STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF HENNEPIN | FOURTH JUDICIAL DISTRICT

Bonnie Berthiaume, Robert Berthiaume, Doris Burnham, Richard Burnham, Nancy Mayer-Gosz, Fletcher Lewis, and Carole Lewis,

Plaintiffs,

vs.

Allianz Life Insurance Company of North America and Imeriti, Inc. d/b/a Imeriti Financial Network,

Defendants.

ORDER GRANTING CLASS CERTIFICATION

File No. 27-CV-17-15118

The above-entitled matter came on for hearing before the Honorable Laurie J. Miller, a judge of the above-named Court, on November 20, 2018, on Plaintiffs' Motion for Class Certification. Amy S. Conners, Esq., Brian J. Linnerooth, Esq., Maher Mahmood, Esq., and Jennifer L. Olson, Esq., appeared on behalf of Plaintiffs Bonnie Berthiaume, Robert Berthiaume, Doris Burnham, Richard Burnham, Nancy Mayer-Gosz, Fletcher Lewis, and Carole Lewis (collectively "Named Plaintiffs"). Jeffrey D. Hedlund, Esq., and Larry E. LaTarte, Esq., appeared on behalf of Defendant Allianz Life Insurance Company of North America ("Allianz"). David P. Pearson, Esq., and Kyle R. Kroll, Esq., appeared on behalf of Defendant Imeriti, Inc ("Imeriti").

The Court has reviewed the memoranda of law, the arguments of counsel, and all files, records, and proceedings herein. Being fully informed in the premises, the Court makes the following:

ORDER

1. Plaintiffs' Motion for Class Certification is **GRANTED**.

2. The following class is certified pursuant to Rule 23 of the Minnesota Rules of Civil Procedure:

National Class

All residents of the United States who, during the Class Period, purchased an Allianz annuity or other Allianz life insurance product from Sean M. Meadows and were defrauded of some or all of their investment. The Class Period commences on January 1, 2004 and continues through August 5, 2014. Excluded from the class is any parent, subsidiary, affiliate, controlled person, officer, director, agent, servant, employee, or immediate family member of Defendants.

Minnesota Subclass

All residents of the State of Minnesota who, during the Class Period, purchased an Allianz annuity or other Allianz life insurance product from Sean M. Meadows and were defrauded of some or all of their investment. The Class Period commences on January 1, 2004 and continues through August 5, 2014. Excluded from the class is any parent, subsidiary, affiliate, controlled person, officer, director, agent, servant, employee, or immediate family member of Defendants.

Senior Citizens and Disabled Persons Subclass

All residents of the State of Minnesota who are senior citizens or disabled, who during the Class Period, purchased an Allianz annuity or other Allianz life insurance product from Sean M. Meadows and were defrauded of some or all of their investment. The Class Period commences on January 1, 2004 and continues through August 5, 2014. Excluded from the class is any parent, subsidiary, affiliate, controlled person, officer, director, agent, servant, employee, or immediate family member of Defendants.

3. Robert Berthiaume, Doris Burnham, Richard Burnham, Nancy Mayer-Gosz, and Fletcher Lewis are appointed as Class Representatives.

4. Having considered the requirements of Minnesota Rule of Civil Procedure 23.07, Amy Conners, Jennifer Olson, and Thomas Heffelfinger are appointed as Class Counsel.

5. Within 21 days of the date of this Order, Class Counsel shall submit a proposed class notice to the Court for approval.

6. The attached Memorandum is incorporated herein.

BY THE COURT:

Miller, Laurie
2019.02.15
14:24:52 -06'00'

Dated: February 15, 2019

Laurie J. Miller
Judge of District Court

MEMORANDUM

I. Factual Background

These facts are derived from the parties' pleadings and arguments. They are taken as true for the purpose of this Order only, and do not constitute findings of fact.

In June 2015, Sean Meadows ("Meadows"), a financial adviser who sold annuities, among other things, was sentenced to 25 years in federal prison for defrauding his clients out of millions of dollars. Meadows accomplished this, in part, by directing his clients to surrender their annuities within a relatively short time after having purchased them, which caused them to incur surrender fees, and by then directing them to invest the now-diminished value into new annuities, a fraudulent scheme known as "churning." Each time Meadows sold a new annuity, he earned a new commission. When his clients withdrew their money from their annuities early, in addition to substantial surrender penalties payable to the insurance company, they also often paid tax penalties, further depleting their savings. Plaintiffs allege Meadows caused his clients to surrender nearly 40% of all policies he opened at Allianz. Meadows sometimes directed his clients to redirect the money from surrendered annuities into a bond fund, which turned out to be non-existent. Thus, in

addition to churning his clients' accounts, Meadows was also running a Ponzi scheme. He conducted these activities for well over a decade before his illegal actions came to light. Meadows is not a defendant in this action. Through this action, Plaintiffs seek to hold accountable an insurance company and independent marketing organization that worked with Meadows. Plaintiffs allege the defendant entities were in a position to see what Meadows was doing, but failed to act on so-called "red flags," which signaled that Meadows was engaging in fraudulent, unethical, and illegal actions.

A. Allianz's Contacts with Meadows

Allianz is a Minnesota corporation which sells fixed index, variable, and index variable annuities, in addition to life insurance products, in Minnesota and across the United States. In its annuity marketing materials, Allianz advertised, "Our top priority is the safety of your money." (Declaration of Amy Conners, filed October 23, 2018 ["Conners Decl."], Ex. 1 at 968, 351.) Annuity policies are designed to be held for a long time, and often have significant surrender fees that are triggered by premature surrender. Throughout the time Meadows served as an Allianz agent, Allianz had in place compliance and surveillance systems to monitor its agents' activities. Allianz processed requests for surrenders and replacement annuities, and monitored high annuity surrender activity by its agents. (*See* Conners Decl., Ex. 8 at 6726 (Allianz compliance procedures identify surrender of annuities within a short period of policy issuance as a potential red flag).)

From 2000 until March 2014, Meadows was an authorized independent insurance agent for Allianz and its predecessor, which allowed him to sell Allianz annuities to his clients. Meadows was not an Allianz employee, and he was also authorized to sell other carriers' products. He sold many Allianz annuities over the years, and he also caused his

clients to surrender many Allianz annuities over the years. For example, from May 9-12, 2008, Allianz processed at least five annuity surrenders on behalf of Meadows' clients. (*See* Conners Decl., Ex. 6.) Of the annuity policies purchased by Meadows' clients, 30% were surrendered within four years of issuance. (*See* Conners Decl., ¶ 8.) Allianz opened an investigation into Meadows' annuity surrender and replacement transactions in April 2012, which it subsequently closed in July 2012, with no action taken. Allianz did not shut down Meadows' activities until 2014. In the meantime, Allianz honored Meadows as a high-producing agent, and rewarded him with "producer perks" and trips. (*See* Conners Decl., Exs. 17, 18.)

