UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No.: 0:20-cv-60814-RKA

KAREEM BRITT and MONIQUE LAURENCE, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

IEC CORPORATION d/b/a INTERNATIONAL EDUCATION CORPORATION, and IEC US HOLDINGS, INC. d/b/a FLORIDA CAREER COLLEGE,

Defendants.

DEFENDANTS' REPLY IN SUPPORT OF THEIR JOINT MOTION TO COMPEL ARBITRATION OR IN THE ALTERNATIVE TO DISMISS PLAINTIFFS' COMPLAINT

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INTRODUCTION

Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Compel or, in the Alternative, Motion to Dismiss ("Opposition") misses the mark. Long on innuendo and hyperbole, but short on facts, the Complaint, and now the Opposition, attempt to divert the Court's attention away from the plain language of the Enrollment Agreements and arbitration provisions, which each plaintiff voluntarily signed and initialed. As to the Motion to Compel Arbitration, Plaintiffs fail to overcome the heavy presumption under the Federal Arbitration Act ("FAA") in favor of arbitrability and that courts resolve all doubts in favor of arbitration. Plaintiffs do not dispute the existence of their arbitration agreement or that the FAA applies.[1] Rather, Plaintiffs attempt to circumvent arbitration by arguing that: (1) FCC's May 2019 "Notice Regarding Borrower Defense Claims" ("Notice") precludes arbitration of their claims because they are not within the scope of claims the parties agreed to arbitrate and that Defendants should be estopped or deemed to have waived arbitration by the Notice; and (2) that their claims should not be compelled to arbitration because they are "borrower defense claims" as defined by 34 C.F.R. § 685.300(i). Plaintiffs' arguments are contrary to law and should be rejected. Likewise, Plaintiffs merely reinforce the same standing and pleading deficiencies in the Complaint that Defendants challenge in the Motion to Dismiss, offering no reason why the Court should forgive here what are routinely clear grounds for dismissal. For the reasons stated herein and in the originating Motion, the Court should grant Defendants' Motion to Compel Arbitration or, in the alternative, the Motion to Dismiss.

MOTION TO COMPEL ARBITRATION

I. Plaintiffs' reliance on the Notice is a red herring and of no effect.

A. The Notice has no impact on the parties' arbitration agreements.

Contrary to Plaintiffs' contention, the Notice, provided long after execution of the Enrollment Agreements, does not modify the arbitration agreements. It is a fundamental principle

[1] Plaintiffs' request for a jury trial under 9 U.S.C. § 4 must be denied. (Opp. at 30.) Only where a party denies existence of an agreement to arbitrate does it have a statutory right to a jury trial. *Burch v. P.J. Cheese Inc.*, 861 F.3d 1338, 1347 (11th Cir. 2017); *see also Parris v. Dean Witter Reynolds, Inc.*, 659 F. Supp. 928, 930 (N.D. Ga. 1987). It is undisputed the parties entered into arbitration agreements; the only disputed legal issue is the scope of the arbitration agreement, which a Court, not a jury, decides. *See Int'l Asset Mgmt., Inc. v. Holt*, 487 F. Supp. 2d 1274, 1287–88 (N.D. Okla. 2007); *see also Johnson v. Carter*, No. 2:11-CV-493-WKW, 2012 WL 666089, at *6 (M.D. Ala. Feb. 13, 2012), *adopted by* 2012 WL 652225 (M.D. Ala. Feb. 29, 2012); *Bender v. Smith Barney, Harris Upham & Co., Inc.*, 789 F. Supp. 155, 158–59 (D.N.J. 1992).

