CASE NO.: 18-14490
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

AMANDA LAWSON-ROSS and TRISTIAN BYRNE,

Appellants,

v.

GREAT LAKES HIGHER EDUCATION CORP.,

Appellee.

On Appeal from the United States District Court
for the Northern District of Florida
Gainesville Division
Case No. 1:17-cv-00253-MW-GRJ

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Amanda Lawson-Ross and Tristian Byrne v. Great Lakes Higher Education Corp.
Appeal No. 18-14490

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to 11th Cir. Rule 26.1-1, Appellants' hereby certify that the following is a list of all persons and entities that have an interest in the outcome of this case:

1. Allison, Ryan, Appellate counsel to Amicus Curiae American Federal of Teachers
2. American Federation of Teachers, Amicus Curiae
3. Ascendium Education Group, LLC
4. Breslow, Brandon, District Court and appellate counsel to Appellants Amanda Lawson-Ross and Tristian Byrne
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10. Gay, Faith, Appellate counsel to Amicus Curiae American Federal of Teachers
11. Ginzburg, Maria, Appellate counsel to Amicus Curiae American Federal of Teachers
12. Great Lakes Educational Loan Services, Inc., corporate subsidiary of Great Lakes Higher Education Corp.
13. Great Lakes Higher Education Corp.
14. Griffin, Mark, Appellate counsel to Amicus Curiae Veterans Education Success, The Retired Enlisted Association, and the Ivy League Veterans Council
15. Gross, Merrick, District Court counsel to Great Lakes Higher Education Corp.
16. The Ivy League Veterans Council, Amicus Curiae
17. Jones, The Honorable Gary J., United States Magistrate Judge
18. Konavoa, Yelena, Appellate counsel to Amicus Curiae American Federal of Teachers
19. Larkin, Margaret, Appellate counsel to Amicus Curiae American Federal of Teachers
20. Lawson-Ross, Amanda
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22. Nelnet Diversified Solutions, LLC, owner of Great Lakes Educational Loan Services, Inc.

23. Nelnet, Inc. (NYSE: NNI), owner of Great Lakes Educational Loan Services, Inc.

24. Paolini, Christopher, District Court counsel to Great Lakes Higher Education Corp.

25. The Retired Enlisted Association, Amicus Curiae

26. Richard, Mark, Appellate counsel to Amicus Curiae American Federal of Teachers

27. Roesch, Benjamin, Appellate counsel to Amicus Curiae Veterans Education Success, The Retired Enlisted Association, and the Ivy League Veterans Council

28. Shrader, Brian, District Court and appellate counsel to Appellants Amanda Lawson-Ross and Tristian Byrne

29. Veterans Education Success, Amicus Curiae

30. Walker, The Honorable Mark E., United States District Judge

31. Yanes, Katherine Earle, District Court and appellate counsel to Appellants Amanda Lawson-Ross and Tristian Byrne

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/s/ *Katherine Earle Yanes*
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INTRODUCTION

Amanda Lawson-Ross and Tristian Byrne brought this action because their student loan servicer, Great Lakes Higher Education Corporation ("Great Lakes"), actively misled them when responding to their questions about eligibility for Public Service Loan Forgiveness ("PSLF"). As alleged in the Amended Complaint ("Complaint"), Great Lakes encouraged student loan borrowers, including Lawson-Ross and Byrne, to contact it for individualized advice, while simultaneously providing them incorrect information. *See, e.g*, Complaint ¶¶ 64-65. This conduct violated Florida statutory and common law.

Great Lakes counters that liability for its systematic violation of laws against misrepresentations applicable to all Florida businesses would fundamentally impede "the federal government's ability to create and administer a student loan program." *See* Brief of Appellee ("GLHEC Br.") at 10. Yet neither the Complaint's allegations nor the remedies it sought do anything of the sort. Rather, the claims at issue are predicated on a separate duty, complementary to the Higher Education Act ("HEA"), not to make affirmative misrepresentations to borrowers. *Cf. Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 529 (1992) (distinguishing laws requiring the provision of information from those policing the "duty not to deceive"). None of the claims impose, or seek to impose, any affirmative "disclosure requirement[s]" that would run afoul of 20 U.S.C. § 1098g.

There is no basis for finding preemption here, particularly given the applicable presumption against preemption. As set forth previously, *see* Opening Brief of Appellants ("Lawson-Ross Br.") at 16-17, "[b]ecause state police powers are implicated here,"[1] longstanding Supreme Court precedent requires courts "to presume that federal law does not displace state law unless Congress' intent to do so is clear and manifest." *Arizona v. United States*, 567 U.S. 387, 441 (2012) (Alito, J. concurring in part); *see also, e.g., Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (noting, in the context of conflict preemption, that the analysis must "start" by assuming that state historic police powers were not superseded, unless it was the "clear and manifest purpose of Congress"); *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005) (noting that when an express preemption provision has two "plausible" interpretations, courts "have a duty to accept the reading that disfavors preemption").

Irrespective of any presumption,[2] Great Lakes points to no evidence in the text, history, structure, or context of 20 U.S.C. § 1098g to support the District

[1] In *Cliff v. Payco Gen. Am. Credits, Inc.*, 363 F.3d 1113, 1125 (11th Cir. 2004), this Court recognized the longstanding presumption against preempting state consumer protection laws, noting that "consumer protection is a field traditionally regulated by the states," and holding that the HEA does not preempt the field of student loan debt collection.

