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## 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, No. 18-35383

On Appeal from United States District Court District of Oregon, Portland Division Case No. 3:17-cv-01986-MO

Defendant-Appellee.

## **APPELLEES' SUPPLEMENTAL EXCERPTS OF RECORD**

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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

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## UNITED STATES DISTRICT COURT

### DISTRICT OF OREGON

### PORTLAND DIVISION

LEIF HANSEN, on behalf of himself and all others similarly situated.

Civil Case No. 3:17-cv-1986-MO

GOVERNMENT EMPLOYEES INSURANCE COMPANY'S MOTION TO DISMISS

GOVERNMENT EMPLOYEES INSURANCE COMPANY, a Maryland corporation,

Plaintiff,

v.

Defendant.

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[ORAL ARGUMENT REQUESTED]

### SER 01

### <u>Certification of Compliance with LR 7-1(a)(1)</u>

Counsel for Defendant Government Employees Insurance Company ("GEICO") certifies that they conferred with Plaintiff's counsel and Plaintiff opposes this Motion.

### <u>Motion</u>

GEICO moves this Court for an order dismissing this case with prejudice under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). The grounds for this Motion are set forth below. GEICO believes its personal jurisdiction argument from pages 3 to 7 of its contemporaneously filed Motion to Strike is best addressed by Rule 12(f) at this stage, but to avoid any waiver argument, GEICO moves to dismiss the claims of absent putative out-of-state class members and expressly incorporates its personal jurisdiction argument as a Rule 12(b)(2) motion here.

#### Memorandum of Law

To have standing in federal court, individually or on behalf of a class, a plaintiff must allege an actual, redressable, injury-in-fact. Plaintiff Leif Hansen ("Hansen") only alleges that he may, potentially, have a redressable injury and he wants GEICO to pay to find out if it exists. With no redressable injury-in-fact, Hansen lacks Article III standing to sue GEICO. The Court should also dismiss Hansen's breach of contract and breach of the implied covenant of good faith and fair dealing claims because he did not allege facts supporting elements of those claims.

Hansen alleges he made a claim under his GEICO-issued insurance policy (the "Policy") for collision damage to his 2017 GMC Sierra 3500 pickup truck (the "Truck"). Compl. (Doc. 1) ¶ 11. Hansen asserts GEICO breached the Policy but does not allege GEICO refused to pay the costs to repair covered damage to the Truck caused by the collision, or that the amount GEICO paid (less the deductible) was insufficient to pay the costs to repair covered damage caused by the collision. Instead, he alleges GEICO did not pay for pre- and post-repair electronic scans of Page 2–GOVERNMENT EMPLOYEES INSURANCE COMPANY'S MOTION TO DISMISS

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the Truck. *Id.* ¶¶ 20, 21. These scans would not repair covered damage to the Truck, but could, according to Hansen, potentially identify damage not already identified and repaired. *Id.* ¶ 13. Because no scan was performed, Hansen thinks it is possible some undetected, post-repair damage may, if the repair shop that performed the repair did not identify the damage during the repair process, exist after the repair. *Id.* ¶¶ 20, 21. Other than this *possibility*, Hansen does not allege any damage to his Truck caused by the collision exists that could not be repaired for the amount GEICO paid. *See generally id.* 

Hansen's speculation about the *possibility* that some undetected damage *could* exist—and that an electronic scan *potentially may* identify it—is by definition hypothetical, not an actual, injury. This hypothetical injury does not satisfy Hansen's burden to allege a concrete, redressable injury-in-fact sufficient to establish Article III standing. Without standing, this Court lacks subject matter jurisdiction and the Complaint should be dismissed.

Even if Hansen had standing, the Complaint should be dismissed because he failed to state claims for breach of contract or bad faith. Without allegations that GEICO did not pay the cost to repair damage covered by the Policy, Hansen did not allege facts plausibly suggesting GEICO breached a term of the Policy or that a breach caused Hansen damage and his breach of contract claim fails. Further, Hansen did not allege GEICO frustrated any objectively reasonable expectation under the Policy either, and his bad faith claim fails.

### I. <u>HANSEN'S ALLEGATIONS DO NOT CREATE STANDING TO SUE</u> <u>GEICO OR SUPPORT ELEMENTS OF HIS CLAIMS</u>

While GEICO disputes many of Hansen's allegations, it assumes they are true for

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purposes of this Motion.<sup>1</sup> Parks Sch. of Bus., Inc. v. Symington, 51 F.3d 1480, 1484 (9th Cir. 1995). The Complaint alleges that Hansen is the "owner of a group of Portland-area auto repair shops." Compl. ¶ 12. Hansen is also an insured on a GEICO insurance policy that provides coverage for collision losses to the Truck (*i.e.*, the Policy). Id. ¶ 9. According to the Complaint, the Policy's collision coverage states that GEICO "will pay for a collision *loss* to the owned auto or non-owned car for the amount of each loss less the applicable deductible," and it defines "loss" as "direct and accidental loss of or *damage to* . . . an insured auto, including its equipment." Id. ¶ 10 (emphases added) (ellipses in the original).<sup>2</sup>

In November 2017, the Truck's rear bumper was allegedly damaged in a collision. *Id.* ¶ 1. On November 4, Hansen reported a claim to GEICO and scheduled an appointment for a repair estimate. *Id.* During this appointment, Hansen requested "pre- and post-repair electronic scans to ensure that his vehicle was repaired safely and completely." *Id.* ¶ 12. GEICO "refused to authorize the scans." *Id.* ¶ 19. After repairs were completed to the Truck, Hansen "again requested electronic scans to ensure that the [Truck] had been safely and completely repaired." *Id.* ¶ 20. GEICO has not paid for a scan and no scan has been performed. *Id.* ¶¶ 20-21. According to Hansen, because the scans were not performed, the Truck is "at risk for having undetected repairs and being unsafe to drive." *Id.* ¶ 21.

Hansen does not allege that GEICO failed to pay for complete repairs (less the Policy's deductible) or that any damage that could have been identified by a scan actually exists but was

<sup>1</sup> GEICO particularly disputes Hansen's characterization of how GEICO handles policyholder claims generally (*e.g.*, Compl. ¶¶ 19, 23, 25) or that it would purposely underpay claims, causing its policyholders to accept unsafe or incompletely repaired vehicles (*e.g.* Compl. ¶ 48).

<sup>2</sup> Exhibit 1 is a copy of the Policy. Because the Complaint refers to it (and quotes it incompletely and with an error), the Court may consider it without converting this Motion to a summary judgment motion. *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994). The language quoted in the Complaint can be found at GEICO-HANSEN000010, 11.

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not otherwise identified by the repair shop or GEICO. See generally id. Rather, he only alleges it is possible some unidentified, speculative, invisible damage could exist after the repair. Id. ¶ 21. Hansen—an experienced owner of multiple auto body shops with the equipment to perform the scans at likely no cost to him—does not allege his Truck needs any additional repair, of any kind. See generally id.

Hansen asserts individual and putative class claims for (1) breach of contract and (2) breach of the implied covenant of good faith and fair dealing (bad faith). *Id.* ¶¶ 36-49.<sup>3</sup>

### II. <u>HANSEN DOES NOT HAVE ARTICLE III STANDING BECAUSE HE DID NOT</u> <u>ALLEGE AN INJURY-IN-FACT REDRESSABLE BY THE COURT</u>

"To satisfy Article III's case or controversy requirement, [a plaintiff] must establish standing to sue." *Human Life of Washington Inc. v. Brumsickle*, 624 F.3d 990, 1000 (9th Cir. 2010). "The irreducible constitutional minimum of standing contains three elements: the plaintiff must demonstrate (1) an injury-in-fact, (2) causation, and (3) a likelihood that the injury will be redressed by a decision in the plaintiff's favor." *Id.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)) (internal quotation marks omitted). "Where, as here, a case is at the pleading stage, the plaintiff must 'clearly allege facts demonstrating' each element." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (quoting *Warth v. Seldin*, 422 U.S. 490, 518 (1975)) (alterations incorporated).

Hansen's allegation that some possible, hypothetical damage to the Truck caused by the collision may exist does not satisfy the injury-in-fact or redressability requirements. This "lack of Article III standing requires dismissal for lack of subject matter jurisdiction under Federal

<sup>&</sup>lt;sup>3</sup> This is not Hansen's first lawsuit alleging GEICO should pay for electronic scans. The shops he owns, Leif's Auto Collision Centers, LLC, filed suit alleging GEICO is part of a conspiracy to not provide scans in violation of the Sherman Antitrust Act. See Compl. ¶ 14, Leif's Auto Collision Ctrs., LLC v. Gov't Empl. Ins. Co., No. 3:17-cv-1822 (D. Or. Nov. 14, 2017), Doc. 1. Page 5–GOVERNMENT EMPLOYEES INSURANCE COMPANY'S MOTION TO DISMISS

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Rule of Civil Procedure 12(b)(1)." Maya v. Centex Corp., 658 F.3d 1060, 1067 (9th Cir. 2011).

### A. <u>The Complaint Does Not Allege An Injury-In-Fact That Is Concrete And Actual</u> <u>Or Imminent, As Opposed To Conjectural Or Hypothetical</u>

An injury-in-fact is "an invasion of a *legally protected interest* which is (a) *concrete* and particularized and (b) *actual or imminent, not conjectural or hypothetical.*" *Lujan*, 504 U.S. at 560 (internal citations and quotation marks omitted) (emphases added); *Spokeo*, 136 S. Ct. at 1547 ("We have made it clear time and time again that an injury in fact must be both concrete *and* particularized."). Allegations of "possible future injury do not satisfy the requirements of Art. III." *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990).

A 'concrete' injury must be 'de facto'; that is, it must actually exist." Spokeo, 136 S. Ct. at 1548 (emphasis added). It must be "'real, ' and not 'abstract." Id. (emphasis added). A wrongdoing "divorced from any concrete harm" is constitutionally inadequate. Id. at 1549. A plaintiff does not "automatically satisf[y] the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." Id. Instead, "the plaintiff must allege a statutory violation that caused him to suffer some harm that 'actually exist[s]' in the world." Robins v. Spokeo, Inc. ("Spokeo II"), 867 F.3d 1108, 1113 (9th Cir. 2017) (emphasis added) (on remand from Spokeo, 136 S. Ct. 1540 (2016)), cert. denied, No. 17-806, 2018 WL 491554 (U.S. Jan. 22, 2018).

Spokeo's reasoning applies equally to common law wrongdoing, such as the contractual violation alleged here, as it does to statutory violations. See, e.g., 136 S. Ct. at 1549 (libel); Svenson v. Google Inc., No. 13-CV-04080-BLF, 2016 WL 8943301, at \*1, \*10, \*14-16 (N.D. Cal. Dec. 21, 2016) (plaintiff lacked standing to assert breach of a contractual privacy agreement where Google granted a third-party the ability to access personal information in violation of the

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agreement (*i.e.*, it "*could have*" been shared), but the third party did not access the information so the plaintiff could not establish a concrete injury). Even where some conceptual legal right has been violated, "Article III requires such violation to have caused some real—as opposed to purely legal—harm to the plaintiff." *Svenson*, 2016 WL 8943301, at \*1, \*10, \*14-16.

The Complaint does not allege a concrete injury-in-fact. Hansen, instead, alleges only the *possibility* that some undetected damage to the Truck caused by the collision exists and the possibility that a scan could reveal it. Compl. ¶ 20, 21. The "risk" of "undetected repairs," alleged by Hansen, is hypothetical, not actual, damage, and not "a distinct and palpable injury" or a concrete harm "that actually exists in the world." Compl. ¶ 21; Gladstone Realtors v. Vill. of Bellwood, 441 U.S. 91, 100 (1979); Spokeo II, 867 F.3d at 1113; Spokeo, 136 S. Ct. at 1548. Quite the opposite, it is a repair-shop-owner's hypothesis about the possibility of unalleged, undetected harm (despite his shop having made the repairs), when he can determine whether damage actually exists. The absence of allegations of existing post-repair damage that could only have been discovered via scan is telling because it: (1) likely means no collision damage would have been identified that could not have otherwise been identified; and (2) shows the true purpose of this suit is not to get reimbursed from his insurance policy for the costs to repair the Truck, but rather, is to get a court order compelling GEICO to pay Hansen's shops an automatic additional \$200 (the cost of the pre- and post-repair scans) for every GEICO insured or claimant who brings a vehicle to his shops for repairs, whether or not a scan is necessary to identify additional damage. The allegations that injury might possibly exist are exactly the "conjectural or hypothetical" allegations that fail to state an injury-in-fact. See Lujan, 504 U.S. at 560 ("conjectural or hypothetical" allegations are not a "concrete and particularized" injury-in-fact).

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In *Spokeo*, the Supreme Court held that merely pleading a Fair Credit Reporting Act violation—with no resulting, real-world harm—does not allege a "concrete injury." 136 S.Ct. at 1549. The Court recognized that some legal violations "result in no harm" and therefore no injury-in-fact. *Id.* at 1550. Hansen has only alleged a potential contractual violation—the purported failure to provide scans to detect collision damage that may or may not exist—but failed to connect the potential issue to an actual, real-word, concrete harm. He alleged only the abstract possibility of undetected damage. This does not amount to injury-in-fact, and, therefore, he lacks standing under *Spokeo* and the authorities it cites.

### B. <u>The Complaint Does Not Allege An Injury That Could Be Redressed By A</u> <u>Favorable Decision</u>

Redressability requires it to be "likely, *rather than merely possible*, that a favorable decision by the court would redress the injury." *Am. Fed'n of Gov't Employees, Local 2119 v. Cohen*, 171 F.3d 460, 466 (7th Cir. 1999) (emphasis added). "Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998).

Here, it is, at most, "merely possible" that a favorable decision would remedy Hansen's injury: hypothetical undetected damage remaining to the Truck after repairs are performed using the funds paid by GEICO and the deductible. A Court-ordered scan may identify no additional damage to the Truck caused by the collision and Hansen will remain in the same position he is in now—with a fully-repaired Truck and no damages. *Arakaki v. Lingle*, 477 F.3d 1048, 1064 (9th Cir.2007) (injury not redressable where it was uncertain that a court order terminating certain government funding would mean savings for plaintiffs or spending to benefit someone else). Hansen alleged no facts demonstrating additional damage *will be detected* or even that it is

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"likely" such damage will be detected. Instead, he alleges that, without a scan, there is a possibility of "undetected repairs." Compl. ¶21. Even if the Court ruled that GEICO must provide the scans, it is only "possible," rather than "likely" that any injury to the Truck because of the collision will be found—let alone redressed. Without allegations demonstrating a favorable decision is "likely" to redress any injury, Hansen lacks of Article III standing.

### C. Without Article III Standing, Hansen Cannot Represent The Putative Class

Because he lacks individual standing, Hansen cannot assert claims on behalf of a putative class either. *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974) ("[I]f none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class."); *Pence v. Andrus*, 586 F.2d 733, 736–37 (9th Cir. 1978) ("[I]n class actions, the named representatives must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.") (internal citations and quotation marks omitted).

### III. THE COMPLAINT FAILS TO STATE A CLAIM

Even if Hansen had standing, the Complaint fails to allege requisite elements of either cause of action. The breach of contract claim fails to allege GEICO breached a term of the contract or that any breach caused Hansen damage. The breach of the implied covenant of good faith and fair dealing claim fails because Hansen does not allege GEICO frustrated his objectively reasonable expectations under the Policy, the standard in Oregon.

### A. Hansen Had To Allege Plausible Facts Supporting The Elements Of His Claims

A complaint must allege "enough facts to state a claim to relief that is plausible on its face." *Clemens v. Daimler Chrysler Corp.*, 534 F.3d 1017, 1022 (9th Cir. 2008) (quoting *Bell* Page 9–GOVERNMENT EMPLOYEES INSURANCE COMPANY'S MOTION TO DISMISS

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Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)); Ashcroft v. Iqbal, 556 U.S. 662, 678, (2009) (a "claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged"). The factual allegations "must be enough to raise a right to relief above the speculative level . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Twombly*, 550 U.S. at 555. "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do." *Iqbal*, 556 U.S. at 678. "Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancements." *Id.* (quoting *Twombly*, 550 U.S. at 557, 127 S.Ct. at 1966).

### B. <u>The Breach Of Contract Claim Fails Because Hansen Does Not Allege Breach</u> <u>Or Damage</u>

"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*, 144 Or App 565, 570 (1996) (emphases added) (quoting *Fleming v. Kids & Kin Head Start*, 71 Or App 718, 721 (1985)). Hansen does not allege facts plausibly suggesting breach or damage.

### i. The Complaint Does Not Allege GEICO Breached Any Policy Term

Hansen alleges the Policy requires GEICO to pay for loss to the Truck caused by a collision, less the deductible and defines "loss" as "direct and accidental . . . *damage to*" the vehicle, including its equipment. Compl. ¶ 10. Hansen does not allege the November 2017 collision caused any damage to the Truck for which GEICO refused to pay. Instead, he alleges GEICO did not pay for scans that may have potentially identified undetected, unalleged damage caused by the collision—damage that may not exist. Compl. ¶¶ 19-21.

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Instead of alleging GEICO breached a term of the contract by failing to pay for direct and accidental damage to the Truck, Hansen alleges GEICO refused to pay to use his preferred tool to identify damage—*i.e.*, an electronic vehicle scan—just as a hypochondriac may prefer a CAT Scan to diagnose the cause of an earache when a physical exam of the ear with a speculum would do. *Id.* The Policy could have specified the tool that must be used to identify or complete repairs, but Hansen did not (and cannot) allege any "relevant terms" of the Policy that required GEICO to pay for his preferred tool. Since Hansen failed to allege that GEICO "breached" a "relevant term[]," by refusing to pay for the scans, his breach of contract claim fails. *See Slover*, 144 Or App at 570 (Hansen had to allege a "breach" of the contract's "relevant terms").

### *ii.* The Complaint Does Not Allege Damage

"Damage is an *essential element* of any breach of contract action." *Moini v. Hewes*, 93 Or App 598, 602–03 (1988) (emphasis added). Damage here would be a "direct and accidental loss of or damage to" the Truck that GEICO (with the deductible) has not paid to repair. Compl. ¶ 10 (quoting the Policy). Hansen alleges no such thing. Rather, he complains GEICO declined to pay for electronic confirmation that no damage exists. Instead of damage under the Policy, Hansen, a body shop owner, is requesting GEICO pay to use his preferred tool to obtain electronic reassurance that no damage remains. This is not damage.

### C. <u>The Breach Of The Implied Covenant Of Good Faith And Fair Dealing Claim</u> <u>Fails Because Hansen Does Not Allege His Reasonable Expectations Were</u> <u>Frustrated</u>

In Oregon, the duty of good faith and fair dealing implied in every contract is applied to effectuate the objectively reasonable contractual expectations of the contract. Uptown Heights Associates Ltd. P'ship v. Seafirst Corp., 320 Or 638, 644-45 (1995) (quoting Pacific First Bank

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v. New Morgan Park Corp., 319 Or. 342 (1994) and Tolbert v. First National Bank, 312 Or. 485, 494 (1991)). The duty "cannot serve to contradict an express contractual term." *Id.* at 645.

The Complaint asserts that by not compensating Hansen for pre- and post-repair scans, GEICO frustrated "the reasonable expectation, rooted in the plain language of the Policy, that GEICO will compensate [Hansen] in an amount sufficient to obtain complete and safe repairs." Compl. ¶47. Hansen also conclusorily alleges that GEICO "caused policyholders to accept vehicles that are unsafely or incompletely repaired after collision." *Id.* ¶48. Hansen does not, however, allege that *his* Truck was unsafely or incompletely repaired because GEICO did not pay for a scan. *Id.* ¶48. Even assuming Hansen stated an objectively reasonable expectation, without plausible facts suggesting the Truck could not be properly repaired with the amount GEICO paid (plus the deductible), Hansen's reasonable expectations to be compensated sufficiently to obtain a complete and safe repair could not have been frustrated.<sup>4</sup>

### IV. <u>CONCLUSION</u>

GEICO respectfully requests that the Court dismiss Hansen's Complaint under Rule 12(b)(1) because he lacks standing, or that each claim be dismissed under Rule 12(b)(6) because Hansen failed to state his claims.

Respectfully submitted this 1st day of February, 2018.

<sup>&</sup>lt;sup>4</sup> GEICO would, of course, fulfill its contractual duty and pay for any direct and accidental loss or damage to the vehicle, subject to the terms, conditions, definitions, and limitations of the Policy. And if additional damage were presented by GEICO's insured, and GEICO had an opportunity to inspect the damage and determine if it was caused by the collision, GEICO would consider the new information and make any payments required by the Policy. But Hansen did not identify Policy language that would require GEICO to pay for an insured's preferred method to confirm that all damage has been repaired, nor is it reasonable to expect an insurer to do so without some facts indicating that additional damage exists.

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Tel: 1-800-841-3000

GEICO CASUALTY COMPANY P.O. Box 509090 San Diego, CA 92150-9090

Date Issued: October 23, 2017

**Declarations Page** 

This is a description of your coverage. Please retain for your records.

Policy Number: Coverage Period:

05-17-17 through 11-17-17 Your coverage begins and ends at 12:01am local time at the address of the named insured.

Endorsement Effective: 10-23-17

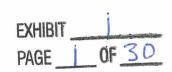
CAROL M HANSEN AND LEIF C HANSEN

Named Insured		Additional Drivers		
Carol M Hansen Leif C Hansen		None		
Vehicles	VIN	Vehicle Location	Finance Com Lienholder	ipany/
1 2009 Porsche	Cayenne S	Portland OR 97224		
2 2017 GMC	Sierra	Portland OR 97224		
Coverages*		Limits and/or Deductibles	Vehicle 1	Vehicle 2
Bodily Injury Liabi Each Person/Eac		\$250,000/\$500,000	\$95.04	\$96.89
Property Damage	an a	\$100.000	\$80.12	\$85,20
Personal Injury Pi		Non-Ded	\$15.67	\$13.26
Uninsured Motoris		Troit-Dou		Ψι σι ω σ
Each Person/Eac		\$250,000/\$500,000	\$25.00	\$20.29
Comprehensive		\$500 Ded	\$20.86	\$23.81
Collision		\$500 Ded	\$55.51	\$86.63
Emergency Road	Service	Full	\$4.66	\$1.54
Rental Reimburse	ement	\$35 Per Day	\$7.56	\$7.56
		\$1050 Max	-	-
Mechanical Break	down	\$250 Ded	-	\$25.11
Six Month Premi	ium Per Vehicle		\$304.42	\$360.29
Total Six Month				\$664.71

\*Coverage applies where a premium or \$0.00 is shown for a vehicle.

If you elect to pay your premium in installments, you may be subject to an additional fee for each installment. The fee amount will be shown on your billing statements and is subject to change.

T-J DEC\_PAGE (03-14) (Page 1 of 2)



Continued on Back Policy Change Page 5 of 6

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#### **Discounts**

The total value of your discounts is	\$410.24
Restraint	\$10.55
Seat Belt	
Anti-Theft	\$4.79
Good Driver	\$190.20
Persistency	\$44.15
Anti-Lock Brake	\$7.48
New Vehicle Discount	
Multi-Vehicle Discount	
The following discounts have also been applied	
Driving Experience	Included
Financial Responsibility	
Contract Type: A30OR Contract Amendments: ALL VEHICLES - A30OR A355 A54ED1 A54OR	
Unit Endorsements: A431 (VEH 1,2); CC115 (VEH 1,2); CC280L (VEH 2)	

The following forms for your policy are available to review online at geico.com/express:

Form Name	Form Number (Revision Date)
Rental Reimbursement Coverage	A431 (05-11)
Emergency Road Service	CC115 (04-08)
Multi-Risk Physical Damage Coverage	CC280L (02-96)

You may view, save and print the forms listed above on our website. You will not receive a paper copy of the forms unless you request that we mail you a paper copy of any of the forms listed above at no cost by calling us at 1-800-841-3000.

### **Important Policy Information**

-We welcome you to our GEICO family in the Auto Voluntary B10 rate program.

-A premium charge of \$31.74 is included in your total premium for the Upgraded Accident Forgiveness benefit.

-Your policy includes the Upgraded Accident Forgiveness benefit, which waives the surcharge associated with the first at-fault accident by any driver on your policy.

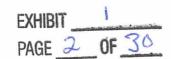
-Reminder - Physical damage coverage will not cover loss for custom options on an owned automobile, including equipment, furnishings or finishings including paint, if the existence of those options has not been previously reported to us. This reminder does NOT apply in VIRGINIA, however, in Virginia coverage is limited for custom furnishings or equipment on pick-up trucks and vans but you may purchase coverage for this equipment. Please call us at 1-800-841-3000 or visit us at geico.com if you have any questions.

-Claims incurred while an insured vehicle is being used to carry passengers for hire may not be covered by this contract. Please review the contract for a full list of exclusions and contact us if you plan to use any of your insured vehicles for this purpose.

-A credit or discount has been applied to this policy: MULTI-VEHICLE DISCOUNT. A credit or discount has been applied to this policy: NEW VEHICLE DISCOUNT.

-As you have requested, we have included Multi-Risk Coverage on your 2017 GMC. There is a \$250 deductible for Mechanical Breakdown. The Comprehensive and Collision deductibles are listed on your Policy Declaration.

-The 2017 GMC has been added to your policy.



Policy Change Page 6 of 6

## Case 3:17-cv-01986-MO Document 21-1 Filed 02/01/18 Page 3 of 30 Case: 18-35383, 11/13/2018, ID: 11086125, DktEntry: 20, Page 19 of 131

GEICO

ONE GEICO PLAZA Washington, D. C. 20076-0001 Telephone: 1-800-841-3000

## Oregon Family Automobile Insurance Policy

A-30OR (08-11)

**EXHIBIT** PAGE 3 0F 30

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Whenever, "he," "his," "him," "himsel f" appears in this policy, you may read "she," "her," "hers," or "herself."

#### AGREEMENT

We, the Company named in the declarations attached to this policy, make this agreement with you, the policyholder. Payment of the first premium is a condition precedent to effective coverage under this insurance policy. Relying on the information you have furnished and the declarations attached to this policy, we will do the following:

#### SECTION I

Liability Coverages Your Protection Against Claims From Others Bodily Injury Liability Property Damage Liability

#### DEFINITIONS

The words italicized in Section I of this policy are defined below.

- 1. Auto business means the business of selling, repairing, renting, leasing, brokering, servicing, storing, transporting or parking of autos.
- 2. Bodily injury means bodily injury to a person, including resulting sickness, disease or death.
- 3. Farm auto means a truck type vehicle with a gross vehicle weight of 15,000 pounds or less, not used for commercial purposes other than farming.
- 4. Insured means a person or organization described under PERSONS INSURED.
- Non-owned auto means an automobile or *trailer* not owned by or furnished for the regular use of either you or a relative, other than a *temporary substitute auto*. An auto rented or leased for more than 30 days will be considered as furnished for regular use.
- 6. Owned auto means:
  - (a) a vehicle described in this policy for which a premium charge is shown for these coverages;
  - (b) a trailer owned by you;
  - (c) a private passenger auto, farm auto or utility auto, ownership of which you acquire during the policy period or for which you enter into a lease during the policy period for a term of six months or more, if
    - (i) it replaces an owned auto as defined in (a) above; or
    - (ii) we insure all *private passenger auto*, *farm auto* and *utility autos* owned or leased by *you* on the date of the acquisition, and *you* ask us to add it to the policy no more than 30 days later;
    - (d) a temporary substitute auto.
- 7. Personal vehicle sharing program means a legal entity qualified to do business in the state of Oregon engaged in the business of facilitating the sharing of private passenger motor vehicles for noncommercial use by individuals within the state of Oregon.
- 8. Private passenger auto means a four-wheel private passenger, station wagon or jeep-type auto.
- 9. Relative means a person related to you who resides in your household.
- **10.** *Temporary substitute auto* means an automobile or *trailer*, not owned by *you*, temporarily used with the permission of the owner. This vehicle must be used as a substitute for the *owned auto* or *trailer* when withdrawn from normal use because of its breakdown, repair, servicing, loss or destruction.
- 11. *Trailer* means a trailer designed to be towed by a *private passenger auto*, if not being used for business or commercial purposes with a vehicle other than a *private passenger auto*, *farm auto* or *utility auto*.
- **12.** Utility auto means a vehicle, other than a *farm auto*, with a gross vehicle weight of 15,000 pounds or less of the pick-up body, van or panel truck type not used for commercial purposes.
- 13. War means armed conflict between nations, whether or not declared, civil war, insurrection, rebellion or revolution.
- 14. You and your means the named insured shown in the declarations or his or her spouse or registered domestic partner if a resident of the same household. As used throughout this Policy, 'spouse' includes a registered domestic partner.

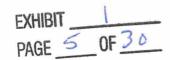
#### LOSSES WE WILL PAY FOR YOU UNDER SECTION I

Under Section I, we will pay damages which an *insured* becomes legally obligated to pay because of:

- 1. bodily injury, sustained by a person, and;
- 2. damage to or destruction of property,

arising out of the ownership, maintenance or use of the *owned auto* or a *non-owned auto*. We will defend any suit for damages payable under the terms of this policy. We may investigate and settle any claim or suit.

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#### ADDITIONAL PAYMENTS WE WILL MAKE UNDER THE LIABILITY COVERAGES

- 1. All investigative and legal costs incurred by us.
- 2. All court costs charged to an insured in a covered lawsuit.
- 3. Interest calculated on that part of a judgment that is within our limit of liability and accruing:
  - (a) Before the judgment, where owed by law, and until we pay, offer to pay, or deposit in court the amount due under this coverage;
  - (b) After the judgment, and until we pay, offer to pay, or deposit in court, the amount due under this coverage.
- 4. Premiums for appeal bonds in a suit we appeal, or premiums for bonds to release attachments; but the face amount of these bonds may not exceed the applicable limit of our liability.
- Premiums for bail bonds paid by an *insured* due to traffic law violations arising out of the use of an *owned auto*, or *non-owned auto*, not to exceed \$250 per bail bond.

We will upon request by an *insured*, provide reimbursement for the following items:

- (a) Costs incurred by any *insured* for first aid to others at the time of an accident involving an *owned auto* or *non-owned auto*.
- (b) Loss of earnings up to \$50 a day, but not other income, if we request an *insured* to attend hearings and trials.
- (c) All reasonable costs incurred by an *insured* at our request.

#### EXCLUSIONS

#### When Section I Does Not Apply

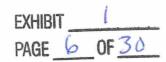
Section I does not apply to any claim or suit for damage if one or more of the exclusions listed below applies:

- 1. Section I does not apply to any vehicle used to carry passengers or property for compensation or a fee, including but not limited to the delivery of food or any other products. However, a vehicle used in an ordinary car pool on a ride sharing or cost sharing basis is covered.
- 2. Bodily injury or property damage caused intentionally by or at the direction of an insured is not covered.
- 3. We do not cover bodily injury or property damage that is insured under a nuclear liability policy.
- 4. Bodily injury or property damage arising from the operation of farm machinery is not covered.
- 5. Bodily injury to an employee of an insured arising out of and in the course of employment by an insured is not covered.

However, **bodily injury** of a domestic employee of the **insured** is covered unless benefits are payable or are required to be provided under a workers' compensation law.

- 6. We do not cover **bodily injury** to a fellow employee of an **insured** if the fellow employee's **bodily injury** arises from the use of an auto while in the course of employment and if workers' compensation or other similar coverage is available. We will defend **you** if suit is brought by a fellow employee against **you** alleging use, ownership or maintenance of an auto by **you**.
- 7. We do not cover an *owned auto* while used by a person (other than *you* or a *relative*) when he is employed or otherwise engaged in the *auto business*.
- 8. A non-owned auto while maintained or used by any person is not covered while such person is employed or otherwise engaged in (1) any auto business if the accident arises out of that business; (2) any other business or occupation of any insured if the accident arises out of that business or occupation, except a private passenger auto used by you or your chauffeur or domestic servant while engaged in such other business.
- 9. We do not cover damage to:
  - (a) property owned, operated, transported or used by an insured; or
  - (b) property rented to or in charge of an *insured* other than a residence or private garage.
- 10. We do not cover an auto acquired by you during the policy term, if you have purchased other liability insurance for it.
- 11. We do not cover:
  - (a) the United States of America or any of its agencies;
  - (b) any person, including you, if protection is afforded under the provisions of the Federal Tort Claims Act.
- 12. We do not cover *bodily injury* or property damage that results from the operation of a *non-owned auto* or *temporary substitute auto* that is designed for use principally off public roads that is not registered for use on public roads.
- 13. We do not cover punitive or exemplary damages awarded due to a loss where the *insured* was legally intoxicated or under the influence of illegal narcotics or narcotics used illegally by the *insured* at the time of loss.
- 14. Section I does not apply:
  - (a) To **bodily injury** or property damage caused by an auto driven in or preparing for any racing, speed or demolition contest or stunting activity of any nature, whether or not prearranged or organized.
  - (b) To the operation or use of a motor vehicle on a track designed primarily for racing or high speed driving. This does not apply if the vehicle is being used in connection with an activity other than racing, high speed driving or any competitive driving.

