PATRICK HAMMON (255047)
TYLER ATKINSON (257997)
ABIMAEL BASTIDA (303355)
ANDREW PARKHURST (324173)
McMANIS FAULKNER
A Professional Corporation
50 West San Fernando Street, 10th Floor
San Jose, California 95113
Telephone: (408) 279-8700
Facsimile: (408) 279-3244
Email: phammon@mcmanislaw.com

Attorneys for Respondent,
Lambda Inc.

AMERICAN ARBITRATION ASSOCIATION

HEATHER NYE,

Claimant,

vs.

LAMBDA, INC.,

Respondent.

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

REPLY IN SUPPORT OF RESPONDENT LAMBDA INC.'S DEMURRER TO DEMAND FOR ARBITRATION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

INTRODUCTION

As much as Claimant's counsel would like to stand in the shoes of the pertinent regulators (and for the Arbitrator to stand in the shoes of the Legislature), this matter is actually a narrow dispute between a School and one of its students relating to her specific experiences as a student and as a purported "consumer" of those educational services. As part of that narrow dispute, Claimant must meet certain pleading requirements in order to assert her individualized claims. Claimant has failed to do so.

In order to assert a UCL or FAL claim, Claimant must plead facts that show that she herself ***has*** lost money or property—not just that she might one day. And to the extent that she is able to identify such actual losses, she is obligated to establish a causal nexus, not just to Bloom Institute of Technology (formerly known as "Lambda, Inc.," and referred to herein as "Bloom" or the "School") in general, but to the ***specific*** activities that she claims were tortious. Claimant has not carried either of these burdens. Instead, Claimant merely represents that her contingent obligation to repay money, if she finds qualified employment, constitutes an injury within the meaning of these statutes—even though (1) she is not presently obligated to pay one penny to the School and (2) she would have the same obligation, even if, for example, the School were "approved" at all pertinent times under the paradigm advanced by Claimant's counsel. Neither of these allegations is sufficient, and so her statutory claims should be dismissed.

In order to assert her fraud-based claims, Claimant must meet heightened pleading standards and aver ***specific*** facts that show that she herself reasonably relied on certain purported misrepresentations (or concealments), and was damaged ***as a result of*** such reliance—not just that the School allegedly made such misrepresentations, on the one hand, and that she has incurred some expenditures, on the other. Claimant has failed to meet these pleading requirements as well. Instead, Claimant's Demand merely asserts skeletal recitations of the elements of a fraud claim, devoid of any facts, and leaves unanswered many critical questions, including, but not limited to (1) how or when the School allegedly misrepresented its status to her regarding whether it was "approved," (2) why advertisements from before she began contemplating enrolling at the School (or after she already enrolled) are relevant to this dispute at

all, (3) what she would have done differently in the event she had not come across the purported misrepresentations, (4) why it was reasonable for her to rely on such advertisements, and (5) how she suffered any damage that was caused by the purported misrepresentations. These critical omissions in her pleading render her fraud-based claims fatally defective.

In light of these flaws, the School, therefore, strongly urges the Arbitrator to dismiss Claimant's causes of action, or, at a minimum, force her to amend her Demand to address these critical defects in her allegations.

I. Claimant Concedes That Her Grievances About The Quality Of The Education She Received Are Irrelevant—And So Her Related Allegations Should Be Stricken

In her concluding argument, Claimant states without equivocation that she is "not mak[ing] any educational malpractice claims," and that her "claims certainly do not 'turn on, implicate, or embrace' [educational malpractice theories]." (Opp. at 18.) Rule 33 of the AAA Consumer Arbitration Rules explains that dispositive motions are appropriate where "the motion is likely to . . . dispose of or narrow the issues in the case." Given her concession that her accusations regarding the quality of the education she received set forth, among other places, in paragraphs 35-38 and 80-82 of her Demand are not relevant to her claims, striking such allegations would fulfill the precise objective of Rule 33 by "narrow[ing] the issues in the case" to those that actually pertain to the operative causes of action. Claimant's counsel's attempt to put the School and its curriculum at large on trial should not be countenanced.

Curious, however, is the fact that, even though she makes this concession, her Opposition nevertheless continues her legally irrelevant assault on the quality of the education she received. (Opp. at 15 [arguing that she suffered damages because "she purchased outside educational materials, including a JavaScript course, because Lambda's materials were inadequate"].) This contention, which would require the Arbitrator to evaluate whether the educational materials she received from the School were, in fact, "inadequate," is the precise type of allegation which California courts have found to be prohibited. (See *Peter W. v. San Francisco USD* (1976) 60 Cal.App.3d 814, 824–825.) As the Court of Appeal forewarned, there simply would be no way

for the Arbitrator to assess this averment without making the precise type of judgments about the quality of the School's pedagogical methods that the *Peter W*. court frowned upon. (*Id*.)

As Rule 33 Motions are designed to streamline the issues in the arbitration, the Arbitrator should strike the allegations Claimant admits are irrelevant, and ensure that she does not use such irrelevant attacks to bolster her other causes of action, like she has done in her Opposition.

II. All of Plaintiff's Claims Should Be Dismissed Because She Has Not Sufficiently Pleaded Any Damages Or A Causal Relationship Between Such Purported Damage and Any Allegedly Tortious Activity.

A. Plaintiff Has Not Adequately Pleaded That She Suffered Damages Sufficient To Give Her Standing Under the UCL or the FAL.

