NOTIFY

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT.
1784CV02682-BLS2

COMMONWEALTH OF MASSACHUSETTS

v.

PENNSYLVANIA HIGHER EDUCATION ASSISTANCE AGENCY
d/b/a FedLoan Servicing

NOTICE SENT
02.28.18
T.F.B.
J.C.G.
E.B.H.
C.+E.
C.F.F. III
E.V.C. III
L.S.H.
MASS. A.G.
Y.S.
J.R.
S.A.K.

(LAT)

MEMORANDUM AND ORDER DENYING DEFENDANT'S MOTION TO DISMISS

The Commonwealth of Massachusetts has sued the Pennsylvania Higher Education Assistance Agency (PHEAA) for engaging in allegedly unfair and deceptive acts and practices against Massachusetts student loan borrowers. It appears to be undisputed that PHEAA, although originally established to help provide student loans and grants for Pennsylvania residents, has become one of the largest student loan servicers in the country and now manages the federal student loan accounts of hundreds of thousands of Massachusetts residents under a contract with the United States Department of Education. The Commonwealth claims that PHEAA violated the federal Consumer Financial Protection Act and G.L. c. 93A by charging and collecting amounts not owed by borrowers, failing to process borrowers' applications for income driven repayment plans in a timely and accurate manner, and failing to properly count borrowers' qualifying payments under the Public Service Loan Forgiveness program.

PHEAA has moved to dismiss this action on several grounds. The Court will DENY this motion because it is not convinced that PHEAA is an arm of the Commonwealth of Pennsylvania and shares in its sovereign immunity, that PHEAA cannot be sued under G.L. c. 93A or that its alleged misconduct is exempt from c. 93A because it is affirmatively permitted by federal law, or that the United States Department of Education is an indispensable party.

1. Background—PHEAA's Enabling Act. Certain aspects of the enabling act that created PHEAA provide background relevant to PHEAA's claims that it is entitled to invoke the Commonwealth of Pennsylvania's sovereign immunity and that it cannot be sued under G.L. c. 93A because it is a public entity.

PHEAA was established by the Pennsylvania Legislature as "a public corporation and government instrumentality." 24 Pa. Stat. § 5101. It is authorized to make, guarantee, and service student loans. *Id.* § 5104(3).

By statute, PHEAA has substantial financial and operational independence from the Commonwealth of Pennsylvania. PHEAA can spend money "for any of its purposes" without needing any legislative appropriation. *Id.* § 5104(3). Although PHEAA must deposit its revenues "in the State Treasury," it may use its funds whenever it wants "at the discretion of the board of directors for carrying out any of the corporate purposes of the agency." *Id.*; see also *id.* § 5105.10 (PHEAA's loan servicing, loan repayment, and other revenues are held within State Treasury in a segregated "Educational Loan Assistance Fund," are all "appropriated to [PHEAA's] board," and "may be applied and reapplied as the board shall direct and shall not be subject to lapsing"). And PHEAA may borrow money, enter into contracts, and exercise most other powers of an independent corporate entity without needing approval from the Commonwealth of Pennsylvania. *Id.* § 5104.

Furthermore, by law Pennsylvania cannot be held liable for any of PHEAA's debts or other obligations. *Id.* § 5014(3) ("no obligation of the agency shall be a debt of the State and it shall have no power to pledge the credit or taxing power of the State nor to make its debts payable out of any moneys except those of the corporation").

2. <u>PHEAA Does Not Share Pennsylvania's Sovereign Immunity</u>. PHEAA urges the Court to dismiss this action as a matter of comity, out of respect for the sovereign immunity of the Commonwealth of Pennsylvania.

Federal courts have repeatedly rejected PHEAA's assertion that it shares Pennsylvania's sovereign immunity from suit. See *United States ex rel. Oberg* v. *Pennsylvania Higher Educ. Asst. Agency*, 804 F.3d 646, 676-677 (4th Cir. 2015) (PHEAA not immune from suit under federal False Claims Act), cert. denied, 137 S.Ct. 617 (2017); *Pele* v. *Pennsylvania Higher Educ. Asst. Agency*, 13 F.Supp.3d 518 (E.D. Va. 2014), aff'd, 628 F.Appx. 870 (4th Cir. 2015) (PHEAA not immune from suit under federal Fair Credit Act), cert. denied, 137 S.Ct. 617 (2017); *Lang* v.

Pennsylvania Higher Educ. Asst. Agency, 201 F.Supp.3d 613 (M.D. Pa. 2016) (PHEAA not immune from suit under federal Fair Labor Standards Act).