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- 15. We do not cover any liability assumed under any contract or agreement.
- 16. Regardless of any other provision in this policy, there is no coverage for punitive or exemplary damages.
- 17. Bodily injury or property damage due to the discharge of a weapon or the throwing or ejecting of any projectile is not covered.
- 18. An order of restitution awarded in a criminal proceeding or equitable action is not covered.
- 19. There is no coverage under this Section for any person or organization while any motor vehicle is operated, maintained or used as part of personal vehicle sharing facilitated by a *personal vehicle sharing program*.

#### PERSONS INSURED

#### Who Is Covered

Section I applies to the following as insureds with regard to an owned auto:

- 1. you and your relatives;
- any other person using the auto with your permission except those specifically excluded. The actual use must be within the scope of that permission;
- any other person or organization for his or its liability because of acts or omissions of an *insured* under 1. or 2. above. Section I applies to the following with regard to a *non-owned auto*

Section I applies to the following with regard to a non-owned auto:

- 1. (a) you;
  - (b) your relatives who are not specifically excluded, when using a private passenger auto, farm auto or utility auto or trailer.

Such use must be with the permission, or reasonably believed to be with the permission, of the owner and within the scope of that permission;

2. a person or organization, not owning or hiring the auto, regarding his or its liability because of acts or omissions of an *insured* under 1, above.

The limits of liability stated in the declarations are our maximum obligations regardless of the number of *insureds* involved in the occurrence.

#### FINANCIAL RESPONSIBILITY LAWS

When this policy is certified as proof of financial responsibility for the future under the provisions of a motor vehicle financial responsibility law, this liability insurance will comply with the provisions of that law.

#### OUT OF STATE INSURANCE

When the policy applies to the operation of a motor vehicle outside of *your* state, we agree to increase *your* coverages to the extent required of out-of-state motorists by local law. This additional coverage will be reduced to the extent that *you* are protected by another insurance policy. No person can be paid more than once for any item of loss.

#### LIMITS OF LIABILITY

Regardless of the number of autos or trailers to which this policy applies:

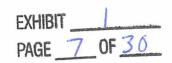
- The limit of bodily injury liability stated in the declarations as applicable to "each person" is the limit of our liability for all damages, including damages for care and loss of services, because of **bodily injury** sustained by one person as the result of one occurrence.
- The limit of such liability stated in the declarations as applicable to "each occurrence" is, subject to the above
  provision respecting each person, the total limit of our liability for all such damages, including damages for care
  and loss of services, because of *bodily injury* sustained by two or more persons as the result of any one
  occurrence.
- 3. The limit of property damage liability stated in the declarations as applicable to "each occurrence" is the total limit of our liability for all damages because of injury to or destruction of the property of one or more persons or organizations, including the loss of use of the property as the result of any one occurrence.

#### **OTHER INSURANCE**

If the *insured* has other insurance against a loss covered by Section I of this policy, we will not owe more than our pro-rata share of the total coverage available.

Any insurance we provide for losses arising out of the ownership, maintenance or use of a vehicle **you** do not own shall be excess over other valid and collectible insurance. However, any insurance we provide shall be primary if the vehicle **you** do not own is a **temporary substitute auto** and is loaned, rented or donated to **you** by a person engaged in the business of selling, renting, leasing or repairing motor vehicles and the motor vehicle is provided in the course of that business, provided:

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- (a) the person or organization providing the motor vehicle is not negligent in maintaining the motor vehicle or in providing the motor vehicle wherein injury, death or damage results from that negligence;
- (b) the motor vehicle is provided to you as a temporary substitute auto while the owned auto is being repaired or serviced; and
- (c) a written agreement exists between the provider of the motor vehicle and **you** specifically stating that the provider is not liable for any injury, death or damage arising from the use of the motor vehicle.

### CONDITIONS

The following conditions apply to Section I:

- 1. NOTICE
  - As soon as possible after an occurrence, written notice must be given us or our authorized agent stating:
  - (a) the identity of the *insured*;
  - (b) the time, place and details of the occurrence;
  - (c) the names and addresses of the injured, and of any witnesses; and
  - (d) the names of the owners and the description and location of any damaged property.

If a claim or suit is brought against an *insured*, he must promptly send us each demand, notice, summons or other process received.

2. TWO OR MORE AUTOS

If this policy covers two or more autos, the limit of coverage applies separately to each. An auto and an attached *trailer* are considered to be one auto.

3. ASSISTANCE AND COOPERATION OF THE INSURED

The *insured* will cooperate and assist us, if requested:

- (a) in the investigation of the occurrence;
- (b) in making settlements;
- (c) in the conduct of suits;
  (d) in enforcing any right of contribution or indemnity against any legally responsible person or organization because of *bodily injury* or property damage;
- (e) at trials and hearings;
- (f) in securing and giving evidence; and
- (g) by obtaining the attendance of witnesses.

Only at his own cost will the *insured* make a payment, assume any obligation or incur any cost other than for first aid to others.

4. ACTION AGAINST US

No suit will lie against us:

- (a) unless the *insured* has fully complied with all the policy's terms and conditions, and
- (b) until the amount of the *insured's* obligation to pay has been finally determined, either:
  - (i) by a final judgment against the *insured* after actual trial; or
  - (ii) by written agreement of the *insured*, the claimant and us.

A person or organization or the legal representative of either, who secures a judgment or written agreement, may then sue to recover up to the policy limits.

No person or organization, including the *insured*, has a right under this policy to make us a defendant in an action to determine the *insured's* liability.

Bankruptcy or insolvency of the *insured* or his estate will not relieve us of our obligations.

5. SUBROGATION

When payment is made under this policy, we will be subrogated to all the *insured's* rights of recovery against others. The *insured* will help us to enforce these rights. The *insured* will do nothing after loss to prejudice these rights. This means we will have the right to sue for or otherwise recover the loss from anyone else who may be held responsible.

#### SECTION II

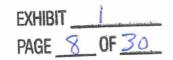
#### **Auto Medical Payments**

Protection For You And Your Passengers For Medical Expenses

#### DEFINITIONS

The definitions of terms shown under Section I apply to this Coverage. In addition, under this Coverage, occupying means in or upon or entering into or alighting from.

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## Case 3:17-cv-01986-MO Document 21-1 Filed 02/01/18 Page 9 of 30 Case: 18-35383, 11/13/2018, ID: 11086125, DktEntry: 20, Page 25 of 131

#### PAYMENTS WE WILL MAKE

Under this Coverage, we will pay all reasonable expenses actually incurred by an *insured* within one year from the date of accident for necessary medical, surgical, x-ray, dental services, prosthetic devices, ambulance, hospital, professional nursing and funeral services. The one year limit does not apply to funeral services.

This Coverage applies to:

- 1. you and each relative who sustains bodily injury caused by accident:
  - (a) while occupying the owned auto; or
  - (b) while occupying a non-owned auto if you or your relative reasonably believe you have the owner's permission to use the auto and the use is within the scope of that permission; or
  - (c) when struck as a pedestrian by an auto or trailer.
- any other person who sustains *bodily injury* caused by accident while *occupying* the *owned auto* while being used by *you*, a resident of *your* household, or other persons with *your* permission.

#### EXCLUSIONS

3.

#### When Section II Does Not Apply

- 1. There is no coverage for *bodily injury* sustained by any occupant of an *owned auto* used to carry persons or property for compensation or a fee, including but not limited to the delivery of food or any other products. However, a vehicle used in an ordinary car pool on a ride sharing or cost sharing basis is covered.
- 2. There is no coverage for an *insured* while occupying a vehicle located for use as a residence or premises.
  - You and your relatives are not covered for bodily injury sustained while occupying or when struck by:
    (a) a farm-type tractor or other equipment designed for use principally off public roads, while not upon public roads; or
    - (b) a vehicle operated on rails or crawler-treads.
- 4. There is no coverage for persons employed in the *auto business*, if the accident arises out of that business and if benefits are required to be provided under a workers' compensation law.
- 5. There is no coverage for bodily injury sustained due to war.
- 6. The United States of America or any of its agencies are not covered as an *insured*, a third party beneficiary, or otherwise.
- 7. Section II does not apply:
  - (a) To **bodily injury** caused by an auto driven in or preparing for any racing, speed or demolition contest or stunting activity of any nature, whether or not prearranged or organized.
  - (b) To the operation or use of a motor vehicle on a track designed primarily for racing or high speed driving. This does not apply if the vehicle is being used in connection with an activity other than racing, high speed driving or any competitive driving.
- 8. There is no coverage under this Section for any person or organization while any motor vehicle is operated, maintained or used as part of personal vehicle sharing facilitated by a *personal vehicle sharing program*.

#### LIMIT OF LIABILITY

The limit of liability for medical payments stated in the declarations as applying to "each person" is the limit we will pay for all costs incurred by or on behalf of each person who sustains **bodily injury** in one accident. This applies regardless of the number of persons insured or the number of autos or **trailers** to which this policy applies.

#### **OTHER INSURANCE**

If the *insured* has other medical payments insurance against a loss covered by Section II of this policy, we will not owe more than our pro rata share of the total coverage available.

Any insurance we provide to a person who sustains **bodily injury** while **occupying** a vehicle **you** do not own shall be excess over any other valid and collectible insurance.

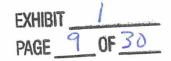
#### CONDITIONS

The following conditions apply to this Coverage:

#### 1. NOTICE

As soon as possible after an accident, written notice must be given us or our authorized agent stating:

- (a) the identity of the insured;
- (b) the time, place and details of the accident; and
- (c) the names and addresses of the injured, and of any witnesses.



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2. TWO OR MORE AUTOS

If this policy covers two or more autos, the limit of coverage applies separately to each. An auto and an attached *trailer* are considered to be one auto.

3. ACTION AGAINST US

Suit will not lie against us unless the *insured* has fully complied with all the policy terms.

4. MEDICAL REPORTS - PROOF AND PAYMENT OF CLAIMS

As soon as possible, the injured person or his representative will furnish us with written proof of claim, under oath if required. After each request from us, he will give us written authority to obtain medical reports and copies of records.

The injured person will submit to an examination by doctors chosen by us and at our expense as we may reasonably require.

We may pay either the injured person, the doctor or other persons or organizations rendering medical services. These payments are made without regard to fault or legal liability of the *insured*.

5. SUBROGATION

When payment is made under this policy, we will be subrogated to all the *insured's* rights of recovery against others. The *insured* will help us to enforce these rights. The *insured* will do nothing after loss to prejudice these rights.

This means we will have the right to sue for or otherwise recover the loss from anyone else who may be held responsible.

#### SECTION III

#### **Physical Damage Coverages**

Your Protection For Loss Or Damage To Your Car

#### DEFINITIONS

The definitions of the terms auto business, farm auto, personal vehicle sharing program, private passenger auto, relative, temporary substitute auto, utility auto, you and war under Section I apply to Section III also.

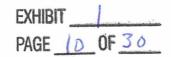
Under this Section, the following special definitions apply:

- 1. Actual cash value is the replacement cost of the auto or property less depreciation or betterment.
- 2. Betterment is improvement of the auto or property to a value greater than its pre-loss condition.
- 3. Collision means loss caused by upset of the covered auto or its collision with another object, including an a attached vehicle.
- 4. Custom parts or equipment means paint, equipment, devices, accessories, enhancements, and changes, other than those which are original manufacturer installed, which:
  - (a) Are permanently installed or attached; or
  - (b) Alter the appearance or performance of a vehicle;

this includes any electronic equipment, antennas, and other devices used exclusively to send or receive audio, visual, or data signals, or to play back recorded media, other than those which are original manufacturer installed, that are permanently installed in the **owned auto** or a newly acquired vehicle using bolts or brackets, including slide-out brackets.

- 5. Depreciation means a decrease or loss in value to the auto or property because of use, disuse, physical wear and tear, age, outdatedness or other causes.
- 6. Diminished value means 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.
- 7. Insured means:
  - (a) regarding the owned auto:
    - (i) you and your relatives;
    - (ii) a person or organization which is not specifically excluded, maintaining, using or having custody of the auto with *your* permission, if his use is within the scope of that permission.
  - (b) regarding a *non-owned auto*; *you* and *your relatives* who are not specifically excluded, using the auto, if the actual operation or use is with the permission or reasonably believed to be with the permission of the owner and within the scope of that permission.
- 8. Loss means direct and accidental loss of or damage to:
  - (a) an insured auto, including its equipment; or
  - (b) other property insured under this section.

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9. Non-owned auto means a private passenger auto, farm auto, utility auto or trailer not owned by or furnished for the regular use of either you or your relatives, except a temporary substitute auto. You or your relative must be using the auto or trailer within the scope of permission given by its owner. An auto rented or leased for more than 30 days will be considered as furnished for regular use.

#### 10. Owned auto means:

- (a) any vehicle described in this policy for which a specific premium charge indicates there is coverage;
- (b) a *private passenger auto, farm auto* or *utility auto* or a *trailer*, ownership of which is acquired by *you* during the policy period or for which *you* enter into a lease during the policy period for a term of six months or more; if
  - (i) it replaces an owned auto as described in (a) above, or
  - (ii) we insure all *private passenger*, *farm*, *utility autos* and *trailers* owned or leased by *you* on the date of such acquisition and *you* request us to add it to the policy within 30 days afterward;
- (c) a temporary substitute auto.
- 11. Trailer means a trailer designed to be towed by a private passenger auto and not used as a home, residence, office, store, display or passenger trailer. Trailer does not mean a trailer with built-in sleeping facilities designed for recreational or camping use.

#### LOSSES WE WILL PAY FOR YOU

#### Comprehensive (Excluding Collision)

1. We will pay for each *loss*, less the applicable deductible, caused other than by *collision*, to the *owned auto* or *non-owned auto*. This includes breakage of glass and *loss* caused by:

(a) missiles;	(j) windstorm;
(b) falling objects;	(k) hail;
(c) fire;	(I) water;
(d) lightning;	(m) flood;
(e) theft;	(n) malicious mischief;
(f) larceny;	(o) vandalism;
(g) explosion;	(p) riot; or
(h) earthquake	(q) civil commotion.
(i) colliding with a bird of	or animal;

At the option of the *insured*, breakage of glass caused by *collision* may be paid under the Collision Coverage, if included in the policy.

2. We will pay, up to \$200 per occurrence, less any deductible shown in the declarations, for *loss* to personal effects due to:

(a) fire;	(e) falling objects;
(b) lightning;	(f) earthquake; or
(c) flood;	(g) explosion.

(d) theft of the entire automobile;

The property must be owned by you or a relative, and must be in or upon an owned auto.

3. Losses arising out of a single occurrence shall be subject to no more than one deductible.

#### Collision

- 1. We will pay for *collision loss* to the *owned auto* or *non-owned auto* for the amount of each *loss* less the applicable deductible.
- 2. We will pay up to \$200 per occurrence, less the applicable deductible, for *loss* to personal effects due to a *collision*. The property must be owned by *you* or a *relative*, and must be in or upon an *owned auto*.
- 3. Losses arising out of a single occurrence shall be subject to no more than one deductible.

#### ADDITIONAL PAYMENTS WE WILL MAKE UNDER THE PHYSICAL DAMAGE COVERAGES

- We will reimburse the *insured* for transportation expenses incurred during the period beginning 48 hours after a theft of the entire auto covered by Comprehensive Coverage under this policy has been reported to us and the police. Reimbursement ends when the auto is returned to use or we pay for the *loss*. Reimbursement will not exceed \$25 per day nor \$750 per *loss*.
- 2. We will pay general average and salvage charges for which the *insured* becomes legally liable when the auto is being transported.

#### EXCLUSIONS

#### When The Physical Damage Coverages Do Not Apply

 An auto used to carry persons or property for compensation or a fee, including but not limited to the delivery of food or any other products is not covered. However, a vehicle used in an ordinary car pool on a ride sharing or cost sharing basis is covered.

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- 2. Loss due to war is not covered.
- 3. We do not cover *loss* to a *non-owned auto* when used by the *insured* in the *auto business*.
- 4. There is no coverage for *loss* caused by and limited to wear and tear, freezing, mechanical or electrical breakdown or failure, unless that damage results from a covered theft.
- 5. Tires, when they alone are damaged by collision, are not covered.
- 6. Loss due to radioactivity is not covered.
- 7. Loss to any tape, wire, record disc or other medium for use with a device designed for the recording and/or reproduction of sound is not covered.
- 8. We do not cover loss to any radar or laser detector.
- 9. We do not cover *trailers* when used for business or commercial purposes with vehicles other than *private passenger auto, farm auto* or *utility autos.*
- 10. We do not cover *loss* to an *owned auto* or *non-owned auto* that results from destruction, impoundment, confiscation or seizure of a vehicle by governmental or civil authorities because *you*, a *relative*, or anyone else engaged in illegal activities.
- 11. We will not provide any compensation for diminished value.
- 12. Section III does not apply:
  - (a) To any *loss* caused by participation in or preparing for any racing, speed, or demolition contest or stunting activity of any nature, whether or not prearranged or organized.
  - (b) To any *loss* caused by the operation or use of a motor vehicle on a track designed primarily for racing or high speed driving. This does not apply if the vehicle is being used in connection with an activity other than racing, high speed driving or any competitive driving.
- 13. We do not cover loss for custom parts or equipment, in excess of \$1,000, unless the existence of those custom parts or equipment has been previously reported to us and an endorsement to the policy has been added.
- 14. There is no coverage for any liability assumed under any contract or agreement.
- 15. There is no coverage for *loss* or damage resulting from:
  - (a) The acquisition of a stolen vehicle;
  - (b) Any governmental, legal or other action to return a vehicle to its legal, equitable, or beneficial owner, or anyone claiming an ownership interest in the vehicle;
  - (c) Any confiscation, seizure or impoundment of a vehicle by governmental authorities; or
  - (d) The sale of an owned auto.
- **16.** There is no coverage for the destruction, impoundment, confiscation or seizure of a vehicle by governmental or civil authorities due to its use by *you*, a *relative* or a permissive user of the vehicle in illegal activity.
- 17. There is no coverage under this Section for any person or organization while any motor vehicle is operated, maintained or used as part of personal vehicle sharing facilitated by a *personal vehicle sharing program*.

#### LIMIT OF LIABILITY

- The limit of our liability for loss:
- 1. is the actual cash value of the property at the time of the loss;
- 2. will not exceed the prevailing competitive price to repair or replace the property at the time of *loss*, or any of its parts, including parts from non-original equipment manufacturers, with other of like kind and quality and will not include compensation for any diminution of value that is claimed to result from the *loss*. Although *you* have the right to choose any repair facility or location, the limit of liability for repair or replacement of such property is the prevailing competitive price which is the price we can secure from a competent and conveniently located repair facility. At *your* request, we will identify a repair facility that will perform the repairs or replacement at the prevailing competitive price;
- 3. to personal effects arising out of one occurrence is \$200;
- 4. to a trailer not owned by you is \$500;
- 5. for custom parts or equipment is limited to the actual cash value of the custom parts or equipment, not to exceed the actual cash value of the vehicle. However, the most we will pay for loss to custom parts or equipment is \$1,000, unless the existence of those custom parts or equipment has been previously reported to us and an endorsement to the policy has been added.

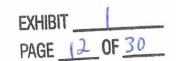
Actual cash value of property will be determined at the time of the loss and will include an adjustment for depreciation/ betterment and for the physical condition of the property.

#### OTHER INSURANCE

If the *insured* has other insurance against a *loss* covered by Section III, we will not owe more than our pro-rata share of the total coverage available.

Any insurance we provide for a vehicle you do not own shall be excess over any other valid and collectible insurance.

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#### CONDITIONS

The following conditions apply only to the Physical Damage Coverages:

#### 1. NOTICE

- As soon as possible after a loss, written notice must be given us or our authorized agent stating:
- (a) the identity of the *insured*;
- (b) a description of the auto or trailer;
- (c) the time, place and details of the loss; and
- (d) the names and addresses of any witnesses.

In case of theft, the *insured* must promptly notify the police. In the case of theft of the entire auto, the *insured* must promptly notify the police that the vehicle was stolen. To be eligible as a covered *loss*, the police report must acknowledge and classify the report as theft of a motor vehicle. The *insured* must cooperate fully: with the policy investigation, with the prosecution of any person(s) charged with theft and any civil suit brought by **us** against the person(s) responsible to recover for the *loss*.

#### 2. TWO OR MORE AUTOS

If this policy covers two or more autos or *trailers*, the limit of coverage and any deductibles apply separately to each.

#### 3. ASSISTANCE AND COOPERATION OF THE INSURED

The insured will cooperate and assist us, if requested:

- (a) in the investigation of the loss;
- (b) in making settlements;
- (c) in the conduct of suits;
- (d) in enforcing any right of subrogation against any legally responsible person or organization;
- (e) at trials and hearings;
- (f) in securing and giving evidence; and
- (g) by obtaining the attendance of witnesses.
- 4. ACTION AGAINST US

Suit will not lie against us unless the policy terms have been complied with and until 30 days after proof of loss is filed and the amount of **loss** is determined.

If we retain salvage, we have no duty to preserve or otherwise retain the salvage for any purpose, including as evidence for any civil or criminal proceeding. If **you** ask us immediately after a **loss** to preserve the salvage for inspection, we will do so for a period not to exceed 30 days. **You** may purchase the salvage from us if **you** wish.

### 5. INSURED'S DUTIES IN EVENT OF LOSS

- In the event of loss the insured will:
- (a) Protect the auto, whether or not the *loss* is covered by this policy. Further *loss* due to the *insured's* failure to protect the auto will not be covered. Reasonable expenses incurred for this protection will be paid by us.
- (b) File with us, within 91 days after *loss*, his sworn proof of loss including all information we may reasonably require.
- (c) At our request, the *insured* will exhibit the damaged property.
- 6. APPRAISAL

If we and the *insured* do not agree on the amount of *loss* within 60 days after proof of loss is filed, either the *insured* or we may demand an appraisal, however, to be binding both the *insured* and we must mutually agree to the appraisal. In that event, we and the *insured* will each select a competent and disinterested appraiser. The appraisers will state separately the *actual cash value* and the amount of the *loss*. If they fail to agree, the appraisers will select a competent and disinterested umpire and they will submit the dispute to the umpire. An award in writing of any two will determine the amount of *loss*. We and the *insured* will each pay his chosen appraiser and will bear equally the other expenses of the appraisal and umpire.

We will not waive our rights by any of our acts relating to appraisal.

#### 7. PAYMENT OF LOSS

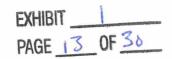
We may at our option:

(a) pay for the loss; or

(b) repair or replace the damaged or stolen property.

At any time before the *loss* is paid or the property replaced, we may return any stolen property to *you* or to the address shown in the declarations at our expense with payment for covered damage. We may take all or part of the property at the agreed or appraised value, but there will be no abandonment to us. We may settle claims for *loss* either with the *insured* or the owner of the property.

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#### 8. NO BENEFIT TO BAILEE

This insurance does not apply directly or indirectly to the benefit of a carrier or other bailee for hire liable for the *loss* of the auto.

#### 9. SUBROGATION

When payment is made under this policy, we will be subrogated to all the *insured's* rights of recovery against others. The *insured* will help us to enforce these rights. The *insured* will do nothing after *loss* to prejudice these rights.

This means we will have the right to sue for or otherwise recover the *loss* from anyone else who may be held responsible.

10. ASSIGNMENT

With respect to Section III, Physical Damage Coverages, an Assignment of interest under this policy will not bind us without our consent. Any nonconforming assignment shall be void and invalid. Moreover, the assignee of a nonconforming assignment shall acquire no rights under this contract and we shall not recognize any such assignment.

#### SECTION IV

#### **Uninsured Motorists Bodily Injury Coverage**

## Protection For You And Your Passengers For Injuries Caused By Uninsured And Hit-And-Run Motorists DEFINITIONS

The definitions of terms for Section I apply to Section IV, except for the following special definitions:

- Hit-and-run auto is a motor vehicle causing bodily injury to an insured through physical contact with him or with an auto he is occupying at the time of the accident and whose operator or owner cannot be identified, provided the insured or someone on his behalf:
  - (a) reports the accident within 72 hours to a police, peace or judicial officer or to the Commissioner of Motor Vehicles;
  - (b) files with us within 30 days a statement setting forth the facts of the accident and claiming that he has a cause of action for damages against an unidentified person; and
  - (c) makes available for inspection, at our request, the auto occupied by the insured at the time of the accident.

*Hit-and-run auto* also includes an auto which causes *bodily injury* to an *insured* arising out of an auto accident but without physical contact with the *insured* or the auto the *insured* is *occupying* at the time of the accident. For this provision to apply, the facts of the accident must be confirmed by legally adequate evidence other than the testimony of any person having a claim for the accident under this or any similar insurance.

#### 2. Insured means:

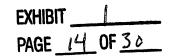
- (a) the named insured shown in the declarations and his or her spouse if a resident of the same household;
- (b) relatives of (a) above if residents of his household;
- (c) any other person while occupying an owned auto;
- (d) any person who is entitled to recover damages because of **bodily injury** sustained by an **insured** under (a), (b), and (c) above.

If there is more than one *insured*, our limit of liability will not be increased.

#### 3. Insured auto is an auto:

- (a) described in the declarations and covered by the bodily injury liability coverage of this policy;
- (b) temporarily substituted for an *insured auto* when withdrawn from normal use because of its breakdown, repair, servicing, loss or destruction; or
- (c) operated by you or your spouse if a resident of the same household.
- But the term insured auto does not include:
  - (i) an auto used to carry passengers or goods for hire, except in a car pool;
  - (ii) an auto being used without the owner's permission or being used by a person who is specifically excluded under this policy; or
- (iii) under subparagraphs (b) and (c) above, an auto owned by or furnished for the regular use of an *insured*.
- 4. Occupying, occupied, occupies means in, upon, entering into or alighting from.
- 5. State includes the District of Columbia, the territories and possessions of the United States, and the Provinces of Canada.
- 6. Uninsured auto is a motor vehicle which has no bodily injury liability insurance policy applicable with liability limits complying with the financial responsibility law of the state in which the insured auto is principally garaged at the time of an accident. This term also includes an auto whose insurer is or becomes insolvent or denies coverage. The term uninsured auto does not include:
  - (a) an insured auto; unless the vehicle is a stolen vehicle;

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- (b) an auto owned or operated by a self-insurer within the meaning of any motor vehicle financial responsibility law, motor carrier law or any similar law; unless the recovery from the self-insurer is less than the uninsured motorist or underinsured motorist coverage of the *insured*;
- (c) an auto owned by the United States of America, any other national government, a state, or a political sub-division of any such government or its agencies; unless the recovery from the governmental entity or its agency is less than the uninsured motorist or underinsured motorist coverage of the insured;
- (d) a land motor vehicle or *trailer* operated on rails or crawler-treads or located for use as a residence or premises; or
- (e) a farm-type tractor or equipment designed for use principally off public roads, except while used upon public roads.
- 7. Stolen vehicle means an insured vehicle that causes bodily injury to the insured arising out of a motor vehicle accident if:
  - (a) The vehicle is operated without the consent of the *insured*;
  - (b) The operator of the vehicle does not have collectible motor vehicle bodily injury liability insurance;
  - (c) The *insured* or someone on behalf of the *insured* reported the accident within 72 hours to a police, peace or judicial officer or to the equivalent department in the *state* where the accident occurred; and
  - (d) The *insured* or someone on behalf of the *insured* cooperates with the appropriate law enforcement agency in the prosecution of the theft of the vehicle.

#### LOSSES WE PAY

Under the Uninsured Motorists Bodily Injury Coverage we will pay:

- Damages for *bodily injury* caused by accident which the *insured* is legally entitled to recover from the owner or operator of an *uninsured auto* or *hit-and-run auto* arising out of the ownership, maintenance or use of that auto;
- b. When your limits for Uninsured Motorists Bodily Injury Coverage are equal to the limits of liability of the person causing the accident, and the amount of your recovery is less than the limits of your Uninsured Motorists Bodily Injury Coverage.

The amount of the *insured's* recovery for these damages will be determined by agreement between the *insured* or his representative and us. The dispute may be arbitrated if an agreement cannot be reached.

#### EXCLUSIONS

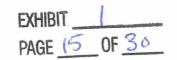
#### When Section IV Does Not Apply

- 1. This Coverage does not apply to **bodily injury** to an **insured** if the **insured** or his legal representative has made a settlement or has been awarded a judgment of his claim without our prior written consent.
- 2. Bodily injury to an insured while occupying or through being struck by an uninsured auto owned by an insured or a relative is not covered.
- 3. The Uninsured Motorists Bodily Injury Coverage will not benefit any workers' compensation insurer, self insurer, or disability benefits insurer.
- 4. We do not cover the United States of America or any of its agencies as an *insured*, a third party beneficiary or otherwise.
- 5. We do not cover any person while *occupying* a vehicle described in the declarations on which Uninsured Motorists Bodily Injury Coverage is not carried.
- 6. Regardless of any other provision of this policy, there is no coverage for punitive or exemplary damages under the Uninsured Motorists Bodily Injury Coverage or Underinsured Motorists Coverage of this policy.
- 7. This coverage does not apply to any liability assumed under any contract or agreement.
- 8. Section IV does not apply:
  - (a) To damage caused by an *insured's* participation in or preparing for any racing, speed, or demolition contest or stunting activity of any nature, whether or not prearranged or organized.
  - (b) To damage caused by an *insured's* operation or use of a motor vehicle on a track designed primarily for racing or high speed driving. This does not apply if the vehicle is being used in connection with an activity other than racing, high speed driving or any competitive driving.
- There is no coverage under this Section for any person or organization while any motor vehicle is operated, maintained or used as part of personal vehicle sharing facilitated by a personal vehicle sharing program.

#### LIMITS OF LIABILITY

Regardless of the number of autos or trailers to which this policy applies:

- The limit of liability for Uninsured Motorists Bodily Injury Coverage stated in the declarations for "each person" is the limit of our liability for all damages, including those for care or loss of services, due to **bodily injury** sustained by one person as the result of one accident.
- The limit of liability stated in the declarations as applicable to "each accident" is, subject to the above provision respecting each person, the total limit of our liability for all such damages, including damages for care and loss of services, because of *bodily injury* sustained by two or more persons as the result of one accident.
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3. When coverage is afforded to two or more autos, the limits of liability shall apply separately to each auto as stated in the declarations but shall not exceed the highest limit of liability applicable to one auto.

If separate policies with us are in effect for **you** or any person in **your** household, they may not be combined to increase the limit of our liability for a loss.

The amount payable under this Coverage will be reduced by all amounts:

- (a) paid by or for all persons or organizations liable for the injury;
- (b) paid or payable under any workers' compensation law, disability benefits law or any similar law;

(c) paid or payable under the Bodily Injury Coverage or Medical Payments Coverage of this policy.

However, the amount payable under this coverage will not be reduced by amounts paid or payable under the Medical Payments Coverage of this policy unless *you* have employees who operate motor buses, motor trucks or taxicabs as defined by Oregon statute and those employees are covered by workers' compensation.

Payment by us of any personal injury protection benefits to or on behalf of an *insured* shall be applied in reduction of the amount of damages that *insured* is entitled to recover for the same accident under the uninsured or underinsured motorists coverage.

#### OTHER INSURANCE

When an *insured occupies* an auto not described in this policy, this insurance is excess over any other similar insurance available to the *insured* and the insurance which applies to the *occupied* auto is primary.

Except as provided above, if the *insured* has other similar insurance available to him and applicable to the accident, the damages will be deemed not to exceed the higher of the applicable limits of liability of this insurance and the other insurance. If the *insured* has other insurance against a loss covered by the Uninsured Motorist provisions of this policy, we will not be liable for more than our pro-rata share of the total coverage available.

#### ARBITRATION

If any person making claim hereunder and we do not agree that such person is legally entitled to recover damages from the owner or operator of an *uninsured auto* because of *bodily injury* to an *insured*, or to the amount of payment that may be owing under this Coverage, then, in the event the *insured* and we elect by mutual agreement at the time of the dispute to settle the matter by arbitration, the arbitration shall take place under the arbitration laws of the state of Oregon or, if the parties agree, according to any other procedure.

Any judgment upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof provided, however, the costs to the *insured* of the arbitration proceeding shall not exceed \$100 and that all other costs of arbitration shall be borne by us, except attorney fees or expenses incurred in the production of evidence or witnesses or the making of transcripts of the arbitration proceedings.

Such person and we each agree to consider ourselves bound and to be bound by any award made by the arbitrator(s) pursuant to this Coverage in the event of such election. Binding arbitration will not be used to resolve disputes regarding policy interpretation, the existence of this Coverage in a particular policy, or the application of this Coverage to a particular claim or claimant.

We will be obligated to pay no more than the applicable policy limits for this Coverage regardless of whether an arbitration results in an award in excess of the applicable policy limits for this Coverage as defined in this policy.

At the election of the *insured*, such arbitration shall be held:

- (a) in the county and state of residence of the insured;
- (b) in the county and state where the insured's cause of action against the uninsured motorist arose; or
- (c) at any other place mutually agreed upon by the insured and us.

