December 21, 2021

Via Email

Arbitrator Linda H. McPharlin, Esq.
c/o Marina Cortes, Case Administrator
American Arbitration Association
MarinaCortes@adr.org

Re: *Linh Nguyen v. Lambda, Inc,* AAA Case No. 01-21-0003-8509

Dear Arbitrator McPharlin:

Claimant Linh Nguyen writes in response to Respondent Bloom Institute of Technology's (formerly Lambda, Inc., referred to herein as "Bloom") December 13, 2021 letter regarding confidentiality ("Bloom Ltr.").

Ms. Nguyen has agreed to a standard protective order. Bloom's proposed order, by contrast, is non-standard, contrary to well-established law, impractical, and unduly burdensome on Ms. Nguyen and this Tribunal. Bloom asks this Tribunal to look past longstanding precedent, and require the party *challenging* a confidentiality designation to prove—without equal access to the facts and context about each document's provenance and purpose—that the designating party's document does *not* involve a trade secret or other commercially sensitive business information. Bloom does not cite a single case or arbitration decision blessing this upside-down approach. Bloom also mischaracterizes AAA rules and this Tribunal's December 3, 2021 Order, all of which make clear that confidentiality is not required by the parties unless they agree to it. Bloom also misrepresents the terms of Ms. Nguyen's ISA, which protects her personal information, not the company's documents.

Throughout its submission, Bloom contends that there is something nefarious about transparency, going so far as to imply that Ms. Nguyen's counsel opposes their proposed protective order because it would hinder counsel's alleged goal of publicity or could be used to publicly shame the company. These aspersions on counsel's motives are a red herring unsupported by fact. Bloom recognizes just as well as Ms. Nguyen that some documents it produces may be confidential, other documents will not be—that determination will not turn on either side's motives, just whether the confidentiality standards are met. Likewise, the dispute addressed in these papers—about the process for assessing confidentiality—turns on well-trod legal grounds, not speculation about either party's intentions.

And, in all events, this is not about the lawyers, it is about Ms. Nguyen and Bloom's students. Ms. Nguyen cares deeply about transparency and the plight of her fellow classmates, and does not believe Bloom should be allowed to bar students from learning basic, non-confidential information about whether their school lied to them. For its part, Student Defense is a non-profit organization that, among other things, provides *pro bono* legal services to students who have been harmed by predatory institutions of higher education. Student Defense represents other clients in nearly identical proceedings against Bloom, and has been contacted by dozens of former Bloom students who describe circumstances nearly identical to those experienced by Ms. Nguyen. Student Defense does not expect to represent all, or even most, of these students. But all

of them—including its other clients—would be harmed by an order that grants Bloom presumptive confidentiality over evidence of its illegal conduct. Ms. Nguyen's protective order is already designed to protect Bloom's *confidential* documents from being made public; Bloom appears to be seeking the same treatment for its *non-confidential* documents.

Because Bloom failed to attach Ms. Nguyen's edits to its proposed protective order, those edits are attached here as Exhibit A (clean version) and Exhibit B (track changes version). Ms. Nguyen's version is in line with universally accepted terms in protective orders, including those in the Northern District of California's Model Protective Order and the protective order that Bloom itself entered in the *Lambda Labs* matter, both of which provide that "the burden of persuasion . . . shall be on the Designating Party."[1] Ms. Nguyen respectfully requests that her proposed protective order be entered in this case.

ARGUMENT

I. California Law Places the Burden on the Designating Party

"A party asserting good cause bears the burden, for each particular document it seeks to protect, of showing that specific prejudice or harm will result if no protective order is granted." *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1130-31 (9th Cir. 2003); *see also Ramirez v. Trans Union, LLC*, No. 12-cv-00632, 2012 WL 8261626, at *1 (N.D. Cal. July 25, 2012) (explaining that "the Model Stipulated Protective Order approved by the Northern District [of California] states that if there is a dispute regarding a document's confidentiality, the *burden is on the party asserting that a document is confidential* to file a motion with the court seeking to retain the document's confidentiality," and denying Defendant's motion to shift the burden to the party challenging the designation because it is " inconsistent with Ninth Circuit case law") (emphasis added); *Estrada v. City & Cnty. of San Fran.*, No. 16-cv-00722, 2016 WL 7230511, at *3-4 (N.D. Cal. Dec. 14, 2016) ("There is no reason to shift the burden to Plaintiff to file a motion challenging Defendants' confidentiality designation. Even when parties operate under a protective order, the designating party still bears the burden of moving to retain confidentiality. . . . Thus, if Plaintiff challenges a designation of confidentiality, Defendants, as the designating party, shall file and serve a motion to retain confidentiality.").[2]

