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D. H.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT—CHANCERY DIVISION

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**17 CH 761**
	)	**Hon. Kathleen M. Pantle**
NAVIENT CORPORATION, SALLIE MAE BANK, NAVIENT SOLUTIONS, INC., PIONEER CREDIT RECOVERY, INC., and GENERAL REVENUE CORPORATION,	)	
	)	
Defendants.	)	

ORDER

Defendants Navient Corporation, Navient Solutions, Inc., Pioneer Credit Recovery, Inc., and General Revenue Corporation have moved to dismiss the complaint filed by Plaintiff, the People of the State of Illinois. Defendant Sallie Mae Bank has joined in this motion to the extent the arguments of the co-defendants apply to Sallie Mae Bank. Sallie Mae Bank has also filed a separate motion to dismiss which is the subject of a separate Order. This motion is brought pursuant to 735 ILCS 5/2-615, 2-619, and 2-603(b). Defendants contend that dismissal is appropriate because the claims brought by the Plaintiff are preempted by federal law, specifically whether the State's servicing claims are preempted by Section 1098g of the Higher Education Act of 1965 and the State's origination claims are expressly preempted or precluded by the federal Truth in Lending Act of 1968. Defendants also contend that Plaintiff has not pleaded a proper cause of action under the Illinois Consumer Fraud and Deceptive Business Practices Act, and that Plaintiff has violated section 2-603(b) of the Illinois Code of Civil Procedure by filing a complaint that does not comply with its dictates.

Defendants' motion to dismiss is denied. However, the Court is granting the separate motion to dismiss filed by Defendant Sallie Mae Bank (in a separate Order) pursuant to 735 ILCS 5/2-615 without prejudice and with leave to replead. Therefore, any responsive pleading otherwise due by these Defendants is stayed until Plaintiff files an amended complaint or notifies the Court that it does not intend to file an amended complaint. The Court will then set a date for a responsive pleading.

Background

General

The Illinois Consumer Fraud and Deceptive Business Practices Act ("ICFA") is a regulatory and remedial state statute designed to protect consumers, borrowers, and businessmen against fraud, unfair methods of competition, and other unfair and deceptive business practices. 815 ILCS 505/1 *et seq.* In considering whether state consumer protection claims are preempted, the Supremacy Clause of the Constitution makes federal law "the supreme Law of the Land." U.S. Const., art. VI, cl. 2. Under the supremacy clause, a federal enactment may preempt a state statute in three circumstances: (1) when Congress has expressly preempted state action (express preemption), (2) when federal regulation is so comprehensive that no room exists for supplementary state regulation or the field is "so dominant that it displaces state regulation on the same subject" (implied preemption), and (3) when state action actually conflicts with federal law (conflict preemption). *Resource Tech. Corp. v. Ill. Commerce Comm'n*, 354 Ill. App. 3d 895, 901 (1st Dist. 2004).

The Higher Education Act of 1965 (Pub.L. 89–329) (the "HEA") is the primary federal statute governing student lending. Title IV of the Higher Education Act deals specifically with student assistance and regulates the different grants to students and loan programs, which include the William D. Ford Federal Direct Loan Program and the Federal Family Education Loan Program. 20 U.S.C. § 1070. The Truth in Lending Act of 1968 (Pub.L. 90–321) (the "TILA") is a federal statute designed to assure a meaningful disclose of credit terms so that consumers will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect consumers against inaccurate and unfair credit billing and credit card practices. 15 U.S.C. § 1601(a). Among other requirements, the TILA requires creditors who deal with consumers to make certain written disclosures concerning finance charges and related aspects of credit transactions.

The Attorney General filed this lawsuit against the Defendants, Navient Corporation, Navient Solutions, LLC, Pioneer Credit Recovery, Inc., General Revenue Corporation (collectively "Navient ") and Sallie Mae Bank for violating the ICFA, by defrauding borrowers in the loan process from start to finish; from the risky subprime private loans they peddled to schools knowing that many would default, in order to use schools to gain access to federal loan volume with guaranteed repayment, to the deceptions they made to borrowers about federal repayment options and post-default rights. Navient moves to dismiss the State of Illinois' Complaint with prejudice pursuant to Section 2-619 and Section 2-615. Navient also moves to have the entire Complaint dismissed as defective due to violations of basic pleading rules under 735 ILCS 5/2-603(b).

The Complaint is divided into three categories of allegations: those relating to the origination of private student loans (Compl., ¶¶ 97-215), those relating to the servicing of federal and private student loans (Compl., ¶¶ 216-419), and those relating to debt collection (Compl., ¶¶ 420-65). Navient's Motion does not specifically address the State's allegations regarding the servicing of loans contained in ¶ 469(j)-(m) or the allegations regarding debt collection contained in ¶ 470.

Origination of Loans

Until approximately 1994, federal loans were almost exclusively originated and funded by private lenders, and guaranty agencies insured those funds, which were in turn, reinsured by the federal government. (Compl., ¶ 19). Although these Federal Family Education Loans ("FFEL loans") were funded by private lenders, if the borrower did not pay back the money, the lender would be reimbursed by the guaranty agency, which would in turn, be reimbursed by the federal government. (Compl., ¶ 19). Thus, the lender received the borrower's payments. (Compl., ¶ 19). In 1994, through the enactment of the William D. Ford Direct Student Loan Program, the federal government began originating loans directly to borrowers, called Direct Loans, thereby eliminating private entities as the middlemen. (Compl., ¶ 20). When borrowers make payments on Direct Loans, the federal government receives those payments. (Compl., ¶ 22). By 2010, the FFEL loans were eliminated as a federal program and replaced with the Direct Loan program. (Compl., ¶ 21). Nevertheless, loans made through the FFEL system still constitute more than twenty percent of outstanding student loans today, which equates to approximately $335 billion. (Compl., ¶ 24).

Federal student loans are funded or guaranteed by the federal government. (Compl., ¶ 8). For undergraduate education, federal student loans come in two main forms: subsidized and unsubsidized loans. (Compl., ¶ 25). Generally, on subsidized loans, the government pays the interest while the borrower is in school. (Compl., ¶ 26). On unsubsidized loans, the borrower accrues and pays all of the interest. (Compl., ¶ 26). Federal student loans are unique because the interest rates are lower and capped by the government, they come with a variety of repayment options, and they are primarily needs-based and made to borrowers regardless of credit history. (Compl., ¶¶ 14-16).

Unlike federal student loans, private student loans are not tied to, or guaranteed by the federal government. (Compl., ¶ 38). Rather, private loans are made by private institutions, usually to cover the gap between the cost of higher education and the federal aid available to a borrower. (Compl., ¶ 38). Private loans are almost always more expensive than federal loans and they almost always have interest rates that are substantially higher than federal student loans. (Compl., ¶ 41). Additionally, in contrast to the federal student loan interest rates set by Congress, private student loan interest rates fluctuate based on financial indexes such as the Prime rate or LIBOR. (Compl., ¶ 42). Many private student loans also come with variable, rather than fixed, interest rates. (Compl., ¶ 43). Private student loans constitute approximately 10-12% of the student loan market. (Compl., ¶ 40).

Private loans are extended to borrowers by private institutions, such as Sallie Mae Bank, based on the lender's assessment of the borrower's likelihood of repaying the loan. (Compl., ¶ 39). Private student loan lenders have to more fully evaluate a potential borrower's likelihood of repaying the loan because the loans are not guaranteed by the federal government – if a borrower does not repay the loan then the lenders lose money. (Compl., ¶ 29). Sallie Mae has securitized many of the private student loans it originated, including SLM Student Loan Trust 2010-B, containing 6,819 Illinois loans. (Compl., ¶ 45).

Servicing of Loans

The Department of Education contracts with private entities, such as Navient, for the management or "servicing" of federal student loans. (Compl., ¶ 27). Navient Solutions, Inc. is the largest servicer of federal student loans, servicing over $275 billion in federal loan value. (Compl., ¶ 222). Federal student loan servicers handle a multitude of issues for borrowers, including: collecting payments, providing repayment options to borrowers, facilitating the loan's payoff, and collecting on delinquent and defaulted loans. (Compl., ¶¶ 28, 219). There are several repayment options available for borrowers that are temporarily unable to make their loan payments. Forbearance allows borrowers to stop making principal and interest payments or to reduce their payments for a set period. 34 C.F.R. § 682.211(a)(1). Income-driven repayment ("IDR") programs permit borrowers to set their monthly payment amount to reflect their income. 34 C.F.R. § 685.209.

Navient also services private student loans. (Compl., ¶ 46). In contrast to federal loans, there are no standard repayment plans for private student loan borrowers. (Compl., ¶ 47). Therefore, private loan repayment plans are provided at the discretion of the servicer, sometimes with parameters set by the lender or current owner of the debt. (Compl., ¶ 48).

Defaulting of Loans

For federal loans, a borrower's loan is considered to be in default after there are no payments made on the loan for 270 days. (Compl., ¶ 32). Borrowers may have the opportunity to remove federal loans from their defaulted status using processes called "rehabilitation" or "consolidation." (Compl., ¶ 34). In order the collect on the defaulted loans, the government may garnish a borrower's wages without a court order and offset federal benefits to which the borrower is entitled and relies upon, such as social security income. (Compl., ¶ 35).

For private loans, the lender or servicer sets the time period of missed payments before default. (Compl., ¶ 49). For example, Navient gives a private loan borrower 212 days before the borrower is considered in default. (Compl., ¶ 50). Once a private loan borrower defaults, the loan is typically sent to a debt collector to attempt to collect on the loan. (Compl., ¶ 51). Besides paying on the loan or agreeing to a settlement of the debt, there are no standard options to get out of default unless additional options are offered by the servicer, lender or current owner of the debt. (Compl., ¶ 52). If a lender, servicer or debt collector decides to, it can sue a borrower or cosignor to collect on the private student loan debt. (Compl., ¶ 53).

Both federal and private student loans may be discharged in bankruptcy in extremely limited circumstances. (Compl., ¶¶ 36, 54).

Legal Standard

A Section 2-615 motion to dismiss challenges the legal sufficiency of a complaint based solely on defects on the face of the complaint. 735 ILCS 5/2-615; *In re Marriage of Van Ert*, 2016 IL App (3d) 150433, ¶ 14; *Jarvis v. S. Oak Dodge*, 201 Ill. 2d 81, 85-86 (2002). A cause of action should not be dismissed under Section 2-615 unless it is apparent that the respondent cannot prove any set of facts that would entitle her to relief. *In re Marriage of Van Ert*, 2016 IL App (3d) 150433, ¶ 14. Under Illinois' fact-pleading standard, the plaintiff must allege facts sufficient to bring a claim within a legally recognized cause of action. *City of Chi. v. Beretta U.S.A. Corp.*, 213 Ill. 2d 351, 368 (2004). "The requirement that a complaint set forth facts necessary for recovery under the theory asserted is not satisfied, in the absence of the necessary allegations, by the general policy favoring the liberal construction of pleadings." *Id.* (quoting *Teter v. Clemens*, 112 Ill. 2d 252, 256-57 (1986)). In considering a motion to dismiss, a court must disregard the conclusions that are pleaded and look only to well-pleaded facts to determine whether they are sufficient to state a cause of action against the defendant. *Id.* If not, the motion must be granted. *Id.*

In contrast, a Section 2-619 motion provides for the involuntary dismissal of a cause of action based on certain defects or defenses. 735 ILCS 5/2-619; *Borowiec v. Gateway 2000, Inc.*, 209 Ill. 2d 376, 383 (2004). Generally, Section 2-619 affords a "means of obtaining a summary disposition of issues of law or of easily proved issues of fact, with a reservation of jury trial as to disputed questions of fact." *Kedzie & 103rd Currency Exch. v. Hodge*, 156 Ill. 2d 112, 115 (1993). One of the enumerated grounds for a Section 2-619 dismissal is that the claim asserted against the defendant is barred by other affirmative matter thereby avoiding the legal effect of or defeating the claim. 735 ILCS 5/2-619(a)(9); *Abruzzo v. City of Park Ridge*, 231 Ill. 2d 324, 331 (2008). "Affirmative matter" in a section 2-619(a)(9) motion, is something in the nature of a defense which negates the cause of action completely ***." *Van Meter v. Darien Park Dist.*, 207 Ill. 2d 359, 367 (2003) (quoting *Ill. Graphics Co. v. Nickum*, 159 Ill. 2d 469, 486 (1994)). Thus, the moving party admits the legal sufficiency of the complaint, but asserts an affirmative defense or other matter to defeat the plaintiff's claim. *Id.* A litigant may combine a Section 2-615 motion to dismiss and a Section 2-619 motion for involuntary dismissal in one pleading. 735 ILCS 5/2-619.1; *Jenkins v. Concorde Acceptance Corp.*, 345 Ill. App. 3d 669, 674 (1st Dist. 2003). For purposes of both motions, the court accepts as true all well-pleaded facts and all reasonable inferences that can be drawn from those facts. *Jarvis*, 201 Ill. 2d at 86; *Van Meter v. Darien Park Dist.*, 207 Ill. 2d 359, 367 (2003).

Specifically, Navient asserts that the Attorney General's claims regarding origination of private loans in ¶¶ 468 (a)-(d) and claims regarding servicing of federal loans in ¶ 469(i) must be dismissed pursuant to Section 2-615. Additionally Navient contends that the rest of its servicing claims in ¶¶ 469 (a)-(h) must be dismissed pursuant to Sections 2-615 and 2-619.

FEDERAL SERVICING CLAIMS & THE HIGHER EDUCATION ACT

The Higher Education Act of 1965 (the "HEA") is the primary federal statute governing student lending. Pub. L. 89–329. President Lyndon B. Johnson initiated and passed the HEA as part of his "Great Society."[1] 20 U.S.C. § 1070. President Johnson believed that there was a strong demand for more higher education opportunities for lower and middle income families, program assistance for small and less developed colleges, additional and improved library resources at higher education institutions, and utilization of college and university resources to help deal with national problems like poverty and community development.[2] The HEA provides in its preamble that it exists "[t]o strengthen the educational resources of our colleges and universities and to provide financial assistance for students in postsecondary and higher education. 20 U.S.C. § 1071(a)(1). Title IV of the HEA deals specifically with student assistance and regulates the different grants to students and loan programs, which include: Federal Pell Grants, Federal Perkins Loans, the William D. Ford Federal Direct Loan Program ("Direct Loan Program"), and the Federal Family Education Loan Program ("FFELP").

