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

CA No. A152137

APPELLANTS' OPENING BRIEF AND EXCERPT OF RECORD

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

Honorable Richard C. Baldwin, Former Circuit Court Judge

Continued. . .

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I. INTRODUCTION

An agreement to arbitrate is a contractual promise to resolve disputes in a more informal, expeditious, and inexpensive setting than a court proceeding. More than one thousand former students of Western Culinary Institute ("WCI") agreed to arbitrate disputes with WCI on an individual basis, expressly disclaiming class litigation. Nonetheless, as a result of manifest error by the trial court, they have avoided fulfilling this commitment.

This cannot stand. When WCI asked enrolling students to make certain contractual commitments — that they pay tuition, be available to take classes at certain times, abide by school policies, and arbitrate disputes with WCI — WCI was entitled to rely on those commitments. Having received the benefit of their contract with WCI, a culinary education and comprehensive training, former students cannot now disregard their agreement to arbitrate disputes on an individual basis. They must perform their side of the bargain.

Plaintiffs-Respondents ("Plaintiffs") thus far have avoided their promise to arbitrate with a bevy of arguments that this Court and the United States Supreme Court have repeatedly rejected. Plaintiffs protest that bilateral arbitration is an unfair alternative to class litigation because, Plaintiffs argue, they cannot afford lawyers who would prosecute arbitration claims. But the Supreme Court jettisoned this same argument just two years ago, in *AT&T Mobility LLC v. Concepcion*, 131 S Ct 1740 (2011). Undeterred, Plaintiffs

complain that arbitration is unfair because the proceedings are too expensive, even though the arbitration agreement says nothing about such costs. Again, this Court disposed of that same argument just five years ago, in *Motsinger v. Lithia Rose-FT, Inc.*, 211 Or App 610, 617-18, 156 P3d 156 (2007).

Helpfully, this Court need not accept Plaintiff's invitation to enter the unconscionability thicket. Plaintiffs agreed to submit threshold arbitrability issues, including unconscionability, for decision by an arbitrator, not a court. As the Supreme Court held in *Rent-A-Center, West, Inc. v. Jackson*, 130 S Ct 2772, 2777 (2010), this commitment, too, is enforceable.

At bottom, Plaintiffs' complaint about arbitration is not with the features of *this* arbitration agreement, or even more generally, *this* contract; Plaintiffs' argument is with arbitration itself. Simply stated: they would rather sue in a class action than arbitrate individually. But that was not their agreement. If class members decide to pursue claims against WCI, they must do so as they said they would — in individual arbitrations.

Plaintiffs' peculiar position on the issue of arbitration also highlights why this case should not proceed as a class action. In moving to dismiss this appeal, they contended that because the class representative did not sign an arbitration agreement with a class action waiver, WCI could not enforce its contracts with class members whose agreements included such a waiver. On the other hand, in defending class certification at the trial court, they brushed aside defenses

unique to the class representative's claim in an attempt to homogenize differences among class members, such as their personal reasons for pursuing a culinary degree. While this Court has appellate jurisdiction, WCI respectfully requests that it examine the class certification decision and decertify the class.

II. STATEMENT OF THE CASE

A. Nature of the Action and Relief Sought

In this lawsuit, plaintiff Nathan Surrett and the class he represents (collectively, "Plaintiffs") allege that Western Culinary Institute Ltd., a culinary school, and its parent company Career Education Corporation (collectively, "WCI"), committed fraud and unlawful trade practices when it admitted students without disclosing that, after graduating, the students would not obtain any material benefit from an education and training at WCI.

The certified class is composed of almost 2,300 WCI graduates who enrolled and attended over a four-year period. No sub-classes were certified. WCI moved to compel arbitration of claims of the 1,061 class members who signed an arbitration agreement that expressly disclaimed participation in class litigation. The trial court denied the motion without explanation and, pursuant to ORS 36.730(1)(a), WCI brings this immediate appeal.

WCI respectfully requests that this Court: (1) compel to arbitration class members who waived participation in class litigation, and (2) remand this case to the trial court with instructions to decertify the class in its entirety.

B. Nature of the Order to be Reviewed

This is an interlocutory appeal from the Order Denying Defendant's Motion to Compel Arbitration of Certain Class Members Claims and to Stay the Action entered in this case on July 30, 2012. (ER 145 (Dkt 334).)

Pursuant to ORS 19.270, ORS 19.425, and the doctrine of pendent appellate jurisdiction, WCI also seeks review of the trial court's orders relating to certification of the plaintiff class: (1) Order Granting, in Part, and Denying, in Part, Plaintiff's Motion to Certify Class Action (ER 24 (Dkts 132, 137)); and (2) Order Denying Motion to Decertify Class (ER 127 (Dkt 291)).

C. Basis of Appellate Jurisdiction

The Court has jurisdiction over this appeal pursuant to ORS 36.730(1)(a), permitting immediate appeal from "[a]n order denying a petition to compel arbitration," and ORS 19.270(1), vesting jurisdiction over the cause in the Oregon Court of Appeals.

D. Dates of Trial Court Order and Notice of Appeal

On July 27, 2012, the trial court issued an order denying WCI's Motion To Compel Arbitration of Certain Class Members Claims and to Stay Action. On August 6, 2012, WCI filed a Notice of Appeal in this Court. The same date, WCI served the Notice of Appeal on all counsel by hand delivery and on pro se plaintiff Megan Koehnen by certified mail.

E. Questions Presented on Appeal

1. Should class members who agreed to arbitrate claims against WCI bilaterally, and who expressly disclaimed participation in a class action, be compelled to arbitrate their claims?

2. Where the operative arbitration agreement delegates questions of arbitrability to the arbitrator (a "delegation provision"), should the trial court or the arbitrator decide arbitrability defenses raised by class members?

3. Should Plaintiffs be permitted to continue litigating the certified claims as a class action, given material variability within the class — including class members' differing arbitration agreements?

F. Summary of Argument

Oregon and federal law favor arbitration as a means of resolving disputes. *Motsinger v. Lithia Rose-FT, Inc.*, 211 Or App 610, 624, 156 P3d 156 (2007). For that reason, agreements to arbitrate are enforceable to the same extent as other contracts.

Though all members of the certified class committed to arbitrate their disputes with WCI, about half the class signed contracts expressly disclaiming participation in class litigation. Nonetheless, they persist in participating as absent plaintiffs in this class action.

Their commitment is enforceable. At the trial court, Plaintiffs resisted being held to their promise to arbitrate by arguing that the contract they signed

is unconscionable. These unconscionability arguments lack merit, but the Court need not even reach decision on them. The United States Supreme Court has instructed that where, as here, a contract delegates threshold arbitrability issues like unconscionability to be decided by the arbitrator, a court may decide only a challenge to the delegation provision. *Rent-A-Center, West, Inc. v. Jackson*, 130 S Ct 2772, 2778-79 (2010). Unless the delegation clause is itself unconscionable (Plaintiffs did not argue at the trial court that it was), arbitration should be compelled and the arbitrator should decide arbitrability defenses.

Even if the Court does reach the merits of Plaintiffs' unconscionability arguments, it can readily dispatch them. Plaintiffs say that the waiver of class litigation is unconscionable because their claims are not worth enough to attract lawyers who would work for a contingency fee, even though the Supreme Court rejected this argument in *AT&T Mobility LLC v. Concepcion*, 131 S Ct 1740 (2011). Plaintiffs contend that arbitration is unfair because the proceedings are too expensive for them, even though this Court rejected this argument in *Motsinger*, 211 Or App at 617-18. Unable to find unconscionable terms in the contract's text, Plaintiffs give its provisions labored readings to contrive unconscionability. This will not do. Even if the arbitration agreement did include some unconscionable element, the unconscionable part should be severed and the remainder of the agreement enforced. In short, Plaintiffs have no viable basis to evade their commitment to arbitrate.

G. Summary of Facts

This is a class action by former WCI students who allege that WCI committed fraud and unlawful trade practices by failing to disclose certain information to students when they enrolled. Specifically, Plaintiffs allege that WCI committed fraud and violated the Unlawful Trade Practices Act, ORS 646.605 *et seq.*, by failing to inform prospective students that its programs do not give students any material benefit, and prepare them only for the low-paying, entry-level jobs that they could have gotten without the degree. WCI denies that its programs confer no material benefit, and maintains that its graduates have a competitive advantage in the job market. In any event, WCI made all disclosures required by its regulator, and informed students when they enrolled that it could not guarantee particular employment outcomes and that most graduates would start their careers in entry-level positions.

Before the trial court, class certification was contested. Plaintiffs' first two proposed class representatives dismissed their claims when they were tested through discovery. The third putative representative, Jennifer Adams, moved for class certification and the trial court granted the motion as to certain claims. But when the parties confirmed that Adams was not even a member of the class she supposedly represented, Plaintiffs promoted Nathan Surrett to replace her. In December 2010, Plaintiffs filed a Fifth Amended Complaint substituting Mr. Surrett as the class representative. (ER 10 (Dkt 201).) WCI

agreed that Mr. Surrett could replace Ms. Adams, and reserved its right to test his fitness as a class representative after it took discovery on such issues.

The certified class includes approximately 2,300 former WCI students who enrolled and attended over a four-year period. Importantly for this appeal, all class members signed contracts when they enrolled that contained an agreement to arbitrate claims against WCI, but the agreement's text changed over the four-year class period. Thus, different members of the class signed different arbitration agreements. About half of the class — 1,061 members — signed arbitration agreements that expressly disclaimed participation in class litigation. The arbitration agreement executed by these class members provides, in relevant part, as follows:

> **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"). ***
>
> 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. ***

> 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.

(ER 140, 144.)

On April 27, 2011, the United States Supreme Court handed down the landmark decision *AT&T Mobility LLC v. Concepcion*, 131 S Ct 1740 (2011), which requires more rigorous enforcement of arbitration agreements in cases, like this, where the Federal Arbitration Act applies. *Concepcion* effectively prevents plaintiffs from participating in class actions where their contracts expressly disavow class litigation. Before *Concepcion*, many states' courts — including Oregon's — considered such class action waivers unenforceable. Based on the new Supreme Court precedent, WCI moved to compel Mr. Surrett to arbitrate his claims on an individual basis. (Dkt 230.) WCI's motion applied only to Mr. Surrett and the other individual litigants. If it had prevailed in compelling Mr. Surrett to arbitrate, the underlying class action case would have ended. (Of course, absent class members could then have pursued their individual claims, if any, in their own arbitration proceedings.)

Plaintiffs opposed the motion by distinguishing the arbitration agreement at issue in *Concepcion* from the one Mr. Surrett signed: Mr. Surrett's

agreement, unlike the one in *Concepcion*, did not expressly waive the right to bring a class action. (Dkt 234.) Apparently on this basis, the trial court denied WCI's motion. (Dkt 258.)

At that juncture, WCI had a decision to make: either bring an immediate appeal or seek to decertify the class on the very ground Plaintiffs had exploited, to wit, that Mr. Surrett's arbitration agreement was not representative of the one signed by nearly half the class. Rather than appeal the order denying the motion as to Mr. Surrett, WCI focused on the trial court's apparent rationale for denying the motion and on enforcing contractual rights against class members who signed agreements with class action waivers. First, it moved to decertify the class on the basis that, among other things, Mr. Surrett's arbitration contract was materially different from that signed by many absent class members. (ER 59-62, 123-26 (Dkt 266).) The trial court denied the motion without explanation. (ER 127 (Dkt 291).) WCI then sought leave to appeal the class certification decision pursuant to ORS 19.225 (ER 128 (Dkt 292)), but the trial court denied the request, again without explanation (ER 135 (Dkt 294)).

Promptly thereafter, WCI moved to compel arbitration for the 1,061 class members who had signed arbitration agreements with class action waivers. (Dkt 296.) The trial court denied the motion, again without explanation, in an order dated July 27, 2012. (ER 145 (Dkt 334).) WCI then filed this appeal.

H. Motions

On August 6, 2012, WCI filed a Notice of Appeal. Because the trial court persisted in hearing pretrial matters despite the appeal, WCI filed in this Court a motion to direct the trial court to cease exercising jurisdiction over the case, pursuant to ORS 19.270(1). That motion also sought, on an emergency basis, a temporary stay of trial court proceedings. This Court declined to issue an emergency temporary stay.

While WCI's motion to direct the trial court to cease exercising jurisdiction was pending, Plaintiffs moved in the trial court for a summary determination of appealability, pursuant to ORS 19.235(1). Given the overlap between WCI's motion in this Court and Plaintiffs' motion in the trial court, this Court considered and decided both motions together: the Court rejected Plaintiffs' challenge to appealability and directed the trial court to cease exercising jurisdiction over the case. (ER 146-48.)

Plaintiffs moved for reconsideration and for dismissal of this appeal. This Court denied Plaintiffs' motion. The order of Chief Judge Haselton said:

> The motion to dismiss is denied. At plaintiffs' urging, the trial court has allowed plaintiffs to pursue this class action as a single class notwithstanding that there are two groups of affected plaintiffs in distinctly different legal positions and notwithstanding that none of the named class representatives signed agreements with both consent-to-arbitrate and waiver-of-collective-action clauses. The disposition of this appeal — that is, the determination of whether the claims of those members of the single class who executed both the consent-to-arbitration clause and the waiver-of-collective action clause must be

> arbitrated and cannot be litigated by way of class action — will have practical effect on the rights and liabilities of defendants and of (at the very least) those members of the class who signed agreements containing both clauses. To be sure, the named class representative did not execute both clauses; nevertheless, as representatives of the certified class — that is, of all members of that class — they are obligated to represent the interests of all members of the class. Any assertion to the contrary speaks to the propriety of the class as certified or to the propriety of the designation of those named representatives.

(ER 149-50.)

III. ASSIGNMENTS OF ERROR

First Assignment of Error

The Trial Court Erred By Declining to Compel Into Arbitration Class Members Who Agreed to Arbitrate and Disclaimed Class Litigation

A. Preservation of Error

WCI moved to compel arbitration of the class representative and individual plaintiffs on August 23, 2011. (Dkt 230.) Plaintiffs opposed the motion. (Dkt 236.) WCI filed a reply brief in support of the motion on September 16, 2011. (Dkt 241.) The trial court heard argument on the motion on November 9, 2011 (Dkt 247), and denied the motion by order on December 1, 2011 (Dkt 258). WCI did not bring an immediate appeal for reasons explained in Section II(G) (Summary of Facts) of this brief.

WCI then moved to decertify the class on the ground, among others, that class members had executed materially different arbitration agreements. That procedural history is documented in the second assignment of error.

WCI then moved to compel arbitration of class members who had signed arbitration agreements expressly waiving participation in class litigation, on May 23, 2012. (Dkt 296.) Plaintiffs opposed the motion. (Dkt 300.) WCI filed a reply brief in support of the motion. (Dkt 303.) The trial court heard argument on the motion on July 6, 2012 (Dkt 299), and denied the motion by order on July 27, 2012 (ER 145 (Dkt 334)). This appeal followed.

B. Standard of Review

Denial of a motion to compel arbitration is reviewed for errors of law. *Citigroup Smith Barney v. Henderson*, 241 Or App 65, 69, 250 P3d 926 (2011).

C. Argument

1. Class Members Committed to Arbitrate Disputes with WCI

When students enroll at WCI, they sign a contract — called the "Enrollment Agreement" — that governs their relationship with the school. (ER 137-44.) Among the students' obligations under the contract are: that they must pay tuition, be available to take classes at specified times, abide by policies stated in the school catalog, and, of particular importance here, arbitrate disputes with WCI. The Agreement to Arbitrate provides, in relevant part, as follows:

> 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").

(ER 140, 144.)

Agreements to arbitrate are enforceable to the same extent as other contracts. *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 US 265, 271 (1995). "Oregon law and [federal law] favor arbitration as a means for resolving disputes." *Motsinger v. Lithia Rose-FT, Inc.*, 211 Or App 610, 624, 156 P3d 156 (2007). Accordingly, "as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone Memorial Hosp. v. Mercury Const. Corp.*, 460 US 1, 24-25 (1983).

Here, there is no doubt that members of the class agreed to arbitrate the dispute underlying this lawsuit. The arbitration agreement covers various distinct types of disputes: it encompasses "[*a*]*ny* disputes, claims, or controversies" relating to students' (1) "recruitment, enrollment, attendance, or education," (2) "financial aid or career service assistance," or (3) "relationship with [WCI]." (ER 140, 144 (emphasis added).)

Though it need only fall within one of these categories to qualify for mandatory arbitration, this suit falls into all three. First, the complaint makes allegations relating to students' recruitment by, enrollment at, and education at WCI. For example, it alleges that WCI "[o]ffered student[s] admission without receipt of evidence that the applying student[s] can reasonably expect to benefit from the education obtained." (ER 16 at ¶ 14(A).) Second, the complaint makes allegations relating to financial aid and career service assistance. For example, it alleges that WCI "[knew], but fail[ed] to disclose, that most graduates will not earn enough to allow them to pay off school loans." (ER 16 at ¶ 14(F).) Third, the complaint makes allegations relating to students' relationship with WCI. For example, it alleges that WCI "failed to make disclosures *** in an effort to induce prospective students to enroll at, attend, and incur financial obligations to pay WCI School and in order to retain money of plaintiffs and the class." (ER 18 at ¶ 16.) The arbitration agreement squarely applies to this suit.

2. Arbitration Agreements Disclaiming Participation in Class Litigation Are Presumptively Enforceable

The certified class is composed of approximately 2,300 former WCI students who enrolled and attended over a four-year period. Though all class members signed contracts when they enrolled that contained an agreement to arbitrate claims against WCI, the terms of the agreement changed over the four-

year class period. Thus, different members of the class signed different arbitration agreements.

About half of the class signed contracts that expressly disclaimed participation in class litigation. For these class members, the agreement to arbitrate provided as follows:

> 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.

(ER 140, 144.) This term is a common feature of arbitration agreements. "Many consumer contracts contain a waiver of the right to bring a class action, many times in conjunction with a mandatory arbitration clause." 9 John L. Amabile, *Business & Commercial Litigation in Federal Courts* § 101:90 (3d ed. 2012). Where, as here, an arbitration agreement is governed by the Federal Arbitration Act ("FAA"), 9 USC § 1 *et seq.*, an expressed disclaimer of class litigation is presumptively enforceable.[1]

[1] "The FAA applies to arbitration agreements that affect or involve interstate commerce." *Harnisch v. College of Legal Arts, Inc.*, 243 Or App 16, 22, 259 P3d 67 (2011). The arbitration agreement contained in WCI's enrollment contract clearly fits this definition. In *Harnisch*, this Court held that a similar arbitration agreement was subject to the FAA because "[m]any of the students, including some plaintiffs in this case, funded their education with federal loans." *Id*. The same holds here.

The FAA, enacted to overcome judicial hostility to arbitration, adopts a national policy favoring arbitration. *Hall Street Assocs., LLC v. Mattel, Inc.*, 552 US 576, 581 (2008). Section 2 of the FAA provides:

> A written provision in *** a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction *** shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 USC § 2. This short statutory section "makes contracts to arbitrate 'valid, irrevocable, and enforceable,' so long as their subject involves 'commerce' *** and whether enforcement be sought in state court or federal." *Hall Street*, 552 US at 582.

The FAA puts arbitration agreements "on equal footing with all other contracts." *Id.* (internal quotation omitted). The statute includes a "saving clause" ("save upon such grounds as exist at law or in equity for the revocation of any contract"), which permits invalidation of arbitration agreements by "generally applicable contract defenses, such as fraud, duress, or unconscionability." *Doctor's Assocs., Inc. v. Casarotto*, 517 US 681, 687 (1996). Though courts may apply these standard contract defenses, courts may not "singl[e] out arbitration provisions for suspect status." *Id.* They may not, in other words, invalidate arbitration agreements under state laws applicable only, or predominantly, to arbitration provisions. *Id.* As one court has explained: "Even when using doctrines of general applicability, state courts are not

permitted to employ those general doctrines in ways that subject arbitration clauses to special scrutiny." *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F3d 159, 167 (5th Cir 2004); *see also Motsinger v. Lithia Rose-FT, Inc.*, 211 Or App 610, 623, 156 P3d 156 (2007) ("[A]rbitration clauses cannot be singled out for special treatment under an unconscionability analysis and should be governed by the same principles as other contracts.").

The Supreme Court recently considered one such instance, in the case *AT&T Mobility LLC v. Concepcion*, 131 S Ct 1740 (2011). Under California's so-called "*Discover Bank* rule," the state's courts invalidated arbitration agreements that included a term disclaiming participation in class litigation. In the namesake case *Discover Bank v. Superior Court*, 113 P3d 1100 (Cal 2005), the California Supreme Court held that class action waivers are unconscionable because, the Court said, they are "one-sided, exculpatory contracts" that "operate to insulate a party from liability that otherwise would be imposed under California law." *Id.* at 1109. Though the *Discover Bank* rule, on its face, merely applied the "generally applicable" contract defense of unconscionability, the Supreme Court held that the rule's main thrust was to "interfere[] with arbitration." *Concepcion*, 131 S Ct at 1750. The Court compared *Discover Bank* to theoretical rules invalidating arbitration agreements that fail to provide for judicially monitored discovery, that fail to abide by the Federal Rules of Evidence, or that do not provide for ultimate disposition by a jury. Though

possibly derived from the generally applicable contract defense of unconscionability, these rules would be incompatible with arbitration. Likewise, California's *Discover Bank* rule applied unconscionability "in a fashion that disfavors arbitration." *Id.* at 1747. Because the *Discover Bank* rule "st[oo]d as an obstacle to the accomplishment of the FAA's objectives," *id.* at 1748, the Supreme Court held it preempted by federal law.

"*Concepcion* is broadly written." *Coneff v. AT&T Corp.*, 673 F3d 1155, 1158 (9th Cir 2012). *Concepcion* does not just narrowly invalidate California's *Discover Bank* rule; more broadly, it "holds that state law may not be used to invalidate a class-action waiver in an arbitration agreement on the ground that the only economical way to litigate the claim is through a class action." *In re Am. Exp. Merchants' Litig.*, 681 F3d 139, 143 (2d Cir 2012) (Jacobs, CJ, dissenting from denial of en banc rehearing). "[*Concepcion*] ruled that th[e] attempt by California to police arbitration agreements was inconsistent with the FAA." *Id.* at 146.

Under *Concepcion*, the FAA preempts state common law rules invalidating class action waiver provisions in arbitration agreements. The Ninth Circuit, in an opinion by Judge Graber, has applied *Concepcion* to Washington's equivalent of *Discover Bank — Scott v. Cingular Wireless*, 161 P3d 1000 (Wash 2007). In *Coneff v. AT&T Corp.*, 673 F3d at 1157-61, the Ninth Circuit held that the FAA preempted the Washington Supreme Court's

rule on unconscionability of class-action waivers for the same reasons stated in *Concepcion*: "if California's substantive unconscionability rule is preempted by the FAA, then so is Washington's similarly reasoned rule." *Id.* at 1160.

Oregon's common law rule regarding class action waivers is likewise preempted by the FAA. In *Vasquez-Lopez v. Beneficial Oregon, Inc.*, 210 Or App 553, 152 P3d 940 (2007), this Court held that an arbitration agreement's class action ban is substantively unconscionable because it is one-sided in effect and operates to insulate its proponent from liability. *See id.* at 572 ("In short, the class action ban is unilateral in effect and, more significantly, it gives defendant a virtual license to commit *** fraud."). This is the same rationale of *Discover Bank* (which this Court even cited in *Vasquez-Lopez*). Indeed, the similarity of *Vasquez-Lopez* to *Discover Bank* was noted approvingly by one court two years before *Concepcion*. *See Chalk v. T-Mobile USA, Inc.*, 560 F3d 1087, 1095 (9th Cir 2009) ("Like the Supreme Courts of California and Washington, the *Vasquez-Lopez* court declared that a class action waiver in a contract where individual damages are likely to be small is substantively unconscionable as a matter of state contract law." (internal citations omitted)). If the FAA preempts California's *Discover Bank* and Washington's *Scott*, so too Oregon's *Vasquez-Lopez*.

For these reasons, the U.S. District Court in Oregon has held that the FAA preempts the class action waiver unconscionability argument of *Vasquez-*

Lopez. In *Willis v. Nationwide Debt Settlement Group*, 878 F Supp 2d 1208 (D Or 2012), Judge Brown rejected an unconscionability challenge to an arbitration agreement's class action waiver clause. Applying *Concepcion* to Oregon law, the District Court held that *Concepcion* "directly rejected" the very same substantive unconscionability arguments mounted in that case. *Willis* also rebuffed efforts to distinguish Oregon's common law rule from that at issue in *Concepcion*. Addressing the contention that California's rule was somehow "more categorical" than Oregon's, *Willis* says: "the Oregon and California rules have the same effect: They render arbitration clauses unconscionable in circumstances where the large number of litigants and the low-dollar value of claims would make litigation of such claims individually impractical or unlikely." *Id.* at 1218. Stated differently, *Vasquez-Lopez* frustrates the goals of arbitration in the same way and to the same extent as *Discover Bank*. It is, accordingly, preempted by the FAA.

The Ninth Circuit's decision in *Coneff* and the District Court's decision in *Willis* are particularly persuasive, not just because of their source, but because of their reasoning.[2] The question settled by *Concepcion* — on which

[2] Though not bound by decisions of the Ninth Circuit and federal district courts when applying federal law, Oregon courts normally "defer to federal court precedents" and especially "give weight to those of the Ninth Circuit, in which Oregon lies." *Abbott v. Goodwin*, 105 Or App 132, 804 P2d 485 (1991). "The question of federal preemption of state law generally presents a question of federal law." *In re Get Real II, LLC*, 217 P3d 638 (Okla Ct App 2009) (citing *Allis-Chalmers Corp. v. Lueck*, 471 US 202, 214 (1985)); *see also Gay v.*

the federal circuit courts had previously split[3] — was this: is a state-law rule deeming unconscionable most collective litigation waivers in arbitration contracts a "generally applicable contract defense" or does it "disfavor or interfere with" arbitration? Two principles drove the Supreme Court's answer to this question: first, state-law rules may not "rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable," *Concepcion*, 131 S Ct at 1747 (citing *Perry v. Thomas*, 482 US 483, 492 n9 (1987)); and second, state-law rules may not frustrate the purposes of arbitration, *id.* at 1749-50. As to the first principle: California's *Discover Bank* rule relied on the uniqueness of arbitration because its premise was that bilateral arbitration is an unfair alternative to class litigation. The *Discover Bank* rule failed, in other words, because it "derive[d] [its] meaning from the fact that an agreement to arbitrate is at issue," *id.* at 1746. As to the second principle: the *Discover Bank* rule frustrated the purposes of arbitration because class litigation "sacrifices the principal advantage of arbitration — its informality — and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." *Id.* at 1751.

CreditInform, 511 F3d 369, 393 (3d Cir 2007) ("[W]e are concerned with the federal law that Congress set forth in the FAA; the federal law is controlling here and the Pennsylvania law must conform with it.").

[3] *Compare Gay v. CreditInform*, 511 F3d 369, 392-95 (3d Cir 2007); *Pyburn v. Bill Heard Chevrolet*, 63 S.W.3d 351, 365 (Tenn Ct App 2001).

The same is true for Oregon's *Vasquez-Lopez* rule. Because the premise of *Vasquez-Lopez* is that bilateral arbitration is a poor alternative to class litigation, the rule derives its meaning from the fact that an agreement to arbitrate is at issue. To paraphrase one court, *Vasquez-Lopez* holds that an agreement to arbitrate may be unconscionable because it is an agreement to arbitrate. *Gay*, 511 F3d at 395. *Vasquez-Lopez* also frustrates the purposes of arbitration for the same reasons stated in *Concepcion*: class litigation is slower, more costly, and more likely to generate procedural morass than the speed, low cost, and finality of individual arbitration. These are the reasons that, applying *Concepcion*, the Ninth Circuit held that the FAA preempts Washington's *Scott* rule and the federal District Court held that the FAA preempts Oregon's *Vasquez-Lopez* rule. The reasons apply with equal force here.

Where an arbitration agreement is governed by the FAA, the agreement's class action ban normally cannot be invalidated with reference to a state-law rule of substantive unconscionability. The class action waiver in arbitration agreements signed by class members is therefore presumptively enforceable.

3. Class Members Cannot Avoid their Commitment to Arbitrate with Arbitrability Defenses

i. Where the Agreement Delegates Questions of Arbitrability to the Arbitrator, the Arbitrator Must Adjudicate Arbitrability Defenses

Unable to rely on the agreement's waiver of class litigation to avoid their commitment to arbitrate, Plaintiffs assuredly will argue that other aspects of the

contract make it unenforceable. This Court should not consider those arguments, however, because the contract delegates those questions to the arbitrator.

The agreement provides, "[A]ny 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.) This type of "delegation clause" is a common feature of arbitration contracts. It "clearly and unmistakably" manifests the parties' "agree[ment] to arbitrate the question of arbitrability." *Momot v. Mastro*, 652 F3d 982, 988 (9th Cir 2011).

A delegation clause "is an agreement to arbitrate threshold issues concerning the arbitration agreement." *Rent-A-Center, West, Inc. v. Jackson*, 130 S Ct 2772, 2777 (2010). "[P]arties can agree to arbitrate 'gateway' questions of 'arbitrability,' such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy. *** An agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the *** court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other." *Id.* at 2777-78.

Traditionally, when enforcement of an arbitration agreement is resisted, a court will decide only challenges to the arbitration agreement itself, leaving to

the arbitrator challenges to the contract as a whole. *Vasquez-Lopez*, 210 Or App at 563. Where an arbitration agreement includes a delegation clause, however, a court may decide only a challenge to *that* clause. *Rent-A-Center*, 130 S Ct at 2778-79. Stated differently, "[e]ven when a litigant has specifically challenged the validity of an agreement to arbitrate he must submit that challenge *to the arbitrator* unless he has lodged an objection to the particular line in the agreement that purports to assign such challenges to the arbitrator — the so-called 'delegation clause.'" *Id.* at 2781 (Stevens, J, dissenting).

Rent-A-Center — which holds that courts may decide only challenges to an arbitration agreement's delegation clause — substantially simplified the task of courts considering motions to compel arbitration. Where an arbitration agreement has a delegation clause, typically, a court will decide only, first, whether an arbitration agreement existed between the parties, and second, whether the agreement clearly and unmistakably delegated the question of arbitrability to the arbitrator. *E.g.*, *Fadal Machining Centers, LLC v. Compumachine, Inc.*, 461 F App'x 630, 632 (9th Cir 2011) (conducting this two-step analysis).

Here, both tasks are easily performed. First, an agreement to arbitrate exists. The Enrollment Agreement requires that "disputes, claims, or controversies" between students and WCI be "resolved pursuant to this paragraph." It then goes on to require an arbitration administered by the

American Arbitration Association or the National Arbitration Forum before a single arbitrator. Second, the arbitration agreement clearly and unmistakably delegates the question of arbitrability to the arbitrator. Plaintiffs made no contrary argument at the trial court. The arbitration agreement provides that "any objection to arbitrability or the existence, scope, validity, construction, or enforceability of this Arbitration Agreement shall be resolved" in the arbitration. This delegation provision is far more "clear and unmistakable" than the ones in *Momot* (which delegated to the arbitrator disputes relating to "the validity or application of" the arbitration agreement) and in *Fadal* (which incorporated the American Arbitration Association's Commercial Arbitration Rules, giving the arbitrator "the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement"), in both of which cases the Ninth Circuit concluded that the delegation clause was clear and unmistakable. *See* 652 F3d at 988; 461 F App'x at 632.[4]

Once the Court is satisfied that an arbitration agreement existed, and that it delegates questions of arbitrability to the arbitrator, the Court's inquiry is at an end: arbitration should be compelled and the arbitrator should decide arbitrability questions.

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[4] The delegation clause in *Rent-A-Center* gave to the arbitrator "authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable." 130 S Ct at 2775.

ii. The Arbitration Agreement is Not Unconscionable

Though this Court need not — and should not — consider arbitrability questions like whether the arbitration agreement is unconscionable, WCI will briefly address the issue in an abundance of caution.

"In Oregon, the test for unconscionability has both procedural and substantive components." *Livingston v. Metropolitan Pediatrics, LLC*, 234 Or App 137, 151, 227 P3d 796 (2010). "Procedural unconscionability refers to the conditions of contract formation and involves a focus on two factors: oppression and surprise. Oppression exists when there is inequality in bargaining power between the parties, resulting in no real opportunity to negotiate the terms of the contract and the absence of meaningful choice. Surprise involves the question whether the allegedly unconscionable terms were hidden from the party seeking to avoid them." *Id.* Oregon courts will not find procedural unsconscionability merely because an adhesive contract was executed by a party with unequal bargaining power. *Motsinger v. Lithia Rose-FT, Inc.*, 211 Or App 610, 617, 156 P3d 156 (2007).[5] Even where a contract is "offered to the weaker party on a 'take-it-or-leave-it' basis," it will not be procedurally unconscionable absent "other oppressive circumstances" and "deception." *Sprague v. Quality Restaurants Northwest, Inc.*, 213 Or App 521, 526, 162 P3d 331 (2007). In any event, procedural unconsionabilty alone will

[5] *See also, e.g.*, *Hays Group, Inc. v. Biege*, 222 Or App 347, 351-52, 193 P3d 1028 (2008) (rejecting argument that an adhesive contract is unconscionable).

not invalidate a contract. *See Vasquez-Lopez*, 210 Or App at 567 ("[O]nly substantive unconscionability is absolutely necessary.").

"'Substantive unconscionability' generally refers to the terms of the contract, rather than the circumstances of formation, and the inquiry focuses on whether the substantive terms unfairly favor the party with greater bargaining power." *Livingston*, 234 Or App at 151. "The determination that a contract or term is or is not unconscionable is made in the light of its setting, purpose and effect." *Carey v. Lincoln Loan Co.*, 203 Or App 399, 422, 125 P3d 814 (2005). This Court has expressed "reluctance *** to declare provisions substantively unconscionable." *Motsinger*, 211 Or App at 616.

Here, the arbitration agreement is not procedurally unconscionable. Though it is an adhesive contract, none of its terms was hidden from the class members who signed it. It is written in plain English and its heading — "Agreement to Arbitrate" — is printed in boldface and underlined type. For ease of reading, each new topic within the arbitration agreement is separated by an underlined heading, such as "Location of arbitration," "Class and consolidated actions," and "Arbitrator's award." Even someone quickly skimming the contract would understand that they are committing to arbitrate claims against WCI. But students should not have skimmed the agreement. Each page of the contract says in all capital and boldface type, "Be sure to read all pages of this Agreement as they are all part of your contract with the

school." Above the signature line, the contract says — this time in boldface and italic type — "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." And again: "Once I sign this Agreement *** I understand that a legally binding contract will be created. My signature indicates that I agree to all terms within this agreement."[6] Plaintiffs were at least high school graduates (or equivalent), many had attended college as well, and were equipped to understand the obligations to which they were agreeing. (ER 93.) Just as in *Motsinger v. Lithia Rose-FT, Inc.*, 211 Or App at 616, there is no evidence in the record that Plaintiffs were confused by the contract, misled into signing it, or surprised by its terms. Other than the adhesive nature of the contract, which "is not enough to invalidate an arbitration clause," *id.* at 617, these circumstances bear no indicia of procedural unconscionability.

The arbitration agreement is not substantively unconscionable either. An arbitration agreement will be held unconscionable where its terms are unfairly one-sided in effect. *Id.* at 623. Often, "that inquiry turns on whether plaintiff's opportunity to vindicate her rights in an arbitral forum, when compared to the remedies available to defendant, is substantively unconscionable." *Id.* at 626.

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[6] Also, a party is "presumed to be familiar with the contents of any document that bears the person's signature." *First Interstate Bank v. Wilkerson*, 128 Or App 328, 337 n11, 876 P2d 326 (1994).

Here, the arbitration agreement gives Plaintiffs and WCI the same opportunity to vindicate their rights. They are both bound to arbitrate claims against one another. The arbitration is governed by neutral rules prescribed by the American Arbitration Association or the National Arbitration Forum. Each party bears its own expenses and attorney fees, unless fee-shifting is authorized by law or the rules of the arbitration forum.[7] Far from being unfairly one-sided, this arbitration agreement treats Plaintiffs and WCI equally.

Plaintiffs protested at the trial court that the arbitration agreement "purports to erase the State regulatory framework that governs the school's conduct." (Dkt 300.) It does this, Plaintiffs argued, by providing, under the heading "Choice of Law," that "The arbitrator shall apply federal law to the fullest extent possible ***." (ER 140, 144.) But, contrary to Plaintiffs' argument, this doesn't "erase" state law at all; it merely affirms the principle of federal preemption and selects federal law as controlling in the event that state law is not. Insofar as Oregon law regulates WCI where federal law does not, Oregon law would control the arbitration proceeding.

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[7] Plaintiffs argued at the trial court that the arbitration agreement is unconscionable because it does not provide for shifting of attorney fees to the prevailing party. That is far from clear. Though WCI may argue in arbitration that an award of attorney fees is not available, the contract is susceptible to argument by Plaintiffs that fees are recoverable if "authorized by law or the rules of the arbitration forum." Because ORS 646.638(3) authorizes an award of fees for prevailing plaintiffs, one expects that Plaintiffs would seek to recover fees as "authorized by law" under this statute.

Plaintiffs further made the argument, expressly rejected in *Concepcion*, that the arbitration agreement "imposes costs beyond what any indebted consumer can afford." In support, Plaintiffs filed declarations from Portland-area attorneys who said they would not represent class members on a contingency-fee basis because not enough money is at stake. Considering the same argument, the Eleventh Circuit said:

> The Plaintiffs' evidence [that consumer law attorneys would not represent them in arbitration] goes only to substantiating the very public policy arguments that were expressly rejected by the Supreme Court in *Concepcion* — namely, that the class action waiver will be exculpatory, because most of these small-value claims will go undetected and unprosecuted.

Cruz v. Cingular Wireless, LLC, 648 F3d 1205, 1214 (11th Cir 2011); *see also Coneff*, 673 F3d at 1159 ("Although Plaintiffs argue that the claims at issue in this case cannot be vindicated effectively because they are worth much less than the cost of litigating them, the *Concepcion* majority rejected that premise.").

Moreover, the argument here is far weaker than it was in *Concepcion*, *Cruz*, and *Coneff*. All of those cases were about genuinely small-dollar claims: an improper charge of $30.22 (*Concepcion*), a requirement to pay $36 in fees and enroll in less favorable calling plans (*Coneff*), a wrongful charge of $2.99 a month for a undesired roadside assistance (*Cruz*). Here, by contrast, Plaintiffs have substantial monetary claims and a set of lawyers committed to pursuing claims for them. They allege that they were fraudulently induced to pay tuition in amounts ranging from $20,000 to $40,000, plus interest paid on their student

loans. This is just the sort of claim that a single lawyer representing multiple plaintiffs in separate arbitration proceedings could and would prosecute.[8]

This Court has enforced arbitration agreements far more slanted than the one here. The arbitration agreement enforced in *Motsinger* required the plaintiff, but not the defendant, to submit all potential claims to arbitration. 211 Or App at 619. The arbitration agreement enforced in *Sprague* imposed a shorter limitations period than available under Oregon law, which the Court said "imposes a burden on plaintiff that is not shared by defendant." 213 Or App at 526-27. The arbitration agreement enforced in *Hatkoff v. Portland Adventist Medical Center* required only the employee-plaintiff, but not the employer-defendant, to exhaust a grievance process before arbitrating. 252 Or App 210, 221-22, 287 P3d 1113 (2012). There, the employee-plaintiff had to initiate the prerequisite grievance within 90 days — effectively setting a three-month limitations period that constrained only the employee-plaintiff. *Id.* at 222-23. In all of these cases, despite unequal terms, this Court rejected unconscionability challenges to the operative arbitration agreements. If it reaches decision on arbitrability, it should do the same here.

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[8] Though the declarations of consumer attorneys filed by Plaintiffs say that they would not "handle *an individual* case like this in arbitration" (Dkt 238-39 (emphasis added)), they do not say whether they would represent *many* of the Plaintiffs in separate arbitrations, given experience prosecuting these cases. This was a subject of interest at the Supreme Court's recent argument in *American Express Co. v. Italian Colors Restaurant*, No. 12-133 at 3-4, 20-21 (US Feb. 27, 2013), where the Court discussed arbitration plaintiffs sharing the costs of lawyers and experts.

iii. Even if Particular Terms in the Arbitration Agreement Were Unconscionable, they Should be Severed and the Remaining Arbitration Agreement Should be Enforced

In the event that the Court (rather than the arbitrator) reaches the issue of unconscionability and decides that one or more of the arbitration agreement's terms is unconscionable, it should sever those terms and enforce the remainder of the agreement. The arbitration agreement provides:

> 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.

(ER 140, 144.) Pursuant to this provision, WCI has agreed to waive the arbitration agreement's limitations on non-economic damages.

Where an arbitration agreement contains unconscionable provisions but is not "so 'permeated by unconscionability' as to render the whole of the clause unenforceable," the unconscionable provisions should be severed and the agreement enforced. *Willis*, 878 F Supp 2d at 1221; *see also* ORS 72.3020(1) ("[The Court] may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result."). "Furthermore, if there is an explicit severability clause, the court must construe that clause in a manner that

best reflects the intent of the [parties]." *Reid v. Optumhealth Care Solutions, Inc.*, No. 12-00747, 2012 WL 6738542, *8 (D Or Oct. 11, 2012) (internal citation omitted).

The central thrust of this arbitration agreement is to require the parties to litigate their disputes in a bilateral, private, and informal forum. The types of damages available, and the procedural details of the arbitration, are collateral to the basic bargain of the agreement. If these provisions are unconscionable, they should be severed and the agreement enforced.

Second Assignment of Error

The Trial Court Erred By Certifying and Maintaining a Class Whose Members are in "Distinctly Different Legal Positions"

A. Preservation of Error

Plaintiffs moved to certify the class on August 31, 2009. (Dkt 98.) WCI opposed the motion. (Dkt 108.) The trial court issued a letter opinion to explain its decision on the motion on December 3, 2009. (ER 1 (Dkt 132).) The trial court then issued an order granting in part and denying in part the motion on February 9, 2010. (ER 24 (Dkt 137).)

In light of the substitution of the class representative, intervening rulings by the trial court, and new law handed down by the U.S. Supreme Court, WCI moved to decertify the class and for summary judgment on February 15, 2012. (ER 28 (Dkts 266, 268).) Plaintiffs opposed the motions. (Dkts 275, 276.) WCI filed reply briefs in support of its motions. (ER 94 (Dkts 279, 280).) The

trial court denied both motions by order on April 6, 2012 (ER 127 (Dkt 291).) WCI then sought leave to appeal pursuant to ORS 19.225 (ER 128 (Dkt 292)), which Plaintiffs opposed (Dkt 293), and the trial court denied the request (ER 135 (Dkt 294)).

B. Standard of Review

Certification and maintenance of a class is generally reviewed for abuse of discretion; however, legal conclusions are reviewed for errors of law. *Froeber v. Liberty Mut. Ins. Co.*, 222 Or App 266, 274-75, 193 P3d 999 (2008).

C. Argument

Material Variability Within the Class, Including Class Members' Different Arbitration Agreements, Precludes Class Litigation

Ruling on Plaintiffs' motion to dismiss this appeal, Chief Judge Haselton questioned whether class certification was proper in the first instance, given that the arguments of class counsel were at odds with the principles of class litigation. As discussed above, only about half of the certified class signed arbitration agreements that expressly disclaimed class litigation. Despite material differences in class members' arbitration agreements, Plaintiffs sought — and the trial court approved — certification of a single, unified class.

Plaintiffs then tried to use class certification as shield to prevent the trial court and this Court from considering the different contracts of (and contract defenses for) the absent class members. When WCI moved to compel into arbitration class members who had waived class litigation, Plaintiffs argued that

WCI could move only against the class representative, not "non-party" absent class members. But the class representative and class counsel may pursue only uniform claims and defenses. The premise of their position — that a class action defendant may not assert contractual defenses arising from absent class members' contracts if they do not also arise in the class representative's contract — confirms that the class vehicle may not be used in this case consistent with WCI's due process rights. It also shows that those charged with representing the class are not suited to represent a class due to material differences in the claims and defenses of class members.

Chief Judge Haselton explained this contradiction in Plaintiffs' position:

> At plaintiffs' urging, the trial court has allowed plaintiffs to pursue this class action as a single class notwithstanding that there are two groups of affected plaintiffs in distinctly different legal positions and notwithstanding that none of the named class representatives signed agreements with both consent-to-arbitrate and waiver-of-collective-action clauses. *** To be sure, the named class representative did not execute both clauses; nevertheless, as representatives of the certified class — that is, of all members of that class — they are obligated to represent the interests of all members of the class. Any assertion to the contrary speaks to the propriety of the class as certified or to the propriety of the designation of those named representatives.

(ER 149.) Chief Judge Haselton is right: Plaintiffs' position in this appeal has highlighted one among many problems of litigating this case as a class action.

