UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LEIF HANSEN ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED, Plaintiff-Appellant, v. GOVERNMENT EMPLOYEES INSURANCE COMPANY, Defendant-Appellee.	No. 18-35383 On Appeal from United States District Court District of Oregon, Portland Division Case No. 3:17-cv-01986-MO

APPELLEES' ANSWERING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, defendant-appellee Government Employees Insurance Company states it is a wholly owned subsidiary of GEICO Corporation. GEICO Corporation is an indirect, wholly owned subsidiary of a publicly traded, holding company, Berkshire Hathaway, Inc. No publicly held company directly owns 10% or more of Government Employees Insurance Company's stock.

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STATEMENT OF JURISDICTION

Government Employees Insurance Company ("GEICO") agrees this case satisfies 28 U.S.C. § 1332(d)(2) and 28 U.S.C. § 1291.[1]

GEICO disputes, as it did below, that the district court, or this Court, has personal jurisdiction over GEICO to adjudicate claims asserted by out-of-state class members that have no factual connection to Oregon. *See Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco Cty.*, 137 S. Ct. 1773, 1781–82 (2017); (SER 64-68). To the extent it is necessary, GEICO expressly preserves its personal jurisdiction argument here and incorporates it by this reference. (SER 64-68).

COUNTER-STATEMENT OF THE ISSUES

1. Plaintiff/Appellant Leif Hansen ("Hansen") brought a breach of contract claim against GEICO because, although GEICO paid the cost to repair his vehicle (less the deductible), it refused to pay the cost for pre- and post-repair diagnostic scans following a collision. Hansen identifies no damage to the vehicle that could not be (or was not) repaired by the amount GEICO has already paid for

[1] As it did below, GEICO also disputes that Plaintiff/Appellant Leif Hansen has Article III standing and that this Court has subject matter jurisdiction. Hansen alleged only a hypothetical harm, not a concrete, real world injury that can be redressed by the court. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). GEICO incorporates its argument on subject matter jurisdiction from its briefing below. (SER 05-09)

repairs. Instead, he requests a pre-repair scan because it might identify other damage and a post-repair scan because it could reconfirm repairs were completed properly. Where, as here, the insurance policy defines a covered "loss" as "loss of or damage to" a covered auto or its equipment, and limits GEICO's liability to the cost necessary to provide a "repair," is GEICO obligated to pay for diagnostic scans absent any identified "damage to" or "loss of" Hansen's vehicle for which GEICO has not already compensated him?

2. Hansen brought a bad faith claim based on allegations that he expects GEICO to pay for the pre-repair and post-repair diagnostic scans he requested. Where, as here, the policy defines a covered "loss" as "loss of or damage to" a covered auto or its equipment, and limits GEICO's liability to the cost necessary to provide a "repair," does Oregon's implied duty of good faith and fair dealing require GEICO to pay for diagnostic scans, which do not repair a vehicle, absent any damage for which GEICO has not already compensated Hansen?

STATEMENT OF THE CASE

A. Nature Of The Case

This case arises out of an insurance claim for collision damage to the rear bumper of Hansen's 2017 GMC Sierra 3500 ("Truck"). GEICO paid the cost to repair the bumper (less the deductible), and Hansen, an experienced owner of a group of auto repair shops, identifies no damage to the bumper (or anywhere else

on the Truck) caused by the collision that could not have been repaired with the money GEICO already paid. Instead, he claims the collision coverage in his GEICO insurance policy ("Policy") requires GEICO to pay for pre- and post-repair diagnostic scans of the Truck to confirm that repairs were properly performed.

Hansen asserts claims on behalf of himself and a putative nationwide class for (1) breach of contract and (2) breach of the implied duty of good faith and fair dealing. (ER 82-84 ¶¶ 36-49).

Because the collision coverage in Hansen's Policy requires GEICO to pay only for "direct and accidental loss of or damage to" the Truck, not for a diagnostic scan, the district court dismissed Hansen's claims with prejudice.

B. Course Of Proceedings And Disposition Below

GEICO moved to dismiss both of Hansen's claims under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) and to strike his nationwide class allegations under Rules 12(b)(2) and 12(f). (SER 1-12; SER 62-80).

The district court granted GEICO's 12(b)(6) Motion, holding that the Policy covers only the cost of repairing actual damage to an insured vehicle (or the cost to replace a lost vehicle), not the cost of identifying unreported damage. (*See* ER

28:4-17).[2] The district court held that Hansen's failure to allege *any* unrepaired damage was fatal to his breach of contract claim:

> For breach of contract, I think it's a fairly straightforward analysis. Some loss or damage that wasn't paid for has to be alleged. And the contract does not on its express terms promise any more than that. It doesn't promise to pay for diagnostics, and external events such as manufacturer's requirements can't really plug much into the contractual analysis.
>
> Certainly, in context, the terms itself in context I don't think mean much different than they do just on their simple expression of the words. It doesn't really, as I look at it in context, mean anything other than to pay for the loss or damages. And so without that, I don't believe that a claim is properly stated.

(ER 28:5-17).

The district court also held that, even if insureds reasonably expect coverage for scans, requiring GEICO to pay for scans would impermissibly alter the Policy because, in the Policy, GEICO only promised to pay the cost of repairing actual damage, not the cost to determine whether damage exists:

> Even if it is a reasonable expectation of the parties, it still has to not add a term to the contract.
>
> And, of course, one good way to think of that is does it require in a contract like this one to pay for something that the contract never promised to pay for. And here I think it is a new term, inconsistent with the express terms of the contract. I think read as a whole, when you promise to pay for certain things, then good faith and fair dealing can't get you to promise to pay for more than the things you said you'd pay for. That's an inconsistency when the nature of the contract is fundamentally a promise to pay.

