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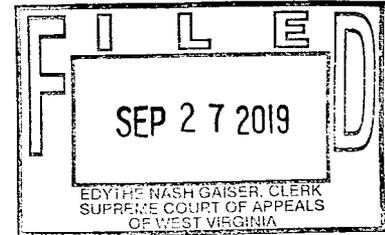
STATE OF WEST VIRGINIA, *ex rel.*
NAVIENT SOLUTIONS, LLC,

Petitioner,

v.

THE HONORABLE RONALD E. WILSON,
JUDGE OF THE 1ST CIRCUIT COURT
OF WEST VIRGINIA AND REBECCA L.
BROGAN-JOHNSON,

Respondents.



PETITION FOR WRIT OF PROHIBITION

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PETITION FOR WRIT OF PROHIBITION

Pursuant to W.Va. R. App. P. 16, the State of West Virginia, upon the relation of Navient Solutions, LLC (“NSL”), seeks a writ of prohibition pursuant to the original jurisdiction of this Court. In support of this petition for relief against the actions of Respondent The Honorable Ronald E. Wilson, Judge of the Circuit Court of Ohio County, West Virginia (“Respondent” or the “Circuit Court”), NSL submits the following verified statement of the case and the facts, pertinent argument showing why relief should be granted, and an appendix of documentary proof.

I. QUESTIONS PRESENTED

1. Whether the Circuit Court exceeded its legitimate powers and committed clear legal error in failing to issue findings of fact and conclusions of law consistent with *State ex rel. Allstate Co. v. Gaughan*.
2. Whether the Circuit Court exceeded its legitimate powers and committed clear legal error in failing to find Plaintiff’s claims preempted by federal law, where all claimed wrongdoing were actions required by and in compliance with pertinent federal regulations under the Higher Education Act.
3. Whether the Circuit Court exceeded its legitimate powers and committed clear legal error in failing to find that Plaintiff has *not* presented and maintained a cognizable claim for Breach of Contract.
4. Whether the Circuit Court exceeded its legitimate powers and committed clear legal error in failing to find that Plaintiff should be estopped from pursuing her claims because she failed to act on relief offered to her in resolution of a Consumer Financial Protection Bureau Complaint she initiated.

II. STATEMENT OF THE CASE

Plaintiff, Rebecca L. Brogan-Johnson, brought the underlying lawsuit alleging state law violations of the West Virginia Consumer Credit and Protection Act (WVCCPA) in relation to communications about the monthly payment amount on her current Federal Consolidation Student Loan (the “Loan”). *See generally* Compl. (App. 000330 – App. 000346). Plaintiff alleges that NSL has failed to properly communicate its corrected application of an incentive interest rate she

was offered by one of the Loan's previous servicers. *Id.* at ¶¶ 19 – 34 (App. 000337 – App. 000338). Plaintiff also claims that NSL is now improperly applying the incentive rate, *see id.* at ¶¶ 36, 44, 58, 69 (App. 000339 – App. 000343), despite Plaintiff not offering any contractual proof of the provisions of the incentive rate program. *See Compl. generally.*

To be sure, NSL has always honored the incentive rate; but—as *required by federal law*—has applied the interest rate to the accumulation of interest, not to the calculation of monthly payment. A review of the loan origination, consolidation, and subsequent servicing by institutions other than NSL provides necessary context and demonstrates that all of NSL's actions in servicing Plaintiff's Loan were *required by federal law*.

Plaintiff's Loan is a product of several federally guaranteed student loans made pursuant to the Federal Family Education Loan Program (FFELP)¹, a program authorized by the Higher Education Act of 1965 (HEA). *See* FFELP Consolidation Loan Application and Promissory Note (App. 000028 – App. 000029). The interest rates for federally guaranteed student loans made under the FFELP are established by Congress and the United States Department of Education. *See* 34 C.F.R. § 682.402(a). Plaintiff consolidated Loan was disbursed in October 2002. *Id.* For Federal Consolidation Loans disbursed at that time, the regulations provide:

“For a Consolidation loan for which the application was received by the lender on or after October 1, 1998 and prior to July 1, 2010, the interest rate for the portion of the loan that consolidated loans other than HEAL loans is a fixed rate that is the lesser of – **(A)** The weighted average of interest rates on the loans consolidated, rounded to the nearest higher one-eighth of one percent; or **(B)** 8.25 percent.

¹ Throughout this litigation, Plaintiff has argued, without factual basis, that her Loan is not subject to federal student loan regulations. *See e.g.* Pl.'s Reply to Def.'s Resp. to Pl.'s Mot. for Summ. J. at 8 – 9 (App. 000302 - 000303) (“Navient has failed to Establish that the Plaintiff's Repayment Interest Rate is Governed by the Higher Education Act of 1965.”). Plaintiff maintains that the interest rate on her federal student loans is not governed by the Higher Education Act. *Id.* In fact, in her Combined Response Motion, Plaintiff titles an entire section of her argument “Navient has Failed to Establish that the Plaintiff's Repayment Interest Rate is Governed by the Higher Education Act of 1965.” *Id.* Plaintiff provides “there is no genuine basis in this record to make this assumption.” *Id.* This statement by Plaintiff is at best a reflection of Plaintiff's failure to review nearly any of the documents filed in this case, including exhibits to her own motions.

34 C.F.R. § 682.202(a)(4).

When the Loan was initially consolidated, Plaintiff was mailed a “Loan Repayment and Disclosure Schedules for loans guaranteed under the Higher Education Act of 1965” by her consolidating lender, Citibank (New York State), as trustee for The Student Loan Corporation. *See* Pl.’s Mem. in Supp. of Mot. for Summ. J. at Ex. 3 (App. 000034). Based on the formula set forth in 34 C.F.R. § 682.202(a)(4), Citibank set the interest rate for the Loan at 3.75%. *Id.*

On or about January 20, 2003, Plaintiff’s consolidating lender, Citibank, sent Plaintiff a letter advising her that her request to add three additional student loans to the Loan had been completed, and that as a result, her new principal balance would be \$73,322.89. *Id.* at Ex. 4. (App. 000036). Because the addition of the three student loans to her consolidation increased the weighted average of interest rates on the loans subject to consolidation, the contractual interest rate on the Loan was set at 4.00%. *Id.* at Ex. 5 (App. 000038).

Approximately eight years later, Citibank sold the Loan. NSL, then known as Sallie Mae, Inc., first began servicing the Loan, effective September 16, 2011. On September 20, 2011, Sallie Mae, Inc. sent Plaintiff a letter informing her that the Loan had been transferred to it for servicing. *See* NSL’s Mem. in Support of Mot. for Summ. J. at Ex. 1 (App. 000179 – App. 000180).

Plaintiff contends she qualified for a repayment incentive program offer by Citibank, which provided a reduced rate of interest given that Plaintiff maintained certain payment consistencies. Pl.’s Mem. in Supp. of Mot. for Summ. J. at 2 – 3 (App. 000006 – App. 000007). The specific terms of this incentive program are unknown, because *Plaintiff has not produced a contract or any other written documents which contain the particular terms of the incentive program.*

NSL itself has no records or documents which provide for these specific terms. Nonetheless, based on prior account statements and NSL’s general familiarity with such voluntary

incentive programs—which are specifically authorized under Dept. of Education regulations, *see* 34 C.F.R. § 685.211—NSL honored the claimed incentive rate, and has calculated the accumulation of interest on the Loan at the incentive rate of 3.00% ever since it began servicing the Loan in 2011. *See* NSL’s Mem. in Support of Mot. for Summ. J. at Ex. 1 (App. 00017 – App. 000180).