The doctrine of issue preclusion bars PHEAA from relitigating this issue yet again. See *Lang*, *supra*, at 621-628 (issue preclusion barred PHEAA from relitigating whether it was arm of state for Eleventh Amendment immunity purposes, even though Third Circuit's arm-of-the-state test differs somewhat from test applied by Fourth Circuit in *Oberg*); *Pennsylvania Higher Educ. Asst. Agency* v. *NC Owners, LLC*, No. 1:16-CV-1826, 2017 WL 2506397 (M.D. Pa. 2017) (issue preclusion barred PHEAA from relitigating whether it was arm of state for purposes of diversity jurisdiction, even though issue was litigated in *Oberg* in context of Eleventh Amendment assertion of sovereign immunity).

"Ultimately, '[f]airness is the "decisive consideration" in determining whether to apply offensive issue preclusion' " against a defendant in a civil action, based on a decision in a prior lawsuit that did not involve the current plaintiff. *Pierce* v. *Morrison Mahoney LLP*, 452 Mass. 718, 730 (2008), quoting *Matter of Goldstone*, 445 Mass. 551, 559 (2005), quoting in turn *Matter of Cohen*, 435 Mass. 7, 16 (2001). A trial court judge has " 'wide discretion in determining whether' applying offensive collateral estoppel 'would be fair to the defendant.' " *Pierce*, *supra*, at 731, quoting *Bar Counsel* v. *Board of Bar Overseers*, 420 Mass. 6, 11 (1995). For the reasons discussed below, the Court concludes in the exercise of its discretion that PHEAA should be bound by the Fourth Circuit's resolution of essentially identical sovereign immunity issues in *Oberg* and that applying offensive issue preclusion against PHEAA is completely fair and appropriate in these circumstances.

2.1. Question of Comity. When one State is sued in the courts of another State, any application of the defendant's sovereign immunity is a discretionary matter of comity, not something mandated by law.

Nothing in the United States Constitution requires the courts of one State to recognize the sovereign immunity of another State. Neither the Eleventh Amendment (which restricts the power of federal courts to entertain suits against a State), nor the Full Faith and Credit Clause, nor the federal structure of the Constitution requires one state to treat others as immune from suit. *Nevada* v. *Hall*,

440 U.S. 410, 418-427 (1979); see also *Franchise Tax Bd. of Calif.* v. *Hyatt*, 136 S.Ct. 1277, 1279 (2016) (*Franchise Tax Bd. II*) (equally divided Supreme Court declined to overrule *Hall*). All that the Full Faith and Credit Clause requires in this context is that, if the courts of one State entertain a suit against a second State, then the forum State is bound to provide at least the same extent of immunity that it would afford its own government. *Franchise Tax Bd. II*, 136 S.Ct. at 1281. In other words, the forum State may not, acting under its own law, award damages against agencies of the second State "that are greater than it could award against [its own] agencies in similar circumstances." *Id.*

"It may be wise policy, as a matter of harmonious interstate relations, for States to accord each other immunity or to respect any established limits on liability." *Hall*, 440 U.S. at 426. But it is up to each State to decide whether and to what extent to recognize and apply such a voluntary principle of interstate comity. *Id.*

The Supreme Judicial Court has not decided whether it "should create an exception to our rule of asserting jurisdiction to the fullest possible extent where the nonresident defendant is another State," or is some other entity that "could properly be considered part of the State government." *Carlson Corp.* v. *University of Vermont*, 380 Mass. 102, 103 n.3 (1980).

But even though it is not "constitutionally mandated ..., this court retains the discretion to decline the exercise of jurisdiction as a matter of comity" out of respect for the sovereign immunity of other States. *Mejia-Cabral* v. *Eagleton School, Inc.*, 10 Mass. L. Rptr. 1999 WL 791957, *3 (Mass. Sup. Ct. 1999) (Sosman, J.).

2.2. Rules that Apply as a matter of Comity. The principle of comity will be satisfied here if the Court applies to PHEAA the same sovereign immunity rules that would apply to an otherwise identical authority created under Massachusetts law. See *Franchise Tax Bd. II*, 136 S.Ct. at 1281-1282; *Franchise Tax Bd. of Calif.* v. *Hyatt*, 538 U.S. 488, 499 (2003) ("*Franchise Tax Bd. I*"); see also *Mejia-Cabral*, *supra*, (comity required Massachusetts court to respect sovereign immunity of State of Connecticut, where Commonwealth would be immune from similar claim under Massachusetts law). This approach, of "relying on the contours of [the forum State's] own sovereign immunity from suit as a benchmark for [the] analysis," allows the

forum State court to "sensitively appl[y] principles of comity with a healthy regard for [the other State's] sovereign status." *Franchise Tax Bd. I.*, 538 U.S. at 499.

