

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

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|---------------------------------|---|----------------------------------|
| Winthrop Resources Corporation, |) | |
| |) | |
| Plaintiff, |) | Case No. 0:17-cv-01448 (DWF/SER) |
| |) | |
| v. |) | JURY TRIAL DEMANDED |
| |) | |
| Apollo Education Group, Inc., |) | |
| |) | |
| Defendant. |) | |
| |) | |

**APOLLO EDUCATION GROUP, INC.’S
ANSWER, AFFIRMATIVE DEFENSES, AND COUNTERCLAIMS**

Defendant Apollo Education Group, Inc. (“Apollo”), by and through its attorneys, submits its Answer, Affirmative Defenses, and Counterclaims to Plaintiff’s Complaint and Demand for Jury Trial as follows:

Parties

1. Winthrop Resources Corporation (hereinafter “Winthrop”), is a corporation duly organized and existing under the laws of the State of Minnesota with its principal place of business located at 11100 Wayzata Boulevard, Suite 800, Minnetonka, Minnesota 55305.

ANSWER: In response to Paragraph 1, Defendant is without sufficient information to admit the allegations and, therefore, denies them.

2. Apollo Education Group, Inc. is a corporation duly organized and existing under the laws of the State of Arizona with its principal place of business located at 4025 South River Point Parkway, Phoenix, Arizona 85040.

ANSWER: In response to Paragraph 2, Defendant admits the allegations.

3. Apollo Education Group, Inc. was formerly known as Apollo Group, Inc. and changed its name to Apollo Education Group, Inc., effective November 15, 2013. Through an Amendment executed in January 2014, Winthrop and Apollo agreed that the lease and its schedules at issue in this lawsuit were amended to reflect Apollo's name change.

ANSWER: In response to Paragraph 3, Defendant admits the allegations.

4. Apollo Education Group, Inc., and Apollo Group, Inc. are hereinafter collectively referred to as "Lessee" or "Defendant."

ANSWER: In response to Paragraph 4, Defendant admits the allegations.

Jurisdiction and Venue

5. Venue is appropriate in this judicial district as Winthrop is located in this judicial district, some or all of the causes of action occurred in or arose from this judicial district, and Lessee has contractually consented to venue in this district.

ANSWER: In response to Paragraph 5, Defendant admits that venue is proper in this judicial district.

6. This Court has jurisdiction over the parties and the subject matter of this action.

ANSWER: In response to Paragraph 6, Defendant admits the allegations.

7. Lessee has transacted business in Minnesota, entered into contracts in Minnesota with Minnesota entities, and has had other intentional and substantial contacts with Minnesota.

ANSWER: In response to Paragraph 7, Defendant admits the allegations.

8. In its lease agreement with Winthrop, Lessee contractually consented to this Court's jurisdiction for any dispute concerning the leases at issue in this action.

ANSWER: In response to Paragraph 8, Defendant admits the allegations.

Factual Allegations

9. On or about December 21, 2010, Winthrop and Lessee entered into a contractual relationship pursuant to which Winthrop purchased substantial equipment and related items selected by Lessee and leased the equipment and related items to Lessee.

ANSWER: In response to Paragraph 9, Defendant admits that Winthrop and Defendant entered into a Lease Agreement (No. AP122110), which was signed by Defendant on or about February 11, 2011 and by Winthrop on or about February 21, 2011, and which was subsequently amended by Rider. Defendant denies the remaining allegations in Paragraph 9.

10. On or about February 11, 2011, Lessee executed Lease Agreement Number AP122110. A true and correct copy of Lease Agreement Number AP122110 is attached as Exhibit A to this Complaint and incorporated herein by reference.

ANSWER: In response to Paragraph 10, Defendant admits only that the document attached as Exhibit A was the document initially executed by Defendant on or about February 11, 2011 and Winthrop on or about February 21, 2011. Defendant denies the remaining allegations in Paragraph 10.

11. On or about March 28, 2011, Lessee executed Lease Schedule No. B01, issued pursuant to Lease Agreement Number AP122110, which identifies, among other things, certain of the equipment leased to Lessee and the monthly lease charges due thereon. A true and correct copy of Lease Schedule No. B01 is attached as Exhibit B to this Complaint and incorporated herein by reference.

ANSWER: In response to Paragraph 11, Defendant admits the allegations.

