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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Carson Little,

10 Plaintiff,

11 v.

12 Grand Canyon University,

13 Defendant.
14

No. CV-20-00795-PHX-SMB

ORDER

15 Pending before the Court is Plaintiffs Seth Hannibal-Fisher and David Tran's
16 Motion to Consolidate Cases.¹ (Doc. 84.) Plaintiff Carson Little filed a Response opposing
17 consolidation. (Doc. 88.) Defendant Grand Canyon University ("GCU") filed a Response
18 in which it also opposed consolidation. (Doc. 90.) Plaintiffs Hannibal-Fisher and Tran
19 replied. (Doc. 94.) None of the parties requested oral argument. The Court has reviewed
20 the pleadings and relevant law and will deny Plaintiffs Hannibal-Fisher and Tran's Motion
21 to Consolidate for the reasons explained below.

22 **I. BACKGROUND**

23 Plaintiff Little initially filed his case before this Court on April 24, 2020, seeking a
24 partial refund for the costs of room and board and fees for the Spring 2020 COVID-19-
25 interrupted semester at GCU. (Doc. 1.) On January 28, 2022, the Court granted in part
26 Plaintiff Little's Amended Motion for Class Certification. (Doc. 72.) The Order certified

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28 ¹ Plaintiffs Hannibal-Fisher and Tran are the Plaintiffs in a separate, but related, class action
against Defendant that is also pending before this Court. *See Hannibal-Fisher, et al. v.*
Grand Canyon University, No. 20-CV-01007-SMB (D. Ariz.).

1 Plaintiff Little’s class for a claim of breach of contract for GCU’s refusal to refund partial
2 costs of room and board and partial costs of fees for the Spring 2020 semester, (*see* Doc.
3 72 at 14), but denied certification for Plaintiff Little’s unjust enrichment claims, (*id.*). The
4 Court certified the following class: “All students enrolled in on-campus classes at Grand
5 Canyon University for the Spring of 2020 semester who were charged and paid fees for
6 services, facilities, resources, activities, and/or events that were not provided, in whole or
7 in part, during the Spring 2020 semester.” (*Id.* at 8–9.)

8 Plaintiffs Hannibal-Fisher and Tran also brought their action seeking to represent a
9 class related to GCU’s campus-closure as a result of the COVID-19 pandemic during
10 Spring 2020 semester. Unlike in the *Little* action, Plaintiffs Hannibal-Fisher and Tran
11 brought a claim for breach of contract for GCU’s failure to disperse partial refunds for
12 tuition in addition to bringing a claim for breach of contract for GCU’s failure to grant a
13 partial refund for housing costs and fees. They also brought claims for unjust enrichment,
14 money had and received, conversion, and accounting. (*See Hannibal-Fisher, et al. v.*
15 *Grand Canyon University*, No. 2:20-CV-1007-SMB, Doc. 42.) Plaintiffs initially filed
16 their case on May 22, 2020. (Doc. 1.) GCU filed a motion to dismiss, and on March 5,
17 2021, the Court granted in part and denied in part GCU’s motion. (Doc. 42.) The Court
18 allowed Plaintiff Hannibal-Fisher and Tran’s claims for breach of contract for housing
19 costs and fees for the Spring 2020 semester, unjust enrichment claims, and money had and
20 received claim to proceed, and dismissed Plaintiffs’ claims for breach of contract for
21 tuition, conversion, and accounting. (*Id.* at 16–17.) Plaintiffs Hannibal-Fisher and Tran
22 have yet to seek class certification from this Court. They now seek to consolidate their
23 case with the *Little* action. (Doc. 84.) Plaintiff Little and GCU both oppose consolidation.
24 (*See* Docs. 88, 90.)

25 **II. LEGAL STANDARD**

26 “If actions before the court involve common questions of law or fact, the court may:
27 (1) join for hearing or trial any or all matters at issue in the actions; (2) consolidate the
28 actions; or (3) issue any other orders to avoid unnecessary cost or delay.” Fed. R. Civ. P.

