The Honorable Brian McDonald
Hearing Date: August 3, 2023
Without Oral Argument

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

MARSHALL HORWITZ, DAVID LAYTON, RICHARD JOHNSON, and a class of similarly situated individuals, Plaintiffs, v. UNIVERSITY OF WASHINGTON, an agency of the STATE OF WASHINGTON, Defendant.	No. 22-2-15374-1 SEA

PLAINTIFFS' MOTION TO CERTIFY CLASS

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INTRODUCTION:

The University of Washington provides retirement benefits to faculty members and staff through both the University of Washington Retirement Plan (UWRP) and the University of Washington Voluntary Investment Plan (VIP). *Horwitz v. UW*, 2023 WL 1466542 at *1 (W.D. Wash. 2023). Under the UWRP, eligible employees participate in the plan by making mandatory contributions – in amount based on percentage of salary – that are matched by UW. Strong Dec. Ex. 4, UWRP 4 § 4.11. Employees may also voluntarily participate in the VIP by making additional elective contributions that are not matched. Strong Dec. Ex. 5, UWVIP. Under both plans, employees' contributions are subject to contribution limits set forth in the applicable federal tax law.

Participants have a right to all mandatory UWRP employee and employer contributions. Under the plan, "[w]hile in an Eligible Position, a Participant must contribute." A. Strong [7/19/23] Dec., A20. Federal District Court Judge Barbara Rothstein recognized that UW has a mandatory duty to match those mandatory employee contributions: "'UW will make a matching contribut[ion] equal to each Participant contribution' UWRP at 4 § 4.1; *see Duncan v. Alaska USA Fed. Credit Union, Inc.*, 148 Wn.App. 52, 63 (2008) ('the word 'will' has been held to be mandatory, not discretionary')." *Horwitz*, 2023 WL 1466542 at *3. In federal court, UW agreed that "the UWRP provides the University *must match* participants' UWRP contributions." Haack Dec., A56 (emphasis added).

And UWRP participants have the right to make contributions in addition to their UWRP to the VIP, subject to pertinent federal tax law contribution limits. A. Strong [7/19/23] Dec., A44 ("Contributions to th[e VIP]…are in addition to any contributions which may be made to the University of Washington Retirement Plan (UWRP)"). The VIP provides that each participant shall enter into a "contribution agreement…under which the employee's salary is reduced by an amount equal to the contributions that the employee wishes to have made to the [VIP]." *Id*. A44.

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UW has been failing to provide all mandatory UWRP contributions and VIP elective contributions. Recently, UW completed an internal audit that determined 714 plan participants received less than the required UWRP contribution percentage between 2018 and 2021. Haack Dec., A10, A24-25. UW's internal audit also discover that "for several of our samples, our VIP contributions amounts differed from amounts in Workday," *i.e.* the employee's election in Workday was "calculated with a percentage or dollar amount that differed from what was in the Fidelity [the account manager] files." *Id*. A19.

Further, in discovery, UW has produced documents showing that they did indeed have a historical process for calculating a VIP contribution limit that would "maximize" UWRP matching contributions, *i.e.*, UW would determine the applicable federal tax law contribution limit and subtract an employee's UWRP employee and matching contributions to determine the amount of additional VIP contributions allowed under that pertinent limits (a VIP limit). *Id*. A33-34. VIP "limits" were "determined by subtracting the EE's total UWRP contribution and the UW's match from the IRS limit." *Id*. A34. "The remainder is the VIP limit." *Id*. Thus, UW explained that "[i]n all cases UWRP contributions will be maximized first." *Id*. A31. UW thus would make sure that plan participants would receive all promised UWRP matching contributions as well as all additional voluntary VIP contributions that were permitted under the pertinent federal tax law contribution limits.

Plaintiffs now move to certify a class covering individuals who did not receive all mandatory matching contributions and/or the additional voluntary VIP contributions.[1]

RELIEF REQUESTED

The named plaintiffs move for class certification under CR 23(a) and CR 23(b)(1) and (2). The class is defined as:

> All UWRP plan participants who did not receive the full applicable percentage of salary in UWRP employee and matching contributions and/or their additional

[1] Plaintiffs have also filed a concurrent motion to limit UW's contact with putative class members about the subject matter of this litigation. Dkt. 31.

