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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 AUSTEN ALLRED'S NOTICE OF MOTION AND MOTION TO DISMISS UNDER 12(b)(6); MOTION TO STRIKE UNDER RULE 12(f)**

Date: May 19, 2023
Time: 10:00 am
Dept: Courtroom A - 15th Floor
Judge: Magistrate Judge 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, Austen Allred, 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

Attorneys for Defendants,
BLOOM INSTITUTE OF TECHNOLOGY;
AUSTEN ALLRED

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**INTRODUCTION**

Plaintiffs' counsel's goal in this litigation is simple. They hope to turn narrow (and baseless) consumer grievances into a broader referendum on Bloom Institute of Technology ("Defendant," "Bloom," or "the School") and its executives.[1] Their allegations are designed not to secure injunctive or equitable relief against the School and Mr. Allred, but rather to generate headlines.[2]

Unfortunately for Plaintiffs' counsel, their stint in this Court should be short-lived. Every cause of action in Plaintiffs' Complaint is subject to an informed and valid arbitration agreement. Consequently, this Court lacks jurisdiction, and Plaintiffs' counsel's media campaign cannot play out here. However, if the Court does not compel all of Plaintiffs' claims to arbitration, Defendant Austen Allred ("Mr. Allred") submits this Motion to Dismiss and Motion to Strike.

As set forth in he School's concurrently filed Motion to Dismiss, the Plaintiffs fail to state a claim of wrongdoing in the first instance. As set forth here, it also fails to connect Mr. Allred, individually, to that claim. Yet, Plaintiffs' counsel frivolously endeavor to impute the alleged actions of the School to Mr. Allred to drag him into their manufactured dispute with the School. There is no basis for that, pleaded or otherwise. And even if there were, Plaintiffs do not, and likely cannot, plead the requisite elements of each asserted cause of action. Nor can they establish an appropriate remedy this Court can order against Mr. Allred.

Plaintiffs should be ordered to arbitrate their dispute (to the extent it has any merit) with the School and Mr. Allred, consistent with the agreement each of them consciously entered. If any

[1] Concurrent with this submission, Mr. Allred joins Bloom in filing Defendants' Motion to Compel Arbitration. He also joins in the arguments set forth in Bloom's Motion to Dismiss and incorporates those herein. Briefly, all the claims against him (and the School) are subject to an enforceable arbitration agreement and may not be resolved here. Although Mr. Allred is not a party to the ISA, as an executive of Bloom he "may invoke arbitration agreements executed by [his] employer." *En Pointe Techs. Sales, LLC v. Ovex Techs. (Priv.) Ltd.*, No. 217CV04362PSGSKX, 2018 WL 4006524, at *5 (C.D. Cal. Aug. 17, 2018). Accordingly, Mr. Allred's Motion to Dismiss under Rule 12(b)(6) and Motion to Strike under Rule 12(f) is offered in the alternative should the Court decline to compel some or all of the claims alleged in this case against him to arbitration.

[2] That is consistent with their prior conduct, which involved leaking the Complaint to the media before it was even served on Defendants. (*See* "Students of BloomTech, formerly known as Lambda School, filed a class-action lawsuit against the coding boot camp," https://www.businessinsider.com/lambda-school-bloomtech-class-action-lawsuit-2023-3, Mar. 16, 2023.)

claims escape arbitrability, the remainder of this action should be stayed pending the outcome of those that are subject to the agreement. And regardless of whether Defendants' Motion to Compel Arbitration is granted in whole or in part, to the extent any claims against Mr. Allred remain with this Court, they should be dismissed for incurable pleading defects.

## PLAINTIFFS FAIL TO ADEQUATELY PLEAD ANY CAUSE OF ACTION AGAINST MR. ALLRED.

### 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). Dismissal under Rule 12(b)(6) is appropriate "where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory." *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008). To survive a Rule 12(b)(6) motion to dismiss, the plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible when the plaintiff "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

In reviewing the plausibility of a complaint, courts "accept factual allegations in the complaint as true and construe the pleadings in the light most favorable to the non-moving party." *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). Courts, however, do not "accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008) (citation omitted). Likewise, courts need not "accept as true allegations that contradict matters properly subject to judicial notice." *Id.* And even where factual allegations are accepted as true, "a plaintiff may plead [himself] out of court" if he "plead[s] facts which establish that he cannot prevail on his . . . claim." *Weisbuch v. Cty. Of Los Angeles*, 119 F.3d 778, 783 n.1 (9th Cir. 1997) (citation omitted).

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## II. FUNDAMENTAL FLAWS IN THE COMPLAINT REQUIRE DISMISSAL OF ALL CLAIMS.

### A. Plaintiffs Cannot Sue Mr. Allred Under The CLRA, UCL, Or FAL.

As an initial matter, none of Plaintiffs have established they can bring claims under California's Consumers Legal Remedies Act ("CLRA"), Unfair Competition Law ("UCL"), or False Advertising Law ("FAL"). To do so, they must either: (1) be California residents; or (2) allege they were harmed by wrongful conduct occurring in California. *Debono v. Cerebral, Inc.*, No. 22-CV-03378, 2023 WL 300141, at *2 (N.D. Cal. Jan. 18, 2023). Neither condition is satisfied here.

None of the Plaintiffs are or were California residents at any time before, during, or after they enrolled with the School. Ms. Fuller is a resident of Lakewood, Washington. (Compl., ¶ 8). Mr. Goncalves is a resident of Philadelphia, Pennsylvania. (Compl., ¶ 9). Mr. McAdams is a resident of Apoka, Florida. (Compl., ¶ 10). Mr. Molina is a resident of Olympia, Washington. (Compl., ¶ 11).

Nor have any of the Plaintiffs alleged they were harmed by wrongful conduct occurring in California. True, they have alleged that the School is headquartered in California and that Mr. Allred is a California resident. But that is not enough. *See Debono*, 2023 WL 300141, at *2 (finding the fact that defendant was incorporated and did business in California alone was insufficient for out-of-state plaintiffs to allege a UCL claim).

