THE HONORABLE VERONICA ALICEA-GALVÁN
Department 21
Noted for: Friday, June 9, 2017 at 10 a.m.

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' MOTION TO DISMISS THE COMPLAINT

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I. INTRODUCTION

The State's lawsuit against Navient[1] is an impermissible attempt to overturn decades of federal regulation of student loans in favor of its own subjective view of what the disclosure rules for loan servicing should be. The State's complaint is fatally flawed in two separate and independent ways.

First, the State's origination and federal servicing claims are barred by a comprehensive federal regulatory scheme. The federal Higher Education Act ("HEA"), 20 U.S.C. §§ 1001 *et seq.*, and the federal Truth in Lending Act ("TILA"), 15 U.S.C. §§ 1601 *et seq*., already establish a comprehensive regulatory framework for what disclosures must be made to student loan borrowers throughout the various stages of a loan's lifecycle. Under the HEA, Congress "instruct[ed]" the Department of Education ("ED") to "[e]stablish a set of rules" for federal loan servicing "that will apply across the board." *Chae v. SLM Corp.*, 593 F.3d 936, 945 (9th Cir. 2010). Together with the TILA, the HEA regulations prescribe rules for what disclosures must be made for the origination of private student loans and the servicing of federal student loans.

Tellingly, the State has not alleged a single violation of these rules or regulations. Instead, after years of investigating Defendants—and evidently not finding violations of any of those rules—the State has resorted to accusing Navient of generic "unfair or deceptive" business practices under the Washington Consumer Protection Act ("CPA"), RCW 19.86.020. The problem, of course, is that the State does not allege a breach of any actual rules set forth in governing federal law.

The State's effort to sidestep federal regulations is plainly barred by state law and the federal Supremacy Clause. Faced with across-the-board regulatory schemes similar to the TILA,

[1] Navient Corporation is a holding company that does not engage in student lending or servicing activities. The allegations in ¶¶ 2.5, 2.10, 2.13, 5.1, 5.29, 5.196, and 9.4 of the complaint ("Compl.") specifically directed at Navient Corporation are both factually incorrect and insufficient to state a claim against Navient Corporation. Because these matters, as pled, require a factual response, Navient Corporation will be moving separately for summary judgment at the appropriate time. Navient Solutions, LLC (hereinafter "Navient") is the affiliate of Navient Corporation that serves as a student loan servicer.

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Washington courts have held that claims of unfair and deceptive practices under the CPA are preempted by federal law. *See Miller v. U.S. Bank of Wash., N.A.*, 72 Wn.App. 416, 421-22, 865 P.2d 536, 541 (1994) (dismissing CPA claim as preempted by TILA and its implementing regulations). Similarly, the Ninth Circuit has held that the HEA expressly preempts efforts by plaintiffs to use consumer protection laws to impose alternate disclosure standards for federal loan servicing. *Chae*, 593 F.3d at 942 (quoting express language in the HEA, 20 U.S.C. § 1098g, that federal student loans "***shall not be subject to any disclosure requirements of any State law***" (emphasis added)). Together, these rules bar the State's effort to impose liability on Navient for conduct that is already regulated under the HEA and TILA. To permit otherwise would allow the state to usurp the federal government's ability to establish uniform nationwide standards for the approximately 40 million student borrowers across the country. *See, e.g., id.* at 947 (citing the HEA's "uniform application of standards for the FFELP" as enhancing "the overall purpose of nationwide regulatory uniformity"). It would also allow the State to force student loan servicers to become *de facto* financial counselors, a role that is not contemplated by federal law, by ED servicing contracts, or by the terms of student loan agreements.

The State's attempt to impose alternate, after-the-fact standards also violates basic principles of fair notice and due process. *See F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 132 S. Ct. 2307, 2317 (2012) ("[L]aws which regulate persons or entities must give fair notice of conduct that is forbidden or required."); *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 132 S. Ct. 2156, 2168 (2012) ("[T]he potential for unfair surprise is acute" where the agency "never . . . suggested that it thought the industry was acting unlawfully."). Because the State's federal servicing claims in ¶¶ 7.3(f)-(j) are expressly preempted by federal law, and because the origination claims in ¶¶ 9.4(a)-(b) are barred under state law, these claims must be dismissed under Civil Rule 12(b)(6).

Second, the State's origination and federal servicing claims must be dismissed for the separate and independent reason that the complaint fails to state a claim under the CPA. Even if the allegations of the complaint were true, which they are not, the State has not alleged

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conduct amounting to "unfair" or "deceptive" practices as a matter of law. This applies to all three categories of claims: origination, servicing, and collection. As to originations, the State accuses Defendants of "originating exceptionally risky" loans. Compl. ¶ 9.4(b). Even if the Court accepts the allegation that "exceptionally risky" or "subprime" loans were made, making such loans to students (the majority of whom would be expected to have little or no income and limited or no credit history) is not inherently "unfair" or "deceptive." The State also accuses Navient of failing to disclose its opinions regarding projected default rates of certain loans, which is not a "material fact" of which omission is actionable under the CPA.

As to servicing, the State does not allege that Navient failed to disclose material information regarding repayment plans to borrowers. Its allegation is only that Navient did not do so ***in each and every phone conversation with borrowers***. This artificial "duty" to reiterate certain disclosures on every phone call is not required by any federal law.[2] The State's complaint also attacks "promises" to act in marketing and advertisements, as well as alleged mistakes and errors in processing of payments. But the CPA is not violated by promises of future performance or mistakes and errors, but only by actual unfair or deceptive conduct. As to collection, the State fails to sufficiently allege Washington's public interest because it does not even purport to identify a single borrower inside Washington who was in fact injured by the alleged collection activities. On this ground as well, Count III must be dismissed for failure to state a claim under the CPA.

For the reasons set forth below and summarized in the attached Exhibit A,[3] the State's claims in its First, Second, and Third Causes of Action ("Counts I-III") must be dismissed pursuant to CR 12(b)(6).

