be used in conjunction with a bad  
27 faith claim.” MTD at 21. The cases cited by Defendants are unrelated to this proposition, and are  
28 in fact related only to Section 17200 claims, not claims for breach of the implied covenant of good

1 faith and fair dealing.<sup>10</sup>

2 Fourth, Defendants contend that Plaintiffs' bad faith claim is duplicative of the breach of  
3 contract claim. It is true that when the allegations of a claim for breach of the implied covenant  
4 "do not go beyond the statement of a mere contract breach and, relying on the same alleged acts,  
5 simply seek the same damages or other relief already claimed in a companion contract cause of  
6 action, they may be disregarded as superfluous as no additional claim is actually stated." *Careau*  
7 *& Co. v. Security Pacific Business Credit, Inc.*, 222 Cal.App.3d 1371, 1395 (1990). It is possible  
8 that Plaintiffs' implied covenant claim is duplicative of their breach of contract claim; as currently  
9 pleaded, the court cannot tell, and so declines to dismiss on that basis at this time. *See* fn. 10,  
10 above.

11 Although the court rejects Defendants' arguments against Plaintiffs' implied covenant  
12 claim, it still finds that dismissal of this claim is appropriate for the same reasons the breach of  
13 contract claim must be dismissed. Even assuming arguendo that Plaintiffs can articulate how  
14 Defendants' alleged failure to abide by the requirements of Section 1861.16(b) constitutes breach  
15 of an implied covenant, Plaintiffs have insufficiently pleaded Defendants' failure to abide by  
16 Section 1861.16(b) for the reasons already stated.<sup>11</sup> Accordingly, Plaintiffs' implied covenant  
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18 <sup>10</sup> Defendants cite *Safeco Ins. Co. v. Superior Court*, 216 Cal. App. 3d 1491 (1990) and *Wayne*  
19 *Merritt Motor Co. v. New Hampshire Ins. Co.*, No. 11-CV-01762-LHK, 2011 WL 5025142, at \*7  
20 (N.D. Cal. Oct. 21, 2011). Both cases follow *Moradi-Shalal v. Fireman's Fund Ins. Cos.*, 46  
21 Cal.3d 287 (1988), in which the California Supreme Court found that the California Unfair  
22 Insurance Practices Act, which prohibits "unfair and deceptive acts or practices in the business of  
23 insurance," does not create a private cause of action and instead leaves enforcement primarily to  
24 the California Insurance Commissioner. In subsequent cases, California courts have prohibited  
25 UCL claims that attempted to "plead around *Moradi-Shalal*'s holding by merely relabeling their  
26 cause of action as one for unfair competition." *Textron Fin. Corp. v. Nat'l Union Fire Ins. Co. of*  
27 *Pittsburgh*, 118 Cal.App.4th 1061, 1070 (2004). In *Safeco*, the courts rejected a Section 17200  
28 claim based on defendant's claims settlement practices as being barred by *Moradi-Shalal*. 216  
Cal.App.3d at 1494. In *Wayne*, the court dismissed a Section 17200 claim based on the allegation  
that the defendant misrepresented the coverage provided under the policy by burying a limitation  
of liability clause in the endorsement as being barred by *Moradi-Shalal*. 2011 WL 5025142 at \*8.  
Defendants have not developed this argument as a reason to dismiss Plaintiffs' UCL claims (as  
opposed to the implied covenant claim), and thus the court declines to consider whether *Moradi-*  
*Shalal* would bar those claims.

<sup>11</sup> The court finds the implied covenant claim insufficient because of Plaintiffs' failure to  
sufficiently allege wrongdoing by Defendants. The court declines to determine at this point  
whether the wrongdoing, if sufficiently alleged, would support an implied covenant claim.

1 claim is **dismissed**.

2 **4. Quantum Meruit**

3 Under California law, quantum meruit is “an equitable remedy implied by the law under  
4 which a plaintiff who has rendered services benefitting the defendant may recover the reasonable  
5 value of those services when necessary to prevent unjust enrichment of the defendant.” *In re De*  
6 *Laurentiis Entertainment Group, Inc.*, 963 F.2d 1269, 1272 (9th Cir.), *cert. denied*, *Carolco*  
7 *Television, Inc. v. National Broadcasting Co., Inc.*, 506 U.S. 918 (1992) (citations omitted). “To  
8 establish a claim for quantum meruit, the plaintiff must prove that: [1] the plaintiff rendered  
9 services to the defendant’s benefit; and [2] the defendant would be unjustly enriched if the  
10 plaintiff was not compensated.” *Precision Pay Phones v. Qwest Commc’ns Corp.*, 210 F. Supp.  
11 2d 1106, 1112 (N.D. Cal. 2002) (citing *De Laurentiis*, 963 F.2d at 1272). The claim applies  
12 especially where the defendant acquires the benefit with knowledge of the circumstances  
13 establishing unjust enrichment. *First Nationwide Savings v. Perry*, 11 Cal. App. 4th 1657, 1663-  
14 64 (1992). A defendant’s expectation to compensate for a received benefit is not necessary, but  
15 compensation must be “expected” by a plaintiff “only in the sense that the services rendered must  
16 not have been intended to be gratuitous.” *De Laurentiis*, 963 F.2d at 1272–73.

