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HEATHER NYE,

Claimant,

vs.

LAMBDA, INC.,

Respondent.

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

RESPONDENT LAMBDA INC.'S OPPOSITION TO CLAIMANT HEATHER NYE'S DISPOSITIVE MOTION

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INTRODUCTION

Before hearing from a single witness or exchanging one iota of evidence, Claimant Heather Nye ("Claimant" or "Nye") has asked the Arbitrator to leap to the conclusion that Lambda Inc. ("Lambda School" or the "School") operated without approval in California and, as a result, the agreement Nye voluntarily executed with the School, should be voided, even though she has already reaped substantial and unpaid-for benefits from the School, all by availing herself of the consumer protection laws from a state in which she does not live in and did not live in during her tenure as a student. Claimant would have the Arbitrator reach these conclusions, without addressing significant questions with regard to the applicability of the California Education Code and the California Unfair Competition Laws ("UCL"), and without affording Lambda School its Due Process rights, by denying the School its opportunity for a full hearing on the evidence. Claimant's Dispositive Motion (the "Motion") has fallen woefully short of overcoming the significant barriers she must clear, especially in light of the sweeping relief she requests through her pre-discovery dispositive motion.

Claimant's Motion, which purports to effectively resolve the entire arbitration in just seven (7) pages of briefing, is also an unfair usage of the procedures set forth under Rule 33 of the AAA Consumer Arbitration Rules. The Motion, after all, provides no admissible evidence, requires the Arbitrator to accept all of Claimant's interpretations of disputed facts, and, instead of streamlining issues in the arbitration, seeks to essentially end it altogether—all before Lambda School has presented any evidence whatsoever or had the opportunity to review any of Claimant's disclosures. What makes it even more improper is that, in asking the Arbitrator to provide the ultimate relief she seeks through this arbitration, Claimant has forced Lambda School to sketch out its entire defense through this Opposition, all while Claimant has only articulated the scantest of details regarding her individualized experiences with Lambda School in her Arbitration Demand. The net result of Claimant's misuse of Rule 33 is that, in not seeking resolution of specific or individualized issues that would streamline the dispute, and instead pressing Lambda School to articulate its entire defense case in this Opposition, Claimant has

exacerbated the informational asymmetries in this arbitration. Through these tactics, Claimant will now know much, if not all, of Lambda School's legal defenses, while Lambda School remains in the dark about some of the most basic facts regarding Claimant's allegations, like the extent to which she benefited from her Lambda School education, her current employment, and when, or if, she even saw the specific misrepresentations her Demand claims the School articulated. This is prejudicial, improper, and unfair.

What only compounds this unfairness is that Claimant's Motion was submitted at a time that would require Lambda School to file this Opposition before Claimant has agreed to any type of limitation regarding confidentiality through a stipulated protective order or otherwise. Indeed, the day before filing Claimant's Motion, her counsel, the National Student Legal Defense Network, suggested in an article in the Business Insider that materials from these arbitrations may be used for external purposes, by pronouncing that "[w]hile [Lambda School's] students' agreements bar them from bringing a class-action lawsuit, the NSLDN is hoping [one claimant's] case and [Ms. Nye's arbitration and one other] will pave the way for a larger case." (Declaration of Patrick Hammon in Support of Respondent's Opposition to Claimant's Dispositive Motion ("Hammon Decl."), ¶2, Ex. A [https://www.businessinsider.com/lambda-school-promised-lucrative-tech-coding-career-low-job-placement-2021-10)].) In other words, Claimant's usage of Rule 33 to seek a premature disposition of the ultimate relief she seeks has forced Lambda School to show many, if not all, of its proverbial cards at a time when the parties have not even agreed whether and to what extent the parties' exchanges will be kept confidential. While Lambda School trusts that Claimant did not do as much so that she or her counsel could wield Lambda School's representations in other fora, the unresolved nature of this issue only heightens the unfairness of Claimant's Motion.

No matter how much Claimant's counsel wishes it was, however, this case is not a referendum on postsecondary education, the marketplace for such education services more broadly, or the viability of Income Share Agreements ("ISAs"). It is a specific and individualized dispute between one particular consumer, on the one hand, and a provider of

education services, on the other. To the extent Claimant's counsel thinks broader policy-based relief is appropriate, counsel should seek it through the legislature or the pertinent state regulatory agencies—not a consumer arbitration. Lambda School respectfully requests that the Arbitrator deny Claimant's early dispositive motion with prejudice.

ARGUMENT

I. Legal Standard

Though her Motion fails to identify what precise procedural vehicle she is using to make her request, Claimant's "Dispositive Motion" appears to be tantamount to a motion for summary judgment in light of its reliance on specific facts, and not just legal issues. Furthermore, while her Motion does not plainly state the specific claim for which it seeks summary disposition (instead, entitling the Motion as a "dispositive motion on her claim that Respondent Lambda School was unlawfully operating without a license at the time she was enrolled"), it appears her Motion is premised on her claim arising under the State of California's Unfair Competition Laws, as that is the only cause of action specifically mentioned in her Motion.

Though Claimant's submission does not identify the appropriate legal standard for evaluating what appears to be a summary judgment motion to resolve a UCL claim, most jurisdictions require parties moving for summary judgment to show that there are no triable issues of material fact that could prevent judgment from being entered in the movant's favor. (See, e.g., Fed. R. Civ. P. 56; Cal. Code Civ. Proc. § 437c.) Under California law, a triable issue exists if the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the nonmoving party. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) "[T]he party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment ***as a matter of law***." (*Aguilar*, *supra*, 25 Cal.4th at p. 850 [emphasis added].) "All doubts as to whether there are any triable issues of fact are to be resolved in favor of the party opposing summary judgment." (*Ingham v. Luxor Cab Co.* (2001) 93 Cal.App.4th 1045, 1049.) In ruling on the motion, courts typically must "consider all of the evidence" and "all" of the "inferences" reasonably drawn there from, and must view such

evidence and such inferences, in the light most favorable to the opposing party. (Code of Civil Procedure § 437(c)(c); *Aguilar*, *supra*, 25 Cal. 4th at 843.) Resolving UCL claims through dispositive motions, like this one, is not particularly common, given the equitable nature of the claim. (*Cortez v. Purolator Air Filtration Prod. Co.* (2000) 23 Cal.4th 163, 180 ["A court cannot properly exercise an equitable power without consideration of the equities on both sides of a dispute."])

