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CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

TOMMY D. THORNTON et al., Plaintiffs and Respondents, v. CAREER TRAINING CENTER, INC., et al., Defendants and Appellants.	D044598 (Super. Ct. No. GIC790815)

APPEAL from an order of the Superior Court of San Diego County, Joan M. Lewis, Judge. Order affirmed and remanded with directions on Proposition 64 issues.

Kaye, Rose & Maltzman, LLP, B. Otis Felder; Duane Morris LLP, Keith Zakarin, Edward M. Cramp for Defendants and Appellants.

Majors & Fox, Gary W. Majors, Frank J. Fox and Lawrence J. Salisbury for Plaintiffs and Respondents.

Defendants Career Training Center, Inc., formerly doing business as Computer Education Institute, Inc., Sam Afrookhteh and Matthew Amir Baniassad (collectively CEI) challenge the trial court's denial of their second motion to compel arbitration of the action of plaintiffs Tommy D. Thornton, Robert Thornton, Anthony Griego (collectively

the individual plaintiffs) and Trade School Review Association (TSRA) for violation of California's unfair competition law (UCL) (Bus. & Prof. Code,[1] § 17200 et. seq) and other causes of action. CEI contends the court erred by finding inapplicable an arbitration clause in various Sallie Mae promissory notes the individual plaintiffs signed to obtain student loans. Further, in its reply brief CEI contends Proposition 64, which limits private enforcement of the UCL, applies to pending appeals and the plaintiffs lack standing to pursue their UCL cause of action.[2]

This court recently held Proposition 64 (as approved by voters, Gen. Elec., (Nov. 2, 2004)) applies to UCL actions filed before its effective date of November 3, 2004. (*Bivens v. Corel Corporation* (2005) 126 Cal.App.4th 1392 (*Bivens*); *Lytwyn v. Fry's Electronics, Inc.* (2005) 126 Cal.App.4th 1455 (*Lytwyn*).) We direct the trial court to grant judgment on the pleadings in favor of CEI on the plaintiffs' UCL cause of action. As to the individual plaintiffs, who, unlike TSRA, allege injuries caused by CEI's conduct, we direct the court to grant them leave to amend the UCL cause of action to attempt to assert class certification.

We conclude the court's finding on the arbitration issue is proper as there is no indication CEI and the individual plaintiffs agreed to arbitrate disputes against CEI

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1 Statutory references are to the Business and Professions Code unless otherwise specified.

2 We requested supplemental briefing on this issue from the plaintiffs, and we have taken their response into consideration.

pertaining to its enrollment practices. CEI is neither a signatory to nor third party beneficiary of the promissory notes, and the alleged wrongdoing of CEI does not concern the notes or student loans. Accordingly, we affirm the court's order denying CEI's motion to compel arbitration.

FACTUAL AND PROCEDURAL BACKGROUND

CEI sold vocational education. In January 2001 the individual plaintiffs enrolled at the San Diego campus of CEI, each paying more than $10,000 for training in the field of "computer networking."

In June 2002 the individual plaintiffs sued CEI for unfair competition (§ 17200 et seq.) "as private attorneys general on behalf of the general public," violation of the Private Postsecondary and Vocational Education Reform Act of 1989 (former Ed. Code, § 94700 et seq.) and intentional misrepresentation. The complaint alleges CEI made numerous false representations, including that it was a nationally accredited school, the courses it offered carried transferable college credits, and graduates of the computer networking program would be prepared for a certification examination and could expect annual salaries upwards of $58,000. Further, the complaint alleges CEI failed to give a variety of statutorily required disclosures, such as "placement statistics regarding prior graduates." TSRA, a nonprofit association, joined in the unfair competition cause of action as a private attorney general.

CEI moved to compel arbitration under its contracts with the individual plaintiffs, and to stay the matter pending completion of arbitration. The trial court denied the

motion on the ground the arbitration clauses are not triggered because they exclude claims addressed by state law, and the complaint alleges only state law claims. CEI appealed, and this court affirmed the trial court's order. (*Thornton v. Computer Education Institute* (Jan. 28, 2004, D041407) [nonpub. opn.].)

