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3
4 IN THE COURT OF APPEALS OF THE STATE OF OREGON

5 SHANNON GOZZI, et al.,

6 Plaintiffs and

7 JENNIFER ADAMS fka JENNIFER
8 SCHUSTER, and NATHAN SURRETT,
9 individually and on behalf of all other
10 similarly-situated individuals,

11 Plaintiffs-Respondents,

12 vs.

13 WESTERN CULINARY INSTITUTE,
14 LTD and CAREER EDUCATION
15 CORPORATION,

16 Defendants-Appellants.

Multnomah County Circuit Court Case No.
0803-03530

Court of Appeals No. A152137

**PLAINTIFF-RESPONDENT
SURRETT'S PETITION FOR
RECONSIDERATION AND MOTION
TO DISMISS APPEAL**

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1 **MOTION**

2 Plaintiff-Respondent Surrett and the certified class he represents move for
3 reconsideration of the Order Granting Motion to Compel Circuit Court to Cease Exercising
4 Jurisdiction entered August 30, 2012. A copy of the order is attached as Appendix 1. In
5 addition Plaintiff-Respondent Surrett and the certified class move to dismiss this appeal
6 because the underlying issue is not justiciable. Alternatively, Mr. Surrett and the class seek
7 remand to the trial court to allow the trial court to exercise jurisdiction over that part of the
8 class that is not subject to the challenged arbitration clause. Doing so would allow Mr.
9 Surrett and all of the class members not parties to the arbitration clause at issue in this appeal
10 to proceed to trial.

11 **ARGUMENT**

12 **A. Overview and Summary**

13 In the motion they presented to the Court, defendants-appellants sought a termination
14 of trial court jurisdiction in an effort to stay further proceedings in the trial court. This Court
15 determined that the trial court order is appealable. That decision came while the trial court
16 had under advisement a motion for summary determination of the appealability of its order.
17 Plaintiff Surrett on his own behalf and on behalf of the class seek reconsideration of this
18 Court's Order Granting Motion to Compel Circuit Court to Cease Exercising Jurisdiction
19 pursuant to ORAP 6.25. In addition, Mr. Surrett and the class move to dismiss the appeal.

20 This Court did not consider whether the underlying matter on appeal is justiciable. It
21 is fundamental that appeals require justiciable controversies with an actual controversy
22 between adverse parties. *Seal Rock Water Dist. v. City of Toledo*, 66 Or App 555, 560
23 (1984). The case has been certified as a class action. Class actions are creatures of statute,
24 and as such the rights, privileges and duties of class members are defined by the class action
25 rule, ORCP 32. That rule provides that class actions may only be litigated through the
26 representative parties.

1 It is undisputed that the arbitration clause, which is the subject of this appeal, does not
2 apply to Mr. Surrett, the class representative, or to approximately half of the class. Once the
3 trial court determined that this case could be maintained as a class action, and the trial court
4 appointed Mr. Surrett as class representative, the matter could only be litigated through him.

5 The defendants had several choices. They could have moved against all iterations of
6 the arbitration agreement when they moved to compel arbitration of Mr. Surrett's claims, or
7 they could have sought a subclass to obtain a representative of this subset of the class that
8 signed a different form of agreement. But they chose neither. Instead, they filed a non-
9 justiciable motion directed at absent class members.

10 After losing the first motion to compel arbitration of Mr. Surrett's claim, defendants
11 had 30 days to appeal that ruling. They did not timely appeal. Defendants' subsequent effort
12 to move against absent class members was of no effect because ORCP 32, the class action
13 rule, does not allow defendants to litigate against absent class members.

14 The lack of justiciable controversy is not the only problem. It is undisputed that Mr.
15 Surrett and the class members who signed earlier enrollment agreements are not affected by
16 the underlying appeal. This Court's order is overbroad because it extends to the class
17 representative and members of the class who did not sign the arbitration clause that is at
18 issue. The matter is set for trial in January after four and a half years of extensive litigation.