[2] Again, Navient recognizes that for the purpose of this motion the Court must take these allegations as true, but Navient vigorously denies the allegation that it failed to provide appropriate assistance to borrowers requesting information regarding alternative payment plans by telephone.

[3] For the Court's convenience, Defendants attach Exhibit A, which summarizes the State's claims subject to dismissal, as well as the grounds for dismissal related to each of those claims.

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II. RELIEF REQUESTED

Navient seeks dismissal of the State's complaint because: (1) the State's origination claims in Count I and the State's federal servicing claims in ¶¶ 7.3(f)-(j) of Count II are preempted by federal law; (2) the State has failed to state a claim for "unfair" or "deceptive" conduct under the CPA in Counts I-III.

III. STATEMENT OF FACTS

Navient Corporation, through its wholly owned subsidiaries including Navient Solutions, LLC ("Navient"), is a loan management and servicing company formed in 2014 as a spin-off of SLM Corporation. Compl. ¶¶ 2.5-2.6. Navient services significant portfolios of both Federal Family Education Loans Program loans ("FFELP loans"), direct loans made by ED, and private education loans. *Id*. Navient acts as a loan servicer for both its own loans and loans owned by ED and others.

The complaint arises out of Navient's alleged practices related to (1) federal student loans and (2) private education loans. The following sweeping federal framework[4] exists to regulate such practices.

A. FEDERAL STUDENT LOANS

Over fifty years ago, Congress enacted the HEA and began to "provide financial assistance for students in postsecondary and higher education." Pub. L. No. 89-329, 79 Stat. 1219 (Nov. 8, 1965). Two major federal loan programs are at issue in the complaint: the Direct Loan Program, 20 U.S.C. § 1087a *et seq*., under which the federal government provides student loans directly to eligible borrowers ("Direct Loans"); and the Family Education Loan Program ("FFEL Program"), *see* 20 U.S.C. § 1071 *et seq.*, under which the federal government guarantees qualifying student loans made by private lenders.[5]

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[4] A "trial court may take judicial notice of public documents if their authenticity cannot reasonably be contested." *McAfee v. Select Portfolio Servicing, Inc.*, 193 Wn.App. 220, 226, 370 P.3d 25, 29 (2016). The regulations Defendants cite throughout this motion fall within that authority.

[5] In 2010, Congress terminated lending under the FFEL Program. Health Care and Education Reconciliation Act, Pub. L. No. 111-152, § 2201 *et seq*., 124 Stat. 1029, 1074 (Mar. 30, 2010). No new loans were disbursed under that program after June 30, 2010. *Id.*

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Federal student loan programs are highly regulated. Congress "instruct[ed]" ED to "[e]stablish a set of rules that will apply across the board." *Chae*, 593 F.3d at 945. Through the public notice and comment process, detailed and extensive regulations prescribe every aspect of federal student loans, including charges to borrowers (34 C.F.R. § 682.202, § 685.202), repayment plans (§ 682.209, § 685.208), deferment and forbearance (§§ 682.210–211, §§ 685.204–205), and due diligence in servicing a loan (§ 682.208). ED has also promulgated the forms of promissory notes, borrower disclosures, and other forms which may not be altered by either the borrower or servicer. Under the HEA, ED may limit (or even terminate) the participation of a federal student loan servicer that violates any statutory provision, regulation, or agreement. 34 C.F.R. § 682.700(a), § 682.709.

In addition to promulgating regulations, ED enters into detailed contracts with third-party servicers to administer Direct Loans and FFELP Loans that it owns. *See* 20 U.S.C. § 1087f(a)(1). ED administers the program and has broad and exclusive authority to prescribe servicer requirements. *See* 20 U.S.C. § 1082(a)(1); *see also id.* §§ 1087a, 1087e. ED has entered into such a contract with Navient ("ED Servicing Contract").

As with nearly every other aspect of federal student loans, the HEA and regulations dictate the terms under which borrowers repay their federal student loans. Congress and ED expressly provide in great detail when and how servicers like Navient are required to notify borrowers of their repayment options. Notably, there is no allegation in the complaint that Navient violated any of these requirements.

Two repayment options established by Congress for borrowers temporarily unable to make their loan payments are relevant to the State's allegations: (1) forbearance and (2) income-driven repayment ("IDR") programs. 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), 685.205(a). Federal regulations require servicers granting a forbearance to provide borrowers a notice within 30 days confirming the terms of forbearance. *See id.* § 682.211(b)(1). This includes information about interest capitalization. *See id.* § 682.211(e). In addition, every 180

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days during the forbearance period, the servicer must provide information to the borrower about how much interest will be capitalized and when capitalization will occur. *See id*. There is no allegation in the complaint that Navient failed to provide these disclosures.

Depending on their individual circumstances and the type of loans they borrowed, borrowers may be eligible to enroll in one of several IDR programs. IDR programs permit borrowers to set their monthly payment to reflect their income. Unlike with forbearance, servicers like Navient cannot enroll borrowers in IDR plans instantaneously over the phone—borrowers themselves must fill out the mandatory federal IDR application and submit it, along with supporting documents, directly to the federal government.[6]

Federal law imposes specific requirements on lenders and servicers like Navient to inform borrowers of the availability of IDR programs. These specific requirements include:

- When the loan is disbursed and before the start of repayment, federal loan servicers must provide borrowers with information on the types of repayment plans available, including IDR plans. *See* 20 U.S.C. § 1083(a)(11), (b)(6), § 1087e(p).

- Before the start of repayment, borrowers must be offered the option of enrolling in an IDR plan. *See id.* §§ 1077(a)(2)(H), 1087e(d)(1)(D)-(E). The notice must inform the borrower (1) that the borrower may be eligible for income-based repayment; (2) of the procedures for selecting income-based repayment; and (3) how the borrower may obtain more information about income-based repayment plans. *See* 20 U.S.C. § 1087e(p); 34 C.F.R. § 682.205(e).

