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

2017 MAR 20 PM 3:12

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff, v. NAVIENT CORPORATION, SALLIE MAE BANK, NAVIENT SOLUTIONS, LLC, PIONEER CREDIT RECOVERY, INC., and GENERAL REVENUE CORPORATION, Defendants.	)	No. 17 CH 00761 Hon. Kathleen M. Pantle Presiding Judge Calendar No. 15

NAVIENT DEFENDANTS' MOTION TO DISMISS UNDER SECTION 2-619.1

Defendants Navient Corporation, Navient Solutions, LLC, Pioneer Credit Recovery, Inc. and General Revenue Corporation ("Defendants") hereby move to dismiss the Complaint, with prejudice, pursuant to Section 2-619.1. In support of its Motion, Defendants attach and incorporate the accompanying Memorandum of Law, which fully sets forth Defendants' arguments under section 2-619 of the Code of Civil Procedure based on federal law preemption, and under section 2-615 of the Code of Civil Procedure based on Plaintiff's failure to plead adequate claims, or to plead claims in compliance with 735 Ill. Comp. Stat. 5/2-603(b).

Dated: March 20, 2017

Respectfully submitted,

By: Martin Roth

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CERTIFICATE OF SERVICE

I, Martin L. Roth, swear under penalty of perjury under the laws of the State of Illinois to the following:

1. I am over the age of 21 and not a party to this action.

2. On the 20th day of March, 2017, I caused the preceding document to be served on counsel of record in the following manner:

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

2017 MAR 20 PM 3: 12

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff,	)	
	)	No. 17 CH 00761
v.	)	Hon. Kathleen M. Pantle Presiding Judge Calendar No. 15
NAVIENT CORPORATION, SALLIE MAE BANK, NAVIENT SOLUTIONS, LLC, PIONEER CREDIT RECOVERY, INC., and GENERAL REVENUE CORPORATION, Defendants.	)	

NAVIENT DEFENDANTS' MEMORANDUM
IN SUPPORT OF ITS MOTION TO DISMISS

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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 three separate and independent ways.

First, the State's origination and federal servicing claims are barred by a comprehensive federal regulatory scheme. As the State knows, 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). Likewise, the Federal Reserve Board has promulgated a "comprehensive set of rules . . . implementing the principles of the Truth in Lending Act" for the origination of private student loans. *Lanier v. Assocs. Fin., Inc.*, 114 Ill. 2d 1, 11, 499 N.E.2d 440, 444 (1986).

Tellingly, the State has not alleged a single violation of these rules or regulations. Instead, after years of investigating the company—and evidently not finding violations of any of the actual applicable rules—the State has resorted to accusing Navient of generic "unfair and deceptive" business practices, and of "fail[ing] to perform its ***core duties*** in the servicing of

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[1] Navient Corporation is a holding company that does not engage in student lending or servicing activities. The allegations in the January 18, 2017 Complaint ("Compl.") ¶¶ 70, 92, 99, 100, 217, and 435-36 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 plans to move 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.

student loans" under the Illinois Consumer Fraud Act ("CFA"), 815 ILCS 505/1-1 *et seq.* Compl. ¶ 221 (emphasis added); *see also id.* ¶¶ 216-419, 469. The problem, of course, is that Navient's actual "core duties" are those set by federal law and by contract with the ED, and the state does not allege breach of any of these rules.

The State's effort to sidestep federal regulations is plainly barred by state law and the federal Supremacy Clause. Under longstanding Illinois Supreme Court precedent, a plaintiff cannot use the CFA to disturb or displace federal disclosure standards under the TILA for the origination of private loans. *See Lanier*, 114 Ill. 2d at 16, 499 N.E.2d at 446 (affirming trial court dismissal of CFA claims as precluded by the TILA). Similarly, the Seventh Circuit has adopted the rule from the Ninth Circuit that the HEA expressly preempts any effort to displace federal disclosure standards using state consumer fraud acts. *Bible v. United Student Aid Funds, Inc.*, 799 F.3d 633, 639 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 1607 (2016) (adopting the Ninth Circuit's reasoning in *Chae v. SLM Corp.*, 593 F.3d 936 (9th Cir. 2010) (citing 20 U.S.C. § 1098g)). Together, these rules by the Illinois Supreme Court and the Seventh and Ninth Circuits bar the State's effort to impose new disclosure standards on Navient by bringing claims under the CFA. 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.*, *Chae*, 593 F.3d at 947 (citing the HEA's "uniform application of standards for the FFELP" as enhancing "the overall purpose of nationwide regulatory uniformity").

To permit the State to impose liability under the CFA would also force student loan servicers to act as *de facto* financial counselors, a role not contemplated by federal law, by ED servicing contracts, or by student loan agreements. In fact, testifying before the U.S. Senate in

2014, the Attorney General acknowledged that, in her view, ***new federal law*** (as opposed to existing state consumer protection statutes) is needed to "protect borrowers":

> Congress should make stronger consumer protections apply to the private companies that play a role in higher education. . . . To protect borrowers, ***we need protections in place that are above and beyond the general prohibitions against unfair and deceptive practices in state consumer fraud acts.***[2]

Specifically, the AG complained that the law did not currently compel loan servicers to "make clear to borrowers what their repayment options are" or to serve as "counselors" to student borrowers. *Id.* Remarkably, the State now seeks to impose liability on Navient for ***precisely the same conduct*** that the AG already admitted was "above and beyond" the scope of liability under consumer protection laws.

