UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 20-60814-cv-ALTMAN/HUNT

KAREEM BRITT and
MONIQUE LAURENCE,
on behalf of themselves and
all others similarly situated,

Plaintiffs,

vs.

IEC CORPORATION d/b/a INTERNATIONAL
EDUCATIONCORPORATION and
IEC US HOLDINGS, INC. d/b/a FLORIDA
CAREER COLLEGE,

Defendants.
_____/

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO COMPEL OR, IN THE ALTERNATIVE, MOTION TO DISMISS

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INTRODUCTION

The Complaint in this case lays bare a shocking pattern of predatory conduct by a self-proclaimed "institution of higher education" known as Florida Career College ("FCC") and its parent company, International Education Corporation ("IEC"), which calls itself a "premier national provider of post-secondary career education." Compl. ¶¶ 46–47. These companies are not what they say they are. Indeed, as set forth in the Complaint in painstaking detail based on a comprehensive factual investigation, these Defendants created a profit center for themselves by cashing in on federal student loans that were supposed to be used for educational services for students. Worse, Defendants used that federal loan money to perpetuate their own business scheme, and left the students worse off than when they enrolled. Plaintiffs Kareem Britt and Monique Laurence are two such students, seeking to represent a class that has been similarly victimized by Defendants.

Defendants' primary argument appears to be that the Court should compel arbitration, though they simultaneously disavow arbitration for the very claims that are at issue in this lawsuit. Contradictions aside, there is no legal or factual basis to compel arbitration because the parties in this lawsuit did not agree to arbitrate the claims in this case. IEC has no contract with Plaintiffs, and FCC expressly and unequivocally agreed in writing that it would not invoke any arbitration agreement to prevent a class action lawsuit such as this one. And because the issue of arbitration begins and ends with the contractual terms, Defendants' strained inquiry of the federal regulatory landscape—a landscape in "flux" according to Defendants—is both irrelevant and wrong, and provides no support for compelling the arbitration of any of Plaintiffs' claims.

Defendants' motion to dismiss fares no better. The standing argument is premature, belied by the allegations, and otherwise based on a misreading of well-established law in this Circuit. The pleading arguments are nonstarters; each claim is well pleaded, drawing on specific factual allegations that more than satisfy even the most stringent pleading and legal requirements.

Both of Defendants' motions should be denied.

FACTUAL BACKGROUND

Plaintiffs Britt and Laurence attended and completed programs offered by Defendant FCC, a for-profit vocational school owned and operated by Defendant IEC. *Id.* ¶¶ 1, 3, 31-32, 48. IEC controls and manages FCC; together Defendants are engaged in a scheme to enrich themselves while substantially damaging students looking for education and career training as a way to improve their financial prospects. *Id.* ¶¶ 2-3, 48-52, 87.

Plaintiffs Britt and Laurence each entered into a contract with FCC. *Id.* ¶¶ 173, 207. Each contract consists of the terms of each Plaintiff's Enrollment Agreement, the terms of the Course Catalog that each Plaintiff received, and the May 14, 2019 Supplement that FCC sent to students updating the terms of their agreements, including the arbitration provisions. *Id.* ¶¶ 112, 237-38. The Supplement updating the arbitration provision of the contract with FCC (attached hereto as Exhibit 1) is clear and unambiguous:

> We agree not to use any predispute arbitration agreement to stop you from bringing a lawsuit concerning our acts or omissions regarding the making of the Federal Direct Loan or the provision by us of educational services for which the Federal Direct Loan was obtained. You may file a lawsuit regarding such a claim or you may be a member of a class action lawsuit regarding such a claim even if you do not file it. This provision does not apply to any other claims.

Id. Britt and Laurence did not enter into any agreement or contract with IEC.

Defendants' uniform predatory practices, acts, omissions, and misrepresentations pressure students to enroll and take out federal loans based on false beliefs. *Id.* ¶¶ 2, 11. Defendants then profit from enrolled students' federal student aid without providing those students the experience or career opportunities Defendants promised them. *Id.*. Defendants demand and encourage their own employees to enroll students at any cost. *Id.* ¶¶ 12, 92.

FCC trains its employees to harass and accost prospective students; if they do not meet their enrollment quotas, employees are fired. *Id.* ¶¶ 82-83, 89, 98-99. Defendants give recruiters lead sheets with contact information of prospective students purchased from various sources, including job search websites. *Id.* ¶ 97. Defendants employ a recruitment process that "flows through a set of pre-planned stages that FCC has designed to effect maximum pressure and,

therefore, maximum enrollment." *Id.* ¶ 105. Defendants' employees are trained to exploit students' individual struggles and present FCC as the means to a better life. *Id.* ¶ 103. They promise but fail to deliver training for a new career, job placement assistance, adequate equipment, and hands-on experience. *Id.* ¶¶ 14, 123, 125-26, 136. Defendants do not tell prospective students the low median earnings and dismal employment outcomes of their graduates, instead letting students believe that FCC programs will help their employment prospects. *Id.* ¶¶ 15-16. After Defendants have created a false image of what they are providing, they pressure students to take out loans to finance their education. *See id.* ¶¶ 3, 91, 111, 113, 175.

Defendants sell a predatory product. *Id.* ¶ 61. Graduates of FCC are unable to find employment in their field of study or are unable to earn enough to repay their loans after covering their basic needs. *Id.* ¶¶ 7, 70-72. FCC is crippling students with debt for its inflated tuition, but spends a fraction of tuition on instructional expenses. *Id.* ¶¶ 18, 20, 64-65. Defendants' practices are even more egregious as they target Black people, *id.* ¶ 23, using Black models in their advertisements on social media platforms where advertisers can target audiences based on race and location. *Id.* ¶¶ 140-42; *see also id.* ¶¶ 143-50. Their enrollment statistics substantiate that their racial targeting tactics are successful. *Id.* ¶¶ 25, 153-62.

ARGUMENT

The Motion to Compel Arbitration Should Be Denied.

I. Legal Standard

Evaluating motions to compel arbitration under the Federal Arbitration Act is a two-step process. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985); *Klay v. All Defendants*, 389 F.3d 1191, 1200 (11th Cir. 2004). First, the court must "determine whether the parties agreed to arbitrate the dispute." *Klay*, 389 F.3d at 1200. Second, the court must "decide whether legal constraints external to the parties' agreement foreclosed arbitration." *Id.* (internal quotation marks omitted). "Because arbitration is a matter of contract…[,] the FAA's strong proarbitration policy only applies to disputes that the parties have agreed to arbitrate." *Id.* Whether parties have agreed to arbitrate a dispute depends on the terms of the parties' contract. *Id.*

Summary judgment principles apply to this analysis. When faced with a motion to compel arbitration, "a district court may conclude as a matter of law that parties did or did not enter into an arbitration agreement only if 'there is no genuine dispute as to any material fact' concerning the formation of such an agreement." *Bazemore v. Jefferson Cap. Sys., LLC*, 827 F.3d 1325, 1333 (11th Cir. 2016) (quoting Fed. R. Civ. P. 56(a)).

II. Plaintiffs' Claims Are Not Subject to Arbitration.

Plaintiffs' claims are not subject to arbitration because there is no agreement with Defendants to arbitrate any of the claims.[1] First, the Supplement to the parties' written agreement modified their contract and eliminated arbitration for the claims alleged. Second, even if the Supplement did not modify the contracts, FCC still cannot compel arbitration because of promissory estoppel and waiver. Finally, even if the Borrower Defense Regulations ("BDR") were relevant to this motion—which they are not—none of Plaintiffs' claims are subject to arbitration.

A. The Parties Have Not Agreed to Arbitration.

Pursuant to the "first step" in the analysis, it is clear that the parties have not agreed to arbitrate this dispute. Plaintiffs' contracts with FCC specifically exclude from arbitration the claims in this lawsuit.

1. FCC's Supplement Precludes Arbitration.

On May 14, 2019, FCC emailed students a Supplement updating the terms of their contracts with FCC, including the arbitration provisions. Ex. 1; Compl. ¶¶ 112, 237-38. The language in the Supplement could not be clearer:

> We agree not to use any predispute arbitration agreement to stop you from bringing a lawsuit concerning our acts or omissions regarding the making of the Federal Direct Loan or the provision by us of educational services for which the Federal Direct Loan was obtained. You may file a lawsuit regarding such a claim or you may be a member of a class action lawsuit regarding such a claim even if you do not file it. This provision does not apply to any other claims.

[1] IEC does not have a good faith basis to move to compel arbitration in the first place, and Defendants' motion tacitly acknowledges this fact. While the opening pages of Defendants' motion loudly proclaim both Defendants FCC and IEC as co-movants to compel arbitration, IEC then quietly disappears from the section of the motion actually discussing arbitration.

Ex. 1.

