Court of Appeals, State of Colorado 2 East 14th Street, Denver, CO 80203	DATE FILED: February 4, 2021 10:07 AM FILING ID: BEEE281B9251A CASE NUMBER: 2020CA1692
Appeal From: District Court, City and County of Denver, Colorado Judge Ross B.H. Buchanan, No.: 2014CV34530	
Plaintiffs-Appellees/Cross-Appellants: State of Colorado ex rel. Cynthia H. Coffman, Attorney General, and Julie Meade, Administrator, Uniform Consumer Credit Code, v. **Defendants-Appellants/Cross-Appellees:** Center for Excellence in Higher Education, Inc., a not-for-profit company; CollegeAmerica Denver, Inc., and CollegeAmerica Arizona, Inc., divisions thereof, d/b/a CollegeAmerica; Stevens-Henager College, Inc., a division thereof, d/b/a Stevens-Henager College; CollegeAmerica Services, Inc., a division thereof, Carl Barney, Carl Barney Living Trust, and Eric Juhlin.	▲COURT USE ONLY▲ Court of Appeals Case No.: 2020CA1692

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Opening Brief of Carl Barney, Carl Barney Living Trust, and Eric Juhlin

Certificate of Compliance

I hereby certify that this Opening Brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The Opening Brief complies with the applicable word limits set forth in C.A.R. 28(g). It contains 8,948 words, including screenshots.

The Opening Brief complies with all other requirements of C.A.R. 28. It contains, under a separate heading before discussing each issue, a concise statement of (1) the applicable standard of review with citations to authority; and (2) whether the issue was preserved, and if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

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Statement of Case

In 2014, the State of Colorado (State) sued CollegeAmerica Denver, Inc., its Chief Executive Officer Eric Juhlin, its former CEO and Chairman Carl Barney, as well as the Carl Barney Living Trust (Trust), under the Colorado Consumer Protection Act (CCPA). *See* 14CF1-34.[1] In addition to substantial civil penalties, the State sought more than $232 million in restitution from the individual defendants, even though that enormous sum bore no relation to any individual or even collective net profits. 17CF10945. The trial court held a four-week trial in 2017. Almost three years later, on August 21, 2020, the trial court entered judgment for the State, holding the individual defendants jointly and severally liable on all six CCPA claims and imposing for each claim the maximum civil penalty of $500,000—totaling $3 million. Op. ¶767-68.[2]

[1] The separate court files are cited throughout by year/CF/page. So, for example, the State's complaint is located at14CF1-34 or in the 2014 court file at pages 1-34.

[2] The trial court's August 21, 2020 opinion and judgment, which is located at 20CF1-160, is cited throughout as "Op." followed by the page or paragraph number.

Factual Background

1. The non-school defendants.

Carl Barney. Mr. Barney founded CollegeAmerica in the early 1990s. Op. ¶1. He served as the college's Chairman and Chief Marketing Officer for a time. Tr. H:10-11.[3] In both capacities, Mr. Barney was involved in CollegeAmerica's advertising and admissions practices.

Mr. Barney worked with the management team to create CollegeAmerica's general advertising framework. Ex. 570(1:187).[4] Many of the messages the college used focused on the general value of higher education and referenced Bureau of Labor Statistics (BLS) data to demonstrate that higher education generally leads to higher earnings over a student's lifetime. *See* Ex. 503(1:100); Op. ¶43.

Similarly, Mr. Barney was involved in the implementation of CollegeAmerica's general admissions practices. He compiled the admissions consultant manual (AC manual) which explained CollegeAmerica's admissions process known as the 16 Steps. Ex. 198(2:1862). The 16 Steps guided admissions

[3] The trial transcripts are cited by the lettered exhibits attached to the State's post-trial proposed findings, just as they are cited in the trial court's opinion. So, Tr. H:10 is page ten of the lettered "H" transcript.

[4] Trial exhibits are cited by their original number (with volume and page number). So, Ex. 570 (found in exhibits volume 1 at page 187) is Ex. 570(1:187).

consultants through the admissions process from the prospective student's first visit through the first week of classes. *See Id*.

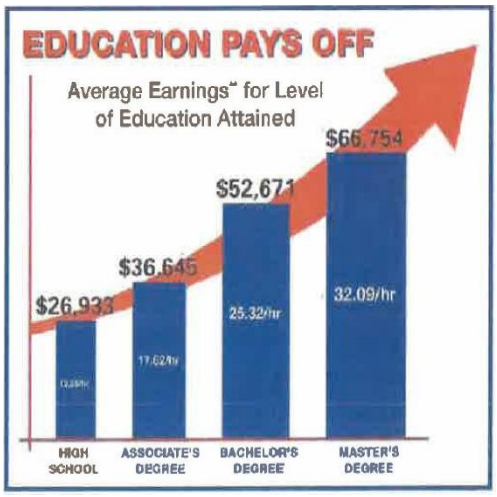
Both the advertising and admissions practices stressed the need for being scrupulously honest. Advertising and promotional materials have always been under close scrutiny by the United States Department of Education and the college's accreditor. Ex. 425(2:1206). So Mr. Barney stressed the importance that all promotional materials be carefully reviewed for clarity, compliance, accuracy, and honesty. *See Id.* at 1-2.

To that end, he required that all ads be created using checklists and that each ad be approved by CollegeAmerica's General Counsel and Vice President of Accreditation. Ex. 425(2:1207). Later, this policy evolved to require the final approval of the CEO or Chief Marketing Officer. Ex. 697(1:480).

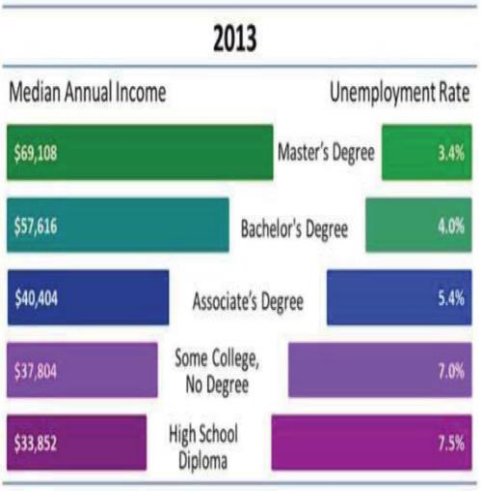
The AC manual similarly stressed the importance of honesty when dealing with prospective students. Ex. 198(2:1809) ("It may be hard, but it is okay to not enroll a student if it is the honest thing to do—if our college is not right for them."). CollegeAmerica's approach to admissions eschewed the hard sell tactics that Mr. Barney had observed at other colleges. Tr. I:32 ("[N]ever push or pressure people who legitimately want to think about it."). *See* Tr. I:14, 50.