However, U.S. Department of Education regulations mandate that Plaintiff’s Consolidation Loan must be repaid within thirty years. *See* 34 C.F.R. § 682.209(e)(2):

“If the sum of the amount of the Consolidation loan and the unpaid balance on other student loans to the applicant – ... (vi) Is equal to or greater than \$60,000, the borrower shall repay the Consolidation loan in not more than 30 years.”

The same regulations establish that the repayment schedule for a Consolidation loan must be established by the lender. *Id.* at § 682.209(e)(4) (emphasis added).

In accordance with federal regulations, NSL determined that Plaintiff would be unable to repay the Loan in full within the federally mandated 30-year period based on her current monthly payment amount. Accordingly, NSL notified Plaintiff by letter dated April 10, 2016, that her monthly payment amount—but not the amount of interest accumulating on the loan—would be changed from \$307.11 to \$328.89—an increase of \$21.78. Pl.’s Mem. in Supp. of Mot. for Summ. J. at Ex. 8 (App. 000046 – App. 000047). The letter contained a disclosure statement which reads: “*Review of payment schedule.* Periodically, Navient may review your account and adjust your monthly payment amount to ensure that your loan will pay off by its stated loan term end date. We will inform you of any such change before the new monthly payment amount is due.” *Id.* (App. 000047). This is exactly what NSL did, as required by federal law, and is precisely why Plaintiff’s complaint is preempted.

On April 17, 2016, Plaintiff wrote NSL asking for a more detailed explanation of this payment increase. *Id.* at Ex. 10 (App. 000054). On the same day, NSL responded, explaining that the adjustment in payment was necessary because Plaintiff's Federal Consolidated Loan would not be paid off in the time frame set by Federal Regulations. *Id.* On May 15, 2016, Plaintiff again asked for an explanation and copies of the loan amortization schedules. *Id.* (App. 000055). NSL responded that same day, referencing its April 10, 2016, letter, reiterating that the payments were adjusted to ensure payment was made within the appropriate, contracted-for time period. *Id.*

On June 5, 2016, Plaintiff wrote NSL, for a third time, and requested amortization schedules, promissory note, and other loan documents. *Id.* (App. 000056 – App. 000057). NSL responded, the same day, explaining again that:

a review of your account after your terms were aligned indicated that the minimum monthly payment amount for your loan(s) needs to be modified to ensure your loan(s) will be paid off by your agreed upon loan term end date. As a result, your payment amount was adjusted so that your loans(s) will be paid off as scheduled. A letter explaining the change in your payment amount was sent via U.S. Mail on April 26, 2016. The payment amount change will ensure that your consolidation loan is satisfied within the remaining repayment terms. Also, unpaid interest was not capitalized when your account was adjusted.

Id. (App. 000056).

And, on June 7, NSL provided Plaintiff with Plaintiff's Federal Consolidation Loan Application and Promissory Note. *Id.* (App. 000058 – App. 000059).

Plaintiff continued her inquiries and NSL continually and timely responded for the next several weeks. *Id.* (App. 000061 – 000066). Then, on September 5, 2016, Plaintiff filed a Complaint against NSL with the Consumer Financial Protection Bureau (CFPB), alleging:

Improper student loan collection: breach of contract; fraudulent, deceptive and misleading representation sin debt collection; collection by unfair and unconscionable means; and fraud. Navient redisclosed and realigned the terms of the consolidated student loan repayment to increase the monthly payment amount

after about 14 years of timely payments. No previous payment was ever late, and nearly all monthly payments were for more than the minimum amount due.

See Id. at Ex. 11, CFPB Compl. (App. 000068).

Plaintiff, in the CFPB Complaint, specified the desired resolution as:

Damages for breach of contract, statutory damages under state law for fraudulent, deceptive and misleading representations in debt collection, statutory damages under state law for collection by unfair and unconscionable means, damages for fraud. An investigation by the CFPB into the servicer's conduct for loans similarly situated and regulatory damages and/or prohibitions as warranted.

See NSL's Mem. in Support of Mot. for Summ. J. at Ex. 2 (App. 000182 – 000187).

NSL timely responded to Plaintiff's CFPB Complaint, addressing Plaintiff's concerns and again providing an explanation for the adjustment in monthly payment:

We reviewed your concerns raised to the CFPB regarding your Federal Consolidated Loan and attempted to reach you on September 8 and September 15, 2016 to discuss these concerns in more detail. Unfortunately, our attempts were unsuccessful and we haven't received a response to our outreach.

Recently Navient reviewed accounts to ensure that loans will be paid off within their repayment terms. After a review of your loan, we found that the minimum monthly payment amount needed to be modified to allow the loan to be paid off in the available repayment period. This increased your monthly payment amount from \$307.11 to \$328.89.

Your original interest rate is 4.00 percent. You are receiving a 1.00 percent interest rate reduction due to a timely payment customer incentive program. Navient calculates payment amounts based on the original interest rate. Please note that the increase in your payment amount would allow you to repay less interest over the life of your loan and likely pay your loan off sooner. We have attached a copy of your Promissory Note for your review, the Trust in Lending Disclosure Statement is not available.

We are willing to recalculate your payment amount using the discounted interest rate of 3.00 percent. This would decrease your payment to approximately \$303.17. Please keep in mind that your payment amount may change if your incentive program benefit is lost or you choose to utilize deferment, forbearance or a repayment option. If you are interested in lowering your payment to \$303.17, please contact us at 888-545-4199 at your earliest convenience.

Id. at Ex. 3 (App. 000189 – 000190).

The CFPB provided Plaintiff with a guideline of how to proceed with a complaint if she was not satisfied with the company (NSL's) response:

What happens next?

Review the company's response:

...

The company's response should include the steps they took, or will take, in response to your complaint.

If you're okay with the company's response, then you're finished! If you aren't okay with it, we want your feedback. You can call us to dispute it, or select "dispute" and share your feedback when you review the response online.

...

What happens if I dispute the company's response?

We use the feedback consumers like you provide about company responses to make decisions about which issues and companies to investigate. We also publish on our website which companies get the most disputes from consumers.

See September 19, 2016 CFPB Corr. to Plaintiff (App. 000192).

Following NSL's below response, the CFPB matter was closed because Plaintiff took no further action with respect to her complaint or the relief offered by NSL:

We've confirmed that your payment can be adjusted to \$303.17 for the remaining terms of your loan. We were unsuccessful in our attempts to reach you to discuss reducing the payment. If you are interested in doing so, you are welcome to contact us at 888-545-4199.

Id. at Ex. 4 (App. 000192 – 000196).

