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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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SHASTA LINEN SUPPLY, INC., on
behalf of themselves and all
others similarly situated,

CIV. NO. 2:16-00158 WBS AC

Plaintiffs,

v.

APPLIED UNDERWRITERS, INC.;
APPLIED UNDERWRITERS CAPTIVE
RISK ASSURANCE COMPANY, INC.;
CALIFORNIA INSURANCE COMPANY;
and APPLIED RISK SERVICES,
INC.,

Defendants.

PET FOOD EXPRESS LTD., and
ALPHA POLISHING, INC. d/b/a
GENERAL PLATING CO., on
behalf of themselves and all
others similarly
situated,

CIV. NO. 2:16-01211 WBS AC

Plaintiffs,

MEMORANDUM AND ORDER RE:
DEFENDANTS' MOTION TO DISMISS

v.

APPLIED UNDERWRITERS, INC.;
APPLIED UNDERWRITERS CAPTIVE
RISK ASSURANCE COMPANY, INC.;
CALIFORNIA INSURANCE COMPANY;

1 and APPLIED RISK SERVICES,
2 INC.,

3 Defendants.

4
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6 Plaintiffs Shasta Linen Supply, ("Shasta"); Pet Food
7 Express, Ltd. ("Pet Food"); and Alpha Polishing¹ (collectively
8 "plaintiffs") initiated these actions² against Applied
9 Underwriters Inc. ("AU"); Applied Underwriters Captive Risk
10 Assurance Company, Inc. ("AUCRA"); Applied Risk Services, Inc.
11 ("ARS"); and California Insurance Company, Inc. ("CIC")
12 (collectively "defendants")³ alleging that defendants
13 fraudulently marketed and sold a workers' compensation insurance
14 program to them and other employers in violation of California
15 and federal law. Before the court is defendants' Motion to
16 dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6).
17 (Defs.' Mot. to Dismiss (Docket No. 62).)

18 I. Factual and Procedural Background

19 California requires that all employers purchase
20 workers' compensation insurance coverage for employees that
21

22 ¹ The amended complaint in the Pet Food action added
23 Alpha Polishing, Inc., as a new plaintiff.

24 ² On July 6, 2017, the court entered an order
25 consolidating the actions for pre-trial purposes. (Shasta Docket
2:16-158 No. 59; Pet Food Docket 2:16-1211 No. 58.)

26 ³ AU is the parent company of AUCRA and ARS, and controls
27 CIC through another subsidiary. (SSAC ¶ 8, Ex. A, Ins. Comm'r's
28 June 20 Decision & Order ("Comm'r's Order") at 9-10 (Shasta
Docket No. 56-1).)

1 suffer injury or death due to an occupational accident. (Shasta
2 Second Amended Compl. ("SSAC") ¶ 3 (Shasta Docket No. 56); Pet
3 Food Amended Compl. ("PFAC") ¶ 3 (Pet Food Docket No. 54).) The
4 California Insurance Code also requires that all workers'
5 compensation insurance policy forms, rates, and rating plans be
6 filed for approval with the California Workers Compensation
7 Insurance Rating Bureau ("the Bureau") and approved by the
8 California Department of Insurance. (SSAC ¶ 22; PFAC ¶ 23; see
9 also California Insurance Code §§ 11658, 11735.)

10 Defendants allegedly marketed and sold a workers'
11 compensation insurance program under the names EquityComp and
12 SolutionOne (collectively "the program") to plaintiffs and other
13 California employers. (SSAC ¶ 29; PFAC ¶ 30.) Defendants filed
14 this policy with the Bureau and got approval from the Department
15 of Insurance. (SSAC ¶ 30; PFAC ¶ 31.) After the program's
16 policies took effect for the plaintiffs, defendants allegedly
17 required plaintiffs to sign a Reinsurance Participation Agreement
18 ("RPA"). (SSAC ¶¶ 28, 43; PFAC ¶¶ 29, 44.)

19 Plaintiffs allege that the RPA modified the terms of
20 the existing insurance policies, including the rates, causing
21 plaintiffs to incur significantly higher costs for the insurance
22 program than defendants had marketed. (SSAC ¶ 70; PFAC ¶ 74.)
23 Plaintiffs claim that defendants used the RPA to charge excessive
24 rates and additional fees to plaintiffs and other program
25 participants. Plaintiffs also allege that defendants
26 deliberately misrepresented the costs of the program in their
27 marketing materials to induce plaintiffs to rely on those costs
28 and enter the program. (SSAC ¶¶ 2, 5, 7; PFAC ¶¶ 2, 5, 7.)

1 Additionally, plaintiffs claim that the RPA's rates are
2 void because, among other things, defendants did not file the
3 rates with the Commissioner of the California Department of
4 Insurance ("the Commissioner") as required by California
5 Insurance Code § 11735.⁴ (SSAC ¶ 38; PFAC ¶ 39.) Defendants
6 concede the RPA was not filed or approved by the Department of
7 Insurance prior to its use. (SSAC ¶¶ 28, 34; PFAC ¶¶ 29, 35.)

