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 **PLAINTIFF NATHAN SURRETT'S OPPOSITION TO DEFENDANTS' MOTION TO COMPEL ARBITRATION AND DISMISS ACTION**

I. OVERVIEW

Defendants move to compel arbitration of the individual plaintiffs' claims and to stay or dismiss this case. Plaintiff Surrett opposes the motion and provides this opposition.[1]

Defendants' arguments turn on several incorrect assumptions. According to defendants, their arbitration clause banned class-wide arbitrations. That is incorrect. Defendants' arbitration clause adopted the commercial rules of the American Arbitration Association ("AAA"). Assuming that the clause is enforceable—which plaintiffs dispute—there is no class action ban because the AAA commercial rules explicitly allow for class-wide arbitrations.

The lack of a class action ban makes defendants' motion a bit more remarkable. Defendants do *not* move to compel arbitration of the class's claims. For whatever reason, they

[1] Plaintiff Surrett understands that plaintiff Adams is joining in and adopting this argument. Plaintiff Surrett relies upon Ms. Adams' declaration as part of the factual record.

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only move to compel the individual claims. As they have not moved against the class, there is no basis for the alternative motions to dismiss or stay this case.

Defendants admit in their brief that the arbitration clause in question was unconscionable at the time the contract was executed. Defendants assert, however, that *AT&T Mobility LLC v. Concepcion*, 131 S Ct 1740 (2011) rendered these claims subject to mandatory arbitration on an individual basis. Defendants are incorrect. Given the arbitration clause at issue in this case, *AT&T Mobility* changed nothing.

Defendants claim that they have not waived their right to compel arbitration. To the contrary, defendants have actively litigated this case. They have repeatedly invoked this Court's authority for affirmative relief. They jointly submitted a notice plan after class certification. They sat silently after notice went out to a class of 2,500 former culinary trade school students. They waited through the opt-out period that produced only 11 opt outs. Defendants waited, knowing full well of their rights to seek to arbitrate. That wait caused prejudice.

Defendants also argue that CEC, a non-signatory of the agreement, gets the benefit of the arbitration agreement. In doing so, they ignore that the students signed contracts with WCI and not CEC and that CEC is not mentioned in the agreement. They also ignore the Oregon Administrative Rules that place affirmative duties on WCI. CEC is neither a party nor third-party beneficiary of the agreement. Therefore, they are not entitled to claim the benefits of the mandatory binding arbitration clause.

Finally, even if both defendants may enforce the arbitration clause, even if they did not waive their rights under the agreement, even if *AT&T Mobility* indeed changed the nature of the agreement, the arbitration clause is unconscionable and thus unenforceable. The arbitration clause is procedurally unconscionable because it is inconspicuously buried in fine print. The arbitration clause is substantively unconscionable because it strips away state law fraud and statutory claims, voids a fee shifting statute, prohibits recovery of statutory damages, prohibits recovery of punitive damages, purports to nullify an entire body of State law applicable to the

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school, and compels arbitration in an expensive forum that these indebted trade school students cannot afford.

II. FACTS

A. The arbitration clause

In their motion, defendants set out the mandatory arbitration clause, which is part of their enrollment agreement, in normal print. For readability, defendants used bold and underline typography. (Def. Motion, pp. 5-6). The appearance of the text of the arbitration clause in the enrollment agreement is substantially different. The agreement is in fine print. Declaration of Joseph Wetzel, Ex. C, p. 4 and Ex. D, p. 2. The arbitration clause, which is barely legible, appears under "Policies and Disclosures" as Paragraph 11. It is on a page after the signature line. It contains no emphasis and is in no way set apart from the text. Id. As defendants admit, the agreement is between "the school"—Western Culinary Institute—and the student. Def. Motion to Compel, pp. 5-6, Wetzel Dec., Ex. C, p. 3, 4 and Ex. D, pp. 1-4. CEC does not appear anywhere in the enrollment agreement. Ex C, pp. 1-4 and Ex. D, pp. 1-4.

The agreement contains a binding mandatory arbitration clause that purports to do the following:

- It adopts Commercial Arbitration Rules of the American Arbitration Association in effect at the time of the arbitration
- It purports to be the sole remedy for resolution of any disputes "between the parties"
- It commands the arbitrator to apply federal law
- It limits the party to "actual damages"
- It prohibits the award of statutory damages
- It prohibits the award of attorney fees
- It prohibits the award of punitive damages
- It requires the parties to bear their own costs and expenses
- It splits the costs of the arbitrator between the parties

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- It keeps confidential the existence, content or results of any arbitration.