Plaintiff did not respond to NSL's request to "discuss reducing the payment." See *Id.* at Ex. 5, Affidavit of NSL representative, James M. Austin (App. 000198 – App. 000200). Plaintiff did not dispute NSL's response to Plaintiff's CFPB Complaint. *Id.* Rather, Plaintiff ignored NSL's offer and the CFPB dispute resolution procedures, instead opting to file this lawsuit in January of 2017—four (4) months after the closure of her CFPB Complaint. See *id.*; see Compl. (App. 000330 – App. 000346). Plaintiff alleges three causes of action: (1) Breach of Contract, (2) violations of

Section 127 of the WVCCPA, and (3) violations of Section 128 of the WVCCPA. Indeed, after the extensive exchange of written discovery in this matter, it was Plaintiff who, after a significant amount of inactivity, concluded no material issues of fact remained and initiated summary judgment briefing. *See* Circuit Court Docket Sheet, *compare* April 4, 2018 filing of Pl.’s Mot. for Summ. J. with last docketed activity of August 4, 2017 (App. 000367). NSL agreed no material issues of fact existed to stay determination of the clear questions of law and itself filed for summary judgment, arguing (1) that Plaintiff’s claims were preempted by the HEA and attendant regulations, (2) that Plaintiff failed to establish a prima facia claim for breach of contract, and (3) that Plaintiff’s claims were otherwise estopped because she had abandoned relief offered to her through the course of the CFPB complaint proceeding she initiated. *See* (App. 145 – App. 177).

Following extensive briefing from NSL and Plaintiff, the cross-motions for summary judgement were ripe for ruling on June 21, 2018. *See id.* The Docket reflects that on September 4, 2018, Judge Wilson entered an “Order Denying Plaintiff’s and Defendant’s Motions for Summary Judgment” (*see* Order at App. 000001 – 000002); however, this Order was not communicated to the parties until April 5, 2019. *See* footnote 1 of Notice of Intent to File Writ of Prohibition requesting issuance of findings of fact and conclusions of law consistent with *State ex rel. Allstate Co. v. Gaughan*, 203 W. Va. 358, 508 S.E.2d 75 (1998) (App. 000359 – App. 000361).

Judge Wilson’s two-page Order merely recited the summary judgement standard and concluded there “is a genuine issue of material fact in that the Defendant disputes certain claims made by Plaintiff and in that the Plaintiff disputes certain claims made by the Defendant.” (App. 000001 – App. 000002). Accordingly, NSL filed a “Notice of Intent to File Writ of Prohibition”, requesting the issuance of findings of fact and conclusions of law pursuant to *Gaughan*. (App. 000358 – App. 000360). NSL awaited such an issuance of the Court’s findings. NSL again, on

July 25, 2019, requested such findings consistent with *Gaughan*. See ltr. of July 25, 2019 from A. Zurbuch to Judge Wilson (App. 000361 – App. 000362). Judge Wilson responded to both requests for findings consistent with *Gaughan* with that Order on August 2, 2019, “Denying on the Ground of Redundancy Defendant’s Request for Findings of Fact and Conclusions of Law”. See Order (App. 000363 – 000366). It is from this August 2, 2019 Order and Judge Wilson’s Order Denying Summary Judgement (App. 000001 – App. 000002) that NSL seeks extraordinary relief.

III. SUMMARY OF ARGUMENT

Because Plaintiff seeks to advance claims under the WVCCPA which conflict with federal law, the claims are preempted. Plaintiff asks to enlarge NSL’s disclosure and servicing duties beyond what is required under the HEA and FFEL. NSL adjusted Plaintiff’s monthly payment amount to ensure Plaintiff’s loan would be paid off in the time mandated by federal law. NSL clearly communicated this roughly \$20 monthly increase to Plaintiff, following up with additional explanation when requested by Plaintiff. To be sure, all of NSL’s communications were guided by and in compliance with the HEA and its regulations. Now, Plaintiff, as a matter of law, may not advance claims under the WVCCPA because they undermine and directly conflict with the federal servicing laws governing Plaintiff’s Loan.

Plaintiff dwells upon the irrelevant to distract from the relevant. The record is clear that NSL’s servicing practices for student loan incentive rates comply with federal law. But rather than identifying any evidence which suggests NSL did not honor the incentive rate correctly, Plaintiff sought to avoid summary judgment by ignoring the record evidence, making assertions unsupported by the record evidence, and distracting the Court with immaterial facts and falsehoods. For the most obvious examples: (1) Plaintiff attempts to argue that her Federal Consolidation Loan is not even subject to federal oversight. This is nonsensical and should not be

an issue that needs to be addressed at this stage of litigation; and (2) in the face of federal laws which refute her allegations, Plaintiff cannot produce a contract to support her claims that NSL has somehow breached its obligations to her under the *federally ordained* incentive interest rate program.

“Judges are not like pigs, hunting for truffles buried in briefs.” *A. L. v. Jackson Cnty. Sch. Bd.*, 635 Fed. Appx. 774, 786-787 (11th Cir. 2015). Instead, as this Court has long held, it is incumbent upon the non-moving party to point to the record evidence, if any, that a genuine issue of material fact exists for trial. *Syl. Pt. 2 Tolliver v. Kroger Co.*, 201 W. Va. 509, 498 S.E. 2d 702. Because Plaintiff cannot do so, she attempted to poison the well with contradictions, assertions with no basis in the record, and immaterial facts in hopes that the Circuit Court would throw its hand up in frustration and deny the pending cross-motions for summary judgment. Indeed, this is precisely what occurred. But irrespective of the unnecessary confusion presented by Plaintiff, it was incumbent on the Circuit Court to address NSL’s dispositive legal arguments. *See Gaughan*, 203 W. Va. at 361 (Upon request, “trial courts are obligated to enter an order containing findings of fact and conclusions of law.”).

But now—viewing Plaintiff’s claims for what they are—this Court should instruct dismissal of this lawsuit because (1) Plaintiff’s claims are preempted by federal law, (2) Plaintiff has not introduced evidence to support a prima facie claim for breach of contract, and (3) Plaintiff abandoned an earlier resolution afforded through proceedings she initiated with the CFPB.

IV. STATEMENT REGARDING ORAL ARGUMENT

This case is appropriate for oral argument under Rule 19(a) because it involves both clear error “in the application of settled law,” namely the supremacy of federal law, as well as an “unsustainable exercise of discretion” by the Circuit Court to permit progression of (1) claims that

seek to expand duties beyond those required by federal law, (2) a breach of contract action on allegations of violation of non-existent contractual provisions, and (3) claims which should and could have been fully resolved through the course of a federal agency complaint process.

V. ARGUMENT

A. **Statement of Jurisdiction and Standard of Review.**

This Court has jurisdiction to hear this Petition for Writ of Prohibition under Article VIII, Section 3 of the West Virginia Constitution and pursuant to West Virginia Code §§ 51-1-3 and 53-1-2. *See also* W.Va. R. App. P. 16.