The class action is a procedural device that allows a group of plaintiffs who have suffered a common wrong to prosecute their claims through a representative. While the device allows aggregation of claims to "achieve

economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated," it does so "without sacrificing procedural fairness" to defendants. *Bernard v. First Nat'l Bank of Or.*, 275 Or 145, 152 n3, 550 P2d 1203 (1976) (internal quotation omitted). The class action is not a tool to avoid individualized proofs or to dodge individualized defenses; to the contrary, it is a mechanism to prosecute a large group of individual claims through representative litigation. Stated differently, the class action is merely a *procedural* device for common proof of claims; it does not alter the *substantive* obligations of each plaintiff to prove his or her claim or the *substantive* rights of defendants to challenge claims with available defenses.[9]

For this reason, all defenses that would be available in bilateral litigation continue to be available in class litigation — anything less would violate due process. *See Lindsay v. Normet*, 405 US 56, 66 (1972) ("Due process requires that there be an opportunity to present every available defense."). "To hold that a case may proceed as a class action when there appears to be a legitimate issue or defense which will require an individual inquiry of a considerable number of the claimants would *** deprive the defendants of valuable procedural and

[9] The Oregon Supreme Court's recent decision in *Strawn v. Farmers Insurance Co. of Oregon*, 350 Or 336, 258 P3d 1199 (2011), and on reconsideration, 350 Or .521, 256 P3d 100 (2011), endorse this basic principle. The Court said, "To prevail in a class action for fraud, the class plaintiff must prove reliance *on the part of all class members*." 350 Or at 358 (emphasis added).

substantive rights by preventing them from asserting what appears to be a bona fide defense." *Bernard*, 275 Or at 159.

The issue noted by Chief Judge Haselton about class members' different contracts is just the tip of the iceberg. Trial of this case will involve numerous individual proofs and defenses, which casts serious doubt on the propriety of class litigation. Among these issues:

- Plaintiffs' case is that WCI committed fraud and violated the UTPA by encouraging students to enroll on the implied promise that the program would qualify graduates for high-paying jobs when, in fact, many graduates got entry-level positions. However, students enrolled for different reasons and based on a different mix of information. For instance, many students had prior culinary industry experience and others did basic due diligence about the job market. These students may have enrolled with eyes wide open about post-graduation job prospects. For this reason, the Los Angeles Superior Court denied class certification of a nearly identical case. *See Vasquez v. California School of Culinary Arts, Inc.*, No. BC393129, at 6-16 (Cal Supr Ct Mar. 6, 2012) (App 1-23).

- The trial court tried to avoid this problem by drawing from a line of cases suggesting that plaintiffs need not prove the "reliance" element of a UTPA claim when the alleged deception is an omission rather than a misstatement. (ER 6-8.) It certified only claims based on alleged omissions by WCI, for example, that WCI "[k]new but failed to disclose that [its] training would qualify graduates for mostly low paying poverty-wage jobs." (ER 8, 13.) However, even on a pure omissions claim, Plaintiffs will still have to prove that the allegedly omitted information would have been "material" to each student — even those who understood their post-graduation job prospects because they had worked in a restaurant before enrolling, had researched jobs available to culinary graduates, or already had a job lined up with a prior employer.

- Plaintiffs will also have to prove causation of damage as an element of their claim. *See* ORS 646.638(1) (creating a cause of action for persons who suffer "ascertainable loss *** as a result of" an unlawful trade practice); *Conzelmann v. Nw. Poultry & Dairy Products Co.*, 190 Or 332, 350, 225 P2d 757 (1950) (stating that "consequent [or] proximate injury"

is an element of common law fraud). But some students excelled at WCI, got great jobs, and have enjoyed prosperous culinary careers, while others barely passed their coursework and, predictably, struggled in the industry. For the latter type of student, WCI cannot be said to have caused his or her damage. For the former, he or she suffered no damage.

- Relatedly, Plaintiffs will have to prove damages, which will be widely variable. The trial court simply deferred this issue until after trial, which promises to present an unmanageable series of mini-trials to determine who was damaged, how and to what extent, how much their damages should be discounted by the value they received from their education, and other individual issues. Because Plaintiffs proposed no way measure damages on a class basis, this case may not proceed as a class action. The Supreme Court recently held that a class may not be certified absent a competent class-wide methodology to measure damages. *See Comcast Corp. v. Behrend*, 133 S Ct 1426, 1433 (2013) ("Questions of individual damage calculations will inevitably overwhelm questions common to the class."). On this basis, the Illinois Court of Appeals held that class treatment was not appropriate in a similar case. *See Lilley v. Career Education Corp*., No. 5-10-0614 (Ill Ct App Oct. 25, 2012) (App 24-36).

- At trial, WCI will challenge the ability of the class representative, Nathan Surrett, to make these proofs. Take, for example, the materiality of WCI's alleged omissions: Mr. Surrett testified in deposition that he did not enroll based on any impression of WCI's post-graduation placement rates or any expectations about the salary he might earn. (ER 68, 70, 73, 88, 90.) He admitted that, before enrolling, data about placement and potential earning were not important to him. (*Id*.) WCI will mount the defense at trial that any omissions about salaries or job outcomes were not material to Mr. Surrett's enrollment decision. And if Mr. Surrett's individual proof fails, it will impact the entire class.

- WCI will also challenge Mr. Surrett's ability to prove causation and actual injury. He testified in deposition that WCI met his expectations and that, upon graduation, he promptly obtained a number of positions in the culinary field preparing the type of food he dreamed of making when he enrolled. (ER 79, 81, 82, 86.) After graduating, Mr. Surrett got a good job at a top-rated Portland restaurant but abandoned the culinary field because he moved out of state for personal reasons and, ultimately, decided to pursue a career in forestry instead. (ER 81-83.)

The list could go on. 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. Plaintiffs cannot demonstrate that this litigation is over questions of law or fact common to the class, *see* ORCP A(2), that claims or defenses of the representative party are typical of the class, *see* ORCP A(3), that the representative party will adequately protect the interests of the class, *see* ORCP A(4), and — most of all — that representative litigation "is superior to other available methods for the fair and efficient adjudication of the controversy," *see* ORCP 32 B.

Although this is an interlocutory appeal of an order denying a motion to compel arbitration, it is within the Court's jurisdiction to decide the propriety of class certification.[10] The interest of judicial economy weighs in favor of doing

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[10] WCI will briefly address the Court's jurisdiction to reach this issue.

First, this Court has already decided that this appeal vests in this Court jurisdiction over the whole case. *See* ORS 19.270. The issue was briefed in WCI's Motion to Compel Circuit Court to Cease Exercising Jurisdiction, Plaintiff's opposition, and WCI's reply; Appellate Commissioner Nass decided the issue (ER 146 n2); and, on a motion for reconsideration, Chief Judge Haselton affirmed that decision (ER 149). The Court's jurisdiction is not limited to one order; it encompasses the whole case.

Second, if ORS 19.270 left any doubt, ORS 19.425 clarifies: "Upon an appeal, the appellate court may review any intermediate order involving the merits or necessarily affecting the judgment appealed from ***." The trial court's decision to certify and maintain a plaintiff-class certainly "involve[s] the merits" of this appeal.

Third, this Court has jurisdiction under the doctrine of pendent appellate jurisdiction. *See* 7B Wright & Miller, *Federal Practice & Procedure* § 3937

so. WCI sought leave to appeal the class certification decision pursuant to ORS 19.225, but the trial court denied the request (without explanation). (ER 128-35.) If this Court defers decision on class certification until a post-trial appeal, the result could be two trials and two or three appeals. This would be an enormous waste of resources for the courts and the parties.

As Chief Judge Haselton observed, the problems with class certification are brought into focus by the main subject of this appeal — the arbitration issues discussed above. WCI will not brief all the complex dimensions of class certification here. WCI invites the Court to consider the briefs it filed at the trial court seeking decertification of the class. (ER 28-63, 94-126.) Also, if the Court believes it would be helpful, WCI would welcome the opportunity to file a supplemental brief focused on decertification issues.

IV. CONCLUSION

For the foregoing reasons, WCI respectfully requests that this Court (1) compel to arbitration absent class members who expressly waived

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(3d ed. 2012) ("Once a 'final decision' appeal is properly taken before the conclusion of trial court proceedings, there may be good reasons to undertake review of some matter that would not be independently appealable. In extending review, commonly under the label of pendent jurisdiction, courts have tended to look for and to emphasize a strong relationship between the appealable order and the additional matters swept up into the appeal."); *see also, e.g.*, *id.* at § 1802 n39 (collecting cases using doctrine to review class certification orders). Because class members' different arbitration agreements is a reason to decertify the class, the issues of arbitration and class certification are inextricably entwined.

participation in class litigation, and (2) remand with instructions to decertify the class.

DATED: May 16, 2013

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CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury under the laws of the State of Oregon that, on May 16, 2013, he caused to be served APPELLANTS' OPENING BRIEF AND EXCERPT OF RECORD on the person(s) listed below through the Court's ECF notification:

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I hereby certify that on this day I efiled the original of this APPELLANTS' OPENING BRIEF AND EXCERPT OF RECORD with the State Court Administrator via the Oregon Judicial Department's Appellate e-File system to:

State Court Administrator
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1163 State Street
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CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 9,638 words. I further certify that the size of the type in this brief is not smaller that 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

DATED: May 16, 2013

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SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 03/06/12			DEPT. 308
HONORABLE JANE L. JOHNSON	JUDGE	C. WRIGHT	DEPUTY CLERK
HONORABLE	JUDGE PRO TEM		ELECTRONIC RECORDING MONITOR
C. CONCEPCION/C.A.	Deputy Sheriff	NONE	Reporter

BC393129

DANIEL VASQUEZ ET AL

VS
CALIFORNIA SCHOOL OF CULINARY ARTS INC ET AL
R/T BC463344/BC459917/EC055672/

Plaintiff Counsel: NO APPEARANCES

Defendant Counsel:

NATURE OF PROCEEDINGS:

COURT'S RULING ON SUBMITTED MATTER, PLAINTIFFS' MOTION FOR CLASS CERTIFICAITON, TAKEN UNDER SUBMISSION ON MARCH 1, 2012

This Court, having received and reviewed the pleadings and having heard oral argument, denies Plaintiffs' Motion for Class Certification for the reasons set forth in the 22-page Court Ruling which is filed this date and copy served on all counsel along with this minute order via Case Anywhere electronic service provider by courtroom clerk.

MINUTES ENTERED
03/06/12
COUNTY CLERK

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES – CENTRAL CIVIL WEST

DANIEL VASQUEZ, et al., on behalf of themselves and all others similarly situated, Plaintiffs, v. CALIFORNIA SCHOOL OF CULINARY ARTS, Inc., et al, and DOES 1-1,000,000 inclusive, Defendants	Case No. BC393129 [Related to BC463344, EC055672, BC459917, BC470851, BC474275] Judge Jane L. Johnson Department 308 Court's Ruling on Plaintiffs' Motion for Class Certification

MOTION FOR CLASS CERTIFICATION

Date of Hearing: **January 31, 2012**
Department: 308
Case No.: BC393129

This court, having received and reviewed the pleadings and having heard oral argument, rules as follows on Plaintiffs' Motion for Class Certification.

I. BACKGROUND FACTS

Defendant Career Educational Corporation ("CEC") owns and operates numerous for-profit culinary schools across the United States, including Defendant California School of Culinary

Arts ("CSCA"). CSCA, located in Pasadena, does business as "Le Cordon Bleu School of Culinary Arts."

Plaintiffs allege that "prospective students of CSCA were subjected to misleading and deceptive advertising, sales and recruiting process by Defendants." According to Plaintiffs:

> These representations were delivered in closely-controlled uniformity through television advertising, the internet, letters to high school students, print media, brochures and catalogs, and during the face-to-face recruitment process, which was scripted by the use of standardized flip charts and written scripts that CSCA's approximately 30-40 Admissions Representatives used to recruit students.

The operative Fourth Amended Complaint alleges the following causes of action: (1) Fraud; (2) Violation of the Unfair Competition Law; (3) Violation of the Consumer Legal Remedies Act; (4) Declaratory Relief; (5) Money Had and Received; (6) Unjust Enrichment; and (7) Constructive Trust.

This motion seeks to certify the following two classes:

> (1) All persons who enrolled in, or graduated from, the Culinary Arts program at CSCA, from June 23, 2004 to July 1, 2009; and
> (2) All persons who enrolled in, or graduated from, the Patisserie & Baking Program at CSCA, from June 23, 2004 to July 1, 2009.

II. REQUEST FOR JUDICIAL NOTICE

The Court grants Defendant's request to take judicial notice of Davis-Miller v. Automobile Club of Southern California (2011) 201 Cal.App.4th 106 and Mazza v. American Honda Motor Company (9th Cir.2012) 2012 U.S.App.LEXIS 626. The court declines, though, to take judicial notice of the extensive commentary provided by Defendant.

III. EVIDENTIARY OBJECTIONS

With regard to Defendant's evidentiary objections (not numbered), the Court sustains the evidentiary objections to the Kelly declaration, Anglade pars. 5 and 6, Villalobos, pars. 21, 22, and 23; Gibson pars. 21, 22, and 23; Mergil 20, 21 and 22; O'Shea pars. 21, 22, 23; Vasquez

pars. 23, 24, 25; Fowler pars. 19, 20, and 21; Borges pars. 20, 21, and 22; Hancock pars. 12 and18. The remaining objections are overruled.

With regard to Plaintiff's evidentiary objections (also not numbered), the Court sustains the first evidentiary objection located on pages 9 and 27, the 2nd evidentiary objection located on pages 32, and the 3rd evidentiary objection located on page 30. The Court also sustains the evidentiary objection to Appendix "A" attached to defendant's opposition.

With regard to Defendant's evidentiary objections to the evidence submitted by Plaintiffs as part of the supplemental briefing on certification regarding the unfair prong of the UCL, the Court sustains objections 1-4 and 9 as it is the submission of new evidence not permitted as part of the supplemental briefing, sustains 8 as the previously sustained objection to Kelly declaration, and overrules 5-7 as previously overruled objection to Hancock declaration.

IV. APPLICABLE LAW

Ca. Code of Civil Proc., § 382 permits certification, including a UCL claim, "when the question is of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court." A plaintiff bears the burden of demonstrating that class certification under section 382 is proper. City of San Jose v. Superior Court (1974) 12 Cal.3d 447, 460; Caro v. Procter & Gamble Co. (1993) 18 Cal.App.4th 644, 654. To do so, the plaintiff must "establish the existence of both an ascertainable class and a well-defined community of interest among the class members." Linder v. Thrifty Oil Co. (2000) 23 Cal.4th 429, 435. A plaintiff must also demonstrate that the class procedure is superior to other forms of adjudication. Reese v. Wal-Mart Stores, Inc. (1999) 73 Cal.App.4th 1225, 1234. As Sav-on Drug Stores, Inc. v. Superior Court (2004) 34 Cal.4th 319, 334-335 notes:

> Nor is it a bar to certification that individual class members may ultimately need to itemize their damages. We have recognized that the need for individualized proof of damages is not per se an obstacle to class treatment (Occidental Land, Inc., supra, 18 Cal.3d at p. 363, 134 Cal.Rptr. 388, 556 P.2d 750 [homebuyers' class action against developer]) and "that each member of the class must prove his separate claim to a portion of any recovery by the class is only one factor to be

> considered in determining whether a class action is proper" (Vasquez v. Superior Court (1971) 4 Cal.3d 800, 809, 94 Cal.Rptr. 796, 484 P.2d 964 (Vasquez) [consumers' class action against finance companies]).

The focus of the court is not on whether plaintiffs can affirmatively prove their claims at trial, but rather, whether the class action "will splinter into individual trials," given the disputed facts and defendants' due process right to present individual evidence on the triable issues. Kennedy v. Baxter Healthcare Corp. (1996) 43 Cal.App.4th 799, 810.

By contrast, in a CLRA lawsuit, class action standards are governed by Ca. Civil Code, §1781(b). As noted in Davis-Miller v. Automobile Club of Southern California (2011) 201 Cal.App.4th 106, 121-122:

> Unlike under the UCL, it is Civil Code section 1781(b) that governs class action certification under the CLRA. One of the main distinctions between them, is that, if the following requirements are satisfied, a court must certify the class. (Civ.Code § 1781(b); see Hogya v. Superior Court (1977) 75 Cal.App.3d 122, 140, 142 Cal.Rptr. 325.) The requirements are: " '(1) [i]t is impracticable to bring all members of the class before court; (2)[t]he questions of law or fact common to the class are substantially similar and predominate over the questions affecting the individual members; (3)[t]he claims or defenses of the representative plaintiffs are typical of the claims or defenses of the class; [and] (4)[t]he representative plaintiffs will fairly and adequately protect the interests of the class.' (Civ.Code § 1781, subd. (b)....) The trial court, however, has 'considerable latitude' under those four conditions in deciding whether a class action is proper. [Citation.]" (Steroid Hormone Product Cases (2010) 181 Cal.App.4th 145, 153, 104 Cal.Rptr.3d 329.)

Moreover, "[t]he CLRA claim requires a different analysis than the UCL claim, because the CLRA requires a showing of actual injury as to each class member." In re Steroid Hormone Product Cases (2010) 181 Cal.App.4th 145, 155. Thus, injury must be proven as to each class member. Davis-Miller v. Automobile Club of Southern California, supra.

V. DISCUSSION

Plaintiffs allege that "prospective students of CSCA were subjected to closely-controlled and uniformly misleading and deceptive advertising, sales and recruiting process by Defendants." In

particular, Plaintiffs assert that Defendants represented that upon graduation they would (1) be able to obtain a position as a Chef; (2) earn a Chef's salary; and (3) be able to service and pay off their loans.

This motion seeks to certify the following two classes:

> (1) All persons who enrolled in, or graduated from, the Culinary Arts program at CSCA, from June 23, 2004 to July 1, 2009; and
> (2) All persons who enrolled in, or graduated from, the Patisserie & Baking Program at CSCA, from June 23, 2004 to July 1, 2009.

A. NUMEROSITY

According to the moving papers:

> The members of each putative class number in the thousands, and it would be decidedly impracticable for the judiciary to bring those thousands of students from each CSCA program before this Court to have their rights adjudicated against Defendants in individual proceedings.

See also Opposition, page 3, lines 4-8 ("The class definition potentially includes over 8,000 students in four different culinary programs...") and footnote 4 (8,090 putative class members).

Numerosity is not contested by Defendant, and the Court finds that this element has been satisfied. Rose v. City of Hayward (1981) 126 Cal.App.3d 926, 934.

B. ASCERTAINABILITY

A class is ascertainable if it has "objective characteristics and common transactional facts making the ultimate identification of class members possible when that identification becomes necessary." Cohen v. DIRECTV, Inc. (2009) 178 Cal.App.4th 966, 97; Daar v. Yellow Cab Co. (1967) 67 Cal.2d 695, 706 ("If the existence of an ascertainable class has been shown, there is no need to identify its individual members in order to bind all members by the judgment.")

While Defendant asserts that the class definitions are not ascertainable because the definition is overly broad, Rose v. City of Hayward (1981) 126 Ccal.App.3d 926, 932, explains:

> As to the ascertainability question, its purpose is " 'to give notice to putative class members as to whom the judgment in the action will be res judicata.' [Citation.] 'Class members are "ascertainable" where they may be readily identified without unreasonable expense or time by reference to official records. [Citation.]' " (Aguiar v. Cintas Corp. No. 2 (2006) 144 Cal.App.4th 121, 135, 50 Cal.Rptr.3d 135 (Aguiar).) In determining whether a class is ascertainable, the trial court examines the class definition, the size of the class and the means of identifying class members. (Miller v. Woods (1983) 148 Cal.App.3d 862, 873, 196 Cal.Rptr. 69.)

Here, in examining the class definition, the court finds that it is objective and, thus, ascertainable, since school records should be able to clearly indicate who enrolled in its school between June 23, 2004 and July 1, 2009. See Declaration of Kelly, ¶8. Whether the class definition is overly broad is more a question of whether there is a community of interest.

C. COMMUNITY OF INTEREST

The community of interest requirement has three essential elements: "(1) predominant questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class." Linder v. Thrifty Oil Co. (2000) 23 Cal.4th 429, 435.

1. PREDOMINANT QUESTIONS OF LAW OR FACT

The commonality requirement under both the UCL and CLRA are substantially similar and can be addressed together. See Davis-Miller v. Automobile Club of Southern California (2011) 201 Cal.App.4th 106, 123.

"Commonality as a general rule depends on whether the defendant's liability can be determined by issues common to all class members: " 'A class may be certified when common questions of law and fact predominate over individualized questions. As a general rule if the defendant's liability can be determined by facts common to all members of the class, a class will be certified even if the members must individually prove their damages.... [T]o determine whether common

questions of fact predominate the trial court must examine the issues framed by the pleadings and the law applicable to the causes of action alleged.' " (Ali v. U.S.A. Cab Ltd. (2009) 176 Cal.App.4th 1333, 1347, 98 Cal.Rptr.3d 568, quoting Hicks v. Kaufman & Broad Home Corp. (2001) 89 Cal.App.4th 908, 916, 107 Cal.Rptr.2d 761.)" Knapp v. AT & T Wireless Services, Inc. (2011) 195 Cal.App.4th 932, 941. As further explained in Wal-Mart Stores, Inc. v. Dukes (2011) 131 S.Ct. 2541, 2551 (citing Professor Richard A. Nagareda, Class Certification in the Age of Aggregate Proof (2009) 84 N.Y.U.L.Rev. 97, 131–132):

> What matters to class certification ... is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers

Fraud, UCL, CLRA (Affirmative Misrepresentations)

Here, Plaintiff argues that the fraud, UCL and CLRA causes of action lend themselves to common questions of law or fact because there were common affirmative misrepresentations as follows:

> ...based on standardized conduct and a uniform pattern and practice designed and tightly controlled by CEC, Defendants misrepresented to all prospective students, on a uniform basis, that as graduates of CSCA they would obtain a position as a "Chef", be able to obtain "Chef's" salary, and thereby be able to make the payments on their student loans, and pay them off...
>
> Here, the unfair practice alleged is that Defendants engaged in a scheme which caused prospective students to believe that attending CSCA was a good investment in their future, while simultaneously knowing or willfully ignoring the facts that CSCA graduates ended up in a worse financial situation upon graduation than before they enrolled...
>
> Defendants' fraudulent and deceptive conduct in recruiting prospective students to CSCA through the affirmative misrepresentation of a prosperous career as a "Chef" in the culinary industry, and active concealment of material facts concerning the opportunities in the culinary industry that a CSCA education actually leads to, are violations of the CLRA's provisions.

Defendant disputes that any alleged representations were uniform or broadly disseminated, and, on that basis, contending a class cannot be certified on any cause of action. See Fairbanks v. Farmers New World Life Insurance Co. (2011) 197 Cal.App.4th 544, 562 ("a class action cannot proceed for a fraudulent business practice under the UCL when it cannot be established that the defendant engaged in uniform conduct likely to mislead the entire class.") See also Cohen v. DirectTV, Inc. (2010) 178 Cal.App.4th 966, 979:

> The record supports the trial court's finding that common issues of fact do not predominate over the proposed class because the class would include subscribers who never saw DIRECTV advertisements or representations of any kind before deciding to purchase the company's HD services, and subscribers who only saw and/or relied upon advertisements that contained no mention of technical terms regarding bandwidth or pixels, and subscribers who purchased DIRECTV HD primarily based on word of mouth or because they saw DIRECTV's HD in a store or at a friend's or family member's home. In short, common issues of fact do not predominate over Cohen's proposed class because the members of the class stand in a myriad of different positions insofar as the essential allegation in the complaint is concerned, namely, that DIRECTV violated the CLRA and the UCL by inducing subscribers to purchase HD services with false advertising

Here, Defendant submit admissible evidence to demonstrate that there were no uniformity in the representations made to prospective students. In fact, there was a mix of information, which varied in format and presentation in various geographic locations, all of which changed over the class period.

a. Television Advertising

The types of television ads that ran during the class period include statements such as:

> -You can be trained by culinary professionals to work as a chef, pastry chef, restaurant manager and more.
>
> -You can train as a culinary professional and work as a chef, pastry chef, restaurant manager and more.
>
> -I love being a chef and I'm glad that last commercial has you thinking about becoming a chef too...It will give you the scoop on where you could work and what it's like being a chef, pastry chef, restaurant manager and more.
>
> -This could be your year for a fresh start in a new career as a chef or pastry chef.

> -Do you love to cook? Then you should really think about becoming a chef. [See Declaration of Amy Benakote in Support of Class Certification Motion, Exhibit B]

According to the declarations of class representatives Daniel Vasquez (¶4), Rene Villalobos (¶4), Alana O'Shea (¶4) and Ryan Fowler (¶4), Elisabeth Gibson (¶4) and Rosaura Borges (¶4), these commercials led them to believe that they would be able to obtain a position as a Chef upon graduation.

However, evidence of any uniformity in television advertising is undermined by the fact that (1) Vasquez admitted the television ad he saw did not say he would become a chef upon graduation and no one said that to him [See Exhibit P of Amended Compendium in Opposition]; and (2) Fowler admitted at his deposition that he only felt he saw a television ad but "could remember little or nothing about it. [See Exhibit F of Amended Compendium of Exhibits in Opposition ("ACEO")].

Moreover, at least one class representative, Michael Mergel, admits he never saw any television advertisements at all. See Declaration of Michael Mergel. [See Ex. K of Amended Compendium in Opposition]. Further, there is evidence that the effect of the TV advertisements could be interpreted differently by different people. Some class members who saw the advertisements interpreted the message not as a promise of a job or position, but that a degree would give them a competitive edge in the market. [See Shellie Madero-Murrietta Dep., Ex. L. of Amended Compendium of Exhibits in Opposition].

Thus, there appears to be no evidence that the entire class saw the television advertisements or that they all interpreted the ads to mean that they would become chefs upon graduation. In fact, according to the deposition testimony of Brad Lunblad, the Director of Marketing, television advertisements were not nationwide or even statewide but, rather, targeted toward specific markets, specifically Southern California. See Exhibit C of Amy B. Benakote's declaration in Support of Class Certification Motion. See also Declaration of Lunblad, ¶2 (television, radio, direct mail and print advertising are localized), ¶8 (television, print and radio ads "are updated and/or changed

frequently.") and ¶10 (television ads aired during the day when high school students are in class).

As noted in Pfizer Inc. v. Superior Court (2010) 182 Cal.App.4th 622, 632:

> In sum, the certified class, consisting of all purchasers of Listerine in California over a six-month period, is overbroad because it presumes there was a class-wide injury. However, large numbers of class members were never exposed to the "as effective as floss" labels or television commercials. As to such consumers, there is absolutely no likelihood they were deceived by the alleged false or misleading advertising or promotional campaign. Such persons cannot meet the standard of section 17203 of having money restored to them because it "may have been acquired by means of" the unfair practice.

Thus, while Plaintiffs have certainly presented evidence that some of the class members saw the television advertisements, there is no evidence that all of the class members saw the television advertisements or even the same television advertisement. For this reason, Massachusetts Mutual Life Ins. Co. v. Superior Court (2002) 97 Cal.App.4th 1282, upon which Plaintiffs rely is distinguishable. In that case, the Court found that an inference of reliance upon the representations could be made because the misrepresentations were "broadly disseminated." Id. at 1294. However, as explained in Davis-Miller v. Automobile Club of Southern California (2011) 201 Cal.App.4th 106, 125:

> An inference of classwide reliance cannot be made where there is no evidence that the allegedly false representations were uniformly made to all members of the proposed class.

See also Pfizer Inc. v. Superior Court (2010) 182 Cal.App.4th 622, 633-634 (Tobacco II's marketing scheme was decades-long):

> We are mindful Tobacco II held "where ... a plaintiff alleges exposure to a long-term advertising campaign, the plaintiff is not required to plead with an unrealistic degree of specificity that the plaintiff relied on particular advertisements or statements." (Tobacco II, supra, 46 Cal.4th at p. 328, 93 Cal.Rptr.3d 559, 207 P.3d 20.) The tobacco litigation arose out of the "decades-long campaign of the tobacco industry to conceal the health risks of its product while minimizing the growing consensus regarding the link between cigarette smoking and lung

> cancer...." (Id., at p. 327, 93 Cal.Rptr.3d 559, 207 P.3d 20.) Here, unlike the saturation advertising promulgated by the tobacco defendants, the Listerine "as effective as floss" campaign was limited in its scope and lasted just over six months.

For these reasons, this case is also distinguishable from McAdams v. Monier, Inc. (2010) 182 Cal.App.4th 174, 182 ("We conclude the trial court misperceived the nature of plaintiff's CLRA class action. The class action is based on a single, specific, alleged material misrepresentation: Monier knew but failed to disclose that its color roof tiles would erode to bare concrete long before the life span of the tiles was up.")

Thus, because there is insufficient evidence that each class member saw the same commercials, or if they even saw any commercials at all, it cannot be said that the alleged misrepresentations were uniform such that an inference of reliance could arise.

b. Internet Advertising

Class members who testified that visited the CSCA website are split on whether the CSCA's internet website offered certain jobs upon graduation. Class representative Alana O'Shea testified that the website promised that she would get a job as an executive chef (although no salary was promised) [See Exhibit M of ACEO], while Shellie Madero-Murietta saw no promises, only a request for information. [See Exhibit L of ACEO in Opposition]

Regardless, though, there is no indication that each putative class member visited the CSCA's website. As recently noted in Mazza v. American Honda Motor Company (9th Cir.2012) 2012 U.S.App.LEXIS 626 at p. 33-34 (which also serves to further distinguish Tobacco II from this action):

> For everyone in the class to have been exposed to the omissions, as the dissent claims, it is necessary for everyone in the class to have viewed the allegedly misleading advertising. Here the limited scope of that advertising makes it unreasonable to assume that all class members viewed it.
>
> In the absence of the kind of massive advertising campaign at issue in Tobacco II, the relevant class must be defined in such a way as to include only members who were exposed to advertising that is allegedly to be materially misleading.

c. Letters to High School Students

Attached to the declaration of Plaintiffs' counsel Michael Louis Kelly ("Kelly Declaraiton") as Exhibits S and T are sample letters to high school students that state: "If you're the kind of person who has always dreamed of becoming a professional chef, we can help turn your dream into a reality...at the California School of Culinary Arts."

No evidence was submitted that any high school student saw, read or was misled by the high school letters. However, even if such evidence could be produced, there is evidence that not every class member could have been exposed to the letter since not all incoming CSCA students come directly from high school (see, for example, ¶2 of Shala Sokhansang's declaration wherein she indicates that before coming to CSCA she "owned and operated seven beauty supply stores and 2 restaurants on Melrose."). Mazza v. American Honda Motor Company, supra.

d. Print Media/Brochures and Catalogues

Exhibits L through V to the Kelly Declaration are examples of print media, brochures and catalogues produced by Defendant in response to discovery. These documents contain the following representations:

> Exhibit L states: "Train to become a Professional Chef."
>
> Exhibits M and N state: "You can graduate a Le Cordon Bleu level culinary chef and enter a world where your skills are both respected and sought after."
>
> Exhibits O and P state: "You'll graduate a Le Cordon Bleu level pastry chef, in an artistic field where your skills are in demand..." Exhibit P further states: "Whether you've ever dreamed of...becom[ing] an executive level pastry chef for a four-star restaurant, the Le Cordon Bleu Patisserie & Baking Program at CSCA is perfect for you."
>
> Exhibit Q states: "CSCA is a great place to explore all aspects of the restaurant industry. Whether you want to be a restaurant chef..."
>
> Exhibit R states: "...we separate the chefs from the cooks."
>
> Exhibits S-V list careers in the Culinary Arts, including Banquet Chef, Television Chef, Chef/Owner, Personal Chef, Pastry Chef and Executive Chef.

However, there is no indication that every class member saw or read these documents. For instance, putative class member Mariano Benavides, Jr. notes in ¶6:

> Prior to my enrollment, I was provided a number of advertisements and marketing pieces, which I briefly glossed over. I did not rely on them as guarantees of my success as a chef...Nothing in the information provided to me made me think I could expect to become an executive pastry chef immediately upon graduation. [See Exhibit R of Amended Compendium of Exhibits in Opposition]

See also Declaration of Shala Sokhansang, ¶9: "I do not recall seeing any marketing materials listing various chef positions that could be obtained after graduation from CSCA."

As noted in Davis-Miller v. Automobile Club of Southern California (2011) 201 Cal.App.4th 106, 121, 125:

> ...when the class action is based on alleged misrepresentations, a class certification denial will be upheld when individual evidence will be required to determine whether the representations at issue were actually made to each member of the class...
>
> An inference of classwide reliance cannot be made where there is no evidence that the allegedly false representations were uniformly made to all members of the proposed class.

e. In Person/Telephone

Rafael Castaneda, CSCA's PMK for training and supervision of admissions personnel, testified that CEC does have a standardized the admission process across all of their culinary schools, and that failure to comply could result in disciplinary action. He attests to the fact that admissions personnel are required to use scripts and company produced flip charts. [See Exhibit B, Kelly Declaraiton]

Plaintiffs submit the declaration of Tino Anglade, who worked for Defendant as an "Associate Admissions Representative" between June 27, 2005 and October 5, 2005. Anglade supports

Plaintiffs' claim that prospective students were told, that upon graduation, they would earn enough to service and pay off their loans, declaring

> ...I was trained, instructed and required to assure prospective students that they would have no trouble paying off the loans they would have to take out to attend CSCA, and that they should not be concerned about being able to make their loan payments. [See Exhibit HH of declaration of Michael Kelly]

However, Anglade contradicted himself in his subsequent deposition testimony when he admitted that, as far as their presentation was concerned, "no two people did it the same way." [See Exhibit C to ACEO]

Moreover, Anglade testified that he did not represent to any student that they would become a chef upon graduation, and that he was told not to give figures about what a student would make upon graduation:

> Q: So you didn't tell students that you are going to be a chef when you graduate?
>
> A: No...So, I let them know that if somebody wanted to hire them as a chief, sobeit. But in the real world it didn't happen that way. It was kind of a school of hard knocks that came from time being in the kitchen....
>
> Q: Did you ever hear any of your colleagues make promises like a student would earn a certain amount of money when they graduated?
>
> A: I heard some of the senior reps that I shadowed give figures, yes.
>
> Q: In your training, though, you were told not to do that?
>
> A: Of course...No. You never do that. Refer them to the internet. Let them do that research because they will hold it against you and we are highly regulated. [See Exhibit C to Amended Compendium in Opposition]

See also Declaration of Rosie Steben, the Senior Admissions representative at Le Cordon Bleu- Los Angeles, ¶8 ("For as long as I have been at CSCA, admissions representatives have been instructed not to promise jobs or salaries.")

Some class members testimony bears this out. For example, putative class member Elam Lopez testified in September 2011, that she was never told that she would be a chef upon graduating or that she would be making a certain salary. [See Exhibit I of Amended Compendium in Opposition] Class member Jose Alexander Mendez's testimony supports CSCA's position that no representation was made that he would become a chef or make a certain salary upon graduation. [See Exhibit J of Amended Compendium in Opposition] See also declarations of putative class members Mariano Benavides, Jr. (¶5), Bryan Hankins (¶4), Joel Orner (¶5), Shala Sokhansang (¶7)and Claudia Wilker (¶5) wherein they all indicate that they were never made any promises that they would become chefs upon graduation, or that they would make a specific salary.

That being said, Plaintiff has presented some testimony that some representations were made as to job positions (for example, to Michael Mergil, a promise he would start as an assistant pastry chef) and salary (for example, to class representative Alana O'Shea that some chefs that graduate from the school are making about $90,000 a year). (See Exhibits K and M of Amended Compendium of Exhibits).

See also putative class member Shellie Madero-Murrietta ("Q: Did your admissions representative ever tell you that you should expect to get a job other than an entry-level position immediately upon graduation? A: To my understanding, it wouldn't be an entry-level position. It wouldn't be an executive chef position. But I wouldn't have to start at the bottom. [See Exhibit L of Amended Compendium in Opposition]), and putative class member Isaac Silva ("Q: Did anyone ever tell you how much you would be making upon graduating from CSCA? A: I don't remember who, but I remember hearing 40 to 60 a year." [See Exhibit O of Amended Compendium in Opposition]).

This evidence establishes that there is a variety of different representations made to each putative class member. Some were told that they would become chefs, others not. Some were told certain starting salaries, while others were not. Some were told that they could pay off their loans, while others had no representations made to them. As noted in Knapp v. AT&T Wireless Services, Inc. (2011) 195 Cal. App. 4th 932, 945:

> Knapp also argues the trial court erred by failing to certify a class as to her UCL claims in light of the Supreme Court's decision in In re Tobacco II Cases, supra, 46 Cal.4th 298. That case, however, does not affect our analysis as to commonality. As the court explained in Cohen, supra, 178 Cal.App.4th at page 980: "Although the rules under the UCL may or may not be different following our Supreme Court's recent decision in In re Tobacco II Cases ... (Tobacco II), ... we do not understand the UCL to authorize an award for injunctive relief and/or restitution on behalf of a consumer who was never exposed in any way to an allegedly wrongful business practice. In other words, we find the trial court expressed a 'valid reason' for denying class certification when it examined the nature of the claims in [the plaintiff]'s case, and juxtaposed those claims against the respective positions of the class members."

See also Davis-Miller v. Automobile Club of Southern California (2011) 201 Cal.App.4th 106, 121, 125 ("An inference of classwide reliance cannot be made where there is no evidence that the allegedly false representations were uniformly made to all members of the proposed class.")

Fraud, UCL, CLRA (Active Concealment)

In addition, Plaintiff claims that the fraud, UCL and CLRA causes of action lend themselves to common questions of law and fact because there was concealment. Plaintiffs allege that Defendants concealed (1) that few students would become chefs, (2) none of the CSCA graduates would become chefs upon graduation, (3) that graduates would earn only $9-$13 an hour for many years after graduation, (4) that CSCA graduates could have gotten the same jobs without the education, and (5) that it would be virtually impossible for CSCA graduates to ever pay off the loans.

Concealment consists of the suppression of a fact by one who has a duty to disclose or who gives information of other facts that are likely to mislead for want of communication of that fact. See Civil Code Section 1710(3). Plaintiffs offer no legal basis, either contractual or statutory, for a duty to disclose. Instead, they argue that, because Defendant made affirmative representations, it was required to tell the whole truth and not conceal that students would not become chefs immediately after graduation or earn enough to service their loans. However, for purposes of common facts with respect to concealment, the foregoing theory is dependent on common facts with respect to the affirmative representations which were made. And, as already determined by the Court, the alleged affirmative misrepresentations are not common or widely disseminated.

Further, under Ca. Education Code, §94910(b), the duty to disclose placement rates depends on if an "institution makes any express or implied claim related to preparing students for, a particular career, occupation, vocation, job, or job title." However, as explored above, there was no uniformity in making such a disclosure. Similarly, under §94910(d), salary information shall only be disclosed "if the institution or a representative of the institution makes any express or implied claim about the salary that may be earned after completing the educational program." Again, though, there was no uniformity in this alleged disclosure.

As such, any duty to disclose information would be dependent upon the types of affirmative disclosures actually made. See Ca. Education Code, §94910. Because there was no uniform disclosure, any concealment would involve multiple individualized issues that are not amenable to class certification. In addition, there is evidence that Defendants made disclosures, including that CSCA did not guarantee jobs or salaries. (See, for example, Silva Depo, 51:1-21; 52:8-23).

Lastly, Plaintiffs allege that the unfair prong of the UCL lends itself to common questions of fact, that is, whether Defendant's business model was fundamentally unfair in that CSCA was selling education at a price point that was so high that there was no reasonable possibility that the putative class members could pay back the loans. Plaintiffs assert this is the "glue" that holds the Plaintiffs together, and, further, the court can reach this liability determination on a class-wide basis with no individualized issues serving as an obstacle to the Court's analysis.

However, on closer examination, that assertion does not hold true. Plaintiffs argue that the court should apply the balancing test adopted by the Second Appellate District in Ticconi v. Blue Shield of California (2008) 160 Cal.App. 4th 528, Pastoria v. Nationwide Insurance (2003) 112 Cal.App.4th 1490, and McKell v. Washington Mutual, Inc. (2006) 142 Cal.App.4th 1457 in analyzing whether CSCA could be found liable under the UCL's unfair prong. Simply put, the court looks at whether the utility of the conduct is outweighed by the harm to the consumer.

Here, however, the application of the test to the class [whether the conduct (selling an education at an unreasonable price point) balanced against the harm to the class member (inability to pay off the loan)] is not as straightforward and uniform as Plaintiffs contend. During the course of oral argument, Plaintiffs acknowledged that, had CSCA told students in advance they could never get a job in the culinary industry that would generate enough money to pay off their loans, the business model would not be unfair. In other words, this is fundamentally an alleged unfairness based on a failure to disclose. Thus, the unfair allegations cannot be separated from the fraud allegations and, as already concluded by the court, individualized issues predominate with respect to the misrepresentation and concealment.

Further, whether a class member was unable to pay off his or her loan at the price point set by CSCA appears to be a damages issue. For this proposition, Plaintiffs rely on the expert declaration of Dr. John Hancock. However, one cannot get to the issue of damages unless there is a showing that each class member was defrauded in a uniform manner or that the business plan itself was affected each class member in a uniform way. Knapp v. AT&T Wireless Services, Inc. (2011) 195 Cal. App. 4th 932, 945 ("we do not understand the UCL to authorize an award for injunctive relief and/or restitution on behalf of a consumer who was never exposed in any way to an allegedly wrongful business practice.") In that there has not been a showing of uniformity of misrepresentations/concealment (see Davis-Miller v. Automobile Club of Southern California, supra) the issue of damages cannot be the "glue" that would support class certification.

Lastly, Plaintiffs are, in essence, asking the Court to regulate the price of an education in the for-profit educational industry, a regulated industry, in the guise of a class action. That is a job for the Legislature, not the courts.

For the foregoing reasons, CSCA's liability cannot be determined by issues common to all class members.

TYPICALITY

Class representative's claims are typical "if they are reasonably co-extensive with those of absent class members; they need not be substantially identical." Hanlon v. Chrysler Corp. (9th Cir.1998)150 F.3d 1011, 1020.

Plaintiffs have submitted the declarations of the class representatives who opine that "each proposed class representative was subject to the same fraudulent recruiting process as all other putative class members...[and] were subject to the same types of misstatements and omission as experienced by the proposed class representatives."

However, because multiple individualized issues will predominate, it cannot be said that the class representatives are typical of the class members.

ADEQUACY

Adequacy of representation depends on whether the plaintiff's attorney is qualified to conduct the litigation and whether the named plaintiff's interests are not antagonistic to, or in conflict with, the interests of the other class members. McGhee v. Bank of America (1976) 60 Cal. App. 3d 442, 450.

Defendant does not challenge whether Plaintiff's counsel is qualified to conduct the litigation. The Court finds, based on the moving papers and evidence attached thereto, that counsel are qualified to conduct the litigation.

Defendant, however, does challenge the adequacy of the class representatives. As noted in the opposition:

> Plaintiffs here are subject to personal defenses that do not apply to all class members. Some of the named Plaintiffs never even saw the purportedly false and misleading statements...Others had unclean hands...For instance, David Vasquez lied on his enrollment application by claiming he had a high school diploma, when in fact he did not. ..

As noted in Hodges v. Akeena Solar, Inc. (N.D.Cal.2011) 274 F.R.D. 259, 266-267:

> ...the typicality requirement is permissive: "representative claims are 'typical' if they are reasonably co-extensive with those of absent class members; they need not be substantially identical." Hanlon, 150 F.3d at 1020. The test is whether "other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." Hanon, 976 F.2d at 508. A court should not find typicality satisfied if "there is a danger that absent class members will suffer if their representative is preoccupied with defenses unique to it." Id. (internal citation omitted).

However, there is an insufficient basis, even if some unique defenses exist, that "class members will suffer if their representative is preoccupied with defenses unique to it." See Massachusetts Mutual Life Ins. Co. v. Superior Court (2002) 97 Cal.App.4th 1282, 1295 ("Moreover, we note that "[c]ourts have been nearly unanimous . . . in holding that possible differences in the application of a statute of limitations to individual class members, including the named plaintiffs, does not preclude certification of a class action so long as the necessary commonality and . . . predominance are otherwise present.")

Thus, the court finds the typicality requirement is satisfied.

SUPERIORITY

This element is not relevant to the CLRA cause of action. See Civil Code section 1781(b).

Courts are required to carefully weigh respective benefits and burdens and to allow maintenance of the class action only where substantial benefits accrue both to litigants and the courts. Linder v. Thrifty Oil Co. (2000) 23 Cal.4th 429, 435.

Defendants claim that a class action is not a superior method of handling this action because (1) at least 770 class members have arbitration agreements, and (2) "given the amounts in controversy in this case and the availability of counsel to pursue them, individual class members 'certainly have a financial incentive to prosecute their individual claims' rather than proceeding on a class basis."

In this case, the Court finds that the burden to this Court in letting this case go forward as a class action would not be superior because an individualized analysis would need to be made as to what representations, if any, the class members saw, and whether they relied upon such representations vis-à-vis the claims made by the moving party. The court finds that this type of individualized analysis is not amenable to class status.

