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AMERICAN ARBITRATION ASSOCIATION

HEATHER NYE,

Claimant,

vs.

LAMBDA INC.,

Respondent.

AAA Case No.: 01-21-0003-8512

RESPONDENT LAMBDA INC.'S DEMURRER TO DEMAND FOR ARBITRATION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

INTRODUCTION

Claimant Heather Nye ("Nye" or "Claimant") has not paid one penny to Lambda Inc. ("Lambda"). She has, however, received almost two years of coursework and practical training in the areas of software, data science, cyber security, information technology, from Lambda. Under the parties' agreement (the "ISA"), however, Nye will only be required to pay for her receipt of such education if she finds qualifying employment that meets the minimum salary requirements outlined in the contract, and does so within the five-year period contemplated in the ISA. In the event she does, she will be required to pay a small portion of her salary back to Lambda. In the event she does not, she will not owe Lambda any money—now or ever.

Nye brings her Demand for Arbitration, not to recover any damages or restitution, but to cancel her ***contingent*** obligation to pay Lambda for the education she has already received in the event she obtains qualified employment within the specified time period. Such remote and indirect ***potential*** obligations, however, are not cognizable damages under any of the causes of action she asserts.

Even if such potential liabilities ***were*** sufficient for pleading the causes of action in her Demand, however, some or all of her claims should still be dismissed as they were not pleaded with the requisite particularity, do not adequately allege causation, and are largely premised on prohibited "educational malpractice" theories. Granting Lambda's Motion in whole or in part will substantially streamline this arbitration, conserve the parties' resources, and help crystalize the issues that are in dispute.

STATEMENT OF ALLEGATIONS

Claimant Heather Nye "was working as a bar tender and trying to pay off her student loans when, in or around May of 2019, she saw posts about Lambda on Twitter." (Demand, ¶ 75.) Purportedly relying on "Lambda's advertised job placement rate of over 80% and its promise that Lambda would not get paid until she did," Nye subsequently "decided to enroll at Lambda in June of 2019, financed by an ISA." (*Id.*, ¶ 14.) An ISA is a "financial arrangement, known as an Income Share Agreement ("ISA"), [under which] Lambda students agree to pay

17% of their post-Lambda salary for twenty-four months, but only once they are making more than $50,000 per year in a qualifying job." [1] (*Id.*, ¶ 7.) The ISA also imposes a cap on the amount that would ever be paid to Lambda of $30,000. (*Id*., ¶ 85.) Furthermore, any payments owed under the ISA are only collectable during the first five years after Nye left the Lambda program. (*Id*.)

Nye claims that "[o]nly after enrolling at Lambda and becoming aware of news stories about Lambda's misconduct did she discover that the [foregoing] representations that induced her to enroll at Lambda were false and misleading." (*Id.*, at ¶ 7.) In March, 2021, Nye voluntarily decided to quit Lambda, "[e]ven though she was only a couple of months away from completion." (*Id*., at ¶ 84.) Since leaving Lambda, Nye has worked as a restaurant manager, and "hopes to soon find a job in the tech field," but "she does not feel like her Lambda education has adequately prepared her." (*Id.*)

Nye's wide-ranging allegations fundamentally fall into four (4) categories. First, she claims Lambda overstated its job placement statistics (see, *inter alia,* Demand, ¶¶ 40-60, collectively, her "job placement" allegations). Second, she claims Lambda exaggerated the extent to which its economic incentives aligned with those of its students (see, *inter alia*, *Id*., ¶¶ 61-74, collectively, her "economic incentive" allegations). Third, she claims Lambda concealed information regarding its right or ability to remain in operation (see, *inter alia*, *Id*., ¶¶ 86-98, collectively, her "regulatory allegations"). Fourth, she claims that the quality of education she received prior to quitting Lambda was sub-par (see, *inter alia*, *Id.*, ¶¶ 35-38; 80-82, collectively, her "education quality" allegations). The Demand asserts five causes of action—for violations of California's unfair competition laws, false advertising laws, and Consumer Legal Remedies Act,

[1] The ISA's payment obligations are only triggered if the student is hired in the fields of "Software, Data Science, Cyber Security, Information Technology or using, in whole or in part, the skills acquired by you as a result of the Higher Education or Training provided by Company;" or as Nye's demand refers to them, "qualifying job[s]." (Demand, Exh. B, p. 2.)

as well as for intentional and negligent misrepresentation—all of which are premised on these four different sets of allegations.