Pennsylvania courts apply this principle. They will not recognize the sovereign immunity of agencies created by other States if similarly situated Pennsylvania agencies would not be immune from suit under Pennsylvania law. See *Laconis* v. *Burlington County Bridge Comm'n*, 583 A.2d 1218, 1221-1222 (Pa. Supr. Ct. 1990) (declining to recognize immunity of New Jersey public commission that was "not funded by tax money" with respect to injuries sustained by Pennsylvania resident at Pennsylvania end of bridge, because similarly situated Pennsylvania commission would have no sovereign immunity under Pennsylvania law); see also *Flamer* v. *New Jersey Transit Bus Operations, Inc.*, 607 A.2d 260 (Pa. Sup. Ct. 1992) (applying limited waiver of sovereign immunity under New Jersey Tort Claims Act, including as to venue, because similarly situated Pennsylvania entity would be protected by similarly limited waiver of immunity under analogous Pennsylvania statute).

So, to apply principles of comity to PHEAA's sovereign immunity claim, we must be clear as to what rules Massachusetts courts apply to determine whether similarly situated public authorities established under Massachusetts law may be sued for compensatory damages.

If a Massachusetts public entity is sued under Massachusetts law, whether the entity shares the Commonwealth's sovereign immunity in Massachusetts courts will turn on whether the entity is financially independent. A public authority that is "supported by its own nontax revenue sources and without the Commonwealth's credit pledged on its behalf" does not share the Commonwealth's sovereign immunity. *Karlin* v. *Massachusetts Tpk. Auth.*, 399 Mass. 765, 765–767 (1987). Such an entity is not considered an arm of the state for purposes of applying "governmental or sovereign immunity" under Massachusetts law because a suit against it does "not present the need for the protection of public funds" that underlies the Massachusetts doctrine of sovereign immunity. *Id.* at 767. In contrast, a public authority that is "funded in part from the Commonwealth's treasury" and in part from the budgets of cities and towns that share in the Commonwealth's sovereign immunity is itself protected by sovereign immunity and thus "is not amenable to suit without the

Commonwealth's express consent." *Smith* v. *Massachusetts Bay Transp. Auth.*, 462 Mass. 370, 373 (2012).

Different rules apply when a public entity is sued in Massachusetts courts under federal law. As explained below, whether such a suit may be brought without violating the Commonwealth's sovereign immunity turns on whether the defendant entity is an "arm of the state" for purpose of applying a State's sovereign immunity under the United States Constitution.

The States themselves are immune from suit under federal law in their own courts, and Congress has no power under Article I of the United States Constitution to abrogate that sovereign immunity. See *Alden* v. *Maine*, 527 U.S. 706, 754 (1999). Thus, "[e]xcept where Congress exercises its enforcement power under § 5 of the Fourteenth Amendment to the United States Constitution, a State retains sovereign immunity from private suit [under federal law] in its own courts unless it consents to suit." *Boston Medical Ctr. Corp.* v. *Secretary of the Exec. Off. of Health and Human Svcs.*, 463 Mass. 447, 462-463 (2012) (applying *Alden*).

This immunity "bars suits against States but not lesser entities," and thus "does not extend to suits prosecuted against a municipal corporation or other governmental entity which is not an arm of the state." *Alden*, *supra* at 756.

The same rules that determine whether an entity is an "arm of the state" for purposes of enforcing State's immunity from suit in federal courts under the Eleventh Amendment apply for purpose of applying whether the entity is entitled to sovereign immunity under *Alden* against federal claims asserted in state court. See, e.g., *Goldman* v. *Southeastern Pennsylvania Transp. Auth.*, 57 A.3d 1154, 1172-1179 (Pa. 2012); *Norgaard* v. *Port of Portland*, 196 P.3d 67, 69-70 (Or. Ct. App. 2008); *Hines* v. *Georgia Ports Auth.*, 604 S.E.2d 189, 192-193 (Ga. 2004). This case law is consistent with a ruling by the Supreme Judicial Court, in a case decided before *Alden*, that Massachusetts state entities are immune from claims brought under federal law in Massachusetts courts to the same extent that the Eleventh Amendment would bar such claims against them in Federal court. See *Morris* v. *Massachusetts Maritime Academy*, 409 Mass. 179, 184 (1991).