Over the years, the HEA has been amended to provide greater opportunities for individuals to attend higher education institutions and to supply resources to improve college and university facilities. On August 24, 2008, the Higher Education Opportunity Act (HEOA) (P.L. 110-315) was enacted which reauthorized the HEA.[3] The HEOA requires that postsecondary institutions participating in federal student aid programs make certain disclosures regarding the terms of private loans and federal financial aid to students.[4]

Congress has the authority to preempt state law pursuant to the supremacy clause of the United States Constitution (U.S. Const., art. VI). *Valstad v. Cipriano*, 357 Ill. App. 3d 905, 922 (4th Dist. 2005). Under the supremacy clause, a federal enactment may preempt a state statute in three circumstances: (1) when Congress has expressly preempted state action (express preemption), (2) when federal regulation is so comprehensive that no room exists for supplementary state regulation or the field is "so dominant that it displaces state regulation on the same subject" (implied preemption), and (3) when state action actually conflicts with federal

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[1] Twinette L. Johnson, Education Law Symposium: ***Article: Going Back To The Drawing Board: Re-Entrenching The Higher Education Act to Restore its Historical Policy of Access***, 45 U. Tol. L. Rev. 545, 557-58 (2014); *see also* Aaron Cooley, *Higher Education* Act, http://lawhigheredu.com/75-higher-education-act-hea.html.

[2] Johnson, *supra* note 10, at 558; *see also The Early History of the Higher Education Act of 1965*, http://www.pellinstitute.org/downloads/trio_clearinghouse-The_Early_History_of_the_HEA_of_1965.pdf.

[3] U.S. Dep't of Educ., *Higher Education Opportunity Act – 2008*, https://www2.ed.gov/policy/highered/leg/hea08/index.html#dcl.

[4] *Id.*

law (conflict preemption). *Id.* (quoting *Resource Tech. Corp. v. Ill. Commerce Comm'n*, 354 Ill. App. 3d 895, 901 (2004)). Courts must presume that Congress did not intend to displace state law, unless that was Congress' clear and manifest purpose. *People v. Ebelechukwu*, 403 Ill. App. 3d 62, 64 (1st Dist. 2010) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). "Because the intent of Congress controls on issues of preemption, 'if the statute contains an express pre-emption clause, the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent.'" *Chambers v. Osteonics Corp.*, 109 F.3d 1243, 1246 (7th Cir. 1997) (quoting *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993)).

> Even when Congress has not completely displaced state regulation of a specific subject or object, state law is nullified to the extent that it actually conflicts with federal law. Actual conflicts arise when it is physically impossible to comply with both federal and state regulations or when state law interferes with the accomplishment and execution of the purposes and objectives of Congress.

Crain v. Lucent Techs., 317 Ill. App. 3d 486, 492, 250 Ill. Dec. 876, 882, 739 N.E.2d 639, 645 (2000) (citing *Kellerman v. MCI Telecomms. Corp.*, 112 Ill. 2d 428, 438 (1986); *Fidelity Fed. Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982)).

In order to support its preemption claim, Navient must prove that: (1) the HEA expressly preempts the ICFA; (2) Congress legislated so comprehensively in the area of student financial lending that the HEA occupies an entire field of regulation and leaves no room for state law; or (3) the ICFA conflicts with the HEA such that it is impossible for a party to comply with both, or ICFA is an obstacle to achievement of the objectives of HEA. In this Motion to Dismiss, Navient has only asserted that the HEA expressly preempts the State's allegations. (Reply Br., p. 10).

Analysis

Express Preemption

The only preemption provision implicated by Navient's Motion to Dismiss is Section 1098g, which provides in relevant part: "Loans made, insured, or guaranteed pursuant to a program authorized by Title IV of the Higher Education Act of 1965... **shall not be subject to any disclosure requirements of any State law.**"[5] 20 U.S.C. § 1098g (emphasis added).

[5] Section 1098g of HEA is entitled "Exemption from State disclosure requirements."

> The fundamental objective of statutory construction is to ascertain and give effect to the intent of the legislature. The best indication of legislative intent is the statutory language given its plain and ordinary meaning. When statutory language is plain and unambiguous, the statute must be applied as written without resort to aids of statutory construction.

People v. Kinzer, 232 Ill. 2d 179, 184 (2009) (citations omitted). Courts "may not depart from a statute's plain language by reading into it exceptions, limitations, or conditions the legislature did not express. Courts should not attempt to read a statute other than in the manner it was written." *Id.* at 184-85 (citations omitted). The statutory language in Section 1098g clearly preempts *any state disclosure* requirements. Thus, to the extent that the State alleged that Navient violated state disclosure requirements, Section 1098g would expressly preempt those claims.

The State argues that its servicing claims are not merely "disclosure" requirements and are clearly pled as deception claims under the ICFA. (Resp. Br., p. 13). The State contends that neither the Section 1098g nor any other section of the HEA addresses or sanctions the type of unfair and deceptive conduct at issue in the its student loan servicing allegations. (Resp. Br., p. 13).

Conversely, Navient argues that Section 1098g expressly preempts these particular ICFA claims because they seek to impose disclosure requirements that differ from the HEA's otherwise-comprehensive disclosure rules for federal student loans. (Mot. to Dismiss, p. 18-20). Thus, the issue is whether the State's claims are actually improper state disclosure requirements. Navient relies heavily on *Chae v. SLM Corp.*, 593 F.3d 936 (9th Cir. 2010) and *Bible v. United Student Aid Funds, Inc.*, 799 F.3d 633 (7th Cir. 2015), *cert. den.* 136 U.S. 1607 (2016) to support its assertion that the State is attempting to impose alternate disclosure standards. Navient contends that, similar to *Chae*, the Attorney General's claims are based on alleged failures to disclose. (Mot. to Dismiss, p. 18-19).

In *Chae*, the Ninth Circuit considered whether Sallie Mae's alleged unfair or fraudulent practices of using "billing statements and coupon books that trick borrowers into thinking that interest is being calculated via the installment method when Sallie Mae really uses a simple daily calculation" and using statements that extended the first repayment date were preempted by the HEA. *Chae*, 593 F.3d at 943; *see also Linsley v. FMS Inv. Corp.*, 2012 U.S. Dist. LEXIS 53737, *12-14. The Ninth Circuit held that Section 1098g expressly preempted both of the student borrower's allegations because they were "restyled improper-disclosure" claims. *Id.* The Ninth Circuit noted that the student borrowers did not contend that their state law prevented the loan servicer from employing any of the three loan-servicing practices at issue. *Id.* It considered the "allegations in substance to be a challenge to the allegedly-misleading method Sallie Mae [the loan-servicer] used to communicate with the plaintiffs about its process." *Id.* at 942-43. Thus, the Ninth Circuit concluded that "[i]n this context, the state-law prohibition on misrepresenting a business practice 'is merely the converse' of a state-law requirement that alternate disclosures be made." *Id.* at 943 (citation omitted).

The Ninth Circuit rejected the student borrowers' argument that their claim was not predicated on non-compliance with the HEA's disclosure requirements since "they do not seek specific disclosures, but merely seek to stop Sallie Mae from fraudulently and deceptively misleading borrowers through the written documents." *Id.* at 943 (citations omitted). The Ninth Circuit reasoned, based on the Supreme Court's decision in *Cipollone*, that "preemption cannot be avoided simply by relabeling an otherwise-preempted claim." *Id.* (citing *Cipollone v. Liggett Grp.*, 505 U.S. 504, 527 (1992)). "In *Cipollone*, the Supreme Court concluded that smokers fraudulent misrepresentation claim that cigarette manufacturers 'through their advertising, neutralized the effect of federally mandated warning labels' was 'predicated on a state-law prohibition against statements in advertising and promotional materials that tend to minimize the health hazards associated with smoking.'" *Linsley*, 2012 U.S. Dist. LEXIS 53737, *12-13 (quoting *Cipollone*, 505 U.S. at 527). The Supreme Court reasoned in *Cipollone* that "[s]uch a *prohibition*, however, is merely the converse of a state-law *requirement* that warnings be included in advertising and promotional materials" and therefore held that Section 5(b) of the Federal Cigarette Labeling and Advertising Act preempted the fraudulent misrepresentation claim and "supersede[d] petitioner's first fraudulent-misrepresentation theory." *Id.* at *13 (emphasis in original) (quoting *Cipollone*, 505 U.S. at 527). Similarly, the Ninth Circuit reasoned that "[a] properly-disclosed [HEA] practice cannot simultaneously be misleading under state law, for state disclosure law is preempted by the federal statutory and regulatory scheme" and therefore "plaintiffs' claims challenging the language in Sallie Mae's billing statements and coupon books are restyled improper-disclosure claims, and are therefore subject to express preemption under 20 U.S.C. §1098g." *Chae*, 593 F.3d at 943.

However, the *Chae* court distinguished between claims based on disclosure and claims based on "the use of fraudulent and deceptive practices apart from billing statements." *Id.* The Ninth Circuit explained that "[t]hese claims are *not impacted by any of the* [HEA's] express preemption provisions." *Id.* (emphasis added). The *Chae* court then analyzed these claims under a conflict preemption analysis.[6] *Id.*

Navient asserts that the Seventh Circuit recently adopted the rule and reasoning from *Chae* in *Bible v. United Student Aid Funds, Inc.*, 799 F.3d 633, 639 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 1607 (2016). (Resp. Br., p. 18). However, Navient is misguided in attempting to frame the summary that *Bible* provides on *Chae* as an adopted holding. Indeed, in *Bible*, the focus was on whether a borrower's breach of contract claim actually conflicted with the HEA and its associated regulations. *Id.* at 653. The Seventh Circuit summarized the Ninth Circuit's conflict preemption analysis in *Chae,* which held that conflict preemption applied and prevented the court from entertaining the claims because the plaintiffs were asking the court to impose a higher standard of compliance than required by federal law which would ultimately differ and impede uniformity across the country. *Id.* at 653-54. *Bible* then distinguished *Chae*'s conflict preemption holding and stated that the plaintiff's claims were not conflict preempted because they were not attempting to require more of the defendant than was already required by the HEA and its regulations. *Id.* at 654. The Seventh Circuit ultimately held that a state claim that does not seek to vary the requirements of federal law does not conflict with federal law. *Id.* at 653-54. Notably, conflict preemption is a separate analysis from express preemption, and the decision in *Bible* has nothing to say about express preemption under the HEA generally or under Section 1098g in particular.

Navient also cites to *Brooks* and *Linsley* to support the notion that the Section 1098g of the HEA expressly preempts any effort by state law to impose alternate disclosure standards on federal loan servicers. (Mot. to Dismiss, p. 18). Both *Brooks* and *Linsley* considered whether the HEA preempted the borrowers' claims under the Connecticut Unfair Trade Practices Act (CUTPA). *See Brooks v. Sallie Mae*, 2011 Conn. Super. LEXIS 3182, *3-4; *Linsley v. FMS Inv. Corp.*, 2012 U.S. Dist. LEXIS 53735, *2. Both courts held that the each of the plaintiffs'

[6] Ultimately, *Chae* held that the conflict preemption prohibited the "plaintiffs from bringing their remaining [state] claims because, if successful, they would create an obstacle to the achievement of congressional purposes." *Chae*, 593 F.3d at 950.

respective CUTPA claims based on misrepresentation were expressly preempted by Section 1098g. *Brooks*, 2011 Conn. Super. LEXIS at *16-17; *Linsley*, 2012 U.S. Dist. LEXIS at *16-17. Both courts reasoned that had the information been properly disclosed, then the information sought could not be simultaneously misleading. *Brooks*, 2011 Conn. Super. LEXIS at *19-20; *Linsley*, 2012 U.S. Dist. LEXIS at *17.[7] However, similar to *Chae*, the *Brooks* court distinguished between claims based on disclosure and claims based on processing practices, noting that the borrower had made additional allegations that were not predicated on improper disclosures and concluded that those claims were not preempted. *Brooks*, 2011 Conn. Super. LEXIS *20. The borrower in *Brooks* had alleged that the guaranty agency "purposefully delayed the processing of her December 2007 [economic deferment request] in order to drive up late fees" and "refused to accept income information supplied by [the plaintiff] that complied with" the HEA. *Id.* The *Brooks* court concluded that these claims could not be considered improper disclosure claims; thus, they were not expressly preempted by Section 1098g. *Id.*

The State's allegations for servicing can be divided into four categories: (1) practices related to enrolling borrowers in repayment plans, (2) practices related to recertification in income driven repayment plans, (3) practices related to application and allocation of borrower's loan payments, and (4) practices related to cosigner releases. For purposes of the preemption analysis, Navient is only challenging the first two categories of allegations concerning repayment plans and recertification.

