

AMERICAN ARBITRATION ASSOCIATION
Commercial Arbitration Tribunal

In the Matter of the Arbitration between

Re: 72 434 E 01020 12 MAVE

Anna Berkowitz and Martin Berkowitz
Claimants

and

California School of Culinary Arts, Inc. a California corporation; Career Education Corporation,
a Delaware corporation; and Does 1 to 100, inclusive.
Respondents

AWARD OF ARBITRATOR

I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties, and having been duly sworn and having duly heard the proof and allegations of the Parties, FIND as follows:

I. Summary of the Case

This case arises from a dispute between Claimants Anna and Martin Berkowitz, on one side, and Respondents California School of Culinary Arts, Inc. ("CSCA") and Career Education Corporation ("CEC"), on the other side. Claimants contend that Anna Berkowitz (hereinafter "Anna") was fraudulently induced to attend Respondents' culinary school. And as a result, Claimants have suffered damages (including, but not limited to, the cost of tuition). Respondents claim that Claimants were provided training as represented; that Claimants received full value for their investment. Respondents deny any misrepresentations or other fraudulent conduct.

Claimants assert the following claims: (1) fraud; (2) violation of California's Unfair Competition Law (Business & Professions Code § 17200, *et seq.*, known as the "UCL"); (3) violation of the Consumer Legal Remedies Act ("CLRA"); (4) violation of the repealed Private

Postsecondary and Vocational Education Reform Act of 1989 (the "Reform Act")/ breach of contract; and (5) civil theft.

A. Claimants' Contentions

Claimants contend that Respondents, California School of Culinary Arts-Le Cordon Bleu ("CSCA"), and Career Education Corporation ("CEC"), (collectively "Respondents") induced Claimants Anna, and Martin Berkowitz (hereinafter "Martin"), (collectively "Claimants") by various misrepresentations to attend their school. Claimants contend that this "recruitment" occurred while Anna was still in high school; and it sent Claimants into a devastating financial predicament. By convincing Claimants--based on lies--to borrow approximately \$40,000.00 to pay to attend CSCA, all the while knowing that there was no chance for Anna to make sufficient money after graduation to be able to service the debt, much less pay it off.

Claimants contend that the business of CSCA, Respondents' for-profit culinary trade school, depends in substantial part on the ability of students to obtain financial aid to pay the school's high cost of tuition. In order to convince unsuspecting consumers to attend their school, Respondents hired and trained a fleet of aggressive sales people, referred to as "Admissions Representatives." In reality, these so-called Admissions Representatives were just high-pressure sales people. CSCA had no admissions criteria for student applicants, other than the students needed to have a high-school diploma or GED, and pass an IQ test. Even those minimal criteria were generally disregarded, with Admissions Representatives instructing applicants to lie about their diploma status; and allowing applicants to take the IQ test multiple times until they finally reached the minimum passing score.

Claimants contend that to generate as many admissions starts as possible, once hired by Respondents, CSCA's so-called Admissions Representatives were put through an elaborate sales training process, wherein they learned high-pressure sales tactics based upon psychological marketing methods. According to Claimants, CSCA's Admissions Department amounted to nothing more than a high pressure sales arena, where Admissions Representatives were expected to sign up as many students as possible per

enrollment period, or lose their jobs to other, more aggressive and successful Admissions Representatives. Further, Claimants contend that CSCA Admissions Representatives met their sales goal targets by misleading prospective students with untrue statements about the salaries and jobs they could expect as the outcome of attending CSCA and disseminated written marketing materials which furthered these misrepresentations.

Claimants contend that the Admissions Representative assigned to them at CSCA, Steven Hong, made numerous representations to them during the recruiting process about the outcome of attending CSCA, specifically that: (1) immediately upon graduation Anna would easily be able to find employment as a Pastry Chef; (2) Anna would earn at least \$75,000 per year to start; and (3) with the money she would earn as chef, Anna and Martin would be able to easily pay off the loans they were encouraged to take out for Anna to be able to attend CSCA. Claimants were also told that admission to CSCA was very selective, and Anna would be lucky if she were admitted. She was repeatedly assured that she was a "shoe-in" to land a job upon graduation as a Pastry Chef; and would easily make \$75,000 a year. All of these representations were false and misleading.

