[DO NOT PUBLISH]

In the

United States Court of Appeals

For the Eleventh Circuit

No. 21-12801

BENZO RUDNIKAS,

Plaintiff-Appellant,

versus

NOVA SOUTHEASTERN UNIVERSITY, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 1:19-cv-25148-JEM

Before WILLIAM PRYOR, Chief Judge, ROSENBAUM, and MARCUS, Circuit Judges.

PER CURIAM:

Benzo Rudnikas, a law student at Nova Southeastern University, sought (and was denied) accommodations for his disability. He sued the school. While litigation was pending, Rudnikas was suspended for violating the Code of Conduct and then dismissed for falling below the required minimum grade-point average ("GPA"). He moved for a preliminary injunction to reverse his suspension and remove a failing grade, alleging that the school had retaliated against him for seeking accommodations and filing a lawsuit. The district court denied his motion. After a thorough review of the record and with the benefit of oral argument, we conclude that Rudnikas's expulsion does not moot his appeal and, finding no error in the district court's order, we affirm.

I. BACKGROUND

A. Factual Background

Rudnikas enrolled in Nova Southeastern University College of Law ("NSU") as a part-time evening law student in Fall 2019. Rudnikas sought accommodations under the Americans with Disabilities Act (the "ADA"). When he didn't receive the accommodations he wanted, in December 2019, he sued NSU (pro se) for violating the Americans with Disabilities Act and the Rehabilitation Act by not giving him reasonable accommodations. In his lawsuit, Rudnikas sought declaratory relief, injunctive relief, and, under the

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Rehabilitation Act, damages. The district court set the deadline to file an amended complaint as July 6, 2020.

A quick tangent (which will become relevant later): in January 2020, a friend of Rudnikas, who was also an NSU law student, remained in a classroom after class and had a phone call with a third person. The class was recorded so those who couldn't attend in person could review the recording. Because the recording continued after the class ended, the phone call was recorded, too. A different NSU classmate, while reviewing the class recording, heard the phone conversation. He shared the recording with some other classmates, and the group reported the call to NSU because they believed the content of the call violated the school's professionalism standards. NSU investigated and generated a confidential report recommending that the student apologize to his classmates as a sanction (the "Confidential Report" or "Report"). Although NSU's Code of Conduct prohibited sharing the Report, the student shared the Report with Rudnikas.

During the summer of 2020, Rudnikas took a criminal-law course at NSU. In June 2020, a political debate during class spilled into Rudnikas's section groupchat.[1] During the discussion, Rudnikas posted screenshots of the Confidential Report into the chat.

[1] Rudnikas and his classmates used a WhatsApp groupchat to communicate with each other.

On August 7, NSU affirmed Rudnikas's suspension—in place until April 30, 2021—and, on August 26, removed him from classes. Under the terms of the suspension, Rudnikas was required to petition for reinstatement after the suspension was to be lifted in April 2021.

B. Motions for Preliminary Relief in the District Court

Meanwhile, back in the district court, on September 2, 2020, Rudnikas filed three motions. *First*, he filed a motion entitled "Plaintiff's Emergency Motion for Temporary Restraining Order & Expedited Motion for Preliminary Injunction." In that filing, Rudnikas asked the district court to (1) reinstate him in classes and waive any absences as a result of his suspension; (2) remove his failing grade in his criminal-law course; (3) require NSU to not commit any further code-of-conduct investigations into him; and (4) require NSU to grade him on a pass/fail system for the rest of the district-court proceedings; give him copies of all his exams; and, if he failed an exam, provide him with the answer key and review the exam with the entire class. In support of this motion, Rudnikas asserted that NSU suspended him in retaliation for his filing of his disability-discrimination lawsuit. Because we later conclude that this motion is properly characterized as seeking a preliminary injunction, we refer to this motion as the "preliminary-injunction motion."

Second, Rudnikas moved to amend the scheduling order to allow him to file a second amended complaint (the "scheduling-

order motion").[2] The deadline to amend the complaint had passed nearly two months earlier, on July 6. But Rudnikas sought to excuse his failure to timely seek to amend by explaining that he had his amended complaint ready on that day, but he didn't have the exhibits prepared. He said he "thought the best thing he could do to show diligence to this Court would be just to make sure everything was complete with exhibits even if it took him a couple of extra days." But then, he continued, NSU dismissed him on July 15, and he spent the next few weeks appealing his suspension. Rudnikas posited that he had good cause to amend the scheduling order because, while he was originally going to be only a few days late, his suspension—NSU's action—caused the delay. During the delay, Rudnikas said, he discovered NSU had a history of discriminating against disabled people and lying to federal courts about doing so.

Rudnikas attached two complaints to his scheduling-order motion. The first complaint was a proposed second amended complaint. This complaint added details about other disability-discrimination lawsuits against NSU between 2000 and 2020. It also sought more detailed injunctive and declaratory relief.

The second complaint was titled, "Proposed Verified Rule 15D Supplemental Complaint." It incorporated Rudnikas's proposed second amended complaint. It added factual details about

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[2] This motion embedded other requests that Rudnikas either disclaimed or didn't appeal, so we don't discuss them further.

his friend's January 2020 phone call and the investigation into it, as well as the June 2020 investigation into Rudnikas and his friend. The second complaint also included a panoply of new contractual, statutory, and common-law claims, including, as relevant here, an ADA retaliation claim. Rudnikas alleged that NSU had suspended him in retaliation for his asking for accommodations and for his filing of the lawsuit.

Third, Rudnikas moved to admit in this action deposition testimony from earlier cases against NSU—*Hirsch v. Nova Southeastern. University, Inc.*, 289 F. App'x 364 (11th Cir. 2008), and *Redding v. Nova Southeastern University, Inc.*, 165 F. Supp. 3d 1274 (S.D. Fla. 2016).

While Rudnikas's three motions were pending, on September 10, NSU told Rudnikas that his GPA had fallen below the required minimum to continue and he would be academically dismissed from NSU. Rudnikas never petitioned for reinstatement.

Instead, in October 2020, Rudnikas retained counsel. The next month, a magistrate judge held an evidentiary hearing on Rudnikas's preliminary-injunction motion. Rudnikas admitted under oath that he had received notice of the investigation into him at least three times (on June 16, 19, and 22). But he said that NSU had locked him out of his email account in early July. As to his criminal-law exam, Rudnikas explained that he had not taken his online final exam because he "didn't think it was fair that if [he] took the exam and [NSU] affirmed [his] dismissal — [NSU] affirmed [his] dismissal, [NSU] would just change whatever grade [he] had

to failing. So [he] told the administration that that was no way to study for an exam, and [he] asked them to reopen the exam." For its part, NSU called an information-technology employee who testified that NSU hadn't locked Rudnikas out of his email account. And the school called an NSU College of Law administrator, who testified that, while she had investigated Rudnikas in June 2020, it was NSU's general administration (not its College of Law) that conducted the hearing and sanctioned Rudnikas.

Months after the hearing, Rudnikas asked the district court to take judicial notice that his friend was a non-disabled comparator who had committed the same misconduct—sharing the confidential report—but had been placed on probation, not suspended. According to Rudnikas, his friend's different treatment was evidence that NSU's explanation for his suspension was pretext for retaliation.

The magistrate judge recommended denying all Rudnikas's motions. As to the preliminary-injunction motion, the magistrate judge recommended denying the requested relief because the issues identified—relating to Rudnikas's suspension—were outside the scope of the operative complaint (which related to Rudnikas's request for accommodation). In the alternative, she continued, Rudnikas had not shown that his friend was a relevant comparator for ADA-retaliation purposes because Rudnikas—not his friend—had published the pictures, so their conduct was different. As to Rudnikas's scheduling-order motion and his motion to admit testimony from other lawsuits, the magistrate judge recommended

denying them because the depositions of NSU employees in other cases—Rudnikas's reason for amending the scheduling order (and obviously the basis for his motion to admit testimony from other lawsuits)—were available to him well before the July deadline to amend, and his failure to review the depositions earlier did not constitute good cause. As to Rudnikas's motion for judicial notice, the magistrate judge recommended denying it because whether the friend was a comparator was irrelevant to the operative complaint, which didn't include an ADA retaliation claim.

Over Rudnikas's objection, the district court adopted the magistrate judge's recommendation in full. As to the preliminary-injunction motion, the district court said that Rudnikas's motion failed because it depended on facts not in the operative complaint, and even if the proposed complaints were considered, Rudnikas hadn't shown any basis to conclude that NSU's reason for suspending him was pretextual. The district court adopted the recommendations as to the other motions as untimely filed.

Rudnikas appealed the denial of each of these four motions.[3]

In this court, NSU moved to dismiss the appeal on two jurisdictional grounds: (1) as moot because Rudnikas was no longer a

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[3] Rudnikas also moved to invoke judicial estoppel against NSU, which the district court denied. While Rudnikas appealed that denial, a motions panel of this Court dismissed the portion of this appeal as to that motion, and we don't consider it further.

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student at NSU, and (2) for lack of appellate jurisdiction because none of the orders were interlocutorily appealable. We denied the motion to dismiss as to the preliminary-injunction motion and carried the rest of the motion with the case.

II. STANDARD OF REVIEW

"The grant or denial of a preliminary injunction is a decision within the sound discretion of the district court." *United States v. Lambert*, 695 F.2d 536, 539 (11th Cir. 1983). We review for the abuse of that discretion. *Id.*

III. DISCUSSION

We divide our discussion into two parts. *First*, we examine our jurisdiction, specifically the following: (1) whether there is an interlocutorily appealable order; (2) if so, over which orders we should exercise pendent appellate jurisdiction; and (3) whether this appeal is moot. We conclude that we have appellate jurisdiction, that pendent appellate jurisdiction is not appropriate in this case, and that this appeal is not moot. *Second*, we affirm the district court's denial of the motion for a preliminary injunction.

