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At an Comm Part 4 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 15th day of July, 2014

PRESENT:

HON. LAWRENCE KNIPEL,
Justice.

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CHRISTOPHER FRASER, Individually and on behalf of all others similarly situated,

Plaintiff,

- against -

Index No. 503099/12

ACCESS GROUP, INC., et al.,

Defendants.

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The following papers numbered herein:	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	16, 20, 26
Opposing Affidavits (Affirmations)	41
Reply Affidavits (Affirmations)	
Supplemental Reply Affidavit (Affirmation)	
Other Papers Memoranda of Law	29, 40, 45

Upon the foregoing papers, in motion sequence number 1, defendants Access Group, Inc. (Access), and Xerox Education Services, LLC (XES), f/k/a/ ACS Education Services, Inc. (ACS), (collectively referred to as Defendants) move for an order dismissing the complaint of plaintiff Christopher Fraser pursuant to CPLR 3211(a)(1), (2), (3), (7) and (10).

Facts and Procedural Background

Plaintiff commenced this class action seeking to recover damages premised upon breach of contract, unjust enrichment and deceptive and misleading business practices in violation of General Business Law § 349. Succinctly stated, plaintiff, an attorney who recently began repaying his student loans, alleges that defendants erroneously calculated the amount paid by him on one of his loans during a two year period when he was paying only interest, which resulted in negative amortization in breach of his loan agreements and in violation of controlling federal regulations.

Plaintiff's Complaint[1]

In his complaint, plaintiff asserts that on June 20, 2007, he executed two Master Promissory Notes with Access to obtain three loans from the Federal Family Education Loans Program (FFELP) in the amount of $47,610 to finance his first year of law school: (1) a Subsidized Stafford loan in the amount of $8,500, with a fixed interest rate of 6.8%; (2) an Unsubsidized Stafford loan in the amount of $12,000, with a fixed interest rate in the amount of 6.8%; and (3) a Graduate PLUS loan (the GradPLUS Loan) in the amount of $27,110, with a fixed interest rate of 8.5% (collectively referred to as the Loans). In June of 2010, plaintiff graduated from law school and his Loans became eligible for repayment. Because he was unemployed at the time, he entered into two consecutive forbearance periods, which temporarily suspended his monthly payments.

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[1] Inasmuch as this action has not yet been certified as class action, this decision will not address those allegations made to support the propriety of certifying the class.

When the forbearance periods ended in April of 2011, the outstanding balance on plaintiff's Loans had increased from $47,610 to $59,000 and the monthly repayment amount requested by Access was $687. Because he was unable to pay this amount, plaintiff submitted an application on July 14, 2011 to be enrolled in the Easy Pay 2 Step Extended Payment Plan (the Easy Pay Plan), pursuant to which he was required to make interest only monthly payments in the fixed amount of $340 per month for two years, followed by monthly payments of principal and interest for the balance of the 25-year term of the Loans. Plaintiff contends that pursuant to Section 682.209 of the Federal Higher Education Act (the HEA), payments made under plans such as the Easy Pay Plan must equal the amount of interest that accrues between scheduled payments.

In February 2012, Access advised plaintiff that his Loans would be serviced by ACS,[2] upon the same terms and conditions. Upon receipt of this notice, plaintiff reviewed his statements to determine if the payments did, in fact, remain the same. His review revealed that despite the fact that he had been paying $340 per month, and sometimes more, the amount of interest that accrued on the Loans exceeded the amount of his interest only payments. As a result, the outstanding balance on his Loans increased each month. Plaintiff alleges, upon information and belief, that Access and ACS capitalized the unpaid interest, causing negative amortization, so that he would have to pay more over the life of the Loans,

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[2] On March 27, 2012, ACS changed its name to Xerox Education Services, Inc. On December 21, 2012, that company changed its name to XES. XES presently handles all payment processing with respect to plaintiff's Loans.

which is not permissible pursuant to the terms of the Easy Pay Plan or federal law. Plaintiff accordingly made several attempts to communicate with Access regarding why the principal balance of his Loans had increased.

