

STATEMENT OF MATERIAL FACTS

1. Defendant Teen Help operates as a referral service for specialty programs and schools including members of the World Wide Association of Specialty Programs and Schools. Teen Help is paid by the schools based on the number of enrollments obtained. *See* Affidavit of Jean Foye, director of Teen Help, at ¶ 1, attached hereto as Exhibit A.

2. Teen Help employs representatives that take telephone calls, emails or letters from parents and refer schools to these parents for them to consider for their teenagers. *Id.* at ¶ 2.

3. Teen Help does not have any ownership interest whatsoever in the individual schools or the World Wide Association. *Id.* at ¶ 3.

4. Teen Help is not a member of the World Wide Association. *Id.* at ¶ 4.

5. Plaintiffs have named Teen Help, along with 26 other defendants, in a single suit claiming fraud, negligence and intentional torts.

6. Plaintiffs are former students and their parents. Some, but not all, of these parents contacted Teen Help before enrolling their child in a World Wide member school. *Id.* at ¶ 5.

7. Plaintiffs allegedly attended ten (10) different World Wide member schools over a ten to fifteen year period “from about the mid-1990's to mid-2000's.”

8. During this time period, Teen Help has referred over 8,000 students to some 20 different schools, employing between 25-30 different parent representatives. *Id.* at ¶ 6.

9. No two parent contacts are ever the same. Teen Help representatives do not use scripts. Rather, their parent contacts range from minimal email contact to months of telephone calls while parents decide what to do with a struggling child. *Id.* at ¶ 7.

10. Parents do not have contracts with Teen Help. Rather, every parent signs an Enrollment Agreement with the school where they enroll their child. *Id.* at ¶ 8.

11. Each parent plaintiff in this action forever discharged and released claims against Teen Help as part of the Enrollment Agreement. *Id.* at ¶ 11.

12. Several parent plaintiffs, including Charles and Karen Burnett, Lee Colburn, David Sallee and Jonathon Walmsley, signed Enrollment Agreements containing a clause entitled: CHOICE OF JURISDICTION, LAW AND OTHER MATTERS. This clause requires any action be brought in the jurisdiction where the school is located. *Id.* at ¶ 12.

13. Teen Help was not involved in referring each student plaintiff. *Id.* at ¶ 10.

ARGUMENT

I. PLAINTIFFS CANNOT PROCEED WITH JOINT ACTIONS BECAUSE THEIR CLAIMS DO NOT ARISE FROM THE SAME TRANSACTION OR OCCURRENCE

Plaintiffs' claims must be severed because they do not arise out of the same transaction or occurrence. To proceed jointly, Rule 20 requires plaintiffs' claims arise "out of the same transaction, occurrence, or series of transactions or occurrences." Here, the claims of 27 different plaintiffs arise over a ten to fifteen year period and are asserted against up to 27 different defendants. Plaintiffs' claims cannot satisfy Rule 20's same transaction or occurrence requirement.

In *Papagiannis v. Pontikis*, 108 F.R.D. 177 (N.D.Ill. 1985), two plaintiffs joined in an action against defendants claiming they were fraudulently induced to invest in oil wells. The court rejected plaintiffs' attempt to combine their separate claims through use of a RICO claim. Judge Shadur ruled, "In Rule 20(a) terms, the cozening of [plaintiffs] certainly did not involve the 'same

transaction [or] occurrence.’ And the situation also does not present the ‘same ... series of transactions or occurrences,’ for that characterization does not fairly apply to two victims’ wholly separate encounters with a confidence man simply because he follows the same routine in cheating each of them.” *Id.* at 179. The court severed plaintiffs’ claims because fraud “necessarily requires individualized proof.” *Id.*

In so ruling, Judge Shadur distinguished his case from the type of mass misrepresentation of a fraudulent prospectus. This was further explained in *Insolia v. Phillip Morris Inc.*, 186 F.R.D. 547 (W.D.Wis. 1999). There, three former smokers combined claims against various tobacco companies. In rejecting joinder, the court reviewed federal cases generally and found, “[t]he general consensus that emerges from these cases is that Rule 20 demands more than the bare allegation that all plaintiffs are victims of a fraudulent scheme perpetrated by one or more defendants; there must be some indication that each plaintiff has been induced to act by the same misrepresentation.” *Id.* at 549.

In this case, plaintiffs’ alleged misrepresentations span over 10 -15 years. As noted by Teen Help, no two enrollments are ever the same, but rather result from various kinds and levels of parent interaction. (Fact No. 9) Accordingly, there does not exist the same transaction or occurrence required for permissive joinder under Rule 20.