Although the Supreme Court has not addressed this issue directly, it has made clear that the meaning and scope of States' sovereign immunity in State courts under *Alden* is no different than the meaning and scope of their sovereign immunity in Federal courts under the Eleventh Amendment. It explained that "the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment. Rather, as the Constitution's structure, its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today (either literally or by virtue of their admission into the Union upon an equal footing with the other States) except as altered by the plan of the Convention or certain constitutional Amendments." *Alden*, 527 U.S. at 713; accord *Northern Ins. Co. of New York* v. *Chatham County, Ga.*, 547 U.S. 189, 193 (2006).

2.3. Issue Preclusion Bars PHEAA's Sovereign Immunity Defense. In *Oberg*, the United States Court of Appeals for the Fourth Circuit held (among other things) that PHEAA is supported by its own substantial non-tax revenues, that Pennsylvania is neither legally nor functionally liable for any of PHEAA's debts or other liabilities, and "that PHEAA operates autonomously, largely free from state interference in its substantive decisions." *Oberg*, 804 F.3d at 657-668 & 669. On the other hand, it recognized that Pennsylvania treats PHEAA as a state agency for many purposes, and that many of PHEAA's activities address in-state rather than out-of-state operations. *Id.* at 674-676. Since these factors pointed in different directions, the court focused its analysis on "the Eleventh Amendment's twin reasons" for protecting States against being sued in federal court. *Id.* at 676, quoting *Hess* v. *Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 47 (1994). The Fourth Circuit held that PHEAA is not an arm of the state, and thus is not protected by Pennsylvania's sovereign immunity, because allowing claims for damages "to proceed against PHEAA" would "not place the Pennsylvania treasury at risk" and would "not offend the sovereign dignity of Pennsylvania." *Id.* at 677.

The Court concludes that the doctrine of issue preclusion bars PHEAA from relitigating any of these rulings or holdings in *Oberg*.

The doctrine of issue preclusion "bars 'successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment,' even if the issue recurs in the context of a different claim." *Alicea* v. *Commonwealth*, 466 Mass. 228, 235 (2013), quoting *Taylor* v. *Sturgell*, 553 U.S. 880, 892 (2008), quoting in turn *New Hampshire* v. *Maine*, 532 U.S. 742, 748-749 (2001). "A party is precluded from relitigating an issue where '(1) there was a final judgment on the merits in the prior adjudication; (2) the party against whom preclusion is asserted was a party (or in privity with a party) to the prior adjudication; and (3) the issue in the prior adjudication was identical to the issue in the current adjudication,' was essential to the earlier judgment, and was actually litigated in the prior action." *Degiacomo* v. *City of Quincy*, 476 Mass. 38, 42 (2016), quoting *Tuper* v. *North Adams Ambulance Serv., Inc.*, 428 Mass. 132, 134 (1998).

PHEAA implicitly concedes that most of the elements of issue preclusion are satisfied here. There was a final judgment on the merits in the prior case, PHEAA was a party, the Fourth Circuit's rulings were essential to the prior judgment, and these issues were actually litigated first on PHEAA's motion for summary judgment and then on appeal. The fact that the Commonwealth was not a party to the *Oberg* litigation is of no moment. It is entitled to the benefits of issue preclusion because PHEAA was a party to the prior litigation, PHEAA had a "full and fair opportunity to litigate the issue in the first action," and there is nothing unfair about treating *Oberg* as binding in these circumstances. See *Pierce*, 452 Mass. at 731 (allowing offensive collateral estoppel to benefit non-party to prior proceeding), quoting *Matter of Goldstone*, 445 Mass. at 559.

The Court concludes that, in addition, the issues decided in *Oberg* are either identical to the sovereign immunity issues raised in this case, or at least overlap to an extent "so substantial that preclusion is plainly appropriate." *Commissioner of the Department of Employment and Training* v. *Dugan*, 428 Mass. 138, 143 (1998).

Oberg established that PHEAA is supported by its own non-tax revenues and that Pennsylvania has no liability, legally or functionally, for any award of damages against or other debt of PHEAA. This is identical to the issue that determines whether a similarly-situated Massachusetts entity would be immune from suit under

Massachusetts law. See *Karlin*, 399 Mass. at 765–767 (Massachusetts Turnpike Authority does not share Commonwealth's sovereign immunity). PHEAA may not relitigate the issue in defending against the claims brought under G.L. c. 93A.

In addition, *Oberg* established that PHEAA is not an arm of the state for purpose of applying the Eleventh Amendment's ban on suits against the States in federal court. As explained above, this is identical to the issue that determines whether a similarly-situated Massachusetts entity would be immune from suit in Massachusetts courts under federal law. PHEAA may not relitigated the issue in defending against the claims brought under the federal Consumer Financial Protection Act.

