IN THE COURT OF APPEALS FOR THE STATE OF OREGON

SHANNON GOZZI, et al.,
Plaintiffs,

and

JENNIFER ADAMS, fka Jennifer Schuster, and NATHAN SURRETT,
individually and on behalf of all similarly-situated individuals,
Plaintiffs-Respondents,

v.

WESTERN CULINARY INSTITUTE, LTD. and CAREER EDUCATION CORPORATION,
Defendants-Appellants.

Multnomah County Circuit Court No. 080303530

Court of Appeals No. A152137

RESPONDENTS' ASWERING BRIEF AND SUPPLEMENTAL EXCERPT OF RECORD

Appeal from the Order of the Circuit Court
for Multnomah County
entered July 30, 2012

Hon. Richard C. Baldwin
Circuit Court Judge

JULY 2013

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STATEMENT OF THE CASE

Nature of the action and relief sought

Defendants are Western Culinary Institute, Ltd. (WCI) and its parent Career Education Corporation (CEC). WCI operates a for-profit trade school, now know as Le Cordon Bleu College of Culinary Arts, in Portland, Oregon. The plaintiff class members are current and former WCI students. In March 2008 plaintiffs filed claims for fraud and violations of the Oregon Unlawful Trade Practices Act alleging misrepresentations that induced them to enroll, pay tuition and incur financial obligations. In February 2010, the case was certified as a class action. In June 2011, after notice and the expiration of the opt-out period, the class consisted of approximately 2,500 former students. In August 2011, defendants moved to compel arbitration and dismiss the action. In December 2011 the trial court denied defendants' motion, a decision from which defendants declined to appeal.

In February 2012 defendants moved for summary judgment against all the class allegations asserted by the class representative. On the same date, defendants also moved to decertify the class. In April 2012, the trial court denied defendants' motion for summary judgment. Defendants moved the court to certify the class decertification issue for interlocutory appeal,

pursuant to ORS 19.225. The trial court declined to endorse an immediate appeal.

On May 23, 2012, defendants again moved to compel arbitration. The trial court denied the motion. Defendants appeal from this order.

Defendants seek not only review and reversal of the trial court's order denying their second motion to compel arbitration, but also a directive to decertify the class.

Nature of the order to be reviewed

The trial court denied defendants' second motion to compel arbitration by order dated July 27, 2012.

Statutory basis for appellate jurisdiction

Appellate jurisdiction and/or reviewability are in dispute. Defendants rely on ORS 36.730(1)(a), which permits interlocutory appeal of an order denying a motion to compel arbitration. Defendants rely on ORS 19.270 and ORS 19.425 as authority for this court to review the trial court's order denying their motion to decertify the class.

Relevant dates for appellate jurisdiction

The trial court's order denying defendants' second motion to compel arbitration was entered on July 30, 2012. The defendants' notice of appeal was served and filed on August 6, 2012.

Questions presented on appeal

1. Does ORS 36.730 permit appeal from denial of a second motion to compel arbitration that presented the same issues as those litigated in the first motion to compel arbitration from which defendants declined to appeal?

2. Can defendants show prejudice necessary for reversal, where they have failed to address on appeal their waiver of arbitration, thus conceding this independent ground supporting the trial court's decision?

3. If this court can reach the merits, did the trial court correctly deny defendants' motion to compel arbitration on grounds of waiver, unconscionability, or both?

4. Does this court have authority outside of ORS 19.225 to review and reverse the trial court's decision to deny defendants' motion to decertify the class?

5. Did the trial court correctly deny defendants' motion to decertify the class, where variances in the arbitration agreements have nothing to do with class certification?

Summary of arguments

More than three and one-half years after the complaint was filed, defendants lost a motion to compel arbitration that, if granted, defendants claim would have ended the entire class action case. Open Br, p. 9. The

motion was denied and defendants declined to appeal. Instead, defendants chose continued litigation and sought, among other things, a summary judgment on all class allegations, which was denied. Defendants then filed a second motion to compel arbitration, which was denied for the same reasons as its first motion, namely because defendants waived arbitration by delay and litigation conduct, and the unconscionable terms common to all the arbitration agreements rendered them unenforceable. The class action ban in some of the contracts had nothing to do with the unconscionability determination. The arbitration agreement was unconscionable because of other terms that eliminated state law rights and remedies, prohibited recovery for statutory, punitive and consequential damages, denied costs and attorney fees, and imposed prohibitive costs that made arbitration inaccessible to plaintiffs.

Defendants appeal the denial of their second motion to compel arbitration on the basis of *AT&T Mobility v. Concepcion,* ___ US ___, 131 S Ct 1740, 179 L Ed 2d 742 (2011), which told states they could not declare an arbitration agreement unconscionable solely because the agreement banned class actions. As the trial court below was never asked to invalidate WCI's arbitration agreements on this ground, defendants' main argument is entirely irrelevant to the issues in this appeal.

Other issues that defendants choose not to address, however, are dispositive and require affirmance of the trial court's decision. First, defendants failed to appeal the denial of their first motion to compel arbitration, in which *defendants asked the trial court* to resolve the issues of their waiver of arbitration and the unconscionability of their arbitration agreement. As a consequence, the trial court's decision became final and unreviewable when the interlocutory appeal period expired. *Snider v. Production Chemical Manufacturing, Inc.,* 348 Or 257, 267-268, 230 P3d 1 (2010). ORS 36.730 does not contemplate successive motions to compel -- each with attendant interlocutory appeal rights -- throughout the course of civil litigation.

Second, there was ample evidence justifying the trial court's decision to deny the motion on the ground that defendants waived arbitration by delay and litigation conduct. This independent ground – undisputed by defendants -- supports the trial court's decision and renders other claims of error nonprejudicial.

If this court reaches the merits, the trial court should be affirmed. Defendants waived arbitration by years of litigation in court, during which they sought affirmative relief in discovery and dispositive motions, disavowing any interest in arbitration. In addition, all versions of the

arbitration agreement contain the same terms that the trial court found unconscionable: the arbitration agreements nullify state consumer protection law and bar recovery of the statutory, punitive, and consequential damages, attorney fees and costs available to plaintiffs in court. Further, the agreements impose burdensome arbitration costs, which deny plaintiffs access to the arbitration forum.

Finally, this court has no authority to consider defendants' second assignment of error. Defendants have not met the terms of interlocutory review under ORS 19.225 and no other statute allows the court to review the trial court's denial of defendants' motion to decertify the class. In any case, whether some of WCI's unconscionable and unenforceable arbitration agreements also contain a class action ban has nothing to do with the common claims and defenses that justify this class litigation.

STATEMENT OF FACTS

The class consists of approximately 2,500 current and former students who attended WCI between March 5, 2006 and March 1, 2010. ER 26, ¶ 4, ER 12, ¶ 6. The students alleged that defendants made affirmative misrepresentations and failures to disclose material information about the value and benefits of WCI's educational services, which induced them to

enroll, pay tuition and incur student debt. ER 25-26, ¶¶ 1 (A) - (D). The class was certified on February 5, 2010.

1. The Arbitration Agreements

Each class member signed an Enrollment Agreement with WCI. The contracts were revised over the years. All contracts contained an arbitration section requiring arbitration of disputes between the parties. Before November 2007, the arbitration section did not address class actions. SER 1-2 (Surrett's contract). After November 2007, the arbitration section prohibited arbitration or litigation on a class basis. ER 140. Class representative Nathan Surrett and approximately 1,440 class members signed the pre-November 2007 version of the contract. Approximately 1,060 class members signed contracts of the post-November 2007 vintage.

All the arbitration agreements contained the same terms, which plaintiffs asserted were unconscionable:

1. The arbitration agreement prohibited the arbitrator from awarding any damages except actual or economic damages, thus eliminating statutory, compensatory and punitive damages allowed under the UTPA, and consequential and punitive damages available for fraud.

The pre-November 2007 contract provided:

> The arbitrator shall not have any authority to award punitive damages, treble damages, consequential or indirect damages,

> or other damages not measured by the prevailing party's actual damages * * *.

SER 2, ¶ 11.

The post-November 2007 contract provided:

> The arbitrator will have no authority to award consequential damages, indirect damages, treble damages or punitive damages, or any monetary damages not measured by the prevailing party's economic damages.

ER 140, ¶ 11.

2. The arbitration agreement required the arbitrator to apply exclusively federal law, thus bypassing statutory remedies and the regulatory framework applicable to for-profit trade schools.

The pre-November 2007 contract provided:

> The arbitrator shall apply federal law to the fullest extent possible in rendering a decision.

SER 2, ¶ 11.

The post-November 2007 contract provided:

> The arbitrator shall apply federal law to the fullest extent possible * * *.

ER 140, ¶ 11.

3. The arbitration agreement disallowed attorney fees to the prevailing plaintiff in contravention of the UTPA:

The pre-November 2007 contract provided:

> The arbitrator shall not have any authority * * * to award attorney's fees.

SER 2, ¶ 11.

The post-November 2007 contract provided:

> The arbitrator will have no authority to award attorney's fees except as expressly provided by this Enrollment Agreement or authorized by law or the rules of the arbitration forum.

ER 140, ¶ 11.

4. The arbitration agreement required the parties to bear their own costs and expenses, and split the costs of the arbitrator.

The pre-November 2007 contract provided:

> The parties shall bear their own costs and expenses. The parties also shall bear an equal share of the fees and costs of the arbitration, which include but are not limited to the fees and costs of the arbitrator, unless the parties agree otherwise or the arbitrator determines otherwise in the award.

SER 2, ¶ 11.

The post-November 2007 contract provided:

> Each party shall bear the expense of its own counsel, experts, witnesses, and preparation and presentation of proofs. All fees and expenses of the arbitrator and administrative fees and expenses of the arbitration shall be borne equally by the parties unless otherwise provided by the rules of the AAA or the NAF governing the proceedings, or by specific ruling by the arbitrator, or by agreement of the parties.

ER 140, ¶ 11.

5. The arbitration agreement imposed the commercial arbitration rules of the American Arbitration Association ("AAA").

The pre-November 2007 contract provided:

> * * * the dispute shall be resolved by binding arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association then in effect or in accordance with procedures that the parties agree to in the alternative.

SER 2, ¶ 11.

The post-November 2007 contract provided:

> If brought before the AAA, the AAA's Commercial Arbitration Rules, and applicable supplementary rules and procedures of the time the arbitration is brought shall be applied.

ER 140, ¶ 11.

Plaintiffs presented evidence in opposition to each motion that the cost of arbitration, which included a $1,275 per plaintiff filing fee, attorney fees likely to surpass $20,000, arbitrator and hearing fees, and litigation expenses, was beyond the ability of individual class members to afford. SER 4, ¶¶ 3, 4 (Dec of Nathan Surrett); SER 10. Moreover, plaintiffs' evidence showed that individual claimants would not be able to find competent counsel to represent them in an arbitration in which neither state law remedies nor attorney fees were available to the prevailing claimant. SER 11-12, ¶¶ 6-9 (Dec of Larson); SER 15-16, ¶¶ 4-6 (Dec of Baxter).

2. Defendants' motions to compel arbitration

First motion to compel arbitration

In their first motion to compel arbitration, defendants asked the trial court for two forms of relief. Defendants moved to compel class representative Nathan Surrett to submit to individual (not class) arbitration, based on defendants' interpretation of Surrett's contract with WCI. At the same time, defendants moved to dismiss the class action in its entirety, on the theory that all class members were subject to an arbitration agreement that precluded class litigation and class arbitration. SER 17-41. As defendants acknowledge, it was their intent that if they "had prevailed in compelling Mr. Surrett to arbitrate, the underlying class action case would have ended." Open Br at 9.

Defendants also argued that **the court** – not an arbitrator – should address and reject impediments, such as unconscionability and waiver, to enforcing the arbitration agreement. SER 30-31; 33-34 ("In determining whether to compel arbitration, **a court must preliminarily determine:** (1) whether the parties are bound by a valid arbitration agreement; and (2) if so, whether the particular type of controversy between the parties is within the scope of that agreement." SER 30:16-18 (emphasis added)); ("**courts**

routinely have rejected these waiver arguments * * *." SER 33:21-22 (emphasis added)).

Defendants justified their three and a half year delay in seeking arbitration by relying on the then-recent Supreme Court decision in *AT&T v. Concepcion,* which decided that arbitration agreements with class action bans are not per se unconscionable. SER 24

Plaintiffs argued in opposition that defendants had waived the right to compel arbitration by delay and extensive litigation in court. CR # 236, pp. 11-14. Plaintiffs also argued that the arbitration provision was unconscionable both procedurally and in substance. Cr # 236, pp. 14-17.

Plaintiffs also pointed out that Surrett's contract did not contain a ban on class actions, thus making *Concepcion* irrelevant to the case and a poor justification for defendants' delay. CR # 236, pp. 9-10, 12. Defendants then submitted into evidence and asked the court to consider post-November 2007 contracts that contained an express class ban, as support for individual arbitrations. SER 41-42, ¶ 3; SER 43-46. Defendants explained that the post-November 2007 contracts supported their motion to dismiss the action entirely: "Plaintiffs simply cannot identify any class member who has not signed a bilateral arbitration agreement. Indeed, Plaintiffs' contractual arguments are even more far-fetched with respect to class members who

entered into Enrollment Agreements beginning in November 2007, when an express class-arbitration waiver was added to the bilateral arbitration provision. Without any class representative to maintain class claims – indeed without any class, given each member's individual agreement to arbitrate on a bilateral basis – the Court has ample grounds for dismissal." CR # 241, p. 3:15-23.

The trial court denied the motion. CR # 258. Defendants did not appeal from the denial of their first motion.

Other motions

After losing the motion to compel, defendants moved to decertify the class. ER 28. They also moved for summary judgment to dismiss all the class claims asserted by the class representative. CR ## 266, 267, 268. The trial court denied these motions. ER 127.

Second motion to compel arbitration

After losing the above motions, defendants filed a second motion to compel arbitration with a renewed focus on the post-November 2007 contracts. CR # 296. Defendants made clear that their second motion to compel arbitration was a reprise of the first. Defendants explained that their second motion was necessary because "all class members' claims were not ordered to arbitration when Defendant moved to compel arbitration of the

class representative's claims[.]" CR # 296, p. 1:7-8. Defendants again submitted as evidence and asked the court to interpret the WCI contract in effect beginning in November 2007, as well as a subsequent contract revision with an identical arbitration section in effect beginning in October 2009. SER 48, ¶ 2; ER 137-140. In their second motion, defendants repeated their argument that students who signed these contracts were required to submit to individual (not class) arbitration. Defendants made little effort to distinguish the unconscionable terms common to all the agreements. Instead, they repeated their view that *Concepcion* had preempted a state court's application of unconscionability rules to an arbitration agreement. [1]

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[1] Compare argument in defendants' first motion to compel arbitration:

> "*Concepcion* also held that the FAA preempts any state-law rules that disfavor arbitration – including those asserted by Plaintiffs that shroud themselves in the veil of an unconscionability analysis."

CR # 241, p. 3:7-11 [Reply].

with defendants' argument in their second motion to compel arbitration:

> *Concepcion* held that the FAA preempts any state-law rules that disfavor arbitration, including those asserted by Plaintiffs based on unconscionability.

CR # 296, p. 3:22-23.

Plaintiffs argued in opposition to defendants' second motion that defendants were moving improperly for reconsideration of a decision already made. CR # 300, p. 1:24. Plaintiffs reasserted and bolstered their waiver argument. CR # 300, pp. 2, 4-7; SER 47-48. Plaintiffs also reasserted their unconscionability arguments and the evidence supporting it. CR # 300 pp. 2-4, 9-11; SER 6-9;11-13;14-16.[2] As explained above, all contracts contained the same terms that made the arbitration agreement unconscionable in the first motion.[3] The trial court denied the second motion to compel arbitration. CR # 334.

The trial was set to begin on January 14, 2013.

RESPONSE TO FIRST ASSIGNMENT OF ERROR

The trial court properly denied defendants' second motion to compel arbitration.

Preservation of error

Although defendants' preservation discussion includes other trial court decisions with which they disagree, the only decision from which defendants have appealed is the order denying their second motion to compel arbitration.

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[2] Plaintiffs incorporated in their second opposition the attorney declarations submitted in opposition to the first motion to compel arbitration. CR # 300, p. 4, n 3.

[3] With one exception: Surrett's pre-November 2007 arbitration agreement contained a provision keeping the arbitrator's decision confidential. Later contracts did not contain a confidentiality provision.

Plaintiffs argue below that the order denying defendants second motion to compel arbitration is not reviewable on appeal.

Standard of review

This court's standard of review is addressed below as it pertains to particular issues.

ARGUMENT

I.
THE CONSEQUENCES OF DEFENDANTS' FAILURE TO APPEAL FROM DENIAL OF THEIR FIRST MOTION TO COMPEL ARBITRATION

ORS 36.730 allows an interlocutory appeal from a trial court's decision to deny arbitration. ORS 36.730(1) ("An appeal may be taken from: (a) An order denying a petition to compel arbitration; (b) An order granting a petition to stay arbitration."). In *Snider,* 348 Or 257, the court addressed the consequences of failing to take an interlocutory appeal from a denial of arbitration. The court decided that if a party chooses not to appeal from a denial of a motion to compel arbitration, that decision becomes final and unreviewable later by other means. 348 Or at 266-267. In *Snider*, the defendant did not appeal from the interlocutory order denying a petition to compel arbitration but instead appealed from the final judgment at the end of the case and assigned error to the denial of arbitration.

Snider did not address serial motions to compel arbitration. However, its rationale, based on the court's review of the 2003 legislation authorizing the interlocutory appeal, supports the nonreviewability of the trial court's order here. The *Snider* court examined the legislature's choice and concluded that "the legislature wanted to have the issue of arbitrability be decided quickly and finally before the parties went to the expense and effort of trying their case in court." 348 Or at 266. Allowing continuous motions to compel arbitration – each one subject to interlocutory appeal -- would undercut the legislature's goal of early and final resolution of the arbitration issue.

Here, defendants failed to appeal the denial of their first motion to compel arbitration and the trial court's decision became final and unreviewable. Defendants are now bound by that denial and the legal bases that supported it.

The trial court invoked Yogi Berra at the hearing on defendants' second motion to compel arbitration observing, "Deja vu all over again." Hearing July 6, 2012, Tr 3:21. The trial court was correct. When defendants filed a second motion to compel arbitration, they raised the same issue -- that the contract required individual arbitration of claims --, and defended against the same issues – waiver and unconscionability – that had been resolved in the first motion. Not surprisingly, the trial court issued the same ruling. The trial

court may have denied defendants' second motion because defendants were bound by the outcome in the first motion. *Oregon Educ. Ass'n v. Oregon Taxpayers United*, 253 Or App 288, 302, 291 P3d 202, 211 (2012) (the law of the case doctrine "precludes relitigation or reconsideration of a point of law decided at an earlier stage of the same case."); *Morley v. Morley,* 24 Or App 777, 781, 547 P2d 636 (1976) (law of the case doctrine applies to prior trial court decision, as well as appellate court decision in the same case). This basis for the trial court's decision would have been correct.

When defendants filed their second motion to compel arbitration, they argued for the first time that the arbitrator – not the court – should decide issues of waiver and enforceability of the arbitration provision. However, the trial court had already resolved these issues – at defendants' request – when it denied defendants' first motion. The waiver decision had to do with defendants' excessive delay and extensive litigation in court – a discretionary determination supported by a factual record that grew only more unfavorable for defendants by the time of their second motion. The unconscionability decision was based on terms of the arbitration agreement common to all the contracts. The class action ban in the post-November 2007 contracts (the focus of defendants' second motion) did not make the arbitration agreement any *less* unconscionable, and defendants do not so suggest. Instead, without

discussion or support, defendants would have this court ignore the trial court's disposition of controlling issues finally resolved before their second motion.

II.
WAIVER IS AN INDEPENDENT GROUND THAT SUPPORTS THE TRIAL COURT'S DECISION

A. Waiver is not contested

The trial court below issued an order denying the motion, and did not express written or oral reasons for its decision. However, the issue was litigated below and the record fully supports denial of the motion on the basis of defendants' waiver.

By failing to address their waiver of arbitration, defendants have conceded it. Waiver is an unchallenged, alternate ground supporting the trial court's decision; defendants have failed to demonstrate reversible error. *Roop v. Parker Northwest Paving Co.,* 194 Or App 219, 236, 94 P3d 885 (2004), *rev den* 338 Or 374 (2005) ("where [appellants] fail to challenge the alternative basis of the trial court's ruling, we must affirm it"); *State v. Stoudamire*, 198 Or App 399, 416, 108 P3d 615 (2005) (affirming trial court by equally divided court; Landau, J., concurring on this basis, stating, "It is axiomatic that, when a trial court bases a decision on multiple grounds, an appellant may prevail on appeal only after demonstrating that *all* of the bases for the court's decision were erroneous."). *See also State ex rel SOSCF v.*

Duncan, 164 Or App 610, 612, 993 P2d 818, (1999), *rev den,* 330 Or 361 (2000) ("[B]ecause mother's challenge is directed to only one of two grounds on which the termination order is based, we affirm."); *Jensen v. Medley,* 336 Or 222, 239-240, 82 P3d 149 (2003) (although trial court's jury instruction relating to one of the plaintiff's theories of liability was erroneous, court affirmed the verdict because there was another basis for it that the defendant did not challenge on appeal). Any opinion of this court on the issues defendants raise on appeal would have no effect on the outcome, because waiver independently supports affirmance. *See Abbott v. DeKalb*, 346 Or 306, 310, 211 P3d 246 (2009), *cert den* 558 US 1123 (2010) (dismissing review as improvident until after the Court of Appeals addressed independent bases that supported the trial court's decision).

Waiver is an independent ground, raised and fully litigated below, that supports the trial court's decision.

B. The court, not an arbitrator, should decide waiver by litigation conduct

Defendants do not address this issue and have thus conceded it. In any case, defendants themselves asked the trial court to decide the waiver issue on their first motion to compel.

There is a general consensus among courts interpreting the FAA that the court, not the arbitrator, should decide the question of waiver of arbitration

by litigation conduct. In *Marie v. Allied Home Mortgage Corp.,* 402 F3d 1, 11-14 (1st Cir 2005) the court gave several reasons why the court should decide waiver by litigation conduct, and why this outcome is consistent with *Howsam v. Dean Witter Reynolds, Inc.,* 537 US 79, 123 S Ct 588, 154 L Ed 2d 491 (2002) (arbitrator should decide procedural issue whether claim barred by six-year limitations period imposed by arbitration rules). First, the FAA states that a court is permitted to stay a court action pending arbitration only if "the applicant for the stay is not in default in proceeding with such arbitration." 9 USC § 3.[4] 402 F3d at 12. A "default" is generally understood to include waiver. 402 F3d at 13 (citing cases from four circuit appeals courts supporting proposition). According to *Marie,* "This language would seem to place a statutory command on courts, in cases where a stay is sought, to decide the waiver issue themselves." 402 F3d at 13.

