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**IN THE SUPERIOR COURT OF ARIZONA IN AND FOR
MARICOPA COUNTY**

MIKAYLA FOSS; ELEANOR WIERSMA;
ABIGAIL GARBARINO,

NO. CV2018-006692

Plaintiffs,

v.

COMPLAINT
(Declaratory Judgment; Other Contract)

ARIZONA BOARD OF REGENTS,

(Jury Trial Requested)

Defendant.

For their Complaint against Defendant, Plaintiffs allege as follows.

PARTIES

1. Mikayla Foss, Eleanor Wiersma and Abigail Garbarino are adults residing in Arizona as students at state universities, who have been classified as out of state students for tuition purposes. They submit to the jurisdiction of this Court for this matter. They bring this action on their own behalf and on behalf of a similarly situated class, as defined below.

2. Defendant Arizona Board of Regents ("ABOR") is the governing board for The University of Arizona ("U of A"), Arizona State University ("ASU"), and Northern Arizona University ("NAU") (collectively, the "Universities"). ABOR is a corporate body that may be sued.

1 **JURISDICTION AND VENUE**

2 3. This Court has jurisdiction over actions seeking declaratory and injunctive relief
3 under Article VI, Section 14 of the Arizona Constitution and A.R.S. §§ 12-123, 12-1801, and
4 12-1831. The Court has jurisdiction over all other claims pursuant to A.R.S. § 12-123.

5 4. Venue is proper in Maricopa County under A.R.S. § 12-401.

6 **FACT ALLEGATIONS**

7 5. During the 2017-18 school year, Mikayla Foss was a full time, non on-line student at ASU
8 majoring in Exercise and Wellness. She and her parents paid her tuition together and she is
9 liable to them for their share and she is also taking out a student loan. She is a United States
10 citizen and because her parents are California residents, she was classified as an out of state
11 student.

12 6. During the 2017-18 school year, Eleanor Wiersma was a full time, non on line student at the
13 U of A majoring in Criminal Justice. She and her parents paid her tuition together in 2017-18,
14 she is liable to them for their share and she is also taking out a student loan. She has a \$5,000
15 annual scholarship. She is a United States citizen and because her parents are Maryland
16 residents, she was classified as an out of state student.

17 7. During the 2017-18 school year, Abigail Garbarino was a full time, non on-line student at
18 ASU. She and her parents paid her tuition together, she is liable to them for their share and she
19 also has a Dean's Scholarship that could be applied to either in state or out of state tuition. She
20 is a United States citizen and because her parents are Michigan residents, she was classified as
21 an out of state student.

22 8. Congress passed and President Clinton signed the Personal Responsibility and Work
23 Opportunity Reconciliation Act of 1996, also known as the Welfare Reform Act. See 8 U.S.C.
24 §§ 1601-1646. The Act, in part, is a comprehensive statutory scheme for determining aliens'
25 eligibility for federal, state, and local benefits. Congress explicitly stated a national public
26 immigration policy of removing the availability of public benefits as an incentive for
27 immigration and of promoting the self-sufficiency of aliens.

28 9. 8 U.S.C. 1623(a), a part of the Act, states: "(n)otwithstanding any other provision of law, an

1 alien who is not lawfully present in the United States shall not be eligible on the basis of
2 residence within a State (or a political subdivision) for any postsecondary education benefit
3 unless a citizen or national of the United States is eligible for such a benefit (in no less an
4 amount, duration, and scope) without regard to whether the citizen or national is such a
5 resident.”

6 10. On June 21, 2017, the Arizona Court of Appeals construed this statute in *State Ex Rel.*
7 *Brnovich v. Maricopa C.C.C.B.D.*, 395 P.3d 714 (Ariz. App. 2017).

8 11. In determining whether in state tuition was a “postsecondary education benefit” as defined
9 in the statute, the Court held that in state tuition was “the quintessential residence-based,
10 postsecondary education benefit...” *Id.* at 717; see also, *Martinez v. Regents of the Univ. of*
11 *Cal.*, 50 Cal.4th 1277, 117 Cal.Rptr.3d 359, 241 P.3d 855, 865 (Cal. 2010).