West Virginia Code § 53-1-1 provides that a right to a writ of prohibition shall lie, in part, where a Circuit Court “exceeds its legitimate powers.” W.Va. Code § 53-1-1; *James M.B. v. Carolyn M.*, 193 W. Va. 289, fn. 3, 456 S.E.2d 16, fn. 3, (1995); *State ex rel. Owners Ins. Co. v. McGraw*, 233 W. Va. 776, 780, 760 S.E.2d 590, 594 (2014) (citation omitted). An extraordinary writ of prohibition “lies only to restrain inferior courts from proceeding in causes over which they have no jurisdiction, or, in which, having jurisdiction, they are exceeding their legitimate powers and may not be used as a substitute for writ of error, appeal or certiorari.” *State ex rel. Owners Ins. Co. v. McGraw*, 233 W. Va. 776, 780, 760 S.E.2d 590, 594 (2014) (citation omitted). “Preemption is a question of law reviewed *de novo*.” Syl. Pt. 1, *Morgan v. Ford Motor Co.*, 224 W. Va. 62, 680 S.E.2d 77, 80 (2009).

In determining whether to issue the writ of prohibition for cases where the lower tribunal exceeded its legitimate powers, this Court examines five factors:

(1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal’s order is clearly erroneous as a matter of law; (4) whether the lower tribunal’s order is an oft repeated error or manifests persistent disregard for either

procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression.

Syl. Pt. 1, *State ex rel. Med. Assur. of W. Virginia, Inc. v. Recht*, 213 W.Va. 457, 583 S.E.2d 80 (2003) (quoting Syl. Pt. 4, *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996)).

All five factors need not be satisfied for the writ to issue, and the third factor—clear error of law—is given the most weight. See *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 15, 483 S.E.2d 12, 15 (1996) (“it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.”).

Here, the Circuit Court committed clear and serious error in (1) failing to enter obligatory findings of fact and conclusions of law consistent with *State ex rel. Allstate Co. v. Gaughan*; (2) failing to acknowledge and apply preemption under the HEA; (3) permitting a breach of contract action without *any evidence* of actual contract or particular contractual terms; and (4) permitting continued adjudication of Plaintiff's claims after resolution of a federal complaint adjudication before the CFPB. These errors warrant issuing a writ.

B. The Circuit Court Committed Clear Legal Error by Failing to and Refusing to Enter Findings of Fact and Conclusions of Law Consistent with the Obligation Set Forth in *State ex rel. Allstate Co. v. Gaughan*.

The non-discretionary duty of a complaining party to request findings of fact and conclusions of law before seeking an extraordinary remedy from this Court and the trial court's duty to oblige to such a request are clearly set forth in *Gaughan*:

A party seeking to petition this Court for an extraordinary writ based upon a non-appealable interlocutory decision of a trial court, must request the trial court set out in an order findings of fact and conclusions of law that support and form the basis of its decision. In making the request to the trial court, counsel must inform the trial court specifically that the request is being made because counsel intends to seek an extraordinary writ to challenge the court's ruling. When such a request is made, trial courts are obligated to enter an order containing findings of fact and conclusions of law. Absent a request by the complaining party, a trial court is under no duty to set out findings of fact and conclusions of law in non-appealable interlocutory orders.

Gaughan, Syl. Pt. 6.

Because the Circuit Court Order denying summary judgement merely stated the summary judgement standard and concluded material issues of fact existed (App. 000001 – App. 000002), NSL requested an Order containing findings of fact and conclusions of law (App. 000358 – App. 000360); (App. 000361 – App. 000362). By the Order of August 2, 2019, the Circuit Court denied NSL’s requests for findings of fact and conclusions of law, stating that that it adequately stated its “factual decision and its conclusion of law.” (App. 000365).

NSL disagrees that the Circuit Court adequately explained the reasoning behind its conclusion. This is not an insignificant lapse by the Circuit Court. Indeed, as this Court has observed, the import of conclusive findings on interlocutory orders is twofold. *First*, “findings of fact and conclusions of law is to provide an appellate court with a clear understanding of the lower court's decision.” *Gaughan* at 367, citing *Mayo v. Lakeland Highlands Canning Co.*, 309 U.S. 310, 316, 60 S.Ct. 517, 520, 84 L.Ed. 774 (1940); *Glover v. Johnson*, 855 F.2d 277, 284 (6th Cir.1988); *Wynn Oil Co. v. Purolator Chem. Corp.*, 536 F.2d 84, 85 (5th Cir.1976). *Second*, requiring the issuance of findings of fact and conclusions of law “serves the purpose of prompting the lower court ‘to fully and conscientiously consider the basis for [the] decision.’” *Id.* at 367 – 368, quoting *Finney v. Arkansas Bd. of Correction*, 505 F.2d 194, 212 n. 15 (8th Cir.1974). Upon these principles, this Court held:

that a party seeking to petition this Court for an extraordinary writ based upon a non-appealable interlocutory decision of a trial court, must request the trial court set forth in its order findings of fact and conclusions of law that support and form the basis of its decision. In making the request to the trial court, counsel must inform the trial court specifically that the request is being made because counsel intends to seek an extraordinary writ to challenge the court's ruling. When such a request is made, trial courts are obligated to enter an order containing findings of fact and conclusions of law.

Gaughan, 203 W. Va. at 368. NSL twice requested the Circuit Court to issue findings of fact and conclusions of law, satisfying its obligations under *Gaughan*. But NSL’s requests were not honored by the Circuit Court. Rather, exhibiting its failure to “fully and conscientiously consider the basis for [the] decisions” to deny NSL’s motion on *fundamental issues of law*, the Circuit Court failed to discharge an explicitly nondiscretionary duty. See Syl. Pt. 3. *State ex rel. Greenbrier Cty. Airport Auth. v. Hanna*, 151 W. Va. 479, 480, 153 S.E.2d 284, 285 (1967) (“Mandamus lies to require the discharge by a public officer of a nondiscretionary duty.”). Thus, refusal of the Circuit Court to comply with *Gaughan* is clear legal error.²

C. The Circuit Court Exceeded Its Authority and Clearly Erred by Failing to Conclude that The Federal Higher Education Act Preempts Plaintiff’s State Law Causes of Action.

Irrespective of the Circuit Courts refusal to comply with *Gaughan*, it committed clear legal error by failing to address NSL’s substantive legal arguments—including that of preemption under the HEA. Under the Supremacy Clause of the United States Constitution, federal legislation and regulation may preempt state law. See generally *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990). “The Supremacy Clause of the United States Constitution, Article VI, Clause 2, invalidates state laws that interfere with or are contrary to federal law.” Syl. Pt. 1, *Cutright v. Metropolitan Life Ins. Co.*, 491 S.E.2d 308 (W. Va. 1997). “Preemption is ‘compelled whether Congress’

² This Court maintains the flexibility and discretion “to treat petitions for extraordinary relief according to the nature of the relief sought rather than the writ pursued.” See, e.g. *State ex rel. TermNet Merch. Servs., Inc. v. Jordan*, 217 W. Va. 696, 699, 619 S.E.2d 209, 212 (2005). Indeed, as noted in *State ex rel. Potter v. Office of Disciplinary Counsel of State*, “this Court has, in past cases, treated a request for relief in prohibition as a petition for writ of mandamus if so warranted by the facts.” 226 W. Va. 1, 2, 697 S.E.2d 37, 38 (2010). The Court failed to abide by the nondiscretionary duty of entering findings of fact and conclusions of law consistent with *Gaughan*. While this failure alone would perhaps best be meet by a writ of mandamus, The Court’s error is not limited to a refusal to comply with *Gaughan*. Rather, the Court, by inadequate ruling also committed clear legal error by incorrectly denying NSL’s legal arguments. Hence, prohibition best serves to address the clear substantive legal errors of the Court’s Order on summary judgement. For this, relief in prohibition offers the best course for the thorough determination of the legal issues before the Court.

command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.” *Morgan v. Ford Motor Co.*, 680 S.E.2d 77, 80 (W. Va. 2009) (citing *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)). “To discern Congress’ intent we examine the explicit statutory language and the structure and purpose of the statute.” *Id.* at 84. (citing *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 138 (1990); see also *FMC Corp. v. Holliday*, 498 U.S. 42, 56-57 (1990).