PHEAA argues that it should not be bound in this case by *Oberg* because the Fourth Circuit's test for determining whether PHEAA is an arm of the state differs from the test that the First Circuit would have applied. The arm-of-the-state tests applied by the Fourth Circuit and First Circuit differ as follows.

The Fourth Circuit considers "four non-exclusive factors when considering whether a state-created entity functions as an arm of its creating state:" (1) whether any judgment ... will be paid by the State; (2) the degree of autonomy exercised by the entity ...; (3) whether the entity is involved with state concerns as distinct from non-state concerns...; and (4) how the entity is treated under state law...." *Oberg*, 804 F.3d at 650-651. If the State will end up paying any judgment against the entity, then the entity is an arm of the State and the other factors are irrelevant. *Id.* at 651. Otherwise all four factors must be considered. Where the factors point in different directions, the Fourth Circuit will balance them and treat the entity as an arm of the State if and only if allowing the lawsuit to proceed against the entity would place the State treasury at risk or offend the State's sovereign dignity. *Id.* at 677-678.

The First Circuit applies a two-part test to evaluate the same concerns. The first step is to determine whether "whether the state has indicated an intention — either explicitly by statute or implicitly through the structure of the entity — that the entity share the state's sovereign immunity. If no explicit indication exists, the court must consider the structural indicators of the state's intention. If these point in different directions, the court must proceed to the second stage and consider whether

the state's treasury would be at risk in the event of an adverse judgment." *Irizarry-Mora* v. *University of Puerto Rico*, 647 F.3d 9, 12 (1st Cir. 2011), quoting *Redondo Constr. Corp.* v. *Puerto Rico Highway & Transp. Auth.*, 357 F.3d 124, 126 (1st Cir. 2004).

PHEAA's arguments that the Court should apply the First Circuit's test, and that under this test PHEAA is an arm of the State because the Pennsylvania legislature has made clear that PHEAA is entitled to share in Pennsylvania's sovereign immunity, are both unavailing.

To the extent it makes any difference, it would not be appropriate to apply the First Circuit's arm-of-the-state test in this case.

The Court is not obligated to use the First Circuit's test. Although Massachusetts courts " 'give respectful consideration to such lower Federal court decisions as seem persuasive,' ... [they] 'are not bound by decisions of Federal courts except the decisions of the United States Supreme Court on questions of Federal law.' " *Commonwealth* v. *Pon*, 469 Mass. 296, 308 (2014), quoting first *Commonwealth* v. *Hill*, 377 Mass. 59, 61 (1979), and then *Commonwealth* v. *Montanez*, 388 Mass. 603, 604 (1983).

The First Circuit's test has no possible relevance to the claims asserted against PHEAA under G.L. c. 93A. A determination under federal law as to whether an entity is "an arm of the state for purposes of sovereign immunity under the Eleventh Amendment" does not resolve whether the entity is entitled to sovereign immunity against a state law claim brought in state court, because "Eleventh Amendment immunity" and immunity under state law "are distinct concepts" often governed by different principles and rules. *Ioven* v. *Nestel*, 150 A.3d 571, 574 (Pa. Comm. Ct. 2016), app. denied, 169 A.3d 569 (Pa. 2017). As explained above, under Massachusetts law the question of whether PHEAA is immune from suit under c. 93A turns solely on whether PHEAA is "supported by its own nontax revenue sources and without the Commonwealth's credit pledged on its behalf," not on whether PHEAA is an arm of the state for the purposes of applying the Eleventh Amendment or *Alden* immunity against federal claims in state court. *Karlin* v. *Massachusetts Tpk. Auth.*, 399 Mass. at 765–767.

With respect to the claims asserted under federal law, since PHEAA's assertion of sovereign immunity must be evaluated as a matter of comity, it makes sense to apply the same test that Pennsylvania courts use when they conduct an Eleventh Amendment arm-of-the-state analysis. The Supreme Court of Pennsylvania has adopted a test that is essentially identical to the Fourth Circuit's test, except that it has broken out the same considerations into six factors rather than four. Compare *Goldman* v. *Southeastern Pennsylvania Transp. Auth.*, 57 A.3d 1154, 1172-1179 (Pa. 2012), with *Oberg*, 804 F.3d at 650-651 & 677-678.[1] Where the factors point in different directions, Pennsylvania courts will resolve the issue by addressing, "primarily," whether a suit against the entity "would offend the dignity of the Commonwealth of Pennsylvania, and secondarily, whether the Commonwealth has any actual legal liability" for any judgment against the entity. *Goldman*, *supra.* This also exactly matches the Fourth Circuit's arm-of-the-state test. See *Oberg*, *supra*, at 677-678.

