DANIEL M. PETROCELLI (S.B. #97802)
dpetrocelli@omm.com
DAVID L. KIRMAN (S.B. #235175)
dkirman@omm.com
O'MELVENY & MYERS LLP
1999 Avenue of the Stars
Los Angeles, California 90067-6035
Telephone: (310) 553-6700
Facsimile: (310) 246-6779

JILL A. MARTIN (S.B. #245626)
jmartin@trumpmational.com
TRUMP NATIONAL GOLF CLUB
One Trump National Drive
Rancho Palos Verdes, CA 90275
Telephone: (310) 202-3225
Facsimile: (310) 265-5522

Attorneys for Defendants
DONALD J. TRUMP and TRUMP UNIVERSITY, LLC

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

SONNY LOW et al., on Behalf of Themselves and All Others Similarly Situated,

Plaintiffs,

v.

TRUMP UNIVERSITY, LLC et al.,

Defendants.

Case No. 10-CV-0940-GPC(WVG)

CLASS ACTION

DEFENDANTS TRUMP UNIVERSITY'S AND DONALD J. TRUMP'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION FOR DECERTIFICATION

Hearing: July 22, 2016
Time: 1:30 p.m.
Courtroom: 2d
Judge: Hon. Gonzalo P. Curiel

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

Other Authorities

I. INTRODUCTION

Recent developments in this case establish that a class trial will be either impossible or unconstitutional. Since defendants filed their first motion for decertification, the parties have conducted 28 depositions, including four former TU students and California class representative Sonny Low; exchanged over 100,000 pages of documents; submitted proposed trial plans; and conducted expert discovery in the related *Cohen* case. In addition, plaintiffs have withdrawn one of the three core misrepresentations certified by this Court—which plaintiffs relied on extensively in obtaining certification of the class, opposing decertification, and supporting their "full refund" damages model—and they have withdrawn Tarla Makaeff as a class representative. These changes themselves have narrowed the triable issues, parties, and relevant facts in this case. They have also provided context to and highlighted the importance of other discovery—which existed, but was not previously focused on or addressed by the parties or the Court—that is highly relevant to certification. Combined, the record now establishes plaintiffs cannot meet their burden under Rule 23 and decertification is required because:

- Defendants did not *uniformly* misrepresent that TU was an "accredited university" or that Mr. Trump personally "hand-picked" its instructors. TU advertised through many channels—newspaper, radio, online, post cards and other direct mailings—and the certified alleged misrepresentations were not made uniformly across these channels. Even channels that contained the certified misrepresentations, such as newspapers, did not contain the misrepresentations consistently.
- TU students were exposed to different advertising, different TU employees, and different representations, each of which shaped students' understanding and reliance on the marketing they saw. Many students purchased TU programs without attending a 90-minute free preview. Others purchased TU products or services years before attending a 90-minute free preview. Still others heard varying representations by *individual* TU employees. These individual experiences cannot be resolved through class-wide proof.
- Plaintiffs' full-refund model no longer works following plaintiffs' withdrawal of the alleged mentorship misrepresentation.

- Plaintiffs' proposed trial plan violates many of Mr. Trump's constitutional rights while providing none of the efficiencies of a class action.

Finally, as a recent decision in this district makes clear,[1] this Court's reliance on FTC Act cases—at plaintiffs' urging[2] —has been expressly prohibited by the Ninth Circuit. The Ninth Circuit has explicitly declined to incorporate FTC Act authority to consumer claims without *clear guidance* from state supreme courts.[3] No guidance, much less clear guidance, exists in California, New York, or Florida on this point. The Court must therefore revisit and reject plaintiffs' full-refund model in its entirety, further compelling decertification.

II. BACKGROUND

A. TU's marketing substantially varied over time.

TU began business operations in 2004 as an online real estate education company. In early 2005, Mr. Trump was interviewed by Jon Ward about TU's launch. Ex. 1;[4] Ex. 2 at 214:1–25, 211:22–212:9. During the 20-minute "Launch Video," Mr. Trump answered many questions about TU's operations, including several about the original TU instructors whom Mr. Trump hired to develop and

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[1] *In re: First Am. Home Buyers Prot. Corp. Class Action Litig.*, 2016 WL 695567, at *23 (S.D. Cal. Feb. 22, 2016) ("[T]he Ninth Circuit has declined to apply the FTC standard to consumer actions 'in the absence of a clear holding from the California Supreme Court' that it should be applied." (citation omitted).

[2] Dkt. 414 at 13 (failing to bring binding authority to court's attention but encouraging court to adopt FTC act cases); 36 (citing out-of-circuit district court case that relied on FTC authority but not Ninth Circuit authority).

[3] *See Lozano v. AT & T Wireless Servs., Inc.*, 504 F.3d 718, 736 (9th Cir. 2007) ("[I]n the absence of *a clear holding* from the California Supreme Court," it was impermissible to assume that the FTC Act applied to state law consumer claims. (emphasis added)); *Jones v. ConAgra Foods, Inc.*, 2014 WL 2702726, at *4 (N.D. Cal. Jun. 13, 2014) ("There is no reason to import the remedies from the FTC Act into a California UCL or FAL case, and Plaintiffs point to no authority that does so."); *see also Joe Hand Promotions, Inc. v. Bragg*, 2016 U.S. Dist. LEXIS 24752, at *16 (S.D. Cal. Feb. 29, 2016).

[4] All Exhibit references herein are to the Declaration of David L. Kirman unless otherwise noted.

teach TU's e-learning content.[5] In 2007, TU expanded its operations when the company began offering live seminars. Ex. 2 at 89:11–21, 216:9–16. During the class period, TU marketed its products and live events through different marketing channels—direct mailings; radio, newspaper, and online advertisements; phone calls by individual TU employees; TU's website; and emails, among others—which were subject to policies that evolved. *See* Ex. 4; Ex. 5 at 42, 47.

TU's advertising varied in substance depending on the marketing channel. For example, some Internet and email marketing was short and to the point and did not contain any of the "core" misrepresentations, Covais Decl. Ex. A at 9:

Most newspaper advertisements and direct mailings were more detailed but also varied in substance. Many advertisements did not contain *any* reference to the "core" misrepresentations at issue in this case. *See* Covais Decl. Ex. A.