12. On or about June 21, 2011, Lessee executed Lease Schedule No. B02, issued pursuant to Lease Agreement Number AP122110, which identifies, among other things, certain of the equipment leased to Lessee and the monthly lease charges due thereon. A true and correct copy of Lease Schedule No. B02 is attached as Exhibit C to this Complaint and incorporated herein by reference.

ANSWER: In response to Paragraph 12, Defendant admits the allegations.

13. On or about September 14, 2011, Lessee executed Lease Schedule No. B03, issued pursuant to Lease Agreement Number AP122110, which identifies, among other things, certain of the equipment leased to Lessee and the monthly lease charges due thereon. A true and correct copy of Lease Schedule No. B03 is attached as Exhibit D to this Complaint and incorporated herein by reference. Lease Agreement No. AP122110 and Lease Schedule Nos. B01, B02 and B03 are hereinafter collectively referred to as the "Lease."

ANSWER: In response to Paragraph 13, Defendant admits the allegations in the first two sentences. Defendant denies that Lease Agreement Number AP122110 and schedules B01, B02, and B03 constitute the entire lease between the parties, and Defendant denies the remaining allegations in Paragraph 13.

14. Pursuant to the express terms of the Lease, Lessee agreed to pay lease charges for the equipment in the amounts and for the term provided in the Lease. Exhibit A, ¶ 1 and ¶ 3, Exhibit B, Exhibit C and Exhibit D. If any payment is late, Lessee also agreed to pay a late fee equal to the lesser of one and one-half percent (1½%), or the maximum percentage allowed by law of the amounts past due. Exhibit A, ¶ 3.

ANSWER: In response to Paragraph 14, Defendant admits that it agreed to pay lease charges per the terms set forth in Exhibits A-D, and further admits that ¶ 3 of Exhibit A sets forth the terms governing late payments. Defendant denies the remaining allegations in Paragraph 14.

15. Pursuant to the express terms of the Lease, Lessee agreed that the term of the Lease was to continue for an Initial Term as defined therein, and continue for successive periods of four (4) calendar months each until terminated as set forth in the Lease. Exhibit A, ¶ 1.

ANSWER: In response to Paragraph 15, Defendant admits that ¶ 1 of Exhibit A governs the term of the Lease. Defendant denies the remaining allegations in Paragraph 15.

16. Pursuant to the express terms of the Lease, Lessee agreed to and was required to keep in place maintenance agreements on the equipment identified in Lease Schedule Nos. B01, B02 and B03 and the failure to do so is an Event of Default under the Lease. Exhibit A, ¶ 8.

ANSWER: In response to Paragraph 16, Defendant admits that ¶ 8 of Exhibit A provides the terms governing the Lessee's maintenance obligations under the Lease. Defendant denies the remaining allegations in Paragraph 16.

17. Lessee failed to keep in place maintenance agreements on the equipment identified in Lease Schedule Nos. B01, B02 and B03 and therefore committed an Event of Default under the Lease. Exhibit A, ¶¶ 8, 16.

ANSWER: In response to Paragraph 17, Defendant admits that maintenance agreements were not maintained at all times for each piece of leased equipment, but denies that it committed an Event of Default under the Lease.

18. Lessee has admitted that it did not keep in place maintenance agreements on the equipment identified in Lease Schedule Nos. B01, B02 and B03.

ANSWER: In response to Paragraph 18, Defendant admits that maintenance agreements were not maintained at all times for each piece of leased equipment, but denies that it committed an Event of Default under the Lease.

19. Pursuant to the express terms of the Lease, Lessee was required to return to Winthrop all equipment identified in Lease Schedule Nos. B01, B02 and B03 and the failure to do so results in a continuation of Lessee's obligation to make the payments required under Lease Schedule Nos. B01, B02 and B03. Exhibit A, ¶¶ 7, 16.

ANSWER: In response to Paragraph 19, Defendant admits that ¶ 7 of Exhibit A provides the terms governing the return of leased equipment to Lessor and that ¶ 16 of Exhibit A sets forth Events of Default under the Lease. Defendant denies the remaining allegations in Paragraph 19.

20. Lessee did not return to Winthrop all of the equipment identified in Lease Schedule Nos. B01, B02 and B03.

ANSWER: In response to Paragraph 20, Defendant admits it did not return each piece of leased equipment identified in Lease Schedule Nos. B01 and B03 because a very small percentage of the equipment could not be located. Defendant denies that it did not return any equipment that was not subject to the Loss provision in ¶ 12 of Exhibit A rather than the return provision of ¶ 7 of Exhibit A. Defendant further denies the remaining allegations in Paragraph 20.

