

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

JOHN T. MACDONALD JR., CHELSEA	:	Case No. 11-cv-00831
A. PEJIC, SHAWN HAFF,	:	Hon. Gordon J. Quist
STEVEN BARON, DIMPLE KUMAR,	:	
CARRIE KALBFLEISCH,	:	
ANDERS CHRISTENSEN,	:	
DANNY WAKEFIELD, DAN GUINN,	:	
BENJAMIN FORSGREN,	:	
SHANE HOBBS, and KEVIN PRINCE,	:	
on behalf of themselves and all	:	
others similarly situated,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
THOMAS M. COOLEY LAW SCHOOL,	:	
and DOES 1-20,	:	
Defendants.	:	
	:	
	:	
	:	

BRIEF IN OPPOSITION TO DEFENDANT’S MOTION TO DISMISS

Steven Hyder (P69875)
The Hyder Law Firm,
P.C.
PO Box 2242
Monroe, MI 48161
hyders@hyderlawfirm.com
Phone (734) 757-4586

Jesse Strauss (admitted
NY-4182002)
Strauss Law PLLC
305 Broadway, 9th Fl.
New York, NY 10007
Phone (212) 822-1496
Facsimile (212) 822-1437

David Anziska
Law Offices of David
Anziska
305 Broadway, 9th Fl.
New York, NY 1000
Phone (212) 822-1496
Facsimile (212) 822-1437

Frank Raimond
Law Offices of Frank
Raimond
305 Broadway, 9th Fl.
New York, NY 10007
Phone (212) 822-1496
Facsimile (212) 822-1437

*Counsel for Plaintiffs, individually
and for all others similarly situated.*

December 22, 2011

TABLE OF CONTENTS

I. PRELIMINARY STATEMENT 1

II. FACTS 5

III. POINTS OF LAW 9

 A. Motion to Dismiss Standard..... 9

 B. The American Bar Association and the National Association of Law Placement Are Not Necessary Parties 10

 C. Federal Law Does Not Preempt Plaintiffs’ MCPA and Fraud Claims 12

 i. Express Preemption Does Not Apply 14

 ii. Field Preemption Does Not Apply 15

 iii. There is No Conflict Between the HEA and State Law 19

 iv. Plaintiffs Have No Recourse for Cooley’s Deception, but for This Action 20

 D. None of the Plaintiffs’ Claims Are Barred By The Statute of Limitations..... 21

 E. Cooley’s Deceptive and Misleading Marketing Materials Are Not Exempt from the Michigan Consumer Protection Act 22

 i. The MCPA Applies to Educational Institutions 22

 ii. The MCPA’s Exemption for Regulated Conduct Does Not Apply..... 27

 F. Plaintiffs Have Plead Every Element of A Fraud Claim With the Required Particularity... 29

 i. The FAC Alleges Reliance With Particularity 31

 ii. The FAC Alleges False Statements 36

 iii. Cooley Had a Duty to Provide Truthful Information and Plaintiffs Have Plead Silent Fraud 39

 iv. The FAC Alleges Injury and Causation..... 41

 G. The FAC States a Claim for Negligent Misrepresentation 42

 H. The FAC Does Not Violate F.R.C.P. 8..... 43

IV. CONCLUSION 45

I. PRELIMINARY STATEMENT

Thomas M. Cooley Law School (“Cooley” or “Defendant”), the largest law school in America, has been systematically defrauding thousands of prospective and enrolled students by reporting deceptive and misleading job placement data and salary information in a misguided attempt to inflate the value of a Cooley degree and thereby draw millions of undeserved tuition dollars. Now, twelve Cooley graduates have stepped forward on behalf of themselves and their classmates to end the fraud and deception. Their action should be permitted to proceed.

The deception, misleading statements and fraud alleged in the First Amended Complaint (“FAC”) are simple and cunning: Cooley reports that, depending on the year, between 76 percent and 82 percent of its graduates secured “employment” within nine months of graduation and earned a mean salary of approximately \$50,000. The context of these representations makes it appear to the reasonable consumer, such as Plaintiffs, that the employment obtained is full-time, permanent and employment for which a Cooley degree is required or preferred.

However, the FAC alleges that in reality few Cooley graduates obtain full time, permanent jobs for which a JD degree is required or preferred. The majority of employment found by Cooley graduates is either part-time or temporary and it does not required a Cooley degree.

The FAC alleges that Cooley’s misleading and deceptive statements have resulted in Plaintiffs paying grossly inflated tuition, resulting in millions of dollars in damages. Cooley students graduate on average with a staggering \$105,798 in loans, with a stunning 90 percent of them taking out loans to attend the school. These misrepresentations and omissions have also left

the federal government – and ultimately the U.S. taxpayer – potentially on the hook for absorbing tens of millions of dollars in non-dischargeable loans.¹

Cooley’s Memorandum of Law in Support of its Motion to Dismiss (“Def.’s Memo of Law” or “Memorandum of Law”) stems largely from the indignation at being called out for their malfeasance while Cooley believes that other law schools are permitted to get away with reporting misleading and deceptive job placement data. Cooley asserts, again and again, that the reporting of misleading and deceptive job placement data is endemic to American law schools and is condoned by the American Bar Association (“ABA”). Plaintiffs agree. But Cooley should know better than to make this argument to a court of law: the pervasiveness of misleading and deceptive marketing practices – or any other tortious activity – is not a defense to Cooley’s participation in it.² And when Cooley’s own misleading and deceptive statements have damaged Plaintiffs by causing them to incur tens of thousands in debt and enriched Cooley in the same amount, the “just following the crowd” defense rings especially hollow.

¹ The majority of the lending is guaranteed by the Federal Government under the Federal Family Education Loan Program (FFELP), *See* 20 U.S.C. §§ 1071-1087-4. Under that program, the Federal government repays selected guarantee agencies when a student borrower defaults and, under some programs, the Federal government pays interest on the loans to the lender while the student borrower is enrolled in the school. *See* 34 C.F.R. §§ 682.404(a) (describing the Federal government’s duty to repay guarantee agencies); 20 U.S.C. § 1078(a)-(b) (describing the Stafford Loan program which offers interest subsidies to qualifying students). Therefore, although Plaintiffs are the victims of Cooley’s deceptive and misleading statements, the Federal government and, by extension, the United States taxpayers, are also victimized because of increased interest subsidies required under FFELP and due to defaults caused by the excessive debt taken on by Cooley graduates under false pretenses.

² *See Surlis v. Greyhound Lines, Inc.*, 474 F.3d 288, 300 (6th Cir. 2007) (compliance with regulations “does not relieve one of tort liability. . .”); *The T.J. Hooper*, 60 F.2d 737, 740 (2d Cir. 1932) (“there are precautions so imperative that even their universal disregard will not excuse their omission”). It is also a long held principle of Michigan product liability law that compliance with governmental and industrial standards does not preclude a trier of fact from finding certain conduct to be negligent. *See Marietta v. Cliff’s Ridge, Inc.*, 385 Mich. 364, 369-70 (1971).

Cooley attempts to place a legal gloss on its indignation by making three arguments that fail as a matter of established law. First, non-parties ABA and the National Association of Law Placement (“NALP”) are not indispensable parties pursuant to F.R.C.P. 19 because (a) no relief is demanded of the ABA and NALP by Plaintiffs and, therefore, complete relief for Cooley’s deceptive and misleading statements can be accorded among existing parties; and (b) requiring Cooley to accurately report its post-graduate employment data would not create inconsistent obligations and would not expose Cooley to lawsuits by the ABA, NALP, or any other nonparties. Second, there is no Federal preemption (express, field or conflict) of State statutory and common claims against educational institutions such as Cooley for their misleading marketing. The United States Congress has never expressed or implied that State consumer protection law claims against educational institutions are preempted by the Higher Education Act (“HEA”) 20 U.S.C. § 1001 et seq. or any other Federal statute. Also missing from Cooley’s motion, oddly, is a discussion of the impact of the Higher Education Opportunity Act of 2008 (“HEOA”), Pub. L. No. 110-315, which specifically *prohibits* the Department of Education (“DOE”) from regulating how the ABA assesses student achievement and, in turn, prohibits the ABA from preventing law schools from assessing student achievement any way they please, demonstrating a Congressional preference for non-uniformity, not uniformity as Cooley baldly asserts.

Finally, as explained below, Cooley’s treatment of these issues is inchoate because Cooley does not discuss whether Plaintiffs, either through the ABA or the DOE, have other means to seek relief for the damage that Cooley’s deceptive and misleading employment data caused them. In fact, Plaintiffs do not, making Cooley’s argument that Plaintiffs should seek relief elsewhere simple sophistry.

Cooley fairs no better on its challenge to the substance of Plaintiffs' claims. First, Plaintiffs have plead, with sufficiency, every element of a claim under the Michigan Consumer Protection Act ("MCPA"). Cooley does not challenge this. Instead, Cooley cites a single non-binding case in which the MCPA was found not to apply to Cooley because of the commercial purpose of the plaintiff's Cooley education. However, that case is an anomaly and is in a different procedural context: none of the Plaintiffs in this matter had a commercial or business purpose for their attendance at Cooley and Cooley ignores at least two other cases where the MCPA applied to educational goods and services. Cooley also fails to apprise the Court of the factors that need to be weighed before the Court can factually determine whether Plaintiffs purchased a Cooley education for a personal purpose or in aid of a supposed business. Second, the general transaction in question – the provision of legal education – is not governed by State or Federal law beyond the ABA's accreditation standards. But the ABA is not a governmental entity, meaning that the MCPA's exemption for authorized conduct does not apply.

Finally, the Memorandum of Law misstates the fraud allegations in the FAC as well as Plaintiffs' damages theory. The FAC's allegations are simple and straightforward: Cooley made at least six material misstatements during the statutory period that were relied on by the Plaintiffs. The misstatements falsely inflated the value of a Cooley degree, thereby causing Plaintiffs to overpay. The Plaintiffs identify the statement (the inflated employment data), the speaker (Cooley through its website and marketing materials); the time and place (the years the misleading employment data was available and where it was available); and the content of Cooley's statements (that a certain percentage of graduates found employment that required the purchase of a Cooley degree). Cooley knew, or had reason to believe, that its reported employment data was deceptive and misleading because it (i) has access to the real data by, *inter*

alia its participation in NALP's annual employment survey and its own internal reports and (ii) it rapidly expanded enrollment while reporting consistent employment rates despite a contracting market for legal services.

Cooley does not really refute Plaintiffs' core allegations. It is widely accepted that American law schools, Cooley included, employ all sorts of legerdemain to boost employment rates in a contracting legal market place. Indeed, there is no better evidence of this than the fact that between 2004 and 2009 the total number of Cooley graduates skyrocketed by an astounding 137 percent, from 404 to 958 graduates at a time when the legal services industry shed 15,000 jobs, yet Cooley's alleged employment rate barely budged from 82 to 78 percent. Accordingly, the Court should allow Plaintiffs to proceed with their action and finally hold Defendants accountable for their deception and fraud which has cost Plaintiffs dearly, and enriched Cooley exponentially.

