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**CERTIFICATION FROM
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT IN**

QUEEN ANNE PARK HOMEOWNERS ASSOCIATION,
a Washington non-profit corporation

Plaintiff-Appellant,

v.

STATE FARM FIRE AND CASUALTY COMPANY,
a foreign insurance company,

Defendant-Appellee

Washington Supreme Court No. 90651-3
U.S. Court of Appeals for the Ninth Circuit No. 12-36021

PLAINTIFF-APPELLANT'S REPLY BRIEF

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ORIGINAL

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I. INTRODUCTION

The fundamental question in this case is whether the undefined term “collapse” is ambiguous—*i.e.*, susceptible to more than one reasonable interpretation—and if so, whether “substantial impairment of structural integrity” is one of those reasonable interpretations. State Farm’s brief in this case proffers at least eight different definitions of “collapse,” so the word is undisputedly ambiguous.

Thus, the only real dispute is whether “substantial impairment of structural integrity” is also a reasonable interpretation. The dictionary demonstrates it is. As Justice Stephens recognized in *Sprague v. Safeco Ins. Co. of Am.*, 174 Wn.2d 524, 534, 276 P.3d 1270 (2012), the phraseology may be different, but “substantial impairment of structural integrity” is consistent with the dictionary definition, “a breakdown of vital strength.” *See also, e.g., Am. Concept Ins. Co. v. Jones*, 935 F. Supp. 1220, 1227-28 (D. Utah 1996) (“[S]ome of the dictionary definitions of collapse . . . include definitions such as ‘a breakdown in vital energy, strength, or stamina[,]’ . . . which suggest that the term ‘collapse’ is ‘fairly susceptible’ to an interpretation that it means a substantial impairment of structural integrity.”).

The holdings of numerous courts also show that this is a reasonable interpretation. The nature of the damage in those cases may or may not have been different. But the facts in those cases would not change the significance of their holdings: scores of judges have considered the purely legal question of whether “collapse” in an insurance policy can reasonably be interpreted as “substantial impairment of structural integrity” and concluded that it can.

But perhaps most importantly, State Farm itself has repeatedly interpreted “collapse” as “substantial impairment of structural integrity.” *See Mercer Place Condo. Ass’n v. State Farm Fire & Cas. Co.*, 104 Wn. App. 597, 602, 17 P.3d 626 (2000); ER 93. State Farm claims the facts in those cases were different, and that *Mercer Place* is not a holding. True, but that does not affect

the key point: State Farm has at times chosen to interpret “collapse”—a word that State Farm wrote in the Association’s Policies—as “substantial impairment of structural integrity.” The Association respectfully submits that if the insurer that drafted the Policies thinks “collapse” means “substantial impairment of structural integrity,” then no one could say that this is not *a* reasonable interpretation. This Court should therefore adopt that interpretation also. *See Dairyland Ins. Co. v. Ward*, 83 Wn.2d 353, 358, 517 P.2d 966 (1974) (“It is Hornbook law that where a clause in an insurance policy is ambiguous, the meaning and construction most favorable to the insured must be applied . . .”).

II. ARGUMENT

A. “Collapse” Is Ambiguous Because It Is Susceptible to More than One *Reasonable* Interpretation

The parties agree that an undefined term in an insurance policy is ambiguous if it is susceptible to more than one reasonable interpretation.¹ That said, State Farm appears to contend that “collapse” is not ambiguous. *See Brief of Appellee*, at 16. The multiple definitions it offers up demonstrate otherwise. For example, State Farm contends at page six of its brief that “collapse” can mean either “a structure’s significant falling or caving” or “imminent falling or caving or similar damage.” *Brief of Appellee*, at 6-7. But then at page 18, the insurer argues an average purchaser would understand “collapse” to mean either “rubble-on-the ground” or “a significant falling or caving in that does not reach the ground.” *Brief of Appellee*, at 18. At page 28, State Farm offers yet another definition: “some type of falling down or caving in or tipping or leaning,

¹ *See Brief of Appellee*, at 14; *see also Holden v. Farmers Ins. Co. of Wash.*, 169 Wn.2d 750, 756, 239 P.3d 344 (2010) (“A term will be deemed ambiguous if it is susceptible to more than one reasonable interpretation.”). Contrary to the implication at page 34 of State Farm’s brief, the Association has never claimed that “collapse” is ambiguous simply because it has multiple dictionary definitions; the word is ambiguous because it has more than one *reasonable* definition.

or a dangerous condition indicating that such a structural deformation was imminent”—“STFDCITLDCISSDI,” apparently, as opposed to “SISI.” *Brief of Appellee*, at 28-29. Elsewhere State Farm argues that “actual collapse,” “imminent collapse,” and “[i]mminent actual collapse” are reasonable interpretations. *See Brief of Appellee*, at 20, 38.