While plaintiffs fail to identify advertising that misrepresented TU's accreditation status, the TU marketing that referenced the term "hand-picked" used it in various ways:

> **Newspaper Advertisement:** "our instructors are top, hand-picked real estate pros," *id.* Ex. A at 5;
>
> **Direct Mailing:** "my hand-picked instructors," *id.* Ex. A at 16;

[5] The Launch Video was included in a DVD and audio compilation that TU sold as the "Wealth Builder's Blueprint." *See* Ex. 1; Ex. 2 at 214:1–13. TU's marketing department later created shorter promotional videos excerpted from the Launch Video. Ex. 2 at 214:1–216:16. Plaintiffs and the Court relied on these promotional videos as a basis for certification. *See* Dkt. 122-2 Ex. 1; Dkt. 298 at 22 & n.13.

> **Telephone Script:** "I am calling with a special invitation from Donald Trump and the team at Trump University to attend a free class. . . . Donald Trump is sending one of his top experts . . . to teach the Trump system of real estate investing," *id.* Ex. C at 19; and
>
> **PowerPoint Presentation:** "Every Instructor is Hand-Picked by the ***Founders***." Ex. 21 at 372.

B. TU students' experiences varied from student to student.

Attendees discovered TU through different marketing channels and were exposed to distinct advertisements. *See, e.g.*, Ex. 6 at 20:11–16 (Canup heard about TU from an "advertisement on the radio for a set of CDs"); Ex. 7 at 17:12–20 (Cohen "receiv[ed] something in the mail"); Ex. 8 at 20:1–8 (Rains Colic saw a newspaper ad); Ex. 9 at 47:11–16 (Mohan searched "real estate coaching classes or seminars" on the internet and found TU); Ex. 10 at 32:19–33:12 (Nielsen saw an internet pop-up ad). Deposition testimony, mostly elicited after the defendants filed their first motion for decertification, confirms the various (and distinct) advertisements students saw or heard.[6]

1. Sonny Low.

Sonny Low is a 74-year-old California resident who attended TU workshops and purchased the Gold Elite package that included a 3-day in-field mentorship. Low never saw a representation from TU that it was an "accredited" university. Ex. 11 at 109:19–21. The closest Low could recall to seeing this representation was a letter from Michael Sexton that Low received *after* signing up for TU's Gold Elite

[6] Notably, when the Court considered defendants' first motion for decertification, the only issues before the Court related to whether plaintiffs offered a viable damages model in light of the Supreme Court's decision in *Comcast*. *See infra*, Section II.E. Thus, the Court has not considered whether plaintiffs satisfy their burden under Rule 23 to prove this case should proceed as a class action since the Court's original certification decision on February 21, 2014. All evidence—new and old—is relevant to the issues now before the Court. *See NEI Contracting & Eng'g, Inc. v. Hanson Aggregates, Inc.*, 2016 WL 2610107, at *5 (S.D. Cal. May 6, 2016) ("[A] motion to decertify a class is not governed by the standard applied to motions for reconsideration, and does not depend on a showing of new law, new facts, or procedural developments after the original decision.").

program.[7] *Id.* at 76:7–77:9. In fact, Low testified that TU's accreditation status was "not even a consideration for [him]" when he made his purchasing decision. *Id.* at 116:11–15. As for the "handpicked" representation, Low testified that during the initial TU seminars he attended, he got the "impression" TU instructors had never met Mr. Trump, and therefore could not possibly have been handpicked by him, *id.* at 129:8–134:16, but later claims that he believed Trump handpicked the instructors. Low, like many students who attended live events, never saw the promotional video depicting Mr. Trump. Ex. 13 at 188:11–13.

Low received a Bachelor's of Science and a Master's degree from public universities. Ex. 11 at 110:17–112:8, 123:10–17. Low then worked for 34 years as a foreign services officer, but retired with little money saved for retirement. *Id.* at 245:7–21. He was also underwater on his mortgage and heavily in debt. *Id.* at 245:22–246:25. In his late sixties, Low searched for supplemental income. He attended a business seminar focused on stock investing, but he decided not to pursue the training. Ex. 13 at 192:12–193:1.

Later, in 2009, Low saw a TU advertisement in his local newspaper, and saw TU as a means to "be a success." Ex. 11 at 28:6–8, 29:12–17, 29:24. Low attended three TU workshops (one that he received for free) and rated them as excellent. *See* Ex. 15 at 312, 313, 315. He described his instructors as "inspirational and spectacular." Ex. 14 at 310. Low also rated his mentorship as excellent, explaining that the most valuable part of his mentorship experience was "[h]aving a one-to-one mentorship with a [m]entor who indeed has employed the different strategies that have resulted in success." Ex. 15 at 312. Low rated the TU mentorship experience as "5, 5, 5…" *Id.*

Despite these glowing reviews, Low's interest waned after he completed his mentorship. During the three days Low spent with his mentor, Geoff Nowlin, Low

[7] This mailing does not reference in any way TU's accreditation status. *See* Ex. 3 at 31.

learned that two of the most critical skills for investing—property valuation and internet research—were things he disliked. In Low's own words, he showed "exasperation" when his mentor tried to teach him various real estate investing skills such as "extensive internet research, the [valuation] software, Cap Rate, CAC return, owner financing, etc." Ex. 16 at 320.

To date, Low has never complained about the TU live events he attended. In fact, in his deposition just two months ago Low testified that "Trump University . . . gave a lot of value" during those events. Ex. 11 at 88:2–6. Rather, Low believes he was not given the mentorship that TU promised because he expected his mentor would fly out to help Low "whenever [Low] needed him over a one-year period." *Id.* at 189:1–190:2. In Low's view, he was paying TU to have his mentor Nowlin "at [his] disposal for a year" to "guarantee that [Low] would be a success in real estate." *Id.* These expectations, however, directly conflict with TU's written mentorship description, *see* Ex. 18 (stating that Low's mentor would work "SIDE-BY-SIDE" with him "FOR THREE FULL DAYS" (emphasis in original))—a document Low relied on extensively during his depositions. *See, e.g.*, Ex. 13 at 161:14–16, 172:13–15, 187:19–22, 194:19–24; Ex. 11 at 204:7–10, 204:17, 205:18–20; 224:5–11. Low's expectations also conflict with the presentations given to TU students about the "3-Day In-Field Mentorship." *See, e.g.*, Covais Decl. Ex. D at 21. Low never tried to make an offer on any property and, unsurprisingly, did not achieve success in real estate.

2. Art Cohen

Former TU student Art Cohen was deposed on June 9, 2015. Cohen was highly educated, holding both a Bachelor of Science degree and a Master of Business Administration. Ex. 7 at 69:4–10. In 2009, Cohen sold a profitable company he owned and was "looking to do something new," including investing in real estate. *Id.* at 60:23–62:21.