Another standard that is virtually universal in evaluating motions of this kind is the requirement that the movant must make the foregoing showing through the use of ***admissible*** evidence. (See Cal. Code Civ. Proc. §437c(d).) This means that, for Claimant to prevail, she must rely on evidence that has been properly authenticated and is capable of overcoming all hearsay objections. (See Cal. Ev. Code §§ 1200 *et seq.*, 1400 *et seq.*)

II. Claimant Has Not Established That The UCL Applies In This Case.

A. California's Unfair Competition Laws Are Presumptively Non-Extraterritorial.

"[V]iolation of California's UCL is a state law claim." (*Fontenberry v. MV Transp., Inc.* (E.D. Cal. 2013) 984 F. Supp. 2d 1062, 1067 [dismissing extraterritorial UCL claims].) Accordingly, the UCL only reaches "unlawful business act[s] or practice[s] committed in California." (*Sullivan v. Oracle Corp.* (2011) 51 Cal.4th 1191, 1207 (citing Cal. Bus. & Prof.Code § 17200).) As such, "[t]here is a presumption against extraterritorial application." (*Fontenberry*, 984 F. Supp. 2d at 1067 (citing *Diamond Multimedia Sys., Inc. v. Superior Court* (1999) 19 Cal.4th 1036, 1059).) "[T]he presumption against extraterritoriality applies to the UCL in full force." (*Sullivan*, 51 Cal.4th at 1207 (citing *Norwest Mortgage, Inc. v. Superior Court* (1999) 72 Cal.App.4th 214, 222–225).) "California's UCL may only be applied extraterritorially where the unlawful conduct that forms the basis of the out-of-state plaintiff's claim occurs in California." (*Fontenberry*, at 1067 (citing *Sullivan* at 1207–09).) Put more specifically, the UCL does not reach "claims of non-California residents injured by conduct occurring beyond California's borders." (*Norwest Mortgage*, 72 Cal.App.4th at 222.)

B. Claimant Is Not, Nor Was She Ever, A Resident of California.

Claimant has not pleaded—and certainly not conclusively established—that the UCL even applies to her allegations in the first place. Claimant, after all, has not pleaded, let alone proven, that she received any of the educational services provided by Lambda School, which exclusively offers its educational programs online, while she was in California ***or*** that any of those educational services were overseen or administered by personnel in California. Instead, Claimant's Demand indicates that she lived in ***Texas*** while she was enrolled at Lambda School. In addition to Texas, at the Preliminary Conference, Claimant's counsel indicated that she did at some point, or does now, live in Florida. (Hammon Decl., ¶3.) Regardless of her location, what is clear is that none of the alleged wrongdoing occurred in California. The issue is further complicated by Lambda School's incorporation in Delaware and the provision in the ISA that the contract is to be governed by New York state law. (*Id.*, at ¶3.) At this early juncture in the case, it appears that, if any unlawful conduct occurred at all, it occurred in Texas or Florida, and without any clear connection to California.

C. Claimant Has Not Established That Any Of The Allegedly Unlawful Activities Occurred In California.

Similarly, Claimant has not pleaded—or conclusively established—sufficient facts that would show the underlying business practices occurred in California. Nye has not articulated any facts that prove that any pertinent decision, practice, or activity took place in California. On Reply, Claimant may try to do so—and if she tries to do so, such sandbagging should not be countenanced. (See *Cal. Sportfishing Prot. All. v. Pac. States Indus., Inc.* (N.D. Cal. Sept. 22, 2015) No. 15-1482, 2015 WL 5569073, at *2 ["Raising new arguments in a reply brief is classic sandbagging...."]; *Trombley Enterprises, LLC v. Sauer, Inc.* (N.D. Cal. Aug. 13, 2019) No. 5:17-CV-04568-EJD, 2019 WL 3804710, at *6 ["Raising new arguments in a reply brief is improper"].) But even if she were permitted to do so, Lambda School anticipates that whatever she alleges will still fall short of overcoming the presumption against extraterritoriality.

For example, Claimant may later argue that she is still entitled to avail herself of the protections of California's unfair competition laws, despite the fact that she apparently never stepped foot inside the State, because of some connection between the School and California. But the California Supreme Court has already held that genericized and abstract attempts at establishing a jurisdictional nexus with California in *Sullivan*. (See *Sullivan*, *supra*, 51 Cal.4th 1191.) In *Sullivan*, the Supreme Court specifically addressed the potential extraterritorial extension of a California unfair competition claim based on practices manifested in other states. The plaintiffs in *Sullivan* alleged that their employer, Oracle Corporation, a California software company, violated the FLSA and California law by misclassifying out-of-state employees as exempt and failing to pay overtime. (*Id.* at 1195-96.) Plaintiffs argued that this policy was an unlawful act under the UCL because the "decision-making process to classify [non-California plaintiffs] as exempt from the requirement to be paid overtime wages under the FLSA occurred primarily from within the headquarters offices of Oracle Corporation located in Redwood Shores, California." (*Id.* at 1208.) The California Supreme Court rejected plaintiffs' argument. Like a decision to continue operating and providing postsecondary education, the court held that "an employer's [decision] to adopt an erroneous classification policy is not unlawful in the abstract." (*Id.* (quoting *Walsh v. IKON Office Solutions, Inc.* (2007) 148 Cal.App.4th 1440, 1462).) Accordingly, the *Sullivan* court held that the mere fact that "Oracle's decision to classify its [employees] as exempt was made in California does not, standing alone, justify applying the UCL to the nonresident plaintiffs' FLSA claims for overtime worked in other states." (*Id.*)

Likewise, merely pointing to the existence of offices in California has been held to be insufficient for purposes of overcoming what the *Sullivan* court made clear is a strong presumption against extraterritoriality. For example, in *Silverman v. Wells Fargo & Co.* (N.D. Cal. Nov. 19, 2018) No. 18-CV-03886-YGR, 2018 WL 6046209, at *4, the district court dismissed a UCL claim on these same grounds, despite plaintiffs' arguments that Wells Fargo "engage[d] in substantial sales and marketing of their financial products and services in the State

of California" because plaintiffs failed to "connect any of the particular wrongdoing described in the complaint to the State of California." (*Id.* at *4.)

