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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

PACIFIC BELLS, LLC; BRUNSWIKST., LLC;  
and WOW DISTRIBUTING, INC., on their own  
behalf and on behalf of similarly situated  
employers,

and

MELISSA JOHNSTON; LENA MADDEN;  
JUDI CHAPMAN; KATHERINE SOLAN;  
JOHN EDMUNDSON; and MIKE LINDBO,  
individuals on their own behalf and on behalf of  
similarly situated employees,

Class Plaintiffs,

v.

JAY INSLEE, in his capacity as Governor of the  
State of Washington; CAMI FEEK, in her  
capacity as the Commissioner and Chief  
Executive Officer of the Washington  
Employment Security Department; DONALD  
CLINTSMAN, in his capacity as the Acting  
Secretary of the Washington Department of  
Social and Health Services; and THE LONG-  
TERM SERVICES AND SUPPORTS TRUST  
FUND, an employee benefit plan,

Defendants.

No. \_\_\_\_\_

**ERISA COMPLAINT—CLASS ACTION  
COMPLAINT FOR DECLARATORY  
RELIEF, FIDUCIARY BREACH, AND  
RESTITUTION OF AMOUNTS  
WRONGFULLY WITHHELD**

Class Plaintiffs, Pacific Bells, LLC, BrunswikSt., LLC, and WOW Distributing, Inc., on  
their own behalf and on behalf of similarly situated employers, and Melissa Johnston,  
Lena Madden, Judi Chapman, Katherine Solan, John Edmundson, and Mike Lindbo, on their  
own behalf and on behalf of similarly situated employees (collectively “Plaintiffs” or “Class

1 Plaintiffs”), by their undersigned attorneys, file the following complaint against Defendants, and  
2 allege as follows:

3 **I. INTRODUCTION**

4 1.1 Beginning January 1, 2022, Washington State workers will pay \$0.58 per \$100  
5 (.58%) of earnings to the Long-Term Services and Support Trust Fund (the “Trust”) pursuant to  
6 the Long-Term Services and Support Trust Program, referred to as “WA Cares” or the “Act” and  
7 codified at RCW 50B.04, *et seq.* This action challenges the Act and requests a declaratory  
8 judgment that the Act is unenforceable as it violates ERISA and federal and state laws governing  
9 employee benefit plans and multiple employer welfare arrangements (“MEWAs”).

10 1.2 Specifically, Pacific Bells, LLC, BrunswikSt., LLC, and WOW Distributing, Inc,  
11 on their own behalf and on behalf of all others similarly situated (collectively, the “Employer  
12 Class”) and Melissa Johnston, Lena Madden, Judi Chapman, Katherine Solan, John Edmundson,  
13 and Mike Lindbo, on behalf of themselves and all similarly situated employees (collectively the  
14 “Employee Class”) bring this action against Defendants for declaratory relief that (1) WA Cares  
15 is preempted by ERISA; (2) WA Cares and its Trust constitute a MEWA as defined by ERISA,  
16 subject to both ERISA and state insurance law; (3) as a MEWA, the forfeiture provisions of WA  
17 Cares are impermissible and violate ERISA, state insurance law and the requirements of I.R.C. §  
18 7702B, which have been adopted by WA Cares; (4) employers are not required to withhold and  
19 remit a premium equal to .58% (0.0058) of wages paid to individuals in “employment” with an  
20 “employer,” as defined by RCW 50B.04.010, to the Employment Security Department of the  
21 State of Washington (“ESD”) or report any related information thereto; (5) WA Cares violates  
22 the Equal Protection Clause of the Fourteenth Amendment and the Privileges and Immunities  
23 Clause of the U.S. Constitution; (6) WA Cares Act violates the Age Discrimination in  
24 Employment Act of 1967 (“ADEA”) and the Older Workers Benefit Protection Act; (7) all  
25 provisions of RCW 50B.04, *et seq.*, are void and unenforceable because the offending provisions  
26 are not severable; and (8) the enforcement of employee benefit plan provisions that violate  
27 ERISA or other federal and state statutes constitutes a breach of Defendants’ fiduciary duty

1 under ERISA and at common law. The Employee Class also seeks restitution of their own  
2 contributions pursuant to ERISA and/or the common law governing trusts to restore their own  
3 after-tax funds that were deposited in the Trust to provide long-term care insurance on their  
4 behalf, plus earnings, increased by any ancillary expenses.

## 5 II. JURISDICTION AND VENUE

6 2.1 This Court has subject matter jurisdiction over this action pursuant to 29 U.S.C.  
7 §§ 1331 (federal question) and 1132(e)(1) (ERISA). The claims described herein are brought as  
8 a class action under Rule 23 of the Federal Rules of Civil Procedure. This Court has ancillary  
9 jurisdiction over all other related state law claims.

10 2.2 Venue is proper in the Western District of Washington pursuant to 29 U.S.C.  
11 § 1132(e)(2) as the breach took place in Washington State, Plaintiffs reside or are employed in  
12 Washington State, and one or more Defendants reside in Washington State.

13 2.3 Plaintiffs bring this action under, and the declaratory, prospective injunctive and  
14 other relief requested in this action is authorized pursuant to, 29 U.S.C. §§ 1132(a)(1)(B),  
15 1132(a)(2) and 1132(a)(3), 28 U.S.C. §§ 2201 and 2202, and 42 U.S.C. § 1983.

