UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

In Re: **Sarah Hunter,** Debtor.	Case No.: 15-17329-JKS Adv. Pro. No.: 15-02052-JKS Judge: Hon. John K. Sherwood
Sarah Hunter, Plaintiff, v. **New Jersey Higher Education Student Assistance Authority,** Defendant.	

DECISION AND ORDER REGARDING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT TO DISCHARGE STUDENT LOAN DEBT PURSUANT TO 11 U.S.C. § 523(a)(8) AND DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

The relief set forth on the following pages, numbered three (3) through twenty-four (24), is hereby **ORDERED**.

HONORABLE JOHN K. SHERWOOD
UNITED STATES BANKRUPTCY JUDGE

DATED: JANUARY 5, 2018

APPEARANCES

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PRELIMINARY STATEMENT

Plaintiff Sarah Hunter (hereinafter "Hunter") is a debtor in a chapter 13 proceeding before this Court and has filed suit against Defendant New Jersey Higher Education Student Assistance Authority (hereinafter "NJHESAA") seeking, among other things, to discharge her student loan debt. In the chapter 13 case, NJHESAA has filed thirteen claims against Hunter totaling $288,911.15.[1] Hunter moved for partial summary judgment declaring that $43,033.00 of NJHESAA's total claim, along with the related interest and charges accrued to date, is dischargeable because the corresponding loans are not "qualified education loans." Essentially, Hunter argued that NJHESAA was guilty of loaning funds to her for amounts that exceeded the cost of attendance at college and graduate school.

NJHESAA cross moved for summary judgment seeking to dismiss Hunter's complaint. One of its main arguments was that because NJHESAA was a "governmental unit" as the term is used in § 523(a)(8) of the Bankruptcy Code, it does not matter if the loans in question were "qualified education loans" or not. So long as a governmental unit makes the loans, they are non-dischargeable. Thus, Hunter filed opposition to the cross-motion, arguing that NJHESAA is not a "governmental unit." The Court heard oral argument on November 14, 2017 and requested that the parties submit post-hearing briefs. The arguments raise a host of issues for the Court to consider in determining whether all or part of Hunter's student loan debts are non-dischargeable under § 523(a)(8) of the Bankruptcy Code. The Court must also consider the viability of claims by

[1] Certification of Janice Seitz, ECF No. 22.

Hunter against NJHESAA based on fraud and breach of contract. These issues and claims are addressed below.

JURISDICTION

The Court has jurisdiction over this proceeding pursuant to 28 U.S.C. §§ 1334(b), 157(a), and the Standing Order of Reference from the United States District Court for the District of New Jersey dated July 23, 1984, as amended September 18, 2012. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (I). Venue is proper under 28 U.S.C. §§ 1408 and 1409(a).

FACTS AND PROCEDURAL HISTORY

Hunter was a student at Seton Hall University from 2007 through 2013.[2] She graduated with a Bachelor's of Science degree in Diplomacy and International Relations and Russian Suburban Studies as well as a Master's in Diplomacy and International Relations.[3] She financed her education with various forms of financial aid, including loan proceeds from NJHESAA.[4]

On April 22, 2015, Hunter filed a voluntary petition for relief under chapter 13 of the Bankruptcy Code.[5] Between May 14, 2015 and May 28, 2015, NJHESAA filed thirteen claims totaling $288,911.15, twelve under NJCLASS and the last through Navient Solutions Inc. on behalf of NJHESAA.[6] NJCLASS is a loan program administered by NJHESAA.[7] By Order dated

[2] Certification of Lisa M. McQuade, Esq. Ex. C, at 9, ECF No. 22.
[3] *Id.* at 8.
[4] *Id.* at 14-16.
[5] Certification of Lisa M. McQuade, Esq. ¶ 1, ECF No. 22.
[6] Certification of Janice Seitz, ECF No. 22.
[7] N.J.S.A. 18A:71C-21.