[1] *See* N.D. Cal Stipulated Protective Order for Standard Litigation § 6.3, *available at* https://www.cand.uscourts.gov/forms/model-protective-orders/; *Lambda Labs, Inc. v. Lambda, Inc.*, No. 4:19-cv-04060, Dkt. 56 at ¶ 6.3 (N.D. Cal. Apr. 28, 2020).

[2] *See also Shelley v. Cnty. of San Joaquin*, No. 13-cv-0266, 2015 WL 2082370, at *7 (E.D. Cal. May 4, 2015) ("[T]he burden of justifying the confidentiality of each and every document sought to be covered by a protective order remains on the party seeking the protective order; any other conclusion would turn Rule 26(c) on its head."); *Goddard v. City of Inglewood*, No. 07-cv-05458, 2009 WL 10699503, at *2 (C.D. Cal. Feb. 4, 2009) ("To be clear, however, the designating party bears the burden of making, for each document it seeks to protect, a particularized showing of good cause for the confidentiality designation under the protective order."); *Nativi v. Deutsche Bank Nat'l Tr. Co.*, 223 Cal. App. 4th 261, 318 (Cal. Ct. App. 2014) ("[T]he burden is on the party seeking the protective order to show good cause for whatever order is sought.").

This bedrock standard is also enshrined in the Model Protective Order for the Northern District of California, which provides: "If the Parties cannot resolve a challenge without court intervention, the Designating Party shall file and serve a motion to retain confidentiality. . .The burden of persuasion in any such challenge proceeding shall be on the Designating Party."[3]

This standard is common across jurisdictions. *See, e.g., Cipollone v. Liggett Grp., Inc.*, 785 F.2d 1108, 1122 (3d Cir. 1986) ("[T]he burden of justifying the confidentiality of each and every document sought to be covered by a protective order remains on the party seeking the protective order[.]"); *Application of Akron Beacon J.*, No. 94-cv-1402, 1995 WL 234710, at *12 (S.D.N.Y. Apr. 20, 1995) (holding that a protective order "improperly shifted the burden" by requiring challenging party to show "particularized need" for material designated as confidential, where designating party had never been required to show good cause); *Otoski v. Avidyne Corp.*, No. 09-cv-3041, 2010 WL 5158390, at *1 (D. Or. Dec. 13, 2010) ("[T]he designating party bears the burden, for each particular document it seeks to protect, of showing that specific harm will result if the documents are not protected . . . [b]road allegations of harm, unsubstantiated by specific examples or articulated reasoning does not satisfy the requirements of this rule.") (internal quotation omitted).[4]

Bloom admits that this is standard practice "in public court litigation," Bloom Ltr. at 1, and cites no authority for a different practice in arbitration. These legal norms should not be upended here. As a practical matter, the designating party knows best why certain documents should be kept confidential. For instance, the designating party inherently knows more about what its trade secrets are, or which documents contain confidential research, development, or commercially sensitive information. Arguments for confidentiality in federal court commonly require the designating party's affidavit explaining the facts supporting its position. *See, e.g., Gulf Oil Co. v. Bernard*, 452 U.S. 89, 102 n. 16 (1981) (explaining that the party seeking the protective order must submit "a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements"); *Contratto v. Ethicon, Inc.*, 227 F.R.D. 304, 307 (N.D. Cal. 2005) ("Where a business is the party seeking protection, it will have to show that disclosure would cause significant harm to its competitive and financial position. That showing requires specific demonstrations of fact, supported where possible by affidavits and concrete examples, rather

[3] N.D. Cal Stipulated Protective Order for Standard Litigation § 6.3, *available at:* https://www.cand.uscourts.gov/forms/model-protective-orders/.