[2] Disregarding this precedent, Great Lakes claims that, because there is a "unique federal concern," any presumption "favors" preemption. GLHEC Br. at 38; *see also id.* at 44 (asserting that the presumption against preemption is "inappropriate" given

Court's holding. Nor does Great Lakes confront the natural consequences of that holding, which would convert *any* state law claim regarding a communication by a student loan servicer into a preempted attempt to enforce state "disclosure requirements" because, irrespective of veracity, a claim could be reframed as one alleging that the servicer should have disclosed true and non-deceptive information.

Displaying little confidence that the language of § 1098g should be construed this broadly, Great Lakes focuses instead on two other types of preemption: field and conflict. But these arguments, as discussed *infra*, are substantively flawed in numerous respects. Most notably, there is no evidence—much less "clear and manifest" evidence —that Congress intended the HEA to preempt the "more general obligation … not to deceive," *i.e.*, a "duty" that *complements* the purposes of the HEA. *Cipollone*, 505 U.S. at 528-29. As noted in our opening brief, it is "difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct." *Dan's City Used Cars, Inc. v. Pelkey*,

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an alleged "unique federal interest in student loans"). To support this novel proposition, Great Lakes cites only to *Boyle v. United Technologies Corporation*, 487 U.S. 500 (1988). Neither *Boyle* nor any other case we are aware of applies a presumption *favoring* preemption of state consumer protection law. Moreover, *Boyle* does not address presumptions and also requires far more than Great Lakes asserts. *Id.* at 507 (noting that an "area of uniquely federal interest" is a "necessary, not a sufficient, condition for the displacement of state law" in the context of contractor immunity); *see also* Part IV, *infra*.

569 U.S. 251, 265 (2013). Yet this is precisely what Great Lakes contends that the HEA requires.

ARGUMENT

I. LAWSON-ROSS AND BYRNE'S CLAIMS ARE NOT EXPRESSLY PREEMPTED.

The plain language of 20 U.S.C. § 1098g, together with its structure, context, and history, cannot be reconciled with the District Court's holding that Lawson-Ross and Byrne's claims are expressly preempted. *See* Lawson-Ross Br. at 19-35; *see also Coventry Health Care of Missouri, Inc. v. Nevils*, 137 S. Ct. 1190, 1197 (2017) (applying "text, context, and purpose" to interpret an express preemption provision). In response, Great Lakes provides no evidence that Congress intended to preempt state law causes of action like the ones brought by Lawson-Ross and Byrne. Great Lakes does not address the history of the Truth in Lending Act amendments which supports a narrow and precise reading of the term "disclosure requirements." Lawson-Ross Br. at 24-27. Nor does Great Lakes suggest that Congress intended to deprive student borrowers of the ability to redress affirmative misrepresentations by servicers. Instead, Great Lakes' arguments boil down to two principal assertions: *first*, that the Complaint is predicated entirely on state law "disclosure requirement[s];" and *second*, that allegations of "affirmative misrepresentation" are nothing more than an attempt to apply a non-substantive "label" to otherwise preempted claims. Neither argument has merit.

A. The Complaint is rooted in the duty not to act deceptively or make material misstatements.

The claims in this case neither rest on a state law "disclosure requirement" nor require "disclosure" as a remedy. Rather, Lawson-Ross and Byrne's claims are premised on affirmative statements Great Lakes made, wholly separate from any federally mandated "disclosure requirements." Great Lakes, to advance its pecuniary interests, encouraged borrowers to contact it for individualized advice and then falsely advised borrowers, including Lawson-Ross and Byrne, of their eligibility for Public Service Loan Forgiveness. *See* Complaint ¶¶ 29, 38, 41-44, 49-55 (alleging Great Lakes offered to provide individualized "advice," but instead made false statements).

In response, Great Lakes argues that, because the claims are "substantively based on an alleged failure to disclose," those claims must be preempted. GLHEC Br. at 50. But saying this does not make it so: the Complaint is premised on misleading communications Great Lakes made to Lawson-Ross and Byrne in response to their questions about PSLF eligibility, *not* on any disclosures the HEA mandates. Nor are the claims rooted in an "obligation to say something other than what it said," as Great Lakes contends. *Id.* at 45-46. Instead, the claims at issue are premised entirely on state laws designed to ensure that Great Lakes, when choosing to speak (*i.e.*, apart from being federally required to make certain "disclosures"),

does so truthfully.[3] *See* Complaint ¶¶ 42, 44, 54-55; 75 (alleging Great Lakes provided affirmatively false information).

Furthermore, not all communications between a borrower and a servicer are "disclosures." *See* Lawson-Ross Br. at 21-22 (discussing 34 C.F.R. § 682.205(a)(4)(ii) and distinguishing "disclosures" from "other communications"). If accepted, Great Lakes' argument would convert all claims based on false or deceptive communications into required disclosures, a consequence far beyond what the language and history of § 1098g can bear.

B. "Affirmative misrepresentation" is not merely a "label" applied to preempted claims.

The distinction discussed above, between an expressly preempted "disclosure requirement" and a violation of the general duty not to deceive, is neither a "distinction without a difference" nor a matter of "label[ing]" as Great Lakes asserts. GLHEC Br. at 38-45. This distinction has been recognized by the Supreme Court in *Cipollone,* repeatedly applied by this Court, and adopted by other courts within and outside of the HEA's context. *See, e.g., Cipollone,* 505 U.S. at 527-29; *Altria Grp., Inc. v. Good*, 555 U.S. 70, 82-83 (2008) (noting that the presence of federally mandated warnings did not preclude claims from alleging a "breach of the duty not to deceive."); *McCulloch v. PNC Bank, Inc.*, 298 F.3d 1217, 1225 (11th Cir. 2002)

[3] The District Court correctly noted that "[t]his case, in essence, is about Great Lakes's failure to provide accurate information." Dkt. 44 at 8.

