

EXHIBIT 1

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

EDMOND JOHNSTON, JR., individually and
as the representative of all persons similarly
situated,

Plaintiff,

vs.

UNITED SERVICES AUTOMOBILE
ASSOCIATION ("USAA"),

Defendant.

NO.

CLASS ACTION COMPLAINT FOR
BREACH OF CONTRACT AND FOR
VIOLATION OF THE INSURANCE FAIR
CONDUCT ACT (RCW 48.30.015(3))

COMES NOW, EDMOND JOHNSTON, JR. (hereinafter "Mr. Johnston" or "Plaintiff")
in the above styled and numbered cause and files this, his Class Action Complaint, as the
proposed Class Representative of a Class to be composed of certain insureds of UNITED
SERVICES AUTOMOBILE ASSOCIATION (hereinafter "USAA") with policies issued in the
state of Washington, and in support thereof would respectfully show the Court the following:

I. INTRODUCTION

1.1 This actions seeks to recover damages suffered by Plaintiff and the Members of
the Class, all USAA insureds within the State of Washington, as a result of
USAA's breach of its policies of insurance and violations of the Washington

CLASS ACTION COMPLAINT FOR BREACH
OF CONTRACT AND FOR VIOLATION OF THE
WASHINGTON INSURANCE CODE - 1

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1 Insurance Fair Conduct Act.

2 1.2 USAA advertised, solicited, and sold automobile insurance policies providing
3 First Party Uninsured Motorist Coverage Property Damage (UIM PD) coverage in
4 the State of Washington.

5 1.3 This coverage promises to pay for all non-excluded damages and loss the insured
6 has suffered in a covered event. Under the UIM PD coverage, USAA will pay
7 compensatory damages which the insured is legally entitled to recover. This
8 includes any loss in value (a/k/a "diminished value") under Washington Law (see
9 WPI 30.12). Diminished value, if not excluded under the policy (which USAA
10 has not done) is owed under *Moeller v. Farmers Ins. Co. of Washington*, 173 Wn.
11 2d 264, 267 P.3d 998 (2011) where the vehicle is not fully restored to its pre-loss
12 condition.

13 1.4 Plaintiff claims that, when certain automobiles-like Mr. Johnston's vehicle and
14 those within the proposed Class-sustain damage to their structural systems and
15 bodies, they cannot be repaired to their pre-accident condition and are as a result
16 tangibly different than they were pre-accident. This causes the vehicles to suffer a
17 loss in value at the time of the accident called "diminished value".

18 1.5 In certain of parts of its policies (comprehensive and collision coverages found in
19 Part D of the policy), but not the part under which Mr. Johnston sought coverage,
20 USAA has added an exclusion for diminished value. Specifically, USAA has
21 excluded diminished value in comprehensive and collision coverages when
22 policies were renewed or new policies were issued. This added language defining
23 "repair" under Part D - as not requiring "a return to the pre-loss market value of
24 the property;" and further defining the "loss" that USAA will pay for under
25 comprehensive and collision coverages "does not include any loss of use, or
26

27 CLASS ACTION COMPLAINT FOR BREACH
28 OF CONTRACT AND FOR VIOLATION OF THE
WASHINGTON INSURANCE CODE - 2

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1 diminution (hereafter "DV exclusion"). This language does not apply to UIM PD
2 in Mr. Johnston's USAA policy.

3 1.6 Thus, USAA clearly knew of loss due to diminished value and elected not to
4 exclude it on all claims.

5 1.7 On April 17, 2014, Alicia Johnston, the wife of Edmond J. Johnston, Jr.,
6 ("Johnston" or "Plaintiff"), was involved in an auto accident in Bremerton,
7 Washington, when a 2011 Toyota Prius III insured by USAA under Plaintiff's
8 policy was rear-ended by an uninsured driver. The vehicle had approximately
9 37,300 miles on it at the time of the accident. As shown by the USAA repair
10 estimate the vehicle suffered major damage to its rear body and bumper, required
11 paint and body work, and took three days to repair. The estimated cost of repair
12 was \$1,871.80. As the first repair did not address all of the problems with
13 Plaintiff's car, a second repair costing \$964.28 was necessary. USAA treated
14 Plaintiff's claim for policy benefits as a covered loss under Plaintiff's Part C -
15 Underinsured Motorist Coverage for which a deductible (\$100) applied.