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."); *Chirstopher 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 is barred from imposing alternate disclosure obligations, the State's claims regarding origination of private loans in ¶¶ 468(a)-(d) must be dismissed pursuant to 735 ILCS 5/2-615, and its claims regarding servicing of federal loans in ¶¶ 469(a)-(h) must be dismissed pursuant to 735 ILCS 5/2-619.

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 CFA. Even if

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[2] Testimony of Illinois Attorney General Lisa Madigan for a Hearing on "The Role of States in Higher Education," before the Committee on Health, Education, Labor, and Pensions, United States Senate, at 4 (July 24, 2014) (emphasis added).

the allegations of the complaint were true, which they are not, the State has not alleged conduct amounting to "unfair" or "deceptive" practices as a matter of law. As to originations, the State accuses Defendants of "subprime" lending. Compl. ¶ 468(a). Even if the Court accepts the allegation that "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 projected default rates and the existence of certain contracts with schools—neither of which constitute "material facts" whose omission is actionable under the CFA.

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.[3] 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 CFA is not violated by promises of future performance or by "mistakes and errors," but only by actual unfair and deceptive conduct. For these reasons, the State's claims regarding origination of private loans in ¶¶ 468(a)-(d) and servicing of federal loans in ¶¶ 469(a)-(i) must be dismissed under 735 ILCS 5/2-615 for the independent reason that they fail to state a claim as a matter of law.

Third, even if the State's claims were not barred or legally defective, the complaint must be dismissed in its entirety because the State has violated basic pleading rules. Under 735 ILCS 5/2-603(b), separate theories of liability must be pleaded as separate counts. By improperly scores of allegations based on multiple theories of liability into a single cause of action, the State

[3] 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.

has violated section 603(b) and improperly forced Defendants to respond to a scattershot complaint. "Defendants are not required to guess at what they are being called upon to defend." People ex rel. Skinner v. Graham, 170 Ill. App. 3d 417, 438, 524 N.E.2d 642, 654 (1988).[4] For this reason, the entire complaint must be dismissed as defective under 735 ILCS 5/2-603(b).

For the reasons set forth below and summarized in the attached Exhibit A,[5] the State's complaint must be dismissed pursuant to 735 ILCS 5/2-615 and 735 ILCS 5/2-619. *See* 735 ILCS 5/2-619.1 (allowing for motions to be brought together).

LEGAL STANDARD

Under 735 ILCS 5/2-619, a complaint must be dismissed if "the claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim." *See Smith v. Waukegan Park Dist.*, 231 Ill. 2d 111, 120, 896 N.E.2d 232, 238 (2008) ("Dismissal under section 2-619(a)(9) is appropriate when an affirmative matter bars or defeats the plaintiff's claim."); *see also Van Meter v. Darien Park Dist.*, 207 Ill. 2d 359, 367, 799 N.E.2d 273, 278 (2003) ("The purpose of a section 2-619 motion to dismiss is to dispose of issues of law and easily proved issues of fact at the outset of litigation."). These affirmative matters include preemption defenses. *See Moskowitz v. Washington Mut. Bank*, FA., 329 Ill. App. 3d 144, 149, 768 N.E.2d 262, 266 (2002) (granting a motion to dismiss a CFA claim under section 2-619 on the basis of federal preemption).

Under 735 ILCS 5/2-615, a complaint must be dismissed if its allegations, taken as true, "fail[] to allege the facts necessary for the plaintiff to recover." *Boswell v. City of Chicago*, 2016 IL App (1st) 150871, ¶ 42 (Simon, J., dissenting)(citations omitted); *see also Schuler v. Abbott*

[4] Despite the complaint's pleading deficiencies, many of the allegations are obviously either preempted or fail to state a claim. This motion attempts as best as it can to sort the allegations in ¶¶ 468-470 into individual claims, and to explain why each of those claims should be dismissed.

[5] 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.

Labs., 265 Ill. App. 3d 991, 994, 639 N.E.2d 144, 147 (1993) (emphasis added). To survive a motion to dismiss under section 2-615, "the plaintiff must allege facts sufficient to bring a claim within a legally recognized cause of action." *Chicago v. Beretta U.S.A. Corp.*, 213 Ill. 2d 351, 368 (2004). Illinois requires fact pleading, which "imposes a heavier burden on the plaintiff" and "is not satisfied . . . by the general policy favoring the liberal construction of pleadings." *Id.*(quoting *Teter v. Clemens*, 112 Ill. 2d 252, 256-57, 492 N.E.2d 1340, 1342 (1986)). In reviewing a motion to dismiss, a court must "disregard the conclusions that are pleaded and look only to the well-pleaded facts to determine whether they are sufficient to state a cause of action." *Id.* A court must ignore any legal conclusions or "bald assertions," focusing instead only on the well-pleaded facts of the complaint. *Moon v. Liu*, 2015 IL App (1st) 143606, ¶ 24, 44 N.E.3d 1134, 1142; *In re Visitation of J.T.H.*, 2015 IL App (1st) 142384, ¶ 18, 42 N.E.3d 433, 436. Absent such facts, a motion to dismiss "must be granted." *Beretta*, 213 Ill. 2d at 368-69, 821 N.E. 2d at 1112. The Illinois Supreme Court has affirmed dismissals of CFA claims precluded by the TILA under section 2-615. *See, e.g., Lanier*, 114 Ill. 2d at 16, 499 N.E.2d at 446.