Plaintiffs have not established a right to bring their CLRA, UCL, or FAL claims. Accordingly, the entire Complaint must be dismissed.

### B. Plaintiffs' Claims Are Premised On A Misconception Of Director And Officer Liability.

Also preliminarily, it is important to clarify an apparent misconception Plaintiffs have about the nature of corporate officer and director liability. Even if Plaintiffs had stated a claim of wrongdoing against the School, they have entirely failed to connect it to Mr. Allred. However, as pled, all of Plaintiffs' claims require both of those. That is, the Complaint against Mr. Allred hinges on the unstated (and factually undeveloped) assertion that he is somehow personally liable for the School's vaguely complained of conduct. Not so. In California:

> It is well settled that corporate directors and officers cannot be held *vicariously* liable for the corporation's torts in which they do not participate. Their liability, if any, stems from their own tortious conduct, not from their status as directors or officers of the enterprise. An officer or director will not be liable for torts in which he does not

> personally participate, of which he has no knowledge, or to which he has not consented. While the corporation itself may be liable for such acts, the individual officer or director will be immune unless he authorizes, directs, or in some meaningful sense actively participates in the wrongful conduct.

*Frances T. v. Village Green Owners Assn.*, 723 P.2d 573, 580 (Cal. 1986) (en banc) (cleaned up).

In the Ninth Circuit, cases holding corporate officers personally liable for CLRA, UCL, or FAL claims "have typically involved instances where the defendant was the 'guiding spirit behind the wrongful conduct, . . . or the "central figure" in the challenged corporate activity.'" *Wolfe Designs, Inc. v. DHR & Co.*, 322 F. Supp. 2d 1065, 1072 (C.D. Cal. 2004), *citing Davis v. Metro Prods., Inc.*, 885 F.2d 515, 524 n.10 (9th Cir. 1989)); *see Consumerinfo.com, Inc. v. Chang*, No. CV-09-3783, 2009 WL 10673337, at *3 (C.D. Cal. Dec. 31, 2009); *Kamal v. Eden Creamery, LLC*, No. 18-CV-01298, 2019 WL 2617041, at *14 (S.D. Cal. June 26, 2019). Notably, "mere knowledge of tortious conduct by the corporation is not enough to hold a director or officer liable for torts of the corporation absent other 'unreasonable participation' in the unlawful conduct by the individual." *Id.* (citation omitted).

So, to plausibly state a claim against Mr. Allred, Plaintiffs must allege that he was the driving force behind or unreasonably participated in the School's complained of corporate conduct. As set forth below—and in addition to other pleading defects—they have not. That too is fatal to all their claims.

**C. Plaintiffs Fail To Tie Specific Misconduct To The Alleged Harm.**

Furthermore, all of Plaintiffs' claims are tied—directly or derivatively—to two asserted deceptive or unfair practices: (1) misstated job placement statistics; or (2) misstated accreditation status. To successfully plead those, Plaintiffs must "identify specific advertisements and promotional materials; allege when [they] were exposed to the materials; and explain how such materials were false or misleading." *Debono*, 2023 WL 300141, at *1. They must "identify any particular false or misleading representations that they read and relied upon" and "tie these allegations to the named plaintiffs specifically." *Id.* at *1-2.

The Complaint falls woefully short of that standard. Yes, Plaintiffs do point to specific advertisements, promotional material, or statements. But missing is any articulated connection

between those and the particulars of when they were viewed, how they were false or misleading, how they were reasonably relied upon, or how they tie to each named Plaintiff specifically.

For example, in deciding to enroll at the School, Ms. Fuller alleges that she relied on "a slew of Facebook ads," "Lambda's website" and "YouTube videos." (Compl., ¶ 107). Mr. Goncalves alleges that he "reviewed Lambda's website and promotional materials." (Compl., ¶ 118). Mr. McAdams "received targeted ads on Google, YouTube, and social media from Lambda" and "researched Lambda's website." (Compl., ¶ 125). And Mr. Molina "noticed numerous ads on Google and social media touting Lambda" and conducted "significant research." (Compl., ¶ 135). None of those allegations identify a specific advertisement or misstatement that they saw or relied upon. Nor do they set forth when Plaintiffs were exposed to the materials. Nor do they establish how the materials were false or misleading. Nor do they tie the foregoing to each named Plaintiff, individually.

So, as set forth in more detail below, while the Complaint does purport to identify specific materials, it does not meet the standards required to impose liability under any of CLRA, UCL, or FAL. *Debono*, 2023 WL 300141, at *1-2.

**D. Plaintiffs' CLRA Claim Fails.**

The salient allegation of Plaintiff's CLRA cause is that:

> *Lambda* misrepresented to the public, prospective students, and current students, including Plaintiffs, at least the following: (i) its job placement rates; and (ii) to the Subclass, that it had approval to operate and enroll students.

(Compl., ¶ 163) (emphasis added).

Setting aside the defects in this cause of action that are more fully analyzed in Bloom's Motion to Dismiss, Plaintiffs' CLRA claims against Mr. Allred suffer from a more fundamental problem: they fail to allege that Mr. Allred himself, and individually, made or unreasonably participated in any of the representations or that they saw and reasonably relied upon them.

