

IN THE MATTER OF ARBITRATION
BETWEEN

THE INTERNATIONAL UNION, UNITED
AUTOMOBILE, AEROSPACE AND
AGRICULTURAL IMPLEMENT WORKERS
OF AMERICA, (UAW), LOCAL
UNION 4121,

Union,

and

THE UNIVERSITY OF WASHINGTON,

Employer.

**UNIVERSITY OF WASHINGTON'S
MOTION FOR RECONSIDERATION**

I. INTRODUCTION

The arbitrator's award is contrary to both contract and statute. The University requests that the award be reconsidered and vacated, and that the Union's grievance be denied.

The Collective Bargaining Agreement expressly provides that tuition and fee *waivers* will be maintained at current levels—not that *tuition and fees* will be maintained at current levels. In fact, the Union has tried and failed—repeatedly—to get a freeze of new fees. The

1 arbitrator's award is contrary to this clear contract language, and directly contravenes the
2 parties' negotiating history.

3 Furthermore, the award is contrary to statute. Washington's legislature has long
4 recognized the importance of student government for university students. Students learn to
5 develop their own government, set their own goals, and enrich and improve their own
6 environment through self-determination. In 2009, the legislature enhanced students' rights to
7 self-governance by giving university student governments the ability to impose fees on the
8 entire student body. Students at the University of Washington have embraced these rights and
9 responsibilities by engaging in campus-wide, democratic processes to design and implement
10 these new fees to save a popular transportation program and to improve important student
11 facilities.

12 Contrary to the Union's position, its opportunity to bargain collectively on behalf of a
13 small subset of students does not trump the rights established by the legislature for the entire
14 student body. The award is contrary to a clear legislative mandate. This motion for
15 reconsideration is not made lightly by the University. These issues are too important to the
16 University and its entire student body to let an erroneous decision stand. The arbitration
17 decision is not supported by the evidence in the case, and is contrary to important state
18 statutes and public policy.

19 The University respectfully requests that you reconsider your decision issued on
20 May 24, 2012, and deny the Union's grievance.¹

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¹ The arbitrator's jurisdiction has been extended by stipulation of the parties to allow time for negotiation. This motion is being filed because these negotiations have not been successful.

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II. DISCUSSION

A. **THE GRIEVANCE IS NOT SUPPORTED BY THE CONTRACT, CONTRAVENES STATE STATUTE AND PUBLIC POLICY, AND SHOULD BE DENIED.**

1. **There was no express agreement to waive future fees.**

The key provision of the Collective Bargaining Agreement (“CBA”) states: **“Tuition and fee waivers for ASEs with a 50% FTE appointment will be maintained at their current rates/levels.”** Union Ex. 2 at Article 7 (emphasis added).

This provision means the University will continue to *waive* fees at the current level—that is, it will continue to waive the Operating Fee and the Technology Fee, which it had historically waived. This is the only reading of this provision consistent with the plain meaning of the text, the parties’ negotiation history and later actions, and the statutory framework surrounding university tuition and fees.

a. ***The plain meaning of the Collective Bargaining Agreement.***

The arbitration decision concluded the imposition of the U-PASS and Student Facilities Renovation fees resulted “in tuition and fee waivers not being maintained at current rates/levels” in violation of the CBA. This conclusion might make sense if the agreement said “**tuition and fees** will be maintained at current rates/levels.” But that is *not* what the parties bargained for. Instead, the agreement calls for “tuition and fee **waivers**” to be maintained at their current rates/levels. Article 7 (emphasis added). And that is precisely what the University did. The University’s treatment of the ASEs has been entirely consistent through the life of the contract. It has always waived two fees. It has not waived any others. That is the only interpretation of the agreement that is consistent with the plain language used by the

1 parties, the context surrounding the agreement, and the statutory framework underlying
2 university fee structures.

