UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No.: 0:20-cv-60814-RKA

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

Plaintiffs,

v.

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

Defendants.

DEFENDANTS' MOTION TO STAY DISCOVERY AND BIFURCATE CLASS DISCOVERY WITH SUPPORTING MEMORANDUM OF LAW

Pursuant to Rule 26 of the Federal Rules of Civil Procedure, Defendants IEC Corporation, d/b/a/ International Education Company ("IEC"), and IEC US Holdings, Inc., d/b/a Florida Career College ("FCC") (collectively, "Defendants"), hereby move the Court for entry of an order staying all discovery pending resolution of the Motion to Compel Arbitration, or in the Alternative to Dismiss the putative class action Complaint of Kareem Britt and Monique Laurence (the "Motion") [D.E. 24]. In the event the Court does not compel all claims to arbitration or dismiss this action in its entirety, Defendants move for entry of an order bifurcating class discovery and merits discovery, limiting the initial phase of discovery to issues necessary for certification followed by a secondary phase of discovery concerning the merits of the claims after the class certification hearing.

INTRODUCTION

Plaintiffs' putative class action Complaint alleges that Plaintiffs enrolled at FCC, but did not have the experience they were allegedly "promised" and now have student loan debt they are unable to pay. Plaintiffs have demanded initial disclosures from Defendants and have indicated an intent to propound immediate discovery relating to both class certification and merits on Defendants. As explained in the Motion, each Plaintiff consented to arbitration in the Enrollment Agreement and

waived any right to class arbitration, so all claims asserted by Plaintiffs are subject to arbitration. In the event any claims are not compelled to arbitration, the claims also lack adequate factual support and Plaintiffs fail to state any claim upon which relief can be granted and should be dismissed. Plaintiffs oppose Defendants' Motion. Defendants have yet to file their reply, nor has this Court determined whether it will hear oral argument on the Motion. In light of this landscape and the high likelihood all of Plaintiffs' claims will be either compelled to arbitration or dismissed, a stay of discovery would be appropriate to conserve judicial and party resources. Furthermore, to the extent any discovery before this Court is warranted, discovery should be bifurcated into a class phase and a merits phase.

ARGUMENT

I. DISCOVERY SHOULD BE STAYED PENDING A RULING ON DEFENDANTS' MOTION.

"[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigations." *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). This includes broad discretion in determining how to manage pretrial discovery matters. *See, e.g.*, *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1366 (11th Cir. 1997) (citation omitted) (overturning order to compel discovery for a failure to rule on the motion to dismiss first); *Perez v. Miami-Dade Cty.*, 297 F.3d 1255, 1263 (11th Cir. 2002) ("broad discretion in managing pretrial discovery matters").

The Eleventh Circuit "emphasizes the responsibility of trial courts to manage pretrial discovery in order to avoid a massive waste of judicial and private resources and a loss of society's confidence in the court's ability to administer justice." *Perez*, 297 F.3d at 1263 (internal quotation marks omitted). This includes "[g]ranting a discovery stay until an impending motion to dismiss is resolved." *Rivas v. Bank of New York Mellon*, 676 Fed. App'x. 926, 932 (11th Cir. 2017)*; see also Borislow v. Canaccord Genuity Grp. Inc.*, Case No. 14-80134-CIV-RYSKAMP/HOPKINS, 2014 WL 12580035, at *1 (S.D. Fla. June 24, 2014) (granting stay; a district court's "authority encompasses a stay of discovery pending the resolution of a dispositive motion") (citation omitted).

The Eleventh Circuit repeatedly has instructed district courts that "[f]acial challenges to the legal sufficiency of a claim or defense, such as a motion to dismiss based on a failure to state a claim for relief, should . . . be resolved *before* discovery begins." *Chudasama*, 123 F.3d

at 1367–68 (emphasis added); *Bufkin v. Scottrade, Inc.*, No. 19-12003, 2020 WL 2043393, at *2 (11th Cir. Apr. 28, 2020) (finding a stay of discovery appropriate given the potential for the claims against one party to be resolved in the motion to compel arbitration and claims against the other party to be resolved in the motion to dismiss); *see also Dragash v. Federal Nat'l Mtg. Ass'n*, 700 F. App'x. 939, 946 (11th Cir. 2017) ("*In general* motions to dismiss . . . 'should be resolved before discovery begins'") (citation omitted) (emphasis added); *Rivas*, 676 F. App'x. at 932 (A "motion to dismiss *should, ideally,* 'be resolved before discovery begins.'") (citation omitted) (emphasis added).

