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IN THE SUPERIOR COURT OF WASHINGTON
IN AND FOR THE COUNTY OF KING

STATE OF WASHINGTON,

Plaintiff/Petitioner,

v.

NAVIENT CORPORATION, et al.,

Defendant/Respondents.

No. 17-2-01115-1 SEA

DEFENDANTS' REPLY IN SUPPORT OF
MOTION TO DISMISS THE COMPLAINT

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1 I. INTRODUCTION

2 Throughout its brief, the State repeatedly insists that it does not allege improper-
3 disclosure claims, but instead alleges “unfair and deceptive practices.” With respect to its federal
4 loan servicing claims, this is precisely the argument that was considered—and rejected—in
5 *Chae*. See *Chae v. SLM Corp.*, 593 F.3d 936, 943 (9th Cir. 2010) (rejecting borrowers’ claims
6 that “they do not seek specific disclosures, but merely seek to stop Sallie Mae from fraudulently
7 and deceptively misleading borrowers”). By simply reciting this conclusory claim, the State
8 ignores the central thrust of *Chae*—that even “restyled” disclosure claims are preempted by the
9 HEA. Without any basis to distinguish *Chae*, the State resorts to arguing *Chae* was wrongly
10 decided and is non-binding. But *Chae* is directly on point, and it should be followed here to
11 dismiss the State’s federal servicing claims in ¶¶ 7.3(f)-(j).

12 With respect to the State’s origination claims, the Court should invoke the “primary
13 jurisdiction” doctrine and dismiss the claims in ¶¶ 9.4(a)-(b) because they satisfy the three-part
14 *Vogt* test, including—importantly—that they directly implicate TILA’s “pervasive [federal]
15 regulatory scheme.” *Vogt v. Seattle-First Nat’l Bank*, 117 Wn.2d 541, 554, 817 P.2d 1364,
16 1371-72 (1991). If these origination claims were allowed to proceed, “danger exists that judicial
17 action would conflict with the regulatory scheme.” *Id.* Nowhere does the State dispute that *Vogt*
18 and *Miller* set forth the proper test for primary jurisdiction. Yet inexplicably, the State fails to
19 apply the test or justify why its state law claims should proceed despite interfering with TILA’s
20 regulatory scheme.

21 Finally, the State fails to explain how a number of its claims amount to “unfair” or
22 “deceptive” conduct as a matter of law even when, for example, its failure-to-disclose claims do
23 not actually allege failure to disclose material facts. For these reasons, and as set forth in
24 Navient’s motion, the Court should reject the State’s effort to “backdoor” brand new disclosure

1 rules in place of a comprehensive federal regulatory scheme, and should dismiss the claims in
2 Counts I-III pursuant to CR 12(b)(6).

3 II. ARGUMENT

4 A. The State Cannot Avoid Preemption Under The HEA Simply By “Re-Styling” Its 5 Otherwise-Preempted Servicing Claims

6 The State does not dispute, nor can it, that disclosures to federal student loan borrowers
7 are extensively regulated by the HEA. Nor does the State dispute that 20 U.S.C. § 1098g
8 expressly preempts state disclosure laws. Rather, the State argues that its allegations simply
9 have *nothing to do with disclosures*. This is semantics. The State’s federal servicing claims
10 both expressly allege and are premised upon improper disclosures. Specifically, the State alleges
11 that Navient failed to disclose the available “federal loan repayment options”; a “date certain” for
12 recertifying IDR plans; and the “need to recertify” eligibility for an IDR plan. Compl. ¶ 7.3(f)-
13 (j). The State’s brief recites the same conclusory argument that these claims “neither arise[]
14 from nor [are] related to any federal disclosure requirement.” State’s Opp. at 14. But the State
15 fails to explain how these claims are any different from the “restyled improper-disclosure
16 claims” that the *Chae* court concluded were expressly preempted by § 1098g. *Chae*, 593 F.3d at
17 943. And “preemption cannot be avoided simply by re-labeling an otherwise-preempted claim.”
18 *Chae*, 593 F.3d at 943.