Claimants contend that CSCA's written marketing materials, such as those shown to Claimants, were similarly misleading and false. As just one example, Anna saw a chart depicting CSCA graduates significantly out earning four year college graduates, career military and junior college graduates at all times during the first five years. Anna also saw numerous other CSCA marketing materials, including, without limitation, a list of "Careers" available to CSCA graduates such as "Executive Chef," "Sous Chef," "Personal Chef," and "Pastry Chef," as well as another stating that CSCA was an "Investment in Your Future." Claimant Martin Berkowitz, who co-signed for Anna's CSCA student loans, also saw numerous CSCA marketing materials during CSCA's recruiting process, including a document stating that the school prepared students "for a good-paying career as a professional chef," and that a CSCA degree could be "serve[d] immediately to future employers who are hungry for talented chefs." Other examples of CSCA marketing materials that Martin saw include, without limitation, a document stating that CSCA was "an investment in your future." Claimants relied on these material misrepresentations in making the decision to borrow \$40,749.53 for Anna to attend CSCA.

B. Respondents' Contentions

Respondents deny Claimants' allegations that misrepresentations were made to Claimants. Respondents contend that such representations would have been against their policy. Respondents further contend that Claimants are intelligent persons; and that no "reasonable" person would have believed that the course in which Claimant Anna enrolled would lead to immediate employment as a "Pastry Chef."

Respondents argue that Martin Berkowitz is a sophisticated businessman who has owned two businesses. Therefore, it is incredible that he would have accepted as more than puffery that entry level graduates of culinary school could be earning \$75,000 a year, especially since Martin, as a sophisticated and accomplished businessman was only earning income in the \$100,000 range. Respondents argued that he was a shrewd businessman who viewed the money paid to Respondents as an investment in a future lawsuit. Claimants reject that argument, asserting that he was a supportive and loving father who believed in his daughter and also in the representations of Respondents and their salespersons/CSCA Admissions Representatives.

Respondents claim that Claimants were provided with accurate information concerning the culinary program and the success of its graduates. Finally, Respondents contend that Claimants received full value for their investment and that Claimant Anna received the training that Respondents had promised Claimants.

II. FINDINGS OF FACT

1. Claimant Anna Berkowitz was recruited to attend CSCA when she 17 years old and was still in high school.
2. The business of Respondents was to operate a for-profit culinary trade school to train students in various culinary skills.
3. In order to recruit students to attend their school, Respondents hired and trained sales people, referred to as "Admissions Representatives."

4. The only admissions criteria for CSCA was a high-school diploma or GED and pass an IQ test.

5. Applicants were allowed to take the IQ test multiple times to achieve a "passing" score.

6. Admissions Representatives were put through an elaborate sales training process, wherein they learned high-pressure sales tactics based upon psychological marketing methods.

7. CSCA Admissions Representatives also distributed written marketing materials that contained misrepresentations about the program and the success of its students.

8. The Admissions Representative assigned to Claimants at CSCA, Steven Hong, made numerous representations to them during the recruiting process about the outcome of attending CSCA, specifically: (1) that immediately upon graduation Anna would easily be able to find employment as a Pastry Chef; (2) Anna would earn at least \$75,000 per year to start; and (3) Anna and Martin would be able to easily pay off the loans they were encouraged to take out for Anna to be able to attend CSCA with the money she earned. Claimants were also told that admission to CSCA was very selective, and Anna would be lucky if she was admitted. She was repeatedly assured that she was a "shoe-in" to land a job upon graduation as a Pastry Chef, and would easily make \$75,000 a year. All of these representations were false and misleading.

