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BLOOM INSTITUTE OF TECHNOLOGY;
AUSTEN ALLRED

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

FULLER, et al.,

Plaintiffs,

vs.

BLOOM INSTITUTE OF TECHNOLOGY, et al.,

Defendants.

Case No. 3:23-CV-01440-AGT

DEFENDANT BLOOM INSTITUTE OF TECHNOLOGY'S NOTICE OF MOTION AND MOTION TO DISMISS UNDER 12(b)(6)

Date: May 19, 2023
Time: 10:00 a.m.
Dept: Courtroom A, 15th Floor
Judge: Magistrate Alex G. Tse

NOTICE

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on May 19, 2023, at 10:00 a.m., or as soon thereafter as the matter may be heard in the above-entitled court located at the Phillip Burton Federal Building, 450 Golden Gate Avenue, San Francisco, California, before the Honorable Magistrate Alex G. Tse, defendant, Bloom Institute of Technology, will move the Court, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, to dismiss this action.

This motion will be based upon this notice of motion and motion, the accompanying memorandum of points and authorities, declaration of Patrick Hammon, request for judicial notice; the papers and records on file herein; and on such oral and documentary evidence as may be presented at the hearing on the motion.

Dated: April 12, 2023

PILLSBURY WINTHROP SHAW PITTMAN LLP

/s/ *Patrick Hammon*

By: PATRICK HAMMON
ANDREW K. PARKHURST
Attorneys for Defendants,
BLOOM INSTITUTE OF TECHNOLOGY;
AUSTEN ALLRED

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INTRODUCTION

Four people—with no technical training or education or prior careers in the tech industry—enrolled in a coding bootcamp. None of them paid a penny to receive their education. Instead of paying upfront (or at all) to enroll, each agreed that, if they obtained certain types of qualified employment in the tech industry, they would pay some portion of their future earnings back to the school as payment for their education. Three of them completed the program; one of them withdrew; like thousands of other graduates from that school, all four of those students ended up with jobs in the tech sector or information technology. After getting those jobs, one paid "nearly $10,000" from his earnings to the School; another paid "approximately $1,000;" the other two still have not paid a penny. Not once in their Complaint do any of the Plaintiffs allege that, during the pertinent time period, the School has ever threatened to initiate formal collection proceedings, let alone litigation, against any of the four students in connection with the money they owe under their agreements with the School. The four individuals are still working in the tech sector and IT industry, armed with the expertise and training the school helped them develop, and none face any discernible threat of being compelled to pay another penny to the institution that provided it to them.

If the Court is wondering "what we are doing here?," it is not alone. Bloom Institute of Technology (formerly Lambda School) ("Defendant," "Bloom," or the "School")[1] and Austen Allred (together "Defendants") are scratching their proverbial heads as well. The parties made a deal, the students benefited from that deal, but now their lawyers do not want them to honor it.

To justify their refusal to honor their payment obligations (and recoup the few payments they have already made to the School), the students' lawyers have hurled thirty-six pages worth of allegations against it, asserting three causes of action and countless allegations, which fundamentally boil down to two basic grievances. ***First***, the students' lawyers claim the School misrepresented

[1] Concurrent with this submission, Defendant Bloom joins with Defendant Austen Allred in filing Defendants' Motion to Compel Arbitration. The School also joins in the arguments set forth in Mr. Allred's Motion to Dismiss under Rule 12(b)(6) and Motion to Strike under Rule 12(f), and incorporates those herein. Briefly, all the claims against the School (and Mr. Allred) are subject to an enforceable arbitration agreement and may not be resolved here. The School's Motion to Dismiss is offered in the alternative should the Court decline to compel some or all of the claims alleged in this case against it to arbitration.

certain job placement rates. ***Second***, the students' lawyers claim the School engaged in various unlawful business practices, most notably operating in a manner that the students' lawyers now claim was illegal by continuing to operate before receiving an approval from something called the BPPE. To the extent either of these allegations are concerning *now*, they certainly were not concerning *then*, as the students' own Complaint reveals that, to the extent of these topics actually were issues, they were generally known and widely covered in the press, including in the School's own blogposts, both *before* and *during* the period in which the four students enrolled—and yet the students remained in the program until completion (or, in one student's case, withdrawal).

Fortunately for the School (and other future students who hope to find the same type of gainful employment in the tech industry as these four did), the students' lawyers' effort at unwinding the deal they reached is based upon defective legal theories, and ones that can be dismissed immediately. As for the School's supposedly misrepresented job placement rates, the students cite nothing, even upon information and belief, as to how the specific rates they claim they saw (and allegedly relied upon) were actually false. Their complaint provides literally no averments of any kind that even remotely suggest that a representations that 201 of the 255 (or 79%) graduates from the first half of 2019 with verified placement data were placed in jobs—or that 181 of the 244 (or 74%) graduates from the second half of 2019 with verified placement data were placed in jobs—were false. As for the School's supposedly unlawful conduct, the students fail to show how such allegedly illegal practices caused them any meaningful or discernible harm by the supposed violations of the laundry list of laws and statutes set forth in their complaint. In light of these essential problems in their allegations, the students cannot maintain any of their causes of action against the School or Mr. Allred, not under the UCL, the FAL, or the CLRA.

To the extent the Court denies, or only grants in part, Defendants' Motion To Compel Arbitration and Request for Stay, without waiving any of its rights or otherwise conceding that this matter is not subject to arbitration, either in whole or in part, Defendants move in the alternative to dismiss each and every claim that does or may remain with this Court, under Federal Rule of Civil Procedure 12(b)(6).

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BACKGROUND

I. Plaintiffs Initiate This Action—And Defendants Remove To Federal Court.

On March 16, 2023, Plaintiffs, Jessica Fuller, Alexander Goncalves, Brett McAdams, and Quinn Molina (collectively "Plaintiffs") filed a Class Action Complaint in the Superior Court for the County of San Francisco alleging claims for (1) Violations of the Consumer Legal Remedies Act (CLRA) (California Civil Code sections 1750, *et seq.*; (2) Violations of the Unfair Competition Law (UCL) (California Business and Professions Code sections 17200, *et seq.*; and (3) Violations of the False Advertising Law (FAL) (California Business and Professions Code sections 17500, *et seq.*). On March 27, 2023, Defendants filed a Notice of Removal to the District Court for the Northern District of California under 28 U.S.C. section 1441 and 28 U.S.C. section 1332.

II. Defendant's BPPE License In California And Plaintiff's Residency Outside California.

Plaintiffs allege that the School was cited by the California Bureau for Private Postsecondary Education (the "BPPE") on March 20, 2019. (Compl., ¶ 34.) Plaintiffs attach the purported notice of citation as Exhibit E to their Complaint. What they do not allege in their pleading is the notice to the School of its right to appeal through an "informal conference with the Bureau; and/or through an administrative hearing." (*Id.*, Exh. E, p. 3.) The School appealed the citation as prescribed in the letter, which according to the March 20 letter, stayed enforcement of the citation.