A material dispute of fact exists whether there is a sufficient basis, or any basis, for invoking the California UCL statute in the first instance. The question must be answered before the Arbitrator can even reach the question whether the UCL can form a basis for the relief Claimant seeks by her Motion. Claimant's attempt at invoking the UCL in connection with education services she received outside California from educators and professionals, who the evidence will show are scattered throughout North America, therefore, must fail.

III. The New York Choice-of-Law Provision Claimant Agreed To In Her ISA With Lambda School Bars Her UCL Claim.

Claimant's agreement with Lambda School contains a New York choice-of-law provision. (See Complaint, Ex. B.) Where an out-of-state plaintiff has agreed to a different state's choice-of-law provision in the parties' agreement, courts are permitted to find that the UCL is inapplicable. (*Campusano v. BAC Home Loans Servicing LP* (C.D. Cal. Jan. 20, 2012) No. CV11-04609 AHM (JCX), 2012 WL 13008750.) In *Campusano*, several out-of-state plaintiffs executed so-called Security Instruments, which contained non-California choice-of-law clauses. (*Id.* at *4.) When those plaintiffs sued the defendant claiming, among other things, that it had violated California's unfair competition laws, the district court dismissed their UCL claims because "under California's choice-of-law rules the UCL is inapplicable to the claims of the out-of-state Plaintiffs because of the choice–of-law clause in their Security Instruments." (*Id.*) Similarly, in *Mazza v. Am. Honda Motor Co.* (9th Cir. 2012) 666 F.3d 581, the Ninth Circuit applied California's choice-of-law rules to find the UCL inapplicable to the claims of the non-California plaintiffs in that case. (*Mazza*, 2012 WL 89176, at *6-7.) Notably, the court reached this result even though the defendant's allegedly fraudulent misrepresentations originated in California and the defendant's corporate headquarters were in California. (*Id.*) Here, Claimant agreed to the New York choice-of-law provision; she should not be able to now cherry-pick favorable consumer protection laws from other states.

IV. Even If The UCL Applied, Claimant Has Not Shown That The Virtual Educational Services Provided Outside of California Could Ever Run Afoul Of The Alleged Regulatory Violations Or The California Education Code.

Even if Claimant were able to overcome the presumption against extraterritoriality attendant to California's unfair competition laws (which she cannot), judgment on her UCL claim still should not be entered at this juncture because she has not established that she was on the other end of an "unlawful" business practice. At most, and taking her interpretation of the documents she attaches to her Motion at face-value, Claimant has pleaded allegations that Lambda School's provision of educational services ***in California*** was "unlawful." After all, under Claimant's interpretation of the facts, the citation issued by the BPPE would only render the provision of educational services ***in California*** unlawful. But Claimant does not allege that she obtained or received any educational services in California or by instructors in California. There is simply no evidence (or argument) in Claimant's Motion that could establish how or why regulatory sources of guidance operating only ***in California*** would have any bearing on the provision of educational services in other states. As such, even if Claimant had some basis for stating a UCL claim premised on out-of-state activities, she has not cited any authority, or offered any argument, as to how or why the sources of in-state regulation she identifies—a BPPE citation letter and the California Education Code—would render the provision of virtual educational services outside of California "unlawful." Accordingly, Claimant's Motion does not establish that the purported unlawful business practices ***she*** experienced ***outside California*** were unlawful under the California UCL statute.

Moreover, looking to the California Education Code itself, the laws governing postsecondary education in California were enacted and amended to provide a framework for high-quality education in the state. (See, e.g., Cal. Ed. Code, §§ 66002-03.) Nothing in the Education Code indicates that it was intended to govern the activities of educational institutions operating outside California and with non-resident students—and Claimant has offered no authority stating otherwise. Instead, Claimant presumes without argument that the California Education Code applies and, according to Claimant, is capable of voiding her agreement with

Lambda School that arose from activities outside of California. Claimant offers no authority that could support injecting the California Education Code into a non-Californian's transaction with Lambda School.

Claimant should not be allowed to cull from favorable state-level regulatory-based statutes such as the UCL and the California Education Code to supply whatever law she feels gives her a favorable advantage in pursuing her claims.

V. The Relief Sought Is Not Available Under The California UCL Statute.

"Injunctions are the primary form of relief available under the UCL to protect consumers from unfair business practices, while restitution is a type of ancillary relief."[1] (*Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 337; *Esparza v. Safeway, Inc.* (2019) 36 Cal.App.5th 42, 53, *as modified on denial of reh'g (June 28, 2019), review denied (Sept. 25, 2019)* ["Injunctive relief and restitution are the only remedies available under the UCL[,]" thus"[a] UCL claim must be based on the existence of harm supporting injunctive relief or restitution."].) The limited application of the UCL statute means it cannot be used as a catch-all claim for any alleged wrong a claimant may want redressed in the absence of a cause of action on point:

> The UCL is not an all-purpose substitute for a tort or contract action. Instead, the act provides an equitable means through which ... private individuals can bring

[1] The defining principle of equitable jurisprudence is that a plaintiff is not entitled to pursue equitable relief if an adequate remedy at law exists. (See, e.g., *Franklin v. Gwinnett Cty. Pub. Schs.* (1992) 503 U.S. 60, 75-76 ["[I]t is axiomatic that a court should determine the adequacy of a remedy in law before resorting to equitable relief."]) As both types of remedies are equitable in nature, courts generally require a UCL plaintiff to demonstrate that legal remedies are unavailable in connection with their grievances. (*Rhynes v. Stryker Corp.* (N.D. Cal. May 31, 2011) ["Where the claims pleaded by a plaintiff may entitle her to an adequate remedy at law, equitable relief is unavailable."]) This principle was reaffirmed in an unpublished decision *Consumer Advocs. v. DaimlerChrysler Corp.*, No. G029811, 2005 WL 327053, at *1 (Cal. Ct. App. Jan. 31, 2005) in which the court concluded that the UCL plaintiff had failed to demonstrate that it lacked an adequate remedy at law for addressing her concerns, especially in light of the fact that the underlying law she claimed the defendant violated already included legal remedies for such aggrieved parties. Here, Claimant has completely sidestepped this burden. Her Motion leaves unanswered the question of why legal remedies are inadequate against this backdrop. Indeed, Claimant's Motion points to, not one, but two different sections of the Education Code—specifically sections 94917 or 94902—that would, according to her, provide legal defenses to any prospective enforcement action by Lambda School. Also unanswered is why basic legal defenses to such prospective contract actions would not adequately protect her rights and concerns. In short, Claimant has not shown that there is an inadequacy of available legal remedies such that the extraordinary equitable powers of the Arbitrator need to be invoked.

