The Honorable MARSHA J. PECHMAN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

ANYSA NGETHPHARAT and JAMES KELLEY; Plaintiffs, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY; Defendant.	NO. 2:20-cv-00454 MJP REPLY ISO MOTION FOR CLASS CERTIFICATION

I. SUMMARY & RESPONSE TO STATE FARM'S FACTUAL CLAIMS.

State Farm, under its duty of good faith and fair dealing, WAC §284-30-391, and Washington law, owed its insureds full payment *complying with §391* on their total loss claims. As Plaintiffs showed, the State Farm documents and the admissions from State Farm's 30(b)(6) witness Mr. Graff and claims specialist Ms. Gray [Dtk#74 at 6-11] confirm that *for every single claim in the proposed Class* State Farm followed a consistent claims practice. State Farm inspected and then declared the insured vehicle a total loss, electronically obtained an Autosource Report ("VE" in State Farm speak) *which for everyone in the Class* included an unauthorized deduction for a "typical negotiation adjustment" ("TNA"). Taking a TNA adjustment saved State Farm $1,071.31 per claim, as shown by the analysis of the sample of 150 claims (Torelli Supp. Report at ¶13; Dkt#88) requested in discovery on 8/17/20 and ordered produced by this Court on 2/8/21. Dkt#76. State Farm presents this valuation (pocketing the

Law Offices of
STEPHEN M. HANSEN, P.S.
1821 Dock Street, Suite 103
Tacoma Washington 98402
(253) 302-5955; (253) 301-1147 Fax

savings due to the TNA and unpaid tax without disclosure) orally to the insured as what State Farm will pay. The Autosource report provided only in very rare circumstances (one out 141 claims in the sample of claims, Dkt#88 at ¶22) where the insured insists.

State Farm makes a series of assertions that its common claims practice cannot be addressed under Rule 23(a)(2) (commonality) and 23(b)(3) (predominance and manageability) repeatedly using the phrase "individual issues" in a set of assertive hypothetical arguments completely divorced from the actual facts of this case. The assertions overlap, are repeated in different places, with citation to cases that have absolutely nothing to do with the issues in this matter. Plaintiffs in this reply have attempted to address each argument in a single place, rather than responding several times under each section of Rule 23.

State Farm's opposition, *without providing one example of this to the Court, let alone on a claim in the proposed Class*, starts with that it "individually" determines what it will pay. *This is contrary to the under-oath admissions of Mr. Graff* [Dkt#74 at 7-8] that: State Farm will not remove the TNA deduction, will almost never resolve the claim other than at the Autosource valuation, and will require an expensive and difficult appraisal process before paying more. That State Farm's assertions of "individual" determinations is misleading is shown by the sample of 150 claims *that State Farm fought so hard to avoid providing*: o**f the 130 claims falling within the proposed Class, 129 were paid with the TNA deduction having been taken.** Dkt#88 at ¶3-13. (Contrary to the request, State Farm included motorcycle, trailer, and RV claims on the class list, (none of these types of Autosource reports ever take a TNA), and another 11 claims were paid with Autosource reports without a TNA adjustment, and as such not in the proposed Class. As such, 130 of 150 claims were within the Class definition).

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STEPHEN M. HANSEN, P.S.
1821 Dock Street, Suite 103
Tacoma Washington 98402
(253) 302-5955; (253) 301-1147 Fax

The one exception of the 130 Class claims (#132 in the sample, Dkt#88-1) was a local economist who this Court will likely immediately recognize, and in Dr. Torelli's description from personal knowledge and the claims notes he was an "unusually perceptive and persistent insured." State Farm paid the loss based upon a higher appraisal. Dkt#88 at ¶8-9. This sample of actual claims shows *exactly what Mr. Graff admitted*: claims within the Class are paid based upon Autosource reports (with a hidden TNA deduction) with extremely rare escalation to appraisal. In these rare cases, State Farm's Mr. Graff admitted, appraisers are *not qualified, nor permitted* to address issues regarding the TNA adjustment. 4/15/21 Graff Depo. at 12:3 to 14:16, 18:16 to 20:24; Dkt#94-2. As such, the expensive individual appraisal proceedings State Farm argues for (Dkt#83 at 24) are not a viable alternative. Haggling over the TNA deduction *is not possible* in State Farm's consistent total loss claims process.