On July 24, 2019, the School was notified that the citation was affirmed following the informal conference on May 15, 2019. (Compl., Exh. F, p. 1.) Included in the letter sent on July 24 was another notification of the School's right to further appeal, stating that the School "ha[s] the right to appeal this affirmed Citation through an Administrative Hearing." (*Id.*, at p. 3.) The Complaint also points out that, during the pendency of the citation and appeal, the School continued to work with the BPPE regarding state approval by submitting its application on May 14, 2019, and subsequently amending and updating its submission under the advisement of the BPPE until it gained formal approval to operate in August 2020. (*Id.*, ¶¶ 39-43, Exhs. G-H, J.)

The School's understanding of its status with respect to the BPPE before August 2020 was considered pending concerning its ability to operate. The School was engaged in good faith throughout the approval process from the date it was notified of the citation and, as is shown by the

allegations in the Complaint and the attached exhibits, the School never sought to avoid BPPE oversight in California. The School also endeavored during the process to maintain transparency and only once it obtained BPPE approval did they relay as much to students and the public. While not formally licensed to operate before August 2020, the School also had not yet exhausted every avenue of appeal of the citation or the approval process. Until such exhaustion (which never arose because the School was ultimately approved by the BPPE on August 17, 2020), the School contends it would not be accurate to characterize the School as "not approved" or operating in an "unlawful" manner with respect to BPPE approval.

ARGUMENT

I. LEGAL STANDARD

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of the claims alleged in the complaint. *Ileto v. Glock*, 349 F.3d 1191, 1199-1200 (9th Cir. 2003). All the factual allegations in the complaint are accepted as true, but legally conclusory statements that are not supported by actual factual allegations need not be accepted. *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009). The complaint must proffer sufficient *facts* to state a claim for relief that is plausible on its face. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 558-59 (2007).

"A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678 (citation omitted). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—that the pleader is entitled to relief." *Id.* at 679.

In addition to the minimum pleading standards described in *Iqbal* and *Twombly*, "Rule 9(b) requires that, when fraud is alleged, a party must state with particularity the circumstances constituting fraud," including UCL, FAL, and CLRA claims in federal court. *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124 (9th Cir. 2009). "The 'circumstances' required by Rule 9(b) are the 'who, what, when, where, and how of the fraudulent activity,'" which requires that the pleading "'set forth what is false or misleading about a statement, and why it is false.'" *United States*

v. Ronca, No. 217CV08044ODWFFMX, 2019 WL 5538416, at *2 (C.D. Cal. Oct. 25, 2019), *quoting Cafasso v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1055 (9th Cir. 2011).

II. PLAINTIFFS' CLRA AND FAL CLAIMS SHOULD BE DISMISSED.

Plaintiffs allege that Defendants violated the CLRA and the FAL for the same two reasons: That the School allegedly (1) misrepresented job placement rates it posted on its website in 2020 and, (2) misrepresented its status with the BPPE. Both of these claims should be dismissed because neither is adequately pleaded—under Rule 12(b)(6) or 9(b).

A. Plaintiffs' CLRA And FAL Claim Are Not Adequately Pleaded With Respect To Their Claims That Defendants Misrepresented Their Job Placement Rates.[2]

Plaintiffs have not pleaded with any particularity what job placement rates they specifically saw, relied on, or about which they were unaware in light of the articles published a few months before they signed their ISAs (and featured prominently in their Verified Complaint) that purported to call the School's placement rates into question. And even more devastatingly to their claims: they have not pleaded any allegations showing why the specific rates they suggest they saw were *false*.

1. Plaintiffs Do Not Plead Which Specific Job Placement Rates (Or Related Materials) They Claim They Saw.

Plaintiffs have not alleged with particularity what job placement numbers they allege they saw that caused them to sign their ISAs. The Complaint pleads generally that the School maintained a "79% placement rate … up on Lambda's website until December 3, 2020," which presumably would have been the time period when three of the Plaintiffs (Fuller, Goncalves, and McAdams) all signed ISAs. (Compl., ¶¶ 72, 109, 118, 125.) However, despite referencing the "79% placement rate" in their Complaint, and identifying the time period where that rate was purportedly posted, none of the three Plaintiffs plead that they actually saw any specific materials articulating the 79% placement rate. Plaintiff Fuller pleads that she viewed a "placement rate of approximately 80%" (Compl., ¶ 107), and Plaintiff McAdams claims he saw a "placement rate approaching 80%" (*Id.*, ¶ 125). Plaintiff Goncalves does not plead ***any*** detail about any specific placement rate he claims he saw, stating only that he was "attracted by Lambda's impressive—and prominently displayed—job placement rate." (*Id.*, ¶ 118.) Giving Plaintiffs' every benefit of the doubt, their Complaint suggests

[2] Plaintiffs' UCL claims premised on the same allegations should be dismissed for the same reasons identified in this section. *See*, *infra*, III(A).

that they recall seeing job placement rates (though they cannot remember what they were), know now that 79% was posted near or around the time they considered enrollment, and therefore conclude that that figure must have been the one that they saw when considering the School. But this effort at back-ending into claims premised on allegations of fraud is a far cry from what they must plead under Rule 12(b)(6), let alone Rule 9(b). The only plausible reason they have not pleaded the specific rate they saw (let alone where, when, or how they saw it) is that they are not certain which placement rates, *if any*, they actually viewed.

Plaintiff Molina's allegations are even more confusing. According to the Complaint's General Allegations, the School apparently stopped displaying the 79% rate on its website near or around December 2020, when it then posted a "74% placement rate," which was allegedly on its site until November 7, 2021. (Compl., ¶ 73.) However, Plaintiff Molina alleges, like Plaintiffs Fuller and McAdams, that he saw "placement rates of approximately 80%" (*id.*, ¶ 135), even though he enrolled in January 2021 (when, according to the Complaint, the 79% rate had not been on the School's site for approximately two months). Either Mr. Molina does not remember the rate he actually saw, to the extent he saw one at all (which would mean his claim he relied upon one should fail) *or* he did not conduct any further investigation of the issue during the two months before executing his ISA (which would mean these rates were not as important to him as his allegations now suggest). Either way, his claim is not adequately pleaded and should be dismissed.

If Plaintiffs cannot identify the particular rate they claim they saw, then the central purpose of Rule 9(b) is defeated because Defendants are deprived of notice of which allegations they must defend. *See Leakas v. Monterey Bay Mil. Hous., LLC*, No. 22-CV-01422-VKD, 2022 WL 2161608, at *9 (N.D. Cal. June 15, 2022). The School cannot defend against allegations that they misrepresented a particular job placement rate, or that Plaintiffs relied on a purportedly misrepresented rate, when Plaintiffs have failed to point to the specific placement rate they claim they saw or that they relied on.

2. Plaintiffs Do Not Plead That The Two Rates They Insinuate They Saw Are False.

According to the Complaint, the only two job placement rates that could plausibly make sense for Plaintiffs to have seen were "79%" (near or before Fuller, Goncalves, and McAdams

signed their ISAs) and "74%" (near or before Molina signed his ISA). But Plaintiffs do not plead any facts, general or specific, that could even remotely suggest that the 79% and 74% placement rates were false. While the Complaint spares no detail in describing why Plaintiffs believe job placement rates they did ***not*** see were false, it is devoid of ***any*** specific fact that would even suggest that the 79% or 74% rates were inaccurate. Plaintiffs' claims should be dismissed on this basis alone—***they literally do not plead that they were exposed to anything untrue about the School's job placement outcomes***.

