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 COMPEL ARBITRATION OR, IN THE ALTERNATIVE, MOTION TO DISMISS PLAINTIFFS' CLASS ACTION COMPLAINT AND INCORPORATED MEMORANDUM OF LAW

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IEC Corporation, d/b/a/ International Education Company ("IEC"), and IEC US Holdings, Inc., d/b/a Florida Career College ("FCC," and collectively, "Defendants"), pursuant to Federal Rule of Civil Procedure 12(b)(1) and the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 2–4, move to compel Plaintiffs Kareem Britt and Monique Laurence to individually arbitrate each and all of their claims that the Court determines are not "borrower defense claims." In the alternative, Defendants move pursuant to Federal Rule of Civil Procedure 12(b) to dismiss the putative Class Action Complaint of Kareem Britt and Monique Laurence ("Complaint") as follows:

INTRODUCTION

Plaintiffs, two former FCC students, allege they enrolled at FCC but did not have the experience they were "promised" and now have student loan debt they are unable to pay. The statutory claims are derived from Plaintiffs' use of federal student aid funds. Each Plaintiff consented to arbitration in the Enrollment Agreement and waived any right to class arbitration. Thus, all claims asserted by Plaintiffs are likely subject to arbitration and should be arbitrated individually. To be clear, Defendants do *not* seek to compel arbitration of any claims the Court determines are "Borrower Defense Claims." In the event any claims are not compelled to arbitration, the claims lack adequate factual support and the Complaint is replete with dramatized allegations, the vast majority of which have no relevance to the named Plaintiffs. Because Plaintiffs fail to state a claim upon which relief can be granted, the Complaint must be dismissed.

RELEVANT FACTS AND ALLEGATIONS

I. Plaintiffs' Claims

Plaintiffs' Complaint asserts: (**Count I**) violation of the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"); (**Count II**) breach of contract; (**Count III**) negligence; (**Count IV**) violation of the Equal Credit Opportunity Act, ("ECOA,"), (Disparate Impact); (**Count V**) violation of ECOA (Disparate Treatment); (**Count VI**) violation of Title VI of the Civil Rights Act of 1964; and (**Count VII**) an additional violation of FDUTPA. (*See generally* Compl., ECF No. 1.) Counts I–III are asserted on behalf of both Plaintiffs and a putative class of "[a]ll persons who enrolled at any FCC campus in Florida within the last four years." (Compl., ¶ 220.) The core allegations are that FCC made certain misrepresentations about its services and breached its purported contractual obligations. Counts IV–VII are asserted only by Britt and the putative subclass of "[a]ll Black students who enrolled at any FCC campus in Florida within the last five years." (*Id.*) The core allegations are that IEC and FCC used predatory tactics such as "reverse

redlining" to target, lure and enroll black students. Plaintiffs seek monetary damages in addition to declaratory and injunctive relief.

II. IEC and FCC

IEC operates as a premier national provider of post-secondary career education. (Compl., ¶ 46.) IEC is the "parent company of various for-profit colleges," including FCC. (Compl., ¶¶ 33, 47.) Plaintiffs do not attribute any particular acts to IEC, yet Plaintiffs allege in almost every count that an undifferentiated combination of the "Defendants" is somehow liable for everything. (*See, e.g.*, Compl., ¶¶ 234, 245–46.) Plaintiffs' only allegations against IEC derive from IEC's corporate relationship with FCC: that IEC allegedly exercises direct control over its subsidiaries and that their controlling management is one and the same. (*Id.*, ¶¶ 33–34, 48–49.)

FCC is a nationally accredited institution of higher education offering career training in a variety of business and medical fields at ten campuses in Florida. (Compl., ¶¶ 53, 56; Ex. [●CC], at 4.) FCC's Florida campuses are accredited by the Council on Occupational Education ("COE").[1] "FCC offers diplomas, certificates, and associate degrees in various fields, including: Business Office Administration, Patient Care Technician, Pharmacy Technician, Health Services Administration, Medical Assistant Technician, Medical Front Office and Billing, Dental Assistant, Heating Ventilation and Air Condition, Information Technology, Computer Network Technician, Nursing, and Cosmetology." (*Id.*, ¶ 56.) Plaintiffs allege FCC trains "recruiters," has goals for recruiters to speak with prospective students, and engages in employee oversight (including "prais[ing] well-performing recruiters"). (Compl., ¶¶ 82–84, 88.) Plaintiffs also allege that FCC offers resources to students completing forms required for federal student aid, private student loans, or retail installment contracts. (*Id.*, ¶ 111.) Finally, Plaintiffs allege FCC works to ensure that students attended classes after enrolling. (*Id.*, ¶ 117.)

The fundamental plausibility of Plaintiffs' allegations of misconduct by IEC and FCC, including predatory conduct such as "reverse redlining," is speculative at best. IEC and FCC both operate within the highly regulated higher education sector and are subject to constant government

[1] *See* Database of Accredited Postsecondary Institutions and Programs, U.S. Dep't of Educ., available at https://ope.ed.gov/dapip/#/institution-profile/109457 (last visited May 27, 2020). "The court may take judicial notice at any stage of the proceeding." Fed. R. Evid. 201(d). This Court may take judicial notice of "information publicly available from an official government website." *Setai Hotel Acquisition, LLC v. Miami Beach Luxury Rentals, Inc.*, No. 16-cv-21296, 2017 WL 3503371, at *19–20 (S.D. Fla. Aug. 15, 2017) (collecting cases).

and independent third-party oversight. FCC, like all schools in this highly regulated sector, is subject to ongoing and intense scrutiny by federal and state regulators and accreditors. This oversight includes announced and unannounced site visits and internal audits. U.S. DEP'T OF EDUC., FEDERAL STUDENT AID HANDBOOK 2017–2018, ("FSA Handbook") https://ifap.ed.gov/sites/default/files/attachments/fsahandbook/1718FSAHbkActiveIndex.pdf.

To satisfy its audit requirements, for instance, FCC is required by the Department of Education ("ED") to have "an independent auditor conduct an annual audit of the school's compliance with the laws and regulations that are applicable to the FSA programs in which the school participates (a compliance audit) and an audit of the school's financial statements (a financial statement audit)." FSA Handbook, at 2-79; *see also* Compliance Audits and Audited Financial Statements, 34 C.F.R. 668.23 (2011); Information to Be Verified, 34 C.F.R. 668.56 (2012). Audits include reviewing documents for refund and attendance information, admissions practices, placement, and so on to ensure the federal guidelines are met in order for students to receive federal funding to attend FCC's programs. *See* FAFSA Information to Be Verified for the 2017–2018 Award Year, 81 Fed. Reg. 18,843. In these audits, ED reviews dozens of individual student files and demands a less than 5% error rate for continued participation in federal student aid programs. *See* FSA Handbook, at 2-92. The school itself also is expected to engage independent financial auditors to conduct regular audits of student files to ensure compliance. *Id.*, at 2-206. ED also routinely conducts program reviews to evaluate compliance with Title IV's requirements, identify any actions needed to improve administrative capabilities, and assess errors in performance. *Id*. at 2-210. Accreditors, who must approve programs at FCC, also conduct routine reviews and audits—both announced and unannounced—as frequently as every year depending on the accreditation grants. *Id*. at 2-210.

III. Plaintiff Kareem Britt

Plaintiff Britt enrolled in the HVAC program at FCC's Lauderdale Lakes campus in August 2018; "Mr. Britt is Black." (Compl., ¶¶ 31, 173.) Britt alleges he spoke with an admissions representative named "Lisa" after seeing an FCC advertisement on Facebook in August 2018. (*Id.*, ¶¶ 164, 168.) According to Britt, "Lisa" made such generalized statements as "FCC has great programs, people who attend FCC become successful, and attending FCC could change his life." (*Id.*, ¶ 169.) Then, on August 22, 2018, Britt allegedly met with "Lisa" on campus and discussed obtaining an education at FCC; he alleges being told "that the Career Services Department

provided job placement" and, thereafter, they toured the campus. (*Id.*, ¶¶ 170–72.) Britt does not allege any specific promises or guarantees were made to him. He signed an Enrollment Agreement, attached hereto as **Exhibit A**, to attend FCC's classes after this tour. (*Id.*, ¶ 173.)

Britt alleges that, after executing the Enrollment Agreement, he met with a financial aid advisor named "Keith" and obtained financial aid information. (*See* Compl., ¶¶ 174–79.) Britt was informed of the cost of the program, that he "would qualify for a $6,000 federal Pell Grant and he would receive a 'scholarship loan' from the school for $3,000." (*Id.*, ¶ 176.) Britt incredibly alleges he believed he was borrowing directly from the school and was not aware loans he obtained were Federal student loans. (*Id.*, ¶ 177.) Despite alleging he was unaware of his loan commitments, Britt admits he was informed of his obligation to pay $75/month toward the loans and that he completed the financial aid and student loan paperwork himself. (*Id.*, ¶¶ 177–79.)

Britt alleges FCC did not have adequate instructors or equipment despite being assured by "Lisa" that "each student would receive his own tool kit." (Compl., ¶¶ 180–83.) Britt does not identify actual promises made or any other source that would impose the specific standards sought. Britt further alleges FCC failed to disclose information regarding the HVAC program and employment information. The 2018 Course Catalog in effect at the time, attached hereto as **Exhibit B**, expressly identifies where to obtain information about the school, including a direct link to sources cited in the Complaint. (*See* Ex. B, at 2 ("Required Federal Disclosure Information").) Britt's alleged dissatisfaction turns on his contradictory allegation that FCC did not provide him with "a list of employers to contact" and did not ensure that he had interviews to attend. (Compl., ¶ 187.) This, despite his admission that after seeking assistance from the Career Services Department, "[a]n FCC Career Services Representative found him" multiple job placements and provided resume assistance, online job posting, and that FCC actually obtained job placements for him. (*Id.*, ¶¶ 185, 187.)

