UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Demian Oksenendler, individually and on behalf of all others,

Plaintiff,

vs.

NorthStar Education Finance, Inc., d/b/a Total Higher Education,

Defendant.

Case No. 20-cv-00805-DWF-ECW

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

Defendant NorthStar Education Finance, Inc. ("Northstar") submits this memorandum in support of its motion to dismiss Plaintiff's Complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

INTRODUCTION

In February 2020, Northstar informed its borrowers that recent economic conditions had jeopardized the funding for its student loan bonus program. Northstar explained that its ability to fund certain incentive payments ("Bonus" or "Bonuses") was dependent on the existence of excess cash being released from its financing trusts, which is only permitted once terms and conditions are met pursuant to specific indenture agreements associated with the respective financings. Further, the notification indicated that such funding had already declined; and that expected future declines would "result[] in an inability to pay the Bonus in the very near future." Compl. Ex. C. Characterizing this announcement as a "suspension" of the Bonus program, Compl. ¶ 5, Plaintiff asserts claims

for breach of his original loan contract, which was superseded by a 2009 class action settlement; breach of the 2009 settlement agreement; and violation of Minnesota and California consumer protection laws.

Plaintiff's claims are premature and baseless. He does not (and cannot) allege that Northstar actually suspended his Bonus payments, and the letter he incorporates into his Complaint does not disavow any contractual obligation. The letter merely predicts that funding for Bonus payments will soon run out—a result contemplated by the class action settlement, which provides that no particular level of funding is guaranteed. Plaintiff's claims are therefore unripe, and this Court should dismiss the Complaint for lack of subject matter jurisdiction.

Plaintiff's Complaint also fails to state a claim for relief. His claim for breach of his loan agreement is barred by the prior class settlement, which superseded and modified his original contract. His claim for breach of the Settlement Agreement fails because Plaintiff's allegations of breach are conclusory—he does not identify any provision of the Agreement that Northstar supposedly breached—and the conduct Plaintiff *does* allege (a potential suspension of payments due to a loss of funding) is authorized by the plain terms of the Agreement. Lastly, Plaintiff's consumer protection claims fail because (i) an alleged breach of contract does not violate the statutes Plaintiff invokes, (ii) his claims based on representations or omissions are barred by the prior class settlement; and (iii) Plaintiff does not allege any specific misrepresentations or facts giving rise to a duty to disclose.

For these reasons, Northstar respectfully requests that the Court dismiss Plaintiff's Complaint.

BACKGROUND

Northstar is a nonprofit provider of student loans. Compl. ¶ 1. In 2001, Northstar began offering a "Bonus" to its borrowers, effectively lowering the interest cost for borrowers who were no more than 59 days late in making loan repayments. *Id.* Allegedly in reliance on this Bonus program, Plaintiff took out a loan from Northstar in 2001 and consolidated his student loans with Northstar in 2004. *Id.* ¶¶ 14, 15, 17.

In early 2008, Northstar suspended Bonus payments due to "the ongoing disruption in the global markets." Compl. ¶ 3. Soon thereafter, borrowers filed several nationwide class actions, which were transferred and coordinated before this Court in the multidistrict litigation captioned *In re NorthStar Education Finance, Inc., Contract Litigation*, 08-MD-01990 (D. Minn.). The plaintiffs, led by Plaintiffs' counsel here, argued that the Bonuses were not discretionary; that suspension of the Bonuses constituted a breach of the student loan agreements; and that Northstar's representations and omissions in marketing the Bonus program violated several consumer protection statutes. Compl. Ex. B at § I. Northstar disputed these claims, and the parties settled in late 2009. *Id.*

The Settlement Agreement required the creation of a Settlement Bonus Trust Account that would be used to pay Bonuses, subject to certain conditions, and provided comprehensive terms regarding how the Account would be funded going forward. Compl. Ex. B. Specifically, the Agreement stated that the Account will be funded by 90% of the excess cash released from (a) Northstar's three warehouse lending facilities, "pursuant to the terms and conditions of trust indenture agreements Northstar entered into with the lenders," (b) Northstar's secured bond financings, "pursuant to the terms of conditions of

the two governing bond indenture agreements," and (c) "refinancings of these above-referenced warehouse lending facilities and secured bond financings." *Id.* at §§ II.D.3, II.D.5. The Settlement Agreement acknowledged that "[t]hese lending facilities and bond indenture agreements contain terms and conditions—including terms and conditions governing *how and when funds will be released to Northstarand in turn available to pay the Bonus*—that are still binding on Northstar and will continue to be binding unless refinanced." *Id.* at § II.D.3 (emphasis added). Thus, because the funding for the Settlement Bonus Trust Account would be "dependent on myriad financial, business, and legislative contingencies beyond Northstar's control," the Settlement Agreement provided that "[t]he Settling Parties cannot guarantee any particular level of funding." *Id.* at § II.D.5.