The failure to plead any such allegations is notable because the 79% and 74% placement rates, and the methodologies used to derive them, are set forth in the "H1 2019 Outcomes Report" and the "H2 2019 Outcomes Report," respectively (when referred to together the "2019 Outcome Reports"), both of which were publicly available on the School's webpage, and which are incorporated into by Plaintiffs' reference to them in their Complaint. (Compl., ¶ 71, fn. 19, fn. 20, ¶ 72, fn. 21, fn. 22; Declaration of Patrick Hammon in Support of Defendants' Motion to Dismiss under Rule 12(b)(6) ("Hammon Decl."), ¶ 2, Exhs. A, B.) In other words, the placement rates, and how they were calculated, were never some closely held secret, not at the time they might have been seen by Plaintiffs or when they drafted their Complaint. If Plaintiffs wanted to review and analyze the 2019 Outcome Reports, and then plead why the placement rates calculated in those reports are incorrect or prepared in a false or misleading manner, they could have done so. But Plaintiffs apparently chose not to, instead opting to merely plead in a blanket and conclusory manner that ***other*** placement rates—and specifically ones they did not see— were false and misleading. All of the math supporting the 79% and 74% rates is right there in the open, and has been for years. Yet Plaintiffs failed to articulate a ***single*** allegation regarding why the data was flawed or skewed, the methodology was unreliable or untrustworthy, or the conclusions were unsupported or miscalculated. Their CLRA and FAL claims, therefore, must fail.

3. Plaintiffs Do Not Plead The School Knew The 79% Or 74% Rates Were False.

"[U]nder the CLRA, plaintiffs must sufficiently allege that a defendant was aware of a defect at the time of sale to survive a motion to dismiss." *Punian v. Gillette Co.*, No. 14-CV-05028-LHK, 2015 WL 4967535, at *9 (N.D. Cal. Aug. 20, 2015), *citing Wilson v. Hewlett Packard Co.,* 668 F.3d

1136, 1145 (9th Cir. 2012). "Similarly, a plaintiff bringing a claim under the FAL must allege sufficient facts to show that a defendant knew that any allegedly false or misleading statements were false or misleading when made." *Punian*, 2015 WL 4967535, at *9, *citing In re Sony Grand Wega KDF–E A10/A20 Series Rear Projection HDTV Television Litig.,* 758 F. Supp. 2d 1077, 1094 (S.D. Cal. 2010); *see also Rice v. Sunbeam Products, Inc.,* No. CV 12–7923–CAS–AJWX, 2013 WL 146270, at *10 (C.D. Cal. Jan. 7, 2013) (dismissing FAL claim as legally insufficient because "plaintiff fails to adequately allege defendant's knowledge of the purported defect."). Thus, under both the CLRA and the FAL, Plaintiffs must allege that Defendants knew the job placement rates were false or misleading at the time they were supposedly disseminated.

Plaintiffs fail to meet this burden. If Plaintiffs cannot even allege facts today showing why such rates were false, it is not surprising that they did not point to any facts showing that the School knew they were false when they were allegedly posted on its website.

That all of the data upon which these rates were based was set forth in the 2019 Outcome Reports that are (and were) publicly available on the School's website only highlights this defect in Plaintiffs' claim. It simply makes no sense to allege that the School was secretly aware of the falsity of these rates when it openly and transparently laid out all the information used to calculate them for the public, and, in the case of the data from H-2 2019, even, according to the very documents Plaintiffs incorporated by reference, made it available to Moody, Famiglietti & Andronico, LLP to audit. (Hammon Decl., ¶ 2, Exh. B at 10.)

4. Plaintiffs Cannot Be Said To Have Reasonably Relied On Any Allegedly False Job Placement Rates When Their Own Complaint Indicates That They Should Not Have Taken Such Representations At Face Value.

A claim alleging that a misrepresentation was made is subject to dismissal where public information exists that undermines a plaintiff's claims of reliance. *See Gray v. Toyota Motor Sales, U.S.A.*, No. CV 08-1690 PSG JCX, 2012 WL 313703, at *8–9 (C.D. Cal. Jan. 23, 2012), *aff'd sub nom. Gray v. Toyota Motor Sales, U.S.A., Inc.*, 554 F. App'x 608 (9th Cir. 2014) (dismissing CLRA and UCL claims brought under a theory of fraudulent nondisclosure where the alleged misrepresentation about the Toyota Prius' gas mileage was known to the public on account of the

fact that it had received "mainstream-media attention" indicating the claims falsity before Plaintiffs purchased their vehicles).

In *Herron v. Best Buy Co. Inc.*, 924 F. Supp. 2d 1161 (E.D. Cal. 2013), a Plaintiff sued Best Buy and Toshiba for violating provisions of the CLRA and UCL when Defendants claimed that a Toshiba Satellite L505 laptop (the "Laptop") had a battery life of "up to 3.32 hours" when it did not. *Id.* at 1174–75. Plaintiff alleged that he was "induced to purchase the Laptop" and "paid more for his Laptop than he would have paid" had it not been for Best Buy's "fraudulent" statement. *Id.* The Court dismissed the portion of the plaintiff's CLRA claim that sought relief for the alleged fraudulent misrepresentation against Best Buy because plaintiff had admitted in his pleading "that *Newsweek* [had] published an article publicly criticizing" the laptop's battery-life and its performance under testing.

In this case, as Plaintiffs allege in their Complaint, on February 11, 2020, Zoe Schiffer & Megan Farokhmanesh with the Verge news outlet published an article on their website titled "*The High Cost of a Free Coding Bootcamp*." (Compl., ¶ 86, fn. 29.) On February 19, 2020, New York Magazine published an article along the same lines as the Verge article and raised similar allegations against the School, including regarding its job placement numbers. (Compl., ¶ 69, fn. 17.) Both publicly available articles, published only a few months before Plaintiffs signed their ISAs, render any claim by Plaintiffs that they relied upon a specific job placement rate, not only unreasonable, but also unbelievable. Both articles are hereby incorporated into Defendants' motion by reference. (Hammon Decl., ¶ 3, Exh. C, D.)

Plaintiff Fuller pleads that "[a]fter seeing the [Facebook] ads [for the School], she visited Lambda's website and watched YouTube videos about the program to learn more," before enrolling and signing her ISA on April 22, 2020. (Compl., ¶ 107, 109.) Plaintiff Goncalves "began researching [the School] based on a friend's recommendation …. [and] reviewed Lambda's website and promotional materials for himself" before he signed his ISA on May 20, 2020. (Compl., ¶¶ 117-118.) Plaintiffs McAdams pleads that he "research[ed]" the School and that he "researched [the School's] website" before deciding to enroll and execute his ISA on June 15, 2020. (Compl., ¶¶ 124; 125.) Plaintiff Molina also "research[ed]" the School, "consulted with his brother, a self-taught

coder and web developer," and after "significant research and consultation," decided to sign an ISA on January 8, 2021. (*Id*., ¶ 135.) In other words, each Plaintiff enrolled *after* the articles questioning, among other things, the School's outcomes and reporting, which they cite in their Verified Complaint, were in the public domain—and each did so after each claims they engaged in substantial research regarding the School. They cannot, therefore, claim that they actually, let alone reasonably, relied upon any job placement rates when they themselves admit that they were, or should have been, on notice about such representations before they enrolled at the School. *See Lew v. Kona Hosp.*, 754 F.2d 1420, 1423 (9th Cir. 1985) ("A verified complaint may be treated as an affidavit to the extent that the complaint is based on personal knowledge.").

