UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No. 20-CIV-81173-RAR

RAYMOND GIBSON, and on behalf of
All Others Similarly Situated,

Plaintiffs,

v.

LYNN UNIVERSITY, INC.,

Defendant.
_____/

DEFENDANT'S MOTION TO STRIKE CLASS ACTION ALLEGATIONS IN PLAINTIFF'S AMENDED CLASS ACTION COMPLAINT

Defendant, LYNN UNIVERSITY, INC. ("Lynn"), through the undersigned counsel and pursuant to Fed. R. Civ. P. 12(f) and Rule 23, moves to strike the class action allegations in Plaintiff's Amended Class Action Complaint [ECF No. 12]. Lynn states as follows:

INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiff, a former undergraduate student at Lynn, asks this Court to manufacture a *post facto* discount on tuition and fees for himself as well as all other Lynn students with respect to tuition and fees for the forty-nine (49) days[1] of the Spring 2020 semester that he learned remotely due to the COVID-19 pandemic.[2] According to the Amended Complaint, Plaintiff, and the putative class, did not receive the "full experience" each of them *subjectively expected* when they signed up for classes in Spring 2020. And, because Lynn has a separate Online program which offers cheaper credit hours, Plaintiff asks the Court to arbitrarily apply, by judicial fiat, the per-

[1] Plaintiff claims Lynn conducted fifty-four (54) days in the Spring 2020 semester remotely but included test taking days which are not instructional. *See* ECF No. 12 ¶ 60.

[2] The Amended Complaint seeks a similar discount for the Summer 2020 semester but Plaintiff only registered for classes in Spring 2020 and not Summer 2020. *See* ECF No. 12 ¶¶ 1, 43. In any event, Plaintiff withdrew the Summer 2020 claim. ECF No. 23 at p.3 n.1.

credit cost for the online program he never chose to apply to, to the regular undergraduate day program he in fact chose. In other words, Plaintiff says the Court should manufacture, out of thin air, an arbitrary discount on the tuition and fees Plaintiff contractually agreed to pay (indeed, he signed a Financial Responsibility Agreement promising to pay agreed-upon tuition and fees, on the schedule provided, in exchange for his ability to register for classes) based on Plaintiff's *subjective* belief that what he received was of lesser value than what he expected.

Lynn's motion to dismiss addresses its response to the claim on the merits, including the undisputed fact that Plaintiff and the putative class ratified any alleged breach (if there was an agreement for exclusively in-person education in the first instance, which prohibited the transition to remote learning in response to a pandemic) and that the documents upon which Plaintiff relies specifically state "[t]here will be **no refund** of tuition, fees, charges or any other payments made to the University in the event the operation of the University is suspended at any time as a result of any act of God, strike, riot, disruption *or for any other reasons beyond the control of the University."* (emphasis added). Lynn seeks to strike Plaintiff's class claims.

Plaintiff proposes the following class definition in his Complaint:

> *All persons who paid, on behalf of themselves or another, tuition or fees for in-person education in the Undergraduate Day Division or Graduate Division at Lynn University for the Spring or Summer 2020 term.*

Amend. Compl. ¶ 80. Plaintiff alleges there are thousands of students enrolled at Lynn (with no breakdown for degree program) and presupposes that each member of the putative class paid tuition and semester-based moneys to Lynn and ostensibly did not receive the benefits that they subjectively believe they paid to receive. *Id.* at ¶¶ 83, 85-87.

As discussed in detail below, this case is not appropriate for class treatment for four key reasons.

First, on the very issue of whether there was a contract, Plaintiff's claim is predicated on the assertion that when he signed up for classes, *he* assumed and understood that such classes would be provided exclusively in-person. In other words, unlike a typical class action where a plaintiff sues based on a standard written contract and alleges a breach applicable to the Plaintiff and the putative class, here, the determination of the existence of an agreement or "meeting of the minds," in the first instance, requires the Court to evaluate the "minds" of each putative class member to determine if they, individually, had the same beliefs and expectations as those held by Plaintiff when he registered for classes and entered into an agreement with Lynn. For example, class members who never thought about, considered, or expected that Lynn would only deliver its education and services in-person, would not in fact be a proper class member in this case and have no viable claim for a breach of this supposed contract. In order for the Court to identify class members, it must explore the minds and expectations of every person who registered for classes during the Spring 2020 term.