16 1.8 Despite being repaired using available collision repair techniques, Plaintiff's
17 vehicle could not be fully restored to its pre-loss condition. As a result, it was
18 worth less after it was repaired than it was worth before the accident. Due to the
19 nature of the damage and the state of aftermarket body shop repair techniques,
20 Plaintiff's vehicle was tangibly and identifiably different after the accident and
21 repairs. These differences are detectible in any later inspection, and the vehicle's
22 market value has therefore been diminished.

23 1.9 Mr. Johnston's policy promised to pay for all of his "property damage" "caused by
24 and auto accident." The USAA policy defines "Property damage" as "physical
25 damage to your covered auto...." Importantly, diminished value is not excluded
26

27 CLASS ACTION COMPLAINT FOR BREACH
28 OF CONTRACT AND FOR VIOLATION OF THE
WASHINGTON INSURANCE CODE - 3

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1 from the property damage covered under USAA's "Underinsured Motorists
2 coverage."

3 1.10 However, like other members of the proposed Class, when Plaintiff presented his
4 vehicle to USAA to have property damage to his insured vehicle adjusted and
5 paid, USAA made misrepresentations and misleading statements to him about
6 diminished value, withheld valuation information from him, adjusted his claim
7 using an unreasonable standard and without conducting a reasonable
8 investigation, and attempted to settle his diminished value claim for less than the
9 amount to which a reasonable man would have believed he was entitled.

10 1.11 Specifically, when USAA informed Mr. Johnston about diminished value
11 coverage it first refused to tell him how it had calculated his loss. Later, USAA
12 attempted to mislead Mr. Johnson that the "17C formula" employed by parties to
13 a lawsuit in Georgia was an appropriate measure of his damages. USAA knew or
14 should have known that on December 1, 2008, Georgia Insurance Commissioner,
15 John Oxendine, issued a directive to all auto insurance companies doing business
16 in Georgia telling them that his office does not endorse or support the use of the
17 17C formula. He further ordered all insurance companies to stop telling
18 policyholders that the 17C formula is the last word in the determination of
19 Georgia diminished value claims.

20 1.12 The method employed by USAA is described in a letter to Plaintiff from USAA's
21 adjuster Annie K. Chambers. On information and believe, this method is the 17C
22 formula. In its quest for uniformity, USAA has chosen to evaluate diminished
23 value claims using a method that uniformly undervalues the loss in USAA's favor.
24 The information supplied by USAA about diminished value is misleading because
25 it causes the insured to believe wrongly that USAA's method is the only approved
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27 CLASS ACTION COMPLAINT FOR BREACH
28 OF CONTRACT AND FOR VIOLATION OF THE
WASHINGTON INSURANCE CODE - 4

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1 method of calculating a loss in fair market value.

2 1.13 USAA's conduct in relation to Plaintiff's diminished value claim breached its
3 contract. USAA's common course of conduct in handling diminished value
4 violates the Washington Insurance Code, RCW 48.30 *et seq.*

5 **II. JURISDICTION AND VENUE**

6 2.1 USAA transacts business in Pierce County, Washington. Venue is therefore
7 proper pursuant to RCW 4.12.025 section (1) and (3)(d) as the county in which
8 the Defendants transact business.

9 2.2 Plaintiff's individual damages are less than \$75,000 and as such, Federal diversity
10 jurisdiction does not exist.

11 2.3 If the proposed Class were to be certified, the claims asserted herein exceed the
12 minimum jurisdiction amount of this Court, but the average loss due to
13 diminished value on a per claim basis will be, on information and belief,
14 approximately \$1,460.00.