The Settlement Agreement also specified how Northstar must distribute Bonus payments. First, the Agreement required Northstar to make certain minimum guaranteed payments for a period of five years. Compl. Ex. B at § II.E.2. For payments after that initial period, the Agreement provided that Bonus payments shall be made to eligible class members' accounts from the Settlement Bonus Trust Account on a *pro rata* basis. *Id.* at §§ II.D.5, II.F.2. The Agreement expressly acknowledged that the amounts of such payments may vary depending on "the amounts available in the Settlement Bonus Trust Account," *id.* at § II.F.2., which amounts, as noted above, are subject to "myriad" contingencies "beyond Northstar's control," *id.* at § II.D.5. As this Court explained, the Agreement provided for "cash payments to class members, *some* of which are guaranteed and all of which are calculated pursuant to a non-discretionary formula." Preliminary

Approval Order at 3, No. 08-md-01990 (D. Minn. Dec. 21, 2009), ECF No. 44 (emphasis added).

The Settlement Agreement also stated that "[t]his Stipulation and its exhibits constitute the entire agreement among the parties hereto." Compl. Ex. B at § II.M.4. And it released Northstar from all claims relating to the Bonus program, including claims based on (i) "the marketing and advertising of the Bonus, Settlement Class Members' decision to enter into a Northstar-originated student loan because of the Bonus, the economic benefit received by Settlement Class Members in connection with the Bonus, and the Suspension of the Bonus," or (ii) "any facts, circumstances, transactions, events, occurrences, acts, omissions or failures to act related to the Bonus that are alleged in the Action." *Id.* at § II.A.27.

As a member of the Settlement Class, Plaintiff received notice of the Settlement Agreement and information about its terms. Compl. ¶ 18. He chose to remain in the Settlement Class, accepted the terms of the Settlement Agreement, and received the benefits thereunder. *Id.*

In February 2020, Northstar sent a notice to its borrowers, explaining that the level of excess cash released from its financing trusts (which is subject to terms and conditions in respective indenture agreements) had recently declined. Compl. Ex. C. Northstar predicted that "the funding source for paying the Bonus is anticipated to continue to decline, resulting in an inability to pay the Bonus in the very near future." *Id.* Northstar further predicted that, because its financing trusts "are the sole source for the funding of

the Bonus, this means it is likely the Bonus will not continue to be paid in the near future." *Id.*

Plaintiff takes issue with these predictions, claiming that borrowers who are no more than 59 days past due are entitled to a Bonus, even if the funding sources described in the Settlement Agreement run dry. Compl. ¶ 59. Plaintiff therefore claims that any suspension of Bonus payments would breach both his student loan contract and the Settlement Agreement. Compl. ¶¶ 53, 61. He also claims that Northstar's anticipated suspension of Bonuses and Northstar's unspecified misrepresentations and omissions violated the Minnesota Deceptive Trade Practices Act (MDTPA), the Minnesota Consumer Fraud Act (MCFA), the California Legal Remedies Act (CLRA), and the California Unfair Competition Law (CUCL). *Id.* ¶¶ 68, 72, 81, 90. Plaintiff, a resident of California, brings these claims on behalf of himself, a nationwide class, and a California class of Northstar borrowers. *Id.* ¶¶ 37-38.

Northstar moves to dismiss all of Plaintiff's claims.

LEGAL STANDARDS

To survive a motion to dismiss under Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (*quoting Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). On a motion to dismiss, courts must accept factual allegations as true, but they are "not bound to accept as true a legal conclusion couched as a factual allegation." *Twombly*, 550 U.S. at 555 (quotation and citation omitted).