B. Plaintiffs' CLRA And FAL Claim Are Not Adequately Pleaded With Respect To Their Claims That Defendants Misrepresented Their Status With The BPPE.

The Complaint alleges that the School was not approved by the BPPE to operate at the time Plaintiffs Fuller, Goncalves, and McAdams enrolled and signed their ISAs (excluding Plaintiff Molina who signed his ISA after August 2020) (s*ee, e.g*., Compl., ¶¶ 116, 123, 133), and that had they known that the School was not approved by the BPPE to operate (a claim which the School disputes) they would not have enrolled at the School or signed an ISA. (*See*, *e.g*., Compl., ¶ 172.) This theory fails for two independent reasons.

1. Like Their Claim Regarding Job Placement Rates, Plaintiffs Do Not Specifically Allege That They Saw Any Misrepresentation About The School's BPPE Status.

Plaintiffs do not allege that they ever saw any representations by the School that it was approved by the BPPE, or any statements at all regarding the BPPE, before or after they enrolled and signed their ISAs. While the Complaint does allege generally that the School asserted it was "approved to operate" by the BPPE in three separate versions of its course catalogs starting in May 2019 (Compl., ¶ 44, Exh. K), Plaintiffs do not allege that they specifically ever saw such representations. Indeed, Plaintiffs do not even allege that these "catalogs" were still publicly available or in circulation near or around the times they signed their ISAs between April 2020 and June 2020.

As Plaintiffs did not allege they ever even saw any representations regarding the School's approval status, it is unsurprising that they also did not allege that they relied upon such information,

that they would have done something different had they not been exposed to it, or that they were harmed in any discernible way. This allegation, not only does not pass muster under Rule 9(b), but it also fails under 12(b)(6) as well.

2. Plaintiffs' Claim Also Fails As Information Concerning Defendant's Status With The BPPE Was Publicly Available Information.

Just as there were publicly available news articles calling into question the School's job placement rates before Plaintiffs enrolled, there were also articles pre-dating Plaintiffs' enrollment that put a spotlight on the School's status with respect to the BPPE. Indeed, in their Verified Complaint, Plaintiffs identify two articles by Rosalie Chan on August 29 and August 30, 2019, both published in Business Insider, that discuss the School's then-current status with the BPPE. (Compl., ¶ 45, fn. 10, ¶ 46, fn. 11.) In other words, per their own allegations, Plaintiffs knew, or should have known, that the School had not yet been approved by the BPPE well before they enrolled, and they certainly could not have reasonably relied on any representations suggesting otherwise. That the supposed misrepresentations in the course catalogs (which, again, Plaintiffs do not claim they saw) ***pre-date*** the very news articles cited in their Complaint only reinforces this conclusion.

Additionally, the BPPE is a public agency that provides information on its website about the approval status of post-secondary school applicants and notices of actions taken against specific post-secondary schools. (Hammon Decl., ¶ 4, Exh. E; Defendant's Request for Judicial Notice, Exh. 1.) Plaintiffs, therefore, cannot allege they reasonably relied upon representations about the School's status with the BPPE in a course catalog in 2019, when a simple internet search would have revealed exactly where the School was, and was not, in the BPPE's processes.

C. Plaintiffs' CLRA Claim Fails For The Independent Reason That Their Allegations Do Not Meet The Threshold Requirements For Asserting A CLRA Claim.

The CLRA "establishe[s] a nonexclusive statutory remedy for unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer." *Gray v. Dignity Health*, 70 Cal.App.5th 225, 237 (2021), *reh'g denied (Nov. 8, 2021), review denied (Jan. 26, 2022)*, *supra*, 70 Cal.App.5th at 242-43 (internal citations omitted). The CLRA defines a "[c]onsumer" as

"an individual who seeks or acquires, by purchase or lease, any goods or services for personal, family, or household purposes." Civ. Code, § 1761(d). The "[s]ervices" a "consumer" receives under the CLRA are defined as "work, labor, and services for other than a commercial or business use, including services furnished in connection with the sale or repair of goods." Civ. Code, § 1761(b). "Goods" under the CLRA are defined as any "tangible chattels bought or leased for use primarily for personal, family, or household purposes." Civ. Code, § 1761(a).

While the School has not found any cases in which a California court has found a violation of the CLRA in connection with student loans, including none with respect to ISAs or other contingent repayment agreements, cases arising in the context of insurance are instructive. For example, courts have held that the sale of insurance products does not give rise to a CLRA claim because they are neither goods nor services as defined by the statute. *Broberg v. The Guardian Life Ins. Co. of America*, 171 Cal.App.4th 912, 924 (2009). Insurance contracts do not involve "work" or "labor" and cannot "be described as personal services or services 'furnished in connection with the sale or repair of goods.'" *Id.* at 924–925, *quoting* Civ. Code, § 1761(b). Rather, insurance contracts are "simply agreements to pay if and when an identifiable event occurs." *Id.* at 925; *see also Berry v. American Express Publishing, Inc.*, 147 Cal.App.4th 224, 233 (2007) (finding that the mere extension of credit alone by a credit card issuer does not qualify as a "service" under the CLRA).

Moreover, courts have consistently held that ancillary services such as advertising and processing claims do not fall within the scope of the CLRA. *See, e.g., Meyer v. Capital All. Grp.*, No. 15-2405-WVG, 2017 WL 5138316, at *6 (S.D. Cal. Nov. 6, 2017) ("advertising or marketing of loans[, intangible goods], is an ancillary service that does not fall within the CLRA") (collecting cases); *Jamison v. Bank of Am., N.A.*, 194 F. Supp. 3d 1022, 1031 (E.D. Cal. 2016) (adopting the reasoning in *Fairbanks v. Superior Court*, 46 Cal. 4th 56 (2009) that ancillary services "such as helping consumers select insurance policies, maintaining the polices, and processing claims, are not 'services' under the CLRA"); *Consumer Sols. Reo, LLC v. Hillery*, 658 F. Supp. 2d 1002, 1016-17 (N.D. Cal. 2009) (dismissing CLRA claim with prejudice because "loans are intangible goods and . . . ancillary services provided in the sale of intangible goods do not bring [intangible] goods within the coverage of the CLRA"). The *Meyer* court reasoned that this is because "such services do not

transform intangible goods and services into tangible goods and services that would otherwise not be covered by the CLRA." *Meyer*, 2017 WL 5138316, at *6.

First, Plaintiffs' ISAs, which are more like the insurance contracts and loan agreements described above, are not "goods" under the CLRA; no authorities demonstrate otherwise. ***Second***, ISAs are not "work" or "labor" performed in "connection with the sale or repair of goods;" thus, they are not "services" under the CLRA either. ***Third***, Plaintiffs are not "consumer[s]" under the CLRA because they did not allege that they executed their ISAs "for personal, family, or household purposes." Indeed, their allegations regarding job placement rates confirm that Plaintiffs executed their ISAs for professional and/or business-oriented reasons.[3] Plaintiffs' CLRA claim, therefore, should be dismissed.