21. Lessee has not made the continued payments required under the Lease.

ANSWER: In response to Paragraph 21, Defendant denies the allegations.

22. On several occasions, Winthrop notified Lessee that Lessee has failed to make payments required under the Lease.

ANSWER: In response to Paragraph 22, Defendant denies the allegations.

23. Pursuant to the express terms of the Lease, the nonpayment by Lessee of any lease charges when due, or the nonpayment of any other charges which continues for a period of ten business days from the date of written notice, constitutes an event of default entitling Winthrop to exercise the remedies set forth in the Lease. Exhibit A, ¶ 16(1) and ¶ 17.

ANSWER: In response to Paragraph 23, Defendant admits that §§ 16 & 17 of Exhibit A provides the terms regarding Events of Default and Remedies. Defendant denies the remaining allegations in Paragraph 23, including any implication that Defendant did not make any required payments when due, that an Event of Default occurred, or that Winthrop is entitled to any remedies from Defendant.

24. Pursuant to the express terms of the Lease, Lessee agreed that it would pay, on demand, all costs, expenses and fees paid or payable in connection with any claim to enforce the Lease, including, but not limited to, attorneys' fees and out-of-pocket costs and travel and related expenses incurred to enforce the Lease. Exhibit A, ¶ 18.

ANSWER: In response to Paragraph 24, Defendant admits that ¶ 18 of Exhibit A provides the terms regarding Costs and Attorneys' Fees. Defendant denies the remaining allegations in Paragraph 24.

25. Pursuant to the express terms of the Lease, the Lease is a net lease and Lessee's obligations to pay all lease charges and other amounts payable thereunder are absolute and unconditional. Exhibit A, ¶ 27.

ANSWER: In response to Paragraph 25, Defendant admits that ¶ 27 of Exhibit A provides the terms regarding Net Lease. Defendant denies the remaining allegations in Paragraph 25.

26. Lessee has failed and refused to pay the lease charges and other charges when due, despite demand, and therefore committed events of default under the Lease. Among other things, Lessee has failed and refused to pay the full lease charges due for the months of November 2016, December 2016, January 2017, February 2017, and March 2017.

ANSWER: In response to Paragraph 26, Defendant denies the allegations.

27. The amount due under the Lease totals in excess of \$50,000.00, the exact amount to be determined in these proceedings. The amount owed by Lessee to Winthrop continues to accrue as a result of Lessee's failure to make the payments required under the Lease.

ANSWER: In response to Paragraph 27, Defendant denies the allegations.

Count I
Breach of Contract

28. Winthrop restates and realleges the allegations contained in the paragraphs above as though fully set forth herein.

ANSWER: Paragraph 28 incorporates each preceding allegation and therefore does not call for separate response. To the extent a response is required, Defendant incorporates by reference each preceding response set forth in the Answer.

29. Lessee is bound by the terms of the Lease and Winthrop has the right to enforce the Lease.

ANSWER: Paragraph 29 sets forth a legal conclusion to which no response is required.

30. Lessee has caused Events of Default under the Lease and has otherwise breached the Lease by, among other things, failing and refusing to pay the lease charges and other charges when due, and otherwise failing to meet its obligations under the Lease.

ANSWER: In response to Paragraph 30, Defendant denies the allegations.

31. Pursuant to Paragraph 17 of the Lease, Winthrop is entitled to recover from Lessee, among other things, all accrued and unpaid lease charges and other amounts currently due and owing, is entitled to recover from Lessee all lease charges and amounts as and when they become due, is entitled to accelerate and cause to become immediately due and payable all lease charges and other amounts due and/or likely to become due under the Lease, is entitled to recover the casualty loss value of the equipment, is entitled to possession of the equipment and is entitled to pursue all other remedies available under the Lease, at law, equity or under any statute.

ANSWER: In response to Paragraph 31, Defendant denies the allegations.

32. The above-described conduct constitutes a breach of the Lease by Lessee, and as a direct and proximate result of Lessee's breach of the Lease, Winthrop has suffered money damages in an amount in excess of \$50,000.00, to be proven in these proceedings, and Winthrop is entitled to pursue all remedies available under the Lease, at law, equity or under any statute.

ANSWER: In response to Paragraph 32, Defendant denies the allegations.

