

**EXHIBIT 1: [PROPOSED] SUBSTITUTED SUPPLEMENTAL MEMORANDUM**

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19 **UNITED STATES DISTRICT COURT**  
20 **CENTRAL DISTRICT OF CALIFORNIA**

21 JOYCE WALKER, KIM BRUCE  
22 HOWLETT, and MURIEL SPOONER, on  
23 behalf of themselves and all others similarly  
24 situated,

25 Plaintiffs,

26 v.

LIFE INSURANCE COMPANY OF THE  
SOUTHWEST, a Texas corporation,

Defendant.

CASE NO.: CV 10-9198 JVS (RNBx)

**[PROPOSED] LIFE INSURANCE  
COMPANY OF THE SOUTHWEST'S  
SUPPLEMENTAL MEMORANDUM  
IN OPPOSITION TO CLASS  
CERTIFICATION**

Judge: Hon. James V. Selna  
Date: Sept. 18, 2012  
Time: 1:30p.m.  
Courtroom: 10C

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1 **INTRODUCTION**

2 During the September 18, 2012 class certification hearing, the Court heard oral  
3 argument on, *inter alia*, the question of whether the proposed “sales illustration”  
4 subclasses fail on ascertainability grounds. Plaintiffs argued that some combination of a  
5 policy file review and a questionnaire could resolve the factual disputes underlying the  
6 issue. Plaintiffs further argued that they now believe that policy files contain conflicting  
7 evidence concerning illustration “use” (*i.e.*, whether and when an illustration was used)  
8 only 5% of the time, as opposed to LSW’s estimate of at least 56% of files in conflict. The  
9 Court invited supplemental submissions.  
10  
11

12 As shown in LSW’s opposition filings, and as further detailed below, the  
13 ascertainability problem is intractable:  
14

- 15 • Policy files were never meant to be—and cannot be treated as—a complete or  
16 accurate source of information concerning what transpired during any given  
purchase transaction.
- 17 • Policy files contain incomplete and often conflicting information about  
18 illustration usage. Plaintiffs reach their 5% number only by ignoring (or  
19 resolving in their favor by picking and choosing among) conflicting file  
evidence presented in illustrations, agent reports and applications.
- 20 • No questionnaire can save the day. Using a questionnaire to attempt to  
21 resolve an ascertainability problem runs afoul of Rule 23’s prohibition on  
22 “opt-in” classes. In any event, here, any questionnaire would create more  
evidentiary issues and factual disputes than it would resolve.
- 23 • Plaintiffs cannot solve their ascertainability problem by kicking it down the  
24 road. Months after the class certification motion was filed, Plaintiffs are still  
25 changing their minds about who is in and out — and are now saying that such  
26 a threshold question should be tabled for the indeterminate future. This  
problem will not improve with age. Case law demands that it be addressed

1 now.

2 For these reasons, and as detailed below, the Court was correct to flag a potential  
3 ascertainability problem, and given the apparent absence of a common answer, should find  
4 that the problem defeats class certification.  
5

## 6 ARGUMENT

### 7 **I. A REVIEW OF POLICY FILES CANNOT SOLVE THE** 8 **ASCERTAINABILITY PROBLEM**

#### 9 **A. Policy Files Cannot Determine What a Policyholder Received or When**

10 Plaintiffs largely propose to solve their ascertainability problem by reviewing policy  
11 files to determine who received what, and when. *See, e.g.*, Pltf. Mem. at 1-4. The  
12 fundamental problem with this approach, however, is that policy files are not the correct  
13 tool for the task. It is necessary to consider the entire universe of what was conveyed to  
14 each policyholder.  
15

16 Policy files do not collect every document that is part of the purchase process. *See*  
17 McDonald Dec. ¶ 7. LSW's head of New Business explained the limited purpose of policy  
18 files:  
19

20 [A policy file] is not designed to (and does not) include every single document  
21 that is provided to a potential policyholder in the application process. It is  
22 intended to include only the administrative information LSW needs to  
23 determine whether to issue a policy (to a great extent, the underwriting  
24 process), the terms of that policy, and subsequent communication directly  
25 between LSW and the customer (e.g., annual statements). For this reason, the  
26 policyholder file is not intended to be a comprehensive set of all information  
exchanged during the sales process. It is impossible to tell, just by looking at  
the contents of LSW's files, every piece of information and every document  
that was provided to policyholders.