A. Jurisdiction

i. Interlocutory Jurisdiction

Our motions panel concluded—and we agree—that Rudnikas's preliminary-injunction motion is properly characterized as one for a preliminary injunction and that we have appellate jurisdiction to review its denial. *See* 28 U.S.C. § 1292(a)(1).

Rudnikas entitled his motion "Plaintiff's Emergency Motion for Temporary Restraining Order & Expedited Motion for Preliminary Injunction." While the title of his motion is ambiguous, we look at the substance, not the title, to determine the character of such a motion. *AT&T Broadband v. Tech Commc'ns, Inc.*, 381 F.3d 1309, 1314 (11th Cir. 2004). "An order granting a [temporary restraining order] may be appealable as an order granting a preliminary injunction when three conditions are satisfied: (1) the duration of the relief sought or granted exceeds that allowed by a [temporary restraining order] ([fourteen] days), (2) the notice and hearing sought or afforded suggest that the relief sought was a preliminary injunction, and (3) the requested relief seeks to change the status quo." *Id.*

Here, Rudnikas wanted to change the status quo—he was suspended and wanted to be reinstated. He also wanted relief lasting longer than fourteen days—he wanted to be graded pass/fail for the rest of the district-court proceedings. NSU had notice, and the magistrate judge held an evidentiary hearing. We therefore agree that this motion is one for a preliminary injunction and not for a temporary restraining order. Accordingly, we have interlocutory appellate jurisdiction over its denial.

ii. Pendent Appellate Jurisdiction

Ordinarily, only certain orders are immediately appealable. We can exercise "pendent appellate jurisdiction" to review otherwise nonappealable orders if they are "'inextricably intertwined' with an appealable decision or if 'review of the former decision is

necessary to ensure meaningful review of the latter.'" *Hudson v. Hall*, 231 F.3d 1289, 1294 (11th Cir. 2000) (alterations adopted and citation omitted).

Pendent appellate jurisdiction over the other motions is not appropriate here. *First*, as to Rudnikas's motion for judicial notice and his scheduling-order motion, the district court assumed the facts in those motions were properly in the record when it decided Rudnikas's motion for a preliminary injunction. That is, while the district court denied Rudnikas's motion because the motion relied on facts outside the operative complaint, the district court also and independently denied the motion on the merits, taking into account the facts alleged in the denied motions to take judicial notice and to amend the scheduling order. For this reason, we don't need to separately review the denials of those other motions to review the preliminary-injunction ruling.

Second, as to Rudnikas's motion to admit testimony, we also don't need to exercise pendent appellate jurisdiction to decide this appeal. Rather, even if we assume without deciding that the district court erred in denying that motion, the contents of those depositions do not affect our analysis of the preliminary-injunction order on appeal.

In sum then, we review *only* the denial of the preliminary-injunction motion and not the denial of the other motions.

iii. Mootness

We also must establish whether this appeal is moot.[4] We conclude that it is not.

"[T]he doctrine of mootness 'derives directly from the case-or-controversy limitation.'" *Carver Middle Sch. Gay-Straight All. v. Sch. Bd. of Lake Cnty.*, 842 F.3d 1324, 1330 (11th Cir. 2016) (quoting *Al Najjar v. Ashcroft*, 273 F.3d 1330, 1335 (11th Cir. 2001)). "A case is moot when it no longer presents a live controversy with respect to which the court can give meaningful relief." *Ethredge v. Hail*, 996 F.2d 1173, 1175 (11th Cir. 1993). When an appeal is moot, we lack jurisdiction and must dismiss it. *Id.*

This appeal isn't moot. In his motion for a preliminary injunction, Rudnikas asked the district court—among other things—to require NSU to "[r]emove the failing grade in [c]riminal [l]aw" and to reverse his suspension. NSU does not contest that the district court has the power to issue such an order.

[4] There is a difference between a case as a whole being moot and an interlocutory appeal being moot. *See Vital Pharms., Inc. v. Alfieri*, 23 F.4th 1282, 1290 (11th Cir. 2022) ("To be clear, we hold only that the cross-appeal and portions of the appeal [of an expired preliminary injunction] are moot. We do not hold that the entire case is moot."). In the underlying case here, Rudnikas also seeks money damages, so, even if his appeal of the denial of his preliminary injunction were moot, his case wouldn't be moot. *Id.* ("Vital's complaint requests money damages, and such claims, if at all plausible, ensure a live controversy in the district court." (alterations adopted & quotation marks omitted)).

Instead, NSU says that this demand cannot constitute meaningful relief because Rudnikas is no longer a student at NSU and hasn't petitioned for reinstatement. NSU also represented at oral argument that, even if we removed the failing grade, Rudnikas would remain suspended. *See* Oral Argument at 11:00–14:00.

We find this argument unavailing. Here, two barriers stand between Rudnikas and reinstatement at NSU: (1) his suspension and (2) his inadequate GPA. Taking them in reverse order, at oral argument, Rudnikas claimed to the court that, without the criminal-law exam grade, his GPA would satisfy NSU's minimum to be a student. *See* Oral Argument at 3:40–4:07. NSU agreed. *See* Oral Argument at 11:10–11:25. So an order from us removing Rudnikas's criminal-law-exam grade would negate the basis for his academic dismissal.

Rudnikas also seeks for his suspension to be overturned. In the context of a school suspension, the Seventh Circuit has explained that an appeal of a time-limited suspension becomes moot when it ends. *Osteen v. Henley*, 13 F.3d 221, 223 (7th Cir. 1993) ("More important, the expulsion was only for two years, and the two years are up, so that there is, at least as far as the record discloses, no obstacle to his being readmitted."). And that rule generally makes sense because, once a suspension is over, there is usually nothing else a court can do to provide relief. *Id. But cf. Doe v. Pulaski Cnty. Special Sch. Dist.*, 306 F.3d 616, 621 (8th Cir. 2002) (awarding relief to school district so that the school didn't have to purge the records of a graduated student); *Bird v. Lewis & Clark*

Coll., 303 F.3d 1015, 1020 (9th Cir. 2002) (explaining that, to the extent that a student's grades impacted her chances of future employment or admission to graduate school, graduation didn't moot her claims).

But that general rule doesn't apply here. Even though Rudnikas's suspension ended on April 30, 2021, NSU said at oral argument that, Rudnikas would *still* have to petition for reinstatement (assuming we removed his failing grade in his criminal-law class, thus negating the basis for his dismissal). Oral Argument at 14:00–14:30. But, on the other hand, if we reversed Rudnikas's Code of Conduct suspension, he would no longer have to petition for reinstatement.

In sum, Rudnikas faces two hurdles to taking classes at NSU: his Code of Conduct suspension and his sub-minimum GPA. He asks us to reverse the suspension *and* erase a failing grade on his transcript, which would raise his GPA above the minimum and eliminate the basis for his dismissal. So if we granted him the requested relief, Rudnikas would be reinstated. And NSU's September 10 academic dismissal does not moot Rudnikas's September 2 motion for a preliminary injunction to erase the failing grade in his criminal-law course and overturn his suspension.

B. Merits

Rudnikas argues that the district court erred in not granting a preliminary injunction. We disagree.

"A district court may grant injunctive relief if the movant shows the following: (1) substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public interest." *McDonald's Corp. v. Robertson*, 147 F.3d 1301, 1306 (11th Cir. 1998). We need only consider the first prong because Rudnikas hasn't shown a likelihood of success on the merits.

Rudnikas argues that he is entitled to a preliminary injunction based on an ADA retaliation claim. An ADA retaliation claim uses Title VII's standard for relief. *Stewart v. Happy Herman's Cheshire Bridge, Inc.*, 117 F.3d 1278, 1287 (11th Cir. 1997). First, the plaintiff must establish a prima facie case. *Id.* Once a prima facie case is established, "the burden then shifts to the defendant [] to come forward with legitimate non-discriminatory reasons for its actions that negate the inference of retaliation." *Id.* Finally, "[t]he plaintiff must then demonstrate that [he] will be able to establish at trial that the [defendant's] proffered non-discriminatory reasons are a pretextual ruse designed to mask retaliation." *Id.*

The plaintiff can show pretext by demonstrating "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in [the] proffered legitimate reasons for [the] actions that a reasonable factfinder could find them unworthy of credence." *Springer v. Convergys Customer Mgmt. Group Inc.*, 509 F.3d 1344, 1348 (11th Cir. 2007) (internal quotation marks and

citation omitted). A plaintiff must show both that the given reason is false *and* that the true reason was discrimination. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993).