In evaluating both practices, Mr. Barney relied on his knowledge of industry practice. He regularly reviewed advertisements from other colleges for ideas, Tr. I:101-102, and he routinely saw BLS data in most advertisements, Tr. I:102-104-06. He never saw any college that advertised its own salary data. Tr. I:106.

Indeed, several of the advertising messages at issue in this case are frequently used in higher education, including by the U.S. Department of Education. Op. ¶39. Consider one comparative example:



CollegeAmerica – Ex. 678(1:337).[5]



Colorado State University – Ex. 3517(4:902).

Both the admissions manual and CollegeAmerica's advertisements were routinely scrutinized by the college's accreditor, the Accrediting Commission for

[5] The trial court described the Education Pays Chart as the college's most frequently used advertising message. Op. ¶43.

Career Schools and Colleges (ACCSC), as well as by the Colorado Division of Private Occupational Schools (DPOS). Tr. I:6-10, 104-05 (Barney). Both agencies received copies and reviewed the college's advertisements to ensure compliance with express prohibitions on deceptive marketing.[6] Ex. 2093(3:1239) (ACCSC review) (describing 16 Steps as a safeguard). That rigorous oversight by higher education experts and regulators gave Mr. Barney confidence that the admissions and advertising practices provided honest and accurate information to prospective students. Tr. I:10 (Barney).

Eric Juhlin. Mr. Juhlin was hired as CollegeAmerica's Chief Executive Officer in May 2010. Op. ¶563; Tr. I:203 (Juhlin). Before then, Mr. Juhlin had owned his own colleges in Texas. Tr. J:8-10. Following a transition period, Mr. Juhlin took over corporate management of CollegeAmerica.

At some point between mid-2011 to 2012, Mr. Juhlin assumed responsibility for providing final approval of advertisements. Op. ¶565. Before reaching Mr. Juhlin's desk, each advertisement was first reviewed and signed off on by the Vice

[6] *See* Ex. 2132(3:768) (ACCSC's *Standards of Accreditation*) ("A school's advertising . . . [must be] truthful and accurate and avoid leaving any false, misleading, or exaggerated impressions[.]"); *see* CRS 23-64-123 (setting out specific deceptive trade or sales practices in education context); *see also* Tr. Q:14-16 (V. Oerman) (testimony of former DPOS program specialist about advertising review).

President of Advertising, the Vice President of Compliance, and the General Counsel to ensure that the advertisement was honest and accurate and not misleading or deceptive. Ex. 697(1:479-80). Mr. Juhlin gave final approval at the end of that review process.

CollegeAmerica continued to periodically use national wage data in its advertisements after Mr. Juhlin took over corporate management. This practice was consistent with what Mr. Juhlin had experienced throughout his career in higher education, including as a former board member of the Career College Association and as commissioner for the Accrediting Council for Independent Career Schools. Tr. J:9-10 (Juhlin).

Within the highly regulated post-secondary education industry, using BLS data was recognized as operating in a "safe zone." Tr. R:228-32, 235 (Jones). BLS data is the most reliable federal wage data available on occupational wage earnings.[7] It provides prospective students with helpful consumer information about potential career earnings, a primary area of interest for prospective students. *See id.* Because BLS data provides helpful information, it is ubiquitous in higher education. Tr. R:229, 233 (Jones).

[7] *See* 84 Fed. Reg. 49788, 49810 (Sept. 23, 2019) (explaining that BLS data "is helpful because a student is generally interested in earnings over the course of a career, not just a few years after completion of the program").

In fact, during the period at issue, the Department of Education required colleges, including CollegeAmerica, to make disclosures on its website about occupation-based wage data sourced entirely from BLS data. *See* 34 CFR 668.6(b)(1)(i) Tr. R:293 (Jones). Moreover, Mr. Juhlin testified that both ACCSC and DPOS reviewed CollegeAmerica's advertisements on several occasions without objection as to the use of BLS data. Tr. J:104, 121-22, 139-40.

In contrast with the general acceptance of BLS data, the industry practice has been not to use school-specific data. *See, e.g.*, Tr. I:106 (Barney); Tr. J:88 (Juhlin); Tr. C:299-302 (Goldhammer) (testifying that all six of the colleges she worked for used BLS data and none used school-specific data in marketing). That general consensus has taken shape for several reasons.

First, prospective students are generally more interested in potential career earnings (which BLS data represents) than they are in potential salary in the first year or two after graduating (which is often the only available school-specific data). *See, e.g.*, 84 Fed. Reg. 49788, 49810 (Sept. 23, 2019). Second, prospective students may be more likely to misinterpret school-specific data as an express promise of what they can earn. *See, e.g.*, Tr. M:127 (Beales). Third, disclosing school-specific wage data requires considerable line-drawing without any consensus among schools, which is likely to increase consumer confusion. Tr.

R:210-211, 241-42 (Jones). Finally, the lack of prescriptive rules or consensus about how to calculate and disclose school-specific data puts colleges at risk of facing student consumer complaints. Tr. J:85-88 (Juhlin).

Before disclosing school-specific wage data, a school must make several judgment calls about what information to calculate and report—e.g., what is the minimum number of students necessary to ensure the information is representative; should schools count students who are currently unemployed; should schools exclude students who are physically unable to work; should schools exclude students pursuing additional education; how often should the data be updated; and how should a school treat seismic economic events like the Great Recession. Tr. J:82-88 (Juhlin). Some states have developed school-specific wage disclosure rules although they differ from one another in key respects. The U.S. Department of Education initially set out an approach to measure programs using school-specific data, but it later abandoned that effort, in part because of disagreements about how to answer similar questions. *See generally* Tr. R:207 (Jones).

Colorado has never issued prescriptive school-specific wage data disclosure requirements. So a school attempting to do so would have to wrestle, on its own, with disputed data questions. Such discretion brings with it a heightened risk that potential students would be confused about how the college calculates its school-

specific wage information. *See* Tr. J:85, 204-06 (Juhlin). Mr. Juhlin viewed the continued use of BLS data as the safest course for CollegeAmerica. Tr. J:88 (Juhlin). At no point did Mr. Juhlin believe that CollegeAmerica's use of BLS data was misleading students. No student ever said to Mr. Juhlin, and no CollegeAmerica employee ever reported to him that any student said, that they expected to attain the truthful BLS wage earnings referenced and cited in CollegeAmerica's advertisements. Tr. J:196.

Carl Barney Living Trust. Up until December 31, 2012, the Trust was the sole shareholder of CollegeAmerica Denver, Inc., which operated the college under the same name. Op. ¶3. On that date, CollegeAmerica merged into the preexisting nonprofit entity Center for Excellence in Higher Education (CEHE). Following the merger, Mr. Barney was named CEHE's chairman and Mr. Juhlin its CEO. Op. ¶4.

