No. 18-1531

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

NICOLE D. NELSON

Plaintiff-Appellant

v.

GREAT LAKES EDUCATIONAL LOAN
SERVICES, INC., et al.,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS
3:17-cv-00183-NJR-SCW

BRIEF OF APPELLANT AND REQUIRED SHORT APPENDIX

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June 25, 2018

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Seventh Circuit Rule 26.1, counsel for Appellant states as follows:

1. The name of every party that the undersigned attorney represents in the case:

   Nicole Denise Nelson

2. The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

   Peiffer Wolf Carr & Kane, A Professional Law Corp.

   National Student Legal Defense Network

3. The parent corporations and any publicly held companies that own ten percent or more of the stock of the party represented by the attorneys:

   N/A

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6. The parent corporations and any publicly held companies that own ten percent or more of the stock of the party represented by the attorneys:

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   National Student Legal Defense Network

9. The parent corporations and any publicly held companies that own ten percent or more of the stock of the party represented by the attorneys:

   N/A

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JURISDICTIONAL STATEMENT

The District Court had subject matter jurisdiction under 28 U.S.C. § 1332(d)(2) because the matter in controversy exceeds the sum or value of $5,000,000, exclusive or interest and costs, and is a class action in which the named Plaintiff-Appellant Nicole Nelson ("Nelson") is a citizen of Illinois, whereas Defendant-Appellee Great Lakes Education Loan Services Inc. ("Great Lakes") is a corporation organized and operating under the laws of the State of Wisconsin, with a principal place of business in Wisconsin. On February 9, 2018, the District Court issued a final judgment dismissing Nelson's claims with prejudice finding those claims were expressly preempted by 20 U.S.C. § 1098g. Short Appendix ("SA") 16. Nelson timely appealed that judgment, which disposed of all of her claims, on March 7, 2018. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

1. Did the District Court err when it held that all of Nelson's state law claims that her student loan servicer had committed deceptive, unfair, and fraudulent practices were expressly preempted by 20 U.S.C. § 1098g?

STATEMENT OF THE CASE

This case is about a student loan borrower's ability to assert her rights under state consumer protection laws to remedy unfair, deceptive, and fraudulent practices committed by her student loan servicer. Appellant Nicole Nelson has alleged that Great Lakes, the servicer of her federal student loans, in order to minimize its costs and maximize profits, specifically and systematically directed its employees to steer borrowers in financial difficulty into "forbearance" status, rather than providing disinterested, individualized, and "expert" counseling (as they had offered) to determine whether other repayment programs would be more financially beneficial to borrowers. *See generally* SA 18, 25 (First Amended Class Action Complaint ("Compl.")[1] ¶¶ 6, 7, 34). As a direct result of this business practice, Nelson and a putative class of similarly situated borrowers accumulated unpaid interest that was capitalized at the end of each forbearance period, increasing both the total amount owed on their loans and their required monthly payments. SA 23 (Compl. ¶¶ 26-29). Nelson alleged that Great Lakes' conduct violated the Illinois Consumer Fraud and Deceptive Business Practices Act and constituted both constructive fraud and negligent misrepresentation under Illinois common law. SA 38-48.

The District Court dismissed the Complaint. Relying on a narrow provision of the Higher Education Act of 1965, as amended ("HEA"), that prohibits the

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[1] Due to a clerical error, the Amended Complaint includes two sets of numbered paragraphs 1-7. For the sake of clarity and to avoid confusion, when citing to the Amended Complaint, this brief uses both "Short Appendix" ("SA") page cites and numbered paragraphs that correspond to allegations in the Amended Complaint.

application of state law "disclosure requirements" to federal student loans, the District Court held that federal law expressly bars a student loan borrower from using state consumer protection laws designed to remedy unfair, deceptive, and fraudulent acts and practices of a student loan servicer because such claims are "disguised failure-to-disclose claims." SA 12.

The Higher Education Act and Student Loan Servicing

The HEA "was originally passed in 1965 '[t]o strengthen the educational resources of our colleges and universities and to provide financial assistance for students in postsecondary and higher education.'" *Leveski v. ITT Educ. Servs., Inc.*, 719 F.3d 818, 819 (7th Cir. 2013) (quoting Pub. L. No. 89-329, 79 Stat. 1219 (1965)). As part of the HEA, Congress established the Federal Family Education Loan Program ("FFEL"), which operated as a "system of loan guarantees meant to encourage [commercial] lenders to loan money to students and their parents on favorable terms." *Bible v. United Student Aid Funds, Inc.*, 799 F.3d 633, 640 (7th Cir. 2015) (quoting *Chae v SLM Corp.*, 593 F.3d 936, 938 (9th Cir. 2010)). Under FFEL, loans were issued by lenders, guaranteed by guaranty agencies, and reinsured by the U.S. government. *See generally* 20 U.S.C. § 1078(a)-(c).[2]

[2] Effective in 2010, Congress ceased the origination of new FFEL loans and transitioned entirely to a "Direct Loan" program wherein the United States serves as the lender and contracts with non-governmental entities to service loans issued by the Department. 20 U.S.C. § 1071(d); *see also* Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, § 2201 *et seq*., 124 Stat. 1029, 1074. Federal Direct Loans "have the same terms, conditions, and benefits" as those issued under FFEL. 20 U.S.C. § 1087e(a)(1). The express preemption provision at issue in this case, 20 U.S.C. § 1098g, applies equally to Direct Loans and FFEL loans. 20 U.S.C. § 1098g (referring to loans "made, insured, or guaranteed"). As of Fiscal Year 2017, the Department guarantees and

As a practical matter, a student loan borrower will rarely have any interaction with the lender or holder of her student loan after her loan is originated. Most student loan borrowers communicate exclusively with a loan servicer who has been "delegate[d]" the authority by a lender or loan holder to service the borrower's loan and who must abide by the HEA and its implementing regulations. 34 C.F.R. § 682.203(a).

Student loan servicing encompasses an array of acts and responsibilities, including receiving and applying payments to a student loan borrower's account, maintaining account records, and "[i]nteractions with a borrower, including activities to help prevent default on [on student loans], conducted to facilitate" repayment. 12 C.F.R. § 1090.106 (Consumer Financial Protection Bureau defining "student loan servicing"). Department of Education regulations broadly define a "[t]hird-party servicer" as an entity that "contract[s] with a lender or guaranty agency . . . to administer . . . any aspect of the lender's or guaranty agency's FFEL programs required by" statute, regulation, or other applicable "arrangement, agreement or limitation." 34 C.F.R. § 682.200. Nelson has alleged that Great Lakes' "principal responsibilities" as a servicer include "managing borrowers' accounts, processing monthly payments, assisting borrowers to learn about, enroll in, and remain in alternative repayment plans, and communicating directly with borrowers

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holds approximately $1.367 trillion in federal student loans owed by approximately 43 million borrowers. U.S. Dep't of Educ., Office of Federal Student Aid, FY 2017 Ann. Rep., 3 (Nov. 13, 2017), https://www2.ed.gov/about/reports/annual/2017report/fsa-report.pdf.

about repayment of their loans." SA 17 (Compl. ¶ 1). Servicers may have contractual or other obligations to communicate with borrowers.[3]

Factual Allegations

The parties to this case are Appellant Nicole Nelson, on behalf of herself and similarly situated student loan borrowers, and Appellee Great Lakes Educational Loan Services. Great Lakes is a servicer of federal student loans, including loans taken out by Nelson. *See, e.g.*, SA 17-18 (Compl. ¶¶ 1, 5). As of December 31, 2017, Great Lakes was servicing $224.4 billion in government-owned student loans for 7.5 million borrowers and $10.7 billion in FFEL loans for almost 479,000 borrowers.[4]

Nelson took out student loans authorized under Title IV of the HEA in order to finance her attendance at institutions of higher education. Nelson began repaying her loans on December 14, 2009. SA 33 (Compl. ¶ 79).

Great Lakes explicitly offered to help struggling borrowers and encouraged them to reach out for guidance. As alleged, Great Lakes held itself out to student

[3] For example, as alleged by Nelson, the Department expects that servicers will have conversations about repayment plans with borrowers. *See* SA 24 (Compl. ¶¶ 31-32) (alleging that the Department has informed borrowers to "[w]ork with your loan servicer to choose a federal student loan repayment plan that's best for you," that "[y]our loan servicer will help you decide whether one of these plans is right for you," and to "[a]lways contact you loan servicer immediately if you are having trouble making you student loan payment"); *see also* 34 C.F.R. § 682.205(a)(4)(ii) (distinguishing "disclosures" from "other communications"). Other federal agencies have similar expectations. *See, e.g.*, 12 C.F.R. § 1090.106 (defining "student loan servicing" to include "[i]nteractions with a borrower, including activities to help prevent default on obligations arising from post-secondary education loans, conducted to facilitate" repayment). These obligations are not required under Illinois law.

[4] *See* PR Newswire, *Nelnet Completes Acquisition of Great Lakes Educational Loan Services, Inc.* (Feb. 7, 2018), https://www.prnewswire.com/news-releases/nelnet-completes-acquisition-of-great-lakes-educational-loan-services-inc-300595308.html.

loan borrowers as having "expert[ise]" in student loans with an ability to "help" or "work on … behalf" of borrowers like Nelson. *See, e.g.*, SA 25, 27, 38-41, 44, 46 (Compl. ¶¶ 34, 46, 130-31, 138, 143, 158, 172). More specifically, Great Lakes encouraged borrowers who were having trouble making payments to contact Great Lakes "for assistance in evaluating the various alternative repayment options." SA 24 (Compl. ¶ 33). Great Lakes also promoted itself as having "trained experts" who "work on your behalf" and who could be contacted for "advice" regarding a variety of repayment "options." SA 25 (Compl. ¶ 34). Great Lakes further promoted itself as having "access to your latest student loan information and understand[ing] all of your options." *Id.* The U.S. Department of Education amplifies this message and encourages borrowers to contact their servicer if they are having trouble making payments and to "[w]ork with your loan servicers to choose a federal student loan repayment plan that's best for you." SA 24 (Compl. ¶ 32).

When Nelson "changed jobs," which resulted in her receiving "considerably less income," SA 33 (Compl. ¶ 89), on or about September 30, 2013, she contacted Great Lakes seeking to avail herself of the advertised assistance, *id.* (Compl. ¶ 90). In March 2014, after becoming unemployed a few months prior, Nelson again contacted Great Lakes. SA 34 (Compl. ¶¶ 101-102). In these instances, Great Lakes recommended that Nelson enter into "forbearance" as the "best option" for Nelson's personal financial situation. SA 34, 38 (Compl. ¶¶ 99, 130(d)). Nelson "relied on the information provided" by Great Lakes. SA 34-35 (Compl. ¶¶100, 112). Nelson further alleged that Great Lakes, despite saying it was "working on your behalf,"

was not working on her behalf. *See, e.g.* SA 25, 27 (Compl. ¶¶ 34, 46). Rather, as alleged in the Complaint, Great Lakes was acting in its own pecuniary interest because its practice of steering borrowers into forbearance saved it money and improved its bottom line. SA 25, 28, 31-32 (Compl. ¶¶ 34, 51, 67-77).

Forbearance is "the temporary cessation of payments, allowing an extension of time for making payments, or temporarily accepting smaller payments than previously scheduled." 34 C.F.R. § 682.211(a)(1). Forbearance has substantial costs, including interest capitalization that can "dramatically increase the total amount due each month after the forbearance period ends."[5] SA 23 (Compl. ¶¶ 26-29). These costs increase the longer the borrower is in forbearance. *Id.* (Compl. ¶ 26). For these reasons, forbearance is not appropriate for borrowers experiencing long-term financial distress. *Id.* (Compl. ¶¶ 26-29).

As an alternative to forbearance, borrowers experiencing longer-term financial hardship may be eligible for an income-driven repayment plan, which sets an individualized monthly payment as a percentage of a borrower's discretionary income. SA 20-21 (Compl. ¶¶ 13-16). *See generally, e.g.*, 34 C.F.R. §§ 682.215 (income-based repayment plan for FFEL loans), 685.208 (Direct Loan repayment plans). Income-driven repayment plans offer borrowers experiencing long term

[5] A recent report by the Government Accountability Office calculated that a borrower with $30,000 in debt would pay an additional $1,124 on her loans if she spent 6 months in forbearance and $6,742 on her loans if she spent the first three years of repayment in forbearance. U.S. Gov't Accountability Office, "Actions Needed to Improve Oversight of Schools' Default Rates," GAO-18-163, 19 (April 2018), https://www.gao.gov/assets/700/691520.pdf. As noted *supra*, as of December 31, 2017, Great Lakes serviced loans for nearly 8 million borrowers participating in the Title IV student loan programs.

financial hardship important protections: a borrower makes payments based on her family size and income, which are lower than the standard 10-year repayment monthly payments and may be as low as $0 per month, SA 21 (Compl. ¶¶ 17-18), and, if a borrower's income remains low, she eventually may be eligible for loan forgiveness, *id.* (Compl. ¶ 16).

Enrolling borrowers in income-driven repayment plans is "time-consuming" and requires a servicer to have "lengthy and detailed conversations" with a borrower about her "particular financial situation." SA 31 (Compl. ¶¶ 67-68). It further requires a servicer and a borrower to "determine the income-driven repayment plan that is most appropriate for each borrower." *Id.* (Compl. ¶ 68); *see also* SA 31-32 (Compl. ¶¶ 69-73). By contrast, enrolling borrowers in forbearance "can often be completed over the phone, in a matter of minutes, and generally without the submission of any paperwork." SA 32 (Compl. ¶ 74). As alleged, Great Lakes saved money by systematically steering borrowers to forbearance, rather than income driven plans. SA 28 (Compl. ¶ 51). Nelson has further alleged that Great Lakes' compensation policies incentivized its call representatives to direct borrowers into forbearance. *See* SA 21, 28-29 (Compl. ¶¶ 21, 52-53).

The District Court Proceedings

On February 21, 2017, proceeding under 28 U.S.C. § 1332(d)(2), Nelson filed a complaint asserting state law causes of action against Great Lakes on behalf of herself and similarly situated borrowers. Nelson filed an Amended Complaint on May 15, 2017, *see* SA 17-49, in which she asserted that Great Lakes' conduct

violated the Illinois Consumer Fraud and Deceptive Business Practices Act. She alleged that Great Lakes engaged in numerous unfair and deceptive acts and practices in the servicing of federal student loans, particularly by holding themselves out as "experts" and offering individualized help to borrowers, while simultaneously and systematically steering borrowers, including Nelson and other members of the putative class, into forbearance without analyzing whether forbearance was the best option for a particular borrower. SA 38 (Compl. ¶¶ 130-31). Nelson asserted that Great Lakes' conduct in this regard also constituted both constructive fraud and negligent misrepresentation under Illinois common law. SA 42-48 (Compl. ¶¶ 148-85)

On May 30, 2017, Great Lakes filed a Motion to Dismiss for Failure to State a Claim. Following the submission of written briefs, the District Court held oral argument on Great Lakes' motion on July 25, 2017. At the invitation of the District Court, the parties submitted supplemental briefs on August 1, 2017. On December 19, 2017, the District Court entered a Memorandum and Order ("Order") granting Great Lakes' motion and holding that Nelson's claims were expressly preempted by 20 U.S.C. § 1098g, which provides that "[l]oans made, insured, or guaranteed pursuant to a program authorized by title IV of the Higher Education Act of 1965 (20 U.S.C. § 1070 et seq.) shall not be subject to any disclosure requirements of any State law." *See* SA 1. The District Court, "[h]aving found [Nelson's] claims as pleaded to be expressly preempted," did "not determine" whether Nelson's claims

were preempted under "conflict preemption" or whether Nelson had otherwise stated a claim pursuant to Fed. R. Civ. P. 12(b)(6). SA 14.

On February 9, 2018, the District Court entered a final Judgment dismissing Nelson's action with prejudice. SA 16. On March 7, 2018, Nelson timely filed a Notice of Appeal.

SUMMARY OF THE ARGUMENT

The Higher Education Act expressly preempts state law in only a few discrete areas. *See, e.g.*, 20 U.S.C. §§ 1078(d) (state usury laws), 1091a(a) (statute of limitations), 1091a(b)(1)-(3) (certain costs and charges), 1095a(a) (wage garnishment), and 1098g (disclosure requirements). This last provision narrowly provides that "[l]oans made, insured, or guaranteed pursuant to a program authorized by Title IV of the Higher Education Act of 1965 (20 U.S.C. § 1070 et seq.) shall not be subject to any disclosure requirements of any State law." 20 U.S.C. § 1098g. The HEA does not expressly state that individual borrowers may not use state consumer protection laws to assert causes of action against loan servicers, nor does it evince an intent to strip student loan borrowers of judicial recourse to assert state law consumer protection claims. Nor does the statute expressly bar state attorneys general from enforcing state laws on behalf of their citizens.

