PILLSBURY WINTHROP SHAW PITTMAN LLP
PATRICK HAMMON (255047)
patrick.hammon@pillsburylaw.com
ANDREW K. PARKHURST (324173)
andrew.parkhurst@pillsburylaw.com
2550 Hanover Street
Palo Alto, CA 94304-1115
Telephone: 650.233.4500
Facsimile: 650.233.4545

Attorneys for Defendants,
BLOOM INSTITUTE OF TECHNOLOGY;
AUSTEN ALLRED

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

FULLER, et al.

Plaintiffs,

vs.

BLOOM INSTITUTE OF TECHNOLOGY, et al.

Defendants.

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

DEFENDANTS' NOTICE OF MOTION AND MOTION TO COMPEL ARBITRATION AND TO STAY THE CASE

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

NOTICE

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on May 19, 2023, at 10:00 a.m., or as soon thereafter as the matter may be heard in the above-entitled court located at the Phillip Burton Federal Building, 450 Golden Gate Avenue, San Francisco, California, before the Honorable Magistrate Alex G. Tse, defendants, Bloom Institute of Technology and Austen Allred, will move the Court for an order compelling arbitration and staying the case.

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

Dated: April 12, 2023

PILLSBURY WINTHROP SHAW PITTMAN LLP

/s/ *Patrick Hammon*

By: PATRICK HAMMON
ANDREW PARKHURST

Attorneys for Defendants,
BLOOM INSTITUTE OF TECHNOLOGY;
AUSTEN ALLRED

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INTRODUCTION

"While [Bloom's] agreements [with its students] bar them from bringing a class-action lawsuit, the NSLDN is hoping [one student's] case and two others will pave the way for a larger case."[1] For the past few years, Plaintiffs' counsel have apparently been looking for a way to circumvent the agreement to arbitrate between Bloom and its students and bring "a larger case" against the School. In their most recent attempt, the purported class action captioned as *Fuller v. Bloom Institute of Technology*, they seem to believe they found a way to do it. Unfortunately for Plaintiffs' counsel, however, their interpretation of the parties' arbitration agreement is wrong. The language, which they would like to turn into a loophole so large that it would render the entire provision meaningless, means exactly what legions of other courts have already found it to mean, when other attorneys have tried the same gambit: it simply confirms an existing right to seek equitable relief from a court in aid of, or to confirm, the parties' arbitration agreement or the arbitrator's orders. Plaintiff's counsel's creative, but unavailing, play to prosecute the "larger case" they have been searching for over the last few years should, therefore, be rejected.

But even if this Court hesitated in joining the chorus of courts that have already rejected Plaintiffs' urged interpretation of the language in the parenthetical in the arbitration provision at issue, the parties' agreement makes plain that, if there are questions regarding what is, and is not, arbitrable, they should be decided by a duly appointed arbitrator. Accordingly, the case should be compelled to arbitration, even if the Court were inclined to adopt a more expansive, and disfavored, interpretation of the parties' arbitration agreement.

BACKGROUND

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

On March 16, 2023, Plaintiffs filed a Putative Class Action Complaint in the Superior Court for the County of San Francisco against Bloom Institute of Technology ("Bloom" or the "School") and Austen Allred ("Mr. Allred"). On March 27, 2023, Defendants, Bloom Institute of Technology

[1] Declaration of Patrick Hammon in Support of Motion to Compel ("Hammon Decl."), ¶ 2, Ex. A. (https://www.businessinsider.com/lambda-school-promised-lucrative-tech-coding-career-low-job-placement-2021-10), Oct. 25, 2021.)

(formerly Lambda School) ("Defendant," "Bloom," or the "School"), and Austen Allred (together "Defendants"), filed a Notice of Removal to the District Court for the Northern District of California under 28 U.S.C. section 1441 and 28 U.S.C. section 1332.

II. The Income Share Agreement Expressly Sets Forth An Arbitration Agreement.

Each Plaintiff signed an Income Share Agreement ("ISA") prior to enrolling in the School's program. All of Plaintiffs' allegations and purported harm relate to or arise out of their ISAs. Each ISA includes, under the section named "DISPUTES," the same provision titled "Arbitration," that states, among other things:

> As the **exclusive means** of initiating adversarial proceedings to resolve **any dispute** arising out of this agreement, your Lambda School tuition, or your payments to Lambda School (other than any proceeding commenced by either party seeking an injunction, a restraining order, or any other equitable remedy or a proceeding commenced by either party in small claims court), either party may demand that the dispute be resolved by binding arbitration administered by the American Arbitration Association in accordance with its Consumer Arbitration Rules available at www.adr.org. If AAA is completely unavailable, and if you and Lambda School cannot agree on a substitute, then either you or Lambda School may request that a court appoint a substitute. The rules in this arbitration agreement will be followed if there is disagreement between the agreement and the arbitration forum's procedures. Judgment on any award rendered in any such arbitration may be entered in any court having jurisdiction. This arbitration agreement is governed by the Federal Arbitration Act (FAA).

(Compl., Exhs. A-D (the "Arbitration Agreement") (emphasis added).)

ARGUMENT

III. LEGAL STANDARD.

"The Federal Arbitration Act applies to arbitration agreements in any contract affecting interstate commerce." *SanDisk Corp. v. SK Hynix Inc.*, 84 F. Supp. 3d 1021, 1027 (N.D. Cal. 2015), *citing Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001); 9 U.S.C. § 2. The Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1 *et seq.*, "sets forth a policy favoring arbitration agreements and establishes that a written arbitration agreement is 'valid, irrevocable, and enforceable.'" *Marselian v. Wells Fargo & Co.*, 514 F. Supp. 3d 1166, 1170-71 (N.D. Cal. 2021), *quoting* 9 U.S.C. § 2. "The FAA reflects both a 'liberal federal policy favoring arbitration' and the 'fundamental principle that arbitration is a matter of contract.'" *Boyle v.*

Relativity Educ., LLC, No. CV 16-9402 PA (KSX), 2017 WL 11636425, at *2 (C.D. Cal. May 12, 2017), *quoting AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745, 179 L. Ed. 2d 742 (2011).

Under the FAA, "arbitration is a matter of contract, and courts must enforce arbitration contracts according to their terms." *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 529 (2019). Where a valid contract to arbitrate exists, "the [FAA] leaves no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985). Plaintiffs resisting arbitration "bear the burden of showing that an arbitration agreement should not be enforced." *Chun Ping Turng v. Guaranteed Rate, Inc*., 371 F. Supp. 3d 610, 618 (N.D. Cal. 2019), *citing Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91 (2000).

IV. A DULY APPOINTED ARBITRATOR SHOULD DETERMINE WHETHER—AND WILL EVENTUALLY DETERMINE THAT—ALL OF PLAINTIFFS' CLAIMS ARE SUBJECT TO THE ARBITRATION AGREEMENT.

A. The Arbitration Agreement Expressly Indicates That Disputes About Arbitrability Should Be Decided By An Arbitrator.

"The question whether parties have submitted a particular dispute to arbitration is an issue for judicial determination unless the parties clearly and unmistakably provide otherwise." *SteppeChange LLC v. VEON Ltd*., 354 F. Supp. 3d 1033, 1042 (N.D. Cal. 2018), *citing Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002). Here, the plain meaning of the Arbitration Agreement does just that in making it clear that questions of arbitrability are to be delegated to the arbitrator. The Arbitration Agreement states, in no uncertain terms, that the "the **exclusive** means of initiating adversarial proceedings to resolve **any dispute** arising out [the ISA] … shall be binding arbitration." (Compl., Exh. A-D (emphasis added) (hereinafter the "Exclusive Means Clause".) The Arbitration Agreement opens with plain and unequivocal language that establishes that *all* disputes are for the arbitrator to decide. (*Id.*) This would naturally, therefore, include *any* disputes as to the arbitrability of Plaintiffs' claims. Accordingly, the plain language indicates that the parties "clearly

and unmistakably" intended for questions about arbitrability to be delegated to an arbitrator.[2]

B. The Parties' Incorporation Of AAA's Rules Evinces The Parties' Clear Intention That Questions Regarding Arbitrability Should Be Delegated To An Arbitrator.