IV. Plaintiff Monique Laurence

Plaintiff Laurence enrolled in the Medical Assistant program at FCC's Orlando campus in 2017 and graduated in 2018; "Ms. Laurence is Latina and White." (Compl., ¶¶ 32, 207.) Laurence alleges that, after speaking with an admission representative and receiving follow up communications a couple of times per month, she visited the campus twice before making the decision to enroll. (*Id.*, ¶¶ 196, 198–99.) Laurence alleges that, in or around May 2017, she visited FCC's Orlando campus and met with "a recruiter" after previously speaking with someone over

the phone. (*See id.*, ¶¶ 196, 199.) According to Laurence, "[t]he recruiter told Ms. Laurence that FCC provided lifelong job placement" and "promised Ms. Laurence that she would make great money and that she would even learn how to do x-rays." (*Id.*, ¶ 200.) Laurence did not enroll during her first visit but returned a week later for another tour and received the same assurances. (*Id.*, ¶¶ 204–05.) Laurence met with instructors who "welcomed her and told her it was a great school and a good program." (*Id.*, ¶ 206.) After her second visit, Laurence reviewed and signed the Enrollment Agreement, attached hereto as **Exhibit C**, enrolling in the Medical Assistant program. (*Id.*, ¶ 206.)

Laurence alleges that, after she signed the Enrollment Agreement, a financial aid advisor assisted her with her financial aid applications. The advisor allegedly handed Laurence several documents and instructed her to sign them. (Compl., ¶ 209.) Laurence does not allege she was precluded from reviewing the documents, did not have sufficient time to review them, or did not review them. Laurence alleges she "filled out the FAFSA on the school's computer" and the advisor informed her of the amount she would need to fund tuition. (*Id.*, ¶ 210.) Laurence alleges the school later discontinued the x-ray portion of the program, did not have adequate equipment, and that she was underprepared for a certification exam. (Compl., ¶¶ 213–15.) The 2017 Course Catalog in effect at the time, attached hereto as **Exhibit D**, explains FCC reserves the right to make changes to any program. (*See* Ex. D, at 1 ("Consumer Information").) Laurence admits she received resume assistance from FCC and obtained a job offer. (Compl., ¶ 218.)

V. The "Contract"

The operative contracts in this case consist of each Plaintiff's Enrollment Agreements and the relevant Course Catalogs for 2017 and 2018.[2] Upon receiving, completing, and signing the Enrollment Agreements, Britt and Laurence were enrolled at FCC. (Compl., ¶ 110.) By signing the Enrollment Agreements, Britt and Laurence acknowledged and agreed they had received, "read, understood and agreed to the obligations and responsibilities set forth [in the Enrollment Agreement] and in the school's [course] catalog . . . ." (Exs. A, C, at 1.) The Course Catalog is

[2] As these documents form the basis of Plaintiffs' Complaint and are referenced throughout, *yet not attached to the Complaint*, the Court may consider them on a motion to dismiss without converting the motion to one for summary judgment. *See Fin. Sec. Assurance, Inc. v. Stephens, Inc.*, 500 F.3d 1276, 1284–85 (11th Cir. 2007); *see also Degirmenci v. Sapphire-Fort Lauderdale, LLP*, 693 F. Supp. 2d 1325, 1341–42 (S.D. Fla. 2010). The consideration of these documents is particularly important here, where the terms of the actual contracts contradict the allegations in the Complaint. *See* Motion to Dismiss, Section III(C), *infra*.

incorporated into the Enrollment Agreement by law. *See* FLA. ADMIN. CODE ANN. r. 6E-2.004 ("The catalog shall constitute *a* contractual obligation . . . .") Together, the Enrollment Agreement and relevant Course Catalog form a single contract and the provisions must be read in harmony. *See Overseas Priv. Inv. v. Metro. Dade Cty.*, 826 F. Supp. 1564, 1578 (S.D. Fla. 1993), *rev'd on damages only*, 47 F.3d 1111 (11th Cir. 1995). Britt and Laurence were expressly advised that the Enrollment Agreement is a legally binding agreement and was subject to the Course Catalog. Britt and Laurence each acknowledged receipt of their course catalog prior to enrolling, as evidenced by their initials and date of receipt. (Exs. A, C, at 1.) Despite reference in the Complaint to a "supplement" to the Enrollment Agreement, Plaintiffs fail to include any purported "supplement" to the Enrollment Agreement with the Complaint or identify it as anything more than a "notice"; as discussed below, the alleged "supplement" lacks any consideration or reliance and does not form part of the Contract. (Compl., ¶ 18.)

A. General Terms in Each Plaintiff's Enrollment Agreement Are Consistent

Each Enrollment Agreement contains an integration clause: "[t]his agreement constitutes the complete contract between the between the school and the student, and no verbal statements or promises made before the execution of this agreement will be recognized . . . ." (Ex. A, at 3; Ex. C, at 3.)

Each Enrollment Agreement expressly explains that the federal or state governments, or loan guarantee agency—not IEC nor FCC— are extending the loans, and the consequences for defaulting on those loans. (*See* Ex. A, at 3, ¶ 1; Ex. C, at 3, ¶ 1.) "Federal financial aid" and "federal funds" are referenced numerous times throughout the Enrollment Agreements. (*Id.*)

Each Enrollment Agreement expressly states that the school cannot and will not make promises or guarantees about employment but will assist the student: "2. Placement assistance will be provided. However, no school can ethically promise or guarantee employment to any student or graduate." (Ex. A, at 3, ¶ 2; Ex. C, at 3, ¶ 2.)

Each Enrollment Agreement expressly discloses that the school reserves the right to change or modify, without notification, the program content, equipment, staff, or materials and organization as it deems necessary, with approval of the school's accreditation and/or licensing agencies. (*See* Ex. A, at 3, ¶ 5; Ex. C, at 3, ¶ 5.)

Each Enrollment Agreement explicitly calls for Britt and Laurence to limit the liability of the school and expressly disclaimed any right to seek or recover "indirect, punitive, incidental, special or consequential damages . . . ." (Ex. A, at 3, ¶ 6; Ex. C, at 3, ¶ 6.)

B. Mandatory Arbitration, Jury Trial Waiver, and Class Action Waiver

Each Enrollment Agreement contains clear, unequivocal and materially identical mandatory arbitration provisions,[3] (*see* Ex. A, at 4, ¶ 1; Ex. C, at 4, ¶¶ 1, 3), jury trial waiver provisions, (*see* Ex. A, at 4, ¶ 3; Ex. C, at 4, ¶ 2), and class action waiver provision by which both Britt and Laurence waived their right to proceed with any claim as a class plaintiff or member of a class action, (*see* Ex. A, at 4, ¶ 6; Ex. C, at 4, ¶ 4).[4]

Notably, Britt and Laurence both expressly acknowledged: "I have had an opportunity to fully read and understand this entire agreement. By my above initials and my below signature, I certify that I have read, understand, and agree to the terms of this Enrollment Agreement." (Ex. A, at 4; Ex. C, at 4.)

C. The Course Catalog

Plaintiffs allege the Course Catalogs are contracts that purportedly establish a "promise" or a contractual obligation to prepare and equip students for employment. (Compl., ¶¶ 239, 240.) What Plaintiffs quote from, however, is a restatement of FCC's "Mission Statement" regarding FCC's programs and career services, to wit: "[a]ll programs are designed to prepare graduate for entry-level positions." (Exs. B, D, at 5 ("Career Services").)

Plaintiffs allege FCC promised "job placement assistance." (Compl., ¶¶ 240–41.) Plaintiffs falsely characterize the statement as a promise and omit the critical contextual prefatory statement: "*Florida Career College is not permitted by law to guarantee employment. Florida Career College makes every effort to assist students with job search services*. All programs are designed to prepare graduate for entry-level positions." (Exs. B, D, at 5 ("Career Services")

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[3] Britt's Enrollment Agreement calls for any dispute concerning interpretation, scope or enforcement of the arbitration agreement to be decided by a court, (*see* Ex. A, at 4, ¶ 2), while Laurence's Enrollment Agreement calls for any dispute concerning interpretation, scope and enforcement of the arbitration agreement to be decided by an arbitrator, (*see* Ex. C, at 4, ¶ 1).

[4] Each Enrollment Agreement further requires that "the fact of and all aspects of this arbitration and the underlying dispute shall remain strictly confidential by the parties, their representatives and AAA. I agree that any actual or threatened violation of this provision would result in irreparable harm and will be subject to being immediately enjoined." (Ex A, at 4, ¶ 9; Ex C, at 4, ¶ 9.) Plaintiffs' recent media campaigns since the filing of the Complaint disparage Defendants and advance false allegations that are in clear violation of this confidentiality provision.

(emphasis added).) This statement is entirely consistent with the Enrollment Agreements. FCC does not promise employment, nor does it promise job placement assistance, but rather states it makes every effort to provide such assistance.

The Course Catalogs also reserve FCC's right to make modifications to an program without prior notice. (Exs. B, D, at 1 ("Consumer Information").) The Course Catalog provides links to FCC's Gainful Employment Disclosures and an explanation of the types of disclosures included. (Exs. B, D, at 2 ("Required Federal Disclosure Information").)