Second, even if one assumes a contract and breach, no objective metric exists to evaluate each class member's damages, because, "loss of experience" damages, as those sought by Plaintiff, are not only based on rank speculation but such damages, even if they could be quantified, are inherently subjective and not appropriate for class wide relief. And *this* issue, the inherently subjective, wildly variable nature of the supposed harm, is what makes this case uniquely *unsuited* to class treatment. Indeed, even as it relates to fees, where the issue is not merely access to services in-person, but whether students paid for a specific service they claim was not offered at all, damages will inherently differ from student to students, as some students never used, nor intended to use, various Lynn services, regardless of whether they were offered on or off campus. Evaluating this claim will require the Court to conduct thousands of individualized inquiries into

the extent and scope of services usage by individual students to determine what pro-rated refund they may be entitled to (if they are entitled to one at all).

Third, unjust enrichment claims are inherently incapable of being assessed on a class basis, as the Eleventh Circuit has already determined.

Finally, this case should not be treated as a class because the proposed class includes many individuals who lack standing to seek relief. Specifically, the class includes not just students (the individuals who supposedly entered the contract and suffered the "experiential harm"), but all those who *paid tuition or fees*. Many individuals can pay tuition without ever having entered into an agreement with Lynn. In addition, that someone paid tuition on behalf of a student does not equate to a damage based on an experiential loss (a harm that logically pertains only to *students* who expected the "experience" they claim to have lost). To the extent the class includes anyone who was not a student, the class, as currently framed, is not proper as a matter of well-settled law.

As the class includes impermissible members, and as the class claims are fundamentally ill suited to class treatment, the Court should strike the class action allegations.

I. This Court Possesses Authority to Strike the Class Action Allegations in Accordance with Both Rules 12 and 23 of the Federal Rules of Civil Procedure and Should Strike Plaintiff's Allegations Because They Are Inappropriate for Class Treatment.

Under Rule 12(f), "the Court may strike from a pleading any redundant, immaterial, impertinent, or scandalous matter" upon a defendant's motion prior to filing a responsive pleading. Fed. R. Civ. P. 12(f). A court may strike class allegations from the complaint if it is "obvious" from the pleadings that "the proceeding cannot possibly move forward on a classwide basis." *See Kiossovski v. Forest Labs., Inc. (In re Celexa & Lexapro Mktg. & Sales Practices Litig.)*, No. MDL No. 09-02067-NMG, 2016 U.S. Dist. LEXIS 75366, at *17-18 (D. Mass. June 9, 2016) (citing *Manning v. Boston Med. Ctr. Corp.*, 725 F.3d 34, 59 (1st Cir. 2013)); *Smikle v. Coca-Cola Enters.*,

Inc., No. 03-0431 (RBK), 2004 U.S. Dist. LEXIS 32028, at *41-42 (D.N.J. May 17, 2004) (granting motion to strike at pleadings stage where complaint, on its face, demonstrated that certification was inappropriate under Rule 23(b)(2) or (b)(3)); *Thompson v. Merck & Co.*, Nos. 01-1004, 01-1328, 01-3011, 01-6029, 02-1196, 02-4176, 2004 WL 62710, at *3 (E.D. Pa. Jan. 6, 2004) (striking class claims where it was evident from complaint that plaintiffs could not satisfy Rule 23(b)(2) or (b)(3)); *Barabin v. Aramark Corp.*, 210 F.R.D. 152, 162 (E.D. Pa. 2002) (granting motion to strike plaintiffs' class allegations where it was evident from the complaint that plaintiffs could not satisfy Rule 23).

Rule 23 vests the Court with the power to issue an order requiring "that the pleadings be amended to eliminate allegations about representation of absent persons (*i.e.*, class members) and that the action proceed accordingly." Fed. R. Civ. P. 23(d)(1)(D). Further, Rule 23(c)(1)(A) requires the Court to determine whether to certify a class action at "an early practicable time." Fed. R. Civ. P. 23(c)(1)(A); *Pilgram v. Univ. Health Card., LLC*, 66 F.3d 943, 949 (6th Cir. 2011). Thus, the Court is vested with the authority, and indeed is instructed, to review class allegations at this juncture and order that the class allegations be stricken from the Complaint where, as here, it is clear that class treatment is inappropriate for the exceptionally broad and unwieldy class and subclass that Plaintiff proposes in the Complaint.