19 Unable to avoid *Chae*’s clear holding, the State resorts to arguing it was wrongly decided.
20 State’s Opp. at 18-24 (dedicating six pages of its brief to argue how *Chae* “should have been
21 decided”). First, the State argues that the “plain language” meaning of the word “disclosure” in
22 § 1098g means only those disclosures related to origination, not servicing. *Id.* at 21-22. This is
23 the opposite of a plain reading of the statute, which explicitly says “*any* disclosure
24 requirements,” not “origination” or “some” disclosure requirements. The State’s argument also
has no basis in law. The HEA enumerates other “disclosure” regulations that do, in fact, apply to
servicing. *See, e.g.*, 20 U.S.C. § 1083(e) (“Required disclosures during repayment”); 34 C.F.R.

1 § 682.205(a)(4) (“Required disclosures for borrowers having difficulty making payments”). The
2 argument that both Congress and ED enacted “required disclosures” for federal loans under the
3 HEA that do not fall within the meaning of “any disclosure requirement” lacks any basis in logic
4 or law.

5 In its effort to re-construe § 1098g, the State also appeals to “Ninth Circuit case law.”
6 State’s Opp. at 18. The irony, of course, is that the State cites Ninth Circuit cases to construe
7 § 1098g when the Ninth Circuit has already directly construed § 1098g in *Chae*. None of the
8 other Ninth Circuit cases cited by the State even concern § 1098g. And the State simply ignores
9 cases from other jurisdictions interpreting § 1098g, all of which reach the same conclusion as the
10 Ninth Circuit in *Chae*. See, e.g., *McCulloch v. PNC Bank Inc.*, 298 F.3d 1217, 1226 (11th Cir.
11 2002) (“Congress specifically intended for the HEA to preempt any State disclosure
12 requirements relating to [federal loans].”); *United States v. Gorski*, No. CV 11-4252 AG, 2012
13 WL 12886823, at *7 (C.D. Cal. Mar. 22, 2012) (dismissing state law claims related to federal
14 student loans); *Washkoviak v. Student Loan Mktg. Ass’n*, 849 A.2d 37, 40-41 (D.C. 2004)
15 (affirming dismissal of a consumer protection act claim alleging Sallie Mae misrepresented facts
16 to student borrowers).

16 To rescue its claims, the State maintains for the first time in its brief that it alleges
17 “affirmative deceptive statements.” State’s Opp. at 13. But the State’s federal servicing claims
18 do not actually allege that. Instead, its allegations are limited to failures to disclose. For
19 instance, the State alleges that Navient “present[ed] the federal loan repayment options . . . in a
20 deceptive manner.” Compl. ¶ 7.3(f). At bottom, this is an allegation that Navient failed to
21 disclose *all* available repayment options or *more details* about those options. By contrast, an
22 “affirmative deceptive statement” would be a claim that Navient disclosed *false or incorrect*
23 repayment options. Likewise, the State alleges that Navient failed to disclose:

- 24 • a *date certain* (not that it disclosed the *wrong date*), *id.* ¶ 7.3(g)-(h);

- 1 • the *need to recertify* (not that it represented that borrowers *need not certify*), *id.*
- 2 ¶ 7.3(i); and
- 3 • the suitability of *alternatives to forbearances* (not that it represented to borrowers
- 4 that *forbearances are not available* or *falsely described forbearances*), *id.*
- 5 ¶ 7.3(j).

6 The State’s claims are therefore disclosure claims, not “affirmative deceptive statements.”
7 Indeed, they are no different than the “misrepresentation claims” that the *Chae* court concluded
8 are preempted “improper-disclosure claims.” *Chae*, 593 F.3d at 942.

9 The unpublished *Genna* decision cited by the State is not to the contrary—in fact, that
10 court noted that *Chae*’s logic “is unassailable.” *Genna v. Sallie Mae, Inc.*, No. 11 CIV. 7371
11 LBS, 2012 WL 1339482, at *8 (S.D.N.Y. Apr. 17, 2012). But the facts of *Genna* are extreme:
12 Sallie Mae allegedly repeatedly failed to enroll the borrower in a requested payment plan, falsely
13 confirmed that he was enrolled, falsely reported him to credit agencies when he missed his
14 payment, and a call center representative finally “declined further cooperation and expressly
15 invited Genna to bring suit.” *Id.* at *2. The *Genna* court simply held that the HEA does not
16 preclude state laws prohibiting affirmative false statements, but as explained above, the State
17 does not allege affirmative false statements.