Def. Motion, pp. 5-6.

B. AAA rules and arbitration costs

Defendants assert that their mandatory arbitration clause bars class arbitrations. To the contrary, there is no mention of class arbitration in the clause or in any other provision of the Enrollment Agreement. Def Motion, pp. 5-6. The silence on class arbitration does not end the inquiry. The agreement specifically adopts AAA Commercial Arbitration rules. Those rules provide: "[T]he American Arbitration Association will administer demands for class arbitrations pursuant to its Supplementary Rules for Class Arbitrations if (1) the underlying agreement specifies that disputes arising out of the parties' agreement should be resolved by arbitration, and (2) the agreement is silent with respect to class claims, consolidation, or joinder of claims." Declaration of David F. Sugerman, p. 2, Para 4 and Ex. A (AAA Policy on Class Arbitrations (June 14, 2005) *reprinted at* http://www.adr.org/sp.asp?id=28763) By specifying AAA rules, WCI chose to incorporate a class arbitration procedure into its enrollment agreement.

C. The impact of the arbitration costs and rules

Under the terms of the arbitration clause and the applicable rules, plaintiffs must pay a filing fee of $1275 (for claims valued at $10,000-75,000). Sugerman Dec., Ex. A, p. 3. As there are approximately 2500 members of the class, the aggregate filing fees exceed $3.1 million, assuming no class arbitration. In the event of a class arbitration, the filing fee is $71,000. Id. The plaintiffs cannot afford the filing fees, the arbitration costs, or the attorneys' fees. Surrett Declaration in Opposition to Motion to Compel, p. 2, Para 2-4; Adams Declaration in Opposition to Motion to Compel, p. 2, Para 4-6.

Even if the plaintiffs could afford attorney fees, they would have trouble hiring competent counsel. No experienced Oregon consumer attorney would represent a consumer in an individual arbitration with these features. The State remedies—especially attorney fees—are essential for hiring competent counsel. Dec. of Steve Larson, pp 2-3. Dec. of Justin Baxter, p. 2.

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D. Proceedings to date

Plaintiffs filed this case in March 2008.[2] In April 2008, plaintiff and defense counsel conferred regarding a possible motion to compel arbitration. Defendants did not file a motion at that time, even though they contemplated doing so. Sugerman Dec., p. 2, Para 4.

The Court certified this case as a class action on February 5, 2010. The Court signed the parties joint proposed notice plan on April 25, 2011. Notice went out by mail, email and through an internet website, and the opt out period ran on June 20, 2011. Sugerman Dec., p. 2, Para 5. The notice went to just over 2,500 former students. A total of 11 class members opted out.

To date, defendants have produced the equivalent of approximately 49,000 pages of documents, and plaintiffs have produced the equivalent of approximately 7,000 pages of documents. The parties have taken some 14 depositions and have appeared before the Court multiple times on motions filed by both sides. Sugerman Declaration, p. 3, Para 6.

Before filing this motion, defendants affirmatively:

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

[2] The original plaintiffs were Meagan Kohenen and Shannon Gozzi.

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

Over the course of the years, plaintiffs' counsel has devoted over 2,000 hours to the case and advanced substantial costs on behalf of the plaintiffs and the class. Sugerman Dec., pp. 3-4, Para 6-7.

The other salient chronology arises from the U.S. Supreme Court decisions construing the Federal Arbitration Act. The U.S. Supreme Court decided *Green Tree Financial Corp. v. Bazzle*, before the class period, on October 8, 2003. AAA announced its policy decision regarding class arbitrations on July 14, 2005. Sugerman Dec., Ex. A, p. 7 *reprinted at* (http://www.adr.org/sp.asp?id=28779)

The U.S. Supreme Court decided *Stolt-Neilsen S.A. v. Animal Feeds International Corp.*, 130 S. Ct. 1758 on April 27, 2010, a year before the parties agreed on a joint notice plan. The U.S. Supreme Court decided *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 on April 27, 2011. The Court signed the joint notice plan on April 25, 2011and signed a supplemental order regarding email on May 3, 2011. Notice began on May 5, 2011, and the opt-out period ended June 20, 2011. Sugerman Declaration, pp. 2-3 Para 5.