8 On August 29, 2014, Shasta filed an administrative
9 appeal with the California Department of Insurance, challenging,
10 among other things, the legality of the RPA. (SSAC ¶ 8, Ex. A,
11 Comm'r's Order.) Shasta argued that the RPA was void as a matter
12 of law because defendants did not file the RPA with the
13 Commissioner thirty days prior to when it was to take effect, as
14 required by § 11735. (Id. at 2.)

15 On January 26, 2016, Shasta brought an action in this
16 court alleging fraud and unfair competition against defendants
17 for their marketing and sale of the insurance program and RPA.
18 (Shasta Compl. (Shasta Docket No. 1).) With respect to the RPA,
19 Shasta again argued that the RPA was void because defendants did
20 not file it with the Commissioner prior to it taking effect,
21 thereby violating § 11735. (Id. ¶ 3.) Shasta argued that
22 billing plaintiff under the void RPA constituted fraud and was an
23 unfair business practice. (Id. ¶ 4.) Defendants moved to
24 dismiss the complaint to the extent it relied on § 11735, arguing
25 that a rate is legal unless and until the Commissioner holds a
26 hearing and disapproves the rate, pursuant to § 11737. (Defs.'
27

28 ⁴ All statutes referenced are from the California Insurance Code unless stated otherwise.

1 June 13, 2016 Mot. to Dismiss at 6 (Shasta Docket No. 17).)

2 On June 20, 2016, the court granted defendants' motion
3 to dismiss to the extent Shasta relied on § 11735, stating that
4 "a rate that has not been filed as required by § 11735 is not an
5 unlawful rate unless and until the Commissioner conducts a
6 hearing and disapproves the rate." (June 20, 2016 Order ("June
7 20 Order") at 4 (Shasta Docket No. 30).) Because Shasta had not
8 alleged that the Commissioner had held a hearing and disapproved
9 the RPA, the court concluded that plaintiff did not plausibly
10 allege that the RPA was void. (Id.)

11 On the same day as the court's order of dismissal, the
12 Commissioner issued a Decision and Order in Shasta's
13 administrative case, holding that the RPA must be filed and
14 approved by the Commissioner pursuant to § 11735 before use.
15 (SSAC ¶ 8, Ex. A, Comm'r's Order.) Because defendants did not
16 file the RPA before it took effect, the Commissioner stated, the
17 "RPA is void as a matter of law." (Id.) Based on the
18 Commissioner's Order, Shasta filed a motion for reconsideration
19 of the June 20 Order granting the motion to dismiss. (Shasta
20 Docket No. 33.) The court denied Shasta's motion for
21 reconsideration, holding that the Commissioner's Order did not
22 control this court and that the court's previous June 20 Order
23 was not clearly erroneous. (Mem. and Order Re: Mot. for Recons.
24 (Shasta Docket No. 47).)

25 Pet Food filed a separate class action against
26 defendants in state court asserting claims for unfair
27 competition, rescission, declaratory relief, and fraud. The
28 action was removed to federal court on March 29, 2016. (Pet Food

1 Docket No. 1.) Defendants, as they had in the Shasta case, moved
2 to dismiss the Pet Food complaint to the extent it sought to
3 invalidate the RPA on the ground that it is an unfiled rate or
4 rating plan in violation of § 11735. (Pet Food Docket No. 15.)
5 The court denied defendants' motion to dismiss as moot because
6 Pet Food's complaint did not rely on § 11735. (Order Re: Mot. to
7 Dismiss (Pet Food Docket No. 35).)

8 On June 21, 2017, the plaintiffs in both actions filed
9 amended complaints that are nearly identical. The complaints
10 assert claims under the federal Racketeer Influence Corrupt
11 Organizations ("RICO") statute, 18 U.S.C. § 1962; under the
12 California Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code
13 § 17200; and for unjust enrichment.

14 II. Legal Standard

15 On a Rule 12(b)(6) motion, the inquiry before the court
16 is whether, accepting the allegations in the complaint as true
17 and drawing all reasonable inferences in the plaintiff's favor,
18 the plaintiff has stated a claim to relief that is plausible on
19 its face. See Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). "The
20 plausibility standard is not akin to a 'probability requirement,'
21 but it asks for more than a sheer possibility that a defendant
22 has acted unlawfully." Id. "A claim has facial plausibility
23 when the plaintiff pleads factual content that allows the court
24 to draw the reasonable inference that the defendant is liable for
25 the misconduct alleged." Id. Under this standard, "a well-
26 pleaded complaint may proceed even if it strikes a savvy judge
27 that actual proof of those facts is improbable." Bell Atl. Corp.
28 v. Twombly, 550 U.S. 544, 556 (2007).

1 III. Discussion

2 A. Racketeer Influenced and Corrupt Organizations Claim

3 To state a RICO claim, plaintiffs must allege (1) the
4 conduct of (2) an enterprise that affects interstate commerce (3)
5 through a pattern (4) of racketeering activity or collection of
6 unlawful debt. 18 U.S.C. § 1962(c). In addition, the conduct
7 must be the proximate cause of harm to the victim. Holmes v.
8 Sec. Inv'r Prot. Corp., 503 U.S. 258, 268 (1992). Defendants'
9 motion only challenges whether the complaints (1) sufficiently
10 plead an enterprise and (2) allege a specific intent to defraud
11 as required to plead mail and wire fraud as "racketeering
12 activity."

