The Honorable Brian McDonald
Hearing Date: July 28, 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 LIMIT DEFENDANT'S CONTACT WITH PUTATIVE CLASS MEMBERS ON THE SUBJECT MATTER OF THIS CLASS ACTION

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

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

INTRODUCTION

Plaintiffs Marshall Horwitz, David Layton and Richard Johnson are employees of the University of Washington who have lost matching contributions to the University of Washington Retirement Plan due to UW's mismanagement of the plan and breach of the plan contract. After years-long attempts to resolve these contribution issues without a legal proceeding without cooperation from UW, Plaintiffs determined the only way to vindicate their rights and the rights of the other affected plan participants was to bring this class action. Horwitz Dec., ¶¶13-25.

This action was filed on September 22, 2022. Dkt. 1. Under the rule governing class actions, CR 23, a motion to certify a class is to be decided "as soon as is practicable." CR 23(c)(1). UW, however, has delayed class certification both by removal and by stalling on discovery. UW now attempts to use the delay to mislead putative class members by sending them a unilateral notice that does not mention this action and misstates the rights and remedies available for aggrieved plan participants. The Court should exercise its authority under CR 23(d) to prohibit UW from unilaterally communicating with putative class members about the subject matter of this litigation.

RELIEF REQUESTED

UW notified named plaintiff Marshall Horwitz that UW intended to send a notice to the putative class. This notice misleads putative class members about their rights in this action, the remedies available to class members, and instructs class members to consult with the UW regarding the subject matter of this lawsuit (rather than class counsel). UW thus intends to violate CR 23 and RPC 4.2(a).

Under CR 23(d) plaintiffs request the following relief:

- Prohibit the UW and its attorneys from having any communications with class members regarding the subject matter of this litigation without express authorization from the Court or plaintiffs' counsel; and
- If UW sends its improper notices while this motion is pending, require a Court-approved

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

corrective communication by the UW President to all plan participants.[1]

STATEMENT OF THE CASE

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. On the other hand, employees may 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.

Prior to 2018, UW informed plan participants if an individual elective contribution to the VIP would, when combined with all expected matching UWRP contributions for the year, cause them to exceed a pertinent federal tax law limit on contributions. Horwitz Dec., ¶¶4-10. This permitted participants and UW to adjust VIP contributions in order ensure that plan participants received all promised employer matching contributions while still complying with IRS limits – *i.e.*, as necessary to avoid exceeding a federal contribution limit. *Id.* However, in 2018, UW ceased notifying plan participants of their excess contributions to the VIP, and instead began to reduce participants' matching UWRP contributions to below the mandatory contribution percentages, resulting in a loss of matching contributions. *Id*, ¶¶11. Plaintiffs seek to certify a class of plan participants who are affected by this problem.

Federal Court Judge Barbara Rothstein, in her order remanding this case to this Court, explained that "[p]laintiffs' claim that UW breached the retirement plans is premised on their allegation that UW had a duty to advise plan participants of any excess contributions so that they

[1] Plaintiff will conduct discovery to learn more about this communication with the class. Additional remedies may be requested.

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

may correct those contributions and to enable plan participants to maximize their matching UWRP contributions." *Horwitz*, 2023 WL 1466542, at *3.

UW's argument on removal included a merits argument that UW had no contractual duties to provide matching contributions. Judge Rothstein remanded the case, rejecting UW's argument that it had no contractual duties under the contracts as "mak[ing] little sense." Judge Rothstein explained (*id*. at *3-4):

> Plaintiffs' claim that UW breached the retirement plans is premised on their allegation that UW had a duty "to advise plan participants of any excess contributions so that they may correct those contributions," and to enable plan participants to maximize their matching UWRP contributions. Defendant argues that "the essence" of that alleged duty is certain federal tax law incorporated into the relevant plan provisions. As Defendant points out, the Complaint alleges that the plans, in their maximum contribution provisions, are subject to Internal Revenue Code provisions setting forth applicable contribution limits. Compl. ¶ 19; *see* UWRP at 6 § 4.11; VIP at 4 § 4.4. The Complaint also alleges that the plans incorporate a procedure approved by the IRS – which is posted on an IRS webpage entitled, "Fixing Common Plan Mistakes" – for correcting excess contributions to retirement plans. Compl. ¶ 20. According to Defendant, the entire source of the duty alleged by Plaintiffs are these federal contribution limits and related claw-back procedures, such that Plaintiffs' claim turns on – and "necessarily raises" – a federal issue.
>
> …[I]t is clear that the alleged duty primarily stems from language in the plans that create affirmative duties on UW's part without incorporating or otherwise relying upon tax law. Specifically, the Complaint cites a provision in the UWRP plan that expressly imparts on UW "a duty to 'advise' plan participants about excessive contributions." Compl. ¶ 17; *see* UWRP at 4 § 4.11 ("If the reduction is under this Plan, UW will advise the affected Participant of any limitations on his or her Plan Contributions required by this section."). The Complaint also alleges that certain plan provisions obligate UW to ensure that all UWRP contributions are ultimately matched. In particular, the Complaint cites a contractual "promise to provide matching contributions percentages" (Compl. ¶ 28), which Plaintiffs contend is grounded in a UWRP provision that mandates specified contributions into that plan, and then states that "UW will make a matching contribute on 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"). The Complaint also cites a VIP plan provision stating that VIP contributions are "in addition to any contributions which may be made to the [UWRP]." Compl. ¶ 12 (quoting VIP at 3 § 4.1). All of this language cited in the Complaint, which does not incorporate or otherwise rely upon federal tax law, suggests obligations on UW's part to notify plan participants about excess

