UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JUSTIN SPANGLER and TRAVIS LEIGHTON, individually and on behalf of all those similarly situated,

Plaintiffs,

v.

NATIONAL COLLEGE OF TECHNICAL INSTRUCTION, AMERICAN MEDICAL RESPONSE, INC., a Delaware Corporation, *et al.*,

Defendants.

Case No. 14-cv-3005 DMS (RBB)

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION TO CERTIFY CLASS

This matter comes before the Court on Plaintiffs' motion for class certification. Defendants filed an opposition to the motion, and Plaintiffs filed a reply. The motion came on for hearing on April 15, 2016. Jason Hartley, Jason Linder, John Landay and Malcolm Roberts appeared for Plaintiffs, and Ryan Hansen and Noah Katsell appeared for Defendants. Having considered the pleadings and arguments of counsel, the Court grants in part and denies in part Plaintiffs' motion.

I.

BACKGROUND

According to Plaintiffs, Defendant American Medical Response, Inc. ("AMR") operates and controls Defendant National College of Technical Instruction

("NCTI"), which offers paramedic programs in California. NCTI Dep. at 14, 244. NCTI markets this program through written materials, emergency medical services conferences, mailers, fliers, and online marketing materials including its website. NCTI Dep. at 16, 21, 38 & NCTI Dep., Ex. 2, 3, 7. Each enrolled student also receives a course catalog, student materials, and enrollment packets and letters. NCTI Dep., Ex. 4–6, 8–16, 19.

Paramedic programs in California require three phases: (1) a "didactic" classroom phase, (2) a "clinical" phase in a hospital or medical services clinic, and (3) a "field internship" phase. NCTI Dep., Ex. 7, 9–15. NCTI conducts the didactic phase and receives full payment for its program prior to commencement of the second phase. NCTI Dep. at 119.

Paramedic programs, under Title 22, Division 9, Chapter 4 of the California Code of Regulations ("Title 22"), are required to commit to program enrollees that they will be provided clinical internships within a specified time. Specifically, Title 22 § 100152(c) states: "An approved paramedic training program and/or CCP training program shall not enroll any more students than the training program can commit to providing a clinical internship to begin no later than thirty (30) days after a student's completion of the didactic and skills instruction portion of the training program." Similarly, Title 22 § 100153(d) requires that paramedic programs may not enroll more students than they can commit to place in field internships within a specified period of time: "The paramedic training program shall not enroll any more students than the training program can commit to providing a field internship to begin no later than ninety (90) days after a student's completion of the hospital clinical education and training portion of the training program." The school and student may mutually agree to a later date for the clinical internship or field internship to begin in the event of special circumstances, including a student's illness, injury, military duty, etc. *Id.* Under Title 22, Plaintiffs argue NCTI is

1 precluded from enrolling more students than it can commit to timely place in hospital
2 clinical and field internships.
3 NCTI represents in its brochure distributed at events and on its website that
4 "NCTI's paramedic training program fulfills all the training requirements set forth
5 by the state for emergency medical technician paramedics." NCTI Dep., Ex. 2;
6 NCTI Dep. at 29. NCTI's website states that there is "Guaranteed clinical placement
7 by NCTI" and "Guaranteed internship placement by NCTI if student chooses to
8 intern with AMR or one of NCTI's contracted agencies." NCTI Dep., Ex. 7.
9 Enrollment letters, which are sent to every student, state that NCTI "has contracts
10 with many hospitals throughout California" and "NCTI guarantees placement with
11 AMR" for the field internship. NCTI Dep., Ex. 9–14.
12 Plaintiffs contend that NCTI's contracts with hospitals were only general
13 agreements that did not in fact obligate hospitals to accept placement of NCTI's
14 students after completion of the first phase. NCTI Dep. at 160. Similar generalized
15 contracts applied to the field internship providers, according to Plaintiffs, and AMR
16 "bypassed" NCTI students for its own field internship program on multiple
17 occasions. Hartley Decl., Ex. F (internal Defendant emails discussing the issues).
18 As a result, Plaintiffs claim that late or failed placements in hospital clinical and field
19 internships were widespread, such that NCTI violated its obligations under Title 22
20 and misled students about internship opportunities with AMR.
21 Plaintiffs further allege that NCTI misled students regarding job opportunities
22 with AMR. Among other materials, Defendants cite to NCTI's brochure and course
23 catalog, which state, respectively, that: "NCTI is owned by … (AMR). Employment
24 opportunities may be a benefit to the NCTI student," (NCTI Dep., Ex. 2), and
25 "graduation from NCTI courses will be looked upon favorably in job applications
26 and interviews with [AMR.]" *Id.*, Dep., Ex. 5. Defendants claim that AMR in fact
27 provided no special job opportunities to NCTI students, citing Rule 30(b)(6)
28 deposition testimony from NCTI representatives.

Finally, Plaintiffs allege that NCTI misrepresented the length of its program, pointing to NCTI's brochure, which reads: "It is expected students will complete this program in approximately one year. The maximum time for completion will be 18 months." NCTI Dep., Ex. 2. NCTI's enrollment agreement, which was distributed to all students prior to paying tuition, further states that completion is estimated to take 12–16 months. NCTI Dep., Ex. 9.

According to NCTI's website, the didactic portion takes 7–8 months, the clinical internship takes 2–3 months, and the field internship takes 4–6 months. Plaintiffs contend that even without including delays in placement for the second and third phases, students would be unable to complete the program in 12–16 months. They allege that students paid a premium over other paramedic programs, as they were told by NCTI that they could graduate sooner.