[4] *See also Perfx Wireline Servs., LLC v. Dynaenergetics US, Inc.*, No. 20-cv-03665, 2021 WL 5628859, at *2 (D. Colo. Apr. 16, 2021) ("[T]he parties first shall revise [the proposed protective order], to place the burden on the designating (rather than objecting) party. It is the designating party who has the burden of proof and must present the matter to the Court."); *Miles v. Boeing Co.*, 154 F.R.D. 112, 116 (E.D. Pa. 1994) ("To allow information to become presumptively confidential without affording Plaintiff an opportunity to disagree with that designation and then to bear the burden of mounting a challenge would run afoul of the basic burden—shifting approach mandated by Rule 26(c)."); *U2 Home Ent., Inc. v. Kylin TV, Inc* ., No. 06–cv–2770, 2008 WL 1771913, at *2 (E.D.N.Y. Apr.15, 2008) (where "the confidentiality designation is contested, the party seeking to maintain confidential treatment for the challenged document will have the burden of establishing good cause for the continuation of that treatment"); *Velasquez v. Frontier Med. Inc.*, 229 F.R.D. 197, 200 (D.N.M. 2005) ("It is the party seeking the protective order who has the burden to show good cause for a protective order.").

than broad, conclusory allegations of harm."). Nothing about arbitration proceedings suggests that this support should be dispensed with.

In light of the designating party's superior knowledge about why a document might be confidential, it is nonsensical to place the burden on the receiving party to prove why materials should *not* be protected. Further, as discussed below, placing the burden on the designating party will deter frivolous and/or mass-designations, which will save the parties and this Tribunal time and resources.

II. The Authorities Bloom Cites Do Not Require Confidentiality

Lacking any authority—in or out of arbitrations—for its burden-shifting position, Bloom tries to tease out of the AAA Consumer Arbitration Rules an inference that Ms. Nguyen "expected the arbitration proceedings to be kept confidential when [she] executed the ISA." Bloom Ltr. at 3-4. The opposite is true.

The AAA's consumer rules require *the arbitrator and the AAA* to maintain confidentiality, but leave the rest to the parties to decide by agreement. As to the *parties*, the AAA's Statement of Ethical Principles state:

> [T]he AAA takes no position on whether parties should or should not agree to keep the proceeding and award confidential between themselves. *The parties always have a right to disclose details of the proceeding, unless they have a separate confidentiality agreement.*[5]

In accordance with these Ethical Principles, this Tribunal's December 3 Order provides that "[e]xcept for the confidentiality required of AAA and the arbitrator [by Consumer Rule 30], *maintenance of confidentiality by the parties or others is generally a matter of agreement between the parties*." (emphasis added). Ms. Nguyen has agreed to a standard procedure for protecting the confidentiality of hers and Bloom's documents, not an aberrant one.[6]

Likely recognizing this, Bloom stretches the facts to argue that Ms. Nguyen agreed to keep these proceedings confidential back when she enrolled in the school. The plain terms of her ISA demonstrate otherwise. While Bloom is correct that the ISA addresses confidentiality, it does so only to limit Bloom from disclosing Ms. Nguyen's "employment or financial information," and is silent as to information about the school:

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[5] AAA Statement of Ethical Principles (emphasis added), *available at:* https://www.adr.org/StatementofEthicalPrinciples.

[6] Bloom ignores these requirements and instead tries to find a confidentiality rule in Principle 12 of the AAA's Consumer Due Process Protocol Statement. Bloom Ltr. at 4. But that provision neither suggests blanket confidentiality nor that the burden should be on the non-designating party. Rather, it states the commonsense ideas that the parties should have some degree of "privacy" with respect to the hearing itself and that the arbitrator, quite naturally, should "carefully consider claims of privilege and confidentiality when addressing evidentiary issues." *See* AAA Consumer Due Process Protocol Statement of Principles, *available at* https://www.adr.org/sites/default/files/document_repository/Consumer%20Due%20Process%20Protocol%20(1).pdf.

> a. Confidentiality. Company agrees that all employment or financial information of Student and any non-public records or information provided to Leif pursuant to this Agreement is personal and confidential information. Company agrees not to, directly or indirectly, disclose, publish, cause to be disclosed or published, or use personal or financial information concerning you or your Employer for any purposes other than (i) as expressly authorized herein, (ii) as incidental to performance of this Agreement, or (iii) to enforce its rights under this Agreement.

Claimant's ISA (Demand, Ex. B) § 11(a). Bloom's attempt to write additional confidentiality provisions into the ISA must be rejected.