3 ***b. Negotiation of the Collective Bargaining Agreement.***
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5 The Union has repeatedly asked the University to waive all fees, and the University
6 has never agreed to do so. There is no express agreement to waive new fees, and no such
7 agreement can be implied based on the negotiating history.

8 The tuition-and-fee-waiver language has been in the CBA since it was first executed in
9 2004. The Union has admitted that, during the negotiation of the 2004 agreement, it sought a
10 provision that would “guarantee that any new fees would be waived for new ASEs during the
11 life of the contract,” and that the “University shall not unilaterally impose new fees.” Union
12 Ex. 13 at 1. The Union specifically asked for ASEs to “be exempt from any newly created
13 student fees.” This language was struck from the agreement, and thus was not part of the
14 parties’ deal from the beginning. BH Ex. 2 at 6.
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16 The Union has also admitted that in 2007 it again sought to “guarantee no new fees
17 imposed.” *Id.* But once again, the University did not agree to this language, and it was not
18 included in the amended agreement. In 2009, the Union was even more specific. It sought
19 waiver of the student facilities renovation fee and “any other fees that approximate the
20 function of the current fees.” BH Ex. 6 at 5. The Union’s request was rejected. BH Ex. 6.
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22 Contract language, whether or not ambiguous, must be interpreted in the context of the
23 circumstances surrounding the making of the contract. *Spectrum Glass Co., Inc. v. Pub. Util.*
24 *Dist. No. 1 of Snohomish County*, 129 Wn. App. 303, 311, 119 P.3d 854 (citing *Berg v.*
25 *Hudesman*, 115 Wn.2d 657, 667, 801 P.2d 222 (1990)). Circumstances that should be
26 considered include statements made by the parties in negotiations and the course of dealing
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1 between the parties. *Id.* (citing *Berg*, 115 Wn.2d at 666–68). When a party seeks to have
2 language added to a contract during the course of negotiations, and that language is rejected
3 by the other party, the context rule demands that the term be excluded from the contract. An
4 alternate interpretation ignores the circumstances surrounding the making of the contract.
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6 The Union should not be allowed by arbitration to obtain something that it failed to
7 achieve at the negotiation table, and that is not authorized by state statute. By its own
8 admission, the Union has asked for years for the University to agree to waive new student
9 fees. If the existing agreement already contained such a provision, there would have been no
10 need for the Union to ask for it—repeatedly. In fact, the agreement contains no such
11 provision, and the Union’s grievance should be denied.
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13 *c. Statutory framework for legislatively authorized statutory fee*
14 *waivers.*

15 It is no coincidence that the two fees the University has historically waived are the two
16 fees for which there is express statutory approval for waiver. By state statute, universities
17 may exempt certain graduate students “from paying a portion of the resident operating fee and
18 the technology fee” RCW 28B.15.615. These are the only two fees the University has
19 previously agreed to waive, and the state statute supports the University’s interpretation of the
20 agreement.
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22 **2. Waiver of student-imposed fees is contrary to state statute and**
23 **strong public policy.**

24 University fees are creatures of statute, but the arbitration decision did not contain a
25 single reference to the statutes authorizing University fees and the limited instances in which
26 the legislature has authorized university fee waivers. The arbitrator appears to have missed
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1 the significance of these statutes, and the limitations they provide on the statutory authority of
2 the University to waive certain fees—particularly the student-originated fees in this case.

3 The statutory framework for tuition and fees is spelled out in RCW 28B.15. As
4 previously described by the University, these statutes identify the different types of fees, what
5 they can be used for, and which ones the University can waive for certain graduate students.
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7 This limitation is provided in RCW 28B.15.615, which states:

8 Subject to the limitations of RCW 28B.15.910, the governing boards of the
9 state universities and the regional universities may exempt the following
10 students from paying all or a portion of the resident **operating fee and the**
11 **technology fee**: Students granted a graduate service appointment, designated
12 as such by the institution, involving not less than twenty hours of work per
13 week. The exemption shall be for the term of the appointment.