16 2.4 This Court has authority to award attorneys' fees and costs pursuant to 42 U.S.C.  
17 § 1988 and 29 U.S.C. § 1132(g).

## 18 III. PARTIES

19 3.1 The Employer Class. The named representatives of the Employer Class are  
20 employers based in Washington State with employees subject to WA Cares. Pacific Bells, LLC  
21 is headquartered in Vancouver, WA; WOW Distributing, Inc. is headquartered in Mukilteo, WA;  
22 and BrunswikSt., LLC is headquartered in Seattle, WA. The named representatives file this  
23 action on their behalf and on behalf of a class of all similarly situated employers. Beginning  
24 January 1, 2022, each named representative of the Employer Class will have a statutory  
25 obligation to withhold .58% of wages paid to its Washington employees and remit the withheld  
26 wages to ESD. Under the WA Cares administrative scheme, the Employer Class has  
27 administrative responsibility, makes discretionary decisions with respect to payroll withholding,

1 and acts as a statutory agent of its employees. RCW 50B.04.080. As a plan administrator  
2 maintaining the plan, fiduciary, and agent of a plan participant, the Employer Class has standing  
3 to bring a declaratory judgment action under ERISA to clarify the rights of the participants under  
4 WA Cares.

5 3.2 The Employee Class. The named representatives of the Employee Class are  
6 employees whose wages will be subject to mandatory withholding at the rate of .58% beginning  
7 January 1, 2022, pursuant to WA Cares. Melissa Johnston resides in Eagle Point, Oregon. She  
8 is an out-of-state resident whose wages will be subject to payroll withholdings under WA Cares  
9 based on her place of employment. Lena Madden resides in King County, Washington and has  
10 wages that will be subject to payroll withholdings under WA Cares. She plans to retire out of  
11 state. Judi Chapman resides in King County, Washington. She plans to retire within ten years.  
12 Katherine Solan resides in King County, Washington and has wages that will be subject to  
13 payroll withholdings under WA Cares. John Edmundson resides in King County, Washington.  
14 He has wages that will be subject to payroll withholdings under WA Cares and plans to retire  
15 within ten years. Mike Lindbo resides in Pierce County, Washington and has wages that will be  
16 subject to payroll withholdings under WA Cares. He is considering retiring out of state. None  
17 of the named individuals in the Employee Class purchased private long-term care insurance  
18 before November 1, 2021, to qualify for exemption and their wages will be subject to mandatory  
19 withholding under WA Cares, effective January 1, 2022, based on their employment for an  
20 employer in Washington State. Each named representative earned higher wages after attaining  
21 age 40. The named representatives of the Employee Class are plan participants pursuant to 29  
22 U.S.C. § 1002(7), ERISA Section 3(7), because they are subject to mandatory employee  
23 contributions under WA Cares and may be entitled to benefits in the future based on those  
24 contributions. As participants, the Employee Class members have standing pursuant to 29  
25 U.S.C. § 1332, ERISA Section 502, to clarify their rights to benefits under WA Cares. The  
26 named representatives of the Employee Class file this action on behalf of a class of similarly  
27 situated employees subject to WA Cares mandatory withholding.

1           3.3     Defendants. Defendant Jay Inslee is the Governor of the State of Washington and  
2 he is being sued in his official capacity as the executive responsible for appointing the  
3 commission members who oversee the Long-Term Services and Support Trust Fund and  
4 receiving annual reports regarding administrative expenses under WA Cares and as an ERISA  
5 fiduciary charged with sponsoring and monitoring WA Cares. Defendant Cami Feek is the  
6 Commissioner and Chief Executive Officer of ESD and she is being sued in her official capacity  
7 as the head of the state department charged with the collection and assessment of WA Cares  
8 premiums and for developing rules and educational materials for the Act and as an ERISA  
9 fiduciary charged with the administration of a welfare benefit plan. RCW 50B.04.020(4).  
10 Defendant Donald Clintsman is the acting Secretary of the Washington State Department of  
11 Social and Health Services and he is being sued solely in his official capacity as the head of the  
12 agency charged with educating employees about WA Cares and with the authority to authorize  
13 disbursements from the Trust and as an ERISA fiduciary charged with the administration of a  
14 welfare benefit plan. RCW 50B.04.020(3). The final defendant, the Long-Term Services and  
15 Support Trust Fund (the “Trust”), is a trust maintained separate and distinct from the State and  
16 its general fund. RCW 50B.04.100. The Trust is entirely funded by and holds only employee  
17 after-tax contributions and the earnings thereon. No state funds are contributed to the Trust. No  
18 state funds are used to pay the benefits under WA Cares. The Trust is the sole source of  
19 payments of benefits under WA Cares. The Trust, together with WA Cares, is an employee  
20 benefit plan within the meaning of 29 U.S.C. §§ 1002(5) and 1332(d)(1), ERISA Sections 3(5)  
21 and 502(d)(1), and is a legal entity that may be sued in federal court. It is not a governmental  
22 plan within the meaning of 29 U.S.C. § 1002(32), ERISA Section 3(32), as it is not providing  
23 benefits for only employees of the state. A substantial number of non-governmental employees  
24 will be subject to mandatory employee contributions to the Trust. The Trust is therefore a  
25 MEWA within the meaning of 29 U.S.C. § 1002(40)(A), ERISA Section 3(40)(A), subject to  
26 both ERISA and state insurance law. At all times, Defendants were acting and continue to act  
27 under color of state law and as ERISA fiduciaries.