of contract law that a promise must be supported by consideration in order to be enforceable; this applies equally to contract modifications. *See Solnes v. Wallis & Wallis, P.A.*, 15 F. Supp. 3d 1258 (S.D. Fla. 2014), *aff'd*, 606 F. App'x 557 (11th Cir. 2015). Plaintiffs do not dispute the absence of consideration for the Notice. Rather, according to Plaintiffs, where a contract provides for modification and the parties later modify the terms of the contract, no new consideration is needed. (Opp. at 6.) Yet, the Enrollment Agreements do not provide for future modification. Plaintiffs rely on language in the Catalog that refers to educational programmatic changes, *not* contractual rights.[2] (Opp. at 5–6 (citing ECF No. 24-2, at 31).) By its terms, the language relied upon relates to modifications to *the Catalog*, not the Enrollment Agreement. Even if deemed to have contractual effect, which it does not, the Notice is also irrelevant. By its terms, the Notice was clearly provided pursuant to the Borrower Defense Regulations ("BDR"), (*see* ECF No. 30-1), and its language mirrors verbatim the language mandated by the BDR, *see also* 34 C.F.R. 685.300(e)(3)(iii)(B), (f)(3)(iii)(B). Because Defendants only seek arbitration of claims the Court determines are not borrower defense claims, Plaintiffs' reliance on the Notice to overcome the arbitration agreements is irrelevant. Plaintiff must be compelled to arbitrate their claims against Defendants on an individual basis.[3]

B. Plaintiffs' contention that the Notice precludes arbitration of all claims based on the doctrines of promissory estoppel and waiver is without merit.

Plaintiffs cannot establish promissory estoppel. (Opp. at 7.) As an initial matter, Plaintiffs cannot plausibly allege they relied on the Notice in deciding whether to sign the Enrollment Agreement. The Notice was provided in May 2019, long after Laurence graduated and

[2] The language relied on by Plaintiffs provides "[t]he College is required to make changes in programs or policies when ongoing federal, state, or accrediting changes require such changes. These changes may affect students currently in attendance at the time the change is made. ***Changes will be published in a revision to the Catalog***." (*Id.* (emphasis added).)

[3] Plaintiffs contention that IEC cannot move to compel arbitration because it is not a party to the contract, (*see* Opp. at 4, n1), ignores the express language of the arbitration agreement which extends to "any of its *parents, subsidiaries, affiliated entities*, officers, directors, agents or employees, without limitation . . . ." (ECF No. 24-1, at 5 (emphasis added).) This broad language encompasses IEC, as FCC's parent company. And, because Plaintiffs' claims arise solely from their enrollment with FCC, IEC is an intended third-party beneficiary to the arbitration agreement. *See Zac Smith & Co. v. Moonspinner Condo. Ass'n, Inc.*, 472 So. 2d 1324, 1324–25 (Fla. 1st DCA 1985) ("Section 682.03, Florida Statutes (1983), applies to third-party beneficiaries to a contract containing an arbitration clause, such as in the instant case, and subjects the third-party beneficiary to the arbitration agreement."). Accordingly, IEC may move to enforce the arbitration agreement.

approximately one month before Britt's graduation. Since each Plaintiff's contract had been fully or substantially performed in May 2019, they could not have relied on the Notice in connection with enrollment or continued enrollment. Plaintiffs' contention that they detrimentally relied on the Notice by having to expend (lawyer) resources commencing the instant lawsuit is also without merit. Setting aside the absurdity and implausibility of this argument, promissory estoppel does not apply. Plaintiffs must establish: (1) detrimental reliance on a promise made by a defendant; (2) defendant reasonably should have expected the promise to induce reliance in the form of action or forbearance on the part of a plaintiff or a third person; and (3) injustice can be avoided only by enforcement of the promise against a defendant. *See Uphoff v. Wachovia Sec., LLC*, No. 09-80420-CIV, 2009 WL 5031345, at *4 (S.D. Fla. Dec. 15, 2009). Plaintiffs cannot establish detrimental reliance based on the mere filing of a lawsuit in court in contravention of the parties' arbitration agreements, particularly after the agreements have been performed. Moreover, Defendants could not have reasonably expected Plaintiffs to misconstrue the scope of arbitrable claims. Finally, there is no prejudice to Plaintiffs in arbitrating their claims pursuant to the arbitration agreements and regulations. Presumably each Plaintiff will rely on the allegations in the complaint and any factual investigation in individual arbitration. Any "prejudice" results *solely* from Plaintiffs filing a complaint in court in breach of their arbitration agreements.

