# EXHIBIT A

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF MICHIGAN**
**SOUTHERN DIVISION**

Joy Eberline, *et al.*,

Plaintiffs,

v.

Douglas J. Holdings, Inc., *et al.*,

Defendants.

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Case No. 14-cv-10887

Judith E. Levy
United States District Judge

Michael J. Hluchaniuk
United States Magistrate Judge

**[PROPOSED] *AMICUS CURIAE* BRIEF OF AMERICAN ASSOCIATION OF COSMETOLOGY SCHOOLS IN SUPPORT OF DEFENDANTS' MOTIONS TO CERTIFY ORDER [DKT. 77] FOR INTERLOCUTORY APPEAL UNDER 28 U.S.C. § 1292(b) AND FOR STAY**

The American Association of Cosmetology Schools, as *amicus curiae*, respectfully submits this brief in support of Defendants' Motions to Certify Order [Dkt. 77] for Interlocutory Appeal under 28 U.S.C. § 1292(b) and for Stay. Consistent with E.D. Mich. L.R. 7.1(a), although Defendants' counsel concurs in the filing of this brief, on November 20, 2018, *amicus*'s counsel contacted Plaintiffs' counsel and requested but did not obtain concurrence in filing this brief.

## I. Corporate Disclosure Statement

In the spirit of E.D. Mich. L.R. 83.4, 6th Cir. R. 26.1, and Federal Rule of Appellate Procedure 29:

> I, undersigned counsel of record for *amicus curiae*, certify that to the best of my knowledge and belief, the American Association of Cosmetology Schools ("AACS") does not have a parent corporation, no publicly held company holds 10% or more of stock of AACS, and no parents, subsidiaries, or affiliates thereof have any outstanding securities in the public's hands.

## II. Interest of *Amicus Curiae*

*Amicus* American Association of Cosmetology Schools ("AACS" or "Cosmetology Schools"), is a national, non-profit association. Its members offer courses of instruction in the beauty and wellness industry, including cosmetology, skin, nail, barbering and massage programs. AACS has over 600 member schools. And AACS estimates that cosmetology programs – both AACS member schools and non-member institutions – educate nearly 200,000 students annually. Cosmetology school graduates tend to be self-employed. Many go on to become owners of small businesses. Cosmetology and barbering programs are regulated by the states. The overwhelming majority of AACS members are small, single location schools owned by families.

Cosmetology schools have a strong interest in this case, and AACS files this brief in support of certification of interlocutory appeal and for a stay out of concern for the uncertainty and confusion created by this Court's recent holding that, under the Fair Labor Standards Act ("FLSA"), cosmetology students may be deemed FLSA "employees" for time spent on cleaning, doing laundry, and restocking products. Such a finding will disrupt the education of tens of thousands of students at AACS member schools, threaten the economic viability of those schools, and infringe on the expertise and prerogative of professional educators, accreditors, state regulators, and schools to determine the appropriate curriculum for cosmetology students.

## III. Argument

This Court should exercise its discretion to grant certification for interlocutory appeal of the Order at Dkt. 77 and impose a stay of further district court litigation pending that appeal for reasons set forth herein, which are in addition to those set forth in Defendants' Motion.

A district court may permit a party to seek interlocutory appeal if it finds that the order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an

immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b); *see Swint v. Chambers County Com'n*, 514 U.S. 35, 47 (1995); *In re Trump*, 874 F.3d 948, 952 (6th Cir. 2017). For reasons including those set forth herein, this standard is unequivocally satisfied such that this matter should be certified for interlocutory appeal and stayed.

This Court's recent decision establishes that there is substantial ground for difference of opinion on the issue of cosmetology school students' status as students versus "employees" – and the nature of the time those students spend learning while doing by engaging in cleaning, laundry, and restocking products in the schools' clinical learning environments. This Court's decision is inconsistent with the holding from now three separate Courts of Appeals and a litany of sister district courts that have rejected arguments that cosmetology school and massage therapy school students are FLSA "employees."[1] Those courts have consistently held that the "learning by doing" model of education

[1] In addition to the authority collected in Defendant's Motion, most recently on November 9, 2018, the Tenth Circuit Court of Appeals joined the chorus in holding that massage therapy students were not FLSA "employees." *Nesbitt v. FCNH, Inc.*, -- F.3d -- , No. 17-1084, 2018 WL 5851472 (Nov. 9, 2018).

used in cosmetology schools does not convert students into employees for time spent in the schools' clinics doing tasks that are common to learning how to work as a licensed cosmetologist in a salon.