13 1. Enterprise

14 Pursuant to RICO, it is "unlawful for any person
15 employed by or associated with any enterprise engaged in . . .
16 interstate or foreign commerce, to conduct or participate,
17 directly or indirectly, in the conduct of such enterprise's
18 affairs through a pattern of racketeering activity." 18 U.S.C. §
19 1962(c). An "enterprise" is defined as "any individual,
20 partnership, corporation, association, or other legal entity, and
21 any union or group of individuals associated in fact although not
22 a legal entity." 18 U.S.C. § 1961(4). It may include "a group
23 of persons associated together for a common purpose of engaging
24 in a course of conduct." United States v. Turkette, 452 U.S.
25 576, 583 (1981).

26 To establish liability under § 1962(c), the plaintiff
27 "must allege and prove the existence of two distinct entities:
28 (1) a 'person'; and (2) an 'enterprise' that is not simply the

1 same 'person' referred to by a different name." Cedric Kushner
2 Promotions, Ltd. v. King, 533 U.S. 158, 161 (2001). Plaintiffs
3 define their enterprise, known as the AU RPA Enterprise, as an
4 "association-in-fact." Defendants do not challenge whether the
5 AU RPA Enterprise, as pled, satisfies the elements of an
6 associated-in-fact enterprise, but instead question whether
7 plaintiffs have been able to sufficiently allege distinctiveness
8 between the RICO persons and the enterprise.

9 The "enterprise" at issue consists of the four
10 corporate defendants themselves and five individuals associated
11 with those companies. (SSAC ¶ 73; PFAC ¶ 77.) A plaintiff may
12 name all members of an associated-in-fact enterprise as
13 individual RICO persons, River City Mkts., Inc. v. Fleming Foods
14 W., Inc., 960 F.2d 1458, 1461-62 (9th Cir. 1992), but must
15 establish that those individual members are "separate and
16 distinct" from the enterprise they collectively form, Living
17 Designs, Inc. v. E.I. Dupont de Nemours & Co., 431 F. 3d 353, 361
18 (9th Cir. 2005).

19 Defendants argue that the companies are essentially
20 indistinguishable from one another, and thus they cannot form an
21 enterprise that is distinct from the corporations themselves.
22 (Defs.' Mem. of P. & A. at 17.) However, that the four
23 corporations are named as defendants and RICO persons does not
24 necessarily mean that a distinct RICO enterprise has not been
25 alleged. Plaintiffs allege that the corporations came together
26 for the purpose of conducting the affairs of the AU RPA
27 Enterprise, thereby creating an enterprise that exists separately
28 from the businesses of the four companies. (Pls.' Mem. of P. &

1 A. at 16.)

2 The Ninth Circuit has indicated that an enterprise
3 consisting of related but legally distinct entities likely does
4 satisfy the distinctiveness requirement. Sever v. Alaska Pulp
5 Corp., 978 F. 2d 1529, 1534 (9th Cir. 1992) (when determining
6 whether these entities are distinct, "the only important thing is
7 that [the enterprise] be either formally. . . or practically. . .
8 separable from the individual." (citations omitted)). Here,
9 while the companies may not be practically separate, they have
10 maintained their formal, legal separation.

11 However, the Ninth Circuit has not explicitly addressed
12 whether legal separation is sufficient to satisfy the
13 distinctiveness requirement, and district courts within the
14 circuit remain split on the question of what is required to show
15 distinctness. Some courts conclude that "the formal, legal
16 separation of the defendant entities satisfies the RICO
17 distinctiveness requirement." Waldrup v. Countrywide Fin. Corp.,
18 Civ. No. 2:13-8833 CAS, WL 93363, at *7 (C.D. Cal. Jan. 5, 2015);
19 see also Monterey Bay Military Hous., LLC v. Pinnacle Monterey
20 LLC, 116 F. Supp. 3d 1010, 1046 (N.D. Cal. 2015), order vacated
21 in part on reconsideration on other grounds, Civ. No. 14-3953
22 BLF, WL 4624678 (N.D. Cal. Aug. 3, 2015) ("Defendants cannot shed
23 their other corporate distinctions when it suits them,
24 particularly where it is alleged that the separate corporate
25 entities were critical in carrying out the racketeering
26 activity."); Negrete v. Allianz Life Ins. Co. of N. Am., 926 F.
27 Supp. 2d 1143, 1151 (C.D. Cal. 2013) (finding that the "formal
28 separation [of parent and subsidiary companies] is alone

1 sufficient to support a finding of distinctiveness"). Others
2 require "something more" than mere legal distinctiveness, like
3 different or uniquely significant roles in the enterprise. See,
4 e.g., In re Countrywide Fin. Corp. Mortg. Mktg. & Sales Practices
5 Litig., 601 F. Supp. 2d 1201 (S.D. Cal. 2009).

