

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CIVIL ACTION
FILE NUMBER 1:07-cv-20085-DLG

THOMAS JOSEPH BENTEY, an individual;
THOMAS JOSEPH BENTEY, as Putative
Class Representative of persons similarly
situated,

Plaintiff(s),

v.

ST. THOMAS UNIVERSITY SCHOOL OF
LAW; ROMAN CATHOLIC
ARCHDIOCESE OF MIAMI; FRANKLYN
M. CASALE, an individual; ROBERT A.
BUTTERWORTH, an individual, GEORGE
SHELDON, an individual; JOHN
HERNANDEZ, an individual; FAREZA
KHAN, an individual; STEPHEN PLASS, an
individual; COUNCIL, AMERICAN BAR
ASSOCIATION, SECTION OF LEGAL
EDUCATION and ADMISSIONS TO THE
BAR; ACCREDITATION COMMITTEE,
AMERICAN BAR ASSOCIATION,
SECTION OF LEGAL EDUCATION and
ADMISSIONS TO THE BAR; UNITED
STATES DEPARTMENT OF EDUCATION;

Defendants.

**DEFENDANTS' MOTION TO DISMISS, MOTION FOR A MORE
DEFINITE STATEMENT, MOTION TO STRIKE, AND MOTION
TO REJECT PLAINTIFF'S CLASS ACTION CERTIFICATION**

Defendants, ST. THOMAS UNIVERSITY SCHOOL OF LAW, FRANKLYN M.
CASALE, individual, ROBERT A. BUTTERWORTH, individual, GEORGE SHELDON,
individual, JOHN HERNANDEZ, individual, FAREZA KHAN, individual, AND STEPHEN
PLASS, individual and THE ARCHDIOCESE OF MIAMI, INC., (hereinafter "the Movants") by
and through their undersigned counsel, hereby file this Motion to Dismiss Plaintiff's Complaint

for Failure to State a Claim, Motion for a More Definite Statement, Motion to Strike, and Motion to Reject Plaintiff's Class Action Certification in support state:

1. This multi-count action arises after Plaintiff, a student at St. Thomas University School of Law from August 2005 until May 2006, was dismissed from the law school because he failed to maintain a grade point average of 2.5 or better. *See* Plaintiff's Complaint, ¶¶ 13, 17. Plaintiff sued the Movants and several other Defendants.

2. In the Complaint, the Plaintiff alleged twelve (12) counts against the Movants including counts for consumer fraud, breach of contract, legal fraud-misrepresentation, equitable fraud, negligence, failure to deal in good faith, unjust enrichment, violation of A.B.A standards, violation of state and federal statutes, R.I.C.O., emergent relief, and class action.

3. The Movants file their Motion to Dismiss the Complaint pursuant to Federal Rules of Civil Procedure 12(b)(6) for failure to state a claim, their Motion for a More Definite Statement pursuant to Federal Rules of Civil Procedure 12(e), their Motion to Strike pursuant to Federal Rules of Civil Procedure 12(f), and their Motion to Reject Plaintiff's Class Action Certification.

4. For the reasons provided below, the Movants' various Motions should be granted in favor of the Movants.

MEMORANDUM OF LAW

Standard of Review on a Motion to Dismiss

Under Federal Rule of Civil Procedure 12(b)(6) the defense of failure to state a claim upon which relief may be granted may be made by motion, "before pleading if a further pleading is permitted." A motion to dismiss a complaint for failure to state a claim allows of no discretion in the usual sense, since a complaint is either good or not good. *Mitchell v. E-Z Towers, Inc.*,

269 F.2d 126, 130 (5th Cir. 1959).

A Rule 12(b)(6) motion to dismiss addresses the legal sufficiency of a complaint. The standard is that a complaint should not be dismissed for failure to state a claim unless it appears beyond a doubt that the plaintiff can prove no set of facts that would entitle him to relief. *Bradberry v. Pinellas County*, 789 F.2d 1513, 1515 (11th Cir. 1986). In ruling on a motion to dismiss, a court must view the complaint in the light most favorable to the plaintiff and take its allegations as true. *Hishon v. King & Spaulding*, 467 U.S. 69, 73 (1984); *Quinones v. Durkis*, 638 F. Supp. 856 (S.D. Fla. 1986). A motion to dismiss for failure to state a claim may nevertheless be granted when the movant establishes beyond doubt that the plaintiff can prove no set of facts to support his claim that would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Harper v. Blockbuster Entm't Corp.*, 139 F.3d 1385, 1387 (11th Cir. 1998).

“Although a plaintiff is not held to a very high standard in a motion to dismiss for failure to state a claim, some minimal pleading standard does exist.” *Wagner v. Daewoo Heavy Indus. Am. Corp.*, 289 F.3d 1268, 1270 (11th Cir. 2002) (citations omitted), *rev'd on other grounds*, 314 F.3d 541. There is no duty on the part of the trial court or the appellate court to create a claim which the plaintiff does not spell out in his pleadings. *Case v. State Farm Mut. Auto. Ins. Co.*, 294 F.2d 676, 677-68 (5th Cir. 1961). “[C]onclusory allegations, unwarranted deductions of facts or legal conclusions masquerading as facts will not prevent dismissal.” *Oxford Asset Mgmt., Ltd. v. Jaharis*, 297 F.3d 1182, 1188 (11th Cir. 2002) (citations omitted); *Accord Jones v. Law Firm of Hill and Ponton*, 141 F. Supp. 2d 1349, 1354 (M.D. Fla. 2001) (A court does not generally accept conclusory allegations in a plaintiff’s complaint as true in determining whether to dismiss a case for failure to state a claim upon which relief can be granted). The purpose of the rule providing for dismissal of a complaint on the basis that it does not state a claim upon

which relief can be granted is to allow a court to eliminate actions that are fatally flawed in their legal premises and destined to fail, and thus to spare the litigants the burdens of unnecessary pretrial and trial activity. *Advanced Cardiovascular Sys., Inc. v. Scimed Life Sys., Inc.*, 988 F.2d 1157, 1160 (Fed. Cir. 1993) (citing *Neitzke v. Williams*, 490 U.S. 319, 326-27 (1989)).