Plaintiffs seek to certify both a class and a subclass of the class based upon these alleged misrepresentations. Plaintiffs define the class to include:

> All persons who enrolled in and/or purchased Defendants' Paramedic Program in California as of November 14, 2010 to the present.

> The subclass is defined to include all members of the class who:

> were not placed by Defendants in a hospital clinical internship that began within 30 days after their completion of the didactic and skills instruction portion of the training program and/or were not placed by Defendants in a field internship that began within 90 days after their completion of the hospital clinical education and training portion of the training program.

Plaintiffs seek class certification for the following causes of action: violation of California's Consumer Legal Remedies Act ("CLRA"), Cal. Civ. Code §§ 1750 *et seq.*; violation of California's False Advertising Law ("FAL"), Cal. Bus. & Prof. Code §§ 17500 *et seq.*; violation of the unfair, unlawful and fraudulent prongs of California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code §§ 17200 *et seq*; and breach of contract. Although Plaintiffs also allege claims for fraudulent misrepresentation, negligent misrepresentation and breach of implied covenant, they

have not pursued these claims in their class certification motion. Accordingly, these claims are not addressed in this Order.

II.

DISCUSSION

A. Federal Rule of Civil Procedure 23

"The class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 131 S.Ct. 2541, 2550 (2011) (citing *Califano v. Yamasaki*, 442 U.S. 682, 700–01 (1979)). To qualify for the exception to individual litigation, the party seeking class certification must provide facts sufficient to satisfy the requirements of Federal Rules of Civil Procedure 23(a) and (b). *Doninger v. Pacific Northwest Bell, Inc.*, 564 F.2d 1304, 1308–09 (9th Cir. 1977). These Rules do "'not set forth a mere pleading standard.'" *Comcast Corp. v. Behrend*, ___ U.S. ___, 133 S.Ct. 1426, 1432 (2013) (quoting *Dukes*, 131 S.Ct. at 2551–52).

Federal Rule of Civil Procedure 23(a) sets out four requirements for class certification—numerosity, commonality, typicality, and adequacy of representation.[1] In addition to showing that these requirements are met, "[t]he party must also satisfy through evidentiary proof at least one of the provisions of Rule 23(b)." *Dukes*, 131 S.Ct. at 2551–52. Here, Plaintiff relies on Rule 23(b)(3), which requires that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

[1] Fed. R. Civ. P. 23(a) provides: "One or more members of a class may sue or be sued as representative parties on behalf of all members only if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a).

The court must conduct a rigorous analysis to determine whether the prerequisites of Rule 23 have been met. *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 161 (1982). It is well-recognized that "the class determination generally involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action.'" *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 (1978) (quoting *Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555, 558 (1963)). However, "[a]lthough some inquiry into the substance of a case may be necessary to ascertain satisfaction of the commonality and typicality requirements of Rule 23(a), it is improper to advance a decision on the merits at the class certification stage." *Moore v. Hughes Helicopters, Inc.*, 708 F.2d 475, 480 (9th Cir. 1983) (citation omitted). Rather, the district court's review of the merits should be limited to those aspects relevant to making the certification decision on an informed basis. *See* Fed. R. Civ. P. 23 advisory committee notes. If a court is not fully satisfied that the requirements of Rules 23(a) and (b) have been met, certification should be denied. *Falcon,* 457 U.S. at 161.[2]

B. <u>The Class and Subclass</u>

As noted, the proposed class consists of "all persons who enrolled in and/or purchased Defendants' Paramedic Program in California as of November 14, 2010 to the present." This includes a proposed subclass of all class members "who were not placed by Defendants in a hospital clinical internship that began within 30 days after their completion of the didactic and skills instruction portion of the training program and/or were not placed by Defendants in a field internship that began within 90 days after their completion of the hospital clinical education and training portion

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[2] A corollary requirement for class certification is ascertainability. Ascertainability looks to whether the class is sufficiently definite or adequately defined. *Turcios v. Carma Labs, Inc.*, 296 F.R.D. 638, 645 (C.D. Cal. 2014). Defendants do not dispute that this requirement has been met. The Court finds the proposed class and subclass are sufficiently definite and adequately defined.

of the training program." Whether the putative class and subclass meet the requirements of Rules 23(a) and (b)(3) is addressed below starting with Rule 23(a).

1. *Rule 23(a)*

Rule 23(a) contains four prerequisites for class certification—numerosity, commonality, typicality, and adequacy of representation. Each requirement is addressed in turn.

a. Numerosity

Rule 23(a)(1) requires the class to be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1); *Staton v. Boeing Co.*, 327 F.3d 938, 953 (9th Cir. 2003). The plaintiff need not state the exact number of potential class members; nor is a specific minimum number required. *Arnold v. United Artists Theatre Circuit, Inc.*, 158 F.R.D. 439, 448 (N.D. Cal. 1994). Rather, whether joinder is impracticable depends on the facts and circumstances of each case. *Id.* Defendants do not contest that this requirement is met.

Here, Defendants' class list includes at least 2,300 prospective class members. *See* Hartley Decl. ¶ 14. Joinder of 2,300 plaintiffs in one action would prove impracticable, as would joinder of hundreds of proposed members in the subclass. Ex. H; Hartley Decl. ¶ 9 (identifying several hundred putative subclass members). Accordingly, both the class and subclass meet the numerosity requirement.

b. Commonality

The second element of Rule 23(a) requires the existence of "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). This requirement is met through the existence of a "common contention" that is of "such a nature that it is capable of classwide resolution[.]" *Dukes*, 131 S.Ct. at 2551. As summarized by the Supreme Court:

> What matters to class certification ... is not the raising of common 'questions' – even in droves – but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of

> the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers.