Plaintiff goes on to allege that Access misleadingly and falsely provided him with an application to enroll in the Easy Pay Plan that included a chart containing sample repayment schedules with estimated interest only payments which varied depending on the borrowers' total outstanding loan balance. More specifically, the application stated that "the enclosed chart will provide you with an estimate of your monthly payment within the various plan options you have available. The rates used in the estimates is 6.8%; your rate(s) may be different. To obtain your payment schedule using your current balance and rate, please . . . call" Access. The application also stated that the payment estimates in the chart did not reflect the actual amount of a student borrower's monthly interest only payment. Plaintiff thus alleges that the conduct of Access in approximating a student borrowers repayment schedule, despite the fact that said schedules are capable of being determined with mathematical certainty, constitutes a deceptive and misleading business practice that violates General Business Law § 349.

When plaintiff received no response to his inquires to Access with regard to the amount of interest that he had been charged, he filed the complaint commencing this action on October 1, 2012. In August 2013, plaintiff advised his attorney that the unpaid interest had been deleted from his account without his knowledge or approval. Counsel in turn

advised defendants' attorney that plaintiff would consider the removal of the accrued interest to be a settlement offer, that the offer was not accepted and that plaintiff would oppose any argument that his action was mooted by defendants' unilateral actions.

On November 28, 2012, XES removed this action to the United States District Court for the Eastern District of New York. On June 7, 2013, Magistrate Judge Roanne L. Mann issued a Report and Recommendation concluding, as is relevant herein, that federal question jurisdiction did not exist. The action was then remanded to this court on June 27, 2013, with the consent of both parties. On October 9, 2013, the parties entered into an Agreement and Stipulation that provided that the complaint would be amended to name XES as a defendant in place of ACS. Plaintiff thereafter filed an amended complaint on October 31, 2013.

Defendants' Contentions

In support of their motion to dismiss the complaint, Glenn A. Gabe, the Director of Servicing Oversight for Access, alleges that the initial interest only monthly payment for plaintiff's GradPLUS Loan had been slightly understated as the result of human error. Mr. Gabe explains that when plaintiff applied for the Easy Pay Plan in July of 2011, Student Loan Servicing System was servicing loans for Access. Upon receipt of the application, the employee who manually keyed plaintiff's interest on the GradPLUS Loan into the Easy Pay Calculator erroneously entered the rate of 6.8%, the rate on plaintiff's other two loans, instead of 8.5%. As a result, the amount of the monthly interest only payments that plaintiff was asked to pay on his Loans was lower than it should have been.

In reliance upon an annexed GradPLUS Loan History Statement, Mr. Gabe asserts that the amount of interest that remained unpaid as a result of this error gradually increased, but was never capitalized into the balance of plaintiff's GradPLUS Loan. Accordingly, the interest did not impact the principal balance of the subject loan or either of his other two loans. After plaintiff filed his first complaint, Access conducted an investigation of plaintiff's allegations and on July 31, 2013, waived the entire $964.57 sum of the unpaid interest on plaintiff's GradPLUS Loan. Commencing on August 1, 2013, plaintiff's monthly loan payment was calculated using the correct interest rate.

In reliance upon this affidavit and evidence, defendants argue that plaintiff's cause of action for breach of contract must fail because he claims that defendants breached their contract with him by setting the amount of his monthly interest only payments at an amount less than the actual interest that accrued, thereby resulting in negative amortization. Defendants contend that this argument is not based upon any individually negotiated contract term, but is instead premised upon an alleged violation of federal regulations. In fact, in his complaint, plaintiff alleges that the terms and conditions of the Easy Pay Plan are controlled by the regulations promulgated by the United States Department of Education to implement the HEA. Defendants further contend that the HEA does not provide student borrowers with a private right of action to enforce its provisions. Moreover, a number of courts have held that a borrower cannot avoid this procedural bar by asserting a state law breach of contract action.

Defendants also argue that even if plaintiff's claim is not procedurally barred, it fails as a matter of law because he cannot establish an actual breach. In this regard, defendants assert that the documentary evidence that they submit in support of their motion establishes that the so called unpaid interest was never capitalized into the outstanding principal balance of plaintiff's Loans.