CEI then brought a second motion to compel arbitration, and to stay the matter pending completion of arbitration, on the ground arbitration is compelled by arbitration clauses contained in various Sallie Mae promissory notes the individual plaintiffs and majority of CEI students allegedly signed to obtain student loans. The trial court denied the motion on the grounds the defendants are neither parties to nor third party beneficiaries of the notes, and the arbitration clauses concern disputes between borrowers and lenders concerning the notes. The court further found the defendants waived any right to seek arbitration by unreasonable delay in raising the Sallie Mae argument.

DISCUSSION

I

Plaintiffs' Motion To Dismiss

Before CEI filed its reply brief, the plaintiffs asked us to summarily dismiss CEI's appeal on the grounds of frivolity and delay, raising essentially the same arguments they raise in their respondents' brief. The plaintiffs rely on *Ferguson v. Keays* (1971) 4 Cal.3d 649, 658, which notes "the appellate courts have discretion to impose appropriate sanctions or penalties upon the parties or their attorneys, 'Where the appeal is frivolous or taken solely for the purpose of delay . . . .' " (See also Eisenberg et al., Cal. Practice

Guide: Civil Appeals and Writs (The Rutter Group 2004) ¶ 5:36, p. 5-13 ["Appellate courts have inherent authority to dismiss an appeal that is 'frivolous or taken solely for delay,' and can also impose *monetary sanctions* in connection with the dismissal."].)

As a practical matter, however, "the power summarily to dismiss a frivolous appeal is seldom exercised." (*Coleman v. Gulf Ins. Group* (1986) 41 Cal.3d 782, 790, fn. 5.) "The reason is that, to determine whether the appeal is frivolous, the court usually will have to examine the record and review the merits; having done so, little is to be gained by dismissing rather than deciding the appeal on its merits." (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs, *supra,* ¶ 5:37, p. 5-14.) Such is the case here, and thus we deny the plaintiffs' motion and dispose of the appeal on its merits. The plaintiffs have not requested monetary sanctions.

II

Proposition 64

Section 17200 prohibits "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." The Legislature intended this " 'sweeping language' to include ' "anything that can properly be called a business practice and that at the same time is forbidden by law." ' " (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1266, quoting *Barquis v. Merchants Collection Assn.* (1972) 7 Cal.3d 94, 111, 113.)

When this lawsuit commenced, section 17204 provided that "any person acting for the interests of itself, its members or the general public" could bring a UCL cause of

action. (Former § 17204.) As the court explained in *Kraus v. Trinity Management Services, Inc.* (2000) 23 Cal.4th 116, 126, "representative UCL actions make it economically feasible to sue when individual claims are too small to justify the expense of litigation, and thereby encourage attorneys to undertake private enforcement actions. Through the UCL a plaintiff may obtain restitution and/or injunctive relief against unfair or unlawful practices . . . to protect the public and restore to the parties in interest money or property taken by means of unfair competition."

On November 2, 2004, the voters approved Proposition 64; it became effective the following day. (Cal. Const., art. II, § 10, subd. (a).) Proposition 64 amended Business and Professions Code section 17204 to state a UCL cause of action may be prosecuted "by any person who has suffered injury in fact and has lost money or property as a result of such unfair competition." (§ 17204.) Further, Proposition 64 amended Business and Professions Code section 17203 to require that a private party may bring a representative action only if he or she meets the standing requirement of section 17204 and complies with class certification requirements set forth in Code of Civil Procedure section 382. Proposition 64 curtails the previously broad standing to pursue a UCL action.

CEI contends that because the UCL cause of action is strictly statutory, Proposition 64 applies to cases pending on appeal. The plaintiffs counter that application of Proposition 64 to this action would violate the rule against retrospective application of statutes.

