

The Honorable Brian McDonald

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SUPERIOR COURT OF THE STATE OF WASHINGTON
KING COUNTY

MARSHALL HORWITZ, DAVID LAYTON,
RICHARD JOHNSON, and a class of similarly
situated individuals, Plaintiffs,

No. 22-2-15374-1 SEA

v.

ANSWER

UNIVERSITY OF WASHINGTON, an agency
of the STATE OF WASHINGTON, Defendant.

DEFENDANT UNIVERSITY OF WASHINGTON'S
ANSWER
(22-2-15374-1 SEA)

ROPES & GRAY LLP
10250 CONSTELLATION BOULEVARD
SUITE 1750
CENTURY CITY, CA 90067-6257
T +1 310 975 3300 · F +1 310 975 3400

1 Defendant, UNIVERSITY OF WASHINGTON (herein “Defendant”), by and through its
2 undersigned counsel of record, hereby appears in the above-entitled matter in response to
3 Plaintiffs’ Class Action Complaint and admits, denies, and alleges as follows:

4 **PARTIES**

5 1. Defendant admits Marshall Horwitz, David Layton, and Richard Johnson are plaintiffs,
6 and are faculty and staff at the University of Washington. Defendant University of Washington
7 admits it is the Defendant, is a State of Washington agency, and is the sponsor of a public employee
8 retirement plans authorized by statute for University employees. Defendant denies that the named
9 plaintiffs represent a class of similarly situated individuals.

10 **VENUE**

11 2. Defendant denies that the facts give rise to Plaintiffs’ claim, but admits that as alleged,
12 facts giving rise to Plaintiffs’ claim occurred in King County, Washington.

13 3. Admit.

14 **FACTS RELATED TO THE UNIVERSITY OF WASHINGTON RETIREMENT**

15 **BENEFITS**

16 4. Admit. Certain non-faculty member employees are also eligible for the UWRP and
17 UWVIP.

18 5. Admit in part and deny in part. Eligible participants have a choice to participate in a
19 Department of Retirement Services Plan or UWRP. UWRP has an initial two-year optional period
20 that is not mandatory. Participants who are at least age 50 are not required to contribute the full
21 10% employee contribution and can elect to contribute only 7.5%.

22 6. Defendant denies retirement plans for its employees are written contracts between the
23 University and its employees rather than retirement plans provided by statute for public employees
24 and administered by the University under rules adopted pursuant to the authority granted by statute
25 to develop and administer the retirement plans.

26 7. Defendant admits the retirement plans are governmental plans under Section 414(d) of
27 the Internal Revenue Code and are not subject to the Employee Retirement Income Security Act

1 of 1974, as amended, but denies interpretation of the plans is governed by contract law and denies
2 that questions regarding administration of the plans are not subject to state law requirements for
3 judicial review of administrative retirement decisions by Washington State government agencies.

4 8. Defendant admits in part that the University is required by statute to match employee
5 contributions to the UWRP in the percentages stated for the plan participants, subject to the terms
6 and conditions of the plan, including without limitation the federal tax contribution limits and the
7 requirement that employer contributions cannot be made unless “matching” an employee
8 contribution. Defendant otherwise denies the allegations in this paragraph.

9 9. Defendant admits UWRP participants could elect to increase their UWRP contributions
10 as stated, but denies that the University does not require salary reduction agreements as part of the
11 election.

12 10. Defendant admits that the plan was amended effective May 28, 2020 such that plan
13 participants who had attained age 50 would be defaulted to a contribution rate of 10% and that
14 such participants could opt-out of the additional 2.5% at any time. Defendant denies that the 2.5%
15 is mandatory.

16 11. Admit.

17 12. Defendant admits the quoted text is part of the UWVIP plan document, but denies that
18 this is a complete and accurate statement of the plan design. Defendant avers that as designed, it
19 is possible for plan participant behavior in electing certain UWVIP contribution rates to affect the
20 total amount of UWRP contributions that a participant can receive in order to comply with federal
21 tax laws.

22 13. Defendant admits contributions to the UWRP and UWVIP are subject to contribution
23 limitations under federal tax laws administered by the federal Internal Revenue Service.

24 14. Deny.

25 15. This paragraph makes a statement of purported law and not fact, so does not require an
26 answer. Insofar as an answer might be required, Defendant denies this is a complete and accurate
27 statement of any obligation of public retirement plans to provide information to their members.