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.) The "lost money or property" standard was added to the UCL in 2004 by the voters through Proposition 64 in order to limit non-injured parties from filing suit, while simultaneously "preserv[ing] standing for those who *had* had business dealings with a defendant **and had lost money or property as a result of the defendant's unfair business practices**." (*Hinojos v. Kohl's Corp.,* 718 F.3d 1098, 1104 (9th Cir. 2013) (quoting *Clayworth v. Pfizer, Inc.* (2010) 49 Cal.4th 758, 788) [emphasis added]).) The *Kwikset* court gave examples that could satisfy the "lost money or property" requirement:

> (1) surrender in a transaction more, or acquire in a transaction less, than he or she otherwise would have; (2) have a present or future property interest diminished; (3) be deprived of money or property to which he or she has a cognizable claim; or (4) be required to enter into a transaction, costing money or property, that would otherwise have been unnecessary.

(*Id.* at 323; see *Hall v. Time Inc.* (2008) 158 Cal.App.4th 847, 854–55 [plaintiffs suffered an injury in fact under the UCL when they have (1) "expended money due to the defendant's acts of unfair competition;" (2) "lost money or property;" and (3) "been denied money to which [they had] a cognizable claim."].)

Claimant's Opposition asserts that she has adequately pleaded damages sufficient for purposes of establishing standing under the UCL and her other statutory causes of action because (1) she claims she has "incurr[ed] debt" (Opp. at 11), even though she has not made any

payments in connection with that debt (and none are due), and (2) she "made economic expenditures," like when "she purchased outside educational materials, including a JavaScript course" (Opp. at 15). Neither allegation, however, is sufficient under the UCL.

i. Claimant has Not Incurred a "Debt" For Purposes of UCL/FAL Standing.

Claimant argues that she incurred a "debt," which, according to her, qualifies for standing purposes under *Vega v. Ocwen Financial Corp.* (C.D. Cal., Mar. 24, 2015, No. 2:14-CV-04408-ODW) 2015 WL 1383241 and *Lane v. Wells Fargo Bank, N.A.* (N.D. Cal. June 21, 2013) No. 12-cv-04026, 2013 WL 3187410. At first blush, it might appear like these district courts agreed with Claimant's contention that debt, in general, can constitute "a present or future property interest diminished," and therefore a sufficient economic injury under *Kwikset*. However, a closer read reveals that this is not, in fact, the case. For example, in *Vega*, the plaintiff had defaulted on her mortgage, and the defendant had become her default mortgage servicing company. (*Id.* at *1.) Vega's UCL claim alleged that Ocwen had wrongfully assessed various fees that Ocwen added to her mortgage payment amount, which in turn increased the amount of plaintiff's debt. (*Id.*) While the plaintiff in *Vega* had never made a payment to Ocwen from the date the company began administering her default mortgage, that was immaterial to the district court's finding. (*Id.*) Instead, the district court's holding that plaintiff had standing made clear that the reason the plaintiff had sufficiently alleged economic injury under the UCL was because the increase in her "debt diminishe[d] the **equity she obtained in her home**." (*Id.* at *8 [emphasis added]; see also *Lane*, 2013 WL 3187410, at **10-11 [holding that a class of borrowers who had not yet paid an allegedly improper expense charged by the bank on their mortgage accounts had standing under the UCL because "the debt is an economic injury **and lien upon [their] property**"] [emphasis added]; *Evans v. Select Portfolio Servicing, Inc.* (E.D.N.Y., Sept. 30, 2020, No. 18CV5985PKCSMG) 2020 WL 5848619, at *19 [same].) The economic injury alleged in these unpublished authorities was not the existence of a debt ***generally***; instead, it was the fact that the allegedly wrongful increases in her mortgage payment increased her debt level, which would increase the mortgage amount that would be counted against her home value.

In other words, there was a direct and immediate decrease in the value of the plaintiffs' property due to a non-contingent encumbrance imposed by the defendants.

Here, the opposite is true of Claimant. Claimant has not suffered the loss of any value in property by virtue of the alleged "debt" or otherwise. The mortgages in *Vega* and *Lane* were a debt counted against the value of the plaintiff's homes, which had measurable value that had been decreased by virtue of the debts at issue. Claimant, on the other hand, does not plead that her ISA was or is secured against any asset or thing of value. Absent such allegations, whatever "debt" Claimant may eventually owe has no similarity to the debts owed in *Vega* and *Lane.* While it is true that the School could be owed money in the future under the ISA ***if*** Claimant is able to find a qualifying position making over $50,000 per year in the next 52 months[1], until that time (if it ever occurs), Claimant has not suffered any diminishment of a "present or future property interest."