July 27, 2015, Hunter's chapter 13 plan was confirmed.[8] As part of the confirmed plan, a portion of Hunter's monthly payments to the chapter 13 Trustee have been disbursed to NJCLASS and NJHESAA.[9]

On July 23, 2015, the same day of the chapter 13 confirmation hearing, Hunter filed an adversary complaint against NJHESAA seeking to declare the student loan debts dischargeable and for damages based on NJHESAA's alleged fraud and breach of contract.[10] On August 17, 2015, NJHESAA filed an answer to the complaint.[11]

On May 16, 2016, NJHESAA deposed Hunter. During the deposition, Hunter testified that she executed the NJHESAA loan applications and certified that the loan proceeds would be used for authorized educational expenses only and that she did not owe a refund on a federal or state assistance grant.[12] She also confirmed that the loan proceeds were disbursed by NJHESAA directly to Seton Hall University on her behalf.[13] For each academic year, Seton Hall University issued a refund to Hunter in the amount of overpayments that exceeded the cost of attendance.[14] Hunter acknowledged receipt of the refunds. She testified that some refunds were used for expenses related to her study abroad programs and for rent and living expenses during graduate school. Otherwise, she could not recall how she used the refunds.[15]

[8] Am. Order Confirming Plan, In re Sarah Hunter, No. 15-17329 (JKS), ECF No. 33.
[9] Chapter 13 Trustee Annual Report, In re Sarah Hunter, No. 15-17329 (JKS), ECF No. 48.
[10] Hunter's Adversary Compl., ECF No. 1.
[11] NJHESAA's Answer to the Compl., ECF No. 3.
[12] Certification of Lisa M. McQuade, Esq. Ex. C, at 34-46, ECF No. 22.
[13] *Id.* at 14-15.
[14] *Id.* at 15.
[15] *Id.* at 23-33.

Hunter is now employed as a research analyst in New York City at the Global Center for Responsibility and earns approximately $50,000 a year.[16] She lives with her boyfriend and daughter in a rented townhouse in Jamesburg, New Jersey.[17] Her boyfriend earns between $60,000 and $70,000 per year and contributes to her living expenses.[18] Hunter claims that it would be extremely difficult to maintain a minimum standard of living if she had to repay her student loan debt in full. She further states that in her chosen field of human rights, there are limited opportunities for other employment at higher pay rates. Finally, she certifies that she tried to seek a deferment of the loans, which was granted subject to payment of interest on the debt, and that she had to borrow money from her parents to make the interest payment.[19]

Hunter's amended complaint has five counts. The first count claims that the student loan debt is not a qualified education loan pursuant to 11 U.S.C. § 523(a)(8) and is dischargeable. The second count claims that the student loan debt is dischargeable because it imposes undue hardship. The third count seeks damages against NJHESAA for breach of contract and fraud. The fourth count claims NJHESAA violated the New Jersey Consumer Fraud Act. The fifth count claims damages for breach of express and implied terms of the contract.[20]

On March 10, 2017, NJHESAA filed an answer to the amended complaint.[21] The Court has scheduled trial for February 28, 2018.[22]

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[16] *Id.* at 7-8.
[17] *Id.* at 5-6.
[18] *Id.* at 6-7.
[19] Certification of Debtor, ECF No. 25.
[20] Hunter's Am. Compl., ECF No. 13.
[21] NJHESAA's Answer to the Am. Compl., ECF No. 16.
[22] Joint Scheduling Order, ECF No. 19.

On October 2, 2017, Hunter filed her motion for partial summary judgment declaring that $43,033.00 of NJHESAA's claims, along with the related interest and charges accrued to date, are dischargeable because such loans are not qualified education loans.[23] NJHESAA filed a cross-motion for summary judgment to dismiss each of the five counts of the amended complaint.[24] In Hunter's brief in opposition to NJHESAA's cross-motion for summary judgment, she adds the argument that NJHESAA is not a "governmental unit" under § 523(a)(8)(A)(i) of the Bankruptcy Code.[25]

On November 14, 2017, the Court held oral argument. The Court reserved its decision and instructed Hunter to file a post-hearing brief by November 17, 2017 solely related to the issue of whether NJHESAA is a governmental unit. NJHESAA was instructed to respond by December 1, 2017.

On November 17, 2017, Hunter filed her post-hearing brief [26] and on December 1, 2017, NJHESAA filed its reply.[27] On December 5, 2017, Hunter filed a sur-reply without permission from the Court.[28] The unauthorized sur-reply was not considered by the Court.