1 *Id.* In order to resolve what documents and information a given Paragon or Provider  
2 purchaser received, individualized fact finding (*i.e.*, discovery and a trial for each putative  
3 class member) will be necessary.  
4

5 Indeed, any approach to resolving UCL and fraud claims that fails to consider the  
6 entire universe of documents provided to class members would run afoul of *Davis v.*  
7 *HSBC*, 10–56488, 2012 WL 3804370 (9th Cir. 2012) (all disclosures have to be considered  
8 in adjudicating UCL and common-law fraud claims).<sup>1</sup> Plaintiffs have not addressed  
9 *Davis*, although LSW raised it during oral argument.<sup>2</sup> Rather, Plaintiffs’ only argument for  
10 limiting inquiry to illustrations (and indeed to only those illustrations appearing in policy  
11 files) is that LSW’s agents certify that they do not say anything inconsistent with  
12 illustrations. *See* Tr. 54:6-24. Plaintiffs argue that the agents’ certifications bring this case  
13 within *Yokoyama*. *Id.* 54:6-12. Indeed, the first page of Plaintiffs’ Reply asserts that  
14 “LSW’s certification requirement is *identical* to that imposed by the insurance company in  
15 *Yokoyama*.” Reply 1 (emphasis added).  
16  
17  
18

19 But Plaintiffs are wrong. In *Yokoyama*, an insurance company required its brokers  
20 to certify that they “made no statements which *differ[ed]* in any significant manner from  
21 [the Company’s disclosure] material.” 594 F.3d 1087, 1090 (9th Cir. 2010) (emphasis  
22

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23 <sup>1</sup> *Davis* also suggests that the failures of all three named plaintiffs to read the disclosures in  
24 their policies are “fatal.” *Compare Davis*, 2012 WL 3804370, at \*7 (“Fatal to Davis’s  
25 claim is the undisputed fact that he failed to read the Important Terms & Disclosure  
26 Supplemental Declaration of Joel Fleming (“Fleming Dec.”), Ex. A 208:11-15; Fleming  
Dec., Ex. B 219:6-8; Fleming Dec., Ex. C 156:10-2.

<sup>2</sup> *Davis* was decided after LSW filed its Opposition.



1 added).<sup>3</sup> Here, LSW uses a distinct certification, imposed by California statute, which  
2 calls for all insurance agents to certify only that they “have made no statements that are  
3 *inconsistent* with the illustration.” *See, e.g.,* Walker Dec., Ex. A at 21 (emphasis added);  
4 Cal. Ins. Code §10509.956(d).  
5

6 This distinction is key because disclosures made by LSW and agents *may differ from*  
7 illustrations; what they cannot do is *contradict* illustrations. For example, Joyce Walker  
8 had a conversation with her agent about the fees she would be charged. Shapiro Dec., Ex.  
9 U. And she received a handwritten disclosure that she would be charged fees beyond a  
10 single Monthly Administrative Charge, including mortality charges and a 5% Premium  
11 Expense. Shapiro Dec., Ex. V at JW002715 (“What charges are deducted...?”;  
12 “Premium—5%... Mortality”). These disclosures did not contradict her illustration (which  
13 included all fees in calculations but did not list them). They supplemented it. LSW has  
14 shown through agent Declarations and voluminous marketing documents that other salient  
15 disclosures also are made. They too *supplement* the illustration.  
16  
17

18 Moreover, that LSW’s certification is imposed by the state of California (Cal. Ins.  
19 Code §10509.956(d); Reply at 10) further undermines Plaintiffs’ position. If Plaintiffs are  
20 correct, then agents are superfluous—they cannot say a thing that is not already in the  
21 illustration. That makes no sense. Why have a detailed licensing and regulatory regime for  
22  
23

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24 <sup>3</sup> *Yokoyama* —which predates *Dukes* and *Mazza*—held that the District Court of Hawaii  
25 had misapplied Hawaii law in determining whether individualized reliance was required  
26 under Hawaii’s consumer protection statute. 594 F.3d 1087, 1094 (9th Cir. 2010).  
*Yokoyama* did not hold that a class should be certified. It simply remanded for another  
round of class certification briefing. *Id.*