1. The Parties Expressly Incorporated AAA's Rules, Which Manifests A Clear Intention To Delegate.

"In the Ninth Circuit, incorporation of an arbitrator's arbitration rules constitutes evidence that the parties agreed to arbitrate arbitrability." *SteppeChange*, 354 F. Supp. 3d at 1043, *citing Oracle Am., Inc. v. Myriad Grp. A.G.*, 724 F.3d 1069, 1074 (9th Cir. 2013) (Holding with "[v]irtually every circuit to have considered the issue … that incorporation of the American Arbitration Association's (AAA) arbitration rules constitutes clear and unmistakable evidence that the parties agreed to arbitrate arbitrability.") (hereinafter the "Arbitrability Rule").

Here, each ISA states that a "dispute be resolved by binding arbitration administered by the American Arbitration Association in accordance with its Consumer Arbitration Rules available at www.adr.org." (Compl., Exh. A-D.) The AAA Consumer Arbitration Rules state that the "arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim." CAR R-14(a).

The AAA Consumer Arbitration Rules also set forth that the "arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part." *Id.*, R-14(b). Due to the ISA's delegation provision, CAR R-14 is expressly incorporated into the parties' agreement. Thus, the parties manifested a clear and unmistakable intent to delegate arbitrability to the arbitrator based on the plain language of the Arbitration Agreement that

[2] Plaintiffs may point to the parenthetical language that follows the Exclusive Means Clause, which references "injunction[s]" and "other equitable relief" (hereinafter referred to as the "Parenthetical Language") (*id.*), as a basis for suggesting that the parties did not mean to delegate the arbitrability question to an arbitrator. This, however, is wrong for at least two reasons. ***First***, the Parenthetical Language says nothing about arbitrability or delegating questions of arbitrability. In the absence of such language, the Exclusive Means Clause should control, meaning that, along with every other dispute "arising out of" the ISA (also referred to as one of the "Covered Disputes"), questions of arbitrability are for the arbitrator. ***Second***, if the "arising out of this agreement" phrase referred to something else, like payment disputes, as an example, it would mean that that language would be surplusage, as such disputes are ***already*** covered by the subsequent language in the clause—namely, the "arising out of… your Lambda School tuition, or your payments to Lambda School." The first phrase must mean something—thus, the question of what is arbitrable is itself for the arbitrator.

incorporates the AAA arbitration rules.

2. The Arbitrability Rule Applies, Irrespective Of The Parties' Relative "Sophistication" Levels.

Oracle, and a later case that further interpreted its holding, *Brennan v. Opus Bank*, 796 F.3d 1125 (9th Cir. 2015), held that incorporation of AAA arbitration rules was "clear and unmistakable evidence that the parties agreed the arbitrator would decide arbitrability." *Brennan*, 796 F.3d at 1130. In announcing and applying this widely-accepted rule, however, *Oracle* seemingly offered two caveats to its holding, which some courts have interpreted as limiting considerations. ***First***, the court expressly acknowledged that the facts before it involved "sophisticated parties to a commercial contract." *Oracle*, 724 F.3d at 1075. ***Second***, in a footnote, the court noted, that although it applied the Arbitrability Rule to commercial contracts, the court was "express[ing] no view as to the effect of incorporating arbitration rules into consumer contracts." *Id.* at fn. 2.

Brennan acknowledged *Oracle*'s "sophisticated parties" language, but expressly declined to find that the Arbitrability Rule does *not* apply in cases involving unsophisticated parties and/or non-commercial contracts. Indeed, according to the *Brennan* court, the case involved a sophisticated plaintiff (attorney and business executive) and an at-will employment agreement. *Brennan*, 796 F.3d at 1130-31 (holding that the appeals court "need not decide nor do we decide here 'the effect [if any] of incorporating [AAA] arbitration rules into consumer contracts' or into contracts of any nature between 'unsophisticated' parties.") (internal quotation omitted). In fact, the Ninth Circuit was clear in explaining "that its holding should not be understood to 'foreclose the possibility that this rule could also apply to unsophisticated parties or to consumer contracts. Indeed, the vast majority of the circuits that hold that incorporation of the AAA rules constitutes clear and unmistakable evidence of the parties' intent do so without explicitly limiting that holding to sophisticated parties or to commercial contracts.'" *Id.* (citing different Circuit Court decisions).

After *Oracle* and *Brennan*, District Courts in the Ninth Circuit have thrown the weight of their authority behind delegating arbitrability to the arbitrator when the AAA arbitration rules are incorporated into an arbitration clause—regardless of the sophistication of the parties or the nature of the agreement at issue. *See*, *e.g.*, *Maybaum v. Target Corp.*, No. 222CV00687MCSJEM, 2022 WL

1321246, at *5 (C.D. Cal. May 3, 2022) ("[T]he majority of courts have concluded that *Brennan* applies equally to sophisticated and unsophisticated parties."); *Miller v. Time Warner Cable Inc*., No. 816CV00329CASASX, 2016 WL 7471302, at *5 (C.D. Cal. Dec. 27, 2016) (compelling arbitration because " the greater weight of authority has concluded that the holding of [*Brennan*] applies similarly to non-sophisticated parties."); *Gerlach v. Tickmark Inc.*, No. 4:21-CV-02768-YGR, 2021 WL 3191692, at **4–5 (N.D. Cal. July 28, 2021) (holding with the "greater weight of authority" of cases post-*Brennan* that found in favor of delegation regardless of sophistication); *Marriott Ownership Resorts, Inc. v. Flynn,* 2014 WL 7076827, *8 (D. Haw. Dec. 11 2014) (holding that incorporation of AAA rules constitutes clear and unmistakable evidence of intent to delegate arbitrability, regardless of the sophistication of the parties); *Mendoza v. Microsoft Inc.,* 2014 WL 4540225, *4 (W.D. Wash. Sept. 11, 2014) (same).

Post-*Brennan*, the Ninth Circuit has tacitly endorsed the view that the sophistication of one or both parties to an arbitration provision is not a requirement to find delegation through the incorporation of AAA rules. In *Mohamed v. Uber Technologies, Inc.*, 848 F.3d 1201 (9th Cir. 2016), a putative class action brought by former ride-share service drivers who drove for Uber, the circuit court reversed the lower court's finding, which addressed the question of sophistication, and upheld a delegation clause in the agreement between Uber and the drivers with no discussion of, or attention to, the parties' level of sophistication. *Id.* at 1207-09. Had the Ninth Circuit been concerned with a disparity in the level of sophistication between the drivers and Uber—and indeed the lower court invited such an inquiry (*see Mohamed v. Uber Techs., Inc.*, 109 F. Supp. 3d 1185, 1202, fn. 16 (N.D. Cal. 2015), *aff'd in part, rev'd in part and remanded*, 836 F.3d 1102 (9th Cir. 2016), and *aff'd in part, rev'd in part and remanded*, 848 F.3d 1201 (9th Cir. 2016))—presumably it would have addressed the question in its holding reversing the District Court.