Nevertheless, relying on an expansive reading of the phrase "disclosure requirements" in 20 U.S.C. § 1098g, the District Court held that a student loan borrower cannot pursue any state law cause of action against a servicer asserting that the servicer has violated state consumer protection laws. Under the District

Court's holding, neither a borrower nor a state law enforcement agency can use state consumer protection law to remedy unfair, deceptive, or fraudulent acts and practices, even where the acts and practices relate neither to federally disclosures nor to any other conduct required by federal law. According to the District Court, where a loan servicer holds itself out as an "expert" who will work "work on … behalf" of a borrower, but instead acts unfairly, deceptively, and fraudulently in its own pecuniary interest, the application of state law to remedy such conduct would force an unlawful affirmative "disclosure requirement" onto the servicer, *i.e.*, constituting a "disguised failure-to-disclose" claim where Great Lakes would have to disclose that it, in fact, is not an "expert" and is not working on behalf of the student loan borrowers. SA 11. Essentially, based exclusively on the term "disclosure requirement" in 20 U.S.C. § 1098g, the District Court held that federal law preempts the application of state law against lenders or servicers that provide unregulated, discretionary, and tailored advice to a student loan borrower and do so fraudulently, deceptively, or unfairly. The District Court's rationale, if adopted, would preempt all state causes of action arising from communications by loan servicers because, irrespective of the veracity or unfairness of the communications, the claim could be reframed as one alleging that the servicer "should have disclosed" true, fair, or non-deceptive information.

In so holding, the District Court erred in several ways.

First, the District Court failed to examine the text, context, and history of 20 U.S.C. § 1098g, each of which makes clear that Congress sought only to preempt

state laws that imposed affirmative obligations on lenders and servicers to provide, or "disclose," clear and standardized delivery of core terms to borrowers that related directly to the consumer transaction. Nothing in the text, context, or history of this express preemption clause supports a determination that Congress intended to preempt state law claims for unfair, deceptive, or fraudulent acts by a student loan servicer. The District Court's error in this regard is particularly striking in light of the longstanding direction from the Supreme Court that courts should not lightly find the historic police powers of states to be expressly preempted by federal law. *See, e.g.*, *Altria Grp., Inc. v. Good*, 555 U.S. 70, 77 (2008); *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005).

Second, the District Court based its decision on a misreading of the Ninth Circuit's decision in *Chae v. SLM Corp.*, 593 F.3d 936 (9th Cir. 2010). In *Chae*, the Ninth Circuit held that a misrepresentation claim that challenged the content of certain billing statements was expressly preempted by § 1098g. Relying on that one aspect of the Ninth Circuit's holding, the District Court dramatically expanded *Chae* to stand for the proposition that virtually all state law consumer protection or fraud claims against a loan servicer amount either to a "disclosure requirement" or a "disguised failure-to-disclose" claim.

Chae is not so broad and, read properly, supports reversal in this case. The *Chae* holding on express preemption cited by the District Court was limited to a narrow category state law claims regarding written disclosures. *Id.* at 943. In contrast, here, the District Court erroneously ignored the remainder of *Chae*, which

affirmatively *rejected* the idea that 20 U.S.C. § 1098g expressly preempts all state law claims alleging fraudulent and deceptive acts and practices. These two parts of *Chae* cannot be read in isolation; to do so would render *Chae* inconsistent with *Cipollone v. Liggett Group*, 505 U.S. 504 (1992), on which *Chae* relies and which itself distinguishes between federal laws prohibiting state laws that require certain statements from state laws predicated on the "more general obligation … not to deceive." *Id.* at 528-29.

At bottom, because the HEA provides no private right of action, the District Court's decision, if affirmed, will leave borrowers without judicial recourse against servicers for false, unfair, or fraudulent statements. And there is no indication in the text, context, or history of § 1098g that this is the result Congress intended. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 487 (1996) ("It is, to say the least, 'difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct.'" (quoting *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984)).

STANDARD OF REVIEW

Federal preemption is an affirmative defense upon which a defendant, in this case Great Lakes, bears the burden of proof. *Vill. of DePue, Ill. v. Exxon Mobil Corp.*, 537 F.3d 775, 786 (7th Cir. 2008). This Court reviews *de novo* the decision of the District Court to grant a motion to dismiss under Fed. R. Civ. Pro. 12(b)(6). *Id.*; *Costello v. BeavEx, Inc.*, 810 F.3d 1045, 1050 (7th Cir. 2016), *cert. denied,* 137 S. Ct. 2289 (2017); *Boucher v. Fin. Sys. of Green Bay*, 880 F.3d 362, 365 (7th Cir. 2018). In

undertaking a *de novo* review of an order of dismissal on preemption grounds, this Court accepts as true all factual allegations in the amended complaint and draws all permissible inferences in Nelson's favor. *See Bible v. United Student Aid Funds*, 799 F.3d 633, 639 (7th Cir. 2015).

Even if certain allegations in Nelson's complaint are expressly preempted because they assert state law violations premised on a failure to disclose, "the correct judicial response is not to dismiss the complaint, let alone with prejudice." *Bausch v. Stryker Corporation*, 630 F.3d 546, 559 (7th Cir. 2010). In such a case, this Court must remand the decision to the District Court, with instructions to "proceed under the original complaint, with the understanding, provided by the court if necessary, as to the proper scope of claims that can survive the legal challenge," permitting the District Court to proceed to judgement on non-preempted claims. *Id.*

ARGUMENT

The plain language of 20 U.S.C § 1098g, together with its context and history, makes abundantly clear that there is no basis for finding preemption in this case—a result called for *a fortiori* under the applicable standard for evaluating preemption claims, a standard that the District Court wholly failed to address or even acknowledge. Even if § 1098g were ambiguous, because Great Lakes invokes it to assert federal preemption of a state's historic police powers, the District Court had a "duty" to reject the assertion. *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005) (noting that when there are two "plausible" interpretations of an express

preemption provision, courts "have a duty to accept the reading that disfavors preemption"). That standard is undoubtedly met here.

To be certain, where "a federal law contains an express pre-emption clause," such as in 20 U.S.C. § 1098g, a court considering the applicability of a state law in light of such a clause must address both "the substance and scope of Congress' displacement of state law." *Altria Grp., Inc. v. Good*, 555 U.S. 70, 77 (2008). In so doing, the "ultimate touchstone" of a court's analysis is to ascertain the "purpose of Congress." *Id.* (quoting *Medtronic*, 518 U.S. at 485). But "[w]hen the text of a pre-emption clause is susceptive of more than one plausible reading, courts ordinarily accept the reading that disfavors pre-emption." *Id.* (internal quotation marks omitted). *See also Bates*, 544 U.S. at 449. And, "'the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Altria*, 555 U.S. at 543 (noting a presumption against expressly preempting the historic police powers of the States) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). *See also, e.g.*, *Bates*, 544 U.S. at 449; *Cipollone v. Liggett Group*, 505 U.S. 504, 516 (1992); *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 740 (1985); *Reid v. Colorado*, 187 U.S. 137, 148 (1902) ("It should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police powers of the States, even when it may do so, unless its purpose to effect that result is clearly manifested."); *Arizona v. United States*, 567 U.S. 387, 441 (2012) (Alito, J. concurring in part, and dissenting in part) ("Because state police powers are implicated here, our precedents require us

to presume that federal law does not displace state law unless Congress' intent to do so is clear and manifest."); *Patriotic Veterans, Inc. v. Indiana*, 736 F.3d 1041, 1046 (7th Cir. 2013).[6] Consumer protection laws, including those alleged by Nelson, are "well within the scope" of historic state police powers. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146, 150 (1963); *Cliff v. Payco Gen. Am. Credits, Inc.,* 363 F.3d 1113, 1126 (11th Cir. 2004).

In Part I below, we establish that the plain text of § 1098g, when read in context and with its history, does not even come close to providing "clear and manifest" evidence that Congress intended to preempt state law prohibitions on fraudulent, unfair, and deceptive conduct through its preemption of state law "disclosure requirements." In contrast, the District Court reviewed only a dictionary definition of the word "disclosure," but not "disclosure requirement," as well as the competing and equally "persuasive" definitions of the word "disclosure" proffered by Nelson and Great Lakes. SA 9 (finding "aspects of both" proffered definitions "persuasive"). Without reference to anything more than those definitions, the

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[6] This presumption has not been altered by a recent holding, outside of the context of historic state police powers, that appears to eliminate the disfavoring of express preemption in certain cases. *Puerto Rico v. Franklin Cal. Tax-Free Trust,* 136 S. Ct. 1938, 1946 (2016). In *Franklin*, not only was the statute at issue outside of the context of state police powers, but the language of the bankruptcy code at issue was "plain" and thus the Supreme Court "beg[a]n" and "end[ed]" its analysis there. 136 S. Ct. 1946. In contrast, the analysis in *Altria* "beg[a]n … with the assumption that the historic police powers of the States," are not to be preempted, absent a showing of a "clear and manifest" Congressional intent, 555 U.S. at 543. *Altria*, therefore, is binding and there remains a presumption against preemption in cases in which one party advances an interpretation of federal law that broadly displaces historic state police powers. *See Shuker v. Smith & Nephew, PLC*, 885 F.3d 760, 771 n.9 (3d Cir. 2018) (discussing *Franklin*); *see also Ass'n des Elevuers de Canards et d'Oies du Quebec v. Becerra*, 870 F.3d 1140, 1146 (9th Cir. 2017), (cert. pending) (applying *Altria*, after *Franklin*, and presuming that the historic police powers of the States are not to be expressly preempted without a showing of clear and manifest Congressional purpose).

District Court found that, through § 1098g, it "appear[ed]" that Congress intended to preempt state consumer protection laws. SA 10. But the text, history, and context establish that Congress did not intend to preempt these historic state consumer protection laws. Rather, Congress sought only to preempt state laws that imposed affirmative disclosure obligations, not state law prohibitions on unfair, deceptive, or fraudulent statements. For these reasons alone, the decision of the District Court should be reversed.

In Part II, we explain how the District Court erred in applying the Ninth Circuit's opinion in *Chae v. SLM Corp.,* 593. F.3d 936 (9th Cir. 2010). Far from supporting the District Court's judgment, read properly, *Chae* supports reversal. The Ninth Circuit held in *Chae* that § 1098g preempted a misrepresentation claim that challenged the content of loan billing statements—but expressly rejected claims for fraudulent and deceptive practices apart from those statements. *Id.* at 943. Thus *Chae*, on its face, does not compel the District Court's holding. Moreover, this proper and more limited reading of *Chae* is required by the Supreme Court's decision in *Cipollone v. Liggett Group*, 505 U.S. 504, 528-29 (1992), which found that state laws predicated on a "general obligation … not to deceive" were not *per se* barred by a federal law preempting requirements or prohibitions under state law.

I. PREEMPTION OF STATE "DISCLOSURE REQUIREMENTS" DOES NOT BAR THE APPLICATION OF STATE CONSUMER PROTECTION LAW PROHIBITIONS AGAINST FRAUDULENT, DECEPTIVE, AND UNFAIR PRACTICES.

A. The District Court's interpretation of § 1098g is counter to the text of that statute and the context in which the word is used.

1. Irrespective of any presumptions, or even the need to find "clear and manifest" evidence of Congressional purpose, the task of construing the scope of § 1098g must "focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' preemptive intent." *Time Warner Cable v. Doyle*, 66 F.3d 867, 875 (7th Cir. 1995) (quoting *CSX Transp., Inc. v. Easterwood,* 507 U.S. 658, 664 (1993)). "Also relevant, however, is the 'structure and purpose of the statute as a whole,' as revealed not only in the text but through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 486 (1996) (quoting *Gade v. Nat'l Solid Wastes Mngmt. Ass'n*, 505 U.S. 88, 111 (1992) (opinion of O'Connor, J.)) (internal citations omitted). In this context, the preemption of state law "disclosure requirements" cannot reach the state consumer protection claims brought by Nelson.

Although the HEA does not define the word "disclosure" or the phrase "disclosure requirements," the context of the HEA's use of "disclosure" indicates it refers only to the standardized provision of the core terms of the loan transaction. Black's Law Dictionary, referenced by the District Court with the support of

Appellee, SA 9, defines a "disclosure" as "[t]he act or process of making known something that was previously unknown; a revelation of facts." Black's Law Dictionary (10th Ed. 2014). Although Black's does not define "disclosure requirement," it defines a "disclosure statement" as a "document containing relevant information that a reasonable person would find important in making a decision about a transaction or application." Black's Law Dictionary (10th ed. 2014).[7] Although far from dispositive of this case, both of these definitions establish that the core feature of a "disclosure requirement" involves an affirmative "revelation of facts," and not the individualized guidance offered by Great Lakes.

Other portions of the HEA reveal that the phrase "disclosure requirement" refers only to mandatorily provided, standardized information about the core terms of a transaction. In 20 U.S.C. § 1083(a), Congress articulated nineteen separate pieces of information that comprise "required disclosures" that must be made "in simple and understandable terms" before a federal loan is disbursed.[8] These

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[7] In other contexts, "disclosure" can have a related, but materially different meaning. For example, where information is secret, private or confidential, to "disclose" such information means to reveal it, but this definition is not relevant to the interpretation of § 1098g, which pertains to "loan … disclosure requirements." *See, e.g.,* Gramm-Leach-Bliley Act, 15 U.S.C. § 6802 (protecting private information of individuals and generally prohibiting financial institutions to "disclose" nonpublic information to a third party); 18 U.S.C. § 1905 (establishing penalties for government employees who, among other things "disclose[]" certain nonpublic information); 18 U.S.C. § 1906 (similar); 18 U.S.C. § 3322 (limiting "disclosure" of grand jury information).

[8] A prior version of § 1083 existed in 1982 when § 1098g was enacted. Pub. L. No. 96–374, § 433A, 94 Stat. 1367 (1980). Congress then quickly amended these disclosure requirements shortly after the enactment of § 1098g. Pub. L. 97-301, § 13(a)(1), 96 Stat 1400 (1982); Pub. L. 98-79, § 3, 97 Stat 476 (1983). Congress has also expanded the disclosure requirements over the years. Pub. L. 100-50, § 10(z), 101 Stat. 346 (1987); Pub. L. 102-325, § 426, 106 Stat. 548 (1992); Pub. L. 103-208, § 2(c)(53), (54), (k)(4), 107 Stat.

disclosures may be made "by written or electronic means, including as part of the application material provided to the borrower, as part of the promissory note evidencing the loan, or on a separate written form provided to the borrower." *Id.* The disclosures required by § 1083(a) consist entirely of standardized information about the core terms of the transaction, such as the fact that the funds must be repaid, the name of the lender, the principal amount, fee information, the interest rate, information about prepayment and capitalization, a description of repayment options, statements regarding deferment and forbearance, and information about loan forgiveness and default. 20 U.S.C. § 1083(a)(1)-(19).

The statute also requires servicers to make certain disclosures to borrowers who are having difficulty making payments. 20 U.S.C. § 1083(e)(2). It requires servicers to provide "in simple and understandable terms" "[a] description of the repayment plans available to the borrower, including how the borrower should request a change in repayment plan," a description of how a borrower requests a forbearance, information about the expected costs of forbearance, and a description of ways to avoid default. *Id.*

In addition, the HEA enumerates thirteen elements of "required disclosures" that must be made "prior to the start of the repayment period" by "written or electronic means" and which must be "simple and understandable." 20 U.S.C. § 1083(b). These disclosures include information about the loan servicer, the date on which repayment is to begin, the estimated balance, the interest rate, a description

2468, 2485 (1993); Pub. L. 105-244, § 428, 112 Stat. 1704 (1998); Pub. L. 110-315, § 434(a), 122 Stat. 3247 (2008).

of repayment plans and schedules, consolidation information, and the name of additional resources "where borrowers may receive advice and assistance on loan repayment." *Id.* §§ 1083(b)(1)-(13).[9]

The Department's regulations[10] also make clear that not all communications between a borrower and a servicer are "disclosures," and expressly distinguish a "disclosure," on the one hand, from an "other communication[]" between a borrower and either a lender or servicer, on the other. *See* 34 C.F.R. § 682.205(a)(4)(ii). Indeed, the Department recently amended its regulations and explicitly acknowledged that a borrower having trouble making her payments would have

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[9] The required the disclosure of "additional resources" including nonprofit organization, advocates, and counselors (including the Department's Student Loan Ombudsman), where borrowers may receive advice and assistance on loan repayment, strongly suggests that such "advice and assistance" is not, itself, a disclosure. *See* 20 U.S.C. § 1083(b)(13).

[10] Broadly speaking, the Department's regulations mirror the requirements of 20 U.S.C. § 1083. By way of example only, the Department's regulations require lenders to disclose to borrowers certain information at the time of, or prior to, repayment. *See* 34 C.F.R. §§ 682.205(a)(2)(i)-(xiv). These disclosures include information such as the name and contact information for the lender, *id.* § 682.205(a)(2)(i), the scheduled start date for repayment, *id.* § 682.205(a)(2)(ii), balance and interest capitalization information, *id.* §§ 682.205(a)(2)(iii)-(iv), (viii), information about fees charged, *id.* § 682.205(a)(2)(v), the repayment schedule, *id.* § 682.205(a)(2)(vi), terms of consolidation loans, *id.* § 682.205(a)(2)(vii), prepayment information, *id.* § 682.205(a)(2)(ix), repayment benefits and plans, *id.* §§ 682.205(a)(2)(x)-(xii), information about defaults, *id.* § 682.205(a)(2)(xiii), and contact information for additional resources for receiving "additional advice and assistance on loan repayment," *id.* § 682.205(a)(2)(xiv). Each of these disclosures must be made "in simple and understandable terms" at a point in time prescribed in the regulation. 34 C.F.R. § 682.205(a)(1). The Department also requires Direct Loan servicers to make certain "disclosures" to borrowers. See Office of the Under Sec'y, *Advancing the Student Aid Bill of Rights – An Update on Deliverables*, U.S. Dep't of Educ., https://sites.ed.gov/ous/2015/12/advancing-the-student-aid-bill-of-rights-an-update-on-deliverables/ (announcing requirements for "disclosures," including quarterly statements while borrowers are in school or their grace period, pre-transfer notifications when the servicer changes, additional information on initial correspondence on Public Service Loan Forgiveness and Teacher Loan Forgiveness programs, and enhancements to monthly billing statements).