[2] The district court did not address GEICO's motion to strike or its Rule 12(b)(1) arguments. (ER 28-30).

(ER 29:8-18). The district court did not hold, as Hansen repeatedly misstates in his brief, that the Policy covers "only visible physical damage to the car." (*Compare* AOB 2, 9, 14-16 (repeatedly misrepresenting the district court holding), *with* ER 2-31 (making no ruling that the policy covers "only visible physical damage")).

STATEMENT OF FACTS

While GEICO disputes many factual allegations in Hansen's Complaint, it assumes their truth for purposes of this appeal, as it must.[3] *Parks Sch. of Bus., Inc. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995).[4]

A. Hansen Demands GEICO Pay For Pre- And Post-Repair Scans, Without Identifying Any Unrepaired Damage

Under the Policy, Hansen's Truck is insured for losses caused by a collision. (ER 76, ¶ 9). The Truck's rear bumper was damaged in a collision. (*Id.* at ¶ 11).

[3] GEICO particularly disputes Hansen's characterization of how GEICO handles policyholder claims generally (*e.g.*, ER 78-79, ¶¶ 19, 23, 25) and that it would purposely underpay claims, causing its policyholders to accept unsafe or incompletely repaired vehicles (*e.g.*, ER 83-84, ¶ 48).

[4] GEICO does not assume the new allegations in Hansen's brief are true, *Schneider v. Cal. Dep't of Corr.*, 151 F.3d 1194, 1197 n.1 (9th Cir. 1998) (new allegations beyond the complaint "are irrelevant for Rule 12(b)(6) purposes"), and it specifically objects to the references to the movie Back to the Future, the assertions about car computer systems in the Introduction, and the multiple assertions purportedly supported by New York Times articles and blogs. (AOB 1, 3-4 & n.1-5. Hansen did not ask the Court to take judicial notice of these articles and blogs, and judicial notice would not be appropriate. *See, e.g.*, *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 960 (9th Cir. 2010) ("Courts may take judicial notice of publications introduced to indicate what was in the public realm at the time, not whether the contents of those articles were in fact true." (internal quotation marks omitted)). Thus, GEICO requests that the Court ignore these new allegations not contained in Hansen's complaint.

Hansen, an experienced owner of a group of auto repair shops, reported a claim to GEICO and scheduled an appointment for a repair estimate. (*Id.*). At the appointment, Hansen requested "pre- and post-repair electronic scans *to ensure that his vehicle was repaired* safely and completely." (ER 77, ¶ 12 (emphasis added)). These "scans cost roughly $100 each." (*Id.* at ¶ 14). GEICO did not pay for the scans. (ER 78, ¶ 19).

After the repairs, Hansen "again requested electronic scans *to ensure* that the [Truck] had been safely and *completely repaired*," and again, GEICO did not pay for the scans. (*Id.* at ¶¶ 20-21 (emphases added)). According to Hansen, because the scans were not performed, the Truck is "at *risk* for having undetected repairs and being unsafe to drive." (*Id.* at ¶ 21 (emphasis added)). Although repairs were performed without a pre-repair scan, Hansen identified no repair that could not be performed absent that scan. He also identified no remaining damage or defect with the Truck that could have been, or needs to be, diagnosed with a post-repair scan. (*See* ER 74-84).

Hansen does not allege GEICO failed to pay the cost to completely repair the collision damage to the bumper. Although Hansen's "Statement of Facts" on appeal discusses hackers remotely engaging a vehicle's systems, he does not allege that, after the repairs, any collision damage remains or that his Truck malfunctions in any way. (*See* AOB 3-8). He also does not allege that any undetected damage

exists or that a scan would have identified damage that was otherwise undetected. (*See* AOB 3-8; ER 74-84).

Hansen does not allege his Truck was not restored to "pre-loss condition" in any way. Rather, he alleges only that it is possible some hypothetical, undetected damage could exist after the repairs. (*See* ER 78, ¶ 21; SER 51 (conceding there is only the "[t]he possibility of undetected damage to [the Truck]")). Based on this possibility, he alleges that GEICO must pay for two scans to reassure him that his bumper was completely repaired.

B. The Policy Defines "Loss" And Limits GEICO's Liability

The collision coverage in the Policy states:

> [GEICO] will pay for ***collision loss*** to the ***owned auto*** or ***non-owned auto*** for the amount of each ***loss*** less the applicable deductible.

(ER 52 (emphasis in the original); *accord* ER 76, ¶ 10).[5]

The Policy expressly defines the term "***loss***":

> ***Loss*** means direct and accidental *loss of* or *damage to* . . . an insured auto, including its equipment . . .

(ER 51 (emphases added); *accord* ER 76, ¶ 10). "Loss" includes both (1) the "loss of" an insured automobile (*e.g.*, theft or total destruction of a vehicle); and (2)

[5] The district court properly considered the Policy's undisputed language in resolving GEICO's motion to dismiss because the complaint refers to it (though quoting it incompletely and with an error). *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994), *overruled on other grounds by Galbraith v. Cty. Of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002).

"damage to" an insured automobile. However, Hansen does not allege "loss of" his Truck or any of its equipment. Therefore, only the "damage to" portion of the definition applies here.

The collision coverage also limits GEICO's "liability for ***loss***":

> [T]he ***actual cash value*** of the property at the time of the ***loss*** . . . [which] will not exceed the prevailing competitive price to repair or replace the property at the time of ***loss*** . . . .

(ER 53) (emphasis in original).

STANDARD OF REVIEW

This Court reviews a Rule 12(b)(6) dismissal *de novo*. *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1030 (9th Cir. 2008). In doing so, the Court assumes the truth of the well pleaded allegations, but it does not assume the truth of conclusory allegations, or "opinions . . . or arguments," such as Hansen's alleged opinion that scans are a "necessary part of collision repairs." *N. Highlands I, II, LLC v. Comerica Bank*, 328 F. App'x 358, 360 (9th Cir. 2009); (ER 77, ¶ 12).

