AMERICAN ARBITRATION ASSOCIATION

In the Matter of the Arbitration Between HEATHER D. NYE, Claimant, v. LAMBDA, INC. D/B/A LAMBDA SCHOOL; JOHN DOES 1-9, Respondents.	AAA Case No. 01-21-0003-8512

CLAIMANT HEATHER D. NYE'S RESPONSE TO RESPONDENT LAMBDA SCHOOL'S DEMURRER TO DEMAND FOR ARBITRATION

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INTRODUCTION

In June 2019, Claimant Heather D. Nye took out an Income Share Agreement ("ISA") to finance her attendance at the Lambda School. She did so based on Lambda's heavily marketed 85.9% job placement rate and statement that it would only get paid if and when she did. Both of these statements were false. Lambda also concealed from Ms. Nye that when it recruited and enrolled her, it did so in violation of a California order to cease all operations, stop enrolling students, and shut down. Had Lambda disclosed any—let alone all—of these material facts, Ms. Nye would not have enrolled or signed an ISA indebting her to up to $30,000 in tuition. Ms. Nye brings claims against Lambda for violations of the California Consumer Legal Remedies Act ("CLRA"), California Civil Code § 1750, *et seq.*, Unfair Competition Law ("UCL"), California Business and Professional Code § 17200, *et seq.,* False Advertising Law ("FAL"), California Business and Professional Code § 17500, *et seq.*, as well as for intentional and negligent misrepresentation.

In its demurrer, Lambda does not challenge the falsity of its representations to Ms. Nye. Instead, Lambda argues that Ms. Nye: (i) fails to satisfy heightened pleadings obligations for her fraud-based claims; (ii) has not alleged damages; (iii) cannot prevail on her claims that Lambda's job placement rates or promises regarding not getting paid until she did were false because she did not graduate from Lambda; and (iv) "does not specifically allege a claim for educational malpractice," but could not sustain such a claim if she did.

None of these arguments remotely satisfy the rigorous standard for sustaining a demurrer. Indeed, in *Nguyen v. Lambda, Inc,* AAA Case No. 01-21-0003-8509 (filed May 13, 2021), one of the companion arbitrations filed against Lambda, the arbitrator has already found that Lambda "failed to show substantial cause" that it was likely to succeed on many of these arguments, and therefore denied Lambda the opportunity to brief the issues. *See* Exhibit A (Arbitrator's Order in *Nguyen v. Lambda* Denying Lambda's Request to File Motion to Dismiss (Oct. 25, 2021)). Lambda's arguments should similarly be rejected here, and its demurrer overruled.

COUNTERSTATEMENT OF FACTS

Lambda is a private, for-profit online coding school founded in 2017 by its current chief executive officer, Austen Allred. Demand ¶ 3. Headquartered in San Francisco, Lambda provides online six and twelve-month computer science courses. *Id.* Lambda's core business model is to entice students to enroll by promising them that tuition is free unless and until they find a job that pays $50,000 or more per year. *Id.* ¶ 6. Through this financial arrangement, known as an ISA, Lambda students agree to pay 17% of their post-Lambda salary for twenty-four months, but only once they are making more than $50,000 per year in a qualifying job. *Id.* ¶ 7.

In or around May of 2019, Ms. Nye saw posts about Lambda on Twitter. *Id.* ¶ 75. Intrigued, she visited Lambda's website for more information and was convinced to enroll by Lambda's 85.9% job placement rate, statement that it would only get paid if and when she did, and zero-dollar upfront cost. *Id.* She enrolled in Lambda's web-development program and signed the ISA on June 19, 2019. *Id.* ¶¶ 75–76.

A. Lambda's False and Misleading Job Placement Rates

Lambda believed that job placement was the "most critical component of [its] operations" and "to the prosperity of the company as a whole." *Id.* ¶ 45. Similarly, to prospective coding boot camp students, no information is more important than a school's record of successfully placing students in computer technology careers. *Id.* ¶ 8. At all times relevant to this case, Lambda prominently displayed an 85.9% job placement rate on its website as well as in marketing materials and on social media, including through Mr. Allred's personal Twitter account. *Id.* ¶ 9. The website stated: "85.9% hired within 180 days." *Id.* ¶ 49.

Lambda's senior management, including Mr. Allred, knew that these widely disseminated job placement representations were false and misleading. *Id.* ¶ 10. At the same time it was publicly touting the 85.9% job placement rate, Lambda warned one of its investors in a private memo: "We're at roughly 50% placement for cohorts that are 6 months graduated" and "[p]lacement to date has been manual and one-off, which isn't possible at scale." *Id.* ¶¶ 12, 51.

Lambda had long suffered with "low" job placement rates. In August 2018, Lambda's Director of Career Readiness received an "Employee Corrective Action Form" from Lambda's executive leadership, reprimanding her for poor job placement performance. *Id.* ¶ 44. The form stated:

> Placements are the most critical component of Lambda's operations, not only in the School's obligation to its students, but to the prosperity of the company as a whole. A common discussion point in regards to Outcomes is that current placement rates are too low and time to placement is too high. Creative tactics and adjustments to current careers processes as well as follow through are needed to improve both of these measurements. . . . CS1 students graduated on 1/19/18. Since then we've had a new class graduate approximately every five weeks. As of 8/1/18, only 16 students of the 48 graduated students assigned to [the employee] have been placed.

Id. ¶ 45. This comment was issued *one day after* Lambda stated the following on its website: "[E]very single Lambda School graduate who has been on the job market for six months is either employed in a full-time role as a software engineer or has joined an early startup working for equity." *Id.* ¶ 43.

Lambda's job placement representations were critical to Ms. Nye's decision to enroll and take out an ISA that indebted her to up to $30,000 of tuition at Lambda. *Id.* ¶¶ 78, 114; *see also infra* note 1. Because Ms. Nye is not currently employed in a field related to her course of study at Lambda, she has not yet made any payments to Lambda, but is obligated to do so under specified employment conditions, notwithstanding that she left the school before graduating.