1 agents at all?<sup>4</sup> And why were Mr. Howlett and Ms. Spooner provided a “binder” of  
2 documents by their independent agents — in addition to what those agents wrote on the  
3 “white board” during the many of hours of meetings they had learning about the product?<sup>5</sup>  
4

5 **B. Policy Files Contain Conflicting Information**

6 Even focusing myopically on policy files alone, pervasive evidentiary conflicts  
7 defeat certification based on ascertainability. In its class certification opposition papers,  
8 LSW showed that 30% of policy files contain no evidence of sales illustration use,<sup>6</sup> that  
9 another 56% of files have conflicting evidence, and that no file can conclusively establish  
10 sales illustration “use.” Perla Declaration Concerning the Sample ¶¶ 7-10. Prior to the  
11 hearing, Plaintiffs’ class certification filings did not dispute this showing. Rather, even  
12 they admitted that a large percentage of the class had no evidence of sales illustration use.  
13  
14 See Dinglasan Dec. ¶ 9.  
15

16 Now, however, Plaintiffs offer a “revision” of their findings based on what they say  
17 is “a more detailed review” of the files. Pltf. Mem. at 2; Dinglasan Supp. Dec. ¶ 2.  
18 Plaintiffs now say they have found conflicting file evidence only 5% of the time. See Pltf.  
19 Mem. at 2. As an initial matter, the very fact of this “revision” — unveiled during oral  
20

21 <sup>4</sup> That LSW’s certification is a requirement of state law also means that it would have been  
22 present in *Fairbanks* and *Kaldenbach*, two other California insurance class actions. The  
23 courts there neither believed that the state was forbidding agents from making additional  
24 disclosures nor restricted consideration of disclosures outside of illustrations in rejecting  
25 class certification. 197 Cal. App. 4th 544, 564 (2011); 178 Cal. App. 4th 830, 847 (2009).  
26 <sup>5</sup> See Shapiro Dec., Ex. C 72:11-20 (“binder”); 106:11-107:4 (“white board”); Shapiro Ex.  
B 67:4-11 (Howlett and Spooner had a dozen meetings over fourteen months).

<sup>6</sup> LSW does not require illustration use before application. McDonald Dec. ¶ 13-14. Thus,  
if an illustration was used prior to application, it was simply because an agent decided to do  
so.

1 argument — spotlights the problem: even class counsel, with months of time at their  
2 disposal to review the files (and every incentive to get it right or at least to be consistent)  
3 cannot seem to settle on what they think the files show. More importantly, Plaintiffs  
4 continue to make the following errors in their revised analysis.  
5

6 **1. Unfounded Reliance On Illustration Print Dates**

7 Because Plaintiffs’ proposed subclasses are limited to policyholders who received  
8 what Plaintiffs call sales illustrations (*i.e.*, illustrations at or prior to application),  
9 determining *when* an illustration was used (if ever) is critical. The lynchpin of Plaintiffs’  
10 revised analysis is that an illustration’s print date is treated as *conclusive evidence* that the  
11 illustration was *used* with a policyholder *on that date*. See Dinglasan Supp. Dec. ¶ 4 (“I  
12 compared the print date on the illustration with the date that the application for the policy  
13 was signed.”).  
14  
15

16 That conclusion—print date equals use date—is unfounded. None of the named  
17 Plaintiffs claims to have reviewed his or her challenged illustrations on the print dates.<sup>7</sup>  
18 Further, the sample of 400 proves that illustration print date is not a reliable proxy for the  
19 date of illustration usage. An illustration signature date (*i.e.*, when a human being put pen  
20 to paper) constitutes better evidence of the timing of use than a print date. But, on 434 of  
21  
22

23 <sup>7</sup> Walker received an illustration prepared on October 3, 2007 that she never signed.  
24 Walker Dec., Ex. A. The illustration she signed on January 11, 2008 was prepared on  
25 December 27, 2007. Fleming Dec., Ex. D. Howlett and Spooner received illustrations  
26 prepared July 27, 2007, but neither signed until July 30, 2007. Howlett Dec., Ex. A;  
Spooner Dec., Ex. A. Ms. Spooner was unsure whether she first saw her illustration before  
or after she dictated her application. Fleming Dec., Ex. C 232:6:9.

