DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO Court Address: Lindsey-Flanigan Courthouse 520 W. Colfax Denver, CO 80204	DATE FILED: December 21, 2020 10:03 PM CASE NUMBER: 2014CV34530 ▲ COURT USE ONLY ▲
STATE OF COLORADO, ex. rel. PHILIP J. WEISER, ATTORNEY GENERAL, AND MARTHA FULFORD, ADMINISTRATOR, UNIFORM CONSUMER CREDIT CODE, Plaintiffs v. CENTER FOR EXCELLENCE IN HIGHER EDUCATION, INC., a not-for-profit company; COLLEGEAMERICA DENVER, INC. and COLLEGEAMERICA ARIZONA, INC., divisions thereof, d/b/a COLLEGEAMERICA; STEVENS-HENEGAR COLLEGE, INC., a division thereof, d/b/a STEVENS HENEGAR COLLEGE; COLLEGE AMERICA SERVICES, INC., a division thereof; THE CARL BARNEY LIVING TRUST; CARL BARNEY, Chairman of CEHE and Trustee of the Carl Barney Living Trust; and ERIC JUHLIN, Chief Executive Officer of CEHE, Defendants	Case Number: 2014 CV 34530 Division: **5D**

ORDER RE: DEFENDANTS' RULES 59 AND 60(B) MOTION TO AMEND JUDGMENT AND ORDER JURY TRIAL

THIS MATTER is before the court on the Defendants' Rule 59 and 60(b) Motion to Amend Judgment and Order Jury Trial, filed October 19, 2020 ("Motion"). The court, having reviewed the Motion, Plaintiffs' Response, Defendants' Reply, the court file, and having heard the arguments of counsel at the hearing held on this matter on December 2, 2020, and being otherwise fully advised in the premises, hereby FINDS and ORDERS as follows.

INTRODUCTION

Defendant's Motion requests that this court set aside the permanent injunctions entered in the court's Findings of Fact , Conclusions of Law, and Judgment ("Final Judgment"), filed August 21, 2020, and order a new trial to a jury before a different judge. Defendants assert that the delay in issuing the court's order caused them to go out of business, rendering the injunctions essentially moot, and that this judicial officer was biased against the Defendants because they initiated the inquiry which is the subject of Exhibit 3 to the Motion, and ultimately drafted the order too hastily in response to external deadlines, adopting too much of the content from the State's Proposed Findings of Fact and Conclusions of Law. Defendants assert that the appropriate remedy is a new trial, and that they are entitled to a jury trial before a different judge.

The record before the court, including all exhibits attached to the Motion and Plaintiffs Response thereto, are inadequate for the court to conclude that the injunctive relief ordered in the Final Judgment is somehow inappropriate and should be set aside or vacated. Even if the court were inclined to agree, Defendants have failed to demonstrate an entitlement to jury trial under Colorado law, as set forth in this court's Order Re: Plaintiffs Motion to Strike Jury Demand, filed August 13, 2016. Accordingly, the Motion will be DENIED IN ITS ENTIRETY.

1. The Injunctions Will Not Be Set Aside

Through exhibits attached to their Motion, Defendants assert that they ceased enrolling new students in September, 2019, notified DPOS and ACCSC in June, 2020 that they intended to permanently close their Colorado campuses, and have now done so as of September 13, 2020. Defendants assert that "the prolonged nature of the case negatively impacted the reputation and crippled the finances of CA, causing a significant drop in enrollment at all of its Colorado campuses since the start of this litigation." Motion, at 3. In his affidavit, Exhibit 2 to the Motion, Defendant Juhlin asserts that CollegeAmerica's revenues and net income decreased between 2012 and 2018. Mr. Juhlin attributes these impacts to "a combination of: (1) the AG investigation (discovery, litigation, and court proceeding), (2) ongoing negative media due to the litigation, and (3) actions taken by CollegeAmerica's accreditor due to uncertainty from the AG litigation." Ex. 2 at 3. Having closed their Colorado campuses, Defendants assert that there is no purpose to the injunctive relief set forth in the Final Judgment.

As the court noted in the Final Judgment,

> Even if Defendants discontinued certain of their practices, there is still a need for injunctive relief in this case and this Court has the authority to enter such relief. In *May Dept. Stores Co.,* the Colorado Supreme Court stated that "[c]essation or modification of an unlawful practice does not obviate the need for injunctive relief to prevent future misconduct. 863 P.2d at 979 n.24 *(citing Old Homestead Bread Co. v. Marx Baking Co*., 117 P.2d 1007, 1010 (1941)). According to the United States Supreme Court: "It is the duty of courts to beware of efforts to defeat injunctive relief by

> protestations of repentance and reform, especially when abandonment [of the unlawful practice] seems timed to anticipate suit, and there is probability of resumption." *United States v. Oregon State Medical Soc*., 343 U.S. 326, 333 (1952).