1                   **IV. EXHAUSTION OF ADMINISTRATIVE REMEDIES**

2           4.1     Plaintiffs lack an “adequate, available or non-futile and clearly defined”  
3 administrative remedy. Specifically, there is no administrative remedy under WA Cares that  
4 would permit Plaintiffs to redress the violations alleged or obtain the relief sought herein.

5                   **V. FACTUAL ALLEGATIONS**

6           5.1     WA Cares is the nation’s first public state-operated long-term care insurance  
7 program. WA Cares provides long-term care insurance and not unemployment or disability  
8 insurance. WA Cares, which is codified at RCW Chapter 50B.04, will be funded by a .58%  
9 premium on all employee wages, beginning January 1, 2022. The premium assessment,  
10 however, is not sufficient to fund the promised benefits and the Trust through which WA Cares  
11 benefits will be paid is currently projected to be depleted by 2076.

12           5.2     Employers will be required to collect this premium assessment beginning on  
13 January 1, 2022, via after-tax payroll withholdings and must remit those premiums to ESD as  
14 part of their quarterly reporting. Employers are not required to separately contribute to WA  
15 Cares, but must remit the employee-paid premiums. Employers are also required to exercise  
16 discretion when they determine which employees are subject to the premium and must keep  
17 records of hours worked. Employers are the statutory agent of the employee for purposes of WA  
18 Cares.

19           5.3     Of significance, and unlike other state programs, there is no cap on wages subject  
20 to the premium assessment under WA Cares. All wages and remuneration, including stock-  
21 based compensation, bonuses, paid time off, and severance pay, are subject to the premium. For  
22 example, an employee with wages of \$65,000 will pay \$377 in premiums each year, while an  
23 employee with wages of \$250,000 will pay \$1,450 in premiums each year.

24           5.4     All individuals in “employment” with an “employer,” as defined by  
25 RCW 50B.04.010, will be required to pay premiums for long-term care insurance starting  
26 January 1, 2022. The exceptions are self-employed individuals, employees of the federal  
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1 government, employees of a federally recognized tribe, certain collectively bargained employees,  
2 and employees who qualify for an exemption (discussed below).

3 5.5 For purposes of WA Cares, an employee is treated as employed in Washington if  
4 the employee's service is localized in Washington or, if the service is not localized in any state,  
5 the employee performs some services in Washington and the services are directed or controlled  
6 from Washington. Out-of-state employers must collect and remit premiums for any employees  
7 that primarily work in Washington.

8 5.6 Benefits are limited to Washington State residents who have paid premiums under  
9 WA Cares for either (a) a total of ten years without interruption of five or more consecutive  
10 years, or (b) three years within the last six years from the date the application for benefits is  
11 made. In addition, to qualify for WA Cares benefits, an employee must have worked at least 500  
12 hours during each of the ten years or each of the three years, as applicable.

13 5.7 From a practical standpoint, this means that older employees who plan to retire in  
14 the next ten years will be required to pay premiums to ESD but may never qualify for the  
15 benefits. It also means that retirees who move out of Washington will not qualify for the  
16 benefits. WA Cares thereby restricts the ability of employees to travel out-of-state.

17 5.8 Benefits under WA Cares will first become available January 1, 2025. If an  
18 individual is eligible, and if the Department of Social and Health Services determines that an  
19 individual requires assistance with at least three activities of daily living, WA Cares provides  
20 benefits of up to \$100 per day, up to a maximum lifetime limit of \$36,500.

21 5.9 An employee may permanently opt out of WA Cares and all associated premiums  
22 and benefits if (a) the employee is 18 years or older on the date he or she applies for the  
23 exemption, and (b) the employee attests that he or she has other long-term care insurance, as  
24 defined in RCW 48.83.020, purchased on or before November 1, 2021.

25 5.10 WA Cares was amended in April of 2020 to require that employees must purchase  
26 long-term care insurance before November 1, 2021, to be eligible to opt out of the Act. This  
27 provided a very short window to purchase long-term care insurance. For many employees, the

1 opt-out process was illusory. Three months before the November 1 deadline, many insurance  
2 companies in Washington froze the application process. For those companies that continued to  
3 write insurance, the underwriting process would take more than 90 days. Even for those  
4 employees who were able to find insurance, the opt-out process was a Hobson's Choice—pay  
5 .58% of wages to Washington State or purchase private insurance that they previously did not  
6 want or need. Many employers were forced to adopt an ERISA long-term care plan to provide a  
7 mechanism for their employees to timely opt out.

8 5.11 To opt out of WA Cares, a qualifying employee must provide identification to  
9 verify his or her age and must apply for an exemption with ESD between October 1, 2021, and  
10 December 31, 2022. If approved, an employee's exemption will be effective for the quarter  
11 immediately following approval. Once an employee opts out, the employee cannot opt back into  
12 WA Cares, *i.e.*, the opt-out is permanent.

13 5.12 After an employee's application for exemption is processed and approved, he or  
14 she will receive an approval letter from ESD. The employee must provide this approval letter to  
15 all current and future employers. Employers must maintain copies of any approval letters  
16 received.

17 5.13 If an employee who is exempt from WA Cares fails to provide the exemption  
18 approval letter, the employer must collect and remit premiums beginning January 1, 2022. An  
19 employee will not be entitled to a refund of any premiums collected before the employee's  
20 exemption took effect or before the employee provided the approval letter to their employer.