III. ARGUMENT

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A. *AT&T Mobility v. Concepcion* has no impact on this dispute

Defendants' premise is that *AT&T Mobility v. Concepcion*, 131 S Ct 1740 (2011) changed everything. According to defendants, the WCI mandatory arbitration clause was unconscionable and unenforceable under pre-*AT&T Mobility* case law because it barred class arbitrations. Defendants assert that as a result, their arbitration clause was unconscionable and unenforceable under Oregon law. Def. Motion, p. 3.

The argument is at odds with defendants' prior position in this litigation. In their Answer to Second Amended Complaint, defendants first raised various affirmative defenses. Defendants asserted that the mandatory arbitration clause supported four different affirmative defenses, including Fifth Defense, Answer to Second Amended Complaint, Para 38 ("Claims Limited by Contract"), Fifth (sic) Defense, Answer to Second Amended Complaint, Para 39 ("Estoppel/Waiver"), Eighth Defense, Answer to Second Amended Complaint, Para 41 ("Failure to Comply with Dispute Resolution Procedures"), Ninth Defense, Answer to Second Amended Complaint, Para 41 ("Lack of Subject Matter Jurisdiction"). Yet defendants now admit that their agreement was unconscionable under Oregon law at the time they alleged each of these defenses. There are two ways to view this new position. It is possible that defendants are now admitting that they had no basis to raise the cited defenses. On the other hand, it seems more likely that defendants believed their defenses were valid and were raised in good faith at that time.[3]

The bigger problem with the argument is that defendants are incorrect about the state of Oregon law of unconscionability as it existed prior to *AT&T Mobility*. In *Vasquez-Lopez v. Beneficial Finance Or., Inc.*, 210 Or App 553 (2007), the Court provided clear guidance on unconscionability, explaining that unconscionability turns on an evidentiary record and is a question of law to be assessed on the basis of facts in existence at the time of the making of the

[3] Defendants Answer to Fifth Amended Complaint, served January 6, 2011, maintains the same defenses, with a correction of the inadvertent numbering error. Answer to Fifth Amended Complaint, Para 30-31, 33-34.

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contract. 210 Or App. At 566. The doctrine of unconscionability looks to both procedural and substantive forms of unconscionability. *Id.*(citations omitted).

Procedural unconscionability focuses on the conditions of contract formation, including oppression and surprise. Oppression arises out of unequal bargaining power, resulting in no real negotiation and absence of choice. Surprise involves the extent to which supposedly agreed-upon terms are hidden within the form contract by the party seeking to enforce the terms. *Id.* (citations omitted).

Oregon law emphasizes substantive unconscionability. The fairness of the terms at issue are the essential issue. *Id.* at 569. In *Vasquez-Lopez*, the contract contained an express class action ban. *Id.* ("'No class actions or joiner [sic] or consolidation of any Claim with the claim of any other person are [sic] permitted in arbitration without the written consent of you and us.'").

The *Vasquez-Lopez* Court concluded that the class action ban was unconscionable. 210 Or App 571-72. But the Court also independently found that excessive arbitration cost—in the form of a cost-sharing agreement—was also unconscionable. 210 Or App 573-74. The applicable method of evaluating the cost issue is to compare the cost of arbitration to the cost of trial. 210 Or App at 574. The takeaway from *Vasquez-Lopez* is that Oregon courts look at all features of the arbitration clause and determine whether—based on the evidence—it was unconscionable at the time of its signing.

Defendants have conveniently collapsed the Oregon analysis into a framework that does not apply. In *AT&T Mobility v. Concepcion*, the Supreme Court addressed whether the Federal Arbitration Act preempted California's per se rule that any class action ban in a consumer contract is unconscionable. The Court held that it did. 131 S. Ct. at 1746. The ruling preempted California's *Discover Bank* rule, announced in *Discover Bank v. Superior Court*, 36 Cal 4th 148, 113 P3d 1100 (2005).

Defendants imply that *Vasquez-Lopez* adopted the *Discover Bank* rule. (Def Memo at p. 14). To the contrary, *Vasquez-Lopez* makes clear that there is no *per se* rule of unconscionability.