Regarding financial assistance, the Course Catalogs make clear that *loans* requiring repayment are principally available through the "Federal Financial Aid Programs" as well as certain state loan programs, but that scholarships requiring no repayment, are provided through the FCC Institutional Aid Programs. (*See* Exs. B, D, at 6–9 ("Financial Assistance").)

VI. Borrower Defense to Repayment Regulations

ED promulgated Borrower Defense to Repayment regulations on November 1, 2016, which became effective July 1, 2017 (the "2016 BDR Regulations"). For loans first disbursed on or after July 1, 2017, the 2016 BDR Regulations specify the conditions under which a Direct Loan student borrower may assert a defense to repayment of the loan under Title IV of the Higher Education Act of 1965, as amended (the "HEA"). Borrower Defenses, 34 C.F.R. § 685.222 (2016); Agreements between an Eligible School and the Secretary, 34 C.F.R. § 685.300 (2018). The 2016 BDR Regulations impose certain restrictions on the use of pre-dispute arbitration agreements and class action waivers by institutions of higher education, such as FCC, that participate in the Direct Loan Program.[5] Specifically, the 2016 BDR Regulations condition a school's continued

[5] The 2016 BDR Regulations do not ban arbitration provisions. *See* Student Assistance General Provisions, 81 Fed. Reg. 75,926, 76,023 (2016) ("Department does not have the authority, and does not propose, to displace or diminish the effect of the FAA. These regulations do not invalidate any arbitration agreement . . . ."). As set forth in ED's commentary, "The regulations effect neither a deprivation of a property right of an institution in agreements it already has with students, nor an impairment of those contracts. The regulation affects the terms on which an institution may continue to participate in a Federal program. . . . Rights acquired by the institution under agreements already executed with students remain fully enforceable on their own terms. . . . The institution is not obligated to continue to participate in the Direct Loan program. If it chooses to continue to participate, it agrees to do so under rules such as these that change—prospectively—the conduct in which it can engage. These rules thereafter bar the institution that chooses to continue to participate from exercising rights acquired by the institution under agreements already executed with students. The regulations abrogate none of those agreements; an institution that chooses not to continue to participate is free to rely on those agreements." *Id* at 76,024–25.

participation in the Direct Loan program on its agreement to prospectively forbear from enforcing pre-dispute arbitration agreements and class actions waivers as to a "borrower defense claim." 34 C.F.R. § 685.300. A borrower defense claim is defined as "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. § 685.300(i). Breach of contract and misrepresentation claims are excluded from the definition of "borrower defense claim." *Id.*

The 2016 BDR Regulations also require institutions to provide written notice to students that it will not use a pre-dispute arbitration agreement to stop a student from "bringing a lawsuit concerning its 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." 34 C.F.R. §§ 685.300(e)(3) and (f)(3). The required notice must also explain "[t]his provision does not apply to any other claims" and that the Court decides whether a claim asserted is one "regarding the making of the Direct Loan or the provision of educational services for which the loan was obtained." *Id.* In or about May 2019, FCC provided students with the required notice. (Compl., ¶ 238.)

In 2019, ED published new Final Regulations as to borrower defense to repayment claims on Direct Loans first disbursed on or after July 1, 2020, which will become effective on July 1, 2020 ("2019 BDR Regulations"). The 2019 BDR Regulations permit the use of pre-dispute arbitration agreements and class action waivers as a condition of enrollment as to all claims, including any borrower defense claim. Student Assistance General Provisions, 84 Fed. Reg. 49,788, 49,933.

The BDR Regulations are in flux. Because FCC intends to continue its participation in the Direct Loan program, FCC will forebear from enforcing Plaintiffs' arbitration agreements regarding any claim the Court determines is a borrower defense claim.[6]

[6] FCC reserves its right to compel arbitration of any remaining claims in the event of new legal or factual developments.

ARGUMENT

MOTION TO COMPEL ARBITRATION

I. Procedural standard.

Section 4 of the Federal Arbitration Act ("FAA") empowers "[a] party aggrieved by the alleged failure . . . of another to arbitrate under a written agreement for arbitration" to "petition any United States district court . . . for an order directing that such arbitration proceed in the manner provided for in such agreement." 9 U.S.C. § 4. "Motions to compel arbitration are generally treated as motions to dismiss for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1)." *Schriever v. Navient Sols., Inc.*, No. 2:14-cv-596, 2014 WL 7273915, at *2 (M.D. Fla. Dec. 19, 2014); *see also Owings v. T-Mobile USA, Inc.*, 978 F. Supp. 2d 1215, 1222 (M.D. Fla. 2013). When considering such motions, the Court is free to consider evidence proffered by a defendant outside of the pleadings. *Schriever*, 2014 WL 7273915, at *2.

II. Plaintiffs' claims are subject to arbitration pursuant to the arbitration agreements.

The FAA declares arbitration agreements generally enforceable and reflects a liberal federal policy in favor of arbitration. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344–46 (2011). Britt's and Laurence's arbitration agreements are expressly governed by the FAA. (*See* Exs A, C at 4.) Moreover, the FAA governs the arbitration agreements because the contracts evidence transactions involving commerce.[7] 9 U.S.C. § 2; *see also Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001).

Under both federal and Florida law, there are three factors a court must consider in determining a party's right to arbitrate: "(1) a written agreement exists between the parties containing an arbitration clause; (2) an arbitrable issue exists; and (3) the right to arbitration has not been waived." *Sims v. Clarendon Nat. Ins. Co.*, 336 F. Supp. 2d 1311, 1326 (S.D. Fla. 2004)

[7] The phrase "involving commerce" has been construed broadly. *See Jenkins v. First Am. Cash Advance of Ga., LLC*, 400 F.3d 868, 874 (11th Cir. 2005). "Involving commerce" as used in the FAA is equivalent to "affecting commerce," and signal an intent to exercise Congress' commerce power to the fullest extent permitted by the Commerce Clause. *See Citizens Bank v. Alafabco Inc.*, 539 U.S. 52, 56 (2003). The FAA applies where interstate commerce is involved and when the economic activity in question represents a general practice subject to federal control. *Id.* The Enrollment Agreements are contracts for education. FCC's operations are extensively regulated by ED pursuant to the HEA. 20 U.S.C. § 1071, *et seq*. FCC is a participant in ED's Student Financial Aid Program, administered under Title IV of the U. S. Code and the HEA. (*Id.*) FCC is nationally accredited by Commission of the COE, which is approved to confer accreditation by ED under the HEA.

(citing *Marine Envtl. Partners, Inc. v. Johnson*, 863 So. 2d 423, 426 (Fla. 4th DCA 2003)); *Mercury Telco Grp., Inc. v. Empresa De Telecommunicaciones De Bogota S.A. E.S.P.*, 670 F. Supp. 2d 1350, 1354 (S.D. Fla. 2009). "By its terms, the [FAA] leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985) (emphasis in original). Thus, if the aforementioned criteria are met, the Court is required to issue an order compelling arbitration. *John B. Goodman Ltd. P'ship v. THF Const., Inc.*, 321 F.3d 1094, 1095 (11th Cir. 2003) ("Under the FAA, 9 U.S.C. § 1 *et seq.*, a district court must grant a motion to compel arbitration if it is satisfied that the parties actually agreed to arbitrate the dispute.") "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *AT&T Techs., Inc. v. Commc'n Workers of Am.*, 475 U.S. 643, 650 (1986) (internal brackets and quotation marks omitted). "Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983); *see also Hirshenson v. Spaccio*, 800 So. 2d 670, 674 (Fla. 5th DCA 2001). All factors necessary to compel arbitration are satisfied here.

First, Britt and Laurence both acknowledge they enrolled at FCC by executing an Enrollment Agreement, each of which contains an arbitration agreement requiring individual arbitration.

Second, the claims asserted are within the scope of the arbitration agreements and are, thus, arbitrable. The arbitration agreements provide that "any dispute that I am may bring against the school, or any of its parents . . . no matter how characterized, pleaded or styled, shall be resolved by binding arbitration . . . ." (Ex A at 4, ¶ 1; Ex. C at 4, ¶ 1.) The language of each arbitration provision is broad and covers all the claims advanced by Plaintiffs. Substantially similar clauses have been found broad enough to embrace tort, contract, and statutory claims so long as they are grounded in the contractual relationship. *See AXA Equitable Life Ins. Co. v. Infinity Fin. Grp., LLC*, 608 F. Supp. 2d 1330, 1336, 1338–39, 1344 (S.D. Fla. 2009); *Triple Int'l Invs., Inc. v. K2 Unlimited, Inc.*, 287 F. App'x 63, 65–66 (11th Cir. 2008) ("In the case at bar, the arbitration clause applies to '[a]ny legal dispute arising from' the agreement."). In addition, courts have consistently recognized that the types of claims brought by Plaintiffs in this action are subject to arbitration.

See, e.g., *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (arbitration does not limit substantive statutory rights); *Gregory v. Electro-Mech. Corp.*, 83 F.3d 382, 384, 386 (11th Cir. 1996); *In re Managed Care Litig.*, No. 00-cv-04984, 2008 WL 2741626, at *1 (S.D. Fla. July 14, 2008); *Nexsun Corp. v. Condo*, No. 8:10-cv-331, 2010 WL 2103039, at *2 (M.D. Fla. May 25, 2010); *Orkin Exterminating Co. v. Petsch*, 872 So. 2d 259, 263 (Fla. 2d DCA 2004); *Aztec Med. Servs., Inc. v. Burger*, 792 So. 2d 617, 620 (Fla. 4th DCA 2001).