Cohen learned of TU when he received a direct mailing advertisement, which

he described as "a card, a postcard, like a private invitation."[8] *Id.* at 17:12–15. Cohen attended a free 90-minute TU seminar, where the instructor told his class that TU was accredited and that "[he] was . . . handpicked by Donald Trump." *Id.* at 29:13–22, 99:10–100:5. These misrepresentations by Harris were not uniformly made to class members.[9] *See, e.g.*, Ex. 19 at 56:9–13, 113:9–13. According to Cohen, Harris also stated that "he worked directly with Donald Trump" and "was teaching . . . things that Donald Trump would use in his daily course of business." Ex. 7 at 28:3–29:12. This, again, is very different from what many TU students experienced. Cohen did see a promotional video depicting Mr. Trump during the 90-minute free preview. *Id.* at 9:17–10:3.

Just a few months after purchasing a Gold Elite package from TU, Cohen invested in a theater company. *Id.* at 59:2–9. Cohen, like Low, lost interest in real estate investing and never pursued the strategies TU taught him. *Id.* at 58:20–59:5.

3. Mette Nielsen

Unlike Low and Cohen, former TU student Mette Nielsen was not a college graduate when she signed up for TU.[10] Ex. 10 at 28:10–29:11. Before attending a TU training in 2009, Nielsen had worked as an administrative assistant and her primary responsibility was looking after her children. *Id.* at 29:19–31:4. Nielsen learned of TU from a pop-up advertisement online. *Id.* at 32:22–33:12, 33:21–34:2.

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[8] Cohen did not produce the mailing. Private invitations, like all of TU's advertising, varied greatly throughout the class period. *Compare* Ex. 12 ("special invitation" referencing "hand-picked"), *with* Covais Decl. Ex. B at 18 ("special invitation" containing none of plaintiffs' alleged misrepresentations).

[9] In fact, some students were told that "Michael Sexton . . . the President and Co-founder of" TU hired instructors. Ex. 20 at 352–53; *see* Ex. 31 at 482. Others were told that "Every Instructor is Hand-Picked by the Founders," not Donald Trump. Ex. 21 at 372.

[10] In addition to TU students' varying levels of education, students' real estate experience varied greatly. Some students had little or no experience with real estate investing, *see, e.g.*, Ex. 6 at 17:4–18:5, 24:14–21; Ex. 11 at 212:24–213:1, others had already invested in one or two properties, *see, e.g.*, Ex. 22 at 13:11–16:22, while others had worked as licensed real estate agents and brokers for a decade or more, *see, e.g.*, Ex. 23 at 18:17–21:3.

Nielsen never saw an advertisement or was told that TU was an accredited school (nor did she believe that TU was accredited). *Id.* at 62:6–63:1. Nielsen does not recall seeing a video involving Mr. Trump at the free preview seminar. *Id.* at 36:21–37:4. And although she testified that she was "[p]ossibly" told that TU instructors were "handpicked" by Mr. Trump, *id.* at 67:10–15, it did not matter to her whether they actually were handpicked, and she believed that Mr. Trump's involvement in TU was limited to his endorsement. *Id.* at 68:17–70:23. Nielsen had "a good experience" with TU and "received value." *Id.* at 80:3–13; *accord id.* at 69:6–15, 71:9–25. She applied TU's techniques and found a series of successful investment opportunities. *Id.* at 47:5–52:19, 58:7–22.

4. Marla Rains Colic

Before signing up for TU, Marla Rains Colic worked as a pharmaceutical sales representative. Ex. 8 at 16:1–8. In 2008, she decided to change careers because she and her husband wanted "a business opportunity that [they] could both do together." *Id.* at 21:25–22:7. Rains Colic saw an advertisement for TU in the newspaper and attended one of TU's free 90-minute seminars. The advertisement did not represent TU as an "accredited university," nor did TU *ever* represent to Rains Colic that it was accredited. *Id.* at 105:6–8. Nor did Rains Colic believe TU was accredited: "[y]ou have to be pretty thick-skulled to think it was a university. For goodness sa[k]es. I mean, a university is a four-year degree. I knew it was a business seminar." *Id.* at 105:6–106:12. Thrilled with the substance of their first seminar, the couple purchased a TU three-day seminar to learn more. *Id.* at 26:16–22. The three-day seminar was "very intense," but Rains Colic learned a lot. *Id.* at 26:21–22. Rains Colic did not expect Mr. Trump to have personally selected any of the TU instructors or mentors; she simply believed that she was "attending a seminar that was part of his umbrella of companies." *Id.* at 107:8–108:14.

Following the TU courses, Rains Colic and her husband spent considerable time learning the real estate trade and applying the techniques they learned from

TU. *Id.* at 115:2–11. She believed that using this information properly "takes hard work, determination, a back bone and the ability to do what other people don't want to do." *Id.* at 109:12–18. The hard work paid off: Rains Colic and her husband have become successful investors, which they credit in part to TU for giving them "the platform" and "information to do what [they] needed to do." *Id.* at 111:4–7.

C. TU students had diverging interactions with TU's sales team.

TU's sales team changed over time. At least six TU employees oversaw the telephone sales during the class period. Ex. 26 at 111:1–7, 199:19–23; Ex. 27 at 90:15–22; Ex. 28 at 27:5–17. TU started with only one phone number and a single sales member, Mark Covais, who was tasked with fielding *all* incoming calls. Ex. 27 at 92:2–25, 93:6–12; Ex. 29 at 87:15–88:3, 89:7–14. Covais would ask potential customers "what they're interested in" and try to "see if [TU] [had] a program that was going to be a good fit." *Id.* at 87:23–88:3. Covais's sales approach and interactions with these customers were unscripted, *id.* at 193:2–10, 293:3–5; Ex. 30 at 78:21–79:6, 79:20–80:23, 206:7–20, and varied by customer, *id.* at 205:12–206:2. Even as TU's sales department grew and developed a basic script to gather customer information, there was sporadic oversight of its use. Ex. 29 at 88:4–89:6, 90:23–91:18. Jason Nicholas, a member of TU's sales department, testified that he "absolutely" went off script during phone calls. Ex. 30 at 77:20–78:13. As a result of this variation in sales styles, a customer's interaction with TU's sales department was "[a]lways different" and "the story that was being portrayed . . . always changed" "based on . . . the consumer on the other end." *Id.* at 205:12–206:2. These differences were due in large part to the fact that TU's sales scripts varied over time. *Compare* Covais Decl. Ex. C at TU 19, *with id.* at 20.