[23] Hunter's Mot. for Summ. J., ECF No. 21.
[24] NJHESAA's Cross-Mot. for Summ. J., ECF No. 22.
[25] Hunter's Br. in Opp'n to NJHESAA's Cross-Mot. for Summ. J., ECF No. 23.
[26] Hunter's Suppl. Br., ECF No. 26.
[27] NJHESAA's Suppl. Reply Br., ECF No. 27.
[28] Hunter's Sur-Reply, ECF No. 29.

DISCUSSION

A. NJHESAA Is A Governmental Unit

An important issue touching on the dischargeability of Hunter's student loan debt is whether the lender, NJHESAA, is a governmental unit. This is clear in light of 11 U.S.C. § 523(a)(8), which states:

> "A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt— unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor's dependents, for—
> (A) (i) *an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution*; or
> (ii) an obligation to repay funds received as an educational benefit, scholarship, or stipend; or
> (B) any other educational loan that is a qualified education loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986, incurred by a debtor who is an individual;" (emphasis added).

The logical starting point is § 523(a)(8)(A)(i), which plainly states that an educational loan is non-dischargeable if it is made or funded by a governmental unit. NJHESAA's cross-motion for summary judgment argues that § 523(a)(8)(A)(ii) and (B) are irrelevant if NJHESAA is a governmental unit. In other words, if § 523(a)(8)(A)(i) is satisfied, there is no need to consider whether the loans to Hunter were "educational benefits" or "qualified education loans."

The Court agrees that if NJHESAA is a governmental unit then § 523(a)(8)(A)(i) is satisfied and the student loans may only be discharged if they impose undue hardship. The term "governmental unit" is defined in § 101(27) of the Bankruptcy Code:

> "The term "governmental unit" means United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States (but not a United States trustee while serving as a trustee in a case under this title), a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government."

The definition essentially consists of two types of entities that are considered governmental units. First, the definition includes the entities themselves: the "United States; State; Commonwealth; District; Territory; municipality; foreign state." Second, the definition includes the arms of those entities: a "department, agency, or instrumentality of the United States (but not a United States trustee while serving as a trustee in a case under this title), a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government." (emphasis added). Based on the clear language of 11 U.S.C. § 101(27), if NJHESAA is a New Jersey State department, agency or instrumentality then it is a governmental unit.

Janice Seitz, a Program Officer at NJHESAA, has certified that "NJHESAA is a New Jersey state agency."[29] In addition, NJHESAA was established as an instrumentality of the state when it was created under N.J.S.A. 18A:71A-3, which states:

> "The Higher Education Student Assistance Authority, a body corporate and politic, shall be established in the Executive Branch of the State Government and for the purposes of complying with the provisions of Article V, Section IV, paragraph 1 of the New Jersey Constitution, the authority is allocated in but not of the Department of State. *The authority shall constitute an instrumentality of the State* exercising public and essential governmental functions, and the exercise by the authority of the powers conferred by this act in

[29] Certification of Janice Seitz ¶¶ 1-2, ECF No. 22.

> the furthering of access to postsecondary education, whether by loans, grants, scholarships or other means, shall be deemed and held to be an essential governmental function of the State. The authority shall submit its budget request directly to the Division of Budget and Accounting in the Department of the Treasury." (emphasis added).

Rather than opposing these clear statements that NJHESAA is an agency and instrumentality of the State of New Jersey, Hunter argues that NJHESAA must clear more hurdles before it can be considered a governmental unit. First, Hunter argues that the Court should look to the definition of "governmental unit" found in the Internal Revenue Code. See, *e.g.*, I.R.C. § 170(c)(1). But, if Congress intended the Court to use the Internal Revenue Code's definition of a "governmental unit" rather than 11 U.S.C. § 101(27), this would have been specified in 11 U.S.C. § 523(a)(8)(A)(i). In 11 U.S.C. § 523(a)(8)(B), the Bankruptcy Code does incorporate the Internal Revenue Code's definition of "qualified education loan." Since this is not done in subsection (A) with respect to the definition of "governmental unit," the plain language of the Bankruptcy Code's definition applies. Therefore, the Court gives no weight to the Internal Revenue Code's definition of "governmental unit" or case law interpreting that definition.

