The Honorable Judith H. Ramseyer
Hearing: June 28, 2023
9:00 AM

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

ALEXANDER BARRY, individually and on behalf of all others similarly situated,

Plaintiff,

v.

UNIVERSITY OF WASHINGTON,

Defendant.

No. 20-2-13924-6-SEA

ORDER GRANTING PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

THIS MATTER having come before the Court on Plaintiff's Motion for Class Certification (the "Motion"), following the Court's review of the Motion, the papers submitted in support and in response, the hearing thereon, after conducting a rigorous analysis to ensure that the Plaintiff has satisfied the requirements of CR 23(a) and CR 23(b)(3), and good cause appearing, the Motion is hereby GRANTED.

I. STANDARD OF REVIEW

Class actions, authorized by CR 23 in Washington, are an essential tool for adjudicating cases with multiple claims that involve similar factual and/or legal inquiries and that are too modest to prosecute individually. *Chavez v. Our Lady of Lourdes Hospital at Pasco*, 190 Wash. 2d 507, 514, 415 P.3d 224 (2018) (other citations omitted). Washington courts liberally interpret CR 23 because the rule "avoids multiplicity of litigation, saves members of the class the cost and trouble of filing individual suits, and frees the defendant from the harassment of identical future litigation." *Weston v. Emerald City Pizza, LLC*, 137 Wash. App. 164, 168, 151 P.3d 1090 (2007) (quoting *Smith v. Behr Process Corp.*, 113 Wash. App. 306, 318, 54 P.3d 665 (2002) (cleaned up).

To certify a class, Plaintiff must meet all of the requirements under CR 23(a), numerosity, commonality, typicality, and adequacy of representation, and at least one subdivision of 23(b). *Schwendeman v. USAA Casualty Insurance Co.*, 116 Wash. App. 9, 18, 65 P.3d 1 (2003). These rules provide:

> (a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interest of the class.
>
> (b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
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> . . . .
>
> (3) The court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair

> and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

CR 23(a); CR 23(b)(3). As noted further below and in the Court's oral ruling on June 28, 2023, incorporated herein, the proposed class meets the requirements of CR 23(a) and CR 23(b)(3).

II. THIS CASE SATISFIES THE CR 23(a) PREREQUISITES

To start, Plaintiffs have carried their burden of demonstrating this case meets each of the four CR 23(a) prerequisites.

CR 23(a)(1) Numerosity. First, CR 23(a)(1) requires that a class be so numerous that joinder of all members is impracticable. When a class is large, joinder is usually impracticable. *Jordan v. County of Los Angeles*, 669 F.2d 1311, 1319 (9th Cir. 1982). Joinder is generally deemed impracticable in classes with over 40 members. *Chavez*, 190 Wash. 2d at 520. Here, numerosity is satisfied because the proposed class contains over 56,000 members, including undergraduate and graduate students. Compl. ¶ 24. *See Little v. Grand Canyon Univ.*, No. CV-20-00795-PHX-SMB, 2022 WL 266726, at *5 (D. Ariz. Jan. 28, 2022) (finding numerosity met and certifying class in COVID-19 fee refund case where proposed class included over 20,000 students).

CR 23(a)(2) Commonality. Second, the commonality element of Rule 23(a)(2) requires only that "there are questions of law or fact common to the class." CR 23(a)(2). "Commonality" under CR 23(a)(2) is a "low threshold test" that "is qualitative rather than quantitative, that is, there need be only a single issue common to all members of the class." *Smith*, 113 Wash. App. at 320. Commonality is met if the "course of conduct" that gives rise to the cause of action affects all the class members. *Pellino v. Brink's Inc.*, 164 Wash. App. 668, 682, 267 P.3d 383 (2011) (commonality satisfied when alleged facts indicate defendant was engaged in common course of conduct in relation to all potential class members). Plaintiff satisfies the low commonality hurdle. Common issues here include: (1) whether UW and Class members had a contract; (2)

whether those contracts obligated UW to provide in-person instruction; (3) whether those contracts obligated UW to provide access to campus facilities and in-person resources; (4) whether UW breached the contracts; (5) whether UW unlawfully kept funds paid; (6) whether UW was unjustly enriched by keeping the funds paid; and (7) the fact and measure of damages derived from verifiable class-wide information maintained by UW. Commonality is met because the proof will focus on UW's conduct and will be common to the Class.