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Each case must be examined for substantial disparities in bargaining power, combined with terms that are unreasonably favorable to the party with greater power. Each case is decided on its own facts. *Vasquez-Lopez,* 210 Or App at 566-67; *see also, Sprague v. Quality Restaurants Northwest Inc.,* 213 Or App 521, 525-26 (2007) (restating the framework); *Livingston v. Metro. Pediatrics,* 234 Or App 137, 151-52 (2010)(in analyzing unconscionability, look to the setting, purpose and effect of the agreement and decide each case on its own facts). The upshot is that *AT&T Mobility* had little impact on Oregon consumer law, at least as it applies to this case.[4]

B. Insurmountable hurdle: The WCI arbitration clause has no class action ban

Defendants quote the text of the arbitration clause. (Def Memo, pp. 5-6). *Cf., Vasquez-Lopez,* 210 Or App at 569 (setting forth an explicit class action ban). As noted previously, the WCI mandatory arbitration clause expressly adopts the commercial rules of AAA. Those rules specifically provide that in the case of a silent agreement, AAA will administer demands fro class arbitration. *Sprague v. Quality Restaurants,* 213 Or App at 529 (noting that under AAA rules, silent arbitration agreements are administered as class arbitrations).

Defendants incorrectly read *Stolt-Nielsen SA v. Animal Feeds International Corp.,* 130 S Ct 1758 (2010). Defendants assert that *Stolt-Nielsen* establishes that an agreement that is silent on class arbitration cannot be construed as allowing class arbitration (Def. Memo, p. 12). In fact, the *Stolt-Nielsen* Court held that, "[A] party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." 130 S. Ct. at 1775 (emphasis in the original). In the present case, the contract upon which defendants rely specifically incorporates rules that allow for class-wide arbitration. This is an

[4] This is why defendants' long list of post-*AT&T Mobility v. Concepcion* cases is of no particular relevance. Each California case arises under the *Discover Bank* rule with its now invalid *per se* rule of unconscionability. As Oregon has always taken a fact specific approach to unconscionability, *AT&T Mobility* did not have the same impact on Oregon case law.

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insurmountable problem for defendants: there is no class-wide arbitration ban at issue in this case. For that reason, *AT&T Mobility v. Concepcion*, has no impact on this case.[5]

C. CEC is not a party to the agreement and cannot enforce the WCI arbitration clause

Defendants admit that the agreement in issue is between WCI and the students. (Def Memo, pp. 5, 6, 9, There is no basis for concluding that CEC was a party to the agreement. The agreement does not purport to confer a benefit on CEC, as it applies only to, "'[D]isputes or controversies between the parties to this Agreement arising out of or relating to the student's recruitment, enrollment, attendance, education, or career service assistance by WCI or to this Agreement.'" Def Memo, p. 11 (*quoting* WCI Enrollment Agreement, Wetzel Dec., Ex C and D; Defendants' emphasis deleted).

The Federal Arbitration Act does not purport to preempt state law rules of contractual validity, as long as those rules are rules of general application. *AT&T Mobility v. Concepcion*, 131 S Ct at 1746 (citations omitted). Oregon courts have consistently held that agreements to arbitrate must meet Oregon's generally-applicable standards of contractual validity if they are to be enforced. *See, e.g.*, *Martin v. Comcast*, 209 Or App 82 (2006) (asserted modification of existing agreement to include new mandatory arbitration clause tested against State law standards for modification of existing contract); *Vasquez-Lopez*, 210 Or App at 566 (applying general standard of unconscionability); *Motsinger v. Litih Rose-Ft, Inc.*, 211 Or App 610, 614 (2007) (same); *Sprague v. Quality Restaurants Northwest, Inc.*, 213 Or App 521, 525-26 (2007) (same); *Drury v. Assisted Living Concepts, Inc.*, Ca. No. A141068, 2011 WL 3835073, 2011 Ore. App. LEXIS 1201 *6-*7 (Aug. 31, 2011) (third-party beneficiary rules apply when seeking to enforce contract with unsigned arbitration provision).

[5] If defendants are correct about *Stolt-Nielsen*, which plaintiffs dispute, they waited over a year to file their motion to compel arbitration. If defendants are correct about *Stolt-Nielsen*, one could infer that defendants chose to wait to see the form, content and method of notice, whether it was effective and whether there were many opt outs.