II. FACTS

Churning out nearly 1,000 newly-minted JD graduates each year, Cooley is by far the largest law school in the country with approximately 4,000 students spread out across four campuses, the overwhelming majority of whom -- 82 percent -- are enrolled on a part-time basis. FAC ¶30.³ Coincidentally, it also has the lowest admissions standards of any accredited or provisionally accredited law school in the country, accepting 83 percent of all applicants, with a median LSAT score of 146 and median GPA of 2.99. FAC ¶31.

In marketing itself to prospective and enrolled students, the school makes a number of bold, if not incredulous statements that are incommensurate with its low academic and reputational standings in the legal marketplace, including publishing its own law school rankings

³Recently, Cooley announced that it will be opening a Tampa Bay-area campus in Riverview, Florida in May 2012 that can accommodate a planned enrollment of 700 students. FAC ¶30.

that ranks Cooley as the second “best” law school in the country, right below the top-ranked school, Harvard Law School, and well above such notable institutions as Yale, Columbia, the University of Chicago and Stanford. FAC ¶35. Beginning in the early 2000s, Cooley embarked on a strategy to become “America’s Largest Law School.” FAC ¶33. Consequently, between 2001 and 2004, Cooley’s entering class increased dramatically, rising from 918 students in 2001 to 1,385 students in 2004, thereby fulfilling the administration’s goal. *Id.* Likewise, the number of graduates jumped from 404 in 2004 to 503 in 2005 to 612 in 2006 to a whopping 958 in 2009. *Id.* However, in achieving this goal, the Cooley administration openly fretted that “[e]mployment remains a major challenge.” FAC ¶34.

But the employment numbers Cooley publicly reported to entice applicants and encourage enrolled students to remain enrolled improbably belie that challenge. Throughout the Class Period, Cooley reported with “Madoff”-like consistency that, depending on the year, between 76 and 82 percent of its graduates secured employment within nine months of graduation and earned a mean salary of roughly \$50,000. FAC ¶4. Specifically, the school posted employment reports between 2005 and 2011 on its website asserting that the Class of 2004 enjoyed a placement rate of 79 percent and earned a mean salary of \$46,000 (posted between 2005-2006) (FAC ¶43); the Class of 2005 enjoyed a placement rate of 82 percent and earned a mean salary of \$49,000 (posted between 2006-2007) (FAC ¶42); the Class of 2006 enjoyed a placement rate of 82 percent and earned a mean salary of \$52,000 (posted between 2007-2009) (FAC ¶41); the Class of 2009 enjoyed a placement rate of 78 percent and earned a mean salary of \$52,000 (posted between 2010-2011) (FAC ¶40); and the Class of 2010 enjoyed a placement rate of 76 percent and earned a mean salary of \$55,000 (posted in 2011) (FAC ¶39). The context of these representations make it appear to the reasonable consumer, such as

Plaintiffs, that the jobs reported are full-time, permanent positions for which a law degree is required or preferred. FAC ¶4.

In deciding to apply and remain enrolled in Cooley, each of the twelve Plaintiffs relied on salary data and employment information posted on Cooley's website, marketing material and/or disseminated to third-party data clearinghouses and publications, such as the ABA and *US News*, and expressly relied on the employment reports that Cooley posted on its website. FAC ¶¶16-27. Each Plaintiff specifically alleges that he or she was enrolled in Cooley or considering enrolling in Cooley when the deceptive employment and salary data were reported, and the deceptive employment and salary data influenced their decisions to enroll or remain enrolled because each Plaintiff was keenly aware that the value of their Cooley degree was, in part, due to its ability to enhance future earnings. *Id.* In addition, none of the Plaintiffs enrolled in the school with the intention of using their JD degrees for an ongoing business or to start a non-legal business, but rather to prospectively better themselves and their personal circumstances through the attainment of full-time employment in the legal sector. *Id.*

The FAC alleges that Cooley's reported employment data is demonstrably false because: (i) the reported placement rates and salary information have remained eerily steady throughout the past decade, even though the total number of graduates from 2004 to 2009 has increased dramatically from 404 to 958 students -- an astounding *137 percent*. Indeed, the school's own internal documents reveal that administrators fretted that larger classes would diminish their graduates' job prospects, but no meaningful change in the employment statistics materialized, and the placement rate barely budged from 82 to 78 percent between those years (FAC ¶5(a), ¶53); (ii) The reported placement rates and salary information have barely dipped since the onslaught of the "Great Recession," even though the legal employment market is highly

oversaturated, with law schools churning out 43,000 JD degrees each year, while roughly half as many jobs (26,000) are available (FAC ¶5(b), ¶ 64, ¶67, ¶ 73); (iii) Cooley inflates their graduates reported mean salaries by calculating them based on a small, deliberately selected subset of graduates, namely those who have salaries to report (FAC ¶¶ 74-78); and (iv) as set forth in painstaking detail, the employment and salary data reported by Cooley for 2009 and 2010 graduates are completely at odds with employment statistics reported by NALP for 2009 and 2010 graduates, meaning that for Cooley's statistics to be accurate Cooley would need to be placing students from those classes well above the 40 percent of law school graduates nationally who secure full-time, permanent legal employment, despite its extremely lenient admission standards and being ranked in the bottom tier by every major law school rankings (FAC ¶¶55-61).

In reality, the employment data reported by Cooley bears little resemblance to the actual experiences and dim employment opportunities encountered by their recent graduates. Based on interviews with former students and other investigatory work, Plaintiffs believe that perhaps fewer than *25 percent* of recent Cooley graduates secure full-time, permanent employment for which a JD degree is required or preferred within nine months of graduating. The majority of Cooley graduates work in either part-time or temporary positions or positions for which a law degree is not required or preferred, making the \$110,000 in government back debt they incurred to obtain a Cooley degree a burden with no discernable benefit. FAC ¶52.

Accordingly, Plaintiffs seek damages and equitable relief on behalf of the Class, which includes, but is not limited to, the refunding and reimbursing current and former students for a portion of the tuition paid to Cooley; an order enjoining Cooley from continuing to market its false and inaccurate employment data and salary information; an order requiring that Cooley retains a third party to independently audit all employment and salary data; and any additional

relief that this Court determines to be necessary or appropriate to provide complete relief to Plaintiffs and the Class. FAC ¶13. No relief is demanded of any entity other than Cooley.

III. POINTS OF LAW

A. Motion to Dismiss Standard

Cooley has moved to dismiss pursuant to F.R.C.P. 12(b)(6) asserting that the FAC fails to state a claim. When reviewing motions to dismiss for failure to state a claim, a Court must “construe the complaint in the light most favorable to the nonmoving party, accept the well-pleaded allegations as true, and determine whether the moving party is entitled to judgment as a matter of law,” *Commercial Money Ctr., Inc. v. Ill. Union Ins. Co.*, 508 F.3d 327, 336 (6th Cir. 2007). In other words, the Court must assume that the twelve Plaintiffs – all holders of a Cooley law degree – have made factual allegations that are true. *See Albright v. Oliver*, 510 U.S. 266 (1994); *Gunasekera v. Irwin*, 551 F.3d 461, 466 (6th Cir. 2009) (holding that on a 12(b)(6) motion, a court must “accept all the ... factual allegations as true and construe the complaint in the light most favorable to the Plaintiff [.]”); *Ass’n of Cleveland Fire Fighters v. City of Cleveland, Ohio*, 502 F.3d 545, 548 (6th Cir. 2007) (“factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true”).

Because the goal of a F.R.C.P. 12(b)(6) motion is to test the legal sufficiency of the FAC, Courts have held that “Specific facts are not necessary; the statement need only ‘give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.’” *Sensations, Inc. v. City of Grand Rapids*, 526 F.3d 291, 295 (6th Cir. 2008) (quoting *Erickson v. Pardus*, 551 U.S. 89, (2007)); *see also Bishop v. Lucent Techs., Inc.*, 520 F.3d 516, 519 (6th Cir. 2008).

B. The American Bar Association and the National Association of Law Placement Are Not Necessary Parties

To place a legal gloss on the “just following the crowd” argument, Cooley asserts that the ABA, the crowd’s apparent foreperson, should also be a defendant in this action. For reasons that are unclear, Cooley also asserts that NALP, a wholly separate organization that has been collecting more specific employment data from law schools for decades, is also a necessary Defendant. Cooley’s F.R.C.P. 19 argument is meritless.⁴

Cooley’s F.R.C.P. 19 argument rests on the incorrect assertion that Plaintiffs are seeking “system-wide remedy.” Def’s Memo of Law p. 14. The Plaintiffs do not request the Court order “a rewrite of the [] national employment-and salary-reporting standards applicable to the ABA-accredited law schools” which is the systematic remedy Cooley suggests. Def.’s Memo of Law pp. 15, 19. From the face of the FAC, those assertions are simply incorrect – the relief requested is against Cooley, and against Cooley alone. *See* FAC ¶ 13 (“Plaintiffs now seek . . .to hold Thomas Cooley accountable for its deceptive and misleading practices . . . Plaintiffs seek damages and equitable relief which includes but is not limited to the following: refunding and reimbursing current and former students for a portion of the tuition paid to Thomas Cooley, an order enjoining Thomas Cooley from continuing to market its false and inaccurate employment data and salary information; an order requiring that Cooley retain a third party to independently audit all employment and salary data. . .”); FAC ¶ 110 (requesting preliminary and injunctive

⁴ The majority of Defendants’ purported F.R.C.P. 19 argument is a recitation of what Cooley claims is a “scheme of reporting rules” governing law school employment data reporting. (Def’s Memo of Law p. 15. Plaintiffs address the purported statutory scheme in their preemption argument, *infra* section C. In any event, it is unclear why Cooley is demanding that Plaintiffs and the Court go through the exercise of determining whether the ABA and NALP are necessary parties because Cooley does not request dismissal of the action under F.R.C.P. 19(b). There is nothing procedurally precluding NALP and the ABA from being joined as Defendants except for the logical fact that neither NALP nor the ABA are alleged to have wronged Plaintiffs.

relief against Cooley ordering it to cease unfair business practices, “as well as disgorgement and restitution to Plaintiffs of all revenue associated with their unfair practices, or such revenues as the Court may find equitable and just, including the partial reimbursement of tuition”); FAC ¶ 118 (requesting “punitive damages, the disgorgement of tuition monies” against Cooley); FAC ¶ 126 (same). At no time and in no place does the FAC demand any relief from the ABA or NALP, or demand systemic relief.⁵ *Sch. Dist. v. Sec’y of the United States Dep’t of Educ.*, 584 F.3d 253, 265 (6th Cir. 2009) (denying a F.R.C.P. 19 motion and noting that “Rule 19 does not turn on the relief that the claimants could have sought but on the relief they did seek”); *see also Searcy v. County of Oakland*, 735 F. Supp. 2d 759, 771 (E.D. Mich. 2010) (joinder not necessary where the named defendant’s “liability is independent of that” of the alleged necessary parties); *Dahill Mgmt. LLC v. Gregory A. Moore & Int’l Title Clearing, Inc.*, 2010 U.S. Dist. LEXIS 22889 (E.D. Mich. Mar. 11, 2010) (stating that “Defendants’ contention that they are blameless does not meet the” F.R.C.P. 19(a)(1)(A) standard and noting that if the Defendants believe that another party is to blame, the appropriate motion is one under F.R.C.P. 14 for impleader); *Doran v. Bondy*, 2005 U.S. Dist. LEXIS 16424 (W.D. Mich. Feb. 18, 2005) (denying a F.R.C.P. 19 motion where, after a “pragmatic analysis . . . the Court can grant all of the relief Plaintiffs seek without [the alleged necessary party] in the case.”).