- Throughout repayment, federal law requires that every borrower's monthly billing statement include specified information regarding IDR repayment plans, including a link to an ED website with further information about IDR plans. *See* 20 U.S.C. §§ 1083(e)(1), 1087e(p).

- If "a borrower has notified the lender that the borrower is having difficulty making payments," federal law requires a notice to the borrower containing a description of the repayment plans available, including how the borrower should request a change in plan and a description of the requirements for obtaining forbearance on a loan, including the expected costs associated with forbearance. *Id.* §§ 1083(e)(2), 1087e(p). The notice may be made through written or electronic means. *See* 20 U.S.C. § 1087e(p); 34 C.F.R. § 682.205(d).

[6] *See* Federal Student Aid, U.S. Department of Education, Income-Driven Repayment Plan Request, *available at* https://studentloans.gov/myDirectLoan/ibrInstructions.action?source=15SPRRPMT#. ED requires borrowers in IDR plans to recertify their income and family size annually to remain in the program. *See* Compl. ¶ 299; 34 C.F.R. § 682.215(e)(1); § 685.221(e)(1).

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Again, there is no allegation in the complaint that Navient failed to make any of these disclosures.

B. PRIVATE EDUCATION LOANS

Private education loans are not guaranteed or reinsured under the FFELP or any other federal student loan program. Borrowers use private education loans primarily to supplement federally guaranteed loans in meeting the cost of education. In other words, borrowers often borrow the maximum amount under federal programs, and then use private loans to help them fill the gap and cover the cost of attendance at schools.

During 2003 to 2007 (the relevant time period for the State's origination allegations, Compl. ¶ 5.29), origination of private education loans had to comply with the rules set out in the TILA and its implementing regulations.[7] *See, e.g.*, 15 U.S.C. § 1601, *et seq.*; 15 U.S.C. § 1604 ("Disclosure guidelines"); 15 U.S.C. § 1631 ("Disclosure requirements"); 15 U.S.C. § 1632 ("Form of disclosure; additional information"); 15 U.S.C. § 1664 ("Advertising of credit other than open end plans"); 12 C.F.R. § 226.17 ("General disclosure requirements"); 12 C.F.R. § 226.18 ("Content of disclosures"); 12 C.F.R. § 226.24 ("Advertising"); 12 C.F.R. § 226 App. H ("Closed-End [Credit] Model Forms and Clauses"); 12 C.F.R. § 226, Supp. I ("Official [Federal Reserve Board] Staff Interpretations"). The key 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 . . . ." 15 U.S.C. § 1601(a).

To that end, the TILA and its regulations required private education loan originators in this period to provide disclosures, "before consummation of the transaction," that "reflect the terms of the legal obligation between the parties." 12 C.F.R. § 226.17(b), (c)(1). These include disclosures of:

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[7] In 2010, the Federal Reserve Board promulgated even more specific rules under the TILA that private education loan originators must follow. *See* 12 C.F.R. § 226.46-48. The Dodd-Frank Wall Street Reform and Consumer Protection Act has since charged the Consumer Financial Protection Bureau with enforcing compliance with TILA and its regulations. *See* 12 USC 5481(12)(O), 5514(b)-(c) and 5515(b)-(c). These later regulations are not directly relevant to the State's complaint, because the alleged conduct in Count I is limited to the period 2003-2007. Compl. ¶ 5.29.

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- the "amount financed," as calculated by a specified formula, *id.* § 226.18(b);
- the annual percentage rate along with "a brief description such as 'the cost of your credit as a yearly rate,'" *id.* § 226.18(e);
- for variable rate loans, detailed information about how the annual percentage rate may change, *id.* § 226.18(f);
- information about charges for prepayment and late payments, *id.* § 226.18(k), (l); and
- a reference to the relevant contract for "information about nonpayment, default, the right to accelerate the maturity of the obligation, and prepayment rebates and penalties," *id.* § 226.18(p).

In addition, because credit is typically extended to students without an agreement on when repayment will begin, creditors must make additional disclosures concerning finance charges, payment schedules, and total payments at the time a repayment schedule was set. *Id.* § 226 Supp. I, Cmt. 17(i)(1); *id.* § 226.17(i). Model forms included in the regulations demonstrated how to disclose private education loans in compliance with the law. *See id.* § 226, Supp. I, App. G & H; *id.* § 226 Supp. I, Cmt. 17(i)(5). In the end, there is no allegation in the complaint that Navient violated TILA or any other applicable standard.

IV. STATEMENT OF ISSUES

1. Whether the State's origination claims in ¶¶ 9.4(a)-(b) of Count I and its federal servicing claims in ¶¶ 7.3(f)-(j) of Count II are barred by state and federal law, and require dismissal.

2. Whether the State's claims in Count I-III fail to state a claim under the CPA for "unfair" or "deceptive" conduct, and require dismissal.

V. LEGAL STANDARD

Under CR 12(b)(6), a complaint must be dismissed if "it appears beyond doubt that the plaintiff can prove no set of facts consistent with the complaint, which would entitle the plaintiff to relief." *Bowman v. John Doe Two*, 104 Wn.2d 181, 183, 704 P.2d 140 (1985) (internal quotation marks omitted). A trial court reviewing a motion under CR 12(b)(6) will "decide whether the allegations in a complaint . . . show[] that the pleader is entitled to relief." *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 120, 744 P.2d 1032, 1046 (1987).