In October 2013, Lori Hansel, one of Meadows' clients, notified Allianz that Meadows had told her and her husband they would not be taxed if they surrendered their Allianz annuity and reinvested the money into a bond fund with Meadows. Allianz offered to waive its fees and to issue a refund for fees already paid, if the Hansels wanted to reinvest with Allianz, but Ms. Hansel said the money was in a bond fund with Meadows and she was not sure they could get it back. This information prompted Allianz to open an investigation into Meadows on October 23, 2013. In or around February 2014, Allianz investigator Barb Krueger ("Kruger") emailed Meadows questioning where the Hansels' money had gone after being moved out of the Allianz annuity contract. Initially, Meadows failed to respond. Thereafter, on February 14, 2014, Krueger explained that if she did not receive a response from Meadows by February 21, 2014, his "appointment with Allianz Life may be in jeopardy." (Conners Decl., Ex. 19 at 10396.) Meadows again failed to divulge any additional information about the Hansels' money. During the course of the Allianz investigation, Krueger contacted other Meadows clients to inquire about their recent

annuity surrenders. Allianz continued to process surrender requests from Meadows' clients throughout the months of Krueger's investigation. Allianz subsequently terminated Meadows' appointment as an authorized Allianz agent in early March 2014.

B. Imeriti's Contacts with Meadows

Imeriti is an Independent Marketing Organization ("IMO") operating in the life insurance industry and headquartered in Minnesota. IMOs recruit independent agents to work with insurance carriers, such as Allianz. IMOs also provide basic sales support to independent agents who sell insurance carrier products. In Imeriti's contract with Allianz, Imeriti agrees to "[u]nderstand the Preferred Agent Agreements" between independent agents and Allianz, and to report to Allianz if Imeriti knows or suspects that an independent agent has "failed to comply with the promises they made in those contracts." (Conners Decl., Ex. 24 at IMER000222.)

Meadows became associated with RZ Financial Network ("RZ"), an IMO, on May 26, 2008. RZ subsequently merged with Imeriti in October 2012. From time to time during Meadows' six-year association with Imeriti and its predecessor RZ, Meadows submitted surrender requests through Imeriti. In September 2010, Imeriti founder Nathan Zuidema ("Zuidema") received a call from a regional vice president with Aviva Life and Annuity Company ("Aviva") informing him that Aviva was reviewing Meadows' book of business. Imeriti did not receive another call from Aviva in regards to Meadows, but on November 2, 2010, Imeriti received notice that Meadows had ended his association with Aviva.

Imeriti employee Tamara Boyd ("Boyd") had the most significant interactions with Meadows of any Imeriti employee. In November 2013, Boyd had a telephone conversation with Meadows in which she "strongly suggested" that he should not move forward with

three annuity surrenders of which she had been notified. (Conners Decl., Ex. 27 at 11669.) In response, Meadows told Boyd that his client needed money for a large purchase. Boyd made no further objection, and thereafter faxed the surrender request to Allianz pursuant to the client's wishes, as conveyed to her by Meadows.

On December 20, 2013, Allianz contacted Imeriti about its ongoing investigation into Meadows. Between December 2013 and February 2014, Allianz contacted Imeriti on multiple occasions in an attempt to contact Meadows. In late February 2014, Allianz informed Imeriti that Meadows was being terminated as an Allianz agent, because Allianz believed he was operating a Ponzi scheme. In early March 2014, Imeriti likewise terminated Meadows.

II. Procedural History

On October 3, 2017, Plaintiffs filed this action, which had been commenced by service on October 4, 2016. Plaintiff filed an eight-count Amended Complaint, seeking to assert statutory and common law claims on their own behalf and on behalf of all others similarly situated. Plaintiffs allege six claims against Allianz: violations of the Minnesota Consumer Fraud Act, Minn. Stat. § 325F.69 (Count 1); violations of the Minnesota False Statement in Advertising Act, Minn. Stat. § 325F.67 (Count 2); violations of the Minnesota Uniform Deceptive Trade Practices Act, Minn. Stat. § 325D.44 (Count 3); violations of the Minnesota Deceptive Acts Perpetrated Against Senior Citizens and Disabled Persons Act, Minn. Stat. § 325F.71 (Count 4); negligence (Count 5); and aiding and abetting fraud (Count 7). Plaintiffs allege two claims against Imeriti: negligence (Count 6); and aiding and abetting fraud (Count 8). Through the current motion, Plaintiffs move for class certification, appointment of class representatives, and appointment of class counsel.

On November 6, 2017, Allianz and Imeriti (collectively, "Defendants") filed separate motions to dismiss the Amended Complaint. The Honorable Mel I. Dickstein, a judge of the above-named Court, heard both motions on January 30, 2018, and issued an order denying both Defendants' motions to dismiss on April 12, 2018.

On July 15, 2018, Plaintiffs filed their Motion for Class Certification, requesting that the Court certify a proposed National Class, with two subclasses, appoint Plaintiffs as class representatives, and appoint Best & Flanagan as class counsel. In the Amended Complaint, Plaintiffs define the proposed National Class as follows:

> All residents of the United States who, during the Class Period, purchased an Allianz annuity or other Allianz life insurance product from Sean M. Meadows and were defrauded of some or all of their investment. The Class Period commences on January 1, 2004 and continues through the date of Meadows' indictment, August 5, 2014. Excluded from the class is any parent, subsidiary, affiliate, controlled person, officer, director, agent, servant, employee, or immediate family member of Defendants.

Amended Complaint, ¶ 114. The proposed subclasses include (1) a Minnesota subclass, consisting of the subset of the National Class who are Minnesota residents, and (2) a Senior Citizens and Disabled Persons subclass, consisting of the subset of the Minnesota subclass who are senior citizens or disabled. In their Memorandum of Law in Support of Motion for Class Certification, Plaintiffs propose amending all of these class definitions to include spouses who are primary beneficiaries of any covered Allianz annuities and other Allianz life insurance products, and to slightly change the wording. Defendants oppose class certification, arguing that individual issues regarding Plaintiffs' claims and Defendants' affirmative defenses make this case inappropriate to proceed as a class action.

The class certification motion was heard on November 20, 2018, at which time the Court took the motion under advisement.

III. Legal Analysis

Plaintiffs argue that all of Rule 23's requirements have been met and that a class action is the superior means of adjudicating Plaintiffs' claims against Defendants. Defendants respond that individualized questions of law and fact would predominate at trial, and as a result, individual adjudication of the Plaintiffs' claims would be preferable to a class action. Rule 23 of the Minnesota Rules of Civil Procedure is modeled after its federal counterpart. *Compare* Fed. R. Civ. P. 23 *with* Minn. R. Civ. P. 23. Both sides have cited many federal cases, in addition to state cases, to support their arguments. Because the state and federal procedural rules are parallel, federal precedent is instructive in interpreting Minnesota's class action rule, but it is not binding precedent. *See Johnson v. Soo Line R.R.,* 463 N.W.2d 894, 899 n.7 (Minn. 1990) ("federal cases interpreting the federal rule are helpful and instructive but not necessarily controlling.")

A. Rule 23.01 Requirements

Four prerequisites must be established by a preponderance of the evidence before the Court may certify a class action. *Whitaker v. 3M Co.*, 764 N.W.2d 631 (Minn. Ct. App. 2009). Rule 23.01 sets out the four prerequisites:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Minn. R. Civ. P. 23.01. While Allianz does not contest Plaintiffs' showing of any of the four Rule 23.01 requirements, focusing on Rule 23.02 instead, Imeriti challenges whether Rule 23.01 has been satisfied, and the Court addresses each of its elements in turn.