Since the arm-of-the-state test used by Pennsylvania courts is almost identical to and essentially indistinguishable from the Fourth Circuit's test, it is appropriate as a matter of comity to treat the determination in *Oberg* that PHEAA is not an arm

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[1] In *Goldman*, the Pennsylvania Supreme Court said that the relevant factors, as applied to that case, included: (1) SEPTA's legal status "within the governmental structure of Pennsylvania both statutorily and under our case law; (2) the degree of control the Commonwealth exercises over the SEPTA Board...; (3) the power of the SEPTA Board to independently raise revenue on its own; (4) the degree of funding provided by the five counties SEPTA serves relative to that provided by the Commonwealth; (5) whether any monetary obligation incurred by SEPTA is binding on the Commonwealth; and (6) whether the core function of SEPTA—providing public transportation services—can be categorized as a function which is normally performed by local government or state government." 57 A.3d at 1179.

These six factors map directly onto the four factors articulated by the Fourth Circuit. *Goldman* factor (1) is essentially the same as *Oberg* factor (4), which asks "how the entity is treated under state law." *Goldman* factors (2), (3), and (4) are all aspects of *Oberg* factor (2), which concerns "the degree of autonomy exercised by the entity." *Goldman* factor (5) is the same as *Oberg* factor (1), which asks "whether any judgment ... will be paid by the State." And *Goldman* factor (6) is a case-specific application of *Oberg* factor (3), which asks "whether the entity is involved with state concerns as distinct from non-state concerns." See *Oberg*, 804 F.3d at 650-651.

of the State for Eleventh Amendment purposes as having preclusive effect in this case. See *Degiacomo*, 476 Mass. at 42; *Lang* 201 F.Supp.3d at 621-628.[2]

Even if the First Circuit's test controlled here, which it does not, PHEAA's assertion that Pennsylvania law clearly indicates that PHEAA is entitled to share in the State's sovereign immunity is without merit. The Commonwealth Attorneys Act, which treats PHEAA as an "independent agency" that may be represented by the State's Attorney General, says nothing about sovereign immunity. See 71 Pa. Stat. § 732-102.[3] The Sovereign Immunity Act, which contains a limited waiver of Pennsylvania's sovereign immunity for suits against "Commonwealth parties," see 42 Pa. Stat. § 8522, says nothing to suggest any legislative intent that PHEAA is entitled to share in Pennsylvania's sovereign immunity. PHEAA argues, in substance, that one can reasonably infer such intent because: (i) the Legislature partially waived the sovereign immunity of "Commonwealth parties," *id.*; (ii) for purposes of the Sovereign Immunity Act the Legislature defined "Commonwealth parties" to include any "Commonwealth agency," *id.* § 8501; (iii) for purposes of the Commonwealth Attorneys Act it defined "Commonwealth agency" to include any "independent agency," 71 Pa. Stat. § 732-102; and (iv) the Legislature then defined that term to include PHEAA, once again for the purposes of the Commonwealth Attorneys Act, *id.* Under First Circuit precedent, such a string of definitions adopted in unrelated statutes for entirely different purposes does not constitute evidence that the State legislature intended that an entity be treated as an arm of the state. See

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[2] It is worth noting that the conclusions by the Supreme Court of Pennsylvania in *Gorman* closely parallel the Fourth Circuit's holdings in *Oberg*. The Pennsylvania court held that the Southeastern Pennsylvania Transportation Authority ("SEPTA") may be sued in state court under the Federal Employers' Liability Act after concluding that the relevant factors pointed in different directions, that a suit against an independent entity like SEPTA would not threaten the sovereign dignity of Pennsylvania, and that a judgment against SEPTA would have no impact on Pennsylvania's treasury. See *Gorman*, 57 A.3d at 1181-1185.

[3] As the Fourth Circuit explained, "PHEAA is authorized to pursue student-loan collection actions independently, see 24 Pa. Stat. § 5104.3, but the Commonwealth Attorneys Act otherwise requires the Attorney General to represent PHEAA in civil litigation absent a delegation of authority, see 71 Pa. Stat. § 732-204(c). PHEAA's standard practice is to seek such delegations in all non-collection actions; PHEAA's general counsel could not recall a request ever being denied." *Oberg*, 804 F.3d at 656.