D. Students had diverging interactions with TU employees.

TU students were exposed to different representations by TU instructors and sales staff before, during, and after the 90-minute free preview. Some students were told by their instructors that they had been handpicked by Mr. Trump, Ex. 7 at

29:13–22, while other students were either informed that Michael Sexton hired the instructor, Ex. 31 at 482, or were told nothing at all about who made the hiring decisions at TU, Ex. 32 at 507. Many class members were never told anything during the 90-minute preview seminar because they *never attended the event*, Covais Decl. ¶ 5; *see* Ex. 38 at 67:18–21 (Makaeff).

In fact, TU records show hundreds of class members paid to attend a TU live event without first attending the free preview, Covais Decl. ¶ 5; *id.* at Exs. E, F, G:

Subclass	Total Class Members (approx.)	Number of Class Members who never attended a 90-minute free preview (approx.)	Percentage of Class Members who did not attend free preview (approx.)
California	1520	132	8.7%
New York	544	45	8.3%
Florida	653	96	14.7%

Other students had completely different interactions with TU employees because they previously attended a TU workshop or online course, or purchased various other TU products before attending a 90-minute preview, Covais Decl. ¶ 6:

Subclass	Number of Class Members who purchased a TU product before attending a 90-minute free preview	Breakdown of TU products that were purchased by such class members
California	38	Self-Study Course: 31 Online Course: 3 Phone Coaching: 2 Live Retreat: 1 Software: 1
New York	25	Self-Study Course: 19 Online Course: 4 Phone Coaching: 1 In-Field Mentorship: 1
Florida	19	Self-Study Course: 9 Online Course: 6 Live Retreat: 4

E. Relevant Procedural Posture.

This case was certified on February 21, 2014. Plaintiffs sought to broadly certify a class based on defendants' "centrally-orchestrated strategy" to defraud TU students through "a fraudulent 'up-sell' scheme." Dkt. 124 at 1. The Court rejected the request and narrowly certified three "core" misrepresentations for class-wide determination: (1) "Trump University was an accredited university"; (2) "students would be taught by real estate experts, professors and mentors hand-selected by Mr. Trump"; and (3) "students would receive one year of expert support and mentoring." Dkts. 298 at 4; 418 at 2.

On February 19, 2015, defendants moved for decertification, arguing that plaintiffs' "full-refund" damages theory—plaintiffs' *only* damages theory—was not viable because it failed to account for value that TU provided each class member.[11] Plaintiffs opposed decertification by extensively relying on cases brought under the Federal Trade Commission Act ("FTC Act"). *See* Dkts. 405 at 9–10, 414 at 13, 36. At plaintiffs' urging, the Court determined that "claims filed under the FTC Act [were] most analogous" to this case. Dkt. 418 at 8. Then, relying on the reasoning of *FTC v. Figgie International Inc.*, 994 F.2d 595 (9th Cir. 1993), the Court ruled that plaintiffs could proceed under their full-refund theory regardless of whether the students received "some value." Dkt. 418 at 9–10.

The Court decertified "all issues of damages," yet it determined that, under *Figgie*, the "baseline" for restitution (under California law) and damages (under New York and Florida law) would be a full refund. Dkt. 418, at 9–10, 12.

On February 8, 2016, plaintiffs filed a motion to withdraw Tarla Makaeff as the lead California class representative. Dkt. 443. Plaintiffs submitted a

[11] Defendants also argued that decertification was necessary because plaintiffs could not prove damages without an expert witness. The Court deferred consideration of this argument because it concluded that plaintiffs' full-refund theory was "plausible." Dkt. 418 n.6. As explained in Section IV.D below, plaintiffs cannot proceed on a full-refund theory because it violates Ninth Circuit law.

supplemental memorandum in support of Makaeff's motion to withdraw in which they withdrew their third "core" misrepresentation. *See* Dkt. 466 at 6 n.3. Plaintiffs relied heavily on this third misrepresentation in both their class certification motion and opposition to defendants' motion for decertification.[12]

On April 29, the parties submitted competing trial plans to the Court. *See* Exs. 33, 34. As explained in defendants' supplemental trial brief, plaintiffs' trial plan is not only infeasible, but it also violates defendants' constitutional rights on damages. Ex. 33 at 542 ("Damages determinations . . . will begin with the 'baseline' of what each student-victim paid" to TU). Plaintiffs also propose use of a special master, use of statistical sampling, and use of separate juries to decide piecemeal whether plaintiffs were entitled to punitive damages and, if so, the proper amount. Each of plaintiffs' proposals violates clearly established Ninth Circuit or Supreme Court law. *See* Ex. 35.

On May 6, 2016, the Court held a pretrial conference. Dkt. 478. There, the Court rejected plaintiffs' request to hold separate trials for equitable and legal claims, and their request to allow separate juries to decide entitlement and amount of punitive damages. Dkt. 481. The Court then set trial for November 28, 2016.

III. LEGAL STANDARD

"[T]he district court is charged with the duty to monitor[] its class decisions in light of the evidentiary developments of the case." *NEI Contracting*, 2016 WL 2610107, at *5 ("The district judge *must* define, redefine, subclass, and decertify as appropriate in response to the progression of the case from assertion to facts." (emphasis added)). Indeed, an order granting class certification is "inherently

[12] *See, e.g.*, Dkt. 124 at 17 (alleged mentorship misrepresentation "key" to students' decision-making); Dkt. 405 at 14 ("TU 'mentors' did not provide any services that a realtor would not provide for free"), *id.* at 21 (arguing that Everett did not receive value from her mentorship because "all of the information her 'mentor' provided was basic information of the type a real estate agent would provide for free"); *id.* at 23 (arguing that Brown's mentorship was worthless).

tentative." *Id.* (internal citation omitted).[13] The Court has discretion to decertify a class at any time. *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 966 (9th Cir. 2009). Unlike a motion for reconsideration, "a motion to decertify a class . . . does not depend on a showing of new law, new facts, or procedural developments after the original decision." *NEI Contracting*, 2016 WL 2610107, at *5. Rather, the question is whether plaintiffs have met their burden to demonstrate "that the requirements of Rules 23(a) and (b) are met." *Marlo v. United Parcel Serv., Inc.*, 639 F.3d 942, 947 (9th Cir. 2011); *Munoz v. Giumarra Vineyards Corp.*, 2016 WL 2756425, at *3 (E.D. Cal. May 12, 2016).