1. Plaintiffs' CLRA Claim For Misrepresented Job Placement Rates Fails.

***First***, Plaintiffs contend that Mr. Allred is liable under the CLRA for allegedly misrepresenting the School's job placement rates. Despite that, the Complaint fails to allege that Mr. Allred himself—rather than the School—articulated either the 74% or the 79% statistics, which are

the only statistics the Complaint can be fairly read to suggest Plaintiffs allegedly relied on. Sure, the Complaint identifies several alleged statements supposedly made by Mr. Allred throughout time concerning the School's outcomes. (Compl., ¶ 54 (Job Placement Rate ("JPR") statement in *2018*); ¶ 76 (JPR statement in *2022*); ¶ 86 (JPR statement in *2019*); ¶ 87 (JPR statements in *2021* and *2022*).)[3] But even if Plaintiffs were correct—that one of the *other* job placement rates discussed by Mr. Allred in, for example, 2018 or 2019 were false—their claim must nevertheless fail because not a single Plaintiff alleges that they saw, let alone relied upon, any of the foregoing supposed "misrepresentations" made by Mr. Allred, individually, regarding job placement rates.[4]

With respect to the vague allegations regarding job placement rates that Plaintiffs allege they *did* see, the Complaint says nothing about Mr. Allred's role in preparing or disseminating such information. As such, the Complaint fails to provide *specific* facts suggesting that Mr. Allred actively was involved in, or "was the guiding spirit," behind the information Plaintiffs relied on. Without that, there is no basis to impute any of the School's alleged misrepresentations to him. Consequently, the claim fails.

2. Plaintiffs' CLRA Claim For Misrepresented Approval Status Also Fails.

With respect to the allegedly misrepresented approval status of the School, the Complaint falls short for the same reason. Once again, even if the Complaint alleged that *Bloom* misrepresented that it was authorized to operate and enroll students (which it does not), nothing in it comes close to alleging that *Mr. Allred* ever made such statements.

In fact, the only supposed "misrepresentation" Plaintiffs allege Mr. Allred made concerning the School's California Bureau for Postsecondary Education ("BPPE") status is that he stated "[b]ecause we're talking with BPPE, it doesn't affect students at all." (Compl., ¶ 45.) While

[3] Plaintiffs include various other statements made by Mr. Allred, individually, in the complaint. Many (if not all) of those statements are superfluous and designed solely to drum up unfournded inferences. For example, Plaintiffs cite several of Mr. Allred's Twitter posts. But none of them assert they ever visited Mr. Allred's Twitter page or otherwise saw his tweets. Moreover, all of those tweets were posted *after* the Plaintiffs enrolled at Bloom in 2020 and early 2021. Lastly, Plaintiffs do not plead with any particularity why they contend the Tweets are false or misleading.

[4] Any alleged statement after January 2021 is irrelevant to the present dispute as each of the Plaintiffs had *already* enrolled at that point. Simply, the later statements could not have been relied on by Plaintiffs for their earlier acts. Again, Plaintiffs' apparent aim is to manufacture unsupportable inferences about dissemination, reliance, or falsity.

Plaintiffs allege that "[t]his [statement] was false," they never attempt to explain why. Further, the Complaint does not allege that any of the named Plaintiffs ever saw, let alone relied, on this supposed misrepresentation. It cannot, therefore, be the basis of any party's liability—especially not Mr. Allred's.

3. Plaintiffs' CLRA Claim Fails To Assert A Cognizable Remedy Against Mr. Allred.

To remedy the alleged CLRA violation, Plaintiffs seek "injunctive relief, namely to cancel their ISA's and for restitution of payments made." (Compl., ¶ 164). Neither is available against Mr. Allred. There is no allegation in the Complaint that Mr. Allred personally received any of the funds paid by the two Plaintiffs who actually made tuition payments. Nor is Mr. Allred a party to the ISA. So neither restitution nor injunctive relief is available against him. Where no remedy is available against a particular defendant, courts may dismiss causes of action at the pleadings stage. *See Madrid v. Perot Systems Corp.*, 130 Cal. App. 4th 440, 467 (2005); *see also, e.g.*, *Cheverez v. Plains All American Pipeline, LP*, No. CV15-4113, 2016 WL 4771883, at *2-3 (C.D. Cal. Mar. 4, 2016).

In sum, Plaintiffs fail to allege that Mr. Allred, individually, made any misrepresentation. They further fail to establish a basis to impute the School's statements to Mr. Allred. And even if they could, they fail to show how the statements were false or relied on, or that a remedy against Mr. Allred is available. The Court should dismiss Plaintiffs' first cause of action in its entirety.

**E. Plaintiffs' UCL Claim Fails.**

Again, without differentiating between the two Defendants, the Complaint asserts a multi-pronged UCL claim against both parties. The claim rests on both the unlawfulness and fraudulence prongs of the UCL. Neither are sufficiently pleaded.

1. The UCL "Unlawful" Claims Fail.

Plaintiffs claim that Mr. Allred violated the UCL by virtue of the supposed violation of ten different "state and federal laws." (Compl., ¶ 169.). But the Complaint is completely devoid of any averments, which, if true, would demonstrate that ***Mr. Allred*** himself directed, authorized, or committed any of the allegedly unlawful conduct, at least inasmuch as it would support a claim under the UCL.

Again, it is important to clarify that to impose liability on Mr. Allred, Plaintiffs must show

that he was the impetus for or unreasonably participated in the unlawful conduct. *Wolfe Designs*, 322 F. Supp. 2d at 1072; *Deckers Outdoor Corp. v. Fortune Dynamic, Inc*., No. CV 15-769, 2015 WL 12731929, at *8-9 (C.D. Cal. May 8, 2015) (internal quotations omitted). Identifying an officer's or director's role "in the corporation and alleging that they were 'responsible' for the ... practices . . . does not make it plausible that they were personally liable any more so than it would make any officer responsible for the torts allegedly committed by their corporation." *O'Connor v. Uber Techs., Inc*., No. C-13-3826, 2013 WL 6354534, *18 (N.D. Cal. Dec. 5, 2013). Plaintiffs do not come close to meeting this burden in connection with any of the laws or statutes they claim he violated.

