The Honorable Brian McDonald
Hearing Date: October 13, 2023 at 10:00 AM
With 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 FOR PARTIAL SUMMARY JUDGMENT ON DEFENDANT'S APA DEFENSE

Alexander F. Strong, WSBA #49839
BENDICH, STOBAUGH & STRONG, P.C.
126 NW Canal Street, Suite 100
Seattle, Washington 98107
(206) 622-3536
Attorneys for Plaintiffs

TABLE OF CONTENTS

BENDICH, STOBAUGH & STRONG, P.C.
126 NW CANAL STREET, SUITE 100
SEATTLE, WASHINGTON 98107
(206) 622-3536

TABLE OF AUTHORITIES

Washington Cases

Federal Cases

Constitutional Provisions and State Statutes

BENDICH, STOBAUGH & STRONG, P.C.
126 NW CANAL STREET, SUITE 100
SEATTLE, WASHINGTON 98107
(206) 622-3536

Other Authorities

BENDICH, STOBAUGH & STRONG, P.C.
126 NW CANAL STREET, SUITE 100
SEATTLE, WASHINGTON 98107
(206) 622-3536

INTRODUCTION

Named plaintiffs brought suit against the University of Washington (UW) for breach of contract on behalf of themselves and a class of similarly situated individuals. UW previously defended (and removed) this case on the basis that the plans imposed no relevant contractual duty. Federal District Judge Barbara Rothstein rejected this argument, explaining that plaintiffs' breach of contract claims are based on "[o]rdinary contract principles." *Horwitz v. UW*, 2023 WL 1466542 at *3 (W.D. Wash. 2023). UW now shifts tactics entirely, arguing that this Court lacks jurisdiction because plaintiffs did not seek judicial review of any administrative decision under the Administrative Procedure Act (APA). However, this Court has original jurisdiction over actions for breach of contract, and the Legislature specifically exempted contract actions from APA procedures. RCW 34.05.050(3). Moreover, even if the APA could apply to a breach of contract case, a party cannot be required to exhaust a procedure that does not exist and the undisputed record shows that no administrative procedure existed when plaintiffs brought this lawsuit.

RELIEF REQUESTED

Under CR 56(d), the Court may render a summary judgment ruling on a portion of a case. Plaintiffs seek a partial summary judgment ruling striking UW's APA defense.

STATEMENT OF THE CASE

UW provides retirement benefits to faculty and staff through both the UW Retirement Plan (UWRP) and the UW Voluntary Investment Plan (VIP). *Horwitz*, 2023 WL 1466542 at *1. Under the UWRP, eligible employee participants make mandatory contributions—in amounts based on salary percentage—that are matched by UW. Dkt. 33, Strong Dec. Ex. 4, UWRP § 4.1. Employees may voluntarily participate in the VIP by making additional elective contributions that are not matched. *Id*. Ex. 5, UWVIP. Under both plans, employees' contributions are subject to contribution limits set forth in the applicable federal tax law.

Plaintiffs alleged that UW consistently interpreted its contractual duties under the

BENDICH, STOBAUGH & STRONG, P.C.
126 NW CANAL STREET, SUITE 100
SEATTLE, WASHINGTON 98107
(206) 622-3536

retirement plans to require it to maximize UWRP contributions. Dkt. 1, ¶¶16-22. The record now shows that plaintiffs were correct. Dkt. 43, Gatlin Dec., ¶¶19-20. UW would first determine an individual plan participants' maximum contributions under the pertinent federal tax law contribution limitations and then subtract the total of UWRP (employee and matching) contributions to determine a VIP limit. Dkt. 40, Haack Dec., A29-40. UW informed employees that it "reserved the right to stop VIP contributions to prevent over-deferrals." *Id*., A31. It did this by calculating "VIP deferral limit[s]" which were "impacted by the [UWRP] employee and employer contributions." *Id*., A30. UW provided examples to explain the VIP deferral limit in practice (*id*., A34):