1. Numerosity

First, Rule 23.01(a) requires that a class be "so numerous that joinder of all members is impracticable." Minn. R. Civ. P. 23.01(a); *Streich v. Am. Fam. Mut. Ins. Co.,* 399 N.W.2d 210, 217 (Minn. Ct. App. 1987). Plaintiffs' newly-proposed class includes all individuals who "purchased an Allianz annuity or other Allianz life insurance product from Sean M. Meadows, and for whom Allianz processed a policy application or surrender, and who suffered losses due to Sean M. Meadows' fraudulent, illegal, and unethical business practices" between January 1, 2004 through August 5, 2014. (Plaintiffs' Memorandum of Law in Support of Motion for Class Certification, filed on October 23, 2018 ["Plaintiffs' Memo"], at 3.) The class definition from the Amended Complaint includes all those "who, during the Class Period, purchased an Allianz annuity or other Allianz life insurance product from Sean M. Meadows and were defrauded of some or all of their investment." Based on information provided by Allianz and the Minnesota Department of Commerce, Plaintiffs estimate the class consists of approximately 60 individuals. Imeriti argues that Plaintiffs' 60-person class size estimate is based on mere speculation. Because Plaintiffs' class definition only references Allianz's conduct, Imeriti asserts that Plaintiffs failed to make any showing as to the size of the class for the claims against Imeriti.

Class certification is appropriate if a plaintiff can provide a reasonable, good-faith estimate of the number of potential class members. *Lewy 1990 Trust ex rel. Lewy v. Investment Advisors, Inc.*, 650 N.W.2d 445 (Minn. Ct. App. 2002). The Court finds that Plaintiffs have submitted evidence sufficient to support their conclusion regarding the number of class members. Plaintiffs have provided data showing the total number of annuity policies surrendered by Meadows' clients during his association with Allianz prior to his arrest. (*See*

Conners Decl., Ex 5.) Based on their calculations, Plaintiffs estimate that approximately 60 class members fall within their proposed National Class definition. The Court recognizes that Plaintiffs are unable to provide a more precise number of class members in part because Allianz has declined to identify all policy owners who purchased an Allianz annuity from Meadows, citing its refusal to disclose the identities of persons who are not parties to this action prior to a determination by the Court that the case may be treated as a class action. (*See* Conners Decl., Ex 59 at Interrog. 12.) The Court notes that Allianz has not contested the numerosity requirement for purposes of this motion.

While Imeriti does contest numerosity, Plaintiffs assert that the 60-person estimate applies to Imeriti as well as Allianz, because Imeriti received payments on all surrender applications for Allianz annuities sold by Meadows, even for applications that were sent directly to Allianz, bypassing Imeriti's services. (*See* Conners Decl., Ex. 63 at 125:3-12.) The Court finds that Plaintiffs have provided a reasonable, good-faith basis for their estimate that that approximately 60 individuals fall within their proposed class definition, as to both Defendants. That number is large enough to satisfy the numerosity requirement.

2. Commonality

Next, Plaintiffs must identify that their complaint raises "questions of law or fact common to the class." Minn. R. Civ. P. 23.01(b). "The threshold for commonality is not high and requires only that the resolution of the common questions affect all or a substantial number of class members." *Streich,* 399 N.W.2d at 214. "[A] court must consider whether the generalized evidence will prove or disprove an element on a simultaneous, class-wide basis that would not require examining each class member's individual position." *Lewy,* 650 N.W.2d at 455. The commonality requirement of Rule 23.01 is distinct from the inquiry

under Rule 23.02(c) regarding whether common issues of law or fact would predominate over questions affecting only individual members. *See In re Hartford Sales Practices Litig.*, 192 F.R.D. 592, 603 (D. Minn. 1999). To satisfy the commonality requirement under Rule 23.01, a party need only show that "the legal question linking the class members is substantially related to the resolution of the litigation." *DeBoer v. Mellon Mortgage Co.,* 64 F.3d 1171, 1174 (8th Cir. 1995) (citations and quotation marks omitted).

Imeriti spends much of its briefing on the Rule 23.01(b) commonality requirement arguing that Plaintiffs' claims against Imeriti are false and unsupported by evidence. However, "[w]hen considering a motion for class certification, a court need not ask whether the plaintiff or plaintiffs have stated a cause of action or will ultimately prevail on the merits, but rather whether the requirements of Rule 23 are met." *City of Farmington Hills Employees Ret. Sys. v. Wells Fargo Bank, N.A.*, 281 F.R.D. 347, 352 (D. Minn. 2012) (citing *Beckmann v. CBS, Inc.,* 192 F.R.D. 608, 613 (D. Minn. 2000)) (internal quotations omitted).

Imeriti also argues that any evidence offered by Plaintiffs to prove Imeriti's alleged negligence or aiding and abetting of fraud would be time-, client-, and interaction-specific. But the possibility of individualized evidence on common claims does not defeat a Rule 23.01(b) showing. *See In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions,* 148 F.3d 283, 310 (3d Cir. 1998) (affirming a finding of commonality where all of plaintiffs' claims stemmed from defendant's alleged encouragement of fraudulent sales practices). Plaintiffs need only show that the course of action giving rise to their cause of action affects all putative class members, and that at least one of the elements of that cause of action is shared by all of the putative class members. The Court finds that Plaintiffs have sufficiently shown a nexus between the underlying issues of law and of fact to satisfy the commonality

requirement of Rule 23.01(b). Plaintiffs all claim to have been injured by Defendants' failure to notice and stop Meadows' illegal behavior during his years of churning activities, despite what Plaintiffs characterize as "red flags" which they say should have prompted Defendants to take action against Meadows much earlier than they did. Given the low threshold for a commonality showing at the Rule 23.01(b) stage, the Court finds Plaintiffs have satisfied this prerequisite. Imeriti's arguments that its defenses of comparative fault and statute of limitations will require individualized proof do not detract from the commonality of Plaintiffs' claims, and are better suited for analysis at the Rule 23.02(c) stage.

3. Typicality

The third prerequisite, typicality, focuses on whether the "claims or defenses of representative parties are typical of the claims or defenses of the class." Minn. R. Civ. P. 23.01(c). This requirement is met "when the claims of the named plaintiffs arise from the same event or are based on the same legal theory as the claims of the class members." *Lewy*, 650 N.W.2d at 453. A "strong similarity of legal theories" satisfies the typicality requirement even if substantial factual differences exist. *Lockwood Motors, Inc. v. Gen. Motors Corp.*, 162 F.R.D. 569, 575 (D. Minn. 1995); *Alpern v. UtiliCorp United, Inc.,* 84 F.3d 1525, 1540 (8th Cir. 1996) ("Although factual differences may exist amongst the claims, such differences will not preclude class certification when the claims arise from the same course of conduct and gives rise to the same legal or remedial theories."). This requirement ensures that the class representatives will fully represent and prosecute the case to benefit the entire class, and not just themselves. *See In re Prudential Ins. Co. of Am Sales Practices Litig.*, 148 F.3d at 285.