(suggesting a difference between "affirmative misrepresentations" and the "fail[ure] to disclose"); *Spain v. Brown & Williamson Tobacco Corp.*, 363 F.3d 1183, 1192 (11th Cir. 2004) (applying *Cipollone*).

Cipollone crystalizes this distinction. There, the Supreme Court plurality distinguished claims based on the neutralization of federally mandated warnings from claims predicated on a state law "duty not to make false statements of material facts or to conceal such facts." *Id.* at 528–29; *see also* Lawson-Ross Br. at 28-30.[4] This analysis applies equally here.[5]

[4] In *Spain*, this Court noted that "[o]ver the years, … courts have treated the plurality opinion in *Cipollone* as if it were a majority opinion, and we join them today." 363 F.3d at 1192. Great Lakes takes a different approach, claiming that the Court in *Cipollone* "held" that the distinction between an "affirmative" requirement and a "negative" requirement is somehow "not substantive." GLHEC Br. at 39. Not so. Despite quoting from *Cipollone* to establish what the Supreme Court purportedly "held," Great Lakes cites to and quotes from a footnote in Justice Blackmun's opinion, concurring in part and dissenting in part. *Id.* at 39 (citing and quoting *Cipollone*, 505 U.S. at 540 n.5). This quotation comes from Part II of that opinion, which notes, at the outset, that Justice Blackmun's "agreement with the Court ceases at this point." *See Cipollone*, 505 U.S. at 534 (Blackmun, J.).

[5] The Complaint does not contend that Great Lakes "nullified the numerous written disclosures" made regarding PSLF eligibility, as Great Lakes contends. GLHEC Br. at 46. Although 20 U.S.C. § 1083(e)(1)(I) may require servicers to "disclose" certain information (*e.g.*, a "list of names") about repayment plans, nothing in § 1098g gives servicers license to provide false disclosures or false information in separate communications.

In fact, this distinction has been recognized in cases applying the HEA. *See* Lawson-Ross Br. at 30. In *Chae*, for example, the Ninth Circuit looked critically at these two types of claims under the HEA and distinguished them based on "properly-disclosed FFELP practices" (expressly preempted) from those rooted in "fraudulent and deceptive practices" (not expressly preempted).[6] 593 F.3d 936, 942-43 (9th Cir 2010); *see also, e.g., Genna v. Sallie Mae, Inc.*, No. 11-cv-7371-LBS, 2012 WL 1339482 at *8 (S.D.N.Y. Apr. 17, 2012); *Davis v. Navient Corp.*, No. 17-CV-00992-LJV-JJM, 2018 WL 1603871, at *1 (W.D.N.Y. Mar. 12, 2018), *report and recommendation adopted*, No. 17-CV-0992, 2019 WL 360173 (W.D.N.Y. Jan. 29, 2019); *Daniel v. Navient Solutions, LLC*, 328 F. Supp. 3d 1319, 1324 (M.D. Fla. 2018). Most recently, since our opening brief was filed, the U.S. District Court for

[6] *Linsley v. FMS Investment Corporation*, cited by Great Lakes at 41-42, reiterates *Chae's* distinction. There, the District Court found the plaintiff's claims expressly preempted because the misrepresentation was based on the failure to "properly disclose the HEA's requirements." No. 3:11-cv-961-VLB, 2012 WL 1309840, at *6 (D. Conn. Apr. 17, 2012). Those claims, like the preempted claims in *Chae*, were based on "properly disclosed" requirements and not on other affirmative misrepresentations by the servicer. *Id.*
The only other supporting case cited by Great Lakes is *Nelson v. Great Lakes Educ. Loan Services, Inc.*, No. 3:17-cv-00183-NJR, 2017 WL 6501919 (S.D. Ill. Dec. 19, 2017). But that unpublished decision, currently on appeal to the Seventh Circuit, is an outlier and its rationale has been rejected by numerous other courts. *See Pennsylvania v. Navient Corp.*, No. 3:17-CV-1814, 2018 WL 6606218, at *14 n.9 (M.D. Pa. Dec. 17, 2018)("reject[ing] the reasoning of an unpublished, non-binding" decision in *Nelson*); *Student Loan Servicing Alliance v. District of Columbia*, __ F.Supp. 3d __, No. 18-0640, 2018 WL 6082963 at *14 (D.D.C. Nov. 21, 2018) ("*SLSA"*) ("declin[ing the] invitation to extend" *Nelson* to the claims at issue).

the Middle District of Pennsylvania rejected arguments akin to those made here, holding § 1098g "does not preempt the enforcement of a statute of general applicability under a state's traditional police power, here, the Commonwealth's state consumer protection law … which proscribes unfair and deceptive acts or practices in commerce." *Pennsylvania v. Navient Corp.*, __ F.Supp. 3d __, No. 3:17-CV-1814, 2018 WL 6606218, at *14 (M.D. Pa. Dec. 17, 2018).