Next, Hunter contends that NJHESAA cannot be considered a governmental unit because it lacks sovereign immunity. Sovereign immunity is a protection provided by the Eleventh Amendment to the United States Constitution that bars federal jurisdiction over lawsuits brought against a state without the state's consent.[30] This immunity extends to state departments and agencies that are arms of the state.[31] Hunter describes NJHESAA as a "self-perpetuating

[30] *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 98 (1984).
[31] *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429 (1997).

commercial enterprise" because it is funded by student loan reserve bonds for which the State of New Jersey has no liability. She also argues that NJHESAA was established as a "sue and be sued" entity under New Jersey law.

There is no statutory requirement or case law that requires a state department, agency or instrumentality to have sovereign immunity or be backed financially by the state to be considered a governmental unit under 11 U.S.C. § 523(a)(8)(A)(i) or 11 U.S.C. § 101(27). NJHESAA was established by statute as an instrumentality of New Jersey and is described as a state agency. NJHESAA's ability to fund itself through the issuance of bonds and the fact it must sue and be sued in its own name do not mean that NJHESAA is not an instrumentality of the State of New Jersey. Rather, this is an example of the discretion a state has in legislating how a state department, agency or instrumentality may exist and operate.

The Court finds that NJHESAA is an agency and instrumentality of the State of New Jersey and therefore, NJHESAA is a governmental unit as defined in 11 U.S.C. § 101(27). Because it is a governmental unit, the dischargeability of Hunter's student loans is governed by 11 U.S.C. § 523(a)(8)(A)(i). Whether the student loans are "qualified education loans" under 11 U.S.C. § 523(a)(8)(B) and whether the funds loaned to Hunter were for "educational benefits" under § 523(a)(8)(A)(ii) are irrelevant.

Because the first count of Hunter's complaint relies on 11 U.S.C. § 523(a)(8)(B), NJHESAA's cross-motion for summary judgment is granted as to the dismissal of that count.

B. Undue Hardship Is An Issue Of Fact For Trial

Under § 523(a)(8) of the Bankruptcy Code, an educational loan made by a governmental unit is non-dischargeable "unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor's dependents." To determine whether a debtor's student loan debt would impose "undue hardship," the Third Circuit adopted the test used in *Brunner v. N.Y. State Higher Educ. Servs. Corp.*, 831 F.2d 395 (2d Cir. 1987).[32]

Under this test, undue hardship requires each of the following elements: "(1) that the debtor cannot maintain, based on current income and expenses, a minimal standard of living for herself and her dependents if forced to repay the loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period for student loans; and (3) that the debtor has made good faith efforts to repay the loans."[33] The debtor has the burden of establishing each of these elements by a preponderance of the evidence. The Court may not consider any equitable concerns or other extraneous factors not contemplated by the *Brunner* framework. If one of the requirements of the *Brunner* test is not met, the Court's inquiry must end there.[34]

Regarding the ability to maintain a minimal standard of living, Hunter filed a certification in response to NJHESAA's cross-motion which states that it would be extremely difficult to maintain a minimum standard of living for herself and her child if she is forced to repay her student loan debt with only a $50,000 annual salary. She states that the monthly loan payments amount to

[32] *Pa. Higher Educ. Assistance Agency v. Faish (In re Faish)*, 72 F.3d 298 (3d Cir. 1995).
[33] *Faish*, 72 F.3d at 304-305.
[34] *Faish*, 72 F.3d at 306.

nearly as much as she makes each month even after she cut her budget to include only necessities. The remainder leaves very little for housing, transportation to and from her work in New York City, food and childcare for her two-year-old daughter.[35]

As to her prospects, Hunter has a Bachelor's of Science degree in Diplomacy and International Relations and Russian Suburban Studies as well as a Master's in Diplomacy and International Relations, which she applied toward a career in human rights. However, Hunter certifies that there are limited opportunities for other employment or advancement at higher pay rates in her chosen field and she does not expect her financial situation to significantly improve over the course of the thirty years it would take to pay back the student loan debt.[36]

Regarding her good faith attempts at repayment, Hunter certifies that she sought a loan deferment, but even with a deferment, she was still required to make substantial interest payments and to do so she had to borrow money from her parents. She also certifies that she wrote NJHESAA a letter asking for assistance and received a response only advising her to decrease monthly expenses or increase her monthly income.[37] No such correspondence has been provided to the Court.