Following *Oracle, Brennan*, and *Mohamed*, Judge Donato in the Northern District decided in *McLellan v. Fitbit, Inc.*, No. 3:16-CV-00036-JD, 2017 WL 4551484 (N.D. Cal. Oct. 11, 2017) that, because the Fitbit consumer agreement included in its arbitration clause that "The American Arbitration Association (AAA) will administer the arbitration under its Commercial Arbitration

Rules and the Supplementary Procedures for Consumer Related Disputes," the agreement reflected clear and unmistakable evidence of the parties' intention to delegate questions of arbitrability. *Id.* at *2. In reaching this holding, *McLellan* noted the unworkability and "little practical sense" in a court attempting to weigh "factors that might make someone 'sophisticated'" on a "party-by-party assessment of sophistication" with respect to members of a class "under some loose amalgam of personal education, line of work, professional knowledge, and so on," because such an assessment "would undermine contract expectations in potentially random and inconsistent ways." *Id.* at *3. Members of a class come from all walks of life, and, as the court recognized, it would be nearly impossible for a court to try to assess each potential member's relative "sophistication" for purposes of delegating questions of arbitrability.

In *Diaz v. Intuit, Inc*., No. 5:15-CV-01778-EJD, 2017 WL 4355075 (N.D. Cal. Sept. 29, 2017) the court compelled arbitration with respect to a putative class action suit brought by users of online tax preparation software after finding that delegation was required because the contract (an end-user license agreement required to use the software) incorporated the AAA arbitration rule, irrespective of the parties' sophistication. *Id.* at *3. The court explained that "courts in [the Northern District] have consistently found that the reference to AAA rules evinces a clear and unmistakable intent to delegate arbitrability to an arbitrator, regardless of the sophistication of the parties." *Id.* (citations omitted); *see also Cordas v. Uber Techs., Inc.*, 228 F. Supp. 3d 985 (N.D. Cal. 2017) ("nearly every decision in the Northern District of California has consistently found effective delegation of arbitrability regardless of the sophistication of the parties").[3]

Like the delegation provision in *Brennan*, each of Plaintiffs' ISAs state that "dispute[s] be resolved by binding arbitration administered by the American Arbitration Association in accordance with its Consumer Arbitration Rules available at www.adr.org." (Compl., Exh. A-D.) Those rules make plain that the arbitrator has "the power to rule on his or her own jurisdiction, including any

[3] At least one District Court in New York has also found *Brennan* persuasive in finding that the incorporation of arbitration rules empowering the arbitrator to decide arbitrability constitutes clear and unmistakable evidence of the parties' intent do delegate arbitrability, and noted that the *Brennan* court's holding explicitly did not limit the application of the rule to "sophisticated parties or to commercial contracts." *Peni v. Daily Harvest, Inc.*, No. 22CV5443 (DLC), 2022 WL 16849451, at *7 (S.D.N.Y. Nov. 10, 2022). Thus, even if New York law applied, the same outcome should occur.

objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim." Accordingly, the Arbitrability Rule applies, and any doubts in this case regarding arbitrability should be resolved by the arbitrator, not this Court.

3. Only A Minority Of Courts Consider "Sophistication" In Their Assessment Of The Arbitrability Rule.

Despite the weight of authority favoring delegation in this case, Plaintiffs may nevertheless point to the smattering of authority that still considers the parties' relative sophistication, or lack thereof, in determining whether the inclusion of AAA or JAMS rules, for example, constitutes an intent to delegate the question of arbitrability.

The leading case cited by plaintiffs trying to avoid arbitrability delegation is *Tompkins v. 23andMe, Inc.*, No. 5:13-CV-05682-LHK, 2014 WL 2903752, (N.D. Cal. June 25, 2014), *aff'd*, 840 F.3d 1016 (9th Cir. 2016), which held that "[t]here [was] good reason not to extend this doctrine from commercial contracts between sophisticated parties to online click-through agreements crafted for consumers." *Id.* at *11. *Tompkins*, however, was decided post-*Oracle*, but pre-*Brennan*, and thus without the benefit of the *Brennan* court's guidance "that its holding should not be understood to 'foreclose the possibility that this rule could also apply to unsophisticated parties or to consumer contracts." *Brennan*, 796 F.3d at 1130-31; *see Cordas*, *supra*, 228 F. Supp. 3d at 992 (relying on *Brennan*'s holding in delegating questions of arbitrability and finding *Tompkins* holding unpersuasive because it pre-dated *Brennan*).

Tompkins, which followed the minority view, is also distinguishable from this case as it involved a "click-through" (or a "clickwrap") agreement, which "presents the user with a message on his or her computer screen, requiring that the user manifest his or her assent to the terms of the license agreement by clicking on an icon." *Tompkins,* No. 5:13-CV-05682-LHK, 2014 WL 2903752, at *5, 11. In contrast, the ISAs signed by Plaintiffs in this matter are not the type of online contracts users "click-through" before using a mobile application or purchasing a consumer good. Plaintiffs received their ISAs upon request and were given an opportunity to read, review, seek advice from anyone, including asking questions to the School's support staff, and return the signed ISA if they chose to enroll. *Tompkins* is both out of date and involved a contract where concerns

regarding the counterparty's "sophistication" would seem more relevant.

Of course, some courts post-*Brennan* have not followed the prevailing view in this Circuit. *See Ingalls v. Spotify USA, Inc.*, No. C 16-03533 WHA, 2016 WL 6679561, at *4 (N.D. Cal. Nov. 14, 2016) (involving clickwrap agreement) and *Eiess v. USAA Fed. Sav. Bank*, 404 F. Supp. 3d 1240 (N.D. Cal. 2019) (involving form agreement for opening checking account). The face of Plaintiffs' 12-page ISAs, however, reveals that they are *not* clickwrap agreements, nor are they like the lengthy and usually adhesive agreements consumers are given with when they open accounts at financial institutions. Accordingly, there is no reason the Court should follow the minority view here.

4. Even If The Court Applied The Minority And Disfavored View, The Arbitrability Question Should Still Be Delegated To An Arbitrator Because Plaintiffs Are "Sophisticated" Parties.

To the extent the Court is inclined to weigh factors in determining Plaintiffs' level of sophistication, in spite of the authority above finding that the level of sophistication does not impact the question of delegation when the arbitral rules are incorporated into the agreement, Plaintiffs should not be considered unsophisticated parties. Plaintiffs received their ISAs, which are only 12-page documents, with an unlimited number of opportunities to inquire about the ISA's terms. The terms of the arbitration clause contained in the ISA are under an all-caps heading titled "DISPUTES" and a subheading titled "Arbitration." Included in the clause is the "www.adr.org" website where the Plaintiffs could easily have accessed the AAA Consumer Arbitration Rules. In other words, there was no mystery here—Plaintiffs had every chance to review the provisions of the ISA and bring their question to Defendants' staff, or anyone else.

Moreover, Plaintiffs were not unsophisticated at the time they signed their ISAs. According to their verified Complaint, each Plaintiff performed a degree of investigation and inquiry into the School before signing their ISAs. Plaintiff Fuller pleads that "[a]fter seeing the [Facebook] ads [for the School], she visited Lambda's website and watched YouTube videos about the program to learn more." (Compl., ¶ 107.) According to her, she then made the decision after looking into the School that she should enroll and signed an ISA on April 22, 2020. (*Id.*, ¶ 109.) Also noteworthy, each ISA signed by Plaintiffs contains three checkboxes at the end of the ISA, one of which asks whether an

individual consents to the Electronic Funds Transfer Authorization (EFTA). (*Id*., Exh. A-D.) Plaintiff Fuller did not give her consent to the EFTA, suggesting that she read the ISA carefully and made deliberate decisions as to what she wanted to agree to, and what she did not.

Plaintiff Goncalves "began researching [the School] based on a friend's recommendation …. [and] reviewed Lambda's website and promotional materials for himself" before he signed his ISA on May 20, 2020. (*Id*., ¶¶ 117-118.) Plaintiff McAdams pleads that he "research[ed]" the School and that he "researched [the School's] website" before deciding to enroll. (*Id*., ¶¶ 124-215.) He signed an ISA on June 15, 2020. (*Id*., ¶ 125.) Plaintiff Molina also "research[ed]" the School, "consulted with his brother, a self-taught coder and web developer," and after "significant research and consultation," decided to sign an ISA on January 8, 2021. (*Id*., ¶ 135.)