VI. CONCLUSION

As set forth above, the focus of the court is not on whether plaintiffs can affirmatively prove their claims at trial, but rather, whether the class action "will splinter into individual trials," given the disputed facts and defendants' due process right to present individual evidence on the triable issues. Kennedy v. Baxter Healthcare Corp. (1996) 43 Cal.App.4th 799, 810. That focus, as further explained in Wal-Mart Stores, Inc. v. Dukes (2011) 131 S.Ct. 2541, 2551 (citing Professor Richard A. Nagareda, Class Certification in the Age of Aggregate Proof (2009) 84 N.Y.U.L.Rev. 97, 131–132):

> What matters to class certification ... is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers

Here, it clear that there are dissimilarities within the proposed class as to the fraud, UCL and CLRA causes of action. For the reasons set forth above, those causes of action do not lend themselves to common questions of law or fact because the alleged representations and/or

concealments were not common to all class members. Because multiple individualized issues will predominate, it cannot be said that the class representatives are typical of the class members.

Lastly, a class action is not the superior method of handling this matter since the burden to this Court in letting this case go forward would require an individualized analysis as to liability. For the foregoing reasons, the Motion for Class certification is denied

SUPREME COURT OF ILLINOIS

SUPREME COURT BUILDING
200 East Capitol Avenue
SPRINGFIELD, ILLINOIS 62701-1721

March 27, 2013

Ms. Michele Odorizzi
Mayer Brown LLP
71 South Wacker Drive
Chicago, IL 60606

No. 115470 - Jenna Lilley et al., etc., petitioners, v. Career Education Corporation et al., respondents. Leave to appeal, Appellate Court, Fifth District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on May 1, 2013.

2012 IL App (5th) 100614-U

NO. 5-10-0614

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

JENNA LILLEY, JESSICA LILLEY, CANDACE LINDSEY, and ASHLEY CUNNINGHAM, Individually and on Behalf of All Others Similarly Situated,	)	Appeal from the Circuit Court of Madison County.
Plaintiffs-Appellees,	)	
v.	)	No. 08-L-113
CAREER EDUCATION CORPORATION and SANFORD BROWN COLLEGE, INC.,	)	Honorable Daniel J. Stack,
Defendants-Appellants.	)	Judge, presiding.

JUSTICE SPOMER delivered the judgment of the court.
Presiding Justice Donovan concurred in the judgment.
Justice Chapman dissented.

ORDER

¶ 1 *Held*: The circuit court erred in certifying a class of all persons who enrolled in a specified program at a vocational school within a specified time period on the basis of common law fraud and the school's violation of various provisions of the Illinois Private Business and Vocational Schools Act (105 ILCS 425/1 to 27 (West 2008)) and the Illinois Consumer Fraud and Deceptive Business Practices Act (815 ILCS 505/1 to 12 (West 2008)), where individualized issues predominate regarding whether the class members actually relied on any alleged misrepresentations by agents of the school and whether the school's alleged violations of the Acts caused the class members to incur damages.

¶ 2 The defendants, Career Education Corporation and Sanford Brown College, Inc., (the College) appeal the November 29, 2010, order of the circuit court of Madison County, which granted the motion of the plaintiffs, Jenna Lilley, Jessica Lilley, Candace Lindsey, and Ashley Cunningham, individually and on behalf of all others similarly situated, to certify the

following class:

> "All persons who attended Sanford Brown College in Collinsville, Illinois and enrolled in the Medical Assistant Program at any time during the period from July 1, 2003 through and including the present date. Excluded from the class are Defendants, Defendants' employees and any entities in which either Defendant has a controlling interest, and the parents, subsidiaries, affiliates, and the officers and directors of Defendants and the members of their immediate families, and persons who have filed in a forum of competent jurisdiction an individual action for damages and/or injunctive relief."

For the reasons that follow, we reverse.

¶ 3 FACTS

¶ 4 On February 11, 2008, the plaintiffs filed a class action complaint in the circuit court of Madison County against the College. The class action complaint was twice amended, and the operative complaint is the second amended complaint (complaint), filed September 24, 2010. According to the complaint, the plaintiffs entered the medical assistant diploma program at the Collinsville campus of the College. Each plaintiff met an admissions representative of the College, who took them through a standard admissions procedure prior to their enrollment. First, the complaint alleges that each plaintiff was administered a testing instrument designed to determine whether she possessed a high school equivalent of basic reading and math abilities. Along with this testing instrument, the complaint alleges the College developed sales scripts designed to indicate to each plaintiff that her test results made her better suited to the medical assistant program. However, the complaint alleges that these tests were not validated for use in this manner.

¶ 5 Second, the complaint alleges that each plaintiff was given copies of literature and an enrollment agreement which disclosed placement and salary statistics for recent graduates

of the College. According to the complaint, on information and belief, the enrollment agreements contained misinformation and misrepresentations which amounted to a violation of section 15.1(11) of the Illinois Private Business and Vocational Schools Act[1] (Schools Act) (105 ILCS 425/15.1(11) (West 2008)) and also amounted to a violation of the Illinois Consumer Fraud and Deceptive Business Practices Act (Consumer Fraud Act) (815 ILCS 505/1 to 12 (West 2008)), because the statistics differed from those filed with the Illinois Board of Education. Furthermore, the complaint alleges that the enrollment agreements contained false certifications by the admissions representatives regarding their compliance with State Board of Education rules and regulations and the Schools Act.

¶ 6 Third, the complaint alleges that each plaintiff met with financial aid advisors who failed to comply with unspecified legal requirements that they disclose in writing the average monthly payment schedule for their student loans and failed to disclose that graduates of the medical assistant program suffer from higher debt-to-income ratios and higher rates of default than graduates of traditional, nonproprietary colleges and universities in the area. In addition, the complaint alleges that each plaintiff was required to sit through a preenrollment interview with an admissions representative which included scripted misrepresentations regarding job opportunities offered to graduates of the College. In addition, the complaint alleged that each plaintiff was required to view flip charts that further misused placement statistics and falsely lulled each plaintiff into a sense of trust and confidence with the admissions representative.

¶ 7 Fourth, the complaint alleged that the admissions representatives falsely informed the plaintiff, Jenna Lilley, that the academic credits earned from attending the College would

---

[1]Effective February 1, 2012, the Schools Act has been repealed and replaced with the Private Business and Vocational Schools Act of 2012 (105 ILCS 426/1 to 999 (West Supp. 2011).

transfer to any accredited nursing program in the area, in violation of specific enumerated regulations of the Illinois Board of Education. The complaint also contained numerous other allegations that the equipment and supplies were outdated or substandard, the teachers were inadequate, and the overall training the plaintiffs received was inadequate.

¶ 8 Count I of the complaint alleged numerous violations of the Schools Act (105 ILCS 425/1 to 27 (West 2008)) and regulations promulgated thereunder (23 Ill. Adm. Code § 451.120 to 451.590 (2000)). Counts II and III alleged violations of the Consumer Fraud Act (815 ILCS 505/1 to 12 (West 2008)) by way of deceptive conduct and unfair practice, respectively. Counts IV and V alleged common law fraud by way of misrepresentation and omission, respectively. The complaint requested monetary relief in the form of compensatory damages, restitution, injunction, and attorney fees.

¶ 9 The plaintiffs filed a motion for a class certification, dated July 31, 2008, pursuant to section 2-801 of the Illinois Code of Civil Procedure (735 ILCS 5/2-801 (West 2008)), requesting a certification of the above-described class, consisting of every student who attended the medical assistant program at the Collinsville campus of the College from July 1, 2003, "through and including the present date." In support of their motion, the plaintiffs produced, *inter alia*, affidavits of three former admissions representatives of the College, attesting to the practices outlined in the complaint, and copies of the enrollment materials and flip charts allegedly used by the College.

¶ 10 In opposition to the motion for a class certification, the College produced excerpts of the depositions of the various plaintiffs. In one excerpt, Cassandra Allen testified that she relied on oral representations made by the admissions representative of the College in making her enrollment decision and neither read nor relied upon the written materials furnished in the enrollment agreements. Miss Allen testified that had she read the placement statistics furnished in the enrollment agreement, she would not have enrolled at the College.

According to the deposition excerpt, it was the admissions representative's representation that the average starting salary for a graduate was $15 to $20 per hour that induced her to enroll. Similarly, while the documentation she was provided represented that the graduation rate was 40%, she did not read, and thus did not rely upon, the documentation. Instead, she relied upon the admission representative's representation that the graduation rate was 98%. Finally, while the documentation showed the employment rate was 73.64%, she did not read and did not rely upon that figure, but rather relied upon the admissions representative's statement that the rate was 90%.

¶ 11 Jessica Lilley's testimony in the deposition excerpt provided by the College was similar to that of Cassandra Allen, but she worked with a different admissions representative of the College. Jessica Lilley testified that she did not read the statistics set forth in the enrollment agreement and did not rely upon them in making her enrollment decision. Rather, she testified that her decision to enroll was based on a false statement made by her admissions representative regarding the transferability of credits to other colleges. Ashley Cunningham's testimony in the deposition excerpt provided by the College told a similar tale, but in relation to yet a different admissions representative. However, Miss Cunningham could not remember what representations were made to her, other than a statement regarding credit transferability. She did not read, and did not rely upon, the statistics provided by the College in the enrollment agreement.

¶ 12 The College also produced an affidavit of Lynn Johnson, a representative of the College, who averred that each admissions interview process is different and that the scripts provided by the College only act as a guide. In addition, the College produced affidavits of four former students of the College, who are class members based on the definition requested in the motion for a class certification. Each of these former students averred that they were currently employed, were never misled by the College, and were satisfied with the education

and employment they obtained through the College.

¶ 13 The circuit court held a hearing on the motion for a class certification on November 15, 2010, based on oral argument of counsel and the documentary submissions set forth above. At the conclusion of the hearing, the circuit court requested further briefing on the issue of whether the plaintiffs are required to prove causation as an element of their claims under the Schools Act (105 ILCS 425/1 to 27 (West 2008)). After supplemental briefing was provided, the circuit court entered an order on November 29, 2010, granting the plaintiffs' motion and certifying the class as proposed. On December 28, 2010, the College filed a petition for leave to appeal, which this court allowed on February 2, 2011.

¶ 14 ANALYSIS

¶ 15 " 'Decisions regarding class certification are within the sound discretion of the trial court and should be overturned only where the court clearly abused its discretion or applied impermissible legal criteria.' " *Bemis v. Safeco Insurance Co. of America*, 407 Ill. App. 3d 1164, 1167 (2011) (quoting *Avery v. State Farm Mutual Automobile Insurance Co.*, 216 Ill. 2d 100, 125-26 (2005)). "However, the trial court's discretion must be exercised within the bounds of section 2-801 of the Illinois Code of Civil Procedure (the Code) (735 ILCS 5/2-801 (West 2006)), which sets forth the four prerequisites that the proponent of class certification must establish before the class may be certified." *Bemis*, 407 Ill. App. 3d at 1167 (citing *Avery*, 216 Ill. 2d at 126). "These were explained in *Avery* as follows:

> '(1) numerosity ("[t]he class is so numerous that joinder of all members is impracticable"); (2) commonality ("[t]here are questions of fact or law common to the class, which common questions predominate over any questions affecting only individual members"); (3) adequacy of representation ("[t]he representative parties will fairly and adequately protect the interest of the class"); and (4) appropriateness ("[t]he class action is an appropriate method for the fair and efficient adjudication of

the controversy").' " *Bemis*, 407 Ill. App. 3d at 1167 (quoting *Avery*, 216 Ill. 2d at 125 (quoting 735 ILCS 5/2-801 (West 1998))).

¶ 16 As in *Bemis*, the College focuses primarily on the commonality requirement of section 2-801 of the Code (735 ILCS 5/2-801 (West 2010)) on appeal, arguing that because under all the theories the plaintiffs advance, they must prove that any violations of the Schools Act (105 ILCS 425/1 to 27 (West 2008)) or the Consumer Fraud Act (815 ILCS 505/1 to 12 (West 2008)) caused them to incur damages. Accordingly, the College argues that common questions of fact or law do not predominate over the questions affecting only individual class members. Similarly, under the plaintiffs' common law fraud theories, the College submits that there would be individual issues regarding detrimental reliance and causation. As we explained in *Bemis*, "[i]n order to satisfy the commonality requirement, the proponent of class certification must show that the ' "successful adjudication of the purported class representatives' individual claims will establish a right of recovery in other class members." ' " 407 Ill. App. 3d at 1167 (quoting *Avery*, 216 Ill. 2d at 128 (quoting *Goetz v. Village of Hoffman Estates*, 62 Ill. App. 3d 233, 236 (1978))). "Where this test is met, ' " 'a judgment in favor of the class members should decisively settle the entire controversy, and all that should remain is for other members of the class to file proof of their claim.' " ' " *Bemis*, 407 Ill. App. 3d at 1167 (quoting *Smith v. Illinois Central R.R. Co.*, 223 Ill. 2d 441, 449 (2006) (quoting *Southwestern Refining Co. v. Bernal*, 22 S.W.3d 425, 434 (Tex. 2000) (quoting *Life Insurance Co. of the Southwest v. Brister*, 722 S.W.2d 764, 772 (Tex. Ct. App. 1986)))).

¶ 17 In *Bemis*, we further described our role in assessing commonality as follows:

> " 'Determining whether issues common to the class predominate over individual issues requires the court to identify the substantive issues that will control the outcome, assess which issues will predominate, and then determine whether these

issues are common to the class.' [Citation.] 'Such an inquiry requires the court to look beyond the pleadings to understand the claims, defenses, relevant facts, and applicable substantive law.' [Citation.] 'The test for predominance is not whether the common issues outnumber the individual ones, but whether common or individual issues will be the object of most of the efforts of the litigants and the court.' " *Bemis*, 407 Ill. App. 3d at 1167-68.

¶ 18 With the above principles in mind, we turn to the substance of the plaintiffs' claims, beginning with the claims under the Schools Act (105 ILCS 425/1 to 27 (West 2008)) and regulations promulgated thereunder (23 Ill. Adm. Code § 451.120 to 451.590 (2000)). The purpose of the Schools Act is:

"to provide for the protection, education and welfare of the citizens of the State of Illinois; to provide for the education, protection and welfare of the students of its private business and vocational schools; and to facilitate and promote quality education and responsible, ethical business practices in each of the private business and vocational schools enrolling students in this State." 105 ILCS 425/1.2 (West 2008).

¶ 19 To effectuate its purposes, the Schools Act creates a Private Business and Vocational Schools State Advisory Council under the State Board of Education (the Board), charged with carrying out the intent of the Schools Act, protecting the interests of the students, and enhancing the ability of the schools to provide quality courses of instruction. 105 ILCS 425/2 (West 2008). To that end, the Board is authorized to promulgate standards for courses of instruction and to issue certificates of approval to vocational schools, which are required prior to their operation. 105 ILCS 425/4, 5 (West 2008). The Schools Act sets forth specific requirements for documentation that a vocational school is required to submit to obtain a certificate of approval, and also sets forth requirements for sales representatives to meet in

order to obtain a permit to represent a vocational school. 105 ILCS 425/6, 7, 9, 10, 11 (West 2008).

¶ 20 The Schools Act provides that vocational schools shall utilize enrollment agreements making written disclosures of specific facts to all prospective students, including statistics showing the number of students who enrolled in past years, the number of students who graduated, and the number who were employed in their field of study, delineating the number of students who were employed utilizing the vocational school's placement services, as well as average starting salary. 105 ILCS 425/15.1 (West 2008). This information is also required to be submitted to the Board on an annual basis. 105 ILCS 425/15.2 (West 2008). The Board has the authority to refuse to renew or to suspend, place on probation, or revoke certificates or sales representative permits for a variety of causes, specifically delineated in the Schools Act, including for violations of the Act or any standard, rule, or regulation promulgated thereunder. 105 ILCS 425/16 (West 2008).

¶ 21 The Schools Act specifically sets forth a detailed statutory scheme for enforcing its provisions. In addition to the above-mentioned authority to suspend or revoke certificates of authority or sales representative permits, the Board is empowered to investigate violations, either upon its own motion or upon verified complaint of any student or employee of a vocational school (105 ILCS 425/17 (West 2008)), and the Schools Act sets forth an administrative hearing and appeals procedure for the suspension or revocation of such certificates and permits. See 105 ILCS 425/17 to 23 (West 2008). In addition, certain enumerated violations of the Schools Act are declared to also be violations of the Consumer Fraud Act (815 ILCS 505/1 to 12 (West 2008)), including false and misleading statements tending to induce students to enroll in the vocational school and failure of the vocational school to make the required disclosures in the enrollment agreement. 105 ILCS 425/25.2(a) (West 2008). To that end, the Attorney General or a state's attorney is empowered to

investigate and enforce the provisions of the Schools Act to the same extent as set forth in the Consumer Fraud Act. 105 ILCS 425/25.2(b) (West 2008). Additionally, the Schools Act specifies that violations of its provisions are considered a business offense under the law, except fraudulent misrepresentations, which are delineated as Class A misdemeanors for the first offense and Class 4 felonies for the second or subsequent offenses. 105 ILCS 425/26 (West 2008). Finally, the circuit courts are empowered to issue injunctions prohibiting violations of the Schools Act upon application of the Board, the Attorney General, or any state's attorney. 105 ILCS 425/26.1 (West 2008).

¶ 22 It is clear from the foregoing that the Schools Act provides a broad and detailed statutory scheme for administrative and criminal enforcement of its provisions, and any rules or regulations promulgated thereunder, giving the Board, the Attorney General, and the state's attorneys the power to remedy or enjoin *any* violations. In contrast, the language in the Schools Act providing for a private right of action is limited, stating that such a private right of action exists only for "[a]ny person *who suffers damages as a result of* a violation of this Act." (Emphasis added.) 105 ILCS 425/26.2 (West 2008). Accordingly, we find that the plaintiffs, in order to recover for a violation of the Schools Act or its accompanying rules or regulations, must prove that said violation caused them harm. It is clear from the record before us that if any one of the named plaintiffs is able to show that they were so harmed, this will not necessarily establish a right of recovery in all the other class members. The dissent contends that causation is not a factor and the plaintiffs only need to prove a violation of the Schools Act. This may very well be correct if the cause of action was brought by the Illinois Attorney General or the Madison County State's Attorney, but causation and damages are required for a private right of action.

¶ 23 The individual questions and issues that will predominate in order to establish a right of recovery in the class members are apparent when examining the deposition excerpts of the

named plaintiffs. Although the complaint alleges various violations of the provisions of the Schools Act that require written disclosures of graduation and placement statistics in the enrollment agreement (105 ILCS 425/15.1 (West 2008)), all of the plaintiffs testified that they did not read, and did not rely, on these statistics in their decision to enroll at the College. Rather, each of the plaintiffs complain of various misrepresentations that were made by different sales representatives of the College that they encountered. The scenarios encountered by the various members of the class as far as which admissions representative they encountered, what, if any, false representations were made, whether they relied on those representations in making their enrollment decision, and whether their decision to enroll at the College caused them some type of damage, would have to be borne out on an individual basis in order for each class member to recover.

¶ 24 The same is true for the plaintiffs' remaining Schools Act claims based on the screening test and financial aid irregularities. In order to establish a private right of recovery, each plaintiff needs to prove that any alleged violations by the College caused them damage. It is clear from the numerous affidavits submitted by the College by class members who are fully satisfied by their education at the College and placements that the individual issues would predominate at a trial on the plaintiffs' Schools Act claims.

¶ 25 An identical analysis applies to the plaintiffs' Consumer Fraud Act (815 ILCS 505/1 to 12 (West 2008)) and common law fraud claims. Section 10a(a) of the Consumer Fraud Act (815 ILCS 505/10a(a) (West 2008)) provides that "[a]ny person who suffers actual damages as a result of a violation of this Act committed by any other person may bring an action against such person." The elements of a cause of action under the Consumer Fraud Act are: (1) a statement by the seller; (2) of an existing or future material fact; (3) that is untrue without regard to the defendant's knowledge or lack thereof of such truth; (4) made for the purpose of inducing the reliance; (5) on which the plaintiff relied; and (6) that resulted

in damage to the plaintiff. *Tolve v. Ogden Chrysler Plymouth, Inc.*, 324 Ill. App. 3d 485, 490 (2001). The Illinois Supreme Court has made clear that any private individual seeking actual damages under the Act must show that the violation of the Act proximately caused the damages. *Barbara's Sales, Inc. v. Intel Corp.*, 227 Ill. 2d 45, 72 (2007).

¶ 26 Based on the foregoing, each and every class member would need to show that reliance on a misrepresentation of fact caused them damage in order to recover under the Consumer Fraud Act, as well as under the common law fraud theories advanced in the complaint. See *Tolve*, 324 Ill. App. 3d at 490 (elements of common law fraud are: (1) a false statement of material fact; (2) known or believed to be false by the party making it; (3) an intent to induce the other party to act; (4) action by the other party in reliance on the truth of the statement; and (5) damage to the other party as a result of the reliance). Again, the record shows that individual issues of reliance and damage would predominate at trial. Accordingly, the circuit court abused its discretion when it certified the class. The four named plaintiffs can proceed with their individual causes of action and, if successful, receive an award of actual damages, treble damages if fraud is proven, injunctive relief, and reasonable attorney fees and costs. 105 ILCS 426/85(m) (West Supp. 2011).

¶ 27 CONCLUSION

¶ 28 For the foregoing reasons, the November 29, 2010, order of the circuit court of Madison County, which granted the plaintiffs' motion for a class certification, is reversed.

¶ 29 Reversed.

¶ 30 JUSTICE CHAPMAN, dissenting:

¶ 31 I do not agree with the majority.

¶ 32 I will confine my analysis to the requisite issue of commonality, as did the majority.

In determining commonality, the court must first understand what are the substantive issues that control the outcome. I believe my colleagues misapprehend what are the substantive issues, in holding that individualized questions of law and fact predominate, *i.e.*, whether the class members relied on any misrepresentations by school agents and whether the school's violations of the Acts caused the class members to incur damages. Instead, the focus should have centered on whether defendants violated the Illinois Private Business and Vocational Schools Act (105 ILCS 425/15.1(11) (West 2008)) and the Consumer Fraud and Deceptive Business Practices Act (815 ILCS 505/1 to 12 (West 2008)) by failing to provide and explain required disclosures to persons protected under the Acts, thereby depriving the class members of an informed decision. This proof would establish the causation element of plaintiffs' claims and the common right of recovery for all class members.

¶ 33 The trial judge got it exactly right when he stated in his class certification order that " 'causation' is not a factor as it appears that the plaintiffs need only prove violation of the Illinois Private Business and Vocational Schools Act, 105 ILCS 425/1 *et seq.* and that the members of the class are all persons meant to be protected by that act in order to establish a right to recover."

¶ 34 I also believe that my colleagues' reliance on *Bemis v. Safeco Insurance Co. of America* is misplaced. The *Bemis* case sought class certification against Safeco Insurance for breach of contract in failing to pay the full amount of medical expenses members claimed under their automobile medical payments coverage. *Bemis*, 407 Ill. App. 3d at 1165, 948 N.E.2d at 1056-57. This court held that common issues do not predominate because proof of the nonpayment of the customary charge for one class member's reasonable and necessary medical expenses would not establish a right of recovery for any other class member. *Id.* at 1168, 948 N.E.2d at 1059. The court reasoned that since Illinois did not allow for a presumption that a billed charge is the usual and customary charge for a reasonable and

necessary medical service, proof of the determination of breach would be required on an individualized basis. *Id.*

¶ 35 This is not the situation in the case before us, where the right of recovery is established as to all class members because causation is inherent in the proof of the violation of the statute. Statutory violations are somewhat unique in this regard in that the violation itself can constitute the common injury to the proposed class. *Walczak v. Onyx Acceptance Corp.*, 365 Ill. App. 3d 664, 850 N.E.2d 357 (2006).

¶ 36 Furthermore, any issue of actual loss or individual damages (as distinguished from injury/damage) is not determinative of class certification. Factual variations among the individual class members do not defeat the class and can be determined in ancillary proceedings. *Id.* at 677, 850 N.E.2d at 369. The court can utilize a number of procedures to address individual damages. *Clark v. TAP Pharmaceutical Products, Inc.*, 343 Ill. App. 3d 538, 549, 798 N.E.2d 123, 132 (2003).

¶ 37 This is a consumer-oriented action that is most appropriate to class litigation. The certification of the class in this case would serve the interests of justice and judicial economy while preserving defendants' due process rights and defenses.

¶ 38 I would affirm the circuit court's class certification.

CIRCUIT COURT OF THE STATE OF OREGON
FOURTH JUDICIAL DISTRICT
MULTNOMAH COUNTY COURTHOUSE
1021 S.W. FOURTH AVENUE
PORTLAND, OR 97204-1123

RICHARD C. BALDWIN
JUDGE

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Re: Jennifer Adams v. Western Culinary Institute, et al.
Case No. 0803-03530
Opinion Letter Re Plaintiffs Motion For Class Certification

Dear Counsel,

The Court has now had an opportunity to carefully consider Plaintiff's Motion for Class Certification. Based on applicable Oregon law, and after assessing all factors set forth in ORCP 32, the Court allows the motion, in part, and denies the motion, in part.

BACKGROUND

Jennifer Adams, a former culinary student at Defendant Western Culinary Institute, LTD, a subsidiary of Defendant Career Education Corporation, seeks to prosecute a class action for damages and equitable relief individually and on behalf of all other similarly situated persons. In her Fourth Amended Complaint And Demand For Jury Trial, plaintiff alleges as follows:

"The classes consist of current and former WCI-School students, . . .
The contract/unjust enrichment class consists of all students . . . who attended WCI-School, made tuition payments, incurred financial obligations, or otherwise suffered ascertainable loss within the six years prior to the date of commencement of this action. The Unlawful Trade Practices Act subclass consists of all students . . . who attended WCI-School, . . . within one year of the date of commencement of this action. The fraud subclass consists of all students . . . who attended WCI-School, . . . within two years of the date of commencement of this action. As alleged below, defendants' fraudulent concealment has tolled these limitations periods." (para. 6)

"Based on information and belief, plaintiff estimates that the contract/unjust enrichment class size numbers between 5,000 and 6,000 people, and the UTPA subclass size to number approximately 750 people. Plaintiff estimates that the fraud subclass numbers approximately 2,000 people. Regardless of the exact number, the classes are so numerous that joinder is impracticable because of the large size and geographic dispersion of the class." (para. 7)

Plaintiff's allegations of underlying facts pertinent to her Motion for Class Certification are as follows:

"Defendants made misleading representations and omissions to plaintiff and the class regarding the value of the WCI-School education, benefit of the degree, exclusivity of the degree, nature of ongoing career placement, job placement rates, post-graduate salaries, and its operation under the regulations of Oregon's Office of Degree Authorization, including:

". . ."

B. Affirmatively representing in the WCI-School catalog that the Le Cordon Bleu curricula gives students greater opportunities to acquire the knowledge and skills necessary to excel in the culinary/hospitality world, when in fact Le Cordon Bleu training does not provide those benefits for the entry level jobs for which the school's catalog says it trains its students;

C. Affirmatively representing in the WCI-School catalog that the school trains students for entry level jobs, but failing to disclose that those entry level jobs do not require that training;

D. Knowing, but failing to disclose, that WCI-School's training would qualify graduates for mostly low paying, poverty-wage jobs;

". . ."

G. Knowing, but failing to disclose, that defendants were so concerned about loan defaults given the imbalance between WCI-School tuition and expected wages that CEC paid to Sallie Mae 25 percent or more of sub-prime loans that Sallie Mae made to WCI students;

H. Knowing, but failing to disclose, that students who attend WCI-School will not obtain material benefit from the course of study;

I. Calculating job placement rates in a manner inconsistent with that required by the State of Oregon's governing regulations;

J. Providing each student with graduate job placement rates that affirmatively represented that it places over 90 percent of its students in jobs, but failing to disclose that those rates were composed mostly of jobs that do not require culinary training like prep cook and line cook;

". . ."

M. Defendants affirmatively represented that they provide post-graduation career placement assistance, but by inflating job placement figures to include jobs for which a culinary degree is unnecessary, they misrepresented the nature of career services that they would provide;

". . ." (Para. 14)

Plaintiff has also alleged that "(a)s a result of the misrepresentation and omissions described above, defendants violated the following regulations:

1. OAR 583-030-0035(8)(d) by failing to clearly explain the true relationship between the curriculum and subsequent student qualification for occupational practice;

2. OAR 583-030-0035(9) by offering admission without evidence that the applying student can reasonably expect to benefit from the education obtained;

3. OAR 583-030-0035(11)(e) by not clearly describing placement services;

4. OAR 583-030-0035(12) by communicating information that is inaccurate and misleading:

5. OAR 583-030-0035(12)(a) by misrepresenting and/or omitting in the school catalog material information about the relationship of the curriculum to occupational qualification, career planning, placement services, financial aid, and job opportunities for current students;

6. OAR 583-030-0035(20) by engaging in practices that are fraudulent, dishonest, unethical, exploitive, irresponsible, deceptive, and inequitable and thus harmful to plaintiff and the class." (para 14, sub.O)

It is undisputed that these regulatory standards apply to defendants as a school offering academic degrees in Oregon. See OAR 583-030-0035.

In support of her contention that defendants have engaged in deceptive practices, plaintiff relies on statements in a catalog routinely provided by defendants to all students attending the Institute. The catalog includes the following statements:

> "LE CORDON BLEU – AN INTERNATIONAL PASSPORT SINCE 1895
> Few institutions of any kind possess the prestigious reputation of Le Cordon Bleu. This internationally renowned school for the culinary arts has become synonymous with expertise, innovation, tradition, and refinement – qualities which are meticulously nurtured by the school."
>
> "Le Cordon Bleu's partnership with Le Cordon Bleu Schools North America further expands this influence. Le Cordon Bleu's arrival in the United States is significant beyond mere expansion. Its ushers in a new educational era in culinary arts that combines classical European techniques with modern American technology and training. As a result, students will be afforded even greater opportunities to acquire the knowledge and skills necessary to excel in the culinary world"
>
> "With this comprehensive training, WCI graduates should be able to function in a variety of food service organizations that focus on cuisine, baking and pastry, or management. Specifically, graduates from the Associate of Occupational Studies (AOS) LCCB Culinary Arts Program will have received training for entry-level positions such as Garde Manger, Line Cook, Baker, Roundsman, Catering Cook, Banquet Cook, and Prep Cook. Students graduating from the LCB Hospitality and Restaurant Management program will have received training for entry-level positions such as Assistant Manager, Maitre D', Bartender, Wine Steward, Assistant Catering Manager, Manager Trainee, and Wait Person. . . ." See Plaintiff's Declarations.

Students were also provided a "WCI Graduate Success Rates Form" (dated Mar. 31, 2007) indicating a total employment rate for students graduating between 10/1/05 and 9/30/06 of 94.49%. The employment rate for graduates of each program offered was in excess of 88%. The employment rates do not indicate the nature of the employment position or salaries obtained by the graduates. Plaintiff contends the Rates Form is misleading because many of the entry level restaurant jobs included in the placement statistics do not require any culinary training or specialized education. See Plaintiff's Declarations. Plaintiff contends defendants misrepresented job placement figures to students as well as the value and significance of defendants' programs in violation of Oregon Administrative Rules previously cited.

Plaintiff's declarations indicate that defendants tracked the positions its graduates obtained and salaries following graduation but did not disclose this information to students. The data shows that approximately 70% of its 2007-2008 graduates earn less than $22,500 and 87% less than $25,000 per year. The charges for defendants' programs range from $41,050 for a 60 week program down to $18,050 for a 30 week diploma, depending on the length and type of program. Plaintiff contends defendants engaged in deceptive practices because students were unable to assess the value of the program in relationship to cost as a result of defendant's catalog statements and the nondisclosure of salary and job information known to defendants.

Defendants contend it provides quality education and training in the culinary field, and is nationally accredited by and in good standing with the Accrediting Commission of Career Schools & Colleges of Technology. Defendants' Declarations indicate that its educational programs are also accredited by the American Culinary Foundation Accrediting Commission and in good standing, after regular reviews, with the Oregon Department of Degree Authorization. Defendants point to the following statements from the catalog and Student Disclosure Form about what students can expect from defendants' programs:

> "The success or satisfaction of an individual student is not guaranteed and is dependent upon abilities and the application of personal efforts . . . [c]areer 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."

"The purpose of WCI is to provide basic training . . . [its] programs offer students the opportunity to [a]cquire the attributes of a professional, entry-level cook or hospitality management trainee." Topaz Dec., Ex. C.

Defendant's Enrollment Agreement provides:

> 5. Success of Students. 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.
>
> 8. Employment. WCI does not guarantee employment following graduation but does offer career planning assistance to students and graduates . . . Employment and externship decisions are outside the control of the school. Some programs may require additional education, licensure and/or certifications for employment in some positions. Topaz Dec. Ex. D.

Defendants Student Disclosure Form provided to students includes the following statements:

> "2. Employment & Salaries
>
> Western Culinary Institute has served the community since 1983 and is proud of its graduate employment record. The School will offer job search assistance; however it cannot guarantee employment, a specific job title, salary or salary range. I have not been guaranteed employment, a specific job title, salary or salary range by any employee of Western Culinary Institute.
>
> 3. Externship
>
> The school provides guidance and assistance in securing an externship; however it cannot guarantee an externship at a specific property or position, with a particular chef or manager, with a salary, or in foreign country. Furthermore, I understand that I must be an active participant in securing my externship. I have not been guaranteed a specific externship by any employee of Western Culinary Institute." See Topaz Decl.

Defendants also submitted several declarations regarding the value of its education and training and the benefits of a culinary education.

UTPA AND FRAUD CLAIMS

As indicated above, plaintiff's Unlawful Trade Practices Act (UTPA) and Fraud claims are based on allegations of affirmative misrepresentations and failure to disclose certain information known to defendants relating to the value and benefits of the educational services provided by defendants. Defendants argue that class certification of these claims is not "superior to other available methods for the fair and efficient adjudication" of such claims because individual determinations of whether students relied on the alleged misrepresentations would overwhelm common issues. Defendants also argue, for similar reasons, that other factors militate against class certification under ORCP 32 (A) (B). Defendants emphasize that "education is an inherently individual experience" and rely on submissions relating to the value of the educational services defendants provide to students. See Defendants Opposition Memo at pages 12-15.

A core issue for the Court is whether individual determinations of reliance on misrepresentations by students would be required in this class action with respect to the UTPA and Fraud Claims. Generally, a UTPA or Fraud claim based on express misrepresentations does require proof that the plaintiff relied in fact on those representations to his or her detriment. See *Newman v. Tualatin Development Co.*, 287 Or 47 (1979) (Class action could not be brought against builder where reliance by purchasers on express warranty would have to be individually

determined); see also *Feitler v. Animation Celection*, 170 Or. App. 702 (2000). However, this element of proof is a requirement only in fraud claims alleging affirmative misrepresentations of fact. Here, plaintiff's UTPA and Fraud Claims include allegations of express statements and allegations of nondisclosure of information.

In *Sanders v. Francis*, 277 Or 593, (1977) an automobile dealer allegedly sold a car to a consumer at a price substantially higher than the advertised price. The Court held that whether a claim under the UTPA requires proof of reliance by the consumer "as an element of causation necessarily depends on the particular practice alleged. The Court's rationale was as follows:

> "In many cases plaintiff's reliance may indeed be a requisite cause of any loss, i.e. when plaintiff claims to have acted upon a seller's express representations. But an examination of the possible forms of unlawful practices shows that this cannot invariably be the case. Especially when the representation takes the form of a 'failure to disclose' under sub section (2), as in this case, it would be artificial to require a pleading that plaintiff had 'relied' on that non-disclosure. Similarly, if the particular violation of paragraph (i) is a sale made in wilful disregard of the advertised price, and intended at the time of the advertisement, then plaintiff's damage results precisely from defendants' reliance on her ignorance, not from plaintiff's reliance on defendants' advertisement." 277 Or. at 599.

In *Tri-West Construction Co. v. Hernandez*, 43 Or App 961 (1979), a contractor made false and misleading statements about a homeowner's right to rescind a contract for home improvements. The contractor argued that because the homeowner "had actual written notice of their "right to rescind, they could not justifiably rely upon any contrary representation made by [the contractor]. 430 Or App at 971. Citing *Sanders v. Francis*, supra, the Court rejected this argument:

> "In this case, the unlawful practice alleged by defendants was a representation by plaintiff that defendants had no right to rescind a contract which both federal law (15 USC § 1635) and state law (ORS 83.710 *et seq*) required plaintiff to inform defendants they did have a right to rescind. The representation was therefore not a mere statement of opinion, it was an affirmative misstatement by one party of a fact which that party was required to accurately state to the other. Similarly, proof that a party justifiably relied on a representation is not necessary when the representation involves a matter about which the party making it is legally required to inform the other." 43 Or App at 972-73.

See also *Strawn v. Farmers Ins. Co.*, 228 OR App 454 (2009) (fraud class certification affirmed where fact finder could reasonably infer detrimental reliance from continued payment of premiums for coverage insurance company never intended to provide) and *Handy v. Beck*, 282 Or 653 (1978) (fraud actionable without misrepresentation where defendant concealed and failed to disclose information he had a duty to report).

This Court concludes that under *Sanders & Triwest,* class members here may assert their nondisclosure allegations as actionable under the UTPA and at common-law without proof of reliance. Those allegations are set forth in paragraph 14 (C),(D), (H) and (J), supra. UTPA or Fraud Claims arising from express written representations made to all students in defendants' catalog contrary to the nondisclosed information may not be maintained as a class action because reliance must be determined on an individualized basis. See *Newman v. Tualatin Development Co.* supra. However, these representations may be relevant to prove whether the nondisclosure of information by defendants constituted a deceptive practice.

Plaintiff has also alleged defendants failed to disclose that defendants "paid to Sallie Mae 25 percent or more of sub-prime loans that Sallie Mae made to WCI students [because defendants were] concerned about loan defaults given the imbalance between WCI-School tuition and expected wages . . .". Para 14 (G), supra. The Court expresses no opinion on whether this alleged nondisclosure provides a basis for plaintiff's UTPA or Fraud claims without further pretrial briefing by the parties.

Defendants have cited *Diallo v. American Intercontinental University, Inc.*, 2009 WL 4021178 (Ga App; 11/23/09) in support of their position that this action should not be certified as a class action. In *Diallo,* former students of American Intercontinental University, Inc. sought class certification for Fraud claims alleging that the University "had induced them and others to enroll in the school by making false representations relating to accreditation and placement rates. Class certification was denied, in part, because "individual assessments would be needed to ascertain, for example, any reliance each putative class member had placed upon the school's SACS-accredited status in electing to enroll; which SACS accreditation requirements were pertinent to that class member; and whether AIU's alleged failure to meet one or more such requirements had resulted in injury to that individual." *Diallo* is distinguishable from this case because the Court was not faced either with Unlawful Trade Practices claims or with substantial allegations of nondisclosure of information sufficient to support UTPA or Fraud claims. Compare also *Newman v. Tualatin Development Co.*, supra, where allegations were based on express warranty only, with no allegations of nondisclosure.

The Court anticipates in this case that issues of liability and damages will likely be bifurcated at time of trial. Based on the pleadings and submissions, class members may have sustained different damages. This potential difference in damages by class members does not necessarily present a valid basis for declining to certify this class action. See, e.g., *Alsea Veneer, Inc. v. State of Oregon*, 117 Or App 42 (1992). Here, the Court would likely move forward to individual determinations of damages sustained by class members in the event plaintiffs meet their burden of proof on liability. See also *Shea v. Chicago Pneumatic Tool Company*, 164 Or App 198 (1999).

The Court certifies these claims only as to students who entered into contracts for services with defendants after defendants allegedly knew and failed to disclose that the outcomes for students were materially different than represented in defendants' catalog. The size of this class would appear to be sufficiently large to support certification. See *Newman v. Tualatin Development Co.*, supra. The Court limits plaintiff's proposed class as indicated because determinations of whether individual students relied on express misrepresentations prior to defendants' failure to disclose information would overwhelm common issues and not frame a manageable class. Any such claims would more appropriately be prosecuted as individual claims. See ORCP 32 (B).

CONTRACT AND UNJUST ENRICHMENT CLAIMS

Plaintiff has not demonstrated an adequate basis to proceed on her claims for breach of contract. Nor has plaintiff demonstrated a basis for certification of her claims for unjust enrichment. Questions of fact as to the value of the educational services provided to students and varying amounts of tuition paid are not common to the proposed class. See ORCP 32 (A) (2). Therefore, those claims are not certified as part of this class action.

DEFENDANTS MOTIONS TO STRIKE

Defendants have filed Motions To Strike The Declarations of Ray Lindley and Richard Ross Filed In Support of Plaintiffs Motion To Certify Class Action. Defendants contend that the declarations constitute expert testimony and fail to comply with OEC 702. Defendants also argue that expert opinion that laws or rules were violated by defendants should be disregarded. However, the Court has only considered the content of the declarations as relevant to the requirements and factors set forth in ORCP 32 and has not considered the declarants' opinions as expert testimony. Defendants' motions are therefore allowed, in part, and denied in part.

Accordingly, plaintiff's counsel may submit an appropriate form of Order certifying that the specific prerequisites of ORCP 32 (A) are satisfied and that this action may be maintained as a class action. Pursuant to ORCP 32 (C), the Order will be conditional and may be altered or amended before a decision on the merits.

Sincerely,

RICHARD C. BALDWIN
Circuit Court Judge

IN THE CIRCUIT COURT OF THE STATE OF OREGON

IN AND FOR THE COUNTY OF MULTNOMAH

NATHAN SURRETT individually 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

FIFTH AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL

CLASS ACTION—DAMAGES/ EQUITABLE RELIEF

(UNLAWFUL TRADE PRACTICES ACT ORS 646.608, and FRAUD),

Claims Not Subject to Mandatory Arbitration

Plaintiffs allege:

PRELIMINARY STATEMENT

1.

This is an action for money damages and equitable relief brought by Nathan Surrett individually on behalf of all similarly situated persons. This action is also brought by Jennifer Adams on her own behalf only. Plaintiffs allege claims for violation of the Unlawful Trade Practices Act, ORS 646.608, *et seq.* and for fraud. The Court has certified for class action

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treatment only the factual allegations in paragraphs 14C, 14D, 14H, and 14J as to Unlawful Trade Practices Act and Fraud claims. To the extent allegations other than the certified allegations are alleged, Ms. Adams alleges them solely on her own behalf.

Plaintiffs allege that defendants operated a trade school, Western Culinary Institute now known as Le Cordon Bleu College of Culinary Arts in Portland ("WCI") and that defendants induced plaintiffs and similarly-situated students to enroll at, attend, and incur financial obligations to pay WCI by making uniform omissions common to plaintiffs and the class as set forth in the certified allegations in paragraphs 14C, 14D, 14H, and 14J below, and as further alleged below only on behalf of plaintiff Adams. Plaintiffs and the class further allege that defendant Career Education Corp. participated in the alleged misconduct as a result of its setting of policies, approving the conduct at issue in this case, and supervising WCI's operations. Prior plaintiffs initially filed the case for equitable relief, giving written notice of the intention to seek damages as required by ORCP 32H. More than 30 days after giving notice, prior plaintiffs filed an amended complaint adding claims for damages for themselves and the proposed class.

PARTIES

2.

Plaintiff Jennifer Adams attended Western Culinary Institute and paid tuition and incurred financial obligations to do so as a result of misrepresentations and omissions made to plaintiff by defendants. Plaintiff Adams attended Western Culinary Institute in 2006 and 2007, graduating in June, 2007. Plaintiff Nathan Surrett enrolled and began attending WCI in May 2007 and graduated in September 2008. Plaintiff Surrett paid tuition and incurred financial obligations as a result of omissions made to plaintiff and the class by defendants.

3.

Defendant Western Culinary Institute, Ltd. ("WCI Ltd.") is a foreign corporation that operates Western Culinary Institute now known as Le Cordon Bleu College of Culinary Arts in

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Portland ("WCI-School"), an Oregon trade school, located in Multnomah County. Defendant WCI Ltd. is registered to do business in Oregon. Defendant WCI Ltd. is a wholly-owned subsidiary of defendant Career Education Corporation.

4.

Defendant Career Education Corporation (CEC) is a foreign corporation that provides support and oversight to defendant WCI Ltd. in its subsidiary's operations of WCI-School.

JURSIDICTION AND VENUE

5.

WCI-School operates in Multnomah County. Some of the acts complained of in this action took place in Multnomah County.

CLASS ALLEGATIONS

6.

The class consists of all current and former students who enrolled at Western Culinary Institute -- now known as Le Cordon Bleu College of Culinary Arts in Portland -- on or after March 5, 2006 (up to and including March 1, 2010), who attended Western Culinary Institute/Le Cordon Bleu College of Culinary Arts in Portland on or after March 5, 2006 (up to and including March 1, 2010), and who made tuition payments or incurred financial obligations, excluding where applicable all officers and directors of defendants, attorneys for the class, any judge who sits on the case, and any student who did not continue his or her studies due to academic ineligibility.

7.

Based on information and belief, plaintiff estimates that the class consists of approximately 2,600 people. Regardless of the exact number, the classes are so numerous that joinder is impracticable because of the large size and geographic dispersion of the class.

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8.

There are questions of fact and law common to the classes in that each class member has suffered an injury as a result of defendants' conduct. Common questions of law and fact predominate over any questions affecting only individual class members.