18 **B. The State Wrongly Dismisses The Doctrine Of “Primary Jurisdiction” Even Though**
19 **Its Origination Claims Implicate TILA’s Pervasive Regulatory Scheme**

20 The State cavalierly dismisses the applicability of “primary jurisdiction” principles to this
21 case, arguing that even the possibility of deferring to a federal agency “makes no sense.” State’s
22 Opp. at 12. Contrary to the State’s contention, those principles are not limited to instances where
23 “an authorized agency ‘took overt affirmative actions specifically to permit the actions or
24 transactions.’” *Id.* (quoting *In re Real Estate Brokerage Litig.*, 95 Wn.2d 297, 301, 622 P.2d

1 1185, 1187 (1980)). The Washington Supreme Court long ago made clear that primary
2 jurisdiction is designed to ensure uniformity of state and federal law, and to avoid interference
3 with complex federal regulatory schemes. *Vogt v. Seattle-First Nat'l Bank*, 117 Wn.2d 541, 544,
4 817 P.2d 1364, 1371 (1991) (“The court will usually defer ... if enforcement of a private claim
5 ... involves an area where a uniform determination is desirable.”). Under this long-standing
6 doctrine, courts apply a three-part test to determine whether to dismiss a claim. *Miller v. U.S.*
7 *Bank of Wash., N.A.*, 72 Wn.App. 416, 420-21, 865 P.2d 536, 540 (1994). The State does not
8 dispute that *Vogt* and *Miller* set forth the proper test, and makes no serious effort to explain why
9 its claims fail that test.

10 All three elements support the conclusion that this Court should dismiss the origination
11 claims and defer to federal agency enforcement of TILA’s regulatory scheme. First, as Navient’s
12 original motion explained, 15 U.S.C. § 1607 authorized several federal agencies to enforce
13 disclosure-related claims arising from private education loans during the 2003-2007 time period.¹
14 And under Section 5(a) of the Federal Trade Commission Act, those agencies retain the authority
15 to prosecute “unfair or deceptive acts or practices in or affecting commerce” from that time
16 period. One of those agencies is the Federal Trade Commission (“FTC”). *See* FTC Performance
17 and Accountability Report Fiscal Year 2007, 2007 WL 5415663, at *8 (“*[T]he FTC’s challenge*
18 *is to combat unfair and deceptive practices involving*, among other things, mortgages, credit
19 cards, payment cards, debt collection, and *student loans.*” (emphases added)); *see also Miller*, 72
20 Wn.App. at 421-22 (“the Comptroller of the Currency has primary jurisdiction because a bank’s
21 relationship with its customers is regulated and the Comptroller has the power to grant relief”).

22
23 ¹ Today, the CFPB regulates private education lending. 75 Fed. Reg. 57252-02; 15 U.S.C. § 1607.
24 For pre-July 21, 2011 private education lending, a number of federal agencies, including the FTC, retain
enforcement authority.

1 Second, these agencies, including the FTC, developed special competence in this area.²

2 Third, and critically, allowing this state law action to continue would directly interfere
3 with TILA’s complex regulatory scheme. Imposing new requirements on lenders or servicers to
4 disclose, for example, graduation rates, credit scores, and the likelihood of default from certain
5 schools—retroactively, and on a state-by-state basis—would destroy any semblance of
6 concision, clarity, or consistency regarding origination of private education loans. Indeed,
7 “Congress . . . has already vested responsibility for determining whether [TILA] should require
8 additional disclosures . . . exclusively with the Federal Reserve Board.” *Hauk v. JP Morgan*
9 *Chase Bank USA*, 552 F.3d 1114, 1121 (9th Cir. 2009). As the Supreme Court of the United
10 States held in the TILA context:

11 The concept of “meaningful disclosure” that animates TILA cannot be applied in
12 the abstract. *Meaningful* disclosure does not mean *more* disclosure. Rather, it
13 describes a balance between “competing considerations of complete
14 disclosure . . . and the need to avoid . . . [informational overload.]” . . .
15 Administrative agencies are simply better suited than courts to engage in such a
16 process.

