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6 **IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON**
7 **IN AND FOR THE COUNTY OF KING**

8 MARSHALL HORWITZ, DAVID LAYTON,
9 RICHARD JOHNSON, and a class of
10 similarly situated individuals,

11 Plaintiffs,

12 vs.

13 UNIVERSITY OF WASHINGTON, an
14 agency of the STATE OF WASHINGTON,

15 Defendants.

NO. 22-2-15374-1 SEA

**ORDER ON PLAINTIFFS' MOTION
TO LIMIT DEFENDANT'S CONTACT
WITH PUTATIVE CLASS MEMBERS**

16 THIS MATTER came on for hearing on Plaintiffs' Motion to Limit Defendant's Contact with
17 Putative Class Members. The Court, having reviewed that Motion and all associated pleadings, hereby
18 rules as follows:

19 In this action, Plaintiffs challenge defendant University of Washington's ("UW") management of
20 its retirement plans. UW's motion for summary judgment and Plaintiffs' motion for class certification are
21 currently pending and set for argument in mid-October. The current motion concerns UW's recent and
22 proposed future communications with putative class members.

23 On July 5, 2023, UW's counsel informed Plaintiffs' counsel that UW intended to send out
24 communications to putative class members informing them that certain IRS corrections had been
25 identified and would be made to plan participants' retirement accounts. On July 17, 2023, UW's counsel
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1 sent Plaintiffs’ counsel the initial notices addressed to two named plaintiffs and a template “Notice of
2 Correction and Right to Appeal” to be sent to affected plan participants regarding “their specific
3 operational correction.”

4 Two days later, Plaintiffs filed this motion seeking to limit UW’s communications with putative
5 class members regarding the subject matter of this litigation. However, by the time Plaintiffs filed their
6 motion, UW already sent out the initial notices.
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8 The initial notice states that UW had conducted an audit of its retirement plan and that some plan
9 participants experienced an “operational issue” requiring correction. The notice further states that
10 corrections would be made according to the IRS self-correction procedure, that in mid to late July, notice
11 of the correction would be provided and that the plan participant would then have an opportunity to request
12 a hearing to review the correction decision and result. The notice advises plan participants that they can
13 get more information by contacting UWHR Benefits. The notice does not mention this litigation.
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15 UW also provided to Plaintiffs a template of the proposed “Notice of Correction and Right to
16 Appeal.” This proposed document informs the individual plan participant of the specific “correction”
17 made to their account and advises them of the right and procedures to appeal though the Administrative
18 Procedures Act. This notice also does not mention this litigation. To date, this document has not been
19 sent out.
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21 In their motion, Plaintiffs argue that UW’s communications with putative class members violate
22 RPC 4.2(a) and CR 23. Their proposed order seeks to prohibit UW “from communicating with members
23 of the putative class about UWRP and VIP errors and UW’s proposed corrections, as well as about UW’s
24 administrative exhaustion defense.”
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1 UW initially argues that this Court lacks jurisdiction to grant the relief requested by Plaintiffs,
2 briefly recounting the argument in their summary judgment motion. That motion is set to be heard by the
3 Court on October 13, 2023. In the meantime, and unless that motion is granted, this Court has the authority
4 to rule on motions in this case.

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6 By separate motion, UW also requests that Court stay the matter or continue consideration of this
7 motion until its summary judgment motion is heard. However, that motion is not scheduled for two
8 months, and UW does not state that it will refrain from further communications with putative class
9 members in the interim. Accordingly, the motion to continue or stay is denied with respect to Plaintiffs'
10 motion to limit defendant's contact with putative class members.

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12 With respect to Plaintiffs' claim that the UW's communications with putative class members
13 violate RPC 4.2(a), there appears to be no Washington authority directly on point. However, "[t]he
14 majority rule is that while named plaintiffs are clients of class counsel precertification, absent class
15 members have no attorney-client relationship with putative class counsel prior to class certification and
16 the expiration of any opt-out period, and thus neither the ethical rules governing communications with
17 represented parties nor the attorney-client privilege, are applicable precertification." 2 *McLaughlin on*
18 *Class Actions* § 11:1 (19th ed.); see also 3 *Newberg and Rubenstein on Class Actions* § 9:7 (6th ed.) ("but
19 for a few outlying decisions, courts generally permit the defendant and defendant's counsel to
20 communicate directly with these absent putative class members before a class action is certified.").