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If the plaintiff fails to state a claim upon which relief can be granted, CR 12(b)(6) provides for dismissal of the claims. *State ex rel. Pub. Disclosure Comm'n v. 119 Vote No! Comm.*, 135 Wn.2d 618, 623, 957 P.2d 691, 694 (1998). Although all facts alleged in the plaintiff's complaint are presumed true, the court is "not required to accept the complaint's legal conclusions as true." *Rodriguez v. Loudeye Corp.*, 144 Wn.App. 709, 718, 189 P.3d 168, 172 (2008). "If a plaintiff's claim remains legally insufficient even under his or her proffered hypothetical facts, dismissal pursuant to CR 12(b)(6) is appropriate." *Gorman v. Garlock, Inc.*, 155 Wn.2d 198, 215, 118 P.3d 311, 320 (2005).

VI. AUTHORITY

A. THE STATE'S ORIGINATION AND FEDERAL SERVICING CLAIMS ARE BARRED BY STATE AND FEDERAL LAW.

Under the Supremacy Clause of the United States Constitution, "[t]his Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land." U.S. Const., art. VI, cl. 2. Federal preemption of a state law is "compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Berger v. Personal Prods., Inc.*, 115 Wn.2d 267, 270, 817 P.2d 1364, 1371 (1990). As the Washington Supreme Court has explained, whether state law is preempted depends on "whether under the circumstances of a particular case, state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Vogt v. Seattle-First Nat'l Bank*, 117 Wn.2d 541, 553, 817 P.2d 1364 (1991).

The State's origination and federal servicing claims are barred because both state and federal law forbid Washington state law from displacing federal regulations governing the conduct alleged. Specifically, the federal servicing claims in ¶¶ 7.3(f)-(j) of Count II are expressly preempted by the HEA, which prohibits any alternate disclosure standard from being imposed by state law. The origination claims in Count I are barred because the TILA comprehensively regulates the origination of private student loans, and the CPA exempts from liability any conduct extensively regulated by federal law. *See* RCW § 19.86.170.

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The State's attempt to impose liability under the CPA also violates basic principles of fairness and due process. "[L]aws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *Fox*, 132 S. Ct. at 2317. For decades, the HEA has set the standards for the servicing of federal loans, and the TILA has set the standards for the origination of private education loans. Federal agencies have promulgated extensive regulations interpreting and applying these statutes. Yet the State now seeks to "backdoor" novel interpretations of these obligations and effectively impose new requirements on Defendants. The State "can point to nothing that would have given [Navient] affirmative notice" of the requirements it now seeks to enforce. *Id.* at 2319.

For these reasons, the state's claims in Count I and in ¶¶ 7.3(f)-(j) of Count II must be dismissed pursuant to CR 12(b)(6).

1. The Origination and Servicing of Student Loans Are Comprehensively Regulated by Federal Law.

The servicing of student loans is governed by the complex federal regulatory scheme and Navient's ED Servicing Contract. As to private loan origination, the TILA and its regulations establish comprehensive rules for disclosures to student borrowers. *See supra* pp. 8-10. Likewise, the HEA and its implementing regulations establish comprehensive standards for disclosing information to borrowers during the servicing and collecting of federal student loans. 15 U.S.C. § 1603(7). Under the HEA, ED has promulgated a myriad of regulations governing federal student loans, including 34 C.F.R. § 682.205 ("Disclosure requirements for lenders"). This regulation requires that a lender provide specific information to borrowers "at or prior to repayment," including contact information for the lender, the loan balance and interest rate, the repayment schedule, information regarding fees, additional resources for third party advice and assistance on loan repayment, and a description of various repayment plans. These federal laws, together with the ED Servicing Contract, establish all of Navient's disclosure obligations and responsibilities for servicing of federal student loans.

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2. Under Ninth Circuit Precedent, the HEA Expressly Preempts the State's Claims Regarding Federal Loan Servicing.

The State's federal servicing claims in ¶¶ 7.3(f)-(j) of Count II are expressly preempted by the HEA. The HEA provides: "Loans made, insured, or guaranteed pursuant to a program authorized by Title IV of the Higher Education Act . . . ***shall not be subject to any disclosure requirements of any State law***." 20 U.S.C. § 1098g (emphasis added).[8] The plain language of § 1098g preempts any state law claims that purport to impose alternate disclosure obligations in the course of servicing federal student loans.

The seminal case on this matter is *Chae v. SLM Corp.*, 593 F.3d 936 (9th Cir. 2010) (affirming summary judgment in favor of defendant Sallie Mae because the plaintiff's claims for unlawful, unfair or fraudulent business practices under the California Unfair Competition Law were expressly preempted by the HEA). The facts of *Chae* are strikingly similar to this case. In *Chae*, the plaintiffs were student borrowers who brought suit against Sallie Mae arising from the defendant's servicing of student loans. The borrowers alleged that Sallie Mae's actions "constitut[ed] an unfair or deceptive practice" under California law because the company purportedly misrepresented the "rights, remedies, and obligations" available to student borrowers with respect to their federal loans. 593 F.3d at 942-43.

The Ninth Circuit squarely rejected the plaintiffs' argument, and affirmed summary judgment in Sallie Mae's favor. The court found that the plaintiff's allegations of "misrepresentations" and "allegedly-misleading" conduct under California's consumer protection law were, in effect, nothing more than "restyled improper-disclosure claims," and thus were expressly preempted by § 1098g. *Id.* In no uncertain terms, the Ninth Circuit rejected this backdoor approach to displacing federal regulation, writing:

> ***At bottom, the plaintiffs' misrepresentation claims are improper-disclosure claims.*** The plaintiffs do not contend that California law prevents [defendant] from employing any of the three loan-servicing practices at issue. We consider these allegations in substance to be a challenge to the allegedly-misleading method

[8] Federal student loans fall within Title IV of the HEA, and are thus subject to the express preemption provision. *See* Section III *supra.*

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> [defendant] used to communicate with the plaintiffs about its practices. ***In 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. (emphasis added). Because § 1098g of the HEA expressly preempts any effort by state law to impose alternate disclosure standards on loan servicers, the Ninth Circuit affirmed summary judgment in favor of Sallie Mae. *Id.* at 938; *see also Brooks v. Salle Mae, Inc.*, No. FSTCV096002530S, 2011 WL 6989888, at *6 (Conn. Super. Ct. Dec. 20, 2011) (citing *Chae* and dismissing claims under the Connecticut Unfair Trade Practices Act challenging misrepresentations connected to student loan servicing); *Linsley v. FMS Inv. Corp.*, No. 3:11CV961 VLB, 2012 WL 1309840, at *6 (D. Conn. Apr. 17, 2012) ("[A]s was the case in *Chae*, [plaintiff] may not avoid preemption by relabeling his otherwise-preempted claim as one of misrepresentation and not improper disclosure.") (granting motion to dismiss).