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[4] 9 USC § 3 provides:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

Second, the Revised Uniform Arbitration Act of 2000 (RUAA), upon which the U.S. Supreme court relied in *Howsam,* 537 US at 85, includes waiver among the substantive issues that are generally decided by courts: "Waiver is one area where courts, rather than arbitrators, often make the decision as to enforceability of an arbitration clause." RUAA §6, cmt. 5, 7, U.L.A. 16 (Supp 2004).

Third, where waiver takes the form of litigation conduct, the trial court is in the best position to assess issues such as forum shopping, justifications for delay, and abuse and waste of judicial resources.

Finally, leaving the waiver decision with the court furthers a key purpose of the FAA – the speedy resolution of disputes. 402 F3d at 12-14.

Several federal and state cases reach the same conclusion. *Plaintiff's Shareholders Corp. v. Southern Farm Bureau Life Ins. Co.,* 486 Fed Appx 786, 789 (11th Cir 2012) ("questions regarding waiver based on litigation conduct are presumptively for the courts—and not the arbitrators—to decide."); *JPD, Inc. v. Chronimed Holdings, Inc.,* 539 F3d 388, 393 (6th Cir 2008) ("[W]e join the First and Third Circuits in holding that the court, not the arbitrator, presumptively evaluates whether a defendant should be barred from seeking a referral to arbitration because it has acted inconsistently with reliance on an arbitration agreement."); *Ehleiter v. Grapetree Shores, Inc.,*

482 F3d 207, 217-218 (3rd Cir 2007) ("[T]he Supreme Court did not intend its pronouncements in *Howsam* * * * to upset the 'traditional rule' that courts, not arbitrators, should decide the question of whether a party has waived its right to arbitrate by actively litigating the case in court."); *Radil v. National Union Fire Ins. Co. of Pittsburg, PA,* 233 P3d 688, 694-695 (Colo 2010) (trial court, not arbitrator, decides claim of litigation based waiver); *Ocwen Loan Servicing, LLC v. Washington,* 939 So2d 6, 12-14 (Ala 2006), *cert dismissed* 549 US 1162 (2007) (waiver by litigation involves matters occurring in the judicial forum and should be resolved by the court).

Oregon courts have not yet fully addressed the issue. In *Industra/Matrix Joint Venture v. Pope & Talbot, Inc.,* 341 Or 321, 336-337, 142 P3d 1044 (2006) the court interpreted the FAA and decided that the arbitrator should decide an issue of procedural arbitrability based on a party's noncompliance with conditions precedent, such as failure to have a business license. However, the question of waiver by litigation conduct was not before the court. 341 Or at 328, n. 4. In *Livingston v. Metropolitan Pediatrics, LLC,* 234 Or App 137, 227 P3d 796 (2011) the court interpreted the Oregon Arbitration Act, not pertinent here, and addressed waiver in the form of defendants' participation in a BOLI proceeding. *Citigroup Smith Barney v. Henderson,* 241 Or App 65, 76, 250 P3d 926 (2011) decided that where an

arbitration agreement is silent about who decides preliminary issues, the FAA had a "default rule" which allowed an arbitrator to decide whether a party had waived arbitration, as in the case, by filing an interpleader action in court. *Henderson* relied on *Howsam*, 537 US 79*,* which decided that a party's compliance with an arbitration time line should be decided by an arbitrator, reasoning that arbitrators have as much or more expertise in interpreting their own arbitration rules as a court, and the parties would likely expect an arbitrator to decide this issue.

In *Henderson* the court did not address (and apparently was not called upon to reconcile) the countervailing considerations that apply when waiver is based on a party's litigation conduct. Nor did *Henderson* address an ambiguous arbitration agreement like WCI's, which designated not one but two decision makers to resolve issues about the validity and enforceability of the arbitration agreement.[5] Waiver by litigation conduct implicates enforceability.

In this case, the proper rule, reaffirmed in *Howsam,* states that the question of arbitrability, is "an issue for judicial determination [u]nless the parties clearly and unmistakably provide otherwise." 537 US at 83. *See also Harnisch v. Coll. of Legal Arts, Inc.,* 243 Or App 16, 22, 259 P3d 67 (2011)

[5] The ambiguity of the arbitration agreement in this respect is discussed in detail below at pp. 32-34.

("[T]he strong federal policy favoring arbitration is not so strong that it overrides the contracting parties' intent and requires arbitration where the parties have not agreed to arbitrate.").

Here, given the arbitration agreement's ambiguous designation of decision makers, and the good reasons why a court is in the best position to evaluate waiver by litigation conduct, the trial court was the proper decision maker.

C. Waiver was established here

Standard of review

A reviewing court is required to assume that, to the extent that the trial court's decision is based on facts found by the court, the court found the facts in a manner consistent with its decision. *Ball v. Gladden,* 250 Or 485, 488, 443 P2d 621 (1968).

A party waives arbitration when (1) the party had knowledge of an existing right to compel arbitration; (2) the party acted inconsistently with that right; and (3) the action resulted in prejudice to the party opposing arbitration. *Wilbur-Ellis Company v. Hawkins,* 155 Or App 554, 558, 964 P2d 291 (1998), citing *Fisher v. A.G. Becker Paribas Inc.,* 791 F2d 691, 694 (9th Cir 1986).

1. Defendants' knowledge

When the case was filed in March 2008, defendants knew that the WCI contracts contained arbitration sections. Defendants also knew that the contracts of student who enrolled after November 2007 contained express class action bans.

2. Defendants' actions were inconsistent with an interest in arbitration

Delay

The complaint was filed March 5, 2008. In April 2008, defendants' counsel conferred with plaintiffs' counsel about filing a motion to compel arbitration. SER 7, ¶ 4. The defendants did not file a motion at that time. The litigation continued and the parties engaged in extensive discovery, including several contested hearings requiring the trial court's intervention and dispositive motions. SER 8-9, ¶ 7; SER 48, ¶ 3. The class was certified on February 5, 2010. Notice was sent to prospective class members and the opt-out period expired on June 20, 2011. More than four years into the litigation, defendants filed the motion to compel arbitration from which they now appeal. CR # 296.

Litigation conduct

During years of delay before moving to arbitrate the parties engaged in extensive discovery, including more than 14 depositions, and extensive document exchanges. Defendants' affirmative litigation conduct included:

• several contested protective orders and motions to compel, SER 8-9, ¶ 7; SER 48, ¶ 3;

•a successful motion to dismiss one count alleging a violation of the UTPA, CR # 23 (Motion); CR # 62 (Order of dismissal).

•a motion to compel arbitration from which defendants declined to appeal, CR # 230;

•a motion to decertify the class, ER 28;

•a motion for summary judgment, CR # 266, 267, 268.

Only after this extensive litigation, and only after losing dispositive motions seeking dismissal of the class allegations and the class action, did defendants filed their second motion to compel arbitration in June 2012. In their second motion to compel arbitration defendants excused their delay – again – with reliance on *Concepcion,* the same excuse for delay defendants had offered the year before in their first motion to compel arbitration.

Defendants' four-year delay, their extensive use of judicial resources in defending the case in court, and their choice to litigate a dispositive summary judgment motion clearly support waiver.

3. Prejudice to plaintiffs

Delay

The class members brought this action because defendants induced them to incur student debt far beyond what they can repay on the wages they can obtain with a WCI certificate. Their debt mounts with every delay. Arbitration is a decision that should be made early and expeditiously. Instead, defendants have used arbitration motions as an excuse for delay. Trial was set for January 14, 2013. Now, five years into this litigation, defendants have succeeded in halting the trial outright.

Other prejudice

Plaintiffs have incurred the expenses of class litigation, including extensive discovery, which would not have been available to defendants in an individually arbitrated claim.

Defendants lost their motion to compel arbitration on the basis of waiver, unconscionability, or both. Defendants attempted to relitigate those issues with a second arbitration motion and lost again. Defendants now want

an arbitrator to decide those issues. As the court observed in *Doctor's Assocs., Inc. v. Distajo,* 107 F3d 126 (2d Cir), *cert den* 522 US 948 (1997):

> The "prejudice" that supports a finding of wavier can be "substantive" prejudice to the legal position of the party opposing arbitration, such as when the party seeking arbitration loses a motion on the merits and then attempts, in effect, to relitigate the issue by invoking arbitration[.]

107 F3d at 131.

Defendants also sought dispositive rulings from the court in order to end the litigation outright. Their first motion to compel arbitration included a motion to dismiss the action entirely. Their motion for summary judgment sought dismissal of all the class allegations as a matter of law. In *Good Samaritan Coffee Co. v. LaRue Distributing, Inc.,* 275 Neb 674, 684-686, 748 NW2d 367 (2008) the court found a waiver of arbitration based on a three-year delay, discovery motions and a motion for partial summary judgment. As the court observed, summary judgment is a request for resolution of the case in a judicial forum – a request clearly inconsistent with the right to arbitrate. 275 Neb at 685-686. The court also observed that allowing a party to invoke its right to arbitrate after such an extensive delay would undercut the very rationale—speed and efficiency—that supports the strong presumption in favor of arbitration in the first place. *See also Johnson Associates Corp. v. HL Operating Corp.,* 680 F3d 713, 718-719 (6th Cir 2012) (eight-month delay in

filing motion to compel arbitration during which parties litigated discovery and scheduling issues held waiver of arbitration).

Defendants' motion was properly denied because they waived the right to arbitrate.

III.
UNCONSCIONABILITY

Standard of review

The evidence supporting unconscionability is reviewed for "any evidence" to support the trial court's decision. *Livingston,* 34 Or App at 153. Whether the facts support a determination of unconscionability is a question of law to be assessed on the basis of facts in existence at the time the contract was made. *Vasquez-Lopez,* 210 Or App 553, 566, 152 P3d 940 (2007). The court looks to state law to determine whether an arbitration agreement under the FAA is unconscionable. *Motsinger v. Lithia Rose-FT, Inc.*, 211 Or App 610, 614, 156 P3d 156 (2007).

ARGUMENT

A. The court, not the arbitrator, should decide unconscionability

Defendants pursue two conflicting paths on this point. First, they ask this court to decide that *Concepcion* invalidated this court's unconscionability analysis in *Vasquez-Lopez.* Open Br, pp. 15-23. Then they assert that the

decision about unconscionability should be made by the arbitrator. Open Br, pp. 23-26. Case law interpreting the FAA places the decision with the court.

Where, as here, plaintiffs' unconscionability challenge is to the arbitration clause and not to other parts of the contract, the issue is to be decided by the court, not the arbitrator. *Livingston,* 234 Or App at 151; *Sprague v. Quality Restaurants Northwest, Inc.,* 213 Or App 521, 524, 162 P3d 331, *rev den* 343 Or 223 (2007); *Vasquez-Lopez,* 210 Or App at 562-563.

In *Rent-A-Center West, Inc. v. Jackson,* 561 US ___, 130 S Ct 2772, 177 L Ed 2d 403 (2010), the case on which defendants rely, the Supreme Court reiterated this rule, that where a party challenges the validity of the agreement to arbitrate, the court, not the arbitrator, must decide whether the arbitration agreement can be enforced. ("If a party challenges the validity under § 2 [of the Federal Arbitration Act] of the precise agreement to arbitrate at issue, the federal court must consider the challenge before ordering compliance with that agreement under § 4 [of the FAA]." 130 S Ct at 2778). *See also Puleo v. Chase Bank USA, N.A.,* 605 F3d 172, 180 (3rd Cir 2010) ("The Courts of Appeals are unanimous in recognizing that an unconscionability challenge to the provisions of an arbitration agreement is a question of arbitrability that is presumptively for the court, not the arbitrator, to decide[;]" citing cases).

In other respects, *Rent-A-Center* is distinguishable. *Rent-A-Center* involved an arbitration clause that unambiguously delegated the question of unconscionability to the arbitrator. 130 S Ct at 2775; 2777, n. 1 (acknowledging rule and explaining that parties did not dispute that language delegating decision to arbitrator was clear and unmistakable). Here, in contrast, the delegation language was ambiguous, as plaintiffs argued below. CR # 300, pp. 8-9. The WCI arbitration agreement stated, in relevant part:

> Any disputes, claims, or controversies * * * arising out of or relating to * * * any objection to arbitrability or the existence, scope, validity, construction, or enforceability of this Arbitration Agreement **shall be resolved pursuant to this paragraph (the "Arbitration Agreement").**

ER 140, 144 (emphasis added).

The paragraph then described **two** decision makers, an arbitrator and a "tribunal of competent jurisdiction." The tribunal was charged specifically with decisions regarding the invalidity and unenforceability of the Arbitration Agreement, as follows:

> If any part or parts of this Arbitration Agreement are found to be **invalid** or **unenforceable** by a decision of **a tribunal of competent jurisdiction**, then such specific part or parts shall be of no force and effect and shall be severed, but the remainder of this Arbitration Agreement shall continue in full force and effect.

ER 140, 144 (emphasis added).

WCI drafted an arbitration agreement that delegates decisions about the invalidity and unenforceability of the Arbitration Agreement to a tribunal of competent jurisdiction, such as a court. This indicates that the parties did not clearly and unmistakably delegate enforceability questions to the arbitrator. As the court explained in *First Options of Chicago, Inc. v. Kaplan*, 514 US 938, 115 S Ct 1920, 131 L Ed 2d 985 (1995):

> [G]iven the principle that a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration, one can understand why courts might hesitate to interpret silence or ambiguity on the "who should decide arbitrability" point as giving the arbitrators that power, for doing so might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide.

514 US at 945.

For this reason, the court in *First Options* "reverse[d] the presumption" in favor of arbitration. 514 US at 945. According to the court, "the law treats silence or ambiguity about the question '*who* (primarily) should decide arbitrability' differently" from other arbitration decisions. 514 US at 944. The question whether the parties have submitted a particular dispute to arbitration, *i.e.,* the question of arbitrability, is an issue for judicial determination here, because the parties have not clearly and unmistakably provided otherwise.

Recent cases have applied the rule to conclude that the decision on arbitrability should remain with the court. *Peleg v. Neiman Marcus Group, Inc.,* 204 Cal App 4th 1425, 1439-1445, 140 Cal Rptr 3d 38 (2012) (severance clause providing that a court may decide question of enforceability created ambiguity; in absence of clear manifestation that arbitrator was to decide the issue, court would decide; citing three other California cases reaching same decision); *Palmer v. Infosys Technologies Ltd. Inc.,* 832 F Supp 2d 1341, 1344-1345 (MD Ala 2011) (arbitration agreement did not clearly and unmistakably confer authority on arbitrator to decide unconscionability, a question of contract enforceability).

B. The arbitration agreement is unconscionable

Defendants argue that the Supreme Court's decision in *Concepcion* invalidated *Vasquez-Lopez*. Not so. *Concepcion* disallowed a per se rule that a class action ban rendered an arbitration agreement unconscionable. In contrast, *Vasquez-Lopez* did not rely on a per se rule, but looked at all the features of the arbitration clause and the evidentiary record before the court to assess the overall fairness of the agreement. This is what courts are supposed to do with an unconscionability challenge. *Concepcion* did not alter this well-established judicial function.

The primary focus in assessing the unconscionability of an arbitration agreement is "whether one party was disadvantaged by a substantial disparity in bargaining power combined with terms that are unreasonably favorable to the party with the greater power." *Vasquez-Lopez,* 210 Or App at 567 (internal quotation omitted).

Procedural unconscionability focuses on the conditions of contract formation, including oppression and surprise. Oppression arises out of unequal bargaining power, resulting in no real negotiation and absence of choice. *Vasquez-Lopez*, 210 Or App at 566. Surprise involves the extent to which supposedly agreed-upon terms are hidden in the form contract drafted by the party seeking to enforce its terms. *Id.* Oppression and surprise, the elements of procedural unconscionability, are present here. The WCI arbitration agreement was a standard "take it or leave it" contract of adhesion. The arbitration agreement was one section of a four-page, closely printed document. The terms were hidden in single spaced small font in a lengthy paragraph beginning with "Agreement to submit to WCI's Grievance Procedure."

Eliminates state law remedies

As to the essential element of substantive unconscionability,[6] there are several terms that render the arbitration section substantively unfair to plaintiffs. First, the contract eliminates significant state law remedies. The UTPA allows recovery for statutory, consequential and punitive damages. ORS 646.638 (allowing actual or statutory damages and punitive damages under UTPA); *Becket v. Computer Career Institute, Inc.,* 120 Or App 143, 148-149, 852 P2d 840 (1993) (lost wages as a result of enrolling and attending school held recoverable damages in UTPA claim). Common law fraud allows recovery for economic, consequential, and punitive damages. *Dizick v. Umpqua Community College*, 287 Or 303, 599 P2d 444 (1979) (damages for fraud when college misrepresented training student was to receive included wages student would have earned had he worked instead of going to school); *Millikin v. Green*, 283 Or 283, 286, 583 P2d 548 (1978) (punitive damages available for fraud). Under WCI's arbitration agreement, however, "The arbitrator will have no authority to award consequential damages, indirect damages, treble damages or punitive damages, or any monetary damages not measured by the prevailing party's economic damages." ER 140, ¶ 11.

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[6] *Vasquez-Lopez* explains, "both procedural and substantive unconscionability are relevant, although only substantive unconscionability is absolutely necessary." 210 Or App at 567.

The elimination of plaintiffs' state law remedies makes the arbitration agreement unconscionable. *See Ingle v. Circuit City Stores, Inc.,* 328 F3d 1165, 1179 (9th Cir 2003), *cert den* 540 US 1160 (2004) (arbitration agreement unconscionable because it failed to provide for all the types of relief that would otherwise be available in court); *Circuit City Stores, Inc. v. Adams*, 279 F3d 889, 894 (9th Cir), *cert den* 535 US 1112 (2002) (arbitration clause held unconscionable because of, among other things, a limitation on the amount of damages a plaintiff could recover); *Torrance v. Aames Funding Corp.,* 242 F Supp 2d 862, 865 (D Or 2012) (limitation on UTPA damages rendered arbitration agreement unconscionable); *see also Shotts v. OP Winter Haven, Inc.*, 86 So 3d 456, 474 (Fla 2011) (prohibition on punitive damages at arbitration rendered arbitration clause unenforceable); *Zuver v. Airtouch Commc'ns, Inc.*, 153 Wash 2d 293, 318, 103 P3d 753 (2004) (arbitration agreement prohibiting punitive damages unenforceable); *Armendariz v. Found. Health Psychcare Servs., Inc.,* 24 Cal 4th 83, 103, 6 P3d 669, 683 (2000) (arbitration agreement that did not allow full range of statute remedies held unenforceable); *Paladino v. Avnet Computer Techs., Inc.,* 134 F3d 1054, 1059 (11th Cir 1998) (holding unenforceable an arbitration agreement that limited remedies otherwise available in court).

Eliminates state regulatory law

The arbitration agreement also purports to erase any other state law that applies to WCI's conduct. WCI's contract directs that, "The arbitrator shall apply federal law to the fullest extent possible[.]" ER 140, ¶ 11. This eliminates Oregon's consumer protection regulations that govern for-profit trade schools. Several regulations – directly relevant to plaintiffs' claims -- that would be set aside by WCI's arbitration agreement, include the following:

- Schools may not admit students without evidence that the student can reasonably expect to benefit from the education obtained. OAR 583-030-0035 (9).

- Schools must explain the true relationship between the curriculum and subsequent student qualification for occupational practice, including employment placement rates. OAR 583-030-0035 (8)(d). This rule also designates what employment the school may and may not represent to prospective students in its graduate placement rates.

- Schools must not communicate information that is inaccurate or misleading. OAR 583-030-0035 (12).

- Schools may not misrepresent or omit from their catalogs material information about the relationship of the curriculum to occupational

qualification, career planning, placement services, financial aid, and job opportunities. OAR 583-030-0035 (12)(a).

• Schools may not engage in fraudulent, dishonest, unethical, exploitive, irresponsible, deceptive, and inequitable practices. OAR 538-030-0035 (20). (The OAR is set forth at App-1).

Imposes high costs

As the court recognized in *Vasquez-Lopez,* costs can be prohibitively high in an absolute sense, such as here where they were well beyond what plaintiffs can afford. Also, arbitration costs may be prohibitive when they are significantly higher than the cost of trial, where nobody has to pay for the judge by the hour and, as here, where state law would allow cost and fee shifting to the prevailing party, but the arbitration agreement prohibits it. 210 Or App at 574.

In *American Express Co. v. Italian Colors Restaurant,* ___ US ___, 133 S Ct 2304, ___ L Ed 2d ___ (2013), the court decided that the high cost of expert proof in an antitrust case that made individual litigation unaffordable did not invalidate a ban on class litigation. However, the court reaffirmed established principles that an arbitration agreement would not be enforced if it prohibited the assertion of statutory rights, or if the administrative fees for arbitration were "so high as to make access to the forum impracticable." Slip

Op at *5, citing *Green Tree Financial Corp.-Ala. v Randolph,* 531 US 79, 90, 121 S Ct 513, 148 L Ed 2d 373 (2000).

WCI's arbitration section did both. Students were required to bear the fees and costs of arbitration, including a $1,270 filing fee, attorney fees, litigation expenses, and half the arbitrator's hourly fee, which were not recoverable even when the student prevailed.[7] The arbitration section was particularly onerous because it eliminated the UTPA remedies of punitive damages and attorney fees, and the consequential and punitive damages available for common law fraud. Plaintiffs' evidence showed that no competent attorney would represent a plaintiff in arbitration on a debt recovery claim under these onerous circumstances, in which the prevailing party cannot be made whole and the lawyer cannot be paid. SER 11-13; 14-16. As was the case in *Vasquez-Lopez,* WCI's arbitration agreement is "sufficiently onerous to act as a deterrent to plaintiffs' vindication of their claim." 210 Or App at 575.

[7] The arbitration section explicitly prohibits the award of attorney fees, but it also purports to allow fees "authorized by law[.]" ER 140, ¶ 11. At the same time it directs the arbitrator to "apply federal law to the fullest extent possible[.]" Federal law does not allow attorney fees. Defendants have indicated an intent to enforce the attorney fee prohibition in arbitration. Open Br, p. 30, n 7.

The court should not sever unconscionable terms

Defendants argue for severing the unconscionable parts of the agreement in order to enforce the arbitration requirement. The court should reject this option for several reasons. First, the trial court's decision not to sever would be an exercise of discretion, which was not abused here. 210 Or App at 577. Second, severing the many unconscionable provisions of the agreement would require the court to rewrite the agreement, which is not permitted. Third, as *Vasquez-Lopez* notes, when the court repairs an unconscionable arbitration agreement, it removes the incentive for contract drafters to write lawful agreements. 210 Or App at 577, n 7.