"contact" with her servicer as a result of a required disclosure. *See* Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program, 78 Fed. Reg. 65,768, 65,770 (Nov. 1, 2013). The Department assumed that this "contact" would be either as a result of an "earlier disclosure" or "from other contact between the [servicer] and the borrower." *Id.* As a result of this "contact," the Department decided an additional "repayment disclosure," pursuant to 34 C.F.R. § 682.205(a)(4)(i), would be confusing, so eliminated the requirement, confirming that the Department expects "contacts" between borrowers and servicers beyond the conveyance of disclosures required by federal law. *Id.* at 65,781.

Read naturally and in full, the text and structure of the HEA—together with its implementing regulations—establish that Congress sought only to expressly preempt state laws that required lenders or servicers to affirmatively disclose to borrowers standardized, prescribed provision of the terms and conditions and facts of a student lending transaction. The preemption of state "disclosure requirements" was not meant to preempt state law claims of fraud, misrepresentation, and unfair and deceptive practices that were brought by Nelson. To hold otherwise, as the District Court did, is tantamount to reading the narrow phrase "disclosure requirement" to prohibit the application of state law to police or remedy fraudulent, unfair, or deceptive advice in connection with the servicing of a federal student loan and would effectively bar any state law claim resulting out of a communication, of any sort, between a borrower and a servicer. The text of the HEA does not suggest—

much less establish by "clear and manifest" evidence—that Congress intended § 1098g to have such an expansive scope.

2. The legislative history of § 1098g confirms that Congress did not intend to disrupt traditional consumer protection law in this context. Section 1098g was codified as Congress exempted federal student loans from the disclosure requirements of the Truth in Lending Act ("TILA") and state disclosure requirements.[11] Pub. L. 97-320, § 701, 96 Stat. 1538 (1982). At the time, TILA, and its implementing regulation, required a creditor, for each transaction, to disclose its identity, the amount being financed, any finance charges, the annual percentage rate, any variable rate, the payment schedule, the total amount of payments to be made, any demand features, and additional information about prepayment, late payments, and assumption.[12] Congress was concerned about lenders and servicers being required to provide duplicative disclosures, since TILA's coverage overlapped with comparable disclosures required under the HEA for federal student loans. *See* S. Rep. 97-536, at 42, *reprinted in* 1982 U.S.C.C.A.N. 3054, 3096. The report noted that "all disclosures required under the Truth in Lending Act are currently being

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[11] Section 701(a) of Pub. L. 97-320 exempted HEA Title IV loans from coverage under TILA, while § 701(b) provided that "Loans made, insured, or guaranteed pursuant to a program authorized by title IV of the Higher Education Act of 1965 … shall not be subject to any disclosure requirements of any State law." Pub. L. 97-320, § 701, 96 Stat. 1538. TILA itself was "[e]nacted because of the divergent, and often fraudulent, practices by which credit customers were apprised of the terms of the credit extended to them," and its purpose is "to assure credit customers a meaningful disclosure of credit terms, thus enabling these consumers to compare more readily the various available credit terms and thereby to avoid the uninformed use of credit." *Johnson v. McCrackin-Sturman Ford, Inc.*, 527 F.2d 257, 262 (3d Cir. 1975).

[12] *See* Truth in Lending; Revised Regulation Z, 46 Fed. Reg. 20,848, 20,902-03 (April 7, 1981) (codified at 12 C.F.R. § 226.18 effective April 1, 1981).

provided to students receiving loans under … the Higher Education Act of 1965." *Id.* It further explained that "the committee believes that the exemption from Truth in Lending provisions for these students [sic] loans will help eliminate duplicative paperwork for students, post-secondary educational institutions, state guarantee agencies and lenders" and would "still provid[e] all disclosures and protections to students that are currently required under the Act." *Id.* The same Senate Report later explicitly tied together the TILA amendments in § 701(a) to § 701(b) of the Public Law, which added what is now codified at 20 U.S.C. § 1098g. *Id.* at 71, *reprinted in* 1982 U.S.C.C.A.N. at 3125 ("This section exempts from the Truth in Lending Act and from disclosure requirements of any state law loans that are made, insured or guaranteed under any program authorized by Title IV of the Higher Education Act of 1965.").

Although the Senate Report does not describe the state law disclosures in detail, at the time § 701 was codified, TILA permitted states and creditors to apply to the Federal Reserve Board for a determination of whether a state law disclosure is "substantially the same in meaning as disclosure required under this subchapter." 15 U.S.C. § 1610(a)(2) (1982). If the Board determined that the state-required disclosure is substantially the same in meaning as a disclosure required by TILA, "then creditors located in that State may make such disclosure in compliance with such State law in lieu of the disclosures required by" TILA. *Id.*; *see also* 12 C.F.R. § 226.29 (1982). It stands to reason that Congress had these state law

disclosures in mind when it enacted § 1098g and exempted federal student loans from TILA because they would be just as duplicative as the TILA disclosures.[13]

Conversely, there is no trace of a suggestion in the legislative history of the HEA, the amendments to the HEA (including the amendments in § 701 that also amended TILA), or the regulatory history of the disclosure provisions, that Congress intended to preempt individuals or state enforcement agencies from using the historical powers of the states to protect student loan borrowers from consumer harms. "It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 487 (1996) (quoting *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984)); *Sikkelee v. Precision Airmotive Corp.*, 822 F.3d 680, 696 (3d Cir. 2016), *cert. denied sub nom. AVCO Corp. v. Sikkelee*, 137 S. Ct. 495 (2016).[14] Indeed,

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[13] There are several indications that Congress was concerned about state truth in lending disclosures when it enacted § 1098g. Statements from concerning bills related to the public law that eventually codified § 1098g indicate concern about both TILA and state truth in lending statutes creating duplicative and confusing disclosures for federal student loans. One senator stated that "[s]ome 23 States have enacted their own truth-in-lending provisions. As is true with respect to the Federal [TILA], State disclosure laws serve no useful purpose in connection with loans made under title IV of the Higher Education Act of 1965. It is therefore appropriate that the proposed exemption apply as well to State laws." 97 Cong. Rec. 19,897, 19,916 (daily ed. Aug. 9, 1982) (statement of Sen. Heinz).

In addition, TILA's civil liability provision authorizes liability for failure to comply with state law "disclosure requirements" that have been determined to be "substantially the same" as those imposed by TILA, 15 U.S.C. § 1640, strengthening the inference that "disclosure requirements" in § 1098g was meant to refer to mandated provision of specified facts about a covered loan in state truth in lending acts.

[14] Other features of the HEA suggest that Congress envisioned a separate body of law and remedies to enable individual borrowers to remedy individualized wrongs by a lender or service. For example, the HEA permits the Secretary to broadly "limit, suspend, or terminate the continued participation of an eligible lender" for failing to comply with the mandatory disclosure provisions, but does not permit the Secretary to impose targeted, less

the record establishes that Congress meant only to prohibit states from requiring lenders and servicers to make additional standardized disclosures to borrowers.

3. Finally, interpreting the term "disclosure requirement" to mean the provision of precise, standardized information about the terms and conditions of the transaction is consistent with the use of that term in other consumer lending contexts.[15] For example, the TILA and its implementing regulation require disclosures that are clear and conspicuous, in a form that consumers can keep, and that are delivered before a transaction for closed end credit is consummated. *See* 15 U.S.C. § 1604; 12 C.F.R. § 226.17. And courts interpreting the terms "disclosure requirement," "disclosure statement," or simply "disclosure" under other consumer

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drastic sanctions on a lender or servicer for acting unfairly, deceptively, or providing misleading information. *See* 20 U.S.C. § 1083(f)(4). Nor does the statute "provide a basis for a claim for civil damages." *Id.* § 1083(f)(2)(B). Accordingly, for the Secretary to address a single claim of an individualized misrepresentation by a loan servicer under the FFEL program, the Secretary is limited to severe remedies such as limiting, suspending, or terminating *the lender's* participation in the student loan programs.

[15] *See e.g.*, Consumer Leasing Act, 15 U.S.C. § 1667a (requiring "consumer lease disclosures" that consist of "a dated written statement on which the lessor and lessee are identified setting out accurately and in a clear and conspicuous manner" information including payment amount, other charges, "the number, amount, and due dates or periods of payments"); Electronic Funds Transfer Act, 15 U.S.C. § 1693c (requiring "disclosures" provided "at the time the consumer contracts for an electronic fund transfer service" of the "terms and conditions of electronic fund transfers involving a consumer's account," including "any charges," "the consumer's right to stop payment of a preauthorized electronic fund transfer and the procedure to initiate such a stop payment order" and "the telephone number and address of the person or office to be notified in the event the consumer believes than [sic] an unauthorized electronic fund transfer has been or may be effected"); Truth in Savings Act, 12 U.S.C. § 4302 (requiring "disclosure" "in a clear and conspicuous manner" of interest rate, minimum balance requirements, and minimum initial deposit requirements on advertisements for certain deposit accounts). In many cases, because disclosures are so standardized and regulatory requirements for how information is presented are so precise, implementing agencies have authority to promulgate model forms. *See, e.g.*, 15 U.S.C. § 1667f(b); 15 U.S.C. § 1693b(b); 12 U.S.C. § 4308(b).

lending statutes also have done so narrowly, referring to factual information required as part of a credit transaction. *See*, *e.g.*, *Evanto v. Fed. Nat. Mortg. Ass'n*, 814 F.3d 1295, 1297 (11th Cir. 2016) (interpreting TILA's private right of action provision with the term "disclosure statement" to mean only "a document provided before the extension of credit that sets out the terms of the loan"); *Gutierrez v. Wells Fargo Bank N.A.*, 704 F.3d 712, 728 (9th Cir. 2012) (noting that although the Court could not issue an injunction "requiring the bank to make specific disclosures, it can enjoin the bank from making fraudulent or misleading representations"); *Aguayo v. U.S. Bank*, 653 F.3d 912, 926 (9th Cir. 2011) (distinguishing a "disclosure," which it described as "an informational statement of terms prior to entering into a transaction" from a "notice," which it deemed a "specific communication of a claim or demand submitted to a party in the course of" a transaction).[16]

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[16] The Department's recent Notice of Interpretation on preemption, including § 1098g, 83 Fed. Reg. 10,619 (Mar. 12, 2018) ("Notice"), is entitled to no deference because "deference does not apply to preemption decisions by federal agencies." *Grosso v. Surface Transp. Bd.*, 804 F.3d 110, 116-17 (1st Cir. 2015) (collecting cases and citing *Wyeth v. Levine*, 555 U.S. 555, 576-77 (2009)). Deference is even less appropriate in this case because the Department did not provide the public an opportunity to comment on the published interpretation. *United States v. Mead Corp.*, 533 U.S. 218, 230-31 (2001); *White v. Scibana,* 390 F.3d 997, 1000 (7th Cir. 2004), *as amended* (Feb. 14, 2005) ("Not all agency interpretations of ambiguous statutes are entitled to full *Chevron* deference; some are treated as persuasive only, based upon the form, content, circumstances, and reflected expertise of the interpretation."). Moreover, because the Notice conflicts with years of prior statements by the Department on preemption, the interpretation contained in the Notice is entitled to even *less* deference. *See I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 446 n. 30 (1987) (quoting *Watt v. Alaska*, 451 U.S. 259, 273 (1981)). The Department has previously taken a narrow interpretation of HEA's preemption of state laws. *See, e.g.*, Letter from V. Burton, Attorney, Office of Gen. Counsel, Dep't of Educ. to J. Bellman, Asst. Comm'r, Maryland Dep't of Labor, Licensing, and Regulation, January 21, 2016, https://na-production.s3.amazonaws.com/documents/Dept._of_Ed_Response.1.21.2016_dORyoLm.pdf; Statement of Interest of the United States of America, *Sanchez v. Asa College, Inc.,* No. 14-cv-5006 (JMF) (S.D.N.Y. Jan. 23, 2015), ECF No. 64,

B. Applying a correct interpretation of § 1098g, Nelson's consumer protection claims are not expressly preempted.

Nelson's claims do not hinge on a state law "disclosure requirement," nor does Nelson seek to require that Great Lakes make any additional disclosures. Rather, the crux of Nelson's complaint is that Great Lakes held itself out as entity consisting of "experts" in student loan financing who "work on … behalf" of student loan borrowers, and who will provide individualized "advice" to student loan borrowers. *E.g.*, SA 25 (Compl. ¶ 34). Great Lakes chose, as a business practice, to communicate with borrowers in ways in addition to those affirmative "disclosures require[d]" by federal law—and through ways that, in fact, were not disclosures at all. SA 21, 25, 27, 33, 35 (Compl. ¶¶ 21, 33-38, 46, 91-93, 111). But Nelson alleged that instead of providing the offered guidance, Great Lakes engaged in fraudulent, unfair, and deceptive practices by steering her into forbearance for its own pecuniary benefit and to her detriment. SA 38-39 (Compl. ¶¶ 130-31). This violated core state law *prohibitions* on fraudulent, unfair, and deceptive conduct, which are not shielded by § 1098g's preemption of *affirmative* disclosure requirements.

More specifically, Nelson alleged that Great Lakes encouraged borrowers "to contact [Great Lakes] for *assistance in evaluating* the various alternative

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https://www.courtlistener.com/recap/gov.uscourts.nysd.429318/gov.uscourts.nysd.429318.64.0.pdf; Notice of Interpretation, 55 Fed. Reg. 40,120 (Oct. 1, 1990). Finally, to the extent that the Department attempts to articulate a deference-worthy interpretation of "disclosure" in its recent Notice of Interpretation, its interpretation is not a reasonable or persuasive one. 83 Fed. Reg. 10,691, 10,621 (March 12, 2018) ("The Department interprets 'disclosure requirements' under section 1098g of the HEA to encompass informal or non-written communications to borrowers as well as reporting to third parties such as credit reporting bureaus.").

repayment options," as opposed to "contact[ing] others for student loan advice." SA 24 (Compl. ¶ 33). Nelson further alleged that Great Lakes employed "experts" who will "work on your behalf" and provide "Free Expert Help!" and free "advice." SA 25 (Compl. ¶ 34); *see also* SA 41 (Compl. ¶ 143(a)) (referring to Great Lakes' "claims of 'expert' status and claims of working on the behalf of student loan borrowers"). Nelson also alleged that Great Lakes advertised itself as a "primary contact for questions about your loans." SA 25 (Compl. ¶ 35). Also, Nelson alleged that despite (1) "attempting to publicly assure student loan borrowers that [it would] *help student loan borrowers identify* and enroll in an *appropriate*, affordable repayment plan," SA 27 (Compl. ¶ 46) (emphasis added); (2) "[h]olding themselves out to be experts in student loan servicing," SA 38 (Compl. ¶ 130(a)); and (3) making "recommend[ations]" as to the "best" option for student loan borrowers, *id.* (Compl. ¶ 130(d)), Great Lakes nevertheless "[s]ystematically steer[ed]" borrowers into deferment and forbearance, even though those options were often not in the best interest of individual borrowers, SA 39 (Compl. ¶ 130(g)); s*ee also* SA 40 (Compl. ¶ 138) (alleging damages "due to the unfair and deceptive practices [of Great Lakes], including … the misrepresentations and omissions of [Great Lakes], who held themselves out as 'experts' who work to 'serve' student loan borrowers, working on the behalf of struggling student loan borrowers, and helping them make sure

everything goes as smoothly as possible while simultaneously steering [borrowers] into forbearance and deferment.”).[17]

Despite these allegations, the District Court concluded that Nelson’s claims “involve ‘disclosures,’” SA 11, because “[t]he converse of these allegations is that [Great Lakes’] employees should have disclosed … they were not ‘experts’ and were working on behalf of [Great Lakes] … and should have disclosed that forbearance may not be the ‘best option’ for all borrowers,” SA 12-13. With respect to the allegation that Great Lakes steered Nelson into forbearance, the District Court opined that a steering claim “is merely an allegation that [Great Lakes] should have disclosed alternative repayment options,” SA 13, when in fact Nelson’s claims do not require specific affirmative disclosures, but are based on state law prohibitions against unfair, deceptive, and fraudulent practices. The District Court’s rationale, if adopted, would preempt all state causes of action arising from communications by

[17] The Complaint is replete with allegations of conduct that does not constitute a “disclosure.” For example, Great Lakes’ core servicing duties include “managing borrowers’ accounts, processing monthly payments, assisting borrowers to learn about, enroll in, and remain in alternative repayment plans, and communicating directly with borrowers about the repayment of their loans.” SA 17 (Compl. ¶ 1). As noted above, Great Lakes encouraged borrowers to contact them for individualized guidance on repayment options. SA 24-25 (Compl. ¶¶ 33-34). Despite assuring borrowers of assistance, Great Lakes “systematically and routinely disregarded that commitment and systematically used their “expert” call center employees, who were “here to serve you,” to steer student loan borrowers experiencing long-term distress or hardship into forbearance and deferment delaying borrowers’ entry into alternative or income-driven repayment plans.” SA 27 (Compl. ¶ 46); *see also* SA 33-35 (Compl. ¶¶ 93, 95-100, 103, 107-112). Great Lakes’ customer service representatives followed scripts that steered Nelson and other borrowers into forbearance and Great Lakes compensated these representatives based on short call length and how many times they cut off the borrower mid-sentence. SA 28-30, 33-34 (Compl. ¶¶ 49, 53-54, 56-58, 92, 104). Great Lakes avoided having to hire more staff and compensate them to enroll borrowers experiencing longer-term financial distress into income-driven repayment plans by steering borrowers into forbearance. SA 28-29, 31-32 (Compl. ¶¶ 51-52, 67-77).

loan servicers because, irrespective of the veracity or unfairness of the communications, the claim could be reframed as one alleging that the servicer "should have disclosed" true, fair, and non-deceptive information. There is no evidence that Congress intended to disrupt the historical consumer protection role of states in this regard. *Cf. Gutierrez*, 704 F.3d at 728 (recognizing the distinction between a disclosure and a misrepresentation).