19 In ordering termination of trial court jurisdiction, this Court overlooked *Harnisch v.*
20 *College of Legal Arts, Inc.*, 243 Or App 16 (2011), which teaches that non-signatories to an
21 arbitration agreement are not bound by the agreement and should not be part of an appeal.
22 Though Mr. Surrett and half the class are not parties to the challenged arbitration agreement,
23 this Court's order effectively stays their claims. There is no basis for doing so.

24 The Court decided the appealability question without the benefit of a record and fully-
25 developed argument. As the underlying matter cannot be determined because it is not
26 justiciable, the Court should dismiss the appeal. Even if the Court defers on the question of

1 dismissal, it should remand that part of the class that did not sign the arbitration agreement at
2 issue so that the class members and class representative may proceed to trial.

3 **B. Prior Proceedings**

4 A review of trial court proceedings provides a framework for understanding the
5 justiciability defect. Plaintiffs filed this case on March 5, 2008, Plaintiff-Respondent's
6 Abstract of Record ("Abs-"), p. 1. Defendants first raised their arbitration clause defense in
7 their Answer to Second Amended Complaint on June 13, 2008. Abs-1.

8 The parties briefed class certification. Defendants did not raise the issue of the
9 arbitration clause in the class certification briefing. Neither did defendants claim that they
10 used different forms of arbitration clause. Abs-1. Plaintiff and the proposed class specifically
11 argued class certification based upon defendants' waiver of those arguments. Abs-1. The trial
12 court granted in part plaintiff's motion to certify class action on February 5, 2010. Abs-1.

13 Class notice went out, and the opt-out period ran on June 20, 2011. Abs-1. After the
14 opt-out period ran, the defendants moved to compel arbitration of the claims of the named
15 plaintiffs, Mr. Surret (the class representative) and Ms. Adams (the individual named
16 plaintiff) on August 23, 2011. Abs-2. The defendants did not move to compel arbitration of
17 absent class members' claims. Abs-2. The trial court denied the motion to compel arbitration
18 on December 1, 2011. Abbs-2. Defendants did not appeal.

19 Even though the trial court ordered that this case be maintained as a class action,
20 defendants filed a motion to compel arbitration of certain absent class members' claims and
21 to stay the entire case on May 23, 2012. Abs-2. That is the matter pending before this Court.
22 While the motion to compel arbitration was directed at only those absent class members who
23 signed the later agreement, defendants sought, and this Court granted, an end to trial court
24 jurisdiction over the entire class and the entire action. Order Granting Motion to Compel
25 Circuit Court To Cease Exercising Jurisdiction, p. 3.

1 **C. The class action rule determines who is and who is not a party.**

2 1. Salient legislative history

3 Oregon common law did not recognize the existence of a right to pursue a class action
4 for money damages. *American Timber & Trading Co. v. First Nat'l Bank of Oregon*, 263 Or
5 1, 7-9 (1972). The Legislative Assembly created the right. 1973 Or Laws ch. 970. *See*,
6 *Bernard v. First Nat'l Bank of Oregon*, 275 Or 145, 149-52 (1976)(construing former ORS
7 13.220). The rule was codified at ORCP 32. *Guinasso v. Pacific First Federal Savings and*
8 *Loan Assoc.*, 89 Or App 270, 272, *rev den* 305 Or 672 (1988). The rule has been extensively
9 revised by the Council on Court Procedures. *Shea v. Chicago Pneumatic Tool Co.*, 164 Or
10 App 198, 206-07 (1999) *rev den*, 330 Or 252 (2000).¹

11 2. The rule defines both rights and liabilities

12 Fundamental to the class action is its representative nature. The class representative
13 represents absent class members. *Thomas v. U.S. Bank Assn 'n*, 244 Or App 457, 473-74, *rev*
14 *den* 351 Or 401 (2011)(citing A. Conte and H. Newberg, 1 Newberg on Class Actions, Sec.
15 1.2, 14 (4th ed. 2002)).