2. The State's case.

The State filed suit under the CCPA in 2014 seeking restitution, even from the individual defendants, totaling $232 million based on all tuition and fees paid to CollegeAmerica dating back to 2007. 17CF10945. It also sought another $3 million in civil penalties and several injunctions. *Id.* The defendants requested a jury trial; the State objected. 15CF4704, 16CF43-50.

At trial, the State argued that the defendants violated the CCPA in six ways: (1) using BLS and other national wage data in the college's advertisements and not disclosing CollegeAmerica's own graduates' wages during the admissions process; (2) misreporting the college's graduates as employed in-field to its accreditor and on its website; (3) representing that its institutional loan program, EduPlan, helps make college affordable; and (4-6) misrepresenting discrete aspects of three educational programs (EMT, sonography, and radiology). 17CF10940-44. The State also argued that the Trust was liable for Mr. Barney's personal liability under an alter ego theory. 15CF203-06.

Despite a massive investigation of the defendants and interviewing scores of CollegeAmerica's students, the State provided *no evidence* of consumer confusion related to CollegeAmerica's advertisements. Not a single student testified to any confusion about the BLS data CollegeAmerica used. Instead, the State's own student witness testified that he understood the advertised BLS data reflected national average salaries—not the college's own graduates' information. Tr. B:114 (Dean). In addition, the State's investigator understood that the figures were not CollegeAmerica-specific. Op. ¶75.

3. The trial court's decision.

After a four-week trial that ended in November 2017, Judge Buchanan remained undecided for nearly three years, even though the State had sought urgent, extraordinary equitable relief to "protect" students. The trial court's extreme delay was the subject of state judicial commission proceedings that are addressed in a sealed portion of the appellate record, *see* S-CF 2947 (order sealing exhibits), and a separate sealed file transmitted to this Court on January 25, 2021. In January 2020, after Mr. Barney made an initial complaint,[8] the state commission began monitoring the delay (which by then had extended more than two years) and urged Judge Buchanan on many occasions to issue a judgment.

Eight months later, Judge Buchanan entered his final judgment on August 21, 2020 at 4:46 a.m (the significance of which is revealed in the sealed file). The trial court entered judgment against each defendant on each CCPA claim and imposed the maximum civil penalty.

In support of its judgment against the individual defendants and the Trust, the trial court made factual findings copied nearly word-for-word from the State's proposed findings of fact and conclusions of law. *Compare* 17CF10890-93 ¶¶625-646 *with* Op. ¶¶563-584.

[8] Mr. Juhlin later made a complaint in May 2020.

Summary of Argument

After a nearly three-year delay, the trial court copied word-for-word the State's findings of fact supporting personal liability.[9] *Compare* 17CF10890-93 ¶¶625-646 *with* Op. ¶¶563-584; *see Uptime Corp. v. Colorado Research Corp.*, 161 Colo. 87, 94 (1966) ("The combination of circumstances here[—i.e., delay and verbatim copying—]would undoubtedly lead us to give very little weight to the trial court's findings when examining them to determine their propriety in light of the evidence.").

Judge Buchanan conceded during a recent hearing that he "use[d] the state's proposed findings of fact [and] conclusions of law as a starting point." Tr. (Dec. 2, 2020) p. 70:24 -71:1. But he assured the defendants that he "checked every paragraph, [he] checked every citation" and "was very careful about that." *See Id.* at 71:4-5. Yet within just the findings of fact and conclusions of law addressing personal liability, there are multiple obvious errors even the lightest review would have caught.

Take one example:

[9] This statement is true with the exception of six words in Op. ¶564, where the trial court changed "positions which he **holds today**" in 17CF10890 ¶626 to "positions which he **held at the time of trial**," and the trial court's preference to drop "Tr." in citations to Exhibit Transcripts.

	Finding of Fact	**Conclusion of Law**
What the State & the Court said.	"Juhlin had knowledge that Defendants did not offer EMT . . . at the Colorado campuses. **Ex. I at 237:3-5**." *See* 17CF10891 ¶634 & Op. ¶572 (emphasis added**).**	"At all times, Juhlin had knowledge that Defendants did not offer EMT . . . at the Colorado campuses. **Ex. I at 237:3-5**." *See* 17CF10928 ¶799 & Op. ¶713 (emphasis added).
What the record says.	"A. I don't know. As, again, I said I don't know specific categories of it there were specific categories I was designated for. I was the 30(b)(6) [witness]." **Ex. I at 237:3-5.**	Questioning Mr. Juhlin about his prior 30(b)(6) deposition testimony about EMT training. **Ex. I at 237:3-5.**

The trial court found that Mr. Juhlin made **knowingly** false representations about EMT training based on knowledge Mr. Juhlin acquired when he testified as a 30(b)(6) corporate witness. *See* Op. ¶¶572, 713. That mistake would have been apparent had the trial court done even a cursory review of the testimony.

Beginning with the question preceding Mr. Juhlin's cited testimony and continuing through Ex. I at 238:15, there are six clear references to Mr. Juhlin's prior 30(b)(6) testimony about EMT training. And at least when the testimony occurred, the trial court understood the State to be asking Mr. Juhlin if he could recall "the information he learned six months ago." Ex. I:237-238. More to the

point, Mr. Juhlin *was not even employed* by CollegeAmerica when the alleged EMT misrepresentations were made.

Consider another example involving Mr. Juhlin's testimony:

	Finding of Fact	**Conclusion of Law**
What the State & the Court said.	"Since 2010, 90% of Defendants' advertisements have been reviewed and approved by Juhlin or Carl Barney. *Id.* at 213:2-5." 17CF10890 ¶627 & Op. ¶565 (**citing Ex. I at 213:2-5**).	"[A]fter being hired as the CEO in 2010, Defendant Juhlin also reviewed and approved all CollegeAmerica advertisements. *See* Ex. I at 212:5-213:15." 17CF10928 ¶798 & Op. ¶712 (**citing Ex. I at 212:5-213:5**).
What the record says.	"[Q] . . . was written; is that right? A. Yeah. Q. Or a Data Letter. A. I can't remember which it was either." **Ex. I at 213:2-5.** Presumably, the finding relates to **Ex. I at 207:1-18**, where Mr. Juhlin testified that starting between **mid-2011 into 2012**—not 2010—90% of the ads would have been reviewed by him or Mr. Barney.	Testimony regarding CA's Medical Specialties program. **Ex. I at 212:5-213:5**.

More important than citing to the wrong page, the State misstates the testimony. Mr. Juhlin testified he began reviewing advertisements "in mid-2011 into 2012." Ex. I:207. Even then, he did not review all advertisements. *Contra* Op. ¶712. If the trial court had checked the State's citation to Mr. Juhlin's testimony, those mistakes would have been plain.