II. THE DISTRICT COURT MISREAD *CHAE V. SLM CORP.* WHICH, READ PROPERLY, SUPPORTS REVERSAL.

To support its holding that Nelson's allegations constitute "disguised failure-to-disclose" claims, the District Court relied heavily—indeed, almost exclusively—on the Ninth Circuit's opinion in *Chae v. SLM Corp.,* 593 F.3d 936 (9th Cir. 2010) and non-authoritative cases citing *Chae*. *See* SA 10-11.[18] The District Court fundamentally misread *Chae*'s limited holding regarding the preemptive scope of § 1098g. Far from supporting preemption in this case, *Chae* and the Supreme Court's decision in *Cipollone*, upon which *Chae* relies, confirm that federal law does not preempt Nelson's claims. Both cases support reversal of the District Court's judgment.

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[18] *Chae* is not binding on this court. *United States v. Clark*, 538 F.3d 803, 812 (7th Cir. 2008) (noting that the Seventh Circuit should respectfully consider, but is not bound by, the decisions of its sister circuits). We also note that this Court recently distinguished *Chae* with respect to *conflict* preemption, but, in so doing, expressed no opinion regarding *express* preemption. *Bible*, 799 F.3d at 653–54. The District Court's decision in this case rested entirely on express preemption and did not reach the question of conflict preemption. SA 14.

A. The District Court erred by expanding *Chae*.

In *Chae*, plaintiffs sued Sallie Mae ("SLM") regarding three separate practices SLM used to service student loans. *First*, plaintiffs challenged SLM's use of the "simple daily interest" method of calculating interest. 593 F.3d at 940. Plaintiffs asserted that the loan agreements barred SLM from using that method and required SLM to use an "installment method." *Id.* Plaintiffs alleged that the failure to use the installment method conflicted with FFEL program requirements and violated California law. *Id. Second*, plaintiffs asserted that California law prohibited SLM from charging late fees where SLM also charged simple daily interest. *Id. Third*, plaintiffs challenged, again under California law, SLM's method of setting the first repayment date on particular types of loans known as Consolidation and PLUS loans. *Id.* at 940-41.

The *Chae* plaintiffs pleaded five causes of action under California law: unfair or fraudulent business practices, breach of contract, breach of covenant of good faith and fair dealing, violation of Consumer Legal Remedies Act and unjust enrichment. *Id.* at 941 n.4. On appeal from summary judgment in SLM's favor, the Ninth Circuit considered whether these claims were expressly preempted by § 1098g, *id.* at 941-943, and if not, whether they were preempted under principles of conflict preemption, *id.* at 943-949.

With respect to express preemption, the Ninth Circuit held that one narrow category of factual allegations—*i.e.*, "plaintiffs' claims challenging the language in [SLM's] billing statements and coupon books"—involved "restyled improper-

disclosure claims" expressly preempted by § 1098g. *Id.* at 943. Because these claims were about "properly-disclosed FFELP practice[s]," the language contained in those documents could not "simultaneously be misleading under state law" and were therefore expressly preempted. *Id.*

Importantly, the Ninth Circuit squarely *rejected* SLM's express preemption defense regarding plaintiffs' "remaining claims alleg[ing] breach of contract, unjust enrichment, breach of the implied covenant of good faith and fair dealing, *and the use of fraudulent and deceptive practices apart from the billing statements*." *Id.* (emphasis added). "These claims," the Ninth Circuit held, "are not impacted by any of the FFELP's express preemption provisions." *Id.* Indeed, "[a] properly-disclosed FFELP practice cannot simultaneously be misleading under state law," *id.*, but states can prohibit fraudulent, unfair, or deceptive practices regarding conduct by a servicer that neither constitutes "disclosures" nor touches upon federal "disclosure requirements," without running afoul of § 1098g.[19]

Other courts have correctly noted the distinction made by the Ninth Circuit in this regard. For example, one district court found that claims involving statements that were "neither authorized by the Secretary of Education nor conformed to any explicit dictates of federal law," but were instead day-to-day interactions between a consumer and servicer that were not "standardize[d] or coordinate[d]" by any provision of the HEA were not expressly preempted. *Genna v. Sallie Mae, Inc.*, No. 11-cv-7371 LBS, 2012 WL 1339482, at *8 (S.D.N.Y. Apr. 17,

[19] Ultimately, the Ninth Circuit held that plaintiffs' claims in *Chae* were preempted under principles of conflict preemption that are not at issue in this appeal. 593 F.3d at 950.

2012) ("In *Chae,* the plaintiffs challenged written statements that were explicitly regulated and sanctioned by federal law … Sallie Mae has not shown that § 1098g, or anything else in the HEA, expressly preempts Genna's claims.").[20] Accordingly, read properly, *Chae* does not support the District Court's opinion.

B. The District Court's decision is inconsistent with Supreme Court precedent on which *Chae* relied.

The District Court's expansion of *Chae* to reach all state law consumer protection claims premised on any communication between a borrower and a servicer is not only inconsistent with *Chae*, but is also inconsistent with the Supreme Court precedent on which *Chae* relied, which expressly distinguished between the application of state laws that violated a federal prohibition against required statements, on the one hand, from the application of state laws predicated on the "more general obligation … not to deceive," on the other. *Cipollone*, 505 U.S. at 528-29.

In *Cipollone*, the Supreme Court interpreted preemption provisions in two federal cigarette labeling statutes. First, in § 5(b) of the 1965 Federal Cigarette Labeling and Advertising Act ("1965 Act"), Congress expressly prohibited laws that required "statements relating to smoking and health … in the advertising of [properly labeled] cigarettes." *Cipollone*, 505 U.S. at 518 (quoting the 1965 Act).

[20] *See also*, *e.g.*, *Gentleman v. Mass. Higher Educ. Assistance Corp.*, 272 F. Supp. 3d 1054, 1069 (N.D. Ill. 2017) ("Count IV is based not on ASA's refusal to make disclosures, but on its alleged attempt to collect a debt that it knew, or should have known, Gentleman did not owe. Accordingly, ASA's preemption argument fails."); *Davis v. Navient Corp.*, No. 17-cv-00992-LJV-JJM, 2018 U.S. Dist. LEXIS 41635, at *6 (W.D.N.Y. Mar. 12, 2018) ("[T]o the extent that plaintiff's claims arise from Navient Solutions' unregulated conduct over the telephone, they are similar to those in *Genna*, and are not subject to express preemption.").

That provision was subsequently amended by the Public Health Cigarette Smoking Act of 1969 ("1969 Act"), in which Congress provided that "[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act." *Cipollone*, 505 U.S. at 515.

The Court examined the scope of these preemption provisions with respect to claims based on conduct that post-dated the 1965 Act, and, separately, to claims based on conduct that post-dated the 1969 Act. Although Justice Stevens delivered the opinion of the Court with respect to the preemptive scope of the 1965 Act, his opinion only announced a plurality view with respect to the scope of the 1969 Act (joined by Chief Justice Rehnquist and Justices White and O'Connor). Although only the plurality discussion of the 1969 Act is discussed in *Chae*, both the plurality opinion and the Court's holding regarding the 1965 Act dictate that *Chae* cannot be as broad as the District Court reasoned.

i. *Cipollone's* discussion of the 1969 Act contrasts starkly with the District Court's holding.

In the portion of *Cipollone* cited in *Chae,* four justices found that the 1969 Act preempted one, but not both, of plaintiff's state law fraudulent misrepresentation claims. *Id.* at 527-29. In the first claim, plaintiff alleged that the defendants, "through their advertising, neutralized the effect of federally mandated warning labels." *Id.* at 527. This, according to the plurality, was entirely "predicated on a state law prohibition" against certain types of statements regarding the hazards of smoking. *Id.* The plurality held that "such a *prohibition* … is merely the converse of

a state-law *requirement* that warnings be included in advertising and promotional materials." *Id* (emphasis in original). Thus, because the 1969 Act preempted state law advertising requirements, plaintiff's claim was expressly preempted. *Id*. Relying on this plurality holding, *Chae* held that § 1098g expressly preempts claims that directly challenge the language of "properly-disclosed" FFELP practices. 593 F.3d at 943.

Cipollone did not end there. With respect to the second post-1969 claim, the plurality held that a claim for "intentional fraud and misrepresentation both by 'false representation of a material fact [and by] conceal[ment of] a material fact" was *not* expressly preempted. *Id.* at 528-29. This claim, which was not mentioned in *Chae*, was predicated on a state law "duty not to make false statements of material facts or to conceal such facts," *i.e.*, the "more general obligation … not to deceive." *Id.* There was no evidence that Congress intended to proscribe the historic "regulation of deceptive advertising," *id.* at 529, and thus the Court did not find broadly—as the District Court did here—that all consumer claims that touch upon the same subject matter as those expressly preempted are also, *ipso facto,* disguised failure-to-disclose claims.

As with the second-1969 Act claim in *Cipollone*, as well as the non-expressly preempted claims in *Chae*, Nelson's claims are not predicated on challenging the use, or adequacy, of federal disclosures. Nor does Nelson seek to "neutralize" any

such requirements.[21] Rather, Nelson's claims are predicated on the "more general obligation … not to deceive" that is rooted in the Illinois Consumer Fraud and Deceptive Business Practices Act and Illinois common law.[22]

ii. *Cipollone*'s holding regarding the 1965 Act further supports a narrower reading of *Chae* than was applied by the District Court.

Finally, although not mentioned in *Chae,* the majority holding in *Cipollone* on the narrower preemption provision in the 1965 Act supports the further conclusion that § 1098g only preempts state laws that aim to govern affirmative "disclosure requirements." The 1965 Act preempted state laws that required "statements relating to smoking and health"[23] on cigarette packing and advertising.

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[21] Indeed, Great Lakes could have acted consistently with all federal disclosure requirements *and* state consumer protection law by not deceptively holding themselves out as experts who could provide individualized advice to borrowers while, as alleged in the complaint, *see e.g.*, SA 38 (Compl. ¶ 130), systematically steering borrowers into forbearance.

[22] Count I was brought under Illinois Consumer Fraud and Deceptive Business Practices Act, 815 Ill. Comp. Stat. 505/2. The statute requires "consideration shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to Section 5(a) of the Federal Trade Commission." The FTC's seminal Policy Statement on Unfairness pursuant to § 5 of the FTC Act, 15 U.S.C. § 45, notes that certain unfair practices cannot be cured by disclosure but rather must be banned entirely: "The practices in this [case] primarily involved deception, but the Commission noted the special susceptibilities of such patients as one reason for banning the ads entirely rather than relying on the remedy of fuller disclosure." FTC Policy Statement on Unfairness, Appended to *In re International Harvester Co.*, 104 F.T.C. 949, 1070 n.23 (1984).

[23] *Cipollone*, 505 U.S. at 514 ("(a) No statement relating to smoking and health, other than the statement required by section 4 of this Act, shall be required on any cigarette package. (b) No statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act." (quoting § 5 of the Federal Cigarette Labeling and Advertising Act, which took effect on January 1, 1966)).

Id. at 518. On its face, and akin to the "disclosure requirement" language in § 1098g, this statute barred state laws that "required" particular "statements,"[24] and therefore was not properly applied to "pre-empt state-law damages actions." *Id.* at 519-20. And there, as here, the narrow reading of the preemption clause was supported by the purpose and legislative history of act. *Id.* at 519.

CONCLUSION

The District Court's judgment should be reversed.

Respectfully Submitted,

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June 25, 2018

[24] Although not mentioned in *Chae*, the majority holding in *Cipollone* regarding the 1965 Act is more on point than the plurality holding regarding the 1969 Act. A "disclosure requirement" is far more similar to a "[required] statement . . ." than the "requirements and prohibitions" language from the 1969 Act. *Id.* at 519, 527.

**CERTIFICATE OF COMPLIANCE WITH
TYPE-VOLUME LIMITATION**

1. This brief complies with the length limitation of Fed. R. App. P. 32(a)(7)(B) because it does not exceed 11,076 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the requirements of Fed. R. App. P. 32(a) and Circuit Rule 32(b) because it has been prepared in a proportionally spaced typeface using Microsoft® Word for Mac version 16.14.1, with Century Schoolbook size 12 font for the text and Century Schoolbook size 11 font, for footnotes.

s/ Daniel A. Zibel
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June 25, 2018

CERTIFICATE OF SERVICE

I hereby certify that on June 25, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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June 25, 2018

REQUIRED SHORT APPENDIX

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Certificate

Pursuant to Circuit Rule 30(d), I hereby certify that this short appendix includes all of the materials required by Circuit Rules 30(a) and (b).

s/ Daniel A. Zibel
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Counsel for Appellant

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

NICOLE DENISE NELSON, individually and on behalf of all others similarly situated,	)	
Plaintiff,	)	**Case No. 3:17-CV-00183-NJR-SCW**
vs.	)	
GREAT LAKES EDUCATIONAL LOAN SERVICES, INC., and DOES, 1-10,	)	
Defendants.	)	

MEMORANDUM AND ORDER

ROSENSTENGEL, District Judge:

This matter comes before the Court on the Motion to Strike and to Dismiss Plaintiff's First Amended Class Action Complaint filed by Defendant Great Lakes Educational Loan Services, Inc. ("Great Lakes") (Doc. 29). For the reasons set forth below, the motion is granted.

BACKGROUND

Plaintiff Nicole Nelson is an Illinois resident who began repaying her student loans on December 14, 2009 (Doc. 24, ¶¶ 1, 79). Defendant Great Lakes is Nelson's student loan servicer (*Id.* at ¶ 149). As a loan servicer, Great Lakes is responsible for managing borrowers' accounts, processing payments, assisting borrowers, and communicating with borrowers about the repayment of their loans (*Id.* at ¶ 1).

Federal student loan borrowers have a number of repayment plans available to them. Nelson alleges that federal student loan borrowers who are unable to afford their current payment can change to another repayment plan at any time, including an

"income-driven" repayment plan. These income-driven plans set the borrower's monthly student loan payment at only a percentage of his or her "discretionary" income (*Id.* at ¶ 16). Income-driven repayment plans can offer borrowers extended payment relief, as well as other benefits such as a $0 monthly payment that still counts as a qualifying payment toward loan forgiveness (*Id.* at ¶ 18-19).

The United States Department of Education has advised borrowers to contact its student loan servicer before applying for any alternative repayment plan or forbearance (*Id.* at ¶ 32). Likewise, Great Lakes repeatedly encouraged borrowers experiencing financial hardship to contact it for assistance in evaluating the various alternative repayment options and not to contact others for student loan advice (*Id.* at ¶ 33). For example, Great Lakes' website states: "You don't have to pay for student loan services or advice. Our expert representatives have access to your latest student loan information and understand all of your options." (*Id.* at ¶ 34). Nevertheless, Nelson claims, despite attempting to publicly assure borrowers that Great Lakes will help them enroll in an appropriate, affordable repayment plan, it systematically and routinely disregarded that commitment and used its "expert" call center employees to steer student loan borrowers experiencing long-term financial distress or hardship into forbearance and deferment. Nelson claims this practice delayed borrowers' entry into alternative or income-driven repayment plans.

Nelson asserts that Great Lakes took these actions to save money in two ways. First, it had to pay fewer employees to be on the phone with student loan borrowers processing a forbearance or deferment than it would if employees had to explain

enrollment in income-driven repayment options, as those options take significantly longer to explore (*Id.* at ¶ 51, 70). Likewise, Great Lakes would have to pay more employees to review and process income-driven repayment plan applications and yearly renewals, thereby increasing operating costs (*Id.* at ¶¶ 51, 72). Nelson further avers that Great Lakes incentivized its employees to push borrowers into forbearance without exploring income-driven repayment plans (*Id.* at ¶ 52). Specifically, Great Lakes tracked, evaluated, and compensated its customer service personnel, in part, based on average call time (*Id.* at ¶ 53). The shorter the call, the more compensation employees received (*Id.*).