Like the plaintiffs in *Chae*, the State has brought "restyled improper-disclosure claims" against Navient on the basis of five categories of alleged conduct:

- In ¶ 7.3(f), the complaint alleges "***[p]resenting*** the federal loan repayment options that are available to borrowers ***in a deceptive manner***";
- In ¶ 7.3(g) and (h), the complaint alleges that Defendants ***failed to disclose*** a "date certain" deadline for submitting recertification materials for IDR plans;
- In ¶ 7.3(i), the complaint alleges that Defendants ***failed to disclose*** to "borrowers who receive electronic communications that they need to recertify eligibility for an income driven repayment plan";
- In ¶ 7.3(j), the complaint alleges that Defendants "***deceptively*** offer[ed] forbearances to federal student loan borrowers who express a long-term inability to repay, when in fact a forbearance is intended for a temporary hardship"; and

Compl. ¶¶ 7.3(f)-(j) (emphases added).

Whether or not they expressly challenge disclosures, at bottom, these are all disclosure allegations. Specifically, ¶ 7.3(f) alleges failure to disclose federal loan repayment options; ¶¶ 7.3(g) and (h) allege failure to disclose a "date certain" for IDR recertifications; ¶ 7.3(i)

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alleges failure to disclose certain facts regarding IDR recertifications; and ¶ 7.3(j) alleges failure to disclose information related to forbearances. The State restyles some of its allegations by using phrases like "presenting . . . in a deceptive manner," "deceptively representing," or "deceptively offering." But as *Chae* held, these claims are "merely the converse of a state-law requirement that alternate disclosures be made." *Chae*, 593 F.3d at 942 (internal quotation omitted).

In short, the State's purported claims of "unfair or deceptive" practices are nothing more than "restyled improper-disclosure claims" that are "subject to express preemption under 20 U.S.C. § 1098g." *Id.* at 943. To hold otherwise would run afoul of the express language of the HEA and usurp the federal government's authority to establish uniform, nationwide standards for federal loan servicing. *See id.* at 947 (citing "the overall purpose of nationwide regulatory uniformity that will be enhanced by a holding that the federal statute and federal regulations exclusively govern the uniform application of standards for the FFELP").

For these reasons, the State's federal servicing claims in ¶¶ 7.3(f)-(j) of Count II are preempted by the HEA, and must be dismissed. CR 12(b)(6).

3. TILA Precludes Liability Under the Consumer Protection Act for the State's Origination Claims.

The State's origination claims in Count I are barred because the TILA comprehensively governs the origination of private student loans, and federal agencies have primary jurisdiction over the challenged origination practices.

RCW § 19.86.170 provides, in relevant part:

> Nothing in this chapter shall apply to actions or transactions otherwise permitted, prohibited or regulated under laws administered by the insurance commissioner of this state, the Washington utilities and transportation commission, the federal power commission or actions or transactions permitted by any other regulatory body or officer acting under statutory authority of this state or the United States[.]

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Under § 19.86.170, therefore, conduct is exempt from liability under the CPA where it is specifically "permitted, prohibited, or regulated" by the federal government. The Washington Supreme Court has explained the preclusive scope of § 19.86.170 in *Vogt*, 117 Wn.2d at 543, 817 P.2d at 1365. In *Vogt*, the court stated that "[w]hen both a court and an agency have jurisdiction over a matter," the court looked to three factors to determine whether the court or the agency had "primary jurisdiction," and thus "whether the court or the agency should make the initial decision":

1. "The administrative agency has the authority to resolve issues that would be referred to it by the court";
2. "The agency must have special competence over all or some part of the controversy which renders the agency better able than the court to resolve the issues"; and
3. "The claim before the court must involve issues that fall within the scope of a pervasive regulatory scheme so that the danger exists that judicial action would conflict with the regulatory scheme."

Vogt, 117 Wn.2d at 554, 817 P.2d at 1371-72.

In *Miller v. U.S. Bank of Wash., N.A.*, 72 Wn. App. 416, 421–22, 865 P.2d 536, 541 (1994), a business owner sued a bank under the CPA for failing to honor a struggling business's check. The trial court dismissed Miller's CPA claim as preempted by federal law, and the Court of Appeals affirmed. Applying the *Vogt* three-part test for primary jurisdiction, the *Miller* court found as to the first factor that "a bank's relationship with its customers is regulated and the Comptroller has the power to grant relief." *Id*. As to the second factor, the court found special competence of the FTCA "to regulate and resolve disputes arising in the bank-customer relationship" as a result of "the pervasive federal regulation of the banking system, and [the FTCA's] intent to regulate unfair and deceptive practices." *Id*. The court found the third factor satisfied because "the issues fall within the scope of a pervasive [federal] regulatory scheme and a danger exists that judicial action could conflict with that regulatory scheme." *Id*.