In contrast to the appearance of careful consideration owing mostly to the opinion's length at 160 pages, the trial court failed to consider the trial testimony or evidence. Accordingly, this Court should "give very little weight to the trial court's findings." *See Uptime Corp.*, 161 Colo. at 94.

The trial court erred by imposing CCPA liability against the individual defendants.

The individual defendants cannot be liable under the CCPA for approving the use of *truthful* BLS data which the evidence presented showed consumers understood reflected national data—not the college's own information. Ex. M:95-96, 102 (Beales). Moreover, the trial court's conclusion, that the individual defendants intended to engage in deceptive trade practices related to CollegeAmerica's wage advertisements, is not supported by any evidence.

Second, the trial court erred by imposing CCPA liability against the individual defendants based on its own personal reaction to the EduPlan loan advertisements.

At the preliminary injunction stage, Judge Mullins reviewed the same advertisements and found they were not misleading based on the most natural reading of the language. That finding deserves heightened attention. Whereas Judge Mullins ruled promptly after hearing the evidence, Judge Buchanan ruled nearly three years after trial, when his memory had faded, and adopted almost verbatim the State's proposed findings about the EduPlan loan advertisements. *Compare* Op. ¶¶615-620 *with* 17CF10909-10 ¶¶720-726.

Beyond that, there is no evidence that either Mr. Barney or Mr. Juhlin ever reviewed or approved any of the EduPlan advertisements. In short, there is no legal or factual basis to impose liability on the individual defendants.

The same general flaw infected each of the remaining CCPA claims and the liability finding related to the Trust. By adopting word-for-word the State's proposed findings, the trial court imposed personal liability in instances when the individual defendants were not involved, were not aware of the alleged deceptive acts, and in some instances were not yet hired. So too, the trial court found the Trust liable under an alter ego theory based only on Mr. Barney's role as trustee and beneficiary, which is insufficient to support liability.

Finally, the trial court erred as a matter of law when it denied the individual defendants a jury trial and when it retroactively applied significant 2019 legislation

that eliminated the CCPA's significant public impact element. For these reasons, this Court should vacate the trial court's judgment.

Argument

1. There is no basis to impose personal liability against Carl Barney or Eric Juhlin.

The trial court took far too simplistic a legal approach to impose personal liability for alleged corporate wrongdoing. It relied almost exclusively upon the ruling in *Hoang v. Arbess* that in some cases corporate officers may be held personally liable without piercing the corporate veil. Op. ¶¶703-06 (citing *Hoang v. Arbess*, 80 P.3d 863 (Colo. App. 2003)). But, as explained by an experienced federal judge well versed in Colorado law, the "circumstances" in that "one-man operation" case were "unique and compelling, and . . . courts should be cautious when asked broadly to apply *Hoang* in other contexts." *Holloway v. Briller, Inc.*, No. 15-cv-01337, 2016 WL 915752 (D. Colo. Mar. 10, 2016).

Here, unlike in *Hoang*, the State challenged advertising of a large institution that had compliance officers and dozens of staff working closely over many years with expert regulators and accreditors to ensure that all representations were truthful and compliant. There were no CCPA violations by the institution that ran

the advertising. In no event should the trial court have imposed personal liability on Carl Barney or Eric Juhlin.

1.0. Preservation and Standard of Review.

The defendants argued that the CCPA claims failed as a matter of law and that there was no basis for imposing personal liability regardless. 17CF9518-9522; 17CF8853-64; 17CF8844-51. The trial court rejected those arguments and upheld both CCPA and personal liability. Op. 101-131. Appellate review is de novo. *Shekarchian v. Maxx Auto Recovery, Inc.*, 2019 COA 60, ¶33.

1.1. There is no basis to impose CCPA liability for advertising accurate BLS data.

For several reasons, the trial court erred in holding the individual defendants liable under the CCPA for advertising accurate BLS data and not disclosing CollegeAmerica-specific earnings information. Op. at 119-123.

The defendants did not make false statements. The trial court erred by holding that the individual defendants made false statements based solely upon its own personal reaction to the wage advertisements. *See Bell v. Publix Sup. Mkts., Inc.*, 982 F.3d 468 (7th Cir. 2020). In the context of an implied false claim, it is the reasonable consumer's reaction to the advertisement that is determinative—not the court's personal reaction. *See American Brands, Inc. v. R.J. Reynolds Tobacco Co.*,

413 F. Supp. 1352, 1357 (S.D.N.Y. 1976) ("[T]he court's reaction is at best not determinative and at worst irrelevant.").

Here, the trial court imposed CCPA liability based on advertisements even though the ads displayed accurate information, Op. ¶597, and even though each advertisement included "at least a link or a cite to the BLS data itself," inviting consumers "[t]o go check it out." Tr. T:56. In other words, the advertisements did not include express falsehoods. Instead, the trial court opined, without expressly saying, that the advertisements made implied false statements.

To find that an otherwise true claim made an implied false representation required the court to determine how reasonable consumers understood the advertisement. *See* Op. at 103-04 (quoting *Donaldson v. Read Magazine, Inc.*, 333 U.S. 178 (1948)). The trial court avoided that inquiry. Op. ¶598. Its failure to find that a reasonable consumer would be, or that actual students were, deceived into believing that BLS data was CollegeAmerica-specific is error.

The defendants lacked knowledge that any statement was false. Even assuming the advertisements made implied false statements (despite citing truthful BLS data), the trial court erred in concluding the individual defendants had knowledge that any advertisement made implied false statements. To be a deceptive trade practice under the CCPA, a false or misleading statement "must be

made 'with knowledge of its untruth.'" *Campfield v. State Farm Mut. Auto. Ins. Co.*, 532 F.3d 1111, 1120 (10th Cir. 2008) (quoting *Rhino Linings*, 62 P.3d at 147).

Here, the trial court found Mr. Barney and Mr. Juhlin personally liable, not based on their knowledge of any false statement, but instead based on their knowledge that, although many CollegeAmerica graduates met or exceeded the advertised national averages,[10] on average CollegeAmerica's graduates' wages were lower. Op. ¶709-10, 712. But the trial court did not find the advertisements untrue because the BLS average exceeded what the average CollegeAmerica graduate may have earned.[11] *See generally* Op. at 106 (linking to O*NET which

[10] *See* Tr. L:156 (Guryan) (explaining that his study showed several CollegeAmerica graduates who will meet or exceed BLS average lifetime earnings mark).

[11] Most other Colorado colleges use BLS data in their marketing, Ex. 3517(4:900) (39 of 57 Colorado colleges that participate in federal student aid programs), even though the national average wages exceed their own average graduates' wages, Ex. 3519(4:899). *See* Tr. S:66-79, 100-07 (Juhlin). Therefore, such a broad holding would impute wrongdoing on many Colorado colleges and expose them to significant liability.