> suit to prevent unfair business practices and restore money or property to victims of these practices. The overarching legislative concern was to provide a streamlined procedure for the prevention of **ongoing or threatened** acts of unfair competition. Because of this objective, the remedies provided are limited.

(*Madrid v. Perot Systems Corp.* (2005) 130 Cal.App.4th 440, 452 [emphasis added] [internal citations omitted].)[2]

Injunctive relief is appropriate under the UCL "only when there is a threat of continuing misconduct." (*Id.* at 463 (citing Cal. Code Civ. Proc., § 525 ["injunction is a writ or order requiring a person to refrain from a particular act"]).) The purpose of the UCL claim must be to prevent the alleged acts of unfair competition going forward; it "is not a remedy designed to right completed wrongs." (*Id.* at 464–465 (citing *Gafcon, Inc. v. Ponsor & Associates* (2002) 98 Cal.App.4th 1388, 1403, n. 6.).) A claimant seeking UCL injunctive relief must establish that the harm alleged will continue without an injunction barring the allegedly unfair conduct. (See, e.g., *Robinson v. U-Haul Co. of California* (2016) 4 Cal.App.5th 304, 316 [affirming the 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]; *Herr v. Nestle U.S.A., Inc.* (2003) 109 Cal.App.4th 779, 790 [injunction properly issued preventing Nestle from engaging in future discriminatory practices]; *People v. National Association of Realtors* (1981) 120 Cal.App.3d 459, 476 ["[N]o equitable reason for an injunction" where there is no reason to believe the defendant will resume the proscribed conduct.].)

Claimant's Motion styles itself generally as request that the Arbitrator rule the ISA is unenforceable under the Education Code. However, the relief she seeks is a "declar[ation] that

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[2] Claimant's Motion does not seek any form of restitution from Lambda School, and thus the requirement need not be addressed. However, as argued in its demurrer, Lambda School notes that Claimant has no entitlement to restitution because she has not lost any money or property as required to have standing under the UCL. (See *Kwikset*, *supra*, at 320–321.) Any argument that Claimant nevertheless still has standing for her UCL claim because she ***may*** incur monetary liability in the future, should she get a job and honor the terms of her ISA, is not sufficient. (*Jensen v. Quality Loan Serv. Corp.* (E.D. Cal. 2010) 702 F. Supp. 2d 1183, 1199 ["Moreover, Plaintiff has not alleged that he has lost any property, only that he "will" lose his personal residence if a non-judicial foreclosure occurs."]) Alleging she might suffer a financial injury is not the same as alleging that she has.

her ISA is not enforceable," a "declar[ation] that, until August 17, 2020, Lambda School conducted business as a private postsecondary education institution without approval to operate," and "order Lambda to cancel Ms. Nye's ISA and enjoin Lambda from ever collecting on her ISA." (Dispositive Motion, p. 6.) None of these forms of relief are available under the UCL statute.

First, Claimant cites no authority indicating that her requests for this type of declaratory relief are even available under the UCL. It would be improper and not in keeping with the UCL's remedial limitations for the Arbitrator to declare whether the ISA is, or is not, enforceable. Furthermore, as Claimant concedes in her Motion, Lambda School is presently, and has been for over a year, formally approved by the BPPE. The UCL does not confer on the Arbitrator the power to declare that already-abated practices were unlawful in the past—which is precisely what Claimant is asking Him to do through her Motion.

Second, Claimant cites no authority indicating that her request that Lambda School be ordered to cancel the ISA and that Lambda School be enjoined from collecting on the ISA is a proper form of UCL relief. Claimant leaves unanswered whether a request for a mandatory injunction requiring Lambda School to cancel an existing ISA contract has any basis under the UCL, or whether the UCL grants the Arbitrator the power to rescind an existing contract.

Third, Claimant cites no authority indicating that the UCL authorizes the Arbitrator to enjoin the future performance of an existing contract. Even if Claimant is required to perform under the ISA in the future, the UCL cannot be used to enjoin enforcement by Lambda School of that agreement when there is no actual or on-going harm to Claimant or the marketplace by the present existence of the ISA contract. Indeed, because Lambda School is approved to operate, it would be impossible currently for Lambda School to repeat the allegedly wrongful conduct Claimant complains of by this Motion. Claimant cites no authority for her position that injunctive relief is appropriate when the allegedly unlawful activity has already ceased and cannot be repeated in the future. Put simply, there is nothing for this Arbitrator to enjoin, given

that Claimant concedes that whatever purportedly unlawful activity has already abated. (Motion at 4 ["The BPPE eventually granted Lambda's approval to operate"].)

Of course, Claimant may argue that the possibility that she may incur an obligation in the future to pay Lambda School under the ISA constitutes an ongoing or future injury. But this is not a consequence of an allegedly unlawful activity. Indeed, if Claimant had executed her ISA one year later, she would also incur an obligation under the ISA, but, according to her own arguments, would have no UCL claim to invalidate it. In other words, a potential future obligation to pay money is not an injury specifically caused by the particular violations Nye claims Lambda School committed. Because a "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 Grp.*, Inc., 171 Cal.App.4th 1305, 1349 (2009)), and Claimant would be similarly obligated under the ISA whether Lambda School received the specific approval she claims the school needed to operate lawfully or not, there is no ongoing injury that would warrant remediation through injunctive relief.

The Arbitrator should not accept Claimant's invitation to allow equitable permanent injunctions to so casually intrude into the realm of contract. Claimant's request is not the proper use of injunctions and is not the type of injunction permitted through a UCL claim.

VI. Claimant Has Not Shown That Her UCL Claim May Be Premised On Alleged Violations Of Either The Education Code Or Guidance From The BPPE.