FACTUAL BACKGROUND

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. ¶ 70. Navient services significant portfolios of both Federal Family Education Loans Program ("FFELP") loans, direct loans made by the Department of Education ("ED"), and private education loans. *Id.* Navient acts as a loan servicer for both its own loans and loans owned by the ED and others.

The complaint arises out of Defendants' alleged practices related to (1) federal student loans and (2) private education loans.[6] The following sweeping federal framework[7] exists to regulate such practices.

I. 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 FFELP Loans, *see* 20 U.S.C. § 1071 *et seq.*, under which the federal government guarantees qualifying student loans made by private lenders.[8]

Federal student loan programs are highly regulated. Congress "instruct[ed]" the 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,[9] detailed and extensive regulations have been promulgated prescribing every aspect of federal student loans, including charges to borrowers (34 C.F.R. § 682.202, § 685.205), repayment plans (§ 682.209, § 685.208), deferment and forbearance

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6 This motion does not address the State's allegations regarding debt collections contained in ¶ 470. In doing so, Defendants in no way concede the validity of those claims and reserve the right to challenge those allegations upon a motion for summary judgment at the appropriate time.

7 "[C]ourts may take judicial notice of an agency's rules and regulations as matters of public record." *Busch v. Bates*, 323 Ill. App. 3d 823, 832, 753 N.E.2d 1184, 1191 (2001); *see also People v. Pollution Control Bd.*, 103 Ill. 2d 441, 447, 469 N.E.2d 1102, 1105-06 (1984) (holding that notice in the Federal Register is "a matter of public record of which we may take judicial notice"). The regulations Defendants cite throughout this motion fall within this authority.

8 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.*

9 The State is very familiar with this public notice and comment process given that the Illinois Attorney General was a designated "negotiator" and regular participant in the ED's negotiated rulemakings process in 2014, 2015, and 2016.

(§§ 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 the borrower or the 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* §§ 1087a, 1087e. ED has entered into such a contract with Navient. Compl. ¶ 245.

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 notice within 30 days confirming the terms of forbearance. *See* 34 C.F.R. § 682.211(b)(1). This includes information about interest capitalization. *See id.* § 682.211(e). In addition, every 180 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 amount 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.[10] 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.

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[10] *See* Federal Student Aid, U.S. Department of Education, Income-Driven Repayment Plan Request, available at https://studentloans.gov/myDirectLoan/ibrInstructions.action?source=15SPRRPMT#. The 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).

> *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).

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

II. 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 2000 to 2009 (the "relevant time period" for the origination allegations in the complaint, Compl. ¶ 97), origination of private education loans had to comply with the rules set out in the TILA and its implementing regulations.[11] *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

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[11] 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 implementing regulations. *See* 12 U.S.C. §§ 5481(12)(O), 5514(b)-(c) and 5515(b)-(c). These later regulations are not directly relevant to any conduct alleged to have occurred in 2000-2009.

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:

- 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 demonstrate how to originate private education loans in compliance with the law. *See id.* § 226, Supp. I, App. G & H ("[C]reditors using [model forms] properly will be deemed to be in compliance with the regulation with regard to those disclosures."); *id.* § 226 Supp. I, Cmt. 17(i)(4) (referring to "disclosure forms approved for use in certain student credit programs").

ARGUMENT

I. THE ATTORNEY GENERAL'S CLAIMS UNDER THE ILLINOIS CONSUMER FRAUD ACT 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. The Illinois Supreme Court has explained that "when the express language of a federal statute indicates an intent to preempt state law," state law is preempted under the federal Supremacy Clause. *Vill. of Mundelein v. Wisconsin Cent. R.R.*, 227 Ill. 2d 281, 288, 882 N.E. 2d 544, 549 (2008).

Under state law, the Illinois Supreme Court "perceive[s] 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." *Lanier*, 114 Ill. 2d at 16, 499 N.E.2d at 447 (affirming trial court dismissal of claims under 735 ILCS 5/2-615). These principles and policies clearly indicate that where state law and federal law conflict, including where TILA governs, state law must yield to federal law.

The State's origination claims in ¶¶ 468(a)-(d) are barred because under well-established precedent in Illinois, the CFA forbids state law from requiring disclosures contrary or in addition to those set forth by the TILA. Likewise, the State's federal servicing claims in ¶¶ 469(a)-(h) are preempted by the HEA, which expressly prohibits any alternate state law disclosure standards.

The State's attempt to impose liability under the CFA for conduct already regulated by federal law 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 federally insured and federally issued student 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 statutory frameworks. Yet the State now seeks to "backdoor" novel interpretations of these obligations and effectively impose new requirements related to loan origination and servicing, none of which are required under federal law. The State "can point to nothing that would have given [Navient] affirmative notice" of the requirements it now seeks to enforce. *Fox*, 132 S. Ct. at 2319.

For these reasons, the state's claims in ¶¶ 468(a)-(d) must be dismissed pursuant to 735 ILCS 5/2-615, and the claims in ¶¶ 469(a)-(h) must be dismissed pursuant to 735 ILCS 5/2-619.

