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

Defendants.

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO STAY DISCOVERY AND BIFURCATE CLASS DISCOVERY

Defendants have already granted themselves a stay of discovery in this matter. Indeed, pursuant to Rule 26(a)(1)(C), the parties' initial disclosures were due on June 5, 2020, yet Defendants have refused to make theirs. Plaintiffs made their initial disclosures on June 5, 2020. When counsel for Plaintiffs pressed Defendants to make their disclosures, Defendants simply refused, declaring there is no need for any discovery in this case. Then, when told they could not unilaterally ignore the Rules of Civil Procedure, Defendants hurriedly filed this motion to stay discovery and bifurcate class discovery. ECF No. 34. But, as their motion demonstrates, Defendants cannot simply wish discovery away. As shown below, the motion is both inappropriate and meritless. It should be denied.

I. Defendants' Motion Inappropriately Seeks Reconsideration and Does Not Comply with Local Rule 7.1.

As an initial matter, the Court has already rejected the very relief that Defendants seek in their motion. In the Joint Scheduling Report, Defendants expressly requested that the Court stay and bifurcate discovery because of their forthcoming motions to compel arbitration and dismiss. *See* Joint Scheduling Report [ECF No. 22] at 3–4. But the Court rejected those requests; it neither stayed nor bifurcated discovery. *See* Order Setting Trial and Pre-Trial Schedule [ECF No. 29] at 1–2. Now, through this motion, Defendants essentially seek reconsideration and relief from the Court's scheduling order, but bring forth no good reason for the Court to rule differently now. *Compare* Joint Scheduling Report, [ECF No. 22] at 3 (requesting a stay of discovery and bifurcation of class and merits discovery. Also stating discovery will be obviated due to their motion to compel arbitration and dismiss, or at the least, narrow the parties and claims), *with* Defendants' Motion to Stay Discovery and Bifurcate Class Discovery [ECF No. 34] at 6–9 (stating the motion will dismiss all or a large portion of the Complaint and bifurcation of discovery is appropriate).

Defendants, in addition to deciding for themselves which Federal Rules are applicable, also violated Local Rule 7.1 with respect to their alternative request to bifurcate discovery. At no time during the meet-and-confer process did Defendants request Plaintiffs' position on the motion to bifurcate. Plaintiffs, of course, oppose bifurcation.

II. Defendants' Motions to Compel Arbitration and Dismiss Claims Are Anything But "Clearly Meritorious and Case Dispositive."

Defendants base their motion to stay discovery on a gross mischaracterization of *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1367–68 (11th Cir. 1997) and two other unreported Eleventh Circuit opinions that do no more than cite it. As nearly all district courts in

the Eleventh Circuit recognize, "a stay of discovery pending the determination of a motion to dismiss is the exception rather than the rule." *Ray v. Spirit Airlines, Inc.*, No. 12-cv-61528, 2012 WL 5471793, at *3 (S.D. Fla. Nov. 9, 2012), and "*Chudasama* does not prescribe a broad rule that discovery should be deferred whenever there is a pending motion to dismiss." *Id.* (internal quotations omitted). A stay is required only where a party proves that its motion to dismiss is "clearly meritorious and truly case dispositive." *McCabe v. Foley*, 233 F.R.D. 683, 686 (M.D. Fla. 2006); *see also In re Managed Care Litig.*, No. 00-md-1334, 2001 WL 664391, at *2–3 (S.D. Fla. June 12, 2001) (applying *Chudasama* standard in motion-to-compel-arbitration context).

Defendants do not come close to meeting their burden here. To begin with, "[t]he procedural posture . . . is a far cry from the bizarre situation in *Chudasama*" because Defendants' motions to compel arbitration and dismiss are already ripe for deciding. *Ray*, 2012 WL 5471793, at *3 ("A reasonably timely ruling on [defendant's] motion to dismiss should suffice to meet any looming threat of unwarranted discovery costs and burdens."); *see also Runton v. Brookdale Senior Living, Inc.*, No. 17-cv-60664, 2017 WL 9672657, at *1 (S.D. Fla. June 16, 2017) (similar); *Select Exp. Corp. v. Richeson*, No. 10-cv-80526, 2010 WL 11561196, at *1 (S.D. Fla. Dec. 1, 2010) (similar). Indeed, nothing in this case mirrors the situation in *Chudasama*, which "involved particularly egregious facts which one hopes will be seldom, if ever, duplicated again." *Ray*, 2012 WL 5471793, at *3.