In arguing that the ABA is a necessary party Cooley ignores the FAC’s allegations that Cooley has failed to comply with the minimum standards established by the ABA because

⁵ Because most law schools report deceptive and misleading employment data, almost every law school in the nation is vulnerable to a suit such as this. The common practice foretells of systematic change but is not an indication that the ABA and NALP are necessary parties. In fact, quite the opposite, to the extent the ABA is permitting accredited law schools to disseminate deceptive and misleading employment data, a rash of consumer protection suits such as this against law schools may prompt ABA action to crack down on law school deception. *See* FAC ¶¶ 79-92.

Cooley “tabulates, calculates and tallies the raw data inputted in the job surveys filled out by recent graduates in a shoddy, slipshod manner, cynically choosing to omit or ignore critical statistical data that would substantially lower both placement rates and salary information reported in its employment reports and distributed to third-party data clearinghouses.” FAC ¶ 60. Therefore, even a re-write of the ABA’s regulations (which Plaintiffs are not demanding) would have no effect on these allegations because the FAC alleges that Cooley partially ignores the ABA’s standards when reporting employment data, a practice which exacerbates the fraud and deception imposed on Plaintiffs.⁶

C. Federal Law Does Not Preempt Plaintiffs’ MCPA and Fraud Claims

Citing no cases on point, Cooley’s primary argument for dismissal is that HEA preempts State consumer protection claims and common law tort claims. Def.’s Memo of Law, pp. 20-24. Cooley cites no case law in support of their preemption argument and it is far fetched at best and downright misleading at worst: The HEA neither expresses nor implies a Congressional preemption of State consumer protection claims or any desire of the United States Congress to regulate law schools beyond protecting the Federal government’s student financial aid funding.

⁶ Cooley’s F.R.C.P. 19 argument only alleges that the ABA and NALP are necessary parties under F.R.C.P. 19(a)(1)(A). To the extent that the ABA and NALP’s ability to protect their interest (of which none is claimed) is impaired and, therefore, the ABA and NALP are necessary parties under F.R.C.P. 19(a)(1)(B), that assertion is incorrect. A finding that Cooley’s marketing materials are not deceptive or misleading under Michigan law would not impair the ABA or NALP’s ability to enforce their own regulations. Conversely, if Cooley is found liable to Plaintiffs under Michigan law, it does not mean that Cooley has necessarily violated the ABA and NALP’s minimal standards – even though the FAC alleges otherwise. *See* FAC ¶ 60; *Daudert v. State Farm Fire & Cas. Co.*, 2007 U.S. Dist. LEXIS 22764 (E.D. Mich. Mar. 29, 2007) (explaining that F.R.C.P. 19(a)(1)(B) is designed to prevent inconsistent obligations); *Doran*, 2005 U.S. Dist. LEXIS 16424 (narrowly defining inconsistent obligations as “conflicting judgments arising out of the same claim or related claims based upon the same transaction.”) Therefore, there is no risk of “double, multiple or insistent obligations” that require the ABA’s and NALP’s presence in the case to resolve. As set forth below, Cooley does not claim – nor can it claim – that the ABA, NALP, or even the Federal government prohibit it from providing employment information beyond the bear minimum required.

Indeed, the HEA is a funding statute and its stated purpose was to “to assist in making available the benefits of postsecondary education to eligible students.” 20 USCA § 1070; *see also Slovynec v. DePaul Univ.*, 332 F.3d 1068, 1069 (7th Cir. 2003) (noting that the HEA is a “funding statute” and its provisions address only the Secretary of Education’s power to revoke a schools eligibility for Federal funds); *Hunt v. Sallie Mae, Inc.*, 2011 U.S. Dist. LEXIS 78306 (E.D. Mich. July 19, 2011) (“With respect to the HEA, it was enacted to promote financial assistance to students in higher education”).

The HEA certainly requires schools that accept Federal student aid to make accurate reports (20 U.S.C. § 1092(a)(1)(R)). However, the reporting provisions of HEA were designed to protect the Federal government’s funds, not Plaintiffs’ monetary investment in a law degree. As set forth below there is no indication – either express or implied – that the HEA is the sole means by which students can challenge deceptive and misleading marketing practices by educational institutions that receive Federal monies. And because there is no private right of action under the HEA, it is imperative that Plaintiffs have the ability to bring consumer protection claims to protect their investments. *See Thomas M. Cooley Law Sch. v. ABA*, 459 F.3d 705, 711 (6th Cir. Mich. 2006) (holding there is no private right of action under the HEA but “disputes can be resolved, not through the HEA, but through a common law claim”); *see College Loan Corp v. SLM Corp.*, 396 F.3d 588, 598 (4th Cir. 2005) (finding that State law claims could be brought to enforce provisions of the HEA where “the Supreme Court (and this Court as well) has recognized that the availability of a State law claim is even more important in an area where no Federal private right of action exists”); *see also In re Ocwen Loan Servicing, LLC Mortg. Servicing Litig.*, 491 F.3d 638, 642-44 (7th Cir. 2007) (“[i]t would be surprising for a Federal regulation” to bar State actions for breach of contract or fraud and noting that

“assertion of plenary regulatory authority does not deprive persons harmed by the wrongful acts [regulated entities] of their basic State common-law-type remedies”); *Kreams v. Tempe Technical Institute, Inc.*, 39 F.3d 222, 227 (9th Cir. 1994) (holding that a private tort suit against an accrediting agency is not preempted by the HEA because the interests of the HEA “may be more effectively vindicated by private tort suits in State court”).

Nevertheless, Cooley attempts to stretch the purpose of the HEA so that its very existence immunizes it from liability for its deceptive and misleading marketing materials. As set forth below, that novel argument must fail for three independent reasons: (1) the HEA does not contain an express statutory preemption of fraud claims or State consumer protection claims; (2) there is no field preemption because the HEA does not evince any intent to occupy the field of law school employment reporting and, in fact, expressly prohibits the DOE and the ABA from creating uniform national standards; and (3) there is no conflict preemption because it is entirely possible for Cooley to comply with the HEA and to report accurate employment data.

Moreover, an additional factor weighs against a finding of any preemption: without State law remedies, the Plaintiffs would be left without any recourse for Cooley’s deceptive and misleading employment reports. Cooley may wish that the victims of its misleading and deceptive marketing practices were left without any remedies for that fraud, but this Court should deny that wish.

i. Express Preemption Does Not Apply

Cooley acknowledges that there is no express preemption of State law consumer protection statutes and State common law fraud. Def.’s Memo of Law, p. 17. Cooley had no other choice: case law establishes that the HEA does not preempt State consumer protection statutes. *See College Loan Corp.*, 396 F.3d at 596 (“The doctrine of express preemption has no

application here (as the parties agree), because the HEA makes no mention of preempting State tort and contract claims”); *Cliff v. Payco Gen. Am. Credits, Inc.*, 363 F.3d 1113, 1125 (11th Cir. 2004) (holding that even within the sections of the HEA containing express preemption provisions, “the section, read as a whole, is absolutely silent regarding civil liability under consumer protection laws”); *Morgan v. Markerdowne Corp.*, 976 F. Supp. 301, 318 (D.N.J. 1997) (“The determination that the HEA neither explicitly nor implicitly preempts all State law is one that has been reached by the vast majority of courts that have addressed the issue”).

ii. Field Preemption Does Not Apply

In the absence of express preemption, Cooley next argues that the more nebulous concepts of field and conflict preemption preclude Plaintiffs’ MCPA and fraud claims. But this argument too fails for a multitude of reasons. First, “in all preemption cases, and particularly in those in which Congress has legislated in a field which the States have traditionally occupied, we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.” *Wyeth v. Levine*, 129 S. Ct. 1187, 1194-1195 (2009) (internal quotes omitted). Consumer protection is a field traditionally regulated by the states through their common law and the adoption of statutes such as the MCPA. See *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132,135 (1963); *Wimbush v. Wyeth*, 619 F.3d 632, 642-643 (6th Cir. 2010) (stating that in a products liability case, the Circuit “operates under a presumption against preemption”). Therefore, there is a presumption that the MCPA and State common law claims are not preempted by the HEA. After all, it has never been the role of the Federal government to regulate educational institutions

(beyond protecting Federal financial aid funds), and, as set forth above, that was not Congress's purpose in passing the HEA.⁷

Second, there is no indication that Congress intended to "occupy the field" of law school employment reporting. Cooley admits that there is no express preemption, but fails to address the implication that stems from its absence. The HEA's preemption provisions only apply to student loan collection efforts. *See e.g.* 20 U.S.C. § 1099 (1982) (loans shall not be subject to State law disclosure requirements); 20 U.S.C. § 1078(d) (any other State and Federal usury law does not apply); 20 U.S.C. § 1091a(a) (1986) (State statutes of limitations do not apply); 20 U.S.C. § 1091a(b) (1986) (student may not raise State law infancy claims). In light of the limited express preemptions, it can be assumed that Congress did not intend to preempt State consumer protection laws and common law fraud claims against educational institutions for other claims. *Cliff*, 363 F.3d at 1125-1126 (holding that the presumption against preemption "is reinforced by those provisions of the HEA, noted earlier, that expressly preempt isolated provisions of State law . . . preclude our finding that the HEA 'occupies the field.'"); *College Loan Corp*, 396 F.3d at 596 n.5 ("because Congress deemed it necessary to specifically preempt certain State laws, it is clear that Congress could not have intended the HEA to so 'occupy the field' that it would automatically preempt all State laws"); *Kreams*, 39 F.3d at 225 ("These express provisions for preemption of some State laws imply that Congress intentionally did not preempt State law generally, or in respects other than those it addressed" and there is no implied preemption under

⁷ Cooley's entire preemption argument is built upon two lines of the Federal Code, 20 U.S.C. § 1092(a)(1) and §1094(a)(1). Far from "imposing additional and conflicting requirements" than imposed by these provisions, (Def.'s Memo of Law 17) Plaintiff are simply attempting to breath life into those provisions by assuring that the information required to be disclosed is not deceptive and misleading. Notably, this is not a case where Plaintiffs are seeking to use State common law to avoid their student loan obligations by pointing out technical violations of the HEA. *c.f.* *Chae*, 593 F.3d 948-950; *Armstrong v. Accrediting Council for Continuing Educ. & Training*, 980 F. Supp. 53, 63 (D.D.C. 1997).

the HEA of a common law negligence law suit because “That implication cannot be reconciled with the narrow and precise preemptions expressed”); *Tipton v. Secretary of Educ.*, 768 F. Supp. 540, 554 (S.D. W. Va. 1991) (same).

