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*Counsel for Plaintiffs, individually and for all others similarly situated*

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES, CENTRAL CIVIL WEST

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|---|---|
| DANIEL VASQUEZ, CHERISH HERNDON, RENE VILLALOBOS, ALANA O'SHEA, ELISABETH GIBSON, MICHAEL MERGIL, NORMA RIZO, ROSAURA BORGES, RYAN FOWLER, and ELISA HERNANDEZ on behalf of themselves and all others similarly situated,<br><br>Plaintiffs,<br><br>v.<br><br>CALIFORNIA SCHOOL OF CULINARY ARTS, INC., a California corporation, CAREER EDUCATION CORPORATION, a Delaware corporation, SALLIE MAE, INC., a Delaware corporation; SALLIE MAE BANK OF UTAH, a Utah corporation; SALLIE MAE EDUCATION TRUST, a Delaware statutory trust; DOLLAR BANK, FEDERAL SAVINGS BANK, a Pennsylvania corporation; STILLWATER NATIONAL BANK AND TRUST COMPANY, a national bank; SOUTHWEST BANCORP, INC., an Oklahoma corporation; WELLS FARGO BANK, N.A., a national association; WELLS FARGO & COMPANY, a Delaware corporation; STUDENT LOAN FINANCE CORPORATION, a South Dakota corporation; SUN TRUST BANKS, INC., a Georgia | Case No. BC393129<br><br>[Related to BC463344, EC055672, BC459917, BC470851]<br><br>CLASS ACTION<br><br>Assigned to the Hon. Jane L. Johnson<br>Dept. 308<br><br>**NOTICE OF RULING RE DEFENDANTS' MOTION TO STAY ACTION AND COMPEL ARBITRATION**<br><br>**DATE: October 21, 2011**<br>**TIME: 2:45 p.m.**<br>**DEPT.: 308**<br><br>Complaint Filed: June 23, 2008 |

corporation; SUN TRUST STUDENT LOAN FUNDING, LLC, a Delaware limited liability company; BANK OF AMERICA CORPORATION, a Delaware corporation; ACADEMIC MANAGEMENT SERVICES CORPORATION, a Delaware corporation; WACHOVIA FINANCIAL SERVICES, INC., a North Carolina corporation; J.P. MORGAN CHASE BANK (FKA BANK ONE), a New York corporation; FIFTH THIRD BANK, an Ohio corporation; CITIGROUP, INC., a Delaware corporation; COLLEGE LOAN CORPORATION, a Nevada corporation, and DOES 1 to 1,000,000 inclusive,

Defendants.

**TO THE HONORABLE COURT AND TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

**PLEASE TAKE NOTICE** that defendants California School of Culinary Arts and Career Education Corporation's Motion to Stay Action and Compel Arbitration came on for hearing in the above-captioned matter, before Department 308 of the Los Angeles Superior Court, the Honorable Jane Johnson presiding, on October 21, 2011 at 2:45 p.m.

After reviewing the moving papers, opposition, reply papers, all supporting documents, and hearing oral argument, the Court denied the motion, adopting its Tentative Ruling, which is attached to this Notice as Exhibit "A".

DATED: November 21, 2011

**KIRTLAND & PACKARD LLP**

By: _____

MICHAEL LOUIS KELLY
BEHRAM V. PAREKH
JOSHUA A. FIELDS

*Counsel for Plaintiffs, individually and for all others similarly situated*

# EXHIBIT A

# VASQUEZ v. CA. SCHOOL OF CULINARY ARTS, INC.

## MOTION TO STAY ACTION AND COMPEL ARBITRATION

Date of Hearing: **October 21, 2011**
Department: 308
Case No.: BC393129

**TENTATIVE RULING**: Defendants Ca. School of Culinary Arts, Inc. and Career Education Corporation Motion to Stay Action and Compel Arbitration is denied because Defendant waived the right to seek arbitration, the evidence of prejudicial delay is overwhelming and there was no justifiable reason proffered for the three year delay in bringing this motion.

**DISCUSSION**

As noted in Davis v. Continental Airlines (1997) 59 Cal.App.4th 205, 211, "there is no single test for waiver of the right to compel arbitration, but waiver may be found where the party seeking arbitration has (1) previously taken steps inconsistent with an intent to invoke arbitration, (2) unreasonably delayed in seeking arbitration, or (3) acted in bad faith or with willful misconduct." However, while engaging in litigation is, by itself, insufficient to support a finding of waiver, waiver may be found if, in addition to engaging in litigation, the responding party "who seeks to establish waiver...show[s] that some prejudice has resulted from the other party's delay in seeking arbitration." Davis v. Continental Airlines, supra, 59 Cal.App.4th at p. 212.