AFFIRMATIVE DEFENSES

For its affirmative defenses, Defendant states and alleges as follows:

First Affirmative Defense

Plaintiff's claims are barred, in whole or in part, for failure to state a claim.

Second Affirmative Defense

Plaintiff's claims or recoveries are barred or limited, in whole or in part, by its failure to mitigate damages or reduce its costs.

Third Affirmative Defense

Plaintiff's claims or recoveries are barred or limited, in whole or in part, by the equitable doctrine of unjust enrichment.

Fourth Affirmative Defense

Plaintiff's claims are barred or limited, in whole or in part, because Plaintiff's conduct violates the covenant of good faith and fair dealing.

Fifth Affirmative Defense

Plaintiff's claims or recoveries are barred or limited, in whole or in part, because the remedies Plaintiff seeks constitute an unenforceable penalty for breach of contract.

Sixth Affirmative Defense

Plaintiff's claims or recoveries are barred or limited, in whole or part, under the doctrine of unconscionability.

Seventh Affirmative Defense

Plaintiff's claims are barred or limited, in whole or in part, because Plaintiff seeks to enforce commercially unreasonable provisions.

Eighth Affirmative Defense

Plaintiff's claims are barred or limited, in whole or in part, because Plaintiff has suffered no compensable damages and is entitled to no remedy under the terms of the parties' contract / Lease.

Ninth Affirmative Defense

Plaintiff's claims or recoveries are barred or limited, in whole or in part, by the doctrines of laches, estoppel, and/or waiver.

Tenth Affirmative Defense

Plaintiff's claims or recoveries are barred or limited, in whole or in part, by the doctrine of unclean hands.

Eleventh Affirmative Defense

Plaintiff's claims or recoveries are barred or limited, in whole or in part, by the doctrine of set-off.

Twelfth Affirmative Defense

Plaintiff's claims or recoveries are barred or limited, in whole or in part, because the alleged wrongful conduct on Defendant's part was justified.

Thirteenth Affirmative Defense

Plaintiff's claims or recoveries are barred or limited, in whole or in part, by the applicable principles of acceptance and ratification.

Reservation

Apollo expressly and specifically reserves the right to amend this Answer to add, delete, and/or modify defenses based upon orders issued by any court, or based upon legal theories, facts, and/or circumstances that may or will be divulged through discovery and/or further legal analysis of the parties' positions in this litigation.

COUNTERCLAIMS

Defendant Apollo Education Group, Inc. ("Apollo"), by and through its attorneys, submits its Counterclaims against Plaintiff Winthrop Resources Corporation ("Winthrop") and alleges and states as follows:

1. Apollo incorporates by reference its foregoing answers as if set forth fully herein.

WINTHROP'S HISTORY OF BAD FAITH BUSINESS PRACTICES

2. For over a decade, Winthrop has engaged in bad faith business practices designed to trap unsuspecting lessees, conjure up false disputes and events of default, demand exorbitant and unfair payments from lessees, and earn unjustifiable financial windfalls.

3. Winthrop's bad faith business practices are well detailed in pleadings filed in federal court and made pursuant to Fed. R. Civ. P. 11 on behalf of and by a former Winthrop employee and by Winthrop's current counsel, who filed the instant complaint against Apollo.

4. The pleadings, motions, and other papers filed by Winthrop's former employee and Winthrop's current counsel detail the objectives and means of Winthrop's unlawful conduct, and the unfair consequences of Winthrop's conduct to lessees such as Apollo.

5. As set forth in such court papers, Winthrop maintains internal business and financial incentives that provide Winthrop with great profit by alleging that a lessee under its agreements has defaulted or has not terminated a lease agreement at the end of its initial or successive term.

6. Winthrop, its owners, and its employees, all receive substantial financial windfalls when Winthrop is able to claim that a lessee did not properly terminate the lease agreements or was in "default," even for some unspecified or wholly immaterial reason.

7. On information and belief, Winthrop sales personnel receive a commission on the net profit of the lease. Winthrop and its sales personnel, therefore, have a significant financial incentive to claim that lessees failed to terminate the agreements or were in default. These significant financial incentives encourage and reward the unlawful conduct by Winthrop personnel.

8. Winthrop's improper business practices were brought to light in detail in a federal lawsuit filed by former Winthrop employee James Natale that outlined Winthrop's practice of attempting to catch lessees in "missed notice" and other situations to claim that the lessees were in default. (*James M. Natale v. Winthrop Resources Corporation*, 2:07-cv-04686-RB, E.D. Pa. (ECF No. 4)). (A copy of this complaint is attached as Exhibit A.)