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

As previously noted, the origination, servicing, and collection of student loans are governed by the terms of the ED Servicing Contract and a complex federal regulatory scheme. The TILA and its associated federal regulations establish specific standards for disclosures for the origination of private education loans. *See supra* pages 8-10. According to the Illinois Supreme Court, the TILA and its implementing regulations provide a "comprehensive set of rules" for disclosures to borrowers. *Lanier*, 114 Ill. 2d at 9, 499 N.E.2d at 447.

Likewise, the HEA and its implementing regulations establish comprehensive standards for disclosing information to borrowers in the course of servicing and collecting "[l]oans made, insured, or guaranteed pursuant to a program authorized by Title IV of" the HEA, otherwise known as federal student loans. 15 U.S.C. § 1603(7). Under the HEA, ED has promulgated a number of regulations governing federal student loans, including 34 C.F.R. § 682.205 ("Disclosure requirements for lenders"). That 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. *Id.* § 682.205(a)(1) These federal laws, together with the ED Servicing Contract, comprehensively govern Navient's obligations and responsibilities in servicing student loans.

B. Under Longstanding Illinois Supreme Court Precedent, the Consumer Fraud Act Precludes Liability for the State's Origination Claims.

It is well established under Illinois law that a plaintiff cannot impose disclosure standards contrary to or in addition to those set forth by the TILA. *Lanier*, 114 Ill. 2d at 17-18, 499 N.E.2d at 447. 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 the Truth in Lending Act is a defense to liability under the Illinois Consumer Fraud Act" for claims alleging unfair or deceptive practices associated with private loans. *Id.*; *Jackson v. South Holland Dodge, Inc.*, 197 Ill. 2d 39, 46-47, 755 N.E 2d 462, 467-468 (2001) (a plaintiff may not "obtain relief [under the CFA] based on actions which do not violate TILA"). The CFA expressly provides that actions or conduct "specifically authorized by laws administered by any regulatory body or officer acting under statutory authority of this State or the United States" are exempt from liability under the Act. 815 ILCS 505/10b(1). Thus, "Illinois consumer statutes do ***not*** impose liability beyond that 'mandated by the [Federal] Truth in Lending Act in situations where [as here] both the Act and the Illinois Statutes apply." *See Jackson*, 197 Ill. 2d at 46-47, 755 N.E 2d at 467-468 (emphasis in original).

The key decision on this issue is *Lanier v. Assocs. Fin., Inc.*, 114 Ill. 2d 1, 499 N.E.2d 440 (1986). In *Lanier*, the plaintiff brought a CFA claim alleging that a creditor originating a private loan fraudulently calculated interest on installment loans to unsophisticated borrowers.

Id. at 5, 499 N.E.2d at 441. Specifically, the plaintiff alleged that the creditor failed to explain the effects of early repayment on the interest rate, even though "defendants knew that it was likely, from a statistical standpoint, 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.* at 9, 499 N.E.2d at 443. The creditor moved to dismiss, on the ground that its loan disclosures had not violated the TILA or state law. *Id.* The circuit court granted dismissal, and the appellate court affirmed. *Id.* at 4, 18, 499 N.E.2d at 441, 447. The Illinois Supreme Court also affirmed, holding in no uncertain terms that "the Consumer Fraud Act's general prohibition of fraud and misrepresentation in consumer transactions did not require more extensive disclosure . . . than the disclosure required by the comprehensive provisions of the Truth in Lending Act." *Id.* at 17, 499 N.E.2d at 447. Because the disclosures in the loan transaction complied with the TILA, the Illinois Supreme Court held, the plaintiff could not state a claim for violation of the CFA, even though the plaintiff was alleging fraudulent misrepresentation in the origination of the loan. *Id.* at 17-18, 499 N.E.2d at 447. In rejecting plaintiff's claims, the *Lanier* Court cited "a consistent policy against extending disclosure requirements under Illinois law beyond those mandated by the Truth in Lending Act." *Id.* at 17, 499 N.E.2d at 447.

Illinois courts have "overwhelmingly" agreed with the Illinois Supreme Court's reasoning in *Lanier*, and have consistently held that compliance with the TILA precludes liability for claims brought under the CFA where such claims would alter federal disclosure requirements. *See Franks v. Rockenbach Chevrolet Sales, Inc.*, No. 95 C 6266, 1998 WL 919714, at *4 (N.D. Ill. Dec. 30, 1998) (collecting cases); *see also Jarvis v. S. Oak Dodge, Inc.*, 201 Ill. 2d 81, 89–90, 773 N.E.2d 641, 647 (2002). Most recently, the Supreme Court reaffirmed that *Lanier* bars CFA claims alleging "lack of disclosure in the context of loans" because "the required disclosure [in the TILA] implicitly provided specific authorization not to make any additional disclosures." *Price v. Philip Morris, Inc.*, 219 Ill. 2d 182, 251-52, 848 N.E.2d 1, 43 (2005); *id.* at 249, 848 N.E.2d at 41 ("[F]ull compliance with applicable disclosure requirements is a defense, under [CFA] section 10b(1), to a claim of fraud based on the failure to make additional disclosures.").