16 As the class action exists as a creature of statute, the rights and liabilities are
17 controlled by the rule, ORCP 32. *Cf.*, *Hughes v. PeaceHealth*, 344 Or 142, 154
18 (2008)(Legislatively-created rights and remedies are controlled by the Legislature—finding
19 cap on economic damages does not violate Or. Con. Art 1, §10 in wrongful death action
20 because the right is a creature of statute.)

21 The text of the rule makes clear that cases maintained as class actions are litigated
22 through representative parties. ORCP 32A (“One or more members of a class may sue *** as
23 representative parties on behalf of all.”) The requirements for a class action focus on the
24 class representative, including claims and defenses, adequacy, and notice requirements.

25 _____
26 ¹ The Council on Court Procedures is a legislatively-created agency. ORS 1.730 Its actions
promulgating and amending rules governing civil procedure have the force of law, unless the
Legislative Assembly amends, repeals or supplements them by statute. ORS 1.735.

1 ORCP 32A. The text of the rule distinguishes between class representatives and class
2 members. ORCP 32B, 32D, 32E, 32F, 32H, 32I, 32L, and 32M.

3 Those distinctions are the root of the problem. Defendants litigated and lost the
4 motion to compel arbitration when they moved against the class representative. Undeterred,
5 they then filed a second motion against absent class members. But absent class members are
6 not parties for purposes of litigating class actions. ORCP 32. The motion was misdirected,
7 and so is the appeal.

8 3. An appeal of the denial of a motion directed only at absent class members is not
9 justiciable.

10 This Court must consider whether a pending controversy is justiciable. *Poddar v.*
11 *Clatsop County*, 167 Or App 162, 164 (2000). Whether a controversy is justiciable turns on a
12 number of considerations. At the outset, a justiciable controversy is one that is between the
13 parties. *Cummings Const. Co. v. School Dist. No. 9, Coos County*, 242 Or 106, 110
14 (1965)(internal quotations and further citations omitted).

15 The status of absent class members is one that arises from time-to-time in class action
16 cases. *Thomas v. U.S. Bank, supra*, 244 Or App 457 (addressing preclusive effect on absent
17 class members). The problem with defendants' underlying motion is that class members are
18 not named parties. They are absent, unnamed parties who did not initiate the action, who will
19 nevertheless be bound by the judgment. Rubenstein, W., *Newberg on Class Actions* Sec. 1:5
20 (5th ed. 2012 update).²

21 Absent class members are treated as parties for some purposes and not for others. *In*
22 *re Cement Antitrust Litig. (MDL 296)*, 688 F2d 1297, 1309 (9th Cir 1982) (citations omitted;
23 construing FRCP 23). Absent class members have few responsibilities. They do not hire
24 counsel or appear in court. They do not provide discovery, except as third-party witnesses,

25 _____
26 ² While the Newberg treatise frames the absent class member issue in the context of FRCP
23, this Court has cited and relied upon the same discussion previously in construing rights
and liabilities of parties under ORCP 32. *Thomas v. U.S. Bank*, 244 Or App at 473-74.

1 they are rarely subject to cross- or counterclaims, and only pay fees and costs in the event of
2 a common fund recovery. Rubenstein, W., *Newberg on Class Actions* Sec. 1:5 (citations
3 omitted).

4 Treating absent class members as parties for purposes of this appeal is problematic.
5 This Court previously concluded that class members are not parties within the meaning of
6 ORS 19.029 (*renumbered* ORS 19.250). *Guinasso v. Pacific First Federal Sav and Loan*
7 *Ass'n*, 89 Or App at 273. If they are not parties for purposes of the notice of appeal, how can
8 they be parties to an appeal that applies only to them?

9 Beyond the vagaries of immediate procedural questions, the consequence of elevating
10 class members to independent parties creates very real risks for the future of class actions.
11 Class representatives take on special duties to put the interests of the class ahead of their own
12 individual interests. But absent class members have no such responsibilities. By elevating
13 absent class members to the position of parties for purposes of an appeal, this Court starts
14 down a path that may create chaos. One can anticipate a series of next questions that will
15 come if absent class members are deemed parties for purposes of an appeal. Can they hire
16 separate counsel and speak for the class? Will they have the right to control the appeal? Will
17 they now assume responsibility for costs and fees that might grow out of an appeal? Will the
18 poorly-considered brief or argument of an absent class member apply to the class? This
19 Court's ruling threatens to undermine the representative nature of class actions. It is at odds
20 with the directives of ORCP 32 that class action litigation proceeds through representative
21 parties.