9. CSCA's written marketing materials, such as those shown to Claimants, were similarly misleading and false. For example, Anna saw a chart depicting CSCA graduates significantly out earning four year college graduates, career military and junior college graduates at all times during the first five years. Anna also saw numerous other CSCA marketing materials, including, without limitation, a list of "Careers" available to CSCA graduates such as "Executive Chef," "Sous Chef," "Personal Chef," and "Pastry Chef," as well as another stating that CSCA was an "Investment in Your Future."

10. Claimant Martin Berkowitz, who co-signed for Anna's CSCA student loans, also saw numerous CSCA marketing materials during CSCA's recruiting process, including a document stating that the school prepared students "for a good-paying career as a professional chef," and that a CSCA degree could be "serve[d] immediately to future employers who are hungry for talented chefs."

Other examples of CSCA marketing materials that Martin saw include, without limitation, a document stating that CSCA was “**an investment in your future.**”

11. Respondents also failed to disclose other material facts they knew to be true. For example, that from 2004 to 2010, none of CSCA's graduates found employment as "Chefs" immediately upon graduation, and that none of CSCA's graduates would be able to make enough money from a job in the culinary industry to make payments on their CSCA student loans.

12. Claimants relied on these material representations in making the decision to borrow \$40,749.53 in order for Anna to be able to attend CSCA.

13. After completion of the CSCA program, Claimant Anna spent several months seeking employment in the culinary field but was not able to obtain any employment comparable to that which had been represented by CSCA.

14. Failing to find employment in her chosen field of culinary arts, Claimant Anna once again enrolled in school to pursue a different profession.

15. Claimants suffered damages in the amount \$67,000.

III. ANALYSIS AND CONCLUSIONS OF LAW

A. FRAUD

The elements of a claim for fraud based on affirmative misrepresentations are that the defendant made a false representation, that the defendant knew was false or that it made recklessly and without regard for its truth, an intent to defraud on the part of the defendant, i.e. intent to induce reliance, justifiable reliance by the plaintiff, and resulting damage. *See Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal. 4th 951, 974; CACI 1900. All of the elements of a fraud claim based on affirmative misrepresentations are present here.

During the process of recruiting Claimants to CSCA, Respondents made numerous false representations about what a CSCA education provides to graduates, i.e. the outcome of attending CSCA. These representations were contained in both affirmative statements of the Admissions Representative

assigned to Claimant Anna, Steven Hong (which her father and co-claimant Martin Berkowitz personally witnessed), and also in written marketing materials for the school. The affirmative representations Respondents made to Claimants include, without limitation, that:

- (1) Immediately upon graduation Anna would easily be able to find employment as a Pastry Chef;
- (2) Claimant Anna would earn at least \$75,000 per year to start; and
- (3) Claimants would be able to easily pay off the loans they were encouraged to take out to be able to attend CSCA with the money she earned.

Among the CSCA marketing materials that Anna saw was a chart depicting CSCA graduates significantly out earning four year college graduates, career military and junior college graduates at all times during the first five years. Claimant Martin saw a document which contained the Le Cordon Bleu logo entitled "[h]ow to prepare a delicious future". This document specifically stated that CSCA prepares you "for a good paying career as a professional chef" and that after "15 months," CSCA graduates can "[s]erve immediately to future employers who are hungry for talented new chefs".

Respondents' argument that Claimants' reliance on their representations regarding the outcome Claimant Anna would obtain by attending CSCA – such as obtaining a position as a Pastry Chef immediately upon graduation, earning \$75,000, and being able to pay back the student loans – was somehow not justifiable, is unsupported by the facts. Claimant Anna was a seventeen year old high school student at the time she was being recruited by CSCA. She had no experience working in the culinary industry. Similarly, Claimant Martin had no experience working in the culinary industry. For these reasons, based on Anna's youthful age and lack of experience and knowledge of the culinary industry at the time she decided to attend, and Martin's lack of experience and knowledge of the culinary industry during Anna's recruitment, their reliance was entirely *justifiable* under the relevant standard.