15 2.4 Given USAA's share of the Washington market for Auto: Private Passenger Auto
16 Physical Damage and the number of Class Members in the State of Washington
17 meeting the Class Definition identified by USAA in a prior case (*Busani v. USAA*,
18 Pierce County Superior Court Cause No. 99-2-08217-1), as well as class
19 membership meeting the Class definition identified by other Washington insurers,
20 on information and belief, the proposed Class will have less than 1498 claims in it
21 (using the prior settlement) or 2,726 (using other insurers numbers and adjusting
22 for market share) claims, but more than 500¹. As such, the total maximum
23 damages recoverable and sought by the Class will be at most \$3,979,960.00, and

24 _____
25 ¹
26 Some Class members may have more than one claim which qualifies for membership in the Class, so the number of
27 Class Members will be slightly smaller.

1 likely less, and therefore Federal Court Jurisdiction does not exist under 28
2 U.S.C. § 1332(d).

3 2.5 All of the Defendants are residents of, and are citizens of, Washington under 28
4 USC § 1332(c)(1) and § 1332(c)(1)(A) and (C) such that diversity does not exist.

5 2.6 Plaintiff is a citizen of Washington. All members of the proposed Class are
6 insured under policies issued in and for the State of Washington for vehicles
7 registered in the State of Washington, and as a result nearly all are Washington
8 residents and citizens. Less than one percent (1%) of the members of the
9 proposed Class will be citizens of other States, and they will then be connected to
10 Washington State via their vehicles and insurance policies. As such under 28
11 USC § 1332(d)(4)(A) and (B) no Federal jurisdiction exists under the Class
12 Action Fairness Act ("A district court shall decline to exercise jurisdiction under
13 paragraph (2) -") and this case is not removable.

14 III. THE PARTIES

15 3.1 Plaintiff, Edmond J. Johnston, Jr., is an adult citizen of Washington. At the time
16 of the accident that is the subject of this lawsuit, Mr. Johnston was insured under a
17 policy of insurance issued by USAA. That policy provided coverage for UIM PD
18 losses.

19 3.2 Defendant, United Services Automobile Association (USAA), is a Texas-based
20 Fortune 500 diversified financial services group of companies including a Texas
21 Department of Insurance regulated reciprocal inter-insurance exchange and
22 subsidiaries offering banking, investing, and insurance to people and families that
23 serve, or served, in the United States military. USAA does business throughout
24 the State of Washington.

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27 **CLASS ACTION COMPLAINT FOR BREACH
OF CONTRACT AND FOR VIOLATION OF THE
28 WASHINGTON INSURANCE CODE - 6**

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1 IV. COMMON COURSE OF CONDUCT BY USAA

2 4.1 USAA solicits and advertises for consumers to purchase First Party coverage for
3 their vehicles from itself. Washington law requires USAA to offer as a
4 supplement or a part of its First Party insurance additional "coverage for the
5 protection of persons insured thereunder who are legally entitled to recover
6 damages from owners or operators of underinsured motor vehicles...." RCW
7 48.22.030(2).

8 4.2 As noted above, the policies that USAA issued during the proposed Class period
9 promised to pay for the damages that insureds were "legally entitled to recover"
10 from an underinsured motorist. Importantly, diminished value is not excluded
11 from the property damage covered under USAA's "Underinsured Motorists
12 coverage."

13 4.3 Despite having not excluded diminished value as a loss, USAA systematically
14 fails to adjust and pay damage caused by underinsured motorists in accordance
15 with the standards set forth in the Washington Administrative Code.

16 4.4 USAA is aware of its obligations under the specific provisions of Washington
17 Administrative Code Sections § 284-30-330 and § 284-30-350. These include
18 (but are not limited to) those in § 284-30-330:

- 19 (1) Misrepresenting pertinent facts or insurance policy provisions.
20 (2) Failing to acknowledge and act reasonably promptly upon
21 communications with respect to claims arising under insurance policies.
22 (3) Failing to adopt and implement reasonable standards for the prompt
23 investigation of claims arising under insurance policies.
24 (4) Refusing to pay claims without conducting a reasonable investigation.
25 (5) Failing to affirm or deny coverage of claims within a reasonable time
26

27 CLASS ACTION COMPLAINT FOR BREACH
28 OF CONTRACT AND FOR VIOLATION OF THE
WASHINGTON INSURANCE CODE - 7

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after fully completed proof of loss documentation has been submitted.