In determining whether to grant a stay, courts generally examine whether a stay will: (1) reduce the burden of litigation on the court and the parties, simplify the issues, and streamline the trial; and (2) unduly prejudice or tactically disadvantage the non-moving party. *See Coatney*, 2016 WL 4506315, at *1. It is appropriate to stay discovery where a "movant shows 'good cause and reasonableness.'" *Tradex Global Master Fund SPC Ltd. v. Palm Beach Capital Mgmt., LLC*, No. 09-21622-CIV-MORENO, 2009 WL 10664410 (S.D. Fla. Nov. 24, 2009) (citation omitted) (granting stay). Both factors weigh in favor of granting a stay of discovery here, as detailed below.

A. Discovery Should Be Stayed Because Resolution of the Motion to Compel Arbitration or Motion to Dismiss Will Eliminate or Significantly Reduce the Discovery Burden and Simplify and Streamline the Issues.

"Allowing a case to proceed through the pretrial processes with an invalid claim that increases the cost of the case does nothing but waste the resources of the litigants, squander scarce judicial resources, and damage the integrity and the public's perception of the federal judicial system." *Chudasama*, 123 F.3d at 1368. The Eleventh Circuit has explained that "eliminating nonmeritorious claims for relief that unnecessarily broaden the scope of discovery" avoids "significant costs to the parties, the court and other litigants." *Id.* at 1370; *see also Gill-Samuel v. Nova Biomedical Corp.*, No. 13-cv-62591, 2014 WL 11762719, at *1 (S.D. Fla. Feb. 18, 2014) (granting stay in a putative class action and acknowledging that a "ruling on whether to strike . . . class-action allegations or dismiss the Complaint in its entirety can have significant ramifications on the scope of any factual discovery between the parties"); *Khan v. Bankunited, Inc.*, 2016 WL 4718156, at *1 (M.D. Fla. May 11, 2016) (discovery stay "may be appropriate when" resolution of a motion to dismiss "will potentially narrow the scope of discovery in a case of this complexity and size"); *Pierce v. State Farm Mut. Auto. Ins. Co.*, No. 14-22691-CIV-WILLIAMS, 2014 WL 12528362, at *1 (S.D. Fla. Dec. 10, 2014) (granting discovery stay in a putative class action).

To assess the likelihood that a motion will narrow discovery, courts take a "preliminary peek" at the merits of the motion. *Bufkin*, 2020 WL 2043393, at *2 (affirming stay after a "***preliminary peek***" at the merits of motions to compel the claims to arbitration and to dismiss the claims); *Borislow*, 2014 WL 12580035, at *1 (granting stay where "[t]he Court's review . . . leaves it with the concern that Plaintiff's defamation claim may be legally deficient").

1. Plaintiffs' claims are subject to arbitration.

Plaintiffs have asserted seven (7) claims against Defendants, failing entirely to differentiate attributable conduct to either entity. Those claims are: (1) violation of the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"); (2) breach of contract; (3) negligence; (4) violation of the Equal Credit Opportunity Act, ("ECOA,") (Disparate Impact); (5) violation of ECOA (Disparate Treatment); (6) violation of Title VI of the Civil Rights Act of 1964; and (7) an additional violation of FDUTPA. (*See generally* Compl., ECF No. 1.) As described more fully in the Motion, all claims are indisputably subject to individual arbitration. (Motion, at 10–15.) Each Plaintiff entered an Enrollment Agreement containing a clear, unequivocal and materially identical mandatory arbitration provision, jury trial waiver provision and class action waiver provision which they expressly acknowledged and by which they waived their right to proceed with any claim as a class plaintiff or member of a class action.[1] (Motion at 7.)