Third, even in areas where it is apparent that Congress intended the HEA to expressly preempt State law – student loan collection efforts – Courts have found that the HEA does not “occupy the field” of student loan collection efforts. *See Chae v. SLM Corp.*, 593 F.3d 941-942 (9th Cir. 2010) (“we have previously held that field preemption does not apply to the HEA.”); *Cliff*, 363 F.3d at 1126 (“we have no trouble concluding that HEA does not ‘occupy the field’ of debt collection practices”). It would be an odd result if the HEA were found to “occupy the field” of “law school employment and salary reporting” as proposed by Cooley (Def. Memo of Law pp. 18-21) when the HEA has been found not to occupy the field of student loan collection efforts, despite its express purpose to provide student financial assistance and its several express preemption provisions regarding student loan collection efforts.⁸

Finally, Cooley’s assertion that “the text of the HEA demonstrates Congress’s intent to occupy the field” of law school employment and salary reporting is simply incorrect. In making that argument, Cooley ignores Section 1099b(g) and Section 1099(b)(A)(5)(a) of the HEA. *See* 20 U.S.C. § 1099b(g); 20 U.S.C. §1099(b)(A)(5)(a).

⁸ The regulations promulgated by the Secretary of Education for collection of student loans are legion. *See* 34 C.F.R. 682 *et seq.* For example, the regulations require that before placing a student loan in delinquency, the lender must send four collection letters to the borrower and make four diligent efforts to contact the borrower by telephone; one telephone contact must occur on or before the 90th day of delinquency, one must occur after the 90th day of delinquency, and at least two of the collection letters must warn the borrower that if the loan is not paid, the default will be reported to all national credit bureaus. *See* 34 C.F.R. § 682.411(d). And there are many more, governing almost every aspect of lenders student loan collection efforts. *Id.* In comparison, the supposed “uniform Federal scheme of regulations governing law school employment and salary reporting” (Def’s. Memo of Law, p. 20) which Defendants claim preempts the field consist of one regulation *See* 34 C.F.R. 668.41(d)(5)(i)-(iii).

Section 1099b(g) expressly prohibits the Secretary of Education from interfering in how accrediting agencies, such as the ABA, define “success with respect to student achievement.”⁹ More tellingly, Congress could not have intended to “occupy the field” of law school employment and salary reporting because in 20 U.S.C. §1099(b)(A)(5)(a), Congress required the accrediting agencies to measure “success with respect to student achievement in relation to the institution’s mission, which may include different standards for different institutions or programs, as established by the institution, including, as appropriate, consideration of State licensing examinations, consideration of course completion, and job placement rates.” *See* 20 U.S.C. § 1099(b)(A)(5)(a) (emphasis added). The Code of Federal Regulation further elaborates that this means that accrediting agencies have the discretion to consider (or not consider) an institution’s alternative standards. *See* 34 C.F.R. § 602.16(f)(2) (“Nothing . . . restricts . . . an institution from developing and using institutional standards to show its success with respect to student achievement, which achievement may be considered as part of any accreditation review.”) Clearly, the statutory scheme laid out by Congress does not express a preference for uniformity as asserted by Cooley. *See* Def.’s Memo of Law 21-22. In fact, quite the opposite; Congress expressly envisioned different institutions defining student achievement as they see fit and has expressed no preference for uniformity and none should be inferred.¹⁰ *See Medtronic, Inc. v.*

⁹ The HEOA was an attempt to reduce “the intrusion on institutional autonomy” created by prior Federal law. *See* Judith Areen, *Accreditation Reconsidered*, 96 Iowa Law Review 1471, 1484 (2011).

¹⁰ 20 U.S.C. §1099(b)(A)(5)(a) also renders Cooley’s assertion on page 9 of the Memorandum of Law that “these [ABA mandated minimal standards] do not leave room for Cooley to wander in reporting its data” false. Most law schools in the nation release the bare minimum of information, using the ABA’s minimal requirements. However, the uniformity alleged by Cooley is more happenstance than design – the ABA standards are so minimal, and allow such deception, that every school happily complies. The ABA itself recognizes the threadbare nature of the regulations governing the reporting of employment data: the preface to its “standards and rules” explicitly states that its standards – including those governing employment reporting – are only

Lohr, 518 U.S. 470 (1996) (“Congress’ intent is the “ultimate touchstone in every preemption case”).

iii. There is No Conflict Between the HEA and State Law

Conflict preemption occurs when it is impossible to comply with both Federal and State law, or where State law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *See Wimbush v. Wyeth*, 619 F.3d 632, 644 (6th Cir. 2010) (holding that there is no preemption of State tort law simply because it parallels Federal law). In order for there to be conflict preemption of the MCPA and State common law fraud, it would mean that the HEA required Cooley to report misleading and deceptive job placement data. That is illogical and unsupportable. *See Murungi v. Tex. Guar. Sallie Mae*, 646 F. Supp. 2d 804, 809-810 (E.D. La. 2009) (finding no conflict preemption because “the HEA’s regulations [do not] require [the party alleging conflict preemption] to make a misrepresentation, suppression, or omission with the intent to obtain an unjust advantage” that is prohibited under State law). Indeed, there is nothing preventing Cooley from complying with reporting requirements under the HEA and, at the same time, report accurate employment information. *See Id.* Rather, the two schemes act in tandem: the HEA requires some minimal reporting in order for Cooley to participate in Federal student assistance programs, while the MCPA requires Cooley’s disclosures to be non-misleading and not deceptive.¹¹

“minimal requirements” and that “Consistent with their aspirations, mission and resources, law schools should continuously seek to exceed these minimum requirements.” The preamble to the ABA Standards are annexed to hereto as Exhibit A. In addition, Hulett “Bucky” Askew, an advisor to the ABA, has categorized law schools’ employment reporting requirements as “an honor system.” *See Sloan, Karen, Going to Law School? Proceed with Caution*, The Legal Intelligencer, and December 17, 2009 (annexed hereto as Exhibit B).

¹¹ Cooley argues that the FACs’ allegation that the use of self reported and unaudited student surveys is misleading creates a conflict with 20 U.S.C. § 1092(a)(1)(R), because that provision requires that job placement data shall be “gathered from such sources as alumni surveys and

iv. Plaintiffs Have No Recourse for Cooley's Deception, but for This Action

Cooley's preemption argument should be rejected for the independent reason that but for this State law action, Plaintiffs would be left with no remedy for Cooley's deceptive and misleading employment data.

Rule 24(b) of the ABA Standards for Approval of Law Schools allows Plaintiffs to make a "written complaint" about Cooley, but does not provide Plaintiffs any relief for Cooley's deceptive and misleading statements. See Rule 24 of the ABA Standards for Approval of Law Schools, annexed to hereto as Exhibit C. In addition to not providing a remedy, Rule 24 cannot be used to adjudicate any student's or alumni's individual dispute. Rather, the scheme is designed to allow the ABA to penalize Cooley, a far cry from the damages sought by Plaintiffs to address their own losses. Plaintiffs could also write to the DOE complaining of Cooley's misleading and deceptive practices but, as set forth below, Plaintiffs' would also not be entitled to any relief from Cooley. *L'grke v. Benkula*, 966 F.2d 1346, 1348 (10th Cir. Okla. 1992) (students can petition the Secretary of the DOE for relief, but have no other remedy under the HEA).

Assuming that written complaints made to the DOE and the ABA were successful, the best that Plaintiffs could hope for is that as a result of their complaints, Cooley loses its ABA accreditation, receives a sanction and the DOE revokes Cooley's eligibility to receive Federal aid.¹² And even if Cooley had to shut down because of the ABA or DOE sanctions imposed on

student satisfaction surveys." Def's Memo of Law p. 22. The use of the words "such sources as" implies that Cooley can use a wide variety of data gathering techniques. See *Cliff*, 363 F.3d at 1127 (holding that the mere possibility of preemption is not compelling when its possible to comply with both the HEA and State law).

¹² The FAC details how the ABA's Section on Legal Education and Accreditation to the Bar has been "captured" by law schools and therefore is unlikely to act on Plaintiff's written complaints. See FAC ¶¶ 88-98. Specifically, the National Advisory Committee on Institutional Quality and

it, Plaintiffs themselves would obtain no relief because, as graduates of Cooley, they have already obtained degrees and the Code of Federal Regulations allows only current students of closed institutions to petition the Secretary of Education to discharge Federal student loans by reason of a school's closure.¹³ See 20 U.S.C. § 1087 (Secretary of Education has exclusive authority to discharge student loans); 34 C.F.R. § 682.402(d) (“Secretary . . . discharges the borrower’s obligation with respect to the loan . . . if the borrower . . . could not complete the program of study for which the loan was intended because the school at which the borrower (or student) was enrolled, closed”). Plaintiffs have already obtained their degrees –at a deceptively inflated price – making them ineligible for loan discharge.

In sum, but for this action, the Plaintiffs have no remedy and no ability to obtain relief for the substantial debt they have incurred due to Cooley misleading and deceptive job placement data.

D. None of the Plaintiffs’ Claims Are Barred By the Statute of Limitations

Cooley makes a completely frivolous argument that “at least five” of the twelve Plaintiffs’ claims are barred by the MCPA’s and fraud’s six-year statute of limitations period. According to Cooley, misleading and deceptive statements made by Cooley before August 11, 2005 are not legally actionable. In making this argument, Cooley assumes, incorrectly, that the only statements the Plaintiffs alleged to be deceptive and misleading were made *before* Plaintiffs

Integrity, a Federal organization that advises the DOE on accreditation issues, has questioned the ABAs ability to monitor law schools and has accused the ABA of failing to “set a standard for job placement by its member institutions.” *Id.*

¹³ See *Maxwell v. New York Univ.*, 2009 U.S. Dist. LEXIS 45859 (S.D.N.Y. June 1, 2009) (holding that only select administrative remedies are available to students under the HEA because “students, do not have standing to sue a school for breach of its obligation to award and disburse Federal aid in strict compliance with the HEA.”); *Nehorai v. United States Dep’t of Educ. Direct Loan*, 2008 U.S. Dist. LEXIS 30161, 2-3 (E.D.N.Y. Apr. 14, 2008) (discussing the administrative remedies available for the discharge of student loans).

applied to Cooley that, in the case of five of the Plaintiffs, was likely before August 11, 2005. But the FAC clearly states – and the Memorandum of Law acknowledges – that the deceptive and misleading employment placement data was relied on “in deciding to remain enrolled at Cooley.” Def.’s Memo of Law, p. 24-25, FAC ¶ 16-27. *Boyle v. GMC.*, 468 Mich. 226, 230, 661 N.W.2d 557 (2003) (setting the accrual date of a fraud action under Michigan law as the date the fraud occurred). Accordingly, because each of the Plaintiffs were enrolled in Cooley during the six-year period preceding August 11, 2011, and the fraud occurred when they were presented with the misleading employment data, claims related to Cooley’s misleading statements during their enrollment are actionable.

E. Cooley’s Deceptive and Misleading Marketing Materials Are Not Exempt from the Michigan Consumer Protection Act

i. The MCPA Applies to Educational Institutions

Without challenging the FACs’ allegations that its deceptive and misleading marketing materials violated the MCPA, Cooley asserts that it, and all providers of legal education, are exempt from the MCPA. Cooley’s argument should be rejected.