Plaintiffs' claims fall within the Supplement's definition of non-arbitrable claims because they "regard[] the making of the Direct Loan or the provision of educational services . . . for which the loan was obtained." Ex. 1; Compl. ¶¶ 112, 238. Indeed, this entire lawsuit centers around the core theme that Defendants committed grievous acts and omissions toward their own students, in the context of providing so-called educational services, in order to benefit from their making and obtaining Federal Direct Loans.

The claims and allegations confirm this point. *See, e.g.*, Compl. ¶¶ 234 (alleging Defendants' acts and omissions violating FDUTPA were "[i]n connection with the making of federal student loans for enrollment. . . or for the provision of educational services), 240-41 (breach of contract claim relates to FCC's failure to provide the educational experience and job placement assistance promised in the contract itself and for which direct loans were obtained); 245-46 (negligence claim relates to acts in which Defendants engaged in order to procure students' enrollment and loan funds); 253-64 (Equal Credit Opportunity Act and Title VI claims relate to discriminatory acts taken in the making of student loans and educational services provided); 268 (FDUTPA claim for racial discrimination subclass also regards the making of the Direct Loan and educational services provided).

2. FCC's Supplement Is Enforceable Because It Modified the Parties' Contracts.

The Supplement updated the terms of students' contracts with FCC, including the arbitration provisions. Ex. 1; Compl. ¶¶ 112, 237-38. As Defendants correctly note, each Plaintiff's contract with FCC consists of the terms of each Plaintiff's Enrollment Agreement and the terms of the Course Catalog. Mot. at 5-6. The Course Catalogs included extensive provisions and notifications governing the terms of Plaintiffs' enrollment at FCC. Among these provisions are terms allowing FCC to unilaterally update its agreement with Plaintiffs so long as Plaintiffs receive adequate notification. ECF No. 24-2 at 31 ("The College is required to make changes in programs or policies when ongoing federal, state, or accrediting changes require such changes. These

changes may affect students currently in attendance at the time the change is made. Changes will be published in a revision to the Catalog. Students will be notified of any changes at the institution."). In the notification email, FCC explicitly acknowledged that the Supplement was "a supplement to your Enrollment Agreement." Ex. 1. Because the students' contract with FCC specifically allows for contract supplements, modifications, and revisions, as quoted above, the Supplement expressly modified any terms that purported to prevent Plaintiffs from bringing this class action in federal court.

In a passing and dispirited attempt to avoid this outcome, Defendants suggest that the Supplement is unenforceable because it "lacks any consideration or reliance." Mot. at 6. But under well-established contractual principles, Defendants are mistaken. Where, as here, "a contract provides for modification and the parties modify the contract in accord with the contract, no new and independent consideration is required to support the modification. Rather, the contract as modified is supported by the original consideration." *Bolus v. Morrison Homes, Inc.*, No. 8:08-cv-1957-T-23TBM, 2009 WL 4730601, at *2 (M.D. Fla. Dec. 9, 2009) (citations and internal quotation marks omitted); *accord Diverse Elements, Inc. v. Ecommerce, Inc.*, 5 F. Supp. 3d 1378, 1382 (S.D. Fla. 2014) ("A party can only reserve its right to unilaterally change a contract where that reservation is subject to limitations, such as reasonable notice."); *Bank of Am., N.A. v. Jill P. Mitchell Living Trust*, 822 F. Supp. 2d 505, 527 (D. Md. 2011) ("Courts may enforce contracts that provide a party with the unilateral right to modify an agreement so long as the contract requires the party to give advance notice.").

In sum, Plaintiffs and FCC have a binding contract providing that the claims in this case would not be subject to arbitration. And since it is well settled that "arbitration is a creature of contract" and a "court cannot compel parties to arbitrate their dispute in the absence of a clear agreement to do so," the motion to compel here must be denied as a matter of law. *Larsen v. Citibank FSB*, 871 F.3d 1295, 1302 (11th Cir. 2017).

3. FCC's Supplement Also Precludes Arbitration Based on Promissory Estoppel and Waiver.

Even if the Supplement did not modify the parties' contracts, the Supplement would nevertheless preclude arbitration based on two additional principles: promissory estoppel and waiver. First, because Plaintiffs plainly relied on the Supplement in expending their resources to commence this lawsuit in federal court, Defendants are estopped from invoking arbitration. *See Uphoff v. Wachovia Sec., LLC*, No. 09-80420-CIV, 2009 WL 5031345, at *4 (S.D. Fla. Dec. 15, 2009) (citing elements for promissory estoppel). Indeed, absent the language in the Supplement, Plaintiffs would not have prepared a lengthy class action complaint or provided the time necessary to prepare a case on behalf of a similarly situated class. *See Ocean Ave., LLC. v. Great Healthworks, Inc.*, Case No. 0:13-cv-61796-WPD, 2014 WL 11706419, at *5-6 (S.D. Fla. Feb. 4, 2014) (promissory estoppel should be applied "where the promisor reasonably should have expected that his affirmative representations would induce the promisee into action or forbearance substantial in nature, and where the promisee shows that such reliance thereon was to his detriment.") (citation omitted)). Plaintiffs' reliance was entirely reasonable under the circumstances given the nature and context of Defendants' promise—that if they sued, Plaintiffs could represent a class and need not file their suit in arbitration. *Id.* Accordingly, it is difficult to contemplate a more reasonable act of reliance under these circumstances than Plaintiffs' preparing and filing a federal class action. Further, if FCC is not held to its promise, Plaintiffs and class members will be severely prejudiced by losing their ability to collectively pursue their claims.

Defendants also waived any right to arbitrate these claims. Waiver is the "voluntary, intentional relinquishment of a known right." *Witt v. Metro. Life Ins. Co.*, 772 F.3d 1269, 1279 (11th Cir. 2014). "[W]hether waiver has occurred depends upon the facts of each case." *Freeman v. SmartPay Leasing, LLC*, 771 F. App'x 926, 932 (11th Cir. 2019) (citation and internal quotation marks omitted). Here, the Supplement clearly states that arbitration is waived. Although Defendants assert baldly that any waiver argument here "fails," they do not offer any credible

argument to support their contention.[2] *See Ivax Corp. v. B. Braun of Am., Inc*., 286 F.3d 1309, 1318 (11th Cir. 2002) (waiver of arbitration may occur by actions conducted outside the litigation context).

B. The Borrower Defense Regulations Offer No Support to Defendants' Contention that Any of Plaintiffs' Claims are Subject to Arbitration.

The question whether the parties have agreed to arbitrate any claims begins and ends with Defendants' Supplement.[3] However, Defendants insist that 34 C.F.R. § 685.300(i)(1), which contains the BDR's definition of "borrower defense claim," somehow governs which claims are not subject to arbitration, and reads into them a "carve-out" that excludes all Plaintiffs' claims. Even though the parties' written agreements are silent regarding 34 C.F.R. § 685.300(i)(1), not referring to it a single time, because Defendants beg the Court to ignore the language and delve

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[2] Although the language of the Supplement is clear, as is the law on estoppel and waiver, Defendants' motion should still be denied even if it were not because a summary judgment standard governs motions to compel arbitration.

[3] This same point also dooms Defendants' reliance on *Carr v. Grand Canyon Univ.*, No. 19-1707, 2019 U.S. Dist. LEXIS 194520 (N.D. Ga. Aug. 19, 2019) *appeal filed*, No. 19-13639 (11th Cir. Sept. 12, 2019), ECF No. 26. *Carr* and its current appeal before the Eleventh Circuit are irrelevant here. While FCC's Supplement provided its own broad definition of what claims could not be arbitrated in this case, the *Carr* defendants issued *a notice that directly cited 34 C.F.R § 685.300(i)(1) for its definition of "borrower defense claims" (referred throughout as non-arbitrable claims). Id.* Opp. Defs' Mot. Compel. 8-9, ECF No. 17. Accordingly, while the question of what constituted a non-arbitrable claim under 34 C.F.R. § 685.300(i)(1) was arguably before the court in *Carr*, it is entirely irrelevant here. This difference also means that a stay in this matter pending the Eleventh Circuit's anticipated decision in *Carr* on what constitutes a non-arbitrable claim under 34 C.F.R. § 685.300(i)(1) would be unjustified, as the Eleventh Circuit's decision will have no relevance here. *Carr* is also unpersuasive on its own, as it is a non-binding opinion whose interpretation of 34 C.F.R. § 685.300(i)(1) has been rejected by other courts that have considered the regulation. In *Ward v. Grand Canyon Edu., Inc.*, No. 17-A-03474-2 at *3 (Gwinnett Super. Ct. Dec. 6, 2019), *appeal filed*, No. 17A03474 (Ga. Ct. App. May 27, 2020) [attached hereto as Exhibit 2], the court correctly found the definition of "borrower defense claim" "is intended to clarify that claims other than those based on a breach of contract or substantial misrepresentation that may be asserted under § 685.222(b) if reduced to a judgment can ***also*** be asserted by students. . . . [the] phrase ["including a claim other than"] is intended to be inclusive[.]" This interpretation is consistent with the text and purpose of the rule, and is therefore more persuasive than *Carr*. *See also California Ass'n of Private Postsecondary Sch. v. DeVos*, No. CV 17-999 (RDM), 2020 WL 516455, at *1 (D.D.C. Jan. 31, 2020).

into this regulation and the BDR's framework, Plaintiffs will show why Defendants arguments here also fail.