Plaintiffs make much of the May 2019 "Notice Regarding Borrower Defense Claims" ("Notice") somehow precluded arbitration of *any* claims because they fall outside the scope of claims the parties agreed to arbitrated and that Defendants should be estopped or deemed to have waived arbitration by the Notice. Not true. First, as made clear in the Motion, Defendants seek to compel arbitration *only* as to non-borrower claims, which includes the vast majority if not all of the claims (depending on this Court's final determination of arbitrability). The borrower defense regulations only prevent institutions from enforcing pre-dispute arbitration agreements against Plaintiffs who bring borrower defense claims which, as defined in the regulation, expressly excludes breach of contract and misrepresentation claims (Counts 1, 2 and 3) from the definition. (Motion at 12-14.) Additionally, the claims alleging violations of the Equal Credit Opportunity Act (Counts 4 and 5) and Title VI of the Civil Rights Act (Counts 6 and 7), as pleaded, are not claims that are directly related to the loan or to the provision of educational services itself and are,

[1] Defendants make clear that they do not seek to compel arbitration as to any claims the Court determines are a "borrower defense" claim ("BDR claims"), Defendants' sound reading of the applicable federal regulations militates in favor of finding that none of the claims constitute a BDR claim. (Motion at 10-15.)

thus, outside the scope of the BDR regulations. (Motion at 15.) Given the strong liberal federal policy in favor of arbitration and enforcing the bargained for benefits in an agreement, all claims (other than those otherwise determined with finality to be BDR claims) should be compelled to arbitration.

Requiring Defendants to participate in any discovery before the arbitrability determination is made is violative of public policy and the Federal Arbitration Act ("FAA"). Specifically, engaging in discovery while a motion to compel arbitration is pending defeats the very purpose of such motion and the arbitration clause itself. In recognition of the cost savings associated with arbitration, the FAA mandates a stay of judicial proceedings where a plaintiff files a lawsuit in the face of a binding arbitration clause. *See* 9 U.S.C. § 3 (if issue is referable to arbitration, the court must stay the action until the arbitration is conducted); *see also Seaboard Coastline Railroad Co. v. Nat'l Rail Passenger Corp.*, 554 F.2d 657 (5th Cir.1977) (strong federal policy to encourage arbitration and to relieve congestion in courts); *Niven v. Dean Witter Reynolds, Inc.*, 1985 WL 5802, at *1 (M.D. Fla. 1985) (denying plaintiff's motion requesting that discovery matters be resolved by the court, and stating that "[s]uch double-barreled discovery would almost inevitably frustrate one of the purposes underlying arbitration, namely, the inexpensive and expedient resolution of disputes and the easing of court congestion").

Finally, if discovery is not stayed during the pendency of the Motion, Defendants are left with a Hobson's choice—facing potential involuntary waiver of their bargained for right to arbitration, or a motion to compel and itinerate sanctions for failing to participate in discovery. *See, e.g., Stone v. E.F. Hutton & Co.*, 898 F.2d 1542, 1543 (11th Cir.1990) ("The use of pre-trial discovery procedures by a party seeking arbitration may sufficiently prejudice the legal position of an opposing party so as to constitute a waiver of the party's right to arbitration."). Early notice of a defendant's intent to exercise its arbitration rights, as Defendants gave here, is key because it allows the court to "manage the litigation with this contingency in mind." *Gutierrez v. Wells Fargo Bank, NA*, 889 F.3d 1230, 1236 (11th Cir. 2018). "For example, if the court knows a party has potential arbitration rights that could throw the case out of court, it can limit the scope of early discovery with this possibility in view, in order to avoid significant expenditures if it turns out that the arbitration provision governs." *Id*. at 1236–37.

2. Plaintiffs' claims are also subject to dismissal.

Even if this Court does not compel arbitration of all of Plaintiffs' claims, Defendants have presented convincing grounds for dismissing all or at least a large portion of the Complaint, sufficient to warrant staying discovery pending the outcome of the Court's determination on the Motion to Dismiss.

Where, as here, Defendants raise a "threshold legal issue[] that may dispose of Plaintiff's claim in its entirety," a stay is appropriate. *Pierce*, 2014 WL 12528362, at *1 (granting stay in the context of a putative class action). "[D]elaying [a] ruling on a motion to dismiss such a claim until after the parties complete discovery encourages abusive discovery and, if the court ultimately dismisses the claim, imposes unnecessary costs." *Chudasama*, 123 F.3d at 1368. "The Eleventh Circuit instructs that this is precisely when a stay of discovery is warranted." *Borislow*, 2014 WL 12580035, at *1; *see also Khan*, 2016 WL 4718156, at *1 (M.D. Fla. May 11, 2016) (granting stay; noting that discovery stay "may be appropriate when" resolution of a motion to dismiss "will potentially narrow the scope of discovery in a case of this complexity and size").