Likewise, Plaintiffs cannot establish waiver. "In considering waiver, ... 'questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration,'" and thus "'the party who argues waiver bears a heavy burden of proof."' *Burch*, 861 F.3d at 1351 (internal citations omitted) (*citing Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). The Notice states that Defendants will not compel arbitration of borrower defense claims. Here, Defendants seek to compel arbitration *only* as to *non-BDR claims*. The issue, then, is not whether the Defendants waived their right to arbitrate borrower defense claims—which they did not—but whether certain of the claims asserted by the Plaintiffs in this case, in fact, constitute borrower defense claims. Any claims determined by this Court not to be borrower defense claims are subject to arbitration pursuant to the parties' bargained for agreements.

II. <u>The scope of arbitrable claims are those the Court deems non-borrower defense claims.</u>

Plaintiffs advance a tortured construction of the BDR in an attempt to avoid their binding arbitration agreements, (*see* Opp. at 9–12), which should be rejected. The plain language of the BDR establishes Plaintiffs' claims do not fall within the definition of a borrower defense claim.

A. The BDR regulation expressly excludes breach of contract and misrepresentation claims from the definition.

Plaintiffs misconstrue the definitions of "borrower defense" and "borrower defense claims." When interpreting a regulation, "it is axiomatic that a court must begin with the plain language of the [regulation]." *BellSouth Telecomm. v. Town of Palm Beach*, 252 F.3d 1169, 1187 (11th Cir. 2001). The BDR only prevents institutions from enforcing pre-dispute arbitration agreements against plaintiffs who bring a "borrower defense claim," defined by the regulations as "a claim that is or could be asserted as a borrower defense as defined in § 685.222(a)(5), including a claim ***other than one based on § 685.222(c) or (d)*** that may be asserted under § 685.222(b) if reduced to judgment." 34 C.F.R. § 685.300(i)(1) (emphasis added). This definition expressly excludes Plaintiffs' claims for breach of contract and misrepresentation. 34 C.F.R. § 685.222 delineates the types of claims a student may bring administratively before the Department. A "borrower defense" is a defense to repayment of amounts owed on a Direct Loan or a right to recover amounts previously paid based on an "act or omission of the school attended by the student that relates to the making of a Direct Loan for enrollment at the school or the provision of educational services for which the loan was provided." 34 C.F.R. § 685.222(a)(5). Specifically *excluded* from the definition of "borrower defense" are claims based on § 685.222(c) (breach of contract) and 685.222(d) (substantial misrepresentation). 34 C.F.R. § 685.300(i).

The scope of borrower defenses available to students to assert with the Department to avoid repayment of their student loans is far broader than the scope of "borrower defense claims" for which institutions participating in the Direct Loan program agree not to arbitrate pursuant to pre-dispute arbitration agreements. *See* 34 C.F.R. §§ 685.222; 685.300. The definitions for a "borrower defense" and "borrower defense claim" are separate and distinct. The effect of the language of § 685.300 and § 685.222 is that a claim for breach of contract or substantial misrepresentation based on a borrower defense is within the purview of claims to be filed with and resolved by the Department.[4] It necessarily follows that any non-borrower defense claim for contract breach or misrepresentation against an institution, as alleged by Plaintiffs, are arbitrable.

[4] For example, § 685.222 sets forth specific criteria and standards to be applied by the Department for a borrower defense based on breach of contract or substantial misrepresentation. § 685.222(c)–(d). Those claims have their own statute of limitations, evidentiary standards, and relief.