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elective VIP contributions as provided in the plans, subject to the applicable tax law contribution limitations. The class includes all such UWRP plan participants who were employed by UW within the applicable statute of limitations period.

ISSUE PRESENTED

Should the Court certify the class as defined above under CR 23(b)(1) and –(b)(2)?

EVIDENCE RELIED ON

The motion is based on the complaint, the declarations of Marshall Horwitz, Erika Haack, Stephen K. Strong, and two declarations of Alexander F. Strong, dated July 19, 2023 and July 21, 2023.

ARGUMENT

I. THE CASE SHOULD BE CERTIFIED FOR A CLASS BECAUSE CR 23(A) REQUIREMENTS ARE MET.

A. Civil Rule 23 is liberally construed to resolve multiple claims in one case.

The purpose of a class action is "to provide relief for large groups of people with the same claim, particularly when each individual claim may be too small to pursue." *Moore v. Health Care Authority*, 181 Wn.2d 299, 309 (2014). "Class actions demonstrate a state policy favoring aggregation of small claims for purposes of efficiency, deterrence, and access to justice." *Id.* Our Supreme Court recently reaffirmed that "Washington courts liberally interpret CR 23" and "courts should err in favor of certifying a class[.]" *Chavez v. Our Lady of Lourdes Hospital*, 190 Wn.2d 507, 515, 517, n.8 (2018) (reversing trial court's decision denying class certification and noting "[a] trial court is entitled to 'noticeably more deference' on a grant of class certification as opposed to a denial.").

In making the class certification decision, the Court takes the substantive allegations of the complaint and supporting declarations as true. *Elter v. United Services Automobile Assoc.*, 17 Wn.App.2d 643, 655-56 (2021); *Smith v. Behr Processing Corp.*, 113 Wn.App. 306, 320 (2002).

A class is certified when there is a common legal issue affecting numerous people; it is

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not a decision on the merits. *WEA v. Shelton School Dist.*, 93 Wn.2d 783, 783-90 (1980). Doubts about certification are resolved in favor of a class action. *Scott*, 160 Wn.2d at 857; *Chavez*, 190 Wn.2d at 514.

B. There are over seven hundred class members at minimum, each with a relatively small claim, so that joinder of each class member is impracticable.

The first CR 23(a) requirement is that "the class is so numerous that joinder [of each individual as a party] is impracticable." This "numerosity" requirement does not require an "exact number or specific identity of class members." 1 *Newberg on Class Actions*, §3:13, pp. 210-14 (5th ed. 2011). Forty or more class members gives rise to a "presumption that joinder is impracticable." *Miller*, 115 Wn.App. at 821; *Stevens v Brink's Home Security, Inc.*, 162 Wn.2d 42, 44 (2007). "Impracticability" also exists where an individual's claim is relatively small compared to the burden and expense of litigation and the most effective way to obtain a remedy is by a class action. *Smith*, 113 Wn.App. at 319; *Moore*, 181 Wn.2d at 309.

Here, the University conducted an audit that shows that UW itself has identified over 700 individuals who received less than their "expected" (*i.e.*, mandatory) UWRP contributions, an order of magnitude higher than the threshold for numerosity. Haack Dec., A10, A24-25. And thus, UW has already identified hundreds of individuals who did not receive the entire matching contribution. *Id*. The audit also shows that there are individuals who did not receive all elective VIP contributions beyond the UWRP contributions up to the pertinent federal tax law contribution limits. *Id*. A19.

The University may argue that it is possible not all 700 such individuals are class members but such speculation is immaterial. For purposes of class certification, plaintiffs need only describe class members, not identify them each individually. The CR 23(a) numerosity requirement does not require an "exact number or specific identity of class members." Rubenstein, 1 *Newberg on Class Actions*, §3:13, pp. 210-14 (5th ed. 2011). A "good-faith estimate of the class size is sufficient when the precise number of class members is not readily ascertainable." *Id.* The State of Washington made similar speculation in arguing the numerosity requirement was not met in

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another class action, which King County Superior Court Judge Averil Rothrock rejected on the basis of this authority. *Rush v. State*, King County No. 20-2-03771-1, A. Strong [7/21/23] Dec., Ex. 1 at 2 ("Numerosity is sufficiently demonstrated[, e]ven if some of the…evidence may not represent the exact numbers of class members.").