IV. ARGUMENT

A. Decertification is required because class members were not uniformly exposed to the alleged "core" misrepresentations.

"Common issues do not predominate where there is 'no cohesion among the [class] members because they were exposed to quite disparate information from various representatives of defendant.'" *First Am.*, 2016 WL 695567, at *24. To maintain certification, plaintiffs must establish that the "core" misrepresentations were uniformly seen by all class members. *Id.* at *21; *Marlo*, 639 F.3d at 947.

First American —a case just published in the Southern District of California—is illustrative and should govern the Court's decision here. 2016 WL 695567, at *20–21. There, the defendant sold home warranty plans and, as here, did so through separate marketing channels:

> (1) directly mailing plan renewals to existing customers using various cover letters, some of which "contained the allegedly false or misleading representations, while others did not," *id.* at *21;
>
> (2) employing area managers who interacted with local real estate agents who then sold the warrantees to homebuyers, *id.* at *20; and
>
> (3) defendant advertised directly to consumers through direct mailings, telephone calls, and defendant's website, *id.*

[13] Unless otherwise noted, internal citations omitted.

Based on the potential variation, the Court concluded that "significant individual issues as to whether the putative class members were even exposed to, much less relied on, the alleged misrepresentations." *Id.* at *21. The plaintiffs failed to prove defendant "engaged in a uniform advertising campaign." *Id.* at *20.

The record in this case against certification is even stronger than in *First American*. TU students were exposed to various (and different) advertisements and distinct in-person representations. These variations shaped class members' individual experiences. Plaintiffs themselves cannot define the nature of their alleged "university" misrepresentation,[14] much less establish that defendants misrepresented TU's accreditation status *uniformly throughout the class period*.

The deposition testimony of nearly every TU student—including all three of the class representatives in this action—proves this fact:

- **Sonny Low** had no "recollection" that TU represented itself as an "accredited" university. Ex. 11 at 109:19–21.
- **Joann Everett** could not remember being told TU was an "accredited" university. Ex. 23 at 251:21–252:4.
- **John Brown** testified that nobody represented that TU was an "accredited" university. Ex. 22 at 103:6–8.
- **Michelle Gunn** similarly testified that she was never told TU was accredited and that "[i]t was pretty clear" from TU's marketing that the live event workshops were business seminars. Ex. 19 at 42:14–19.
- **Paul Canup** testified that he was never told—and never saw a TU advertisement that represented—that TU was "accredited." Ex. 6 at 95:15–96:9.
- **Marla Rains Colic** was "never told" that TU was an "accredited university." Ex. 8 at 105:6–8.
- Nor was **Meena Mohan**, who never saw or heard any representation that "Trump University was a licensed university or an accredited university." Ex. 9 at 141:8–19.

[14] This case has been pending for over six years and plaintiffs have still failed to pinpoint with any precision the representations on which they rely for their "university" misrepresentation. *See* Dkt. 124 at 1 ("legitimate academic institution"); *id.* at 2 ("institution of higher learning"); ("'accredited' academic university"); *Cohen* Dkt. 1 ¶ 1 ("elite university"); *id.* ¶ 19 ("actual university"); *id.* ¶ 21(j) ("real university").

- **Mette Nielsen** similarly never saw or heard any representation that "Trump University was an accredited school." Ex. 10 at 62:6–14.
- **Amy H.** also never saw a TU advertisement representing TU as an "accredited university." Ex. 36 at 94:21–95:15.

The only student who testified that TU misrepresented its accreditation status was Art Cohen, who testified that he heard the alleged misrepresentation from *an individual TU instructor*. *See* Ex. 7 at 99:10–101:1. As Cohen's experience illustrates, assessing whether a misrepresentation about TU's accreditation status was made to a particular student—and, if so, what the substance of the representation was—requires individualized inquiries into each class member's experiences: (1) what marketing material did the student see or hear?; (2) did individual TU employees make representations to the student?;[15] (3) was the student exposed to TU's website, which expressly stated that "Trump University does not offer credits or degrees"? (Ex. 37 at 625); and (4) did the student previously purchase another TU product—*e.g.*, phone coaching, an online or self-study course, or a live retreat—and, if so, did that product or service provide context about TU's accreditation status? These questions directly relate to plaintiffs' alleged "accredited university" misrepresentation, yet none can be answered on a class-wide basis.

Plaintiffs similarly fail to prove defendants uniformly misrepresented that Mr. Trump personally "handpicked" instructors or mentors. Because plaintiffs have abandoned their third "core" misrepresentation that TU misrepresented "students would receive one year of expert support and mentoring," plaintiffs now appear to argue that TU students who purchased mentorships are entitled to a full refund because these students were told that Mr. Trump hand-picked every mentor. Plaintiffs have never identified a *uniform misrepresentation* regarding handpicked mentors. The Court must therefore decertify all claims involving TU mentorships.

[15] For example, while some instructors referred to TU as a "university" during lectures, others repeatedly called it a "company." Ex. 31 at TU 481–82.

Nor can plaintiffs meet their burden to show any uniform representation involving "hand-picked." The term "handpicked" was used in only some TU advertising, and when it was used, the term was used in materially distinct ways and referred to different people or groups of people who did the handpicking. *See* Covais Decl. Ex. A at 5, 16; Ex. 21 at 372. Critically, many students never even saw marketing containing the term "hand-picked" because: (i) they heard a radio advertisement for a TU product, Ex. 6 at 20:11–16; (ii) they had previously purchased a TU product or coaching service and decided to attend a live event, *see* Covais Decl. ¶ 6; or (iii) they searched online for real estate training and found TU's website, Ex. 9 at 47:11–16.

Students also had distinct interactions with TU instructors and sales employees before purchasing a live event. For example, some students who attended 90-minute free preview events heard misrepresentations, *see, e.g.*, Ex. 7 at 28:1–29:12, but others were specifically told that Sexton, not Mr. Trump, hired instructors, *see, e.g.*, Ex. 31 at 482. And hundreds of students did not attend a free preview before purchasing a live event, creating additional variation in students' exposure to TU marketing. *See* Covais Decl. ¶ 5.

Given TU students' radically different experiences, plaintiffs cannot show that TU students were exposed to the same "core" misrepresentations. *First Am.*, 2016 WL 695567, at *19; *see Cohen v. Implant Innovations, Inc.*, 259 F.R.D. 617, 643 (S.D. Fla. 2008) ("Whether each putative class member received or was exposed to the defendant's marketing materials is an individualized question of fact in the instant case.").