1 16. This paragraph makes a statement of purported law and not fact, so does not require an
2 answer. Insofar as an answer might be required, Defendant denies it has the contractual and
3 fiduciary duties alleged. Defendant admits it has the duties to plan participants stated in statute and
4 in the provisions of the plans adopted by the University under the authority delegated by statute to
5 develop and implement retirement plans for University employees.

6 17. Defendant admits the UWRP provides the University will advise a participant if
7 contributions made to the plan in a given year with respect to such participant exceed the
8 contribution limits imposed by federal tax law, but denies that the plan provides for the University
9 to advise participants about any actions participants might take in light of federal limits on
10 contributions.

11 18. Defendant admits there were certain instances prior to 2018 in which communications
12 between plan administrators and participants about participants altering UWVIP salary deferral
13 elections to prevent exceeding overall contribution limits under federal tax laws, but denies such
14 communications were required by the plan or done as a matter of policy, procedure, or uniform
15 practice rather than done in response to isolated inquiries, requests, or other individual
16 circumstances.

17 19. Defendant admits UWRP contribution limits are founded on the requirements of Section
18 403(b) of the Internal Revenue Code.

19 20. This paragraph makes a statement of purported law and not fact, so does not require an
20 answer. Insofar as an answer might be required, Defendant denies that the IRS website reference
21 applies to UWRP as it applies to qualified 401(a) plans.

22 21. Defendant admits the UWVIP has a plan term allowing a participant to self-report to
23 UWVIP administrators that excess contributions have been made to a plan account with respect to
24 such participant and providing how and when the plan administrator must distribute the excess
25 contributions. Defendant denies that the remainder of the paragraph is “consistent with tax law”
26 and denies this paragraph is a complete and accurate statement of that plan term in the UWVIP.
27

1 22. This paragraph makes a statement of purported law and not fact, so does not require an
2 answer. Insofar as an answer might be required, Defendant denies this paragraph uses the term
3 “excess contributions” correctly when referring to when a benefit plan formula or design has the
4 possibility of producing excess contributions if no amounts in excess of the federal limits are
5 actually contributed to plan accounts. Defendant further denies that either federal tax law or the
6 UWVIP plan term applying federal contribution limitations require plan administrators to advise
7 participants of the effect of UWVIP contributions on UWRP contributions. Defendant further
8 avers that the plan provision to which this paragraph appears to refer, requiring the University to
9 advise participants of distributions of actual excess contributions, does not require the University
10 to advise participants concerning its prevention of excess contributions.

11 23. Deny.

12 24. Defendant admits there have been instances in which plan administrators and participants
13 communicated about participants’ altering their UWVIP salary deferral elections to take into
14 account overall contribution limits under federal tax laws, but denies the remainder of this
15 paragraph. Defendant avers that it has informed, and continues to inform, participants that the
16 amount of UWVIP and UWRP contributions is collectively subject to federal tax contribution
17 limits.

18 25. Defendant denies it does not advise participants when they have made more total plan
19 contributions than federal law allows. Defendant avers that it has informed, and continues to
20 inform, participants that the amount of UWVIP and UWRP contributions is collectively subject to
21 federal tax contribution limits.

22 26. Defendant admits participants cannot redesignate contributions made in one tax year as
23 contributions for the following tax year, but denies this is a retirement plan policy rather than a
24 requirement of federal income tax law.

25 27. Defendant denies it reduces matching contributions made to plan accounts in any
26 circumstance below the contributions required by the retirement plan.

27 28. Deny.

1 29. This paragraph makes a statement of purported law and not fact, so does not require an
2 answer. Insofar as an answer might be required, Defendant denies it made any reduction to UWRP
3 plan accounts or that there is a provision in tax law on “cutbacks.”

4 30. Defendant denies it distributed amounts out of UWRP plan accounts, that it “admitted”
5 an “error” concerning the same, and denies that there is a provision in tax law on “claw backs.”

6 31. Defendant denies it distributed amounts out of UWRP plan accounts, and denies that there
7 is a provision in tax law on “claw backs.”

8 32. Defendant denies it applies retirement plan amendments to violate vested rights of plan
9 participants. The remainder of the allegations are allegations of purported law rather than
10 allegations of fact, so no response is required. Insofar as any response is necessary, the principles
11 of law alleged are not fully and accurately stated and do not apply in the context of the claims in
12 this lawsuit.