Id. (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 132 (2009)). Commonality is satisfied by "the existence of shared legal issues with divergent factual predicates" or a "common core of salient facts coupled with disparate legal remedies within the class." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019–20 (9th Cir. 1998). Commonality "only requires a single significant question of law or fact." *Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581, 589 (9th Cir. 2012). Plaintiffs bear a "limited burden" to demonstrate commonality. *Id.*

Here, Plaintiffs assert that the existence and effect of the alleged misrepresentations and the measure of damages are all answerable through class litigation. They claim common issues of fact and law for the putative class include, among others: (1) whether Defendants misrepresented that NCTI students had greater prospects for job opportunities with AMR, (2) whether Defendants misrepresented the expected time for completion of the paramedic program, (3) whether those misrepresentations were likely to deceive consumers, and (4) damages as result of Defendants' unfair and fraudulent business practices, breach of contract, and related conduct.

Plaintiffs argue common issues of fact and law for the subclass include, among others: (1) whether Defendants failed to timely place students in hospital clinics and field internships, in violation of Title 22, (2) whether that failure constitutes an unlawful business practice, (3) whether Defendants misrepresented that they were compliant with California law, (4) whether those misrepresentations were likely to deceive consumers, and (5) damages as a result of Defendants' unfair, unlawful, and fraudulent business practices, breach of contract, and related conduct.

Defendants do not specifically address commonality. Rather, they argue that individualized issues predominate over questions of fact and law common to the class. That is a different inquiry, which is addressed later under Rule 23(b)(3).

Commonality under Rule 23(a)(2) only requires the existence of a significant common issue of fact or law. Plaintiffs have identified a number of legal and factual issues common to the class. They have put forth evidence that several significant representations were made by Defendants to *all* students regarding the advantages of NCTI's program, and that the representations were important to the enrollment decisions of the named Plaintiffs and putative class members. Plaintiffs intend to prove through common evidence that the written representations were disseminated to all class members, were objectively false and misleading, and materially so. Class treatment will allow these common factual and legal issues to be answered collectively.

c. Typicality

The next requirement of Rule 23(a) is typicality, which focuses on the relationship of facts and issues between the proposed class and its representatives. "[R]epresentative claims are 'typical' if they are reasonably co-extensive with those of absent class members; they need not be substantially identical." *Hanlon*, 150 F.3d at 1020. "The test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992) (citation and internal quotation marks omitted).

Here, Defendants argue that Plaintiffs Leighton and Spangler cannot represent the class because they did not apply to AMR for employment. Opp. Br. at 2. Plaintiffs argue the misrepresentations at issue were not uniquely made to the named Plaintiffs but were present in the handbook and in written marketing materials available to all class members. Plaintiffs report that they read these materials and

were deceived into enrollment by these common misrepresentations. *See, e.g.*, Spangler Dep. at 97–100 (brochure's representations of program duration). Further, Plaintiffs claim that NCTI's "mismanagement ultimately made [them] … unable or not desirous to seek an AMR job[.]" Reply Br. at 9. These alleged violations and injuries apply equally to all class members. Accordingly, Plaintiffs are typical of the class.

Plaintiffs are also typical of the subclass. Spangler alleges that NCTI failed to place him in a field internship. *See* Spangler Dep. at 18. This is typical of the injury allegedly suffered by those who were not placed in a field internship within 90 days of completing the didactic portion of the program.

d. Adequacy of Representation

The final requirement of Rule 23(a) is adequacy. Rule 23(a)(4) requires a showing that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). This requirement is grounded in constitutional due process concerns: "absent class members must be afforded adequate representation before entry of judgment which binds them." *Hanlon*, 150 F.3d at 1020 (citing *Hansberry* v. *Lee*, 311 U.S. 32, 42–43 (1940)). In reviewing this issue, courts must resolve two questions: "(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members, and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Id.* (citing *Lerwill* v. *Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978)). The named plaintiffs and their counsel must have sufficient "zeal and competence" to protect the interests of the rest of the class. *Fendler* v. *Westgate-California Corp.*, 527 F.2d 1168, 1170 (9th Cir. 1975).

Plaintiffs have demonstrated the absence of any conflict between themselves and counsel and the members of the proposed class. Plaintiffs have also demonstrated they and their counsel will vigorously prosecute the case on behalf of

the class. Defendants do not contend otherwise. Accordingly, Plaintiff has satisfied Rule 23(a)(4).

2. Rule 23(b)(3): Predominance and Superiority

Having satisfied the requirements of Rule 23(a), the next issue is whether Plaintiffs have shown that at least one of the requirements of Rule 23(b) is met. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614–15 (1997). Plaintiffs focus on Rule 23(b)(3) and assert they have met its requirements.