The plain and unequivocal language for the Arbitration Agreement compels questions of arbitrability to the arbitrator. To the extent the Court does not reach that conclusion, it should still compel arbitration because the question of arbitrability should be deemed delegated to the arbitrator based on the incorporation of the AAA Consumer Arbitration Rules into the arbitration clause.

V. EVEN IF THE ARBITRABILITY QUESTION WERE NOT DELEGATED TO AN ARBITRATOR, THE COURT SHOULD STILL COMPEL ARBITRATION BECAUSE THE PARTIES' AGREEMENT REQUIRES PLAINTIFFS' CLAIMS BE BROUGHT IN ARBITRATION.

A. Legal Standard

Under the FAA, the court's role is "limited to determining (1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue …. If the response is affirmative on both counts, then the Act requires the court to enforce the arbitration agreement in accordance with its terms." *Boyle v. Relativity Educ., LLC*, No. CV 16-9402 PA (KSX), 2017 WL 11636425, at *2 (C.D. Cal. May 12, 2017) (citation omitted). "[A]ny doubts as to arbitrability must be resolved in favor of coverage and '[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.'" *Ambler v. BT Americas Inc.*, 964 F. Supp. 2d 1169, 1173-74 (N.D. Cal. 2013), *quoting AT&T Tech., Inc. v. Commc'n Workers*, 475 U.S. 643, 650 (1986).

With respect to validity and enforceability, arbitration provisions are valid "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2; *see also Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 67 (2010). "To determine whether a valid and enforceable agreement to arbitrate has been established, courts 'should apply ordinary state law principles that govern the formation of contracts.'" *Buchla v. Buchla Elec. Musical Instrument, LLC*, No. 15-CV-00921-HSG, 2015 WL 4463695, at *2 (N.D. Cal. July 21, 2015), *quoting First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995)).

With respect to the first prong, Plaintiffs do not dispute that a valid agreement to arbitrate was included in each of their ISAs. Rather, with respect to the second prong, they contend that their claims are not encompassed by the Arbitration Agreement because their claims are subject to the carve-out included in the Arbitration Agreement that purports to exempt "any proceeding commenced by either party seeking an injunction, a restraining order, or any other equitable remedy." (*See* Compl., ¶¶ 6, 48, fn. 1.) But creative pleading aimed at disguising the nature of the dispute as one that only involves "equitable relief" does not mean that their claims are somehow immune to the Arbitration Agreement.

B. All Three Of Plaintiffs' Causes Of Action Are Disputes That The Arbitration Agreement Expressly Requires To Be Arbitrated.

The Arbitration Agreement states in no uncertain language that "the exclusive means of initiating adversarial proceedings to resolve **any** dispute arising out of this agreement, your **Lambda School tuition**, or your **payments** to Lambda School" (referred to herein as a "Covered Dispute"). (Compl., Exh. A-D (emphasis added).) Each of Plaintiffs' claims is a Covered Dispute subject to arbitration. Looking to Plaintiffs' claims, and the allegations that purport to supports them, the gravamen of each, and the relief sought through them, is focused on "cancelling the ISAs and other **tuition** payment plans for Plaintiffs and the Class and enjoin[ing] any effort to collect upon or otherwise enforce them" (in other words, "a dispute arising out of" the ISAs) and for "restitution in the form of refunds for **all payments** made" (in other words, "a dispute arising out of [Plaintiffs'] payments to Lambda School"). (*Id*., Prayer for Relief, p. 36, ¶¶ 9-10 (emphasis added).)

All of the "disputes" Plaintiffs are attempting to redress through this action fall within the

clear and mandatory language in the Arbitration Agreement. For example, Plaintiffs' first cause of action for violations of the CLRA, and their third cause of action for violations of the FAL, rest on the same allegation that they executed their ISAs, and in the case of two of them, made "payments to Lambda School," because of purported misrepresentations regarding (1) the School's job placement rates and (2) its BPPE approval status. These claims are disputes "arising out of th[eir] agreement," their "tuition," and/or " [their] payments to Lambda School." Plaintiffs' first and third causes of action should be compelled to arbitration under the plain language of the parties' contract.

The same is true with respect to Plaintiffs' second cause of action for violations of the UCL. This claim centers on two basic, but flawed, theories: (1) that the School's allegedly *fraudulent* business practices induced them to enter their ISAs and (2) that the School's allegedly *unlawful* business practices harmed them by causing them to incur debt and, in some cases, make payments to the School. (*See id*., ¶¶ 168-173.) Accordingly, this claim is also a "dispute arising out of th[eir] agreement," their "tuition," and/or a "[their] payments to Lambda School." Plaintiffs' second cause of action should be compelled to arbitration as well.

The plain language of the parties' Arbitration Agreement, which defines which types of disputes are arbitrable, unmistakably covers all three of Plaintiffs' causes of action as each is premised on a Covered Dispute.

C. The Court Should Not Countenance Plaintiffs' Attempt At Pleading Around The Agreement They Executed.

Mindful of the fact that all of their causes of action are premised on Covered Disputes, and therefore must be arbitrated, Plaintiffs attempt to cleverly plead around their agreement by, among other things, characterizing their claims as only seeking "equitable" relief. Such gamesmanship, however, is unavailing.

1. Plaintiffs' Attempt At Creating A Carveout Is Incorrect.

Plaintiffs' attempt at arguing that the Parenthetical Language in the parties' Arbitration Agreement somehow creates a carveout for ***any*** cause of action, so long as it seeks equitable relief, is inconsistent with the plain language of the contract. The unambiguous words in the provision at issue identify types of ***disputes*** that must be arbitrated—and make exceptions in narrow

circumstances based upon ***remedies*** sought. Critically, the Parenthetical Language does not identify a new class of ***disputes*** that do ***not*** need to be arbitrated. Nothing in the provision suggests that a Covered Dispute suddenly becomes outside its scope because of the remedy it seeks. Indeed, the correct read of the Parenthetical Language is that it empowers parties to either seek injunctive or ***similar*** equitable relief (1) to enforce the Arbitration Agreement; (2) to effectuate the arbitrator's decisions; (3) to preserve the status quo while the arbitrator decides the underlying merits; and/or (4) after the merits of the underlying substantive claims have been adjudicated in arbitration.

With respect to the first and second uses of the remedies included in the Parenthetical Language, courts in the Ninth Circuit and elsewhere have found that these types of clauses are not "carve-outs" in the sense that they create avenues for litigating claims outside of arbitration, but rather they are meant to "aid" in accomplishing and effectuating the results of the arbitration process.

In *Dohrmann v. Intuit, Inc.*, 823 F. App'x 482 (9th Cir. 2020), albeit an unpublished decision, the Ninth Circuit adopted just such a view as to an arbitration clause that required "'any dispute or claim' 'will be resolved by binding arbitration" and that included a clause stating "any party to the arbitration may at any time seek injunctions or other forms of equitable relief from any court of competent jurisdiction." *Id.* at 484. The court held that the language concerning "injunctions or other forms of equitable relief" only permitted the "district court to issue equitable relief in aid of arbitration, not determine the merits of an arbitrable dispute." *Id.* at 484-85, *citing AT&T Techs.*, 475 U.S. at 650. The *Dohrmann court* held that the "language 'any party to the arbitration,' 'suggests that arbitration still applies to all disputes, but that in addition, the parties are 'entitled to pursue equitable remedies' before courts." *Id.* at 485, *citing Comedy Club, Inc. v. Improv W. Assocs.*, 553 F.3d 1277, 1285 (9th Cir. 2009). The *Dohrmann* arbitration agreement—"'any dispute or claim' 'will be resolved by binding arbitration" and "any party to the arbitration may at any time seek injunctions or other forms of equitable relief from any court of competent jurisdiction"—is substantially the same as the Arbitration Agreement's language—"As the exclusive means of initiating adversarial proceedings to resolve any dispute arising out of this agreement, your Lambda School tuition, or your payments to Lambda School (other than any proceeding commenced

by either party seeking an injunction, … or any other equitable remedy …), either party may demand that the dispute be resolved by binding arbitration." (Compl., Exh. A-D.)