1 the 491 illustrations that are signed and dated and appear in the sample files (88% of them),  
2 *the signature date does not match the print date, it falls later. See Supplemental*  
3 Declaration of Timothy Perla (“Perla Dec.”) at 4. This fatally undermines Plaintiffs’  
4 reliance on print dates as a proxy for date of use.<sup>8</sup>

6 Furthermore, even using signature dates as a proxy for date-of-use would not solve  
7 the ascertainability problem because that too would just lead to yet more file  
8 contradictions and uncertainty. For the 491 signed/dated illustrations, the signature date  
9 fell a median of 12 days after the print date. *See Perla Dec. at 4.* And that time gap  
10 matters. The sample contains 122 illustrations for which print date precedes or matches  
11 application date (*i.e.*, what Plaintiffs deemed to be sales illustrations). Of those, 30 bear a  
12 signature date *after* application date. *See Perla Dec. at 5.* This proves two things. First,  
13 simply looking at signature date instead of print date reduces by 25% the number of sales  
14 illustrations that precede or are contemporaneous with the application date. Second, agents  
15 do very often print an illustration prior to application, but do not use it until after.

18 Finally, even a signature date could not appropriately be treated as conclusive or  
19 reliable evidence of illustration use. Plaintiffs can scarcely claim otherwise. Ms. Walker  
20 claims to have been misled by a pre-application illustration that she never signed. Walker  
21 Dec., Ex. A at 21. But LSW’s file also contains a second illustration. It was printed *and*  
22 *signed* post-application, and showed a pattern of higher premium payments that matched  
23  
24

25 \_\_\_\_\_  
26 <sup>8</sup> To the extent the files also contain unsigned illustrations as well, they offer no evidence concerning the timing of use (if any).

1 her actual underwriting class. Yet during her deposition, Ms. Walker testified that she did  
2 *not receive or review this latter illustration*, even though she acknowledges that her  
3 signature appears. *See Fleming Dec. Ex. A 205:9-210:10.* Were a fact finder simply to  
4 review her policy file, they would likely draw the common sense conclusion that the signed  
5 illustration was used—but according to Ms. Walker, not so.<sup>9</sup>

7 In short, the presence of an illustration in a policy file cannot be counted as evidence  
8 of illustration “use”—and certainly not conclusive evidence establishing *when* an  
9 illustration was used. Plaintiffs err because they rely on illustration print dates as  
10 conclusive evidence of use on those dates.

## 12 2. Misinterpretation of Agent Reports

13 Plaintiffs also address inaccurately the Agent Reports in files. Specifically,  
14 sometimes (not always), files contain an Agent Report, which is a document that may be  
15 submitted to LSW at the time of application. Part 1, Question 7 of the Agent Report asks  
16 the agent to “List any sales materials, *including illustrations*, used relating to the new  
17 application.” *See Dinglasan Supp. Dec. ¶ 6* (emphasis added).

19 According to the Dinglasan Declaration, if an illustration is listed in response to  
20 Question 7, Plaintiffs assume that response must be conclusive evidence that an illustration  
21 was use prior to application. *See id.* Plaintiffs then also assume that an illustration must  
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24 <sup>9</sup> Indeed, twice in Plaintiffs’ filing they emphasize that it would improper to look only at  
25 Ms. Walker’s file given that she cleared up the obvious factual inconsistency in her  
26 “Declaration” and her “testimony.” Pltf. Mem. at 4. This is precisely the problem – if we  
need policyholders to testify at depositions and in affidavits to resolve threshold factual  
disputes, we don’t have an ascertainable class under Rule 23.

1 not have been used *only* if the answer specifically states “N/A” or “none.” *See id.* ¶ 7. In  
2 all other situations, Plaintiffs treated agent reports as irrelevant, that is, as providing no  
3 evidence concerning illustration use. *See id.* (“Where Part 7 was blank or where it listed  
4 some items but did not list an illustration I treated the agent’s report as not indicating one  
5 way or the other whether a sales illustration was used.”).

7 This is not a reasonable methodology. Question 7 *specifically asks about*  
8 *illustrations*. Thus, if an agent does not list an illustration—irrespective of whether they  
9 wrote “N/A” or something else—that plainly would be evidence that no illustration was  
10 used. For instance, very often, an agent would list “brochures” as the materials used—in  
11 other words, the agent was asked about illustrations, and listed only something else  
12 (brochures). By any fair minded analysis, this is evidence that no illustration was used.  
13 There are over 30 instances in which an agent report lists only materials other than an  
14 illustration—all instances in which Plaintiffs err by failing to acknowledge evidence  
15 against illustration use. Perla Dec. ¶ 3.