6 Here, plaintiffs have plausibly pled that each
7 subsidiary had a distinct role in the enterprise.⁵ (SSAC ¶ 73-
8 78; PFAC ¶ 77-82.) Additionally, defendants received a patent
9 for the program that itself articulates how operating through
10 separate companies facilitated the AU Program scheme. (SSAC ¶
11 37, Ex. E, "Reinsurance Participation Plan," Patent No. 7,908,157
12 B1 (Docket No. 54-5).)⁶ Accordingly, even if legal separateness
13 is not sufficient, the plaintiffs have been able to plead that
14 each of the four corporate entities played a unique role in the
15 enterprise, thus satisfying the "something more" standard.

16 Defendants further argue that an enterprise must be not
17 only different than the "persons" alleged to have committed the
18

19 ⁵ In the complaints, plaintiffs state that "[d]efendants'
20 decision to sell the illegal workers' compensation insurance
21 Program as separate corporate forms, and via the AU RPA
22 Enterprise rather than through divisions of AU, facilitated and
23 made possible the unlawful activity because separating the
24 regulatory approval of the GC policies filed by CIC from the rest
25 of the AU Program, including the RPA, enabled AU to circumvent
26 the necessary regulatory checks-and-balances needed in
27 comprehensive state workers' compensation systems. . . .It also
28 enabled Defendants to trick employers as to the legality of the
Program being offered." (SSAC ¶¶ 77-78; PFAC ¶¶ 81-82.)

⁶ The court may consider the patent because plaintiffs
attached it to their complaint. See Lee v. City of Los Angeles,
250 F. 3d 668, 689 (9th Cir. 2001) (stating that a court may
consider material which is properly submitted as part of the
complaint).

1 RICO violation, but also different than the conduct that makes up
2 the alleged pattern of racketeering activity. However, the Ninth
3 Circuit has rejected the latter requirement. See, e.g., Odom v.
4 Microsoft Corp., 486 F. 3d 547, 549 (9th Cir. 2007) (rejecting
5 the obligation for a separate structure distinct from the
6 racketeering activity). Accordingly, plaintiffs have satisfied
7 the distinctiveness requirement.

8 2. Racketeering Activity

9 Racketeering activity is any act indictable under the
10 several provisions of Title 18 of the United States Code,
11 including the predicate acts alleged by plaintiffs in this case:
12 mail fraud, 18 U.S.C. § 1341, and wire fraud, 18 U.S.C. § 1343.
13 Cohen v. Trump, Civ. No. 10-940 GPC WVG, WL 690513, at *3 (S.D.
14 Cal. Feb. 21, 2014). The elements of mail fraud or wire fraud
15 are: (1) the existence of a scheme to defraud; (2) the use of the
16 mails or wires to further the scheme; and (3) a specific intent
17 to defraud. Eclectic Props. E., LLC v. Marcus & Millichap Co.,
18 751 F. 3d 990, 998 (9th Cir. 2014). The third requirement of a
19 specific intent to deceive or defraud only needs to be alleged
20 generally. Odom, 486 F. 3d at 554 (explaining that "while the
21 factual circumstances of the fraud itself must be alleged with
22 particularity, the state of mind--or scienter--of the defendants
23 may be alleged generally"). To satisfy this requirement,
24 plaintiffs must first prove "the existence of a scheme which was
25 reasonably calculated to deceive persons of ordinary prudence and
26 comprehension," and then, "by examining the scheme itself" the
27 court may infer defendants' specific intent to defraud. United
28

1 States v. Green, 745 F. 2d 1205, 1207 (9th Cir. 1984) (citations
2 omitted).

3 Here, plaintiffs allege that defendants developed a
4 scheme to conceal the true nature of the insurance program from
5 regulators so that defendants could burden employers, like the
6 plaintiffs, with oppressive and unconscionable terms. (SSAC ¶ 6;
7 PFAC ¶ 6.) The complaints further allege that defendants misled
8 the plaintiffs into believing the program was legal, and
9 deceptively failed to explain how the program operated. (SSAC ¶¶
10 42-55; PFAC ¶¶ 43-56.)

11 However, plaintiffs concede that defendants disclosed
12 in program documents that the RPA was not a filed retrospective
13 rating plan, and detailed how the profit sharing program would
14 work. (SSAC ¶ 52; PFAC ¶ 53.) Additionally, defendants
15 described in detail, in a publicly available patent, how the
16 program would operate. As plaintiffs explain, “[d]efendants have
17 even gone as far as to patent their planned methodology.” (SSAC
18 ¶ 36; PFAC ¶ 37.)

19 Moreover, while the RPA was never officially filed with
20 the Department of Insurance, it does appear that the Department
21 was aware of the RPA’s existence. In its 2013 report, the
22 Department explained that,

23 The EquityComp product is sold with an
24 accompanying Profit Sharing Plan through the
25 Company’s affiliate, Applied Underwriters
26 Captive Risk Assurance, Company, Inc.
27 (AUCRA). AUCRA then enters into a
28 Reinsurance Participation Agreement with the
insured in order to form a segregated
protective cell by which the insured shares
in a portion of the premiums and losses
between the Company and the insured
protected cell.

