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.
_____/

REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR RECONSIDERATION

In their Response, ECF No. 146 ("Response"), to Plaintiffs' Motion for Reconsideration, ECF No. 145 ("Motion"), Defendants misrepresent the Parties' prior briefing and the relevant caselaw, and advance no compelling counterargument to Plaintiffs' contention that the Court's Order Compelling Arbitration, ECF No. 143 ("Order"), must be reconsidered 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). Because Plaintiffs have identified five valid bases for reconsideration, they respectfully request that the Court grant their Motion, reconsider its Order, and deny Defendants' Motion to Compel Arbitration, ECF No. 70.

I. Defendants offered no argument or evidence to refute Plaintiffs' assertion that the Court failed to acknowledge that arbitration is a question of venue determined at the time of filing.

Defendants do not address the first main argument actually advanced by Plaintiffs in their Motion: that the Court failed to recognize that 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), and that consequently, the Court erred when it found that a change in circumstances that occurred while litigation was pending could evict Plaintiffs from federal court. "This question of timing is dispositive[.] . . .

[W]hen 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." ECF No. 145 at 3.

Rather than actually refuting this point, Defendants cite to *Benoay v. Prudential-Bache Sec., Inc.*, 805 F.2d 1437, 1440 (11th Cir. 1986), for the proposition that a court may compel arbitration during the course of litigation "when a change in the law opens the path for a later motion to compel arbitration." ECF No. 146 at 4. But as Defendants' own language makes clear, *Benoay* is entirely distinguishable. In *Benoay*, the defendants had not moved to compel state law claims that were "inextricably intertwined" with nonarbitrable claims and thus, under the law of the circuit at the time the case was filed, nonarbitrable themselves. *See Benoay*, 805 F.2d at 1440. Shortly after the Supreme Court held, in *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985), that this "doctrine of intertwining" was inconsistent with the Federal Arbitration Act, *id.* at 217, the defendants moved to compel arbitration, *Benoay*, 805 F.2d at 1440. Rejecting the plaintiff's argument that the initial failure to move to compel constituted waiver, the Eleventh Circuit held that "any right to arbitrate the state law claims which [the defendants] acquired did not accrue until" the decisional law changed. *Id.* The rule established by *Lipcon* and *Flowers Indus., Inc.*, was not implicated: "the facts at the time of filing" did not change, only the controlling law.

Here, by contrast, we are not dealing with a change in decisional law—we are dealing with a change to the operative facts. The only barrier to arbitration at the outset of this case was Defendants' waiver of their contractual right to arbitrate. *See* ECF No. 144 at 4 n.2. The withdrawal of the 2016 Regulations may have extinguished that waiver, but it did so—as the Court pointed out—by operation of contract. *See* ECF No. 143 at 11 n.4. Because there was no change *in the law*, no path was opened for arbitration. Defendants' Response fails to establish otherwise.

II. Defendants fail to establish that the arguments upon which the Court's decision rests were advanced by the Parties.

Defendants do not point to any statements in the record raising the specific arguments "that when the occurrence of the condition subsequent caused Defendants' waiver to 'expire,' Defendants became entitled to reverse the performance that they had rendered under the waiver." ECF No. 145 at 5 (internal citations omitted). In their Response, Defendants essentially concede that they made no such argument, stating only that "[t]he effect of the regulations and FCC Notice on the arbitration agreement was squarely within the ambit of issues briefed multiple times by both

parties" and citing generally to the Parties' briefing on Defendants' Motion to Compel. ECF No. 146 at 5. "A passing reference to an issue in a brief is not enough, and the failure to make arguments and cite authorities in support of an issue waives it." *Hamilton v. Southland Christian Sch., Inc.*, 680 F.3d 1316, 1319 (11th Cir. 2012). Because Defendants cannot even claim that they made a passing reference to the issue of performance under the arbitration agreement, this argument was waived. *See id*.

Defendants also did not argue 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. 145 at 5 (internal citations omitted) (alteration in original). In Response, Defendants state that they "not[ed] that the regulations governed the relationship between institutions and the federal government" and quoted language showing that "the regulations did not ban arbitration agreements." ECF No. 146 at 5. But they do not, and cannot, point to anywhere in the record in which they state, let alone argue, that despite *Grand Canyon*'s holding, students cannot vindicate their rights under the 2016 Regulations. This argument was therefore also waived. *See Hamilton*, 680 F.3d at 1319.

III. Defendants falsely assert that Plaintiffs' arguments concerning contract law were already briefed and misstate the rules of contract interpretation.

Defendants claim, *with no citation to the record*, that the Court already considered the arguments that Plaintiffs raised in their Motion concerning the correct interpretation of a condition subsequent and whether its occurrence can affect a party's past performance. ECF No. 146 at 5. This is patently false: the Court had no opportunity to consider Plaintiffs' arguments because the issue was not briefed, and it was not briefed because *Defendants failed to raise it*. Defendants next attempt to argue that Plaintiffs waived any argument regarding proper interpretation of an ambiguous contract. ECF No. 146 at 6. Again, Plaintiffs could not have argued that the Supplement was, at best, ambiguous as to whether the occurrence of the condition subsequent entitled Defendants to reverse the performance that they had rendered under the waiver, because *Defendants never suggested such an interpretation*. "[A]rguments *that could have been presented* in opposition to the original motion but were not are waived" on reconsideration. *First Fla. Bank v. Fed. Deposit Ins. Corp. for First Integrity Bank, N.A.*, No. 08-C-0686, 2009 WL 10670071, at *1 (M.D. Fla. Aug. 21, 2009) (emphasis added). Of course, a nonmoving party cannot present an argument in response to a position that the movant never took.

