UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

IN RE: ITT EDUCATIONAL SERVICES, INC., *et al.*[1] Debtors.	Case No. 16-07207-JMC-7A Jointly Administered
DEBORAH J. CARUSO, the chapter 7 trustee for the bankruptcy estates of ITT Educational Services, Inc., ESI Service Corp., and Daniel Webster College, Inc., Plaintiff, vs. PEAKS TRUST 2009-1; DEUTSCHE BANK TRUST COMPANY AMERICAS; DEUTSCHE BANK NATIONAL TRUST COMPANY; DEUTSCHE BANK TRUST COMPANY DELAWARE; ACCESS GROUP INC., k/n/a ACCESSLEX INSTITUTE; MIDDLEFIELD BANKING CO., successor to LIBERTY BANK, N.A., DEUTSCHE BANK SECURITIES, INC.; MOEHN MANAGEMENT, INC.; WELLS FARGO BANK, N.A.; LIBERTY HARBOR MASTER FUND I, L.P.; FUTURE FUND BOARD OF GUARDIANS; DEUTSCHE BANK, AG, LONDON BRANCH, a subsidiary of DEUTSCHE BANK AG; OREGON PUBLIC EMPLOYEES RETIREMENT FUND; KKR FI PARTNERS I L.P.; USAA LIFE INSURANCE COMPANY; ENSIGN PEAK ADVISORS, INC.; AMERICAN EQUITY INVESTMENT LIFE INSURANCE COMPANY; MARYLAND STATE RETIREMENT AND PENSION FUND; 8 CAPITAL PARTNERS, L.P.; KKR DEBT INVESTORS 11(2006) (IRELAND) L.P.; FULL CIRCLE CAPITAL CORPORATION, n/k/a GREAT ELM CAPITAL CORPORATION; UNITED OF OMAHA LIFE INSURANCE COMPANY and PAN-AMERICAN LIFE INSURANCE GROUP, INC., Defendants.	Adversary No. ____________

[1] The debtors in these cases, along with the last four digits of their respective federal tax identification numbers are ITT Educational Services, Inc. [1311]; ESI Service Corp. [2117]; and Daniel Webster College, Inc. [5980].

COMPLAINT (I) TO AVOID FRAUDULENT TRANSFERS AND PREFERENTIAL PAYMENTS AND RECOVER TRANSFERRED PROPERTY; (II) TO RECOVER DAMAGES FOR AIDING AND ABETTING BREACHES OF FIDUCIARY DUTY AND FRAUD; AND (III) OBJECTING TO CLAIMS

Deborah J. Caruso, the chapter 7 trustee ("Trustee" or "Plaintiff") in the above-captioned cases of ITT Educational Services, Inc., ESI Service Corp. and Daniel Webster College, Inc. (collectively referred to as either "ITT" or "Debtors"), by and through her undersigned counsel, and for her complaint against the PEAKS Trust 2009-1 ("PEAKS"), Deutsche Bank Trust Company Americas ("DBTCA"), Deutsche Bank National Trust Company ("DBNTC" or "Lender Trustee"), Deutsche Bank Trust Company Delaware ("DBTCD"), Access Group., Inc., k/n/a Accesslex Institute ("Access Group"), Middlefield Banking Co, successor to Liberty Bank, N.A. ("Liberty Bank"), Deutsche Bank Securities Inc. ("DBSI"), Moehn Management, Inc. ("Moehn"), Wells Fargo Bank, N.A. ("Wells Fargo"), Liberty Harbor Master Fund I, L.P., Future Fund Board of Guardians, Deutsche Bank, AG, London Branch, a subsidiary of Deutsche Bank AG., Oregon Public Employees Retirement Fund, KKR FI Partners I L.P., USAA Life Insurance Company, Ensign Peak Advisors, Inc., American Equity Investment Life Insurance Company, Maryland State Retirement and Pension Fund, 8 Capital Partners, L.P., KKR Debt Investors 11(2006) (Ireland) L.P., Full Circle Capital Corporation, n/k/a Great Elm Capital Corporation, United of Omaha Life Insurance Company and Pan-American Life Insurance Group, Inc. (each a "Defendant" and collectively, the "Defendants"),[2] states as follows:

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[2] Wells Fargo, Liberty Harbor Master Fund I, L.P., Future Fund Board of Guardians, **Error! Main Document Only.**Deutsche Bank, AG, London Branch, a subsidiary of Deutsche Bank AG, Oregon Public Employees Retirement Fund, KKR FI Partners I L.P., USAA Life Insurance Company, Ensign Peak Advisors, Inc., American Equity Investment Life Insurance Company, Maryland State Retirement and Pension Fund, 8 Capital Partners, L.P., KKR Debt Investors 11(2006) (Ireland) L.P., Full Circle Capital Corporation, United of Omaha Life Insurance Company and **Error! Main Document Only.**Pan-American Life Insurance Group, Inc. are sometimes collectively referred to as the "Peaks Senior Creditors."

NATURE OF ACTION

ITT's PEAKS Loan Program was a for-profit education version of the sub-prime mortgage lending catastrophe, in which students rather than new homeowners were the victims. For the benefit of ITT insiders and Defendants, the PEAKS Loan Program allowed ITT to defraud students and evade regulators, while shielding the fruits of ITT's fraud from claims of students through a complicated structure involving multiple trusts and a circuitous flow of funds between ITT and Defendants. After ITT paid hundreds of millions to Defendants, and millions to insiders, there was little or nothing to pay $1.5 billion in student claims, U.S. Department of Education ("ED") claims, or claims of other creditors.

This Complaint seeks four forms of relief, pursuant to sections 105, 541, 544, 547, 548, 550, 551, and 704 of title 11 of the United States Code (11 U.S.C. § 101 *et seq*., the "Bankruptcy Code"), Indiana's Uniform Fraudulent Transfer Act ("IUFTA"), and common law principles of unjust enrichment. They are:

(1) To avoid and recover all fraudulent transfers and preferential payments that ITT's Former Management"[3] caused ITT to make to Defendants, directly or indirectly, and to avoid all obligations that ITT's Former Management caused ITT to incur in connection with the so-called "PEAKS Loan Program**.**" The obligations and transfers sought to be avoided include:

a. ITT's obligations under the agreements relating to the PEAKS Loan Program (collectively, the "PEAKS Agreements"),[4] including ITT's

[3] The defined phrase "ITT's Former Management" refers to those former ITT officers and directors, including, without limitation, Kevin Modany ("Modany") and Daniel M. Fitzpatrick ("Fitzpatrick"), who engaged in any wrongful acts concerning the conception, implementation, concealment and/or misleading reporting of the PEAKS Loan Program, misrepresentations made to ITT students, and the fraudulent transfers to or for the benefit of any of the Defendants as discussed in this complaint. It also includes those former ITT officers and directors that were aware, or should have been aware, of any such improper conduct but failed and/or refused to take any action to prevent or remedy such improper conduct or otherwise failed to properly exercise their respective fiduciary duties.

[4] The PEAKS Agreements include, without limitation: (i) the "Indenture and Credit Agreement," dated as of January 20, 2010, among PEAKS, DBTCA and DBNTC; (ii) the PEAKS TRUST 2009-1 Amended and Restated Trust Agreement, dated as of January 20, 2010, between Access Group and DBTCD; (iii) the Lender Trust Agreement, dated as of January 20, 2010, between PEAKS and DBNTC; (iv) the "Guarantee Agreement," dated as of January 20, 2010, between ITT and DBTCA; (v) the Private Education Loan Origination and Sale Agreement, dated as of January 20, 2010, among Liberty Bank, ITT, DBNTC, Access Group and PEAKS; (vi) the Agreement for Servicing Private Student Loans, dated as of January 20, 2010, among Access Group, PEAKS, ITT and DBTCA; (vii) the

purported obligation to pay over $3.4 million allegedly due by it under the Guarantee Agreement to DBTCA from September 16, 2016 (the "Petition Date") through January 27, 2017 and any payments for which ITT might allegedly be liable under the Guarantee Agreement after January 27, 2017;

b. All amounts "loaned" by ITT as a Subordinated Note Advances to PEAKS, in return for interest-free, uncollectible Subordinated Note;

c. Payments of over $174 million to PEAKS or to DBTCA, as Indenture Trustee and Collateral Agent under the Indenture and Credit Agreement for the benefit of PEAKS, and to PEAKS Senior Creditors, including Defendants, as subsequent transferees, that ITT's Former Management caused ITT to make under the Guarantee Agreement through the Petition Dates;[5]

d. ITT's obligations under a Letter Agreement, dated as of March 17, 2014, between ITT and DBTCA, also executed by certain PEAKS Senior Creditors (the "POBOB Settlement Agreement");

e. Transfers totaling $40 million to PEAKS and/or to DBTCA for the benefit of PEAKS, and to PEAKS Senior Creditors, including Defendants, as subsequent transferees, that ITT's Former Management caused ITT to pay under the POBOB Settlement Agreement, which amount, upon information and belief, was thereafter ultimately up-streamed to the PEAKS Senior Creditors;

f. Transfers totaling over $16 million that ITT's Former Management caused ITT to make to PEAKS and/or to DBTCA for the benefit of PEAKS, and

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Agreement for Servicing Private Student Loans (PEAKS), dated as of January 20, 2010, between Access Group and Liberty Bank; (viii) the Administration Agreement, dated as of January 20, 2010, among PEAKS, DBTCD, DBTCA, ITT and Access Group; (ix) the Note Purchase Agreement, among PEAKS, DBTCD, Liberty Harbor Master Fund I, L.P., Future Fund Board of Guardians, Deutsche Bank AG, London Branch, Oregon Public Employees Retirement Fund, KKR FI Partners I L.P., USAA Life Insurance Company, Ensign Peak Advisors, Inc., American Equity Investment Life Insurance Company and DBTCA; (x) the Subordinated Note Purchase Agreement, dated as of January 20, 2010, between PEAKS and ITT; (xi) the Loan Agreement, dated as of January 20, 2010, among PEAKS, Wells Fargo and DBTCA; (xii) the Purchase Obligation Agreement, among ITT, DBTCA, Liberty Harbor Master Fund I, L.P., Future Fund Board of Guardians, Wells Fargo, Deutsche Bank AG, London Branch, Oregon Public Employees Retirement Fund, KKR FI Partners I L.P., USAA Life Insurance Company, Ensign Peak Advisors, Inc. and American Equity Investment Life Insurance Company; (xiii) the Syndication Agent Agreement, dated as of January 20, 2010, between DBSI, PEAKS and ITT; and (xiv) the Loan Program Advisory Agreement, dated as of January 20, 2010, between PEAKS and Moehn.

[5] Upon information and belief, ITT's Former Management caused ITT to make the following payments under the Guarantee Agreement to DBTCA: (a) $258,000 in the second quarter of 2012; (b) $244,000 in the third quarter of 2012; (c) $11,840,000 in the fourth quarter of 2012; (d) $1,239,000 in the first quarter of 2013; (e) $138,000 in the third quarter of 2013; (f) $1,036,000 in the fourth quarter of 2013; (g) $40,713,000 in the first quarter of 2014; (h) $1,088,000 in the second quarter of 2014; (i) $52,517,000 in the third quarter of 2014; (j) $64,937,000 in the fourth quarter of 2014; (k) $13,367,000 in the first quarter of 2015; (l) $6,820,000 in the second quarter of 2015; (m) $4,856,000 in the third quarter of 2015; (n) $4,777,000 in the fourth quarter of 2015; (o) $4,354,000 in the first quarter of 2016; (p) $2,659,000 in the second quarter of 2016; and (q) $1,495,000 in the first quarter of 2016.

to PEAKS Senior Creditors, including Defendants, as subsequent transferees, that ITT's Former Management caused ITT to pay as "Payments on Behalf of Borrowers," ("POBOB Payments") on behalf of students with outstanding PEAKS loans, which amounts, upon information and belief, were thereafter up-streamed to the PEAKS Senior Creditors;[6] and

g. Preferential payments totaling over $1.7 million that ITT's Former Management caused ITT to make to PEAKS and/or to DBTCA for the benefit of PEAKS, and to PEAKS Senior Creditors, including Defendants, as subsequent transferees, that ITT's Former Management caused ITT to pay within ninety (90) days of the Debtors' bankruptcy filing.

(2) To recover from Defendants all damages sustained by ITT by reason of Defendants' aiding and abetting ITT's Former Management's breaches of fiduciary duty and/or fraud in connection with the conception, implementation and continuation of the PEAKS Loan Program that contributed to ITT's closure and bankruptcy, including any liability the Debtors may have on account of the massive amount of student loans for which the Department of Education ("ED"), ITT's former students or others are seeking, or may seek, to hold the Debtors liable.

(3) To recover payments, in amounts to be determined after trial, under equitable principles of unjust enrichment.

(4) An order disallowing any and all claims filed by Defendants in the bankruptcy cases, including but not limited to, Proof of Claim #1961 filed on January 26, 2017 by DBTCA as Indenture Trustee and Collateral Agent.

JURISDICTION AND VENUE

1. The Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §§ 151, 157 and 1334.

2. This adversary proceeding is brought pursuant to Rule 7001 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), sections 105, 541, 544, 547, 548, 550, 551

[6] Upon information and belief, ITT's Former Management caused ITT to make the following POBOB payments: (a) ~$2,762,000 in the fourth quarter of 2012; (b) ~$532,000 between January 1, 2013 and February 28, 2013; (c) ~$1,323,000 in March 2013; (d) ~$3,290,000 from April 1, 2013 through June 30, 2013; (e) ~$2,502,000 from July 1, 2013 through September 30, 2013; (f) ~$3,852,000 from October 1, 2013 through December 31, 2013; and; (g) ~$1,832,000 in January 2014.

and 704 of the Bankruptcy Code, the applicable provisions of the IUFTA, and common law principles of unjust enrichment.

3. The claims asserted in Counts I-V are core proceedings under 28 U.S.C. § 157(b)(2)(F) and (H). The claim asserted in Count VIII is a core proceeding under 28 U.S.C. § 157(b)(2)(B). The Court also has jurisdiction to hear and submit proposed findings and conclusions on the aiding and abetting breaches of fiduciary duty and fraud claims set forth in Counts VI and VII pursuant to 28 U.S.C. § 157(c).