ARGUMENT

I. Legal Standard

Under California Code of Civil Procedure section 430.10(e)[2], a demurrer is properly sustained where "[t]he pleading does not state facts sufficient to constitute a cause of action." A demurrer brought under section 430.10(e) "tests the legal sufficiency of the factual allegations in a complaint." (*Rakestraw v. Cal. Physicians' Serv.* (2000) 81 Cal.App.4th 39, 42.) To withstand dismissal, a plaintiff "must show that [s]he pleaded facts sufficient to establish *every element of that cause of action*." (*Cantu v. Resolution Trust Corp*. (1992) 4 Cal.App.4th 857, 879 [italics in original].) "The absence of any allegation essential to a cause of action renders it vulnerable to a general demurrer." (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 437, fn.4.) A demurrer will also "lie where the complaint has included allegations that *clearly* disclose some defense or bar to recovery." (*Cryolife, Inc. v. Superior Court* (2003) 110 Cal.App.4th 1145, 1152 [italics in original].)

II. Claimant's Fraud-Based Claims Should Be Dismissed Because Claimant Has Not Satisfied the Pleading Obligations for Asserting Such Claims.

In addition to the typical pleading standard outlined above, California law requires that fraud-based claims "be pled specifically; general and conclusory allegations do not suffice." (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 645; see *Roberts v. Ball, Hunt, Hart, Brown & Baerwitz* (1976) 57 Cal.App.3d 104, 109 ("[F]raud must be alleged with sufficient specificity to allow defendant to understand fully the nature of the charge made.").) The specificity requirement means plaintiffs must plead "*facts* which show how, when, where, to whom, and by what means the representations were tendered." (*Id.* [internal citations omitted] [italics in

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[2] Lambda does not necessarily agree that California law governs, either procedurally or substantively. Indeed at the Preliminary Conference, Claimant's counsel indicated that Nye had recently moved to Florida, perhaps as an insinuation that a different state's laws govern. In the absence of any showing by Claimant as to which laws govern, Lambda assumes California law governs for the sake of this Motion.

original].) "A plaintiff's burden in asserting a fraud claim against a corporate employer is even greater. In such a case, the plaintiff must allege the names of the persons who made the allegedly fraudulent representations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written." (*Id.*)[3] Nye has fallen woefully short of satisfying these pleading obligations.

While her Demand is rife with accusation about what Lambda allegedly stated (and why she believes it to be false), Nye is glaringly scant in the details she provides about her specific experience concerning, and reliance upon, the supposed misrepresentations. For example, she also does not allege any *facts* supporting her conclusory allegation that she relied upon the purported misstatements. Indeed, many of the statements she points to in her Demand as allegedly false or misleading were made after she signed the ISA in June, 2019, and thus incapable of inducing reliance. (See, e.g., Demand, ¶¶ 52, 55-59, 68-73, 94-95.)

Additionally, Nye does not provide any averments regarding why it would have been reasonable for her to rely on the supposed misrepresentations. To be clear: Lambda denies that it made any misrepresentations. But Nye does not plead why, in the face of such alleged misrepresentations, it would have been reasonable for her to completely ignore the plain language of the integration clause in the ISA, which specifically advised her that "all prior or contemporaneous discussions, understandings and agreements, whether oral or written, between [she] and [Lambda] relating to the subject matter [of the ISA]" were "supersede[d]." (*Id*., Ex. B, at 11). In the same vein, Nye has not alleged *any* facts that would explain why it would be reasonable for her to rely on particular pieces of advertising when the ISA expressly disclaimed