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

contributions and ensure that the UWRP contributions they are required to make are matched.

Confronting these provisions, Defendant argues that the UWRP and VIP plans "disclaim any claw-back duty" by virtue of language in those plans granting UW the "sole discretion" to determine the manner in which excess contributions will be handled. Opp. at 2; *see* UWRP at 6 § 4.11 (providing that "the extent to which annual contributions under [UWRP] will be reduced ... will be determined by UW," and "UW may, in its sole discretion, cause any contribution in excess of the foregoing limitations ... to be returned to UW or distributed to the Participant"); VIP at 4 § 4.5 (providing that "UW may, in its sole discretion, cause any VIP Contribution in excess of the foregoing limitations ... to be distributed to the Participant"). According to Defendant, that disclaimer eliminates any contractual duty concerning the handling of excess contributions, and therefore any duty to ensure that participants maximize their UWRP contributions could arise only under federal tax law.

Defendant's argument lacks merit. As an initial matter, it makes little sense. If the "sole discretion" language operated in the way proposed by Defendant, then UW would have no duty whatsoever – whether based on terms that incorporate federal tax law or terms that do not – with respect to participants' excess contributions. Moreover, that language does not, as Defendant contends, "disclaim any claw-back duty" on UW's part. "Ordinary contract principles require that, where one party is granted discretion under the terms of the contract, that discretion must be exercised in good faith – a requirement that includes the duty to exercise the discretion reasonably." *Curtis v. N. Life Ins. Co.*, 147 Wn.App. 1030 (2008) (quoting *Craig v. Pillsbury Non-Qualified Pension Plan*, 458 F.3d 748, 752 (8th Cir. 2006) (applying Washington law)). Thus, a party to a contract may violate the duty of good faith and fair dealing, existing under all contracts, when that party "abuse[s] discretion granted under the contract." *Microsoft Corp. v. Motorola, Inc.*, 963 F. Supp. 2d 1176, 1184 (W.D. Wash. 2013) (citing Restatement (Second) of Contracts § 205 cmt. d); *see, e.g., Tymshare, Inc. v. Covell*, 727 F.2d 1145, 1154 (D.C. Cir. 1984) (provision in compensation plan permitting employer "sole discretion" to make changes did not permit changes "for any reason whatsoever, no matter how arbitrary or unreasonable."). In accordance with these principles, UW maintained a contractual duty to use good faith in its handling of participants' excess contributions.

Seeing Judge Rothstein's skepticism of UW's contractual arguments, UW now attempts to impair the rights of the putative class members through unilateral communications.

On July 3, 2023, UW informed the Faculty Council on Benefits & Retirement, of which named plaintiff Marshall Horwitz is a member, that UW planned to send unilateral notices to affected plan participants. Horwitz Dec., ¶27. And UW said that the notices would be drafted

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

based on the advice of counsel. *Id*.

Plaintiffs' counsel, upon learning of UW's plan to engage in unilateral communications with putative class members about the subject matter of this litigation, immediately objected both over the phone and in writing. A. Strong Dec., ¶2. UW has now provided the notices to be sent to the named plaintiffs and draft notices to be sent to the other plan participants. *Id*. ¶5, Ex. 3. The notices do not mention this litigation and suggest that proceedings through UW's administrative process is the only method by which a plan participant can challenge the UW's failure to make mandatory retirement contributions. *Id.*, Ex. 3. And UW suggests that, if plan participants have any concerns, they should communicate the UW benefits office. *Id.*.