Additionally, Plaintiff must plead his statutory claims with particularity. Fed. R. Civ. P. 9(b); *DeVary v. Countrywide Home Loans, Inc.*, 701 F. Supp. 2d 1096, 1110 (D. Minn. 2010) (MDTPA); *Russo v. NCS Pearson, Inc.,* 462 F. Supp. 2d 981, 1003 (D. Minn. 2006) (MCFA); *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009) (CLRA and CUCL). To satisfy this requirement, "the complaint must allege such matters as the time, place, and contents of false representations, as well as the identity of the person making the misrepresentation and what was obtained or given up thereby. "In other words, the complaint must plead the 'who, what, where, when, and how' of the alleged fraud." *Drobnak v. Andersen Corp.*, 561 F.3d 778, 783 (8th Cir. 2009) (citation omitted).

ARGUMENT

I. Plaintiff's claims are not ripe.

As a preliminary matter, this Court lacks subject matter jurisdiction because Plaintiff's claims are unripe. *Kennedy v. Ferguson*, 679 F.3d 998, 1001 (8th Cir. 2012) (noting that ripeness is required for Article III subject matter jurisdiction). Because Northstar has not failed to make a Bonus payment or stated with certainty that it will ever fail to make a Bonus payment, this action is premature.

A breach-of-contract claim is not ripe unless the defendant has already breached the contract or has committed an anticipatory breach. *State ex rel. Friends of Riverfront v. City of Minneapolis*, 751 N.W.2d 586, 593 (Minn. Ct. App. 2008); *accord Harper v. Unum Grp.*, No. 2:15-CV-02146, 2017 WL 11237495, at *1 (W.D. Ark. June 9, 2017). An anticipatory breach occurs when a party to a contract makes an unqualified repudiation of the contract. *Friends of Riverfront*, 751 N.W.2d at 593; *Martinez v. Scott Specialty Gases,*

Inc., 100 Cal. Rptr. 2d 403, 409 (Cal. Ct. App. 2000). "If the refusal to perform is not unconditional and if performance is still possible, there is no anticipatory breach." *Drewitz v. Motorwerks, Inc.*, No. A09-1529, 2010 WL 1541436, at *3 (Minn. Ct. App. Apr. 20, 2010); *Martinez*, 100 Cal. Rptr. 2d at 409.

Here, Plaintiff does not allege that Northstar missed a Bonus payment.[1] Nor does Plaintiff allege that Northstar has made an unqualified statement that it would discontinue or suspend bonus payments and/or terminate its bonus incentive program. Rather, Northstar merely stated that the funding for bonus payments will likely run dry, meaning "it is likely the Bonus will not continue to be paid in the near future." Compl. Ex. C. Because Northstar's prediction that the bonuses will be discontinued is conditioned upon the occurrence of a future event, and because Northstar has not repudiated its loan contracts or the Settlement Agreement, Plaintiff has not alleged an anticipatory breach. His breach-of-contract claims are therefore unripe.

Plaintiff's consumer protection claims are likewise premature. As discussed below, any claims based on Northstar's alleged representations that predated the 2010 Final Approval Order are barred by the Class Settlement. Because Plaintiff alleges no post-2010 injury apart from his insufficient allegations of anticipatory breach, his consumer protection are unripe to the extent they are based on post-Settlement events.

[1] Plaintiff does not allege any facts suggesting that Northstar has already suspended the bonus payments, and his conclusory allegations that Northstar has "not honor[ed] the credit" and has "fail[ed] to continue to provide [] the bonus," Compl. ¶¶ 53-54, are entitled to no weight.

II. Count I fails because the Settlement Agreement superseded Plaintiff's original loan contract.

Plaintiff claims that Northstar breached his student loan agreement by indicating that it would likely suspend bonus payments. Compl. ¶¶ 49, 53. This claim fails as a matter of law because the Settlement Agreement superseded Plaintiff's original contract.

It is black-letter law that parties "can alter their contract by mutual consent." *Olson v. Penkert*, 90 N.W.2d 193, 203 (Minn. 1958). Parties can add, change, or cancel contract terms, *Travelers Ins. Co. v. Workmen's Comp. Appeals Bd.*, 434 P.2d 992, 998 (Cal. 1967), and such a modification supersedes the terms to which it relates, *Eluschuk v. Chem. Eng'rs Termite Control, Inc.*, 246 Cal. App. 2d 463, 469 (Cal. Ct. App. 1966). Indeed, parties can substitute "a new contract for the old one," thereby discharging the parties' original duties and barring any right to enforce the original contract. *Olson*, 90 N.W.2d at 203; Restatement (2d) of Contracts § 279 ("The substituted contract discharges the original duty and breach of the substituted contract by the obligor does not give the obligee a right to enforce the original duty.").