The fact that BLS averages exceed school-specific wage averages is neither surprising nor cause for alarm. *See* 84 Fed. Reg. 49788, 49809-10 (Sept. 23, 2019) (the Department of Education describing BLS data as the most helpful information for prospective consumers notwithstanding "research that found earnings from the Bureau of Labor Statistics exceed the actual earnings of program graduates in gainful employment (GE) programs in 96% of programs analyzed").

provides BLS data is not a CCPA violation); *Id.* at ¶723(b) (permitting the defendants to use BLS data).

Although less than clear from the trial court's decision, the trial court ultimately found that what made the BLS advertisements untrue was the lack of an adequate disclosure that the BLS data was not CollegeAmerica-specific information. That is the only way to square up the trial court's factual findings with its injunction permitting the college to continue using BLS data in its advertisements. *See* Op. ¶723(b).

And, while the trial court found CollegeAmerica's disclosures inadequate to alert consumers that the BLS data depicted national wage data and not CollegeAmerica-specific data, that finding does not show that the individual defendants had either actual or constructive knowledge that the disclosures were inadequate. *See Holloway v. Briller, Inc.*, No. 15-cv-01337, 2016 WL 915752 (D. Colo. Mar. 10, 2016) (liability under the CCPA is appropriate where a corporate officer "did not have an honest belief that [the entity's] actions were permissible when they occurred"). This is particularly true given the absence of anything—e.g., student complaints—putting the individual defendants on notice of possible consumer confusion. *See, e.g.*, Tr. S:80-81 (Juhlin); Ex. I:104-05 (Barney).

Far from showing that either individual defendant approved the use of BLS advertisements with *knowledge* that the college's disclosure was inadequate, the evidence at trial confirmed that CollegeAmerica used a more informative disclosure than other colleges. *See* Tr. R:230-31 (Jones) (describing disclosure accompanying "You Could Earn about a Million Dollars More Over Your Lifetime if you Hold the Right Degree"). And as the trial court noted, every advertisement included "at least a link or a cite to the BLS data itself," inviting consumers "[to] [g]o check it out." Tr. T:56.

Indeed, Howard Beales, who previously served as the Bureau of Consumer Protection Chief at the Federal Trade Commission, testified that between the disclosures and repeated use of conditional language, no reasonable consumer would have confused the BLS data for CollegeAmerica-specific data. Tr. M:121, 125; *see* Tr. B:114 (Dean) (testifying that he understood the BLS data reflected national averages and not CollegeAmerica-specific data).

The defendants lacked an intent to deceive. The trial court's conclusion that the individual defendants withheld college specific wage data with the intent to deceive is not supported by any evidence. *See* CRS 6-1-105(1)(u) (an omission must be made with the intent to induce the consumer to enter into a transaction).

Initially, the trial court erred in concluding that, because the defendants knew that money was material to the typical CollegeAmerica student, they also knew that CollegeAmerica-specific wage data was material to a student's decision whether to enroll. *See* Op. ¶604. *But see* Tr. C:184 (Gordy) (testifying that students do not ask about CollegeAmerica's wages "very often"). That conclusion is not supported by the evidence. Nor is it a reasonable inference.

Prospective students are generally interested in career earnings (which BLS data reflects) and not earnings in the first few years after graduation (which is all the school-specific data shows). Ex. 501(1:98-99). By way of example, in the context of discussing prior gainful employment rules, which measured program performance based on school-specific wage data, the Department of Education explained that:

- BLS data may more accurately represent long-term, occupational earning potential rather than the expected earnings of an institution's graduates within two or three years of graduation;
- BLS data is the most reliable source of federal wage data available to help students understand earnings for particular occupations;
- BLS data is helpful because a student is generally interested in earnings over the course of a career, and not just a few years after completion of the program.

See 84 Fed. Reg. 49788, 49810 (Sept. 23, 2019).

Moreover, the trial testimony confirmed that the individual defendants chose not to advertise CollegeAmerica-specific wage data or to disclose such wage data in the admissions interview out of concern that doing so would increase student confusion and expose the college to increased risk of litigation, at least in contrast to using BLS data. *See* Tr. J:82 (Juhlin).

Indeed, Mr. Juhlin's testimony is instructive. He testified that, in the absence of prescriptive rules specifying how to calculate wages, how often to update wages, and the minimum number of students required to make the wage disclosure representative, disclosing the college's school-specific wage data unreasonably increased the likelihood of confusion and litigation. *See id.;* Tr. J:204-06 (Juhlin) (testifying about other colleges that had been sued based on the disclosure of their own salary data); Ex. M:131-34 (Beales).

And, while the trial court rejected that explanation (again, copying the State's findings of fact), it then decided to provide exactly those prescriptive rules in its injunction. Op. ¶723(d). The fact the trial court had to embody the role of policy maker and create prescriptive rules for calculating school-specific wage data confirms Mr. Juhlin's testimony. Making school-specific disclosures entails numerous judgment calls—any of which can create potential consumer confusion and pose risks to the school. Accordingly, this Court should vacate the trial court's

finding that the individual defendants engaged in a deceptive trade practice by approving advertisements with truthful BLS data and not disclosing CollegeAmerica-specific earnings data.

1.2. There is no basis to find the individual defendants liable based on EduPlan advertisements.

The trial court found that the defendants engaged in a deceptive trade practice through the college's EduPlan loan advertisements. Op. ¶¶615-20. Statements like EduPlan loans "can help you pay for college" (Ex. 678(1:376)), in the trial court's view, conveyed to students that they should take out EduPlan loans to attend CollegeAmerica with the implicit promise that their CollegeAmerica degree would allow them to easily pay back their EduPlan loans. Op. ¶¶617-18. In support of that determination, the trial court cited 19 advertisements (Op. ¶¶616, 618). None of those advertisements can support the trial court's broad reading.

1. Five advertisements include the headline "You Can Afford College," while providing information about tax credits, scholarships, private loans, and EduPlan loans. The advertisements specifically say of the EduPlan loans—they can help you pay for college. Ex. 679(1:408, 416, 421, 438, 453).

2. Four advertisements include the headline, "You Can Pay For College," while providing information about tax credits, scholarships, private loans, and EduPlan loans. The advertisements specifically say of the EduPlan loans—they can help you pay for college. Ex. 678(1:376); Ex. 679(1:400, 430, 446).

3. Two advertisements claim that "College May Now Be More Affordable" in direct reference to scholarships. Neither advertisement mentions EduPlan loans. Ex. 678(1:356, 374).

4. The remaining advertisements state that "EduPlan loans are available regardless of your credit history." Ex. 678(1:337, 344, 353, 369); Ex. 679(1:406, 414, 465).

In actuality, CollegeAmerica's advertisements conveyed the truthful message that EduPlan loans could help students pay tuition—nothing more. At the preliminary injunction stage, Judge Mullins found the EduPlan advertisements were not misleading, because EduPlan loans did help students afford tuition. 15CF4254 ("Without EduPlan many students would not be able to pay tuition; therefore, the loans do help students to afford college.").