Setting aside the fact that these latter “definitions” are uselessly tautological—the labels “actual collapse” and “imminent collapse”² make sense only if one first determines what the word “collapse” means—they nevertheless show that State Farm itself believes “collapse” has more than one reasonable interpretation. Thus, whether or not State Farm agrees that “substantial impairment of structural integrity” is one of those reasonable interpretations, it is undisputed that “collapse” is ambiguous.

B. “Substantial Impairment of Structural Integrity” Is One Reasonable Interpretation of “Collapse”

The key issue then is whether “substantial impairment of structural integrity” is a reasonable interpretation of “collapse.” The dictionary, cases from other jurisdictions, and State Farm’s own conduct all demonstrate that it is.

1. The dictionary shows that “the average purchaser” could reasonably interpret “collapse” as “substantial impairment of structural integrity”

State Farm contends that “substantial impairment of structural integrity” is not a reasonable interpretation because the “average purchaser of insurance” would supposedly “never think it means ‘collapse.’” *Brief of Appellee*, at 7. According to State Farm, this is true because, well, State Farm says so: “Even knowing the gypsum/plywood sheathing was decayed, the average

² The “imminent collapse” standard also makes no sense because the Policies say “collapse,” not “imminent collapse.” No one would claim that a policy covering “fire” covers “imminent fire”—either damage from fire exists or it does not. Here, coverage exists for “substantial impairment of structural integrity” because “collapse” can reasonably mean that, not because the Policies cover the precursors to something else.

insurance purchaser would not think the [Association's] buildings have collapsed, let alone 16 years ago³ when the last State Farm policy was in effect." See *Brief of Appellee*, at 11.

But this Court has never relied on that kind of *ipse dixit* in deciding what an "average purchaser" would think. The whole point of the *Boeing*⁴ rule is that insurance companies (and lawyers) cannot really know what an "average purchaser" would think—so courts look to standard English dictionaries to figure that out. See, e.g., *Queen City Farms, Inc. v. Cent. Nat'l Ins. Co. of Omaha*, 126 Wn.2d 50, 77, 882 P.2d 703 (1994) (undefined terms "are to be interpreted in accord with the understanding of the average purchaser of insurance, and the terms are to be given their plain, ordinary and popular meaning. That meaning may be ascertained by reference to standard English dictionaries.").

When State Farm does finally address the *Boeing* rule, it claims that "substantial impairment of structural integrity" is not a reasonable interpretation because "[a] building cannot suffer a breakdown of vital energy, strength, or stamina." *Appellee's Brief*, at 18 (emphasis added). Yet according to the Association's engineer, that is exactly what happened here—parts of the Association's Buildings lost vital strength in that their structural elements became substantially impaired. "Vital" and "substantial" are synonymous—both mean variations of "important."⁵ Thus, the record establishes that the Buildings lost "substantial" (*i.e.*, "vital") "structural integrity" (*i.e.*, "strength") as a result of "hidden decay." See ER 120-21. Conversely, "hidden decay" that

³ The Association was able to assert a claim under policies that pre-dated when it discovered the damage because the Policies simply require proof that the damage "commenc[ed] during the policy period." See ER 152; see also *Ellis Court Apartments P'ship v. State Farm Fire & Cas. Co.*, 117 Wn. App. 807, 810 72 P.3d 1086 (2003) (policy covers damage commencing during policy period, regardless of date of discovery).

⁴ *Boeing Co. v. Aetna Cas. and Sur. Co.*, 113 Wn.2d 869, 784 P.2d 507 (1990) (courts should look to "standard English language dictionaries" to give undefined policy terms their "plain, ordinary, and popular" meaning).

