SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

ANNA ALABURDA; JILL BALLARD; DANIELA LOOMIS; and NIKKI NGUYEN, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

THOMAS JEFFERSON SCHOOL OF LAW, and DOES 1 through 100,

Defendants.

Case No. 37-2011-00091898-CU-FR-CTL

ORDER DENYING CLASS CERTIFICATION

Judge: Hon. Joel M. Pressman
Dept.: 66

The Court rules on Defendant's Evidentiary Objections as follows:

- III.1 – VII.1 - overruled
- VII.2 – sustained
- VIII.1 – VIII.4 – sustained

The Court denies Defendant's Request for Judicial Notice.

Plaintiff's Motion for Class Certification is DENIED.

BACKGROUND

Plaintiffs are four graduates of TJSL who allege that they were misled by Thomas Jefferson School of Law's [TJSL] false and inaccurate employment statistics. The Fourth Amended Complaint alleges that TJSL has a policy of (1) routinely counting unemployed graduates as "employed" (FAC, paragraph 3); (2) shredding critical documents relating to Defendant's

employment data; (3) counting unemployed graduates as "unknown" in order to improperly skew the data; (4) reporting unpaid volunteers and interns as "employed", in violation of the NALP and ABA guidelines (FAC, paragraph 69); and failing to record the source of the employment information it receives and using generally unreliable sources. (FAC, paragraph 68)

The First Amended Complaint [FAC] alleges that plaintiffs owe $650,000 in connection with their lawschool education and that plaintiffs would never have enrolled in the school if they knew that TJSL manipulated or inflated its employment data. (FAC, Paragraph 121) The FAC seeks damages and restitution in the amount of all tuition and fees that defendant received from the plaintiffs. (paragraph 121) The FAC contains claims for violations of Business & Professions Code Sections 17200 and 17500, violations of the Consumer Legal Remedies Act, intentional misrepresentation, negligent misrepresentation and negligence.

Plaintiffs seek to certify a class consisting of: "All TJSL graduates from the Class of 2006 through 2013 who currently reside in California and who reviewed TJSL's employment statistics in US News & World Report's 'Best Graduate Schools' before deciding to enroll at TJSL."

Plaintiffs argue that class treatment is appropriate because plaintiffs' theory of recovery in this case focuses on common practices of TJSL. Specifically, plaintiffs allege that TJSL engaged in a common practice of misreporting its employment data in a single written publication, US News & World Report. Plaintiffs allege that the common practices of TJSL resulted in inflated employment statistics during the class period.

Plaintiffs also contend that class certification is appropriate to avoid repetitious litigation of requiring each individual plaintiff to introduce evidence concerning uniform practices and denial of this motion could result in hundreds of trials with virtually identical evidence.

GENERAL CLASS ACTION REQUIREMENTS

A class action may be maintained only where (1) there is an ascertainable class and (2) a well-defined community of interest in the questions of law and fact involved affecting the parties to be represented. Code Civ. Proc. Section 382; Vasquez v. Superior Court (1971) 4 Cal.3d 800, 809.

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ASCERTAINABLE CLASS

For a proposed class to be ascertainable, (1) the class definition must state precise and objective criteria that allow identification of persons who have claims and will be bound by the results of the litigation. Marler v. E.M. Johansing, LLC (2011) 199 Cal.App.4th 1450, 1459; Medrazo v. Honda of North Hollywood (2008) 166 Cal.App.4th 89, 101; Global Minerals & Metals Corp. v. Superior Court (2003) 113 Cal.App.4th 836, 858; and (2) there must be a way to identify those persons and give them notice of the litigation without undue expense or time, usually by reference to official or business records. Archer v. United Rentals, Inc. (2011) 195 Cal.App.4th 807, 828; Sevidal v. Target Corp. (2010) 189 Cal.App.4th 905, 919). "Courts have recognized that 'class certification can be denied for lack of ascertainability when (1) the proposed definition is overbroad and (2) the plaintiff offers no means by which only those class members who have claims can be [separated] from those who should not be included in the class.'" *Id.* at 921.