Finally, defendants argue that plaintiff's breach of contract claim must be dismissed because he cannot establish that he sustained any damages. Defendants assert that because there has never been any negative amortization resulting from the miscalculation of interest, plaintiff is in exactly the same position with respect to his GradPLUS Loan as he would have been if not for the alleged breach of contract, i.e., the Loan History Statement indicates that the outstanding balance on his GradPLUS Loan was $36,037.54 when he enrolled in the Easy Pay Plan and it was the same amount two years later.

In seeking the dismissal of plaintiff's unjust enrichment claim, defendants argue that the documentary evidence submitted establishes that neither Access nor XES benefitted from the error involved in calculating interest on plaintiff's GradPLUS Loan. In fact, it was plaintiff who benefitted because Access forgave the $964.57 that he would have paid if the amount of monthly interest that he owed had been properly calculated.

Turning to plaintiffs' claim of an alleged violation of General Business Law § 349, defendants argue that dismissal is appropriate because Section 1098g of the HEA expressly exempts FFELP loans, such as those obtained by plaintiff, from state law disclosure

requirements. Moreover, since the estimates provided by Access and relied upon by plaintiff in support of his claim clearly state that the referenced chart set forth only estimates of monthly payments, plaintiff cannot reasonably claim to have been mislead in light of the disclosures with regard to the accuracy of the chart. Finally, defendants again allege that plaintiff cannot succeed on this claim because he cannot prove that he sustained any damages.

In addressing plaintiff's complaint in its entirety, defendants also argue that dismissal is called for because plaintiff's lack of damages compels the conclusion that plaintiff's complaint does not present a live controversy and the court does not address "academic, hypothetical, moot or otherwise abstract questions."

Plaintiff's Opposition

In opposition to defendants' motion, plaintiff first argues that his claims of breach of contract and violation of General Business Law § 349 are not preempted by the HEA. Further, plaintiff argues that he has not brought a claim predicated upon a violation of the HEA, but has instead alleged that defendants failed to honor the express terms of their contractual obligations to him by failing to collect the proper amount of interest while permitting the deficit to accrue for future capitalization on top of the principal balance on his GradPLUS Loan.

Plaintiff also contends that his claim for a violation of General Business Law § 349 is not premised exclusively upon the use of an allegedly deceptive repayment chart, since the

claim includes defendants' failure to collect the proper amount of interest, which defendants intended to capitalize into plaintiff's outstanding GradPLUS Loan balance had he not uncovered the deception and commenced this action. Thus, the claim encompasses a series of deceptive practices and actions taken by defendants that are at odds with the representations and promises made to him. Plaintiff further asserts that since defendants did not tell him that Access intended to under charge him interest, thus resulting in negative amortization and a larger loan balance, defendants' claim that the complained of conduct was fully disclosed is incorrect.

In reliance upon several federal cases, plaintiff goes on the argue that defendants' "'pick off' attempt to manufacture a mootness and/or lack of damages claim by providing restitution" to him does nothing to impede the claims made by him.

Standard of Review

"On a motion to dismiss pursuant to CPLR 3211(a)(7), the court should accept the facts alleged in the complaint as true and afford the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Tanenbaum v Molinoff*, ___ AD3d ___, 2014 NY Slip Op 4186 [2d Dept 2014], citing *Leon v Martinez*, 84 NY2d 83, 87 [1994]; *Schiller v Bender, Burrows and Rosenthal, LLP*, 116 AD3d 756, 756 [2d Dept 2014]; *Baron v Galasso*, 83 AD3d 626, 628 [2d Dept 1977]). The sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any

cause of action cognizable at law the motion for dismissal will fail (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

In contrast, however:

> "In assessing a motion to dismiss a cause of action pursuant to CPLR 3211(a)(7), where evidentiary material is adduced in support of the motion, the court must determine whether the proponent of the pleading has a cause of action, not whether the proponent has stated one (*see Guggenheimer v Ginzburg*, 43 NY2d 268; *Steiner v Lazzaro & Gregory*, 271 AD2d 596 [2d Dept 2000]; *Meyer v Guinta*, 262 AD2d 463, 464 [2d Dept 1999]). '[B]are legal conclusions and factual claims which are flatly contradicted by the evidence are not presumed to be true on such a motion' (*Palazzolo v Herrick, Feinstein, LLP*, 298 AD2d 372 [2d Dept 2002])."

(*Peter F. Gaito Architecture, LLC v Simone Dev.*, 46 AD3d 530, 530 [2d Dept 2007]). Stated differently, under such circumstances:

> "[T]he question becomes whether the plaintiff has a cause of action, not whether the plaintiff has stated one, and unless it has been shown that a material fact claimed by the plaintiff to be one is not a fact at all, and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 275; *Sposato v Paboojian*, 110 AD3d 979, 979 [2d Dept 2013]; *Constructamex, Inc. v Dodge Chamberlin Luzine Weber, Assoc. Architects, LLP*, 109 AD3d 574, 574-575 [2d Dept 2013])."

(*Karimov v Brown Harris Stevens Residential Mgt., LLC*, ___ AD3d ___, 2014 NY Slip Op 3659 [2d Dept 2014]). Thus, affidavits submitted by the defendant will warrant dismissal pursuant to CPLR 3211(a)(7) under circumstances where "the affidavits establish conclusively that plaintiff has no cause of action" (*Rovello v Orofino Realty Co.*, 40 NY2d

633, 636 [1976]).

It is equally well settled that:

> "On a motion to dismiss based on documentary evidence pursuant to CPLR 3211(a)(1), 'dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law' (*Leon v Martinez*, 84 NY2d 83, 88; *see Goshen v Mutual Life Ins. Co. of NY*, 98 NY2d 314, 326 [2002]). Put differently, the documentary evidence must 'resolv[e] all factual issues as a matter of law and conclusively dispose[] of the plaintiff's claim' (*Paramount Transp. Sys., Inc. v Lasertone Corp.*, 76 AD3d 519, 520 [2d Dept 2010]; *see Goshen v Mutual Life Ins. Co. of NY*, 98 NY2d at 326; *Leon v Martinez*, 84 NY2d at 88)."

(*Palmetto Partners, L.P. v AJW Qualified Partners, LLC*, 83 AD3d 804, 806 [2d Dept 2011]). "In order to be considered documentary, the evidence 'must be unambiguous and of undisputed authenticity' (*Fontanetta v John Doe 1*, 73 AD3d 78, 86 [2d Dept 2010]), that is, it must be 'essentially unassailable' (*Suchmacher v Manana Grocery*, 73 AD3d 1017, 1017 [2010])" (*Yeshiva Chasdei Torah v Dell Equity, LLC*, 90 AD3d 746, 746-747 [2d Dept 2011]).

It has also been recognized that:

> "To some extent, 'documentary evidence' is a 'fuzzy' term, and what is documentary evidence for one purpose might not be documentary evidence for another. . . . From the cases that exist, it is clear that judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are 'essentially undeniable,' would qualify as 'documentary evidence' in the proper case (Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:10, at 21-22; *see* 2 Commercial Litigation in New York State Courts

§ 7:60 [3 West's NY Prac Series 2d ed])."

(*Fontanetta*, 73 AD3d at 84-85 [footnote omitted]).

Defendant's Claim that Plaintiff did Not Sustain Any Damages

The court will first address defendants' assertion that plaintiff's complaint must be dismissed on the ground that he cannot establish that he sustained any damages as the result of their alleged wrongful conduct, since a determination of this issue is common to the three causes of action alleged in the complaint. In so doing, the court finds that the GradPLUS Loan History Statement relied upon by defendants establishes that the unpaid interest was not capitalized into the principal of the Loan; plaintiff offers nothing to refute this showing. Further, plaintiff alleges that the unpaid interest was credited to his account in August 2013. Accordingly, the court finds that defendants have established that plaintiff did not sustain any damages by reason of the miscalculation of interest.