⁵ See APPENDIX A, *Webster's Third New International Dictionary* 2280 (2002) (defining "substantial" as "important, essential"); 2558 (defining "vital" as "of the utmost importance").

has not risen to the level of “a breakdown of vital . . . strength” would not constitute “substantial impairment of structural integrity” (as opposed to, for example, a *non*-substantial impairment of structural integrity, or a substantial impairment of *non*-structural elements).⁶

2. *Decisions from other courts demonstrate that “substantial impairment of structural integrity” is one reasonable interpretation of “collapse”*

Cases from other jurisdictions also demonstrate that the dictionary supports the Association’s interpretation. In *Am. Concept Ins. Co. v. Jones*, 935 F. Supp. 1220 (D. Utah 1996), for example, the court held that “collapse” means “substantial impairment of structural integrity” in part because the dictionary shows this is a reasonable interpretation:

The court concludes that Utah would likely follow the modern trend for a number of reasons: . . . (3) some of the dictionary definitions of collapse, discussed by the cases listed above, include definitions such as “a breakdown in vital energy, strength, or stamina” and “sudden loss of accustomed abilities,” which suggest that the term “collapse” is “fairly susceptible” to an interpretation that it means a substantial impairment of structural integrity

The court concludes that Utah courts would find American’s collapse coverage provision ambiguous at best and, thus, construe the policy in favor of the Joneses. Accordingly, the Joneses need only show that there is an issue of material fact regarding whether their home “or any part of” their home sustained substantial impairment to its structural integrity.

Jones, 935 F. Supp. at 1227-28.

The court in *Beach v. Middlesex Mut. Assur. Co.*, 532 A.2d 1297 (Conn. 1987), drew essentially the same conclusion:

A “collapse” is [in the dictionary] defined as “a breakdown in vital energy, strength, or stamina: complete sudden enervation: sudden loss of accustomed abilities . . . an abnormal falling together of the walls of an organ” *Webster, Third New*

⁶ State Farm seems to also contend that “collapse” means “caving or fallen in” simply because some dictionaries do not include “a breakdown of vital . . . strength” as a definition. *See Brief of Appellee*, at 11-12. But this Court has never held that *every* dictionary must support the policyholder’s interpretation. If a word has more than one reasonable dictionary definition, then the court must construe that ambiguity in favor of the insured. *See, e.g., Dairyland*, 83 Wn.2d at 358. That means pick the definition that favors coverage, whether that definition is one of many in a single dictionary, or one in multiple dictionaries. To hold otherwise—to say that “collapse” means “a breakdown of vital . . . strength” only if *every* dictionary definition says that—would turn the rule on its head.

International Dictionary. This definition does not definitively support the [insurer's] narrow reading. Although "collapse" encompasses a catastrophic breakdown, as the [insurer] argues, it also includes a breakdown or loss of structural strength, as the [policyholders] maintain. If the [insurer] wished to rely on a single facial meaning of the term "collapse" as used in its policy, it had the opportunity expressly to define the term to provide for the limited usage it now claims to have intended. As presently drafted, "collapse" is not on its face unambiguous.

Beach, 532 A.2d at 1299-1300.

As the court explained in *Rankin ex rel. Rankin v. Generali-U.S. Branch*, 986 S.W.2d 237 (Tenn. Ct. App. 1998), the fact that "substantial impairment of structural integrity" comports with a reasonable dictionary definition of "collapse" is one of the primary reasons that it represents "the majority view":

In [*Jones*, 935 F. Supp. 1220], the Court summarized several policies underlying the majority view: . . . (3) some dictionary definitions of "collapse" suggest that the term means a substantial impairment of the structure's integrity . . .

This analysis is persuasive.

Rankin, 986 S.W.2d at 238-39 (citations omitted).

The *reasoning* in these non-Washington cases also demonstrates that "substantial impairment of structural integrity" is one reasonable way to interpret "collapse." Forty-plus judges around the country have considered this issue and decided that a policyholder could reasonably understand the undefined term "collapse" to mean "substantial impairment of structural integrity."

Nevertheless, State Farm takes issue with the Association's assertion that "unless . . . these other judges who interpreted "collapse" as [substantial impairment of structural integrity] did so *unreasonably*, then . . . [this Court] must also adopt that definition." *See Brief of Appellee*, at 15. This is wrong, State Farm contends, because "[t]his Court has *always* maintained its independent right to determine whether a term is ambiguous." *Brief of Appellee*, at 15.