UW's insistence that it is entitled to unilaterally send these notices about the subject matter of the litigation to putative class members necessitates the current motion.

ISSUES PRESENTED

1. RPC 4.2(a) prohibits defense counsel from communicating with members of a plaintiff class regarding the subject of a class action. And under CR 23(c)(2) and 23(d) a defendant is prohibited from having unilateral communications with a class regarding the litigation because it interferes with the Court's responsibility to ensure that class members receive accurate and impartial information regarding the action. Here, UW attorneys drafted and will have defendant UW send unilateral notices to class members that misleads them about their rights under the retirement plans and encourages them to contact UW rather than class counsel, regarding the litigation. Does the UW communication violate CR 23 and RCP 4.2(a)?

2. Appropriate remedies when a defendant and its attorneys intend to unilaterally communicate with a certified class include orders prohibiting such unilateral communications about the subject matter of the litigation and Court-approved corrective communications. Should the Court prohibit the UW from engaging in unilateral communications to the class and, if they send such a notice while this motion is pending, require a corrective communication?

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

EVIDENCE RELIED UPON

This motion is based on the declarations of Marshall Horwitz and Alexander Strong, along with the materials already in the record.

ARGUMENT

I. THE UW'S PROPOSED UNILATERAL NOTICE TO THE CLASS IS CONTRARY TO CLASS ACTION PROCEDURES AND VIOLATES THE NO DIRECT CONTACT RULE IN RPC 4.2(a).

A. Washington public policy strongly favors class actions.

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.* "Class actions ... establish effective procedures for redress of injuries for those whose economic position would not allow individual lawsuits[, and thus] improve access to the courts." *Darling v. Champion Home Builders Co.*, 96 Wn.2d 701, 706 (1982).

Washington courts expansively use Civil Rule 23 because "the rule avoids a multiplicity of litigation, 'saves members of the class the cost and trouble of filing individual suits[,] and . . . also frees the defendant from the harassment of identical future litigation." *Scott v. Cingular Wireless*, 160 Wn.2d 843, 856 (2007) (Internal citation and quotations omitted). "Class remedies not only resolve the claims of the individual class members but can also strongly deter future similar wrongful conduct, which benefits the community as a whole." *Id.* Our Supreme Court thus 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 (2018) (reversing trial court's decision denying class certification).

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126 NW CANAL STREET, SUITE 100
SEATTLE, WASHINGTON 98107
(206) 622-3536

B. The Court has both the authority and duty to control a class action, including limiting the UW's misleading communications with putative class members.

Here, UW is attempting to engage in unilateral communications with putative class members regarding the subject matter of this class action in a misleading way intending to impact the rights of the putative class members.

Unnamed "class members occupy a special, nontraditional status in litigation." 1 *Newberg on Class Actions,* §1.3, p. 19 (4th ed. 2002). In contrast to an individual litigant, putative class members have no direct relationship with their attorney and they may not even know how to contact their attorneys, particularly where, as here, no notice has been sent to the class. "[T]he court is [therefore] ultimately in charge of protecting the rights of absent class members." *Id*. at 17.

A court overseeing a class action "has both the duty and the broad authority to exercise control over a class action and to enter appropriate orders governing the conduct of counsel and parties." *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 100 (1981). "Courts applying the *Gulf Oil* standard have found that *ex parte* communications… discouraging participation in a case, undermine the purposes of Rule 23 and require curative action by the court." *Guifu Li v. A Perfect Day Franchise, Inc.*, 270 F.R.D. 509, 517 (N.D. Cal. 2010).

Courts have noted that "a unilateral communications scheme ... is rife with potential for coercion." *Kleiner v. The First Nat'l Bank of Atlanta*, 751 F.2d 1193, 1202 (11th Cir.1985). An ongoing employer-employee relationship, as is the case here, is particularly sensitive to coercion. *Wang v. Chinese Daily News,* 236 F.R.D. 485, 488 (C.D.Cal.), rev'd on other grounds by *Wang v. Chinese Daily News,* 709 F.3d 829 (9th Cir.2012). An *"employer*, by virtue of the employment relationship, *may exercise intense leverage*" over current employees because "[n]ot only can the employer fire the employee, but job assignments can be switched, hours can be adjusted, wage and salary increases held up, and more subtle forms of influence exerted." *N.L.R.B. v. Robbins Tire and Rubber Co.,* 437 U.S. 214, 240 (1978) (emphasis added). Thus, "in

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126 NW CANAL STREET, SUITE 100
SEATTLE, WASHINGTON 98107
(206) 622-3536

the context of an employer/worker relationship, there is a particularly acute risk of coercion and abuse." This makes the unilateral notice especially problematic.