Judge Buchanan's ultimate finding contradicted Judge Mullins'— not because Judge Buchanan heard new evidence that Judge Mullins did not—but because he adopted (with only a few immaterial changes) the State's unsupported findings as to the EduPlan advertisements. *Compare* Op. ¶¶615-620 *with* 17CF10909-10 ¶¶720-725. In doing so, the trial court endorsed the State's improper qualitative attack on CollegeAmerica's degrees. *See* Op. ¶¶407-562.

Even under the trial court's reading of the EduPlan advertisements, there is no basis for imposing personal liability on Mr. Barney or Mr. Juhlin. "A CCPA claim will only lie [when] the defendant *knowingly* engaged in a deceptive trade practice." *Crowe v. Tull*, 126 P.3d 196, 204 (2006) (emphasis added). Aside from moving into evidence the EduPlan advertisements,[12] the State failed to develop any testimony about the development of the EduPlan advertisements or to establish that Mr. Barney or Mr. Juhlin even approved the advertisements—let alone that they *knowingly* approved false representations in the advertisements.

[12] Although the trial court made findings about when the EduPlan advertisements ran (Op. ¶618), the trial court made no findings as to when the specific advertisements were developed or who developed the specific copy.

1.3. There is no basis to find the individual defendants liable for miscalculated employment rates.

The trial court also found the individual defendants jointly-and-severally liable with CollegeAmerica for misreported graduate employment rates in the absence of supporting evidence and based solely on their status as corporate officers.

The trial court found Mr. Barney and Mr. Juhlin personally liable for inflated employment rates sent to CollegeAmerica's accreditor and posted on the college's website. But corporate officers are personally liable only for their actions which violate the CCPA. *See Hoang*, 80 P.3d at 870. On this issue, the trial court (1) found the college hired a well-versed compliance team to prepare the employment rates (Op. ¶610); (2) concluded the compliance team prepared the employment rates (Op. ¶300); and (3) made no finding that the individual defendants knew or should have known the employment rates were inflated.

Indeed, the only finding the trial court made with respect to either individual defendant is that the employment rates were reported to Mr. Juhlin. Op. ¶567. Simply receiving the rates, however, would not have alerted Mr. Juhlin to the possibility that they were improperly calculated. Nor did the trial court find that Mr. Juhlin had actual or constructive knowledge that the employment rates were incorrect.

Moreover, in addition to hiring competent and dedicated staff to prepare the employment rates, CollegeAmerica also hired independent third parties to audit its reported employment rates in 2011 and 2015. Tr. Q:190-95; Op. ¶¶282-85. Those additional, conscientious steps to prepare and later double check the reported employment rates belie any actual or constructive knowledge by either individual defendant that the rates were inflated.

1.4. There is no basis to find the individual defendants liable for misrepresenting sonography's availability.

The trial court found two CCPA violations related to misstatements about CollegeAmerica's sonography program.

First, the trial court found that in March 2010, two employees falsely represented "to former students of Mile High Medical Academy that CollegeAmerica would be launching a Sonography program within a few months to a year." Op. ¶¶646, 385-86. The trial court imposed civil penalties under the CCPA based on the two former Mile High Medical Academy students who enrolled at CollegeAmerica based on alleged representations made during that meeting. Op. ¶752.

While the trial court imposed personal liability associated with this finding against both individual defendants, it made no factual findings from which to do

so. The trial court did not find that either individual was present at or had any knowledge about the meeting when it occurred or at any point before this litigation. *See Rhino Linings United States v. Rocky Mt. Rhino Lining*, 62 P.3d 142, 147 (Colo. 2003) (a false representation must be knowingly false when made). Importantly, Mr. Juhlin could not have engaged in any deceptive trade practice related to the March 2010 meeting because he did not join CollegeAmerica until May 2010, more than two months after the meeting took place.

Second, the trial court found that CollegeAmerica's decision to include the sonography program in its catalog, before the college even offered the program, constituted a false statement. Op. ¶754. The trial court noted that Mr. Juhlin made the decision to leave the program in the catalog. Op. ¶404. But the trial court made no finding as to Mr. Barney's knowledge or involvement in that decision.

Even if the trial court believed that simply including the sonography program in the catalog constituted a false statement, it did not find that Mr. Juhlin made the decision with the intent to deceive any prospective students. *Campfield v. State Farm Mut. Auto. Ins. Co.*, 532 F.3d 1111, 1120 (10th Cir. 2008) (quoting *Rhino Linings United States v. Rocky Mt. Rhino Lining*, 62 P.3d 142 (Colo. 2003) ("To be a deceptive trade practice under the CCPA, 'a false or misleading statement' must be made 'with knowledge of its untruth, or recklessly and willfully made without

regard to its consequences, and with an intent to mislead and deceive the plaintiff.'").

The trial court acknowledged that the college only included sonography in its catalog after it received approval from its accreditor to offer the program. Tr. J:17. And Mr. Juhlin testified that, under ACCSC *Standards*, the college is "allowed to put the program . . . in our catalog, and it's [the college's] decision whether or not to enroll students into that program." *Id.*

The court questioned whether it was necessary to include the program in the catalog before offering it, noting that the college should have clearly communicated to students that it was not offering the program. But the trial court did not find, and there is no basis to conclude, that CollegeAmerica or Mr. Juhlin did so with the intent to deceive. Tr. J:22 (Juhlin); Op. ¶648; *Gen. Steel Domestic Sales, LLC*, 230 P.3d 1275, 1282 (Colo. App. 2010) ("[T]he element of intent is a critical distinction between actionable CCPA claims and those sounding merely in negligence or contract.").

Because the trial court did not find that either individual defendant had knowledge of the purported false statements in 2010, and because the trial court did not find that Mr. Juhlin intended to deceive prospective students by keeping sonography in the catalog, there is no basis for finding personal liability.

1.5. There is no basis to find the individual defendants liable for misrepresenting EMT training.

The trial court found four distinct CCPA violations related to misstatements about EMT training at CollegeAmerica. Op. ¶¶740-746. Three of those alleged violations occurred between 2006-2009 (Op. ¶¶740, 744-45), years before Mr. Juhlin was even employed with CollegeAmerica. The only alleged violation that occurred during Mr. Juhlin's tenure resulted in a civil penalty of $2,000. Op. ¶¶742-43.

Yet the trial court imposed personal liability against Mr. Juhlin for *all four* violations and found him jointly and severally liable for the maximum civil penalty of $500,000. Op. ¶768. In doing so, the trial court impermissibly held Mr. Juhlin personally liable based solely on his official corporate capacity.[13] *See Hoang*, 80 P.3d at 867 (individual liability of corporate officers is appropriate when they personally engage in deceptive trade practices and not based solely on official capacity).