The Association never said otherwise—and State Farm is missing the point. A term is ambiguous if it has more than one reasonable interpretation. Either "collapse" has more than one

reasonable interpretation (and is therefore ambiguous) or it does not; there is no middle ground. Thus, if this Court agrees with the 40-plus judges who have decided that one reasonable interpretation of “collapse” is “substantial impairment of structural integrity,” then according to cases like *Dairyland*, this Court “must” also adopt that interpretation. *See Dairyland*, 83 Wn.2d at 358 (where term is ambiguous, construction most favorable to the insured “must be applied”). Conversely, this Court could reject the “substantial impairment of structural integrity” interpretation, according to *Dairyland*, only if the Court were to first conclude that this is not a reasonable interpretation, *i.e.*, that the 40-plus judges who interpreted “collapse” as “substantial impairment of structural integrity” did not do so reasonably. That deduction flows from the definition of “ambiguous” and the holding in cases like *Dairyland*; it does mean the Court has lost its “independent right” to determine anything.

State Farm also claims that some of the Association’s non-Washington cases are distinguishable because they involved policies with the phrase “risks of,” which State Farm’s omit. But the phrase “risks of” does not enlarge the scope of coverage: “[I]t would make no sense to cover an event which creates a risk of physical damage if physical damage was not a triggering event for coverage. . . . It is impossible to read the insurance policy as providing coverage for ‘risk’ in the absence of a ‘damage.’” *Tocci Bldg. Corp. v. Zurich Am. Ins. Co.*, 659 F. Supp. 2d 251, 259 (D. Mass. 2009). Rather, the phrase simply confirms the “aleatory” nature of an insurance contract—*i.e.*, that the insurer is underwriting risk, as opposed to certainty. *See, e.g., Homeward Bound Servs., Inc. v. Office of Ins. Comm’r*, 724 N.W.2d 380, 388-89 (Wis. 2006) (“‘Risk,’ in this context, conveys the concept that there is an uncertainty about the loss occurring; this uncertainty is substantially the same concept that is conveyed with the words ‘contingent’ or ‘fortuitous.’”). Thus, if including “risk of” does not enlarge coverage, then the corollary must also be true—

omitting the phrase cannot reduce coverage. Consistent with that, numerous courts have interpreted “collapse” as “substantial impairment of structural integrity” where the policy did *not* include the phrase “risks of.” *See, e.g., Jones*, 935 F. Supp. at 1225 (policy insuring “direct physical loss . . . involving collapse” covered “substantial impairment of structural integrity”); *Beach*, 532 A.2d at 1299-1300 (word “collapse” could reasonably be interpreted as “a breakdown or loss of structural strength”); *Indiana Ins. Co. v. Liaskos*, 697 N.E.2d 398, 400-05 (Ill. App. Ct. 1998) (where policy covered “loss caused by the collapse,” “substantial impairment to the structural integrity of a building comes within the dictionary definition of the term ‘collapse’”).

Finally, State Farm tries to distinguish the Association’s non-Washington cases—the ones establishing “the broader and so-called modern definition, which is followed by a majority of jurisdictions”⁷—on factual grounds. Pointing to some blurry pictures photocopied into its brief, State Farm claims the Association’s Buildings could not have been in a state of “collapse” during State Farm’s policy periods because, according to State Farm, they are still “straight and true.” *Brief of Appellee*, at 14. Elsewhere State Farm says things like, “This case is not like most other collapse coverage cases” and, “[S]ubstantial impairment of structural integrity is not nearly as broad as the [Association] suggests it is.” *Brief of Appellee*, at 7, 23.

These arguments are misplaced for several reasons.