CR 23(a)(3) Typicality. Third, CR 23(a)(3) requires that the "claims or defenses of the representative parties [be] typical of the claims or defenses of the class." CR 23(a)(3). The typicality requirement is met when the claims of the representative plaintiffs arise from the same course of conduct that gives rise to the claims of the other class members, and where the claims are based upon similar legal theories. *John Doe L v. Pierce County*, 7 Wash. App. 2d 157, 203, 433 P.3d 838 (2018) (citing *Pellino*,164 Wash. App. at 684). Here, Plaintiff's claims are typical because they arise from the same events and course of conduct and common legal and remedial theories. Plaintiff's claims, like those of Class members, stem from a contract with UW for the provision of in-person education and access to campus facilities and in-person resources. Plaintiff, like members of the Class, was billed by UW for tuition and fees specific to students who registered for in-person courses; and paid the demanded tuition and fees. Compl. ¶ 8. UW stopped providing the promised in-person instruction and access to campus facilities and in-person resources for all students simultaneously. Def. Ans. ¶ 3. UW then retained full price for tuition and fees. Plaintiff alleges UW must refund the pro-rated fees for campus access and in-person resources that UW did not provide when it shuttered its campus. Defendant raises factual differences between students to oppose this finding. These issues stray into the merits of Plaintiff's allegations and his burden of proof as to the claims. Those issues need not be determined at this stage. Since each Class member's claims arise from the same course of UW's conduct, and each Class member makes similar legal arguments, the typicality requirement is met.

CR 23(a)(4) Adequacy. For the final CR 23(a) prerequisite, CR 23(a)(4) requires that the

representative parties will "fairly and adequately protect the interests of the class." CR 23(a)(4). CR 23(a)(4) utilizes a two-part test is: (1) whether any substantial conflicts of interest exist between the representatives and the class; and (2) whether the representatives will prosecute the action vigorously on behalf of the class. *Hanlon v. Chrysler Corp*., 150 F.3d 1011, 1020 (9th Cir. 1998). Plaintiff and his counsel satisfy both parts of this test.

First, the Court finds that Plaintiff's interests are aligned with those of Class members in obtaining a recovery that will provide each with the benefit of their bargain. In addition to these aligned interests, Plaintiff has no conflicts with the Class and seeks to hold UW accountable. Plaintiff has committed to prosecuting this litigation and will continue to advocate for the best interests of the Class. Plaintiff and proposed Class Counsel will vigorously represent the Class.

In addition, proposed Class Counsel, Hagens Berman Sobol Shapiro LLP and Lynch Carpenter LLP are each qualified. Both law firms include experienced class action lawyers, with success in litigating issues relating to the provision of in-person education and campus access during the Spring 2020 quarter, working together and separately. Plaintiff and proposed Class Counsel satisfy the adequacy inquiry, satisfying each requirement of CR 23(a).

III. CR 23(B)(3)'S PREDOMINANCE AND SUPERIORITY REQUIREMENTS ALSO ARE MET HERE

Next, CR 23(b)(3) permits class certification if "common questions of law predominate over questions affecting only individual members and that a class action is the superior method of handling the claim." CR 23(b)(3).

A. Common issues predominate given the central issues raised in this litigation.

Predominance tests whether the proposed class is sufficiently cohesive to call for adjudication by representation. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 623 (1997) "[T]he predominance requirement is not defeated merely because individual factual or legal issues exist; rather, the relevant inquiry is whether the issue shared by the class members is the dominant, central, or overriding issue shared by the class." *Miller v. Farmer Bros. Co.*, 115 Wash. App. 815, 825, 64 P.3d 49 (2003). When one or more of the central issues are common to the class and can be said to predominate, the action may be considered proper under CR

23(b)(3), "even though other important matters will have to be tried separately, such as damages or some defenses peculiar to some individual class members." *Tyson Foods Inc. v. Bouaphakeo*, 577 U.S. 422, 453 (2016). In determining whether predominance is met, the court engages "in a pragmatic inquiry into whether there is a common nucleus of operative facts to each class member's claim." *Smith*, 113 Wash. App. at 323. The "predominance standard is not strictly applied to every aspect of the plaintiffs' claims; rather, questions of judicial economy are central." *Sitton*, 116 Wash. App. at 255. Here, this Court concludes that common questions predominate. Plaintiff identifies key evidence common for all Class members, such as: whether UW, based on UW's conduct and representations, including during enrollment, course registration, billing, and payment, and students paying tuition and fees, formed a contract that required UW to provide in-person instruction and access to facilities and in-person services; whether UW breached that contract when it closed campus; and the calculation of damages. This evidence directly affects every Class member's effort to show liability and every Class member's entitlement to relief.

Defendant targets much of its opposition to class certification here, arguing Plaintiff's proposed methodology is flawed. It does not and cannot, the argument goes, account for myriad differences between class members to place a value on the education for which an individual paid and, accordingly, how the change to remote learning at the height of the Covid-19 pandemic may have affected or reduced that value. The Court finds that these issues also are properly raised on the merits of Plaintiffs' allegations and methodology for calculating damages. Defendant will have the opportunity on the merits to challenge and dispute Plaintiff's claims. Even if some individual differences among class members are shown, the essential question here is whether allegations arise from a "common nucleus of operative facts". *Smith*, 113 Wash. App. at 323. Plaintiff will present the same class-wide evidence that UW's course of conduct, transitioning to online-only education, caused economic loss to Plaintiff and Class members. These common issues predominate over any individual issues, rendering class treatment appropriate.

B. A class action is superior to individual actions covering the same issues and arising out the same transition to remote learning.