Nor can defendants rehabilitate its unconscionable arbitration section by offering to waive provisions now. The court in *Vasquez-Lopez* found such an argument "transparently meritless," because unconscionability applies to contract terms, not contract performance; for this reason it is measured as of the time of contract formation. 210 Or App at 573-574.

The trial court correctly denied defendants' second motion to compel arbitration. That decision should be affirmed.

RESPONSE TO SECOND ASSIGNMENT OF ERROR

This court has no jurisdiction to review the trial court's denial of defendants' motion to decertify the class.

Before the court can consider defendants' second assignment of error, it must determine whether it has jurisdiction to do so. The controlling statutes are clear that it does not.

As a general policy, the Oregon legislature and courts disfavor piecemeal appeals. *Pearson v. Phillip Morris, Inc.,* 208 Or App 501, 513, 145 P3d 298 (2006) and cases cited therein. However, ORS 19.225 allows interlocutory appeal from an order in a class action under certain conditions. It allows interlocutory appeal when the trial court finds the statutory requirements for an appeal,[8] and the Court of Appeal exercises its discretion to permit the appeal.[9] The trial court below declined to make the necessary findings to initiate an interlocutory appeal from its order denying defendants' motion to decertify the class. ER 135.

In addition, this court confines the scope of its review to the trial court's designation of the controlling questions of law. *Shea v. Chicago Pneumatic Tool Co.,* 164 Or App 198, 200, 203-204, 990 P2d 912 (1999), *rev den* 330 Or

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[8] The trial court must find that the order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation[.]" ORS 19.225.

[9] The court of appeals' discretionary standards are explained in *Pearson v. Philip Morris USA, Inc.*, which instructs that the class action interlocutory appeal provision should be reserved only for "exceptional" cases. 208 Or App at 513.

252 (2000) (interpreting ORS 19.225 to limit interlocutory appellate review to questions identified by the trial court as controlling); *Thomas v. U.S. Bank Nat. Ass'n*, 244 Or App 457, 459, n 2, 260 P3d 711, *rev den* 351 Or 401 (2011) ("Under ORS 19.225, our review is limited to the three controlling questions of law identified by the trial court[.]"). The absence of the trial court's controlling questions of law here indicates that review is not appropriate.

ORS 19.225 is the only route available to review the trial court's class certification decisions before final judgment. *Joachim v. Crater Lake Lodge, Inc.,* 276 Or 875, 556 P2d 1334 (1976) (so interpreting ORS 13.400, the nearly identically worded predecessor to ORS 19.225). Defendants failed to obtain the first prerequisite – the trial court's endorsement of the need for interlocutory appeal – and defendants have failed to request the second – that this court exercise its discretion to accept review. Defendants offer no argument that this case is exceptional under the terms justifying review, which focus particularly on the need to show that an immediate appeal is an efficient use of judicial resources and will advance the termination of the litigation. *Pearson,* 208 Or App at 505-509. Indeed, this appeal has the opposite effect – it wastes judicial resources and delays final resolution in the trial court.

Defendants point to ORS 19.270 and ORS 19.425 as sources of statutory authorization to review the class certification decision but these statutes do not help. ORS 19.270 defines the jurisdiction of the trial court and the appellate courts after a notice of appeal has been filed. In *State ex rel. Gattman v. Abraham*, 302 Or 301, 310, 729 P2d 560 (1986) the court defined "jurisdiction of the cause" in the statutory precursor to ORS 19.270(1) to mean jurisdiction of the issue or matter on appeal, and not necessarily the entire case. The court explained: "It was not the intention to oust the trial court of jurisdiction of those parts of the litigation which are not directly involved in the appeal." 302 Or at 311. *See also State v. Branstetter,* 332 Or 389, 403, 29 P3d 1121 (2001) ("The 'cause" is not always the entire case."); *Baugh v. Bryant Ltd. Partnerships,* 98 Or App 419, 425-426, 779 P2d 1071 (1989) (jurisdiction of "the cause" means that an appeal transfers to the appellate court "so much of the case as the judgment [here, order] appealed from purports to decide.") In such cases, the trial court retains authority to proceed with the remainder of the case. Thus ORS 19.270 is not as broad as defendants assert. More importantly, it simply does not address what decisions may be reviewable on appeal.

ORS 19.425 similarly does not aid defendants. That statute addresses appeals from a judgment.[10] It has no application here in an interlocutory appeal from an order.

Finally, defendants refer to "pendant appellate jurisdiction," which is not recognized in Oregon law and is of limited application even in federal cases. Wright & Miller explain that the federal courts have generally rejected invocations to exercise pendant appellate jurisdiction. 16 Wright & Miller, Federal Practice and Procedure § 3937 (2d ed 1996 & 2012 supplement) and cases cited therein including *Akerman v. Oryx Commc'ns, Inc.*, 810 F2d 336, 339 (2nd Cir 1987) (refusing to review class certification decision on appeal from grant of summary judgment on one of multiple claims, stating: "Pendent appellate jurisdiction is a procedural device that rarely should be used because of the danger of abuse."); 7B Wright & Miller, Federal Practice and Procedure § 1802, defendants' other citation, discusses the reluctant and rare use of pendant appellate jurisdiction before 1988 when the federal rules adopted an interlocutory appeal process for a class-certification decision. All the

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[10] ORS 19.425 provides:

> Upon an appeal, the appellate court may review any intermediate order involving the merits or necessarily affecting the judgment appealed from; and when it reverses or modifies such judgment, may direct complete restitution of all property and rights lost thereby.

decisions cited in Wright & Miller § 1802, n. 39 upon which defendants rely (Open Br, p. 41, n. 10) were decided before the federal rule change which, since 1988, allows an interlocutory appeal on terms similar to ORS 19.225. [11]

Preservation of error

In their opposition to the initial class certification decision, defendants made no reference to the variance in contract arbitration sections (some with class action bans and some without), and did not assert that this different contract language somehow precluded certification of a class. CR # 108. In their first motion to compel arbitration, defendants acknowledged the contract variances and asserted that all contracts should be interpreted to require the same result -- individual arbitration of claims. SER 40-41; CR # 241, pp. 3, 12.

Standard of review

The reviewing court gives "wide latitude" to a trial court's decision to certify or decertify a class action, because it is largely a matter of judicial administration. *Newman v. Tualatin Development Co. Inc.,* 287 Or 47, 51, 597 P2d 800 (1979); *Bellknap v. U.S. Bank Nat Ass'n,* 235 Or App 658, 666, 234 P3d 1041 (2010), *rev den* 349 Or 654 (2011). In *Newman,* the court based its conclusion, in part, on the "abuse of discretion" standard of review

[11] FRCP 23(f), like ORS 19.225, requires both the trial and appellate courts to authorize an interlocutory appeal of the class certification decision.

for class certification in use by federal courts. *Froeber v. Liberty Mut. Ins. Co.*, 222 Or App 266, 275, 193 P3d 999 (2008).

ARGUMENT

The contract variances have nothing to do with class certification

In its initial certification decision, the trial court decided that certain allegations based on the UTPA and common law fraud involved common issues suitable for class litigation. ER 6-8. The court also decided that questions of individual damages did not undercut the propriety of class litigation for the common liability issues. ER 8. Defendants opposed class certification but did not mention the contract variances; they did not raise these variances as an impediment to class resolution of common or typical claims or defenses.

In this court, Defendants assert vague threats to their due process and other rights (Open Br, pp. 37-38), but they fail to articulate how the contract variances change, or even implicate, the trial court's substantive decisions about the propriety of class litigation. To the extent defendants challenge the trial court's substantive certification decision, they simply reprise their objections to class litigation for claims they regard as better resolved with proofs tailored to individual students. Open Br, pp. 38-40. ("The bottom line is that common issues do not predominate and allowing this case to proceed

on a class basis will mask individual issues and deprive WCI of its due process right to defend against the different claims of each class member.").

To the extent defendants address the contract variances at all, they do so only in the context of whether Surrett is an appropriate class representative (Open Br at 36), a decision defendants do not attempt to bring to this court, and which could not succeed in any case. Surrett shares with the entire class an arbitration agreement with terms that the trial court found unconscionable and unenforceable. No change in class certification will salvage defendants' unconscionable arbitration agreement, or allow a court to enforce arbitration when defendants have waived it.

For a full discussion why the trial court was correct to deny defendants' motion to decertify the class, plaintiffs refer the court to its briefing in the trial court in support of class certification (CR # 98 - 105) and in opposition to defendants' motion to decertify. CR # 275 – 278.

CONCLUSION

The decision of the trial court should be affirmed. The case should be remanded for trial.

Respectfully submitted this 15th day of July 2013.

/s/ Maureen Leonard
Maureen Leonard OSB 823165
David F. Sugerman OSB 862984
Brian S. Campf OSB 922480
Attorneys for Plaintiffs-Respondents
Nathan Surrett and the Class

Also joining in this brief:

/s/ Tim Quenelle
Tim Alan Quenelle OSB 934000
Attorney for Respondent
Jennifer Adams

CERTIFICATE OF COMPLIANCE

I certify that this brief, including footnotes, is in Times New Roman 14 point font. The word count of this brief is 9,939 words.

/s/ Maureen Leonard
Maureen Leonard OSB 823165
Of Attorneys for Attorneys for
Plaintiffs-Respondents
Nathan Surrett and the Class

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Enrollment Agreement

Western Culinary Institute
Le Cordon Bleu Program
Portland

921 SW Morrison Street, Suite 400 Portland, Oregon 97205
(503)223-2245

Name ("Student") Nathan Surrett Date 5-15-07

Address 358 Yellowstone Dr City Fletcher State NC Zip 28732

Telephone (Home) 828-337-1647 Telephone (Work) _____

E-Mail Chefnate8@gmail.com Social Security Number 243-65-5354

High School Clyde A. Erwin Year Graduated 2004 GED Certificate Date _____

Are you at least 18 years of age? ✓ Yes ___ No
Are you a U.S. citizen? ✓ Yes ___ No If no, are you a resident alien? ___ Yes ___ No

Program

- [X] Associate of Occupational Studies – Le Cordon Bleu Culinary Arts 92 credit hours 60 weeks 4 terms
- [ ] Associate of Occupational Studies – Le Cordon Bleu Hospitality & Restaurant Management 92 credit hours 60 weeks 4 terms
- [ ] Associate of Occupational Studies – Le Cordon Bleu Pâtisserie & Baking 90 credit hours 60 weeks 4 terms
- [ ] Diploma – Le Cordon Bleu Pâtisserie and Baking 54 credit hours 36 weeks 3 terms
- [ ] Diploma – Le Cordon Bleu Culinary Arts 41 credit hours 30 weeks 2 terms

Date of first class 09/24/07 Anticipated Completion Date 08-08-08

Program Costs
The cost for this program at Western Culinary Institute ("WCI") is as follows, subject to the terms and policies as stated in this Enrollment Agreement.

TUITION AND FEES	
Total Tuition	$ 37,950
Enrollment Fee	$ 50
Fee	—
Books and supplies (estimated for entire program)	2,700
TOTAL TUITION AND FEES	40,700

I agree that the payment of program costs will be satisfied by (check all that apply):
☐ Cash ☐ Credit Card ☐ Will Apply for Financial Aid ☐ Third Party (e.g., VA, Voc Rehab, Employer)

The Tuition and Books and Supplies costs noted above are for the entire program. Credit for courses transferred will be determined separately. The enrollment fee is good for enrollment within twelve (12) months from: the date the fee is paid, the cancel date, withdrawal date, or graduation date, whichever is later.

By signing below, I certify that I have received a copy of this Enrollment Agreement, and that I have read, understand and agree to comply with all of its terms. I also acknowledge that I have received a copy of the WCI catalogue in one of the following formats: printed (hard copy), CD-ROM, or downloaded from the WCI online registration site, and I agree to comply with all school policies and rules contained therein. I also understand and agree that this Enrollment Agreement supersedes all prior or contemporaneous verbal or written statements and agreements made by WCI or any employees of WCI, and that no binding promises, representations or statements have been made to me by WCI or any employee of WCI regarding any aspect of the education and training I will receive from the school that are not set forth in writing in this Enrollment Agreement. I further understand and agree that this Enrollment Agreement may not be modified without the written agreement of me and WCI. I hereby certify that all information I provided in my application for admission to WCI is complete, accurate and up to date. Once I sign this Agreement, and WCI accepts this Agreement, I understand that a legally binding contract will be created. My signature indicates that I agree to all of the above terms.

Signature of Student 5-15-07 Date

Signature of Parent or Guardian (required if Student is under the age of 18) Date

ACCEPTED BY WESTERN CULINARY INSTITUTE

Signature of Authorized School Official Title of Authorized School Official 5/18/07 Date

NOTE: Students who are permanent residents of the State of Washington are required to sign an addendum to this Agreement.

Course Information. New classes start 8 times a year for each program with the exception of the Culinary Arts Diploma Program which starts 4 times a year. *For A.O.S and Diploma-LCB Culinary Arts:* A student attends class approximately 5 hours a day between 6am and 12am Mon-Fri, depending on the student's class rotation. Students must successfully complete an externship prior to program completion. *A.O.S. – LCB Hospitality & Restaurant Management:* A student attends class approximately 5 hours a day, between 7am and 12am, Mon-Fri, depending on the student's class rotation. Students must successfully complete an externship prior to program completion. *For A.O.S. and Diploma – LCB Pâtisserie & Baking:* A student attends class approximately 5 hours a day, Mon-Fri, 5am – 12pm. Students must successfully complete an externship prior to program completion. In all programs, individual class times may be subject to change.

Tuition and Fees. I understand that I will be charged tuition and fees at rates established by WCI and published in an addendum to the catalogue and that I am fully responsible for the payment of the tuition and fees charged by WCI. The tuition and fee charges stated above will not change provided that the Student starts classes as scheduled and continues without interruption. Tuition is billed on a payment period basis (the words "payment period" and "term" are used interchangeably in this Agreement). A student who repeats a course already taken at WCI will be charged for the repeated course calculated by taking the total tuition divided by the number of total program credits multiplied by the number of credits in the repeated course. The tuition and fees do not include other program costs, including, but not limited to, books, supplies, and other costs associated with the selected program of study. These additional costs are the obligation of the student.

I understand that it is my sole responsibility to ensure that all tuition and fees for each term are paid by me or funded from financial aid sources prior to my beginning that term. For a detailed breakdown of my financial plan, I must refer to my financial aid award letters and/or cash payment agreements. WCI complies with Federal Truth-in-Lending requirements (Regulation Z) if applicable; please refer to the cash payment agreement for more details. If I leave school for any reason (other than an approved leave of absence) and return at a later date, I will be charged tuition at the rate in effect at the time of my return as well as any applicable reinstatement fee. I understand that I am not released from any of my current or prior obligations to WCI if I leave the school for any reason or if I am not satisfied with the services provided.

I agree to begin classes on or before the start date as indicated on this enrollment agreement without incurring additional tuition charges. I also understand that if I decide to change programs or start at a date later than that indicated, I am subject to any published tuition increases.

BE SURE TO READ BOTH SIDES OF THIS AGREEMENT. BOTH SIDES ARE PART OF YOUR CONTRACT WITH THE SCHOOL.

Revised 10/06

Surrett EXB 9 MOORE, HENDERSON AND THOMAS

Refund Policy 1. If an applicant is not a ...ed, all monies paid by the applicant will be refunded ...n applicant or student may terminate the enrollment agreement by giving written notice to the ...hool. 3. If termination occurs within five (5) business ...ays of enrollment and prior to student attendance, all monies paid shall be refunded less any direct charges for books and supplies not returned or returnable to WCI. 4. If termination occurs after five (5) business days of enrollment and prior to student attendance all monies paid shall be refunded with the exception of the application fee and less any direct charges for books and supplies not returned or returnable to WCI. 5. Students who have not visited the school can withdraw without penalty within three (3) days of: A) Regularly scheduled orientation, or B) A tour of the facilities and equipment. 6. In the event that a student shall terminate his/her attendance prior to his/her completion date, the student shall in no case be obligated for more tuition payments than listed in this section. The policy shall apply to all terminations, for any reason, by either party. In all cases the refund will be calculated from the last date of attendance. 7. WCI reserves the right to cancel or reschedule a starting class if the number of students enrolled is deemed insufficient. WCI will consider such cancellation a rejection and all monies paid by the student will be refunded. 8. If termination occurs more than five (5) business days after enrollment or after student attendance, the student who withdraws from the program is only obligated for the weeks attended within a payment period. A payment period at WCI is approximately 15 weeks in length (except for a final billing period that represents the remainder of the program and may be significantly shorter). The student will be refunded the pro-rata share of the tuition charged for the payment period based on the full weeks not attended within the payment period.

If WCI discontinues instruction after a student enters training, including circumstances where WCI changes its location, the student must be notified in writing of such an event and is entitled to a pro-rata refund of all tuition and fees paid unless comparable training is arranged for by WCI and agreed upon, in writing, by the student. A written request for such a refund must be made within 30 days from the date the program was discontinued and the refund must be paid within 30 days after receipt of such a request.

The Withdrawal Date is used to determine when the student is no longer enrolled at WCI. A written statement will be provided showing allowable charges and total payments along with any monies due the student that will be refunded within 30 days from the student's Withdrawal Date.

Return of Title IV Funds Policy WCI follows the federal Return of Title IV Funds Policy to determine the amount of Title IV aid a Student has received and the amount, if any, which needs to be returned at the time of withdrawal. Under current federal regulations, the amount of aid earned is calculated on a pro rata basis through 60% of the term. After the 60% point in the term, a Student has earned 100% of the Title IV funds. WCI may adjust the Student's account based on any repayments of Title IV funds that WCI was required to make. For details regarding this policy, please see the WCI catalogue.

Inquiries Any inquiry or complaint a student may have regarding this contract may be made in writing to Western Culinary Institute, Office of the President, 921 SW Morrison Street, Suite 400, Portland, OR 97205, or to the Oregon Office of Degree Authorization, 1500 Valley River Drive, #100, Eugene, OR 97401 (541) 687-7452. For State of Washington residents, complaints regarding this school may be made to the State of Washington Workforce Training & Education Coordinating Board, 128 Tenth Avenue SW, P.O. Box 43105, Olympia, WA 98504 (360) 753-5673.

Policies and Disclosures

1. Catalogue: Information about WCI is published in a catalogue that contains a description of certain policies, rules, procedures, and other information about the school. WCI reserves the right to change any provision of the catalogue at any time. Notice of changes will be communicated in a revised catalogue, an addendum or supplement to the catalogue, posting on the Student Portal, and/or other written format. Students are expected to read and be familiar with the information contained in the school catalogue, in any revisions, supplements and addenda to the catalogue, and with all school policies. By enrolling in WCI, the Student agrees to abide by the terms stated in the catalogue and all school policies.
2. Changes: WCI reserves the right to make changes at any time to any provision of the catalogue, including the amount of tuition and fees, academic programs and courses, school policies and procedures, faculty and administrative staff, the school calendar and other dates, and other provisions. WCI also reserves the right to make changes in equipment and instructional materials, to modify curriculum, and when size and curriculum permit, to combine classes. Students who start classes as scheduled and remain continuously enrolled will not be subject to changes in tuition.
3. Program Changes and Cancellations: WCI reserves the right to change, amend, alter, or modify its program offerings and/or schedules. Students who are already enrolled will be notified of any changes, including a change in start date, and every attempt will be made to accommodate student preferences with regard to any schedule change. If the Student does not choose to change to a different start date, the Student will be eligible for a full refund less any direct charges for books/supplies not returned to WCI. WCI reserves the right to postpone the student's start date at its sole discretion.
4. Transfer of Credits: The awarding of credit for coursework completed at any other institution is at the sole discretion of WCI. Additionally, WCI does not imply, promise, or guarantee that any credits earned at WCI will be transferable or accepted by any other institution.
5. Success of Student: The Student's individual success or satisfaction is not guaranteed, and is dependent upon the Student's individual efforts, abilities and application of himself/herself to the requirements of the school.
6. Student's Failure to Meet Obligations: WCI reserves the right to terminate a Student's enrollment for failure to maintain satisfactory academic progress, failure to pay tuition or fees by applicable deadlines, disruptive behavior, posing a danger to the health or welfare of students or other members of the WCI community, or failure to abide by WCI policies and procedures. WCI can discontinue a student's enrollment status, not issue grades, and deny requests for transcripts should a student not meet all of his/her financial and institutional obligations.
7. Graduation Requirements: To be eligible for graduation in any WCI program, students must have completed each of their required classes with a passing grade within the allotted time frame and have maintained a minimum 2.0 grade point average.
8. Employment: WCI does not guarantee employment following graduation but does offer career planning assistance to students and graduates. Some job or externship opportunities may require background checks prior to employment. Applicants with factors such as a prior criminal background or personal bankruptcy may not be considered for employment in some positions. Employment and externship decisions are outside the control of the school. Some programs may require additional education, licensure and/or certification for employment in some positions.
9. Creative Rights: Students retain all rights to their creative academic work. WCI and its faculty will give full attributive credit for any student work used in publications, classes, performances, exhibits, or elsewhere. Major portions of student creative work will not be used without permission, except that general display for a reasonable period of time may be part of a course or degree requirement.
10. Discrimination: WCI does not discriminate on the basis of race, gender, sexual orientation, religion, creed, color, national origin, ancestry, marital status, age, disability, or any other factor prohibited by law in the recruitment and admission of students, the operation of any of its educational programs and activities, and the recruitment and employment of faculty and staff. The Director of Compliance at WCI serves as the compliance coordinator for Title IX of the Educational Amendments of 1972 and Section 504 of the Rehabilitation Act of 1973, which prohibit discrimination on the basis of sex or handicap.
11. Dispute Resolution: Any disputes or controversies between the parties to this Agreement arising out of or relating to the student's reenrollment, enrollment, attendance, education or career service assistance by WCI or to this Agreement shall be resolved first through the grievance policy published in the catalogue. If not resolved in accordance with the procedures outlined in the school catalogue to the satisfaction of the student, then the dispute shall be resolved by binding arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association then in effect or in accordance with procedures that the parties agree to in the alternative. The Federal Arbitration Act and related federal judicial procedure shall govern this agreement to the fullest extent possible, excluding all state arbitration law, irrespective of the location of the arbitration proceedings or of the nature of the court in which any related proceedings may be brought. Any such arbitration shall be the sole remedy for the resolution of any disputes or controversies between the parties to this agreement. Any such arbitration shall take place before a neutral arbitrator in a locale near WCI unless the Student and WCI agree otherwise. The arbitrator must have knowledge of and actual experience in the administration and operation of postsecondary educational institutions unless the parties agree otherwise. The arbitrator shall apply federal law to the fullest extent possible in rendering a decision. The arbitrator shall have the authority to award monetary damages measured by the prevailing party's actual damages and may grant any nonmonetary remedy or relief that the arbitrator deems just and equitable and within the scope of this agreement between the parties. Judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction. The arbitrator shall not have any authority to award punitive damages, treble damages, consequential or indirect damages, or other damages not measured by the prevailing party's actual damages, or to award attorney's fees. The arbitrator also shall not have any authority to alter any grade issued to a student. The parties shall bear their own costs and expenses. The parties also shall bear an equal share of the fees and costs of the arbitration, which include but are not limited to the fees and costs of the arbitrator, unless the parties agree otherwise or the arbitrator determines otherwise in the award. Except as may be required by law, neither a party nor an arbitrator may disclose the existence, content, or results of any such arbitration without the prior written consent of both parties.
12. NOTICE: Any holder of this consumer credit contract is subject to all claims and defenses which the debtor could assert against the seller of goods or services obtained pursuant hereto or with the proceeds hereof. Recovery hereunder by the debtor shall not exceed amounts paid by the debtor hereunder.
13. Assignment: None of the rights of the Student or the Student's parent under this Enrollment Agreement are assignable to any other person or entity.
14. Entire Agreement: This Enrollment Agreement constitutes the entire agreement between Student and the WCI concerning all aspects of the education and training the Student will be provided by the school. By signing this agreement, the Student agrees that no binding promises, representations or statements have been made to the Student by WCI or any employee of WCI regarding any aspect of the education and training the Student will receive from the school that are not set forth in writing in this Enrollment Agreement. WCI will not be responsible for any statement of policy, career planning activities, curriculum or facility that does not appear in this Enrollment Agreement or the school catalogue.
15. Branch Campuses: WCI has two branch campuses: Le Cordon Bleu College of Culinary Arts Atlanta located in Tucker, GA and Le Cordon Bleu College of Culinary Arts Minneapolis/St. Paul located in Mendota Heights, MN.