After review of the allegations, it is clear that the State's servicing claims are not improper disclosures and therefore not expressly preempted under Section 1098g of the HEA. Indeed, the State's claims concerning practices related to enrolling borrowers in repayment plans (Compl., ¶ 469 (a)-(d)) are not "re-styled disclosures' because the core of the State's allegations is that Navient schemed to steer borrowers into forbearances, not just that Navient failed to disclose the availability of IDR plans. Additionally, express preemption does not apply to the claims related to recertification in IDR plans because complying with the principles of the law does not mean that deceptive and unfair practices cannot be analyzed or questioned. Navient's own conduct of

[7] *See also Hunt v. Sallie Mae, Inc.*, 2011 U.S. Dist. LEXIS 78306, *10-12 (state law claims that do not indicate defendant engaged in actions that are impermissible under the HEA, conflict with the HEA and are expressly preempted) ("if Plaintiff's claims were not preempted by the HEA, Defendant would be unable to comply with its obligations under the HEA without being subject to liability under the Michigan laws at issue in this case.") *id.* (citations omitted)).

providing notices that vaguely stated when the borrower's renewal period would expire in both written and electronic notifications and misrepresenting the consequences of failing to renew removed itself from the context of what is an appropriate disclosure. Lastly, Navient has waived the argument that the State's claims are either impliedly preempted or conflict preempted by the HEA.[8]

Practices Related to Enrolling Borrowers in Repayment Plans

In the first category of allegations, the State asserts that from at least January 2010 through the present, despite publicly inviting and assuring borrowers to call Navient and talk to a representative for assistance identifying appropriate, affordable repayment plan, Navient routinely steered borrowers experiencing long-term distress or hardship into forbearance, before or instead of affordable repayment options. (Compl., ¶¶ 224, 226, 245-46, 251). As the primary contact and provider of information to federal student loan borrowers, Navient is charged with assisting borrowers in repaying their loans, which includes providing information on alternative repayment options. (Compl., ¶¶ 224, 243-44). For example, Navient's website has included the following statements:

a. "[I]f you're having trouble, there are options for assistance, including income-driven repayment plans, deferment, forbearance, and solutions to help you avoid delinquency and prevent default... **We can work with you to help you get back on track,** and are sometimes able to offer new or temporarily reduced payment schedules. Contact us at 800-722-1300 and **let us help you make the right decision for your situation.**"
b. "[I]f you're experiencing problems making your loans payments, **please contact us. Our representatives can help you by identifying options and solutions,** so you can make the right decision for your situation."
c. "Navient is here to help. We've found that, 9 times out of 10, **when we can talk to a struggling federal loan customer** we can help him or her get on an affordable payment plan and avoid default."

(Compl., ¶ 245) (emphasis added). Similarly, the U.S. Department of Education has publicly encouraged financially troubled borrowers to contact their federal loan servicer to determine the best repayment option for that borrower. (Compl., ¶ 243). The Department of Education's

[8] The State argues that Navient has not asserted that conflict preemption principles bar the State's servicing claims. (Resp. Br., p. 18). Indeed, Navient conceded in its Reply Brief that it was only asserting that the HEA expressly preempted the state's claims. (Reply Br., p. 10). "Points not argued [in the opening brief] are waived and shall not be raised in the reply brief ***." *Cain v. Contarino*, 2014 IL App (2d) 130482, ¶ 56 (citing Ill. S. Ct. R. 341(h)(7)).

website contains multiple statements such as: "Work with your loan servicer to choose a federal student loan repayment plan that's best for you" and "Before you apply for an income-driven repayment plan ("IDR plan"), contact your loan servicer if you have any questions. Your loan servicer will help you decide whether one of these plans is right for you" and "Always contact your loan servicer immediately if you are having trouble making your student loan payment." (Compl. ¶ 244).

The Department of Education offers numerous repayment plans to eligible borrowers with federal student loans, which are designed to help borrowers manage their student loan debt and make monthly repayment of these loans more affordable. (Compl., ¶ 227). Most types of federal student loans are eligible for at least one IDR plan. (Compl., ¶ 228). The monthly amount that the borrower will pay under the IDR plan is set at an amount that is intended to be more affordable based on the borrower's income and family size, and may be as low as $0 per month. (Compl., ¶ 229). IDR plans are more suitable for borrowers experiencing long-term financial hardship, which include lower monthly payments, a reduction of the additional costs of enrolling in forbearances, and forgiveness of the remaining balance of a federal loan after making the required number of qualifying payments. (Compl., ¶¶ 234, 235).

Federal student loans are generally also eligible for forbearance, which is a short-term postponement of payment. (Compl., ¶ 236). With forbearance, a borrower experiencing financial hardship or illness may be able to stop making payments or reduce her monthly payments for a defined period of time. (Compl., ¶ 236). However, forbearance is typically not suitable for borrowers experiencing financial hardship or distress that is not short-term. (Compl., ¶ 239). The impact of enrolling borrowers experiences long-term financial hardship in forbearances include the accumulation of unpaid interest and capitalization, re-amortization, and dramatic increases in the total amounts due after the forbearances ends. (Compl., ¶¶ 239-41). For borrowers whose financial hardship is long-term, enrolling in an IDR plan is usually a significantly better option than forbearance because IDR plans enable borrowers to avoid or reduce these costs associated with forbearance. (Compl., ¶ 242).

However, a live conversation about the alternative repayment plans such as IDR and the borrower's financial situation is usually time-consuming because of the number and complexity of repayment options available for federal loans. (Compl., ¶ 253). Indeed, due to the detailed nature of IDR plans and the paperwork required, the process of enrolling a borrower in an IDR plan sometimes requires multiple, lengthy conversations with the borrower. (Compl., ¶ 254). Thus, enrolling borrowers in forbearance is less expensive for Navient because of staff resources and time expenditure required to offer borrowers IDR plans. (Compl., ¶ 270). Additionally, Navient's customer service personnel are compensated on average call time and rewarded for call time decreases. (Compl., ¶¶ 255-76). As a consequence of guiding borrowers-including those borrowers who had demonstrated long-term financial difficulties-into forbearance and even multiple consecutive forbearances, Navient has routinely enrolled more borrowers in forbearances than in IDR plans. (Compl., ¶¶ 282, 289). Borrowers placed into forbearance before ultimately enrolling in an IDR plan had delayed access to the benefits of the IDR plans and were subject to the negative consequences of forbearance, including the addition of unpaid interest to the principal balance of the loan. (Compl., ¶ 288). Additionally, Navient placed borrowers into serial forbearances and effectively added nearly four billion dollars of unpaid interest to the principal balance of those loans by enrolling borrowers in multiple forbearances and failing to inform those borrowers about IDR plans at the time of live contact. (Compl., ¶ 293).

Similar to the allegations in *Chae* and *Brooks* which were not expressly preempted under Section 1098g, the State has not simply alleged that Navient failed to disclose the availability of IDR plans. *Chae,* 593 F.3d at 943; *Brooks*, 2011 Conn. Super. LEXIS at *20. The core of the State's allegations is that Navient schemed to steer borrowers into forbearances, which are more costly for borrowers and more beneficial for Navient. These types of allegations are not improper disclosure claims and therefore are not expressly preempted by Section 1098g.

The facts in this case are similar to those in *Genna v. Sallie Mae, Inc.*, 2012 U.S. Dist. LEXIS 54044. In *Genna,* the district court in that case ultimately found that Section 1098g did not expressly preempt claims similar to the case at hand. The district court considered whether Section 1098g expressly preempted the plaintiff's state law claims for fraudulent misrepresentation and breach of contract in relation to servicing student loans. 2012 U.S. Dist. LEXIS 54044, *1. The plaintiff alleged, among other things, that Sallie Mae had misrepresented, through email and phone conversations, that it was granting him a forbearance and enrolling him in the auto-debit program. *Id.* at *2-4. In determining whether the HEA expressly preempted the plaintiff's claims, the district court discussed the Ninth Circuit's decision in *Chae* and found that "[t]he Ninth Circuit's logic is unassailable, but it has no application to the facts of this case." *Id.* at 23. *Genna* differentiated the challenged written statements in *Chae*, which is regulated and sanctioned by federal law, from the alleged statements made by Sallie Mae to the plaintiff during his telephone call. *Id.* The *Genna* court explained

> [i]n *Chae*, the plaintiffs challenged written statements that were explicitly regulated and sanctioned by federal law. In contrast, the statements at issue here were neither authorized by the Secretary of Education nor conformed to any explicit dictates of federal law. There is nothing in the HEA that standardizes or coordinates how a customer service representative of a third-party loan servicer like Sallie Mae shall interact with a customer like Genna in the day-to-day servicing of his loan outside of the circumstance of pre-litigation informal collection activity.

Id. at *23-24. *Genna* held that "Sallie Mae has not shown that § 1098g, or anything else in the HEA, expressly preempts Genna's claims." *Id.* at 24. The *Genna* court then analyzed the plaintiff's claims under the conflict preemption analysis. *Id.*

The facts in this case are similar to those in *Genna*. Indeed, the practices at issue here are neither authorized by the Secretary of Education nor do they conform to any explicit dictates of federal law. There is nothing in the HEA that standardizes or coordinates how a customer service representative of a third-party loan servicer like Navient shall interact with a customer in the day-to-day servicing of his or her loan.

Navient argues that the facts in the unpublished *Genna* decision were extreme. (Reply Br., p. 11). Navient contends that the plaintiff in *Genna* alleged Sallie Mae allegedly failed repeatedly to enroll the borrower in a payment plan, falsely confirmed that he was enrolled, falsely reported him to credit agencies when he missed a payment, and then a call representative declined further cooperation and expressly invited the plaintiff to bring suit. (Reply Br., p. 11). Even so, the premise of *Genna* is that statements and actions that are neither authorized by the Secretary of Education nor conformed to any explicit dictates of federal law are not expressly preempted under the HEA. As stated above, the Secretary of Education has neither authorized nor confirmed that Navient's scheme to steer borrowers into forbearances, which are more costly for borrowers and more beneficial for Navient. Thus, these allegations cannot be expressly preempted by the HEA.

Navient also asserts that the court in *Genna* held that the HEA does not preclude state laws prohibiting "affirmatively" false statements, which are categorically different from the State's claims that Navient's disclosures were insufficient. (Reply Br. at 11-12). Navient argues that the State's allegations are limited to failures to disclose and that the only federal servicing allegation that comes close to "affirmatively" deceptive acts is ¶ 469(c), in which the State alleges that Navient "[m]isrepresent[ed]" to borrowers that it would "work" with borrowers struggling to pay their loans and "help [borrowers] make the right decision for [their] situation." (Reply Br. at 11-12). Navient contends that even this allegation is still, at bottom, a claim based on insufficient disclosures because it in turn is premised on allegations that Navient broke its promise to help borrowers by insufficiently disclosing the availability of IDR plans to borrowers who called. (Reply Br. at 11-12). However, this argument is a mischaracterization of the State's allegations. The complaint alleges that Navient affirmatively told borrowers that they should call them in order to work out an appropriate payment plan for their loans. Instead of abiding by its advertisements on both the Department of Education's website and Navient's own website, Navient compensated its employees for rushing phone calls and pushing borrowers into costly forbearances. Publicly advertising to help borrowers choose an appropriate repayment plan and then steering those borrowers into forbearances are affirmative actions.

Practices Related to Recertification in IDR Plans

In the second category of allegations, the State alleges that even after some borrowers applied for and were approved for IDR plans, Navient failed to provide them with the appropriate information that they needed to stay enrolled in the programs and avoid unaffordable increases in their payments. Since at least January 1, 2010, federal student loan servicers, including Navient, have been required to send at least one written notice concerning the annual renewal requirements to borrowers in advance of their renewal deadline. (Compl., ¶ 305). The IDR payment applies for a period of twelve months. (Compl., ¶ 301). At the end of this twelve-month period, the IDR plan expires unless the borrower renews enrollment in the plan before the expiration date. (Compl., ¶ 301). If the IDR plan expires before the borrower has timely recertified, several negative consequences are likely to occur: (1) the borrower's monthly payment amount will immediately increase from the IDR payment to one that is substantially higher; (2) any unpaid interest that has accrued will be capitalized into the loan's principal balance; (3) the applicable interest subsidy provided by the federal government for the first three years of enrollment in an IDR plan for each month until the borrower renews her enrollment will be lost; (4) for some borrowers who enroll in forbearance when the twelve-month period expires, progress towards loan forgiveness will be delayed because the borrower is no longer making qualifying payments that count towards loan forgiveness. (Compl., ¶ 304). Further, these consequences are all irreversible. (Compl., ¶ 304).

As an initial disclosure notice, Navient advised consumers that they would be notified in advance when their loans were up for renewal in the IDR plan, and that they would be provided a date to submit their renewal application. (Compl., ¶ 306). Instead of providing a date certain, Navient's notices between January 1, 2010 and December 2012, stated only vaguely that the borrower's IDR repayment period would expire in "approximately 90 days." (Compl., ¶¶ 308-09). Further, Navient misrepresented the consequences of failing to recertify by the proscribed date certain by implying that the only consequence would be a delay in the renewal process rather than an increased payment amount or the capitalization of unpaid interest. (Compl., ¶¶ 304, 310-11).

Similarly, the State alleges that for borrowers who consented to receiving electronic communications from mid-2010 and March 2015, Navient only sent them an email with a hyperlink to their website and did not include any indication of the purpose of its notice in the subject line nor the body of the email. (Compl., ¶¶ 314-16). From at least January 1, 2010, through November 15, 2012, the subject line of the email simply read: "Your Sallie Mae Account Information." (Compl., ¶ 317). Likewise, from at least November 16, 2012, through March 18, 2015, the subject line of the email was: "New Document Ready to View." (Compl., ¶ 318). In stark contrast, during the same time period, other emails sent by Navient described the content or purpose of the referenced document. (Compl., ¶ 320). For example, the subject line of one email was "Your Sallie Mae- Department of Education Statement is Available" and the body of the email stated "Your monthly statement is now available. Please log in to your account at Sallie Mae.com to view and pay your bill." (Compl., ¶¶ 320-21). To know that the new document was specifically an IDR plan recertification notice, a borrower would have to click on Navient's hyperlink to their website and then log into the website using his user ID and password. (Compl., ¶¶ 314-15).

Navient's own tracking process showed that between at least July 21, 2011 and March 2015, the percentage of borrowers who did not timely renew their enrollment in IDR plans regularly exceeded sixty percent. (Compl., ¶ 322). The renewal rate has more than doubled after Navient changed its recertification emails to subject line "Your Payment Will Increase" and text of the email to "[I]n order to keep your lower payment amount, it's important that you apply soon to renew your repayment plan" in March 2015. (Compl., ¶ 324-25).