Pursuant to Federal Rules of Civil Procedure 56(c), a motion for summary judgment will be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and

[35] Certification of Debtor, ECF No. 25.
[36] *Id*.
[37] *Id*.

that the moving party is entitled to a judgment as a matter of law."[38] An issue is "genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.[39] All facts and inferences must be construed in the light most favorable to the non-moving party.[40] Thus, while Hunter must establish each of the *Brunner* elements by a preponderance of the evidence for the Court to find undue hardship, to survive summary judgment she must only raise a genuine issue of material fact as to whether the student loan debt imposes undue hardship.

The Bankruptcy Code does not define the term "undue hardship" so bankruptcy courts must decide undue hardship on a case-by-case basis, considering all of a debtor's circumstances.[41] "Despite the fact-intensive nature of the "undue hardship" inquiry, summary judgment may nonetheless be appropriate where the relevant facts are uncontroverted, and no questions remain on the controlling legal issues."[42]

The Court must consider Hunter's certification in opposition to NJHESAA's cross-motion for summary judgment in the light most favorable to her, the non-moving party. The Court finds that Hunter's certification does raise genuine issues of material fact regarding whether the student loan debt imposes undue hardship under the *Brunner* test. Accordingly, NJHESAA's cross-motion is denied as to the second count of the complaint and the Court will decide the undue hardship issue at trial.

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[38] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986).
[39] *Anderson*, 477 U.S. at 248.
[40] *Peters v. Delaware River Port Auth.*, 16 F.3d 1346, 1349 (3d Cir. 1994).
[41] *Faish*, 72 F.3d at 302 (citing Kurt Wiese, Note, *Discharging Student Loans In Bankruptcy: The Bankruptcy Court Tests of "Undue Hardship*," 26 Ariz. L. Rev. 445, 447 (1984)).
[42] *Armstrong v. Access Grp. (In re Armstrong)*, 394 B.R. 43, 50 (Bankr. M.D. Pa. 2008).

C. The Complaint Does Not Set Forth Viable Claims Of Fraud Or Breach Of Contract

Hunter's third through fifth counts seek judgment against NJHESAA based on various theories of fraud and breach of contract. These counts of the complaint are based on allegations of wrongdoing by NJHESAA that are set forth, for the most part, in the third count of the complaint. It is alleged that according to NJHESAA's policies and regulations, NJCLASS loan amounts should not exceed a student's estimated cost of attendance at college minus all other financial assistance that the student is eligible to receive on a yearly basis. According to Hunter's complaint, NJHESAA had an obligation to analyze each student's eligibility for federal student loan or grant assistance before agreeing to a loan amount for an academic year. The complaint and Hunter's motion for summary judgment analyze with some detail the amounts by which the NJHESAA loans exceeded the estimated cost of attendance at Seton Hall University year by year. The essence of the claim is that NJHESAA was lending Hunter too much money,

The complaint further states that NJHESAA had a duty to advise Hunter to exhaust all forms of federal educational assistance before lending her money for the shortfall. According to Hunter, because federal loans are less expensive, more flexible and otherwise better than NJCLASS loans from the student borrower's perspective, NJHESAA has an obligation to counsel its borrowers to accept as little as possible in NJCLASS loans and thus create the most flexible and cost-efficient student loan package in each case.

In summary, the complaint argues that NJHESAA had both a legal and contractual obligation to (i) lend Hunter no more than necessary to pay her estimated cost of attendance at school after considering all other sources of financial aid, and (ii) provide counselling and advice

concerning her best student loan options. NJHESAA's failure to fulfill these legal and contractual obligations is both fraud and breach of contract according to the complaint.

The trouble is that upon review of the complaint and the several rounds of briefing relating to the summary judgment motions, it is difficult to determine whether these legal and contractual obligations exist. Neither party has produced anything resembling a student loan contract. And, though the complaint refers to "NJHESAA's regulations," none are cited or provided that specifically relate to these obligations. Moreover, there is no direct evidence which supports Hunter's claim that she was defrauded. All that the record does show is that the funds were borrowed, they were not fully repaid and that at the time each loan was made, Hunter represented that the loan proceeds would be used for authorized educational expenses only and that she did not owe a refund on a federal or state assistance grant. The record also reflects that in each academic year, Hunter received refunds directly from Seton Hall University for amounts by which her financial aid package exceeded the cost of attendance. Though this would support Hunter's general theme that NJHESAA was lending her too much, it is difficult to put together a viable fraud or breach of contract claim based on this evidence alone.