SUMMARY OF THE ARGUMENT

While Hansen's brief discusses time travel and fighter jets, his complaint does not. Nor does his complaint allege any identified damage for which Hansen was not compensated. Because a diagnostic scan is not a "loss" as the term is unambiguously defined in the Policy, Hansen cannot state a breach of contract claim. The Policy defines "loss" as "loss of" or "damage to" a covered auto or its

equipment caused by collision. The Policy also limits GEICO's liability to the cost to repair or replace the auto or its equipment. A scan is not a "loss of" or "damage to" an automobile or equipment, and Hansen does not allege that a scan would repair any "damage to" the Truck or replace any lost vehicle or equipment. Hansen alleges his Truck was repaired without a pre-repair scan but does not allege any remaining damage or defect – let alone any remaining damage or defect that required a pre-repair scan to repair. (*See* ER 78 ¶ 20 (alleging Hansen requested a post-repair scan "to ensure that the [Truck] had been safely and completely repaired")).

Hansen does not argue the Policy definition of "loss" is ambiguous, and it is not. Yet, instead of applying the Policy definition, he urges the Court to adopt an expansive definition of loss that includes all financial harm, based on references to dictionary definitions, interpretations of other insurance policies by Oregon courts, and other aids to construction. Resorting to other aids to construction instead of applying the unambiguous Policy definition would be improper under Oregon law. Further, the expansive definition Hansen urges contradicts the Policy, which limits GEICO's liability to the cost to repair or replace the Truck or its equipment. Compelling GEICO to pay for pre- and post-repair scans to reconfirm repairs were made—not to actually repair damage to the vehicle—would expand GEICO's obligation under the Policy beyond the promises agreed to by the Parties.

Hansen's bad faith claim fails on similar grounds. Requiring GEICO to pay for scans, even though they are not "damage to" or "loss of" the Truck, would vary the substantive terms of the Policy by adding a new coverage. It would also contradict the express term of the Policy that limits GEICO's liability to the cost of repairing damage or replacing the Truck or its equipment, where Hansen seeks a scan without identifying any unrepaired damage.

Because the Policy's unambiguous definition of "loss" does not include payment for the scans Hansen seeks, this Court should affirm the dismissal of Hansen's complaint.

ARGUMENT

I. HANSEN FAILED TO STATE A BREACH OF CONTRACT CLAIM

"To state a claim for breach of contract, plaintiff must allege the existence of a contract, 'its relevant terms, plaintiff's full performance and lack of breach and defendant's breach resulting in damage to plaintiff.'" *Slover v. Oregon State Bd. of Clinical Soc. Workers*, 927 P.2d 1098, 1101 (Or. Ct. App. 1996) (quoting *Fleming v. Kids & Kin Head Start*, 693 P.2d 1363, 1364 (Or. Ct. App. 1985)). As the district court held, Hansen failed to plead the breach or damage elements of his claim.

The Policy covers "loss" caused by collision, and unambiguously defines "loss" as "loss of" or "damage to" an automobile or its equipment. (ER 51, 52).

Hansen did not allege his Truck or its equipment suffered any "damage" caused by a collision that could not have been, or was not, repaired by the amount GEICO paid (plus his deductible). Nor did he allege any loss of his Truck or its equipment for which he was not compensated. He, therefore, failed to allege a "loss" covered by the Policy for which GEICO did not compensate him.

Requiring GEICO to pay for a scan—absent unrepaired damage—would force GEICO to provide more than coverage for "damage to" or "loss of" the Truck, as provided in the Policy. It would also exceed the Policy's liability limit, which limits GEICO's liability to the cost of a "repair." Hansen does not allege a scan would "repair" anything, or that there is anything on the Truck to repair. Accordingly, Hansen cannot allege that the Policy requires coverage for scans or that he suffered any compensable contract damages. *See, e.g., Sonnier v. State Farm Mut. Auto. Ins. Co.*, 509 F.3d 673, 676 (5th Cir. 2007) (holding State Farm had no obligation to pay for a diagnostic inspection under nearly identical policy language).

A. The Policy's Unambiguous Definition of "Loss" Controls, And It Cannot Plausibly Be Read To Include Coverage For Scans

Hansen urges the Court to broadly interpret "loss" to include diagnostic scans. (AOB 13-17). But a diagnostic scan is not a "loss of" or "damage to" an automobile, meaning it is not a "loss" as the Policy unambiguously defines the term. (ER 51). Therefore, Hansen's proposed interpretation of "loss" is not a

plausible reading of the Policy definition, and it fails as a matter of law.

When interpreting an insurance policy, Oregon courts "begin" the analysis "with the wording of the policy, *applying any definitions contained in the policy*." *Rhiner v. Red Shield Ins. Co.*, 208 P.3d 1043, 1045 (Or. Ct. App. 2009) (emphasis added). When "[t]he text of the policy includes any definitions of disputed terms included in the policy[,] [courts] *must*, in fact, construe the policy in accordance with any such definitions." *Andres v. Am. Standard Ins. Co. of Wis.*, 134 P.3d 1061, 1063 (Or. Ct. App. 2006) (emphasis added). Where only one party's interpretation is plausible under the applicable policy definition, that interpretation controls, and the "analysis goes no further." *Rhiner*, 208 P.3d at 1045. "Only if the policy does not define the terms in dispute do [Oregon courts] invoke assumptions about 'ordinary meaning' and other aids to construction." *Andres*, 134 P.3d at 1063.

Although Hansen agrees that *Rhiner* and *Andres* articulate Oregon's legal framework for interpreting insurance policies, his brief ignores their interpretative framework. (AOB 12).

