**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF FLORIDA**

**CASE NO. 20-60814-cv-ALTMAN/HUNT**

KAREEM BRITT, *et al.*,

Plaintiffs,

v.

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

Defendants.
_____/

**PLAINTIFFS' MOTION FOR RECONSIDERATION**

## INTRODUCTION

On September 13, 2021, the Court granted Defendants' Motion to Compel Arbitration, ECF No. 70. The Court found that when Florida Career College ("FCC") waived its right to compel arbitration in the Supplement that Defendants sent to students on May 14, 2019, it did so subject to a condition subsequent: the waiver was only valid while the 2016 Borrower Defense Regulations were in effect. ECF No. 143, Order, at 11 n.4. The Court concluded, based on this finding, that when the 2019 Regulations took effect on July 1, 2020, the waiver was revoked and Defendants could force Plaintiffs into arbitration. *Id*. at 1. The Court separately held that "students have *no* independent right to call on the [2016] Regulations to invalidate an otherwise-valid arbitration clause," *id.* at 21, because "the [2016] Regulations did little more than outline the terms of a contract between the school and the federal government"—a contract to which students are not a party, *id.* at 20.

A district court has "ample discretion to reconsider" its own interlocutory decisions. *Harper v. Lawrence Cnty., Ala.*, 592 F.3d 1227, 1231–32 (11th Cir. 2010) (quoting *Lanier Constr., Inc. v. Carbone Props. of Mobile, LLC*, 253 F. App'x 861, 863 (11th Cir. 2007), and collecting cases). Plaintiffs respectfully ask the Court to reconsider its decision compelling arbitration to "correct clear error" and "prevent manifest injustice." *Williams v. Cruise Ships Catering & Serv. Int'l, N.V.*, 320 F. Supp. 2d 1347, 1357–58 (S.D. Fla. 2004). Plaintiffs identify five bases for reconsideration. First, the Court's decision is clearly erroneous because it failed to acknowledge that arbitration is a question of venue determined at the time of filing. Second, the Court's decision is clearly erroneous because it rests on an argument not advanced by the Parties. Third, the Court's decision is clearly erroneous because it misinterprets and misapplies a condition subsequent. Fourth, the Court clearly erred because it did not construe ambiguity in the Supplement against FCC. Finally, the Court's decision will result in manifest injustice because it is patently unfair and contravenes public policy.

## ARGUMENT

A finding is clearly erroneous when "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Pullman–Standard v. Swint*, 456 U.S. 273, 285 n.14 (1982). A decision "is contrary to law when it fails to apply or misapplies relevant statutes, case law or rules of procedure." *Tolz v. Geico Gen. Ins. Co.*, No. 08-cv-080663, 2010 WL 384745, *2 (S.D. Fla. Jan. 27, 2010). A

decision is manifestly unjust if is "patently unfair" and "apparent to the point of being indisputable." *Schmidt v. Washington Newspaper Publ'g Co., LLC*, No. 18-cv-80614, 2018 WL 6422705, at *2 (S.D. Fla. Dec. 6, 2018) (citations omitted); *see also Smith v. Lynch*, 115 F. Supp. 3d 5, 12 (D.D.C. 2015) (manifest injustice entails "a result that is fundamentally unfair in light of governing law").

## I. The Court's Decision Is Clearly Erroneous Because It Failed to Acknowledge That Arbitration Is a Question of Venue Determined At The Time of Filing.

The Eleventh Circuit treats issues involving arbitration clauses as questions of venue, *see Lipcon v. Underwriters at Lloyd's, London*, 148 F.3d 1285, 1290 (11th Cir. 1998), which "must be determined based on the facts at the time of filing," *see Flowers Indus., Inc. v. F.T.C.*, 835 F.2d 775, 776 n.1 (11th Cir. 1987). As the Court has already found, FCC's waiver was in effect at the time the lawsuit was filed. *See* Tr. [ECF No. 65, Hearing on First Motion to Compel Arbitration], at 31:6–9 ("I also find that the notice is clear and provides for a waiver of the arbitration clause for borrower defense claims. Since I found that these are borrower defense claims, I again will deny the motion to arbitrate."). This question of timing is dispositive, as Plaintiffs have consistently argued. ECF No. 81, Plaintiffs' Opposition Br. at 13 (court appropriately rejected Defendants' first motion to compel arbitration because "[t]he [2016] regulations were in effect when the lawsuit was filed" (quoting Tr. [ECF No. 65] at 13:17–18 (Altman, J.))); *id.* at 14 (language of FCC's Supplement itself "contemplates analyzing the issue of waiver at a time before the effective date of the New Regulations").