B. <u>Decertification is required because individual issues of reliance, causation, and materiality predominate.</u>

Critical to each of plaintiffs' claims is the availability of either a class-wide presumption of reliance or causation. *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 596 (9th Cir. 2012); *see infra* note 16. To begin, plaintiffs' failure to prove

defendants made uniform misrepresentations to the class precludes any class-wide presumptions in this case.[16] *First Am.*, 2016 WL 695567, at *21.

A class-wide presumption is also inappropriate, as here, when materiality, reliance, and/or causation require individualized inquiries that are not susceptible to class-wide proof. *See In re ConAgra Foods, Inc.*, 302 F.R.D. 537, 576 (C.D. Cal. 2014) (The "Ninth Circuit has held that if a misrepresentation is not material as to all class members, the issue of reliance 'var[ies] from consumer to consumer,' and no classwide inference arises."); *Mazza*, 666 F.3d at 596 ("common questions of fact do not predominate where an individualized case must be made for each member showing reliance"); *First Am.*, 2016 WL 695567, at *22 (denying class certification because plaintiffs failed to prove "materiality on a class-wide basis").

Federal courts have often looked to the seminal California decision, *Caro v. Procter & Gamble Co.*, 18 Cal. App. 4th 644, 668 (1993), to illustrate this principle.[17] In *Caro*, the Court held that while materiality was generally susceptible

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[16] *See Mirkin v. Wasserman*, 5 Cal. 4th 1082, 1095 (1993) (inference of reliance permitted only "when the same material misrepresentations have actually been communicated to each member of a class." (emphasis in original)); *Cohen v. Implant Innovations, Inc.*, 259 F.R.D. 617, 623–24 (S.D. Fla. 2008) ("Plaintiff's argument that causation may be proven [under the FDUTPA] by evidence of putative class members' receipt of the uniform written misrepresentations in the marketing materials is flawed, as the record demonstrates that Defendant did not make uniform representations."); *Rollins, Inc. v. Butland*, 951 So. 2d 860, 879 (Fla. Dist. Ct. App. 2006) (holding that class-wide presumption of reliance does not arise under Florida law when there was "no proof" that each class member "reviewed or relied on the identical advertising"); *Oscar v. BMW of N. Am., LLC*, 2012 WL 2359964, at *4 (S.D.N.Y. June 19, 2012); *see also Garcia v. Medved Chevrolet, Inc.*, 263 P.3d 92, 100 (Colo. 2011) ("[A] trial court must rigorously analyze the evidence presented to determine whether the evidence supports a class-wide inference of causation. . . . [T]he trial court must consider not only whether the circumstantial evidence common to the class supports an inference of causation, but also whether *any individual evidence refutes such an inference*." (emphasis added)).

[17] *See, e.g.*, *Otto v. Abbott Labs. Inc.*, 2015 WL 9698992, at *6 (C.D. Cal. Sept. 29, 2015) ("The Court also referred to two California Court of Appeals decisions, which continue to be instructive: *Tucker v. Pacific Bell Mobile Services*, 208 Cal. App. 4th 201, 228 (2012) and *Caro v. Procter & Gamble Co.*, 18 Cal. App. 4th 644, 668 (1993)."); *see also Tucker*, 208 Cal. App. 4th at 222 ("If the issue of materiality

to class-wide proof because it involved an objective standard, "individual issues involving the *existence and nature* of any material misrepresentation . . . predominate[d] over common issues" and therefore precluded class-wide treatment. *Id.* at 667–68 (emphasis added). The Court explained that "[a] misrepresentation of fact is material if it induced the plaintiff to alter his position to his detriment." *Id.* at 668. "Stated in terms of reliance, materiality means that without the misrepresentation, the plaintiff would not have acted as he did." *Id.* Ultimately, because the plaintiff himself "did not believe" the alleged misrepresentation, the Court determined "there was no material misrepresentation to [the plaintiff]." *Id.* Therefore, "[w]hether other class members believed the [misrepresentation] would be a matter of individual proof." *Id.*

The Ninth Circuit has similarly held that individual testimony from consumers who were exposed to allegedly false advertising is "direct evidence" related to whether the representations were "likely to influence consumers' purchasing decisions." *Skydive Ariz., Inc. v. Quattrocchi*, 673 F.3d 1105, 1111 (9th Cir. 2012). As explained above, determining which particular TU advertisement(s) each class member saw (if they saw any) requires a case-by-case analysis. Determining whether students cared about or relied on particular representations also requires individual proof. For example, during Sonny Low's recent deposition, he emphatically testified that TU's accreditation status "was not even a consideration" for him when he purchased training from TU. Ex. 11 at 109:19–21, 116:11–15. Other students testified similarly. *See* Ex. 6 at 96:17–97:16 (Canup: "It was clear from the start that it was a number of different classes by experts in the field that didn't sound like a university environment."); Ex. 10 at 62:12–14 (Nielsen); Ex. 36 at 95:21–25 (Amy H.); Ex. 9 at 141:20–25 (Mohan). Other students, like John Brown, claim they believed TU was accredited based solely on

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or reliance . . . is a matter that would vary from consumer to consumer, the issue is not subject to common proof" and certification is improper.").

its "University" moniker. Ex. 22 at 103:6–19 ("But when . . . it says Trump University, don't you expect it to be a university, an actual university?"). Such variations undercut plaintiffs' assertion that reliance, materiality, or causation can be established through class-wide proof.

Students' impressions of the alleged "hand-picked" misrepresentation require similarly particularized assessment. Some students never heard that Mr. Trump "hand-picked" instructors, others were specifically told that Sexton or others hired instructors, while others were exposed to TU marketing and advertisements that used "hand-picked" in varying ways. Given these differences, it is not surprising that students had distinct expectations about Mr. Trump's involvement in TU's programming. Ms. Nielsen, for example, believed that Mr. Trump's involvement was limited to his endorsement. Ex. 10 at 68:17–25, 110:11–18, 162:20–163:2; *see also* Ex. 8 at 107:8–108:14 (Rains Colic noting, "I was just attending a seminar that was part of [Mr. Trump's] umbrella of companies"). While many students agreed, Ex. 6 at 33:16–19, 43:2–12, 99:5–21, 100:8–22, 100:25–101:10 (Canup); Ex. 19 at 61:13–19 (Gunn), others like John Brown apparently "expect[ed]" that Mr. Trump would attend the 90-minute preview seminar, Ex. 22 at 29:4–7.