BE SURE TO READ BOTH SIDES OF THIS AGREEMENT. BOTH SIDES ARE PART OF YOUR CONTRACT WITH THE SCHOOL.

IN THE CIRCUIT COURT OF THE STATE OF OREGON

IN AND FOR THE COUNTY OF MULTNOMAH

NATHAN SURRETT, individually and on behalf of all other similarly-situated individuals, and on behalf of herself only, JENNIFER ADAMS fka JENNIFER SCHUSTER,

Plaintiffs,

vs.

WESTERN CULINARY INSTITUTE, LTD and CAREER EDUCATION CORPORATION,

Defendants.

Case No. 0803-03530

DECLARATION OF NATHAN SURRETT IN OPPOSITION TO MOTION TO COMPEL ARBITRATION

Under penalty of perjury, subject to criminal penalties for contempt, I, Nathan Surrett, declare:

1. I am Nathan Surrett. I attended Western Culinary Institute (WCI). I was accepted on April 19, 2007, I signed my enrollment agreement on April 24, 2007, and it was accepted by Western Culinary Institute on May 2, 2007. I offer this declaration in opposition to defendants' motion to compel arbitration. I previously provided a declaration in this case in support of my motion to intervene and for appointment as class representative. I am an adult, and I have personal knowledge of the matters contained in this declaration.

David F. Sugerman | Attorney, PC
520 SW Sixth Avenue, Suite 920 - Portland, Oregon 97204
Phone 503.228.6474 | Fax 503.224-2764

2. As noted in my prior declaration, I incurred expenses to attend the school of approximately $42,000. The loans are all interest-bearing, and as a result my debts are increasing. In round numbers, my current debt levels are approximately $60,000.

3. I understand that the defendants are seeking to move my case to arbitration. I understand that if this case is sent to arbitration, I am required to pay a substantial filing fee, my own attorney fees and half of the arbitrators' fees to pursue the claim in arbitration.

4. I cannot afford to pay an attorney to handle my claim. Since my claim involves recoveries of a debt, I cannot see how I would ever be able to afford to pursue this matter. I cannot afford the filing fee, which I understand is $1275. I cannot afford attorney fees, which I understand might easily surpass $20,000. I can't afford the costs of litigation or half of the arbitrators fee and any hearing fees for a hearing that might take several days or more. As I explained in my prior declaration, my post-graduation work in the trade paid $10-12 per hour.

5. I do not recall seeing or reading the arbitration clause in the Enrollment Agreement. Nor did anyone point it out to me or explain its consequences. Even if someone had mentioned an "arbitration clause" I would not have understood that the contract would strip me of rights under Oregon law, including the ability to seek attorney fees under the Unlawful Trade Practices Act.

6. As I explained in my deposition, I felt time-pressed to sign the agreement. I signed while I was still in Idaho. I was told that I needed to do sign the enrollment agreement before coming to visit the school, in order to be able to enroll in the next class.

I declare that the above statement is true to the best of my knowledge and belief, and I understand it is made for use as evidence in court and is subject to penalty for perjury.

EXECUTED on this day 7 of September, 2011.

David F. Sugerman | Attorney, PC
520 SW Sixth Avenue, Suite 920 - Portland, Oregon 97204
Phone 503.228.6474 | Fax 503.224-2764

By: _____
Nathan Surrett

David F. Sugerman | Attorney, PC
520 SW Sixth Avenue, Suite 920 - Portland, Oregon 97204
Phone 503.228.6474 | Fax 503.224-2764

IN THE CIRCUIT COURT OF THE STATE OF OREGON

IN AND FOR THE COUNTY OF MULTNOMAH

NATHAN SURRETT, individually and on behalf of all other similarly-situated individuals, and on behalf of herself only, JENNIFER ADAMS fka JENNIFER SCHUSTER,

Plaintiffs,

vs.

WESTERN CULINARY INSTITUTE, LTD and CAREER EDUCATION CORPORATION,

Defendants.

Case No. 0803-03530

DECLARATION OF DAVID F. SUGERMAN IN OPPOSITION TO DEFENDANTS' MOTION TO COMPEL ARBITRATION

Under penalty of perjury, subject to criminal penalties for contempt, I, David F. Sugerman, declare:

1. I am counsel for Nathan Surrett and have been appointed to serve as class counsel in this case. I previously represented Jennifer Adams, as well. I am an adult, and I have personal knowledge of the matters contained in this declaration.

2. As part of my consumer class action practice, I stay abreast of developments in various areas of law that affect consumer class actions. I last litigated the issues of mandatory

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compelled arbitration in *Martin v. Comcast*, 209 Or App 82 (2006) As well, I appeared on behalf as an amicus curiae on unconscionability issues in *Vasquez-Lopez v. Beneficial Finance Or., Inc.*, 210 Or App 553 (2007). The issue of mandatory arbitration is important to those of us who handle consumer class actions. I have followed developments in this area closely since for the last half a dozen years.

3. For those of us who handle cases in this area, the American Arbitration Association's handling of class-wide arbitrations has been a matter of common knowledge. The AAA 2005 policy on class actions represented an important development in this area of law. Specifically, the AAA decision to administer class arbitrations in cases in which the arbitration agreement is silent is one that was well-publicized among those who practice in this area.

Exhibit A, attached, is a reprint from the internet of : 1) AAA Policy on Class Arbitrations (June 14, 2005), http://www.adr.org/sp.asp?id=28763 ; 2) AAA Commercial Arbitration Rules (June 1, 2009), http://www.adr.org/si.asp?id=5379 ; 3) AAA Policy on Class Arbitrations, http://www.adr.org/sp.asp?id=28779 (July 14, 2005); and 4) Supplementary Rules for Class Arbitrations http://www.adr.org/sp.asp?id=21936 (Oct. 8, 2003). I accessed and printed these rules from the AAA website on September 8, 2011.

4. After we filed the case in March 2008, I spoke with Dave Ernst who, at the time, represented defendants. Mr. Ernst and I conferred regarding defendants' possible motion to compel arbitration. Based on emails from that time, I believe this conversation took place sometime around April 15, 2008. As I recall, I cited both the *Martin v. Comcast* and *Vasquez-Lopez* decisions to Mr. Ernst. I do not believe we spoke about arbitration after that.

5. The Court initially certified the class and then redefined it after defendants filed a motion to reconsider. The re-defined class disqualified Ms. Adams from serving as class

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representative, so we named Mr. Surrett to replace her. After a number of efforts, the parties reached agreement on a Notice Plan, which the Court signed on April 25, 2011, and the notice period started with the website going up on May 5, 2011. Email and regular mail notice went out on May 6, 2011. The opt out period ran on June 20, 2011. From the class of just over 2,500 students, we received 11 opt outs.

6. To date, we have received in electronic discovery the equivalent of approximately 49,000 pages of documents and have produced the equivalent of approximately 7,000 pages. We have taken 14 depositions, two of which were out-of-state (California and Illinois). Based on unaudited time records, plaintiffs' counsel has spent in excess of 2,000 hours on the case to date.

7. Based on my review of the pleadings file, and as the case file on this matter will confirm, defendants have taken the following affirmative steps in this case:

- Alleged affirmative defenses, including that the mandatory arbitration clause barred the action
- Sought a protective order for confidential documents
- Propounded requests for production to former plaintiffs Koehnen and Gozzi
- Noticed the deposition of former plaintiff Gozzi
- Entered a stipulated order regarding bifurcation of discovery
- Moved to dismiss
- Moved for protective orders to limit discovery (multiple times)
- Moved to strike declarations (multiple times)
- Moved to compel the deposition of plaintiff Koehnen
- Propounded four discovery requests to plaintiff Schuster (NKA plaintiff Adams)

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- Obtained a separate Attorneys' Eyes Only protective order
- Noticed and took the deposition of plaintiff Schuster
- Objected to notices of deposition
- Moved to compel production of discovery (multiple)
- Subpoenaed documents from employers in Oregon
- Sought clarification of the Court's orders
- Moved for an electronic discovery protocol
- Subpoenaed witnesses to depositions (four times)
- Moved for issuance of subpoenas in Washington with a separate commission there
- Requested production of documents from plaintiff Surrett
- Subpoenaed documents from plaintiff Surrett's employer
- Subpoenaed school records from Idaho and Washington

I declare that the above statement is true to the best of my knowledge and belief, and I understand it is made for use as evidence in court and is subject to penalty for perjury.

EXECUTED on this day 9th of September, 2011.

By: _____
David F. Sugerman, OSB No. 86298

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Fees for additional services: The AAA reserves the right to assess additional administrative fees for services performed by the AAA beyond those provided for in these Rules which may be required by the parties' agreement or stipulation.

Standard Fee Schedule

An Initial Filing Fee is payable in full by a filing party when a claim, counterclaim, or additional claim is filed. A Final Fee will be incurred for all cases that proceed to their first hearing. This fee will be payable in advance at the time that the first hearing is scheduled. This fee will be refunded at the conclusion of the case if no hearings have occurred. However, if the Association is not notified at least 24 hours before the time of the scheduled hearing, the Final Fee will remain due and will not be refunded.

These fees will be billed in accordance with the following schedule:

Amount of Claim	Initial Filing Fee	Final Fee
Above $0 to $10,000	$775	$200
Above $10,000 to $75,000	$975	$300
Above $75,000 to $150,000	$1,850	$750
Above $150,000 to $300,000	$2,800	$1,250
Above $300,000 to $500,000	$4,350	$1,750
Above $500,000 to $1,000,000	$6,200	$2,500
Above $1,000,000 to $5,000,000	$8,200	$3,250
Above $5,000,000 to $10,000,000	$10,200	$4,000
Above $10,000,000	Base fee of $12,800 plus .01% of the amount above $10,000,000 Fee Capped at $65,000	$6,000
Nonmonetary Claims[1]	$3,350	$1,250
Deficient Claim Filing Fee[2]	$350	
Additional Services[3]		

[1] *This fee is applicable when a claim or counterclaim is not for a monetary amount. Where a monetary claim amount is not known, parties will be required to state a range of claims or be subject to a filing fee of $10,200.*

[2] *The Deficient Claim Filing Fee shall not be charged in cases filed by a consumer in an arbitration governed by the Supplementary Procedures for the Resolution of Consumer-Related Disputes, or in cases filed by an Employee who is submitting their dispute to arbitration pursuant to an employer promulgated plan.*

[3] *The AAA may assess additional fees where procedures or services outside the Rules sections are required under the parties' agreement or by stipulation.*

IN THE CIRCUIT COURT OF THE STATE OF OREGON

IN AND FOR THE COUNTY OF MULTNOMAH

NATHAN SURRETT, individually and on behalf of all other similarly-situated individuals, and on behalf of herself only, JENNIFER ADAMS fka JENNIFER SCHUSTER,

Plaintiffs,

vs.

WESTERN CULINARY INSTITUTE, LTD and CAREER EDUCATION CORPORATION,

Defendants.

Case No. 0803-03530

DECLARATION OF STEVE D. LARSON IN OPPOSITION TO DEFENDANTS' MOTION TO COMPEL ARBITRATION

Under penalty of perjury, subject to criminal penalties for contempt, I, Steve D. Larson, declare:

1. I am an attorney with Stoll Stoll Berne Lokting & Shlachter, P.C. in Portland, Oregon. I am an adult, and I have personal knowledge of the facts and matters contained in this declaration. I offer this declaration in opposition to defendants' motion to compel arbitration.

2. I have practiced law in the State of Oregon since 1986 and have extensive experience representing both individual plaintiffs and classes in consumer disputes with large companies and organizations. Among other things, I am on the Partner's Council at the National Consumer

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Law Center, am co-Chair of the Consumer Law Section of the Oregon Trial Lawyers, am a past Executive Committee member of the Oregon State Bar Consumer Law section, am a member of the Oregon State Bar's Board of Governors, and am a member of the National Association of Consumer Advocates.

3. I have reviewed the Enrollment Agreement. I could not read the arbitration clause but reviewed the version rendered by defendants in their brief, which was copied for me by Mr. Sugerman. I have also reviewed the Fifth Amended Complaint, which I understand is the current pleading.

4. I am familiar with the American Arbitration Association's Commercial Rules. In the case of arbitration agreements like this one that are silent on class-wide arbitration, my understanding is that AAA will administer the arbitration as a class action and consider whether to proceed under AAA supplementary rules for class action.

5. Though the amounts at issue in this case are not small, the consumers are still in an untenable position if the arbitration clause is enforced. In a case in which a consumer cannot recover attorney fees, the consumer must pay either a contingent fee or hourly.

6. While some attorneys might consider a contingent fee on debt reduction, I do not believe it is appropriate and generally will not consider it. In a case for recovery of money that goes to pay down debts, the consumer does not make a recovery. In my view, this is not a case for which a contingent fee is proper. But even if it is, the margins are such that it would rarely make sense for a consumer to proceed. In debt cases in which there are no attorney fees, statutory damages or punitive damages, a consumer's recovery is fixed at the principle plus interest.

7. Even if it is proper, a contingent fee is problematic in a debt case because the consumer's maximum recovery is reduced by fees of 30-40 percent, litigation costs, the arbitration filing fee and arbitrator hearing costs. Under these circumstances, the consumer

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would be lucky to recover 20 to 30 cents on the dollar and could easily wind up in a net loss situation.

8. My hourly rate is currently $370 per hour. My associates bill at $215 and above. While it is impossible to know how much time a matter like this would take from start to finish, I could foresee an associate spending 100 hours from beginning to entry of judgment. Those fees do not include litigation costs, arbitrator costs, filing fees and hearing fees.

9. In no event will a consumer be made whole. I do not know any Oregon consumer attorney who would handle a an individual case like this in arbitration because of the consumer's debts and inability to finance the fees and costs. I doubt that any experienced Oregon consumer attorney would handle a case like this on a contingent fee because of the practical question about whether a contingency fee is ever appropriate, the thin margins, and the serious risk that the attorney would not materially improve the consumer's position.

I declare that the above statement is true to the best of my knowledge and belief, and I understand it is made for use as evidence in court and is subject to penalty for perjury.

EXECUTED on this 6th day of September, 2011.

Steve D. Larson, OSB No. 863540

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IN THE CIRCUIT COURT OF THE STATE OF OREGON

IN AND FOR THE COUNTY OF MULTNOMAH

NATHAN SURRETT, individually and on behalf of all other similarly-situated individuals, and on behalf of herself only, JENNIFER ADAMS fka JENNIFER SCHUSTER,

Plaintiffs,

vs.

WESTERN CULINARY INSTITUTE, LTD and CAREER EDUCATION CORPORATION,

Defendants.

Case No. 0803-03530

DECLARATION OF JUSTIN BAXTER IN OPPOSITION TO DEFENDANTS' MOTION TO COMPEL ARBITRATION

Under penalty of perjury, subject to criminal penalties for contempt, I, Justin Baxter, declare:

1. I am an attorney at Baxter & Baxter, LLP. My firm has specialized in representing consumers in consumer protection matters since 1991. I have practiced law in Oregon since 1999, and am a past chair of the OSB Consumer Law Section, a member of the National Association of Consumer Advocates, and frequently speak and write regarding consumer rights and consumer litigation.

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2. Over the course of my career I have represented hundreds of consumers in lawsuits in Oregon. I regularly meet consumers who have experienced problems with large companies and entities, and who are seeking counsel. Most of these potential clients are financially unable to afford the cost of paying an attorney an hourly fee.

3. I have experience handling consumer arbitrations in Portland, Oregon. Private arbitrators in the Portland, Oregon area typically charge their normal hourly rates to arbitrate cases unless their rates are limited by an applicable rule or agreement. While the range of hourly fees vary depending on experience, expertise, and other considerations, those fees can be significant. For example, I recently represented a client in an arbitration in which the arbitrator charged $550 per hour.

4. Though the amounts at issue in this case are not small, the consumers are still in an untenable position if the arbitration clause is enforced. While some attorneys might consider a contingent fee on debt reduction, I do not believe it is appropriate and generally will not consider it. In a case for recovery of money that goes to pay down debts, the consumer does not make a recovery. In my view, this is not a case for which a contingent fee is proper. But even if it is, I could not advise a consumer to pursue a claim like this in arbitration without a fee and cost-shifting feature because the consumer's recovery would be limited.

5. Based on my review of the Fifth Amended Complaint and my discussions with David Sugerman, counsel for plaintiff Surrett and the class, I would expect an individual arbitration in a case like this to take at least two or three days for hearing. The consumer-plaintiff would not only pay my hourly fees for that hearing (currently ___ per hour), but also litigation costs, the arbitration filing fee, half the arbitrator's fee, and any additional hearing fees. For a consumer trying to recover debts currently valued at $50,000-60,000, I do not see how any consumer could afford to pursue this matter in arbitration, after fees and costs are factored into the analysis.

6. One of the reasons that arbitration is more complex here is that the consumer's simplest and best remedy—the Oregon Unlawful Trade Practice Act claim—has been written out

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of the mandatory arbitration clause. In addition to assisting with remedies (statutory recoveries, punitive damages, and attorney fees), the UTPA makes it easier and less costly for consumers to prove their claims.

I declare that the above statement is true to the best of my knowledge and belief, and I understand it is made for use as evidence in court and is subject to penalty for perjury.

EXECUTED on this day 7 of September, 2011.

By: _____
Justin Baxter, OSB No. 992178

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IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

NATHAN SURRETT individually and on behalf of all other similarly-situated individuals, and on behalf of herself only, JENNIFER ADAMS fka JENNIFER SCHUSTER, Plaintiffs, v. WESTERN CULINARY INSTITUTE, LTD and CAREER EDUCATION CORPORATION, Defendants.	No.: 0803-03530 DEFENDANTS' MOTION TO COMPEL ARBITRATION AND DISMISS ACTION *Oral Argument Requested*

REQUEST FOR ORAL ARGUMENT

Pursuant to UTCR 5.050, Defendants Western Culinary Institute, LTD ("WCI") and Career Education Corporation ("CEC") (collectively "Defendants") request oral argument on this motion. Counsel for Defendants estimates oral argument will take 30 minutes. Official court reporting is requested for the hearing.

MOTION

Pursuant to ORCP 14 and 9 U.S.C. §§ 3-4, Defendants respectfully move this Court for an Order compelling arbitration of Plaintiff Nathan Surrett's and Plaintiff Jennifer Adams's (collectively "Plaintiffs'") claims and dismissing the above-captioned action.

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INTRODUCTION

Recently, the United States Supreme Court overruled Ninth Circuit and Oregon law in *AT&T Mobility LLC v. Concepcion*, ___ U.S. ____, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011),[1] and thereby rendered Plaintiffs' claims in this case subject to mandatory arbitration on an individual, rather than class-wide, basis. Given this development, Defendants now seek to compel arbitration of Plaintiffs' claims pursuant to the express terms of the bilateral arbitration agreement contained in Plaintiffs' Enrollment Agreements with WCI.[2]

The Federal Arbitration Act ("FAA") (codified at 9 U.S.C. §§ 1, *et seq.*) governs this motion because Plaintiffs' claims implicate interstate commerce. WCI and CEC are foreign corporations that allegedly made fraudulent misrepresentations and omissions to an estimated class of 2,600 enrollees. These enrollees submitted applications from a number of states. And the substantial majority of the enrollees secured loans from the federal government to finance their WCI education. Claims regarding Defendants' business conduct are precisely the type to which the FAA applies. To avoid any doubt, Plaintiffs' Enrollment Agreements include a broadly worded arbitration clause that expressly provides that the FAA would govern disputes such as this one.

The arbitration clause in the Enrollment Agreement indisputably applies to Plaintiffs'

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[1] For the Court's convenience, true and correct copies of all federal and non-Oregon authority are filed concurrently herewith under separate cover.

[2] "When the charges against a parent company and its subsidiary are based on the same facts and are inherently inseparable, a court may refer claims against the parent to arbitration even though the parent is not formally a party to the arbitration agreement." *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315 (4th Cir. 1988); *Letizia v. Prudential Bache Sec., Inc.*, 802 F.2d 1185, 1187-88 (9th Cir. 1986) (holding that non-signatories to arbitration agreement could invoke provision where all wrongful conduct related to plaintiff's claims against signatory defendant); *Livingston v. Metro. Pediatrics, LLC*, 234 Or. App. 137, 149 n.7 (2010) (finding that non-signatory can compel arbitration where "the signatory to the contract containing [an] arbitration clause raises allegations of substantially interdepdendent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract").

claims in this case. The clause requires Plaintiffs to arbitrate "[a]ny disputes or controversies between the parties to this Agreement arising out of or relating to the student's recruitment, enrollment, attendance, education or career service assistance by WCI or to this Agreement . . . ." Courts have applied identical language very broadly. Nevertheless, it is evident that the parties' arbitration agreement encompasses Plaintiffs' claims, which attack Defendants' purported recruitment, enrollment, and career-services practices and which seek damages including a refund of tuition paid pursuant to the Enrollment Agreement.