" 'A retrospective law is one which affects rights, obligations, acts, transactions and conditions which are performed or exist prior to the adoption of the statute.' " (*Aetna Cas. & Surety Co. v. Ind. Acc. Com.* (1947) 30 Cal.2d 388, 391; *Myers v. Philip Morris Companies, Inc.* (2002) 28 Cal.4th 828, 839.) A statute has retrospective effect when it substantially changes the legal consequences of past events. (*Kizer v. Hanna* (1989) 48 Cal.3d 1, 7.) "It is well settled that a new statute is presumed to operate prospectively absent an express declaration of retrospectivity or a clear indication that the electorate, or the Legislature, intended otherwise." (*Tapia v. Superior Court* (1991) 53 Cal.3d 282, 287.)

"The repeal of a statutory right or remedy, however, presents entirely distinct issues from that of the prospective or retroactive application of a statute. A well-established line of authority holds: ' " 'The unconditional repeal of a special remedial statute without a saving clause stops all pending actions where the repeal finds them. If final relief has not been granted before the repeal goes into effect it cannot be granted afterwards, even if a judgment has been entered and the cause is pending on appeal. The reviewing court must dispose of the case under the law in force when its decision is rendered.' " [Citations.]' [Citations.]" (*Physicians Com. for Responsible Medicine v. Tyson Foods* (2004) 119 Cal.App.4th 120, 125-126 (italics omitted); *Younger v. Superior Court* (1978) 21 Cal.3d 102, 109; *Governing Board v. Mann* (1977) 18 Cal.3d 819, 829; *Callet v. Alioto* (1930) 210 Cal. 65, 67; *Brenton v. Metabolife Internat., Inc.* (2004) 116 Cal.App.4th 679, 688; *Beckman v. Thompson* (1992) 4 Cal.App.4th 481, 489.)

"The justification for this rule is that all statutory remedies are pursued with full realization that the legislature may abolish the right to recover at any time." (*Callet v. Alioto*, *supra*, 210 Cal. at p. 67-68; Gov. Code, § 9606 ["Any statute may be repealed at any time, except when vested rights would be impaired. Persons acting under any statute act in contemplation of this power of repeal."].) "Because it is a creature of statute, the right of action exists only so far and in favor of such person as the legislative [or initiative] power may declare." (*Graczyk v. Workers' Comp. Appeals Bd.* (1986) 184 Cal.App.3d 997, 1007.) Unlike a common law right, a " 'statutory remedy does not vest *until final judgment*.' " (*County of San Bernardino v. Ranger Ins. Co.* (1995) 34 Cal.App.4th 1140, 1149; *South Coast Regional Com. v. Gordon* (1978) 84 Cal.App.3d 612, 619.)

"This rule only applies when the right in question is a statutory right and does not apply to an existing right of action which has accrued to a person under the rules of the common law, or by virtue of a statute codifying the common law. In such a case, it is generally stated, that the cause of action is a vested property right which may not be impaired by legislation. In other words, the repeal of such a statute or of such a right should not be construed to affect existing causes of action." (*Callet v. Alioto*, *supra*, 210 Cal. at p. 68.)

Based on the above principles, in *Bivens* and *Lytwyn* this court held Proposition 64 applies to cases filed before its effective date of November 3, 2004, and such application does not run afoul of the general rule of prospective application of statutes. Rather,

Proposition 64 repealed the portion of former section 17204 that allowed private parties to bring representative actions without suffering any injury or loss associated with the defendants' alleged wrongdoing, and the measure contained no saving clause. (*Bivens, supra,* 126 Cal.App.4th at pp. 1402-1405; *Lytwyn, supra,* 126 Cal.App.4th at pp. 1477-1480.)

Moreover, in *Lytwyn,* we rejected the contention, which the plaintiffs here also raise, that an unfair competition cause of action is based on common law rights. "It is clear . . . the right to bring a representative action under . . . section 17204 was a purely statutory right and was not a codification of prior common law rights. . . . [T]he common law of unfair competition required a showing of competitive injury to one's business. The [court] noted . . . such a showing was not required by statutes prohibiting unfair competition: '[S]tatutory "unfair competition" extends to all unfair and deceptive business practices. For this reason, the statutory definition of "unfair competition" "cannot be equated with the common law definition . . . ." ' " (*Lytwyn, supra*, 126 Cal.App.4th at p. 1479.)