Certification under Rule 23(b)(3) is proper "whenever the actual interests of the parties can be served best by settling their differences in a single action." *Hanlon*, 150 F.3d at 1022 (internal quotations omitted). Rule 23(b)(3) calls for two separate inquiries: (1) do issues of fact or law common to the class "predominate" over issues unique to individual class members, and (2) is the proposed class action "superior" to other methods available for adjudicating the controversy. Fed. R. Civ. P. 23(b)(3). In adding the requirements of predominance and superiority to the qualifications for class certification, "the Advisory Committee sought to cover cases 'in which a class action would achieve economies of time, effort, and expense, and promote ... uniformity of decisions as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.'" *Amchem*, 521 U.S. at 615 (quoting Fed. R. Civ. P. 23(b)(3) advisory committee notes).

a. Predominance

A "central concern of the Rule 23(b)(3) predominance test is whether 'adjudication of common issues will help achieve judicial economy.'" *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 944 (9th Cir. 2009) (quoting *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1189 (9th Cir. 2001)). Thus, courts must determine whether common issues constitute such a significant aspect of the action that "there is a clear justification for handling the dispute on a representative rather than on an individual basis." 7A Charles Alan Wright *et al.*, *Federal Practice*

and Procedure § 1778 (3d ed. 2005). The predominance inquiry under Rule 23(b) is more rigorous than the commonality requirement of Rule 23(a)(2), *Amchem*, 521 U.S. at 624, as it "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Id.* at 623. In contrast to Rule 23(a)(2), Rule 23(b)(3) focuses on the relationship between common and individual issues to determine whether the common issues predominate. *Hanlon*, 150 F.3d at 1022. A review of each claim and proposed class and subclass is therefore warranted. *See Amchem*, 521 U.S. at 624.

i. The Class

Plaintiffs argue that cases involving unfair consumer practices, such as the present case, "readily" meet the predominance test because the issues in question—whether representations or omissions were made, and whether they are material—are suitable for common determination, citing *Amchem*, 521 U.S. at 625 ("Predominance is a test readily met in certain cases alleging consumer or securities fraud[.]"). Pls.' Mot. at 21. In *Yokoyama v. Midland Nat. Life Ins. Co.*, 594 F.3d 1087 (9th Cir. 2010), the Ninth Circuit held that Hawaii's Deceptive Practices Act (targeting acts which mislead or deceive) required objective proof only and thus did not involve individualized reliance inquiries. *Id.* at 1093 ("[T]he fact-finder will focus on the standardized written materials given to all plaintiffs and determine whether those materials are 'likely to mislead consumers acting reasonably under the circumstances.'") (Citation omitted). These objective inquiries also permeate the consumer protection statutes at issue in this case.

California UCL and FAL Claims. The UCL provides a cause of action for business practices that are unfair, unlawful or fraudulent. Cal. Bus. & Prof. Code §§ 17200, *et. seq.* Under the fraud prong of the UCL, a showing that members of the public are "likely to be deceived" is all that is required. *Podolsky v. First Healthcare Corp.*, 50 Cal.App.4th 632, 647–48 (1996). Similarly, the FAL prohibits any "unfair, deceptive, untrue, or misleading advertising." Cal. Bus. & Prof. Code §

17500. Whether an advertisement is misleading is judged by the effect it would have on a reasonable consumer. *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 938 (9th Cir. 2008). Any violation of the FAL "necessarily violates" the UCL. *Kasky v. Nike, Inc.*, 27 Cal.4th 939, 950–51 (2002) (citation omitted). "Thus, to state a claim under either the UCL or the [FAL], based on false advertising or promotional practices, 'it is necessary only to show that 'members of the public are likely to be deceived.''" *Id.* at 951 (citations omitted). Further, relief under the FAL or the UCL is available "without individualized proof of deception, reliance and injury." *Mass. Mut. Life Ins. Co. v. Superior Court*, 97 Cal.App.4th 1282, 1288–89 (2002) (citations omitted).

Here, the alleged misrepresentations regarding job placement opportunities with AMR and length of the paramedic program were published in materials distributed to all students, as well as in other readily available marketing materials. Plaintiffs have introduced evidence of these representations in student handbooks, course catalogs, enrollment agreements, printed brochures, and NCTI's website, all of which were widely disseminated to the public and all prospective students. NCTI's website, for example, states: "NCTI's students have employment opportunities available to them as well. With ownership by American Medical Response, there exists a natural connection for job opportunities for EMTs and paramedics and dispatchers." Pls.' Mot. at 12, Ex. A-2 (NCTI Dep., Ex. 3). The website states that "[a]s NCTI is owned and operated by … AMR, employment referrals are a benefit to the NCTI graduate." *Id.*, Ex. A-3 (NCTI Dep., Ex. 7). The course catalog, which was disseminated to every student, adds: "It is important to note that graduation from NCTI courses will be looked upon favorably in job applications and interviews with American Medical Response—NCTI's parent organization." *Id.*, Ex. A-2 (NCTI Dep., Ex. 5). Plaintiffs also introduced evidence from NCTI's corporate representative that NCTI students in fact received no preferential treatment from AMR in their job pursuits. *Id.* at 12–13 (citing Rule 30(b)(6) testimony).

With respect to the average length of the paramedic program, NCTI's brochure states it "is expected students will complete this program in approximately one year. The maximum time for completion will be 18 months." Pls.' Mot. at 13, Ex. A-1 (NCTI Dep., Ex. 2). NCTI's enrollment agreement, distributed to all incoming students, states that there is an "estimated completion of 12-16 months." *Id.*, Ex. A-3, A-4 (NCTI Dep., Ex. 9–16). Plaintiffs have presented evidence of delays in hospital clinical and field internship placements, and further argue that readily verifiable enrollment and completion dates will show on a classwide basis that the time estimate was false and misleading. Pls.' Mot. at 14.