Any notice to putative class members, even pre-certification is governed by CR 23(d). The best practicable notice envisioned by Rule 23 "conveys objective, neutral information about the nature of the claim and the consequence of proceeding as a class." *Kleiner*, 751 F.2d at 1203 (citing *In re Nissan Motor Corp. Antitrust Litig.*, 552 F.2d 1088, 1104–05 (5th Cir.1977)). Where communications are misleading, coercive, or an improper attempt to undermine the class action proceeding, they should be limited by the court. *Id.* at 1203-06; *see also Burrell v. Crown Central Petroleum*, 176 F.R.D. 239, 244–45 (E.D.Tex.1997).

Courts have found "conduct threatening the fairness of the litigation" in a wide variety of contexts. *See Romero v. May Trucking Company*, 2018 WL 5905604 (C.D.Cal. 2018) (failure to identify in its letter the existence of case or the employees' status as putative class members, failed to provide the contact information of plaintiffs' counsel was coercive); *Marino v. CACafe, Inc.*, 2017 WL 1540717 (N.D.Cal. 2017) (defendant's communications were misleading where letter did not inform absent class of the status or existence of the case, the nature of the claims, or opposing counsel's contact information); *Slavkov v. Fast Water Heater I, LP*, 2015 WL 6674575, (N.D.Cal. 2015) (finding employer's communications with employees were misleading and potentially harmful, where letter omitted significant information regarding employees' legal rights and could have been perceived as restricting contact with opposing counsel); *Camp v. Alexander*, 300 F.R.D. 617, 624 (N.D.Cal. 2014). (finding coercive the failure to include any explanation of plaintiffs' claims, a copy of the complaint, or contact information for plaintiffs' counsel); *County of Santa Clara v. Astra USA, Inc.*, 2010 WL 2724512 (N.D. Cal. 2010) (finding coercive failure to attach plaintiffs' complaint, explain plaintiffs' claims or the status of the case, or include contact information for plaintiffs' counsel).

Here, UW both includes misleading information and omits crucial information. The UW one-sided notice states (A. Strong Dec., Ex. 3);

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

> UW record keepers, Fidelity, and TIAA will complete all necessary corrections and you will receive a notice by U.S. Mail informing you of each correction made to your account and providing you an opportunity to request a hearing to review the correction decision and result.
> …
> Where can I get more information? The UWHR Benefits team can answer general questions about the plans and the correction process at benefits@uw.edu or 206-543-4444.
> …
> Sincerely,
> Mindy Kornberg, J.D.
> Vice President for Human Resources

Similar to UW's unilateral notice here, in *Haffer v. Temple Univ.*, 115 F.R.D. 506, 512 (E.D. Penn. 1987), Temple University sent out a memo to class members that told the class members to contact the University if they had "any questions about this matter:"

- Temple Univ. communication said that "[i]f any student-athlete, male or female [*i.e.*, the class members], has any questions about this matter, please call Eve Atkinson, Associate Directors of Athletics..." 115 F.R.D. at 510-11.
- UW's communication states "Where can I get more information? The UWHR Benefits team can answer general questions about the plans and the correction process…" A. Strong Dec., Ex. 3.

The *Haffer* court said the Temple University memo, initiated by a Temple attorney, "violated the Code of Professional Responsibility" because it was an unauthorized communication to party represented by a lawyer. 115 F.R.D. at 510. The Temple University communication was "urging class members to communicate with Atkinson [the Temple Associate Director of Athletics], rather than their own attorneys." *Id*. at 511. The Temple University communication therefore "invites continued violations of the prohibitions against communications with an opposing party." *Id*. In addition to prohibiting "future improper communications," the trial court "grant[ed] plaintiffs' requests that the court send a corrective notice to all female student-athletes . . . at defendants' expense." *Id*. at 512.

Here, as in *Haffer*, the UW notice "invites continued violations of the prohibitions against communications with an opposing party" by instructing the class to communicate with UW for further information that they might want regarding the subject matter of this litigation. And it

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126 NW CANAL STREET, SUITE 100
SEATTLE, WASHINGTON 98107
(206) 622-3536

says issues related to the unilateral notice and proposed correction should be raised through UW's administrative process. A. Strong Dec., Ex. 3.