Based on these allegations, Navient argues that the State has attacked the allegedly misleading method that Navient uses to communicate with borrowers about its renewal practices, thereby making it an "improper disclosure." *See Chae*, 593 F.3d at 943. As Navient points out, the allegations concerning the misrepresentation that Navient would provide a date certain is merely the converse that they failed to disclose a date certain. (Mot. to Dismiss, p. 19). Similarly, the allegations that Navient failed to adequately notify borrowers of the renewal process as well as potential consequences of failing to renew are improper disclosures and misrepresentations that are nothing more than improper-disclosure claims. (Mot. to Dismiss, p. 19). Both of the claims would no longer be misleading had Navient provided a date certain and detailed the renewal process and the consequences of the failure to renew in its communications with borrowers.

However, the State contends that the gravamen of its claims is not that Navient failed to provide specific disclosures mandated by state law, but that the totality of Navient's conduct rendered its interactions with many borrowers unfair and deceptive. (Resp. Br., p. 14). Moreover, the King County Superior Court in Washington State considered whether virtually identical claims were expressly preempted by Section 1098g of the HEA. Order Denying Defendants' Motion to Dismiss the Complaint at 19-46, *State of Washington v. Navient Corp.*, No. 17-2-01115-1 SEA (Wash. Super. Ct. July 7, 2017). In orally ruling on Navient's 12(b)(6) motion, the superior court stated that "[t]he allegations here are claims of Washington law, claims that involve Washington residents and are part of the inherent powers of the state to address, and the Court will do so." *Id.* at 44-45. The superior court held that "[w]ith regard to the issue of preemption, which this Court really feels is overarching in many of these claims, the Court [is] going to deny the motion." *Id.* The superior court disagreed with Navient's assertion that express preemption applied so broadly that their practices could not be questioned and that there are no sets of facts which would grant the plaintiff relief. *Id.* at 45. The superior court explained:

> But, defense composition asks me to read this in such a broad context that, even though you're following the principles of the law, the practices cannot be questioned. In the—this Court does not feel that this is the case. There are certainly cases that find that *Chae* was narrowly tailored to express provisions that have been approved or decided by a regulatory agency that were in the context of what was allowed. Other cases have determined there can be

> statements or assertions or affirmations by a lender that take it outside of the context of what is an appropriate disclosure.

Id. For these reasons, the superior court denied Navient's motion to dismiss.

The reasoning in the superior court's order is persuasive. As the *State of Washington v. Navient* pointed out, following the principles of the law does not mean that the practices cannot be questioned. Indeed, although Navient may have technically complied with the general requirement that they send at least one written notice concerning the annual renewal requirements to borrowers in advance of their renewal deadline, there are no federal requirements for how that notice is sent. In this context, Navient's own assertion, that it would provide a date certain, removed itself from the context of what is an appropriate disclosure. Express preemption in this case may have applied had the State alleged that Navient was required to send additional notices however; applying express preemption in this context would be far-reaching. As such, these allegations are not improper disclosure claims and are not expressly preempted by Section 1098g.

LOAN ORIGINATION & THE TRUTH IN LENDING ACT (TILA)

The Consumer Credit Protection Act (CCPA), 15 U.S.C.A. § 1601 *et seq.*, is federal statute designed to protect borrowers of money by mandating complete disclosure of the terms and conditions of finance charges in transactions, limiting the Garnishment of wages, regulating the use of charge accounts. Title I of the CCPA (Pub. L. 90-321), titled the Truth in Lending Act (the "TILA") (also known as the Consumer Credit Disclosure Act), was enacted to "safeguard the consumer in connection with the utilization of credit by requiring full disclosure of the terms and conditions of finance charges in credit transactions or in offers to extend credit." 90 P.L. 321, 82 Stat. 146.[9] The purpose of the TILA is to "assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair

[9] Other titles of the CCPA include the Equal Credit Opportunity Act, Credit Repair Organizations Act, and Fair Credit Reporting Act.

1. Equal Credit Opportunity Act, 15 U.S.C. § 1691 *et seq.* (preempts only those state laws that are inconsistent with the Act. "A state law is not inconsistent if it is more protective of an applicant.");
2. Credit Repair Organizations Act 15 U.S.C. §§ 1679-1679j (preempts only those state laws that are inconsistent with the Act);
3. Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.* (preempts only those state laws that are inconsistent with the Act and outlines specific exceptions that state laws may not regulate).

credit billing and credit card practices." *Rendler v. Corus Bank, N.A.*, 272 F.3d 992, 996 (7th Cir. 2001); (quoting 15 U.S.C. § 1601(a)); *Lanier v. Assocs. Finance, Inc.*, 114 Ill. 2d 1, *11 (1986). Among other requirements, the TILA requires creditors who deal with consumers to make certain written disclosures concerning finance charges and related aspects of credit transactions.

Section 1610 provides that the TILA statutes "do not annul, alter, or affect the laws of any State relating to the disclosure of information in connection with credit transactions, except to the extent that those laws are inconsistent with the provisions of this subchapter, and then only to the extent of the inconsistency." 15 U.S.C. § 1610(a)(1). Additionally, where state disclosure statutes are substantially the same as TILA statutes, creditors located in that State may make such disclosure in compliance with such state laws in lieu of the disclosure required by TILA. 15 U.S.C. § 1610(a)(2). As such, the express terms of the preemption section apply only to state laws that are inconsistent with the TILA or that relate to certain credit and charge card solicitations (15 U.S.C. § 1610(a)(1), (e)).

The TILA's implementing regulation (12 C.F.R. § 226.28) more specifically details the types of state law requirements that will be found inconsistent and thus preempted, including state laws that: (1) require a creditor to make disclosures or take actions that contradict the requirements of the TILA (12 C.F.R. § 226.28(a)(1)); (2) require the use of the same term to represent a different amount or a different meaning than the TILA or that require the use of a term different from that required in the TILA to describe the same item (12 C.F.R. § 226.28(a)(1)); (3) provide rights, responsibilities, or procedures for consumers or creditors that are different from those required by the TILA (12 C.F.R. § 226.28(a)(2)(i)); and (4) with respect to credit billing, that prevent the creditor from being able to comply with the state law without violating the TILA (12 C.F.R. § 226.28(a)(2)(ii)). Preemptive Effect of Truth in Lending Act (TILA), 61 A.L.R. Fed. 2d 505, 2.

Navient makes two interrelated arguments for why the State's claims dealing with unfair and deceptive loan origination should be dismissed. First, similar to the loan servicing claims, Navient argues that the State's claims are preempted by the TILA. (Mot. to Dismiss, p. 1). Second, Navient argues that compliance with the disclosure requirements of the TILA is a defense to liability under the ICFA for claims alleging unfair or deceptive practices associated with private loans. (Mot. to Dismiss, p. 14); *see Lanier*, 114 Ill. 2d at 16; *Jackson*, 197 Ill. 2d at 45. Navient contends that *Lanier* and its progeny make clear that ICFA liability can only be predicated on an underlying TILA violation and the State did not bear its burden in proving that Navient failed to comply with the TILA. (Mot. to Dismiss, p. 14-16). Thus, Navient's compliance with the TILA precludes the Attorney General from bringing a claim under Section 10b(1) of the ICFA.

After review of the statute, it is clear that the State's origination claims are not preempted or precluded by the TILA. The origination claims are not preempted because the conduct alleged is not specifically authorized by the TILA nor does it conflict with the TILA. In this case, the State is alleging unfair and deceptive conduct, not failures to disclose. The cases cited by Navient hold only that where TILA was implicated and the defendant was in compliance, Illinois law could not impose greater disclosure requirements than those mandated by federal law. Contrary to Navient's assertion, *Lanier* did not hold that merely because a party does not violate a federal law, it does not violate the ICFA. The State does not concede that Navient complied with TILA nor has Navient proffered evidence that its actions were specifically authorized or conformed to TILA.

Federal Preemption

The State argues that the TILA does not preempt its claims for unfair and deceptive conduct under the ICFA because it is merely a disclosure statute. (Resp. Br., p. 8). In response, Navient contends that the State misread its argument because Navient's position is that the State's origination claims should be dismissed based on the Illinois Supreme Court's decision in *Lanier*, not based on federal "preemption." (Reply Br., p. 1). However, Navient's Response Brief categorizes its first "preemption" argument under the title "The Origination and Servicing of Student Loans are Comprehensively Regulated by Federal Law." (Mot. to Dismiss, p. 13). Moreover, under that same section, Navient included its argument for the State's servicing claims and why it believed they were expressly preempted by the HEA. (Mot. to Dismiss, p. 13). Furthermore, Navient's argument that relies on the *Lanier* decision is placed under the following section titled "Under Longstanding Illinois Supreme Court Precedent, the Consumer Fraud Act Precludes Liability for the State's Origination Claims." (*Id.* at p. 14). Therefore, the State did not "misread" Navient's argument.

In its Motion to Dismiss, Navient makes the blanket argument that the TILA and its associated federal regulations establish specific standards for disclosures for the origination of private education loans. (Mot. to Dismiss, p. 13). Navient asserts that during the relevant time period, from 2000 to 2009, the origination of private education loans were required to comply with the following regulations: 15 U.S.C. § 1601, *et seq.* (Congressional findings and declaration of purpose)[10]; 15 U.S.C. § 1604 ("Disclosure guidelines")[11]; 15 U.S.C. § 1631 ("Disclosure requirements")[12]; 15 U.S.C. § 1632 ("Form of Disclosure; additional information")[13]; 15 U.S.C. § 1664 ("Advertising of credit other than open end plans")[14]; 12 C.F.R. § 226.17 ("General disclosure requirements")[15]; 12 C.F.R. § 226.18 ("Content of disclosures")[16]; 12 C.F.R. § 226.24 ("Advertising")[17]; 12 C.F.R. § 226, App. H ("Closed-End [Credit] Model Forms and Clauses")[18];

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[10] Deals with Congressional findings and declaration of purpose as it pertains to (a) informed use of credit and (b) terms of personal property leases. Section (a) provides:

> "The Congress finds that economic stabilization would be enhanced and the competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit. The informed use of credit results from an awareness of the cost thereof by consumers. It is the purpose of this subchapter to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices."

[11] This section deals with three separate categories: (1) the guidelines for which the Bureau is to publish the content of the regulations and model forms and disclosures; (2) effective dates of regulations, exemption authority, and waivers for certain borrowers; and (3) deference to the Bureau and the authority of the Board to prescribe rules under the chapter.

[12] This section discusses the general duty of a creditor to disclose to the obligor and how many creditors must disclose in a transaction. It also authorizes estimates as satisfying statutory requirements and the basis of disclosure for per diem interest. Lastly, the section authorizes the Bureau to determine tolerances for numerical disclosures.

[13] This section deals generally with how information needs to be clearly and conspicuously disclosed, the order of disclosures, and use of different terminology. It also outlines the tabular format for disclosures, as well as, any additional electronic disclosures required.

[14] This section details the rate of finance charge expressed as annual percentage rate ("APR"), and the requisite disclosures in an advertisement, including: the down payment, terms of repayment, and rate of the finance charge expressed as an APR.

[15] This section explains that disclosures must be clear and conspicuous, grouped together, and only contain relevant disclosure information. It also includes that disclosures must be made before consummation and, for private education loans, made in compliance with § 226.47 and 226.46(d). Lastly, it includes the following relevant subsections and rules: basis of disclosures and use of estimates, which creditor must comply with the disclosure requirements when there are multiple creditors, the effect of subsequent events on a disclosure, and interim student credit extensions.

[16] For each transaction, the creditor must disclose the following information: (a) the identity of the creditor; (b) the amount financed with a specific procedure for how it is calculated; (c) a separate written itemization of the amount financed; (d) the prepaid finance charge; (e) the annual percentage rate; (f) the variable rate; (g) the payment schedule and total of payments; (h) prepayment; and (i) late payment.

[17] This section describes the rules for advertisements. In brief, the section provides that creditors must only provide the actual offered/available loans, that the advertisements must be clear and conspicuous, as

12 C.F.R. § 226, Supp. I ("Official [Federal Reserve Board] Staff Interpretations")[19]. However, Navient's numerous citations to the TILA only support the fact that "TILA is a disclosure statute. It does not substantively regulate consumer credit but rather requires disclosure of certain terms and conditions of credit before consummation of a consumer **credit transaction**." *Rendler v. Corus Bank, N.A.*, 272 F.3d 992, 996 (7th Cir. 2001) (quotations omitted); *see also Williams v. Lynch Ford, Inc.*, 2004 U.S. Dist. LEXIS 25883, at *8 (N.D. Ill. 2004). Navient fails to point to one section or regulation in the statute that specifically deals with the conduct alleged in the State's Complaint. Besides, the State has not alleged that Navient failed to accurately disclose an interest rate, or failed to put certain terms in certain boxes on a TILA form. As described in detail below, the State has alleged that Navient unfairly and deceptively offered risky subprime loans to vulnerable borrowers in order to obtain placement on schools' preferred lender lists and increase its bottom line. (Resp. Br., p. 9) (Compl. ¶¶ 98-160, 169-78).

Further, under the plain language of TILA's preemption section, the statute preempts state law provisions only to the extent that the terms and forms mandated by state law are inconsistent with those required by TILA. 15 U.S.C. § 1610(a)(1). Under TILA's implementing regulation, Regulation Z, "[a] State law is inconsistent if it requires a creditor to make disclosures or take actions that contradict the requirements of the Federal law." 12 C.F.R. § 226.28(a)(1). State law requirements that require the disclosure of information not covered by the federal law, or that require more detailed disclosures do not contradict the federal requirements. *Peel v. BrooksAmerica Mortgage Corp.*, 788 F. Supp. 2d 1149, 1159 (C.D. Cal. 2011) (citing 12 C.F.R. Pt. 226, Supp. I, 28(a)(3) (Commentary on Regulation Z)). Accordingly, TILA's preemptive effect on disclosures and other terms required by the states with regard to credit transactions is limited. Indeed, the TILA preempts state law only to the extent state disclosure requirements are explicitly inconsistent with federal law. *Peel*, 788 F. Supp. 2d at 1159. As stated above, Navient fails to point to cite to one section in TILA that specifically regulates the conduct alleged in the Attorney General's Complaint. Moreover, Navient does not cite any case law that supports its

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well as the simple annual rate or periodic rate applied to the unpaid balance, and the annual percentage rate.

[18] This section includes the closed-end model forms and clauses.