21 5.14 If an employer deducts premiums after an employee provides the employer with  
22 the exemption approval letter, the employer must refund the deducted premiums and will be  
23 responsible for restoring the premiums to the employee. The employer is not eligible to receive  
24 a refund of the premiums from ESD.

25 5.15 Because benefits are limited to Washington State residents, employees who move  
26 out of the state will not be eligible to receive benefits under WA Cares. This provision restricts  
27

1 the ability of those that desire to receive the benefit to move or travel out-of-state, as WA Cares  
2 will also not pay out-of-state providers.

3 5.16 Self-employed individuals are exempt from WA Cares but may choose to opt in.  
4 Under the Act, self-employed individuals must elect coverage by January 1, 2025, or within  
5 three years of becoming self-employed for the first time.

6 5.17 Parties to a collective bargaining agreement in existence on October 19, 2017, are  
7 not subject to WA Cares unless and until the existing agreement is reopened and renegotiated or  
8 the existing agreement expires. Parties must notify ESD when the collective bargaining  
9 agreement becomes open.

10 5.18 WA Cares has two forfeiture provisions that are contrary to ERISA, I.R.C.  
11 § 7702B, which the state represented would control the taxation of benefits, and state insurance  
12 laws governing a MEWA. These laws prohibit the forfeiture of mandatory employee  
13 contributions without providing any benefit. WA Cares impermissibly forfeits benefits based on  
14 years of employment and place of residence.

### 15 **Factual Allegations Regarding ERISA Preemption**

16 5.19 Under 29 U.S.C. § 1002, ERISA Section 3, benefit plans are covered by ERISA if  
17 the plan provides for medical benefits and/or benefits in the event of sickness, accident, or  
18 disability. RCW 48.83.020(5) defines long-term care insurance as a policy, practice or program  
19 that provides coverage for one or more necessary or medically necessary diagnostic,  
20 preventative, therapeutic, rehabilitative, maintenance, or personal care services, provided in a  
21 setting other than an acute care unit of a hospital. Given this statutory definition and the  
22 requirement that the insured be unable to perform certain basic activities, WA Cares provides a  
23 benefit that is subject to ERISA. *Schneider v. UNUM Life Ins. Co. of America*, 149 F. Supp. 2d  
24 169 (E.D. Pa. 2001) (long-term care policy is an ERISA employee welfare plan).

25 5.20 ERISA supersedes any state laws that “relate to any employee benefit plan.”  
26 29 U.S.C. § 1144(a). The Supreme Court has identified two threads of ERISA preemption—  
27 “reference to” and “connection with” preemption. *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 96-

1 97, 103 S. Ct. 2890 (1983). A state law inappropriately makes “reference to” a plan if the law  
 2 “specifically refers” to ERISA-covered plans, *District of Columbia v. Greater Washington Bd. of*  
 3 *Trade*, 506 U.S. 125, 130, 113 S. Ct. 580 (1992), if the law acts “immediately and exclusively”  
 4 upon ERISA plans, or if the existence of ERISA plans is “essential to the law’s operation.” *Cal.*  
 5 *Div. of Labor Stds. Enforcement v. Dillingham Const., N.A., Inc.* 519 U.S. 316, 325, 117 S. Ct.  
 6 832 (1996). A state law has an impermissible “connection with” ERISA plans if it governs a  
 7 central matter of plan administration, thereby “interfer[ing] with nationally uniform plan  
 8 administration.” *Gobeille v. Liberty Mut. Ins. Co.*, 577 U.S. 312, 320, 136 S. Ct. 936 (2016).  
 9 Under either thread, the preemption provision “displace[s] all state laws that fall within its  
 10 sphere, even including state laws that are consistent with ERISA’s substantive requirements.”  
 11 *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 829, 108 S. Ct. 2182 (1988).  
 12 WA Cares is preempted under both preemption doctrines.

13 5.21 WA Cares is a state mandate for employers to provide a long-term care benefit to  
 14 employees. Because this mandate can only be satisfied with an ERISA-covered plan, ERISA  
 15 preempts the Act under “reference to” preemption.

16 5.22 The Act also has an impermissible “connection with an ERISA plan.” The Act  
 17 requires that the employer must remit premium payments to ESD by payroll withholdings, as an  
 18 agent of the employees. RCW 50B.04.080. As such, the employer must determine the wages  
 19 that are subject to the Act, which employees are subject to the Act, and whether any employees  
 20 are exempt from the Act. *Id.* Employers must also coordinate the payment of benefits under the  
 21 Act with any long-term care plan the employer maintains. The employee’s premium collection  
 22 is subject to appeal procedures adopted pursuant to RCW 50B.04.120. Such appeal procedures  
 23 are inconsistent with ERISA, which permits the employer the right to structure the employee  
 24 benefit plan and to establish claims procedures with a discretionary standard of review. Such  
 25 requirements and procedures interfere with the administration of the plan—and differing laws in  
 26 different states would interfere with the uniform administration of the plan. By performing the  
 27 acts required by WA Cares, the employer is maintaining the plan. *Medina v. Catholic Health*

1 *Initiatives*, 877 F.3d 1213, 1227 (10th Cir. 2017); *Sanzone v. Mercy Health*, 954 F.3d 1031, 1042  
2 (8th Cir. 2020); *Simas v. Quaker Fabric Corp. of Fall River*, 6 F.3d 849, 852-53 (1st Cir. 1993).