1. Fraudulent Inducement And New Jersey Consumer Fraud Act ("NJCFA") Claims

"In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake."[43] Plaintiffs satisfy Rule 9(b) when they "plead with particularity the circumstances of the alleged fraud in order to place the defendants on notice of the precise

[43] Fed. R. Civ. P. 9(b); See also Fed. R. Bankr. P. 7009.

misconduct with which they are charged, and to safeguard defendants against spurious charges of immoral and fraudulent behavior."[44]

Generally, plaintiffs must "support their allegations of . . . fraud with all of the essential factual background that would accompany the first paragraph of any newspaper story . . . the who, what, when, where and how of the events at issue."[45] Here, while the "who" is NJHESAA in a broad sense, Hunter fails to specifically provide the name or position of any person with whom she had a conversation about the student loan agreement, "what" was said, "when" or "where" this conversation took place and "how" Hunter came to rely on any such conversation. Clearly, Hunter has failed to meet the heightened pleading standard under Rule 9(b).

The third count of Hunter's complaint makes a claim of fraudulent inducement. To sustain a claim of fraudulent inducement, Hunter must plead and prove the following elements: "(1) a material representation of a presently existing or past fact, (2) made with knowledge of its falsity and (3) with the intention that the other party rely thereon, (4) resulting in reliance by that party (5) to his detriment."[46] Here, Hunter's complaint does nothing more than set forth a variety of general allegations and conclusions of law. Hunter claims that NJHESAA failed to advise her of more beneficial educational loans, such as unsubsidized federal loans, and offered loans that exceeded the cost of attendance. But even if these omissions and acts did occur, they are not enough to give rise to a viable fraudulent inducement claim because nothing in the record indicates

[44] *Lum v. Bank of America*, 361 F.3d 217, 223-24 (3d. Cir. 2004).
[45] *In re Rockefeller Ctr. Props. Secs. Litig.*, 311 F.3d 198, 217 (3d Cir. 2002).
[46] *Metex Mfg. Corp. v. Manson*, No. 05-2948 (HAA), 2008 U.S. Dist. LEXIS 25107, at *12 (D.N.J. Mar. 28, 2008) (citing *Jewish Ctr. of Sussex Cty. v. Whale*, 86 N.J. 619, 624 (1981)).

that NJHESAA misrepresented any facts, much less with a knowledge of falsity, or that Hunter relied on any such misrepresentations. The Court has also not seen any legal authority that imposes a duty on NJHESAA to inform students of all potential loan options.

The fourth count of Hunter's complaint repeats the same elements of her fraud claim and seeks relief under the NJCFA. As set forth above, Hunter has failed to meet the heightened pleading standard under Rule 9(b), which also applies to NJCFA claims.[47] To sustain an NJCFA claim, Hunter must prove three elements: "(1) unlawful conduct by a defendant; (2) ascertainable loss; and (3) a causal relationship between the unlawful conduct and the ascertainable loss."[48]

Under the NJCFA, an unlawful practice is the "act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice."[49]

"A complaint must contain facially plausible claims, that is, a plaintiff must plead factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[50] Furthermore, to establish a claim of omission under the NJCFA, Hunter

[47] *Smajlaj v. Campbell Soup Co.*, 782 F. Supp. 2d 84, 98 (D.N.J. 2011).
[48] *Ciser v. Nestle Waters N. Am., Inc.*, 596 F. App'x 157, 160 (3d Cir. 2015).
[49] N.J.S.A. 56:8-2.
[50] *Smajlaj,* 782 F. Supp. 2d at 91-92.

must plead that NJHESAA "concealed, suppressed or omitted a material fact, knowingly and with intent that others rely on the omission."[51] Hunter argues in general terms that NJHESAA violated statutory and regulatory obligations which govern NJCLASS loans and that such conduct would qualify as an unconscionable business practice under the NJCFA. But, other than the Court's understanding and acceptance of the fact that the NJCLASS loan program is intended to be a supplement to subsidized federal loans,[52] no specific regulations or statutes are cited. Because Hunter has failed to meet the heightened pleading standard under Rule 9(b) or to provide any specific statute or regulation that NJHESAA violated as part of an unlawful practice, the Court must dismiss all of Hunter's fraud claims.