18 Plaintiffs compound their error by treating any reference to a “quick calc” as  
19 evidence that a sales illustration was supplied to an applicant. *See Dinglasan Supp. Dec.* ¶  
20 6. A “quick calc” is a summary calculation that looks nothing like the sales illustrations  
21 that the Complaint attacks; it is a completely different document.<sup>10</sup> More importantly, as  
22 Plaintiffs concede, a quick calc is *for agent use only*. *Dinglasan Supp. Dec.* ¶ 6. Question  
23  
24

25  
26 <sup>10</sup> This is self-evident from the example quick calc that Plaintiffs attached to the Dinglasan Declaration. *See Dinglasan Supp. Dec., Ex. C.*

1 7 of the agent report asks the agent to list what the agent “used.” A response indicating that  
2 an agent “used” a quick calc does not mean that the agent also *provided it to an applicant*.

3  
4 Finally, Plaintiffs further err by treating any reference to “IC Solutions” or “ICS” as  
5 conclusive evidence that an applicant received a sales illustration. *See Dinglasan Supp.*  
6 *Dec.* ¶ 6. But, as with quick calcs, such a response only raises questions: that an agent  
7 “used” the software does not mean that a sales illustration was provided to an applicant. It  
8 could be, for instance, that the agent ran a quick calc, and never printed or showed a sales  
9 illustration to anyone.

### 11 3. Misinterpretation of Applications

12 Finally, Plaintiffs also err in their treatment of applications and, in particular, the  
13 sales certification (*i.e.*, “The box below **MUST** be checked if a signed illustration of the  
14 policy applied for is **NOT** enclosed with this application”). The error is twofold.

15  
16 First, Plaintiffs treat an unchecked box as conclusive evidence that a sales  
17 illustration was used. *See Dinglasan Supp. Dec.* ¶ 9. This evidentiary assumption is  
18 inappropriate, however, because the certification does not speak to what was used, but  
19 rather what was “enclosed.” *See, e.g.*, Shapiro *Dec.*, Ex. AA. If, for example, the box is  
20 unchecked, but no illustration appears in the file, that is a conflict in need of fact finding.

21  
22 Second, Plaintiffs treat a checked box as neutral, because they speculate that there  
23 could still be an illustration that does not match “the policy applied for.” *See Dinglasan*  
24 *Supp. Dec.* ¶ 9. But this is also not a reasonable evidentiary conclusion: even if Plaintiffs’  
25 interpretation of “the policy applied for” is accepted, then the checkbox shows that an  
26

1 illustration of the policy applied for was not received. At most, that is one piece of  
2 evidence—not some dispositive, cure-all presumption or irrefutable evidentiary  
3 inference—that no illustration was used. Whether illustrations that do not match the policy  
4 might still exist somewhere is a matter for class-defeating fact-finding.<sup>11</sup>

6 \* \* \*

7 The salient point is simple: the files are inconclusive and no class certification  
8 Declaration can resolve the conflicts. Determining whether or when an illustration was  
9 used is a matter for individualized fact finding. In their Memorandum, Plaintiffs  
10 essentially prove the point. During oral argument, LSW showed that Ms. Walker’s own  
11 policy file is deeply confusing and contradictory (*i.e.*, she claims to have received an  
12 illustration she never signed, and not to have received one she did sign). Plaintiffs respond  
13 by *citing her deposition testimony*. Pltf. Mem. at 4. LSW wholeheartedly agrees: the right  
14 way to fact-find is to inquire individually of each policyholder and agent, not to review a  
15 policy file in isolation.  
16  
17

18 Plaintiffs cannot alter this result by blaming LSW for what they characterize as  
19 “deficient” recordkeeping. Pltf. Mem. 7. It is unclear what point Plaintiffs are making  
20 —that their class certification burden should melt away because policy files are not in their  
21 preferred form? That would have no basis in the law. Nothing in the California Insurance  
22  
23  
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25 <sup>11</sup> It is also unclear why Plaintiffs believe that an illustration that is expressly *not* of the  
26 policy applied for can serve as the basis for a claim of misrepresentation concerning the  
*different* policy that is applied for.