3 As such, the Act is also preempted under the “connection to” test.

4       5.23 To the extent that Defendants argue the premium withholding arrangement is  
5 instead established or maintained by a state agency, courts have found that government-  
6 sponsored employee benefit arrangements dominated by private employees are not exempt from  
7 ERISA. Granted, a governmental plan is one type of plan that is exempt from ERISA coverage.  
8 29 U.S.C. § 1003(b). However, the exemption applies only where the state established and  
9 maintained a plan for its employees, and not employees in general. Similarly, the same provision  
10 exempts from coverage Indian Tribal government plans that meet the statutory definition, but  
11 does not offer the exemption if substantially all the employees of the tribe perform commercial  
12 activities. *Alley v. Resolution Tr. Corp.*, 984 F.2d 1201, 1206 (D.C. Cir. 1993). Such an  
13 argument would erase ERISA protection for private employers if the state could require  
14 employers to maintain state-established retirement plans that only cover private employees.

15       5.24 The Act is not a payroll practice exempt from ERISA because it requires all  
16 employers to adopt a mandatory scheme, even if that scheme conflicts with the employer’s  
17 ERISA long-term care plan. No court has ever held that a mandatory program is a payroll  
18 practice exempt from ERISA. Only those programs that are voluntary or contain an opt out  
19 provision have been held to be an exempt payroll practice. 29 C.F.R. § 2510.3-2(d); *Howard*  
20 *Jarvis Taxpayers Ass’n v. California Secure Choice Ret. Sav. Program*, 997 F.3d 848 (9th Cir.  
21 2021). While the Act contains an opt-out provision, the opt-out is an illusory, one-time opt-out  
22 only during the period from October 1, 2021, through December 31, 2022, for employees 18  
23 years of age or older. The opt-out provision presents the employee with a Hobson’s Choice—  
24 pay .58% of wages to Washington State or attempt to purchase private insurance that the  
25 employee previously did not want or need. In addition, younger employees or employees  
26 employed in Washington after that date will not have the ability to opt out, making WA Cares  
27 mandatory for them. The opt-out also requires the purchase of long-term care insurance before

1 November 1, 2021. Due to the rush to opt out of this ill-conceived program and the limited  
 2 number of insurers in Washington, many employees were effectively denied the opportunity to  
 3 timely opt out, making the program mandatory for this group of employees as well. While an  
 4 opt-out program like the California Secure Choice Retirement Savings Program can be held to be  
 5 a plan established and maintained by the employee as a voluntary arrangement, a mandated plan  
 6 is clearly not a plan established by the employee. A mandatory program for employees is a plan  
 7 or program that is subject to ERISA and no court has ever held otherwise. The Act is preempted  
 8 by ERISA.

9 **Factual Allegations Regarding Violations of the Equal Protection Clause of the Fourteenth**  
 10 **Amendment, the Right to Travel, and Privileges and Immunities Clause**

11 5.25 The Fourteenth Amendment requires that “no state . . . shall deny any person  
 12 within its jurisdiction equal protection of laws.” WA Cares violates the Equal Protection  
 13 guarantees of the Fourteenth Amendment in that: (a) it charges out-of-state residents working in  
 14 the State of Washington a premium, but denies them the benefit of the premium because they  
 15 must be a state resident in order to receive benefits; (b) it restricts the fundamental right to travel,  
 16 as an individual who retires and moves out of the State of Washington will no longer receive the  
 17 benefits; (c) it charges similarly situated individuals different premiums based solely on income  
 18 and there is no compelling state interest for the difference in rate. The Privileges and Immunities  
 19 Clause, Article IV, Section 2, Clause 1 states: “[t]he Citizens of each State shall be entitled to all  
 20 Privileges and Immunities of Citizens in the several States.” U.S. Const. art. IV, § 2, cl. 1. WA  
 21 Cares violates the Privileges and Immunities Clause because it discriminates against a class of  
 22 individuals that live out of state. For example, an employee who resides in Oregon or Idaho,  
 23 works in Washington and pays the premium for at least ten years would nevertheless be denied  
 24 the benefit if not a Washington resident at the time the employee applies for benefits. A  
 25 similarly situated Washington resident would receive the benefit. The only difference between  
 26 the two classes of employees is their place of residence. There is no compelling state interest for  
 27

1 this discrimination, other than residency, in violation of the Privileges and Immunities Clause of  
2 the U.S. Constitution.

3           5.26    Durational residency requirements are subject to strict scrutiny as such  
4 requirements impede the constitutional right to travel. *Dunn v. Blumstein*, 405 U.S. 330, 92 S.  
5 Ct. 995 (1972). Exacting scrutiny is also required where the right involves a fundamental  
6 necessity, such as obtaining assistance when an individual cannot perform activities necessary  
7 for daily living. Under strict scrutiny, there is no compelling state reason for a residency  
8 requirement when the benefits provided are paid out of employee premiums and are not  
9 dependent on the state fisc.

10           5.27    WA Cares forfeits contractual insurance benefits that were paid for by the  
11 employee with after-tax dollars due to the following durational residency requirements:

12           i)       The Act requires out-of-state residents who paid for such benefit while  
13 working in Washington to forfeit the insurance that they paid for with after-tax dollars unless  
14 they abandon their state and move to Washington and remain in Washington for an indefinite  
15 period of time;

16           ii)      The Act requires in-state residents to maintain their residency in perpetuity  
17 or else forfeit the contractual benefits that they paid for with after-tax wages.