2. Breach of Express and Implied Contract Claims

The third and fifth counts of Hunter's complaint allege that NJHESAA's conduct and omissions amount to a breach of the express and implied terms of the contract. Unlike an express term, which is explicitly stated in a contract, an implied term is not stated in a contract but created in law or in fact.

A contract term is implied-in-fact when "founded upon a meeting of minds, which although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in light of the surrounding circumstances, their tacit understanding."[53] "The elements required to form an implied-in-fact contract are identical to those required for an express agreement, that is

[51] *Peters v. U.S. Dep't of Hous. & Urban Dev.*, No. 04:06057 (RBK), 2006 WL 278916, at *6 (D.N.J. Feb. 1, 2006) (citing *Varacallo v. Massachusetts Mut. Life Ins.*, 332 N.J. Super. 31, 43 (Super. Ct. App. Div. 2000)).
[52] N.J.A.C. 9A:10-6.1.
[53] *Hercules Inc. v. United States*, 516 U.S. 417, 424 (1996).

offer, acceptance and consideration," and the implied-in-fact contract "is enforceable as if it were an express contract."[54] However, "a party may not simultaneously allege an implied-in-fact and express contract based on the same terms or embracing the same subject matter."[55] In this case, Hunter does not allege any specific contract terms that could have been implied-in-fact.

A contract term is implied-in-law when "a promise is imputed to perform a legal duty."[56] As explained above, though the complaint refers generally to "NJHESAA's regulations," Hunter fails to cite to any specific statutes or regulations that NJHESAA has violated that would result in a breach of a contract term implied-in-law. The Court cannot say that an alleged obligation is implied-in-law unless it is aware of such a law.

The Court recognizes that N.J.A.C. 9A:10-6.1 describes the NJCLASS loan program as:

> "A State student loan program *intended* to supplement the subsidized Federal Direct Stafford Loan Program and make State sponsored student loans available to students who cannot obtain Federally backed student loans, either because those loans are not available, because the student does not meet the program eligibility requirements as defined by the Federal government, because the student has additional financial need unmet by Federally backed student loans, or because the NJCLASS program offers more affordable interest rates and fees." (emphasis added).

This description of the NJCLASS loan program as a supplement to certain federal loans supports Hunter's theory that NJCLASS loans are to be granted only in amounts that are necessary after the applicable federal loan options are exhausted. Though this maybe the intended purpose of the NJCLASS loan program, it does mean it is a legal obligation enforceable by NJCLASS borrowers.

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[54] *In re Penn Cent. Transp. Co.*, 831 F.2d 1221, 1228 (3d Cir. 1987).
[55] *Chase Manhattan Bank v. Iridium Afr. Corp.*, 239 F. Supp. 2d 402, 409 (D. Del. 2002).
[56] *Hercules Inc*, 516 U.S. at 424.

The Court also recognizes that N.J.A.C. 9A:10-6.6 states:

> "The amount borrowed for an NJCLASS Loan Program loan shall not exceed a student's estimated cost of attendance at the eligible institution minus all other financial assistance for which the student is eligible for the academic period for which the loan is intended. This means that an eligible institution shall determine a student borrower's loan amount eligibility for Federal Direct Stafford loans prior to determining a student borrower's loan amount eligibility for an NJCLASS Loan Program loan. This eligibility determination excludes eligibility for Federal Direct PLUS loans."

Hunter contends NJHESAA had a legal obligation to ascertain the exact amount of need that a student has for a given school year after all federal loans are used up and then to lend no more than that amount. However, N.J.A.C. 9A:10-6.6 assigns that obligation not to NJHESAA, but to "an eligible institution."[57] Furthermore, the limited record reflects that efforts were made during the loan application process to verify that Hunter used the subject loans only for authorized educational expenses and that she did not owe a refund on a federal or state assistance grant.[58] These appear to be efforts to fulfill the purpose of the NJCLASS loan program and to ensure that the amount borrowed would not exceed a student's estimated cost of attendance minus all other financial assistance. The record also reflects that, in addition to the NJCLASS loan program, Hunter used subsidized and unsubsidized loans from the Federal Direct Stafford Loan Program to