State Farm further tries to distract with descriptions of irrelevant parts of its bullpen-style claims' handling (insureds deal with multiple representatives, employees in Phoenix picks up calls or e-mail coming in from 7 states randomly, there is not an assigned Washington specific claims specialist, 4/15/21 Graff Depo. at 41:10-42:4). Yet, Plaintiffs only challenge the TNA adjustment. State Farm's multiple assertions [Dkt#83 at 1,3, 10-13, 15, 16-20, 21-24] and invented evidence [Dkt#85-1, #85-2] that the TNA adjustment is permitted, which underlays State Farm's entire argument, is simply a common predominating question of law applicable to all claims. It is also a weak set of arguments, which are at best an untimely motion for reconsideration of this Court's earlier order, (Dkt#49), denying similar arguments.

Why are these arguments so weak? *As even State Farm itself told the Office of the Insurance Commissioner ("OIC") when §391 was enacted*, adjustments beyond those expressly allowed by §391(b)(4) ("options, mileage, or condition") and §391(5) (prior payments, prior

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STEPHEN M. HANSEN, P.S.
1821 Dock Street, Suite 103
Tacoma Washington 98402
(253) 302-5955; (253) 301-1147 Fax

damage, salvage), and which are "verifiable" by the insured, are simply not allowed. That is what this Court (Dkt#49) and other Courts (e.g., Dkt#19-1 to 19-5) have already found. See #74 at 3-6. State Farm's generic allusion to "discussions" with the OIC (see Dkt#83 at 1, 3) not only fail to show that the OIC considered the TNA deduction, but the actual legislative history, *including particularly State Farm's own submission*, and the history of the regulation, show that additional adjustments to verifiable values were not only not contemplated, but it was clear to everyone, specifically State Farm, that they were not allowed. See Dkt#92 (4/22/21 Harber Report), 92-1, 95, 96-1, 96-2, 96-3. In any event, these are common questions.

This is a key difference from the "condition" adjustment challenged in *Lundquist v. First National Ins. Co. of America*, 2020 WL 6158984 (W.D. Wash. Oct. 21, 2020). The commonality issues identified by Judge Bryan, where the adjustment was expressly permitted by §391(4)(b), *and whether the adjustments were appropriate in amount was at issue*, are not present here. Plaintiffs are not quibbling with the amounts of the TNA and arguing a different amount of TNA should have been taken. The TNA being taken is both prohibited categorically by the regulation as a legal matter and how it is calculated as a factual matter violates the requirements of §391 *as to every claim in the proposed Class*. Dkt#74 at 3-5, 11-13. *See Stanikzy v. Progressive Dir. Ins. Co.*, 2020 WL 2800711, at *2 (W.D. Wa. 5/29/20) (Rothstein, J.) ("This is not a dispute over whether the calculated average of the comp vehicles' [asked to sold adjustment] should be some amount other than $1,008.70; … Instead, the gravamen of this lawsuit is whether Progressive may legally make the adjustments at all.").

This demonstrates that the legal and factual issues common to all Class Members contained in Plaintiffs' causes of action will predominate. In the context of an insurance regulation, to establish a breach, a plaintiff needs only to show that a standard set by a regulation

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STEPHEN M. HANSEN, P.S.
1821 Dock Street, Suite 103
Tacoma Washington 98402
(253) 302-5955; (253) 301-1147 Fax

applied and was not met. *Wash. Cedar & Supply Co. v. Dep't of Labor and Ind.,* 137 Wn. App. 592, 603, 154 P.3d 287 (2007). When, as here, the WAC sets up a specific procedure for carrying out, determining, and documenting actual cash value, the standards become "a part of and should be read into the insurance policy." *Touchette v. NW Mut. Ins. Co.*, 80 Wash. 2d 327, 332, 494 P.2d 479 (1972). *See also Williams v. GEICO Gen. Ins. Co.*, 2020 WL 628720 at *2 (W.D. Wa 10/27/20) (WAC is incorporated into the policy; claim was that insurer breached its policy by "failing to conduct a valuation that met the WAC's specific requirements.").