22 Here is how adjudication of the non-justiciable issue threatens the rights of absent
23 class members. Each time defendants raised the arbitration clause, the class responded that
24 the agreement was unconscionable. As to the form of agreement that applied to Mr. Surret,
25 the class and the trial court had first-hand evidence from an affected individual. But as to the
26 motion directed at absent class members, the class had no such evidence and should not be

1 expected to adduce such evidence because they are not parties.

2 The basis of this appeal, ORS 36.730(1), highlights the underlying problem. It
3 provides that appeals “must be taken as provided in ORS chapter 19.” ORS 36.730(2).
4 Appeals must still be justiciable.

5 The Court’s reasoning suggests that *any* appeal denominated as one taken pursuant to
6 ORCP 36.730 automatically stays the entire proceeding. That analysis is too broad. The right
7 contained in ORS 36.730 is limited by the textual reference to ORS 19, which provides that
8 the ordinary rules of limited jurisdiction continue to apply. The rights contained in ORS
9 36.730 are also limited by case law. Those who do not sign arbitration agreements cannot be
10 compelled to arbitrate. *Harnish v. College of Legal Arts, Inc.*, 243 Or App at 22-23.

11 Properly read, the underlying statute supports plaintiffs and the class. Defendants filed
12 a motion to compel arbitration of Surret and Adams’ claims, and they lost. They did not
13 appeal within 30 days. The issue is concluded. *Snider v. Production Chemical*
14 *Manufacturing, Inc.*, 348 Or 257, 267-68, 230 P3d 1 (2010) (interlocutory review of
15 arbitration decisions under ORS 36.730 is the exclusive means of appellate review).

16 4. The appeal of absent class members’ claims holds hostage plaintiffs and those who
17 prevailed on the arbitration issue.

18 This Court’s order compelling termination of trial court jurisdiction applied across the
19 class, even though the class representative, the individual plaintiff, and half of the class are
20 not affected by the issues on appeal. Thus, even if the matter is justiciable—and Surret and
21 the class strongly dispute that it is—the overbroad relief granted to defendants ignores
22 fundamental rules governing arbitration agreements.

23 In *Harnisch v. College of Legal Arts, Inc.*, 243 Or App at 26-27, this Court recognized
24 that non-parties to an arbitration agreement cannot be compelled to arbitrate, and their claims
25 need not be stayed. Thus, even if this Court somehow concludes that absent class members
26 are parties to this appeal, unaffected class members, the class representative, and the

1 individual plaintiff must be allowed to go forward in the trial court.

2 5. Defendants' choices lead to dismissal.

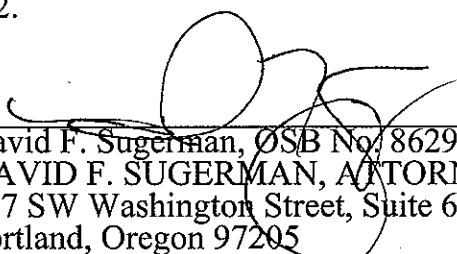
3 Defendants had multiple opportunities to frame this issue in a way that would have
4 preserved it for appeal. But instead defendants chose a tactical approach of litigating one
5 motion at a time, perhaps as a means of delay or of avoiding trial. Had defendants wanted to
6 test this issue or preserve it, they could have raised it in opposition to class certification, they
7 could have moved to compel arbitration of both the representative and class members'
8 claims, and they could have moved for creation of a subclass and appealed through a duly
9 appointed subclass representative. They chose none of these options. They have waived the
10 issue. The appeal should be promptly dismissed so that the case may be tried in January as
11 originally scheduled.