The Policy unambiguously defines "loss" as "direct and accidental *loss of* or *damage to* . . . an insured auto, including its equipment." (ER 51 (emphases added)). Hansen does not argue that the Policy's definition of "loss" is ambiguous or is otherwise defective. (*See* AOB 13-17). He skips the first step and ignores the

Policy language defining "loss," asking this Court to interpret "loss" as if it were an undefined term in the abstract, using dictionary definitions, inapposite Oregon cases, and unrelated provisions from the Policy. (*Id.*) Because the Policy's definition is undisputedly unambiguous, it controls. *Andres*, 134 P.3d at 1063. Resort to "other aids to construction" is improper, and the Court need not—and should not—consider them. *Id.*

Hansen's proposed interpretation of "loss" goes far beyond the Policy's definition. (*See* AOB 14). He urges the Court to broadly interpret "loss" to include all conceivable "financial detriment," or "*any* cost resulting from a . . . collision." (AOB 14 (internal quotation marks omitted)). This expansive interpretation finds no support in the Policy's definition, which limits coverage to the "loss of" or "damage to" the vehicle itself. (ER 51). Nothing in the Policy definition even remotely suggests coverage for anything beyond the cost of repairing or replacing a lost or damaged automobile—let alone coverage for all consequential "financial detriment." (AOB 14). Because the analysis of the meaning of "loss" begins and ends with the Policy's unambiguous definition of "loss," this Court must reject Hansen's expansive interpretation. *Andres*, 134 P.3d at 1063.

Under the Policy's definition, Hansen's attempt to treat a scan as a "loss" does not make sense. A scan is not a "loss of" or "damage to" the Truck or

anything else. (ER 51 (defining "Loss" in the Policy)). Rather, it is Hansen's preferred tool for "identify[ing] potential damage" and "ensur[ing]" that no damage remains. (ER 77, ¶ 13). A scan is not a "loss," as the term is defined in the Policy, and Hansen's proposed interpretation is not plausible. *See Rhiner*, 208 P.3d at 1045.

The district court interpreted "loss" exactly as it is defined in the Policy. It held that GEICO cannot be liable for a "loss" absent allegations of unrepaired or uncompensated "*damage*" *to* the Truck or its equipment and that the Policy does not cover diagnostics. (*See* ER 28:4-17 (emphasis added)). This interpretation is rooted in the Policy definition, and it is the only plausible interpretation before the Court. This Court should reject Hansen's attempt to ignore the Policy's definition of "loss."

B. The Policy's Limitation of Liability Also Excludes Unnecessary Scans from Coverage

Even if Hansen could broaden the meaning of "loss" by reference to "other aids to construction," *Andres*, 134 P.3d at 1063, his proffered definition would still run afoul of the Policy's express limit on liability. (*See* ER 53). As Hansen agrees, GEICO's liability for a "loss" is limited to the cost necessary to "*repair* or replace the property." (AOB 7 (quoting ER 53) (emphasis added)). That is, GEICO is only obligated to pay the cost (less the deductible) to: (1) "repair" damaged property; or (2) "replace" lost or damaged property. (*Id.*). Hansen's

complaint, however, does not seek a "repair" or a "replace[ment]." Rather, the pre- and post-repair scans he seeks come—by definition—*before* and *after* repairs, and they are tools for "ensur[ing]" repairs are "complete." (ER 77, ¶ 13). Something that happens *before* or *after* a repair is not a repair. And, as Hansen confirmed at the district court, scans are a method for obtaining "a proper determination of the scope of [ ] repairs or confirmation that repairs have been performed properly and completely," not performance of a repair. (SER 53). Besides redefining "loss" without considering the Policy's definition, Hansen's proposed interpretation of the Policy would force this Court to expand the meaning of "repair" to include pre- and post- "repair" scans, regardless of extant unrepaired damage. (*See* AOB 17-21).

C. Hansen's Interpretation is Not Supported by Oregon Law or Common Definitions

Beyond Hansen's allegations and prior arguments that scans are something other than a "repair," the dictionary definitions and case law he cites do not support expanding "repair" to include a diagnostic scan where no unrepaired damage is identified. *Black's Law Dictionary* defines "repair" as "the process of restoring something that has been subjected to decay, waste, injury, or partial destruction, dilapidation, etc.," and *Webster's Third New International Dictionary* defines "repair" as "to restore to a sound or healthy state"; "to make good: REMEDY"; "to make up for: compensate for." (AOB 17-18 (internal quotation marks omitted)).

These definitions presuppose the existence of damage and describe the act of restoring damaged property to its pre-loss condition. The Supreme Court of Oregon's interpretation of "repair" in other insurance policies also presupposes damage, defining it as "the restoration of the vehicle to its condition prior to the collision." *Gonzales v. Farmers Ins. Co. of Or.*, 196 P.3d 1, 6 (Or. 2008) (citing *Dunmire Motor Co. v. Or. Mut. Fire Ins. Co.*, 114 P.2d 1005, 1009 (Or. 1941)).

Hansen does not allege any damage that could not have been (or was not) repaired with the payment GEICO made to him, plus his deductible. Nor does he allege a scan would restore his Truck to pre-loss condition. Instead, he asks the Court to interpret "repair" to require different, additional acts—inspecting the Truck to determine if there is any undetected damage to repair, and inspecting the Truck again to confirm all damage was repaired. No dictionary definition or Oregon case supports such an interpretation.

Even if Hansen could get past the Policy's unambiguous definition of "loss," because GEICO's liability is limited to the cost to "repair," and a scan will not "restore" or "REMEDY" any damage, his claim fails. Hansen confirmed this disconnect between a scan and a repair when he argued below that GEICO should pay for a scan "[r]egardless of any latent damage that the scans may have identified." (SER 47). By this, Hansen means that GEICO must pay for scans even if there is no damage, or no damage that could not otherwise have been

identified. Certainly such a process is not a repair.