1 Code requires insurers to track whether or when a sales illustration is provided to a  
2 policyholder. Policy files simply were not designed to capture sales illustration use—this  
3 does not make the files deficient, just (unsurprisingly) ill-suited to a task they were never  
4 intended to perform.  
5

6 Courts and plaintiffs must take defendants as they find them. In *Dukes*, the  
7 defendant had a class-defeating policy of “allowing discretion by local supervisors over  
8 employment matters.” *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2554 (2011). Here,  
9 LSW has a class-defeating policy of not uniformly tracking when illustrations are given to  
10 potential policyholders. Both “polic[ies] against having uniform ... practices” are “very  
11 common and presumptively reasonable.” *Id.* Both defeat certification.  
12

13 The Sixth Circuit’s decision in *Young* is not to the contrary. There, the problem was  
14 volume, not the insufficiency of the records. The court found that determining class  
15 membership could require reviewing millions of files, and was willing to certify  
16 nonetheless. But, unlike here, there was no record evidence that the files would be  
17 insufficient for the task, or produce inaccurate conclusions. *Young v. Nationwide Mut. Ins.*  
18 *Co.*, 11-5015, 2012 WL 3828036, at \*6 (6th Cir. Sept. 5, 2012) (“The district court noted  
19 that an error rate was essentially unknown and that [defendant’s expert’s] error range was  
20 not dispositive for” the program proposed to be used). Here, the problem is not simply one  
21 of sheer volume (though one can reasonably conclude that it is, *Young* notwithstanding),  
22  
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1 but rather that files simply are not an appropriate tool for resolving ascertainability  
2 concerns.<sup>12</sup>  
3

## 4 **II. A QUESTIONNAIRE CANNOT SOLVE THE PROBLEM**

5 In its Tentative Order and during oral argument, the Court questioned whether a  
6 questionnaire could alleviate ascertainability concerns. For two reasons, it could not.

7  
8 *First*, requiring that policyholders return a questionnaire or evidence in order to  
9 become (sub)class members would create an impermissible “opt in” class. *See* Fed. R. Civ.  
10 P. 23(c)(2)(B) (Notice must clearly and concisely state that “the court will *exclude* from the  
11 class any member who requests exclusion”) (emphasis added). By adding the “opt out”  
12 requirement to Rule 23 in the 1996 amendments, Congress *prohibited* “opt in” provisions  
13 by implication. *Andrews Farms v. Calcot*, 258 F.R.D. 640, 656 (E.D. Cal. 2009) (citing  
14 *Kern v. Siemens Corp.*, 393 F.3d 120, 124 (2d Cir. 2004)) (emphasis in original); *see also* 5  
15 Moore’s Federal Practice § 23.104[2][a][ii] (2012) (“there is no authority for establishing  
16 ‘opt in’ classes in which the class members must take action to be included in the class.  
17  
18 Indeed, courts that have considered ‘opt-in’ procedures have rejected them as contrary to  
19 Rule 23”). As the Second Circuit explained at length in *Kern v. Siemens Corp.*, 393 F.3d  
20 120, 124 (2d Cir. 2004), procedures that require the taking of action in order to be in a class  
21  
22  
23

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24 <sup>12</sup> Plaintiffs’ citation to *Shurland* is misleading. There, the defendant had *destroyed* its  
25 records of customer names. *Shurland v. Bacci Cafe & Pizzeria on Ogden, Inc.*, 271 F.R.D.  
26 139, 145 (N.D. Ill. 2010) (“Class actions cannot be defeated by destroying records.”)  
(quoting *Appleton Electric Co. v. Advance–United Expressways*, 494 F.2d 126, 135, 139  
(7th Cir.1974)). There is no such allegation here.

1 (e.g., return questionnaire, submit evidence) are “de facto” impermissible opt-in classes.  
2 *Kern v. Siemens Corp.*, 393 F.3d 120, 124 (2d Cir. 2004) (collecting many authorities).

3  
4 The case cited in the tentative ruling, *Vinole v. Countrywide Home Loans, Inc.*, 571  
5 F.3d 935, 947 (9th Cir. 2009), is not to the contrary. There, the Court referred to the  
6 possibility of “innovative procedural tools,” but did *not* approve their use in that case—and  
7 then cautioned that they could not be used to conduct “a fact-intensive, individual analysis”  
8 of each class member’s claim. *Id.* at 947.

