No. 03-1867

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

COLLEGE LOAN CORPORATION,

Plaintiff-Appellant,

v.

SLM CORPORATION, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Virginia

BRIEF FOR APPELLANT
COLLEGE LOAN CORPORATION

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INTRODUCTION

This appeal presents a pure legal issue: Whether the District Court erred in its pretrial rulings that Plaintiff's state law claims were preempted to the extent such claims implicate the Higher Education Act ("HEA"), 20 U.S.C. §§ 1001 et seq. Those rulings, we submit, are inconsistent with well-settled principles of preemption law embodied in such cases as Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996), and Abbot v. American Cyanamid Co., 844 F.2d 1108 (4th Cir. 1988). The District Court compounded its legal error by excluding evidence at trial and precluding discovery aimed at meeting the improperly high burden set by its preemption rulings. As a result, the District Court both made bad law -- in a way that threatens a program under which millions of college and graduate students fund their educations -- and effectively denied Plaintiff its day in court.

This action involves claims by College Loan Corporation ("CLC") against SLM Corporation ("SLM") and its subsidiaries Sallie Mae Servicing L.P. ("SMS"), Sallie Mae, Inc. ("SMI"), and Student Loan Marketing Association ("SLMA"). Between August 2000 and November 2001, CLC had a contract with SMS, under which SMS was required to process loan applications and promissory notes received by CLC from borrowers for loans made under the HEA-authorized Federal Family Education Loan Program ("FFELP"). Most of those applications were from borrowers asking CLC to consolidate their existing variable rate FFELP loans, including loans held by SLMA and various other SMS-affiliated lenders, into a single, fixed-rate loan.

CLC's consolidation loan business grew dramatically in the second half of 2001, due in part to a drop in FFELP interest rates effective July 1 of that year. In the ensuing months, SMS refused to process hundreds of applications for CLC consolidation loans to pay off loans held by various SMS affiliates, and, in November 2001, SMS terminated the parties' contract. Thereafter, SMS refused to provide CLC with loan verification certificates ("LVCs") with pay-off amounts for thousands of borrowers who had loans held by various SMS affiliates, thereby preventing CLC from completing consolidation of those loans. Defendants' internal documents characterize those actions as part of a "counteroffensive" aimed at stemming both the growth of CLC's business and the "run off" of loans from Defendants' student loan portfolios.

CLC filed the Complaint below alleging that Defendants' conduct constituted, inter alia, tortious interference with CLC's prospective economic advantage and breach of contract. In alleging that Defendants' refusal to provide LVCs was "wrongful" for purposes of the tortious interference claim, CLC relied on the fact that HEA regulations, 34 C.F.R. § 682.209(j), specifically require FFELP lenders to provide LVCs upon request to permit borrowers to consolidate loans. Defendants defended against both the tort and contract claims with the argument that its conduct was justified by its purported reading of a different HEA requirement -- the "Single Holder Rule" of 20 U.S.C. § 1078-3(b)(1)(A).

The fundamental error that requires this Court's de novo review is the District Court's ruling that preemption principles (1) precluded CLC from relying on the Defendants' failure to comply with applicable regulations to show that the refusal to provide LVCs was "wrongful" for purposes of a state law tortious interference claim, and (2) permitted SMS to avoid state law contract and tort liability simply by claiming, but never having to prove, that it was acting pursuant to the Single Holder Rule.

JURISDICTIONAL STATEMENT

The District Court had jurisdiction under 28 U.S.C. §§ 1331, 1332(a)(1), and 1367. This Court has jurisdiction under 28 U.S.C. § 1291, pursuant to an appeal noticed by CLC on July 3, 2003, from a final judgment entered on June 25, 2003, in favor of Defendants.

STATEMENT OF THE ISSUES

1. Whether the District Court erred in ruling that CLC's state law contract and tort claims were impliedly preempted by the Higher Education Act on the ground that such claims would stand as an obstacle to the accomplishment of the objectives of the Act and its implementing regulations.

2. Whether the District Court -- after allowing CLC to proceed with its case only if it could prove that Defendants acted in bad faith -- erred by (a) excluding evidence of Defendants' inconsistent interpretation of the Single Holder Rule in prior federal litigation, and (b) barring CLC from deposing a corporate designee about the Defendants' development of its expansive interpretation of the Rule.