Because Hansen has not identified a repair for which he was not compensated, this Court should affirm the dismissal of his breach of contract claim.

D. Hansen's Cited Authority Rejects His Policy Interpretation And Coverage For Inspections Like Diagnostic Scans

Hansen contends the Fifth Circuit's decision in *Sonnier v. State Farm Mut. Auto. Ins. Co.*, 509 F.3d 673 (5th Cir. 2007), is "analogous" and instructive. (AOB 22-23, n.6). GEICO agrees. *Sonnier* is on point, and it rejects Hansen's interpretive arguments and legal claims. In *Sonnier*, the Fifth Circuit interpreted nearly identical policy language, applied it to nearly identical facts, and held that the insurer ***was not obligated to pay*** for diagnostic inspections where the insured identified no unrepaired damage. 509 F.3d at 676. As Hansen and GEICO agree, this Court should follow *Sonnier*.

Like Hansen, the plaintiffs in *Sonnier* damaged their vehicles and took them to a body shop for estimates and repairs. *Id.* at 674. Like Hansen, the plaintiffs alleged their vehicle manufacturer and an industry trade group recommended an inspection of all seatbelt systems—including warnings—with all collision repairs. *Id.*[6] The insurer paid to repair all the identified collision damage, but refused to

[6] This recommended inspection included, among other things, examining the hardware, road tests, and analyzing "the system's warning lights." *Id.* at n.1.

cover the cost of the seatbelt system inspections. *Id.* The plaintiffs brought a putative class action, claiming breach of contract and bad faith, just as Hansen did here. *Id.* Like Hansen, the *Sonnier* plaintiffs identified no damage to their seatbelt systems in their complaint. *Id.* at 676.

The *Sonnier* district court orally granted the insurer's motion to dismiss, just as the district court did here, holding that "based on the contractual agreement to repair, if there is no complaint of failure, there is nothing to repair." *Id.* at 675 (internal quotation marks omitted); (ER 28: 4-17). On appeal, the plaintiffs argued—as Hansen does here—that their policy necessarily covered diagnostic inspections, "because in order to repair something, one must first inspect to determine what is in need of repair." 509 F.3d at 675.

Like the Policy here, the policy in *Sonnier* defined "loss" as "'direct and accidental *loss of* or *damage to*' the automobile or its equipment," and limited the insurer's liability to "the automobile's actual cash value or the cost of *repair* or replacement." *Id.* (emphases added). The Fifth Circuit held that this definition for "loss" and the limit of liability are unambiguous. *Id.* at 676 (citing *Blakely v. State Farm Mut. Auto. Ins. Co.*, 406 F.3d 747, 753 (5th Cir. 2005)). It read the unambiguous terms "loss" and "repair" to "limit[] the insurer's liability to the cost of restoring the vehicle to substantially the same physical condition as before the accident so that it is as fit for operation as it was prior to the occurrence of the

damage." *Id.* (quoting *Manguno v. Prudential Prop. & Cas. Ins. Co.*, 276 F.3d 720, 725 (5th Cir. 2002) (internal quotation marks omitted)). In affirming the dismissal with prejudice, the Fifth Circuit held that the insurer satisfied its obligation to provide a "repair" for the plaintiffs' "loss," because the plaintiffs did not "further identify anything broken that needs to be fixed." *Id.*

Further, and like the district court here, the Fifth Circuit held that, even if the manufacturer and industry groups recommend an inspection with every collision repair, those recommendations do not impact or affect the interpretive analysis. *Compare id.* at 676 ("The fact that Appellants' automobile manufacturers and the Inter–Industry Conference on Collision Repairs recommend such an inspection does not change our analysis. We are solely guided by the policy language before us, which requires State Farm to pay Appellants for loss to property based upon the cost of repair."), *with* ER 28:8-11 (The Policy "doesn't promise to pay for diagnostics, and external events such as manufacturer's requirements can't really plug much into the contractual analysis.").[7]

[7] The Fifth Circuit also noted that, had plaintiffs actually identified damage to their seatbelts, the insurer would "arguabl[y] . . . have to pay for the" inspection, to determine how to fix the defect." *Sonnier*, 509 F.3d at 676 n.2. Throughout his brief, Hansen repeatedly suggests GEICO undermined the unambiguous Policy definition of "loss" by "conced[ing] that it sometimes pays for diagnostic scans." (*e.g.*, AOB 9, 10, 23). This "concession" does not alter the interpretation of unambiguous Policy terms, or support Hansen in any way. Unremarkably, as the Fifth Circuit speculated, GEICO pays for scans when collision damage is identified and a scan is necessary to determine "how to fix" the defect. *Sonnier*, 509 F.3d at

As in *Sonnier*, Hansen alleged no damage to his Truck. This Court should follow the sound reasoning of the Fifth Circuit in *Sonnier* and affirm the district court.