18           As the benefits paid under WA Cares are funded by premiums paid by the employee over  
19 the employee's working life and held in trust, the payment of benefits from that trust has no  
20 impact on the state fisc and, therefore, there is no compelling state interest for the forfeiture  
21 provisions.

22           5.28    Insurance premiums are generally established by health underwriting criteria,  
23 including age and health, and the insurance for which those premiums pay for is nonforfeitable.  
24 In the instant case, premiums are based solely on income, not health underwriting, and can be  
25 forfeited due to residency or failure to vest. There is no compelling state interest to justify the  
26 state's setting of premiums based on income or residency. Defendants thus violate ERISA as  
27 well as the Equal Protection and the Privileges and Immunities clauses of the Fourteenth

1 Amendment, infringe on the right to travel, and restrict access to the fundamental right to receive  
 2 essential life care when an employee cannot perform the basic functions of self-care by enforcing  
 3 WA Cares. Even if a less deferential standard of review were utilized, such as a rational basis  
 4 standard, the income and residency requirements are not rationally related to an insured premium  
 5 rate. Enforcement of such impermissible provisions is also a breach of fiduciary duty under  
 6 ERISA and at common law.

7 **Factual Allegations Regarding Violations of the ADEA and the Older Workers Benefit**  
 8 **Protection Act**

9 5.29 The Older Workers Benefit Protection Act is an amendment to the Age  
 10 Discrimination in Employment Act of 1967 (“ADEA”) and is designed to prohibit states,  
 11 employee benefit plans, and ERISA fiduciaries from discriminating on the basis of age. *Mount*  
 12 *Lemmon Fire District v. Guido*, 139 S. Ct. 22 (1980) (states are employers under the ADEA).  
 13 WA Cares, on its face, violates the ADEA. It is unlawful to discriminate on the basis of age with  
 14 respect to any employee benefit plan. 29 U.S.C. § 630(I). Any disparity in benefit costs between  
 15 older and younger workers must be justified on the cost of the benefit provided to the employee.  
 16 29 U.S.C. § 623(f)(2)(B). It is not permissible under the ADEA to base premiums provided to  
 17 older workers on income when traditional health underwriting would result in a lower premium.  
 18 Thus, Defendants’ maintenance and enforcement of WA Cares violates both the ADEA and  
 19 ERISA.

20 5.30 Under WA Cares, employees are required to pay the insurance premium  
 21 regardless of age, but those that are within ten years of retirement and who do not need  
 22 assistance with self-care within three years of retirement will be denied the benefit because  
 23 (a) the employee did not pay WA Cares premiums for ten years, and (b) at the time of the  
 24 application for benefits, the employee will not have paid the premium in three of the last six  
 25 years. The Act discriminates against employees of advanced age, denying them any benefit for  
 26 the premium paid in violation of the ADEA. It is not permissible under the ADEA to charge an  
 27 older worker within ten years of retirement a premium and then deny the employee a benefit

1 based on age. While the Act does permit a benefit to be paid if an employee both qualifies and  
 2 applies for the benefits within three years of retirement, that provision cannot justify the cost of  
 3 the forfeiture as only nine percent (9%) of long-term care assistance is provided to individuals in  
 4 their 60s according to the data gathered by the American Association for Long Term Care  
 5 Insurance in 2012.

6 5.31 Older employees, due to age and tenure, have higher wages than when they were  
 7 younger, and their premium increase is due to their tenure rather than health underwriting  
 8 requirements. The increase in premium that relates to age and tenure and not the underwriting  
 9 cost of the benefit discriminates against older workers in violation of the ADEA.

10 5.32 Under the Older Workers Benefit Protection Act, any discrimination in benefits  
 11 due to age must be justified on the basis of cost. The forfeiture of any benefit on premiums  
 12 actually paid by an older worker within ten years of retirement is not justified on the basis of cost  
 13 and violates the Older Workers Benefit Protection Act. Enforcement of such impermissible  
 14 provisions is also a fiduciary breach under ERISA and at common law.

15 **Factual Allegations Regarding MEWA Status and Violations of Insurance Law and**  
 16 **Fiduciary Duties**

17 5.33 The Trust, together with WA Cares, is an employee benefit plan within the  
 18 meaning of 29 U.S.C. §§ 1002(5) and 1332(d)(1), ERISA Sections 3(5) and 502(d)(1). It is not a  
 19 governmental plan within the meaning of 29 U.S.C. § 1002(32) as it is not providing benefits  
 20 solely for employees of the state. A substantial number of non-governmental employees are  
 21 mandatorily contributing to WA Cares. As such, the Trust, together with WA Cares, is a  
 22 MEWA, 29 U.S.C. § 1002(40(A), as defined by federal law and is subject to both ERISA and  
 23 state insurance laws and regulations.

24 5.34 Defendants have represented that the long-term care benefits paid from the Trust  
 25 will be taxed in accordance with I.R.C. § 7702B. Both I.R.C. § 7702B and state insurance law  
 26 prohibit the forfeiture of the long-term care benefits due to residency or years of service. State  
 27 insurance law also has strict underwriting requirements for insurance premiums and those

1 underwriting requirements are not based on income or residency. As a MEWA, WA Cares is  
2 operating without a certificate of authority required by RCW 48.125.020 and offering benefits  
3 not authorized by RCW 48.125.030(3), which limits MEWA offerings to health care services  
4 only. As such, the MEWA operations are not permissible in Washington State and violate state  
5 insurance law.