9. The *Natale* complaint specifically alleges that Winthrop tries to catch unsuspecting customers in "missed notice" and default situations to extend or increase payments allegedly owed by the lessees. (*See* Exhibit A, ¶¶ 20, 31, 41, 53 and 54.)

10. In sworn testimony, this former Winthrop employee detailed how Winthrop targets unsuspecting lessees who are more likely to fall prey to Winthrop's tactics and employs a "premeditated model" based on false claims of "missed notice" or "extended use" to generate unearned and unfair profits. (*Winthrop Resources Corporation v. Sabert Corporation, et al.*, No. 07-CV-1735 (PJS/RLE), D. Minn. (ECF No. 29) (Deposition Excerpts of James M. Natale) (attached as Exhibit B)).

11. This former employee testified that Winthrop's "missed notice" strategy accounts for one of Winthrop's primary profit centers. (Exhibit B, at 124, 153.)

12. This former employee testified that Winthrop was a “deceptive organization.” (Exhibit B, at 149.)

13. This former employee testified that there was a “secret code” within Winthrop. (Exhibit B, at 41-42.)

14. This former employee testified that he had a crisis of conscience relative to working at Winthrop, which came about once he understood Winthrop’s business model. (Exhibit B, at 138.)

15. Winthrop’s current counsel has repeatedly made similar allegations against Winthrop on behalf of lessees in federal court pleadings, motions, and other papers governed by Fed. R. Civ. P. 11.

16. In no less than three separate lawsuits, Winthrop’s current counsel filed claims on behalf of lessees alleging that Winthrop engaged in deceptive practices and breached its covenant to deal with lessees fairly and in good faith. (*See, e.g., Winthrop Resources Corporation v. Pennock Hospital and Pennock Healthcare System*, 15-cv-03987 (RHK/KMM), D. Minn. (ECF No. 5) (attached as Exhibit C); *Winthrop Resources Corporation v. Corinthian Colleges, Inc.*, 14-cv-04455 (DSD/FLN), D. Minn. (ECF No. 6) (attached as Exhibit D); *Winthrop Resources Corporation v. Taro Pharmaceuticals*, 09-cv-267 (DSD/AJB), D. Minn. (ECF No. 2) (attached as Exhibit E)).

17. Pursuant to Fed. R. Civ. P. 11, Winthrop’s current counsel alleged on behalf of lessees in those cases that Winthrop has engaged and continues to engage in a pattern and practice of trying to trap unsuspecting lessees, manufacture false disputes, and demand exorbitant and unjustified payments from lessees.

18. Pursuant to Fed. R. Civ. P. 11, Winthrop's current counsel informed this Court that the terms of Winthrop lease agreements are unenforceable "because they are commercially unreasonable." (Exhibit D, at 5.)

19. Pursuant to Fed. R. Civ. P. 11, Winthrop's current counsel informed this Court that the terms of Winthrop lease agreements are unenforceable "because they seek to impose an unlawful penalty." (Exhibit D, at 5.)

20. Pursuant to Fed. R. Civ. P. 11, Winthrop's current counsel informed this Court that Winthrop "fraudulently induced" a lessee to believe that its lease had a finite term. (Exhibit E, at 5.)

21. Pursuant to Fed. R. Civ. P. 11, Winthrop's current counsel has repeatedly alleged in this Court that Winthrop "engaged in deceptive and bad faith conduct toward" lessees and breached its covenant to deal with lessees fairly and in good faith. (Exhibit C, at 5; Exhibit D, at 8; Exhibit E, at 7.)

22. Pursuant to Fed. R. Civ. P. 11, Winthrop's current counsel has alleged in this Court that Winthrop seeks to exploit lessees by "falsely declar[ing] that a breach has occurred under the Lease in order to demand exorbitant penalties and generate additional income to which it is not entitled." (Exhibit C, at 5.)

23. Pursuant to Fed. R. Civ. P. 11, Winthrop's current counsel has repeatedly alleged in this Court that Winthrop acted contrary to the lessee's expectations, conjured up a pretended dispute, and engaged in a rejection of performance for unstated reasons. (Exhibit C, at 5; Exhibit D, at 7; Exhibit E, at 6-7.)