...

(16) Failing to adopt and implement reasonable standards for the processing and payment of claims after the obligation to pay has been established.

4.5 Despite knowing its obligations and duties to its insureds, USAA has undertaken a course of conduct designed to limit payments for diminished value by failing to adjust the property damage properly, while instituting no reasonable policies and procedures to pay for damages which it knows it is required to pay to many of its policyholders.

V. CLASS ACTION ALLEGATIONS

5.1 This action is brought as a Class Action under Superior Court Civil Rule 23. USAA's conduct has been systematic and continuous and has affected large numbers of USAA policy holders over time. The Proposed Class is, on information and belief, believed to include more than 1000 insureds, but less than 2726 insureds.

5.2 Plaintiff brings this class action to secure redress for USAA's uniform and common practice of adjusting vehicle losses so that USAA fails to restore them to their pre-loss condition, including value, by leaving the vehicles with the unavoidable tangible differences after repair. USAA further uniformly has failed to inform their policyholders of their loss, and pertinent benefits and coverages under the policy while failing to fully adjust their loss. USAA's conduct has been uniform throughout the Class Period, and affected all members of the propose Class in a common and similar manner to how it affected Plaintiff.

5.3 All members of the proposed Class have fully complied with all pertinent policy

CLASS ACTION COMPLAINT FOR BREACH OF CONTRACT AND FOR VIOLATION OF THE WASHINGTON INSURANCE CODE - 8

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1 provisions to receive payment of diminished value under their policies from
2 USAA. USAA or its agents have found Underinsured Motorist Property Damage
3 coverage to apply to each member of the proposed Class's accident and have
4 found the requirements for coverage to have been fulfilled. Each member of the
5 proposed Class has presented his or her vehicle for inspection by USAA or its
6 agents to have the loss fully adjusted, and USAA or their authorized agent has
7 inspected the vehicle. No further performance is required by any member of the
8 proposed Class to secure all available coverages and benefits provided by the
9 USAA policy.

10 5.4 Plaintiff seeks certification of the following Class:

11 All USAA insureds with auto policies issued in Washington State, where
12 the insured's vehicle's damages was covered under the policy's
Underinsured Motorist coverages, and

- 13 1) the repair estimates on the vehicle (including any supplements) totaled at
14 least \$1,000;
- 15 2) the vehicle was no more than six years old (model year plus five years)
and had less than 90,000 miles on it at the time of the accident; and
- 16 3) the vehicle suffered structural (frame) damage and/or deformed sheet
17 metal and/or required body or paint work.

18 Excluded from the Class are (a) claims involving leased vehicles or total
19 losses, (b) employees of USAA, (c) the assigned judge, the judge's staff
and family, (d) underinsured motorist claims where the then in-force
20 policy had a DV exclusion, and (e) accidents occurring before July 1,
2008.

21 5.5 Membership in the Class is so numerous as to make it impractical to bring all
22 Class members before the Court. The exact number of Class members is
23 presently unknown, but can be readily determined from the records maintained by
24 USAA.

25 5.6 The named Plaintiff is typical of members of the Class. He purchased an USAA
26 automotive policy, paid his premiums, and made a claim for loss when his insured

27 CLASS ACTION COMPLAINT FOR BREACH
28 OF CONTRACT AND FOR VIOLATION OF THE
WASHINGTON INSURANCE CODE - 9

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1 automobile was damaged in an accident. Plaintiff filed a claim, and made his
2 vehicle available to USAA for determination and payment of his loss. USAA
3 and/or its authorized agents then failed to adjust the loss to include diminished
4 value and prepared an estimate for the repair of the vehicle that would result in
5 result in tangible and identifiable differences existing in the vehicle after repair
6 from its pre-loss condition.