14 (Emphasis added). The legislature’s statutory framework for fees is very specific, and it only
15 authorizes waiver of these two fees.

16 Student services and activities fees are treated differently by the legislature. “Services
17 and activities fees” include the following:

18 Student activity fees, student use fees, student building use fees, special
19 student fees, or other similar fees charged to all full time students, or to all
20 students, as the case may be, registering at the state’s colleges or universities
21 and pledged for the payment of bonds heretofore or hereafter issued for, or
22 other indebtedness incurred to pay, all or part of the cost of acquiring,
23 constructing or installing any lands, buildings, or facilities of the nature
24 described in RCW 28B.10.300 as now or hereafter amended, shall be included
25 within and deemed to be **services and activities fees**.

26 (Emphasis added). The Student Facilities Renovation fees are considered services and
27 activities fees. As recently as this year, both of the state’s legislative bodies unanimously
28 recognized “that students play an important role in recommending how services and activities
fees should be expended, as the majority of members of the services and activities fees

1 committee at each institution of higher education.” S.H.B. 2352, 62d Leg., Reg. Sess. (2012)
2 (codified at RCW 28B.15.045).

3 In order to be implemented, the legislature requires a student services and activities
4 fee to be approved by a services and activities fee committee, of which a majority of the
5 members are students. RCW 28B.15.045(3). In the event the governing body of a university
6 disagrees with the student services and activities fee committee proposed budget, the
7 legislature has mandated a specific dispute resolution process, with a student acting as chair of
8 that process. RCW 28B.15.045(7). Once a budget has been approved, “funds shall not be
9 shifted” to other uses without approval of the student-led services and activities fee
10 committee. This framework set forth by the legislature cannot be altered by the University, or
11 the Union. RCW 28B.15.045 contains 13 sections, and at no point does it authorize waiver of
12 a student services and activities fee.
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16 In addition to services and activities fees, the legislature has also provided another
17 method for students to impose fees on themselves. RCW 28B.15.610 allows students “to
18 create voluntary fees for each academic year when passed by a majority vote of the student
19 government or its equivalent, or referendum presented to the student body....” The U-PASS
20 fee was adopted pursuant to this statute. This provision also contains no legislative
21 permission to waive voluntary student fees. RCW 28B.15.610.
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23 RCW 28B.15.615 allows the University to waive *only* resident operating fees and
24 technology fees. RCW 28B.15.615 does not address “services and activities fees” or
25 voluntary student fees. The statutory canon of interpretation *expressio unius est exclusio*
26 *alterius* requires that “the express inclusion in a statute of situations in which it applies
27 implies that other situations are intentionally omitted.” *Freeman v. Gregoire*, 171 Wn.2d 316,
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1 336, 256 P.3d 264 (2011) (quoting *In re Det. of Strand*, 167 Wn.2d 180, 190, 217 P.3d 1159
2 (2009)). Here, the express inclusion of operating fees and technology fees implies that the
3 waiver of other fees is excluded from the University's statutory authority. This is also
4 supported by RCW 28B.15.610, which governs the U-PASS fees and states: "The provisions
5 of this chapter **shall not apply to or affect** any student fee or charge which the students
6 voluntarily maintain upon themselves for student purposes only." RCW 28B.15.610
7 (emphasis added). This statute provides further support for the non-waivability of student-
8 imposed fees.
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11 To interpret the contract to allow the University to waive voluntarily imposed student
12 fees for some students, and not others, is inconsistent with the language and purpose of the
13 statute. In fact, the University and the Union recognized the statutorily imposed support and
14 deference for student government by including the following statement in the CBA: "The
15 parties do not intend to . . . restrict, limit, or prohibit the exercise of the functions of the
16 Graduate and Professional Student Senate, the Associated Students of the University of
17 Washington, or any other student organization in matters not covered by this Agreement."
18 Union Ex. 2 at 1. The Agreement does not expressly address student-imposed fees, and those
19 fees have never been waived by the University.
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22 **3. The specific language in RCW 28B.15 controls the more general**
23 **language of RCW 41.56.203.**