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[3] Courts apply these more exacting pleading standards, not just to specific claims for fraud or misrepresentation, but also to consumer protection claims premised on allegations of fraud. (*Kearns v. Ford Motor Co.* (9th Cir. 2009) 567 F.3d 1120, 1125-26.) Accordingly, they apply to Claimant's three statutory claims as well, to the extent they are premised on her fraud allegations.

any liability on the part of Lambda associated with "loss of employment [and] lost income or profits . . ." (*Id.*, Ex. B, at 10.)[4]

Moreover, while Nye does aver that she "would have investigated options for pursuing a web development education at another school" had she known of the alleged misrepresentations, she says nothing about what other options she would have pursued, how her experience would have differed, or why relying on Lambda's advertisements prevented her from doing so. (See *Bower v. AT&T Mobility, LLC* (2011) 196 Cal.App.4th 1545, 1556 [holding that injury and causation were not sufficiently alleged where plaintiff stated merely that if she had known AT&T's statement was misleading she would have looked for a different cellular phone plan].)

Finally, the Demand does not even specifically allege *when*[5] Nye supposedly read the purported misrepresentations, instead merely stating generically that she read statements about Lambda's financial incentives on some undefined day or series of days "in or around May 2019" before enrolling at Lambda. (Demand, ¶ 75.) But, even in providing that vague marker, Nye

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[4] When Nye ultimately ***does*** articulate why she contends it was reasonable to ignore the conspicuous disclaimers in the ISA, Lambda respectfully submits that the Arbitrator can and should dismiss Nye's fraud-based claims because it would be unreasonable ***as a matter of law*** for her to do so. But, at the present juncture, the Demand does not even articulate what Nye would have done in the but-for world, meaning that Lambda cannot even fully make such an attack on the pleadings at this juncture because of the skeletal nature of Nye's fraud-based allegations.

[5] The lack of specificity regarding the timing of her allegations is also problematic because Nye's Demand suggests that Nye could have (and possibly did) discover that the Lambda advertisements at issue were allegedly false or misleading before she supposedly relied upon them. After all, several of the allegedly internal documents (which Nye has not explained how she has obtained and which, according to Nye contradict Lambda's advertisements) were produced or disseminated ***before*** Nye even enrolled at Lambda. (See *id.*, ¶ 11 [describing a memorandum from August 2018 that allegedly contradicted Lambda's job placement advertisements]; ¶ 12 [describing a memorandum from May 2019 that allegedly contradicted the same advertisements].) Coupled with her admission that she herself learned, on her own, that the representations at issue were allegedly false after enrolling at Lambda, and it is not clear, but looks like Nye's alleged discoveries could have happened much earlier in time, and maybe even before enrolling at Lambda. (*Id.*, ¶ 14.) The law's requirement that fraud-plaintiffs plead such claims with specificity is designed to enable fraud-defendants to challenge claims on grounds like these. Claimant's failure to allege *when* she specifically formed her belief that the advertisements at issue were supposedly false, therefore, prejudices Lambda's ability to prepare its defenses as it will be learning the answers to these critical questions for the first time at the merits hearing, when its ability to test those claims will be severely impaired.

stills falls short of satisfying her pleading allegations because she does not even specifically identify *what* she read when she allegedly visited Lambda's website at that time. (*Id.*) In other words, it is not even clear whether Nye was actually exposed to the various alleged misrepresentations set forth in the Demand. Soaking wet, Nye's Demand asserts that ***some*** misrepresentations were made—and that Nye was exposed to misrepresentations on Lambda's website, which may or may not encompass some of the former. Indeed, while she conclusorily asserts that she relied on the job placement and economic incentive advertisements, it is not even clear from her Demand that Nye herself even relied upon (or even saw) "Lambda's [supposed] representations, both implied and explicit, that it was approved to operate, advertise, enroll, and teach students prior to August 2020" in the first place. (*Id.*, ¶¶ 120; 126.) This is hardly sufficient for purposes of meeting the pleading obligations associated with asserting fraud-based claims.