Plaintiffs undoubtedly will argue that Defendants somehow waived the right to compel arbitration in this case. However, in the immediate aftermath of the U.S. Supreme Court's decision in *Concepcion*, courts have repeatedly found waiver arguments unavailing under similar circumstances to those present here. First, *Concepcion* represents a sea change in the law governing the enforcement of arbitration agreements subject to the FAA. Prior to *Concepcion,* bilateral arbitration agreements like the one at issue here (which does not contemplate class arbitration) were unconscionable and thus unenforceable under Oregon law. *Concepcion* made clear that the FAA preempts any state-law limitation on the applicability of arbitration clauses that do not permit class-action arbitration. Second, even if class-action arbitration had been available at any time under the parties' arbitration agreement—*e.g.*, prior to the United States Supreme Court's 2010 ruling precluding such a conclusion in *Stolt-Nielsen S.A. v. Animal Feeds International Corp.*, ___ U.S. ____, 130 S. Ct. 1758, 176 L. Ed. 2d 605—*Concepcion* highlights why a defendant's decision to forego the inferior, arbitral forum for class-actions was not tantamount to a waiver of its right to compel arbitration of individual claims.

Defendants raised Plaintiffs' failure to arbitrate as an affirmative defense in their Answer to Plaintiffs' Fifth Amended Complaint ("Answer"). They have done only what is necessary to defend against Plaintiffs' claims, given their reasonable belief that they did not have the right to enforce the Enrollment Agreement's arbitration clause once the Court certified certain claims for

class treatment. For example, in the brief period since the U.S. Supreme Court issued the *Concepcion* decision, Defendants have made no motion in this Court and have issued no additional discovery requests. Accordingly, the Court should compel Plaintiffs to arbitrate their claims against Defendants on an individual basis and should dismiss this action.

II.

FACTUAL BACKGROUND

A. The Parties

WCI is a Delaware corporation that operates the Western Culinary Institute, an Oregon school now known as Le Cordon Bleu College of Culinary Arts—Portland.[3] The students who enroll at WCI come from different states throughout the United States and from foreign countries as well.[4] WCI advertises to prospective students via television, radio, and internet that can be seen and/or heard in a number of states and countries.[5]

WCI is a wholly-owned subsidiary of CEC.[6] CEC is a Delaware corporation with its principal place of business in Hoffman Estates, Illinois.[7] CEC owns WCI, along with more than 75 other private post-secondary schools operating from physical campuses and/or offering online programs throughout the United States.[8] Plaintiffs' claims against CEC are based on its ownership and alleged control over WCI's alleged actions forming the basis for Plaintiffs'

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[3] Answer ¶ 3.

[4] Aug. 19, 2011 Decl. of Jula Brooks in Support of Defs.' Mot. to Stay Action and to Compel Arbitration ("Brooks Decl.") ¶ 2.

[5] *Id.* ¶ 3.

[6] Answer ¶ 3.

[7] *Id.* ¶ 4.

[8] Brooks Decl. ¶ 4.

claims.[9]

Plaintiffs are former WCI students.[10] They bring this lawsuit as individuals, and Plaintiff Nathan Surrett also brings this suit as a representative of a class of current and former students who enrolled in and attended WCI between March 6, 2006, and March 1, 2010, and who made tuition payments or incurred financial obligations in order to attend WCI.[11]

B. The Arbitration Agreements Between WCI and Its Students

When Plaintiffs expressed an interest in attending WCI and paid an application fee deposit, WCI provided them with a package of documents for their review and signature.[12] That package contained, among other things, the Enrollment Agreement.[13] Plaintiffs each signed the WCI Enrollment Agreement,[14] which contained the following arbitration provision:

> **Dispute Resolution:** Any disputes or controversies between the parties to this Agreement arising out of or relating to the student's recruitment, enrollment, attendance, education or career service assistance by WCI or to this Agreement shall be resolved first through the grievance policy published in the catalogue. If not resolved in accordance with the procedures outlined in the school catalogue to the satisfaction of the student, then the dispute shall be resolved by binding arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association then in effect or in accordance with procedures that the parties agree to in the alternative. The Federal Arbitration Act and related federal judicial procedure shall govern this agreement to the fullest extent possible, excluding all state arbitration law, irrespective of the location of the arbitration proceedings or of the nature of the court in which any related proceedings may be

[9] Fifth Am. Compl. ("Compl.") ¶¶ 1, 3.

[10] *Id.* ¶ 2.

[11] *Id.* ¶ 6.

[12] Decl. of Joseph R. Wetzel in Support of Defs.' Mot. to Stay Action and to Compel Arbitration ("Wetzel Decl.") Ex. A (Surrett Depo. at 105, 132-33, 138-46); Wetzel Decl., Ex. B (Adams Depo. at 62-68).

[13] Wetzel Decl., Ex. A (Surrett Depo. at 32-33).

[14] *Id.* (Surrett Depo. at 105-06); Wetzel Decl., Ex. B (Adams Depo. at 117-28); *see also* Wetzel Decl., Ex. C (Surrett Enrollment Agreement); Wetzel Decl., Ex. D (Adams Enrollment Agreement).

> brought. Any such arbitration shall be the sole remedy for the resolution of any disputes or controversies between the parties to this agreement. Any such arbitration shall take place before a neutral arbitrator in a locale near WCI unless the Student and WCI agree otherwise. The arbitrator must have knowledge of and actual experience in the administration and operation of postsecondary educational institutions unless the parties agree otherwise. The arbitrator shall apply federal law to the fullest extent possible in rendering a decision. The arbitrator shall have the authority to award monetary damages measured by the prevailing party's actual damages and may grant any nonmonetary remedy or relief that the arbitrator deems just and equitable and within the scope of this agreement between the parties. Judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction. The arbitrator shall not have any authority to award punitive damages, treble damages, consequential or indirect damages, or other damages not measured by the prevailing party's actual damages, or to award attorney's fees. The arbitrator also shall not have any authority to alter any grade issued to a student. The parties shall bear their own costs and expenses. The parties also shall bear an equal share of the fees and costs of the arbitration, which include but are not limited to the fees and costs of the arbitrator, unless the parties agree otherwise or the arbitrator determines otherwise in the award. Except as may be required by law, neither a party nor an arbitrator may disclose the existence, content, or results of any such arbitration without the prior written consent of both parties.[15]

At the bottom of each page of the Enrollment Agreement is the following language in bold typeface: "**BE SURE TO READ BOTH SIDES OF THIS AGREEMENT. BOTH SIDES ARE PART OF YOUR CONTRACT WITH THE SCHOOL.**"[16]

Immediately above the signature line, the Enrollment Agreement further provides that the Student "certif[ies] that I have received a copy of this Enrollment Agreement, and that I have read, understand and agree to comply with all of its terms. . . ."[17] Lastly, the Enrollment Agreement provides as follows: "My signature below indicates that I agree to all of the above terms."[18]

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[15] Wetzel Decl. Exs. C and D (emphasis added).

[16] *Id.*

[17] *Id.*

[18] *Id.*

C. Plaintiffs' Allegations

Plaintiffs allege causes of action for fraud and violation of Oregon's Unlawful Trade Practices Act (UTPA) against Defendants. Essentially, Plaintiffs allege that Defendants, through WCI, misrepresented graduate employment prospects and/or graduate salaries by making prospective students believe that they would become highly paid chefs immediately upon graduation.[19] They claim that Defendants misrepresented the value of their services through the WCI catalog by stating that attending WCI would give them greater opportunities to acquire the knowledge and skills necessary to excel in the culinary and/or hospitality world.[20] For example, Plaintiffs also allege that Defendants failed to inform him and others of a number of supposed facts, such as (1) that entry level jobs in the restaurant industry do not require the training the school provides, (2) that most graduates will not earn enough to allow them to pay off school loans, (3) that those who attend WCI will not obtain material benefit from the course of study, and that Defendants' representations about the value of the education, the benefit of the degree, the exclusivity of the degree, the nature of ongoing career placement, and job placement rates, were false and misleading.[21]

Plaintiffs allege that, in reliance on these purported misrepresentations and omissions, they were induced to incur financial obligations to attend WCI, and now seek damages for tuition paid to Defendants and sufficient funds to satisfy the debts that they allegedly incurred to attend the school.[22] These debts and financial obligations included educational loans from (and/or

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[19] Compl. ¶ 14.

[20] *Id.* ¶ 14(A).

[21] *Id.* ¶¶ 14(A), (C), (F), (H), (L).

[22] *Id.* ¶¶ 16, 25.

insured by) the federal government.[23]

III.

ARGUMENT

A. The FAA Governs the Parties' Arbitration Agreement.

The FAA governs arbitration agreements in contracts "involving" interstate commerce. *Industra/Matrix Joint Venture v. Pope & Talbot, Inc.*, 341 Or. 321, 329 (2006) (citing, *inter alia*, 9 U.S.C. § 2 and *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270-81, 115 S. Ct. 834, 130 L. Ed. 2d 753 [1995]); *Harnisch v. Coll. of Legal Arts*, 243 Or. App. 16, 2011 WL 2023001, at *2 (May 25, 2011). The language "involving commerce" in the FAA is "the functional equivalent of the more familiar term 'affecting commerce'—words of art that ordinarily signal the broadest permissible exercise of Congress' Commerce Clause power." *See Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56, 123 S. Ct. 2037, 156 L. Ed. 2d 46 (2003). Thus, for example, where the defendants are a "multistate" operation, the FAA applies. *See Allied-Bruce Terminix Cos.*, 513 U.S. at 281.

The Court of Appeals of Oregon recently held that the FAA applies to arbitration agreements in enrollment contracts between private, for-profit, postsecondary schools and their students. *Harnisch*, 2011 WL 2023001, at *2 (Or. App.) (finding that enrollment agreements involved interstate commerce where some of the school's students funded their education with federal loans and where at least one of the students was an out-of-state resident when she signed her enrollment agreement). The circumstances here are no different: (1) Plaintiffs concede that

[23] Wetzel Decl., Ex. A (Surrett Depo. at 58, 68-69, 183-96); Wetzel Decl., Ex. B (Adams Depo. at 202-13); Wetzel Decl., Ex. E (Surrett Ledger Card); Wetzel Decl., Ex. F (Adams Ledger Card).

they paid their WCI tuition with federal loans and federally insured Sallie Mae loans[24]; and (2) Plaintiffs' own circumstances demonstrate the interstate nature of WCI's business.[25]

Indeed, the Fifth Amended Complaint acknowledges that Defendants are "foreign corporations" who operate a culinary school in Oregon that caters to thousands of students.[26] As discussed above, CEC owns WCI as one of many private postsecondary schools doing business throughout the United States,[27] and allegedly directed the supposedly wrongful conduct alleged in this action at a class of thousands of enrollees.[28] This is precisely the type of "multistate" operation involving interstate commerce to which the FAA applies.

Nevertheless, for the avoidance of any doubt, WCI and Plaintiffs expressly agreed that the FAA would govern their arbitration agreements "to the fullest extent possible, excluding all state arbitration law, irrespective of the location of the arbitration proceedings or of the nature of the court in which any related proceedings may be brought." (Wetzel Decl., Exs. C and D.) Oregon courts will recognize such an agreement to incorporate the provisions of the FAA into a written agreement. *See, e.g., DEX Media, Inc. v. Nat'l Mgmt. Servs., Inc.*, 210 Or. App. 376, 381-82 (2007). *Accord Rodriguez v. Am. Tech., Inc.*, 136 Cal. App. 4th 1121-22 (2006) ("[T]here is no ambiguity regarding the parties' intent. They adopted the FAA—all of it—to govern their arbitration."). Federal courts are in accord. *See, e.g., Borrero v. Travelers Indem. Co.*, CIV S-10-

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[24] Compl. ¶ 14(G); Wetzel Decl., Exs. A (Surrett Depo. at 58, 68-69, 183-96); Wetzel Decl., Ex. B (Adams Depo. at 202-13); Wetzel Decl., Ex. E (Surrett Ledger Card); Wetzel Decl., Ex. F (Adams Ledger Card).

[25] *See* Wetzel Decl., Ex. A (Surrett Depo. at 35-42, 107, 146 [discussing Surrett's initial contact with WCI representatives and execution of enrollment agreement while a resident of Idaho]); Wetzel Decl., Ex. B (Adams Depo. at 40-42 [discussing Adams's decision to leave New Mexico State University to enroll in WCI after considering culinary schools in Rhode Island, California, Arizona, and other states]).

[26] Compl. ¶¶ 3-4, 7.

[27] Brooks Decl. ¶ 4.

[28] Compl. ¶ 6.

322 KJM, 2010 WL 4054114, at *1 (E.D. Cal. Oct. 15, 2010) (granting motion to compel arbitration and enforcing arbitration agreement that was expressly governed by FAA); *Affholter v. Franklin County Water Dist.*, 1:07-CV-0388 OWW DLB, 2008 WL 5385810, at *3 (E.D. Cal. Dec. 23, 2008) (holding that parties to an arbitration agreement agreed that the FAA applied to their dispute, noting that "[p]arties are free to specify the controlling law in arbitration agreements, and courts will honor such agreements"); *Ottawa Office Integration, Inc. v. FTF Bus. Sys., Inc.*, 132 F. Supp. 2d 215, 219 (S.D.N.Y. 2001) (applying the FAA to review of an arbitration agreement "because the Arbitration Agreement specifically provides for the FAA to govern the arbitration"). Indeed, to hold otherwise would be to rewrite the parties' contract. *Rodriguez*, 136 Cal. App. 4th at 1121-22 ("While we may question the wisdom of the parties' choice, and decry the potential for inefficiency, delay, and conflicting rulings, the parties were free to choose their arbitration rules. The court will not rewrite their contract.").

It is thus beyond question that the FAA applies to Plaintiffs' arbitration agreements with WCI.

B. <u>The FAA Requires Arbitration of Plaintiffs' Claims</u>.

In determining whether to compel arbitration, a court must preliminarily determine: (1) whether the parties are bound by a valid arbitration agreement; and (2) if so, whether the particular type of controversy between the parties is within the scope of that agreement. *Industra/Matrix*, 341 Or. at 332; *see also Cox v. Ocean View Hotel Corp.*, 533 F.3d 1114, 1119 (9th Cir. 2008). Arbitration must be compelled "'unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *United Steelworkers of Am. v. Warrior & Gulf Navigation,* 363 U.S. 574, 582-83, 80 S. Ct. 1347, 4 L. Ed. 2d 1409 (1960); *see also Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983) ("As a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration . . . .").

The FAA provides in relevant part that "[a] written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . , or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, . . . shall be valid, irrevocable, and enforceable . . . ." 9 U.S.C. § 2. Accordingly, where the FAA applies, courts look to the forum state's law on contract interpretation, "while giving due regard to the federal policy in favor of arbitration by resolving ambiguities as to the scope of arbitration in favor of arbitration." *Wagner v. Stratton Oakmont, Inc.*, 83 F.3d 1046, 1049 (9th Cir. 1996).

Oregon courts interpreting arbitration agreements governed by the FAA apply ordinary contract principles and enforce those agreements according to their terms. *Industra/Matrix*, 341 Or. at 330-33 (citing *Volt Info. Sciences v. Leland Stanford Jr. U.*, 489 U.S. 478, 109 S.Ct. 1248, 103 L.E.2d 488 (1989)). Here, the arbitration clause in the Enrollment Agreements plainly requires the Plaintiffs who signed them to arbitrate "[a]ny disputes or controversies between the parties to this Agreement arising out of or relating to the student's recruitment, enrollment, attendance, education or career service assistance by WCI or to this Agreement . . . ."[29] The phrase "arising out of or relating to" in an arbitration agreement "is routinely used . . . to secure the broadest possible arbitration coverage." *Britton v. Co-op Banking Group,* 4 F.3d 742, 745 (9th Cir. 1993); *see also Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 721 (9th Cir. 1999) ("Every court that has construed the phrase 'arising in connection with' in an arbitration clause has interpreted that language broadly.").

Here, Plaintiffs' claims must be arbitrated because they unquestionably arise out of or relate to alleged misrepresentations made by WCI during the recruitment of Plaintiffs to WCI, which misrepresentations allegedly influenced Plaintiffs' decision to enroll at WCI and to sign

[29] Wetzel Decl., Exs. C and D (emphasis added).

the Enrollment Agreement due to Plaintiffs' alleged misunderstanding of the benefits that a WCI education would have for their culinary careers. Not only are these claims precisely what Plaintiffs agreed to arbitrate under the terms of the Enrollment Agreement, but the law also requires that any doubt must be resolved in favor of arbitration. *See, e.g.*, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985) ("'The [Federal] Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration . . . .'") (citation omitted); *Industra/Matrix*, 341 Or. at 335 ("[W]hen the scope of an arbitration provision within the coverage of the FAA is at issue, any ambiguity must be resolved in favor of arbitration."). Plaintiffs' claims are therefore subject to arbitration under the terms of their Enrollment Agreements.

C. The Parties Only Agreed to Bilateral, Not Class-Action, Arbitration.

In *Stolt-Nielsen*, the United States Supreme Court recently held that an arbitration agreement that is silent on the question of class procedures (such as the agreement at issue here) "could not be interpreted to allow [class-action arbitration] because 'the changes brought about by the shift from bilateral arbitration to class-action arbitration' are 'fundamental.'" *See Concepcion* 131 S. Ct. at 1750 (quoting *Stolt-Nielsen*, 130 S. Ct. at 1776). In arriving at its conclusion, the Supreme Court observed that, in a class-action arbitration as opposed to in a bilateral arbitration, "[a]n arbitrator chosen according to an agreed-upon procedure . . . no longer resolves a single dispute between the parties to a single agreement, but instead resolves many disputes between hundreds or perhaps even thousands of parties." *Stolt-Nielsen*, 130 S. Ct. at 1776. Accordingly, in class-action arbitrations, "[t]he arbitrator's award no longer purports to bind just the parties to a single arbitration agreement, but adjudicates the rights of absent parties as well." *Id.* Nevertheless, "the commercial stakes of class-action arbitration are comparable to those of class-action litigation . . . even though the scope of judicial review is much more

limited." *Id.* For those reasons, the Supreme Court found that "the differences between bilateral and class-action arbitration are too great for arbitrators to presume, consistent with their limited powers under the FAA, that the parties' mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings." *Id.* In so holding, the Supreme Court reaffirmed a contracting party's right to "specify *with whom* they choose to arbitrate their disputes." *Id.* at 1774 (citing *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289 [2002]).

Although *Stolt-Nielsen* decisively settled the issue of whether the Court could interpret the arbitration clause at issue in this proceeding as allowing for class-action arbitration—it cannot—the Supreme Court's opinion did not address whether the FAA preempted state law holding that arbitration agreements prohibiting class-action arbitration are unconscionable as a matter of public policy. As discussed below, the Supreme Court resolved that issue for the first time in *Concepcion*, holding that the FAA indeed preempted any determination of unconscionability under state law where that determination is predicated on the lack of recourse to class-action arbitration under a given arbitration agreement. 131 S. Ct. at 1747-53. Under *Concepcion*, the Court must enforce the Plaintiffs' arbitration agreements with WCI as drafted—*i.e.*, by compelling arbitration here on an individual basis. *Id.* at 1752 ("Arbitration is a matter of contract, and the FAA requires courts to honor parties' expectations.") (citing *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. ____, 130 S. Ct. 2772, 2776, 177 L. Ed. 2d 403 [2010]).

D. This Motion Is Timely, and Defendants Did Not Waive Their Right To Arbitrate.

Plaintiffs undoubtedly will attempt to escape their agreement to arbitrate by arguing that Defendants have somehow waived this contractual right. But courts routinely have rejected these waiver arguments in the wake of *Concepcion*'s holding that the FAA compels the enforcement of bilateral arbitration agreements such as the one in this case, even if that means (as it does here) that class-wide arbitration will not be permitted. In analyzing waiver, courts in the Ninth Circuit have performed their analysis under the following three factor test: (1) whether

defendants had knowledge of an existing right to compel arbitration, (2) whether defendants took acts inconsistent with that existing right; and (3) whether plaintiffs suffered prejudice resulting from such inconsistent acts. *See, e.g.*, *Fisher v. A.G. Becker Paribas, Inc.*, 791 F.2d 691, 694 (9th Cir. 1986). Oregon courts apply the same analysis to a claim that a party has waived a contractual right to arbitrate. *See Wilbur-Ellis Co. v. Hawkins*, 153 Or. App. 554, 557 (1998). It is well established that, because waiver of a contractual right is disfavored, "any party arguing waiver of arbitration bears a heavy burden of proof." *Fisher*, 791 F.2d at 694; *Wilbur-Ellis*, 153 Or. App. At 557. Plaintiffs cannot carry that burden here.

1. Defendants Have Not Acted Inconsistently with a Known Right To Arbitrate.

First and foremost, Defendants did not act inconsistently with a known right to arbitrate. This motion was prompted by the United States Supreme Court's April 27 decision in *Concepcion*, which rejected the rule in *Discover Bank v. Superior Court*, 36 Cal. 4th 148 (2005), and represented a sea change in the law governing the enforcement of arbitration agreements subject to the FAA. Prior to *Concepcion,* bilateral arbitration agreements like the one at issue here (which does not contemplate class arbitration) were unconscionable and thus unenforceable under Oregon law. *See Vasquez-Lopez v. Beneficial Or., Inc.*, 210 Or. App. 553, 569-72 (2007) (agreeing with the *Discover Bank* court and finding class-action arbitration ban unenforceable); *Chalk v. T-Mobile USA, Inc.*, 560 F.3d 1087 (9th Cir. 2009) (applying *Vasquez-Lopez* and finding class-action waiver substantively unconscionable). Thus any attempt to compel arbitration on an individual basis before *Concepcion* superseded Oregon and Ninth Circuit law holding otherwise would have been futile.[30] Before *Stolt-Nielsen*, the Court either would have stricken the arbitration clause as unconscionable or otherwise ordered class-wide arbitration—both inconsistent with the bilateral arbitration agreements actually made by Plaintiffs with WCI.

[30] Notably, Defendants did expressly reserve their right to compel bilateral arbitration by alleging that right as an affirmative defense. *See* Answer ¶ 33 (asserting an eighth affirmative defense regarding failure to arbitrate).

After *Stolt-Nielsen*, Oregon law's adoption of the reasoning in *Discover Bank* would have compelled a finding that the bilateral arbitration provision in the Enrollment Agreements is unconscionable.

After *Concepcion*, the law is clear that the FAA preempts any state-law limitation on the applicability of arbitration clauses that do not permit class-wide arbitration. 131 S. Ct. at 1747-50. Now, bilateral arbitration clauses that are governed by the FAA will be enforced according to their terms—where, as here, the arbitration clause is silent regarding class-action arbitration, the court must compel arbitration on an individual basis, notwithstanding any contrary state law. *Id.*; *see also Bernal v. Burnett,* 10-CV-01917-WJM-KMT, 2011 WL 2182903 (D. Colo. Jun. 6, 2011) (compelling arbitration post-*Concepcion* of claims against for-profit schools and their parent companies on an individual basis, despite plaintiffs' contentions that the arbitration clauses were unconscionable).