In the process of paying her own student loans, Nelson experienced financial hardship and called Great Lakes on multiple occasions to obtain information regarding repayment options (*Id.* at ¶¶ 79-87). Each time, Nelson was routed to a call center employee who, she alleges, followed a script that was designed to steer her into forbearance (*Id.* at ¶ 93). As a result, Nelson was enrolled in forbearance four times by Great Lakes' "expert" call center employees who led her to believe that was her best option (*Id.* at ¶¶ 92, 96, 99). She also entered unemployment deferment once as a result of her call to Great Lakes. Nelson claims Great Lakes' "expert" employees did not inform her of other alternative repayment options that likely would have allowed her to make much lower monthly payments (*Id.* at ¶ 109).

On May 15, 2017, Nelson filed the First Amended Class Action Complaint, alleging Great Lakes and certain John Does deceptively and systematically deterred her from obtaining access to income-driven repayment plans and instead steered her and

other student loan borrowers into forbearance (*Id.* at ¶¶ 6, 130(g)). Nelson alleges Great Lakes and the John Doe Defendants engaged in "numerous unfair acts and practices," including holding themselves out to be experts, recommending forbearance to borrowers, and failing to inform borrowers of all options—all in an effort to save Great Lakes significant amounts of money (*Id.* at ¶¶ 51, 130). Nelson claims she relied upon the information provided by Great Lakes, which caused her to go into forbearance rather than enter a repayment plan better suited for her circumstances (*Id.* at ¶¶ 135-36, 139).

Nelson seeks to represent two classes of persons made up of student loan borrowers who have been similarly placed in forbearance without being adequately informed of alternative repayment options (*Id.* at ¶ 113). Specifically, Nelson has identified these two classes as:

> **Illinois Consumer Fraud Class**
> All individuals who reside in Illinois or who entered into student loan contracts in Illinois, who since February 21, 2014, were subjected to Defendants' unfair and deceptive conduct, as further described in Count I, and were placed in forbearance without being advised of alternate repayment options.
>
> **Illinois Constructive Fraud Class**
> All individuals who reside in Illinois or who entered into student loan contracts in Illinois, who since February 21, 2012, were subjected to Defendants' unfair, misleading, and/or deceptive conduct, as further described in Count II, who were placed in forbearance without being advised of alternate repayment options.

Nelson, individually and on behalf of the class mentioned above, asserts two claims under Illinois law.[1] In Count I, she alleges a violation of the Illinois Consumer Fraud and Deceptive Business Practices Act on behalf of the Illinois Consumer Fraud Class. In Count II, Nelson alleges constructive fraud on behalf of the Illinois

[1] Nelson does not allege that Great Lakes violated any federal disclosure requirements, as there is no private right of action under the Higher Education Act.

Constructive Fraud Class. Nelson also alleges a third count, negligent misrepresentation, regarding statements made specifically to her.

LEGAL STANDARD

A motion to dismiss under Rule 12(b)(6) challenges the sufficiency of the complaint for failure to state a claim upon which relief may be granted. FED. R. CIV. P. 12(b)(6). To survive a Rule 12(b)(6) motion, a complaint must "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). While a complaint need not include detailed factual allegations, there "must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. The plaintiff must "plead [] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *McReynolds v. Merrill Lynch & Co.*, 694 F.3d 873, 885 (7th Cir. 2012) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)). "In reviewing the sufficiency of a complaint under the plausibility standard, [a court must] accept the well-pleaded facts in the complaint as true, but [it] 'need not accept as true legal conclusions, or threadbare recitals of the elements of a cause of action, supported by mere conclusory statements.'" *Alam v. Miller Brewing Co.*, 709 F.3d 662, 665-66 (7th Cir. 2013) (quoting *Brooks v. Ross*, 578 F.3d 574, 581 (7th Cir. 2009)).

Federal Rule of Civil Procedure 12(f) governs whether to strike matters from a pleading. Under Rule 12(f), upon a motion or upon its own initiative, "[t]he court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Motions to strike are generally disfavored. *See Heller Fin., Inc. v. Midwhey Powder Co.*, 883 F.2d 1286, 1294 (7th Cir. 1989). For this reason, this

Court and others have held that a party must show prejudice to succeed on a motion to strike. *See, e.g., Anderson v. Bd. of Educ. of Chi.*, 169 F. Supp. 2d 864, 867 (N.D. Ill. 2001); *see also Talbot v. Robert Matthews Distrib. Co.*, 961 F.2d 654, 664 (7th Cir. 1992). Prejudice exists where the allegation confuses the issues or is so lengthy and complex that it puts an undue burden on the opposing party. *Cumis Ins. Soc., Inc. v. Peters*, 983 F. Supp. 787, 798 (N.D. Ill. 1997). The Court should not strike matter from a pleading pursuant to Rule 12(f) "unless the challenged allegations have no possible relation or logical connection to the subject matter of the controversy and may cause some form of significant prejudice to one or more of the parties to the action." *See* 5C Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1382 (3d ed.); *accord Anderson*, 169 F. Supp. 2d at 867-68. The burden on a motion to strike is upon the moving party. *See Vakharia v. Little Co. of Mary Hosp. & Health Care Ctrs.*, 2 F. Supp. 2d 1028 (N.D. Ill. 1998).

DISCUSSION

Great Lakes has moved to strike twenty eight factual allegations cited in the complaint that are allegedly copied, verbatim, from another lawsuit, as well as twelve factual allegations derived from anonymous internet postings on www.glassdoor.com. Great Lakes further moves to dismiss Nelson's claims because they are preempted by federal law and because she fails to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure (Doc. 29). Because the Court finds Defendants' express preemption argument most persuasive, the Court first addresses that issue.

Preemption

As an initial matter, Nelson has asserted that Defendants' preemption argument is not properly raised on a motion to dismiss, as preemption is an affirmative defense

(Doc. 33, p. 14). That proposition is not, however, uniformly true. "Preemption may be [a] proper ground for a dismissal pursuant to Rule 12(b)(6)." *French v. STL Distribution Services, LLC*, No. 10-511-GPM, 2010 WL 4684016, at *1 (S.D. Ill. Nov. 10, 2010). "A complaint that, on its face, establishes federal preemption is properly dismissed pursuant to Rule 12(b)(6)." *Green v. Charter One Bank, N.A.*, No. 08 C 1684, 2010 WL 1031907, at *1 (N.D. Ill. Mar. 16, 2010); *see also Currie v. Diamond Mortgage Corp. of Ill.*, 859 F.2d 1538, 1542 (7th Cir. 1988). Thus, if the complaint on its face establishes that Nelson's claims are preempted, then dismissal is appropriate.

Great Lakes asserts that Nelson's state law claims are barred under the Supremacy Clause of the United States Constitution because the manner in which Great Lakes interacts with borrowers—including how it provides information on alternative payment options—is regulated by the federal government pursuant to statute, regulations, and its federal-contracting authority. Specifically, the Department of Education, which administers the Higher Education Act ("HEA") and procures the services of federal contractors like Great Lakes, has promulgated comprehensive regulations prescribing the disclosures for repayment options provided to borrowers. In addition, the Department of Education exercises extensive oversight over contractors like Great Lakes that service student loans on its behalf. Great Lakes argues Nelson's state law claims are an attempt to impose additional disclosure requirements—that is, to require more of Great Lakes than is required by the HEA. As a result, Great Lakes asserts, Nelson's claims are preempted.

Federal law is considered "the supreme Law of the Land." U.S. Cont. art. VI, cl. 2. As a result, when federal and state laws conflict, "the conflicting state law provisions [are] without effect." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). Federal preemption of a state statute occurs when: "(1) Congress enacts a statute that explicitly pre-empts state law; (2) state law actually conflicts with federal law; or (3) federal law occupies a legislative field to such an extent that it is reasonable to conclude that Congress left no room for state regulation in that field." *Chae v. SLM Corp.*, 593 F.3d 936, 941 (9th Cir. 2010) (citing *Tocher v. City of Santa Ana*, 219 F.3d 1040, 1045 (9th Cir. 2000); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372-73 (2000); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992)).

"The Supreme Court has made clear that Congress may indicate its intent to displace state law through express language." *Chae*, 593 F.3d at 942 (citing *Altria Group, Inc. v. Good*, 555 U.S. 70, 129 S.Ct. 538, 543 (2008)). When Congress enacts an express preemption provision, the Court must interpret the provision and "identify the domain expressly pre-empted by that language." *Id.* (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 484 (1996)). To do so, the Court must examine the text of the provision, the surrounding statutory framework, and Congress' stated purpose in enacting the statute. *Id.* "If the statute contains an express preemption clause, the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' preemptive intent." *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993).

In this case, the relevant statute provides: "Loans made, insured, or guaranteed pursuant to a program authorized by title IV of the Higher Education Act of 1965 shall not be subject to any disclosure requirements of any State law." 20 U.S.C. § 1098g. 34 C.F.R. § 682.205, titled "Disclosure requirements for lenders," then regulates the specific disclosures that lenders must make at specific times. Thus, to determine whether Nelson's claims are preempted, the Court must examine whether her claims involve "disclosures."

The parties agree that the word "disclosure" is undefined by the HEA. Therefore, Defendants argue, the Court must construe it in accordance with its ordinary dictionary definition: "The act or process of making known something that was previously unknown; a revelation of facts." BLACK'S LAW DICTIONARY (10th ed. 2014). Nelson asserts that the regulations themselves, as well as supporting case law, provide a "working definition" of disclosure. She argues that § 682.205 provides for "disclosures" as well as "contacts" and "other communications" a lender/loan servicer may have with a borrower. *See* 34 C.F.R. § 682.205 (a)(4)(ii) (certain disclosures are not required "if the borrower's difficulty has been resolved through contact with the borrower resulting from an earlier disclosure or other communication between the lender and the borrower") (emphasis added). Thus, not every contact a lender has with a borrower is a "disclosure." And if the contact is not a "disclosure," she argues, then there can be no preemption.

The Court finds aspects of both parties' definitions persuasive. Defendants' dictionary definition of disclosure is the ordinary meaning of the word. The Court also

agrees that a lender can probably communicate with a borrower without triggering any disclosure requirements as provided in § 682.205. The question, however, is not whether every contact or communication is a disclosure under federal law. Rather, the question before the Court is whether Nelson is trying to force any state law disclosure requirements onto Great Lakes. Construing the statutory framework in conjunction with the plain meaning of the word "disclosure," it appears Congress intended § 1098g to preempt any state law requiring lenders to reveal facts or information not required by federal law.

While the Seventh Circuit has not addressed § 1098g and preemption, the Ninth Circuit has examined the statute and found it to expressly preempt state disclosure requirements under California's Unfair Competition Law and Consumer Remedies Act. *Chae*, 593 F.3d at 942. In *Chae*, the plaintiffs claimed that Sallie Mae employed "unfair" and "fraudulent" business practices related to the first repayment date and its interest calculation. *Id.* The plaintiffs alleged the practices constituted an unfair or deceptive practice under California's Consumer Legal Remedies Act because they "misrepresent[ed]" that the student loans "confer rights, remedies, and obligations" that do not exist. *Id.* The Ninth Circuit interpreted the plaintiffs' misrepresentation claims as, "at bottom," improper-disclosure claims. *Id*. Because the plaintiffs did not contend that California law prevented Sallie Mae from employing the loan-servicing practices at issue, the court considered the allegations, in substance, to be "a challenge to the allegedly-misleading method Sallie Mae 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.* at 942-43 (quoting *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 527 (1992)).

Other courts reviewing the express preemption clause in § 1098g have held that where a state law claim is "rooted in a failure to disclose information required by the HEA," such claim would likely be expressly preempted. *Linsley v. FMS Inv. Corp.*, No. 3:11cv961, 2012 WL 1309840, *4 (D. Conn. Apr. 17, 2012). In *Brooks v. Salle Mae, Inc.*, a state court case cited by Nelson, the plaintiff alleged that Sallie Mae misrepresented the documentation required to determine eligibility for economic deferment and misrepresented that she had to pay all late fees before she could enter economic deferment. *Brooks v. Sallie Mae, Inc.*, No. FSTCV096002530S, 2011 WL 6989888, at *6 (Conn. Super. Ct. Dec. 20, 2011). Citing *Chae* as authority, the court held that the plaintiff's misrepresentation claims were, in fact, disguised improper disclosure claims and were therefore preempted. *Id.*

While none of these cases are binding on this Court, the Court nonetheless finds them persuasive in determining whether the claims made by Nelson involve "disclosures" and are therefore preempted by federal law. Great Lakes argues that Nelson's claims involve "disclosures" because she alleges Great Lakes made various omissions and misrepresentations by failing to inform borrowers of their right to enter an income-driven repayment plan. Great Lakes contends that saying it "failed to inform" is just another way of saying it "failed to disclose" information. Because what Great Lakes is required to disclose is regulated by federal law, *see* 34 C.F.R. § 682.205, Nelson's state law claims are preempted.

Nelson admits that 20 U.S.C. § 1098g preempts state law from governing disclosure requirements and that the regulations contained in 34 C.F.R. § 682.205 govern the disclosures required of lenders. She argues, however, that she does not seek to impose any additional "disclosure" requirements because the alleged wrongful activity occurred during Great Lakes' "contacts" or "other communication" with borrowers. In other words, Nelson asserts her claims are not preempted because she's alleging Great Lakes failed to disclose information at times *not specified* by § 682.205. But what Nelson is essentially saying is: under Illinois state law, Great Lakes should have disclosed additional information to me and other borrowers. Nelson is attempting to require more of Great Lakes than is required by the HEA.

As a result, Nelson's allegations in Count I that Great Lakes "failed to provide" or "failed to offer" borrowers all of their options, "failed to discuss" income-driven repayment plans prior to enrolling borrowers in forbearance, and "failed to follow up or alert" student loan borrowers to more advantageous repayment options after a first forbearance are preempted, as they are no different than a claim that Great Lakes failed to make proper disclosures. *See Chae*, 593 F.3d at 942. Likewise, Nelson's claims in Count I that Great Lakes' employees held themselves out to be experts working on a borrower's behalf, held themselves out as understanding and offering all student loan options, and offered forbearance as a "best option" to struggling borrowers who could have enrolled in a much better plan are also disguised failure-to-disclose claims. *Id.* The converse of these allegations is that Great Lakes' employees should have disclosed (or revealed) they were not "experts" and were working on behalf of Great Lakes, should have disclosed

all options to borrowers, and should have disclosed that forbearance may not be the "best option" for all borrowers. Finally, Nelson's allegation that Great Lakes provided employees with scripts to steer struggling student loan borrowers into forbearance without explaining, or even identifying other, better repayment options is merely an allegation that Great Lakes should have disclosed alternative repayment options.

The conclusion that Nelson's claims in Count I involve disclosures is supported by the elements of the cause of action itself. As in *Chae*, Nelson has pointed to no Illinois state law prohibition against the underlying practice at issue, *i.e.*, "steering" a customer toward a plan that is more favorable to the business. Rather, she brings her claim under the Illinois Consumer Fraud and Deceptive Business Practices Act, which requires an intent that the consumer rely on the concealment or omission of a material fact. *See* 815 ILCS 505/2 (stating it is unlawful, in the conduct of any trade or commerce, to misrepresent, suppress, conceal, or omit any material fact, with the intent that others rely on the concealment, suppression, or omission of such material fact).

In Count II, Nelson alleges constructive fraud on behalf of the Illinois Constructive Fraud Class (*Id.* at ¶¶ 148-168). In this claim, Nelson asserts Great Lakes and the Doe Defendants breached an alleged confidential or fiduciary relationship by misrepresenting, concealing, or omitting the detrimental effects of entering or continuing in forbearance, omitting other alternative repayment options, holding themselves out as "experts," holding themselves out as having all student loan borrowers' information, and holding themselves out as working in the best interest of student loan borrowers (*Id.* at ¶ 154). Nelson alleges Defendants intended for student

loan borrowers to rely on these omissions and misrepresentations in determining how to proceed with paying (or forbearing) their student loan payments (*Id.* at ¶ 157). As a result, Defendants delayed Nelson's and the putative class members' enrollment in alternate or income-driven repayment plans, causing them actual damages.

Count II is also preempted, as it is, "at bottom," a claim that Great Lakes failed to disclose additional information in its correspondence and on its website. Nelson essentially claims Great Lakes breached an alleged fiduciary duty by failing to disclose information relevant to choosing a repayment plan, disclosures that are expressly regulated by § 682.205.

Finally, in Count III, Nelson alleges negligent misrepresentation as to statements made specifically to her (*Id.* at ¶¶ 169-85). Nelson claims Defendants misrepresented or omitted the same material information alleged in Counts I and II, that Great Lakes had a policy of steering borrowers such as herself into forbearance, and that she relied on these misrepresentations and omissions in determining whether to enter forbearance (*Id.* at ¶ 172). Again, this claim involves information that Nelson asserts Great Lakes should have disclosed to her and, as such, it is expressly preempted.

Having found Nelson's claims as pleaded to be expressly preempted, the Court need not determine whether conflict preemption also applies or whether Nelson has stated a claim pursuant to Rule 12(b)(6). Defendants' Motion to Strike is also denied as moot.

CONCLUSION

Because Nelson's claims are expressly preempted, the Motion to Dismiss filed by Great Lakes Educational Loan Services, Inc., and the John Doe Defendants (Doc. 29) is **GRANTED,** and the Motion to Strike is **DENIED as moot.** The First Amended Class Action Complaint is **DISMISSED without prejudice**.