B. Plaintiffs ignore basic principles of statutory interpretation.

Plaintiffs contend that the language of 34 C.F.R. § 685.300(i)(1) compels the conclusion that misrepresentation and breach of contract claims (Counts I and II) are borrower defense claims and, thus, not arbitrable. Plaintiffs contend the phrase "*including a claim other than one . . .*" as being inclusive of such claims, rather than exclusive. (Opp. at 9–10.) Such a reading is precisely *contrary* to how that provision is written, principally because Plaintiffs focus on "including" rather than "other than," words of exclusion.[5] Plaintiffs' interpretation would render the "other than" language superfluous and meaningless.[6] Each word of the regulations must be given effect. *See U.S. v. Canals-Jimenez*, 943 F.2d 1284, 1287 (11th Cir. 1991), *see also CBS Inc. v. PrimeTime 24 Joint Venture*, 245 F.3d 1217, 1222 (11th Cir. 2001). The words "other than" in § 685.300(i) act to carve out, not encompass, claims based on § 685.222(c) or (d). Plaintiffs also ignore the introductory language ("For the purposes of paragraphs (d) through (h) of this section," 34 C.F.R. § 685.300(i)(1)) which provides the precise context to which the definition of borrower defense claim applies. The BDR, upon which institutions agree not to seek enforcement of pre-dispute arbitration agreements and class action waivers, applies only to borrower defense claims as defined in 34 C.F.R. § 685.300(i)(1), not those expressly excluded.

C. Plaintiffs' claims are not borrower defense claims.

As set forth in the moving papers, none of Plaintiffs' claims are borrower defense claims. Counts I through III are premised on allegations of general misrepresentations and breach of contract. Plaintiffs assert garden-variety state law claims that are not tied to the making of a Direct Loan. In addition, claims for breach of contract and misrepresentation are specifically excluded

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[5] *See, e.g.*, *Demko v. United States*, 44 Fed. Cl. 83 (1999), *aff'd*, 216 F.3d 1049 (Fed. Cir. 2000) ("Doctrine of the last antecedent" states that qualifying words, phrases and clauses in a statute must be applied to the words or phrases immediately preceding them and are not to be construed as extending to and including others more remote); *State Farm Fire & Cas. Co. v. Zebrowski*, 706 So. 2d 275, 277 (Fla. 1997) ("While the words 'any person' are all-inclusive, it is necessary to consider what those words modify in order to determine the particular persons authorized to pursue the various claims authorized by [the statute at issue]").

[6] Plaintiffs' citation to Department Guidance is misplaced. The Guidance addresses internal dispute procedures, not arbitration, which is external, separate, and distinct. The Guidance prohibits a school from requiring a student to pursue a complaint based upon a borrower defense claim through an *internal dispute process* before the student presents the complaint to an accrediting agency or government agency authorized to hear the complaint. Thus, this guidance is intended to address the Department's administrative process, not arbitration.

from the definition of a borrower defense claim.[7] The remaining claims, premised on allegations of discrimination, do not relate to the making of a federal loan, and do not fall within the definition of a borrower defense claim. In addition, these claims have their own unique statutory scheme and remedy. Each of Plaintiffs' claims, which fall outside the scope of a borrower defense claim, can be properly resolved through individual arbitration.

Plaintiffs' attempt to distinguish *Carr v. Grand Canyon*., No. 19-13639, 2019 U.S. Dist. LEXIS 194520 (N.D. Ga. Aug. 19, 2019), fails. (*See* Opp. at 8, n3.) The district court's decision in *Carr* sets forth a thorough analysis and interpretation of the definition of a borrower defense claim. The Notice contains the exact language from 34 C.F.R. § 685.300(e)(3)(iii)(B) and (f)(3)(iii)(B). Moreover, it specifically stated that it was being provided pursuant to the BDR. (ECF No. 30-1.) Plaintiffs' reliance on *Ward v. Grand Canyon*, No. 17-A-03474-2 (Gwinnett Sup. Ct. Dec. 6, 2019), an unpublished state court decision that has not been relied on by any other court, is not persuasive. The allegations in *Ward* pertained to the school's refund policy for student loans in which plaintiff sought to represent a class of all students whose tuition had not been properly refunded under the federal student loan regulations. The opinion cited no authority for this interpretation and instead focused on its perceived intent of the regulations, contrary to the law.[8] For the reasons set forth above and in the moving papers, Plaintiffs claims must be compelled to individual arbitration.