Further, "the UCL originated from former Civil Code section 3369, which was an '*exception* to the common law rule that violations of the criminal laws cannot be enjoined.' [Citations.] In 1933, former Civil Code section 3369 was amended to provide that an action could be brought 'by any person acting for the interests of itself, its members, or the general public.' [Citation.] Thus, the right to bring a representative

action under former . . . section 17204 was not a codification of prior common law rights." (*Lytwyn, supra,* 126 Cal.App.4th at pp. 1479-1480.)

We recognize that in *Californians for Disability Rights v. Mervyn's* (2005) 126 Cal.App.4th 386 (*Mervyn's*)), the First Appellate District, Division Four, held Proposition 64 does *not* apply to actions filed before its effective date of November 3, 2004. The court found the application of different rules depending on whether a new statute affects a common law right or purely statutory remedy "exposes a seeming conflict in canons of statutory interpretation." (*Mervyn's,* at p. 395.) The court wrote that in *Landgraf v. USI Film Products* (1994) 511 U.S. 244 (*Landgraf*), the United States Supreme Court "has acknowledged this seeming conflict, and provided a reconciliation" that "the presumption of prospectivity is the controlling principle." (*Mervyn's,* at p. 395.) The *Mervyn's* court concluded that even when the statute in question repeals a purely statutory cause of action, the rule of prospectivity applies unless "the enactment clearly indicates an intent that it be applied retroactively." (*Ibid.*)

We respectfully disagree with the analysis in *Mervyn's. Landgraf* concerned

federal statutes,[3] and it does not discuss California's well-established law that "a cause of action or remedy dependent on a statute falls with a repeal of the statute, even after the action thereon is pending, in the absence of a saving clause in the repealing statute." (*Callet v. Alioto, supra,* 210 Cal. at p. 67; *Younger v. Superior Court, supra*, 21 Cal.3d at p. 109.) " 'It is axiomatic that cases are not authority for propositions not considered.' " (*In re Marriage of Cornejo* (1996) 13 Cal.4th 381, 388.) Indeed, in *Landgraf,* the court acknowledged that "[e]ven absent specific legislative authorization, application of new statutes passed after the events in suit is unquestionably proper in many situations." (*Landgraf, supra,* 511 U.S. at p. 273.)

In our view, the *Mervyn's* court's reliance on *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, was also misplaced, as there the issue was whether Proposition 51, which

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3 In *Landgraf,* the issue was whether a provision of the Civil Rights Act of 1991 (42 U.S.C. § 1981a(a)) (section 102), which created a right to recover compensatory and punitive damages for certain violations of title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.), and a right to a jury trial if such damages were sought, applied to a title VII case pending on appeal when section 102 was enacted. The court noted section 102 "significantly expands the monetary relief potentially available to plaintiffs who would have been entitled to backpay under prior law," and it "also allows monetary relief for some forms of workplace discrimination that would not previously have justified *any* relief under Title VII." (*Landgraf, supra,* 511 U.S. at pp. 253-254.) The court held the new measure did not apply to pending actions, explaining: "In cases like this one, in which prior law afforded no relief, [section] 102 can be seen as creating a new cause of action, and its impact on parties' rights is especially pronounced. . . . The *extent* of a party's liability, in the civil context as well as the criminal, is an important legal consequence that cannot be ignored." (*Id.* at pp. 283-284.) The court noted that absent congressional intent to the contrary, it had never "read a statute substantially increasing the monetary liability of a private party to apply to conduct occurring before the statute's enactment." (*Id.* at p. 284.)

modified the traditional "joint and several liability" doctrine, applied to *common law* actions that accrued before the effective date of the measure. (*Evangelatos,* at p. 1193.) In *Evangelatos,* the court had no cause to address the numerous cases in which the Supreme Court held the repeal of a *statutory* right applies to pending cases.