Here, the district court did not err in concluding that Rudnikas had not met his burden to show a substantial likelihood of success on his ADA retaliation claim because Rudnikas cannot establish that NSU's non-retaliatory reasons for its adverse actions—giving him a failing grade on his criminal-law exam or suspending him for violating the Code of Conduct—are pretextual. As to his criminal-law exam, Rudnikas admits that NSU gave him a failing grade because he did not take the exam. Rudnikas conceded that he had "not had the opportunity to even look at [the criminal exam]" and asked—four minutes before the deadline to complete the exam—for an extension. He points to no evidence in the record to support his conclusion that NSU's stated rationale (that it gave him a failing grade because he didn't take the exam) was false or—let alone "and"—a pretext for retaliation.[5]

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[5] We don't consider Rudnikas's argument that he didn't take the exam because NSU had barred him from campus because Rudnikas made this claim for the first time at oral argument, and "[w]e do not consider arguments raised for the first time at oral argument." *Hernandez v. Plastipak Packaging, Inc.*, 15 F.4th 1321, 1330 (11th Cir. 2021). In any event, while Rudnikas relied on the July 15 letter suspending him as proof of the ban, he testified during the evidentiary hearing before the magistrate judge that the exam was online (so he didn't need to go to campus to take it), and he never mentioned being unable to take the exam in any of his contemporaneous emails. We likewise don't consider Rudnikas's argument that NSU violated its own procedures by

As to his Code of Conduct suspension, Rudnikas says that NSU's reason for suspending him is pretextual because NSU didn't also suspend his friend who engaged in the same misconduct. But the record reflects that Rudnikas and his friend are not similarly situated. For one, the friend shared the confidential report with one only person (Rudnikas) outside of a public context; Rudnikas, on the other hand, shared the report with an entire classful of people in an online groupchat. And for another, the friend met with NSU and accepted responsibility; Rudnikas did not cooperate with efforts to set his disciplinary hearing, did not attend his disciplinary hearing, and did not accept responsibility. These crucial differences between the two means that we cannot say that NSU's proffered non-retaliatory explanation is "unworthy of credence." *Springer*, 509 F.3d at 1348.[6]

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Rudnikas seeks a preliminary injunction requiring his former law school to reverse his Code of Conduct suspension and erase a failing grade. While his status as a former student does not

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academically dismissing Rudnikas without allowing him to retake the class because he also made this claim for the first time at oral argument. *Id.*

[6] Because Rudnikas hasn't shown that the district court erred in concluding that he hadn't shown a likelihood of success on the merits, we do not analyze the other factors for a preliminary injunction. *Johnson & Johnson Vision Care, Inc. v. 1-800 Contacts, Inc.*, 299 F.3d 1242, 1247 (11th Cir. 2002) ("If the movant is unable to establish a likelihood of success on the merits, a court need not consider the remaining conditions prerequisite to injunctive relief.").

moot his appeal, Rudnikas has not shown that the district court erred in denying preliminary relief. We therefore affirm the district court's order denying Rudnikas's preliminary-injunction motion.

AFFIRMED.[7]

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[7] All pending motions are **DENIED AS MOOT**.

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case Number: 19-25148-CIV-MARTINEZ/OTAZO-REYES

BENZO RUDNIKAS,

Plaintiff,

vs.

NOVA SOUTHEASTERN UNIVERSITY, INC.,
Defendant.
_______________________________/

ORDER ADOPTING MAGISTRATE JUDGE'S OMNIBUS REPORT AND RECOMMENDATION

THE MATTER was referred to the Honorable Alicia M. Otazo-Reyes, United States Magistrate Judge, for a Report and Recommendation on the following motions:

1. "Emergency Motion for Temporary Restraining Order & Expedited Motion for Preliminary Injunction" ("Motion for TRO and Preliminary Injunction"), (ECF No. 54);

2. "(1) Emergency Motion to Amend Scheduling Order (2) Motion for Default Judgment & Sanctions for Fraud on the Court (3) Motion to Disqualify Defendant's Counsel, Richard Arthur Beauchamp, Esq. & Benjamin Bean, Esq. & Motion for Referral to the Florida Bar (4) Emergency Motion for Stay of Discovery" ("Motion to Amend"), (ECF No. 55);

3. "Emergency Motion to Admit Testimony in Support of Plaintiff's [Motion to Amend]" ("Motion to Admit Testimony"), (ECF No. 56);

4. "Request for Judicial Notice in Support of DE # 54 and DE # 55 ("Request for Judicial Notice"), (ECF No. 109); and

5. "Motion to Invoke Judicial Estoppel & Deem Plaintiff the Prevailing Party as to All Claims in DE # 54" ("Motion to Invoke Judicial Estoppel"), (ECF No. 110).

(collectively, the "Motions"). Magistrate Judge Otazo-Reyes filed an Omnibus Report and Recommendation ("R&R") recommending that all motions be denied. (ECF No. 131). Plaintiff

timely filed objections to the R&R. (Objections, ECF No. 137). The Court has conducted a *de novo* review of the record and is fully advised in the premises. After careful consideration, the Court finds that Plaintiff's Objections are **OVERRULED** and the R&R is **AFFIRMED** and **ADOPTED** in its entirety.

While the Court finds that Judge Otazo-Reyes's report and recommendation is well-reasoned and already addresses most of Defendant's objections, it will nevertheless reiterate and expand on its reasons for denying Plaintiff's Motions.

A. Motion to Amend and Motion to Admit Testimony

The Court first turns to Plaintiff's Motion to Amend the operative Amended Complaint. (ECF No. 55). Plaintiff seeks to amend the Scheduling order to allow him to file a second amended complaint. The deadline to amend the complaint set forth in the Scheduling Order was July 3, 2020. (*See* ECF No. 44). On September 2, 2020, Plaintiff moved to amend the complaint. (ECF No. 55). In support, Plaintiff argues that "he uncovered an unconscionable scheme that is dispositive of the entire case and basically shows Defendant is not even entitled to discovery." (ECF No. 55, at 26–27).

Pursuant to Federal Rule of Civil Procedure 16(b)(4),[1] a court's scheduling order may only be modified upon a showing of good cause. The good cause standard precludes modification unless the moving party can show that the schedule could not "be met despite [his] diligence[.]" Fed. R. Civ. P. 16(b) advisory committee note; *see also Sosa v. Airprint Sys., Inc.*, 133 F.3d 1417, 1418 (11th Cir. 1998). Where "the facts necessary to formulate the claim were known prior to the deadline or the moving party failed to seek the information it needed to determine whether an

[1] The Court agrees with Judge Otazo-Reyes that Rule 16 applies in determining whether leave to amend should be granted where the deadline to amend the complaint set forth in the court's scheduling order has passed. *See Sosa v. Airprint Sys., Inc.*, 133 F.3d 1417, 1418 n.2 (11th Cir. 1998).

amendment was required before the deadline passed, the moving party cannot establish the Rule 16(b) diligence necessary to show good cause." *Beyel Bros., Inc. v. EMH, Inc.*, No. 19-CV—14392, 2020 WL 6143633, at *3 (S.D. Fla. Oct. 20, 2020).

Plaintiff asserts that he uncovered the alleged "unconscionable scheme" when he reviewed the six depositions cited in his Motion to Admit Testimony (the "Depositions"). The Depositions were taken in two other cases against Defendant, one filed in 2004 and the other in 2014. *See Hirsch v.* NSU, 04-CV—60068-JEM (S.D. Fla. 2004); *Redding v. NSU*, 14-CV-60545-KAM (S.D. Fla. 2015). When reviewing those, he "connected the dots and realized there was an unconscionable scheme between Defendant, its Officer of the Court, and the Law Firm of Panza Maurer Maynard to defraud the public, the judicial system, and the Department of Education." (ECF No. 55 ¶ 50). As Judge Otazo-Reyes aptly points out, the Depositions have been publicly available prior to the filing of this case, on May 20, 2015 and July 6, 2015. Plaintiff further alleges that he was aware of the *Hirsch* and *Redding* cases a couple of days after April 28, 2020, well before the July 3, 2020 deadline to amend the complaint. In the two months that followed, Plaintiff had the opportunity to review the depositions filed in those cases and failed to do so. "Mere 'carelessness is not compatible with a finding of diligence.'" *Beyel Bros.*, 2020 WL 6143633, at *3. The Court is cognizant of Plaintiff's *pro se* status at the time the Motion to Amend was filed and prior to that. However, Plaintiff has failed to show that he acted diligently.

Plaintiff asserts that he was diligent "in attempting to meet this Court's deadline" because he filed a motion for extension of time on July 3, 2020 to extend the deadline to July 6, 2020. This argument is a non sequitur. The record shows that the Court denied Plaintiff's motion for extension of time as moot because July 3, 2020 was a Court holiday and thus "the deadline to amend pleadings [was] already July 6, 2020. *See* Fed. R. Civ. P. 6." (ECF No. 46). Plaintiff further

argues that his emails to FedEx (*See* ECF No. 55-2, at 200), show that his "pleadings were nearly ready on 7/6/20 minus the hundreds of pages of exhibits he stated he would need a little more time to compile." (ECF No. 137, at 13 (emphasis added)). This argument fares no better. The fact that the documents were "nearly" ready on July 6, 2020 does not explain why Plaintiff filed his Motion to Amend two months later on September 2, 2020. Finally, Plaintiff argues that Defendant was deliberately avoiding the Scheduling Order's deadlines because they knew that Plaintiff intended to file an amended complaint prior to the July 6, 2020 and they scheduled Cory Jacobs's disciplinary hearing for July 1, 2020. According to Plaintiff, "[t]he only logical explanation was that Nova was deliberately avoiding this Court's scheduling deadline in bad faith." Plaintiff, however, provides no legal or factual support for these assumptions. Accordingly, Plaintiff's Motion to Amend is denied.

Plaintiff also sought permission to admit the Depositions in support of the Motion to Amend. Given the Court's denial of the Motion to Amend, the Motion to Admit Testimony is similarly denied.