#### TRUST AGREEMENT

When we make a payment under this Coverage:

- 1. We will be entitled to repayment of that amount out of any settlement or judgment the *insured* recovers from any person or organization legally responsible for the *bodily injury*.
- 2. The *insured* will hold in trust for our benefit all rights of recovery which he may have against any person or organization responsible for these damages. He will do whatever is necessary to secure all rights of recovery and will do nothing after the loss to prejudice these rights.
- At our written request, the *insured*, in his own name, will take, through a designated representative, appropriate actions necessary to recover payment for damages from the legally responsible person or organization. The *insured* will pay us out of the recovery for our expenses, costs and attorneys' fees.
- 4. The insured will execute and furnish us with any needed documents to secure his and our rights and obligations.

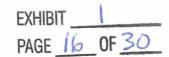
#### CONDITIONS

The following conditions apply only to the Uninsured Motorists Bodily Injury Coverage:

1. NOTICE

As soon as possible after an accident, notice must be given us or our authorized agent stating:

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- (a) the identity of the *insured*;
- (b) the time, place and details of the accident; and
- (c) the names and addresses of the injured, and of any witnesses.

If the *insured* or his legal representative files suit before we make a settlement under this Coverage, he must immediately provide us with a copy of the pleadings.

#### 2. ASSISTANCE AND COOPERATION OF THE INSURED

After we receive notice of a claim, we may require the *insured* to take any action necessary to preserve his recovery rights against any allegedly legally responsible person or organization. We may require the *insured* to make that person or organization a defendant in any action against us.

#### 3. ACTION AGAINST US

Suit will not lie against us unless the *insured* or his legal representative have fully complied with all the policy terms. Additionally, no cause of action shall lie against us unless within two years from the date of the accident:

- (a) agreement as to the amount due under the policy has been concluded;
- (b) you or we have formally instituted arbitration proceedings;
- (c) you have filed an action against us in a court of competent jurisdiction; or
   (d) suit for bodily injury has been filed against the uninsured motorist in a court of competent jurisdiction and, within two years from the date of settlement or final judgment against the uninsured motorist, you have formally instituted arbitration proceedings or filed an action against us in a court of competent jurisdiction.

#### 4. PROOF OF CLAIM - MEDICAL REPORTS

As soon as possible, the *insured* or other person making claim must give us written proof of claim, under oath if required. This will include details of the nature and extent of injuries, treatment, and other facts which may affect the amount payable.

Proof of claim must be made on forms furnished by us unless we have not furnished these forms within 15 days after receiving notice of claim.

The injured person will submit to examination by doctors chosen by us, at our expense, as we may reasonably require In the event of the *insured's* incapacity or death, his legal representative must, at our request, authorize us to obtain medical reports and copies of records.

#### 5. PAYMENT OF LOSS

Any amount due is payable:

- (a) to the *insured* or his authorized representative;
- (b) if the *insured* is a minor, to his parent or guardian; or
- (c) if the *insured* is deceased, to his surviving spouse; otherwise
- (d) to a person authorized by law to receive the payment; or to a person legally entitled to recover payment for the damages.

We may, at our option, pay an amount due in accordance with (d) above.

#### SECTION V

#### **General Conditions**

These conditions apply to all Coverages in this policy.

1. TERRITORY

This policy applies only to accidents, occurrences or losses during the policy period within the United States of America, its territories or possessions, or Canada or when the auto is being transported between ports thereof.

2. PREMIUM

When you dispose of, acquire ownership of, or replace a *private passenger auto*, *farm auto* or *utility auto*, any necessary premium adjustment will be made as of the date of the change and in accordance with our manuals.

3. CHANGES

The terms and provisions of this policy cannot be waived or changed, except by an endorsement issued to form a part of this policy.

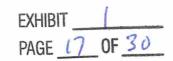
We may revise this policy during its term to provide more coverage without an increase in premium. If we do so, *your* policy will automatically include the broader coverage when effective in *your* state.

The premium for each auto is based on the information we have in your file. You agree:

- (a) that we may adjust *your* policy premiums during the policy term if any of this information on which the premiums are based is incorrect, incomplete or changed.
- (b) that you will cooperate with us in determining if this information is correct and complete.
- (c) that you will notify us of any changes in this information.

Any calculation or recalculation of *your* premium or changes in *your* coverage will be based on the rules, rates and forms on file, if required, for our use in *your* state.

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#### 4. ASSIGNMENT

Your rights and duties under this policy may not be assigned without our written consent.

If you die, this policy will cover your surviving spouse if covered under the policy prior to your death. Until the expiration of the policy term, we will also cover:

- (a) the executor or administrator of *your* estate, but only while operating an *owned auto* and while acting within the scope of his duties; and
- (b) any person having proper custody of and operating the *owned auto*, as an *insured*, until the appointment and qualification of the executor or administrator of *your* estate.

#### 5. POLICY PERIOD

Unless otherwise cancelled, this policy will expire as shown in the declarations. But, it may be continued by our offer to renew and *your* acceptance by payment of the required renewal premium prior to the expiration date. Each period will begin and expire at 12:01 A.M. local time at *your* address stated in the declarations.

#### 6. CANCELLATION BY THE INSURED

**You** may cancel this policy by providing notice to us stating when, after the notice, cancellation will be effective. If this policy is cancelled, **you** may be entitled to a premium refund. If **you** cancel, the return premium will be computed pro-rata.

#### 7. CANCELLATION BY US

We may cancel this policy by mailing to **you**, at the address shown in this policy, written notice stating when the cancellation will be effective.

We will mail this notice:

(a) 10 days in advance if the proposed cancellation is for non-payment of premium or any of its installments when due;

(b) 10 days in advance if the policy has been in effect less than 60 days and is not a renewal;

(c) 30 days in advance in all other cases.

The mailing or delivery of the above notice will be sufficient proof of notice. The policy will cease to be in effect as of the date and hour stated in the notice.

If this policy is cancelled, **you** may be entitled to a premium refund. If **you** cancel, the return premium will be computed pro-rata. Payment or tender of unearned premium is not a condition of cancellation.

#### 8. CANCELLATION BY US IS LIMITED

After this policy has been in effect for 60 days or, if the policy is a renewal policy, effective immediately, we will not cancel except for any of the following reasons:

- (a) You do not pay the initial or any additional premiums for this policy or fail to pay any premium installment when due to us or our agent.
- (b) There has been fraud or material misrepresentation affecting the policy or in the presentation of a claim thereunder, or violation of any of the terms or conditions of the policy.
- (c) Your driver's license or that of any resident of your household, or that of any person who customarily operates an auto insured under this policy, has been under suspension or revocation during the policy period or the 180 days prior to the effective date of the current policy.
- (d) The registration of the only auto listed on the policy was suspended during the policy period.
- (e) You change your principal residence to a state where we do not issue new or renewal automobile policies.

Our failure to cancel for any of the reasons listed above will not obligate us to renew the policy.

#### 9. RENEWAL

We will not refuse to renew this policy unless written notice of our refusal to renew is mailed to **you**, at the address shown in this policy, at least 30 days prior to the expiration date. The mailing or delivery of this notice by us will be sufficient proof of notice. This policy will expire without notice if any of the following conditions exist:

- (a) You do not pay any premium as we require to renew this policy.
- (b) You have informed us or our agent that you wish the policy to be cancelled or not renewed.
- (c) You do not accept our offer to renew or you refuse to provide us with renewal classification and rating information as we may require.

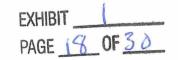
#### **10. OTHER INSURANCE**

If other insurance is obtained on *your owned auto*, any similar insurance afforded under this policy for that auto will terminate on the effective date of the other insurance.

#### **11. DIVIDEND PROVISION**

You are entitled to share in a distribution of the surplus of the Company as determined by its Board of Directors from time to time.

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#### 12. DECLARATIONS

By accepting this policy, you agree that:

- (a) the statements in your application and in the declarations are your agreements and representations;
- (b) this policy is issued in reliance upon the truth of these representations; and

(c) this policy, along with the application and declaration sheet, embodies all agreements relating to this insurance. The terms of this policy cannot be changed orally.

#### 13. FRAUD AND MISREPRESENTATION

Coverage is not provided to any person who knowingly conceals or misrepresents any material fact or circumstance relating to this insurance:

- (a) at the time of application; or
- (b) at any time during the policy period; or

(c) in connection with the presentation or settlement of a claim.

14. EXAMINATION UNDER OATH

The *insured* or any other person seeking coverage under this policy must submit to examination under oath by any person named by us when and as often as we may require.

15. DISPOSAL OF VEHICLE

If **you** relinquish possession of a leased vehicle or if **you** sell or relinquish ownership of an **owned auto**, any coverage provided by this policy for that vehicle will terminate on the date and at the time **you** do so.

16. TERMS OF POLICY CONFORMED TO STATUTES

Any terms of this policy in conflict with the statutes of Oregon are amended to conform to those statutes. **17.** CHOICE OF LAW

The policy and any amendment(s) and endorsement(s) are to be interpreted pursuant to the laws of the state of Oregon.

#### SECTION VI - AMENDMENTS AND ENDORSEMENTS

- 1. SPECIAL ENDORSEMENT UNITED STATES GOVERNMENT EMPLOYEES
- A. Under the Property Damage coverage of Section I, we provide coverage to United States Government employees, civilian or military, using
  - 1. Motor vehicles owned or leased by the United States Government or any of its agencies, or

2. Rented motor vehicles used for United States Government business,

when such use is with the permission of the United States Government. Subject to the limits described in paragraph B, below, we will pay sums *you* are legally obligated to pay for damage to these vehicles.

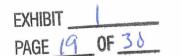
- B. The following limits apply to this Coverage:
  - 1. A \$100 deductible applies to each occurrence.
  - 2. For vehicles described in A.1. above, our liability shall not exceed the lesser of the following:
    - a. the actual cash value of the property at the time of the occurrence; or
    - b. the cost to repair or replace the property, or any of its parts with other of like kind and quality; or
    - c. two months basic pay of the insured; or
    - d. the limit of Property Damage liability coverage stated in the declarations.
  - 3. For vehicles described in A.2. above, our liability shall not exceed the lesser of the following:
    - a. the actual cash value of the property at the time of the occurrence; or
    - b. the cost to repair or replace the property, or any of its parts with other of like kind and quality; or
    - c. the limit of Property Damage liability coverage stated in the declarations.

This insurance is excess over other valid and collectible insurance.

W.C.E. Robinson Secretary

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O.M. Nicely President



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## Automobile Policy Amendment Oregon Personal Injury Protection

Policy Number:

Your policy is amended to provide Personal Injury Protection subject to the terms of this amendment:

We, the Company named in the declarations attached to this policy, make this agreement with you, the policyholder. Payment of the first premium is a condition precedent to effective coverage under this insurance policy. Relying on the information you have furnished and the declarations attached to this policy, we will do the following:

We will pay Personal Injury Protection benefits for:

- (a) Medical expenses;
- (b) Loss of income for those injured persons usually engaged in an income-generating occupation;
- (c) Loss of essential services for those injured persons not usually engaged in an income-generating occupation;
- (d) Child care expenses; and

#### (e) Funeral expenses

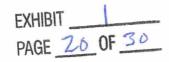
incurred for **bodily injury** to an **injured person** resulting from the use, occupancy, or maintenance of a **motor vehicle** as a **motor vehicle**.

#### DEFINITIONS

The definitions of **bodily injury, personal vehicle sharing program, transportation network company** and **you** in **Section I** of the policy apply to this coverage. The following special definitions apply:

- 1. Child care expenses means child care expenses incurred if the *injured person* is a parent of a minor child and is required to be hospitalized for a minimum of 24 hours, with payments to begin after the initial 24 hours of hospitalization. Payments continue for as long as the person is unable to return to work if the person is engaged in an income-generating occupation or for as long as the person is unable to perform essential services that the person would have performed without income if the person is not usually engaged in an income-generating occupation, subject to the dollar limit.
- 2. Funeral expenses means all reasonable and necessary funeral expenses.
- 3. Injured person means:
  - (a) You, members of your family residing in the same household and children not related to you by blood, marriage, registered domestic partnership or adoption who are residing in your household, and being reared as your own, who sustains bodily injury from the use, occupancy or maintenance of any motor vehicle;
  - (b) A passenger, *occupying*, or a *pedestrian*, struck by the *insured auto*, from the use, occupancy or maintenance of the vehicle.
- 4. Insured auto means a private passenger motor vehicle owned by you and to which the bodily injury liability insurance of the policy applies and for which a specific premium is charged.
- 5. Loss of essential services means the expenses reasonably incurred by the *injured person* for essential services that were performed by a person who is not related to the *injured person* or residing in the *injured person's* household in lieu of the services the *injured person* would have performed without income during the period of the person's disability until the date the person is reasonably able to perform such essential services, if the *injured person* is not usually engaged in an income-generating occupation and if disability continues for at least 14 days.
- 6. Loss of income means 70% of the loss of income from work during the period of the injured person's disability until the date the person is able to return to the person's usual occupation, if the injured person is usually engaged in an income-generating occupation, and if disability continues for at least 14 days. As used in this definition "income" includes but is not limited to salary, wages, tips, commissions, professional fees and profits from an individually owned business or farm.
- 7. *Medical expenses* means all reasonable and necessary expenses incurred of medical, hospital, dental, surgical, ambulance and prosthetic services.
  - (a) Except as provided in (b) below, a provider shall charge a person who receives personal injury protection benefits or that person's insurer the lesser of:
    - (1) An amount that does not exceed the amount the provider charges the general public; or
    - (2) An amount that does not exceed the fee schedules for medical services published pursuant to ORS 656.248 for expenses of medical, hospital, dental, surgical, ambulance and prosthetic services.
  - (b) For expenses of hospital services that are subject to the adjusted cost-to-charge ratio specified for a hospital in the hospital fee schedule published pursuant to ORS 656.248, a provider of hospital services shall charge a person who receives personal injury protection benefits or that person's insurer the greater of:

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- (1) The amount of the hospital charges multiplied by the adjusted cost-to-charge ratio specified for the hospital; or
- (2) Ninety percent of the hospital charges.
- 8. Motor vehicle means a self-propelled land motor vehicle or trailer other than:
  - (a) A farm type tractor or other self-propelled equipment designed for use principally off public roads, while not upon public roads;
  - (b) A vehicle operated on rails or crawler treads; or
  - (c) A vehicle located for use as a residence or premises.
- 9. Occupying means in or upon, entering into or alighting from.
- 10. Pedestrian means a person while not occupying a self-propelled vehicle other than a wheelchair or a similar low-powered motorized or mechanically propelled vehicle that is designed specifically for use by a physically disabled person and that it is determined to be medically necessary for the occupant of the wheelchair or other low-powered vehicle.
- 11. Private passenger motor vehicle means a four-wheel passenger or station wagon type motor vehicle not used as a public or livery conveyance and includes any other four-wheel motor vehicle of the utility, pickup body, sedan, delivery or panel truck type not used for wholesale or retail delivery other than farming, a self-propelled motor home or a farm truck.
- 12. Ride-sharing means the use of any vehicle by any person in connection with a transportation network company from the time a person logs on to or signs in to any computer or digital application or platform that connects or matches driver(s) with passenger(s) until the time a person logs out of or signs off of any such application or platform, including while en route to pick up passenger(s) and while transporting passenger(s).

#### EXCLUSIONS

This insurance does not apply:

- (a) To bodily injury sustained by any person who intentionally causes self-injury, or
- (b) Is participating in any prearranged or organized racing or speed contest or practice or preparation for any such contest;
- (c) To loss of income and loss of essential services for bodily injury sustained by any pedestrian, other than you or a member of your family residing in the same household, in an accident occurring outside the State of Oregon;
- (d) To a *motor vehicle*, including a motorcycle or moped, that is owned or furnished or available for regular use by *you* or members of *your* family residing in the same household, and that is not described in the policy;
- (e) To a motorcycle or moped not owned by you or members of your family residing in the same household, but this exclusion applies only when the injury or death results from that person's operating or riding upon the motorcycle or moped; and
- (f) To a motor vehicle that is not a private passenger motor vehicle when the injury or death results when you or members of your family residing in the same household are operating or occupying the motor vehicle.
- (g) To any *injured person* who willfully conceals or misrepresents any material fact in connection with a claim for personal injury protection benefits.
- (h) To bodily injury sustained by any occupant of a motor vehicle:
  - (1) used to carry persons or property for compensation or a fee, including but not limited to the delivery of food or any other products; or
  - (2) while being used for ride-sharing.

However, a vehicle used in an ordinary car pool is covered. This exclusion does not apply to **you** or a member of **your** family residing in the same houseold while a passenger and not operating the vehicle.

(i) To any person or organization while any motor vehicle is operated, maintained or used as part of personal vehicle sharing facilitated by a *personal vehicle sharing program*.

#### POLICY PERIOD; TERRITORY

This insurance applies only to accidents which occur during the policy period and within the United States of America, its territories or possessions or Canada.

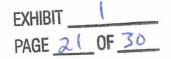
#### COVERAGE LIMITS

Regardless of the number of persons or organizations insured, policies or bonds applicable, claims made or *insured autos* to which this coverage applies, our limit of liability for benefits under this coverage as to *bodily injury* suffered by any one *injured person* in any one *motor vehicle* accident is:

- 1. \$15,000 maximum for *medical expenses* incurred within two years after the date of the person's injury, less any applicable deductible shown in the declarations.
- 2. \$3,000 per month maximum for *loss of income* expenses if the disability continues for at least 14 days for a maximum period of 52 weeks in the aggregate.

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Policy Number:



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- 3. \$30 per day maximum for *loss of essential services* if disability continues for at least 14 days for a maximum period of 52 weeks in the aggregate.
- 4. \$25 per day beginning after the initial 24 hours of hospitalization not to exceed a maximum of \$750 for *child care expenses.*
- 5. \$5,000 maximum for all reasonable and necessary *funeral expenses* incurred within one year after the date of the person's injury.

Any amount payable under this coverage will be reduced or eliminated when the *injured person* is entitled to receive, under the laws of Oregon, any other state, or the United States, workers' compensation benefits or any other similar medical or disability benefits.

Any payments we make to **you** or a member of **your** family residing in the same household under this coverage shall reduce the amount of damages that the **injured person** may be entitled to recover from us under the Uninsured Motorists coverage or Underinsured Motorists coverage for the same accident but may not be applied in reduction of the Uninsured or Underinsured Motorist coverage policy limits.

#### CONDITIONS

1. Notice

As soon as practicable after an accident, written notice must be given to us or our agent stating:

- (a) Time, place and details of the accident;
- (b) The names and addresses of the *injured persons*.

If an *injured person* or his legal representative files a suit against a third party to recover damages, he must provide us with a copy of the pleadings.

Any *injured person* who has received benefits and files a claim or legal action against a third party for damages shall provide us with notice of the claim or legal action by personal service or registered or certified mail.

#### 2. Action Against Company

No action will lie against us unless there has been full compliance with all the terms of this coverage.

#### 3. Medical Reports; Proof of Claim

As soon as practicable, the *injured person* or his representative shall file a written proof of claim with us, under oath if we require. The claim shall include details of the nature and extent of injury, treatment received and contemplated and any other information that may help us determine the amount payable. The *injured person* shall submit to examination at our expense, by doctors chosen by us, as we may reasonably require.

Upon our request, the *injured person* or if he is incapable, his legal representative, shall authorize us to obtain medical reports, copies of records and information respecting *loss of income*. As a condition for receiving *loss of income* expenses, we may ask the *injured person* to cooperate in furnishing us reasonable medical proof of his inability to work.

#### 4. Subrogation

If we cannot seek reimbursement in accordance with the provisions of ORS 742.534 or ORS 742.536, we may seek reimbursement in accordance with the provisions of ORS 742.538. If we make a payment under this coverage, we have the right to sue or otherwise recover the loss from anyone else who may be held responsible. Any person to whom we make payment must help us enforce this right of recovery and do nothing after loss to prejudice this right.

#### 5. Reimbursement and Trust Agreement

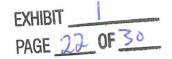
In accordance with the provisions of ORS 742.534, ORS 742.536 and ORS 742.538, if we make a payment under this coverage we will be entitled to recover the amount of our payment from the balance of proceeds available to the *injured person* to whom we made payment from:

- (a) Any applicable uninsured or underinsured motorist benefits;
- (b) Any liability insurance from other parties to the accident; and

(c) Any other payments by or on behalf of the person whose fault caused the accident.

Our right to recovery applies only to the extent that the total amount of benefits paid from all sources, including payment under this coverage, exceed the economic damages sustained by the *injured person*. Our recovery will be reduced by our share of any expenses, costs and attorney fees incurred by the *injured person* in connection with recovery.

Policy Number:



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#### 6, Arbitration

If any person making claim under this coverage and we do not agree as to the amount payable, the dispute shall be decided by arbitration if mutually agreed to at the time of the dispute. Each party will then select a competent and disinterested arbitrator. The two arbitrators will select a third arbitrator. If they are unable to do this within 30 days, the third arbitrator will be selected, upon written request of either party, by a judge of a court of record in the county where the arbitration is pending.

The arbitrators will then hear and determine the question(s) in dispute, and the written decision of any two arbitrators shall be binding on the *injured person* and us.

Each party will pay his or its chosen arbitrator and will bear equally the expenses of the third arbitrator and all other expenses of the arbitration. Your costs for the arbitration shall not exceed \$100.

Attorney's fees and fees for expert witnesses are to be paid by the party incurring them.

Unless both parties agree otherwise, the arbitration will be conducted in the county and state where the *injured person* lives. Arbitration will be conducted in accordance with the usual rules governing procedure and admission of evidence in courts of law.

#### 7. Other Insurance

This insurance shall be excess for:

- (a) Bodily injury to any pedestrian other than you or a member of your family residing in the same household to the extent that amounts are paid or payable to or for that pedestrian under any collateral benefits to which the injured person is entitled, including but not limited to insurance, governmental benefits and gratuitous benefits;
- (b) **Bodily injury** to **you** or a member of **your** family residing in the same household, while **occupying** a **motor vehicle**, not insured under the policy.

#### SECTION II

Any Automobile Medical Payments insurance afforded under this policy shall be excess over any medical expense benefits paid or payable under this or any other *motor vehicle* insurance policy because of *bodily injury* to an *injured person*.

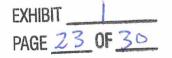
We affirm this amendment.

W. C. E. Robinson Secretary

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William E. Roberts President

Policy Number:



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# **Automobile Policy Amendment**

Policy Number:

Your policy is amended as follows:

#### SECTION V - GENERAL CONDITIONS

The condition for POLICY PERIOD is revised as follows:

Unless otherwise cancelled, this policy will expire as shown in the declarations. But, it may be continued by our offer to renew and *your* acceptance by payment of the required renewal premium prior to the expiration date. Each period will begin and expire as stated in the declarations.

We affirm this amendment.

W. C. E. Robinson Secretary

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William E. Roberts President

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EXHIBIT	
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# Automobile Policy Amendment Oregon

Policy Number:

#### Your policy is amended as follows: SECTION I - LIABILITY COVERAGES DEFINITIONS

The following definitions are added:

- 15. Ride-sharing means the use of any vehicle by any insured in connection with a transportation network company from the time an insured logs on to or signs in to any computer or digital application or platform that connects or matches driver(s) with passenger(s) until the time an insured logs out of or signs off of any such application or platform, including while en route to pick up passenger(s) and while transporting passenger(s).
- 16. Transportation network company means a company or organization facilitating and/or providing transportation services using a computer or digital application or platform to connect or match passengers with drivers for compensation or a fee.

#### EXCLUSIONS

Section I does not apply:

The following exclusion is revised:

- 1. Section I does not apply to any vehicle:
  - (a) used to carry persons or property for compensation or a fee, including but not limited to the delivery of food or any other products; or
  - (b) while being used for ride-sharing.

However, a vehicle used in an ordinary car pool is covered.

#### SECTION III - PHYSICAL DAMAGE COVERAGES

#### DEFINITIONS

The definitions of *ride-sharing* and *transportation network company* under Section I apply to Section III also. **EXCLUSIONS** 

#### When The Physical Damage Coverages Do Not Apply

- The following exclusion is revised:
- 1. An auto:
  - (a) used to carry persons or property for compensation or a fee, including but not limited to the delivery of food or any other products is not covered; or
  - (b) while being used for *ride-sharing* is not covered.
  - However, a vehicle used in an ordinary car pool is covered.

#### SECTION IV - UNINSURED MOTORIST BODILY INJURY COVERAGE

#### LOSSES WE PAY

The items a. and b. are revised as follows:

Under the Uninsured Motorists Bodily Injury Coverage we will pay damages for **bodily injury** caused by accident which the **insured** is legally entitled to recover from the owner or operator of an **uninsured auto** or **hit-and-run auto** arising out of the ownership, maintenance or use of that auto up to the limits of the uninsured motorist coverage.

#### EXCLUSIONS

#### When Section IV Does Not Apply

The following exclusion is added:

12. This coverage does not apply to bodily injury for any person while any vehicle:

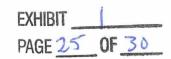
- (a) is being used to carry persons or property for compensation or a fee, including but not limited to the delivery of food or any other products; or
  - (b) is being used for ride-sharing.
  - However, a vehicle used in an ordinary car pool is covered.

#### LIMITS OF LIABILITY

Item 3. is revised as follows:

Subsection (a) and (c) are removed.

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#### OTHER INSURANCE

OTHER INSURANCE is revised as follows:

The first sentence of the second paragraph is removed.

The following section is added at the end of Section IV.

#### UNDERINSURED MOTORIST BODILY INJURY COVERAGE

- (a) The definition of Uninsured auto includes Underinsured auto.
- (b) Underinsured auto means a motor vehicle with respect to which the sum of the limits of liability under all bodily injury liability insurance policies applicable at the time of the accident is less than the sums that the insured is legally entitled to recover as damages for bodily injury that is caused by accident and that arises out of owning, maintaining or using of a motor vehicle.
- (c) We shall not be obligated to make any payment because of **bodily injury** to which this insurance applies and which arises out of the ownership, maintenance or use of an **underinsured auto** unless:
  - the limits of liability under all bodily injury liability insurance policies applicable at the time of the accident have been exhausted by payment of judgments or settlements to the injured person or other injured persons;
  - (ii) the limits of liability under all bodily injury liability insurance policies applicable at the time of the accident have been offered in settlement, we have refused to consent to the settlement, and the *insured* has protected our right of subrogation against any person or organization who may be liable for the *insured's bodily injury*;
  - (iii) the *insured* gives us credit for the unrealized portion of the limits of liability under any bodily injury liability policies applicable at the time of the accident as if the full limits had been received if less than the limits have been offered in settlement and we have consented to the settlement; or
  - (iv) the *insured* gives us credit for the unrealized portion of the limits of liability under any bodily injury liability policies applicable at the time of the accident as if the full limits had been received if less than the limits have been offered in settlement and, if we have refused to consent to the settlement, the *insured* has protected our right of subrogation against any person or organization who may be liable for the *insured's bodily injury*. When seeking consent to settle, the *insured* shall allow us a reasonable time in which to collect and evaluate information related to consent to the proposed offer of settlement. The *insured* shall provide promptly to us any information that we reasonably request that is within the custody and control of the *insured*. For the purposes of this section, a "reasonable time" is no more than 30 days from our receipt of a written request for consent, unless we and the *insured* agree otherwise.

We affirm this amendment.

W. C. E. Robinson Secretary

Wale Flax

William E. Roberts President

A54OR (04-15) Page 2 of 2

PAGE 26 OF 30

# Case 3:17-cv-01986-MO Document 21-1 Filed 02/01/18 Page 27 of 30 Case: 18-35383, 11/13/2018, ID: 11086125, DktEntry: 20, Page 43 of 131



# Automobile Policy Endorsement Rental Reimbursement Endorsement

Policy Number:

We agree with you that the policy is amended as follows:

SECTION III - PHYSICAL DAMAGE COVERAGES

The following coverage is added:

#### Coverage-Rental Reimbursement

When there is a *loss* to an *owned auto* for which a specific premium charge indicates that rental reimbursement coverage is afforded:

We will reimburse the *insured* toward costs the *insured* incurs to rent an auto. Reimbursement will not exceed the limits described in the declarations and payment will be limited to a reasonable and necessary period of time required to repair or replace the *owned auto*. This coverage applies only if:

- 1. The owned auto is withdrawn from use for more than 24 consecutive hours, and
- 2. The loss to the owned auto is covered under comprehensive or collision coverage of this policy.

When there is a total theft of the entire auto, we will reimburse the *insured* toward costs the *insured* incurs to rent an auto, subject to the following limitations:

- 1. This coverage will reimburse the *insured* for reasonable rental expenses beginning 48 hours after a theft of the entire vehicle covered under the comprehensive coverage of this policy; and
- 2. This coverage may be used to reimburse reasonable rental expenses in excess of those provided by Section III of the policy if and to the extent the coverage limits under rental reimbursement exceed those provided in Section III of the policy. In that event, the amount payable under this endorsement is the amount by which this coverage exceeds those described in Section III of the policy; and
- Subject to number 2 above, in no event shall the total amount payable under both this coverage and the supplemental coverage in Section III of the policy exceed the daily limit of coverage provided by this endorsement.

Reimbursement for rental charges shall end the earliest of when the owned auto has been:

- 1. Returned to you; or
- 2. Repaired; or
- 3. Replaced; or
- 4. Deemed a total loss by us:
  - (a) Seventy-two (72) hours after we pay the applicable limit of liability under Section III; or
  - (b) Seventy-two (72) hours after our initial settlement offer;

whichever comes first.

However, when there is a total theft of an owned auto, reimbursement for rental charges shall end the earliest of:

- 1. The date the auto is returned to use if the vehicle is recovered before payment of the total theft claim to **you** or the owner of the vehicle; or if the vehicle is not recovered,
- 2. Seventy-two (72) hours after our initial settlement offer of the actual cash value of the owned auto.
- 3. Seventy-two (72) hours after the failure to provide either a proof of loss or recorded statement if requested by us.

No deductible applies to this coverage.

#### CONDITIONS

In the case of theft of the entire auto, the *insured* must promptly notify the police that the vehicle was stolen. To be eligible as a covered *loss*, the police report must acknowledge and classify the report as theft of a motor vehicle. The *insured* must cooperate fully: with the policy investigation, with the prosecution of any person(s) charged with theft and any civil suit brought by us against the person(s) responsible to recover for the *loss*.

The coverage provided by this endorsement is subject to all the provisions and conditions of SECTION III of the policy.

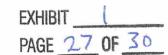
The COMPANY affirms this endorsement.

W. C. E. Robinson Secretary

A-431 (05-11)

Dayfuely

O. M. Nicely President



# Case 3:17-cv-01986-MO Document 21-1 Filed 02/01/18 Page 28 of 30 Case: 18-35383, 11/13/2018, ID: 11086125, DktEntry: 20, Page 44 of 131



# Automobile Policy Amendment Emergency Road Service Coverage

Policy Number:

Your policy provisions are amended as follows:

#### SECTION III

#### PHYSICAL DAMAGE COVERAGES

#### **Emergency Road Service**

We will pay reasonable expenses an *insured* incurs for the owned or non-owned auto, for:

- 1. mechanical labor up to one hour at the place of breakdown;
- 2. lockout services up to \$100 per lockout if keys to the auto are lost, broken or accidentally locked in the auto;
- 3. if it will not run, towing to the nearest repair facility where the necessary repairs can be made;
- 4. towing it out if it is stuck on or immediately next to a public highway;
- 5. delivery of gas, oil, loaned battery, or change of tire. WE DO NOT PAY FOR THE COST OF THE GAS, OIL, LOANED BATTERY, OR TIRE(S).

#### OBTAINING SERVICE UNDER THIS AMENDMENT

You may secure service under this amendment in the following manner:

#### SIGN AND DRIVE

The first method, called sign and drive, features a toll-free number in which the *insured* calls a GEICO Emergency Road Service representative who will dispatch a service vendor. Upon verification of Emergency Road Service (ERS) coverage, reasonable and necessary charges for covered services provided will be automatically billed to the Company by the Service vendor. The *insured* need only sign a receipt at the time of service which authorizes the company to directly pay the service vendor. Any additional mileage, other fees not specifically addressed above, or lockout services in excess of \$100 will be at the *insured's* expense.

#### HIRED SERVICES

The second method occurs when the *insured* does not use the sign and drive feature described above and hires services without prior approval from the Emergency Road Service (ERS) Department. Upon verification of Emergency Road Service (ERS) coverage, for covered services provided, up to a limit of \$50 will apply. Lockout services are limited to \$100. Requests for reimbursement must be accompanied by an original itemized receipt and must be submitted within 60 days of service.

There will be a limit of one reimbursement per disablement.

We affirm this amendment.

W. C. E. Robinson Secretary

Dayfuely

O. M. Nicely President

CC-115 (04-08)

EXHIBIT	
PAGE 28	OF 30

# **GEICO** Casualty

**Policy Number:** 

We agree with you as follows:

#### SECTION III PHYSICAL DAMAGE COVERAGES

Section III is amended to provide Multi-Risk Physical Damage Coverages. This includes:

- 1. comprehensive;
- 2. collision; and
- 3. mechanical breakdown protection

This amendment is subject to all policy conditions and definitions except as specifically modified below.