Plaintiffs’ negligence claims are equally disparate. In *Graziose v. American Home Prods. Corp.*, 202 F.R.D. 638 (D.Nev. 2001), Judge Hunt severed claims from ten different plaintiffs alleging harm from ingestion of phenylpropanolamine in medicines from ten different manufacturers. The purchase and ingestion of the medicine happened at different times by different people. The court could not find the required common transaction or occurrence. *Id.* at 640; *see also Abdullah*

v. Acands, Inc., 30 F.3d 264 (1st Cir. 1994) (approving trial court’s finding of misjoinder of 1000 different asbestos claims against 93 defendants). Likewise, in *Smith v. North American Rockwell Corp.*, 50 F.R.D. 515 (N.D.Okla. 1970), the court reviewed employment discrimination claims that commonly alleged plaintiffs were denied promotion by the defendant over about a two year period. In severing the cases, the court found, “plaintiffs . . . have attempted to join in one action what are in reality four separate lawsuits arising out of four separate series of transactions or occurrences involving four disparate sets of facts.” *Id.* at 522-23.

The description is certainly apt for this complaint combining 27 different plaintiffs. Some are parents claiming they were defrauded at some point over a 10-15 year period. Others are students claiming abuse while at ten different schools. The complaint says, “[n]ot all of the following described acts of child abuse were carried out on every child,” but that they were all subjected to at least one of some thirty forms of alleged abuse. See Section V, ¶ 2. As noted in *Smith*, these are 27 different claims. They do not arise from the same transaction or occurrence¹ and cannot be joined under Rule 20.

II. PLAINTIFFS’ CLAIMS MUST BE SEVERED INTO INDIVIDUAL ACTIONS

¹ The case of *Sun-X Glass Tinting of Mid-Wisconsin, Inc. v. Sun-X Intern., Inc.*, 227 F.Supp. 365, 374 -375 (D.Wis. 1964), provides this illustration: “For example, assume 4 automobiles, A, B, C, and D. A and B collide, causing B to strike C, which in turn strikes D, parked at a curb. Here is a series of events which will produce multiple claims. However, all possible claims will have stemmed from a common transaction or event, namely the collision of A and B. Further, assume A was at fault in the example; and further assume that 10 minutes earlier on the same highway, A negligently caused a collision involving E. Could it fairly be said that the claims of B, C and D have any common question of law or fact with E’s claim against A? There are separate series of events or transactions.”

Under Rule 20, plaintiffs' claims cannot proceed jointly. Teen Help moves plaintiffs' claims be severed into individual actions. Rule 20(b) allows this Court to require separate trials to prevent delay and prejudice. Rule 21 similarly provides parties may be dropped on such terms as are just. Here, plaintiffs' claims must proceed individually.

Plaintiffs' claims must be severed because joinder and consolidation of claims cannot deprive Teen Help of its right to a fair and impartial trial of claims brought against it. It is true the federal rules favor the combining of claims where possible, but "considerations of convenience and economy must yield to a paramount concern for a fair and impartial trial." *In re Repetitive Stress Injury Litigation*, 11 F.3d 368, 373 (2nd Cir. 1993)(refusing consolidation of claims of repetitive stress injuries from 44 different plaintiffs). The Second Circuit explained, "[t]he systematic urge to aggregate litigation must not be allowed to trump our dedication to individual justice, and we must take care that each individual plaintiff's – and defendant's – cause not be lost in the shadow of a towering mass litigation." *Id.* As set forth below, Teen Help is entitled to have its defenses raised against each individual plaintiff because individual issues predominate in these cases. Joint proceedings would only cause jury confusion, discovery and trial delays, and, ultimately, a waste of judicial resources.

In *In re Consolidated Parlodel Litigation*, 182 F.R.D. 441, 446 (D.N.J. 1998), the court denied consolidation of various plaintiffs' claims against a drug manufacturer because "individual issues in these cases will predominate." The court explained each plaintiff's medical history, including their introduction to the marketing and warnings of the drug in question, and causation must be established for each plaintiff. If accomplished, each plaintiff would then have to prove their

own, specific injuries. The court found no basis for consolidation “since the unique details of each case would still need to be presented to the jury.” *Id.* at 445 (citations omitted).

In this case, each parent plaintiff must establish misrepresentations were made to them and they reasonably relied on the same to their detriment. Some parent’s claims are already barred by the statute of limitations.² In each remaining case, how the parent came in contact with Teen Help, who they spoke to, and what independent due diligence they performed will have to be established. Other parent plaintiffs, such as Charles and Karen Burnett, Lee Colburn, David Sallee and Jonathon Walmsley, signed Enrollment Agreements containing forum selection clauses which mandate their claims be brought elsewhere. (Fact No. 12). If they remain, Teen Help will counterclaim against some parents such as Colburn, Burnett and Gomez for their intentional interference with Teen Help referrals through illegal computer hacking and intentional deception. Foye Affidavit at ¶¶14-16.

The student plaintiffs’ claims are also dominated by individual issues. They range in age from 15 to 23. Foye Affidavit at ¶ 13. For some, their intentional tort claims are already barred; for others, even the statute of limitation on negligence claims has run. On each remaining claim, they will need to establish they suffered abuse from one or more of several hundred staff members at ten different schools over some 10-15 year period. They will then need to prove their individual damages and prove such damages were caused by the alleged abuse and not the parental neglect, substance abuse, psychological disorders and criminal behavior that led to their enrollment in the first place. These individual issues predominate over any similarities plaintiffs’ claims may have.