13 33. Defendant denies that the University “reduced” Plaintiff’s employer matching
14 contributions. Defendant admits that Plaintiff may not have received the maximum possible
15 employer matching contributions in each year. Defendant lacks knowledge or information at this
16 time sufficient to have a belief about the truth of the remainder of the allegations in this paragraph,
17 so denies the same.

18 34. Defendant denies that the University “reduced” Plaintiff’s employer matching
19 contributions. Defendant admits that Plaintiff may not have received the maximum possible
20 employer matching contributions in each year. Defendant lacks knowledge or information at this
21 time sufficient to have a belief about the truth of the remainder of the allegations in this paragraph,
22 so denies the same.

23 35. Defendant denies that the University “reduced” Plaintiff’s employer matching
24 contributions. Defendant admits that Plaintiff may not have received the maximum possible
25 employer matching contributions in each year. Defendant lacks knowledge or information at this
26 time sufficient to have a belief about the truth of the remainder of the allegations in this paragraph,
27 so denies the same.

FACTS RELATED TO PLAINTIFF MARSHALL HORWITZ

1
2 36. Admit.

3 37. Admit.

4 38. Admit.

5 39. Admit.

6 40. Defendant lacks knowledge or information sufficient to have a belief about the truth of
7 the allegations in this paragraph, so denies the same.

8 41. Defendant lacks knowledge or information at this time sufficient to have a belief about
9 the truth of the allegations in this paragraph, so denies the same.

10 42. Defendant lacks knowledge or information at this time sufficient to have a belief about
11 the truth of the allegations in this paragraph, so denies the same.

12 43. Defendant admits this message was sent, but denies any implication the communication
13 was required by a retirement plan provision, policy, or uniform practice rather than a
14 communication made only in some circumstances for particular plan participants.

15 44. Defendant lacks knowledge or information at this time sufficient to have a belief about
16 the truth of the allegations in this paragraph, so denies the same.

17 45. Defendant denies this paragraph uses the term “excess contributions” correctly.
18 Defendant admits there were certain years in which Plaintiff Horwitz’s UWVIP contribution rates
19 were changed so that future employee and employer-matching UWRP contributions could be
20 made. Defendant denies the remainder of the assertions in this paragraph.

21 46. Defendant admits that the University effectuated Plaintiff Horwitz’s elected contribution
22 rate in 2021 and 2022, subject to the limitations of the plan terms and applicable tax law, and lacks
23 knowledge or information at this time sufficient to have a belief about the truth of the remaining
24 allegations in this paragraph, so denies the same.

25 47. Defendant lacks knowledge or information at this time sufficient to have a belief about
26 the truth of the allegations in this paragraph, so denies the same.

1 48. Defendant lacks knowledge and information sufficient to have a belief about the truth of
2 the allegation that Plaintiff Horwitz in some way “lost” the sum of matching contributions stated.
3 Defendant denies it did not make all the matching contributions required by the UWRP plan.

4 49. Defendant lacks knowledge or information at this time sufficient to have a belief about
5 the truth of the allegations in this paragraph, so denies the same.

6 50. Admit.

7 51. Defendant denies the characterization of “failure” or that the paragraph is an accurate
8 summary of the conversation and so denies the truth of the allegations in this paragraph.

9 52. Defendant denies the characterization of “problem” or that the paragraph is an accurate
10 summary of the conversation and so denies the truth of the allegations in this paragraph.

11 53. Defendant denies the characterization of a plan design feature and the operation of federal
12 tax law constitute an “error” or that the error alleged by Plaintiff Horwitz is among the errors
13 referenced in the August 27, 2021 correspondence. Defendant admits that it communicated to
14 Plaintiff Horwitz that any errors identified following completion of a review would be shared with
15 the affected plan participant. Defendant avers that the review has not yet been completed.

16 **FACTS RELATED TO PLAINTIFF DAVID LAYTON**

17 54. Admit.

18 55. Admit.

19 56. Admit.

20 57. Defendant lacks knowledge or information at this time sufficient to have a belief about
21 the truth of the allegations in this paragraph, so denies the same.

22 58. Defendant lacks knowledge or information at this time sufficient to have a belief about
23 the truth of the allegations in this paragraph, so denies the same.

24 59. Defendant lacks knowledge or information at this time sufficient to have a belief about
25 the truth of the allegations in this paragraph, so denies the same.