12 12. In determining whether DACA recipients were “not lawfully present in the United States”
13 for purposes of receiving in state tuition, the Court held: “Congress has not defined DACA
14 recipients as ‘lawfully present’ for purposes of eligibility for in-state tuition or other state or
15 local public benefits. Congress has, conversely, authorized each state to determine whether
16 aliens, otherwise non-qualified under federal law, should be granted state or local public
17 benefits. Arizona’s statutory scheme for postsecondary education benefits does not demonstrate
18 an intent to create that eligibility for DACA recipients.” *Id.* at 728.

19 13. Regarding “on the basis of residence within a State,” the Board has clearly stated the in
20 state tuition rate is only available to DACA recipients who “were able to establish in-state
21 residency for tuition purposes...” See,
22 [https://www.azregents.edu/sites/default/files/news-releases/ABOR%20Statement%20on%20C](https://www.azregents.edu/sites/default/files/news-releases/ABOR%20Statement%20on%20Court%20Decision%20Regarding%20DACA%20Students%20June%2029%202017_0.pdf)
23 [ourt%20Decision%20Regarding%20DACA%20Students%20June%2029%202017_0.pdf](https://www.azregents.edu/sites/default/files/news-releases/ABOR%20Statement%20on%20Court%20Decision%20Regarding%20DACA%20Students%20June%2029%202017_0.pdf)

24 14. Regarding treatment of U.S. citizens who are paying out of state tuition at Arizona colleges,
25 while DACA recipients receive in state tuition, the Court held: “(s)hould a state extend
26 residence-based, in-state tuition benefits to non-qualified aliens, IIRIRA requires the benefit be
27 extended to all U.S. citizens and nationals, including those residing out-of-state...” *Id.* at 722
28 n.5.

1 15. On June 29, 2017, the Arizona Board of Regents issued a statement indicating that it would
2 ignore the Court's holding and extend in state tuition to DACA recipients who established state
3 residency for 2017-18, while charging U.S. citizens from other states out of state tuition.

4 16. On April 9, 2018, the Arizona Supreme Court upheld the Court of Appeals' ruling by a
5 vote of 7-0.

6 17. The filing is timely in that the students had no entitlement to in state tuition until the
7 Board's announcement that it would extend in state tuition to DACA recipients who proved
8 residency, on June 29, 2017.

9 **CLASS ACTION ALLEGATIONS**

10 18. Plaintiffs bring this action under Rule 23 of the Arizona Rules of Civil Procedure
11 ("ARCP"). Plaintiffs bring this action on their own behalf and on behalf of a putative class
12 which consists of:

13 a) individuals who attended the U of A, ASU or NAU;

14 b) during the 2017-18 school year;

15 c) who are United States citizens and were over 18 years of age when they paid their
16 tuition;

17 d) who were classified as out of state residents by either the U of A, ASU or NAU, for
18 the 2017-18 school year; and

19 e) who paid tuition in a sum greater than they would have paid, had they received the in
20 state tuition rate.

21 19. The requirements of Rule 23(a), Rule 23(b)(2) and Rule 23(b)(3) are met, as set
22 forth below.

23 **NUMEROSITY**

24 20. Arizona published cases on numerosity are few and give little guidance. For
25 that reason and other reasons, Arizona courts view federal cases construing Rule 23 as
26 authoritative. *ESI Ergonomic Solutions, LLC v. United Artists Theatre Circuit, Inc.*, 203 Ariz.
27 94, 98 fn.2, 50 P.3d 844 (App. 2002). Under federal law, more than forty class members
28 satisfies the numerosity requirement. 1 Newberg on Class Actions, § 3.05 at 3-25 (3rd. Ed.

1 1992); Moore's Federal Practice, § 23.22(3)(a) (Bender 3rd Ed. 1999); *Stewart v. Abraham*,
2 275 F.3d 220, 226-27 (3rd Cir. 2001); *Consolidated Rail v. Town of Hyde Park*, 47 F.3d 473,
3 483 (2d Cir. 1995); *Mullen v. Treasure Chest Casino LLC*, 186 F.3d 620, 624 (5th Cir. 1999);
4 *Perez v. First American Title Ins.*, 2009 WL 2486003, 2 (D.Ariz. 2009) ("Generally, 40 or
5 more members will satisfy the numerosity requirement.")