6 5.35 Defendants' maintenance and enforcement of WA Cares thus violates ERISA and  
7 state insurance law. Defendants, as ERISA fiduciaries, violated their ERISA fiduciary duties by  
8 administering WA Cares in violation of state and federal laws.

9 **Factual Allegations Requiring Return of the Employee Class's Own Mandatory After-Tax**  
10 **Contributions**

11 5.36 The premiums withheld from the Employee Class's paychecks are mandatory  
12 after-tax employee payments, for insurance that both Washington State and the tax code treat as  
13 employee contributions to ensure the tax-free treatment of the benefit payments.

14 5.37 These employee contributions are held in the Trust, a MEWA, and are not  
15 aggregated with Washington State's general funds. The employee contributions are held in the  
16 Trust for the sole purpose of paying for long-term care and ancillary expenses and may not be  
17 used for any other purposes. Therefore, the premiums paid by employees are not state funds and  
18 the return of the premiums does not affect the state's fiscal autonomy.

19 5.38 Upon this Court's declaration that WA Cares and the purpose of the Trust are  
20 unlawful, employees who paid mandatory after-tax contributions to Washington State are  
21 entitled to a return of such contributions, increased by any expenditure made from the Trust, and  
22 the earnings thereon, under ERISA and the general common law principles of trusts.

23 **VI. CLASS ALLEGATIONS**

24 6.1 Class Definition. Pursuant to Rule 23(b)(1), (b)(2) and (b)(3) of the Federal Rules  
25 of Civil Procedure, Plaintiffs bring this case as a class action on behalf of an Employer Class and  
26 Employee Class (the "Class") defined as follows:

27 Employer Class – All employers as defined by RCW 50B.04.010  
who are required to withhold and remit a premium equal to .58%

1 of employee wages to ESD on or after January 1, 2022, pursuant to  
2 WA Cares.

3 Employee Class – All employees as defined by RCW 50B.04.010  
4 who will have their wages reduced by .58% and remitted to ESD  
5 on or after January 1, 2022, pursuant to WA Cares.

6 6.2 Numerosity. According to data published by ESD, there are over 256,000  
7 employers in Washington State with over 3,500,000 employees. Thus, the numerosity  
8 requirement is satisfied.

9 6.3 Commonality. The claims of the Employer Class and the Employee Class both  
10 seek the same unified goals:

- 11 a. That WA Cares and the purpose of the Trust should be declared unlawful;
- 12 b. That Defendants should be prospectively enjoined from (1) requiring  
13 employers to withhold .58% of Washington employees' wages; (2) enforcing WA  
14 Cares; (3) making further expenditures from the Trust; and (4) retaining the  
15 illegally created Trust funds; and
- 16 c. That the Employee Class shall be entitled to a return of any employee  
17 contributions remitted to ESD and held in Trust pursuant to WA Cares, including  
18 any expenditures from the Trust, plus the earnings thereon.

19 Common questions of law and fact exist as to all members of the Class and predominate over  
20 any questions solely affecting individual members of the Class because all individual differences  
21 still lead to the same unified results, a declaration that WA Cares is invalid.

22 6.4 Typicality. The claims of the representative Plaintiffs are typical of the claims of  
23 the Class. Plaintiffs' claims, like the claims of the Class, arise from WA Cares and the goal to  
24 have the Act declared unlawful and unenforceable.

25 6.5 Adequacy. Plaintiffs will fairly and adequately protect the interests of the Class.  
26 Plaintiffs have retained competent and capable attorneys who are experienced trial lawyers with  
27 significant experience in complex and class action litigation. Plaintiffs and counsel are  
committed to prosecuting this action vigorously on behalf of the Class and have the financial

1 resources to do so. Neither Plaintiffs nor their counsel has interests that are contrary to or that  
2 conflict with those of the proposed Class.

3       6.6     Predominance. Defendants have engaged in a common course of conduct toward  
4 Plaintiffs and members of the Class. The common issues arising from this conduct that affect  
5 Plaintiffs and members of the Class predominate over any individual issues. Adjudication of  
6 these common issues in a single action has important and desirable advantages of judicial  
7 economy, and class action treatment is superior to the other available methods for the fair and  
8 efficient adjudication of this controversy.

9       6.7     Superiority. Plaintiffs and Class members will suffer and will continue to suffer  
10 harm and damages as a result of Defendants' unlawful collection of .58% of wages. Absent a  
11 class action, however, most Class members likely would find the cost of litigating their claims  
12 prohibitive. Class treatment is superior to multiple individual suits or piecemeal litigation  
13 because it conserves judicial resources, promotes consistency and efficiency of adjudication,  
14 provides a forum for small claimants, and deters illegal activities. Plaintiffs and their counsel are  
15 unaware of any litigation that has already commenced concerning Defendants' actions. There  
16 will be no significant difficulty in the management of this case as a class action. The Class  
17 members who have amounts withheld will be readily identified by the records of ESD. Because  
18 the amounts withheld will be held in trust, the amounts to be restored to each Class member, and  
19 the earnings thereon, are readily determinable and are readily identifiable from Defendants'  
20 records.