To obtain class certification, a party must meet the four prerequisites of Federal Rule of Civil Procedure Rule 23(a): (i) numerosity – the putative class must be so numerous that joinder of all individual members is impracticable; (ii) commonality – questions of law or fact common to the class must exist; (iii) typicality – the claims or defenses of the representative parties must be typical of the claims or defenses of the class; and (iv) adequacy of representation – the representative parties must fairly and adequately protect the interests of the class. *Mills v.*

Foremost Ins. Co., 511 F.3d 1300, 1307-08 (11th Cir. 2008). Class treatment is appropriate only if, after a "rigorous analysis," the court is satisfied that the plaintiff meets the prerequisites of Rule 23(a). *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011). Additionally, maintaining a class action requires satisfying any one of the conditions outlined in Rule 23(b). *Id.*

Rule 23 is more than "a mere pleading standard"; a party seeking class certification must allege sufficient facts – and not mere conclusions – that meet its requirements. *See Dukes*, 564 U.S. at 351. Whenever it is "possible to decide the propriety of class certification from the face of the complaint," a party need not wait to file a motion to strike class allegations until a motion seeking class certification is filed. *Landeros v. Pinnacle Recovery, Inc.*, 692 Fed. App'x. 608, 611 (11th Cir. 2017). *See also Timoneri v. Speedway, LLC*, 186 F. Supp. 3d 756 (N.D. Ohio 2016) ("A court may strike class action allegations before a motion for class certification where the complaint itself demonstrates that the plaintiff cannot meet the requirements for maintaining a class action."). Plaintiff's Amended Complaint is missing key facts to support his desire for class treatment, as the Amended Complaint merely concludes that a class action would be proper. As such, the Court should strike the class allegations from the Amended Complaint.

II. Plaintiff's Amended Complaint is Legally Deficient with Respect to the Rule 23(a) Requirement of Commonality

The Court should strike Plaintiff's class allegations because they are legally deficient, especially with respect to the issue of commonality.

Plaintiff has not pleaded a question to which there is a common answer. *See Dukes*, 564 U.S. at 350 (holding that it "is not the raising of common 'questions' – even in droves – but, rather, the capacity of a class-wide proceeding to generate common *answers* apt to drive the resolution of the litigation" that is determinative). Plaintiff identifies various questions that he alleges are "common" to the purported class. Amend. Compl. ¶ 85(a)-(k). He then concludes, without

supporting facts, that the determination of the answers to these questions will "in one stroke" provide a resolution for all members of the (poorly defined) class. *Id.* ¶ 86.

Plaintiff's conclusions are without merit for two reasons. Both the central question of the existence and terms of a contract and whether there are damages that can be proven, are inherently subjective and variable, and cannot be commonly determined.

A. Was There a Contract, and is that Commonly Determinable?

On the most basic question, whether there was a contract for exclusive in-person delivery of education and related services, Plaintiff does not allege the existence of a written agreement that provides this explicit term. That term does not exist anywhere, in any agreement between Plaintiff and Lynn. Instead, according to the plain terms of the Amended Complaint, the contract was based on students' "understandings" and "expectations" upon reading Lynn's marketing materials and policies **and their assumption** that the "day program" equated to an in-person delivery. For example, Plaintiff alleges "students' educational experiences are built around the distinction between Lynn's in-person academic divisions and its online academic division." Amend. Compl. ¶ 14. But there is a contract because "students applying to and enrolling in each of these separate Divisions *understand* the differences [between in person and online] *and expect* Lynn to offer classes in each respective Division in the format for which the student applied, enrolled, and paid." *Id.* ¶ 28. Indeed, "students applying to and enrolling in the Online Division *do not expect* their classes to be held on Lynn's campus; students applying to and enrolling in the Undergraduate Day Division or Graduate Division *do not expect their class to be held online*." *Id.* ¶ 29. The crux of the entire Amended Complaint is that, by virtue of simply having an online program and a day program, and by students signing up for a program they *understood and expected* to be in-person, "Defendant and members of the Class each intended to agree, and in fact agreed, that Defendant

would provide and the Class would pay for and attend live, in-person classes on campus." Amend. Compl. ¶ 109.

Given the lack of an actual agreement that applied to the entire putative class (even Plaintiff does not say that Lynn expressly promised, anywhere, to specifically offer classes in person), this claim can only proceed if the Court assumes two things: (1) that a student's unilateral expectations and thought processes can somehow create contractual terms binding on Lynn; and (2) that all members of the putative class read the Lynn documents and policies the same way, *and also* had the same underlying understanding and assumptions as Plaintiff.