In *Losapio v. Comcast Corp.*, No. 1:10-cv-3438, 2011 WL 1497652 (N.D. Ga. Apr. 19, 2011), the Northern District of Georgia dealt with a scenario that is the inverse of ours: although the arbitration agreement between the parties was operative when the lawsuit was filed, the plaintiff opted out shortly thereafter. The court held that the arbitration clause was enforceable, observing: "Although Plaintiff may have opted out of the amended Arbitration Agreement in a timely fashion, Plaintiff did not opt out prior to the time the suit was filed. . . . *At the time of filing*, Plaintiff had not opted out of either the 2008 Subscriber Agreement or the amended 2010 version. As a result, Plaintiff is bound by the arbitration clause." *Id.* at *7 (emphasis added). Because, at the time of filing, Defendants had waived their right to arbitration, Plaintiffs are *not* bound by the arbitration clause. *See id.*

The text of the Supplement also identifies the filing of a lawsuit, and the timing of that filing, vis-à-vis the occurrence of the "condition subsequent," as controlling. The Supplement states, in relevant part, "We agree not to use any predispute arbitration agreement to stop you from *bringing a lawsuit* concerning our acts or omissions regarding the making of the Federal Direct Loan or the provision by us of educational services for which the Federal Direct Loan was obtained." ECF No. 143 at 6 (quoting the Supplement) (emphasis added). "These provisions . . . shall apply to your arbitration agreement with Florida Career College for any period during which [U.S. Department of Education regulations at 34 C.F.R. § 685.300(e) and (f), respectively] and are in effect." *Id.* at 5 (quoting the Supplement). As previously noted, it is indisputable that the 2016 regulations—and thus FCC's waiver—"were in effect when the lawsuit was filed." *See* ECF No. 81 at 13 (quoting Tr. [ECF No. 65] at 13:17–18 (Altman, J.)). Thus, when Plaintiffs filed a class action lawsuit during the period during which the regulations were in effect and the waiver was operative, Defendants were contractually prohibited from invoking the arbitration agreement to stop them.[1] In this light, the Court's conclusion that "[s]ince the Old Regulations aren't 'in effect,' FCC's waiver is no longer applicable," ECF No. 143 at 21, has no bearing. Neither Defendants nor the Court did—or can—demonstrate how the fact that Defendants could arguably stop Plaintiffs from filing a similar lawsuit *today* means that the present, properly filed lawsuit must be evicted from federal court.[2]

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[1] By holding otherwise, the Court appears to say that FCC could meet its obligations under the Supplement by allowing its students to "brin[g] a lawsuit"—i.e., file a complaint in court—even if it immediately forced the case to arbitration. But under this reading the Supplement would be an unenforceable modification to the arbitration agreement, consisting of a promise to refrain from doing something that Defendants could never have done in the first place—preventing student borrowers from filing a case against them. *See Slattery v. Wells Fargo Armored Serv. Corp.*, 366 So. 2d 157, 159 (Fla. Dist. Ct. App. 1979) ("[P]erformance of a pre-existing duty does not amount to the consideration necessary to support a contract."). No party can prevent another from "bringing a lawsuit," if all that is meant by "bringing a lawsuit" is the filing of a complaint in court. And "a cardinal principle of contract interpretation is that the contract must be interpreted in a manner that does not render any provision of the contract meaningless." *Silver Shells Corp. v. St. Maarten at Silver Shells Condo. Ass'n, Inc.*, 169 So. 3d 197, 203 (Fla. Dist. Ct. App. 2015) (citations omitted).