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Whether a third party has a right to enforce a contractual promise in its favor turns on the intentions of the parties to the contract. *Livingston v. Metro. Pediatrics*, 234 Or App 137, 150 & n7 (2010) (construing arbitration clause; citations omitted). By its terms, the agreement limits the arbitration clause to "disputes or controversies between the parties." (Def Memo, p. 5). CEC is conspicuously absent from the contract.

As defendants admit, the WCI mandatory arbitration clause is contained within the enrollment agreement. (Def. Memo, p. 5). The enrollment agreement contains an integration clause that provides it is the entire agreement between the student and the school and cannot be supplemented. Wetzel Dec., Ex C, pp. 2 and 4 and Ex D, pp. 2 and 4.

The text of the enrollment agreement is the best evidence of the parties' intentions. WCI cannot run away from that language. Nowhere in the form contract did WCI seek to include CEC in its mandatory arbitration provision. Nowhere did it explain to students that if there was a dispute over the enrollment agreement, WCI would seek to include CEC in the arbitration agreement. The text demonstrates the intention to limit the burdens and benefits of the integrated contract to the named parties.

CEC cannot establish that the students intended to surrender state law remedies against CEC. CEC cannot establish that the students intended to commit to unaffordable arbitration for claims against CEC. There is no basis to conclude that CEC should be able to take advantage of the WCI mandatory arbitration clause.

D. Even if such rights existed, defendants waived any right to compel arbitration

Defendants affirmatively argue in their motion that they did not waive their right to enforce the mandatory arbitration provision. (Def. Memo, pp. 13-19). As defendants have now placed waiver at issue, plaintiffs do not object to the Court deciding the waiver question.

The gist of defendants' argument is their recurring theme that *AT&T Mobility v. Concepcion* changed everything. (Def. Memo, pp. 13-14). It did not. *AT&T Mobility v. Concepcion* did not do away with the unconscionability doctrine as a defense clearly

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contemplated by the savings clause of the Federal Arbitation Act. 131 S. Ct. at 1746; *see also, In re Checking Account Overdraft Litigation*, Case No. 1:09-md-02036-JLK, MDL No. 2036, Dkt #1853 (SD Fla-Miami Div.) (Sept. 1, 2011), p. 8 (courtesy copy submitted with plaintiff's opposition). Rather, the Supreme Court narrowed the scope of the unconsionability defense. *In re Checking Account Overdraft Lit.*, pp. 8-9. The court in *In re Checking Account Overdraft Lit.* drily noted that plaintiffs in that case asked the Court to find that *Concepcion* has changed nothing, and defendants assert that it has changed everything. *Id.*, pp. 8-9.

The effect of *AT&T Mobility* is important because defendants' waiver argument stands on the incorrect analysis that the recent case changed everything. Defendants' argument is somewhat equivocal, in that they admit that the real change came with *Stolt-Nielsen*. (Def. Motion, p. 14). That case was more than a year ago and long before this Court informed some 2,500 debt-ridden former students that they were part of a class action pending in this Court. And of course, defendants' tacit admission that *Stolt-Nielsen* represented major change is incorrect because the agreement at issue here has always contemplated class-wide arbitration. Thus, where defendants argue, "After *Concepcion*, the law is clear that the FAA preempts any state-law limitation on the applicability of arbitration clauses that do not permit class-wide arbitration,"—Def Mot, p. 15—they are talking about a case other than this one, in a State other than Oregon. This agreement contemplates class-wide arbitration, and Oregon law has never followed a *per se* rule of unconscionability.

If, as defendants claim, they truly believed that the arbitration clause was absolutely unenforceable under Oregon law because of a class-wide arbitration ban, then defendants would not have raised those matters in their answer. The earlier assertion of their rights under the arbitration clause makes clear that defendants were aware of those rights and believed that they could assert them in good faith.

Defendants rely on *Bernall v. Burnett*, 10-CV-01917-WJM-KMT, 2011 WL 2182903, 2011 US Dist LEXIS 59829 (D. Colo. Jun 6, 2011). The case did not address waiver.

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In *Bernall*, the court noted that Colorado did not follow the per se rule California *Discover Bank* rule. 2011 US Dist LEXIS 59829, *7. In *Bernall*, plaintiffs' argument consisted of a showing of adhesion, plus the unfairness of a class action ban. The court reviewed the record before it and concluded that plaintiffs' showing did not establish unconscionability, *Id.* *18-*20.