Common questions pertaining to the certified class allegations in paragraphs 14C, 14D, 14H, and 14J include:

A. Whether defendants violated the Unlawful Trade Practices Act by representing through its omissions that the WCI-School had characteristics, benefits, or qualities that it did not have. ORS 646.608(1)(e);

B. Whether defendants violated the Unlawful Trade Practices Act by falsely representing through its omissions the nature of the transaction or obligation. ORS 646.608(1)(k);

C. Whether plaintiff and members of the class may state a claim for equitable relief under the UTPA for violations of ORS 646.608;

D. Whether defendants acted willfully as defined by ORS 646.638(1);

E. Whether the mandatory arbitration clause in the students' form contract is unconscionable and unenforceable;

F. Whether CEC can claim the benefits of the mandatory arbitration clause when CEC was not a signatory of the contract;

G. Whether defendants:

1. Knew but failed to disclose to students that entry level jobs in the restaurant industry do not require the training the school provides;

2. Knew but failed to disclose to students that WCI-School's training would qualify graduates for mostly low paying, poverty-wage jobs;

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3. Knew but failed to disclose to students that those who attend WCI-School will not obtain material benefit from the course of study;

4. Knew but failed to disclose that job placement rates were composed mostly of jobs that do not require culinary training like prep cook and line cook.

H. Whether such omissions were material;

I. Whether plaintiff and members of the fraud class had a right to rely on such omissions;

J. Whether plaintiff and members of the fraud class may prove reliance on a class-wide basis;

K. Whether the defendants knew, but failed to provide to the class, information described in the certified claims that should have been disclosed.

9.

The claims of the named plaintiff are typical of the claims of the class in that:

A. The fraud and UTPA claims involve identical conduct in making uniform omissions about the characteristics and value of the WCI-School program;

B. Defendants operated WCI-School in a standardized manner with respect to omissions to prospective students, and CEC set policies for WCI and oversaw its operations;

C. The injuries suffered by the named plaintiff and the class members differ only in the amount of damage; and

D. The named plaintiff's claims for relief are based upon the same legal theories as are the claims of the class members.

10.

The named plaintiff will fairly and adequately protect and represent the interests of the class in that:

A. His claims are typical of the claims of the class members;

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B. He is represented by attorneys who are qualified and competent counsel who will vigorously prosecute this litigation; and

C. His interests are not antagonistic to or in conflict with the interests of the class members.

11.

A class action is superior to other available methods for the fair and efficient adjudication of this case in that:

A. Common questions of law and fact predominate over factors affecting only individual members;

B. As far as plaintiff knows, no class action that purports to include WCI-School students has been commenced;

C. Individual class members have little interest in controlling the litigation due to the high cost of each individual action, the risk of fees and costs, and because plaintiff and his attorneys will vigorously pursue the claims;

D. The forum is desirable as defendants do business here;

E. A class action will be an efficient method of adjudicating the claims of the class members who have suffered monetary damages as a result of the same type of conduct by defendants; and

F. In the aggregate, class members have claims for relief that are significant in scope relative to the expense of the litigation.

12.

More than 30 days before seeking damages, a prior plaintiff complied with the requirements of ORCP 32H by delivering notice and demand on behalf of the proposed class on defendants in writing by service on their registered agent and by certified or registered mail, return receipt requested.

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ALLEGATIONS OF FACT

13.

Defendants' WCI-School purports to provide trade school education to plaintiffs and class members that will prepare them for careers in the food service and hospitality industries.

14.

Defendants made uniform omissions common to plaintiffs and the class as set forth in the certified class allegations in paragraphs 14C, 14D, 14H, and 14J below, and as further alleged below individually by plaintiff Adams only, including:

A. Offering student admission without receipt of evidence that the applying student can reasonably expect to benefit from the education obtained;

B. Affirmatively representing in the WCI-School catalog that the Le Cordon Bleu curricula gives students greater opportunities to acquire the knowledge and skills necessary to excel in the culinary/hospitality world, when in fact Le Cordon Bleu training does not provide those benefits for the entry level jobs for which the school's catalog says it trains its students;

C. Knowing but failing to disclose to students that entry level jobs in the restaurant industry do not require the training the school provides;

D. Knowing but failing to disclose to students that WCI-School's training would qualify graduates for mostly low paying, poverty-wage jobs;

E. Knowing, but failing to disclose, that WCI-School students will incur debts that cannot be repaid with low paying jobs for which their education qualifies them;

F. Knowing, but failing to disclose, that most graduates will not earn enough to allow them to pay off school loans;

G. Knowing, but failing to disclose, that defendants were so concerned about loan defaults given the imbalance between WCI-School tuition and expected wages that CEC paid to Sallie Mae 25 percent or more of sub-prime loans that Sallie Mae made to WCI students;

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H. Knowing but failing to disclose to students that those who attend WCI-School will not obtain material benefit from the course of study;

I. Calculating job placement rates in a manner inconsistent with that required by the State of Oregon's governing regulations;

J. Knowing but failing to disclose that job placement rates were composed mostly of jobs that do not require culinary training like prep cook and line cook;

K. CEC affirmatively represented that it was providing support to WCI Ltd. and oversight of its operations when it was not sufficiently doing so and was doing so in ways that caused injury to plaintiff and the class;

L. Defendants failed to disclose that their representations about the value of the education, benefit of the degree, exclusivity of the degree, nature of ongoing career placement, and job placement rates, were false and misleading;

M. Defendants affirmatively represented that they provide post-graduation career placement assistance, but by inflating job placement figures to include jobs for which a culinary degree is unnecessary, they misrepresented the nature of career services that they would provide;

N. Defendants affirmatively represented that they provide post-graduation career placement assistance, but failed to disclose that this assistance focused largely on compiling posted job openings from publicly available sources like Craig's List and local help wanted ads that were accessible to anyone, whether enrolled at the school or not;

O. As a result of the misrepresentations and omissions described above, defendants violated the following regulations:

1. OAR 583-030-0035(8)(d) by failing to clearly explain the true relationship between the curriculum and subsequent student qualification for occupational practice;

2. OAR 583-030-0035(9) by offering admission without evidence that the applying student can reasonably expect to benefit from the education obtained;

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3. OAR 583-030-0035(11)(e) by not clearly describing placement services;

4. OAR 583-030-0035(12) by communicating information that is inaccurate and misleading;

5. OAR 583-030-0035(12)(a) by misrepresenting and/or omitting in the school catalog material information about the relationship of the curriculum to occupational qualification, career planning, placement services, financial aid, and job opportunities for current students;

6. OAR 583-030-0035(20) by engaging in practices that are fraudulent, dishonest, unethical, exploitive, irresponsible, deceptive, and inequitable and thus harmful to plaintiff and the class.

FRAUDULENT CONCEALMENT

15.

Defendants are estopped from relying on a statute of limitations defense as to plaintiff Adams because they intentionally lulled plaintiff Adams, by affirmative inducement and wrongful, active concealment of material facts, into delaying the filing of a cause of action. Defendants had continuing common law and regulatory duties to correct the alleged misrepresentations and omissions and disclose the true character, quality, and nature of their programs, but they intentionally failed to do so. As a result, plaintiff Adams could not have discovered all elements of the alleged torts until, at the earliest, seeking employment after completing her education at WCI-School.

16.

Defendants made the representations and failed to make disclosures knowingly and intentionally in an effort to induce prospective students to enroll at, attend, and incur financial obligations to pay WCI School and in order to retain the tuition money of plaintiffs and the class.

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PLAINTIFF'S FIRST CLAIM FOR RELIEF

UNLAWFUL TRADE PRACTICES ACT

FIRST COUNT-ACTUAL DAMAGES

17.

Defendants acted willfully, and as a result of their misrepresentations and failures to disclose, plaintiffs and members of the class suffered ascertainable loss of money. The sole certified class allegations to which this Count applies are set forth in paragraphs 14C, 14D, 14H, and 14J above; no such limitation applies to the individual allegations of plaintiff Adams.

18.

Plaintiffs and members of the class are entitled to tuition refunds, together with pre-judgment interest and repayment of sufficient funds to satisfy the debts they incurred to attend WCI-School. ORS 646.636.

19.

Plaintiffs and members of the class are entitled to recover damages in the form of student loan principal and/or tuition payments made, plus prejudgment interest. In addition, plaintiff Adams on her own behalf is entitled to recover relocation expenses and lost wages incurred during her period of attendance at the school in amounts to be proven at trial. Plaintiffs and the class are entitled to recover attorneys' fees and costs. ORS 646.638(3).

SECOND COUNT-STATUTORY DAMAGES

20.

Plaintiff re-incorporates ¶¶ 1-16.

21.

Defendants acted recklessly, and as result, plaintiffs and members of the class suffered ascertainable losses of monies.

22.

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Plaintiffs and members of the class are entitled to recover $200 per person, together with attorneys' fees and costs. ORS 646.638 (2009).

SECOND CLAIM FOR RELIEF FRAUD

23.

Plaintiff re-incorporates ¶¶1-16.

24.

Defendants' representations were false and material, and their omissions were material, to plaintiff's and class members' decision to enroll, attend, and incur financial obligations to the school. Defendants made the representations with knowledge of their falsity. Plaintiffs and members of the class had a right to rely on the defendants' misrepresentations and statements and actually relied upon them. The sole certified class allegations to which this Count applies are set forth in paragraphs 14C, 14D, 14H, and 14J above; no such limitation applies to the individual allegations of plaintiff Adams.

25.

As a result, plaintiffs and members of the class suffered economic damages in the form of student loan principal and/or tuition payments made, plus prejudgment interest, all to their economic damages in amounts to be proved at trial. Plaintiffs and members of the class are entitled to recover economic damages in amounts to be proved at trial.

WHEREFORE, plaintiffs seek relief from defendants, and each of them, as follows:

a. On their UTPA Claim, plaintiffs and members of the class are entitled to tuition refunds, together with pre-judgment interest and repayment of sufficient funds to satisfy the debts they incurred to attend WCI-School; student loan principal and/or tuition payments made, plus prejudgment interest; statutory damages; and attorneys fees and

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costs. Plaintiff Jennifer Adams is also entitled to recover moving expenses and lost wages;

b. On their fraud claim, plaintiffs and members of the class are entitled to student loan principal and/or tuition payments made, plus prejudgment interest;

c. As to both claims, plaintiff Surrett seeks an order allowing him to substitute as class representative for plaintiff Adams and allowing this matter to continue as a class action, under the terms previously set forth and with previously-appointed class counsel; and

d. Such other relief as the court may deem just.

DATED this 7th day of December, 2010.

By: _____
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PLAINTIFF'S DEMAND FOR A JURY TRIAL.

DATED this 7th day of December, 2010.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **FIFTH AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL** on the following person(s) on this same day:

☑ by enclosing a copy in an envelope, properly addressed and with first-class postage, and placing in the mail in Portland, Oregon

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DATED this 12 day of December, 2010.

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BK

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

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JENNIFER ADAMS individually and on behalf of all other similarly situated persons,	)	CASE NO. 0803-03530
Plaintiff,	)	ORDER GRANTING, IN PART, AND DENYING, IN PART, PLAINTIFF'S MOTION TO CERTIFY CLASS ACTION AND GRANTING, IN PART, AND DENYING, IN PART, DEFENDANT'S MOTIONS TO STRIKE
v.	)	
WESTERN CULINARY INSTITUTE, LTD, and CAREER EDUCATION CORPORATION	)	
Defendants.	)	

On October 29, 2009, plaintiff appeared through her attorneys, David F. Sugerman and Brian S. Campf, and defendants appeared through their attorneys, Jeff E. Scott and David Ernst on Plaintiff's Motion to Certify Class Action and on Defendants' Motions to Strike. The Court reviewed all of the briefs of the parties and heard oral argument.

The Court issued its letter opinion on December 3, 2009, setting forth its rulings on the class certification motion.

As to the class certification motion, the Court makes the following findings pursuant to ORCP 32 C1:

1. The class is so numerous that joinder of all members is impracticable. ORCP 32A (1).

2. There are questions of law or fact common to the class. ORCP32A (2).
3. The certified claims of Jennifer Adams are typical of the claims of the class. ORCP 32A (3).
4. Jennifer Adams in an adequate class representative, and David F. Sugerman and Brian S. Campf are qualified to serve as class counsel. ORCP 32A (4).
5. A class action is superior to other available methods for the fair and efficient adjudication of the certified claims. ORCP 32B.

Based on the foregoing findings, it is now ORDERED

1. The motion to certify as a class action as it pertains to the Unlawful Trade Practices Act (UTPA) and Fraud claims is GRANTED as to the following allegations:

A. Knowing but failing to disclose to students that entry level jobs in the restaurant industry do not require the training the school provides (Fourth Amended Complaint ¶14C);

B. Knowing but failing to disclose to students that WCI-School's training would qualify graduates for mostly low paying, poverty-wage jobs (Fourth Amended Complaint ¶14D);

C. Knowing but failing to disclose to students that those who attend WCI-School will not obtain material benefit from the course of study (Fourth Amended Complaint ¶14H);

D. Knowing but failing to disclose that job placement rates were composed mostly of jobs that do not require culinary training like prep cook and line cook (Fourth Amended Complaint ¶14J);

2. For purposes of notice, the class consists of all current and former students enrolled at Western Culinary Institute on or after March 5, 2006, who attended Western Culinary Institute and who made tuition payments or incurred financial obligations, excluding – where applicable – all officers and directors of defendants, attorneys for the proposed class, any judge who sits on this case, and any student who did not continue his or her studies due to academic ineligibility.
3. The motion to certify a class action as it pertains to the contract and unjust enrichment claims is DENIED.
4. This class certification order is conditional and may be altered or amended before decision on merits. ORCP 32C (1).
5. Jennifer Adams is appointed to serve as class representative.
6. David F. Sugerman and Brian S. Campf are appointed to serve as class counsel.
7. The parties shall confer on a proposed notice plan and within 30 days of this order provide proposed notice plans if they are unable to agree upon a notice plan.
8. At this time, the Court reserves for future decision whether class member damage issues shall be tried in a single case or bifurcated.
9. The Court does not find that an immediate appeal from this order may advance the ultimate termination of the litigation. ORS 19.225.

As to Defendants Motions to Strike, the Court GRANTS in part and DENIES in part defendants' motions. The Court has limited its consideration of the Declaration of Richard Ross and the Declaration of Ray Lindley as relevant to the requirements and factors set forth in ORCP 32. The Court has not considered the declarations as expert testimony on the merits of the underlying claims.

IT IS SO ORDERED.

Dated this 5th day of February, 2010.

Richard C. Baldwin
Circuit Court Judge

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 DECERTIFY CLASS *Oral Argument Requested* Assigned: Judge Richard C. Baldwin Date of Hearing: March 16, 2012 Time of Hearing: 9:00 A.M.

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 45 minutes. Official court reporting is requested for the hearing.

MOTION

Pursuant to ORCP 32 C, Defendants respectfully move this Court for an Order decertifying the class conditionally certified by this Court's February 5, 2010 Order (the "Conditional Certification Order").

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I. INTRODUCTION

This is the Court's first opportunity to assess Nathan Surrett's adequacy as a class representative and to consider the game-changing United States Supreme Court case of *Dukes v. Wal-Mart*. In light of these recent developments, this lawsuit may not proceed any longer as a class action.

A case may not go forward as a class action unless the Court remains convinced that it can decide the claims of all class members simply by deciding the claims of the proposed class representative. Where that cannot be done, allowing a case to be prosecuted as a class action would compromise defendants', or absent class members', due process rights and would permit form (*i.e.*, class action procedure) to triumph over substance. For that reason, Oregon courts are required to vigilantly consider at all stages of the proceedings whether managing the case as a class action remains proper. If it does not, the class must be decertified.

Nathan Surrett is not an adequate class representative because his experiences in enrolling at, as a student at, and as a graduate of Western Culinary Institute ("WCI") cannot be generalized to other members of the class. Surrett's claims against WCI—to the extent they are viable—are highly individualized in nature: He did not rely on job placement rates in deciding to enroll at WCI, he did not believe he would become a chef on graduation, and he left the profession within a year to pursue an entirely different career in the environmental science field. Surrett cannot represent a class of plaintiffs alleging that WCI did not disclose that its program would not materially advance their careers, because, as he admitted, the information relevant to his decision to enroll at WCI was markedly different from other class members.

The difficulties of litigating this case as a class action are broader than just Surrett's inadequacy as class representative. The decision to purchase an education is very different from purchasing a tool, a car, or other consumer goods. Students enroll for a host of highly personal reasons, and allowing one person's experiences to represent all would ignore that fundamental reality for the impermissible reason that it may be "easier" to decide one case than many cases.

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Moreover, because the students paid substantial tuition that they seek to recover in this lawsuit, a class action is not a "superior" way to manage the case. Each class member has adequate incentive to seek damages if they feel they were wronged.[1] Excusing this basic obligation of individual proof will violate due process and "sacrifice the goal for the going." *City of San Jose v. Superior Court (Lands Unlimited)*, 12 Cal 3d 447, 462 (1974).

The complex division of the Los Angeles County Superior Court recently considered all of these issues in a virtually identical lawsuit filed against another culinary school and found that this type of case simply cannot proceed as a class action. No formula can be applied to solve the highly individual issues that pervade these lawsuits. The same logic applies here.[2]

This class must be decertified for all of the following reasons:

- Allowing Surrett to represent the certified class would violate the due process rights of class members, if any, who have viable claims based on the Alleged Omissions because Surrett admitted that the Alleged Omissions were not material to him and thus that they could not have caused him any harm.
- Allowing Surrett to represent the certified class would violate defendants' due process rights because Surrett's own experience belies the bare representations of class counsel in support of a presumption of class-wide materiality, causation, or injury.

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[1] "David F. Sugerman Attorney, PC" (a sole practitioner, formerly of Paul and Sugerman PC) and Brian Campf, PC both represent Surrett and the class; Tim Quennelle, PC represents individual plaintiff and former class representative Jennifer Schuster nee Adams, as well as other opt outs.

[2] On January 7, 2009, Chief Judge Doris L. Downs of the Fulton Superior Court, Atlanta Judicial District denied certification of very similar claims alleged against American Intercontinental University in a case filed in Fulton County Superior Court in Georgia styled as *Tajuansar Diallo, et al. v. American Intercontinental University, Inc., et. al.*, Case No. 2008-CV-148209. Judge Downs' decision was subsequently affirmed in its entirety by the Court of Appeals of Georgia in *Diallo, et al. v. American Intercontinental University, et al.*, 301 Ga. App. 299, 687 S.E.2d 278 (2009).

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- Allowing Surrett to represent class members who, unlike him, signed an Enrollment Agreement including an arbitration provision with an ***express class-action waiver*** provision (and also a Student Disclosure Form acknowledging the arbitration agreement) would violate defendants' due process rights to enforce those class members' unequivocal contractual waiver of any right to participate in this lawsuit.
- Plaintiffs' claims do not satisfy the requirement of commonality because of the highly individualized enrollment decision process, educational experience, and post-graduate employment experience.
- A class action is not superior here because due process would require the Court to engage in highly complicated, individualized damages calculations for each class member.
- The large amounts of money sought on behalf of each class member and the availability of bilateral arbitration for the efficient resolution of individual claims mean that there is little risk that viable claims will not be pursued by individual class members.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. The Court's Conditional Certification Order.

On December 3, 2009, the Court conditionally certified a limited number of fraud and Unfair Trade Practices Act ("UTPA") claims for class treatment. The class representative at the time was Jennifer Adams, and the class claims were certified "only as to students who entered into contracts for services with defendants after defendants allegedly knew and failed to disclose that the outcomes for students were materially different than represented in defendants' catalog."[3] The Court limited the certified claims to "omissions" claims "because determinations of whether individual students relied on express misrepresentations prior to defendants' failure to

[3] Declaration of Gregory A. Nylen ("Nylen Decl."), Ex. J (Dec. 3, 2009 Opinion Letter Re Plaintiffs Motion For Class Certification ("Letter Order")) at 9.

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disclose information would overwhelm common issues and not frame a manageable class."[4] Nevertheless, the Court acknowledged that this action may require "individual determinations of damages sustained by class members."[5]

Specifically, the Court certified for class treatment Plaintiffs' fraud and UTPA claims alleging that Defendants knew but failed to disclose to students that:

a. entry level jobs in the restaurant industry do not require the training WCI provides;

b. WCI's training would qualify graduates for mostly low-paying, poverty-wage jobs;

c. those who attend WCI will not obtain material benefit from the course of study; and

d. job-placement rates were composed mostly of jobs that do not require culinary training, like prep cook and line cook.[6]

These claims are referred to in this brief as the "Alleged Omissions."

On April 30, 2010, the Court clarified the class definition to confirm that the class includes only those students who enrolled at WCI on or after March 5, 2006.[7] Because Adams enrolled prior to the class period, Plaintiffs' counsel substituted Surrett for Adams as a proposed class representative. Defendants conditionally stipulated to this substitution and the parties

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[4] *Id.*

[5] *Id.* at 8; *see also* Nylen Decl., Ex. Q (Feb. 5, 2010 Conditional Certification Order) (reserving "for future decision whether class member damage issues shall be tried in a single case or bifurcated"); Ex. R (Defs.' Sep. 30, 2009 Opp. to Plfs.' Mot. to Certify Class Action ["Class Certification Opp."]) at 14,-15, 17-18, 28-29.

[6] Nylen Decl., Ex. Q (Conditional Certification Order at 2-3).

[7] Nylen Decl., Ex. S (Apr. 30, 2010 hearing transcript) at 4 ("The court concludes that the Defendants' enclosed language of page 2 of the Defendants' memorandum as to class definition is most consistent with the court's certification rule.").

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agreed that Defendants could challenge Surrett's adequacy at a later time and in the context of a motion to decertify the class.[8]

B. Discovery Has Confirmed Surrett's Inadequacy as a Class Representative.

1. Surrett's Unique Background and Decision to Attend Culinary School.

Before attending WCI, Surrett had no professional cooking experience.[9] After graduating from high school in 2004,[10] Surrett enrolled in Haywood Community College where he obtained an associate's degree in forestry technician science in May 2006.[11] Surrett worked for a while after receiving his diploma, planting trees and doing related work.[12] He then enrolled at the University of Idaho to pursue a bachelor's degree in ecology and conservation but withdrew after just one year, because he found math and science too challenging.[13]

After his experience at the University of Idaho, Surrett decided that he "needed a career change."[14] He chose to pursue a culinary degree because he wanted to "mak[e] other people happy through food."[15] According to Surrett, his decision had nothing to do with the percentage of culinary graduates who were employed upon graduating from culinary school or how much he might earn relative to other careers.[16] At the time of enrollment, Surrett understood that any aspirations he had about being a "well off" chef upon graduation were more fantasy than

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[8] Nylen Decl., Ex. C (Nov. 23, 2010 Stipulated Order Allowing Filing of Plaintiff's Fifth Amended Complaint) at ¶ 3.

[9] Nylen Decl., Ex. K (Jan. 21, 2011 Depo. Tr. of Nathaniel Surrett ("Surrett Depo")) at 153:24-154:5.

[10] *Id.* at 47:19-22.

[11] *Id.* at 48:9-49:17.

[12] *Id.* at 91:18-93:1.

[13] *Id.* at 50:4-24.

[14] *Id.* at 95:12-22.

[15] *Id.*

[16] *Id.* at 120:20-122:11, 282:12-283:25.

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reality.[17] And although he wanted to own an organic restaurant some day, he admitted that he knew it would take some time after graduation to attain that goal.[18]

2. Surrett's Lack of Independent Investigation into His Chosen Field.

Once he decided to attend culinary school, Surrett did little to nothing to research the culinary industry or other culinary schools or programs. His "investigation," if anything, consisted of a single phone call to WCI where he asked only three superficial questions — how was WCI's reputation, how much was tuition, and how were the facilities.[19] Although he visited WCI before beginning classes and thought the school was "fantastic" and "incredible,"[20] he neither asked to speak with any instructors or current students,[21] nor conducted his own research of readily available sources to verify WCI's placement statistics. And he never did anything to evaluate what types of jobs or potential salaries awaited him on graduation, like checking public sources such as salary.com for salary data or visiting any state agency websites with similar information.[22] As he explained, that was not the reason why he enrolled.[23]

3. Surrett Admits that WCI Lived up to Its Promise to Provide Him with a Culinary Education.

Surrett admits that he had no expectation before he enrolled about the income he might earn after graduation.[24] Indeed, he did not think about how much he might earn before he

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[17] *Id.* at 127:20-130:3.

[18] *Id.* at 96:7-97:16, 126:25-129:11; Nylen Decl., Ex. L (Surrett Depo. Ex. 9 ["Surrett Academic File"]) at WCIP0013478 (stating on Application for Admission that that his "short term goal" was to start his career "[i]n the next 5 years" and to "[m]ove to Canada").

[19] Nylen Decl., Ex. K (Surrett Depo.) at 34:2-36:12.

[20] *Id.* at 117:25:118:5.

[21] *Id.* at 118:6-119:8.

[22] *Id.* at 122:13-16.

[23] *Id.* at 282:12-283:25.

[24] *Id.* at 270:6-14.

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enrolled because it simply was not important to him at the time.[25] For the same reason, he admits that WCI graduates' job-placement rates were not significant to him when he enrolled at WCI.[26] In any event, Surrett admits that he does not think that there is anything inaccurate about the Graduate Success Rate Disclosure form that he received before enrolling.[27]

Surrett admits that he read, understood, and signed an Enrollment Agreement with WCI before enrolling at the school.[28] He agreed that his Enrollment Agreement was "a legally binding contract"[29] and understood that it superseded anything his admissions representative may have said to him during the enrollment process.[30] Surrett admits reading and understanding the disclaimers in the Enrollment Agreement regarding the lack of any promises regarding satisfaction, success, employment, or salary before enrolling at WCI.[31] He admits unequivocally that no one at WCI ever promised him employment or income.[32] Accordingly, Surrett knew that his success depended upon his individual abilities and efforts.[33]

4. Surrett Admits that WCI Met His Pre-Enrollment Expectations.

Surrett admits that WCI met his expectations by providing the education and training he expected to receive when he enrolled.[34] He admits that WCI's teaching facilities were adequate and that the vast majority of his instructors were qualified.[35] Surrett used WCI's career-services

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[25] *Id.* at 282:12-283:25.

[26] *Id.* at 120:13-121:19.

[27] *Id.* at 257:4-9.

[28] *Id.* at 108:18-111:5.

[29] *Id.* at 111:2-5; Nylen Decl., Ex. L (Surrett Academic File) at WCIP00013473.

[30] Nylen Decl., Ex. K (Surrett Depo.) at 110:5-18, 224:19-225:21; Ex. L (Surrett Academic File) at WCIP00013474, ¶ 14.

[31] Nylen Decl., Ex. K (Surrett Depo.) at 112:3-113:21, 115:16-116:1.

[32] *Id.* at 98:5-99:22, 104:25-105:10, 160:7-161:7, 276:10-18.

[33] *Id.* 112:9-113:3, 213:22-214:6.

[34] *Id.* at 54:21-55:11, 251:9-16.

[35] *Id.* at 117:25-118:5, 173:7-175:22, 227:13-22.

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department to secure what he described as a "wonderful" externship with Doe Bay Resort & Retreat in Olga, Washington ("Doe Bay") as part of his degree program.[36] Doe Bay offered him a seasonal job as a line cook, which he turned down.[37] Instead, Surrett accepted a position as Banquet Cook at the Nines Hotel in downtown Portland.[38]

Surrett believed that a realistic starting salary expectation upon graduation was $9 to $15 per hour.[39] The Nines Hotel paid him $10 per hour.[40] Although Surrett thought the Nines Hotel was a great opportunity for him, he quit that job after just one month because his domestic partner moved to Seattle, Washington.[41] In Seattle, he worked at Specialties Bakery and Café until a former Doe Bay employee recruited him to work as a line cook for a local restaurant called Carmelita.[42]

5. Surrett Switches Fields To Pursue Environmental Science.

Less than a year after graduating from WCI, Surrett abandoned the culinary field to pursue a different career, in environmental science.[43] He admits not knowing whether he could have achieved his dreams if he had chosen to remain in the culinary field.[44] In choosing a school, Surrett admitted that statistics were not even important to him when he enrolled because he knew that his success was up to him.[45]

C. Surrett's Personal Experiences Are Different from Those of Other Plaintiffs and

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[36] *Id.* at 149:10-150:19; Nylen Decl., Ex. N (Surrett Depo. Ex. 14 ["Externship Essay/Report I"]) at DB000015.

[37] Nylen Decl, Ex. K (Surrett Depo). at 149:10-150:24.

[38] *Id.* at 202:20-204:3.

[39] *Id.* at 197:11-198:5.

[40] *Id.* at 206:11-16.

[41] *Id.* at 205:24-206:10.

[42] *Id.* at 210:5-211:16.

[43] *Id.* at 51:21-52:25.

[44] *Id.* at 268:7-11.

[45] *Id.* at 85:13-86:4.

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Class Members.

Class members range in age from around 19 to around 72.[46] They hail from about 50 states and territories, are from about five different countries.[47] Some enrolled immediately out of high school, others years later with a GED, with some college, or even with a bachelor's degree and hoping for a career change later in life. Surrett's expectations and experiences differed from those of former named plaintiffs Adams, Shannon Gozzi ("Gozzi"), and Meghan Koehnen ("Koehnen"), from class members Cherie Thompson ("Thompson") and Deanna Schreiner ("Schreiner"), and from class members with experiences more akin to those of former graduate Eric Tan ("Tan").

For example, unlike Surrett -- who held an Associate's Degree in forestry technician science and enrolled at WCI after just one year in a University of Idaho bachelor's program in ecology and conservation -- Adams was three years into her bachelor's program in chemistry and biology at New Mexico State University when she decided to pursue a culinary career.[48] Likewise, Adams's prior work experience at doctors' offices and in an Italian restaurant[49] differed substantially from Surrett's experience as a freight handler and as a gym employee. And whereas Surrett did not consider job-placement rates and specific post-graduation jobs or salaries at the time he enrolled at WCI, Adams testified that placement rates were "relatively important" to her decision to enroll.[50]

While Surrett dreamed of owning an organic restaurant, Adams enrolled at WCI based on her own love of food and a desire to "advance [her]self and put [her]self ahead of those who did

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[46] Nylen Decl., ¶ 36.

[47] *Id.*

[48] Nylen Decl., Ex. T (Depo. Tr. of Jennifer Schuster ["Adams Depo."]) at 40:14-41:3.

[49] *Id.* at 51:1-5.

[50] *Id.* at 69:14-16. *But Cf.* Declaration of Deanna Schreiner ("Schreiner Decl.") at ¶ 15 (job placement statistics played no role in decision to attend WCI).

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not" attend culinary school.[51] Although Koehnen's refusal to appear for deposition leaves many unanswered questions regarding her circumstances, we do know that, unlike Surrett (and Adams), she was exclusively interested in work as a pastry assistant or baker.[52] Still different was Gozzi's focus on obtaining a culinary job at a particular location: Disney.[53] Further details regarding Gozzi's motivations are not available because she withdrew as a class representative after her deposition was noticed. Although Defendants were not permitted to depose absent class members, declarations obtained from other students confirm that starting salaries represented in the placement rates were not material to their enrollment decisions.[54]

Surrett and the various former named plaintiffs and class members also performed varying degrees of research in connection with their decisions to enroll at WCI. Surrett conducted virtually no investigation into culinary school and into WCI in particular. Adams, by contrast, researched a number of culinary schools by performing internet searches, requesting enrollment materials, and ultimately participating in more than a dozen calls with WCI and other schools' admissions representatives before enrolling at WCI after several deferrals due to personal reasons.[55] Surrett ruled out schools not nearby his home,[56] while Adams ultimately chose WCI after a nationwide search based on the relatively low cost of living in Portland and because she did not want to live in Arizona.[57] Thompson had a parental resource for information about WCI when she decided to enroll.[58]

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[51] Nylen Decl., Ex. T (Adams Depo.) at 41:5-9, 102:2-6.

[52] Feb. 9, 2012 Declaration of Marsha Parmer ("Parmer Decl."), ¶ 3, Ex. 9 (Koehnan's Contact Log).

[53] Parmer Decl., ¶ 2, Ex. 7 (Gozzi's Contact Log).

[54] Thompson Decl., ¶ 14; Schreiner Decl., ¶ 16; Tan Decl., ¶ 11.

[55] Nylen Decl., Ex. T (Adams Depo.) at 41:12-42:2, 59:11-60:2, 64:20-66:13.

[56] Nylen Decl., Ex. K (Surrett Depo.) at 119:9-17.

[57] Nylen Decl., Ex. T (Adams Depo.) at 42:9-17.

[58] Declaration of Cherie Thompson ("Thompson Decl.") at ¶ 7.

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Once enrolled at WCI, Surrett, the former named plaintiffs, and class members experienced a vast range of performance as evidenced by grade-point averages ("GPAs") that varied widely. Compare, for example, Adams's high GPA of 3.73,[59] to Surrett's GPA of 2.71,[60] to Koehnen's low GPA of 2.0.[61] Adams even received scholarships and grants to help defray the costs of her culinary education,[62] while Surrett did not.[63] Further, unlike Surrett and others,[64] Gozzi withdrew over a grade dispute.[65]

Finally, Surrett, the former named plaintiffs, and class members have had divergent career paths since attending WCI. Compare Surrett's decision to quit a good job in the field to move to another city and then to pursue a career in forestry to Adams's moderately paid work as a chef and as a cook,[66] to Thompson's work as a Kitchen Manager,[67] to Schreiner's position as an Executive Chef,[68] or to Tan's well-paid position prior to becoming a franchise restaurant owner.[69] While Thompson, Tan, and Shreiner credit WCI with their successes and disapprove of this litigation,[70] Surrett, Adams, and others seek to blame WCI for their perceived shortcomings.

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[59] Nylen Decl., Ex. U (Adams Academic Transcript).

[60] Nylen Decl., Ex. V (Surrett Academic Transcript).

[61] Parmer Decl., Ex. 11 (Koehnen Academic Transcript).

[62] Nylen Decl., Ex. T (Adams Depo.) at 244:4-6.

[63] Phillips Decl., ¶ 11.

[64] *See, e.g.*, Nylen Decl., Ex. II (Surrett Decl.) at 45:6-12; Ex. T (Adams Depo.) at 45:1-12; Thompson Decl. at 2.

[65] Parmer Decl., ¶ 2, Ex. 8 (Gozzi Student Activities Report) at WCIP00005080-5082.

[66] Nylen Decl., Ex. T (Adams Depo.) at 83:19-84:16, 250:3-22.

[67] Thompson Decl. ¶ 12.

[68] Schreiner Decl., ¶ 10.

[69] Declaration of Eric Tan ("Tan Decl."), ¶¶ 9-10.

[70] Thompson Decl., ¶¶ 15, 17-20; Schreiner Decl., ¶¶ 21-23; Tan Decl., ¶¶ 15-19.

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D. Defendants' Motion To Compel Arbitration and To Dismiss the Action.

On August 19, 2011, Defendants moved to compel bilateral arbitration of Surrett's and Adams's claims and to dismiss this action. Surrett's principal argument in opposition was that Defendants had waived any right to compel Surrett and Adams to arbitration because the arbitration provisions in the Enrollment Agreements signed by Surrett and Adams contained no express class-action waiver provision and thus the change in the law did not apply as to Surrett and Adams. The Court agreed with Plaintiffs and denied Defendants' Motion to Compel Arbitration on December 1, 2011.

However, unlike Surrett and Adams, almost one half of class members, including all class members who signed a WCI Enrollment Agreement on or after November 29, 2007, expressly waived any right to participate in a class action. Post-November 2007 WCI enrollees agreed that:

> [t]here 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.[71]

In addition, approximately 20% of class members, including all class members who enrolled after January 2009, acknowledged the following in a revised Student Disclosure Form that both they and their Admissions Representative were required to sign at the end of the document and next to *each* disclosure:

> 18. **Binding Arbitration and Waiver of Jury Trial:** I understand that my Enrollment Agreement contains an arbitration provision that provides for the arbitration of any dispute arising out of or relating to my recruitment, enrollment, attendance, education, financial aid or career service assistance, no matter how described, pleaded, or styled under certain circumstances. The terms of the arbitration provision are laid out in my Enrollment Agreement, and I have read and understand them, and agree to them.[72]

[71] Phillips Decl., ¶ 3, Ex. 1 (Nov. 2007 Enrollment Agreement).

[72] Phillips Decl., ¶¶ 9-10, Ex. 6.

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Because the Court certified the class and approved the form of class notice before the fundamental change in the law regarding the enforcement of class-action waivers in arbitration provisions, before Plaintiffs' argument to the Court regarding what they deemed a critical distinction between the language of Surrett's arbitration agreement and those signed by virtually half of all absent class members, and before the Court's December 1, 2011 ruling thereon, absent class members who signed post-November 2007 WCI Enrollment Agreements were never notified that if they remained in the class their claims were subject to bilateral arbitration as a matter of law (the cost of which they would share) and thus were unlikely to have factored this into their decision on whether to opt out of the conditionally certified class.

III. ARGUMENT

A. Legal Standard

The Court has "wide latitude" to decertify the conditionally certified class. *Belknap v. U.S. Bank Nat'l Ass'n*, 235 Or App 658, 667, 234 P3d 1041 (2010); *accord Perry v. FleetBoston Fin. Corp.*, 229 FRD 105, 116 (ED Pa 2005) ("What the district court giveth, the district court may taketh away: the court may decertify or modify a class at any time during the litigation should the class prove to be unmanageable."). Oregon law provides, and the Conditional Certification Order (at 3) recognizes, that decisions to certify a class may be conditional, and may be altered or amended before a decision on the merits. ORCP 32 C(1). Decertification is proper where a class no longer satisfies the requirements to maintain a class action under Oregon law. *See Belknap*, 235 Or App at 667.

To maintain a class action in Oregon, plaintiffs must establish the following: (1) the class is so numerous that joinder of all members is impracticable ("numerosity"); (2) there are questions of law or fact common to the class ("commonality"); (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class ("typicality"); and (4) the

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representative parties will fairly and adequately protect the interests of the class ("adequacy").[73] ORCP 32 A. Plaintiffs bear the burden of satisfying these criteria with competent evidence, *see Safeway v. Or. Public Employees Union*, 152 Or App 349, 358, 954 P2d 196 (1998), and courts conduct a "rigorous analysis" to test whether they are met. *Walmart v. Dukes*, 131 S Ct 2541, 2551 (2011).

In addition to meeting the requirements of ORCP 32 A, a class action may only proceed where it is superior to other available methods for the fair and efficient adjudication of the controversy. ORCP 32 B. Oregon courts are guided by a list of pertinent factors set forth in ORCP 32 B. One important factor is "the extent to which questions of law or fact common to the members of the class predominate over any questions affecting only individual members. ORCP 32 B(3). Another factor concerns "the difficulties likely to be encountered in the management of a class action that will be eliminated or significantly reduced if the controversy is adjudicated by other available means." ORCP 32 B(7).

Plaintiffs must produce evidence that each element of their claims can be established with class-wide facts. *See Bernard v. First Nat'l Bank of Or.*, 275 Or 145, 156, 550 P2d 1203 (1976); *Pearson v. Philip Morris, Inc.*, No. 0211-11819, 2006 WL 663004, at *12 (Multnomah County Circuit Court Feb. 23, 2006). To permit a class action to proceed where it would deprive class members or defendants of an opportunity to pursue or to defend individual claims that depend on individual proof would violate due process. *See Dukes*, 131 S Ct at 2561; *Lindsay v. Normet*, 405 US 56, 66 (1972) ("Due process requires that there be an opportunity to present every available defense."); *Bernard*, 275 Or at 152 & n3 (noting that "[t]he stated purpose of [class certification] was to 'achieve economies of time, effort, and expense, and promote uniformity of

[73] Because ORCP 32 A is identical to Federal Rule of Civil Procedure 23(a), federal-court decisions interpreting Rule 23(a) are persuasive authority here. *See Newman*, 287 Or at 49; *see also Froeber v. Liberty Mut. Ins. Co.*, 222 Or App 266, 277 n9, 193 P3d 999 (2008) (finding decisions by federal courts to be "persuasive" authority); *Hoy v. Jackson*, 26 Or App 895, 897, 554 P2d 561 (1976) (noting that, when Oregon law is patterned after federal law, the cases interpreting the federal rule are entitled to "considerable weight").

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decision as to persons similarly situated, without sacrificing procedural fairness or bring about other undesirable results'").

In deciding whether to maintain a suit as a class action, courts should consider that class actions are "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Dukes*, 131 S Ct at 2550 (citation omitted).

B. Plaintiffs, Under the Class Representation of Surrett, Do Not Meet the Requirements of ORCP 32 A.

As mentioned, ORCP 32 A requires class actions to satisfy four basic elements: numerosity, commonality, typicality, and adequacy. With Surrett now identified as Plaintiffs' class representative, Plaintiffs fail three of these four tests.

1. Surrett Is Not Typical of the Class.

Surrett does not satisfy the third requirement of ORCP 32 A—that the claims or defenses of the class representative are typical of the claims or defenses of the class generally. "The typicality requirement goes to the heart of a representative parties' ability to represent a class ***." *Deiter v. Microsoft Corp.*, 436 F3d 461, 466 (4th Cir 2006). "[P]laintiff's claim cannot be so different from the claims of absent class members that their claims will not be advanced by plaintiff's proof of his own individual claim." *Id.* More simply: "Typicality requires that the named plaintiffs, by proving their claim, also prove the claims of the proposed class members." *Opperman v. Allstate N.J. Ins. Co.*, No. 07-1887, 2009 WL 3818063, *4 (DNJ Nov 13, 2009).

Surrett's claims fail this test. Defendants have argued in their summary judgment brief that Surrett cannot prevail on his claims because, in light of his deposition admissions, he cannot prove the elements of fraud. If the Court determines that genuine issues of material fact preclude summary judgment, Defendants will pursue these same arguments at trial. The trial will, accordingly, focus on *Surrett's* unique experiences and *Surrett's* admissions; the trial's subject matter will therefore not be generalizable to the class.

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To prevail at trial, Plaintiffs will have to prove the elements of a claim for fraud. Under Oregon law, fraud claims require materiality, causation, and actual injury. *Wieber v. FedEx Ground Package Sys., Inc.*, 231 Or App 469, 480, 220 P3d 68 (2009) (quoting *Conzelmann v. N.W.P. & D. Prod. Co.*, 190 Or 332, 350, 225 P2d 757 (1950)).[74] As to Surrett, Plaintiffs can prove neither materiality nor actual injury. Plaintiffs' certified claims are based on the theory that it would be material to the entire class to know prior to enrollment what salaries they could expect to earn upon graduation and the types of jobs they might obtain, and that class-wide injury can be presumed because Defendants allegedly failed to disclose this information. Not so for Surrett. Surrett testified that he did not enroll based on any impression of WCI's post-graduation placement rates or any expectations about the salary he might earn. He admitted that, before enrolling, data about placement and potential earning were not important to him.[75] He also admitted that he understood his success, satisfaction, employment, and salary after graduation would depend on his own ability and effort.[76] Any Alleged Omissions about salaries or job outcomes were therefore not material to Surrett.

Surrett also admitted that he did not suffer any injury as a result of any purported omission by Defendants regarding job outcomes or salaries—and, in fact, his post-graduation experiences bear this out. He testified that WCI met his expectations and that, upon graduation, he promptly obtained a number of positions in the culinary field preparing the type of food he dreamed of preparing when he enrolled. Only Surrett's personal decisions to relocate and ultimately to abandon the culinary field to pursue a career in forestry derailed what might have been a promising culinary career.[77] To prevail at trial, Surrett will have to overcome these

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[74] Similarly, Oregon UTPA claims alleging violations of ORS section 646.608 based on fraudulent omissions require a showing that plaintiff "suffer[ed] an ascertainable loss of money or property as a result of" the omissions. *See* ORS 646.638.

[75] Nylen Decl., Ex. K [Surrett Depo.] at 120:13-121:19, 282:12-283:25.

[76] *See* Section II.B.3, *supra.*

[77] *See* Section II.B.4-5, *supra.*

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potentially devastating admissions to prove the element of actual injury. *See Terry v. Holden-Dhein Enterprises, Ltd.*, 48 Or App 763, 618 P2d 7 (1980) (holding that a plaintiff could not prevail on a UTPA claim where she could not show that she would be in a different position had wrongfully withheld information been disclosed).

"[D]ispositive issues of fact or law that are specific to the named plaintiffs will normally defeat the typicality requirement." *Opperman*, 2009 WL 3818063, *4. "[C]lass certification is inappropriate where a putative class representative is subject to unique defenses which threaten to become the focus of the litigation." *Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 222 F3d 52 (2d Cir 2000) (internal quotation omitted).[78] The Oregon Supreme Court has adopted this rule:

> [I]f, at the time the court must first rule on whether the case may proceed as a class action, it appears probable that an issue or a defense which requires a separate adjudication as to each claim does have substance in enough instances to justify the defendants' asserting it, we believe the legislature intended that the case should not proceed as a class action. To hold that a case may proceed as a class action when there appears to be a legitimate issue or defense which will require an individual inquiry of a considerable number of the claimants would attribute to the legislature an intention either to overload the courts with an unmanageable proceeding or to deprive the defendants of valuable procedural and substantive rights by preventing them from asserting what appears to be a bona fide defense.