> Here's an example for an EE, under age 50, who earns $210,000 and contributes 7.5% to UWRP:
> $45,000 IRS maximum in 2007
> -$15,750 EE contributions to UWRP
> -$15,750 ER contributions to UWRP
> **=$13,500 VIP limit**

UW explained that "*in all cases UWRP contributions will be maximized first*." *Id*., A31. (emphasis added). And, in cases of compensation changes causing an unexpected change in the VIP deferral limit, UW explained "every effort would be made to make any adjustment in the current tax year." *Id*., A30. Rachel Gatlin confirms that UW did this. Dkt. 43, Gatlin Dec., ¶¶19-20.

UW no longer calculates the VIP deferral limit, apparently because it is challenging to implement in its new payroll system. *Id*.

The named plaintiffs all brought this change to UW's attention prior to the filing of this lawsuit. While previously they had been able to adjust VIP contributions to ensure they stayed under the VIP deferral limit, each of the named plaintiffs experienced difficulties with UW no longer adjusting the VIP contributions to ensure the full employer UWRP match. For instance, in 2021, Dr. Horwitz clarified that he wanted to make a "formal claim" for retirement benefits to UW VP of HR Mindy Kornberg. Ms. Kornberg, however, did not respond to him at all, let alone direct him to any existing administrative procedure. Dkt. 50, Horwitz Dec., ¶¶6-8. UW,

BENDICH, STOBAUGH & STRONG, P.C.
126 NW CANAL STREET, SUITE 100
SEATTLE, WASHINGTON 98107
(206) 622-3536

however, provided no method for Dr. Horwitz to have his "formal claim" adjudicated. *Id*.

ISSUES PRESENTED

1. Where plaintiffs bring a claim for breach of contract, the courts of Washington have had original jurisdiction over actions for breach of contract since before statehood, and the APA exempts contract actions from APA procedures, is the exclusive method for bringing a breach of contract claim against a state agency through judicial review from an APA procedure?

2. Assuming *arguendo* APA procedures could apply to a breach of contract action, should the Court require exhaustion of administrative remedies where it is undisputed no administrative procedure existed prior to the filing of this action and where UW has a firm legal position regarding its contractual duties that would make any administrative proceeding futile?

EVIDENCE RELIED UPON

This motion is based on the Declarations of Dr. Marshall Horwitz, Dkt. 32 and Dkt. 50; the Declaration of Erika Haack, Dkt. 40; the Declaration of Rachel Gatlin, Dkt. 43 and the existing record in this action as cited herein.

ARGUMENT

UW'S APA DEFENSE SHOULD BE REJECTED AS A MATTER OF LAW.

A. This Court has original jurisdiction over this breach of contract action.

Plaintiffs brought a complaint alleging a breach of contract. Dkt. 1, ¶97 ("CLAIM FOR BREACH OF CONTRACT"). In its answer, UW asserts that "[t]he Court does not have jurisdiction over the case because it has not come before the Court in compliance with the mandatory procedures required by the Administrative Procedure Act for review of administrative decisions." Dkt. 19 at 11. It repeats this in its motion for summary judgment—"the issue to be decided in this motion is the legal issue whether the Court has jurisdiction." Dkt. 28 at 8. UW's arguments are based on fundamental misunderstandings of administrative law.

A Superior court's jurisdiction over an "action is generally a question whether the superior court has authority to decide [that] type of case." *Outsource Servs. Mgmt., LLC v. Nooksack Bus. Corp.*, 172 Wn. App. 799, 809, *aff'd*, 181 Wn.2d 272 (2014) (applying

BENDICH, STOBAUGH & STRONG, P.C.
126 NW CANAL STREET, SUITE 100
SEATTLE, WASHINGTON 98107
(206) 622-3536

Washington Supreme Court decision in *ZDI Gaming, Inc. v. State*, 173 Wn.2d 608 (2012).