26 60. Defendant admits that Plaintiff Layton’s UWVIP contributions ceased in March 2019.
27

1 61. Defendant admits a contribution of \$86.95 was made to Plaintiff Layton's UWVIP plan
2 account on March 31, 2019.

3 62. Defendant admits contributions to Plaintiff Layton's UWVIP plan account ceased until
4 December 15, 2019, at which point a \$1496.37 UWVIP contribution was made.

5 63. Defendant lacks knowledge or information at this time sufficient to have a belief about
6 the truth of the allegations in this paragraph, so denies the same.

7 64. Defendant admits an inquiry was made by Plaintiff Layton to University Integrated
8 Service Center on November 18, 2019.

9 65. Admit.

10 66. Admit.

11 67. Admit.

12 68. Defendant lacks knowledge or information at this time sufficient to have a belief about
13 the truth of the allegations in this paragraph, so denies the same.

14 69. Defendant admits that, in April 2020, \$1400 was removed from Plaintiff Horwitz's
15 UWVIP account and lacks knowledge or information at this time sufficient to have a belief about
16 the truth of the remaining allegations in this paragraph, so denies the same.

17 70. Admit.

18 71. Defendant lacks knowledge or information at this time sufficient to have a belief about
19 truth of the allegations in this paragraph, so denies the same.

20 72. Admit.

21 73. Defendant lacks knowledge or information at this time sufficient to have a belief about
22 truth of the allegations in this paragraph, so denies the same.

23 74. Deny.

24 75. Defendant admits Plaintiff Layton started the 2021 year with a contribution election of
25 \$3,900 per pay period to UWVIP and lacks knowledge or information at this time sufficient to
26 have a belief about the truth of the remaining allegations in this paragraph, so denies the same.

1 76. Defendant admits that after 3 pay periods, Plaintiff Layton changed his contribution
2 election to \$887 per pay period and lacks knowledge or information at this time sufficient to have
3 a belief about the truth of the remaining allegations in this paragraph, so denies the same.

4 77. Defendant admits that the summer salary was included as eligible pay when applying
5 Plaintiff Layton's elected contribution rate to eligible pay when calculating the UWVIP
6 contribution amount.

7 78. Defendant admits future UWVIP contributions ceased, but denies Plaintiff Layton's
8 UWVIP account balance was reduced or that preventing future contributions was done wrongfully
9 or erroneously.

10 79. Defendant denies contributions were not made as required by the provisions in the
11 retirement plan.

12 80. Defendant admits Plaintiff Layton had communications with retirement plan staff about
13 his concerns, but denies the University ever had a policy or uniform practice about communicating
14 with plan participants concerning limits imposed by federal tax law on their retirement plan
15 contributions. Defendant admits that the University effectuated Plaintiff's elected contribution
16 rate in 2021 and 2022, subject to the limitations of the plan terms and applicable tax law and that
17 such action was consistent with the University's uniform practice during this time period.

18 **FACTS RELATED TO PLAINTIFF RICHARD JOHNSON**

19 81. Admit.

20 82. Admit.

21 83. Defendant lacks knowledge or information at this time sufficient to have a belief about
22 the truth of the allegations in this paragraph, so denies the same.

23 84. Admit.

24 85. Admit.

25 86. Defendant lacks knowledge or information at this time sufficient to have a belief about
26 the truth of the allegations in this paragraph, so denies the same.

27 **CLASS ACTION ALLEGATIONS**

1 87. Deny.

2 88. Admit.

3 89. Defendant denies it has made any reductions to UWRP plan account balances, and denies
4 that all participants in the University's two retirement plans are capable of exceeding the federal
5 tax law limits on total contributions to retirement plans based on the plan design and formula.

6 90. Defendant denies it made any reduction to UWRP plan accounts, that there is a provision
7 in tax law regarding "claw backs" or that contributions are guaranteed notwithstanding the
8 requirements to comply with a participant's salary deferral election and federal contribution limits.
9 Defendant denies this paragraph uses the term "excess contributions" correctly and admits, when
10 using the term correctly, that it has an obligation to provide notice to plan participants when a plan
11 account contains an excess contribution. Defendant denies there is a proper class entitled to seek
12 relief from Defendant.

13 91. Defendant denies there is a class meeting the requirements for class certification.