Plaintiffs' claims against Imeriti, the only Defendant to challenge typicality, include negligence and aiding and abetting fraud. Imeriti argues that within these claims, individual issues predominate, therefore undermining typicality. However, the Named Plaintiffs' claims are typical of the putative class, because they rest on identical legal theories and they arise from the same course of conduct, namely, Imeriti's continued processing of Meadows' annuity applications and surrenders over the years despite its alleged awareness of his churning activities. The Named Plaintiffs have not alleged any unique legal claims that are inapplicable to others in the putative class. Therefore, the Court finds Plaintiffs have met their burden to establish that their claims are typical of the proposed class claims.

4. Fair and Adequate Protection

Finally, Rule 23.01(d) requires the Court to find that the class representatives will "fairly and adequately protect the interests of the class." Minn. R. Civ. P. 23.01(d). This prerequisite has two components: (a) the class representatives' counsel must be qualified, experienced, and generally able to conduct litigation, and (b) the class representatives' interests must not be antagonistic to those of the class. *In re Workers' Comp.,* 130 F.R.D. 99, 107 (D. Minn. 1990); *see also Ario v. Metro. Airports Comm'n*, 367 N.W.2d 509, 513 (Minn. 1985) (typicality requirement is met where "the representative parties have an interest compatible with that of the class sought to be represented").

Allianz does not dispute either component of Rule 23.01(d). Imeriti does not dispute the competence of proposed class counsel, but does dispute the second component, arguing that the Named Plaintiffs "have not competently prosecuted this lawsuit, nor have they demonstrated that they understand their claims." (Imeriti's Memorandum of Law in Opposition of Motion for Class Certification, filed on November 11, 2018 ["Imeriti's

Memo"], at 34.) Plaintiffs respond that the Named Plaintiffs have spent significant effort gathering information, providing documents and other information, attending depositions, and attending mediation sessions. (*See* Conners Decl. ¶ 50.) "Class representatives in complex cases are not required to have the detailed level of firsthand knowledge of facts or law." *Lewy*, 650 N.W.2d at 454 (citing *In re Workers' Comp.,* 130 F.R.D. at 107-08). Further, "[g]eneral knowledge and participation in discovery are enough to demonstrate representational adequacy." *Id*. at 455 (citing *Schwartz v. Sys. Software Assocs., Inc.,* 138 F.R.D. 105, 107–08 (N.D. Ill. 1991)). The Court finds that the Named Plaintiffs have interests compatible with other members of the proposed class, and that they have shown general knowledge of the litigation sufficient to meet the Rule 23.01(d) requirement.

B. Rule 23.02(c) Requirements - Predominance

In addition to satisfying the requirements of Rule 23.01, Plaintiffs must also satisfy one of the three categories described in Rule 23.02 before the proposed class may be certified. *See Peterson v. BASF Corp.,* 618 N.W.2d 821, 826 (Minn. App. 2000) ("[o]nce appellants have satisfied the four prerequisites of rule 23.01, they must show that their proposed class meets one of the requirements of Minn. R. Civ. P. 23.02"), *review denied* (Minn. Jan. 26, 2001). Plaintiffs contend that they meet the requirements of both Rule 23.02(b) (injunctive relief is appropriate for class as a whole) and Rule 23.02(c) (questions of law and fact common to the class predominate over individual questions). The Court will address these subdivisions of Rule 23.02 in reverse order.

Under Rule 23.02(c), a class action may be maintained if it meets two conditions. First, common questions must predominate over individual issues, and second, the class action must be superior to other available methods for the fair and efficient adjudication of

the controversy. Minn. R. Civ. P. 23.02(c). In opposing class certification, Defendants focus primarily on the predominance requirement. They also make brief arguments to contest the superiority requirement, which the Court addresses in a later section of this Order.

"No bright-line rules determine whether common questions predominate." *Lewy*, 650 N.W.2d at 455 (citing *Lockwood Motors*, 162 F.R.D. at 580). Rather, the court "must consider whether the generalized evidence will prove or disprove an element on a simultaneous, class-wide basis that would not require examining each class member's individual position." *Id*. A class action is appropriate when common questions representing the significant aspect of a case can be resolved in a single action. *Id*. (citing *In re Workers' Comp.*, 130 F.R.D. at 108-09). The common question need not be dispositive of the entire action, because "predominance" as used in the rule is not automatically equated with "determinative." *Id*. "[P]redominance will be found where generalized evidence may prove or disprove elements of a claim." *Id*. (citing *In re Hartford Sales Practices Litig.,* 192 F.R.D. 592, 604 (D. Minn. 1999)). Therefore, the Court looks to the elements necessary to recover on each of the claims asserted by Plaintiffs against Defendants. To predominate, common issues must constitute a significant part of the individual cases. *Streich,* 399 N.W.2d at 217.

1. Plaintiffs' Consumer Fraud Claims Against Allianz

Plaintiffs assert four consumer fraud claims against Allianz, alleging that Allianz violated the Minnesota Consumer Fraud Act, Minn. Stat. § 325F.69 ("MCFA"); the Minnesota False Statement in Advertising Act, Minn. Stat. § 325F.67 ("MFSAA"); the Minnesota Uniform Deceptive Trade Practices Act, Minn. Stat. § 325D.44 ("MUDTPA"); and the Minnesota Deceptive Acts Perpetrated Against Senior Citizens and Disabled Persons Act, Minn. Stat. § 325F.71 ("Disabled Persons Act") (collectively, the "consumer

fraud claims"). These statutes "are commonly read together" to prohibit the use of deceptive trade practices. *Liabo v. Wayzata Nissan, LLC*, 707 N.W.2d 715, 724 (Minn. Ct. App. 2006). They require Plaintiffs to show that Allianz made a false or misleading statement that caused Plaintiffs' damages, and that a remedy would confer a public benefit. *Id.*

Allianz opposes class certification of Plaintiffs' consumer fraud claims on two primary grounds: (1) no common evidence can establish that a finding for Plaintiffs will confer a public benefit; and (2) Plaintiffs have not demonstrated that issues relating to reliance and causation are susceptible to proof on a class-wide basis, or that class-wide issues predominate over issues affecting individual class members.

a. Public Benefit

In order to prevail under the MCFA, MFSAA, and Disabled Persons Act, Plaintiffs must do so under the "Private Remedies" section of the Attorney General Statute, Minn. Stat. § 8.31, subd. 3a (the "Private AG Statute"). "[T]he Private AG Statute applies only to those claimants who demonstrate that their cause of action benefits the public." *Ly v. Nystrom*, 615 N.W.2d 302, 314 (Minn. 2000). When deciding whether a public benefit exists, Minnesota courts consider the degree to which a defendant's misrepresentations affected the public, the form of the misrepresentations, the relief sought by the plaintiff, and the ongoing nature of the misrepresentations. *See Khoday v. Symantec Corp.*, 858 F.Supp.2d 1004, 1017 (D. Minn. 2012).