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22 This Court does not find that UW's communications with putative class members constitute a
23 violation of RPC 4.2(a).

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25 Both parties agree that this Court has authority under CR 23(d) to regulate communications with
26 putative class members. It is well-settled that the court has authority to correct communications with

1 class members prior to certification that deceive or mislead class members. *See Gulf Oil v. Bernard*, 452
2 U.S. 89, 101, 101 S.Ct. 2193, 68 L.Ed.2d 693 (1981).

3 Plaintiffs complain, among other things, that the initial notice sent fails to mention the current
4 lawsuit and, instead, encourages putative class members to contact UW for further information. Plaintiffs
5 further argue that the proposed “Notice of Correction and Right to Appeal” is improper, claiming it is
6 designed to create a “new APA exhaustion defense.” While Plaintiffs do not fully articulate how this
7 notice and the described appeal process may impact their claims against UW, the Court is aware that UW’s
8 pending summary judgment motion seeks dismissal of this case, arguing, that under the APA, plaintiffs
9 were first required to seek administration adjudications of their claims against UW.
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11 With respect to the initial notices already sent to putative class member, this Court concludes that
12 UW’s brief discussion of an administrative remedy, while failing to mention the pending lawsuit, could
13 cause confusion and is potentially misleading. More significantly, if the proposed “Notice of Correction
14 and Right to Appeal” is sent to putative class members, it would be misleading by failing to mention that
15 there is a current lawsuit relating to the “corrections,” that the recipients of the notice may be class
16 members of the lawsuit, and that the Plaintiffs in that lawsuit contest the applicability of the APA
17 procedures and the relief that should be afforded to class members.
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19 Finally, it must be noted that Plaintiffs’ motion is focused on UW’s communications with putative
20 class members; Plaintiffs do not argue that UW cannot take the corrective actions to the retirement
21 accounts that are discussed in the notices. Given that UW may take corrective action on participants’
22 retirement accounts, a prohibition of all communication between UW and putative class members on this
23 subject is not appropriate at this stage in the proceedings. Instead, this Court’s authority over
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1 communications with putative class members is to ensure any such communications are not misleading
2 or coercive.

3 Accordingly, the Court orders as follows:

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- 5 1. Within 10 days of this Order, UW shall send a supplemental notice to the recipients of the original
6 notice stating as follows: “On July 19, 2023, the University mailed a letter to certain participants
7 in the University of Washington Retirement Plan and the Voluntary Investment Plan regarding
8 issues that the University had identified with respect to your plan contributions. Please be advised
9 that there is a proposed class-action lawsuit in King County Superior Court that challenges the
10 University’s administration of the retirement accounts and handling of these issues. The litigation
11 is captioned Horwitz et al. v. Univ. Wash. (King Cnty. Sup. Crt. No. 22-2-15374-1 SEA), and the
12 plaintiffs are represented by Alexander Strong with Bendich, Stobaugh & Strong. If the court
13 certifies the class action, you may be a member of the class. In mid-October, the court is scheduled
14 to rule on a motion to certify the class and the University’s motion to dismiss.”
 - 15 2. UW may further add the following language to this notice should it decide to postpone taking
16 action on the corrections: “As a result of these motions, the University has not yet taken further
17 corrective action or sent out individual correction notices.”
 - 18 3. The proposed “Notice of Correction and Right to Appeal” should not be sent as currently worded.
 - 19 4. If, prior to the Court’s decision on the motion to certify class and UW’s summary judgment motion,
20 UW intends to send any further communications to putative class members relating to UWRP and
21 VIP errors and UW’s proposed corrections, it shall provide a copy of the proposed communication
22 to Plaintiffs’ counsel at least 14 days in advance of sending out said communications.

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DATED this ____ day of August, 2023.

THE HONORABLE BRIAN MCDONALD

King County Superior Court
Judicial Electronic Signature Page

Case Number: 22-2-15374-1
Case Title: HORWITZ ET AL VS UNIVERSITY OF WASHINGTON
Document Title: ORDER

Signed By: Brian McDonald
Date: August 14, 2023



Judge: Brian McDonald

This document is signed in accordance with the provisions in GR 30.

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