STATEMENT OF THE CASE

CLC filed this action on September 16, 2002, alleging, among other things, tortious interference with prospective economic advantage and breach of contract. Compl. ¶¶ 74-78, 93-100 (J.A.

__-__, __-__). Defendants moved to dismiss on grounds that CLC's claims were based on Defendants' alleged violation of the HEA and its implementing regulations, which do not contain a private right of action.

Rather than limiting itself to Defendants' "no private right of action" argument, however, the District Court ruled that "the HEA preempts state law actions that implement the HEA to satisfy an element of a common law claim between lenders and servicers." Dec. 10, 2002 Mem. Op. at 8 (J.A. __). The court concluded that, "because state law in this case stands 'as an obstacle to the accomplishment of the objectives of Congress[,]' [CLC's] state law remedies are impliedly preempted by the HEA." Id. (quotations and alterations in original). The court below thus placed a significant substantive restriction on CLC's claims: "Plaintiff cannot employ the purported violations of the HEA to satisfy elements of its state law claims." Id. at 9 (J.A. __).

CLC therefore filed an amended complaint on December 20, 2002, which did not rely on any alleged violation of the HEA to establish even an element of its state law claims. J.A.__. Defendants proceeded to defend their behavior by asserting that what they did was required by the Single Holder Rule. Ruling on Defendants' subsequent motion in limine, the District Court reiterated its preemption ruling. See May 13, 2003 Mem. Op. at 13-15 (J.A. __-__). The Court allowed CLC's contract and tort claims to proceed but solely on the issue of "whether Defendants invoked the Single Holder Rule in good faith or whether they invoked it as part of some bad faith scheme to harm the Plaintiff." Id. at 14 (J.A. __).

Defendants moved thereafter for summary judgment. On June 10, 2003, the District Court denied that motion in part, but reaffirmed that, to prevail on its contract and tort claims, CLC would have to demonstrate that Defendants acted in bad faith or willful disregard of the HEA. June 10, 2003 Mem. Op. at 12, 26-27 (J.A. __, __-__). The Court made clear that the requirement of bad faith or willful disregard was not a creature of state law, but rather derived from "the nettlesome issue of HEA preemption." Id. at 26 (J.A. __).

After a trial on CLC's claims under the District Court's preemption-derived standard of bad faith or willful disregard, a jury returned a verdict in favor of Defendants on June 25, 2003.

STATEMENT OF FACTS

The Federal Family Education Loan Program. The FFELP, 20 U.S.C. §§ 1071 et seq., is the largest of several student financial aid programs established by the HEA. The FFELP makes available low interest loans to help families pay for college costs and to afford "all students * * * the opportunity to pursue the postsecondary education of their choice." S. Rep. No. 102-204, at 6 (1991). See also H.R. Rep. No. 102-447, at 8 (1992).

Under the FFELP, private lenders (including banks and other financial services companies, such as CLC) use their own funds to make loans to students attending postsecondary institutions or to their parents. See 34 C.F.R. § 682.100. The loans are guaranteed by state or non-profit organizations known as guaranty agencies, and reinsured by the federal government. See 20 U.S.C. §§ 1078(a)-(c). The Secretary of Education ("the Secretary") administers the FFELP and is authorized to issue regulations to carry out the program. See id. § 1082(a)(1).

The FFELP provides for several different types of loans: (1) Stafford loans (made to students); (2) PLUS loans (made to parents); and (3) consolidation loans. See id. §§ 1071(c), 1078-2, 1078-3. FFELP consolidation loans pay off the outstanding balances on a borrower's existing FFELP loans and consolidate them into a single loan with a fixed interest rate.

To process a consolidation loan, the HEA requires a consolidation lender, such as CLC, to obtain a loan verification certificate ("LVC") from each holder of a borrower's outstanding student loans. The LVCs provide the consolidation lender with the payoff amount on each outstanding loan.