B. Motion for TRO and Preliminary Injunction[2]

Plaintiff concedes that should his Motion to Amend be denied, the Motion for TRO and Preliminary Injunction must likely be denied. (ECF No. 137, at 2). Indeed, the Court's denial of the Motion to Amend, the Motion for TRO and Preliminary Injunction cannot be granted because the relief it seeks is not of the same character as the operative complaint in this matter. *Kaimowitz v. Orlando, Fla.*, 122 F.3d 41, 43 (11th Cir. 1997) (a preliminary injunction is only appropriate where the "immediate relief [is] of the same character as that which may granted finally."). On this reason alone, the Court denies the Motion for TRO and Preliminary Injunction. The Court

[2] The Court also denies Plaintiff's Request for Judicial Notice, (ECF No. 109), for the reasons stated in Judge Otazo-Reyes's R&R.

further agrees with Judge Otazo-Reyes's findings that, even assuming that Plaintiff could prove a prima facia case of retaliation—as he must do for the Court to grant a TRO or preliminary injunction—he cannot prove that the reasons for his suspension were pretextual.

C. Motion to Invoke Judicial Estoppel

Plaintiff's only objection to Judge' Otazo-Reyes's recommendation that the Court deny the Motion to Invoke Judicial Estoppel is that the recommendation was not "meaningful." (ECF No. 137, at 15). Plaintiff cites to *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353 (11th Cir. 1997) in support of his argument. To begin with, the issues in *Chudasama* are different than those involved in this case. In *Chudasama*, the district court failed to rule on a pending motion to dismiss before imposing harsh discovery sanctions, including the entry of default judgment. The Eleventh Circuit noted in passing that a ruling must be "meaningful" and that "[it] is not enough simply to deny a motion to dismiss with little or no comment and then revisit the defendant's legal contentions when the defendant files a motion for summary judgment after discovery has concluded." *Id.* at 1368 n.28. Certainly, the procedural posture in this case is different than *Chudasama*.

Yet, even assuming that this requirement of "meaningfulness" was applied to the case at hand, Judge Otazo-Reyes's twenty-three-page R&R would pass the "meaningful" muster. The R&R provides the reasons for the recommendation to deny the motion. "Judicial estoppel applies when 'a party assumes a certain position in a legal proceeding, and then succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." *Matter of Brizo,* LLC, 437 F. Supp. 3d 1212, 1220 (S.D. Fla. 2020). The R&R explains—and the Court agrees—that Plaintiff does not contend that Defendant assumed a certain

position in a legal proceeding and now assumes a contrary position because his interests have changed. Instead, Plaintiff invokes judicial estoppel because he argues that "to permit Defendant to continue litigating would require Defendant to change its current position and to knowingly submit false and/or inaccurate testimony that would allege facts that occurred prior to litigation, but which Defendant, Plaintiff, and this Court would know are false . . ." (ECF No. 110, at 1). This reason does not give grounds to invoke judicial estoppel. Therefore, the Motion to Invoke Judicial Estoppel is denied.

Accordingly, it is

ADJUDGED that United States Magistrate Judge Otazo-Reyes's Report and Recommendation, (ECF No. 131), is **AFFIRMED** and **ADOPTED**. It is further **ADJUDGED** that the Motions, (ECF Nos. 54, 55, 56, 109, 110), are **DENIED**.

DONE and ORDERED in Chambers at Miami, Florida this 15th day of July, 2021.

JOSE E. MARTINEZ
UNITED STATES DISTRICT JUDGE

Copies provided to:
Magistrate Judge Otazo-Reyes
All counsel of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 19-25148-CIV-MARTINEZ/AOR

BENZO RUDNIKAS,

Plaintiff,

v.

NOVA SOUTHEASTERN UNIVERSITY, INC.,

Defendant.
_______________________________________/

OMNIBUS REPORT AND RECOMMENDATION

THIS CAUSE came before the Court upon the following submissions from Plaintiff Benzo Rudnikas ("Plaintiff" or "Rudnikas"):

1. "Emergency Motion for Temporary Restraining Order & Expedited Motion for Preliminary Injunction" (hereafter, "Motion for TRO and Preliminary Injunction") [D.E. 54];

2. "(1) Emergency Motion to Amend Scheduling Order (2) Motion for Default Judgment & Sanctions for Fraud on the Court (3) Motion to Disqualify Defendant's Counsel, Richard Arthur Beauchamp, Esq. & Benjamin Bean, Esq. & Motion for Referral to the Florida Bar (4) Emergency Motion for Stay of Discovery" (hereafter, "Motion to Amend") [D.E. 55];

3. "Emergency Motion to Admit Testimony in Support of Plaintiff's [Motion to Amend]" (hereafter, "Motion to Admit Testimony") [D.E. 56];

4. "Request for Judicial Notice in Support of DE # 54 and DE # 55" (hereafter, "Request for Judicial Notice") [D.E. 109]; and

5. "Motion to Invoke Judicial Estoppel & Deem Plaintiff the Prevailing Party as to All Claims in DE # 34" (hereafter, "Motion to Invoke Judicial Estoppel") [D.E. 110].

(collectively, "Motions").[1]

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[1] Rudnikas filed the Motion for TRO and Preliminary Injunction, Motion to Amend, and Motion to Admit Testimony *pro se*. Those submissions were not properly filed as emergency motions because they were not

These matters were referred to the undersigned pursuant to 28 U.S.C. § 636 by the Honorable Jose E. Martinez, United States District Judge [D.E. 8]. The undersigned held an evidentiary hearing on the Motion for TRO and Preliminary Injunction, Motion to Amend, and Motion to Admit Testimony on November 5, 2020 (hereafter, "Evidentiary Hearing") [D.E. 128]. Having considered the evidence presented at the Evidentiary Hearing and having thoroughly reviewed the parties' written submissions, the undersigned respectfully recommends that Plaintiff's Motions be DENIED.

PROCEDURAL AND FACTUAL BACKGROUND

Rudnikas, a law student, brings this action for declaratory and injunctive relief against his law school, Defendant Nova Southeastern University, Inc. (hereafter, "Defendant" or "NSU"). See Am. Compl. [D.E. 34]. Rudnikas alleges that NSU did not adequately accommodate his Attention-Deficit/Hyperactivity Disorder ("ADHD") diagnosis because it failed to provide him with sufficient additional time to complete his assignments and exams. Id. Based on those allegations, Plaintiff asserts the following claims against NSU:

- Count I: Violation of Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794); and
- Count II: Violation of Title III of the Americans with Disabilities Act ("ADA") (42 U.S.C. § 12182).

Id. at 32–40. In his prayer for relief, Rudnikas requests that the Court, *inter alia*: deem NSU's disability accommodation policies and procedures legally insufficient; enjoin NSU from continuing to enforce its inadequate disability accommodation procedures; and require that NSU allow him to retake a final exam for which he claims he was not afforded sufficient additional time to complete. Id. at 37–40.

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rendered moot by the passing of seven days from the time they were filed. See S. D. Fla. L. R. 7.1(d)(1) ("Generally, unless a motion will become moot if not ruled on within seven (7) days, the motion should not be filed as an emergency motion."). Rudnikas subsequently obtained counsel in this matter [D.E. 75, 79].

On June 5, 2020, the Court entered its Order Setting Civil Trial Date and Pretrial Schedule, Requiring Mediation, and Referring Certain Motion to Magistrate Judge (hereafter, "Scheduling Order") [D.E. 44]. Therein, the Court prescribed a deadline of 7-3-2020 for Rudnikas to amend his pleading. See Scheduling Order [D.E. 44 at 4].

On September 2, 2020, Plaintiff filed the Motion for TRO and Preliminary Injunction, the Motion to Amend, and the Motion to Admit Testimony [D.E. 54–56].

In the Motion for TRO and Preliminary Injunction, Rudnikas requests injunctive relief against NSU in connection with an unpled claim of ADA Retaliation against him. See Motion for TRO and Preliminary Injunction [D.E. 54]. That unpled claim of ADA retaliation relates to Rudnikas' suspension from NSU for violations of its Student Code of Conduct. Id. Specifically, Plaintiff requests the following injunctive relief:

> [E]ntry of a 14 day temporary restraining order & preliminary injunction requiring Defendant: 1) reinstate Plaintiff immediately with the classes he was registered for and waive any absences that occurred as a result of his dismissal and provide Plaintiff with opportunities to make up any work he missed as a result of the dismissal. 2) Remove the failing grade in Criminal Law so Plaintiff can receive financial aid and coordinate a time with Plaintiff to take the exam at some other time before graduation free of charge. 3) Grade Plaintiff on a pass/fail scale for the rest of these proceedings and provide Plaintiff with a carbon copy before and after each exam. 4) Obtain permission from this Court before taking any adverse action against Plaintiff until this Court deems otherwise.

Id. at 13.[2]

In the Motion to Amend, Rudnikas requests that the Court amend the 7-3-2020 deadline for amendment of pleadings so that he may file his "Proposed Verified Amended Complaint" [D.E. 55-1] and "Proposed Verified Supplemental Complaint" [D.E. 55-2]. See Motion to Amend [D.E. 55].

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[2] Rudnikas claims that he was "dismissed from NSU," but the evidence set forth below demonstrates that he was suspended for a specified period of time.

In the Motion to Admit Testimony, Rudnikas requests that, in support of the Motion to Amend, the Court, "admit [six] depositions from prior actions [purportedly] involving the same subject matter, Defendant, and Plaintiff's predecessors in interest: *Hirsch v. Nova Se. Univ., Inc.*, 289 F. App'x 364 (11th Cir. 2008) . . . [and] *Redding v. Nova S.E. U., Inc.*, 165 F. Supp. 3d 1274 (S.D. Fla. 2016)." See Motion to Admit Testimony [D.E. 56].

In the Request for Judicial Notice, filed on March 5, 2021, Rudnikas requests that, in support of the Motion for TRO and Preliminary Injunction and the Motion to Amend, the Court take judicial notice of certain facts concerning Rudnikas' suspension from NSU for violations of its Student Code of Conduct. See Request for Judicial Notice [D.E. 109].