The first issue – that Plaintiff's unilateral thought processes is not grounds for asserting a contract by Lynn (since a contract is a *meeting* of the *minds* of *two* parties, not a unilateral set of expectations of one party) is addressed on the merits of Lynn's Motion to Dismiss. This Motion focuses on the second issue: that even if Plaintiff's thought processes *could* create contractual obligations on Lynn such that the Court allowed the claim to go forward, the Court would have to take testimony as to every single class member to understand what documents, facts, thoughts, and assumptions they considered when signing up for classes at Lynn in order to allow this case to proceed as a class. It is likely that many students did not consider any specific documents, and made no specific assumptions as to in-person instruction, since COVID never existed, and thought they'd take classes however they were delivered. It is equally possible that some students made assumptions as to how courses and educational activities might be delivered. But the fact remains that, to make this determination, the Court will *per se* have to conduct an individualized inquiry, as to each class member, to determine what their underlying assumptions and "expectations" were (this term being the one Plaintiff used throughout his Amended Complaint). As this inquiry is highly individualized, not susceptible to common evidence and will vary from person to person,

there is no core common question (was there a contract for in-person delivery exclusively) to which there is a common answer (because the answer is individualized). There is no "glue" as required by *Dukes.* Class treatment is therefore improper.

Notably, the Eleventh Circuit's decision in *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256 (11th Cir. 2009) is on point for this very issue. In that case, the Eleventh Circuit reversed class certification and ordered the case to proceed individually on remand because the question of contract formation was individualized, not common, and common answers did not predominate. Specifically, a former T-Mobile employee sued based on a supposed commission agreement, but core questions existed as to what the terms were of that commission agreement. *Id.* at 1271-72. Given this dispute, commonality was lacking. *Id.* at 1272. The Court explained:

> Vega has not shown commonality under a breach of contract theory because he has not alleged in his complaint the existence of a common contract under which T-Mobile employed all class members. As such, he could not utilize identical evidence on behalf of every member of the class to prove offer, acceptance, consideration, or the essential terms. Instead, these mandatory elements of each class member's claim depend on such individualized facts and circumstances as when a given employee was hired, what the employee was told (and agreed to) with respect to compensation rules and procedures at the time of hiring, the employee's subjective understanding of how he would be compensated and the circumstances under which his compensation might be subject to charge backs, and when and how any pertinent part of the employee's compensation agreement or understanding thereof may have changed during the course of that employee's tenure at T-Mobile. Without the existence of a common contract, of course, there can also be no commonality with respect to whether T-Mobile's conduct relating to commission charge backs, even if undertaken pursuant to a uniform policy, constituted a breach of every class member's particular employment contract, whether any such breach was material for every class member, or whether each class member suffered cognizable damages as a result. Lacking commonality, the allegations in Vega's complaint obviously must fail the predominance test as well.

Id. at 1272. The same is true here. To paraphrase *Vega*: Plaintiff has not shown commonality under a breach of contract theory because he has not alleged the existence of a common contract under which Lynn promised all class members in-person education. Instead, whether a contract

existed is based on each class members' thoughts, expectations, and interpretation of marketing materials provided by Lynn. As such, Plaintiff cannot "utilize identical evidence on behalf of every member of the class to prove offer, acceptance, consideration, or the essential terms. Instead, these mandatory elements of each class member's claim depend on such individualized facts and circumstances" as when a given student enrolled, "what the [student] was told (and agreed to) with respect to [in-person educational delivery and Lynn's educational] procedures at the time of [enrollment], the [student's] subjective understanding of how [education] would be [delivered] and the circumstances under which [tuition and fees] might be subject to [refund], and when and how any pertinent part of the [student's enrollment] agreement or understanding thereof may have changed during the course of that [student's] tenure." For the reasons discussed above, and as clearly established by *Vega*, the inquiry into the existence of a contract, especially under the circumstances alleged by Plaintiff, is simply not suitable for class treatment.

B. Are There Recoverable Damages, and if so, Are Such Damages Common?

Plaintiff explicitly asserts this case is about a loss of an "experience," a textbook case of subjective, individualized damages. For example, Plaintiff alleges that "Universities do not merely sell credit hours in exchange for money as one would sell some common consumer commodity. **They sell an educational experience based on specific services, including in particular live classes and access to campus facilities and resources**." Amend. Compl. ¶ 12. And, therefore, "Plaintiff and the Class agreed to attend Lynn[']s Undergraduate Day Division], and to pay the enormous cost for tuition and fees, *to receive that classroom experience"* that is part of the student's educational *experience. Id.* ¶ 30. Plaintiff makes clear that his harm, and what he seeks relief for through this lawsuit, is that "[t]he remote classes provided to Mr. Gibson and his peers during Lynn's continued operations were not equivalent *to the in-person campus experience* that

Mr. Gibson and other Lynn students chose for their university education." *Id.* ¶ 71. In fact, he directly alleges that "[his] damages take the form of, *inter alia,* a refund of a percentage of tuition and fees reflecting the fact that students could no longer attend classes in person and were instead given an online learning *experience* that is objectively worth less and that failed to provide access to activities and services for which Plaintiff and Class members paid." *Id.* ¶ 79.