Federal regulations require an FFELP loan holder who receives an LVC request from a consolidation lender to complete and return the LVC within ten business days or else provide a written explanation of the reasons for its inability to do so within the same time period. See 34 C.F.R. § 682.209(j). After receiving the completed LVCs, the consolidation lender can process the new loan, pay off the existing lenders, and replace them as the new holder of a single, consolidated loan to the borrower. A consolidation loan thus transfers the borrower's debt from the portfolios of the pre-existing holders to that of the consolidation lender.

College Loan Corporation. CLC provides FFELP loans, including consolidation loans, to students and their families to help them pay for postsecondary education. Since its inception in 1999, CLC has provided more than 200,000 FFELP loans.

A borrower requests a consolidation loan from CLC by completing an application and submitting it to CLC. CLC typically forwards the application to a third-party servicer for processing. After the servicer obtains all the necessary LVCs and processes the application, CLC disburses the loan proceeds to pay off the borrower's existing lenders. Pl.'s Stmt. of Undisputed Facts ("PSUF") ¶ 4 (J.A. __); Tr. at 123, 251-253 (J.A. __, __-__).

In May 2000, CLC entered into a Master Loan Agreement ("MLA") with USA Group, Inc., and its affiliates. Compl. Ex. 1 (J.A. __). Under the MLA, USA Group agreed to act as CLC's servicer to process consolidation loan applications from CLC's prospective borrowers. Id. ¶ 4.26 (J.A. __).

In July 2000, Defendant SLM -- the publicly-traded parent corporation of Defendants SMS, SMI, and SLMA 1/ -- acquired USA

1/ All of the Defendants are for-profit companies. SMS is in the business of processing loan applications and servicing

Group's student loan servicing operations. SMS thereafter assumed all of USA Group's third-party servicer obligations to CLC under the MLA. See id. at ¶ 11.3 (J.A. __); PSUF ¶ 4 (J.A. __); Tr. at 150-151, 270-276 (J.A. __-__, __-__). At the time, SMS was also a third-party servicer for SLMA and other SLM-affiliated entities. PSUF ¶¶ 3, 15 (J.A. __, __); Tr. at 1108 (J.A. __).

The MLA obligated SMS as CLC's servicer to process CLC's loan applications, MLA ¶ 4.26 (J.A. __), which obligation SMS discharged for about a year without incident. Effective July 1, 2001, however, the Secretary set a new, substantially lower fixed interest rate for consolidation loans, which dramatically increased demand for such loans. Tr. at 125-127 (J.A. __-__). By consolidating their student loans, borrowers could exchange

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[Footnote continued]

existing loans for FFELP lenders. First Am. Compl. ¶ 10 (J.A. __); Am. Answer ¶ 10 (J.A. __). SMI performs management and marketing services for SLM. First Am. Compl. ¶ 8 (J.A. __); Am. Answer ¶ 8 (J.A. __). SLMA is a corporation established by Congress and commonly known as "Sallie Mae." See 20 U.S.C. § 1087-2. SLMA's operations are being phased out and transferred to SLM, a process that is expected be completed by 2006. First Am. Compl. ¶ 11 (J.A. __); Am. Answer ¶ 11 (J.A. __). Currently, SLMA both purchases student loans originated by other lenders and competes with CLC by offering consolidation loans as an originating lender. First Am. Compl. ¶ 14 (J.A. __); Am. Answer ¶ 14 (J.A. __); Tr. at 571-575 (J.A. __-__). As of December 31, 2001, the student loans held by Defendants and other affiliated holders and related entities totaled about $71.7 billion and represented some one-third of all such student loans outstanding. First Am. Compl. ¶ 8 (J.A. __); Am. Answer ¶ 8 (J.A. __); Tr. at 122 (J.A. __).

their existing variable rate loans for a low fixed rate consolidation loan, potentially saving substantial amounts in interest payments. Id. at 121 (J.A. __). But by consolidating their loans with other lenders, borrowers would also shift their future interest payments away from their existing lenders. As one of the most active FFELP consolidation lenders, CLC both competed with SLMA as a consolidation lender and posed a threat to Defendants' existing loan portfolios.

Defendants' Consolidation Counteroffensive. Defendants responded to CLC's growth by launching what their internal corporate documents called a "consolidation counteroffensive." Ex. 282 (J.A. __).