9  
10 Nor are Plaintiffs’ cases dispositive. The cases Plaintiffs cite concerning  
11 questionnaires (*see* Reply at 5 n.18; Pltf. Mem. at 9) posit only that questionnaires *could*  
12 *perhaps* be used to resolve simple, objective questions (e.g., whether a house has a certain  
13 kind of windows) unlike the questions that would be required here. The dockets of those  
14 cases reflect no evidence that such questionnaires were ever actually used, much less used  
15 to resolve factual disputes that another litigant has a right to litigate.

16  
17 *Second*, any questionnaire could only exacerbate evidentiary issues, and would  
18 hardly be the “straightforward, objective inquiry” that Plaintiffs assert. Pltf. Mem. at 9. At  
19 very least, any questionnaire would require the policyholder to answer questions, including  
20 but not limited to (1) whether the policyholder received any illustration; (2) whether the  
21 policyholder signed the illustration; (3) whether the policyholder received the illustration  
22 before or after the time of policy delivery; (4) whether the policyholder received the “One  
23 Policy Fee” page; (5) whether the policyholder received the optional report that  
24 enumerated policy costs; (6) whether the illustration depicted loans; (7) what other  
25  
26

1 disclosures were made to the policyholder; (8) when all of this occurred in relation to the  
2 application. If a policyholder received more than one illustration—and there is record  
3 evidence that this happens frequently (Perla Dec. ¶ 6)—he or she would need to answer  
4 each of these questions multiple times.  
5

6 An absent class member could misremember any or all of the events that led him or  
7 her to purchase a policy. *See In re Phenylpropanolamine (PPA) Products Liab. Litig.*, 214  
8 F.R.D. 614, 619 (W.D. Wash. 2003) (rejecting use of sworn affidavits by class members  
9 where class members would be asked to recall subjective details, more than two years old,  
10 which would “sorely tax [their] memories”).<sup>13</sup> These are not the kinds of simple, objective  
11 questions that can be resolved in a questionnaire in a manner consistent with due process,  
12 fairness, and Plaintiffs’ discharge of their burden of proof.  
13  
14

### 15 **III. PLAINTIFFS CANNOT DEFER THEIR ASCERTAINABILITY PROBLEM** 16 **BY LABELING IT A QUESTION OF MANAGEABILITY**

17 Finally, Plaintiffs suggest that a class can be certified even if there is no precise,  
18 objective method for determining who is in the class. *See* Pltf. Mem. at 10-13. This  
19 position is incorrect.  
20

21 Some of Plaintiffs’ own cases explicitly undermine Plaintiffs’ argument. *Boundas*,  
22 for example, recognized that, “[a]lthough the identity of individual class members need not  
23

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24 <sup>13</sup> For example, some agents display illustrations on a computer screen. *See* Foulk Dec. ¶¶  
25 28, 30. Policyholders simply cannot be expected to remember (i) whether they were shown  
26 illustrations on a computer; (ii) when they were shown those illustrations; and (iii) whether  
those illustrations contained an optional costs report. The same challenges would lie if  
illustrations had been discarded.

1 be ascertained before class certification, the membership of the class must be  
2 ascertainable” because “individual class members must receive the best notice practicable  
3 and have an opportunity to opt out.” *Boundas v. Abercrombie & Fitch Stores, Inc.*, 280  
4 F.R.D. 408, 417 (N.D. Ill. 2012) (quoting Manual for Complex Litigation, supra, § 21.222,  
5 at 270 (4th ed. 2004)). See also *O'Connor v. Boeing N. Am., Inc.*, 184 F.R.D. 311, 319  
6 (C.D. Cal. 1998) (“due to notice requirements, class definitions of actions maintained  
7 under Rule 23(b)(3) command greater precision than those brought under Rule 23(b)(1) or  
8 (b)(2).”). This requires a class definition that is “precise, objective, and presently  
9 ascertainable.” *Id.*; *Boundas* at 417 (quoting Manual for Complex Litigation, supra, §  
10 21.222, at 270).  
11  
12