As acknowledged by this Court in *Adams v. Pennsylvania Higher Educ. Assistance Agency*, “Title IV of the Higher Education Act of 1965 created the Federal Family Education Loan Program” for the purpose to “(1) enable the Secretary of Education to encourage lenders to make student loans; (2) provide student loans to those students who might not otherwise have access to funds; (3) pay a portion of the interest on student loans; and (4) guarantee lenders against losses.” *Adams v. Pennsylvania Higher Educ. Assistance Agency*, 237 W. Va. 312, 317, 787 S.E.2d 583, 588 (2016) quoting *McCulloch v. PNC Bank, Inc.*, 298 F.3d 1217, 1224 (11th Cir. 2002). To insulate the purpose and goal of the HEA and FFEL, the federal expressly provided that “Loans 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 (emphasis added). Permitting such duplicate disclosure regimes would undermine the otherwise-comprehensive disclosure rules for federal student loans, and erode the accessibility and affordability of higher education funding from the federal government.

The HEA and the FFEL regulations provide a detailed statutory and regulatory governance structure for federally-insured student loans. See 20 U.S.C. § 1082(a); 34 C.F.R. § 682.100 *et seq.* These laws impose detailed and complex *disclosure requirements* on student loan servicers. See, e.g., 20 U.S.C. § 1078-3(b)(1)(F); 20 U.S.C. § 1083(e)(1)–(2); 34 C.F.R. 668.41(b); 34 C.F.R.

674.31; 34 C.F.R. 674.41; 34 C.F.R. 674.42; and 34 C.F.R. 682.205. For example, a servicer must disclose the balance of a loan, *the interest of a loan, the repayment schedule for the loan*, options for loan consolidation or refinancing, and the opportunity to pay off the loan without penalty. 34 C.F.R. 674.42(a).

The Department of Education interprets Section 1098g's "disclosure requirements" language "to encompass [loan servicers'] informal or non-written communications to borrowers." 83 Fed. Reg. at 10621. Additionally—and importantly—the interpretation explains that the preemptive scope of Section 1098 extends to "State servicing laws attempt[ing] to impose new prohibitions on misrepresentation *or the omission of material information.*" *Id.*

Applying preemption principles, this Court has recognized that the HEA and FFEL preempt certain state law claims, such as those advanced by Plaintiff. Similarly, federal courts throughout the United States, including those in West Virginia, consistently have found the HEA and FFEL to preempt state consumer statutes that conflict with the Congressionally ordained purpose and/or the express provisions of the HEA or FFEL. *See e.g. Brannan v. United Student Aid Funds, Inc.*, 94 F.3d 1260, 1264-65 (9th Cir. 1996); *Seals v. Nat'l Student Loan Program*, 2004 WL 3314948 (Aug. 16, 2004, N.D. W.Va.); *See also Snuffer v. Great Lakes Educ. Loan Servs., Inv. No. 5:14-CV-25899*, 2015 WL 1275455, at *4 (S.D. W. Va. Mar. 19, 2015) ("the Court finds that the WVCCPA is preempted only where conflicting statutory language, regulations, or HEA objectives exist."); *Martin v. Sallie Mae, Inc.*, 2007 WL 4305607, at *9 (S.D. W. Va. Dec 7, 2007) (Higher Education Act and related regulations preempted the WVCCPA to the extent the provisions were in conflict).

As acknowledged by this Court in *Adams*, there are "two approaches taken by courts" in determining "preemption of state consumer credit acts by the FFELP". *Adams v. Pennsylvania*

Higher Educ. Assistance Agency, 237 W. Va. 312, 318. On one hand, “Some courts have found preemption of state consumer acts on a broad, act-wide basis.” See e.g. *Seals v. Nat’l Student Loan Program*, No. CIV.A.5:02 CV 101, 2004 WL 3314948, at *5 (N.D.W. Va. Aug. 16, 2004), aff’d, 124 F. App’x 182 (4th Cir. 2005) (concluding that the HEA completely preempted contrary or inconsistent state law regulations under the WVCCPA); *Brannan v. United Student Aid Funds, Inc.*, 94 F.3d 1260, 1266 (9th Cir. 1996) (Ninth Circuit finding preemption of the entire Oregon consumer protection act, concluding that the act “consists of nothing but prohibitions, restricts and burdens on collection activity[.]”.

Other courts—including this Court—have determined that “the most reasoned approach is to analyze the particular provisions or claims made under state law to determine if each conflict with and are therefore preempted by federal law.” *Adams*, 237 W. Va. at 31. Federal courts in the Southern District of West Virginia have also subscribed to this approach of preemption analysis. See *McComas v. Fin. Collection Agencies, Inc.*, No. 2:96–0431, 1997 WL 118417, at *3 (S.D.W.Va. Mar. 7, 1997) (finding no preemption under particular claim alleged because FFELP regulations mandating telephone contacts do not give license to “use abusive or deceptive methods”); *Snuffer v. Great Lakes Educ. Loan Servs, Inc.*, 97 F.Supp.3d 827, 832 (S.D. W.Va. 2015) (recognizing certain conflicts in WVCCPA but finding no preemption because “barring threatening or fraudulent ... practices cannot be said to place a ‘burden’ on pre-litigation debt collection” under the FFELP regulations).

As previously noted, the Northern District found complete preemption of the WVCCPA by FFELP regulations. See *Seals v. Nat’l Student Loan Program*, No. 5:02–cv–101, 2004 WL 3314948 (N.D. W.Va. Aug. 16, 2004) (relying on *Brannan, supra*). As explained by Judge Stamp

in *Seals*, the Department of Education definitively stated its position on the HEA's preemption of conflicting state laws, such as the WVCCPA:

The Secretary of Education has published an interpretation of this specific issue. In this interpretation, the Secretary states that the Guaranteed Student Loan regulations, enacted under the HEA, were intended to preempt contrary or inconsistent state law to the extent necessary to permit compliance with the Federal regulations. The Secretary further explains that state law is inconsistent with the GSL regulations when it would prohibit, restrict, or impose burdens on the pre-litigation collection efforts of third parties. **Consequently, any state law is preempted that would hinder or prohibit any activity taken by these third parties prior to litigation.**

Seals 2004 WL 3314948, at *5 (internal quotations and citations omitted) (emphasis added). More recently—in March of 2018—the United States Department of Education reiterated the importance of federal preemption under the HEA, given the continued development of conflicting State laws:

Recently, several States have enacted regulatory regimes that impose new regulatory requirements on servicers of loans under the William D. Ford Federal Direct Loan Program (Direct Loan Program). States also impose disclosure requirements on loan servicers with respect to loans made under title IV of the Higher Education Act of 1965, as amended (HEA). Finally, State regulations impact Federal Family Education Loan (FFEL) Program servicing. The Department believes such regulation is preempted by Federal law. The Department issues this notice to clarify further the Federal interests in this area.