III. PLAINTIFFS' UCL CLAIM SHOULD BE DISMISSED.

Plaintiffs claim that Defendant violated the UCL by (1) engaging in fraudulent business practices and (2) engaging in unlawful business practices. Neither claim is adequately pleaded.

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[3] To the extent Plaintiffs argue that their claim under the CLRA is not solely about their ISA, but about the education they received, such contentions should be disregarded. While Plaintiffs no doubt include allegations of educational malpractice in their Complaint, those claims do not appear to support any of their claims, But, if Plaintiffs did attempt to recast their CLRA claim as a claim grounded in an educational malpractice theory, then it should be noted that the undersigned has not found *any* cases in which a California state court held that "education" qualifies under the CLRA. Instead, what has been found are just a couple of unpublished federal court decisions on the issue, each of which would be of no support to Plaintiffs. The leading case, *Anderson v. SeaWorld Parks and Entm't, Inc.*, 2016 WL 8929295 (N.D. Cal. 2016), found that SeaWorld's "educational *and entertainment services*" could fall under the CLRA. *Id.* at *12 (emphasis added). But unlike a theme park, the School was not offering tickets to the general public to visit for the day; it was offering a computer coding school to students administered and taught over the course of an entire year. Furthermore, the allegation in *Anderson* was that SeaWorld had misrepresented the experiences patrons would have at the park, whereas Plaintiffs' allegations center on purported misrepresentations that caused Plaintiffs to enter into ISAs—Plaintiffs allege nothing that would suggest any representations with respect to the education at the School were made pre-enrollment that would later turn out not to be the case. Likewise, in *Claiborne v. Water of Life Cmty. Church*, No. EDCV1700771VAPKKX, 2017 WL 9565337, at *10 (C.D. Cal. Aug. 25, 2017), a court allowed a CLRA claim to proceed past the pleading stage where a church leader used his position to provide a "financial education," but where the real purpose was to solicit attendees into "investing" with him so he could divert over $1.2M for his own purposes. The "education" provided in *Claiborne* was no education at all, but instead it was just one step in a fraudulent scheme to embezzle money from his followers. There is simply no nexus between the type of educational services the School provides and a criminal enterprise orchestrated to steal money from people.

A. Plaintiffs' Claims Under The UCL Fraud Prong Should Be Dismissed For The Same Reasons Their CLRA And FAL Claims Fail.

With respect to the fraudulent prong of their UCL claim, their allegations are the same as those alleged in support of their CLRA and FAL claims, namely that the School misrepresented its (1) job placement rate, and (2) its BPPE status. (*See* Compl., ¶ 172.) Like their other causes of action, Plaintiffs' UCL claim must meet the heightened particularity requirements in Rule 9(b) as well. *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103–04 (9th Cir. 2003); *Kearns v. Ford Motor Co*., 567 F.3d 1120, 1127 (9th Cir. 2009) ("The requirement in Rule 9(b) of the Federal Rules of Civil Procedure that allegations of fraud be pleaded with particularity applies to claims which are made in federal court under the CLRA and UCL.")

Plaintiffs' UCL claim alleged under the fraud prong fails for the same reasons their FAL and CLRA claims should be dismissed. (*See*, *supra*, II(A)–(B).) With respect to the unlawful prong, the same is true to the extent the allegations supporting the unlawful prong are the same as those alleged to support the CLRA, FAL, and UCL fraud prong claims. (*See* Compl., ¶¶ 169(a)–(f).) To the extent the unlawful prong shares the same allegations as those alleged under the CLRA, FAL, and UCL fraud prong, they also fail and should be dismissed. (*See*, *supra*, II(A)–(B).)

B. Plaintiffs Do Not Have Standing To Bring Their UCL Claim Premised On Supposedly Operating Without Appropriate State Approvals Because There Is No Causal Nexus Between The Allegedly Unlawful Acts And The Alleged Harm.

In order to have standing to bring a UCL claim, "[t]here 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.*, 171 Cal.App.4th 1305, 1349 (2009); *see Bettison v. Wells Fargo Bank, N.A.*, No. SACV180419DOCJCGX, 2018 WL 5880835, at *8 (C.D. Cal. June 12, 2018), *citing Rubio v. Capital One Bank*, 613 F.3d 1195, 1203 (9th Cir. 2010). As this Court recently explained, "consumers cannot simply allege a[] [statutory] violation; they must also allege that the ***violation*** injured them." *Debono v. Cerebral Inc.*, No. 22-CV-03378-AGT, 2023 WL 300141, at *1–2 (N.D. Cal. Jan. 18, 2023) (citations omitted; emphasis added) (dismissing UCL claim because plaintiffs failed to "plausibly allege[] that they were harmed by an ARL violation").

Here, Plaintiffs have not met that initial requirement, at least with respect to their claim that the School violated the UCL by operating without what it believes were requisite approvals.

Plaintiffs allege that they have standing under the UCL because they incurred "debt" and, in the case of two of them (Plaintiffs, Goncalves and McAdams), they made tuition payments to the School. However, such allegations are not sufficient. Setting aside the fact that the School disputes Plaintiffs' characterization of their contingent payment obligations as "debt" in the first place, Plaintiffs' theory on standing fails because the supposedly wrongfully incurred debt and tuition payments, on the one hand, do not have the requisite causal relationship with her allegation that the School was operating without approval, on the other.

As an initial matter, these supposed "injuries" did not manifest until ***after*** the School obtained the approval Plaintiffs claim it should have obtained to operate. The ISA itself has a section entitled "WHEN YOU MUST START MAKING MONTHLY PAYMENTS." **(**Compl., Exhs. A-D.) That section provides: "After you have completed, withdraw from, or are withdrawn from (for any reason) your Lambda School program, you are required to begin making payments. You will have a one-month grace period before your first payment is due." Thus, by the plain language of the contract they each signed, their supposed "debt" did not materialize, and they did not make any payments, until well after the School obtained BPPE approval during August 2020 as Ms. Fuller withdrew in January 2021 (Compl., ¶ 112), Mr. Goncalves received his certificate of completion in January 2021, (Compl, ¶ 120), Mr. McAdams received his certificate in February 2021 (Compl, ¶ 130), and Mr. Molina received his in May 2022 (Compl, ¶ 140). In other words, none of Plaintiffs owed any "debt," let alone made any payments, when the School was "unapproved." It therefore cannot be said that their "injuries" were "caused" by the supposedly unlawful conduct as the conduct Plaintiffs complain of was not occurring, or put another way, was

remediated, by the time Plaintiffs' purported injuries were incurred.[4]

But even if their "debt" or tuition payments had been incurred or made while the School was unapproved, Plaintiffs *still* would have not met the UCL's standing requirements because these purported "injuries" were not "caused" by the supposedly unlawful conduct. After all, Plaintiffs' supposed "debt" and tuition payments flowed from the terms in their ISAs, and were not "caused" by the School's supposed lack of "approval" at the time they were executed. Indeed, in the hypothetical but-for world in which the School was approved in the manner Plaintiffs claim it should have been when they executed their ISAs, Plaintiffs would be in the exact same position today.