The foregoing pleading defects are particularly problematic here, where there is no discovery. Nye's inadequately pleaded Demand leaves Lambda in a position where it will have no idea about the specifics of her fraud-based allegations until the merits hearing itself. Accordingly, Nye's fraud-based claims should all be dismissed, unless she can amend her Demand to plead, with the requisite particularity, specific details about her allegations.

III. All Five of Claimant's Causes of Action Should Be Dismissed Because Claimant Has Not Alleged She Has Suffered Any Damages.

Standing under the UCL and the FAL "is limited to any person who has suffered injury in fact and has ***lost money or property*** as a result of unfair competition." (*Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 320–321 (emphasis added) (seminal case interpreting California's standing requirement under the State's consumer protection statutes that found sufficient injury was alleged for standing where consumers relied on manufacturer's "Made in the U.S.A." labeling, and the products were not in fact made in the United States, because consumers did not get what they paid for); see *Hansen v. Newegg.com Americas, Inc.* (2018) 25 Cal.App.5th 714, 723 (citing *Kwikset*) (holding that plaintiffs had pleaded a claim under the UCL and the FAL where the seller had allegedly mislead consumer regarding the non-discounted price of the goods

causing consumers to pay more because they falsely believed they had received a bigger discount than they really had).) In *Kwikset* and *Hansen*, the plaintiffs did not complain that the quality of the product was misrepresented; they only complained that certain representations about the products' origins or true pricing were misrepresented at the time of the sale. In both instances, the plaintiffs had paid money out of pocket for the products in reliance on the sales statements.

Likewise, the CLRA requires that the consumer "experience some kind of damage, or some type of increased costs as a result of the unlawful practice." (*Hansen*, 25 Cal.App.5th at 724; *Bower*, *supra*, 196 Cal.App.4th at 1556 ["An individual seeking to recover damages under the CLRA based on a misrepresentation must prove … actual injury."].) The CLRA, the UCL, and the FAL, have essentially the same standing requirements because claimants alleging one or all of them must be able to plead some damage or actual injury. (See *Hansen*, 25 Cal.App.5th at 724.)

Finally, fraud-based claims for intentional and negligent misrepresentation also require claimants allege "resulting damage." (See *Lazar*, 12 Cal.4th at 638; see *Moncada v. West Coast Quartz Corp.* (2013) 221 Cal.App.4th 768, 781.) "Deception without resulting loss is not actionable fraud." (*Service by Medallion, Inc. v. Clorox Co.* (1996) 44 Cal.App.4th 1807, 1818.) California courts have generally recognized two forms of damages in fraud related cases: "out-of-pocket" damages and "benefit-of-the-bargain" damages. "Out-of-pocket" damages are to restore plaintiffs to the financial position they enjoyed before the fraud was committed. (*Stout v. Turney* (1978) 22 Cal.3d 718, 725.) Out-of-pocket damages thus limit plaintiffs in a tort action such that they cannot "be placed in a better position than [they] would have been had the wrong not been done." (*Kenly v. Ukegawa* (1993) 16 Cal.App.4th 49, 54 [stating the out-of-pocket rule that lost profits are not available to a defrauded plaintiff and finding that only the money paid in reliance of the defendant's false representation was compensable] [internal citation omitted].)

"Benefit-of-the-bargain" damages are intended to satisfy the expectancy interest of defrauded plaintiffs by putting them in the position they would have enjoyed had the false representation been true. (*Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1240.)

Benefit-of-the-bargain damages apply to general tort damages and provide for an "amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not." (*Id.*, at 1241, n. 7 (citing Cal. Civ. Code, § 3333).) Benefit-of-the-bargain damages are measured by the difference in value between what the plaintiff actually received and what he was fraudulently led to believe he would receive. (*Stout*, 22 Cal.3d at 725.)