Strikingly, State Farm *devotes only two paragraphs* on the CPA, asserting (Dkt#83 at 18) that individual causation issues will predominate. This Court has ruled that Plaintiffs have a viable *per se* CPA cause of action. Dkt.#49 at 9-14. For purposes of the CPA, the determination of whether State Farm has violated WAC §391 presents a predominating legal issue. As to the Class Member's additional (i.e., non-*per se*) claims under RCW 19.86 *et seq*., the determination of whether such practices are "unfair or deceptive," Class Members need only show that this has a "capacity to deceive a substantial portion of the public" (*Panag v. Farmers Ins. Co. of Wash*., 166 Wn.2d 27, 47, 204 P.3d 885 (2009) (italics added)) which is decided as a question of law. *State v. LA Invs., LLC*, 2 Wn. App. 2d 524, 539, 410 P.3d 1183 (2018). These are legal issues common to all class members. Individual liability issues will not predominate.

Finally, to damages. Damages are to place the insured "in as good a position as he would have been had the contract not been breached." *Greer v. Nw. Nat. Ins. Co*., 109 Wn.2d 191, 202, 743 P.2d 1244 (1987); (citing 14 *G. Couch, Insurance* § 51:158 (rev. 2d ed. 1982)). Here, the measure of damages is the amount of the unauthorized TNA deduction (plus sales tax) for each insured. As Dr. Torelli shows, even State Farm's purported expert Dr. Marais admitted this standard is met in this case. Dkt#88 at ¶24-27, see also Dkt#95 at 9-12 (MTE Dr. Marais).

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STEPHEN M. HANSEN, P.S.
1821 Dock Street, Suite 103
Tacoma Washington 98402
(253) 302-5955; (253) 301-1147 Fax

As the actual sample of 150 claims shows, these damages can be determined both class wide, Dkt#88 at ¶3-13, 17-19, and can be determined individually for every Class Member in a distribution phase. *Id*. at ¶20-21.

In any event, State Farm ignores completely that it is *well-settled law* that that the possibility that class members' damages may vary, or even need to be calculated individually, or that some may not recover any damages (as e.g. in nearly every stock fraud case, going back to *Blackie v. Barrack*, 524 F.2d 891, 905 (9th Cir. 1975)) does not defeat class certification. *See* Dkt#74 at 18, 20-22. Yet, here the sample of 150 claims shows, exactly as Dr. Torellli said could be done, it is possible to calculate out damages *for each class member* using the same method used in the sample. Dkt#88 at ¶20-21. State Farm's arguments based upon complex cases where it was impossible or difficult to determine damages (Dkt#83 at 19-23) are silly. No complex damage model is necessary, just basic math and a simple review of several documents in the claims file. State Farm does not claim that it does not have the relevant files; it has them.

The reason why a sample is being suggested to accurately identify State Farm's exact liability is because it would be expensive for State Farm (which notably opposed producing any files on a cost/burden basis) to produce multiple files. The only real issues in this matter related to damages are (a) State Farm needs to produce a more accurate Class list (rather than failing to obtain data from Audatex and then either via incompetence or malevolence tossing is claims where no TNA would ever be taken, (see Dkt#88 at ¶3-5); and (b) how precise of a Class-wide damage estimate will be generated. As Dr. Torelli explains, (Exh. 88 at ¶19), a larger file production will yield tighter confidence intervals, but the numbers will not change materially. While the Court may have to address these issues if the parties cannot work them out, they are common legal issues addressing costs under FRCP 1, not a problem with calculating damages.

Law Offices of
STEPHEN M. HANSEN, P.S.
1821 Dock Street, Suite 103
Tacoma Washington 98402
(253) 302-5955; (253) 301-1147 Fax

II. REPLY ARGUMENT

A. *Rule 23(A)(2) Commonality Exists.*

State Farm's Purported "Agreed Value" Does Not Defeat Class Certification or Raise Individual, Predominating Issues. State Farm's repeated "agreed value" argument (Dkt#83 at 1, 4-6, 8-10, 12-13, 15-17) is based on a misreading of §391, which has been rejected by prior Courts. *Stier v. PEMCO*, No. 18-2-08153 at 4, 7 (Wa. Sup. Ct. 4/10/20) (noting that how often, if ever, there was an "'agreement' to use a non-§391 compliant valuation to resolve the loss" was a common issue of law and fact); Dkt#19-1.

Under §391, insurers "must adjust and settle total losses using the methods set forth" in the regulation." According to State Farm, it reached an "agreed value" with its insureds *each time* it paid for a total loss. This argument, if accepted, would render §391 meaningless: any payment would relieve State Farm from compliance with §391. No case law is cited suggesting that an insurer can violate the WAC, fail to disclose, and then profit from its violations because the unsuspecting insured "accepted" the offered payment. Tellingly, State Farm seriously misquotes the subject portion of §391 in its argument saying is reads "When an agreed value is reached" (Dkt#83 at 1:24-25). This quote is manufactured by only including the bolded and underlined words below, including no eclipse, adding a word (reflected in brackets) not found in the regulation, and then leaving out the rest. The actual wording reads as follows:

> If **[When] an agreed value** or methodology **is reached** between the claimant and the insurer using an evaluation that varies from the methods described in subsections (1) and (3) of this section, the agreement must be documented in the claim file. (Bolding added).

