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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

In Re
NATIONAL WESTERN LIFE INSURANCE
DEFERRED ANNUITIES LITIGATION

CASE NO. 05-CV-1018-JLS (LSP)

**ORDER: (1) DENYING
PLAINTIFFS’ MOTION FOR
CLASS CERTIFICATION, (2)
DENYING PLAINTIFFS’ MOTION
TO EXCLUDE THE
DECLARATION OF ALLAN W.
KLEIDON, AND (3) DENYING
PLAINTIFFS’ MOTION TO FILE
EXHIBITS UNDER SEAL**

(Doc. Nos. 129, 161, & 172)

Presently before the Court is Plaintiffs’ motion for class certification. (Doc. No. 129.) Also before the Court are Defendant’s opposition and Plaintiffs’ reply. (Doc. Nos. 151 & 167.) Plaintiffs have also filed a motion to exclude the declaration of Allan W. Kleidon and a motion to file exhibits 1–6 of Plaintiffs’ notice of lodging of deposition testimony under seal. (Doc. Nos. 161 & 172.) For the reasons stated, Plaintiffs’ motion for class certification is **DENIED**, the motion to exclude the declaration of Allan W. Kleidon is **DENIED AS MOOT**, and the motion to file exhibits under seal is **DENIED**.

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BACKGROUND

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2 Named Plaintiffs are seniors who purchased deferred annuities from Defendant National
3 Western Life Insurance Company. They allege that Defendant “orchestrated a nationwide scheme to
4 target senior citizens and lure them into purchasing its high cost and illiquid deferred annuities.”
5 (Memo. ISO Motion at 1.) “An annuity is a contract between an annuity owner . . . and an insurance
6 company pursuant to which the annuity owner makes an upfront lump-sum payment or a series of
7 payments to the insurance company. The insurance company, in turn, agrees to make payments to the
8 annuity owner over a period of time.” (Consolidated Amended Complaint (CAC) ¶ 17.) Where that
9 annuity is “deferred,” “the annuitant foregoes payment until some point in the future” and is “a long-
10 term investment vehicle, not an up front income stream.” (*Id.* ¶ 18.)

11 To sell these products, Defendant contracts with National Marketing Organizations (“NMOs”)
12 who “recruit[] and solicit[] sales agents.” (Memo. ISO Motion at 4.) These sales agents receive
13 “exorbitant commissions” when they sell the complained-of annuities. (*Id.* at 5.)

14 “At the core of [Defendant’s] scheme” were misrepresentations and omissions regarding “the
15 annuities’ product spread (*i.e.*, its costs and internal profits) and asset fee.” (*Id.*) According to
16 Plaintiffs, Defendant misrepresented the nature of bonuses offered with some annuity products, and
17 failed to disclose its agent commissions and overall corporate “plan . . . to increase the asset fee in
18 renewal years.” (*Id.* at 1–2.) Plaintiffs believe that these misrepresentations and omissions violate
19 the Federal Racketeer Influenced and Corrupt Organizations Act and seven California state statutes.

LEGAL STANDARD

21 Motions for class certification proceed under Rule 23 of the Federal Rules of Civil Procedure.
22 Rule 23(a) provides four requirements that must be met in any class action: (1) the class is so
23 numerous that joinder of all members is impracticable; (2) there are questions of law or fact common
24 to the class; (3) the claims or defenses of the representative parties are typical of the claims or
25 defenses of the class; and (4) the representative parties will fairly and adequately protect the interests
26 of the class. Fed. R. Civ. P. 23(a). A proposed class must also satisfy one of the three subdivisions
27 of Rule 23(b). The Plaintiffs bear the burden of making this showing. *Doninger v. Pac. Nw. Bell,*
28 *Inc.*, 564 F.2d 1304, 1308 (9th Cir. 1977); *W. States Wholesale, Inc. v. Synthetic Indus., Inc.*, 206

1 F.R.D. 271, 274 (C.D. Cal. 2002).

2 **ANALYSIS**

3 For purposes of this Order, the Court’s analysis begins and ends with the commonality and
4 typicality requirements of Rule 23(a)(2) and (3). “Both serve as guideposts for determining whether
5 under the particular circumstances maintenance of a class action is economical and whether the named
6 plaintiff’s claim and the class claims are so interrelated that the interests of the class members will be
7 fairly and adequately protected in their absence.” *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147,
8 157 n.13 (1982). To demonstrate commonality, the plaintiff must show “questions of law or fact
9 common to the class,” though the rule does not require that every question of fact or law be common.
10 Fed. R. Civ. P. 23(a)(2). Typicality requires that “the claims or defenses of the representative parties
11 are typical of the claims or defenses of the class.” Fed. R. Civ. P. 23(a)(3). The purpose of the
12 typicality “requirement is to assure that the interest of the named representative aligns with the
13 interests of the class.” *Hanon*, 976 F.2d at 508 (citation omitted).