[2] Because a contractual waiver was in effect, this situation is different from one in which an amendment to an arbitration clause may apply retroactively. "Where an arbitration agreement is not expressly limited to disputes arising out of that agreement, courts generally hold that it applies retroactively." *Donado v. MRC Express, Inc.*, No. 17-cv-24032, 2018 WL 318473, at *1 (S.D. Fla. Jan. 4, 2018). Here, even after the occurrence of the condition subsequent, the arbitration

## II. The Court's Decision Is Clearly Erroneous Because It Rests On Arguments Not Advanced By The Parties.

Throughout its Order, the Court repeatedly faults Plaintiffs for failing to explicitly raise arguments in their response brief. *See, e.g.*, ECF No. 143 at 21–22 n.11. But it is actually Defendants, the party bearing the burden on their own motion, who did not advance any argument to support the theory upon which the Court's holding rests. Defendants argued that "the change in the law was a condition subsequent that nullified, by operation of law, FCC's agreement to refrain from using a pre-dispute arbitration provision to adjudicate BDR claims." *See* ECF No. 70 at 14. But as explained *supra* Part I and discussed in Plaintiffs' opposition brief, ECF No. 81 at 12, this is irrelevant: the waiver was in effect when the lawsuit was filed. Instead of reaching this necessary conclusion, the Court appears to have picked up an argument that Defendants entirely failed to make: that when the occurrence of the condition subsequent caused Defendants' waiver to "expire[]," ECF No. 143 at 1, Defendants became entitled to reverse the performance that they had rendered under the waiver. The Parties did not brief the issue of Defendants' duty of performance under the arbitration agreement, as modified by the Supplement; it is not the Court's place to develop litigants' arguments for them. *See, e.g.*, *Fils v. City of Aventura*, 647 F.3d 1272, 1284 (11th Cir. 2011) ("[D]istrict courts cannot concoct or resurrect arguments neither made nor advanced by the parties."). Had Plaintiffs been afforded the opportunity to address the issue, they would have argued that any change to Defendants' duty of performance is only prospective, *see infra* Part III, and that interpreting the Supplement otherwise would be contrary to central canons of construction, *see infra* Part IV. Because they were not afforded such an opportunity, the argument is waived. *Hamilton v. Southland Christian Sch., Inc.*, 680 F.3d 1316, 1319 (11th Cir. 2012) ("[T]he failure to make arguments and cite authorities in support of an issue waives it.").

Separately, the Court held that Plaintiffs "have no authority to *invoke* the [2016 R]egulations, *enforce* the regulations, or deploy the regulations to *invalidate* their arbitration agreements." ECF No. 143 at 18. As the Court recognized, "the parties . . . vigorously debate[d] whether the New Regulations are retroactive (this, despite the Eleventh Circuit's rather clear ruling on the issue)—apparently *assuming* that, if they aren't, the students can invoke the Old Regulations to avoid arbitration." *Id.* at 16 (emphasis added). But the Parties never briefed or discussed the

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agreement was expressly limited by FCC's waiver to claims arising—or claims filed—outside of the waiver period.

question of whether, although the 2019 Regulations do not apply to Plaintiffs' loans, Plaintiffs nonetheless may have *no power* to vindicate their rights by invoking the 2016 regulations. The Court's lengthy discussion of this issue at ECF No. 18–21, although arguably dicta, is thus inappropriate. *See Access Now, Inc. v. Sw. Airlines Co.*, 385 F.3d 1324, 1329 (11th Cir. 2004) (improper to consider argument not fully briefed where opposing party "never had the opportunity to respond").

Because the Court's decision was reached "outside the adversarial issues presented to the Court by the parties," Plaintiffs respectfully submit that it is clearly erroneous. *See Compania de Elaborados de Cafe v. Cardinal Cap. Mgmt., Inc.*, 401 F. Supp. 2d 1270, 1283 (S.D. Fla. 2003) (quoting *Compagnoni v. United States*, No. 94–813–Civ, 1997 WL 416482, at *2 (S.D. Fla. May 13, 1997)).