Such waiver may be express or implied from the parties' conduct. See Ca. Code of Civil Proc., § 1281.2; Davis v. Blue Cross of No. Calif. (1979) 25 Cal.3d 418, 425; Fisher v. A.G. Becker Paribas Inc. (9th Cir. 1986) 791 F.2d 691, 694

A. AT&T MOBILITY v. CONCEPCION

Moving party first assets that this motion is timely because the motion "was filed shortly after and in response to the United States Supreme Court's April 27 decision in Concepcion." See Moving Papers, page 12, lines 2-3. However, AT&T Mobility v. Concepcion (2011) 131 S.Ct. 1740 is not applicable and has no bearing on this action. In that case, the U.S. Supreme Court held that the Federal Arbitration Act preempts California's judicial rule finding that express class action waivers are unconscionable. Here, though, there is no express class action waiver. As noted in Plows v. Rockwell Collins, Inc. (C.D.Cal.2011) 2011 WL 3501872 at *2:

> Concepcion, Gentry and Discover Bank all deal with the enforceability of class action waivers. The arbitration clauses in Murphy's contract contains no class action ban. In the absence of such a ban, neither the Gentry nor Discover Bank rule automatically would have blocked Defendant's efforts to compel arbitration.

The failure to mention class actions in an arbitration agreement is not the equivalent of an express class-action waiver. Contrary to Defendant's assertion, Stolt-Nielsen S.A. v. AnimalFeeds Int' Corp. (2010) 130 S.Ct. 1758 did not hold that the absence of an express class action agreement is the equivalent of a class action waiver. Rather, the U.S. Supreme Court determined that it was for the arbitrator to determine the intent of the parties but that an implicit agreement to authorize a class action could not be implied, especially where the parties admitted that there was "no agreement" on the issue.

This Court also notes that under California law, the lack of an express class action agreement is not the equivalent of a class action waiver. Pursuant to Ca. Code of Civil Proc., §1281.3, the Court clearly has the authority to order a classwide arbitration even if the parties did not expressly agree to a classwide arbitration. See Keating v. Superior Court (1982) 31 Cal.3d 584, 612-613 and Izzi v. Mesquite Country Club (1986) 186 Cal.App.3d 1309, 1321-1322.

Accordingly, for these reasons, the Court finds that AT&T Mobility v. Concepcion has no bearing on this issue and provides no justification for the delay.

B. LITIGATION OF THE MERITS

Alternatively, Defendants asserts that "while this action has been pending since June 2008, the Defendants have not litigated the merits. Despite this assertion, the Court finds that Defendants have waived arbitration because (1) Defendants have taken steps inconsistent with arbitration, (2) unreasonably delayed in brining this motion, and (3) such delay has caused prejudice to Plaintiffs.

A. STEPS INCONSISTENT WITH ARBITRATION

As set forth in the opposition, Defendants have taken the following actions which are inconsistent with arbitration:

(1) Defendants have propounded form interrogatories on a number of plaintiffs;
(2) Defendants have propounded special interrogatories on each named plaintiff, including contention interrogatories[1];
(3) Defendants have propounded request for production of documents on each named plaintiff and subpoenas to defendant Sallie Mae, Inc, for the production of financial records of a number of named Plaintiffs
(4) Defendants have deposed all 9 class representatives on both class and merits issues;

[1] See Ca. Code of Civil Proc., §2030.010(b): "An interrogatory may relate to whether another party is making a certain contention, or to the facts, witnesses, and writings on which a contention is based. An interrogatory is not objectionable because an answer to it involves an opinion or contention that relates to fact or the application of law to fact, or would be based on information obtained or legal theories developed in anticipation of litigation or in preparation for trial."

(5) Negotiated a stipulated Protective Order regarding confidentiality of information and materials revealed during litigation;
(6) Participated in multiple discovery dispute conferences with the Court;
(7) Negotiated multiple stipulated orders for the production of class member identity and contact information based on a Pioneer noticed procedure[2];
(8) Moved to sever and stay claims against the student lender defendants.
[See Opposition, page 4, line 14 through page 5, line 14]

Defendants, in their reply, do not dispute these facts. Rather, Defendants argue that "[t]hese pre-Concepcion acts are irrelevant to the Court's wavier analysis, as they could not be inconsistent with a right to compel arbitration that did not then exist....On this ground alone, courts have refused to find waiver even after years of litigation between the parties because, in states that followed the Discover Bank decision, there was no existing right to compel bilateral arbitration of individual claims prior to Concepcion."

However, as shown above, Concepcion is inapplicable here. In addition, Defendant's reliance on Estrella and Fisher is misplaced since both case are distinguishable. In Estrella v. Freedom Financial (N.D.Cal.) 2011 WL 2633643 the arbitration agreement contained a class action waiver. In Fisher v. A.G. Becker Paribas (9th Cir. 1986) 791 F.2nd 691, Defendants immediately raised the issue of arbitration in their Motion to Dismiss.