ARGUMENTS

I. MOTION TO DISMISS PLAINTIFF'S COMPLAINT FOR FAILURE TO STATE A CLAIM PURSUANT TO RULE 12 (B)(6)

The Plaintiff has alleged numerous counts against the Movants including counts for consumer fraud, breach of contract, legal fraud-misrepresentation, equitable fraud, negligence, failure to deal in good faith, unjust enrichment, violation of A.B.A standards, violation of state and federal statutes, R.I.C.O., emergent relief, and class action. The Plaintiff's Complaint should be dismissed as to all twelve (12) Counts because, even when viewing the Complaint in the light most favorable to the Plaintiff, the Plaintiff has failed to state a claim. Fed.R.Civ.P. 12(b)(6).

A. St. Thomas University School of Law is Not a Legal Entity Capable of Being Sued

The Plaintiff has made several allegations against "St. Thomas University School of Law" in the Complaint. *See* Plaintiff's Complaint. "St. Thomas University School of Law", however, is not a legal entity. Instead, "St. Thomas University, Inc." is the real party in interest. Federal Rule of Civil Procedure 10 (a) provides that "[i]n the complaint the title of the action shall include the names of all the parties."

In the similar case of *Jarzynka v. St. Thomas University of Law*, 310 F.Supp.2d 1256 (S.D. Fla. 2004), the plaintiff filed suit against "St. Thomas University School of Law." Amongst other arguments, the defendant moved to dismiss the complaint on the grounds that the plaintiff failed to comply with Rule 10(a) in naming the wrong entity. *Id.* at 1260 and 1261. In

ruling in favor of the defendant's dismissal, the *Jarzynka* court held that: "Plaintiff's Second Amended Complaint must be filed against St. Thomas University, Inc., a corporate entity capable of suing or being sued." *Id.* at 1270.

As it did so in *Jarzynka*, ST. THOMAS UNIVERSITY requests that this Honorable Court dismiss the Complaint as to ST. THOMAS UNIVERSITY under Rule 10(a).

B. The Plaintiff Fails to State a Claim for Consumer Fraud, Legal Fraud-Misrepresentation, and Equitable Fraud

In Counts I, III, and IV of the Complaint, the Plaintiff alleges three separate causes of action against the Movants for "Consumer Fraud," "Legal Fraud-Misrepresentation," and "Equitable Fraud," respectively. *See* Plaintiff's Complaint, ¶¶ 37 – 39, and ¶¶ 42 – 51. The Plaintiff failed to plead with particularity the acts of fraud perpetrated by each of the individual Movants.

Federal Rule of Civil Procedure 9(b) provides that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Fed.R.Civ.P. 9(b). The purpose of the particularity requirement in Rule 9(b) is to notify defendants as to the "precise misconduct with which they are charged" and to protect defendants "against spurious charges of immoral and fraudulent behavior." *Durham v. Bus. Mgmt. Assocs.*, 847 F.2d 1505, 1511 (11th Cir. 1988) (*quoting Seville Indus. Machinery Corp. v. Southmost Machinery Corp.*, 742 F.2d 786, 791 (3d Cir. 1984)). Accordingly, pursuant to Rule 9(b), the Plaintiff is required to plead with particularity the acts of fraud committed by each of the individual Movants.

Additionally, in Count I, Plaintiff failed to specify which state consumer fraud statutes the Movants allegedly violated. The Plaintiff alleges that the Movants engaged in

“unconscionable commercial practices, deception, fraud, false promises, false pretences and/or misrepresentations in their interaction with Plaintiff *in violation of state consumer fraud statutes.*” See Plaintiff’s Complaint, ¶ 38 (emphasis added). The Movants cannot file a proper responsive pleading without knowing specifically which state statutes were allegedly violated.

As such, the Movants move to dismiss Counts I, III, and IV of the Complaint because Plaintiff did not allege fraud with particularity in compliance with Rule 9(b).

C. The Plaintiff’s breach of contract claim against the various Movants should be dismissed for failure to state a claim

In Count II of the Complaint, the Plaintiff alleges that the Movants “breached contracts, expressed and implied, with Plaintiff, Bentey, by violating the terms of the Student Catalog and Student Handbook in effect for the 2005-2006 academic year.” See Plaintiff’s Complaint, ¶ 41. The breach of contract claims is made against all of the Movants. The Movants include corporate entities and various individuals.

In Florida, to properly assert a breach of contract claim the Plaintiff must allege the following elements: (1) a valid contract; (2) a material breach; and (3) damages. *J.J. Gumberg Co. v. Janis Servs., Inc.*, 847 So. 2d 1048, 1049 (Fla. 4th DCA 2003). In the Complaint, the Plaintiff alleges that ST. THOMAS UNIVERSITY was responsible for disseminating the Student Catalog and Student Handbook to law school students. See Plaintiff’s Complaint, ¶ 22. The Plaintiff also alleges that the Movants breached the terms of the Student Catalog and Student Handbook in effect for the 2005-2006 academic year. See Plaintiff’s Complaint, ¶ 41.