83 C.F.R. 10619-10622 (2018).

In 2016, in *Adams*, this Court determined “A claim pursuant to West Virginia Code § 46A-2-128(e) for unlawful communications regarding a debt is preempted by the federal regulations governing administration of Federal Family Education Loan Program loans as set forth in Title 34, Part 682 of the Code of Federal Regulations.” Syl. Pt. 5, *Adams*. Accordingly, Plaintiff's claims that NSL's communication “constitutes unfair or unconscionable debt collection practice under w. Va. Code § 46A-2-128, *see* Compl. ¶¶ 60 – 69, (App. 000342 – App. 000343), are overtly preempted, as held in *Adams*.

Conversely, in dealing with claims under Section 127 of the WVCCPA—the Act’s provisions protecting against “Fraudulent, deceptive or misleading representations”—the Court in *Adams* determined “there would appear to be nothing which would conflict with or frustrate the requirements and purpose of the HEA and FFELP by also precluding under State law, making a “false representation” about the “character, extent or amount of a debt”. *Adams* at 321. *quoting* W. Va. Code § 46A-2-127. However, the Court cautioned that other factual scenarios could require individualized examination. *See Adams* at 319. (“we find the most reasoned approach is to analyze the particular provisions or claims . . . to determine if each conflict with and are therefore preempted by federal law.”).

Plaintiff alleges that NSL’s communications regarding the mandatory recalculation of her monthly loan balance amounts to a cognizable claim under Section 127 because NSL failed to provide a specific reason for the change. In other words, the only conduct Plaintiff complains about is a disclosure conduct required by federal law. But these claims must fail because “Loans 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 (emphasis added). Permitting such duplicate disclosure regimes would undermine the otherwise-comprehensive disclosure rules for federal student loans.

The U.S. Court of Appeal for the Ninth Circuit, in *Chae v. SLM Corp.*, 593 F.3d 936 (9th Cir. 2010), was presented with a similar disclosure dispute, and determined that plaintiff’s claims under California’s Consumer Legal Remedies Act for *unfair or deceptive practice* were preempted because they were predicated on imposing disclosure requirements in addition to the expansive requirements under the HEA and its regulations. In *Chae*, the Ninth Circuit considered whether Plaintiff’s claims that Sallie Mae’s alleged practice of using “billing statement and coupon books

that trick borrowers into thinking that interest is being calculated via the installment method when Sallie Mae really uses a simple daily calculation” and using statement that extended the first repayment date were preempted by the HEA. *Chae*, 593 F.3d at 943. The Ninth Circuit held that Section 1098g expressly preempted the student borrower’s allegations because they were “restyled improper-disclosure” claims. *Id.* The Court rejected the borrower’s argument that their claim was not predicated on non-compliance with the HEA’s disclosure requirements since “they do not seek specific disclosures, but merely seek to stop Sallie Mae from fraudulently and deceptively misleading borrowers through the written documents.” *Id.* at 943 (citations omitted). “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.*

As noted, the HEA’s disclosure provisions *explicitly* require preemption. *Infra* at 15; 20 U.S.C. § 1098g (“Loans 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.”) (emphasis added). This language explicitly preempts Plaintiff’s allegations that NSL’s communications regarding the application of the incentive interest rate to her loans and resulting monthly payment schedule are “fraudulent, deception, and/or misleading representations.” *See* Compl. at ¶ 49 (App. 000340) (Plaintiff alleging that “Navient committed fraudulent, deceptive, and/or misleading representations under W. Va. Code § 46A-2-127.”). The same goes with Plaintiff’s allegations under Section 128 of West Virginia’s consumer act. *See* Compl. ¶¶ 61. (App. 000342) (alleging NSL’s communication “constitutes an unfair or unconscionable debt collection practice under W. Va. Code 46A-2-128 in that Navient failed to provide a specific reason why it was increasing Plaintiff’s monthly contract payment.”); *see Adams* at 320 (“we hold that a claim pursuant to West Virginia Code § 46A-2-128(e) for unlawful

communications regarding a debt is preempted by the federal regulations governing administration of Federal Family Education Loan Program as set for in Title 34, Part 682 of the Code of Federal Regulations.”).

Plaintiff’s elaborate factual allegations regarding NSL’s allegedly wrongful servicing of her Federal Consolidation Loan boil down to this: Plaintiff thought her required monthly student loan payments should have been based on a rate of 3.00% interest annually, rather than 4.00%. Plaintiff is incorrect. This is so because NSL was required to calculate Plaintiff’s monthly payment at 4.00% by HEA regulations, which required amortized payment to be complete within a maximum term of 30 years:

(j) Repayment period for the standard and graduated repayment plans Under these plans, if the total amount of the Direct Consolidation Loan and the borrower’s other student loans . . . is—(5) Equal to or greater than \$60,000, the borrower must repay the Consolidation Loan within 30 years of entering repayment.

34 C.F.R. § 685.208(j)(6) (emphasis added). NSL explained this requirement to Plaintiff (multiple times) before the initiation of this action:

Federal regulations require that we service the subsidized and unsubsidized portion of your Federal Consolidation Loan as one loan A recent review of your account revealed that the repayment term assigned to each portion of your consolidation loan was different. To correct this, we aligned the terms on your consolidation loan. However, a review of your account after your terms were aligned indicated that the minimum monthly payment amount for your loan(s) needs to be modified to ensure that your loan(s) will be paid off by our agreed upon loan term end date.

(App. 000054 – App. 000066); *see also* CFPB Response, NSL’s Mem. in Support of Mot. for Summ. J. at Ex. 2 (App. 000182 – 000187). Plaintiff was dissatisfied with this response, and in her lawsuit contends that her monthly payment amount should have been fixed, regardless of any intervening circumstances. However, as the Eleventh Circuit has noted, “[t]he time and amount of the eventual repayment obligation [of federal student loans] are not conclusively established at the time the student signs the promissory note due to numerous contingencies that are expressly

allowed by operation of federal law.” *United States v. Carter*, 506 Fed. Appx. 853, 858 (11th Cir. 2013).³

Indeed, soon after assuming servicing rights over Plaintiff’s loans, NSL (1) identified the prior incorrect application of the incentive interest rate in violation of 34 C.F.R. § 682.202(a)(4); and (2) disclosed to Plaintiff the necessary adjustment in monthly billing to ensure compliance with federal law. *Id.*