These bedrock legal principles defeat Plaintiff's effort to enforce his 2004 loan agreement. During the prior litigation, Class plaintiffs—represented by Plaintiff's counsel here—alleged that Northstar's then-existing loan agreements required Northstar to pay a non-discretionary bonus to any borrower who was less than sixty days in arrears. *See* Compl. Ex. B at § I. Northstar contested this allegation, arguing instead that the bonus was gratuitous and not part of the loan contracts at all. *See id.* That debate is now moot. Northstar and the Class settled the litigation by entering into a new agreement covering

Northstar's obligation to make bonus payments. The Settlement Agreement modifies Northstar's bonus obligations under the original loan contracts, stating that the Agreement "accomplishes the goal of reinstating the Bonus *in modified* and certain form." *Id.* at 3. And the Agreement repeatedly makes clear that it governs Northstar's future bonus obligations. *See, e.g.*, *id.* (noting that "modified" bonus program "may allow for the Bonus to be paid in full on a going-forward basis"); *id.* at § II.D.3 (defining "funding source" for bonus pool); *id.* at Section II.D.5 (explaining that future bonus payments may vary depending on financial conditions); *id.* at § II.F.2 (same).

Plaintiff concedes that he was a member of the Settlement Class, received a class notice, and chose to remain in the Class and accept the benefits of the settlement. Compl. ¶ 18. Thus, whatever Plaintiff claims he was entitled to under his 2004 contract, Northstar's bonus obligations are now governed by the 2010 Settlement Agreement. Count I fails on the law.

III. Plaintiff has not alleged a plausible claim for breach of the Settlement Agreement.

Turning to the operative contract, Plaintiff alleges in Count II that a future suspension of bonus payments would breach the Settlement Agreement. Compl. ¶ 61. This claim fails because Plaintiff does not allege that Northstar has breached (or intends to breach) its bonus obligations under the Settlement Agreement—namely, to deposit excess cash in the bonus pool and distribute payments from those funds. Plaintiff thus fails to allege a plausible breach of contract claim. Moreover, to the extent he claims a guaranteed

right to receive bonus payments for the life of his loan, any such claim is barred by the Settlement Agreement's plain terms.

As the Settlement Agreement makes clear, Northstar is obligated to make bonus payments if, and only if, sufficient funding exists. With respect to funding, the Settlement Agreement dictates that Northstar must fund the bonus pool through two sources: (1) "excess cash" released from warehouse lending facilities and secured bond financings, pursuant to the terms and conditions of Northstar's contracts with third parties; and (2) specified contributions by Northstar. Compl. Ex. B at §§ II.D.3, II.E.1, II.E.2. The parties acknowledged that the first source of funding—cash released from indenture agreements—could vary based on economic conditions. *Id.* at § II.D.3 (stating that contributions pursuant to indenture agreements are pursuant to the terms of those agreements, which "contain terms and conditions—including terms and conditions governing how and when funds will be released to Northstar and in turn available to pay the Bonus"). And the parties agreed that the second source of funding—specified contributions by Northstar—would last for only the first five years after execution of the contract. *Id.* at §§ II.E.1, II.E.2. Lastly, the parties agreed that these two sources constitute "the *only* means through which Northstar is obligated to pay any Settlement Benefits or Bonus," and they acknowledged that "[t]he Settling Parties cannot guarantee any particular level of funding, however, which is dependent on myriad financial, business, and legislative contingencies beyond Northstar's control." *Id.* at §§ II.D.12, II.D.5 (emphasis added).

The Settlement Agreement also dictates how Northstar must distribute bonuses to individual Class members. Specifically, it requires Northstar to calculate bonus payments using the same formula it used prior to suspending payments in 2008. Compl. Ex. B at § II.F.2. And, for any year in which "the amounts available in the Settlement Bonus Trust Account are less than, or greater than, necessary to pay the Bonus amount at the same level as before the Suspension," the Settlement Agreement requires Northstar to distribute bonus payments on a *pro rata* basis. *Id.*

Plaintiff does not allege that Northstar has failed (or will fail) to deposit excess cash into the bonus pool. Nor does Plaintiff allege that Northstar has failed (or will fail) to pay bonuses out of that pool pursuant to the requisite formula. Plaintiff's Complaint therefore does not state a plausible claim for breach of the Settlement Agreement. The Court should dismiss Count II for this reason alone.