Under Florida law, a student and a private university have a contractual relationship. *John B. Stetson University v. Hunt*, 102 So. 637, 640 (Fla. 1924); see also, *Sharick v. Southeastern University of Health Sciences, Inc.*, 780 So. 2d 136, 138 (Fla. 3rd DCA 2000). The

terms and conditions of that contractual relationship may include the publications of the private university at the time of enrollment. *Sharick*, 780 So. 2d at 138. The university's publications are terms of an “implied-in-fact contract” rather than an express contract. *Id.*

In the instant case, the Plaintiff has failed to specify which of the Movants entered into both an express and implied contract with Plaintiff. Assuming that a contractual relationship existed, it was an implied contract between the Plaintiff and ST. THOMAS UNIVERSITY, and not the remaining Movants. The Plaintiff has failed to allege that the remainder of the Movants, i.e, Catholic Archdiocese of Miami, Franklyn M. Casale, Robert A. Butterworth, George Sheldon, John Hernandez, Fareza Khan, and Stephen Plass, were privy to said contractual relationship. As such, Count II should be dismissed as it applies to the remainder of the Movants.

D. Plaintiff’s negligence claim against the Movants is not cognizable under Florida Law

In Count V of the Complaint, the Plaintiff alleges a cause of action in negligence against the Movants. The Plaintiff alleges that he was wrongfully dismissed from the law school for failing to maintain a 2.5 grade point average. *See Plaintiff’s Complaint*, ¶¶ 14 – 18. He further alleges that a review of his Contracts II examination would have revealed that he in fact earned a B or a higher grade rather than a C. *See Plaintiff’s Complaint*, ¶ 18. A higher grade would have resulted in a grade point average above the requisite minimum of 2.5. In his negligence count, the Plaintiff alleges that the Movants were “under a duty to render legal educational services to Plaintiff, Bentey, in a professional and ethical manner” and that they were “negligent in failing to carry out their duty to Plaintiff, Bentey, to provide to him educational services in a professional and ethical manner.” *See Plaintiff’s Complaint*, ¶¶ 52 – 55. In essence, the Plaintiff is asserting

a claim for educational malpractice or negligence.

Whether a duty exists is a question of law for the court to determine. *Kaufman v. A-1 Bus lines, Inc.*, 363 So. 2d 61 (Fla. 3d DCA 1978). The Plaintiff's negligence claim against the Movants is not cognizable under Florida law. Florida law does not recognize a claim for "educational malpractice." *Tubell v. Dade County Public Schools*, 419 So. 2d 388, 389 (Fla. 3d DCA 1982).

In *Tubell*, the basis of plaintiff's complaint was a mistesting and misclassification resulting in the plaintiff being placed in an improper special educational program for a number of years to his detriment. *Id.* at 389. The Third District in affirming the trial court's entry of summary judgment in favor of the defendants held that "even if these allegations are correct *there is no cause of action stated.*" *Id.* (emphasis added). Also, in *Watts v. Florida International University*, Not Reported in F.Supp.2d, 2005 WL 3730879 (S.D. Fla. 2005), the plaintiff asserted several negligence counts against a university. The defendants moved to dismiss those counts on the basis that the negligence claims amounted to a claim for "educational malpractice." In dismissing the complaint, the Southern District cited to the *Tubell* decision and held that "Florida has rejected a claim for 'educational malpractice.'" *Id.* at 12.

Based on the foregoing, the Plaintiff's negligence claim against the Movants is not cognizable under Florida law. *Tubell*, 419 So. 2d at 388, 389. As such, the Plaintiff's claim for negligence against the Movants should be dismissed for failure to state a claim. Fed.R.Civ.P. 12(b)(6).

E. The economic loss rule bars the Plaintiff's negligence claim against the Movants

The economic loss rule is a “judicially created doctrine that sets forth the circumstances under which a tort action is prohibited if the only damages suffered are economic losses.” *Maliner v. Wachovia Bank, N.A.*, Not Reported in F.Supp.2d, 2005 WL 670293 (S.D. Fla. 2005) (citing *Indem. Ins. Co. v. Am. Aviation, Inc.*, 891 So. 2d 532, 536 (Fla. 2004)). The economic loss rule provides that a party who contracts for services may not recover in tort for purely economic losses unless the other party's conduct establishes a “tort ‘distinguishable from or independent of [the] breach of contract.’” *AFM Corp. v. Southern Bell Tel. & Tel. Co.*, 515 So. 2d 180, 181 (Fla.1987) (quoting *Lewis v. Guthartz*, 428 So. 2d 222, 224 (Fla. 1982)). Although the economic loss rule has several exceptions, common law negligence is not one of the exceptions.

In the instance case, the Plaintiff’s negligence claim is based on the implied contractual relationship between ST. THOMAS UNIVERSITY and the Plaintiff, and is not distinguishable from the Plaintiff’s breach of contract claim. Accordingly, the negligence claim is barred by the economic loss rule and must be dismissed. *Florida Power & Light Co. v. Westinghouse Elec. Corp.*, 510 So. 2d 899, 902 (Fla. 1987) (holding that negligence claims based on breach of contract are barred by economic loss rule).

F. Florida’s “impact rule” precludes recovery under a negligence theory absent a physical impact

Florida’s impact rule provides that “before a plaintiff can recover damages for emotional distress caused by the negligence of another, the emotional distress suffered must flow from the *physical injuries the plaintiff sustained in an impact.*” *R.J. v. Humana*, 652 So. 2d 360 (Fla.1995); *Champion v. Gray*, 478 So. 2d 17 (Fla.1985) (emphasis added). Therefore, unless

the emotional damages resulted from a physical injury, the impact rule precludes recovery. *School Bd. of Miami-Dade County, Florida v. Trujillo*, 906 So. 2d 1109 (Fla. 3d DCA 2005).