As threshold issues, Plaintiffs apparently seek to represent classes of students across the entire range of FCC's program offerings across all campuses, when each only participated in one program at one campus. (*See* Compl., ¶¶ 31, 32, 173, 207.) Plaintiffs lack Article III standing to bring claims under the "All FCC Class" or the "Race Discrimination Subclass" because each Plaintiff's experiences are limited to his or her own particular program. (Motion at 16.) The range of FCC's course offerings consist of various courses, components, qualifications, and so on. (*Compare* Compl., ¶¶ 31, 32, 173, 207, *with* Compl., ¶¶ 56, 220). Well-established law in this Circuit establishes that Plaintiffs lacks Article III standing to assert claims regarding products they did not themselves purchase. *Sanchez-Knutson v. Ford Motor Co.*, No. 14-61344-CIV, 2015 WL 11197772, at *4 (S.D. Fla. July 22, 2015) (emphasis added) ("[D]istrict courts in the Southern District of Florida . . . *have consistently held, at the motion to dismiss stage, that a plaintiff cannot assert consumer fraud claims relating to products that he or she did not purchase*").

Plaintiff also inappropriately engage in multiple forms of shotgun pleading, (*see* Motion at 17-20), fail to plead its claims sounding in fraud (Counts 1 and 7) with requisite particularity under Rule 9(b), (*see* Motion at 21, 29), and fail to plead sufficient facts to establish all elements of each claim, (*see generally* Motion at 20-29).

Even if these threshold arguments alone did not defeat the entire Complaint (which they do), each one of Plaintiffs' claims suffers from other fatal defects, which taken together requires dismissal of the entire Complaint. (*See generally* Motion at 20-29.) For instance, Plaintiffs cannot sustain a claim for violation of FDUTPA (Counts 1, 7), without pleading facts sufficient to establish a materially misleading statement was actually uttered or causation. (Motion at 21-22, 29.) Plaintiffs cannot sustain a claim for breach of contract (Count 2) by relying on alleged promises made outside the four corners of an integrated contract. (Motion at 23-24.) Plaintiffs cannot sustain a claim for negligence without pleading sufficient facts establishing an actionable duty or breach. (Motion at 24.) Plaintiffs cannot sustain a claim for ECOA violations (Counts IV and V) when they have failed to establish (and cannot legally establish under applicable federal regulations) that either IEC or FCC are *qualifying creditors* and an fail to carry their burden of establishing a prima facie case of discrimination under *McDonnel Douglas Corp.* and its progeny. (Motion at 25-28.) And, Plaintiffs cannot sustain a claim for Title VI violation (Count VI) by bootstrapping it on a defective FDUTPA claim and otherwise pleading no facts sufficient to carry its prima facie burden of showing discrimination. (Motion at 28-29.) All of the foregoing are strong and conclusive bases justifying dismissal of the Complaint in its entirety. If the Court grants this aspect of Defendants' Motion on this basis alone, that ruling would substantially narrow the scope of discovery in this case. For those reasons, no discovery should be necessary, at least not during the pendency of the Court's consideration.

Without a stay of discovery pending resolution of the numerous threshold challenges raised in the Motion, Defendants will have to incur substantial time and resources in responding to claims that likely will not survive. There is also the potential that the parties will not be able to resolve all of these discovery disputes themselves, requiring them to seek the Court's intervention. Resolution of the Motion, however, will undoubtedly eliminate some or all of the following issues: (a) whether the claim is litigated in this Court or in arbitration; (b) the number of claims at issue; and (c) the number of locations and programs at issue. Therefore, these considerations weigh heavily in favor of a stay.

B. Plaintiffs Will Not Be Prejudiced by the Requested Stay.

Plaintiffs will not be prejudiced by the stay of discovery, which weighs in favor of a stay. As the Eleventh Circuit explained, "neither the parties nor the court have any need for discovery before the court rules on the motion" to dismiss. *Chudasama*, 123 F.3d at 1367 (citations omitted).