State Farm's manufactured language ignores the requirement that the "agreement" which must be "documented in the claim file" is (1) to use a valuation method which "varies" from §391; and (2) that that parties have actually *reached an agreement* using the non-§391 method. (E.g.,

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STEPHEN M. HANSEN, P.S.
1821 Dock Street, Suite 103
Tacoma Washington 98402
(253) 302-5955; (253) 301-1147 Fax

using a bluebook value). In any event, whether the regulation can be fundamentally rewritten as a "get out of jail free card" for State Farm presents a common legal issue.

The issue is simply hypothetical at this point: State Farm produced 150 randomly selected claim files, and not one included a documented *agreement* to use a valuation method that does not comply with §391. Nor did State Farm file such an agreement with its opposition. This utter lack of evidence is not surprising: as State Farm's 30(b)(6) Mr. Graff admitted, *when shown the language in question, he could not conceive of such a situation*: "I mean, could we have possibly reached an agreement with a customer outside of something outlined in the 391? I guess anything's possible. But, in general, I don't know why we would follow a process that's not compliant with 391." 4/15/21 Graff Depo at 81:18-23; Dkt#94-2.

As Mr. Graff further admitted, were such a situation to occur, it would not simply be noted as an agreement to accept a payment, rather the agreement to use a non-§391 compliant valuation (such as a blue book value) would be clearly documented in the file via "file notes to support something other than our typical process." *Id*. at 84:1 – 85:18.

State Farm is free, however, to show proof of any such "agreement," as well as how common they were, and if accepted by the trier of fact as cutting off damages from State Farm's WAC violation, the impact on damages of any such cases. This supports Class Certification. *Moeller v. Farmers Ins. Co. of Wa*., 173 Wn.2d 264, 279-80 (2011). Hypothetical affirmative defenses do not defeat class treatment. *True Health Chiropractic, Inc. v. McKesson Corp*., 896 F. 3d 923, 931-32 (9th Cir. 2018) (defendant has burden to show evidence to support affirmative defenses as relevant; "We are unwilling to allow such speculation and surmise to tip the decisional scales in a class certification ruling.").

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STEPHEN M. HANSEN, P.S.
1821 Dock Street, Suite 103
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(253) 302-5955; (253) 301-1147 Fax

Nor does State Farm's junk survey by Dr. Lynch, as State Farm asserts (Dkt#83 at 10) provide evidence of knowing agreements to use a non-§391 compliant valuation. Putting aside the serious methodological issues (see Plaintiffs' Motion to Exclude, Dkt#93) Dr. Lynch asked no questions regarding the typical negotiation adjustment, or §391, let alone any agreements to knowingly waive its protection.

Finally, State Farm also ignores §391's additional requirement that "[t]he insurer must take reasonable steps to ensure that the agreed value is accurate and representative of the actual cash value of a comparable motor vehicle in the principally garaged area." *Id*. Assuming that as insured *did agree* to use an alternate methodology and agreed to the value resulting from that methodology, State Farm would still be in violation of the regulation because State Farm uses an illegal discount for typical negotiation and has not "tak[en] reasonable steps" to ensure the deduction is accurate.

This case does not involve the need to prove individual vehicle's values. State Farm repeatedly argues (Dkt#83 at 10, 15) that the "fundamental liability question [is] whether each putative class member received less than "actual cash value" suggesting that this is a commonality and predominance issue. As discussed above at 3-4, and earlier (Dkt#74 at 2-5, 11-13), these assertions are not only wrong, but this Court has already rejected these arguments: in denying State Farm's motion to dismiss (Dkt#49 at 10), finding that the "specific, detailed methodologies in Section 391(2) that must be followed to determine a comparable car's 'actual cash value.'" This Court expressly rejected State Farm argument that because the general definition of "actual cash value" means "fair market value" it can apply a negotiation discount to determine the actual cash value of the comparable car. As the Court observed, "[t]his reading of the statute would render superfluous all of the detailed, mandatory requirements of Section

Law Offices of
STEPHEN M. HANSEN, P.S.
1821 Dock Street, Suite 103
Tacoma Washington 98402
(253) 302-5955; (253) 301-1147 Fax

391(2)(b) to determine the actual cash value of the loss vehicle." As this Court concluded,

> [t]o give full effect to the language of Section 391(2), the Court finds that the "actual cash value" determination must comply with the methodologies set forth in Section 391(2). This determines the "fair market value" of a comparable vehicle, which is consistent with the general definition of "actual cash value" in Section 320.