In the negligence Count (V) of the Complaint, the Plaintiff alleges that he was “proximately damaged” as a result of the Movants’ negligence. *See* Plaintiff’s Complaint, ¶ 55. In Paragraph 32 of the Complaint, the Plaintiff provides a list of damages that he allegedly suffered including damages for emotional distress. *See* Plaintiff’s Complaint, ¶ 32. The Plaintiff is precluded from recovering all the damages prescribed under Paragraph 32 under a negligence theory. In *Greenacre Properties, Inc. v. Rao*, 933 So. 2d 19, 25 (Fla. 2d DCA 2006), the Second District held that the impact doctrine “requires proof of a physical injury or illness before a plaintiff is permitted to recover *any type of damages* awardable under a negligence theory.” (Emphasis added).

Accordingly, because the Plaintiff did not suffer a physical injury or impact, the impact rule applies and therefore precludes recovery of all damages under a negligence theory.

G. The Plaintiff’s claim for failure to deal in good faith should be dismissed because in Florida, there is no separate claim for failure to deal in good faith

In Count VI of the Complaint, the Plaintiff alleges a cause of action for “failure to deal in good faith” against the Movants. *See* Plaintiff’s Complaint, ¶ 56 – 59. The Plaintiff alleges that the Movants were “under an obligation to deal in good faith with Plaintiff, Bentley, at all relevant times” and that the Movants “breached their duty of good faith to Plaintiff, Bentley.” *See* Plaintiff’s Complaint, ¶¶ 56 – 59.

It is established under Florida law that “the implied covenant of good faith and fair dealing is a part of every contract.” *Burger King Corp. v. Weaver*, 169 F.3d 1310, 1315 (11th Cir.1999) (*citing County of Brevard v. Miorelli Eng’g, Inc.*, 703 So. 2d 1049, 1050 (Fla.1997)).

The covenant of good faith and fair dealing, however, is limited in two ways. First, a claim for breach of the implied covenant of good faith and fair dealing “must be accompanied by an allegation that an express term of the contract has been breached.” *Weaver*, 169 F.3d at 316. Second, “[t]he implied obligation of good faith cannot be used to vary the terms of an express contract.” *Ernie Haire Ford, Inc. v. Ford Motor Co.*, 260 F.3d 1285, 1291 (11th Cir. 2001) (citing *Ins. Concepts and Design, Inc. v. Healthplan Services, Inc.*, 785 So. 2d 1232, 1234 (Fla. 4th DCA 2001)).

To establish a breach of the implied duty of good faith and fair dealing, the Plaintiff must allege “a failure or refusal to discharge contractual responsibilities, prompted not by an honest mistake, bad judgment or negligence; but, rather 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.” *Mount Sinai Medical Center of Greater Miami, Inc. v. Heidrick*, 329 F.Supp.2d 1309, 1313 (S.D. Fla. 2004) (citing *Shibata v. Lim*, 133 F.Supp.2d 1311, 1319 (M.D. Fla. 2000)) (citing *Cox v. CSX Intermodal, Inc.*, 732 So. 2d 1092, 1097 (Fla. 1st DCA 1999)).

The Plaintiff has failed to allege how each of the Movants deprived the Plaintiff of the benefits of his implied contract with ST. THOMAS. The Plaintiff has also failed to allege that an express term of the contract was breached by the Movants. *Weaver*, 169 F.3d at 316. Additionally, the Plaintiff’s claim for breach of the implied duty of good faith and fair dealing is duplicative of Plaintiff’s breach of contract claim. In *Weaver*, the Eleventh Circuit held that “no independent cause of action exists under Florida law for breach of the implied covenant of good faith and fair dealing.” *Weaver*, 169 F.3d at 1317. As such, the Plaintiff’s claim for failure to deal in good faith against the Movants should be dismissed for failure to state a claim.

Fed.R.Civ.P. 12(b)(6).

H. Plaintiff has failed to allege all of the elements for unjust enrichment in the Complaint

In Count VII of the Complaint, the Plaintiff alleges a cause of action for unjust enrichment against the Movants. *See* Plaintiff's Complaint, ¶¶ 60 – 61. Plaintiff alleges that “by virtue of their acts and omissions, Defendants, individually and collectively, have been unjustly enriched and Plaintiff, Bentley, is entitled to judgment requiring Defendants to disgorge tuition and fees unjustly received.” *See* Plaintiff's Complaint, ¶¶ 60 – 61.

In Florida, a plaintiff cannot recover under both unjust enrichment and breach of contract. *Tobin & Tobin Insurance Agency, Inc. v. Zeskind*, 315 So. 2d 518 (Fla. 3d DCA 1975). The elements of a cause of action for unjust enrichment are: (1) the plaintiff has conferred a benefit on the defendant, who has knowledge thereof; (2) the defendant voluntarily accepts and retains the benefit conferred; and (3) the circumstances are such that it would be inequitable for the defendant to retain the benefit without paying for it. *Peoples Nat. Bank of Commerce v. First Union Nat. Bank of Florida, N.A.*, 667 So. 2d 876 (Fla. 3d DCA 1996) (*citing Hillman Const. Corp. v. Wainer*, 636 So. 2d 576, 577 (Fla. 4th DCA 1994)).

The Plaintiff has failed to allege sufficient facts to support a claim for unjust enrichment. According to the Complaint, the Plaintiff applied and was accepted into ST. THOMAS UNIVERSITY for the purposes of obtaining a law degree (Juris Doctor). *See* Plaintiff's Complaint, ¶ 13. In other words, ST. THOMAS UNIVERSITY was providing educational services to the Plaintiff in exchange for tuition fees. The terms of the implied contract, as set forth in the Student Handbook for 2005 – 2006, required for students to maintain a 2.5 grade

point average. *See* Plaintiff's Complaint, ¶¶ 21 – 23. When the Plaintiff could not maintain the requisite 2.5 grade point average, he was dismissed from ST. THOMAS UNIVERSITY. *See* Plaintiff's Complaint, ¶ 17. The Plaintiff was not required to continue to pay tuition after he was dismissed from ST. THOMAS UNIVERSITY.

The Plaintiff has failed to allege which benefits he conferred on each of the individual Movants. The only “benefits” that the Plaintiff conferred on ST. THOMAS UNIVERSITY was in the form of tuition fees. But, as stated above, ST. THOMAS UNIVERSITY provided educational services in exchange for the tuition fees. As such, the Plaintiff did not confer any benefits on the Movants for which it would be inequitable for the Movants to retain the benefit without paying for it. *Peoples Nat. Bank of Commerce*, 667 So. 2d at 876. Lastly, Plaintiff cannot base an unjust enrichment claim on alleged wrongdoing for which an independent basis for recovery exists, i.e., breach of contract claim. Accordingly, based on the foregoing, Plaintiff's Count VII of the Complaint for unjust enrichment against the Movants should be dismissed for failure to state a claim. Fed.R.Civ.P. 12(b)(6).

I. A violation of the A.B.A. Standards does not create a private cause of action for the Plaintiff

In Count VIII of the Complaint, the Plaintiff alleges a cause of action for “violation of A.B.A. standards.” *See* Plaintiff's Complaint, ¶¶ 62 – 64. Plaintiff alleges that he was “entitled to the benefit and protection of the Standards, Rules of Procedure for Approval of Law Schools promulgated by Defendants, A.B.A. Council and/or A.B.A. Committee including without limitation Standard 501(b); Standard 609-1(3)(8).” *See* Plaintiff's Complaint, ¶ 63. Plaintiff further alleges that the Movants have “blatantly violated the aforesaid A.B.A. standards to the detriment of Plaintiff.” *See* Plaintiff's Complaint, ¶ 64.

The Movants have not found any case law in the United States that stands for the proposition that a violation of A.B.A. standards creates such a private cause of action. Moreover, the Plaintiff has not alleged that there is anything in the A.B.A. standards that creates a private cause of action. Although in certain instances, courts will review a statute to determine if violation of it will create a private cause of action, such is not the case here. *See e.g., Parks School of Business, Inc. v. Symington*, 51 F.3d 1480, 1484 (9th Cir.1995).

The A.B.A. standards are not enacted by the legislature. This Court need not review and analyze the intent of the individuals that authored these standards to determine if a private cause of action was created. Accordingly, Count VII of the Complaint should be dismissed for failure to state a claim. Fed.R.Civ.P. 12(b)(6).

J. Plaintiff's RICO Claim should be dismissed for failure to comply with Local Rule 12.1

In Count X of the Complaint, Plaintiff alleges a cause of action under the Federal Racketeering Influenced and Corrupt Organizations Act (hereinafter "RICO"). *See* Plaintiff's Complaint, ¶¶ 67 – 69. To summarize, the Plaintiff alleges that the Movants devised a scheme whereby enrollment would be increased to enhance revenues from tuition and, in an effort to improve the Florida State Bar passage rate for ST. THOMAS UNIVERSITY, they would increase the dismissal rate for first year law students. *See* Plaintiff's Complaint, ¶¶ 25 – 30. Plaintiff alleges that the scheme and plan devised and implemented by the Movants was in violation of the RICO statute, 18 U.S.C. § 1962(a) – (d). *See* Plaintiff's Complaint, ¶ 68. Plaintiff also alleged that the scheme and plan devised and implemented by the Movants "constitutes a violation of state RICO statues, in pari materia." *See* Plaintiff's Complaint, ¶ 69.

Pursuant to Local Rule 12.1 of the United States District Court for the Southern District

of Florida, “in all civil actions where a pleading contains a RICO cause of action pursuant to 18 U.S.C. §§ 1961–1968 or §§ 772.101–772.104, Fla.Stat., the party filing the RICO claim shall, **within thirty (30) days of the filing (including filing upon removal or transfer)**, serve a RICO Case Statement.” (Emphasis added). The RICO Case Statement is designed to assist the Court with the processing of a RICO claim and must be a detailed, organized, and specific document. *Pierce v. Ritter, Chusid, Bivonia & Cohen*, 133 F.Supp.2d 1344, 1346 (S.D. Fla. 2001).

In *Pierce*, the plaintiff had failed to provide a RICO statement as required by Local Rule 12.1. *Id.* at 1346. Judge Moreno found that the plaintiff’s failure to include a RICO Statement as required by Local Rule 12.1 was grounds for dismissing both the Federal and State RICO counts. *Id.* In issuing its ruling, the *Pierce* court looked at other similar cases in which the plaintiff had failed to provide a RICO Statement. *See e.g., Harrison Enterprises, Inc. v. Moran*, No. 97-4362-CIV, 1999 WL 1211753 (S.D. Fla. Aug. 30, 1999).

This case was transferred from the United States District Court of New Jersey to the United States District Court for the Southern District of Florida on January 11, 2007. In accordance with Local Rule 12.1 the Plaintiff had until February 12, 2007, to file and serve his RICO Case Statement. To date, the Plaintiff has failed to do so. Accordingly, the Plaintiff’s failure to include a RICO Case Statement as required by Local Rule 12.1 is grounds for dismissing both the Federal and State RICO counts. *Pierce*, 133 F.Supp.2d at 1346.

K. The Plaintiff’s claim for emergent relief should be dismissed because it is not cognizable under Florida Law

In Count XI of the Complaint, the Plaintiff alleges a cause of action for “emergent relief.” *See* Plaintiff’s Complaint, ¶¶ 70 – 75. The Plaintiff alleges that he is entitled to a review of his Contract II examination pursuant to the Student Handbook that was in effect for the 2005 – 2006

academic year. *See* Plaintiff's Complaint, ¶ 71. The Plaintiff further alleges that he "verily believes that a grade of C is unjustified and that he is entitled to a higher grade." *See* Plaintiff's Complaint, ¶ 73. Plaintiff has not alleged any cognizable cause of action under Florida law or made any claim for relief.

Assuming that the Plaintiff is seeking to have this Honorable Court require ST. THOMAS to review the Plaintiff's Contracts II grade, such claim for relief is not permitted under Florida law. *McCawley v. Universidad Carlos Albizu, Inc.*, 461 F.Supp.2d 1251, 1257 (S.D. Fla. 2006). Courts are generally reluctant to interfere with or substitute their judgment regarding decisions of academic institutions to award degrees. *McCawley.*, 461 F.Supp.2d at 1257. Such decisions are afforded great deference and are generally not disturbed absent an abuse of discretion. *Id.*

In *McCawley*, the plaintiff-student made a claim for specific performance and asked that the defendant-university be compelled to confer on him a Ph.D. in psychology. *Id.* at 1260. Citing to the case of *Sharick v. Southeastern Univ.*, 780 So. 2d 136, 139 (3d DCA 2000), the Southern District court held that "Florida law prohibits such action." *Id.* (*citing Sharick*, 780 So.2d at 139 n. 1 (holding that the remedy of specific performance is unavailable to compel the granting of a degree where an educational institution has exercised its discretion in refusing to confer such)). The *McCawley* court found that the plaintiff's claim for specific performance failed "as a matter of law." *Id.*

In the case at bar, assuming that the Plaintiff is making a claim for specific performance to require ST. THOMAS UNIVERSITY to review the Plaintiff's Contracts II grade, such claim for relief is not permitted under Florida law. As such, the Plaintiff's claim should be dismissed for failure to state a claim. Fed.R.Civ.P. 12(b)(6).

WHEREFORE, the Movants hereby request that their Motion to Dismiss the Plaintiff's Complaint be granted in favor of the Movants and against the Plaintiff, and any other relief that this Court deems just and proper.

II. MOTION FOR A MORE DEFINITE STATEMENT

Federal Rule of Civil Procedure 8(a)(2) requires that a pleading contain a "short and plain statement of the claim" that shows that the pleader is entitled to relief. Fed.R.Civ.P. 8(a)(2). Federal Rule of Civil Procedure 10(b) requires that the allegations of a claim "shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances ... [and][e]ach claim found upon a separate transaction or occurrence ... shall be stated in a separate count." Fed.R.Civ.P. 10(b). The failure to identify claims with sufficient clarity to enable the defendant to frame a responsive pleading constitutes a "shotgun pleading." *Byrne v. Nezhat*, 261 F.3d 1075, 1129-30 (11th Cir. 2001).

Federal Rule of Civil Procedure 12(e) provides that "[i]f a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading." In this case, the allegations in Counts I, III, IV, and IX of the Complaint are so vague or ambiguous that the Movants cannot properly frame a responsive pleading.

A. The Plaintiff's claim for consumer fraud, legal fraud-misrepresentation, and equitable fraud are vague or ambiguous

In Counts I, III, and IV, the Plaintiff alleges causes of action against all the Movants for "Consumer Fraud", "Legal Fraud-Misrepresentation", and "Equitable Fraud," respectively. *See* Plaintiff's Complaint, ¶¶ 37 – 39, and ¶¶ 42 – 51. The Plaintiff has not specified which acts of

fraud were committed by each of the individual Movants. As discussed in detail above, Rule 9(b) requires that all averments of fraud be pled with particularity. Fed.R.Civ.P. 9(b). The Movants cannot respond to the allegations of the Complaint due to the vagueness or ambiguity of the Complaint.

The Plaintiff has also failed to specify which state fraud statutes the Movants violated. In the Complaint, the Plaintiff alleges that the Movants engaged in “unconscionable commercial practices, deception, fraud, false promises, false pretences and/or misrepresentations in their interaction with Plaintiff *in violation of state consumer fraud statutes.*” See Plaintiff’s Complaint, ¶ 38 (emphasis added). The Movants cannot file a proper responsive pleading without knowing specifically which state fraud statutes were violated.

This Motion for a More Definite Statement should be granted because the allegations in Counts I, III, and IV, are so vague or ambiguous that the Movants cannot reasonably be required to frame a responsive pleading. Fed.R.Civ.P. 12(e).

B. Plaintiff’s claim for violation of state and federal statutes

In Count IX of the Complaint, the Plaintiff alleges a cause of action for “violating state and federal statutes.” See Plaintiff’s Complaint, ¶¶ 65 – 66. The Plaintiff alleges that Defendants have “violated state and federal statutes and regulations related to the provision of education services, payment and refund policies and dismissal policies for students who have participated in loan programs.” See Plaintiff’s Complaint, ¶ 66.

The Plaintiff has failed to specify which state and federal statutes the Movants violated. The Movants cannot properly formulate a response. A more definite statement is appropriate under Rule 12(e) because the allegations in Counts IX, are so vague or ambiguous that the Movants cannot reasonably be required to frame a responsive pleading. Fed.R.Civ.P. 12(e).

WHEREFORE, the Movants hereby request that their Motion for a More Definite Statement be granted in favor of the Movants and against the Plaintiff, and any other relief that this Court deems just and proper.