Comedy Club, the case cited in *Dohrmann* a decade later, found that an arbitration agreement with a similar provision that identified the availability of equitable relief outside of arbitration "still applie[d] to all disputes, but that in addition, the parties are 'entitled to pursue equitable remedies' before courts." *Comedy Club*, 553 F.3d. at 1285. The court held that "it was a rational interpretation of the agreement to say that the arbitrator could decide both equitable and legal claims and that the provision for court jurisdiction on equitable matters was ancillary to the arbitration." *Id*; *see Farr v. Acima Credit LLC*, No. 20-CV-8619-YGR, 2021 WL 2826709, at *6 (N.D. Cal. July 7, 2021), *reconsideration denied*, No. 4:20-CV-8619-YGR, 2021 WL 5161923 (N.D. Cal. Nov. 5, 2021) (where arbitration agreement added similar exemption to seek equitable relief in the courts, the court ordered claims seeking injunctive relief to arbitration because the "relief hinges on the merits of plaintiff's claims," and "will not aid the arbitration proceedings.").

A similar arbitration provision containing nearly identical language was analyzed just last week by a district court in Pennsylvania in *Continental Materials, Inc. v. Veer Plastics Private Limited*, No. 2:22-CV-3685-MRP, 2023 WL 2795345 (E.D. Pa. Apr. 5, 2023). There, like here, the plaintiff argued that "the equitable relief provision [wa]s a carveout," permitting it to seek relief outside of arbitration. *Id.* at *3. In response, the defendant argued that:

> [T]here [wa]s no 'carveout' and that the provision merely permit[ted] parties to seek court intervention in aid of arbitration, i.e., enforcement of an award entered by the arbitrator. . . .[and] that the provision d[id] not carveout any claims, rather [just] permit[ed] certain forms of relief.

Id. Like the Court should here, the Pennsylvania district court agreed with the defendant finding that "the equitable relief provision d[id] not 'carveout' any claims from the arbitration agreement, but rather permit[ted] parties to seek equitable relief in aid of arbitration." *Id.* at *4. In so finding, the court explained:

> [r]eading the equitable relief provision as [the plaintiff] would like [it] to, carving out any request for equitable relief, would create a carveout so broad that it would render the rest of the arbitration agreement void, as it would permit parties to bring any and all claims before a court so long as they include a request for equitable relief. This construction is contrary to principals of contract interpretation and to the parties evidenced intent to send disputes to arbitration.

Id. There, like here, the provision did ***not*** create a carveout; it merely empowered the parties to enforce the arbitration agreement or carry out the arbitrator's eventual orders.

The third manner in which such language can or should be interpreted is as empowering the parties to seek interim relief from the courts to preserve the status quo pending arbitration. Indeed, that conclusion was reached in connection with a similar provision in *Auntie Anne's, Inc. v. Wang*, No. CV 14-01049 MMM (EX), 2014 WL 11728722 (C.D. Cal. July 16, 2014). There, the court found that similar language did not create a carveout, but instead empowered the parties to preserve the status quo pending arbitration. In analyzing the language of the pertinent arbitration provision, as well as language the plaintiff argued created a carveout for actions sounding in equity, the court "conclude[d] that the provision [wa]s more probably intended to permit [the] plaintiff to seek limited relief in a court of law – i.e., an injunction – pending a decision on such relief by the arbitrator of the underlying claims." *Id.* at *11. In reaching this conclusion, the district court essentially acknowledged that such language, like the Parenthetical Language in Plaintiffs' ISAs, really just gave meaning to what many courts within the Ninth Circuit already recognized—that regardless of what any particular arbitration provision says, courts are empowered to order injunctive relief in order to preserve the status quo pending arbitration.[4] *See*, *e.g.*, *Riverside Publ'g Co. v. Mercer Publ'g LLC*, 829 F. Supp. 2d 1017, 1020 (W.D. Wash. 2011), *citing Toyo Tire Holdings of Am., Inc. v. Continental Tire N. Am., Inc.,* 609 F.3d 975, 980 (9th Cir.2010) (acknowledging that "[m]any courts have held" that "equitable relief *in aid of arbitration"* is available to parties to an arbitration); *Gen. Mills, Inc. v. Champion Petfoods USA, Inc.*, No. 20 Civ. 181 (KMK), 2020 WL 915824, at *6 (S.D.N.Y. Feb. 26, 2020) (finding that similar language "simply confirm[s] an already extant, independent legal right").

[4] In reaching this decision, the court relied upon several authorities recognizing as much. *See Toyo Tire*, 609 F.3d at 981 ("[A] district court may issue interim injunctive relief on arbitrable claims if interim relief is necessary to preserve the status quo and the meaningfulness of the arbitration process – provided, of course, that the requirements for granting injunctive relief are otherwise satisfied"); *Holyfield v. Julien Entertainment.com, Inc.*, No. CV 12–9388 CAS (FFMx), 2012 WL 5878380, *3 n. 3 (C.D. Cal. Nov. 21, 2012); *Teradyne, Inc. v. Mostek Corp.*, 797 F.2d 43, 51 (1st Cir. 1986); *Roso-Lino Bev. Distrib. v. Coca-Cola Bottling Co.*, 749 F.2d 124, 125 (2d Cir. 1984); *Sauer-Getriebe KG v. White Hydraulics., Inc.*, 715 F.2d 348, 350 (7th Cir. 1984).

The fourth manner in which such language can or should be interpreted—that it is meant to enable parties to seek injunctive or similar equitable relief ***after*** arbitration—was adopted by a district court in South Carolina, when it analyzed similar language in an arbitration provision, and rejected the same type of expansive interpretation as the one advocated by Plaintiffs in this case. In *Starnes v. Harrell Indus., Inc.*, No. CA 0:13-01109-JFA, 2014 WL 104096 (D.S.C. Jan. 9, 2014), the arbitration provision stated "THE RIGHT OF EITHER PARTY TO SEEK INJUNCTIVE OR EQUITABLE RELIEF FROM A COURT OF LAW." *Id.* at *4. The plaintiff argued that, because he sought the equitable relief of "front pay," his ADA claim was not subject to the parties' arbitration provision. *Id.* The court concluded that, because ADA claims were clearly disputes covered by the arbitration provision, the plaintiff's cause of action should be adjudicated by an arbitrator, and, "if the arbitrator f[ound] [the] [d]efendant liable to [the] [p]laintiff on the ADA claim, and after the arbitrator considers [the] [p]laintiff's entitlement to any available legal remedies—including compensatory damages—the matter w[ould] return to th[e] court for consideration of [the] [p]laintiff's claims for equitable relief related to his ADA claims." *Id.*

These interpretations of similar language are not just one-off district court decisions; they have been adopted widely in other courts that have interpreted equitable relief clauses similarly. "Examples of arbitration agreements with equitable relief provisions that courts found did not create a carve-out include" the following (*see GateGuard, Inc. v. MVI Sys. LLC*, No. 19 CIV. 2472 (JPC), 2021 WL 4443256, at *7–8 (S.D.N.Y. Sept. 28, 2021)):

- "You and we agree that any dispute, claim or controversy ... will be settled by binding arbitration between you and us, and not in a court of law, with the exception of either party seeking injunctive or equitable relief...." *Tabas v. MoviePass, Inc.*, 401 F. Supp. 3d 928, 938 (N.D. Cal. 2019); *see also id.* at 940.
- "Notwithstanding any other provision herein to the contrary, any Claim involving a request for equitable or injunctive relief or specific performance may will? [sic] be litigated at any time under the exclusive jurisdiction of the courts...." *Jacobs Field Servs. N. Am., Inc. v. Wacker Polysilicon N. Am., LLC*, 375 F. Supp. 3d 898, 902, 913 (E.D. Tenn. 2019);
- "Notwithstanding the foregoing, either PARTY may elect to seek injunctive relief or other equitable remedies against the other PARTY from any court of competent jurisdiction, without waiving the PARTY's right to arbitrate disputes for money or damages." *McKesson Corp. v. Health Robotics, S.R.L.*, No. 11 Civ. 728 (JCS), 2011 WL 3157044, at *2 (N.D. Cal. July 26, 2011); *see also id.* at *9.