In California, when the measure in question repeals a purely statutory remedy, the "only legislative intent relevant . . . would be a determination to save [the] proceeding from the ordinary effect of repeal." (*Younger v. Superior Court, supra*, 21 Cal.3d at p. 110.) We are bound by California Supreme Court precedent, and any change in the law

based on considerations of fairness or the litigants' reliance or expectations would have to come from that court or the Legislature.

Under *Bivens* and *Lytwyn*, Proposition 64 applies to the UCL cause of action here. (See also *Branick v. Downey Savings and Loan Assoc.* (2005) 126 Cal.App.4th 828; *Benson v. Kwikset Corporation* (2005) 126 Cal.App.4th 887.) The complaint alleges TSRA "has had no direct dealings with CEI, has suffered no injury as a result of any conduct by the defendants, and therefore seeks no recovery for itself." Accordingly, TSRA lacks standing to pursue a UCL claim, and we direct the trial court to enter an order granting CEI judgment on the pleadings insofar as TSRA is concerned. (See Code Civ. Proc., § 438, subd. (c)(3) [providing the trial court may grant a "motion for judgment on the pleadings" when the "complaint does not state facts sufficient to constitute a cause of action against that defendant."])

The complaint alleges the individual plaintiffs were injured as a result of CEI's alleged conduct, but the UCL cause of action states they bring it only "as private attorneys general on behalf of the general public." Because they have not complied with the class certification procedure now required (§ 17203), we direct the trial court to also grant CEI judgment on the pleadings on the UCL action insofar as the individual plaintiffs are concerned. "In the case of . . . a motion for judgment on the pleadings, leave to amend should be granted if there is any reasonable possibility that the plaintiff can state a good cause of action." (*Virginia G. v. ABC Unified School Dist.* (1993) 15 Cal.App.4th 1848, 1852.) The individual plaintiffs may allege they are pursuing only their own damages in the UCL cause of action, or attempt to seek class certification, and thus we order the court to grant them leave to amend the complaint.[4]

III

Arbitration Ruling

"Whether an arbitration agreement applies to a controversy is a question of law to which the appellate court applies its independent judgment where no conflicting extrinsic evidence in aid of interpretation was introduced in the trial court." (*Brookwood v. Bank of America* (1996) 45 Cal.App.4th 1667, 1670.) Here, the parties introduced no extrinsic

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4 In addition to raising Proposition 64 in its reply brief, CEI filed a separate motion to dismiss the plaintiffs' UCL claims. Given our holding on the merits, we deny the motion. The parties also asked us to take judicial notice of various superior court documents pertaining to rulings on Proposition 64 issues. (Evid. Code, § 452, subd. (d).) The documents are not germane to our decision, and thus we deny the requests.

evidence in aid of interpretation.

CEI contends it is entitled to arbitration under "Sallie Mae loan agreements entered into by former CEI students as well as the [individual] [p]laintiffs themselves." CEI submitted the declaration of defendant Baniassad, which stated he was the secretary and chief executive officer of CEI, and "based on records and summaries of information kept in the regular course of [CEI's] business, I am *informed and believe* that of the 13,878 students who enrolled in CEI from June 1998 to June 2002, 10759, or 77.55% obtained Sallie Mae [l]oans using exemplary promissory note[s] similar to that in Exhibit A . . . ." (Italics added.)

"Exhibit A" was the application of a student, whose name was redacted, for a loan from SLM Financial Corporation, noted to be "a Sallie Mae company," and a promissory note. The note contained the following paragraphs:

> "Arbitration Disclosure. [¶] In this section, the word 'you' refers to the borrower and/or co-borrower and the words 'we' and 'us' refer to the lender and *any subsequent holder* of this promissory note. By applying for a loan with us, you agree that, if a dispute of any kind arises *with respect to this Note or your application for a loan* either you, we or third parties involved in a dispute with us can choose to have that dispute resolved by binding arbitration as described under 'Arbitration Provision' below. [¶] . . . [¶]
>
> "Arbitration Provision. [¶] In this section, the word 'you' refers to the borrower and/or co-borrower and the words 'we' and 'us' refer to the lender *and any subsequent holder* to this promissory note. This provision covers any claim, dispute or controversy . . . arising from or relating to this Note, or your application for a loan or advertisements, promotions or oral or written statements related to this Note or the program under which such a loan is or would be made, the relationships which result from this Note (including to the full extent permitted by applicable law, relationships with third parties who are not signatories of this Note) or the validity, enforceability or scope of this Arbitration Provision or the entire Note (collectively 'Claim'). Any dispute concerning a Claim shall be

> resolved, upon the election of you or us or any third party, by binding arbitration under the applicable code of procedure . . . of the Arbitration Administrator you select as provided above. . . ." (Italics added.)