Third, FCC has not waived its right to arbitrate and is promptly asserting it. Insofar as Plaintiffs attempt to argue that the May 2019 "supplement" or notice amounts to a waiver, their argument fails. As set forth below, and consistent with the notice, to the extent the Court determines any of Plaintiffs' claims are "borrower defense claims," FCC does not seek to compel those claims to arbitration. FCC only seeks to enforce its rights to compel arbitration of non-borrower defense claims.

III. FCC does not seek to compel arbitration of any claims the Court determines are "Borrower Defense Claims".

FCC only seeks to compel arbitration as to those claims the Court determines are *not* borrower's defense claims; it does not seek to compel any claims that the Court determines are borrower defense claims. Pursuant to the 2016 BDR Regulations, the Court is tasked with deciding whether a claim asserted in the lawsuit is a borrower defense claim. As set forth below, the Court should conclude that none of the claims in this action are borrower defense claims.

For purposes of those provisions in the federal regulations relating to use of pre-dispute arbitration agreements and class action waivers, "borrower defense claim" is defined as "a claim that is or could be asserted as a borrower defense as defined in [34 C.F.R.] § 685.222(a)(5),[8] 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).[9] The definition of a "borrower

[8] Section 685.222(a)(5) defines "borrower defense" as a defense to repayment of amounts owed on a Direct Loan or a right to recover amounts previously paid based on 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).

[9] While the scope of borrower defenses upon which a borrower may submit an application to ED to avoid repayment of a student loan may be broad, *see* 34 C.F.R. § 685.222, the scope of "borrower defense claims" for disputes between the school and student for which institutions participating in the Direct Loan program agree not to arbitrate pursuant to a pre-dispute arbitration agreement is much narrower, *see* 34 C.F.R. § 685.300.

defense claim" in 34 C.F.R. § 685.300(i)(1) is distinct from the definition of "borrower defense" under 34 C.F.R. § 685.222(a)(5). In particular, a "borrower defense claim" is "a claim *other than one* based on § 685.222(c) or (d)." 34 C.F.R. § 685.300(i)(1) (emphasis added). Stated another way, any claims falling under 34 C.F.R. §§ 685.222(c) or (d) are, by definition, *not* borrower defense claims. Section 685.222(c) encompasses breach of contract claims in which the student alleges the school "failed to perform its obligations under the terms of a contract with the student." 34 C.F.R. § 685.222(c). Section 685.222(d) encompasses any claim involving a "substantial misrepresentation . . . that the borrower reasonably relied on to the borrower's detriment when the borrower decided to attend, or to continue attending, the school or decided to take out a Direct Loan." 34 C.F.R. § 685.222(d).

Counts I, II, and III fall within the carve-out provisions of 34 C.F.R. §§ 685.222(c) and (d). Count I, which alleges IEC and FCC violated the FDUTPA based on FCC's misrepresentations regarding job placement, the facilities, and curriculum upon which they relied in deciding to enroll, (*see* Compl., ¶¶ 173, 193, 207, 212, 234), falls within the second exclusion of Section 685.300(i)(l)'s definition of "borrower defense claims"—"substantial misrepresentation by the school." A substantial misrepresentation claim includes misrepresentations or omissions by the school that the student relied upon in deciding to attend or continue attending the school. *See* 34 C.F.R. §§ 685.222(d); Subpart F—Misrepresentation, 34 C.F.R. §§ 668.71–74. As such, Count I is not a borrower defense claim and must be compelled to arbitration.

Count II, which alleges FCC breached the Enrollment Agreements and Course Catalogs by failing to prepare graduates for entry level positions, and failing to provide hands-on experience, well-equipped facilities, and job placement assistance, (*see* Compl., ¶¶ 240–41), is expressly excluded as a "borrower defense claim" under Section 685.300(i)(1). *See* 34 C.F.R. § 685.222(c). As such, Count II is not a borrower defense claim and must be compelled to arbitration.

Count III, which alleges negligence by IEC and FCC relating to false or unfulfilled promises by FCC about job placement, is simply a restatement of Counts I and II. (*See* Compl., ¶¶ 245–247.) As such, the negligence claim is excluded and not a borrower defense claim for the reasons stated above.

Instructive on this issue is the decision in *Carr v. Grand Canyon University*. No. 19-cv-1707, 2019 U.S. Dist. LEXIS 194520 (N.D. Ga. Aug. 19, 2019), *appeal filed*, No. 19-13639 (11th

Cir. Sept. 12, 2019).[10] In *Carr*, former students of Grand Canyon University ("GCU") brought a putative class action asserting claims for breach of contract, fraud, intentional misrepresentation, unjust enrichment, and declaratory judgment premised on allegations that GCU misrepresented the time necessary to complete the program. *Id.* at *3. As part of their enrollment, each plaintiff entered into an arbitration agreement requiring arbitration of "any dispute arising from my enrollment, not matter how described, pleaded, or styled." *Id.* at *3. GCU moved to compel arbitration of all of the claims pursuant to the arbitration agreement. *Id.* In opposition to the motion, plaintiffs argued that the arbitration agreement was barred by the 2016 BDR Regulations because the claims were "borrower defense claims" under the regulations. *Id.* The district court expressly rejected plaintiffs' argument, and reasoned as follows:

> 34 C.F.R. § 685.300(i)(1) defines a borrower defense claim as "a claim 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) and (d) that may be asserted under § 685.222(b) if reduced to judgment[."] Defendants argue that all claims that Plaintiffs assert are based on § 685.222(c) and (d) and, thus, do not fall within the definition of a borrower defense claim because they are included in the carve-outs.
>
> Plaintiffs respond that their claims meet the definition of a "borrower defense" and therefore should not be subject to arbitration. They contend that the Court should read the definition of a "borrower defense claim" to include claims based on all borrower defenses (including those based on § 685.222(c) and (d), as long as the claims can be asserted under § 685.222(b) if reduced to judgment). However, as Defendants point out, Plaintiffs' construction of the regulations would render various provisions superfluous, including the separate definitions for "borrower defense" and "borrower defense claim." Further, the introductory language, "For the purposes of paragraphs (d) through (h) of this section," would be meaningless if the terms were construed identically.
>
> Borrower defenses are available to students to avoid repayment of their loans, and the scope of such defenses is broad. However, borrower defense claims, for which institutions participating in the Direct Loan program agree not to arbitrate pursuant to a pre-dispute arbitration agreement, are construed in a more limited manner. Therefore, the Court concludes that sections 685.222(c) and (d) are borrower defenses (and not meaningless, as Plaintiffs argue), but claims under those sections do not constitute borrower defense claims according to the statute.

[10] The matter has been appealed to the U.S. Court of Appeals for the Eleventh Circuit. *See* Notice of Appeal, *Carr v. Grand Canyon Univ.*, No. 19-1707 (N.D. Ga. Sept. 12, 2019), ECF No. 26. The appeal was fully briefed as of January 24, 2020, and Grand Canyon University responded to plaintiff-appellant's supplemental authority on February 20, 2020. *See Carr v. Grand Canyon Univ.*, No. 19-13639 (11th Cir.). Thus, a ruling on the appeal is likely imminent.

Id. at *7–9.[11] The court's reasoning and ruling in *Carr* is directly on point and applies equally here.

Finally, the Equal Credit Opportunity Act claims (Counts IV and V) and the Title VI claims (Counts VI and VII) are not borrower defense claims and are, thus, arbitrable. Counts IV through VII are premised on alleged racial discrimination and purported "reverse redlining" as to federal loans undertaken by black students. Such allegations and claims are *not* "an act or omission of an 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." As set forth in the commentary to the regulations, ED "has stated consistently since 1995 that it does not recognize as a defense against repayment of the loan a cause of action that is not directly related to the loan or to the provision of educational services, such as personal injury tort claims, or actions based on allegations of sexual or racial harassment. [Office of Postsecondary Education, 60 Fed. Reg. 37,768, 37,769.] Such issues are outside of the scope of these regulations, and we note that other avenues and processes exist to process such claims." 81 Fed. Reg. at 75,945.

Based on the foregoing, FCC respectfully submits no claims asserted in the Complaint are "borrower defense claims." FCC, however, does not seek to compel any claims that the Court determines are borrower defense claims and, thus, requests that the Court compel only the non-borrower defense claims to arbitration.

IV. Individual arbitration should be ordered.

"[A] party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 684 (2010). The U.S. Supreme Court specifically has upheld the validity of class action waivers. *See AT&T Mobility*, 563 U.S. at 337–38, 344–46; *see also Kaspers v. Comcast Corp.*, 631 F. App'x 779, 781–82 (11th Cir. 2015) (finding that parties

[11] The Court has the discretion to stay this action pending a ruling on the appeal in the *Carr* case, since the Eleventh Circuit's decision may be determinative on the scope of a "borrower defense claim" as defined in 34 C.F.R. § 685.300(i). *See Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936) (The Court's "[p]ower 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 litigants."); *see also Ortega Trujillo v. Conover & Co. Commc'ns*, 221 F.3d 1262, 1264 (11th Cir. 2000) ("When a district court exercises its discretion to stay a case pending the resolution of related proceedings in another forum, the district court must limit properly the scope of the stay. A stay must not be 'immoderate.'").

may agree to class action waivers in arbitration provisions). As discussed above, Britt and Laurence expressly waived the right to participate in any purported class action proceeding against FCC or IEC. Each Plaintiff's class action waiver is enforceable. Individual arbitration should be ordered as to all non-borrower defense claims the Court compels to arbitration.