**The Concealment (Non-Disclosure) Claim Does Not Require an Additional
Relationship Beyond What Exists Here**

The elements of a claim for concealment/non-disclosure are that (1) a defendant disclosed

some facts to plaintiff, but intentionally failed to disclose another important fact, making the disclosure deceptive; (2) that plaintiff did not know of the concealed fact; (3) that defendant intended to deceive the plaintiff by concealing the fact; and (4) that plaintiff reasonably relied on defendant's deception; (5) that plaintiff was harmed; and (6) that defendant's concealment was a substantial factor in causing plaintiff's harm. CACI 1901; *see also Marketing West, Inc. v. Sanyo Fisher (USA) Corp.* (1992) 6 Cal. App. 4th 603, 613.

Claimants' non-disclosure claim is based on Respondents' numerous, material representations relating to the outcome that a CSCA education provides to graduates of the school. Respondents also failed to disclose other material facts they knew to be true, namely: that from 2004 to 2010, none of CSCA's graduates found employment as "Chefs" immediately upon graduation, and that none of CSCA's graduates would be able to earn enough money from a job in the culinary industry to make payments on their CSCA student loans.

Thus, a claim for non-disclosure (concealment), where the defendant made affirmative representations but intentionally failed to disclose material facts, is valid under the facts of this arbitration. Moreover, a fiduciary relationship is not required for a non-disclosure claim in this instance. *Limandri*, 52 Cal. App. 4th at 336-337.

B. VIOLATION OF CALIFORNIA'S UNFAIR COMPETITION LAW (Business & Professions Code § 17200, et seq., known as the "UCL")

Claimants have made claims based on the UCL's "fraudulent," "unfair," and "unlawful" Prongs. The UCL permits a plaintiff to recover for any unlawful, unfair, or fraudulent business practice, and unfair, deceptive, untrue or misleading advertising practice. *See* Cal. Bus. & Prof. Code §17200. The purpose of the UCL is "to protect both consumers and competitors from unlawful, unfair or fraudulent business practices by promoting fair competition in commercial markets for goods and services." *Hall v. Time, Inc.*, 158 Cal. App. 4th 847, 852 (2008). The right extended to the public by the UCL is the "right to protection from fraud, deceit, and unlawful conduct ... and the focus of the statute is on the defendant's

conduct." *See In Re Tobacco II Cases*, 46 Cal. 4th 298, 324 (2009). Respondents' conduct meets the standard for "fraudulent," "unfair," but not "unlawful" conduct under the UCL.

i. Claimants' Claim Under the UCL's "Fraudulent" Prong

To establish a claim under the UCL's "fraudulent" prong, Claimants "need only show that members of the public are likely to be deceived". *Olsen v. Breeze, Inc.*, 48 Cal. App. 4th 608, 618 (1996). The analysis of this UCL claim is therefore focused on Respondents' conduct, and whether their fraudulent recruiting scheme was *likely* to deceive the public. *See Mass. Mutual Life Ins. Co.*, 97 Cal. App. 4th at 1290. Respondents' written marketing materials for CSCA, such as, for example, without limitation, documents indicating that CSCA was an "investment in your future", documents listing numerous "Chef" positions available to CSCA graduates and the "How to prepare a delicious future" document are likely to deceive the public, and violate the UCL's "fraudulent" prong. Similarly, oral representations made by CSCA Admissions Representatives to prospective students, stating that they would be able to get a position as a Chef immediately upon graduation and make upwards of \$75,000, and be able to pay their CSCA student loans back, such as the specific statements Steven Hong made to Claimants are also fraudulent and likely to deceive the public.