1. Statutory Background

The BDR is relevant insofar as FCC sent the Supplement because of its promulgation. In 2016, the Department of Education ("ED") promulgated the 2016 Borrower Defense Regulations to protect student borrowers from misleading and predatory schools receiving federal student aid. *See* ED, Final Rule, Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, William D. Ford Federal Direct Loan Program, and Teacher Education Assistance for College and Higher Education Grant Program, 81 Fed. Reg. 75926 (Nov. 1, 2016) ("2016 Rule").[4] The BDR defined procedures where previously there had been none and established a federal eligibility standard. Most relevant to the issues here, the BDR *conditioned* institutional participation in the Direct Loan Program on an institution's agreement to *refrain from including or enforcing certain arbitration provisions or class action waivers in their enrollment agreements*. 34 C.F.R. §§ 685.300(e)-(f). Further, the BDR required schools that choose to receive proceeds from federal student loans to notify students that the school will not enforce class action waivers and predispute arbitration agreements. *Id.* Defendants sent such a notification, in the form of the Supplement discussed above, to students in May 2019. Compl. ¶¶ 112, 238.

2. The Definition of Non-Arbitrable Claims is Inclusive, Not Exclusive.

Defendants argue incorrectly that 34 C.F.R. § 685.300(i)(1) of the BDR contains a carve-out, and thus only a *subset* of claims contemplated by the BDR should be subject to arbitration. Conveniently, Defendants also claim Plaintiffs' have not plead any such claims (and they do not

[4] The BDR became law in October 2018 after a court ruled that ED had illegally delayed its July 1, 2017 effective date. *See Bauer v. DeVos*, 332 F. Supp. 3d 181, 183-84, 186 (D.D.C. 2018). ED promulgated a replacement rule, set to take effect on July 1, 2020, for loans made on or after its effective date. *See* ED, Final Rule, Student Assistance General Provisions, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program, 84 Fed. Reg. 49,788–,49,801 (Sept. 23, 2019).

posit what they could be). Mot. at 12-15. But there is no carve out, and the proposed reading would completely frustrate the purpose of the BDR.

The BDR identifies the type of conduct ED recognizes as grounds for a "borrower defense," then in a separate section regarding arbitration agreements and class action waivers, it defines non-arbitrable claims and incorporates the definition of "borrower defense" within that definition. As defined by the BDR, a "borrower defense" is "an act or omission of the school attended by the student that relates to the making of a Direct Loan for enrollment at the school or the provision of educational services for which the loan was provided." 34 C.F.R. § 685.222(a)(5). A non-arbitrable claim is one "that is or could be asserted as a borrower defense as defined in § 685.222(a)(5), *including* a claim other than one based on § 685.222(c) or (d) that may be asserted under § 685.222(b) if reduced to judgment." 34 C.F.R. § 685.300(i)(1) (emphasis added). Contrary to Defendants' assertions, breach of contract and substantial misrepresentation claims, identified in sections 685.222(c) and 685.222(d), respectively, are *also* non-arbitrable within the scope of section 685.300(i)(1). *See Cal. Ass'n of Private Postsecondary Sch.*, 2020 WL 516455, at *1 (stating that the non-arbitrable claims under 34 C.F.R. § 685.300(i)(1) include breach of contract and misrepresentation claims). Non-arbitrable claims also include claims described in section 685.222(b)—claims based on state or federal law resulting in a nondefault, favorable contested judgment from a court or administrative tribunal. As the language of the rules makes clear, the claims specified in sections 685.222(c)-(d) and 685.222(b) are just a *few* claims available to litigate.

3. Regulatory History Supports a Broad Reading of What Claims are Non-Arbitrable Under the BDR.

The operable BDR was promulgated in response to misconduct by Corinthian Colleges, which was subject to "multiple State and Federal investigations, one of which resulted in a finding by the Department that the college had *misrepresented* its job placement rates." Proposed Rule, Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, William D. Ford Federal Direct Loan Program, and Teacher Education Assistance

for College and Higher Education Grant Program, 81 Fed. Reg. 39,330, 39,335 (June 16, 2016) ("NPRM") (emphasis added). Therefore, it only makes sense that misrepresentations identical to those that led to changes in regulatory framework would fall under the category of claims allowed by the rules to be litigated in court. Under Defendants' proposed reading, these claims would be specifically *excluded* from the non-arbitration provision, which is plainly absurd. Also, in the NPRM, ED refers to the arbitration provisions as applying to "*potential* borrower defense claims" multiple times. *Id.* at 39,380-386 (emphasis added). ED also described a non-arbitrable claim as "a claim that is *or could be* asserted as a defense to repayment under § 685.206(c) or § 685.222[.]" *Id.* at 39,422 (emphasis added). Rather than narrowing or "carving out" categories of school misconduct, ED sought to ensure that participating institutions (and courts) would refrain from compelling to arbitration cases where the asserted misconduct could be—but may not yet be asserted or established as—a "borrower defense." Guidance from ED confirms this interpretation. After the BDR became effective, ED stated:

> An institution may not compel any student to pursue a complaint based upon a 'borrower defense claim' (generally, a claim that is or could be asserted as a borrower defense claim by a borrower under the Department's administrative process, see below) through an internal dispute process[.]

Office of Postsecondary Educ., U.S. Dep't of Educ., Guidance Concerning Some Provisions of the 2016 Borrower Defense to Repayment Rules at 4 (Mar. 15, 2019), https://perma.cc/VJ5F-V8LV. ED provides no indication that the non-arbitrable claims defined in section 685.300(i)(1) should be more narrowly construed than the broader definition of "borrower defense" in section 685.222(a)(5). The argument otherwise is illogical, because it would mean either (a) there are no available claims to litigate, because it is unclear what claims *not* based in misrepresentation or breach of contract would be available; or (b) the only claims not subject to arbitration are those already litigated to judgment under 685.222(b)—in contravention of BDR's provisions that enable students to "seek redress in court[.]" 2016 Rule, 81 Fed. Reg. at 75,939. Further, Defendants' interpretation directly conflicts with ED's statement that "[a] claim is not a borrower defense claim if it is not based upon an act or omission of the institution attended by the student that relates to

the making of a Direct Loan . . . . or the provision of educational services for which the loan was provided, such as a personal injury tort claim or a sexual or racial harassment claim." Office of Postsecondary Educ., at 5. Had ED meant for the non-arbitrable claims listed in section 685.300(i)(1) to *exclude* breach of contract and misrepresentation claims, surely it would have listed them along with the claims specifically carved out in the statement above.[5] Therefore, any claim regarding a school's acts or omissions, as defined by section 685.222(a)(5), can form the basis of a non-arbitrable claim under section 685.222(c) or (d).[6] All of Plaintiffs' claims fall under this definition, meaning that even if Defendants' Supplement left any doubt as to which claims are not subject to arbitration, the BDR supports Plaintiffs' position. The motion to compel arbitration should be denied.

[5] The racial discrimination claims and racial harassment claim are clearly different. *See* EEOC, *Race/Color Discrimination*, https://www.eeoc.gov/racecolor-discrimination (last visited June 12, 2020).

[6] Plaintiffs' FDUTPA, negligence, ECOA, and Title VI claims allege misrepresentations related to job placement, market availability, salary, services, facilities, curriculum, equipment, and educational services and programs, in furtherance of luring Plaintiffs or class members to the school to take out loans; therefore, they fall under the definition of a non-arbitrable claim for substantial misrepresentation under section 685.222(d), as well as, of course, the broader definition encompassed in section 685.222(a)(5). Compl. ¶¶ 138-39, 173, 207, 234, 240-41, 245-46, 253, 259, 264, 268; *see* § 685.300(i)(l). Defendants failed to prepare graduates, to provide hands-on experience, well equipped classrooms and facilities, and job placement as promised in the Course Catalog, Compl. ¶¶ 134-39, 240, which falls under a non-arbitrable claim for breach of contract under section 685.222(c). *See* § 685.300(i)(l). Class members who took out loans to attend FCC prior to July 1, 2017 fall under the narrower 1994 rule ("any act or omission of the school attended by the student that would give rise to a cause of action against the school under applicable State law") ED, Final Rule, William D. Ford Federal Direct Loan Program, 59 Fed. Reg. 61,664, 61,696 (Dec. 1, 1994); but even so, arbitration is likewise waived for these claims because FDUTPA is a state law claim, and the remainder of claims are based off the same conduct that gave rise to the FDUTPA claim.