17 Defendants raise several arguments for dismissal of Plaintiffs’ quantum meruit claim: (1)  
18 quantum meruit is a quasi-contract remedy and not appropriate where there is a contract covering  
19 the subject matter of the dispute; (2) quantum meruit is not applicable because Plaintiffs did not  
20 render any services; and (3) Plaintiffs have not sufficiently alleged that Defendants were unjustly  
21 enriched because there is no plausible allegation that Plaintiffs overpaid for their car insurance.  
22 Plaintiffs appear to have abandoned their quantum meruit claim, as they offer no argument in  
23 opposition to Defendants’ motion to dismiss. Accordingly, the quantum meruit claim is **dismissed**  
24 **without leave to amend**.

25 **5. Fraud<sup>12</sup>**

26 Defendants contend that Plaintiffs’ fraud and misrepresentation claim fails to meet the  
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28 <sup>12</sup> The court notes that many of Defendants’ arguments regarding the insufficiency of Plaintiffs’  
fraud claims are raised in the MTS.

1 heightened pleading requirements for fraud claims.

2 Additional pleading requirements apply to fraud claims. The Federal Rules of Civil  
3 Procedure require a party alleging fraud to “state with particularity the circumstances constituting  
4 fraud or mistake.” Federal Rule of Civil Procedure Rule 9(b). Rule 9(b) requires “particularized  
5 allegations of the circumstances constituting fraud, including identifying the statements at issue  
6 and setting forth what is false or misleading about the statement[s] and why the statements were  
7 false or misleading at the time they were made.” *In re Rigel Pharm, Inc. Sec. Litig.*, 697 F.3d 869,  
8 876 (9th Cir. 2012). *See also Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106-07 (9th Cir.  
9 2003) (court may dismiss a claim grounded in fraud when its allegations fail to satisfy Rule 9(b)  
10 by alleging “the who, what, when, where, and how” of the fraud). “The purpose of Rule 9(b) is to  
11 give defendants adequate notice of the charges being brought so they can defend against them, and  
12 to deter the filing of frivolous charges related to fraud.” *Orchard Supply Hardware LLC v. Home*  
13 *Depot USA, Inc.*, 967 F. Supp. 2d 1347, 1365 (N.D. Cal. 2013) (citing *In re Stac Electronics*  
14 *Securities Litigation*, 89 F.3d 1399, 1405 (9th Cir. 1996)).

15 Defendants argue that the role of each Defendant in the fraud must be separately pleaded.  
16 While “there is no absolute requirement that where several defendants are sued in connection with  
17 an alleged fraudulent scheme, the complaint must identify *false statements* made by each and  
18 every defendant.” *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007) (emphasis in  
19 original). “Participation by each conspirator in every detail in the execution of the conspiracy is  
20 unnecessary to establish liability, for each conspirator may be performing different tasks to bring  
21 about the desired result.” *Beltz Travel Serv., Inc. v. Int’l Air Transp. Ass’n*, 620 F.2d 1360, 1367  
22 (9th Cir. 1980). On the other hand, Rule 9(b) does not allow a complaint to merely lump multiple  
23 defendants together but “require[s] plaintiffs to differentiate their allegations when suing more  
24 than one defendant ... and inform each defendant separately of the allegations surrounding his  
25 alleged participation in the fraud.” *Swartz*, 476 F.3d at 764-65. “In the context of a fraud suit  
26 involving multiple defendants, a plaintiff must, at a minimum, ‘identif[y] the role of [each]  
27 defendant[ ] in the alleged fraudulent scheme.’” *Id.* at 765 (quoting *Moore v. Kayport Package*  
28 *Express, Inc.*, 885 F.2d 531, 541 (9th Cir.1989)). Allegations that “everyone did everything” are

1 insufficient. *Destfino v. Reiswig*, 630 F.3d 952, 958 (9th Cir. 2011).