As numerous courts have acknowledged, a plaintiff is not prejudiced because "should the case proceed, Plaintiff w[ould] have ample opportunity to conduct discovery." *Pierce*, 2014 WL 12528362, at *1; *see also Borislow*, 2014 WL 12580035, at *1 (holding that plaintiff could not "reasonably claim prejudice" because "any discovery to which Plaintiff may ultimately be entitled will be available following the stay"); *Solar Star Sys., LLC v. Bellsouth Telecomm., Inc.*, No. 10-21105-CIV, 2011 WL 1226119, at *1 (S.D. Fla. Mar. 30, 2011) (granting motion to stay discovery pending ruling on motion to dismiss and noting that "[p]otentially dispositive motions filed prior to discovery weigh heavily in favor of issuing a stay").

As Defendants' Motion invokes the sufficiency of Plaintiffs' allegations, no discovery is required for the Court to resolve it. Moreover, this case is still in its early stages and a brief stay of discovery will not prejudice either party.

II. TO THE EXTENT THE CASE IS NOT DISMISSED ENTIRELY, DISCOVERY SHOULD BE BIFURCATED.

After the Court has ruled on the Motion, to the extent any claims are determined not to be arbitrable and are also not dismissed, discovery should be bifurcated so that the first phase of discovery relates to class certification alone followed by a secondary phase of discovery concerning the merits of the claims after the class certification hearing. This Court has the authority to control the sequence and timing of discovery by entering appropriate orders "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Fed. R. Civ. P. 26(c). This, coupled with the Court's broad discretion to manage the discovery process prior to a determination on a motion for class certification, *see Stewart v. Winter*, 669 F. 2d 328, 331 (5th Cir. 1982) (holding the district court acted within its discretion in denying plaintiffs' motion to compel), militates in favor of bifurcating discovery.

Indeed, as the 11th Circuit has held:

> In the class action context, one of the first issues confronting the court is class certification. See Fed. R. Civ. P. 23(c)(1) ("As soon as practicable after the commencement of the action brought as a class action, the court shall determine by order whether it is to be so maintained"). To make early class determination practicable and to best serve the ends of fairness and efficiency, courts may allow classwide discovery on the certification issue and postpone classwide discovery on the merits.

Washington v. Brown & Williamson Tobacco Corp., 959 F.2d 1566, 1570–71 (11th Cir. 1992) (citing *Stewart v. Winter*, 669 F.2d 328, 331 (5th Cir.1982)); *see also Rebman v. Follet Higher*

Educ. Group, Inc., No. 6:06-cv-1476-Orl-KRS, 2007 WL 1303031 at *3 (M.D. Fla. May 3, 2007) ("While merits and damages discovery may be appropriate at some stage of the litigation, it is premature to require Follet to produce the detailed information requested at this time as to the entire putative class.").

In this case, bifurcation of class-wide merits discovery is appropriate. Plaintiffs are likely to seek broad discovery into every aspect of Defendants' business. Little to none of this discovery would be relevant to the individual named Plaintiffs. Because Plaintiffs' proposed FCC-wide class action faces significant obstacles to certification, it would be far more efficient for the parties and the Court to address class certification before embarking on Plaintiffs' likely expansive merits discovery. If a class is not certified, Plaintiffs would be left with individual claims, based on a finite set of materials that they specifically saw or interactions they specifically experienced, limited to two programs at two campuses. As such, the denial of class certification necessarily obviates extensive class-wide merits discovery and will have been an invasive waste of resources.

REQUEST FOR HEARING

Pursuant to Local Rule 7.1(b)(2), Defendants respectfully request that the Court schedule a hearing, which we estimate would take approximately one hour, on the Motion to Stay Discovery to assist the Court in determining whether the action should be stayed pending a ruling on Defendants' Motion and whether, if not stayed, discovery should be bifurcated.

CONCLUSION

For all the above reasons, Defendants respectfully request the Court grant a stay of discovery pending a ruling on Defendants' Motion. Furthermore, should any claims remain viable, Defendants respectfully request that discovery be bifurcated, limiting the initial phase of discovery to issues necessary for class certification followed by a secondary phase of discovery concerning the merits of the claims after the class certification hearing.

LOCAL RULE 7.1(A)(3) CERTIFICATE

The undersigned certifies that counsel for the movant has conferred with all parties or non-parties who may be affected by the relief sought in the motion in a good faith effort to resolve the issues raised in the motion and has been unable to resolve the issues.

Dated: July 3, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 3, 2020, a true and correct copy of the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system, and that it is being served this date on all counsel of record via transmission of Notices of Electronic Filing generated by the CM/ECF system.

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