In an abundance of caution, the Court will grant Nelson leave to file a Second Amended Class Action Complaint, on or before **January 19, 2018**. Failure to file a Second Amended Class Action Complaint as ordered will result in the dismissal of this action with prejudice.

IT IS SO ORDERED.

DATED: December 19, 2017

NANCY J. ROSENSTENGEL
United States District Judge

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS**

NICOLE DENISE NELSON, individually and on behalf of all others similarly situated,	)	
Plaintiff,	)	
vs.	)	**Case No. 3:17-CV-00183-NJR-SCW**
GREAT LAKES EDUCATIONAL LOAN SERVICES, INC., and DOES, 1-10,	)	
Defendants.	)	

JUDGMENT IN A CIVIL ACTION

DECISION BY THE COURT.

IT IS ORDERED AND ADJUDGED that, pursuant to the Court's Order dated December 19, 2017 (Doc. 54), this action is **DISMISSED with prejudice.**

DATED: February 9, 2018

JUSTINE FLANAGAN, Acting Clerk

By: s/ Deana Brinkley
Deputy Clerk

APPROVED: ______________________
NANCY J. ROSENSTENGEL
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS
EAST ST. LOUIS DIVISION

NICOLE DENISE NELSON, individually and on behalf of all others similarly situated,	)	
Plaintiff,	)	
v.	)	Case No. 3:17-cv-00183-NJR-SCW
GREAT LAKES EDUCATIONAL LOAN SERVICES, INC., and DOE DEFENDANTS 1-10,	)	Judge Nancy J. Rosenstengel Magistrate Steven C. Williams
	)	***JURY TRIAL DEMANDED***
Defendants.	)	

FIRST AMENDED CLASS ACTION COMPLAINT

Plaintiff, Nicole Denise Nelson ("Plaintiff"), pursuant to FED. R. CIV. P. 15(a)(1)(B), by her undersigned attorneys, on her own behalf and on behalf of all others similarly situated, upon personal knowledge as to herself and her own acts, and upon information and belief as to all other matters, brings this action against Defendants Great Lakes Educational Loan Services, Inc. ("Great Lakes") and Doe Defendants 1-10 (collectively, "Defendants") and alleges as follows:

NATURE OF THE ACTION

1. Defendants' principal responsibilities as a student loan servicer include managing borrowers' accounts, processing monthly payments, assisting borrowers to learn about, enroll in, and remain in alternative repayment plans, and communicating directly with borrowers about the repayment of their loans.

2. Federal student loan borrowers who are unable to afford their current monthly payments have the right to change to another repayment plan at any time, including if the borrower is experiencing financial hardship or distress.

3. In fact, most federal student borrowers are eligible under federal law for an income-driven repayment plan, which sets their monthly student loan payment as only a percentage (generally, 10% to 20%) of their "discretionary" income.

4. Income-driven repayment plans can offer borrowers extended payment relief, as well as other significant benefits, including a $0.00 per month payment amount which count towards various loan forgiveness programs.

5. However, despite the wide-spread availability of income-driven repayment plans, and their clear benefits to student loan borrowers, student loan servicers, like Great Lakes, systematically deterred Plaintiff, and upon information and belief, potentially thousands of other borrowers from obtaining access to some or all of the benefits and protections associated with income driven repayment plans.

6. In fact, and in the face of assuring borrowers that Defendants would help the student loan borrowers find the right repayment option for their circumstances, Great Lakes steered borrowers experiencing non-short-term financial hardship into costly payment relief programs designed for borrowers experiencing short-term financial problems (forbearance), before or instead of affordable and sustainable (albeit, less lucrative) long-term student loan repayment options that were more beneficial to Plaintiff and other student loan borrowers in light of his or her financial situation (income-driven repayment).

7. Consequently, Great Lakes has failed to perform its core duties in the servicing of student loans. Instead, Great Lakes has violated its duties to Plaintiff and others similarly situated under the Illinois Consumer Fraud and Deceptive Business Practices Act, as well as violating the trust that student loan borrowers placed in the company, by steering struggling student loan borrowers into forbearance and deferment, rather than an eligible "income-driven" repayment plan that could have

provided monthly payments as low as $0.00 per month, a significant benefit to the struggling student loan borrower, but potential less profitable for Defendants.

THE PARTIES

1. Plaintiff Nicole Denise Nelson is, and at all times mentioned herein is believed to have been, an individual citizen of the State of Illinois. Ms. Nelson currently resides in Shiloh, Illinois.

2. Defendant Great Lakes Educational Loan Services, Inc. is a corporation organized and operating under the laws of the State of Wisconsin with a principal place of business at 2401 International Lane, Madison, Wisconsin 53704.

3. Defendant Great Lakes Education Loan Services, Inc. may be served through its registered agent Business Filings Incorporated at 600 South Second Street, Springfield, Illinois 62074.

4. Doe Defendants 1 through 10 are Defendants who may be identified an added to this action pending discovery in this matter.

JURISDICTION AND VENUE

5. This Court has federal question subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331.

6. Further, this Court has subject matter jurisdiction over this class action pursuant to 28 U.S.C. 1332(d)(2) based on minimal diversity of citizenship between Plaintiff and Defendants and an amount in controversy exceeding $5,000,000.

7. This Court has supplemental jurisdiction over pendent state law claims pursuant to 28 U.S.C. §1367(a).

8. This Court has personal jurisdiction over the Defendants because Defendants regularly and systematically conduct business in this District, including, at minimum, entering into contracts in this District, collecting student loan payments from this District, and communicating and advising student loan debtors residing in this District.

9. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b) and (c) because Defendants communicate with and advise student loan debtors residing in this District and collect student loan payments from this District.

10. Assignment to the East St. Louis Division of this Court is proper as Plaintiff resides in St. Clair County, Illinois and many of the allegations giving rise to this Complaint occurred in St. Clair County, Illinois.

FACTUAL ALLEGATIONS

11. For federal student loan borrowers entering repayment, the "default" or "standard" repayment plan is the 10-year repayment option.

12. While the standard 10-year repayment plan provides student loan borrowers with consistent monthly payments that ensures both accrued interest and principal will be paid in full in ten years, the standard 10-year monthly payment amount can range from hundreds to *thousands* of dollars per month depending on the amount of student loan debt owed by the student loan borrower.

13. In addition to the standard 10-year repayment plan, there are several other repayment plans available to federal student loan borrowers.

14. Some of those plans, like the "graduated repayment plan" or "extended" options, also allow student loan borrowers to completely pay off the student loan's accrued interest and principal, but over a longer period of time (usually 20 to 25 years). Not surprisingly, the monthly payment amount due under one of these plans is less than the 10-year standard repayment plan.

15. Other student loan repayment plans are "income-driven." There are currently five income-driven plans: (1) Income-Contingent Repayment ("ICR"); (2) Income-Based Repayment ("IRB"); (3) IBR for New Borrowers ("N-IRB"); (4) Pay-As-You-Earn ("PAYE"); and (5) Revised Pay-As-You-Earn ("REPAYE").

16. Each of these income-driven plans requires student loan borrowers to pay only a percentage (10%-20%) of his or her "discretionary income" as his or her monthly payment amount over a certain period of time (generally, 20 or 25 years) – and then the remaining balance of the student loan borrower's student loans will be forgiven.

17. As such, the monthly payments under an income-driven plan are usually drastically lower than the monthly payments under any other student loan repayment plan.

18. In fact, depending on a borrower's income and family size, his or her monthly payments under an income-driven repayment plan can be as low as $0.00.

19. For instance, for student loan borrowers who either have no income – i.e., are unemployed – or have a very low income (usually less than 150% of that borrower's state's poverty level depending on family size), their "income-driven" monthly payment amount would be $0.00 – but that borrower would still be "making" a qualifying monthly payment under his or her "income-driven" plan.

20. Further, federal student loan borrowers have the right to change their repayment plan at any time, including if a student loan borrower is experiencing financial hardship or distress.

21. However, despite the availability of alternative repayment plans with lower monthly payments to almost all federal student loan borrowers who are unable to make their current payments, student loan servicers, such as Defendants, routinely fail to inform struggling student loan borrowers of his or her right to enter an alternative, income-driven repayment plan, failed to properly explain "income-driven" repayment plans to struggling student loan borrowers, and, instead, steered struggling student loan borrowers into forbearance, which is more costly to the student loan borrower, but significantly less costly for the student loan servicer.

22. According to the Complaint for Permanent Injunction and Other Relief in *Consumer Financial Protection Bureau v. Navient Corporation, et al.* (hereinafter "*CFPB v. Navient,*" a matter brought against another student loan servicer:

> Navient representatives sometimes initially responded to borrowers' inability to make a payment by placing them in voluntary forbearance without adequately advising them about available income-driven repayment plans. This occurred even though it is likely that a large number of those borrowers would have qualified instead for a $0 payment in an income-driven repayment plan at that time. Indeed, over 50% of Navient borrowers who need payment relief, and meet the eligibility criteria for income-driven repayment plans, qualify for a $0 monthly payment.
>
> For example, between January 1, 2010 and March 31, 2015, nearly 25% of borrowers who ultimately enrolled in IBR with a $0 payment were enrolled in voluntary forbearance within the twelve-month period immediately preceding their enrollment in IBR. Similarly, during that same time period, nearly 16% of borrowers who ultimately enrolled in PAYE with a $0 payment were enrolled in voluntary forbearance within the twelvemonth period immediately preceding their enrollment in PAYE. The majority of these borrowers were enrolled in voluntary forbearance more than three months prior to their enrollment in the income-driven repayment plan, which suggests that forbearance was not merely offered to these borrowers while their application in an income-driven repayment plan was pending. **Because they were placed into forbearance before ultimately enrolling in an income-driven repayment plan with a $0 payment, these borrowers had delayed access to the benefits of the income-driven repayment plan. They were also subject to the negative consequences of forbearance,** including the addition of interest to the principal balance of the loan, which they potentially could have avoided had they been enrolled in the income-driven repayment plan from the start.

No. 3:17-cv-00101-RDM (M.D. Penn. Jan. 18, 2017) (emphasis added)

23. Federal Student Aid, an Office of the U.S. Department of Education, defines "deferment" on its website as "A postponement of payment on a loan that is allowed under certain conditions and during which interest does not accrue on Direct Subsidized Loans, Subsidized Federal Stafford Loans, and Federal Perkins Loans. All other federal student loans that are deferred will continue to accrue interest. Any unpaid interest that accrued during the deferment period may be added to the principal balance (capitalized) of the loan(s)."[1]

[1] https://studentaid.ed.gov/sa/glossary (last visited May 10, 2017).

24. Forbearance is a short-term, temporary postponement of payment that allows a borrower experiencing financial hardship or illness to stop making payments or reduce his or her monthly payment for a defined period of time.

25. Stated differently, Federal Student Aid, an Office of the U.S. Department of Education, defines "forbearance" on its website as "A period during which your monthly loan payments are temporarily suspended or reduced. Your lender may grant you a forbearance if you are willing but unable to make loan payments due to certain types of financial hardships. During forbearance, principal payments are postponed but interest continues to accrue. Unpaid interest that accrues during the forbearance will be added to the principal balance (capitalized) of your loan(s), increasing the total amount you owe."[2]

26. Forbearance, however, is typically not suitable for student loan borrowers experiencing financial hardship or distress that is not temporary or short-term, as borrowers who enroll in forbearance face significant costs, which generally increase the longer the borrower is in forbearance.

27. These costs include the accrual of unpaid interest and the addition of that unpaid interest to the principal balance of the loan, also known as capitalization.

28. In addition, in some cases, following a forbearance, a loan may be re-amortized, where the monthly payments may be recalculated, which can lead to an increase in the borrower's monthly payment amount.

29. As a result of these costs, long-term enrollment in forbearance can dramatically increase the total amount due each month after the forbearance period ends and over the repayment term for a borrower's federal loans.

[2] https://studentaid.ed.gov/sa/glossary (last visited May 10, 2017).

30. Because income-driven repayment plans enable borrowers to avoid or reduce these costs associated with forbearance, for borrowers whose financial hardship is not temporary and short-term, enrolling in an income-driven repayment plan is usually a significantly better option than forbearance.

31. The U.S. Department of Education has publicly encouraged borrowers to consult their federal student loan servicer to determine the best repayment option or alternative for that individual borrower.

32. In several places on its website, the U.S. Department of Education has advised borrowers to contact their student loan servicer before applying for any alternative repayment plan or forbearance, with statements such as the following:

- "Work with your loan servicer to choose a federal student loan repayment plan that's best for you";[3]
- "Before you apply for an income driven repayment plan, contact your loan servicer if you have any questions. Your loan servicer will help you decide whether one of these plans is right for you";[4] and
- "Always contact your loan servicer immediately if you are having trouble making your student loan payment."[5]

33. Likewise, Great Lakes, as a servicer of federal loans, has repeatedly encouraged borrowers experiencing financial hardship to contact Defendants for assistance in evaluating the various alternative repayment options, and not to contact others for student loan advice.

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[3] Federal Student Aid, U.S. Department of Education, Repayment Plans, https://studentaid.ed.gov/sa/repay-loans/understand/plans (last visited Jan. 18, 2017).

[4] Federal Student Aid, U.S. Department of Education, Income-Driven Repayment Plans, https://studentaid.ed.gov/sa/repay-loans/understand/plans/income-driven.

[5] Federal Student Aid, U.S. Department of Education, Deferment and Forbearance, https://studentaid.ed.gov/sa/repay-loans/deferment-forbearance (last visited Jan. 18, 2017).

34. For example, Defendants' website features statements about how Defendants' "experts" including:

- Everyones [*sic*] personal situation is different. Whenever you're unsure about something related to your student loans, come to us. Our trained experts work on your behalf, and we look forward to making things go as smoothly as possible with your student loans.[6]

- Free Expert Help!

  You don't have to pay for student loan services or advice. Our expert representatives have access to your latest student loan information and understand all of your options.[7]

35. Defendants also tout themselves as "your primary point of contact for questions about your loans."[8]

36. Defendants also tell student loan borrowers "At times, it may feel like your student loans are an overwhelming burden. Remember, we're here to serve you."[9]

37. Defendants also attempt to provide "a tour" of student loan borrowers "Payment Schedule & Disclosures."[10]

38. Upon information and belief, Defendants' website has included other, similar statements.

39. Defendants' website's lack of internet archiving ensures that information is kept away from Plaintiff and able to be hidden by Defendants.

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[6] https://www.mygreatlakes.org/educate/knowledge-center/free-services.html

[7] https://www.mygreatlakes.org/educate/knowledge-center/postponing-your-student-loan-payments.html

[8] https://www.mygreatlakes.org/educate/knowledge-center/transferred-loan-questions.html

[9] https://www.mygreatlakes.org/educate/knowledge-center/free-services.html (last visited May 10, 2017)

[10] https://www.mygreatlakes.org/educate/knowledge-center/payment-schedule.html

40. For instance, using the Internet Archive's Wayback Machine, past versions of a website that have been archived may be viewed. However, many of Defendants' webpages are not able for viewing now by Plaintiff.

41. As such, while Plaintiff can view the Great Lakes homepage (www.mygreatlakes.org) at various points, Plaintiff cannot view any page content from webpages that should have included relevant information, such as the pages titled "Former Students," "Manage Your Student Loan in Three Steps," "Understand Your Repayment Options," Unemployed? Underemployed? Need Relief?." See, Exh. A.

42. In fact, the "Former Students" page was archived on eight separate instances, and none show relevant information. Instead, each archived page shows an outline of the Great Lakes page, but does not show what would have been displayed to student loan borrowers, including Plaintiff. However, upon information and belief, Great Lakes has and retains this information. Exh A at p. 3-10.

43. Additionally, the "Manage Your Student Loan in Three Steps" page was archived on four separate instances, and none show relevant information. Instead, each archived page shows an outline of the Great Lakes page, but does not show what would have been displayed to student loan borrowers, including Plaintiff. However, upon information and belief, Great Lakes has and retains this information. Exh. A at p. 11-16.

44. Further, the "Understand Your Repayment Options" page was archived on ten separate instances, and none show relevant information. Instead, each archived page shows an outline of the Great Lakes page, but does not show what would have been displayed to student loan borrowers, including Plaintiff. However, upon information and belief, Great Lakes has and retains this information. Exh. A at p. 17-28.

45. Moreover, the "Unemployed? Underemployed? Need Relief?" page was archived on five separate instances, and none show relevant information. Instead, each archived page shows an outline of the Great Lakes page, but does not show what would have been displayed to student loan borrowers, including Plaintiff. However, upon information and belief, Great Lakes has and retains this information. Exh. A at p. 29-33.

46. Nevertheless, despite attempting to publicly assure student loan borrowers that Defendants will help student loan borrowers identify and enroll in an appropriate, affordable repayment plan, Defendants have systematically and routinely disregarded that commitment and systematically used their "expert" call center employees, who were "here to serve you," to steer student loan borrowers experiencing long-term distress or hardship into forbearance and deferment delaying borrowers entry into alternative or income-driven repayment plans.