> • "Notwithstanding the foregoing, either [party] may apply to a court of competent jurisdiction for the imposition of an equitable remedy...." *DXP Enters., Inc. v. Goulds Pumps, Inc.*, No. 14 Civ. 1112 (LHR), 2014 WL 5682465, at *1 (S.D. Tex. Nov. 4, 2014); *see also id.* at *4.
>
> • "Notwithstanding any provision of this section to the contrary, each party shall be entitled to seek injunctive and other equitable relief in any court or forum of competent jurisdiction to enforce the provisions of this Agreement...." *Clarus Med., LLC v. Myelotec, Inc.*, No. 05 Civ. 934 (DWF/JJG), 2005 WL 3272139, at *3 (D. Minn. Nov. 30, 2005); *see also id.* at *4.

See GateGuard, Inc., 2021 WL 4443256 at **7-8.

The Court should reach a similar conclusion here, and join the chorus of "courts [that] have routinely rejected the argument that [Plaintiffs] advance[] here." *Info. Sys. Audit & Control Ass'n, Inc. v. TeleCommunication Sys., Inc.*, No. 17 C 2066, 2017 WL 2720433, at *4 (N.D. Ill. June 23, 2017).[5] Parenthetical Language does not create a "carveout" to the types of ***disputes*** that must be arbitrated; it merely empowers the parties "to seek judicial enforcement of the arbitration agreement and of any award entered by the arbitrators," just like the provision in *Continental Materials, Inc.*, to preserve the status quo pending arbitration like in *Auntie Anne's, Inc.*, or to return to court ***after*** Plaintiffs' causes of action are adjudicated by an arbitrator, just like the provision in *Starnes*.[6]

2. Even If The Parenthetical Language Created A "Carveout," Plaintiffs' Attempt At Applying It To All Equitable Remedies Is Unavailing.

Assuming *arguendo* that the Parenthetical Clause has some meaning broader than the enforcement of the arbitration agreement or an award entered by an arbitrator, Plaintiffs' causes of

[5] In support of this conclusion, the *Info. Sys. Audit & Control Ass'n, Inc.* court cited *Comedy Club*, 553 F.3d at 1286 ("[T]he Federal Arbitration Act ... does not give a court the authority to issue equitable remedies, such as a temporary injunction, to maintain the status quo between the parties. Thus, it makes sense that if the parties wanted to give themselves the ability to seek temporary equitable remedies in courts while arbitration was ongoing, they would add such a clause to the arbitration agreement."); *see also Remy Amerique, Inc. v. Touzet Distribution, S.A.R.L.*, 816 F. Supp. 213, 218 (S.D.N.Y. 1993); *Fraser v. Brightstar Franchising, LLC*, No. 16 C 8179, 2016 WL 6442185, at *2 (N.D. Ill. Nov. 1, 2016).

[6] To be sure, some courts *have* found that arbitration agreements can include equitable carveouts. However, as one district court explained, they "have typically only found an equitable relief provision to serve as a carve-out when the provisions says that all 'claims' or 'actions' seeking equitable relief are exempted from arbitration," which this one does not. *GateGuard,* 2021 WL 4443256, at *6-7 (collecting cases). As "that language is lacking" in this Arbitration Agreement, the Parenthetical Language does not "'transform[] arbitrable claims into nonarbitrable ones [just because of] the form of relief prayed for'"—just like the court concluded in *GateGuard. Id*.

action still must be arbitrated as they do not fit within the purported carveout.

As an initial matter, Plaintiffs' preferred interpretation of their agreement would place general language in a parenthetical ("other equitable remedy") over the specific language describing the Covered Disputes ("any dispute arising out of this agreement, your Lambda School tuition, or your payments to Lambda School"). This not only does not make sense, but it also runs afoul of what the United States Supreme Court has described as the "ancient interpretive principle" of *generalia specialibus non derogant*. *Nitro-Lift Techs., L.L.C. v. Howard*, 568 U.S. 17, 21 (2012). That principle, that the specific must govern over the general, militates heavily against Plaintiffs' interpretation that the general "any other" language somehow eviscerates the parties' clear and unmistakable intention to arbitrate disputes like the three causes of action alleged by Plaintiffs.

Plaintiffs' interpretation would also lead to the same "absurd results" that another court within the Northern District considered in rejecting a different attempt at transforming similar language into an exception for ***all*** claims seeking equitable remedies. *See Farr*, *supra*,, 2021 WL 2826709, at *4. In *Farr*, the court noted that, under such a reading, "[a] consumer seeking any form of equitable relief could circumvent arbitration, even where, as here, such relief is predicated on a dispute presumably falling within the scope of the arbitration agreement." *Id.* The same "absurdity" would result here if the Court countenanced Plaintiffs' effort to broaden the Arbitration Agreement.

Plaintiffs' apparent argument—that seeking ***any*** type of equitable relief automatically takes a dispute outside the scope of the Arbitration Agreement—is also inconsistent with other interpretive principles as well. For example, the language "any other equitable remedy" follows the reference to "injunction[s]" and "restraining order[s]." The better interpretation of "other equitable remedy," therefore, is that it covers equitable remedies that are ***similar*** to injunctions and restraining orders, like specific performance or mandatory injunctions—not literally every single type of equitable relief, from accounting of profits to constructive trusts. *Scally v. Pac. Gas & Elec. Co.*, 23 Cal. App. 3d 806 (1972), a case involving statutory interpretation, helps explain why. There, the California Court of Appeal described the interpretive "doctrine of Ejusdem generis," which states that "where general words follow the enumeration of particular classes of persons or things, the general words

will be construed as applicable only to persons or things of the same general nature or class as those enumerated." *Id.* at 819. There, like here, the court was specifically analyzing the language "other" and "any other," and concluded that it must be interpreted in light of the language that preceded it. Applying that principle here makes it clear that the language "any other equitable remedy" should be interpreted like the equitable relief specifically identified before it, namely, injunctions and restraining orders, and not as a loophole that would bring in literally ***every*** type of equitable remedy, from equitable estoppel to equitable tracing.

Like in *Scally*, Plaintiffs' interpretation of the Parenthetical Language should also fail because it also runs afoul of the general principle against interpreting language in a manner that would render certain words or phrases surplusage. Paraphrasing the *Scally* court, "if the [parties] had intended the general words [of 'any other'] to be used in their unrestricted sense, [they] would not have mentioned the particular things or classes of things [such as 'injunction[s]' and 'restraining order[s]'] which would in that event become mere surplusage." *Id.* Or as another district court put it in rejecting an attempt by a plaintiff to argue that similar exemptive language did not apply to all equitable claims, "'[i]f the parties intended to carve out an exception to arbitration for all equitable claims, they could have done so'…" *Farr*, *supra*,, 2021 WL 2826709, at *4.