"Jurisdiction, as the *ZDI* court explained, 'describe[s] the fundamental power of courts to act.'" *Outsource Servs.*, 172 Wn. App. at 809. The Washington Constitution vests original jurisdiction in the superior courts over all "civil actions at law." Wash. const. art. IV. §6. And breaches of contract actions have been actions "at law" for several hundred years. See, *e.g.*, *Colvin v. Clark*, 83 Wash. 376, 379 (1915) (breach of contract is "but a simple action at law"); *State v. Middle Kittitas Irr. Dist.*, 56 Wash. 488 (1910) (breach of contract is "an ordinary action at law").

Thus, in *Outsources Services*, the defendant "did not dispute" that "the superior court generally has subject matter jurisdiction to decide a breach of contract case." 172 Wn. App. at 809.[1]

There is no non-frivolous argument that this Court lacks jurisdiction over plaintiffs' breach of contract claim, as superior courts have had the power to decide breach of contract actions since Washington became a state.

B. The Legislature specifically exempted contract claims from APA procedures.

Though the Court clearly has jurisdiction over actions for breach of contract, UW argues that APA prevents the Court from having jurisdiction over this action. UW's argument is that this case is not really for a breach of contract and thus the only possible jurisdiction that the Court has here would be appellate jurisdiction over a judicial review of agency action. Dkt. 28 at 13 ("the Court lacks jurisdiction because plaintiffs have not complied with the Administrative Procedures Act requirements for appeals of administrative decision"). UW's argument is wrong because plaintiffs are not appealing any administrative decision; they are suing for breach of

[1]The Court of Appeals mentions that the superior court "generally" has jurisdiction over breach of contract cases because the Constitution makes an exception for actions at law in which the total matter in controversy is under $3,000. Wash. const. art. IV, §6. While the monetary threshold has changed, the superior courts have "generally" had original jurisdiction over actions at law since statehood. *Id*.

BENDICH, STOBAUGH & STRONG, P.C.
126 NW CANAL STREET, SUITE 100
SEATTLE, WASHINGTON 98107
(206) 622-3536

contract. And the Legislature specifically made an exception in the APA for "contract" cases, exempting them from APA procedures.

The APA limits a court's jurisdiction over "judicial review of agency action." RCW 34.05.510. In briefing, UW asserts without authority that any act (in the colloquial sense of "a thing done") is an agency action. Dkt. 28 at 9 ("the day-to-day implementation" of the retirement plans "is an agency action"). But "agency action" is a statutorily defined term. (RCW 34.05.010(3)). "Agency action" does not encompass any act ("thing done") undertaken by an administrative agency. Rather, the definition of "agency action" contains a broad exception from any agency decision relating to a contract. Acknowledging the original jurisdiction of the superior courts over actions for breach of contract, the Legislature made an exemption to the APA for any action that could be characterized as a breach of contract. The APA provides that an "agency action," *i.e.*, the subset of agency work that is subject to APA procedures, "does not include an agency decision regarding (a) *contracting* or procurement of goods, *services*, *…as well as all activities necessarily related to those functions*…" RCW 34.05.010(3)(a). Thus, any deed related to the agency function of "contracting" for "services" is *not* an "agency action" and is entirely exempt from APA procedures.

This is because the APA limits "judicial review of agency actions." The APA does not purport to have any effect on the Court's exercise of original (not appellate) jurisdiction over contract actions. "[T]he plain meaning of RCW 34.05.510's. language renders the statute inapplicable in a situation where no specific 'agency action' is being challenged." *Dolan v. King Cnty.*, 2014 WL 6466710 (2014) (unpublished).[2] The *Dolan* Court thus ruled that, since the APA did not apply, there was no limit on the superior court's jurisdiction. *Id*.

The Legislature made this exception for plain policy reasons. As explained above, breach of contract actions have been within the core functions of the courts since medieval times. As our Supreme Court has explained, the government of Washington State is subject to court

[2]Putative class counsel here were class counsel in *Dolan*.