[57] N.J.A.C. 9A:10-6.2 defines an "eligible institution" as "a public or private nonprofit institution eligible for Title IV, Higher Education Act of 1965 assistance, approved or licensed by the New Jersey Commission on Higher Education or its equivalent in another state or country and accredited by a nationally recognized accrediting association and having an annual cohort default rate of 25 percent or less. Eligible institution shall also include proprietary institutions eligible for Title IV, Higher Education Act of 1965 assistance and having an annual cohort default rate of 25 percent or less. An eligible institution for purposes of the NJCLASS Graduate/Professional Students Program shall have a lower cohort default rate threshold, as set forth in N.J.A.C. 9A:10-6.4(c)(2)."
[58] Certification of Lisa M. McQuade, Esq. Ex. C, at 34-46, ECF No. 22.

pay for a portion of her cost of attendance.[59] Even though it appears that NJHESAA endeavored to fulfill the purpose of the NJCLASS loan program, it did not have a legal duty to do so which is enforceable by Hunter. The evidence and statutory framework show a process where the eligible institution (Seton Hall University), student (Hunter) and NJHESAA all play a role in making sure that the purpose of the NJCLASS loan program is fulfilled. This does not mean that NJHESAA has a legal responsibility to ensure that NJCLASS loans are for the absolute minimum amounts necessary in each case. The Court is not aware that such a legal obligation rests with NJHESAA and is not going to assume that one exists.

Alternatively, Hunter's brief in opposition to NJHESAA's cross-motion states that NJHESAA breached the covenant of good faith and fair dealing that is implied in every contract in New Jersey.[60] "The implied duty of good faith and fair dealing requires that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the full fruits of the contract."[61] To violate this covenant, "bad motive or intention is essential," and "an allegation of bad faith or unfair dealing should not be permitted to be advanced in the abstract and absent improper motive."[62] There is no dispute that NJHESAA delivered the full amount of the student loans, the fruits of the contract. If anything, Hunter alleges that NJHESAA gave her too much fruit. Hunter fails to plead any facts by which the Court could infer

[59] Certification of Lisa M. McQuade, Esq. Ex. C, at 14-17, ECF No. 22.
[60] *Elliott & Frantz, Inc. v. Ingersoll-Rand Co.*, 457 F.3d 312, 328 (3d Cir. 2006).
[61] *Elliott & Frantz, Inc.*, 457 F.3d at 328-29.
[62] *Elliott & Frantz, Inc.*, 457 F.3d at 329.

that NJHESAA acted with any bad motive or intention. Thus, Hunter has not set forth evidence sufficient to support her claim that NJHESAA breached the covenant of good faith and fair dealing.

Finally, there is the breach of an express contract. To sustain a claim for breach of contract, Hunter must demonstrate four elements: (1) a contract between the parties; (2) a breach of that contract; (3) damages flowing therefrom; and (4) that the party stating the claim performed its own contractual obligations.[63] Yet, Hunter has failed to provide the Court with a copy of an express contract and does not refer to a specific provision thereof that was violated by NJHESAA. Therefore, the Court finds there is no evidence in the record supporting Hunter's claim against NJHESAA for breach of an express contract.

CONCLUSION

Hunter's motion for summary judgment asks the Court to declare a portion of her student loan debt dischargeable because certain amounts were not qualified education loans under § 523(a)(8)(B). However, NJHESAA is a governmental unit under § 523(a)(8)(A)(i) which renders § 523(a)(8)(B) irrelevant. Therefore, Hunter's motion for summary judgment is denied.

NJHESAA's cross-motion for summary judgment seeks to dismiss each of the five counts in Hunter's complaint. The cross-motion is granted as to the first count and counts three, four and five. However, since it is the policy in this district to give a plaintiff the opportunity to amend a defective complaint rather than dismiss it where justice requires,[64] the Court will consider a motion seeking leave to file a second amended complaint to meet the deficiencies raised herein. Hunter

[63] *Frederico v. Home Depot*, 507 F.3d 188, 203 (3d Cir. 2007).
[64] *Morgan v. Markerdowne Corp.*, 976 F. Supp. 301, 308 (D.N.J. 1997).

should file such a motion only if she and her attorney believe that there is a good faith basis to do so. The motion must be filed by January 31, 2018.

The Court finds a genuine issue of material fact regarding undue hardship. Therefore, the Court denies NJHESAA's cross-motion as to the second count of the complaint. A trial to determine undue hardship will take place on February 28, 2018 or as otherwise scheduled by the Court.[65]

[65] Joint Scheduling Order, ECF No. 19.