B. Lambda Misrepresented That It Only Got Paid Once Students Got Paid

Lambda advertised that "[w]e don't get paid until you do, so we're in this together, from your first day of classes to your first day on the job." *Id.* ¶¶ 13, 61. Ms. Nye read and relied on this statement on Lambda's website prior to enrolling. *Id.* ¶ 62. Knowing that Lambda only got paid if she obtained employment was important to her decision to attend the school. *Id.* In reality, Lambda received money from ISAs long before students obtained employment. *Id.* ¶¶ 63-73. These secret financing arrangements violated Lambda's central promise to Ms. Nye that they were "in this together" until her "first day on the job." *Id.* ¶ 61.

C. Lambda Operated Without State Approval, in Violation of California Law

As a non-degree granting, private postsecondary institution based in California, Lambda could not legally operate without BPPE approval. *See* Cal. Educ. Code § 94886 ("a person shall not open, conduct, or do business as a private postsecondary educational institution in this state without obtaining an approval to operate under this chapter."). Lambda flouted this clear requirement by operating, recruiting, and enrolling students, including Ms. Nye, prior to receiving BPPE approval. Demand ¶ 17.

On March 20, 2019, prior to Ms. Nye's enrollment, the BPPE cited Lambda for "operating without Bureau approval," in violation of the California Education Code. The BPPE ordered Lambda to "cease to operate as a private postsecondary educational institution" and "submit a school closure plan." *Id.* ¶ 89. The BPPE ordered Lambda "discontinue recruiting or enrolling students and cease all instructional services and advertising in any form or type of media, including the https://lambdaschool.com and any other websites not identified here that are associated with the Institution, until such time as an approval to operate is obtained from the Bureau." *Id.*

Lambda appealed. On July 24, 2019, the BPPE affirmed its citation because "[n]o new substantive facts were presented." *Id.* ¶ 90. Yet Lambda continued to operate, advertise its educational services to the public, and enroll students, including Ms. Nye. Had Ms. Nye been aware in June 2019 that Lambda was operating illegally, she would not have signed an ISA that indebted her for up to $30,000 of tuition at Lambda. *Id.* ¶ 97.

ARGUMENT

A. Legal Standard for Demurrer

In ruling on a demurrer, the Court accepts as true all facts alleged in the complaint, as well as those that may be inferred from facts expressly alleged. *Miklosy v. Regents of Univ. of Cal.*, 44 Cal. 4th 876, 883 (Cal. 2008); *see also Blank v. Kirwan,* 39 Cal. 3d 311, 318 (Cal. 1985) ("We give the complaint a reasonable interpretation, reading it as a whole and its parts in their context.") An arbitrator should not sustain a demurrer where the complaint, as a whole, notifies

the defendant of the factual bases on which the plaintiff seeks relief. *See Doheny Park Terrace Homeowners Ass'n., Inc. v. Truck Ins. Exch*., 132 Cal. App. 4th 1076, 1099 (Cal. Ct. App. 2005); *see also Doe v. City of Los Angeles*, 42 Cal. 4th 531, 549-550 (Cal. 2007) (explaining that a complaint need only "give[] notice of the issues sufficient to enable preparation of a defense" and in so doing "acquaint a defendant with the nature, source and extent of [a plaintiff's] cause of action.").

"[I]f on consideration of all the facts stated it appears the plaintiff is entitled to any relief at the hands of the court against the defendants the complaint will be held good." *Zakk v. Diesel,* 33 Cal. App. 5th 431, 446-47 (Cal. Ct. App. 2019). The Complaint's "allegations must be liberally construed with a view to substantial justice." *Id* at 447. A demurrer is not the appropriate procedure for determining the truth of disputed facts, *Fremont Indem. Co. v. Fremont Gen. Corp.*, 148 Cal. App. 4th 97, 113–14 (Cal. Ct. App. 2007), and when heard, "cannot be turned into a contested evidentiary hearing," *Unruh-Haxton v. Regents of Univ. of Cal.*, 162 Cal. App. 4th 343, 365 (Cal. Ct. App. 2008). "It is error to sustain a demurrer where a plaintiff has stated a cause of action under any possible legal theory." *Von Batsch v. Am. Dist. Telegraph Co.*, 175 Cal. App. 3d 1111, 1117 (Cal. Ct. App. 1985).

B. Claimant Satisfies the Pleading Obligations for All of Her Claims

Ms. Nye's Demand far exceeds the relevant pleading standards. Nevertheless, in Section II of its brief, Lambda contends that she: (a) fails to plead fraud claims with particularity; (b) does not allege any facts to support that she relied upon the misrepresentations at issue; (c) was unreasonable to rely on Lambda's widely disseminated representations because the fine print of her ISA contained an integration clause and "limitation on liability" clause; (d) was required to plead a counternarrative of hypotheticals regarding what she would have done had she known of Lambda's misrepresentations, including "what other options she would have pursued" and "how her experience would have differed;" and (e) fails to provide notice of the particular day or particular representation that she relied on. None of these arguments remotely satisfy the rigorous standard for sustaining a demurrer.

1. Ms. Nye Satisfies Heightened Pleading Standards

Lambda first contends that Ms. Nye fails to allege the "when, where, to whom, and by what means the representations were tendered." Demurrer at 7 (internal quotations omitted). Assuming heightened pleading standards apply to this arbitration, Ms. Nye comfortably satisfies them.

Lambda can hardly contend that it lacks "notice of [its] alleged misconduct so that [it] may defend [itself]." *Benavidez v. Cnty. of San Diego*, 993 F.3d 1134, 1145 (9th Cir. 2021). Ms. Nye's Demand *quotes* and provides screen shots of Lambda's own website showing the false statements, provides the dates those statements were operative, and alleges when she reviewed those statements. *See, e.g.,* Demand ¶¶ 11–13 and 46–59. Lambda knows ***exactly*** what it is accused of doing, and Ms. Nye readily satisfies her burden.