47. According to the Complaint for Permanent Injunction and Other Relief in *CFPB v. Navient*:

> Navient ... enrolled an immense number of borrowers in multiple consecutive forbearances, even though they had clearly demonstrated a long-term inability to repay their loans.
>
> For example, between January 1, 2010 and March 31, 2015, Navient enrolled over 1.5 million borrowers in two or more consecutive forbearances totaling twelve months or longer. More than 470,000 of these borrowers were enrolled in three consecutive forbearances, and more than 520,000 of them were enrolled in four or more consecutive forbearances. For borrowers enrolled in three or more consecutive forbearances, each forbearance period lasted, on average, six months. Therefore, hundreds of thousands of consumers were continuously enrolled in forbearance for a period of two or three years, or more.
>
> **Regardless of why these borrowers did not enroll in an income-driven repayment plan from the start, their long-term inability to repay was increasingly clear as each forbearance period expired. Yet Navient representatives continued to enroll them in forbearance again and again, rather than an income-driven repayment plan that would have been beneficial for many of them.**
>
> **Enrollment in multiple consecutive forbearances imposed a staggering financial cost on this group of borrowers. At the conclusion of those**

> **forbearances, Navient had added nearly four billion dollars of unpaid interest to the principal balance of their loans.** For many of these borrowers, had they been enrolled in an income-driven repayment plan, they would have avoided much or all of their additional charges because the government would have paid the unpaid interest on their subsidized loans in full during the first three years of consecutive enrollment.

3:17-cv-00101-RDM (emphasis added)

48. Defendants, upon information and belief, acted in a similar or the exact same manner when presented with similar evidence of non-short-term hardships faced by student loan borrowers.

49. <u>At least, Plaintiff suffered the same harms due to what Plaintiff believes to be an industry wide practice, based upon her investigation and discovery that she was treated similar to what the CFPB alleges, Defendants made their call center employees follow scripts (even when students had varying situations), Defendants' employees' calls were recorded, Defendants' employees' were reviewed based on the length of calls, and, according to one former employee, how many times a student loan borrower was cut off mid-sentence, and Plaintiff was steered into forbearance multiple times when she should have been placed in an alternate or income-driven repayment plan which delayed Plaintiff's entry into an income-driven repayment plan.</u>

50. <u>This information also provides insight to the type and scope of damages sustained by student loan borrowers, including Plaintiff and putative class members, as defined below.</u>

51. Defendants took these actions because they saved, and continue to save, Defendants significant amounts of money in two ways: (1) Defendants had and continue to have to pay fewer employees to be on the phone with student loan borrowers processing a forbearance <u>or deferment</u> versus exploring and explaining enrollment in income driven repayment options, and (2) Defendants have to pay more employees the more income-driven repayment plans they have to process each year.

52. Defendants compensation policies for its customer service representatives have incentivized them to push borrowers to forbearance without adequately exploring income-driven

repayment plans with those borrowers and, in some cases, like Plaintiffs, without ever mentioning income driven repayment plans at all.

53. Upon information and belief, Defendant did track and currently track, did evaluate and currently evaluate, and, at least in part, compensated and continue to compensate its customer service personnel, in part, based on average call time – the shorter, the better.

54. Former and/or current employees of Great Lakes have discussed the scripts that call center employees had to follow, praised the "bonuses," and even disclosed how one of Great Lakes grading criteria was how many times a customer service representative cut off a student-loan borrower mid-sentence.

55. One current employee (as of November 13, 2015) left a review on glassdoor.com titled "Easy, but boring" where the reviewer stated in part "After 9 hours of talking from a script to people who are generally annoyed with you, you will be quite drained." See, Exh. B. [11]

56. One former employee (as of June 16, 2016) left a review on glassdoor.com titled "CSR" where the reviewer stated in part "They don't let people use their own mind. Everything is to a stick scrip [sic]." See, Exh. B.

57. Another former employee (as of August 25, 2016) left a review on glassdoor.com titled "Customer care representative" where the reviewer stated in part:

> Everything was monitored! And micromanage! Like how long you stop taking call. I honestly felt that at first the company really did care about helping people repaying back there student loans but everyone I had a one on one with my supervisor it was always why did you give them a forbearance or why come you don't keep asking for a payment from them it's like because they say the can't afford to make any payments or they lost their job. They expect calls to be less then 5 min which for me was difficult because the people who call in always got a lot to say. they expect you use "there way" of cutting a conversation short by cutting the person mid sentence (they actually monitor that too they sit you down and listen to some conversations you had to see how many times you cut a person mid sentence)" See, Exh. B (grammatical errors in original).

[11] https://www.glassdoor.com/Reviews/Great-Lakes-Higher-Education-Reviews-E28336.htm

58. Another former employee left a review on glassdoor.com titled "Loan Councelor 1" and listed a "Con" as "Having to follow a script as every student had a different concern. See, Exh. B.

59. Additionally, Great Lakes records phone conversations.

60. A former employee (as of April 16, 2017) left a review on Indeed.com titled "A stay at your desk all day position" where the former employee stated in part "You are evaluated frequently from recorded phone conversations. Everything you don on the computer is timed in minutes or seconds." See, Exh. C.[12]

61. Another former employee (as of March 24, 2017) left a review on Indeed.com titled "Review" where the reviewer stated in part:

> The worst part about the job is that you are expected to sit for 8 hours and answer constant phone calls, there is literally no break in between phone calls other than "wrap time" which you are required to keep under a certain amount of time otherwise you can get written up. It is mentally exhausting and they really don't take that into consideration or try to accommodate anyone with any issues they have. They basically tell you to get over it, use your own personal time and get back on the phone. The company is all about numbers they do not care about individual people what so ever. See, Exh. C.

62. This reviewer also described one "Con" as "No down time between phone calls." See, Exh. C.

63. Other Great Lakes employees talk about the "bonuses."

64. A current employee (as of October 12, 2015) left a review on Indeed.com titled "high paced job" where the Great Lakes employee listed the only "Pros" of the job as "bonuses." See, Exh. D.

[12] https://www.indeed.com/cmp/Great-Lakes-Higher-Education-Corporation?

65. Another former Great Lakes employee left a review on Indeed.com titled "Decent pay for this area of Wisconsin" and described the "Pros" of the job as "Insurances, bonuses/incentives." See, Exh. D.

66. On November 30, 2016, in response to a question posted on Indeed.com, a Great Lakes employee responded that the most stressful part about working at Great Lakes was "Probably the screaming customers or management barking down your ear telling you to fit their specific mold on how a call should go and what you need to say to fit their federal guidelines. ... or having every single call recorded and monitored. See, Exh. E.

67. Because of the number and complexity of repayment options available for federal loans, a conversation about alternative repayment plans and the borrower's financial situation is usually time-consuming.

68. As a result, engaging in lengthy and detailed conversations with borrowers about their particular financial situation and trying to determine the income-driven repayment plan that is most appropriate for each borrower would have been financially detrimental for those employees.

69. Additionally, since a student loan borrower is required to submit a paper or online application, and include certain income tax documentation with that application, to enroll in an income-driven repayment plan, the process of enrolling a borrower in such plans sometimes requires multiple, lengthy conversations with the borrower.

70. In addition to the paperwork required to enroll a student loan borrower in an income-driven repayment plan, a student loan borrower in such a plan must also complete an annual re-certification form each year to document his or her current income and family size, which is then used to adjust the borrower's monthly income-based payment amount.

71. Processing this renewal paperwork further increases the necessary man-hours required to operate Defendants' business. Stated differently, having student loan borrowers on income driven plans is more costly to Defendants.

72. As the volume of income-driven repayment plan applications and renewals received by Defendants increases, Defendants also have to increase the size of its staff to review and process those forms, thereby increasing operating costs.

73. In sum, counseling borrowers about alternative student loan payment plans and enrolling those student loan borrowers in income-driven repayment plans is costly for Defendants and its employees.

74. In contrast, enrollment of student loan borrowers in forbearance can often be completed over the phone, in a matter of minutes, and generally without the submission of any paperwork.

75. As compared to the staff resources and time expenditure required to enroll and renew borrowers in income-driven repayment plans, enrolling borrowers in forbearance is substantially less expensive for Defendants and is or was financially beneficial for its employees.

76. Consequently, Defendants "experts" have routinely failed to invest the time and effort necessary to help financially distressed student loan borrowers identify and enroll in affordable repayment plans most appropriate for their financial situation.

77. Consequently, to increase its profits, Defendants routinely engaged in unfair, deceptive, and illegal practices that allows Defendants to profit when student loan borrowers are placed in a forbearance, placed in an alternative repayment plan, including, but not limited to an income-driven repayment with a low or $0.00 monthly payment.

78. Through this Complaint, Plaintiff seeks declaratory relief, as well as compensation for actual losses, punitive or other exemplary damages, as available under applicable law, as well as

attorney's fees and costs of this litigation, and pre- and post-judgment interest, on her own behalf and on behalf of a class of those similarly situated, for the violation of various laws, including but not limited to, the unfair, deceptive, and illegal acts and practices of Defendants.

PLAINTIFF SPECIFIC ALLEGATIONS

79. Plaintiff started repayment of her student loans on or about December 14, 2009.

80. Plaintiff entered into forbearance on or about November 7, 2012.

81. Plaintiff re-entered repayment of her student loans on or about April 8, 2013.

82. Plaintiff re-entered forbearance on or about April 25, 2013.

83. Plaintiff re-entered repayment of her student loans on or about August 12, 2013.

84. Plaintiff re-entered forbearance on or about September 30, 2013.

85. Plaintiff re-entered forbearance on or about March 3, 2014.

86. Plaintiff entered unemployment deferment on or about March 11, 2014.

87. Plaintiff re-entered repayment on or about September 11, 2014.

88. Plaintiff called Defendants on multiple occasions seeking information regarding her student loans and repayment options.

89. On or about September 30, 2013, Plaintiff changed jobs which resulted in Plaintiff receiving considerably less income.

90. Due to this, on or about September 30, 2013, Plaintiff called Defendants.

91. Plaintiff was routed to one of Defendants' call center employees.

92. Upon information and belief, Defendants' call center employee followed a script when talking to and dealing with Plaintiff.

93. Upon information and belief, Defendants' scripts led the call center employee to steer Plaintiff into forbearance.

94. Plaintiff is unable to access this phone recording, and it remains in the exclusive possession of Defendants.

95. During a phone conversation with Defendants, Plaintiff was given the option of forbearance or deferment due to her current situation.

96. Plaintiff was not informed of alternative or income driven repayment options.

97. These other alternative or repayment options would have likely allowed Plaintiff a $0.00 or extremely low monthly payment, and would have counted as qualifying payments towards loan forgiveness.

98. Instead, Plaintiff was, pursuant to Defendants' policy and practice, steered into forbearance and Defendants delayed Plaintiff entry into an alternate or income driven repayment plan.

99. Defendant led Plaintiff to believe that forbearance was her best option.

100. Plaintiff trusted that Defendants were working in her interest and relied on the information provided.

101. On or about December 31, 2013, Plaintiff became unemployed.

102. On or about March 10, 2014, Plaintiff called Defendants.

103. Plaintiff was routed to one of Defendants' call center employees.

104. Upon information and belief, Defendants' call center employee followed a script when talking to and dealing with Plaintiff.

105. Upon information and belief, Defendants' scripts led the call center employee to steer Plaintiff into forbearance.

106. Plaintiff is unable to access this phone recording, and it remains in the exclusive possession of Defendants.

107. During a phone conversation with Defendants, Plaintiff was given the option of forbearance or deferment due to her current situation.

108. Plaintiff was not informed of alternative or income driven repayment options.

109. These other alternative or repayment options would have likely allowed Plaintiff a $0.00 or extremely low monthly payment, and would have counted as qualifying payments towards loan forgiveness.

110. Instead, Plaintiff was, pursuant to Defendants' policy and practice, steered into deferment and Defendants delayed Plaintiff entry into an alternate or income driven repayment plan.

111. Defendant led Plaintiff to believe that unemployment deferment was her best option.

112. Plaintiff trusted that Defendants were working in her interest and relied on the information provided.

CLASS ACTION ALLEGATIONS

113. Plaintiff brings this action pursuant to Rules 23(a) and 23(b)(3) of the Federal Rules of Civil Procedure on behalf of herself and classes of persons similarly situated for declaratory and monetary relief, and defined as:

> **Illinois Consumer Fraud Class**
> All individuals who reside in Illinois or who entered into student loan contracts in Illinois, who since February 21, 2014, were subjected to Defendants' unfair and deceptive conduct, as further described in Count I, and were placed in forbearance without being advised of alternate repayment options.
>
> **Illinois Constructive Fraud Class**
> All individuals who reside in Illinois or who entered into student loan contracts in Illinois, who since February 21, 2012 were subjected to Defendants' unfair, misleading, and/or deceptive conduct, as further described in Count II, who were placed in forbearance without being advised of alternate repayment options.

114. Specifically excluded from the Illinois Consumer Fraud Class and the Illinois Constructive Fraud Class, (collectively the "Classes") are: (a) any officers, directors, or employees of Defendants, or any of their subsidiaries; (b) any judge assigned to hear this case (or spouse or family

member of any assigned judge); (c) any employee of the Court; and (d) any juror selected to hear this case.

115. Plaintiff asserts claims against Defendants, individually and on behalf of all class and members for violations of the law as set forth below.

116. The members of the Classes are ascertainable from objective criteria.

117. If necessary to preserve the case as a class action, the Court itself can redefine the Classes, create additional classes or sub-classes, or both.

118. The requirements of Rule 23(a) are satisfied for the proposed Class because the members of the proposed Classes are so numerous and geographically dispersed that joinder of all its members is impracticable. Although the exact number and identity of each Class member is unknown at this time, there are believed to be at least thousands of potential Class members. Therefore, the "numerosity" requirement of Rule 23(a)(1) is met.

119. The commonality requirement of Rule 23(a)(2) is satisfied because there are questions of law or fact common to Plaintiff and the other members of the proposed Classes. Among those common questions of law or fact are:

a. whether Defendants have a common policy and practice of steering student loan borrowers into forbearance;

b. whether Defendants have a common policy and practice of not adequately describing alternative repayment options to student loan borrowers;

c. whether Defendants have a fiduciary relationship with Plaintiff and Class Members;

d. whether Defendants violated the Illinois Consumer Fraud and Deceptive Business Practices Act and harmed Plaintiff and Class Members; and

e. whether Defendants engaged in constructive fraud and harmed Plaintiff and Class Members.

120. Plaintiff's claims are typical of the claims of the proposed Classes that she seeks to represent, as described above, because they arise from the same course of conduct by Defendants and

are based on the same legal theories. Further, Plaintiff seeks the same form of relief for herself and the proposed Classes. Therefore, the "typicality" requirement of Rule 23(a)(3) is satisfied.

121. Because her claims are typical of the proposed Classes that Plaintiff seeks to represent, Plaintiff has every incentive to pursue those claims vigorously. Plaintiff has no conflicts with, or interests antagonistic to the proposed Classes. Plaintiff, a victim of unscrupulous student loan servicing and general business practices, is committed to the vigorous prosecution of this action, which is reflected in her retention of competent counsel experienced in complex and challenging litigation.

122. Plaintiff's counsel satisfies the requirements of Rule 23(g) to serve as counsel for the proposed Class. Plaintiff's counsel (a) has identified and thoroughly investigated the claims set forth herein; (b) has previously been lead counsel in student loan servicer litigation; (c) has been involved in complex class litigation; (d) has extensive knowledge of the applicable law; and (d) has the resources to commit to the vigorous prosecution of this action on behalf of the proposed Class. Accordingly, Plaintiff satisfies the adequacy of representation requirements of Rule 23(a)(4).

123. This action also meets the requirements of Rule 23(b)(3). Common questions of law or fact, including those set forth above, exist as to the claims of all members of the proposed Class and predominate over questions affecting only individual Class members, and a class action is superior – if not the only method – for the fair and efficient adjudication of this controversy.

124. Class treatment will permit large numbers of similarly situated student loan borrowers to prosecute their respective claims in a single forum simultaneously, efficiently, and without the unnecessary duplication of evidence, effort, and expense that numerous individual actions would produce.

125. This action is manageable as a class action. Notice may be provided to members of the proposed Class by first-class mail and through the alternative means, including electronic mail (email), internet postings including banner ads, distribution through social media, including sponsored

postings on Facebook and Twitter, and by publication. Thus, the superiority and manageability requirements of Rule 23(b)(3) are satisfied.

COUNT I – ON BEHALF OF THE ILLINOIS CONSUMER FRAUD CLASS VIOLATION OF THE ILLINOIS CONSUMER FRAUD AND DECEPTIVE BUSINESS PRACTICES ACT

126. Plaintiff incorporates by reference all preceding paragraphs as if fully set forth herein.

127. Pursuant to the Illinois Consumer Fraud and Deceptive Business Practices Act, "merchandise" includes "any objects, wares, goods, commodities, intangibles, real estate situated outside the State of Illinois, or services." 815 Ill. Comp. Stat. 505/1(b).

128. Defendants' services are "merchandise" as defined by 815 Ill. Comp. Stat. 505/1(b).

129. Pursuant to 815 Ill. Comp. Stat. 505/2:

> Unfair methods of competition and unfair or deceptive acts or practices, including but not limited to the use or employment of any deception, fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact, or the use or employment of any practice described in Section 2 of the "Uniform Deceptive Trade Practices Act", approved August 5, 1965, in the conduct of any trade or commerce are hereby declared unlawful whether any person has in fact been misled, deceived or damaged thereby. In construing this section consideration shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to Section 5 (a) of the Federal Trade Commission Act.