[19] This section details the official Federal Reserve Board staff interpretations of Regulation Z.

assertion. As such, the State's claims that are based on allegations of deceptive or unfair conduct are not preempted by the TILA.

Preclusion & TILA

Navient also contends that Illinois Supreme Court's decision in *Lanier* and its progeny have held that the ICFA forbids state law from requiring disclosures contrary to or in addition to those set forth by TILA. (Mot. to Dismiss, p. 14) *see Lanier v. Assocs. Finance, Inc.*, 114 Ill. 2d 1 (1986); *Jackson v. S. Holland Dodge, Inc.*, 197 Ill. 2d 39, 49 (2001). Navient argues that in light of the "comprehensive set of rules" put in place by federal law, the Illinois Supreme Court has also determined that "compliance with the disclosure requirements of TILA is a defense to liability under the ICFA for claims alleging unfair or deceptive practices associated with private loans." (Mot. to Dismiss, p. 14, citing *Jackson*, 197 Ill. 2d at 46-47). The ICFA expressly provides in Section 10b(1) that "Nothing in this Act shall apply to...[a]ctions or transactions specifically authorized by laws administered by any regulatory body or officer acting under statutory authority of this State or the United States." (Mot. to Dismiss, p. 14, citing 815 ILCS § 505/10b(1)). Thus, Navient argues that the State's ICFA claims violate this well-settled state-law doctrine by impermissibly seeking to impose disclosure requirements that exceed those mandated by the TILA.

In support of this argument, Navient points to, among other things, *Lanier*, 114 Ill. 2d 1 (1986), *Franks v. Rockenbach Chevrolet Sales, Inc.*, 1998 U.S. Dist. LEXIS 20553 (N.D. Ill.), and *Price v. Philip Morris, Inc.*, 219 Ill. 2d 182 (2005). In *Lanier*, the Illinois Supreme Court held that "compliance with the disclosure requirements of the Truth in Lending Act is a defense to liability under the Illinois Consumer Fraud Act." 114 Ill. 2d at 17. In *Franks*, the district court for the Northern District of Illinois held that "the Illinois Supreme Court's decision in *Lanier* compels the conclusion that Franks' [ICFA] claim, which is based on the same acts which formed the basis of his TILA claim, cannot survive the dismissal of the TILA claim." 1998 U.S. Dist. LEXIS 20553, *9 (N.D. Ill.). Lastly, in determining whether compliance with a federal regulatory scheme is sufficient to trigger the exemption of Section 10b(1), the *Price* court noted that "[i]n *Lanier* and *Jackson*, this court held that full compliance with applicable disclosure requirements is a defense, under Section 10b(1), to a claim of fraud based on the failure to make additional disclosures." *Price*, 219 Ill. 2d 182, 249 (2005).

In *Lanier*, the Illinois Supreme Court found that disclosure made in compliance with the TILA could not be the basis of a claim for common law misrepresentation. 114 Ill. 2d 1, 10 (1986). The plaintiffs alleged that the creditor fraudulently misrepresented the interest rate in the loan agreement because the actual interest charged was higher due to prepayment of the loan and the computation of the resulting interest rebate under the Rule of 78's. *Id.* at 9. The plaintiffs asserted that the creditor knew that was likely that the loan would be repaid before its scheduled due date and that the result would be a higher effective interest rate than that listed in the loan agreement. *Id.* The Illinois Supreme Court held that the plaintiffs could not successfully claim that the creditor committed common law misrepresentation by properly complying with the TILA. *Id.* at 10-11. The *Lanier* court reasoned that to hold otherwise would put a creditor "in the anomalous position" of being guilty of misrepresentation by specifically complying with the mandates of the federal law. *Id.* at 10-11.

The plaintiffs in *Lanier* also alleged that the creditor violated the ICFA by not disclosing harsh effects of loan prepayment under the TILA, and more specifically, the Rule of 78's.[20] *Id.* at 11. The plaintiffs argued that mere reference to the Rule of 78's by name in the loan agreement was insufficient under the TILA because few borrowers understood the operation of the Rule of 78's. *Id.* at 12. The Illinois Supreme Court first considered whether the loan agreement complied with the TILA and determined that the disclosure was sufficient. *Id.* at 14. The *Lanier* court gave a great degree of deference to the Federal Reserve Board's ("FRB") official interpretation of the TILA. *Id.* at 13-15. The FRB's interpretation concluded that mere reference to the Rule of 78's by name was sufficient disclosure under the TILA. *Id.* at 14. The *Lanier* court found that the FRB's interpretation was not irrational and that the creditor acted in conformity with the interpretation. *Id.* Thus, *Lanier* concluded that the creditor did not violate the TILA by failing to explain the operation of the Rule of 78's. *Id.* The *Lanier* court then determined whether compliance with the TILA precluded liability under the ICFA and found that, in this case, the creditor's compliance with the disclosure requirements of the TILA was a defense to liability

[20] The plaintiffs were appealing a judgment of the Appellate Court for the First District which affirmed a circuit court's dismissal of their action against defendant finance company in which they alleged that the use of the Rule of 78's to compute interest was fraudulent and violated the ICFA. The circuit court of Cook County granted defendants' motion to dismiss the plaintiffs' lawsuit finding that the loan-disclosure provisions did not violate the TILA nor State law. *Id.* at 5. The appellate court affirmed the dismissal. *Id.* at 5.

under the ICFA. *Id.* at 18. The *Lanier* court considered similar consumer credit statutes, inapplicable to the plaintiffs' loan, that complied with the TILA and were also in compliance with the State acts. *Id.* at 16-17.[21] The Illinois Supreme Court differentiated the ICFA, which is a general prohibition of fraud and misrepresentation in consumer transactions, with the other consumer credit statutes. *Id.* at 16-17. The *Lanier* court noted:

> Because the Illinois consumer credit statutes requiring specific disclosures are met by compliance with the Truth in Lending Act, we believe that the Consumer Fraud Act's general prohibition of fraud and misrepresentation in consumer transactions did not require more extensive disclosure in the plaintiff's loan agreement than the disclosure required by the comprehensive provisions of the Truth in Lending Act. Rather, we perceive in the disclosure provisions of Illinois' consumer credit statutes a consistent policy against extending disclosure requirements under Illinois law beyond those mandated by the Truth in Lending Act, in situations where both the Act and the Illinois statutes apply.

Id. at 17.

Lastly, the *Lanier* court examined the text in the ICFA. *Id.* Section 10b(1) of the ICFA provides that the ICFA does not apply to "[a]ctions or transactions specifically authorized by laws administered by any regulatory body or officer acting under statutory authority of this State or the United States." *Id.* (quoting Ill. Rev. Stat. 1981, ch. 121 1/2, par. 270b(1)). *Lanier* held that under this provision, conduct which is authorized by federal statutes and regulations, such as those administered by the FRB, is exempt from liability under the ICFA. *Id.* Ultimately, the Illinois Supreme Court in *Lanier* had found that the disclosure in the loan transaction between the plaintiffs and the creditor complied with the TILA. *Id.* at 17-18.[22]

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[21] (Consumer Installment Loan Act (Ill. Rev. Stat. 1981, ch. 17, par. 5420); 'An Act in relation to the rate of interest" (Ill. Rev. Stat. 1981, ch. 17, par. 6410); Retail Installment Sales Act (Ill. Rev. Stat. 1981, ch. 121 1/2, par. 505); Motor Vehicle Retail Installment Sales Act (Ill. Rev. Stat. 1981, ch. 121 1/2, par. 565)). Each of these statutes specifically states that compliance with the Truth in Lending Act is compliance with the Illinois statute.

[22] In *Franks*, the plaintiff alleged that certain disclosures, which were based on the same acts which formed the basis of his TILA claim, also formed his ICFA claim. *Franks v. Rockenbach Chevrolet Sales, Inc.*, 1998 U.S. Dist. LEXIS 20553, *4, 8. The district court held that, based on the reasoning in *Lanier*, a plaintiff could not "use the ICFA to obtain relief based on actions which do not violate TILA." *Id.* at *10. *See also Price v. FCC Nat'l Bank*, 285 Ill. App. 3d 661, 661-62 (1996) (based on the reasoning in *Lanier*, the appellate court found that a bank's disclosure of the grace period that complied with TILA automatically meant that the bank's disclosure was in compliance with the Illinois Credit Card Issuance Act)).

Navient argues that Illinois courts have "overwhelmingly" agreed with the reasoning in *Lanier*, and have consistently held that compliance with the TILA precludes liability for claims brought under the ICFA where such claims would alter federal disclosure requirements. (Mot. to Dismiss, p. 15); *see Franks v. Rockenbach Chevròlet Sales, Inc.*, 1998 U.S. Dist. LEXIS 20553 (N.D. Ill.); *Jarvis v. S. Oak Dodge, Inc.*, 201 Ill. 2d 81, 89-90 (2002). Navient asserts that the Illinois Supreme Court recently reaffirmed that *Lanier* bars ICFA claims alleging "lack of disclosure in the context of loans" because "the required disclosure [in TILA] implicitly provided specific authorization not to make any additional disclosures." *Price v. Philip Morris, Inc.*, 219 Ill. 2d 182, 251-52 (2005); *id.* at 249 ("[F]ull compliance with applicable disclosure requirements is a defense, under [ICFA] section 10b(1), to a claim of fraud based on the failure to make additional disclosures.").

Navient's reliance on *Lanier* is misplaced. As the *Jenkins* court explained:

> *Lanier* involved the question of whether ICFA imposed higher disclosure requirements than TILA. The Illinois Supreme Court in *Lanier* held only that, where TILA was implicated and the defendant was in compliance, Illinois law does not impose greater disclosure requirements than those mandated by federal law. The *Lanier* court did not hold... that merely because a party does not violate a federal law, it does not violate ICFA.

Jenkins v. Mercantile Mortgage Co., 231 F. Supp. 2d 737, 752 (N.D. Ill. 2002). Moreover, the fact that Navient may have complied with the TILA does not bar the State's ICFA claims that Navient engaged in unfair and deceptive practices. Illinois courts have held that

> compliance with both the TILA and the [ICFA] is not a physical impossibility-compliance with the TILA does not imply a violation of the [ICFA. It also seems that the ICFA promotes rather than hinders the goals of the TILA The [ICFA] prohibits *inter alia*, 'deceptive practices [employed] in the conduct of any trade or commerce...', thereby promoting the TILA's goal of 'the informed use of credit' in a range of conduct larger than that covered by the disclosure provisions in the TILA.

Grimaldi v. Webb, 282 Ill. App. 3d 174, 181 (1st Dist. 1996) (citing *Heastie v. Cmty. Bank of Greater Peoria*, 690 F. Supp. 716, 721 (N.D. Ill. 1988)). Similarly, the *Price* court explained, "[a]s we noted in *Jackson*, *Lanier* did 'not confer a blanket immunization' from Consumer Fraud Act liability. If the alleged fraud were 'active and direct,' such as a scheme to makes false statements on the financing statement, liability under the Consumer Fraud Act could be imposed." *Price*, 219 Ill. 2d at 249 (quoting *Jackson*, 197 Ill. 2d at 51-52). The State does not concede that Navient did in fact comply with the TILA nor has Navient proffered evidence that its actions were specifically authorized by or conformed to the TILA.

Navient argues that to permit this "end-run" around the TILA would allow the State to improperly substitute its own policy judgments regarding consumer lending disclosures above the judgment of the federal government. (Mot. to Dismiss, p. 16). Contrary to Navient's assertions, the State is attempting to enforce a state consumer protection statute and is not imposing its own "policy judgment." As explained above, "complying with other statutory, regulatory, and contractual obligations does not relieve Navient of its obligation to refrain from committing acts that are unlawful under the [ICFA]." *Consumer Fin. Prot. Bureau v. Navient Corp.*, 2017 U.S. Dist. LEXIS 123825 *26.

Besides, the State has not challenged Navient's failure to disclose. The Illinois Supreme Court in *Price* explained that liability under the ICFA is barred by Section 10b(1) only if the action or transaction at issue is **specifically authorized** by laws administered by the regulatory body. *Price*, 219 Ill. 2d at 241; 815 ILCS 505/10b(1) (emphasis added). The *Price* Court held that "where the plaintiffs' claim is not based on an alleged failure to disclose, compliance with disclosure requirements cannot constitute a defense." *Id.* at 249; *see also Aliano v. Fifth Generation, Inc.*, 2015 U.S. Dist. LEXIS 128104, at *10 (N.D. Ill. 2015).

Navient asserts that any fair reading of ¶¶ 468(a)-(d) in the "VIOLATIONS" section of the Complaint makes plain that the State challenges two courses of conduct relating to the origination of private loans: (1) the alleged failure "to disclose to borrowers that it was highly likely that the loan they were taking out would default" and (2) the alleged failure to disclose the existence of contracts with schools to borrowers. (Mot. to Dismiss, p. 16). Navient contends that both of these allegations directly challenge disclosures by a private loan originator to borrowers. (Mot. to Dismiss, p. 16). Navient argues that under the holding of *Lanier* and its progeny, these disclosures are beyond those mandated by the TILA. (Mot. to Dismiss, p. 16).

The State responds that, unlike *Lanier* and Navient's other cited cases, it is not challenging a term that was disclosed on the face of a loan agreement. (Resp. Br., p. 10). The State argues that no federal regulator has considered and sanctioned the type of conduct set out in its Complaint. (*Id.*). To the contrary, the State asserts that offering or originating private student loans that the offeror or originator knows will likely default constitutes an unfair or deceptive act, particularly where the entity does so in order to make money through access to the borrower's student loans. (*Id.*).