CLASS DEFINITION

Plaintiffs seek to certify a class consisting of: "All TJSL graduates from the Class of 2006 through 2013 who currently reside in California and who reviewed TJSL's employment statistics in US News & World Report's 'Best Graduate Schools' before deciding to enroll at TJSL."

While the definition seems clear enough (those who reviewed US News & World Report), there is little in the way of objective criteria to determine who is in the class. The method of determining whether someone is in the class must be "administratively feasible." A plaintiff does not satisfy the ascertainability requirement if individualized fact-finding or mini-trials will be required to prove class membership. "Administrative feasibility means that identifying class members is a manageable process that does not require much, if any, individual factual inquiry." William B. Rubenstein & Alba Conte, Newberg on Class Actions § 3:3 (5th ed.2011); see also Bakalar v. Vavra, 237 F.R.D. 59, 64 (S.D.N.Y.2006) ("Class membership must be readily identifiable such that a court can determine who is in the class and bound by its ruling without engaging in numerous fact-intensive inquiries."). See also Carrera v. Bayer Corp. (3d Cir., Aug. 21, 2013, 12-2621) 2013 WL 4437225.

In this case, determining membership rests exclusively on self-authentication, which seems in this case to be unreliable. There is no means for the defendant to be able to challenge membership in the class. There is authority that has allowed fraud claims to proceed as a class where members could confirm whether they had been misled. See e.g. Marler v. E.M. Johansing, LLC (2011) 199 Cal.App.4th 1450, 1460. However, this type of self-authentication is appropriate where "objective characteristics and common transactional facts" exist to substantiate membership in the class. Id. In this case, there are few, if any, "common transactional facts" from the perspective of class members. Indeed, for these reasons, many cases have found that a putative class member's self-authentication is not sufficient to verify class membership. See Carrera, *supra* 2013 WL 4437225 at 6-8; In re PPA (W.D. Wash. 2003) 214 F.R.D. 614, 619; Mazur v. eBay, Inc. (N.D. Cal. 2009) 257 F.R.D. 563, 567-68.

Given the problems with verification of the class and lack of objective criteria, the class proposed appears to be unascertainable.

WELL-DEFINED COMMUNITY OF INTEREST

While there are problems with ascertainability as set forth above, the major concern of the court is with the second element necessary for certification: a well-defined community of interest, specifically, that individual questions of law and fact predominate.

The "community of interest" requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class. Keller v. Tuesday Morning, Inc. (2009) 179 Cal.App.4th 1389, 1397.

PREDOMINANT COMMON QUESTIONS OF LAW AND FACT

It appears to the Court that in this case, individual issues predominate over common issues. Commonality is predicated upon whether the elements necessary to establish liability are susceptible to common proof. Brinker Rest. Corp. v. Superior Court (2012) 53 Cal.4th 1004, 1021. "[T]o determine whether common questions of fact predominate the trial court must examine the issue framed by the pleadings and the law applicable to the causes of action alleged." Knapp v. AT&T Wireless Service, Inc. (2011) 195 Cal.App.4th 932, 941.

The Court reviews the various causes of action asserted.

COMMON LAW CLAIMS (NEGLIGENCE AND MISREPRESENTATION)

Elements for Negligent Misrepresentation require reliance. Apollo Capital Fun, LLC v. Roth Capital Partners, LLC (2007) 158 Cal.App.4th 226, 243. Similarly, negligence requires that breach be the proximate or legal cause of the injury. Ladd v. County of Mateo (1996) 12 Cal.4th 913, 917.

Individual issues predominate, particularly with the element of reliance and causation, which is required for class members with respect to the common law claims. There is no evidence that all members of the class were exposed to a uniform stimulus in applying for law school.