The number of affected UWRP participants (over 700 according to UW's audit) is well over the minimum number of potential class members that makes joinder impracticable (generally 40 are sufficient). 1 *Newberg on Class Actions, supra*, §3:12, p. 198. With even hundreds of class members, "the impracticality of bringing all class members before one court is obvious and the Rule 23(a)(1) requirement is easily met." *Id.* at 190. In such cases the numerosity "issue ordinarily receives only summary treatment" and "often is uncontested." *Id*. at 191-93.

C. UW's breach of its duty under the retirement contract raises a common question under CR 23(a)(2).

1. The existence of even one common question justifies class certification.

The second element of a class action is that there must be a question of law or fact common to the class. CR 23(a)(2). There is "a low threshold to satisfy this test" because "a single issue common to the class" satisfies the requirement. *Smith*, 113 Wn.App. at 320. Thus, " 'a common question need only *exist*, not predominate for the [commonality] requirement to be satisfied.' " *Id*. (Court's emphasis, citation omitted). There are common questions of law whenever the defendant has acted or refused to act on grounds generally applicable to the class. *Zimmer v. City of Seattle*, 19 Wn.App. 864, 869 (1978). And common questions of fact exist when the defendant "is engaged in a common course of conduct…or it can be said that there is a common nucleus of operative facts." *Brown*, 6 Wn.App. at 255 (internal quotations omitted); *King v. Riveland*, 125 Wn.2d 500, 519 (1994).

2. There are common questions to the class about UW's duties under the pension contract.

This section discusses the claims here to show that common questions exist. This is not a brief on the merits. *WEA*, 93 Wn.2d at 790. There are several common questions presented

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concerning UW's duties under the pension contract that are the subject of this action.

UW may try to dispute the common points discussed below, but that is beside the point for class certification, as "certification of the class is to be undertaken without consideration of the merits of plaintiff's claims," and normally occurs prior to a decision on the merits. *Id*. at 788-89. In making the class certification decision, the Court takes the substantive allegations of the complaint and supporting declarations as true. *Elter v. United Services Automobile Assoc.*, 17 Wn.App.2d 643, 655-56 (2021); *Smith v. Behr Processing Corp*., 113 Wn.App. 306, 320 (2002).

"[P]ublic employee pension rights are contractual in nature, as the pension constitutes deferred compensation for service rendered." *Bowles v. DRS*, 121 Wn.2d 52, 62 (1993). "A public employee's right to a pension is a 'vested contractual right based on the promise made by the State at the time an employee commences service.' " *Bowles*, 121 Wn.2d at 65, quoting *State Employees v. State*, 98 Wn.2d 677, 686 (1983).

Here, plaintiffs argue that UW has a uniform mandatory duty to provide matching contributions. The pension contract thus gives rise to a common question of whether UW's duty to provide matching contributions is mandatory. Judge Rothstein identified both the contractual promise and the relevant Washington law on the topic: "'UW will make a matching contribut[ion] equal to each Participant contribution' UWRP at 4 § 4.1; *see Duncan v. Alaska USA Fed. Credit Union, Inc.*, 148 Wn.App. 52, 63 (2008) ('the word 'will' has been held to be mandatory, not discretionary')." *Horwitz*, 2023 WL 1466542 at *3. UW seems to argue that this matching contributions is discretionary. Haack Dec., A56 (University has "broad discretion" and has "construed the Plans not to require that it ensure participants' UWVIP elective deferral rates maximize UWRP employer-matching contributions"). Whether UW's promise that it "will make matching [] contribution[]s" creates a mandatory duty to pay matching contributions is a question that is common to the class.