2 Plaintiffs' fraud claim alleges the following wrongdoing by Defendants: "[1]  
3 misrepresentation to Plaintiffs and the Class about Defendants' compliance with California law  
4 and Defendants' rate filings; [2] falsely representing that the amounts offered and billed for  
5 insurance coverage were accurate statements and calculations of the policy premiums owed by  
6 Plaintiffs and the Class; [3] failing to inform Plaintiffs and the Class of Defendants' failure to  
7 offer Plaintiffs and the Class the lowest premium available from any Defendant within  
8 Defendants' Control Group; [4] having knowledge of and the ability to determine the amount of  
9 the premium overcharges to Plaintiffs and the Class members, but concealing and refusing to act  
10 upon that knowledge, including failing to refund the amounts wrongfully withheld; [5] failing to  
11 affirmatively disclose to Plaintiffs and the Class members the material inaccuracies in quoting  
12 Good Driver premiums within Defendants' Control Group (including renewal premiums), as part  
13 of a continuing and ongoing course of conduct; and [6] failing to disclose and continuing to  
14 conceal the duration and amounts of the premium overcharges to Plaintiffs and the Class  
15 members." FAC at ¶ 67. Plaintiffs allege that "the misrepresentations and omissions have been  
16 made, and continue to be made by Defendants' sales and marketing agents and employees,  
17 including Defendants' direct sales representatives, and insurance producers." *Id.* at ¶ 68.  
18 Plaintiffs further allege that certain officers and managers of Defendants have knowledge of the  
19 alleged misrepresentations.<sup>13</sup>

20 While these allegations present an impressive amount of text, close inspection leads this  
21 court to conclude that they are insufficient to meet the Rule 9(b) requirements. The allegations  
22 fail to answer basic questions about the alleged fraud, including who made the alleged  
23 misrepresentations or fraudulent omissions; and how, where, and when those misrepresentations  
24 were communicated. The "what" of the misrepresentations is essentially a restatement of the  
25 requirements of Section 1861.16(b). All that remains is a vague scheme committed by all

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27 <sup>13</sup> Those individuals are "Defendants' President Byron Storms; Kenny Yeh, Product Manager;  
28 Kristi Harris, Compliance Analyst; and Rene Treadaway, Compliance Manager." FAC at ¶ 69.  
Plaintiffs do not allege the relationship of each of these individuals to any specific Defendant.

1 Defendants to misrepresent something about Defendants’ Good Driver rates. These allegations  
2 are simply legal conclusions cast in the form of factual allegations.

3 For the above reasons, the court **dismisses** Plaintiffs’ fraud and misrepresentation claim.

#### 4 **6. Declaratory Relief**

5 Defendants’ only argument for dismissing Plaintiffs’ claim for declaratory relief is that it  
6 seeks a declaration regarding alleged past wrongs, not any prospective rights. However, this  
7 argument misunderstands the nature of the claim. As pleaded, the declaratory relief claim asserts  
8 that Defendants’ conduct is “continuous and ongoing.” FAC at ¶ 59. Plaintiffs seek a judgment  
9 “establishing that Defendants’ continuing non-payment of premium overcharged amounts ...  
10 violate the terms of their standard insuring agreements, Defendants’ rate filings, express and/or  
11 implied material misrepresentations made to the Class by Defendants and/or the obligations owed  
12 by Defendant insurance carriers under applicable law.” *Id.* at ¶ 60. Defendants’ argument is  
13 therefore irrelevant to Plaintiffs’ claim.

14 However, because Plaintiffs have failed to plausibly allege that Defendants committed the  
15 wrongful conduct that is the subject of this claim, Plaintiffs’ claim for declaratory judgment must  
16 also be **dismissed**.<sup>14</sup>

#### 17 **IV. MOTION TO STRIKE**

18 Because every claim in the FAC has been dismissed, the motion to strike is **denied**  
19 **without prejudice as moot**.

#### 20 **V. CONCLUSION**

21 For the reasons stated above, Defendants’ motion to dismiss is **granted in part and**  
22 **denied in part**, and the motion to strike is **denied as moot**. The FAC is dismissed in its entirety.

23 Federal Rule of Civil Procedure 15(a) establishes that leave to amend “shall be freely given  
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25 <sup>14</sup> Because the court determines that the FAC shall be dismissed in its entirety pursuant to Fed. R.  
26 Civ. P. 12(b)(6), it declines to reach the remainder of Defendants’ arguments for dismissal, i.e.,  
27 whether certain Defendants are exempt from Section 1861.16(b) because of the Super Group  
28 exemption, because their rates apply only to members of certain affinity groups, and/or because  
they no longer sell PPAs. It also declines to take judicial notice of Defendants’ exhibits and  
**denies as moot** Plaintiffs’ motion for leave to file a surreply, because they are only relevant to  
these arguments.



1 when justice so requires.” However, “[w]hen a proposed amendment would be futile, there is no  
2 need to prolong the litigation by permitting further amendment.” *Gardner v. Martino*, 563 F.3d  
3 981, 990 (9th Cir. 2009). Here, because it is not clear that amendment would be futile, the court  
4 grants Plaintiffs leave to amend their complaint. The Second Amended Complaint, if any, must be  
5 filed by **October 6, 2015**.

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**IT IS SO ORDERED.**

Dated: September 15, 2015



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Donna M. Ryu  
United States Magistrate Judge