Defendant has provided 111 declarations of graduates from the applicable time frame, who cited a number of reasons for attending TJSL. 82 graduates cited TJSL's location; 43 cited financial aid and scholarships; 19 cited a course or study program; 16 cited the quality of the faculty or employment statistics; 15 cited the bar passage rate; 12 cited TJSL's overall ranking, the fact it was the only school they were accepted, the LSAT/GPA range of students, or the student/faculty ratio; and 11 cited TJSL's culture or ABA accreditation. Additional factors cited as important were: TJSL's reputation in the legal community (cited by 10 graduates), part-time/evening program (8), acceptance rate (6), first acceptance (5), positive interactions with TJSL (5), tuition costs (4), recommendation from friends (4), size of the school/classes (3), quality oif life (3), notable alumni (2), spring admission (2),, quality v. value (2), family or alumni recommendations (2), student satisfaction (2), salary statistics (2), graduation rate (2), family was alumni (1), cost of living (1), job prospects (1), community role (1), new facility (1), faculty relationships (1), marketing materials (1), non-profit status (1), independent status (1), ratio of female professors (1), assessmnet score by lawyers/judges (1), first-year retention (1). (See Comp. 118-166; see also id, at 19 (summarizing responses).)

Given these vastly differing reasons for attending TSJL and the differing weight placed upon the US News & World Report article, there are significant individual issues with respect to reliance and causation.

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CLRA

The CLRA makes unlawful various "unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer." (Civ.Code, § 1770, subd. (a).) It allows "[a]ny consumer who suffers any damage as a result of the use or employment by any person of a method, act, or practice" to bring an action to recover or obtain actual damages, injunctive relief, restitution, and/or punitive damages. (Civ.Code, § 1780, subd. (a).) It also provides that "[a]ny consumer entitled to bring an action under Section 1780 may, if the unlawful method, act, or practice has caused damage to other consumers similarly situated, bring an action on behalf of himself and such other consumers to recover damages or obtain other relief as provided for in Section 1780." (Civ.Code, § 1781, subd. (a).)

This statutory language makes clear that, to obtain relief under the CLRA, both the named plaintiff and unnamed class members must have suffered some damage caused by a practice deemed unlawful under Civil Code section 1770. See In re Steroid Hormone Product Cases (2010) 181 Cal.App.4th 145, 155-56. Generally, causation as to each class member is commonly proved more likely than not by materiality. If material misrepresentations were made to the class members, at least an inference of reliance [i.e., causation/injury] would arise as to the entire class." Id. However, if the issue of materiality is a matter that would vary from consumer to consumer, the issue is not subject to common proof, and the action is properly not certified as a class action. Tucker v. Pacific Bell Mobile Services (2012) 208 Cal.App.4th 201, 222.

In this case, whether the alleged misrepresentations in employment statistics were material varies from consumer to consumer. In support of the Opposition, TJSL has presented 111 declarations of graduates, as discussed above. The declarations indicate differences in what factors influenced the graduates to attend TJSL and differing weights to those various factors. Declarants included 42 different factors and less than 15% of the declarants identified employment statistics as important. Some of these factors included financial aid and scholarships, course of study or program, the quality of the faculty or employment statistics, the bar passage rate, TJSL's overall ranking, the fact that it was the only school to which they were accepted, the LSAP/GPA range of

students, the student to faculty ration, TJSL culture or ABA accreditation, etc... (Id.) Further, the interpretation and weight given to each of these sources differs based on each individual. (see Defendant's Opposition at p. 6 – 7.) Further, differences exist with respect to harm: several of the putative class members reported they are satisfied with their legal education and that it has helped them achieve their goals. (see Defendant's Opposition at p. 6.) To summarize, the putative class consulted, considered, and was motivated by a myriad of sources, besides U.S. News & World Report, when deciding where to attend Law School. See Defendant's Opposition at p. 4-5 [summarizing testimony responses of the different factors considered by many of the putative class members]

Given the differences, individual issues predominate as to materiality for purposes of the CLRA.

UCL

The Unfair Competition Law presents a more difficult issue with respect to commonality because, unlike common law claims and the CLRA discussed above, the focus in the UCL has generally been *objective* and not on subjective reliance or materiality. See In re Tobacco II Cases (2009) 46 Cal.4th 298, 326 ["The fraudulent business practice prong of the UCL has been understood to be distinct from common law fraud and relief under the UCL is available without individualized proof of deception, reliance and injury."] As discussed more fully below, the issue is whether defendant engaged in a business practice "likely to deceive a member of the general public" and not the individual's particular reliance. However, even under this standard, the Court finds that individual issues predominate with respect to recovery under the UCL as explained below.