First, the question before this Court is a purely legal one. *See, e.g., Bradburn v. N. Cent. Reg’l Library Dist.*, 168 Wn.2d 789, 799, 231 P.3d 166 (2010) (“Certified questions from federal court are questions of law”); *Overton v. Consol. Ins. Co.*, 145 Wn.2d 417, 424, 38 P.3d 322 (2002) (“Interpretation of insurance policies is a question of law”). Moreover, because this

⁷ *Monroe Guar. Ins. Co. v. Magwerks Corp.*, 829 N.E.2d 968, 972-73 (Ind. 2005) (“[T]he broader and so-called modern definition, which is followed by a majority of jurisdictions, defines ‘collapse’ as a ‘substantial impairment of the structural integrity of the building or any part of a building.’”).

case was on appeal from a summary judgment, any facts in dispute would have to be construed in favor of the Association anyway. *See, e.g., Bldg. Serv. 32B-J Health Fund v. McCaffree*, 225 F. App'x 25, 26 (2nd Cir. 2007) (circuit courts “review *de novo*” a district court’s grant of summary judgment and “construe all evidence and draw all reasonable inferences in appellants’ favor”). Consistent with that—and contrary to what State Farm implies—the Association is not seeking a ruling that the Policies actually cover the Association’s loss (as opposed to a ruling about what the Policies cover). *See Brief of Appellee*, at 7 (arguing Court should not “expand ‘collapse’ to include these building . . .”). If State Farm believes that the Association’s Buildings were not actually in a state of “substantial impairment of structural integrity” during State Farm’s policy periods because, for example, State Farm thinks the Buildings are “straight and true,” then State Farm can make that factual argument on remand.

Second, State Farm is ignoring that these other courts *held* “collapse” can reasonably be interpreted as “substantial impairment of structural integrity.” The nature of the damage in *Jones* may or may not have been different than here. *See Brief of Appellee*, at 24 (arguing damage in *Jones* was broader because “[r]epairs were required to ‘render [the house] habitable and safe for occupancy’”) (emphasis omitted). Regardless, the *Jones* court decided that because the dictionary demonstrates one reasonable interpretation of “collapse” is “substantial impairment of structural integrity,” then that is all a policyholder must establish: “[T]he Joneses need only show that there is an issue of material fact regarding whether their home ‘or any part of’ their home sustained substantial impairment to its structural integrity.” *Jones*, 935 F. Supp. at 1228. Many facts in these non-Washington cases were presumably different. They may have involved houses, as opposed to condominiums. That does not change the fact that when faced with the exact legal issue here—how to interpret the undefined term “collapse”—these courts *held* the word can

reasonably mean “substantial impairment of structural integrity.” *Cf. Boeing*, 113 Wn.2d at 883 (“[I]t would be incongruous for the court to apply different rules of construction based on the policyholder because once the court construes the standard form coverage clause as a matter of law, the court’s construction will bind policyholders throughout the state . . .”).

Third, the record contains no evidence to support State Farm’s factual allegations. No document states that the Association’s Buildings are in fact “straight and true” (much less that every “part of” them is). No engineer testified that the “substantial impairment of structural integrity” identified by the Association’s engineer is “not nearly as broad” as the “substantial impairment of structural integrity” in other cases. Likewise, the record contains no evidence that structural damage to “lateral” building elements is materially different from structural damage to a building’s “vertical” elements.⁸ The only fact relevant to the purely legal question before this Court is: according to the Association’s engineer, “hidden decay” did in fact cause “substantial impairment of structural integrity” to part of the Association’s Buildings while State Farm insured them. *See* ER 122. *Why* that impairment exists—or whether a jury will ultimately agree that it exists—are fact issues for trial.

3. *State Farm’s own conduct demonstrates that “substantial impairment of structural integrity” is one reasonable way to interpret “collapse”*

State Farm’s own conduct also demonstrates that “substantial impairment of structural integrity” is *a* reasonable interpretation of “collapse.” State Farm applied that definition both in

⁸ State Farm cites ER 91, ER 121, and *KPFF, Inc. v. California Union Ins. Co.*, 66 Cal. Rptr. 2d 36, 39 (Cal. Ct. App. 1997), to support its claim that “lateral system failure” is different because it is “caused by forces like wind or earthquake.” *Brief of Appellee*, at 3. ER 91 is a letter from an adjuster, who is obviously unqualified to opine about structural engineering. ER 121 does not even mention “wind” or “earthquake,” and *KPFF* says nothing about what causes “lateral system failure.”

Mercer Place and while investigating other “collapse” claims. *See Mercer Place*, 104 Wn. App. at 602; ER 93.