In the Motion to Invoke Judicial Estoppel, filed on March 9, 2021, Rudnikas requests that the Court "invoke the doctrine of judicial estoppel and deem Plaintiff the prevailing party as Defendant has admitted to liability in regard to all claims in the current operative complaint . . . ." See Motion for Judicial Estoppel [D.E. 110].

FACTUAL FINDINGS

The following witnesses testified at the Evidentiary Hearing: Michele Struffolino ("Dean Struffolino"), NSU's Associate Dean of Students; Plaintiff; and Juan Pinillos ("Mr. Pinillos"), an IT security analyst at NSU. See Transcript of Evidentiary Hearing (hereafter, "Transcript") [D.E. 128]. Additionally, the following exhibits were admitted at the Evidentiary Hearing: Plaintiff's Exhibits 4, 5, & 17; and Defendant's Exhibits 1–6 & 10–16. Id. at 63–65; see also Exhibit and Witness List [D.E. 85, 120].

Defendant's Exhibits consist of the following documents:

- Exhibit 1 – Disciplinary Complaint [D.E. 85-1 at 1–23];
- Exhibit 2 – June 16, 2020 email from D. Vollweiler to B. Rudnikas re: Notice of Academic Complaint Under the Academic Disciplinary Process (hereafter, "June 16, 2020 Email")

[D.E. 85-1 at 24];

- Exhibit 3 - June 17, 2020 email from B. Rudnikas to D. Vollweiler and M. Struffolino re: Rudnikas v. Nova Southeastern, Inc. Case No: 19-cv-25148 (hereafter, "June 17, 2020 Email") [D.E. 85-1 at 25–26];

- Exhibit 4 - June 19, 2020 correspondence from M. Manley to B. Rudnikas re: Case Number 2020191601 (hereafter, "June 19, 2020 Letter") [D.E. 85-1 at 27–28];

- Exhibit 5 - June 19, 2020 email from M. Manley to B. Rudnikas re: Correspondence for Case (Benzo Rudnikas) (hereafter, "June 19, 2020 Email") [D.E. 85-1 at 29];

- Exhibit 6 - June 22, 2020 email from M. Manley to B. Rudnikas re: Judicial Conference (hereafter, "June 22, 2020 Email") [D.E. 85-1 at 30];

- Exhibit 10 - July 15, 2020 correspondence from M. Manley to B. Rudnikas re: Case Number: 202019601 (hereafter, "July 15, 2020 Letter") [D.E. 85-1 at 34–37];

- Exhibit 11 - July 15, 2020 email from M. Manley (via Maxient) to B. Rudnikas re: Correspondence for Case (Benzo Rudnikas) (hereafter, "First July 15, 2020 Email") [D.E. 85-1 at 38];

- Exhibit 12 - July 15, 2020 email from M. Manley (via Maxient) to B. Rudnikas re: Judicial Hearing Outcome (hereafter, "Second July 15, 2020 Email") [D.E. 85-1 at 39];

- Exhibit 13 - July 27, 2020 to August 4, 2020 email string from B. Rudnikas to R. Chenail, B. Williams, L. Acosta and P. Goldman re: Rudnikas v. Nova Southeastern University, Inc.; Case A#19-cv-25148 (hereafter, "Email Exchange") [D.E. 85-1 at 40–46];

- Exhibit 14 - August 7, 2020 correspondence from M. Manley to B. Rudnikas re: Case No. 202019601 (hereafter, "August 7, 2020 Letter") [D.E. 85-1 at 47];

- Exhibit 15 - August 7, 2020 email from M. Manley to B. Rudnikas re: Outcome Appeal - Update (hereafter, "August 7, 2020 Email") [D.E. 85-1 at 48]; and

- Exhibit 16 – Plaintiff's Proposed Verified Rule 15D Supplemental Complaint [D.E. 85-1 at 49–126].

<u>See</u> Exhibit and Witness List [D.E. 85].

A. <u>Chronology of events derived from Exhibits:</u>

1. On June 10, 2020, Rudnikas published certain pictures (hereafter, "Pictures") from a confidential investigation report underlying an NSU disciplinary action against his classmate,

Corey Jacobs ("Jacobs"), in a WhatsApp group chat comprised of NSU law school classmates. See Def.'s Ex. 1, Disciplinary Complaint [D.E. 85-1 at 1–23].

2. On June 11, 2020, and June 12, 2020, four of Rudnikas' classmates in that group chat (hereafter, "Complainants") reported Rudnikas' publication of the Pictures to Dean Struffolino. Id.

3. The four Complainants were upset by the publication of the Pictures because it revealed their involvement in NSU's disciplinary action against Jacobs. Id.

4. The investigation report was supposed to be confidential as "[t]he College of Law Disciplinary Process Rules provides that only the accused student receives this report." Id. at 1.

5. Dean Struffolino, who was involved in the investigation into Jacobs' conduct, had previously advised Jacobs and the Complainants that they were not to discuss the matter with others. Id. at 2.

6. The Complainants reported to Dean Struffolino that they believed Rudnikas' publication of the Pictures was "meant to discredit, embarrass, intimidate, harass, and retaliate against them for reporting . . . Mr. Jacobs' prior behavior." Id. at 2.

7. Based on the Complainants' reports and her investigation into Rudnikas' conduct, Dean Struffolino filed the Disciplinary Complaint against Rudnikas for publishing the Pictures. Id. at 1–3.

8. The Disciplinary Complaint charged Rudnikas with the following violations:

- NSU Conduct Violations (found in the NSU Student Handbook)
  - Retaliation B 36
  - Interference with University Investigations, Disciplinary Proceedings or Records B 25
  - Harassment B 20
  - Online/Internet Social Networking Usage b.30
  - Complicity B 6

- College of Law Code of Academic Regulations
  - Professionalism 10.1

Id. at 1.

9. Dean Struffolino stated in the Disciplinary Complaint:

> The sharing of the report, in the way it was shared, has damaged the credibility of the College of Law administration and faculty. Our Code of Academic Regulations, similar to ethical rules governing attorneys, encourages law students who witness rule violations and unprofessional behavior to report the behavior to the administration. The use of the report has damaged the integrity of the College of Law process.
>
> ***
>
> As the Associate Dean of Students, and as one who provided guidance and support to all in the prior disciplinary process, I am shocked by this behavior. This behavior raises very serious questions regarding Mr. Jacobs' and Mr. Rudnikas' ability to appropriately and professionally participate in the College of Law JD program. I urge quick and serious sanctions be issued in order to prevent further harm to the students, the College of Law, and the University.

Id. at 2–3.

10. Dean Struffolino emailed Jacobs on June 11, 2020 and called him on June 12, 2020 to discuss the matter. Id. at 3. She received no response. Id. Rather, she received an email from Rudnikas on June 15, 2020, "defending Mr. Jacobs' behavior and further attacking the witnesses named in the report." Id.; see also Pl.'s Ex. 5 (hereafter, "June 15, 2020 Email") [D.E. 120-1 at 18–21].

11. On June 16, 2020, NSU Associate Dean Debra Moss Vollweiler ("Dean Vollweiler") sent Rudnikas the following email advising him of the Disciplinary Complaint filed against him:

> A Complaint has been filed accusing you of violating the NSU Code of Student Conduct and Academic Responsibility. Due to the current physical building closure, this complaint will only be delivered electronically.
>
> In accordance with the Academic Disciplinary Process (ADP) section 3.1.1, this Complaint has been assigned to Dr. Michelle Manley, Assistant Dean for Student Development for NSU to handle this matter under university procedures. Dr.

> Manley will be contacting you soon to begin the process.
>
> You are required to respond and cooperate with the investigation. You should consult the ADP and university handbook for rules regarding additional information about the process. Please read the rules carefully and in full. The Academic Disciplinary Process Rules as well as The NSU Code of Student Conduct and Academic Responsibility and The College of Law Supplemental Standards are available under "Student Policies" on the law school's website: https://www.law.nova.edu/currentstudents.studentservices.html.
>
> If you need additional guidance on the process, please contact Assistant Dean Susan Landrum, copied on this email.

See Def.'s Ex. 2, June 16, 2020 Email [D.E. 85-1 at 24].

12. Rudnikas responded to the June 16, 2020 Email as follows, in pertinent part:

> My main detailed response will come in the form of a Rule 15d supplemental complaint before the July deadline.
>
> ***
>
> Dean Struffulino: Respectfully, I don't think you're in a position to be saying that Cory and I should be sanctioned or that we're unprofessional when neither you nor Dean Vonweiller should be allowed to teach a class on professionalism considering the fact that you don't even have the professional judgment to know when you are violating the United States Criminal Code. . . . If you're going to proceed with this investigation, I will be asking OCR to get involved or moving for a preliminary injunction to have you removed from your positions, I don 't know which yet.

See Def.'s Ex. 3, June 17, 2020 Email [D.E. 85-1 at 25].

13. On June 19, 2020, NSU's Assistant Dean for Student Development Dr. Michelle Manley (hereafter, "Dr. Manley"), sent Rudnikas an email with attached letter advising him of the Disciplinary Complaint filed against him; notifying him of the charges against him; and informing him of a judicial hearing that would be conducted into the matter. See Def.'s Ex. 5, June 19, 2020 Email [D.E. 85-1 at 29]; Def.'s Ex. 4, June 19, 2020 Letter [85-1 at 27–28]. The June 19, 2020 Letter specifically stated:

> The scheduled hearing with Dr. Michelle Manley, Assistant Dean for Student Development, must occur within seven (7) business days from the date of this letter. Please see the contact information below to schedule the conference. If you fail to schedule a hearing as required, it may result in a hold being placed on your record.