“The [MCPA] was enacted to provide an enlarged remedy for consumers who are mulcted by deceptive business practices.” *Dix v. American Bankers Life Assurance Co.*, 429 Mich. 410, 417-418 (Mich. 1987); *see also Forton v. Laszar*, 239 Mich. App. 711, 715, 609 N.W.2d 850 (2000) (“The MCPA is a remedial statute designed to prohibit unfair practices in trade or commerce and must be liberally construed to achieve its intended goals”). Despite the broad remedial purpose of the MCPA, Cooley asserts that there is a blanket exemption from the MCPA for deceptive practices that occur during the “acquisition or providing of legal education.” Def.’s Memo of Law p. 27. Defendant’s assertion is based on language in the MCPA that its protections only apply to goods or services purchased for “personal, family or

household purposes” and that educational goods and services are somehow not purchased for personal, family or household purposes but, rather, are for a business or commercial purpose. MCL 445.903(1); MCL 445.902(1)(g). In support of this purported exemption for misleading behavior, Cooley cites exactly one unpublished case in which it was a party: *Baptichon v. Thomas M. Cooley Law School*, 2009 WL 5214911 (W.D. Mich. Dec. 28, 2009).¹⁴ Aside from being logically dubious, Cooley’s argument is unsupported by case law.

First, Cooley cites *Baptichon* in support of the purported exemption from the MCPA for legal education providers. However, *Baptichon* is inapposite to this case. *Baptichon* relied heavily on the State Court decision of *Baptichon v. Thomas Cooley Law School*, Ingham County Circuit Court Case No. 03-1784-CZ (annexed to Def.’s Memo of Law as Exhibit F). The State Court *Baptichon* decision was not a motion to dismiss, but a motion for summary judgment *after* discovery during which, apparently, the Plaintiff stated that he “intended to use his law degree in his work and that he wanted to use his law degree to go into his own business.” *Id.* at 10. Plaintiffs in this action each allege that they “did not enroll in Thomas Cooley with the intention of using [his or her] JD for an ongoing business or to start a non-legal business, but rather

¹⁴ Unpublished decisions of the Sixth Circuit, decisions from other circuits (published or otherwise) and all district court decisions (published or, unpublished) are only binding on the parties to those particular cases and not on the Court’s resolution of other disputes. *US v. Flores*, 477 F.3d 431, 433-34 (6th Cir. 2007). Even though non-binding, all of those sources can be used as persuasive authority by the Court. However, the persuasiveness of the case “turns on factors such as whether the persuasive authorities employ logical reasoning; whether they are internally consistent; whether they comport with established canons of construction or provide good reason for departing from such canons.” *Smith v. Astrue*, 639 F. Supp. 2d 836, 842 (W.D. Mich. 2009). The Court should take judicial notice that there is little reasoning or statutory interpretation in portions of the *Baptichon* decision addressing the MCPA; the State court merely found that based on the plaintiff’s disposition testimony, he “intended to use his law degree in his wok” and the Federal court relied on that analysis when dismissing the action. *See* Exhibit F, p. 10. In making that decision, the Court did not discuss whether, under the MCPA, good and services purchased for educational purposes are for “personal, family, or household uses.” Therefore, the use of *Baptichon* as persuasive authority is limited.

intended to use [his or her] JD degree to prospectively better [him or herself] and his personal circumstances through the attainment of full time employment in the legal sector.” FAC ¶¶ 16-27. Therefore, at this stage, Plaintiffs have pleaded that their Cooley degrees were attained for personal betterment and not to advance ongoing employment, and their MCPA claims should be permitted to proceed on that ground alone.

Second, Cooley’s insistence that there is a blanket exemption from the MCPA for violations occurring during the “acquisition or providing of legal education” ignores at least two cases where the MCPA was applied to violations occurring during the acquisition of legal educational products and services. In *Stalker v. MBS Direct, LLC*, 2011 U.S. Dist. LEXIS 20112, (E.D. Mich. Mar. 1, 2011), the Plaintiffs brought MCPA claims against “the largest mail-order textbook business in the United States” alleging that “Defendants employ deceptive sales practices to mislead customers—primarily students and their parents—into paying artificially inflated prices for textbooks.” *Id.* at *2. The court denied defendants’ F.R.C.P. 12(b) motion and found that the MCPA applied. *Id.* There was no discussion of the MCPA’s applicability even though the textbooks were sold and purchased by students – presumably including law students – who were seeking to obtain an education with the understanding that many jobs require educational credentials. It was presupposed, by both parties and the Court, that the MCPA applied.

In *Bobbitt v. Academy of Court Reporting, Inc.*, 07-CV-10742 (E.D. Mich), the Plaintiffs were students at a school that offered “courses of study in court reporting, paralegal, private investigation and legal secretary [skills].” See *Bobbitt v. Academy of Court Reporting, Inc.*, 07-CV-10742 (E.D. Mich), Second Amended Complaint, p. 6, annexed hereto as Exhibit D. In *Bobbitt*, despite the fact that the plaintiffs had clearly enrolled in the “Academy of Court

Reporting, Inc.,” to obtain employment rather than for almost any other purpose, the Court and the parties again presupposed that the MCPA applied. Indeed, the Plaintiffs pleaded that they “sought to seek post-secondary education at the Academy’s Michigan campus for their own personal betterment.” *Id* at 45. In this case, too, the Plaintiffs have each alleged that they “intended to use [his or her] JD degree to prospectively better [him or herself] and his personal circumstances.” FAC ¶¶ 16-27. *Bobbitt* not only survived a motion to dismiss but was subsequently certified as a class action. *See Bobbitt v. Acad. of Court Reporting, Inc.*, 252 F.R.D. 327 (E.D. Mich. 2008).

Third, in urging the Court to reject Plaintiffs’ MCPA claims out of hand and without discovery, Cooley’s ignores all the facts that may effect whether Plaintiffs’ purchased their legal education for “personal, family or household purposes” or for some unlikely business purpose. For example, in *Zine v Chrysler Corp*, 236 Mich. App. 261 (1999), the Plaintiff sued Chrysler alleging deceptive statements were made in a brochure promoting the sale of a truck. The court analyzed the purpose of the purchase and found that the plaintiff purchased a truck for use in his business because the Plaintiff had testified that eighty percent of the miles he put on the truck were attributable to business driving, because the record indicated that he placed a cargo box and his company logo on the truck, and because he took the truck as a business tax deduction. *Id*. In contrast, in *Edwards v. Cape*, 2010 Mich. App. LEXIS 535, 9-10 (Mich. Ct. App. Mar. 18, 2010), the Court found that a trip to Africa that was paid for through the Plaintiffs’ employer for members of plaintiff’s family and church, and which included some charitable work, was not

exempt from the MCPA because the record indicated that the primary purpose of the trip was personal.¹⁵ *Id.*

Finally, Cooley offers no principled reason for excluding educational purchases from the reach of the MCPA. In light of the fact that the MCPA “is a remedial statute and as such, it must be broadly construed,” excluding the purchase of a Cooley degree or any education purchases from the MCPA is unwarranted. *State Farm Mut. Auto. Ins. Co. v. BMW of N. Am., LLC*, 2009 U.S. Dist. LEXIS 69079 (E.D. Mich. Aug. 7, 2009) (citing *Price v. Long Realty Co.*, 199 Mich. App. 461, 502 N.W.2d 337 (Mich. Ct. App. 1993)). Aside from *Baptichon*, *Babbot* and *Stalker*, which do not contain any analysis of the issue, Plaintiff cannot identify a single decision where courts analyzed the MCPA’s application to goods and services acquired for educational purposes. Here, of course, none of the Plaintiffs – like nearly every Cooley student – purchased their law degree for a commercial or business purpose (for example for an ongoing business that required them to obtain a law degree) and each purchased the Cooley degree to prospectively find employment and better their personal financial wellbeing – clearly a “personal” purpose falling within the purview of the broadly construed MCPA. FAC ¶¶16-27; *See Saunter v. Fleetwood Enters.*, 2007 U.S. Dist. LEXIS 33564, 19-21 (E.D. Mich. May 8, 2007) (“Zine demonstrates that the relevant inquiry is how the plaintiff puts the consumer good to use”). Plaintiffs’ MCPA claims should be permitted to proceed.

¹⁵ Courts in Michigan regularly examine the factual record to determine whether a good or service was acquired for “personal, family or household purposes” or is exempt from the MCPA because it was purchased for a business or commercial purpose. *See Slobin v. Henry Ford Health Care*, 469 Mich. 211, 217-218 (Mich. 2003) (holding that a law firm that mishandled medical records was engaged in a business purpose and was exempt from the MCPA); *Coding Pros. v. Hale Co. of Lower Michigan*, 1998 Mich. App. LEXIS 2363, 8-9 (Feb. 27, 1998) (above ground solvent transport and storage system exempt from the MCPA because it “could never be used in a personal or household capacity”); *Catallo v MacDonald & Goren*, 186 Mich App 571, 572-573 (1990) (furnishings purchased by a law firm not exempt from MCPA because they could be used for a personal purpose).

ii. The MCPA's Exemption for Regulated Conduct Does Not Apply

Cooley next makes the bold and unsupported assertion that “the providing of legal education” is a transaction that is specifically authorized “under a law administered by a regulatory board or officer acting under statutory authority of this State or the United States.” Def.’s Memo of Law p. 28; MCL 445.904. The statute places the burden of proving an exemption from the MCPA on the person claiming the exemption. *Id.* As set forth below, Cooley cannot meet this burden.

In support of the claimed exemption, Cooley cites MCL §§450.2123(2)(e) and 600.943. Neither is applicable. MCL § 450.2123 is a provision of the Michigan General Corporations Act (“MGCA”) that makes the MGCA applicable to educational institutions. *Id.* Under Cooley’s logic, no corporation in Michigan can be sued for a MCPA violation because every Michigan chartered corporation, educational or otherwise, is covered by the MGCA. MCL 600.943 is part of the Judiciary Act of 1961 that organizes Michigan’s judiciary. *Id.* That particular provision states that the Board of Bar Examiners has the ability to exclude test takers from a school that “is disqualified or of questionable reputation.” *Id.* There are no regulations in that statute regarding the provision of legal education – the statute is designed to insure attorney ethics by allowing the Board of Bar Examiners to determine who is permitted to sit for the Michigan Bar exam. Clearly, both of Cooley’s purported bases for a MCL § 445.904 exemption come nowhere close to the detailed statutory schemes that permit for an exemption. Statutes that apply the exemption are far more comprehensive and pointed than § 450.2123 and § 600.943. ¹⁶

¹⁶ The cases cited by Cooley in support of its purported exemption are inapposite because they involve a level of regulation not present in the two statutes cited by Cooley. For example, The Credit Insurance Act, MCL § 550.601 et seq, governing the sale of life insurance in Michigan, and contains numerous provisions regulating that industry. *Smith v. Globe Life Ins.* 460 Mich. 446 (1999). The Michigan Occupational Code, MCL 339.101 et seq. governs the

See Liss v. Lewiston-Richards, 478 Mich. 203, 210 (2007) (applying the MCL § 450.2123 exemption because: (1) residential home builders are licensed under the Michigan Occupation Code; (2) residential home builders are regulated by the Residential Builders' Maintenance and Alteration Contractors' Board; (3) residential home builders are governed by a set of administrative rules regulating the licensing procedure; and (4) the transaction at issue, contracting to build a residential home, is specifically authorized by law). Cooley does not argue that the HEA governs the provision of legal education. Rather, as discussed above, the HEA is a funding statute that protects the Federal government's student assistance funding from misuse.