Finally, courts in other contexts have distinguished between state laws that violate federal prohibitions against required statements and those that address the general obligation not to deceive. *See* Lawson-Ross Br. at 27-34. Great Lakes attempts to distinguish those cases by asserting that the statutes at issue "do not require uniformity and thus have very narrow preemption provisions." GLHEC Br. at 42. That too misses the mark. As discussed *infra*, numerous courts have held that uniformity is *not* a purpose of the HEA. Moreover, Great Lakes does nothing to establish that § 1098g is not "narrow." *See Keams v. Tempe Technical Inst., Inc.*, 39 F.3d 222, 225 (9th Cir. 1994) (referring to the express preemption provisions in the HEA as "narrow and precise"). Rather, Great Lakes asserts, without support, that § 1098g encompasses not just disclosures, but all communications "implicit or explicit." GLHEC Br. at 44.

C. The District Court erred in deferring to the Notice with respect to express preemption.

Finally, the District Court erred in its application of *Skidmore v. Swift & Co.*, 323 U.S. 134 (1994) to find persuasive, and ultimately defer to, a March 2018 Notice of Interpretation published by the Department. *See* Fed. Preemption and State Regulation of the Dep't of Educ.'s Fed. Student Loan Programs and Fed. Student Loan Servicers, 83 Fed. Reg. 10619-01 (Mar. 12, 2018) ("Notice"); *see also* Lawson-Ross Br. at 35-47 (discussing deference). Notably, we did not suggest that deference to interpretative opinions is never appropriate; rather, we highlighted why this particular interpretative statement is not persuasive under *Skidmore*. *See* Lawson-Ross Br. at 35-37.[7] Indeed, since our initial brief was filed, a second federal court has agreed, concluding that "[t]o the extent the [Notice] suggests that all state consumer protection laws are somehow preempted because they are predicated on 'disclosures,' the Court does not find the [Notice] persuasive." *Pennsylvania v.*

[7] *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000) is inapposite. In *Geier*, the Supreme Court first held that the *statutory* express preemption provision *did not* preempt the application of common law tort actions. *Id.* at 867-68. As to whether state law conflicted with the federal *regulation*, the Court acknowledged that the agency's interpretation of that regulation was entitled to "some weight," under *Auer v. Robbins*, 519 U.S. 452 (1997). *Geier*, 529 U.S. at 883. Ultimately, however, the Court concluded that the regulatory language was "clear enough—even without giving DOT's own view special weight." *Id.* at 886. Nothing about *Geier*, or any other case, suggests that the Department's Notice is "entitled to controlling weight," as Great Lakes claims. GLHEC Br. at 25.

Navient Corp., 2018 WL 6606218, at *16; *see also SLSA*, 2018 WL 6082963, at *21-26, *28 (finding the Notice unpersuasive and affording it "no deference whatsoever" under *Skidmore*).[8]

With respect to the Notice's statement on express preemption, Great Lakes does not dispute that the Notice is conclusory, that the Department offers no analysis of the term "disclosure requirement," and that the Department failed to interpret, or even mention, the history of § 1098g. Lawson-Ross Br. at 38. Nor does Great Lakes rebut the argument that the Notice failed to reference the longstanding presumption against preempting state historic police powers. *Id.* at 42. Rather, Great Lakes' primary response to the persuasive value of the Notice's statements on express preemption is that the Ninth Circuit's holding in *Chae* stands for the proposition that "misleading communications such as the allegations in this case are preempted under § 1098g." GLHEC Br. at 26. As explained previously, that description of *Chae* is incorrect. *Supra* at 8; *see also* Lawson-Ross Br. at 40-42.

[8] With respect to conflict preemption, the Notice also argues that "[e]xisting borrower protections," including the Department's oversight of servicers, "ensure" that borrowers "are protected from substandard practices." Notice at 10,621. But that too is unpersuasive, as the Department's Inspector General recently found. *See* Federal Student Aid: Additional Actions Needed to Mitigate the Risks of Servicer Noncompliance with Requirements for Servicing Federally Held Student Loans (Feb. 12, 2019) (finding that the Department "had not established policies and procedures" to "mitigate[]" the "risk of servicer noncompliance with requirements for servicing federally held student loans.") *available at*: https://www2.ed.gov/about/offices/list/oig/auditreports/fy2019/a05q0008.pdf.

II. "AFFIRMATIVE MISREPRSENTATION" CLAIMS DO NOT CONFLICT WITH THE HEA.

"A party asserting conflict preemption faces a high bar." *Graham v. R.J. Reynolds Tobacco Co.*, 857 F.3d 1169, 1186 (11th Cir. 2017). In order to find Lawson-Ross and Byrne's claims in conflict with federal law, "compliance with both federal and state regulations [must be] a physical impossibility" or "state law [must] stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Foley v. Luster*, 249 F.3d 1281, 1287 (11th Cir. 2001) (internal quotation marks omitted). Great Lakes does not assert impossibility, instead arguing that the claims here present an obstacle to the functioning of the HEA.

Great Lakes asserts that Lawson-Ross and Byrne's claims interfere with Congressional goals of "uniformity" and "federal-ness" because they (i) "nullify HEA provisions eliminating private rights of action;" (ii) "prevent the Department from uniformly administering the federal student loan program by creating implicit disclosure requirements;" and (iii) "interfere with the Department's interest in controlling federal contractors." GLHEC Br. at 30.[9] We discuss the first two arguments immediately below and the third argument, regarding government

[9] To the extent that Great Lakes asserts that its status as a government contractor is relevant to determining whether Lawson-Ross and Byrne's claims are conflict preempted, that fact is not properly before this Court and should not be considered here. *See infra* at n.17.

contracting, *infra* at Part IV. None of Great Lakes' arguments show that Lawson-Ross and Byrne's claims are conflict preempted.