CEI also submitted similar loan documents for plaintiff Robert Thornton. CEI submitted a "Federal Stafford Loan Master Promissory Note" for plaintiffs Tommy Thornton and Anthony Griego, but it points to no arbitration clause in those documents and the copies in the appellate record are somewhat illegible. "The reviewing court is not required to make an independent, unassisted study of the record in search of error or grounds to support the judgment. It is entitled to the assistance of counsel." (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 594, p. 627.)

Setting aside CEI's evidentiary problems, its position nevertheless lacks merit. "Under both federal and state law, the threshold question presented by a petition to compel arbitration is whether there is an agreement to arbitrate." (*Cheng-Canindin v. Renaissance Hotel Associates* (1996) 50 Cal.App.4th 676, 683.) "The question of whether the parties agreed to arbitrate is answered by applying state contract law." (*Ibid.*)

Even if its students signed promissory notes with the above "Arbitration Disclosure" and "Arbitration Provision," there is no suggestion the students agreed to arbitrate any claims against CEI, or that the arbitration clauses apply to a controversy concerning a school's enrollment practices. We must interpret a contract to give effect to the mutual intention of the parties as expressed in the writing. (*Ben-Zvi v. Edmar Co.* (1995) 40 Cal.App.4th 468, 472-473.) CEI relies heavily on the "third party" language of

the "Arbitration Provision," but its definition of "we" and "us" shows the third party language refers to "*any subsequent holder* of this promissory note." Further, the "Arbitration Disclosure" shows arbitration covered "a dispute of any kind [that] arises with respect to this Note or your application for a loan . . . ."

There is no suggestion Sallie Mae had any authority to or intended to impose any arbitration requirement on disputes between the school and its students. As the individual plaintiffs note, "the school has its own direct relationship with the student, its own contract and is better situated to determine for itself exactly how it preferred to have such disputes resolved." Indeed, the arbitration clause in CEI's contract *excluded* state law claims of the nature here.

Moreover, CEI was not, of course, a party to the Sallie Mae promissory notes. "Generally speaking, one must be a party to an arbitration agreement to be bound by it. 'The strong public policy in favor of arbitration does not extend to those who are not parties to an arbitration agreement, and a party cannot be compelled to arbitrate a dispute that he has not agreed to resolve by arbitration.' " (*Buckner v. Tamarin* (2002) 98 Cal.App.4th 140, 142; *Victoria v. Superior Court* (1985) 40 Cal.3d 734, 739.) "Although '[t]he law favors contracts for arbitration of disputes between parties' [citation], ' "there is no policy compelling persons to accept arbitration of controversies which they have not agreed to arbitrate . . . ." ' " (*Victoria*, at p. 744; see also *Arista Films, Inc. v. Gilford Securities, Inc.* (1996) 43 Cal.App.4th 495, 501; *Boys Club of San Fernando Valley, Inc.*

v. Fidelity & Deposit Co. (1992) 6 Cal.App.4th 1266, 1271; *Chan v. Drexel Burnham Lambert, Inc.* (1986) 178 Cal.App.3d 632, 640.)