130. Defendants engaged in numerous unfair acts and practices in the servicing of Plaintiff's and Illinois Consumer Fraud Class Members loans, including:

a. Holding themselves out to be experts in student loan servicing issues or offering "expert" help;

b. Holding themselves out as working on Plaintiff's and Class Members' behalves, when they worked for the benefit of Defendants;

c. Holding themselves out as understanding all student loan options, and offering those options to student loan borrowers, including Plaintiff and Class Members;

d. Offering forbearance as a recommended or best option to struggling student loan borrowers who could have enrolled in a much better repayment plan;

e. Failing to provide struggling student loan borrowers all of their options, or discussing income driven repayment plans prior to enrolling student loan borrowers in forbearance;

f. Failing to follow up with student loan borrowers after a first forbearance and explaining or alerting student loan borrowers to other, more advantageous repayment options; and

g. Systematically steering struggling student loan borrowers, including Plaintiff and Class Members into forbearance without explaining, or even identifying other, better repayment options, based in part of Defendants' failure to adequately staff its operations, providing scripts that call center employees had to follow, reviewing call center employees on call duration and how many times a student loan borrower was cut off mid-sentence, or by providing other incentives for quick call times.

131. Defendants' practices, as set forth above, were unfair in that:

a. The practices were immoral, oppressive and unscrupulous in that they were imposed upon student loan debtors with no meaningful choice, imposed an unreasonable burden on student loan borrowers and was so oppressive as to leave student loan borrowers with little alternative but to submit to the practices. Student loan borrowers had no control over the Defendants' acts, and

b. Student loan borrowers cannot reasonably avoid the injury caused by Defendants', as Defendants are in ultimate control of student loan payment processing, hold themselves out as working in the best interest of the student loan borrowers, hold themselves out as experts who have all of the student loan borrowers information available to them and will work for the student loan borrower to help the student loan borrower with repayment options, and control the information provided by Defendants' employees to struggling student loan borrowers, incentivizing not supplying alternative options to forbearance and instead steering student loan borrowers into forbearance or deferment, thereby delaying student loan borrowers entry into alternate or income driven repayment plans.

132. Defendants' unfair practices and conduct were directed toward Plaintiff and other Illinois Consumer Fraud Class Members.

133. Defendants' intended for student loan borrowers, including Plaintiff and Illinois Consumer Fraud Class Members, to rely on Defendants' acts and practices, Defendants' claims of "expert" status, Defendants' claims of working for the interest of student loan borrowers, Defendants'

claims of working to "serve" Plaintiff and Illinois Consumer Fraud Class Members and Defendants' recommendations (or lack thereof).

134. Defendants also seek to discourage Plaintiff and Illinois Consumer Fraud Class Members from obtaining other student loan related help or advice.

135. Plaintiff did rely on information contained on Defendants website, but the exact statements cannot be recalled as Defendants maintain exclusive control the information contained on their website for pages that have been changed, modified, removed, or deleted – and as set forth above, these pages are not accessible via the Internet Archive.

136. Plaintiff also did rely on other contacts and other communications between Plaintiff and Defendants including information provided to Plaintiff by Defendants. However, Defendant is in exclusive control of the exact information provided, including specifics as to conversations between Plaintiff and Defendant, and information provided through these other communications.

137. Defendants' unfair and deceptive practices occurred during the course of conduct involving trade or commerce, specifically the servicing and collection of student loan debts.

138. Plaintiff and Illinois Consumer Fraud Class Members incurred damages due to the unfair and deceptive practices, including but not limited to the misrepresentations and omissions of Defendants, who held themselves out as "experts" who work to "serve" student loan borrowers, working on the behalf of struggling student loan borrowers, and helping them make sure everything goes as smoothly as possible while simultaneously steering Plaintiff and members of the Illinois Consumer Fraud Class into forbearance and deferment, ultimately delaying Plaintiff and Illinois Consumer Fraud Class Members entry into alternate or income driven repayment plans.

139. Due to Defendants unfair and deceptive practice of steering Plaintiff and Illinois Consumer Fraud Class Members into forbearance and deferment, instead of other, better suited alternative or income-driven repayment plans, Plaintiff and Illinois Consumer Fraud Class Members

suffered actual damages, including, at least, being prevented from capitalizing on months of low or $0.00 monthly payments that qualify as payments towards loan-forgiveness programs.

140. Due to Defendants unfair and deceptive practice of steering Plaintiff and Illinois Consumer Fraud Class Members into forbearance and deferment, instead of other, better suited alternative or income-driven repayment plans, Plaintiff and Illinois Consumer Fraud Class Members suffered actual damages, including, at least, incurring extra, unnecessary interest – which accrues daily – on his or her student loans, which is capitalized if not paid at the end of a forbearance or deferment, and increases the cost of the loan to Plaintiff and Illinois Consumer Fraud Class Members.

141. Due to Defendants unfair and deceptive practices, Defendants impermissibly delayed Plaintiff and Illinois Consumer Fraud Class Members from entering or enrolling in alternate or income driven repayment plans.

142. Plaintiff's and Illinois Consumer Fraud Class Members' damages were directly and proximately caused by Defendants' unfair acts and practices, as alleged herein.

143. Defendants' conduct was addressed to the market generally and otherwise implicates consumer protection concerns and, therefore, a consumer nexus exists in that:

a. Defendants' acts and practices in servicing and collecting student loans, including claims of "expert" status and claims of working on the behalf of student loan borrowers were directed to all individuals whose loans were serviced by Defendants; and

b. Defendants' acts and practices otherwise implicate consumer protection concerns including, but not limited to, promoting fair and upright business practices.

144. Plaintiff, an Illinois resident is authorized to bring a private action under the Illinois Consumer Fraud and Deceptive Businesses Practices Act pursuant to 815 Ill. Comp. Stat. 505/10(a).

145. In sum, Plaintiff and the Illinois Consumer Fraud Class Members were subjected to Defendants' misrepresentations regarding their "expert" status, their access to and understanding of Plaintiff's and Class Members' situations, their work for the benefit of Plaintiff and Class Members, including that Defendants were there to "serve" Plaintiff and Class Members, and Defendants policy and practice of steering student loan borrowers into forbearance or deferment while omitting alternative and income driven repayment options. This was done during (and upon information and belief, before) the Illinois Consumer Fraud Class Period, February 23, 2014 to the present, with Plaintiff and Class Members residing in Illinois, or who had signed loan contracts in Illinois, generally via phone or electronic mail (email), by and through customer service representatives giving false information (that forbearance and deferment were the student loan borrowers only option) or purposefully failing to discuss, or counsel Plaintiff, Class Members and other similarly situated loan borrowers income driven or other alternative payment options.

146. As alleged herein, Defendants' conduct was willful and intentional and done with evil motive or reckless indifference to the rights of others. Punitive damages are thus warranted.

147. Reasonable attorneys' fees and costs should be awarded pursuant to 815 Ill. Comp. Stat. 505/10a.

COUNT II – ON BEHALF OF THE FEDERAL CLASS
CONSTRUCTIVE FRAUD

148. Plaintiff incorporates by reference all preceding paragraphs as if fully set forth herein.

149. Defendants, acting as Plaintiff's and Illinois Constructive Fraud Class Members' student loan servicer, have a confidential and/or fiduciary relationship with Plaintiff and all Illinois Constructive Fraud Class Members, as Defendants are privy to student loan borrowers private, confidential information, including family size and arrangements, income information, and tax information, and Defendants represent to student loan borrowers that Defendants are "experts," have

access to student loan borrowers information (and therefore unique situation), and act for the benefit of student loan borrowers, including providing student loan borrowers information.

150. As such, Defendants act in a position of advisor or counselor as reasonably to inspire confidence in student loan borrowers, taking the role of fiduciary or quasi-fiduciary.

151. Defendants, either explicitly or impliedly indicate to student loan debtors that they will act in good faith and in the best interest of the student loan borrower.

152. The relative position of the Defendants to student loan borrowers, including Plaintiff and Illinois Constructive Fraud Class Members, is such that Defendants have the power and means to take advantage of or exercise undue influence over the student loan borrowers.

153. To increase its profits, rather than acting with scrupulous fairness and good faith in their dealings with student loan borrowers, and refraining from using their position to student loan borrower's detriment and their own advantage, Defendants made representations or omitted material information, performed certain conduct, and breached their confidential or fiduciary relationship with student loan borrowers, including Plaintiff and Illinois Consumer Fraud Class Members.

154. Defendants accomplish this breach of a confidential or fiduciary relationship by misrepresenting, concealing, or omitting the detrimental effects of entering or continuing in forbearance, omitting other alternative repayment options, including income driven repayment options that would allow $0.00 monthly payments holding themselves out as "experts," holding themselves out as having all student loan borrowers information, and holding themselves out as working in the best interest of student loan borrowers, including Plaintiff and the Illinois Constructive Fraud Class Members.

155. As such, Defendants operated in a way most beneficial to themselves and, often, in a manner directly opposite of that which would be beneficial to the student loan borrower, despite

Defendants holding themselves out as "experts," knowledgeable about student loan borrowers' situations, and acting in the best interest of student loan borrowers.

156. Defendants' fraudulent actions were directed toward Plaintiff and Illinois Constructive Fraud Class Members.

157. Defendant intended for student loan borrowers, including Plaintiff and Illinois Constructive Fraud Class Members, to rely on their actions, statements, omissions, and fraudulent misrepresentations in determining how to proceed with paying (or forbearing) their student loan payments.

158. Defendants held themselves out to all student loan borrowers as "experts," held themselves out as knowledgeable regarding student loan borrowers situations, and held themselves out as working on behalf and to the benefit of student loan borrowers.

159. Defendants also intended for student loan borrowers, including Plaintiff and Illinois Constructive Fraud Class Members, to rely on their documents, correspondence, phone conversations, "expert" advice, website, and potentially other documents and communications.

160. These communications were often not only wrong, but made fraudulently or contained material omissions.

161. As such, Defendants intended for student loan borrowers to rely on their actions and fraudulent misrepresentations and, therefore, create, or cause a likelihood of, confusion or of misunderstanding about the "best" way for the student loan borrowers to proceed with repayment or forbearance of their student loans, including omitting information regarding income driven or alternative repayment options, signaling to student loan borrowers that forbearance was the best way to proceed.

162. <u>Plaintiff also did rely on contacts and other communications between Plaintiff and Defendants including information provided to Plaintiff by Defendants. However, Defendant is in</u>

exclusive control of the exact information provided, including specifics as to conversations between Plaintiff and Defendant, and information provided through these other communications.

163. Defendants' actions occurred during the presentation of information involving loan servicing and options available to Plaintiff after becoming unemployed and unable to pay her student loans. The information was presented over the telephone in October 2013.

164. Plaintiff's and Illinois Constructive Fraud Class Members' damages were directly and proximately caused by Defendant's breach of a confidential or fiduciary relationship.

165. Due to Defendants unlawful practice of steering Plaintiff and Illinois Constructive Fraud Class Members into forbearance and deferment, instead of other, better suited alternative or income-driven repayment plans, Plaintiff and Illinois Constructive Fraud Class Members suffered actual damages, including, at least, being prevented from capitalizing on months of low or $0.00 monthly payments that qualify as payments towards loan-forgiveness programs.

166. Due to Defendants unlawful practice of steering Plaintiff and Illinois Constructive Fraud Class Members into forbearance and deferment, instead of other, better suited alternative or income-driven repayment plans, Plaintiff and Illinois Constructive Fraud Class Members suffered actual damages, including, at least, incurring extra, unnecessary interest – which accrues daily – on his or her student loans, which is capitalized if not paid at the end of a forbearance or deferment, and increases the cost of the loan to Plaintiff and Illinois Constructive Fraud Class Members.

167. Due to Defendants unfair and deceptive practices, Defendants impermissibly delayed Plaintiff and Illinois Constructive Fraud Class Members from entering or enrolling in alternate or income driven repayment plans.

168. As such, Plaintiff and all others similarly situated have been damaged as a direct and proximate result of Defendants' willful, intentional, and outrageous conduct, warranting punitive damages for Defendants' irreprehensible behavior.

COUNT III
NEGLIGENT MISREPRESENTATION

169. Plaintiff incorporates by reference all preceding paragraphs as if fully set forth herein.

170. To increase their profits, Defendants, in the course of their business, profession or employment, or any other transaction in which they have a pecuniary interest, supplied false information or omitted material information for the guidance of student loan borrowers.

171. Defendants accomplish this by misrepresenting their "expert" status, misrepresenting that they work for the benefit of student loan borrowers, and misrepresenting or omitting material information, including alternative or income driven student loan repayment options which may have offered a $0.00 monthly repayment amount.

172. Some of Defendants' misrepresentations and/or omissions include, but are not limited to:

a) Defendants claim to be "experts" regarding student loan;

b) Defendants work for the benefit of student loan borrowers;

c) Forbearance or deferment are the only options for struggling student loan borrowers; and

d) Failure to discuss or counsel student loan borrowers on alternative and income driven repayment plans.

e) Offering forbearance as a recommended or best option to struggling student loan borrowers who could have enrolled in a much better repayment plan;

f) Failing to provide struggling student loan borrowers all of their options, or discussing income driven repayment plans prior to enrolling student loan borrowers in forbearance;

g) Systematically steering struggling student loan borrowers, including Plaintiff and Class Members into forbearance without explaining, or even identifying other, better repayment options, based in part of Defendants' failure to adequately staff its operations or by providing other incentives for quick call times

173. Upon information and belief, Defendants employed a policy and practice, including training all employees, to steer Plaintiff and other struggling student loan borrowers into forbearance through presenting misleading information.

174. As such, Defendants are operating in a way most beneficial to themselves and, often, in a manner directly opposite of best interest for the student loan borrower, including Plaintiff, despite holding themselves out as acting in the best interest of the student loan borrower.

175. Defendants' misrepresentations were directed toward Plaintiff.

176. Defendants failed to exercise reasonable care or competence in obtaining or communicating the information.

177. Defendants intended for student loan borrowers, including Plaintiff, to rely on their misrepresentations and omissions in determining whether to enter forbearance.

178. Plaintiff also did rely on other contacts and other communications between Plaintiff and Defendants including information provided to Plaintiff by Defendants. However, Defendant is in exclusive control of the exact information provided, including specifics as to conversations between Plaintiff and Defendant, and information provided through these other communications.

179. Defendants' also intended for student loan borrowers, including Plaintiff, to rely on their documents, correspondence, emails and website as true and correct, even though the website contained vague, inaccurate, and misleading information.

180. As such, Defendants intended for student loan borrowers, including Plaintiff, to rely on their misrepresentations and omissions and, therefore, create, or cause a likelihood of, confusion or of misunderstanding about the "best" path for the struggling student loan borrowers, including Plaintiff, what repayment options were available, what repayment options were beneficial, and how different choices would affect Plaintiff.

181. Defendants' misrepresentations and omissions occurred during the presentation of information involving services to collect student loan debt.

182. Plaintiff relied on Defendants misrepresentations and omissions and incurred damages due to (1) the misleading, vague, incomplete, and inaccurate information provided by Defendants, (2) being advised that forbearance was her only option, and not being able to receive a $0.00 or low payment amount under an income driven repayment plan, and (3) forgoing months of qualifying payments under an income driven plan due to Defendants misrepresentations and omissions.

183. Plaintiff's damages were directly and proximately caused by Defendants' fraudulent misrepresentations.

184. As such, Plaintiff has been damaged as a direct and proximate result of Defendants' conduct, warranting punitive damages for Defendants' irreprehensible behavior.

185. Defendants' conduct was outrageous and done with a bad motive or with reckless indifference to the interests of others. Punitive damages are thus warranted, in order to deter Defendants and other from engaging in similar conduct in the future, as well as to provide additional compensation, retribution and an incentive to prevent injustices that might otherwise go unredressed.

PRAYER FOR RELIEF

Plaintiffs, on behalf of herself and all others similarly situated, request:

A. An Order certifying this matter as a class action pursuant to FED. R. CIV. P. 23;

B. Entry of judgment finding:

   i. Defendants violated the Illinois Consumer Fraud and Deceptive Business Practices Act;

   ii. Defendants are guilty of constructive fraud; and

   iii. Defendants are guilty of negligent misrepresentation; and

C. Monetary damages including compensatory, exemplary, and punitive damages to which Plaintiffs, Illinois Consumer Fraud Class Members and Illinois Constructive

Fraud Class Members are entitled and will be entitled at the time of trial, in an amount exceeding $5,000,000;

D. Pre- and post-judgment interest;

E. The costs of this action;

F. Reasonable attorneys' fees; and

G. Such other and further relief as the Court deems proper.

DEMAND FOR JURY TRIAL

Plaintiff hereby requests a jury trial on all issues so triable.

Respectfully submitted,

Dated: May 15, 2017

By: */s/ Brandon M. Wise*
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COUNSEL FOR PLAINTIFF AND THE CLASSES

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was filed on May 15, 2017 with the Clerk of the Court using the CM/ECF E-Filing System which will send notice and allow access to all counsel of record.

/s/ Brandon M. Wise