2. Reliance in This Case Is Presumed, and Even if it Were Not, Ms. Nye Clearly and Repeatedly Alleges That She Relied on Misrepresentations at Issue

Lambda next argues that Ms. Nye "does not allege any *facts* supporting her conclusory allegation that she relied upon the purported misstatements." Demurrer at 8 (emphasis in original). This is wrong for multiple reasons. First, since she has alleged misrepresentation of material facts—which Lambda does not dispute—reliance is presumed under the UCL. A showing of materiality gives rise to "a presumption, or at least an inference, of reliance" under the UCL. *In re Tobacco II Cases,* 46 Cal. 4th 298, 327 (Cal. 2009). Because job placement rates pertain to the "efficacy" and "purpose" of Lambda's product, *see* Demand ¶ 45 (wherein Lambda describes job placement as the "most critical component of [its] operations"), they are indisputably material. *See, e.g., Novartis Corp. v. Fed. Trade Comm'n,* 223 F.3d 783, 786 (D.C. Cir. 2000) (information is material where it "concerns the purpose, safety, efficacy, or cost of the product or service.") (internal quotation omitted); *Fed. Trade Comm'n v. Lights of America, Inc.*, No. SACVI0-01333JVS, 2013 WL 5230681, at *41 (C.D. Cal. Sept. 17, 2013) (holding that claims about the watts and lifetime of LED light bulbs were *per se* material because they were

express, and "that even if they were implied claims, they were material because the claims relate to the efficacy of the product").

Even without this presumption of reliance, "[it] is enough that the representation has played a substantial part, and so had been a substantial factor, in influencing [the plaintiff's] decision." *In re Tobacco II Cases,* 46 Cal. 4th at 326 (explaining that reliance on the misrepresentation does not have to be "the sole or even the predominant or decisive factor influencing" the individual's decision) (internal quotation omitted). Ms. Nye repeatedly and clearly alleges that she read and relied on the placement rates and statements that Lambda only got paid if she did, and that both were critical to her decision to enroll.[1] Lambda's disbelief of those allegations cannot be tested at the pleading stage, and a demurrer cannot be sustained on that basis. *See, e.g., Fremont Indem. Co.*, 148 Cal. App. 4th at 113–14 (explaining that a demurrer is not the appropriate procedure for determining the truth of disputed facts).

3. The Integration Clause and "No Liability" Clause in the Fine Print of Lambda's ISA's Do Not Exonerate Lambda From Liability

Lambda argues that it was not reasonable for Ms. Nye to rely on its widely disseminated job placement rate representations and statements that it only got paid when she did because the fine print of her ISA contained an integration clause and a "no liability" clause. Demurrer at 8-9. Remarkably, Lambda believes that its own students should have known better than to trust the statements that it marketed heavily on its website, in social media, and elsewhere for many years. Lambda contends that these two clauses in the ISA exonerate it from *any* lies it tells students to induce them to enroll with Lambda. Not so.

[1] *See* Demand ¶ 14 ("Ms. Nye relied on Lambda's advertised job placement rate of over 80% and its promise that Lambda would not get paid until she did when she decided to enroll at Lambda in June of 2019, financed by an ISA."); ¶ 62 ("Ms. Nye read this statement on Lambda's website prior to enrolling. Knowing that Lambda only got paid if she obtained employment was important to her decision to attend the school."); ¶ 78 ("Prior to signing the ISA, Ms. Nye read and relied on Lambda's representations that its job placement rate was over 80%. To Ms. Nye, Lambda's record of successfully placing students was critical to her decision to enroll."); ¶ 119 ("Lambda made statements to Ms. Nye: (a) that were false representations of material fact; (b) that Lambda knew were false or were made recklessly and without regard for their truth; (c) that Lambda intended Ms. Nye to rely upon; (d) that Ms. Nye reasonably relied upon; (e) that Ms. Nye's reliance upon was a substantial factor in causing damage to her; and (f) that caused damages to Ms. Nye."); ¶ 122 ("Ms. Nye reasonably relied on these widely disseminated representations. Had she known the truth, she would not have enrolled at Lambda.").

Lambda first argues that it was unreasonable for Ms. Nye to rely on the statements on its website and in its advertising because "the plain language of the integration clause in the ISA . . . specifically advised her that 'all prior or contemporaneous discussions, understandings and agreements, whether oral or written, between [she] and [Lambda] relating to the subject matter [of the ISA]' were 'supersede[d].'" Demurrer at 8 (citing Claimant's ISA (Ex. B to Demand) at ¶ 23(a)).

This is not a breach of contract case, and Ms. Nye is not alleging any contractual terms that are outside the integrated agreement. Her allegations that she was misled by Lambda's advertised 85.9% job placement rate, its statement that it only got paid when Ms. Nye got paid, and its operation without BPPE approval have nothing to do with the "subject matter herein"—the terms of the ISA. Indeed, it is well established that "an integration clause does not bar a claim of fraud based on statements not contained in the contract. All an integration clause does is limit the evidence available to the parties should a dispute arise over the meaning of the contract. It has nothing to do with whether the contract was induced . . . by fraud." *FMC Techs., Inc. v. Edwards*, No. C05-946C, 2007 WL 1725098, at *4 (W.D. Wash. June 12, 2007), *aff'd*, 302 F. App'x 577 (9th Cir. 2008) (internal citation omitted).[2] Here, Ms. Nye does not dispute the meaning of the ISA—rather, as set forth above, her claims focus on Lambda's misrepresentations that induced her to enroll. The integration clause is irrelevant.

Lambda also argues that it was not reasonable for Ms. Nye to rely on its widely disseminated misrepresentations because the ISA "expressly disclaimed ***any*** liability on the part of Lambda associated with 'loss of employment [and] lost income or profits.'" Demurrer at 8-9 (emphasis in original) (citing Claimant's ISA (Ex. B to Demand) at ¶ 21).[3]

[2] *See also Vai v. Bank of Am. Nat'l Tr. & Sav. Ass'n*, 56 Cal. 2d 329, 344 (Cal. 1961) ("[W]hen the agreement itself is procured by fraud, none of its provisions have any legal or binding effect."); *Herzog v. Cap. Co.*, 27 Cal. 2d 349 (Cal. 1945) (holding that a contractual provision that there were no promises, representations, verbal understandings or agreements except those contained in the contract did not insulate a principal from liability for his own fraudulent conduct).