Under the reasoning in *Miller*, Count I should be dismissed. Private education loans originated during the relevant period in the complaint were subject to the TILA, which was

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enforced by federal agencies. 15 U.S.C.A. § 1607 ("Compliance with the requirements imposed under this subchapter shall be enforced . . ." by federal agencies set forth in § 1607(a)(1)-(6)). Because the TILA confers on specific federal agencies the "authority to resolve issues" under TILA, the first prong of the *Miller* test is satisfied. The second factor is satisfied because the TILA provided enforcement authority to multiple administrative agencies depending on the agency's expertise. For example, the Office of the Comptroller of the Currency enforced the TILA as to national banks, and the National Credit Union Administration Board enforced the TILA as to federal credit unions. *Id*. This satisfies the second factor of the *Miller* test, because the agencies charged with enforcing the TILA have "special competence" over the issues. As to the third factor, the loans described in the complaint are no doubt subject to a "pervasive regulatory scheme" under the TILA, as described at length above. *See supra* pp. 8-10. Any ruling that would permit the State to essentially re-write federal disclosure laws by requiring new disclosures not required by TILA would undoubtedly "conflict with that regulatory scheme" established by federal law. Thus, the third prong of the *Miller* test is satisfied.

For this reason, the State's claims regarding the origination of private loans in Count I must be dismissed.

B. THE STATE HAS FAILED TO STATE A CLAIM FOR UNFAIR OR DECEPTIVE PRACTICES UNDER THE CONSUMER PROTECTION ACT.

Even if the State's claims were not preempted, a number of its allegations fail to state a claim under the CPA as a matter of law. The State's origination claims in Count I and its federal servicing claims in ¶¶ 7.3(f)-(n) of Count II fail to allege "unfair or deceptive" practices. The State's collection claims in Count III fail to allege the public interest element under the CPA. As a result, these claims must be dismissed pursuant to CR 12(b)(6).

To state a claim for unfair or deceptive practices under the CPA, the Attorney General must allege "(1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, and (3) public interest impact." *State v. Kaiser*, 161 Wn. App. 705, 719, 254 P.3d 850, 858 (2011) (citing RCW 19.86.080). The failure of one element is fatal to the claim. *Nguyen v. Doak*

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Homes, Inc., 140 Wn. App. 726, 733, 167 P.3d 1162, 1166 (2007) (*per curiam*). "Whether an act is unfair or deceptive is a question of law," to be determined by the court. *Trujillo v. Nw. Tr. Servs., Inc.*, 183 Wn.2d 820, 835, 355 P.3d 1100, 1107 (2015).

Under this standard, the following claims by the State against Defendants are deficient as a matter of law:

- Count I alleges "unfair" and "deceptive" conduct associated with the origination of student loans by offering "subprime" loans and by failing to disclose its opinions about projected default risks. Even if "subprime" lending occurred, this would not in and of itself be unfair or deceptive, nor is failure to share an opinion regarding projected default risks a "material fact" of which omission is actionable under the CPA.

- ¶ 7.3(e) of Count II alleges a "deceptive" website representation that Navient would "work with" and "help" borrowers. Misrepresentation or deception under the CPA cannot be based on a promise of future performance, nor is an alleged misrepresentation from marketing or advertising actionable if it is not objectively verifiable.

- ¶¶ 7.3(f)-(j) of Count II allege failure to provide "adequate" information to borrowers regarding the availability of and process for recertifying IDR plans over the phone. *See also* Compl. ¶¶ 5.610-5.615. The State does not, and cannot, allege that the information was actually withheld from borrowers.

- ¶¶ 7.3(k)-(n) of Count II allege "unfair" or "deceptive" conduct based on mistakes and errors in payment processing. By definition, mistakes and errors do not amount to unfair or deceptive conduct.

- Count III alleges "unfair" or "deceptive" conduct in the collection of student loans. The State fails to allege that any actual Washington consumers were injured by the alleged collection activities, thereby failing to satisfy the "public interest" prong of the statute.

For the reasons set forth below, the State's claims in Count I, its claims in ¶¶ 7.3(e)-(n) of Count II, and its claims in Count III must be dismissed for failure to state a claim under CR 12(b)(6).

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1. The Origination Claims Fail to Allege Unfair or Deceptive Conduct Because "Subprime" Lending Is Not Unlawful and No "Material Facts" Were Withheld.

As to the origination of private student loans, the State alleges that Navient's predecessors and assignors "[d]eceptively and unfairly offering subprime, high-cost loans to borrowers in spite of the high likelihood those loans would default," ¶ 9.4(a), and failed to disclose to borrowers "a high likelihood of default" and the existence of "contractual arrangements" with schools that would protect from such defaults, ¶ 9.4(b). Taking these allegations at face value, they do not amount to "unfair" or "deceptive" conduct.

Even if "subprime" lending occurred, this would not in and of itself be an "unfair" or "deceptive" business practice as the State alleges. Indeed, 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. Moreover, "subprime" lending in the student loan context has been credited with helping to "[p]romot[e] access to education," helping "enable[] upward socioeconomic mobility and all that higher lifetime earnings can provide," and helping "provid[e] access to education regardless of financial means . . . ." Jonathan D. Glater, *Student Debt and the Siren Song of Systemic Risk*, 53 HARV. J. ON LEGIS. 99, 137-38 (2016). The State has failed to explain how such lending would in and of itself constitute "unfair" or "deceptive" conduct. The State's allegation defies common sense and fails to state a claim under the CPA.

The alleged omissions associated with disclosing projected default rates are not of "material facts." The mere possibility—or even probability—that a borrower may default on his or her loan is not a "fact" within the meaning of the CPA. Washington courts have uniformly held that forward-looking projections about the performance of contractual counterparties are non-actionable matters of opinion, not matters of fact. *West Coast, Inc. v. Snohomish Cnty.*, 112 Wn. App. 200, 206, 48 P.3d 997, 1000 (2002) ("A promise of future performance is not a representation of an existing fact and will not support a fraud claim."); *Havens v. C & D Plastics, Inc.*, 124 Wn.2d 158, 182, 876 P.2d 435, 448 (1994) (reiterating that any alleged

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misrepresentation must be one of "existing fact"). For these reasons, the State's allegations in ¶¶ 9.4(a)-(b) fail to state a claim for unfair or deceptive practices under the CPA.