14 92. Defendant denies it made any reduction to UWRP plan accounts or that there is a
15 provision in tax law regarding "claw backs" or that contributions are guaranteed notwithstanding
16 violations of federal contribution limits. Defendant denies that there is a class entitled to
17 certification under the court rules.

18 93. Defendant denies plaintiffs' claims are typical of any class of participants in Defendant's
19 retirement plans.

20 94. Deny.

21 95. Deny.

22 96. Deny.

23 **CLAIM FOR BREACH OF CONTRACT**

24 97. Defendant denies State of Washington retirement plans are written contracts with plan
25 participants rather than plans governed by statute and the rules and policies adopted by government
26 agencies, here the University of Washington, authorized by statute to administer the retirement
27 plans.

1 **RELIEF**

2 Defendant denies Plaintiffs are entitled to the relief enumerated in their prayer for relief.

3 **DEFENSES**

4 BY WAY OF FURTHER ANSWER AND AFFIRMATIVE AND OTHER DEFENSES,
5 Defendant alleges the following:

6 1. State employee retirement plans are not governed by contract law but are governed by
7 Washington statute, the rules and policies adopted by State agencies under the authority delegated
8 to them to develop and implement all the details of the plans not covered by the Legislature in
9 statute, as well as federal tax law requirements applicable to Section 403(b) plans.

10 2. Contribution and benefit decisions by State employee retirement plans are administrative
11 decisions reviewable by the courts only after aggrieved parties have complied with requirements
12 of the Administrative Procedure Act by filing an administrative appeal and receiving a final agency
13 decision based on an administrative record reviewable by a court under the standards stated in the
14 Administrative Procedure Act.

15 3. Plaintiffs failed to ask for an administrative hearing by the University of Washington to
16 hear and adjudicate their claims the University did not make required contributions to their
17 retirement accounts, or otherwise mismanaged their retirement benefits as alleged in this
18 Complaint.

19 4. Plaintiffs' action in superior court is premature because they have not satisfied the
20 Administrative Procedure Act requirement their administrative claim first be heard and adjudicated
21 by the responsible State agency and only be heard in court on appellate review after administrative
22 hearing and creation of a record of proceedings suitable for judicial review.

23 5. The Court does not have jurisdiction over this case because it has not come before the Court
24 in compliance with the mandatory procedures required by the Administrative Procedure Act for
25 review of administrative decisions.

1 6. The Court does not have jurisdiction over the asserted common law breach of contract
2 claim because the statutory provisions and remedies of the Administrative Procedure Act provide
3 the exclusive means of judicial review of agency action.

4 7. Plaintiffs did not initiate review of administrative decisions within the statute of limitations
5 applying to the request for relief stated in their complaint.

6 8. Plaintiffs' claims are barred in whole or in part by the statute of limitations.

7 9. Plaintiffs failed to exercise diligence in determining their maximum allowable retirement
8 contributions under federal tax law and failed to elect UWVIP contribution rates to prevent their
9 UWVIP contributions from hitting federal tax limits, requiring the University to cease future
10 UWRP contributions in order to comply with such federal tax limits.

11 10. Plaintiffs failed to mitigate their damages.

12 11. Plaintiffs' claim is barred in whole or in part by the equitable doctrines of waiver, estoppel,
13 and laches.

14 12. The University of Washington administered the Plans pursuant to Plan provisions adopted
15 by the University's Board of Regents under the authority delegated to the Board by the Legislature,
16 and applicable state and federal statutory and regulatory law. Defendant has not violated any
17 rights, privileges, or immunities secured to Plaintiffs by the Constitution or laws of the state of
18 Washington.

19 13. At all times relevant to the allegations in the Complaint, Defendant's conduct was
20 reasonable, proper, lawful, constitutional, and made in good faith, without malice, and/or without
21 willful intent to violate any applicable law, rule, or regulation.

22 14. The Complaint fails to plausibly allege facts sufficient to state a breach of contract claim
23 upon which relief can be granted.

24 15. Plaintiffs' request to represent a mandatory class under 23(b)(1)(B) or (b)(2), at the
25 exclusion—even in the alternative—of seeking to represent a permissive 23(b)(3) class for a sole
26 breach of contract claim seeking monetary damages, is barred by controlling Washington Supreme
27 Court precedent. *Sitton v. State Farm Mut. Auto. Ins. Co.*, 63 P.3d 198, 116 Wn. App. 245, 252

1 (2003) (a mandatory class violates “due process” when group remedies “follow only if their
2 contract and tort theories succeed”).