Peterson v. Cellco Partnership, 164 Cal.App.4th 1583 (2008) is instructive. In *Peterson*, the plaintiffs alleged that the 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" has been purportedly incurred as a result of the ISA (or tuition payments made in connection with it), those payments flowed from the parties' bargain, and would not have been any more, or any less, if the School had, or had not, been "approved" in the manner Plaintiffs now claim it should have been. Accordingly, even if the contingent obligation to pay the School (or the tuition payments made by two of the Plaintiffs) *did* qualify as injuries within

[4] Indeed, the case of Plaintiff Molina is even more problematic. Not only did his payment obligations not arise until ***after*** the School obtained BPPE approval, he did not even enroll at the School until approximately five months after approval had been obtained. Plaintiff Molina cannot reasonably allege any harm related to the School's BPPE status because at all times he was affiliated with the School it was approved by the BPPE. Nevertheless, Plaintiff Molina's experience is instructive; the fact that the supposed "debt" he now has is not different in any meaningful way from the other Plaintiffs' proves the point that the School's approval status had no relationship with, and certainly did not "cause," their supposed injuries.

the meaning of the UCL for purposes of establishing standing, the Court should still reject Plaintiffs' "unlawfulness" theory because of their failure to establish any causal nexus between the School's status from a regulatory perspective, on the one hand, and the alleged injuries, on the other, which is a course taken by several other California courts that have ruled on this issue. *See, e.g., Demeter v. Taxi Computer Servs., Inc.*, 21 Cal.App.5th 903, 916-17 (2018) ("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.*, 164 Cal.App.4th 105, 114 (2008), *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"); *Foyer v. Wells Fargo Bank*, N.A., No. 320CV00591GPCAHG, 2020 WL 3893031, at *12 (S.D. Cal. July 10, 2020) ("Plaintiffs' potential loss of their home is plainly a loss of property, but that loss cannot be fairly traced to Defendant's conduct.").

Because the supposedly unlawful practice—of allegedly operating until August 2020 without BPPE approval—did not "cause" their injuries, Plaintiffs do not have standing to assert their UCL claim against the School on this theory. Their claim, therefore, should be dismissed.

C. Plaintiffs' Generalized And Miscellaneous Claims About Unlawful Business Activities Also Fail For Several Other Reasons, Most Of Which Stems From Their Failure To Plead Any Facts Supporting Them.

1. The BPPE Regulatory Regime Does Not Apply To Out-Of-State Plaintiffs Receiving Educational Services Outside Of California.

Plaintiffs do not plead any basis for the application of the California consumer protection statutes (the CLRA, UCL, and FAL) to non-California residents, let alone to allege a violation of a California agency's regulatory regime (the BPPE) to educational service Plaintiffs received *outside* of California and while never at any time stepping foot in, attending classes in, or residing in, California.

The undersigned has not located *any* authority that would support such specific and far-reaching

relief.

Nevertheless, California courts have spoken on the issue generally with respect to the CLRA, UCL, and FAL in finding that "California law embodies a presumption against the extraterritorial application of its statutes." *Churchill Village, L.L.C v. General Elec. Co*., 169 F. Supp. 2d 1119, 1126 (N.D. Cal. 2000); *Sullivan v. Oracle Corp.* (2011) 51 Cal.4th 1191, 1207 ("Neither the language of the UCL nor its legislative history provides any basis for concluding the Legislature intended the UCL to operate extraterritorially.")

In *Debono*, *supra*, 2023 WL 300141, at *1, the court adopted that view with respect to out-of-state plaintiffs alleging violations of the UCL, FAL, and CLRA. The court held that plaintiffs had not "established that they can sue … under the UCL, FAL, or CLRA" because, as non-California residents, none of the plaintiffs had "allege[d] that they were harmed by "wrongful conduct occurring in California." *Id.* at 1126, *citing Norwest Mortg., Inc. v. Superior Ct.*, 72 Cal. App. 4th 214, 224–25 (1999) (the fact that defendant was incorporated and did business in California alone was held to be insufficient for out-of-state plaintiffs to allege a UCL claim); *Cannon v. Wells Fargo Bank N.A*., 917 F. Supp. 2d 1025, 1056 (N.D. Cal. 2013) (same). The court in *Debono* also held that it was "immaterial to this analysis that [the contract] stated that any dispute relating to the terms or to the use of [the defendant's] website or app would be determined in accordance with California law," because, "[a]s other courts have noted, '[a] contractual choice of law provision that incorporates California law presumably incorporates all of California law—including California's presumption against extraterritorial application of its law.'" *Debono*, 2023 WL 300141, at *1, *quoting Underwood v. Future Income Payments, LLC*, No. 17-CV-1570-DOC (DFMx), 2018 WL 4964333, at *12 (C.D. Cal. Apr. 26, 2018). The question was not whether California law could be applied—it could—the question was whether California law allowed for a UCL claim to be brought by non-California residents not alleging harm occurring in California—the court held it could not and dismissed the plaintiff's UCL claim. *See Cotter v. Lyft*, Inc., 60 F. Supp. 3d 1059, 1065 (N.D. Cal. 2014) ("Even if the choice of law provision were intended to confer upon out-of-state drivers a cause of action for violation of California's wage and hour laws, it could not do so. An employee cannot create by contract a cause of action that California law does not provide.").

Plaintiffs do not allege that they were ever residents of California or that they obtained or received any educational services while they were within California. Plaintiffs were virtual students residing in either Pennsylvania, Florida, or Washington State for the entirety of their enrollment with the School. (Compl., ¶¶ 8-11.) Plaintiffs, at most, allege that the School's provision of educational services ***in California*** would have been a potential violation of the California Education Code. Furthermore, the BPPE citation, to the extent it was effective, would seem to only render the provision of educational services ***in California*** unlawful as to persons residing in, or attending courses inside of, California. Plaintiffs have not pleaded any basis for a claim that the Plaintiffs as out-of-state residents are entitled to file claims in California alleging BPPE violations.

Accordingly, even if the School's status with respect to BPPE approval was in question at the time Plaintiffs' signed their ISAs, and the issues with its approval status could give rise to a CLRA, UCL, and/or FAL claim (which the School contends it does not), Plaintiffs have not alleged any averments that would establish they have standing to bring such claims against the School for services rendered ***outside*** California.[5]

2. The Complaint Does Not Allege The School Ever Sought To Enforce Plaintiffs' ISAs. BPPE Statutes Cited By Plaintiffs Do Not Prohibit Entering Into ISAs.