Final Judgment, at 118. In this context, the court was addressing Defendants' misleading conduct with regard to their X-ray, EMT, and sonography programs, which by the time of trial appeared to have ceased, but obviously could have been repeated with respect to new programs. For that reason, the targeted injunctive relief was phrased in general terms but was tailored to specific practices which the court found amounted to deceptive trade practices under various sections of the CCPA. See Final judgment at 150, ¶¶ 722.a, 722.b, and 722.c. In fact, one need look no further than the history of this case to recognize that Defendants have repeatedly been inclined to discontinue certain practices in an effort to escape legal liability for them. *See* Court's Order re: Preliminary Injunction, issued July 16, 2015, at 5-7 (Judge Mullins listed a number of assertions in CollegeAmerica's advertising materials regarding salary ranges which he determined "are not representative of the starting salaries CollegeAmerica graduates can expect to earn," but nonetheless did not order preliminary injunctive relief in view of the fact that "[p]rior to the preliminary injunction hearing on April 20, 2015, CollegeAmerica voluntarily pulled all advertisements containing statements about national wages from its solicitation campaign.")

Although Defendants asserted in argument that Defendants have now effectively crossed the Rubicon by effectively surrendering their accreditation, an irreversible step in winding down their operations, the factual record before the court simply does not support that conclusion.[1] Indeed, letters which CollegeAmerica has exchanged with its accreditor, ACCSC, attached to Plaintiffs Response as Exhibit E, strongly suggest that this is an overstatement. In both his letter to ACCSC and the attached letter to CEHE students authored by Defendant Juhlin on September 11, 2019, he repeatedly characterizes CollegeAmerica's decision to cease recruiting and enrolling new students into most of CEHE's campuses as "strategic" in nature. In the student letter, after stating that the "future of high quality, career-focused college degree programs is through fully online programs," Mr. Juhlin states that "CollegeAmerica has made a strategic decision to transition all of its degree programs to fully online the delivery over the next 3-4 years." Ex. E, at 3. Although CollegeAmerica apparently modified its business model somewhat in approximately May, 2020, after the COVID pandemic was in full swing, by deciding to actually close its on-ground campuses prior to the anticipated dates of graduation of all students, it seems clear from a review of the correspondence that even this is not the irreversible step CollegeAmerica suggests it is. See, e.g., Ex. E, ACCSC's letter of July 21, 2020, at 2, n.3 ("If any school seeks to remain open past the teach-out period, CEHE must inform the Commission as a means to allow the Commission to establish an appropriate application review protocol and process."). Thus, on the basis of the record before the court, it cannot conclude that the injunctive relief is or will become moot.

Defendants also contend that this court utilized too much of the State's Proposed Findings of Fact and Conclusions of Law, filed December 5, 2017, in drafting the Final

[1] The court notes that neither party has requested that the court take additional evidence or amend its findings of fact and conclusions of law. *See*, C.R.C.P 59(f).

Judgment. As the court stated at the hearing on December 2, 2020, after a much too prolonged attempt to "meld" the State's and the Defendants' proposed findings into a single document, the court selected the State's proposal as the most logical starting place for its order, because the proposed findings were more granular, and focused on specific testimony and documentary evidence received at trial, rather than conclusory, highly nuanced assertions about what the evidence had shown. The court certainly adopted portions of the state's proposal, but only after carefully verifying each citation against the record and its extensive trial notes. The court also utilized the Defendants proposed Findings of Fact and Conclusions of Law as something of a checklist of the factual issues to be addressed and legal points to be analyzed. As the court understands it, that is the purpose of having the parties draft proposed findings of fact and conclusions of law in the first place. The court notes that neither of Defendant's post-trial motions contest a single finding of fact or conclusion of law, except in the broad sense of asserting that they will be reversed on appeal. The documents attached as Exhibit 3 to the motion give short shrift to the significant editing and reorganization of portions of the state's proposal, as well as significant portions of the facts and substantially all of the legal analysis which this court drafted.

Finally, Defendants assert that, after initiating the proceedings which are the subject of its Exhibit 2, this court's issuance of the Final Judgment in the early morning hours of August 21, 2020 suggest that the decision was hurried and motivated by external deadlines, and raise "serious concerns about retaliation and an appearance of impropriety." Motion at 4. The court will again acknowledge, as it did at the hearing on December 2, 2020, that the issuance of the order in this case was much too long delayed. Defendants had good reason to be frustrated. However, the drafting of the Final Judgment took place in many separate sessions, some of which were separated by weeks and even months, and eventually required this court's dedication of four weeks of previously-scheduled vacation time between the fall of 2019 and August, 2020 when this judicial officer was away from the court and focused exclusively on drafting this order. The overall direction and outcome of the order were decided long before Defendants initiated the inquiry. Finally, it is not at all unusual that the Final Judgment was issued early in the morning. A large percentage of orders of any significance issued by this judicial officer are filed over the weekend, late at night, and often early in the morning, simply because those are the hours that are available to dedicate to such projects.