The Court finds that a class action here is superior to the alternative of individual actions. Where individual damages are small, the class vehicle is usually deemed superior. *Chavez*, 190 Wash. 2d at 523. "[F]orcing numerous plaintiffs to litigate the alleged pattern or practice ... in repeated individual trials runs counter to the very purpose of a class action." *Sitton*, 116 Wash. App. at 256–57. CR 23(b)(3) includes four factors for this inquiry: "(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action." CR 23(b)(3). Here, class action treatment is superior to adjudicate the claims in this matter.

The first factor favors certification because it would cost Class members more to litigate this action individually than the relatively small amount of damages they will recover. There is no reason to believe putative Class members have any interest in controlling the litigation.

The second factor favors class certification, as neither Plaintiff nor his counsel are aware of any other litigation regarding this matter against UW. *See* Barry Decl. ¶ 10; Kurowski Decl. ¶ 15; Ciolko Decl. ¶ 8.

The third superiority factor also favors certification. This Court is the logical and desirable forum as UW is located in King County, where this case is being litigated, and the Court is familiar with the factual and legal issues. Holding separate trials for claims that could be tried together would be costly and inefficient. *Elter v. United Servs. Auto. Ass'n*, 17 Wash. App. 2d 643, 661, 487 P.3d 539 (2021), *review denied sub nom. Elter v. USAA Cas. Ins.*, 198 Wash. 2d 1027, 498 P.3d 957 (2021).

The final superiority factor—manageability—focuses on the "practical problems that may render the class action format inappropriate for a particular suit." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 164 (1974). That individual issues might exist or take some time to

resolve does not make a class action unmanageable. *Chavez*, 190 Wash. 2d at 521. Trial courts have a "variety of procedural options to reduce the burden of resolving individual damage issues, including bifurcated trials, use of subclasses or masters, pilot or test cases with selected class members, or even class decertification after liability is determined." *Sitton*, 116 Wash. App. at 255. This case can be tried in an efficient matter, and the Court foresees no manageability problems that make over 56,000 individual actions a better alternative. As a result, Plaintiff shows the superiority prong of CR 23(b)(3) has been met here.

IV. THE PROPOSED CLASS IS ASCERTAINABLE

While CR 23 does not explicitly include an ascertainability requirement, some appellate courts have reviewed ascertainability issues in evaluating appeals from class certifications. *See Elter*, 17 Wash. App. 2d 643, 658 (affirming class certification noting that appellant "also argues that 'ascertainability' was not satisfied. But CR 23 does not list an 'ascertainability' requirement" and conducting no further analysis of the argument). In doing so, such courts direct simply that "[t]he definition must include objective rather than subjective criteria that makes the plaintiff class identifiable." *Barnett v. Wal-Mart Stores, Inc.*, 133 Wash. App. 1036 (2006). *See also Kihuria v. Consumer Legal Servs. Am., Inc.*, 5 Wash. App. 2d 1001 (2018) ("The class must be sufficiently identifiable without being overly broad. The class should not be defined by criteria that are subjective or that require an analysis of the merits of the case.") (citations omitted). The proposed Class meets this standard. The condition for class membership is students who paid UW tuition and fees for access to a suite of promised in-person educational services during the Winter and Spring 2020 quarters that UW did not provide. This definition uses precise and objective criteria to identify Class members using UW's student and payment records.

V. CONCLUSION

Plaintiff has satisfied the requirements of CR 23(a) and CR 23(b)(3). Accordingly, **IT IS HEREBY ORDERED** as follows:

1. The Court certifies the following Class:

> All students who were enrolled in and paid for the University of Washington's in-person based educational programs, services, and courses for the Winter Quarter 2020 or Spring Quarter 2020 academic term(s).

Excluded from the Class is UW, any entity in which UW has a controlling interest, and UW's legal representatives, predecessors, successors, assigns, and non-student employees. Further excluded from the Class is this Court and its employees.

2. The Court appoints Plaintiff Alexander Barry as Class Representative.

3. The Court appoints Hagens Berman Sobol Shapiro LLP and Lynch Carpenter, LLP as Class Counsel.

4. The Court directs that notice issue to certified Class members under CR 23(d)(2) and further directs that UW provide Plaintiff's counsel with last known Class member email and mailing address contact information. The parties shall confer and determine a realistic schedule to prepare and send notice to Class members. This Order shall constitute a "judicial order" within the meaning of the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g and 34 C.F.R. § 99.31(a)(9), sufficient to compel the University of Washington to provide this information.

DATED: _____

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HONORABLE JUDITH H. RAMSEYER
KING COUNTY SUPERIOR COURT JUDGE

[Proposed order prepared by Hagens Berman Sobol Shapiro LLP]

King County Superior Court
Judicial Electronic Signature Page

Case Number:	20-2-13924-6
Case Title:	BARRY VS UNIVERSITY OF WASHINGTON ET AL
Document Title:	ORDER RE GRANTING CLASS CERTIFICATION
Signed By:	Judith H. Ramseyer
Date:	June 28, 2023

Judge: Judith H. Ramseyer

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

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