Yet a claim for failure to make additional disclosures is exactly what the State seeks to assert in this case. Although the scattershot pleading is unclear, any fair reading of ¶¶ 468(a)-(d) in the "VIOLATIONS" section 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. *See* Compl. ¶¶ 468(a)-(d). Both of these allegations directly challenge disclosures by a private loan originator to borrowers. But under the clear holding of *Lanier* and its progeny, those disclosures are "beyond those mandated by the Truth in Lending Act." 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. For this reason, the State's origination claims in ¶ 468(a)-(d) are barred, and must be dismissed. 735 ILCS 5/2-615.

C. Under Seventh and Ninth Circuit Precedent, the HEA Expressly Preempts the State's Federal Servicing Claims.

As to federal student loans, the HEA expressly preempts any state law effort to impose alternate disclosure standards as to loan servicing. The HEA reads: "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).[12] The plain language of § 1098g preempts any state law claims that purport to impose alternative 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. Notably, 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 [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.***

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

Id. (emphasis added). Because § 1098g of the HEA expressly preempts any effort by state law to impose alternate disclosure standards on federal loan servicers, the Ninth Circuit affirmed summary judgment in favor of Sallie Mae. *Chae*, 593 F.3d 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).

The Seventh Circuit recently adopted the rule and reasoning from *Chae*. *See Bible v. United Student Aid Funds, Inc.*, 799 F.3d 633, 639 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 1607, (2016). In *Bible*, the Seventh Circuit reiterated *Chae*'s holding that a plaintiff cannot "ask[] the court to impose a higher standard of compliance than was required by federal law" because "[s]uch claims are preempted" by HEA. *Bible*, 799 F.3d at 653-54 (emphasis in original). The *Bible* court also highlighted the Ninth Circuit's reasoning that '"[p]ermitting varying state law challenges across the country, with state law standards that may differ and impede uniformity would pose an obstacle to Congress's purpose in creating the FFELP."' *Id.* at 653 (quoting *Chae*, 593 F.3d at 945).

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

- In ¶ 469(a)-(d), the State alleges that Navient "***misrepresent[ed]***" or "***fail[ed] to disclose*** . . . that the federal government offers income-driven repayment plans to help borrowers avoid default," ¶ 469(a)-(b), failed to "work with" borrowers by "identifying options and solutions," ¶ 469(c), and "[d]eceptively offer[ed] forbearances" to certain borrowers, ¶ 469(d)(emphasis added).

- In ¶ 469(e) and (f), the State alleges that Defendants "***[f]ail[ed] to disclose***" and misrepresented a "date certain" for submitting recertifications for IDR plans.
- In ¶ 469(g) and (h), the State alleges that Navient "***fail[ed] to adequately notify*** borrowers" of renewal notices and misrepresented the potential consequences of failing to submit IDR recertifications.

The State attempts to restyle some of these allegations by sprinkling in words like "misrepresenting" and "deceptively." But as *Chae* held, alleging a "misrepresentation" is "merely the converse of a state-law requirement that alternate disclosures be made." *Chae*, 593 F.3d at 943. The allegation that Defendants "[m]isrepresent[ed]" federal repayment options, ¶ 469(a), failed to "work with" borrowers by "identifying options and solutions," ¶ 469(c), and "[d]eceptively offer[ed]" forbearance plans, ¶ 469(d), is "merely the converse" of its allegation in ¶ 469(b) that Defendants "fail[ed] to disclose" income-based repayment plans. *Chae*, 593 F.3d at 942. Similarly, the allegation in ¶ 469(f) that Defendants "[r]epresent[ed] that Navient will provide a date certain" is merely the converse of its allegation in ¶ 469(e) that Defendants "[f]ail[ed] to disclose a date certain." And the allegations in ¶ 469(g) are merely the converse of allegations that Defendants failed to disclose the "consequences" of not submitting a timely recertification. In short, all of the State's purported claims of "unfair or deceptive" practices in servicing federal student loans either expressly allege improper disclosure, or allege "misrepresentations" that are nothing more than "restyled improper-disclosure claims." *Chae*, 593 F.3d at 943. Either way, these claims are "subject to express preemption under 20 U.S.C. § 1098g." *Id.*

In addition to express preemption under § 1098g, the CFA itself provides an independent defense to the State's servicing claims. As discussed above, the CFA contains an express exemption for conduct that complies with federal law. *See* 815 ILCS 505/10b(1) (providing that actions or conduct "specifically authorized by laws administered by any regulatory body or officer acting under statutory authority of this State or the United States" are exempt from liability under the Act). The same reasoning employed by the Illinois Supreme Court in *Lanier* applies here. *Lanier* found that the lack of violation of TILA's disclosure requirements was a defense to liability under 815 ILCS 505/10b(1). Likewise, the State has not even attempted to allege that Defendants have failed to comply with the HEA or its regulations. Because Navient's federal loan servicing has been "specifically authorized by laws administered by any regulatory body [the ED] or officer [the Secretary of Education] acting under statutory authority of this State or the United States," *id.*, and because the State has failed to plead a single violation of the HEA, Defendants are exempt from liability under the CFA.

For these reasons, the State's servicing claims in ¶¶ 469 (a)-(h) are expressly preempted by the HEA, and must be dismissed. 735 ILCS 5/2-619.