The amount of applicable deductible shown in the policy declarations shall apply to each *loss* under the Multi-Risk Coverage. A \$50 deductible shall apply to glass breakage without any other damage to the auto unless *you* carry full Comprehensive coverage.

#### Mechanical Breakdown

We will pay for *loss* caused other than by *collision* or under the Comprehensive Coverage, due to the mechanical breakdown of the *owned auto*. *Losses* from mechanical breakdown shall not be accumulated to reach the deductible.

#### **Definitions**

For the purposes of this amendment, the following special definitions apply with respect to mechanical breakdown only:

- "Loss" means all risk of physical damage to the owned auto or its equipment.
- "Owned auto" means any vehicle described in this policy for which a specific premium charge indicates there is coverage. "Owned auto" does not mean:
  - a) a newly acquired vehicle; or
  - b) a replacement vehicle; or

#### c) a temporary substitute auto.

#### **Exclusions**

For the purposes of this amendment only, with respect to mechanical breakdown, exclusion 4 is deleted. The following exclusions are added:

12. Oxidation and rust damage are not covered.

# Family Automobile Policy Amendment

# Multi-Risk Physical Damage Coverage

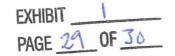
- Damage caused intentionally by you or any other person using an owned auto with your permission is not covered.
- 14. *Loss* due to misuse, alteration, or **lack of proper maintenance** is not covered. **Proper maintenance** is the recommended vehicle maintenance as outlined in the owner's manual provided by the manufacturer.
- 15. Tire wear or other tire damage is not covered.
- 16. Normal wear and tear is not covered.
- 17. Routine maintenance services and parts are not covered. This includes; but is not limited to:
  - a) engine tune up;
  - b) suspension alignment;
  - c) wheel balancing;
  - d) filters;
  - e) lubrication;
  - f) engine coolant;
  - g) fluids;
  - h) spark or glow plugs;
  - i) brake pads;
  - j) brake linings; and
  - k) brake shoes.
- Any *loss* to the extent covered by warranty, recall or voluntary repair programs is not covered.
- 19. Any *loss* to a *temporary substitute auto* is not covered.
- Any *loss* to a newly acquired or replacement auto is not covered.
- 21. Any pre-existing *loss* or damage to any insured auto is not covered.
- 22. Multi-Risk Coverage will either terminate when the Odometer reading exceeds 100,000 miles or when the age of the vehicle is 7 years old, whichever occurs earlier. The 7 year stipulation will only apply to vehicles that are 1996 model year and later.

#### Other Insurance

For the purposes of this amendment only, if **you** have other insurance against a **loss** covered by mechanical breakdown protection, this policy will apply as excess insurance over such other valid and collectible insurance.

.0000100001.

CC-280-L (2-96) Page 1 of 2



# Case 3:17-cv-01986-MO Document 21-1 Filed 02/01/18 Page 30 of 30 Case: 18-35383, 11/13/2018, ID: 11086125, DktEntry: 20, Page 46 of 131

#### Conditions

For the purposes of this amendment only, the following conditions are added with respect to mechanical breakdown coverage:

We affirm this amendment.

1. <u>Notice</u>

e) the location of the owned auto.

For this coverage to be applicable, repairs may not be undertaken prior to obtaining authorization from us.

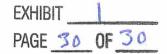
W. C. E. Robinson Secretary • GEICO Casualty Company •

Drapuily

O. M. Nicely President

CC-280-L (2-96) Page 2 of 2

Policy Number:



Scott Brooksby, OSB #950562 E-mail: <u>sbrooksby@olsonbrooksby.com</u> Kristin Olson, OSB #031333 E-mail: <u>kolson@olsonbrooksby.com</u> OLSON BROOKSBY PC 1020 SW Taylor St., Suite 400, Suite 400 Portland, OR 97205 Telephone: 503.290.2420

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Attorneys for Defendant Government Employees Insurance Company

# UNITED STATES DISTRICT COURT

## DISTRICT OF OREGON

### PORTLAND DIVISION

LEIF HANSEN, on behalf of himself and all others similarly situated.

Civil Case No. 3:17-cv-1986-MO

### DECLARATION OF SCOTT BROOKSBY IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

v.

GOVERNMENT EMPLOYEES INSURANCE COMPANY, a Maryland corporation,

Plaintiff,

Defendant.

Page 1–DECLARATION OF SCOTT BROOKSBY IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

# Case 3:17-cv-01986-MO Document 22 Filed 02/01/18 Page 2 of 2 Case: 18-35383, 11/13/2018, ID: 11086125, DktEntry: 20, Page 48 of 131

Pursuant to 28 U.S. C. § 1746, I, Scott Brooksby, state as follows:

1. I am one of the attorneys for Defendant Government Employees Insurance Company (hereinafter "GEICO) in the above-captioned matter.

2. I am an adult above 21 years of age and I make this declaration with personal knowledge.

3. I am competent to testify to the things herein.

4. I make this declaration in support of Defendant GEICO's Motion to Dismiss.

5. GEICO's Motion to Dismiss is made in good faith and is not made for purposes

of delay.

6. Attached as Exhibit 1 to GEICO's Motion to Dismiss is a copy of the GEICO

insurance policy issued to Carol M. Hansen and Leif C. Hansen, which is referred to and quoted

in the Complaint.

# I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

EXECUTED ON this 1st day of February, 2018

Respectfully Submitted,

# **OLSON BROOKSBY PC**

BY: <u>s/Scott A. Brooksby</u> Scott A. Brooksby, OSB #950562 sbrooksby@olsonbrooksby.com 503.290.2420

Attorneys for Defendant Government Employees Insurance Company

Page 2–DECLARATION OF SCOTT BROOKSBY IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

# Case 3:17-cv-01986-MO Document 25 Filed 02/15/18 Page 1 of 9 Case: 18-35383, 11/13/2018, ID: 11086125, DktEntry: 20, Page 49 of 131

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888 S.W. Fifth Avenue
Portland, OR 97204-2099

Attorneys for Plaintiff Leif Hansen

### UNITED STATES DISTRICT COURT

### DISTRICT OF OREGON

### (Portland Division)

LEIF HANSEN, on behalf of himself and all others similarly situated,

Civil No. 3:17-cv-01986-MO

Plaintiff,

v.

GOVERNMENT EMPLOYEES INSURANCE COMPANY, a Maryland corporation,

CLASS ACTION

PLAINTIFF'S OPPOSITION TO DEFENDANT GOVERNMENT EMPLOYEES INSURANCE COMPANY'S MOTION TO DISMISS

Defendant.

Defendant Government Employees Insurance Company ("GEICO") moves the

Court for an order dismissing this case under Federal Rules of Civil Procedure 12(b)(1) and

12(b)(6). Plaintiff Leif Hansen ("Hansen") respectfully requests that the Court deny GEICO's

motion, ECF Dkt. No. 21.<sup>1</sup>

<sup>&</sup>lt;sup>1</sup> Hansen separately addresses GEICO's motion to dismiss under Federal Rule of Civil Procedure 12(b)(2) in the concurrently filed Plaintiff's Opposition to Government Employees Insurance Company's Motion to Strike.

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### **INTRODUCTION**

GEICO argues that Hansen does not allege a concrete, redressable injury. Based on this purported defect in the Complaint, GEICO argues that Hansen lacks standing and has failed to sufficiently allege breach of contract and breach of the implied duty of good faith and fair dealing. GEICO is wrong.

In his Complaint, Hansen alleges that GEICO refused to pay for pre- and postrepair electronic scans of Hansen's vehicle after a collision. These scans cost a total of \$200. GEICO's refusal to pay the \$200 for these scans was a breach of GEICO's contractual obligation to pay for any collision loss to vehicles insured under its policy. Regardless of any latent damage that the scans may have identified and the risk inherent in driving a vehicle that has been only partially repaired, GEICO's conduct injured Hansen in the amount of \$200. He has suffered a concrete injury that the Court can redress by awarding Hansen money damages. He therefore has Article III standing to bring his claims and has sufficiently alleged the elements of breach of contract and breach of the implied covenant of good faith and fair dealing.

### **STANDARDS**

A motion to dismiss for lack of subject matter jurisdiction may be either "facial" or "factual." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). "In a facial attack, the challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction." *Id.* "By contrast, in a factual attack, the challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction." *Id.* GEICO's jurisdictional attack is facial because GEICO expressly concedes that Hansen's allegations "are true for the purposes of this Motion." GEICO's Motion to Dismiss (Motion) at 3–4. GEICO's 12(b)(1) motion is therefore subject to the same standards as a motion to dismiss

### PAGE 2 - PLAINTIFF'S OPPOSITION TO DEFENDANT GOVERNMENT EMPLOYEES INSURANCE COMPANY'S MOTION TO DISMISS

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for failure to state a claim. *See Terenkian v. Republic of Iraq*, 694 F.3d 1122, 1131 (9th Cir. 2012).

A district court may grant a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) only when there is no cognizable legal theory to support the claim or when the complaint lacks sufficient factual allegations to state a facially plausible claim for relief. *Shroyer v. New Cingular Wireless Servs., Inc.*, 622 F.3d 1035, 1041 (9th Cir. 2010). When evaluating the sufficiency of a complaint's factual allegations, courts must accept as true all well-pleaded material facts alleged in the complaint and construe the facts in the light most favorable to the non-moving party. *Wilson v. Hewlett-Packard Co.*, 668 F.3d 1136, 1140 (9th Cir. 2012).

### **SUMMARY OF FACTS**

Hansen holds a GEICO car insurance policy, including collision coverage, for his GMC Sierra 3500 pickup truck ("Sierra 3500"). Compl. ¶ 8. His insurance policy provides that GEICO "will pay for collision loss to the owned auto or non-owned auto for the amount of each loss less the applicable deductible." Motion, Ex. 1 at 11 (Policy) (emphasis omitted). The policy defines "loss" as "direct and accidental loss of or damage to \* \* \* an insured auto, including its equipment." Policy at 10. GEICO issued Hansen's current insurance policy on October 23, 2017. Policy at 1.

On November 17, 2017, the Sierra 3500's rear bumper was damaged in a collision. Compl. ¶ 11. On November 4, 2017, Hansen filed a claim with GEICO, and soon after, he brought his truck to Artistic Car Body (Artistic) for a repair estimate. *Id.* Hansen requested electronic scans to ensure a safe and complete repair. Each scan costs about \$100, so the total cost of pre- and post-repair electronic scans is \$200. *Id.* ¶ 14. Hansen knew these scans

#### PAGE 3 - PLAINTIFF'S OPPOSITION TO DEFENDANT GOVERNMENT EMPLOYEES INSURANCE COMPANY'S MOTION TO DISMISS

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were a necessary part of collision repairs from his experience as an owner of a group of Portlandarea auto repair shops. *Id.* ¶ 12. Nissan, Honda, Toyota, General Motors (GM), and the Automotive Service Association (ASA) all require or recommend that auto collision repair shops perform electronic scans before and after repairs. *Id.* ¶¶ 12–18.

GEICO refused to authorize or reimburse Hansen for pre- and post-repair electronic scans of the Sierra 3500. *Id.* ¶¶ 20–21. By refusing to pay for a complete repair of Hansen's truck, GEICO's conduct violated the express terms of its insurance policy. *Id.* ¶¶ 21– 23, 37–42. On December 13, 2017, Hansen filed a class action complaint, alleging breach of contract and breach of the implied covenant of good faith and fair dealing on behalf of a nationwide class of current and former GEICO insureds, based on GEICO's uniform practice of refusing to pay for pre- and post-repair electronic scans. *See id.* ¶ 29.

In the Complaint, Hansen specifically alleges that he and other GEICO policyholders "do not receive payment for the full extent of their losses and are denied complete and safe repairs." *Id.* ¶ 2. He alleges economic harm based on the fact that "GEICO continues to refuse to compensate [him] for pre- and post-repair electronic scans on the Sierra 3500." *Id.* ¶ 21. Like other policyholders, Hansen has "receiv[ed] incomplete compensation for [his] collision losses . . . *for the scans themselves*," as well as for "further necessary repairs that the scans would reveal." *Id.* ¶ 41 (emphasis added). Although Hansen paid his insurance premiums, GEICO reimbursed him for an amount "below the actual amount of loss," which was at least \$200 higher than what GEICO paid. *See id.* ¶¶ 39, 48.

### PAGE 4 - PLAINTIFF'S OPPOSITION TO DEFENDANT GOVERNMENT EMPLOYEES INSURANCE COMPANY'S MOTION TO DISMISS

### ARGUMENT

### I. Hansen Has Alleged an Injury-in-Fact that Is Redressable by the Court.

Under Article III of the U.S. Constitution, a court cannot decide a legal dispute or expound on the law in the absence of "a case or controversy." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 90 (2013). To establish a case or controversy, and thus have Article III standing, a plaintiff must have a "personal interest." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000). The personal interest must satisfy three elements throughout litigation: (1) injury in fact, *i.e.*, an invasion of a legally protected interest that is concrete and particularized, as well as actual or imminent; (2) causal connection between the injury-in-fact and the defendant's challenged behavior; and (3) likelihood that the injury-in-fact will be redressed by a favorable ruling. *See id.* at 180–81, 189; *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).

GEICO argues that Hansen has not alleged a redressable injury-in-fact because "he only alleges it is possible some unidentified, speculative, invisible damage could exist after the repair." Motion at 5. GEICO also suggests that Hansen may not have suffered injury because, as "an experienced owner of multiple auto body shops with the equipment to perform the scans," he could have performed the scans "at likely no cost to him." *Id.* By GEICO's logic, it could send Hansen a check for the necessary parts and have him do the entire repair himself without being liable for breaching the insurance contract. GEICO seems to suggest that it could breach its policy agreement with impunity as long as Hansen could perform repair work himself, at his own cost, using his own labor and equipment.

But of course the possibility that a customer could fix his own car does not somehow free GEICO from its obligations under its policy agreement. GEICO fails to recognize

### PAGE 5 - PLAINTIFF'S OPPOSITION TO DEFENDANT GOVERNMENT EMPLOYEES INSURANCE COMPANY'S MOTION TO DISMISS

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that the express terms of its policy agreement obligate GEICO to pay for *all* collision losses to an insured vehicle, minus only the applicable deductible. Hansen alleges, and GEICO admits for purposes of this motion, that electronic scans constitute necessary repairs after *every* collision and qualify as part of the collision loss or equipment damage for which GEICO must compensate its insureds under the policy. By failing to pay the \$200 for pre- and post-repair electronic scans of Hansen's Sierra 3500, GEICO breached the policy agreement and injured Hansen in the amount of \$200. Hansen therefore sustained injury whether or not his auto body repair shops have the ability to perform the electronic scans, detect additional damage, and reset the truck's diagnostic codes at his own cost. The possibility of undetected damage to Hansen's truck supports his allegation that the scans are necessary repairs, but is not the basis of his injury.

Hansen's alleged economic harm—deprivation of money to which he was legally entitled—is a quintessential injury-in-fact. *See Sierra Club v. Morton*, 405 U.S. 727, 733 (1972) ("[P]alpable economic injuries have long been recognized as sufficient to lay the basis for standing \* \* \*"). Additionally, if an injury-in-fact is redressable by money damages, the injury satisfies the redressability prong of Article III standing. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 96 (1998); *Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163, 1172 (9th Cir. 2002) ("[B]ecause the award of money damages will redress the injury of lost wages, the third element is also met."). Hansen's roughly \$200 in damages, far from being conjectural or hypothetical, is precisely the type of "real, and not abstract" injury—capable of being redressed by a favorable ruling—that confers Article III standing. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) (internal quotation marks omitted) (quoting *Webster's Third New International Dictionary* 472 (1971) and *Random House Dictionary of the English Language* 305 (1967)). The Court should deny GEICO's motion under Rule 12(b)(1).

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### II. Hansen Has Sufficiently Alleged the Elements of a Breach of Contract Claim.

To state a claim for breach of contract, a "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. Or. State Bd. of Clinical Soc. Workers*, 927 P.2d 1098, 1101 (Or. Ct. App. 1996) (quoting *Fleming v. Kids and Kin Head Start*, 693 P.2d 1363 (Or. Ct. App. 1985)). GEICO argues that Hansen has not alleged that GEICO breached any policy term or that he suffered damages. Hansen has alleged both.

As discussed above, Hansen alleges that his insurance policy constituted an enforceable contract with GEICO whereby GEICO agreed to "pay for collision loss to the owned auto or non-owned auto for the amount of each loss less the applicable deductible." Compl. **11** (emphasis omitted). GEICO breached the contract by refusing to compensate Hansen for electronic scans, which constitute necessary repairs and part of the "collision loss" to Hansen's truck. Compl. **14** 1–42. Hansen, like all similarly situated GEICO insureds, suffered damages at least in the amount of roughly \$200, the value of the scans. *See* Compl. **11** 4, 41, 43. GEICO may believe that electronic scans are unnecessary and constitute no more than Hansen's "preferred tool to identify damage," Motion at 11, but this is a factual issue properly resolved by the trier of fact. Hansen's allegations that GEICO breached its contractual obligations by failing to pay \$200 for essential collision repairs meet the requirements for a breach of contract claim. *See Slover*, 927 P.2d at 1101–02.

# III. Hansen Has Sufficiently Alleged the Elements of a Breach of the Implied Duty of Good Faith and Fair Dealing.

The implied duty of good faith and fair dealing "focuses on the 'agreed common purpose' and the 'justified expectations' of both parties." *Klamath Off–Project Water Users. Inc. v. Pacificorp*, 240 P.3d 94, 101 (Or. Ct. App. 2010) (quoting *OUS v. OPEU*, 60 P.3d 567, 572

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(Or. Ct. App. 2002)). GEICO argues that Hansen cannot state a claim for breach of this implied duty because either (1) his expectation that GEICO would provide electronic scans for his Sierra 3500 was not reasonable, or (2) GEICO could not possibly have frustrated Hansen's expectation because his truck was properly repaired. Yet again, GEICO tries to recast factual issues as legal ones.

Hansen has alleged that electronic scans constitute necessary collision repairs, without which his truck could not possibly be restored to pre-loss condition. Compl. ¶¶ 47–48. Based on the express terms of the policy, it was reasonable for Hansen to expect these repairs, and GEICO frustrated this expectation by refusing to pay for them. *Id.* ¶¶ 47–49. GEICO may disagree that Hansen's expectations were reasonable or that GEICO failed to live up to Hansen's expectations, but Hansen's position is that a proper determination of the scope of necessary repairs or confirmation that repairs have been performed properly and completely is a "justified expectation" under the insurance contract that GEICO has failed to meet. The Court cannot resolve this dispute on a motion to dismiss. *See Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008); *cf. Subramaniam v. Beal*, 2013 WL 5462339, at \*6 n.5 (D. Or. Sept. 27, 2013) ("A borrower can reasonably expect that payments on their loan will be properly recorded and credited. Plaintiff is not required to prove that defendant failed to do so in order to survive a motion to dismiss—she must only state a plausible claim for relief.").

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### PAGE 8 - PLAINTIFF'S OPPOSITION TO DEFENDANT GOVERNMENT EMPLOYEES INSURANCE COMPANY'S MOTION TO DISMISS

# Case 3:17-cv-01986-MO Document 25 Filed 02/15/18 Page 9 of 9 Case: 18-35383, 11/13/2018, ID: 11086125, DktEntry: 20, Page 57 of 131

### CONCLUSION

GEICO has failed to establish that there is no cognizable legal theory to support

Hansen's claims or that the Complaint lacks sufficient factual allegations to state a facially

plausible claim for relief. Hansen respectfully requests that the Court deny GEICO's Motion to

Dismiss.

DATED this 15th day of February, 2018.

TONKON TORP LLP

By: <u>s/ Steven D. Olson</u>

Steven D. Olson, OSB No. 003410 Paul Conable, OSB No. 975368

Attorneys for Plaintiff Leif Hansen

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**Dan Goldfine** (admitted *pro hac vice*) E-mail: dgoldfine@lrrc.com Telephone: 602.262.5392 Ian M. Fischer (admitted *pro hac vice*) E-mail: ifischer@lrrc.com Telephone: 602.262.5724 Brian D. Blakley (admitted pro hac vice) E-Mail: <u>bblakley@lrrc.com</u> Telephone: 702.474.2687 LEWIS ROCA ROTHGERBER CHRISTIE LLP 201 East Washington Street, Suite 1200 Phoenix, AZ 85004.2595 Telephone: 602.262.5392 Facsimile: 602.262.5747

Attorneys for Defendant Government Employees Insurance Company

# UNITED STATES DISTRICT COURT

## DISTRICT OF OREGON

### PORTLAND DIVISION

LEIF HANSEN, on behalf of himself and all others similarly situated.

Civil Case No. 3:17-cv-1986-MO

### **GOVERNMENT EMPLOYEES INSURANCE COMPANY'S REPLY IN** SUPPORT OF ITS MOTION TO DISMISS

**GOVERNMENT EMPLOYEES INSURANCE COMPANY**, a Maryland corporation,

Defendant.

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**SER 55** 

[ORAL ARGUMENT REQUESTED]

# Plaintiff.

v.

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Nowhere in his Opposition does Hansen argue that GEICO refused to pay the cost to repair covered damage to the rear bumper of his Truck<sup>1</sup> allegedly caused by a collision, or that the amount GEICO paid (with the deductible) was insufficient to pay for those costs. Hansen's Opposition confirms that he wants GEICO to pay for his preferred method for "a proper determination of the scope of necessary repairs or confirmation that repairs have been performed properly and completely." Doc. 25 ("Opp.") at 8. He wants GEICO to pay \$200 for this preferred method "[r]egardless of any latent damage that the scans may have identified." *Id.* at 2. Hansen repeatedly calls these scans "necessary repairs," *e.g.*, *id.* at 6, 7, 8, but he does not claim (nor did he allege) that these scans actually repair anything, because they will not do so.

Hansen does not dispute that the Policy only requires GEICO to pay for "direct and accidental loss of or damage to" the Truck caused by "collision," less the deductible. *Id.* at 3 (quoting the Policy). The \$200 Hansen seeks will not repair direct and accidental loss of or damage to the Truck – no loss of or damage to the Truck is even alleged. Instead, Hansen seeks \$200 to diagnose the scope of potential repairs, which hypothetically was not determined by other means, and to confirm that repairs were performed. Hansen does not allege any repairs were missed when the scope of repairs was determined by other means, or that any repairs were not performed. This is not uncompensated direct and accidental loss of, or damage to, the Truck, as required to establish standing and each of Hansen's claims. It is a claim that GEICO did not use his preferred tool – a requirement that appears nowhere in his Policy.

Absent an allegation of "direct and accidental loss of or damage to" the Truck, Hansen alleged only a theoretical, possible injury, not the real-world injury in fact that can be redressed by this Court, meaning he has no Article III standing. He has also not alleged that GEICO breached any term of his Policy or caused him damage. Since Hansen was fully compensated for the direct and accidental loss of or damage to the Truck, he has not alleged GEICO breached the

<sup>&</sup>lt;sup>1</sup> This Reply uses the same terminology, such as Truck and Policy and GEICO, as in GEICO's Motion to Dismiss (Doc. 22).

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implied covenant of good faith and fair dealing by frustrating his expectations to receive a complete repair. Hansen's Complaint should be dismissed with prejudice.

### I. <u>HANSEN LACKS ARTICLE III STANDING</u>

Hansen admits in his Opposition that all he has alleged (or can allege) is that there is a "possibility" that some undetected damage to the Truck remains if his preferred diagnostic tool is not paid for by GEICO, which means there is also a possibility that no damage exists. Opp. at 6. Since Hansen cannot allege an actual, rather than a potential, injury, he has no standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (an injury in fact must be "actual or imminent, not conjectural hypothetical") (internal quotation marks omitted). Hansen failed to allege facts supporting an injury in fact and redressability. *See Legal Aid Soc. of Alameda Cty. v. Brennan*, 608 F.2d 1319, 1333 n.26 (9th Cir. 1979) ("To invoke federal jurisdiction, plaintiffs must allege facts adequate to confer standing . . . ."). Hansen's Policy is clear that GEICO only has to pay for "direct and accidental loss of, or damage to" the Truck caused by collision, Compl. ¶ 10, and Hansen does not allege there is any "direct and accidental loss of, or damage to" the Truck, other than conjectural, hypothetical damage, for which GEICO did not pay.

Hansen does not allege that "damage to the rear bumper" of the Truck could not be, or was not, repaired using the funds GEICO provided, plus the deductible. See Compl. ¶11 (alleging the Truck "suffered damage to the rear bumper in a collision"); Opp. at 1-9 (omitting any argument that the rear bumper could not be, or was not, repaired). He admits as much by taking a sentence from GEICO's Motion out of context. *Id.* at 5-6. GEICO noted that the speculative nature of Hansen's claim is exposed because Hansen – a self-proclaimed experienced shop owner who undisputedly owns a scanning tool he could have used on his Truck to determine whether undetected, unrepaired damage remained – did not allege any undetected or unrepaired damage exists. *See* Doc. 22 ("Mot.") at 5. The *only* reasonable inference from Hansen's failure to so allege is that no undetected, unrepaired damage remains. Because an

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injury in fact is Hansen's burden to allege, however, this omission is sufficient to support dismissal without this inference because his speculation and conjecture cannot support standing.

The Complaint does not allege scans are "necessary repairs," as Hansen now asserts. Opp. at 6, 7, 8. Rather, the Complaint alleges scans are a tool to "identify potential damage" and "ensure [a vehicle has] been safely and completely repaired." Compl. ¶¶ 13, 20.<sup>2</sup> Nor does Hansen identify Policy language requiring GEICO to pay for diagnostic scans independent of whether there is "direct and accidental loss of, or damage to" the Truck caused by collision. Without actual, real-world damage that was unidentified, or repairs that were not made, Hansen has not alleged any concrete, redressable injury he suffered, no matter how much a scan costs. Allegations about the "possibility" of theoretical damage that might exist are the exact kind of "conjectural or hypothetical" allegations the Supreme Court has repeatedly rejected. *Lujan*, 504 U.S. at 560 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)); see also Opp. at 6 ("The possibility of undetected damage to Hansen's truck supports his allegation . . . ."). A "hypothetical" injury is not an injury in fact. *Id*.

A conjectural injury is also not redressable by the Court. *West v. Lynch*, 845 F.3d 1228, 1237 (D.C. Cir. 2017) ("When conjecture is necessary, redressability is lacking.") (citing *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 43-44 (1976)). Nowhere does Hansen allege, or argue, that GEICO paying \$200 for scans will pay to repair damage to the Truck for which GEICO (plus the deductible) did not already pay. Since there is only a "possibility" of unrepaired damage, Opp. at 6, it is only possible – not likely – that an order requiring electronic scans will identify any unrepaired damage to the Truck. *See* Mot. 8-9. This is constitutionally inadequate to demonstrate redressability. *See, e.g., Am. Fed'n of Gov't Employees, Local 2119 v. Cohen*, 171 F.3d 460, 466 (7th Cir. 1999) (it must be "likely, *rather than merely possible*, that

<sup>&</sup>lt;sup>2</sup> Hansen misrepresents that the Complaint alleges "his truck could not possibly be restored to pre-loss condition, without electronic scans." Opp. at 8 (purporting to paraphrase Compl. ¶¶ 47-48). The cited paragraphs say nothing about the Truck, or any uncompensated repairs. See Compl. ¶¶ 47-48.

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a favorable decision by the court would redress the injury") (emphasis added).<sup>3</sup>

### II. HANSEN FAILS TO STATE A CLAIM FOR BREACH OF CONTRACT

To support breach and damage, Hansen cites paragraphs 41 and 42 of the Complaint for the proposition that scans are "necessary repairs," but those paragraphs say no such thing. *See* Opp. at 7 (citing Compl. ¶¶ 41-42). Paragraphs 41 and 42 conclusorily allege that "policyholders receiv[e] incomplete compensation for their collision losses" and "policyholders [do not receive compensation] for the full extent of their losses." Compl. ¶¶ 41-42; *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"). Instead of "necessary repairs," Hansen concedes scanning is a diagnostic tool to determine "the scope of necessary repairs" or to confirm "repairs have been performed." Opp. at 8.

The sole contractual obligation Hansen alleged GEICO breached is the obligation to pay for "direct and accidental loss of or damage to" the Truck caused by "collision." Compl. ¶¶ 37, 42; Opp. at 7. But all he alleges is that GEICO did not pay to use the tool he claims GEICO should have paid for. Opp. at 8. Hansen's Complaint, as explained in his Opposition, demands these scans "[r]egardless of any latent damage that the scans may have identified." *Id.* at 2.

GEICO's purported refusal to pay for a scan of the Truck is not a breach of the obligation to pay for direct and accidental loss of or damage to the vehicle. To breach that obligation, Hansen would have had to allege there was direct and accidental loss of or damage to the Truck for which it did not pay. He did not. Notwithstanding his effort to toss this matter right away to the jury, Opp. at 7, this is a pleading problem for Hansen. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (a complaint must plead "enough facts to state a claim to relief that is plausible on its face"). Hansen's Opposition identifies no allegations of "direct and accidental loss of or damage to" the Truck for which GEICO did not pay. *See, e.g., Slover v. Oregon State* 

<sup>&</sup>lt;sup>3</sup> Hansen does not dispute his lack of standing precludes him from asserting claims on behalf of the putative class. *See* Mot. at 9.

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*Bd. of Clinical Soc. Workers*, 144 Or App 565, 570 (1996) (to state a claim for breach of contract a plaintiff must allege a defendant's breach resulting in damage to the plaintiff).

### III. <u>HANSEN FAILS TO STATE A CLAIM FOR BREACH OF THE IMPLIED</u> <u>COVENANT OF GOOD FAITH AND FAIR DEALING</u>

Hansen's Complaint asserts that, by not compensating Hansen for pre- and post-repair scans, GEICO frustrated "the reasonable expectation, rooted in the plain language of the Policy, that GEICO will compensate [Hansen] in an amount sufficient to obtain complete and safe repairs." Compl. ¶ 47. Apparently recognizing he did not allege the amount GEICO paid (plus deductible) was insufficient for him to obtain a complete and safe repair of the Truck, in his Opposition, Hansen tries to change the expectation to an "expectation that GEICO would provide electronic scans for his" Truck. Opp. at 8.

Hansen provides no support for his conclusion that his "electronic scan" expectation is objectively reasonable. *Id.* Instead he claims "a proper determination of the scope of necessary repairs or confirmation that repairs have been performed properly and completely is a 'justified expectation' under the insurance contract" and paying for scans would meet this expectation *Id.* But again, he does not allege that the proper scope of necessary repairs was not determined or that repairs that were done were not performed properly and completely (by his own shop) with the money paid by GEICO (plus deductible). The 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." *Tucker v. Or. Aero, Inc.*, 474 F Supp2d 1192, 1214 (D Or 2007). Hansen's attempt to move the goalposts fails because it still requires undetected or unrepaired damage to the Truck – which he has not alleged. No matter how he tries to phrase it, without uncompensated damage, he has not plausibly alleged that his objectively reasonable expectations were frustrated, and his claim fails as a matter of law. *See Uptown Heights Assocs. Ltd. P ship v. Seafirst Corp.*, 320 Or 638, 644-45 (1995) (the duty of good faith and fair dealing implied in every contract is applied to effectuate the objectively reasonable contractual expectations of the parties).

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### CONCLUSION

GEICO respectfully requests the Court dismiss Hansen's Complaint under Rule 12(b)(2) because he lacks standing, or that each claim be dismissed under Rule 12(b)(6) because Hansen failed to state his claims.

Respectfully submitted this 1st day of March, 2018.

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# UNITED STATES DISTRICT COURT

## DISTRICT OF OREGON

## PORTLAND DIVISION

LEIF HANSEN, on behalf of himself and all others similarly situated.

Civil Case No. 3:17-cv-1986-MO

GOVERNMENT EMPLOYEES INSURANCE COMPANY'S MOTION TO STRIKE

GOVERNMENT EMPLOYEES INSURANCE COMPANY, a Maryland corporation,

Plaintiff.

v.

Defendant.

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[ORAL ARGUMENT REQUESTED]

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### Certification of Compliance with LR 7-1(a)(1)

Undersigned counsel for Defendant Government Employees Insurance Company ("GEICO") certifies they conferred with Plaintiff's counsel and Plaintiff opposes this Motion.

### **Motion**

Under Federal Rules of Civil Procedure 12(b)(2) and 12(f), GEICO moves this Court for an order striking Plaintiff's nationwide class allegations—references to nationwide practices and a nationwide class in paragraphs 1, 25 and 29. Under Rules 12(f), 23(c)(1)(A) and 23(d)(1)(D), GEICO also moves this Court for an order striking Plaintiff's nationwide class allegations and allegations including owners of vehicles not manufactured by General Motors in the putative class (paragraphs 1, 15, 18, 23, 29, and 34(a)). The grounds for this Motion are set forth below.