Nor is *Lundquist*, *supra*, to the contrary. It, unlike this case, involved the propriety of a "conditioning adjustment," yet, even then, in denying the insurer's MTD Judge Bryan determined that the claims at issue were linked to the legal and factual determination of whether WAC 284-30-391 allowed the deduction. *Lundquist v. First Nat. Ins. Co. of Am.*, No. 18-5301 RJB (W.D. Wa 7/9/18) ("all Plaintiff's claims rise and fall on its compliance with WAC 284-30-391").

As to class certification, *Lundquist* is inapposite. There, the court determined that Plaintiffs were required to prove the value of the comparable vehicles were reduced by condition adjustments that were not itemized and were inappropriate in dollar amounts. *Id*.; 2020 WL 6158984, at *1. Because the deduction was allowed – and the amount that was appropriate was at issue - the Court observed that "Plaintiffs would have to prove that each class member's condition adjustment was for an inappropriate dollar amount, and Defendants, in their responsive case, would have the right to present evidence that each individual class member received an appropriate determination of actual cash value." *Id*. at *2. This case does not present this problem: this Court has already determined that WAC §391 does not authorize the TNA deduction, and there is no argument that the TNA amount should be smaller or different. The argument, as multiple courts have found, is that the deduction is not permissible at all. *Above* at 4.

State Farm's made up "weighting" argument is meritless. Trying to get around this

Law Offices of
STEPHEN M. HANSEN, P.S.
1821 Dock Street, Suite 103
Tacoma Washington 98402
(253) 302-5955; (253) 301-1147 Fax

Court's November 9, 2020 ruling that §391(2) does not permit adjustments for a "typical negotiation adjustment" discount (Dkt#49) State Farm has paid between $20,000 and $30,000 to a litigation expert, who – having earlier testified repeatedly that cigarettes don't cause cancer – has basically made up out of whole cloth that State Farm is "weighting" (under §392) the comparable vehicle when it takes a TNA adjustment, and as such the deduction is permitted and must be individually assessed. As discussed more fully in the motion to exclude Dr. Marais (Dkt#95) and the response to these argument by Mr. Harber (Dkt#92) this is utter sophistry: §392 is concerned only with the information that must be included in an insurer's total loss report. Even a cursory investigation into the historical background of the regulation reveals that the term "weighting" refers to the previous requirement that comparable vehicles (i.e., multiple vehicles [plural] not a single comparable vehicle) be "weighted" by their distance from the principally garaged area of the loss vehicle. See Dkt#92.

B. ***Rule 23(B)(3) Predominance and Superiority Exist.***

The Class Definition Presents no Manageability Issues. State Farm asserts (Dkt#83 at 23) that the proposed class definition excluding insureds who "submitted written evidence supporting a different valuation" creates identification issue making a class action unmanageable. State Farm's argument is based upon either misunderstanding or misconstruing the exclusion, which requires both that the insured (a) submit a different written valuation for the vehicle, and (b) that this value was "paid by State Farm" (Dkt#74 at 2). State Farm ignores the key second part. The exclusion – which has been used in prior total loss cases, with no confusion - is designed to identify and remove any claims where the insurer *paid the claim* based upon a *written valuation of the vehicle* (i.e., not simply negotiating from the fraudulent Autosource valuation) *presented by the insured*.