B. UNREASONABLE DELAY CAUSING PREJUDICE

This action was filed on June 23, 2008. This motion, however, was not filed until June 24, 2011. A three years delay is unreasonable.. Johnson v. Siegel (2000) 84 Cal.App.4th 1087, 1099. Moreover, during this three years, the Plaintiffs have accumulated over $3 million in attorney fees and costs (see Fields Decl., ¶22) dealing with the following:

[2] See Pioneer Electronics (USA), Inc. v. Superior Court (2007) 40 Cal.4th 360

(1) Opposing demurrers and motions to strike;
(2) responding to form interrogatories, special interrogatories and request for production of documents;
(3) Plaintiffs serving their own discovery;
(4) Plaintiff reviewing over 100,000 pages of documents served by Defendants;
(5) Engaging in multiple meet and confer discussions over the scope of discovery and objections;
(6) Negotiating multiple stipulated orders relating to Pioneer notices;
(7) Plaintiffs covered the costs of the third party administrator who provided Pioneer notices;
(8) Plaintiffs counsel appeared in court 14 times, in addition to other telephone discussions with the Court;
(9) All 9 class representatives have been deposed on class and merits issues;
(10) Plaintiffs spent time and expenses deposing 8 defendants employees, including several PMK's in both California and Illinois; and
(11) Plaintiffs filed their class certification motion

Plaintiffs, in addition, have disclosed (1) written and oral statements from CSCA that Plaintiffs contend were false and misleading; (2) facts that Plaintiffs contend establish Defendant's knowledge of such false statements; (3) facts Plaintiffs contend establish that the practices are uniform, pervasive, and closely-controlled by Defendant CEC; and (4) disclosed that a former CSCA admissions representative corroborates Plaintiffs allegations as well as experts witnesses. See Opposition, page 7, lines 4-8.

These facts establish prejudice. Saint Agnes Medical Center v. PacifiCare of California (2003) 31 Cal.4th 1187, 1203-1204 ("[C]ourts have found prejudice where the petitioning party used the judicial discovery processes to gain information about the other side's case that could not have been gained in arbitration

While Defendants claim that this discovery does not amount to prejudice, the Court finds these arguments without merit because (1) the extensive amount of discovery done (see Davis v. Continental Airlines, Inc. (1997) 59 Cal.App.4th 205, 212–216); (2) the fact that information was disclosed about the Plaintiffs' case; (3) the fact that the demurrer was successful in knocking out legal theories that, otherwise, would have gone before the arbitrator[3]; and (4) the amount of costs and fees incurred by Plaintiffs during the three years that ensued since this action was first filed. Indeed, this finding is consistent with Adolph v. Coastal Auto Sales, Inc. (2010) 184 Cal.App.4th 1443, 1451-1452 ("... [C]ourts have found prejudice where the petitioning party used the judicial discovery processes to gain information about the other side's case that could not have been gained in arbitration...").

Accordingly, per the foregoing, the Court finds that Defendants have waived the right to arbitration.

Because the evidence of waiver is so overwhelming, the court need not reach the issue of unconscionability. e motion is denied.

[3] The Court sustained the demurrer to the "Violations of the Private Postsecondary and Vocational Education Reform Act of 1989" cause of action without leave to amend. The Plaintiffs filed a writ which, ultimately, was denied by the Court of Appeal.

PROOF OF SERVICE
[CCP §§1010.6, 1011, 1013, 1013a, 2015.3; CRC 2.260, 2.306]
STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I, the undersigned, am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 2361 Rosecrans Avenue, Fourth Floor, El Segundo, California 90245. I am "readily familiar" with my employer's practice of collection and processing of correspondence and documents for mailing with the United States Postal Service, mailing via overnight delivery, transmission by facsimile machine, and delivery by hand.

On November 21, 2011, I served a copy of each of the documents listed below by placing said copies for processing as indicated herein:

**NOTICE OF RULING RE DEFENDANTS' MOTION TO STAY ACTION AND COMPEL ARBITRATION**

(✓) E-MAIL TRANSMISSION: The correspondence or documents were e-mailed from my place of business on this same date in the ordinary course of business prior to 6:00 p.m. Pacific Time using www.caseanywhere.com.

PERSONS OR PARTIES SERVED:

*PLEASE SEE ATTACHED SERVICE LIST*

(✓) (State) I certify (or declare) under penalty of perjury that the foregoing is true and correct and that this declaration was executed on November 21, 2011.

( ) (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Marti F. Clark

LAW OFFICES
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