17 *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 568-69 (1980).

18 In light of the existing, comprehensive federal regulatory scheme, the Court should
19 decline the State’s invitation to gallop into the field of student lending, and dismiss the State’s
20 origination claims.

21 **C. The State Fails To Address The Legal Deficiencies That Render Its Claims**
22 **Inadequate As A Matter Of Law**

23 The State fails to explain or justify a number of legal defects in its claims. Despite
24 characterizing Navient’s loans as “monstrously harsh” and “exceedingly calloused,” the State has

25 ² FTC, *Annual Report to Congress* (May 2007),
26 <https://www.ftc.gov/sites/default/files/documents/reports/college-scholarship-fraud-prevention-act-2000-sixth-annual-report-congress-department-justice/2006collegescholarshipfraudpreventionreport.pdf> (FTC

1 yet to explain how these private loans are any more “unfair” or “deceptive” than any other loans
2 made to student borrowers, who are often, in the State’s words, “young, uneducated, with low-
3 to-no incomes and credit scores.” State’s Opp. at 9. The State claims that the real issue is that
4 borrowers were allegedly treated as “loss leader[s]” and that Navient “believed it was more
5 likely they would default.” State’s Opp. at 3. Yet nowhere does the State explain how the
6 existence of contractual arrangements are “material,” or how *projected* default rates or *projected*
7 graduation rates are “facts.” *West Coast, Inc. v. Snohomish County*, 112 Wn.App. 200, 206, 48
8 P.3d 997, 1000 (2002) (holding that fraudulent misrepresentation claims must allege an “existing
9 fact” that is “material”).³ And if it is “unfair” to lend to “borrowers at schools with graduation
10 rates below 50 percent,” State’s Opp. at 9-10, then the CPA, unlike federal law, prohibits lending
11 to freshmen at Eastern Washington University, which has a graduation rate of 44%.⁴

12 With respect to its servicing claims, the State has yet to justify how it can sustain a
13 failure-to-disclose claim that does not even allege failure to disclose. *See* Compl. ¶¶ 5.146,
14 5.148 (alleging only that Navient failed to “engag[e] in lengthy and detailed conversations” by
15 phone, not that Navient failed to provide the relevant information to student borrowers).
16 Likewise, the State fails to justify how it can purportedly hold Navient liable for alleged
17 “misrepresentations” that consist of “promises of future performance.” *West Coast*, 112
18 Wn.App. at 206.

19
20 annual report describing its enforcement authority regarding student loan practices) (last accessed June
21 22, 2017).

21 ³ A plaintiff must satisfy pleadings standards for common law fraud where it is bringing a CPA
22 claim “sound[ing] in fraud.” *Vernon v. Qwest Comm’ns Int’l, Inc.*, 643 F. Supp. 2d 1256, 1264 (W.D.
23 Wash. 2009).

23 ⁴ Dept. of Ed., *College Scorecard: Eastern Washington University*,
24 <https://collegescorecard.ed.gov/school/?235097-Eastern-Washington-University> (last accessed June 22,
2017). *See also* Navient’s Original Brief at 4 n.4 (judicial notice is proper).

1 **III. CONCLUSION**

2 The Court should dismiss Counts I-III pursuant to CR 12(b)(6).

3 I certify that this memorandum contains 2,246 words, in compliance with the Local Civil
4 Rules.

5 DATED this 23rd day of June, 2017.

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1 **CERTIFICATE OF SERVICE**

2 I, Mary J. Klemz, declare that I am employed by the law firm of Calfo Eakes &
3 Ostrovsky PLLC, a citizen of the United States of America, a resident of the state of
4 Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and
5 competent to be a witness herein.

6 On June 23, 2017, I caused a true and correct copy of the foregoing document to be
7 served on counsel listed below in the manner indicated.

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