Second, there is a common issues regarding the fiduciary duty UW owes to the

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beneficiaries of its retirement plans and whether those duties require in to exercise its discretion for the benefit of the plan participants. UW claims it has substantial discretion over plan administration. *Id*. ("both Plans give the University discretion and authority in construing Plan terms"). This imposes a fiduciary duty on the UW to administer the retirement plans in the best interests of the plan participants. Restatement (Third) of Trusts § 70 (2007) ("power expressly conferred by the trust instrument, or by statute, is subject to the fundamental duties of prudence, loyalty, and impartiality, to a duty to adhere to the terms of the trust, and to the other fiduciary duties of trusteeship"). Whether UW's fiduciary duty requires it to help plan participants maximize their retirement contributions is another common question. And documents from UW benefits office show that UW understood its duty to help plan participants maximize their UWRP matching contributions and made procedures to do just that. Haack Dec., A31 ("in all cases UWRP contributions will be maximized first"); see also *id*. at A33-34.

Third, UW has filed a summary judgment motion that raises a defense that is common to the class. UW having conceded the plan are contracts, Haack Dec., A73 (calling the UWRP and VIP "the plan contracts"), then having had Judge Rothstein criticize UW's contract arguments as "making little sense," it has changed tacks and argues that the pension plan is not a contract at all. Dkt. 19, p. 11 ¶¶1-2 (the "retirement plans are not governed by contract law" and the "[c]ontribution and benefit decisions…are administrative decisions reviewable…[via] the Administrative Procedure Act"). This argument is meritless because, under Washington law, "public employee pension rights are *contractual* in nature, as the pension constitutes deferred compensation for *service* rendered." *Bowles*, 121 Wn.2d at 62. (emphasis added); see also *Horwitz*, 2023 WL 1466542 at *3-4 (analyzing the plans under Washington contract law and finding "Plaintiffs' breach-of-contract claim is…supported by ordinary contractual obligations"). The APA specifically excludes "an agency decision regarding contracting or procurement of…*services*…" from APA procedures. RCW 34.05.010(3) (emphasis added). Despite the lack of merit in UW's defense, it is common to the class and supports certification.

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These are just three of the common issues that will apply to all putative class members. Thus, there are common questions satisfying the commonality test.

D. The named plaintiffs' claims are typical of class members' claims.

The third element of a class action is that the named plaintiff's claim is "typical" of the class's claim. A plaintiff's claim is typical under CR 23(a)(3) when it arises from the same course of conduct that give rise to the class members' claim and it is based on the same basic legal principles, even though the facts or degree of harm may vary. *Smith, supra*, 113 Wn.App. at 320; *Brown, supra*, 6 Wn.App. at 255-56.

The named plaintiffs' claims all arise from UW's duties under the retirement plan contracts to provide mandatory employer matching contributions and elective VIP contributions.

The named plaintiffs' facts do not need to be identical to the facts of all unnamed class members. "Where the same unlawful conduct is alleged to have affected both the named plaintiffs and the class members, varying fact patterns in the individual claims will not defeat the typicality requirement." *Smith*, 113 Wn.App. at 320.

E. Plaintiff and experienced counsel will adequately represent the class.

Under CR 23(a)(4) a class action may be maintained if "the representative parties will fairly and adequately protect the interest of the class." This requires that the representative parties have a qualified attorney, that the lawsuit is not collusive, and that the plaintiffs' interests are not antagonistic to the class. *Marquardt v. Fein*, 25 Wn.App. 651, 657 (1980); *Doe v. Pierce Co.*, 7 Wn.App.2d 157, 203-04 (2018).

Here, plaintiffs' counsel have successfully litigated employee benefits class actions on behalf of academic employees and other public employees. A. Strong Dec., ¶¶2-4; S. Strong Dec., ¶¶2-7. The lawsuit is contested by UW with experienced defense lawyers, is not collusive, and the named plaintiffs' interests are not antagonistic to the interests of the class. Indeed, class members have exactly the same interest as the named plaintiffs in obtaining all retirement benefits to which they are entitled and not having to re-establish eligibility when they are not

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terminated from employment.

Accordingly, the requirements of CR 23(a) are met.

II. THE CASE SHOULD BE CERTIFIED AS A CLASS ACTION UNDER CR 23(B)(1) AND (2) BECAUSE ALL MEMBERS OF THE CLASS WILL WIN OR LOSE BASED ON THE CONTRACT CLAIM.