Respondents argue that Claimants cannot establish their claim under the fraudulent prong of the UCL because Claimants cannot prove reliance, causation, or injury. This argument, however, fails for the same reason as Respondents' argument with respect to Claimants' fraud claim, as described above.

ii. Claimants' Claim Under the UCL's "Unfair" Prong

There are two different tests for when a defendant's conduct violates the UCL's "unfair" prong. *See Lozano v. AT&T Wireless Services, Inc.*, 504 F.3d 718, 736 (9th Cir. 2007). Under the balancing test applied by the second appellate district and others, whether a defendant's conduct is "unfair" depends on whether the utility of the conduct is outweighed by the harm to the consumer. *See e.g. Ticconi*, 160 Cal. App. 4th at 539; *McKell v. Washington Mutual, Inc.*, 142 Cal. App. 4th 1457, 1473 (2006); *Pastoria v. Nationwide Insurance*, 112 Cal. App. 4th 1490, 1498 (2003).

The California Court of Appeal made clear why the balancing test is appropriate in consumer cases like this one: "[the] 'unfair' prong should be read more broadly in consumer cases

because consumers are more vulnerable to unfair business practices than businesses and without the necessary resources to protect themselves from sharp practices." *Progressive West Insurance Company v. Yolo County Superior Court*, 135 Cal. App. 4th 263, 286 (2005). The balancing test should apply here because this proceeding arises not in a competitor context, but in a consumer context. A pattern of misleading representations may qualify as an unfair business practice. *See, e.g., Wilner v. Sunset Life Ins. Co.*, 78 Cal. App. 4th 952, 965 (2000). In addition, in a case such as this, the omission of a material fact from a representation can form the basis of a UCL claim. *See Id.* at 966-967.

In this case, the Respondents' business model was unfair because Respondents sold CSCA to the public as a means to obtain a better life through a career in the culinary industry when they knew that graduates' wages would not, in fact, allow them to pay their resulting school debts, nevermind obtain the wages represented, or jobs as chefs. Attending CSCA causes consumers, such as Anna, and a co-signor such as Martin, to be put into a significantly *worse* financial situation than had the student not gone at all, and Respondents knew it. Further, if there is any utility to Respondents' culinary trade school scheme, it is minimal given that there is no evidence that attending the school increases starting rates of pay, or rates of promotion, or increases the chances of becoming a Chef, and far more than offset by the tuition charged.

iii. Claimants' Claim Under the UCL's "Unlawful" Prong

To establish a claim under the UCL's "unlawful" prong, the Claimants need to show that the Respondents' conduct violates another law on which the UCL claim is predicated. *See Saunders v. Superior Court*, 27 Cal. App. 4th 832 (1994). However, for the reasons set forth below, Claimants have failed to establish, among other things, that Respondents' conduct violates the CLRA and/or Penal Code section 496, was a breach of contract (due to the voluntary compliance agreement with the California Department of Consumer Affairs and related violations of the Reform Act, and Penal Code § 496, as discussed in more detail below.

C. VIOLATION OF THE CONSUMER LEGAL REMEDIES ACT (“CLRA”)

Claimants also allege a claim under the Consumer Legal Remedies Act or “CLRA,” codified at California Civil Code sections 1750 et seq. Civil Code Section 1770(a) enumerates a list of 23 prohibited acts that can form the basis for a claim for relief. Claimants allege that Respondents violated section 5, 7, 9, and 19 of the statute. (*See Consolidated Amended Complaint* ¶ 63.)

To bring a claim under the CLRA, Claimant must first prove she is a “consumer,” which is defined under the statute as “an individual who seeks or acquires, by purchase or lease, any goods or services for *personal, family, or household purposes.*” Cal. Civ. Code § 1761(d); *Lazar v. Hertz Corp.*, 143 Cal. App. 3d 128, 142 (1983) (attorney who used rental cars for business and not consumer purposes could not be class representative on a CLRA claim alleging overcharges for gas used in refilling tanks on returned vehicles). Here, Claimant alleges that she attended CSCA for professional purposes – *i.e.* to advance her career in the culinary field. For this reason, Claimants CLRA fails.