The Motion to Dismiss Should Be Denied

None of Defendants' myriad procedural and substantive reasons for dismissing Plaintiffs' complaint has any merit, either.

I. Plaintiffs Have Article III Standing to Bring Claims on Behalf of the Classes.

Defendants' assertion that Plaintiffs lack standing to bring claims on behalf of the "All FCC Class" and the "Race Discrimination Subclass" is both premature and wrong.

First, it is premature. Although Defendants couch their argument as a challenge to Article III standing, their argument really pertains to questions of class certification, such as typicality. *See* Fed. R. Civ. P. 23(a). As courts have observed, the "class certification stage is the appropriate time to address … standing to assert claims relative to particular products." *Randolph v. J.M. Smucker Co.*, No. 13-80581-CIV, 2014 WL 1018007, at *6 (S.D. Fla. Mar. 14, 2014); *accord Runton v. Brookdale Senior Living, Inc.*, 2018 WL 1057436, at *9 (S.D. Fla. Feb. 2, 2018) ("A plaintiff's standing as a putative class representative must be resolved before certifying a class; that determination may occur in the course of addressing a properly-presented motion for class certification."); *see also Dabish v. Brand New Energy, LLC*, Case No. 16-cv-400 (BAS)(NLS), 2016 WL 7048319, at *2 (S.D. Cal. Dec. 5, 2016) ("[C]ourts have found that analyzing the issue of standing, when there are similarities between the products, is better accomplished under Rule 23 at the time of class certification.").[7]

At any rate, Defendants' standing argument is wrong. Defendants assert that "[e]ach class representative must sufficiently state a claim under each count." Mot. at 16. But as long as *one* of the Plaintiffs has standing to raise each of the claims in the complaint, Article III is satisfied. *Prado-Steiman ex rel. Prado v. Bush*, 221 F.3d 1266, 1279-80 (11th Cir. 2000). Further, Defendants' assertion that Plaintiffs fail to "plead[] *specific* facts that would support their representation of a class of students from other programs or campuses," Mot. at 16 (emphasis

[7] Although some courts have opted to address standing at the motion to dismiss stage, the inquiry is more efficiently addressed at class certification, once discovery regarding Defendants' conduct has been completed and once, as required by the applicable rule, the Court in its class-certification order "must define the class and the claim claims." Fed. R. Civ. P. 23(c)(1)(B).

added); *see id*. at 17, ignores both the factual allegations and the legal standard that "[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presum[e] that general allegations embrace those specific facts that are necessary to support the claim." *Wilding v. DNC Servs. Corp*., 941 F.3d 1116, 1124 (11th Cir. 2019) (citation and internal quotation marks omitted). Thus, Plaintiffs' allegations of injury embrace specific facts necessary to establish class standing. *See, e.g.*, Compl. ¶¶ 138-39, 164-93, 194-219.

What's more, named plaintiffs are not required to establish standing of absent class members. *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1273 (11th Cir. 2019); *Wilding*, 941 F.3d at 1124-25; *Prado-Steiman ex rel. Prado*, 221 F.3d at 1279. And Defendants rely on inapposite decisions where plaintiffs who purchased products different from those bought by class members lacked standing to represent them. Mot. at 16 (citing *Toback v. GNC Holdings, Inc.*, No. 13-cv-80526, 2013 WL 5206103, at *4-5 (S.D. Fla. Sept. 13, 2013); *Ohio State Troopers Ass'n v. Point Blank Enters.*, 347 F. Supp. 3d 1207, 1221 (S.D. Fla. 2018)). Here, Plaintiffs challenge a policy or practice that is applied classwide, in which case Article III standing is satisfied. *See generally Marko v. Benjamin & Bros., LLC*, 2018 WL 3650117, at *4 (M.D. Fla. May 11, 2018) (standing met based on "policy and practice" of Reservations.com of failing to disclose reservation fee).[8]

Even if Defendants' authority were relevant, it fails to support Defendants' argument. Unlike in the different-products cases, the allegations here are class-wide—*i.e*., Defendants were selling educational and career-opportunity services but failed to provide those services for anyone

[8] *Accord Andrews v. Am. Tel. & Tel. Co.*, 95 F.3d 1014, 1022 (11th Cir. 1996) (standing met where defendant made classwide solicitations to make 900-number calls); *Griffin v. Dugger*, 823 F.2d 1476, 1482-83 (11th Cir. 1987) (standing satisfied based on practices of Florida department of corrections as to all black employees); *A&M Gerber Chiropractic LLC v. Geico Gen. Ins. Co*. 2017 WL 35519, at *4 (S.D. Fla. Jan. 3, 2017); *Braggs v. Dunn*, 321 F.R.D. 653, 662 (M.D. Ala. 2017) (standing under Eleventh Circuit law based on challenge to policies and procedures of Alabama prison system*); Bonnie L. v. Bush*, 2001 WL 1400051, at *4 (S.D. Fla. May 10, 2001) (standing met based on "system-wide" policies and procedures); *Coy v. Allstate Floridian Ins. Corp.*, 2006 WL 8438753, at *4 (M.D. Fla. Jan. 24, 2006).

enrolled at FCC. *See*, *e.g.*, ¶¶ 3-21, 61-139, 173, 207-08, 237-40. Indeed, the factual allegations supporting Plaintiffs' claims, such as the amount spent on educational services or the percentage of FCC graduates who are able to repay their loans, are not campus or program specific. Therefore, there are no material differences in the "programs and other campuses" where Plaintiffs and class members receive FCC's training, and Defendants point to none. Mot. at 16-17. Thus, the allegations, which must be accepted as true, are sufficient to support Plaintiffs' representation of class members in other programs and on other campuses.[9]

Defendants' argument that Plaintiff Monique Laurence cannot represent a racial discrimination subclass, Mot. at 16-17, ignores that only a *single* plaintiff is necessary to support standing, *see supra* at 13–14, and that Plaintiff Kareem Britt is named as an additional class representative for a racial discrimination subclass, *see* ¶¶ 164-93, 220. Defendants do not argue that Britt cannot represent a racial discrimination subclass.

II. The Complaint Is Not a "Shotgun Pleading."

Before addressing any of Plaintiffs' claims, Defendants mistakenly assert that the entirety of the complaint should be dismissed as an impermissible "shotgun pleading."

First, Defendants complain that "Plaintiffs incorporate the factual allegations of the entire Complaint into every count," which, Defendants believe, is a "tactic … designed to confuse Defendants and prevent them from being able to adequately address the actual claims and allegations asserted." Mot. at 26. This assertion cannot be taken seriously. To begin with, nothing in the Federal Rules of Civil Procedure forbids a party from incorporating factual allegations into every count—and Defendants cite no rule stating otherwise. But even putting that wrinkle to the side, Defendants cannot seriously contend that they are "confused." First, the complaint consists

[9] *See also Weiss v. Gen. Motors LLC*, 418 F. Supp. 3d 1173, 1180 (S.D. Fla. 2019); *Guerrero v. Target Corp.*, 889 F. Supp. 2d 1348, 1353-54 (S.D. Fla. 2012) (standing alleged where plaintiff had purchased only few of honey products in defendant's entire product line, but asserted that each product line was not actually honey); *Heuer v. Nissan N. Am., Inc.*, Civil Action No. 17-60018-Civ-Scola, 2017 WL 3475063, at *5 (S.D. Fla. Aug. 11, 2017) (plaintiff has standing to pursue claims for products not purchased where they were essentially "the same product" as product plaintiff purchased).

of various sections, each of which is identified by well-defined headings and at least one of which is expressly required by Rule 8 (e.g., "a short and plain statement of the grounds for the court's jurisdiction"). The complaint then states each of the claims in separate counts. Although, as in most complaints, the allegations are incorporated into each count, this is not a situation where "each count adopts the allegations of all preceding counts, causing each successive count to carry all that came before and the last count to be a combination of the entire complaint." *Weiland v. Palm Beach Cty. Sheriff's Office*, 792 F.3d 1313, 1321 (11th Cir. 2015). Nor is "this . . . a situation where a failure to more precisely parcel out and identify the facts relevant to each claim materially increased the burden of understanding the factual allegations underlying each count." *Id.* at 1324.

Next, Defendants assert that the "Complaint impermissibly relies on group pleading," and that "Plaintiffs' alter-ego styled allegations directed at corporate veil piercing are facially insufficient and do not justify its impermissible group pleading." Mot. at 18-19. This assertion, too, is incorrect. There are only two defendants in this action, and thus Defendants' concerns about "group pleading" are overstated. Further, Defendants' "alter ego" theory is irrelevant, for Plaintiffs allege that IEC's own actions, separate and apart from FCC's, make it liable for the causes of action alleged. Indeed, Plaintiffs allege that IEC "exercises direct control over its subsidiaries—including over FCC." Compl. ¶ 48. Plaintiffs allege that "IEC's and FCC's controlling management is one and the same." *Id.* ¶ 49. Plaintiffs allege that IEC's president and CEO is the same as FCC's president. *Id.* ¶ 50. And Plaintiffs allege that IEC is directly involved in high-pressure tactics and "failing to disclose to prospective students the truth" about FCC's predatory product. *Id.* ¶ 87, 92, 110, 150.