BENDICH, STOBAUGH & STRONG, P.C.
126 NW CANAL STREET, SUITE 100
SEATTLE, WASHINGTON 98107
(206) 622-3536

jurisdiction over breach of contract claims just like any other party. In a case where the State asserted it had sovereign immunity for contractual liability, the Supreme Court rejected the State's attempt to evade its contractual duties and found that, like any other party, the State was subject to the law governing contracts (*Architectural Woods v. State*, 92 Wn.2d 521, 529 (1979)):

> The State must not expect more favorable treatment than is fair between men in its business relations with individuals…There is not one law for the sovereign and another for the subject …[W]henever the contract in any form comes before the courts, the rights and obligations of the contracting parties must be adjusted upon the same principles as if both contracting parties were private persons. Both stand upon equality before the law…

Thus, the Legislature's specific exemption of APA procedures must be considered in light of the State's role as an ordinary party in contract actions and the Court's well-settled jurisdiction over breach of contract actions. UW's argument would, to the contrary of the APA and *Architectural Woods*, make the agency alleged to have breached a contract a special party that is entitled to preside over a proceeding about that alleged breach.

Though the complaint plainly on its face is for breach of contract, UW mischaracterizes plaintiffs as attempting to seek judicial review of an administrative decision. Dkt. 28 at 13. They are not. Plaintiffs are the master of their complaint, and they brought an action for breach of contract. Dkt. 1, ¶97. Rather than really dispute whether contract actions are subject to APA procedures, UW instead appears to argue that there could be no breach of contract claim here because the "plans are not contracts." Dkt. 28 at 11. UW's argument is directly contrary to Washington law.[3]

Under well-settled Washington law, retirement programs are unilateral contracts between employer and employee. Unilateral contracts are common in employment settings. "A promise by an employer to pay a bonus or a pension to an employee" is an offer that is accepted by the employee "by continuing to serve as requested, even though [the employee] makes no promise."

[3] UW's argument is also beside the point. A defendant may defend a breach of contract action by arguing that no valid contract existed. That is a merits defense to liability. UW is incorrectly trying to transform this (bogus) merits defense into a question of jurisdiction.

BENDICH, STOBAUGH & STRONG, P.C.
126 NW CANAL STREET, SUITE 100
SEATTLE, WASHINGTON 98107
(206) 622-3536

1A *Corbin on Contracts* §153 at 18 (1st ed. 1963); *Scott v. J.F. Duthie & Co.*, 126 Wash. 470, 472 (1923) (year-end bonus policy created implied unilateral contract and "compliance with the terms of the offer created a contract *supplementary* to the contract of employment.") (emphasis added); *Powell v. Republic Creosoting Co.*, 172 Wash. 155 (1933); *Simon v. Riblet Tramway Co.*, 8 Wn. App. 289, 292-93 (1973).

Our Supreme Court decided the leading case that retirement benefits are unilateral contracts in the 1950s, explaining that "a pension granted to a public employee is not a gratuity but is deferred compensation for services rendered." *Bakenhus v. Seattle*, 48 Wn.2d 695 (1956); see *Navlet v. Port of Seattle*, 164 Wn.2d 818, 835 (2008) (describing *Bakenhus* as the "seminal" case where the Supreme Court "held that pension benefits conferred in an employment relationship constitute deferred compensation"). Subsequently there have been many Washington cases applying the rule that retirement benefits are *contractual* benefits. "A public employee's right to a pension is a 'vested *contractual* right based on the promise made…at the time an employee commences *service*.'" *Bowles v. Wash. Dept. Ret. Sys.*, 121 Wn.2d 52, 65 (2006), quoting *State Employees v. State*, 98 Wn.2d 677, 686 (1983) (emphasis added); *Navlet*, 164 Wn.2d at 848 ("pension plans" are "unilateral contracts" providing vested benefits that cannot be revoked "when performance has occurred").