D. BREACH OF CONTRACT - VIOLATION OF THE PRIVATE POSTSECONDARY AND VOCATIONAL EDUCATION REFORM ACT OF 1989 (the “Reform Act”)

Claimants assert a direct claim under the repealed Private Postsecondary and Vocational Education Reform Act of 1989 (the “Repealed Reform Act”). Yet they provide no argument at all as to why this claim should not be thrown out for the same reasons Judge Johnson *twice* sustained demurrers to that cause of action without leave to amend. Claimants also ignore that the Court of Appeal summarily denied Claimants’ petition for writ relief from Judge Johnson’s decision in the first of those cases, and that Claimants did not seek appellate review of the second.

Accordingly, Claimants’ claim is denied for the same substantive reasons as were given by Judge Johnson: specifically: (1) the Repealed Reform Act was repealed without a savings clause; (2) the Private Postsecondary Act of 2009 (codified at Cal. Educ. Code §§ 94800, *et seq.*)

(the "2009 Act"), which purported to revive certain claims under the Repealed Reform Act, was passed without complying with Government Code section 9607; (3) the 2009 Act is an unconstitutional taking; (4) the Repealed Reform Act violates the dormant commerce clause; and (5) CSCA's entry into a Voluntary Agreement with the Department of Consumer Affairs ("DCA") in April of 2008 to comply with and perform the Repealed Reform Act's provisions (the "Voluntary Agreement") does not permit a direct claim under the statute.

E. CIVIL THEFT

On March 1, 2013, five months after Claimant filed her original arbitration demand, she served an amendment (without authorization from the Arbitrator) purporting to add a claim for "civil theft" under California Penal Code sections 484(a) and 496(a) in order to seek treble damages under the statute. She contends in her purported amendment and arbitration brief that this claim is supported by the recent decision by the Fourth Appellate District in *Bell v. Feibush*, 212 Cal. App. 4th 1041 (2013), which held that parties may in some circumstances bring civil actions for alleged violations of the statute, even if the defendant has not been convicted of a criminal infraction. However, no other published decision has held that these Penal Code provisions provide a private right of action in circumstances in which there has been no criminal conviction.

Penal Code section 496(a) was enacted to impose liability on "fences" who *receive* stolen property from *others who stole it*. Such is not the case here and, for these reasons, Claimant's civil theft claim is denied.

IV. DISPOSITION

For all the foregoing reasons, the Arbitrator finds in favor of the Claimants on the claims for fraud and violation of the UCL. All other claims are denied.

Accordingly, Claimants are entitled to an award of damages as follows:

Economic damages-- \$42,000 = [\$28,000 [tuition] minus \$7,000 [value to Anna of culinary training] = \$21,000 + \$16,000 [lost opportunity if she had a job earning \$10/hr. for the 40 weeks

she was in culinary school] + \$5,000 [lost opportunity for the months she spent looking employment after graduation from culinary school].

Non-economic damages--\$25,000 = [emotional distress]

Attorney's fees--\$150,000

Costs-- \$0 = The fees and expenses of the AAA, totaling \$1,675 and the compensation of the arbitrator, totaling \$10,300, shall be borne as incurred by the parties.

This Award is in full settlement of all claims submitted to this Arbitration.

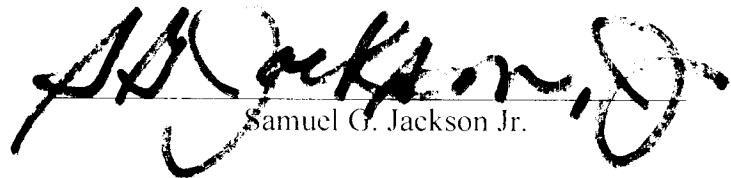
All claims not expressly granted herein are hereby denied.

6-12-13


Samuel G. Jackson Jr.

I, Samuel G. Jackson Jr., do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument which is my Award.

6-12-13


Samuel G. Jackson Jr.