7 5.7 There are numerous and substantial question of law and fact common to all of the
8 members of the proposed Class which predominate over any individual issues.
9 Included within the common questions of law and fact are:

- 10 (a) Whether USAA was contractually obligated to provide payment for
11 diminished value to its insureds.
- 12 (b) Whether Plaintiff and members of the proposed Class had any further
13 obligations before having their losses adjusted by USAA to include
14 diminished value.
- 15 (c) Whether USAA violated Washington Administrative Code Sections §
16 284-30-330 and § 284-30-350.
- 17 (d) Whether USAA violated RCW 48.30.015 and is therefore entitled to an
18 award of reasonable attorneys' fees and actual and statutory litigation
19 costs, including expert witness fees under RCW 48.30.015(3)
- 20 (e) Whether USAA breached its contracts of insurance with the Class by
21 failing to pay a fair measure of diminished value.
- 22 (f) The measure of damages for diminished value for the Class and its amount
- 23 (g) Whether Class members vehicles were tangibly different after an accident
24 and repair compared to before the accident, or if only "intangible"
25 differences remain after repair.

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27 CLASS ACTION COMPLAINT FOR BREACH
28 OF CONTRACT AND FOR VIOLATION OF THE
WASHINGTON INSURANCE CODE - 10

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- 1 5.8 Plaintiff has no interests adverse to the interests of other members of the proposed
2 Class, and will fairly and adequately protect the interests of the Class.
- 3 5.9 Plaintiff has retained the undersigned counsel who are experienced and competent
4 in the prosecution of class actions and complex litigation and have extensive
5 experience with litigation involving diminished value. These counsel have the
6 resources and experience necessary to prosecute this case.
- 7 5.10 A class action is superior to other available methods for the fair and efficient
8 adjudication of this controversy. Absent a class action, due to the refusal of
9 USAA to fully and fairly inform its insureds about inherent diminished value, the
10 Class members will continue to suffer damage and USAA's conduct will proceed
11 without effective remedy.
- 12 5.11 Individual members of the proposed Class have little interest or ability to
13 prosecute an individual action due to the complexities of the issues involved, the
14 costs of assembling proof of the amount of diminished value, the time required,
15 and the relatively small, although significant (on information and belief,
16 averaging around \$1,460.00 per accident in diminished value) damages suffered
17 by each member of the proposed Class.
- 18 5.12 This action will allow the orderly, fair, and expeditious administration of Class
19 claims. It will foster economics of time, effort, and expense and will ensure
20 uniformity of decisions. As with prior diminished value cases in this country,
21 collective adjudication will allow sufficient proof and expertise to be assembled to
22 fairly value and prove the losses at issue.
- 23 5.13 This action will present no difficulties which would impede its management by
24 this Court as a class action and a class action is the best available means by which
25 Plaintiff and the Members of the proposed Class can seek redress for the harm
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27 CLASS ACTION COMPLAINT FOR BREACH
28 OF CONTRACT AND FOR VIOLATION OF THE
WASHINGTON INSURANCE CODE - 11

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1 caused to them by USAA.

2 **VI. PLAINTIFF'S CLASS-WIDE CAUSES OF ACTION**

3 **COUNT I - BREACH OF CONTRACT**

4 6.1 Plaintiff realleges the allegations contained in the previous paragraphs as if fully
5 set forth herein

6 6.2 Plaintiff and members of the proposed Class entered into contracts which were
7 identical in material respects with USAA. They paid all required consideration in
8 the form of premium for the coverage afforded by the USAA policies. They
9 complied with all conditions precedent under the USAA policies and presented
10 their claims. As to each claim, before paying to repair the vehicle, USAA and/or
11 their authorized agents found Underinsured Motorist coverage to exist and to
12 apply and that all conditions precedent to payment were satisfied.

13 6.3 The Underinsured Motorist coverage of the USAA policies cover diminished
14 value. There is no exclusion or limitation for diminished value in the policies of
15 those within the proposed Class. Accordingly, USAA was obligated to cover
16 losses for diminished value on the motor vehicles it insured for Class Members.

17 6.4 USAA breached the express provisions of its policies and its contracts with
18 Plaintiff and members of the proposed Class by not restoring vehicles to their
19 pre-loss value and then not paying for the resulting diminished value on those
20 vehicles (such as those within the Class) that had, or would have, tangible
21 differences after repair.