### Memorandum of Law

If GEICO's concurrently filed motion to dismiss Plaintiff Leif Hansen's ("Hansen") individual claims is denied, many of his class allegations should be stricken because they are defectively pled, and no amount of discovery can cure them. According to Hansen, GEICO breached his insurance policy by refusing to pay for pre- and post-repair electronic scans of his vehicle after a collision. Doc. 1, Compl. ¶¶ 36–49. These scans allegedly could have potentially identified damage not already identified and repaired, if any such damage existed in the first place.<sup>1</sup> Hansen seeks to represent a nationwide class of "GEICO car insurance policyholders in the United States who suffered losses caused by collisions within six years" of the Complaint. *Id.* ¶ 29. On behalf of this nationwide class, he asserts claims for breach of contract and breach of the implied covenant of good faith and fair dealing. *Id.* ¶¶ 36–49.

The nationwide class allegations (references to nationwide practices and a nationwide class at  $\P\P$  1, 25 and 29) (the "Nationwide Class Allegations") should be stricken because this Court lacks personal jurisdiction over GEICO to adjudicate claims arising entirely outside of

<sup>&</sup>lt;sup>1</sup> GEICO incorporates the summary of the allegations in its contemporaneously-filed Motion to Dismiss (at pages 3–5) as if it was set forth here, instead of burdening the Court by repeating it. Page 2–GOVERNMENT EMPLOYEES INSURANCE COMPANY'S MOTION TO STRIKE

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Oregon. See Bristol-Myers Squibb Co. v. Superior Court of Cal. ("BMS"), 137 S. Ct. 1773, 1781–82 (2017). If this Court certified a nationwide class, it would have to resolve numerous out-of-state disputes over GEICO's handling of insurance claims with no connection to Oregon. Hansen has not alleged this Court has general jurisdiction over GEICO or any facts to establish specific jurisdiction for these out-of-state claims.

Even if the Court has personal jurisdiction to adjudicate the out-of-state claims, the Nationwide Class Allegations cannot meet Rule 23(b)(3)'s predominance requirement and should still be stricken. As alleged, the breach of contract and bad faith claims would require this Court to make individual choice-of-law determinations for each putative class member and separately apply the law of at least 50 different jurisdictions, overwhelming any common issues.

Allegations concerning non-GM manufactured vehicles (Compl. ¶¶ 1, 15, 18, 23, 29, 34(a)) should also be stricken because individual issues predominate. Hansen, the owner of a General Motors ("GM") manufactured vehicle, alleges GEICO must follow GM's requirements and GM's requirements differ from other manufacturers. Compl. ¶¶ 15, 21. Even so, he seeks to represent GEICO policyholders who own non-GM vehicles. Sorting through scores of different manufacturers' requirements to determine if it exists, what it is, and how it applies to a particular claim, causes individual issues to predominate over common questions. Allegations concerning non-GM manufactured vehicles (Compl. ¶¶ 1, 15, 18, 23, 29, 34(a)) should be stricken.

### I. <u>THIS COURT LACKS PERSONAL JURISDICTION OVER GEICO FOR THE</u> <u>OUT-OF-STATE CLAIMS</u>

Hansen's Nationwide Class Allegations ask this Court to adjudicate out-of-state claims with no factual connection to Oregon. To adjudicate these claims, this Court needs either general jurisdiction over GEICO or specific jurisdiction over the claims. *BMS*, 137 S. Ct. at 1781–82. It has neither. The Nationwide Class Allegations—if permitted to stand—would overwhelm "*the* primary concern" of personal jurisdiction doctrine as it reflects the Due Process Clause—"the burden on the defendant." *Id.* at 1780 (emphasis added). As the Supreme Court Page 3–GOVERNMENT EMPLOYEES INSURANCE COMPANY'S MOTION TO STRIKE

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held, an improper cause of action can be leveraged into an unfair settlement. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007) (warning against the *in terrorem* effect of implausible allegations). That should not be permitted to happen here. Rule 12(f) authorizes this Court to strike the immaterial or impertinent Nationwide Class Allegations and it should do so.

### A. This Court Lacks General Jurisdiction Over GEICO

Hansen has not alleged facts establishing this Court's general jurisdiction over GEICO, nor can he. "The paradigm all-purpose forums for general jurisdiction are a corporation's place of incorporation and principal place of business." *Daimler AG v. Bauman*, 134 S. Ct. 746, 749 (2014). GEICO is not incorporated in Oregon, and Oregon is not its principal place of business. As Hansen alleges, GEICO is "a foreign corporation with its principle place of business in Chevy Chase, Maryland." Compl. ¶ 5. While GEICO is licensed to conduct business and sells insurance in Oregon, this is not enough to establish GEICO is "essentially at home" there for general jurisdiction in this Court. *See, e.g., BMS*, 137 S. Ct. at 1778, 1781 (California lacked general jurisdiction even though BMS, which was headquartered and incorporated in other states, had over 400 employees, five facilities, a state-government advocacy office and extensive sales in California); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011) (corporation must be "essentially at home in the forum State" for general jurisdiction).

### B. This Court Lacks Specific Jurisdiction To Adjudicate The Out-Of-State Claims

Hansen also alleged no facts establishing specific jurisdiction to adjudicate out-of-state claims against GEICO. If the putative class members appeared in this matter either as members of a certified class—perhaps to claim a portion of a settlement or judgment or to opt out—or individually, this Court would lack personal jurisdiction over GEICO to decide their out-of-state claims. *BMS*, 137 S. Ct. at 1778, 1781. As the Supreme Court held, unnamed class members "are *parties* to the proceedings in the sense of being bound by the settlement." *Devlin v.* 

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*Scardelletti*, 536 U.S. 1, 10 (2002) (emphasis added).<sup>2</sup> Because "[p]ersonal jurisdiction in class actions must comport with due process just the same as any other case," *In re Dental Supplies Antitrust Litig.*, No. 16 CIV 696 (BMC)(GRB), 2017 WL 4217115, at \*9 (E.D.N.Y. Sept. 20, 2017), this Court should follow *BMS*, at the pleading stage, by holding it lacks personal jurisdiction over GEICO to adjudicate out-of-state claims and striking the Nationwide Class Allegations.

Specific jurisdiction requires the claim to "arise out of or relate to the defendant's contacts with the forum." *BMS*, 137 S. Ct. at 1787 (citation and quotation marks omitted). "[T]here must be an affiliation between the forum and the underlying controversy, principally, an activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation." *Id.* (quoting *Goodyear*, 564 U.S. at 919) (internal quotation marks omitted and alterations incorporated). Specific jurisdiction is "confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction." *Id.* 

Here, as in *BMS* where non-California residents sued in California, the nonresident claims are based entirely on conduct outside the forum. *BMS* and Hansen's Complaint are substantively similar:

- (1) In *BMS*, the out-of-state claimants did not purchase the prescription drug in California, and here, the out-of-state claimants did not purchase GEICO policies in Oregon;
- (2) In *BMS*, the prescription drug was not prescribed to the nonresident claimants in California, and here, the out-of-state GEICO policies were not marketed or sold in Oregon;
- (3) In *BMS*, the out-of-state claimants did not ingest the prescription drug in California, and here, the out-of-state claimants did not make claims under, or otherwise use, their GEICO policies in Oregon; and
- (4) In *BMS*, the out-of-state claimants were not injured by the drug or treated in California, and here, the out-of-state claimants did not request—and were not denied—vehicle scans in Oregon.

<sup>&</sup>lt;sup>2</sup> That *Devlin* did not address whether the district court had personal jurisdiction is of no import because the defendants did not raise it, waiving the defense. Fed. R. Civ. P. 12(h).

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Compare BMS, 137 S. Ct. at 1781 with Compl. ¶¶ 24–35 (the class allegations do not connect out-of-state class members' claims to any Oregon conduct). Hansen cannot rely on factual similarities between his claims and the putative out-of-state claims to establish personal jurisdiction. See BMS, 137 S. Ct. at 1781 (the "mere fact" that the residents and nonresidents had the same or similar injuries, in different states, does not create specific jurisdiction). Just as in BMS, the out-of-state claims here lack any factual connection to the forum.

Certifying a nationwide class would create the same jurisdictional defect for nonresident class members as for nonresident plaintiffs in *BMS*. A national class would, for instance, require this Court to exercise jurisdiction over and adjudicate a Florida resident's claim under a Florida-issued insurance policy, for a collision in Florida, involving a vehicle repaired in Florida, by a Florida repair shop. Even Hansen's purported common questions of law and fact would require this Court to decide purely Florida issues, including: (1) whether GEICO refused to pay for scans in handling the Florida claim; (2) how to interpret the insurance policy marketed, sold and issued in Florida, to a Florida resident; (3) whether GEICO breached that Florida policy through conduct in Florida; and (4) the damages the Florida resident sustained as the alleged result of GEICO's conduct in Florida. *See* Compl. ¶ 34 (discussing purported common issues).<sup>3</sup> This would repeat for each out-of-state class member. A nationwide class would require the Court to do exactly what *BMS* forbids: use its "coercive power" to adjudicate issues that have no factual connection to Oregon. *BMS*, 137 S. Ct. at 1779-82.

## C. <u>The Court Must Strike The Nationwide Class Allegations For Lack Of Personal</u> <u>Jurisdiction</u>

Class action defendants have the same due process rights and protections as defendants in individual actions. *In re Dental Supplies, Antitrust Litig.*, 2017 WL 4217115, at \*9; *King County* v. *IKB Deutsche Industriebank, AG*, 769 F. Supp. 2d 309, 314 (S.D.N.Y. 2011); NEWBERG ON

<sup>&</sup>lt;sup>3</sup> GEICO does not concede these are common issues, but accepts the allegations for this Motion only.

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CLASS ACTIONS § 6:26 (5th ed.). Those due process rights are protected, in part, by the Supreme Court's personal jurisdiction doctrines, meaning the exercise of personal jurisdiction must always comport with the Constitution's due process requirements. *E.g., Walden v. Fiore*, 134 S. Ct. 1115, 1121 (2014) ("The Due Process Clause of the Fourteenth Amendment constrains a State's authority to bind a nonresident defendant to a judgment of its courts."); *see also* NEWBERG ON CLASS ACTIONS § 6:26 (5th ed.) ("A court's authority to assert personal jurisdiction over a defendant in a class action suit is generally no different than its authority to assert such jurisdiction in an individual suit . . . ."). This common sense rule recognizes that a defendant's potential exposure increases exponentially in class cases. It would defy logic, the Constitution, and precedent to conclude that a defendant facing an individual plaintiff is entitled to more due process protection than a defendant facing an entire class.

Because this Court would not have personal jurisdiction over out-of-state putative class members' claims, *BMS*, 137 S. Ct. at 1781, the Nationwide Class Allegations are immaterial, impertinent and scandalous and should be stricken from the Complaint. Fed. R. Civ. P. 12(f).

### II. THE COURT SHOULD ALSO STRIKE DEFICIENT CLASS ALLEGATIONS

This Court may strike class allegations before discovery where the Complaint demonstrates a class action cannot be maintained. *Tietsworth v. Sears*, 720 F. Supp. 2d 1123, 1146 (N.D. Cal. 2010) (citing Fed. R. Civ. P. 23(c)(1)(A), 23(d)(1)(D) and 12(f)). Courts routinely use Rule 12(f) to strike class allegations "at the earliest pleading stage of the litigation." *Stubbs v. McDonald's Corp.*, 224 F.R.D. 668, 674 (D. Kan. 2004).<sup>4</sup>

Even if this Court could establish personal jurisdiction over GEICO for out-of-state claims, the Nationwide Class Allegations should be stricken because individual issues, including choice-of-law questions and the application of each state's contract and bad faith laws, will

<sup>&</sup>lt;sup>4</sup> "The standard for evaluating whether class allegations should be stricken is the same as for class certification, and is laid out in Rule 23(a)." *Valentine v. WideOpen W. Fin., LLC*, 288 F.R.D. 407, 414 (N.D. Ill. 2012).

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predominate over purported common issues for a nationwide class. Allegations including owners of non-GM vehicles in the class (Compl. ¶¶ 1, 15, 18, 23, 29, 34(a)) should also be stricken because individual issues about whether scans are required or necessary for each make, model and year of each vehicle will predominate over purported common issues.

GEICO raises these issues now because, as the Supreme Court has recognized, "[s]ometimes the issues are plain enough from the pleadings to determine whether the interests of the absent parties are fairly encompassed within the named plaintiff's claim." *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160 (1982); *Manning v. Boston Med. Ctr. Corp.*, 725 F.3d 34, 59 (1st Cir. 2013) ("If it is obvious from the pleadings that the proceeding cannot possibly move forward on a classwide basis, district courts use their authority under [Rule] 12(f) to delete the complaint's class allegations.").<sup>5</sup> And "no amount of time or discovery can cure these deficiencies." *In re Yasmin & Yaz (Drospirenone) Mktg.*, 275 F.R.D. 270, 274 (S.D. Ill. 2011). Class discovery would needlessly waste party resources and only delay the inevitable. *See id.*<sup>6</sup> Such waste would contradict Rule 12(f), which is intended to "avoid the expenditure of time and money that must arise from litigating spurious issues." *Bureerong v. Uvawas*, 922 F. Supp. 1450, 1478 (C.D. Cal. 1996) (quoting *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir. 1993), *rev'd on other grounds*, 510 U.S. 517 (1994)) (internal quotation marks omitted).

## A. <u>The Nationwide Class Allegations Should Be Stricken Because Individual Issues</u> <u>Predominate Due To Differences In State Laws</u>

"Because 'variations in state law may swamp any common issues and defeat predominance,'[] a court must analyze whether" the states' laws vary "in material ways." *In re Hyundai & Kia Fuel Econ. Litig.*, F. 3d , No. 15-56014, 2018 WL 505343, at \*12 (9th Cir.

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<sup>&</sup>lt;sup>5</sup> Unlike personal jurisdiction, which GEICO must raise at this stage, GEICO can and will raise these issues in opposition to any class certification motion—albeit with the burden of proof switched—should the case proceed to that point.

<sup>&</sup>lt;sup>6</sup> "District courts have broad discretion to control the class certification process, and whether or not discovery will be permitted lies within the sound discretion of the trial court." Vinole v. Countrywide Home Loans, Inc., 571 F.3d 935, 941 (9th Cir. 2009) (emphasis added).

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Jan. 23, 2018) (quoting *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 741 (5th Cir. 1996) and *Pilgrim v. Universal Health Card, LLC*, 660 F.3d 943, 947 (6th Cir. 2011)).

Courts routinely decline to certify nationwide and multistate classes because of the difficulty of applying the laws of multiple jurisdictions, as Hansen seeks here. *See, e.g., Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 624 (1997) (upholding denial of class certification where "[d]ifferences in state law . . . compound[ed factual] disparities."); *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1189 (9th Cir. 2001), *opinion amended on denial of reh'g*, 273 F.3d 1266 (9th Cir. 2001) (upholding denial of class certification where the laws of forty-eight states would apply); *Makaeff v. Trump Univ., LLC*, 3:10-CV-0940-GPC-WVG, 2014 WL 688164, at \*18 (S.D. Cal. Feb. 21, 2014) (common legal issues did not predominate due to "numerous differences that exist as to the common law throughout the fifty states").

"In cases where numerous state laws are potentially applicable to a proposed class, the plaintiffs bear the burden to credibly demonstrate, through an extensive analysis of state law variances, that class certification does not present insuperable obstacles." *Agostino*, 256 F.R.D. at 466 (citations and internal quotations omitted). "Plaintiffs bear the burden of showing uniformity or the existence of only a small number of applicable standards (i.e. 'groupability') among the laws of the fifty states." *Makaeff*, 2014 WL 688164, at \*16. Here, Hansen cannot satisfy his burden because the choice-of-law analysis <u>alone</u> will swamp any common issues—as will the multiple, significant variations in each state's breach of contract and bad faith laws.

### i. Oregon's Choice-Of-Law Rules Present Individual Issues That Predominate

A federal court exercising diversity jurisdiction applies the choice-of-law rules of the state in which it sits. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941). In Oregon, "the contractual rights and duties of the parties are governed by the law or laws that the parties have chosen." ORS § 15.350(1). Hansen's policy has a choice of law provision.<sup>7</sup>

<sup>&</sup>lt;sup>7</sup> Hansen's policy is attached as Exhibit 1 to the concurrently-filed Motion to Dismiss (Doc. 21). The choice of law provision is at GEICO-HANSEN000019.

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Assuming, as Hansen alleges, policies in each state have choice of law provisions, this Court must apply the laws of each state. *See* Compl.  $\P$  38 (alleging the policies use standard forms). This will require the Court to examine each individual policy.

Where a policy has no choice-of-law provision, Oregon determines the applicable law by:

- 1. Identifying the states with a relevant connection to the transaction or the parties, such as the place of negotiation, making, performance or subject of the contract, or the domicile, habitual residence or pertinent place of business of a party;
- 2. Identifying the policies underlying any apparently conflicting laws of these states relevant to the issue; and
- 3. Evaluating the relative strength and pertinence of these policies in:
  - a. Meeting the needs and giving effect to the policies of the interstate and international systems; and
  - b. Facilitating the planning of transactions, protecting a party from undue imposition by another party, giving effect to justified expectations of the parties concerning which state's law applies to the issue and minimizing adverse effects on strong legal policies of other states.

ORS § 15.360. The location of the risk (*i.e.*, of the covered vehicle) and performance of the insurance contract remain the primary concerns in the choice-of-law inquiry. *See* Restatement (Second) of Conflict of Laws § 188, cmt. e<sup>8</sup>; *see also, e.g., Aetna Cas. & Sur. Co. v. Brathwaite*, 90 Or App 109, 116-117 (1988) (Washington law controls where "insurance policies were issued in Washington to Washington residents"); *Aetna Cas. & Sur. Co. v. Martin Bros. Container & Timber Prods. Corp.*, 256 F. Supp. 145, 148 (D. Or. 1966) (Ohio law controls where "insurance policies were "insurance policies were made, executed and delivered in" Ohio).

Oregon's choice-of-law rules would require the Court to review each class member's policy to determine if it has a choice of law provision and, if it does not, to determine the circumstances of the policy's negotiation, making and performance, and the location of the

<sup>&</sup>lt;sup>8</sup> Oregon courts look to Restatement § 188 for guidance in resolving conflict-of-law questions. Manz v. Continental Am. Life Ins. Co., 117 Or App 78, 82 (1992).

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covered vehicle and claim handling. These individualized inquiries preclude a national class.<sup>9</sup>

### *ii.* <u>The Court Would Have To Apply At Least Fifty Different Jurisdictions' Laws</u>

Even without Oregon's choice-of-law rules, applying Oregon state law on a nationwide basis would violate the Full Faith and Credit,<sup>10</sup> Due Process,<sup>11</sup> and Commerce<sup>12</sup> Clauses of the United States Constitution. A court "may not take a transaction with little or no relationship to the forum and apply the law of the forum in order to satisfy the procedural requirement that there be a 'common question of law.'" *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821 (1985) (citation omitted). The McCarran-Ferguson Act, which gives the states authority to regulate the business of insurance without interference from most federal regulation, also compels this conclusion. 15 U.S.C. § 1011, *et seq.* For each out-of-state claim, the Court must identify the state with the material relationship and apply that state's substantive law.

<sup>&</sup>lt;sup>9</sup> Gartin v. S & M NuTec LLC, 245 F.R.D. 429, 439 (C.D. Cal. 2007) (no predominance for a nationwide class with "very complex choice of law issues with regard to every class member"); Ayala v. U.S. Xpress Enterprises, Inc., No. EDCV 16-137-GW(KKX), 2016 WL 7586910, at \*6 (C.D. Cal. Dec. 22, 2016) (no predominance because "Plaintiff has not provided a manageable way for the Court to perform a conflict-of-law analysis for each of the 48 states that the putative Class members reside in."); Cruz v. Lawson Software, Inc., No CIV 98-5900 MJD/JSM, 2010 WL 890038, at \*8 (D. Minn. Jan. 5, 2010) (no predominance because choice-of-law analysis potentially applying the law of all 50 states would be a "herculean" task).

<sup>&</sup>lt;sup>10</sup> "[F]or a state's substantive law to be selected consistent with the Full Faith and Credit Clause and the Due Process Clause, the state must have a significant contract or significant aggregation of contacts, creating state interest so that the choice of its law is neither arbitrary nor fundamentally unfair." *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312–13 (1981).

<sup>&</sup>lt;sup>11</sup> The Due Process Clause constrains the "arbitrary or unfair" application of one state's law to conduct in another state. *Phillips Petroleum*, 472 U.S. at 821. Due process protects GEICO's justifiable expectation that the laws of the state where a policy is issued and the policyholder resides will apply. *See id.* at 822 (applying Kansas law nationwide would frustrate parties' reasonable expectations).

<sup>&</sup>lt;sup>12</sup> Under the Commerce Clause, no single state may "impose its own policy choice on neighboring States," and a state's power to burden interstate commerce is "constrained by the need to respect the interests of other States." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 571 (1996). A court's application of its own state's law violates the Commerce Clause when "the practical effect of the regulation is to control conduct beyond the boundaries of the State." *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989); *see also Montgomery v. New Piper Aircraft, Inc.*, 209 F.R.D. 221, 228 (S.D. Fla. 2002) (Commerce Clause barred applying Florida law to out-of-state class members' claims).

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#### iii. Variations In Contract Law Cause Individual Issues To Predominate

Numerous courts have declined to certify nationwide and multistate classes because "the differences in states' breach of contract laws are important and may be outcome-determinative." Pastor v. State Farm Mut. Auto Ins. Co., No. 05 C 1459, 2005 WL 2453900, at \*9 (N.D. Ill. Sept. 30, 2005), aff'd, 487 F.3d 1042 (7th Cir. 2007); Gustafson v. BAC Home Loans Servicing, LP, 294 F.R.D. 529, 544-547 (C.D. Cal. 2013). Even "minor" differences in state laws "are important enough to deny certification to a nationwide class." Pastor, 2005 WL 2453900,\*8-9. The Gustafson court declined to certify breach of contract claims because of differences in state contract law regarding the admissibility of extrinsic evidence, statutes of limitations, equitable tolling, application of the discovery rule and other legal principles. 294 F.R.D. at 544–57; see also Lozano v. AT&T Wireless Servs., Inc., 504 F.3d 718, 728 (9th Cir. 2007) (rejecting class that "would necessitate a state-by-state review" of standards for contract claims); Jim Moore Ins. Agency, Inc. v. State Farm Mut. Auto. Ins. Co., No 02-80381-CIV., 2003 WL 21156714, at \*11-12 (S.D. Fla. May 6, 2003) (variations in contract interpretation and law militated against class certification); Marino v. Home Depot U.S.A., Inc., 245 F.R.D. 729, 735-36 (S.D. Fla. 2007) (refusing to certify nationwide breach of contract class where fifty states' laws would apply); Bowers v. Jefferson Pilot Fin. Ins. Co., 219 F.R.D. 578, 581 (E.D. Mich. 2004) (same).

Differences in state laws here include variations in: (1) statutes of limitations; (2) the discovery rule or other equitable tolling doctrines; (3) when a breach of contract claim accrues; (4) rules of contract interpretation, including parol evidence; and (5) rules to measure recoverable damages.

Courts consider statute of limitations defenses when deciding predominance.<sup>13</sup> Oregon

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<sup>&</sup>lt;sup>13</sup> See, e.g., Gartin v. S & M NuTec LLC, 245 F.R.D. 429, 441 (C.D. Cal. 2007) ("defenses unique to a particular class member precludes certification"); Barraza v. C. R. Bard Inc., CV16-01374-PHX-DGC, 2017 WL 3976720, at \*7 (D. Ariz. Sept. 11, 2017) ("[Affirmative] defenses cannot be ignored when making a predominance decision."); NEWBERG ON CLASS ACTIONS § 4:55 (5th ed.) ("The potentially individualized nature of affirmative defenses requires that courts consider such defenses in undertaking the predominance analysis.").

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applies a six-year limitation on contract claims, but other jurisdictions apply shorter or longer periods.<sup>14</sup> Variations among state statutes of limitations routinely preclude certification of multistate or nationwide classes.<sup>15</sup>

Discovery rules and equitable tolling doctrines also require inquiry into individual circumstances and state laws, which is "not amenable to class litigation." *See In re Ford Motor Co. E-350 Van Prods. Liab. Litig. (No. II)*, No. 034558, 2012 WL 379944, at \*36 (D. N.J. Feb. 6, 2012).

These differences are further complicated by different legal standards for determining when a breach of contract claim accrues. For example, Arizona defines the accrual date as the date the loss occurred, while Oregon and Alaska define it as when the insurer denies the claim.<sup>16</sup> Each claim would require an individualized fact determination of accrual.

Each putative class member's policy will also be subject to varying rules of interpretation. States vary widely in their treatment of parol evidence. *See Duchardt v. Midland Nat. Life Ins. Co.*, 265 F.R.D. 436, 446 (S.D. Iowa 2009) ("[T]he law[s] of 47 states . . . vary as

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<sup>&</sup>lt;sup>14</sup> See, e.g., ORS § 12.080 (six years); Cal. Civ. Proc. Code § 337(1) (four years); Tex. Civ. Prac. & Rem. Code Ann §§ 16.004(a), 16.051 (four years); 42 Pa. Cons. Stat. § 5525(a)(8) (four years); Colo. Rev. Stat. § 13-80-101(1)(a) (three years); Del. Code Ann. tit. 10 § 8106(a), (b) (three years); Md. Code Ann., Cts. & Jud. Proc. § 5-101 (three years); Miss. Code Ann. § 15-1-49 (three years); N.H. Rev. Stat. Ann. § 508:4 (three years); N.C. Gen. Stat. § 1-52(1) (three years); S.C. Code Ann. § 15-3-530(1) (three years); Utah Code Ann. § 31A-21-313(1) (three years); Ohio Rev. Code Ann. § 2305.06 (eight years); 735 Ill. Comp. Stat. 5/13-206 (ten years); Ind. Code § 34-11-2-11 (ten years); Iowa Code § 614.1(5) (ten years); La. Civ. Code Ann. Art. 3499 (ten years); Mo. Rev. Stat. § 516.110 (ten years); Ky. Rev. Stat. Ann. § 413.090(2) (fifteen years for contracts executed before July 16, 2014); Ky. Rev. Stat. Ann. § 413.160 (ten years for contracts after July 16, 2014).

<sup>&</sup>lt;sup>15</sup> See, e.g., Corley v. Entergy Corp., 220 F.R.D. 478, 487–89 (E.D. Tex. 2004), aff'd, Corley v. Orangefield Indep. Sch. Dist., 152 F. App'x 350 (5th Cir. 2005); Gilman v. John Hancock Variable Life Ins. Co., No. 0200051, 2003 WL 23191098, at \*11 (Fla. Cir. Ct. Oct. 20, 2003); Jim Moore Ins. Agency, Inc. v. State Farm Mut. Auto. Ins. Co., No. 02-80381-Civ., 2003 WL 22097937, at \*2 (S.D. Fla. Sept. 2, 2003); Zarella v. Minnesota Mut. Life Ins. Co., 824 A.2d 1249, 1265–66 (R.I. 2003).

<sup>&</sup>lt;sup>16</sup> Zuckerman v. Transamerica Ins. Co., 650 P.2d 441, 447 (Ariz. 1982); Vega v. Farmers Ins. Co. of Oregon, 323 Or 291, 295 (1996); Fireman's Fund Ins. Co. v. Sand Lake Lounge, Inc., 514 P.2d 223, 227 (Alaska 1973).

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to their rules governing contract interpretation, especially regarding the use of extrinsic evidence in contract interpretation . . . ."). For example, Oregon allows extrinsic evidence, such as "evidence of the circumstances and conduct of the parties during the life of the agreement," to prove the existence of a contract ambiguity, but limits evidence of intent to "the circumstances under which the agreement was made." *Harris v. Warren Family Properties, LLC*, 207 Or App 732, 738 (2006). "California has a liberal parol evidence rule: It permits consideration of extrinsic evidence to explain the meaning of the terms of a contract even when the meaning appears unambiguous." *Foad Consulting Group, Inc. v. Azzalino*, 270 F.3d 821, 826 (9th Cir. 2001). Virginia does not allow extrinsic evidence to create an ambiguity—only to resolve one. *Wilson Arlington Co. v. Prudential Ins. Co. of Am.*, 912 F.2d 366, 371 (1990).

iv. Variations In Bad Faith Law Cause Individual Issues To Predominate

Numerous courts have declined to certify nationwide and multistate classes due to numerous, significant differences in state-specific bad faith law. *See, e.g., Makaeff*, 2014 WL 688164, at \*18; *Gustafson*, 294 F.R.D. at 547–58; *Lane v. Wells Fargo Bank, N.A.*, No C12-04026-WHA, 2013 WL 3187410, at \*3–\*4 (2013). These variations include:

<u>Objective or Subjective Standard</u>: Oregon bad faith requires a plaintiff to show the defendant acted contrary to the parties' objectively reasonable expectations. *Uptown Heights Assocs. Ltd. P'ship v. Seafirst Corp.*, 320 Or 638, 645 (1995). Several states, including California, Florida and Wisconsin also apply an objective standard.<sup>17</sup> Louisiana imposes a subjective standard and requires the plaintiff to prove the defendant acted with intent or ill will.<sup>18</sup> Alaska, Arizona, Iowa and Rhode Island apply a mixed standard.<sup>19</sup>

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<sup>&</sup>lt;sup>17</sup> FEI Enterprises, Inc. v. Kee Man Yoon, 124 Cal. Rptr. 3d 64, 74 (Ct. App. 2011); Vila & Son Landscaping Corp. v. Posen Const., Inc. 99 So. 3d 563, 567 (Fla. Dist. Ct. App. 2012); Anderson v. Cont'l Ins. Co., 271 N.W.2d 368, 377 (Wis. 1978).

<sup>&</sup>lt;sup>18</sup> Brill v. Catfish Shaks of Am., Inc., 727 F. Supp. 1035, 1041 (E.D. La. 1989).

<sup>&</sup>lt;sup>19</sup> Luedtke v. Nabors Alaska Drilling, 834 P.2d 1220, 1225 (Alaska 1992); Zilisch v. State Farm Mut. Auto. Ins. Co., 995 P.2d 276, 238 (Ariz. 2000); Deters v. USF Ins. Co., 797 N.W.2d 621 (Iowa Ct. App. 2011); Fenner v. Lumberman's Mut. Cas. Co., C.A. PC 86-0490, 1990 WL 10000150, at \*1 (R.I. Super. Ct. May 10, 1990).

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The Nature of the Intent: Some states require the plaintiff to prove intent, but even these states differ on the type of intent required. *See Yarger v. ING Bank, fsb*, 285 F.R.D. 308, 325–26 (D. Del. 2012) (denying class certification where law of sixteen states varied regarding intent). New Jersey requires proof the insurer (1) lacked a "fairly debatable" reason for denying coverage and (2) knew of or recklessly disregarded the lack of a reasonable basis for denying coverage.<sup>20</sup> Florida rejected the "fairly debatable" test and instead considers the totality-of-the-circumstances.<sup>21</sup> Delaware considers whether there was a bona fide dispute and the insurer had a meritorious defense to liability.<sup>22</sup> In Arizona, an unreasonable denial may, without more, constitute bad faith.<sup>23</sup> California requires a breach of the insurer's "duty not to withhold unreasonably payments due under a policy" by "fail[ing] to deal fairly and in good faith with [an] insured by refusing, without proper cause, to compensate its insured for a loss covered by the policy."<sup>24</sup> Mississippi and Arkansas require an affirmative act of misconduct and (depending on the state) a showing of malice, gross negligence, dishonesty, or oppression.<sup>25</sup>

<u>Sounding in Tort Versus Contract</u>: States also differ on whether bad faith claims are torts, contract actions, creatures of statute, or are not permitted at all. In Oregon, "an insurer's bad faith refusal to pay policy benefits to its insured sounds in contract and is not an actionable tort."

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<sup>&</sup>lt;sup>20</sup> Pickett v. Lloyd's, 621 A.2d 445, 453 (N.J. 1993).

<sup>&</sup>lt;sup>21</sup> Talat Enterprises, Inc. v. Aetna Life & Cas., 952 F. Supp. 773, 776 (M.D. Fla 1996).

<sup>&</sup>lt;sup>22</sup> McDuffy v. Koval, 226 F. Supp. 2d 541, 546 (D. Del. 2002).

<sup>&</sup>lt;sup>23</sup> See Rawlings v. Apodaca, 726 P.2d 565, 576 (Ariz. 1986) ("[A]n 'evil mind' is not required; the insurer need not intend to harm the insured . . . . To be liable for tort damages, it need only to have intended its act or omission, lacking a founded belief that such conduct was permitted by the policy").

<sup>&</sup>lt;sup>24</sup> Gruenberg v. Aetna Ins. Co., 510 P.2d 1032, 1037 (Cal. 1973).