Claimant's other cases involving "debt" for purposes of UCL standing fare no better. Unlike this case, those decisions involve fact patterns in which plaintiffs have standing by virtue of the fact that they owe money on a due and owing debt, something that Claimant does not have in this case. For example, in *Gallano v. Burlington Coat Factory of California, LLC* (2021) 282 Cal.Rptr.3d 748, the Court of Appeal found that an employee had standing under the UCL when she was allegedly "coerced" into signing a confession and a "promissory note establishing a personal debt of $880" to her employer. (*Id.*) The plaintiff in *Gallano* had not made payments to her former employer at the time she brought her UCL claim, but the court found she nevertheless had standing because by "forcing her to sign the promissory note, [her former employer] exposed her to a multitude of non-trivial financial and legal consequences. (*Id.*, at 757.) Claimant, of course, is in a vastly different position than the plaintiff in *Gallano*. Claimant's ISA, after all, is a ***contingent*** repayment obligation that could mean the School is never paid any money whatsoever if she does not find qualifying employment within the next 52 months. Gallano's promissory note, on the other hand, had no such contingency. Claimant has

[1] The School's ISAs expire after 60 months from the date of graduation or withdrawal from the School. (See Demand, ¶ 85, Exh. B, p. 4.) Because Nye left the School in March, 2021, eight months have already passed, meaning she only has 52 months left on his ISA. (*Id.*, at ¶ 84.)

not pleaded, and indeed has not incurred, any "financial or legal consequences" from the ISA, and it's not clear that she ever will incur any such consequences in the future.[2]

Claimant also tries to establish standing by arguing that the ISA is akin to a student loan. (*Daghlian v. DeVry University, Inc.* (C.D. Cal. 2006) 461 F.Supp.2d 1121[student loan found to be a debt that could satisfy the lost money or property prong]; see *Alvarez v. Adtalem Education Group, Inc.* (N.D. Cal., Dec. 16, 2019, No. 19-CV-04079-JSW) 2019 WL 13065378, at *1 [standing where plaintiffs alleged they "incurred debt" in taking out loans to pay university tuition].) However, a typical student loan, like the loans in *Daghlian* and *Alvarez*, is still a *payment of money* to an institution for educational services. In other words, the "money" is "lost" the moment the student pays money to the school, whether directly out-of-pocket, or from a lender. The student loan arises only because the student has made the decision to borrow the money paid to the school from a lender. In contrast, Claimant has not taken out a student loan or paid any money to the School. Claimant has not "lost money," either in the form of money out-of-pocket, or by incurring a student loan debt used to borrow money that she paid to the School. No matter how Claimant characterizes the "indebtedness" she premises her UCL/FAL claim on, she still has not lost or paid even a single cent in payment to the School. Herein lies the central distinction between the School and traditional educational institutions: Bloom students do not

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[2] Rather than making a full argument in the body of the Opposition, Claimant puts in a footnote a contention that economic injury under the UCL can be established where the purported harm "reduces the amount of other debt a plaintiff can enter." (Opp., p. 13.) The case she cites for this argument is *Rubio v. Cap. One Bank* (9th Cir. 2010) 613 F.3d 1195, wherein the plaintiff was forced to choose between closing her credit card account and keeping the account open at a much higher interest rate, and the court held that "losing the credit that Capital One extended" was a sufficient economic injury under the UCL. (*Id.*, at 1204.) The court's citation in support of this finding makes clear that the "loss of money property" is the damage to one's credit by the loss of access to credit. (*Id.* (citing *White v. Trans Union, LLC* (C.D.Cal.2006) 462 F.Supp.2d 1079, 1084).) The situation in *Rubio* is inapplicable to this case. Claimant has not alleged that she has lost access to credit or suffered any detrimental impacts to her credit. Claimant's Demand does not allege that the ISA has caused her to be unable to get a loan or take out additional debt. Indeed, that is because she currently has no debt against her imposed by the ISA.

Claimant then tries to invoke the finding in *Rubio* to her claims by pointing to a provision in the ISA that limits her ability to enter into other additional ISAs depending on the percentage share of income that an additional ISA would obligate her to. (Demand, Exh. B.) However, the provision she identifies in the ISA is a contractual limitation on her ability to enter into additional ISAs. Her agreement to that provision forms part of Claimant's consideration under the parties' contract; Claimant was willing to forego other opportunities that require an ISA in exchange for the School's educational services. Claimant cannot claim a loss of money of property where she agreed to give up the ability to seek additional ISAs as part of the parties' mutual contractual relationship.

pay any tuition until and unless they find qualifying employment. Analogizing her contingent payment obligation to those incurred by students enrolled at traditional educational institutions ignores this critical distinction. Given the School's unique educational model, it is unsurprising that Claimant has not found any UCL cases that deal with contingent payment obligations like the one she claims she has incurred. But that does not mean that the Arbitrator in this case should accept her invitation to create what would undoubtedly be new law.

Because Claimant undoubtedly realizes these flaws in arguing that an ISA is the same as a typical student loan, she raises two consent orders entered in administrative cases concerning other ISA providers in an attempt to shore up her argument. Neither, however, salvage her defective theory of standing. In the Meratas consent order the Commissioner of the California Department of Financial Protection and Innovation ("CDFPI") apparently stated that, for purposes of licensure to service student loans under the California Student Loan Servicing Act (SLSA), an ISA is a "student loan" under the SLSA. (Opp., p. 14.) In the Better Future Forward, Inc. consent order, the Consumer Financial Protection Bureau ("CFPB") stated that ISAs "are loans and do create debt." (*Id.*) Better Future Forward concerned allegations that the company had been providing ISAs in a manner that violated several federal laws by using "deceptive acts and practices." However, neither of these consent orders says anything about UCL standing, nor could they as findings by administrative agencies do not rewrite firmly established principles of law. The CDFPI and the CFPB made no such findings in their consent orders, nor would they as purely administrative bodies, regarding whether the contingent obligation created by an ISA is a "debt" sufficient to establish a loss of money or property under the UCL. Whether a state license is required to provide ISAs (Meratas), or federal law was violated in how ISAs were provided to consumers (Better Future Forward), says nothing about whether an ISA can be considered a student loan for purposes of pleading a loss of money or property under a UCL claim. Claimant's counsel's attempt at asking the Arbitrator to chip away at the clear intention of California voters to limit standing through the usage of administrative pronouncements should be rejected.