4. In the event this adversary proceeding is found to be "non-core" in whole or in part, Plaintiff consents to the entry of final orders and judgments by the Court pursuant to Bankruptcy Rule 7008.

5. Venue in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409 because this adversary proceeding arises under and in connection with the above-captioned chapter 7 cases.

THE PARTIES

6. On the Petition Date, the Debtors each filed voluntary petitions for relief under chapter 7 of the Bankruptcy Code. Prior to the Petition Date, ITT was a publicly traded for-profit higher education company that was organized under the laws of the State of Delaware. All of the Debtors maintained their principal place of business in Carmel, Indiana.

7. On the Petition Date, the Trustee was appointed as the chapter 7 trustee in each of the Debtors' cases pursuant to section 701(a)(1) of the Bankruptcy Code.

8. Upon information and belief, defendant PEAKS is a statutory trust company organized and existing under the laws of Delaware, and is a party to certain of the PEAKS Agreements.

9. Upon information and belief, defendant DBTCA is a New York banking corporation with its offices at 60 Wall Street, New York, New York, and is a party to certain of the PEAKS Agreements.

10. Upon information and belief, defendant DBNTC is a national banking association, whose offices are located at 2000 Avenue of the Stars, Los Angeles, CA 90067, and is a party to certain of the PEAKS Agreements.

11. Upon information and belief, defendant DBTCD is a Delaware banking corporation with its principal place of business located at 1011 Centre Road, Suite 2000, Wilmington, Delaware 19805, and is a party to certain of the PEAKS Agreements.

12. Upon information and belief, defendant Access is a non-profit corporation with a principal place of business located at 10 North High Street, Suite 400, West Chester, PA 19380 and is a party to certain of the PEAKS Agreements.

13. Upon information and belief, defendant Liberty Bank is a national banking association, with its principal place of business located at 15985 East High Street, Middlefield, OH 44062, and acting as Liberty, N.A. is a party to certain of the PEAKS Agreements.

14. Upon information and belief, defendant Wells Fargo is a national banking association headquartered in Sioux Falls, South Dakota, and is a party to certain of the PEAKS Agreements.

15. Upon information and belief, defendant DBSI is a Delaware corporation with its principal executive offices in New York, New York, and is a party to certain of the PEAKS Agreements.

16. Upon information and belief, defendant Moehn is a Virginia corporation with its principal place of business located at 1899 Preston White Drive, Reston, VA 20191, and is a party to certain of the PEAKS Agreements.

17. Upon information and belief, defendant Liberty Harbor Master Fund I, L.P. is a hedge fund, with its principal place of business located at 200 West Street, New York, NY 10282, and is a party to certain of the PEAKS Agreements.

18. Upon information and belief, defendant Future Fund Board of Guardians is an Australian wealth fund, with its principal place of business located at Locked Bag 20010, Melbourne, VIC 3001, Australia, and is a party to certain of the PEAKS Agreements.

19. Upon information and belief, defendant Deutsche Bank AG, London Branch, a subsidiary of Deutsche Bank AG, is a banking association, with its principal place of business located at Winchester House, 1 Great Winchester Street, London, EC2N 2DB, United Kingdom, and is a party to certain of the PEAKS Agreements.

20. Upon information and belief, defendant Oregon Public Employees Retirement Fund is a fund managed by the Oregon State Treasury with its principal place of business located at 11410 SW 68th Parkway, Tigard, OR 97223 and is a party to certain of the PEAKS Agreements.

21. Upon information and belief, defendant KKR FI Partners I L.P. is a limited partnership with its principal place of business located at 9 West 57th Street, Suite 4200, New York, NY 10019 and is a party to certain of the PEAKS Agreements.

22. Upon information and belief, defendant USAA Life Insurance Company is a corporation with its principal place of business located at 9800 Fredericksburg Road, San Antonio, TX 78288 and is a party to certain of the PEAKS Agreements.

23. Upon information and belief, defendant Ensign Peak Advisors, Inc. is an investment management company, with its principal place of business located at 60 East South Temple, Suite 400, Salt Lake City, UT 84111, and is a party to certain of the PEAKS Agreements.

24. Upon information and belief, defendant American Equity Investment Life Insurance Company is a corporation with its principal place of business located at 6000 Westown Parkway, Suite 300, West Des Moines, IA 50266 and is a party to certain of the PEAKS Agreements.

25. Upon information and belief, defendant Maryland State Retirement and Pension Fund is a public retirement fund with its principal place of business located at 120 E Baltimore Street, Baltimore, MD 21202 and is a party to certain of the PEAKS Agreements.

26. Upon information and belief, defendant 8 Capital Partners, L.P. is a Cayman Island exempted limited partnership with its principal place of business located at 555 California Street, 50th Floor, San Francisco, CA 94104 and is a party to certain of the PEAKS Agreements.

27. Upon information and belief, defendant KKR Debt Investors 11(2006) (Ireland) L.P. is an investment fund, with its principal place of business located at International Finance Service Center, 1 Guild Street, Dublin 1, Dublin, Ireland, and is a party to certain of the PEAKS Agreements.

28. Upon information and belief, on or about November 3, 2016, defendant Full Circle Capital Corporation merged with and into Great Elm Capital Corporation, which is an investment advisory firm, with its principal place of business located at 102 Greenwich Avenue, 2nd Floor, Greenwich, CT 06830, and is a party to certain of the PEAKS Agreements.

29. Upon information and belief, defendant United of Omaha Life Insurance Company is a corporation with its principal place of business located at Mutual of Omaha Plaza, Omaha, NE 68175 and is a party to certain of the PEAKS Agreements.

30. Upon information and belief, defendant Pan-American Life Insurance Group, Inc. is a corporation with its principal place of business located at 601 Poydras Street, New Orleans, LA 70130 and is a party to certain of the PEAKS Agreements.

STATEMENT OF RELEVANT FACTS

Background of ITT, its Business Model and its Management

31. Up until its bankruptcy filing, ITT was one of the largest for-profit education companies in the country, offering masters, bachelor and associate degree programs at 137 campuses, and online programs for students located in all 50 states and the District of Columbia in a number of subjects, including electronics, drafting and design, criminal justice, business, information technology, health sciences and nursing. ITT was founded in 1946 and became a publicly traded company in 1994.

32. As with other for-profit colleges, much of ITT's growth occurred after it became eligible to receive federal student aid loans and grants under Title IV of the Higher Education Act of 1965, 20 U.S.C. §§ 1070 *et seq*. ("Title IV") in 1972. Before that year, only non-profit and public institutions were eligible for title IV student aid funds. Between 1970 and 1975, enrollment in for-profit schools increased by 112 percent, as compared with growth of 30 percent for all higher education sectors. *See* Report of the U.S. Senate Committee on Health, Education, Labor, and Pensions, *For Profit higher Education: the Failure to Safeguard the Federal Investment and Ensure Student Success* (2012) ("Senate Committee Report"), S. PRT. 112-37 at https://www.gpo.gov/fdsys/pkg/CPRT-112SPRT74931/pdf/CPRT-112SPRT74931.pdf.

33. During the relevant time period, Kevin Modany ("Modany") and Daniel M. Fitzpatrick ("Fitzpatrick") were ITT's principal executive officers. Modany served as ITT's Chief Financial Officer from 2003 to 2005; its President and Chief Operations Officer from 2005 to 2007; and its Chief Executive Officer and Chairman of its Board of Directors from 2007 and 2008, respectively, until September 2016. Fitzpatrick served as ITT's Chief Financial Officer from 2005 to 2015. Both Modany and Fitzpatrick were certified public accountants who worked as auditors in national accounting firms prior to joining ITT. Upon information and belief, both were well-versed in financial statements and how to interpret and manipulate them.

34. Because compensation of ITT's Former Management was directly tied to ITT's reported earnings per share ("EPS"), Modany, Fitzpatrick and other senior management were incentivized to report a rosy picture of ITT's revenue and profit. In 2012 alone, Modany received $8.7 million in compensation. Besides Modany, at least four other ITT officers each earned more than $1.5 million in 2012. By way of comparison, in 2009, the president of Indiana University at Bloomington received $337,144 according to the Senate Committee Report.[7]

35. Throughout its existence, nearly all of ITT's revenue was derived from student tuition and fees. Accordingly, ITT's growth was dependent upon raising tuition and/or enrolling more students. Recruiting students was also of great importance because a large number of students who enrolled at ITT withdrew before completing their degree programs. According to the Senate Committee Report, "[o]verall, ITT's withdrawal rate closely tracks the sector-wide withdrawal rate of 54 percent."[8]

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[7] *See* p. 521 at **Error! Main Document Only.**http://help.senate.gov/imo/media/for_profit_report/PartII/ITT.pdf.
[8] *See* p. 531-2 at http://help.senate.gov/imo/media/for_profit_report/PartII/ITT.pdf.

36. Furthermore, students at for-profit institutions like ITT defaulted on their federal loans far more often than students at non-profit schools. According to the Senate Committee Report, by 1990, the student loan default rate at for-profit schools was double that of higher education overall.[9] Defaults by students at for-profit colleges represented almost half of the nationwide total. At the time of the Senate Committee Report, the expected defaults by ITT's students for 2009 was approximately 34 percent.[10]

37. As part of their efforts to drive profits (and thereby increase their own compensation), ITT's Former Management committed substantial resources to advertising and marketing efforts to recruit new students. For example, in 2010, ITT's Former Management caused ITT to employ 2,550 recruiters and to allocate $252 million -- about 19.1% of ITT's total revenue -- to marketing and recruiting, according to the Senate Committee Report[11].

38. ITT's recruiting efforts were aggressive. On information and belief, ITT's Former Management pushed recruiters to maximize sales, requiring them to make around 140 calls a day to prospective students, and compensating recruiters based on results. As discussed below, there is substantial evidence that ITT's recruiting practices frequently violated state and federal consumer protection laws.

The "90/10" Rule and the Need for Title IV Funding

39. Because the great majority of its students could not afford to pay the school's tuition on their own, retaining and aggressively recruiting students was not enough, by itself, to make ITT's business model work. The vast majority of ITT's revenue -- hundreds of millions of dollars annually -- came from Title IV loans to students.

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[9] *See* p. 133 at **Error! Main Document Only.**https://www.help.senate.gov/imo/media/for_profit_report/Contents.pdf.
[10] *Id.*
[11] *Id.* at 520.

40. In 2013, for example, approximately 82% of ITT's revenue came from Title IV funding. In the past ten years alone, ITT created, by a conservative estimate, *$7.3 billion* in student loan debt, both federal and private.

41. In order to obtain access to Title IV funding, however, ITT had to comply (or at least appear to comply) with a host of regulatory requirements. It needed to be authorized by each state in which it operated, to be accredited by an accrediting agency recognized as a reliable arbiter of educational quality, and most importantly, ITT needed to comply with federal financial aid program integrity rules, including:

- that ITT receive no more than 90% of its revenue from the Department of Education ("90/10 Rule"), found at 34 C.F.R. § 668.28;
- that no more than 30% of students default on loans within 3 years ("Cohort Default Rule"), found at 34 C.F.R. § 668.217; and
- that ITT's programs prepare students for gainful employment in a recognized occupation, as measured by the ratio of their loan debt to their income ("Gainful Employment Rule"). *See* 34 C.F.R. § 668.6.

42. Schools that do not comply with the "90/10" rule and the related regulations risk losing their eligibility to participate in federal student aid programs. For ITT and similar businesses, this would have meant losing nearly all of its revenue, and shutting its doors.

43. Accordingly, ITT's business model relied not only on recruiting students, but also on convincing its students to obtain federal aid, and on being able to satisfy state and local regulators that all lending and related requirements were being met.

44. Because ITT received the Title IV funds so long as students took out loans and signed up for classes, ITT would profit from the increased availability of Title IV monies, even if it eventually turned out that many of the students would be unable to repay the loans they were induced to take out.

The "Great Recession" and ITT's Former Management's Scheme to Maintain Eligibility for Title IV Federal Financial Aid

45. Prior to February 2008, ITT and its students generally relied on an unaffiliated third-party lender to provide private education loans to pay the 10% of tuition under the 90/10 Rule that was not funded by Title IV funds or by the students themselves. Upon information and belief, this third-party lender established its own underwriting criteria, interacted with student-borrowers at arms-length without any involvement from ITT's Former Management, and independently made decisions about whether or not to extend loans in each instance. Through such independent underwriting criteria, the 90/10 Rule provided some "check and balance" for Title IV lending.

46. Starting in mid-2007, however, as the country experienced the worst financial downturn since the Great Depression, the ITT business model had to change quickly. As a result of the banking crisis, sources of private financing dried up, particularly, funding for risky private student loans at for-profit colleges, where graduating students would be forced to look for jobs in what many forecasted to be a stagnant U.S. economy for the foreseeable future. Consistent with what was happening elsewhere, ITT reported in its 10-K filings that its agreement with an unaffiliated, private lender had terminated on February 22, 2008.

47. Put simply, the worldwide financial crisis had the potential to destroy ITT's existing business model.

48. ITT's students typically did not have sufficient personal funds to cover their tuition, and they had to pay for the bulk of their tuition through federal aid and private loans. Without access to private loans, ITT's Former Management's options were limited. Reducing the cost of tuition to cover the gap created by the absence of private loans would reduce revenue, lower ITT's EPS and negatively impact executive compensation. Most importantly, without

access to private loans now and in the foreseeable future, ITT's ability to maintain compliance with the 90/10 Rule would be threatened, thereby jeopardizing ITT's access to federal Title IV loans altogether, without which ITT's business would quickly fold.

49. According to the Senate Committee Report, many for-profit schools like ITT went to "great lengths to evade" the "modest checks" created by the 90/10 Rule and the Cohort Default Rule.

The Temporary Credit Program – a Partial Solution to the Financial Crisis Problem

50. ITT's Former Management quickly took steps to attempt to ameliorate the impact of the worldwide financial crisis on ITT's business. To help increase revenue, ITT's Former Management redoubled its recruiting efforts to increase the pool of potential applicants. These efforts paid off, as enrollment soared from 48,155 students in 2006-07 to 88,004 in 2010-11. At the time of the Senate Committee Report, ITT was adding 8-10 new locations per year, and had identified 50 additional locations as "viable opportunities to continue to expand."

51. However, because Title IV loans could not be used to pay more than 90% of students' tuition, increasing enrollment could not solve the crisis faced by ITT. For ITT's business to survive, it also needed to provide potential students with a new source of "private" funding, so they could continue to obtain the federal loans that accounted for most of ITT's revenues.

52. ITT was hit particularly hard by credit tightening during the recession because its aggressive recruiting efforts resulted in enrollment of a great many students with very poor credit profiles and low earnings, as ITT's Former Management was acutely aware. According to Fitzpatrick, the average ITT student earned around $18,000 per year and had a credit score under 600 at the time he or she enrolled. Upon information and belief, the average ITT student without

a family earned only a few thousand dollars above the poverty line and had a deeply sub-prime credit profile, and the average student with a family lived below the poverty line.

53. The initial response by ITT management to the loss of private loans was to create a "Temporary Credit Program," consisting of zero-interest, short-term loans payable in a single installment which was nominally due nine months later (*i.e.*, at the end of the academic year).

54. To ensure that ITT maximized its enrollment and revenue generation, ITT's Former Management established minimal, if any, credit criteria for students to be eligible for Temporary Credits, and, if a student did not meet such *de minimis* credit criteria, ITT's staff could – and often did – grant exceptions and provide a Temporary Credit anyway. Upon further information and belief, although ITT performed a credit check on each student before providing him or her with a Temporary Credit, ITT's personnel rarely, if ever, would allow a student's creditworthiness to interfere with the decision to extend Temporary Credit because the alternative was that the student would not be able to enroll and/or continue his or her studies, and ITT would therefore forego the associated Title IV funds.

55. There is overwhelming evidence, however, that ITT actively misled students regarding the Temporary Credits, the nature of the education they would receive, the transferability of class credits, and virtually everything else associated with ITT.

56. For example, according to allegations made in *Jorge Villalba et al. v. ITT Educational Services, Inc., et al.*,[12] a class action lawsuit filed on behalf of ITT students enrolled between 2006 and 2016 (the "Class Action Complaint"), ITT falsely told students that the Temporary Credit was a grant, and would not have to be repaid. Later, when the Temporary

[12] Adversary Proceeding No. 17-50003.

Credit loans came due, students were told they either had to pay the full balance or agree to high-interest replacement loans under the PEAKS Program.

57. The Class Action Complaint further asserts that ITT's army of 2,500 recruiters targeted prospective students who were in desperate circumstances, and regularly made misrepresentations to such students about ITT's programs and their value, the transferability of its credits to other schools, and ITT's loan programs and other financial aid.

58. The Senate Committee Report also concluded that "ITT recruiters were trained to mislead prospective students about the cost of attending the school." Recruiters were encouraged to utilize a method of questioning students described as the "Pain Funnel," in which students were made to feel they were not adequately dealing with life problems if they were not sufficiently "committed" to getting a degree at ITT despite its high cost. In this regard, tuition at ITT's Indianapolis campus was $44,895 and $93,624 for Associate's and Bachelor's degrees, respectively, in business administration, versus $9,385 and $43,528 for the same two programs at Ivy Tech Community College and Indiana University in Bloomington, respectively.

59. Although the implementation of the Temporary Credit Program allowed ITT to continue enrolling new students who financed their tuition predominantly through federal aid, the Temporary Credit Program did not really solve the problem caused by the loss of ITT's primary private lending source.

60. For one thing, ITT did not immediately receive any cash from the Temporary Credits. Additionally, because ITT had issued Temporary Credits to low-income, high-credit-risk students, ITT's Former Management was forced to discount these likely uncollectible Temporary Credits on ITT's balance sheet by increasing the allowance for "doubtful accounts."

61. As ITT's Former Management increased the Temporary Credit Program, they reported in ITT's Form 10-Q for the third quarter of 2008, that:

> The increased internally funded financing that we are providing to our students will negatively impact our liquidity and expose us to new and greater credit risk. Internally funded financing provides for payments to us by our students over an extended term, which could have a material adverse effect on our cash flows from operations in 2008. In addition, we have the risk of collection with respect to our internally funded financing, which we believe will cause us to increase our allowance for doubtful accounts in 2008 compared to prior year periods, and result in a significant increase in our bad debt expense as a percentage of revenue in 2008 compared to prior year periods. We believe that our bad debt expense as a percentage of revenue in 2008 will exceed the historical range of 1% to 3%. Increases in our bad debt expense in 2008 will result in increased student services and administrative expenses in 2008 compared to prior year periods.

62. For the fourth quarter of 2008, ITT's Former Management further reported in its 10-Q that:

> During the second quarter of 2008, we extended larger amounts of unsecured credit to our students due to a decrease in private education loans made to our students by third-party lenders. We categorized these receivables based on the credit profiles of our students and recorded an allowance for doubtful accounts based on our historical collection experience related to amounts owed by students with similar credit profiles.

63. The "doubtful accounts" became a drag on ITT's reported income and other financial metrics, negatively impacting ITT's EPS and therefore threatening the executive compensation of certain of ITT's Former Management. In addition, and perhaps most importantly, because the Temporary Credits did not provide actual cash, the loans could not be counted as revenue under the 90/10 Rule, which requires use of a cash accounting method for purposes of determining compliance.

The CUSO Loan Program

64. Because of these shortfalls of the Temporary Credits, in February 2009, ITT's Former Management implemented an arrangement with Student CU Connect CUSO, LLC

("CUSO") to ostensibly pay off those Temporary Credits that were a drag on ITT's financial statements. ITT's Former Management designed the CUSO Loan Program to appear to be a "private" loan program controlled by CUSO, under which CUSO and participating credit unions originated approximately $141 million in student loans to ITT students from March 2009 until December 2011, backstopped by an ITT guarantee that protected CUSO and its credit union members from any meaningful exposure.

65. In reality, however, the CUSO Loan Program was nothing more than an off-balance sheet accounting artifice that allowed ITT in the near-term to generate revenue through the pay down of generally uncollectible Temporary Credits at full value while concealing the fact that, in doing so, ITT was incurring a much greater guarantee liability in the long-run to CUSO.

66. Unlike arm's length lending arrangements based on the credit worthiness and earning potential of student borrowers, students with Temporary Credit balances could repay those balances and finance future tuition gaps through CUSO without regard to their credit profiles.

67. To ensure that virtually no ITT student would be denied a CUSO Loan, certain of ITT's Former Management included in CUSO's underwriting criteria a "*Temporary Credit Exception*," which provided that a student would qualify for a CUSO Loan so long as such student: (a) had received a Temporary Credit from ITT; (b) had graduated from ITT or was enrolled at ITT in any academic quarter other than the first academic quarter of such student's first academic year; and (c) had not filed for bankruptcy within the last two years immediately prior to the loan application date.

68. As they were obviously intended to do, these exceptions essentially eliminated CUSO underwriting criteria, so as to permit ITT to receive funds to cancel out all "highly

doubtful" Temporary Credits that ITT's Former Management had caused ITT to extend to its students, and to insure that ITT students could continue to receive federal loans.

69. The CUSO loan proceeds were paid directly to ITT to satisfy the students' outstanding Temporary Credits, providing ITT with a temporary infusion of cash that facially appeared – and was represented by ITT's Former Management – to replace the generally uncollectible Temporary Credits on ITT's books.

70. Thus, the CUSO Loan Program allowed ITT to (a) insure that students would receive "private" loans without regard to their credit worthiness; (b) thereby appear to satisfy the 90/10 rule and allow students to obtain additional credit through Title IV loans; and (c) make it appear as if ITT were generating significant revenue through the pay down of generally uncollectible Temporary Credits at full value – all the while concealing the undesirability of the loans being made to financially strapped students, as well as ITT's growing long-term liability.

The PEAKS Loan Program: Short Term Revenue for ITT at the Cost of Fraud on Students and Massive Future Liability that Was Concealed from Creditors and Investors

71. By December of 2009, ITT's Former Management joined with Defendants to expand the CUSO design, resulting in the PEAKS Loan Program (PEAKS is an acronym for "Program for Education Access and Knowledge for Students"). According to the Senate Committee Report, ITT was "the first school to utilize Wall Street backed 'recourse' lending on a large scale," when it "partnered with Deutsche Bank to lend approximately $346 million to its students" in what the Senate Committee Report described as "an impressively complex series of financial transactions" designed to ostensibly satisfy the 90/10 Rule.

72. In general, the PEAKS Loan Program utilized most of the features of the CUSO Loan Program. For instance, like the CUSO Loan Program, ITT's Former Management and the Defendants designed the PEAKS Loan Program as a "private" loan program, with Liberty Bank,

acting as the originating lender. Similarly, PEAKS – through Liberty Bank – made loans exclusively to ITT students, with little regard for credit-worthiness, and was backstopped by an ITT guarantee that further protected the Defendants.

73. Under the PEAKS Loan Program, Liberty Bank served as a "strawman" source of "private student funding," in which Liberty Bank took no risk of not being paid, and was unconcerned with the creditworthiness of student borrowers. For a 1.05% fee, Liberty Bank issued loans to ITT students to pay off their generally uncollectible Temporary Credits, relying on a contractual commitment from the PEAKS trust to purchase the Liberty Bank loans at an amount equal to 101.05% of the loan amounts. The PEAKS trust then immediately purchased the Student Loans from Liberty Bank.

74. To finance the purchase, PEAKS raised over $300 million in "Senior Debt" from various institutional investors (i.e., the PEAKS Senior Creditors), which debt matures in January 2020 and bears interest at LIBOR + 5.5% (with the minimum LIBOR rate being 2%). The money raised by PEAKS was to be used to (a) purchase PEAKS loans from Liberty Bank, (b) fund a "Reserve Account" to be held by DBTCA and (c) to pay fees associated with the operation of the PEAKS Loan Program.

75. Although PEAKS purchased the Student Loans from Liberty Bank, PEAKS did not retain the loans, or *any* assets. Under the applicable Indenture and Credit Agreement ("<u>Indenture Agreement</u>"), the PEAKS trust purported to "GRANT, CONVEY, PLEDGE, TRANSFER, ASSIGN AND DELIVER" all of its assets (including the Student Loan Notes) to DBTCA as Indenture Trustee and Collateral Agent, which would hold legal title to the Student Loan Notes and other assets, and forward all proceeds to the Senior Creditors under the PEAKS Loan Program.

76. Similarly, although the Student Loans were used to "pay off" the Temporary Credits owing to ITT, ITT actually received only 72% of the loan proceeds, with the remaining 28% being "loaned" by ITT to PEAKS in return for a non-interest bearing subordinated note payable from eventual collections, if any, from students on their PEAKS loans after all of the Senior Debt owed to the PEAKS Senior Creditors was repaid in full. The amount "loaned" to PEAKS was then transferred by PEAKS to DBTCA leaving PEAKS with no apparent available assets.

77. Like the CUSO loans, the PEAKS loans were repayable over 10 years following any applicable deferment period, and included an origination fee and interest rate, which were both keyed to the student's credit score. Upon information and belief – just as with CUSO – nearly half of the students taking out PEAKS loans had credit scores under 600 – something Defendants were fully aware of when Liberty Bank originated the PEAKS loans to such ITT students and PEAKS purchased them.

78. Similar to the CUSO Loan Program, students with Temporary Credit balances could "repay" those balances and finance future tuition gaps no matter what their credit profile by obtaining a PEAKS Loan. As with the CUSO arrangement, the Defendants and ITT's Former Management established underwriting criteria so lax that a PEAKS loan would issue to virtually any applicant to whom ITT had previously extended Temporary Credit, regardless of whether ITT had initially made an exception to the already lax Temporary Credit underwriting criteria in extending the Temporary Credit in the first place.

79. Ostensibly, the criteria prohibited the issuance of a PEAKS loan to any student who, among other things: (a) had any judgments, charge-offs, collections, liens or repossessions in the aggregate amount of more than $2,500 within the last two years; or (b) had any student

loan default that hadn't been paid in full. Such underwriting rules would likely have precluded many ITT students who had received Temporary Credits from qualifying for PEAKS loans, and thus would have impaired ITT's Former Management's ability to offload uncollectable Temporary Credits from ITT's books.

80. As was the case with CUSO, however, ITT's management included in the PEAKS' underwriting criteria a "Temporary Credit Exception," which provided that a student need *not* satisfy the above-mentioned underwriting criteria so long as such student: (a) received a Temporary Credit from ITT; and (b) had not filed for or been discharged in bankruptcy within the last two years immediately prior to the loan application date.

81. Once again, this exception effectively obviated the purported PEAKS underwriting criteria, so as to permit ITT to receive funds to cancel out the "highly doubtful" Temporary Credits that ITT's Former Management had previously caused ITT to extend to its students.

82. Indeed, ITT designed these private loan programs – ostensibly run by third parties – to ensure that any second-year ITT student who had been given a Temporary Credit by ITT could "repay" those balances and finance future tuition gaps no matter what their credit profile.

83. The Defendants, who were collectively issuing the PEAKS loans and facilitating the program, must have been aware that the Temporary Credit Exception would likely result in a significant number of loans to ITT students who would otherwise be denied a PEAKS Loan under ordinary lending underwriting criteria, and, as a result, the anticipated default rate for ITT students taking out PEAKS loans would increase.

84. The PEAKS loans were far from desirable for the ITT students who were misled as part of ITT's scheme. There was a 10% origination fee on top of the Temporary Credit

balance, and the entirety of the Student Loans were subject to an interest rate of Prime Rate + 11.5% – a full percentage point higher than even the exorbitant CUSO loans. While the Peaks Loan Program was in effect, the prime rate was around 3.25%, resulting in an effective interest rate for these students of 14.75%. For students taking out PEAKS loans after April 2011, the interest rate rose to 17.25%.

85. Other fees received by some Defendants were numerous, including:

- Syndication Agent Fees;
- Secured Party Fees;
- Servicing Fees;
- Administrator Fees;
- Origination Agent Fees;
- Indenture Trustee Fees;
- Owner Trustee Fees;
- Arranging Fees;
- Program Manager Fees; and
- Capitalized Fees.

86. PEAKS and DBTCA received the cash flows from the payments on the PEAKS loans and used those funds to pay the principal and interest on the Senior Debt payable to the PEAKS Senior Creditors, and other fees and expenses of the PEAKS Loan Program.

87. Of course, PEAKS and the other Defendants were willing to enter into the PEAKS "loan" program only because ITT received only 72% of the funds, and was required to enter into the Guarantee Agreement. Unlike the CUSO Loan Program, which had a 35% trigger on ITT's guarantee liability, under § 1(a) of the Guarantee Agreement, ITT agreed that to the extent PEAKS had insufficient funds (e.g., funds in its Reserve Account and loan payments received from ITT students on their PEAKS loans), ITT would have to make a "Guaranteed Payment" (as defined in § 1(a) of the Guarantee Agreement) equal to (a) all principal and interest payable to the PEAKS Senior Creditors on their Senior Debt; and (b) all fees associated with the PEAKS Loan Program.

88. ITT also guaranteed that it would maintain a 105% "Parity Ratio" between the value of PEAKS' assets (i.e., the value of the PEAKS loans) and its liabilities (i.e., the outstanding amount due on the Senior Debt). If the value of PEAKS' assets dipped below 105% of the value of its liabilities, ITT was required to pay down the Senior Debt owed to the PEAKS Senior Creditors until the Parity Ratio was re-balanced. This Parity Ratio would increase to 140% if there was a "triggering event" based on certain ITT financial requirements.

89. Student defaults on PEAKS loans had a significant impact on the Parity Ratio because when a PEAKS loan became 180 days delinquent, it was required to be written off for the purpose of the Parity Ratio calculation, thereby triggering ITT's guarantee obligation under the Guarantee Agreement. If ITT did not make required Guaranteed Payments, such as payments to preserve the Parity Ratio, when those payments were due, the PEAKS Senior Creditors could force ITT to immediately pay the entire amount of principal and interest remaining on their Senior Debt rather than waiting for the 2020 maturity date.

90. Because ITT guaranteed all expenses associated with the PEAKS Loan Program, and because Defendants funded only a fraction of the much larger, non-dischargeable debt incurred by students, the Defendants were assured that they had little risk of actually losing money on what ITT's Former Management and the Defendant surely knew or should have known could be high defaults rates by ITT students on their PEAKS loans.

91. Not only did ITT's guarantee assure that the Defendants would bear no risk of loss by reason of their participation in the PEAKS Loan Program, but it guaranteed a hefty rate of return to the PEAKS Senior Creditors by having ITT guarantee the payment of all principal and interest (at Libor plus 5.5%) on the Senior Debt, in addition to providing the myriad fees to some Defendants described above.

92. Although the PEAKS loan terms were unquestionably undesirable for the students being deceived by ITT, Defendants did not bear a commensurate risk of not being paid, because 28% of the funds were immediately turned over to PEAKS by ITT, and because ITT guaranteed payment of 100% of all expenses associated with the PEAKS Loan Program, as well as the repayment of 100% of the principal and interest on the Senior Debt at LIBOR + 5.5%. The creditworthiness of the student borrowers and their easily anticipatable, astronomically high default rates was of little or no importance to PEAKS and the PEAKS Senior Creditors.

93. Given the extraordinary breadth of ITT's guarantee, and the security provided by ITT's "loan" of 28% of the funds in return for a subordinated note, the Defendants' primary potential risk was ITT's own insolvency. As Defendants knew, the one event that could quickly lead to such insolvency would be any actions by ITT in violation of regulations and consumer lending laws that would result in discontinued access to federal student loans, as well as claims by ITT's students.

94. The effect of the high interest rates on the PEAKS loans was to (a) increase the default rate for students that ITT's Former Management and the Defendants knew or should have known were already in a precarious financial condition; (b) increase the likelihood that ITT's guarantee liability would be triggered and the amount of ITT's liability to DBTCA; and (c) increase the potential claims based on fraud, misrepresentation, and violation of consumer protection statutes, of students saddled with high-interest debt they could not repay.

95. Put simply, the PEAKS Loan Program was a bad deal for ITT -- because of the overwhelming likelihood that ITT would have to make significant guarantee payments to DBTCA that far exceeded the short-term benefit ITT received from the pay-off of the Temporary Credits – and for students, because nothing would be left to pay the claims of students who were

misled, and on whom the scheme depended -- facts that ITT's management and the Defendants knew or should have known. Based on data from 2002 – years prior to the financial meltdown and during one of the U.S.'s best economic cycles – the average default rate for students with credit scores lower than 600 was *58.9%* (and nearly half of students who would take PEAKS loans had credit scores that were lower than 600 – a fact well known to Defendants when they originated the PEAKS loans to ITT's students holding likely uncollectible Temporary Credits). At the time of the Senate Committee Report, almost half of all student loan defaults nationwide involved defaults by students at for-profit colleges like ITT.

96. Upon information and belief, PEAKS originated approximately $346 million in PEAKS loans to ITT students, of which ITT received approximately $246.7 million and a worthless subordinated note (nominally in the amount of about $73 million) that ITT's Former Management (and the Defendants as well) knew or should have known would be uncollectible based on the high anticipated default rate of ITT students taking out PEAKS loans.

97. As noted, the scheme wholly depended on ITT's practice of aggressive marketing by recruiters and misleading students, because ITT could only honor its guarantee, and the PEAKS program would only "work," if ITT continued to recruit students, maintain access to Title IV funding, and persuade students to agree to the unfavorable terms of the PEAKS loans.

98. To facilitate the necessary enrollment, ITT did away with even the pretense of applying any admissions standards, dispensing with the requirement that students receive a minimum passing score on the Wonderlic test, a basic aptitude measure. There were in fact dramatic increases in ITT enrollment following the implementation of the PEAKS Loan Program. Although the "Company Overview" provided to PEAKS investor banks stated there

was an average 9.1% increase each year between 1994 and 2008, between 2009 and 2011 the average increase each year was roughly 20%.

99. The "checks and balances" of the 90/10 Rule which anticipated that independent lenders would fund 10% of ITT's revenues was subverted.

100. Upon information and belief, ITT's personnel served as the sole intermediary between PEAKS and ITT students in introducing students to PEAKS loans, and certain of ITT's Former Management instructed ITT's financial aid staff to promptly identify students to take out PEAKS loans so that they could eliminate their likely uncollectible Temporary Credits from ITT's books. Specifically, the Consumer Financial Protection Bureau ("CFPB") has alleged[13] that ITT's Former Management instructed and incentivized ITT's financial aid staff to use tactics such as emailing students, calling them at home, tracking them down in person around campus, pulling them from class, barring them from class, and withholding course materials, diplomas, and transcripts, to pressure students to meet with financial aid staff so that their Temporary Credits could be repackaged into private PEAKS loans.

101. Additionally, the Class Action Complaint alleges that students who resisted the "repackaging" of their Temporary Credits into PEAKS loans were threatened that if they refused to take out a PEAKS loan, they would have to pay any outstanding Temporary Credit and the following year's tuition gap – which ITT's Former Management knew or should have known was impossible in most instances – or else abandon their studies and forfeit the investment of time, if not money, they had made thus far.

102. Other steps taken by ITT included creation of what the Senate Committee Report refers to as "'SWAT teams' of three or four financial aid employees" who would "visit specific

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[13] *See Consumer Financial Protection Bureau v. ITT Educational Services, Inc.*, United States District Court for Southern District of Indiana, Case No. 1:14-cv-00292-SEB-TAB.

campuses and approach students in class who were behind on payments to the school" in order to prevent violation of the 90/10 rule.

103. The Senate Committee Report also notes that because scholarship funds could be used for the "10" side of the 90/10 Rule, several companies, including ITT, designed scholarship programs "that appear to be awarded by outside non-profit organizations, but in reality the design and control of the programs appears to come from within the for-profit school." The Senate Committee Report specifically cites the "Champagne Scholarship" created by ITT, which awarded $21 million in the course of one year and which, according to a former employee and whistle-blower cited by the Report, "nearly every student who applied received the scholarship."

104. Another "scholarship" used by ITT, known as the Presidential Scholarship, offered a *retroactive* 20 percent tuition reduction for certain graduating Bachelor's degree students, for the purpose of improving debt profiles of ITT graduates for reporting purposes. Internal documents show that ITT management concluded this was more "economically efficient" than reducing tuition generally, since ITT was concerned with improving reporting statistics without sacrificing income from students who did not graduate.

105. Upon information and belief, ITT's Temporary Credit Program operated as a tool to pre-qualify students for the PEAKS Loan Program regardless of their credit profile. From January 2010 through July 2011, ITT's Former Management caused ITT to continue lending students millions of dollars in Temporary Credits, thereby ensuring ITT's access to hundreds of millions – if not billions – of dollars more in federal financial aid, including Title IV loans, all of which was incurred by students who were pressured into making ill-advised decisions by ITT's practices, which were central to the scheme. The Temporary Credits that were converted into

high-interest PEAKS loans that students were obligated to pay (but often could not) and that ITT was obligated to repay to DBTCA at a significant premium under the Guarantee Agreement.

ITT Received No Reasonably Equivalent Benefits From Its Participation in the PEAKS Loan Program that Ultimately Caused and/or Contributed to ITT's Insolvency

106. For the reasons stated above, ITT and Defendants knew (or should have readily known) that ITT would derive no actual long-term financial benefit from the PEAKS Loan Program, because it was merely moving money around, less substantial fees, in order to facilitate access to federal funding that depended upon misleading students, essentially ignoring the hidden but massive potential claims of the students that were defrauded.

107. Despite the short-term cash generated from the conversion of likely uncollectible Temporary Credits into PEAKS loans, ITT did not receive reasonably equivalent value for its participation in the PEAKS Loan Program; it received only 72% of the funds, less fees and costs, but guaranteed the obligations owing to Senior Creditors in full. As acknowledged in the Placement Memorandum supplied to PEAKS investors, ITT, as guarantor, "is entering into the Guaranty to provide credit support to the Trust and will not receive any monetary consideration for providing the Guaranty."

108. Further, as discussed previously, by entering into the PEAKS Agreements in January 2010, ITT's Former Management intended to incur, or believed that they would incur, on ITT's behalf, debts that would ultimately be beyond ITT's ability to pay as such debts matured, both because of the future guarantee liability that ITT would incur to DBTCA under the Guarantee Agreement, and also because of the massive potential liability to students who were misled by ITT recruiters and loan "advisors," whose violation of consumer lending laws and aggressive recruitment were an essential part of the PEAKS program.

109. Additionally, ITT's Former Management's decision to participate in the PEAKS Loan Program resulted in ITT having unreasonably small capital left from which to continue ITT's operations or to pay claims of students and other creditors.

110. Indeed, ITT's Former Management knew or should have known that the massive future guarantee liability that ITT would incur under the Guarantee Agreement, along with claims asserted by students who were misled, would ultimately spell financial ruin for ITT – as it did. Upon information and belief, the decision to nonetheless enter into the PEAKS Agreements in January 2010 was motivated by the desire of certain of ITT's Former Management to enhance and protect their executive compensation at an otherwise unsustainable level, and to use funds generated by the PEAKS program to repurchase stock, to the benefit of insiders and other stockholders, and the detriment of students and other creditors.

111. Compounding these issues, a substantial portion of the funds generated by the PEAKS Loans was used to purchase the company's own stock – which enhanced compensation of insiders (by increasing EPS), but contributed to the company's insufficient capital to operate or to pay the potential claims of the students whose high-interest loans were required to make the PEAKS program work.

112. As ITT management and Defendants knew or should have known, the entire PEAKS Program depended on ITT continuing to induce students to take out undesirable, high-interest loans they could not afford to pay, in return for educational instruction of questionable value, which ITT accomplished through marketing practices that violated federal consumer and other laws, generating huge potential claims that ITT would have no prospect of paying. As discussed below, it appears the Peaks Loan Program was designed to prevent students from

having any viable source from which to receive payment for their damages caused by ITT's illegal recruiting methods.

113. Despite ITT's receipt of around $246.7 million from the conversion of Temporary Credits into PEAKS loans, as of the Petition Date, ITT paid and/or had become indebted to the Defendants in an amount in excess of over $275 million, consisting of cash payments of approximately $174,443,939.41 under the Guarantee Agreement,[14] $40 million in payments under the POBOB Settlement Agreement, and $16,092,512.02 in POBOB Payments (collectively, the "Cash Payments"); plus $3.4 million that the Defendants claim is due under the Guarantee Agreement from September 16, 2016 through January 27, 2017, and approximately $41.4 million, representing the principal balance of the Senior Debt as of September 2016, for which ITT has guaranteed the repayment under the Guarantee Agreement. The dates and amounts of the Cash Payments are reflected in Exhibit 1 attached and incorporated herein.

114. Upon information and belief, despite ITT's worsening financial condition, between January 2010 until July 2011, ITT's reported EPS improved, in part, because (a) ITT continued its aggressive recruiting practices; (b) ITT's Former Management was able to offload the "doubtful accounts" associated with those likely uncollectible Temporary Credits that were previously weighing down ITT's net income and other financial metrics and (c) ITT's Former Management failed to properly record the full extent of ITT's liability under the Guarantee Agreement.

115. The potential claims by ITT's students, and ITT's obligations under the Guarantee Agreement, which ITT's Former Management continuously monitored, were ticking time bombs.

[14] These consist of $157,077,067.24 in Senior Note Principal Payments, Parity Payments of $11,688,519.87; interest and fee payments of $5,678,352.30

ITT Actively Conceals Its True Liabilities Under the PEAKS Loan Program from Investors and Creditors

116. ITT's fraudulent intent to deceive investors and creditors is evident from actions it took to conceal relevant information from regulators, investors and creditors, including students.

117. Most obviously, ITT of course did nothing to disclose its contingent liabilities to students for its widespread violations of laws in its recruiting and marketing practices.

118. It also concealed from creditors and investors the facts relating to its direct liabilities under the PEAKS Loan Program. From at least the end of 2011 through the end of the third quarter of 2012, PEAKS loans were defaulting at very high rates. Also upon information and belief, during this same time period, ITT's financial performance and stock price were deteriorating due to declining enrollment and other issues affecting the for-profit college industry. In this environment, ITT's management, investors, and stock analysts were particularly focused on ITT's cash generation, cash obligations and liquidity.

119. Upon information and belief, during the second and third quarters of 2012, ITT's Former Management used an internal model to estimate ITT's liability for the PEAKS Loan Program by estimating the cash flows of PEAKS and ITT's resulting guarantee payments. However, as the performance of PEAKS deteriorated, the Parity Ratio calculated pursuant to ITT's internal model diverged significantly from the actual Parity Ratio that was reported to and tracked by Fitzpatrick and others of ITT's Former Management.

120. By at least the second quarter of 2012, ITT's Former Management was tracking the declining performance of the PEAKS loans. Upon further information and belief, in June of 2012, one of the PEAKS Senior Creditors, who was an institutional investor, asked Fitzpatrick about the decline of the PEAKS Parity Ratio. In response, upon information and belief,

Fitzpatrick was told by ITT's controller that the Parity Ratio had declined dramatically, from 119% to 112% in the course of only three months.

121. By September 2012, Fitzpatrick received additional information indicating that the PEAKS Parity Ratio was about to be breached and that tens of millions of dollars of additional PEAKS loans were projected to default over the next few months. For example, on September 14, 2012, ITT's controller told Fitzpatrick that if the PEAKS loan assets declined by about $6 million, the Parity Ratio would fall below 105%. Less than two weeks later, on September 27, 2012, ITT's controller forwarded Fitzpatrick an analysis of monthly PEAKS loan defaults from ITT's independent loan consultants that projected tens of millions of dollars in student loan defaults by the end of the year.

122. In October 2012, before ITT's Former Management filed ITT's Form 10-Q for the third quarter of 2012, ITT in fact received a demand for a PEAKS guarantee payment of more than *$8.5 million* as a result of the breach of the Parity Ratio, and ITT's Former Management caused ITT to make a payment to DBTCA in that amount. Prior to October 2012, since the inception of the PEAKS Loan Program, ITT's Former Management had caused ITT to make total guarantee payments of only about $502,000.

123. Upon information and belief, when ITT's Former Management received this demand, Modany and Fitzpatrick almost immediately began to analyze the PEAKS delinquent loans that would trigger additional payment demands upon default. Upon further information and belief, based on these analyses, Modany and Fitzpatrick knew that severely delinquent PEAKS loans would require additional projected PEAKS guarantee payments of approximately $30 million in the fourth quarter of 2012 alone.

124. After receiving the PEAKS guarantee payment demand in October 2012, certain of ITT's Former Management devised a scheme (similar to the scheme implemented in connection with the CUSO Loan Program)[15] for ITT to make relatively small payments on delinquent PEAKS loans in order to delay making much larger PEAKS Parity Ratio guarantee payments that defaults on those loans would trigger under the Guarantee Agreement.

125. Upon information and belief, ITT's Former Management determined which students were about to default on their PEAKS loans and made the minimum payment necessary to avoid a default on their behalf, without advising the defaulting students that these payments were being made.

126. Upon further information and belief, certain of ITT's Former Management implemented this scheme – which they later dubbed "Payments on Behalf of Borrowers," or POBOB Payments – with the goal of preventing PEAKS loans from defaulting so as to avoid making Parity Ratio guarantee payments that would otherwise have been required based on actual student loan performance. Upon information and belief, Modany and Fitzpatrick directed and approved the POBOB payments, monitored the amounts of payments, and were aware of the magnitude of the PEAKS Loan balances impacted by the POBOB payments.

127. Another effect of the undisclosed POBOB payments was that they allowed students to ostensibly remain eligible to receive additional Title IV loans that were needed to make the PEAKS Program work for insiders and the Defendants.

[15] Under the CUSO Loan Program, when ITT's guarantee obligation was triggered, ITT had the right to (a) make a minimum payment equal to the amounts then currently due to cure the default, or (b) discharge the defaulted CUSO loans entirely by paying all outstanding principal, interest and other charges. ITT's Former Management almost always elected to make the smaller minimum payments, which caused ITT's guarantee exposure to increase exponentially as a result of continually accruing interest and other charges that ITT would ultimately owe as these CUSO loans remained in default, thereby increasing the amounts directly payable by ITT to CUSO.

128. By November 1, 2012, ITT's Former Management caused ITT to make approximately $2,762,000 in POBOB payments, which prevented the subject PEAKS loans from defaulting and deferred approximately $30 million in guarantee payments that ITT would have been required to make to maintain the Parity Ratio.

129. Monthly POBOB payments from the last quarter of 2012 through January of 2014 exceeded $16 million, comprising approximately 44% of the cash PEAKS received from PEAKS loans over the period from the fourth quarter of 2012 through the second quarter of 2013. Upon information and belief, during this same general time period (from November 2012 through March 2014), ITT made minimal payments under the Guarantee Agreement, totaling just under $7 million.

130. As ITT"s Former Management knew or should have known, the practice of making POBOB payments rather than guarantee payments resulted in lower monthly payment obligations by ITT to DBTCA in the short-term, but increased ITT's overall guarantee obligations to DBTCA under the Guarantee Agreement. Unlike guarantee payments, which would pay down the principal owed to the PEAKS Senior Creditors, *POBOB payments did not reduce ITT's total PEAKS liability*.

131. The POBOB payments actually increased ITT's ultimate PEAKS liability. Although the practice of making POBOB payments obviated the need to make guarantee payments to reduce the Parity Ratio, it also resulted in the debt to the PEAKS Senior Creditors continuing to accrue interest at Libor + 5.5%, thereby unnecessarily increasing ITT's long-term guarantee liability under the Guarantee Agreement.

132. The facts regarding the POBOB payments were concealed from ITT's investors and creditors, just as they were concealed from ITT's student borrowers. Through misleading

statements, ITT's Former Management gave ITT's investors, creditors and regulators the false impression that the PEAKS Loan Program and its composite student loan pools were performing relatively well, even though, upon information and belief, ITT's Former Management knew that PEAKS loans were defaulting at significant rates and ITT's Former Management was merely delaying millions of dollars in guarantee payments by making POBOB payments.

133. From the fourth quarter of 2012 through the second quarter of 2013, ITT's Former Management misled ITT's creditors and investors about the existence and impact of the POBOB payments. For example, ITT's Forms 10-K, 10-Q, and 8-K during this period were rendered false and misleading by the failure to adequately disclose the true nature and extent of the POBOB payments. Each of these filings contained various statements describing the PEAKS guarantee and disclosing the amounts of guarantee payments "and other payments" ITT made in the each relevant period.

134. For example, in ITT's Form 10-Q for the first quarter of 2013, ITT's Former Management misleadingly disclosed that it made "guarantee and other payments" to DBTCA of just over $3 million, without disclosing the POBOB payments or the fact they temporarily prevented much larger guarantee payments. Only later did it disclose that ITT had made "guarantee payments" of $1,239,000, and POBOB payments of $1,855,000.

135. Similarly, in ITT's Form 10-Q for the second quarter of 2013, ITT's Former Management again misleadingly disclosed that it made "guarantee and other payments" to DBTCA of approximately $3.3 million – in fact, all of the $3.3 million in payments were POBOB payments, intended to prevent much larger obligations on ITT's Guarantee.

136. If Defendants reviewed the Form 10-Q statements, they surely knew (or at least should have known) that the statements for the first and second quarters of 2013 were

misleading, because they were aware that PEAKS had not issued any demands on ITT to make guarantee payments of $3 million and $3.3 million in the first and second quarters of 2013, respectively.

137. Based on the poor performance of the PEAKS loan pool, PEAKS guarantee payments would have risen significantly but for the POBOB payments. Together, these misstatements concealed ITT's enormous and imminent PEAKS guarantee obligations.

138. In addition to the fact that the failure to fully and adequately disclose the existence and effect of the POBOB payments rendered numerous statements in ITT's public filings misleading, ITT's Former Management also had an affirmative obligation to disclose the POBOB payments, including in the Management Discussion and Analysis ("MD&A") portion of ITT's public filings. ITT's Former Management was required to disclose information in the MD&A beyond what they were required to disclose in the financial statements, including information about "off balance sheet arrangements" (such as the PEAKS Loan Program). Specifically, companies must disclose information about the nature and amounts of obligations related to such arrangements, as well as information about "contractual obligations" (such as ITT's PEAKS Loan Program guarantee obligations) and known trends, demands or uncertainties bearing upon the company's liquidity. Despite this, ITT's Former Management failed to disclose the existence or effect of the POBOB payments in the MD&A in any of the periodic filings from the fourth quarter of 2012 through the second quarter of 2013.

139. Additionally, ITT's Former Management made several affirmative misstatements in ITT's public filings. For example, in each of these public filings, ITT's Former Management stated that ITT "did not explicitly or implicitly provide any financial or other support to the PEAKS Trust … that we were not contractually required to provide, and we do not intend to

provide any such support to the PEAKS Trust in the foreseeable future, other than what we are contractually required to provide." This statement was false as ITT's Former Management knew that the PEAKS Agreements did not require ITT to make POBOB payments, and in fact *prohibited* the practice. ITT's Former Management nonetheless made this statement in ITT's 2012 Form 10-K and Forms 10-Q for the first three quarters of 2013.

140. In addition, ITT's Former Management stated that ITT would be entitled to eventual repayment of any payments made under the PEAKS guarantee, to the extent PEAKS funds were available. However, unlike Parity Ratio guarantee payments, the POBOB payments were *not* contractually recoverable.

141. Upon information and belief, beginning in or about December 2012, certain of ITT's Former Management received inquiries from certain of the PEAKS Senior Creditors regarding the "strong improvement" in payment results on PEAKS loans, causing ITT's Former Management to disclose the POBOB payment practice to the PEAKS Senior Creditors in or about February 2013. Yet, none of the Defendants promptly and publicly disclosed such practice. Instead, during the third quarter of 2013, ITT continued making POBOB payments instead of the much larger PEAKS guarantee payments that the POBOB payments temporarily delayed.

142. On October 29, 2013, ITT's Former Management filed ITT's third quarter 2013 Form 10-Q. In that filing, ITT's Former Management for the *first time* disclosed that ITT sometimes made POBOB payments, noting that for the period January 1, 2013 through September 30, 2013, ITT's Former Management had caused ITT to make at least $7,647,000 in POBOB payments. Significantly, as alleged above, prior to October 29, 2013, one or more the Defendants knew or should have known that ITT's Former Management had failed to previously

disclose in its public filings their practice of making POBOB payments. However, upon information and belief, the Defendants did not publicly disclose this practice and the impact it had on ITT's long-term liability under the Guarantee Agreement or demand that ITT do so, thereby facilitating the fraud ITT's Former Management had practiced upon ITT's creditors and investors.

143. ITT's Former Management made only limited disclosure of the POBOB payments. Among other things, ITT's Former Management stated that during 2013 it caused ITT to make POBOB payments to "help" student borrowers from defaulting on their PEAKS loans, "which defaults would have triggered contractually required payments by us. . . ." Not even the students were advised of the "help" they were receiving. Notably, ITT's Former Management stated in its third quarter 2013 Form 10-Q that it caused ITT to make the POBOB payments after purportedly assessing, *inter alia*: (a) the likelihood of ITT being contractually required to make payments under the Guarantee Agreement in the near future; (b) the effect on ITT's liquidity that would result from making payments under the Guarantee Agreement compared to making POBOB payments; and (c) the fact that ITT would not be able to recover POBOB payments directly from the student borrowers on whose behalf ITT made such payments.

144. During the same time period, ITT manipulated the Office of Postsecondary Education ID ("OPEID") numbers used to report three-year default information provided to the ED in order to ostensibly stay below the benchmark number of 30%, and manipulated job placement rates in reports to its accreditor, the Accrediting Council for Independent Colleges and Schools ("ACICS"), in order to meet minimum benchmarks set by that agency.

145. As observed in the Senate Committee Report, the 90/10 Rule attaches to an OPEID number rather than to a school or parent company, and "[s]chools with multiple OPEID numbers can shift campuses to different OPEID numbers and classify them as branches even when they are many States apart."

Federal Investigations and Private Complaints Force ITT's Former Management to Disclose the True Extent of ITT's Liability Under the PEAKS Loan Program

146. Beginning in 2012, federal regulatory bodies and whistleblowers were catching wind of the fraudulent nature of the PEAKS Loan Program and had begun to investigate it.

147. On May 18, 2012, ITT received a Civil Investigative Demand ("CID") from the CFPB, which stated that the purpose of the investigation was, in part, "to determine whether for-profit post-secondary companies, student loan origination and servicing providers, or other unnamed persons have engaged or are engaging in unlawful acts or practices relating to the advertising, marketing and origination of private student loans."

148. On October 30, 2012, ITT's Former Management received a CID from the Massachusetts AG's Office, which provided that it was investigating allegations that ITT may have violated Massachusetts General Laws, Chapter 93A, Section 2(a) by "engaging in unfair or deceptive practices in connection with … the financing of education."

149. On February 8, 2013, ITT's Former Management received a subpoena from the SEC and an accompanying letter stating that the SEC was investigating ITT. In particular, the SEC's subpoena requested, *inter alia*, the production of documents and communications relating to the CUSO and PEAKS Loan Programs.

150. On March 11, 2013, a complaint in a securities class action lawsuit was filed against ITT, Modany and Fitzpatrick in the United States District Court for the Southern District of New York, titled, *William Koetsch, Individually and on Behalf of All Others Similarly*

Situated v. ITT Educational Services, Inc., *et al*., filed as Case No. 13-cv-1620-JPO. The complaint alleged, among other things, that ITT and its executive officers violated Sections 10(b) and 20(a) of the Exchange Act and Rule 10b-5 promulgated thereunder by, *inter alia*, ITT's (a) failure to properly account for the CUSO and PEAKS Loan Programs; (b) failure to maintain proper internal controls to ensure that the guarantee obligations under the CUSO and PEAKS Loan Programs were properly recorded; (c) making false statements or knowing omissions relating thereto; and (d) artificially inflating ITT's stock price.

151. On April 17, 2013, another complaint in a securities class action lawsuit was filed against ITT, Modany and Fitzpatrick in the United States District Court for the Southern District of New York, titled, *Massachusetts Laborers' Annuity Fund, Individually and on Behalf of All Others Similarly Situated v. ITT Educational Services, Inc.*, *et al.*, filed as Case No. 1:13-cv-02564. That complaint alleged, among other things, that ITT and its executive officers violated Sections 10(b) and 20(a) of the Exchange Act and Rule 10b-5 promulgated thereunder by, *inter alia*, (a) failing to properly account for the CUSO and PEAKS Loan Programs, (b) failing to establish adequate reserves associated with ITT's guarantee obligations under the CUSO and PEAKS Loan Programs, which caused ITT to misrepresent its earnings, liabilities, net income and financial condition throughout the putative class period, (c) engaging in a scheme to deceive the market and a course of conduct that artificially inflated the price of ITT's stock and (d) operating as a fraud or deceit on purchasers of ITT's common stock by misrepresenting ITT's liabilities related to the CUSO and PEAKs Loan Programs.

152. On May 9, 2013, ITT's Former Management received a second subpoena from the SEC requesting the production of certain communications related to the same subject matter as the subpoena received on February 8, 2013.

153. In September 2013, the CFPB issued a new CID containing broad requests for oral testimony, production of documents and written reports related to private education loans made to ITT's students, internal financing provided to ITT's students (*i.e.*, Temporary Credits) and certain other aspects of ITT's business.

154. As noted, on October 29, 2013, in the midst of these investigations and lawsuits, ITT's Former Management filed its 10-Q for the period ending September 30, 2013, and disclosed for the first time, the practice by ITT's Former Management of making POBOB payments.

155. On February 26, 2014, the CFPB brought the fraudulent nature of the CUSO and PEAKS Loan Programs to light in a complaint it filed in the United States District Court for Southern District of Indiana in Case No. 1:14-cv-00292-SEB-TAB. That complaint (¶¶ 4-12) described the fraudulent scheme – which depended upon inducing students to continue to take out undesirable loans -- as follows:

> If students were not able to pay off the Temporary Credit at the end of the academic year – something ITT knew few students would be able to do – ITT coerced them into paying off their Temporary Credit amounts with high-interest, high-fee private loans payable over ten years. At the same time, to cover the tuition gaps for the upcoming year, students were coerced into taking out additional private student loans. If students were unable to pay off the Temporary Credit and pay the second-year tuition gap, and they refused the private loans, they were threatened with expulsion.

156. As previously noted, the ITT staff of campus financial aid offices (the "Financial Aid Staff") – who were compensated based in part on how many students they were able to force into these private loans – engaged in a variety of aggressive tactics, such as pulling students from class or withholding course materials or transcripts, to get those students to sign up for these private loans.

157. While students were kept unaware that the zero-interest Temporary Credit was just an entry point for these expensive private loans, ITT consistently told investors, from the time the loan programs were put in place, that it was ITT's "plan all along" that students' Temporary Credit would be paid off through private lending programs. ITT had established the lending programs to ensure that income and free cash flow would improve, which in turn improved the appearance of ITT's financial statements.

158. Default rates for ITT students on all loans have been high, but ITT itself projected, as far back as May 2011, that more than 60% of the students who had received the private loans would default. Simply to enhance its financial statements and appearance to investors, ITT sacrificed its students' futures by saddling them with debt on which it knew they would likely default. ITT concurrently insured there would be no funds to pay claims asserted by defrauded students.

159. On August 7, 2014, the SEC notified ITT's Former Management that the SEC's staff of the Division of Enforcement had made a preliminary determination to recommend that the SEC file an enforcement action against ITT that would allege violations of U.S. securities laws.

160. On August 21, 2014, the ED informed ITT's Former Management that it would be subject to heightened cash monitoring before it could request or draw down any further Title IV funds from the ED.

161. On September 30, 2014, another complaint in a securities class action lawsuit was filed against ITT, Modany and Fitzpatrick in the United States District Court for the Southern District of Indiana, titled, *David Banes, Individually and on Behalf of All Others Similarly Situated v. Kevin M. Modany, Inc., et al.*, filed as Case No. 14-cv-1599. That complaint alleged,

among other things, that ITT and its executive officers violated Sections 10(b) and 20(a) of the Exchange Act and Rule 10b-5 promulgated thereunder by, *inter alia*, misleading investors about the reporting of PEAKS.

162. On October 3, 2014, another complaint in a securities class action lawsuit was filed against ITT, Modany and Fitzpatrick in the United States District Court for the Southern District of Indiana, titled, *Babulal Tarapara, Individually and on Behalf of All Others Similarly Situated v. ITT Educational Services, Inc., et al.*, filed as Case No. 14-cv-16I8SE. That complaint alleged, among other things, that ITT and its executive officers violated Sections 10(b) and 20(a) of the Exchange Act and Rule 10b-5 promulgated thereunder by, *inter alia*, (a) failing to consolidate the PEAKS Loan Program on ITT's financial statements and (b) improperly accounting for ITT's guarantee obligations under the Guarantee Agreement.

163. In sum, the house of cards that ITT's Former Management had created through the PEAKS Loan Program, the necessary and concurrent misrepresentations to students, the POBOB payments and ITT's guarantee liability, was quickly crashing down around the heads of ITT's Former Management due to the SEC's and CFPB's full-scale investigations into the CUSO and PEAKS Loan Programs.

164. Since ITT's Former Management could no longer conceal the facts pertinent to the CUSO and PEAKS Loan Programs and ITT's massive liability thereunder, on October 16, 2014, ITT's Former Management finally filed restated 10-Qs for the first, second, and third quarters of 2013, filed ITT's 2013 10-K, and informed investors and creditors about the scope and impact of ITT's exposure to the CUSO and PEAKS Loan Programs. In those reports, ITT's Former Management, among other things, revised and reclassified the CUSO and PEAKS guarantee liability it previously reported in its 2012 10-K and in each of the first three quarters of

2013. ITT's Former Management further disclosed the extent of its prior POBOB payments, totaling over $16 million. Less than two weeks after the extent of ITT's true liability under the Guarantee Agreement came to light, ITT's auditor promptly resigned.

165. On May 12, 2015, the SEC filed a complaint against ITT, Modany and Fitzpatrick in the United States District Court for the Southern District of Indiana, Case No. 15-CV-00758, asserting various claims for securities fraud in connection with the concealment of, *inter alia*, the CUSO and PEAKS Loan Programs.

166. On October 19, 2015, the ED announced that ITT was being placed under "heightened cash monitoring."

167. On April 20, 2016, the Accrediting Council for Independent Colleges and Schools ("ACICS"), an educational accreditation organization, demanded that ITT show cause why its grants of accreditation should not be withdrawn by suspension or otherwise conditioned. As the basis for its "show-cause" letter, the ACICS called into question ITT's administrative capacity, organizational integrity, financial viability and ability to serve students in a manner that complied with ACICS standards. Among, other things, that letter noted the existence of unresolved litigation and investigations by three federal agencies, for a variety of issues related to ITT's student lending practices and misrepresentations to investors and alleged violation of the federal False Claims Act.

168. As a result of the ACICS letter, on June 6, 2016, the ED sent its own letter to Modany, noting the concerns raised in ACICS' letter and stating the ED's belief that ACICS' actions represented an increased risk to the Title IV funds that ITT received from its students. The ED then demanded that ITT's existing surety be increased from approximately $79 million to over $123 million, and subjected ITT to heightened cash monitoring and reporting procedures.

169. On August 17, 2016, ACICS issued a "Continue Show-Cause Directive Letter" that, among other things, continued to question ITT's compliance with certain accreditation standards, including, *inter alia*, whether ITT had adequate revenues and assets to meet its responsibilities.

170. On August 25, 2016, the ED sent another letter to Modany, noting that since August 2014, the ED has been actively monitoring ITT's ongoing operation and finances as well as the civil litigation filed against ITT (and/or its officers) by federal and state law enforcement agencies. The ED demanded that ITT further increase its surety to the ED to over $247 million.

171. On September 6, 2016, ITT's Former Management announced that ITT was permanently shutting down its academic operations and firing the overwhelming majority of its more than 8,000 employees. The Debtors filed for bankruptcy on September 16, 2016.

The Peaks Loan Program Was Structured to Thwart Claims of Defrauded Students

172. After the bankruptcy filing, the full extent of the harm to students and ITT itself from the PEAKS Loan Program became apparent. On January 26, 2018, the Bankruptcy Court entered an Order preliminarily approving a settlement of the student claims asserted in the Class Action Complaint which provides, in part, for return of over $2.7 million in student payments held by the bankruptcy estate, and allowance of student claims of $1.5 billion.

173. Unfortunately for the students who were defrauded by ITT, the Peaks Loan Program -- with its complicated shuffling of funds and student notes among various trusts -- was plainly structured to hinder and delay students' attempts to recover damages from ITT and the lenders participating in the program, notwithstanding federal legislation designed for their protection.

174. By way of background, in 1975 the Federal Trade Commission adopted the landmark *Trade Regulation Rule on Preservation of Consumers' Claims and Defenses*, 16 C.F.R. § 433.1 ("FTC Holder Rule"), requiring that notes contain an express provision that holders of consumer credit notes governed by the rule are "subject to all claims and defenses which the debtor [borrower] could assert against the seller of goods or services obtained with the proceeds" of the loan. On May 3, 2012, the FTC issued an advisory opinion letter to the National Consumer Law Center stating that under the plain language of the FTC Holder Rule, holders are subject not only to defenses that may be asserted by borrowers, but are also subject to affirmative claims.

175. As observed by the National Association of Consumer Advocates ("NACA"):

> The Holder Rule helps to facilitate proper performance under contracts by sellers. Assignees and creditors are in a better position to monitor sellers' conduct and reliability. Consequently, it is reasonable for assignees and creditors to take on sellers' potential liability to consumers. The responsibility arising from the Holder Rule gives assignees and creditors the incentive to complete due diligence when working with sellers. It facilitates a self-regulating scheme in the marketplace that works *if its benefits and obligations are properly applied.* This market mechanism is beneficial not only for millions of consumers who buy and purchase products and services every day, but also for federal and state public enforcement officials, including the FTC, that cannot possibly monitor all of these transactions on their own.

(Emphasis added). *See* NACA's February 12, 2016 *Comments in Response to the Federal Trade Commission's Request for Public Comment on Its Trade Regulation Rule Concerning Preservation of Consumers' Claims and Defenses (The Holder Rule).*

176. The Student Loan Notes are subject to the FTC Holder Rule, and contain the required language stating that holders are subject to claims and defenses that could be asserted by students against the "seller," ITT.

177. Defendants well knew from the outset of the PEAKS Loan Program that the FTC Holder Rule is applicable to the Student Loan Notes, with the result that the "holder" of Student

Loan Notes would be subject to claims of students arising from fraudulent or unlawful acts by ITT in recruiting, advertising its services, or in disclosures relating to the loans.

178. The applicability and potential risks of the FTC Holder Rule is evident from the Student Loan Notes themselves, and is specifically acknowledged in the Private Placement Memorandum (the "Placement Memorandum") delivered to Senior Creditors making loans as part of the PEAKS Program, which states, in part:

> [T]he Student Loan promissory notes issued under the Program will include the FTC Holder Rule language. Under the FTC Holder Rule, the Trust is subject to all claims and defenses that the borrowers on the Student Loans could assert against the Guarantor [ITT] for the educational services purchased with the proceeds of the Student Loans. . . .

Placement Memorandum at 27.

179. In a fairly obvious attempt to circumvent the FTC Holder Rule, however, the PEAKS Loan Program was structured so that all assets of the PEAKS, including Student Loan Notes, were ostensibly transferred to another trust and/or pledged as collateral which could only be used to pay Senior Creditors.

180. As noted earlier, Liberty Bank made the initial Student Loans, then sold the Student Loan Notes to the PEAKS, which purported to "GRANT, CONVEY, PLEDGE, TRANSFER, ASSIGN AND DELIVER" *all of its assets* (including the Student Loan Notes) to DBTCA as Indenture Trustee and Collateral Agent, which would hold legal title to the Student Loan Notes and other assets, and forward all proceeds to the Senior Creditors and Lender under the PEAKS Loan Program. Although the Placement Memorandum acknowledges that the PEAKS would be "subject to all claims and defenses" of students, it says nothing about liability of DBTCA as Indenture Trustee and Collateral Agent (which held all the PEAKS assets) or of

the Senior Creditors, and by implication implies they would have no liability under the FTC Holder Rule.

181. The PEAKS Loan Program involved transfers by ITT to an artifice or device similar to a self-settled trust within the meaning of section 548(e)(1) of the Bankruptcy Code with respect to which ITT was a beneficiary.

182. Put simply, one apparent purpose of the PEAKS Loan Program was to insure that the "holder" of the Student Loan Notes would have no free assets that could be used to pay students' claims arising from fraud or misrepresentation by ITT, notwithstanding the FTC Holder Rule.

COUNT I

AVOIDANCE OF FRAUDULENT TRANSFER PURSUANT TO SECTIONS 544, 548(A)(1)(A) AND 548(E) OF THE BANKRUPTCY CODE AND SECTION 32-18-2-14(1) OF INDIANA'S UNIFORM FRAUDULENT TRANSFER ACT

183. Plaintiff repeats and realleges each of the allegations contained in paragraphs 1 through 182 above as if fully set forth herein.

184. In connection with the PEAKS Loan Program, ITT's Former Management caused ITT to incur the following voidable obligations and make the following voidable transfers (collectively, the "Fraudulent Transfers"):

(a) ITT's execution of the PEAKS Agreements, including the Guarantee Agreement, under which ITT's Former Management caused ITT to agree to make certain guarantee payments to PEAKS or to DBTCA for the benefit of PEAKS. DBTCA is claiming that it is owed $3,401,415.90 allegedly due by ITT under the Guarantee Agreement from the Petition Date through January 27, 2017, and approximately $41.4 million, representing the principal balance of the Senior Debt as of September 2016, for which ITT has guaranteed the repayment under the Guarantee Agreement;

(b) ITT's payments totaling approximately $174,443,939.41 (which amount excludes the $40 million payment under the POBOB Settlement Agreement) to PEAKS or to DBTCA for the benefit of PEAKS, pursuant to its guarantee obligations under the Guarantee Agreement from 2010 through the Petition Date, which sums, upon information and belief, were thereafter ultimately up-streamed to the PEAKS Senior Creditors;

(c) ITT's execution of the POBOB Settlement Agreement, and ITT's payment of $40 million to PEAKS or to DBTCA for the benefit of PEAKS, which amount, upon information and belief, was thereafter ultimately up-streamed to the PEAKS Senior Creditors; and

(d) ITT's payment to PEAKS or to DBTCA for the benefit of PEAKS, of approximately $16,093,000 in POBOB payments, which amount, upon information and belief, was thereafter ultimately up-streamed to the PEAKS Senior Creditors.

185. Each of the Fraudulent Transfers were made with the actual intent to hinder, delay or defraud ITT's creditors, including students, the ED, and state and federal taxing authorities.

186. At the time ITT's Former Management caused each of the Fraudulent Transfers to be made: (i) ITT was insolvent; (ii) ITT became insolvent on the date that such Fraudulent Transfer was made or incurred; (iii) ITT became insolvent as a result of such Fraudulent Transfer; (iv) ITT was engaged in business or a transaction, or was about to engage in business or a transaction, for which ITT's remaining property constituted unreasonably small capital; and/or (v) ITT's Former Management intended to incur, or believed that they would incur, on ITT's behalf, debts that would be beyond ITT's ability to pay as such debts matured.

187. ITT did not receive reasonably equivalent value in connection with any of the Fraudulent Transfers.

188. The Defendants did not receive the benefits from the Fraudulent Transfers in good faith.

189. The true nature and extent of the Fraudulent Transfers (and in particular, the POBOB payments) – albeit known to ITT's Former Management– were not properly disclosed and/or were concealed from ITT's creditors, including students, until such time as the discovery

of the fraudulent scheme was inevitable due to the investigations by, among others, the CFPB and the SEC.

190. At the time each of the Fraudulent Transfers was made, there existed at least one actual creditor of ITT that was harmed by the Fraudulent Transfers, including the Internal Revenue Service ("IRS").

191. All of the Fraudulent Transfers, including but not limited to, all Cash Payments, occurred within ten (10) years of the Petition Date.

192. As shown by Exhibit 1, all of the Cash Payments occurred within four (4) years of the Petition Date, with the exception of three payments in June and July of 2012 totaling $373,988.79.

193. As further shown by Exhibit 1, the Cash Payments made within two (2) years of the Petition Date consisted of $126,683,347.40 in Guarantee payments and $151,750.43 in payments of principal and interest, for a total of $126,835,097.83.

194. Each of the Fraudulent Transfers may be avoided under sections 544, 548(a)(1)(A) and 548(e) of the Bankruptcy Code and section 32-18-2-14(1) of the IUFTA.

WHEREFORE, Plaintiff respectfully requests the Court to enter a judgment:

a. Declaring ITT's execution of each of the PEAKS Agreements to have been a fraudulent transfer pursuant to sections 544, 548(a)(1)(A) and 548(e) of the Bankruptcy Code and section 32-18-2-14(1) of the IUFTA;

b. Avoiding ITT's obligations under each of the PEAKS Agreements as being in violation of sections 544, 548(a)(1)(A) and 548(e) of the Bankruptcy Code and section 32-18-2-14(1) of the IUFTA;

c. Avoiding the claim by DBTCA for payments allegedly due by ITT under the Guarantee Agreement as being in violation of sections 544, 548(a)(1)(A) and 548(e) of the Bankruptcy Code and section 32-18-2-14(1) of the IUFTA;

d. Declaring each payment obligation by ITT to PEAKS or to DBTCA for the benefit of PEAKS under the Guarantee Agreement, as and when such payment obligation came due, to have been a fraudulent transfer pursuant to sections 544, 548(a)(1)(A) and 548(e) of the Bankruptcy Code and section 32-18-2-14(1) of the IUFTA;

e. Declaring each payment made by ITT under the Guarantee Agreement to PEAKS, to DBTCA for the benefit of PEAKS, or to PEAKS Senior Creditors, including Defendants, as subsequent transferees, to have been a fraudulent transfer pursuant to sections 544, 548(a)(1)(A) and 548(e) of the Bankruptcy Code and section 32-18-2-14(1) of the IUFTA;

f. Avoiding each payment made by ITT under the Guarantee Agreement to PEAKS, to DBTCA for the benefit of PEAKS and/or to the PEAKS Senior Creditors, as being in violation of sections 544, 548(a)(1)(A) and 548(e) of the Bankruptcy Code and section 32-18-2-14(1) of the IUFTA;

g. Requiring DBTCA, PEAKS and the PEAKS Senior Creditors, including Defendants, to repay all payments each received, directly or indirectly (as initial and/or subsequent transferees), from ITT under the Guarantee Agreement (excluding the $40 million paid by ITT under the POBOB Settlement Agreement) in an amount to be determined at trial, but no less than $174,443,939.41, plus interest, reasonable attorneys' fees, costs and expenses to the extent permissible by applicable law;

h. Declaring ITT's execution of the POBOB Settlement Agreement to have been a fraudulent transfer pursuant to sections 544, 548(a)(1)(A) and 548(e) of the Bankruptcy Code and section 32-18-2-14(1) of the IUFTA;

i. Avoiding ITT's obligations under the POBOB Settlement Agreement as being in violation of sections 544, 548(a)(1)(A) and 548(e) of the Bankruptcy Code and section 32-18-2-14(1) of the IUFTA;

j. Declaring each payment made by ITT under the POBOB Settlement Agreement, to PEAKS, to DBTCA for the benefit of PEAKS, and to PEAKS Senior Creditors, including Defendants, as subsequent transferees, to have been a fraudulent transfer pursuant to sections 544, 548(a)(1)(A) and 548(e) of the Bankruptcy Code and section 32-18-2-14(1) of the IUFTA;

k. Avoiding each payment made by ITT under the POBOB Settlement Agreement to PEAKS, to DBTCA for the benefit of PEAKS, and to PEAKS Senior Creditors, including Defendants, as subsequent transferees, as being in violation of sections 544, 548(a)(1)(A) and 548(e) of the Bankruptcy Code and section 32-18-2-14(1) of the IUFTA;

l. Requiring DBTCA and PEAKS and the PEAKS Senior Creditors, including Defendants, as subsequent transferees, to repay all payments each received, directly or indirectly (as initial and/or subsequent transferees), from ITT under the POBOB Settlement Agreement in an amount to be determined at trial, but no less than $40 million, plus interest, reasonable attorneys' fees, costs and expenses to the extent permissible by applicable law;

m. Declaring each of the POBOB payments to PEAKS, to DBTCA for the benefit of PEAKS, and to PEAKS Senior Creditors, including Defendants, as subsequent transferees, to have been a fraudulent transfer pursuant to sections 544, 548(a)(1)(A) and 548(e) of the Bankruptcy Code and section 32-18-2-14(1) of the IUFTA;

n. Avoiding each of the POBOB payments to PEAKS, to DBTCA for the benefit of PEAKS, and to PEAKS Senior Creditors, including Defendants, as subsequent transferees, as being in violation of sections 544, 548(a)(1)(A) and 548(e) of the Bankruptcy Code and section 32-18-2-14(1) of the IUFTA;

o. Requiring DBTCA, and PEAKS and PEAKS Senior Creditors, as subsequent transferees, to repay all POBOB payments they received, in an amount to be determined at trial, but not less than $16,093,000,plus interest, reasonable attorneys' fees, costs and expenses to the extent permissible by applicable law;

p. Declaring all other transfers made by ITT, directly or indirectly (as initial and/or subsequent transferees), to any of the Defendants and/or obligations incurred by ITT to any of the Defendants in connection with the PEAKS Loan Program to have been fraudulent transfers pursuant to sections 544, 548(a)(1)(A) and 548(e) of the Bankruptcy Code and section 32-18-2-14(1) of the IUFTA;

q. Avoiding all other transfers made by ITT, directly or indirectly (as initial and/or subsequent transferees), to any of the Defendants and/or obligations incurred by ITT to any of the Defendants in connection with the PEAKS Loan Program as being in violation sections 544, 548(a)(1)(A) and 548(e) of the Bankruptcy Code and section 32-18-2-14(1) of the IUFTA;

r. Requiring each Defendant to repay all other transfers made to it by ITT, directly or indirectly (as initial and/or subsequent transferees), in connection with the PEAKS Loan Program in an amount to be determined at trial, plus interest, reasonable attorneys' fees, costs and expenses to the extent permissible by applicable law; and

s. Granting Plaintiff such other and further relief as may be just and proper.

COUNT II

AVOIDANCE OF FRAUDULENT TRANSFERS PURSUANT TO SECTIONS 544 AND 548(a)(1)(B) OF THE BANKRUPTCY CODE AND SECTION 32-18-2-14(2) OF INDIANA'S UNIFORM VOIDABLE TRANSACTIONS ACT

195. Plaintiff repeats and realleges each of the allegations contained in paragraphs 1 through 182 above as if fully set forth herein.

196. ITT made each of the Fraudulent Transfers (as defined in Count I above) without receiving reasonably equivalent value in exchange.

197. At the time each of the Fraudulent Transfers was made: (a) ITT was insolvent; (b) ITT became insolvent on the date that such Fraudulent Transfer was made or incurred; (c) ITT became insolvent as a result of such Fraudulent Transfer; (d) ITT was engaged in business or a transaction, or was about to engage in business or a transaction, for which ITT's remaining property constituted unreasonably small capital; and/or (e) ITT's Former Management intended to incur, or believed that they would incur, on ITT's behalf, debts that would be beyond ITT's ability to pay as such debts matured.

198. At the time each of the Fraudulent Transfers was made, there existed at least one actual creditor of ITT that was harmed by the Fraudulent Transfers, including the IRS.

199. All of the Fraudulent Transfers, including but not limited to, all Cash Payments, occurred within ten (10) years of the Petition Date.

200. As shown by Exhibit 1, all of the Cash Payments occurred within four (4) years of the Petition Date, with the exception of three payments in June and July of 2012 totaling $373,988.79.

201. As further shown by Exhibit 1, the Cash Payments made within two (2) years of the Petition Date consisted of $126,683,347.40 in Guarantee payments and $151,750.43 in payments of principal and interest, for a total of $126,835,097.83.

202. Each of the Fraudulent Transfers may be avoided under sections 544 and 548(a)(1)(B) of the Bankruptcy Code and section 32-18-2-14(2) of the IUFTA.

WHEREFORE, Plaintiff respectfully requests the Court to enter a judgment:

a. Declaring ITT's execution of each of the PEAKS Agreements to have been a fraudulent transfer pursuant to sections 544 and 548(a)(1)(B) of the Bankruptcy Code and section 32-18-2-14(2) of the IUFTA;

b. Avoiding ITT's obligations under each of the PEAKS Agreements as being in violation of sections 544 and 548(a)(1)(B) of the Bankruptcy Code and section 32-18-2-14(2) of the IUFTA;

c. Avoiding the claim by DBTCA to recover all payments allegedly due by ITT under the Guarantee Agreement as being in violation of sections 544 and 548(a)(1)(B) of the Bankruptcy Code and section 32-18-2-14(2) of the IUFTA;

d. Declaring each payment obligation by ITT to PEAKS, or to DBTCA for the benefit of PEAKS, as applicable, under the Guarantee Agreement, as and when such payment obligation came due, to have been a fraudulent transfer pursuant to sections 544 and 548(a)(1)(B) of the Bankruptcy Code and section 32-18-2-14(2) of the IUFTA;

e. Declaring each payment made by ITT under the Guarantee Agreement to PEAKS, to DBTCA for the benefit of PEAKS, and to PEAKS Senior Creditors, including Defendants, as subsequent transferees, to have been a fraudulent transfer pursuant to sections 544 and 548(a)(1)(B) of the Bankruptcy Code and section 32-18-2-14(2) of the IUFTA;

f. Avoiding each payment made by ITT under the Guarantee Agreement to PEAKS, to DBTCA for the benefit of PEAKS, and to PEAKS Senior Creditors, including Defendants, as subsequent transferees, as being in violation of sections 544 and 548(a)(1)(B) of the Bankruptcy Code and section 32-18-2-14(2) of the IUFTA;

g. Requiring DBTCA, PEAKS and PEAKS Senior Creditors, as subsequent transferees, to repay all payments each received, directly or indirectly (as initial and/or subsequent transferees), from ITT under the Guarantee Agreement (excluding the $40 million paid by ITT under the POBOB Settlement Agreement) in an amount to be determined at trial, plus interest, reasonable attorneys' fees, costs and expenses to the extent permissible by applicable law;

h. Declaring ITT's execution of the POBOB Settlement Agreement to have been a fraudulent transfer pursuant to sections 544 and 548(a)(1)(B) of the Bankruptcy Code and section 32-18-2-14(2) of the IUFTA;

i. Avoiding ITT's obligations under the POBOB Settlement Agreement as being in violation of sections 544 and 548(a)(1)(B) of the Bankruptcy Code and section 32-18-2-14(2) of the IUFTA;

j. Declaring each payment made by ITT under the POBOB Settlement Agreement to PEAKS, to DBTCA for the benefit of PEAKS, and to PEAKS Senior Creditors, including Defendants, as subsequent transferees, to have been a fraudulent transfer pursuant to sections 544 and 548(a)(1)(B) of the Bankruptcy Code and section 32-18-2-14(2) of the IUFTA;

k. Avoiding each payment made by ITT under the POBOB Settlement Agreement to PEAKS, to DBTCA for the benefit of PEAKS, and to PEAKS Senior Creditors, including