<sup>&</sup>lt;sup>25</sup> See, e.g., Broussard v. State Farm Fire & Cas. Co., 523 F.3d 618, 628 (5th Cir. 2008) (Mississippi requires denial "without an arguable or legitimate basis" and "with malice or gross negligence in disregard of the insured's rights"); Aetna Cas. & Sur. Cov. Broadway Arms Corp., 664 S.W.2d 463, 465 (Ark. 1984) (requiring "affirmative misconduct" that was "dishonest, malicious, or oppressive").

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*Employers' Fire Ins. Co. v. Love It Ice Cream Co.*, 64 Or App 784, 791 (1983). Arkansas,<sup>26</sup> Maryland, Michigan, Minnesota, New York and Virginia also require bad faith claims be brought either as breach of contract claims or as independent claims sounding in contract.<sup>27</sup> Florida, Georgia, Missouri, Montana, Pennsylvania and Tennessee have a statutory cause of action for bad faith.<sup>28</sup> Colorado, Hawaii, Nevada and Texas recognize tortious bad faith.<sup>29</sup> Kansas has no private cause of action for a tort of bad faith because it is preempted by statute.<sup>30</sup>

Whether a Breach of Contract Is Required: In Oregon, "[a] party may violate its duty of good faith and fair dealing without also breaching the express provisions of a contract." *Klamath Off-Project Water Users, Inc. v. Pacificorp*, 240 P.3d 94, 101 (Or App 2010). In Florida, however, a defendant must breach an express contract term.<sup>31</sup> In Delaware, "a court can only imply a contractual obligation when the express terms of the contract indicate that the parties would have agreed to the obligation had they negotiated the issue," and therefore "the plaintiff must advance provisions of the agreement that support this finding . . . ." *Fitzgerald v. Cantor*, C.A. 16297-NC, 1998 WL 842316, at \*1 (Del. Ch. Nov. 10, 1998).

<sup>&</sup>lt;sup>26</sup> Arkansas Research Med. Testing, LLC v. Osborne, 2011 Ark. 158, 5 (2011). But Arkansas recognizes a tort of bad faith when an insurer actively engages in "dishonest, malicious, or oppressive conduct in order to avoid its liability." *Id.* at 6.

<sup>&</sup>lt;sup>27</sup> See McCauley v. Suls, 716 A.2d 1129 (Md. Ct. Spec. App. 1998); Kewin v. Mass. Mut. Life. Ins. Co., 295 N.W.2d 50 (Mich. 1980); Saltou v. Dependable Ins. Co., 394 N.W.2d 629 (Minn. Ct. App. 1986); Goode v. Charter Oak Fire Ins. Co., 803 N.Y.S.2d 18 (Sup. Ct. 2005); Harris v. USAA Cas. Ins. Co., 37 Va. Cir. 553 (1994).

<sup>&</sup>lt;sup>28</sup> See Fla. Stat. § 624.155; Ga. Code Ann. §§ 33-4-6, 33-7-11(j); Mo. Rev. Stat. §§ 375.420 and 375.296; Mont. Code. Ann. § 33-18-242; 42 Pa. Cons. Stat. § 8371; Tenn. Code Ann. § 56-7-105.

<sup>&</sup>lt;sup>29</sup> Decker v. Browning-Ferris Indus. of Colorado, Inc., 931 P.2d 436, 443 (Colo. 1997); Best Place, Inc. v. Penn Am. Ins. Co., 920 P.2d 334, 337 (Haw. 1996); U. S. Fid. & Guar. Co. v. Peterson, 540 P.2d 1070, 1071 (Nev. 1975); Viles v. Sec. Nat. Ins. Co., 788 S.W.2d 566, 567 (Tex. 1990).

<sup>&</sup>lt;sup>30</sup> See Spencer v. Aetna Life & Cas. Ins. Co., 611 P.2d 149, 152 (Kan. 1980).

<sup>&</sup>lt;sup>31</sup> Ins. Concepts & Design, Inc. v. Healthplan Servs., Inc., 785 So. 2d 1232, 1234 (Fla. Dist. Ct. App. 2001).

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These state-specific, individual issues (plus others not addressed here<sup>32</sup>) will be compounded because GEICO's state-specific insurance contracts contain different provisions on when to sue and on other obligations under the policy. These differences would require the Court to analyze each contract. These state-law and contractual differences—and the arduous, individualized task of determining which state's laws apply to each class member's policy—mean individual questions predominate over any common, class-wide issues and no amount of fact discovery can change this conclusion.

### B. <u>The Nationwide Class Allegations Should Be Stricken Because Hansen Cannot</u> <u>Establish Superiority</u>

Rule 23(b)(3) "requires the court to determine whether maintenance of this litigation as a class action is efficient and whether it is fair." *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1175–76 (9th Cir. 2010). Nationwide classes are problematic. *See Zinser*, 253 F.3d at 1191–92 ("In this case, where the potential plaintiffs are located across the country and where the witnesses and the particular evidence will also be found across the country, plaintiffs have failed to establish any particular reason why it would be especially efficient for this Court to hear such a massive class action lawsuit.") (quoting *Haley v. Medtronic, Inc.*, 169 F.R.D. 643, 653 (C.D. Cal. 1996)). A nationwide class here will not "reduce litigation costs and promote greater efficiency." *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996). Instead, it will mire the court in the details of 50 states' laws and of each putative class member's individual policy. The heavy, individualized burden of addressing and applying these variations makes a class action unmanageable. *See Haley* at 653 ("[T]he problems and complexities raised by having to consider so many different state laws—even if they are relatively the same—convince the Court that class certification would be inappropriate in the instant litigation."). A nationwide class action is not "superior to other available methods." Fed. R. Civ. P. 23(b)(3).

 $<sup>^{32}</sup>$  E.g., the types of damages available for bad faith, enforceability of suit limitations and appraisal clauses for breach of contract claims, and whether compliance with the policy is a mandatory pre-requisite to a lawsuit.

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### C. <u>Class Allegations That Expand The Class Beyond GEICO Policyholders With</u> <u>GM Vehicles, Such as Hansen, Should Be Stricken</u>

Hansen alleges GM released a position statement that requires pre- and post-repair scans for his 2017 GMC Sierra, but GEICO refused to pay for the scans. Compl. ¶¶ 16, 19, 22. Even though GM's position statement does not apply to their vehicles, Hansen includes allegations improperly expanding the class beyond policyholders with GM vehicles. This creates predominance defects, and all allegations concerning non-GM vehicles (*Id.* ¶¶ 1, 15, 18, 23, 34(a)) and including non-GM vehicle owners in the class definition (*Id.* ¶ 29) should be stricken.

Hansen's alleged theory is that GEICO must provide pre- and post-repair scans because some vehicle manufacturers have recently (within the last 15 months) "issued public statements requiring or recommending" these scans. *Id.* ¶¶ 15–16, 21–22, 34(a).<sup>33</sup> While Hansen seeks to represent owners of GM and non-GM vehicles, he does not allege that all manufacturers have the same position on scans or even favor scans. He quotes an October 2016 GM position statement and vaguely alleges Nissan, Honda, Toyota, "among other manufacturers" "have issued public statements *requiring or recommending*" scans, conceding manufacturers' positions differ, including at least some manufacturers that have no requirement or recommendation. Compl. ¶¶ 15–16. Assuming these allegations are true, they create numerous individual issues.

Not even GM's recent statement requires scans for every GM vehicle. GM's position statement incorporates another document which lists the models and years covered by the statement and the scans applicable. *See* Exs. 1 and 2.<sup>34</sup> Determining what—if any—scan is recommended by GM requires knowing at least the model and model year of the vehicle. *Id.* This is an individualized, vehicle-specific inquiry, even for GM.

The Complaint says nothing about the other manufacturers named, or the "other manufacturers" not identified, other than suggesting manufacturers have a variety of positions.

 <sup>&</sup>lt;sup>33</sup> GEICO does not concede manufacturer recommendations control interpretation of its policies.
 <sup>34</sup> The Court may consider the GM position statement because the Complaint quotes it at paragraph 16. *Edstrom v. Anheuser-Busch Inbev SA/NV*, 647 F. App'x 733, 736 (9th Cir. 1994).
 Page 18–GOVERNMENT EMPLOYEES INSURANCE COMPANY'S MOTION TO STRIKE

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Adjudicating Hansen's theory would require this Court to review manufacture recommendations for every make, model, and year of each putative class member's vehicle to determine what, if anything, the manufacturer said about that vehicle.

For example, a claim involving a 2013 Hyundai Elantra would require the parties to litigate, and the Court to determine, whether Hyundai said anything about scans for a 2013 Elantra, and if that differs from other manufacturer statements about a 2017 GMC Sierra, 2011 Ford Focus, or 2003 Nissan Altima. The timing of each manufacturer's statement (if one exists) will also create individual issues. Sorting through manufacturers, makes and years would create scores of mini-trials-within-a-trial. Individual issues of whether non-GM manufacturers require, recommend, or take no position on scans for a particular vehicle will predominate over common issues. *See Manning*, 725 F.3d at 59 (court may delete class allegations that cannot proceed). These predominance issues, present even at the pleading stage, demonstrate the class must at least be limited to owners of GM vehicles like Hansen.

#### CONCLUSION

GEICO respectfully requests that the Court strike the Nationwide Class Allegations in paragraphs 1, 25 and 29, and strike the allegations regarding owners of non-GM vehicles in paragraphs 1, 15, 18, 23, 29, 34(a).

Respectfully submitted this 1st day of February, 2018.

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Service Information – Position Statement

#### Pre- and Post-Scan of Collision Vehicles

October 2016

General Motors takes the position that all vehicles being assessed for collision damage repairs must be tested for Diagnostic Trouble Codes (DTCs) during the repair estimation in order to identify the required repairs. Additionally, the vehicle must be retested after all repairs are complete in order to verify that the faults have been repaired and new faults have not been introduced during the course of repairs.

Even minor body damage or glass replacement may result in damage to one or more safety-related systems on the vehicle. Any action that results in loss of battery-supplied voltage and disconnection of electrical circuits requires that the vehicle is subsequently tested to ensure proper electrical function.

Many safety and security-related components, sensors and Electronic Control Units (ECUs) require calibration and/or learns when replaced. These systems must be repaired according to the corresponding GM repair procedures in Service Information (GMSi).

### **Technology Supported Diagnostic Aids**

General Motors states that the method to correctly identify vehicle diagnostic trouble codes (DTCs) is by using the appropriate GM diagnostic software: **GDS2 or Tech 2/Tech2Win**, each of which can scan a vehicle for all DTCs in one operation. GM diagnostic software is supported by one of the GM approved diagnostic scan tools (MDI or a J2534 device). GM does not recommend the use of other scan tools and cannot guarantee their accuracy. For a list of vehicle covered by these applications, refer to the GM technical document titled *Vehicles Supported by GDS2 or Tech2/Tech2Win*.

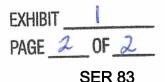
GMSi is the factory source for all diagnostic and repair procedures, wiring diagrams and associated repair information.

GM Service Programming System (SPS) is the ECU programming application that provides calibration updates and guided learn procedures where required.

Any repairs performed without using Genuine GM Parts and not following published GM collision repair procedures may result in erroneous DTCs and expose vehicle owners and occupants to unnecessary risk. GM collision repair information can be accessed for free on genuinegmparts.com or is available through a GMSi subscription.

# How to obtain GM diagnostic and flash programming software and service information in North America

**TIS2Web** is the Internet-based subscription service for GM service information, vehicle calibrations, GDS2 diagnostic software and Tech2 diagnostic software updates. Subscription options and more information on GMSi, SPS and TIS2Web can be found at <a href="http://www.acdelcotechconnect.com/shop-program/psc-program/tis2web/">http://www.acdelcotechconnect.com/shop-program/psc-program/tis2web/</a>.



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Service Information – Approved Equipment for Collision Repair

### Vehicles Supported by GDS2 or Tech2/Tech2Win

October 2016

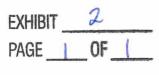
General Motors states that the method to correctly identify vehicle diagnostic trouble codes (DTCs) is by using the appropriate GM diagnostic software: **GDS2 or Tech 2/Tech2Win**, each of which can scan a vehicle for all DTCs in one operation. GM diagnostic software is supported by one of the GM approved diagnostic scan tools (MDI or a J2534 device). GM does not recommend the use of other scan tools and cannot guarantee their accuracy.

GM diagnostic tool information and purchases can be made at <u>http://gmtoolsandequipment.com</u>.Subscription options for GM diagnostic software and more information on GM diagnostic tools can be found at <u>http://www.acdelcotechconnect.com/shop-program/psc-program/tis2web/</u>.

Below is the list of GM vehicles that are supported by GDS2 or Tech2/Tech2Win applications for DTC identification.

Model Year	Model Year	Model Year	Model Year	Model Year	Model Year	Model Year	Model Year 2014
2007	2008	2009	2010	2011	2012	2013	& Future Model Yea
ech2 / Tech2Win	GDS2 Supported Vehicles	GBS2 Supported Vehicles	GDS2 Supported Vehicles	GDS2 Supported Vehicles	GD82 Supported Vehicles	GDS2 Supported Vehicles	GDS2 Supported Vehicles
ALL	Chevrolet HHR (Europe)	Chevrolet HHR (Europe)	Buick LaCrosse	Buick LaCrosse	Buck LaCrosse	Buick Encore	
		Dagwoo Lacetti	Buick Alure	Buick Riedal	Buick Regal	Buick LaCrosse	ALL
MD GDS2	ALL Others Tech 27		Cadillac SRX	Cadillac SRX	Buick Verano	Buick Regal	
Ser.	Tech/Min Supported*	ALL Others Tech 2/	Chevrolet Beat	Chevrolet Beat	Cadillac SRX	Buick Verano	
		Tech2Win Supported*	Chevrolet Carriero	Chevrolet Carnaro	Chevrolet Aveo	Cadillac AT5	
			Chevrolet Cruze	Chevrolet Captiva	Chevrolet Beat	Cadillac SRX	
			Chevrolet Equincat	Chevrolet Cruze	Chevroiet Carnaro	Cadilac X75	
			Chevrolet Sal	Chevrolet Equinox	Chevrolet Captiva	Chevrolet Aveo	
			Chevrolet Sciark	Chevrolet Orlando	Chevrolet Coball	Chevrolet Beat	
			Daewoo Lacetti	Chevrolet Sail	Chevrolet Colorado	Chevrolet Carriano	
			Eldewoo Mariz	Chevrolet Spark	Chevrolet Cruze	Chevrolet Captiva	
			GMC Terrain	Chevrolet Tavera	Chevrolet Enjoy	Chevrolet Cobalt	
			Holden Barina Spark	Chevrolet Vot	Chevroiet Equinox	Chevrolet Colorado	
			Holden Crisze	Daewoo Alcheon	Chevrolet Maibu	Chevrolet Cruze	
			Saab 945	GAIC Terrain	Chevrolet Criando	Chevrolet Eniov	
				Holden Barina Soark	Chevrolet 510	Chevrolet Equinor	
			ALL Others Tech 2 /	Holden Capitya 5	Chevrolet Sail	Chevrolet Mailtu (New Body 5tyle)	
			Tech294in Succontent		Chevrolet Sonic	Chevrolet N300	
				Holden Chipe	Chevrolet Spark	Chevrolet Onix	
				5aab 9-4	Chevrolet Tavera	Chevrolet Orlando	
				Saab 9-5	Chevrolet Volt	Chevrolet Prisma	
					Daewoo Alpheon	Chevrolet 510	
				ALL Others Tech 2 7	GMC Terran	Chevrolet Sait	
				Tech2Win Supported*	Holden Barina	Chevrolet Sonic	
					Holden Barina Spark	Chevrolet Spark	
					Holdes Captiva S	Chevrolet Spin	
					Holden Captiva 7	Cheviclet Tavera	
					Holden Colorado	Chevrolet Tracker	
					Holders Cruze	Chevrolet Traiblazer	
					Holden Malibu	Chevrolet Tran	
					5aab 9-4	Cheviolet Volt	
					Saab 9-5	Daewoo Alpheon	
						GMC Terrain	
					ALL Others Tech 2 /	Holden Barina	
	and the second sec				Tech2Win Supponed*	Holden Barina Spark	
						Holden Captiva 5	
	1					Holden Captiva 7	
						Holden Colorado	
						Holden Colorado 7	
and the second						Holden Chuze	
						Holden Malibu	
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se an ne sent Gad	WALLER PARTY MUST SHIES	A REAL PROPERTY.	CARACTER AND STREET	NEARING		Holden Volt	
						All Others Tech2 / Tech2Min Supporte	61

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Attorneys for Defendant Government Employees Insurance Company

### UNITED STATES DISTRICT COURT

### DISTRICT OF OREGON

### PORTLAND DIVISION

LEIF HANSEN, on behalf of himself and all others similarly situated.

Civil Case No. 3:17-cv-1986-MO

### DECLARATION OF SCOTT BROOKSBY IN SUPPORT OF DEFENDANT'S MOTION TO STRIKE

v.

GOVERNMENT EMPLOYEES INSURANCE COMPANY, a Maryland corporation,

Plaintiff,

Defendant.

Page 1–DECLARATION OF SCOTT BROOKSBY IN SUPPORT OF DEFENDANT'S MOTION TO STRIKE

# Case 3:17-cv-01986-MO Document 24 Filed 02/01/18 Page 2 of 3 Case: 18-35383, 11/13/2018, ID: 11086125, DktEntry: 20, Page 89 of 131

Pursuant to 28 U.S. C. § 1746, I, Scott Brooksby, state as follows:

1. I am one of the attorneys for Defendant Government Employees Insurance Company (hereinafter "GEICO) in the above-captioned matter.

2. I am an adult above 21 years of age and I make this declaration with personal knowledge.

3. I am competent to testify to the things herein.

4. I make this declaration in support of Defendant GEICO's Motion to Strike.

5. GEICO's Motion to Strike is made in good faith and is not made for purposes of delay.

6. Attached as Exhibit 1 to GEICO's Motion to Strike is a General Motors position paper in the form of a copy of a document entitled "Service Information-Position Statement" which is subtitled "**Pre- and Post-Scan of Collision Vehicles, October 2016**" (emphasis in original) which I obtained from the following website:

http://www.genuinegmparts.com/pdf/positionstatements/pre-post-scan-collision-vehicles.pdf on January 30, 2018.

7. Attached as Exhibit 2 to GEICO's Motion to Strike is a General Motors position paper in the form of a copy of a document entitled "Service Information-Approved Equipment for Collision Repair" which is subtitled "Vehicles Supported by GDS2 or Tech2/Tech2Win October 2016" (emphasis in original) which I obtained from the following website:

http://www.genuinegmparts.com/pdf/positionstatements/vehicles-supported-by-GM-scan-toolsreference.pdf on January 30, 2018.

8. Exhibits 1 and 2 to GEICO's Motion to Strike are the General Motors position statement referred to and quoted in Paragraph 16 of the Complaint.

# I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

# Page 2–DECLARATION OF SCOTT BROOKSBY IN SUPPORT OF DEFENDANT'S MOTION TO STRIKE

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### EXECUTED ON this 1st day of February, 2018

### Respectfully Submitted,

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Page 3–DECLARATION OF SCOTT BROOKSBY IN SUPPORT OF DEFENDANT'S MOTION TO STRIKE

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### UNITED STATES DISTRICT COURT

#### DISTRICT OF OREGON

#### (Portland Division)

LEIF HANSEN, on behalf of himself and all others similarly situated,

Plaintiff,

v.

GOVERNMENT EMPLOYEES INSURANCE COMPANY, a Maryland corporation,

Defendant.

Civil No. 3:17-cv-01986-MO

**CLASS ACTION** 

PLAINTIFF'S OPPOSITION TO DEFENDANT GOVERNMENT EMPLOYEES INSURANCE COMPANY'S MOTION TO STRIKE

**Oral Argument Requested** 

Government Employees Insurance Company ("GEICO") moves the Court for an

order striking, or alternatively dismissing, plaintiff Leif Hansen's ("Hansen") class allegations.

GEICO's arguments are procedurally improper and substantively meritless. Hansen respectfully

requests that the Court deny GEICO's motion.

### **INTRODUCTION**

Before discovery has begun and before the Court has considered any motion for

class certification, GEICO attempts to persuade the Court to strike or dismiss Hansen's class

allegations. Under well-established authority, the Court should decline to address GEICO's

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arguments at this stage of litigation. The Ninth Circuit specifically has disallowed the use of motions to strike as substitutes for substantive motions. District courts also routinely deny motions to strike or dismiss class allegations, holding that class representatives should have the opportunity to conduct discovery before courts rule on issues such as predominance and superiority under Federal Rule of Civil Procedure 23(b).

GEICO's arguments lack substantive merit as well. GEICO argues that the Court should adopt a reading of *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S. Ct. 1773 (2017), that other district courts within the Ninth Circuit have resoundingly rejected. The holding in *Bristol-Myers* does not extend to class actions brought in federal court. Any other interpretation of *Bristol-Myers* would severely curtail the Class Action Fairness Act, without furthering the interests of fairness or federalism.

GEICO also urges the Court to rule that individual issues predominate and that a class action is not superior to other available methods of adjudicating the class claims. GEICO asks the Court to reach these conclusions based on alleged differences in state law and vehicle manufacturers' requirements. GEICO fails to explain how the alleged differences are material to Hansen's claims or why they require dismissal before discovery and class certification. The Court could best address any material differences that ultimately emerge by tailoring class or subclass definitions.

#### SUMMARY OF FACTS

Hansen holds a GEICO car insurance policy, including collision coverage, for his GMC Sierra 3500 pickup truck ("Sierra 3500"). Compl. ¶ 8. His insurance policy provides that GEICO "will pay for collision loss to the owned auto or non-owned auto for the amount of each loss less the applicable deductible." GEICO Motion to Dismiss, Ex. 1 at 11 (Policy) (emphasis

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omitted). The policy defines "loss" as "direct and accidental loss of or damage to \* \* \* an insured auto, including its equipment." Policy at 10. GEICO issued Hansen's current insurance policy on October 23, 2017. Policy at 1.

On November 17, 2017, the Sierra 3500's rear bumper was damaged in a collision. Compl. ¶ 11. On November 4, 2017, Hansen filed a claim with GEICO, and soon after, he brought his truck to Artistic Car Body (Artistic) for a repair estimate. *Id.* Hansen requested pre- and post-repair electronic scans to ensure a safe and complete repair. He knew these scans were a necessary part of collision repairs from his experience as an owner of a group of Portland-area auto repair shops. *Id.* ¶ 12. Nissan, Honda, Toyota, General Motors (GM), and the Automotive Service Association (ASA) all require or recommend that auto collision repair shops perform electronic scans before and after repairs. *Id.* ¶ 12–18.

GEICO refused to authorize or reimburse Hansen for pre- and post-repair electronic scans of the Sierra 3500. *Id.* ¶¶ 20–21. By refusing to pay for a complete repair of Hansen's truck, GEICO's conduct violated the express terms of its insurance policy. *Id.* ¶¶ 21– 23, 37–42. On December 13, 2017, Hansen filed a class action complaint, alleging breach of contract and breach of the implied covenant of good faith and fair dealing on behalf of a nationwide class of current and former GEICO insureds, based on GEICO's uniform practice of refusing to pay for pre- and post-repair electronic scans. *See id.* ¶ 29. On February 1, 2018, GEICO filed a motion to strike, or alternatively dismiss, the nationwide class allegations and allegations concerning non-GM-manufactured vehicles.<sup>1</sup>

<sup>&</sup>lt;sup>1</sup> Hansen separately addresses GEICO's motion to dismiss his claims under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) in the concurrently filed Opposition to Government Employees Insurance Company's Motion to Dismiss.

PAGE 3 - PLAINTIFF'S OPPOSITION TO DEFENDANT GOVERNMENT EMPLOYEES INSURANCE COMPANY'S MOTION TO STRIKE

### ARGUMENT

### I. GEICO's Motion Is Procedurally Improper.

# A. The Motion to Strike Prematurely Asks the Court to Dismiss Hansen's Nationwide Class Allegations Before the Class Certification Stage.

GEICO argues that the Court should strike Hansen's class action allegations pursuant to Federal Rules of Civil Procedure 12(f), 23(c)(1)(A), and 23(d)(1)(D). As an initial matter, Rule 23(c)(1)(A) pertains only to the timing of class certification and does not provide grounds to strike class allegations. *See* Fed. R. Civ. P. 23(c)(1)(A) ("At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.").

Although courts may, in some circumstances, entertain motions under Rules 12(f) and 23(d)(1)(D), "it is rare that class allegations are stricken at the pleading stage." *Clerkin v. MyLife.Com*, 2011 WL 3809912, at \*3 n.4 (N.D. Cal. Aug. 29, 2011); *see also In re Wal-Mart Stores, Inc. Wage & Hour Litig.*, 505 F. Supp. 2d 609, 614 (N.D. Cal. 2007) ("Rule 12(f) Motions to strike are generally regarded with disfavor because of the limited importance of pleading in federal practice, and because they are often used as a delay tactic.").

Pursuant to Rule 12(f), courts may grant a motion to strike only where a defendant raises "an insufficient defense" or a party has pleaded "redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). The Ninth Circuit forbids use of a Rule 12(f) motion as "an attempt to have certain portions of [the plaintiff's] complaint dismissed or to obtain summary judgment against [the plaintiff] as to those portions of the suit." *Whittlestone, Inc. v. Handi-Craft Co.*, 618 F.3d 970, 974 (9th Cir. 2010). If courts "allowed litigants to use [Rule 12(f)] as a means to dismiss some or all of a pleading," courts "would be creating redundancies within the Federal Rules of Civil Procedure, because a Rule 12(b)(6)

#### PAGE 4 - PLAINTIFF'S OPPOSITION TO DEFENDANT GOVERNMENT EMPLOYEES INSURANCE COMPANY'S MOTION TO STRIKE

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motion (or a motion for summary judgment at a later stage in the proceedings) already serves such a purpose." *Id.* In short, a defendant may not use a motion to strike as a substitute for another motion properly brought later in litigation.

Rule 23(d)(1)(D) provides that a court may issue an order requiring that "the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly." Fed. R. Civ. P. 23(d)(1)(D). Similar to Rule 12(f), however, Rule 23(d)(1)(D) allows courts to strike class allegations only where the allegations are so implausible that discovery would serve no purpose. *See Kamm v. Cal. City Dev. Co.*, 509 F.2d 205, 210 (9th Cir. 1975) ("The propriety of a class action cannot be determined in some cases without discovery, as for example, where discovery is necessary to determine the existence of a class or set of subclasses. To deny discovery in a case of that nature would be an abuse of discretion." (footnote omitted)); *see also Kassman v. KPMG LLP*, 925 F. Supp. 2d 453, 464 (S.D.N.Y. 2013) ("\* \* [Defendant] makes a forceful argument that Plaintiffs will be unable to satisfy Rule 23(a)(2)'s commonality requirement in this case, but its argument is premature."); *Sanders v. Apple Inc.*, 672 F. Supp. 2d 978, 990 (N.D. Cal. 2009) ("Before a motion to strike is granted, the court must be convinced that any questions of law are clear and not in dispute, and that under no set of circumstances could the claim or defense succeed.").

Here, GEICO does not argue that Hansen raises an improper defense under Rule 12(f). Thus, the Court may grant the motion to strike under Rule 12(f) only if Hansen's allegations are (1) redundant, (2) immaterial, (3) impertinent, or (4) scandalous. GEICO does not argue that Hansen's allegations improperly appear in multiple places in the complaint, fail to relate to the underlying claims for relief or the harm Hansen alleges, or rise to the level of "scandalous." As in *Whittlestone*, GEICO hardly gestures at the standards outlined in Rule 12(f).

#### PAGE 5 - PLAINTIFF'S OPPOSITION TO DEFENDANT GOVERNMENT EMPLOYEES INSURANCE COMPANY'S MOTION TO STRIKE

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*See* 618 F.3d at 974. Rather, GEICO is improperly attempting to use Rule 12(f) as a vehicle for dismissing Hansen's class action allegations. GEICO should raise these arguments at class certification.

Neither can GEICO surmount the high standard for striking class allegations under Rule 23(d)(1)(D). GEICO has failed to establish that there are no circumstances in which the class action claims could succeed. Hansen must have the opportunity to conduct discovery regarding GEICO's conduct and refusal to reimburse other class members for pre- and postrepair electronic scans. Absent this discovery, the Court has no basis to rule whether common issues of fact predominate or whether a class action is the superior method of adjudicating the class claims. Such a ruling properly comes after the parties have had the opportunity to gather and marshal their evidence. GEICO's motion to strike the nationwide class allegations prematurely asks the Court to resolve issues that are properly addressed at class certification.

# B. Even Construed as a Motion to Dismiss the Class Allegations Under Rule 12(b)(2), GEICO's Motion Is Premature.

In the alternative, GEICO argues that the Court should dismiss Hansen's nationwide class allegations in paragraphs 1, 25, and 29 of the Complaint pursuant to Federal Rule of Civil Procedure 12(b)(2). Courts routinely deny Rule 12(b) motions to dismiss class allegations. *See Updike v. Clackamas Cty.*, 2015 WL 7722410, at \*11 (D. Or. Nov. 30, 2015) (collecting cases demonstrating that "[n]umerous district courts have held that even when a plaintiff's class allegations appear suspicious at the pleading stage, a plaintiff should at least have an opportunity to make the case for class certification following appropriate discovery"); *Baas v. Dollar Tree Stores, Inc.*, 2007 WL 2462150, at \*3 (N.D. Cal. Aug. 29, 2007) ("Defendant's arguments regarding the propriety of the class allegations are premature."); *In re Wal-Mart Stores*, 505 F. Supp. 2d at 615 ("In the absence of any discovery or specific arguments related to

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class certification, the Court is not prepared to rule on the propriety of the class allegations and explicitly reserves such a ruling."); *see also Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 941 (9th Cir. 2009) (favorably citing *Baas* and *In re Wal-Mart Stores*).

The parties have not yet had an opportunity to conduct discovery, including discovery related to the terms of out-of-state class members' insurance policies. Discovery will likely confirm that GEICO issues insurance policies with uniform collision loss provisions and loss definitions, using standard language supplied by the Insurance Services Office, Inc. (ISO), regardless of the state in which the policyholders are located. The Court should have the benefit of this discovery before deciding whether a nationwide class action against GEICO violates the Constitution even where Hansen can establish specific jurisdiction with regard to his claim. *See generally Feller v. Transamerica Life Ins. Co.*, 2017 WL 6496803, at \*16–17 (C.D. Cal. Dec. 11, 2017) (considering personal jurisdiction over defendant in the context of class certification and defendant's request to limit the class to California insurance policyholders); *Broomfield v. Craft Brew All., Inc.*, 2017 WL 3838453, at \*15 n.10 (N.D. Cal. Sept. 1, 2017) (deferring ruling on defendant's personal jurisdiction arguments until class certification).

### **II. GEICO's Motion Fails on the Merits.**

### A. *Bristol-Myers* Does Not Preclude the Court from Exercising Specific Jurisdiction Over the Claims of the Putative Nationwide Class Members.

GEICO argues that the Court should strike, or alternatively dismiss, Hansen's nationwide class allegations because the Court lacks personal jurisdiction over the claims of outof-state class members against GEICO. Hansen does not contend that the Court has general jurisdiction over GEICO. Nor does GEICO argue that the Court lacks specific jurisdiction with regard to Hansen's individual claims. The question is thus whether the Court can exercise specific jurisdiction over a nonresident defendant, for purposes of a nationwide class action,

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where the Court indisputably has specific jurisdiction over the claims of the named plaintiff. GEICO cites *Bristol-Myers*, 137 S. Ct. 1773, to urge the Court to answer this question in the negative. GEICO misconstrues the legal effect of *Bristol-Myers*.

*Bristol-Myers* involved a mass tort action in California state court, arising from the claims of more than 600 plaintiffs, from 34 different states, that the drug Plavix caused them injuries. *Id.* at 1777–78. The pharmaceutical company Bristol-Meyers, a citizen of Delaware and New York, argued that the California court lacked personal jurisdiction to adjudicate the non-California plaintiffs' claims. *Id.* at 1778. The non-California plaintiffs did not allege that they obtained Plavix from a California source, suffered any injury in California, or received treatment in California. *Id.* The California court nonetheless concluded that it had personal jurisdiction over Bristol-Meyers based on a "sliding scale approach to specific jurisdiction," under which "the strength of the requisite connection between the forum and the specific claims at issue is relaxed if the defendant has extensive forum contacts that are unrelated to those claims." *Id.* at 1778–81.

The Supreme Court rejected the "sliding scale approach." *Id.* at 1781. It reiterated that specific jurisdiction in the case of a nonresident defendant and nonresident plaintiffs calls for more than "a defendant's general connections with the forum"; it requires an "adequate link between the State and the nonresidents' claims." *Id.* That some "*other* plaintiffs were prescribed, obtained, and ingested Plavix in California—and allegedly sustained the same injuries as did the nonresidents—does not allow the State to assert specific jurisdiction over the nonresidents' claims." *Id.* (emphasis in original).