[3] Even if the "limitation of liability" clause were enforceable (as discussed below, it is not) by its terms it does not apply to claims for injunctive relief or restitution, and therefore does not apply to the primary relief that Ms. Nye

As a California company, Lambda should know that such sweeping "limitation of liability" clauses in contracts are, for good reason, illegal and unenforceable. *See* Cal. Civ. Code § 1668 ("All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law."); *see also MerkAmerica Inc. v. Dell Mktg. LP*, No. 20-cv-05408, 2020 WL 6582665, at *3 (C.D. Cal. Nov. 10, 2020) ("If a limitation clause exempts the defendant from all liability of wrongdoing that may be imposed by law, then it is invalid under section 1668 as the injured party must still retain the right to seek redress.") (internal quotations omitted); *Health Net of Cal., Inc. v. Dep't of Health Servs*., 113 Cal. App. 4th 224, 235 (Cal. Ct. App. 2003) ("[S]ection 1668 prohibits the enforcement of any contractual clause that seeks to exempt a party from liability for violations of statutory and regulatory law, regardless of whether the public interest is affected.").

Finally, even if these ISA clauses were lawful or relevant, companies cannot "mislead consumers" and then rely on fine print to "correct those misinterpretations and provide a shield for liability for the deception." *Williams v. Gerber Prod. Co*., 552 F.3d 934, 939-40 (9th Cir. 2008) (holding that reasonable consumers should *not* be expected to "look beyond misleading representations" to "discover the truth . . . in small print."); *Jou v. Kimberly-Clark Corp.*, No. 13-cv-03075 JSC, 2013 WL 6491158, at *9 (N.D. Cal. Dec. 10, 2013) (holding that, under the Ninth Circuit's decision in *Williams*, a defendant "cannot rely on disclosures on the back or side panels of the packaging to contend that any misrepresentation on the front of the packaging is excused"). Neither the integration clause nor the "limitation on liability" clause provide Lambda the get-out-of-jail free card that is seeks.[4]

seeks – the cancellation of her ISA. It also does not apply to "willful misconduct," which Ms. Nye alleges throughout her Demand.

[4] To the extent Lambda contends that the integration and no liability clauses somehow function as disclaimers, courts interpreting the UCL have made clear that written disclaimers do not cure the falsity of misrepresentations. *Chapman v. Skype Inc.*, 220 Cal. App. 4th 217,228 (Cal. Ct. App. 2013) (finding under the UCL that defendant's representation that a calling plan was "unlimited" was misleading despite the fact that it provided limits on the plan in a separate policy provided to customers). The California Supreme Court has also held that misleading statements enticing consumers to enter into a contract may be a basis for a UCL claim, even though accurate terms may be

4. California Law Does Not Require Ms. Nye to Plead What She Would Have Done but For Lambda's Fraud

Lambda next contends that Ms. Nye was required to plead a counternarrative of hypotheticals regarding what she would have done had she known of Lambda's misrepresentations, including "what other options she would have pursued" and "how her experience would have differed." Demurrer at 9. California law does not require her to conjure up this alternate history. Under the UCL, all she needs to plead is that she suffered economic injury and that the "economic injury was the result of, i.e., *caused by*, the unfair business practice or false advertising that is the gravamen of the claim." *Kwikset Corp. v. Superior Ct.*, 51 Cal. 4th 310, 322 (Cal. 2011) (emphasis in original); *see also Alvarez v. Adtalem Educ. Grp., Inc.*, No. 19-CV-04079-JSW, 2019 WL 13065378, at **4-5 (N.D. Cal. Dec. 16, 2019) (where former students contend that they paid tuition, purchased books, and took on debt to attend a school that advertised fraudulent job placement rates, the allegation that "they would not have enrolled at the school if they knew the truth of the representations about their chances of employment upon graduation" was sufficient to state a UCL, FAL, and CLRA claim). Whether she would have pursued other options or had a different "experience" is entirely irrelevant.

The lone case Lambda cites in support of this argument holds explicitly that it does not apply to claims like Ms. Nye's. In *Bower v. AT&T Mobility, LLC*, the plaintiff alleged that AT&T misrepresented that it was required to collect a sales tax reimbursement from her when, in reality, it was only permitted to do so. 196 Cal. App. 4th 1545, 1553 (Cal. Ct. App. 2011). The court explained:

> This is *not* a case in which the defendant's alleged misrepresentation caused a consumer to purchase a product that he or she would not have bought but for the misrepresentation and the product was worth less than represented by the defendant or was different from what the consumer wanted and expected to buy. (Compare *Kwikset v. Superior Court, supra*, 51 Cal.4th at p. 330, 120 Cal.Rptr.3d 741, 246 P.3d 877 [cause of action stated under § 17200 because defendant's

provided to the consumer before entering into the contract (which did not happen here). *Chern v. Bank of Am.*, 15 Cal. 3d 866, 876 (Cal. 1976) ("[T]he fact that defendant may ultimately disclose the actual rate of interest in its Truth in Lending Statement does not excuse defendant's practice of quoting a lower rate in its initial dealings with potential customers. The original, lower rate may unfairly entice persons to commence loan negotiations with defendant in the expectation of obtaining that rate."). Even if these clauses were relevant and enforceable, they do not provide a defense for Lambda's misconduct.

> labeling of product as "Made in America" when all components were not made in America allegedly caused the consumer to "part with more money than he or she otherwise would have been willing to expend" and he or she would not have purchased the product but for the misrepresentation].)

Id. at 1555 (emphasis added).

5. Ms. Nye's Allegations with Respect to When and Which Representations She Relied on Easily Satisfy Heighten Pleading Standards

Finally, Lambda contends that Ms. Nye does not "specifically allege when" she read Lambda's misrepresentations, and that her allegation that she read them "in or around May 2019" is merely a "vague marker." Demurrer at 9 (internal quotation omitted). From this, Lambda concludes that "it is not even clear whether Nye was actually exposed to the various alleged misrepresentations set forth in the Demand." *Id.* at 10. This is absurd. It would have been more than sufficient for purposes of overruling this demurrer for Ms. Nye to allege that she read the website and relied on it "*before"* deciding to enroll, much less specify the month she did so. Heightened pleadings standards are not so pinched that a plaintiff need recall the exact day she was exposed to a misrepresentation to seek justice for its consequences. *See Benavidez*, 993 F.3d at 1145 (heightened pleading "does not require absolute particularity or a recital of the evidence," and that a complaint "need not allege a precise time frame, describe in detail a single specific transaction or identify the precise method used to carry out the fraud.") (internal quotations omitted)); *Alvarez*, No. 19-CV-04079-JSW, 2019 WL 13065378, at *3 (allegations by former DeVry University students of "an approximate time and place" for alleged job placement rate misrepresentations were sufficient under heightened pleading requirements).