But loss of an "experience" is inherently subjective, not just as to its *amount*, but as to *whether there was harm itself.*

This is not a case where Plaintiff says "I, and thousands of others, was charged $50 for a widget, but that widget was broken, so I should get repaid for the harm that broken widget caused (the cost to fix it, or the cost to fix the harm it caused)." Here, whether any specific student was harmed in the first instance is an *individualized* question. For example, some students may also work and *prefer* to learn remotely and thus save hours on their commute. Others may learn better remotely as opposed to in-person. Some students may take advantage of in-person campus activities (such as the recreation center) and have "suffered" from the fact that it was not offered during the COVID-related closure, others may never use any campus services at all. Some students may participate in student government, others may care less about such activities, etc. Either way, to answer whether a student suffered damages, the Court will be forced to ask whether, and to what extent, each individual class member engaged in, cared about, expected or was disappointed by the loss of a particular in-person component of their educational "experience." Students for whom in-person education or experiences meant little or nothing (because they never participated or used such services on or off campus or because they actually prefer remote learning), *per se* did not suffer any type of concrete, particularized harm necessary to seek relief. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). *See also Vega*, *supra* at 1272-73 (class treatment was improper

because the class clearly included individuals who were not subject to any breach and never suffered harm, and class treatment would require individualized inquiry into whether each class member suffered harm).

Similarly, even if one assumes the *fact* of harm can be commonly decided, which it cannot, the amount is inherently subjective and not ascertainably or objectively provable (generally, and certainly not as a class). More specifically, Plaintiff is suing, on behalf of class members, to recover a "loss of experience." But such damages, and how they are valuated, is not just based on rank speculation (what possible objective metric is one to use to "value" the loss from not having "an experience" in the format someone expects[3]), it also is inherently subjective and cannot be "typical" of the class. And *this* issue—the inherently subjective, wildly variable nature of the supposed harm—is what makes this case uniquely *unsuited* to class treatment. To answer the question of how any class member was harmed, the Court must ask each individualized class member: how much of *your* tuition and fees did *you* attribute to *your* hope or expectation or desire for an "in-person experience?" And of this "experiential cost allotment," how much do you *feel* you "got" from Lynn pre-COVID, how much do you *feel* you lost post-COVID, and how can you *prove* you actually "felt" such a loss (since "experiential" losses are based on feelings and dashed hopes, not on objective metrics)? Clearly, this entire exercise is uniquely unsuited to be answered on a class-wide basis.

---

[3] Plaintiff's comparison of Online and Undergraduate Day Divisions, in which he enrolled, is a red herring. Plaintiff argues that because the different Divisions have different prices, Lynn concedes that remote learning is less valuable. This assumption is improper and irrelevant. Plaintiff admits he did not choose the Online Division. That Lynn offered different programs with different professors, courses, schedules and majors at different prices, does not establish that the terms of the Division to which Plaintiff *never enrolled* apply to him. Nor does it mean Plaintiff can choose to apply the financial terms of the Online Division to him because of the transition to remote learning. The two Divisions are apples and oranges, with separate *terms* and separate *rates* for separate *products*. Plaintiff cannot pick and choose the terms he likes from each Division.

Consider the following example:

A person loves to ski. They go to a ski resort, and have the option of paying $50 per day at the small training slope, or paying $200 per day for access to the black diamond slopes. They know that the ski resort pays a lot of money to maintain these black diamond slopes (they have to pay to have personnel available to assist in case of accidents on this dangerous slope, they pay to have ski lifts operable, etc.). And, of course, they *expect* that the larger slope will offer a much more exhilarating experience than the small training slope, although the resort never promises anything about what the experience on the black diamond slope will be (because an experience is inherently subjective and no vendor can promise what any one person might feel). The customer pays the $200 premium, hoping for the thrill they expect when skiing. As it turns out, the snow on the black diamond slope is a little icy (not because of anything the slope operator did), and the ride down is bumpy and not particularly enjoyable. So the patron comes back to the resort and says "Hey, I paid $200 and expected a thrilling downhill ride. Instead, the experience I got really did not meet my expectations, so I would like you to please refund me my $200 and instead charge me the $50 you charge for the training slope, because I *feel* like the thrill level I got was equal to that slope." Any rational person would consider this argument unpersuasive and inappropriate. Yes, both are ski slopes. Yes, both allow for skiing, but they are not the same product. And no vendor can guarantee a participant's experience. But, this is functionally what Plaintiff is suggesting here: he is saying "I know you have an online program and it is cheaper, and, though I paid and agreed to attend another program, at a higher price, I really expected a certain 'experience.' And, though you did not promise me that experience (it was just my assumption when signing up), I should still get an arbitrary discount, and this Court should figure out that discount for me." And, critical to this motion, Plaintiff wants the Court to "figure out" the