MOTION TO DISMISS

I. Plaintiffs' claims as pleaded fail to establish Article III standing.

Plaintiffs' contention that Defendants' standing challenge is premature and wrong, (*see* Opp. at 13–15), ignores well-settled caselaw that Article III standing is a threshold issue appropriate for consideration at the motion to dismiss phase. *See, e.g., Ohio State Troopers Ass'n v. Point Blank Enters.*, 347 F. Supp. 3d 1207, 1221 (S.D. Fla. 2018); *Sanchez-Knutson v. Ford*

[7] Plaintiffs' negligence claim is simply a restatement of their breach of contract and misrepresentation claims as they allege that FCC made promises about job placement and "breached" its duty regarding the same, (Compl. ¶¶ 245–247), and is also excluded from being a borrower defense claim under § 685.300(i)(1).

[8] The court's analysis is also incorrect, as evidenced by its finding that borrower defense claims are inarbitrable, which the Department itself rejects. 81 Fed. Reg. 75,926, 76,023 (Nov. 1, 2016) ("Department does not have the authority, and does not propose, to displace or diminish the effect of the FAA. These regulations do not invalidate any arbitration agreement . . ."), 75,924–25. Borrower defense claims are not inarbitrable, it is just an administrative consequence.

Motor Co., No. 14-61344-CIV, 2015 U.S. Dist. LEXIS 181103, at *8 (S.D. Fla. July 21, 2015). Plaintiffs' Article III standing begins and ends with their respective programs. Each plaintiff's experience with a single program at a single location does not support standing to assert claims based on the quality of facilities at other locations, or the quality of instruction, outcome, or costs for other programs. (ECF No. 24.) Plaintiffs also plead for alternate class definitions if the original class definitions fail, each limited to one program and each having a race discrimination subclass. (*See* Compl. ¶¶ 230–31.) Because Laurence advances no race discrimination allegations, an All Medical Assistant Program race discrimination subclass is not supported by a single plaintiff and must be dismissed. (*See id*.; *see also* ECF 24, at 16–17.) Plaintiffs' rebuttal that their challenge is to a class-wide policy or practice, (Opp. at 14-15), does not support the class claims because they would be impossible to maintain. *See, e.g.*, *Quilty v. Envision Healthcare Corp.*, No. 8:18-cv-341-T-33CPT, 2018 WL 2445824, at *2–4 (M.D. Fla. May 31, 2018) (holding Article III standing was lacking at the motion to dismiss stage under Rule 23's typicality requirement because plaintiff participated in a different insurance program than some putative class members).

II. Plaintiffs' attempts to justify multiple forms of shotgun pleading fall flat.

Plaintiffs' contention that their Complaint is not a shotgun pleading, (Opp. at 15-17), is belied by a plain reading of it. Thirty-seven pages of factual narrative, with only six pages of claims-specific allegations, force Defendants to wade through hundreds of irrelevant allegations in an attempt to defend itself. Plaintiffs also impermissibly group Defendants together, alleging both did everything, (*see, e.g.*, Compl. ¶¶ 48–49, 245–46), and have no supportable defense for this practice. Allegations about control and management are inadequate, (*see* Opp. at 16), providing no legal or factual support to justify how they could state a claim against IEC pleading in this way, (*see* ECF No. 24, at 18–20). And Plaintiffs fail to provide any justification for inclusion of multiple FDUTPA allegations within a single count, rendering the claim impossible to maintain. The Complaint must be dismissed as an impermissible shotgun pleading. *See Weiland v. Palm Beach Cty. Sheriff's Office*, 792 F.3d 1313, 1321–23 (11th Cir. 2015); *Brown v. Air Line Pilots Ass'n*, No. 19-cv-60242-RKA, 2019 U.S. Dist. LEXIS 164483 (S.D. Fla. Sept. 24, 2019).

III. Plaintiffs fail to state a claim under any cause of action.

A. Counts I and VII fail to state a claim for a violation of FDUTPA.

Contrary to Plaintiffs' contention, (Opp. at 19), Defendants are aware of the *Iqbal/Twombley* plausibility standard applicable to federal court pleadings, which Plaintiffs fail.