Defendants correctly note that waiver of the right to arbitrate looks to three factors. *Wilbur-Ellis Co. v. Hawkins*, 155 Or App 554, 558 (1998). The party asserting waiver must prove: 1) that the adverse party had knowledge of the existing right to compel arbitration; 2) that the adverse party acted inconsistently with that right; and 3) that the action resulted in prejudice to the party opposing arbitration.

Defendants cannot deny knowing about their rights to seek to compel arbitration. While they now claim their agreement was unconscionable until the decision in *AT&T Mobility*, defendants did not act that way. Through multiple affirmative defenses, defendants raised the arbitration clause. And yet they filed no motion. By repeatedly making affirmative motions, engaging in discovery, issuing subpoenas, litigating class certification, agreeing to notice and staying silent throughout the notice period, defendants clearly acted inconsistently with their rights. One could easily conclude that defendants chose to hedge their bets and wait to see how discovery would progress, how the court would decide class certification, and how many class members would opt out of the class.

Plaintiffs and the class have been prejudiced. They have spent substantial amounts of time and money to get ready to try the case. Now defendants want to start over. Defendants do not mention the class. Their motion—which is directed only at the individuals—is arguably an effort to pick off the class representative, which would then require appointment of a new representative to move the case forward to trial. The prejudice to the class is substantial. This Court sent notice to 2,500 class members, informing each that they have claims for fraud and violation of the Oregon Unlawful Trade Practices Act and that this Court would adjudicate those

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claims. By moving against the class representative's claims, defendants are delaying and potentially derailing these claims.

Defendants cite multiple California cases on the issue of waiver in the wake of the *AT&T Mobility v. Concepcion* ruling. (Def. Memo, pp. 16-17). But all of those cases arise from California, which followed the *Discover Bank* rule of *per se* unconscionability for all class action bans. As Oregon follows a different rule, those interpretations do not help defendants here.

E. The arbitration clause is unconscionable in any event.

The Court need not reach the unconscionability argument but may choose to do so to address all issues presented. The unconscionability question ripens if the Court finds: 1) that defendants have not waived their rights to compel arbitration; 2) that CEC is entitled to the benefit of the mandatory binding arbitration clause; 3) that there is a class-wide arbitration ban under the arbitration clause; and 4) that *AT&T Mobility* changed Oregon law in a way that is relevant to this case.

The problems with the WCI arbitration clause have nothing to do with arbitration and class actions and everything to do with the additional terms that strip consumers of their claims and impose an unaffordable and inaccessible arbitration forum. *Vasquez-Lopez v. Beneficial Finance Or., Inc.*, 210 Or App 553 (2007) provides a framework for the unconscionability analysis.[6] Unconscionability is an issue of contractual formation; accordingly, the question turns on a factual record that looks to the nature of the bargaining and agreement at the time the parties signed the contract. 210 Or App. At 566. The doctrine of unconscionability looks to both procedural and substantive issues. *Id.* (citations omitted). Procedural unconscionability focuses on the conditions of contract formation, including oppression and surprise. Oppression arises out

[6] The Court of Appeals consistently uses the *Vasquez-Lopez* framework to analyze unconscionability. *Motsinger v. Litih Rose-Ft, Inc.*, 211 Or App 610, 614 (2007); *Sprague v. Quality Restaurants Northwest, Inc.*, 213 Or App 521, 525-26 (2007); *Livingston v. Metro. Pediatrics*, 234 Or App 137, 151-52 (2010)(look to the setting, purpose and effect and decide each case on its own facts).

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of unequal bargaining power, resulting in no real negotiation and absence of choice. Surprise involves the extent to which supposedly agreed-upon terms are hidden within the from contract by the party seeking to enforce the terms. *Id.* (citations omitted).

The provision is procedurally unconscionable. The clause is buried in classic fine print. If there is any doubt about procedural unconscionabiliy, it is resolved by comparing the text of the agreement in defendants exhibits (Wetzel Dec., Ex. C and D) with the text of the agreement as they rendered it in their briefing (Def. Motion, pp. 5-6). As to the plaintiffs, Mr. Surrett felt rushed in enrolling and was told that there were important deadlines. Surrett Dec., p. 2, Para 6. He signed his agreement before visiting the school. Id. Mr. Surrett did not recall seeing or reading the arbitration clause and no one mentioned it to him. Id. at Para 5. Ms. Adams signed hers over the internet, without any explanation from school officials. Adams Dec., p. 2, Para 7. She did not remember seeing or reading the fine-print clause. Id.