"experiential" damage discount (*i.e.* the cost of dashed expectations) for thousands of putative class members.[4] If this is not the epitome of an *individualized, non-common* issue, nothing could be.

Again, as to this issue as well, *Vega* is instructive. The Court reversed class certification and ordered the case to proceed individually noting the fact that both the fact and amount of damages based on how a commission plan was applied to different employees would *per se* result in massive, individualized differences, undermining Rule 23. Specifically, class treatment was improper because of "the existence of significant individualized issues with respect to breach, materiality, and damages." *Id.* at 1274. "Sorting out and proving the claims, if any, of these class members, and others with similar understandings (or, at least, understandings as substantially different from the one Vega purports to have had), would require substantial individualized evidence different from and in addition to that which Vega would proffer to establish his own claim." *Id.* (*citing Klay v. Humana, Inc.*, 382 F.3d 1241, 1255 (11th Cir. 2004)). Class treatment was thus not appropriate. For the reasons discussed above, the same is true here.

Because both the fact of harm, and the amount and proof of harm is inherently subjective and not susceptible to class treatment, the Court should strike the class allegations.

---

[4] In the Motion to Dismiss the Amended Complaint, Defendant addresses the fact that in addition to misplaced focus on the different Divisions, Plaintiff refers to Lynn's creation of a "remote learning option with discounted tuition for Fall 2020 undergraduate programs" as some form of concession that remote instruction is less valuable than in-person, on-campus instruction. *Id.* ¶¶ 66-67. This argument is specious and supports dismissal. First, there is no legal authority allowing this Court to *infer* a particular type or quality of educational experience based on cost of tuition or fees and then reverse engineer an obligation of the University based on the assumption. The Court should not be second-guessing or divining Lynn's motives when it creates and prices programs. Also, the terms of the Fall 2020 program are not at issue here and reflect clear terms for that program, which are not relevant in this litigation. The issue here is whether Plaintiff can point to any term in Lynn's policies, handbooks, or catalogs establishing that, *for Spring 2020,* Plaintiff contracted with Lynn for *exclusively* in-person, on-campus education and services. After amending the Complaint extensively, Plaintiff still cannot make this showing.

C. Unjust Enrichment Claims Are Inherently Individualized

Plaintiff also asserts unjust enrichment claims; these claims do not present common questions to which there exists a common answer. To grant the equitable relief afforded by an unjust enrichment claim, "a court must examine the particular circumstances of an individual case and assure itself that, without a remedy, inequity would result or persist." *Vega*, 564 F.3d at 1274. This necessarily requires an individual inquiry into each class member's specific circumstances and the attendant equities surrounding such circumstances, which is inappropriate for class treatment. *Id.* at 1274-75 (citing *Klay*, *supra*). The Eleventh Circuit said this was a "critical" issue which leads to the result that "common questions will **rarely, if ever**, predominate an unjust enrichment claim, the resolution of which turns on individualized facts." *Id.* at 1274 (emphasis supplied). This is not one of those rare cases.

As *Vega* held, allowing Plaintiff's unjust enrichment claim to proceed on a class-wide basis would result in a series of mini-trials regarding the equities in any individual student's particular circumstance. For example, for a student who never participated in any on-campus activity, the transition to remote learning due to COVID really made no difference, since COVID did not change anything for them. Similarly, whether Lynn was enriched as to tuition or any particular fee will inherently be different for a student who regularly wants and expects to use certain specific campus services (and claims they paid to get that service, even though these fees are not optional) versus another student who never expects to use and does not care about those same services. In short, due to its individualized nature, the unjust enrichment claim is unsuitable for class treatment.

III. Plaintiff Fails to Satisfy the Requirements of Rule 23(b)

Rule 23(b)(3) requires that "questions of law or fact common to class members ***predominate*** over any questions affecting only individual members, and that a class action is ***superior*** to other available methods for fairly and efficiently adjudicating the controversy." Fed.