In briefing, UW quibbles about whether the defined contribution plans at issue here are "pensions."[4] Dkt. 56, Ex. A, p. 4. This quibble is irrelevant. In *Frank v. Day's Inc.*, the Court of Appeals explained that there is no real distinction between a "pension" versus a "retirement program" for purposes of Washington contract law because *both* are interpreted under

[4] A "pension plan is any "program established or maintained by an employer…to provide retirement income to employees." PENSION PLAN, *Black*'s *Law Dictionary* (11th ed. 2019). A "defined contribution" plan is a plan where the retirement benefits due to the beneficiary are based on the contributions made to the plan (plus the investment returns on those contributions). *Washington Fed'n of State Emps. v. State*, 107 Wash. App. 241, 245 n. 5 (2001). A "defined benefit" plan is a plan where the benefit due is based on a formula (generally average final compensation x years of service), rather than on the contributions made to the plan. *Id*.

BENDICH, STOBAUGH & STRONG, P.C.
126 NW CANAL STREET, SUITE 100
SEATTLE, WASHINGTON 98107
(206) 622-3536

Washington contract law. 13 Wn. App. 401, 404 (1975). "In this jurisdiction, *pensions or retirement programs*, …constitute deferred compensation for services rendered…" *Id*. (emphasis added). In fact, *all employee benefits*, not just retirement benefits, are analyzed under Washington contract law. In *Vizcaino v. Microsoft*, the Ninth Circuit applied Washington law in determining that the reasoning that retirement benefits were deferred compensation "applies to all employee benefits" because they "are for services rendered" and "help to guarantee a competent and happy labor force." 120 F.3d 1006, 1014 (1997).[5] In *Navlet*, the Washington Supreme Court explicitly adopted this reasoning, quoting that "the reasoning [that pension benefits are deferred compensation] *applies to all employee benefits*." 164 Wn.2d at 848 (Supreme Court's insert and emphasis).[6]

Indeed, UW previously recognized in this action that this was a contract dispute. UW relied on the *Navlet* case (cited above by plaintiffs) in federal court to explain that the pension contracts were governed by Washington contract law (Dkt. 40, Haack Dec., A53 n. 6):

> Washington law determines the elements for a breach of contract action. *Providence Health Sys. Washington v. Bush*, 461 F. Supp. 2d 1226, 1237 (W.D. Wash. 2006); Cmpl. ¶ 7. Because the University is a state agency, its retirement plan is not governed by the Employee Retirement Income Security Act of 1974. *See* 29 U.S.C. § 1002(32); *Navlet v. Port of Seattle*, 164 Wn.2d 818, 831 (2008)

It made repeated concessions that plaintiffs' claim was governed by Washington contract law, rather than the APA. *Id.*, A73 (discussing "interpretation of the *plan contracts*")(emphasis added). The University's opposition to remand in federal court used the word "contract" *forty times* and mentioned the Administrative Procedure Act *zero times*. *Id*., A65-82.

Judge Rothstein, thus, in the federal action ruled that plaintiffs were bringing a breach of contract action (*Horwitz*, 2023 WL 1466542 at *4):

> [T]he Court finds that *the Complaint articulates an independent contractual duty on UW's part* to advise plan participants of – and take certain actions to address –

[5] Putative class counsel here were class counsel in *Vizcaino*.

[6] Microsoft's counsel in *Vizcaino* served as class counsel in *Navlet*.

BENDICH, STOBAUGH & STRONG, P.C.
126 NW CANAL STREET, SUITE 100
SEATTLE, WASHINGTON 98107
(206) 622-3536

> excess contributions. Although the precise contours of UW's duty will be determined at a later time, and may ultimately be shaped in part by reference to federal tax law, *it is clear that Plaintiffs' breach-of-contract claim is independently supported by ordinary contractual obligations*.
>
> [Emphasis added.]