Finally, Plaintiffs' urged interpretation—that seeking ***any*** type of equitable relief can suddenly transform a Covered Dispute into a non-arbitrable claim—makes no sense in light of the policies favoring mutuality in interpreting arbitration provisions. Under Plaintiffs' view, if the School initiated a dispute to obtain ***unpaid*** tuition from Plaintiffs, it would need to do so through arbitration, since such relief is legal in nature—but if Plaintiffs initiated a dispute to obtain ***paid*** tuition from the School, it could do so in court, since such relief is (according to Plaintiffs) equitable. This asymmetry makes no sense and offends the FAA's policy favoring mutuality.

Wu v. JPMorgan Chase Bank, N.A., No. LACV1900363JAKSKX, 2019 WL 4261880 (C.D. Cal. Aug. 5, 2019) teaches, not just that courts favor mutuality in interpreting arbitration provisions, but also that courts will, in some circumstances, affirmatively ***edit*** arbitration provisions in order to ensure that they do not effectuate asymmetric outcomes like the one Plaintiffs advocate here. In *Wu*,

an equitable exception, though facially neutral, was literally re-written by the court upon a motion to compel arbitration, because, without the court's edits, it would confer a more substantial advantage to one party to the agreement than it would to the other. *Id.* at *11. If courts in the Northern District will ***re-write*** arbitration provisions to ensure mutuality, surely this Court should not adopt an interpretation that would permit Plaintiffs to litigate a payment dispute in court, while requiring the School to initiate the same type of dispute in arbitration.

Ultimately, as multiple canons of construction favor the more reasonable interpretation of the Arbitration Agreement—that not every single type of equitable relief is exempted from its scope, the Court should resist Plaintiffs' effort at luring it into creating an exception that swallows the rule.

3. Even If Seeking Equitable Relief Automatically Exempted Covered Disputes From The Arbitration Agreement, Plaintiffs' Claims Must Still Be Arbitrated (Or At Least Stayed).

Even if Plaintiffs' flawed interpretation under the Arbitration Agreement were correct, their claims still should be arbitrated. The Complaint identifies fourteen (14) separate types of relief. The first three (3) pertain to the purported class action, and therefore are not relevant to this analysis. The next five (5) seek declarations, all concerning ***past*** events that no longer present live or present controversies. The final six (6) are all captioned as "[o]rder[s]" to Defendants, ranging from the repayment of tuition to the payment of attorney's fees. Even if Plaintiffs were correct that claims seeking any "equitable" relief are automatically outside the scope of the Arbitration Agreement, the remedies they actually seek do not get them there, at least not across the board, especially in light of the FAA's policies in favor of resolving ambiguities and close calls by compelling arbitration.

a. *Plaintiffs' Declaratory Relief Demands Do Not Necessarily Qualify As Equitable Relief.*

With respect to the five (5) requests for ***declaratory relief***, their mere assertion would not automatically get Plaintiffs out of arbitration, even if their interpretation were correct. As an out-of-state court explained in a similar context, "it is not clear that [a] declaratory-judgment claim can in fact be regarded as equitable in nature." *Info. Sys. Audit & Control Ass'n, Inc.*, 2017 WL 2720433, at *3. "Strictly speaking, such claims are neither equitable nor legal but instead take on the character of the underlying claim." *Id.*, *citing Emp'rs Ins. of Wausau v. Shell Oil Co.*, 820 F.2d 898, 900–01

(7th Cir. 1987) ("Declaratory judgments are neither 'legal' nor 'equitable' … To tell how to classify these beasts, we must evaluate the underlying claim.")); *see also Nowak v. Pennsylvania Pro. Soccer, LLC*, No. CIV.A. 12-4165, 2012 WL 4459775, at *2 (E.D. Pa. Sept. 26, 2012) (finding that "the plaintiff's declaratory judgment action d[id] not" constitute equitable relief because, "if there was no declaratory judgment remedy, the plaintiff would have brought a claim for breach of contract, which is a claim that sounds in law, not equity."). The point is just saying "declaratory relief," on its own, is not sufficient for purposes of fitting within a purported exception for "equitable remedies." This is especially true here, where declaratory relief is not even appropriate in the first instance, as each demand concerns ***past*** events, none of which concern ripe or live controversies.

b. *Plaintiffs' Demands That The Court "Order" Defendants To Do Various Things Do Not Necessarily Qualify As Equitable Relief.*

With respect to the final six (6) types of relief—the purported "[o]rder[s] to Defendant—none would get Plaintiffs out of their agreement to arbitrate, even if they were right about the meaning of the Parenthetical Language. (Compl., Prayer for Relief, p. 35-36.) The last two demands, Demand Nos. 13 and 14, which concern attorney's fees and a catch-all request for "all such further relief as the Court deems just and proper," are neither legal nor equitable, and therefore can be put to the side for purposes of this analysis. (*Id.*)

Demand Nos. 10 and 11, which purport to concern "restitution" (in the form of repayment of tuition) and interest accrued in connection therewith, also do not get Plaintiffs out of the woods either. (*Id.*) Even if these disguised claims for ordinary damages did qualify as "restitution," that still does not automatically mean they sound in equity, rather than at law. Demand No. 12 also asks for a public injunction that frames its request as seeking an order barring attempts to collect on amounts owed under ISAs entered into by members of the class, but which is a typical form of a compensatory damage—barring collection on a loan is the same as a money judgment for the amount owed on the same loan. (*Id.*)

In *Great-W. Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002), the Supreme Court, albeit in the ERISA context, explained that restitution is not necessarily an equitable remedy. In *Knudson*, the High Court distinguished between legal and equitable restitution, relying on the "well-

settled principle that restitution is not an *exclusively* equitable remedy." *Id*. at 213, 215 (internal citations omitted) (emphasis in original). The Court found "for restitution to lie in equity, the action generally must seek not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession." *Id*. at 213-14. (internal quotations omitted). After drawing this distinction, the Court held that the restitution sought by the plaintiff was *legal*, and *not* equitable, because the petitioner did not seek imposition of a constructive trust or an equitable lien on specific property; rather, they sought imposition of personal liability on respondents through money damages. *Id*. at 214.

The Supreme Court expanded upon *Great-W Life*'s teaching in *Montanile v. Bd. of Trustees of Nat. Elevator Indus. Health Benefit Plan*, 577 U.S. 136 (2016). In *Montanile*, the High Court dealt with a circumstance where the funds, although specifically identified at one time, had been dissipated by the defendant on nontraceable items, leaving the plan to seek recovery "out of the defendant's general assets." *Id*. at 144. In explaining the distinction between equitable and legal claims, the Court stated "[e]quitable remedies are, as a general rule, directed against some specific thing; they give or enforce a right to or over some particular thing ... rather than a right to recover a sum of money generally out of the defendant's assets." *Id.* at 145. (internal quotations omitted).

The Court in *Montanile* further explained that even if a plaintiff has a right, through an equitable lien or constructive trust, to specific identifiable funds at one point in time, if a defendant has dissipated those specific funds on nontraceable items, any corresponding equitable remedy to those specific funds is eliminated, and the plaintiff remains with a claim at law to compensate for any alleged wrongdoing. *Id*. at 146.

Following these cases, the Ninth Circuit in *Depot, Inc. v. Caring for Montanans, Inc*., 915 F.3d 643 (9th Cir. 2019) held that the plaintiffs' restitution claim was legal, and not equitable. *Id*. at 662. In *Depot, Inc*., the court focused on the facts that plaintiffs had not identified a "specific fund" to which they were entitled and the money plaintiffs sought to recover never existed as a distinct fund. *Id*. In rejecting the plaintiffs' argument, the Court of Appeals stated "a judgment in plaintiffs' favor would have no connection to any particular fund whatsoever. Defendants would simply be

required to pay a certain amount of money, and they could "satisfy that obligation by dipping into any pot" they like. … That is restitution at law, not equity." *Id*. (internal citation omitted).