Fraudulent Practice under the UCL California's broad Unfair Competition Law [UCL] provides a broad remedy for any business practice of unfair competition. The UCL defines unfair competition as "any unlawful, unfair or fraudulent business act or practice." (§ 17200.) Under the statute there are three varieties of unfair competition: plaintiff must establish that the practice is either unlawful (i.e., is forbidden by law), unfair (i.e., harm to victim outweighs any benefit) *or* fraudulent (i.e., is likely to deceive members of the public)." Albillo v. Intermodal Container

Services, Inc. (2003) 114 Cal.App.4th 190, 206. Each of these three prongs—unlawful, unfair, or fraudulent—implicates a different legal standard, although a single practice may simultaneously violate more than one prong. Fairbanks v. Farmers New World Life Ins. Co. (2011) 197 Cal.App.4th 544, 546. In this case, plaintiffs' claims most clearly implicate the "fraudulent" prong.

A fraudulent business practice is one in which "*members of the public* are likely to be deceived." Morgan v. AT & T Wireless Services, Inc. (2009) 177 Cal.App.4th 1235, 1254.) The test is an objective one focused on defendant's conduct. Steroid Hormone Product Cases. *supra,* 181 Cal.App.4th at 153. In other words, unlike common law fraud, the UCL does not require subjective proof of deception, reliance and injury. Tobacco II, *supra*, 46 Cal.4th at 326.

In 2004, Proposition 64 changed the UCL to provide that a private action for relief may be maintained only if the person bringing the action "had suffered injury in fact and has lost money or property as a result of the unfair competition." (Business & Professions Code 17204) Now, there is a requirement in the law of "injury in fact". With respect to the fraudulent prong, the person bringing the action must prove that he or she was injured in fact and lost money as a result of the fraud.

Class Actions Under the Fraudulent Prong of the UCL

The first question after Proposition 64 was whether each class member must now establish that he or she suffered injury in fact and lost money as a result of the unfair competition. The Court held in Tobacco II, *supra,* 46 Cal.4th at 321, that the standing provision added by Proposition 64 "was not intended to have any effect at all on unnamed members of UCL class actions." Thus, while a named plaintiff in a UCL class action must have injury in fact and lost money or property as a result of the unfair competition, once the named plaintiff meets that burden, no further individualized proof of injury or causation is required to impose restitution liability against the defendant in favor of absent class members. In re Steroid Hormone Product Cases (2010) 181 Cal.App.4th 145, 154.

Cases decided after Tobacco II, have clarified that a class action for a fraudulent business practice under the UCL *requires that a defendant have engaged in uniform conduct likely to mislead the entire class.* Davis-Miller v. Auto. Club of S. California (2011) 201 Cal. App. 4th 106,

121; Fairbanks, *supra,* 197 Cal.App.4th at p 562; see also Knapp v. AT & T Wireless Services, Inc. (2011) 195 Cal.App.4th 932, 945 ["we do not understand the UCL to authorize an award for injunctive relief and/or restitution on behalf of a consumer who was never exposed in any way to an allegedly wrongful business practice."]. "Specifically, when the class action is based on alleged misrepresentations, a class certification denial will be upheld when individual evidence will be required to determine whether the representations at issue were actually made to each member of the class." (*Id.;*Knapp, *supra,* 195 Cal.App.4th at p. 944; see also Kaldenbach v. Mutual of Omaha Life Ins. Co. 178 Cal.App.4th 830, 850; Pfizer Inc. v. Superior Court 182 Cal.App.4th 622, 632.)