As explained to Plaintiff, a law school graduate, NSL had a maximum window of time—as prescribed by the federal government—in which to ensure Plaintiff completely paid back her federal student loan. *See* Pl.’s Mem. in Supp. of Mot. for Summ. J. at Ex. 10 (App. 000054 – App. 000066). To comply with this mandate, NSL had to calculate Plaintiff’s monthly payment amount based on the originally contracted-for 4.00%, rather than the incentive rate of 3.00%. *Id.*; *see also*, NSL’s Mem. in Support of Mot. for Summ. J. at Ex. 2 (App. 000182 – 000187). This is so for the simple reason that incentive rate was just that: an incentive. So, for example, if Plaintiff was delinquent on a payment, or otherwise ceased being eligible for an incentive, the rate would revert to the contracted rate set by the HEA and applicable federal regulations of 4.00%. If this were to happen—and payments had been calculated at the incentive rate of 3.00%—the loan would not be paid off in the timeframe required by federal law. *See* Affidavit of NSL representative, James M. Austin (App. 000198 – App. 000200). This was explained to Plaintiff on multiple occasions—

³ In order to assist borrowers and avoid default, numerous options (forbearance, deferment, and changing repayment options) are mandated to be available to federal student loan borrowers. Indeed, the Department of Education regulations implementing the FFEL Program expressly countenance numerous circumstances in which a borrower’s repayment obligations would be subject to modification. *See* 34 C.F.R. § 682.209(xi) (“A borrower may request a change in the repayment schedule on a loan. The lender must permit the borrower to change the repayment schedule no less frequently than annually, or at any time in the case of a borrower in an income-based repayment plan.”) *See also*, 34 C.F.R. § 682.208(d)(1) (“The Secretary strongly encourages lenders to provide a graduated or income-sensitive repayment schedule to a borrower providing for at least the payment of interest charges ... in order to make the borrower’s repayment burden commensurate with his or her projected ability to pay.”)

including through the course of a response to Plaintiff's Complaint with the CFPB. *See id.*; *see* NSL's Mem. in Support of Mot. for Summ. J. at Ex. 2 (App. 000182 – 000187).

Notably, while payments were calculated at the 4.00% to ensure timely payment under the HEA regulations, Plaintiff still continued to enjoy the benefits of the reduced 3.00% incentive rate. *Id.* NSL honored the incentive rate with respect to the accumulation of interest on the outstanding balance of Plaintiff's loan. *Id.* While the repayment schedule is based on the 4.00% rate, the actual effective rate of interest being charged on the Loan was 3.00%. *Id.* This also was extensively explained to Plaintiff in correspondence from NSL. *Id.*

On balance, to permit the prosecution of Plaintiff's claims, NSL would be required to operate in conflict with federal student loan servicing laws and regulations. These specific regulations provided NSL with the discretion to modify Plaintiff's repayment schedule (including her monthly repayment amount) in order to satisfy the federal requirement that the Loan be paid off within the mandated time period of 30 years. NSL communicated these servicing requirements to Plaintiff in a demonstrably clear and timely manner. But most importantly, NSL communicated the servicing requirements in compliance with the HEA's Section 1098g "disclosure requirements." Section 1098g leaves no room for "State Servicing laws [to] attempt to impose new prohibitions on misrepresentation or the omission of material information." NSL's compliance with the HEA and applicable Department of Education regulations cannot be said to violate the WVCCPA, which, *as a matter of law*, cannot augment the disclosure requirements of Section 1098g, or other federal student loan servicing laws.

D. NSL's Servicing Did Not Breach Any Contract or, in turn, Violate the WVCCPA.

In addition to and independent of preemption, Plaintiff's claims must be dismissed because NSL did not breach any contractual terms. Plaintiff has introduced *no* contractual basis for the incentive rate to suggest that NSL has incorrectly applied the incentive rate to her Loan. Indeed,

the incentive interest rate is itself a product of federal regulations. *See* 34 C.F.R. § 685.211 (“Repayment incentives. To encourage on-time repayment, the Secretary may reduce the interest rate for a borrower who repays a loan under a system or on a schedule that meets requirements specified by the Secretary.”). Consistent with the HEA, federal regulations, and NSL’s servicing, the incentive rate serves to lessen the amount of accumulated interest under the Loan—saving Plaintiff thousands of dollars. This is the purpose, and true value, of such an incentive rate.

In West Virginia, a claim for breach of contract requires proof of (1) the formation of a contract, (2) a breach of the terms of that contract, and (3) resulting damages. *Sneberger v. Morrison*, 235 W. Va. 654, 669, 776 S.E.2d 156, 171 (2015). To prove breach of contract, Plaintiff must prove that NSL failed to comply with a term of the contract and Plaintiff suffered damages because of that failure. *Id.*

But Plaintiff has not produced any evidence that NSL breached a contract with Plaintiff. In fact, the only allegations in the Complaint of particular actions that constitute breach are:

36. “Navient is overbilling the Plaintiff by applying a student loan interest rate that is in excess of the contract interest rate.

...

42. “Redisclosure” and/or “realignments” are not authorized

43. A change in the Plaintiff’s student loan interest rate is not authorized.

Compl. ¶¶ 36, 42, 43 (App. 000339). Plaintiff offers even less context to her breach of contract claims in her summary judgment briefing. Plaintiff simply requests “a declaration on summary judgment that Navient has breach the terms of her student loan contract by billing her at a 4% rate of interest when her interest rate is 3.0%.” *See* Pl.’s Mem. in Supp. of Mot. for Summ. J. at 8 (App. 000012).

Most notably, however, Plaintiff fails to specify exactly where—within the long saga of loan issuance, consolidation, and incentive rate qualification—she has derived the contractual right to have her payments altered based on an incentive rate qualification (not to mention, Plaintiff has not explained how this could be reconciled with federal law).⁴ Such a contractual right simply does not exist. As explained above in the context of federal preemption under the HEA, the incentive rate’s effect is enjoyed by Plaintiff and effectuated by NSL, notwithstanding the fact that NSL must calculate payments based on an amortization scale that strictly ensures repayment within 30 years pursuant to 34 C.F.R. § 685.208(j)(6).

Plaintiff has not provided any contractual document which, in any detail, specifies how the interest rate incentive program requires NSL to circumvent compliance with federal law to reduce her monthly payment by roughly \$20.00. Here, Plaintiff cannot even point to the ostensible contract on which she bases her breach of contract claim. And the only contract that exists in evidence before this Court are the Federal Consolidation Loan Application and Promissory Note—which states simply that: (i) the terms of the Note will be interpreted by the Higher Education Act of 1965, as amended, along with other applicable federal statutes and regulations; (ii) interest is calculated based on the formula set forth in the Higher Education Act; and (iii) that the maximum scheduled repayment period for the Loan may be up to 30 years in length. *See* Pl.’s Mem. in Supp. of Mot. for Summ. J. Ex. 1 (App. 000028 – 000029).