The Supreme Court and Ninth Circuit's teachings show that Plaintiffs' belief that their claim for restitution is equitable is wrong. As the Court held in *Great-W Life*, equitable restitution is most appropriate when a plaintiff seeks the imposition of a constructive trust or equitable lien on specific and identifiable property. *Great-W.*, 534 U.S. at 214. However, Plaintiffs have not identified any specific funds or identifiable property to which they are entitled, nor have they even attempted to demonstrate how the relief they seek would be distinguished from any other funds or traced to any specific property. Plaintiffs' failure to plead any such identifiable property should be interpreted as a concession that what they seek is not the return of some *specific* property, but the payment of money in the form of a compensatory damage—i.e., a remedy at law. Plaintiffs' contrived pleading, clearly meant to avoid framing the relief they seek as legal for the purpose of evading the Arbitration Agreement, does not mean that their claim is in fact one sought in equity.

Furthermore, like *Depot. Inc*., even if Plaintiffs in this case prevailed in obtaining proving a claim for *equitable* restitution, the end result would still be that Defendants would be required to pay money to Plaintiffs—not from any specific property or in connection with any traceable fund or account—but from "dipping into any pot" they like. *Depot, Inc.*, 915 F.3d at 662. Plaintiffs seek damages in the form of the repayment of money paid to Defendants under their ISAs. The repayment of money, which could be satisfied by payment from any account, and which has no connection to any specific identifiable property, is nothing other than *legal* restitution in the form of money damages. *See also Duty Free World, Inc. v. Miami Perfume Junction, Inc.*, 253 So. 3d 689, 697 (Fla. 3d DCA 2018) (finding unjust enrichment claim did not constitute claim for "equitable relief" where plaintiffs sought "nothing more than money to compensate them for payments [they] made under [certain] purchase orders" for products the defendants refuser to deliver because the plaintiffs did not allege that the funds they sought to recover could "clearly be traced to particular funds or property in [the defendant's] possession").

Thus, even if the controlling language of the Arbitration Agreement defining a Covered

Dispute did *not* mandate that Plaintiffs' claims be arbitrated (which it does), Plaintiffs' attempt at characterizing the thrust of the relief they seek as "equitable" by denominating it as "restitution" is unavailing. The gravamen of their demand is the request for legal restitution—or more accurately a typical request for a remedy at law in the form of money damages—and their claims should be compelled to arbitration accordingly.

D. All Ambiguities—Whether The Parenthetical Language Is A Carveout, Whether It Applies To All Equitable Relief, And Whether Plaintiffs' Claims Sound In Equity, Rather Than At Law—Should Be Resolved In Favor Of Arbitration.

If Plaintiffs were given every benefit of the doubt, at best, they would have shown that there are some ambiguities in connection with the application of the Arbitration Agreement to their claims. But the FAA's "policy in favor of arbitration" nevertheless counsels in favor of resolving each ambiguity in favor of compelling arbitration. *McKesson*, 2011 WL 3157044, at *9. In *McKesson Corp.*, a similar dispute arose concerning the meaning of language in an arbitration provision that the plaintiffs claimed created a carveout. *Id.* The court nevertheless compelled arbitration, reasoning that:

> At best, the License Agreement is ambiguous as to whether [the plaintiff's] claims fall within the scope of the arbitration requirement. Although the Court finds strained [the plaintiff's] argument that the License Agreement creates a separate exception for equitable claims without limitation—including claims that seek money damages and therefore, arguably, should be classified as legal rather than equitable—to the extent that this interpretation might be found reasonable, the policy in favor of arbitration nonetheless requires that the arbitration clause be enforced as to [the plaintiff's] claims because [the defendant's] interpretation of the contract is also reasonable.

Id. Thus, even if the Court found that ***some*** of Plaintiffs' arguments have merit, arbitration should nevertheless be compelled because all ambiguities should be resolved in favor of arbitration. *See also Tabas v. MoviePass, Inc.*, 401 F. Supp. 3d 928, 940 (N.D. Cal. 2019) (explaining that "ambiguit[ies] must be resolved in favor of arbitration").

VI. TO THE EXTENT ANY CLAIMS ARE NOT COMPELLED TO ARBITRATION, THEY SHOULD BE STAYED PENDING ARBITRATION.

Courts in the Ninth Circuit have discretion to stay claims that are not compelled to arbitration—but routinely stay the entire case when weighing "(1) the economy and efficiency that result from avoiding duplication of effort; (2) how suited the dispute is to the arbitration process; and

(3) the interdependence of the arbitrable claims and the non-arbitrable claims." *Gray v. Conseco, Inc.*, No. SA CV 00-322DOC (EEX), 2000 WL 1480273, at *8 (C.D. Cal. Sept. 29, 2000); *see also Stout v. Grubhub Inc.,* No. 21-CV-04745-EMC, 2021 WL 5758889, at *11 (N.D. Cal. Dec. 3, 2021) (staying public injunctive relief claim pending arbitration); *Eiess v. USAA Fed. Sav. Bank*, 404 F. Supp. 3d 1240, 1261 (N.D. Cal. 2019) (same); *Smith v. Medidata Sols., Inc*., No. 16CV1689-L(JLB), 2018 WL 1562007, at *5 (S.D. Cal. Mar. 30, 2018) (staying PAGA claim pending arbitration). In *Gray*, the court stayed the portion of the case that was not compelled to arbitration, the "equitable portion of [plaintiff's] § 17200 claim," because the "overwhelming majority of the claims" in the case were arbitrable, "[t]he non-arbitrable claim [was] based on exactly the same facts and issues as the arbitrable claims;" and the stay would "promote judicial economy and efficiency." *Id.*[7]

To the extent any of Plaintiffs' claims are not compelled to arbitration, whatever remains should be stayed pending a resolution in arbitration. After all, all of Plaintiffs' claims share the same nexus of facts. For example, Plaintiffs' claim, although false, that Defendants misrepresented their job placement rates to Plaintiffs and members of the proposed class in a manner that caused them to sign ISAs is an allegation that Plaintiffs contend justifies (1) cancelling their ISAs and repaying any money Plaintiffs paid to the School and (2) enjoining Defendants from misrepresenting job placement rates" via public injunctive relief.[8] (*See*, *e.g.*, Compl., ¶ 7.) To the extent the Court does not compel arbitration as to all of Plaintiffs' case, the case should be stayed to avoid duplicative efforts to decide questions in common and avoid rulings that may be incongruent if the cases were to proceed in parallel.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court order that this case be compelled to arbitration in its entirety.

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[7] "In the Ninth Circuit, courts have discretion to stay or dismiss claims subject to a valid arbitration agreement." *Houtchens*, No. 22-CV-02638-BLF, 2023 WL 122393, at *8. In addition, courts typically treat a motion to dismiss brought under Rule 12(b)(1) based on an arbitration provision as a motion to compel arbitration. *See*, *e.g.*, *Lemberg v. San Francisco Opera Ass'n*, No. 17-CV-06641-MMC, 2018 WL 11265549, at *1 (N.D. Cal. Jan. 19, 2018). Defendants' Motion is grounded in the more typical approach in the Ninth Circuit..

[8] For the avoidance of any doubt, the Ninth Circuit in *DiCarlo v. MoneyLion, Inc.*, 988 F.3d 1148 (9th Cir. 2021) has made clear that an arbitration provision ***may*** compel claims seeking public injunctive relief to arbitration and be enforceable. *Id.* at 1156.

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PILLSBURY WINTHROP SHAW PITTMAN LLP

/s/ *Patrick Hammon*

By: PATRICK HAMMON
ANDREW PARKHURST

Attorneys for Defendants,
BLOOM INSTITUTE OF TECHNOLOGY;
AUSTEN ALLRED