While California's UCL statute covers any "unlawful, unfair, or fraudulent business act or practice," that language does not mean that the statute encompasses any and every possible violation of any and all sources of law that may exist. California Courts presume that "when regulatory statutes provide a comprehensive scheme for enforcement by an administrative agency, the courts ordinarily conclude that the Legislature intended the administrative remedy to be exclusive unless the statutory language or legislative history clearly indicates an intent to create a private right of action." (See, e.g., *Peterson v. Cellco Partnership* (2008) 164 Cal.App.4th 1583, 1595.) The California Education Code does not clearly delineate where the

state's power to enforce the code's requirements is exclusive and where claimants are empowered to bring civil actions on their own. (See Cal. Ed. Code, § 94877 [granting BPPE the regulatory authority for enforcing the Education Code sections governing Private Postsecondary Institutions].) What Claimant has not done in her Motion is establish whether her UCL claim premised on a violation of the California Education Code sections she cites (let alone of a BPPE citation) is even allowed. She should not be able to raise a violation of the Education Code or BPPE guidance as a basis for a UCL claim without first establishing that the statutory legal framework can even form such a basis in the first place.

Claimant cites *San Mateo Union High School District v. Educational Testing Services* (N.D. Cal., Aug. 30, 2013, No. C 13-3660 SBA) 2013 WL 4711611, at *11 for the proposition that her UCL claim can be premised on any alleged Education Code violation. As an initial matter, this case says nothing about basing UCL claims on violations of so-called BPPE citations, speaking instead only to UCL claims premised on sections of the Education Code. But, contrary to Claimant's sweeping conclusion that *San Mateo Union High* stands for the proposition that ***all*** Education Code sections may support UCL claims, what the case actually expresses is not so clear. Rather, the only issue that was actually before the court was whether the Education Code section governing school testing results could form a basis for UCL claim—not anything about sections 94917, 94886, 94943, or 94902 of the Education Code, which are the statutes actually cited in Claimant's Motion. The district court's broad reasoning in its non-binding dicta, unrelated to the district court's decision to deny an *ex parte* TRO, can hardly be said to definitively resolve this issue of California state law.

Claimant has not cited to any authority that dispositively resolves the question of whether, or not, she has a private right action under the specific provisions in the California Education Code referenced in her Motion. And while the absence of a private right of action does not generally foreclose the availability of a UCL claim, an actual prohibition of a private right of action does. (*Zhang v. Superior Ct.* (2013) 57 Cal. 4th 364.) Before even reaching a determination as to whether Lambda School violated any of these provisions, the Arbitrator will

have to engage in a statutory interpretation of California law and determine whether, or not, private rights of action exist, or have been barred, with respect to sections 94917, 94886, 94943, or 94902 of the Education Code, and/or whether the BPPE is the only agency empowered to make such a decision.[3] While *San Mateo Union High School District* indicates in non-binding dicta that all provisions of the Education Code confer such rights upon students, other courts have found that such issues are not always black and white. (See, e.g,. *Sandoval v. Merced Union High Sch.* (E.D. Cal. May 3, 2006) No. CV-F-06-066 REC/DLB, 2006 WL 1171828, at *2 [finding no private right of action under certain provisions of Education Code]; *Tirpak v. Los Angeles Unified Sch. Dist.* (1986) 187 Cal. App .3d 639, 645 [same]; *Camfield v. Bd. of Trustees of Redondo Beach Unified Sch. Dist.* (C.D. Cal. Dec. 2, 2016) No. 2-16-CV-02367-ODW-FFM, 2016 WL 7046594, at *4 [same]; *Jane Doe I v. Reddy* (N.D. Cal. Aug. 4, 2003) No. C 02-05570 WHA, 2003 WL 23893010, at *13 [same]; see also *Sutta ex rel. Sutta v. Acalanes Union High Sch. Dist.*, No. C01-1519 BZ (N.D. Cal. Oct. 3, 2001) 2001 WL 1720616, at *5 [finding that whether particular Education Code section conferred a private right of action "appear[ed] to be a novel question of state law"].)

The perils of this endeavor are illustrated in *Daghlian v. DeVry Univ., Inc.* (C.D. Cal. 2006) 461 F. Supp. 2d 1121. In that non-binding district court case interpreting California's Education Code, the district court engaged in a complex statutory analysis regarding whether students have private rights of action under sections 94814, 94816, and 94832. (*Id.* at 1126.) While that court, which does not definitively resolve questions of California state law, ultimately

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[3] Furthermore, as discussed in other sections of this Opposition, it is not even clear whether the ISA is covered by section 94917. A plain reading of the statute would hold that the statute is only triggered when the "note, instrument, or other evidence of indebtedness" is the result of "payment for an educational program." (Cal. Ed. Code, § 94917.) Currently, Claimant does not owe any money to Lambda School (and may never owe any money at all) pursuant to the parameters of her ISA. In other words, before the Arbitrator can decide whether section 94917 would render the ISA unenforceable, the Arbitrator must first decide whether the ISA is a "note, instrument, or other evidence of indebtedness" under statute in the first place. Claimant merely presumes that the ISA is subject to section 94917, but has offered no authority to support the statute's application. As the agency charged with enforcing these provisions, the BPPE would be best positioned to decide whether the ISA is, or is not, subject to the statute's limitations.

concluded that the pertinent Reform Act ***did*** confer a private right of action upon such students, the decision illustrates the level of analysis needed before concluding that such a right exists in the first instance (*id.*)—analysis which has not been offered by Claimant.

VII. Dispositive Relief Cannot Be Granted At This Juncture Because Triable Issues Of Fact Remain Regarding Claimant's Contention That Lambda School Violated The Law.

Despite the sweeping conclusory statements in her Motion, Claimant has not established that the undisputed facts prove that Lambda School ever engaged in any unlawful business practices in the first place. Instead, what Claimant has attempted to do is suggest that the California BPPE indicated in a citation that Lambda School was, for a limited period of time, operating without its approval, and imposed certain limitations on Lambda School thereafter. But Claimant's submission does not make clear what function she contends that citation plays in her analysis—specifically, whether she contends that Lambda School allegedly acted "unlawfully" because it did not abide by the tenets of the citation ***or*** if the citation is her "proof" that Lambda School violated provisions of the California Education Code.

As further argued below, Lambda School contends, and asserts that the evidence will show, that the School was at all times operating in manner that did not violate sections 94917, 94886, 94943, or 94902 of the Education Code either.