[13] In the context of discussing individual liability related to EMT training, the trial court based its finding that Mr. Juhlin had personal knowledge of events preceding his employment on knowledge Mr. Juhlin acquired as the college's 30(b)(6) designee in this litigation. *See* Op. ¶713 (citing Tr. I:237); *see* Tr. I:236-38 (discussing Mr. Juhlin's designation as corporate 30(b)(6) witness for EMT training issues).

The trial court also erred in imposing liability on Mr. Juhlin for the single violation that occurred during his employment. Op. ¶742. On a single day in August 2010, CollegeAmerica advertised EMT training on its website. *Id.* "Mr. Juhlin acknowledged that . . . was an error." Op. ¶380. He described it as an oversight while "building [the] website" and "copying [background] information" from another CEHE college's website. Tr. J:42-43. The trial court did not find, and the record does not support, that it was done knowingly or with the intent to deceive. *See Crowe*, 126 P.3d 196 ("A CCPA claim will only lie if the . . . defendant knowingly engaged in a deceptive trade practice."). A mistake does not imply an intent to deceive. Accordingly, the trial court erred by imposing liability against Mr. Juhlin.

Finally, the trial court also erred in imposing personal liability against Mr. Barney. Although the alleged CCPA violations occurred when he was Chairman, that is not a basis for personal liability. *See Hoang*, 80 P.3d at 864. The trial court made no findings supporting individual liability against him. As with Mr. Juhlin above, there is no basis to impose CCPA liability against Mr. Barney based on an unintentional error such as mistakenly including EMT on the website for one day, particularly in the absence of evidence that he was involved in or had knowledge of the posting.

The three remaining CCPA violations all relate to school catalogs and admissions binders that included information about EMT training because they covered CEHE colleges or campuses offering EMT training. Even if CollegeAmerica did not offer EMT at its Colorado campuses, some of the 17 campuses referenced in the documents did. *See* Op. ¶370. Each of the documents included a clear disclaimer that not every program was offered at every campus; prospective students should inquire with the individual campus. *See* Op. ¶371; Ex. 188(2:1771) ("Confirm availability at your campus."); Ex. 2037(4:856) ("The EMT option may not be available at all campuses.").

That does not support CCPA liability. Even if it would have been better to make available CollegeAmerica-specific documents, as the trial court seemed to suggest, that does not show an intent to deceive. *See Gen. Steel Domestic Sales, LLC v. Hogan Hartson LLP*, 230 P.3d 1275 (Colo. App. 2010) ("[T]he element of intent is a critical distinction between actionable CCPA claims and those sounding merely in negligence or contract."). Moreover, the record does not show that Mr. Barney had any knowledge of the relevant documents or that he knowingly made any false statement in them with the intent to mislead. *See Crowe*, 126 P.3d at 204.

1.6. There is no basis to find the individual defendants liable for misrepresenting LSO certification.

Since 2005, Colorado has required 80 didactic hours, 80 diagnostic images, and 480 clinical hours (no more than 160 of which can be earned in a school setting) to allow someone to sit for the limited scope radiology certification. Op. ¶308.

The college's Medical Specialties program satisfied the 80 didactic hours requirement, and it offered a 160-hour clinical that counted toward the clinical hours necessary to sit for the limited scope certification. CollegeAmerica graduates have qualified to sit for the certification. Op. ¶313.

Between 2006 and 2011, CollegeAmerica catalogs stated that one objective of the Medical Specialties program was to "include preparing students for possible certifications or licenses," including limited scope radiology. Ex. 2042(3:369).

The trial court found this misleading because the Medical Specialties program did not qualify students to sit for the certification immediately upon graduation. In addition to imposing civil penalties based on the catalog statements, the trial court also imposed civil penalties associated with five students "who enrolled in CollegeAmerica in connection with x-ray misrepresentations." Op. ¶747. All those students enrolled before Mr. Juhlin was hired as CollegeAmerica's CEO in May 2010.

Although the trial court found that CollegeAmerica was on notice by 2008 that consumers were confused about the Medical Specialties program (Op. ¶322), there is no evidence that either individual defendant had notice at that date. The record instead shows that Mr. Barney learned of possible confusion in May 2010, the month Mr. Juhlin was hired as CEO. The record also confirms, and the trial court found, that Mr. Barney immediately distributed notice of the requirements to sit for limited scope certification in Colorado to all admissions consultants—just two days after receiving the student complaint. Op. ¶343. Since then, no additional students have complained. Ex. I:72 (Barney); Ex. J:31-33 (Juhlin).

Rather than demonstrating an intent to deceive prospective students, the record shows a good-faith, conscientious effort to resolve student confusion. And nowhere in the decision did the trial court find expressly that either individual defendant had knowledge of any false representation. *See Gen. Steele Domestic Sales*, 230 P.3d at 1281 (noting that the element of intent is critical to an actionable CCPA claim).

2. The trial court erroneously imposed liability on the Trust under an alter ego theory because mere control—even total ownership—is not a sufficient basis to disregard its separate form.

2.0. Preservation and Standard of Review.

The defendants challenged the extension of liability to the Trust in their post-trial briefing. 17CF8860-61; 17CF9246-9247. The trial court rejected those arguments and upheld the Trust's legal liability under an alter ego theory. Op. 149-50. The legal standards for extending that liability and the legal sufficiency for doing so based on undisputed facts present legal issues to be reviewed de novo. *Shekarchian*, 2019 COA 60, ¶33.

2.1. Mere control does not warrant disregarding the Trust's separate form.

To the extent a trust can even have an alter ego,[14] it is only in "extraordinary circumstances" when the trust has been abused. *Connolly v. Englewood Post No. 322 VFR of the United States, Inc.*, 139 P.3d 639, 641 (Colo. 2006). Mere control—even complete control—of a trust as both the trustee and beneficiary is insufficient to warrant an alter ego finding. *See Dill v. Rembrandt Grp., Inc.*, 2020 COA 69, ¶43 (2020) ("[I]t is well settled that ownership alone is not a basis to find

[14] *See Church Joint Venture, L.P. v. Blasingame*, 947 F.3d 925, 935 (6th Cir. 2020) (Sutton, J., concurring) ("A corporation and a trust are not one of a kind.").

alter ego."); *see also Great Neck Plaza L.P. v. Le Peep Rests, LLC*, 37 P.3d 485, 490 (Colo. App. 2001) (affirming lower court's decision to disregard the corporate form based "on patterns of ownership, rather than on the isolated incident of ownership").