Law Offices of
STEPHEN M. HANSEN, P.S.
1821 Dock Street, Suite 103
Tacoma Washington 98402
(253) 302-5955; (253) 301-1147 Fax

As Mr. Graff testified, any *possible* such claims can be identified though State Farm's TLST field – which are searchable, Dkt#74 at 9, n.16 - through being identified as paid using a valuation source of "other." 12/4/20 Graff Depo 245:3 to 247:4; Dkt#75-11. Any such payment, if one exists, would require express management authorization, and be fully documented in the claims file. *Id*. at 171:3 to 172:20. The exclusion is there to allow State Farm to identify and present any such case. Such is highly unlikely: as Mr. Graff testified, paying on something the insured submitted (let alone a written evidence of a different valuation) would be a "one-in-a-million" situation. *Id*. at 234:2

State Farm's argument ignores that this involves an *exclusion*; it is not used to determine who is *included* in the proposed class. The cases cited by State Farm (Dkt#83 at 23-24), *Morrison v. Esurance Ins. Co*., 2020 WL 583824 (W.D Wash. Feb. 6, 2020); *Wetzel v. CertainTeed Corp*., (W.D. Wash. Mar. 25, 2019), are inapposite as in each case *inclusion* in class membership could not be determined based upon the proposed class definition. In *Cover v. Windsor Surry Co*., 2017 WL 9837932, (N.D. Cal. July 24, 2017) plaintiffs could not provide the identities the class members or even estimate the class size. That is not the situation here. The exclusion allows State Farm to identify from its own records any insured who fit within the exclusion and bring them forward. Plaintiffs doubt that any exist given State Farm's claims practice, and State Farm identifies none. This is not an issue.

State Farm has failed to show Superior Alternatives. State Farms finally argues (Dkt#83 at 24) that the WAC provides "two superior alternatives" to resolving over 60,000 claims in one proceeding. Neither is. First, State Farm argues that §391 allows the insured to invoke appraisal to address the TNA deduction. This is a disingenuous argument for several reasons. First, as Mr. Graff admitted, the right of appraisal is *not* available under the UMPD coverage. 4/15/21

Law Offices of
STEPHEN M. HANSEN, P.S.
1821 Dock Street, Suite 103
Tacoma Washington 98402
(253) 302-5955; (253) 301-1147 Fax

Graff Depo. at 11:12 to 11:20; 19:10-19:25. UMPD claims are within the proposed Class. Dkt#74 at 1. Second, as discussed above at 4, Mr. Graff conceded that the determination of the appropriateness of the TNA deduction would be "separate and apart" from the appraisal process. *Id*. at 18:16 to 20:24. Third, State Farm does not explain *how* the appraisal process - which can be a "negative value" exercise most of the time, see Dkt #75-2 at ¶24, *Zinser v. Accufix Research Inst., Inc*., 253 F.3d 1180, 1190 (9th Cir. 2001), would be less costly and easier for insureds than a class action. Finally, State Farm does not explain how an insured would even *know* to challenge the TNA via appraisal when State Farm makes no disclosure of the TNA or provide the actual Autosource Report unless the insured expressly requests a copy. See above at 1-2; Dkt#74 at 8.

According to State Farm, the second "superior" alternative to a class action is reopening claims under WAC 391(6). Yet that provision is (a) only available for "thirty-five days" after payment; (b) requires the insured to not have bought a replacement vehicle; and (c) have "located a comparable vehicle" that costs more, but they did not buy. *Id*. There is no evidence that this restrictive procedure *could be met by anyone*, and in any event, any potential class members would not be able to address a TNA deduction they did not know existed via this process.

CONCLUSION

Based on the above, Plaintiffs respectfully requests the Court GRANT their motion.

RESPECTFULLY SUBMITTED this 23rd day of April 2021.

Law Offices of STEPHEN M. HANSEN, PS

STEPHEN M. HANSEN, WSBA # 15642
Of Attorneys for Plaintiffs

Law Offices of
STEPHEN M. HANSEN, P.S.
1821 Dock Street, Suite 103
Tacoma Washington 98402
(253) 302-5955; (253) 301-1147 Fax

Scott P. Nealey (admitted *pro hac vice*)
Law Office of Scott P. Nealey
315 Montgomery Street, 10th Floor
San Francisco, CA 94104
Telephone: (415) 231-5311
Facsimile: (415) 231-5313
snealey@nealeylaw.com

CERTIFICATE OF SERVICE

The undersigned certifies, under penalty of perjury under the laws of the State of Washington, that on the 23rd day of April 2021, I [X] e-mailed [ ] mailed via regular U.S. mail [ ] faxed [ ] delivered by legal messenger a true and correct copy of this document to counsel of record.

DATED this this 23rd day of April 2021, at Tacoma, Washington.

STEPHEN M. HANSEN, WSBA # 15642

Law Offices of
STEPHEN M. HANSEN, P.S.
1821 Dock Street, Suite 103
Tacoma Washington 98402
(253) 302-5955; (253) 301-1147 Fax