Indeed, the State has alleged that the Origination Defendants unfairly and deceptively offered risky subprime loans to vulnerable borrowers in order to obtain placement on schools' preferred lender lists and increase its bottom line.[23] (Compl. ¶¶ 104-215). Contrary to Navient's assertion, the State has not merely alleged Navient's failure to disclose. Indeed, the State details the Origination Defendants' scheme of offering subprime loans to borrowers in order to secure placement on a school's preferred lender list and access the valuable FFEL volume that was 100% insured by the government. (Compl., ¶¶ 112-33). The State demonstrates how the Origination Defendants effectuated its subprime lending strategy by loosening its credit standards and offering subprime loans to borrowers enrolled in schools with less than 50% graduation rates (Compl., ¶¶ 148-60). For example, by 2003/2004, the Origination Defendants had three credit tiers, "Marginal", "Other", and "Opportunity" loans, in addition to the traditional three qualifying credit tiers of "Excellent", "Good", "Fair". (Compl., ¶¶ 149-54). In contrast to the "Excellent" tier which carried an interest rate of Prime +0%, loans in the "Marginal" tier had +6% interest, loans in the "Other" tier had +7% interest, and loans in the "Opportunity" had +8% interest. (Compl., ¶¶ 151-54). In 2003, the Origination Defendants provided approximately $41 million in Opportunity Loans to approximately 8,200 borrowers, and by 2006 the Origination Defendants provided approximately $231 million in Opportunity Loans to 38,000 borrowers. (Compl., ¶¶ 138-29). Opportunity loans were used as the "baited hook to gain FFEL volume" and were used to "help close deals." (Compl., ¶¶ 141-42). A 2007 investigation by the U.S. Senate Committee on Health, Education, Labor & Pensions cited in its "Second Report on Marketing in the FFEL program:

> Sallie Mae calculations... show for Opportunity Loans offered to a particular college and expected default rate of 70%, an expected yield of negative 9%, and an estimated return on equity of negative 3%. Clearly, these funds are considered a marketing expense rather than a profit center... Internal Sallie Mae documents show that the company used Opportunity Loans funds as a bargaining chip to trade for expanded FFEL market share.

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[23] The origination allegations are directed at Navient Corporation, Navient Solutions, Inc., and Sallie Mae Bank. For purposes of the Complaint, the origination defendants were referred to as "origination defendants" or "Sallie Mae." (Compl. ¶¶ 100-01).

(Compl., ¶ 143).

Further, the State alleges that the Origination Defendants knowingly failed to disclose the high likelihood or percentage of default rates to borrowers or even to schools. (Compl., ¶¶ 173-78). For example, in 2006, the overall percentage of borrowers who defaulted on a Signature Student loan was approximately 33%, yet the percentage of borrowers who attended for-profit schools with less than 50% graduation rates with FICOs less than 640 who were given loans with high interest rates or fees was approximately 75%. (Compl., ¶ 172). However, in response to an employee's recommendation to share Opportunity Loan delinquency and default rates with schools, one of Sallie Mae's Managers of Credit and Business analysis commented: "Most Opportunity volume performs very poorly. This is dangerous territory for a sales person to request and then try to explain to a school when they see poor results…" (Compl., ¶177). Additionally, in other instances, Sallie Mae's open discussions with schools about the high default rates indicated that they were indifferent as to whether or not the loans were repaid. (Compl., ¶ 178).

Additionally, the State alleges that the Origination Defendants took efforts to protect itself from losses on the subprime loans by shifting the risk of default on particular loans by using "credit enhancement" where the school provided a portion of the money to fund the loan upfront and "recourse" arrangements where the school agreed to cover a certain percentage of default for the amount financed. (Compl. ¶ 180-92). In both scenarios, the Origination Defendants entered into these agreements with schools, unbeknownst to borrowers, to cover itself from the high likelihood of default, all while attempting to collect the full amount from the borrower. (Compl. ¶ 180-92).

Lastly, the State alleged that the Origination Defendants did nothing to assist Illinois consumers with finding feasible repayment options when they were struggling to repay these subprime loans. (Compl., ¶¶ 193-215). The State provides two examples where the Origination Defendants benefited from the originated subprime loans but did nothing to help borrowers grapple with the high monthly payments after the Origination Defendants had received access to FFEL and private prime loan volume at schools. (Compl., ¶¶ 193-215).

Moreover, the cases cited by the State support the fact that the State's allegations are more than just failures to disclose. (Resp. Br., p. 10-11). In *People v. Alta Colleges, Inc.*, the district court held that the Illinois Attorney General stated a claim under the federal Consumer Financial

Protection Act ("CFPA") against a for-profit school that originated student loans it knew that students were unlikely to repay. 2014 U.S. Dist. LEXIS 123053, *5-8.[24] Similarly, in *Consumer Financial Protection Bureau v. ITT Education Services, Inc.*, the district court found that the Bureau had stated an unfair act or practice under the CFPA against a service provider that directed 8,600 students to take out private loans with interest rates as high at 16.25% and origination fees as high as 10% with default prediction rates of 64%. 219 F. Supp. 3d 878, 913 (S.D. Ind. 2015). Additionally, in *Consumer Financial Protection Bureau v. Corinthian Colleges, Inc.*, the district court found that the Bureau stated a claim for deceptive acts and practices under the CFPA against a for-profit school and loan servicer for creating and marketing an unaffordable loan program so that the school could charge its students more tuition than covered by Title IV funding from the U.S. Department of Education with more than 60% of borrowers defaulting. 2015 U.S. Dist. LEXIS 178105, at *5-9 (N.D. Ill. 2015). Although none of these cases actually considered whether the TILA precluded the plaintiffs' allegations, they do support the notion that the State's similar claims are challenging deceptive and unfair practices rather than failures to disclose.

THE STATE'S CLAIMS & THE ILLINOIS CONSUMER FRAUD ACT (ICFA)

Navient also contends that the State's allegations fail to state a claim under the ICFA. The ICFA is a regulatory and remedial statute designed to protect consumers, borrowers, and businessmen against fraud, unfair methods of competition, and other unfair and deceptive business practices. 815 ILCS 505/1; *Robinson v. Toyota Motor Credit Corp.*, 201 Ill. 2d 403, 416-17 (2002); *Sullivan's Wholesale Drug Co. v. Faryl's Pharmacy, Inc.*, 214 Ill. App. 3d 1073, 1082 (5th Dist. 1991). Section 2 of the ICFA provides:

> Unfair methods of competition and unfair or deceptive acts or practices, including but not limited to the use or employment of any deception fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact, or the use or employment of any practice described in Section 2 of the 'Uniform Deceptive Trade Practices Act', approved August 5, 1965, in the conduct of any trade or commerce are hereby declared

[24] Specifically, the Illinois Attorney General alleged the for-profit school targeted specific students and pressured them to enroll in their programs immediately while knowing that "most students will leave [the for-profit school] without a degree or the hope of obtaining a well-paying job and with debt that will take decades to repay and/or the certainty of being hounded by collection agencies." 2014 U.S. Dist. LEXIS 123053, *7-8.

> unlawful whether any person has in fact been misled, deceived or damaged thereby. In construing this section consideration shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to Section 5 (a) of the Federal Trade Commission Act.

815 ICS 505/2.

A cause of action under the ICFA has three elements: (1) a deceptive act or practice by the defendant; (2) defendant's intent that the plaintiff relied on the deception; and (3) deception that occurred in the course of conduct involving trade or commerce. 815 ILCS 505/2; *Robinson*, 201 Ill. 2d 403, 417 (2002); *Zekman v. Direct Am. Marketers*, 182 Ill. 2d 359, 373 (1998); *Connick v. Suzuki Motor Co.*, 174 Ill. 2d 482, 501 (1996); *Chandler v. Am. Gen. Fin.*, 329 Ill. App. 3d 729, 735 (1st Dist. 2002). "Moreover, in affirmative misrepresentation or omission cases under the Act, a plaintiff 'must allege the misrepresentation of a material fact.'" *Elder v. Coronet Insurance Co.*, 201 Ill. App. 3d 733, 751 (1st Dist. 1990) (citing *Heastie v. Cmty. Bank*, 690 F. Supp. 716, 718-19 (N.D. Ill. 1988)). A misrepresentation is material if it relates to a matter upon which plaintiff could be expected to rely in determining to engage in the conduct in question. *Heastie*, 690 F. Supp. at 719 (citations omitted).

The Attorney General is authorized to file for an injunction against a defendant who has violated some other, substantive provision of the Act. *People v. United Constr. of Am.*, 2012 IL App (1st) 120308, ¶ 11 (citing 815 ILCS 505/7(a)). Section 7(a) of the ICFA provides:

> Whenever the Attorney General or a State's Attorney has reason to believe that any person is using, has used, or is about to use any method, act or practice declared by this Act to be unlawful, and that proceedings would be in the public interest, he or she may bring an action in the name of the People of the State against such person to restrain by preliminary or permanent injunction the use of such method, act or practice.

815 ILCS 505/7(a). Thus, the Attorney General has the right to litigate a violation of the ICFA and to obtain injunctive relief, civil penalties, or restitution for incidents of consumer fraud, provided that the elements in Section 7 are met. *United Constr. of Am.*, 2012 IL App (1st) 120308, ¶ 13 (citing 815 ILCS 505/7). Unlike private individuals, the Attorney General may litigate a violation without proving that the defendants' actions proximately harmed any consumers. *Id.* at ¶¶ 15-16 (comparing 815 ILCS 505/7 with 815 ILCS 505/10a(a)).

The ICFA must be liberally construed effectuate its purpose. 815 ILCS 505/2; *Oliveira v. Amoco Oil Co.*, 201 Ill. 2d 134, 159 (2002). Several courts have noted that there is a clear mandate from the Illinois legislature that the courts utilize the Act to the utmost degree in eradicating all forms of deceptive and unfair business practices and grant appropriate remedies to injured parties. *Bank One Milwaukee v. Sanchez*, 336 Ill. App. 3d 319, 321-22 (2d Dist. 2003) (citing *Duhl v. Nash Realty Inc.*, 102 Ill. App. 3d 483, 495 (1981)); *Perlman v. Time, Inc.*, 64 Ill. App. 3d 190, 198 (1978); *see also Kirkruff v. Wisegarver*, 297 Ill. App. 3d 826, 838 (1998) (courts should liberally construe and broadly apply the Act to eradicate all forms of deceptive and unfair business practices). One of the goals of Act is to give broader protection than afforded by common law fraud and negligent misrepresentation.[25] *Chandler v. Am. Gen. Fin.*, 329 Ill. App. 3d 729, 735 (1st Dist. 2002) (citing *Oliveira v. Amoco Oil Co.*, 311 Ill. App. 3d at 886, 892); *People v. Maclean Hunter Pub. Corp.*, 119 Ill. App. 3d 1049, 1056 (1st Dist. 1983) (citation omitted). Although the standard of proof for a violation of the ICFA is lenient, a complaint alleging a violation of the Act must be pled with the same particularity and specificity as required under common law fraud. *Robinson*, 201 Ill. 2d 403, 419 (2002); *Connick*, 174 Ill. 2d 482, 502 (1996). Thus, the court should dismiss the complaint if it does not meet these pleading requirements. *Robinson*, 201 Ill. 2d at 419; *Longo Realty v. Menard, Inc.*, 2016 IL App (1st) 151231, ¶ 28; *Demitro v. GMAC*, 388 Ill. App. 3d 15, 20 (1st Dist. 2009).

Deceptive or Unfair Practices

Courts determine whether a given practice is unfair or deceptive on a case-by-case basis. *People v. Stianos*, 131 Ill. App. 3d 575, 581 (1985). In analyzing deceptive conduct, the ICFA allows courts to refer to interpretations of the Federal Trade Commission and federal decisions under the Federal Trade Commission Act. 15 U.S.C. § 45; *See* 815 ILCS 505/2; *People v. Maclean Hunter Pub. Corp.*, 119 Ill. App. 3d 1049, 1057 (1st Dist. 1983). The Federal Trade Commission has explained the standard for analyzing deceptive conduct as follows:

> It is well established that the test to be used in interpreting advertising is the net impression that it is likely to make on the general populace. It is immaterial that a given phrase considered technically may be construed so as not to constitute a misrepresentation or that a deception is accomplished by innuendo rather than by affirmative misstatement. Where an advertisement is subject to two interpretations, one of which is false, the Commission is not

[25] A successful common law fraud complaint must allege, with specificity and particularity, facts from which fraud is the necessary or probable inference, including what misrepresentations were made, when they were made, who made the misrepresentations and to whom they were made. *Connick v. Suzuki Motor Co.*, 174 Ill. 2d 482, 496-97 (1996).

> bound to assume that the truthful interpretation is the only one which will be left impressed on the mind of every reader.

Aliano v. Ferriss, 2013 IL App (1st) 120242, ¶ 24 (citations omitted) (quoting *Williams v. Bruno Appliance & Furniture Mart, Inc.*, 62 Ill. App. 3d 219, 222 (1st Dist. 1978)). "Illinois courts have consistently held an advertisement is deceptive 'if it creates the likelihood of deception or has the capacity to deceive.'" *Chandler v. Am. Gen. Fin.*, 329 Ill. App. 3d 729, 739 (1st Dist. 2002). At the very least, the defendant's "deceptive" conduct must create the likelihood of confusion or misunderstanding. *Aliano*, 2013 IL App (1st) 120242, ¶ 26.

> A cause of action is stated under the ICFA by an allegation of any false promise or deception, not limited to existing facts and without regard to the good or bad faith of the defendant in making the false statements; the focus of our inquiry is therefore the deceptive capacity of the statements at issue.

Maclean Hunter Pub. Corp., 119 Ill. App. 3d 1049, 1058 (1st Dist. 1983) (citation omitted). The center of focus is not on the intent of the seller, but, rather, on the effect that the unlawful conduct might have on the consumer. *People v. Stianos*, 131 Ill. App. 3d 575, 579 (2nd Dist. 1985).

Additionally, conduct may be unfair without being deceiving. *Robinson v. Toyota Motor Credit Corp.*, 201 Ill. 2d 403, 417 (2002). Conduct is considered unfair if it: (1) offends public policy; (2) is considered immoral, unethical, oppressive, or unscrupulous; and (3) causes substantial injury to consumers. *Id.* at 417-18. All three factors do not need to be met in order for a practice to be deemed unfair; a practice may be unfair because of the degree to which it meets one of the criteria or because to a lesser extent, it meets all three criteria. *Id.* at 418; *Demitro v. GMAC,* 388 Ill. App. 3d 15, 20 (1st Dist. 2009).