***First***, the Complaint alleges that *Bloom's* "business acts and practices" violated both the Federal Trade Commission Act ("FTC"), "which prohibits 'unfair or deceptive acts or practices" and Cal. Educ. Code § 94897(b) ("Ed Code"), "which provides that institutions shall not "[p]romise or guarantee employment, or otherwise overstate the availability of jobs upon graduation." (Compl., ¶ 169 (a)-(b).) The Complaint says nothing about how *Bloom's* "business acts [or] practices" violate these two statutes, but presumably Plaintiffs' theories here rest on their claim that the School's job placement rates were misrepresented.[5] And, for the same reason Plaintiffs' CLRA claim based on those representation fails, their UCL unlawfulness one does too. One, they do not allege that Mr. Allred made any of the purported misstatements or that the School's statements should reasonably be imputed to him under the standards set forth in *Wolfe*, *Deckers*, or *O'Connor*. Two, Plaintiffs do not allege that they actually saw, let alone relied upon, any statement made by Mr. Allred, individually. That is insufficient and the claims must fail.

***Second***, the Complaint asserts that UCL liability premised on violations of the CLRA and the FAL. (Compl., 169 (c)-(d).) But as set forth above (*supra*, II. D) and below (*infra*, II. F), the Complaint does not adequately allege violations of those statutes against Mr. Allred. Since the predicate violations cannot be established, Plaintiffs' derivative UCL claim against Mr. Allred must fail as well.

[5] Mr. Allred is left to make this presumption because Plaintiffs fail to substantiate the allegation with any specificity.

***Third***, the Complaint alleges UCL liability premised on violations of Ed Code sections 94886 and 94943, both of which prohibit the operation of a postsecondary educational institution without obtaining the approval of the BPPE. Notably, in the nineteen paragraphs set forth under its heading "UNTIL AUGUST 17, 2020, LAMBDA OPERATED WITHOUT STATE APPROVAL, IN VIOLATION OF CALIFORNIA LAW," the Complaint mentions Mr. Allred in just one of them. (Compl., ¶¶ 31-49.) In that lone paragraph, Plaintiffs do not allege that Mr. Allred directed any of the supposedly unlawful activity; they instead falsely claim that Mr. Allred "engaged in a public misinformation campaign about Lambda's legal status" (Compl., ¶ 45). Even if true, that would *not* violate the pertinent sections of the Ed Code. There is an important distinction between *operating* the School and *statements about* the School's BPPE status. The former might potentially be violative of the cited statutes; the latter is not. And again, Plaintiffs fail to establish how liability can be imposed on Mr. Allred simply because of his role at the School under *Wolfe*, *Deckers*, or *O'Connor*.

***Fourth***, the Complaint alleges UCL liability for violations of Ed Code sections 94917 and 94902(b)(2). (Compl., ¶ 169 (g)-(h).) Both sections speak to the enforceability of agreements reached between students, on the one hand, and educational institutions without approvals to operate, on the other. (*Id.*) Neither statute provides liability for drafting, executing, or enforcing such agreements. That is, the plain language of the statutes does not make an agreement covered by the statutes is unlawful; it is merely unenforceable. Entering into unenforceable agreements is not a predicate violation. Consequently, neither section provides a basis for UCL liability.

***Fifth***, the Complaint asserts UCL liability for violating Cal. Fin. Code § 22100(a) (the "California Financing Law"), which provides that "[n]o person shall engage in the business of a finance lender or broker without obtaining a license from the commissioner." (Compl., ¶ 169 (i)). Nothing in the sections of the Complaint in which Plaintiffs allege that the School engaged in "THE UNLAWFUL BUSINESS PRACTICE OF UNLICENSED LENDING" (*see* Comp., ¶¶ 93-105) mentions Mr. Allred, let alone specifically alleges that he directed any conduct alleged to be in violation of the California Financing Law at issue. Thus, to the extent Plaintiffs' UCL claim is premised on a violation of section 22100(a), it fails, and especially so as to Mr. Allred.

***Sixth***, Plaintiffs allege that UCL liability should attach due to violations of the Consumer Financial Protection Act of 2010, 12 U.S.C. §§ 5531(a), 5536(a)(1)(B). (Compl., ¶ 169 (j)). According to Plaintiffs, these statutes "prohibit[] covered persons from engaging in unfair, deceptive, or abusive acts or practices." (*Id.*) Of course, Plaintiffs do not allege how, why, or when Mr. Allred engaged in "unfair, deceptive, or abusive acts or practices," other than what has already been discussed—and dismissed—above. For the same reason the allegations discussed above fail as to Mr. Allred, these ones do too.

In conclusion, none of the ten supposed state and federal laws that were allegedly violated were done so by Mr. Allred, least of all in a manner that would support a claim under the UCL. Plaintiffs' attempt to impose liability on Mr. Allred simply because of his position at the School is improper and unsupported. *See Frances T.*, 723 P.2d at 580; *Wolfe Designs*, 322 F. Supp. 2d at 1072; *Deckers Outdoor*, 2015 WL 12731929, at *8-9; *O'Connor*, 2013 WL 6354534, *18. Accordingly, Plaintiffs' first theory of a UCL claim should be dismissed.

2. The UCL "Fraud" Claim Fails.

Plaintiffs also allege liability under the UCL under the separate fraudulent prong. (Compl., ¶¶ 171-173.) In support of this allegation, Plaintiffs claim that Defendants acted fraudulently by making "false representations" about: (1) job placement rates; and (2) BPPE approval. (Compl., ¶ 172.) But, as discussed above, the Complaint does not allege that Plaintiffs relied on any representation made by ***Mr. Allred*** concerning job placement rates. Moreover, the Complaint does not allege that Mr. Allred made any misstatements about the School's BPPE status. Accordingly, for the same reasons as set forth in both preceding sections, Plaintiffs' UCL fraud claim should be dismissed.

3. Plaintiffs Do Not Allege A Cognizable Remedy Under The UCL Either.

The law is clear that the only two remedies available under the UCL are: (1) restitution; and (2) injunctive relief. Where neither are available against a particular defendant, courts are permitted to dismiss UCL claims at the pleadings stage. *Madrid*, 130 Cal. App. 4th at 467.