2. The State's Servicing Claims Do Not Allege "Deceptive" Conduct Because They Do Not Even Allege Failure to Disclose Material Facts.

The State alleges "[u]pon information and belief"—based on a limited sample of telephone calls—that Navient did not provide "adequate" information to borrowers regarding the availability of and process for recertifying IDR plans. *See* Compl. ¶¶ 5.160-66, 7.3(f). Although the State acknowledges that Navient "[p]resent[ed] the federal loan repayment options that are available" to its borrowers, the State accuses Navient of doing so "***in a deceptive manner***." *Id.* ¶ 7.3(f) (emphasis added).

Notably, the State does not allege that Navient failed to actually provide the information to borrowers, or that Navient failed to comply with federal disclosure rules. For instance, the State does not claim that Navient failed to provide a monthly reminder of the available repayment plans and directions for changing plans, as required by 20 U.S.C. § 1083(e)(1), or failed to provide written descriptions of repayment plans and directions for requesting a change in plans to borrowers who have advised of difficulty making payments, as required by 20 U.S.C. § 1083. Instead, the State merely claims that borrowers were not provided this information ***each and every time they were on the phone*** with Navient. *Id.* ¶¶ 5.146, 5.148 (accusing Navient of not "engaging in ***lengthy and detailed conversations*** with borrowers about their particular financial situations" by phone, and accusing Navient of not "adequately exploring IDR plans with . . . borrowers" during phone conversations (emphasis added)). The "duty" to disclose such facts to borrowers on every phone call does not exist. By not challenging Navient's disclosures as violating any federal disclosure regulation, the State concedes that Navient complied with all federal rules.

A plaintiff cannot state a claim for "deceptive" conduct based on failure to disclose certain facts when those very facts were disclosed. This is especially true where disclosure occurred under a particular form as prescribed by federal law. *See Hauk v. JP Morgan Chase*

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Bank USA, 552 F.3d 1114, 1121 (9th Cir. 2009) ("[W]hen neither Congress nor the Federal Reserve Board has elected to require a particular disclosure . . . ***a court should not impose that disclosure requirement***" (emphasis added)); *Lowden v. T-Mobile USA Inc.*, 378 F. App'x 693, 695 (9th Cir. 2010) (affirming dismissal of CPA claims because the defendant's telephone service contracts "adequately disclosed that it would pass along regulatory fees . . . to its customers"). Here, federal law expressly provides that disclosures "may be through written or electronic means." *See* 34 C.F.R. § 682.205(d). There is no allegation that Navient violated any disclosure regulations or failed to disclose any material facts, much less in a way inconsistent with governing rules. Aside from calling it "deceptive," which is nothing more than a legal conclusion, *Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 718, 189 P.3d 168, 172 (2008), the State has not alleged any facts that would state a claim for unfair or deceptive conduct under the CPA.

For these reasons, the State's claims of "unfair and deceptive" conduct in ¶¶ 7.3(f)-(j) must be dismissed.

3. The State Cannot Sustain a Consumer Protection Action Based on Alleged Misrepresentations in Navient's Marketing and Advertising.

The State also accuses Navient of "deceptive" conduct under the CPA based on statements made by Navient on its website. *See* Compl. ¶ 5.138 (accusing Navient of "repeatedly encourage[ing] borrowers experiencing financial hardship to contact it for help in evaluating their repayment options"); *id.* ¶ 5.145 (alleging that "despite publicly assuring borrowers that it will help them . . . NSI instead steered borrowers . . . experiencing long-term distress or hardship into forbearance"). The statements on Navient's website include: "[w]e can work with you," *id.* ¶ 5.138(a), "let us help you make the right decision," *id.*, "Navient is here to help," *id.* ¶ 5.138(c), and "[w]e can help you find an option that fits your budget . . .," *id.* ¶ 5.139. Based on these statements, the State seeks to impose liability under the CPA for "deception." *See id.* ¶ 7.3(e) (alleging a violation of RCW 19.86.020 on the basis of "[d]eceptively

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representing that the NSI counsels borrowers about their repayment options, when in fact, little to no counseling actually occurs").[9]

Under Washington law, a plaintiff cannot sustain a cause of action for "deception" or fraud under the CPA based on "promise[s] of future performance." *West Coast*, 112 Wn. App. at 206, 48 P.3d at 1000 ("A promise of future performance is not a representation of an existing fact and will not support a fraud claim."); *Havens*, 124 Wn.2d at 182, 876 P.2d at 448 (reiterating that any alleged misrepresentation must be one of "existing fact"). To permit a cause of action on that basis would conflate unfair and deceptive practices with failing to perform on a contract. "[W]ere the rule otherwise, any breach of contract would amount to fraud . . . ." *Segal Co. (E. States) v. Amazon.Com*, 280 F. Supp. 2d 1229, 1232 (W.D. Wash. 2003) (quoting *Nyquist v. Foster*, 44 Wn.2d 465, 470, 268 P.2d 442, 445 (1954)). Here, the State claims that Navient represented that it would "work with" and "help" its borrowers, and that "in fact, little to no counseling actually occurs." Compl. ¶ 7.3(e). The State's allegations "rest[] on the fact that defendant misrepresented its intent to fulfill a future promise." *Segal*, 280 F. Supp. 2d at 1232. This type of alleged conduct is not actionable under the CPA. *Id.*

Furthermore, a plaintiff cannot state a claim under the CPA based on statements in marketing and advertisements that are not objectively verifiable by absolute characteristics. *Babb v. Regal Marine Indus., Inc.*, 179 Wn. App. 1036, 2014 WL 690154, at *3 (Feb. 20, 2014) (holding that "[g]eneral, subjective, unverifiable claims about a product or service" do not constitute unfair or deceptive acts within the meaning of the CPA). Here, the relevant statements include general representations that Navient would "work with you to help you get back on track," "help you make the right decision for your situation," and "help you by identifying options and solutions, so you can make the right decision for your situation." Compl. ¶ 5.138(a)-(b). These statements do not purport to represent an objectively verifiable "existing fact." The

[9] Again, Navient recognizes that for the purpose of this motion the Court must take these allegations as true, but Navient vigorously denies the allegation that it failed to provide appropriate assistance to borrowers requesting information regarding alternative payment plans by telephone.