Accordingly, Plaintiff has failed to establish a basis for her breach of contract claim. *Id.* Plaintiff cannot and has not exhibited a single contractual term which requires NSL to alter monthly payments—in conflict of federal law—under the incentive program. Plaintiff has

⁴ “Navient is overbilling the Plaintiff by applying a student loan interest rate that is in excess of the contract interest rate.” *See Compl.* ¶ 36 (App. 000339). However, Plaintiff does not—anywhere in these proceedings—identify what contract this is and how this contract requires incentive interest rates to be applied *anywhere in the record*.

provided no evidence of a contractual term that requires this in lieu of NSL's longtime policy, (which complies with federal law), to honor the incentive program—offering the same or more savings to Plaintiff—by adjusting the accrual of interest under the loan. Because Plaintiff has failed to produce or specify exactly what contract or contract term(s) NSL breached, Plaintiff's claims must be dismissed. *Conaway v. E. Associated Coal Corp.*, 178 W. Va. 164, 168, 358 S.E.2d 423, 427 (1986) (“To successfully defend against a motion for summary judgment, the plaintiff must make some showing of fact which would support a prima facie case for his claim.”). Further, because the evidence shows that NSL complied with the terms of the only contract(s) in evidence, i.e., the Promissory Note, and that NSL serviced Plaintiff's Loan in accordance with the HEA and applicable regulations, the breach of contract claim should be dismissed.

E. Plaintiff is Estopped from Asserting her Claims Because She Ignored and Abandoned Relief Offered to Her at the Conclusion of the Federal Consumer Financial Protection Bureau Complaint *She Initiated*.

Plaintiff is estopped from advancing her claims because the precise contractual remedy she seeks in this action was previously offered to Plaintiff by NSL. On September 5, 2016, Plaintiff filed a Complaint against NSL with the CFPB. Pl.'s Mem. in Supp. of Mot. for Summ. J. at Ex. 11 (App. 000068). Plaintiff alleged NSL “redisclosed and realigned the terms of the consolidated student loan repayment to increase the monthly payment amount . . .” *Id.*

NSL responded to the CFPB Complaint, explaining it had made the adjustment consistent with federal law, as NSL had done in response to Plaintiff's previous direct inquires to NSL. *See* NSL's Mem. in Support of Mot. for Summ. J. at Ex. 3 (App. 000189 000190). Based on NSL's Response and offer, the CFPB matter was closed because NSL's response addressed Plaintiff's complaint and desired resolution—NSL offered to extend the reduced monthly payment amount

to Plaintiff, and asked Plaintiff to contact it to have her payment amount adjusted.⁵ *Id.* (App. 000195 – App. 000196).

Plaintiff did nothing—took no action—after this offered resolution concluding the CFPB Complaint. Affidavit of NSL representative, James M. Austin (App. 000198 – App. 000200) (“Based on my review of NSL’s business records, Ms. Johnson did not, in any fashion, contact NSL regarding NSL’s offer to adjust her monthly payment.”). Plaintiff did not call NSL. *Id.* Plaintiff did not write NSL. *Id.* NSL received no further update regarding Plaintiff’s wishes through the CFPB or otherwise—that is, until Plaintiff filed this lawsuit.

Equitable estoppel allows “a person's act, conduct or silence when it is his duty to speak,” to preclude him from asserting a right he otherwise would have had against another who relied on that voluntary action. *In re Varat Enterprises, Inc.*, 81 F.3d 1310, 1317 (4th Cir. 1996); *see Dickerson v. Colgrove*, 100 U.S. 578, 580, 25 L.Ed. 618 (1879). Equitable estoppel precludes a party from asserting rights “he otherwise would have had against another” when his own conduct renders assertion of those rights contrary to equity. *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 417–18 (4th Cir. 2000).

In West Virginia, the defense of equitable estoppel is available at law as well as in equity. *Harris v. Coliver*, Syl. pt. 3105 W.Va. 174, pt. 3 syl., 141 S.E. 791. “To raise an equitable estoppel there must be conduct, acts, language or silence amounting to a representation or a concealment of material facts.” *Greco v. Meadow River Coal & Land Co.*, 145 W.Va. 153, pt. 5 syl., 113 S.E.2d 79 (emphasis added). In addition, it must appear that the one making the statement intended or should reasonably have expected that it would be acted upon by the other party, and that such

⁵ If Plaintiff were to accept this adjusted payment and then subsequently fail to maintain the incentive rate by missing a payment, she would likely be subjected to a balloon payment or increased future monthly payments to satisfy all payments on the Loan in satisfaction of federal law. *See* 34 C.F.R. § 685.208(j)(6). As such, this adjusted payment would not satisfy the HEA regulations in the event of the loss of incentive.

party, without fault himself, did act upon it to his prejudice." *Bank of Sutton v. Skidmore*, 113 W.Va. 25, pt. 3 syl., 167 S.E. 144. "The burden is on the asserter of an estoppel in pais, to prove his reliance on, and injury from, the representations or conduct of the one against whom the estoppel is claimed." *Brotherhood Investment Co. v. McArthur et al.*, 110 W.Va. 326, pt. 2 syl., 158 S.E. 175; *Wallace v. St. Clair*, W.Va., pt. 6 syl., 127 S.E.2d 742.

As evidenced by the CFPB complaint history (App. 000189 – App. 000196), NSL timely responded to Plaintiff's initial complaint and worked to form a creative resolution for Plaintiff—offering to adjust Plaintiff's monthly payment (even though not required by any contract with Plaintiff) in a desire to avoid further costly and burdensome dispute or litigation of the matter. All NSL asked of Plaintiff, was that she "please contact us at 888-545-4199 at your earliest convenience . . . if you are interested in lowering your payment to \$303.17." *Id.* But she never called, or otherwise followed up on the CFPB resolution.

As observed in *Adams*, "there is no private cause of action under the FFELP regulations." *Adams* at 318 citing *Labickas v. Arkansas State Univ.*, 78 F.3d 333, 334 (8th Cir. 1996) and *L'ggrke v. Benkula*, 966 F.2d 1346 (10th Cir. 1992). However, the CFPB has "supervisory authority" over student lenders, including NSL. See <https://www.consumerfinance.gov/policy-compliance/guidance/supervision-examinations/institutions/> (CFPB has supervisory authority "over nonbank mortgage originators and services, payday lenders, and private student lenders of all sizes."). Yet, after filing a CFPB complaint and receiving NSL's response and proposed resolution, Plaintiff abandoned her CFPB inquiry and filed the instant lawsuit. In other words, Plaintiff chose to abandon her complaint with a federal agency who lawfully exerts oversight authority on NSL and initiated claims under WVCCPA provisions which are not actionable against NSL.

By not responding to this resolution offer, Plaintiff is now precluded from asserting the alleged contractual wrong against NSL. *In re Varat Enterprises, Inc.* at 1317. Plaintiff's silence on the offered resolution precludes Plaintiff from perpetuating her same complaints in this action. *See Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 417-18 (4th Cir. 2000). Anything to the contrary represents a cognizable inequity to NSL, and for that matter, the West Virginia courts which have facilitated this matter and the CFPB. It was Plaintiff's duty to speak and she remained silent. It was Plaintiff that unnecessarily prolonged the resolution of this matter, which to date has cost the parties and the courts much time and resources. Accordingly, equity, as routinely observed and applied by West Virginia Courts, requires that Plaintiff must be estopped from further advancing her claims against NSL.

VI. CONCLUSION

For all the foregoing reasons, and in light of the impending violation of well-established preemption and contract law principles in West Virginia, NSL respectfully requests that this Court enter a rule to show cause and issue a writ of prohibition vacating the Circuit Court's Order and clarifying the appropriate application of the supremacy of federal law and contract law and equity to foreclose Plaintiff's claims.

Respectfully submitted,


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