Plaintiffs assert that the public benefit analysis focuses primarily on Defendants' conduct, "the proof of which is common to all class members and will not vary between individual class members." (Plaintiffs' Memo at 21.) The conduct Plaintiffs seek to challenge includes Allianz's alleged misrepresentations that it prioritizes and ensures the

safety of its clients' money. Plaintiffs claim to have been misled regarding Allianz's vetting, its internal investigations of its agents, and the alleged safeguards in place to protect its clients. The Court finds that Plaintiffs can establish the following factors by evidence common to all class members: the degree to which Allianz's representations affected the public; the form of Allianz's representations, and the ongoing nature of Allianz's representations. Much of Defendants' opposition identifies potential factual weaknesses in Plaintiffs' claims. Under *Whitaker*, 764 N.W.2d at 638, the Court must resolve factual disputes relevant to Rule 23 requirement, and find that Plaintiffs meet the certification requirements by a preponderance of the evidence. *Id.* To satisfy that standard here, the Court need not find that Plaintiffs will ultimately prevail at trial, but rather that they have put forth sufficient facts to support a finding that their common issues, if resolved in their favor, would confer a public benefit. The Court finds that Plaintiffs have met this burden. If the common issues are resolved in Plaintiffs' favor, the public will benefit from the decision regarding Defendants' responsibility to safeguard customers against fraudulent agents such as Meadows.

b. Reliance, Causation, Damages, and Predominance

The core of the parties' dispute over class action certification is whether the issues of reliance, causation, and damages can be proven with generalized evidence on a class-wide basis, or whether evidence involving individual class members will overwhelm the common issues. Allianz argues that proving Plaintiffs' statutory consumer fraud claims will require plaintiff-by-plaintiff and transaction-by-transaction inquiries. Allianz further argues that highly individualized issues relating to damages predominate. The Court disagrees. As Plaintiffs argue, the key issues of fact and law proposed for class treatment can be addressed

through common evidence. Although some individualized issues exist, they do not predominate over the common issues. Plaintiffs correctly note that the core of Allianz's alleged liability is based on uniform underlying misrepresentations regarding the information provided in their marketing materials.

In interpreting the Private AG Statute as applied to Minnesota's consumer fraud statutes, the Minnesota Supreme Court in *Group Health Plan, Inc. v. Philip Morris Inc.*, 621 N.W.2d 2 (Minn. 2001), acknowledged that causation is a necessary element of an action to recover damages. The Court went on to hold that:

> [W]here the plaintiffs' damages are alleged to be caused by a lengthy course of prohibited conduct that affected a large number of consumers, the showing of reliance that must be made to prove a causal nexus *need not include direct evidence of reliance by individual consumers of defendants' products*. Rather, the causal nexus and its reliance component may be established by other direct or circumstantial evidence that the district court determines is probative as to the relationship between the claimed damages and the alleged prohibited conduct.

Id. at 14 (emphasis added). The *Group Health* Court reasoned that "[t]o impose a requirement of proof of individual reliance in the guise of causation would reinstate the strict common law reliance standard that we have concluded the legislature meant to lower for these statutory actions." *Id*. at 15.

Allianz argues that this case is more akin to *In re St. Jude Med., Inc.*, 522 F.3d 836, 837 (8th Cir. 2008), where a group of prosthetic heart valve recipients moved for class certification in their suit against St. Jude under the Minnesota consumer fraud statutes after their implanted heart valves were recalled. Reversing class certification, the Eighth Circuit found that "it is clear that resolution of St. Jude's potential liability to each plaintiff under the consumer fraud statutes will be dominated by individual issues of causation and reliance." *In re St. Jude Med., Inc.*, 522 F.3d at 840. But this case is distinguishable. There, St.

Jude presented evidence that a number of the heart valve recipients *never* received any material representation about the heart valve. Focusing on testimony by Robert Berthiaume, Allianz argues that his admission that he "[could not] recall" receiving written materials from Allianz is direct evidence that he did not rely on Allianz's alleged misrepresentation. (Declaration of Larry E. LaTarte, filed November 9, 2018 ["LaTarte Decl."], Ex. C at 89:8-12.) The Court disagrees. A majority of the Named Plaintiffs, including Mr. Berthiaume's wife, Bonnie Berthiaume, testified that they had reviewed Allianz's marketing materials. (*See* Conners Decl., Ex. 38 at 53:2-24; Ex. 39 at 85:12-86:20; Ex. 54 at 53:15-2l; Ex. 55 at 54:7-13, 108:3-14; Ex. 56 at 61:16-62:8.) Further, Allianz has not negated the common sense inference that its annuity marketing materials may have persuaded the class members of the safety of their investments. *See City of Farmington Hills Employees Ret. Sys.*, 281 F.R.D. at 356. The impact of Allianz's representations regarding its annuities was likely the same for all class members—namely, to instill a belief about the safety of their investments. *Id*.

As far as damages are concerned, the fact that individual plaintiffs may seek varying amounts of damages does not necessarily mean that individual issues predominate over common issues. In *Lewy*, the question of whether individual damages issues should preclude class certification arose in the context of a proposed class of investors, each of whom would require a different damages calculation, and class certification was held to be proper:

> Courts frequently grant class certification despite individual differences in class members' damages. *See White v. NFL*, 822 F.Supp. 1389, 1403–04 (D.Minn.1993); *B & B Inv. Club v. Kleinert's Inc.*, 62 F.R.D. 140, 144 (E.D.Pa.1974); *In re Memorex Sec. Cases*, 61 F.R.D. 88, 103 (N.D.Cal.1973); *Minnesota v. U.S. Steel Corp.*, 44 F.R.D. 559, 567 (D.Minn.1968). IAI contends that it will require a minimum of eight hours for damage calculations for each plaintiff and that that length of time should foreclose the possibility of a class action. The trustees dispute that estimate. But the necessity of calculating separate damages does not destroy the appropriateness of the class-action method. *See U.S. Steel*, 44 F.R.D. at 567. If IAI has breached a fiduciary duty

> to the class, then calculating the damages for all the affected shareholders in one action makes more sense than forcing each shareholder to bring a separate action just to split the damage-calculation time.

650 N.W.2d at 456-57; *see also City of Farmington Hills Employees Ret. Sys.*, 281 F.R.D. at 353 ("individual questions with respect to damages do not defeat class certification"). Likewise here, if Defendants have violated consumer fraud laws, thereby leaving Plaintiffs vulnerable to Meadows' allegedly unlawful churning activities, then it makes more sense to calculate whatever damages may be due to such violations in one action, instead of splitting them up into a multitude of separate actions.

The Court concludes that Plaintiffs' statutory consumer fraud claims can be proven or disproven on a class-wide basis through the use of generalized evidence. Because Plaintiffs can rely upon direct and circumstantial evidence to prove reliance on a class-wide basis, common questions predominate over questions affecting individual class members. Plaintiffs can prove a causal nexus on a class-wide basis through direct and circumstantial evidence that policyholders were misled by Allianz's marketing materials to their detriment. This evidence could include consumer testimony, expert testimony, consumer surveys, and market research. *Mooney v. Allianz Life Ins. Co. of N. Am.*, CIV.06-545 ADM/FLN, 2008 WL 2952055, at *2 (D. Minn. July 28, 2008). Therefore, the Court finds that class certification of Plaintiffs' consumer fraud claims is appropriate.