Moreover, the Court's decision casts doubt on the expertise of cosmetology school regulators, accreditors, and cosmetology school decision makers and second-guesses their sound educational decisions – further exposing the substantial ground for difference of opinion on students' "employee" status. In effect, this Court's decision substitutes a federal court's judgment for the judgment of state regulators, accreditors, educators, and schools who are charged with making these determinations in the first instance. These regulators, accreditors, educators, and schools have reasonably determined that students best learn their profession by doing all of the tasks cosmetologists regularly perform in a salon, including cleaning, doing laundry, and restocking products. These entities are ultimately charged with preparing future cosmetologists for a profession where, as a legal and practical matter, cosmetologists must safely and sanitarily deliver services to the public while at the same time earning a livelihood through, among other things, working in a salon environment where they will be expected to

effectively clean, do laundry, and sell beauty products. *See Hollins v. Regency Corp.,* 867 F.3d 830, 836–7 (7th Cir. 2017) (declining to second guess a cosmetology school's educational decisions and holding that the school could have concluded that "acting as receptionists, cleaning and sanitizing the floor, selling salon beauty products, and restocking those products . . . . are also part of the job of the cosmetologist, and that the students needed to learn time-management skills"); *Jochim v. Jean Madeline Educ. Ctr. of Cosmetology, Inc.*, 98 F. Supp. 3d 750, 758–59 (E.D. Pa. 2015) (holding that "as part of her clinical work, [a student was required] to clean her work station and assist in keeping the clinic as a whole clean and sanitary. This is consistent with clinical educational work[.]").

The implication that cosmetology schools take advantage of students because students may spend time learning to do these tasks in a school clinic is misleading and wrong. All states have licensing rules that require cosmetology schools to provide students with many hundreds of hours of in-person education, much of it practical time in the clinical setting. The Court's decision attacks and undermines the general quality and effectiveness of a well-established cosmetology

education. It will cause a profound disruption to schools' operations as they try to refashion their curricula as a result of the Court's treatment of learning activities like cleaning, doing laundry, and restocking products. The Court's decision will cause further disruption as schools assess whether other learning activities risk reclassification as compensable "work." These are implications that educational institutions are immune from under Sixth Circuit law. *See Doherty v. S. Coll. of Optometry*, 862 F.2d 570, 577 (6th Cir. 1988) (holding that implicit in an educational institution's "general 'contract' with its students is a right to change the [school's] academic degree requirements if such changes are not arbitrary or capricious").[2]

Certification for interlocutory appeal will also afford the Court of Appeals for the Sixth Circuit an opportunity to advance the ultimate

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[2] Other courts in this circuit recognize that educational institutions "are not subject to the supervision or review of the courts to ensure the uniform application of their academic standards" such that "judicial intervention is not appropriate [as to academic decisions] unless there is a challenge that the action on the part of the educational institution was arbitrary and capricious." Nor is a court equipped to review "academic records" or curricula "based upon academic standards that are within the peculiar knowledge, experience, and expertise of the" school and its regulators and accreditors. *Nuttelman v. Case W. Reserve Univ.*, 560 F. Supp. 1, 2–3 (N.D. Ohio 1981) (Aldrich, J.), *aff'd*, 708 F.2d 726 (6th Cir. 1982).

termination of this litigation, and stop as soon as possible the likely violence the implications of this Court's decision will work on cosmetology schools across the country. This Court's decision is likely to have a devastating impact on cosmetology schools, their students and their actual employees both within the Sixth Circuit and across the nation – and certainly among AACS's more than 600 member schools and the nation's nearly 200,000 cosmetology students. This Court's reasoning will create a cottage industry of costly FLSA litigation that cosmetology schools will now inevitably face, notwithstanding the fact that all other courts to address the issue have disagreed with this Court's conclusion based upon materially indistinguishable record evidence. The consequences of this Court's decision will undoubtedly cause schools to divert away from students limited cosmetology school resources so that these resources can, instead, be spent on legal fees. This Court's decision will thus drive up the cost of tuition in a climate where efforts are being made to do the exact opposite, harming students in the process.[3] The Sixth Circuit can conclusively and swiftly bring a

[3] Because students perform clinical services for paying guests, paying guests expect to receive such services at a steep discount

halt to this parade of horribles, aided by the grant of a stay of this case pending the outcome of the interlocutory appeal.

Interlocutory appeal will also stem other unfortunate consequences of this Court's decision as the Court's holding will also likely bring financial ruin to some school owners (most especially small, single location schools owned by families), put actual school employees out of work, and badly disrupt, and perhaps permanently eliminate, the students' educational and career plans. These are issues that warrant the Court of Appeals's swift attention.

In addition to the increased financial burden students will likely experience because this Court's decision will increase tuition costs, students will further be harmed because some schools will likely be forced to close. It is often difficult for students to transfer schools—particularly in rural areas where the closest school may be many hundreds of miles away. And even if transfers can be arranged, they frequently result in the loss of credits, which are additional education-related costs that students may not be able to recover. Before this

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compared to non-student rates. As such, increasing the cost charged to guests for clinical services is not practical.

additional damage can be done, the Court of Appeals should have an opportunity to conclusively resolve the legal issues involved in this case as soon as possible.

## IV. Conclusion

For the reasons including those set forth herein, this Court should exercise its discretion to grant certification for interlocutory appeal of the Order at Dkt. 77 and impose a stay of further district court litigation pending that appeal.

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Respectfully submitted,

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