Here, Plaintiffs do not specifically seek—because they cannot seek—either restitution or injunctive relief against Mr. Allred in his individual capacity. Again, there are no allegations that

Mr. Allred *personally* received any of the funds paid by the two Plaintiffs who actually made tuition payments. Additionally, there is no allegation that Mr. Allred himself is currently engaged in any type of fraudulent, misleading, or unlawful conduct or activities that could be enjoined. Because Plaintiffs do not allege that Mr. Allred has any money or property that can be returned to them via restitution or that he is currently engaged in tortious activity that can be abated, their UCL claim can and should be dismissed.

**F. Plaintiffs' FAL Claim Is Inadequately Pleaded As Well.**

Plaintiffs also bring a FAL claim against both Defendants. (Compl., ¶¶ 174-176). In what becomes its refrain, the Complaint alleges that Defendants violated the FAL by: (i) making misrepresentations about job placement rates; and (ii) failing to disclose its allegedly unapproved status with the BPPE (and certain consequences that flow therefrom). Once again, and as set forth above, Plaintiffs did not allege that they ever saw any of the statements concerning job placement rates that Mr. Allred himself allegedly made, nor that there were any specific statements—or omissions—made by Mr. Allred, rather than the School. If there were any doubt, the specific language in the FAL cause of action refers to the former as "*Lambda's* statements" and the latter as "*Lambda's* advertisements" (Compl., ¶ 175 (a)-(b) (emphasis added))—meaning that the Complaint concedes that it was the School, not Mr. Allred, that engaged in the purportedly liability-producing activity under the FAL. As articulated repeatedly above, Plaintiffs' cannot impose liability upon Mr. Allred purely because of his position at the School.

Further, the FAL claim should be dismissed because it does not allege a cognizable remedy against Mr. Allred. As with the UCL, there are two remedies available for violations of the FAL: (1) restitution; and (2) injunctive relief. For the same reasons set forth above, neither may be awarded against Mr. Allred. *Madrid*, 130 Cal. App. 4th at 467.

For both reasons, the Court should dismiss Plaintiffs' FAL claim as alleged against Mr. Allred.

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**MOTION TO STRIKE UNDER RULE 12(F)**

Defendants, Bloom Institute of Technology and Austen Allred (together "Defendants") join in this Motion to Strike under Rule 12(f).

## I. LEGAL STANDARD

Rule 12(f) permits a court to strike from a pleading "an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). "Immaterial matter is that which has no essential or important relationship to the claim for relief or the defenses being plead." *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir. 1993), *rev'd on other grounds by Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994). "Impertinent matter consists of statements that do not pertain, and are not necessary, to the issues in question." *Id.*

While motions to strike are generally viewed with disfavor, they may be granted when "it is clear that the matter to be stricken could have no possible bearing on the subject matter of the litigation. *U.S. v. Wang*, 404 F. Supp. 2d 1155, 1156 (N.D. Cal. 2005) (citation omitted). That is because "the function of a 12(f) motion to strike is to avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial." *Sidney-Vinstein v. A.H. Robbins Co.*, 697 F.2d 880, 886 (9th Cir. 1983). Indeed, district courts have "considerable discretion" in deciding motions to strike. *Vashistha v. Martin*, No. CV-97-4758, 1998 WL 656568, at *3 (C.D. Cal. July 10, 1998) ("The Ninth Circuit views a motion to strike as a matter that lies entirely within the trial court's sound discretion.").

## II. THE CLASS ALLEGATIONS SHOULD BE STRICKEN.

The Plaintiffs' class allegations are fatally flawed for at least two reasons. ***First***, each Plaintiff expressly waived their right to bring a class action. ***Second***, the complaint makes clear that the class allegations cannot satisfy the requirements of Rule 23. Both are independent grounds to strike the class allegations.

### A. The Plaintiffs Waived Their Right To Bring Or Participate In A Class Action.

Although Rule 12(f) imposes a demanding standard, courts will nevertheless find it met in cases involving motions to strike class allegations. That includes cases where claims are subject to arbitration, such as here. *Eshagh v. Terminix Int'l Co., L.P.*, No. 1:11CV0222 LJO DLB, 2012 WL

12874468, at *1 (E.D. Cal. July 6, 2012) (granting motion to compel and striking class allegations), *aff'd*, 588 F. App'x 703 (9th Cir. 2014). And it includes claims covered by class action waivers, again as here.

Indeed, just a few weeks ago, Judge Freeman struck class allegations under Rule 12(f) where the parties had agreed that:

> Any dispute arising out of or in connection with the Agreement (the General Terms), unless amicably settled between the Parties, shall be referred to the competent court or other dispute resolution authority, determined as per the procedural law of Nexo jurisdiction. ***You agree that any dispute resolution proceeding subject to the Applicable Law under the preceding sentence shall be conducted only on an individual basis and not as a plaintiff or class member in any purported class, consolidated or representative action or proceeding***. No court or other dispute resolution authority can consolidate or join more than one claim and can otherwise preside over any form of a consolidated, representative, or class proceeding. Any relief awarded cannot affect other Clients of Nexo.

*Jeong v. Nexo Capital Inc.*, No. 21-CV-02392-BLF, 2023 WL 2717255, at *3 (N.D. Cal. Mar. 29, 2023) (emphasis in original). A similar result has been consistently reached in the Ninth Circuit. *See, e.g.*, *Holman v. Bath & Body Works, LLC*, No. 12-CV-01603, 2021 WL 5826468, at *26 (E.D. Cal. Dec. 8, 2021), *report and recommendation adopted*, No. 1:20-CV-1603, 2022 WL 463298 (E.D. Cal. Feb. 15, 2022); *Ragsdale v. Wilshire Com. Cap. LLC*, No. CV-21-00549, 2021 WL 4699526, at *4 (C.D. Cal. Apr. 30, 2021).

Here, all four Plaintiffs expressly waived their right to bring a class action in their ISA. Like the waiver in *Jeong*, each ISA conspicuously provides:

> **No Class Action**
>
> YOU AND LAMBDA SCHOOL MAY EACH BRING CLAIMS AGAINST THE OTHER ONLY IN AN INDIVIDUAL CAPACITY AND NOT AS A PLAINTIFF OR CLASS MEMBER IN ANY PURPORTED CLASS OR REPRESENTATIVE PROCEEDING. CLAIMS OF TWO OR MORE PERSONS MAY NOT BE JOINED OR CONSOLIDATED IN THE SAME ARBITRATION UNLESS THEY ARISE FROM THE SAME TRANSACTION.