A. The So-Called BPPE Citation Does Not Prove that Lambda School Acted Unlawfully.

As an initial matter, regardless which laws govern, the BPPE citation, without more, is unauthenticated hearsay. It is an out-of-court (or out-of-arbitration) statement that Claimant is asking the Arbitrator to accept for the truth of its content. Claimant has not laid a foundation, authenticated the document, established why it is an appropriate subject matter for judicial notice, or explained how it falls within any exception to any state's laws against hearsay.

But even if that citation were admissible at this juncture, without a sponsoring witness or an explanation as to how it is not hearsay, Claimant still would not have established through undisputed facts that Lambda School engaged in any unlawful business practices. First, she has not established that an alleged violation of a BPPE citation may support a UCL claim. Assuming

her interpretation of *San Mateo Union High Sch. Dist.* were correct and binding, all that case establishes is that UCL claims may be tethered to violations of certain provisions of the ***California Education Code***—not the tenets of a citation issued by the BPPE. Claimant cites no authority, and the undersigned has not located any, for the proposition that a citation by the BPPE may serve as a predicate for a UCL claim. Indeed, other courts have rejected UCL claims based upon guidance provided by regulators. (See, e.g., *Newton v. American Debt Services, Inc.*, 75 F. Supp. 3d 1048 (N.D. Cal. 2014) [finding that violation of an FDIC consent order cannot form the basis of a UCL claim for "unlawful" or "unfair" conduct].) As such, this potential usage of, or reliance on, the citation at issue is unavailing.

Second, if Claimant intends that the supposed citation somehow proves that Lambda School violated a provision of the California Education Code (and that this somehow applied to students outside of California), that usage of the citation is improper. Claimant bears the burden of proving ***herself*** and in connection with the facts in ***this*** case that Lambda School engaged in an unlawful business practice—not that a regulatory body at some point in time may have believed as much. (See *People v. McKale* (1979) 25 Cal.3d 626, 635 ["Without supporting facts demonstrating the illegality of a rule or regulation, an allegation that it is in violation of a specific statute is purely conclusory and insufficient to withstand demurrer."].) Claimant cites no authority that UCL plaintiffs can bootstrap other out-of-state regulatory entities' opinions to sidestep their burdens of proof for establishing illegality.

Third, Claimant has provided no explanation as to why any guidance from the BPPE would be relevant in the first place to educational services provided to a non-California resident.

B. Claimant Has Not Established That Lambda School Violated Any Section Of The California Education Code.

Claimant's allegation is that Lambda School acted unlawfully, albeit two years ago, by allegedly maintaining its operations without "an approval to operate." (See, e.g., California Education Code §§ 94886, 94917, 94943, and 94902.[4]) Claimant, however, has not introduced

[4] As a threshold matter, sections 94917 and 94902 of the California Education Code do not *per se* regulate educational institutions like Lambda School. Instead, their tenets apply when such an

undisputed facts that would establish that Lambda School remained in operations without such approval.

Initially, the specific provisions cited in Claimant's Motion do not specifically spell out precisely what "an approval to operate" means or requires. Despite that lack of clarity, Claimant, however, asks the Arbitrator to assume that there can only be ***one*** means for obtaining such approval and that there is only ***one*** arbiter of whether that means has been achieved—both of which exclusively run through the California Bureau for Private Postsecondary Education—without ***any*** authority to support her interpretation of the Education Code.

Despite Claimant's *ipse dixit*, she has not offered any undisputed evidence showing that Lambda School remained in operations without approval during the times relevant to her claims. Indeed, the evidence introduced at arbitration will establish that Lambda School received various licenses to operate as a business and obtained specific approvals to provide educational services from several states before, during, and after the citation mentioned by Claimant was issued. Seemingly uninterested in allowing Lambda School to put on its defense, Claimant ignores this possibility and asks the Arbitrator to conclude today, before any witness has testified, that no such approvals exist and/or that no such approvals would be sufficient within the meaning of the California Education Code. This, on its own, warrants denying Claimant's Motion.

But, in addition to the foregoing, the evidence that will be introduced during the hearing in this matter will establish that Lambda School received other approvals to remain in operation at the times relevant to Claimant's contentions. Lambda School will establish as much through at least three principle showings.

First, Lambda School will introduce evidence at arbitration that establishes that

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institution attempts to enforce an agreement with a student who executed such an agreement when the institution was operating without approval. In other words, Claimant cannot be said to have violated sections 94917 or 94902 of the Education Code, when those statutes are effectively affirmative defenses to enforcement or collection actions.

Moreover, Claimant did not even reference section 94917 of the Education Code in her Arbitration Demand. Therefore, it is not at issue in this case, and cannot be shoehorned into it through a dispositive motion.

Claimant's interpretation of the limited and selectively cherry-picked documents does not support her conclusion that Lambda School operated illegally. Indeed, the plain language in the March 20, 2019, citation itself clearly indicates that Lambda School did not need to cease operations while it was challenging or appealing the BPPE citation. The citation, after all, on its face, indicated that it was not effective as of March 20, 2019. (See Motion, Ex. A at 3 ["If a hearing is requested, you will not be required to comply with this Citation until 30 days after a final order is entered against you."]) In other words, Claimant's own purported evidence shows that Lambda School was not prohibited from remaining in operations as of and after March 20, 2019—including when, on June 19, 2019, Claimant actually executed the ISA at issue. (*Id.* at 3.) Other evidence introduced at arbitration will establish that Lambda (i) appealed the citation and (ii) initiated an approval process with the BPPE shortly after the citation—two steps which had the effect of staying the tenets of the citation. By implication, therefore, such evidence will establish that Lambda School was at least able to remain in operation until both the appeal and approval process were completed. Of course, all constituents can anticipate that Claimant will dispute Lambda School's arguments regarding the significance and import of these post-citation steps taken by the School. But such contentions simply reinforce Lambda School's point that disputes of material fact exist that make granting a dispositive motion at this juncture improper.