As an initial matter, although Great Lakes premises its conflict preemption arguments on interference with "uniformity," this Court has not identified uniformity among the purposes of the HEA. Instead, this Court has twice identified the "purposes underlying the HEA's loan programs" as "enabl[ing] the Secretary of Education to encourage lenders to make student loans, ... provid[ing] student loans to those students who might not otherwise have access to funds, ... pay[ing] a portion of the interest on student loans, and ... guarantee[ing] lenders against losses." *Cliff*, 363 F.3d at 1127 (citing 20 U.S.C. § 1071(a)(1)); *McCulloch*, 298 F.3d at 1224. Consistent with *Cliff* and *McCulloch*, other courts have affirmatively *rejected* uniformity as among the HEA's purposes. *See, e.g.*, *College Loan Corp. v. SLM Corp.*, 396 F.3d 588, 597 (4th Cir. 2005) ("We are unable to confirm that the creation of 'uniformity' … was actually an important goal of the HEA."); *SLSA*, 2018 WL 6082963, at *26-*27. *Daniel*, 2018 WL 3343237, at *3 ("Uniformity, however, is not one of Congress's expressed goals in enacting the HEA, and broadening the scope of the preemption statute would not rest upon a 'fair understanding of congressional purpose.'" (quoting *Cipollone*, 505 U.S. at 530)).[10] Far from serving

[10] In *College Loan Corporation*, the Fourth Circuit further noted that "[t]o infer pre-

as an obstacle to Congressional purposes, the asserted claims are among the "many provisions of state consumer protection statutes [that] do not conflict with the HEA or its regulations" but rather "complement and reinforce the HEA." *Cliff*, 363 F.3d at 1130 (citing *McComas v. Financial Collection Agencies, Inc.*, No. CIV. A. 2:96-0431, 1997 WL 118417, at *3 (S.D.W. Va. Mar. 7, 1997)).

Even if "uniformity" were a statutory purpose, courts have repeatedly rejected state consumer protection claims as impinging on federal interests in uniformity, because "[s]tate-law prohibitions on false statements of material fact do not create diverse, nonuniform, and confusing standards" that merit preemption. *Cipollone*, 505 U.S. at 528-29 (internal quotation marks omitted).[11] In other words, a state law duty not to deceive when communicating with borrowers does not create varying state law requirements that would lead to lack of uniformity.[12]

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emption whenever an agency deals with a problem comprehensively is virtually tantamount to saying that whenever a federal agency decides to step into a field, its regulations will be exclusive." 396 F.3d at 598 (quoting *Hillsborough County, Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 717 (1985)).

[11] Great Lakes also highlights the Department's concerns about uniformity in the Notice of Interpretation. GLHEC Br. at 21-22. But the Department's discussion about uniformity is based on apparent concerns regarding "[s]tate regulations *requiring licensure* of Direct Loan servicers," not on the application of state consumer protection laws. Notice, 83 Fed. Reg. at 10,620 (emphasis added).

[12] This is consistent with the conflict preemption holding of *Chae*. There, the conflict-preempted claims went to the heart of the government's operations, *i.e.*,

Nevertheless, Great Lakes asserts that the claims at issue "interfere" with the goals of "uniformity" and "federal-ness" insofar as the claims "nullify HEA provisions eliminating private rights of actions." GLHEC at 30. Indeed, the HEA does not provide a private right of action, *McCulloch*, 298 F.3d at 1223, and 20 U.S.C. § 1083(f) provides that the "failure ... to provide information as required by [§ 1083] shall not ... provide a basis for a claim for civil damages." Neither point is relevant because the claims here are not based on a failure to provide disclosures required by § 1083 or any other HEA provision. For that reason, the cases cited by Great Lakes, *see* GLHEC Br. at 31-32, rejecting claims premised on violations of the HEA are inapposite.

Nor do Lawson-Ross and Byrne's claims impose implicit disclosure requirements. As we have explained, a servicer can avoid liability for the claims here by not making affirmative misrepresentations. Nothing about these claims requires more. Great Lakes poses a hypothetical of a call representative responding to a borrower's statement that "I'm glad my loans are on track for PSLF." GLHEC Brief at 33. But those facts are not alleged here. Rather, Lawson-Ross and Byrne each allege that they specifically inquired about their eligibility for PSLF. Complaint ¶¶

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allowing states to regulate the mechanics of late fees, repayment periods, and interest calculation, which presented an "actual conflict" with federal law. 593 F.3d at 948-49. But state law claims premised on a basis not to deceive or misrepresent present no similar uniformity problems. *Cipollone*, 505 U.S. at 528-29.

41, 49. Even under the hypothetical, Great Lakes could avoid liability by providing borrowers with accurate information or simply instructing them to take their questions elsewhere. Nothing in Lawson-Ross and Byrne's claims or Great Lakes' hypothetical *requires* servicers to make additional statements or "disclosures." They merely require that when a loan servicer provides information to a borrower, that information not be false or deceptive.