Instead of alleging failure to perform any obligation under the Settlement Agreement, Plaintiff appears to assume that Northstar must *always* pay him a nonzero bonus. He invokes Section II.D.1, which states:

> The core settlement benefit is the reinstatement of the Bonus (according to certain terms and conditions, as set forth below) as a guaranteed benefit. This Settlement mandates that the Bonus be paid over the life of Settlement Class Members' loans, except for in certain circumstances set forth below.

Compl. Ex. B at § II.D.1. Without explanation, Plaintiff asserts that those circumstances are not present here, Compl. ¶ 31, and therefore concludes that the Settlement Class Members are entitled to continued bonuses, Compl. ¶ 59.

But Section II.D.1 does not guarantee bonuses in all circumstances. Quite the opposite, it states that the reinstatement of the bonus is subject to “certain terms and conditions” set forth in the Agreement and that the bonuses will not be paid “in certain circumstances.” Compl. Ex. D at § II.D.1. Those “terms and conditions” dictate that the bonus payments will come exclusively from two limited funding sources, which could yield $0 in funding. And the “certain circumstances” in which a bonus may not be paid include the circumstance, foreshadowed by Section II.D.5, in which funding runs dry.

Furthermore, Plaintiff’s theory rests on an interpretation of the terms “guaranteed” and “mandatory” that is undermined by numerous other provisions in the Agreement. For Plaintiff’s theory to be correct, a “guaranteed” or “mandatory” bonus is one that will always be greater than $0. But the Settlement Agreement makes clear that bonuses are only “guaranteed” and “mandatory” in the sense that they are *not discretionary* (as Northstar had claimed in the underlying litigation). That does not mean Northstar must pay bonuses when the fund is empty; indeed, the Settlement Agreement states the opposite.

Plaintiff’s theory is also at odds with class counsel’s prior arguments to this Court. In their brief in support of final approval, class counsel acknowledged that bonus payments were guaranteed for only five years, and that subsequent payments would be subject to Northstar’s revenue:

> The Settlement . . . provides for: (1) the addition of a contractual settlement term that recognizes the Bonus in writing as long as Defendant or one of its beneficiaries own the loans; (2) guaranteed payments *over the next five years* totaling nearly ten million dollars; (3) a formula that calculates amounts due and owing toward the Bonus in excess of the guaranteed payments *to be paid from Defendant’s excess revenue* <u>*should Defendant’s performance allow for such payments*</u>; and (4) enhanced payments on all loans sold to third parties

that are not Defendant's beneficiaries.

Mem. in Supp. of Mot. for Final Approval at 2, No. 08-md-01990 (D. Minn. Mar. 1, 2010), ECF No. 47 (emphasis added). Similarly, class counsel acknowledged that the bonuses might shrink to nothing. *Id.* at 7 ("At its core, the Settlement provides that the Bonus is now a non-discretionary term of the Settlement contract (*unless certain adverse economic conditions occur* or an outright sale of a loan is effected)."); *id.* ("The Settlement eliminates Northstar's 'discretion' to cancel the Bonus (*subject to certain financial conditions* as outlined in the Agreement.") (emphasis added)).

Plaintiff has not alleged any facts suggesting Northstar's likely (but uncertain) suspension of bonus payments would breach the Settlement Agreement. And, to the extent he claims a lifetime right to receive bonus payments, such a theory is barred by the Settlement Agreement's plain terms. Accordingly, should the Court deem Plaintiff's claim to be ripe, the Court should dismiss Count II for failure to state a claim.

IV. Plaintiff's consumer protection claims fail for myriad reasons.

In Counts III through VI, Plaintiff alleges that Northstar violated state consumer-protection statutes by: (1) suspending the bonus program in willful violation of the student loan agreements and the Settlement Agreement; and (2) misrepresenting that bonuses were guaranteed under all circumstances and failing to disclose that they were not guaranteed under all circumstances. Compl. ¶¶ 68, 72, 81, 90. These claims fail for the reasons explained below.

A. Northstar's alleged breaches of contract do not support Plaintiff's statutory claims.

To the extent that Plaintiff claims that Northstar's alleged breach of contract constitutes an independent statutory violation, Plaintiff is wrong.

First, Plaintiff's breach-of-contract claims fail for the reasons explained above. Consequently, his breach-of-contract allegations cannot sustain his statutory claims.