> In addition, a hearing may still be scheduled by the conduct officer and you will be notified of the designated date and time. If you do not appear for the scheduled hearing, the conduct officer can hold the hearing in abstentia.
>
> If you have any questions. please do not hesitate to contact me at mmichell@nova.edu or (954) 262-7281.

See Def.'s Ex. 4, June 19, 2020 Letter [D.E. 85-1 at 28].

14. On June 22, 2020, Dr. Manley sent Rudnikas a second email, providing him with another copy of the June 19, 2020 Letter and requesting that he contact her office to schedule a time to discuss the Disciplinary Complaint. See Def.'s Ex. 6, June 22, 2020 Email [D.E. 85-1 at 30].

15. Rudnikas did not respond to the June 19, 2020 Email or the June 22, 2020 Email. See Def.'s Ex. 10, July 15, 2020 Letter [D.E. 85-1 at 34-37].

16. In the July 15, 2020 Letter, Dr. Manley stated that she had emailed Rudnikas again on July 10, 2020 "to give [him] yet another opportunity to coordinate a mutually agreeable date and time for [his] judicial hearing and indicated that if [he] failed to do so, the hearing would go forward July 15, 2020 at 9:00 a.m. with or without [his] participation, and that a determination would be made based on the information available." Id. The July 15, 2020 Letter further stated that Rudnikas had not responded to the July 10, 2020 Email. Id.

17. According to the July 15, 2020 Letter, Dr. Manley sent Rudnikas one final email "at 8:23 a.m. on the morning of July 15, 2020 reminding [him] that the judicial hearing would be going forward at 9:00 a.m." Id. Rudnikas did not respond to that email or appear for his judicial hearing. Id. Accordingly, the judicial hearing was conducted in his absence on July 15, 2020. Id.

18. Later that day, Dr. Manley emailed Rudnikas the July 15, 2020 Letter detailing the outcome of the judicial hearing at which he did not appear. Id.; Def.'s Ex. 11, First July 15, 2020 Email [D.E. 85-1 at 38]; Def.'s Ex. 12, Second July 15, 2020 Email [D.E. 85-1 at 39].

19. Dr. Manley reported the following finding in the July 15, 2020 Letter:

> [Rudnikas'] behavior . . . was egregious and in blatant violation of university standards. Mr. Rudnikas' actions damaged the integrity of the College of Law Disciplinary practices and created a hostile environment for witnesses to a disciplinary proceeding. Subsequent behavior by Mr. Rudnikas indicates an absence of remorse and or understanding of the seriousness nature of said violations.

See Def.'s Ex. 10, July 15, 2020 Letter [D.E. 85-1 at 36].

20. As a sanction for his conduct, Rudnikas was suspended, effective July 15, 2020 through April 30, 2021. Id. Upon conclusion of his suspension, Rudnikas would have to request readmission to NSU and meet with Dr. Manley to demonstrate that he understood and was able to abide by NSU's Code of Conduct going forward. Id.

21. Rudnikas was permitted to and did appeal his suspension. Id.; Def.'s Ex. 13, Email Exchange [D.E. 85-1 at 40–46].

22. On August 7, 2020, Dr. Manley sent Rudnikas an email with attached letter reporting that his appeal had been denied by Dr. Brad Williams, Vice President of Student Affairs and Dean of Undergraduate Studies, and that his suspension was effective August 7, 2020 through April 30, 2021. See Def.'s Ex. 13, Email Exchange [D.E. 85-1 at 40–46]; Def.'s Ex. 15, August 7, 2020 Email [D.E. 85-1 at 48]; Def.'s Ex. 14, August 7, 2020 Letter [D.E. 85-1 at 47].

B. Dean Struffolino's Testimony:

23. Dean Struffolino confirmed the filing of the Disciplinary Complaint against Rudnikas for his publication of the Pictures, as detailed above.

24. Dean Struffolino also testified that neither she nor Dean Vollweiler had any influence over the outcome of Rudnikas' judicial hearing.

C. Rudnikas' Testimony:

25. Rudnikas testified that on June 10, 2020, during a "political" discussion in the law

school class WhatsApp group chat, he revealed the involvement of one of the Complainants in NSU's disciplinary action against Jacobs. Rudnikas made this revelation after one of the Complainants made a comment in the group chat which upset him.

26. Once Rudnikas had made that revelation, another of the Complainants made a comment in the group chat, which Rudnikas felt was insulting and humiliating to him.

27. After those comments were made, Jacobs called Rudnikas to advise him that he wanted to publish the Pictures in the group chat.

28. During that conversation with Rudnikas, Jacobs stated the he wasn't sure he should publish the Pictures because the NSU administration "could make a big deal out of it . . . ." See Transcript [D.E. 128 at 25:25–26:10].

29. Rudnikas then published in the group chat the Pictures, which Jacobs had provided to him, because: he felt that he had been humiliated in the group chat and what Complainants did to Jacobs "was morally wrong"; and he was accused of making false allegations relating to the Complainants' actions. Id. at 26:11–27:3.

30. On June 11, 2020, Jacobs advised Rudnikas that Dean Struffolino had called him to discuss, what he believed was, the publication of the Pictures.

31. Rudikas received but did not respond to either the June 19, 2020 Email or the June 22, 2020 Email; and he did not contact anyone at NSU to schedule the judicial hearing until July 22, 2020.

32. Rudnikas did not attend the July 15, 2020 judicial hearing because he did not have notice of it as he had been locked out of his NSU email account from July 10, 2020 through July 16, 2020 and, as a result, did not receive either of Dr. Manley's emails dated July 10, 2020 or July 15, 2020 informing him of the date of the judicial hearing. Rudnikas claimed he received the

following error message when trying to log into his email account: "fix account or dismiss." Id. at 10:16–22.

33. Rudnikas had a Criminal Law final exam scheduled for August 3, 2020 through August 4, 2020. However, he did not take the exam because he did not believe it was fair that he should be required to prepare for and take the exam while his appeal was pending.

D. Mr. Pinillos' Testimony:

34. Mr. Pinillos' limited testimony concerned his investigation of Rudnikas' claim that he was locked out of his NSU email account from July 10, 2020 through July 16, 2020.

35. Mr. Pinillos' investigation revealed no evidence that Rudnikas was locked out of his NSU email account or that he sent any emails from his NSU email account during that time period.

36. The error message Rudnikas claims to have received when trying to access his NSU email could have been easily resolved by following the error message's prompts.

37. Mr. Pinillos was not aware of Rudnikas having contaced anyone at NSU or its IT department concerning difficulties accessing his NSU email account.

DISCUSSION

1. Motion for TRO and Preliminary Injunction [D.E. 54]:

The standard for requesting a temporary restraining order and a preliminary injunction is the same. See Perdomo v. HSBC Bank USA, No. 13-CV-22645, 2013 WL 12101097, at *1 (S.D. Fla. 2013) (quoting Morgan Stanley DW, Inc. v. Frisby, 163 F. Supp. 2d 1371, 1374 (N.D. Ga. 2001)).

"A district court has broad discretion in granting or denying a preliminary injunction." Ndimbie v. Broward Cty. Hous. Auth., No. 11-CV-60395, 2011 WL 13217296, at *1 (S.D. Fla. 2011) (citing Sierra Club v. Georgia Power Co., 180 F.3d 1309, 1310 (11th Cir. 1999)). "A

preliminary injunction is typically prohibitive in nature and seeks simply to maintain the status quo pending a resolution of the merits of the case." Pritchard v. Fla. High Sch. Athletic Ass'n, Inc., 371 F. Supp. 3d 1081, 1085 (M.D. Fla. 2019) (citing Haddad v. Arnold, 784 F. Supp. 2d 1284, 1295 (M.D. Fla. 2010)). To obtain a preliminary injunction, the plaintiff must establish:

> (1) a substantial likelihood that Plaintiff will prevail on the merits of the underlying cause of action; (2) a substantial threat that Plaintiff will suffer irreparable injury if the injunction is not granted; (3) that the threatened injury to plaintiff outweighs the threatened harm the injunction may have on the defendant; and (4) that the public interest will not be adversely affected by granting the preliminary injunction.

Ndimbie, 2011 WL 13217296, at *1 (citing KH Outdoor, LLC v. City of Trussville, 458 F.3d 1261, 1268 (11th Cir. 2006)). "In this Circuit, a preliminary injunction is an extraordinary and drastic remedy not to be granted unless the movant clearly established the burden of persuasion as to each of the four prerequisites." Siegel v. LePore, 234 F.3d 1163, 1176 (11th Cir. 2000) (alteration and internal quotation marks omitted) (citing United States v. Jefferson Cty., 720 F.2d 1511, 1519 (11th Cir. 1983)). If the plaintiff is unable to show a substantial likelihood of success on the merits, the remaining prerequisites need not be considered. See Bloedorn v. Grube, 631 F.3d 1218, 1229 (11th Cir. 2011) (citing Pittman v. Cole, 267 F.3d 1269, 1292 (11th Cir. 2001)); see also Wreal, LLC v. Amazon.com, Inc., 840 F.3d 1244, 1248 (11th Cir. 2016) (Failure to meet even one of the four prerequisites "dooms" a request for preliminary injunction) (citing Siegel, 234 F.3d at 1176)).