II. THE ATTORNEY GENERAL HAS FAILED TO STATE A CLAIM FOR UNFAIR OR DECEPTIVE PRACTICES UNDER THE CONSUMER FRAUD ACT.

Even if the State's claims were not preempted, a number of its allegations fail to state a claim under the CFA. Taking the State's origination claims in ¶¶ 468(a)-(d) and its servicing claims in ¶¶ 469(a)-(i) as true, the State fails to plead conduct amounting to "unfair or deceptive" practices as a matter of law. As a result, these claims must be dismissed under section 2-615.

To state a claim under the CFA, "the Attorney General must allege that (1) defendants committed a deceptive act or practice, (2) defendants intended for customers to rely on that deceptive act or practice, and (3) the deception occurred in the course of conduct involving trade or commerce." *People ex rel. Madigan v. United Const. of Am., Inc.*, 2012 IL App (1st) 120308, ¶ 16, 981 N.E.2d 404, 411. The AG may also allege "unfair" conduct separate and apart from "deceptive" conduct. *Crichton v. Golden Rule Ins. Co.,* 358 Ill. App. 3d 1137, 1146, 832 N.E.2d 843 (2005).

Setting aside any legal conclusions, the following allegations do not amount to "unfair" or "deceptive" conduct as a matter of law:

- ¶¶ 468(a)-(d) fail to allege unfair or deceptive conduct because even if subprime lending occurred, it would not in and of itself be unfair or deceptive, and because Defendants are under no obligation to disclose their opinions about borrowers' default risks or the existence of contractual arrangements with schools, neither of which are "material fact[s]."

- ¶¶ 469(a)-(h) likewise fail to allege unfair or deceptive conduct because the State does not even claim that information regarding IDR plans was never provided to borrowers. Instead, the State merely alleges that the information was not provided ***on every phone call***, a requirement that does not exist under federal law in the first place.

- ¶ 469(c) 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." *Right Field Rooftops, LLC v. Chicago Cubs Baseball Club, LLC*, 136 F. Supp. 3d 911, 918 (N.D. Ill. 2015).

- ¶ 469(i) fails to allege unfair or deceptive conduct associated with payment processing because, by definition, mistakes and errors are not actionable as consumer fraud.

For these reasons, the State's claims in ¶¶ 468(a)-(d) and ¶¶ 469(a)-(i) must be dismissed for failure to state a claim. 735 ILCS 5/2-615.

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

In ¶¶ 468(a)-(d), the State alleges that Defendants violated the CFA by "[u]nfairly and deceptively originating risky loans" while "[f]ailing to disclose to borrowers the existence of contractual arrangements" with schools and "[f]ailing to disclose to borrowers that it was highly likely the loan they were taking out would default." In essence, the State seeks to impose liability under the CFA for the act of making "subprime" loans by itself, and by extension, for not disclosing projected default rates or information about the existence of loss-sharing agreements.

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. In fact, "subprime" lending in the student loan context has been credited with helping to "[p]romot[e] access to education," help "enable[] upward socioeconomic mobility and all that higher lifetime earnings can provide," and help "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 entirely to allege 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 failure to disclose opinions regarding projected default rates are not omissions of "facts." A CFA claim based on the failure to disclose information to consumers must allege the omission or concealment of a "material fact." *Connick v. Suzuki Motor Co.*, 174 Ill. 2d 482, 504–05, 675 N.E.2d 584, 595 (1996). "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.* 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 CFA. 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. *See, e.g.*, *Avon Hardware Co. v. Ace Hardware Corp.*, 2013 IL App (1st) 130750, ¶ 17, 998 N.E.2d 1281, 1288 (affirming dismissal of fraud action "as to the claims involving statements of future performance" because those were mere "expression[s] of opinion"); *Lagen v. Balcor Co.*, 274 Ill. App. 3d 11, 17, 653 N.E.2d 968, 973 (1995) ("Generally, financial projections are considered to be statements of opinion, not fact."). Because the alleged failure to disclose opinions regarding projected default rates does not represent failure to disclose a "material fact" within the meaning of the CPA, this fails to state a claim.

The State also alleges "[f]ail[ure] to disclose to borrowers the existence of contractual arrangements . . . with schools to protect themselves from some of the losses they knew were likely to occur due to defaults on risky subprime loans they made to borrowers." Compl. ¶ 468(b). The State has failed to explain why Defendants would be required to disclose to borrowers the existence of loss-sharing agreements. At any rate, this is nothing more than an extension of the inadequate theory that Defendants did not disclose the likelihood of default, which fails to state a claim for the reasons set forth above.

Not only has the State failed to allege omission of "facts," it has also failed to allege that information regarding projected default rates or the existence of loss-sharing agreements was "material." An omitted fact is only "material" if it is of the type that ***would have changed the borrowers' behavior*** had it been available to them. *Connick v. Suzuki Motor Co.*, 174 Ill. 2d 482, 505, 675 N.E.2d 584, 595 (1996) ("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."). The State has made no allegation whatsoever that disclosure of projected default rates or of contractual loss-sharing arrangements with schools would have caused any borrower to make a different decision about taking out his or her student loans. Without such an allegation, the complaint fails to state a cause of action.