III. MOTION TO REJECT THE PLAINTIFF'S CLASS CERTIFICATION

In Count XII of the Complaint, the Plaintiff has asserted a count for class action. *See* Plaintiff's Complaint, ¶¶ 76 – 82. The Plaintiff alleges that he is qualified to act as representative of a class of persons who have attended St. Thomas Law School from January 1, 2003, to the present who were dismissed from the law school at any time after January 1, 2003 due to alleged failure to maintain a cumulative grade point average of 2.5. *See* Plaintiff's Complaint, ¶ 77. The Plaintiff further alleges that: the proposed class is so numerous that joinder of all members is impractical; there are questions of law and fact common to the class; the claims or defenses of the representative parties are typical of the claims and defenses of the class; and that the Plaintiff will fairly and adequately represent the members of the proposed class. *See* Plaintiff's Complaint, ¶¶ 78 – 81. The Plaintiff has failed to plead every element required by Federal Rule of Civil Procedure 23 and Local Rule 23.1 of the United States District Court for the Southern District of Florida.

This Court has broad discretion in determining whether to certify a class. *Heaven v. Trust Co. Bank*, 118 F.3d 735, 737 (11th Cir. 1997). For a class to be certified, it must satisfy Rule 23(a) and at least one of the alternative requirements of Rule 23(b). *See Pickett v. Iowa Beef Processors*, 209 F.3d 1276, 1279 (11th Cir. 2000); Fed.R.Civ.P. 23. The Plaintiff must initially satisfy each of the four threshold requirements of Rule 23(a): (1) the class must be so numerous that joinder of all members is impracticable (“numerosity”); (2) there are questions of law or fact common to the class (“commonality”); (3) the claims or defenses of the

representative parties are typical of the claims or defenses of the class (“typicality”); and (4) the representative parties will fairly and adequately protect the interests of the class (“adequacy of representation”). Fed.R.Civ.P. 23(a).

The Plaintiff bears the burden of establishing that all four of the Rule 23 requirements have been met. *Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718, 721 (11th Cir. 1987), *cert. denied*, 485 U.S. 959 (1988) (emphasis added). “These prerequisites are mandatory and the failure to establish any one is fatal to a motion for class action certification.” *Hernandez v. Medows*, 209 F.R.D. 665 (S.D. Fla. 2002).

A trial court may certify a class only after rigorously analyzing whether the Plaintiff has satisfied all the elements of Rule 23. *See General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 161 (1982); *Baptist Hosp. of Miami v. Demario*, 661 So. 2d 319, 321 (Fla. 3d DCA 1995). “[T]here must not only be allegations relative to the matters mentioned in Rule 23(a)(2),(3), and (4), and Rule 23(b), but, in addition, there must be a statement of basic facts. Mere repetition of the language of the Rule is inadequate.” *Gillibeau v. City of Richmond*, 417 F.2d 426, 432 (9th Cir. 1969).

The Plaintiff has only made conclusory allegations that repeat the language of Rule 23. *See e.g.*, Plaintiff’s Complaint ¶¶ 78 – 82. The Plaintiff has failed to provide the basic facts upon which any of the elements of Rule 23 may be established.

i. Numerosity

Rule 23(a)(1) requires the Plaintiff to demonstrate that the members of the class are so numerous that separate joinder of each member is impracticable. Fed.R.Civ.P. 23(a)(1). The Eleventh Circuit has indicated that “less than twenty-one is inadequate, more than forty [is] adequate.” *See Cox v. Amer. Cast Iron Pipe Co.*, 784 F.2d 1546, 1553 (11th Cir.1986).

Although the Plaintiff is not required to provide the exact size of the proposed class, he is expected to provide a *reasonable estimate* that the number is large enough to render joinder of the individual class members impracticable. *Boca Raton Community Hosp., Inc. v. Tenet Healthcare Corp.*, 238 F.R.D. 679, 691 (S.D. Fla. 2006) (citing *Walco Invest., Inc. v. Thenen*, 168 F.R.D. 315, 324 (S.D. Fla. 1996)) (emphasis added). Local Rule 23.1 also requires the Plaintiff to allege the approximate size of the class.

The only allegation in the Complaint involving the class provides as follows: “Plaintiff, Bentey, as putative class representative, seeks to represent a class composed of all students who have attended Defendant, St. Thomas Law, from January 1, 2003 to present and continuing into the future, who were dismissed from Defendant, St. Thomas Law, at any time after January 1, 2003, who were dismissed due to alleged failure to maintain a grade point average of 2.5.” See Plaintiff’s Complaint, ¶ 77. This allegations does not provide any evidence that joinder is impracticable. Moreover, the Plaintiff has not provided an approximate size of the class.

As such, class certification should be denied because the Plaintiff has not satisfied the first requirement of Rule 23.

ii. Commonality

The second criterion for class certification requires that there be a common question of fact or law. Fed.R.Civ.P. 23(a)(2). Commonality requires that there is at least one issue affecting all or a significant number of proposed class members. *Stewart v. Winter*, 669 F.2d 328 (5th Cir. 1982); *Kreuzfeld v. Carnehammar*, 138 F.R.D. 594, 599 (S.D. Fla. 1991). Again, the Plaintiff has simply made conclusory statements to establish this criterion without providing any supportive facts. Even assuming that the Plaintiff attempted to rely on his allegations that St. Thomas Law planned or schemed to dismiss 25% of the first year class, and that this plan was

never disseminated to the students, it still does not establish commonality. There are many legal issues and factual issues that may be different for every member of the alleged class. *See Cheatwood* 2002 WL 4629 at 2.