14 Plaintiffs argue that their “claims are based on a common course of conduct designed to further
15 the conspiracy to market and sell National Western deferred annuities to senior citizens based on
16 certain misrepresentations and omissions.” (Memo. ISO Motion at 17.) That is, “Class members were
17 sold deferred annuities which were worth substantially less than what was represented, as their
18 annuities were burdened with undisclosed commission costs, illusory bonuses and increasing asset
19 fees – all of which directly reduced their credited interest rate.” (Reply at 3–4.) Allegedly, “National
20 Western systematically represents to investors through its standardized written materials that its
21 deferred annuities are safe, secure and competitive, when in fact, they are poorly performing products
22 that are burdened with excessive undisclosed commissions and other expenses.” (Memo. ISO Motion
23 at 17–18.) Thus, given that “[t]hese fundamental misrepresentations and omissions are uniform and
24 apply to all Class members,” Plaintiffs believe that they have demonstrated commonality. Further,
25 since the class representatives were all “seniors” and were “presented with and signed National
26 Western’s standardized annuity application and consumer disclosure form,” their claims are “typical
27 of those asserted by the proposed Classes.” (*Id.*)

28 Plaintiffs evidence, at least as presented here, cannot support a finding of commonality or

1 typicality. For example, none of the Plaintiffs currently have a policy on which Defendant charges
2 an asset fee. (*See* Opp. at 27–28; Reply at 9.) As such, the Court is unclear as to how they could be
3 typical of class members who were charged an asset fee. Although “typicality does not require that
4 a class representative’s claim be identical to that of the class,” the asset fee portion of Plaintiffs’
5 claims is not “reasonably coextensive of absent class members” who were subject to such
6 manipulation. *Dukes v. Wal-Mart, Inc.*, 509 F.3d 1168, 1184 (9th Cir. 2007). Without having a class
7 representative who shares this claim, a finding of typicality would be improper.

8 More significantly, Plaintiffs have not demonstrated that all of Defendant’s products contain
9 the same misrepresentations and omit the same information. According to Plaintiffs, National Western
10 sold at least twenty deferred annuity products to class members. (*See* Memo. ISO Motion, App. A.)
11 Unless there is evidence that all of Defendant’s annuity products contain the same misstatements and
12 omissions then it would be impossible to conclude that Plaintiffs had carried its burden with respect
13 to commonality.

14 The Court has found no such evidence. Although Defendant used standardized forms, it
15 appears that those forms differed between deferred annuity products. (*Compare* Memo. ISO Motion,
16 Exs. 14 & 15 *with id.*, Exs. 16 & 17.) Plaintiffs’ evidence does not support the conclusion that those
17 different materials contain the same misrepresentations and omit the same information. Thus, the
18 Court finds that Plaintiffs have not carried their burden to show commonality and typicality and their
19 motion is **DENIED WITHOUT PREJUDICE**.¹

20 Consequently, the motion to exclude the declaration of Allan W. Kleidon is also **DENIED AS**
21 **MOOT**. The motion to file exhibits 1–6 of Plaintiffs’ notice of lodging of deposition testimony under
22 seal is **DENIED AS UNTIMELY**. With a hearing set for January 7, 2010 and their final brief due
23 by November 13, 2009, Plaintiffs filed this motion along with their notice on January 6, 2010. Filing
24 so much evidence so far beyond the deadline set by this Court and so close to the scheduled hearing
25 was inappropriate. Therefore, documents 172, 173, and 174 on the docket are hereby **STRICKEN**.

27 ¹ Although both Plaintiffs and Defendant advanced numerous arguments in favor of and
28 against certification, the Court expresses no opinion on their merit. The import of this Order is wholly
confined to the issues addressed herein and should not be taken as having bearing on any other issue
raised by the parties.

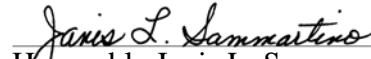
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CONCLUSION

For the reasons stated, Plaintiffs' motion to certify is **DENIED WITHOUT PREJUDICE**, the motion to exclude is **DENIED AS MOOT**, and the motion to file under seal is **DENIED AS UNTIMELY**. Further, document numbers 172, 173, and 174 are **STRICKEN** from the docket. If Plaintiffs wish to file a renewed motion for class certification, they **MAY FILE BY** February 12, 2010.

IT IS SO ORDERED.

DATED: January 11, 2010



Honorable Janis L. Sammartino
United States District Judge