2. Plaintiffs' Negligence Claims Against Allianz and Imeriti

Plaintiffs assert negligence claims against both Allianz and Imeriti. Negligence is generally defined as the failure to exercise such care as persons of ordinary prudence usually exercise under the circumstances. *Flom v. Flom,* 291 N.W.2d 914, 916 (Minn. 1980). "The essential elements of a negligence claim are: (1) the existence of a duty of care; (2) a breach

of that duty; (3) an injury was sustained; and (4) breach of the duty was the proximate cause of the injury." *Lubbers v. Anderson*, 539 N.W.2d 398, 401 (Minn. 1995).

Defendants oppose class certification of Plaintiffs' negligence claim on two primary grounds. First, they argue Plaintiffs have not demonstrated that issues relating to breach of duty are susceptible to proof on a class-wide basis or that class-wide issues predominate over issues affecting individual class members. Second, they argue that Plaintiff-specific comparative negligence issues defeat predominance. Imeriti adds a third argument, contending that individualized inquiries will be required to determine the timeliness of each individual class member's claims. The Court considers each of these arguments in turn.

a. Breach of Duty and Predominance

Plaintiffs contend each Defendant breached a duty of care by failing to detect and stop Meadows' illegal churning activities, which went on for many years, and as a result, members of the class were harmed. Courts generally consider the following factors when determining whether a defendant owed a duty of care: "(1) the foreseeability of harm to the plaintiff, (2) the connection between the defendant's conduct and the injury suffered, (3) the moral blame attached to the defendant's conduct, (4) the policy of preventing future harm, and (5) the burden to the defendant and community of imposing a duty to exercise care with resulting liability for breach." *Domagala v. Rolland*, 805 N.W.2d 14, 26 (Minn. 2011). The duty to exercise reasonable care arises from the probability or foreseeability of injury to the plaintiff. *Id*.

Allianz argues that determining whether it breached a duty to various class members will necessitate individualized inquiries, because "for each annuity transaction with respect to which Allianz was allegedly negligent, the Plaintiff who engaged in that transaction must

establish that it was not suitable." (Allianz's Memorandum of Law in Opposition of Motion for Class Certification, filed on November 9, 2018 ["Allianz's Memo"], at 24.) Imeriti similarly argues that the dissimilarities between Imeriti's involvements with respect to each Plaintiff will impede the generation of common evidence.

The Court disagrees. Under the negligence theory advanced by Plaintiffs, Allianz and Imeriti had a duty to exercise reasonable care, and they allegedly breached that duty when: (1) Allianz and Imeriti became aware of facts indicating that Meadows was churning annuity policies; and (2) failed to warn Plaintiffs of Meadows' fraudulent churning scheme; but instead (3) continued to process frequent annuity applications and surrenders for Meadows' clients. Plaintiffs argue that a reasonable person should expect that continuing to process sales and surrenders requested by an agent known to be acting fraudulently, and choosing not to disclose the fraud to regulators or the agent's clients, could cause injury to that agent's clients. Contrary to Allianz's assertion, Plaintiffs need not present evidence that each individualized annuity transaction presented by Meadows was financially unsuitable. Instead, if Plaintiffs can prove the existence of the above three prerequisites, Plaintiffs can show negligence on behalf of Allianz and Imeriti. As such, *Rothwell v. Chubb Life Ins. Co. of Am.*, 191 F.R.D. 25 (D.N.H. 1998), is inapposite. There, the cause of action was breach of fiduciary duty, necessitating each plaintiff to prove: (1) the existence of a fiduciary relationship; and (2) that policy replacement was not beneficial to his or her interests. *Id*. at 32. The type of individualized inquiries that rendered class certification inappropriate in *Rothwell* therefore do not exist here.

Class members will rely upon many of the same factual allegations to establish liability, and thus, the Court finds that common evidence will be used to try to prove that

Defendants acted negligently. For this inquiry, the actions of Allianz and Imeriti will be the focus, including when each company knew or should have known of Meadows' fraudulent sales practices, their subsequent processing of Meadows' annuity applications and surrenders, and their failure to warn Meadows' customers.

The Court notes that much of Defendants' opposition identifies potential factual weaknesses in Plaintiffs' claims. The question at class certification is not whether the plaintiffs have already proven their claims through common evidence. Rather, it is whether questions of law or fact capable of resolution through common evidence predominate over individual questions. *Blades v. Monsanto Co.*, 400 F.3d 562, 566-67 (8th Cir. 2005). The potential weaknesses on the merits of Plaintiffs' claims as identified by Defendants do not mean that the individual evidence on Plaintiffs' claims will overwhelm the common evidence. The Court finds that a preponderance of the evidence supports a finding that the common issues presented by Plaintiffs' claims predominate over individual issues.

b. Comparative Fault Defenses

In a negligence action, a plaintiff cannot recover from a defendant if the plaintiff's negligence is equal to or greater than that of the defendant. Minn. Stat. § 604.01. *See also Tester v. Am. Standard, Inc.*, 590 N.W.2d 679, 680 (Minn. Ct. App. 1999). Defendants argue that it will be impossible to determine whether each Defendant was more negligent than each Plaintiff without engaging in individualized analyses of comparative fault, and therefore, individual questions will overwhelm any common evidence at trial. Imeriti argues that "many of the Plaintiffs blindly trusted Meadows and were comparatively negligent." (Imeriti's Memo, at 19.) Allianz asserts that the following questions would be relevant to their comparative negligence defense: "Did [each Plaintiff] ask Meadows any questions

about the transaction? Did [each Plaintiff] sign blank documents or provide inaccurate information? Was the surrender and replacement suitable?" (Allianz's Memo, at 27.)

"Courts traditionally have been reluctant to deny class action status under Rule 23(b)(3) simply because affirmative defenses may be available against individual members." *Smilow v. Sw. Bell Mobile Sys., Inc.*, 323 F.3d 32, 39 (1st Cir. 2003). In fact, courts have held that affirmative defenses raise common issues that are appropriately tried using the class action device. *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 962 F. Supp. 450, 512 (D.N.J. 1997) (citing *In re "Agent Orange" Prod. Liab. Litig.,* 100 F.R.D. 718, 723 (E.D.N.Y.1983) ("[c]ertification would be justified if only to prevent relitigating [affirmative] defenses over and over")).

Allianz cites *Smith v. Brown & Williamson Tobacco Corp.*, 174 F.R.D. 90 (W.D. Mo. 1997), for the proposition that "[b]ecause a finding of negligence cannot be made without consideration of the plaintiff's comparative fault, the apparent general issue of negligence is overwhelmed by individual issues." *Id*. at 96-97. There, a group of smokers filed suit against a cigarette manufacturer, asserting various theories of recovery for injuries allegedly incurred from smoking cigarettes. Plaintiffs sought to certify a class of over 2000 members. Here, Plaintiffs seek to certify a much smaller class of around 60 individuals. Practically, Defendants' comparative fault defense will be much less arduous to present, given the relatively compact size of the proposed class.