6 21. The Court can take judicial notice that the proposed class has more than forty members,
7 published data from authoritative sources establishes this.

8 **COMMONALITY**

9 22. The commonality requirement "requires simply that there exist questions of law
10 or fact common to the class." *Lennon v. First National Bank of Arizona*, 21 Ariz.App. 306,
11 309, 518 P.2d 1230 (App. 1974). "The existence of shared legal issues with divergent factual
12 predicates is sufficient, as is a common core of salient facts coupled with disparate legal
13 remedies within the class." *Parra v. Bashas' Inc.*, 536 F.3d 975, 978 (9th Cir. 2008).

14 23. The legal and factual issues are not just shared, they are virtually identical. All events at
15 issue occurred in Arizona. One state statute of limitation applies on each cause of action.
16 Only Arizona affirmative defenses apply. There is a single legal issue and little factual
17 variance of any relevance.

18 **TYPICALITY**

19 24. There is little Arizona case law discussing specific criteria regarding typicality.
20 Federal law states: "(U)nder the rule's permissive standards, representative claims are 'typical'
21 if they are reasonably coextensive with those of absent class members; they need not be
22 substantially identical." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998); *Staton*
23 *v. Boeing*, 327 F.3d 938, 957 (9th Cir. 2003).

24 25. In this case, class representatives are in a factual and legal posture identical to
25 the class members.

26 **ADEQUACY**

27 26. Under Arizona law, Plaintiffs' attorneys must be qualified, experienced and
28 reasonably capable. Lead Plaintiffs must not collude with the Defendants and must not have

1 interests which are obviously antagonistic to the interests of the class they seek to represent.
2 *Lennon, supra*, at p. 309. The burden of proving inadequacy is on the defendant. *Lewis v.*
3 *Curtis*, 671 F.2d 779, 788 (3rd Cir. 1982).

4 27. In order to determine whether obvious antagonism of interests exists, federal
5 courts have looked to whether a lead plaintiff is a spouse, family member or employee of
6 counsel, if any counsel is a class member, if there are unusual bonus fees for lead plaintiffs
7 which could create a conflict with class members and whether lead plaintiffs will promptly
8 move for certification. *Lyon v. Ariz.*, 80 F.R.D. 665, 667-68 (D.Ariz. 1978).

9 28. Counsel are not members of the class and no lead plaintiff is a spouse, family member or
10 employee of counsel. Lead Plaintiffs will promptly move for certification and no bonus fees
11 have been promised to lead Plaintiffs.

12 29. Plaintiffs' counsel are also qualified, experienced and reasonably capable, having both
13 litigated successfully in this area of the law for decades.

14 **RULE 23(B)(2), ARCP**

15 30. Rule 23(b)(2) certification is appropriate if "the party opposing the class has
16 acted or refused to act on grounds generally applicable to the class, thereby making appropriate
17 final injunctive relief or corresponding declaratory relief with respect to the class as a whole";
18 Rule 23(b)(2), ARCP.

19 31. This criteria is clearly satisfied.

20 **RULE 23(B)(3), ARCP**

21 32. Rule 23(b)(3) certification is appropriate if "the questions of law or fact common to the
22 members of the class predominate over any questions affecting only individual members,
23 and...a class action is superior to other available methods for the fair and efficient adjudication
24 of the controversy."

25 33. Courts consider "predomination" factors and "superiority" factors. With regard
26 to predomination, the Court should certify even in cases where there is large factual variance
27 between class members if "questions of law common to all class members" lie at the heart of
28 the case. *Godbey v. Roosevelt School Dist.*, 131 Ariz. 13, 17-18, 638 P.2d 235 (App. 1981).

1 This case fits that description perfectly.

2 34. With regard to superiority, Rule 23(b)(3) directs the Court to look at: a) the
3 desirability of concentrating claims in this forum; b) difficulties of management; c) current
4 claims by class members; and d) class members' interest in controlling their individual claims.
5 Rule 23(b)(3), ARCP.