MOTION TO DISMISS

Notwithstanding the foregoing, should the Court determine that one or more of Plaintiffs' claims are "borrower defense claims" and are thus not arbitrable, Defendants move to dismiss any and all such claims, as detailed below:

I. Plaintiffs lack standing to bring claims under the "All FCC Class" and the "Race Discrimination Subclass" because their experiences are limited to their programs.

Each class representative must sufficiently state a claim under each count. Britt and Laurence are unable to do so here. They lack standing individually and also as part of a class. *Wooden v. Bd. of Regents of the Univ. Sys.*, 247 F.3d 1262, 1288 (11th Cir. 2001) ("Thus, just as a plaintiff cannot pursue an individual claim unless he proves standing, a plaintiff cannot represent a class unless he has standing to raise the claims of the class he seeks to represent.")

Plaintiffs define the "all FCC Class" as "[a]ll persons who enrolled at any FCC campus in Florida within the last four years." (Compl., ¶ 220.) Neither Plaintiff pleads specific facts that would support their representation of a class of students from other programs or other campuses, which is fatal to their Complaint. *See Toback v. GNC Holdings, Inc.*, No. 13-cv-80526, 2013 WL 5206103, at *4–5 (S.D. Fla. Sept. 13, 2013) (finding a plaintiff could not establish Article III standing for FDUTPA class action claims as to a line of products did not function as advertised because the plaintiff had only purchased one of the products and thus lacked standing with respect to any other product from the line); *see also Ohio State Troopers Ass'n v. Point Blank Enters.*, 347 F. Supp. 3d 1207, 1221 (S.D. Fla. 2018). *Toback* is entirely consistent with the U.S. Supreme Court's explanation that "a plaintiff who has been subject to injurious conduct of one kind [does not] possess by virtue of that injury the necessary stake in litigating conduct of another kind, although similar, to which he has not been subject." *Blum v. Yaretsky*, 457 U.S. 991, 999 (1982).

Plaintiffs define the "Race Discrimination Subclass" as "[a]ll Black students who enrolled at any FCC campus in Florida within the last five years." (Compl., ¶ 220.) Plaintiffs also appear to have anticipated a ruling that one or both of them lack standing by pre-emptively offering up alternative classes and subclasses. (*See id.*, ¶¶ 230–31.) Despite Plaintiffs' attempts to cast an alternative subclass, Laurence, the named plaintiff supporting claims for the Medical Assistant

Program, does not (and cannot) plead any facts that would support her representation of a racial discrimination subclass. (*See id.*, ¶¶ 194–219, 230–31.) Moreover, neither Britt nor Laurence pleads facts supporting their proper representation of students from other programs or campuses.

II. The Complaint should be dismissed as an impermissible shotgun pleading.

The Complaint fails to give Defendants adequate notice of the claims against them by employing three impermissible "shotgun pleading" methods, as identified by the Eleventh Circuit Court of Appeals: (1) impermissibly supporting the complaint with conclusory, vague or immaterial facts not related to any particular claim; (2) impermissibly relying on group pleading without specifying which defendant is responsible for which act or omission; and (3) impermissibly pleading multiple claims in a single count. *See Weiland v. Palm Beach Cty. Sheriff's Office*, 792 F.3d 1313, 1321–23 (11th Cir. 2015) ("The unifying characteristic of all types of shotgun pleadings is that they fail . . . to give the defendants adequate notice of the claims against them and the grounds upon which each claim rests.").

A. Plaintiffs improperly rely on conclusory, vague and immaterial allegations.

"The failure to identify claims with sufficient clarity to enable the defendant[s] to frame a responsive pleading constitutes a 'shotgun pleading' that violates Rule 8(a)(2)." *Affordable Aerial Photography, Inc. v. Modern Living Real Estate, LLC*, No. 19-cv-80488, 2019 WL 3716775, at *2 (S.D. Fla. Aug. 7, 2019) (citing *Byrne v. Nezhat*, 261 F.3d 1075, 1129–30 (11th Cir. 2001)). Here, Plaintiffs incorporate the factual allegations of the entire Complaint into every count, (*see* Compl., ¶¶ 232, 236, 244, 248, 255, 261, 266), including hundreds of paragraphs of conclusory allegations and irrelevant commentary with no bearing whatsoever on Britt's or Laurence's personal experiences, (*see, e.g.*, *id.*, ¶¶ 3–28, 51–52, 54–121, 122–33, 136–39, 140–63). This pleading tactic is designed to confuse Defendants and prevent them from being able to adequately address the actual claims and allegations asserted. *See Weiland*, 792 F.3d at 1320 (explaining the origin of concern for shotgun pleadings as being "calculated to confuse the 'enemy,' and the court, so that theories for relief not provided by law and which can prejudice an opponent's case . . . can be masked"); *Brown v. Air Line Pilots Ass'n*, No. 19-cv-60242-RKA, 2019 U.S. Dist. LEXIS 164483 (S.D. Fla. Sept. 24, 2019) (citing the "cardinal sin" of shotgun pleading by "failing to incorporate only the specific factual allegations that support the cause of action asserted in each count" in dismissing putative class action complaint), *aff'd per curium*, No. 19-14194, 2020 U.S. App.

LEXIS 14407 (11th Cir. May 6, 2020). Because the Complaint is replete with conclusory, vague and immaterial allegations, it must be dismissed.

B. Plaintiffs improperly rely on group pleading.

The Complaint impermissibly relies on group pleading and must be dismissed. A complaint "must be specific, putting each [d]efendant on notice and informing each [d]efendant as to under which capacity they are allegedly being held liable." *Steen Grp. LLC v. Bullguard Ltd.*, No. 13-cv-60070, 2013 WL 12089956, at *3 (S.D. Fla. June 4, 2013) (granting motion to dismiss). Plaintiffs that "assert multiple claims against multiple defendants without specifying which of the defendants are responsible for which acts or omissions" are engaging in impermissible shotgun pleading. *Weiland*, 792 F.3d at 1323. Instead, a complaint must "articulat[e] the factual basis for *each Defendant's* liability." *Joseph v. Bernstein*, 612 F. App'x 551, 555 (11th Cir. 2015) (emphasis added). A complaint is fatally deficient where it "indiscriminately groups the defendants together . . . ." *Id.* (affirming dismissal). Additionally, allegations that "improperly lump [defendants] together" without alleging "any specific factual allegations as to each . . . are clearly insufficient under *Twombly*." *Bentley v. Bank of Am., N.A.*, 773 F. Supp. 2d 1367, 1373 (S.D. Fla. 2011) (granting motion to dismiss); *Fox v. Loews Corp.*, 309 F. Supp. 3d 1241 (S.D. Fla. 2018). In *Fox*, the plaintiff "allege[d] that all . . . Defendants committed deceptive conduct" but did not allege "how [each defendant could] plausibly be responsible for th[at] conduct." *Fox*, 309 F. Supp. 3d at 1249. The court held that the plaintiff "impermissibly and confusingly lump[ed] the two remaining Defendants together" and dismissed the case. *Id.*

Dismissal is likewise compelled here. Plaintiffs' only allegations against IEC are that it exercises direct control over its subsidiaries and that its controlling management is one and the same. (*See* Compl., ¶¶ 48–49.) Plaintiffs do not attribute any particular acts to IEC, yet in almost every count[12] Plaintiffs impermissibly claim that an unarticulated combination of the "Defendants" is somehow liable for everything. (*See, e.g.*, *id.*, ¶¶ 234, 245–46 ("Defendants had a duty" and "Defendants breached").) Plaintiffs bear the burden of providing fair notice as to the claims against each defendant, and their failure to do so should result in dismissal. *See Petrovic v. Princess Cruise Lines, Ltd.*, No. 12-cv-21588, 2012 WL 3026368, at *5 (S.D. Fla. July 20, 2012) ("It is not for the court or the parties to speculate as to the identity of the Defendants these allegations are

[12] Only Count II, Breach of Contract, names FCC individually. (*See* Compl., ¶¶ 236–243.)

levied against as the burden rests on the plaintiff to provide fair notice of the grounds for the claims made against each of the defendants.").