Last, Defendants assert that "Count I is deficient because it contains multiple sub-counts and does not separate into a different count each cause of action or claim for relief." Mot. at 20 (internal quotation marks omitted) (alteration omitted). It's not clear what Defendants mean by this. Count I is for FDUTPA violations, which—as Defendants observe correctly elsewhere, Mot. at 20—contains three, and only three, elements. *See Rollins v. Butland*, 951 So. 2d 860, 869 (Fla. Dist. Ct. App. 2006) ("FDUTPA has three elements: (1) a deceptive or unfair practice; (2)

causation; and (3) damages."). Defendants appear to complain about the subparagraphs in paragraph 234 as "multiple sub-counts." Mot. at 20. But Defendants are wrong: the subparagraphs in paragraph 234 are not "sub-counts"—whatever that means—but only examples of the first element of a FDUTPA claim. Defendants have cited no law requiring anything different.

III. Each of Plaintiffs' Counts States a Claim.

A. Plaintiffs' Complaint States a FDUTPA Claim and is Not Barred by the Integrated Contract.

Defendants incorrectly claim that Plaintiffs do not allege their FDUTPA count with sufficient particularity under Rule 9(b). Defendants are mistaken: Rule 9(b) does not apply to FDUTPA claims but, even if it did, Plaintiffs' allegations more than satisfy the rule.

Most courts within this district have held that Rule 9(b) does not apply to FDUTPA claims.[10] As these courts recognized, FDUTPA is a cause of action independent from fraud and was not intended to be cabined by the stricter elements and pleading requirements of fraud. *See, e.g.*, *FTC*, 281 F. Supp. 3d at 1333 (because "FDUTPA was enacted to provide remedies for conduct outside the reach of traditional common law torts like fraud, 'the plaintiff need not prove the elements of fraud to sustain an action under [FDUTPA]'") (quoting *Tenet Healthcare*, 420 F. Supp. 2d at 1310)); *see also Hetrick v. Ideal Image Dev. Corp.*, 372 F. App'x 985, 992 (11th Cir. 2010) (noting different legal standards governing fraud and FDUTPA claims even where plaintiff alleged both and each arose from same conduct). Accordingly, Rule 9(b) does not apply here.

Even if Rule 9(b) did apply, however, Plaintiffs' complaint would be sufficient. "[P]ursuant to Rule 9(b), a plaintiff must allege: (1) the precise statements, documents, or misrepresentations made; (2) the time, place, and person responsible for the statement; (3) the content and manner in

[10] *See, e.g.*, *FTC v. Student Aid Ctr., Inc.*, 281 F. Supp. 3d 1324, 1331-33 (S.D. Fla. 2016); *Deere Constr., LLC v. Cemex Constr. Materials Fla., LLC*, 198 F. Supp. 3d 1332, 1342-43 (S.D. Fla. 2016); *Harris v. Nordyne, LLC*, No. 14-civ-21884, 2014 WL 12516076, *4-5 (S.D. Fla. Nov. 14, 2014); *Sanchez-Knutson v. Ford Motor Co.*, 52 F. Supp. 3d 1223, 1239 (S.D. Fla. 2014); *U.S. Bank Nat. Ass'n v. Capparelli*, No. 13-80323-CIV, 2014 WL 2807648, at *5 (S.D. Fla. June 20, 2014); *Guerrero*, 889 F. Supp. 2d at 1354-55; *State of Fla. v. Tenet Healthcare Corp.*, 420 F. Supp. 2d 1288, 1310-11 (S.D. Fla. 2005).

which these statements misled the Plaintiffs; and (4) what the defendants gained by the alleged fraud." *Am. Dental Ass'n v. CIGNA Corp.*, 605 F.3d 1283, 1291 (11th Cir. 2010) (internal quotation marks omitted). Here, Plaintiffs meet each of these requirements. They allege the precise statements or misrepresentations made by identifying the five specific misrepresentations that were unconscionable, unfair, or deceptive under FDUTPA. *See* Compl. ¶ 234(a)-(e). The Complaint is replete with examples where Plaintiffs alleged the time, place, and persons responsible for these statements.[11] And Plaintiffs describe how the content and manner of these statements deceived them. According to Plaintiffs, the statements were misleading because they falsely stated or implied that Plaintiffs would receive their education as promised and a job if Plaintiffs enrolled in FCC. *See, e.g., id.* ¶ 138-39. Finally, the Complaint alleges what Defendants gained: Plaintiffs' tuition dollars. *See, e.g., id.* ¶ 139 (absent deceptive statements "the members of the proposed class or subclass would not have . . . agreed to pay what they did in tuition").

Defendants claim that Plaintiffs fail to allege any materially misleading statements under FDUTPA. *See* Mot. at 21-22. This is inaccurate. *See, e.g.*, Compl. ¶¶ 127-33, 136, 171-72, 183, 190, 200-02, 206.

Defendants also assert that "a for-profit entity does not violate FDUTPA by simply presenting information in the light most conducive to its business." Mot. at 21. Defendants are mistaken for two reasons.

[11] *Compare, e.g.*, Compl. ¶ 234(a), (d), and (e) *with id.* ¶ 199-200 ("In or around May 2017 . . . Ms. Laurence went to FCC Orlando to meet with a recruiter . . . The recruiter told Ms. Laurence that FCC provided lifelong job placement, but failed to provide Ms. Laurence with the actual job placement rates); *compare id.* ¶ 234(b) *with id.* ¶¶ 194-98 (alleging Plaintiff Laurence was inundated with calls by FCC recruiter after posting her resume on two job search websites after moving to Florida in December 2016) *and id.* ¶ 130 ("In 2017-2018, FCC's Executive Director directed Career Services Representatives at FCC West Palm Beach to persuade graduates to falsify employment waiver documents so the school's placement numbers appeared higher than they actually were."); *compare id.* ¶ 234(c) *with id.* ¶ 170-72, 183 (alleging FCC recruiter misled Plaintiff Britt about tools and equipment available to FCC students during Britt's August 22, 2018 tour).

First, this argument ignores the motion to dismiss standard by asking the Court to view Plaintiffs' allegations in a light most favorable to Defendants. *See Magwood v. Sec., Fla. Dept. of Corr.*, 652 F. App'x 841, 843 (11th Cir. 2016). Plaintiffs allege these statements were blatant falsehoods, distortions, and lies that swindled themselves and other vulnerable people out of thousands of dollars in tuition—not "spin" on accurate data and facts.

Defendants are also mistaken because their argument is premised on a flawed reading of a non-binding opinion—*Casey v. Fla. Coastal Sch. of Law, Inc.*, No. 3:14-CV-1229-J-39PDB, 2015 WL 10096084, at *15 (M.D. Fla. 2015). The *Casey* court dismissed FDUTPA claims because it believed that the law-school student plaintiffs in the matter were sufficiently sophisticated not to have been duped by the defendant given that independent third-parties like *US News* and NALP offered alternative data on the defendant's employment outcomes. *See id.* at *15. The court's holding on sophistication and due-diligence has no bearing here. To begin with, the *Casey* plaintiffs had much more extensive education than Plaintiffs. While in *Casey*, the defendant operated a law school offering a post-professional degree to college-educated students, FCC operates a career college that targets vulnerable people often working minimum wage jobs. Further, even if Plaintiffs here were "sufficiently sophisticated" to catch or detect Defendants' misrepresentations and omissions, it is unclear how they would have done so under these facts. While NALP and *U.S. News* independently analyzed the *Casey* defendant's employment numbers and made public their independently curated analyses, *id.* at *13, no data was available here that Defendants had not already doctored or misleadingly designed, *see* Compl. ¶¶ 127-33.

Defendants assert that Plaintiffs failed to plead how Defendants' FDUTPA violations injured Plaintiffs. Mot. at 22. The argument is groundless: Plaintiffs allege that Defendants' conduct injured Plaintiffs by deceiving them into paying tuition expenses. *See* Compl. ¶ 139. Relatedly, Defendants submit that Plaintiffs may not seek consequential damages under FDUTPA for "lost future profits or wages." The argument is irrelevant. Plaintiffs are not seeking damages for lost future profits or wages; Plaintiffs' core damages consist of the purchase price or the difference between the value of what they were given and the value of what they were promised

according to Defendants' representations. *See, e.g., id.* ¶¶ 138-39; *see also Gastaldi v Sunvest Resort Comms., LC*, 709 F. Supp. 2d 1299, 1306 (S.D. Fla. Mar. 4, 2010) ("[Under FDUTPA], actual damages is the difference in the market value of the product or service in the condition in which it was delivered and its market value in the condition in which it should have been delivered according to the contract of the parties.") (citation and internal quotation marks omitted).