III. THE HEA DOES NOT PREEMPT THE FIELD.

Lawson-Ross and Byrne's claims are not field preempted. *See* GLHEC Br. at 14-28.[13] As an initial matter, Great Lakes does not cite a single case holding that Congress intended to preempt the field of student loan servicing, and we are unaware of any. This Court has repeatedly held that the HEA does *not* occupy the field. *See Cliff*, 363 F.3d at 1126 (noting "no trouble concluding that the enactment of the HEA does not 'occupy the field' of debt collection practices and thus does not impliedly preempt the Florida Act"); *Ammedie v. Sallie Mae, Inc.*, 485 F. App'x 399, 402 (11th

[13] Field preemption was not argued in the District Court. *See* Motion to Dismiss [Dkt. 26] at 5-10, Suppl. Brief of Great Lakes [Dkt. 34] at 1-18; Great Lakes' Response to Lawson-Ross' Supp. Br. [Dkt. 39]. Great Lakes has therefore waived and forfeited this argument. *Access Now, Inc. v. Sw. Airlines Co.*, 385 F.3d 1324, 1332 (11th Cir. 2004) (noting that "exceptional conditions" must be present for this court to permit issues to be raised for the first time on appeal).

Cir. 2012) ("The HEA does not defensively preempt all state-law claims in the area of consumer protection.").[14]

Even still, Great Lakes cannot establish field preemption for at least three reasons. *First*, the HEA contains numerous express preemption clauses, including § 1098g, the presence of which strongly indicates that Congress did not intend to preempt the field. *Cliff*, 363 F.3d at 1126 (noting the presumption against preemption "is reinforced by those provisions of the HEA ... that expressly preempt isolated provisions of state law" and holding the HEA did not occupy the field in part "in light of" the express preemption provisions) (quoting *Cipollone*, 505 U.S. at 517).[15]

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[14] *Cliff* and *Ammedie* are consistent with the holdings of every other court to discuss field preemption under the HEA. *See e.g.*, *Chae*, 593 F.3d at 942 ("[F]ield preemption is off the table to resolve this case involving the HEA and its attendant federal regulations."); *College Loan Corp.*, 396 F.3d at 596 n.6 ("Our analysis reveals that the courts addressing the issue have consistently concluded that the HEA does not occupy the field of higher education loans."); *Armstrong v. Accrediting Council for Continuing Educ. & Training, Inc.*, 168 F.3d 1362, 1369 (D.C. Cir. 1999) ("Federal education policy regarding [FFELP] lending is not so extensive as to occupy the field"); *Adkins v. Excel Coll. of Corbin, Inc.*, 21 F.3d 427, 1994 WL 124268 (6th Cir. 1994) (table) (finding nothing in the HEA suggesting the "extraordinary preemptive power" necessary to confer federal jurisdiction).

[15] *See also Keams v. Tempe Technical Inst., Inc.*, 39 F.3d 222, 225-26 (9th Cir. 1994) ("It is apparent from the language of the express preemption clauses that Congress expected state law to operate in much of the field in which it was legislating. Thus, there can be no inference that Congress left no room for supplementary state regulation.") (internal quotation marks and citations omitted); *SLSA*, 2018 WL 6082963, at *17 (rejecting field preemption and noting other courts have as well because these "courts have reasoned that Congress could not have intended to

Second, the Department's Notice, on which Great Lakes urges the Court to rely, did not assert field preemption. *Third*, both the Department's Master Promissory Note ("MPN"), *see* GLHEC Br. at 7 n.7, which constitutes the loan agreement between Direct Loan borrowers and the Department, and the Department's servicing contract with Great Lakes contemplate the application of state law.[16]

IV. *BOYLE* IMMUNITY IS INAPPLICABLE.

Although Great Lakes relies on *Boyle v. United Technologies*, 487 U.S. 500 (1988) to characterize its field and conflict preemption arguments, *Boyle* is principally about government contractor immunity, typically where "the enforcement of state tort law against military contractors must be preempted inasmuch as its operation would interfere with the exercise of discretion by government officials charged with making these sensitive policy judgments."

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occupy the field because the HEA requires adherence to state law in particular provisions and explicitly preempts state law in others").

[16] The MPN notes: "[u]nder applicable state law, except as preempted by federal law, you may have certain borrower rights, remedies, and defenses in addition to those stated in this MPN and the Borrower's Rights and Responsibilities Statement." *See* MPN, Direct Subsidized Loans and Direct Unsubsidized Loans, OMB NO. 1845-0007 at 3. U.S. Department of Education Master Promissory Note for Direct Subsidized Loans *available at* https://studentloans.gov/myDirectLoan/subUnsubHTMLPreview.action. Likewise, the Department's contract with Great Lakes, *see* GLHEC Br. at 6 n.6, requires Great Lakes to "maintain[] a full understanding of all federal and state laws and regulations[.]" *See* Great Lakes Servicing Contract at 20 *available at* https://www2.ed.gov/policy/gen/leg/foia/contract/greatlakes-061709.pdf.

Hudgens v. Bell Helicopters/Textron, 328 F.3d 1329, 1334 (11th Cir. 2003). "Stripped to its essentials," the "military contractor defense" outlined in *Boyle* "is available only when the defendant demonstrates with respect to its design and manufacturing decisions that *the government made me do it*." *Brinson v. Raytheon Co.*, 571 F.3d 1348, 1351 (11th Cir. 2009) (emphasis added); *see also Harduvel v. Gen. Dynamics Corp.*, 878 F.2d 1311, 1316 (11th Cir. 1989) ("[*Boyle*] derives from the principle that where a contractor acts under the authority and direction of the United States, it shares the sovereign immunity that is enjoyed by the government.").[17] None of the steps to finding immunity required by the Supreme Court in *Boyle* are satisfied here.