R. Civ. P. 23(b)(3) (emphasis supplied). To find predominance, the Court must identify the genuine common questions and determine that the resolution of such questions would predominate in the proceeding. *Wachtel v. Guardian Life Ins. Co. of Am.*, 453 F.3d 179, 184-85 (3d Cir. 2006) (finding that a court cannot properly certify a Rule 23(b)(3) class without comparing the common and individual issues present in a case). *See also Vega, supra* at 1270 ("Whether an issue predominates can only be determined after considering what value the resolution of the class-wide issue will have in each class member's underlying cause of action.").

Each of the claims discussed above shows why common answers to common questions do not predominate. To recap:

First, on the very issue of whether there was a contract, Plaintiff's claim is predicated on the assertion that when he signed up for classes, *he* assumed and understood that such classes would be provided in-person exclusively. To answer this question for the class, the Court will have to evaluate the "minds" of each putative class member to determine if they, individually, had the same beliefs and expectations as Plaintiff did when he signed up for classes, and determine what such person expected. The answer to this question is specifically individualized, and the *class-wide* issue (what Lynn's documents say) does not predominate as to the individualized question of how each class member *understood* such documents and what their assumptions were with respect to whether in-person instruction and activities were promised or expected (and whether there was a meeting of the minds in the first instance).

Similarly, even if one assumes a contract and breach, no objective class-wide metric exists to evaluate whether each class member suffered damages, and, if they did, the measure of those damages. The Court will have to ask each class member whether they were harmed (again, for students who prefer, for various reasons, to be off campus, they had no harm), and even if they

were harmed, what the value of that "loss of experience" is in a way that can be proven and is legally sufficient. The answer to these questions will vary with all class members, and these individualized answers to both the fact and amount of damages means that *class-wide answers* to the common damages-related question do not predominate. Instead, individualized answers predominate this inquiry.

And, finally, given the nature of an unjust enrichment claim, and the fact that the Court will have to determine, as to each class member's specific payments and expectations, whether Lynn was enriched, and *unjustly* so, the answers to these questions are individualized and common answers will not predominate. For example, it is possible that, as to any specific class member, they paid very little, and Lynn was actually not enriched at all from their matriculation (on-campus or remotely). And, even if Lynn was enriched, it may be that in a specific student's case, the enrichment was not *unjust* (*i.e.* the student never planned to use on-campus services in the first place and expected to pay Lynn for the fee simply because it is a mandatory fee that is not charged based on *use*). In short, these claims are inherently incapable of being assessed on a class basis.

Notably, as discussed above, the Eleventh Circuit in *Vega* dealt with many of the identical issues raised by this motion, unanimously reversed a lower court's class certification, and ordered the claim to proceed individually. In doing so, the Court repeatedly explained that the lower court erred in assuming class issues predominated when, in fact, core questions on contract formation, breach, damages, and unjust enrichment meant the case was highly individualized and answers to these questions could not be addressed on a class basis. The same result should follow here.

Plaintiff fails to establish the requisite predominance of common questions of law or fact, and as such, he likewise fails to show that class treatment is superior to other methods. Therefore, Plaintiff's claims are inappropriate for resolution on a class basis.

IV. The Class Includes Class Members Who Lack Standing

For a district court to certify a class action, the named plaintiffs must have standing. *Vega, supra* at 1265. "A district court may not certify a class … if it contains members who lack standing. If members who lack the ability to bring a suit themselves are included in a class, the court lacks jurisdiction over their claims …." *In re Zurn Pex Plumbing Products Liability Litigation*, 644 F.3d 604, 616 (8th Cir. 2011). In the Eleventh Circuit, a district court must, at a minimum, be satisfied that at least one named plaintiff has Article III standing as to each claim being raised. *Prado—Steiman v. Bush*, 221 F.3d 1266, 1279 (11th Cir. 2000) (prior to the certification of a class and before undertaking any analysis under Rule 23, the Court "must determine that at least one named class representative has Article III standing to raise each class subclaim."). A plaintiff with no injury in fact lacks standing to bring suit. *See, e.g., Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). Courts have universally held that parents lack standing to assert claims against educational institutions where their child, the student, is over the of eighteen. *See, e.g., McCormick v. Dresdale*, 2010 U.S. Dist. LEXIS 41848, * (D.R.I. Apr. 28, 2010); *Doe v. The University of the South*, 687 F. Supp. 2d 744, (E.D. Tenn. 2009) (no standing for parents of majority age student to bring claim against university); *see also HB v. Monroe Woodbury Cent. Sch. Dist.*, No. 11-CV-5881(CS) 2012 U.S. Dist. LEXIS 141252, *60 (S.D.N.Y. Sept. 27, 2012) ("[A]lthough parents may sue on behalf of their minor child, they do not have standing to assert claims on their own behalf for a violation of their child's right."). *See also Gendler v. Related Grp.*, No. 09-21867, 2009 U.S. Dist. LEXIS 139040, at *18 (S.D. Fla. Sep. 14, 2009) (dismissing claims against defendants because named plaintiffs lacked privity with specific defendant and thus standing to sue, even if unnamed class members might have had standing to sue).