E. The Other Cases Relied Upon By Hansen Do Not Support His Interpretive Arguments

Because Hansen fails to establish that the controlling Policy language is ambiguous, the Court should not look to external sources, such as other Oregon cases, for interpretive guidance. *See Andres*, 134 P.3d at 1063. Hansen cites cases concerning medical insurance, diminished value, and airworthiness to support his contrived interpretation of "loss" and "repair." (AOB 15-16, 19-23). To the extent the Court considers these cases, each is inapposite because the insured in each case identified some unrepaired damage or a defect that required repair or treatment. And for the same reason, each supports GEICO's position.

i. The medical insurance cases involve an ongoing effort to remedy an identified injury

The medical insurance cases do not support Hansen's argument. Rather, they illustrate what is missing from his claims—identified damage or injury. (*See* AOB 20-21 (citing *Zeh v. Nat'l Hosp. Ass'n*, 377 P.2d 852 (Or. 1963);

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676 n.2. That scans are sometimes necessary to *effectuate* a repair does not mean that the Policy obligates GEICO to pay for a scan anytime an insured demands—or a manufacturer recommends—one, or to determine if any repair is even necessary. Instead, it means GEICO pays for a scan where it cannot satisfy its Policy obligations without one, exactly as *Sonnier* contemplates. *See id.*

Beveridge v. Hartford Acc. & Indem. Co., 770 P.2d 943 (Or. Ct. App. 1989); *SAIF Corp. v. Carlos-Macias*, 418 P.3d 54 (Or. Ct. App. 2018)).[8]

In *Zeh*, the policy excluded coverage for "medical care" for pre-existing conditions during the first six months after issuance. *See* 377 P.2d at 852. The plaintiff consulted a doctor about leg pain before obtaining the policy, and then he consulted other doctors within six months after the policy issued. *Id.* The second set of doctors recommended a diagnostic procedure they considered necessary to provide effective treatment. *Id.* at 855. However, the insurer refused to cover it because it was "medical care" for a pre-existing condition during the policy's six-month waiting period. *Id.* at 856. The court agreed with the insurer, concluding that the diagnostic procedure was excluded "medical care," because it was a necessary step in remedying the insured's *pre-existing* pain. *Id.* at 858.

In *Beveridge*, the insured suffered from myeloma and complained of pulmonary problems. 770 P.2d at 943-44. While he was hospitalized, his physician recommended a diagnostic bronchoscopy. *Id.* at 944. Due to complications from the procedure, the insured later died. *Id.* When his wife claimed the proceeds of his accidental death policy, the insurer denied coverage,

[8] In addition to identifying an injury or health problem requiring treatment, each case interprets policy language that is different from the Policy language at issue here. Even if these cases presented facts similar to Hansen, they would not help the Court decide the ultimate question – namely, what the Policy requires.

arguing that the bronchoscopy fell within the policy's exclusion for "sickness or disease or medical or surgical treatment therefor." *Id.* (internal quotation marks omitted). The court agreed, holding that the diagnostic procedure was part of an ongoing "intensive treatment program" and was therefore excluded medical treatment. *Id.* at 944-45.

SAIF was a workers' compensation case. 418 P.3d at 54. There, the insured complained of shoulder pain, and the insurer paid for surgery. *Id.* The shoulder pain persisted after the surgery, but the insurer refused to pay for subsequent diagnostic tests. *Id.* The court found the tests were covered because they were "necessary to determine the extent of the claimant's disability." *Id.* at 56.

Hansen's argument, by analogy, is that because these cases treated diagnostic tests as part of "medical care," this Court should treat his requested scans as part of his vehicle's "repair." (*See* AOB 20-21). The analogy breaks down, however, because, unlike here, the medical tests were a necessary part of a plan to treat an identified injury. *See Zeh*, 377 P.2d at 858; *Beveridge*, 770 P.2d at 944-45*; SAIF*, 418 P.3d at 56. Here, the requested scan is not part of—much less a necessary part of—any plan to treat or repair any identified damage or defect. While Hansen quotes *Beveridge* for the proposition that some diagnostics, such as temperature readings, are necessary to treat "acute infection," (AOB 20-21 (quoting *Beveridge*, 770 P.2d at 945 n.2)), he fails to allege anything analogous to

an "acute infection" here. He fails to allege any injury, damage, or defect.

ii. The "diminished value" and "airworthiness" cases involve unrepaired damage

The "diminished value" cases Hansen cites are likewise unhelpful to him. (AOB 15-16, 18-19 (citing *Gonzales v. Farmers Ins. Co. of Or.*, 196 P.3d 1 (Or. 2008); *Rossier v. Union Auto. Ins. Co.*, 291 P. 498 (Or. 1930)). As Hansen agrees, *Gonzales* and *Rossier* hold that where repairs fail to restore a vehicle to its "pre-loss" or "preaccident" physical condition, the insurer must compensate the insured for any decrease in the vehicle's value because of incomplete repairs and remaining physical damage.[9] But this is of no consequence here because Hansen fails to allege that: (1) his Truck was not restored to "pre-loss" or "preaccident" physical condition; or (2) any failure to restore the Truck to "pre-loss" or "preaccident" physical condition decreased its value. Hansen alleges no unrepaired collision damage. *Gonzales* and *Rossier* are inapposite.

The airworthiness case is likewise unhelpful because Hansen does not allege his Truck was not drivable after repairs. (*See* AOB 15 (citing *Busch v. Ranger Ins. Co.*, 610 P.2d 304 (1980)). In *Busch*, the insured made a claim under his "all risk"

[9] AOB 15-16, 18-19; *accord*, *Gonzales*, 196 P.3d at 7 ("We hold that 'repair,' as used in the policy at issue in this case, requires defendants to restore plaintiff's vehicle to its preloss physical condition. If defendants do not or cannot so restore plaintiff's vehicle, defendants must compensate plaintiff for the diminished value of the vehicle."); *Rossier*, 291 P. at 500 (Plaintiff wrecked his newly purchased Studebaker, and it was so "bent, crushed, warped, twisted, broken, and otherwise injured" that it could not be restored to "the condition it was before the wreck").

policy for damage to his airplane's propellers incurred in a hard landing. *Id.* at 305. The damage caused the airplane to lose its FAA "airworthiness" certification and it could not be recertified without an extensive engine tear-down and inspection, for which the insurer refused to pay. *Id.* at 306. The court found the policy covered the cost of tasks necessary for recertification because certification was "*not merely a safety precaution*" – without it, the insured could not legally fly the airplane and, effectively, "had no airplane at all." *Id.* (emphasis added).[10]

Hansen's claim here is not analogous. He does not allege that he cannot legally drive his Truck without the requested scan; he does not allege anything is wrong with the Truck whatsoever. Quite the opposite, he repeatedly acknowledges the requested scan is merely a precautionary measure. (*e.g.*, ER 78, ¶ 21).