UW's litigation position that the retirement plans are not really contracts should be given no credence given UW's repeated previous concessions and Judge Rothstein's ruling on this issue.[7]

Here, it is well-settled that retirement programs are contracts for employee services. And the Legislature explicitly excluded contracts from the APA. This exclusion respects the Court's original (not appellate) jurisdiction over actions for breach of contract and Washington case law that the government is subject to contract actions in the same manner as any private party. UW's argument would improperly have a government agency, unlike any private party, oversee determination of whether the agency itself had breached a contract. UW's argument would have the APA, despite disclaiming the applicability of APA procedures to contract claims, upend hundreds of years of the superior courts exercising jurisdiction over breach of contract claims.

UW's argument that this case does not fall within this Court's original jurisdiction must be rejected as a matter of law.

C. Assuming *arguendo* APA procedures could cover a contract claim, exhaustion could not be required because no procedure existed when this case was filed.

Though UW, in both its answer and motion for summary judgment, couches its APA defense as a matter of "jurisdiction," UW describes the "jurisdictional" problem as arising from "failure to comply with APA requirements for obtaining judicial review of their claims against

---

[7] UW invited Judge Rothstein to rule on the nature of plaintiffs' breach of contract action because UW's argument for remand was that UW had no contractual duty under the plans to provide matching contributions and that the only possible source of such a duty was under federal tax law. Dkt. 40 167-68 ("the complaint cites no plan provision for th[e] contractual duty" to maximize UWRP contributions and therefore "the only possible source…is federal tax law"). UW thus argued that the merits showed there was no contractual duty and therefore only a federal issue. *Id*. Judge Rothstein rejected UW's contract arguments and remanded the action. *Horwitz*, 2023 WL 1466652.

BENDICH, STOBAUGH & STRONG, P.C.
126 NW CANAL STREET, SUITE 100
SEATTLE, WASHINGTON 98107
(206) 622-3536

UW retirement plans for alleged errors in administration of its retirement plans." Dkt. 28 at 14. Though UW calls its APA defense "jurisdictional," it would be more appropriate to call it an exhaustion defense.[8]

UW, however, fails to identify the standard by which a court rules on an exhaustion defense. Under the exhaustion doctrine, a court will *only* require a plaintiff to exhaust administrative remedies prior to filing a lawsuit where "(1) [the plaintiff's] claim is cognizable in the first instance by an agency alone; (2) the agency has clearly established mechanisms for the resolution of complaints by aggrieved parties; and (3) the administrative remedies can provide the relief sought." *Milligan v. Thompson,* 90 Wn. App. 586, 596 (1998). It is an affirmative defense. *Id*. at 590; see also CR 8(c) (affirmative defenses include all "avoidance defenses"). A defendant seeking dismissal due to failure to exhaust administrative remedies must show all three of the above factors are met. See *Allstot v. Edwards*, 116 Wn. App. 424, 431-32 (2003). The undisputed record shows that UW cannot meet its burden.

First, UW cannot show that plaintiffs' breach of contract claim is cognizable in the first instance in a UW-led APA proceeding. As explained above, the APA's exemption of contract actions is fatal to UW's APA defense.

Second, a party can *only* be required to exhaust where the agency "has clearly established mechanisms" for resolving the claims brought in the lawsuit. Here, the record shows not only that there was no "clearly established procedure," but also that no administrative procedure existed at all prior to the filing of this action.

UW's briefing and evidence both show that it is attempting to create an APA procedure now, only after the filing of this lawsuit. UW submitted Rachel Gatlin's testimony that demonstrated there was no "administrative procedure," but rather that UW would fulfill its

---

[8] Our Supreme Court has explained that it is "misleading" to call an exhaustion defense a matter of "jurisdiction" because "the exhaustion doctrine has no bearing on the jurisdiction of the court in terms of the constitutional power to hear a case." *Cost Mgmt. Servs., Inc. v. City of Lakewood*, 178 Wn.2d 635, 648 (2013).