Cases Post-Tobacco II

Plaintiffs rely heavily on In re Steroid Hormone Product Cases, supra, 181 Cal.App.4th 145, where the Second District, Division Four reversed the trial court's denial of certification. Plaintiff in *In re* Steroid, alleged that defendant sold products containing a substance that legally required a prescription. A significant basis for the UCL claim was that defendant sold products that violated state statutes, including Health and Safety Code section 11056.4. The UCL claim was based upon the unlawful prong of the UCL. "Martinez's UCL claim presents two predominate issues (other than Martinez's individual standing), both of which are common to the class: (1) whether GNC's sale of androstenediol products was unlawful; and if so, (2) the amount of money GNC "may have ... acquired by means of" those sales that must be restored to the class (Bus. & Prof.Code, § 17203)." In that context, the court distinguished other cases involving fraud finding that this action was based on unlawful conduct and not fraudulent conduct. The Court reversed the finding of the trial court that actual injury was required of the class, citing Tobacco II, which was decided only months after the trial court's decision.

Given that the *In re* Steroid dealt with the unlawful prong, the Court does not find its reasoning helpful to resolve this case, which is based on the fraud prong of the UCL. The case also only applies the reasoning of Tobacco II.

Several appellate cases after Tobacco II have upheld the denial of class certification for UCL claims on the ground that commonality was lacking. The common theme in these cases is either (1) the lack of evidence showing a common pattern and practice of misrepresentation to

members of the class or (2) lack of evidence that members of the proposed class were *exposed* to the misrepresentation. These cases have generally held that Tobacco II does not stand for the proposition that a consumer who was never exposed to an alleged false or misleading advertising or promotional campaign is entitled to restitution." Pfizer at 631–632.

1. The Problem of Common Practice

Cases showing lack of a common practice include Kaldenbach, *supra,* 178 Cal.App.4th at 833, where plaintiff sued two insurance companies regarding the sale of "a so-called 'vanishing premium' life insurance policy" and alleged claims for violation of the UCL, violation of the CLRA and common law fraud and concealment. The appellate court affirmed denial of the class stating: "the trial court could properly conclude there was no showing of uniform conduct likely to mislead the entire class, and the viability of a UCL claim would turn on inquiry into the practices employed by any given independent agent—such as whether the agent involved in any given transaction took [the defendants'] training and read [the defendants'] manuals or used the training and materials in sales presentations, and what materials, disclosures, representations, and explanations were given to any given purchaser." *Id.* at 850. The Court found that the evidence did not establish common representations or omissions as the training manuals and written materials were not uniform. See also Fairbanks, *supra* 197 Cal.App.4th at 564 ["the alleged misrepresentations regarding insurer's marketing and sale of universal life insurance policies were not commonly made to members of the class."]

Similarly in Knapp, *supra*, 195 Cal.App.4th at 943, the appellate court affirmed denial of certification of class of wireless telephone subscribers finding that the alleged misrepresentations were not uniformly made to proposed class members. "The complaint acknowledges some misrepresentations were oral and others were made in various written materials." *Id.*

In our case, plaintiffs have alleged a uniform practice on the part of TJSL.

Plaintiffs have the burden on certification to show that defendant conducts itself in a common way or that the policies have a widespread illegal effect. See Dailey v. Sears, Roebuck & Co. (2013) 214 Cal.App.4th 974. To support the motion, plaintiff provides TSJL's discovery responses. Response to Special Interrogatory No. 25 details a data collection process. This is

further supported by a 2005 memorandum authored by Rebecca Rauber, Associate Dean of Career Services. (Lodged as Ex. 18) The deposition testimony of Dean Kransberger states that in the last seven years there have been no changes to policies with respect to collection of employment data. (Kransberger Depo I at 172:7-11) The practice appears to be that Career Services Office at TJSL contacts graduating students regarding employment status or uses secondary sources. TJSL then records the graduates' employment data into a computer database. (Ex. 18 at p. 5) TJSL ultimately transfers the data to the National Association of Law Placement [NALP], the ABA and US News. (p.5)

Plaintiff alleges that TSJL, in the above practice, has a policy, among many, of routinely counting unemployed graduates as employed (FAC paragraph 3). Plaintiff provides the declaration of Justin McCrary, an expert that opines that a potential methodology estimating the misreporting is possible. The Court disregards this declaration as it does not offer actual data to support a common practice. See Dailey v. Sears, Roebuck & Co. (2013) 214 Cal.App.4th 974, 999-1000.