In this case, the State has alleged unfair or deceptive conduct because (1) originating subprime student loans that the offeror or originator knows will likely default constitutes and unfair and deceptive act, particularly when done so to gain access to valuable FFEL loan volume; (2) Navient's promises to help borrowers when they reached out are presented as facts for borrowers to reasonably rely on and are unfair or deceptive; and (3) Navient's repetitive behavior of misallocating and misapplying payments without a system in place to fix these "errors" is deceptive and offends public policy, is considered immoral, unethical, oppressive, or unscrupulous, and/or causes substantial injury to customers.

Allegations Concerning Offering Or Originating Subprime Loans That Are Likely To Default In Order To Be Placed On A Preferred Lender List And Thereby Acquire Federally Guaranteed Loan Volume, While Shifting That Default Risk To Schools Without Disclosing Those Facts To Borrowers, Properly State "Unfair And Deceptive Conduct"

Navient asserts three arguments for why the origination claims fail to amount to "unfair or deceptive" practices as a matter of law. (Mot. to Dismiss, p. 20-22). First, Navient contends that "subprime lending" is not considered to be an "unfair" or "deceptive" practice. Second, Navient argues that the alleged failure to disclose opinions regarding projected default rates or the existence of loss-sharing agreements are not omissions or concealment of "facts" or "material facts" as required under the ICFA. Third, Navient contends that it is under no obligation to disclose to borrowers the existence of loss-sharing agreements. Each of these arguments will be addressed in turn.

Navient argues that nearly all student lending, which often consists of lending to borrowers with little or no income, limited or no credit history, low or no FICO scores, and an individually unknowable likelihood of graduation could be characterized as a form of "subprime lending." (Mot. to Dismiss, p. 22). However, as detailed above, the State cites to several district court cases that have found similar behavior to be unfair and deceptive under the CFPA, the federal equivalent of the ICFA.[26] Indeed, as the district courts held in those cases, originating subprime student loans that the offeror or originator knows will likely default constitutes an unfair and deceptive act, particularly when done so to gain access to federal student loans. (Resp. Br., p. 22) *supra*, p. 32; *see also CFPB v. Corinthian Colls., Inc.*, 2015 U.S. Dist. LEXIS 178105 (N.D. Ill. 2015); *CFPB v. ITT Educ. Servs., Inc.*, 219 F. Supp. 3d 878 (S.D. Ind. 2015); *People v. Alta Colls., Inc.*, 2014 U.S. Dist. LEXIS 123053. Similarly here, the State has alleged that Navient created particular types of subprime loans with high interest rates and offered them to specific colleges with high expected default rates. Further, the State has alleged that Navient used these subprime loans to gain access to valuable FFEL volume. In essence, the State has alleged that Navient targeted a specific type of student and offered them loans that would more than likely

[26] Similar to the ICFA, the CFPA makes it unlawful for any service provider to engage in any unfair, deceptive, or abusive act or practice. 12 U.S.C. § 5536(a)(1)(B). Under the CFPA, an act or practice can be abusive if it takes unreasonable advantage of the reasonable reliance by the consumer on a covered person to act in the interests of the consumer. 12 U.S.C. § 5531(d)(2)(C).

default but at the same time gives Navient access to prized government funded loans. Indeed, this type of "subprime lending" is unfair and deceptive.

The State has pleaded sufficient facts in support of its contention that Navient's default rates were part of a larger scheme employed to access valuable FFEL loan volume

Navient argues that the alleged failure to disclose opinions regarding projected default rates or the existence of loss-sharing agreements are not omissions or concealment of "facts" or "material facts" as required under the ICFA. (Mot. to Dismiss, p. 22). "An omission or concealment of a material fact in the conduct of trade or commerce constitutes consumer fraud." *Connick v. Suzuki Motor Co.*, 174 Ill. 2d 482, 504-05 (1996) (citing 815 ILCS 505/2). "A material fact exists where a buyer would have acted differently knowing the information, or if it concerned the type of information upon which a buyer would be expected to rely in making a decision whether to purchase." *Id.* at 505.

Navient contends that Illinois courts have uniformly held that forward-looking projections about the performance of contractual counterparties are non-actionable matters of opinion, not matters of fact. (Mot. to Dismiss, p. 22) (citing *Avon Hardware Co. v. Ace Hardware Corp.*, 2013 IL App (1st) 130750, ¶ 19 (affirming dismissal of fraud action "as to claims involving statements of future performance" because those were mere "expression[s] of opinion"); *Lagen v. Balcor Co.*, 274 Ill. App. 3d 11, 17 (1995) ("Generally, financial projections are considered to be statements of opinion, not fact.")).

While it is true that misrepresentations of intention to perform future conduct, even if made without a present intention to perform,, do not generally constitute fraud, Illinois courts have recognized an exception to this rule. "Under this exception, such promises are actionable if the false promise or representation of future conduct is alleged to be the scheme employed to accomplish the fraud." *HPI Health Care Servs., Inc. v. Mt. Vernon Hosp., Inc.*, 131 Ill. 2d 145, 168 (1989) (internal quotation marks omitted). In this case, the State has alleged that Navient was engaged in a scheme to secure placement on a school's preferred lender list and access the valuable FFEL volume that was 100% insured by the government. The Complaint contains detailed allegations on how Navient loosened its credit standards in order to offer subprime loans with high default rates to students enrolled in schools with low graduation rates. These allegations fall within the exception and present a case "where the false promise[s] or representation[s] of intention or of future conduct [were] the scheme or device to accomplish the [alleged] fraud." *HPI Health Care Servs., Inc.*, 131 Ill. 2d at 169.

The State has pleaded sufficient facts showing that Navient's default rates and risk sharing agreements were material

Navient contends that information regarding projected default rates or the existence of loss-sharing agreements was "material." Contrary to Navient's assertion, the State has alleged that information regarding projected default rates or the existence of loss-sharing agreements is "material." A material fact exists where a buyer would have acted differently knowing the information, or if it concerned the type of information upon which a buyer would be expected to rely in making a decision whether to purchase.. *Connick v. Suzuki Motor Co.*, 174 Ill. 2d 482, 505 (1996). An "omission or concealment of a material fact in the conduct of trade or commerce constitutes consumer fraud." *Falls v. Silver Cross Hosp. & Medical Ctrs.*, 2016 IL App (3d) 150319, ¶ 28 (quoting *White v. DaimlerChrysler Corp.*, 368 Ill. App. 3d 278, 283 (1st Dist. 2006)); 815 ILCS 505/2. Circumstantial evidence may establish the violator intended for consumer reliance to result from an act or omission. *Falls*, 2016 IL App (3d) 150319, ¶ 30. It is reasonable to conclude that disclosure of the projected default rates or of contractual loss-sharing agreement with schools are matters (1) upon which a reasonable person could be expected to rely in determining whether to take out a specific loan or deal directly with a specific lender and (2) that would have caused borrowers to make different decisions. It cannot be said that such information is of no relevance.

The State has pled a host of facts showing that both the high default rates and the risk-sharing agreements were facts on which borrowers could be expected to rely, and which would have caused borrowers to act differently, had they been disclosed. (Resp. Br., p. 23). Indeed, a 2007 Sallie Mae email entitled "Sub-Prime Lending workgroup meeting attachments," describes Opportunity loans[27] as "the baited hook to gain FFEL volume." (Compl. ¶ 141). Moreover, the State alleges that the Origination Defendants knowingly failed to disclose the high likelihood or percentage of default rates to borrowers or even to schools. (Compl., ¶¶ 173-78). For example, in 2006, the overall percentage of borrowers who defaulted on a Signature Student loan was approximately 33%, yet the percentage of borrowers who attended for-profit schools with less

[27] Opportunity loans represented the greatest portion of Sallie Mae's subprime volume as of academic year 2005 to 2006. Compl. ¶ 140.

than 50% graduation rates with FICOs less than 640 who were given loans with high interest rates or fees was approximately 75%. (Compl., ¶ 172). The Defendants not only knew that these subprime loans more than likely ended in default, but also that schools would not appreciate the high default rates of these loans. (Compl., ¶ 177). Lastly, the State alleges because of the high risk of default on these loans, the Defendants formed "credit enhancement' agreements and "recourse" arrangements with schools, to cover itself from the high likelihood of default, all while attempting to collect the full amount from the borrower. (Compl. ¶¶ 180-92). It is reasonable that a borrower rely on this type of information before facing the exponentially high risk of default on these loans but also a high hurdle in discharging them in bankruptcy.

Navient argues that the State has failed to explain why Navient would be required to disclose to borrowers the existence of loss-sharing agreements. (Mot. to Dismiss, p. 23). The State responds that Navient's "offloading of the risk of default is a fact borrowers would have relied on when deciding to take out a loan and would have caused them to act differently." (Resp., p. 24). The State relies on *Falls v. Silver Cross Hospital & Medical Centers*, to support the notion that "[f]ailing to tell a consumer about the existence of a contractual arrangement with a third party to limit losses when entering into a financial transaction can be a violation of the CFA." (Resp., p. 24). 2016 IL App (3d) 150319, ¶¶ 28-41. Navient fails to reply to the State's argument in its Brief.

In *Falls*, the plaintiff alleged that Silver Cross, the insurance company, included language in its consent form that misled plaintiff into consenting to allow "a Hospital Lien for the full amount of the hospital services" without first informing the plaintiff and the class that Silver Cross had contractually agreed to accept less than the "full amount" for hospital services provided to the customers of United Healthcare. 2016 IL App (3d) 150319, ¶ 31. The appellate court noted that "[g]enerally speaking, we are well aware that hospitals are free to negotiate an agreement with the patient to allow the hospital to place a lien for the purpose of securing payment for services rendered." *Id.* ¶ 38. However, the appellate court found that the secret agreement between Silver Cross and United Healthcare violated the ICFA because the consent form secured the plaintiff's permission for Silver Cross to return United Healthcare's PPO discounted payment, thereby allowing Silver Cross to renege on the terms of the FPA and pursue balance billing by hospital lien with the patient's uninformed blessing. *Id.* Similarly in this case, the State has alleged that Navient has credit enhancement agreements with schools where the borrower's school has agreed to cover a portion of the borrower's loan all upfront all while attempting to collect the full amount from the borrower. (Compl. ¶ 186).

The State Has Pleaded Sufficient Facts Showing that Navient's Promises to Help Borrowers When They Reached Out Are Presented As Facts for Borrowers to Rely On and Are Actionable

In this case, Navient's representations that "our representatives can help you by identifying options and solutions" and "9 times out of 10, when we can talk to a struggling federal loan customer we can help him or her get on an affordable payment plan and avoid default," if shown to be false, would constitute a deception within the meaning of the ICFA because these statements could mislead the public by creating a false impression of authority or expertise. *See Maclean Hunter Pub. Corp.*, 119 Ill. App. 3d 1049, 1058 (1st Dist. 1983). As the State persuasively explains, "Navient held itself out as a trusted resource that struggling borrowers could contact to assist them with making the right decision for their situation. Borrowers experiencing financial difficulties called Navient for any number of reasons: they may not have received or understood the notices, may have questions about them, or perhaps believed Navient's promise to help. Navient then turned around and, at the very moment borrowers needed help most, pushed them into a forbearance that increased the cost of a borrower's loan. Navient's written communications are only the beginning of its interaction with struggling borrowers, not the end, and cannot absolve itself of its subsequent misconduct during calls with borrowers." (Resp., p. 25).

Navient argues that ¶¶ 469(a)-(h) (steering borrowers into forbearances) fails because the State does not even claim that information regarding IDR plans was never provided to borrowers. (Mot. to Dismiss, p. 24). Navient asserts that the State merely alleges that the information was not provided on every phone call, a requirement that does not exist under federal law. (*Id.*). Navient argues that this "duty" to disclose such facts to borrowers on every phone call does not exist. (*Id.*). Moreover, Navient contends that by not challenging any of the federal disclosure regulations, the State tacitly admits that Navient complied with the applicable rules. (*Id.*).

Navient asserted a similar argument in *Consumer Financial Protection Bureau v. Navient Corp.*, 3:17-CV-101 at 44-45 (M.D. Pa. Aug. 4, 2017), https://www.consumerfinancemonitor.com/wp-content/uploads/sites/14/2017/08/navient.pdf. In the pending district court case, Count I of the CFPB's Complaint alleges that Navient violated the CFPA's prohibition on abusive acts or practices because Navient's webpage stated that Navient would help borrowers find a repayment option appropriate for the individual borrower's situation but that Navient steered borrowers into forbearance without adequately advising them about other repayment options. *Id.* at 44. In Navient's Motion to Dismiss, Navient argued that Count I should have been dismissed because Navient had no duty to provide individualized financial counseling to borrowers. *Id.* In denying Navient's Motion to Dismiss, the district court specifically explained as it related to Count I that "Navient's alleged practice is abusive under the CFP Act if Navient took unreasonable advantage of a borrower's reasonable reliance that Navient would act in the borrower's interest." *Id.* at 45. The district court gave examples of how the CFPB's Complaint alleged specific statements that Navient advertised on their website, that customer representatives did not give complete information on IDR plans and instead pushed borrowers into forbearances, and that these actions were both detrimental to borrowers and beneficial to Navient. *Id.* The district court reasoned that "[t]his is sufficient at the pleading stage to allege that Navient took unreasonable advantage of borrowers' reasonable reliance on Navient's statements that Navient would give them adequate information to properly choose a repayment plan." *Id.* at 45-46. The district court also found that the complaint alleged that Navient placed reliance inducing statements on their webpage and that this type of active conduct created a duty to act in accordance with their own statements. *Id.* at 46-47. These allegations are strikingly similar to those contained in the State's Complaint. In this case, the State, similar to the CFPB in Pennsylvania, has alleged sufficient facts that show "that Navient took unreasonable advantage of borrowers' reasonable reliance on Navient's statements that Navient would give them adequate information to properly choose a repayment plan." *Id.* Additionally, Navient's active or affirmative conduct took unreasonable advantage of borrowers' reasonable reliance that Navient would give them adequate information to choose an IDR plan and not be steered into costly forbearances.