BENDICH, STOBAUGH & STRONG, P.C.
126 NW CANAL STREET, SUITE 100
SEATTLE, WASHINGTON 98107
(206) 622-3536

obligations under the plans by adjusting VIP contributions to stay under the limit and maximize UWRP contributions. Ms. Gatlin testified that, rather than undergo any administrative process, the University "could and sometimes did intervene manually to cease future VIP contributions." Gatlin Dec., ¶19. Ms. Gatlin further testified that UW would at times "notify the plan participant in which pay period their [VIP] contributions ceased, the amount of their final [VIP] contribution, and the pay period in which they could resume contributing [to the VIP]." *Id*. This was part of their former policy of calculating a VIP limit that would avoid any reduction to UWRP contributions. UW informed employees that it "reserved the right to stop VIP contributions to prevent over-deferrals," *i.e.*, UW retained the ability to stop VIP contributions to prevent any reduction to mandatory UWRP contributions. Dkt. 40, Haack Dec., A31. UW explained that "*in all cases UWRP contributions will be maximized first*." *Id*. (emphasis added).

UW's interpretation of its contractual obligations changed, without notice to plan participants, apparently due to UW's troubles programming its new payroll system. Gatlin dec., ¶20 ("The UW began to realize that that the new [payroll] system's inability to implement the prior practice was causing issues" and thus UW "conclude[ed] it was not feasible to continue the practice").

Dr. Horwitz tried repeatedly to have UW address this issue. Beginning January 2021, Dr. Horwitz repeatedly contacted UW HR through designated communication channels, but received no response. Dkt. 32, Horwitz Dec., ¶14. In February 2021 in a conference call with UW HR, Dr. Horwitz requested the UW correct the errors to his contributions, but UW declined to address them. *Id.* Dr. Horwitz then brought his concerns directly to HR VP Mindy Kornberg and UW President Ana Mari Cauce who promised to investigate and correct the mistakes. *Id.*, ¶18. No investigation or corrections occurred. In another HR meeting in July 2021, the UW again declined to act on the issues Dr. Horwitz raised. *Id.,* ¶21. In November 2021, Dr. Horwitz made presentations regarding the plan errors to the UW Faculty Senate Council on Benefits and Retirement, as well as the UW Board of Regents. *Id.*, ¶¶22-23. The UW never took any action.

BENDICH, STOBAUGH & STRONG, P.C.
126 NW CANAL STREET, SUITE 100
SEATTLE, WASHINGTON 98107
(206) 622-3536

Finally, after over a year of attempting to resolve his issues through UW, Dr. Horwitz told Ms. Kornberg that he wanted to make a "formal claim." Dkt. 50, Horwitz Dec., ¶¶6-7. Ms. Kornberg did not direct him to administrative procedures because none whatsoever existed. *Id*., ¶8.

UW's submissions in this Court and in federal court confirm that no administrative procedure existed when plaintiffs filed the instant lawsuit. As mentioned above, UW repeatedly maintained in federal court that, while the retirement plans should be construed under Washington contract law, that plaintiffs did not interpret the plan terms correctly. In its federal motion to dismiss UW refers to itself as a "contracting party," (Dkt. 40, Haack Dec., A57) agreed that "Washington law determines the elements for a breach of contract action," (A53 n.5) discussed the standard "to plead a contract under Washington law," (A53) and argued that plaintiffs could "not plausibly allege that the University breached its commitments under the Plans," (A52). In its opposition to remand, UW said that "interpretation of the plan contracts is subject to both federal law and state law," (*id.,* A73) discussed the nature of how, in UW's view "federal tax law was…incorporate[ed] into the contract," (A74) referred to how federal tax law referred to 403(b) plans like the one here as "403(b) contracts," (A69 (quoting 26 C.F.R. § 1.403(b)-(4)(f))), as part of arguing that questions of federal law "were necessarily raised by Plaintiffs' contract claim," (A72).