Finally, Defendants appear to argue that the policy in favor of arbitration trumps the normal canons of contract interpretation, *requiring* the Court to resolve any ambiguity in the Supplement in favor of arbitration. ECF No. 146 at 6. This is wrong. Courts are to address questions of arbitrability with "a healthy regard for the federal policy favoring arbitration," *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983), but the policy is by no means dispositive. The Court can and should resolve contractual ambiguity in favor of the Plaintiffs and consistent with the 2016 Regulations, and read the Supplement to prohibit arbitration of the borrower defense claims advanced by Plaintiffs in this case.

IV. Defendants misrepresent, and fail to rebut, Plaintiffs' showing that manifest injustice will result.

As an initial matter, Defendants conflate the nonexhaustive list of grounds for granting a motion for reconsideration with the standard for "manifest injustice." *See* ECF No. 146 at 6. In fact, as this Court has observed, "[f]ederal courts have struggled to define [manifest injustice]," *Schmidt v. Washington Newspaper Publ'g Co., LLC*, No. 18-80614-Civ, 2018 WL 6422705, at *3 (S.D. Fla. Dec. 6, 2018), but many have adopted definitions that center on the idea of fairness, *see, e.g.*, *Coffin v. Magellan HRSC, Inc.*, No. Civ 20-0144, 2021 WL 2589732, at *31 (D.N.M. June 24, 2021) ("no manifest injustice is at stake" where court's decision "does not risk 'fundamentally unfair' results"); *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"); *James v. Am. Int'l Recovery, Inc.*, 799 F. Supp. 1156, 1181 (N.D. Ga. 1992) (observing that "general notions of fairness" are applied by courts to determine whether action would "work a fundamental, and thus manifest, injustice"). "What is clear from the case law, and from a natural reading of the term itself, is that a showing of manifest injustice requires that there exist a fundamental flaw in the court's decision that without correction would lead to a result that is both inequitable and not in line with applicable policy." *Walker v. HongHua Am., LLC*, No. 4:12-cv-00134, 2012 WL 1898892, at *2 (S.D. Tex. May 23, 2012) (internal quotations and citations omitted). Contrary to Defendants' assertions, this is exactly what Plaintiffs have argued.

Defendants claim that "Plaintiffs agreed to arbitration in the first instance and should not be heard to complain when compelled to a forum to which they agreed." ECF No. 146 at 6. What they ignore is that, through the Supplement, Defendants agreed to waive their rights under that agreement, and it is the breach of that promise that forms the basis for Plaintiffs' complaint. ECF

No. 145 at 8 ("Plaintiffs only filed this lawsuit, and engaged in motions practice and discovery, because it was clearly within their rights under the Supplement."); *see also* ECF No. 143 at 19 n.9 ("In moving to compel arbitration here, then, [FCC has] (arguably) done precisely what it promised not to do."). Manifest injustice arises from a ruling, like the Order, "that upset settled expectations—expectations on which a party might reasonably place reliance." *Qwest Servs. Corp. v. FCC*, 509 F.3d 531, 540 (D.C. Cir. 2007).

Defendants also attempt to frame Plaintiffs' public policy concerns as dissatisfaction with the negotiated Protective Order. ECF No. 146 at 7. This framing is disingenuous at best. Plaintiffs were proceeding as a putative class; the evidence that they collected, and that was subject to the Protective Order, was developed for the benefit of all tens of thousands of members of that class. *See* ECF No. 145 at 10. By erroneously ordering Plaintiffs to individual arbitration, the Court's Order is unfairly and unjustly denying those class members access to evidence that they would have been entitled to review had the class been certified or had they joined as named plaintiffs. Further, the existence of the Protective Order in this case is not, as Defendants contend, a barrier to other entities learning about Defendants' conduct that is at issue in this lawsuit, including FCC's compliance with the terms of its agreements with the Department of Education. For example, in a public court proceeding, any party may intervene to challenge the scope of a protective order and seek access to court records. Additionally, the open nature of judicial proceedings, as opposed to closed-door arbitration, allows members of the public and interested parties access to other important facts about the litigation itself—such as the fact that Defendants are continuing their efforts to compel Plaintiffs to arbitration, even after the Court, in a public ruling, suggested that doing so places FCC in violation of its Program Participation Agreement with the Department of Education. *See* ECF No. 146 (asking the Court to deny Plaintiffs' Motion and to compel arbitration); ECF No. 143 at 19–20 n.9 (asking whether the federal government has grounds to assert an enforcement action against FCC).

Finally, Defendants accuse Plaintiffs of "cast[ing] aspersions and disparag[ing] Defendants" by arguing that the Court's interpretation of the Supplement renders it illusory. In doing so, they entirely miss the point: it is Plaintiffs' position that the waiver provision was *not* illusory, but rather granted students the right to proceed with litigation against Defendants so long as that litigation was initiated while the provision was in effect. *See* ECF No. 145 at 3–4. Plaintiffs merely warn that by concluding otherwise—by implicitly finding that Defendants intended all

along that their promise be practically unenforceable—the Court itself has ascribed to Defendants bad faith motives. *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)).

CONCLUSION

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

Dated: October 15, 2021

Respectfully Submitted,

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