² For example, plaintiffs Gomez and Colburn have been on internet websites making these allegations for well over three years prior to filing their complaint. Foye Affidavit at ¶ 15.

The joint trial of predominately individual issues creates jury confusion, delay and waste. In a joint trial, Teen Help would be prejudiced by jury confusion. As stated, not all plaintiffs will be able to pursue all claims whether due to their Enrollment Agreements, the statute of limitations or simple lack of evidence. Jurors cannot possibly be expected to keep track of which plaintiff is pursuing which claims at trial, not to mention against which defendant. Moreover, Teen Help is entitled to pursue counterclaims against certain parent plaintiffs, which would only lead to more confusion in a joint trial.

For example, in *Graziose*, the court refused to try the ten plaintiffs' phenylpropanolamine claims together because their separate medical histories, contributing factors and alleged damages would "require an unmanageable trial . . . conducted in such a way as to create confusion and chaos for the jury." 202 F.R.D. at 641; *see also Insolita*, 186 F.R.D. at 550 (finding risk of jury confusion outweighed any benefit from joining actions where each claim turned on unique facts); *Saval v. BL Ltd.*, 710 F.2d 1027, 1031 (D.Md. 1983)(upholding severance where "The cars were purchased at different times, were driven differently, and had different service histories. Quite probably, severance would have been required in order to keep straight the facts pertaining to the separate automobiles.") The court in *Webb v. Goord*, 197 F.R.D. 98 (S.D.N.Y. 2000) expressed similar concern where thirty seven different prisoners incarcerated in separate facilities tried to combine their individual abuse claims in a conspiracy claim against all the prisons and the Department of Correctional Services. The court ruled, "[c]ombining into a single action unrelated incidents involving distinct events and disparate parties also carries the *potential* of confusing a jury and of exposing some defendants to the risk of liability by loose institutional association for the unconnected wrongdoing of others." *Id.*

at 101 (emphasis in original). Teen Help is especially vulnerable to liability by “loose institutional association” having been lumped together with ten schools, a trade association, a Mexican boot camp, another marketing company, billing company, and various defunct entities. Jury confusion would reign and Teen Help’s individual defenses would be “lost in the shadow of a towering mass litigation” at a joint trial of plaintiffs’ indiscriminate claims.

Teen Help would also be prejudiced by delay. The court in *Grazione* recognized, “[p]ermitting joinder in this case would permit the Plaintiffs to significantly increase the cost to Defendants by forcing them to participate in discovery or other proceedings that are irrelevant to the claims against each of them.” 202 F.R.D. at 641. Here, Teen Help was not involved in the referral of each student³ and should not have to litigate claims it has nothing to do with. Further, claims subject to Enrollment Agreements cannot proceed against Teen Help where parents signed releases and hold harmless agreements prohibiting suit against Teen Help. (Fact No. 11) Severance would allow Teen Help to have claims against it dismissed or at least greatly curtailed. Also, as stated in *Smith*, “[i]n practical effect, there would inescapably be as many separate lawsuits as parties plaintiff. The disadvantage would be, however, that each would be heard end-to-end and each party would await the hearing of evidence as to all others.” 50 F.R.D. at 523. Teen Help should not be forced to wait. Finally, “[j]udicial resources are wasted, not conserved, when a jury is subjected to a welter of evidence relevant to some parties but not others.” *Insolia*, 186 F.R.D. at 551. Delay, jury confusion and interminable trials are a waste of this Court’s and Teen Help’s limited resources.

³ Teen Help was involved in referring only six of the twelve student plaintiffs. Foye Affidavit at ¶ 10.

Accordingly, Teen Help is entitled to sever these claims to avoid the juror confusion, discovery and trial delays, and the unnecessary expense of joint trials of these dissimilar claims. Plaintiffs' claims are impermissibly joined under Rule 20. Therefore, this Court should sever and dismiss all plaintiffs other than Mr. William Chase Wood to bring separate, individual actions.

CONCLUSION

Plaintiffs' action cannot be combined because they did not arise out of the same transaction or occurrence. Though the federal rules favor joinder and consolidation, a paramount concern is a fair trial. Teen Help cannot receive a fair trial from the joinder of 27 highly individualized, unique claims. Rather, Teen Help will be prejudiced by jury confusion, waste and delay. Therefore, plaintiffs' claims must be severed and dismissed to be brought as separate actions.

DATED this 27th day of November, 2006.

SILVESTER & CONROY

/S/ Spencer C. Siebers

Spencer C. Siebers

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of November, 2006, I electronically filed the foregoing **MEMORANDUM IN SUPPORT OF MOTION TO SEVER AND DISMISS** with the Clerk of the Court using the CM/ECF system and that I sent a true and correct copy by United States mail, first-class, postage-prepaid, to the following:

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