24 The Union relies on RCW 41.56.203, which provides that "tuition and fee remission
25 and waiver is within the scope of bargaining." This statute, enacted in 2002, provides no
26 definition of tuition and fees. Instead, as described above, tuition and fees are statutorily
27 provided for in RCW 28B.15, and their waivability is specifically addressed in that statute.
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1 The Union argues RCW 41.56.203 should prevail over all other statutes because
2 RCW 41.56.905 says it prevails in the event of a conflict. But there is no conflict here.
3 RCW 41.56.203 is consistent with RCW 28B.15.615 because RCW 28B.15.615 allows for
4 waiver of specified fees, and RCW 41.45.203 allows for bargaining related to those waivable
5 fees.
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7 The Union also argues RCW 41.56 “supersedes *earlier* statutes bearing on the
8 University’s authority to establish and waive fees.” Union Br. at 14 (emphasis added).
9 However, RCW 28B.15.610 was amended in **2009**—well after the statute on which the Union
10 relied was enacted—to *increase* student government’s ability to impose mandatory fees on the
11 entire student body. *See* S.S.B. 5776, 61st Leg., 1st. Reg. Sess. (Wash. 2009). The
12 amendment did not provide authority for a waiver, which the legislature knew how to do
13 because it had expressly provided for waiver of the operating and technology fees. As
14 previously discussed, RCW 28B.15.045 was amended in 2012, also without including the
15 ability to waive those fees.
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18 During debate of the amendment of RCW 28B.15.610, Representative Gary Alexander
19 objected to the mandatory nature of the new student fees, and introduced an amendment that
20 would allow students to opt out of the fees created pursuant to RCW 28B.15.610. *Regarding*
21 *Student Fees, Charges, and Assessments: Hearing on S.S.B. 5776 Before H. Comm. on State*
22 *Gov’t & Tribal Affairs*, 61st Leg. (Wash. 2009) [hereinafter *Hearing on S.S.B. 5776*]
23 (statement of Rep. Gary Alexander, Member, H. Comm. on State Gov’t & Tribal Affairs).
24 But that amendment was defeated, and the legislature elevated the importance of student self-
25 governance over that of the University’s ability to allow students to opt out. Representative
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1 Sam Hunt emphasized the importance of student self-governance in decisionmaking regarding
2 fees, stating:

3 [T]hese are student government decisions. I think part of the student work is to
4 learn, and work in government, and work in their own government and their
5 self-determination, and so I would urge a “yes” vote on the bill.

6 *Hearing on S.S.B. 5776* (statement of Rep. Sam Hunt, Chair, H. Comm. on State Gov’t &
7 Tribal Affairs). The arbitrator’s decision turns the legislature’s express public policy position
8 on its head by elevating the University’s ability to waive student fees above the students’ right
9 of self-governance.

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11 When interpreting statutes, courts give meaning to each part of a statute, and favor a
12 statutory interpretation that does not render any portion of the statute meaningless or
13 superfluous. *Jongeward v. BNSF R.R. Co.*, 174 Wn.2d 586, 601, 278 P.3d 157 (2012). Here,
14 the University’s interpretation is the only one that harmonizes the statutes relating to
15 collective bargaining for certain student employees and fee-setting authority for all students.
16 It is also consistent with the plain meaning of the Agreement and the context surrounding the
17 Agreement.
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19 **B. THE ARBITRATOR SHOULD RECONSIDER, AND CLARIFY IF NECESSARY, HIS**
20 **DECISION TO AVOID GIVING ASEs A WINDFALL.**