The recent Southern District case, *First American*, is instructive on this point, too. There, the proposed class contained three categories of individuals who purchased home warranty plans from the defendant: (1) sellers; (2) real estate agents; and (3) buyers/owners. 2016 WL 695567, at *22. The Court found that a class-wide inference did not apply because "Plaintiffs ha[d] not demonstrated [they] could establish materiality [of the misrepresentations] on a class-wide basis." *Id.* Rather, the Court concluded there were numerous reasons class members may have purchased the warranty plans, some of which were wholly unrelated to the misrepresentations. For example, some "real estate agents purchased . . . warranty plans as 'gifts' for their clients," while others "picked First American because prior clients had a good experience with them." *Id.* The Court also reasoned that "it

[was] implausible" that differently situated class members (buyers and sellers) "would . . . attach the same importance to alleged misrepresentations." *Id.*

Here, it is similarly "implausible" to lump TU students into a single category given their varying educational backgrounds, real estate experience, exposure to other business seminar programs, and interactions with individual TU employees and other TU products and services. College educated students, for example, had experience with degree-granting universities that shaped their understanding of TU's marketing and their expectations about whether TU was an "accredited university." Students who had previously attended a business seminar also had experience that impacted their expectations about TU's programming. These experiences are but a few that shaped students' interpretation of and reliance on the alleged misrepresentations.

TU students' reason(s) for attending TU provide yet another layer of variability. Many students were motivated by factors wholly unrelated to the "core" misrepresentations: (1) they were attracted to the Trump "Brand," as a symbol for excellence, Ex. 19 at 175:5–20 (Gunn); (2) they wanted to gain real estate knowledge, Ex. 8 at 26:19–22 (Rains Colic); Ex. 19 at 40:23–41:6 (Gunn); (3) TU offered the opportunity to network with other real estate investors, Ex. 19 at 40:20–23 (Gunn); (4) TU appeared to be of a higher quality than similar programs, Ex. 6 at 41:25–42:14 (Canup); (5) they wanted to learn subject matter referenced at a preview event, *id.* at 33:23–34:7 (Canup); (6) they believed that real estate was a "dangerous" market to enter without knowledge, Ex. 9 at 82:19–83:3 (Mohan); and (7) they wanted to use real estate investment to generate income, Ex. 6 at 24:14–25 (Canup); Ex. 8 at 27:1–9 (Rains Colic).

Plaintiffs have therefore failed to carry their burden to establish that materiality, reliance, and causation are amenable to class-wide proof. *See First Am.*, 2016 WL 695567, at *21–22.

C. Sonny Low's recent testimony establishes that he lacks standing.

Low's lack of reliance on the "core" misrepresentations requires decertification. *See Plascencia v. Lending 1st Mortg.*, 2011 WL 5914278, at *2 (N.D. Cal. Nov. 28, 2011) (actual reliance by class representative required to prove class-wide presumption of reliance); *Baghdasarian v. Amazon.com, Inc.*, 2009 WL 4823368, at *4–5 (C.D. Cal. Dec. 9, 2009) ("actual reliance require[d] [for] plaintiffs prosecuting a private enforcement action" under California law), *aff'd*, 458 F. App'x 622 (9th Cir. 2011). TU's accreditation status "was not even a consideration" for Low. Ex. 11 at 109:19–21, 116:11–15. Neither was whether Mr. Trump "hand-picked" TU's instructors.

During his first deposition, Low testified to his understanding of the meaning of "handpicked": "[I]t would be somebody handpicked using *whatever criteria that Donald J. Trump and Trump University used in selecting these mentors*." Ex. 13 at 70:10–22. Following three to four sessions of preparation each attended by three lawyers, Ex. 11 at 27:5–24, Low changed his testimony during his second deposition and now claims that "handpicked" means "whatever Donald J. Trump used with his determination, that he would pick the people." *Id.* at 157:7–9. That Low has a shifting, different, and imprecise definition of this word severely undermines any contention that he relied on it in purchasing a TU program.

Although Low claims the "handpicked" representation was important to him, his testimony demonstrates that he did not believe it to be true at the time he purchased his Gold Elite program. Low testified that at the time he attended the TU three-day seminar his "impression" was that the instructor (Steve Goff) "had not spoken with Mr. Trump." *Id.* at 129:20–23. Low drew the same conclusions about his other TU instructors, including James Harris, the TU instructor who spoke during Low's 90-minute preview seminar. *Id.* at 130:22–134:16. That Low did not believe these instructors were "handpicked" by Mr. Trump (whatever that means to Low) before purchasing a TU program defeats any claim of reliance on this term.

Low's testimony, and his many complaint letters, establish that he was dissatisfied with his mentor, and was otherwise unconcerned with the alleged "core" misrepresentations until he met the plaintiffs' lawyers.

D. The Court's reliance on FTC cases violates binding Ninth Circuit law.

Under binding Ninth Circuit authority, the Court erred by relying on FTC Act cases, such as *Figgie*, 994 F.2d at 595, when it concluded that plaintiffs' full-refund damages theory provided a plausible "baseline" for the restitution and damages under relevant state law.[18] *See Lozano v. AT & T Wireless Servs., Inc.*, 504 F.3d 718, 736 (9th Cir. 2007) ("[I]n the absence of a *clear holding* from the California Supreme Court," it was impermissible to assume that the FTC Act applied to state law consumer claims. (emphasis added)).

Plaintiffs' counsel invited this error. Even though many class members—and class representatives—conceded that TU courses had value, plaintiffs' counsel represented that a "full refund" was proper under FTC Act authority:

> **[Plaintiffs' Counsel]:** … And I would point out also, Your Honor, the *Ivy Gate* case. That's an FTC case, but it is business coaching. That was business coaching, which is -- that's pretty darn close to coaching on Trump's special real estate techniques. It's certainly not something that's ingested. So that's a little bit closer to this model.
>
> **THE COURT:** Although, as far as the law that was applied in *Ivy Capital* -- do you know of any California case or any Ninth Circuit case which has employed the FTC type of analysis employed in the case such as what we have?
>
> **[Plaintiffs' Counsel]:** I certainly don't know of anyone that's done it in this context. I agree with Your Honor; I know as far as the actual facts of this case, we are in uncharted territory. I don't think that means it's implausible. Dkt. 414 at 13.[19]

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[18] *Yokoyama v. Midland Nat'l Life Ins. Co.*, 594 F.3d 1087, 1091 (9th Cir. 2010) ("If the district court's [certification] determination was premised on a legal error, we will find a per se abuse of discretion.").