Plaintiffs claim that the School violated the UCL due to alleged violations of (1) California Education Code section 94917, which provides that "[a] note, instrument, or other evidence of indebtedness relating to payment for an educational program is ***not enforceable*** by an institution

[5] Plaintiffs' CLRA, FAL, and UCL claims are subject to a choice of law provision stating that "New York law governs all adversarial proceedings arising out of this agreement, your Lambda School tuition, or your payments to Lambda School." (Compl., Exhs. A-D.) In *Campusano v. BAC Home Loans Servicing LP*, No. CV11-04609 AHM (JCX), 2012 WL 13008750 (C.D. Cal. Jan. 20, 2012), the court applied the analysis prescribed in *Nedlloyd Lines B.V. v. Superior Ct*., 3 Cal. 4th 459 (1992), and dismissed non-California plaintiff's UCL claim due to out-of-state choice of law provision included in the parties' agreement. *See id.*, *4; *see In re Apple & AT & T iPad Unlimited Data Plan Litig*., 802 F. Supp. 2d 1070, 1076 (N.D. Cal. 2011) (dismissing plaintiffs' CLRA, UCL, and FAL claims because plaintiffs were not California residents and each plaintiff had agreed to an out-of-state choice of law provision). Here, Plaintiffs' claims all arise out of the ISA for the reasons stated above. Plaintiffs' claims fall under the choice of law provision. The choice of law provision in the ISAs, especially when applied to out-of-state Plaintiffs alleging violations of California consumer statutes, adds an additional layer to the extraterritoriality limitations on Plaintiffs claims, and another basis for dismissing them altogether.

unless, at the time of execution of the note, instrument, or other evidence of indebtedness, the institution held an approval to operate" (emphasis added), and (2) California Education Code section 94902(b)(2), which provides that "[a]n enrollment agreement is ***not enforceable*** unless … [a]t the time of the execution of the enrollment agreement, the institution held a valid approval to operate" (emphasis added). The key term in each of these statutes is "not enforceable." Section 94902(b)(2) does not make entering into enrollment agreements with students unlawful. Nor does Section 94917 make unlawful the act of issuing a "note, instrument, or other evidence of indebtedness" (which the Schools' ISAs are not). If the statutes make any act unlawful (to the extent such unlawfulness can be actionable in the context of a UCL claim), it would be any acts taken to ***enforce*** an enrollment agreement or a "note, instrument, or other evidence of indebtedness."

Plaintiffs do not allege in their Complaint that the School has taken any actions to "enforce" the ISAs. To the extent any step taken to enforce an ISA would be unlawful under the UCL, no such steps have apparently been taken according to Plaintiffs, otherwise, presumably they would have pleaded such acts in the Complaint. Plaintiffs' UCL claim alleging violations of California Education Code sections 94917 and 94902(b)(2) should be dismissed.

3. Plaintiffs' Allegation That Defendant Violated The California Financing Law Fails.

ISAs are credit sales, not loans. As acknowledged by the Consumer Financial Protection Bureau (CFPB), credit sales and loans are different.[6] "The term 'credit sale' refers to any sale in which the seller is a creditor." 15 U.S.C. § 1602. In contrast, a "loan" is an advance of funds to a person. Regulation K, 12 C.F.R. pt. 211.2(q) ("Loans and the extension of credit" means all direct and indirect advances of funds to a person made on the basis of any obligation of that person to repay the funds). This distinction is important, and the difference between credit sales and loans is codified and treated differently at both the federal and state levels. *Compare* H-1 (Credit Sale Model Form) with H-2 (Loan Model Form) of Appendix H to Part 1026 – Closed-End Model Forms. At the state level, the distinction is even more important because credit sales are regulated under entirely separate regimes from loans, with different licensing requirements and restrictions on

[6] https://www.consumerfinance.gov/ask-cfpb/what-is-a-retail-installment-sales-contract-or-agreement-is- this-a-loan-en-817/, last visited October 20, 2022.

finance and related charges. A credit sale involves the sale of a good or service by a seller to a buyer, in at least one installment at a time. *See*, *e.g.*, Cal. Civ. Code § 1802.5. A seller of goods or services that also offers financing in connection with that sale is governed in most states by the respective state's retail installment sales act. *See* NCLC Treatise on Consumer Credit Regulation at 1.6.1.

First, because the School does not advance any funds to its students under the ISA, but rather acts as a "seller" of educational services, its ISAs would be characterized under applicable law as credit sales—not loans. Thus, it is accurate for the School to state within its ISAs and elsewhere that its ISAs were not loans. (*See* Compl., Exh. A-D.)

Second, in addition, noting the distinctions between the School's ISA and a student loan is relevant here because, unlike a loan, the amount a student pays toward their ISA every month, and whether they pay anything back at all, is completely dependent on the student's employment status and monthly income. Under the School's ISA, a student with an income below $50,000 annually would not be obligated to make any payments for the entire duration of the contract. Income-based repayment is a core characteristic of the School's ISA that is distinct from a private student loan where income-based repayment may not be available. Against this backdrop—and in light of the numerous statements about the repayment obligations and other terms and conditions of the School's ISA—stating that an ISA is not a loan or debt is not misleading and not unlawful under the UCL.

Third, with respect to alleged violations of the Consumer Financial Protection Act ("CFPA"), Plaintiffs do not plead any acts that give rise to UCL liability because the Complaint does not allege any acts that violate the statute. Plaintiffs cannot claim a UCL violation where their pleading fails to allege the "unfair, deceptive, or abusive acts or practices," that the School engaged in, especially when Plaintiffs have not pleaded how any of their allegations can properly be characterized unfair, deceptive, or abusive as those terms are used in the CFPA, Plaintiffs must allege more than a bare and conclusory assertion that the School violated the CFPA.

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IV. PLAINTIFFS HAVE FAILED TO PLEAD THAT THEY LACK AN ADEQUATE REMEDY AT LAW.

In California federal courts, FAL, UCL, and/or CLRA plaintiffs seeking equitable remedies must plead that legal remedies are inadequate or unavailable in order to state claims under such statutes. *See*, *e.g.*, *Forrett v. Gourmet Nut, Inc*., No. 22-cv-02405-BLF, 2022 WL 6768217, at *5 (N.D. Cal. Oct. 11, 2022) (dismissing UCL, FAL and unjust enrichment claims because "plaintiff cannot state a claim for equitable relief if the pleading does not demonstrate the inadequacy of a legal remedy" and rejecting plaintiff's argument that "courts allow plaintiffs to plead equitable relief in the alternative to legal relief"); *Axelrod v. Lenovo (United States) Inc.*, No. 21-CV-06770-JSW, 2022 WL 976971, at *2 (N.D. Cal. Mar. 31, 2022) (dismissing claims under the UCL and FAL because "[i]t is well-established that claims for relief under the FAL and UCL are limited to restitution and injunctive relief."), *citing Korea Supply Co. v. Lockheed Martin*, 29 Cal. 4th 1134, 1146-49 (2003)). Plaintiffs have not done so here. Accordingly, each of their causes of action must be dismissed.

The starting point of the analysis is *Sonner v. Premier Nutrition Corp*., 971 F.3d 834, 844 (9th Cir. 2020), which recognized that "traditional principles governing equitable remedies in federal courts, including the requisite inadequacy of legal remedies, apply when a party requests restitution under the UCL and CLRA in a diversity action." Against that backdrop, the *Sonner* court made clear that federal courts still require that plaintiffs establish that they "lack[] an adequate remedy at law before securing equitable restitution for past harm," including in a diversity action for claims brought "under the UCL and CLRA." *Id.*, *citing Mort v. United States*, 86 F.3d 890, 892 (9th Cir. 1996) ("It is a basic doctrine of equity jurisprudence that courts of equity should not act ... when the moving party has an adequate remedy at law." (ellipsis in original), *quoting Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 381 (1992)); *see also, e.g.*, *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 75–76 (1992) (holding that when "remedies are equitable in nature ... it is axiomatic that a court should determine the adequacy of a remedy in law before resorting to equitable relief"); *Schroeder v. United States*, 569 F.3d 956, 963 (9th Cir. 2009) ("[E]quitable relief is not appropriate where an adequate remedy exists at law."). *Sonner's* teachings apply with equal force at

the pleading stage. *In re ZF-TRW Airbag Control Units Prod. Liab. Litig.*, 601 F. Supp. 3d 625, 769 (C.D. Cal. 2022) (holding that *Sonner* applies at the pleading stage in dismissing UCL, CLRA, and unjust enrichment claims for failing to plead an inadequate remedy at law).