First, for immunity under *Boyle*, Great Lakes must "establish that its activity involves a 'uniquely federal' interest warranting the displacement of state law." *Glassco v. Miller Equip. Co.*, 966 F.2d 641, 642 (11th Cir. 1992) (quoting *Boyle*, 487 U.S. at 504). Great Lakes cites no authority to support its assertion that federal

[17] Separately, *Boyle* does not support affirmance at this stage because *Boyle* immunity applies only to government contractors. FFELP loans, such as those of Lawson-Ross and Byrne, *may* be owned by the Department *or* by a commercial holder. *See generally SLSA*, 2018 WL 6082963, at *29. Commercially held loans are typically serviced through a contract with the private holder, whereby *Boyle* would be inapplicable. Although Great Lakes asserts that Lawson-Ross and Byrne's loans are owned by, and serviced pursuant to a contract with, the Department, *see* GLHEC Br. at 5 (citing ¶¶ 35, 37 of the Complaint), that threshold fact is not actually included in the Complaint and is not supported by evidence. Therefore, it is not properly considered here. *See* GLHEC Br. at 13 (highlighting how "the complaint itself" must establish that an affirmative defense applies).

student loan servicing contracts are a *uniquely* federal interest. *See* GLHEC Br. at 37. Rather, Great Lakes appears to suggest that three features of the Title IV program make it so: (i) the existence of the program as a "federal" program; (ii) the monetary size of the program; and (iii) the fact that the administration of the Title IV program "involves a federal contractor." GLHEC Br. at 29.

These facts, separately or together, do not command the conclusion that the Title IV program is "uniquely" federal. That Congress created a large program, which the Department employs contractors to help manage, cannot *de facto* mean that this dispute raises "uniquely federal interests." Indeed, under Great Lakes' theory, it is hard to fathom why *any* large government program would not be "uniquely" federal, thus eliminating state historic police powers over contractors. Great Lakes concedes as much in its brief, arguing that the "holding" of *Boyle* is that the mere "involvement" of a federal contractor is sufficient to "create[]a 'unique federal interest.'" GLHEC Br. at 38; s*ee also id.* at 28 (arguing that "an entire field of state law can be preempted" where it so much as "touches an area over which the federal government has a uniquely federal interest in uniformity").

Second, for *Boyle* to apply, the contractor must show that "a 'significant conflict' exists between an identifiable federal policy or interest and the operation of state law," *or* that "the application of state law would frustrate the specific operation of federal legislation." *Glassco*, 966 F.2d at 642 (quoting *Boyle*, 487 U.S.

at 507). To do so, "the government contractor must demonstrate that '(1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States.'" *Id*. at 642-43. The first two conditions provide that "the suit is within the area where the policy of the 'discretionary function' would be frustrated," thus assuring that the relevant design feature was considered by the Government and "not merely by the contractor itself." *Boyle*, 487 U.S. at 512.

Great Lakes does not meet *Boyle's* "significant conflict" prong. There is no evidence, on the face of the complaint or elsewhere, of "reasonably precise specifications" to which Great Lakes "conformed." *See Glassco*, 966 F.2d at 642-43 (quoting *Boyle*, 487 U.S. at 512); *see also Brinson*, 571 F.3d at 1351-52 ("Where the government merely approves imprecise or general guidelines, the contractor retains the discretion … and enjoys no immunity against liability[.]"). Moreover, Great Lakes' contract with the Department specifically requires Great Lakes to comply with state law, *supra* at n.16, and there is no evidence that Great Lakes warned the Department about the dangers of any contract specifications.

This case, instead, falls precisely where *Boyle* found immunity inapplicable. In *Boyle*, the Supreme Court hypothesized a federal contract where "the United States contracts for the purchase and installation of an air conditioning-unit,

specifying the cooling capacity but not the precise manner of construction." 487 U.S. at 509. The Court next described that "a state law imposing upon the manufacturer of such units a duty of care to include a certain safety feature [that] would not be a duty identical to anything promised the Government, but neither would it be contrary." *Id.* at 509. In this context, the Court found, that "[t]he contractor could comply with both its contractual obligations and the state-prescribed duty of care" and "[n]o one suggests that state law would generally be pre-empted." *Id.*; *see also Dorse v. Eagle-Picher Indus., Inc.*, 898 F.2d 1487, 1489 (11th Cir. 1990) (rejecting contractor immunity when the state-imposed duty of care was not "precisely contrary" to the contractual duty). Here too, the state law obligation not to make affirmative misrepresentations is neither identical, nor contrary, to Great Lakes' contractual obligations. Great Lakes may readily comply with both.

V. GREAT LAKES' REMAINING GROUNDS FOR AFFIRMANCE SHOULD BE REJECTED.

Great Lakes further argues for affirmance because the claims here are not properly pled as class claims and do not satisfy the requirements of Fed. R. Civ. P. 9(b). GLHEC Br. at 51-57. These arguments do not support affirmance.