Bernard v. First Nat'l Bank of Or., 275 Or 145, 159, 550 P2d 1203 (1976). That is precisely the case here. Basic problems with Surrett's claim are unique to Surrett. His claims are not typical of the class at large; accordingly, class certification under ORCP 32 A cannot be sustained.

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[78] *See also Shanley v. Cadle*, 277 FRD 63, 69 (D Mass 2011) ("Both typicality and adequacy may be defeated where the class representatives are subject to unique defenses which threaten to become the focus of the litigation."); *Green v. FedEx Nat., LTL, Inc.*, 272 FRD 611, 615 (MD Fla 2011) ("Typicality may be destroyed by the existence of unique defenses that would preoccupy the named plaintiff to the detriment of the interests of absent class members."); *Fireside Bank v. Superior Court*, 155 P3d 268 (Cal 2007) ("[E]vidence that a representative is subject to unique defenses is one factor to be considered in deciding the propriety of certification."); *H & J Paving of Fla., Inc. v. Nextel, Inc.*, 849 So 2d 1099 (Fla Ct App 2003) (affirming denial of class certification for absence of typicality and commonality because the class representative "had unique defenses applicable only to [it]").

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2. Surrett is Not an Adequate Representative of the Class.

For similar reasons that Surrett is not typical of the class under ORCP 32 A(3), Surrett is also not an adequate representative of the class under ORCP 32 A(4). Surrett's focus at trial will be trying to establish that his unique circumstances—his pre-enrollment investigation and expectations, his studies at WCI, and his actions after graduating—are not fatal to his claims. Surrett's need to shore up his own case and to beat back defenses in light of his admissions and his unique experiences precludes him from vigorously pursuing the interests of the class.

Oregon law requires that, to be an adequate class representative, there can be "no disabling conflicts of interest between the class representatives and the class." *Alsea Veneer, Inc. v. State of Oregon*, 117 Or App 42, 53, 843 P2d 492 (1992), *rev'd in part on other grounds*, 318 Or 33 (1993); *see also Safeway*, 152 Or App at 358 (finding proposed class representative inadequate where it had taken positions inconsistent with those of the class during the litigation).

In *Safeway*, the trial court found the Oregon Public Employees Union (the "OPEU") was not an adequate representative for a class of defendants comprised of "all people who seek to use Safeway's premises to solicit signatures on initiative petitions," because the union had taken the position in the litigation that it had the right to petition outside some, but not all, of the 92 Oregon Safeway locations. *Id.* The appellate court affirmed the district court's refusal to certify a class, holding that "[g]iven OPEU's position, it cannot be expected fairly and adequately to protect the interests of class members who would claim a constitutional right to gather petition signatures on Safeway premises at which OPEU does not claim such a right." *Safeway, Inc.*, 152 Or App at 358.

Surrett's inability to establish the materiality of the Alleged Omissions to his decision to enroll at WCI or that he lost money or property as a result of the Alleged Omissions means he is inadequate as a class representative. *See Shanley*, 277 FRD at 69 (stating that a class representative whose focus is on beating back unique defenses is not an adequate representative). Further, allowing Surrett to continue as class representative when there are serious doubts about

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the viability of his claim would violate the due process rights of class members, if any, who have viable claims. *See Taylor v. Sturgell*, 553 US 880, 891, 894, 898 (2008) ("[d]ue process limitations" require "[r]epresentative suits" to rest on actual and direct representation of one party by another, not merely representation that is "close enough").

Relatedly, ignoring the deficiencies in Surrett's personal case to allow him to serve as a class representative and proxy for all other class members would deprive Defendants of their due process rights. There can be no presumption or inference of class-wide materiality, causation or injury where, as here, there is directly contrary evidence confirming that the supposedly omitted information was not material to the class representative's enrollment decision and was not the "as a result of" cause of any alleged injury. *See In re Countrywide Fin. Mortgage Mktg. & Sales Practices Litig.*, No. 10-257, 2011 WL 6325877, *10 (SD Cal Dec. 16, 2011) (denying class certification where defendants' evidence regarding materiality refuted the representations of plaintiff's counsel); *Pearson*, 2006 WL 66304, at *10 ("While the court does not determine the merits in the certification proceeding, it must have evidence, and not merely representations of counsel, that a type of proof is available."); *Kingsbury v. U.S. Greenfiber, LLC,* No. 08-151, 2009 WL 2997389, *10 (CD Cal Sept. 14, 2009) ("Any inference of reliance that could be drawn from Pulte's alleged misrepresentations are overcome by the overwhelming evidence that [plaintiff] did not rely on any of the statements at issue."); *Laster v. T-Mobile USA, Inc.*, No. 05-1167, 2009 WL 4842801, *1 (SD Cal Dec. 14, 2009) (granting summary judgment where undisputed facts demonstrated that no named plaintiff had relied on the alleged false advertising).

3. Plaintiffs Do Not Satisfy the Requirement of Commonality, Particularly in Light of *Wal-Mart v. Dukes*.

The United States Supreme Court's recent decision in *Wal-Mart v. Dukes* casts serious doubt on the viability of Plaintiffs' proposed class. *Dukes* confirmed that courts should conduct a "rigorous analysis" and should "probe behind the pleadings before coming to rest on the

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certification question." *Wal-Mart Stores, Inc. v. Dukes*, 131 S Ct 2541, 2551 (2011). *Dukes* also clarified the commonality requirement under the Federal Rules of Civil Procedure, which mirrors that of ORCP 32 A(2). The appropriate inquiry regarding commonality is whether there are common questions that would "generate common *answers*" apt to drive the resolution of the litigation. *Id.* at 2551 (quoting Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 Colum L Rev 149, 176, n110 (2003)). A less stringent test is toothless given that "any competently crafted class complaint literally raises common 'questions.'" *Id.* (citation omitted). The rule adopted in *Dukes*, and that should govern this case, is that class treatment is appropriate only where the "claims *** depend upon a common contention" that is "capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* 131 S Ct at 2551.

Plaintiffs can satisfy neither the commonality requirement in ORCP 32 A(2) nor the far more difficult requirement to demonstrate that a class action is superior to other methods of adjudicating Plaintiffs' claims, as required by ORCP 32 B. Indeed, individual issues permeate both questions of liability and of damages, rendering the maintenance of a class action unmanageable in this case. *See Pearson*, 2006 WL 66304, at *12 (denying class certification of fraud and UTPA claims based on uniform representations due to lack of class-wide proof of reliance and causation).

This Court certified claims "only as to students who entered into contracts for services with defendants after defendants allegedly knew and failed to disclose that the outcomes for students were materially different than represented in Defendants' catalog."[79] But these Alleged Omissions cannot be considered in a vacuum. The Court must consider whether all class members would likely consider the mix of information described in defendants' catalog and related enrollment documents (including, for example, the GSRD form and various different

[79] Nylen Decl., Ex. J (Letter Order) at 9; *see also* Ex. Q (Conditional Certification Order) at 2-3.

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Disclosure Statements issued during the class period) to represent outcomes materially different from those they actually experienced. This analysis, which necessarily requires an individualized assessment of the expectations prior to enrollment and the outcomes after enrollment, cannot be ignored or replaced by a "formula."

As the Court recognized, Defendants' Alleged Omissions are only actionable to the extent that they are material—*i.e.*, the Alleged Omissions (or the alleged affirmative misrepresentations in the catalog that should have been corrected by omitted information) had to be a substantial factor in all class members' enrollment decisions. *See Millikin*, 283 Or at 285-286; *Wieber*, 231 Or App at 480. Because Surrett has been designated as the "everyman" whose experiences are the proxy for all class members, the fact that he did not find these omissions to be material means that no class members can recover. At best, there can be no presumption of materiality or harm with respect to the absent class members. *See In re Countrywide Fin. Mortgage Mktg. & Sales Practices Litig.*, No. 08-1988, 2011 WL 6325877, *10 (SD Cal Dec. 16, 2011) (denying class certification where defendants' evidence regarding materiality refuted the representations of plaintiff's counsel).

In *Countrywide*, the court refused to certify a class in a consumer fraud case under circumstances similar to those present here. The court found that plaintiff had not established that the materiality element of her California Unfair Competition Law claim was subject to proof by common evidence where plaintiff "fail[ed] to provide any evidence to support this argument" and where defendants submitted evidence demonstrating that "class members may have been unconcerned" with the alleged misrepresentation. *Id.* "Under these circumstances, the element of materiality is not subject to common proof on a classwide basis." *Id.*

Here, thousands of individual inquiries would be required to determine why people enrolled, how they understood the mix of information presented to them during the enrollment process, whether and how the allegedly omitted information factored in each plaintiff's enrollment decision, and whether each plaintiff suffered harm as a result of the alleged omission.

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The class members were not buying a widget or a commodity; they were buying an education. The limited individual and class discovery available has indicated a wide range of circumstances that could contribute to class members' enrollment decisions, including different goals, ages, work experiences, and education levels. WCI students' different abilities and efforts are reflected in the range of GPAs achieved while at WCI. Lastly, discovery has shown a broad range of outcomes for class members, including students who dropped out of their culinary program or have left the culinary field for personal reasons, graduates in low-paying jobs, moderately successful graduates, and high-earning graduates. The highly individualized enrollment-decision process, educational experience, and post-graduate employment experience precludes a common answer to these crucial questions and thus guts Plaintiffs' class of the requisite commonality under ORCP 32 A(2). Surrett cannot satisfy his substantial burden to proceed on a class basis and his effort to do so cannot survive this Court's rigorous analysis.

It is precisely for this reason that the Supreme Court, in the recent *Dukes* case, found no commonality. There, the Court found that a common question regarding liability would not support a class action where plaintiffs' claims implicated millions of employment decisions made by various representatives. A similar problem presents itself here. To paraphrase the Court:

> Here [Plaintiffs] wish to sue about literally [thousands] of [enrollment] decisions at once. Without some glue holding the alleged *reasons* for all those decisions together, it will be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question[s (i) *was the alleged omission/misrepresentation material to my enrollment decision* and (ii) was I harmed].

Dukes, 131 S Ct at 2552; *see also In re Google Adwords Litigation*, No. 08-3369, 2012 WL 28068, *14-15 (ND Cal Jan. 5, 2012) (noting complications arising from the widely varying goals informing the purchase decisions of class members).

Like the Wal-Mart employees seeking backpay in *Dukes*, each class member here must establish his or her own right to recover, and this cannot be done on a class-wide basis. *Cf. Alsea*

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Veneer, Inc. v. State of Oregon, 117 Or App 42, 843 P2d 492 (1992) (addressing strict-liability statutory violations); *In re Google Adwords Litigation*, 2012 WL 28068, at *12-14 (addressing California UCL and FAL claims, which do not require individualized proof of harm to establish liability).

In *Belknap*, the appellate court had "little trouble" affirming the trial court's decertification decision three years after the original certification where the trial court concluded that "individual questions of fact-questions that would require numerous witnesses to be called-predominated" and "in most if not virtually all cases, the resolution of one individual's factual issues will have no impact on resolving another's claim." *Belknap*, 235 Or App at 667. For the same reasons, the Court should decertify the conditionally certified class in this case.

C. Due Process Requirements Render a Class Action Inferior in this Case.

1. Individual Issues Predominate Over any Common Questions and Render this Case Unmanageable as a Class Action.

In its letter ruling, the Court suggested that the individual issues pertaining to damages could possibly be addressed in the second phase of a bifurcated proceeding where individual damages cases would be presented and resolved.[80] In so noting, the Court accurately stated that differences in damages amongst class members "do[].not necessarily present a valid basis for declining to certify [a class]."[81] But this case goes way beyond differences in mechanical damages calculations and involves core issues regarding value, causation, and injury. Where such complications are properly considered, courts have consistently recognized that difficulty calculating the differences in individual damages is a factor that must be considered in determining whether individual issues predominate over common ones.

Here, determining the fact or amount of harm is not something that may be done by application of a mathematical formula (*e.g.*, multiplying the number of purchases or shares by

[80] *See* Nylen Decl., Ex. J (Letter Order) at 8.

[81] *Id.*

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some number) but rather requires a detailed review of each class member's experiences. Class members enrolled for different reasons, obtained different "value" from their education and obtained different jobs and salaries after they graduated from WCI. *See In re Google Adwords Litigation*, 2012 WL 28068, *15 (noting that the proposed class included individuals with "widely varying goals, which makes it difficult to calculate the actual value" received in exchange for payment and denying class certification because benefits received by individual class members "would need to be accounted for in any restitution calculation"); *see also In re Vioxx Class Cases*, 103 Cal Rptr 3d 83, 100 (Cal Ct App 2009) (finding that restitution could not be calculated on a class-wide basis where the issue of the value received by class members who purchased Vioxx was patient-specific); *McLaughlin*, 522 F3d at 229 (decertifying class and finding no reasonable means for calculating benefit-of-the-bargain damages on a class-wide basis).[82]

The fact-intensive nature of these individual inquiries negates any perceived benefits of class-wide adjudication of Plaintiffs' claims, *see* ORCP 32 B, in particular because individual issues will predominate heavily over common ones, *see* ORCP 32 B(3), and the result will be an unmanageable quagmire of thousands of damages mini-trials, *see* ORCP 32 B(7). It is well established that courts conducting a predominance inquiry apply a more rigorous standard than that embodied in the commonality requirement for class certification. *Amchem Prods., Inc. v. Windsor*, 521 US 591, 623-24 (1997); *see also In re Ferrero Litigation*, --- F.R.D. ----, 2011 WL

[82] *See, e.g.*, *McLaughlin*, 522 F3d at 231-33 (decertifying class and holding that burden of individual determinations of damages must be considered in the predominance calculus); *Steering Comm. v. Exxon Mobile Corp.*, 461 F3d 598, 602 (5th Cir 2006) (affirming denial of class certification due to predominance of individual damage issues); *In re Google Adwords Litigation*, 2012 WL 28068, at *14-15 (denying class certification where plaintiffs failed to affirmatively demonstrate that restitution could be calculated by methods of common proof, because "in many instances, individual proof would show that [putative class members] received significant revenues and other benefits from [their purchases] that would need to be individually accounted for in any restitution calculation"); *Mazur v. eBay, Inc.*, 257 FRD 563, 571 (ND Cal 2009) (denying certification where individualized inquiries into existence and extent of harm predominated over common questions).

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5557407, *5 (SD Cal Nov. 15, 2011) ("The predominance analysis *** is more stringent than the commonality requirement ***."); *Cruz v. Dollar Tree Stores, Inc.*, Nos. 07-2050, 07-4012, 2011 WL 2682967 (ND Cal July 8, 2011) (decertifying class in the absence of common proof because "the commonality threshold, let alone the predominance inquiry" had not been met). Here, it will be impossible to determine damages on a class-wide basis without violating Defendants' due process rights.

To assess damages, the Court would have to take into account numerous case-by-case factors, including each class member's reasons for enrollment, their expectations at enrollment, the amount of tuition they paid, the amount of financial aid, grants, or scholarships they received, the loans they may have obtained, the different interest rates on those loans, any loan forgiveness they may have or will receive,[83] their experiences after graduation, the positions they obtained, the salaries and benefits at those positions, the reasons why they were or were not promoted or decided to stay at or leave those positions, all to determine in what amount (or even whether) each class member was harmed by Defendants' Alleged Omissions.

In one recent omissions case, the Ninth Circuit found that a limited advertising campaign consisting of product brochures and television commercials "f[e]ll short" of the type of "extensive and long-term fraudulent advertising campaign" that would entitle plaintiffs to a presumption of reliance on those materials and thus held that any class would need to be limited to those individuals "who were exposed to advertising that is alleged to be materially misleading." *Mazza v. Am. Honda Motor Co.*, --- F3d ----, 2012 WL 89176, at *12 (9th Cir Jan. 12, 2012). Further, the court held that "the relevant class must also exclude those members who

[83] For example, the President has recently used his executive authority "to expand the existing income-based repayment program with a 'Pay as You Earn' option that would allow graduates to pay 10 percent of their discretionary income for 20 years and have the rest of their debt forgiven." (Nylen Decl., Ex. Y (Oct. 25, 2011 N.Y. Times article).) Other "borrowers who have a mix of direct federal loans and loans under the old Federal Family Education Loan Program" will be able to "consolidate them at a slightly lower interest rate." *Id.* The applicability of these programs to class members is inherently a highly individualized inquiry.

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learned of the *** allegedly omitted limitations before they purchased or leased [the product at issue]." *Id.* Accordingly, the court vacated the class certification decision "because common questions of fact do not predominate where an individualized case must be made for each member showing reliance." *Id.*

Like *Mazza*, this case involves a relatively limited advertising campaign consisting of school catalogs and other enrollment and admissions materials. There is no sustained, pervasive campaign that would justify a presumption that each class member had read and relied on the same information prior to enrolling at WCI. More importantly, the class as conditionally certified undoubtedly includes students who either knew or learned of the allegedly omitted information before they enrolled at WCI. For example, it would be unreasonable to presume that Surrett (who, before enrolling, did only limited research and had only superficial interaction with WCI admissions personnel) and Adams (who did more extensive internet research, had conversations with other culinary school admissions personnel, and spoke a dozen times with WCI admissions personnel) and Thompson (who is the daughter of a WCI graduate) relied on the same mix of information when enrolling at WCI. It would also be unreasonable to presume that none of these individuals knew or discovered the allegedly omitted information prior to enrolling. Indeed, Surrett even admitted that WCI met his expectations. Further, the class as conditionally certified is overbroad in that it invariably includes individuals who learned of the allegedly omitted information prior to their enrollment at WCI.

2. The alleged size of class members' claims and the availability of bilateral arbitration further militate against class-wide adjudication.

An order decertifying the conditionally certified class would not harm the rights of absent class members. Absent class members' claims would be tolled pending notification of a decertification order. ORCP 32 N(2), (4); *see also Culver*, 277 F3d at 914. As discussed in Defendants Opposition to Plaintiffs' Motion To Certify Class Action ("Class Cert. Opp."), the class members in this case have asserted claims on the order of tens of thousands of dollars each

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and thus there is little risk that any class member who in good faith felt aggrieved would forego his claims against Defendants.[84] Individual class members still have an interest in controlling whether and where to litigate against WCI.[85] A class action is not superior under these circumstances.[86] Furthermore, at least one court has recognized that the availability of bilateral arbitration of class members' claims obviates any concern that class members will have to initiate separate, costly in-court litigations to obtain relief. *BeauPerthuy v. 24 Hour Fitness USA, Inc.*, 772 F Supp 2d 1111, 1134-35 (ND Cal 2011) (existence of arbitration agreements between class members and defendant favored decertification where individualized inquiries predominated plaintiffs' claims). Given the predominance of individual issues regarding materiality and damages and the availability of an efficient, and therefore superior, arbitral forum for the resolution of class members' highly individualized, high-dollar claims, the Court should decertify the conditionally certified class.

D. The Class Definition Should Be Amended to Exclude Any Class Member Who Signed an Enrollment Agreement Containing an Express Class-Action Waiver.

At a minimum, the Court should decertify the class and/or modify the class definition and dismiss the claims of any class member who signed a post-November 2007 WCI Enrollment Agreement. Plaintiffs argued against Defendants' motion to compel arbitration on the ground that Surrett's (and Adams's) pre-November 2007 WCI Enrollment Agreements did not include an express class-action waiver like the one at issue in *AT&T Mobility LLC v. Concepcion*, 131 S Ct 1740, 1753 (2011) (holding that state law limitations on the enforceability of arbitration

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[84] *See* Nylen Decl., Ex. R (Class Cert. Opp.) at 29-30 (citing ORCP 32(B)(8)).

[85] *Id.* (citing ORCP 32(B)(4)).

[86] *See, e.g., City of St. Petersburg v. Total Containment, Inc.*, 255 F.R.D. 630, 658 (S.D. Fla. 2009) ("individual class members certainly have financial incentive to prosecute their individual claims"); *Smith v. City of Oakland*, No. C-06-0717, 2008 WL 2439691, at *1 (N.D. Cal. June 16, 2008) ("potential for substantial damages coupled with the applicability of fee-shifting statutes" meant plaintiff failed to show superiority); *Abby v. City of Detroit*, 218 F.R.D. 544, 549 (E.D. Mich. 2003) ("Other courts have found superiority lacking under similar circumstances, i.e., where proposed class members have brought individual actions.") (collecting cases).

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provisions including class-action waivers are preempted by the FAA), and like that found in many absent class members' Enrollment Agreements.[87]

By arguing that Surrett is exempt from bilateral arbitration based on a difference between the language of his arbitration agreement and that signed by approximately half of the absent class members, Surrett underscored a fundamental heterogeneity in the class conditionally certified by this Court. The class as defined is comprised of what should be two subclasses: those who signed a class action waiver and those, like Surrett, who did not. The subclass to which Surrett does not belong cannot survive a motion to compel bilateral arbitration. Members of that subclass should be dismissed from this class action.

There is no dispute that all class members who signed Enrollment Agreements after November 1, 2007, agreed to an express class action waiver. As such, they may not participate in this class-action lawsuit. Thus, Surrett is an inadequate class representative for absent class members who, unlike him, agreed to an express class action waiver that would compel bilateral arbitration of their claims. Allowing class members who expressly waived their right to participate in a class action to ride the coattails of a representative plaintiff who did not sign such a waiver would violate Defendants' due process right to invoke bilateral arbitration against those WCI students who expressly waived their right to participate in an in-court class action.

The Court should not allow Plaintiffs an opportunity to substitute another representative for this newly discovered "subclass" because such a substitution would be futile. *See, e.g., In re FleetBoston Fin. Corp. Securities Litig.*, 253 FRD 315, 335 (DNJ 2008) ("[T]he efficient administration of justice and the interests of the class" are served by decertification where "the facts at bar indicate that all reasonable attempts to find a suitable class representative would be futile."); *Powell v. Nat'l Football League*, 773 F Supp 1250, 1255 (D Minn 1991) ("Because no replacement representatives have *or are likely to* come forward *** the court determines that

[87] Nylen Decl., Ex. W (Surrett's Opp. to Defs.' Mot. To Compel Arbitration and To Dismiss Action) at 1, 4, 7-10.

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dismissal without prejudice is warranted." (emphasis added)). Indeed, at least one court has acknowledged the futility of finding a substitute class representative in the face of a bilateral arbitration provision signed by class members and cited the risk of decertification under these circumstances as a reason to approve a pending class-wide settlement agreement. *See Perry v. FleetBoston Fin. Corp.*, 229 FRD 105, 116 (ED Pa 2005) (recognizing that an enforceable bilateral arbitration provision would bar individual class members from pursuing their claims as a class). Accordingly, the Court should decertify the class certified by the Conditional Certification Order and dismiss the claims of any class member who signed a post-November 2007 WCI Enrollment Agreement including an express class-action waiver, without prejudice. Alternatively, the Court should amend the class definition to encompass only those class members who enrolled between the beginning of the class period and November 28, 2007.

E. Plaintiffs' Counsel Should Not Get Yet Another Chance To Substitute a Class Representative for Any Surviving Class Claims.

This Court has recognized that there comes a time when "[f]ree and liberal substitution of representative plaintiffs is not appropriate." *Rivera*, Ltr. Op. at 5. In *Rivera*, the Court granted defendants' motion to dismiss plaintiff's class claims and declined to allow for substitution of class representatives because plaintiffs had been "allowed full discovery and an extensive 3-year period in which to develop their claims." *Id.*; *see, e.g.*, *Wymer v. Huntington Bank, Charleston, N.A.*, No. 3:10-0865, 2011 WL 5526314, *10 (SD W Va Nov. 14, 2011) (denying class certification and substitution of an adequate class representative after 15 months, two class representatives, and four complaints, noting that "the Court will not allow Plaintiffs to go on an endless hunt for a named representative").

Plaintiffs' litany of inadequate class representatives must come to a stop. Their first representative, Koehnen, refused to appear for her deposition and would not return her counsel's calls. Her counsel withdrew, and her claims were dismissed. Plaintiffs' second representative, Gozzi, withdrew as class representative after Defendants noticed her deposition. Plaintiffs' next

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representative, Adams, enrolled prior to the start of the class period and thus is not a class member. More recently, Surrett has demonstrated his inadequacy as a class representative given his inability to establish materiality and harm as a result of the Alleged Omissions.

If anything, this parade of class representatives simply confirms why no class representative can represent a class on such highly individualized claims. After over four years of litigation and six complaints, class counsel should not get a fifth opportunity to promote another class representative.

IV. CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court decertify the conditionally certified class.

DATED: February 13, 2012

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By: _____

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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 DECLARATION OF GREGORY A. NYLEN IN SUPPORT OF DEFENDANTS': (1) MOTION FOR SUMMARY ADJUDICATION OF CLAIMS BASED ON CERTIFIED ALLEGATIONS; AND (2) MOTION TO DECERTIFY CLASS

DECLARATION OF GREGORY A. NYLEN

I, Gregory A. Nylen, declare as follows:

1. I am an attorney licensed to practice law in California and I am a shareholder with the law firm of Greenberg Traurig, LLP, counsel of record for defendants Western Culinary Institute ("WCI") and Career Education Corporation ("CEC"). I am admitted *pro hac vice* in this action. I make this declaration in support of Defendants' Motion for Summary Adjudication of Claims Based on Certified Allegations and Defendants' Motion to Decertify Class. 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 the Court's November 7, 2008 Order allowing absent class member Jennifer Schuster to intervene, to allow Shannon Gozzi to withdraw as class representative, and for leave to file a Third Amended Complaint.

3. Attached hereto as **Exhibit B** is a true and correct copy of the October 22, 2008 Declaration of David F. Sugerman in Support of Plaintiffs' Counsel's Motion to Terminate

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IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

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

Plaintiffs,

vs.

Case No. 0803-03530

WESTERN CULINARY INSTITUTE, LTD and CAREER EDUCATION CORPORATION,

Defendants.

VIDEOTAPED DEPOSITION OF NATHANIEL S. SURRETT

Taken in behalf of the Defendants

January 21, 2011

BE IT REMEMBERED that the videotaped deposition of NATHANIEL S. SURRETT was taken before Jennifer J. DeOgny, court reporter, on January 21, 2011, commencing at the hour of 9:08 a.m., in the conference room of the Law Office of David F. Sugerman, PC, in the City of Portland, County of Multnomah, State of Oregon.

-:-

APPEARANCES:

LAW OFFICE OF DAVID F. SUGERMAN, PC
Attorney at Law
By David F. Sugerman
Counsel for Plaintiff Nathaniel S. Surrett.

LAW OFFICE OF TIM QUENELLE, PC
Attorney at Law
By Tim Quenelle
Counsel for Plaintiff Jennifer Schuster

GREENBERG TRAURIG, LLP
Attorneys at Law
By Gregory Nylen
Counsel for Defendants

SMITH FREED & EBERHARD P.C.
Attorneys at Law
By John M. Kreutzer
Counsel for Defendants

ALSO PRESENT: Trinity Webber (Videographer)

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NATHANIEL S. SURRETT
was thereupon called as a witness in behalf of the Defendants and, after having been first duly sworn, was examined and testified as follows:

EXAMINATION BY-MR. NYLEN:

Q. Good morning. My name is Greg Nylen. I'm with the law firm of Greenberg Traurig, and we represent the defendants in this action.

Have you ever had your deposition taken before?

A. No.

Q. Could you state your full name for the record, please.

A. My name is Nathaniel Shawn Surrett.

Q. And could you state your full address for the record, please.

A. 1420 Madison Avenue Northwest, Olympia, Washington 98502.

Q. Do you have a cell phone?

A. I do.

Q. What's your cell phone number?

A. The area code is (828) 337-1647.

Q. What area code is (828)?

A. North Carolina.

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Q. Do you recall when you were originally scheduled to graduate from WCI when you enrolled?
A. Yes. It was around September or October of 2008.
Q. 2008 or 2007?
A. Scheduled to graduate?
Q. Uh-huh.
A. Scheduled to graduate in 2008.
Q. I'm sorry. Okay. It wasn't February of 2008?
A. No, sir.
Q. Did you consider any schools other than Evergreen to attend after attending WCI?
A. Yes.
Q. Which ones?
A. Washington State.
Q. Why did you pick Evergreen?
A. I picked Evergreen because it was still on the West Coast.
Q. Washington State's not on the West Coast?
A. Coastal is what I should say.
Q. Okay. What did you do to investigate those two schools before choosing Evergreen?
A. I thoroughly looked through their website, I contacted the school to see which program was right for

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me, and I chose Evergreen.
Q. Did you ask anybody at Evergreen what kind of salaries you might make after graduation?
A. I did.
Q. What did they tell you?
A. They said it depended on your field of study and the amount of effort you put into your degree.
Q. Did you ask anybody about what kind of jobs you could expect to obtain after graduation?
A. Yes.
Q. And what did they tell you?
A. Internships to begin with for some of the science degrees, depending on what degree you were in, maybe an upper level management position. It depends on where you were.
Q. Did you ask them anything about placement statistics or placement rates?
A. No.
Q. Why not?
A. It didn't apply.
Q. Why not?
A. It didn't apply to me because I learned not to rely on a school.
Q. Did you tell anybody that at Evergreen?
A. No.

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Q. Did they provide you with any disclosures relating to placement statistics?
A. No.
Q. Did you ask anybody if they had any disclosures?
A. No.
Q. Did you do any independent research to determine whether there were any placement statistics applicable to graduates from Evergreen?
A. Could you rephrase that, please.
Q. Did you do any independent research or investigation to see if you could find any placement statistics relating to Evergreen on your own? You said you relied on you. Did you do any independent investigation about placement statistics?
A. I did a little bit.
Q. Like what? What did you do?
A. I contacted some alum at Evergreen to see where they were, how they were doing.
Q. Anything else?
A. I looked at Evergreen's website and looked at the students that had graduated. I looked at students that had recent scholarships.
I think that's about it.
Q. Did you actually apply to any other schools

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other than Evergreen after graduating from WCI?
A. No.
(Document, EXB. 3, marked.)
BY-MR. NYLEN: (Continuing)
Q. I've marked as Exhibit 3 a copy of your Career Services file relating to WCI. Let me ask you a question.
In terms of your own investigation of placement statistics relating to Evergreen, you testified that you talked to some of the graduates to see where they were; is that correct?
A. Yes, sir.
Q. As a result of those discussions or any other investigation you did on your own, did you ever determine any placement statistics of your own or placement rates of your own relating to Evergreen?
A. No, I didn't.
Q. But you enrolled there anyway despite not having those numbers or statistics, correct?
A. Correct.
Q. Is that because the actual numbers or statistics were not important to you; is that right?
A. No, that's not right.
Q. Then why didn't you do something to find out what the actual numbers were?

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A. I didn't think that the statistics they provided about their employment were incredibly important at the time. I needed to finish my bachelor's degree.
Q. Let's talk for a minute about your employment prior to going to WCI, after getting out of high school. Can you just kind of walk me through jobs you had up to WCI, from when to when, what your job duties were, and where you worked.
And you can take a look at this career student services file. There's two resumes in here. Take a look at those for a minute. WCI --
MR. NYLEN: Do I have to say the "P" every time or can we just agree -- okay.
MR. SUGERMAN: Just use the last digits, otherwise we'll be here till way into the night.
BY-MR. NYLEN: (Continuing)
Q. Let's just say -13510 through -13511.
A. Understood.
Q. Did you prepare either of these resumes?
A. I did. I prepared both.
Q. Was -13511 prepared before -13510?
A. I don't believe so. I believe it was prepared after -13510.
Q. Were they prepared for different purposes?

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A. Yes, sir.
Q. And what were the purposes?
A. The purpose of this was to get a job in Portland. The first one -- that would be -13510 -- was to attain a job in Portland. The second one was to attain a job elsewhere, outside of Portland.
Q. I see. Did anyone at WCI help you prepare either of these resumes?
A. No, sir.
Q. Are you sure about that?
A. Pretty sure.
Q. They didn't provide you with any input?
A. On the first one?
Q. On either of them.
A. I'm saying that on the first one they said, "This looks good."
Q. So you provided it to WCI for comment?
A. During a class assignment, yes.
Q. Did you ever make any effort to obtain any input from anyone at WCI's Career Services Department or otherwise to get help on preparing a resume?
A. I did.
Q. Who did you ask help from?
A. I think I asked Susan Milke.
Q. Did she give you help?

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A. She did.
Q. What kind of help did she give you?
A. She looked over my resume and said, "I think this looks good."
Q. Did you ask her or anyone else at WCI for any other help in connection with your resume?
A. No.
Q. When you say "this," do you mean the one that was intended to help you find a job in Oregon --
A. I'm referring to --
Q. -- or both?
A. I'm referring to -- -13510 is the one that Susan Milke helped me on.
Q. Did you ask for any help on -13511 from anyone at WCI?
A. I did not.
Q. Why not?
A. It was a class assignment.
Q. I see. But you chose not to ask anyone at WCI for help with that version of your resume, correct?
A. Correct.
MR. SUGERMAN: Objection; mischaracterizes prior testimony.
You can answer.

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BY-MR. NYLEN: (Continuing)
Q. Is there any reason why you could not have asked for help from WCI with that version of your resume?
A. No.
Q. Is there a reason why you didn't ask for help in connection with that version of your resume?
A. No.
Q. If you want to look at these resumes to refresh your recollection, that's fine. If you could walk me through your employment after graduating from high school to and including WCI, and then we'll take WCI next.
A. Okay. So start during the summer after high school?
Q. Yes.
A. During the summer after high school I worked for Airborne Express, which turned into DHL. My father and grandfather were managers there. I worked for many summers and during some fall and winter hours. My job there was as a freight handler. I handled freight that we picked up in the Asheville area, sorted it into carts, put it into trucks, and it got shipped to other cities. I did that from 2004 to 2006.
Q. And why did you leave that job?

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a cook at any time before attending WCI?
A. As a line cook, I assume I did.
Q. Did you have any cooking experience, professional cooking experience prior to attending WCI?
A. No, sir.
Q. So how do you know you would have been able to get a job as a line cook prior to attending WCI?
A. Anybody can work at McDonald's.
Q. Do you have any -- what facts do you have to support your belief that you could have obtained a job as a line cook prior to attending WCI?
A. I have no facts.
Q. Did you make pastries for a living at any time before attending WCI?
A. No.
Q. Do you know what "garde manger" is?
A. I think I do.
Q. It means keeper of the food or pantry manager, correct?
A. Yes.
Q. What does that job entail specifically?
A. I guess making salads, making sure things are prepared correctly. It depends on where you are, I think.
Q. A person who's in charge of preparing and

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serving cold foods; is that right?
A. Yes.
Q. Did you ever work as a garde manger before attending WCI?
A. No, sir.
Q. Did you have the skills necessary to work as a garde manger before attending WCI?
A. No.
Q. Did you decide at some point that you wanted to attend culinary school?
A. Yes, I did.
Q. You wanted a career change at some point, correct?
A. Yes, sir.
Q. When was that? When did you reach that realization?
A. I reached that realization in January of 2007, that I needed a career change.
Q. Okay. And how did you come to that realization?
A. By going with what I like to do, what my family and friends enjoyed, what I enjoyed myself.
Q. And what were those things?
A. Making other people happy through food.
Q. So you decided at some point that you wanted

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to get into the culinary field?
A. Yes.
Q. And was it at that point?
A. It was around that time. I mean, January was when I decided that I needed a change. The next couple of months I decided what that change should be.
Q. Okay. And did you make any decisions about what kind of career you wanted in the culinary field?
A. I wanted to own my own restaurant.
Q. You wanted an organic restaurant, correct?
A. I think so.
Q. That's something you wanted down the road, right?
A. Or right off the start.
Q. Didn't you understand that that would take a few years before you'd have your own restaurant after graduation?
A. No.
Q. You sure about that?
A. I'm pretty sure.
Q. Didn't you tell somebody at WCI that you thought it would take five years or so to really get going in a culinary career?
A. I don't recall doing that.
Q. Why did you think that you'd be able to have

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a restaurant right after graduation?
A. I've heard of other people doing it.
Q. Did anybody at WCI tell you you would have a restaurant right after you graduated?
A. No professors did.
Q. Did anybody at WCI tell you you would have a restaurant after graduation?
A. No one told me that I would have a restaurant.
Q. So you based this understanding on conversations you had with other people?
A. Yes, sir.
Q. Who?
A. Family, friends.
Q. Anyone at WCI?
A. No, sir.
Q. How did you first learn about WCI?
A. I typed in "culinary school" through Google search and that was the first thing that came up.
Q. Okay. Did you -- so it wasn't through any sort of advertising that was sent to you unsolicited?
A. Partially. I asked the school to send me more information after reading their website, and they did.
Q. But that was solicited by you?

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A. Yeah.
Q. It wasn't as a result of some spam ad, correct?
A. No, it was not.
Q. When you found WCI through the Google search, did that lead you to a website?
A. It did.
Q. Which website?
A. The WCI cover page explaining what the school is, what you can hope to achieve with the school. It didn't have any technical information on it.
Q. What did it say about what you could achieve through the school?
A. Become a chef, pursue your culinary dreams; things like that.
Q. Did it say anything about you could have a restaurant after graduation?
A. I don't recall so.
Q. Did it promise you any kind of employment?
A. I don't recall so.
Q. Did it promise you any salary that you might earn after graduation?
A. No.
Q. Did you see any print ads relating to WCI

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before you attended the school?
A. Before I attended the school, no.
Q. Or before you enrolled at the school?
A. Before I enrolled either, no.
Q. What kind of materials did WCI send you after you asked them to send you materials?
A. They within a week after I asked sent me the WCI pamphlet explaining what the school did and was and an enrollment agreement.
(Document, EXB. 4, marked.)
BY-MR. NYLEN: (Continuing)
Q. I've marked as Exhibit 4 what plaintiffs contend is an ad published by WCI Bates stamped -2781.
Have you seen this document before?
A. I don't believe so.
Q. Did you see this advertisement prior to enrolling at WCI?
A. I don't believe I saw this particular one, no.
Q. So you didn't rely on this advertisement prior to enrolling at WCI?
A. Not this particular advertisement, no.
(Document, EXB. 5, marked.)
BY-MR. NYLEN: (Continuing)
Q. I've marked as Exhibit 5 what plaintiffs

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contend is another advertisement by WCI Bates stamped -2779, -2780 previously marked as Exhibit 4 to the Rab deposition.
Have you seen this document before?
A. No, sir.
Q. So you didn't rely on this document prior to enrolling at WCI, correct?
A. Not this particular document, correct.
(Document, EXB. 6, marked.)
BY-MR. NYLEN: (Continuing)
Q. We've marked as Exhibit 6 a document plaintiffs contend is an advertisement produced by WCI Bates stamped -2768.
Have you seen this document before, Mr. Surrett?
A. No, sir, I have not seen this document.
Q. So you didn't rely on this document prior to enrolling at WCI; is that correct?
A. That's correct.
Q. Nor did you rely on any statements in that particular document prior to enrolling at WCI, correct?
A. Correct.
Q. And is that also true for Exhibit 5, you didn't rely on any statements in that particular document prior to enrolling at WCI?

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A. Correct.
Q. And Exhibit 4, did you rely on any statements in that particular document prior to enrolling at WCI?
A. No.
(Document, EXB. 7, marked.)
MR. SUGERMAN: Counsel, this is really hard to read.
Can you read this?
THE WITNESS: Yes.
MR. SUGERMAN: So it's just middle age hard to read. That's good. Thank you.
BY-MR. NYLEN: (Continuing)
Q. I've marked as Exhibit 7 another document that plaintiffs contend is produced by WCI Bates stamped -615 through -616.
Have you seen this document before?
A. No, sir.
Q. Did you rely on this document or any statements it contains prior to enrolling at WCI?
A. I did not.
(Document, EXB. 8, marked.)
BY-MR. NYLEN: (Continuing)
Q. I've marked as Exhibit 8 a two-page document that is another advertisement or document, rather, that

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witness's academic file at WCI, and I'd like to kind of walk through this for a little bit.
If you could take a look at the first two pages, -13473 through -13474.
A. Okay.
Q. And is that your signature that appears above "signature of student"?
A. Yes, sir.
Q. And did you sign this document on May 15th, 2007?
A. I believe I did.
Q. So that's your handwriting with putting the date on the same line?
A. The date is my handwriting. My name is not my handwriting.
Q. Which name? Your signature is your handwriting on --
A. The signature is my handwriting, but the name under "student" is not my name -- that's not my handwriting.
Q. All right. So whose handwriting is it?
A. I believe it's whoever sent me the document.
Q. Did you fill in your address underneath that before signing it?
A. I did.

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Q. Was your name on next to name before you signed it?
A. Yes, it was.
Q. And this document listed the tuition and fees you would be expected to pay in attending WCI before you signed the enrollment agreement, correct?
A. Yes.
Q. It says "date of first class 5-21-07."
Is that the date that you were expected to start at WCI?
A. Yes, sir.
Q. And the anticipated completion date, that was -- August of 2008 was your expected graduation date from the school?
A. That was, yes.
Q. This is a North Carolina address.
Were you in North Carolina at the time you signed this agreement?
A. No, sir.
Q. Where were you?
A. I was in Idaho.
Q. Did you receive a WCI catalog at the time that you signed the enrollment agreement?
A. Yes.
Q. So you see where it says, "I also

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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 on-line registration site."
MR. SUGERMAN: I'm not sure where you're reading this. Can you tell us --
BY-MR. NYLEN: (Continuing)
Q. I'm sorry. It's above "signature of student." It says, "By signing below" -- it's right above your signature -- "I certify that I have received a copy of this enrollment agreement and that I have read, understand and agree to comply to all of its terms."
Do you see that?
A. Yes.
Q. That's right above your signature, correct?
A. Yes, sir.
Q. So you read, understood, and agreed to comply with all of the terms of this enrollment agreement before you signed it, correct?
A. To the best of my ability, yes.
Q. It's a true statement that you read, understood, and agreed to comply with the agreement, correct?
A. It's a true statement, yes.

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Q. Are you in the habit of signing documents that you haven't read first?
A. What was that?
Q. Are you in the habit of signing documents that you haven't read first?
A. No, sir.
Q. So all it says in the next sentence is that, in essence, you've received a copy of the catalog in one of these formats.
Do you see that?
A. Above my signature?
Q. Yeah.
A. Yeah.
Q. What format did you receive the catalog in? Was it just a printed copy?
A. It was printed.
Q. Do you see where it says, "I agree to comply with all school policies and rules contained therein"? Do you see that?
A. Yes, sir.
Q. So you understood before signing this enrollment agreement that you agreed to comply with all the school policies and rules contained in the school catalog, correct?
A. I agreed with what was in the school

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catalog, yes.
Q. And you read the school catalog before you signed this, correct?
A. Of course.
Q. And you see where it says, "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"? Do you see that sentence?
A. Yes, sir.
Q. And you agreed with that statement before signing this enrollment agreement, correct?
A. I did.
Q. "I hereby certify that all information I provided in my application for admission to WCI is complete, accurate and up to date."
Do you see that right above your signature?
A. Yes, sir, I see that.
Q. And that was a true statement when you signed this agreement, correct?

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A. Correct.
Q. And you understood that once you signed the agreement a legally binding contract would be created.
Is that your understanding?
A. Yes, sir.
Q. At the time you received this document, was the tuition and fees filled in already in the box stated "tuition and fees"?
A. Yes, sir.
Q. Was that filled in by someone at WCI?
A. I believe so.
Q. That was already on there?
A. Yes, along with my name.
Q. What else was already on there at the time you received the document?
A. I'm not a hundred percent sure of this because it was a long time ago. I believe it was my name, the amount of tuition and fees, and these dates up here, but --
Q. Date of first class and anticipated completion date?
A. Yes, sir.
Q. And the rest you filled in?
A. Yes.
Q. Except for the signature of the authorized

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school officer and the title and the date?
A. Yes.
Q. So in connection with reading through this enrollment agreement before signing it, as was your practice, on the next page where it says "policies and disclosures," you read through those before signing this, correct?
A. Yes, sir.
Q. You read No. 5 where it says, "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"? You read that before signing this enrollment agreement, correct?
A. Uh-huh.
Q. Is that a "yes"?
A. Yes, sir, it is.
Q. And you understood that statement before signing this enrollment agreement?
A. Yes, I did.
Q. What was your understanding of what that statement meant before you signed this?
A. Give my best effort.
Q. Your success is dependent on your individual efforts and abilities, correct?

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A. Yes.
Q. And success in the culinary field, correct?
A. Yes.
Q. No. 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."
You read that statement before signing this agreement, correct?
A. I did.
Q. And you understood the statement before signing this agreement?
A. Yes.
Q. Can you turn to -13475 to -13476, please.
A. Yes, sir.
Q. What is this a copy of? Did you sign a -- just tell me in your words what this is a copy of.

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facilities that you saw on your tour?
A. No. I thought it was fantastic, seeing a kitchen for the very first time, it was incredible.
Q. So the facilities looked adequate to you?
A. Yes, they did.
Q. Did you talk to any professors on that visit?
A. No.
Q. Did you ask to?
A. No. I didn't want to bother anybody.
Q. That was your choice, right?
A. Yes, sir.
Q. Did she tell you that you couldn't speak to any professors?
A. No.
Q. Did you talk to any current or former WCI students prior to enrolling at the school?
A. No.
Q. Why not?
A. I think that when I attended the tour it was in the evening and I don't remember seeing students there, but I didn't talk to students before I enrolled.
Q. Did you ask anybody whether you could talk to students before you enrolled?
A. No.