21 The arbitration award found the University liable for “monetary damages” with
22 interest, but did not specify how to calculate those damages. As previously described, the
23 University believes the arbitration decision should be reconsidered, and the grievance denied.
24 In the alternative, the University asks for clarification regarding the damages award and the
25 opportunity to present additional evidence regarding the benefits to the ASEs that far
26 outweigh any potential damages.
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1 **1. The University should not be required to disgorge payment for the**
2 **U-PASS program after ASEs have already enjoyed the benefits of**
3 **that program.**

4 The Union asked for refunds to ASEs who would otherwise have opted out of the
5 U-PASS program. Union Br. at 18. The arbitration award provided for “monetary damages,”
6 but did not restore the previous opt-out U-PASS program. Awarding monetary damages to
7 ASEs for the U-PASS program is unfair and would create a windfall for two reasons.

8 First, the U-PASS program is incredibly popular, with more than 89 percent of the
9 ASEs using their U-PASSes for public transit trips in 2011–12. Declaration of Joshua N.
10 Kavanagh at 2.² It is obvious that the University should not be required to refund the U-PASS
11 fee to any student who used the pass. *Lincor Contractors, Ltd. v. Hyskell*, 39 Wn. App. 317,
12 320–21, 692 P.2d 903, 906–07 (1984); *see also* Restatement (Second) of Contracts § 347
13 cmt.d (1981). Furthermore, the U-PASS program includes additional benefits that the
14 University cannot track as easily to specific users. Kavanagh Decl. at 2. The U-PASS
15 provides cardholders with discounted carpool parking, vanpool fare credits, lower
16 membership rates for Zipcar, fare-free rides on the NightRide shuttle system, discounts and
17 special offers from more than 50 local merchants, and discounts on lights, helmets and
18 pedometers at Hall Health. Ex. 5 at 000012. It would be a windfall to refund the U-PASS fee
19 to ASEs who already benefitted from these programs throughout the year.

20 Second, the cost of the U-PASS for ASEs using the old opt-out model would be
21 dramatically higher than under the current universal program. The cost of the opt-out
22 program rose 98 percent from 2008 to 2009, and increases of an additional 50 percent were

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28 ² Reconsideration should be granted without the need for supplementing the record. If the arbitrator does not agree, we request that the record be re-opened to allow for submission of additional evidence.

1 predicted. University Ex. 4 at 5. It would not be fair to give the ASEs the benefit of a lower
2 cost pass provided by a universal program if they are unwilling to participate in the universal
3 program. Instead, the ASEs who used the U-PASS should be charged the equivalent of what
4 an opt-out pass would have cost if the program had continued. This would result in a
5 significantly higher cost for more than 89 percent of ASEs, and a refund for just over 10
6 percent. Given this higher cost, the University believes any damages to the small percentage
7 of ASEs who would have opted out of the program are more than offset by the benefit to the
8 class as a whole of a lower cost pass, which benefits the vast majority of Union members.
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11 For both of these reasons, the University should not be required to refund any fees to
12 the Union or the ASEs for time periods when the ASEs had full use and enjoyment of the
13 U-PASS, which would include the 2011–12 academic year and fall quarter 2012.
14

15 **2. The University should not be required to repay facilities renovation**
16 **fees after the benefit of the fee has already been realized by ASEs.**

17 The Student Facilities Renovation Fee was approved in 2009 following a four-year,
18 student-led effort to improve three important student buildings: Hall Health, which provides
19 medical services for students including ASEs; the Husky Union Building (HUB), which
20 provides food, entertainment, and a central gathering location for all campus students; and the
21 Ethnic Cultural Center, which has been a student-led initiative since its creation in 1968.
22 Because the fee involved incurring long-term debt, it was required to be approved by, and was
23 approved by, two consecutive services and activities fee committees, which are student
24 controlled committees. The fees were also endorsed by the Associated Students of the
25 University of Washington and the Graduate and Professional Student Senate. Declaration of
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1 Gary Quarfoth at Exhibit A. The Union was aware of the fee, and tried to get the University
2 to waive it for all ASEs in 2009 negotiations. BH Ex. 6 at 5. The University refused.