Courts have repeatedly held that a party does not waive its right to arbitrate despite delay where a change in the law has made a previously unarbitrable case subject to arbitration. Indeed, this case is on "all fours" with the Ninth Circuit's seminal decision in *Fisher v. A.G. Becker Paribas, Inc.*, where the court held that a motion to compel arbitration is timely if a Supreme Court decision changes the law governing the arbitrability of the dispute at issue. 791 F.2d at 694. In *Fisher,* the Ninth Circuit found no waiver when defendants' motion to compel arbitration was made almost four years after the litigation was filed following pretrial motions and "extensive discovery," but also shortly after the Supreme Court's decision in a case in which the Court repudiated existing law holding that section 10(b) securities law claims were non-arbitrable. *Id.* at 697; *see also Conover v. Dean Witter Reynolds, Inc.,* 837 F.2d 867, 868 (9th Cir. 1988) (holding that a two-year delay in filing a motion to compel arbitration did not waive the right to bring the motion because "[a]n earlier motion to compel would have been futile"); *Letizia v. Prudential Bache Sec., Inc.,* 802 F.2d 1185, 1186-87 (9th Cir. 1986) (finding no waiver

where a change in Supreme Court law nearly two years after the case was filed and after the close of discovery because "there could be no waiver here because there was no existing right to arbitration"); *Olivares v. Hispanic Broad. Corp.*, No. CV 00-00354-ER, 2001 WL 477171, at *1 (C.D. Cal. Apr. 26, 2001) ("Defendant's delayed filing of its motion to compel until now does not constitute a waiver because it was the first opportunity for Defendant to file such a motion."). *Accord Ackerberg v. Johnson,* 892 F.2d 1328, 1332-33 (8th Cir. 1989) (collecting cases finding no waiver when a motion to compel arbitration was filed after a change in the law as to the arbitrability of claims).

Here, just as in *Fisher* and the other cases cited above, there is no waiver because there has been a change in the law that makes this case arbitrable on an individual basis in accordance with the terms of the parties' agreement. Court after court has determined—on circumstances virtually identical to those presented here—that *Concepcion* has fundamentally altered the availability of bilateral arbitration of disputes brought as class action litigations, changing what was just months ago an exercise in futility into a realistic option for parties with arbitration agreements that do not allow for class-action arbitration. On this ground, courts have refused to find waiver because, in states that followed the *Discover Bank* decision, there was no existing right to compel bilateral arbitration prior to *Concepcion. See, e.g.*, *Swift v. Zygna Game Network, Inc.*, No. C-09-5443 EDL, 2011 WL 3419499, at *7-10 (N.D. Cal. Aug. 4, 2011) (compelling arbitration and rejecting waiver despite year-and-a-half delay, failure to assert affirmative defense relating to arbitration, and commencement of substantive discovery, because pre-*Concepcion* attempt to compel arbitration would have been futile); *Morse v. Servicemaster Global Holdings, Inc.*, No. C 10-00628 SI, 2011 WL 3203919, at *3 (N.D. Cal. Jul. 27, 2011) (compelling arbitration and rejecting waiver because the "fundamental shift" of *Concepcion* meant that defendants did not act inconsistently with a known existing right to compel arbitration at earlier stage); *In re Cal. Title Ins. Anti-Trust Litig.*, No. 08-01341, 2011 WL 2566449, at **2-

3 (N.D. Cal. Jun. 27, 2011) (compelling arbitration and rejecting waiver despite delay and commencement of discovery where it would have been futile for defendants to move to compel individual arbitration prior to *Concepcion*); *Villegas v. U.S. Bancorp,* No. C. 10-1762 RS, slip op. at 2 (N.D. Cal. Jun. 20, 2011) (rejecting waiver argument made in opposition to motion to compel arbitration made 13 months after complaint was filed, finding that prior to *Concepcion*, "defendants had every reason to believe that any motion to compel arbitration would have been soundly rejected" and that motion filed in timely manner after the *Concepcion* did not constitute a waiver); *Quevedo v. Macy's, Inc.*, No. CV 09-1522 GAF, 2011 WL 3135052, at **3-7 (C.D. Cal. Jun. 16, 2011) (compelling arbitration and rejecting waiver despite two-year delay because defendant reasonably believed it could not obtain individual arbitration due to *Discover Bank* rule).

Even the existence of a certified class does not preclude the post-*Concepcion* invocation of bilateral arbitration agreements.[31] In *Estrella v. Freedom Financial*, No. C 09-03156, 2011 WL 2633643 (N.D. Cal. July 5, 2011), the court ordered individual arbitration of a class that had been certified for over a year. The court echoed *Concepcion*'s finding that requiring the availability of class-wide arbitration "interferes with fundamental attributes of arbitration" and thus was inconsistent with the FAA. *Id.* at *4 (citing *Concepcion*, 131 S. Ct. at 1748). Applying the waiver analysis from *Fisher*, the court held that—despite prior class certification—there was no waiver because "prior to the Supreme Court's decision in *Concepcion*, it would have been futile for the defendants to file a motion to compel arbitration." *Id.* at *5.

2. Plaintiffs Have Not Been Prejudiced.

Plaintiffs' forthcoming waiver argument must also fail because they have not been

[31] Indeed, pre-*Concepcion*, at least one Oregon court held that where an arbitration agreement did not provide for arbitration of class claims, "it was necessary for the court to resolve whether the class could proceed as a class action before it could determine whether to compel arbitration." *Greene v. Salomon Smith Barney, Inc.*, 228 Or. App. 379, 384 (2009) (emphasis added).

prejudiced by the timing of this motion. Although the case has been proceeding since June 2008, Defendants have done only what is necessary to defend against Plaintiffs' claims, given their reasonable belief that they did not have the right to enforce the Enrollment Agreement's bilateral arbitration clause so long as the case persisted as a class action. *See Greene*, 228 Or. App. at 384 (noting, pre-*Concepcion*, that enforcement of bilateral arbitration agreement was predicated on a finding that litigation could not proceed as a class action). Defendants have moved to dismiss, conducted discovery of named plaintiffs, and opposed class certification, but have not gained any unfair advantage as a result of this reasonable conduct. This type of limited activity, designed only to preserve Defendants' rights and entirely reasonable given the pre-*Concepcion* legal landscape in Oregon, is an insufficient basis for a claim of prejudice to Plaintiffs. *See, e.g.*, *In re Cal. Title Ins. Anti-Trust Litig.*, 2011 WL 2566449, at *3 (no prejudice where parties had engaged in discovery and trial was set for a year out); *Quevedo*, 2011 WL 3135052, at **6-7 (no prejudice despite two year delay where defendant "ha[d] not invoked the litigation machinery beyond the minimum required to defend against the suit"); *Hoffman v. Swift Transp. Co.*, No. CV 07-321-AS, 2007 WL 4268769, at *2 (D. Or. Nov. 30, 2007) (noting that "demonstrating prejudice is no easy task" and finding no prejudice where defendant litigated only to the extent to preserve its rights under the law).

Indeed, the Ninth Circuit has firmly established that such activity, including motions to dismiss, do not constitute prejudice to the party opposing arbitration. *See, e.g.*, *Fisher*, 791 F.2d at 697-98 (no prejudice despite "extensive discovery" and pretrial motions); *Brown v. Dillard's, Inc.*, 430 F.3d 1004, 1012 (9th Cir. 2005) ("Unsurprisingly, courts are reluctant to find prejudice to the plaintiff who has chosen to litigate, simply because the defendant litigated [e.g., by filing a motion to dismiss or requesting limited discovery] before moving to compel arbitration."); *Britton v. Co-op Banking Group*, 916 F.2d 1405, 1413 (9th Cir. 1990) (no prejudice despite two years of discovery and motion practice); *Lake Comm., Inc. v. ICC Corp.*, 738 F.2d 1473, 1477

(9th Cir. 1984), *overruled on other grounds*, (finding no prejudice where party moving to compel arbitration had already engaged in discovery and filed motion to dismiss).

Further, it is also well settled that Plaintiffs cannot point to their own ill-spent litigation expenses to establish prejudice when they were contractually bound to arbitrate in the first instance. *See, e.g.*, *Fisher*, 791 F.2d at 698 (no prejudice due to cost to plaintiffs because "any expense incurred as a result of the [plaintiffs'] deliberate choice of an improper forum, in contravention of their contract, cannot be charged to [defendant]."); *Britton*, 916 F.2d at 1413 (rejecting cost argument because "it was appellees who refused to arbitrate, and the costs they incurred in pursuing litigation should not count against [appellant's] effort to avoid litigation"); *see also Quevedo*, 2011 WL 3135052, at *7 ("The legal expenses that [plaintiff] has incurred do not suffice to show prejudice.").

Finally, in the weeks since the United States Supreme Court issued the *Concepcion* decision, Defendants have made no motion in this Court and have issued no additional discovery requests to Plaintiffs, focusing instead on the issues presented by this motion. Consequently, Plaintiffs can point to no prejudice resulting from the brief time that has passed from the issuance of the *Concepcion* decision and this motion.

E. <u>This Litigation Should Be Dismissed or, in the Alternative, Stayed Pending the Completion of Arbitration</u>.

Given that all of Plaintiffs' claims are subject to their arbitration agreements with WCI, the Court should dismiss Plaintiffs' action. *See, e.g.*, *Sparling v. Hoffman Constr. Co.*, 864 F.2d 635, 641 (9th Cir. 1988) (affirming district court's dismissal of claims because parties agreed to submit claims to arbitration); *Murphy v. DirecTV, Inc.*, No. 2:07-cv-06465-JHN-VBKx, 2011 WL 3319574, at *4 ("An action may be dismissed if the arbitration clause was broad enough to bar all of [the] claims that should be submitted to arbitration."); *Quevedo*, 2011 WL 3135052, at **17-18 (finding that "dismissal would be more appropriate" where "[a]ll claims are arbitrable,

and it appears nothing will remain for the Court to decide once the arbitration is complete"). Moreover, the terms of Plaintiffs' arbitration agreements with WCI contemplate such an outcome when they provide that "[a]ny such arbitration shall be the sole remedy for the resolution of any disputes or controversies between the parties to this agreement." *See Quevedo*, 2011 WL 3135052, at *17 (noting parties' agreement to dismiss lawsuit where claims subject to arbitration). Accordingly, the Court should dismiss Plaintiffs' lawsuit.

At a minimum, Plaintiffs lawsuit should be stayed pending arbitration of Plaintiffs' claims. Section 3 of the FAA provides:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement . . . .

9 U.S.C. § 3.[32] Consequently, barring a complete dismissal of Plaintiffs' claims, the Court should stay this litigation pending arbitration.

IV. CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court stay this action and compel the bilateral arbitration of Plaintiffs' claims.

Dated: August 19, 2011

SMITH FREED & EBERHARD P.C.
By: _____
John Kreutzer, OSB #973069
E-Mail: jkreutzer@smithfreed.com
Attorney for Defendants Western Culinary Institute, Ltd. and Career Education Corporation

[32] Oregon law is in accord: "If a party makes a petition to the court to order arbitration, the court on just terms shall stay any judicial proceeding that involves a claim alleged to be subject to the arbitration until the court renders a final decision under this section." Or. Rev. Stat. § 36.625(6) (emphasis added). "If the court orders arbitration, the court on just terms shall stay any judicial proceeding that involves a claim subject to the arbitration." *Id.* § 36.625(7) (emphasis added).

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

NATHAN SURRETT individually and on behalf of all other similarly-situated individuals, and on behalf of herself only, JENNIFER ADAMS fka JENNIFER SCHUSTER, Plaintiffs, v. WESTERN CULINARY INSTITUTE, LTD and CAREER EDUCATION CORPORATION, Defendants.	No.: 0803-03530 DECLARATION OF JILL A. DEATLEY IN SUPPORT OF DEFENDANTS' MOTION TO COMPEL ARBITRATION AND DISMISS ACTION

DECLARATION OF JILL A. DEATLEY

I, Jill A. DeAtley, declare as follows:

1. I serve as the Vice President for Regulatory Review for Career Education Corporation ("CEC"), the parent company of Le Cordon Bleu College of Culinary Arts – Portland, formerly known as the Western Culinary Institute LTD ("WCI"), a position I have held since 2008. Previously, I served as Director of Regulatory Review and Regulatory Review Manager for CEC. In this position I am responsible for, among other things, regulatory compliance for all CEC schools, enrollment agreements, and media compliance review. I have personal knowledge of the facts set forth in this Declaration and, if called upon by the Court, I could and would testify competently thereto under oath.

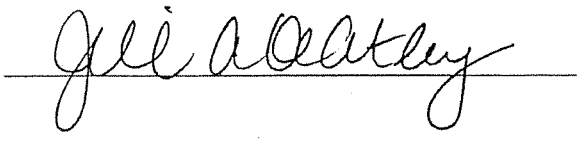
2. Attached hereto as Exhibit A is a true and correct copy of a WCI Enrollment Agreement with a "Dispute Resolution" provision representative of that appearing in WCI Enrollment Agreements prior to November 2007.

3. Attached hereto as Exhibit B is a true and correct copy of a WCI Enrollment

Agreement with an "Agreement to Arbitrate" provision representative of that appearing in WCI Enrollment Agreements beginning in November 2007.

I HEREBY DECLARE THAT THE ABOVE STATEMENT IS TRUE TO THE BEST OF MY KNOWLEDGE AND BELIEF AND THAT I UNDERSTAND IT IS MADE FOR USE AS EVIDENCE IN COURT AND IS SUBJECT TO PENALTY FOR PERJURY.

DATED: September 16, 2011.

By 

Western Culinary Institute
Le Cordon Bleu Program
Portland

Enrollment Agreement

600 SW 10th Avenue, Suite 400
Portland, OR 97205
888-848-3202

Name ("Student")_____ Date _____

Address _____ City _____ State _____ Zip _____

Telephone (Home) _____ Telephone (Work) _____

E-Mail _____ Social Security Number _____

Are you at least 18 years of age? ___ Yes ___ No Are you a U.S. citizen? ___ Yes ___ No If no, are you a resident alien? ___ Yes ___ No

Attestation of High School Graduation or Equivalency: I understand that one requirement for admission is graduation from high school or its equivalency. I hereby certify that (select one):

☐ I am scheduled to graduate from
High School _____ City _____ State _____ Graduation Date_____

☐ I graduated from
High School _____ City _____ State _____ Graduation Date_____

☐ I earned a GED at
Testing Facility _____ City _____ State _____ Examination Date_____

☐ I earned an Associate or Higher Degree from the following U.S. accredited college or university
Institution _____ City _____ State _____ Graduation Date_____

If, for any reason, this attestation of high school graduation, GED completion, or awarded degree is found to be false or untrue, I understand that I will not have met an admissions requirement of the school and I will not be considered a regular student and thus, will be subject to immediate dismissal. Furthermore, I understand that if this attestation is found to be false or untrue, all Title IV financial aid and any state or institutional financial aid that was disbursed on my behalf must be refunded to the appropriate source, and that I will be responsible for payment to the school of any monies refunded. By my signature below, I attest that the information provided above is true and correct to the best of my knowledge, and authorize the school to request transcripts or other documentation to confirm my attestation.

Program:
[___] **Associate of Occupational Studies – Le Cordon Bleu Culinary Arts** 92 credit hours 60 weeks
[___] **Associate of Occupational Studies – Le Cordon Bleu Pâtisserie & Baking** 90 credit hours 60 weeks
[___] **Diploma – Le Cordon Bleu Pâtisserie and Baking** 54 credit hours 36 weeks
[___] **Diploma – Le Cordon Bleu Culinary Arts** 41 credit hours 30 weeks

Date of first class _____ Anticipated Completion Date _____

The time frames provided are based on full-time student status for a normally progressing student. The actual time frame for completion can vary depending on the individual.

Program Costs
The cost for this program at Western Culinary Institute ("WCI") is as follows, subject to the terms and policies as stated in this Enrollment Agreement ("Agreement").

TUITION AND FEES		
Tuition		
Enrollment Fee		
Fee		
Books and supplies (estimated for entire program)		
TOTAL TUITION AND FEES		

I agree that the payment of program costs will be satisfied by (check all that apply):
☐ Cash ☐ Credit Card ☐ Will Apply for Financial Aid ☐ Third Party (e.g., VA, Voc Rehab, Employer)

The Enrollment Fee is a one-time fee paid at the time of application. The Tuition and Books and Supplies costs noted above are for the entire program. Credit for courses transferred will be determined separately. The enrollment fee is good for enrollment within twelve (12) months from: the date the fee is paid, the cancel date, withdrawal date, or graduation date, whichever is later. The refund policy is addressed on page 2 of this agreement.

By signing below, I certify that I have received a complete copy of this Agreement, and that I have read, understand and agree to comply with all of its terms. *I also acknowledge that I have received and had an ample opportunity to review a copy of the WCI catalog in one of the following formats: printed (hard copy), CD-ROM, or downloaded from the WCI online registration site, and I agree to comply with all school disclosures, policies and rules contained therein. I also understand and agree that this Agreement supersedes all prior or contemporaneous verbal or written statements and agreements made by WCI or any employees of WCI, and that no binding promises, representations or statements have been made to me by WCI or any employee of WCI regarding any aspect of the education and training I will receive from the school or the prospects for employment or salary upon graduation that are not set forth in writing in this Agreement. I further understand and agree that this Agreement may not be modified without the written agreement of me and WCI. I hereby certify that all information I provided in my application for admission to WCI is complete, accurate and up to date. Once I sign this Agreement, and WCI accepts this Agreement, I understand that a legally binding contract will be created. My signature indicates that I agree to all terms within this agreement.*

THIS CONTRACT CONTAINS A BINDING ARBITRATION PROVISION WHICH MAY BE ENFORCED BY THE PARTIES.

Signature of Student	Printed Name	Date

Signature of Parent or Guardian (required if Student is under the age of 18)	Printed Name	Date

ACCEPTED BY WESTERN CULINARY INSTITUTE

Signature of Authorized School Official	Printed Name and Title of Authorized School Official	Date

Note: Students who are permanent residents of the State of Washington are required to sign an addendum to this agreement.

Tuition and Fees: I understand that it is my sole responsibility to ensure that all tuition and fees for each term are paid by me or funded from financial aid sources, which may include a cash payment agreement with WCI, prior to my beginning that term. I understand it is my sole responsibility to ensure that all financial aid paperwork has been completed; my financial obligation will not be released due to incomplete paperwork. For a detailed breakdown of my financial plan, I must refer to my financial aid award letters and/or cash payment agreements. WCI complies with Federal Truth-in-Lending requirements (Regulation Z) if applicable; please refer to the cash payment agreement for more details. If I leave school for any reason (other than an approved leave of absence) and return at a later date, I will be charged tuition at the rate in effect at the time of my return as well as any applicable reinstatement fee. I understand that I am not released from any of my obligations or commitments to WCI if I leave the school for any reason or if I am not satisfied with the services provided (refunds calculated as outlined in the Refund Policy below). I also understand that if I am in default of my obligations under this Agreement and my account is referred to a collection agency or an outside attorney to collect the outstanding balance, I will pay the costs of collection, including reasonable attorneys fees, to the extent permitted by state law.

I understand that I will be charged tuition and fees at rates established by WCI and published in an addendum to the catalog and that I am fully responsible for the payment of the tuition and fees charged by WCI (refunds calculated as outlined in the Refund Policy below). The tuition and fee charges stated in this agreement will not change provided that I start classes as scheduled or earlier and continue without interruption. Tuition rates may also vary depending on my enrollment status. Tuition is billed on a payment period basis (the terms "payment period" and "term" are used interchangeably in this Agreement). The tuition and fees do not include other program costs, including, but not limited to, books, supplies, laboratory fees, and other costs associated with the selected program of study. I understand that these additional costs are my obligation and not the obligation of WCI. A student who repeats a course already taken at WCI will be charged for the repeated course calculated by taking the total tuition divided by the number of total program credits multiplied by the number of credits in the repeated course.

Refund Policy 1. If an applicant is not accepted, all monies paid by the applicant will be refunded. 2. An applicant or student may terminate the enrollment agreement by giving written notice to the school. 3. If termination occurs within five (5) business days of enrollment and prior to student attendance, all monies paid shall be refunded less any direct charges for books and supplies not returned or returnable to WCI. 4. If termination occurs after five (5) business days of enrollment and prior to student attendance all monies paid shall be refunded with the exception of the enrollment fee and less any direct charges for books and supplies not returned or returnable to WCI. 5. Students who have not visited the school can withdraw without penalty within three (3) days of: A) Regularly scheduled orientation, or B) a tour of the facilities and equipment. 6. In the event that a student shall terminate his/her attendance prior to his/her completion date, the student shall in no case be obligated for more tuition payments than listed in this section. The policy shall apply to all terminations, for any reason, by either party. In all cases the refund will be calculated from the last date of attendance. 7. WCI reserves the right to cancel or reschedule a starting class if the number of students enrolled is deemed insufficient. WCI will consider such cancellation a rejection and all monies paid by the student will be refunded. 8. If termination occurs more than five (5) business days after enrollment or after student attendance, the student who withdraws from the program is only obligated for the weeks attended within a payment period. A payment period at WCI is approximately 15 weeks in length (except for a final billing period that represents the remainder of the program and may be significantly shorter). The student will be refunded the pro-rata share of the tuition charged for the payment period based on the full weeks not attended within the payment period. I understand that if I withdraw or am withdrawn prior to the end of the term, I am subject to the Return of Title IV Funds policy noted below which may increase my balance due to WCI. If there is a balance due to WCI after all Title IV funds have been returned, this balance will be due immediately, unless a cash payment agreement for this balance has been approved by WCI. Credit balances due to the Student of less than $5 (after all refunds have been made) will not be refunded to the Student/lender unless requested by the Student.

If WCI discontinues instruction after a student enters training, including circumstances where WCI changes its location, the student must be notified in writing of such an event and is entitled to a pro-rata refund of all tuition and fees paid unless comparable training is arranged for by WCI and agreed upon, in writing, by the student. A written request for such a refund must be made within 90 days from the date the program was discontinued and the refund must be paid within 30 days after receipt of such a request.

The Withdrawal Date is used to determine when the student is no longer enrolled at WCI. A written statement will be provided showing allowable charges and total payments along with any monies due the student that will be refunded within 30 days from the student's Withdrawal Date.

Return of Title IV Funds Policy WCI follows the federal Return of Title IV Funds Policy to determine the amount of Title IV aid the Student has received and the amount, if any, which needs to be returned at the time of withdrawal. Under current federal regulations, the amount of aid earned is calculated on a pro rata basis through 60% of the term. After the 60% point in the term, a Student has earned 100% of the Title IV funds. WCI may adjust the Student's account based on any repayments of Title IV funds that WCI was required to make. For details regarding this policy, please see the WCI catalog.