Finally, Defendants argue that the contract's merger and disclaimer of reliance clauses bar Plaintiffs' FDUTPA claim. *See* Mot. at 23. In so doing, Defendants rely on a 2007 case that dealt with merger clauses and the tort of fraud in the inducement. *See id.* But Plaintiffs make a FDUTPA claim—not one for fraud in the inducement—and differences between these claims lead merger and disclaimer clauses to far different legal consequences for each. First, disclaimer of reliance clauses are irrelevant for FDUTPA claims because, as Defendants themselves acknowledge, FDUTPA does not require reliance in the first place. *See Adrianne Roggenbuck Trust v. Dev. Res. Grp., LLC*, 505 F. App'x 857, 862 (11th Cir. 2013); *Coffey v. WCW & Air, Inc.*, Case No. 3:17-cv-90-MCR-CJK, 2018 WL 4154256, at *5 (N.D. Fla. Aug. 30, 2018); *Fitzpatrick v. General Mills, Inc.*, 635 F.3d 1279, 1282-83 (11th Cir. 2011); *Butler v. Yusem*, 44 So.2d 102 (Fla. 2010) ("injury by the party acting in reliance on the representation" is element of fraud in inducement). Although disclaimer of reliance language is irrelevant, a merger clause may bar a FDUTPA claim if the contract *expressly contradicts* the Defendants' allegedly unfair or deceptive statements. *See Coffey*, 2018 WL 4154256, at *5.[12]

As the contract never expressly contradicted any of the statements supporting Plaintiffs' FDUTPA claim, dismissal would be inappropriate. Although the contract notes that promising or guaranteeing employment may be unethical or illegal, it never states that Defendants do not

[12] Although the law governing the relationship between merger clauses and FDUTPA claims is clear, it is not clear whether merger clauses bar fraud in the inducement claims. The most recent court to have addressed the question held that "the presence of a merger clause is not an impediment to a cause of action for fraud in the inducement." *Cal. Instit. of Arts & Tech., Inc. v. Campus Mgmt. Corp.*, Case No. 18-24701-CIV-SMITH, 2020 WL 1692079, at *4 (S.D. Fla. Jan. 21, 2020).

promise employment placement. *See* ECF 24-1 at 4; 24-2 at 7; 24-3 at 4; 24-4 at 7. Stating that a promise made may be unethical or illegal is of course quite different from not making the promise or denying it—people make amoral promises all the time, as Defendants allegedly did here. Further, even if the contract expressly contradicts Defendants' employment-related statements, dismissal of the FDUTPA claim would still be unmerited because only 3 of the 5 statements on which Plaintiffs base the claim were employment-related. *See* Compl. ¶¶ 234(a), (d), and (e).

B. Plaintiffs' Breach of Contract Claims Are Not Barred by the Integrated Contracts Rule Barring Reliance on Inconsistent Allegations.

Defendants argue that Plaintiffs' breach of contract claims are barred because they are expressly contradicted by the plain language of the Enrollment Agreements. Mot. at 23 (quoting *Degirmenci v. Sapphire-Fort Lauderdale, LLLP*, 693 F. Supp. 2d 1325, 1341 (S.D. Fla. 2010)). As an initial matter, "an inquiry into whether the contracts at issue contained integration clauses, and the subject matter covered by those contracts, is precisely the kind of factual inquiry that is not appropriate under the legal standard for a Motion to Dismiss." *Zokaites v. Balistreri Realty, Inc.*, No. 06-61244-CIV, 2006 WL 8431529, at *4 (S.D. Fla. Nov. 27, 2006); *see also Allapattah Srvs., Inc. v. Exxon Corp.*, 61 F. Supp. 2d 1308, 1314-17 (S.D. Fla. 1999) (similar).

Further, "Florida law is clear that if a party alleges that a contract was procured by fraud or misrepresentation as to a material fact, an integration clause will not make the contract incontestable, and the oral representations may be introduced into evidence to establish fraud." *Zokaites*, 2006 WL 8431529, at *3; *see also Adios Aviation, LLC v. El Holdings I, LLC*, 2015 WL 12564317, at *6 (S.D. Fla. Sept. 29, 2015) (same); *McArthur Dairy, LLC v. McCowtree Bros. Dairy*, 2011 WL 2731283, at *3-4 (S.D. Fla. July 13, 2011). *See* Compl. ¶¶ 122-33.

In any event, Defendants entirely focus on allegations regarding employment and even here they fail to demonstrate that the allegations in the Complaint are expressly contradicted by plain language in the Enrollment Agreements or Course Catalogs. The integration clause provides that "no verbal statements or promises made before the execution of this agreement will be recognized." Exs. A, B. The Course Catalogs state that FCC "is not permitted by law to guarantee

employment." Ex. B, at 5; Ex. D, at 5. This language in both of these documents, however, does not expressly *contradict* the allegations in the Complaint: that Defendants would provide education and experience that, Defendants promised or implied, would prepare attendees for career opportunities.[13] There is no language in the Enrollment Agreements or Course Catalogs saying that the career training and education provided by Defendants will not result in jobs, or career opportunities, for those enrolling in and completing FCC's programs. Plaintiffs further allege that Defendants' representations and omissions, conveying that their programs and training were designed to provide class members with career opportunities, fall within the meaning of the contract. *See* Compl. ¶¶ 3-21, 61-139, 173, 207-08, 237-40. Additionally, Defendants ignore language in the Supplement (accepted as true and construed in Plaintiffs' favor) that indicates Plaintiffs are not precluded by the Enrollment Agreements and Course Catalogs from raising their Complaint's allegations in a class action where, as here, they are related to their provision of educational services. *See* Compl. ¶ 238; *see also supra* at 5-8 Thus, Plaintiffs' breach of contract claim is not defeated by the integration clause.[14]

C. Plaintiffs' Negligence Claim is Not Barred by the Terms of the Contract or Plaintiffs' Contract Claims.

Defendants next claim that the Enrollment Agreements preclude Plaintiffs from maintaining both an action in tort and one in contract, based on the same set of facts. Mot. at 24. But Plaintiffs may plead alternative theories of relief, even if the claims rely upon the same set of

[13] *See, e.g.*, *Coffey*, 2018 WL 4154256, at *5 ("Although the pertinent integration clause suggests that the [Plaintiffs] did not *rely on* Defendants' suggestion that their home water supply was not safe to drink without water treatment, it does not *contradict* that suggestion."); *Fed. Deposit Ins. Corp. v. Amos*, No. 3:12CV548-MCR/EMT, 2016 WL 4943827, at *1 (N.D. Fla. Feb. 2, 2016); *Hobirn, Inc. v. Aerotek, Inc.*, 787 F. Supp. 2d 1298, 1304 (S.D. Fla. 2011) (applying Florida law and finding that integration clause did not prevent plaintiff from bringing claim because integration clause did not expressly contradict alleged misrepresentations).

[14] Defendants' integration clause also has no application to the omissions alleged by Plaintiffs. *See Solar Star Sys., LLC v. BellSouth Telecommunications, Inc.*, No. 10-21105-CIV, 2012 WL 37387, at *3 (S.D. Fla. Jan. 6, 2012) ("omissions are analyzed differently than representations, and the integration clause only bars claims arising from affirmative pre-contractual statements, but not claims arising from omissions").

facts. *See Ideal Frame Co., Inc. v. Decisionhr USA, Inc.*, No. 8:16-CV-1963-T-36MAP, 2017 WL 3113466, at *3 (M.D. Fla. Mar. 22, 2017).[15] The only authority cited by Defendants is inapposite because, unlike here, there the plaintiff "chose[] not to plead an alternative claim for breach of contract." *Kaye v. Ingenio, Filiale De Loto-Quebec*, Inc., No. 13-61687-CIV, 2014 WL 2215770, at *5 n.4 (S.D. Fla. May 29, 2014).

Equally meritless is Defendants' argument that Plaintiffs' negligence claim must be dismissed because Plaintiffs fail to plead the existence or breach of any duty. Mot. at 24. First, the alleged facts, which must be construed as true and in Plaintiffs' favor, establish that Defendants violated various duties owed under state and federal law, including to "refrain from promising or implying guaranteed job placement, market availability, or salary" under Fla. Stat. § 1005.04(1)(c). *See* Compl. ¶ 234; *see also id.* ¶¶ 110-12, 134-39, 173, 207-08, 237-40, 245. Defendants also owed Plaintiffs a duty to disclose that FCC's courses, programs, and training would not guarantee them jobs.[16] When Defendants, as alleged, undertook the disclosure of information about their career training programs and made half-truths that promised or implied guarantees of job opportunities and placement, *see, e.g.*, ¶¶ 166, 169, 170-71, 183-87, 190, 200-02, they had a duty to disclose all material facts. Third, whether Defendants breached a duty (which Plaintiffs adequately allege) is a question of fact for the jury. *See Anderson v. Snyder*, 389 F. Supp. 3d 1082, 1090 (S.D. Fla. 2019); *Zivojinovich v. Ritz Carlton Hotel Co., LLC*, 445 F. Supp. 2d 1337, 1346 (M.D. Fla. 2006).