24. Pursuant to Fed. R. Civ. P. 11, Winthrop's current counsel has alleged in this Court that Winthrop "acted unfairly and in bad faith to try to 'set up' a claimed default [by lessee] so [Winthrop] and its representatives could squeeze even more profit and personal income from the agreements with [Winthrop]." (Exhibit D, at 8.)

25. Pursuant to Fed. R. Civ. P. 11, Winthrop's current counsel represented to this Court that that Winthrop has – *in many cases* – "attempted to set up its customer so it can claim that the customer has defaulted under a lease." (*Winthrop Resources Corporation v. Corinthian Colleges, Inc.*, 14-cv-04455 (DSD/FLN), D. Minn. (ECF No. 13, at 1) (attached as Exhibit F)).

26. As recently as July 8, 2016, Winthrop's current counsel represented to this Court pursuant to Fed. R. Civ. P. 11 that "Winthrop uses certain tactics to trap lessees in order to obtain a financial windfall." (*Winthrop Resources Corporation v. Pennock Hospital and Pennock Healthcare System*, 15-cv-03987 (RHK/KMM), D. Minn. (ECF No. 45, at 4) (attached as Exhibit G)).

27. As recently as July 8, 2016, Winthrop's current counsel represented to this Court pursuant to Fed. R. Civ. P. 11 that "[f]rom all appearances, Winthrop's unsavory business practices continue to this day." (Exhibit G, at 2.)

28. Winthrop's bad faith conduct with and toward Apollo since July 2016 demonstrates that Winthrop's unlawful and deceptive practices, as detailed by its former employee and current counsel, continue to this day.

29. Winthrop filed this lawsuit in an attempt to advance the very business practices that Winthrop's current counsel in this case previously, repeatedly, and correctly condemned as deceptive and unlawful.

APOLLO'S RELATIONSHIP AND AGREEMENTS WITH WINTHROP

30. Apollo and Winthrop entered into a Lease Agreement (No. AP122110) ("Lease Agreement"), which was signed by Apollo on or about February 11, 2011 and by Winthrop on or about February 21, 2011. (A copy of the Lease Agreement is attached as Exhibit H.)

31. Apollo and Winthrop subsequently agreed to and executed Riders to the Lease Agreement ("Lease Riders"), which were executed by Apollo on or about February 15, 2011 and by Winthrop on or about February 21, 2011. (Copies of the Lease Riders are attached collectively as Exhibit I.)

32. Apollo and Winthrop subsequently agreed to and executed Schedules to the Lease Agreement, including but not limited to Master Lease Schedule B, Lease Schedule No. B01, Lease Schedule No. B02, and Lease Schedule No. B03 (collectively, "Lease Schedules"). (Copies of the Lease Schedules are attached as Exhibit J.)

33. Apollo timely delivered security deposits to Winthrop per the terms of the Lease Schedules.

34. Apollo timely made each and every payment due under the Lease Agreement and Lease Schedules.

35. In total, Apollo has leased in excess of 1,000 servers from Winthrop under the Lease Agreement and paid Winthrop in excess of \$15 million as payments under the Lease Agreement.

36. Apollo unequivocally desired and intended to terminate the Lease Schedules and provided timely notice to Winthrop of such termination.

37. Since receiving Apollo's notices of termination, Winthrop has sought at every turn to frustrate and deny Apollo's ability to terminate the Lease Schedules.

38. Per the detailed instructions Winthrop provided to it, Apollo timely returned over 97% of the equipment under the Lease Schedules in accordance with the instructions provided.

39. Winthrop designated the return location as Breakaway Technologies, Inc. in Park City, Illinois.

40. Prior to its return of equipment to Winthrop under the Lease Schedules, Apollo had all the equipment tested and formally certified by Curvature, Inc., a reputable third party service provider.

41. On information and belief, Winthrop has a long history of prior dealings with Curvature and has previously accepted Curvature's testing results and certifications.

42. Apollo also purchased a one year, prepaid service agreement from Curvature for the equipment returned under the Lease Schedules, which would be available to any purchaser of the returned equipment.

43. In the process of returning equipment under the Lease Schedules, Apollo discovered that approximately 2.6% of the equipment on the Lease Schedules (certain equipment on Schedules B01 and B03) could not be located.

44. Apollo obtained the cost to replace the missing equipment from Curvature and then delivered and tendered the replacement cost for the missing equipment by check payable to Winthrop in the amount of approximately \$58,000.00.