Plaintiffs' alter-ego styled allegations directed at corporate veil piercing are facially insufficient and do not justify its impermissible group pleading. Plaintiffs fails to plead allegations to support piercing the veil between a parent and its subsidiary to make an "extraordinary case" under Florida law. *Court Appointed Receiver of Lancer Offshore, Inc. v. Citco Grp.*, No. 05-cv-60080, 2011 WL 1233126, at *7 (S.D. Fla. Mar. 30, 2011) ("Under Florida law, the corporate veil may be pierced 'in only the most extraordinary cases.'"). "To state a cognizable claim for piercing the corporate veil, a plaintiff must allege facts that . . . demonstrate that the subsidiaries are 'mere instrumentalities' of the parent, and that the defendants engaged in 'improper conduct' in the formation or use of the subsidiary." *Id.* at *6. Florida courts have adopted a stringent three-part test for determining whether it is appropriate to pierce the corporate veil, and require evidence that: "(1) the shareholder dominated and controlled the corporation to such an extent that the corporation's independent existence was in fact nonexistent and the shareholders were alter egos . . .; (2) the corporate form must have been used fraudulently or for an improper purpose; and (3) the fraudulent or improper use of the corporate form caused injury to the claimant." *Id.* at *7 (rejecting attempt to hold parent liable for the actions of its subsidiaries); *see also Stansell v. BGP, Inc.*, No. 8:09-cv-2501, 2010 WL 2791850, at *1 (M.D. Fla. July 14, 2010) (dismissing the complaint).[13]

Plaintiffs allege no facts of wrongful conduct by IEC individually in the Complaint. Moreover, allegations as to corporate management are facially inadequate to support any notion of veil piercing. In apparent acknowledgement of this deficiency, Plaintiffs merely allege in conclusory fashion that IEC "exercises direct control over its subsidiaries" and that controlling management of IEC and FCC is "one and the same." (Compl., ¶¶ 48–49.) The mere fact that an entity is a corporate parent or affiliate is utterly insufficient to pierce the corporate veil because, "[g]enerally, parent corporations are not liable for their subsidiaries' acts." *Patterson v. Orlando-Orange Cty*, No. 6:18-cv-950, 2019 WL 2090269, at *6 (M.D. Fla. Apr. 16, 2019), *adopted by*

[13] Florida law applies to attempts to pierce the corporate separateness of companies. "[I]n determining whether the corporate veil can be pierced under the theory of alter ego liability, the law of the state of incorporation is to be applied." *Kronotex USA, LLC v. Hodges*, No. 07-cv-21939, 2008 WL 11406179, at *2 (S.D. Fla. Apr. 25, 2008).

2019 WL 2085067 (M.D. Fla. May 13, 2019). Equally insufficient attempts to disregard the corporate form are the allegations that the entities are in the same vicinity and have overlapping officers or directors, (*see* Compl., ¶¶ 49–52), because "the sharing of a business address and the overlap of officers is insufficient to support a finding that the subsidiaries are the alter ego of their corporate parents." *Meterlogic, Inc. v. Copier Sols., Inc.*, 126 F. Supp. 2d 1346, 1358 (S.D. Fla. 2000). For these reasons, the Complaint is an impermissible shotgun pleading and must be dismissed.

C. Plaintiffs improperly plead multiple claims in a single count.

In addition to the shotgun pleading issues plaguing the Complaint as a whole, 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." *Weiland*, 792 F.3d at 1322–23. Claims such as those in paragraph 234 are improperly pleaded; the legal effect of some activities may be distinguishable from others. Defendants are prevented from being able to adequately respond. The Complaint must be dismissed.

III. The Complaint should be dismissed in its entirety as each count fails to state a claim.

A. Legal Standard

To survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6), "[a] plaintiff must plausibly allege all the elements of the claim for relief. Conclusory allegations and legal conclusions are not sufficient; the plaintiff must state a claim to relief that is plausible on its face." *Pedro v. Equifax, Inc.*, 868 F.3d 1275, 1279 (11th Cir. 2017). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)). While the Court must accept a complaint's well-pleaded allegations as true, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678.

B. Plaintiffs' FDUTPA claim (Count I) should be dismissed because the claim is inadequately pleaded and barred by the integrated contract.

A claim "under FDUTPA has three elements: (1) a deceptive act or unfair practice; (2) causation; and (3) actual damages." *Rollins, Inc. v. Butland*, 951 So. 2d 860, 869 (Fla. 2d DCA 2006); FLA. STAT. § 501.201 *et seq*. Plaintiffs failed to plead the essential elements of the claim, either doing so inadequately or not at all. Furthermore, the Enrollment Agreement integration

clauses preclude Plaintiffs' claims as they are premised on pre-contractual statements. (*See* Compl., ¶¶ 173, 207.)

1. Plaintiffs fail to plead each sub-claim with adequate particularity.

Plaintiffs' allegations under Count I—all of which sound in fraud—are not pleaded with the requisite particularity required under Fed. R. Civ. P. 9(b). *See, e.g.*, *Blair v. Wachovia Mortg. Corp.*, No. 5:11-cv-566, 2012 WL 868878, at *3–4 (M.D. Fla. Mar. 14, 2012) ("[W]here the gravamen of [a FDUTPA] claim sounds in fraud . . . the heightened pleading standard of Rule 9(b) would apply."). In *Blair*, the court held that the plaintiff's FDUTPA claim premised on allegations that the defendants "utilized a fraudulent scheme" to issue overvalued loans sounding in fraud and failed to meet the requirements of Rule 9(b) because she did not allege "precisely what statements were made," the person making the statements or the time and place when made. *Id*. at *4; *Llado-Carreno v. Guidant Corp.*, No. 09-cv-20971, 2011 WL 705403, at *5 (S.D. Fla. Feb. 22, 2011) (dismissing FDUTPA claim under Rule 9(b) for lack of "specific facts").

To satisfy 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 which these statements misled the plaintiff; and (4) what the defendant gained by the alleged fraud.'" *Feldman v. Am. Dawn, Inc.*, 849 F.3d 1333, 1340 (11th Cir.), *cert. denied*, 138 S. Ct. 322 (2017) (quoting Fed. R. Civ. P. 9(b)). Plaintiffs failed to plead individualized sub-claims based on the activities alleged, much less with the required precision. (*See* Compl., ¶¶ 232–35.) The putative class allegations are replete with those sounding in fraud, including alleged misrepresentations, misleading or false statements, false promises, and even falsification of documents. (*See id.*, ¶¶ 94–95, 122–23, 126, 130–31, 193). Plaintiffs failed to satisfy Rule 9(b)'s heightened pleading requirement, including failing to plead the manner in which these statements misled them. Count I must be dismissed.

2. The allegations fail to establish any materially misleading statement.

FDUTPA requires Plaintiffs to allege a deceptive act or practice, here, in the context of employment and salary data allegations. Even if Plaintiffs' allegations are plausible and true, which they are not, a for-profit entity does not violate FDUTPA by simply presenting information in the light most conducive to its business. *See Casey v. Fla. Coastal Sch. of Law, Inc.*, No. 3:14-cv-1229, 2015 WL 10096084, at *15 (M.D. Fla. Aug. 11, 2015), *adopted by* 2015 WL 10818746, *1 (M.D. Fla. Sept. 28, 2015) (finding, in the context of unfair employment and salary data

allegations, that a for-profit law school was not prohibited from publishing facts in the light most conducive to business as long as it is not probably deceptive and likely to cause injury; potential students were "reasonably expected to perform some due diligence . . . beyond glancing at a for-profit enterprise's self-serving numbers before plunging into substantial debt"). On this basis alone, Count I fails and must be dismissed.

3. Plaintiffs fail to adequately plead causation.

Plaintiffs do not allege sufficient facts to establish a causal relationship between any of the alleged job placement promises, on the one hand, and either Britt's or Laurence's alleged loss of money spent to attend the school, on the other. Although "actual reliance" is not a necessary element, a viable FDUTPA claim requires that a plaintiff establish causation. *See Fitzpatrick v. Gen. Mills, Inc.*, 635 F.3d 1279, 1282–83 (11th Cir. 2011); *Blair*, 2012 WL 868878, at *3. Count I merely alleges Defendants' "violations caused Plaintiffs and class members damages" but do not describe *how* the conduct is alleged to have caused damages. (Compl., ¶ 235.) Moreover, the allegations in the Complaint make any causation implausible. (*See* Compl., ¶¶ 165, 172, 194–96.)

4. Plaintiffs assert only speculative, consequential damages not permitted under FDUTPA, which is fatal to the claims.

To state a claim for money damages under FDUTPA, a plaintiff must establish that: (1) he or she was subjected to a deceptive act or unfair practice; (2) there was causation between such act or practice and the plaintiff's damages; and (3) the plaintiff suffered "actual damages." *Rollins,* 951 So. 2d at 869. "Actual damages under FDUTPA must directly flow from the alleged deceptive act or unfair practice. FDUTPA does not provide for the recovery of nominal damages, speculative losses, or the compensation for subjective feelings of disappointment." *Marrache v. Bacardi U.S.A., Inc.*, No. 19-cv-23856, 2020 WL 434928, at *2 (S.D. Fla. Jan. 28, 2020). Consequential damages such as lost future profits or wages, which Britt appears to seek by arguing that he was deprived of job placement opportunities, are also not available under FDUTPA. *Hesterly v. Royal Caribbean Cruises, Ltd.*, No. 06-cv-22862, 2008 WL 11406184, at *6–7 (S.D. Fla. Aug. 6, 2008). The allegation that Defendants' unfair practices deprived Britt and others similarly situated of job placement does not give rise to quantifiable damages under FDUTPA. *See Rollins, Inc.*, 951 So. 2d at 873 (dismissing class claims because FDUTPA "does not provide for the recovery of nominal damages, speculative losses, or compensation for subjective feelings of disappointment"). Count I must be dismissed on this basis.

5. The claims are precluded by the existence of an integrated contract.

It is well-settled that Plaintiffs may not maintain an action under principles of both tort and contract because the contract is an integrated one. *See Topp, Inc. v. Uniden Am. Corp.*, 513 F. Supp. 2d 1345, 1348 (S.D. Fla. 2007) ("No action for the tort of fraud in the inducement will lie where the alleged fraud contradicts a subsequent written contract."). Here, Britt's and Laurence's Enrollment Agreement each contained an integration clause which expressly provided that "no verbal statements or promises made before the execution of this agreement will be recognized." (Ex. A, at 3; Ex. C, at 3.) Any other promises allegedly made, then, even if true (which they are not), would be irrelevant and not actionable in tort or contract.

C. Plaintiffs' breach of contract claim (Count II) should be dismissed as barred by the integrated contracts, which contradict Plaintiffs' allegations, and no such breach could have occurred.