In the absence of an actual statute on point, Cooley's argument is that the ABA promulgates regulations regarding the provision of legal education. Even though the ABA has certain minimal guidelines that Cooley must comply with when reporting graduates' employment status, the ABA is a "private voluntary professional association" and, therefore, under the express statutory language of MCL 445.904(1)(a), the ABA regulations (which are not "law") do not serve to exempt Cooley from the MCPA. *See Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 443 (U.S. 1989); *see also Bobby v. Van Hook*, 130 S. Ct. 13, 20 (U.S. 2009) (Alito, J. concurring) (noting that "The ABA is a venerable organization with a

construction of homes and the licensing and regulation of home builders. *Liss v. Lewiston Richards, Inc.*, 478 Mich. 203 (2007). The Michigan Saving Banks Act, MCL 487.3101 et seq, is a comprehensive statute governing banking in the State of Michigan, including regulations governing residential mortgages. *Newton v. Bank West*, 262 Mich. App. 434, (2004).; The Michigan Gaming Control and Revenue Act, MCL 432.201 et seq., is a detailed statutory scheme regulating gambling in the *State of Michigan*. *Kraft v. Detroit Entertainment, L.L.C.*, 261 Mich. App. 534 (2004). *See also Baumkel v. Scotts Miracle-Gro Co.*, 2009 U.S. Dist. LEXIS 90463, 25-26 (E.D. Mich. Sept. 28, 2009) (exemption applies where "the provision of lawn care services is subject to regulation by not only Federal law under the FIFRA, but also under Michigan law pursuant to the Michigan Natural Resources and Environmental Protection Act . . . that statute regulates the distribution, sale, use and application of pesticides in the State of Michigan. Part 83 requires a commercial applicator of pesticides to obtain a certification and license from the MDOA in order to lawfully apply pesticides").

history of service to the bar, but it is, after all, a private group with limited membership” and “I see no reason why the ABA Guidelines should be given a privileged position”). Moreover, Cooley’s compliance with the MCPA is not inconsistent with the ABA regulations, as Cooley can comply with the minimal ABA reporting requirements while, at the same time, reporting non-misleading and deceptive employment data.¹⁷ In any event, as a policy matter, allowing a trade group to create its own rules and then allowing adherence to those rules to exempt its members from State consumer protection statutes guts those statutes. Cooley’s argument that they are exempt from the MCPA should be rejected.¹⁸

F. Plaintiffs Have Plead Every Element of A Fraud Claim With the Required Particularity

Cooley next asserts that the Plaintiffs cannot state a claim for common law fraud under Michigan law because of certain pleading deficiencies. However, although Defendants’ motion to dismiss alludes to pleading deficiencies, a plain reading of the motion, combined with the FAC, demonstrates that the issues by Cooley are one of proof, not of pleading.

¹⁷ Cooley already complies with NALP’s data collection requirements which are different than the ABA’s requirements.

¹⁸ The ABA’s status as a private membership organization is important because unlike the a “regulatory board or officer acting under statutory authority of this State or the United States” (MCL 445.904(1)(a)), there is no mechanism by which Plaintiffs can democratically challenge the ABA’s minimal regulations regarding the reporting of employment data. The members of the ABA’s Section on Legal Education are unelected and the ABA can choose how, and who, appoints them. Indeed, even members of the United States Senate who have sought information regarding law school employment data have been stymied and stonewalled by the ABA. *See* FAC ¶ 80 (explaining the efforts of Senator Barbra Boxer of California to have the ABA revise its guidelines, and her disappointment that, in response, the ABA “resorted to half measures”); FAC ¶ 81 (explaining the efforts of Senator Charles Grassley of Iowa to do the same, and his frustration with the ABA); FAC Exhs. 12 through 13 (letters written from United States Senators to the ABA regarding these issues). If there was actually a statutory scheme governing law school employment reporting in place, and the ABA was a regulatory body as opposed to a trade association, the United States Senate would simply enact legislation addressing the issue rather than write letters that appear to be all but ignored.

Under Michigan law, a fraud claim requires the following elements, each of which has been plead: (1) that defendant made a material representation (the job placement numbers reported by Cooley are detailed in the Amended Comp. ¶¶ 39-46, 74-78); (2) that the material misrepresentation was false (the reported job placement numbers grossly inflate the number of Cooley graduates who obtain employment for which a law degree is required or preferred, (FAC ¶¶ 50 – 63)); (3) that when the statement was made, the maker knew that it was false, or made it recklessly, without any knowledge of its truth (Cooley increased its enrolment by 137 percent while maintaining constant placement rates of between 78 percent and 82 percent even in light of a massive contraction in the market for legal services and a national over supply of lawyers (the qualification of 42,000 new lawyers each year for only 26,000 jobs in the legal sector and the loss of 15,000 jobs in the legal sector and Cooley had access to the actual data through its participation in NALP’s annual employment survey) (FAC ¶¶ 5, 33-34, 64-73)); (4) that it was made it with the intention that it should be acted upon by plaintiff (FAC ¶¶ 30-32, 35, 72-73); (5) that plaintiff acted in reliance upon it (each Plaintiff alleges they relied on the employment information reported by Cooley in deciding to enroll and remain enrolled in Cooley (FAC ¶¶ 16-27)); and (6) that he thereby suffered injury (each Plaintiff alleges that they paid falsely inflated tuition due to the representations (FAC ¶¶ 16-27, 108, 116, 124)). *Hi-Way Motor Co. v. Int’l Harvester Co.*, 398 Mich. 330, 336 (1976) (stating the elements for common law fraud in Michigan).

Cooley cannot deny that the elements of common law fraud are stated and, instead, alleges that they are not stated with the requisite particularity as required by F.R.C.P. 9(b). What Cooley is really doing, however, is nitpicking at issues that will be more fully developed in

future stages of this litigation. Cooley is on notice of the allegations leveled by twelve of its graduates against it, and Cooley can respond with its own proofs.

Cooley's approach has consistently been rejected by the Sixth Circuit. *See Coffey v. Foamex, LP*, 2 F.3d 157, 161 (6th Cir. 1993) (holding that F.R.C.P. 9(b) must be read liberally); *Michaels Bldg. Co. v. Ameritrust Co., N.A.*, 848 F.2d 674, 679 (6th Cir. 1988) (holding that a court should not be "too exacting" or "demand clairvoyance" from a pleading when in determining whether the requirements of F.R.C.P. 9(b) have been met). Instead, the Sixth Circuit has held that if the defendant has fair notice of the charges against him, F.R.C.P. 9(b) is satisfied. *Id.* at 680.¹⁹

i. The FAC Alleges Reliance With Particularity

On page 31 of Def's Memo of Law, Cooley asserts that, even though the FAC pleads otherwise, Plaintiffs did not in fact rely on Cooley misleading and deceptive employment statistics. Def's Memo of Law p. 31. Cooley's argument is nonsense.

Each Plaintiff specifically pleads that "in applying and deciding to remain enrolled at Thomas Cooley [Plaintiff] relied on salary data and employment information posted on Cooley's website, marketing matter and/or disseminated to third-party data clearing houses and publications, such as the *ABA and US News* and specifically relied on Cooley's representations

¹⁹ Defendants do not appear to challenge the intent element of Plaintiffs fraud claim, stated in ¶¶ 5, 33-34, 64-73 of the FAC. The Complaint alleges that Cooley has expanded its enrollment by 137 percent without affecting its employment rates and that Cooley administrators, in developing their "strategic plan" believed that employing the increased class would be a problem. Nevertheless, Cooley's reported post-graduate employment rates remained constant. In any event, as a legal matter, Defendants attempt to challenge the intent element would fail. Michigan recognizes "constructive fraud" which does not require purposeful intent. *General Elec. Credit Corp. v. Wolverine Ins. Co.*, 420 Mich. 176, 188-90, (1984); *Feldkamp v. Farm Bureau Ins. Co.*, No. 272855, 2009 Mich. App. LEXIS 89 (Jan. 15, 2009) ("the distinction between actual fraud and constructive fraud is that actual fraud is an intentional misrepresentation that a party makes to induce detrimental reliance, while constructive fraud is a misrepresentation that causes the same effect, but without a purposeful design to defraud.").

that, depending on the year, approximately 80 percent of its graduates were employed within nine months graduation and earned a median salary of roughly \$50,000.” FAC ¶¶ 16-27 (stating the same for each Plaintiff). In addition, each Plaintiff states the exact reports that were available when they decided to continue to enroll or were available when they were deciding to initially enroll. *Id.* For example, Plaintiff John MacDonald alleges that he was deciding to enroll at Cooley at about the time that Cooley deceptively reported that 82 percent of its 2005 graduates secured employment within nine months of graduation, and that he was deciding whether to remain enrolled in Cooley at about the time that Cooley misleadingly reported that 82 percent of its 2006 graduates secured employment within nine months of graduation. *Id.* ¶ 16. The FAC also alleges that Plaintiff MacDonald relied on those misleading reports.

What Defendants really appear to be challenging is whether Plaintiff MacDonald actually relied on these numbers, or if he was merely aware of them, or if he completely ignored them – clearly factual issues that will be further developed at a later phase of the litigation. Importantly, Cooley does not deny that it made the statements or that the statements were posted as Plaintiffs claim they were. Rather, Cooley postulates that Plaintiffs’ fraud claims should be dismissed because Plaintiffs do not “narrow those alleged statements down to a month or year” or state whether they saw the statement online, in print marketing materials or in third party clearing houses. Def.’s Memo of Law p. 32. In fact, Plaintiffs do narrow the alleged fraudulent statements to the exact year when they were posted and reference every employment report Defendants posted on their website between 2005 and 2011 that were relied on by Plaintiffs. *Id.* ¶¶ 39-43, fn. 4-7. Moreover, Cooley reported the same deceptive and misleading employment data to every outlet annually, so whether or not, for example, Plaintiff MacDonald became aware of the deceptive employment data regarding the graduating class of 2005 in June of 2007 through

its publication in *U.S. News and World Report* or in September of 2007 because it was posted on Cooley's website, or both, is immaterial. The statements were identical and Plaintiff MacDonald alleges he relied on them.

Finally, even though the FAC is specific about the years Plaintiffs relied on the misleading employment data, and what misleading data was available that year, that level of specificity is not required to satisfy F.R.C.P. 9. See *State Farm Mut. Auto. Ins. Co. v. Hawkins*, 2008 U.S. Dist. LEXIS 66873, 7-8 (E.D. Mich. Sept. 2, 2008) (Complaint satisfied F.R.C.P. 9 where "Plaintiff describes the time, place, and manner of the fraud alleged"); *Kmart Corp. v. Arena, Inc.*, 2006 U.S. Dist. LEXIS 75074, 9-10 (E.D. Mich. Sept. 29, 2006) (Fraud stated with the required particularity where plaintiff "describes the time frame of the fraud, occurring between February 2002 and June 2004"); *Dow Chem. Co. v. GE Co.*, 2005 U.S. Dist. LEXIS 40875 (E.D. Mich. Sept. 27, 2005) (Fraud stated and F.R.C.P. 9 satisfied where "Although GE has not specified specific months, the allegations are specific enough to put Dow on notice of its alleged wrongful conduct. . . . describing specific documents, and providing a general time frame during which the events allegedly occurred."); *Kukuk v. Fredal*, 2001 U.S. Dist. LEXIS 16419 (E.D. Mich. Aug. 1, 2001) (finding that a complaint met F.R.C.P. 9's requirement where "Plaintiffs' Complaint alleges that from October 7, 1996 through January 10, 1997, meetings and investments occurred"); see also *Starcevic v. Atofina Chems., Inc.*, 2005 U.S. Dist. LEXIS 32903, 4-5 (E.D. Mich. Sept. 12, 2005); *Tramontana v. May*, 2004 U.S. Dist. LEXIS 4557, 20-21 (E.D. Mich. Mar. 16, 2004).