A. Class certification issues are premature.

Great Lakes asserts that the claims should be dismissed because they are based on verbal misrepresentations, which are purportedly not suitable for class certification. GLHEC Br. at 48-49, 52. The fact that this case includes class claims should not impact whether the underlying causes of action are preempted. Moreover, this case was dismissed before class certification discovery began and before a class certification motion had been filed. Thus, dismissal based on class-issues would be premature. *See, e.g.*, *Daniel*, 328 F. Supp. 3d at 1322-23; *Moody v. Ascenda USA Inc.*, 193 F. Supp. 3d 1347, 1352 (S.D. Fla. 2016). Any issues regarding class certification should be resolved at that stage and not as part of a motion to dismiss.

Ultimately, class certification is not precluded because the claims involve oral misrepresentations. Where, as here, Appellants have alleged a "common course of conduct" that include oral misrepresentations, that "common course" may predominate over various "individual issues" that may also be present. *Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718, 724-25 (11th Cir. 1987); *Klay v. Humana, Inc.*, 382 F.3d 1241, 1258 (11th Cir. 2004), *abrogated in part on other grounds by Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639 (2008); *see also, e.g., In re First All. Mortg. Co.*, 471 F.3d 977, 991 (9th Cir. 2006) (noting that a district court correctly "rejected a 'talismanic rule that a class action may not be maintained where a fraud is consummated principally through oral misrepresentations'").

B. Rule 9(b) does not require dismissal of the Complaint.

Great Lakes also argues that Appellants' claims "sound in fraud" but do not satisfy Rule 9(b)'s particularity requirement, thus supporting affirmance. GLHEC Br. at 52-57.[18] This argument likewise fails.

First, Rule 9(b)'s pleading requirement does not apply to each of Lawson-Ross and Byrne's claims. For example, despite Great Lakes' contention, there is a "dearth of … Florida law supporting" the view that Rule 9(b) is applied to a breach of fiduciary duty claim. *Honig v. Kornfeld*, 339 F. Supp. 3d 1323, 1339 n.5 (S.D. Fla. 2018). Similarly, although Great Lakes notes that Rule 9(b) has been applied to claims under the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"), the statutory claim here is under the Florida Consumer Collection Protection Act ("FCCPA"). We are not aware of any binding authority applying Rule 9(b) to claims under the FCCPA. Moreover, district courts have applied the more liberal pleading standard of Rule 8 to such claims, *Blake v. Select Portfolio Servicing, Inc.*, No. 6:17-

[18] This argument was not timely raised to the District Court, resulting in waiver, and is not appropriately resuscitated here. Great Lakes' Motion to Dismiss was based *entirely* on express preemption. *See* Dkt. 26. After the District Court ordered supplemental briefing specifically limited to the Notice and the extent of deference owed thereto, *see* Dkt. 31, Great Lakes responded by including "other grounds" for dismissal, including the arguments presented in Part V of its brief to this Court. *See* Dkt. 34 at 18-28. Lawson-Ross and Byrne asserted in response that these new arguments were not timely raised and were therefore waived. Dkt. 40 at 20-22. Having waived this argument below, Great Lakes should not be permitted to introduce it here. *Cf. Access Now, Inc.*, 385 F.3d at 1332.

cv-1523-ORL-31TBS, 2018 WL 467392, at *1-*2 (M.D. Fla. Jan. 18, 2018), as well as to claims under the FCCPA's analogous federal statute, the Fair Debt Collection Practices Act. *CFPB v. Frederick J. Hanna & Associates, P.C.*, 114 F. Supp. 3d 1342, 1372-73 (N.D. Ga. 2015) (explaining that "consumer protection claims are not claims of fraud, even if there is a deceptive dimension"); *see also LeBlanc v. Unifund CCR Partners*, 601 F.3d 1185, 1190 (11th Cir. 2010) (noting parallels between the FDCPA and the FCCPA); *CFPB v. Navient Corp.*, 3:17-cv-101, 2017 WL 3380530, at *24 (M.D. Pa. Aug. 4, 2017) (noting, in the context of consumer protection claims against a servicer, that "FDCPA claims … are not claims of fraud, even if there is a deceptive dimension.").

Second, even if elements of the Complaint are subject to Rule 9(b), that standard has been satisfied here. The Complaint provides the requisite information regarding the time (¶¶ 41-42, 49-41) place (¶¶ 41-43), and substance (¶¶ 42, 50-51) of Great Lakes' alleged misrepresentations, so as to satisfy the 9(b) standard. *U.S. ex rel. Matheny v. Medco Health Sols., Inc.*, 671 F.3d 1217, 1222 (11th Cir. 2012) (requiring allegations regarding the "time, place, and substance" of alleged fraud to satisfy Rule 9(b)).

Finally, even if not waived and greater specificity is required, the proper remedy is to dismiss relevant claims *without* prejudice so as to provide an opportunity to amend. *See, e.g.*, *Firestone v. Firestone*, 76 F.3d 1205, 1209 (D.C.

Cir. 1996) (noting that Rule 9(b) normally "does not support a dismissal with prejudice," and "leave to amend is almost always allowed."); *Hart v. Bayer Corp.*, 199 F.3d 239, 247 n.6 (5th Cir. 2000) (same).

CONCLUSION

The District Court's judgment should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in FRAP 32(a)(7)(B). This brief contains 6,480 words excluding the parts of the brief exempted by FRAP 32(f). This brief complies with the typeface requirements of FRAP 32(a)(5) and the type style requirements of FRAP 32(a)(6). It has been prepared in a proportionally spaced typeface using Word 2016 in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I certify that on February 20, 2019, I filed the foregoing with the Clerk of Court using the Electronic Filing System which will send a Notice of Docket Activity to:

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