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[15] *See also Janssen v. Malin Haley DiMaggio Bowen & Lhota, P.A.*, No. 11-62720-CIV, 2012 WL 2054932, at *5 (S.D. Fla. June 7, 2012) ("the Court rejects Defendants' argument that Plaintiff fails to state a claim for breach of contract because the allegations for the negligence and breach of contract claim are identical. A plaintiff may plead alternative theories of relief."); *Manicini Enters., Inc. v. American Exp. Co.*, 236 F.R.D. 695, 698-99 (S.D. Fla. 2006) (plaintiff may plead inconsistent or alternative theories of relief)).

[16] Under Florida law, "a duty to disclose arises when one party has information that the other party has the right to know because of the fiduciary or other relationship of trust or confidence between them.'" *Temurian v. Piccolo*, No. 18-CV-62737, 2019 WL 1763022, at *6 (S.D. Fla. Apr. 22, 2019). Even absent such a relationship, "Florida law also provides that' '[w]here a party in an arm's-length transaction undertakes to disclose information, all material facts must be disclosed.'" *Brady v. Medtronic, Inc.*, No. 13-62199-CIV, 2015 WL 11181971, at *6 (S.D. Fla. Mar. 30, 2015).

D. Plaintiff Britt's ECOA Claims Should Not Be Dismissed.

There is no basis to dismiss Plaintiff Britt's ECOA' claim. First, Defendants' IEC and FCC are "creditors" under ECOA. Second, the Complaint meets the required pleading standard.

1. IEC and FCC are Creditors Under ECOA.

Under ECOA, it is unlawful for "any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction." 15 U.S.C. § 1691(a). A creditor is defined as "any person who regularly extends, renews, or continues credit; any person who *regularly arranges for the extension, renewal, or continuation of credit*[.]" 15 U.S.C. § 1691a. (emphasis added). For purposes of discrimination "the term creditor also includes a person who, in the ordinary course of business, *regularly refers applicants or prospective applicants to creditors*, or selects or offers to select creditors to whom requests for credit may be made." 12 C.F.R. § 202.2(l) (emphasis added). Plainly, both definitions express that arranging credit, the facilitating of the credit interaction, establishes an entity as a "creditor." Defendants *regularly arrange* for the extension, renewal, and continuation of credit for students, including Plaintiffs, by helping students with their FAFSA and taking out loans. Compl. ¶¶ 111, 113; 175-78, 210. Also, according to ED, "the institution plays a central role in determining which individuals receive loans, the amount of loan an individual receives[.]" 2016 Rule, 81 Fed. Reg. at 75,930.

Courts have repeatedly held that an entity that "arranges" credit is a creditor under ECOA. *See, e.g., Brook v. Sistema Universitario Ana G. Mendez, Inc.*, No. 8:17-CV-171-T-30AAS, 2017 WL 1743500, at *3 (M.D. Fla. May 4, 2017); *Martino v. City Furniture, Inc.*, No. 05-61316-CIV, 2006 WL 8431428, at *1 (S.D. Fla. June 15, 2006); *Munoz v. Int'l Home Capital Corp*., No. C 03-01099 RS, 2004 WL 3086907, at *6 (N.D. Cal. May 4, 2004). Defendants try to distract the Court by tying the definition of "creditor" to credit, but they fundamentally misread the facts and the law. Further, Defendants' argument that the ECOA claim fails because Plaintiffs do not allege that Defendants were "aware of any discriminatory lending practices by the federal government," Mot. at 26, is irrelevant as Plaintiff seeks to hold Defendants accountable for only their own conduct.

Plaintiff Britt's ECOA claim is based on the well-established "reverse-redlining" claim under ECOA, which centers on Defendants' predatory practices, and which is sufficiently pleaded.

2. Plaintiff Britt Sufficiently Pleads an ECOA Claim.

Reverse redlining occurs when a creditor specifically targets and extends credit to a protected class for a predatory product. *See Steed v. EverHome Mortg. Co.*, 308 F. App'x 364, 368 (11th Cir. 2009) (citing *Hargraves v. Capital City Mortg. Corp.*, 140 F. Supp. 2d 7, 20 (D.D.C. 2000), *reconsideration granted in part and denied in part*, 147 F. Supp. 2d 1 (D.D.C. 2001)). To establish this claim, Plaintiff Britt alleges that Defendants engage in predatory practices to sell predatory products by intentionally targeting students on the basis of race, or that their conduct results in a disparate impact on the basis of race, or that their conduct results in a disparate impact on the basis of race. *See id.*

To establish a prima facie case for ECOA under a reverse redlining theory, a plaintiff must allege: (1) he is a member of a protected class; (2) applied for and was qualified for a loan; (3) the loan was given on grossly unfavorable terms; and (4) he was intentionally targeted or discriminated against. *M & T Mortg. Corp. v. White*, 736 F. Supp. 2d 538, 575 (E.D.N.Y. 2010). Defendants cite the wrong test. Mot. at 27.

Plaintiff Britt sufficiently alleges each element.[17] Plaintiff Britt is part of a protected class; he is Black. Compl. ¶ 31. He applied for and was qualified for a loan. *Id.* ¶¶ 176, 178. His loans were given on grossly unfavorable terms as he was lured in by predatory practices, racial targeting, overvaluations, and misrepresentations by Defendants for a predatory product. *Id.* ¶¶ 140-42, 164-73, 180-93. He is now unable to repay the debt he was pressured to take out to finance his "education." *See id.* ¶ 191. Alleging "grossly inflated appraisals" is sufficient for the grossly

[17] Notably, "the elements of a prima facie case are flexible and should be tailored, on a case-by-case basis[.]" *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1123 (11th Cir. 1993). Also, the "prima facie case relates to the employee's burden of presenting evidence that raises an inference of discrimination," it is an evidentiary standard, not a pleading requirement, *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 510 (2002); *see McCone v. Pitney Bowes, Inc.*, 582 F. App'x 798, 801 n. 4 (11th Cir. 2014) (a plaintiff need not plead a prima facie case to survive dismissal).

unfavorable terms element. *Barkley v. Olympia Mortg. Co.*, No. 04-CV-875, 2007 WL 2437810, at *15 (E.D.N.Y. Aug. 22, 2007); *M&T Mortg. Corp.*, 736 F. Supp. 2d at 560 (holding whether grossly inflated appraisal satisfied the grossly unfavorable terms element was a genuine issue of fact and denied summary judgment).

Further, allegations regarding loans that are designed to fail may sufficiently plead an ECOA claim. *See Hargraves* 140 F. Supp. 2d at *18, 20-21, 23 (holding that loans designed to fail, among other practices, were enough to show defendants loans were unfair and predatory was a question for the jury). As Plaintiff Britt alleges, Defendants target students to take out loans that they are unable to repay and that are designed to fail as Defendants create "a false image of the school to induce students to enroll . . . . mak[ing] false representations, overpromising, and overvaluing their product. Compl. ¶ 109. Plaintiff Britt is unable to repay loans he was pressured to take out for Defendants inflated tuition. *See id*. ¶¶ 175, 191. Further, FCC does not tell "the truth about FCC's job placement statistics or the low rate of students who are able to repay their student loans." *See id*. ¶ 110. Had he known, he would not have enrolled. *See id*. ¶ 139. FCC graduates do not make earnings "sufficient to pay their loans after covering their basic needs. *Id*. ¶¶ 70-71.

Additionally, just as ECOA extends to more than just the denial of credit, it extends to *other matters* than just the traditional credit transaction of a loan, but racial targeting, misrepresentations, and other tactics used before getting to the financial aid office and loan terms. *See Hargraves*, 140 F. Supp. 2d at *23 ("a 'credit transaction' includes not only the extension of credit but investigation procedures, terms of credit, collection procedures, and *other matters*." (citing 12 C.F.R. § 202.2(m)) (emphasis added). Defendants are simply incorrect when they assert that "ECOA looks solely to the terms of the loan, not to what any particular borrower bought with it," and Plaintiff must identify discriminatory loan *terms*. Mot. at 27.