It is well settled that, on a motion to dismiss, a court may consider documents "which a plaintiff refers to . . . in its complaint" when "the document is central to its claim, its contents are not in dispute, and the defendant attaches the document to its motion to dismiss." *Fin. Sec. Assurance*, 500 F.3d at 1284. Where the referenced contract itself contradicts the general and conclusory allegations of the pleadings, the document will govern. *Infante v. Bank of Am. Corp.*, 468 F. App'x 918, 921 n.2 (11th Cir. 2012). "Where the allegations of a complaint are expressly contradicted by the plain language of an attachment to that complaint, the attachment controls, and the allegations are nullified." *Degirmenci*, 693 F. Supp. 2d at 1341–42. "In Florida, a contract may consist of more than one document. In the event that a contract consists of more than one document, the documents must be construed together." *Overseas Priv. Inv.*, 826 F. Supp. at 1578 (citing *Int'l Ship Repair v. Gen. Portland, Inc.*, 469 So. 2d 817 (Fla. 2d DCA 1985)).

As discussed above, the Enrollment Agreements' integration clauses preclude consideration of alleged promises made outside the four corners of the Enrollment Agreements, or statements that contradict the express terms of the Enrollment Agreements. The Court may and, in fact, *should* rely on the Enrollment Agreements and Course Catalogs referenced in (but not appended to) the Complaint. This is particularly true where the plain language of those contracts contradicts the conclusory, vague or implausible allegations in the Complaint. Further, the Enrollment Agreements and relevant Course Catalogs must be read together as a single contract with the terms read harmoniously—not interpreted in a way that is internally inconsistent. Here, the contract contains an integration clause, and one cannot look to alleged "promises" made outside

the four corners of the contract itself. (*See* Ex. A, at 3; Ex. C, at 3.) Neither the Enrollment Agreements nor the Course Catalogs guarantee employment; in fact, the Course Catalog specifically disclaims that FCC is prohibited from making any such guarantees. (*See* Ex. B, at 5; Ex. D, at 5 ("Career Services").) Vague assurances in the Course Catalog are not guarantees and could not "promise" anything above and beyond the terms of the Enrollment Agreement. The Enrollment Agreements and the Course Catalogs cannot be read in any way as creating an entitlement to lifetime employment, specific requirements for individual educational locations, or a particular course experience; these are explicitly subject to change. (*See, e.g.*, Ex. B, at 1; Ex. D, at 1 ("Consumer Information").) For the foregoing reasons, Count II must be dismissed.

D. Plaintiffs' negligence claim (Count III) should be dismissed as precluded by the existence of contractual claims and the terms of the contract.

1. Plaintiffs' negligence claim is impermissible based on the same set of facts as the breach of contract claim.

Plaintiffs' integrated Enrollment Agreements with FCC preclude them from maintaining an action sounding in tort and one sounding in contract. Where there is privity of contract, a tort claim may only be brought where it is independent of the actions complained of for the contract breach. *See Kaye v. Ingenio, Filiale De Loto-Quebec, Inc.*, No. 13-cv-61687, 2014 WL 2215770, at *4–5 (S.D. Fla. May 29, 2014) (explaining that parties in contractual privity may not recast causes of action that are otherwise breach-of-contract claims as tort claims). Despite attempts to evade this preemption issue, the negligence claim arises from the same set of facts as the breach of contract claims, (*see, e.g.*, Compl., ¶¶ 236, 244 (each re-alleging the factual background of "paragraphs 1 through 231")), and is barred.

2. Plaintiffs do not adequately plead an actionable duty or breach thereof.

Plaintiffs' negligence claim further fails as a matter of law because Plaintiffs cannot establish the existence of or breach of a duty. Neither IEC nor FCC had a duty to ensure job placement, nor did either have a duty to refrain from advertising and promoting their business. *See Casey*, 2015 WL 10096084, at *15 (finding a for-profit law school was not prohibited from publishing facts in the light most conducive to business, as long as it is not probably deceptive and likely to cause injury). Plaintiffs' failure to adequately plead the source of such a duty, or breach thereof, is fatal to their negligence claim. For the foregoing reasons, Count III must be dismissed.

E. Britt's claims alleging ECOA violations (Counts IV and V) should be dismissed because neither IEC nor FCC are qualifying creditors and Britt failed to plead a prima facie case.

ECOA makes it unlawful for any "creditor" to discriminate against any applicant "with respect to any aspect of a credit transaction," and provides remedies for discriminatory actions taken on basis, among other classes, race, color, and national origin. 15 U.S.C. § 1691(a).

1. Britt cannot establish that IEC or FCC are qualifying creditors.

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; or any assignee of an original creditor who participates in the decision to extend, renew or continue credit." 15 U.S.C. § 1691a(e); *see also* Definitions, 12 C.F.R. § 202.2(l). ECOA also includes "arrangers of credit" (beyond those that merely extend or fund credit) within the definition of "creditor." Britt must proffer more than just a bare legal conclusion that either FCC or IEC "regularly extends, renews, or continues credit . . . or that defendant participates in any way in the decision to extend credit" in order to survive dismissal. (Compl., ¶¶ 251, 257.)

Numerous courts have observed that the definition of a "creditor" is linked to that of "credit" within the Act. Those same courts have held that a creditor is necessarily one that grants applicants the ability "to defer payment of a debt or to incur debts and defer its payment . . . ." *Beard v. Worldwide Mortg. Corp.*, 354 F. Supp. 2d 789, 810 (W.D. Tenn. 2005) (granting motion to dismiss where the definition of a "creditor" is linked to that of "credit" within the Act, and noting that the plaintiff failed to assert the defendant was an entity granting applicants the ability "to defer payment of a debt or to incur debts and defer its payment or to purchase property or services and defer payment therefore"); *Riethman v. Berry*, 287 F.3d 274, 277 (3d Cir. 2002) ("The hallmark of 'credit' under the ECOA is the right of one party to make deferred payment."); *Shaumyan v. Sidetex Co.*, 900 F.2d 16, 18 (2d Cir. 1990) ("[I]t is apparent that the ECOA extends only to instances in which the right to defer payment of an obligation is granted. Absent a right to defer payment for a monetary debt, property or services, the ECOA is inapplicable."); *Capitol Indem. Corp. v. Aulakh*, 313 F.3d 200, 203 (4th Cir. 2002) (noting that in reading the definitions of "credit," "creditor," and "credit transaction" together, it is "clear that the essence of the 'credit' relationship under the equal credit statutes is one that provides a right to defer payment on a debt or other obligation.")

Federal regulations also make clear that IEC and FCC cannot be considered creditors under the ECOA, under any definition, unless Britt can show not only that the lender (here, the federal government) was extending loans on a discriminatory basis, but that FCC and/or IEC were aware of its discriminatory lending practices. *See* 12 C.F.R. § 202.2(l) ("A person is not a creditor regarding any violation of the Act or this regulation committed by another creditor unless the person knew or had reasonable notice of the act, policy or practice that constituted the violation before becoming involved in the credit transaction."). Plaintiffs plead no facts to establish either fact. Moreover, the definition of "arranger of credit" only extends to those who "regularly arrange[] for the extension, renewal, or continuation of credit." 15 U.S.C. § 1691a(e).

The Court should take judicial notice of the process of federal loan procedures, which calls into question the plausibility of Plaintiffs' allegations. *In re Checking Account Overdraft Litig.*, 797 F. Supp. 2d 1323, 1327 (S.D. Fla. 2011) ("[I]n analyzing the sufficiency of the complaint, the Court limits its consideration to the well-pleaded factual allegations, documents central to or referenced in the complaint, and matters judicially noticed."); *United States ex rel. Osheroff v. Humana, Inc.*, 776 F.3d 805, 812 n. 4 (11th Cir. 2015) ("Courts may take judicial notice of publicly filed documents . . . at the Rule 12(b)(6) stage.") (quoted in *Fowler v. Caliber Home Loans, Inc.*, 277 F. Supp. 3d 1324, 1330 (S.D. Fla. 2016)). The HEA sets the terms and conditions for student borrowers of federally insured educational loans. In other words, student eligibility is established by federal law, not by IEC or FCC. *See generally* 20 U.S.C. § 1071 *et seq.*; *Educ. Credit Mgmt. Corp. v. Barnes*, 318 B.R. 482, 484 (S.D. Ind. 2004) ("Federally subsidized student loans, issued pursuant to the Federal Family Education Loan program and other similar programs, are made by local private financial institutions under terms approved by the U.S. Department of Education [].").

Britt advances no legal basis or factual allegations establishing the federal government's loans were extended on a discriminatory basis. Nor does he advance any allegation that IEC or FCC were somehow aware of any discriminatory lending practices by the federal government. Moreover, Britt does not allege, nor could he, that IEC or FCC directly fund student loans; instead, students are eligible to receive federal financial aid directly from the federal government under Title IV of the HEA. IEC and FCC are agnostic to the process of students obtaining federal loans, which is an arms-length transaction between the student and the federal government. Thus, Counts IV and V should be dismissed on this basis.

2. Britt fails to establish the required prima facie case of discrimination.

To establish unlawful discrimination under the ECOA in the absence of direct evidence of discrimination, the plaintiff must allege and come forward with circumstantial evidence that creates an inference to "shift the burden" to the defendant to defend the treatment, under the analysis developed in *McDonnell Douglas Corporation v. Green* and its progeny. 411 U.S. 792 (1973); s*ee also, e.g.*, *Cooley v. Sterling Bank*, 280 F. Supp. 2d 1331, 1337 (M.D. Ala. 2003); *Shiplet v. Veneman*, 620 F. Supp. 2d 1203, 1231–32 (D. Mont. 2009).