Second, even if Plaintiff did breach its contract with Plaintiff, those breaches are not prohibited by statute. Wrongfully suspending (or indicating that it might suspend) the bonus program does not violate any statute Plaintiff cites. It is not a false or misleading representation or promise[2] or a deceptive practice;[3] it does not create a likelihood of confusion of misunderstanding;[4] and it does not involve drafting[5] or inserting unconscionable terms[6] into a contract. In short, as courts have repeatedly recognized, a breach of contract—without more—does not violate these statutes. *E.g. Cherne Contracting Corp. v. Wausau Ins. Cos.*, 572 N.W.2d 339, 343 (Minn. Ct. App. 1997) ("[A] party is not entitled to recover tort damages for a breach of contract, absent an 'exceptional case' where the breach of contract constitutes or is accompanied by an independent tort."); *Ansari v. NCS Pearson, Inc.*, No. CV 08-5351, 2009 WL 10678873, at *2 (D. Minn. Mar. 30, 2009) (characterizing MCFA claims as statutory tort claims), *objections overruled,* No.

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[2] *See* Minn. Stat. § 325D.44, subd. 1(5), (7); § 325F.69; Cal. Civ. Code § 1770(a)(2), (5), (7), (9), (13), (14), (16); Cal. Bus. & Prof. Code. § 17200.

[3] *See* Minn. Stat. § 325F.69; Cal. Civ. Code § 1709; Cal. Bus. & Prof. Code. § 17200.

[4] *See* Minn. Stat. § 325D.44, subd. 1(13).

[5] *See* Cal. Civ. Code § 1668.

[6] *See* Cal. Civ. Code § 1770(a)(19).

CV 08-5351, 2009 WL 2337137 (D. Minn. July 23, 2009); *Baba v. Hewlett-Packard Co.*, No. C 09-05946 RS, 2010 WL 2486353, at *4 (N.D. Cal. June 16, 2010) (CLRA); *Rosell v. Wells Fargo Bank, N.A.*, No. 12-cv-06321-JD, 2014 WL 4063050, at *6 (N.D. Cal. Aug. 15, 2014) (CUCL).

Third, all of these statutes require a showing that the plaintiff relied upon the alleged misconduct or that the alleged misconduct was intended to induce the plaintiff to act, actually induced the plaintiff to act, or otherwise had a causal connection to the plaintiff's subsequent actions. *Yarrington v. Solvay Pharm., Inc.*, No. A05-2288, 2006 WL 2729463, at *5 (Minn. Ct. App. Sept. 26, 2006) (MDTPA); *Grp. Health Plan, Inc. v. Philip Morris Inc.*, 621 N.W.2d 2, 13-14 (Minn. 2001) (MCFA); *Durell v. Sharp Healthcare*, 108 Cal. Rptr. 3d 682, 697 (Cal. Ct. App. 2010) (CLRA); Cal Bus. & Prof. Code § 17204 (CUCL). Here, Plaintiff does not (and cannot) allege that Northstar's purported breach of contract in February 2020 was intended to induce or has induced any particular conduct by Plaintiff or other putative class members.

For each of these independent reasons, Northstar's alleged breach of contract does not support any of Plaintiff's statutory claims.

B. Plaintiff does not state a viable claim based on Northstar's alleged misrepresentations or omissions.

Plaintiff also alleges that Northstar (i) falsely represented that his "interest rates . . . would be reduced by the T.H.E. Repayment Bonus" and/or (ii) failed to disclose that the bonus "could be revoked or modified at any time." Compl. ¶¶ 68, 72, 81, 90. Plaintiff does not identify any specific misrepresentation, but he nonetheless asserts that he relied on

these unspecified misrepresentations "when deciding to purchase the loans and bonus programs." Compl. ¶ 83. Plaintiff further alleges that he and putative class members would not have "purchased" the loans or would have negotiated better terms had they known the true nature of the loans, Compl. ¶¶ 84, 92, and that Northstar's conduct was designed "to induce Plaintiff and the other [putative] Class members to select their loans over competitors' loan products and services," *id.* ¶ 85.

These claims fail for at least four reasons: (1) they are barred by the Class Settlement; (2) Plaintiff fails to allege any act of misrepresentation, much less with particularity; (3) Plaintiff fails to allege circumstances giving rise to a duty to disclose; and (4) at least one of the California statutes Plaintiff cites, the CLRA, does not apply to loans.