"When a preliminary injunction goes beyond the status quo and seeks to force one party to act, it becomes a mandatory or affirmative injunction and the burden placed on the moving party is increased." K.G. ex rel. Garrido v. Dudek, 839 F. Supp. 2d 1254, 1260 (S.D. Fla. 2011) (quoting Mercedes-Benz U.S. Int'l, Inc. v. Cobasys, LLC, 605 F. Supp. 2d 1189, 1196 (N.D. Ala. 2009)). "A mandatory preliminary injunction is disfavored and should not be granted 'except in rare

instances in which the facts and law are clearly in favor of the moving party.'" Antoine v. Sch. Bd. of Collier Cty., Fla., No. 16-CV-37, 2017 WL 9674515, at *4 (M.D. Fla. 2017) (citing Martinez v. Mathews, 544 F.2d 1233, 1243 (5th Cir. 1976)).

"A district court should not issue an injunction when the injunction in question is not of the same character, and deals with a matter lying wholly outside the issues in the suit." Kaimowitz v. Orlando, Fla., 122 F.3d 41, 43 (11th Cir.), opinion amended on other grounds on reh'g, 131 F.3d 950 (11th Cir. 1997) (citing De Beers Consol. Mines v. U.S., 325 U.S. 212, 220 (1945)); see also Torres Puello v. Guerrero Mendez, No. 20-CV-198, 2020 WL 4004481, at *2 (M.D. Fla. 2020) ("Like preliminary injunctions, temporary restraining orders are a tool appropriately used only to 'grant intermediate relief of the same character as that which may be granted finally.'") (quoting Kaimowitz, 122 F.3d at 43).

The issues identified in the Amended Complaint concern Rudnikas' allegations that NSU failed to adequately accommodate his ADHD diagnosis by failing to provide him with sufficient additional time to complete his assignments and exams. See Am. Compl. [D.E. 34]. The Motion for TRO and Preliminary Injunction, and the evidence adduced at the Evidentiary Hearing, concern Rudnikas' suspension from NSU for violations of its Code of Conduct. As noted above, the relief sought in the Motion for TRO and Preliminary Injunction is as follows:

> [E]ntry of a 14 day temporary restraining order & preliminary injunction requiring Defendant: 1) reinstate Plaintiff immediately with the classes he was registered for and waive any absences that occurred as a result of his dismissal and provide Plaintiff with opportunities to make up any work he missed as a result of the dismissal. 2) Remove the failing grade in Criminal Law so Plaintiff can receive financial aid and coordinate a time with Plaintiff to take the exam at some other time before graduation free of charge. 3) Grade Plaintiff on a pass/fail scale for the rest of these proceedings and provide Plaintiff with a carbon copy before and after each exam. 4) Obtain permission from this Court before taking any adverse action against Plaintiff until this Court deems otherwise.

See Motion for TRO and Preliminary Injunction [D.E. 54 at 13]. The difference in character between the issues in the Amended Complaint and the relief sought in the Motion for TRO and Preliminary Injunction is highlighted by the fact that Rudnikas bases the latter on an unpled ADA Retaliation claim against NSU resulting from his suspension for violations of its Student Code of Conduct. Id. at 4–13.

Because the relief requested in the Motion for TRO and Preliminary Injunction "is not of the same character, and deals with a matter lying wholly outside the issues in the [Amended Complaint]," the undersigned recommends that it be denied. Kaimowitz, 122 F.3d at 43.

For completeness, the undersigned also addresses the likelihood that Rudnikas will prevail on the merits of his unpled ADA Retaliation claim, which underlies the Motion for TRO and Preliminary Injunction. See Motion for TRO and Preliminary Injunction [D.E. 54 at 4–13].

To establish a *prima facie* case of retaliation under the ADA, the plaintiff must prove the following: "(1) he participated in an activity that the ADA protects; (2) he suffered an adverse . . . action; and (3) there is a causal connection between the participation in the protected activity and the adverse . . . decision." Olmsted v. Defosset, 205 F. Supp. 2d 1316, 1320–21 (M.D. Fla. 2002) (citing Gupta v. Fla. Bd. of Regents, 212 F.3d 571, 587 (11th Cir. 2000)).[3]

If the plaintiff is able to establish a *prima facie* case of retaliation under the ADA, "the burden then shifts to the defendant . . . to come forward with legitimate non-discriminatory reasons for its actions that negate the inference of retaliation." Stewart v. Happy Herman's Cheshire Bridge, Inc., 117 F.3d 1278, 1287 (11th Cir. 1997) (citing Goldsmith v. City of Atmore, 996 F.2d 1155, 1163 (11th Cir. 1993)). "If the defendant offers legitimate reasons for the . . . action, the

[3] ADA Retaliation claims are assessed under the same framework as retaliation claims made under Title VII. See Hughes v. Wal-Mart Stores E., LP, No. 19-14863, 2021 WL 717164, at *3 (11th Cir. 2021) (citing Standard v. A.B.E.L. Servs., Inc., 161 F.3d 1318, 1328 (11th Cir. 1998)).

plaintiff then bears the burden of proving by a preponderance of the evidence that the reasons offered by the defendant are pretextual." Goldsmith, 996 F.2d at 1163 (citing Donnellon v. Fruehauf Corp., 794 F.2d 598, 600 n.2 (11th Cir.1986)).

NSU argues that even assuming *arguendo* that Rudnikas "is able to demonstrate that he has established a prima facie case of retaliation, NSU has proffered a legitimate, nondiscriminatory reason for his suspension, being that Plaintiff engaged in behaviors toward other students that violated the NSU Code of Student Conduct." See Response to Motion for TRO and Preliminary Injunction [D.E. 67 at 11].

Rudnikas contends that NSU's justification for suspending him was a "pretextual ruse designed to mask retaliation[,] because the day prior to [NSU] initiating the sham code of conduct investigation[,]" he sent the June 15, 2020 Email which "brought to Defendant's attention very specific facts indicating that the students, who initially filed the complaint against Mr. Jacobs . . . made false allegations to the University which is by itself grounds for expulsion according to the student handbook . . . ." See Motion for TRO and Preliminary Injunction [D.E. 54 at 8–11].

Rudnikas' argument fails because the evidence at the Evidentiary Hearing establishes that the investigation into his publication of the Pictures commenced on June 11, 2020 and June 12, 2020, when the Complainants brought the matter to Dean Struffolino's attention—days before he sent the June 15, 2020 Email.

Rudnikas also argues in his Request for Judicial Notice that NSU's justification for suspending him was pretextual because Jacobs was also subject to disciplinary proceedings at NSU for his involvement in the publication of the Pictures but he received a lesser punishment than Rudnikas. See Request for Judicial Notice [D.E. 109 at 3–5, 8]; see also Feise v. N. Broward Hosp. Dist., 683 F. App'x 746, 751 (11th Cir. 2017) ("a plaintiff may demonstrate pretext either

by identifying a similarly situated comparator who was treated less harshly"); Lewis v. City of Union City, Georgia, 918 F.3d 1213, 1218 (11th Cir. 2019) (comparators must be "similarly situated in all material respects.").

This argument also fails because Jacobs and Rudnikas are not similarly situated in all material respects as Rudnikas, and not Jacobs, published the Pictures.

Moreover, because Rudnikas' requested relief, goes "beyond the status quo and seeks to force [NSU] to act," his burden is increased and the Motion for TRO and Preliminary Injunction "should not be granted 'except in rare instances in which the facts and law are clearly in favor of the moving party.'" Dudek, 839 F. Supp. 2d at 1260; Antoine, 2017 WL 9674515, at *4. Here, Rudnikas has failed to demonstrate that the facts and law are clearly in his favor as he has failed to satisfy his burden of proving that the reasons offered by NSU for suspending him were pretextual. Goldsmith, 996 F.2d at 1163. Accordingly, the undersigned further finds that Rudnikas has failed to establish a substantial likelihood that he will prevail on the merits of his unpled ADA Retaliation claim. Ndimbie, 2011 WL 13217296, at *1. Therefore, the undersigned recommends that the Motion for TRO and Preliminary Injunction also be denied on this basis.

2. **Motion to Amend [D.E. 55]:**

Rudnikas requests that the Court amend its Scheduling Order to allow him to file his "Proposed Verified Amended Complaint" and "Proposed Verified Supplemental Complaint" beyond the Court's 7-3-2020 deadline for amendment of pleadings. See Motion to Amend [D.E. 55].

"[T]he Court of Appeals for the Eleventh Circuit has explained that, 'when a motion to amend is filed after a scheduling order deadline, Rule 16 [of the Federal Rules of Civil Procedure (hereafter, "Rule 16")] is the proper guide for determining whether a party's delay may be

excused.'" Aceituno v. Carnival Corp., No. 20-CV-23935, 2021 WL 1647890, at *2 (S.D. Fla. 2021) (quoting Sosa v. Airprint Sys., Inc., 133 F.3d 1417, 1418 n.2 (11th Cir. 1998)); see also Golden View Condo., Inc. v. QBE Ins. Corp., No. 11-CV-60137, 2011 WL 13112060, at *6 (S.D. Fla. 2011) (Jordan, J.) (explaining that a request to file a supplemental pleading pursuant to Rule 15(d) of the Federal Rules of Civil Procedure after "the deadline for submission of motions to amend the pleadings passed. . . . should be considered one to modify the pre-trial schedule under Rule 16(b)").