## III. The Court's Decision Is Clearly Erroneous Because It Misinterprets and Misapplies A Condition Subsequent.

The fact that the Supplement contained a condition subsequent, as Defendants briefly stated in their motion with no developed argument, is of no moment. A condition subsequent ends an agreement moving forward; it does not force the parties to return to the status quo ante, stripping them of any benefits accrued while the agreement was operative. The Court quotes Williston on Contracts for the proposition that "[a] condition subsequent has been defined as a future event, the happening of which discharges the parties from their otherwise binding agreement." ECF No. 143 at 11 n.4. Reading further, Williston explains that a condition subsequent is "an event which occurs subsequent to a duty of immediate performance, that is, a condition which divests a duty of immediate performance of a contract after it has once accrued and become absolute." Conditions subsequent, 13 Williston on Contracts § 38:9 (4th ed.). To illustrate: if Party A breaks her leg and agrees to pay Party B to walk her dog until she recovers, her recovery relieves Party A of the obligation to continue paying Party B to walk her dog—it does not entitle her to the return of all sums she has paid Party B up until that point. *See id.* at n.4 ("A condition subsequent is a condition which relieves a party of the obligation of *further performance*.") (emphasis added) (quoting *Wood v. Roy Lapidus, Inc.*, 10 Mass. App. Ct. 761, 413 N.E.2d 345 (1980)). Similarly, when Defendants agreed not to use any predispute arbitration agreement to stop students from "bringing a lawsuit" while the 2016 Regulations were in effect, the rescission of the 2016 Regulations may have allowed them to stop *further lawsuits*—it did not allow them to order into arbitration lawsuits filed

up to that point. *See id*. This is because the time for performance under the agreement, with respect to *this lawsuit*, has passed. Plaintiffs have brought their lawsuit and Defendants did not stop them from doing so. The occurrence of the condition subsequent has no bearing, because no further performance is possible.

**IV. The Court Clearly Erred Because It Did Not Construe Ambiguity Against FCC.**

Under Florida law, "any ambiguity in the terms [of a contract] should be resolved in favor of upholding the purpose of the agreement and giving effect to every term in the agreement." *City of Homestead v. Johnson*, 760 So. 2d 80, 83 (Fla. 2000) (citing *Ideal Farms Drainage Dist. v. Certain Lands*, 154 Fla. 554, 19 So. 2d 234 (Fla. 1944)). The stated purpose of the Supplement was compliance with federal law. ECF No. 143 at 5 (quoting the Supplement) ("Under federal law, Florida Career College is providing you with the notice below. These provisions are included pursuant to U.S. Department of Education regulations at 34 C.F.R. § 685.300(e) and (f).").[3] Although the Court found that the terms of the waiver were clear with respect to an isolated provision—the effective period of the waiver, ECF No. 143 at 11—at other turns, the language is ambiguous at best. *See supra* Parts I (ambiguity surrounding meaning of "bringing a lawsuit") and III (ambiguity surrounding effect of condition subsequent). "[A]n ambiguous term in a contract is to be construed against the drafter." *Johnson*, 760 So. 2d at 84. Here, there is no question that FCC controlled the language of the waiver. FCC expressly stated its intent to comply with federal law. But the construction of the contract supplied by the Court results in an outcome that is manifestly contrary to the purpose of the regulation in question. Under the 2016 Regulations, FCC made an unqualified, unambiguous promise to the Department of Education that it would not move to compel arbitration of any borrower defense claims. *See* ECF No. 143 at 19 n.9. Rather than read the Supplement as permitting Defendants to break that promise in direct contravention of the

[3] Despite Defendants' stated intent, the Supplement did not in fact comply with the notice requirements of 34 C.F.R. § 658.300(f)(3). Had FCC complied with the regulation, the Supplement would have read: "We agree not to use any predispute arbitration agreement to stop you from bringing a lawsuit concerning our acts or omissions regarding the making of the Federal Direct Loan or the provision by us of educational services for which the Federal Direct Loan was obtained. You may file a lawsuit regarding such a claim or you may be a member of a class action lawsuit regarding such a claim even if you do not file it. This provision does not apply to any other claims. We agree that only the court is to decide whether a claim asserted in the lawsuit is a claim regarding the making of the Direct Loan or the provision of educational services for which the loan was obtained." *See* 83 FR 34047-01, at *34049 (setting forth the text of 34 C.F.R. § 658.300(f)(3)(iii)(B)).