Here, Plaintiffs have failed to plead that they lack an adequate remedy at law. Nowhere in the Complaint do they allege that their purported harm could not be redressed by legal remedies. Nor could they as what they seek is relief from their ISAs obligations to make payments upon finding qualifying employment, and any refunds of the money they paid to the School under the ISA. With respect to refunds, *Sonner* faced a similar question to the one posed by Plaintiffs in this action. The plaintiff in *Sonner* "concede[d] that she [sought] the same sum in equitable restitution as 'a full refund of the purchase price'—$32,000,000—as she requested in damages to compensate her for the same past harm." *Sonner*, 971 F.3d at 844. Accordingly, she "fail[ed] to explain how the same amount of money for the exact same harm is inadequate or incomplete, and nothing in the record supports that conclusion." *Id.* If Plaintiffs and members of the putative class intend to seek relief in the form of refunds of the monies paid so far to the School, or from the obligations that arise under their ISAs, and they contend that the relief should come in the form of an equitable relief, as opposed to a remedy at law, then as described in *Sonner*, they must plead why such legal relief would nevertheless be inadequate. Plaintiffs and the putative class members have not done so.

Moreover, where a claim is limited in the remedies available to plaintiffs, courts in the Ninth Circuit have dismissed with prejudice claims where the plaintiff has an adequate remedy at law. In *Gibson v. Jaguar Land Rover N. Am., LLC*, No. CV2000769CJCGJSX, 2020 WL 5492990, at *3–4 (C.D. Cal. Sept. 9, 2020), the court found that a remedy at law in the form of money payments to putative class members would be adequate in redressing the harm alleged in the Complaint, which it held was "fatal to Plaintiff's UCL claim because '[r]emedies under the UCL are limited to restitution and injunctive relief, and do not include damages.'" *Id.* at *4, *quoting Silvercrest Realty, Inc. v. Great Am. E&S Ins. Co.*, 2012 WL 13028094, at *2 (C.D. Cal. Apr. 4, 2012), *citing Korea Supply*, 29 Cal. 4th at 1146–49. The *Gibson* court dismissed the UCL claim with prejudice in its entirety as limited to only equitable forms of relief, and the CLRA claim with prejudice to the extent it sought equitable relief. *Id.*

In *Sharma v. Volkswagen AG*, 524 F. Supp. 3d 891, 908 (N.D. Cal. 2021), a case analogous to the one brought by Plaintiffs, the court found that the alleged injury was pleaded to be the result of the putative class members "reliance on partial representations and/or omissions by Defendants, [causing] Plaintiffs and other Class members [to] suffer[] a *loss of money* and/or *loss in value*." *Id.* at 908 (emphasis in original). The court averred that "[p]ost-*Sonner* courts have indicated that this is exactly the type of injury for which legal remedies are appropriate." *Id.*, *citing In re MacBook Keyboard Litig.*, No. 5:18-cv-02813-EJD, 2020 WL 6047253, at *4 (N.D. Cal. Oct. 13, 2020) ("Because Plaintiffs' claims rest on their alleged overpayments and Apple's failure to issue refunds, the Court finds that monetary damages would provide an adequate remedy for the alleged injury."); *see Gomez v. Jelly Belly Candy Co.*, 2017 WL 8941167, at *1 (C.D. Cal. Aug. 18, 2017) (dismissing UCL claim in full and CLRA claim for equitable relief because the plaintiff failed to allege facts showing that money could not compensate her for the alleged harm arising from, like this case, a purportedly misleading advertisement). The *Sharma* court dismissed putative class members UCL claim with prejudice to the extent it sought equitable restitution because an adequate remedy at law was available based on the class members' pleading.

As held in *Gibson* and *Sharma*, because Plaintiffs and the putative class members' are seeking relief in the form of tuition payment relief and payment refunds, both legal remedies, and the UCL is limited to only equitable forms of relief, the Court should find that Plaintiffs cannot sustain a claim under the UCL. The Complaint as pleaded makes clear that Plaintiffs would be made whole through legal remedies, a fact fatal to their UCL, which does not include damages as a form of available relief.

Plaintiffs and the putative class members' UCL claim should be dismissed with prejudice because, to the extent they are able to prevail, Plaintiffs will be made whole by a remedy at law. The FAL is no different. Plaintiffs and the putative class members' FAL claim should also be dismissed because, to the extent they are able to prove a misrepresentation was made (which they will not), the Plaintiffs will be made whole by a remedy at law. Lastly, although the CLRA does allow for damages and equitable relief, Plaintiffs have pleaded their claims under the CLRA only in the form of equitable relief and have not pleaded why a remedy at law would be inadequate. To the extent

Plaintiffs are able to sustain a CLRA claim at all in light of the arguments above, if they desire to do so in equity, they should have their claim dismissed and be given an opportunity to re-plead their CLRA claim such that they establish the inadequacy of a remedy at law.[7]

CONCLUSION

Each of Plaintiffs' three causes of action should be dismissed. Their fraud-based allegations, asserted in connection with all three claims, must fail since they never allege what job placement rates they specifically saw, let alone why those rates were false. Their averment that the School's approval status was misrepresented to them should fail for the same reason; they do not plead they ever saw or relied upon any such statements. Once those two misrepresentations fall, their CLRA and FAL claims must be dismissed in their entirety, and all that remains is their laundry list of allegedly unlawful practices alleged in connection with their UCL claim. But each of those allegations fail because they lack standing to assert them or fail to assert any specific factual allegations that would show that the School actually violated any of the cited laws or statutes. Accordingly, to the extent the case is not compelled to arbitration in its entirety, whatever claims remain before this Court should be dismissed and with prejudice.

Dated: April 12, 2023

PILLSBURY WINTHROP SHAW PITTMAN LLP

/s/ *Patrick Hammon*

By: PATRICK HAMMON
ANDREW K. PARKHURST
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[7] Defendants note that Plaintiffs' failure to plead an inadequate remedy at law should be treated not only as dispositive of their claims, all of which are pleaded only in equity, but also should be regarded as supporting Defendants' Motion to Compel Arbitration and Stay of the Case filed concurrently with this Motion to Dismiss. That is, to the extent Plaintiffs are able to allege their claims for relief at all, they should be brought through claims that have available remedies at law, because, after all, that is what they are seeking. Regardless of what those claims are, because they seek a legal remedy, under the Arbitration Clause in the ISAs (Compl., Exhs. A-D), those claims must be brought in arbitration. Accordingly, to the extent the Court is inclined to allow Plaintiffs leave to amend or substitute their claims to ones alleging a remedy at law, they should be compelled to do so in arbitration.