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Q. Why not?
A. I didn't understand why I should talk to students.
Q. That wasn't important to you?
A. The thought hadn't crossed my mind.
Q. Did you talk to anyone else other than Barbara prior to enrolling at WCI about WCI?
A. I don't remember talking to anyone else.
Q. Did you research any other schools other than WCI prior to enrolling there?
A. I think -- I didn't research. I looked at the Culinary Institute of America which was in California and decided that was too far away. I only looked at their website for a couple minutes and then realized it was in California and stopped looking.
Q. The CIA in Napa?
A. Yes, I think that's where it is.
Q. And by the "CIA," I mean Culinary Institute of America not the Central Intelligence Agency.
A. Yes, sir.
Q. Did you investigate any other culinary schools before enrolling at WCI?
A. I did not.
Q. Why not?
A. I perceived Western Culinary Institute to be

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the best school in the Northwest, so I wanted to go to the best school.
Q. What did you base that understanding on?
A. Through advertising, what the admissions officer Barbara had mentioned, and student placement rates.
Q. Did you do any other investigation to determine whether it was the best school in the West?
A. No.
MR. SUGERMAN: Objection; mischaracterizes prior testimony.
BY-MR. NYLEN: (Continuing)
Q. Do you know what a placement rate is?
A. Currently?
Q. Did you know prior to enrolling?
A. Not really.
Q. Do you have an understanding now as to what a placement rate is?
A. Yes, sir.
Q. What's your understanding?
A. A placement rate depicts the percentage of students who receive jobs right after school associated with that school.
Q. A percentage of students who obtain entry-level employment after school, correct?

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A. It didn't specify what kind of employment. It just said "these students get employed."
Q. Are you sure it didn't specify what kind of employment?
A. I don't recall.
Q. Did it say "initial employment"?
A. I don't recall.
Q. Did you ask anyone what kind of jobs it reflected?
A. Huh-uh.
Q. That's a "no"?
A. That's a "no."
Q. Did you compare any placement statistics relating to WCI to any placement statistics relating to any other schools?
A. No, sir.
Q. Why not?
A. I -- at the time I didn't really know the significance of it.
Q. Since you didn't know the significance of it, it wasn't important to you at the time, correct?
A. It was important.
Q. How was it important?
A. It was important because the admissions office wanted me to know what it was, so I assumed it

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was important.
Q. So why didn't you check into the statistics for other culinary schools if it was important to you?
A. Because they seemed to be the best culinary school in the Northwest.
Q. But why didn't you compare it to other schools to see what their rates were?
MR. SUGERMAN: Object to the form; argumentative.
You can answer.
A. I'm not sure.
BY-MR. NYLEN: (Continuing)
Q. Did you do anything to independently verify any placement statistics that WCI may have provided to you before you enrolled?
A. At WCI, no.
MR. SUGERMAN: So I notice we're coming up on the noonhour. Do you have thoughts about schedule? Do you want to take a moment to talk about that? Or what's your pleasure?
MR. NYLEN: Why don't we go for another ten minutes and then we'll take a lunch break.
MR. SUGERMAN: Fair enough.
MR. NYLEN: Then we can talk about how long we need at that point.

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MR. SUGERMAN: Sounds good. Thank you.
BY-MR. NYLEN: (Continuing)
Q. Did you do any research prior to enrolling at WCI to determine that graduates from the school obtain jobs in their field of study?
MR. SUGERMAN: Object to the form.
You can answer.
A. Could you repeat the question.
BY-MR. NYLEN: (Continuing)
Q. Did you do any research before you enrolled at WCI to determine whether graduates from the school obtained jobs in their field of study?
A. No.
Q. Why not?
A. The form said that they were placed in a job.
Q. Did you do anything to investigate that?
A. No.
Q. Do you know what a student loan default rate is?
A. I think I do.
Q. Tell me what your understanding is of student loan default rate.
A. I think it's the percentage of students who default on their loans.

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Q. Did you do any research before enrolling at WCI to determine what the student loan default rates were at WCI?
A. No, sir.
Q. Why not?
A. That had never crossed my mind.
Q. It wasn't important to you prior to enrolling, was it?
A. I never thought about it.
Q. So, therefore, it wasn't important, correct?
A. It hadn't crossed my mind. I didn't give it a value.
Q. So my question is, how could it have been important to you if you hadn't thought about it?
MR. SUGERMAN: Objection; asked and answered.
You can answer the question.
A. Can you repeat the question.
BY-MR. NYLEN: (Continuing)
Q. How could student loan default rates have been important to you prior to enrolling at WCI if you hadn't even thought about it at that time?
A. How could they have been important. They hadn't crossed my mind, so it wouldn't have been important.

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Q. Did you research student loan default rates at any other culinary schools before deciding to enroll at WCI?
A. No, sir.
Q. The same reason, they weren't important to you at that time?
A. Sure. Yes.
Q. You mean that's correct?
A. That's correct.
Q. Do you know who owns WCI?
A. Now I think I know who owns them. I believe it's Career Education Corporation.
Q. Had you heard of Career Education Corporation before you enrolled?
A. No, I hadn't.
Q. Do you know what a 10K is?
A. I believe it's a race.
Q. Other than the race? That's fair.
A. No, I don't.
Q. Do you know what the Securities and Exchange Commission is?
A. I've heard a lot about it recently, but back then I didn't know what that was.
Q. Did you review any filings by CEC -- if I refer to "CEC," can we have an understanding that

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refers to Career Education Corporation?
A. Yes, sir.
Q. Did you review any filings by CEC with the SEC prior to enrolling at WCI?
A. No, sir.
Q. Other than the fifth amended complaint, have you reviewed any other complaints filed in this case?
A. I think I reviewed the fourth amended complaint.
Q. Before it was filed?
A. I don't know.
Q. Any other complaints?
A. No, I don't think so.
Q. Did you review any declarations filed by anyone other than you in this case before they were filed?
A. No.
Q. Did you review any other pleadings or papers that were filed in this case before they were filed?
A. I don't think so, no.
Q. Let's take a look at your application for admission and then we can take a break. That's in your academic file, admissions file, which that particular document is Bates stamped -13477 through -13478. Have you seen this document before?

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A. Yes.
Q. Is this your handwriting that appears on the document other than the "Surrett, comma, Nathan" at the top of the first page?
A. Yes, sir.
Q. So you filled out this document?
A. I did.
Q. Is there anything in this document that is inaccurate?
A. I don't think so, no.
Q. You say that you use an e-mail address chefnate8@gmail.com?
A. Yes.
Q. When did you start using that e-mail address?
A. I created that as soon as I started looking into culinary school.
Q. And do you still use that e-mail address?
A. I do.
Q. Is becoming a chef something that you aspired to?
A. At the time it was.
Q. Did you expect to be a chef straight out of culinary school?
A. I did.

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Q. Did anyone at WCI promise you you'd become a chef?
A. No.
Q. You see on the next page where it says "What are your planned career goals? Short term: In the next five years, start my career"? Do you see that?
A. Uh-huh.
Q. So by that did you mean -- is that a "yes"?
A. That's a "yes."
Q. And you wrote that there?
A. Yes.
Q. Also "move to Canada."
So was it your short-term goal to start your career within the next five years after applying to WCI?
A. Yes.
Q. So did you expect that it would take a few years to get your career going after you graduated from WCI?
A. I expected that it would take me a few years to get my business started.
Q. And the business being the organic restaurant?
A. Yes.
Q. You said a long-term goal would "be highly

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successful, amazing, renound."
I assume that's renowned; is that correct?
A. Yes.
Q. And "well-off"; is that right?
A. Correct.
Q. Did you expect to be well-off immediately after graduating from WCI?
A. I did.
Q. You had this as a long-term goal, not a short-term goal.
A. Uh-huh, but I did expect that.
Q. Based on what?
A. Based on the hype.
Q. Did anyone promise you that you'd make a particular salary after you graduated from WCI?
A. No, sir.
Q. So if you expected to be well-off immediately upon graduation, why didn't you put this in the short-term goal?
A. Because I was talking to Barbara at the time I was filling this out and I felt that would sound very silly.
Q. It sounds silly because normally it takes people awhile to become well-off after graduating from college, does it not?

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externship?
A. I want to say early June. I went up and visited in May to make sure I liked it, and I believe I started in June of 2008.
Q. What was the nature of the externship?
A. What was the nature?
Q. Yeah.
A. It was working with a chef cooking, learning from her. I had opportunities to manage also.
Q. In fact, you filled in for her as a chef when she was out sometimes, correct?
A. Correct.
Q. And that was while you were still in school, was it not?
A. That was during my externship.
Q. Were you still enrolled then or -- I mean, were you still enrolled or had you graduated?
A. I hadn't graduated yet, so I guess I was still enrolled.
Q. Okay. How did you like the job?
A. It was wonderful.
Q. It was the kind of job you were looking for, wasn't it?
A. Yes.
Q. In fact, it was exactly the kind of job you

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were looking for, wasn't it?
A. Not exactly.
Q. Wasn't it at a place that had organic cuisine?
A. Partially organic.
Q. Okay. Didn't you express how much you liked the job to your employer?
A. I told him that it was great.
Q. Okay. In other words, fair to say you were happy with the job?
A. Yes.
Q. Did that job turn into employment after you graduated?
A. No. It was a seasonal position.
Q. Did they offer you a job after you graduated?
A. Not really.
Q. You sure about that?
A. Uh-huh.
Q. Is that a "yes"?
A. I am sure that they didn't offer anything other than a seasonal position.
Q. Did they offer you a seasonal position after you graduated?
A. Yes.

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Q. So they did offer you a job?
A. For the next year, yes.
Q. What job did they offer you?
A. To work in the kitchen as the same position I was in.
Q. And what was the technical -- or was there a name for that position?
A. Line cook.
Q. And you would fill in for the chef when she's not around in that position the following year, too? Did they tell you that?
A. They didn't specify.
Q. But it would have been the same job?
A. It would have been.
Q. We'll get back into that a little bit later. Let's take a look at the catalog for a little bit.
A. Okay.
MR. NYLEN: Can we go off the record for a second.
(Discussion held off the record.)
(Recess taken from 1:30 to 1:32.)
(Document, EXB. 10, marked.)
BY-MR. NYLEN: (Continuing)
Q. Mr. Surrett, if you could take a look at the document I've marked as Exhibit 10, which is Bates

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stamped -3209 through -3263. Let me know when you've completed your review.
A. I will let you know.
I don't know if I've seen this catalog before, not this particular one, but I have seen -- I'm sure I must have seen it.
MR. NYLEN: Let's go off the record for a second.
(Discussion held off the record.)
BY-MR. NYLEN: (Continuing)
Q. After you signed the enrollment agreement, what was the next step you took in the process of enrolling at WCI?
A. I mailed in the enrollment agreement and waited for a phone call and instructions.
Q. And then what happened?
A. I received a call -- I don't remember the date -- from Barbara saying when my enrollment date started, when I should be there; if I wanted to tour the school in advance, what date I could do that. And I did before I started classes.
And I think that's about how -- I think -- I think that's all I talked about.
Q. Did you tell Ms. Brinkerhoff in one of your conversations before you enrolled that you didn't have

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extensive experience cooking?
A. Yes.
Q. And, in fact, you had no professional cooking experience prior to enrolling at WCI, correct?
A. Correct.
Q. Did you tell her, Ms. Brinkerhoff, in one of your conversations that one of the things you wanted to do after you graduated was do an organic farm restaurant?
A. Yes.
Q. Did Ms. Brinkerhoff or anybody else at WCI tell you that you would be able to open an organic farm restaurant right after you got out of school?
A. No.
Q. You did not tell Ms. Brinkerhoff in these conversations that what was important to you was getting an entry-level job when you graduated from WCI, correct?
A. I did not tell?
Q. Did you tell her in any of these conversations what mattered to you is getting an entry-level job when you graduated?
A. I didn't say anything remotely similar --
Q. -- ultimately an organic restaurant at some point in your career, correct?

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A. Correct.
Q. I've asked similar questions, but I just want to make sure I'm covering all my bases.
Did Ms. Brinkerhoff or anyone else at WCI promise you before you enrolled at the school that you would obtain any type of job after you graduated?
A. They said it was highly likely.
Q. Highly likely that you would, you would obtain any sort of job?
A. No, they didn't say any sort of job. They just said it would be highly likely.
Q. But you've already -- that was before you signed the enrollment agreement?
A. I don't recall.
Q. At the time that you -- before you signed the enrollment agreement, you were not even convinced of a future for you in the culinary field, correct?
A. At the time I signed it --
Q. Yes.
A. -- I didn't feel there was a future for --
Q. Yes, you weren't sure.
A. I guess that's fair, yes, I wasn't sure.
Q. Did anyone other than Ms. Brinkerhoff have any discussions with you regarding WCI's placement statistics before you enrolled at the school?

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A. No.
Q. Did anyone other than Ms. Brinkerhoff say anything to you or have any discussions with you about salaries you might expect to make after graduation before you enrolled at the school?
A. Not that I recall.
Q. Did Ms. Brinkerhoff say anything to you with respect to the quality of training you might expect to obtain at WCI?
A. She did.
Q. What did she say?
A. She said that culinary degree was excellent. And out of all the degrees she would pick, she would pick that one.
Q. Did she say anything to you about the quality of training you might expect?
A. She hinted at it.
Q. How so? Explain.
A. When the topic of the quality of training came up, she said it was top-notch. It wasn't those exact words, but it was in a similar way.
Q. Did she say anything else?
A. Did she?
Q. Yeah.
A. I don't remember her saying anything else.

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Q. Did you ask her what she meant by "top-notch"?
A. No, I didn't.
Q. Did you do any independent research to determine what the quality of the training at WCI would be before you enrolled at the school?
A. I did not.
Q. Did Ms. Brinkerhoff or anyone else say anything to you with respect to WCI's placement services before you enrolled at the school?
A. Which placement services?
Q. Placement services offered by WCI.
A. Are we talking about employment or housing or --
Q. Employment.
A. With employment they said that they usually place students in positions. They didn't say what kind.
Q. Did you ask what kind?
A. No.
Q. Why not?
A. The question didn't occur to me.
Q. The kind of position wasn't critical for you at that time?
A. Just starting out, no, it wasn't.

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Q. Did you read any statements in any advertisements about placement services before you enrolled at WCI?
A. No.
Q. Did you read any statements in any advertisements about the quality of training at WCI before you enrolled at the school?
A. I believe so. I mean, I read the website pertaining to the level of quality.
Q. Do you recall any specifics?
A. Just pictures.
Q. Pictures of what?
A. Pictures of the school that they represented in this catalog.
Q. Do you contend that any of the pictures of the school in the catalog are inaccurate?
A. Do I say that they're inaccurate?
Q. Yes.
A. In some ways, yes.
Q. How so?
A. The class sizes are much smaller in the photographs. The kind of food that they show here was not often made in classes. And students seemed really happy from when I was in there.
Q. Are there any pictures in the catalog that

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purport to show an entire class?
A. Yes, a few.
Q. Which ones?
A. If you turn to -03222, it's showing the entire class up on the line smiling, having a great time.
Q. How do you know that that's supposed to show the entire class? What do you base that on? Why couldn't there be other people in the room where that picture was taken?
A. There could be.
Q. So you're just speculating?
A. Yes.
Q. Did you see or read any statements in any advertisements about placement statistics before you enrolled at WCI? And putting aside the graduate success rates disclosure form, which isn't an advertisement, did you see any or read any statements in any ads about placement statistics before you enrolled at the school?
A. Would a Food Network commercial count?
Q. What did you see in a Food Network commercial?
A. I just saw an ad for Western Culinary Institute once.

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Q. Did that ad mention placement statistics?
A. No.
Q. I'm asking you if you saw any advertisements that mentioned placement statistics before you enrolled at the school.
A. No.
Q. Did you see any ads that mentioned salaries before you enrolled at the school?
A. I did not.
Q. Before you enrolled at WCI, did Ms. Brinkerhoff tell you that WCI's training would qualify you to work as a chef immediately upon completion of the program?
A. She did not say that.
Q. Did anyone else say that before you enrolled?
A. No.
Q. Did you see, hear, or read any other statements in any context to the effect that WCI's training would qualify you to work as a chef immediately upon graduation from the program?
A. No.
Q. And, in fact, nobody at WCI guaranteed you that you would become a chef immediately upon completion of the program in which you enrolled,

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correct?
A. Correct.
Q. And no one from WCI guaranteed you that you would own and operate a restaurant immediately upon completion of the program in which you enrolled, correct?
A. Correct.
Q. Did anybody from WCI tell you that its training of management track students would qualify them to manage restaurants, resorts, and hotels upon completion of any program at the school?
A. I don't remember.
Q. Did you see, hear, or read any statements in any advertisements for WCI to the effect that WCI's training of management track students would qualify them to manage restaurants, resorts, and hotels upon completion of the program?
A. I don't remember. I want to say, no, I didn't hear anything.
Q. Well, you never enrolled in the Hospitality and Restaurant Management program, correct?
A. Correct.
Q. So you have no idea what admissions people or anyone else from WCI may have told prospective students who enrolled in that program before they

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inaccurate.
Q. Can you go to -13559.
A. Yes.
Q. Is this your handwriting on this document?
A. Yes, the first half is my handwriting.
Q. And did you sign it where it looks like a signature?
A. Yes, sir.
Q. You signed it on June 1st, 2007?
A. Yes.
Q. Why did you -- tell me about this document. What is it?
A. From what I remember, I had stayed with my aunt and uncle right after moving from the University of Idaho in Salem and I had used my savings for travel and I wasn't making money while I was in the University of Idaho, so I requested the expense of living check early so I could make a rent payment and other expenses like a car payment.
Q. And did WCI help you out with that request?
A. They did.
Q. They gave you the money you needed?
A. Yes.
Q. Can you go to -13561.
A. Yes.

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Q. Did you -- have you seen this document before?
A. I think they mailed this to me.
Q. You saw this before agreeing to enter into any agreements with SallieMae regarding student loans concerning your education at WCI?
A. I don't remember seeing it before I signed my note, but I could have seen it before then.
Q. Who provided you with this document?
A. SallieMae.
Q. Not WCI?
A. Correct.
Q. Turn to -13584.
Do you know if those are your signatures that appear on this document above "signature of student"?
A. Are we looking at Authorization for Title V (sic)?
Q. Correct. Are these two different signatures or are they both yours?
A. They're both mine. My document came apart. Thank you.
Q. Do you know why there's two different dates next to the signatures here, April 26 and May 15th?
A. I don't recall why. I'm sure it had to do

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with the document we just looked at, the request for living expenses.
Q. Did you ever request a leave of absence from school?
A. I did not.
MR. SUGERMAN: When you get to a good break point, let's take a few minutes.
MR. NYLEN: Sure.
BY-MR. NYLEN: (Continuing)
Q. Can you turn back to three for a minute, please, Exhibit 3. Can you look at Bates -13504, please.
A. Yes.
Q. When you left WCI, I should say before you left, did you go through an exit interview?
A. I think I went through one over the phone.
Q. Do you remember who you talked to?
A. I believe Susan Milke, but I'm not a hundred percent sure.
Q. Okay. Was this in February of 2008?
A. For my exit interview?
Q. Yeah.
A. No, I don't think so.
Q. So February 26, 2008, doesn't sound like the correct date?

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A. No. My externship ended in October and it started in May, so I don't know what this date's referring to.
Q. You don't recall having an exit interview on February 26, 2008?
A. I don't.
Q. Do you recall telling Ms. Milke that the positions you desired were prep or a line cook after you graduated?
A. Huh-uh.
Q. Do you recall saying the salary range, realistic salary range you wanted was between $9 and $15 an hour?
A. Can you say that again.
Q. Do you recall telling her that the salary, realistic salary range you wanted was between nine and $15 an hour?
MR. SUGERMAN: Objection; mischaracterizes his prior testimony.
You can answer.
A. After being in the school, yes, that was what I expected.
BY-MR. NYLEN: (Continuing)
Q. Do you recall telling Ms. Milke that during your exit interview?

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A. I might have, but I don't honestly recall this.
Q. The bottom line is that's what you expected, correct?
A. Sure. Yes.
Q. At the time that you left WCI, were you not sure that you would stay in the culinary field?
A. As of February 26th?
Q. Yeah.
A. I wasn't know if I was going to stay in the school, and I honestly don't remember this piece of paper.
Q. I'm not asking if you remember the piece of paper. I'm asking if you remember having this conversation, conversation discussing these things.
A. I don't. Would it—
MR. SUGERMAN: Wait for a question, please.
BY-MR. NYLEN: (Continuing)
Q. Can you look at -13505.
MR. NYLEN: Just give me another five minutes and then we'll take a break.
MR. SUGERMAN: Thank you.
A. Yes.
BY-MR. NYLEN: (Continuing)
Q. This says "graduate job search process."

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Is that your signature above your name?
A. Yes, sir.
Q. You dated this February 21st, 2008, correct?
A. Yes, sir.
Q. And then you print your name there.
Is that your printing?
A. Yes, sir.
Q. "The process of locating satisfying career employment must be a cooperative effort between Career Services and the graduate."
Do you see that statement at the top of the document?
A. Yes, I see that.
Q. And that was your understanding before you signed this?
A. Uh-huh.
Q. Is that a "yes"?
A. Yes, sir.
Q. It says, "All graduates requesting job search assistance are requested to register on the student portal."
Did you go through these steps listed here on this document, one, two, three to register on the student portal?
A. Yes, sir, I did those steps.

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Q. And when did you do that?
A. I don't remember the date.
Q. And then, "To conduct a postgraduate job search, contact the Career Services office and e-mail or fax an updated copy of your resume."
Did you do that?
A. Yes.
Q. Do you have a more updated resume than the one you produced in this case? Actually, I didn't see a copy of the resume in the production.
Do you have a copy of your current resume?
A. Yes.
Q. Is there a reason you didn't produce that in connection with the documents that you produced in this case?
A. I didn't think it would be part of the case.
MR. NYLEN: Let's mark that as a request. I think it is certainly relevant to our document request, and I would ask that you produce a copy of that.
(Requested-information)
A. Okay.
BY-MR. NYLEN: (Continuing)
Q. Did you provide information to Career Services as to the type of job you were seeking after graduation, what geographical area, pay range, and any

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other important details?
A. I don't remember doing so.
Q. Did you communicate regularly with Career Services by phone or e-mail no less than weekly?
MR. SUGERMAN: Objection; mischaracterizes the document.
MR. NYLEN: I'm just asking what he did.
MR. SUGERMAN: He can answer the question.
A. Did I communicate regularly by phone or e-mail? Yes.
BY-MR. NYLEN: (Continuing)
Q. How often?
A. Triweekly.
Q. Who did you communicate with?
A. I'm pretty sure it was Susan Milke or another woman that worked in the office. I don't recall her name.
Q. By e-mail or phone?
A. I think I came up to the office and visited.
Q. Ever send e-mails?
A. Yes.
Q. Did you keep copies of those e-mails?
A. I don't remember.
Q. Again, I'll mark this as a request, please. The e-mails you may have sent to Career Services are

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clearly responsive to our document request, and I would ask that you search for and produce copies of any of those.
(Requested-information)
A. Okay.
Q. Did you maintain a written log of your employment search to include contacts, applications, interviews, and follow-up activity?
A. I did not.
Q. Did you notify Career Services upon acceptance of a job offer, change in position, or change of address?
A. Is this while I'm in school?
Q. While you're looking for a job, as part of the job search process either before or after leaving school.
A. During school, yes, I notified them.
Q. How about after school?
A. I did not have contact with the school.
Q. Can you turn to -- let's go to -13507. This is an employment verification form. It reflects that you got this job at Doe Bay starting on June 7th, 2008, that you made $11 per hour, 22,880 per year.
Do you see that?
A. Yes, sir.

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Q. And it says your job title is lead line; is that correct?
A. Yes and no. It depended on the day.
Q. There were days where you were a lead line cook?
A. There were days when I was just a prep cook.
Q. But there were days when you were a lead line cook?
A. Yes, sir.
Q. That means you're in charge of the other line cooks?
A. There were no other line cooks.
Q. So what's the difference between lead line and prep?
A. If I'm working with a chef, I'm a prep cook. If I'm working by myself, that's because no one else was working, so I was the lead line.
Q. $11 per hour is within the range you expected to make after graduation, correct?
A. Yes.
Q. And they offered you this job after graduating if you wanted it, correct?
A. For the next year, yes.
Q. At the same salary?
A. They didn't say.

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Q. Do you have any reason to believe they would have paid you differently?
A. No.
MR. NYLEN: You want to take a break?
MR. SUGERMAN: Yep. Let's. Thank you.
(Recess taken from 2:40 to 2:51.)
BY-MR. NYLEN: (Continuing)
Q. Can you turn to Exhibit 9, Bates -13498 for a minute. It's not the greatest copy in the world, but have you seen this document before? It looks like a food handler's certificate in your name.
A. Yes.
Q. So have you seen this before?
A. I think so.
Q. Did you earn a food handler certificate while you were at WCI?
A. I did.
Q. Did you need that in order to go out and work in the culinary field?
A. Yes.
Q. And had you obtained that before going to WCI?
A. Had I?
Q. Yes.
A. I could have, but I did not.

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Q. Did you do that through your first class at WCI?
A. Yes.
Q. Can you tell me where you went to work after graduating from WCI, the first place.
A. I believe the first place after graduating and after finishing with Doe Bay was the Nines Hotel.
Q. When did you work at the Nines?
A. I think the end of October, partway through the month of November.
Q. What year?
A. 2008.
Q. What did do you at the Nines?
A. I started helping out with a party event.
Q. Doing what?
A. I was just serving people at a banquet. And then I ended up getting hired after that working in the banquet kitchen.
Q. What were you doing in the banquet kitchen?
A. Cutting pieces of fruit into tiny little squares.
Q. What else?
A. That's about it.
Q. Why did you leave?
A. I left because of family circumstances.

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Q. What were those circumstances?
A. I had to move.
Q. Why did you have to move?
A. To be with my partner.
Q. Your family had issues with the fact that you wanted to be with your partner?
A. No.
Q. So these were personal issues, in other words?
A. Yes, sir.
Q. Any other reason why you left the Nines?
A. Oh, no. It was a great place.
Q. Who did you work for there?
A. I don't know.
Q. How much did you get paid?
A. I think $10 an hour.
Q. So that was within the hourly range that you expected while you were still in school to earn after graduation, correct?
A. During --
Q. That was within the hourly range you expected to earn after graduation, correct?
MR. SUGERMAN: Object to the form.
You can answer.
A. It was what I was informed of after signing

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the enrollment agreement that I would be making after graduation, yes.
BY-MR. NYLEN: (Continuing)
Q. That was what you expected to earn after you graduated, correct?
MR. SUGERMAN: Object to the form.
You can answer.
A. Could you repeat.
BY-MR. NYLEN: (Continuing)
Q. That's what you -- within the range of what you expected to earn right after you graduated, correct?
A. Yes.
Q. Did they tell you at the Nines that this job could lead to something else down the road?
A. No.
Q. What was the title for the job?
A. Banquet cook. I don't even know if it was that.
Q. Where did you go to work after the Nines?
A. I was unemployed for two months during the months of November, December. It was more than two months, December, January, February. I think March was when I gained employment in Seattle.
Q. Were you unemployed due to your family

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circumstances?
A. Yes.
Q. That had nothing to do with WCI?
A. No.
Q. Correct?
A. Correct, it had nothing to do with WCI.
Q. When did you sign the retainer agreement with plaintiffs' counsel?
A. The what agreement?
Q. Retainer agreement.
A. What is that?
Q. When did you sign an agreement with plaintiffs' counsel so they could represent you?
A. I don't recall the exact date. I think it was October of 2008.
Q. Does October of 2008 sound right?
A. It sounds right right now.
Q. Okay. Do you have any reason to believe it was another date?
A. There's so many dates going on right now, I would love to see it in my hand before I said "yes."
Q. Let me put it this way: Your counsel represented during a break that that was the date upon which you signed the retainer agreement.
Do you concur with that?

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A. Yes.
Q. That's all I want to get -- since it wasn't on the record, I want to get it on the record.
A. Of course.
Q. All right. So after this two-month period where you had some family issues, did you then go out and try to find another job?
A. Yes, I did.
Q. How long did it take you to find a job?
A. A few months.
Q. What steps did you take to find another job?
A. I reformatted my resume. I basically used craigslist and walked all around Seattle looking for jobs.
Q. Why did you look in Seattle and not Portland?
A. That is where I moved.
Q. I see. And did you ask for assistance from WCI's Career Services Department in connection with your job search?
A. No.
Q. Why not?
A. I didn't feel that it was relevant in Washington State.
Q. Is that a decision you made on your own?

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A. Yes.
Q. Did you ever ask them whether they could help find you a job in Seattle?
A. I don't recall doing so.
Q. Where did you find a job ultimately after your search?
A. I found employment with Specialties Bakery and Cafe in downtown Seattle.
Q. What was the job?
A. It was coming in early making cookie and muffin mixes.
Q. How much did you make in connection with that job?
A. I think it was $9 an hour.
Q. How many hours a week?
A. It started out at 30 and dropped down to less than 20.
Q. How long did you work there?
A. I worked there for a month and a half, maybe two months.
Q. And why did you leave?
A. I left because a former employee at Doe Bay offered me a position at a different restaurant in Seattle and I liked working with her because she was nice.

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Q. And that's Carmelita --
A. Carmelita, yes.
Q. -- is the restaurant?
A. Yes.
Q. As opposed to the person.
Is that a vegetarian restaurant?
A. It is.
Q. And that's the type of restaurant that you ultimately wanted to open on your own, correct?
A. Something similar, correct.
Q. And what was the job that you got there?
A. I worked as a line cook.
Q. And that's the kind of job that you expected to obtain after graduating, right?
A. After attending the school for some time that's the job I expected to have.
(Document, EXB. 13, marked.)
BY-MR. NYLEN: (Continuing)
Q. I've marked as Exhibit 13 a copy of WCI's 2006 to 2007 catalog Bates stamped -2699 through -2766.
Can you take a moment to look at Exhibit 13, please, and let me know when you've completed your review.
A. Okay.
Q. Have you seen this document before?

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A. I believe so.
Q. Is this a copy of the catalog that you received prior to enrolling at WCI?
A. Yes, sir.
Q. Can you turn to Page -2712, please.
A. Yes.
Q. And you testified earlier that you reviewed this catalog before you signed the enrollment agreement, correct? Do you remember that testimony?
A. Yes, sir.
Q. Do you see where it says "graduates" -- this is in the right-hand side, the full paragraph in the middle of the page that starts, "With this comprehensive training," second sentence, "Specifically, graduates from the AOS LCB culinary arts program will have received training for entry-level positions such as garde manger, line cook, baker, roundsman, catering cook, banquet cook and prep cook."
Do you see that?
A. Yes, sir.
Q. So you read that statement before you signed your enrollment agreement?
A. I must have.
Q. So you understood before signing your enrollment agreement that the catalog stated that

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graduates will have received training for entry-level positions such as garde manger, line cook, baker, roundsman, catering cook, banquet cook, and prep cook, correct?
A. Correct.
Q. And you obtained a job after graduation as a banquet cook at the Nines, correct?
A. Correct.
What was that?
Q. You obtained a job at the Nines as a banquet cook after graduating from WCI, correct?
A. Correct.
Q. And you obtained a job as a line cook at Doe Bay after graduating from WCI, correct?
A. That was during WCI.
Q. Okay. But you were offered a job in that same position after graduating, correct?
A. Yes.
Q. And you obtained a job at Carmelita as a line cook after graduating from WCI as well, correct?
A. Correct.
Q. You also see where it says, the last paragraph on this page, "The success or satisfaction of an individual student is not guaranteed and is dependent upon abilities and the application of

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Q. Did you use those skills in connection with your job at Doe Bay?
A. No.
Q. Did you use them in connection with your job at Carmelita?
A. No.
Q. How about in the bakery that you got a job at, did you use your skills there?
A. I just made muffin mixes and cookie mixes, so I didn't use skills that I learned here to do that.
Q. You took Advanced Garde Manger at WCI as well?
A. I believe so.
Q. Did you study the production and artistic presentation of pates, terrines, cold appetizers and decorative pieces?
A. Yes, I did study that.
Q. Had you learned that before attending WCI?
A. No.
Q. Did you use any of those skills in connection with your jobs at Carmelita or Doe Bay?
A. No.
Q. Did the skills you learned in your baking courses at WCI, were they more advanced than the skills you used in that baking job you had?

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A. In the Advanced Baking & Pastry class.
Q. Or the other baking class?
A. The other baking class, were they more advanced than what I used on the job?
Q. Yes.
A. Correct, they were.
Q. There's no reason you could not have used those skills on a job if you had the opportunity to do so, correct?
A. Had I had the opportunity to work in a different bakery, I could have used those skills.
Q. Advanced Baking & Pastry, you took that course at WCI?
A. Yes.
Q. Does this description here on Bates -2724 look like an accurate description of what you learned in that course?
A. Yes.
Q. And had you learned those skills before going to WCI?
A. No, I had not.
Q. Did you use any of those skills at Doe Bay or Carmelita?
A. I did not.
Q. International Cuisine on the same page, you

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took that course at WCI?
A. Yes, sir.
Q. And did you learn in that course product identification, correct utilization and cooking methods as well as regional beers, wines and spirits from Europe, South America, Asia and the Middle East?
A. Yes.
Q. You learned those skills?
A. I did.
Q. Did you use any of those skills in connection with your job at Carmelita?
A. No.
Q. Did you use any of those skills in connection with your job at Doe Bay?
A. No.
Q. Could you have used those skills in a job if you had the opportunity to do so?
A. I suppose I could have.
Q. Can you take a look at the – there's one more disclosure I wanted to talk about. It would be Exhibit 9. I just have a follow-up question on Exhibit 9. Bates Nos. -13474 and -13476, these are the enrollment agreements. It's the same paragraph, 14, under Policies and Disclosures.
In both it states, "This enrollment

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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."
Do you see that statement?
A. Yes, sir.
Q. Did you read that statement before signing these enrollment agreements?
A. I did.
Q. And you understood this statement before signing the enrollment agreements?
A. Yes.
Q. Do you have any reason to believe that WCI gave out only As and Bs to students even if they didn't earn them?
A. I have no reason to believe that.

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not get versus other applicants.
Q. How do you know who the other applicants were?
A. I didn't. I didn't need to. I wasn't hired.
Q. So you don't know whether the other applicants had a culinary degree or not, correct?
A. No.
Q. Okay. So that's just speculation about them, right?
A. Yes.
Q. Okay. With respect to these three chefs, did any of them tell you that getting a culinary degree does not give you a competitive advantage?
A. Did any of them tell me that it does not give me a competitive advantage?
Q. Over those who didn't go culinary school.
A. Yes.
Q. They all told you that?
A. Yes.
Q. You're under oath.
A. I am under oath.
Q. We'll be speaking to these people. You're under oath.
A. Okay.

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MR. SUGERMAN: Object to the form. Move to strike.
BY-MR. NYLEN: (Continuing)
Q. Do you know if any of these people went to culinary school, these three chefs?
A. Yes.
Q. Where did they go?
A. I have no idea.
Q. Other than speaking to these three chefs, do you base your statement that jobs included in the placement rate calculation on the graduate success rate disclosure form consisted of mostly of jobs that require no culinary degree on anything else?
A. That went right by me. Could you say it again.
Q. Okay. Do you base the statement in your declaration under oath that the jobs included in the placement rate calculation consisted of mostly of jobs that required no culinary degree on anything other than your conversations with these three chefs?
A. No.
Q. So you have no idea whether those placement statistics reflect jobs obtained by people for which a culinary degree is required, correct?
MR. SUGERMAN: Objection; mischaracterizes

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his testimony. Object to the form.
You may answer the question.
A. Can you repeat it.
BY-MR. NYLEN: (Continuing)
Q. So you have no idea sitting here today under oath whether the jobs reflected in those placement statistics include people who got jobs that did require a culinary degree --
MR. SUGERMAN: Object to the form.
Q. -- correct?
MR. SUGERMAN: Excuse me. Object to the form; mischaracterizes prior testimony.
You may answer the question.
A. I think I do have information and that would be from evidence that David has pulled up.
BY-MR. NYLEN: (Continuing)
Q. What evidence is that?
A. I'm referring to the fifth amended complaint.
Do you have that?
Q. Yes. We marked it as the first exhibit.
A. I don't know how to proceed from here.
MR. SUGERMAN: Just do the best you can. If you don't know the answer to the question, just ask -- he's got a question, he asks it, you answer it, we go

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on.
A. Okay. I don't know.
BY-MR. NYLEN: (Continuing)
Q. Did anyone at WCI ever tell you that you'd get a job after graduating that required a culinary degree?
A. Did they tell me that I would?
Q. Yeah, that you would get a job after graduation that required a culinary degree?
A. Oh, no.
Q. Did anyone tell you that the jobs you would get after graduation would require a culinary degree?
A. No.
Q. Did anyone at WCI ever tell you the jobs you could expect to obtain after graduation require the training that the school provides?
A. Did anyone at the school tell me that?
Q. Yes.
A. I don't remember that. I don't think so.
Q. You testified in Paragraph 6, "I received a course catalog. The school did not tell me that entry-level jobs in the restaurant industry do not require the training that the school provides; that WCI training would qualify graduates for mostly low-paying poverty level wage jobs; or that those who attend WCI

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will not obtain material benefit from the course of study."
Do you see that?
A. Uh-huh.
Q. Did you write that sentence? Your lawyer wrote that sentence for you, did he not?
A. I believe so.
Q. Did you write the sentences in the prior paragraph or did your lawyer come up with that?
A. I believe David wrote that.
Q. Do you have any evidence that training from WCI only qualifies graduates for mostly low-paying poverty level wage jobs?
A. I have no evidence.
Q. Can you turn to Page 10 for a minute, please.
A. Are we on the same document?
Q. Paragraph 10. Sorry. I keep saying "page" rather than "paragraph." My apologies.
Page 3, Paragraph 10, you reference -- you say you reviewed the fourth amended complaint, and I believe you testified that you reviewed both the fifth and fourth earlier.
A. Yes, sir.
Q. And then you say that you reviewed the wage

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and placement information for graduates, Topaz, Deposition Exhibit 7.
Is that the graduate success rate disclosure form you testified about earlier?
A. I believe it is.
Q. And then the Court's class certification decision, what did you review in that regard?
A. I don't recall right now.
Q. Was the only reason you went to culinary school to make a lot of money?
A. No.
Q. You went there to get a culinary education, correct?
A. Correct.
Q. And that's what you got, right?
A. Yes.
(Document, EXB. 16, marked.)
BY-MR. NYLEN: (Continuing)
Q. Could you take a moment to look at Exhibit 16, a two-page e-mail that appears to have been sent by you to the Office of Degree Authorization on Saturday, April 18th, 2009.
Have you seen this document before?
A. I remember it now.
Q. Is this a copy of an e-mail that you, in

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fact, sent to the Office of Degree Authorization on Saturday, April 18th, 2009, at 10:48 p.m.?
A. Yes.
Q. Did you draft this document or did someone else draft it for you?
A. I made this.
Q. Anybody assist you in drafting this?
A. No. I made it myself.
Q. Did you talk to anybody about this before sending it?
A. I don't think I did.
Q. Did you actually file a complaint with the ODA?
A. I just sent them an e-mail.
Q. Whatever happened in response to this on behalf of the ODA?
A. I don't think they ever responded back to me. I don't remember.
Q. I'll just help refresh your recollection and speed things along.
MR. NYLEN: Let's mark this one next.
(Document, EXB. 17, marked.)
BY-MR. NYLEN: (Continuing)
Q. I've marked as Exhibit 17 what appears to be a chain of e-mails starting with the one included in

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Exhibit 16 and then also included what appears to be an e-mail from Mr. Alan Contreras at the ODA dated April 20th, 2009, at 9:37 a.m.
Have you seen this e-mail before?
A. Uh-huh.
Q. Is that a "yes"?
A. That's a "yes."
Q. Is this an e-mail from Mr. Contreras to you on Monday, April 20th, 2009, that you received on that date in response to your e-mail to him or to the ODA, rather, on Saturday April 18th, 2009?
A. Yes.
Q. And chefnate8@gmail.com, that's your e-mail address, correct?
A. Correct.
Q. Did you receive any other e-mails from Mr. Contreras at any time?
A. I don't remember. I don't remember sending these, but I know I did.
Q. Did you send Mr. Contreras any other e-mails?
A. I honestly don't know.
Q. Did you send any other e-mails to the ODA that you recall?
A. I don't think so. I might have.

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A. Correct.
Q. What facts do you have sitting here today under oath to support that allegation, that WCI knew those facts but failed to disclose them?
MR. SUGERMAN: Objection; asked and answered. Object to the form.
You may answer the question.
BY-MR. NYLEN: (Continuing)
Q. I have not asked this question and you have not answered it as to what facts you have to support the allegation that WCI knew those facts but failed to disclose them.
MR. SUGERMAN: Objection. Move to strike. Object to the form. Please restate the question in a nonargumentative fashion.
MR. NYLEN: Could you read back my prior question, please.
(Reporter read back as requested.)
A. I'm not sure how to answer that.
BY-MR. NYLEN: (Continuing)
Q. Are you aware of any such facts?
A. Currently, no.
Q. Are you aware of any facts sitting here today under oath that WCI or CEC knew but failed to disclose to students that WCI's school training would

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qualify graduates for mostly low-paying poverty wage jobs?
A. I don't have any facts right now.
Q. Are you aware of any facts sitting here today to support the allegation in Paragraph 14H of your complaint that WCI and CEC knew but failed to disclose to students that those who attend WCI's school will not obtain material benefit from the course of study?
A. I do not have any evidence right now.
Q. Are you aware of any facts sitting here today testifying under oath to support your allegation in Paragraph 14J of the complaint that WCI or CEC knew but failed to disclose that job placement rates were composed mostly of jobs that do not require culinary training like prep cook and line cook?
A. I do not know of any right now.
Q. Why did you decide to change your career direction and go to Evergreen?
A. I decided to finish what I had started in Idaho.
Q. And go back into that field?
A. Yeah.
Q. Something that interested you more?
A. Interested me equally.

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Q. Any other reason?
A. I didn't feel that working in the culinary industry was going to go anywhere.
Q. But you didn't stick it out long enough to know whether it would go anywhere, right?
A. I felt that I did an adequate job.
Q. But you don't know one way or the other whether you ultimately could have had that organic restaurant if you'd stayed in the field longer, correct?
A. I don't know that.
MR. NYLEN: I have no further questions.

EXAMINATION BY-MR. SUGERMAN:
Q. Mr. Surrett, I need to go back and cover a few issues with you. First of all, let's talk about the end of your externship at Doe Bay.
They offered you a job after you ended your externship?
A. Yes.
Q. Approximately when did your externship position end?
A. In October of 2008.
Q. And the job they offered you, it was going to start when, the next day?

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A. No. It would have started in the next year.
Q. Next year being when?
A. I think May of 2009.
Q. And that's what you meant by it was a seasonal position?
A. Yes, sir.
Q. Thank you.
Before you enrolled, did anybody from Western Culinary Institute share with you information about earnings of graduates?
MR. NYLEN: Object to "share."
BY-MR. SUGERMAN: (Continuing)
Q. You can answer the question.
A. I didn't know what you said.
Q. I'll repeat the question. He's making objections for the record.
A. Okay.
Q. Prior to when you signed the enrollment agreement, did anybody from Western Culinary Institute provide you with earnings information on their graduates?
A. No.
Q. You were asked about the wage you expected to earn in several different places today. And if I understood the questioning, it was about the wages at

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the Nines and at Doe Bay.
Do you remember that part of your testimony?
MR. NYLEN: Mischaracterizes the witness's testimony.
A. Yes, I do remember that.
BY-MR. SUGERMAN: (Continuing)
Q. Before you enrolled at Western Culinary Institute, did you have a wage level that you expected to earn?
MR. NYLEN: Object to the form.
A. Before I enrolled?
BY-MR. SUGERMAN: (Continuing)
Q. Yes.
A. I did not.
Q. And so information about what wages you would likely earn came when?
MR. NYLEN: Object to the form; lack of foundation.
A. I'm not sure how to answer that.
BY-MR. SUGERMAN: (Continuing)
Q. Well, let's step back.
In the process of starting the job search for your externship, did you learn information about what positions paid in the trade?
A. Yes.