13 Similarly, in *Galvan*, this Court recognized that “[t]he class definition must be clear  
14 in its applicability so that it will be clear later on whose rights are merged into the  
15 judgment, that is, who gets the benefit of any relief and who gets the burden of any loss.”  
16 *Galvan v. KDI Distribution Inc.*, SACV 08-0999-JVS ANX, 2011 WL 5116585, at \*3  
17 (C.D. Cal. Oct. 25, 2011) (quoting *Xavier v. Phillip Morris USA, Inc.*, No. C 10-02067  
18  
19  
20  
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25  
26

1 WHA, 2011 WL 1464942, at \*12 (N.D.Cal. April 18, 2011)).<sup>14</sup> If a class is certified and  
2 LSW successfully moves for summary judgment, the Court and both parties will need to  
3 know who is subject to res judicata. So the question is not whether the leg work to actually  
4 ascertain the class should be completed now or later, it is *whether a class can be*  
5 *ascertained at all*. Here, as detailed above, it cannot.

7 Finally, regardless whether LSW is entitled to a jury, a class “cannot be certified on  
8 the premise that [LSW] will not be entitled to litigate” the question of whether and when an  
9 illustration was received. *See Dukes*, 131 S. Ct. at 2560-61 (“Wal-Mart is entitled to  
10 individualized determinations of each employee's eligibility for backpay.”). Leaving aside  
11 what the Seventh Amendment might say, “the Rules Enabling Act forbids interpreting  
12 Rule 23 to ‘abridge, enlarge or modify any substantive right[.]’” *Dukes*, 131 S. Ct. at 2561  
13 (citing 28 U.S.C. § 2072(b)). And LSW has a Due Process right to contest class  
14 membership.  
15  
16

17 In *Stone v. Advance America*, for example, plaintiffs sought to certify a UCL class  
18 where class membership would be determined by “self-identify[ing] sworn affidavits that  
19 [class members] principally spoke Spanish when they took out payday loans at  
20

21 \_\_\_\_\_  
22 <sup>14</sup> The other cases that Plaintiffs cite as approving “similar case management tools” are  
23 distinguishable. In *Bayer*, the court suggested that claim forms or affidavits could be  
24 appropriate because the claims involved were small—a factor not present here. *See* 2011  
25 WL 5878376, at \*4 (D.N.J. Nov. 22, 2011) (quoting 3 Newberg on Class Actions § 10:12  
26 (4th ed. 2002) (“Methods of claim verification may also vary with the... the size of the  
claims involved. A simple statement or affidavit may be sufficient where claims are  
small[.]”). In *TFT-LCD Antitrust Litigation*, “defendants held an overwhelming market  
share” meaning that “almost all LCD products sold in the United States” fell within the  
class. 2012 WL 253298, at \*2 (N.D. Cal. Jan. 26, 2012).

1 Defendants' stores." *Stone v. Advance Am.*, 278 F.R.D. 562, 571 (S.D. Cal. 2011). The  
2 court rejected this approach. It found that there were "due process concerns" and held that  
3 defendants were "entitled to examine the individual customers." *Id.* at 570. This Court  
4 should do the same.  
5

6 **CONCLUSION**

7 The Court should deny Plaintiffs' Motion for Class Certification.

8  
9 DATED: October 2, 2012

Respectfully submitted,

10 WILMER CUTLER PICKERING HALE AND  
11 DORR LLP

12 By: /s/ Jonathan A. Shapiro

13 Jonathan A. Shapiro

14 Andrea J. Robinson

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15 Attorneys For Defendant

16 Life Insurance Company of the Southwest  
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26

1 **PROOF OF SERVICE**

2 I am a resident of the Commonwealth of Massachusetts, over the age of eighteen  
3 years, and not a party to the within action. My business address is Wilmer Cutler Pickering  
4 Hale and Dorr LLP, 60 State Street, Boston, Massachusetts 02109. On October 2, 2012, I  
5 served the within document(s):

6 **[PROPOSED] SUPPLEMENTAL MEMORANDUM IN OPPOSITION  
7 TO CLASS CERTIFICATION**

8 I placed the document(s) listed above in a sealed envelope with postage  
9 thereon fully prepaid, in the United States mail addressed as set forth  
10 below.

11 I personally caused to be hand delivered the document(s) listed above to  
12 the person(s) at the address(es) set forth below.

13 I emailed the document(s) listed above to the person(s) at the address(es)  
14 set forth below.

15  I electronically filed the document(s) listed above via the CM/ECF system.

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