Fresenius Med. Car Cardiovascular Resources, Inc. v. *Puerto Rico and Carribbean Cardiovascular Ctr. Corp.*, 322 F.3d 56, 69-70 (1st Cir. 2003).

In the absence of any clear statutory indication that the Legislature intended for PHEAA to share in Pennsylvania's sovereign immunity, the First Circuit's test becomes indistinguishable from the Fourth Circuit's test. Thus, even one the First Circuit's test provided the applicable rules of decision, it would still be appropriate to treat the Fourth Circuit's rulings in *Oberg* has having preclusive effect in this case.

In sum, under the doctrine of issue preclusion, the Fourth Circuit's rulings establish that PHEAA is not an arm of the state, either under Massachusetts law or under federal constitutional principles, and bar PHEAA from relitigating the issue.

3. Chapter 93A Claim.

3.1. PHEAA Is a "Person" Subject to Suit under G.L. c. 93A. PHEAA's assertion that it cannot be sued under G.L. c. 93A because it is not a "person" within the meaning of that statute is also without merit.

The Attorney General may bring an action in the name of the Commonwealth against any "person" who is using "unfair or deceptive acts or practices in the conduct of any trade or commerce." G.L. c. 93A, §§ 2 & 4. For purposes of this statute, the Legislature has defined the term "person" to "include, where applicable, natural persons, corporations, trusts, partnerships, incorporated or unincorporated associations, and any other legal entity." *Id.* § 1. On its face this statutory definition of "person" would seem to encompass PHEAA, which is a legal entity.

PHEAA argues that it nonetheless cannot be sued under c. 93A because it is public instrumentality rather than a private corporation. It invokes "the widely accepted rule of statutory construction that general words in a statute such as 'persons' will not ordinarily be construed to include the State or political subdivisions thereof." *Perez* v. *Boston Hous. Auth.*, 368 Mass. 333, 339 (1975), quoting *Hansen* v. *Commonwealth*, 344 Mass. 214, 219 (1962).

This argument is unavailing because PHEAA is not a State, an arm of state, or a political subdivision of a State. As explained above, the Fourth Circuit's decision in *Oberg* conclusively establishes that PHEAA is not an arm of the state. PHEAA is

therefore barred from claiming that it is the equivalent of the Commonwealth of Pennsylvania for the purpose of applying c. 93A.

PHEAA makes no claim that it is exempt from c. 93A liability because it was not engaged in trade or commerce when it serviced student loans in Massachusetts. As a result, the appellate case law holding that public entities may not be sued under c. 93A when they engage in governmental activity that does not constitute "trade or commerce" within the meaning of the statute are not relevant here. Cf. *Park Drive Towing, Inc.* v. *City of Revere*, 442 Mass. 80, 86 (2004); *Boston Housing Auth.* v. *Howard*, 427 Mass. 537, 539-540 (1998); *All Seasons Servs., Inc.* v. *Commissioner of Health & Hosps. of Boston*, 416 Mass. 269, 271-272 (1993); *Morton* v. *Town of Hanover*, 43 Mass. App. Ct. 197, 205-206 (1997); *Bretton* v. *State Lottery Comm'n*, 41 Mass. App. Ct. 736, 738-740 (1996).[4]

3.2. The "Permitted Practices" Exemption. PHEAA's further argument that its alleged misconduct cannot be challenged under c. 93A because it is "otherwise permitted" by federal law, see G.L. c. 93A, § 3, is also without merit. The Commonwealth alleges that PHEAA committed unfair trade practices by charging and collecting amounts not owed by borrowers, not processing certain kinds of applications in a timely and accurate manner, and improperly accounting for borrowers' payments under the Public Service Loan Forgiveness program. PHEAA

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[4] The Court recognizes that *Bretton* contains dictum suggesting that the State Lottery Commission is not a "person" within the meaning of c. 93A because it is a public entity specially created by statute. 41 Mass. App. at 738. But the *Bretton* court expressly stated that it "need not rely on that ground" because it concluded that the Commission was not engaged in trade or commerce within the meaning of c. 93A. *Id.* at 738-739. Since the discussion of whether the Commission was a "person" was "unnecessary to the holding of the case," it is "merely dicta" and not binding. *Town of Dartmouth* v. *Greater New Bedford Regional Vocational Technical High School Dist.*, 461 Mass. 366, 381 (2012).