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Q. Was that the first time you learned about the likely wages you would earn?
A. Not the first time during the degree.
Q. When was the first time during the degree?
A. During the winter of 2007.
Q. After you had enrolled?
A. After I had enrolled.
Q. After you had started school?
A. After I had started school.
Q. After you had committed to the loans that we've talked about?
A. Yes, sir.
Q. Do you know people in the trade who work as line cooks?
A. In the culinary trade?
Q. Yes, sir.
A. I do.
Q. Can you estimate how many people you know, how many line cooks you know?
A. Probably more than 20.
Q. Do you know whether all of them went to culinary school?
A. I don't know everyone's educational background, but most of them did not.
Q. Did you expect WCI to be truthful with you

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when you were enrolling?
A. Yes.
Q. Did you expect them to disclose all the relevant information in their possession?
A. Yes.
Q. And did you expect them to comply with Oregon law?
A. Of course.
Q. When they showed you those placement statistics of 95 percent, what did that -- what did you understand that to mean?
MR. NYLEN: Asked and answered.
BY-MR. SUGERMAN: (Continuing)
Q. You can answer.
A. Okay. I understood that to mean the percentage of students who graduated got very good jobs.
Q. Jobs that required a culinary degree?
A. Yes.
Q. Would you turn to Exhibit 14, please.
Did you make some notes about your concerns regarding Western Culinary Institute in these reports that you filed?
A. I did.
Q. And so, for example, if you turn to Page -13

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of Exhibit 14, were you concerned at that time about wages you could earn and the debts you had incurred? Do you see that?
A. On the third paragraph?
Q. Yes.
A. I do. And I agree that I said that.
Q. Did you note on Page -15, did you make a note about the quality of your education in response to the last question on that page?
A. Yes.
Q. And did you refer to the chefs that you met along the way snickering when they heard that you went to school to learn that you could have started in the restaurant without going to school?
A. Yes.
Q. Those were statements you made before you knew anything about this lawsuit?
A. I believe so.
Q. Your pay at Carmelita was how much?
MR. NYLEN: Asked and answered.
A. I think it was between ten and $11.
BY-MR. SUGERMAN: (Continuing)
Q. Do you know what the federal poverty level is for a family of four?
A. I think it's around $22,000 a year.

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MR. SUGERMAN: Thank you. No further questions at this time.
MR. NYLEN: I have some follow-up questions.

EXAMINATION BY-MR. NYLEN:
Q. Please turn to Exhibit 9, Bates -13499, -13500.
This is the graduate success rate disclosure form that you testified about earlier?
A. Yes.
Q. Does this document say anywhere that any of the jobs reflected on it require a culinary degree?
A. No.
Q. Did WCI tell you in any way prior to enrolling that the jobs -- anybody at WCI tell you that the jobs reflected on this document require a culinary degree?
A. They insinuated it.
Q. Did they tell you that?
A. No.
Q. How did they insinuate it? What words did they use and who said them?
A. I believe it was Barbara. She recommended highly that I get this degree in order to be successful in the culinary world.

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Q. Did she tell you that the jobs reflected on this document require a culinary degree?
A. She never said one way or the other.
Q. Okay. So your belief that the jobs reflected on this document required a culinary degree, that was your assumption, correct?
A. Yes.
Q. That didn't come from anything that anybody at WCI said to you before you enrolled, correct?
A. Correct.
Q. You talked about chefs snickering and some of the comments you had for your reports about Doe Bay Do you recall that?
A. I do.
Q. What chefs? What are their names?
A. Abigail was her first name, Jason -- I don't know his last name -- and Sarah Freeman. I think it was Freeman. I don't remember.
Q. Are they still at Doe Bay?
A. No. Abigail is.
Q. Where is Sarah Freeman?
A. I don't think Freeman's her last name, but her first name is Sarah. I think she lives in North Carolina. She's moved around a lot.
Q. You had concerns about the wages you would

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earn that you developed after enrolling at WCI; is that correct?
A. Could you repeat that.
Q. You had concerns about the wages you would earn; is that correct?
A. About the wages I would earn after enrolling?
Q. Yes.
A. Yes.
Q. But WCI never made any promises to you of any kind concerning wages you would earn, right?
A. Correct.
Q. You know full well when you enrolled that they were making no such promises, correct?
A. Yes.
Q. And you knew that success depended on your individual efforts after you graduated, correct?
A. Yes.
Q. Did you determine prior to enrolling at WCI that the jobs listed on this graduate success rate disclosure form required a culinary degree, or is that something that your lawyers told you after the fact?
MR. SUGERMAN: Objection; attorney-client privilege.
Don't answer the question as phrased.

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(Instruction-by-counsel)
BY-MR. NYLEN: (Continuing)
Q. When did you decide that the jobs listed on the GSRD form required a culinary degree? Is that something you developed after -- an understanding you developed after enrolling at WCI?
A. Yes.
Q. When did you first develop that understanding? It was after leaving the school, wasn't it?
A. No. It was while I was still in school.
Q. Did you tell anybody about it?
A. Yeah.
Q. Who did you tell?
A. Other students.
Q. Who?
A. Corey.
Q. Corey who?
A. Whalen, maybe.
Q. How do you spell that?
A. W-H-A-L-E-N.
Q. Where is Corey Whalen now?
A. I have no idea.
Q. Did you tell anybody who worked for WCI?
A. No. I take that back. I did tell the

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A. Like as a student?
Q. After they graduate.
A. So we're saying that they have a degree?
Q. Yes.
A. I don't know of any students.
Q. Have you done any research to determine whether that happens?
A. I didn't research other students.
Q. Are you aware of any WCI graduates at all who became chefs?
A. I am not.
Q. Have you done any research to determine what WCI graduates could expect to earn after graduation?
A. Have I done any research to determine what WCI graduates can earn after graduation?
Q. Yes.
A. No.
Q. Did you research that issue before you decided to enroll at WCI?
A. Can you specify the issue.
Q. Did you research what graduates of WCI could expect to earn after graduation before you decided to enroll at WCI?
A. I did not.
Q. Why not?

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A. It didn't cross my mind.
Q. It wasn't important to you at the time, correct?
MR. SUGERMAN: Object to the form.
You can answer.
THE WITNESS: Did you say --
MR. SUGERMAN: You can answer. I objected to the form of the question.
A. Can you ask it again.
BY-MR. NYLEN: (Continuing)
Q. It wasn't important to you at the time, correct?
A. Was it important to me --
Q. It wasn't important to you at the time, correct?
A. That?
Q. How much graduates would expect to earn after graduation.
A. It wasn't something that crossed my mind.
Q. And that's because it wasn't important, right?
A. It's something that I hadn't thought about.
Q. And you hadn't thought about it because it wasn't a critical issue for you, right?
A. I guess you could say that.

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Q. Did you ever do any research to determine what people who went to culinary school would earn upon graduation from culinary school versus those who didn't go to culinary school might earn in the culinary field?
A. I did not.
MR. NYLEN: I don't have anything further.
MR. SUGERMAN: Just a few things in follow-up.

EXAMINATION BY-MR. SUGERMAN:
Q. Are you aware of the various Oregon Administrative Rules that apply to trade schools like Western Culinary Institute?
A. I'm aware of a few of them that I mentioned in the fifth amended complaint.
Q. When you see those, do you know what they mean?
A. More or less. I'm not a hundred percent sure what they mean.
Q. That's fine.
Did you assume in dealing with Western Culinary Institute at the time that you were enrolling that there was benefit to be gained by borrowing all this money to go to trade school?
A. Yes.

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Q. Did you assume that your earnings would make it a worthwhile debt for you to take on and a worthwhile obligation and a worthwhile program?
A. I did.
MR. NYLEN: Object to the form.
MR. SUGERMAN: Thank you. Nothing further.

EXAMINATION BY-MR. NYLEN:
Q. Take a look at Exhibit 1, please, the complaint.
What Oregon regulations are you aware of applicable to WCI?
A. The ones mentioned in the complaint.
Q. Why don't you point them out for me and tell me what you think they mean one by one.
MR. SUGERMAN: Okay. I need a break.
MR. NYLEN: I have a question pending. He needs to answer it.
MR. SUGERMAN: Greg, I need to make a call real quick because we were going to be through before 5:00.
MR. NYLEN: Once he finishes the question. I have it pending.
You answered a question that wasn't even related to what I followed up on, so now I'm going to

which you contend the defendants violated those regulations?
A. I think I have.
MR. NYLEN: I have nothing further.
(Videotaped deposition adjourned at 4:56 p.m.)

STATE OF OREGON)
) ss.
COUNTY OF MULTNOMAH)

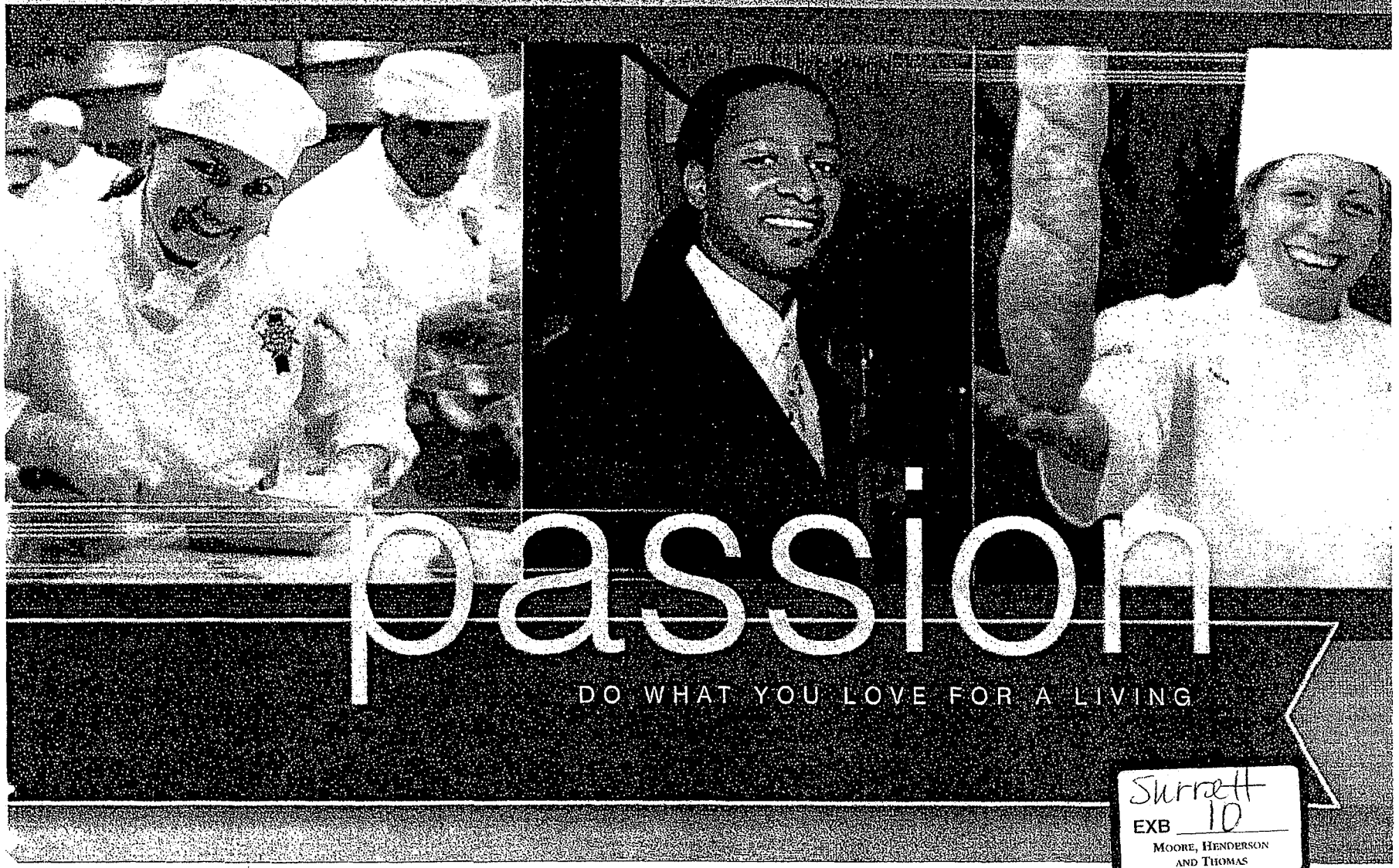
I, Jennifer J. DeOgny, court reporter, hereby certify that, pursuant to the Rules of Civil Procedure, NATHANIEL S. SURRETT personally appeared before me at the time and place set forth in the caption hereof; that at said time and place I reported in stenotype all testimony adduced and other oral proceedings had in the foregoing matter; that thereafter my notes were reduced to typewriting under my direction; and the foregoing transcript, pages 1 to 290, both inclusive, constitutes a full, true, and correct record of such testimony adduced and oral proceedings had and of the whole thereof.

Witness my hand and notarial seal at Portland, Oregon, this 7th day of February, 2011.

Jennifer J. DeOgny, CSR, RPR
Notary Public No. 401678

Western Culinary Institute
Le Cordon Bleu Program
Portland

2007-2008 Catalog



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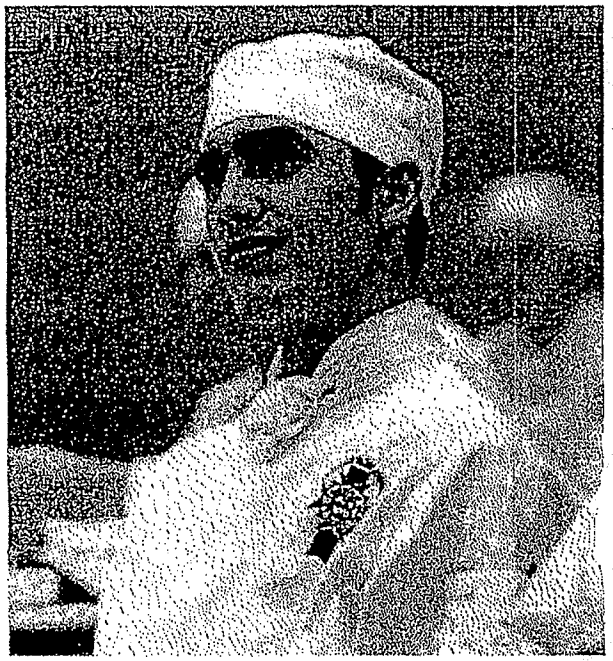

Admissions Information

Non-Discrimination

The school admits students without regard to race, gender, sexual orientation, religion, creed, color, national origin, ancestry, marital status, age, disability, or any other factor prohibited by law.

Admissions Policy

All applicants are required to complete a personal interview with an admissions representative, either in person or by telephone, depending upon the distance from the school. Parents and/or significant others are encouraged to attend. This gives applicants and their families an opportunity to find out more about the school's equipment and facilities and to ask questions relating to the school's curriculum and career objectives. Personal interviews also enable school administrators to determine whether an applicant is a strong candidate for enrollment into the program.

In addition, each applicant must:

- Complete an Application form
- Execute all enrollment documents including the Application form and Enrollment Agreement (if applicant is under 18 years of age, the Enrollment Agreement must also be signed by a parent or guardian)
- Provide proof of a high school diploma or a General Educational Development diploma (GED), or its equivalent, as determined by school administrators.
- Financial aid forms (if applicant wishes to apply for financial aid)
- Payment of enrollment fee (non-refundable unless applicant is denied admission or cancels application as outlined on the Enrollment Agreement)

The school reserves the right to reject applicants if the items listed above are not successfully completed.

Western Culinary Institute requires all candidates to furnish proof of a high school diploma or a General Educational Development diploma (GED), or its equivalent, as determined by school administrators. Although WCI will not accept "Ability-To-Benefit" (ATB) applicants, we encourage them to obtain their GED and will provide them with information about GED testing procedures and locations. ATB students are often very motivated students and Western Culinary Institute welcomes them in our programs, but only after receiving a GED.

All applicants for whom English is a second language must demonstrate competency in English. A TOEFL (Test of English as a Foreign Language) score of 475 or prior enrollment in an English speaking school may fulfill this requirement. Additional information may be obtained at www.toefl.org.

Although most students have experience in the food service industry, the main attribute Admissions Representatives look for is a sincere commitment to becoming a professional culinarian or hospitality manager.

Admissions Procedures

The AOS in LCB Culinary Arts and AOS and Diploma LCB Pâtisserie and Baking classes begin eight (8) times a year. The AOS in LCB Hospitality and Restaurant Management starts four (4) times a year and the Diploma in LCB Culinary Arts classes begins two (2) times a year.

Upon requesting information about Western Culinary Institute, candidates will be assigned an Admissions Representative and will be furnished literature about WCI. Candidates who express a serious interest in attending Western Culinary Institute will be sent an Enrollment Package. The Enrollment Package and Enrollment Fee must be completed, signed and sent to the Admissions Representative to reserve a start date.

Students should apply for admission as soon as possible in order to be accepted for a specific program and start date.

Candidates can also complete enrollment paperwork online by visiting our website (www.wci.edu). Candidates who complete the online enrollment process may be granted conditional acceptance until WCI receives enrollment paperwork with the candidate's original signatures.

Successful candidates will be mailed an acceptance letter and a separate notice informing them of their orientation date and time.

IN THE CIRCUIT COURT FOR 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.

Case No. 0803-03530

DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DECERTIFY CLASS

Oral Argument Requested

Assigned: Judge Richard C. Baldwin
Date of Hearing: March 16, 2012
Time of Hearing: 9:00 a.m.

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I. INTRODUCTION

Two significant events have occurred since the Court conditionally certified this class, either of which calls for a reexamination of the Court's original certification decision: first, discovery has now made clear that Nathan Surrett is not a proper lead plaintiff; and second, the U.S. Supreme Court has given guidance on a federal class action rule identical to Oregon's. Both of these events support decertification of the class previously certified in this case.

This case, in essence, calls on the Court to second-guess whether a WCI education is worth the price of tuition. As a judge of the Los Angeles Superior Court, considering a virtually identical claim earlier this month, aptly observed in denying class certification: "Plaintiffs are in essence asking the Court to regulate the price of an education in the for-profit educational industry, a regulated industry, in the guise of a class action. That is a job for the Legislature, not the courts." *Vasquez, et al. v. California School of Culinary Arts, Inc.* ("*Vasquez*") (Supp. Nylen Decl., Ex. H at 19.)[1]

Discovery conducted on Mr. Surrett has revealed that: (1) his decision to enroll at WCI, like the decisions of other class members, was based on highly personal considerations; and (2) his job outcomes, including his decision to abandon the profession after a year, arose from unique personal circumstances. Surrett did not enroll at WCI based on any understanding of the components of WCI's placement rates, any representations in WCI's catalog or enrollment agreement that he should expect to obtain success in a high paying job on graduation, or any weighing of tuition costs against the salary he expected to earn. Surrett enrolled because he wanted to learn to cook so he could open an organic restaurant, something his friends and family

[1] In that case, the complex court division of the Los Angeles Superior Court denied class certification in a copycat case filed against another CEC culinary school. The court rejected plaintiffs' theories (including that defendants there omitted to disclose material information about salaries to be earned and the relationship between those salaries and the ability to repay loans). Defendants request that the Court take judicial notice of the *Vasquez* decision, pursuant to OEC 201(b) and 202(1).

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(not anyone at WCI) told him he could expect to do. Surrett left the profession within a year after obtaining two quality jobs in the field because he decided to pursue another passion, environmental science. These unique experiences illustrate not only why Surrett cannot be a lead plaintiff, but why no one can be a lead plaintiff here: the reasons people go to school, what they want to do with their education, and how much value they get from their degree, is unique to every individual. In this regard, WCI is no different from every trade school, college, or university in the country. Ultimately, this case cannot be maintained as a class action due to the myriad reasons why students enroll, the different "values" they receive from their education and training, and the different employment and other outcomes they obtain.

Surrett, like all WCI graduates, garnered substantial material benefits from his education. Surrett's argument to the contrary relies on a simplistic definition of "benefit" -- that is, whether the education paid off, quickly, in a purely economic sense. This forces the Court to reduce the varied and highly individualized benefit of a course of study to a short-term single dollar value premised exclusively on the difference between earnings prior to and immediately after attending WCI and to compare that to the cost of attending the school.

This Court seized on these issues early on in this case and questioned its ability to make such subjective value determinations on a class-wide basis.[2] Ultimately, the Court conditionally certified four omissions claims for class treatment based on assurances from class counsel that the Court's concerns were unfounded. Now, discovery has proved otherwise.

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[2] *E.g.*, Supplemental Decl. of Greg Nylen ("Supp. Nylen Decl."), Ex. F (Oct. 29, 2009 Hearing Tr.) at 7:2-8:2 (Court questioning the ability to determine each class member's damages without thousands of mini-hearings because "it depends on the effect of this transaction on each person"), 90:5-91:1 (Court noting that establishing a material omission does not solve the problem that individualized damages determinations would be required); *see also* Nylen Decl., Ex. J (Dec. 3, 2009 Order) at 8-9 (recognizing that class members may have sustained different damages and finding that "[q]uestions of fact as to the value of the educational services provided to students and varying amounts of tuition paid are not common to the proposed class").

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The problems with this class action go beyond Mr. Surrett's deficiencies as class representative and the absence of commonality among class members: this lawsuit is simply unmanageable as a class action. To avoid a windfall to the many students who received substantial benefit from their WCI education—and, indeed, credit WCI with the professional success they enjoy today—the Court will have to make thousands of individualized inquiries to determine why each class members enrolled at WCI, what "value" they each obtained, and what costs they incurred (across several programs at different price points).

Finally, Plaintiff essentially ignores that the arbitration agreements signed by many students who enrolled after him, which agreements include an express class action waiver. Defendants cannot be required to litigate a class action with students who agreed to arbitrate these disputes. Nor can they be found to have waived a right to arbitrate such claims, having raised the issue promptly after the U.S. Supreme Court clarified the enforceability of such agreements in its watershed opinion *AT&T Mobility LLC v. Concepcion*, 131 S Ct 1740 (2011). At an absolute minimum, if this class is not decertified, it will need to be narrowed to remove such students from the class.

II. DEFENDANTS ACCURATELY REPRESENTED THE EVIDENTIARY RECORD

Surrett contends that Defendants did not accurately describe his testimony when it described the admissions he made throughout his deposition.[3] In all events, Plaintiff cannot dispute that Surrett was asked the following questions and gave the accompanying responses:

Re: Comparing WCI to Other Culinary Schools

- **Q.** Did you investigate any other culinary schools before enrolling at WCI?
  A. I did not.[4]

[3] Plaintiffs also muddy the factual record on this motion with irrelevant "evidence" pertaining to alleged affirmative misrepresentations that have not been certified for class treatment. This reply does not address those irrelevant factual contentions and the Court should disregard them for the purposes of this motion.

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Re: The Immateriality of Placement Rates to His Decision To Attend WCI

- **Q.** Do you know what a placement rate is?
  A. Currently?
  Q. Did you know prior to enrolling?
  A. Not really.[5]

- **Q.** Did you ask anyone what kind of jobs it reflected?
  A. Huh-uh.
  Q. That's a "no"?
  A. That's a "no."
  Q. Did you compare any placement statistics relating to WCI to any placement statistics relating to any other schools?
  A. No sir.
  Q. Why not?
  A. I – at the time I didn't really know the significance of it.[6]

Re: The Immateriality of Salary Information to His Decision To Attend WCI

- **Q.** Did you do any research what graduates of WCI could expect to earn after graduation before you decided to enroll at WCI?
  A. I did not.
  Q. Why not?
  A. It didn't cross my mind. ***
  Q. It wasn't important to you at the time, correct?
  A. That?
  Q. How much graduates would expect to earn after graduation.
  A. It wasn't something that crossed my mind.
  Q. And that's because it wasn't important, right?
  A. It's something that I hadn't thought about.
  Q. And you hadn't thought about it because it wasn't a critical issue for you, right?
  A. I guess you could say that.[7]

- *In response to class counsel's questioning:* **Q.** Before you enrolled at Western Culinary Institute, did you have a wage level that you expected to earn? ***

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[4] Nylen Decl. Ex. K (Jan. 21, 2011 Depo. Tr. of Nathaniel Surrett ["Surrett Depo."]) at 119:21-23.

[5] *Id.* at 120:13-16.

[6] *Id.* at 121:8-19.

[7] *Id.* at 282:21-283:25.

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A. Before I enrolled?
Q. Yes.
A. I did not.[8]

Re: The Unrealistic Career Expectations Created by His Friends and Family

- **Q.** So if you expected to be well-off immediately upon graduation, why didn't you put this in the short-term goal?
  A. Because I was talking to Barbara at the time I was filling this out and I felt that would sound very silly.
  Q. It sounds silly because normally it takes people awhile to become well-off after graduating from college, does it not? ***
  A. I guess so.[9]

- **Q.** Did anyone at WCI tell you you would have a restaurant after graduation?
  A. No one told me I would have a restaurant.
  Q. So you based this understanding on conversations you had with other people?
  A. Yes, sir.
  Q. Who?
  A. Family, friends.
  Q. Anyone at WCI?
  A. No.[10]

Re: His First-Hand Impression of WCI's Facilities

- **Q.** Did you have any concerns about the facilities that you saw on your tour?
  A. No. I thought it was fantastic, seeing a kitchen for the very first time, it was incredible.[11]

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[8] *Id.* at 270:7-14.

[9] *Id.* at 129:17-130:3.

[10] *Id.* at 97:6-16. Plaintiff seeks to blame WCI for not warning Surrett about the challenges associated with his dream of restaurant ownership soon after graduation (Opp. at 10) when Surrett himself was too ashamed to tell anyone at WCI about his "very silly"—*i.e.*, unreasonable—pre-enrollment expectations.

[11] Nylen Decl., Ex. K (Surrett Depo.) at 117:25-118:3.

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Re: Reading and Understanding WCI's Disclaimers Regarding No Promise of Satisfaction, Success, Employment or Salary Before Enrolling

- **Q.** You read No. 5 where it says, "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"? You read that before signing this enrollment agreement, correct?
  A. Uh-huh.
  Q. Is that a "yes"?
  A. Yes, sir, it is.
  Q. And you understood that statement before signing this enrollment agreement?
  A. Yes, I did. ***
  Q. Your success is dependent on your individual efforts and abilities, correct?
  A. Correct.[12]

- **Q.** So you understood before signing your enrollment agreement that the catalog stated that graduates will have received training for entry-level positions such as garde manager, line cook, baker, roundsman, catering cook, banquet cook, and prep cook, correct?
  A. Correct.[13]

- **Q.** You also see where it says, the last paragraph on this page, "The success or satisfaction of an individual student is not guaranteed and is dependent upon abilities and the application of personal efforts to the requirements of Western Culinary Institute"? Do you see that statement?
  A. Yes, sir.
  Q. You read and understood that statement prior to signing the enrollment agreement, correct?
  A. Correct.[14]

These admissions, and others undisputed by Surrett in his Opposition, tell the story of an individual who enrolled in culinary school not just for money (Opp. at 10), but also because he "needed a career change" and "wanted to 'mak[e] people happy through food'" (Mot. at 5). He assumed it was the "best school" (*see* Opp. at 7) without comparing it to any others. Surrett did

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[12] *Id.* at 112:9-113:1.

[13] *Id.* at 212:24-213:5.

[14] *Id.* 213:22-214:6.

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not ask about job-placement statistics and did not understand what they meant. After all, his family and friends told him that he would go straight to the top—*i.e.*, that despite no prior professional culinary experience he would buck the trend of having to work one's way up in a new career and would own a restaurant immediately after graduating from WCI. As much as he wanted to believe this, Surrett knew how far-fetched his family's and friends' expectations were; he was embarrassed to share them with an admissions representative who could have tempered such unreasonable expectations.

While at WCI, Surrett's suspicions were confirmed—his family's and friends' expectations were way off the mark. (*See* Opp. at 9.) As he claims he understood when he signed his Enrollment Agreement, and as stated in WCI's catalog, Surrett was learning new skills that would qualify him for entry-level positions in the culinary field paying between $9 and $15 per hour. (*See id.*) He completed his program and soon thereafter began working in the field. One year later, for personal reasons and after realizing that he was not up to the challenges involved with restaurant ownership, Surrett quit the culinary field to return to school at The Evergreen State College. Unsurprisingly, his next school's placement statistics also "were not important to his decision to [attend]."[15] (*Id.* at 8.)

Surrett "agree[s] that he attended WCI for a culinary education and that he got one." (*Id.* at 10) And he admits "there is nothing in WCI's catalog he believes is false or misleading" and "there is nothing he contends is inaccurate about the numbers reflected on the WCI job placement form." (*Id.* at 11[emphasis added].) Surrett now purports to represent all class members on claims certified "only as to students who entered into contracts for services with

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[15] Surrett argues that Defendants manipulated his testimony about his enrollment at Evergreen and made it appear as if he was testifying about WCI. (Opp. at 8:18-20 (citing Mot. at 8:14-16).) Defendants did no such thing. The cited portion of Defendants' opening brief appears under the heading "**Surrett Switches Fields To Pursue Environmental Science.**" (Mot. at 8:11.) In that section, Defendants accurately describe Mr. Surrett's testimony that "I didn't think that the statistics they [Evergreen] provided about their employment were incredibly important at the time. I needed to finish my bachelor's degree." (Surrett Depo. at 86:1-4.)

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defendants after defendants allegedly knew and failed to disclose that the outcomes for students were materially different than represented in defendants' catalog." (Nylen Decl., Ex. J [Dec. 3, 2009 Opinion Letter] at 9.)

III. ARGUMENT

A. Surrett Misstates the Applicable Burden.

Without citing any authority, Surrett contends that it is Defendants' burden to establish that commonality and superiority are not present. (Opp. at 12, 15.) To the contrary, "[t]he party seeking class certification bears the burden of demonstrating that initial certification is appropriate, and likewise on a motion to decertify the class, bears the burden of producing a record demonstrating the continued propriety of maintaining the class action." *Ellis v. Elgin Riverboat Resort*, 217 FRD 415, 419 (ND Ill 2003) (internal citations omitted) (emphasis added).[16] No matter who bears the burden on this motion, Plaintiff does not dispute the conditional nature of the Court's certification order and he agrees that the Court has "wide latitude" to decide whether to decertify a conditionally certified class.[17] (Opp. at 12.)

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[16] *See also Marlo v. United Parcel Service, Inc.*, 639 F3d 942, 947 (9th Cir 2011) (affirming decertification order and finding that district court correctly placed burden of establishing that class-action requirements still were met on party seeking to maintain class certification); *Stastny v. Bell Tel. & Tel. Co.*, 628 F2d 267, 276 (4th Cir 1980) (reversing district court for failing to decertify class where, after initial certification order, it became clear that representative plaintiff could no longer meet her burden of proving class action requirements); *Stepp v. Monsanto Research Corp.*, No. 3:91cv468, 2012 WL 604328, at *3 (SD Ohio Feb. 24, 2012) ("In order to survive Defendants' request for decertification, the Plaintiffs retain the burden of establishing that the prerequisites to certification under Rule 23(a) continue to be met."); *In re Credit Suisse First Boston Corp.*, 250 FRD 137, 140 (SDNY 2008) (decertifying class on motion for reconsideration and decertification after finding plaintiff failed to carry his continued burden to establish that class-certification requirements were met).

[17] Surrett begins his discussion of the legal standard by articulating an inapposite standard of appellate review. (*See* Opp. at 12.) Obviously, that standard does not control this motion.

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B. Surrett Is Not Typical of the Class.

Surrett argues that Oregon's typicality requirement differs dramatically from that of the federal rule. Plaintiff is wrong. The 1979 case cited by Surrett, *Newman v. Tualatin Development Co., Inc.*, explicitly "adopt[s]" the standard applied to the "identical federal rule." 287 Or 47, 50, 597 P2d 800 (1979).

Surrett tells only part of the story when he says that a class representative is "typical" if his injuries arise from the same course of conduct as those of the class. If this were the proper standard, then a class representative could sue on a legal theory not applicable to the class at large, as long as his injuries arose from a "course of conduct" affecting the whole group. For example, a plaintiff whose negligence claim depends on his "special relationship" with the defendant could sue on behalf of class members who suffered the same injury but have no special relationship with the defendant. For this reason, Oregon courts have held that, typicality exists only where "the claims of all class members arise from the same transaction and are based on the same *** theory of liability." *Alsea Veneer, Inc. v. Oregon*, 117 Or App 42, 53, 843 P2d 492 (1992) (emphasis added). In other words, the reasons why a defendant is liable to the lead plaintiff must be the same as for the class as a whole.

ORCP 32 A(3), by its terms, requires that both the claims and defenses of the class representative must be typical of the class. In *Powell v. Equitable Savings and Loan Ass'n*, the Oregon Court of Appeals held that the named plaintiffs' claims were not typical of the class because, although all class members had experienced the same injury, the named plaintiffs included residents of Idaho and Washington, in addition to Oregon, against whom the defendant could raise defenses available only under the laws of those states. 57 Or App 110, 113-14, 643 P2d 1331 (1982). *Powell* therefore stands for the proposition that defenses unique to particular named plaintiffs, which are not applicable to the class as a whole, will defeat typicality.

This is as it should be. There are quite serious problems with Surrett's claims, and they will be fully aired at trial. For example, WCI will argue at trial that Surrett cannot prove

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materiality, causation, or actual injury, three essential elements of a claim for fraud, and will argue that Surrett failed to mitigate his damages by continuing his culinary training once he became aware of the expected pay for entry-level culinary jobs and by abandoning the culinary field altogether, incurring additional loans, and pursuing a different course of study just one year after graduating (*see* Mot. at 15-17). If the jury agrees, this will eviscerate, or at least dramatically handicap, the claims of all class members, regardless of their individual merits. It is precisely this concern that underlies the requirement of typicality.

C. Surrett Is Not an Adequate Representative.

The above-mentioned defenses that are unique to Surrett create a disabling conflict of interest for him. Surrett's focus at trial will be making his uniquely difficult proofs and beating back defenses that are unique to him. With Surrett's efforts fixed on rehabilitating his problematic case, Surrett cannot adequately represent the claims of the class as a whole. Surrett has no serious answer to this. He says only that this conflict is not significant enough to be "disabling" (but does not say why not), and that Defendants' challenge to his adequacy depends on the success of their Motion for Summary Adjudication. Surrett is wrong on both counts.

1. Surrett's Conflict Is Disabling.

"[D]ifferences in the strategy, defenses, and monetary stake in the outcome render [a lead plaintiff] inappropriate [as a class] representative." *In re Yarn Processing Patent Litigation*, 56 FRD 648, 653 (SD Fla 1972); *see also Safeway v. Or. Public Employees Union*, 152 Or App 349, 358-359, 954 P2d 196 (1998) (finding proposed class representative inadequate where it had taken positions inconsistent with those of the class during litigation); *TBK Partners v. Chomeau*, 104 FRD 127, 132 (D Mo 1985) ("The second reason that plaintiff is not an adequate representative is that plaintiff is uniquely subject to certain defenses and claims which other class members are not."); *Kraus v. Paterson Parchment Paper Co.*, 65 FRD 368, 369 (SDNY 1974) (same).

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Surrett has weakened, if not conceded, the class's claims with his deposition admissions, which came after he joined the case as representative of a class asserting omissions claims regarding whether Defendants knowingly "failed to disclose that the outcomes for students were materially different than represented in defendants' catalog." Apart from conceding even then that "there is nothing in WCI's catalog he believes is false or misleading" and that "there is nothing he contends is inaccurate about the numbers reflected on the WCI job placement form" (Opp. at 11), Surrett admitted that the true sources of his lofty post-graduate expectations were statements made by his friends and family, not WCI. (*See* p. 5, *supra.*) Since then, he has made no effort to explain these admissions other than to revert to the refrain that this is an omissions case. (Opp. at 11.) Whether Surrett's deposition admissions reflect disabling conflicts or simply a lack of attention to the class's claims, Surrett is an inadequate class representative.[18] *Kase v. Salomon Smith Barney, Inc.*, 218 FRD 149, 159 (SD Tex 2003) (finding class representative inadequate when representative showed no inclination to take an active role in monitoring class counsel's activities, and the representative's prayer for relief included an unusual remedy election that ignored other available forms of damages).

Perhaps more troubling is Surrett's admission that he has foregone potentially valuable individual damages claims, including "actual interest payments, moving expenses, wages lost during education, and—perhaps—a differential for future damages" (Opp. at 17 n3, 18 n4) in an

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[18] Surrett also appears to concede that class counsel (not he, Plaintiffs' fourth proposed class representative) is driving this litigation when he suggests in his opposition (at 11) that these admissions are "beside the point" because "he is relying on his attorneys' knowledge and application of the law, the testimony, and other discovery in this lawsuit." *Compare* Oct. 29, 2009 Hearing Tr. 72:17-20 ("Let's assume they bring a parade of people who say I'm happy. I can still prove that that person is damaged notwithstanding [whether] they know it or not.") *with Sanchez v. Wal Mart Stores, Inc.*, No. Civ. 06-02573, 2009 WL 1514435, at *3 (ED Cal May 28, 2009) (finding that "Plaintiff's counsel, and not Plaintiff, is the driving force behind *** action" where class representative only learned she had a claim after class counsel contacted her and "told her so" and thus allowing uninformed class representative to proceed would risk violating due-process rights of absent class members).

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effort to artificially homogenize class members' claims.[19] This conflict alone renders Surrett inadequate as a class representative. *See Fosmire v. Progressive Max Ins. Co.*, --- FRD ----, No. 10-5291, 2011 WL 4801915, at *8 (WD Wash Oct. 11, 2011) (denying class certification because class representative's "attempt to split her class members' claim by excluding stigma damages creates a conflict between her interests and the interests of the putative class, rendering her an inadequate class representative"); *Sanchez v. Wal Mart Stores, Inc.*, No. 06-02573, 2009 WL 1514435, at *3 (ED Cal May 28, 2009) (finding that counsel's decision to limit damages sought to "economic injury" constituted "strategic claim-splitting" that "creates a conflict between Plaintiff's interests and those of the putative class, and renders Plaintiff an inadequate class representative"); *Pearl v. Allied Corp.*, 102 FRD 921, 923 (ED Pa 1984) ("[P]laintiffs' efforts to certify a class by abandoning some of the claims of their fellow class members have rendered them inadequate class representatives."); *City of San Jose v. Superior Court*, 12 Cal 3d 447, 464, 115 Cal Rptr 797 (1974) ("[B]y seeking damages only for diminution in market value, plaintiffs would effectually be waiving, on behalf of the hundreds of class members, any possible recovery of potentially substantial damages—present or future. This they may not do.").[20]

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[19] Fifth Am. Compl. at 11-12 (stating that Adams is "also entitled to recover moving expenses and lost wages" but not seeking similar remedies for the class).

[20] *See also Nafar v. Hollywood Tanning Sys.*, 339 F App'x 216, 224 (3d Cir 2009) ("By seeking only partial relief, [class representative] may be engaging in claim splitting, which is generally prohibited by the doctrine of *res judicata*."); *In re TFT-LCD (Flat Panel) Antitrust Litigation*, No. 07-1827, 2012 WL 273883, at *3 n5 (ND Cal Jan. 30, 2012) (noting the implication of *Dukes* that, "[b]ecause concerns about preclusion are much more significant [where a class seeks monetary damages], courts have refused to certify classes based on conflicts of interest between the named plaintiffs and the absent class members"); *In re Teflon Prods. Liability Litigation*, 254 FRD 354, 368 (SD Iowa 2008) ("any *possibility* that a subsequent court could determine that claims for [certain types of damages] were barred by *res judicata* prevents the named plaintiffs' interests from being fully aligned with those of the class"); *Thompson v. Am. Tobacco Co.*, 189 FRD 544, 550 (D Minn 1999) ("If the named Plaintiffs have in fact jeopardized the class members' potential claims for personal injury damages, they would be deemed to have interests 'antagonistic' to those of the class.") (citation omitted); *Feinstein v. Firestone Tire & Rubber Co.*, 535 F Supp 595, 606 (SDNY 1982) (denying class certification where "cosmetic" tailoring of class claims "was purchased at the price of presenting putative class members with significant risks of being told later that they had impermissibly split a single cause of action").

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2. Defendants' Adequacy Argument Does Not Depend on Its Summary Adjudication Motion.

Contrary to Plaintiff's suggestion (Opp. at 13-14), at summary judgment, the only question before the Court is whether fact questions require adjudication by a fact-finder. *See* ORCP 47 C. Denial of the motion would not indicate that WCI's defenses are weak, only that questions of fact are present. If the Court denies summary judgment because of fact disputes, this ensures that the Surrett-specific defenses previewed in the motion will be hotly contested at trial. Thus, Surrett's focus at trial will be beating back those defenses and shoring up his own case, not advocating for class interests generally. *See, e.g.*, *Sanchez*, 2009 WL 1514435, at *3 (denying class certification and noting that "[t]he Court is concerned that adjudication of Plaintiff's individual claims necessarily will devolve into disputes over her unique circumstances, to the detriment of the claims of absent class members").

3. Class Counsel Should Not Be Permitted To Seek A Fifth Class Representative.

Lastly, without addressing any of the authority cited in Defendants' Motion to Decertify and without any argument or authority in support of his position, Surrett argues that the Court should put off deciding the issue and allow class counsel the opportunity to "seek to name a new class representative." (Opp. at 20.) Defendants respectfully disagree. Defendants have spent an extraordinary amount of time and money addressing the claims of four sequential putative class representatives already. The fact that they have all proven inadequate confirms that this class is not homogeneous and should not remain certified.

D. Surrett's Testimony Belies the Requisite Commonality.

Surrett incorrectly contends that his own testimony, which was not available at the time of class certification, "does not have anything to do with" the issue of commonality. (Opp. at 15.) Plainly it does, as his testimony confirms that there are not common answers to common

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questions as required by the United States Supreme Court in *Wal-Mart Stores, Inc. v. Dukes*, 131 S Ct 2541, 2551 (2011).

> What matters to class certification . . . is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers.

Id. (quoting Prof. Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 NYU L Rev 97, 132 (2009)). *Dukes* heightened the commonality standard, and the requirement described by the U.S. Supreme Court mirrors that set forth in ORCP 32 A(2). Thus, the availability of additional discovery of a class representative's claims and recent case law providing "new gloss to the long-standing [and identically worded] federal rule of commonality" (Opp. at 14) warrants the Court's attention.

Surrett argues in support of two common questions that supposedly bind the class together. (Opp. at 15.) The first, regarding the alleged fraudulent calculation of placement rates, concerns an alleged affirmative misrepresentation that the Court has not certified for class treatment—*i.e.*, that WCI knowingly violated the regulations governing the reporting of placement rates in order to disclose inflated numbers to prospective students—and which would require individualized proof of reliance and thus would not be conducive to class treatment.[21] The second, whether defendants violated the UTPA by failing to disclose wage information, is a classic example of a common question that is so abstract as to be meaningless. *See Dukes*, 131 S Ct at 2551 (recognizing that "any competently crafted class complaint literally raises common

[21] The Court declined to certify Plaintiff's claim that "Defendants made uniform omissions common to plaintiffs" by "[c]alculating job placement rates in a manner inconsistent with that required by the State of Oregon's governing regulations" (*see* Fifth Am. Compl. ¶ 14I) because this claim was really an affirmative misrepresentation claim or, at least, a mixed affirmative misrepresentation/omission claim requiring proof of individual reliance. *See* Dec. 3, 2009 Order at 8-9.

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questions" but holding that "[w]hat matters to class certification *** [is] the capacity *** to generate common *answers* apt to drive the resolution of the litigation") (citations omitted).

Putting aside that Surrett has failed to establish that WCI has miscalculated its rates or that WCI had any duty to disclose wage information to its prospective students, discovery has demonstrated that the "common questions" of materiality, causation, and harm underpinning the certified claims in this action have no "common answers" that can be established on a class-wide basis. Indeed, the parties agree that materiality and damages are questions of fact. (Opp. at 16-17; SJ Opp. at 30.)

Surrett himself gives wildly varying accounts of his understanding of job-placement rates, salary prospects, and their importance to his decision to enroll at WCI. (*Compare* Nylen Decl., Ex. K [Surrett Depo.] at 120:13-16 [did not know what a placement rate was at the time of enrollment] *and* 121:8-19 ["at the time I didn't really know the significance of" WCI placement statistics] *and* 270:7-14 [no wage-level expectation at time of enrollment] *and* 282:21-283:25 ["[h]ow much graduates [of WCI] would expect to earn after graduation" not important to him], *with* 272:9-19 ["understood [placement statistics] to mean the percentage of students who graduated [and] got very good jobs" that "required a culinary degree"].) Just moments after claiming he understood the statistics on the GSRD form reflected only jobs that "required" a culinary degree (Opp. at 6-7), Surrett admitted that this understanding came after enrolling at WCI, not when deciding whether to enroll (Nylen Decl., Ex. K [Surrett Depo.] at 276:19-277:7).

There are additional possible answers to Surrett's "common questions." For example, a diligent absent class member who read and understood WCI's placement-rate information, asked meaningful questions of WCI's admissions personnel, and conducted her own inquiry into the entry-level wage and job prospects within her chosen field of study would likely give different answers than Surrett. This "chosen field of study" factor creates an entirely separate problem when considering that the class contains students who majored in the management area. Similarly, an enrollee with experience in the culinary field that would inform her understanding

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of what entry-level positions would pay would certainly have a different understanding than Surrett. "Under these circumstances, the element of materiality is not subject to proof on a classwide basis." *In re Countrywide Fin. Corp. Mortgage Mktg. & Sales Practice Litig.*, No. 10-0257, 2011 WL 6325877, at *10 (SD Cal Dec. 16, 2011); *see also Mazza v. Am. Honda Motor Co. Inc.*, 666 F3d 586, 596 (9th Cir 2012), (denying class certification after considering that different class members would rely on a different mix of information that could include knowledge of allegedly omitted facts); *Sanchez*, 2009 WL 1514435, at *4 (finding that due process would require the court to allow defendant to present evidence of each class member's knowledge of defendant's product before entering into transaction); *Cohen v. DirecTV, Inc.*, 101 Cal Rptr 37 (Cal Ct App 2009) (refusing to certify class where consumers were exposed to a variety of information about defendant's services, including word-of-mouth representations from family and friends).