However, the Declaration of Karen Grant, an employee in Career Services until 2007, states that she gathered employment information and was instructed to record a student "employed" even if currently unemployed if the student had any job for any duration. This declaration supports plaintiff's allegation of a common practice.

Defendant provides the declaration of the Director of Career Services since 2007 who states that TJSL provides highly detailed raw employment data on an individual-by-individual basis to NALP. Once this information is transmitted to NALP, NALP [not TJSL] "processes, interprets, and distills the data into summary numbers." (Bracker Declaration at paragraph 5) This declaration is not necessarily inconsistent with Karen Grant's declaration, who provides facts of the compilation on TJSL's part prior to the transfer of information to NALP. However, to the extent there are disputes, the Court does not need to resolve them at this juncture.

In sum, unlike cases such as Kaldenbach, Fairbanks and Knapp, plaintiffs have established for purposes of certification a common practice by TJSL.

2. The Problem of Exposure

In Pfizer, *supra*, 182 Cal.App.4th 622, the Court found on another problem: Lack of

exposure by the class to misrepresentation. In Pfizer plaintiff alleged defendant misrepresented in a marketing campaign that its mouthwash was "as effective as floss." After the court noted that the marketing campaign had ended, the court concluded "[O]ne who was not exposed to the alleged misrepresentations and therefore could not possibly have lost money or property as a result of the unfair competition is not entitled to restitution. [T]he class certified by the trial court, i.e., all purchasers of Listerine in California during a six-month period, is grossly overbroad because many class members, if not most, clearly are not entitled to restitutionary disgorgement." The Court reasoned that perhaps the majority of class members who purchased Listerine during the pertinent six-month period did so *not* because of any exposure to Pfizer's allegedly deceptive conduct, but rather, because they were brand-loyal customers or for other reasons.

In Cohen v DIRECTV, Inc. (2009) 178 Cal.App.4th 966, 969-970, the court found that common issues of fact did not predominate because a proposed class of Directv subscribers would include subscribers who never saw the alleged false advertisements or representations of any kind before deciding to purchase the company's HD services, or who decided to subscribe to the services for entirely different reasons. The Second District Court of Appeals affirmed the trial court's denial of class certification because, among other reasons, many subscribers purchased DIRECTV HD – not because of the alleged advertisements - but primarily based on word of mouth.[1] *Id.*

In this case, unlike Pfizer and Cohen, the class is narrowly defined to include only those who reviewed the US News & World Report article. Plaintiffs have provided declarations of representatives that were allegedly deceived by the US News & World Report article. So in a sense, the exposure problem is eliminated by the class definition.

However, the problem is that exposure alone does not end the inquiry. Just as the consumers in Pfizer and Cohen, students who were exposed may have attended TSJL for different reasons. In other words, a class member who reviewed U.S. News & World Report may not have

[1] The Court in Cohen concluded without making a distinction between the CLRA and UCL, stating: "[T]he trial court's concerns that the UCL and the CLRA claims alleged by Cohen and the other class members would involve factual questions associated with their reliance on DIRECTV's alleged false representations was a proper criterion for the court's consideration when examining "commonality" in the connect of the subscribers' motion for class certification." Id. at 981. However, the facts of the case make it clear that the problem was that members of the class were not exposed to the misrepresentation.

been harmed.

Remedy Under the UCL: Restitution

Once a likelihood of deception is shown, the scope of remedies available under the UCL are limited. "A UCL action is equitable in nature; damages cannot be recovered...[P]revailing plaintiffs are generally limited to injunctive relief and restitution." Tobacco II Cases, *supra*, 46 Cal.4th at p. 312; see § 17203. Section 17203 provides for restitution "to restore to any person in interest any money or property, real or personal, which may have been acquired" by means of the unfair practice. "The object of restitution is to restore the status quo by returning to the plaintiff funds in which he or she has an ownership interest." Korea Supply Co. v. Lockheed Martin Corp. (2003) 29 Cal.4th 1134, 1149. Restitution operates to return a measurable amount wrongfully taken by means of the unfair practice. Colgan v. Leatherman Tool Group, Inc. (2009) 135 Cal.App.4th 663, 698.