Last, Plaintiff Britt pleads sufficient evidence of intentional discrimination. Plaintiff alleges Defendants are engaged in a scheme to target Black people using Black models and distributing "advertisements on certain media and in certain locations," advertising on radio stations perceived to have a Black audience, recruiting at High Schools with large Black

populations, and, among other actions, targeting Black prospective students on social media platforms where it is possible to target advertisements to people interested in "African Americans" and/or "African American Culture." Compl. ¶¶ 24, 140-51. The Complaint also alleges, using statistical data, that the targeting is successful. *Id*. ¶¶ 153-62. Such facts have been held sufficient to state an ECOA claim in other reverse redlining cases. *See, e.g.*, *Horne v. Harbour Portfolio VI, LP*, 304 F. Supp. 3d 1332, 1341-42 (N.D. Ga. 2018).(finding an ECOA claim based in part on statistical racial demographic evidence and allegations that defendants advertised in Black communities); *Hargraves*, 140 F. Supp. 2d at *21-22 (finding an ECOA claim based in part on statistical evidence and allegations that defendants advertised in the Black community). All of these facts alleged in the Complaint point in one direction: Defendants are intentionally trapping Black students in debt by inducing them to enroll and to take out loans designed to fail.

E. Plaintiff Britt Sufficiently Pleads a Title VI Claim.

1. Plaintiff Britt's Title VI Claim is Not Predicated on Any Claim.

Plaintiff Britt's Title VI claim is based on the same facts and circumstances as his FDUTPA and ECOA claims, but is not predicated on them. He sufficiently states a claim of intentional discrimination under Title VI; he does not allege a disparate impact claim. Compl. ¶ 264. Thus, Defendants' argument regarding disparate impact, Mot. at 28, is irrelevant.

2. Plaintiff Britt States a Claim Under Title VI.

Plaintiff Britt sufficiently alleges facts to establish a prima facie case of intentional discrimination under Title VI both by the test Defendants propose, as well as the elements used for ECOA, which the Court may choose to adopt when considering the Title VI claim. *Brook*, 2017 WL 1743500, at *4 ("The Court sees no reason why Plaintiff cannot pursue her Title VI claim using a theory akin to reverse redlining. Courts have allowed plaintiffs to advance reverse redlining theories under other civil rights laws, like ECOA ….") (citations omitted). Regardless of the test chosen, Plaintiff Britt sufficiently states a claim.

Racial targeting for loans designed to fail is adverse action. Defendants argue Plaintiff Britt fails to plead adverse action, Mot. at 29, however, Plaintiff alleges he enrolled and took out student

loans based on FCC's misrepresentations and omissions. *See* Compl. ¶¶ 139, 164-73, 177-78, 180-93. He did not receive the product promised, and now he is crippled by debt unable to make his payments. *Id.* ¶¶ 180-89; *see id.* ¶ 191. Student loan debt can affect nearly every aspect of a students' life, including their credit, ability to provide for themselves and their families, and even secure stable housing. *Id.* ¶ 79, 139. This is certainly adverse action at the hands of Defendants.

Title VI claims do not require comparator evidence. *Blunt v. Lower Merion Sch. Dist.*, 826 F. Supp. 2d 749, 758 (E.D. Pa. 2011), *aff'd*, 767 F.3d 247 (3d Cir. 2014) (citing *Anderson v. Wachovia Mortg. Corp.*, 621 F.3d 261, 273 (3d Cir. 2010) and *Pivirotto v. Innovative Sys., Inc.*, 191 F.3d 344, 352-54 (3d Cir. 1999); *Brook*, 2017 WL 1743500, at *3-4 (plaintiff sufficiently alleged facts for a Title VI reverse redlining claim without providing comparator evidence). Therefore, Defendants argument that Plaintiff must plead comparator evidence fails. Mot. at 29. Under reverse redlining, "courts have readily adopted evidence of targeting to replace comparisons of the treatment of minorities with the treatment of non-minorities." *Ohio Civil Rights Comm'n v. Wells Fargo Bank, N.A.*, No. 1:11-CV-623, 2012 WL 1288489, at *6 (N.D. Ohio Apr. 16, 2012). To necessitate such evidence "would mean that Title VI . . . created to be an instrument for the abolition of discrimination, allows [this] injustice so long as it is visited exclusively on [one ethnic group].'" *Brook*, 2017 WL 1743500 at *4 (citing *Contract Buyers League v. F & F Inv.*, 300 F. Supp. 210, 216 (N.D. Ill. 1969)). Last, Plaintiff pleads sufficient evidence of intentional discrimination, as explained above *supra* at 24-27.

F. Plaintiff Britt Sufficiently Pleads a FDUTPA Claim.

Plaintiff Britt sufficiently pleads a racial discrimination claim for FDUTPA under the test cited *supra* at 17–21.[18] Plaintiff Britt alleged that Defendants are engaged in a deceptive act or unfair practice as he alleges Defendants are engaged in a scheme to target Black students to enroll

[18] A FDUTPA claim may be established if a Plaintiff satisfies the test for FDUTPA, *supra* at 17–21, or alleges a violation of "[a]ny law, statute, rule, or ordinance which proscribes unfair methods of competition, or unfair, deceptive, or unconscionable acts or practices[,]" Fla. Stat. § 501.203(3); *State Farm Mut. Auto. Ins. Co. v. Performance Orthapaedics & Neurosurgery, LLC*, 315 F. Supp. 3d 1291, 1306-08 (S.D. Fla. 2018). Therefore, Plaintiff may prevail on its FDUTPA claim if its ECOA claim prevails or if its FDUTPA claim prevails on its own.

using misrepresentations, omissions, and high-pressure tactics to take out loans they ultimately cannot afford and are designed to fail. Compl. ¶¶ 140, 268, 269; *see id.* ¶¶ 70-71, 76. Engaging in a scheme to target certain consumers using misrepresentations states a claim for FDUTPA. *See State, Office of Attorney General, Dept. of Legal Affairs v. Commerce Commercial Leasing, LLC*, 946 So. 2d 1253, 1259 (Fla. 1st DCA 2007) (finding a FDUTPA claim where defendant engaged in a scheme to target unsophisticated business owners to purchase a product using false representations); *FTC*, 281 F. Supp. 3d at 1330, 1333-34 (finding a FDUTPA claim where defendants engaged in "an unlawful debt relief enterprise that preyed on consumers' anxiety about student loan debt by falsely promising to reduce or eliminate their debt").

Plaintiff Britt alleged causation and actual damages. FCC heavily advertises to the Black community; Plaintiff heard about FCC from a targeted advertisement on Facebook. Compl. ¶¶ 140-51, 164. FCC's standard operating procedure includes misrepresenting and overvaluing their product to induce prospective students like Plaintiff to enroll and take out student loans, *See id.* ¶¶ 82, 101-10, 122, 137-39, 166, 169-75, 180-90, 193. A reasonable person would believe the promises and resources would be provided as stated, especially for the cost. Plaintiff and class members did not receive the product and value FCC promised. *Id.* ¶¶ 62-65, 122-33, 137-39, 180-90, 193. But for Defendants' unlawful practices, Plaintiff Britt and class members would not have enrolled in FCC and would not be crippled by debt. *See id.* ¶¶ 70, 139, 173, 191. Thus, Plaintiff's actual damages are a direct result of Defendants' actions and lack of value provided by Defendants' product.

IV. Damages and Injunctive Relief

Plaintiffs do not dispute that punitive damages are not available for the FDUTPA and Title VI claims. But Defendants' remaining arguments—such as whether Defendants' contractual limitations would forbid Plaintiffs from recovering punitive damages on Plaintiffs' breach-of-contract or negligence claims—are more appropriately left for a later date. *See Miller v. Comery*, No. 0:14-CV-60223, 2014 WL 7336676, at *3 (S.D. Fla. Dec. 24, 2014) ("'The decision whether

to award punitive damages and the amount that should be awarded have traditionally been questions for the jury to determine.'"). Last, contrary to Defendants' argument, Mot. at 30, even if plaintiffs fail to allege future harm, allegations of past harm are sufficient for injunctive relief under the FDUTPA. *See Jeff Enterprises, Inc. v. Home Depot U.S.A.*, Inc., No. 07-60302-CIV, 2008 WL 11402017, at *6-7 (S.D. Fla. Mar. 10, 2008); *Davis v. Powertel, Inc.*, 776 So. 2d 971, 975 (Fla. Dist. Ct. App. 2000).

CONCLUSION

The Court should deny the motion to compel and the motion to dismiss. With respect to the motion to compel, if the Court concludes that any genuine dispute exists, then, in accordance with 9 U.S.C. § 4, the Court must "make an order referring the issue or issues to a jury" to decide the issue. To that end, Plaintiffs demand under 9 U.S.C. § 4 a jury trial on all issues in the motion to compel. In the event the Court is inclined to grant the motion to dismiss in any respect, Plaintiffs respectfully request leave to amend.

REQUEST FOR HEARING

In accordance with Local Rule 7.1(b)(2), Plaintiffs requests a one-hour hearing focused on the factual, legal, and procedural issues raised by the motion to compel and motion to dismiss.

Dated: June 22, 2020

Respectfully Submitted,

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