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

In ¶¶ 469(a)-(h), the State alleges that the "Servicing Defendants" "[m]isrepresent[ed] the federal loan repayment options" available to some borrowers, ¶ 469(a), including by "failing to disclose" the existence of IDR plans, ¶ 469(b), "[m]isrepresenting" that they would "work with" borrowers and "identify[] options and solutions," ¶ 469(c), "[d]eceptively offering forbearances," ¶ 469(d), and "failing to disclose" the date certain for recertifying IDR plans, ¶¶ 469(e)-(f), among other disclosure allegations.

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. Compl. at 2 (alleging that "Navient failed to inform struggling borrowers about the available repayment options at the critical time that the borrower needed to know about the options—while the borrower was on the phone with Navient"). The "duty" to disclose such facts to borrowers on every phone call does not exist. By not challenging any of the federal disclosure regulations, the State tacitly admits that Navient complied with the applicable rules. By failing to even allege that Navient did not disclose certain facts, the State has failed to allege "deceptive" conduct.

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. *See Robinson v.*

Toyota Motor Credit Corp., 201 Ill. 2d 403, 420, 775 N.E.2d 951, 962 (2002) ("[S]ince those penalty provisions are clearly set out in the lease, plaintiffs have not alleged sufficient facts to establish that Toyota's conduct was deceptive."); *Sklodowski v. Countrywide Home Loans, Inc.*, 358 Ill. App. 3d 696, 704, 832 N.E.2d 189, 197 (2005) (holding that "Countrywide's practice of not paying interest on escrow funds is not 'deceptive' because the mortgage agreement clearly discloses this policy"); *see also Carr v. CIGNA Securities, Inc.*, 95 F.3d 544, 547 (7th Cir. 1996) (affirming the dismissal of a securities fraud suit in part because the plaintiff should have read contract provisions disclosing the riskiness of the challenged investment). In other words, 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.

For these reasons, the State's claims in ¶¶ 469(a)-(h) must be dismissed.

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

In ¶ 469(c), the State alleges that the so-called Servicing Defendants "[m]isrepresent[ed] that [they] 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.'" 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. *See, e.g.*, Compl. ¶ 226 (alleging that "***[d]espite assuring borrowers that it would help them find the right repayment option for their circumstances***, Navient routinely steered borrowers experiencing long-term financial hardship, including Illinois borrowers, into costly payment relief . . . ." (emphasis added)).

Under Illinois law, a plaintiff cannot state a claim for unfair and deceptive practices based on statements in marketing and advertisements that cannot be "objectively verifiable by specific or absolute characteristics." *Right Field Rooftops,* 136 F. Supp. 3d at 918 (granting defendant's motion to dismiss claims under the CFA because the alleged false statement was a "subjective statement" that could not be definitively disproven). The alleged misrepresentations include general and undefined statements 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. ¶ 245(a)-(b) (emphasis omitted). Under controlling precedent, these statements cannot form the basis of a claim for unfair or deceptive practices because they do not purport to represent an "objectively verifiable" fact, and thus they cannot form the basis for claims of consumer fraud. The State improperly attempts to twist conventional and entirely proper marketing statements into fraudulent "misrepresentations." Because these statements do not purport to assert an objectively verifiable fact "the truth or falsity of which [could] be precisely determined," they are more akin to "puffery," which is plainly "not actionable as consumer fraud under" the CFA. *See Avery v. State Farm Mut. Auto. Ins. Co.*, 216 Ill. 2d 100, 174, 835 N.E.2d 801, 847 (2005). For this reason, the State's allegation in ¶ 469(c) must be dismissed for failure to state a claim.

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

In ¶ 469(i), the State alleges that Navient "unfairly ma[de] errors" by "misallocating and misapplying payments made by consumers." Admittedly, therefore, the State seeks to impose liability under the CFA for conduct that it 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 CFA. The CFA exists to deter deceptive conduct. *Lee v. Nationwide Cassel, L.P.*, 277 Ill. App. 3d 511, 518, 660 N.E.2d 94, 100 (1995), *aff'd in part, rev'd in part*, 174 Ill. 2d 540, 675 N.E.2d 599 (1996) (noting that one of the purposes of the CFA is "to eradicate all forms of deceptive and unfair business practices"). By definition, mistakes and errors cannot be deterred. As a matter of law, therefore, the allegations in ¶ 469(i) do not amount to "unfair or deceptive" practices, and those claims must be dismissed.

III. THE STATE'S COMPLAINT VIOLATES ILLINOIS PLEADING RULES BY ALLEGING MULTIPLE CLAIMS AS A SINGLE CAUSE OF ACTION.

The State's claims against Defendants must also be dismissed because the complaint violates mandatory pleading rules. 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 shall be divided into paragraphs numbered consecutively, each paragraph containing, as nearly as may be, a separate allegation.

Id. A complaint alleging distinct theories of liability cannot be alleged as a single count. Instead, each separate theory for recovery should be pleaded as a separate cause of action.