3 16. Without assuming the burden of proof, Plaintiffs’ request to maintain a class action is
4 inappropriate because the putative class does not and cannot meet the requirements of Washington
5 Superior Court Civil Rule 23.

6 17. Plaintiffs’ requests for exemplary damages and attorney’s fees must be dismissed because
7 matching contributions are not wages and the University did not withhold wages willfully and with
8 intent to deprive. Employer-matching contributions are not wages because they are not
9 “compensation due to an employee by reason of employment.” *First*, participants are not entitled
10 to employer-matching contributions merely “by reason of employment,” but solely by reason of
11 the employee’s UWRP contributions, subject to contribution limits. *Second*, matching
12 contributions are not “compensation.” Additionally, exemplary damages and attorney’s fees are
13 inappropriate because the University has not “willfully and with intent” deprived Plaintiffs of
14 wages. *First*, the Complaint shows (*e.g.*, Cmpl. ¶ 85) that the University holds the *bona fide* belief
15 that it is not obliged to contribute matching contributions contrary to an employees’ elections and
16 IRS limits. This is dispositive. *See McAnulty v. Snohomish Sch. Dist.* 201, 515 P.2d 523, 116 Wn.
17 App. 834 (1973).

18 18. Plaintiffs claim for damages is defective, in whole or in part, because Plaintiffs suffered no
19 damages cognizable in law or equity, and because it is speculative.

20 19. Plaintiffs’ claims are barred, in whole or in part, because Defendant appropriately,
21 completely, and fully performed and discharged any and all obligations and legal duties, if any,
22 arising out of the matters alleged in the Complaint, and did not breach any fiduciary duty owed to
23 Plaintiffs.

24 20. Defendant reserves the right to rely on any other defenses that may become available or
25 may be disclosed by additional investigation or discovery during the proceedings in this case and
26 reserves its right to amend its Answer and assert such other defenses, affirmative or otherwise.

1 **UNIVERSITY OF WASHINGTON'S PRAYER FOR RELIEF**

2 WHEREFORE, Defendant University of Washington prays that Plaintiffs' Complaint be
3 dismissed with prejudice, Plaintiffs take nothing by their Complaint, and Defendant be allowed its
4 costs and reasonable attorney fees herein.

5 Submitted: March 24, 2023

6 ROPES & GRAY LLP
7 *Attorneys for Defendant University of Washington*

8 By /s/ Amy Jane Longo
9 Amy Jane Longo (Admitted *Pro Hac Vice*)
10 10250 Constellation Blvd.
11 Los Angeles, CA 90067
12 Telephone: 310-975-3269
13 Email: Amy.Longo@ropesgray.com

14 By /s/ Daniel V. Ward
15 Daniel V. Ward (Admitted *Pro Hac Vice*)
16 Prudential Tower
17 800 Boylston St.
18 Boston, MA 02199
19 Telephone: 617-951-7703
20 Email: Daniel.Ward@ropesgray.com

21 DAVIS WRIGHT TREMAINE LLP
22 *Attorneys for Defendant University of Washington*

23 By /s/ Sheehan Sullivan
24 Sheehan Sullivan, WSBA # 33189
25 920 Fifth Avenue, Suite 3300
26 Seattle, WA 98104-1610
27 Telephone: 206-622-3150
Email: sulls@dwt.com

1 **CERTIFICATE OF SERVICE**

2 I certify under penalty of perjury under the laws of the State of Washington that I caused
3 the document to which this certificate is attached to be delivered to the following via the King
4 County Superior Court E-service System and electronic mail:

5 BENDICH, STOBAUGH & STRONG, P.C.
6 *Attorneys for Plaintiffs Horowitz, Layton, and Johnson*
7 Alexander F. Strong, WSBA #49839
8 David Stobaugh, WSBA #6376
9 Stephen K. Strong, WSBA #6299
10 126 NW Canal Street, Suite 100
11 Seattle, WA 98107
12 Telephone: 206.622-3536

13 DATED this 24th day of March, 2023.

14 /s/ Sheehan Sullivan
15 Sheehan Sullivan, WSBA # 33189
16 920 Fifth Avenue, Suite 3300
17 Seattle, WA 98104-1610
18 Telephone: 206.622.3150
19 E-mail: sulls@dwt.com