1 (Defs.' Req. for Judicial Notice in Supp. of Mot. to
2 Dismiss, Ex. 9 (Docket No. 61-1).)⁷ From this, the court cannot
3 infer that defendants actively concealed the structure of the
4 insurance program or the existence of the RPA from regulators,
5 plaintiffs, or the public generally. An intent to defraud is not
6 plausible if the allegations give rise to an "obviously
7 alternative explanation" for the behavior. Iqbal, 556 U.S. at
8 679. Here, the "obvious alternative explanation" is that
9 defendants simply did not think the RPA needed to be filed. This
10 explanation clarifies why defendants explicitly described the
11 insurance program's structure and the existence of the RPA in
12 documents that were provided to plaintiffs and in a publicly
13 available patent, and yet did not file the RPA.

14 The Ninth Circuit has explained that "defendants'
15 provision of adverse information to the public by way of
16 disclosures negates an inference that they acted with an intent
17 to defraud." In re Worlds of Wonder Sec. Litig., 35 F. 3d 1407,
18 1425 (9th Cir. 1994) (citations omitted). Here, if defendants in
19 fact knew that the RPA needed to be filed, then publicly
20 disclosing the fact that it was unfiled would constitute adverse
21 information. Thus, because defendants shared information
22 regarding the RPA, including that fact that it was not filed,
23 both directly with plaintiffs and in a publicly available patent,
24 they have been able to refute any inference of fraud.

25 ⁷ The court takes judicial notice of the existence of
26 this report, which is an official record, and the fact that these
27 statements were made by the Department, thereby putting the
28 Commissioner on notice as to the RPA. However, the court does
not take notice of the truth of the facts asserted within the
report. See Lee, 250 F. 3d at 689.

1 Accordingly, plaintiffs have not sufficiently alleged a
2 plausible basis to infer a specific intent to defraud, and their
3 RICO claim must be dismissed. Given the existence of the patent,
4 even if plaintiffs were given leave to amend the court cannot see
5 how they would be able to plead facts to create a plausible
6 inference that defendants intended to conceal the structure of
7 the program and thereby defraud plaintiffs.

8 A. California Unfair Competition Law

9 1. Standing

10 Plaintiffs assert a claim for injunctive relief and
11 restitution under the UCL, Cal. Bus. & Prof. Code § 17200, et
12 seq. Defendants argue that plaintiffs lack standing to seek
13 either of these remedies, and thus have failed to plead a viable
14 UCL claim. A plaintiff has Article III standing if he or she is
15 able to show (1) that he or she has suffered an "injury in fact,"
16 (2) that the injury is "fairly traceable" to the challenged
17 conduct, and (3) that it is "likely", as opposed to "merely
18 speculative," that the injury will be redressed by a favorable
19 decision. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61
20 (1992).

21 a. Injunctive Relief

22 Plaintiffs originally requested an order enjoining
23 defendants' allegedly unlawful business practices. (SSAC ¶ 151;
24 PFAC ¶ 155.)⁸ To establish standing to seek prospective

25 ⁸ The court addresses the issue of whether plaintiffs
26 have standing to seek an injunction because the parties briefed
27 this topic at length. However, the court notes that at oral
28 arguments plaintiffs stated that they were not seeking an
injunction but instead wanted a declaratory judgment stating that
the RPA and entire program were void. In determining whether

1 injunctive relief, plaintiff must show, in addition to the
2 requirements listed above, that the harm suffered is "concrete
3 and particularized" and there must be a "sufficient likelihood
4 that [he or she] will again be wronged in a similar way." City
5 of Los Angeles v. Lyons, 461 U.S. 95, 111 (1983).

6 Defendants argue that because plaintiffs admittedly do
7 not intend to participate in defendants' insurance program in the
8 future, they are unable to allege a real and immediate threat of
9 future injury. However, the purportedly unlawful RPAs that have
10 already been issued to plaintiffs allow defendants to continue
11 billing, collecting, and holding plaintiffs' monies well past the
12 present date. (SSAC ¶¶ 37, 40, 55; PFAC ¶¶ 38, 41, 56.) In
13 Phillips v. Apple, Inc., the court dismissed the plaintiffs'
14 claim for injunctive relief because they had not offered any
15 "reason for the Court to find a likelihood of future harm." Civ.
16 No. 15-04879 LHK, WL 1579693, at *9 (N.D. Cal. Apr. 19, 2016).
17 However, in this case, the existence of the operative contract
18 creates a real and immediate threat of repeated injury for the
19 plaintiffs. Plaintiffs need not make a future purchase of
20 defendants' program in order to be harmed in the future.

21 Additionally, the Consent Order and Settlement
22

23 plaintiffs have standing to seek declaratory relief, "the
24 question in each case is whether the facts alleged, under all the
25 circumstances, show that there is a substantial controversy,
26 between parties having adverse legal interests, of sufficient
27 immediacy and reality to warrant the issuance of a declaratory
28 judgment." Golden v. Zwickler, 394 U.S. 103, 108 (1969). Here,
because the existing RPA is still being enforced, there is
sufficient immediacy and reality. Accordingly, plaintiffs have
standing to seek declaratory relief.