22 6.5 As a direct and foreseeable consequence of the foregoing, Plaintiff and the
23 members of the Class have been damaged by receiving less (in the form of the
24 difference in the pre-accident value of the vehicle and its value as a vehicle
25 repaired to industry standards) than they would have received had USAA paid the
26

27 **CLASS ACTION COMPLAINT FOR BREACH**
28 **OF CONTRACT AND FOR VIOLATION OF THE**
WASHINGTON INSURANCE CODE - 12

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1 amounts Plaintiff and members of the Class has contracted for, in an amount to be
2 determined at trial.

3 **COUNT II - VIOLATION OF RCW 48.30.015(3)**

4 6.6 Plaintiff realleges the allegations contained in previous paragraphs as if fully set
5 forth herein.

6 6.7 At all relevant times, USAA was engaged in trade or commerce in the State of
7 Washington

8 6.8 USAA failed to disclose to Plaintiff and members of the proposed Class
9 information concerning its refusal to adjust and pay diminished value claims,
10 which information was in its possession during the Class period. This failure was
11 intended by USAA to induce Plaintiff and the members of the proposed Class to
12 enter into transactions they otherwise would not have entered into if the
13 information had been disclosed and to prevent them raising claims for diminished
14 value.

15 6.7 The acts and conduct of USAA constitutes unfair and/or deceptive acts and
16 practices in violation of (as detailed above) amongst other provisions Washington
17 Administrative Code Sections § 284-30-330 and § 284-30-350, and RCW
18 48.30.015

19 6.8 USAA's unlawful acts in violation of the WAC have been a proximate cause of
20 damage to Plaintiff and the members of the proposed Class in an amount to be
21 proven at trial.

22 6.9 USAA's acts entitle Plaintiff and members of the proposed Class whose claims are
23 within the applicable statute of limitations to an "award [of] reasonable attorneys'
24 fees and actual and statutory litigation costs, including expert witness fees" under
25 RCW 48.30.015(3).

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27 **CLASS ACTION COMPLAINT FOR BREACH**
OF CONTRACT AND FOR VIOLATION OF THE
28 **WASHINGTON INSURANCE CODE - 13**

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1 VII. PLAINTIFF'S CLASS-WIDE PRAYER FOR RELIEF

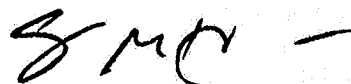
2 7.1 Plaintiff and the members of the proposed Class have been injured as a result of
3 USAA's wrongful conduct as described above. As a result, Plaintiff and the
4 members of the proposed Class are entitled to and pray for the following relief:

- 5 A. Payment of the difference between the insured vehicle's pre-loss value and
6 its projected market value as a repaired vehicle after the accident;
7 B. An "award [of] reasonable attorneys' fees and actual and statutory
8 litigation costs, including expert witness fees" under RCW 48.30.015(3)
9 C. Costs of suit;
10 D. Post-judgment interest on the judgment at the rate provided by law from
11 the date of judgment until paid;
12 E. Injunctive, equitable, and declaratory relief; and
13 F. Certification of the proposed Class.

14 WHEREFORE, THE FORGOING BEING CONSIDERED, Plaintiff respectfully
15 requests that the Court certify this case as a Class Action and that judgment be entered for the
16 Plaintiff and members of the proposed Class against USAA for the damages described above.

17 RESPECTFULLY SUBMITTED this 15th day of July, 2014.

18 Law Offices of STEPHEN M. HANSEN, P.S.

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20 _____
21 STEPHEN M. HANSEN, WSBA #15642
22 Of Attorneys for Plaintiff

23 Debra Brewer Hayes
24 (Pro hac vice to be applied for)
25 Charles Clinton Hunter
26 (Pro hac vice to be applied for)
27 The Hayes Law Firm, PC
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27 CLASS ACTION COMPLAINT FOR BREACH
28 OF CONTRACT AND FOR VIOLATION OF THE
WASHINGTON INSURANCE CODE - 14

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