6 35. Addressing forum desirability first, this is the only feasible forum. Regarding
7 difficulties of management, all Defendants and Plaintiffs are in one state, governed by the law
8 of one state, the facts are fairly uniform and the case turns on a few issues of law. Regarding
9 the final two factors, this case perfectly fits a description offered by the 9th Circuit: "From
10 either a judicial or litigant viewpoint, there is no advantage in individual members controlling
11 the prosecution of separate actions. There would be less litigation or settlement leverage,
12 significantly reduced resources and no greater prospect for recovery." *Hanlon, supra* at p. 1023.

13 CAUSES OF ACTION

14 A. DECLARATORY AND INJUNCTIVE RELIEF PURSUANT TO A.R.S. § 15 12-1831 ET. SEQ.

16 36. All Plaintiffs repeat all allegations as if fully set forth herein.

17 37. An actual controversy exists. All members of the class have legal rights, legal status and/or
18 legal relationships that are affected by the construction of a statute and contracts. See, A.R.S. §
19 12-1832. The members of the class can seek injunctive and declaratory relief as to whether a
20 breach has occurred or whether they are entitled to benefits under the statute. See, A.R.S. § 12-
21 1832 and 1833. The provisions of A.R.S. § 12-1841 do not apply, because no municipal
22 ordinance is at issue and no claim of unconstitutionality is asserted.

23 38. Plaintiffs are entitled to in state tuition rates for the 2017-18 school year under 8 U.S.C.
24 1623(a). They request the Court so declare, enjoin the continued violation of this statute and
25 order the disgorgement of funds improperly collected from them in light of the statute.

26 B. BREACH OF CONTRACT

27 39. All Plaintiffs repeat all allegations as if fully set forth herein.

28 40. Plaintiffs and Defendants engaged in an offer, acceptance, an exchange of consideration in

1 the form of tuition monies and educational services and a meeting of the minds. As the class is
2 defined, all have the capacity to contract and no portion of the statute of frauds (A.R.S. § 44-
3 101) applies, but the contract was clearly evidenced by a writing in any event.

4 41. Defendants have charged an amount that they are specifically prohibited from charging by
5 federal law. In *White v. Mattox*, 619 P.2d 9, 127 Ariz. 181, 184 (Ariz. 1980), the Court held:
6 “In the instant case, the Legislature has not prohibited the transfer of liquor licenses. Transfers
7 are not per se illegal. The transfer is made subject to conditions and must conform to the
8 standards prescribed by the State. Hence, since the act of transfer is not forbidden as illegal or
9 contrary to public policy, recovery of the purchase price for the license should not be
10 withheld.” The Court then ordered rescission.

11 42. Identically, Congress has not prohibited charging tuition to out of state students or stated
12 that doing so is against public policy. This is not per se illegal. But the tuition charged must be
13 subject to conditions described by 8 U.S.C. § 1623. A failure to do so is a basis for rescission
14 and recovery of those funds illegally charged, as it was in *White*, supra.

15 C. UNJUST ENRICHMENT

16 43. All Plaintiffs repeat all allegations as if fully set forth herein.

17 44. Should the Court hold that the class lacks a remedy at law against the Defendants,
18 Defendants’ improper collections in violation of federal law has caused them to be enriched
19 and plaintiffs in the class to be impoverished. The enrichment and impoverishment are
20 connected and there is an absence of justification for the enrichment and the impoverishment.

21 45. Plaintiffs in the class have been damaged in the amount of the sums collected from them in
22 violation of federal law.

23 PRAYER FOR RELIEF

24 WHEREFORE, Plaintiffs respectfully request that the Court:

- 25 A. Certify this case as a class action, pursuant to Rule 23(a), 23(b)(2) and 23(b)(3), ARCP;
26 B. Order disgorgement of sums illegally collected;
27 C. Award damages in the amount of sums improperly collected;
28 D. Award pre and post judgment interest;

1 E. Enjoin Defendants from any further attempt to file or collect out of state tuition from a
2 United States citizen who is classified as being subject to out of state tuition rates, while
3 simultaneously granting in state tuition rates to students who come under DACA;

4 F. Award costs and attorneys fees under A.R.S. § 12-341.01, the private attorney general
5 doctrine, the common fund doctrine and any and all other theories that have the potential to
6 provide for an award of fees;

7 G. Provide such other relief as the Court deems just.

8
9 SIGNED THIS 24TH DAY OF April, 2018

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