BOTTINI & BOTTINI, INC.

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July 18, 2013

VIA CM/ECF

Ms. Molly C. Dwyer
Clerk of Court
Office of the Clerk
United States Court of Appeals
for the Ninth Circuit
P.O. Box 193939
San Francisco, CA 94119-3939

Re: *Ferguson et al. v. Corinthian Colleges, Inc. et al.*, No. 11-56965 (9th Cir.)

Dear Ms. Dwyer:

On behalf of Plaintiffs-Appellees (the "Students"), we write in response to the June 26, 2013 Rule 28(j) letter of Defendants-Appellants – a for-profit education company and its subsidiaries ("Corinthian") – regarding *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013) ("*Amex*"), and *Kilgore v. KeyBank, N.A.*, No. 09-16703, 2013 WL 1458876 (9th Cir. Apr. 11, 2013) (*en banc*).

Amex reaffirms the validity of the "inherent conflict" doctrine. 133 S. Ct. at 2310. Because that doctrine forms the basis for California's *Broughton-Cruz* rule, *Amex* supports the Students' argument that the *Broughton-Cruz* rule remains good law post-*Concepcion*. Appellees' Answering Br. at 23-25.

Contrary to Corinthian's letter, *Amex* has nothing to do with state law. The statement in *Amex*'s dissent cannot preclude the Students from invoking the "inherent conflict" doctrine to vindicate their *state* statutory claims because the Supreme Court's decision in *Perry v. Thomas* and numerous circuit-court decisions render unenforceable any arbitration agreement that deprives a party of *state* statutory rights. *See* 482 U.S. 483, 492 n.9 (1987); Appellees' Answering Br. at 36-38 (citing *Kaneff v. Del. Title Loans, Inc.*, 587 F.3d 616 (3d Cir. 2009); *Kristian v. Comcast Corp.*, 446 F.3d 25 (1st Cir. 2006); *Booker v. Robert Half Int'l, Inc.*, 413 F.3d 77 (D.C. Cir. 2005); *Alexander v. Anthony Int'l, L.P.*, 341 F.3d 256 (3d Cir. 2003)).

The *en banc* proceedings in *Kilgore* further support the continued validity of the *Broughton-Cruz* rule. The three-judge panel's opinion in *Kilgore* erroneously endorsed the sweeping argument – advanced by Corinthian here – that the *Broughton-Cruz* rule, as recognized in *Davis v. O'Melveny & Myers*, 485 F.3d 1066 (9th Cir. 2007), was vitiated by *Concepcion*. But the order granting rehearing *en banc* stripped that opinion

of all precedential effect. *Kilgore v. KeyBank, N.A.*, 697 F.3d 1191, 1192 (9th Cir. 2012). Because the *en banc* Court refused to reach the "broad argument" endorsed by the three-judge panel, *Kilgore*, 2013 WL 1458876, at *5, the *Broughton-Cruz* rule remains on the books, and *Davis* remains binding.

Following *Davis*, the Court should reject Corinthian's arguments because they rely on the three-judge panel opinion in *Kilgore*, which lacks precedential value.

Respectfully yours,

s/ Albert Y. Chang
Albert Y. Chang
for BOTTINI & BOTTINI, INC.

CERTIFICATE OF SERVICE

U.S. Court of Appeals Docket Number: 11-56965

I hereby certify that on July 18, 2013, I caused the foregoing document to be filed electronically with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: July 18, 2013

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s/ Albert Y. Chang
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