Mr. Barney's "complete control" of the Trust is the sole factual basis for the court's alter ego finding. *See* Op. ¶718. The trial court made no finding of any abuse or misuse of the Trust related to the CCPA violations; indeed, the court did not mention—let alone analyze—the three specific factors necessary to make an alter ego determination. *Dill*, 2020 COA 69 at ¶41-42.[15]

The court instead copied verbatim from the State's filing, which itself is a patchwork of half-thoughts.[16] In just seven paragraphs, the opinion (1) quickly raises—and just as quickly abandons without any application here—the point that trusts can be held directly liable under the CCPA; (2) asserts as "widely accepted"

[15] To establish an alter ego theory, it must be shown: (1) that the Trust is an alter ego of Mr. Barney; (2) that the Trust's separate form was used to perpetrate a fraud or defeat a rightful claim; and (3) that piercing the veil would achieve an equitable result. *Dill*, 2020 COA 69 at ¶42.

[16] *Compare* Op. ¶¶ 715-721 *with* 17CF10928-29 ¶¶ 801-807.

a legal proposition that is questioned;[17] and (3) relies on a proposition, quoted (from a secondary source) in dicta, which on its face is inapposite.[18] *See* Op. ¶¶ 715-721. This level of reliance on the State's words coupled with such little evidence of independent analysis by the trial court, as much and perhaps more so than the examples above, raises important questions about whether the opinion truly reflects independent judicial decision making.

Because mere control—even total ownership—is not a sufficient basis to warrant disregarding the separate form of the Trust, the trial court's finding of liability against the Trust should be reversed and vacated.

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[17] *See, e.g., Church Joint Venture, L.P. v. Blasingame*, 947 F.3d 925, 935 (6th Cir. 2020) (Sutton, J., concurring).

[18] The language quoted from *In re Cohen*, 8 P.3d 429 (Colo. 1999) in Op. ¶719 is itself a quote from a secondary source. The language is quoted in a portion of the opinion that is dicta, which is obvious from two statements that bookend it. *See In re Cohen*, 8 P.3d at 432 ("Apparently, the parties had no interest in questioning the validity of the written spendthrift trust.") *& id.* at 434 ("Therefore, whether the oral or written Trust was void ab initio is immaterial for disciplinary purposes and we do not reach that question."). And *Cohen* concerns whether existing creditors can access trust funds—not whether the trust itself is liable. Finally, the trial court did not consider whether *Cohen* applies to trust created under another state's laws. *See* 14CF3-4 (noting that the Trust is located in Nevada).

3. The trial court's imposition of personal liability and the State's pursuit of damages confirm the right to a jury trial.

3.0. Preservation and Standard of Review.

The defendants timely requested a jury trial and opposed the State's motion to strike, but the trial court struck the jury demand. 15CF4704, 16CF32-39, 16CF720-24. Appellate review is de novo. *People v. Shifrin*, 2014 CO 14, ¶14.

3.1. Personal liability confirms the defendants' right to a jury trial.

The primary authority the trial court cited to support personal liability entitles the individual defendants to a jury trial. Op. ¶¶703-06 (quoting *Hoang v. Arbess*, 80 P.3d 863 (Colo. App. 2003)). *Hoang* did not allow personal liability to be imposed in a bench trial; to the contrary, it held that whether an individual defendant could be personally liable for having engaged in the wrongdoing "is a question of fact for the jury." 80 P.3d at 868. Likewise, it held "the trial court erred in granting a directed verdict and dismissing [plaintiffs'] claims under the Consumer Protection Act." *Id.* at 869. At most, *Hoang* might entitle the State to have its personal liability claims get to a jury. Minimally, therefore, under *Hoang*, the judgment must be reversed and remanded for a jury trial on personal liability.

Joint-and-several monetary penalties are not "equitable' in nature. *See Liu v. SEC*, 140 S.Ct. 1936, 1949 (2020). The State's demand for $232 million in joint-and-several liability judgments against the individual defendants defeats the notion

that the State sought predominantly equitable relief. 17CF10945. What the State sought was money "damages"—punitive damages at that—far removed from "what each defendant received" in any "net profits from wrongdoing." *Liu,* 140 S.Ct. at 1945. The individual defendants were entitled to a jury trial before being held personally liable for any penalties, much less for $232 million bearing no relation to any individual or even collective net profits.

In addition, this case involving a $232 million demand for restitution (plus another $3 million in civil penalties) is not controlled by *People v. Shifrin*, which held there was no right to a jury trial in a CCPA case when the "state's primary objective" was to "put an end to [the wrongful] conduct" and the incidental monetary relief involved a "simple mathematical calculation" for mortgage borrowers "charged fees differently from what they had been told would be assessed." 2014 COA 14, ¶¶9, 12, 19 & n.2. Here, in contrast, the legal claims were "more substantive and more numerous than [any] equitable claim." *Mason v. Farm Credit of So. Colo.,* 2018 COA 46, ¶33.

4. The Court should enter judgment for the individual defendants as a matter of law.

4.0 Preservation and Standard of Review.

Over defense objections, 19CF128-36, 19CF608-21, 19CF820-44, the trial court retroactively applied a 2019 law eliminating the State's requirement to prove significant public impact. Op. at 109-117. This Court's review is de novo. *Taylor Morrison of Colo., Inc. v. Bemas Constr., Inc.*, 2014 COA 10, ¶16.

4.1 The trial court erred by not requiring proof of significant public impact.

As a general rule, statutes are "presumed" to apply prospectively only. *Ficarra v. Dep't of Regulatory Agencies*, 849 P.2d 6, 11 (Colo. 1993). This general presumption will give way to "a clear legislative intent" that the law should apply retroactively. *City of Golden v. Parker*, 138 P.3d 285, 290 (Colo. 2006). But no such clear legislative intent is apparent with respect to the CCPA provision. Even the trial court acknowledged the provision was "decidedly less than clear" on retroactivity. Op. at 116. In other words, the general presumption applies.

4.2 The CCPA violations should be vacated and remanded.

Because the trial court retroactively applied the 2019 legislative changes, it made no findings of significant public impact. Because the significant public impact element is factual, the judgment must be vacated and remanded. *See*

generally Hildebrand v. New Vista Homes II LLC, 252 P.3d 1159, 1169 (Colo. App. 2010). Given the small number of students affected by the narrow CCPA claims involving the EMT, radiology, and sonography programs (nine out of approximately 10,000 students), this Court should go further as to those claims and enter judgment for the defendants as a matter of law. *See Colo. Coffee Bean, LLC v. Peaberry Coffee, Inc.*, 251 P.2d 9, 24-26 (Colo. App. 2010).

Conclusion

For the reasons above, the Court should vacate and reverse the judgment imposing personal liability against the individual defendants and liability against the Trust, or, at a minimum, vacate and remand the case for jury trial.

Respectfully submitted,

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Certificate of Service

I hereby certify that on this 4th day of February 2021, this Opening Brief was filed and served via Colorado Courts E-filing upon all counsel registered to receive electronic notifications.

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