

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

-----oo0oo-----

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

Plaintiffs,

v.

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

Defendants.

CIV. NO. 2:16-00158 WBS AC

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

Plaintiffs,

v.

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

CIV. NO. 2:16-01211 WBS AC

MEMORANDUM AND ORDER RE:  
DEFENDANTS' MOTION TO DISMISS

1 and APPLIED RISK SERVICES,  
2 INC.,  
3 Defendants.  
4

5 -----oo0oo-----

6 Plaintiffs Shasta Linen Supply, ("Shasta"); Pet Food  
7 Express, Ltd. ("Pet Food"); and Alpha Polishing<sup>1</sup> (collectively  
8 "plaintiffs") initiated these actions<sup>2</sup> 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")<sup>3</sup> 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 <sup>1</sup> The amended complaint in the Pet Food action added  
23 Alpha Polishing, Inc., as a new plaintiff.

24 <sup>2</sup> 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 <sup>3</sup> 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.<sup>4</sup> (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           <sup>4</sup> 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 Foot'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.<sup>5</sup> (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).)<sup>6</sup> 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 <sup>5</sup> 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.)

<sup>6</sup> 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).)<sup>7</sup> 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 <sup>7</sup> 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.)<sup>8</sup> To establish standing to seek prospective

25           <sup>8</sup> 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 Agreement<sup>9</sup> 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.<sup>10</sup>

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 <sup>9</sup> 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  
28 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).

<sup>10</sup> 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 § 11658<sup>11</sup> by failing to  
22

---

23 <sup>11</sup> 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.”<sup>12</sup>  
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 <sup>12</sup> 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



17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28