45. Without explanation, Winthrop refused to accept and returned the check for the replacement cost of the equipment.

46. Again without explanation, Winthrop then claimed that the Lease Schedules remained in effect and that continuing lease payments were required for all equipment listed on the Lease Schedules, *including the over 97% of equipment on the Lease Schedules that had been timely returned to Winthrop in certified working condition and in accordance with the instructions provided by Winthrop.*

47. Winthrop has not engaged at all, let alone in good faith, on why the replacement cost payment tendered and delivered by Apollo was insufficient to satisfy Apollo's obligations under the Lease Agreement and Lease Schedules.

48. On November 17, 2016, counsel for Apollo notified counsel for Winthrop that Apollo had made approximately \$42,510.33 in excess payments with respect to Lease Schedule B03, and requested return of such excess payment.

49. Winthrop has refused and failed to return the excess payments made under Lease Schedule B03.

50. Winthrop has also refused and failed to return the security deposits made by Apollo under the Lease Schedules or to apply or credit the security deposits to the total amounts due under the Lease Schedules.

51. Winthrop contends that each of the Lease Schedules renewed and are continuing in full force and effect, even for *each and every piece of equipment on the Lease Schedules that was timely returned to Winthrop in certified working condition and in accordance with the instructions provided by Winthrop.*

52. Winthrop makes this astonishing claim notwithstanding the following facts: (1) Apollo timely provided notice of its intent to terminate the Lease Schedules; (2) Apollo timely returned all available equipment under the Lease Schedules; (3) Apollo had all returned equipment tested and certified by a reputable third-party service provider with whom, on information and belief, Winthrop had a long and acceptable business relationship; (4) Apollo purchased an additional year of maintenance for all of the returned equipment; and (5) Apollo tendered \$58,000 to Winthrop as replacement cost of the very small portion of equipment Apollo was unable to locate.

53. Winthrop's conduct regarding the Lease Schedules is made in bad faith and for the sole purpose of extracting an unearned windfall from Apollo.

54. Winthrop's bad faith conduct is consistent with its long history of seeking to trip up unsuspecting lessees such as Apollo, manufacturing improper claims of default or extension, and demanding unreasonable payments, as detailed in repeated federal court filings by Winthrop's current counsel.

55. Winthrop's bad faith conduct in this matter is consistent with the bad faith conduct undertaken by Winthrop in each of the cases in which Winthrop's current counsel represented Winthrop lessees, and the many others referenced by Winthrop's current counsel in which "Winthrop has attempted to set up its customer so it can claim that the customer has defaulted under a lease."

56. As in those other cases, Winthrop has "engaged in deceptive and bad faith conduct toward" Apollo and breached its covenant to deal with Apollo fairly and in good faith.

COUNT 1 – DECLARATORY JUDGMENT

57. Apollo realleges and incorporates by reference each and every of the foregoing allegations.

58. Apollo timely notified Winthrop of its intent and desire to terminate the Lease Schedules.

59. Apollo has complied with all of its obligations under the Lease Agreement and Lease Schedules.

60. Winthrop's claim that the Lease Schedules are ongoing is unjustifiable and conjured up solely to extract an unfair financial windfall.

WHEREFORE, Apollo seeks a declaration that the Lease Agreement has been terminated as to Lease Schedule Nos. B01, B02, and B03.

COUNT 2 – BREACH OF CONTRACT

61. Apollo realleges and incorporates by reference each and every of the foregoing allegations.

62. Apollo timely notified Winthrop of its intent and desire to terminate the Lease Schedules.

63. Apollo has complied with all of its obligations under the Lease Agreement and Lease Schedules.

64. Winthrop has refused and failed to return the security deposits made by Apollo under the Lease Schedules or to apply or credit the security deposits to the total amounts due under the Lease Schedules.

65. Winthrop has refused and failed to return the excess payments made by Apollo under Lease Schedule B03.

66. In failing to return Apollo's security deposits and excess payments, Winthrop has breached its obligations under the Lease Agreement and the Lease Schedules.

67. Apollo has been damaged as a direct and proximate result of the Winthrop's breaches of its contractual obligations.

WHEREFORE, Apollo is entitled to an award of damages caused by Winthrop's breach in an amount to be determined at trial, as well as its attorneys' fees and costs.