At best, Claimant has alleged that she may ***one day*** incur a financial obligation to repay the School for the education she received. But "the risk of suffering speculative, unknown damages ***in the future*** is insufficient to support a UCL claim." (*Poghosyan v. First Fin. Asset Mgmt., Inc.* (E.D. Cal. Jan. 28, 2020) No. 119CV01205DADSAB, 2020 WL 433083, at *8 [emphasis added].)

ii. Claimant's Other Damages Theory Does Not Establish UCL/FAL Standing.

Ostensibly aware of the dubious nature of her claim that her obligations under the ISA, which are not due or owing (and may never be), qualify for standings purposes under the UCL, Claimant subsequently argues that she "'lost money or property'" when she made certain unspecified "economic expenditures," like purchasing outside educational materials, including a JavaScript course, because Lambda's materials were inadequate." (Opp., p. 15 (citing Demand, ¶ 82).) The Arbitrator should view this contention with a jaundiced eye.

Setting aside the fact that she has not adequately alleged a causal nexus between any of the alleged wrongful conduct, on the one hand, and these "expenditures," on the other, it is not clear that these "damages" qualify under the UCL in the first instance. She has not, after all, indicated what, ***if any***, money she paid for the supposed JavaScript course she took through Udemy. While an "identifiable trifle" of economic injury may be sufficient for conferring UCL standing, Claimant has not "identifi[ed]" what that trifle was in the first place.

At a minimum, Claimant should be required to "identif[y]" her "trifle" or be subject to dismissal. (*Meyer v. Cap. All. Grp.* (S.D. Cal. Nov. 6, 2017) No. 15-CV-2405-WVG, 2017 WL 5138316, at *5 [granting summary judgment against UCL plaintiffs where plaintiffs "failed to meet their burden to establish that they suffered a quantifiable, non-trivial economic injury"].) While there is "little case law clarifying the extent of lost money or property" required for UCL or FAL standing, courts have nevertheless dismissed claims for lack of standing where such damages are "de minimis." *Saitsky v. DirecTV, Inc.* (C.D. Cal. Sept. 22, 2009) No. CV 08-7918 AHM (CWX), 2009 WL 10670629, at *5 [dismissing claim, in part, due to lack of standing because plaintiff's alleged injuries "appear[ed] to be de minimis."]) "Although this bar is not

high, trivial, de minimis, or non-existent alleged injuries are not sufficient and do not constitute injury-in-fact for UCL and FAL standing." (*Meyer,* 2017 WL 5138316, at *2.) Claimant has introduced no facts, in her Demand or her Opposition, sufficient to show that the so-called "economic expenditures" she made (but does not quantify) are non-trivial losses that would confer UCL standing. (See *Reichman v. Poshmark, Inc.* (S.D. Cal. Jan. 3, 2017) 267 F.Supp.3d 1278 [finding allegations insufficient where that unsolicited text "advertising uses the paid for and economically valuable text message allotments."); *Olmos v. Bank of Am., N.A.* (S.D. Cal. June 1, 2016) No. 15-CV-2786-BAS(BGS), 2016 WL 3092194 at *4 ["[T]he allegation that Plaintiff received two short text messages is insufficient to convey standing because the loss of battery life and bandwidth as a result of these two messages was de minimis."]; *Hernandez v. Path, Inc.* (N.D. Cal. Oct. 19, 2012) 2012 WL 5194120 *2 [finding that "the specific harm caused by diminished resources of which Plaintiff complains is de minimis: depletion of two to three seconds of battery capacity." [internal citation omitted]]; *Lueras v. BAC Home Loans Servicing, LP* (2013) 221 Cal.App.4th 49, 82 ["We have deemed such costs to be de minimis, and they are not sufficient to qualify as injury in fact under section 17204"]; *Rucker v. Bank of Am., N.A.* (Cal. Ct. App. Sept. 29, 2016) No. B266355, 2016 WL 5462837, at *4 (unpublished) ["the money she spent to copy photos for her loan modification applications is unrelated to the alleged Unfair Competition Law violations and is de minimis as a matter of law"].) Despite these requirements, Claimant has not pleaded (or identified in her Opposition) any facts that show that her ambiguous "outside purchases" are sufficient under the law for purposes of establishing standing.

B. **Claimant's Attempt To Differentiate The CLRA Is Unpersuasive.**

Claimant's Opposition contends that "Lambda … makes the incorrect argument that '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.'" (Opp., p. 15 (citing Demurrer, p. 11).) But Claimant completely ignores the finding in *Hansen v. Newegg.com Americas, Inc.* (2018) 25 Cal.App.5th 714, cited by the School in its opening brief, that the standing requirements are "essentially identical" across the UCL, FAL, and

CLRA. (*Id.*, at 724.) Claimant also ignores the School's citation to *Bower v. AT&T Mobility, LLC* (2011) 196 Cal.App.4th 1545, where the appeals court found that "[a]n individual seeking to recover damages under the CLRA based on a misrepresentation must prove … actual injury." (*Id.*, at 1556.)

Instead of trying to differentiate these cases or explain why neither finding is applicable to this case, Claimant points to non-binding authority from the Ninth Circuit in *Hinojos*, *supra*, 718 F.3d 1098, for the finding that the "any damage" requirement under the language of the CLRA "is a capacious one that includes any pecuniary damage as well as opportunity costs and transaction costs that result when a consumer is misled by deceptive marketing practices." (*Id.*, at 1108.) In reaching that conclusion, the Ninth Circuit relied on the California Supreme Court case, *Meyer v. Sprint Spectrum L.P.* (2009) 45 Cal.4th 634, which held that a consumer alleging a CLRA violation must "experience some kind of damage," or suffer "some type of increased costs" to have standing. (*Id.*, at 641.) But Claimant's analysis stops short of explaining why the CLRA should be treated any different from the UCL/FAL.

First, *Hinojos* made no actual differentiation between the CLRA and the UCL/FAL with respect to standing. *Hinojos* merely stands for the proposition that "any plaintiff who has standing under the UCL's and FAL's "lost money or property" requirement will, *a fortiori,* have suffered "any damage" for purposes of establishing CLRA standing." (*Hinojos* at 1108.) In other words, while *Hinojos* does point out that the statutory language "any damage" (CLRA) and "lost money or property" (UCL/FAL) are different, the case did not engage in a substantive differentiation between the two requirements that would enable the Arbitrator to define when something is, or is not, a UCL/FAL violation, as opposed to a CLRA violation.

Second, Claimant's Opposition does not explain why she believes the "any damage" and "lost money or property" standing requirements are any different. Indeed, the case law's description of the CLRA's requirement that there be "pecuniary" harm, "damages," and "increased costs" does not seem to parse the statutes in any discernable way. (See *Hodsdon v. Mars, Inc.* (N.D. Cal. 2016) 162 F.Supp.3d 1016, 1022, *aff'd* (9th Cir. 2018) 891 F.3d 857

[finding that "pecuniary loss," described as the increment of "the extra money paid" because of a CLRA violation, "is economic injury and affords the consumer standing to sue."].)

Claimant has not pleaded a viable theory for standing under the UCL or FAL, and her Opposition gives no reason why the door to standing should swing open any wider such that her CLRA claim should survive either. Claimant has not pleaded that she suffered any damages in the form of pecuniary losses, lost opportunities, or increased costs. Claimant's CLRA claims should be dismissed, just like her UCL and FAL claims.

C. Claimant Has Not Pleaded Any Facts That Establish The Requisite Causal Connection Between the Alleged Tortious Activity and the Alleged Injury.

"There must be a causal connection between the harm suffered and the unlawful business activity. That causal connection is broken when a complaining party would suffer the same harm whether or not a defendant complied with the law." (*Troyk v. Farmers Group, Inc.* (2009) 171 Cal.App.4th 1305, 1349; see *Bettison v. Wells Fargo Bank, N.A.* (C.D. Cal. June 12, 2018) No. SACV180419DOCJCGX, 2018 WL 5880835, at *8 (citing *Rubio v. Capital One Bank* (9th Cir. 2010) 613 F.3d 1195, 1203).)

Here, one of Claimant's allegations is that the School violated the UCL's unlawful prong by operating without approval. Her allegedly wrongfully "incurred debt," however, has no causal relationship with her claim that the School was operating without approval. That "incurred debt," to the extent it can be characterized as such, flows from her ISA, not from whether or not the School was "approved" at the time it was executed. Indeed, any "debt" incurred through an ISA would still be owed, regardless of whether the School was in or out of compliance with pertinent Education Code sections. Accordingly, even if such a contingent liability were recognized as an economic injury for purposes of conferring UCL standing, Claimant has not shown that that injury flowed from anything, other than an ISA, the validity of which as an instrument is not being challenged in this arbitration. (See *Foyer v. Wells Fargo Bank* (S.D. Cal. July 10, 2020) N.A., No. 320CV00591GPCAHG, 2020 WL 3893031, at *12 ["Plaintiffs' potential loss of their home is plainly a loss of property, but that loss cannot be fairly traced to Defendant's conduct."].)

Peterson v. Cellco Partnership (2008) 164 Cal.App.4th 1583 is instructive. In *Peterson*, the plaintiffs alleged that defendant violated the UCL by selling insurance while unlicensed to do so, and unlawfully retained a percentage of the insurance premiums. (*Id*. at 1586-87.) The California Court of Appeal sustained the trial court's demurrer of the UCL claim. (*Id.* at 1590.) The court reasoned that the plaintiffs had not sustained an actual economic injury because they did not allege that they paid more for the insurance and they received the bargained for insurance at the bargained for price. (*Id*. at 1591.) While aspects of the *Peterson* court's analysis concerning the "benefit-of-the-bargain" defense to UCL claims have been subsequently limited, nothing about the court's conclusion that the alleged injury did not flow from the status of the defendant's license has been called into question. Like in *Peterson*, whatever debt purportedly incurred through the ISA flowed from the parties' bargain, and would not have been more, or less, if the School had, or had not, been "approved" under the paradigm urged by Claimant. (See *Demeter v. Taxi Computer Servs., Inc.* (2018) 21 Cal.App.5th 903, 916-17 ["Demeter has not provided evidence that the service he purchased from TAXI was somehow not up to par, nor has he established a dispute of fact concerning whether the amount he paid for his TAXI membership was more than it was worth because of TAXI's (then) unbonded status."]; *Medina v. Safe-Guard Prod., Internat., Inc.* (2008) 164 Cal.App.4th 105, 114, as modified (July 11, 2008) ["Medina has not alleged that he didn't want wheel and tire coverage in the first place, or that he was given unsatisfactory service or has had a claim denied, or that he paid more for the coverage than what it was worth because of the unlicensed status of Safe–Guard"].) Accordingly, even if the contingent obligation to pay the School ***did*** qualify as an injury within the meaning of the UCL for purposes of establishing standing, Claimant's "unlawfulness" theory should still be dismissed because of her failure to establish any causal nexus between the School's status from a regulatory perspective, on the one hand, and her alleged injury, on the other.

The chronology set forth in Claimant's Demand highlights this defect in her theory. The very face of the BPPE citation attached to her Demand indicates that it would not be effective until after a final decision was reached, in the event the citation was appealed. She entered her ISA—incurring the alleged debt—at a time when that citation was stayed, meaning that the

School was not operating "unlawfully" at the time it was executed. The fact that her contractual obligations did not change during the period in which that citation was stayed and the period during which Claimant argues the School became prohibited from continued operations proves that the alleged "incurred debt" would exist, regardless of whether the School was approved (within Claimant's paradigm) or not.

The same causal defect exists with respect to Claimant's separate allegation that she relied on a "statement that [the School] would only get paid if and when she did," in deciding to enroll with the School. (Demand, ¶ 75.) The supposed misrepresentation according to Claimant is that the School sometimes sells the contractual rights to the ISAs to third-parties in exchange for payment. (See Demand, ¶¶ 61-74.) However, even if this were a misrepresentation, the allegation is still devoid of causality. Whether the School sold Claimant's ISA or not (and she has not alleged that her ISA was sold to a third party) would not break her obligations under the ISA. Regardless, whether the School or a third party buyer is entitled to payment under the ISA in the event Claimant finds a qualifying job in the next 52 months has no effect on her obligations and causes her no greater harm under either case.

The same causational defect exists with regard to Claimant's miscellaneous purchases she claims as damages. Assuming she made such "economic expenditures" in the first place, there are no allegations in the Demand that any were caused, in a legal sense, from any of the School's allegedly tortious activities under the UCL or otherwise. Again, under the unlawful theory of her UCL claim, there is no nexus, pleaded or otherwise, between the School's approval status, on the one hand, and her purchase of a JavaScript course, on the other. Taking Claimant at her word, that she was "forced" to purchase such outside educational materials, there is nothing in her Demand that would suggest that she would somehow not needed to have made such purchases if the School had hypothetically been "approved" at all times during her enrollment.

If there were any doubt as to whether she satisfied this component of her pleading burden with regard to her "outside purchases" theory, it would be extinguished by looking at the very admissions in her Opposition: on page 15, Claimant concedes, in no uncertain terms, that the reason she "purchased outside educational materials" was "because Lambda's materials were

inadequate." (Opp. at 15.) Her own allegation concedes that she made such purchases because of her views on the quality of materials the School provided—and not because of the School's status as an approved (or unapproved) postsecondary educational institution or because of her views on whether a third party owned her ISA—views which her Opposition already conceded are not relevant to her specific claims. Because there is no causal link between the actual wrongdoing she claims the School engaged in, on the one hand, and the alleged "outside purchases," on the other, she has not satisfied her burden of establishing a causal nexus for any of her claims—and especially not for purposes of establishing standing under the UCL, FAL, or CLRA.

D. **Plaintiff's Damages Theories Do Not Support Her Fraud Claims**

For very similar reasons as above, Claimant's fraud-based claims are also defective in that she has not alleged a cognizable theory of damages. As set forth in its Demurrer, Claimant's fraud-based claims generally require a plaintiff to allege she suffered "out of pocket" or "benefit of the bargain" damages. Claimant does not dispute this fact, instead simply claiming that she has made one of these showings. Specifically, she restates the standard for so-called "benefit of the bargain" damages, asserting that "allegations that the product advertised was of less value than the product actually received constitutes 'a plausible damages theory' for fraud-based claims." (Opp. at 16.) In arguing that she meets that standard, Claimant cites *Alvarez*, where a district court found, at the motion to dismiss stage, that the plaintiffs had adequately alleged damages under their common law fraud theories premised on job placement rate misrepresentations. (*Id.* (citing *Alvarez*, *supra*, 2019 WL 13065378, at *4-5).) Her analysis, however, is unavailing.

Initially, Claimant's rebuttal only speaks to one variant of her common law fraud theories. As set forth in the School's Motion, Claimant also asserts claims based upon the allegation that (i) Bloom allegedly falsely stated it would not get paid until students get paid and (ii) Bloom allegedly concealed the fact that it was not "approved" when Claimant enrolled. Claimant cites no authority, and provides no explanation, as to how her alleged reliance on such supposed misrepresentations (or concealed facts) caused her any damage. Neither her Demand

nor her Opposition explains how she could possibly have been harmed by the alleged misrepresentation that the School does not get paid until its students do or the allegedly concealed fact that the School was not approved. The absence of any explication of such damages is fatal to these fraud theories, and should be remedied by dismissal, or at a minimum an order forcing her to articulate her specific damages theories in connection with these claims.

With regard to her job placement rates theory, however, Claimant's analysis misses the mark in several principal respects. First, unlike the plaintiffs in *Alvarez*, Claimant has not paid a cent for the education she received. Unlike *Alvarez*, where the plaintiffs actually paid money for their education, Claimant's education was free—at least until she obtains qualifying employment. In *Alvarez*, the court affirmed of plaintiffs' damages theory for purposes of establishing standing to assert their fraud claims presumably on the theory that they "over-paid" for the education they received. Claimant cannot be said to have "over-paid" for her education as she has not paid any money in the first instance. Indeed, the only way she will pay any money is if she succeeds in finding qualified employment. Claimant either will not find a qualifying job (and in that event has suffered no economic losses) or she will (and in that event cannot claim to have been harmed by the School's representations about job placement). But she cannot have it both ways.

Second, also unlike the plaintiffs in *Alvarez*, Claimant has not graduated from the School. While Claimant gives the back of the hand to this analysis in the School's Motion, she misses a critical point. Claimant cannot be said to be "damaged" in terms of the post-graduation job prospects she claims she bargained for when she did not graduate in the first place. While Claimant asserts that the School "invented" this requirement, it is actually a very simple proposition of law. Claimant apparently avers that she was deceived into believing she would have had better chances of finding employment upon graduating, and implies that her damages could be measured by the difference between her expected job placement prospects and her actual job placement prospects. But, in not graduating, there is no discernible way to measure what she contends are her post-graduation diminished job placement prospects since she did not graduate.

Finally, while Claimant does not specifically claim that the "economic expenditures" she purportedly was "forced" to make bolster her common law fraud theories, it bears noting that such "expenditures," at least as pleaded in her Demand and identified in her Opposition, do not fall within either the "out of pocket" or "benefit of the bargain" rubrics into which she concedes her damages must fit to state a common law claim for fraud. According to her own allegations, her alleged JavaScript courses from Udemy, for example, are not "out of pocket" expenses she incurred in relying on the alleged misrepresentations or nondisclosed facts. They also cannot be "benefit of the bargain" damages because such damages are measured by the difference between the value of what was expected and what was received. Money spent on a supplementary program is irrelevant to that calculation.

Just like in connection with her statutory claims, Claimant has not adequately pleaded that she suffered any cognizable damage in connection with her fraud-based claims. As such, they, too, should be dismissed.

III. Plaintiff's Fraud-Based Theories Are Not Adequately Pleaded

But even if Claimant had adequately alleged that she suffered some type of damage sufficient for supporting any of her fraud-based claims, her Demand falls far short of satisfying the other attendant pleading burdens necessary for asserting such causes of action. While Claimant argues otherwise, the contentions she advances in defending her Demand are unavailing.

First, she states that "Lambda can hardly contend that it lacks 'notice of [its] alleged misconduct'" because she included quotations and screenshots in her Demand. (Opp. at 6.) But the School's Motion did not argue that it did not have notice of the misconduct Claimant alleged the School engaged in. Indeed, the School's Motion acknowledged that Claimant's "Demand is rife with accusation about what Lambda allegedly stated (and why she believes it to be false." (Demurrer at 8.)[3] Instead, the School indicated in its Motion that Claimant's Demand is

[3] Nevertheless, in light of Claimant's strident claim that "Lambda knows ***exactly*** what it is accused of doing, and Ms. Nye readily satisfies her burden" (Opp. at 6), it bears noting that Claimant's Demand is especially devoid of facts regarding the somewhat remarkable claim that "Lambda [made] representations, both implied and explicit, that it was approved to operate, advertise, enroll, and teach students prior to August 2020" (Demand at ¶ 120(c)). What those "implied and explicit" representations Claimant alleges the School made remain a mystery to this day,

"glaringly scant in the details she provides about her specific experience concerning, and reliance upon, the supposed misrepresentations." (*Id.*) Claimant's straw-man here mischaracterizes the School's argument—and misses the point.

The point is that all Claimant's Demand sets forth are generic, conclusory allegations regarding, among other things, when she was exposed to the alleged misrepresentations and why they mattered to her. She claims that her Demand "repeatedly and clearly alleges that she read and relied on the placement rates and statements that Lambda only got paid if she did, and that both were critical to her decision to enroll." (Opp. at 7.) And in support of that assurance, she cites approximately five (5) different paragraphs in her Demand. (*Id.* at 7, fn. 7.) But she does not explain how allegations like "Ms. Nye relied on Lambda's advertised job placement rate of over 80% and its promise that Lambda would not get paid until she did when she decided to enroll at Lambda in June of 2019, financed by an ISA" (*id.*) are anything other than recitations of the bare-boned elements of a fraud claim. It is Claimant who can hardly claim that her Demand has put the School in a position to "defend [itself]" (Opp. at 6 (citing *Benavidez v. Cnty. Of San Diego* (9th Cir. 2021) 993 F.3d 1134, 1145)) when her allegations provide no information about, for example, when or why Claimant was searching for this information (if she was searching for it in the first place) or why it mattered to her decision-making process.

Claimant defends her conclusory allegations, claiming that "[h]eightened pleadings standards are not so pinched that a plaintiff need recall the exact day she was exposed to a misrepresentation to seek justices for its consequences." (Opp. at 11.) But, again, Claimant is putting words in the School's mouth: the School never argued that Claimant's allegations were defective because she has not asserted the "exact day she was exposed to [the alleged] misrepresentation[s]." (Opp. at 11.) Instead, the School argued that the law requires more than

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meaning that the School ***does*** "lack[] 'notice of [its] alleged misconduct'" at least as to this particular theory of Claimant's fraud allegations.

Moreover, Claimant did not respond to the School's argument that "many of [the quotes and screen shots in her Demand that she believes rescue her fraud allegations] . . . were made after she signed the ISA in June 2019, and [are] thus incapable of inducing reliance." (Demurrer at 8 (citing Demand ¶¶ 52, 55-59, 68-73, 94-95).) In other words, Claimant's Demand, which she assures the Arbitrator is a paragon of clarity regarding the School's purported misconduct, actually does not put the School on notice of which particular representations are at issue—and which were included in her Demand for rhetorical reasons.

skeletal allegations, devoid of facts, regarding the alleged fraud at issue. (Demurrer at 9-10.) Indeed, the vague temporal markers in her Demand do not even meet the standard set in one of the two authorities Claimant cites in support of her contention. (*Alvarez*, WL 13065378, at *3 [finding fraud allegations sufficient where "[e]ach plaintiff [had] allege[d] an approximate time and place of . . . in-person representations [regarding the allegedly deceptive job placement rates]].) Claimant's Demand leaves unanswered basic details like whether she was investigating the School, was considering multiple coding schools, or she just stumbled upon the School's website when she supposedly saw the alleged misrepresentations at issue.

Claimant also defends her bare-boned allegations by claiming that she is not required to plead what she would have done differently, had she been not exposed to the information she claims was fraudulent. (Opp. at 10.) As an initial matter, setting aside whether a fraud plaintiff must plead *what* she would have done differently in the absence of an alleged fraud, it is axiomatic that a fraud plaintiff must plead *that* she would have done something differently. Claimant has barely even done that. Still, Claimant tries to distance her pleading from the one in *Bower*, *supra*, 196 Cal.App.4th at 1553, by claiming that her case fits within the language excerpted in her brief. (Opp. at 10.) But Claimant cannot now claim that hers is a case where "the product was worth less than represented by the defendant or was different from what the consumer wanted and expected to buy" (Opp. at 10 (citing *Bower*)) when she has already conceded that her claims "certainly do not 'turn on, implicate, or embrace'" her allegation "that Lambda did not provide her with what she would consider a quality education" (Opp. at 18 [citing Demurrer at 14]).

Claimant then spills much ink on an irrelevant discussion regarding the role of integration clauses and disclaimers in breach of contract cases. (Opp. at 7-9.) Again, Claimant is creating straw-men, instead of addressing the School's arguments. The School never argued that the "integration clause and 'no liability' clause in . . . Lambda's ISAs [] exonerate Lambda from liability." (Opp. at 7.) The School merely pointed to language in the parties' agreement in order to demonstrate just how empty her fraud allegations were pleaded as they do not speak in any way, shape, or form to the issue of why it would be reasonable to rely on the alleged

misrepresentations at issue in the face of such provisions. (Demurrer at 8.) Despite Claimant's tome on contract law, whether she likes it or not, plain language in an agreement can and will bear on whether it was reasonable to rely on an alleged misrepresentation. (See, e.g., *BASF Corp. v. Platinum Collision Ctrs., Inc.* (C.D. Cal. July 3, 2019) No. EDCV181614MWFKKX, 2019 WL 6317776, at *6 ["[W]here alleged misrepresentations in a fraud in the inducement action contradict an integrated written agreement, as here, California courts routinely conclude that reliance is simply not justifiable." (citations omitted)]; *L'Garde, Inc. v. Raytheon Space and Airborne Sys.* (C.D. Cal. Sept. 6, 2013) 11-CV-4592-GW (AGRx), 2013 WL 12113998, at *17-18 [dismissing fraud-based claims and noting that "there cannot be justifiable reliance where a plaintiff claims to have relied upon a promise or representation which is wholly inconsistent with an express term of the contract knowingly executed by the plaintiff"]; *Khan v. CitiMortgage, Inc.* (E.D. Cal. 2013) 975 F. Supp. 2d 1127, 1141 ["[N]othing suggests that Ms. Khan's reliance on a loan modification or postponement of foreclosure was justified, especially since she remained obligated on her promissory [note] and [deed of trust]"]; *Slivinsky v. Watkins-Johnson Co.* (1990) 221 Cal.App.3d 799, 807 [concluding that the plaintiff's "alleged reliance on [the defendant's] oral promises of continuing employment is simply not justifiable because the representations contradict the parties' integrated employment agreement which provided that the employment was at will"].) Claimant's failure to plead any allegations as to why it was reasonable to rely on the alleged representations, despite such language in the contract, renders her claims subject to dismissal as a matter of law, since such reliance would be unreasonable, and definitely makes them susceptible to demurrer with leave to amend so that the School has notice of its allegations.

CONCLUSION

Under AAA's Consumer Arbitration Rules, there is no generalized right to discovery between the parties. This makes it particularly challenging for parties like the School when faced with demands like Claimant's which do little more than recite the bare-boned elements of the claims at issue and provide vague, conclusory allegations about, for example, their standing to assert such causes of action. Fortunately, the Arbitrator has permitted the School to file this

Motion, which is poised to streamline the issues in the dispute by striking Claimant's legally irrelevant attacks on the School's curriculum, dismiss her statutory claims for lack of standing, and force her to, at a minimum, provide facts, not just recitations of the elements, in support of her fraud-based claims. For the foregoing reasons, the School respectfully requests that the Arbitrator grant its Motion.

DATED: November 23, 2021

McMANIS FAULKNER

/s/ *Patrick Hammon*
PATRICK HAMMON
ANDREW PARKHURST

Attorneys for Respondent,
LAMBDA, INC.