The WCI mandatory arbitration clause directs the arbitrator to "apply federal law to the fullest extent possible in rendering a decision." Def Motion, p. 6, l. 4-5 (internal quotations omitted). The clause thus strips all WCI students of their state law claims. That means that the claim under the Unlawful Trade Practices Act does not exist. Neither does the fraud claim under Oregon law. Federal law provides no analogous claims. There are no federal consumer statutes that regulate this transaction between the school and student. Nor is there a federal common law claim of fraud. *See*, *Burns v. Int'l, Inc v. Western Sav & Loan Ass'n*, 978 F2d 533 535-36 (9th Cir. 1992) (affirming subject matter jurisdiction dismissal of claim against S&L officer, holding no federal common law of fraud).

Apart from stripping State law claims, the arbitration clause purports to erase the State regulatory framework that governs the school's conduct. The State regulatory framework provides critical consumer protections to Oregon for-profit trade school students. Here is what gets discarded if State law does not apply:

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- Schools may not admit students without evidence that the applying student can reasonably expect to benefit from the education obtained OAR 583-0300-0035(9)
- Schools must explain the true relationship between the curriculum and subsequent student qualification for occupational practice OAR 583-030-0035(8)(d)
- Schools must not communicate information that is inaccurate or misleading OAR 583-0300-0035(12)
- Schools may not misrepresent or omit from their catalogs material information about the relationship of the curriculum to occupational qualification, career planning, placement services, financial aid, and job opportunities OAR 583-0300-0035(12)(a)
- Schools may not engage in fraudulent, dishonest, unethical, exploitive, irresponsible, deceptive, and inequitable practices OAR 583-0300-0035(20)

The mandatory arbitration clause also imposes costs beyond what any indebted consumer can afford. The individual plaintiffs' debt loads now total approximately $50,000 to $60,000 each. They cannot afford the filing fee or the costs of arbitration. They cannot afford to pay an attorney. Nor can any competent and experienced consumer attorney afford to handle these individual cases in arbitration.

It is instructive to compare the arbitration clause in this case to the one at issue in defendants' main authority, *AT&T Mobility v. Concepcion.* As the Court explained, AT&T Mobility arbitration program had the following consumer-friendly features. AT&T Mobility had to bear all costs for non-frivolous claims, the arbitration had to take place in the county in which the customer was billed, in claims for less than $10,000, the consumer could opt to proceed in person, by phone or on written submission, parties could opt for small claims court in lieu of arbitration, and the arbitrator could award any form of individual relief, including injunction and punitive damages. The agreement prohibited AT&T from seeking recovery of its attorneys' fees, and if the consumer obtained an arbitration award greater than AT&T's last offer, AT&T had to pay a $7,500 minimum recovery and twice the amount of the consumer's attorney fees. 131 S Ct

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at 1744-45. Here, by comparison, consumers are straddled with costs that effectively prohibit access to arbitration and stripped of remedies and state law standards that would provide significant relief. This mandatory arbitration clause is unconscionable.

F. Defendants are not entitled to stay the action or to a dismissal

Defendants ask the Court to stay or dismiss this case. Defendants have not moved to compel arbitration of the class claims. Nor have they addressed the Court's authority under ORCP 32E. In class actions, courts are given broad authority to make appropriate orders to determine the course of proceedings. ORCP 32E(1). That provision governs how the Court should proceed. The parties, the Court and the class need to get this matter to trial. If necessary, the Court may order class counsel to locate a replacement class representative and—pursuant to its authority granted by ORCP 32E(1)—stay consideration of any additional motions to compel arbitration that the defendants may later file.

CONCLUSION

The Court should deny defendants' motions. The matter should be set for trial.

DATED this 9th day of September, 2011.

By:_____

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **PLAINTIFF NATHAN SURRETT'S RESPONSE TO DEFENDANT WESTERN CULINARY INTITUTE, LTD's FIRST SET OF REQUESTS FOR PRODUCTION** on the following persons on this same day:

☐ by hand delivering

☐ by facsimile transmission

☐ by electronic mail

☐ 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 15th day of December, 2010.

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