*Bristol-Myers* does appear to limit mass actions in state courts to forums that can exercise general jurisdiction over the defendant. For a corporation, that forum would be the state

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of incorporation or its principal place of business. See 28 U.S.C. § 1332(c)(1). Yet,

"[r]egardless of the temptation by defendants across the country to apply the rationale of *Bristol-Myers* to a class action in federal court, its applicability to such cases was expressly left open by the Supreme Court." *Broomfield*, 2017 WL 3838453, at \*15.

The Supreme Court limited its holding to mass actions, with individually named plaintiffs, in state courts. It distinguished *Bristol-Myers* from *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), a case involving the due process rights of nonresident class members, and declined to decide whether the holdings of either *Bristol-Myers* or *Phillips* extended to nonresident defendants in a class action. *Id.* 1782–83. In Justice Sotomayor's dissent, she emphasized that *Bristol-Myers*'s holding has no effect on class actions. *Id.* at 1789 n.4 (Sotomayor, J., dissenting) ("The Court today does not confront the question whether its opinion here would also apply to a class action in which a plaintiff injured in the forum State seeks to represent a nationwide class of plaintiffs, not all of whom were injured there."). Additionally, the Court specifically confined its holding to actions in state courts. *Id.* at 1783–84 ("[S]ince our decision concerns the due process limits on the exercise of specific jurisdiction by a State, we leave open the question whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court.").

After *Bristol-Myers*, other defendants, including GEICO, have called on district courts to bar all nationwide class actions except those brought in the defendant's home state. Of the district courts that have confronted the issue, the large majority have rejected defendants' invitation to read *Bristol-Myers* so expansively. *See Branch v. GEICO*, 2018 WL 358504, at \*12 n.10 (E.D. Va. Jan. 10, 2018) ("It is not necessary to consider GEICO's rather unique argument about personal jurisdiction, which is based on a rather strained reading of [*Bristol-Myers*] that

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has been soundly rejected by other courts.") (citing *Day v. Air Methods Corp.*, 2017 WL 4781863, at \*2 (E.D. Ky. Oct. 23, 2017) and *Fitzhenry–Russell v. Dr. Pepper Snapple Grp., Inc.*, 2017 WL 4224723, at \*5 (N.D. Cal. Sept. 22, 2017)). With one exception, district courts within the Ninth Circuit uniformly have held that *Bristol-Myers* is inapplicable to class or collective actions. *See, e.g., Feller*, 2017 WL 6496803, at \*17; *Swamy v. Title Source, Inc.*, 2017 WL 5196780, at \*2 (N.D. Cal. Nov. 10, 2017); *but see Wenokur v. AXA Equitable Life Ins. Co.*, 2017 WL 4357916, at \*4 n.4 (D. Ariz. Oct. 2, 2017) (stating in a footnote, without discussion, that the court "lacks personal jurisdiction over the claims of putative class members with no connection to Arizona and therefore would not be able to certify a nationwide class").

There are sound reasons for *not* extending *Bristol-Myers*'s holding to class actions. While plaintiffs in a mass tort action are each named parties to the litigation, only the class representative is a party to a class action, at least before class certification. As the dissent in *Devlin v. Scardelletti* noted, no party in that case was "willing to advance the novel and surely erroneous argument that a nonnamed class member is a party to the class-action litigation before the class is certified." 536 U.S. 1, 16 n.1 (Scalia, J., dissenting) (emphasis omitted); *see Standard Fire Ins. Co. v. Knowles*, 568 U.S. 588, 593 (2013) (approvingly quoting Justice Scalia's dissent in *Devlin*); *see also Devlin*, 536 U.S. at 9–10 ("Nonnamed class members \* \* \* may be parties for some purposes and not for others."). Requiring named parties to each establish a nexus between their claims against the defendant and the forum state is very different from requiring unnamed, non-parties to demonstrate specific jurisdiction. It is sufficient for a court to have specific jurisdiction over the class representative's claims. *Compare Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007) ("In a class action, standing is satisfied if at least one named plaintiff meets the requirements.").

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Moreover, outlawing nationwide class actions against nonresident defendants in federal court would subvert the purpose of the Class Action Fairness Act (CAFA). CAFA allows federal district courts to hear class actions if (1) the class has more than 100 members, (2) the parties are minimally diverse (*i.e.*, at least one class member is a citizen of a different state from at least one defendant), and (3) the amount in controversy exceeds \$5,000,000. 28 U.S.C. § 1332(d). "CAFA's primary objective" is to "ensur[e] Federal court consideration of interstate cases of national importance." *Knowles*, 568 U.S. at 595 (internal quotation marks omitted). Nothing in the statute suggests that the only federal courts permitted to hear interstate cases are those that may exercise general jurisdiction over the defendant. To the contrary, when passing CAFA, Congress was particularly concerned with ensuring that "out-of-state defendants" would have access to federal courts "in litigation involving persons from multiple jurisdictions." S. Rep. 109–14, at 6 (Feb. 28, 2005). No case has ever hinted at the notion that CAFA somehow violates the due process rights of nonresident defendants by subjecting them to the claims of unnamed, nonresident class members in a single forum.

No countervailing interest such as fairness or federalism militates in favor of limiting CAFA to in-state defendants. Judge Sotomayor's points about the benefits to defendants of consolidated actions apply with particular force to class actions. In her dissent in *Bristol-Myers*, Justice Sotomayor highlighted that litigating claims in separate suits in multiple states "would prove far more burdensome" than litigating one case, in one state, involving residents and nonresidents with identical claims. 137 S. Ct. at 1786 (Sotomayor, J., dissenting). The *Bristol-Myers* majority concluded that fairness or convenience to the defendant did not outweigh the territorial limits of state power, but this concern is not at play in federal courts. Here, GEICO cannot plausibly argue that it is burdened by defending against one action, as opposed to dozens

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across the country, in federal court, and the Court has the power and responsibility to adjudicate the interstate class claims. Doing so will ensure that GEICO and its policyholders are subject to uniform rules and protections. In sum, the *Bristol-Myers* holding does not extend to the unnamed putative class members in Hansen's nationwide class allegations.

# **B.** GEICO Has Not Established that Individual Issues Predominate or Call into Question the Superiority of a Class Action.

# 1. GEICO Does Not Identify Any Material Differences In State Law that Justify Striking Nationwide Class Allegations.

GEICO argues that a parade of horribles will follow the Court's denial of its motion to strike Hansen's nationwide class allegations. Foremost among these is the alleged logistical nightmare of making individual choice-of-law determinations for each putative class member. GEICO also argues that individual issues predominate due to variations in states' contract and bad faith law. GEICO, however, fails to identify any material differences in state law concerning interpretation of the particular insurance policy term at issue. Every difference in state law to which GEICO points would, at most, weigh in favor of creating a number of subclasses at class certification.

According to GEICO, Oregon's choice-of-law rules require the Court to review each class member's policy to determine if the policy has a choice-of-law provision and, if it does not, determine the applicable law by examining the circumstances of the policy's negotiation, making and performance, and the location of the covered vehicle and claim handling. Not so. Absent a material difference in states' substantive law, Oregon law applies. *See Waller v. Auto-Owners Ins. Co.*, 26 P.3d 845, 848 (Or. App. 2001) ("We previously have explained that if there is no material difference—*i.e.*, if there is a 'false conflict' instead of an 'actual conflict'—Oregon law applies.").

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GEICO objects that application of Oregon law to the nationwide class would be unconstitutional under *Shutts*, 472 U.S. 797. In *Shutts*, the Supreme Court held that it is unconstitutional for a forum state to apply its own law to a nationwide class action lawsuit when doing so would be "arbitrary" or "fundamentally unfair." *Id.* at 818. The Supreme Court started its inquiry into whether application of the forum state's law would be arbitrary or fundamentally unfair by "determin[ing] whether Kansas [the forum state] law conflicts in any material way with any other law which could apply. There can be no injury in applying Kansas law if it is not in conflict with that of any other jurisdiction connected to this suit." *Id.* at 816. Under *Shutts*, application of Oregon law in a nationwide class action would comport with the Constitution if no material conflict exists between Oregon law and that of any other jurisdiction.

Here, the Court must decide whether GEICO breached the express terms of the insurance policy by failing to reimburse for necessary repairs. GEICO points to no substantive difference in state contract law concerning contract formation and breach. Instead, GEICO focuses on variations in (1) statutes of limitations, (2) discovery rules or other equitable tolling doctrines, (3) when a breach of contract claim accrues, (4) parol evidence rules, and (5) rules to measure recoverable damages. None of these alleged variations concerns the circumstances in which a party becomes liable for breaching an express contract term.

Nor does it seem likely that rules regarding extrinsic evidence and contract ambiguity will become relevant. The insurance policies are standard contracts, drafted by the ISO, not subject to individual negotiation by policyholders. GEICO cannot claim that it ever engages in contemporaneous negotiations with policyholders to change the ISO form language at issue in the complaint. This would defeat the purpose of ISO policy forms, as described by the Ninth Circuit: "The ISO is an association funded by a number of insurance companies, whose

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functions include writing standard insurance policy forms which comply with the legal and administrative requirements of the various states." *Crane v. Royal Insurance Company of America*, 17 F.3d 1186, 1187 n.1 (9th Cir. 1994); *see also Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 772 (1993) ("ISO develops standard policy forms and files or lodges them with each State's insurance regulators \* \* \*"). Indeed, in other contexts, GEICO entities have boasted about the "uniformity" of their policies and practices. *See Gov't Employees Ins. Co. v. KJ Chiropractic Ctr. LLC*, 2015 WL 12839140, at \*2 (M.D. Fla. Feb. 16, 2015) (arguing that the uniformity of GEICO's operations gave rise to an inference that GEICO made certain payments). Hansen has not alleged that any extrinsic evidence exists regarding the meaning of the policy, and thus the parol evidence rule is unlikely to come into play. *See Abercrombie v. Hayden Corp.*, 883 P.2d 845, 850 (Or. 1994) (defining the parol evidence rule). Whether pre- and post-repair scans are part of the "loss" covered by GEICO's policy is a factual issue that does not depend on evidentiary rules or rules of construction. This determination is no different from the questions whether a car required a new fender or an oil change.

The only differences in contract law that may impact the putative class members' claims are rules concerning the period of time in which a plaintiff may bring a breach of contract action. GEICO cites statutes of limitations for contract law claims ranging from three to fifteen years. Hansen only seeks to represent policyholders who suffered collision losses within six years of the filing of the Complaint. Compl. ¶ 29. Thus, some states' longer statutes of limitations are irrelevant. As for states with shorter statutes of limitations, differences in such statutes are not material and do not preclude class certification. *See Williams v. Sinclair*, 529 F.2d 1383, 1388 (9th Cir. 1975) ("The existence of a statute of limitations issue does not compel a finding that individual issues predominate over common ones.").

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**SER 101** 

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Regarding Hansen's class claims for breach of the duty of good faith and fair dealing, GEICO argues that states differ in (1) whether they apply an objective or subjective standard to such claims, (2) the nature of the intent required, (3) whether bad faith claims sound in tort or contract, and (4) whether a breach of an express contract term is also required. But again, at this stage of litigation, these potential differences in states' bad faith laws make no material difference. If the trier of fact finds that GEICO willfully breached the express terms of its standard insurance policy, GEICO would be liable regardless of which state's law applied. *See Allapattah Servs., Inc. v. Exxon Corp.*, 333 F.3d 1248, 1261 (11th Cir. 2003) ("Because all of the dealer agreements were materially similar and Exxon purported to reduce the price of wholesale gas for all dealers, the duty of good faith was an obligation that it owed to the dealers as a whole. Whether it breached that obligation was a question common to the class and the issue of liability was appropriately determined on a class-wide basis."), *aff'd sub nom. Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546 (2005).

The cases upon which GEICO relies are not to the contrary; indeed, they are legally and factually inapposite. *See, e.g., Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1189 (9th Cir.) (upholding denial of class certification based on predominance of individual state law issues concerning damages and causation in negligence, products liability, and breach of warranties claims), opinion amended on denial of reh'g, 273 F.3d 1266 (9th Cir. 2001); *Makaeff v. Trump Univ., LLC*, 2014 WL 688164, at \*17 (S.D. Cal. Feb. 21, 2014) (denying class certification of 14 subclasses covering all 50 states for statutory and common law claims, including common law fraud and unjust enrichment claims); *Gustafson v. BAC Home Loans Servicing, LP*, 294 F.R.D. 529, 542 (C.D. Cal. 2013) (denying class certification based on "[t]he sheer number of form contracts at issue here"); *Lane v. Wells Fargo Bank, N.A.*, 2013 WL

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3187410, at \*4 (N.D. Cal. June 21, 2013) (denying class certification for breach of contract and implied good faith claims based on the parties' failure to define the "other" mortgage contracts held by putative class members, which could potentially each have "specific contractual language"). Unlike the cases GEICO cites, this case has not reached class certification, and potential material differences in state law, such as the affirmative defenses that GEICO might assert in response to different class members' claims, have not yet come to light.

More importantly, unlike Zinser, Makaeff, Gustafson, and Lane, this case arises from "the simple breach of a standard form contract and involves only the standard rules of contract interpretation." Steinberg v. Nationwide Mut. Ins. Co., 224 F.R.D. 67, 76 (E.D.N.Y. 2004). In an almost identical case, a district court in the Eastern District of New York concluded that variances in state contract law did not preclude class certification. See id. at 76–81. There, the plaintiff alleged that a car insurance company deducted a "betterment charge" from the amount it reimbursed for collision losses, in violation of its standard insurance policy. Id. at 70. The plaintiff moved for certification of a class of "millions" of people in almost every state. Id. at 70. The court emphasized the "major importance" of the fact that the insurer's "automobile insurance contracts contain[ed] similar, if not identical, key terms pertinent to this litigation." Id. at 79. Based on the similarity of the key contract terms, the court concluded that it could "categorize the variances in state law in a manageable fashion" and granted the class certification motion in its entirety, notwithstanding the potential applicability of all 50 states' contract law. Id. at 78–79. The same result should follow here. No actual conflicts in state law exist at this time, and if such conflicts do become apparent, the Court can create manageable subclasses to accommodate these differences.

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**SER 103** 

### 2. The Particular Manufacturer of Each Class Member's Car Is Irrelevant to Whether GEICO Breached Its Policy Agreement.

According to GEICO, Hansen's case theory is that GEICO must provide pre- and post-repair electronic scans because vehicle manufacturers, such as GM, have recently started requiring the scans. Yet, argues GEICO, Hansen only quotes from GM's position statement, without quoting from position statements of other vehicle manufacturers. GEICO argues that Hansen's reliance on GM's position statement creates predominance defects that justify striking all allegations concerning non-GM vehicles. GEICO, however, misunderstands Hansen's claims.

Hansen has never argued that GEICO must provide pre- and post-repair electronic scans simply because GM issued a policy statement requiring these scans. Rather, Hansen argues that electronic scans are part of safe, complete repairs for *every* modern vehicle, regardless of vehicle manufacturers' requirements or recommendations. *See* Compl. ¶ 12. GM's position statement is one piece of evidence confirming that electronic scans constitute necessary repairs. In his Complaint, Hansen cites other evidence that repairs are incomplete without electronic scans. This evidence includes the public statements of Nissan, Honda, and Toyota, in which these manufacturers require or recommend that auto collision repair shops perform electronic scans before and after repairs. Compl. ¶ 15. The Complaint describes the ASA's public endorsement of electronic system scanning as well. *Id.* ¶ 17. Hansen further relies on his own experience as the owner of a group of Portland-area auto repair shops. *Id.* ¶ 12. The policy statements of the automobile manufacturers, the ASA's public endorsement, and Hansen's experience all support his allegations that GEICO has breached its contractual obligations.<sup>2</sup>

 $<sup>^{2}</sup>$  Additionally, the manufacturers' and the ASA's statements substantially resemble each other and do not create individual issues that will predominate over common questions of fact. *See* 

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GEICO also argues that Hansen's class allegations will result in scores of minitrials-within-a trial because even GM does not require scans for every GM vehicle. In support of its argument, GEICO attaches to its motion a document allegedly listing the models and years covered by GM's October 2016 position statement. A close read of the position statement and list of models and years reveals that GM recommends the use of particular GM *software* for scans of different vehicles, but appears to recommend diagnostic scan tools that can be used with every vehicle. Additionally, in its October 2016 position statement, GM does not state specifically which vehicle models and years require scans. To the contrary, GM states "that *all vehicles* being assessed for collision damage repairs must be tested for Diagnostic Trouble Codes (DTCs) during the repair estimation in order to identify the required repairs." Motion to Strike, Ex. 1 at 1 (emphasis added).

Even if different vehicles require different scanning technology, Hansen has alleged that the price of the scans is the same no matter which tool a repair shop uses. *See* Compl. ¶ 14. GEICO breaches its policy agreement every time GEICO refuses to authorize or reimburse its insureds for pre- and post-repair electronic scans, no matter the type of automobile involved. *See id.* ¶¶ 41–42. Contrary to GEICO's arguments, the question whether pre- and post-electronic scans constitute a "loss" under GEICO's policy, for which GEICO is contractually obligated to pay, is not an individualized, vehicle-specific inquiry. Hansen's class allegations pose no danger of mini-trials.

Moreover, if, after discovery, *meaningful* differences in the scans required for various vehicles emerge, the Court has several options. If the differences emerge at class

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Position Statements of Nissan, Honda, Toyota, and the ASA, Exs. A–D. The Court may consider material incorporated by reference in the Complaint—such as these position statements—without converting GEICO's motion into a motion for summary judgment. *See United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003).

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certification, the Court has discretion to limit the class, create subclasses, or decline to certify a class. *See Armstrong v. Davis*, 275 F.3d 849, 872 (9th Cir. 2001), *abrogated on other grounds by Johnson v. California*, 543 U.S. 499 (2005). If the differences emerge after class certification, the Court retains the power to revise the class or even decertify it. *See United Steel, Paper & Forestry, Rubber, Mfg. Energy, Allied Indus. & Serv. Workers Int'l Union, AFL–CIO, CLC v. ConocoPhillips Co.*, 593 F.3d 802, 809 (9th Cir. 2010) ("[A] district court retains the flexibility to address problems with a certified class as they arise \* \* \*."). The Court can appropriately determine the precise limits of the class or subclasses later in litigation with the benefit of discovery.

#### **CONCLUSION**

GEICO provides the Court with no justification for striking or dismissing

Hansen's nationwide class allegations, or for striking the allegations regarding owners of non-

GM vehicles. Hansen respectfully requests that the Court deny GEICO's Motion to Strike.

DATED this 15th day of February, 2018.

TONKON TORP LLP

By: <u>s/ Steven D. Olson</u> Steven D. Olson, OSB No. 003410 Paul Conable, OSB No. 975368 Attorneys for Plaintiff Leif Hansen

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#### N I S S A N Collision Position Statement-Pre- and Post-Repair Scanning Reference: NPSB-16-604

Reference: NPSB-16-604 Date: June, 20 2016

### TO: COLLISION REPAIR INDUSTRY

#### **POSITION STATEMENT: Pre- and Post-Repair System Scanning**

FRANKLIN, TN– Nissan vehicles today have more technology and electrical components than ever before. Today, it is necessary in most repair situations for the vehicle to have a pre- and post- repair system scan so that the repairer is informed of any trouble codes present, even in cases where there are no identifier lights on the dash.

A pre-repair system scan can identify items up front that are malfunctioning on a vehicle. This helps the repair facility to fully understand the scope of the collision repair, even before starting. The post-repair system scan will confirm that trouble items have been properly repaired and systems are calibrated, helping to ensure our customers' safety and satisfaction.

It is the stance of Nissan North America, that **all** of our vehicles be scanned following a collision repair to help ensure the vehicles' systems are communicating properly with no trouble codes outstanding. It is also recommended that, where appropriate, a pre-repair scan also be completed for reasons mentioned above. The safety of our customers is our number one priority, and we believe these pre- and post-repair scans are more and more integral to a safe, quality repair. We ask the general repair industry to adhere to these strict guidelines going forward.

For additional information, please see service manual section "BCS".

#### Parts Warranty

Nissan North America's New Vehicle Limited Warranty, and Limited Warranty on replacement parts do not apply to any parts other than Genuine Nissan original equipment parts.

Nissan North America will not be responsible for any subsequent repair costs associated with a vehicle and/or part failure caused by the use of parts other than Genuine Nissan replacement parts.

For additional collision information: <u>http://collision.nissanusa.com</u>.

Exhibit A Page 1 of 1

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American Honda Position Statement



Issued: July 2016

#### SUBJECT: POST-COLLISION DIAGNOSTIC SCAN AND CALIBRATION REQUIREMENTS FOR HONDA AND ACURA VEHICLES

It is the position of American Honda that **all** vehicles involved in a collision\* **must** have the following minimum diagnostic scans, inspections, and/or calibrations done to avoid improper repair:

- A preliminary diagnostic scan during the repair estimation phase to determine what Diagnostic Trouble Codes DTCs may be present, so proper repairs may be included. See Background On Scan Requirements paragraph for more information.
- A post repair diagnostic scan to confirm that no DTCs remain.
  - Any repair that requires disconnection of electrical components in order to perform the repair will require a post-repair diagnostic scan to confirm if the component is reconnected properly and functioning.
  - Damage that requires body parts replacement will always require a post-repair diagnostic scan.
- Some safety and driver assistive systems will require inspections, calibration, and/or aiming after collision or other body repairs. See page 2 for additional information.

\*A collision is defined as damage that exceeds minor outer panel cosmetic distortion.

#### **Background On Scan Requirements**

Honda and Acura vehicles include numerous electronic control systems, including those that operate safety and driver assist systems. Most of these systems include onboard self-diagnostics that monitor the state of health and/or rationality of input and output circuits. When monitored circuit values fall outside predetermined thresholds, DTCs may be set in one or more electronic control unit (ECU).

The mechanical forces encountered in a collision can damage electrical circuits and components in ways that are not easily diagnosed with visual inspection methods. Here are some other electronic control system self-diagnostic facts:

- The proliferation of electronic control systems has increased the number of potential DTCs beyond the point where a dashboard indicator can be installed and/or illuminated for every DTC. Dashboard indicators are intended for driver notification, not vehicle diagnostics.
- Therefore, the presence or absence of dashboard indicators/warning lights is **not** an acceptable method to determine if post collision diagnostic scans are necessary.
- Many DTCs do not illuminate any dashboard indicators, but an electronic control system may still operate improperly or be completely inoperative.
- Because of the complexities of serial data networking, dashboard indicators that do illuminate may appear unrelated to the actual vehicle problem.
- Some self-diagnostics require multiple failures, or other criteria such as a number of drive cycles, to be met before illuminating any indicators.
- Low battery voltage and/or repair procedures may inadvertently set multiple DTCs. Clear the DTCs and determine which ones reset after battery voltage is stabilized.

#### **Diagnostic Recommendations**

The **recommended** way to accurately determine the post-collision status of all Honda and Acura vehicle electronic control systems is with the i-HDS.

- The i-HDS has an "All DTC Check" feature that will scan available electronic control systems for DTCs in one operation.
- American Honda does not test other scan tools and cannot comment on their capabilities or accuracy.

NOTE: Not all electronic control systems can be scanned using the i-HDS. For example, Honda LaneWatch<sup>™</sup> and earlier model air conditioning and climate control systems have self-contained diagnostics that are not accessible using the i-HDS. For systems such as these, refer to the published diagnostic procedures in the appropriate service information available on the Honda Independent Repair/ServiceExpress website: (techinfo.honda.com).

#### Inspection/Calibration/Aiming Requirements

Safety and driver assistive systems that will require inspections, calibration, and/or aiming after collision or other body repairs include, but are not limited to the following:

#### After reconnecting the 12-volt battery:

After collision repairs are complete and the battery is reconnected, some electrical systems may not operate properly. These may include, but are not limited to the following:

- Navigation systems
- Engine idle speed learn
- Power window, power tailgate, moonroof, power sliding door position and/or pinch detection
- Keyless access and immobilizer/security systems

Since the reset procedures vary by vehicle and system, enter the vehicle information into ServiceExpress and search the keyword "Reset". This search will retrieve a list of reset procedures required after parts replacement and/or a battery disconnect. Some reset procedures can be done without special tools. Others may require scan tool software.

#### Front passenger's seat weight sensor - Inspections and calibration:

These sensors control passenger's front airbag operation and the PASSENGER AIRBAG OFF indicator based on the occupant's weight. Like any scale, weight sensors are a precision device.

- The service information may refer to these sensors as the seat weight sensor (SWS) system or occupant detection system (ODS) depending on model and year.
- This inspection requires a scan tool to fully check the seat weight sensor's operation using the following criteria:
  - Empty front passenger seat weight to confirm the sensors can detect this condition
  - o Seat weight with a known calibration weight amount if necessary
- This check **must** be done after **any** collision, regardless of damage even if no airbags deployed.
- The check confirms sensor operation and that no binding or damage exists in the relationship between the seat frame, weight sensors, and floor pan.
- Weight sensor calibration is also required when front passenger seat components have been removed or replaced. Refer to the service information for procedures.

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#### Driver assistive system aiming:

Some models use one or more of the following camera and/or radar based driver support systems that require <u>software-based</u> aiming and/or calibration to ensure proper operation after certain components have been removed and/or replaced:

- Adaptive Cruise Control (ACC)
- Collision Mitigation Braking System<sup>™</sup> (CMBS<sup>™</sup>)
- Forward Collision Warning (FCW)
- Lane Departure Warning (LDW)
- Lane Keeping Assist System (LKAS)
- Road Departure Mitigation (RDM)
- Blind Spot Information (BSI)
- LaneWatch<sup>™</sup> (Honda Only)
- Multi-View Camera System (MVCS Acura Only)

NOTE: Rearview (backup) cameras do not require any aiming procedures after removal or replacement unless the vehicle is also equipped with the Multi-View Camera System (MVCS).

These procedures may require special tools and/or the i-HDS to complete. Refer to the service information for specific information.

The chart below shows damage areas where driver assistive system components may be located in close proximity. Collision damage in these areas should be given particular attention because certain repairs and/or parts replacement may require aiming procedures to be done.

Collision Damage Area	Driver Assistive System Components Affected				
Front Bumper and Grille Area	Millimeter Wave Radar Unit Front Camera (w/Multi-View Camera System)				
Windshield Area	Multipurpose Camera Unit				
Front Passenger's Door/Mirror Area	LaneWatch™ Camera (Honda Only) Right Side Camera (w/Multi-View Camera System)				
Driver's Front Door/Mirror Area	Left Side Camera (w/Multi-View Camera System)				
Rear Bumper Area	Blind Spot Information System Radar Units Rear Camera (w/Multi-View Camera System)				

#### How To Obtain Service Information, i-HDS Dignostic Software and Interface Hardware

i-HDS software, as well as other service information, is available to independent repair facilities and others for use on laptop or desktop computer hardware. These may be purchased in three time intervals: 1 day, 30 days, and 365 days.

NOTE: The i-HDS software requires the use of a Bosch MVCI or Denso DST-i vehicle communications interface (VCI) device between the vehicle and your computer, which must be purchased separately.

To purchase i-HDS diagnostic software and/or a vehicle interface device do the following:

- 1. Access the Honda Independent Repair/ServiceExpress website: (techinfo.honda.com).
- 2. Click the link under the "Diagnostic Tools" heading (near middle of page).
- 3. Confirm your computer meets the system requirements and/or purchase a VCI device by clicking the link(s) under "Hardware".
- 4. Click the link under "Software" to purchase i-HDS software and follow the directions.

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TOYOTA QLEXUS + SCION

# CRB COLLISION REPAIR INFORMATION

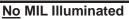
_	ULLETIN							
FOR THE COLLISION REPAIR PROFESSIONAL								
TITLE:	Scanning for Electrical System Faults	2016-191						
SECTION:	Electrical	Page 1 of 1						
APPLICABLE VEHICLES:	All Toyota, Lexus and Scion Models							
DATE:	July 2016							

Toyota, Lexus and Scion onboard vehicle electrical systems are designed to control and communicate with engine, drivetrain, body electrical, navigation, audio, handling and safety systems. In the event of a collision, electronic control modules, actuators, sensors, or wiring can be damaged. Damage related to these systems may cause them to not perform properly during future operating conditions including subsequent collisions.

These electrical systems are designed to set fault codes known as DTCs (Diagnostic Trouble Codes) if a fault is detected. **Not all DTCs illuminate a MIL (Malfunction Indicator Light)**. Toyota's "Techstream" and "Techstream Lite"\* scan tool and software can retrieve and report all DTCs for all Toyota, Lexus, and Scion vehicles.\*\*

Considering the fact that a capable scan tool is the only way to identify some DTCs, Toyota requires that repairers perform a "Health Check" diagnostic scan if a vehicle has sustained damage as a result of a collision that may affect electrical systems. Additionally, Toyota strongly recommends that repairers perform a "Health Check" diagnostic scan before and after every repair to identify and document DTCs. If DTCs are identified pre-repair, then they can be considered to create a complete vehicle damage analysis report. If DTCs are identified post-repair, then they can be diagnosed and addressed before returning a vehicle to the customer.





2GR-FK5		Tire Pressure / Threshold Value [] 😴									
M0597 mile		Sansor 2: 110 Sansor 4: 110									
2016_Tacoma_2 File Notes Houlth Cheel Data 1-7/2 Data 2-7/2	Campaign Status; 2 Healt Check Results PERMANENE NO -Install Check Network of depth for dataInstall Check Network of depth for dataInstall Check Network of the Installed Status; 2 -Installed The Check Network -Ins										
	System	Monitor	DTC	Curr	Pend	Hist	Test	Calibration	Update		
	Engine	Itc	-	CAR	-	-	PRIME	1296120400000	Yes		
	Transmission							8565666481000	Yes		
	Cruise Control										
	Intaltiva PIA		C14ED	X		X					
	Nevigation System		BISCI BISFE	X		X					
	Four Wheel Drive	-						8953F0481000	No		
	ABS/V5C/TRAC							F15200421R	No		
	Tito Pressure Menitor			-							
	Occupant Detection			-	_						
Sart	Air Conditioner			-	_			B95200400021 CONTINENTAL	No		
Expand>>	Combination Motor			-	-		-	22.21.07.pre	No		
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TO Ocerch	Gateway			-				PARA 19400022			
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DTCs found during Health Check

\*Call Toyota Approved Dealer Equipment at 800.368.6787 for information, availability and pricing. \*\* Before using an aftermarket scan tool, check with the manufacturer to ensure that their equipment can retrieve History, Pending and Current DTCs as well as 'Time Stamp' their occurrence on all Toyota vehicles.

#### PLEASE ROUTE THIS BULLETIN TO YOUR COLLISION REPAIR CENTER MANAGER AND COLLISION REPAIR TECHNICIANS

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Toyota Supports ASE Certification

Exhibit C Page 1 of 1

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## **Position Statement on Vehicle Scanning from ASA's Collision Operations Committee**

The need for pre- and post-repair vehicle scanning as a normal part of the repair process is a topic of significant discussion within the collision repair industry. This discussion has explored and evaluated by the Automotive Service Association's Collision Operations Committee, which has announced the following position statement on the issue.

The Automotive Service Association supports the electronic scanning of all vehicles prior to and after collision repairs are completed in order to ensure that all potential damage has been identified to achieve a safe and complete repair. ASA will maintain this position until such time as the vehicle manufacturers identify the specific years, makes, models and scenarios where such scanning is not necessary.

ASA's position on pre- and post-repair vehicle scanning is consistent with similar positions issued by General Motors, Audi, Honda, FCA (Chrysler), Toyota, Nissan and the Equipment and Tool institute and other industry associations. You can view the existing OEM position statements on vehicle scanning <u>here</u>.

ASA also supports full disclosure and a customers' written acknowledgement of the diagnostic trouble codes (DTCs) identified by the scans, along with documenting and informing the customer of other issues with the vehicle that are not related to the accident but where a DTC is present.

ASA will continue to seek input on this topic from our members and others, as the information available evolves. Thank you for your membership and continued support of an association committed to helping improve the service and collision repair industries.

#### Automotive Service Association® Driving Your Success!

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04/2017

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Attorneys for Defendant Government Employees **Insurance** Company

#### UNITED STATES DISTRICT COURT

#### DISTRICT OF OREGON

#### PORTLAND DIVISION

LEIF HANSEN, on behalf of himself and all others similarly situated.

Civil Case No. 3:17-cv-1986-MO

#### **GOVERNMENT EMPLOYEES INSURANCE COMPANY'S REPLY IN** SUPPORT OF ITS MOTION TO STRIKE

**GOVERNMENT EMPLOYEES INSURANCE COMPANY**, a Maryland corporation,

Plaintiff,

v.

Defendant.

#### Page 1–REPLY IN SUPPORT OF MOTION TO STRIKE

#### **SER 113**

### [ORAL ARGUMENT REQUESTED]

Hansen's Opposition to GEICO's Motion to Strike is nonsensical:

- Hansen argues the Motion to Strike is procedurally improper but later concedes it is procedurally proper.
- Hansen ignores that *BMS*'s personal jurisdiction analysis turns on a claim's connection to the forum, not on whether putative class members are parties yet.
- Hansen asks this Court to allow a class action to move forward for putative class members he concedes he cannot represent.
- Hansen asks this Court to ignore facial differences in the laws of the 50 states because they are not actually different and then concedes they are different.