The State's failure to comply with the plain terms of section 603(b) warrants dismissal of the complaint. *See People ex. rel. Skinner v. Graham*, 170 Ill. App. 3d 417, 438, 524 N.E.2d 642, 654 (1988) (holding that commingling numerous theories of liability in a single count requires Defendant to guess at what they are being called to defend and requires dismissal). Here, the State has alleged numerous theories of liability under various courses of conduct, making it difficult to identify and attack pleading defects with precision. The State has alleged no less than 21 different theories of liability under the CFA with respect to the (1) origination, (2) servicing, and (3) collection of student loans against five separate Defendants playing different roles over a 17-year time period—all in one jumbled mega-count entitled "VIOLATIONS." Compl. at 77-81. But 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 conducted by all Defendants. Further, each of the three general categories is alleged with distinct theories of liability, including alleged failures to disclose, alleged misrepresentations, and alleged "unfair" conduct. Despite scores of theories of liability, the State has grouped all of these claims into a single count. The State has therefore failed to comply with the express terms of Section 603(b). *See Graham*, 170 Ill. App. 3d at 438, 524 N.E.2d at 654. Defendants should not have to respond to this birdshot approach to pleading.

This is not the first time that the State has failed to properly plead a violation of the CFA. In *People of the State of Illinois v. Liberty Mut.*, the State similarly alleged a violation of the CFA based on "three distinct theories of liability," each of which alleged a different scheme that harmed consumers in the insurance market. No. 06 CH-13359, 2007 WL 4478828 (Ill. Cir. Ct. Cook Co. Apr. 11, 2007). The court concluded: "Because each separate theory for recovery under the [CFA] should be pled as its own count, the Complaint should be dismissed for failure to comply with Section 603(b)." *Id.* Here, the State's complaint must be dismissed for the same reason.

CONCLUSION

For the reasons set forth above and summarized in Exhibit A, Defendants respectfully submit that the complaint should be dismissed pursuant to 735 ILCS 5/2-619.1.

Dated: March 20, 2017

Respectfully submitted,

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Exhibit A

EXHIBIT A

Claim	Description	Bases for Dismissal	Authority for Dismissal
All Claims ¶¶ 468-470		Failure to plead separate claims separately; impermissible amalgamation of claims	735 ILCS 5/2-603(b).
Origination Claims ¶ 468 (a), (b), (c), (d)	Alleged "subprime" lending and alleged failures to disclose regarding likelihood of default and loss-sharing	Precluded by the Truth in Lending Act, 15 U.S.C. §§ 1601 *et seq.* Failure to state a claim for "unfair or deceptive" practices because alleged conduct is not unlawful and material facts were disclosed	735 ILCS 5/2-615
Servicing Claims ¶ 469 (a), (b), (c), (d), (e), (f), (g), (h)	Alleged failures to disclose facts regarding income-driven repayment plans	Preempted by the Higher Education Act, 20 U.S.C. § 1098g Failure to state a claim for "unfair or deceptive" practices because material facts were disclosed	735 ILCS 5/2-619 735 ILCS 5/2-615
Servicing Claim ¶ 469(c)	Alleged misrepresentations based on marketing and advertising	Preempted by the Higher Education Act, 20 U.S.C. § 1098g Failure to state a claim based on marketing and advertising	735 ILCS 5/2-619 735 ILCS 5/2-615
Servicing Claim ¶ 469 (i)	Alleged errors and mistakes in payment processing	Failure to state a claim for "unfair or deceptive" practices	735 ILCS 5/2-615

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

People of the State of Illinois

v.

Navient Corporation, et al.

No. 17 CH 761

NOTICE OF MOTION

To:

See Certificate of Service

On April 3, 2017 at 9:30 a.m./~~p.m.~~ or as soon thereafter as counsel may be heard, I shall appear before the Honorable Kathleen M. Pantle or any judge sitting in that Judge's stead, in the courtroom usually occupied by him/her, located at 50 West Washington Street, Chicago, IL, Illinois, and present Defendants' Motion to Dismiss.

Atty. No.: 90443 Pro se 99500

Name: Martin L. Roth

Atty. for: Certain Defendants

Address: 300 North LaSalle Street

City/State/Zip Code: Chicago, IL 60654

Telephone: 312-862-7170

Primary Email: rothm@kirkland.com

Secondary Email:

Tertiary Email:

☐ PROOF OF SERVICE BY DELIVERY

I, ____________, ☐ the attorney ☐ non-attorney certify that on the ______ day of ____________, I served this notice by delivering a copy personally to each person to whom it is directed.

Dated: ____________ ____________
Signature/Certification

☑ PROOF OF SERVICE BY MAIL

I, Jennifer M. Rogalny, ☐ the attorney ☑ non-attorney certify that I served this notice by mailing a copy to the individuals on the Certificate of Service at the addresses on the Certificate of Service
(address on envelope)

and depositing the same in the U.S. Mail at 300 North LaSalle Street, Chicago, IL 60654
(place of mailing)

at 5:00 p.m. a.m/p.m.. on the 20th day of March, with proper postage prepaid.

Dated: March 20, 2017 Jennifer M. Rogalny
Signature/Certification

☐ PROOF OF ELECTRONIC SERVICE (WHERE PERMISSIBLE)

I, ____________ ☐ the attorney ☐ non-attorney certify that on the ______ day of ____________, I served this notice electronically ☐ via the Clerk's Office E-filing system, or ☐ by telefax transmission (______ pages) with consent of the recipient where permissible under Ill. Sup Ct. R.11, at fax no. ____________, at ______ a.m./p.m., from ____________.
(Place)

☐ Via email (Sender's Email is ____________
Recipient's email is: ____________).

Dated: ____________ ____________
Signature/Certification

NOTE: If more than one person is served by delivery or mail, additional proof of service may be made by attaching an additional sheet to this Notice of Motion.

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS