IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

IN RE: HIGHER ONE ONEACCOUNT MARKETING AND SALES PRACTICES LITIGATION	No. 3:12-md-2407 (VLB) April 22, 2013

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 8(a), 9(b) AND 12(b)(6)

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Introduction

Founded in 2000 on a college campus by students, Higher One is a company dedicated to serving the financial needs of students by providing expanded options for receiving financial aid/tuition refunds. Over 500 schools currently contract with Higher One to disburse refunds to students.

Plaintiffs are current and former college students whose financial aid/tuition refunds were disbursed by Higher One.[1] Plaintiffs admit that, as part of that process, they were offered options for receiving their refunds, which generally included: (1) receiving a paper check; (2) having the funds deposited into an existing bank account via ACH (i.e. electronic) transfer; or (3) opening a no-monthly-fee, no-minimum-balance, FDIC-insured checking account called a "OneAccount," provided by Higher One's banking partners and serviced by Higher One, and having their refund deposited into that account.

Plaintiffs do not allege, nor can they, that Defendants (Higher One and its banking partners, The Bancorp Bank and Wright Express Financial Services Corporation) charge a fee either to open the OneAccount or to provide the refund via any other option chosen by the student. What they do allege is that once a OneAccount is opened, Defendants somehow violates the law by charging routine bank fees, which are fully disclosed in the Account Agreement and Fee Schedule to which Plaintiffs expressly agreed. In an attempt to cast this

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[1] Plaintiffs have named Higher One Holdings, Inc. as a Defendant. Higher One Holdings, Inc. is a holding company that conducts no business with customers. Higher One, Inc., a subsidiary of Higher One Holdings, Inc., is the entity with whom Plaintiffs interacted. Plaintiffs have not sued Higher One, Inc.

completely appropriate process as unlawful, Plaintiffs' Amended Consolidated Class Action Complaint ("Complaint"),[2] throws out a laundry list of allegations in the apparent hope that one might stick. None of the allegations stick, and the Complaint should be dismissed in its entirety.[3]

Plaintiffs' core claim is that, because of Defendants' allegedly inadequate and misleading disclosures, Plaintiffs deposited their student aid refunds into a OneAccount, rather than choosing a different disbursement option, and are therefore not bound to pay the disclosed and agreed upon fees. Perhaps recognizing that they cannot meet the heightened pleading standards necessary to support a fraud or misrepresentation claim, *see* Fed. R. Civ. P. 9(b), Plaintiffs dress up their Complaint by alleging numerous purported violations of Department of Education ("DOE") regulations, some relating to disclosures and some to other processing aspects of student loan disbursement.

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[2] While the Complaint is the first amendment in this Court, it is actually Lead Plaintiffs' Counsel's fourth bite at the apple. They originally filed a putative class action complaint in the District Court for the Central District of California, then withdrew it and refiled a virtually identical complaint in California state court. Defendants removed that Complaint back to federal court, and Plaintiffs' counsel voluntarily dismissed it just days before Defendants' motion to dismiss was to be filed. Plaintiffs' counsel filed the *Price* complaint in this Court the same day that they dismissed the California case. The current iteration of the Complaint comes only after the parties had fully briefed Defendants' motion to dismiss in *Price*.

[3] In addition to this motion, Defendants have moved to strike Plaintiffs' nationwide class allegations under the Connecticut Unfair Trade Practices Act. *See Price, et al. v. Higher One Holdings, Inc.*, No. 3:12-cv-1093 (D. Conn. Oct. 28, 2012), Dkt. # 39. This motion was fully briefed prior to Plaintiffs' filing of the Consolidated Amended Complaint. In their Rule 26(f) Report, the parties agreed that "the motion to strike raises an issue of law that will continue to be relevant to this case under all circumstances and that the motion, which is fully briefed, should be decided now." *Id.* Dkt. # 9 at 9. The parties have therefore filed today a joint motion for the Court to rule on the pending motion to strike from *Price*.

As Plaintiffs recognize, Higher One is a "third-party servicer," and therefore subject to the Higher Education Act ("HEA") and its implementing regulations. Accordingly, Plaintiffs' state-law claims must be dismissed to the extent they are expressly or impliedly preempted by the HEA. The HEA's express preemption of state-law disclosure requirements mandates dismissal of Plaintiffs' claims to the extent they are premised on allegedly inadequate or misleading disclosures in the loan disbursement process. These expressly preempted allegations are at the heart of Plaintiffs' case and are essential predicates to their consumer protection claims (Counts One and Two), as well as their tort claims (Counts Five–Seven), each of which depends upon a finding that the contract Plaintiffs entered is invalid due to inadequate or improper disclosures. Moreover, Plaintiffs' consumer protection claims (Counts One and Two) are impliedly preempted to the extent they are predicated on violations of HEA regulations because Congress vested the DOE with exclusive authority to enforce the HEA and private enforcement would pose an obstacle to Congress's purpose of uniform DOE enforcement.

Even if Plaintiffs' claims were not preempted, Plaintiffs' allegations supporting Counts One, Two, Five, Six, and Seven are not pled sufficiently to satisfy Fed. R. Civ. Pro. 8(a). While rife with argument and conclusory allegations, the Complaint contains few, if any, facts pertaining to the named Plaintiffs, themselves. In addition, the non-Connecticut consumer-protection claims are pled in an entirely conclusory fashion in Count Two.

Moreover, certain of the allegations supporting Plaintiffs' CUTPA and other state consumer-protection claims simply cannot plausibly support a finding of

any unfair or deceptive practice. Thus, even if Counts One and Two are not dismissed in their entirety as preempted and/or under Rule 8, they should be dismissed for failure to state a claim as a matter of law.

In Counts Three and Four, Plaintiffs assert claims of breach of contract and breach of the covenant of good faith and fair dealing, alleging that they were improperly charged certain non-Higher One ATM Fees (Count Three) and Overdraft Fees (Count Four). However, because the written Account Agreement and Fee Schedule provided to each accountholder plainly authorized Defendants to charge these fees, these claims must be dismissed.[4]

Though unenumerated, Plaintiffs also appear to allege a claim for rescission. *See* Compl. ¶¶ 215–24. This claim fails because rescission is a remedy, not a valid cause of action. It also fails because, though based on allegations of fraud or mistake, it utterly fails to satisfy the requirements of Fed. R. Civ. P. 9(b).

Plaintiffs' unjust enrichment claim, Count Six, fails because such a claim cannot survive where there is an express contract.

Finally, Plaintiffs' conversion and statutory theft claims (Counts Five and Seven) fail because Plaintiffs do not allege that Defendants exercised *exclusive* dominion over their funds, and because funds deposited with a bank are not specifically identifiable. The statutory theft claim fails for the additional reason that the required specific intent was not adequately pleaded.

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[4] Plaintiffs allege that Connecticut law governs their claims by virtue of a Connecticut choice of law clause in the Account Agreement. Compl. ¶ 178. For purposes of this motion only, Defendants accept Plaintiffs claim as true and have briefed the issues under Connecticut law.

For these reasons, explained more fully below, the Complaint should be dismissed in its entirety, with prejudice.

Plaintiffs' Allegations

Colleges and universities contract with Higher One to disburse financial aid refunds, the money remaining from a student's aid package after the school deducts its tuition and fees. Compl. ¶ 4. These funds can come from scholarships, federal financial aid, Title IV federal loans, or private loans. *Id.*

Plaintiffs allege that Higher One contacts students before they enroll in school, sends them a debit card, and advises them to use the number on the card to log onto the Higher One website. *Id.* ¶¶ 159(b), 58, 68. The debit card and website have the name and logo of the students' college or university on it, which Plaintiffs refer to as "co-branding." *Id.* ¶¶ 58, 64. Plaintiffs also allege "on information and belief" that sometime before the school term begins, students receive an e-mail with "text substantially similar" to the following:

> [Your college or university] has partnered with Higher One to provide a new method for receiving financial aid disbursements to all . . . students. It is called the [name of college] Debit Card. If you have received your Higher One card and are expecting Financial Aid; please activate the card and choose your disbursement preference right away to avoid any delays to your disbursement.

Compl. ¶ 58. Elsewhere, Plaintiffs conclusorily allege, sometimes on "information and belief" and sometimes not, that even before going on the Higher One website, Higher One "opens" an account and sends students a "preloaded debit card." Plaintiffs do not explain what it means to "open" the account or what is

allegedly "preloaded" onto the debit card. *See, e.g., id.* ¶¶ 48, 49.[5]

Plaintiffs concede that, on the Higher One website, students generally have three options as to how to receive their refund disbursement: (1) deposited into a OneAccount, to which the debit card affords access; (2) mailed from Higher One to the student in the form of a paper check; or (3) deposited via ACH transfer into the student's preexisting bank account. *Id.* ¶ 69. Plaintiffs were informed that the fastest option to receive funds was through the OneAccount. *Id.* ¶ 66.[6]

Plaintiffs each chose the OneAccount option for disbursement of their refunds. *Id.* ¶¶ 19–30. After choosing this option, they were presented with the "Account Terms and Conditions and Related Disclosures" (the "Account Agreement"). *Id.* ¶ 82. Though Plaintiffs attach a "representative copy" of the Account Agreement to their Complaint as Exhibit B, they do not attach the page requiring consent to the agreement (the electronic equivalent of a "signature page"). Accordingly, Defendants have attached as an exhibit the actual Account Agreement and Fee Schedule for Plaintiff Tarsha Crockett, along with the consent page. It shows that Plaintiff Crockett was required to click "I agree" to accept the

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[5] Plaintiffs' conclusory allegation that Higher One "opens" an account without the students' consent and mails a "preloaded" debit card is inaccurate and does not comport with Plaintiffs' allegations that students are required to choose between three disbursement options, one of which is the OneAccount. *See infra* Section V.B.

[6] A check must be mailed, deposited, and clear before funds are available. Similarly, transferring money to a third-party bank does not occur instantaneously. *See* Board of Governors of the Federal Reserve System, About Automated Clearinghouse Services, *available at* http://www.federalreserve.gov/paymentsystems/fedach_about.htm (last visited Apr. 15, 2013) (describing steps in transfer process).

Account Agreement. *See* Exs. 2–4.[7]

The Account Agreement has a number of provisions and disclosures addressing fees. First, it says that "By using the Account you agree to the terms of this Agreement and the Schedule of Fees that may be imposed. You grant us the right to collect the fees, as earned, directly from your Account balance." Compl. Ex. B at 6. It then again says "You agree to pay all fees and charges applicable to this Account. Please refer to the Schedules of Fees for the charges associated with certain transactions and/or requests." *Id.* at 9 (original emphasis with hyperlink). In fact, the Account Agreement refers and hyperlinks to Higher One's Fee Schedule, a "representative" copy of which is attached as Exhibit C to the Complaint, no fewer than eight times. *Id.* at 6, 8, 9, 12.

The Account Agreement and Fee Schedule also specifically address and disclose the Insufficient Funds Fee (which Plaintiffs term an "Overdraft Fee"), Non-Higher One ATM Fee, and Merchant PIN-Based Transaction Fee ("PIN Fee") at the heart of Plaintiffs' case. With respect to the Insufficient Funds Fee, the Account Agreement provides:

> You agree to maintain sufficient available funds on deposit to cover all items presented for payment against your Account. If you do not, payment may be refused. We reserve the right, without prior notice to you, to either pay or return any item presented for payment against insufficient or uncollected funds. In addition to the amount of the item, we may charge your Account a fee for the payment or

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[7] On a motion to dismiss, the Court may consider any document that is "'integral' to the complaint." *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 n.4 (2d Cir. 2002) (considering contracts on motion to dismiss where complaint was "replete with reference to the contracts and request[ed] judicial interpretation of their terms"); *see also Marcus v. Lincolnshire Mgmt., Inc.*, 409 F. Supp. 2d 474, 476 & n.1 (S.D.N.Y. 2006) (where plaintiff alleges breach of contract, court may consider the contract, itself, without converting motion into one for summary judgment).

> return of the item against insufficient or uncollected funds, in accordance with our Schedules of Fees.

Id. at 8. The Fee Schedule sets forth the fees for each "Insufficient or Uncollected Funds – Returned Item or Paid Item." *Id.* Ex. C at 3.

The non-Higher One ATM fee disclosures are equally clear. The Fee Schedule provides that Higher One will charge a $2.50 fee for "Non-Higher One ATM Transactions," and advises students that they can avoid this fee by either using their card to swipe and sign for purchases or by using "FREE Higher One ATMs only." *Id.* (hyperlink to ATM locations in original). In addition to explaining the fee Higher One imposes for using non-Higher One ATMs, the Account Agreement also explains the possibility that a third-party ATM owner or operator may impose its own fee for using its ATM. Under the heading of "ATM Operator/Network Fees," the Account Agreement states: "When you use an ATM not owned by us, you may be charged a fee by the ATM operator or any network used (and you may be charged a fee for a balance inquiry even if you do not complete a fund transfer)." Compl. ¶ 90; *id.* Ex. B at 12; *see also id.* ("If you use an ATM not owned by us for any transaction . . . you may be charged a fee by the ATM operator . . . . If you obtain cash from a bank teller, the bank may charge a fee. This ATM fee or bank fee *is a third party fee amount assessed by the individual ATM operator or bank only and is not assessed by us.* This ATM or bank fee will be charged to your Account.") (emphasis added).

The Fee Schedule explains that PIN Fees are incurred if, at a merchant, you select "debit" at the checkout and enter your PIN number. The disclosure further explains that you can avoid these fees by pressing "credit" and signing for

purchases rather than entering your PIN number. *Id.* Ex. C at 3. Each Plaintiff alleges being charged one or more of the above fees. *Id.* ¶¶ 161–72.

Based on these allegations, Plaintiffs assert causes of action for violation of CUTPA, violation of nine other states' consumer protection laws, breach of contract, breach of the covenant of good faith and fair dealing, rescission, conversion, unjust enrichment, and violation of Conn. Gen. Stat. § 52-564 (statutory theft). Count Two, alleging breach of other state consumer protection statutes, is asserted only on behalf of a class of current and former OneAccount account holders in nine states. The remaining counts are brought on behalf of a nationwide class of current and former OneAccount account holders.

The Legal Standard

To withstand a motion to dismiss, a complaint's factual allegations must be sufficient "to raise a right to relief above the speculative level," and the Court must dismiss the complaint if it does not contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555, 570 (2007); *DiFolco v. MSNBC Cable L.L.C.*, 622 F.3d 104, 111 (2d Cir. 2010). "[A] complaint is not required to have detailed factual allegations, but it demands more than an unadorned, the defendant-unlawfully-harmed-me accusation." *Id.* (internal quotation marks omitted). Furthermore, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009).

The Second Circuit has recently recognized that a defendant's exposure to "costly inquiries and document requests . . . though sometimes appropriate, elevates the possibility that 'a plaintiff with a largely groundless claim [will] simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value, rather than a reasonably founded hope that the discovery process will reveal relevant evidence.'" *Pension Benefit Guar. Corp. v. Morgan Stanley Inv. Mgmt.*, -- F.3d --, 2013 WL 1296481, at *9 (2d Cir. Apr. 2, 2013) (quoting *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 347 (2005)). Thus, Rules 8 and 12(b)(6) should be interpreted to "help 'prevent settlement extortion—using discovery to impose asymmetric costs on defendants in order to force a settlement advantageous to the plaintiff regardless of the merits of his suit.'" *Id.* (quoting *Am. Bank v. City of Menasha*, 627 F.3d 261, 266 (7th Cir. 2010) (Posner, J.)).

Argument

I. The Higher Education Act Expressly Preempts Counts One, Two, Five, Six, Seven, and the Rescission Claim.

The Supremacy Clause of the United States Constitution provides that federal law "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. Under this principle, Congress has the power to preempt state law. Congress may preempt state law by enacting a statute containing an express preemption provision, or impliedly. *See Arizona v. United States*, 132 S. Ct. 2492, 2500–01 (2012).

The HEA contains a provision expressly preempting "any disclosure

requirements of any State law." 20 U.S.C. § 1098(g). The express preemption provision exists because Congress and the DOE specified detailed disclosure requirements that lenders and institutions (and, by extension, third-party servicers like Higher One) must make in connection with student lending. *See* 20 U.S.C. § 1083; 34 C.F.R. §§ 668.164–668.165. For institutions, and the servicers that contract with them to disburse funds, 34 C.F.R. §§ 668.164 and 668.165 set forth the requisite "notices and authorizations" an institution or servicer must make when disbursing Title IV program funds. *See, e.g.*, 34 C.F.R. § 668.164(c)(3)(ii) (requiring that before opening the account, all terms and conditions of it must be disclosed); 34 C.F.R § 668.164(c)(3) (vii) (prohibiting a debit card from being marketed as a credit card); *see also* DOE Dear Colleague Letter, GEN-12-08, A14 (explaining that there are no prohibitions on co-branding, and recommending certain disclosures regarding ATM accessibility).[8]

Many, if not most, of Plaintiffs' claims are predicated on an alleged failure to disclose, or improper disclosure of, facts relating to the student refund disbursement process and the OneAccount terms. For instance, Plaintiffs allege:

> (1) Defendants do not adequately disclose their relationship with Plaintiffs' schools when they issue "cobranded" marketing materials and referred to the schools as "partners." Compl. ¶¶ 55–56, 58–61, 63–64;
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> (2) "Higher One does not adequately disclose that students may elect to receive their financial aid refund via methods other than a Higher One account." *Id.* ¶ 62; *see also id.* ¶¶ 67, 70;
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> (3) "Higher One [p]rovided [d]eceptive [a]ccount [d]isclosures [t]o

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[8] Indeed, Plaintiffs allege that Defendants had an obligation to make various disclosures precisely because Higher One is a third-party servicer bound to the requirements of § 668.165. Compl. ¶¶ 149–50.

> [p]laintiffs and [d]id [n]ot [a]dequately [d]isclose [t]he [u]nconscionable and [u]nusual [f]ees [a]ssociated with the [a]ccounts." *Id.* ¶ 28; *see also id.* ¶¶ 82–86, 65;
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> (4) The Account Agreement does not disclose that "Higher One will charge its own fee for the use of a non-Higher One ATM." *Id.* ¶ 91;
>
> (5) Higher One improperly labels the debit card as "DEBIT" but charges PIN-based transaction fees. *Id.* ¶¶ 111–22; and
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> (6) Higher One "does not properly disclose its extremely limited number of 'fee-free' ATMs or the fact that the small number of ATMs makes it very likely students will incur additional out-of-network fees." *Id.* ¶¶ 108, 103–05.

Plaintiffs assert that Defendants' allegedly improper or inadequate disclosures regarding student loan refund disbursements can support a claim under CUTPA and other state consumer-protection laws. *Id.* ¶¶ 184–86, 191–92, 205–14. They also base their conversion, statutory theft, and unjust-enrichment claims on these improper disclosures, suggesting that the failure to make necessary disclosures meant that Plaintiffs never actually agreed to the Account Agreement (or the Fee Schedule). *See, e.g., id.* ¶ 216. In short, Plaintiffs are attempting to have state law govern the kinds of disclosures schools and their servicers must make. The HEA prohibits this. *See* 20 U.S.C. § 1098g.

As this Court has held, a state-law claim "predicated on [the] failure to properly disclose" is "subject to express preemption under Section 1098g." *Linsley v. FMS Inv. Corp.*, No. 3:11-cv-961, 2012 WL 1309840, *6 (D. Conn. Apr. 17, 2012) (Bryant, J.). In *Linsley,* the Court applied § 1098g to preempt a CUTPA claim where the plaintiff alleged that a loan servicer seeking to collect on a defaulted HEA loan sent him a letter that misrepresented his options to cure the default. *Id.* at *1. According to the plaintiff, the letter contained misrepresentations because it

either misinformed, or did not disclose, certain rights he had under the pertinent DOE regulations. *Id.* This Court dismissed the CUTPA claim, holding that whether the claim was labeled as "misrepresentation" or "improper disclosure," § 1098g worked just the same. *Id.* at *6. In either case, the HEA preempted the claim because the plaintiff was attempting to apply state law disclosure requirements to Title IV loans. The Court further noted that "under the HEA the express remedy for improper or incorrect disclosures by service[r]s is to report the service[r]s to the DOE and for the DOE to institute formal or informal compliance procedures against the servicer." *Id.* at *3 n.2.

Similarly, in *Brooks v. Salle Mae, Inc.*, No. FSTCV096002530S, 2011 WL 6989888 (Conn. Super. Ct. Dec. 20, 2011), the trial court determined that § 1098g preempted a CUTPA claim to the extent that it alleged that a loan servicer made misrepresentations about the borrower's deferment options for an HEA loan. In *Brooks*, the court wrote that "[t]o the extent that CUTPA requires the defendant to disclose the information that the plaintiff sought . . . § 1098g preempts those factual allegations" because plaintiff was seeking to apply state law to loans issued pursuant to the HEA. *Id.* at *5. The court observed that "allegations that the defendant misrepresented [the conditions under which she could defer payment of an HEA loan] are no different than a claim that the defendant failed to make proper disclosures to the plaintiff." *Id.* at *6.

Both *Linsley* and *Brooks* applied the reasoning of *Chae v. SLM Corp.*, 593 F.3d 936 (9th Cir. 2010). In *Chae*, the plaintiffs alleged that a loan servicer "trick[ed] borrowers into thinking that interest [wa]s being calculated via the

installment method when [defendant] really use[d] a simple daily calculation." *Id.* at 942. The Ninth Circuit held that § 1098g preempted California-law claims—including claims under the California Unfair Competition Law invoked in Count Two here—where "[a]t bottom, the plaintiffs' misrepresentation claims are improper-disclosure claims" about loans issued under HEA. *Id.* In addressing plaintiffs' assertion that this holding would leave them without a remedy, the Ninth Circuit pointed out that DOE had ample enforcement powers, and that if the servicer's "disclosures are misleading, the plaintiffs' remedy is to complain about [the servicer] to the DOE and to ask the agency to intervene." *Id.* at 943 n.6.

Allegations that Defendants made improper disclosures and misrepresentations in connection with student loan disbursement process pervade the Complaint. But these allegations are expressly preempted by the HEA. Accordingly, Plaintiffs cannot support their CUTPA or other consumer-protection claims with allegations of disclosure-based violations, including that Defendants: (1) inadequately or improperly disclosed account terms, *see* Compl. ¶¶ 82–86, 91; (2) misrepresented their relationship with Plaintiffs' schools, *see id.* ¶¶ 55–64; (3) inadequately disclosed Plaintiffs' options for receiving their funds, *id.* ¶¶ 63, 67, 70; (4) labeled the debit card "DEBIT," *id.* ¶¶ 111–22; or (5) inadequately disclosed the number or location of ATMs on campus, *see id.* ¶¶ 103–05, 107–08.

Counts Five through Seven are similarly preempted. Each claim depends on the Account Agreement being invalidated due to the allegedly improper or inadequate disclosures made to Plaintiffs before they entered into the Agreement.

II. Counts One and Two Are Impliedly Preempted.

Plaintiffs' consumer-protection claims in Counts One and Two are expressly predicated on alleged violations of DOE regulations. These claims are impliedly preempted because allowing them to go forward would pose an obstacle to the accomplishment of Congress's goal of uniform federal enforcement of the HEA by the DOE.

"The ordinary principles of preemption include the well-settled proposition that a state law is preempted where it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Arizona*, 132 S. Ct. at 2505 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). "What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000).

Here, an examination of the HEA demonstrates that Congress intended to provide the DOE with the exclusive power to interpret and enforce the HEA's provisions. Section 1070(b) expressly states that "[t]he *Secretary* [of Education] shall . . . carry out programs to achieve the purposes of" Title IV. 20 U.S.C. § 1070(b)(emphasis added); *see also id.* § 1071(a)(1) ("The purpose of [the Federal Family Education Loan Program] is to enable the Secretary" to encourage loan insurance programs). Section 1082 grants broad "[g]eneral powers" to the DOE to "prescribe such regulations as may be necessary to carry out the purposes of [the HEA]." *Id.* § 1082(a)(1). The Secretary is also empowered to sue to enforce the law, *id.* § 1082(a)(2), and to impose civil penalties and sanctions, *id.* § 1082(g),

(j)(1), for violations of the HEA or DOE regulations.

Congress specifically authorized the DOE to prescribe regulations relating to third-party servicers, like Higher One. *See, e.g., id.* §§ 1082(a)(1); 1094(c)(1)(H). In particular, Congress required the DOE to "prescribe such regulations as may be necessary to provide for . . . a compliance audit of a third party servicer . . . with regard to any contract with an eligible institution . . . for administering or servicing any aspect of the student assistance programs under" the HEA. *Id.* § 1094(c)(1)(C)(i). The DOE is similarly required to prescribe regulations providing for "the limitation, suspension, or termination of the eligibility of a third party servicer to contract with any institution to administer any aspect of an institutions' student assistance program . . . whenever the Secretary has determined . . . that such organization . . . has violated or failed to carry out any provision . . . [or] any regulation prescribed under" the HEA. *Id.* § 1094(c)(1)(H).

The DOE implemented these directives by promulgating regulations allowing the Secretary to withhold Title IV program funds, impose fines, and limit, suspend, or terminate third-party servicers' contracts, 34 C.F.R. §§ 668.81–98, for a violation of "any statutory provision of or applicable to Title IV of the HEA." *Id.* § 668.81. Thus, Congress and the DOE have determined that violations of the HEA by third-party servicers should be enforced by the DOE, itself, not by students through private civil actions. *See id.* §§ 668.81–91 (detailing the DOE's power to impose administrative penalties, suspend or terminate third-party servicer contracts, and order payment to the DOE or "designated recipients" of

improperly disbursed funds).[9] The DOE monitors compliance with the HEA by requiring third-party servicers to submit to annual "compliance audits." *Id.* § 668.23(c). If the audit reveals a violation of the HEA or its implementing regulations, "the Secretary determines the amount of liability" of the servicer and requires payment of a penalty. *Id.* § 668.23(f)(1). Also, a third-party servicer cited for a substantial violation is precluded from entering into another service contract for two years. *Id.* § 668.25(d)(1)(ii). If the servicer "has been limited, suspended, or terminated by the Secretary," then it may not enter into a service contract for five years. *Id.* § 668.25(d)(i).

Plaintiffs seek an end-run around this regulatory framework, asking this Court and a Connecticut jury to interpret the meaning of the DOE's regulations (potentially in a manner conflicting with the DOE's own interpretation) and to impose penalties not contemplated by Congress or the DOE. Allowing Plaintiffs' HEA-based claims to go forward would effectively delegate to courts and juries in various different states the task of interpreting and enforcing the HEA and its implementing regulations—a task that Congress expressly entrusted to the DOE alone.

The Supreme Court has made clear that state law is preempted even when it "attempts to achieve . . . the same goals as federal law," if it "involves a conflict in the method of enforcement." *Arizona*, 132 S. Ct. at 2505; *see also Colo. Dep't of*

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[9] Indeed, "'nearly every court to consider the issue . . . has determined that there is no express or implied private right of action to enforce any of the HEA's provisions.'" *Thomas M. Cooley Law School v. Amer. Bar Ass'n*, 459 F.3d 705, 710 (6th Cir. 2006) (quoting *McCuloch v. PNC Bank, Inc.*, 298 F.3d 1217, 1221 (11th Cir. 2002) (collecting cases from the Second, Sixth, Seventh, Eighth, Ninth, Tenth, and D.C. Circuits)).

Pub. Health & Env't v. United States, 693 F.3d 1214, 1224 (10th Cir. 2012) ("To avoid conflict preemption, 'it is not enough to say that the ultimate goal of both federal and state law is the same. A state law also is pre-empted if it interferes with the methods by which the federal statute was designed to reach this goal.'") (quoting *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987)). In *Arizona*, the Supreme Court held that a provision of an Arizona statute imposing criminal sanctions on an alien for applying for work in a public space posed a conflict with the enforcement of federal immigration law, because—notwithstanding that the state law furthered a common goal—Congress had not contemplated criminal penalties against aliens for this conduct. *Id.* at 2503–2505. Similarly here, Congress clearly did not contemplate private enforcement of the HEA. Congress instead gave "extensive enforcement authority to the Secretary indicating that Congress intended this mechanism to be the exclusive means for ensuring compliance with the statutes and regulations." *L'ggrke v. Benkula*, 966 F.2d 1346, 1348 (10th Cir. 1992); *see also Armstrong v. Accrediting Council for Continuing Educ. & Training, Inc.*, 168 F.3d 1362, 1369 (D.C. Cir. 1999) ("[I]t is the Secretary and guaranty agencies—not students—who enforce statutory and regulatory requirements . . . .").

In *Armstrong*, the D.C. Circuit applied this method-of-enforcement type preemption in the context of the HEA. A loan recipient brought an action for damages against the entities that could enforce the loan, arguing under a contract theory that her loan was void and unenforceable. 168 F.3d at 1368. The circuit court affirmed the dismissal of her claim under an implied preemption

theory, holding that, "[i]f accepted, Armstrong's claim that she may void her student loan based on the school's alleged [Guaranteed Student Loan Program] ineligibility would frustrate specific federal policies regarding the consequences of losing or falsely certifying accreditation." *Id.* at 1369. In other words, the plaintiff in *Armstrong* sought a state-law remedy for an alleged HEA violation that had specific statutory and regulatory consequences. *Cf. Parola v. Citibank (South Dakota) N.A.*, -- F.Supp.2d --, 2012 WL 3940676, at *6 (D. Conn. Sept. 10, 2012) (Bryant, J.) (student borrower did not state claim against Title IV lender for breach of contract provision that incorporated HEA standards because borrower "is only entitled to the remedies for breach of the [contract] created by the HEA" and "the HEA does not create a private right of action").

Similarly here, Plaintiffs seek a state-law remedy—namely, damages (and in some instances treble damages)—for alleged violations of the HEA and its implementing regulations that Congress intended to be penalized only under the specific statutory and regulatory framework set forth in 20 U.S.C. § 1094 and 34 C.F.R. §§ 668.81–98. This is impermissible. As this Court held in *Linsley*, an individual student's remedy for alleged HEA violations is to report the violation to the DOE so that the Secretary may "institute formal or informal compliance procedures against the servicer." 2012 WL 1309840, at *3 n.2.

Plaintiffs' consumer-protection claims in Counts One and Two depend upon a finding that Defendants violated HEA and its implementing regulations. *See* Compl. ¶¶ 139–158, 186–98. For example, Plaintiffs' claim that Defendants violated 34 C.F.R. § 668.614(c)(3)(i) by "automatically open[ing] bank accounts"

for them without obtaining their consent, Compl. ¶¶ 50, 189–90, depends upon an interpretation of whether or not they in fact consented in writing to open the account by clicking "I agree." Similarly, Plaintiffs' allegation that Defendants violated § 668.16(c)(3)(vii) by allegedly allowing students to overdraw their accounts and thereby incur so-called "Overdraft Fees," Compl. ¶ 195, depends upon a determination of whether an "overdraft fee" amounts to the conversion of the bank account and accompanying debit card into a credit card or credit instrument (an undefined term) under § 668.16(c)(3)(vii). And Plaintiffs' claim that Defendants violated § 668.164(c)(3)(v) by allegedly failing to provide adequate access to Higher One ATMs depends upon an interpretation of what "convenient access" means under § 668.16(c)(3)(v).

Allowing the litigative process in various states to determine these issues would pose an obstacle to the DOE fulfilling its congressionally delegated task of uniformly enforcing both the HEA and its own regulations. A finding in this case, for example, that Defendants' conduct violated the HEA could well pose a direct conflict with the DOE's interpretation and enforcement through the annual audit process described above.

In sum, Plaintiffs' consumer protection claims "involve[] a conflict in the method of enforcement" of the HEA and are therefore preempted. *Arizona*, 132 S. Ct. at 2505. They therefore cannot support their CUTPA or other state consumer protection claims based on allegations that Defendants: (1) opened a OneAccount in their names without their consent in violation of 34 C.F.R. § 668.164(c)(3)(i), *see* Compl. ¶¶ 48–49; (2) failed to inform them of the terms and

conditions associated with the OneAccount in violation of 34 C.F.R. § 668.164(c)(3)(ii), *see* Compl. ¶¶ 82–86, 91, 103, 107–08; (3) coerced them into choosing the OneAccount in violation of 34 C.F.R. §§ 668.164(c)(3) & 668.165(b) *see* Compl. ¶¶ 55–63, 73–78; (4) converted their debit cards into credit cards or credit instruments in violation of 34 C.F.R. § 668.164(c)(3)(vii), *see* Compl. ¶¶ 126–27; (5) failed to provide convenient ATM access in violation of 34 C.F.R. § 668.164(c)(3)(v), *see* Compl. ¶¶ 97–102; (6) charged a fee for the delivery of financial aid funds in violation of 34 C.F.R. § 668.164(c)(3)(iv), *see* Compl. ¶¶ 11, 139; or (7) applied their financial aid funds to fees instead of to educational expenses, *see* Compl. ¶ 11 (alleging that charging fees "violates the public policy expressed by the HEA, which limits the use of federal financial aid funds to educational expenses"); *id.* ¶¶ 145, 198–99.[10]

III. Counts One, Two, Five, Six, Seven, and the Rescission Claim Do Not Satisfy Rule 8(a).

Even aside from the preemption issues discussed above, Counts One,

[10] Eliminating the consumer-protection claim predicates that are expressly or impliedly preempted, Plaintiffs are left with their allegations that Defendants violated public policy by: (1) not providing paper bank statements, *see id.* ¶¶ 156–57; (2) permitting ATM owners to charge their own ATM fees on top of the non-Higher One ATM fee, *see id.* ¶¶ 87–96; and (3) charging insufficient-funds, or "overdraft" fees in alleged violation of the covenant of good faith and fair dealing, *see id.* ¶¶ 125–30. However, as set forth below, Plaintiffs fail adequately to plead consumer-protection claims on these grounds. *See infra* Section V.B (addressing paper bank statements); Section VII (addressing insufficient-funds fee); and Section VI (addressing non-Higher One ATM fee). Accordingly, the Court should dismiss Counts One and Two in their entirety. However, to the extent the Court does not agree entirely with Defendants' arguments, it may nevertheless dismiss *portions* of these claims. *See, e.g., Wooten v. Fortune Brands, Inc.*, 98 C 4603, 1999 WL 705763 (N.D. Ill. Aug. 27, 1999) (dismissing one "portion of the claim with prejudice"); *Peteete v. Asbury Park Police Dep't*, CIV. A. 09-1220 MLC, 2010 WL 5151238 (D.N.J. Dec. 13, 2010).

Two, Five, Six, and Seven, and the Rescission claim must be dismissed because they are inadequately pled. Though the Complaint may be lengthy, the named Plaintiffs plead virtually nothing about their own individual experiences. Indeed, there is only one section addressing, in entirely conclusory fashion, how each Plaintiff was subjected to Defendants' supposedly unlawful practices and the language of each paragraph in that section varies only to the extent that the Plaintiffs incurred different types of fees. *See* Compl. ¶¶ 19–30. Other key allegations in the Complaint are pled on "information and belief" even though they relate to information as to which the Plaintiffs should have specific personal knowledge.

For example:

- Plaintiffs implausibly allege that Defendants "opened" accounts without their consent and sent them "preloaded" debit cards. *Id.* This conclusory allegation can be ignored even at the Rule 12(b)(6) stage because it is unsupported by facts necessary to render it plausible. Though Plaintiffs refer to "pre-loaded debit cards," *see, e.g.,* Compl. ¶ 48, they fail entirely to allege facts suggesting what is loaded onto these cards.[11] Similarly, though they repeatedly allege that Higher One "opened accounts for each Plaintiff," *see, e.g., id.* ¶ 49, they also concede that these accounts were activated only after Plaintiffs affirmatively selected them from three potential disbursement options, *see id.* ¶ 69; *see also* Ex. A. at 18 ("All students use OneDisburse to select whether their disbursement is by check, direct deposit or to an OneAccount debit card."). In short Plaintiffs' allegations do not plausibly support a claim that Defendants opened accounts for them without their consent.

- Plaintiffs allege that the Account Agreements and Fee Schedules "were

[11] Indeed, regulations implementing the Electronic Funds Transfer Act make a clear distinction between a debit card connected to a bank account and a "prepaid card," which is one that comes "preloaded" with a particular amount of funds. *See,* 12 CFR 235.2(f), (i). Here, Plaintiffs have pled facts entirely consistent with their being sent inactive debit cards (which were not activated unless and until they elected to sign up for the OneAccount), and inconsistent with being sent a "preloaded" card that already contained their refund monies.

filled with misrepresentations and ambiguities," Compl. ¶¶ 19–30, but utterly fail to identify the misrepresentations and ambiguities, despite having full access to the relevant documents.

- Plaintiffs allege, "on information and belief" that "each Plaintiff received an email from Higher One that contained text substantially similar" to that set forth in Paragraph 58 of the Complaint. However, Plaintiffs have personal knowledge of the communications they allegedly received from Higher One and are required to state the content of those communications to the extent they rely on them to support their claims. As courts have made clear, they cannot rely on "information and belief" to avoid pleading actual facts in these circumstances.

- Plaintiffs allege generically that ATM access was "extremely limited," but do not allege any specific facts to support this conclusion, such as the number of ATMs on their respective campuses, their locations or their operating hours.

- Three Plaintiffs allege that they were charged "Overdraft Fees." The Fee Schedule does not mention Overdraft Fees, but instead a fee for "Insufficient or Uncollected Funds – Returned Item or Paid Item." This fee is charged any time an account holder attempts to make a purchase with insufficient funds, whether or not Higher One, in its discretion, actually allows the account to be overdrawn to cover the purchase. Though the notion that allowing an account to be overdrawn converts a debit card into a credit card or credit instrument is unfounded, Plaintiffs' allegations are defective for an even more basic reason: They only plead that they were charged this fee; they do not that they were charged the fee because their accounts were actually permitted to be overdrawn.

In sum, Plaintiffs simply do not plead adequate facts to plausibly support their claims or to permit Defendants to defend. These pleading deficiencies "particularly inappropriate" because Plaintiffs have "access, without discovery to . . . documents and reports that provide specific information from which to fashion a suitable complaint," including the emails and other representations they allegedly received from Higher One. *Pension Benefit. Guar. Corp. v. Morgan Stanley Inv. Mgmt. Inc.*, No. 10-cv-4497, 2013 WL 1296481, at *12 (2d Cir. Apr. 2, 2013); *see also FTA Market Inc. v. Vevi, Inc.*, No. 11-cv-4789 CB, 2012 WL 383945,

at *4 (S.D.N.Y. Feb. 1, 2012) ("[T]he Court will not accept facts alleged upon information and belief when such information is within the control of the plaintiff.").

In *Caires v. J.P. Morgan Chase Bank, N.A.*, under analogous circumstances, this Court rejected "conclusory alleg[ations] that [plaintiff] was charged 'excessive and unreasonable fees,' that Chase 'rejected payments without justification,' breached 'modification agreements,' 'unlawfully proceeded with foreclosures based on the mortgagor's failure to meet impossible shifting demands,' and 'inexplicably and arbitrarily increased mortgagor debt obligations,'" concluding that "subjective conclusions unsupported by specific facts are insufficient to allow the Court to draw the reasonable inference that Chase violated CUTPA" under Rule 8. 880 F. Supp. 2d 288, 305 (D. Conn. 2012). Just as in *Caires*, the named Plaintiffs here plead no facts relevant to their actual circumstances and assert merely "subjective conclusions" insufficient to satisfy their pleading obligations. Their claims should therefore be dismissed.

IV. Count Two is Inadequately Pled.

Even if the Court does not find that all of the above Counts must be dismissed due to failure to meet the pleadings requirements of Rule 8, Count Two certainly must be. Count Two is ostensibly "asserted on behalf of the members of the each State Subclass under their respective consumer protection statutes." Compl. ¶ 206. The State Subclasses are defined as "[a]ll current and former Higher One accountholders who are citizens of Texas, Washington, California, North Carolina, Louisiana, Florida, Mississippi, Alabama, and Kentucky for the

purpose of asserting claims under their respective state consumer protection statutes." *Id.* ¶ 35. However, Count Two only alleges violations of the consumer-protection statutes of California, North Carolina, Texas, Washington, Louisiana, Florida and Kentucky. *See* Compl. ¶¶ 206–14. Plaintiffs nowhere allege a violation of the Alabama Deceptive Trade Practices Act, Ala. Code §§ 8-19-1–8-19-15, or the Mississippi Consumer Protection Act, Miss. Code Ann. §§ 75-24-1, *et seq.* As no allegations at all are set forth under the Alabama and Mississippi laws, any purported claims under those laws must be dismissed.

Moreover, with respect to North Carolina, Texas, Washington, Louisiana, Florida, and Kentucky, Plaintiffs cut-and-paste a single, identical allegation, altering only the name of the relevant state's consumer-protection law: "Defendants engage in unfair business practices relating to the non-consensual creation of bank accounts for disbursement of financial aid and imposition of bank fees on consumers, in violation of" the particular state's consumer-protection law. Compl. ¶¶ 208–13. This repeated allegation is nothing more "than an unadorned, the defendant-unlawfully-harmed-me accusation," which fails to satisfy the pleading requirements of Rule 8(a). *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do.") (internal quotation marks omitted).

In essence, Plaintiffs allege that Defendants violated state laws prohibiting unfair business practices because "Defendants engage in unfair business practices." Compl. ¶¶ 208–13. This circularity cannot satisfy Rule 8(a). As this Court recently held with respect to CUTPA, "[i]t is well established that merely

stating that the defendant's conduct violates public policy or is unfair and/or deceptive is not sufficient to sustain a CUTPA claim." *Davis v. Conn. Commty. Bank*, -- F. Supp. 2d --, No. 3:10CV261 (VLB), 2013 WL 1296473, at *16 (D. Conn. Mar. 26, 2013) (internal quotation marks omitted).

It is no answer that Plaintiffs "repeat and reallege the preceding and subsequent paragraphs [of the Complaint] as though set forth" in Count Two. Indeed, this Court rejected a similar tact in *Davis*, noting that "it is well established that such general allegations, without supporting facts other than a clause incorporating an entire complaint by reference, are insufficient to withstand even a motion to dismiss because they do not give fair notice of what the claim is and the grounds upon which it rests." *Id.* (internal quotation marks and brackets omitted); *see also Lastra v. Barnes & Noble Bookstore*, No. 11 Civ. 2173, 2012 WL 12876, at *7 (S.D.N.Y. Jan. 3, 2012).

Plaintiffs also assert claims under the California Unfair Competition Law. Compl. ¶ 207. Though it contains a few more sentences, this claim still falls well short of meeting Rule 8's pleading requirements, as set forth in *Twombly* and *Iqbal*. This is particularly true given that California courts generally abstain from deciding UCL claims seeking equitable relief where the case involves economic issues in heavily regulated industries.[12] Thus, Plaintiffs UCL claim should be

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[12] *See Desert Healthcare Dist. v. PacifiCare FHP*, 94 Cal. App. 4th 781, 795 (2001)(explaining that California courts will abstain from ruling on UCL claims that require a court of equity to wade into an area of complex economic policy" and abstaining in context of health service provider contracts); *see also Willard v. AT&T Comm'ns of Cal., Inc.*, 204 Cal. App. 4th 53, 59-60 (2012) (affirming trial court decision abstaining from ruling on UCL claim regarding landline service fees); *California Grocers Assn. v. Bank of America*, 22 Cal. App. 4th 205 (1994)

dismissed for failure to plead sufficient facts to allow this Court to undertake the abstention analysis.

V. Plaintiffs Cannot Rely on Certain of Their Allegations to Support Counts One and Two.

Even if Plaintiffs' consumer protections claims in Counts One and Two are found not to be preempted and are found to be adequately pleaded, certain allegations upon which Plaintiffs rely to support Counts One and Two do not, as a matter of law, rise to the level of unfair or deceptive practices necessary to sustain those claims.

Plaintiffs allege that, among other reasons, they were caused to open Higher One accounts because Defendants: (1) "cobranded" their materials with Plaintiffs' schools and referred to each school as their "partner"; Compl. ¶¶ 6, 19–30, 41(b), 52, 53–59, 64, 109, 124, 159(c), 207(e); (2) violated 34 C.F.R. 668.164(c)(3)(iv) by requiring students to incur a fee to open a Higher One Account; (3) deceptively labeled the card a "debit" card notwithstanding that Defendants charge PIN fees; Compl. ¶¶ 111–22; and (4) violated the E-Sign Act, 17 U.S.C. § 7001(b)(2). Compl. ¶¶ 156–58. As demonstrated below, Plaintiffs' CUTPA claim and other state consumer protection law claims fail to the extent that the enumerated acts serve as the predicates for the alleged violation of the statutes.

A. Defendants Did Not Misleadingly Portray Their Relationship with Plaintiffs' Schools.

The description of Higher One as a school's "partner" in the disbursement of refunds is completely accurate. By contracting with a school to administer the

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(abstaining from ruling on UCL claim about whether bank charged an unconscionably high fee).

school's financial aid disbursements, Higher One agrees, in essence, to stand in the shoes of the school. This, in turn, requires it to abide by a complex set of DOE regulations that, among other things: (1) governs the timing and delivery of funds; 34 C.F.R. § 668.164; (2) requires Higher One to covenant to be jointly and severally liable with the school to the DOE for any violations in administering any part of the Title IV program; 34 C.F.R. § 668.25(c)(3); (3) forces Higher One to submit to annual program-compliance audits by the DOE, 34 C.F.R. § 668.23(c); and (4) requires that Higher One promise to report to the DOE any information regarding certain misconduct by the school. 34 C.F.R. § 668.25(c)(2); *see generally* 34 C.F.R. §§ 668.14, 668.82 (school's obligation as a Title IV participant) and 668.25(c)(1) (servicer's agreement to comply with those obligations); Compl. Ex. A at 14 ("[T]hird-party servicers act as the college and share the same responsibilities and liabilities under law."). Higher One's role in the disbursement process is, in every relevant sense, as the school's partner in disbursing funds. Therefore the use of the term "partner" cannot form the basis for any violation of CUTPA or any other state consumer protection statute. *Cf. Haynes v. Yale-New Haven Hosp.*, 699 A.2d 964, 974–75 (Conn. 1997) (holding that CUTPA claim could not be premised on hospital's representation that it was a "major trauma center" because it was, in fact, a major trauma center).

Next, there is nothing improper about co-branding a debit card, website, or any other materials. Plaintiffs acknowledge that Higher One has arrangements with schools to be their service provider. *See* Compl. ¶¶ 4, 31. Noticeably absent from the Complaint is any allegation that schools did not give Higher One

permission to use their logos in co-branded materials. Thus, there is nothing deceptive or unfair about a school's partner distributing financial aid refunds using the school's logo when contacting students about the disbursement of financial aid funds from that school. Indeed, without co-branding, students might not realize that the mailer sent by Higher One concerns their financial aid refunds. Moreover, the DOE allows this co-branding. In a Dear Colleague Letter, which the Complaint references, DOE noted that "[c]urrently there are no Title IV prohibitions disallowing the debit card provider and the institution from displaying their respective logos on either the student's identification card or debit card." DOE, DCL GEN-12-8: Disbursing or Delivering Title IV Funds through a Contractor at A14, *available at* http://ifap.ed.gov/dpcletters/GEN1208.html (last visited Apr. 22, 2013).

Plaintiffs' CUTPA and state consumer protection law claims, to the extent they are based on the use of "co-branding" or "partnership" representations, fail to state a claim. *See Haynes*, 699 A.2d at 974–75.

B. Defendants Do Not Charge a Fee for Opening An Account.

Plaintiffs allege that Defendants violate 34 C.F.R. § 668.164(c)(3)(iv) by limiting access to free Higher One ATMs, thereby indirectly requiring them to pay a fee to receive their financial aid refunds from non-Higher One ATMs. Compl. ¶¶ 11, 187, 196. Plaintiffs have not adequately alleged a violation of this regulation. Thus, any CUTPA or other state consumer protection claim premised on a violation of this statute does not state a claim.

34 C.F.R. § 668.164(c)(3)(iv) states:

> In cases where the institution opens a bank account on behalf of a student or parent, establishes a process the student or parent follows to open a bank account, or similarly assists the student or parent in opening a bank account, the institution must—
>
> Ensure that the student or parent does not incur any cost in opening the account or initially receiving any type of debit card, stored-value card, other type of automated teller machine (ATM) card, or similar transaction device that is used to access the funds in that account.

On its face, § 668.164(c)(3)(iv) only applies to fees or costs incurred to "open" the account or to "initially receiv[e]" an ATM card. Plaintiffs do not allege that they incurred any fees, including PIN Fees and non-Higher One ATM Fees, at any time before their accounts were opened or that they were charged a fee simultaneously with the account being opened. Indeed, Plaintiffs (inaccurately) allege that Higher One "opens" an account for them before they even receive a communication from Higher One. Compl. ¶¶ 48–49. There is likewise no allegation that Defendants charge for receipt of an ATM card; rather, Plaintiffs allege only that they are sent an ATM card. *Id.* ¶¶ 55–57. The fees that Plaintiffs allege they were charged were all incurred *after* their accounts were opened and they received their debit cards. Thus, Plaintiffs cannot rely on violation of this regulation to support a CUTPA or other state consumer protection statute. *See Heyman Assocs. No. 1 v. Ins. Co. of State of Pa.*, 653 A.2d 122, 129 (Conn. 1995) (CUTPA claim predicated on violation of another law cannot stand where no violation of the other law is shown).

C. Defendants Do Not Violate Consumer Protection Statutes By Labeling Debit Cards as Debit Cards.

Plaintiffs allege that Defendants violate CUTPA and other state consumer protection statutes by labeling the debit card they received with the word

"DEBIT" and thus "deceiving" Plaintiffs into incurring a $0.50 Merchant PIN-Based Transaction fee each time they made a purchase by typing in their Personal Identification Numbers ("PIN") rather than by pressing "credit" at a merchant terminal and signing for the purchase. Compl. ¶¶ 111–20. A debit transaction can be effected as either a PIN-based debit transaction or a signature debit transaction. As the Board of Governors of the Federal Reserve have stated:

> [A] customer secures a PIN debit transaction by typing in a PIN at the POS terminal and a signature debit transaction by signing a receipt or an electronic screen. A customer is typically prompted at the POS terminal to choose "credit" or "debit"; when the consumer uses a debit card, a choice of "credit" results in a signature debit transaction, while a choice of "debit" results in a PIN debit transaction (*the names of the choices notwithstanding, both types of transactions are in fact debit transactions*).

Board of Governors of the Federal Reserve System, Report to Congress on the Disclosure of Point-of-Sale Debit Fees, 5 (Nov. 2004), *available at* http://www.federalreserve.gov/boarddocs/rptcongress/posdebit2004.pdf (last visited Apr. 22, 2013) (emphasis added). Thus, there is nothing misleading about calling the card what it is: a debit card. *See, e.g., Haynes*, 699 A.2d at 974–75. Indeed, DOE regulations prohibit Defendants from calling the debit card a credit card. 34 C.F.R § 668.164(c)(3) (vii).

Moreover, the Fee Schedule listed a $0.50 "Merchant PIN-based Transaction Fee," explained the fee in the column entitled "Why is a fee assessed for this service?" and also explained how the cardholder could avoid the fee: "Instead of entering your Personal Identification Number (PIN) at checkout choose 'credit' and sign the receipt to avoid the PIN fee." Compl. Ex. C at 3. These instructions are straightforward, and Plaintiffs' allegations that the

instructions do not cover all circumstances at all merchants—such as when a cardholder must press two buttons rather than one—does nothing to controvert the fact that Plaintiffs were told that they would incur a fee if they typed in their PIN number at a merchant POS terminal.

D. Plaintiffs Do Not Allege Ascertainable Loss From Any Alleged Violation of the E-Sign Act.

Plaintiffs also make the allegation that, by purportedly violating the E-Sign Act and the Electronic Funds Transfer Act ("EFTA"), Defendants violate CUTPA and other state consumer protection statutes. According to Plaintiffs, they have "no reasonable opportunity" to "receive bank statements" in "written form" because Defendants: (1) required them to sign an E-Sign Disclosure and Consent form so that they would receive bank statements electronically; (2) then provided them the right to opt out by phone and receive paper statements; and (3) told them that opting out may result in termination of their access to the Higher One website. Compl. ¶¶ 156–58. Even if these allegations could establish a violation of EFTA or the E-Sign Act—which they do not—Plaintiffs fail to allege that they did not actually receive their bank statements or in any way suffered an ascertainable loss of money or property. The absence of such an allegation is fatal to Plaintiffs' CUTPA claim. *See* Conn. Gen. Stat. § 42-110g(a).[13]

[13] Other states' consumer protection laws likewise require a showing of ascertainable loss. *See* Cal. Bus. Prof. Code § 17204 (loss requirement for any private action); Fla. Stat. § 501.211(2) (loss requirement for damages action); Ky. Rev. Stat. § 367.220(1) (loss requirement for any private action); Tex. Bus. & Com. Code § 17.50(a) (same); Wash. Rev. Code § 19.86.090 (same); La. Rev. Stat. § 51:1409(A) (same); *Wilson v. Blue Ridge Elec. Membership Corp.*, 578 S.E. 2d 692, 694 (N.C. Ct. App. 2003) (plaintiff must show "actual injury").

VI. Plaintiffs Fail to State a Claim for Breach of Contract (Count Three).

Plaintiffs allege that Higher One breached the contract "embodied in Higher One's Account Agreement and Fee Schedules" because when Plaintiffs made withdrawals from non-Higher One ATMs, Higher One charged a $2.50 out-of-network fee, and also "allowed" the operator of the non-Higher One ATM to charge its own fee. Compl. ¶¶ 226, 230. Plaintiffs ignore, however, that Higher One has no control over the third-party ATM provider. Moreover, the contract makes clear not only that Higher One would charge a $2.50 non-Higher One ATM transaction fee, but also that operators of non-Higher One ATMs might charge their own separate fees—a disclosure that is in fact required by federal law. *See* 12 C.F.R. § 1005.7(a), (b)(5). Because Higher One "could not legally or logically be in breach of a contract where no default has occurred under the terms of the contract," Plaintiffs' contract claim must be dismissed. *Patron v. Konover*, 646 A.2d 901, 908 (Conn. App. Ct. 1994), *cert. denied*, 648 A.2d. 879 (Conn. 1994).

The contract's terms are clear. The Non-Higher One ATM Transaction Fee is described in the Account Agreement, which expressly incorporates the Fee Schedule. *See* Compl. Ex. B at 9. The Fee Schedule lists the $2.50 fee for "Non-Higher One ATM Transactions," and explains that the fee is incurred when a "Non-Higher One ATM has been used." Compl. Ex. C at 2. The Account Agreement additionally discloses that third party operators of non-Higher One ATMs might also charge their own separate fees. *Id.* Ex. B. at 12. As Plaintiffs recognize, "Under the heading of 'ATM Operator/Network Fees,' the Account Agreement states: 'When you use an ATM not owned by us, you may be charged

a fee by the ATM operator or any network used.'" Compl. ¶ 90(quoting Ex. B at 12); *see also id.* ("If you use an ATM not owned by us for any transaction, including a balance inquiry, you may be charged a fee by the ATM operator even if you do not complete a withdrawal. If you obtain cash from a bank teller, the bank may charge a fee. This ATM or bank fee *is a third party fee amount assessed by the individual ATM operator or bank only and is not assessed by us.*" (emphasis added)). The contract thus explains that a $2.50 Non-Higher One ATM Transaction Fee will be assessed by Higher One for use of a non-Higher One ATM, and discloses the fact that an ATM Provider/Network Fee might be assessed by the operator of the non-Higher One ATM.

Plaintiffs strain to conflate these two provisions, which describe two distinct fees, arguing that the contract "does not make it clear that the [$2.50] ATM fee is being charged by Higher One," but instead appears to be "a notation of the amount of the fee charged by the non-Higher One bank." *Id.* ¶ 92. For three reasons, Plaintiffs' tortured reading of the contract is unsupportable.

First, the words of the contract make clear that the $2.50 fee would be charged by Higher One, not by a third party. The Account Agreement provides: "By using the Account you [the accountholder] agree to . . . the Schedule of Fees . . . . You grant *us* the right to collect the fees . . . ," *id.* Ex. B at 6 (emphasis added), making clear that the Fee Schedule enumerates Higher One's Fees, not someone else's fees. Consistent with this, the schedule on which the $2.50 fee appears is called the "OneAccount Fee Schedule," referring to the name of the Higher One Account. Compl. Ex. C at 2. Further, the schedule lists, alongside the

$2.50 non-Higher One ATM transaction fee, a dozen fees that could only have been assessed by Higher One, not by a third party. The fact that the $2.50 fee appears alongside these other Higher One fees indicates that the $2.50 fee, too, is assessed by Higher One, not by a third party.

***Second*, common sense dictates that Higher One would not, and could not, disclose the actual fees that independent third parties might charge. Higher One has no knowledge or control of what a third party might charge for the use of the third party's ATM, or which third parties' ATMs Plaintiffs might use.**

***Third*, regulations that govern ATM fee notices recognize that a card issuer is unable to provide notice of the fees charged by third parties. Under the regulations, a card issuer must disclose "at the time a consumer contracts . . . [a]ny fees imposed by the [card issuer] for electronic fund transfers [*e.g.*, ATM withdrawals] or for the right to make transfers." 12 C.F.R. § 1005.7(a),(b)(5). In addition to this obligation to disclose *its own* fees at the time the account is opened, the card issuer must also provide "notice that a fee *may be* imposed by an automated teller machine." 12 C.F.R. § 1005.7(b)(11) (emphasis added). The ATM operator, in turn, must communicate *its* fee to the customer at the point of use—on the screen of the ATM when the when cash is actually withdrawn. 12 C.F.R. § 1005.16. Thus, the regulations ensure that the accountholder is provided notice of his bank's fee for using a non-bank owned ATM when he opens his bank account and notice of the third party ATM provider's fee, if any, when he uses the ATM.**

Defendants have complied with applicable regulations by disclosing both

their own fee for "Non-Higher One ATM Transactions" and the fact that an ATM operator may, in addition, charge separate fees, which Defendants refer to as "ATM Operator/Network Fees." Plaintiffs' attempt to twist Defendants' compliance into a breach of contract underscores that their interpretation of the contract is unreasonable. The Fee Schedule clearly discloses the $2.50 fee Defendants charged for use of a Non-Higher One ATM.

Though truly ambiguous contract terms are not susceptible to a motion to dismiss, it is well established that "courts cannot indulge in a forced construction ignoring provisions or so distorting them as to accord a meaning other than that evidently intended by the parties." *Buell Indus. v. Greater N.Y. Mut. Ins. Co.*, 791 A.2d 489, 501 (Conn. 2002) (internal quotation mark omitted). As the Connecticut Supreme Court emphasized in *Buell Industries*, "a court will not torture words to import ambiguity . . . and words do not become ambiguous simply because lawyers or laymen contend for different meanings." *Id.* (internal quotation marks omitted); *see also Kelly v. Figueiredo*, 610 A.2d 1296, 1299 (Conn. 1992) ("The fact that the parties advocate different meanings of [a] clause does not necessitate a conclusion that the language is ambiguous.") (internal quotation marks omitted). Here, there is simply no ambiguity: The Account Agreement and Fee Schedule clearly disclose that Higher One will charge a specific $2.50 Non-Higher One ATM Transaction Fee. The Account Agreement also discloses that a third party ATM Operator might charge its own fee. Higher One did not therefore breach the contract by charging the disclosed $2.50 fee.

VII. Plaintiffs Fail to State a Claim for Breach of the Covenant of Good Faith and Fair Dealing (Count Four).

In Count Four, Plaintiffs allege that Defendants breached the covenant of good faith and fair dealing by using their contractual "discretion to determine whether or not to approve a transaction" in order to "maximize their revenue from Overdraft Fees." Compl. ¶¶ 235, 237. Count Four fails because the contract expressly permits Higher One to charge Plaintiffs insufficient-funds fees if they attempt to overdraw their accounts. In addition, Count Four fails because Plaintiffs do not allege any facts demonstrating that Higher One's actions were done in bad faith.

The covenant of good faith and fair dealing is an implied duty in every contract "requiring that neither party do anything that will injure the right of the other to receive the benefits of the agreement." *Beckenstein Enters.-Prestige Park, LLC v. Keller*, 974 A.2d 764, 773 n.7 (Conn. Ct. App. 2009). "[T]he essential elements of a claim of breach of the implied covenant of good faith and fair dealing are as follows: (1) that there was a contract . . . ; (2) that the defendant acted in such a way to impede or interfere with the plaintiff's right to receive benefits that she reasonably expected to receive under the express terms of the contract; and (3) that such acts . . . were taken in bad faith." *Weissman v. Koskoff,* No. HHDCV106012922S, 2011 WL 590461, at *4 (Conn. Super. Ct. Jan. 13, 2011), *aff'd sub nom. Weissman v. Koskoff, Koskoff & Bieder, P.C.,* 46 A.3d 943 (Conn. App. Ct. 2012); *see also Renaissance Mgmt. Co., Inc. v. Conn. Hous. Fin. Auth.*, 915 A.2d 290, 298 (Conn. 2007).

There can be no breach of the covenant of good faith and fair dealing

where, as here, the contract expressly permits the challenged actions. *Beckenstein*, 974 A.2d at 774; *Magnan v. Anaconda Indus., Inc.*, 479 A.2d 781, 786 (Conn. 1984) (covenant may generally not "be applied to achieve a result contrary to the clearly expressed terms of a contract"); *Enzo Biochem, Inc. v. Johnson & Johnson.*, No. 87-cv-6125 (KMW), 1992 WL 309613 (S.D.N.Y. Oct. 15, 1992) ("[C]ourts do not imply a covenant of good faith and fair dealing when it would conflict with an express term of the contract.").

Here, the relevant Account Agreement provision states that the account holder "agree[s] to maintain sufficient available funds on deposit to cover all items presented for payment against [the accountholder's] Account." Compl. Ex. B at 8. If the accountholder does not meet this obligation, Higher One "may charge [the] Account a fee for the payment, or return of the item against insufficient or uncollected funds." *Id.*

That the contract provided that Plaintiffs "may" be charged fees—not that they "will" be charged—does not create a reasonable expectation that the fees would be waived, and certainly does not rise to the level of bad faith. *Hassler v. Sovereign Bank*, 644 F. Supp. 2d 509, 517 (D.N.J. 2009), *aff'd*, 374 F. App'x 341 (3d Cir. 2010) (dismissing claim for breach of covenant of good faith and fair dealing and rejecting argument that "by describing the actions that [defendant] 'may' take or . . . charges customers 'may' incur, the Agreement implies that customers are entitled to an unexpressed limitation" or that defendant would refrain from taking the contractually authorized action).

Plaintiffs' claim for breach of the covenant of good faith also fails because

Plaintiffs do not adequately allege that Defendants charged the insufficient-funds fee in bad faith. A claim for the breach of the covenant of good faith and fair dealing must be supported by an allegation of bad faith, and courts routinely dismiss claims where this allegation is absent. *See, e.g.*, *Blumberg Assocs. Worldwide, Inc. v. Brown & Brown of Conn., Inc.*, 30 A.3d 38, 49 (Conn. App. Ct. 2011); *Keller v. Beckenstein,* 979 A.2d 1055, 1064 (Conn. App. Ct. 2009); *Miller Auto. Corp. v. Jaguar Land Rover N. Am., L.L.C.*, No. 3:09–cv–1291(EBB), 2010 WL 3417975, *5 (D. Conn. Aug. 25, 2010); *Hassler,* 644 F. Supp. 2d at 517.

Without more, an interest in maximizing revenue does not amount to bad faith. *De La Concha of Hartford, Inc. v. Aetna Life Ins. Co.*, 849 A. 2d 382, 390 (Conn. 2004) (no breach of covenant and no bad faith where defendant only "pursued its own self-interest . . . [but] it did not do so because of a dishonest purpose, a furtive design or ill will toward the plaintiff"); *Suthers v. Amgen Inc.*, 441 F. Supp. 2d 478, 485 (S.D.N.Y. 2006) ("Plaintiffs have no support for the broad proposition that an entity violates the implied covenant of good faith and fair dealing by acting in its own self-interest consistent with its rights under a contract.")

Here, the Complaint alleges only that fees were charged "in bad faith, in that the purpose . . . was to maximize Defendants' revenue . . . at the expense of their customers." Compl. ¶ 238. This is an insufficient allegation of bad faith, which warrants dismissal of this claim.

VIII. Plaintiffs' Rescission Claim Fails.

Although not specifically labeled as a separate count, Plaintiffs assert a

"rescission" cause of action. Compl. ¶¶ 215–224. Plaintiffs' theory is that no contract was formed between Plaintiffs and Defendants because Plaintiffs' consent "to the terms of Higher One's Account Agreement and fee schedule was not real or free and was given under mistake or fraud." *Id.* ¶ 216. This claim fails for two reasons (in addition to those applying to the consumer protection and tort claims generally).

First, rescission is not a cause of action; it is a remedy available to a plaintiff who succeeds in proving that he or she was fraudulently induced to enter into a contract. *Leisure Resort Tech. v. Trading Cove Assocs.*, 889 A. 2d 785, 793 (Conn. 2006) (describing rescission as a remedy for a plaintiff who was "fraudulently induced to enter into a transaction"); *IM Partners v. Debit Direct Ltd.*, 394 F. Supp. 2d 503, 518 (D. Conn. 2005) ("Rescission is appropriate where a party made material misrepresentations of fact upon which the plaintiff had a right to rely and which induced it to enter into the contract.") (internal quotation marks and brackets omitted); *Gen. Elec. Capital Corp. v. DirecTV, Inc.*, 94 F. Supp. 2d 190, 201–02 (D. Conn. 1999) ("A party claiming fraud in the inducement or fraudulent misrepresentation or omission can seek rescission, or it can claim damages for breach of contract."). Here, because rescission is a remedy and not a cause of action, this claim must fail.

Second, Plaintiffs base this claim on "mistake or fraud." Compl. ¶ 216. Therefore, this claim must satisfy Rule 9(b)'s pleading requirement, which says each plaintiff "alleging fraud or mistake . . . must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). Plaintiffs have

not pled fraud or mistake with the requisite particularity.

To meet Rule 9(b), "the complaint must: (1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent." *Lerner v. Fleet Bank, N.A.*, 459 F.3d 273, 290 (2d Cir. 2006). "[T]his requires the plaintiffs to identify which defendant caused each allegedly fraudulent statement to be spoken, written, wired or mailed; to whom the communication was made; when the communication was made; and how it advanced the fraudulent scheme." *Defazio v. Wallis*, 500 F. Supp. 2d 197, 203 (E.D.N.Y. 2007) (citing *McLaughlin v. Anderson*, 962 F.2d 187, 191 (2d Cir. 1992)).

Importantly, *each* Plaintiff must plead the requisite who, what, when, where, and how of any purported fraud directed at him or her. *See Mason v. Coca-Cola Co.*, 774 F. Supp. 2d 699, 702 (D.N.J. 2011) ("In class action cases, each individually named plaintiff must satisfy Rule 9(b) independently") (internal quotation omitted); *accord Sanford v. MemberWorks, Inc.*, 625 F.3d 550, 558–59 (9th Cir. 2010); *In re Bayer Corp. Combination Aspirin Prods. Mktg. & Sales Practices Litig.*, 701 F. Supp. 2d 356, 378 (E.D.N.Y. 2010) ("Plaintiffs cannot use class actions to escape pleading requirements").

Not a single statement in the Complaint pleads wrongful conduct specific to any named Plaintiff. Instead, Plaintiffs simply allege in one massive paragraph that every purported wrongful act alleged in the Complaint happened to them, individually. Compl. ¶¶ 19–30. These conclusory, blanket allegations do not provide the necessary who, what, when, where, and how needed to satisfy Rule

9(b). *Cosmas v. Hassett*, 886 F. 2d 8, 11 (2d Cir. 1989) (to satisfy Rule 9(b), Plaintiffs must "state when and where the statements were made, and identify those responsible for the statements"); *Kalin v. Xanboo, Inc.*, 526 F. Supp. 2d 392, 401 (S.D.N.Y. 2007) ("Rule 9(b) requires that Plaintiff's pleadings lay out . . . the who, what, when, where, and how of the fraud.") (internal quotation marks and brackets omitted). Indeed, each Plaintiff fails to identify when they made their refund selection, what specific representations they heard, or whether Higher One, another defendant or the school made those representations to them. *See* Compl. ¶¶ 19–30. Moreover, none of the Plaintiffs identify how their ATM access was limited, what representations were made about that access or what specific representations in the Fee Schedule and Account Agreement caused a mistake or fraud to occur. *Id.*

For these reasons, Plaintiffs' rescission claim must be dismissed.

IX. Plaintiffs' Unjust Enrichment Claim (Count Six) Fails.

Count Six boils down to a claim that Higher One was "unjustly enriched" because it collected various transaction fees from Plaintiffs under the terms of the Account Agreement. *See* Compl. ¶ 258. Because an express contract existed between Plaintiffs and Higher One, Plaintiffs cannot maintain an unjust enrichment claim. *Alstom Power, Inc. v. Schwing America, Inc.*, No. 3:04-CV-1311 (JBA) 2006 WL 2642412, at *5 (D. Conn. Sept 14, 2006) ("[W]here an express contract exists, restitution for unjust enrichment, a quasi contractual remedy, is unavailable."). Plaintiffs try to avoid dismissal by alleging that their unjust enrichment claim does not include the paragraphs of the complaint "which allege

the existence of a valid contract." Compl. ¶ 253. This cannot save the unjust enrichment count because as discussed above, Plaintiffs have not adequately pled a basis for rescinding the contract. *See* Section VIII, *supra*.

X. Plaintiffs' Fifth and Seventh Counts Must Be Dismissed.

In their Fifth Count, Plaintiffs allege that, by "defaulting" Plaintiffs into Higher One Accounts and depositing their financial aid funds into those accounts "without their consent," Defendants have "assumed and exercised the right of ownership over these funds, in hostility to the rights of Plaintiffs. . . ." Compl. ¶ 242. In their Seventh Count, Plaintiffs allege that, "[b]y automatically depositing such funds, and by debiting improperly disclosed, unusual, and unconscionable bank fees from the accounts" with the "inten[t] to permanently deprive" Plaintiffs of the funds collected as fees, Defendants are liable for theft under Conn. Gen. Stat. § 52-564. Compl. ¶ 263, 265. Even apart from the preemption and pleadings arguments addressed above, no legally viable conversion or statutory theft claim exists based on these allegations.

Conversion, under Connecticut law, is the "unauthorized assumption and exercise of the right of ownership over goods belonging to another, *to the exclusion of the owner's rights*." *Davis v. Conn. Cmmty. Bank.*, 3:10-CV-261 (VLB), 2013 WL 1296473, at *14 (D. Conn. Mar. 26, 2013) (emphasis added). "The elements of civil theft are also largely the same as the elements to prove the tort of conversion, but theft requires a plaintiff to prove the additional element of intent over and above what he or she must demonstrate to prove conversion." *Id.* (quoting *Sullivan v. Delisa*, 923 A.2d 760, 771 (Conn. App. Ct. 2007)). Plaintiffs do

not—and cannot—allege that Defendants deprived them of access to the funds in their accounts. Plaintiffs merely allege that Defendants "assumed and exercised the right of ownership over these funds." Compl. ¶ 242. This is not sufficient to state a claim for conversion or theft. If it were, then *every* bank would necessarily be subject to such a claim because it is in the nature of depository banking that the bank assumes control over the funds deposited with it. *See, e.g., Wawrzynowicz v. Wawrzynowicz*, 319 A.2d 407, 408 (Conn. 1972). Plaintiffs do not—and cannot—allege that they are unable to withdraw their money or close their Higher One accounts. Defendants therefore do not exercise control "to the exclusion of [Plaintiffs'] rights." *Davis*, 2013 WL 1296473, at *14.

Plaintiffs' conversion and theft claims also fail because funds in a deposit account do not constitute specific, identifiable money. "[I]n order to establish a valid claim of conversion or statutory theft for money owed, a party must show ownership or the right to possess, *specific, identifiable money*, rather than the right to the payment of money generally." *Mystic Color Lab, Inc. v. Auctions Worldwide, LLC*, 934 A.2d 227, 236 (Conn. 2007) (emphasis added). When money is deposited in a bank account, the money belongs to the bank, with the bank being "indebted to its account holders for the amount of funds that they have deposited." *Fleet Bank Conn., N.A. v. Carillo*, 691 A.2d 1068, 1070 n.6 (Conn. 1997). Thus, a claim relating to funds held in a bank account is essentially a contract claim for money owed. However, "funds deposited in a bank account are not sufficiently specific and identifiable . . . to support a claim for conversion against the bank." *Fundacion Museo de Arte Contemporaneo de Caracas v. CBI-*

TDB Union Bancaire Privee, 160 F.3d 146, 148 (2d Cir. 1998) (applying parallel New York law); *see also Belford Trucking*, 243 So. 2d at 648, *cited with approval in Macomber v. Travelers Prop. & Cas. Corp.*, 804 A.2d 180 (Conn. 2002) ("[W]here the parties have an open account, and the defendant is not required to pay the plaintiff *identical moneys* which he collected, there can be no action in the tort of conversion.") (emphasis added); *Reliance Ins. Co. v. U.S. Bank of Wash.*, 143 F.3d 502, 506 (9th Cir. 1998) ("[B]ank accounts generally cannot be the subject of conversion, because they are not specific money, but only an acknowledgment by the bank of a debt to its depositor."); *MKT REPS S.A. de C.V. v. Standard Chartered Bank Int'l (Americas) Ltd.*, No. 10-cv-22963, 2012 WL 1852411, at *1 (S.D. Fla. May 21, 2012) (dismissing claim for failing to satisfy the "requirement that the money that forms the basis of a conversion claim is specific and identifiable"). As this Court recently observed, money held at a bank in a non-segregated account is fungible. *See Davis*, 2013 WL 1296473, at *5 (collecting cases discussing the "fungibility of cash"). Accordingly, Plaintiffs fail to state a claim for conversion or theft with respect to the funds held in their accounts.

Plaintiffs also fail to state a conversion or theft claim with respect to money Defendants collected in fees, because those fees are expressly authorized by a contract and "an action in tort is inappropriate where the basis of the suit is a contract, either express or implied." *Macomber*, 804 A.2d at 199 (internal quotation marks omitted). Conversion only "occurs when one, *without authorization*, assumes and exercises ownership over property belonging to another, to the exclusion of the owner's rights." *Hi-Ho Tower Inc. v. Com-Tronics,*

Inc., 761 A.2d 1268, 1281 (Conn. 2000) (internal quotation mark omitted). Because the fees were authorized under the contract, Plaintiffs fail to state a claim for conversion or theft.

Even if the conversion claim were to survive Defendants' motion to dismiss, Plaintiffs' theft claim fails because Plaintiffs do not allege that Higher One had a specific intent to steal Plaintiffs' money. The Connecticut Supreme Court has held that "[s]tatutory theft under § 52-564 is synonymous with larceny." *Deming v. Nationwide Mut. Ins. Co.*, 905 A.2d 623, 639 (Conn. 2006) (internal quotation mark omitted). "Because larceny is a specific intent crime, the state must show that the defendant acted with the subjective desire or knowledge that his actions constituted stealing." *State v. Saez*, 972 A.2d 277, 302 (Conn. App. Ct. 2009).

Beyond mere conclusions, Plaintiffs do not allege that Defendants *subjectively desired* to *steal* their money or acted with knowledge that their actions constituted stealing. On the contrary, Plaintiffs allege that Higher One's actions were undertaken in connection with the Account Agreement. Accordingly, Defendants acted with an "honestly held claim of right," thus precluding liability for statutory theft. *See Lawson v. Whitey's Frame Shop*, 682 A.2d 1016, 1021 (Conn. App. Ct. 1996) (where defendant acts "under an honestly held claim of right," "the plaintiffs' proof that the defendant converted their property cannot, on its own, support a finding of statutory theft under § 52-564").

Conclusion

For the foregoing reasons, the Complaint must be dismissed in its entirety with prejudice.

Date: April 22, 2013

DEFENDANTS HIGHER ONE HOLDINGS, INC., THE BANCORP BANK, AND WRIGHT EXPRESS FINANCIAL SERVICES CORP.

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CERTIFICATE OF SERVICE

I hereby certify that on April 22, 2013 a copy of the foregoing was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

/s/Kim E. Rinehart
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