And, as explained above, Judge Rothstein ruled at UW's invitation on its contract arguments. Judge Rothstein rejected UW's arguments that plaintiffs' complaint alleged no plausible contractual duty, ruling that "it is clear that Plaintiffs' breach-of-contract claim is independently supported by ordinary contractual obligations." *Horwitz*, 2023 WL 1466542 at *4.

It is only after this that UW decided to try to transform plaintiffs breach of contract claim into a challenge to agency action. UW's first mention of any "administrative procedure" took place at a meeting on July 3, 2023. Dkt 32, ¶26. UW said that it would, in the future, send out

BENDICH, STOBAUGH & STRONG, P.C.
126 NW CANAL STREET, SUITE 100
SEATTLE, WASHINGTON 98107
(206) 622-3536

notices that would be subject to an "appeal" process. That was nine months *after* plaintiffs filed this lawsuit and five months after Judge Rothstein rejected UW's contract arguments. In its motion to dismiss, UW explicitly confirms that it had not yet created any "administrative procedure" when this lawsuit was filed, saying that it "*will* send…notices of proposed corrections" and the "notices *will* include a statement of the participants' right to appeal." Dkt. 28 at 13. Thus, both the record and UW's submissions show that no "administrative procedure" existed at all when this lawsuit was filed and, rather, UW concocted the "administrative procedure" as a response to this lawsuit.

A non-existent procedure cannot be a clearly established procedure. Thus, even assuming *arguendo* that the APA could somehow limit a contract claim when it purports to do just the opposite, exhaustion cannot be required here where no procedure existed that could be exhausted at the time this lawsuit was filed.[9]

CONCLUSION

UW's APA defense does not apply because this Court has original jurisdiction over breach of contract actions and the APA exempted contract actions from APA procedures. Additionally, it is undisputed that no "administrative procedure" existed when plaintiffs filed this lawsuit. Exhaustion is only required where a clearly established procedure exists. The Court should grant plaintiffs' motion and reject UW's APA defense as a matter of law.

I certify that this motion contains 4,621 words, in compliance with the Local Civil Rules.

[9] Additionally, even assuming *arguendo* APA exhaustion is required for contract actions and assuming *arguendo* plaintiffs could be required to exhaust an administrative procedure that did not exist, the APA grants the court authority to "relieve a petitioner of the requirement to exhaust" where exhaustion would be "futile." RCW 34.05.534. Here, UW is very clear that it interprets the retirement plans to allow VIP contributions to reduce UWRP contributions. See Dkt. 41 at 5 (conceding "UW has consistently stated that the Plans do not require UW to "optimize" matching contributions"). Since UW maintains that plaintiffs' claims here are meritless, any "administrative procedure" overseen by UW would be futile.

BENDICH, STOBAUGH & STRONG, P.C.
126 NW CANAL STREET, SUITE 100
SEATTLE, WASHINGTON 98107
(206) 622-3536

DATED this 15th day of September, 2023.

Respectfully submitted,

BENDICH, STOBAUGH & STRONG, P.C.

/s/ Alexander F. Strong
Alexander F. Strong, WSBA #49839
126 NW Canal Street, Suite 100
Seattle, Washington 98107
(206) 622-3536
Attorney for Plaintiffs

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 Partial Summary Judgment on Defendant's APA Defense
2. Notice of Hearing
3. Proposed Order Granting Plaintiffs' Motion for Partial Summary Judgment

Parties:

John E. Justice, WSBA #23042
Jeffrey S. Myers, WSBA #16390
2674 R W Johnson Blvd SW
Tumwater, WA 98512
(360) 754-3480
jjustice@lldkb.com
jmyers@lldkb.com
Attorneys for Defendant University of Washington

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

DATED this 15th day of September, 2023.

/s/ Erika R. Haack
Erika R. Haack
ehaack@bs-s.com