Nye has not alleged any damages that could satisfy the standing or minimum pleading requirements outlined above. Nye's first attempt to allege damages claims that "Lambda charges $30,000 for its program" (Demand, ¶ 4), but then she corrects herself to be slightly more precise later alleging that the ISA she signed to attend Lambda "***indebted*** her to $30,000 of tuition" (*Id.*, ¶ 19 [emphasis added]). Nye adds some clarity later alleging that she is not actually "indebted" to Lambda for $30,000 in the typical sense; rather she "agree[d] to pay 17% of [her] post-Lambda School salary for 24 months, but only once [she made] more than $50,000 per year (or the equivalent of $4,166.66 per month). The ISA is capped at a maximum repayment of $30,000, so [she] won't pay more than $30,000 under any circumstances." (*Id.*, ¶ 27.) The Demand discloses an additional fact that the ISA has a five-year expiration—so if Nye does not find a position fitting the description alleged in Paragraph 27 in the next five-years, or finds a position any time after the first three years, she may owe Lambda some money, but it would likely be some amount less than $30,000 to Lambda. (Demand, ¶ 85.)

Thus, the best Nye can allege with respect to damages is that if, some day in the next three years, she gets a position in the technology industry, she may have to pay Lambda up to $30,000 over 24-months (assuming she maintains that employment for the duration), and if she gets a position between the next 3-5 years, she may have to pay Lambda some money, but in an amount that is likely less than $30,000. What is clear from the foregoing is that Nye has not alleged that she has lost any money or property to date. Nye has not alleged that she paid any money out-of-pocket to Lambda for the two years of education she received from Lambda. Nye has not alleged that she lost any profits or future earnings by attending Lambda. Nye has not alleged that she has suffered damages of any kind to date, let alone any that would meet the

standard for pleading a claim under the UCL, CLRA, or for fraud. Her failure to do so is fatal to each and every single one of her causes of action.

IV. Claimant's Causes of Actions Premised on Her Job Placement and Economic Incentive Allegations Should Be Dismissed Because Claimant Has Not Alleged A Causal Relationship Between The Alleged Misrepresentations, on The One Hand, and Any Purported Outcome-Oriented Injury, on The Other.

The facts as pleaded by Nye establish that she cannot bring a claim for fraud (or for violation of the consumer protection statutes) based on either of the alleged outcome-focused misrepresentations (i.e., her job placement and economic incentive allegations) because, by her own admission, the alleged misrepresentations could not possibly have caused her any harm. Specifically, among other allegations, Nye avers that she was misled into believing that, upon graduation, Lambda would be incentivized to help her find employment (Demand, ¶¶ 61-74) and that Lambda was successful in helping its graduates find employment (*Id.*, ¶¶ 40-60). But Nye never graduated. (*Id.*, ¶ 84.) Accordingly, she cannot state claims premised on these particular theories since she never completed her Lambda education. In other words, Nye cannot say that misrepresentations about post-graduation outcomes caused her any post-graduation harm because she herself never graduated.

Nye's Demand specifically alleges that Lambda misrepresented the fact that it does not get paid until its students get paid. (*Id.*, ¶¶ 40-60.) For example, Nye avers that "[k]nowing that Lambda only got paid if she obtained employment was important to her decision to attend the school." (*Id.*, ¶ 61.) The implication of Nye's claim is that her post-graduation prospects would actually be less promising than advertised since, according to her, Lambda misrepresented its incentive to help her find employment post-graduation. But Nye never graduated; as she admits in her Demand, she did not complete Lambda's program and "[e]ven though she was only a couple of months away from completion, … Ms. Nye formally withdrew from Lambda in March of 2021." (*Id.*, ¶ 84.) Accordingly, Nye cannot claim that she suffered any harm relating to alleged misrepresentations concerning Lambda's incentives to help her find a job after

graduating since she never graduated or put herself in a position to benefit (or be harmed) by Lambda's incentive (or lack thereof) to help her get paid.