[10] Hansen also cites *Grooms v. Davidson Chevrolet Oldsmobile Cadillac*, 800 N.Y.S.2d 321, 321 (N.Y. City Ct. 2005), as "the only published decision specifically addressing diagnostic scans of modern cars." (AOB 22, n.6). *Grooms* is a city court decision from what appears to be a small claims proceeding in Watertown, New York. To the extent *Grooms* is authority at all, it is inapplicable here. In *Grooms*, the plaintiff called her automobile dealership, explained that her check-engine light was on, and scheduled an appointment. 800 N.Y.S.2d at 322. At her appointment, she told the manager the check-engine light had turned off. *Id.* The manager informed her that she could pay for a scan, but he did not explain what a scan could detect, and she declined to pay for one. Later, she had problems with her car that a scan would have likely detected, and the court faulted the manager for failing to inform her of the "possibility of the diagnostic scan uncovering additional problems with [the] vehicle." *Id.* at 324. Importantly, however, *Grooms* says nothing about any insurer's obligations or duties, any policy language, or any requirement to actually provide a scan.

F. Hansen's "Context" Arguments Are Incorrect And Irrelevant

Hansen also attempts to justify his interpretation with other Policy provisions. (*See* AOB 16-17). As with his cases, the Court should not reach this "context" argument because Hansen fails to argue that the Policy's controlling provisions are ambiguous. *See Andres*, 134 P.3d, at 1063. However, to the extent the Court considers this argument, it is easily rejected.

Hansen contends "loss" must mean more than "visible physical damage," because GEICO specifically limits its liability for "loss" to exclude coverage for other types of harm, including compensation for "diminished value." (AOB 16-17; *see* also ER 51, 53 (defining "diminished value" and excluding it from coverage). According to Hansen, GEICO would not need to exclude "diminished value" unless "loss" covers more than the cost of repairing "damage to" a vehicle. (AOB 16-17). His argument relies on a misrepresentation of the district court's holding and is wrong.

The Policy *excludes* "diminished value," which is defined as "the difference, if any, between the market value of the ***owned auto*** immediately preceding a ***loss*** and the market value of the ***owned auto*** after repair of physical damage resulting from that ***loss***." (ER 51 (emphasis in original)). Where such a diminished value exists, it could conceivably be considered "damage" to the vehicle. *See, e.g.*, *Gonzales*, 196 P.3d at 7 (holding diminished value resulting from incomplete

repairs is covered, but declining to address whether diminished value caused by stigma would be covered because it was not at issue). Putting aside the existence or recoverability of "diminished value" under the Policy, or any policy, Hansen's argument fails because "diminished value" is a concrete form of damage.

Hansen repeatedly claims the district court held that the term "loss" covers only "visible physical damage" to support his "diminished value" argument. (*See* AOB 2, 9, 14-16). This premise is demonstrably false. *See* ER 2-31. The district court held that there had to be some damage to be repaired, and none was alleged. (ER 28:4-17). Unlike Hansen's claim for scans, which lack any allegation of damage to the Truck, diminished value, as defined in the Policy, is a form of damage that could theoretically exist—though, it is not alleged here.

Hansen also cites several exclusions in the Policy he claims "preclude recovery for several types of restorations, but not diagnostic tests." (AOB 22). He is mistaken. These exclusions provide no context explaining how a diagnostic scan, without unrepaired damage, fits within the definition of "loss" or "repair." The "war" exclusion excludes a cause of "loss," not type of repair (or restoration). (ER 53). The limit for loss for custom parts or equipment does not "preclude recovery for [a type] of restoration[]." (AOB 22). Rather, it recognizes a right to recover the cost of repairs for custom parts and equipment, but provides a limit to the amount that can be recovered. (ER 53). These Policy provisions do not, as

Hansen claims, "indicate that 'repair' includes diagnostic tests." (AOB 22). They give no insight into whether diagnostic tests, with no unrepaired damage, are covered under the Policy. Rather, as Oregon law instructs, that question is answered in the negative by the Policy's unambiguous definition of "loss." *See Rhiner*, 208 P.3d at 1045-46; *Andres*, 134 P.3d at 1063-64.

G. Hansen Also Failed To Allege The Damages Element of His Claim

Beyond his failure to allege GEICO breached any Policy terms, Hansen also fails to allege the damages element of his contract claim. *See Moini v. Hewes*, 763 P.2d 414, 417 (Or. Ct. App. 1988) ("Damage is an essential element of any breach of contract action."). To allege compensable damages under the collision coverage, Hansen needed to allege a "loss"—meaning collision "damage to" his Truck—that GEICO did not pay to repair or replace. He alleges no such thing. Instead, he complains that GEICO declined to pay for his preferred means of reassurance that no damage exists. This is not compensable "damage," and it is another basis to affirm the district court.

II. HANSEN CANNOT ALLEGE A BAD FAITH CLAIM

Hansen's bad faith claim fails for largely the same reasons as his breach of contract claim. While the implied duty of good faith exists to effectuate the parties' objectively reasonable expectations, that duty "does not vary the substantive terms of the bargain." *U.S. Nat'l Bank of Or. v. Boge*, 814 P.2d 1082

(Or. 1991); *accord Tucker v. Or. Aero, Inc.*, 474 F. Supp. 2d 1192, 1214 (D. Or. 2007) (duty of good faith and fair dealing "does not expand the substantive duties under a contract; rather, it relates to the performance of the contract"). It "cannot serve to contradict an express contractual term." *Uptown Heights Associates Ltd. P'ship v. Seafirst Corp.*, 891 P.2d 639, 643 (Or. 1995).