21       6.8     Appropriateness of Declaratory Relief. Defendants have acted on grounds  
22 generally applicable to the Class, thereby making declaratory relief appropriate with respect to  
23 the Class as a whole. Furthermore, the prosecution of separate actions by individual members of  
24 the Class would create a risk of inconsistent or varying adjudications with respect to individual  
25 members of the Class that would establish incompatible standards of conduct for Defendants.

**VII. CLAIMS FOR RELIEF**

**First Claim for Relief – ERISA Preemption**

7.1 Plaintiffs reallege and incorporate by reference each and every allegation set forth in the preceding paragraphs.

7.2 Plaintiffs seek a declaration that WA Cares is preempted by ERISA.

**Second Claim for Relief – Violations of U.S. Constitution and ERISA**

7.3 Plaintiffs reallege and incorporate by reference each and every allegation set forth in the preceding paragraphs.

7.4 Plaintiffs seek a declaration that WA Cares violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, the right to travel, the Privileges and Immunities Clause, and ERISA and the enforcement of such impermissible provisions is a fiduciary breach under ERISA and common law.

**Third Claim for Relief – Violations of ADEA, OWBPA, and ERISA**

7.5 Plaintiffs reallege and incorporate by reference each and every allegation set forth in the preceding paragraphs.

7.6 Plaintiffs seek a declaration that WA Cares violates the ADEA, the Older Workers Benefit Protection Act, and ERISA and the enforcement of such impermissible provisions is a fiduciary breach under ERISA and common law

**Fourth Claim for Relief – Violations of ERISA, Fiduciary Duties, and Insurance Law**

7.7 Plaintiffs reallege and incorporate by reference each and every allegation set forth in the preceding paragraphs.

7.8 Plaintiffs seek a declaration that WA Cares and the Trust are a MEWA as defined by ERISA, that the MEWA is operating without a certificate of authority and is providing benefits not authorized by Washington law and that the forfeiture provisions, the offering of impermissible benefits, and setting of premiums based on income violate ERISA, Defendants' fiduciary duties under ERISA and at common law, and insurance law.

**Fifth Claim for Relief –Restitution**

7.9 Plaintiffs reallege and incorporate by reference each and every allegation set forth in the preceding paragraphs.

7.10 After declaratory and injunctive relief are granted, the Employee Class seeks the return of all their own after-tax premiums that were deposited in the Trust, including any Trust expenditures for ancillary expenses, and the earnings thereon, as these assets are the employees’ own assets and not the assets of the state and are to be returned to the employees under ERISA as well as the common law of trusts.

**VIII. PRAYER FOR RELIEF**

Wherefore, Plaintiffs pray for judgment against Defendants as follows:

A. Certification of the proposed Class pursuant to Rule 23(b)(1) or (b)(2) or, in the alternative, Rule (b)(3) of the Federal Rules of Civil Procedure.

B. Appoint the undersigned counsel as Class counsel.

C. Appoint Pacific Bells, LLC, BrunswikSt., LLC, and WOW Distributing, Inc as class representatives for the Employer Class and Melissa Johnston, Lena Madden, Judi Chapman, Katherine Solan, John Edmundson, and Mike Lindbo as class representatives for the Employee Class and award compensation to the class representatives.

D. Declare that WA Cares is unlawful and unenforceable under ERISA, federal, and state law. In addition, if any provision of the Act is unenforceable, declare that the entire Act is unenforceable as the Act’s provisions are not severability and the validity of every provision of the Act is necessary to fund the required benefits.

E. Prospectively enjoin Defendants from (1) collecting the payroll premium of .58% from employee wages; (2) enforcing WA Cares; (3) making further expenditures from the Trust; and (4) retaining the illegally created Trust funds.

F. Return the Employee Class their premiums paid to the Trust, any expenditures from the Trust, and the earnings thereon.

1 G. Declare that Defendants are financially responsible for notifying Class members  
2 of their wrongful conduct and the return of any amounts withheld and the earnings thereon.

3 H. Award attorneys' fees and costs pursuant to 42 U.S.C. § 1988 and 29 U.S.C.  
4 § 1132(g). In addition, attorneys' fees shall be awarded pursuant to a common fund created by  
5 the return of premiums and associated earnings to the Employee Class.

6 I. Grant such other relief as this Court deems necessary, just, and proper.

7 DATED this 9<sup>th</sup> day of November, 2021.

8 DAVIS WRIGHT TREMAINE LLP  
9 *Attorneys for Pacific Bells, LLC, BrunswikSt.,*  
10 *LLC, and WOW Distributing, Inc, and Melissa*  
11 *Johnston, Lena Madden, Judi Chapman,*  
12 *Katherine Solan, John Edmundson, and Mike*  
13 *Lindbo, as well as the Employer and Employee*  
14 *Class*

15 By /s/ Richard J. Birmingham  
16 Richard J. Birmingham, WSBA #8685  
17 920 Fifth Avenue, Suite 3300  
18 Seattle, WA 98104-1610  
19 Telephone: 206.622.3150  
20 Fax: 206.757.7700  
21 Email: richardbirmingham@dwt.com

22 By /s/ Christine Hawkins  
23 Christine Hawkins, WSBA#44972  
24 929 108<sup>th</sup> Avenue NE, Suite 1500  
25 Bellevue, WA 98004-4786  
26 Telephone: 425.646.6100  
27 Fax: 425.646.6199  
Email: christinehawkins@dwt.com