Navient asserts that it is insufficient as a matter of law to allege "deceptive" failure to disclose when the information was disclosed at other times or by other means. (Mot. to Dismiss, p. 25). Navient argues that under Illinois law, a plaintiff cannot state a claim for "deceptive conduct" on the basis of failure to disclose material facts when those very facts were, in fact, disclosed. (Mot. to Dismiss, p. 25); *See Robinson v. Toyota Motor Credit Corp.*, 201 Ill. 2d 403, 420 (2002) (agreeing with the appellate court that because certain penalty provisions were clearly set out in the lease, the plaintiffs did not allege sufficient facts to establish that the defendant's conduct in imposing these penalties was deceptive); *Sklodowski v. Countrywide Home Loans, Inc.*, 358 Ill. App. 3d 696, 704-05 (1st Dist. 2005) (plaintiff did not allege sufficient facts to establish that the defendant's conduct of not paying interest on escrow funds was deceptive because the mortgage agreement clearly disclosed this policy, there was no allegation that there was a separate agreement to pay interest on these funds, and there was no cited Illinois statute that required lenders to pay interest). However, as the State points out, the cases Navient relies upon are factually inapplicable because they involved disputes over predetermined terms of a contract rather than an ongoing relationship between borrowers and their servicers. (Resp. Br., p. 26). Indeed, the relationship between a borrower and servicer is constantly changing because a borrower's financials change. Unlike the predetermined terms of a lease or a mortgage agreement, the federal government has intentionally and specifically taken into account the fact that a borrower's financials change over the course of a month or a year, which is why IDR plans were created in the first place and why they need to be annually recertified.

Navient singles out ¶ 469(c)[28] and argues that it fails as a matter of law because the State cannot sustain a cause of action for unfair or deceptive conduct based on statements in mass marketing that are not "objectively verifiable by specific or absolute characteristics." (*Id.*). Navient contends that the State's theory of liability clearly rests in significant part on its allegation that Navient "misled" borrowers through a purported campaign of deceptive mass marketing. Navient argues that the alleged misrepresentations include general and undefined statements that do not purport to represent an "objectively verifiable" fact and that these statements are more akin to "puffery," which is plainly "not actionable as consumer fraud" under the ICFA. *Right Field Rooftops, LLC v. Chi. Cubs*, 136 F. Supp. 3d 911, 919 (N.D. Ill. 2015).

"'Puffery' denotes the exaggerations reasonably to be expected of a seller as to the degree of quality of his or her product, the truth or falsity of which cannot be precisely determined.

[28] "Misrepresenting that Servicing Defendants would "work with" borrowers struggling to pay their loans, "help [borrowers] make the right decision for [their] situation"; and "help [borrowers] by identifying options and solutions, so [borrowers] can make the right decision for [their] situation" when, in fact, Servicing Defendants in many instances did not do so." Compl. ¶ 469(c).

Puffing signifies meaningless superlatives that no reasonable person would take seriously, and so it is not actionable as fraud." *Hanson-Suminski v. Rohrman Midwest Motors, Inc.*, 386 Ill. App. 3d 585, 594 (1st Dist. 2008) (citations omitted); *see also Barbara's Sales, Inc. v. Intel Corp.*, 227 Ill. 2d 45, 73 (2007). In this case, both Navient and the U.S. Department of Education contain statements on their websites that repeatedly tell consumer and borrowers to consult with their federal student loan servicer to determine the best repayment plan. It would not be reasonable to expect a consumer/borrower to not rely on both Navient and the Department of Education's affirmations that Navient, their federal loan servicer, would not help them find a beneficial and appropriate repayment plan. As such, Navient's contention that its own statements were mere puffery is without merit.

Navient relies on *Right Field Rooftops*, where the district court held that a statement did not obtain objectively verifiable facts and was not actionable under the ICFA, the Lanham Act, or the UDTPA[29]. *Id.* at 920. In *Right Field Rooftops*, the district court considered whether a statement made by the owner of the Cubs about the relationship between the Cubs and Rooftops, LLC was misleading or deceiving. *Id.* at 917. In response to a question regarding the construction at Wrigley Field, the owner of the Cubs stated: "It's funny—I always tell this story when someone brings up the rooftops. So you're sitting in your living room watching, say, Showtime. All right, you're watching 'Homeland.' You pay for that channel, and then you notice your neighbor looking through your window watching your television." *Id.* at 918. The district court found that any reasonable person hearing the statement would believe it was the owner's personal opinion rather than a fact. *Id.* at 919. The district court reasoned that the owner stated it to fans at a convention and prefaced it with, "I always tell this story" as if to describe how he felt about the situation. *Id.* Further, the district court found that there was no objective way to verify

[29] The Lanham Act and UDPTA contain similar elements. *Right Field Rooftops, LLC*, 136 F. Supp. 3d 911, 918 (N.D. Ill. 2015). To establish a claim under the false or deceptive advertising prong of § 43(a) of the Lanham Act, a plaintiff must prove: "(1) a false statement of fact by the defendant in a commercial advertisement about its own or another's product; (2) the statement actually deceived or has the tendency to deceive a substantial segment of its audience; (3) the deception is material, in that it is likely to influence the purchasing decision; (4) the defendant caused its false statement to enter interstate commerce; and (5) the plaintiff has been or is likely to be injured as a result of the false statement, either by direct diversion of sales from itself to defendant or by a loss of goodwill associated with its products." *Id.* Additionally, the ICFA contains identical elements as a Lanham Act and UDTPA violation except there is no requirement that any person was misled, deceived, or damaged by the unfair method of competition. *Id.*; *see* 815 ILCS 505/2.

the owner's statement because there is no way to fact check whether the Rooftops are similar to those who charge admission to watch their neighbor's television. *Id.* Thus, the district court held that the statement did not obtain objectively verifiable facts and was not actionable under any of the three statutes. *Id.* at 920.

As the State correctly points out, unlike the *Right Field Rooftops* case, the statements at issue in this case constitute a mass marketing campaign by Navient in which it encourages borrowers to rely on its judgment regarding student loan repayment options. (Resp. Br., p. 28). The State is correct; the endorsement of these statements by the U.S. Department of Education removes any doubt as to whether they are facts to be relied upon by borrowers. (Resp. Br., p. 28). As such, these allegations are actionable under the ICFA.

The State Has Pleaded Sufficient Facts to Show Misallocating and Misapplying Borrower Payments Could Constitute "Unfair And Deceptive Conduct"

Navient asserts that ¶ 469(i)[30] fails to allege unfair or deceptive conduct associated with payment processing because, by definition, mistakes and errors are not actionable as consumer fraud. (Mot. to Dismiss, p. 26). Navient argues that mistakes and errors are intrinsically not deceptive conduct and thus are not covered by the ICFA. (Mot. to Dismiss, p. 26). In response, the State asserts that the conduct at issue is more than human errors and mistakes; rather, it involves systemic errors in allocating and applying borrower payments. (Resp. Br., p. 28).

In the third set of allegations, the State alleges that Navient does not have adequate processes and procedures in place to sufficiently address certain errors it makes in the processing of payments received from borrowers and cosignors or to prevent errors from recurring. (Compl., ¶ 326). One of Navient's primary responsibilities is to process payments made by borrowers and cosignors on their student loan accounts. (Compl., ¶ 325). Specifically as it relates to borrowers who pay by mail or through an external bill payment system, the Attorney General alleges that Navient misallocated payments or misapplied submitted payments even when there are written instructions on paying or dividing payments among the loans. (Compl., ¶¶ 331, 333). For example, on at least one occasion, after making one late payment immediately upon graduating, a borrower and her cosignor received repeated harassing phone calls from Sallie Mae even after

[30] "Unfairly making errors, sometimes month after month, in misallocating and misapplying payments made by consumers, while failing to implement adequate processes and procedures to prevent the same errors from recurring, or to prevent the same errors from impacting other consumers." (Compl. ¶ 349(i)).

their check had been cleared from the borrower's bank account but before the check was posted on Navient's end. (Compl., ¶ 337). The same borrower receives statements that her account is still past due, despite the fact that she is current on her payments. (Compl., ¶ 337).

Borrowers bear the burden of having to repeatedly correct errors by calling Navient month after month. (Compl., ¶¶ 328, 352). Further, while Navient may correct specific errors if a consumer contacts Navient to report it, if the error is not escalated beyond a first-level customer service representative, Navient does not necessarily identify and fix the underlying issue causing the error to prevent it from recurring. (Compl., ¶ 349). Some borrowers have suffered the same payment processing error in multiple months. (Compl., ¶ 349). As a result, these types of misallocations and misapplications have resulted in borrowers incurring improper late fees, increased interest charges, notices and calls regarding a delinquency on the account, the furnishing of inaccurate negative information to consumer reporting agencies and the loss of certain benefits. (Compl., ¶¶ 328-31, 342, 346).

Under the ICFA, "unfair conduct is defined on a case-by-case basis because of the futility of trying to anticipate all the unfair methods and practices a fertile mind might devise." *Laughlin v. Evanston Hosp.*, 133 Ill. 2d 374, 395 (1990). The ultimate determination of what is "unfair" is left to the trier of fact. *Id.* As stated above, conduct is considered unfair if it: (1) offends public policy; (2) is considered immoral, unethical, oppressive, or unscrupulous; and (3) causes substantial injury to consumers. *Robinson v. Toyota Motor Credit Corp.*, 201 Ill. 2d 403, 417-18 (2002). In this case, a trier of fact could find that Navient's repetitive behavior of misallocating and misapplying payments without a system in place to fix these "errors" offends public policy, is considered immoral, unethical, oppressive, or unscrupulous, and/or causes substantial injury to consumers. Although the ICFA was not intended to eradicate human mistakes and errors, it was intended to eradicate "recurrent" unfair behavior.

Navient clearly knew that their payment allocation and application system was problematic. Notably, the Complaint alleges that "each year Navient receives **thousands of complaints** and inquiries relating to payment misapplication or misallocation that are escalated beyond a first-level customer service representative." (Compl., ¶ 332) (emphasis added). Additionally, Navient's own representative acknowledged repeated errors that occurred each month but offered no solutions and stated: "She told me that I was 100% correct and I shouldn't have to call every month to tell them how to do their job... Her exact words were 'It's like we are chasing out own tail'…" (Compl., ¶ 347). Yet in light of the numerous complaints, Navient has failed to put into place appropriate procedures and processes to address or prevent such issues. (Compl., ¶ 326). As such, these allegations are actionable under the ICFA.

735 ILCS 5/2-603(b)

Lastly, Navient argues that the State's claims must be dismissed because the Complaint violates mandatory pleading rules. (Mot. to Dismiss, p. 27). Navient contends that the State has alleged no less than twenty-one different theories of liability under the ICFA with respect to the (1) origination, (2) servicing, and (3) collection of student loans against five separate Defendants playing different roles over a seventeen-year time period-all in one jumbled mega-count entitled "VIOLATIONS." (Mot. to Dismiss, p. 27). Navient asserts that each of these three general categories of business conduct relates to a different phase of the loan process, different business practices of the Defendants, and activities not conduct by all Defendants. (Mot. to Dismiss, p. 27). Further, Navient contends that each of the three categories is alleged with distinct theories of liability, including alleged failures to disclose, alleged misrepresentations, and alleged "unfair" conduct. (Mot. to Dismiss, p. 28). Navient argues that the State has failed to comply with the express terms of Section 603(b). (Mot. to Dismiss, p. 28).

The purpose of Section 2-603 "is to give notice to the court and to the parties of the claims being presented." *Cable Am., Inc. v. Pace Electronics, Inc.*, 396 Ill. App. 3d 15, 19 (1st Dist. 2009) (citing *Smith v. Heissinger*, 319 Ill. App. 3d 150, 154 (2001)). Under Illinois law, a plaintiff must plead multiple theories of liability as multiple claims. 735 ILCS 5/2-603(b). Section 603(b) provides:

> Each separate cause of action upon which a separate recovery might be had shall be stated in a separate count or counterclaim, as the case may be and each count, counterclaim, defense or reply, shall be separately pleaded, designated and numbered, and each shall be divided into paragraphs numbered consecutively, each paragraph containing, as nearly as may be, a separate allegation.

735 ILCS 5/2-603(b). Failure to comply with Section 2-603 may be grounds for dismissal of the complaint. *Cable Am., Inc.*, 396 Ill. App. 3d at 19. Complaints are to be liberally construed with an eye toward doing justice between the parties. 735 ILCS 5/2-603(c).

In this case, it is possible to decipher who the allegations in the State's Complaint are directed at and what they are alleged to have violated. The State's 84-page Complaint provides the following labeled sections: Summary of the Case; Public Interest; Jurisdiction and Venue; Background; Parties; Trade and Commerce in Illinois; Sallie Mae Unfairly and Deceptively Originate Private Student Loans; Unfair and Deceptive Servicing of Federal and Private Loans; Navient, Pioneer Credit Recovery, and General Revenue Corporation's Unfair and Deceptive Debt Collection Practices; Applicable Statutes; Violations; Remedies; and Prayer for Relief. Further, the Complaint includes allegations that separate the relevant time period for each section (e.g. Compl., ¶¶ 97, 216, 420). Lastly, the Complaint specifically directs each section to certain defendants. (e.g. Compl., ¶¶ 98, 217, 426, 468, 469, 470).

As the State points out, the Attorney General's Complaint clearly sets forth its ICFA claims in detail and alleges separate ICFA violations in individually numbered and lettered paragraphs. Navient was clearly aware of the kind of unfair and deceptive conduct that the Complaint alleges because it filed a detailed Motion to Dismiss to failure to state a claim under the ICFA. As such, Navient's Section 603(b) Motion to Dismiss should be denied.

I. CONCLUSION

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Defendants' motion to dismiss is denied.

This matter is set for status on August 22, 2018 at 10:00 a.m. 4217

DATE: July 10, 2018

ENTERED
JUDGE KATHLEEN M. PANTLE-1775
JUL 10 2018
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK

Kathleen M. Pantle

Kathleen M. Pantle

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