Britt must plead facts establishing a prima facie case of discrimination under the ECOA by alleging (1) he is a member of protected class, (2) that applied for and was qualified for credit, (3) despite his qualifications was rejected, and (4) others of similar credit stature were extended credit or were given more favorable treatment than plaintiff. *See Mercado Garcia v. Ponce Fed. Bank F.S.B.*, 779 F. Supp. 620, 628 (D.P.R. 1991); *Cooley*, 280 F. Supp. 2d at 1339–40. Although denial of credit is not a prerequisite, in order to adequately plead a violation of the ECOA, the plaintiff must identify an allegedly predatory term in the loan. *See Brook v. Sistema Universitario Ana G Mendez*, No. 8:17-cv-171, 2017 WL 1743500, at *2–3 (S.D. Fla. May 4, 2017) (finding no ECOA claim and reasoning that Plaintiff does not explicitly describe the credit transaction she believes was unlawful, other than to note that she took out federal student loans in excess of $40,000).

The reality of the federal loan programs calls into question the plausibility of Counts VI and V as a matter of law. *See Cliff v. Payco Gen. Am. Credits, Inc.*, 363 F.3d 1113, 1122 (11th Cir. 2004) ("Title IV of the HEA authorizes the Secretary of Education to administer several federal student loan and grant programs . . . . Under these programs, lenders make guaranteed loans under favorable terms to students and their parents, and these loans are guaranteed by guaranty agencies and ultimately by the federal government."). The ECOA looks solely to the terms of the loan, not to what any particular borrower bought with it. Britt fails to plead facts to support an ECOA claim; instead, he relies on unsupportable and implausible conclusions and conjecture. Britt's claim that the educational services he bought with his federal loans were not as promised does not render the loan terms "predatory." IEC and FCC are not the proper target of an ECOA claim for the simple reason that neither entity can limit student borrowing at all. Britt cannot allege either IEC or FCC had any involvement whatsoever in the decision-making process surrounding the underlying credit transaction. *See Nicholson v. Johanns*, No. 06-cv-635, 2007 WL 3407045, at *5 (S.D. Ala. Nov. 13, 2007) ("The ECOA is not a general, catch-all, prophylactic remedy

allowing any disgruntled debtor to sue a creditor for any slight, real or imagined; rather, the conduct it proscribes is the discriminatory administration of a credit transaction [and w]ithout proof of discrimination, plaintiffs have no cognizable ECOA claim."). Even assuming IEC or FCC is a "creditor," Britt fails to identify the allegedly violative terms of the loans. For the foregoing reasons, Counts IV and V should be dismissed.

F. Britt's Title VI claim (Count VI) should be dismissed.

Count VI is predicated on inadequate FDUTPA claims and fail to state a claim for relief.

1. Count VI is predicated on a defective FDUTPA claim.

Count VI is predicated on the same facts and circumstances as Count VII alleging a violation of FDUTPA. Count VII, in turn, is predicated on Counts IV and V alleging claims under the ECOA, which fail and are subject to dismissal due to Britt's failure to state a claim for reverse redlining (because no terms are specified). All of Britt's bootstrapped claims should be dismissed. *See Hunter v. Bev Smith Ford, LLC*, No. 07-cv-80665, 2008 WL 1925265, at *7 (S.D. Fla. Apr. 29, 2008) ("[T]his Court has already held that defendant did not violate TILA, MVRSFA, FCRA, ECOA, or FCCPA. For these reasons, this Court finds no violation of the FDUPTA.").

2. Title VI provides no private right of action for disparate impact claims.

A private right of action exists for discriminatory treatment/intentional discrimination, but not disparate impact claims. *See Alexander v. Sandoval*, 532 U.S. 275 (2001). Britt must plead specific conduct that constituted racial discrimination in order to survive a motion to dismiss. *See, e.g., Price v. Wallette*, 471 F. App'x 255 (5th Cir. 2012) (dismissing Title VI claims where minor students and their parents alleged unfair treatment by school board and school officials but did not allege specific conduct that constituted racial discrimination). Britt fails to do so. No private right of action exists and the disparate impact claims in Count VI should be dismissed.

3. Britt fails to adequately state a claim under Title VI.

In the absence of direct evidence of discrimination, Britt must establish a prima facie case with circumstantial evidence, using a variation of the *McDonnell Douglas* model. *See* 411 U.S. 792. A plaintiff must plead facts sufficient to establish a prima facie showing that he is (1) a member of a protected class; (2) suffered an adverse action at the hands of defendants in pursuit of their education; (3) qualified to continue in pursuit of their education; and (4) were treated differently from similarly situated students who were not members of a protected class. *Bell v. Ohio State Univ.*, 351 F.3d 240, 253 (6th Cir. 2003).

Britt has failed to plead any facts identifying an adverse action taken against him by either IEC or FCC, or that the terms of the loans received were different from others similarly situated outside the class. Britt merely asserted minimal allegations of intentional discrimination and pleads no facts as "direct evidence" of discrimination. (*See, e.g.*, Compl., ¶ 42.) Britt merely claims he was specifically targeted for enrollment, and, as a result, incurred debt he is now unable to pay because of the alleged quality of his education. Britt does not, however, identify any adverse action that was taken against him by either IEC or FCC, nor could he establish he was treated differently from similarly-situated students. Britt's alleged dissatisfaction with the quality of his education and the availability of jobs does not constitute an adverse action by either Defendant. Even assuming that Britt could establish he suffered an adverse action by the Defendants, he has failed to allege that either IEC or FCC treated any similarly-situated, non-protected students differently from the way he was treated "with regard to any aspect of [their] relationship with the [university]." *Bell*, 351 F. 3d at 253. Failing same, Count VI must be dismissed.

G. Plaintiff Britt's Additional FDUTPA claim (Count VII) should be dismissed.

1. Count VII suffers the same fatal defects as Count I

The only facts asserted in support of Count VII are conclusory. (*See, e.g.*, Compl., ¶ 269 ("As a result of these actions, Defendants caused Plaintiff Kareem Britt and class members damages.") Britt does not actually plead how one caused the other, nor does he plead actual damages. For the reasons discussed above regarding Count I, Count VII should be dismissed.

2. Britt's failure to state an ECOA claim compels dismissal of Count VII

If the ECOA claims are dismissed due to failure to state a claim for reverse redlining (because no terms are specified), Count VII, a bootstrapped claim, should be dismissed as well. *See Hunter*, 2008 WL 1925265, at *7 ("[T]his Court has already held that defendant did not violate TILA, MVRSFA, FCRA, ECOA, or FCCPA. For these reasons, this Court finds no violation of the FDUPTA.") (emphasis added).

IV. Plaintiffs are not entitled to punitive damages.

Plaintiffs allude to seeking punitive damages but have failed to plead how any particular claims entitle them to punitive damages, and this demand should be dismissed as follows:

A. Counts I and VII FDUTPA claims are limited to actual damages.

Claims under FDUTPA are limited to actual damages. *See Rollins*, 951 So. 2d at 869 (analyzing the impact of the damages limitation on FDUTPA claims in the context of a class action). Plaintiffs are therefore not entitled to punitive damages.

B. Count II (Breach of Contract) and Count III (Negligence) are subject to contractual limitations on liability, which prohibit punitive damages.

Florida law generally recognizes the enforceability of punitive damages waivers and other liability waivers. *See Mt. Hawley Ins. Co. v. Pallet Consultants Corp.*, No. 06-cv-61763, 2009 WL 1911722, at *26 (S.D. Fla. July 1, 2009) ("the law is clear that limitation-of-liability clauses are enforceable"). Each Enrollment Agreement expressly precludes recovery of punitive damages. (*See* Ex. A, at 3; Ex. C, at 3.) Plaintiffs are therefore contractually barred from seeking recovery of same.

C. Count VI's Title VI claims do not permit recovery of punitive damages.

It is well-settled that Title VI claims cannot support a claim for punitive damages. *See Sheely v. MRI Radiology Network, P.A.*, 505 F.3d 1173, 1197 (11th Cir. 2007) (describing legislative and judicial history leading to the prohibition on punitive damages). Plaintiffs' claim for punitive damages under Title VI should be dismissed.

V. Plaintiffs lack standing to seek injunctive relief.

Finally, Plaintiffs' allegations relate to only past activities, making them claims for damages—not proper candidates for injunctive relief. *See AA Suncoast Chiropractic Clinic, P.A. v. Progressive Am. Ins. Co.*, 938 F.3d 1170 (11th Cir. 2019) (claim for injunctive relief was really damages claims in disguise and the class definition included only past activity).

CONCLUSION

For all of the foregoing reasons, Defendants IEC and FCC respectfully request that the Court compel individual arbitration as to all claims that the Court determines are not borrower defense claims. In the alternative, Defendants respectfully request that the Court dismiss all claims in the Complaint and, given the futility of any anticipated amendment, such dismissal should be with prejudice.

REQUEST FOR HEARING

Pursuant to Local Rule 7.1(b)(2), Defendants respectfully request that the Court schedule a hearing, which is estimated to require approximately one hour, on the Motion to Compel or, in the alternative, Motion to Dismiss to assist the Court in determining whether the claims in the Complaint should be compelled to individual arbitration or dismissed for failure to state a claim upon which relief can be granted.

Dated: June 1, 2020

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 1, 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.

/s/ Christopher Oprison
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