12 **CONCLUSION**

13 This Court should dismiss the appeal because it is not justiciable. If the Court declines
14 to do so, it should nevertheless grant the motion for reconsideration and vacate the order
15 compelling the circuit court to cease exercising jurisdiction and remand the matter to the trial
16 court so that the class representative, individual plaintiff and class members who did not sign
17 the arbitration agreement may proceed to trial.

18 DATED this 13th day of September, 2012.

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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 **ORDER GRANTING MOTION TO COMPEL CIRCUIT COURT TO CEASE EXERCISING JURISDICTION**

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.,

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

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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

EJ8712

ORDER GRANTING MOTION TO COMPEL CIRCUIT COURT TO CEASE EXERCISING JURISDICTION

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APPENDIX 1

PLAINTIFF-RESPONDENTS' ABSTRACT OF RECORD

On March 5, 2008 Shannon Gozzi and Meagan Kohlen filed the COMPLAINT commencing this action making claims for fraud and violation of the Unlawful Trade Practices Act and seeking certification of a class action.

On June 13, 2008, defendants filed their ANSWER TO SECOND AMENDED COMPLAINT, raising the following defenses that specifically alleged the existence of an arbitration agreement: FIFTH DEFENSE (Claims Limited by Contract, ¶38), FIFTH DEFENSE [sic] (Estoppel/Waiver, ¶39), EIGHTH DEFENSE (Failure to Comply with Dispute Resolution Procedures, ¶41), NINTH DEFENSE (Lack of Subject Matter Jurisdiction, ¶42).

On August 31, 2009, plaintiffs filed their MOTION TO CERTIFY CLASS ACTION. Defendants filed their opposition on September 30, 2009 and did not argue about the arbitration clause or differing versions of the contract.

On October 22, 2009, plaintiffs filed their REPLY MEMORANDUM IN SUPPORT OF MOTION FOR CLASS ACTION and made the following argument: "Defendants do not assert that they used materially different enrollment agreements or catalogs or that some students enrolled without signing agreements. They cannot deny this is a uniform transaction." Reply Memorandum, p. 14, l. 3-5 (Oct. 22, 2009).

On February 5, 2010, the trial court GRANTED IN PART the MOTION TO CERTIFY CLASS ACTION.

On April 26, 2011, the trial court approved the Parties' Joint Proposed Class Notice Plan. Notice went out to the class, and the class had a deadline to opt out of June 20, 2011.

On August 23, 2011, defendants filed their MOTION TO COMPEL ARBITRATION AND DISMISS ACTION. Specifically, defendants moved "for an Order compelling arbitration of Plaintiff Nathan Surrett's and Plaintiff Jennifer Adams's (collectively 'Plaintiffs') claims and dismissing the above-captioned action." Motion, p. 1 (Aug. 23, 2011).

On December 1, 2011, the trial court DENIED Defendants' MOTION TO COMPEL ARBITRATION AND DISMISS ACTION.

On February 13, 2012, defendants filed their MOTION TO DECERTIFY CLASS ACTION, arguing for the first time that they had used different forms of arbitration agreements. Def. Motion, p. 12 (Feb. 13, 2012). On April 5, 2012, the trial court denied the motion.

On May 23, 2012, defendants filed their MOTION TO COMPEL ARBITRATION OF CERTAIN CLASS MEMBERS' CLAIMS AND TO STAY ACTION. On July 27, 2012, the trial court denied that motion.

1 **CERTIFICATE OF SERVICE**

2
3 I hereby certify that I served the foregoing **PLAINTIFF SURRETT'S MOTION**
4 **FOR RECONSIDERATION AND MOTION TO DISMISS** on the following persons on
5 this same day:

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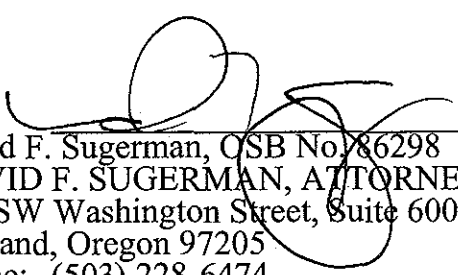
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8 DATED this 13th day of September, 2012.

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