Second, evidence at the arbitration will show that Lambda School's continued operations were always open and notorious, and were not concealed from any relevant regulatory body (let alone any current or prospective students). Inaction and continued communications between such regulators and Lambda School, which will be proven up at the arbitration hearing, will establish that Claimant's contention that Lambda School lacked any "approval" within the meaning of the Education Code to continue operating is not nearly as open and shut as Claimant has alleged. Indeed, the evidence will show that, at all times after the citation was affirmed by the BPPE, Lambda School was actively working with the BPPE through the formal application process. Against this backdrop, Claimant's contention will be shown to make no sense. Lambda School cannot be said to have been operating illegally when regulators—the same regulators

whose views in one citation Claimant contends should be dispositive—knew that Lambda School remained in operations and continued working with the School through that application process. (*Bell v. Blue Cross of Cal.* (2005) 131 Cal. App. 4th 211, 216-217 [explaining that a general rule of statutory interpretation is that the "construction of a statute by the executive department charged with its administration is entitled to great weight and substantial deference."]; cf. *Backus v. Gen. Mills, Inc.* (N.D. Cal. 2015) 122 F. Supp. 3d 909, 926-28 [dismissing UCL claim to the extent it was based on FDA and FDCA laws and regulations where regulatory attitudes and industry norms with respect to particular product changed].) Such evidence will be especially relevant to Claimant's averment that Lambda School violated section 94943 of the Education Code, which, as Claimant's Motion makes clear, only applies to "***[k]nowingly*** operating . . . without an approval to operate." (Cal. Ed. Code, §94943(a) [emphasis added].) Lambda School can hardly be said to have violated this provision, especially not through a summary disposition, when the Arbitrator has not heard any evidence about what the School knew or did not know, and the foregoing demonstrates that reasonable minds could have interpreted such engagement with regulators as an approval of continued operations. Again, Lambda School fully expects that Claimant will dispute the School's arguments regarding the meaning of these events. But that is why the parties commenced an arbitration in the first place, so that disputes of material fact, like these, can be adjudicated by the Arbitrator.

Third, the California Education Code itself establishes that an immediate suspension of operations, under any circumstances, was never what the Legislature contemplated with respect to postsecondary educational institutions. Specifically, section 94926 of the Education Code sets forth several requirements for an educational institution's "closure plans." Ostensibly because an abrupt and immediate suspension of operations would be disruptive to students, the California Legislature set forth several steps an educational institution must take before closure, including with respect to "providing teach-outs," providing refunds, and disposing student records, among other things. Indeed, one of the very citations introduced by Claimant makes plain that, to the extent Lambda School was being told it was required to do anything, it was required "[t]o

comply with the Order of Abatement the Institution must submit a school closure plan to the Bureau pursuant to California Education Code section 94926," not to immediately suspend all operations. Lambda School cannot be found to have acted unlawfully when the very statutory regime and regulators at issue expressly required Lambda School ***not*** to shut down at the time. (See *Puentes v. Wells Fargo Home Mortg., Inc.* (2008) 160 Cal. App. 4th 638, 644 ["When the Legislature has permitted certain conduct, 'courts may not override this determination," by declaring such conduct actionable under... section 17200.'"] [citing *California Med. Assn v. Aetna US Healthcare, Inc.* (2001) 94 Cal. App. 4th 151, 169].) Herein lies one of the central contradictions in Claimant's position—she is essentially now contending that Lambda School should have abruptly stopped providing educational services to her, even though the law would have prohibited Lambda School from doing so, and she herself would have likely objected, as evidenced by her continued receipt of such services during the time period at issue.

Each of the foregoing points establish, at a minimum, that material disputed facts exist that preclude entry of the order requested by Claimant at this point since each tend to establish that Lambda School was not operating without approval during the pertinent timeframe at issue.

VIII. Claimant's Claim Cannot Be Granted Via A Dispositive Motion Because Lambda Has Not Had An Opportunity To Prove Its Affirmative Defenses—Some Or All Of Which Would Bar Her From Obtaining the Relief She Seeks.

It would also be premature to enter orders consistent with the relief sought through Claimant's Motion because Lambda School has not been permitted to introduce one iota of evidence in support of its affirmative defenses. UCL claims, after all, are actions in equity. (*Barquis v. Merchants Collection Assn.* (1972) 7 Cal.3d 94, 112.) "[D]etermination of the appropriate remedy is left to the sound discretion of the trial court in the exercise of that court's power to grant equitable relief." (*Cortez v. Purolator Air Filtration Prod. Co.* (2000) 23 Cal.4th 163, 179-81.) As part of that exercise of discretion, "equitable considerations may enter into the court's disposition of a UCL action." (*Id.*) While "equitable defenses may not [ordinarily] be asserted to wholly defeat a UCL claim," such defenses may "guide the court's discretion in fashioning the [appropriate] equitable remedies" in conjunction with such claims. (*Id.*)

UCL remedies, after all, "are cumulative to remedies available under other laws," and are intended to serve "an independent purpose – deterrence of and restitution for unfair business practices." (*Id.*) "Therefore, what would otherwise be equitable defenses may be considered by the court when the court exercises its discretion over which, if any, remedies authorized by section 17203 should be awarded." (*Id.*) Indeed,

> [s]ection 17203 does not mandate [any] restitutionary or injunctive relief when an unfair business practice has been shown. Rather, it provides that the court 'may make such orders or judgments ... as may be necessary to prevent the use or employment ... of any practice which constitutes unfair competition ... or as may be necessary to restore ... money or property.'

(*Id.*) Accordingly, "[a] court cannot properly exercise an equitable power without consideration of the equities on both sides of a dispute." (*Id.*; see also *Tustin Community Hospital, Inc. v. Santa Ana Community Hospital Assn.* (1979) 89 Cal.App.3d 889 [court should consider laches affirmative defense when deciding whether to grant injunctive relief to prohibit an alleged trademark infringement]; *Vasquez v. Leprino Foods Co.* (E.D. Cal. May 3, 2021) No. 117CV00796AWIBAM, 2021 WL 1737480, at *6 ["Equitable defenses (including consent and waiver) may be raised against UCL claims . . . as trial courts have discretionary authority to consider these defenses in fashioning remedies under the UCL," even where they are not defenses to the underlying statutory violations]; *Pac. Coin Mgmt. v. BR Telephony Partners* (Cal. Ct. App. Feb. 8, 2006) No. B165217, 2006 WL 290569, at *18 [accepting laches as valid equitable defense to deny UCL claim for restitution].) "In deciding whether to grant the remedy or remedies sought by a UCL plaintiff, the court ***must*** permit the defendant to offer such considerations." (*Cortez*, 23 Cal.4th at 181 [emphasis added].)