(Compl., Exhs. A-D).

Per the plain language of the parties' agreement, Plaintiffs' effort at bringing a class action is prohibited, spurious, and futile. The class allegations can have no possible bearing on the subject matter of the Plaintiffs' lawsuit, and are therefore immaterial *and* impertinent. Consequently, the

class allegations should be stricken.

**B. Plaintiffs' Class Allegations Also Cannot Satisfy The Requirements Of Rule 23.**

The Complaint defines one class and one subclass as:

> All persons who enrolled at Lambda and: (i) entered into an ISA, retail installment contract, deferred tuition plan, or any other tuition payment plan with an arbitration clause that contains a carve-out for any proceeding commenced by either party seeking an injunction or any other equitable remedy; or (ii) who otherwise did not sign any such agreements with an arbitration clause, or opted out of one; and (iii) who have not yet had their ISA, retail installment contract, deferred tuition plan, or other tuition payment plan cancelled and all payments made to Lambda refunded.
>
> . . .
>
> All persons within the Class who enrolled at Lambda prior to August 17, 2020, the date that Lambda obtained the BPPE's approval to operate.

(Compl., ¶¶ 142, 143). Under that definition, the class allegations fail for at least three reasons.

***First***, the Plaintiffs have the burden of "establishing a class that is 'precise,' 'objective,' and 'presently ascertainable.'" *Brazil v. Dell Inc.*, 585 F. Supp. 2d 1158, 1167 (N.D. Cal. 2008). The Plaintiffs' class definitions are not ascertainable because they include members who have not been damaged and thus lack standing. That requires striking the definition. *See, Sanders v. Apple Inc.*, 672 F. Supp. 2d 978, 991 (N.D. Cal. 2009) (striking class definition because "no class may be certified that contains members lacking Article III standing. . . . The class must therefore be defined in a way that anyone within it would have standing.").

Plaintiffs' class would necessarily include members who never even saw any of the purported misrepresentations as well as individuals who suffered no damages. Instead, it would include members who are completely satisfied with the education they received as well as other members who have not paid—and may never pay—anything under their ISAs. None of those individuals would have been damaged and thus they would lack standing to participate in a class. *Id.*; *see also Tietsworth v. Sears*, 720 F. Supp. 2d 1123, 1146 (N.D. Cal. 2010) (class not ascertainable because it included members who were not damaged). Further, the class definition would also necessarily include students who saw, but did not rely on, any of the job placement rates Plaintiffs claim were false or misleading.

***Second***, the class allegations do not satisfy the commonality requirements of Rule 23. To do

so, the "claims must depend upon a common contention . . . . That common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). Plaintiffs' own complaint demonstrates that commonality is not present. Their allegations point to a litany of purportedly false—and critically ***different***—representations spanning four years. To resolve whether those serve as a basis for liability under the CLRA, UCL, or FLA, each purported class member's awareness of the misstatement and reliance thereon will have to be tested. Put simply, there is no single issue that is central to the validity of each class member's claim.

***Third***, even if the Plaintiffs could establish common questions of fact, it is clear they would not predominate over individual questions. Again, the causes of action asserted by Plaintiffs each require an individualized inquiry, turning on the specific misrepresentation, the means of disclosure, the reasonableness of reliance, and the amount of damages. Accordingly, individual questions of fact predominate over any common questions of law and the class allegations fail. *See, e.g.*, *Campion v. Old Republic Home Protection Co., Inc.*, 272 F.R.D. 517, 528 (S.D. Cal. 2011) (denying class certification for false advertising claims where misrepresentations were alleged to have been made by different means); *Cohen v. DIRECTV Inc.*, 178 Cal.App.4th 966, 979-82 (2009) (denying class certification for CLRA claims because actual reliance must be established for an award of damages); *In re Hotel Telephone Charges*, 500 F.2d 86 (9th Cir. 1974) (noting class actions may be unsuitable in fraud cases where different representations are alleged and reliance is not uniform).

For each of these three reasons, the class allegations should be stricken.

## III. PLAINTIFFS' REQUESTS FOR DECLARATORY AND INJUNCTIVE RELIEF SHOULD BE STRICKEN

### A. Plaintiffs Have Not And Cannot Appropriately Seek Declaratory Relief.

As a matter of law, declaratory relief is unavailable to remedy violations of the UCL or FLA. *See, e.g.*, *Davidson v. United Servs. Automobile Ass'n*, No. CV 20-00527, at *3-4 (C.D. Cal. Mar. 10, 2020), *citing Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal.4th 1134, 1150 (2003)); *Madrid*, 130 Cal.App.4th at 452; *Downey v. Public Storage, Inc.*, 44 Cal.App.5th 1103, 1114 (2020). So, at best, Plaintiffs can only seek declaratory relief through their CLRA claims. Notably, they do

not. Instead, they only seek "injunctive relief, namely to cancel their ISAs and for restitution of payments made." (Compl., ¶ 164). Because declaratory relief is unavailable under the UCL or FAL and because Plaintiffs do not seek a declaration related to alleged violations of CLRA, the allegations should be stricken from the complaint.