Defendants argue that whether AMR's statements are material is an individualized question based on subjective interpretation, and thus is not amenable to resolution on a classwide bases, citing *Fairbanks v. Farmers New World Life Ins. Co.*, 197 Cal. App. 4th 544 (2011), and other cases. Opp. Br. at 3. In *Fairbanks*, plaintiffs who purchased term life insurance sought to sue for misrepresentations regarding the "permanence" of the policy. In effect, they alleged that the advertising misled them into believing that term life policies were as permanent as whole life insurance. *Id.* at 564. The court denied certification because the insurance agent's individualized representations during the sale were intertwined with the alleged misrepresentations in the advertising. Here, in contrast, Defendants have not introduced evidence that their representatives made oral representations that altered the substance of the representations at issue. To the contrary, Defendants admit that it is "impossible to determine what putative class members were told about potential employment with AMR, or if it was even discussed at all[.]" Opp. Br. at 3. Because Plaintiffs have based their claims only on representations stated in the materials disseminated to students, the alleged misrepresentations are standardized and amenable to classwide determination.

Defendants also argue an individualized inquiry is required to determine whether class members "saw or heard" any of the alleged representations, noting for

example that one of the statements quoted by Plaintiffs from the course catalog is "located within a thirty-one page document." Opp. Br. at 4. However, given an objective, reasonable person standard, the trier of fact will not have to determine whether each Plaintiff or putative class member subjectively relied on one or more of the representations, but instead will only have to determine whether those representations were likely to deceive a reasonable person. No individualized inquiry is needed. Plaintiffs intend to prove their case through NCTI's alleged course of conduct, which is based on standardized written materials in course catalogs and enrollment agreements provided to each putative class member as well as in other widely disseminated materials available to all students, including NCTI's brochures and web-based materials. The trier of fact can therefore determine liability under the UCL and FAL based on facts and law common to the class which predominate over individualized inquiries.

California CLRA Claim. The CLRA prohibits "unfair methods of competition and unfair or deceptive acts or practices." Cal. Civ. Code § 1770(a). Relief under the CLRA is limited to "'[a]ny consumer who suffers any damage *as a result of* the use or employment by any person of a method, act, or practice' unlawful under the act." *Mass. Mut.*, 97 Cal.App.4th at 1292 (citing Cal. Civ. Code § 1780(a) (original emphasis)). This limitation on relief requires a showing not only "that a defendant's conduct was deceptive but that the deception caused them harm." *Id.* However, "[c]ausation as to each class member is commonly proved more likely than not by materiality." *Id.* (quoting *Blackie v. Barrack*, 524 F.2d 891, 907 n. 22 (9th Cir. 1975) ("The fact that a defendant may be able to defeat the showing of causation as to a few individual class members does not transform the common question into a multitude of individual ones; plaintiffs satisfy their burden of showing causation as to each by showing materiality as to all.") If the trial court finds material misrepresentations were made to the class members, "an inference of reliance [*i.e.*, causation and injury] would arise as to the entire class." *Vasquez v.*

Superior Court, 4 Cal.3d 800, 814 (1971); *see also Sterns v. Ticketmaster Corp.*, 655 F.3d 1013, 1022 (9th Cir. 2011) (holding that materiality is established "if a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question").

Defendants argue that whether the representations were material presents individualized issues, as students attended NCTI for a variety of reasons unrelated to AMR, and statements regarding program length were simply estimates or predictions and not actionable opinions. Opp. Br. at 6–8, 13–14. Defendants further argue that an evaluation of the individual circumstances that resulted in the length of each student's program completion would be required. *Id.* at 14–16. However, individual factors that may have gone into each student's decision to enroll in NCTI's paramedic program does not affect the objective materiality of the alleged misrepresentations. The representations regarding job placement opportunities and expected timeframe for program completion are obviously important considerations. Students enroll in vocational programs for a reason: to get a job. Making that a reality and allocating the required time to complete the program would be important to a reasonable person "in determining his choice of action in the transaction in question[.]" *Sterns*, 655 F.3d at 1022. It certainly cannot be said that that the facts allegedly misrepresented are "so obviously unimportant that the jury could not reasonably find that a reasonable man would have been influenced by it." *Id.* Ultimately, therefore, whether the alleged misrepresentations were deceptive and caused harm are merits questions susceptible to proof by generalized evidence.

Breach of Contract. Plaintiffs' claim for breach of contract is also amenable to class adjudication. A breach of contract claim contains four elements: "(1) the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to plaintiff." *Reichert v. General Ins. Co. of America*, 68 Cal.2d 822, 830 (1968). Plaintiffs argue the enrollment agreement, signed by every student, provides that "the school will furnish all the services and

perform all the acts required of it in this agreement, in the school's catalog (or brochure), and in any solicitations or advertisements made on behalf of the school." Pls.' Mot. at 14. Defendants do not specifically address this argument.

Plaintiffs argue that if "NCTI failed to live up to its representations, it is in breach of these agreements on a class-wide basis." *Id.* The Court agrees. The contract at issue was signed by each class member and the same common evidence discussed above would be used to show the promises made (*i.e.*, the representations) and breach thereof.

Plaintiffs, therefore, can establish liability under the consumer protections statutes above as well as contract liability based on common evidence. Whether damages can be proved by common evidence that predominates over individualized inquiries is addressed next.