Defendants, as subsequent transferees DBTCA, as being in violation of sections 544 and 548(a)(1)(B) of the Bankruptcy Code and section 32-18-2-14(2) of the IUFTA;

l. Requiring DBTCA, and PEAKS and/or the PEAKS Senior Creditors, to repay all payments each received, directly or indirectly (as initial and/or subsequent transferees), from ITT under the POBOB Settlement Agreement in an amount to be determined at trial, plus interest, reasonable attorneys' fees, costs and expenses to the extent permissible by applicable law;

m. Declaring each of the POBOB payments to DBTCA, and PEAKS and/or the PEAKS Senior Creditors, as subsequent transferees, to have been a fraudulent transfer pursuant to sections 544 and 548(a)(1)(B) of the Bankruptcy Code and section 32-18-2-14(2) of the IUFTA;

n. Avoiding each of the POBOB payments to DBTCA, PEAKS and/or the PEAKS Senior Creditors, as subsequent transferees, as being in violation of sections 544 and 548(a)(1)(B) of the Bankruptcy Code and section 32-18-2-14(2) of the IUFTA;

o. Requiring DBTCA, PEAKS and/or the PEAKS Senior Creditors, as subsequent transferees, to repay all POBOB payments they received, in an amount to be determined at trial, plus interest, reasonable attorneys' fees, costs and expenses to the extent permissible by applicable law;

p. Declaring all other transfers made by ITT, directly or indirectly (as initial and/or subsequent transferees), to any of the Defendants and/or obligations incurred by ITT to any of the Defendants in connection with the PEAKS Loan Program to have been fraudulent transfers pursuant to sections 544 and 548(a)(1)(B) of the Bankruptcy Code and section 32-18-2-14(2) of the IUFTA;

q. Avoiding all other transfers made by ITT, directly or indirectly (as initial and/or subsequent transferees), to any of the Defendants and/or obligations incurred by ITT to any of the Defendants in connection with the PEAKS Loan Program as being in violation of sections 544 and 548(a)(1)(B) of the Bankruptcy Code and section 32-18-2-14(2) of the IUFTA;

r. Requiring each Defendant to repay all other transfers made to it by ITT, directly or indirectly (as initial and/or subsequent transferees), in connection with the PEAKS Loan Program in an amount to be determined at trial, plus interest, reasonable attorneys' fees, costs and expenses to the extent permissible by applicable law; and

s. Granting Plaintiff such other and further relief as may be just and proper.

COUNT III

UNJUST ENRICHMENT

203. Plaintiff repeats and realleges each of the allegations contained in paragraphs 1 through 182 above as if fully set forth herein.

204. Defendants were enriched by the Cash Payments, in whole or in part, at the expense of the Debtors, without justification and under circumstances such that it would be contrary to fundamental principles of justice, equity and good conscience to permit Defendants to retain the Cash Payments.

205. Plaintiff may have no adequate remedy at law.

WHEREFORE, Plaintiff respectfully requests, as alternative relief, that the Court enter a Judgment requiring each Defendant to repay all Cash Payments by which each Defendant was wrongfully enriched, in an amount to be determined at trial, plus interest, reasonable attorneys' fees, costs and expenses to the extent permissible by applicable law.

COUNT IV

AVOIDANCE OF PREFERENTIAL TRANSFERS WITHIN SECTION 547 OF THE BANKRUPTCY CODE

206. Plaintiff repeats and realleges each of the allegations contained in paragraphs 1 through 182 above as if fully set forth herein.

207. ITT's Former Management caused ITT to make the following transfers (the "Preference Payments"), totaling $1,754,042.99 to PEAKS and/or DBTCA for the benefit of PEAKS, within ninety (90) days of the Debtors' bankruptcy filing on September 16, 2016, as shown by Exhibit 1 attached and incorporated herein, which payments were subsequently transferred to Senior Creditors, including Defendants.

208. Each of the Preference Payments:

(a) was made to or for the benefit of PEAKS;

(b) was for or on account of an antecedent debt owed by the debtor before such Preference Payment was made;

(c) was made at a time when the Debtor making the payment was insolvent; and

(d) enabled PEAKS and Senior Creditors, including Defendants, to receive more than they would have received if the case were a case under chapter 7 of the Bankruptcy Code, the transfer had not been made, and such creditors had received payment of such debt to the extent provided by the provisions of the Bankruptcy Code, all as set forth in section 547 of the Bankruptcy Code.

WHEREFORE, Plaintiff respectfully requests the Court to enter a judgment:

a. Declaring the above-referenced payments to have been preferential payments recoverable under section 547 of the Bankruptcy Code;

b. Avoiding each such payment pursuant to section 547 of the Bankruptcy Code;

c. Requiring each transferee Defendant to repay all such transfers made to it by ITT, directly or indirectly (as initial and/or subsequent transferees), plus interest, reasonable attorneys' fees, costs and expenses to the extent permissible by applicable law; and

d. Granting Plaintiff such other and further relief as may be just and proper.

<u>COUNT V</u>

RECOVERY OF PROPERTY PURSUANT TO SECTIONS 550 AND 551 OF THE BANKRUPTCY CODE

209. Plaintiff repeats and realleges each of the allegations contained in paragraphs 1 through 208 above as if fully set forth herein.

210. Each of the Fraudulent Transfers is avoidable pursuant to sections 544 and 548 of the Bankruptcy Code, and each of the Preference Payments is avoidable pursuant to section 547 of the Bankruptcy Code, and as a result, each of the Fraudulent Transfers and Preference Payments is recoverable by Plaintiff pursuant to section 550 of the Bankruptcy Code.

211. Pursuant to section 551 of the Bankruptcy Code, any transfer that is avoided under section 544, Bankruptcy Code is preserved for the benefit of Plaintiff, the beneficiaries of which are creditors of Debtors' Chapter 7 estates.

WHEREFORE, Plaintiff respectfully requests the Court to:

a. Enter a money judgment against PEAKS, DBTCA, and the PEAKS Senior Creditors, as subsequent transferees, in an amount equal to all payments each received, directly or indirectly (as initial and/or subsequent transferees), from ITT under the Guarantee Agreement (excluding the $40 million paid by ITT under the POBOB Settlement Agreement) in an amount to be determined at trial, but no less than $174,443,939.41, plus interest, reasonable attorneys' fees, costs and expenses to the extent permissible by applicable law;

b. Enter a money judgment against DBTCA, PEAKS and the PEAKS Senior Creditors, as subsequent transferees, in an amount equal to all payments each received, directly or indirectly (as initial and/or subsequent transferees), from ITT under the POBOB Settlement Agreement in an amount to be determined at trial, but no less than $40 million, plus interest, reasonable attorneys' fees, costs and expenses to the extent permissible by applicable law;

c. Enter a money judgment against DBTCA, PEAKS and the PEAKS Senior Creditors, as subsequent transferees, in an amount equal to all payments each received from ITT, directly or indirectly (as initial and/or subsequent transferees), as POBOB payments in an amount to be determined at trial, but no less than $16,093,000, plus interest, reasonable attorneys' fees, costs and expenses to the extent permissible by applicable law;

d. Enter a money judgment against each of the Defendants in an amount equal to all other transfers made to each, directly or indirectly (as initial and/or subsequent transferees), by ITT in connection with the PEAKS Loan Program in an amount to be determined at trial, plus interest, reasonable attorneys' fees, costs and expenses to the extent permissible by applicable law;

e. Enter a judgment requiring the Defendants to pay all of the aforesaid sums to Plaintiff;

f. Disallow any claim the Defendants may have against Plaintiff until such time as they pay the aforementioned amount to Plaintiff pursuant to section 502(d) of the Bankruptcy Code; and

g. Grant Plaintiff such other and further relief as may be just and proper.

COUNT VI

AIDING AND ABETTING BREACH OF FIDUCIARY DUTY

212. Plaintiff repeats and realleges each of the allegations contained in paragraphs 1 through 211 above as if fully set forth herein.

213. ITT's Former Management owed fiduciary duties to ITT, and/or its investors and creditors, by virtue of their status as officers and/or directors of ITT. These duties include the duty of care and the duty of loyalty.

214. By reason of the conduct described above, ITT's Former Management breached their fiduciary duties, including by:

(a) creating, implementing and participating in the PEAKS Loan Program as a misleading means of temporarily offloading likely uncollectible Temporary Credits from ITT's financials while at the same time creating a future obligation to repay the same obligations to DBTCA (in the form of the guarantee on defaulting PEAKS loans) albeit in an amount far in excess of the sums ITT received from PEAKS to pay off the Temporary Credits;

(b) making each of the Fraudulent Transfers in connection with the PEAKS Loan Program;

(c) failing to consolidate the PEAKS Loan Program on ITT's financials and to properly calculate and account for ITT's liability on its guarantee under the Guarantee Agreement as part of a scheme to mislead ITT's investors and creditors;

(d) making secret POBOB payments so as to increase exponentially ITT's liability under the Guarantee Agreement;

(e) concealing the true nature and extent of ITT's liability under the PEAKS Loan Program from ITT's investors and creditors; and

(f) creating a scheme that induced the ED to continue making hundreds of millions of dollars available to ITT through federal financial aid, including Title IV loans, on which one or more persons are or may seek to hold ITT liable.

215. ITT's Former Management, including Modany and Fitzpatrick, engaged in such conduct, and concealed facts from students, investors and regulators, for their own self-interest, as a means to greatly enhance their own compensation, to the long-term detriment of ITT, its creditors and shareholders.

216. Upon information and belief, the Defendants knew of one or more of ITT's Former Management's breaches of fiduciary duties to ITT.

217. By reason of the conduct described above, including providing the funding for the PEAKS Loan Program and converting uncollectible Temporary Credits into defaulting PEAKS Loans on which ITT would have significantly greater exposure, each of the Defendants aided and abetted ITT's Former Management's breaches of their respective fiduciary duties to ITT, its investors and/or its creditors by providing substantial assistance and/or encouragement of the wrongdoing by ITT's Former Management.

218. ITT suffered damages as a result of ITT's Former Management's breaches of fiduciary duties as well as Defendants' aiding and abetting of such breaches of fiduciary duties.

219. Upon information and belief, each of the Defendants intended to cause the harm to ITT, its investors and/or creditors and acted willfully and wantonly to cause that harm. Accordingly, Plaintiff is also entitled to an award of punitive damages.

WHEREFORE, Plaintiff respectfully requests the Court to enter a judgment:

a. Awarding Plaintiff damages in an amount to be determined at trial, plus interest, reasonable attorneys' fees, costs and expenses to the extent permissible by applicable law;

b. Awarding Plaintiff punitive damages in an amount to be determined at trial; and

c. Granting Plaintiff such other and further relief as may be just and proper.

COUNT VII

AIDING AND ABETTING FRAUD

220. Plaintiff repeats and realleges each of the allegations contained in paragraphs 1 through 219 above as if fully set forth herein.

221. ITT's Former Management owed fiduciary duties to ITT, and/or its investors and creditors, by virtue of their status as officers and/or directors of ITT. These duties include the duty of care and the duty of loyalty.

222. ITT's Former Management therefore had an obligation to properly and fully disclose the fraudulent nature of the PEAKS Loan Program and the extent of ITT's true liability thereunder to ITT's investors and creditors, including on ITT's financial filings, but they failed to do so.

223. Upon information and belief, ITT's Former Management failed to make such disclosures with the intent of defrauding ITT's investors and creditors, including the ED, in order to induce the ED to continue making hundreds of millions of dollars available to ITT in Title IV loans, so as to, *inter alia*, enrich certain of ITT's Former Management at the expense of ITT, its ITT's investors and its creditors.

224. ITT's investors and creditors justifiably relied on the material omissions of ITT's Former Management in not taking any action with respect to each of the Fraudulent Transfers.

225. Each of the Defendants knew of ITT's Former Management's fraudulent conduct.

226. By reason of the conduct described above, each of the Defendants aided and abetted ITT's Former Management's fraudulent conduct by providing substantial assistance to advance the commission of ITT's Former Management's fraud.

227. ITT has suffered damages as a result of ITT's Former Management's fraud as well as Defendants' aiding and abetting of that fraud.

228. Upon information and belief, each of the Defendants intended to cause the harm to ITT, its investors and creditors and each acted willfully and wantonly to cause that harm. Accordingly, Plaintiff is also entitled to an award of punitive damages.

WHEREFORE, Plaintiff respectfully requests the Court to enter a judgment:

a. Awarding Plaintiff damages in an amount to be determined at trial, plus interest, reasonable attorneys' fees, costs and expenses to the extent permissible by applicable law; Awarding Plaintiff punitive damages in an amount to be determined at trial; and

b. Granting Plaintiff such other and further relief as may be just and proper.

COUNT VIII

OBJECTION TO CLAIMS

229. Plaintiff repeats and realleges each of the allegations contained in paragraphs 1 through 182 above as if fully set forth herein.

230. On January 26, 2017, DBTCA filed Proof of Claim #1961 as Indenture Trustee and Collateral Agent, purportedly based on ITT's alleged liability under the Indenture and Credit Agreement and Guarantee Agreement.

231. For the reasons set forth above, the Trustee contends that ITT's obligations under the Indenture and Credit Agreement and Guarantee Agreement should be avoided, and that DBTCA and the other Defendants herein are liable as transferees of avoidable transfers.

232. Pursuant to section 502(d) of the Bankruptcy Code, the Court shall disallow any claim of an entity from which property is recoverable under sections 542, 543, 550, or 553, or that is a transferee of a transfer avoidable under sections 544, 547, 548, 549 or 724, unless such entity or transferee has paid the amount, or turned over any such property.

WHEREFORE, Plaintiff respectfully requests the Court to enter an Order disallowing Proof of Claim #1961, as well as all other claims that have been filed or may be filed by Defendants herein, and further prays for such additional relief as may be proper.

Dated: September 7, 2018
Indianapolis, IN

Respectfully submitted,

RUBIN & LEVIN, P.C.

By: */s/ John C. Hoard*
John C. Hoard

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