As discussed in Defendants' opening brief (Mot. at 21-22), there are numerous individual issues (not addressed in Surrett's opposition) that militate against a finding of commonality in this case. Depending on which of Surrett's statements in his deposition ultimately are believed, his claim could be fatally damaged. At the very least, Surrett's contradictory positions regarding his expectations and the importance of certain information to his enrollment decision demonstrate that "class members may have been unconcerned" with the alleged misrepresentations. *See In re Countrywide*, 2011 WL 6325877, at *10. The numerous permutations of pre-culinary-school experience, knowledge, understanding, factors informing the decision to enroll in culinary school, experience at WCI, and post-graduate outcomes undoubtedly present within a class of approximately 2,300 individuals warrants decertification under the test established in *Dukes*.

E. Surrett Cannot Meet His Burden To Establish that a Class Action Is Superior.

Surrett's oppositions to decertification and to summary adjudication make it abundantly clear that a class action is not superior in this case. Individual issues of value, materiality,

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causation, and harm will predominate over common ones. Any effort to resolve these highly individualized inquiries on a class-member-by-class-member basis after a limited trial on common issues would result in an unmanageable litany of approximately 2,300 mini-trials. Many of these mini-trials would be for class members who suffered no harm, but would occupy this Court for the foreseeable future. *See Sanchez*, 2009 WL 1514435, at *4 (denying class certification in failure to warn case where class treatment would vitiate defendant's due-process rights to introduce evidence with respect to each class member's claim, including (1) the knowledge the class member already possessed about defendant's product before entering into the transaction, (2) the factors relevant (or not relevant) to that class member's decision to purchase the product, (3) whether further disclosure sought by the plaintiff would have materially affected the class member's purchase decision, (4) each class member's actual use and experience with the product, and (5) the supposed true "value" of the product).

A comparison of the experiences of two WCI graduates deposed in this case, Surrett and Kirk Bachmann,[22] illuminates the highly individualized nature of any inquiry into the reasons for attending a culinary school, the mix of knowledge, information, and experience a student has prior to enrollment, the benefits of a formal culinary training, and the post-graduate application of that training. Surrett's story is by now well known to the Court. In comparison with Surrett, Bachmann spent his childhood and teenage years working with his father, a master pastry chef, and his uncle, a chef. (Supp. Nylen Decl., Ex. G [Bachmann Depo.] at 7:14-8:13.) He had experience working at his family's inn and restaurant. (*Id.* at 8:20-9:7.) There, he worked as a cook on "[a] line of one," handling "[c]ooking, baking, serving, managing *** employees ***, front of the house and back." (*Id.* at 9:16-24.) Bachmann attended the University of Oregon for four years before returning to his family's business. (*Id.* at 8:8-16.) At his father's request, Bachmann attended WCI before returning to run his family's business. (*Id.*)

[22] Although Bachmann is not a member of the class, his experiences are offered only to demonstrate the vastly different circumstances under which students enroll in culinary schools.

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Bachmann returned to the family business after earning a diploma in culinary arts, resumed cooking alongside his father, and assumed additional managerial responsibilities at the restaurant. (*Id.* at 22:3-5, 26:7-14.) He later became a chef at a Portland restaurant, an instructor at WCI, Vice President of Academic Affairs of WCI, and ultimately, President of Le Cordon Bleu College of Culinary Arts in Chicago. (*Id.* at 22:15-28:25, 37:13-23, 42:11-16.) As Bachmann explained, a culinary education can equip individuals with experience in the industry to return to their prior employers "with enhanced skills and be able to do their job at a higher level and position themselves for further advancement in that organization ***." (*Id.* at 103:22-04:23.) To say that Surrett and Bachmann (or anyone with prior professional culinary experience) enrolled at WCI for the same reasons and benefited in the same ways defies credibility.

1. Individual Issues of Materiality and Causation Predominate.

Surrett's blanket contention that all "recruitment and admissions" is *per se* material (Opp. at 15) ignores the highly individualized nature of the decision to enroll in postsecondary school, given the various backgrounds of WCI students. It would be unreasonable to suggest that a student with Bachmann's experience, or any experience in the culinary field for that matter, would interpret and rely on job-placement statistics in the same manner as alleged by Surrett or that she would come to the same unreasonable assumptions Surrett allegedly did regarding his short-term post-graduate job prospects.[23] Determining which class members understood WCI's job-placement information through personal experience or investigation, and thus had reasonable

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[23] Surrett goes out of his way to describe WCI's Culinary Arts degree as "WCI's most expensive degree." (Opp. at 6.) This raises a number of serious issues, given that he makes no showing regarding the price of tuition for the other programs, whether students in those programs receive a benefit, and whether substantially lower student loan debts would be as difficult to repay as his own purport to be. Surrett's analysis ignores that each of WCI's programs confers unique benefits via different curricula, qualifies students for different positions, and accordingly keeps its own post-graduate employment metrics. Surrett offers no factual basis to conclude that his reasons for enrolling in the Culinary Arts program are at all indicative of those underlying the enrollment decisions of other programs' students. (Nylen Decl., Ex. M [Surrett Catalog] at WCIP00003218 [catalog description of various programs].)

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post-graduate expectations, alone is grounds for decertification. *See Mazza*, 666 F3d at 596 (finding class certification inappropriate due to the individual issues because "the relevant class must also exclude those members who learned of the *** allegedly omitted limitations before they purchased or leased the [product at issue]"). Further, while it is true that the highly regulated field of post-secondary education sets forth certain requirements pertaining to disclosures, the examples given by Surrett either concern alleged affirmative or mixed misrepresentations (re: job-placement calculation, competitive advantage, and exclusivity) and other conduct (re: assessing incoming students), which are not at issue in the certified claims.[24]

In *Vasquez* the trial court refused to certify a class where plaintiffs claimed that the defendant culinary school omitted alleged facts that:

- Few students would become chefs;
- None of the school's graduates would become chefs upon graduation;
- Graduates would earn only $9-$13 an hour for many years after graduation;
- The school's graduates could have gotten the same jobs without the education; and
- It would be virtually impossible for the school's graduates to pay off their loans.[25]

The consumer-protection statute provisions asserted in *Vasquez* were the California equivalents of those asserted by Surrett here. *Compare* ORS 646.608(1)(e) (prohibiting representations that service has "sponsorship, approval, characteristics, ingredients, uses, benefits, quantities or qualities that they do not have"), *with* Cal. Civ. Code 1770(a)(5) (prohibiting representations that service has "sponsorship, approval, characteristics, ingredients,

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[24] Moreover, Plaintiff's unsupported speculation that WCI students would have been lied to had they asked more questions (Opp. at 16) cannot save class members from their representative's individual lack of diligence.

[25] Supp. Nylen Decl., Ex. H [*Vasquez* Order] at 17.

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uses, benefits, or quantities which they do not have"); *also compare* ORS 646.608(1)(k) (prohibiting misrepresentation of "the nature of the transaction or obligation incurred"), *with* Cal. Civ. Code 1770(a)(14) (prohibiting representation "that a transaction confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law") *and* (a)(16) (prohibiting representation "that the subject of a transaction has been supplied in accordance with a previous representation when it has not"). The *Vasquez* plaintiffs alleged that representations in the culinary school's catalog and elsewhere failed to tell the "whole truth." (Supp. Nylen Decl., Ex. H [*Vasquez* Order] at 17.) Similarly, Surrett read WCI's website, spoke to admissions representatives, viewed placement rates, saw advertising, and conferred with family and friends before deciding to enroll at WCI. (Opp. at 6-8; p. 6, *supra*.) Also similar was the evidence in *Vasquez* that defendants "made disclosures, including that [the school] did not guarantee jobs or salaries.". (Supp. Nylen Decl., Ex. H [*Vasquez* Order] at 17.) Ultimately, the *Vasquez* court held that differences in the mix of information relevant to plaintiffs' enrollment decisions defeated commonality. (*Id.* at 8.)

2. Individual Issues of Value and Damages Predominate.

If tackling individual issues of materiality and causation is daunting, meaningfully addressing the issues of value (or "benefit") and damages is simply impossible. Presumably, that is why Surrett has not proposed any reliable way to make such determinations on a class-wide basis. Apparently recognizing the problems presented by individual questions of value and harm, Surrett simply argues initially that a WCI culinary education has no value. (Opp. at 16.) He concedes, however, that the value of a WCI education may be something other than zero (*id.* at 16-17), and claims that determining damages for each class member is just a matter of calculating the difference between the tuition paid and a uniform "value" to be calculated by a hypothetical expert (*id.* at 17). But asserting that an expert can do it is insufficient at this late stage. *In re Google Adwords Litigation*, No. 5:08-CV-3369 EJD 2012 WL 28068 at *15 (ND Cal Jan 05, 2012) (denying class certification where plaintiffs failed to affirmatively demonstrate

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that restitution could be calculated by methods of common proof because "in many instances, individual proof would show that [putative class members] received significant revenues and other benefits from [their purchases] that would need to be individually accounted for in any restitution calculation").

Even Surrett's oversimplified approach fails.[26] His theory is predicated on the unsupported (and counterintuitive) contention that "the only way to assess the value of this degree is whether the training and education provide economic advantage." (*Opp.* at 16.) Seeking to measure damages by the difference between tuition paid and a set dollar value assigned to a WCI degree—an inherently arbitrary exercise that ignores the individual factors contributing to a student's decision to attend school, performance and efforts while enrolled, and post-graduate decision making—is a veiled effort to have the Court regulate prices. (*See* Supp. Nylen Decl., Ex. H [*Vasquez* Order] at 19 ("Plaintiffs are, in essence, asking the Court to regulate the price of an education in the for-profit educational industry, a regulated industry, in the guise of a class action. That is a job for the Legislature, not the courts.").)

This Court was attuned to these issues at the original hearing on class certification and was rightly skeptical of the predominance of individual damages issues and of the potential unmanageability of class-member damages claims. (*See* Supp. Nylen Decl., Ex. F [Oct. 29, 2009 Hearing Tr.] at 7:2-8:2, 25:4-12, and 90:5-91:3 [questioning whether class counsel was asking the Court to engage in price regulation and separately observing that damages issues would likely require individualized determinations]). Soon thereafter, the Court correctly held in its Conditional Certification Order that "[q]uestions of fact as to the value of the educational

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[26] Notably, Surrett's approach requires him to jettisons several potential damages theories, including "actual interest payments, moving expenses, wages lost during education, and—perhaps—a differential for future damages," on behalf of absent class members. (*See id.* at 18 n.4)

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services provided to students and varying amounts of tuition paid are not common to the proposed class." (Nylen Decl., Ex. J [Dec. 3, 2009 Order] at 9.)

Surrett's own brief demonstrates some of the individual inquiries associated with this overly simplified assessment of the value or benefit of a WCI degree. It posits two overbroad sub-classes of people who would benefit differently from a WCI culinary: those with prior experience in the industry (like Bachmann) and those without (Surrett). Putting aside the vast possible range of prior experience (*e.g.*, waiting tables, to washing dishes, to specific types of food preparation), Surrett's arguments regarding WCI students with prior experience and those without underscores the obvious: different individuals will benefit differently from their studies at WCI. To suggest that those with prior experience in the industry obtained no material benefit from formal culinary training lacks factual basis.

Given these variables and others that necessarily factor into any assessment of the benefit obtained from a course of training, Surrett simply has not met his burden of proposing a method for dealing with class-wide damages calculations. *See, e.g., In re Google Adwords Litigation*, 2012 WL 28068, at *15 (noting that "widely varying goals" behind a purchase "make[] it difficult to calculate the actual value" received by the purchaser); *see also In re Vioxx Class Cases*, 180 Cal App 4th 116, 135-136, 103 Cal Rptr 3d 83 (finding that restitution could not be calculated on a class-wide basis where the issue of value received by class members was class-member specific).

Surrett offers no explanation about how any formula could establish class-wide value. In any event, this is precisely the type of formulaic approach rejected by *Dukes*. *See* 131 S Ct at 2561 (noting Wal-Mart's right to litigate individual defenses to claims for monetary relief and holding that "the necessity of that litigation will prevent [damages] from being 'incidental' to [issues of liability and injunctive relief]").

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3. An Issues Class Is Not Superior in this Case.

Instead of addressing recent authority on the predominance of individual damages and causation issues in a case such as this (Mot. at 24-26 & n.82), Surrett argues that the Court should at least certify an issues class (Opp. at 17). Surrett offers one distinguishable case for this proposition, *Shea v. Chicago Pneumatic Tool Co.*, 164 Or App 198, 990 P2d 912 (1999). The facts and issues involved in *Shea* are materially different than those presented here.

Shea was a product liability case where, unlike here, there were several "core" and complex issues capable of class-wide resolution. *Shea v. Chicago Pneumatic Tool Co.*, No. 950906261, 1996 WL 34393262 (Multnomah Cnty Cir Ct July 30, 1996). The court certified six substantial questions for class treatment: (1) whether the product at issue was dangerously defective due to its design; (2) whether the product was dangerously defective due to inadequate testing; (3) whether the product manufacturer was negligent in its design of the product; (4) whether the product manufacturer was negligent in its testing of the product; (5) whether plaintiffs' scientific proof of causation was sufficient to meet the applicable standards under Oregon law; and (6) whether the manufacturer should be held liable for punitive damages and, if so, in what amount. *Shea* 164 Or App at 201-02. The court determined that the superiority of addressing these complex common issues on a class-wide basis outweighed the predominance of individual issues, particularly in light of the "significant issue of scientific causation in th[e] case, which will require special treatment under OEC 104, OEC 702 and *State v. O'Key* ***." *Id.*

For three reasons, *Shea* should not control here. First, in *Shea*, there were six substantial, "core" issues capable of class-wide resolution. By contrast, the common issues in this case involve determining whether WCI failed to disclose certain facts in its catalog, enrollment agreement, and GSRD forms, and a presumption (based either on the subject matter or on the regulatory framework) that those facts are material to the entire class. Surrett proposes leaving

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most if not all complex issues in this case for individual proof after a class phase.[27] (Opp. at 17-18.) To make matters worse, Surrett has threatened that, if the Court certifies an issues class, he will inject additional and far more complicated damages issues, "where appropriate, actual interest payments, moving expenses, wages lost during education, and—perhaps—a differential for future damages" into the individual phase of the proceedings.[28] (*Id.* at 18 n.4.)

Second, *Shea* involved what the Court approximated to be a 43-member class. Thus the benefits of certifying costly, complex, common issues was weighed against the detriment of approximately 40 individualized proceedings. Here, there are approximately 2,300 class members whose complex individual issues including damages issues far outweigh the marginal benefit of a class-wide determination regarding whether an omission has occurred.

Third, the appellate court in *Shea* did not consider defendants' constitutional arguments because the trial court did not certify that issue for appeal. Here, constitutional due process arguments are central to Defendants' motion to decertify. Accordingly, *Shea* does nothing to dispose of Defendants' principal argument against the superiority of a class action in this case: that adherence to due process in this case would mire the court in endless individual litigation.

Defendants do not dispute that the rules allow this Court to certify an issue class "when appropriate." *Shea*, 164 Or App at 205 (quoting ORCP 32 G). Nor do Defendants argue that predominance is a requirement for class certification in Oregon. However, predominance is a "'pertinent' matter that the trial court must consider" in its determination of superiority. *See id.* at

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[27] If Defendants' are right that questions of materiality and causation present individual issues, then there would be virtually nothing left for class-wide determination, rendering this action even more unsuitable for any form of class treatment.

[28] Given the potentially significant damages claims by each class member, Surrett presents no compelling argument that absent class members lack incentive to pursue their claims on an individual basis. *See* ORCP 32(B)(8); *see also id.* 32(B)(4).

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207. We respectfully submit that the predominance of individual issues in this case easily overwhelms any benefits to be achieved by class treatment.

F. Defendants Have a Due-Process Right To Seek To Enforce Bilateral Arbitration Agreements Against Class Members.

Plaintiff does not dispute that nearly half of the absent class members signed Enrollment Agreements containing an express class-arbitration waiver that was not present in the Enrollment Agreement signed by Surrett. (Opp. at 18-19.) Defendants have a due-process right to enforce these arbitration agreements against absent class members. *Lindsay v. Normet*, 405 US 56, 66 (1972) ("Due process requires that there be an opportunity to present every available defense."); *Bernard v. First Nat'l Bank of Or.*, 275 Or 145, 152, n3, 550 P2d 1203 (1976) (noting that "[t]he stated purpose of [class certification] was to 'achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bring about other undesirable results'" (emphasis added)).

Defendants have not acted inconsistently with a right to compel bilateral arbitration with class members who waived their right to participate in this suit. They moved to compel Surrett and Adams to bilateral arbitration shortly after *AT&T Mobility LLC v. Concepcion*, 131 S Ct 1740 (2011), fundamentally changed the law regarding the enforceability of class-action waivers in arbitration agreements. That motion also sought dismissal of this case in its entirety, given Defendants' position that Plaintiff could not produce a class representative who had not waived the right to bring the class claims in this suit. Plaintiff did not dispute Defendants' lack of active litigation since *Concepcion* issued, relying as he does now (Opp. at 18) almost exclusively on pre-*Concepcion* events as a basis for his argument that Defendants' motion was not timely.

Defendants' approach was consistent with that of defendants in *Estrella v. Freedom Financial*, No. 09-03156, 2011 WL 2633643 (ND Cal July 5, 2011), who moved to compel bilateral arbitration of named plaintiffs' claims, in what to Defendants' knowledge at the time was the only post-*Concepcion* opinion involving a class that had already been certified and received

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notice, and for which the opt-out period had run. *See id.* at *6 (granting defendants' motion to compel bilateral arbitration of class representatives and arranging for further submissions proposing how notice of the ruling would be issued to the certified class). A later order in the same case, No. 09-03156, 2012 WL 214856 (ND Cal Jan. 24, 2012), held that, because *Concepcion* is a "fundamental shift" and a "change[of] the legal landscape," a party's failure to move to compel arbitration was not an "act[] inconsistent[] with a known right to compel." *Id.* at *3. The alternative—moving to compel over 2,000 absent class members into over 2,000 bilateral arbitrations—undoubtedly would have violated those absent class members' due-process rights given the fact, undisputed in Plaintiff's opposition, that absent class members were unlikely to have factored the possibility of being compelled into bilateral arbitration in their decision not to opt out of the class certified by the Court with notice that contemplated neither the subsequent events of *Concepcion* nor Surrett's argument distinguishing his arbitration agreement from that agreed to by approximately half of absent class members.

Surrett led his Opposition to Defendants' Motion to Compel Arbitration/Dismiss with an argument that, because his arbitration agreement did not include an express class-arbitration waiver, *Concepcion* did not fundamentally change anything for him (MTCA Opp. at 7-11). Defendants replied that, given this effort to distinguish himself from the class, Surrett's opposition raised "serious questions about whether the class as certified should stand." (MTCA Reply at 12.) The Court denied Defendants' Motion to Compel Arbitration/Dismiss in December and, although Defendants' declined to appeal the Court's decision regarding the arbitration language in Surrett's and Adams's Enrollment Agreements, they filed this Motion to Decertify on a schedule stipulated to by Plaintiff. Defendants have done nothing inconsistent with their right to compel bilateral arbitration of absent class members who signed arbitration agreements including an express class-action waiver since Plaintiff distinguished himself from absent class members and Surrett an issue in his opposition to Defendants' Motion to Compel Arbitration/Dismiss. Plaintiff makes no argument that these absent class members have suffered

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any prejudice in the interim and, contrary to his assertion (Opp. at 19), amending the class definition to exclude absent class members who waived their right to participate in a class action in this Court will have no impact on whether what remains of Surrett's case after summary judgment can proceed to trial.

Plaintiff's unconscionability arguments similarly fail. First, the limited arguments he made regarding unconscionability in opposition to Defendants' Motion to Compel Arbitration/Dismiss were directed at aspects of Surrett's arbitration agreement that are not present in later versions signed by over 1,000 absent class members. For example, Plaintiff's procedural unconscionability argument does not address the bold, underlined language identifying the various subparts of the newer arbitration clauses. (Decl. of Denese Phillips, Exs. 1-5.) The newer arbitration clauses do not nullify state fee-shifting rules. (*Id.*) And the terms regarding the allocation of the costs of arbitration are more favorable to students under the newer arbitration clauses. (*Id.*) Further, the newer arbitration clauses contain an express severability/waiver provision not present in Surrett's version of the arbitration clause. (*Id.*) None of Plaintiff's arguments in opposition to Defendants' Motion to Compel Arbitration/Dismiss contemplates the different language agreed to by many absent class members.

Second, Defendants' reply arguments in support of their Motion to Compel Arbitration/Dismiss apply with equal or greater force here: (1) *Concepcion* vitiates Plaintiff's unconscionability arguments by holding that the FAA preempts any state-law unconscionability rule that disfavors arbitration; (2) Surrett's Enrollment Agreement was not procedurally unconscionable; (3) applying federal law "to the fullest extent possible" does not necessarily strip class members of state-law claims (and in any event Plaintiff does not assert any statutory damages here); (4) the bare assertion that Surrett's arbitration clause imposed undue costs or burdens on Surrett is insufficient to meet his burden to prove unconscionability; and (5) Oregon courts express a clear preference in favor of severance wherever possible to avoid invalidating an

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agreement in its entirety, particularly where the agreement concerned is an arbitration agreement. Plaintiff's attempt to rest on arguments he made and which applied to an arbitration agreement with different language than that signed by any class member who enrolled after November 2007 is no basis to allow those class members to remain in any class that survives this motion.

IV. CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court decertify the conditionally certified class.

DATED: March 9, 2012

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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,	)	CASE NO. 0803-03530
Plaintiff, v.	)	ORDERS DENYING DEFENDANTS PENDING MOTIONS
WESTERN CULINARY INSTITUTE, LTD, and CAREER EDUCATION CORPORATION	)	
Defendants.	)	

This matter having come before the Court upon Defendants Motion to Decertify Class and Motion For Summary Adjudication of Claims Based on Certified Allegations and the Court having fully considered oral argument and legal authorities submitted by the parties,

Now, therefore, the Court denies defendants motions in their entirety.

Dated this 5th day of April, ~~2011.~~ 2012.

Richard C. Baldwin
Circuit Court Judge

IN THE CIRCUIT COURT FOR 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.	Case No. 0803-03530 **MOTION TO AMEND ORDER DENYING DEFENDANTS' PENDING MOTIONS** Pursuant to ORS 19.225

MOTION

Defendants Western Culinary Institute and Career Education Corporation respectfully request that this Court amend its Order of April 4, 2012, pursuant to ORS 19.225, to state that it 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.

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UTCR 5.010 CERTIFICATION

On April 18, 2012, counsel for defendants Western Culinary Institute, Ltd. and Career Education Corporation, Stephen F. English, conferred with counsel for plaintiffs, David F. Sugerman, about this motion. This motion is opposed.

POINTS AND AUTHORITIES

Defendants Western Culinary Institute and Career Education Corporation (collectively, "WCI") respectfully request that this Court amend its Order of April 4, 2012 (the "Order"), to state: (a) that it "involves a controlling question of law as to which there is substantial ground for difference of opinion," and (b) that "an immediate appeal from the order may materially advance the ultimate termination of the litigation." ORS 19.225.

WCI's motions for decertification and for summary judgment presented complex and difficult issues. Given that the U.S. Supreme Court, and, in remarkably similar cases to this, courts of New York, California, and Georgia, have recently rejected legal theories on which Plaintiffs rely, there is substantial ground for difference of opinion on the Court's Order. Although WCI understands that the Court denied the motions and does not intend to reargue the issues in this application, obtaining guidance from the Court of Appeals now would help clarify the issues to be tried before the parties embark on what otherwise will be a very time-consuming and expensive trial. Waiting for post-trial appellate review here, given the time, expense, uncertainties of what issues should be tried to a jury (and whether they should be tried on a class-wide or individual basis) would be inefficient under these circumstances.

Among the myriad issues presented to this Court in WCI's motions, some were particularly noteworthy for their importance and substance, including the following:

- **Whether Defendants Owe A Duty To Disclose Under Applicable Law.** This Court certified only certain specifically mentioned claims that were based on pure omissions and then only "as to students who entered into contracts for services with defendants after defendants allegedly knew and failed to disclose that the outcomes for students were materially different than represented in defendants' catalog." *See* December 9, 2009, Opinion Letter Regarding Plaintiffs' Motion for

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Class Certification, at p. 9 (emphasis added). This Court did not certify any affirmative misrepresentation claims or so-called "mixed representation" claims – including any such claims regarding placement statistics – because they require proof of individual reliance. *See Pearson v. Philip Morris, Inc.*, No. 0211-11819, 2006WL 663004, at*12 (Mult Cnty Cir Ct, Feb. 23, 2006). Given that Defendants cannot be liable for alleged omissions unless they have a duty to disclose, a controlling issue that must be decided now is whether Oregon law imposes on WCI (and possibly other institutions regulated by Oregon's Office of Degree Authorization) a duty to disclose to prospective students information not specified in or required by the controlling regulations, such as: (a) the specific titles of the jobs first obtained by graduates upon completion of their programs, (b) the specific salaries earned by graduates in connection with those jobs, and (c) that placement statistics provided to prospective students regarding initial employment of graduates included jobs for which a culinary degree was not required. As these are questions of law and not fact, it is WCI's position that a jury should not decide them. *See Fazzolari By & Through Fazzolari v. Portland Sch. Dist. No. 1J*, 303 Or 1, 4, 734 P2d 1326, 1328 (1987) ("[i]n either case, 'duty' by definition appears as a legal issue and, if disputed, is decided by the court").

- **Whether Plaintiff Nathan Surrett Carried His Burden Of Raising Triable Issues As To The Materiality Of Any Alleged Omissions.** Even if Defendants owed Plaintiff a duty to disclose salary and job title information, Plaintiff still has the burden of showing that any alleged omissions were material to *him*. *Pearson v. Provident Life & Accident Ins. Co.*, No. 01-1202, 2004 WL 6039152, *6-7 (D Or Mar. 17, 2004). A controlling issue here is whether WCI's express and repeated disclosures and disclaimers about this issue, and Surrett's testimony about his understanding of what types of jobs awaited him, preclude as a matter of law any finding that the allegedly omitted facts were material to Surrett. Further, a controlling issue is whether Surrett can show that he suffered any injury in fact as a result of any omissions, which is also required under Oregon law.

- **Whether Mr. Surrett's Claims Are Typical Of Those Of The Class.** Mr. Surrett is the latest in a series of proposed class representatives in this case, and this Court had never before considered his suitability or made any order thereon. A controlling issue is whether Mr. Surrett's claims can be typical of all absent class members where it is undisputed that he conducted no due diligence about likely jobs or salaries that awaited him on graduation, did not know or think about what the initial job placement rates represented when he enrolled, obtained immediate employment in his field of study and left the field to pursue another graduate school degree. A controlling issue is whether his claims are typical of a class that includes many people who read WCI's catalog, conducted basic due

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diligence and knew, as WCI represented, that they would qualify for entry-level jobs in the field upon completion of their programs and who stayed and advanced in their chosen profession.

- **Whether Mr. Surrett's Claims Satisfy The Commonality Requirements Recently Clarified By The United States Supreme Court In *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).** *Dukes* further defined the commonality requirement under the FRCP, which mirrors ORCP 32(a)(2), and held that the appropriate inquiry on this issue is whether there are common questions that would "generate common *answers*" apt to drive the resolution of the litigation. Controlling issues here are whether the fundamental holdings in *Dukes* should be applied in Oregon state courts addressing class certification and, if so, whether Mr. Surrett satisfied his burden of establishing that he met the commonality requirement as elucidated by *Dukes*. The different mix of information available to and considered by class members in making their enrollment decisions, the highly individualized enrollment decision processes of the various class members and their widely varying educational and post-graduate employment experiences should preclude a common answer to the crucial questions of why class members enrolled at WCI, how they understood the mix of information presented to them during the enrollment process, how the allegedly omitted information factored in each class member's enrollment decision, and whether each class member suffered harm as a result of the alleged omissions.

- **Whether a class is viable if determinations of causation and damages requires separate hearings for each of its 2,300 members.** Plaintiffs have not offered (and cannot meaningfully propose) any class-wide mechanism to determine: (1) the value of the education received by each class member; (2) whether a class member who researched and understood the likely jobs that would await him or her on program completion can obtain any financial recovery in this case. If, as contemplated by the Court's original certification order, 2,300 separate hearings need to be held to decide individual causation and damages, then there is, at a minimum, "substantial ground for difference of opinion" as to whether this case properly can be managed as a class action.

- **Whether WCI students who agreed to bilaterally arbitrate their claims may participate as class members.**

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These are important and challenging questions. Complicating matters, Oregon trial courts have thus far received little guidance from this State's appellate courts as to the answers—particularly whether or how this State will follow the *Dukes* decision.

ORS 19.225 provides that, in a class action, when a circuit court judge states in an interlocutory order that there is substantial ground for difference of opinion on controlling questions of law and, further, that an immediate appeal may materially advance the ultimate termination of the litigation, the Court of Appeals may, in its discretion, permit an appeal of the order. These standards are satisfied here.

There is substantial ground for difference of opinion on the above-mentioned questions. This is well illustrated by the fact that, in a nearly identical case in Los Angeles Superior Court, *Vasquez v. California School of Culinary Arts*, many of these same questions were answered in WCI's favor in denying class certification. Likewise, in a similar case about disclosure to law school applicants of post-graduation employment data, *Gomez-Jimenez v. New York Law School*, No. 652226/11, __ N.Y.S.2d __, 2012 WL 934387 (NY Sup Ct Mar. 21, 2012), a judge of the New York Supreme Court (that state's trial court) dismissed the class action on a number of the same grounds urged in WCI's motions. Even if *Vasquez* and *Gomez-Jimenez* were wrongly decided, they show a substantial ground for difference of opinion on the issues WCI's motions presented.[1]

Further, immediate appeal may advance the ultimate termination of the litigation.[2] First, WCI might prevail in the appeal. For example, if the Court of Appeals decides that, as a matter of law, WCI had no duty to disclose to enrolling students information not specified in the

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[1] A third case, *Diallo v. Am. InterContinental Univ., Inc.*, 687 SE2d 278 (Ga Ct App 2009), also shows a substantial ground for difference of opinion. There, the Georgia Court of Appeals affirmed a trial court's denial of class certification because "the question whether [a university] is liable for having fraudulently induced individuals to enroll at the school would 'require a highly individualized, case-by-case determination as to each putative class member.'" *Id.* at 282.

[2] WCI underscores that the statute says "may" not "will." ORS 19.225. Plaintiffs may argue that an interlocutory appeal will likely delay a trial. Even if this were true (and WCI doubts that it is), Plaintiffs cannot deny that an interlocutory appeal *may* advance termination of the litigation because WCI might prevail in the appeal.

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controlling regulations, this ruling would end the suit. If the Court of Appeals decides that Mr. Surrett is not a typical class representative or that the class, as now defined, lacks commonality, having this guidance now would avert a re-trial after a post-trial appeal. For these reasons, an immediate appeal may advance the ultimate termination of the litigation.

Moreover, an immediate appeal is the most prudent course for a second, perhaps more important reason: the parties have unclear parameters on how this class action should be submitted to a jury. Will the jury decide whether WCI had a duty to disclose information, or will the Court do so, leaving to the jury the question of whether WCI breached the duty? Will Plaintiffs be allowed to go beyond the Court's ruling certifying only claims based on WCI's alleged omissions, and present evidence at trial that WCI made affirmative misrepresentations (or, as Plaintiffs' counsel said at oral argument, "half truths"), or are Plaintiffs bound by the Court's prior order? Should the parties be prepared to conduct 2,300 individualized damages trials? The parties at this point do not know even how the Court believes these questions should be answered. In short, all involved would benefit from some guidance from the Court of Appeals on how, and if, this complex case should proceed.

This motion does not require the Court to decide whether an immediate appeal is wise or appropriate at this juncture. These are questions for the Court of Appeals, in its discretion, to decide. *See Pearson,* 208 Or App at 503-09 (stating the standard for the Court of Appeals' exercise of discretion in deciding to hear an interlocutory class action appeal). All this Court must decide is: (a) whether its recent Order involves controlling questions of law as to which there is substantial ground for difference of opinion, and (b) whether an immediate appeal may hasten termination of the suit. ORS 19.225. WCI respectfully asks the Court to answer these questions in the affirmative.

CONCLUSION

For these reasons, WCI respectfully requests that the Court amend its Order to state: (a) that it "involves a controlling question of law as to which there is substantial ground for

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difference of opinion," and (b) that "an immediate appeal from the order may materially advance the ultimate termination of the litigation." ORS 19.225.

DATED: April 18, 2012

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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,	)	CASE NO. 0803-03530
Plaintiff,	)	ORDER DENYING DEFENDANTS
v.	)	MOTION TO AMEND ORDER
WESTERN CULINARY INSTITUTE, LTD, and CAREER EDUCATION CORPORATION	)	
Defendants.	)	

This matter having come before the Court upon Defendants Motion to Amend Order Denying Defendants Pending Motions (ORS 19.225) and the Court having considered authorities cited by the parties,

Now, therefore, defendants motion is denied.

Dated this 7th day of May, 2012.

Richard C. Baldwin
Circuit Court Judge

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 OF CERTAIN CLASS MEMBERS' CLAIMS AND TO STAY ACTION

Oral Argument Requested

Western Culinary Institute
Le Cordon Bleu Program
Portland

Enrollment Agreement

600 SW 10th Avenue, Suite 400
Portland, OR 97205
502-223-2245

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 Hospitality & Restaurant Management** 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 fees charges stated in this agreement will not change provided that I start classes as scheduled 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 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. 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 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 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. 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.
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:** 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 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 internship/externship placement or employment 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.
8. **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.
9. **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.
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. **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.
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 parents under this Agreement are assignable to any other person or entity.
14. **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.
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.

LE CORDON BLEU
COLLEGE OF CULINARY ARTS

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** 101 credit hours 60 weeks
[ ] **Associate of Occupational Studies – Le Cordon Bleu Culinary Arts** 101 credit hours 84 weeks
[ ] **Associate of Occupational Studies – Le Cordon Bleu Pâtisserie & Baking** 98 credit hours 60 weeks
[ ] **Associate of Occupational Studies – Le Cordon Bleu Pâtisserie & Baking** 98 credit hours 84 weeks
[ ] **Certificate – Le Cordon Bleu Pâtisserie and Baking** 39 credit hours 36 weeks
[ ] **Certificate – Le Cordon Bleu Culinary Arts** 37 credit hours 36 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 Le Cordon Bleu College of Culinary Arts (the "College") 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 College catalog in one of the following formats: printed (hard copy), CD-ROM, or downloaded from the College 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 the College or any employees of the College, and that no binding promises, representations or statements have been made to me by the College or any employee of the College 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 the College. I hereby certify that all information I provided in my application for admission to the College is complete, accurate and up to date. Once I sign this Agreement, and the College 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 LE CORDON BLEU COLLEGE OF CULINARY ARTS

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 the College, 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. The College 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 the College 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 the College and published in an addendum to the catalog and that I am fully responsible for the payment of the tuition and fees charged by the College (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 the College. A student who repeats a course already taken at the College 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 the College. 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 the College. 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. The College reserves the right to cancel or reschedule a starting class if the number of students enrolled is deemed insufficient. The College 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 the College 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 the College. If there is a balance due to the College 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 the College. 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 the College discontinues instruction after a student enters training, including circumstances where the College 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 the College 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 the College. 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 The College 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. The College may adjust the Student's account based on any repayments of Title IV funds that the College was required to make. For details regarding this policy, please see the College catalog.

Inquiries Any inquiry or complaint a student may have regarding this contract may be made in writing to Le Cordon Bleu College of Culinary Arts, 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 the College 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. The College 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 impact 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 the College, the Student agrees to abide by the terms stated in the catalog and all school policies.
2. **Changes:** The College 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. The College 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 impact students.
3. **Program Changes and Cancellation:** The College 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. The College 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 the College. Additionally, the College does not imply, promise, or guarantee that any credits earned at the College will be transferable or accepted by any other institution. There is a meaningful possibility that some or all credits earned at the College 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 the College.
5. **Success of Student:** The College 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:** The College 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 College community, conviction of a crime, failure to abide by the College policies and procedures or any false statements in connection with this enrollment. The College 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:** The College 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. The College 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:** The College does not make any representations or claims to prospective or current students regarding the starting salaries of the College'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 the College regarding anticipated salaries in deciding to enroll at the College.

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 the College may use his/her name, voice, image, likeness, and biographical facts, and any materials produced by the Student while enrolled at the College, 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 the College.
11. **Discrimination:** The College 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 the College 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 the College'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 the College to the College's Grievance Procedure set forth in the College catalog. The parties agree to participate in good faith in the College's Grievance Procedure. Compliance with the College'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 the College from requiring the Student to utilize the College'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 the College's Grievance Procedure. The College 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 the College; (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 the College, 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 the College'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 the College unless the Student and the College 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 the College 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 the College.
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 College 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 the College or any employee of the College 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. The College 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:** The College has two branch campuses: Le Cordon Bleu College of Culinary Arts located in Tucker, GA and Le Cordon Bleu College of Culinary Arts located in Mendota Heights, MN.

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

JENNIFER ADAMS individually and on behalf of all other similarly situated persons, Plaintiff, v. WESTERN CULINARY INSTITUTE, LTD, and CAREER EDUCATION CORPORATION Defendants.	)	CASE NO. 0803-03530 ORDER DENYING DEFENDANT'S MOTION TO COMPEL ARBITRATION OF CERTAIN CLASS MEMBERS CLAIMS AND TO STAY ACTION

This matter having come before the Court upon defendant's Motion To Compel Arbitration Of Certain Class Members Claims And To Stay Action , and the Court having considered legal memorandum, oral argument and all applicable law,

Now, therefore, defendant's Motion is denied in its entirety.

Dated this 27th day of July, 2012.

Richard C. Baldwin
Circuit Court Judge

IN THE COURT OF APPEALS OF 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

ORDER GRANTING MOTION TO COMPEL CIRCUIT COURT TO CEASE EXERCISING JURISDICTION

Appellants have appealed from the trial court's order denying appellant's motion to compel arbitration as to certain members of the plaintiff class. Appellants have moved under ORS 19.270(1) to compel the trial court to cease exercising jurisdiction in the case, arguing that, upon the filing of the notice of appeal, the trial court was divested of jurisdiction to proceed in the case.[1] Respondents oppose the motion on the grounds that (1) respondents filed a motion for summary determination of jurisdiction under ORS 19.235(1) and the trial court retains jurisdiction notwithstanding the pendency of this appeal to rule on that motion, and (2) the order being appealed is not appealable because the motion the order disposes of is not applicable to the named class representatives.

Appellants are correct that, under ORS 19.270(1), the filing of a notice of appeal deprives the trial court of jurisdiction to proceed with the "cause" that is the subject of the notice of appeal,[2] even if the appellate court ultimately determines that the trial

[1] Appellants also moved for a temporary order staying all circuit court proceedings pending a ruling on the motion to compel. By order dated August 7, 2012, the court denied that motion.

[2] As appellants note, it may be difficult in some cases, such as this one where an

court decision being appealed is not appealable. *Murray Well-Drilling v. Deisch*, 75 Or App 1, 704 P2d 1159 (1985) (so holding). However, after *Murray Well-Drilling* was decided, the legislature adopted ORS 19.235, subsection (1) of which provides that, notwithstanding ORS 19.270, the trial court retains jurisdiction after the filing of notice of appeal to make a summary determination of whether the trial court decision is appealable. Respondents state, and appellants do not dispute, that respondents have filed in the trial court a motion under ORS 19.235(1) for summary determination of appealability. It follows that, under ORS 19.235(1), upon the filing of that motion, the trial court had jurisdiction to rule on it.

However, to the extent that respondents argue that their motion under ORS 19.235(1) results in the trial court retaining plenary jurisdiction to proceed with the case or that this court is or will be bound by the trial court's ruling on the motion, respondents are incorrect. A motion filed in the trial court under ORS 19.235(1) only results initially in the trial court retaining jurisdiction to rule on the motion. It is true that, if the trial court determines that the order being appealed is not appealable, the trial court then retains jurisdiction to proceed with the case through trial and entry of judgment. ORS 19.235(2). But, apparently the trial court has not yet ruled on the motion, and has not determined that the order in question is not appealable; therefore, for the time being, the trial court lacks plenary jurisdiction to proceed with the case.

Moreover, the trial court's determination of the appealability issue is subject to this court's determination of appealability. ORS 19.235(4). If this court determines that the order being appealed is appealable, that determination is binding on the trial court and the trial court's jurisdiction to proceed in the case ends.

It would have been preferable if either appellants or respondents had moved this court for a summary determination of appealability under ORS 19.235(3) or for respondents to have moved to dismiss the appeal if respondents believe, as they contend, that the trial court's order is not appealable. However, the failure of either party to move for appropriate relief does not deprive this court of jurisdiction to determine whether it has jurisdiction of the appeal, including determining whether the order in question is appealable. Indeed, where jurisdiction is in doubt, this court has an affirmative duty to determine its jurisdiction, on its own motion if necessary. *See, e.g.,*

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appeal is taken from an interlocutory order, to determine exactly what the "cause" is. However, respondents here do not contend that the "cause" is any less than the claims alleged on behalf of all class members. Respondents argue that the order being appealed applies only to class members other than the two named class representatives, but they do not dispute that the "cause" is all claims alleged in the operative complaint.

ORDER GRANTING MOTION TO COMPEL CIRCUIT COURT TO CEASE EXERCISING JURISDICTION

Clawson v. Prouty, 215 Or 244, 249, 333 2d 1104 (1959) (every court has authority to determine its own jurisdiction).

Appellants contend that the order from which they have appealed is appealable under ORS 36.730(1)(a): "An appeal may be taken from * * * [a]n order denying a petition to compel arbitration * * *." The order being appealed here denies appellants' motion to compel arbitration. Respondents nevertheless contend that the order is not appealable because (1) appellants earlier filed a motion to compel the named class representatives to arbitrate their claims, the trial court denied that motion, and appellants did not appeal from that order as they could have under ORS 36.730(1), and (2) in a class action, under ORCP 32, unnamed members of the class are not parties to the action. Respondents conclude that, because the order in question affects only some of the unnamed members of the class and does not affect the named class representatives, the order is not appealable.

The court is not persuaded. First, ORS 36.730(1)(a) does not distinguish between denials of petitions to compel arbitration based on whether the order denying a request to compel arbitration affects all or fewer than all parties. Second, the named respondents, on behalf of the unnamed members of the class affected by appellants' motion to compel, resisted the relief sought by appellants. Having done so, successfully, the named respondents will not be heard to assert that they do not represent the interests of those class members.

Therefore, the court determines that the order denying appellants' motion to compel arbitration as to some class members is appealable under ORS 36.730. Further, this court having determined that the order is appealable, the trial court no longer retains jurisdiction under ORS 19.235 to proceed with the case.

For the foregoing reasons, appellants' motion is granted and the trial court is directed to cease exercising jurisdiction in this case pending disposition of this appeal.

James W. Nass 8/30/2012 8:25:43 AM
JAMES W. NASS
APPELLATE COMMISSIONER

c: Tim Alan Quenelle
Stephen F English
David F Sugerman
Multnomah County Circuit Court

Ej/8712

ORDER GRANTING MOTION TO COMPEL CIRCUIT COURT TO CEASE EXERCISING JURISDICTION

IN THE COURT OF APPEALS OF 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

ORDER DENYING RECONSIDERATION AND DENYING MOTION TO DISMISS AND TO REMAND

Respondents have moved for reconsideration of the appellate commissioner's order dated September 19, 2012, and also have moved to dismiss the appeal and to remand part of the case to the trial court on the ground that the appeal is not justiciable because (1) the order being appealed does not affect any legal right or obligation of those members of the class who signed agreements containing only a consent-to-arbitration clause, and (2) there are no named class representatives who signed agreements containing both a consent-to-arbitration clause and a waiver-of-collective-action clause and a case cannot otherwise proceed as to unnamed class members.

The motion for reconsideration is denied.

The motion to dismiss is denied. At plaintiffs' urging, the trial court has allowed plaintiffs to pursue this class action as a single class notwithstanding that there are two groups of affected plaintiffs in distinctly different legal positions and notwithstanding that none of the named class representatives signed agreements with both consent-to-arbitrate and waiver-of-collective-action clauses. The disposition of this appeal--that is, the determination of whether the claims of those members of the single class who executed both the consent-to-arbitration clause and the waiver-of-collective action

clause must be arbitrated and cannot be litigated by way of class action--will have practical effect on the rights and liabilities of defendants and of (at the very least) those members of the class who signed agreements containing both clauses. To be sure, the named class representative did not execute both clauses; nevertheless, as representatives of the certified class--that is, of all members of that class--they are obligated to represent the interests of all members of the class. Any assertion to the contrary speaks to the propriety of the class as certified or to the propriety of the designation of those named representatives. *See* ORCP 32 A(3); ORCP 32 A(4).

The transcripts are due 28 days from the date of this order.

10/25/2012
9:55:19 AM

RICK T. HASELTON
CHIEF JUDGE, COURT OF APPEALS

c: Tim Alan Quenelle
Stephen F English
David F Sugerman
Robyn Anderson
Beovich Walter & Friend

Ej/10112

ORDER DENYING RECONSIDERATION AND DENYING MOTION TO DISMISS AND TO REMAND