1 Agreement⁹ settled all regulatory issues going forward. However,
2 these documents, while they affect the defendants' ability to
3 sell future policies, do not affect the current RPA that has been
4 issued to plaintiffs. Defendants concede that "pursuant to the
5 consent order, AUCRA would stop issuing new RPAs but could
6 continue to administer and enforce RPAs." (Defs.' Mot to Dismiss
7 6 (Shasta Docket No. 62).) Thus, while there may be no risk of
8 injury from future programs, plaintiffs still face a real and
9 immediate threat of injury from the RPA that has already been
10 issued to them. Accordingly, plaintiffs have established
11 standing in order to seek injunctive relief.¹⁰

12 b. Restitution

13 In order to have standing to seek restitution, a
14 plaintiff must "(1) establish a loss or deprivation of money or
15 property sufficient to qualify as injury in fact, i.e., economic
16 injury, and (2) show that that economic injury was the result of,
17 i.e., caused by, the unfair business practice." Kwikset Corp v.
18 Super. Ct., 51 Cal. 4th 310, 322 (2011). While plaintiffs must
19 allege that they expended money because of the defendants' acts
20 of unfair competition, they need not prove compensable loss.
21 Monarch Plumbing Co., Inc. v. Ranger Ins. Co., Civ. No. 2:06-1357

22 _____
23 ⁹ The court takes judicial notice of the Consent Order
24 and Settlement Agreement because they are public records whose
25 existence "can be accurately and readily determined from sources
26 whose accuracy cannot readily be questioned." See Fed. R. Civ.
27 P. 201(b). Additionally, plaintiffs refer to the Settlement
Agreement in their Amended Complaint and it forms the basis of
one or more of their claims. As such, even if it were not an
official record, the court could take judicial notice of it. See
United States v. Ritchie, 342 F. 3d 903, 908 (9th Cir. 2003).

28 ¹⁰ See footnote 8.

1 WBS KJM, WL 2734391 at *6 (E.D. Cal. Sept. 25, 2006) (standing
2 established where plaintiffs alleged injury in form of higher
3 insurance premiums). While plaintiffs "may ultimately be unable
4 to prove a right to damages (or, here, restitution), that does
5 not demonstrate that [they] lack standing to argue for [their]
6 entitlement to them." Clayworth v. Pfizer, Inc., 49 Cal. 4th
7 758, 789 (2010).

8 Here, plaintiffs allege that "[t]he RPA, as enforced by
9 Defendants, resulted in significant premiums, fees, charges,
10 and/or penalties to Plaintiff[s] and Class members in excess of
11 those advertised during the marketing of the program or that
12 would have been paid in the absence of Defendants' wrongful
13 conduct." (SSAC ¶ 140; PFAC ¶ 144.) Because plaintiffs are not
14 required to prove the specific amount they overpaid as a result
15 of defendants' conduct at the pleading stage, plaintiffs'
16 allegation, albeit general, is sufficient to establish standing
17 to make a claim for restitution.

18 Plaintiffs may only recover the portion of the funds
19 that defendants have retained as a result of the alleged unfair,
20 fraudulent, or unlawful business practice. In re Tobacco Cases
21 II, 240 Cal. App 4th 779, 802 (4th Dist. 2015). Here, plaintiffs
22 are asking for exactly that--for "full restitution of all
23 monetary sums unlawfully obtained by defendants." (SSAC ¶ 143;
24 PFAC ¶ 147). Restitution, "as used in the UCL, is not limited
25 only to the return of money or property that was once in the
26 possession of [a plaintiff]." Korea Supply Co. v. Lockheed
27 Martin Corp., 29 Cal. 4th 1134, 1149 (2003). Rather, restitution
28 also allows a plaintiff to recover money or property in which

1 plaintiff has a vested interest. Id. Plaintiffs may have an
2 ownership interest in "any profits [the defendant] may have
3 gained through interest or earnings on the plaintiffs' money that
4 [defendant] wrongfully held." Juarez v. Arcadia Fin., Ltd., 152
5 Cal. App. 4th 889, 915 (4th Dist. 2007). Here, plaintiffs are
6 seeking disgorgement of profits earned by defendants as a result
7 of their alleged unlawful collection and retention of monies.
8 Because the Juarez court clarifies that plaintiffs may have an
9 ownership interest in this form of money, plaintiffs have
10 standing to seek restitution.

11 The court may, at a later stage, ultimately determine
12 that plaintiffs would have suffered the same harm whether or not
13 defendants had complied with the law, and thus find that
14 plaintiffs are not entitled to restitution. However, at this
15 stage plaintiffs have sufficiently pled their right to
16 restitution.