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State improperly attempts to twist conventional and entirely proper marketing statements into fraudulent "misrepresentations." The State fails to allege any facts showing that these statements are objectively or verifiably false, and instead only offers the legal conclusion that such a general statement was "deceptive." Because "the truth or falsity of [these statements] cannot be precisely determined," they are more akin to "puffery," which is plainly not actionable as consumer fraud. *See Babb*, 2014 WL 690154, at *3 ("General, subjective, unverifiable claims about a product or service are 'mere puffery' that cannot give rise to false advertising or, in this context, an unfair or deceptive act.").

Thus, the State cannot state a claim under the CPA for any allegations of unfair or deceptive practices relying on the quoted statements. For this reason, the State's claims in ¶ 469(c) must be dismissed.

4. The State Cannot Sustain a Consumer Protection Action for Allegations of Mistake or Error, Which Are Neither Unfair Nor Deceptive.

In ¶¶ 7.3(l) and (m) of the complaint, the State alleges that Navient "unfairly" made errors and mistakes by "misallocating" and "misapplying" borrowers' payments. Specifically, the State alleges that Navient made "***[e]rrors*** in the allocation" of payments, "***errors*** in the application" of payments, and "failed to put systems in place that address the wide array of application and allocation ***mistakes***" regarding borrower payments. Compl. ¶¶ 5.122-.123 (emphases added). Thus, the State is admittedly seeking to impose liability under the CPA for conduct that it readily admits is human error and mistake. The problem, of course, is that mistakes and errors are intrinsically not deceptive conduct, and thus are not covered by the CPA. The purpose of the CPA is "to deter deceptive conduct." *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 785, 719 P.2d 531, 535 (1986). By definition, mistakes and errors cannot be deterred. *Id.* As a matter of law, therefore, the conduct alleged in ¶¶ 7.3(l) and (m) do not amount to unfair or deceptive conduct, and thus those claims must be dismissed.

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5. The State Fails to Allege Public Interest Impact in Washington.

As to Count III, the State's allegations fail to state a cause of action, and must be dismissed. Where the State brings a CPA enforcement action, it must show public interest impact in Washington. *See Kaiser*, 161 Wn. App. at 719, 254 P.3d at 858. The State attempts to satisfy this burden by reciting that the alleged conduct "affects the public interest because . . . the companies' acts or practices injured numerous Washington consumers." Compl. ¶ 8.3. This is nothing more than a legal conclusion, which is entitled to zero weight. *Rodriguez*, 144 Wn. App. at 718, 189 P.3d at 172.

Even after years of investigation, the complaint does not even allege that a single Washington consumer was actually affected. The most the State alleges is that "[u]pon information and belief, the conduct in this section was ***targeted*** at borrowers across the nation, including borrowers in Washington." Compl. ¶ 5.209 (emphasis added). In short, the complaint does not contain any well-pleaded facts alleging that any actual borrower in Washington was affected by the allegedly deceptive debt collection practices. For this reason, Count III fails to satisfy the public interest prong, and the Court should dismiss Count III pursuant to CR 12(b)(6). *See Moon v. GMAC Mortg. Corp.*, No. C08-969Z, 2009 WL 3185596, at *7 (W.D. Wash. Oct. 2, 2009) (dismissing CPA claim at summary judgment where plaintiff merely recited the elements of the claim in conclusory fashion).

VII. CONCLUSION

Accordingly, for the reasons set forth above and summarized in Exhibit A, Defendants respectfully submit that ¶¶ 9.4 (a) - (b), 7.3 (e) - (n), and 8.2 (a) - (b) of the state's complaint be dismissed pursuant to CR 12(b)(6). A Proposed Order is attached.

I certify that this memorandum contains 8,108 words, in compliance with the Local Civil Rules.

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DATED this 20th day of March, 2017.

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CERTIFICATE OF SERVICE

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

On March 20, 2017, I caused a true and correct copy of the foregoing document to be served on counsel listed below in the manner indicated.

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EXHIBIT A

Claim	Description	Ground(s) for Dismissal	Authority for Dismissal
FIRST CAUSE OF ACTION (the origination of Subprime Private Student Loans) Compl. ¶ 9.4 (a) - (b)	Deceptive and unfair practices related to private loans	Precluded by the Truth in Lending Act, 15 U.S.C. §§ 1601 *et seq.*	RCW § 19.86.170 CR 12(b)(6)
SECOND CAUSE OF ACTION (the servicing of student loans) Compl. ¶ 7.3 (f) - (j)	Alleged failures to disclose regarding likelihood of default and loss-sharing	(1) Preempted by the Higher Education Act, 20 U.S.C. § 1098g (2) Failure to state a claim for "unfair or deceptive" practices because all material facts were disclosed	RCW § 19.86.170 CR 12(b)(6)
SECOND CAUSE OF ACTION (the servicing of student loans) Compl. ¶ 7.3 (e)	Alleged misrepresentations based on marketing and advertising	(1) Preempted by the Higher Education Act, 20 U.S.C. § 1098g (2) Failure to state a claim based on marketing and advertising	RCW § 19.86.170 CR 12(b)(6)
SECOND CAUSE OF ACTION (the servicing of student loans) Compl. ¶ 7.3 (k) - (n)	Alleged failures to correctly allocate or apply payments and related claims	Failure to state a claim based on mistakes or errors	CR 12(b)(6)
THIRD CAUSE OF ACTION (the collection of student loans) Compl. ¶ 8.2 (a) - (b)	Alleged deceptive and unfair practices regarding rehabilitation	Failure to allege public interest impact	CR 12(b)(6)

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