In any event, to decide whether a movant has proven its motion to dismiss is "clearly meritorious and truly case dispositive," courts take a "preliminary peek" at the motion. *McCabe*, 233 F.R.D. at 685. A brief review of Defendants' motions to compel arbitration and dismiss shows that both are a far cry from being "clearly meritorious and case dispositive." Indeed, the opposite

is true here, where Defendants seek a stay based on a request for arbitration when at the same time seemingly admitting that arbitration may not even be applicable to all of the claims.

a. The Motion to Compel Arbitration Is Meritless Because the Language in the Parties' Contracts Does Not Allow the Instant Dispute to Be Arbitrated.

Defendants' Motion to Compel Arbitration does not justify a stay of discovery because it is meritless. Because arbitration "is a matter of contract," courts may compel arbitration only where the parties' existent agreement requires them to arbitrate. *Klay v. All Defendants*, 389 F.3d 1191, 1200 (11th Cir. 2004). Here, Plaintiffs were under no contractual obligation to arbitrate at all.

The basic facts are clear. As Defendants concede, Plaintiffs and Florida Career College's ("FCC") original contract consisted of both the Enrollment Agreement and the Course Catalog, the two documents establishing policies governing Plaintiffs' enrollment at FCC. *See* Defendants' Motion to Compel Arbitration [ECF No. 24] at 6 ("The Course Catalog is incorporated into the Enrollment Agreement by [Florida] law. Together, the Enrollment Agreement and relevant Course Catalog form *a single contract* and the provisions must be read in harmony." (emphasis added) (citation omitted)). The Course Catalog authorized FCC "to make changes in programs or policies when ongoing federal, state, or accrediting changes require such changes." ECF No. 24-2 at 31. On May 14, 2019, FCC sent students a "Notice" which FCC described as a "supplement to [the] . . . Enrollment Agreement." ECF No. 30-1. Because the students' contract with FCC provided FCC with the right to modify the policies governing students' enrollment, FCC had the right to issue this Supplement and update the terms of Plaintiffs' enrollment at the school, including Plaintiffs' initial agreements to arbitrate any claims against it. *See Bolus v. Morrison Homes, Inc.*, No. 8:08-cv-1957-T-23TBM, 2009 WL 4730601, at *2 (M.D. Fla. Dec. 9, 2009).

The Supplement ended any agreement to arbitrate Plaintiffs' claims because it expressly allowed students to bring in court "claims concerning acts or omissions regarding the making of

the Federal Direct Loan or the Provision by Florida Career College of educational services for which the Federal Direct Loan was obtained." Plaintiffs' claims plainly concern such "acts or omissions." *See* Response [ECF No. 30] at 5.

Defendants also argue that 34 C.F.R. § 685.300(i)(1), and not the clear language of the Supplement, defines what claims Plaintiffs can bring in federal court because Defendants asked the Court to compel arbitration for only claims that are *not* borrower defense claims under that regulation. *Id.* at 2. "But wishes don't make for laws[.]" *McGirt v. Oklahoma*, No. 18-9526, 2020 WL 3848063, at *5 (U.S. July 9, 2020). Any *right* to compel arbitration could arise only from the terms of an existing contract, *Klay*, 389 F.3d at 1200, not litigation demands.

Defendants also say 34 C.F.R. § 685.300(i)(1) matters because FCC advised students the was promulgated "pursuant to" two *other* regulations, 34 C.F.R. § 685.300(e) and (f). Defendants' logic is enigmatic. 34 C.F.R. § 685.300(i)(1) contained Defendants preferred definition of borrower defense claims, not 34 C.F.R. § 685.300(e) or (f). FCC never even mentioned 34 C.F.R. § 685.300(i)(1), instead telling students plainly and clearly that they could bring "claims concerning acts or omissions regarding the making of the Federal Direct Loan or the Provision by Florida Career College of educational services for which the Federal Direct Loan was obtained." [ECF No. 30-1]. Indeed, if Defendants intended for 34 C.F.R. § 685.300(i)(1) to govern the contractual right to arbitrate, then FCC should have (and could have) included *that* language in the Supplement. Certain of their peers did precisely this. *See, e.g.*, *Carr v. Grand Canyon Univ.*, No. 19-1707, 2019 U.S. Dist. LEXIS 194520 (N.D. Ga. Aug. 19, 2019), ECF No. 17 at 8, *appeal filed*, No. 19-13639 (11th Cir. Sept. 12, 2019).