1 42(a). A district court has “broad discretion” to consolidate complaints pending in the
2 same district. *Garity v. APWU Nat’l Lab. Org.*, 828 F.3d 848, 855–56 (9th Cir. 2016)
3 (quoting *Inv’rs Research Co. v. U.S. Dist. Court for Cent. Dist. of Cal.*, 877 F.2d 777, 777
4 (9th Cir. 1989)). “In determining whether or not to consolidate cases, the Court should
5 weigh the interest of judicial convenience against the potential for delay, confusion and
6 prejudice.” *Khalafala v. Miller*, No. CV-10-1259-PHX-ROS, 2011 WL 1808031, at *1
7 (D. Ariz. May 12, 2011) (quoting *Zhu v. UCBH Holdings, Inc.*, 682 F. Supp. 2d 1049, 1052
8 (N.D. Cal. 2010)).

9 **III. DISCUSSION**

10 **A. Motion to Consolidate**

11 Plaintiffs Hannibal-Fisher and Tran argue that the two cases before this Court, while
12 not identical, are similar enough to warrant consolidation. (Doc. 84 at 6.) They argue that
13 the claims for unjust enrichment of tuition arise from the same transaction or series of
14 transactions as the room and board and fees claims. (*Id.*) Furthermore, they argue that the
15 two cases arise from GCU’s response to the COVID-19 pandemic, the closure of its
16 campus, and its shift to online learning and services. (*Id.* at 7–8.) They also point out that
17 in both cases, the Plaintiffs seek to represent classes of students, albeit in different ways.
18 (*Id.* at 8.) They contend that consolidation will promote judicial efficiency and protect the
19 potential classes. (*Id.*) Plaintiffs Hannibal-Fisher and Tran also argue that “[a]ny
20 remaining discovery can be conducted in tandem, and common issues and defenses can be
21 adjudicated simultaneously, avoiding duplicative briefing and testimony, limiting the
22 burden on the Court and witnesses.” (*Id.* at 8–9.) Plaintiffs Hannibal-Fisher and Tran state
23 that they are willing to expedite their motion for class certification to accommodate any
24 concern of delay. (*Id.* at 9.) Notably, Plaintiffs Hannibal-Fisher and Tran also “made clear
25 to GCU that they do not intend to pursue the claims already certified in *Little* through the
26 instant suit, either on a class basis or individually (unless Plaintiffs properly opt out of the
27 *Little* class).” (*Id.* at 6.)

28 Plaintiff Little opposes consolidation, noting that Plaintiffs Hannibal-Fisher and

1 Tran now move for consolidation after two years of litigating separately. (Doc. 88 at 2.)
2 Plaintiff Little points out that Plaintiffs Hannibal-Fisher and Tran admitted that they do not
3 plan to pursue claims already certified in the *Little* case, and “[w]ith that admission, and
4 the dismissal order entered on March 5, 2021, Movants effort at a class action has been
5 whittled down to unjust enrichment claims concerning tuition, and there are no such claims
6 in the *Little* case.” (*Id.* at 3.) With prospect of their entire suit being dismissed, Plaintiff
7 Little claims that the Hannibal-Fisher and Tran Plaintiffs now “desperately seek to glom
8 onto the far stronger Little action to save themselves.” (*Id.*) Because they are pursuing
9 differing claims, Plaintiff Little contends that the cases involve different factual and legal
10 questions, making consolidation inappropriate. (*Id.* at 4.) He also argues that there is no
11 risk of inconsistent adjudications if the cases remain separate because the two sets of
12 Plaintiffs seek different claims for different conduct. (*Id.*) Plaintiff Little also argues that
13 courts have repeatedly refused to consolidate cases that were in different stages of
14 discovery, and that, unlike in *Little*, Plaintiffs Hannibal-Fisher and Tran have yet to seek
15 class certification or proceed past written discovery. (*Id.* at 5 (citing *Dishon v. Gorham*,
16 No. CV-16-04069-PHX-ROS, 2018 WL 4257936, at *5 (D. Ariz. Sept. 6, 2018)). Thus,
17 Plaintiff Little argues, consolidation will delay its case. (*Id.*)

18 GCU contends that consolidation is inappropriate because the resulting litigation
19 would be more costly, inefficient, and prejudicial to Plaintiff Little and GCU. (Doc. 90 at
20 12.) GCU argues that the *Hannibal-Fisher* action is duplicative of *Little*—the earlier filed
21 and certified action—and that the first-to-file rule empowers the Court to dismiss the case
22 rather than consolidate it. (*Id.* at 6.) GCU also argues that consolidation is inappropriate
23 under the claims splitting doctrine. (*Id.* at 8.)