Damages. Defendants argue Plaintiffs have failed to tie their stated theories of restitution to the claims at issue, citing *Comcast,* 133 S.Ct. at 1426. In *Comcast*, the Supreme Court held that plaintiffs' method of proving damages "fell short of establishing that damages are capable of measurement on a classwide basis." *Id.* at 1433. The Court, in reversing an order granting class certification, held that "a model purporting to serve as evidence of damages in [a] class action must measure only those damages attributable to that theory [of liability]. If the model does not even attempt to do that, it cannot possibly establish that damages are susceptible of measurement across the entire class for purposes of Rule 23(b)(3)." *Id.* Following *Comcast*, the Ninth Circuit has held that "plaintiffs must be able to show that their damages stemmed from the defendant's actions that created the legal liability. *Pulaski & Middleman, LLC v. Google, Inc.*, 802 F.3d 979, 987–88 (9th Cir. 2015) (quoting *Leyva v. Medline Industries, Inc.*, 716 F.3d 510, 514 (9th Cir. 2013).

Here, Plaintiffs seek restitution as damages based upon the alleged misrepresentations discussed above. The UCL, FAL and CLRA "all authorize courts to award restitution, and the standards are the same under all three statutes."

Makaeff v. Trump University, LLC, 309 F.R.D. 631, 636 (S.D. Cal. (2015) (citing statutes and collecting cases). Clearly, courts have broad discretion to award restitution in order to prevent the use or employment of an unfair practice in the future. *Mass. Mut.*, 97 Cal.App.4th at 1289. For example, depending upon the circumstances, restitution may include: (1) disgorgement, *Fletcher v. Security Pacific National Bank*, 23 Cal.3d 442 (1979) (unfair practice exploited many victims of small sums of money resulting in large and illicit sum of money for defendant); (2) full recovery, *Makaeff*, 309 F.R.D. at 637 (full refund of tuition for alleged worthless program); or (3) the difference between what plaintiff paid and the value of what plaintiff received. *Kwickset Corp. v. Superior Court*, 51 Cal.4th 310, 329 (2011) (held, plaintiff deceived by misrepresentations into making purchase and "*pa[ying] more* … than he or she otherwise might have been willing to pay if the product had been labeled accurately[,]" is entitled to difference) (original emphasis).

In a two paragraph argument, Plaintiffs state they seek full refunds for the tuition amounts paid to Defendants; however, they offer no analysis or evidence in support of the theory. Pls.' Mot. at 22–23. That won't do, as Plaintiffs have an affirmative obligation to show that their request for class certification of damages passes muster under *Comcast*. *Pulaski,* 802 F.3d at 987–88 ("We explained that *Comcast* stood for the proposition that 'plaintiffs must be able to show that their damages stemmed from the defendant's actions that created the legal liability.'") (Citation omitted).

In *Makaeff,* plaintiffs sought full refund of their tuition as restitution because "core misrepresentations of Trump University" rendered the education "worthless." 309 F.R.D. at 637. They argued that only a full refund would "return them to the position that they were in before being ensnared in Defendants' scam." *Id.* The district court agreed, and held that the plaintiffs' proposed method of calculating restitutionary damages was consistent with both their theory of liability and settled law, citing *Clark v. Superior Court,* 50 Cal.4th 605 (2010) (restitution may include

1 "return of money obtained through an improper means to the person from whom the
2 property was taken"). 309 F.R.D. at 638. Notably, however, the court stated that
3 "[i]n the aftermath of *Comcast*, a number of California district court decisions have
4 rejected the full-recovery model in product misbranding cases." *Id.* at 636
5 (collecting cases). Such is the case here.

6 In the present case, Plaintiffs do not argue that the alleged misrepresentations
7 rendered their education worthless. Plaintiffs only argument is that they and
8 "putative class members paid for an education at a school which misrepresented
9 material *aspects* of its program[,]" (Reply Br. at 8 (emphasis added)), including job
10 opportunities with AMR, average length of the paramedic program, and placement
11 time for hospital and field internships. Plaintiffs have not challenged the quality of
12 education they received. Indeed, Plaintiff Leighton admits his NCTI education
13 qualified him to work as a paramedic firefighter. Opp. Br. at 4 (citing deposition).
14 Defendants also point out that two-thirds of the students in Leighton's class who
15 finished the NCTI program were employed by fire departments, and other students
16 who had been sponsored by their employers for the NCTI program returned to their
17 employment after graduation—presumably with greater job qualifications and
18 opportunities for advancement. *Id.* at 7.

19 In *Comcast*, the Supreme Court noted that the lower court upheld class
20 certification of plaintiffs' damages theory on grounds that because the plaintiffs had
21 "'provided a method to measure and quantify damages on a classwide basis,' [] it
22 [was] unnecessary to decide 'whether the methodology [was] a just and reasonable
23 inference or speculative.'" 133 S. Ct. at 1434 (quoting *Behrend v. Comcast Corp.*,
24 655 F.3d 182, 206 (3rd Cir. 2011)). Rejecting the lower court's reasoning, the
25 Supreme Court stated that "[u]nder that logic, at the class-certification stage any
26 method of measurement is acceptable so long as it can be applied classwide, no
27 matter how arbitrary the measurements may be. Such a proposition would reduce
28 Rule 23(b)(3)'s predominance requirement to a nullity." *Id.*

So it is here. While Plaintiffs' full refund model may theoretically apply classwide, it has no sensible application classwide under Plaintiffs' theory of liability. Plaintiffs concede NCTI's paramedic program has value. Providing a full refund is therefore unsupported by the evidence. As such, the full refund model is arbitrary, and it is rejected.[1]

As a fallback position, Plaintiffs argue that "[i]n the event a jury finds that some other measure of damages is appropriate, such as the difference between NCTI tuition and a less expensive program, such an award could also be determined on a class-wide basis." Pls.' Mot. at 22–23. There are three problems with this argument, each of which is fatal. First, the trier of fact does not determine if a damages theory can be applied classwide. That is a determination for the Court. Second, Plaintiffs must make a showing that their proposed theory passes muster under Rule 23(b)(3) before a jury may decide the merits of the damages claim. Plaintiffs have made no such showing. A one sentence argument, followed by a footnote is not sufficient. Third, even if the material in the footnote is considered, it is insufficient to meet the "rigorous analysis" required by *Comcast*.