In any event, 34 C.F.R. § 685.300(i)(1) would allow Plaintiffs to bring their claims in federal court, even if it did govern. Although Defendants assert that "the scope of borrower

defenses" available through the Department of Education's administrative process is "far broader" than the sweep of the arbitration provisions, Defs' Reply [ECF No. 6] at 6, the text and regulatory history establish that *the exact opposite* is true. The Department wanted institutions, not taxpayers, to be accountable—subject to class actions in public court proceedings—for any potentially illegal acts or omissions related to the making of a Direct Loan for enrollment at the institution or the provision of educational services for which the loan was provided. Office of Postsecondary Educ., U.S. Dep't of Educ., Guidance Concerning Some Provisions of the 2016 Borrower Defense to Repayment Rules at 4-5 (Mar. 15, 2019), https://perma.cc/VJ5F-V8LV.[1]

Finally, even putting the weakness of Defendants' interpretation of 34 C.F.R. § 685.300(i)(1) aside, *see* Response [ECF No. 30] at 8–12, Defendants' interpretation cannot be *clearly* meritorious and case dispositive if a majority of courts to have considered it have rejected it. *See Cal. Ass'n of Private Postsecondary Sch. v. DeVos*, No. CV 17-999 (RDM), 2020 WL 516455, at *1 (D.D.C. Jan. 31, 2020) (stating non-arbitrable claims under 34 C.F.R. § 685.300(i)(1) include breach of contract and misrepresentation claims); *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).

In sum, Defendants' motion to stay should be denied because their motion to compel arbitration is not clearly meritorious and, even they acknowledge, not case dispositive.

[1] "Nothing in these regulations prohibits an institution from having and enforcing a mandatory predispute arbitration requirement or class action ban in connection with any claim not concerning a borrower defense claim or in connection with any claim asserted by a student who is not a Direct Loan borrower. 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 for enrollment at the institution 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." *Id.* at 5.

b. The Motion to Dismiss Is Not Only Meritless, But Also Would Fail to Dispose of the Case.

Defendants' motion to dismiss is meritless for the reasons discussed in Plaintiffs' response to that motion. *See* Response [ECF No. 30] at 13–30. In addition, even if the motion had any merit, it would still fail to dispose of all claims because Plaintiffs would almost certainly be able to cure any pleading issues via amendment. *See Alcon Laboratories, Inc. v. Allied Vision Grp, Inc.*, Case No. 18-61638-CIV-WILLIAMS, 2018 WL 6441451, at *2 (S.D. Fla. Oct. 26, 2018).

III. Defendants' Motion to Bifurcate Discovery Should Be Denied Because Class Discovery and Merits Discovery Largely Overlap.

The Court's earlier decision rejecting Defendants' request to bifurcate discovery was correct because merits and class discovery generally overlap. Defendants premise this motion on caselaw from the early 1980s to the mid-2000s. No surprise there. That period preceded a series of seminal Supreme Court decisions that expanded the extent to which class and merits questions overlap. *See Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 279–80 (2014) (holding defendants entitled to use merits-related evidence to defeat argument raised in plaintiffs' certification motion); *Comcast Corp. v. Behrend*, 569 U.S. 27, 34 (2013) ("[C]lass determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action."); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) ("[C]ertification is proper only if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied. Frequently that 'rigorous analysis' will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped." (citation and internal quotation marks omitted)).

In the wake of these decisions, courts have been highly reluctant to bifurcate discovery, including in this district. *See Keim v. Watches of Switzerland Grp. USA, Inc.*, 391 F. Supp. 3d

1140, 1141–42 (S.D. Fla. June 3, 2019); *Coleman v. Lennar Corp.*, Case No. 18-mc-20182-WILLIAMS/TORRES, 2018 WL 3672251, at *6 (June 14, 2018); *Cabrera v. Gov. Empls. Ins. Co.*, No. 12–61390–CIV, 2014 WL 2999206, at *8 (S.D. Fla. July 3, 2014). This is justified. Bifurcation inhibits a court's ability to adequately adjudicate class certification. *See Chen-Oster v. Goldman, Sachs & Co.*, 285 F.R.D. 294, 300 (S.D.N.Y. 2012) ("[B]ecause of the 'rigorous analysis' required by *Dukes*, courts are reluctant to bifurcate class-related discovery from discovery on the merits."); *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 258 F.R.D. 167, 174–75 (D.D.C. 2009) ("Discovery relating to class certification is closely enmeshed with merits discovery, and in fact cannot be meaningfully developed without inquiry into the basic issues of the litigation." (citation omitted)). It is also generally inefficient because it results in parties repeatedly asking the court to police disputes over whether a particular discovery request falls into one category or the other. *See, e.g.*, *Keim*, 391 F. Supp. at 1442 ("[A]s other courts have noted, 'bifurcating discovery may give rise to disputes over whether a particular discovery request relates to the merits or to class certification.'" (citation omitted)).

Because bifurcation would interfere with the Court's ability to perform the 'rigorous analysis' required to evaluate Plaintiffs' future class certification motion and inefficiently draw the Court into needless discovery disputes, the Court should deny Defendants' motion to bifurcate discovery.

* * *

For all these reasons, Defendants' motion to stay discovery or to bifurcate should be denied.

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Respectfully Submitted,

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