Stretching even further, Bloom contends that it "makes sense that the parties would intend for disputes to be handled confidentially" because privacy is a "hallmark of [the] education industry." Bloom Ltr. at 5. Bloom states that it would be unfair for Ms. Nguyen to use her "privacy interest as a sword and a shield, publicly criticizing the school but keeping the full story out of the public record." *Id*. She is not. Ms. Nguyen has agreed to provide documents requested by Bloom and accepts her burden to establish that any such documents are entitled to confidential treatment under the ISA and the Protective Order.

With no support for its position in caselaw, the AAA, or the ISA, Bloom cites two cases for the proposition that parties tend to "generally expect arbitrations to be confidential." *Id*. But these cases do not supersede the caselaw cited above, the terms of the ISA, or the AAA rules that govern this proceeding. Moreover, they are irrelevant. In *Guyden v. Aetna*—an employment dispute that does not arise under the AAA's consumer rules—the contract at issue expressly stated that "[a]ll proceedings, including the arbitration hearing and decision, are private and confidential, unless otherwise required by law. Arbitration decisions may not be published or publicized without the consent of both the Grantee and the Company." 544 F.3d 376, 384 (2d Cir. 2008). Ms. Nguyen's ISA has no such provision. In *Yuen v. Superior Court*, also not under the AAA consumer rules, Bloom cites to dicta from a concurring opinion explaining that "forcing" separate arbitrations to be "consolidated" might "compromise business secrecy and confidentiality," a scenario far afield from the circumstances here. 121 Cal. App. 4th 1133, 1141 (Cal. Ct. App. 2004).

III. Bloom's Remaining Arguments Do Not Justify The Unorthodox Protective Order It Seeks

Bloom contends that, unless the burden is shifted to the challenging party, the school will be put "in the costly and time consuming position of fighting on the issue of confidentiality repeatedly as to potentially hundreds of documents." Bloom Ltr. at 7. This assumes Ms. Nguyen will act in bad faith. Ms. Nguyen could equally speculate that Bloom will promiscuously over-designate documents as confidential if the burden is shifted onto her. Suffice to say, courts have consistently placed the burden on the designating party, without trying to adjudicate ulterior motives or tactical advantages that parties might hypothesize about each other.

Bloom also contends that, because the business is likely to have more documents than the consumer, there is an "unfair asymmetry" wherein the school will be "forced to spend a substantial amount of time defending its confidentiality designations." *Id*. As discussed at the November 22 hearing, the fact that the business has more documents is neither surprising nor compelling, and is certainly not a basis upon which to upend longstanding legal norms. And again, Bloom has control over the documents it asserts as confidential; this will only become burdensome if Bloom seeks to designate documents that are not entitled to protection.

Bloom next argues that the "fairest, most efficient, and most economical way to proceed is to ensure that designations are only challenged when a genuine dispute over confidentiality is raised." *Id*. Claimant's position will accomplish exactly that—placing the burden on the designating party will deter both sides from making overly broad or unsubstantiated assertions of confidentiality.[7]

Finally, Bloom argues that Ms. Nguyen's standard protective order would "upset settled issues" in the *Lambda Labs* matter because the "less restrictive protective order proposed by Claimant" may "threaten judicial comity." *Id*. at 7-8. The meaning of this is mysterious, as the protective order in the *Lambda Labs* matter—exactly like the one proposed by Ms. Nguyen here—provided that the "burden of persuasion . . . shall be on the Designating Party." *Lambda Labs*, No. 4:19-cv-04060, at Dkt. 56 ¶ 6.3. Judicial comity is also not a concern, as the *Lambda Labs* order allows—in the section governing "duration"—for confidentiality designations to be removed by agreement of the designating party or when "a court order otherwise directs." *Id.* ¶ 4. This approach would not harm Lambda Labs, as its documents are not at issue here. In addition, the fact that Lambda Labs chose (or chose not) to dispute a Bloom designation in the trademark litigation is irrelevant here, and should not provide a basis for Bloom to secure automatic confidential treatment of its documents in perpetuity. Bloom should be required to establish—based on the protective order entered in this case—that its documents are entitled to protection.

Respectfully Submitted,

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[7] *See, e.g.*, *N.T. by & through Nelson v. Children's Hosp. Med. Ctr.*, No. 13-cv230, 2017 WL 3314660, at *7 (S.D. Ohio Aug. 3, 2017) (where the designating party "purposely or negligently over-designate[s] . . . requiring a challenging party to individually identify potentially thousands of problematic designations foists an unfair burden on the challenging party who has arguably done nothing wrong").

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