While individualized proof of entitlement to damages is no bar to a class action, the Court has authority to deny certification where the right to recover damages is highly individualized. Evans v. Lasco Bathware, Inc. (2009) 178 Cal.App.4th 1417, 1429-30. Specifically with respect to the UCL, the Court has held in order to obtain class wide restitution under the UCL, plaintiffs need establish not only a practice likely to deceive members of the pubic, but also the existence of a "measurable amount" of restitution, supported by the evidence. In re Vioxx Class Cases (2009) 180 Cal.App.4th 116, 136. When individual issues predominate as to the measure of restitution, then class certification is not appropriate. Id.

In Vioxx, the Court of Appeal affirmed the denial of class certification because, among other things, plaintiffs could not proceed on a class basis with respect to remedy of restitution. Plaintiff sued Vioxx on the grounds that defendant misrepresented that the drug was safer than a generic alternative. The theory of restitution was based upon the difference between the cost of Vioxx and a generic equivalent. The Court found that Plaintiffs could not establish restitution by using the generic drug as a comparator because whether or not Vioxx was better than the generic was an issue subject to individual proof for each patient (e.g. the differences among patients who take those types of medications). Id. at 126–127.

In this case, like the class in Vioxx, entitlement to restitution is subject to individual proof.

Plaintiff seeks restoration of tuition and fee payments. (See e.g. FAC Paragraph 121) However, as TSJL argues, "the value of a TJSL education [even assuming false reporting in US News & World Report] is not zero – graduates report…their TJSL education not only helped them achieve their goals, but was also valuable as an end in itself." See Opposition at 18:11-13. Like the patients in Vioxx, students are in different positions with respect to job status and other factors and thus the amount of restitution will depend upon an individual student's situation.

Cases have allowed statistical methods to be used to calculate damages in cases such as unpaid overtime compensation. See Evans, *supra*, 178 Cal.App.4th at 1429-30. However, this is not a case such as wage and hour, involving only disputes regarding the amount of damage. Instead, the issue is entitlement to restitution. In this case, plaintiff offers the declaration of expert Justin McCrary who discusses a potential methodology estimating the misreporting[2], but there is no evidence presented of a methodology for restitution. Any methodology would have to take into account the value of the service provided, which is necessarily is an individual issue, making class certification inappropriate.

CLASS REPRESENTATIVE (typicality and adequacy of representation)

Given the individualized nature of the relief in this case, it is difficult to determine whether any class representative would have "typical" claims.

CONCLUSION

In sum, the predominance of individual issues over common issues as to all the relief sought precludes class certification. Given the multiple individual issues, class treatment is not a superior means over individual actions to resolve the issues presented in this litigation. Stated differently, even if certified, multiple individual issues will arise making certification unnecessary and even inefficient.

Dated: Oct. 21, 2013

JOEL M. PRESSMAN
Judge of the Superior Court

[2] The Court finds that the declaration is unhelpful to establish any methodology. See Dailey v. Sears, Roebuck & Co. (2013) 214 Cal.App.4th 974, 999-1000 ["expert did not offer any actual data evidencing that defendant conducts itself in a common way toward all the proposed class members…"] See discussion above.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

Central
330 West Broadway
San Diego, CA 92101

SHORT TITLE: Alaburda vs. Thomas Jefferson School of Law

CLERK'S CERTIFICATE OF SERVICE BY MAIL	CASE NUMBER: **37-2011-00091898-CU-FR-CTL**

I certify that I am not a party to this cause. I certify that a true copy of the Order denying class certification was mailed following standard court practices in a sealed envelope with postage fully prepaid, addressed as indicated below. The mailing and this certification occurred at San Diego, California, on 10/21/2013.

Clerk of the Court, by: _____ L. Uria _____, Deputy

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