Further, the defenses asserted against the Named Plaintiffs are related to the class claims and are typical of those that Defendants intend to assert against the class. *See Schojan v. Papa Johns Int'l, Inc.*, 303 F.R.D. 659, 670 (M.D. Fla. 2014). The Court therefore finds that the common questions on liability predominate over these individual considerations and

make class-wide adjudication appropriate, notwithstanding the possible individualized proof that may be offered on affirmative defenses.

c. Statute of Limitations and Fraudulent Concealment

Imeriti also argues that its potentially claim-dispositive statute of limitations defenses will depend on individualized facts related to timing and knowledge. Imeriti contends that any claims arising more than four years before this case was first commenced will require proof of fraudulent concealment to be maintained. *See* Minn. Stat. § 541.05, subd. 1(4). To prove fraudulent concealment as a basis for tolling a statute of limitation, the plaintiff must show that the tortfeasor acted in a way that concealed plaintiff's potential cause of action, and the concealment could not have been discovered by reasonable diligence. *Sletto v. Wesley Const., Inc.*, 733 N.W.2d 838, 846 (Minn. Ct. App. 2007).

In predicting that Plaintiffs will argue that fraudulent concealment tolls the statute of limitation, Imeriti contends the determination of each individual claim's timeliness will depend on Plaintiff-specific inquiries, including whether or not each Plaintiff knew about the surrender penalties. Plaintiffs respond that evidence showing Imeriti continued to process and facilitate Meadows' transactions after it knew or should have known about Meadows' fraud is common evidence of fraudulent concealment. *See Minnesota Laborers Health & Welfare Fund v. Granite Re, Inc.*, 844 N.W.2d 509, 514 (Minn. 2014) ("[a]ny concealment by positive affirmative act and not mere silence is itself fraudulent so as to prevent the statute from running.").

The Court finds that common issues predominate, and that individual questions which may arise regarding a statute of limitations or fraudulent concealment do not defeat class certification. "As long as a sufficient constellation of common issues binds class

members together, variations in the sources and application of statutes of limitations will not automatically foreclose class certification under Rule 23(b)(3)." *Waste Management Holdings, Inc. v. Mowbray,* 208 F.3d 288, 296 (1st Cir. 2000); 1 Herbert H. Newberg, *Newberg on Class Actions,* § 4.26 at 4–104 (3d ed. 1992) ("[c]hallenges based on the statute of limitations, fraudulent concealment, releases, causation, or reliance have usually been rejected and will not bar predominance satisfaction because those issues go to the right of a class member to recover, in contrast to underlying common issues of the defendant's liability"). Further, individual issues related to fraudulent concealment may be addressed in the damages phase of the litigation, if bifurcation becomes appropriate. *In re Potash Antitrust Litig.*, 159 F.R.D. 682, 699 (D. Minn. 1995) (citing *Greenhaw v. Lubbock County Beverage Ass'n,* 721 F.2d 1019, 1030 (5th Cir. 1983)).

3. Plaintiffs' Aiding and Abetting Claims against Allianz and Imeriti

Plaintiffs assert aiding and abetting fraud claims against both Allianz and Imeriti. To prevail on an aiding and abetting claim, a plaintiff must prove three elements: (1) the primary tortfeasor committed a tort that caused injury to the plaintiff, (2) the defendant must have known that the primary tortfeasor's conduct constituted a breach, and (3) the defendant must have substantially assisted or encouraged the primary tortfeasor in the achievement of the breach. *Witzman v. Lehrman, Lehrman & Flom*, 601 N.W.2d 179, 187 (Minn. 1999).

Defendants argue generally that class certification on the aiding and abetting claims would require individualized inquiries to prove (1) as to each plaintiff, that Meadows' actions were fraudulent, and (2) that Defendants had knowledge of each allegedly fraudulent transaction. Imeriti also argues that its affirmative defense based on the statute of

frauds as to individual claims further demonstrates a lack of commonality. The Court analyzed the affirmative defense argument fully above, and will not repeat its analysis here.

In *In re Endotronics*, CIV. 4-87-130, 1988 WL 9250, at *7 (D. Minn. Jan. 28, 1988), the Court found that an aiding and abetting claim could be proven on a class-wide basis, stating:

> The overwhelming weight of authority holds that repeated misrepresentations of the sort alleged here satisfy the common question requirement. [When c]onfronted with a class of purchasers allegedly defrauded over a period of time by similar misrepresentations, courts have taken the common sense approach that the class is united by a common interest in determining whether a defendant's course of conduct is in its broad outlines actionable . . . and that the issue may profitably be tried in one suit.

Id. (citing *Blackie v. Barrack,* 524 F.2d 891, 902 (9th Cir.1975) (quotation marks omitted)). The question here, then, is whether the claim that Allianz and Imeriti aided and abetted Meadows' fraud "may profitably be tried in one suit."

Plaintiffs allege that Meadows defrauded his customers by "luring them into selling their annuities so that he could fund his Ponzi scheme." (Plaintiff's Reply Memorandum of Law in Support of Motion for Class Certification, filed on November 11, 2018 ["Plaintiffs' Reply"], at 4.) This scheme is common to all proposed class members. While the details of each annuity transaction may differ slightly from plaintiff to plaintiff, "these differences do not change the uniform nature of the basic misrepresentation that Plaintiffs allege." *In re Lutheran Broth. Variable Ins. Prod. Co. Sales Practices Litig.*, 99-MD-1309(PAM/JGL), 2004 WL 909741, at *2 (D. Minn. Apr. 28, 2004). Because Meadows' fraud was allegedly perpetrated through this "common scheme of deception," individualized inquiries into Meadows' actions with respect to each plaintiff are not necessary. *Id*.

Allianz argues that in order for Plaintiffs to prove that Allianz had knowledge of Meadows' fraud, they "must prove that knowledge with respect to each annuity transaction in which each Plaintiff engaged." (Allianz's Memo, at 29.) The Court disagrees. In *Fed. Deposit Ins. Corp. v. First Interstate Bank of Des Moines, N.A.*, 885 F.2d 423 (8th Cir. 1989), the Court, in considering an aiding and abetting claim, found that Plaintiff could prove the "knowledge" factor by showing that Defendant "had a general awareness of its overall role" in the fraudulent scheme, and that "such knowledge could come through circumstantial evidence." *Id*. at 431. As such, proving an aiding and abetting claim does not require the showing of individualized knowledge as Allianz asserts. Plaintiffs can instead present common circumstantial evidence in their effort to prove that Allianz possessed knowledge of Meadows' deceptive conduct. This can be done through class-wide proof.

C. Rule 23.02(c) Requirements - Superiority

To satisfy Rule 23.02(c), not only must common questions predominate, but the class action must be superior to other available dispute-resolution methods for this particular case. Factors to consider in a superiority analysis include "manageability, fairness, efficiency, and available alternatives." *Streich,* 399 N.W.2d at 218. The class action is most often needed in litigation in which individual claims are small. *Forcier v. State Farm Mut. Auto. Ins. Co.,* 310 N.W.2d 124, 130 (Minn. 1981). When collective adjudication promises substantial efficiency benefits or makes it possible for class members with small claims to enforce the substantive law, a class action is superior to other available methods for the fair adjudication of the controversy. *Lewy*, 650 N.W.2d at 457 (citations omitted).