1. Plaintiff released these claims by remaining in the Settlement Class.

To the extent Plaintiff asserts claims based on Northstar's representations or omissions in marketing the bonus program, he released any such claims by remaining in the Settlement Class. Under the plain terms of the Settlement Agreement, the "Settled Claims" include all claims related to "the Bonus, *including without limitation the marketing and advertising of the Bonus*" and "Settlement Class Members' *decision to enter into a Northstar-originated student loan because of the Bonus.*" Compl. Ex. B at § II.A.27 (emphasis added). The Settled Claims also included claims based on "any facts, circumstances, transactions, events, occurrences, acts, omissions or failures to act related to the Bonus that are alleged in the Action." *Id.* at § II.A.27. And the class released all claims that they "ever had, now have, or hereafter can, shall, or may have against [Northstar], whether known or unknown, that relate in any way to the facts, occurrences,

transactions, other matters alleged in the Litigation, *or that could have been asserted* in the Litigation." Final Approval Order at 8-9, No. 08-md-01990 (D. Minn. Apr. 8, 2010), ECF No. 75 (emphasis added).

Thus, because Counts III through VI are based on alleged misrepresentations and omissions about the bonus program, these claims are barred by the Settlement Agreement, Final Approval Order, and the doctrine of *res judicata*. *See In re Gen. Am. Life Ins. Co. Sales Practices Litig.*, 357 F.3d 800, 803 (8th Cir. 2004) (holding that class action settlement barred class members' subsequent claim under the doctrine of *res judicata*).

2. Plaintiff does not allege any misrepresentation.

Moreover, Plaintiff has not met the basic pleading standard—much less the heightened standard for fraud under Rule 9(b)—to support his misrepresentation claims. Plaintiff does not allege a single instance in which Northstar affirmatively misrepresented anything about the bonus program—much less "who, what, where, when and how" required by Rule 9(b). *See Drobnak*, 561 F.3d at 783 (explaining that Rule 9(b) requires allegations of who, what, where, when, and how). Instead, Plaintiff relies on conclusory assertions that, "[a]t all relevant times, Northstar misrepresented that Plaintiff and Class Members would be entitled to the promised bonus as long as they made their payments

on[] time and in full." Compl. ¶ 82. Such conclusions are not sufficient to meet any pleading standard, much less the Rule 9(b) standard. *See Twombly*, 550 U.S. at 555.[7]

3. Plaintiff does not allege circumstances giving rise to a duty to disclose.

Plaintiff also does not allege (much less with particularity) any circumstance giving rise to a duty to disclose. This requires dismissal of his consumer protection claims to the extent he alleges fraudulent omission.

To prevail on a fraudulent omission theory, Plaintiff must show special circumstances giving rise to a duty to disclose. *Graphic Commc'ns Local 1B Health & Welfare Fund A v. CVS Caremark Corp.*, 850 N.W.2d 682, 696 (Minn. 2014) (MCFA); *Wilcox v. State Farm Fire & Cas. Co*., No. CV 14-2798, 2015 WL 927093, at *8 (D. Minn. Jan. 16, 2015) (MDTPA), *report and recommendation adopted in relevant part*, 2015 WL 927342 (D. Minn. Mar. 4, 2015); *Baba*, 2010 WL 2486353, at *3, *7 (CLRA and CUCL). Under the relevant Minnesota statutes, such a duty exists only if there is a special relationship between the parties, as when (a) the parties have a confidential or fiduciary relationship; (b) the defendant has special and exclusive knowledge of material facts; or (c) the defendant's partial representations are misleading without the disclosure. *Graphic Commc'ns*, 850 N.W.2d at 695 (MCFA); *see Wilcox*, 2015 WL 927093, at *8 (MDTPA). Under the relevant California statutes, such a duty exists in the additional circumstances in

[7] Because Plaintiff does not identify a single misrepresentation or omission, much less with any particularity, Northstar cannot assess whether Plaintiff's claims are time-barred. Northstar reserves the right to assert a statute of limitations defense if Plaintiff later identifies the purported acts of misrepresentation or omission.

which "the defendant actively conceals a material fact from the plaintiff." *Baba*, 2010 WL 2486353, at *3, *7 (CLRA and CUCL).

Plaintiff has not adequately alleged any of these circumstances:

First, Plaintiff does not allege any fiduciary relationship between the parties.

Second, Plaintiff does not allege that Northstar had exclusive knowledge of the fact that the bonus program could be discontinued under certain circumstances. Indeed, any such claim would fly in the face of the Settlement Agreement, which makes clear that bonus payments were contingent on financial conditions.