Even if Plaintiffs did seek declaratory relief under the CLRA, it must be for the purpose of preventing reasonably likely future harm. *See, e.g.*, *Galvez v. Touch-Tel U.S.A., L.P.*, No. CV-08-5642, 2011 WL 13213882, at *3 (C.D. Cal. Mar. 28, 2011) (Under the CLRA, "[w]here a plaintiff seeks declaratory and injunctive relief, he must demonstrate that he is realistically threatened by a repetition of the violation."); *TransparentGov Novato v. City of Novato*, 34 Cal.App.5th 140, 148 (2019) (Declaratory relief "operates prospectively to declare future rights, rather than to redress past wrongs."); *Gest v. Bradbury*, 443 F.3d 1177, 1181 (9th Cir. 2006) (citations omitted) (declaratory relief only available when "realistically threatened by a repetition of the violation"). That is, declaratory relief, like injunctive relief, "operates prospectively to declare future rights rather than to redress past wrongs," by "setting controversies at rest before they lead to repudiation of obligations, invasion of rights or commissions of wrongs; . . . the remedy is to be used in the interests of preventative justice, to declare rights rather than execute them." *TransparentGov Novato*, 34 Cal.App.5th at 148 (internal citations omitted).

Even if the Plaintiffs did seek declaratory relief under the CLRA, it would not save them from that result. The Plaintiffs' Complaint requests several forms of declaratory relief from the Court. Specifically, the Plaintiffs ask the Court to declare: (1) "that Defendants conducted business as a private postsecondary educational institution in California without obtaining approval to operate" in violation of the Education Code and the UCL, (2) "that Defendants knowingly operated a private postsecondary institution without approval to operate," in violation of the Education Code and the UCL, (3) "that Defendants' job placement rate representations at all times relevant to this Complaint were fraudulent and misleading, in violation of the UCL, FAL, and CLRA," and (4) that Defendants "engaged in the business of a finance lender or broker without obtaining a license from the commissioner" in violation of the California Financing Law. (Compl., ¶¶ 35-36.)

Each of these declarations asks the Court to look back in time and declare certain facts to be

true. That is impermissible. Declaratory relief may not be granted to decide whether during some period of time more than two years ago the School operated without approval from the BPPE. And it certainly may not be granted to declare that the School operated without approval with "knowing" intent to violate the BPPE's rules. Declaratory relief may not be granted to determine whether past statements by the School or Mr. Allred were true or false. That is especially true when those statements are not capable of inflicting any future harm on Plaintiffs or members of the proposed class. Simply, even if Plaintiffs were able to prove that a misstatement was made, any harm caused has ***already*** occurred. Finally, declaratory relief may not be granted to determine whether the School was acting as a finance lender or broker when the Plaintiffs (or any of the proposed class members) signed their ISAs, as such relief would be nothing more than another retroactive and—frankly, advisory—opinion.

None of the declaratory relief requested is capable of being granted, either because it is sought under a statute that does not permit it (the UCL or FAL) or because it seeks to redress past alleged wrongs. The allegations are thus immaterial, impertinent, spurious, and futile. Consequently, all declaratory relief allegations should be stricken.

**B. Plaintiffs Have Not Alleged Any Ongoing Harm Or Threat Of Future Harm Capable Of Supporting Injunctive Relief.**

Each of the CLRA, UCL, and FAL allow for injunctive relief. However, as with declaratory relief, injunctive relief is appropriate "only when there is a threat of continuing misconduct." *Madrid*, 130 Cal.App.4th at 463, *citing* Cal. Civ. Proc. Code § 525 ("injunction is a writ or order requiring a person to refrain from a particular conduct.").

Plaintiffs seek to "enjoin any effort to collect upon or otherwise enforce" the ISAs. Missing entirely from the Complaint, however, is any allegation the School has *ever* tried to enforce the ISAs—of Plaintiffs or otherwise. That is fatal to their request. A plaintiff seeking injunctive relief must establish that the harm alleged will continue without an injunction barring the conduct alleged to violate the CLRA, UCL, or FAL. *See, e.g.*, *Robinson v. U-Haul Co. of Cal.*, 4 Cal. App. 5th 304, 316 (2016) (affirming trial court's issuance of an injunction where there was no error in finding that U-Haul's past harmful conduct could be reinstituted in the future.); *People v. Nat. Assoc. of Realtors*, 120 Cal. App. 3d 459, 476 (1981) ("[N]o equitable reason for an injunction" where there is no

reason to believe the defendant will resume the proscribed conduct.); *In re Vioxx Class Cases*, 180 Cal. App. 4th 116, 130 (2009) (the FAL does not permit injunctive relief "when there is no threat that the misconduct to be enjoined is likely to be repeated in the future.").

As set forth above, the existence of an unenforceable ISA is in and of itself *not* violative of the CLRA, UCL, or FLA. Nor are attempts to enforce the ISAs. Again, the Ed Code does not provide liability for drafting, executing, or seeking to enforce the agreements. Instead, it simply states that they are, in fact, unenforceable. Without that, the Complaint does not plead that there is any realistic threat of a repeated violation and, thus, there is no basis for injunctive relief.

Consequently, the allegations are immaterial, impertinent, spurious, and should be stricken.

**C. Plaintiffs' Request For Public Injunctive Relief Should Be Stricken.**

"[T]he statutory remedies available for a violation of the [CLRA], the [UCL], and the [FAL] include public injunctive relief, i.e., injunctive relief that has the primary purpose and effect of prohibiting unlawful acts that threaten future injury to the general public." *McGill v. Citibank, N.A.*, 2 Cal. 5th 945, 951 (2017). The court in *McGill* "distinguished between private injunctive relief—i.e., relief that primarily 'resolve[s] a private dispute' between the parties …and 'rectif[ies] individual wrongs' …, and that benefits the public, if at all, only incidentally—and public injunctive relief—i.e., relief that 'by and large' benefits the general public … and that benefits the plaintiff, 'if at all,' only 'incidental[ly]' and/or as 'a member of the general public.'" *Id.* at 955 (internal citations omitted). *McGill* summarized that "public injunctive relief under the UCL, the CLRA, and the false advertising law [(the FAL)] is relief that has the primary purpose and effect of "prohibiting unlawful acts that threaten future injury to the general public." *Id.* (internal citations omitted); *see also Stover v. Experian Holdings, Inc.*, No. SACV1800826CJCDFMX, 2018 WL 11462838, at *4 (C.D. Cal. Oct. 31, 2018), *on reconsideration in part*, No. SACV1800826CJCDFMX, 2019 WL 13241682 (C.D. Cal. Jan. 30, 2019), and *aff'd*, 978 F.3d 1082 (9th Cir. 2020) ("Public injunctive relief does not include relief in which there is 'no real prospective benefit to the public at large from the relief sought.'"), *citing Kilgore v. KeyBank, Nat. Ass'n*, 718 F.3d 1052, 1061 (9th Cir. 2013)). Alternatively, "[r]elief that has the primary purpose or effect of redressing or preventing injury to an individual plaintiff—or to a group of individuals similarly situated to the plaintiff—does not

constitute public injunctive relief." *McGill*, 2 Cal. 5th at 955.