2. The Injunctive Relief Applies to all Defendants, including CEHE, Barney, and Juhlin.

Defendants argue that the injunctive relief set forth in the Final Judgment cannot be applied to Independence University because it was not a named defendant in the case. The State argues that the injunctions must apply to Independence University because it is owned and managed by Defendants, including CEHE, which indisputably owns Independence University, and has characterized it as merely a "brand" of CEHE.

It is certainly not contested that Independence University was not a named defendant. There was virtually no evidence of any significance regarding Independence University at trial.

However, it is equally uncontested that the court's injunctions are binding upon all defendants, including CEHE, Barney and Juhlin. It is also clear, from the correspondence between CEHE and its accreditor, ACCSC, that CEHE has offered students at their on ground campuses, including those in Colorado, an opportunity to transfer to Independence University, in which event they will receive a 30% reduction in their tuition. Exhibit E, Letter of July 21, 2020, at 4. Thus, CEHE must continue to comply with the injunctions with respect to all of their brands, including Independence University. To hold otherwise would be to allow CEHE to continue to engage in deceptive trade practices, only through another vehicle, albeit one that it fully controls.

3. Defendants Are Not Entitled to a Jury Trial

Defendants assert that they are entitled to a new trial before a jury. This issue was raised at the outset of the case, and became the subject of the Plaintiff's Motion to Strike Jury Demand, filed December 31, 2015. This court granted that Motion in its order dated April 13, 2016, relying primarily upon *People v. Shifrin,* 342 P.3d 506, 512 (Colo. App. 2014). The analysis set forth in that Order appears to remain sound, and the court hereby adopts it in its entirety.

Defendant's rely upon *Mason v. Farm Credit of Colorado, ACA*, 419 P.3d 975 (Colo. 2018) to argue that they should be entitled to a retrial before a jury. They argue that it was only on the verge of trial that the state made plain its intention to seek over $230 million in restitution, making it "clear that the AG's case is principally about large, backward-looking damages." Motion, at 9.

However, in *Shifrin, supra*, the court of appeals held that a defendant is not entitled to a jury trial when the Attorney General seeks civil penalties, restitution and disgorgement under the CCPA. 342 P.3d at 512-13. The *Shifrin* court found that "the majority of courts in other jurisdictions have concluded that similar consumer protective actions [to the CCPA] are primarily equitable." *Id. Mason* did not involve the CCPA, nor does it conflict in any way with *Shifrin*. In fact, the issue in *Mason* was whether the trial court erred in analyzing the basic thrust of the case based upon the original complaint, and not the amended complaint which added claims against another defendant, who then requested a jury trial. The court held that "upon receipt of a proper jury demand under Rule 38 a trial court must consider the claims in the plaintiffs most-recently-filed complaint to determine whether the case must be tried to a jury." 419 P.3d at 983. The court then analyzed the claims asserted against the new defendant, replevin and conversion, and determined that they were legal in nature, entitling him to a jury trial. Id., at 983-984.

Even assuming, for purposes of argument, that the state's eleventh hour clarification that it was seeking $230 million in restitution amounted to the functional equivalent of an amended complaint, and even assuming Defendant had requested a jury trial on that basis, the State's claim was still for restitution, and therefore was an equitable claim under *Shifrin.* The Supreme Court of California has recently observed that the holding in *Shifrin* still represents the consensus of "a substantial majority of other state courts that have addressed the question whether there is a right to a jury trial in civil actions brought under those states' unfair or deceptive practice laws

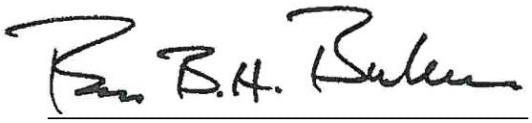
[which] have concluded that there is no right to a jury trial in such actions." *Nationwide Biweekly Administration, Inc. v. Superior Court of Alameda County*, 462 P.3d 461, 489 n. 21, 261 Cal.Rptr.3d 713, 746, n.21 (Cal. 2020).

CONCLUSION

For all the foregoing reasons, Defendants' Rules 59 and 60(b) Motion to Amend Judgment and Order Jury Trial is DENIED IN ITS ENTIRETY.

DATED this 21st day of December, 2020.

BY THE COURT:



Ross B. H. Buchanan
District Court Judge