24 Here, the Court finds that consolidation is inappropriate. With Plaintiffs Hannibal-
25 Fisher and Tran no longer pursuing claims that have been certified in *Little*, their only
26 remaining claims are for unjust enrichment and money had and received, (Doc. 42 at 16),
27 and as the Court explained when ruling on Plaintiff Little’s Motion for Class Certification,
28 unjust enrichment claims are unsuitable for class certification, (*see* Doc. 72 at 13 (“The

1 individual analysis that the court must perform before granting relief on such a claim makes
2 it unsuitable for class certification.”)). It is unclear whether a money had and received
3 claim—which is also an equitable claim—could be certified. Thus, it is unclear whether
4 Plaintiffs Hannibal-Fisher and Tran will be able to certify their class. Additionally, there
5 no longer strong similarities of law and to justify consolidating the two cases. Plaintiffs
6 Hannibal-Fisher and Tran are now exclusively pursuing distinct claims and for different
7 conduct from that of Plaintiff Little. The unjust enrichment claim for tuition will have little
8 bearing on Plaintiff Little’s claims, which are for breach of contract related to room and
9 board and fees, and Plaintiff Little is not pursuing a money had and received claim. Thus,
10 combining the cases is unlikely to increase efficiency. Discovery in the two cases is likely
11 to focus on different facts, and trial and summary judgment are likely to raise differing
12 legal issues. Thus, the Court finds that the cases do not involve common issues of law and
13 fact that would warrant consolidation.

14 Even if the cases did contain substantially similar issues of law and fact warranting
15 consolidation, the cases are at different stages in litigation, and combining the cases is
16 likely to delay the *Little* case. Denial of consolidation is appropriate where cases are at
17 different stages in litigation. *See Dishon*, 2018 WL 4257936, at *5 (denying motion to
18 consolidate where two actions were at different stages of litigation); *Robert Kubicek*
19 *Architects & Assocs., Inc. v. Bosley*, No. CV-11-02112-PHX-DGC, 2012 WL 6554396, at
20 *8 (D. Ariz. Dec. 14, 2012) (same). While Plaintiffs Hannibal-Fisher and Tran have yet to
21 even seek certification as of the writing of this Order—and likely face significant hurdles
22 when and if they do so—Plaintiff Little has already obtained certification of its class and
23 is well into discovery. Thus, even if common issues of law and fact warranted
24 consolidation, the cases are at differing stages, which weighs against consolidating the
25 actions. Therefore, the Court will deny the Motion to Consolidate.

26 **B. GCU’s Request for Dismissal**

27 GCU also used its Response to Plaintiffs Hannibal-Fisher and Tran’s Motion to
28 Consolidate as an opportunity to seek dismissal of Plaintiffs Hannibal-Fisher and Tran’s

1 entire case. (*See, e.g.*, Doc. 90 at 3.) The Court refuses to entertain this request.

2 “[I]t is procedurally improper to include a request for affirmative relief in a response
3 brief.” *Meghinasso v. Mercedes-Benz USA*, No. C17-5930-LK, 2022 WL 226078, at *1
4 (W.D. Wash. Jan. 26, 2022); *see also Travelers Indem. Co. of Am. v. Dodson-Duus, LLC*,
5 No. C12-5625 BHS, 2013 WL 4498694, at *3 (W.D. Wash. Aug. 21, 2013) (“Defendants’
6 motion seeks dispositive relief, which the Court declines to consider in a responsive brief
7 or as a motion to strike.”). A response brief to a motion to consolidate is not the proper
8 vehicle to bring a dispositive motion. GCU must bring a separate, dispositive motion in
9 order for the Court to consider dismissal. Thus, the Court will not consider GCU’s
10 arguments regarding dismissal in this Order.

11 **IV. CONCLUSION**

12 Accordingly,

13 **IT IS ORDERED** denying Plaintiffs Hannibal-Fisher and Tran’s Motion to
14 Consolidate. (Doc. 84.)

15 Dated this 1st day of August, 2022.

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Honorable Susan M. Brnovich
United States District Judge