#### I. <u>GEICO'S MOTION TO STRIKE IS PROCEDURALLY PROPER, NOT</u> <u>PREMATURE AND SHOULD BE GRANTED</u>

#### A. <u>GEICO's Rule 12(f) and 23(c)(1)(A) and (d)(1)(D) Motion Should Be Granted</u>

Hansen admits his lead argument – that GEICO's Motion is "Procedurally Improper" – is untrue. In bold headings, he says GEICO's Rule 12(f) and 23(d)(1)(D) Motion is "Procedurally Improper" and "Premature[]" *but then explicitly states that these Rules are proper vehicles to strike class allegations*. Doc. 26 ("Opp.") at 5 ("Similar to Rule 12(f) . . . Rule 23(d)(1)(D) allows courts to strike class allegations . . . ."); *see also Tietsworth v. Sears*, 720 F. Supp. 2d 1123, 1146 (N.D. Cal. 2010) ("Under Rules 23(c)(1)(A) and 23(d)(1)(D), as well as pursuant to Rule 12(f), this Court has authority to strike class allegations prior to discovery if the complaint demonstrates that a class action cannot be maintained"). GEICO's Motion is procedurally proper, timely, and meets the standard for striking allegations.

Hansen concedes this Court should strike class allegations before discovery where the allegations are defective as a matter of law and "no amount of time or discovery can cure these deficiencies." *In re Yasmin & Yaz (Drospirenone) Mktg.*, 275 F.R.D. 270, 274 (S.D. Ill. 2011); Opp. at 5-6 (conceding the Court should strike class allegations where "there are no circumstances in which the class action claims could succeed") (quoting *Sanders v. Apple Inc.*, 672 F. Supp. 2d 978, 990 (N.D. Cal. 2009)).<sup>1</sup>

<sup>&</sup>lt;sup>1</sup> Numerous courts have stricken class allegations before discovery. See, e.g., Thompson v. Merck Co., No. C.A. 01-1004, 2004 WL 62710, at \*2 (E.D. Pa. Jan. 6, 2004); Barrus v. Dick's Sporting Goods, Inc., 732 F. Supp. 2d 243, 250 (W.D.N.Y. 2010); Boland v. Select Comfort Page 2–REPLY IN SUPPORT OF MOTION TO STRIKE

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It is plain on the face of the Complaint that this Court lacks personal jurisdiction over putative out-of-state class members' claims and that individual questions of state-specific law predominate over any purported common questions for a nationwide class. Any nationwide discovery would be a needless waste of time and resources, would require disproportionate discovery expenses (by a factor of 50), and would only delay the inevitable dismissal of the irreparably defective allegations. *See Bureerong v. Uvawas*, 922 F. Supp. 1450, 1478 (C.D. Cal. 1996) (Rule 12(f) is intended to "avoid the expenditure of time and money that must arise from litigating spurious issues.") (internal quotation marks and citation omitted). The Nationwide Class Allegations (¶¶ 1, 25, 29) are "immaterial" and "impertinent" and should be stricken.

It is also plain that differences in manufacturer recommendations – if recommendations exist, to which vehicles they apply, when and how they went "into effect," what they mean and how they apply – will swamp any purported common issues. No amount of discovery will obviate these individualized determinations. Allegations regarding owners of non-GM vehicles in  $\P\P$  1,15,18,23, 29,34(a) are both immaterial and impertinent and should also be stricken.

#### B. <u>GEICO's Rule 12(b)(2) Motion Should, Alternatively, Be Granted</u>

Hansen's argument that granting Rule 12(b)(2) relief would be premature is meritless and improperly supported. See Opp. at 6-7. He relies exclusively on cases deciding defective Rule 12(b)(6) motions rather than Rule 12(b)(2) motions. Id. Of course this Court has authority to dismiss claims, at the pleading stage, when it lacks personal jurisdiction as a matter of law. Here, Hansen has not even *pled* personal jurisdiction. See Compl. ¶ 6 (pleading subject matter jurisdiction, not personal jurisdiction); Schwarzenegger v. Fred Martin Motor Co., 374 F.3d 797, 800 (9th Cir. 2004) ("[T]he plaintiff bears the burden of demonstrating that jurisdiction is

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Corp., No. 1:10-cv-00465, 2010 WL 3083021, at \*6 (M.D. Pa. Aug. 6, 2010); Cornette v. Jenny Garton Ins. Agency, Inc., No. 2:10-cv-60, 2010 WL 2196533, at \*2 (N.D. W. Va. May 27, 2010); Berk v. J.P.Morgan Chase Bank, N.A., No. 11-2715, 2011 WL 4467746, \*8 (E.D. Pa. Sept. 26, 2011); Wright v. Family Dollar, Inc., No. 10 C 4410, 2010 WL 4962838, at \*2-4 (N.D. III. Nov. 30, 2010).

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appropriate."). The jurisdictional question raised by the Nationwide Class Allegations is a pure question of law that the Court can and should decide now. No amount of discovery will change that – a point Hansen implicitly concedes.

#### II. <u>THIS COURT LACKS PERSONAL JURISDICTION TO ADJUDICATE THE</u> <u>NATIONWIDE CLASS ALLEGATIONS</u>

Hansen frames the question: whether the Court has specific, personal jurisdiction to adjudicate out-of-state class claims against an out-of-state defendant. Opp. at 7-8. As *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County* ("*BMS*"), 137 S. Ct. 1773 (2017), its progeny, and the Supreme Court's due process jurisprudence confirm, the answer is no.

*BMS*'s holding is clear: for the Court to adjudicate an out-of-state claim against a nonresident defendant, there must be a factual connection between the *out-of-state claim and the forum*. *Id.* at 1779-82. *BMS* was about a defendant's due process rights and whether and when a court can force an out-of-state defendant to defend against out-of-state claims. *Id.* at 1779. Where "all the conduct giving rise to the non-residents' claims occurred elsewhere," the forum lacks specific jurisdiction over those claims. *Id.* at 1782. *BMS* turned on the factual nature of the claims, not on who filed the claims or whether they were "parties." *BMS*'s due process and jurisdictional analysis does not differentiate between parties and nonparties. Rather, it forbids courts from exercising their "coercive power" to adjudicate out-of-state "claims" in which they have "little legitimate interest" against nonresident defendants. *Id.* at 1780.

Hansen does not, and cannot, argue the claims of out-of-state putative class members have any factual connection to Oregon. *See* Opp. at 7-12. Before *BMS*, and in the months since, numerous courts have applied its analysis to strike or dismiss nationwide class allegations.<sup>2</sup>

<sup>&</sup>lt;sup>2</sup> See, e.g., DeBernardis v. NBTY, Inc., No. 17 C 6125, 2018 WL 461228, at \*2 (N.D. Ill. Jan. 18, 2018) (striking claims to the extent they seek to recover for of out-of-state putative class members); *McDonnell v. Nature's Way Prod., LLC*, No. 16 C 5011, 2017 WL 4864910, at \*4 (N.D. Ill. Oct. 26, 2017) (same); *Wenokur v. AXA Equitable Life Ins. Co.*, No. CV-17-00165-PHX-DLR, 2017 WL 4357916, at n.4 (D. Ariz. Oct. 2, 2017) (the court "lacks personal jurisdiction over the claims of putative class members with no connection to Arizona" and Page 4–REPLY IN SUPPORT OF MOTION TO STRIKE

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In re Dental Supplies Antitrust Litigation, which GEICO cited and Hansen did not address, explains why – as a matter of due process – BMS must apply to class actions:

Plaintiffs attempt to side-step the due process holdings in *Bristol-Mvers* by arguing that the case has no effect on the law in class actions because the case before the Supreme Court was not a class action. This argument is flawed. *The constitutional requirements of due process does [sic] not wax and wane when the complaint is individual or on behalf of a class. Personal jurisdiction in class actions must comport with due process just the same as any other case.* 

No. 16CIV696BMCGRB, 2017 WL 4217115, at \*9 (E.D.N.Y. Sept. 20, 2017) (holding *BMS* applies to class actions) (emphasis added).

Hansen relies on the flawed reasoning of *Fitzhenry-Russell v. Dr. Pepper Snapple Group*, No. 17-cv-00564, 2017 WL 4224723 (N.D. Cal. Sept. 22, 2017), to argue that due process provides fewer protections to defendants in class actions than defendants in individual actions (such as the "mass action" in *BMS*). Opp. at 9-10.<sup>3</sup> The Magistrate in *Fitzhenry-Russell* (1) *overlooked* that *BMS* turned on the nature of the *claim's* impact on the defendant's due process rights and (2) improperly focused on the status of putative class members. 2017 WL 4224723, at \*5. As in *Fitzhenry-Russell*, Hansen incorrectly relies on the theory that putative class members are not "parties." *Id.* at 10; 2017 WL 4224723, at \*5. Under *BMS*, the question for the Court is *the claims' impact on the defendant*.

The dispositive due process and personal jurisdiction questions do not turn on "party" status. Rather, they ask if there is a factual connection between the forum and the out-of-state claims. *See BMS*, 137 S. Ct. at 1781. *Fitzhenry-Russell* does not address this question. Instead, it relies on *Devlin*, which was concerned entirely with a plaintiff's due process rights – not a defendant's – and is therefore inapplicable here. 2017 WL 4224723, at \*5 (citing *Devlin*, 536

Page 5-REPLY IN SUPPORT OF MOTION TO STRIKE

<sup>&</sup>quot;would not be able to certify a nationwide class."); *Demedicis v. CVS Health Corp.*, No. 16-CV-5973, 2017 WL 569157, at \*4 (N.D. Ill. Feb. 13, 2017) (applying the same analysis to reach the same result before *BMS*); *Demaria v. Nissan N. Am., Inc.*, No. 15 C 3321, 2016 WL 374145 (N.D. Ill. Feb. 1, 2016) (same).

<sup>&</sup>lt;sup>3</sup> Each of the handful of cases Hansen cites as suggesting *BMS* does not apply to class actions relies heavily (if not exclusively) on *Fitzhenry-Russell*. See Opp. at 10 (citing cases).

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U.S. 1, 9-10 (2002)).<sup>4</sup>

Not only was *Fitzhenry-Russell's* focus misplaced, its "parties" distinction leads to absurd results. *Demaria v. Nissan N. Am., Inc.*, a pre-*BMS* case dismissing a nationwide class, illustrates this point. *See* No. 15 C 3321, 2016 WL 374145 (N.D. Ill. Feb. 1, 2016). In *Demaria*, an Illinois resident and out-of-state residents asserted common law, federal law and state statutory claims and sought to represent a nationwide class as to the common and federal law claims. *Id.* at \*1, \*4. Applying the same jurisdictional analysis as in *BMS*, the court dismissed the non-Illinois state statutory claims and the federal and common law claims to the extent they were brought on behalf of plaintiffs whose claims did not arise out of the defendant's Illinois activities. *Id.* at \*8, \*14. *Demaria* also limited the alleged class to individuals whose claims were linked to the defendant's Illinois conduct. *Id.* If, as Hansen argues, the *BMS* analysis applies to only individual claims and *Demaria* was incorrect to limit the class to only claims would have been a mere technicality. Those same plaintiffs, who could not assert claims on their own behalf, would still have their claims litigated as putative members of the nationwide class.

Further, even Hansen concedes putative class members are considered "parties" after certification. Opp. 10.<sup>5</sup> The "parties" argument is, at most, a timing question that proves GEICO's larger point. Indeed, one would ask why nationwide class allegations are not "immaterial" or "impertinent" under Rule 12(f) if they would result in certification of a class that

<sup>&</sup>lt;sup>4</sup> *Fitzhenry-Russell* also relies on a nominal distinction between "mass actions" and "class actions." For jurisdictional and due process purposes, mass actions and class actions are functional equivalents. A practical example illustrates the point: If a nationwide class is certified, out-of-state class members must each prove damages. Thus, for each out-of-state class member, the court must decide and award damages based on conduct that occurred entirely out of state, requiring the court to do exactly what *BMS* forbids—use its "coercive power" to adjudicate issues that have no factual connection to the forum. *BMS*, 137 S. Ct. at 1779-82.

<sup>&</sup>lt;sup>5</sup> Hansen and *Fitzhenry-Russell* rely on the dissent in *Devlin v. Scardelletti*, 536 U.S. 1, n.1 (2002), for the uncontroversial proposition that class members are not "parties" before certification. Opp. at 10; *Fitzhenry-Russell*, 2017 WL 4224723, at \*5. *Devlin*, however, held that class members are "parties" for purposes of a judgment, settlement, and due process rights to an appeal. 536 U.S. 1.

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includes claims over which the Court has no personal jurisdiction.<sup>6</sup>

The error in the "party" reasoning, and the suggestion that putative class members stand in the putative representative's shoes for personal jurisdiction, is easily demonstrated: Assume an out-of-state claimant in *BMS* assigned her Plavix claims to a California resident. This assignment would not change the jurisdictional analysis, because the assigned out-of-state claims would still not arise out of facts connected to California and the court would still lack personal jurisdiction to adjudicate the assigned claim against the non-resident defendant.

Hansen and *Fitzhenry-Russell* also confuse subject matter jurisdiction for personal jurisdiction. *Fitzhenry-Russell* holds that *BMS*'s personal jurisdiction analysis did not apply because "there is some support for the position" that, in class actions, "the citizenship of the unnamed plaintiff is not taken into account." *See* 2017 WL 4224723, at \*5. Knowing the citizenship of plaintiffs, however, is necessary to consider traditional and CAFA diversity jurisdiction, but irrelevant to whether a court has personal jurisdiction to adjudicate claims against a defendant. Hansen expands on this error by arguing that applying *BMS* to class actions would contradict CAFA. Opp. at 11. CAFA, however, expands district courts' subject matter jurisdiction to allow class actions with minimal diversity to proceed in federal court. *See* 28 U.S.C. § 1332(d). CAFA has nothing to do with personal jurisdiction. Applying *BMS* to class actions does not "subvert" CAFA or "outlaw[] nationwide class actions," as Hansen contends. *Id.* Following *BMS*, CAFA and nationwide class actions may proceed – as they always have – where district courts can establish personal jurisdiction over *the claims against the defendant*.

The personal jurisdiction rules *BMS* discusses and enforces apply to all claims, even outof-state claims brought as class actions. Any other result would violate defendants' due process rights. Hansen must establish that the out-of-state claims have a factual connection to Oregon,

<sup>&</sup>lt;sup>6</sup> Hansen's argument also fails to explain the "proper" time to raise this jurisdictional issue. It makes no sense to wait to until after class discovery and certification, as that would not change the jurisdictional analysis in any way and would directly contradict Rule 12(f)'s policy of avoiding such needless discovery. *See, e.g., Bureerong*, 922 F. Supp. at 1478.

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*see BMS*, 137 S. Ct. at 1781, and he does not even attempt to do so. As a matter of law, the Court lacks personal jurisdiction over the out-of-state claims and should dismiss or strike the nationwide allegations now.<sup>7</sup>

#### III. <u>THE NATIONWIDE CLASS ALLEGATIONS SHOULD BE STRICKEN</u> <u>BECAUSE INDIVIDUAL ISSUES PREDOMINATE DUE TO DIFFERENCES IN</u> <u>STATE LAWS</u>

Assuming personal jurisdiction, Hansen's Opposition fails to cure the obvious nationwide class defects that will waste this Court's and GEICO's time, prejudice the Oregon putative class members, and permit meritless nationwide discovery to swamp GEICO and create *in terrorem* effects. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007). Hansen's answer is not a rigorous analysis of the law of 50 states but really amounts to "trust me there are no differences."

#### A. <u>Subclasses And Purported Standard Policy Forms Do Not Eliminate The</u> <u>Material Differences In State Law</u>

Contrary to Hansen's broad assertion, GEICO identified several material differences in state law requiring the Court to conduct a choice-of-law analysis and causing individual issues to predominate. Hansen concedes GEICO identified material differences in state law but claims "[e]very difference" could be resolved by "creating a number of subclasses at class certification." Opp. at 12. He does not explain how an Oregon subclass member could represent any other state's subclass member, how these subclasses would work, or how many subclasses would exist given the numerous permutations of differences in state law. But even with such an explanation, Hansen's proposed subclasses cannot work because he would not be a member of, and lacks standing to represent, any subclass except those based on Oregon law and Oregon's interpretation of that law. *See, e.g., Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 216 (1974) ("To have standing to sue as a class representative it is essential that a plaintiff

<sup>&</sup>lt;sup>7</sup> Hansen suggests that *BMS* applies only to state courts. Opp. at 9. This is incorrect. While *BMS* did not decide whether its jurisdictional rules apply to federal courts, *see* 137 S.Ct. at 1784, lower courts have consistently concluded that they do. *See, e.g., McDonnell,* 2017 WL 4864910, at n.7 (noting that even *Fitzhenry-Russell* agrees that *BMS* applies to federal courts).

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must be a part of that class ...."); *Betts v. Reliable Collection Agency, Ltd.*, 659 F.2d 1000, 1005 (9th Cir. 1981) ("[Plaintiff] no longer qualified as a member of the subclass he purported to represent. Consequently, the fundamental requirement that the representative plaintiff must be a member of the class he represents is completely lacking on the record before us."); *Roby v. St. Louis Sw. Ry. Co.*, 775 F.2d 959, 961 (8th Cir. 1985) ("A fundamental requirement of representatives in a class action is that they must be members of the subclasses they seek to represent."); *Fairley v. Patterson*, 493 F.2d 598, 604 (5th Cir. 1974) ("[T]he original plaintiffs cannot properly represent a sub-class of electors of which they may not be members."). Hansen's concession that the Court may have to create subclasses of which he would not be a member confirms it is appropriate for the Court to strike his Nationwide Class Allegations at this stage because subclass cannot exist without a class representative. *See In re Initial Pub. Offering Sec. Litig.*, No. 21 MC 92 (SAS), 2008 WL 2050781, at \*3 (S.D.N.Y. May 13, 2008) (striking allegations of a class without a representative).

Hansen also cannot avoid differences in state laws with his *unsupported* assertion that GEICO uses the same ISO policy forms in every state. Opp. at 13-14. This unsupported assertion is contradicted by Hansen's own Policy, which is incorporated into the Complaint and is not an ISO form. *See* Doc. 21 Ex. 1 (no ISO markings); *Osher v. JNI Corp.*, 302 F. Supp. 2d 1145, 1159 (S.D. Cal. 2003) (court may ignore inconsistent allegations); *In re Livent, Inc. Noteholders Sec. Litig.*, 151 F. Supp. 2d 371, 405-06 (S.D.N.Y. 2001) (court need not accept as true allegations contradicted by documents upon which a complaint relies). It is also contradicted by the fact that nearly every state promulgates rules for insurance policies and "require[s] that insurers file their . . . policy forms for review by state authorities . . . ." *See Wal-Mart Stores, Inc. v. Crist*, 855 F.2d 1326, 1333 (8th Cir. 1988).<sup>8</sup>

<sup>&</sup>lt;sup>8</sup> See also Ala. Code. § 27-14-8; Alaska Stat. § 21.42.120; Ariz. Rev. Stat. Ann. § 20-398; Ark. Code Ann. § 23-79-109; Colo. Rev. Stat. § 10-4-419; Conn. Gen. Stat. § 38a-421; Del. Code. Ann. tit. 18, § 2712; D.C. Code § 31-2502; Fla. Stat. § 627.410; Ga. Code Ann. § 33-24-9; Haw. Rev. Stat. §§ 386-124, 431:10C-301; Idaho Code § 41-1812; 215 Ill. Comp. Stat. 5/143; Ind. Code § 27-8-5-1.5; Iowa Code § 515.102; Kan. Stat. Ann. § 40-216; Ky. Rev. Stat. Ann. § Page 9–REPLY IN SUPPORT OF MOTION TO STRIKE

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The cases Hansen cites do not help him. Steinberg v. Nationwide Mutual Insurance Co., which Hansen cites for the proposition that there is no conflict of state laws where there are standard contracts, is inapposite. See Opp. at 16 (citing 224 F.R.D. 67 (E.D.N.Y. 2004)). Unlike here, the plaintiff in Steinberg "demonstrated" that the contracts in the various states<sup>9</sup> were substantively identical. 224 F.R.D. at 74. Hansen's own Policy contradicts such a showing. Government Employees Insurance Co. v. KJ Chiropractic Center LLC, which Hansen cites to support his claim that GEICO's policy language is uniform nationally, is also inapposite. See Opp. at 14 (citing 2015 WL 12839140, at \*2 (M.D. Fla. Feb. 16, 2015)). That case was **not** about policy language, it was simply about whether different underwriting entities paid Personal Injury Protection claims to a health care provider. KJ Chiropractic, 2015 WL 12839140, at \*2.

#### B. <u>GEICO Identified Material Differences In State Contract Law</u>

GEICO identified several differences in state contract laws – (1) statutes of limitation, (2) equitable tolling, (3) accrual, (4) extrinsic evidence rules and (5) the measure of damages – that are not dependent on whether the language of the insurance policies in each state is the same or different. Doc. 23 ("Mot.") at 12-17. Each of these state laws dictates how each state interprets the language, what it does with the language and who could be a class member.

Hansen's Opposition does not address the demonstrated differences in states' accrual rules, rules regarding equitable tolling or rules to measure recoverable damages, except to

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<sup>304.14-120;</sup> La. Stat. Ann. § 861; Me. Stat. tit. 24-A, § 2412; Md. Code Ann., Ins. § 11-206; Mass. Gen. Laws ch. 175, § 2B; Mich. Comp. Laws § 500.2236; Minn. Stat. § 70A.06; Miss. Code Ann. § 83-2-7; Mo. Rev. Stat. § 379.321; Mont. Code Ann. § 33-1-501; Neb. Rev. Stat. § 44-7508; Nev. Rev. Stat. § 686B.070; N.H. Rev. Stat. Ann. § 412:5; N.J. Stat. Ann. § 17:29AA-6; N.M. Stat. Ann. § 59A-18-12; N.Y. Ins. Law § 2307; N.C. Gen. Stat. § 58-36-55, 58-41-50; N.D. Cent. Code § 26.1-30-19; Ohio Rev. Code Ann. §§ 3902.04, 3902.07; Okla. Stat. Ann. tit. 36, § 3610; ORS § 742.003; 40 Pa. Cons. Stat. § 477b; R.I. Gen. Laws § 27-44-4.1; S.C. Code Ann. § 38-61-20; S.D. Codified Laws § 58-11-12; Tenn. Code Ann. § 56-5-105; Tex. Ins. Code Ann. § 5.06; Utah Code Ann. § 31A-21-201; Vt. Stat. Ann. tit. 8, § 4201; Va. Code Ann. § 38.2-2014; Wash. Rev. Code § 48.18.100; W. Va. Code § 33-6-8; Wis. Stat. § 631.20; Wyo. Stat. Ann. § 26-15-110.

<sup>&</sup>lt;sup>9</sup> The *Steinberg* class apparently did not include Hawaii, Massachusetts, and New Jersey because those contracts were not the same. 224 F.R.D. at 70.

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conclude, without explanation, that the differences are immaterial. Opp. at 13. The differences in accrual and tolling rules, which Hansen concedes exist, are material to who is in the class and to GEICO's defenses. Differences in damages laws are material to what putative absent class members could recover.

Affirmative "defenses [(such as statutes of limitations)] cannot be ignored when making a predominance decision." *Barraza v. C. R. Bard Inc.*, CV16-01374-PHX-DGC, 2017 WL 3976720, at \*7 (D. Ariz. Sept. 11, 2017); *Gartin v. S & M NuTec LLC*, 245 F.R.D. 429, 441 (C.D. Cal. 2007) ("defenses unique to a particular class member precludes certification"); NEWBERG ON CLASS ACTIONS § 4:55 (5th ed.) ("The potentially individualized nature of affirmative defenses requires that courts consider such defenses in undertaking the predominance analysis.").

*Williams v. Sinclair* does not hold that differences in statutes of limitations are not material for a predominance inquiry, as Hansen suggests. *See* Opp. at 14 (citing 529 F.2d 1383, 1388 (9th Cir. 1975)). *Williams* held only that differences in statutes of limitations do not "compel a finding that individual issues predominate over common ones;" it does not preclude such a finding. 529 F.2d at 1388. Hansen's bald conclusion that "states' longer statutes of limitations are irrelevant [and] differences in [states with shorter] statutes are not material and do not preclude class certification" is unsupported. *See* Opp. at 14. Differences in statutes of limitations, like the other differences, are material because Hansen cannot look out for absent class members with longer or shorter limitations periods and because he lacks standing to represent subclasses of putative class members with these differing periods. What Hansen proposes by trying to ignore differences in limitations periods is an impermissible fail-safe class. *Booth v. Appstack*, No. C13-1533JLR, 2016 WL 3030256, at \*9 (W.D. Wash. May 25, 2016) (*quoting Kamar v. RadioShack Corp.*, 375 F. App'x 734, 736 (9th Cir. 2010)) ("A fail-safe class occurs 'when the class itself is defined in a way that precludes membership unless the liability of the defendant is established."").

Hansen's conclusion that it does not "seem[] likely that rules regarding extrinsic evidence Page 11–REPLY IN SUPPORT OF MOTION TO STRIKE

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and contract ambiguity will become relevant" fails to meet his burden and is unconvincing. See Opp. at 13. Hansen has not alleged that the policies expressly cover electronic scans. See Compl.  $\P$  10 (quoting the Policy). Rather, he alleges that scans are part of a "loss," despite unambiguous language in his Policy that "loss" is "direct and accidental loss of or damage to" caused by collision and scans do not repair direct and accidental loss of or damage to a vehicle. Opp. at 14. If Hansen's claims may proceed (which they should not, as GEICO's Motion to Dismiss argued), despite the lack of ambiguity in his Policy, Hansen relies on manufacturer statements – extrinsic evidence – to support his claim that "loss" includes scans that effect no repairs. Whether this extrinsic evidence is permitted and for what purpose turns on the relevant state's law, *see* Mot. at 13-14 (citing cases), and will require a highly individualized state-by-state law analysis.

#### C. GEICO Identified Material Differences In State Bad Faith Law

Hansen does not dispute that GEICO identified differences in state bad faith law including differences in: (1) whether states apply an objective or subjective standard; (2) the nature of intent required; (3) whether bad faith sounds in contract or in tort; and (4) whether breach of an express contractual provision is also required. Opp. at 15. Rather, he tries to avoid these differences by arguing they are not material because "if the trier of fact finds that GEICO willfully breached the express terms of its standard insurance policy, GEICO would be liable regardless of which state's law applied." *Id.* That statement makes no sense.

If Hansen is trying to prove that GEICO willfully breached an express term of his Policy to prove bad faith, his position alienates and prejudices absent putative class members who need not show intent or that GEICO breached an express term of their policy to prove bad faith. His oversimplification also does not explain how this Court or the trier of fact would account for the different intent standards in the various states that require intent. *See, e.g., Broussard v. State Farm Fire & Cas. Co.*, 523 F.3d 618, 628 (5th Cir. 2008) (unlike Oregon, Mississippi requires denial "without an arguable or legitimate basis" and "with malice or gross negligence in disregard of the insured's rights"); *Aetna Cas. & Sur. Co v. Broadway Arms Corp.*, 664 S.W.2d Page 12–REPLY IN SUPPORT OF MOTION TO STRIKE

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463, 465 (Ark. 1984) (requiring in Arkansas, unlike in Oregon, "affirmative misconduct" that was "dishonest, malicious, or oppressive").

Whether the claim sounds in tort or contract, or is a statutory creation, is also material. This impacts the types of damages available (including punitive damages, statutory penalties, or extra-contractual damages). Hansen does not explain how this Court could investigate and resolve these differences or how he would have standing to represent subclasses if these putative absent class members were divided into their numerous subsets into which he does not fit.

As with the statutes of limitation problem, Hansen tries to circumvent differences in state bad faith laws by defining an impermissible fail-safe class. *See Booth*, 2016 WL 3030256, at \*9 (defining a fail-safe class). Hansen asks the Court to define the putative class to include only those whose policies GEICO willfully breached an express provision of – as with statute of limitations, this does not resolve state law differences and assumes the merits to define the class.

Allapattah Services., Inc. v. Exxon Corp., on which Hansen relies, is inapposite. Opp. at 15 (citing 333 F.3d 1248 (11th Cir. 2003)). The Allapattah defendant opposed certification on the basis of different affirmative defenses "which pertained primarily to the issue of damages rather than liability." 333 F.3d at 1261. The defendant did not raise the kind of substantive differences in bad faith law GEICO raised here, and the court did not even discuss bad faith law. See generally id. The cases GEICO cited, however, are on point, and demonstrate that a class action with differences in state laws will not be maintainable. See Opp. at 15-16 (arguing the cases upon which GEICO relies are inapposite because they were decided at the class certification stage); Mot. at 14 (citing cases). Discovery is not required to show that these differences in state law will predominate over any common issues (which Hansen's Opposition does not even identify), warranting striking the Nationwide Class Allegations now. See, e.g., In re Yasmin, 275 F.R.D. at 274 (striking class allegations because "the laws of all fifty states plus the District of Columbia would be applicable to the putative nationwide class members' claims," meaning "individual issues of law predominate"); Tietsworth, 720 F. Supp. 2d at 1146 (striking Page 13–REPLY IN SUPPORT OF MOTION TO STRIKE

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class allegations where the complaint shows a class action cannot be maintained).

#### D. <u>The Differences In State Law Will Compel Individual Choice-of-Law</u> <u>Analyses That Will Predominate Over Common Issues</u>

Hansen's only substantive response to GEICO's argument that individual choice-of-law determinations will be required is to say this is only necessary where there are material differences in state law. Opp. at 12. But Hansen has conceded these differences and cannot show that they are not material. Just to determine what law applies, the Court must review each class member's policy to determine if it has a choice of law provision and, if it does not, to determine the circumstances of the policy's negotiation, making and performance, and the location of the covered vehicle and claim handling. Mot. at 10-11.

This choice-of-law analysis is just the first step. The Court must apply each state's different laws, sort through the various different defenses and affirmative defenses (including those that arising from the differing contracts), and carve-up the class based on whether absent putative class members can prove the merits of claims comparable to Hansen's Oregon claim.

#### IV. INDIVIDUAL ISSUES PREDOMINATE OVER COMMON QUESTIONS IF NON-GM VEHICLE OWNERS ARE INCLUDED IN THE CLASS

Hansen's claim that differences between manufacturer scanning requirements are irrelevant to the predominance question because he now claims to have alleged scans are required for "every modern vehicle" is belied by the few manufacturer position statements he provided. Opp. at 17. Hansen provided positions for only GM, Nissan, Toyota and Honda. Each of these *few* manufacturers has a different position on scans.

Nissan's Collision Position Statement recommends post-repair scans for all vehicles and pre-repair scans "where appropriate." Doc. 26-1. Nissan's recommendation of post-repair scans for all vehicles is not a firm requirement. Rather, Nissan states that scans are necessary only "in most repair situations." *Id.* 

Honda, in contrast says "all vehicles involved in a collision must have" certain scans. Doc. 26-2 at 1. But that also does not mean all vehicles. Honda defines "collision" as "damage Page 14–REPLY IN SUPPORT OF MOTION TO STRIKE

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that exceeds minor outer panel cosmetic distortion," which creates an individualized issue of how much damage meets that requirement. *Id.* Honda then discusses various scenarios where it contends scans are necessary or "recommended." Doc. 26-2 at 1-3.

Toyota requires a scan only "if a vehicle has sustained damage as a result of a collision that may affect electrical systems." Doc. 26-3. Toyota also recommends repairers perform a scan before and after repairs. *Id.*<sup>10</sup>

And the Automotive Service Association, an association of repair shops that want to get paid an additional \$200 per repair whether or not a scan is necessary, supports scans for all vehicles only "until such time as the vehicle manufacturers identify the specific years, makes, models and scenarios where such scanning is not necessary." Doc. 26-4.

Each of these recommendations differs and each recognizes that diagnostic scans *are often unnecessary*. Each of these require individual questions about when a scan is required.

Hansen cannot both rely on manufacturer recommendations and then claim they do not matter when it turns out that the manufacturer recommendations create individualized issues that will defeat certification. The Court must ultimately determine whether GEICO breached each policy, considering the make and model of each class member's vehicle, the damage the vehicle sustained, if any, and whether the policy covered electronic scans.

Instead of demonstrating common questions will predominate over these individual issues, Hansen merely argues these are not individual issues. Opp. 17. He is wrong and his allegations about non-GM vehicles in paragraphs 1, 15, 18, 23, 29, 34(a) should be stricken.

#### **CONCLUSION**

GEICO respectfully requests that the Court strike the Nationwide Class Allegations in paragraphs 1, 25 and 29, and strike the allegations regarding owners of non-GM vehicles in paragraphs 1, 15, 18, 23, 29, 34(a).

<sup>&</sup>lt;sup>10</sup> None of these manufacturers recommend or require that the customer or her insurer pay for a repairer to determine what repairs are necessary.

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Respectfully submitted this 1st day of March, 2018.

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