C. Claimant Has and Continues to Suffer Damage Due to Lambda's Misconduct

Lambda next contends that Ms. Nye's demand should be dismissed in its entirety because she has not yet made payments on her ISA. Lambda ignores long-standing authority in California demonstrating that incurring debt, even where no payments have been made, is sufficient economic injury to state a claim under the UCL, FAL, CLRA, and for intentional and negligent misrepresentation.

1. Because Ms. Nye Has Suffered Economic Injury, She Has Standing Under the UCL and FAL

To have standing under the UCL and FAL, a plaintiff must have "suffered injury in fact and ha[ve] lost money or property as a result of the unfair competition." Cal. Bus. & Prof. Code § 17204.[5] The "lost money or property" standard was added to the UCL in 2004 through Proposition 64, the purpose of which was to "'curtail the prior practice of filing suits on behalf of clients who have not used the defendant's product or service, viewed the defendant's advertising, or had any other business dealings with the defendant.'" *Hinojos v. Kohl's Corp.*, 718 F.3d 1098, 1104 (9th Cir. 2013) (quoting *Clayworth v. Pfizer, Inc.*, 49 Cal. 4th 758, 788 (Cal. 2010)). Proposition 64 "plainly preserved standing for those who *had* had business dealings with a defendant," *id.*—as Ms. Nye indisputably did—and does not require out-of-pocket monetary payments prior to a lawsuit, as Lambda contends.

The California Supreme Court has made clear that economic injury under the UCL is "not a substantial or insurmountable hurdle" and that it suffices to "allege some specific, identifiable trifle of injury.'" *Kwikset*, 51 Cal. 4th at 324 (internal quotations omitted). The *Kwikset* court emphasized that there are "*innumerable ways*" to establish economic injury under the UCL, including to:

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

Id. at 323 (emphasis added).

One of the "innumerable ways" to establish economic injury is, quite logically, through the existence of a debt, regardless of whether payments have been made prior to the filing of the lawsuit. In *Vega v. Ocwen Fin. Corp.*, the court found that an existing debt was a "a present or future property interest diminished," and therefore a sufficient economic injury under *Kwikset.*

[5] The standing requirements for the UCL and FAL are the same. *See Shaeffer v. Califia Farms, LLC*, 44 Cal. App. 5th 1125, 1136 (Cal. Ct. App. 2020) (citing *Kasky v. Nike, Inc*., 27 Cal. 4th 939, 951 (Cal. 2002)). For purposes of brevity, references to UCL in this section are intended to cover both the UCL and FAL.

No. 14-cv-04408, 2015 WL 1383241 at *8 (C.D. Cal. Mar. 24, 2015) (internal quotations omitted). The court explained that the "increase in [plaintiff's] debt diminishes the equity she obtained in her home, and thus she is financially injured when her debt increases." *Id.* The court further made clear that "[t]he fact that she failed to make any mortgage payments is not dispositive." *Id.*; *see also Lane v. Wells Fargo Bank, N.A.*, No. 12-cv-04026, 2013 WL 3187410, at **10-11 (N.D. Cal. June 21, 2013) (holding that a class of borrowers who had not yet paid an allegedly improper expense charged by the bank on their mortgage accounts had standing under the UCL because "the debt is an economic injury and lien upon [their] property"); *Gallano v. Burlington Coat Factory of Cal., LLC*, 282 Cal. Rptr. 3d 748, 756-57 (Cal. Ct. App. 2021) (finding that an employee had standing under the UCL when required by the employer to assume a debt for business expenses, even though the employee had not made any payments on the debt).[6] In each of these cases, "allegations of a 'loss of money or property' did not require an actual expenditure of money by the plaintiff to confer standing to support a UCL claim." *Gallano*, 282 Cal. Rptr. 3d at 757.

These rulings extend to student loans. *Daghlian v. DeVry Univ., Inc.*, 461 F. Supp. 2d 1121, 1156 (C.D. Cal. 2006) (finding that $40,000 in federal student loan debt conferred standing under the UCL). Regardless of how Lambda characterizes and markets its ISAs, they are student loans and therefore are a debt. On August 5, 2021, the California Department of Financial Protection and Innovation ("DFPI") issued a consent order with Meratas, Inc.—the company that currently finances Lambda's ISAs—finding that "ISAs made solely for use to finance a postsecondary education are 'student loans' for the purposes of the SLSA [California

[6] Among the reasons debt is an economic injury under the UCL is that it reduces the amount of other debt a plaintiff can enter. *See Rubio v. Cap. One Bank*, 613 F.3d 1195, 1204 (9th Cir. 2010) (closing bank account is an economic loss because plaintiff would lose access to credit); *Evans v. Select Portfolio Servicing, Inc*., No. 18-cv-5985, 2020 WL 5848619 at *19 (E.D.N.Y. Sept. 30, 2020) (finding, under California law, that an increase in the size of a mortgage, regardless of whether plaintiff made any payments on the mortgage, diminishes plaintiff's home equity, causing financial injury.). These holdings apply here because Ms. Nye's ISA prohibits her from entering into any "additional income share agreements or similar arrangements with Company or any other Person that, in the aggregate, obligate [her] to pay a total Income Share exceeding 30.0% of [her] Earned Income." Claimant's ISA (Ex. B to Demand) at ¶ 7(a).