UW also knew it is wrong to unilaterally communicate with the putative class because UW has previously been enjoined from such improper notices. Plaintiffs' counsel here were class counsel in a previous class action against UW regarding merit raises. A. Strong Dec., ¶4, Ex. 1. In that action, UW attorneys drafted a communication that was sent by the UW President (less egregious than here because the communication only bad-mouthed class counsel; it did not tell class members top pursue remedies through UW). A. Strong Dec., Ex. 1. Then-King County Superior Court Judge Mary Yu issued an injunction against UW. Judge Yu ruled (*id*.):

> Without making a finding as to whether there were violations of the Rules of Professional Conduct, the court, out of an abundance of caution, orders Defendant to refrain from unilateral substantive communications about this lawsuit with members of the certifies class unless class counsel or the court has approved the communication. If there is additional evidence that counsel caused the communication in order to influence class members, the court may hold an evidentiary hearing on the question with a possible referral to the Washington State Bar Assocation.

Plaintiffs' counsel, upon learning of UW's intent to embark on this same course again, sent this order to UW's attorneys and implored them not to unilaterally send notices about the subject matter of the litigation to the class. A. Strong Dec., ¶¶2-4. While not disputing that the proposed notice did indeed touch on the subject matter of this litigation, the UW attorneys offered two alleged distinctions to attempt to justify this particular attempt to undermine the class action process.

First, UW attempted to distinguish this proposed notice from the one criticized by Judge Yu because the class was already certified in that action and the class has not yet been certified here. A. Strong Dec., Ex. 2. This distinction is wrong because the Court's authority and duty to manage the class action process begins with the filing of the case, rather than the date of certification.

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126 NW CANAL STREET, SUITE 100
SEATTLE, WASHINGTON 98107
(206) 622-3536

Courts have repeatedly found that absent class members are protected from coercive communications from the class opponent and their counsel *prior to certification*. "*Gulf Oil*, and a court's power to restrict communications between parties and potential class members, apply *even before a class is certified*." *Ralph Oldsmobile, Inc. v. Gen. Motors Corp.*, 2001 WL 1035132, at *2 (S.D.N.Y. 2001) (emphasis added). *Bower v. Bunker Hill Co.*, 689 F. Supp. 1032, 1033 (E.D. Wash. 1985) (barring defense counsel's communications with class members *both before and after class certification*); *Kleiner*, 751 F.2d at 1207 (defense counsel had an ethical duty to refrain from discussing litigation with members of class as of date of class certification, *if not sooner*); *Haffer*, 115 F.R.D. at 510 (*precertification* communications to potential class members by counsel for the defendant university and university official in which potential class members were encouraged not to meet with class counsel violated ethical rule against lawyers contacting represented parties)

Second, UW attempted to distinguish this notice because it is not seeking opt outs and, according to UW, is therefore not affecting the case. A. Strong Dec., Ex. 2. UW says Judge Yu's order involved opt outs. *Id*. It did not; it had the same certification under CR 23(b)(2) as is sought here. A. Strong Dec., ¶5. And this notice is even more improper than the many examples found coercive above regarding opt outs, *supra* pp. 8-10. Requesting an opt out, requires the defendant to at least acknowledge the existence of litigation. Here, the notice goes beyond merely encouraging opt outs, and states that plan participants rights under the retirement plans and any "corrections" are entirely in the hands of UW. A. Strong Dec., Ex. 3. In essence, the notice is UW's attempt to unilaterally divest this Court of jurisdiction over the class action and obtain individual administrative reviews and/or piecemeal settlements. UW wants to impact the rights of putative class members by telling them review is limited to "request[ing] a hearing to review the correction decision and result," *id*., and will be decided by UW, not the Court. Moreover, UW"s notice completely fails to tell plan participants that there is an active legal action regarding UW's retirement plan failures. *Id*. Like the many other instances in which

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

courts found class opponent unilateral communications coercive, discussed *supra* pp. 8-10, it expressly encourages individuals with questions to contact the opposing party for advice, rather than plaintiffs' counsel.

This Court should protect unnamed class members by ordering UW to not make unilateral communications with unnamed class members about the subject matter of this litigation.

CONCLUSION

Contrary to RPC 4.2(a) and CR 23, the UW and its attorneys intend to send a unilateral notice seeking piecemeal settlements and to instruct the class members to consult with the UW, rather than class counsel, regarding the issues in the class action. The Court should prohibit such communications.

I certify that this motion contains 4,100 words, in compliance with the Local Civil Rules.

DATED this 19th day of July, 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
Attorneys 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 to Limit Defendant UW's Communications with Putative Class Members
2. Note for Motion
3. Declaration of Alexander F. Strong in support of Motion to Limit Communications
4. Declaration of Marshall Horwitz

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 19th day of July, 2023.

/s/ Erika R. Haack
Erika R. Haack