Third, Plaintiff does not allege that Northstar made any misleading partial representations about the bonus. Plaintiff merely states that he had an unspecified phone call with an unnamed Northstar employee, during which the employee "assured [Plaintiff] that his understanding of the T.H.E. Program was correct" but did not say that "[Northstar] could *revoke* the T.H.E. Program *for any reason*." Compl. ¶ 16 (emphasis added). This is a red herring. Northstar's February 2020 letter does not "revoke" the bonus program; it merely predicts that continued loss of funding will make bonus payments impossible. Beyond that, Northstar does not claim an unqualified right to "revoke" the bonuses. Its alleged failure to disclose such a right thus could not have misled Plaintiff.

Fourth, Plaintiff provides no facts to support his conclusory allegation that Northstar actively concealed the fact (apparent on the face of the Settlement Agreement) that the bonuses could be discontinued under some circumstances. *See* Compl. ¶ 82.

In short, Plaintiff has not alleged any circumstances giving rise to a duty to disclose. Thus, to the extent his statutory claims are not barred by the ripeness doctrine or the Settlement Agreement, he still has not alleged viable claims based on alleged omissions.

4. The CLRA does not apply to Plaintiff's loan.

Finally, Plaintiff's CLRA claim fails for the additional reason that the CLRA does not apply to financial products like student loans. A plaintiff may bring a claim under the CLRA when "any person" uses a statutorily prohibited trade practice "in a transaction . . . that results in the sale or lease of *goods or services* to any consumer." Cal. Civ. Code § 1770(a) (emphasis added). The CLRA defines "goods" as "tangible chattels bought or leased," and "services" as "work, labor, and services for other than a commercial or business use, including services furnished in connection with the sale or repair *of goods*." Cal. Civ. Code § 1761(a), (b) (emphasis added).

Plaintiff appears to concede, as he must, that his loan is not a "good" (a "tangible chattel bought or leased") but argues that it is a service because, "in addition to the credit itself, the loan packages at issue and sold to Plaintiff and the Class included the following services: management of the T.H.E. Program, application of the bonuses earned under the program, customer service and counseling regarding the terms of the T.H.E. Program and loan servicing." Compl. ¶ 78. Plaintiff's theory is based on outdated California law.

At one time, California courts held that financial products like loans constituted "services" under the CLRA if they were *accompanied by* services beyond a credit transaction. *See Becker v. Wells Fargo Bank, N.A., Inc.*, No. 2:10-cv-02799, 2011 WL 1103439, at *13 (E.D. Cal. Mar. 22, 2011) (describing the evolution of the law). But the

California Supreme Court has held that another financial product (life insurance products) were *not* "goods or services" within the meaning of the CLRA by virtue of the fact that they were accompanied by ancillary services. *Fairbanks v. Superior Court*, 205 P.3d 201, 203-06 (Cal. 2009) (holding that life insurance is not a tangible good and any related services therefore are not "in connection with" a good). As the California Supreme Court explained:

> [A]ncillary services are provided by the sellers of virtually all intangible goods—investment securities, bank deposit accounts *and loans*, and so forth. The sellers of virtually all these intangible items assist prospective customers in selecting products that suit their needs, and they often provide additional customer services related to the maintenance, value, use, redemption, resale, or repayment of the intangible item. Using the existence of these ancillary services to bring intangible goods within the coverage of the Consumers Legal Remedies Act would defeat the apparent legislative intent in limiting the definition of "goods" to include only "tangible chattels."

Id. at 206 (emphasis added). Numerous courts have applied the rationale of *Fairbanks* to dismiss CLRA claims related to loans. *See, e.g.*, *Alborzian v. JPMorgan Chase Bank, N.A.*, 185 Cal. Rptr. 3d 84, 93 (Cal. Ct. App. 2015) ("*Fairbanks* applies with equal force to lenders."); *Mazonas v. Nationstar Mortgage LLC*, No. 16-cv-00660, 2016 WL 2344196, at *1, *3-4 (N.D. Cal. May 4, 2016) (holding that "the CLRA does not apply to intangible products, like home loans, or ancillary services connected with those goods" and collecting cases).

Thus, Plaintiff's claims do not relate to a "good or service" within the meaning of the CLRA, and his CLRA claim must be dismissed.

CONCLUSION

For the reasons stated herein, Northstar respectfully requests that the Court dismiss Plaintiff's claims in their entirety.

Dated: May 15, 2020

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