Student Loan Servicing Act]." *In the Matter of Student Loan Servicing Act License Application of Meratas Inc.* NMLS No. 2120180, Consent Order at ¶ M (Ca. Dep't of Fin. Prot. and Innovation Aug. 5, 2021), *available at:* https://dfpi.ca.gov/wp-content/uploads/sites/337/2021/08/Meratas-Consent-Order.pdf. The DFPI found that the SLSA "does *not* exclude contingent debt generally nor ISAs specifically," from the definition of "student loan" and explained that the legislature "intended the SLSA to encompass contingent debt, as federal student loans are similarly contingent in nature given the availability of income-based payment plans and other options for students to extinguish their obligations without repaying the amount advanced." *Id.* ¶ L.[7]

The Consumer Protection Financial Bureau ("CFPB") recently made similar findings about ISAs under federal law. On September 7, 2021, the CPFB issued a consent order with Better Future Forward, Inc. ("BFF"), a company that (like Meratas) provides students with ISAs to finance postsecondary education. *In the Matter of Better Future Forward, Inc., et al.,* CFPB No. 2021-CFPB-0005, Consent Order at ¶ 1 (Sept. 7, 2021), *available at:* https://files.consumerfinance.gov/f/documents/cfpb_better-future-forward-inc_consent-order_2021-09.pdf. In no uncertain terms, the CFPB found that "ISAs are loans and do create debt." *Id.* ¶ 23.[8]

Ms. Nye therefore has standing because her ISA is a debt, and a debt is a qualifying economic injury under the UCL. As a result of Lambda's unfair and deceptive business practices, Ms. Nye was duped into entering an economic transaction with Lambda that legally binds her to pay Lambda up to $30,000 if certain conditions are met. She is subject to binding reporting

[7] *See also* Press Release, California Dep't of Fin. Protection and Innovation, "California DFPI Enters Groundbreaking Consent Order with NY-Based Income Share Agreements Servicer," (Aug. 5, 2020), *available at:* https://dfpi.ca.gov/2021/08/05/california-dfpi-enters-groundbreaking-consent-order-with-ny-based-income-share-agreements-servicer/.

[8] The CFPB further determined that the statement on BFF's ISA that it was "not a loan" would mislead consumers because it was "untrue." *Id.* ¶¶ 19, 23. Accordingly, the CFPB found that the company "engaged in deceptive acts and practices" in violation of the Consumer Financial Protection Act of 2010. *Id.* ¶ 26. Notably, like BFF, Lambda's ISAs state in all capital letters on the first page: "THIS AGREEMENT DOES NOT CONSTITUTE A LOAN." Claimant's ISA (Ex. B to Demand) at 1.

obligations to Lambda, Claimant's ISA (Ex. B to Demand) at ¶ 4(b), must, if she does acquire the requisite employment, make payments to Lambda, *id.* ¶¶ 2, 4-10, and has agreed that Lambda can "enforce all legal rights and remedies in the collection of such amount and related fees (including any rights available to Company to garnish wages or set off any federal or state tax refund)," with Ms. Nye liable for any collection costs, *id.* at ¶ 12(b). Whether or not the debt has yet come due, the obligation exists now. There cannot be any serious dispute that, by agreeing to Lambda's loan instrument in exchange for its education services, Ms. Nye "enter[ed] into a transaction, costing money or property, that would otherwise have been unnecessary." *Kwikset*, 51 Cal. 4th at 323.

In addition, Ms. Nye made economic expenditures that confer standing under the UCL. Ms. Nye "lost money or property" when she purchased outside educational materials, including a JavaScript course, because Lambda's materials were inadequate. Demand ¶ 82. As set forth above, an economic injury does not have to be substantial; all that is required is an "identifiable trifle." *Kwikset*, 51 Cal. 4th at 324-5(internal quotations omitted); *see also Aron v. U-Haul Co. of Cal.*, 143 Cal. App. 4th 796, 802-3 (Cal. Ct. App. 2006) (finding the UCL standing requirement met where lack of proper fuel meters forced truckers to refill tanks completely instead of only replacing used fuel). Even though Ms. Nye's JavaScript course was not expensive, it is an "identifiable trifle" she was forced to spend unnecessarily. For this reason, as well, Ms. Nye has standing under the UCL.

2. Ms. Nye Has Standing Under the CLRA

Lambda next makes the incorrect argument that "[t]he CLRA, the UCL, and the FAL, have essentially the same standing requirements because claimants alleging one or all of them must be able to plead some damage or actual injury." Demurrer at 11. The CLRA's standing requirement is in fact even more permissive than the UCL's. Under the CLRA, "[a]ny consumer who suffers *any damage* as a result of the use or employment by any person of a method, act, or practice declared to be unlawful by Section 1770 may bring an action against that person." Cal. Civ. Code § 1780(a) (emphasis added).

"[T]he California Supreme Court made clear that the CLRA's 'any damage' requirement is a capacious one that includes any pecuniary damage as well as opportunity costs and transaction costs that result when a consumer is misled by deceptive marketing practices." *Hinojos*, 718 F.3d at 1108. This "any damage" standard "includes even minor pecuniary damage." *Id.* Accordingly, "any plaintiff who has standing under the UCL's . . . 'lost money or property' requirement will, *a fortiori*, have suffered 'any damage' for purposes of establishing CLRA standing." *Id.* Ms. Nye easily satisfies this standard.

3. Ms. Nye Has Alleged Standing on her Intentional and Negligent Misrepresentation Claims

Lambda also asserts that Ms. Nye lacks standing to bring her intentional and negligent misrepresentation claims because she has not alleged any out-of-pocket or benefit-of-the-bargain damages. Demurrer at 11-12. But under California law, allegations that the product advertised was of less value than the product actually received constitutes "a plausible damages theory" for fraud-based claims. *Alvarez*, No. 19-CV-04079-JSW, 2019 WL 13065378, at **4-5. Ms. Nye believed, falsely, that she was enrolling in a state-approved institution with an 85.9% job placement rate, and that the institution would not get paid until she found a qualifying job. This is precisely the type of common law damages claim accepted in California. *See, e.g.*, *id.* at *5 (finding that plaintiff alleged damages under common law fraud theories for job placement rate misrepresentations).

D. Lambda Invents A "Causal Relationship" Requirement That Has No Basis in Law or Fact

Lambda contends that Ms. Nye cannot state a claim because "she never completed her Lambda education." Demurrer at 13. Lambda continues: "Since the alleged misrepresentations about Lambda's success concern program graduates, which Nye never was, she cannot state she suffered any harms due to overstated professional outcomes." *Id.* at 14. Lambda does not cite to a single case in this section of its brief, which is not surprising given how far afield it is from how courts have adjudicated the causation element of the UCL in circumstances nearly identical to this case.