Similarly, PHEAA's assertion that Judge Saris held that the University of Massachusetts is not a "person" within the meaning of G.L. c. 93A is incorrect. What she actually held is that c. 93A did not waive the Commonwealth's sovereign immunity either explicitly or by necessary implication. See *Max-Planck-Gesellschaft Zur Foerderung der Wissenschaften E.V.* v. *Whitehead Institute for Biomedical Research*, 850 F.Supp.2d 317, 327-331 (D.Mass. 2011) (Saris, J.).

has not identified any federal law that authorizes a student loan servicer to do such things.

"A defendant's burden in claiming the exemption [under § 3] is 'a difficult one to meet. To sustain it, a defendant must show more than the mere existence of a related or even overlapping regulatory scheme that covers the transaction. Rather, a defendant must show that such scheme affirmatively permits the practice which is alleged to be unfair or deceptive.' " *Commonwealth* v. *Fremont Inv. & Loan*, 452 Mass. 733, 750 (2008), quoting *Fleming* v. *National Union Fire Ins. Co.*, 445 Mass. 381, 390 (2005); accord, e.g., *Aspinall* v. *Phillip Morris, Inc.*, 453 Mass. 431, 434-435 (2009) (describing this burden as a "heavy one").

PHEAA has not met its difficult and heavy burden of proving that its alleged misconduct is affirmatively authorized by federal law.

4. The U.S. Department of Education Is Not an Indispensable Party. Finally, PHEAA's assertion that this action may not proceed because the United States Department of Education is an indispensable party, but may not be joined without its consent, is also unavailing. Cf. Mass. R. Civ. P. 19(b). The Department retained PHEAA to service federal student loans. PHEAA does not assert that this action is preempted by federal law. But it does insist that the Department is an indispensable party because the Department filed a "Statement of Interest" asserting that the Commonwealth's claims are preempted "to the extent" that they "conflict with the requirements of federal law."

The Department's statement of interest in this proceeding is much narrower than it may appear at first blush. The Department does not actually argue that any of the Commonwealth's claims is preempted by federal law, or that any of the alleged misconduct by PHEAA at issue here is affirmatively allowed by federal law. Instead, the Department cautions that some of the injunctive relief that the Commonwealth asks for in its complaint may conflict with the requirements of regulations promulgated by the Department or the requirements of PHEAA's loan servicing contract with the Department. But the Department does not suggest that, if the Commonwealth can prove that PHEAA has violated the federal Consumer Financial

Protection Act and G.L. c. 93A, federal law would bar the assessment of civil penalties or the award of money damages or restitution against PHEAA.

The mere fact that some but not all of the relief sought by the Commonwealth in this case is allegedly inconsistent with the Department's rights under its contract with PHEAA does not make PHEAA an indispensable party.

Where the United States or one of its agencies has some legal interest in the subject matter of a state civil action, but relief could be granted against the current defendant without infringing upon any legal rights of the federal agency, that agency is not an indispensable party and the case may proceed in state court. *Kitras* v. *Town of Aquinnah*, 64 Mass. App. Ct. 285, 291-296, rev. denied, 445 Mass. 1109 (2005).

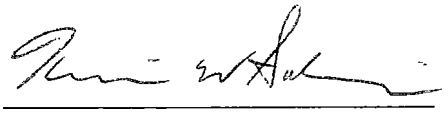
This follows from the more general principle that where "[a] decree may be framed" to grant relief against the defendants "who are before the court," without "affect[ing] the rights of those who are not," any missing parties "are not indispensable parties." *Franks* v. *Markson*, 337 Mass. 278, 284 (1958). This general principle has now been codified in the rules of civil procedure. See Mass. R. Civ. P. 19(b) (factors to consider in determining whether missing party is indispensable include "the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures," any prejudice to the missing party "can be lessened or avoided").

In *Kitras*, the plaintiffs claimed easements by necessity crossing their neighbors' lots. Many of those lots were held by the United States in trust for the Wampanoag Tribal Council of Gay Head, Inc. *Id.* at 286. However, it appeared that any easements awarded in the case could be located so that they would not affect any of the land held in trust by the United States. *Id.* at 294-295. Since there was no showing "that the United States inevitably has an interest in whatever judgment may be entered," the United States was not an indispensable party. *Id.* at 296.

This case is indistinguishable from *Kitras*. Since any relief against PHEAA could be structured to as not to interfere or otherwise conflict with the Department's legal rights, and it is therefore not inevitable that the Department will have an interest in whatever judgment may be entered, the Department is not an indispensable party.

ORDER

Defendant's motion to dismiss is DENIED. The Court will hold a Rule 16 scheduling conference with the parties on April 17, 2018, at 2:00 p.m.



February 28, 2018

Kenneth W. Salinger
Justice of the Superior Court