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[1] Plaintiffs' counsel have cited to *Makaeff,* 2014 WL 688164, for the proposition that the "full refund[] … method is appropriate on a classwide basis." Pls.' Mot. at 22. Unfortunately, counsel did not cite to the district court's subsequent decision in *Makaeff*, 309 F.R.D. at 631, wherein the court granted defendant's motion to decertify plaintiffs' damages claim and bifurcated that portion of the case. *Id.* at 637–40, 642–43 (holding full refund method of recovery consistent with plaintiffs' theory of liability, but finding defenses regarding valuation and offset raised due process concerns meriting bifurcation so such individualized defenses could be presented). Defendants raise the same arguments here. For example, they argue that a full refund would be excessive because many putative class members were gainfully employed as firefighters or paramedics after completing NCTI's program, and that many other putative class members' own conduct caused delay and placement issues. While these arguments raise issues under Rule 23(b)(3)'s predominance and superiority prongs, the Court declines to further address the issues because, as explained in text above, the full refund restitutionary model advanced by Plaintiffs fails under *Comcast.*

In the footnote, Plaintiffs cite to a web link for Southwestern College's paramedic program in San Diego County and note the total tuition cost is $3,400. NCTI's tuition is $8,950. Plaintiffs argue, a "jury could potentially find that the proper measure of damages is not a full refund, but the 'premium' paid by NCTI students over less-expensive programs they would have attended were they not misled." Pls.' Mot. at 23, n. 11. Here, again, Plaintiffs' have failed to show the existence of a measurable amount of restitution that can be applied classwide. Plaintiffs are required to "present evidence of a damages methodology that can determine the price premium attributable to [the defendant's] use of the misleading advertisements and [] omissions." *In re NJOY, Inc.,* 2015 WL 4881091, at *41 (C.D. Cal. 2015). Where a plaintiff seeks to value the product on a classwide basis by means of a comparable product (here other paramedic programs), the measure of damages cannot be awarded without evidence that the comparable product is a valid comparator for the entire class. *In re Vioxx*, 180 Cal.App.4th 116, 131 (2009); *see also In re POM Wonderful LLC*, 2014 WL 1225184, at *5 (C.D. Cal. 2014) (denying certification of damages where expert failed to "answer the critical question why the price difference existed, or to what extent it was a result of [defendant's] actions").

The essence of Plaintiffs' claims is that NCTI misled prospective students about job opportunities with AMR and the length of its paramedic program. To recover a "price premium" Plaintiffs need to show that they paid more than they otherwise would have if the product (NCTI's paramedic program) had been represented accurately. *See Kwickset*, 51 Cal.4th at 329; *Vioxx*, 180 Cal.App.4th at 131 ("The difference between what the plaintiff paid and the value of what the plaintiff received is a proper measure of restitution."). To establish this measure of damages, there must be evidence of the actual value of what the plaintiff received. *Vioxx*, 180 Cal.App.4th at 131 ("When the plaintiff seeks to value the product received by means of the market price of another, comparable product, that measure

cannot be awarded without evidence that the proposed comparator is actually a product of comparable value to what was received.”).

Here, there is nothing of substance to analyze. No expert testimony. No survey or other evidence of the factors prospective paramedic students would consider in making enrollment decisions. No evidence comparing Southwestern College and other paramedic programs with NCTI’s curriculum, admission requirements, job placement ratings, length of program, or any other criterion. Defendants argue Southwestern is not a valid “class-comparator” for several reasons, including a number of stringent prerequisites to admission that Southwestern requires but NCTI does not—*e.g.*, one year full-time work experience as an EMT-B in a pre-hospital setting or two years of experience as a firefighter or lifeguard, and satisfactory completion of a variety of courses—all of which streamline Southwestern’s program. Opp. Br. at 11. Without evidence to draw the comparison between suitable programs, a trier of fact cannot determine on a classwide basis that Plaintiffs and putative class members paid NCTI a “price premium” ($5,500) that they would not have paid in the absence of the alleged misrepresentations. This damages model, therefore, suffers the same fate as the full refund model.

ii. The Subclass

The subclass is comprised of class members who were not timely placed in a hospital clinical and/or field internship in violation of Title 22 of the California Code of Regulations. Plaintiffs seek to prove this claim through the same standardized representations in NCTI’s course catalog, enrollment letters, brochures, and website, including among other representations: “Guaranteed clinical placement by NCTI,” (website), “Guaranteed internship placement by NCTI if student chooses to intern with AMR or one of NCTI’s contracted agencies,” (website), “NCTI guarantees placement with AMR” for field internships, (enrollment letters), and “NCTI … fulfills all the training requirements set forth by the state for emergency medical

technician paramedics." (Brochure). Pls.' Mot. at 4–5. NCTI's course catalog similarly provides: "This approval means the institution complies with the minimum standards established under applicable law for the operation of a school engaged in occupational instruction." *Id.* at 4, Ex. A at 74:12–75:1, Ex. 5. The course catalog and enrollment letters were distributed to every student, and the other materials were readily available to all. Plaintiffs also have come forward with common evidence that these representations were inaccurate. *Id.* at 5–11 (citing contracts with hospitals that did not ensure student placement in the clinical phase, emails between NCTI and AMR representatives regarding AMR's failure to timely place students, and admissions and testimony from NCTI representatives regarding failed placements).