Cooley next alleges that to the extent that Plaintiffs relied upon the deceptive and misleading employment data, that reliance was unreasonable because Plaintiffs should have known that far fewer than the reported amount of Cooley graduates actually obtained *full-time*,

permanent employment that required a Cooley degree. Def.'s Memorandum of Law, p. 39. In other words, Cooley has the audacity to argue that its own graduates unreasonably relied on Cooley's marketing materials because they should have realized that Cooley's reported employment statistics were inaccurate and that most Cooley graduates do not obtain full-time, permanent employment for which a JD degree is required or preferred. Aside from making a cynical and unprincipled argument, Cooley misstates the law.

Reliance is unreasonable only where "the plaintiffs were either presented with the information and chose to ignore it or had some other indication that further inquiry was needed." *Mable Cleary Trust v. Edward-Marlah Muzyl Trust*, 262 Mich. App. 485, 502, (2004)). Here, Plaintiffs allege that Cooley hid the correct information. FAC ¶¶ 45-46, 51 ("Thomas Cooley, by virtue of its participation in NALP's annual employment survey, clearly has the means to, and actually does, distinguish between various degrees of employment, and breaks down the exact percentage of its recent graduates who have secured either part-time or full time employment or whether a position requires a JD degree. Yet, rather than including these numbers on its website and marketing materials and making this information available to the public at large, the school continues to present highly misleading data to prospective and current students. . ."); *see also Stout v. Withrow*, 2008 Mich. App. LEXIS 335, (Feb. 14, 2008) (reliance was reasonable where Defendant never provided the correct information to the plaintiff and covered it up by making misleading representations).

Cooley's reasonable reliance argument is also a bit of an occultation: Even if this was the proper motion to determine whether Plaintiffs had access to the correct information, Cooley does not allege that upon being shown the correct information, Plaintiffs chose to ignore it or that there was some indication that Plaintiffs should have inquired further regarding Cooley's

employment data. *See Papin v. Demski*, 383 Mich. 561, 570, (1970) (the party alleging unreasonable reliance has the burden of proof). In sum, there was no way for Plaintiffs to know that Cooley's employment reports were a fraud and Cooley does not alleged otherwise.

Rather, Cooley contends that that because *Plaintiffs' counsels'* analysis demonstrates that Cooley's employment reports are deceptive and misleading, Plaintiffs should have been able to do the same. *See* Def.'s Memo of Law, p. 39 - 40. But just because the analysis can be done (FAC ¶¶ 53-67) does not mean that Plaintiffs had any reason to do the analysis, or any indication that the analysis should be done. Plaintiffs simply believed Cooley's representations and they had no obligation, nor incentive, to search for the truth. As such, their reliance was reasonable. *Franklin Bank v. Tindall*, 2008 U.S. Dist. LEXIS 86771 (E.D. Mich. Oct. 27, 2008) (noting that the availability of publicly filed documents does not make reliance unreasonable because "Plaintiff did not have an affirmative duty to discover such facts even though they may have been available in public records" and further noting that "for more than a century, Michigan courts have held that the defrauded party owed no duty to the party who defrauded him to use due diligence to discover the fraud"); *Stout*, 2008 Mich. App. LEXIS 335 (reliance reasonable where "none of the written information plaintiff received prior to purchasing the property indicated that there was a problem"); *see also Waun v. Universal Coin Laundry Machine, LLC*, No. 267954, 2006 Mich. App. LEXIS 2821 (Sept. 26, 2006) ("The fact that plaintiff might have ascertained the situation from others is no defense if plaintiff had a right to rely on defendant's representations").

Cooley's reliance argument must fail for one final reason: It would have been simple enough for Cooley to disclaim its reported employment rate and State that "the majority of our graduates are employed in jobs that do not require a Cooley degree or is temporary or part time."

But Cooley chose not to, instead engendering reasonable reliance among its students and alumni that a Cooley degree was worth the high price of tuition because it provided its graduates job opportunities that were otherwise unavailable. *See* FAC ¶¶ 68-70 (noting Cooley rising tuition costs and administration salaries). Cooley knew, or had reason to know, that was untrue. *See* FAC ¶¶ 5, 33-34. Cooley profited handsomely from its misinformation. For Cooley to now blame Plaintiffs for failing to realize the fraud and deception before being saddled with tens of thousands of dollars in debt is a perfidious response to this lawsuit.

ii. The FAC Alleges False Statements²⁰

Cooley next falls back on its canard that because the employment reports may be literally true, they cannot be misleading. Def.'s Memo of Law p. 34 – 36. Cooley's proposition is unsupported in law and is contrary to the clearly pleaded allegations in the FAC.

Cooley is the largest law school in America. The employment data it reported for 2004 graduates (available to the public between 2005 and 2006), 2005 graduates (available to the public between 2006 and 2007), 2006 graduates (available to the public between 2007 and 2009), 2009 graduates (available to the public in 2010), and 2010 graduates (available to the public in 2011) states the "percentage of graduates employed." Next to that heading, Cooley lists the percentile of graduates of each class who are supposedly employed: 79 percent of 2004 graduates are reported as employed; 82 percent of 2005 graduates are reported as employed; 82 percent of 2006 graduates are reported as employed; 78 percent of 2009 graduates are reported as employed; and 76 percent of 2010 graduates are reported as employed. *See* FAC Exhs 2-6, ¶¶ 39-44. For

²⁰ Defendant's Memorandum of Law only addresses the deceptive and misleading statements in the employment reports posted on Cooley's webpage. However, the FAC alleges that the same data from those reports was re-reported to third parties, and republished in both digital and print marketing materials. FAC ¶¶ 4, 16-27, 47. Those statements, which were identical to those on the website for any given year, and their context, are also misleading. In the discovery phase of litigation, Plaintiffs expect to request these documents and may amend the Complaint at that time.

each reported year, beneath the percentile reported as employed is a list of “Firms Employing Cooley Grads,” all of which are known law firms, followed by public interest law firms employing Cooley graduates, as well as schools, government agencies and branches of the judiciary employing Cooley grads. *Id.* The overall impression left by Cooley’s employment reports is that Cooley graduates, in significant numbers, find full time employment for which a Cooley degree is required or preferred. *Id.* There is no disclaimer that the employment reported does not require a law degree or is part time or temporary, although Cooley now claims it was clear what was being reported. *Id.* Any reasonable consumer was lead to believe that graduates of Cooley, America’s largest law school, are employed full time and permanently as lawyers within nine months of graduation at the rates reported.

The FAC alleges that the facts are very different from Cooley’s rosy reports. The facts supporting the allegation that Cooley’s reported employment rates are fraudulent are outlined in painstaking detail in the FAC, including: FAC ¶ 45, alleging that the vast majority of Cooley’s graduates obtain employment that does not require a law degree or that are either temporary or part time; FAC ¶¶ 33-34, alleging that when Cooley was dramatically expanding the size of its student body, school administrators openly fretted that “[e]mployment remains a major challenge;” FAC ¶¶ 53 and 64, alleging that between 2004 and 2009 the total number of Cooley graduates skyrocketed by an astounding 137 percent, from 404 to 958 graduates, while the legal services industry shed 15,000 jobs and experienced a massive surplus of lawyers, yet Cooley’s alleged placement rate barely budged from 82 to 78 percent; FAC ¶ 46 which alleges that the graduates who answer the survey are self selecting; FAC ¶ 54, which alleges that the prevalence of solo practitioners indicates that many Cooley graduates have no other employment options but to try to start their own law firm; FAC ¶55 which alleges that only 62.9 percent of law graduates

nationally obtain a job for which a law degree is required or preferred, and many of those jobs are temporary or part time; FAC ¶¶57-58, which alleges that Cooley’s employment rate is most likely below the national average because of Cooley’s fourth tier ranking in *US News and World Report* and poor national reputation; FAC ¶¶ 59-60, which allege that Cooley’s employment data is unaudited and unverified, and is tabulated, calculated and tallied in a slipshod manner ; ¶¶ 62-63, which allege that Cooley may hire its own graduates to improve its employment rate; ¶¶ 64-67, which allege that Cooley’s placement rates have maintained constant throughout the “Great Recession” while the legal job market has contracted substantially.²¹

Even if it is literally true that Cooley graduates find “employment” at the rates stated in Cooley’s employment reports (no matter how attenuated from the practice of law) – a contention Plaintiffs bitterly dispute (FAC ¶60) – the law recognizes numerous circumstances in which an incomplete representations can be false even though its “literally” true. *See SEC v. Conaway*, 698 F. Supp. 2d 771, 830 (E.D. Mich. 2010) (“Yet, whatever the language used to explain why a statement, that may be literally true, is misleading, the concept of implied representation is well established [] in common law fraud”) (*citing* RESTATEMENT (SECOND) OF TORTS § 529); *Williams v. Benson*, 3 Mich.App. 9, 18-19 (1966) (“A fraud arising from the suppression of the truth is as prejudicial as that which springs from the assertion of a falsehood, and courts have not hesitated to sustain recoveries where the truth has been suppressed with the intent to defraud”) (quoting *Tompkins v. Hollister*, 60 Mich. 470,483, 27 N.W. 651 (1886)). For example, under the Lanham Act, 15 USC § 1125, statements are that are literally true are actionable as false advertising if they are “true yet misleading or confusing.” *American Council of Certified*

²¹ The fact that Plaintiffs here allege that the employment statistics were false and misleading distinguishes this case from *Hord v. Environmental Reserch Inst.*, 463 Mich 399 (2000) where the information was true, but was true for a different year than for which the plaintiff assumed it was true. Defendants’ reliance on *Hord* is misplaced.

Podiatric Physicians & Surgeons v. American Bd. of Podiatric Surgery, Inc., 185 F.3d 606, 614 (6th Cir. 1999). In fact, the HEA itself recognizes that additional disclosures are often required to make employment data accurate. *See* 20 USC § 1094(a)(8) (requiring disclosure of “any other information necessary to substantiate the truthfulness of the advertisement” of employment data).

iii. Cooley Had a Duty to Provide Truthful Information and Plaintiffs Have Plead Silent Fraud

Defendants’ memorandum of law next claims that Plaintiffs have failed to plead “silent fraud” because Cooley had no duty to its students to speak truthfully about their post-graduate employment prospects. Def.’s Memo of Law pp. 37-38. Again, Cooley is incorrect on the law.

To allege an omission or “silent fraud,” a plaintiff must show that “the defendant intended to induce him to rely on its nondisclosure and that defendant had an affirmative duty to disclose.” *Clement-Rowe v. Michigan Health Care*, 212 Mich. App. 503 (1995) (question of fact regarding when plaintiff became aware of the misleading information precluded summary judgment on plaintiff’s silent fraud claim). In *Clement-Rowe*, the issue was not whether or not the employee specifically requested the information but whether, in light of the *importance of the information*, it should have been provided.²² *See Clement Rowe*, 212 Mich. App. At 508 (“Today’s employment market is both tenuous and difficult. Nearly all employment is at-will. The economic well-being and financial stability of a potential employer is an important factor in accepting a job offer”); *See also Ramirez v. IBM*, 2011 U.S. Dist. LEXIS 127244 (E.D. Mich. Nov. 3, 2011).