To establish causation under the UCL, a plaintiff need only show that "the misrepresentation was an immediate cause of the injury-producing conduct." *In re Tobacco II Cases,* 46 Cal. 4th at 326. Thus, a student's enrollment and incursion of debt in reliance on a university's misrepresentations constitutes injury in fact upon which claims for false advertising and deceptive business practices can be based. The plaintiff in *Daghlian*, for example, alleged that he suffered injury when he spent tens of thousands of dollars on tuition and, due to DeVry's misrepresentations about whether his credits were transferrable, "did not receive what he had bargained for." 461 F. Supp. 2d at 1155 (internal quotations omitted). Plaintiff argued that he had standing to proceed "regardless of his future actions" (i.e. whether he actually attempted to transfer the credits) and the court agreed, finding that, although he "does not allege that he attempted to transfer the credits to another educational institution," he "does assert that he enrolled at DeVry and incurred $40,000 in debt '[i]n reliance on' defendants' misrepresentations and omissions about the transferability of credits." *Id.* This alone was sufficient to establish that plaintiff "personally suffered injury as a result of defendants' allegedly false and/or misleading advertising and unfair business practices." *Id.*

In *Alvarez*, where former students alleged that an institution of higher education advertised fraudulent job placement rates, the allegation that "they would not have enrolled at the school if they knew the truth of the representations about their chances of employment upon graduation" was sufficient—regardless of whether the students graduated—to state a claim under the UCL, FAL, CLRA, and for common law fraud. No. 19-CV-04079-JSW, 2019 WL 13065378, at **4–5. Likewise, that Ms. Nye chose to withdraw after learning of Lambda's misconduct is legally irrelevant, and certainly does not mean that she suffered no injury. To hold otherwise would mean that students would be deprived of legal recourse for fraudulent representations by their schools unless they remained enrolled at the offending institutions even after discovering the misconduct, a legally untenable proposition.

Lambda's argument is also factually inaccurate. Although Lambda contends that the job placement rate misrepresentations at issue "concern program graduates," Demurrer at 14,

Lambda's misrepresentations were *not* about "program graduates" at all. Indeed, from at least April 2019 until December 2019, the placement rate representations on its website did not specify anything about graduates, stating instead: "85.9% hired within 180 days." Demand ¶ 49. Lambda cannot write this fact out of Ms. Nye's Demand.[9]

E. Ms. Nye Does Not Plead Educational Malpractice Claims

Likely recognizing the strength of Ms. Nye's case and the weakness of its arguments above, Lambda concludes with an entire section devoted to "educational malpractice" claims that it admits were not pleaded. *See* Demurrer at 14 ("[T]he Demand does not specifically allege a claim for 'educational malpractice.'"). Lambda is correct that Ms. Nye does not make any educational malpractice claims. To be clear, Ms. Nye's five causes of action are based on Lambda's misconduct in three areas: misrepresentations regarding job placement rates, misrepresentations regarding payment for ISAs, and Lambda's operation without approval from the BPPE. The "educational malpractice" theories that Lambda describes are irrelevant to the issues before this tribunal, and Ms. Nye's claims certainly do not "turn on, implicate, or embrace" them. Demurrer at 14. Lambda's attempt to manufacture an issue where there is none should be disregarded.

CONCLUSION

For the reasons set forth above, Lambda plainly fails to satisfy the rigorous standard for sustaining a demurrer. Lambda's demurrer should be overruled in its entirety.

Respectfully Submitted,

Dated: November 12, 2021

/s/ Alexander S. Elson
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[9] Lambda's argument that graduation is required to state a claim is all the more galling given that the terms of its ISA authorize it to collect from students, such as Ms. Nye, who do not graduate.

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ORDER ON RESPONDENT'S REQUEST TO FILE MOTION TO DISMISS

Case Number: 01-21-0003-8509

Linh Nguyen
-vs-
Lambda, Inc.

Respondent has requested by its letter of September 15, 2021, that the Arbitrator grant its request to file a motion to dismiss pursuant to Consumer Arbitration Rule 33. Claimant filed opposition to this request on October 14, 2021.

Having reviewed the parties' submissions, the Arbitrator concludes that Respondent has failed to show substantial cause that a motion to dismiss is likely to succeed and dispose of or narrow issues in the case. The request to file the motion is denied.

Dated: October 25, 2021

ARBITRATOR

Linda Hendrix McPharlin, Arbitrator

September 15, 2021

VIA E-MAIL

Linda Hendrix McPharlin
c/o Marina Cortes
Case Administrator
American Arbitration Association
MarinaCortes@adr.org

Re: **Lihn Nguyen v. Lambda Inc.; Case Number 01-21-0003-8509**

Dear Arbitrator McPharlin

I write on behalf of Respondent, Lambda Inc. ("Lambda" or "Respondent"), in the above-referenced matter. Pursuant to Rule 33 of the American Arbitration Association (AAA) Consumer Arbitration Rules, Lambda hereby requests leave to file a demurrer to (or a motion to dismiss) the demand for arbitration submitted by claimant, Lihn Nguyen ("Claimant").

Leave should be granted because there are significant efficiencies that could be gained by addressing important defects in Claimant's allegations, which may result in the disposing, or narrowing, of the issues in the case. For example, Respondent respectfully submits that there are several material problems with Claimant's unfair competition claim, including, but not limited to, Claimant's failure to properly plead standing under the Unfair Competition Law (UCL) requirements. Specifically, Respondent contends that Claimant has not properly alleged any loss of money or property as a result of the alleged false advertising.

Respondent contends that Claimant's claims under the California Consumer Legal Remedies Act (CRLA) will also fail. The CRLA is not an otherwise applicable general law. Rather than applying to all businesses, or to business transactions in general, the CRLA applies only to transactions for the sale or lease of consumer "goods" or "services" as those terms are defined in the act. (See Civ. Code § 1761.) Here, the bargained for exchange between the Claimant and Respondent is neither a good nor service as defined by the CRLA. Accordingly, the CRLA does not apply.

Likewise, Claimant's fraud-based clams suffer from several important defects. For example, the demand for arbitration fails to allege any of the "who, what, when, where" facts that are required to properly state such causes of action. Furthermore, Claimant

has not adequately alleged any facts that would establish, if true, that she relied on any of the disclosed or nondisclosed information at issue.

Addressing these defects in Claimant's demand for arbitration by way of a dispositive motion at this stage of the litigation would substantially benefit the proceeding because it would dispose of, or narrow, the issues that need to be addressed at the merits hearing. Further, a dispositive motion would reduce costs for both parties, as well as the time and expense needed to adjudicate the issues in this case during the hearing. Finally, given that Respondent does not have notice of the particulars of Claimant's allegations against it, granting leave would still be prudent as it would encourage Claimant to provide additional information about her allegations, either in an opposition filing or an amended demand, even if the Arbitrator ultimately denies Respondent's demurrer (or motion to dismiss), in whole or in part.