In their Prayer for Relief, Plaintiffs ask the Court to impose "public injunctive relief, including enjoining Defendants from misrepresenting job placement rates, and collecting on any ISA or other tuition payment plan entered into while Defendants maintained such misrepresentations." (Compl., Prayer for Relief, p. 36, ¶ 12.) The requested relief has two components: (1) that the School be enjoined from "misrepresenting job placement rates;" and (2) that the School be enjoined from collecting on ISAs that were entered into while a misrepresentation was "maintained." (*Id.*) However, "[c]ourts do not take relief styled as a 'public injunction' at face value" (*Ajzenman v. Off. of Comm'r of Baseball*, No. CV203643DSFJEMX, 2020 WL 6037140, at *6 (C.D. Cal. Sept. 14, 2020))—and this Court should not do so here.

With respect to the ***first*** component, Plaintiffs have failed to plead with any particularity under Rule 9(b) that the School is currently misrepresenting its job placement numbers. Instead, Plaintiffs plead instances where they claim the School's job placement rates were false, almost of which were in 2018 and 2019, then attempt to extend those allegations into the present by claiming in conclusory fashion that because the School still advertises a job placement rate in 2023, it must be the case that "[l]ike the earlier rates from 2018 and 2019, the published rates from 2020 to the present were, and continue to be, false and misleading." (Compl., ¶ 78.) Combing the Complaint, the latest Plaintiffs plead any allegation that the School had published a misleading job placement number was in Fall 2021. (*See* Compl. ¶¶ 79-82.) The Complaint does not plead with any particularity that the School's most recent published job placement rates are false or misleading, or that they have been misleading at any time in the past year-and-a-half. It is, therefore, not clear what the Court would enjoin when Plaintiffs have not pleaded that there is a current misrepresentation that must be enjoined, and Plaintiffs have not pleaded any allegations that could support a finding that misrepresentations are likely to be made in the future.

But even if they had, Plaintiffs' requested relief is hardly like the types of "misleading advertisement campaigns" that other courts have deemed to affect the public at large within this framework. For starters, Plaintiffs have never alleged that the supposedly misleading job placement rates were ever part of a broad advertising campaign targeted toward the public. Instead, soaking

wet, their Complaint suggests that the School supposedly articulated such rates in reports and blog spots all on the School's own website and social media—a far cry from radio, television, or other paid advertisements seen in other cases. Indeed, it would seem that, to be exposed to such job placement rates, a "consumer" would need to be actively reviewing the School's website. Accordingly, the individuals who would be affected by such relief would not be the public at large—it would be people just like Plaintiffs who are interested in coding and investigating the School as a potential opportunity. Public injunctive relief this is not. *See Stout v. Grubhub Inc.*, No. 21-CV-04745-EMC, 2021 WL 5758889, at *8 (N.D. Cal. Dec. 3, 2021) (explaining that "the fact that the alleged underlying misconduct concerns false advertising does not mean that any requested injunctive relief affecting the accuracy of that advertising is automatically deemed public in nature").

With respect to the ***second*** component, Plaintiffs are not seeking an injunction benefiting the public. Their prayer as written is to enjoin the School from "collecting on any ISA or other tuition payment plan entered into while Defendants maintained such misrepresentations." (Compl., Prayer for Relief, p. 36, ¶ 12.) The injunction Plaintiffs seek, by definition, only would apply to Plaintiffs and potential members of the putative class who have signed ISAs—not the general public, who have not signed ISAs. Barring any collection efforts by the School with respect to the ISAs would only have the "purpose or effect of redressing or preventing injury … to a group of individuals similarly situated," that being Plaintiffs and members of the putative class, which does not constitute public injunctive relief. *See Wright v. Sirius XM Radio, Inc.*, 16-cv-01688, 2017 WL 4676580, at *9 (C.D. Cal. June 1, 2017) (rejecting application of *McGill* rule since prayer for relief was not actually for "public injunctive relief" as it only pertained to a class of plaintiffs holding lifetime subscriptions to defendant's service).

Moreover, seeking public injunctive relief barring the School from engaging in collection efforts with respect to ISAs is superfluous of Prayer for Relief No. 9, which asks the Court to "enjoin any effort to collect upon or otherwise enforce" the ISAs signed by Plaintiffs and members of putative class. (Compl., Prayer for Relief, p. 36, ¶ 9.) If Plaintiffs and members of the putative class are able to gain relief through a private injunction, and the injunction would benefit Plaintiffs and the putative class members alone, and not the general public, then a request for public injunctive relief is

duplicative and should be stricken from the Complaint.

Plaintiffs and the putative class members' request for public injunctive relief should be stricken from the Complaint.

## CONCLUSION

The parties agreed to arbitrate their disputes. Mr. Allred respectfully requests the court enforce that agreement, compel arbitration, and dismiss the complaint under Rule 12(b)(1) for lack of jurisdiction. To the extent the Court does not compel all of Plaintiffs' claims against Mr. Allred to arbitration (or *stay* them pending the completion of arbitration), Mr. Allred respectfully requests the Court dismiss Plaintiffs' claims against him with prejudice. And to the extent any claims survive arbitration and dismissal, Mr. Allred respectfully requests the Court strike the impertinent, immaterial, and impossible allegations set forth above from the Complaint.

Dated: April 12, 2023

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