Here, the class purports to include anyone "who paid, *on behalf of themselves or another*, tuition or fees" for the Spring 2020 term, not merely students. Amend. Comp. ¶ 80. Parents or others who paid tuition, however, are not students at Lynn and they have not alleged any contractual relationship with Lynn. The Amended Complaint is clear that it is the *students* who reviewed, relied on, and agreed to the documents point to in arguing there was an alleged contract for in-person delivery. And the Amended Complaint is clear that it is *students* who expected the "on-campus experience" that is the basis for this lawsuit, and it is only a student, not any person who "paid…tuition or fees" who would have suffered harm from not receiving that "experience."

As the class is currently defined to clearly include members who lack constitutional standing (because they never entered into contracts with Lynn and suffered no harm as alleged in the Amended Complaint), the current class definition should be stricken.

CONCLUSION

For each of the foregoing reasons, class treatment of the allegations in the Amended Complaint is inappropriate. As such, the Court should strike the class allegations in Plaintiff's Amended Complaint and order Plaintiff to proceed with his claims individually (if such claims can withstand Lynn's existing Motion to Dismiss).

Respectfully submitted,

/s/ Mendy Halberstam
Mendy Halberstam, Esq.
Florida Bar No. 68999
Email: mendy.halberstam@jacksonlewis.com
Stephanie L. Adler-Paindiris, Esq.
Florida Bar No. 0523283
Email: stephanie.adler-paindiris@jacksonlewis.com
Allison Gluvna Folk, Esq.
Florida Bar No. 041075
Email: allison.folk@jacksonlewis.com
Leslie Lagomasino Baum, Esq.

Florida Bar No. 1007655
Email: leslie.baum@jacksonlewis.com
JACKSON LEWIS P.C.
One Biscayne Tower, Suite 3500
Two South Biscayne Boulevard
Miami, Florida 33131
Telephone: (305) 577-7600

Counsel for Defendant

CERTIFICATE OF CONFERRAL

I hereby certify that I conferred in detail with Plaintiff's counsel regarding this motion. Plaintiff opposes the relief sought in this motion.

s/ Mendy Halberstam
Mendy Halberstam, Esq.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 16, 2020, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record identified on the attached Service List via transmission of Notice of Electronic Filing generated by CM/ECF and Electronic Mail.

s/ Mendy Halberstam
Mendy Halberstam, Esq.

SERVICE LIST

United States District Court for the Southern District of Florida
Gibson, et al. v. Lynn University, Inc.
CASE NO.: 20-CIV-81173-RAR

Matthew D. Schultz, Esq.
Florida Bar No. 0640328
Email: mschultz@levinlaw.com
Rebecca K. Timmons, Esq.
Florida Bar No. 121701
Email: rtimmons@levinlaw.com
Brenton J. Goodman, Esq.
Florida Bar No. 126153
Email: bgoodman@levinlaw.com
LEVIN, PAPANTONIO, THOMAS
MITCHELL, RAFFERTY & PROCTOR, P.A.
316 S. Baylen Street, Suite 600
Pensacola, Florida 32502
Telephone: (850) 435-7140

Patrick Madden, Esq.
Email: pmadden@bm.net
BERGER MONTAGUE, P.C.
1818 Market Street, Suite 3600
Philadelphia, PA 19103
Telephone: (215) 875-3000

Counsel for Plaintiff and the Proposed Class

Mendy Halberstam, Esq.
Florida Bar No. 68999
Email: mendy.halberstam@jacksonlewis.com
Stephanie L. Adler-Paindiris, Esq.
Florida Bar No. 0523283
Email: stephanie.adler-paindiris@jacksonlewis.com
Allison Gluvna Folk, Esq.
Florida Bar No. 041075
Email: allison.folk@jacksonlewis.com
Leslie Lagomasino Baum, Esq.
Florida Bar No. 1007655
Email: leslie.baum@jacksonlewis.com
JACKSON LEWIS P.C.
One Biscayne Tower, Suite 3500
Two South Biscayne Boulevard
Miami, Florida 33131
Telephone: (305) 577-7600

Counsel for Defendant