Defendants are also clear on the weight of authority holding Rule 9(b) applies to all claims sounding in fraud, including under FDUTPA.[9] (Opp. at 17–18.) Fundamentally, ignoring Plaintiffs' self-serving hyperbole, a business delivering information in a way favorable to it is not, in and of itself, a FDUTPA violation and is properly dismissed if sufficient facts beyond these conclusory allegations are not pleaded. *See Casey v. Fla. Coastal Sch. of Law, Inc.*, No. 3:14-cv-1229, 2015 WL 10096084, *15 (M.D. Fla. Aug. 11, 2015). Plaintiffs' attempts to distinguish *Casey* are unpersuasive. Plaintiffs were not "unclear" about how to access statistical data about FCC; the same sources cited were recommended in the Course Catalog, which Plaintiffs affirmed they read, understood, and agreed to. (*See* ECF No. 24, 4, 7–8.) Counts I and VII fail.

B. Count II for breach of contract fails because the claims are directly contradicted by the controlling contract.

Plaintiffs identify no actionable statements in support of their breach of contract claim. (*See* ECF No. 24, at 21–22.) Also contrary to Plaintiffs' contention, (Opp. at 21–22), the terms of the Enrollment Agreement contradict Plaintiffs' allegations and should control. *See Degirmenci v. Sapphire-Fort Lauderdale, LLP*, 693 F. Supp. 2d 1325, 1341–42 (S.D. Fla. 2010). Some of the contradictory terms are plainly apparent: mutual disclaimers of verbal statements or pre-contractual promises; reservations of rights regarding periodic changes to courses, materials, staff, or program content; and explanations that placement assistance was offered but permanent job placement was not guaranteed. (*See* ECF No. 24, at 7–8, 21–22.) Britt also allegedly was told that job placement was provided; there was no disclosure of job placement rates so his reasoning for needing to make additional disclosures is moot. (*See* Compl. ¶ 171.) The Course Catalog informed both Plaintiffs where to find employment and loan statistics, which they acknowledged. (ECF No. 24, at 7–8.) Count II fails.

C. Count III fails to state a claim for negligence.

Plaintiffs' allegations under Fla. Stat. § 1005.04 do not support an actionable duty under a negligence theory. Defendants are aware of no cases in which a court used this statute to supply the duty for a negligence or negligence per se action, or a private right of action. With no independent duty from the contractual terms, this claim should be dismissed. *See Everest Indem.*

[9] The weight of authority dictates that application of Rule 9(b) is tied to an analysis of the allegations on a case by case basis and those sounding in fraud, as Plaintiffs' FDUTPA claims do, are held to a heightened pleading standard. *See, e.g.*, *Leon v. Cont'l AG*, 301 F. Supp. 3d 1203, 1225–26 (S.D. Fla. 2017) (distinguishing types of FDUTPA claims and collecting cases).

Ins. Co. v. Cintas Corp. No.2, No. 19-cv-60405, 2019 U.S. Dist. LEXIS 90955, at *7–11 (S.D. Fla. May 28, 2019); *Crossroads Fin., LLC v. Alma-Mater Collection, Inc.*, No. 15-81095-CIV-MARRA, 2020 U.S. Dist. LEXIS 77317, at *13 (S.D. Fla. Apr. 30, 2020). Count III fails.

D. Counts IV and V fail to state a claim for violation of ECOA and Plaintiff fails to establish Defendants are "creditors."