Despite such fairly non-controversial principles of equity jurisprudence, Claimant nevertheless has asked the Arbitrator to enter drastic and sweeping declaratory relief before hearing any evidence regarding Lambda School's affirmative defenses. Lambda School, for example, has not been able to elicit any evidence about Claimant's unclean hands, unjust enrichment, or consent, among other considerations. Indeed, Lambda School does not even know if Claimant has actually obtained lucrative employment, and has unilaterally decided to

employ self-help and not abide by the terms of the ISA, without judicial intervention. Given the under-developed, if not un-developed, state of the record, it would be entirely premature (and improper) to adjudicate Claimant's UCL claim at this juncture before such equitable considerations were introduced and evaluated.

IX. Even If Claimant Had A Viable UCL Claim, The Arbitrator Still Should Not Enter Judgment In Her Favor Because Abstention Is Appropriate.

Assuming arguendo that the Arbitrator disregards the foregoing, and finds that Claimant has stated a viable UCL claim, the Arbitrator should nevertheless abstain from adjudicating her claim on the grounds argued in the Motion due to the BPPE's administration of the state's complex postsecondary education regulatory scheme.

Arising from the equitable nature of the injunction and restitution remedies available under the UCL is a court's discretion to abstain from employing these remedies. (See, supra, *Alvarado*,153 Cal.App.4th 1292; *Rex. v. Chase Home Fin. LLC* (C.D. Cal. 2012) 905 F.Supp.2d 1111, 1134.) For example, courts may abstain when a lawsuit involves wholesale policy determinations better suited for a legislature or an administrative agency, rather than a judge. (See *Cal. Grocers Ass'n v. Bank of Am.* (1994) 22 Cal. App. 4th 205 [finding court abused discretion by granting injunctive relief under UCL because "th[e] case implicate[d] a question of economic policy: whether service fees charged by banks are too high and should regulated."]; *see also Shamsian v. Dep't of Conservation* (2006) 136 Cal. App. 4th 621.)[5]

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[5] Judicial abstention is also appropriate if granting injunctive relief would be unnecessarily burdensome for the trial court to monitor and enforce. (See *Diaz v. Kay-Dix Ranch* (1970) 9 Cal. App. 3d 588 [affirming judgment that declined to impose injunctive relief that "would subject farm operators to burdensome, if bearable, regulation, and the courts to burdensome, if bearable, enforcement responsibilities"].) While it is not presently clear if this basis for abstention is implicated in this case, Claimant has specifically asked the Arbitrator, not just to provide declaratory relief concerning her specific rights and responsibilities vis-à-vis Lambda School, but also to boldly declare more broadly that Lambda School operated unlawfully until August 17, 2020. (Motion at 6.) It is not yet clear why Claimant is making such a request; however, its inherent over-breadth suggests that Claimant may be attempting to invoke the Arbitrator's powers in connection with other Lambda School students. This type of ostensibly more complex relief warrants abstention as well. (Cf. *McMillan v. Lowe's Home Ctrs., LLC* (E.D. Cal. May 4, 2016) No. 1:15-cv-00695 DAD SMS, 2016 WL 2346941, at *5 [case involved injunctive relief against only two parties, as opposed to the "issu[ance of] a network of injunctions across the state or to engage in a long-term monitoring process"].)

Here, Claimant's request effectively asks the Arbitrator to step into the role of a policymaker by asking Him to make determinations about what the California Education Code does, and does not, permit. Hardly a black-and-white issue, as set forth above, the evidence at the arbitration hearing will show that the BPPE's engagement with Lambda School was ongoing and dynamic. What is perhaps more problematic is Claimant's request that the Arbitrator, not only find that Lambda School's operations violated the California Education Code, but also define and impose the consequences of such allegedly unlawful operations through the guise of declaratory relief. Rather than the appropriate remedies for a UCL claim, like restitution (which would entail an order that Lambda School repay Claimant moneys she paid the School) or injunctive relief (which would entail an order commanding Lambda School to stop operating without an approval), Claimant seeks something more robust—namely, the cancellation and/or rescission of her agreement with Lambda School and a broad advisory opinion about Lambda School's past operations. In so requesting, Claimant has asked the Arbitrator to do more than issue an authorized remedy in connection with a straightforward legal statute. Instead, she has asked the Arbitrator to "assum[e] the functions of an administrative agency" (*Alvarado*, 64 Cal. Rptr. 3d at 253) and engage in the precise type of "overly complex" "analyses" that make abstention appropriate (*Wehlage v. EmPres Healthcare, Inc.* (N.D. Cal. 2011) 791 F.Supp.2d 774, 786). (See also *Walsh v. Kindred Healthcare* (N.D. Cal. 2011) 798 F.Supp.2d 1073, 1085 [finding abstention appropriate to the extent UCL claim was premised on state statute requiring the state agency to adopt regulations setting forth minimum nursing hours at skilled nursing facilities].)

As just another example, Claimant's UCL claim will ask the Arbitrator to step into the shoes of both the BPPE and the California Legislature and determine the meaning of various provisions of the Education Code in light of the BPPE's conduct and continued engagement with Lambda School after the citations at issue. These complex, highly regulated subject matters create precisely the type of circumstances in which abstention is warranted.

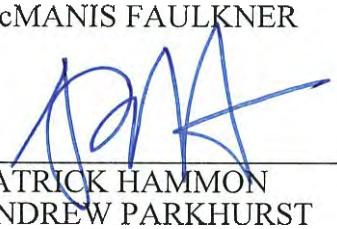
Claimant may disagree with Lambda School's argument that abstention is appropriate on these facts. But that is why the parties have an arbitration hearing in just a few short months—namely, so that the parties can have a robust debate about these very issues. Summary disposition at this juncture is entirely inappropriate.

CONCLUSION

Claimant's Motion is premature, legally defective, and a waste of the parties' time and resources. Myriad issues of disputed fact infect Claimant's contentions. It is inappropriate to decide such issues now through a dispositive motion. Accordingly, Claimant's Motion should be denied.

DATED: November 12, 2021

McMANIS FAULKNER



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