Inquiries Any inquiry or complaint a student may have regarding this contract may be made in writing to Western Culinary Institute, Office of the President, 600 SW 10th Avenue, Suite 400, Portland, OR 97205, or to the Oregon Office of Degree Authorization, 1500 Valley River Drive, #100, Eugene, OR 97401 (541) 687-7452. For State of Washington residents, complaints regarding this school may be made to the State of Washington Workforce Training & Education Coordinating Board, 128 Tenth Avenue SW, P.O. Box 43105, Olympia, WA 98504 (360) 753-5673.

Schedule: I understand that upon availability I will receive a class schedule with approximately 5 scheduled class hours per day within the time frames of 5:00 am – 2:00pm, 12:00 pm - 8:00pm, or 4:00 pm - 12:00 am. All programs require externship coursework, times are subject to site agreement but generally require 8 hours per day. Class schedules are reserved on a first come, first served basis and class schedules vary for each class starting date. A waiting list may exist for some class starting dates. In the event that I have completed all requirements to reserve a class schedule and am on a waiting list, I will be placed on the next available starting date schedule.

Policies and Disclosures

1. **Catalog:** Information about WCI is published in a catalog that contains a description of certain policies, rules, procedures, and other important disclosures and information about the school and the educational programs offered. WCI reserves the right to change any provision of the catalog at any time. Notice of changes will be communicated in a revised catalog, an addendum or supplement to the catalog, or other written format. Changes will not negatively affect students. Students are expected to read and be familiar with the information contained in the school catalog, in any revisions, supplements and addenda to the catalog, and with all school policies. By enrolling in WCI, the Student agrees to abide by the terms stated in the catalog and all school policies.
2. **Changes:** WCI reserves the right to make changes at any time to any provision of the catalog, including the amount of tuition and fees, academic programs and courses, school policies and procedures, faculty and administrative staff, the school calendar and other dates, and other provisions. WCI also reserves the right to make changes in equipment and instructional materials, to modify curriculum, and when size and curriculum permit, to combine classes. Changes will not negatively affect students.
3. **Program Changes and Cancellation:** WCI reserves the right to change, amend, alter, or modify its program offerings and/or schedules. Students who are already enrolled will be notified of any changes, including a change in start date, and every attempt will be made to accommodate student preferences with regard to any schedule change. If the Student does not choose to change to a different start date, the Student will be eligible for a full refund. WCI reserves the right to postpone the Student's start date at its sole discretion.
4. **Transfer of Credits:** The awarding of credit for coursework completed at any other institution is at the sole discretion of WCI. Additionally, WCI does not imply, promise, or guarantee that any credits earned at WCI will be transferable or accepted by any other institution. There is a meaningful possibility that some or all credits earned at WCI will not transfer to or be recognized by other institutions. It is the Student's obligation to ascertain in advance of enrollment whether a possible recipient institution will recognize a course of study or accept credits earned at WCI.
5. **Success of Student:** WCI graduates/completers who obtain employment after graduation typically start out in an entry-level position. Career advancement and the success or satisfaction of an individual student are not guaranteed and depend on a variety of factors including, without limitation, a Student's abilities, personal efforts, employer and the economy. Career advancement assistance for a specific industry position may be enhanced by the education received but will depend on an individual's abilities, attitude, and prior relevant experience as well as the economy and local job market.
6. **Student's Failure to Meet Obligations:** WCI reserves the right to terminate the Student's enrollment for failure to maintain satisfactory academic progress, failure to pay tuition or fees by applicable deadlines, disruptive behavior, posing a danger to the health or welfare of students or other members of the WCI community, conviction of a crime, failure to abide by WCI policies and procedures or any false statements in connection with this enrollment. WCI can discontinue the Student's enrollment status, not issue grades, and deny requests for transcripts should the Student not meet all of his/her financial and institutional obligations or for any false statements in connection with this enrollment.
7. **Employment:** WCI does not guarantee employment or career advancement following graduation but does offer career planning assistance to students and graduates as described in the catalog. Some job or internship opportunities may require substantial travel, background checks, and/or drug testing. Applicants with a prior criminal background, a personal bankruptcy or failed drug test may not be considered for internships/externships or employment in some positions. Employment and internship/externship decisions are outside the control of the school. Graduates of some programs may require additional education, licensure, drug testing and/or certification for employment in some positions. WCI maintains information in its Career Services offices regarding the specific initial employment that its graduates obtain. It is available to students to review upon request.
8. **No Representations as to Salaries:** WCI does not make any representations or claims to prospective or current students regarding the starting salaries of WCI's graduates or the starting salaries of jobs in any field of employment. The salaries that may be earned by any particular graduate/completer are subject to many variables including, among other things, the student's abilities, efforts and prior relevant experience as well as the needs in the industry, the economy, and the local job market for the employment and freelance opportunities sought by the student. By signing this form, the Student confirms that s/he has not been promised anything about salaries and that the Student has not relied on anything heard or read from WCI regarding anticipated salaries in deciding to enroll at WCI.
9. **Graduation Requirements:** Upon completion of training, each student is awarded a degree or certificate showing the title of the course and the fact that the training was satisfactorily completed. No degree or certificate shall be issued until all tuition has been paid in full.

10. **Use of Images and Works:** The undersigned agrees that WCI may use his/her name, voice, image, likeness, and biographical facts, and any materials produced by the Student while enrolled at WCI, without any further approval or payment, unless prohibited by law. The undersigned acknowledges that the foregoing permission includes the right to tape and photograph him or her and to record his or her voice, conversation and sounds for use in any manner or medium in connection with any advertising, publicity, or other information relating to WCI.
11. **Discrimination:** WCI does not discriminate on the basis of race, gender, sexual orientation, religion, creed, color, national origin, ancestry, marital status, age, disability, or any other factor prohibited by law in the recruitment and admission of students, the operation of any of its educational programs and activities, and the recruitment and employment of faculty and staff. The Director of Compliance at WCI serves as the compliance coordinator for Title IX of the Educational Amendments of 1972 and Section 504 of the Rehabilitation Act of 1973, which prohibit discrimination on the basis of sex or handicap.
12. Agreement to submit to WCI's Grievance Procedure: The Student agrees to submit any claim, dispute, or controversy that the Student may have arising out of or relating to his or her recruitment, enrollment, attendance, education, financial aid assistance, or career service assistance by WCI to WCI's Grievance Procedure set forth in the WCI catalog. The parties agree to participate in good faith in WCI's Grievance Procedure. Compliance with WCI's Grievance Procedure is mandatory and is a condition precedent to the Student commencing arbitration or otherwise pursuing his or her claim. Notwithstanding the preceding sentence, if a statute or other legal authority specifically bars WCI from requiring the Student to utilize WCI's Grievance Procedure, or if a court of competent jurisdiction determines that such a requirement is unenforceable with regard to the Student, then the preceding sentence shall be severed and shall have no force and effect, and the Student may, but will not be required to, submit his or her claim to WCI's Grievance Procedure. WCI may waive any or all limitations and requirements set forth in this provision. Such waiver shall not waive or effect any other portion of the Enrollment Agreement, this paragraph, or the Arbitration Agreement. Other grievance procedures - This provision is in addition to any grievance procedure specifically provided for by statute or rule to the extent that the claims are within the scope of such statute or rule.
    Agreement to Arbitrate - Any disputes, claims, or controversies between the parties to this Enrollment Agreement arising out of or relating to (i) this Enrollment Agreement; (ii) the Student's recruitment, enrollment, attendance, or education; (iii) financial aid or career service assistance by WCI; (iv) any claim, no matter how described, pleaded or styled, relating, in any manner, to any act or omission regarding the Student's relationship with WCI, its employees, or with externship sites or their employees; or (v) any objection to arbitrability or the existence, scope, validity, construction, or enforceability of this Arbitration Agreement shall be resolved pursuant to this paragraph (the "Arbitration Agreement"). Choice of Arbitration Provider and Arbitration Rules - Unless the parties agree to an alternative, the arbitration shall be administered by the American Arbitration Association ("AAA") or the National Arbitration Forum ("NAF"). The arbitration shall be before a single arbitrator. If brought before the AAA, the AAA's Commercial Arbitration Rules, and applicable supplementary rules and procedures of the AAA, in effect at the time the arbitration is brought, shall be applied. If brought before the NAF, the NAF's Code of Procedure in effect at the time the arbitration is brought shall be applied. Copies of the AAA's Rules or the NAF's Code may be obtained from WCI's Campus President. Information about the arbitration process also can be obtained from: AAA at www.adr.org. or 1-800-778-7879; NAF at www.arb-forum.com or 1-952-516-6400 or toll-free at 1-800-474-2371. Location of arbitration – All in-person hearings and conferences in the arbitration shall take place in a locale near WCI unless the Student and WCI agree otherwise. Language - The language of the arbitration shall be in English. Any party desiring or requiring a different language shall bear the expense of an interpreter. Choice of Law - The arbitrator shall apply federal law to the fullest extent possible, and the substantive and procedural provisions of the Federal Arbitration Act (9 U.S.C. §§1-16) shall govern this Arbitration Agreement and any and all issues relating to the enforcement of the Arbitration Agreement and the arbitrability of claims between the parties. Costs, fees, and expenses of arbitration - Each party shall bear the expense of its own counsel, experts, witnesses, and preparation and presentation of proofs. All fees and expenses of the arbitrator and administrative fees and expenses of the arbitration shall be borne equally by the parties unless otherwise provided by the rules of the AAA or the NAF governing the proceeding, or by specific ruling by the arbitrator, or by agreement of the parties. Relief and remedies - The arbitrator shall have the authority to award monetary damages and may grant any non-monetary remedy or relief available by applicable law and rules of the arbitration forum governing the proceeding and within the scope of this Enrollment Agreement. The arbitrator will have no authority to alter any grade given to the Student or to require WCI to change any of its policies or procedures. The arbitrator will have no authority to award consequential damages, indirect damages, treble damages or punitive damages, or any monetary damages not measured by the prevailing party's economic damages. The arbitrator will have no authority to award attorney's fees except as expressly provided by this Enrollment Agreement or authorized by law or the rules of the arbitration forum. Class and consolidated actions - There shall be no right or authority for any claims within the scope of this Arbitration Agreement to be arbitrated or litigated on a class basis or for the claims of more than one Student to be arbitrated or litigated jointly or consolidated with any other Student's claims. Arbitrator's Award – At the request of either party, the arbitrator shall render a written award briefly setting forth his or her essential findings and conclusions. Judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction. Severability and right to waive- If any part or parts of this Arbitration Agreement are found to be invalid or unenforceable by a decision of a tribunal of competent jurisdiction, then such specific part or parts shall be of no force and effect and shall be severed, but the remainder of this Arbitration Agreement shall continue in full force and effect. Any or all of the limitations set forth in this Arbitration Agreement may be specifically waived by the party against whom the claim is asserted. Such waiver shall not waive or effect any other portion of this Arbitration Agreement. Survival of provisions of this agreement – This Arbitration Agreement will survive the termination of the Student's relationship with WCI.
13. **NOTICE:** Any holder of this consumer credit contract is subject to all claims and defenses which the debtor could assert against the seller of goods or services obtained pursuant hereto or with the proceeds hereof. Recovery hereunder by the debtor shall not exceed amounts paid by the debtor hereunder.
14. **Assignment:** None of the rights of the Student or the Student's parents under this Agreement are assignable to any other person or entity.
15. **Entire Agreement:** This Agreement constitutes the entire agreement between Student and the WCI concerning all aspects of the education and training the Student will be provided by the school. By signing this Agreement, the Student agrees that no binding promises, representations or statements have been made to the Student by WCI or any employee of WCI regarding any aspect of the education and training the Student will receive from the school or the prospects of employment or salary upon graduation that are not set forth in writing in this Agreement. WCI will not be responsible for any representation, statement of policy, career planning activities, curriculum or facility that does not appear in this Agreement or the school catalog.
16. **Branch Campuses:** WCI has two branch campuses: Le Cordon Bleu College of Culinary Arts Atlanta located in Tucker, GA and Le Cordon Bleu College of Culinary Arts Minneapolis/St. Paul located in Mendota Heights, MN.

IN THE CIRCUIT COURT OF THE STATE OF OREGON

IN AND FOR THE COUNTY OF MULTNOMAH

NATHAN SURRETT, individually and on behalf of all other similarly-situated individuals, and on behalf of herself only, JENNIFER ADAMS fka JENNIFER SCHUSTER

Plaintiffs,

vs.

WESTERN CULINARY INSTITUTE, LTD and CAREER EDUCATION CORPORATION,

Defendants.

Case No. 0803-03530

DECLARATION OF DAVID F. SUGERMAN IN SUPPORT OF ABSENT CLASS MEMBERS' OPPOSITION TO DEFENDANTS' MOTION TO COMPEL ARBITRATION OF CERTAIN CLASS MEMBERS' CLAIMS AND TO STAY ACTION

Under penalty of perjury, subject to criminal penalties for contempt, I, David F. Sugerman, declare:

1. I am one of the attorneys representing the plaintiffs in this matter and make this statement in support of absent class members' opposition to defendants' motion to compel arbitration of certain class members' claims and to stay action. I have knowledge of the matters contained in this declaration.

David F. Sugerman | Attorney, PC
707 SW Washington Street, Suite 600 - Portland, Oregon 97205
Phone 503.228.6474 | Fax 503.228.2556

2. To date, the parties have taken some 19 depositions. Eight of those have been taken by the CEC defendants.

3. In addition to the long list of proceedings on this case set forth in my prior declaration in opposition to Defendants' Motion to Compel Arbitration (Surrett), pp. 3-4, the CEC defendants have undertaken the following additional steps in court. They filed and lost their Motion to Compel Arbitration. They filed and lost their Motion to Decertify the Class. They have issued third party subpoenas to competing culinary schools. They have taken depositions of witnesses from a competing trade school.

4. Exhibit A, attached, is a copy of a document printed from the National Arbitration Forum, http://www.adrforum.com/newsroom.aspx?itemID=1528 (accessed June 11, 2012) announcing in 2009 that NAF would no longer handle consumer arbitrations. This arose out of allegations that NAF unfairly processed arbitrations and failed to disclose important information regarding the ownership of NAF.

DATED this 11th day of June, 2012.

By: _____

David F. Sugerman, OSB No. 86298
DAVID F. SUGERMAN, ATTORNEY PC
707 SW Washington Street, Suite 600
Portland, Oregon 97205
Phone: (503) 228-6474
Fax: (503) 228-2556
E-Mail: david@davidsugerman.com
Attorney for Plaintiffs

583-030-0035

Standards for Schools Offering Degree Programs In or From Oregon

In order to receive and hold authorization to offer in or from Oregon instruction or related services leading to one or more degrees, a school must remain open to inspection at all times and continuously satisfy each of the following standard requirements as written, except where the Office approves modification under OAR 583-030-0036 or substitution under 583-030-0011. Standards are applicable to all programs.

(1) Name. The school shall use for doing business publicly a name that is consistent with its purpose and educational programs.

(2) Control.

(a) All persons responsible for top management policy must be individually qualified by education, experience, and record of conduct to assure effective management, ethical practice, and the quality of degrees and services offered. Boards must collectively demonstrate financial, academic, managerial and any necessary specialized knowledge, but individual members need not have all of these characteristics. Any controlling organization or owner is subject to this standard.

(b) Administrators shall be paid by fixed salary and not by commission. Any portion of payment that is based on enrollment of students recruited by the administrator or the administrator's staff is considered payment by commission.

(c) Teachers shall be paid by fixed salary and not by commission. Any portion of payment that is based on enrollment of students recruited by the teacher is considered payment by commission.

(d) Nonprofit Schools:

(A) Persons who control a nonprofit school shall demonstrate a commitment to the school's best interest as a public trust.

(B) A nonprofit school shall have a published policy that is followed in practice against conflicts of interest at all organizational levels.

(e) For-profit Schools:

(A) A school operated for profit shall disclose fully to the Office, the specific financial interest of any organization or person, except that a large group of shareholders may be described generally. Any person or entity holding at least 5 percent of voting or common shares in a for-profit school must be named and the percentage of holdings disclosed. All business activities of interested organizations or persons are subject to disclosure.

(B) All board members, administrators, or owners of five percent or more of shares of an applicant school or parent corporation must disclose with explanation the following:

(i) Any prior felony convictions.

(ii) Any known violations of federal financial aid rules by a school of which the person was a board member or employee.

(iii) Any known violations of the policies of an accreditor by a school of which the person was a board member or employee.

(iv) Any previous or current ownership or administration of a school that closed or filed for bankruptcy.

(3) Organization.

(a) The school and any parent organization shall be organized so as to distribute responsibility clearly among positions in a logical structure that is consistent with services offered and qualifications needed to fulfill the duties of the positions. An individual may occupy more than one position.

(b) The school shall satisfy the Office that all top executive officers and other administrators are individually qualified by education, experience, and record of conduct to assure competent management, ethical practices, and effective educational service. Unless an exception is approved by the Office because of sufficient compensatory qualification, administrators above the entry level shall have experience related to their present duties, and all administrators with authority over academic programs shall possess appropriate degrees earned from schools that are regionally accredited or otherwise determined by the Office to be acceptable.

(c) The school shall make available to the Office an administrator generally responsible for school operations within the state and transaction of business with the Office. Unless an exception is approved by the Office because of sufficient compensatory qualification, that administrator shall possess a degree at least as high as any offered by the school in connection with operations in Oregon, together with appropriate administrative experience.

(d) There shall be an academic officer for the entire school responsible for faculty and academic programs offered in or from Oregon. Unless an exception is approved by the Office because of sufficient compensatory qualification, that officer shall possess at least a master's degree and shall possess a doctor's degree if the school offers any graduate or non-baccalaureate professional degree. That officer shall have experience in teaching and academic administration, both experiences appropriate to the level, size, and complexity of the school.

(e) There shall be a business officer for the entire school responsible for accounting and managerial services. Unless an exception is approved by the Office because of unusual compensatory qualification, that officer shall possess at least a bachelor's degree in a business-related field, together with appropriate administrative experience.

(4) Teachers.

(a) The school must obtain and keep official transcripts for all teaching faculty.

(b) The school shall satisfy the Office that all teachers are individually qualified by education and experience to give expert instruction or evaluation in their specialties. Unless an exception is approved by the Office because of sufficient compensatory qualification, teachers shall be qualified for the various levels of instruction or evaluation as described below, with degrees earned from schools that are accredited by a federally recognized accreditor or otherwise determined by the Office to be acceptable.

(c) Teachers shall be numerous enough and so distributed as to give effective instructional and advisory attention to students in all programs offered by the school.

(d) A school having an undergraduate FTE student-faculty ratio of greater than 30-1 or a graduate FTE student-faculty ratio of greater than 20-1 for students taught in or from Oregon must demonstrate that students and faculty have adequate opportunities for one-to-one interaction.

(e) A school that does not have at least one full-time teacher resident in Oregon or directly teaching Oregon students in each specialty must demonstrate with specific examples the adequacy of faculty contribution to organizational integrity and continuity, to academic planning, and to resident student development.

(f) The school shall have a faculty development policy that continuously improves their knowledge and performance.

(g) The school must provide ODA with annual data regarding turnover of full-time teachers. ODA may limit use of part-time teachers upon finding that such turnover or use results in substandard education of students.

(h) The school shall demonstrate an effort when hiring teachers to avoid dependence on its own most recent graduates. No more than 20 percent of all applicant school teachers can hold their highest degree from the applicant school unless fewer than 10 schools in the United States offer the highest degree available in the field. Schools offering solely religious degrees are exempt from this requirement.

(i) A teacher of an academic or scientific discipline within an occupational or professional degree program (e.g., economics within a business program, psychology within education, anatomy within nursing) ordinarily shall possess the appropriate degree in the discipline rather than a non-disciplinary occupational or professional degree.

Lower-division undergraduate courses may be taught by those with non-disciplinary degrees who have demonstrable and extensive acquaintance with the discipline.

(j) Standards applicable to specific degree levels.

(A) Standards applicable to associate degrees: A teacher on a faculty offering associate's degrees ordinarily shall possess a bachelor's degree appropriate to the subject taught or evaluated, except that compensatory nonacademic qualifications will be more readily accepted by the Office in programs leading to occupational degrees. Where the degree emphasizes transfer courses in the arts and sciences, the teacher ordinarily shall possess an appropriate master's degree.

(B) Standards applicable to bachelor's degree programs: A teacher on a faculty offering bachelor's degrees ordinarily shall possess an appropriate master's degree.

(C) Standards applicable to master's degree programs: A teacher on faculty offering master's degrees ordinarily shall possess an appropriate doctor's degree and some teaching experience, except that up to half of the teachers in an occupational or professional degree program may substitute for the doctorate a master's degree together with occupational or professional licensure or equivalent certification and related work experience. More substitutions may be permitted where the terminal degree for teachers in an occupational or professional field is not generally considered to be a doctorate.

(D) Standards applicable to doctoral programs: A teacher on a faculty offering doctor's degrees ordinarily shall possess an appropriate doctor's degree and substantial graduate or first-professional teaching experience, including experience overseeing advanced independent study or student practice, except that the doctor's degree alone may suffice for teaching courses at the master's level generally or at any level in the teacher's particular subspecialty.

(5) Credit. The school shall award credit toward degrees proportionate to work done by students and consequent upon the judgment of qualified teachers and examiners. Credits are generally expressed as either semester (SCH) or quarter credit hours (QCH). One semester credit represents approximately 45 hours of on-task student work in a semester (usually two study hours per faculty contact hour). A quarter credit hour represents approximately 30 hours of student work in a quarter. Credit hours earned through nontraditional learning schedules shall have proportionate value to credit hours based on customary term lengths.

(a) Instructional methods:

(A) Credit awarded by the school shall be based solely upon the judgment of teachers who have had extensive direct contact with the students who receive it, with the exception of methods listed in these rules if approved in advance by ODA

(B) At least one academic year of credit toward any degree, most of it near the end, shall represent teaching or direct evaluation by faculty members employed by the school, except that the Office may approve a lesser amount for an associate's degree.

(C) Credit may be awarded for distance learning if the school demonstrates that it has adequate methods in place to ensure that student work is sufficient both in quality and quantity to meet ODA requirements, courses are developed and taught by qualified faculty and there will be sufficient interaction between students and faculty and, if possible, among students. The Office may limit or disallow credit awarded for any type of distance learning if the school cannot demonstrate adequate oversight and quality control measures.

(D) Transfer credit integral to the school's approved degree curriculum may be awarded at the corresponding degree level for academic work documented by other schools that are regionally accredited, authorized to confer degrees in or from Oregon, or otherwise individually or categorically approved by the Office. Such credit must be converted as needed from semester, quarter or nontraditional calendar systems.

(b) Noninstructional Methods No more than one year of an academic program can be completed using any combination of the noninstructional methods set forth in (A), (B), and (C) below:

(A) Advanced Placement credit integral to the approved degree curriculum may be awarded in the lower-division up to a limit of one academic year for passing examinations constructed by testing organizations satisfactory to the Office.