The Court finds that a class action is the most efficient and effective way to adjudicate Plaintiffs' claims. The record discloses no unusual difficulties in management or

notification of class members, since Allianz possesses records for each of Meadows' former clients who purchased an Allianz product. The parties have not indicated that other litigation has been commenced against Defendants with respect to any of Meadows' clients in this or any other forum. Minimizing the number of individual lawsuits filed on this basis promotes the interests of judicial economy and efficiency. Concentrating the litigation of these claims in one forum is desirable and will help avoid inconsistent adjudications.

Regarding the calculation of damages, Defendants assert that Plaintiffs have failed to meet their burden of showing that damage calculations can be made on common evidence. Plaintiffs counter that a mathematical formula can be used to determine damages on a class-wide basis. "At class certification, plaintiff must present a likely method for determining class damages, though it is not necessary to show that his method will work with certainty at this time." *Chavez v. Blue Sky Natural Beverage Co.*, 268 F.R.D. 365, 379 (N.D. Cal. 2010). "Calculations need not be exact, but at the class-certification stage . . . any model supporting a plaintiff's damages case must be consistent with its liability case . . . ." *Comcast Corp. v. Behrend*, 569 U.S. 27, 35 (2013) (internal citation and quotation marks omitted). The Supreme Court has also held that certification is proper "when one or more of the central issues in the action are common to the class and can be said to predominate . . . even though other important matters will have to be tried separately, such as damages . . . ." *Tyson Foods, Inc. v. Bouaphakeo*, ___ U.S. ___, 136 S.Ct. 1036, 1045 (2016) (citation omitted). The Court finds that although Plaintiffs' proposed damages process requires individual inquiry, it will not overwhelm the liability and damages issues capable of class-wide resolution. The Court therefore concludes that damages are sufficiently measurable on a class-wide basis, and that individual damages issues will not predominate.

In sum, because this case presents no unusual management problems and will provide representation to an otherwise unrepresented class, the facts compel certification of a class action as the superior method of adjudication.

D. Rule 23.02(b) – Injunctive Relief Must Be Primary Focus

Plaintiffs also seek certification under Rule 23.02(b), which provides for class certification where "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Minn. R. Civ. P. 23.02(d). Plaintiffs devote only one paragraph of their opening brief to their request to certify a class for purposes of injunctive relief, arguing that because of their claims that Allianz continues to make false representations regarding the safety of clients' money and that it continues to fails to implement policies and procedures to protect clients' investments, injunctive relief would be appropriate for the class as a whole. (Plaintiffs' Memo at 19.) Allianz responds that certification of an injunctive relief class "is proper only when the primary relief sought is declaratory or injunctive." *In re St. Jude Med., Inc.*, 425 F.3d 1116, 1121 (8th Cir. 2005).

The Court finds that Plaintiffs have not shown that injunctive relief is the primary focus of their claim. The principal relief sought by Plaintiffs is money damages for past churning transactions involving Meadows, who is no longer an agent of either Defendant, not prospective injunctive relief for unidentified clients of other unnamed agents. This is not a case where, because Plaintiffs seek injunctive relief as a precursor to their claims for money damages, a hybrid class certified under both Rules 23.02(b) and 23.02(c) may be appropriate. *See, e.g., Beckmann v. CBS, Inc.*, 192 F.R.D. 608, (D. Minn. 2000) (hybrid class

certified in employment discrimination case brought on behalf of class of female technicians claiming their employer was responsible for a hostile work environment and sex discrimination). The facts alleged in the Amended Complaint center around Sean Meadows' misdeeds, and the class is defined as all of the clients to whom Meadows sold and resold Allianz annuities, in a churning scheme, which went on undetected by either Allianz or Imeriti for many years. When Meadows' scheme eventually came to light, he was terminated by Defendants, prosecuted, and is now serving time for his misdeeds. Meadows poses no further risk to any client served by either Defendant. Plaintiffs have not identified any evidence of an ongoing failure to detect other churning schemes by either Defendant that would warrant the conclusion that injunctive relief is the primary focus of their complaint. Accordingly, the Court finds that this is not an appropriate case to certify a hybrid class under both subdivisions (b) and (c) of Rule 23.02.

E. Definition of Class

Plaintiffs offered one class definition in their Amended Complaint, and a different, broader one in their motion seeking class certification. A primary difference is Plaintiffs' attempt to add spouses who are named as beneficiaries of Allianz annuities or policies as members of the class. Defendants argue that attempting to expand a class definition through a memorandum in support of class certification is improper. *See Nerland v. Caribou Coffee Co., Inc.*, 564 F.Supp. 2d 1010, 1033 n.12 (D. Minn. 2007). Admittedly, the Court has discretion to redefine a proposed class in such a way as to allow a class action to be maintained. *See Zurn Pex Plumbing Prods. Liab. Litig.*, 267 F.R.D. 549, 558 (D. Minn. 2010), *aff'd*, 644 F.3d 604 (8th Cir. 2011). The Court's discretionary power does not, however, necessarily extend

to allow Plaintiffs unilaterally to alter the definition between their pleading and their motion for class certification, and Plaintiffs have cited no authority to suggest otherwise.

Defendants further argue that spouses have no standing to be included as class members, because beneficiaries lack any cognizable property right in an annuity until after the policyholder has died. Plaintiffs respond that the spouses who are named as beneficiaries have suffered a concrete injury, consisting of the loss of familial retirement assets. The Court finds that while it may redefine a class to allow a class action to proceed, Plaintiffs' attempt to add spouses to the class definition through their brief is not well-founded. To the extent the spouses are not policyholders, and are simply named as beneficiaries, they do not have a vested property right in the policy proceeds, because the policyholders may change their beneficiaries at any time.

The Court finds that the class definition should be based upon that set forth in Plaintiffs' Amended Complaint.

Defendants also object that Plaintiffs' class definition creates an improper "fail-safe" class, which is one "that cannot be defined until the case is resolved on its merits." *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 538 (6th Cir. 2012). Such a class improperly shields putative class members from an adverse judgment, because if the class wins, they win, but if the class loses, they are defined as being outside the class, and therefore their claims survive to be brought another day. Plaintiffs disagree that their definition creates a "fail-safe" class, and point out that no Minnesota case has ever applied the "fail-safe" doctrine to refuse class certification. The Court finds that whether or not the "fail-safe" doctrine applies in Minnesota cases, the definition as certified in this Order, based upon the definition in the Amended Complaint, does not run afoul of the "fail-safe" case law. The class members,

defined as those who purchased an Allianz annuity or other Allianz life insurance product from Sean M. Meadows and were defrauded of some or all of their investment, can be ascertained before the case is resolved on its merits. The definition does not depend upon a finding of liability on the part of either Allianz or Imeriti.

To the extent the Court has not approved an expansion of the class definition to include spouses of policyholders, a question arises as to which of the Named Plaintiffs should be appointed as class representatives. Allianz argues that Bonnie Berthiaume and Carole Lewis are not appropriate class representatives, as neither of them are policyholders in their own right. The Court agrees that it would not be proper to include as class representatives anyone who falls outside the class definition. Accordingly, the Court will appoint as class representatives all of the Named Plaintiffs except for Bonnie Berthiaume and Carole Lewis.

IV. Conclusion

Based on the analysis outlined above, Plaintiffs' motion for class certification, appointment of class representatives and appointment of class counsel is granted, on the terms set forth in this Order.

L.J.M.