In addition to CR 23(a), a class action must satisfy at least one of CR 23(b). Classes are certified under CR 23(b)(1) (potential for "inconsistent adjudications") "to avoid prejudice to the defendant or absent class members." *Sitton v. State Farm Mut. Auto Ins. Co.*, 116 Wn.App. 245, 251 (2003). This applies here because the pension contracts should have a uniform meaning based on their wording and not have varying decisions in different cases on the same issues.

CR 23(b)(2) applies when the "party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate…declaratory relief with respect to the class as a whole…" "Certification under subsection (b)(2) is [thus] appropriate when injunctive or declaratory relief is requested, and when the defendant has acted or refused to act or failed to perform a legal duty on grounds generally applicable to the class." *Sitton v. State Farm*, 116 Wn.App. 245, 251 (2003); *Brown*, *supra*, 6 Wn.App. at 254-56.

Employee benefit actions are frequently certified under CR 23(b)(2) because by nature they normally involve injunctive or declaratory relief. See *Fowler v. Guerin*, 899 F.3d 1112, 1120 (9th Cir. 2018); see also several cases brought by class counsel here: *Dolan v. King County*, 172 Wn.2d 299 (2013) (action by public defenders to obtain employee status and pension benefits); *Scannell v. City of Seattle*, 97 Wn.2d 701 (1982) (action by employees for vacation and retirement benefits); *Vizcaino v. Microsoft*, 97 Wn.3d 1187 (9th Cir. 1996), *modified* 120 F.3d 1006 (9th Cir. 1997) (*en banc*), *enforced by mandamus*, *Vizcaino v. U.S. District Court*, 173 F.3d 713 (9th Cir. 1999) (action by contract workers to obtain benefits); *Roberts v. King County*, No. 97-2-07412-6 SEA, 107 Wn.App. 806 (2001), *rev. denied*, 149 Wn.2d 1024 (2002) (action by employees for equal pay for equal hours); S. Strong Dec., ¶¶2-7.

Monetary relief is available in cases certified under CR 23(b)(1) or (2) where the money

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damages are "incidental" to the injunctive or declaratory relief. "Incidental" damages flow directly from liability to the class as a whole and do not require subjective judgments to determine their value. *Sitton*, 116 Wn.App. at 252; *Nelson*, 160 Wn.2d at 189. "Incidental" is not a quantitative measure—not the amount of money the defendant may have to pay—but is instead a qualitative measure, *i.e*., whether any damages are capable of computation by objective standards, such as by a formula. *Id*.

The monetary relief here flows mechanically from the injunctive and declaratory relief sought in this case. Determining the amount owed for the UW's failure to provide retirement contributions is a straightforward mathematic calculation. The relief due any individual class member can be objectively computed from the UW's payroll records. S. Strong Dec. ¶¶6-7; *Moore*, 181 Wn.2d at 308 ("Class membership can be determined with certainty based on the [employer's] employment records, and damages can be calculated based on that class membership"); *Fowler*, 899 F.3d at 1120 (remanding for certification under (b)(2) because relief would require "apply[ing] a single formula to…electronic records" rather than "a claim requiring individualized determinations of eligibility for damages."); *Rush v. State*, King County No. 20-2-03771-1, Order Certifying Class, A. Strong [7/21/23] Dec., Ex. 1 ("[i]ncidental monetary relief can be based on a formula applied to electronic payroll records…[and d]amages are capable of computation by objective standards").

The court should thus certify the class under CR 23(b)(1) and (2).

CONCLUSION

The Court should accordingly certify the class under CR 23(a) and CR 23(b)(1) and (2). A proposed order is attached.

I certify that this motion contains 3,365 words, in compliance with the Local Civil Rules.

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DATED this 21st day of July, 2023.

Respectfully submitted,

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DECLARATION OF SERVICE

I, Erika Haack, declare that I effected service of the following document(s) on the parties listed below via the King County Superior Court eFiling application.

Document(s):

1. Motion for Class Certification;
2. Note for Motion;
3. Declaration of Alexander F. Strong in support of Motion for Class Certification;
4. Declaration of Stephen K. Strong in support of Motion for Class Certification;
5. Declaration of Erika Haack in support of Motion for Class Certification.

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I declare under penalty of perjury that the foregoing is true and correct.

DATED this 21st day of July, 2023.

/s/ Erika R. Haack
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