For example, the Plaintiff has not provided sufficient facts to establish that the other members of the class were not aware of the alleged plan or scheme. If the other members were aware of the alleged plan or scheme then these proposed class members' cases would not be common with the Plaintiff's case. Accordingly, the Plaintiff has failed to establish the commonality requirement of Rule 23.

iii. Typicality

Rule 23(a)(3) requires that the claims of the named plaintiff be typical of the claims of the class. Fed.R.Civ.P. 23(a)(3). ***Proof of typicality requires more than general conclusory allegations.*** *Walco Investments*, 168 F.R.D. at 326 (emphasis added). To determine whether a proposed class has "typicality," this Court must determine if the "class representatives' claims have the same essential characteristics as the claims of the other members of the class." *In re Amerifirst Securities Litigation*, 139 F.R.D. 423, 428 (S.D. Fla. 1991) (citing *Appleyard v. Wallace*, 754 F.2d 955, 958 (11th Cir.1985)). A representative is typical if it is a class member and it "***possess [es] the same interests and suffer[s] the same injury***" as other class members. *Falcon*, 457 U.S. at 156 (emphasis added). "A sufficient nexus is established if the claims or defenses of the class and the class representatives arise from the same event or pattern or practice and are based on the same legal theory." *Cheney v. Cyberguard Corp.*, 213 F.R.D. 484 (S.D. Fla. 2003) (citing *Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332, 1337 (11th Cir.1984)).

The Plaintiff has made only general conclusory allegations. *Walco Investments*, 168

F.R.D. at 326. A review of the alleged damages and demand for relief in the Complaint reveals that the alleged damages are specific only to the Plaintiff and not the other class members. For example, the following damages and demand for relief are specific to the Plaintiff: “loss of residence and occupancy associated with law school attendance,” “loss of earnings during the attendance at law school,” “personal embarrassment, distress, anxiety and emotional upset,” and “injunctive relief enjoining Defendant, St. Thomas Law, to review the Plaintiff’s Contract II examination to determine if the grade should be adjusted; enjoining Defendant, St. Thomas Law to reinstate Plaintiff, Bentey, if the Contract II examination grade is adjusted upward.” *See* Plaintiff’s Complaint, ¶ 32 & Demand for Relief.

In summary, the Plaintiff has not established that he possesses the same interests and suffered the same injury as other class members. *Falcon*, 457 U.S. at 156. Therefore, Plaintiff’s claims are not typical of the claims of the class and certification should be denied.

iv. Adequacy of Representation

Rule 23 (a)(4) requires that the Plaintiff provide fair and adequate representation. The adequacy-of-representation requirement “encompasses two separate inquiries: (1) whether any substantial conflicts of interest exist between the representatives and the class; and (2) whether the representatives will adequately prosecute the action.” *Valley Drug Co. v. Geneva Pharm., Inc.*, 350 F.3d 1181, 1189 (11th Cir. 2003) (*quoting In re HealthSouth Corp. Sec. Litigation*, 213 F.R.D. 447, 460-461 (N.D. Ala. 2003)).

In the Complaint, the Plaintiff moved to certify Lombardi & Lombardi, P.A., as class counsel and to certify the Plaintiff as representative of the class. *See* Plaintiff’s Complaint, Demand for Relief. To date, the law firm of Lombardi & Lombardi, P.A., has not filed any documents to appear *pro hac vice* and the Plaintiff has not retained any local counsel. At this

time, the Plaintiff has failed to establish the adequacy of representation requirement of Rule 23.

WHEREFORE, the Movants hereby request that their Motion to Reject the Plaintiff's Class Certification be granted in favor of the Movants and against the Plaintiff, and that an Order be entered denying Plaintiff's class certification, and any other relief that this Court deems just and proper.

IV. MOTION TO STRIKE PLAINTIFF'S ALLEGED DAMAGES AND DEMAND FOR RELIEF

Federal Rule of Civil Procedure 12(f) provides that a "court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed.R.Civ.P. 12(f). The Plaintiff alleges that he has sustained various damages as a result of being unjustifiably dismissed from St. Thomas Law School. *See* Plaintiff's Complaint, ¶ 32. In addition, under the title of "Demand for Relief," the Plaintiff has demanded various forms of relief including: injunctive relief, emergent relief, refund of tuition, compensatory damages, punitive damages, treble damages, and attorneys fees and costs. *See* Plaintiff's Complaint, Demand for Relief. The Movants move to strike any and all damages sought by the Plaintiff that are not allowable under Federal or Florida law.

WHEREFORE, the Movants hereby request that their Motion to Strike Plaintiff's Alleged Damages and Demand for Relief be granted in favor of the Movants and against the Plaintiff, and any other relief that this Court deems just and proper.

V. CONCLUSION

For the foregoing reasons, the Movants respectfully request that their Motion to Dismiss all Counts of the Complaint be granted favor of the Movants and against the Plaintiff under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim.

In the alternative, the Movants respectfully request their Motion for a More Definite Statement with respect to Counts I, III, IV, and IX, be granted in favor of the Movants and against the Plaintiff under Federal Rule of Civil Procedure 12(e) because the allegations are so vague or ambiguous that the Movants cannot reasonably be required to frame a responsive pleading.

The Movants also respectfully request that their Motion to Strike Plaintiff's "Alleged Damages" and "Demand for Relief" be granted in favor of the Movants and against the Plaintiff under Federal Rule of Civil Procedure 12(f) because the damages sought are not allowable under Federal or Florida law.

Lastly, the Movants respectfully request that their Motion to Reject Plaintiff's Class Action Certification be granted in favor of the Movants and against the Plaintiff because the Plaintiff has failed to satisfy all the requirements under Federal Rule of Civil Procedure 23 and Local Rule 23.1 of the United States District Court for the Southern District of Florida.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY a true and correct copy of the foregoing was mailed this **5th** day of March 2007, to: **Michael F. Lombardi, Esq.**, LOMBARDI & LOMBARDI, P.A., 1862 Oak Tree Road, Edison, New Jersey 08820. (Counsel for Plaintiff).

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