Representations regarding timely and guaranteed clinical and field internship placements would be material to prospective students who were considering competing paramedic programs. Given the proffered standardized evidence, Plaintiffs may be able to establish materiality (*i.e.*, reliance) on a classwide basis.

Defendants argue individual issues predominate because some students were themselves at fault for not being timely placed, while others agreed with NCTI on a later placement date for their own personal reasons, and thus, the circumstances of each student's placement would have to be examined. Opp. Br. at 15–16, 18–22. Those issues, while relevant to damages, will not otherwise derail class certification on liability issues given the objective standards at issue under the FAL, UCL and CLRA. Similarly, the breach of contract claim would involve proof through the same generalized evidence. Plaintiffs have demonstrated that the merits of the liability issues can be addressed through common evidence on a classwide basis, and that questions of law and fact common to the subclass predominate over individualized inquiries.

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b. Superiority: Class and Subclass

Certification under Rule 23(b)(3) is proper when "questions of law or fact common to class members predominate over any questions affecting only individual members, and … a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. Proc. 23(b)(3). As discussed, this action meets the predominance requirement of Rule 23(b)(3) on issues of liability under the consumer protection statutes and breach of contract cause of action at issue. The superiority requirement is satisfied as well with respect to liability under the consumer protection statutes and breach of contract.

The superiority requirement includes consideration of:

(A) The class members' interests in individually controlling the prosecution or defense of separate actions;

(B) The extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) The desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) The likely difficulties in managing a class action.

Fed. R. Civ. Proc. 23(b)(3). This inquiry "requires the court to determine whether maintenance of this litigation as a class action is efficient and whether it is fair," such that the proposed class is superior to other methods for adjudicating the controversy. *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1175–76 (9th Cir. 2010).

Defendants do not directly dispute that the foregoing requirements are met. Class members certainly have an interest in individually controlling the prosecution of separate actions. The individual claims of putative class members are relatively small compared to the cost of prosecuting an individual action, and no other individual action has been brought to the Court's attention. Hundreds, and potentially thousands, of individual lawsuits spread across California would be substantially less manageable than concentrating these claims in this forum to

determine issues of liability based on common evidence. Plaintiffs' motion to certify the class and subclass is therefore granted as to liability.

As noted, however, Defendants have raised individualized defenses with respect to damages and Plaintiffs have failed to support their full refund and price premium restitution models for both the class and subclass. While this may raise difficulties in managing a class action, they will not defeat certification of the liability issues. *See Jiminez v. Allstate Ins. Co.*, 765 F.3d 1161, 1167–68 (9th Cir. 2014) (affirming district court's certification of liability issue where defendant's "opportunity to raise any individualized defense it might have at the damages phase of the proceedings" was preserved). The Ninth Circuit in *Jiminez* cited to the Sixth Circuit's decision in *In re Whirlpool Corp. Front-Loading Washer Prods. Liability Litigation*, 722 F.3d 838, 853–55 (6th Cir. 2013), for the proposition that, "no matter how individualized the issue of damages may be, determination of damages may be reserved for individual treatment with the question of liability tried as a class action." 765 F.3d at 1167; *see also Butler v. Sears, Roebuck and Co.*, 727 F.3d 796, 800 (7th Cir. 2013) ("a class action limited to determining liability on a class-wide basis, with separate hearings to determine—if liability is established—the damages of individual class members, or homogeneous groups of class members, is permitted by Rule 23(c)(4) and will often be the sensible way to proceed").

III.

CONCLUSION

For the reasons set out above, Plaintiffs' motion for class certification under Federal Rule of Civil Procedure 23 is granted in part and denied in part. Specifically, Plaintiffs' motion for class certification is granted as to liability with respect to the class and subclass for claims asserted under the FAL, UCL, CLRA, and breach of contract. Plaintiffs' motion for class certification is denied without prejudice with respect to damages for both the class and subclass. Plaintiffs Justin Spangler and Travis Leighton are appointed as class and subclass representatives. Landay Roberts

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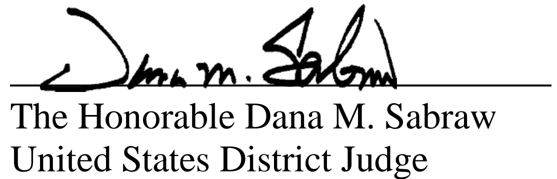
LLC and Siegel Hanson LLP are appointed as counsel for the putative class pursuant to Federal Rule of Civil Procedure 23(g). Class counsel shall give notice to the class and subclass of the pendency of this action. No later than June 17, 2016, the parties shall jointly file a motion for approval of their proposed form of notice, method of distributing it to the class members, and time for distributing it. The proposal shall comply with Federal Rule of Civil Procedure 23(c)(2)(B).

IT IS SO ORDERED.

Dated: May 19, 2016



The Honorable Dana M. Sabraw
United States District Judge