COUNT 3 – BREACH OF THE DUTY OF GOOD FAITH AND FAIR DEALING

68. Apollo realleges and incorporates by reference each and every of the foregoing allegations.

69. Because of Winthrop's various agreements and business relationship with Apollo, including but not limited to the Lease Agreement and Lease Schedules, the law imposes upon Winthrop an implied covenant of good faith and fair dealing.

70. Winthrop violated the covenant of good faith and fair dealing by engaging in deceptive and bad faith conduct toward Apollo, conjuring up pretended disputes, engaging in unjustifiable rejection, and seeking an unfair financial windfall.

71. Consistent with the business practices detailed in the lawsuit filed by Winthrop's former employee and in the other cases in which Winthrop's current counsel represented Winthrop lessees, Winthrop seeks to exploit Apollo and to wrongfully declare that the Lease Schedules are continuing in full despite Apollo's unequivocal and timely notices of termination of those Lease Schedules, all in order to generate additional income to which Winthrop is not entitled.

72. Apollo unequivocally desired to terminate the Lease Schedules and provided timely written notice to do so.

73. Since receiving Apollo's notices of termination, Winthrop has sought at every turn to frustrate and deny Apollo's ability to terminate the Lease Schedules.

74. Apollo timely returned all equipment it was able to locate per the return instructions provided by Winthrop and simultaneously tendered the replacement cost to Winthrop for the small amount of equipment that it was unable to locate in the amount of approximately \$58,000.00.

75. Winthrop refused to accept and returned the check for replacement cost without explanation as to why that proffered payment may have been insufficient to satisfy Apollo's obligations under the Lease Agreement and Lease Schedules.

76. Winthrop has refused to engage at all, let alone in good faith, on why the proffered replacement cost payment made by Apollo for the missing items was not

sufficient to satisfy Apollo's obligations under the Lease Agreement and Lease Schedules.

77. Winthrop abused its power in failing to specify the terms by which Apollo could, in Winthrop's view, comply with the Return provisions and terminate the Lease Schedules and thereby unjustifiably hindered Apollo's compliance with and rights under the Lease Agreement.

78. Apollo has been damaged as a direct and proximate result of the above breaches of the implied covenant of good faith and fair dealing by Winthrop.

WHEREFORE, Apollo is entitled to an award of damages caused by Winthrop's breaches in an amount to be determined at trial, as well as its attorneys' fees and costs.

COUNT 4 – UNJUST ENRICHMENT

79. Apollo realleges and incorporates by reference each and every of the foregoing allegations.

80. Winthrop has maintained possession and use of the returned equipment for several months, but nevertheless seeks to charge Apollo continuing lease amounts for the returned equipment.

81. Winthrop has refused and failed to return to Apollo the security deposits made by Apollo or to apply or credit the security deposits to the total amounts due under the Lease Schedules.

82. Winthrop has refused and failed to return the excess payments made by Apollo under Lease Schedule B03.

83. Winthrop's retention of the security deposit payments, excess lease payments, and returned equipment has been and is inequitable and has unjustly enriched Winthrop.

84. Apollo has been damaged as a direct and proximate result of the Winthrop's conduct.

WHEREFORE, Apollo is entitled to an award of damages caused by Winthrop's conduct in an amount to be determined at trial, as well as its attorneys' fees and costs.

JURY DEMAND

Apollo demands a jury trial.

RELIEF REQUESTED

WHEREFORE, having fully answered the Complaint, Apollo prays for judgment on the Complaint and its Counterclaims as follows:

1. That Plaintiff's Complaint be dismissed and that Plaintiff take nothing from Apollo by virtue of the Complaint;
2. On its Counterclaim for Declaratory Judgment, declaring the Lease Agreement for Lease Schedules B01, B02, and B03 was properly terminated and is no longer in force and effect;
3. On its Counterclaim for Breach of Contract, granting judgment for Apollo and awarding damages caused by Winthrop's conduct;

4. On its Counterclaim for Breach of the Duty of Good Faith and Fair Dealing, granting judgment for Apollo and awarding damages caused by Winthrop's conduct;
5. On its Counterclaim for Unjust Enrichment, granting judgment for Apollo and awarding damages caused by Winthrop's conduct;
6. That Apollo be awarded attorneys' fees, costs and expenses of this suit; and
7. For such other and further relief as the Court may deem just and proper.

Dated: May 8, 2017

Respectfully submitted,

APOLLO EDUCATION GROUP, INC.

By: s/ Aron J. Frakes

One of Its Attorneys

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