Based on the foregoing, Respondent respectfully requests leave to file a demurrer to Claimant's demand for arbitration.

Very truly yours,

McMANIS FAULKNER

PATRICK HAMMON
ABIMAEL BASTIDA

AB:lmm

October 14, 2021

Via Email
Arbitrator Linda H. McPharlin, Esq.
c/o Marina Cortes, Case Administrator
American Arbitration Association
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Re: *Linh Nguyen v. Lambda, Inc*, AAA Case No. 01-21-0003-8509

Dear Arbitrator McPharlin:

Pursuant to the October 8, 2021 order in this matter, Claimant Linh Nguyen submits this response opposing Lambda's September 15, 2021 letter seeking leave to file a motion to dismiss. Ms. Nguyen respectfully submits that each issue raised by Lambda is so clearly without merit that briefing would be a waste of time and resources.

First, Lambda claims that Ms. Nguyen lacks standing under the California Unfair Competition Law ("UCL") because she does not allege a loss of money or property. But taking out an Income Share Agreement ("ISA") that indebts her to up to $30,000 in tuition payments is clearly economic harm under the UCL. Regardless, as indicated in her Demand, Ms. Nguyen started making payments on her ISA in June 2021, Demand ¶ 90, and to date has made over $10,0000 in payments. *See* Exhibit A (attaching Claimant's payment history and monthly ISA payment receipts).

Second, Lambda claims that its educational services are not "goods" or "services" under the California Consumer Legal Remedies Act ("CLRA"). To the contrary, California courts have examined this question directly and determined that education is a "service" under the CLRA.[1]

Third, Lambda contends that Ms. Nguyen fails to allege the "who, what, when, and where" of the misrepresentation made to Lambda students and that they do not have "notice of the particulars of Claimant's allegations." This is not a serious argument. Ms. Nguyen has filed a 40 page Demand that *quotes* and provides screen shots of the false statements on Lambda's website, and alleges what dates those statements were operative. *See, e.g.,* Demand ¶¶ 11–13 and 46–59. Lambda knows exactly what it is being accused of.

Finally, Lambda contends that Ms. Nguyen fails to plead facts sufficient to establish that she relied on the representations at issue. This is wrong for multiple reasons. First, on these facts

[1] *See, e.g., Russ v. Apollo Grp., Inc*., No. 09-cv-904, 2009 WL 10674112, at *3 (C.D. Cal. Sept. 23, 2009) ("The Defendants have not provided sufficient authority for the Court to find that the legislature intended to omit education . . . from the definition of 'services' [under the CLRA]."); *Anderson v. SeaWorld Parks and Entm't, Inc*., No. 15–cv–02172, 2016 WL 8929295, at *12 (N.D. Cal. Nov. 7, 2016) ("[T]here is no language in the pertinent portions of the CLRA . . . that might lead to a conclusion that the legislature did not intend the CLRA to cover 'entertainment' or 'education' as 'services.'"); *Claiborne v. Water of Life Cmty. Church*, No. 17-cv-0771, 2017 WL 9565337, at *9-10 (C.D. Cal. Aug. 25, 2017) (relying on *Anderson* and *Russ* to conclude that defendant provided plaintiff "a service of financial education that is covered by the CLRA" and explaining that "education" was listed as a service under section (b) of the Model National Consumer Act, upon which the CLRA was based).

reliance is presumed under UCL.[2] Regardless, even without such a presumption, "[it] is enough that the representation has played a substantial part, and so had been a substantial factor, in influencing [the plaintiff's] decision."[3] Here, Ms. Nguyen repeatedly and clearly alleges that she read and relied on the placement rates and statements that Lambda only got paid if she did, and that both were critical to her decision to enroll.[4] This is more than enough.

Accordingly, Ms. Nguyen respectfully submits that briefing on these issues would be futile.

Respectfully Submitted,

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[2] Under the UCL, a showing of materiality gives rise to "a presumption, or at least an inference, of reliance." *In re Tobacco II Cases,* 46 Cal. 4th 298, 327 (Cal. 2009). Because express or implied claims about Lambda's job placement rates are presumptively material, there is therefore a presumption or inference of reliance. *See, e.g., Telebrands Corp.,* 140 F.T.C. at 292 (presuming that claims are material if they pertain to the efficacy, safety, or central characteristics of a product); *FTC v. Lights of America, Inc.,* No. SACVI0-01333JVS, 2013 WL 5230681, at *41 (C.D. Cal. Sept. 17, 2013) (holding that claims about the watts and lifetime of the LED light bulbs were *per se* material because they were express, and "that even if they were implied claims, they were material because the claims relate to the efficacy of the product").

[3] *In re Tobacco II Cases,* 46 Cal. 4th at 327 (internal quotation marks omitted) (explaining that reliance on the misrepresentation does not have to be "the sole or even the predominant or decisive factor influencing" the individual's decision).

[4] *See* Demand ¶ 14 ("Ms. Nguyen relied on Lambda's advertised job placement rate of over 80% and its promise that Lambda would not get paid until she did when she decided to enroll at Lambda in July of 2019, financed by an ISA."); ¶ 62 ("Ms. Nguyen read this statement on Lambda's website prior to enrolling. Knowing that Lambda only got paid if she obtained employment was important to her decision to attend the school."); ¶ 78 ("Prior to signing the ISA, Ms. Nguyen read and relied on Lambda's representations that its job placement rate was over 80%. Lambda's record of successfully placing students was critical to her decision to enroll."); ¶ 124 ("Lambda made statements to Ms. Nguyen: (a) that were false representations of material fact; (b) that Lambda knew were false or were made recklessly and without regard for their truth; (c) that Lambda intended Ms. Nguyen to rely upon; (d) that Ms. Nguyen reasonably relied upon; (e) that Ms. Nguyen's reliance upon was a substantial factor in causing damage to her; and (f) that caused damages to Ms. Nguyen."); ¶ 127 ("Ms. Nguyen reasonably relied on these widely disseminated representations. Had she known the truth, she would not have enrolled at Lambda.").

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