(B) Challenge examination credit as an actual component of the approved degree curriculum may be awarded only at the undergraduate level for successful performance on a final course examination, or on a similar test covering all course content, given by the school in lieu of requiring class attendance. No more than 25 percent of an undergraduate degree program may be earned through challenge examinations.

(C) Noncollegiate learning integral to the approved degree curriculum may be awarded credit only at the undergraduate level for learning validated by a student "portfolio," a credit evaluation guide issued by the American Council on Education, or a similar criterion. Such learning must be formulated through sufficient contact between teacher and student, communicated competently in terms of ideas (e.g., concept, generalization, analysis, synthesis, proof) rather than mere description, and judged by faculty members or contracted experts demonstrably qualified to evaluate it. Upper-division credit of this type may be awarded only in academic fields in which the school employs its own faculty. No more than 25 percent of an undergraduate degree program may be earned through award of credit for noncollegiate work.

(6) Curriculum. The school shall assure the quality of all attendant teaching, learning, and faculty-student interaction. The curriculum shall have a structure that reflects faculty responsibility for what is to be learned overall, as well as in each course, and thus for the

logical sequence and increasing difficulty of subjects and instructional levels. While requirements are sometimes listed in both semester and quarter credit hours, ODA usually states credit hours as semester credit hours. If quarter credits are not listed, colleges using the quarter system should multiply the stated credits by 1.5 to obtain the correct requirement in quarter credit hours (QCH) under quarter systems. These are the basic requirements for different kinds of degrees available in Oregon. ODA may approve minor variations from these curriculum standards in order to allow programs to operate efficiently.

(a) Undergraduate Programs All associate and bachelor's degrees require one year (at least 6 semester (SCH) or 9 quarter credit hours (QCH) or equivalent alternate term credit hours) of English composition or equivalent ODA-approved writing courses. Students may meet this requirement by achieving a score on a nationally normed test that would permit a waiver of English composition requirements or the award of academic credit in English composition at an accredited college or university.

(b) Associate Degrees An associate's degree requires at least two academic years (60 semester credit hours or 90 quarter credit hours) in FTE postsecondary study. The degree requires at least 15 SCH or 22 QCH in general education courses, including the undergraduate English composition requirement

(A) Associate of Arts. A full-transfer degree, the A.A. requires two academic years applicable to B.A. or B.S. study fulfilling baccalaureate liberal arts requirements. A major is optional. Thus, the A.A. requires 24 SCH (36 QCH) in the liberal arts and sciences, with at least 6 hours (9 QCH) each in the humanities, sciences, and social sciences.

(B) Associate of Science. A limited-transfer degree, the A.S. requires a major and two academic years applicable to professional or technical baccalaureate study. The A.S. degree requires 24 SCH (36 QCH) in the humanities, sciences and social sciences, or in non-vocational courses closely related to them.

(C) Associate, Professional or Technical. A terminal degree, the professional or technical associate's degree requires a major (Degree title examples: Associate of Applied Arts, Associate of Applied Science, Associate of Technology, Associate of Occupational Studies, Associate of Business, Associate of Religion). In addition to the major requirements, this degree requires the basic 15 SCH or 22 QCH in general education courses, including the English composition requirement.

(c) Bachelor's Degrees A bachelor's degree, or baccalaureate, requires at least four academic years (120 SCH or 180 QCH) in FTE postsecondary study. At least 40 semester credit hours (60 QCH) shall be in upper-division courses, and no more than two academic years of instruction (no more than 50 percent of credit hours used for the degree) shall be from schools that do not offer baccalaureate degrees.

(A) General Education: The degree requires one academic year (at least 30 SCH or 45 QCH) of general education, which includes the one-year undergraduate English composition requirement.

(B) Major Field: The degree requires distinct specialization, i.e., a "major," which entails approximately one academic year of work (30 SCH or 45 QCH) in the main subject, with 20 SCH (30 QCH) in the upper division and 15 SCH (22 or 23 QCH) of upper-division hours taught by the resident faculty. A dual major simply doubles these numbers.

(C) An interdisciplinary major is also permitted. It requires two academic years (60 SCH) in either three or four disciplines, with at least 15 hours in each discipline and at least 9 upper-division hours in each. A school may offer a major or an interdisciplinary option in any field in which it has more than one fully qualified teacher if at least one teaches full time.

(D) Degrees. The following bachelor's degree names, levels and types are available in Oregon:

(i) Bachelor of Arts. An arts degree, the B.A. requires competency in a foreign language and one academic year in the humanities, i.e., 30 SCH, of which 12 can be in foreign languages. The language competency requirement is equivalent to the 12 hours, the second-year level, and ESL students can satisfy it with 12 hours of English language and literature. As general education outside the major, the B.A. requires 24 SCH in the liberal arts and sciences, with at least 6 hours in each of the three areas: humanities, social sciences, and natural sciences.

(ii) Bachelor of Science. A science degree, the B.S. requires one academic year in the social or natural sciences, i.e., 30 SCH, of which 12 can be in mathematics and state-approved computer courses. As general education outside the major, the B.S. requires 24 SCH in the liberal arts and sciences, with at least 6 hours in each of the three areas: humanities, social sciences, and natural sciences.

(iii) Bachelor, Professional. As general education outside the major, the professional bachelor's degree requires 24 SCH hours in the liberal arts and sciences, with at least 6 hours in each of the three liberal arts and sciences areas: humanities, social sciences, and natural sciences.

(iv) Bachelor, Technical. As general education outside the major, the technical bachelor's degree requires 24 SCH in the liberal arts and sciences, or in non-vocational courses closely related to them, with at least 3 semester hours in each of the three areas: humanities, social studies, and natural sciences, and a total of at least 9 in the two areas most unrelated to the major.

(d) Graduate Degrees A graduate curriculum shall reflect a concept of the graduate school as a group of scholars, the faculty members of which have had extensive collegiate teaching experience and are engaged in the advancement of knowledge. A

graduate degree must involve teaching by such qualified faculty and cannot be earned solely by testing and/or portfolio review.

(A) A master's degree shall require at least one full academic year in FTE post-baccalaureate study, except that a first-professional master's degree may be authorized for study beyond fulfillment of undergraduate requirements approved by the Office if the total period of study is at least five academic years. The curriculum shall specialize in a single discipline or single occupational or professional area and culminate in a demonstration of mastery such as a research thesis, a work of art, or the solution of a practical professional problem.

(B) A doctor's degree shall require at least three academic years in specialized post-baccalaureate FTE study, except that a first-professional doctor's degree may be authorized for four academic years of study beyond fulfillment of undergraduate requirements approved by the Office. Study for a closely related master's degree may be counted toward doctoral requirements. The doctor's degree shall represent a student's ability to perform independently basic or applied research at the level of the professional scholar or to perform independently the work of a profession that involves the highest levels of knowledge and expertise. Requirements for the degree shall include demonstration of mastery of a significant body of knowledge through comprehensive examination, unless a graduate must pass a similar examination in order to be admitted to professional practice in Oregon. The curricular program of a research degree shall be appropriately broad and shall manifest full understanding of the level and range of doctoral scholarship, the function of a dissertation and its defense, the nature of comprehensive examination, and the distinction between matriculation and degree candidacy.

(7) Learning. The school shall require each student to complete academic assignments and demonstrate learning appropriate to the curriculum undertaken.

(a) Teachers or evaluators shall inform students clearly using a syllabus or similar instrument of what should be learned in each course and how it will be measured.

(b)(A) Expectations of student performance shall be increased with each ascending step in degree level. Higher degrees must represent an increase in the difficulty of work and expectations of students, not simply a cumulation or increase in quantity of student work.

(B) Evidence of expectation (e.g., syllabi and sample exams) and performance (e.g., student grades) shall be retained for all academic courses for at least one year.

(c) The school shall require students to make continuous progress toward a degree while they are enrolled and liable for tuition and shall suspend or dismiss those who do not make such progress, except that a period of probation with guidance may be instituted in order to obviate separation of a student who can be expected to improve immediately. Continuous progress for students receiving Title IV aid shall be defined according to

federal Title IV standards. Students not receiving Title IV aid shall meet the school's own published standards for satisfactory progress.

(d) Grading and appeal procedures shall be fair and administered equitably, and criteria of student progress shall be validated by research if not obviously valid.

(8) Recruitment:

(a) The school is responsible for insuring that its recruitment agents are knowledgeable about the school's:

(A) History and accreditation;

(B) Programs of study;

(C) Admission and assessment requirements;

(D) Ability to assist in providing housing and/or job placement;

(E) Financial policies and procedures, including the point at which students can expect to receive financial aid disbursements;

(F) Refund policy;

(G) Graduation requirements and rates;

(H) Rules and regulations;

(I) Placement rates if they are used in recruiting.

(b) The school is responsible for insuring that its recruitment agents are providing accurate, realistic information about the school, its policies and achievements, and its ability to assist students.

(c) A prospective student shall receive a complete description of the school and its policies, including an estimate of annual or program costs, before being enrolled. This estimate is not binding on the institution but must give prospective students a reasonable idea of their financial commitment.

(d) Where a degree implies preparation for a specific occupation, the school shall explain clearly the true relationship between its curriculum and subsequent student qualification for occupational practice, including employment rates in the field and graduates' success rates in passing licensure examinations if applicable. Employment rates in the field shall treat graduates as employed in the field only if the position in which the graduate is employed is at least half-time and requires or is usually filled by a person with a college degree.

(e) The school shall take precautions to avoid unrealistic expectation of housing availability and cost when the school does not provide housing and job placement, including part-time employment and practica during the student's enrollment.

(f) A claim made to attract students shall be documented by evidence available to any person on request. The school shall make no attempt to attract anyone who does not appear likely to benefit from enrollment, and no attempt to attract students on any basis other than instruction and campus life appropriate to an educational institution.

(g) Outside the regular student financial aid process, there shall be no discounting of tuition as an incentive to enroll.

(9) Admission. The school shall offer admission only on receipt of evidence that the applying student can reasonably expect to complete a degree and to benefit from the education obtained.

(a) A student admitted to undergraduate degree study for the first time shall have either a high school diploma or an equivalent credential. Home-schooled students without a traditional credential may be admitted provided that they can demonstrate the ability to perform college-level academic work.

(b) A student admitted to undergraduate degree study with undergraduate experience shall have a record of successful performance therein or else a record of responsibility and achievement following unsuccessful collegiate performance.

(c) A student admitted to graduate degree study shall have a baccalaureate degree from a school that is accredited, authorized to confer degrees in Oregon, or otherwise approved by the Office either individually or by category.

(d) A student admitted to first-professional degree study shall have at least three academic years of accredited or ODA-approved undergraduate credit, graded average or better, including pre-professional courses specified by the school and approved by the Office.

(10) Guidance. The school shall help students to understand the curriculum and to make the best use of it.

(a) There shall be a program of general orientation for new students.

(b) Each student shall be assigned a qualified academic advisor to assist individually in planning, course selection, learning methods, and general adjustment.

(c) The school shall provide career guidance to the extent that curriculum is related to a specific prospective occupation or profession.

(11) Student Affairs. Through both services and supervision the school shall demonstrate commitment to the success of individual students and to maintenance of an atmosphere conducive to learning.

(a) Rules of student conduct shall be reasonable, sufficiently specific, fully communicated, systematically and equitably enforced, and accompanied by policy and practice of disciplinary due process, including notice and hearing and related rights.

(b) Health, counseling or psychological services provided to students must meet requirements for professional practice in Oregon.

(c) Housing where provided or endorsed by the school shall be conducive to study and adequately supervised.

(d) Financial aid services shall be provided by qualified administrators.

(e) Placement services where provided shall be described clearly to students, and the school shall take precautions to avoid unrealistic expectation of placement.

(f) Records documenting relationships between the school and a student shall be open to that student, who may request changes or enter dissenting comments, and the content of records shall be objective and fair. The private notes of a counselor are not to be considered educational records and shall not be transmitted as such, either inside or outside the school. All medical records are confidential and shall not be released without permission of the patient.

(g) There shall be available to undergraduate students and responsible for student affairs an official who possesses knowledge, skill, and managerial experience particularly appropriate to the function, unless the Office waives this requirement. In general, waivers are granted only for small startup schools in their first approval cycle and for schools that mainly teach people who are of nontraditional age (23 or older) or already in the workforce.

(h) Every school shall distribute a student handbook or similar publication describing services and regulations, unless such descriptions are complete in the school's main catalog.

(12) Information. The school shall be scrupulously ethical in all communication with the public and with prospective students. School publications, advertisements, and statements shall be wholly accurate and in no way misleading. Reference to state approval shall be limited to that described in OAR 583-030-0041. Reference to accreditation shall be limited to that defined in OAR 583-030-0015(2)

(a) The school shall publish at least every two years a catalog or general bulletin. The catalog shall contain a table of contents and adequate information concerning period covered, school name and address, telephone numbers, state approval, purpose,

relationship to occupational qualification, faculty and administrators (listing position or teaching specialization together with all earned degrees and their sources, omitting unearned degrees and not confusing professional licenses with degrees), degree requirements and curricula, academic calendar, credit policy in accordance with OAR 583-030-0035(5), transferability of credit to other schools, admission requirements and procedures, academic advising and career planning, academic policies and grading, rules of conduct and disciplinary procedure, student services (counseling, health, placement, housing, food, bookstore, activities, organizations), student records, library, facilities, fees and refunds, estimated total expenses, financial aid, and job opportunities for current students. Electronic publication meets this standard provided that a paper version of the catalog is provided to ODA, is available to students upon request and is maintained as the "official" version in order to avoid confusion if electronic versions are changed.

(b) A school without regional accreditation shall print in a separate section of its catalog titled "transfer of credit to other schools" a statement warning students verbatim that "transfer of credit is always at the discretion of the receiving school, generally depends on comparability of curricula, and may depend on comparability of accreditation." Other comments may follow concerning the school's documented experience in credit transferability, but it must be clear that a student should make no assumptions about credit transfer.

(13) Credentials. The school shall provide accurate and appropriate credit transcripts for students who enroll and diplomas for students who graduate.

(a) The school shall maintain for every past and present student, and shall issue at the request of any student who is not delinquent in fee payment, a current transcript of credits and degrees earned. The transcript shall identify the school fully and explain the academic calendar, length of term, credit structure, and grading system. It shall identify the student and show all prior degrees earned, details of any credit transferred or otherwise awarded at entry, and periods of enrollment. It shall include for each period of enrollment every completed course or module with an understandable title, number of credits earned, and grade received. The transcript shall note with or without explanation if the student is not immediately eligible to continue enrollment, e.g., for reasons of academic probation or suspension.

(b) Upon satisfaction of degree requirements and payment of all fees owed, the school shall provide the graduating student with a diploma in a form approved by the Office, appropriately documenting conferral of the degree.

(14) Records. The school shall keep accurate and safe all records affecting students. There shall be at all times complete duplicate transcript information kept in a location away from the original transcripts, such that duplicates and originals are not exposed to risk of simultaneous damage. In addition to transcripts, which may never be destroyed, the school shall maintain detailed records documenting the significant parts of its formal relationship with each student: financial transactions and accounts, admission qualifications, validation of advanced standing, instructor course records as posted to

transcripts, and status changes due to unsatisfactory performance or conduct. Such supporting records shall be kept safe for a period of at least three years after a student has discontinued enrollment. Instructor course records other than those posted to transcripts shall be kept for at least one year.

(15) Library. The school shall provide or arrange for its faculty and students direct or electronic access to verbal and sensory materials sufficient in all subjects of the curriculum to support instruction and to stimulate research or independent study.

(a) The school may arrange for comprehensive privileges from libraries of other organizations, provided it can prove convenient access and extensive use, but the school shall retain full responsibility for adequacy of resources available to students.

(b) Library services shall be under the direction of a person educated professionally in library and information studies, except that the Office may waive this requirement where the range of academic fields represented is narrow.

(c) Library resources shall be current, well distributed among fields in which the institution offers instruction, cataloged, logically organized, and readily located.

(d) The school should conform to the following guidelines for library services unless it can justify a deviation on the basis of unusual educational requirements.

(A) With the exception of those in specialized associate's degree programs, students should receive direct, contracted or electronic access to a minimal basic collection equivalent to that held by accredited schools offering similar programs. The applicant school must demonstrate this comparability.

(B) Staff should include a professional librarian for each 1,000 students, with clerical support adequate to relieve librarians of all non-professional duties.

(C) Students should have full access to all resources for at least 40 hours per week, and all services should be available for 20 hours per week. The facility, whether provided by the college directly or by contract, should seat no less than 10 percent of the students enrolled unless the program is primarily intended to train practitioners in technical or fine arts fields, in which case a lower percentage may be requested. If the school meets the library standard largely by electronic means, electronic services must be available to a comparable portion of the student body for a comparable period.

(16) Facilities. The school shall have buildings and equipment sufficient for the achievement of all educational objectives.

(a) Buildings in general, including student or faculty housing units, shall be uncrowded, safe, clean, well furnished, and in good repair; and they shall be well lighted, heated, ventilated, and protected from noise. School grounds where provided shall be appropriately used and adequately maintained.

(b) Instructional facilities shall be adequate and conducive to learning. There shall be no less than 15 square feet per student station in classrooms, with at least one station for every two FTE students enrolled. Total classroom and study area, including library space for reading, shall be no less than 10 square feet per FTE student.

(c) Laboratory space and instructional equipment shall be inventoried, its use explained on the resulting report, and its adequacy defended on criteria obtained from experts and documented by the school. A laboratory ordinarily shall have no less than 30 square feet per student station.

(d) Clinical facilities and other public service areas shall be appropriate for instruction of students as well as for service to patients or clients.

(e) Faculty offices shall be sufficient to prevent crowding and to allow private conversations with students.

(17) Finance. The school shall have financial resources sufficient to ensure successful continuing operation and to guarantee full refund of any unearned tuition. There shall be competent financial planning using complete and accurate records. The school shall demonstrate satisfaction of this standard upon application, and thereafter annually, by submitting independently audited financial statements with opinion by a certified public accountant.

(a) Financial reports shall be prepared in a format acceptable to the Office, clearly delineating assets and liabilities and informatively classifying revenues by source and expenditures by function. In some cases, the Office at its discretion may accept an audited balance sheet with opinion, together with annual operating statements that have been reviewed by the auditor. A school that is a subsidiary shall submit financial statements of the parent corporation on request. In unusual circumstances, the Office may require a special investigative audit and report.

(b) Current assets shall be entirely tangible and such that the school is not dependent for solvency on substantial increases in receivables collection rate, gifts, tuition rates, or enrollment. Prospective tuition for which a student is not legally liable is not an asset and shall not be shown as a receivable or other balance sheet asset. Tuition collected but still subject to refund shall be shown as a "prepaid" or "unearned" tuition liability.

(c) A school unable to demonstrate financial strength may be permitted at the discretion of the Office to submit a surety bond in amount equal to the largest amount of prepaid tuition held at any time. The bond would be subject to claims for tuition refund only.

(d) The school shall carry casualty and general liability insurance sufficient to guarantee continuity in case of accident or negligence, and it shall provide or else require by policy professional liability insurance for all of its officers and employees.

(18) Fees and Refunds. The school shall maintain fee and refund policies that are fair, uniformly administered, and clearly explained in the school catalog as well as in any contract made with students. A student shall not be enrolled without having received the explanatory material. The school shall not change its tuition or fees more than once during a calendar year.

(a) Tuition shall be charged by the credit hour or by fixed rate for instruction during an academic semester, quarter, or shorter term. No student is obligated for tuition charged for a term that had not commenced when the student withdrew or a term that was truncated by cessation of school services.

(b) Except as noted below in this section, fees not included in tuition shall not exceed five percent of full-time tuition for any term in which separate fees are charged. One-time application or admission fees may exceed 5 percent of first-term tuition but shall not exceed $200. Lab or equipment fees related to the actual necessary operational costs of specific courses may exceed 5 percent of tuition provided that the fees are made known to students prior to enrollment in the course. Nominal fees for late payments, course withdrawals and the like are acceptable.

(c) After classes begin for a term, a student who withdraws from a course is eligible for a partial refund through the middle week of the term. Refunds shall be based on unused instructional time and shall be prorated on a weekly basis for schools using a semester, quarter or nontraditional calendar. Without specific Office approval, refund rates shall not be differentiated on the criteria of a student's source of income or loan repayment obligations except as otherwise required by law.

(d) Any fees for credit transferred, for credit attempted or earned by examination or portfolio must be based on the cost of service actually provided, ordinarily less than the cost of regular instruction. The mere award of credit does not justify a fee.

(e) Academic policies shall not artificially prolong the enrollment of a failing student with the effect of increasing financial obligation.

(f) Separation from the school for reason of discipline or other administrative action shall not cause forfeiture of ordinary refund amounts.

(19) Evaluation. The school shall, in order to improve programs, evaluate its own educational effectiveness continually in relation to purpose and planning, including in all aspects the opinions of students. There shall be evaluation of present curriculum and instruction, of attrition and reasons for student withdrawal, and of performance by students after their graduation. In addition to the comments of graduates, employer opinions and licensing examination records should be used in the post-graduation study.

(20) Fair Practice. Notwithstanding the absence of a specific standard or prohibition in this rule, no school authorized to offer degrees or seeking to qualify for such authorization shall engage in any practice that is fraudulent, dishonest, unethical, unsafe,

exploitive, irresponsible, deceptive, or inequitable and thus harmful or unfair to persons with whom it deals.

Stat. Auth.: ORS 348.606
Stats. Implemented: ORS 348.603 & 348.606
Hist.: ECC 22, f. & ef. 12-22-75; ECC 2-1980, f. & ef. 4-14-80; ECC 3-1981, f. & ef. 12-16-81; EPP 1-1988, f. & cert. ef. 1-7-88; EPP 1-1995, f. & cert. ef. 10-6-95; EPP 1-1996, f. & cert. ef. 8-7-96; ODA 2-1998, f. & cert. ef. 8-12-98; ODA 1-2001, f. & cert. ef. 6-27-01; ODA 1-2002, f. & cert. ef. 2-19-02; ODA 1-2003, f. & cert. ef. 4-16-03; ODA 4-2003, f. 10-29-03, cert. ef. 11-1-03; ODA 2-2004(Temp), f. & cert. ef. 2-11-04 thru 7-30-04; Administrative correction 8-19-04; ODA 5-2005, f. 12-1-05, cert. ef. 12-7-05

CERTIFICATE OF SERVICE AND FILING

I hereby certify that on the date stated below I filed the foregoing RESPONDENTS' ANSWERING BRIEF AND SUPPLEMENTAL EXCERPT OF RECORD by efiling to the following:

State Court Administrator
Appellate Courts Records Section
1163 State Street
Salem Oregon 97310-2563

I further certify that I served a true copy of the same document by means of the electronic mail function of the efiling system to the following registered efilers:

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DATED this 15th day of July 2013.

____/s/ Maureen Leonard____
Maureen Leonard OSB 823165
Of Attorneys for Plaintiff-Respondent
Nathan Surrett and the Class