[19] It is "counsel's duty to remain apprised of binding precedent" and bring it to the Court's attention. *Allen v. Similasan Corp.*, 306 F.R.D. 635, 641 (S.D. Cal. 2015).

Plaintiffs' counsel also relied on an Ohio district court case that "cites the *FTC v. Figgie* case to support the notion [of] a full refund measure of damages" in consumer cases. Dkt. 414, at 36. Again, this was improper given that the law in this Circuit is contrary, a conclusion echoed in the recent *First American* decision: "the Ninth Circuit has declined to apply the FTC standard to consumer actions 'in the absence of a clear holding from the California Supreme Court' that it should be applied." 2016 WL 695567, at *23 (quoting *Lozano*, 504 F.3d at 736).

In *Jones v. ConAgra Foods, Inc.*, the district court was confronted with the same issue presented here: whether *Figgie*'s full refund theory was applicable in a consumer class action case. 2014 WL 2702726, at *19 & n.37 (N.D. Cal. June 13, 2014). The *Jones* court rejected plaintiffs' argument that *Figgie* applied, finding "*Figgie* . . . distinguishable" because it was an FTC enforcement action under the FTC Act, which permitted much broader and distinct statutory remedies than consumer class actions. *Id.* at *19 n.37. The court therefore unequivocally held: "There is no reason to import the remedies from the FTC Act into a California UCL or FAL case, and Plaintiffs point to no authority that does so." *Id.*; *accord Joe Hand Promotions*, 2016 U.S. Dist. LEXIS 24752 at *16.

For similar reasons, the Court should not have extended plaintiffs' full-refund theory to plaintiffs' Florida and New York claims. The Ninth Circuit's decision in *Mazza* compels this result. *Mazza* reiterated the longstanding federalism principle that "each state has an interest in setting the appropriate level of liability for companies conducting business within its territory." 666 F.3d at 592. Indeed, as the Ninth Circuit explained:

> As it is the various states of our union that may feel the impact of such effects, it is the policy makers within those states, within their legislatures and, at least in exceptional or occasional cases where there are gaps in legislation, *within their state supreme courts, who are entitled to set the proper balance and boundaries between maintaining consumer protection, on the one hand, and encouraging an attractive business climate, on the other hand*.

Id. (emphasis added). Here, without clear guidance from the highest courts in Florida and New York, the Court's adoption of a damages "baseline" violates the principles set forth in *Mazza*. *See Jones*, 2014 WL 2702726, at *19 n.37. No such clear guidance exists. Two additional reasons support this conclusion. *First*, incorporating FTC Act remedies impermissibly creates a private right of action under the FTC Act. *See Dreisbach v. Murphy*, 658 F.2d 720, 730 (9th Cir. 1981) ("[P]rivate litigants may not invoke the jurisdiction of the federal district courts by alleging that defendants engaged in business practices proscribed by [the FTC Act]."); *Kerr v. Am. Home Mortg. Servicing, Inc.*, 2010 WL 3743879, at *3 (S.D. Cal. Sept. 23, 2010) ("To imply a private right of action to enforce the Federal Trade Commission Act . . . would be contrary to the legislative design which we discern to have been deliberately wrought"). In *Holloway v. Bristol-Myers Corp.*, 485 F.2d 986, 997–98 (D.C. Cir. 1973), the D.C. Circuit explained why Congress granted the FTC "exclusive enforcement authority" over the FTC Act. "Above all," the court noted, private consumer cases are simply "not subject to the same constraints" as the FTC when implementing the broad powers granted under the FTC Act. *Id.* at 997 (FTC "need[s] to weigh each action against the Commission's broad range policy goals and to determine its place in the overall enforcement program of the FTC.") .

Second, the Court's adoption of a full-refund "baseline" alters the state law burdens of proof. For example, the Ninth Circuit's recent decision, *Pulaski & Middleman, LLC v. Google, Inc.*, made clear that the measure of restitution under California law is "the return of the excess of what the plaintiff gave the defendant over the value of what the plaintiff received." 802 F.3d 979, 988 (9th Cir. 2015). This is not to say that a full-refund is unavailable under California law. The remedy is available, but plaintiffs bear the burden to establish valuelessness: "A full refund *may* be available in a UCL case when the plaintiffs prove the product had *no* value to them because the price paid minus the value actually received equals the

price paid—zero." *Mullins v. Premier Nutrition Corp.*, 2016 WL 1535057, at *6 (N.D. Cal. Apr. 15, 2016) (emphasis in original). As the Court in *Mullins* explained, "To prevail on this theory, [plaintiffs] must prove (1) that consumers buy Joint Juice only because of its claimed health benefits; and (2) Joint Juice does not, in fact, provide those benefits *to anyone*." *Id.* (emphasis in original).

As the Court has already observed—and plaintiffs have conceded—plaintiffs cannot prove that TU failed to provide value *to anyone*. TU students, even class representatives, have testified that they received value from TU. In partially granting defendants' first motion for decertification, the Court found that plaintiffs had satisfied *Comcast* by submitting what the Court then considered to be a "plausible damages model." Dkt. 418 at 17. Recent discovery and developments in the case have rendered that model decidedly *implausible*, which requires decertification. *See McVicar v. Goodman Global, Inc.*, 2015 U.S. Dist. LEXIS 110432, at *44 (C.D. Cal. Aug. 20, 2015); *In re POM Wonderful LLC*, 2014 WL 1225184, at *5–6 (C.D. Cal. Mar. 25, 2014).

E. The Combination of These Issues Demands Decertification

Under the reasoning set forth above, the combination of the many individualized inquiries as well as plaintiffs' unconstitutional trial plan require decertification. *See W. States Wholesale v. Synthetic Indus.*, 206 F.R.D. 271, 280 (C.D. Cal. 2002); *Villalpando v. Exel Direct Inc.*, 2016 WL 1598663, at *5 (N.D. Cal. Apr. 21, 2016); *Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770, 775–77 (7th Cir. 2013) (Posner, J.) (affirming decertification based on infeasible trial plan).

V. CONCLUSION

For the foregoing reasons, defendants respectfully request that the Court decertify the class in its entirety.

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O'MELVENY & MYERS LLP
DANIEL M. PETROCELLI
DAVID L. KIRMAN

By: /s/Daniel M. Petrocelli
Daniel M. Petrocelli
Attorneys for Defendant
DONALD J. TRUMP and TRUMP UNIVERSITY, LLC