17 2. Unlawful Conduct

18 a. "Borrowing" Insurance Code § 11658

19 The UCL forbids unlawful, unfair, and fraudulent
20 business practices. (Cal. Bus. & Prof. Code § 17200.)

21 Plaintiffs allege that defendants violated § 11658¹¹ by failing to
22

23 ¹¹ Section 11658(a) states: "A workers' compensation
24 insurance policy or endorsement shall not be issued by an insurer
25 to any person in this state unless the insurer files a copy of
26 the form or endorsement with the rating organization pursuant to
27 subdivision (e) of Section 11750.3 and 30 days have expired from
28 the date the form or endorsement is received by the commissioner
from the rating organization without notice from the
commissioner, unless the commissioner gives written approval of
the form or endorsement prior to that time."

1 file the RPA with the Bureau or receive approval from the
2 California Department of Insurance, thereby engaging in an
3 unfair, unlawful, and/or fraudulent business practice. Section
4 11658(a) does not provide a private right of action. See Farmers
5 Ins. Exch. v. Super. Ct., 137 Cal. App. 4th 842, 850 (2d Dist.
6 2006) ("a statute creates a private right of action only if the
7 statutory language or legislative history affirmatively indicates
8 such an intent"). However, plaintiffs do not purport to state a
9 private cause of action, but rather attempt to "borrow" §
10 11658(a) to satisfy the "unlawful" prong of the UCL.

11 The Ninth Circuit has held that a violation of a
12 section of the California Insurance Code may be "borrowed" to
13 make a claim under the UCL. Chabner v. United of Omaha Life Ins.
14 Co., 225 F.3d 1042, 1048 (9th Cir. 2000). "Virtually any law can
15 serve as the predicate for a Business and Professions Code
16 section 17200 action; it may be. . . civil or criminal, federal,
17 state or municipal, statutory, regulatory, or court-made."
18 Gafcon, Inc. v. Ponsor & Assocs., 98 Cal. App. 4th 1388, 1425 n.
19 15 (4th Dist. 2002). The Chabner court further clarified that
20 "[i]t does not matter whether the underlying statute also
21 provides for a private cause of action; section 17200 can form
22 the basis for a private cause of action even if the predicate
23 statute does not." 225 F.3d at 1048.

24 A plaintiff cannot "plead around an absolute bar to
25 relief simply by recasting the cause of action as one for unfair
26 competition." Id. (citations omitted). But this limit is
27 narrow. To prevent an action under the UCL, "another provision
28 must actually 'bar' the action or clearly permit the conduct."

1 Hauk v. JP Morgan Chase Bank USA, 552 F.3d 1114, 1122 (9th Cir.
2 2009). Defendants cite to a number of California Court of Appeal
3 cases in which the courts did not allow plaintiffs to borrow a
4 violation of Insurance Code § 790 to form the basis of a UCL
5 claim. However, all of the cases cited by defendants occurred
6 before Chabner, in which the court explicitly held that “even
7 assuming that [previous cases] prevent causes of action based on
8 section 790.03(f), it does not necessarily follow that they also
9 prevent causes of action based on” other sections of the
10 Insurance Code. 225 F.3d at 1049. Because there is nothing that
11 bars the borrowing of § 11658 for the purposes of a UCL claim,
12 plaintiffs may borrow that section to use as the basis of their
13 UCL claim. Moreover, this court is bound by the Ninth Circuit’s
14 interpretation, which allows an Insurance Code violation to be
15 borrowed to make a UCL claim, absent a contrary ruling by the
16 California Supreme Court. See, e.g., Johnson v. Barlow, Civ. No.
17 06-1150 WBS GG, 2007 WL 1723617, at *3 (E.D. Cal. June 11, 2007).

18 b. Sections 11375 and 11737

19 The court previously dismissed Shasta’s claims “to the
20 extent that plaintiff seeks to invalidate the RPA on the theory
21 that defendants violated California Insurance Code § 11735.”¹²
22 (June 20 Order at 5.) At the time of the court’s ruling, the
23 Commissioner had not conducted a hearing and disapproved of the
24 RPA’s rates. The court explained that using a rate that was not

25 ¹² Section 11735(a) states: “Every insurer shall file with
26 the commissioner all rates and supplementary rate information
27 that are to be used in this state. The rates and supplementary
28 rate information shall be filed not later than 30 days prior to
the effective date. Upon application by the filer, the
commissioner may authorize an earlier effective date.”

1 filed pursuant to “§ 11735 is not an unlawful rate unless and
2 until the Commissioner conducts a hearing and disapproves the
3 rate.” (Id.)

4 The day the court issued the order, the Commissioner
5 issued its Decision and Order, finding that defendants’ RPA was
6 in fact unfiled and therefore void as a matter of law. (Comm’r’s
7 Order.) Plaintiffs’ amended complaints now re-allege the same
8 claims the court previously dismissed, but, in light of the
9 Commissioner’s ruling, the complaints now explicitly state that
10 the Commissioner has conducted a hearing and disapproved of the
11 RPA under § 11735. (SSAC ¶¶ 8, 56-58; PFAC ¶¶ 8, 57-59.)