CEI submits that since it received loan funds as tuition, it is a nonsignatory "closely related" to the Sallie Mae promissory notes. CEI cites *Net2Phone, Inc. v. Superior Court* (2003) 109 Cal.App.4th 583 (*Net2Phone*), in which the court held "that where a private plaintiff which has itself suffered no injury files a representative action under [the UCL] alleging that certain of defendant's contractual provisions subject its customers to an 'unlawful, unfair or fraudulent business . . . practice' and the contract contains a forum selection provision, the plaintiff is bound to that provision just as defendant's customers would be bound had they filed the action themselves." (*Id.* at p. 585.) The court explained, "Consumer Cause is 'closely related' to the contractual relationship because it stands in the shoes of those whom it purports to represent. Its argument to the contrary is inconsistent with its position as a representative plaintiff. Were we to hold otherwise, a plaintiff could avoid a valid forum selection clause by having a representative nonparty file the action." (*Id.* at p. 589.)

Net2Phone is inapplicable. Here, in contrast to *Net2Phone,* the individual plaintiffs are *not* uninjured representatives prosecuting contract claims against a signatory to the contract. Rather, the plaintiffs' claims are against a third party nonsignatory for matters unrelated to the contract. CEI's reliance on *Buckner v. Tamarin*, *supra,* 98 Cal.App.4th 140, is also misplaced. There, the court acknowledged that under the following three circumstances a nonsignatory may be bound to a medical arbitration

agreement: an agent can bind a principal; spouses can bind each other, and a parent can bind a minor child. (*Id.* at pp. 142-143.) *NORCAL Mutual Ins. Co. v. Newton* (2000) 84 Cal.App.4th 64, is also unavailing as there the court held a woman who claimed coverage under her husband's medical malpractice insurance policy was bound by its arbitration clause. (*Id.* at pp. 72-84.)

Alternatively, CEI relies on a third party beneficiary theory. Civil Code section 1559 provides "[a] contract, made expressly for the benefit of a third person, may be enforced by him [or her] at any time before the parties thereto rescind it." "The contract need not be *exclusively* for the benefit of the third party, i.e., he [or she] need not be the sole or the primary beneficiary." (1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 665, p. 603.) "Insofar as intent to benefit a third person is important in determining his [or her] right to bring an action under a contract, it is sufficient that the promisor must have understood that the promisee had such intent." (*Lucas v. Hamm* (1961) 56 Cal.2d 583, 591.) The term "expressly" in Civil Code section 1559, however, means " 'in an express manner; in direct or unmistakable terms; explicitly; definitely; directly.' " (*City & County of San Francisco v. Western Air Lines, Inc.* (1962) 204 Cal.App.2d 105, 120; *Shell v. Schmidt* (1954) 126 Cal.App.2d 279, 290.) CEI adduced no evidence showing it was an intended third party beneficiary of the Sallie Mae promissory notes. (See *Neverkovec v. Fredericks* (1999) 74 Cal.App.4th 337, 349 [party urging third party beneficiary theory has burden of proof].)

CEI further contends the "issue of whether the arbitration agreement applies to this dispute is a matter for the arbitrator, not the courts, to decide." The "Arbitration Provision" states it applies to issues of "validity, enforceability or scope of this Arbitration Provision . . . ." CEI, however, does not cite the appellate record to show it raised this issue at the trial court. When a party provides a brief "without . . . record reference establishing that the points were made below," we may "treat the points as waived, or meritless, and pass them without further consideration." (*Troensegaard* v. *Silvercrest Industries, Inc.* (1985) 175 Cal.App.3d 218, 228.) Although we may review a purely legal question raised initially on appeal, we decline to do so here. Any arguable merit to CEI's argument is inconsequential as no reasonable arbitrator would find this action is subject to arbitration under the Sallie Mae promissory notes. Referring the matter to an arbitrator would merely cause additional delay.

The trial court properly denied CEI's motion to compel arbitration.[5]

DISPOSITION

The order is affirmed and remanded with directions. The trial court is directed to grant judgment on the pleadings on the complaint's UCL cause of action (third), and to

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5 Given our holding, we are not required to consider the trial court's reliance on waiver as an alternative ground for denying CEI's motion to compel arbitration.

allow the individual plaintiffs leave to amend the complaint to comply with Proposition 64. The parties are to bear their own costs on appeal.

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MCCONNELL, P. J.

WE CONCUR:

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AARON, J.

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IRION, J.