In support of his assertion that defendants cannot render his claim moot by crediting the unpaid interest to his account after he commenced the instant action, plaintiff relies upon several federal cases, including *Schaake v Risk Management Alternatives, Inc.* (203 FRD 108 [SDNY 2001], *White v OSI Collection Services* (01-CV-1343 [ARR] [EDNY 2001]) and *Namdar v Jas Collection Agency, Inc.* (97-CV-6857 [JM] [EDNY 1999], to argue that defendants' action in so doing is analogous to a Federal Rule of Civil Procedure Rule 68 offer of judgment, and that such an offer does not apply to a class action so as to render it moot. The law in this state, however, compels a different conclusion. In the recent case of

Ovitz v Bloomberg L.P. (18 NY3d 753 [2012]), the facts of which are strikingly similar to those in this case, the Court of Appeals granted Bloomberg's 3211(a)(7) motion to dismiss plaintiff's class action claims predicated upon General Obligations Law §§ 5-901 and 5-903 and General Business Law § 349, as well as his demand for equitable relief, finding that he did not sustain any injury.

In *Ovitz*, plaintiff entered into a two-year equipment lease with defendant that provided that it would be automatically renewed for successive two-year periods unless either the lessee (plaintiff) or lessor (Bloomberg) decided to terminate it prior to renewal by giving not less than 60 days' prior written notice to the other. Plaintiff continued use defendant's services until he notified Bloomberg on September 15, 2008 that he wanted to cancel his agreement; defendant refused, advising him that his agreement contained an automatic renewal provision. Two weeks after plaintiff commenced the subject class action against Bloomberg, defendant waived the early termination buy-out and collection of fees. The Court of Appeals accordingly dismissed plaintiff's claims under the General Obligations Law and General Business Law on the ground that plaintiff did not suffer any harm as a result of Bloomberg's alleged practices.

Similarly, in *Abramovitz v Paragon Sporting Goods Co., Inc.* (202 AD2d 206, 208 [1st Dept 1994]), the court held that the dismissal of plaintiff's individual causes of action as devoid of merit mandated dismissal of the class action claims as moot (*see also Canestaro v Raymour & Flanigan Furniture Co.*, 42 Misc 3d 1210(A), 1210A (NY Sup Ct 2013]

[plaintiffs could not avoid their threshold obligation to plead a viable claim for themselves, by purporting to represent a putative class of unnamed individuals]).

Applying the rationale of these cases to the facts herein, defendants' action in crediting plaintiff's GradPLUS Loan with the amount of interest that he claims he underpaid, and not capitalizing it into the principal as he claims, compels the finding that plaintiff did not sustain any damages, so that dismissal of this action is appropriate. The fact that plaintiff commenced a class action, as did the plaintiff in *Ovitz*, *Abramowitz* and *Canestaro*, does not compel a contrary result under New York law.[3]

Breach of Contract

Turning to the individual causes of action asserted by plaintiff, the court finds, as a threshold issue, that plaintiff's breach of contract is not preempted under the HEA. This contention was considered and rejected in cases including *College Loan Corporation v SLM Corporation* (396 F3d 588, 593-598 [4th Cir Va 2005]) and *Genna v Sallie Mae, Inc.* (No. 11 Civ 7371, *7-9 [LBS] [SDNY 2012]). In this regard, the court finds defendants' attempt

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[3] The court also notes that implicit in these holdings is recognition of the principle that "[s]tanding to sue requires an interest in the claim at issue in the lawsuit that the law will recognize as a sufficient predicate for determining the issue at the litigant's request" (*Caprer v Nussbaum*, 36 AD3d 176, 182 [2d Dept 2006], citing *New York State Assn. of Nurse Anesthetists v Novello*, 2 NY3d 207, 211 [2004]). Thus, since plaintiff herein has already received everything that he it entitled to in this action, this action must be dismissed as moot (*see Genesis Healthcare v Symczyk*, ___ US ___, 81 USLW 4229 [2013]).

to distinguish these cases to be unavailing.

Further, while the court agrees with defendants' assertion that there is no private cause of action under the HEA (*see Parola v Citibank*, 894 F Supp 2d 188, 196 [D Conn 2012]; *Gibbs v SLM Corp.*, 336 F Supp 2d 1 [D Mass 2004]; *Josey v Sallie Mae*, 09 Civ. 4403 [SHS] [AJP] [SDNY 2009]), it has been held that the HEA does not preempt a state court proceeding to enforce a contract (*see College Loan Corp.*, 396 F3d at 598; *see generally Genna* (No. 11 Civ 7371, *5). In this case, plaintiff alleges that he is seeking to enforce the provisions of the contracts that he entered into with defendants, and is not seeking damages predicated upon a violation of Section 682.209. Accordingly, the court finds that plaintiff's breach of contract claim is not precluded by HEA.

In addressing the merits of plaintiff's claim, it is well settled that in order to recover on a cause of action for breach of contract, a plaintiff must establish "(1) the existence of a contact, (2) the plaintiff's performance under the contract, (3) the defendant's breach of the contract, and (4) resulting damages" (*Palmetto Partners, L.P.*, 83 AD3d at 806, citing *JP Morgan Chase v J.H. Elec.*, 69 AD3d 802, 803 [2d Dept 2010]; *Furia v Furia*, 116 AD2d 694, 695 [2d Dept 1986]; *accord Elisa Dreier Reporting v Global NAPS Networks*, 84 AD3d 122, 127 [2d Dept 2011]). Thus, a plaintiffs' failure to prove damages resulting from an alleged breach is fatal to his or her cause of action (*see Alpha Auto Brokers v Continental Ins. Co.*, 286 AD2d 309, 310 [2d Dept 2001], citing *Cramer v Spada*, 203 AD2d 739, 741 [3d Dept 1994]; *Ruse v Inta-Boro Two-Way Radio Taxi Assocs.*, 166 AD2d 641 [2d Dept 1990];

accord Proper v State Farm Mut. Auto. Ins. Co., 63 AD3d 1486, 1487 [3d Dept 2009] [failure to prove the essential element of damages is fatal to a cause of action for breach of contract]). Accordingly, since plaintiff did not sustain any damages herein, as discussed above, this cause of action must be dismissed.

Unjust Enrichment

"[T]o prevail on a claim of unjust enrichment, 'a party must show that (1) the other party was enriched, (2) at that party's expense, and (3) that "it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered"'" (*Cruz v McAneney*, 31 AD3d 54, 59 [2d Dept 2006], quoting *Citibank v Walker*, 12 AD3d 480, 481 [2d Dept 2004], quoting *Paramount Film Distrib. v State of New York*, 30 NY2d 415, 421 [1972], *cert denied* 414 US 829 [1973]; *accord Whitman Realty Group v Galano*, 41 AD3d 590, 592-593 [2d Dept 2007]). Herein, plaintiff cannot establish that defendants were enriched in any way, since they credited him with the $964.57 that he should have paid in interest. From ths it follows that dismissal of this cause of action is also appropriate.

In the alternative, although not argued by defendants, it is well established that recovery for unjust enrichment is barred by a valid and enforceable contract (*Whitman Realty Group*, 41 AD3d at 592-593, citing *Samiento v World Yacht*, 38 AD3d 328, 329 [1st Dept 2007]; *Singer Asset Fin. Co., LLC v Melvin*, 33 AD3d 355 [1st Dept 2006]; *Stark v City of New York*, 31 AD3d 530, 531 [2d Dept 2006]). Accordingly, since plaintiff's claims are predicated solely upon the written agreements that he entered into with defendants, he cannot

also seek recovery on the basis of this quasi-contract claim.

General Business Law § 349

General Business Law § 349(a) provides that "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful."

> "To establish a cause of action under General Business Law § 349, a plaintiff must prove that the challenged act or practice was consumer oriented, that it was misleading in a material way, and that the plaintiff suffered injury as a result of the deceptive act. Whether a representation or omission, the deceptive practice must be likely to mislead a reasonable consumer acting reasonably under the circumstances. In addition, to recover under the statute, a plaintiff must prove actual injury, though not necessarily pecuniary harm (*see Stutman v Chemical Bank*, 95 NY2d 24, 29 [2000]; *see also Small v Lorillard Tobacco Co.*, 94 NY2d 43 [1999]; *Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d 20 [1995])."

(*Smith v Chase Manhattan Bank*, 293 AD2d 598, 599 [2d Dept 2002]).

It must be recognized, however, that General Business Law § 349 "contemplates actionable conduct that does not necessarily rise to the level of fraud" (*Gaidon v Guardian Life Ins. Co.*, 94 NY2d 330, 343 [1999]). Further, "there can be no section 349(a) claim when the allegedly deceptive practice was fully disclosed" (*Broder v MBNA*, 281 AD2d 369, 371 [1st Dept 2001], citing *Sands v Ticketmaster-New York*, 207 AD2d 687 [1st Dept 1994], *lv dismissed in part and denied in part* 85 NY2d 904 [1995]). Finally, like the other causes of action asserted by plaintiff, a cause of action premised upon a violation of General

Business Law § 349 is properly dismissed when plaintiff can neither plead nor prove that he or she has suffered any actual damages as a direct result of the alleged statutory violations (*Abramovitz*, 202 AD2d at 207). In this regard, it has also been held that a plaintiff cannot set up the deception as both act and injury (*see Donahue v Ferolito, Vultaggio & Sons*, 13 AD3d 77, 78 [1st Dept 2004], *lv denied* 4 NY3d 705 [2005], citing *Small*, 94 NY2d at 56; *DeRiso v Synergy*, 6 AD3d 152 [1st Dept 2004], *lv denied* 3 NY3d 610 [2004]).

The court first declines to find, as argued by plaintiff in opposition to the motion, that his claim is based upon defendants' actions in undercharging him interest that he believed would result in negative amortization, instead of relying solely upon statements in the chart referred to in his complaint. In this regard, a review of the complaint fails to support this claim. Morever, as discussed more fully hereinafter, even if plaintiff's cause of action were to be more broadly construed, dismissal would still be mandated.

The court next finds, as argued by defendants, that the HEA expressly exempts FFELP loans, such as plaintiff's, from state disclosure law pursuant to 20 USC § 1098g (*see e.g. Chae v SLM Corp.*, 593 F3d 936, 942 [9th Cir Cal 2010]; *College Loan Corp.*, 396 F3d at 596, fn 5).

Further, the court finds that there was no materially misleading statement made to plaintiff, as the record indicates that the chart upon which plaintiff relies clearly states that the figures contained therein were only estimates, so that the fact that an individual's payments may differ was fully disclosed to all borrowers, including plaintiff. Accordingly,

defendants are entitled to dismissal of the cause of action alleging a violation of General Business Law § 349(a) on this ground (*see e.g. Shovak v Long Is. Commercial Bank*, 50 AD3d 1118, 1119-1120 [2d Dept 2008], citing *Lum v New Century Mtge.*, 19 AD3d 558, 559 [2d Dept 2005]; *Wint v ABN Amro Mtge. Group*, 19 AD3d 588, 590 [2d Dept 2005]; *Fisher v Equicredit*, 19 AD3d 541, 542 [2d Dept 2005], *lv denied* 6 NY3d 701 [2005]; *Zuckerman v BMG Direct Mktg.*, 290 AD2d 330, 330-331 [1st Dept 2002], *lv denied* 98 NY2d 602 [2002]).

In the alternative, the cause of action must be dismissed because plaintiff fails to allege that he suffered injury as a result of the allegedly deceptive business practices or false advertising (*see e.g. Ballas v Virgin Media*, 60 AD3d 712 [2d Dept 2009], citing *Lonner v Simon Prop. Group*, 57 AD3d 100 [2d Dept 1995]; *Vigiletti v Sears, Roebuck & Co.*, 42 AD3d 497 [2d Dept 2007]; *Smith*, 293 AD2d at 599).

Conclusion

Accordingly, for the above discussed reasons, plaintiff's complaint is dismissed. The court therefore will not address the issue of whether additional parties must be joined pursuant to CPLR 1001(a) in order to afford complete relief.

The foregoing constitutes that order, decision and judgment of this court.

ENTER:

J.S.C.

HON. LAWRENCE KNIPEL
SUPREME COURT JUSTICE

FILED
COUNTY CLERK
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