12 Shasta previously filed a motion for reconsideration in
13 light of the Commissioner’s Order, and this court denied the
14 motion, holding that “the Commissioner’s Order does not control
15 this court.” (Mem. and Order Re: Mot. for Recons. at 11) The
16 Order stated that failure to file the RPA pursuant to section
17 11735 “renders the plan[] unlawful.” (Comm’r’s Order at 62).
18 That interpretation directly conflicts with this court’s June 20
19 Order, which held that a rate does not become unlawful unless and
20 until the Commissioner acts to disapprove it. (June 20 Order at
21 4.) The court again disagrees with the Commissioner and
22 maintains the position, as it has in previous rulings, that under
23 section 11737, an unfiled rate is not unlawful per se.

24 Further, the Commissioner did not conduct a formal rate
25 disapproval hearing pursuant to § 11737(d). In order to legally
26 disapprove a rate, the Commissioner must first “serve notice on
27 the insurer of the intent to disapprove and shall schedule a
28 hearing to commence within 60 days of the date of the notice.”

1 Cal. Ins. Code § 11737(d). The Commissioner did not follow this
2 protocol. Even assuming the Commissioner had properly
3 disapproved of the RPA's rates, the disapproval would be
4 prospective only, see Cal. Ins. Code § 11737(g), and apply only
5 to RPAs issued after June 20, 2016. The Plaintiffs' RPAs do not
6 fall into that category.

7 Plaintiffs have not successfully argued that the
8 Commissioner's Order constituted a rate disapproval hearing
9 within the meaning of section 11737 that rendered the RPA
10 retroactively unlawful. Thus, the court's reasoning for its
11 previous dismissal remains applicable and defendants' reliance on
12 the prior ruling is appropriate. Accordingly, the court will
13 again grant defendants' motion to dismiss plaintiffs' claims to
14 the extent they seek to declare defendants' use of the RPA was
15 illegal on the theory that defendants failed to comply with §
16 11735.

17 B. Unjust Enrichment

18 California courts are divided with regard to whether
19 unjust enrichment is a freestanding cause of action or simply a
20 general principle that underlies various legal doctrines and
21 remedies. The Ninth Circuit has followed the latter approach,
22 finding that unjust enrichment is not a freestanding cause of
23 action. See Bosinger v. Belnden CDT, Inc., 358 F. App'x 812, 815
24 (9th Cir. 2009). However, it has since clarified that a claim
25 for unjust enrichment may still be maintained as an independent
26 claim for quasi-contract. Astiana v. Hain Celestial Grp., 783 F.
27 3d 753, 762 (9th Cir. 2015). A claim for quasi-contract seeking
28 restitution is based on the theory that a defendant "has been

1 unjustly conferred a benefit through mistake, fraud, coercion, or
2 request.” Id.; see also Munoz v. MacMillan, 195 Cal. App. 4th
3 648, 661 (4th Dist. 2011) (“Common law principles of restitution
4 require a party to return a benefit when the retention of such
5 benefit would unjustly enrich the recipient; a typical cause of
6 action involving such remedy is ‘quasi-contract.’”).

7 Defendants argue that plaintiffs cannot plead a claim
8 for quasi-contract because a valid express contract exists.
9 However, “where the defendant obtained a benefit from the
10 plaintiff by fraud, duress, conversation, or similar conduct. . .
11 the plaintiff may choose not to sue in tort, but instead to seek
12 restitution on a quasi-contract theory.” McBride v. Boughton,
13 123 Cal. App. 4th 379, 388 (1st Dist. 2004).

14 In Astiana, the plaintiff alleged that she was entitled
15 to relief because the defendant had “‘enticed’ plaintiffs to
16 purchase their products through ‘false and misleading’ labeling,
17 and that [defendant] had been unjustly enriched as a result.”
18 Astiana, 783 F.3d at 762. The Ninth Circuit held that “this
19 straightforward statement is sufficient to state a quasi-contract
20 cause of action.” Id. Here, plaintiffs allege that
21 “[d]efendants were unjustly enriched when they deceptively sold
22 Plaintiffs and Class members the illegal [insurance] program and
23 received and retained the benefits.” (Pls.’ Mem. of P. & A. in
24 Opp’n to Defs.’ Mot. to Dismiss at 25 (Docket No. 63); SSAC ¶¶ 2,
25 6, 10, 153-156; PFAC ¶¶ 2, 6, 10, 157-160.) As in Astiana, this
26 statement is sufficient to state a quasi-contract cause of
27 action. Accordingly, the court will construe plaintiffs’ unjust
28 enrichment claim as a claim for quasi-contract and deny the

1 motion to dismiss as to this claim.

2 IT IS THEREFORE ORDERED that defendants' motion to
3 dismiss plaintiffs' complaints be, and the same hereby is,
4 GRANTED as to plaintiffs' RICO claims; GRANTED as to plaintiffs'
5 attempts to invalidate the RPA on the theory that defendants
6 violated Insurance Code section 11735; and DENIED in all other
7 respects.

8 Dated: October 17, 2017

9 
10 WILLIAM B. SHUBB
11 UNITED STATES DISTRICT JUDGE

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