The same is true with regard to Nye's claims premised on the alleged misrepresentations concerning job placement outcomes. The Demand avers that on August 2, 2018, Lambda posted to its website that "every single Lambda School ***graduate*** who has been on the job market for six months is either employed in a full-time role as a software engineer or has joined an early startup working for equity." (Demand, ¶ 11 [emphasis added].) The Demand also claims that Lambda made another misrepresentation on October 8, 2018, wherein Lambda allegedly made the following announcement on its website: "Since Lambda School's inception in April 2017, over 75 Lambda School ***graduates*** have been hired, including 83% of early cohorts, with an average salary increase of over $47,000 per hired graduate." (*Id.*, ¶ 46 [emphasis added].) The screenshot purportedly taken from Lambda's website on December 14, 2019, states that "86% of Lambda School ***graduates*** are hired with 6 months and make over $50K a year." (*Id*., ¶ 52 [emphasis added].) Since the alleged misrepresentations about Lambda's success concern program graduates, which Nye never was, she cannot state she suffered any harms due to overstated professional outcomes.

Thus, to the extent Nye claims she suffered any damage by virtue of these alleged outcome-oriented misrepresentations, which she apparently has (*id.*, at 38), she cannot establish a causal nexus between her professional condition today and any of the purported misstatements.

V. Claimant's Causes of Action Premised on Her Education Quality Allegations Should Be Dismissed as They Are Improper and Disguised Claims for Educational Malpractice.

While the Demand does not specifically allege a claim for "educational malpractice," many of Nye's allegations turn on, implicate, or embrace her claims that Lambda did not provide her with what she would consider a quality education. (Demand, ¶¶ 35-38; 80-82.) Educational malpractice, however, is a negligence theory of liability, which is disfavored in most

jurisdictions[6] and is specifically prohibited in California. In *Peter W. v. San Francisco USD* (1976) 60 Cal.App.3d 814, 825, an 18-year-old former public school student, who graduated high school with a fifth grade reading level, sued his school district for failure to provide an adequate education. (*Id.*) The California Court of Appeal concluded that the complaint failed to allege a breach of a duty the law would recognize, noting that "classroom methodology affords no readily acceptable standards of care, or cause, or injury." (*Id.* at 824.) The court recognized the difficulties of assessing the wrongs and injuries involved, the lack of a workable rule of care against which a school district's conduct may be measured, and the incalculable burden which would be imposed on public school systems. (*Id.*)

California courts have applied the educational malpractice bar to claims by students against all kinds of educational institutions, including public schools, private universities, and charter schools. (See *Wells v. One2One Learning Found.* (2006) 39 Cal.4th 1164 [publicly-funded charter school]; *Chevlin v. Los Angeles College Dist.* (1989) 212 Cal.App.3d 382 [community college]; *Smith v. Alameda Cty. Soc. Servs. Agency* (1979) 90 Cal.App.3d 929 [public school district]; *Peter W. v. San Francisco Unified Sch. Dist.* (1976) 60 Cal.App.3d 814 [public school district]; *Zumbrun v. Univ. of So. Cal.* (1972) [private university].)

Here, to the extent Nye alleges claims premised on the quality of the education she received, her claims should be dismissed as they would require the Arbitrator to make judgments about pedagogical methods, the quality of the school's classes, instructors, curriculum, and teaching assistants, among other things. They would also require the Arbitrator to opine on the cause of Nye's allegedly diminished professional prospects, including whether or to what extent she is uniquely responsible for her successes and failures. The foregoing issues demonstrate, not only why such claims are fraught with peril, but also why the court in *Peter W.* announced that such claims are barred. The Arbitrator, therefore, should dismiss (or strike) all of Nye's

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[6] In *Ross v. Creighton Univ.* (7th Cir. 1992) 957 F.2d 410, 414-15, the Seventh Circuit noted that the overwhelming majority of states that have considered this type of claim have rejected it, including at least eleven states (as of 1992 – nearly thirty years ago), among which were California, New York, New Jersey, Florida, Maryland, Iowa, and Wisconsin.

education quality allegations. Declining to do so will unnecessarily complicate the arbitration, confound and confuse the issues, and needlessly prolong the proceedings.

CONCLUSION

For the foregoing reasons, Lambda respectfully requests that the arbitrator sustain its demurrer to claimant's demand.

DATED: October 26, 2021

McMANIS FAULKNER

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