3 The Union is barred by laches from seeking reimbursement of the Student Facilities
4 Renovation Fee. Laches applies “when (1) the plaintiff knew the facts constituting a cause of
5 action, (2) the plaintiff unreasonably delayed commencing an action, and (3) the defendant
6 was materially prejudiced by the delay in bringing the action.” *Harmony at Madrona Park*
7 *Owners Ass’n*, 143 Wn. App. 345, 362, 177 P.3d 755 (2008). Here, the Student Facilities
8 Renovation Fee was passed in 2009 as part of a comprehensive funding mechanism **before**
9 the facilities renovations began. The University issued bonds to fund the renovation based on
10 the agreement that the fee would be used to repay the bonds. Quarfoth Decl. at 1. The Union
11 waited until after the borrowed money was spent, and the renovations were well underway or
12 in some cases complete, before complaining about this fee. *Id.* The HUB and Hall Health
13 have already re-opened for student use, and the Ethnic Cultural Center is scheduled to re-open
14 in January 2013. *Id.*

15 In essence, the students have borrowed the money to pay for these renovations from
16 the University, and have agreed to repay those bonds using this mandatory student fee. To
17 allow a subset of students to benefit from the renovation—and the loan of University money
18 to accomplish it—without paying back the debt is fundamentally unfair to the rest of the
19 student body. It could also result in violations of the University bond obligations and higher
20 costs to all other students because the money for the renovations has already been spent and
21 will need to be repaid by a smaller group of students. There is no practical way to exclude
22 ASEs from the benefits of these new student buildings, and they should not be able to reap
23 those benefits without paying their fair share. This strikes at the core of the public policy

1 allowing students to impose mandatory fees on themselves. RCW 28B.15.041 specifies that a
2 student services and activities fee is “charged to all students” to avoid precisely this situation,
3 where a small group of students seeks to get a free benefit at the expense of other students.
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5 The University believes the liability portion of the arbitration decision should be
6 reconsidered and vacated. But even if it stands, the monetary damages should be stricken
7 because it would be unfair to allow a small subset of students to reap a windfall at the expense
8 of all other students.
9

10 III. CONCLUSION

11 The after-the-fact desires of the few should not outweigh the needs of the many. The
12 University’s students have worked together to exercise their statutory authority to impose fees
13 on themselves to develop a lower cost U-PASS transportation alternative, and to pool their
14 collective resources to significantly improve student buildings. Both the legislature and the
15 University support student government and the important public policy of students engaging
16 in self-governance and directing the use of their own resources.
17

18 Whether this important public policy may supersede an express contractual provision
19 is not at issue here because there is no such express agreement in this case. The University
20 has never agreed, either expressly or implicitly, to waive new fees. Since bargaining between
21 the Union and the University began, the Union has asked the University to agree to waive new
22 fees. The University has repeatedly refused. The parties agreed only to maintain current fee
23 waivers.
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25 The Union should not be able to achieve through arbitration what it was never able to
26 achieve through negotiation. The University asks the arbitrator to reconsider his decision and
27 deny the Union’s grievance.
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1 In the alternative, the University asks the arbitrator to clarify his order for relief. The
2 Union members have already had full use of the U-PASS for the academic year. The
3 improvements funded by the Student Facilities Renovation Fee are already underway using
4 borrowed money, and students are already enjoying some of these renovated facilities. The
5 University asks that the arbitrator clarify his decision to prevent a windfall to the Union by
6 finding monetary relief is not warranted here, or, in the alternative, to order a refund only to
7 those students who did not use the U-PASS or facilities funded by the Student Facilities
8 Renovation Fee in 2011-12.
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11 Dated this 19th day of October, 2012.

12 HILLIS CLARK MARTIN & PETERSON P.S.

13
14
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