purpose of the contract, *see id.* ("In moving to compel arbitration here, then, it's (arguably) done precisely what it promised not to do."), the Court should resolve any ambiguity in favor of the Plaintiffs and consistent with the 2016 Regulations, *see Johnson*, 760 So. 2d at 83, 84, and read the Supplement to prohibit arbitration of the borrower defense claims advanced by Plaintiffs in this case.

**V. The Court's Decision Will Result in Manifest Injustice.**

Here, in addition to being wrong as a matter of law, the Court's decision results in manifest injustice. Compelling Plaintiffs to arbitrate their claims against their wishes is "patently unfair," *Schmidt*, 2018 WL 6422705, at *2, and rewards bad-faith tactics by Defendants in a manner that is "fundamentally unfair," *Smith*, 115 F. Supp. 3d at 12, and against public policy.

The Court stated that "Britt and Henry haven't shown that they've been prejudiced by any delay in sending this case to arbitration." ECF No. 143 at 29. But it is not the delay in sending this case to arbitration that has prejudiced Plaintiffs—it is sending this case to arbitration at all, when FCC clearly and unequivocally promised that it would not do so. As Plaintiffs explained in their opposition brief, "Plaintiffs relied on the Supplement in expending their time and resources toward investigating the facts of this lawsuit and assisting their lawyers in the preparation and prosecution of the lawsuit." ECF No. 81 at 15 n.3. Plaintiffs only filed this lawsuit, and engaged in motions practice and discovery, because it was clearly within their rights under the Supplement. And although the Court suggests that this was unreasonable, given the impending occurrence of the condition subsequent, *see* ECF No. 143 at 10 n.2, the Court's holding unfairly charges Plaintiffs with a construction of the Supplement that the Court only just announced.[4] Furthermore, it was anything but clear, at the time that Plaintiffs initiated this lawsuit, that July 1, 2020, would be the date on which the 2019 Regulations would go into effect—as Defendants noted in their Motion, whether the 2019 Regulations would *ever* become effective was "uncertain." ECF No. 70 at 17 n.7. And even well after the 2019 Regulations went into effect, the primary authority in the

[4] Plaintiffs by no means "understood that, in light of the changing legal landscape, they might be sent to binding arbitration." ECF No. 143 at 10 n.2. As Parts I through IV make clear, even if Plaintiffs understood that FCC's "waiver would remain applicable only for the period during which the [2016] Regulations were 'in effect,'" they did *not* understand—nor do they believe—that this meant that their vested rights under the waiver would be eradicated upon the revocation of the 2016 Regulations.

Eleventh Circuit on the matter, *Young v. Grand Canyon University, Inc.*, indicated that the new regulations had no effect on Plaintiffs' circumstances. *See* 980 F.3d 814, 816 n.1 (11th Cir. 2020) (2019 Regulations "apply only to loans distributed on or after July 1, 2020, and are therefore inapplicable" to earlier loans); *see also* Tr. [ECF No. 65] at 8:13–15 ("I came in today expecting a concession from you given the *Grand Canyon* decision, which could not have been clearer.") (Altman, J., addressing Defendants).