State Farm claims that these other cases are irrelevant because it “used ‘substantial impairment of structural integrity’ only for vertical load,” and because the meaning of collapse was “not at issue” in *Mercer Place*. *Brief of Appellee*, at 39-40. State Farm again misses the point. The issue in this case is whether “substantial impairment of structural integrity” is a reasonable way to interpret “collapse.” State Farm’s past conduct shows that it is—because State Farm itself has previously equated the word “collapse” with “substantial impairment of structural integrity.” State Farm may disagree that the damage in this particular case has risen to the level of “substantial impairment of structural integrity” (because, for example, the damage is to certain kinds of structural elements and not others). But that does not affect the impact of State Farm’s past conduct: the fact that State Farm itself has previously equated “collapse” with “substantial impairment of structural integrity” shows the latter is a reasonable interpretation of that policy term.

State Farm’s argument about *Mercer Place* is equally unavailing. *Mercer Place* is significant not because the Court of Appeals *held* “collapse” means “substantial impairment of structural integrity.” Rather, the case is significant because it discloses that State Farm has previously interpreted “collapse” as “substantial impairment of structural integrity,” thus demonstrating the reasonableness of that interpretation. *Mercer Place* could be a newspaper article and it would convey the same point.

State Farm’s attempt to distinguish *Lynott v. Nat’l Union Fire Ins. Co.*, 123 Wn.2d 678, 688, 871 P.2d 146 (1994), also fails. State Farm claims “the *Lynott* insurer already had available a policy form that would have solved the problem,” while State Farm only “modified its policy to

define ‘collapse’ in 1998” (*i.e.*, after the Association’s policy periods). *Brief of Appellee*, at 41. Yet the record contains no evidence to support that statement. No document or testimony establishes that State Farm only began defining “collapse” in 1998, or that State Farm did not sell a “collapse”-defining policy as of the date it insured the Association. Thus, the issue here and in *Lynott* is exactly the same: how to interpret an undefined word that the insurance company chose to define in other policies it sells. In holding that courts should construe that other policy language against the insurer, this Court’s message was simple: if an insurer wants to avoid a dispute over the meaning of a policy term, the insurer should simply include a definition, just like it does in its other policies.

State Farm sells other policies that define “collapse” as “actually fallen down.” *See* ER 104. The Association’s Policies don’t say that. According to *Lynott*, this Court should construe that omission against State Farm. *See Lynott*, 123 Wn.2d at 688 (“In evaluating the insurer’s claim as to meaning of language used, courts necessarily consider whether alternative or more precise language, if used, would have put the matter beyond reasonable question.”).

III. CONCLUSION

This case epitomizes why *contra proferentem* is the seminal rule in insurance coverage cases:

In light of the drafters’ expertise and experience, the insurer should be expected to set forth any limitations on its liability clearly enough for a common layperson to understand; if it fails to do this, it should not be allowed to take advantage of the very ambiguities that it could have prevented with greater diligence.

Emter v. Columbia Health Servs., 63 Wn. App. 378, 384, 819 P.2d 390 (1991) (quoting *Kunin v. Benefit Trust Life Ins. Co.*, 910 F.2d 534, 540 (9th Cir. 1990)).

State Farm admits that courts have been equating “collapse” with “substantial impairment of structural integrity” since at least 1959. *See Brief of Appellee*, at 21. In other words, State Farm

has known for over 50 years that this Court might decide that “collapse,” when undefined, is ambiguous. Nevertheless, State Farm chose not to include a definition for that word in the Association’s Policies. Worse yet, State Farm sells other policies that do define “collapse”—a fact this Court has said it should construe against State Farm. Also construed against State Farm: the fact it has previously chosen to interpret “collapse” as “substantial impairment of structural integrity,” which indicates that State Farm itself believes the phrase is a reasonable interpretation of “collapse.” The dictionary and decisions from other courts also confirm that.

For each of these reasons, the Association respectfully requests that this Court answer the certified question with: “substantial impairment of structural integrity.”

Respectfully submitted this 26th day of November, 2014.

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By: 

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Appendix A

Webster's
Third
New International
Dictionary
OF THE ENGLISH LANGUAGE
UNABRIDGED

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Clerk of the Court,

Attached are the following documents to be filed in the Supreme Court of Washington

- Plaintiff-Appellant's Reply Brief; and
- Certificate of Service

Sent on behalf of

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Thank you.

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