Hansen alleges that GEICO's refusal to pay for pre- and post-repair scans failed to meet his "reasonable expectation, rooted in the plain language of the Policy, that GEICO will compensate [him] in an amount sufficient to obtain complete and safe repairs." (ER 83, ¶ 47). But Hansen does not allege GEICO failed to compensate him in an amount sufficient to obtain complete and safe repairs. Rather, he alleges he wants GEICO to pay to confirm this. (*See, e.g.*, ER 78 ¶ 20). Hansen has not plausibly alleged any objectively reasonable expectation was not met.

Even assuming GEICO's policyholders reasonably expect coverage for pre- and post-repair scans, requiring GEICO to pay for such scans would expand GEICO's obligations under the Policy and contradict an "express contractual term." It would contradict the definition of "loss," which expressly limits coverage to "damage to" or the "loss of" a covered vehicle. (ER 51). Instead of honoring that contractual limitation, an order requiring scans would contradict it and create a new coverage for something else—namely, the act of determining whether

"damage to" the vehicle (i.e., "loss") even exists.

Such an order would also contradict the Policy's liability limit, which restricts GEICO's liability to the cost to "repair or replace" damaged "property." (AOB 7 (quoting ER 53)). This limit caps GEICO's obligation at the cost of "fix[ing]" (i.e, "repairing") identified damage. *See, e.g.*, *Sonnier*, 509 F.3d at 676-77 (dismissing plaintiffs' bad faith claim with the breach of contract claim). Going beyond GEICO's obligation to pay the cost to "repair," and requiring it to pay for a scan through the implied duty of good faith, would contradict that liability limit. *See id.* For the same reason, the implied duty of good faith cannot require GEICO to pay for a pre- or post-repair scan every time an insured requests one or an industry group recommends one. *See id.* Instead, as Hansen concedes, GEICO's "repair" obligation requires only that it pay the cost "necessary to restore a vehicle to its pre-collision condition." (AOB 20; *accord* AOB 10, 17, 22-24).

This Court should affirm the dismissal of Hansen's bad faith claim.

III. THIS APPEAL PRESENTS PURE QUESTIONS OF CONTRACTUAL INTERPRETATION, NOT QUESTIONS OF FACT

Hansen's argument that GEICO's putative obligation to pay for scans is not a question of law, but instead a question of fact for the jury, fails. (AOB 24-25). "The interpretation of a written contract is a question of law." *Fuller v. Equitable Sav. & Loan Ass'n*, 718 F.2d 951, 952 (9th Cir. 1983). Hansen is wrong in his claim that his alleged opinion "that electronic scans are 'a necessary part of

collision repairs'" creates a factual issue that avoids this rule. (*See* AOB 24-25 (quoting ER 77 ¶ 12)).

Hansen's opinion says nothing about what the Policy requires GEICO to cover. The undisputedly unambiguous definition of "loss" in the Policy determines what is covered, which is a pure legal question. Hansen's alleged opinion only says what he would like to occur during a repair. This opinion cannot create a factual question as to what the Policy means or requires. And even if it could, the meaning of Policy language is dictated by Oregon's interpretive tools, not Hansen's experience.

Hansen's opinion, in any event, is not a "factual allegation," so the Court should disregard it when considering a motion to dismiss. *N. Highlands I, II, LLC v. Comerica Bank*, 328 F. App'x 358, 359–60 (9th Cir. 2009) (When reviewing a Rule 12(b)(6), this Court "need not assume the truth of opinions") (citing *Anderson v. Clow*, 89 F.3d 1399, 1403 (9th Cir. 1996)); *United States v. Bonanno Organized Crime Family of La Cosa Nostra*, 879 F.2d 20, 27 (2d Cir. 1989) ("'[O]pinions couched as factual allegations are not given a presumption of truthfulness.'") (quoting 2A JAMES. WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 12.07[2.-5] at 63-64 (2d ed. 1987)). It is also an unreasonable inference from the facts alleged. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001) (courts do not "accept as true allegations that are merely

conclusory, unwarranted deductions of fact, or unreasonable inferences"). Hansen alleged no facts plausibly suggesting diagnostic scans were a necessary part of the repairs to the Truck. He alleged no damage to the Truck that went unrepaired because there was no pre-repair scan, or no latent damage that needed to be identified with a post-repair scan. Hansen has alleged no fact from which the Court could reasonably infer a scan is necessary to repair his Truck, let alone, as Hansen's unsupported opinion suggests, necessary for *every* repair.[11]

IV. HANSEN WAIVED HIS RIGHT TO AMEND THE COMPLAINT

Hansen never sought leave to amend the complaint from the district court, and he does not seek to amend here, implicitly conceding that, if this Court affirms, he cannot cure any of the defects identified by the district court, and waiving any opportunity to do so. *See, e.g.*, *Alaska v. United States*, 201 F.3d 1154, 1163–64 (9th Cir. 2000) (if leave to amend not sought from the district court, "the request on appeal to remand with instructions to permit amendment comes too late" (internal quotation marks omitted)).

CONCLUSION

For the foregoing reasons, this Court should affirm.

[11] Taken to its logical conclusion, Hansen's unsupported opinion is that a small paint scratch cannot be "completely" "repaired" without a scan. (ER 77, ¶ 12; *accord* AOB 25). This is an unreasonable inference, and it is not entitled to a presumption of truth.

RESPECTFULLY SUBMITTED this 13th day of November, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on November 13, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF System.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Jeff A. Siatta

CERTIFICATE OF COMPLIANCE

The undersigned certifies that pursuant to FRAP 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached Answering Brief is proportionally spaced, has typeface of 14 or more points, and contains 7,874 words.

/s/ Jeff A. Siatta