Rule 16(b)(4) provides that a court's "schedule may be modified only for good cause and with the judge's consent." Fed. R. Civ. P. 16(b)(4). "This good cause standard precludes modification unless the schedule cannot be met despite the diligence of the party seeking the extension." Aceituno, 2021 WL 1647890, at *2 (quoting Sosa, 133 F.3d at 1418); see also De Varona v. Disc. Auto Parts, LLC, 285 F.R.D. 671, 672–73 (S.D. Fla. 2012) ("diligence is the key to satisfying the good cause requirement.") (citing Sosa, 133 F.3d at 1419). "If either the facts necessary to formulate the claim were known prior to the deadline or the moving party failed to seek the information it needed to determine whether an amendment was required before the deadline passed, the moving party cannot establish the Rule 16(b) diligence necessary to show good cause." Beyel Bros., Inc. v. EMH, Inc., No. 19-CV-14392, 2020 WL 6143633, at *3 (S.D. Fla. 2020) (citing Southern Grouts & Mortars, Inc. v. 3M Co., 575 F.3d 1235, 1241–42 n.3 (11th Cir. 2009)). "If the party seeking relief 'was not diligent, the [good cause] inquiry should end.'" ConSeal Int'l Inc. v. Neogen Corp., No. 19-CV-61242, 2020 WL 2494596, at *3 (S.D. Fla. 2020) (alteration in original) (citing Sosa, 133 F.3d at 1418).

Rudnikas contends that he has satisfied Rule 16(b)'s good cause requirement "because he uncovered an unconscionable scheme that is dispositive of the entire case and basically shows

Defendant is not even entitled to discovery." See Motion to Amend [D.E. 55 at 26–27]. The evidence concerning the alleged "unconscionable scheme" was purportedly found in the six depositions cited in the Motion to Admit Testimony (hereafter, "Depositions"). Id. at 12–13. Rudnikas contends that his review of the Depositions allowed him to "connect[] the dots and realize[] there was a unconscionable scheme between Defendant, its Officer of the Court, and the Law Firm of Panza Maurer Maynard to defraud the public, the judicial system, and the Department of Education." Id. at 13.

Rudnikas' argument is meritless. The Depositions were publicly available prior to the inception of this case. See Hirsch v. NSU, 04-CV-60068-JEM (S.D. Fla. 2004) [D.E. 24, 25, 27] (filed on June 14, 2004); Redding v. NSU, 14-CV-60545-KAM (S.D. Fla. 2015) [D.E. 66, 79-1] (filed on May 20, 2015 and July 6, 2015, respectively]. Moreover, Plaintiff was aware of the Hirsch and Redding cases "[a] couple of days after" his civil procedure final exam, which took place on April 28, 2020. See Proposed Verified Supplemental Complaint [D.E. 55-2 at 27–28]. Rudnikas' failure to review the Depositions prior to the Court's 7-3-2020 deadline does not establish the Rule 16(b) diligence necessary to show good cause and does not justify his filing of the Motion to Amend on September 2, 2020. See Beyel Bros., Inc., 2020 WL 6143633, at *3 ("Mere 'carelessness is not compatible with a finding of diligence.'") (quoting Will–Burn Recording & Pub. Co. v. Universal Music Group Records, No. 08–CV-0387, 2009 WL 1118944, at *3 (S.D. Ala. 2009)).

Accordingly, the undersigned recommends that the Motion to Amend be denied.[4]

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[4] In the Motion to Amend, Rudnikas also requests that the Court: sanction and enter a default judgment against NSU for fraud on the Court; disqualify NSU's counsel and refer them to the Florida Bar; and stay discovery in this action pending a ruling on the request for default judgment. See Motion to Amend [D.E. 55]. At the Evidentiary Hearing, counsel for Rudnikas withdrew the request to disqualify NSU's counsel and refer them to the Florida Bar. See Transcript [D.E. 128 at 71–72]. Counsel for Rudnikas also represented that the request for sanctions and for default judgment and the request for stay of discovery

3. **Motion to Admit Testimony [D.E. 56]:**

As noted above, Rudnikas requests that the Court admit the Depositions in support of the Motion to Amend. See Motion to Admit Testimony [D.E. 56]. In light of the undersigned's recommendation that the Motion to Amend be denied, the undersigned recommends that the Motion to Admit be similarly denied.

4. **Request for Judicial Notice [D.E. 109]:**

Rudnikas requests that, in support of both the Motion for TRO and Preliminary Injunction and the Motion to Amend, the Court take judicial notice of purported facts concerning: NSU's disciplinary proceedings against Jacobs for his involvement in Rudnikas' publication of the Photographs; NSU's disciplinary proceedings against Rudnikas for his publication of the Photographs; and Jacobs' lesser punishment than Rudnikas for his role in the incident. See Request for Judicial Notice [D.E. 109]. Rudnikas requests that the Court take judicial notice of these purported facts for the purpose of establishing Jacobs as a similarly situated comparator and to demonstrate that his suspension was an act of retaliation in support of his unpled ADA Retaliation claim. Id. at 3–4, 8.

The Court has the discretion to refuse to take judicial notice of facts which are not relevant to the issues of a case. See United States v. Alindor, 799 F. App'x 678, 684–85 (11th Cir. 2020) ("The district court was within its discretion to refuse to take judicial notice of facts that are not relevant to the issues in the case.") (citing Fed. R. Evid. 402) ("Irrelevant evidence is not admissible."). Rule 401 of the Federal Rules of Evidence provides that evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence;

were contingent on the Court's ruling on his request to amend the Court's 7-3-2020 deadline to further amend the complaint. Id. at 69–71. In recommending that the Motion to Amend be denied, the undersigned further recommends that the request for entry of a default judgment against NSU for fraud on the Court be denied as baseless; and that the request for stay of discovery be denied as moot.

and (b) the fact is of consequence in determining the action." Id.

Here, the facts surrounding the publishing of the Pictures and the disciplinary proceedings resulting therefrom are not probative of the claims in Rudnikas' current pleading, namely the Amended Complaint. Based on this lack of relevance as to the current pleading and the undersigned's recommendation that the Motion to Amend be denied, the undersigned recommends that the Request for Judicial Notice be denied.

5. Motion to Invoke Judicial Estoppel [D.E. 110]:

Rudnikas requests that the Court "invoke the doctrine of judicial estoppel and deem Plaintiff the prevailing party as Defendant has admitted to liability in regard to all claims in the current operative complaint." See Motion to Invoke Judicial Estoppel [D.E. 110 at 1]. Rudnikas argues that "[t]o permit Defendant to continue litigating would require Defendant to change its current position and to knowingly submit false and/or inaccurate testimony that would allege facts that occurred prior to litigation, but which Defendant, Plaintiff, and this Court would know are false because of Defendant's admissions . . . that it had no facts to support its affirmative defenses prior to litigation, prior to discovery." Id. at 9–10.

"Judicial estoppel is an equitable doctrine invoked at a court's discretion, designed to protect the integrity of the judicial process." Transamerica Leasing, Inc. v. Inst. of London Underwriters, 430 F.3d 1326, 1335 (11th Cir. 2005) (citing New Hampshire v. Maine, 532 U.S. 742, 749–50 (2001)). "The doctrine of judicial estoppel applies when 'a party assumes a certain position in a legal proceeding, and then succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.'" Matter of Brizo, LLC, 437 F. Supp. 3d 1212, 1220 (S.D. Fla. 2020) (quoting New Hampshire v. Maine,

532 U.S. 742, 749 (2001)). "The purpose of judicial estoppel is to prevent a party from using an argument in one phase of a case and then relying upon a contradictory argument to prevail in another phase." Matter of Brizo, LLC, 437 F. Supp. 3d at 1220 (citing Pegram v. Herdrich, 530 U.S. 211, 227 n.8 (2000)).

Rudnikas does not contend that NSU assumed a certain position in a legal proceeding, succeeded in maintaining that position, and now assumes a contrary position because its interests have changed, which are conditions precedent to the Court's invocation of the equitable doctrine of judicial estoppel. Matter of Brizo, LLC, 437 F. Supp. 3d at 1220.

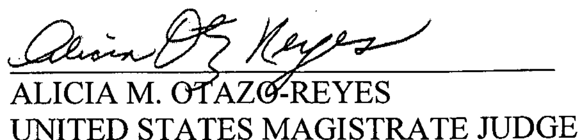
Therefore, the undersigned recommends that the Motion to Invoke Judicial Estoppel be denied.

RECOMMENDATION

Based on the foregoing considerations, the undersigned **RESPECTFULLY RECOMMENDS** that the Motions [D.E. 54–56, 109, and 110] be **DENIED**.

Pursuant to Local Magistrate Judge Rule 4(b), the parties have **fourteen days** from the date of this Report and Recommendation to file written objections, if any, with the Honorable Jose E. Martinez. Failure to timely file objections shall bar the parties from attacking on appeal the factual findings contained herein. See Resolution Tr. Corp. v. Hallmark Builders, Inc., 996 F.2d 1144, 1149 (11th Cir. 1993). Further, "failure to object in accordance with the provisions of [28 U.S.C.] § 636(b)(1) waives the right to challenge on appeal the district court's order based on unobjected-to factual and legal conclusions." See 11th Cir. R. 3-1 (I.O.P. - 3).

RESPECTFULLY SUBMITTED in Chambers at Miami, Florida, this 2nd day of June, 2021.



ALICIA M. OTAZO-REYES
UNITED STATES MAGISTRATE JUDGE

cc: United States District Judge Jose E. Martinez
Counsel of Record

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 21-12801-CC

BENZO RUDNIKAS,

Plaintiff - Appellant,

versus

NOVA SOUTHEASTERN UNIVERSITY, INC.,

Defendant - Appellee.

Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before WILLIAM PRYOR, Chief Judge, and ROSENBAUM and MARCUS, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Rehearing En Banc is also treated as a Petition for Rehearing before the panel and is DENIED. (FRAP 35, IOP2)

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