²² In *Clement-Rowe*, the employee asked whether the money had been allocated for the position, not whether the Defendant was in good financial health. Again, in *Ramirez*, the issue was not whether the Plaintiff specifically asked or not, but the importance of the information. *See Ramirez*, 2011 U.S. Dist. LEXIS 127244 (“Plaintiff here alleges that his employer had a duty to disclose its adverse financial conditions at the time of his hire, that Defendant IBM failed to do so, and that Defendant intended to induce him to rely on its nondisclosures and thus convince him to forego other employment prospects and accept employment with Defendant IBM”).

Plaintiffs do not allege that they specifically requested additional information regarding Cooley's employment reports beyond what was publicly available but, as in *Clement-Rowe* and *Ramirez*, that is beside the point. The value of a Cooley degree is, in part, dependant on the ability of it holder obtain employment for which a Cooley degree is required or preferred. The ability to personally better themselves by obtaining gainful legal employment after graduation is an important factor in Plaintiffs' decision to enroll and remain enrolled at Cooley. As such, whether Plaintiffs asked for additional information or not, Cooley has a duty to disclose truthful information regarding graduates' employment prospects. *See Kahn v. Ran*, 2009 U.S. Dist. LEXIS 35474, 32-33 (E.D. Mich. Apr. 27, 2009) (Michigan law claim of silent fraud plead in where "those making statements regarding a securities offering must disclose all material information necessary so that the statements are not misleading"); *Basirico v. State Farm Mut. Auto. Ins. Co.*, 2006 U.S. Dist. LEXIS 87761, 20-22 (E.D. Mich. Dec. 5, 2006) (actionable silent fraud claim where a defendant "suppressed information under circumstances that generated a non-contractual duty to disclose").

Finally, Cooley's position that it had no fiduciary duty to Plaintiffs to disclose accurate information about post-graduate employment represents a complete abdication of its responsibilities as an educator and a fiduciary of the Federal government's student financial assistance funds. Cooley has a fiduciary duty to the Federal government to ensure that Federal monies are properly spent.²³ *See* 34 C.F.R. §668.82; *Maxwell*, 2009 U.S. Dist. LEXIS 51253, 21-

²³ The FAC alleges that Cooley provided information to Plaintiffs for the purpose of securing Federally backed financial aid. FAC ¶¶ 117, 125. Moreover, although the fiduciary duty runs between Cooley and the government does not necessary extend to students, courts have found that a fiduciary relationship exists between students and the educational institutions they attend. *See Blank v. Board of Higher Education of the City of New York*, 273 N.Y.S2d 796 (N.Y. Sup. Ct. 1966) (holding that administrators and faculty members who advised a student regarding graduation requirements has a fiduciary relationship with the student and, through their actions,

22 (“Under the HEA, an educational institution operates as a fiduciary to the DOE . . . but courts have held that the fiduciary duty only runs between the school and the government”); *Moy v. Adelphi Inst.*, 866 F. Supp. 696, 708 (E.D.N.Y. 1994).

In sum, Cooley is alleged to have misled its students into taking tens of thousands of dollars of debt, much of it backed by the Federal government, to purchase a degree that is worth substantially less than Cooley purports. Cooley had a duty – fiduciary and otherwise – to honestly advise its students about the actual value of their degree so that students can make an educated decision regarding whether they will be able to pay their substantial debt.

iv. The FAC Alleges Injury and Causation

Cooley feigns ignorance at the damages claimed by Plaintiffs. Def.’s Memo of Law, p. 40-42. But the FAC is abundantly clear as to what Plaintiffs are requesting: the difference between the price they paid for their Cooley degree based on Cooley’s misleading and deceptive employment statistics and the actual value of the Cooley, which is substantially less. FAC ¶¶ 16-27, 116, 113 (“Defendants’ acts and practices. . . further proximately caused Plaintiff and other members of the Class to pay inflated tuition”); ¶ 121 (same); *Thompson v. Paasche*, 950 F.2d 306, 314 (6th Cir. 1991) (“Under Michigan law, a fraud plaintiff is entitled to the benefit of the bargain – in other words, what the purchaser would have gotten had the representations been true”); *Mayhall v A H Pond Co, Inc*, 129 Mich App 178, 185 (1983) (damages for fraud and under the MCPA are “the difference between the actual value of the property when the contract was made and the value that it would have possessed if the representations had been true”).

Cooley is simply incorrect when it states “Plaintiffs’ do not allege that any statement by Cooley proximate caused their alleged injury.” Def.’s Memo of Law p. 41. In fact, Plaintiffs’

caused the school to breach its duty to the student); *Healry v. Larsoon*, 323 N.Y.S.2d 625 (N.Y. Sup. Ct. 1971) (same).

allege that Cooley's deceptive and misleading job placement data caused them to enroll in Cooley, continue to enroll in Cooley, and pay inflated tuition. *See* FAC ¶ 8 ("by playing fast and loose with its employment data, Thomas Cooley creates an impression of bountiful employment opportunity that in reality does not exist, and bamboozles Plaintiff into taking substantial debt to finance their Cooley education"); ¶ 9; ¶ 12 ("Plaintiffs. . . have taken on tens of thousands of dollars in non-dischargeable debt based in Thomas Cooley's deceptive and misleading statements"); ¶¶ 16-27 (each Plaintiff alleges "had [Plaintiff] been aware that Thomas Cooley's reported placement rates [were not what Cooley reported, Plaintiff] would have elected to either pay less to Cooley or perhaps not attend the school at all"); ¶ 71 ("Thomas Cooley misleads and defrauds its students while saddling them with thousands of dollars in crushing, non-dischargeable debt.")

In any event, proximate cause is an issue of fact and, for pleading purposes, and the Plaintiffs have undeniably stated that Cooley's misleading statements were the proximate cause of Plaintiff's economic injury. *See Dominguez v. Corr. Med. Servs.*, 555 F.3d 543 (6th Cir. 2009) (denying summary judgment where there was an issue of fact regarding proximate cause in a tort case); *Kutz v. Lansing Community College*, 1999 U.S. Dist. LEXIS 6604 (W.D. Mich. Apr. 28, 1999) (issues of fact regarding proximate cause precluded summary judgment).

G. The FAC States a Claim for Negligent Misrepresentation

For the same reasons that Plaintiffs have stated a cause of action for fraud, Plaintiffs have also stated a cause of action for Negligent Misrepresentation under Michigan law. To establish a claim for negligent misrepresentation, the Plaintiff must plead: (1) justifiable and detrimental reliance on (2) information provided without reasonable care (3) by one who owed a duty of care. *See German Free State of Bavaria v. Toyobo Co.*, 480 F. Supp. 2d 958, 964 (W.D. Mich.

2007). Although the Sixth Circuit has yet to rule, other circuits have concluded that F.R.C.P. 9(b) does not apply to claims of negligent misrepresentation. *Yaldu v. Bank of Am. Corp.*, 700 F. Supp. 2d 832, 845 (E.D. Mich. 2010) (listing causes where F.R.C.P. 9(b) was not applied to negligent misrepresentation cases).

As noted above, Plaintiffs have pleaded every element of their fraud claims with the requisite particularity. Plaintiffs have plead that they relied on the deceptive and misleading job placement data during the time in which they were deciding whether to enroll and/or remain enrolled in Cooley (FAC ¶¶16 - 26); that the data was incorrect (FAC ¶¶ 50 - 63), and that Cooley owed them a duty to provide the correct information (FAC ¶¶ 117, 125).

H. The FAC Does Not Violate F.R.C.P. 8

Front and center of Cooley's excessively long brief is an argument that despite the strength of Plaintiffs' claims under the MCPA, as well as for fraud and negligent misrepresentation, the FAC should nevertheless be dismissed because it allegedly violates F.R.C.P. 8.

Plaintiffs' counsel consented to Cooley's application to file an excessively long brief because of the complexity of the allegations made in the FAC and the overall context of Cooley's misleading and deceptive behavior – exactly the reason why the FAC spans 62 pages. DKT 28. But instead of addressing the complexity of this action, Cooley used three pages of its brief to level bombastic and inaccurate statements about opposing counsel and the FAC. Defendants' actions reek of animus toward Plaintiffs' counsel that is uncalled for and unbecoming of a member of the legal academy.

Even on its merits, the Court should reject Cooley's F.C.R.P. 8 argument. First, Cooley fails to identify a single allegation that is extraneous, argumentative or conculsory. Cooley

merely points out that the FAC is long, and that 26 of 126 paragraphs of the FAC contextualize the dispute between Plaintiffs and it, rather than directly mention Cooley. But there is no prohibition to contextualizing a complaint, especially where the Court may not be aware of the current controversies enveloping American legal education. Here, the nature of the dispute required a detailed account of how Cooley's actions damaged Plaintiffs in light of the massive surplus of lawyers and why the Plaintiffs cannot seek relief elsewhere because of the conflicted nature of the ABA. 5 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1217 at 240-41 (3d ed. 2004) (“What constitutes a short and plain statement must be determined in each case on the basis of the nature of the action, the relief sought, and the respective positions of the parties in terms of the availability of information and a number of other pragmatic matters”); *See City of Pontiac Gen. Empl. Ret. Sys. v. Stryker Corp.*, 2011 U.S. Dist. LEXIS 72362, 23-28 (W.D. Mich. July 6, 2011) (Quist, J.) (“Although long, however, the FAC is neither confusing nor incomprehensible and generally fulfills the purposes of Rule 8 by giving Defendants fair notice of Plaintiffs' claims”).

Cooley has been placed on notice of the claims against it, and all the allegations have been pleaded with particularity. As such, Plaintiffs' claims should be permitted to move forward into discovery and this action resolved on its merits. Cooley's Rule 8 argument is without merit.

IV. CONCLUSION

Plaintiffs' FAC states causes of action against Cooley for violations of the MCPA, common law fraud, and common law negligent misrepresentation. Cooley's attempt to dismiss this action at the pleading stage must fail. Each of the Plaintiffs' claims is legally viable because they fall within the limitation period, there is no preemption of Plaintiffs' claims, and the ABA and NALP are not necessary parties.

Dated: December 22, 2011

By: /s/ Jesse Strauss
Jesse Strauss (NY 4182002)
Strauss Law PLLC
305 Broadway, 9th Floor
New York, NY 10007
jesse@strausslawpllc.com
Phone (212) 822-1496
Facsimile (212) 822-1407

Steven Hyder (P69875)
The Hyder Law Firm, PC
PO Box 2243
Monroe, MI 48161
hyders@hyderlawfirm.com
Phone (734) 757-4586
Michigan Counsel

CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that on December 22, 2011, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system that will automatically send e-mail notification of such filing to the attorneys of record.

By /s/ Jesse Strauss

Jesse Strauss (admitted NY – 4182002)

Strauss Law, PLLC

305 Broadway, 9th Fl.

New York, NY 10007

Phone (212) 822-1496

Facsimile (212) 822-1437

Dated: December 22, 2011