The consequences of this decision are stark. Students will no longer be able to proceed as a group. The Parties were proceeding under a Protective Order, ECF No. 63, that Defendants zealously enforced; as a result, evidence that Plaintiffs developed for the benefit of the putative class will not be accessible to them or any other students. *See generally* ECF No. 124, Plaintiffs' Withdrawn Motion for Certification of a Rule 23 Class (discussing, in general terms, collected evidence and referencing sealed exhibits). Moreover, that evidence will not be readily accessible to public or other entities such as the Department of Education, which has an interest in knowing whether FCC is complying with regulations such as those that prevent a participating school from making substantial misrepresentations to its students. FCC receives over $75 million in Title IV funds per year, *see* U.S. Department of Education, Federal Student Aid, "Proprietary School 90/10 Revenue Percentages – 2017-2018 Award Year: Report and Summary Chart," https://studentaid.gov/sites/default/files/2017-2018-data.xls; the federal government and the American people therefore have a material interest in knowing whether FCC is complying with the conditions of receiving that federal money. *See, e.g.*, Preamble to the 2016 Regulations, 81 FR 75926-01, *76023 ("A major objective of the [direct loan] program is protecting the taxpayer investment in Direct Loans. That objective includes preventing the institutions empowered to arrange Direct Loans for their students from insulating themselves from direct and effective accountability for their misconduct, from deterring publicity that would prompt government oversight agencies to react, and from shifting the risk of loss for that misconduct to the taxpayer."); U.S. Department of Education, Press Release: "Extended Closed School Discharge Will Provide 115K Borrowers from ITT Technical Institute More Than $1.1B in Loan Forgiveness," Aug. 26, 2021, *available at* https://www.ed.gov/news/press-releases/extended-closed-school-discharge-will-provide-115k-borrowers-itt-technical-institute-more-11b-loan-forgiveness. In the end, it is FCC that benefits, and the public who suffers, as a result of this litigation being halted.

This outcome is also patently unfair as a matter of public policy. If we accept the Court's theory, FCC's Supplement was entirely meaningless—the rights it conveyed were wholly illusory. Worse, FCC appears to take the position, enabled by this Court's ruling, that Plaintiffs should have known that FCC did not mean what it seemed to be saying at the time. The Court should not prop up such bad faith actions. *See Mount Sinai Med. Ctr. of Greater Miami, Inc. v. Heidrick & Struggles, Inc.*, 329 F. Supp. 2d 1309, 1313 (S.D. Fla. 2004), *aff'd*, 188 F. App'x 966 (11th Cir. 2006) (quoting *Shibata v. Lim*, 133 F. Supp. 2d 1311, 1319 (M.D. Fla. 2000)) (a party breaches the covenant of good faith and fair dealing "by a conscious and deliberate act, which unfairly frustrates the agreed common purpose and disappoints the reasonable expectations of the other party thereby depriving that party of the benefits of the agreement"). The Supplement made an express promise to Plaintiffs—a promise that was made in compliance with federal regulations, that Plaintiffs reasonably understood to be real, and that FCC now says it will not keep. The Court should not interpret an ambiguous contract in a way that so clearly undermines the covenant of good faith and fair dealing and thereby contravenes public policy. *See Ernie Haire Ford, Inc. v. Ford Motor Co.*, 260 F.3d 1285, 1291 (11th Cir. 2001) ("[T]he implied covenant of good faith and fair dealing is a part of every contract under Florida law.").

## CONCLUSION

For the foregoing reasons, Plaintiffs respectfully ask the Court to reconsider its Order and to deny Defendants' Motion to Compel Arbitration. In the alternative, Plaintiffs ask the Court to order further briefing on the operation and effect of the Supplement's condition subsequent.

## Certification of Good-Faith Conference; Unable to Resolve the Issues Presented in the Motion

As required by Local Rule 7.1(a)(3)(A), the undersigned certifies that Plaintiffs have attempted to confer with all parties or non-parties who may be affected by the relief sought in this motion in a good-faith effort to resolve the issues raised herein. On September 21, 2021, Plaintiffs emailed Defendants' counsel regarding their intention to move for reconsideration of the Court's order compelling arbitration, to which Defendants indicated it was unclear what grounds under the rules that Plaintiff have to pursue such relief. The next day, Plaintiffs emailed Defendants explaining a district court is free to reconsider its interlocutory decisions and no rules prohibit such motion, and inviting Defendants to meet and confer on the motion. Defendants objected to Plaintiffs' basis for pursuing a motion for reconsideration and provided no dates for the parties to

discuss. Later on September 22, 2021, Plaintiffs again requested Defendants' availability to meet and confer on either September 23 or 24. Defendants did not respond to that email. Defendants clearly oppose the motion for reconsideration.

Dated: September 24, 2021

Respectfully Submitted,

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