Britt incorrectly argues that IEC and FCC are "creditors" under the ECOA. (Opp. 24-25.) There is no convincing caselaw to support that conclusion. Plaintiff's reliance on the words "other matters" from the regulation include investigation procedures, creditworthiness standards, terms of credit, furnishing credit information, altering credit, and collection procedures. As IEC/FCC have no authority to set these loan terms or to make any decisions extending credit, they cannot be creditors. Plaintiff's reliance on *Hargraves* is unavailing given the court there scrutinized loan terms issued by the defendant-lender that extended credit. *Hargraves v. Capital City Mortg. Corp.*, 140 F. Supp. 2d 7, 22–23 (D.D.C. 2000). All cases Plaintiff relies on *other than Brook v. Sistema Universitario Ana G Mendez*, No. 8:17-cv-171, 2017 WL 1743500 (S.D. Fla. May 4, 2017), involved mortgage lenders that extended credit directly, which is not the case under Plaintiffs' Complaint. *Brook* is a distinct outlier: its interpretation is skewed given the inapposite cases cited, and is undermined by a plain text reading of the statute and corresponding regulations. (*See* ECF No. 24, at 25–26.) There is no allegation Defendants extended credit under the federal loan programs, or that they engaged in activities attendant to doing so. The federal government and its approved lenders extend credit. *Educ. Credit Mgmt. Corp. v. Barnes*, 318 B.R. 482, 484 (S.D. Ind. 2004). There are no allegations those lenders specifically target a protected class. Moreover, Plaintiff cites to no "grossly unfavorable terms" sufficient to give rise to liability. Finally, the argument that the loans are designed to fail, (Opp. at 26), is facially implausible and absurd. Federal regulations require performance standards for default rates be met in order to participate in federal funding programs in order to maintain eligibility for federal student aid participation. (*See* ECF No. 24, at 25–26.) These metrics are regularly monitored. *See id.*; 34 C.F.R. § 668.200 *et seq.*; 20 U.S.C. § 1071 *et seq.* Counts IV and V both fail.

E. Counts VI and VII fail to plead facts to establish discrimination under Title VI or FDUTPA.

Britt's Title VI claim cannot withstand a facial challenge because it is impossible to determine the predicate for the claim from the face of the Complaint. The claim is premised on the same facts that are applicable to the main class as a whole. For example, based on Plaintiff's

allegations, none of the students received the product promised so there is no plausible inference to be made that others outside the protected class were treated more favorably. There are no allegations that Black students faced higher tuition (thus resulting in higher loans), nor that Black students were steered towards particular programs or were given different loan terms. *See Mumid v. Abraham Lincoln High Sch.*, 618 F.3d 789, 795 (8th Cir. 2010) (rejecting students claim that substandard programming was "strong evidence of intentional discrimination" based on national origin but failing to identify someone similarly situated whom the school treated more favorably; deficient programming in itself is not evidence of intentional discrimination). The argument that the loans are allegedly designed to fail (thus becoming an adverse action) is implausible and, currently, not pleaded. Plaintiff is not able to produce any binding authority on the issue of comparing the class's treatment to others and pleads no facts that lead to an inference of discrimination. *Brook* is once again an outlier as the only court in the country found to extend reverse redlining to Title VI claims. 2017 WL 1743500, at *10. Britt's FDUTPA claim is also unsupportable. (Opp. at 28-29.) In addition to the general pleading issues previously briefed, (ECF No. 24, at 20–23, 29), the predicate for the racial discrimination FDUTPA claim is an implausible ECOA claim and should be dismissed. *See Hunter v. Bev Smith Ford, LLC*, No. 07-cv-80665, 2008 WL 1925265, at *7 (S.D. Fla. Apr. 29, 2008). Counts VI and VII both fail.

F. Injunctive relief is an inappropriate remedy in this case.

Contrary to Plaintiffs' contention, (Opp. at 29–30), injunctive relief is improper. Plaintiff can cite to no binding, or adequately persuasive, authority to overcome recent pronouncements as to injunctive relief. *See AA Suncoast Chiropractic Clinic, P.A. v. Progressive Am. Ins. Co.*, 938 F.3d 1170 (11th Cir. 2019) (claim for injunctive relief was really damages claims in disguise and the class definition included only past activity). Plaintiff is not entitled to injunctive relief.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court compel individual arbitration as to all claims the Court determines are not borrower defense claims. In the alternative, Defendants respectfully request that the Court dismiss all claims in the Complaint with prejudice.

Dated: July 6, 2020

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 6, 2020, a true and correct copy of the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system, and that it is being served this date on all counsel of record via transmission of Notices of Electronic Filing generated by the CM/ECF system.

/s/ Christopher Oprison
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