On one front of this counteroffensive, SMS refused to process many of CLC's loan applications, notwithstanding its contractual obligations as CLC's third-party servicer under the MLA. Instead, SMS diverted many of those applications to SLMA or another SLM-affiliated entity for funding. In some cases, SMS simply crossed off CLC's name from the application and substituted SLMA's name or that of another SLM-affiliated entity. Exs. 12, 328 (J.A. __, __). In others, SMS contacted CLC borrowers and attempted to sell them a consolidation loan from SLMA or an SLM-affiliated entity. PSUF ¶ 29 (J.A.__); Tr. at 158, 160, 285, 288-290 (J.A. __, __, __, __-__). In all, SMS failed to process more than 500 of CLC's applications. Defs.' Statement of Undisputed Facts ("DSUF") ¶ 18(a) (J.A. __). After

CLC discovered and confronted SMS about its diversion of CLC's loan applications, SMS terminated the MLA. See Tr. at 289, 291-292, 295-296, 333-335 (J.A. __, __-__, __-__, __-__). The other Defendants assisted SMS in its wrongful conduct. Id. at 868-870, 1332 (__-__, __).

On another front of the "consolidation counteroffensive," SMS -- this time as servicer for SLM affiliates -- refused to complete and return LVCs to CLC for loans held by such entities, in violation of 34 C.F.R. § 682.209(j). All told, SMS refused to complete and return LVCs for well over 10,000 borrowers. Tr. 481-494 (J.A. __-__); DSUF ¶ 8(b) (J.A. __). Instead, having learned that CLC's would-be borrowers were interested in consolidation, SMS often diverted that information to SLMA and other SLM-affiliated entities, which then contacted the borrowers and attempted to sell them a consolidation loan. PSUF ¶ 29; Tr. at 158, 160, 285, 288-290 (J.A. __, __, __, __-__). Again, the other Defendants assisted SMS in this wrongful conduct. See Tr. at 868-870, 1332 (J.A. __-__, __).

Defendants' Reliance On The Single Holder Rule. When CLC challenged SMS' conduct in the second half of 2001, SMS defended its actions by asserting that CLC was not entitled to consolidate the loans in question under the HEA's so-called Single Holder Rule. See DSUF ¶¶ 8(b), 18(a) (J.A. __, __). The Single Holder Rule provides that a lender that does not hold a loan of the borrower may make a consolidation loan to that borrower only if either (1) the borrower's outstanding loans are held by multiple holders, or (2) the borrower certifies that the borrower has been unable to obtain a consolidation loan with income-sensitive repayment terms from the holder of the borrower's outstanding loans. See 20 U.S.C. § 1078-3(b)(1)(A). The HEA defines "holder" for purposes of the FFELP as "an eligible lender who owns a loan." Id. § 1085(i).

For each consolidation loan Defendants prevented CLC from making, the borrower had signed a CLC application/promissory note including the necessary certification under 20 U.S.C. § 1078-3(b)(1)(A). See Ex. 177 (J.A. __). Defendants, however, ignored those certifications. Moreover, in many instances, the loans that borrowers asked CLC to consolidate had been sold to securitization trusts by SLMA or other SLM-affiliated lenders. 2/ As a result, none of the Defendants or their affiliates possessed either legal title or beneficial ownership of these loans. In many other instances, the loans CLC sought to consolidate were owned not by SLMA, but rather by other SLM-affiliated FFELP lenders. The Defendants nevertheless maintained that the Single Holder Rule justified their misconduct by claiming that all loans

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2/ Securitization is a process by which portfolios of loans held by SLMA and other SLM-affiliates are sold to a special purpose SLM-affiliate, SLM Funding Corporation, which then sells the loans to securitization trusts established for this purpose. Those trusts, in turn, sell securities backed by the loans. First Am. Compl. ¶ 16 (J.A. __); Tr. at 877-880 (J.A. __-__).

held by any SLM affiliates or securitization trusts are held by a single "holder." Ex. 315 (J.A. __).

The Proceedings Below. After a good faith effort to resolve the dispute, CLC brought this suit. CLC's contract claims arise out of SMS's failure to process CLC's loan applications in breach of its contractual obligations as third-party servicer for CLC under the MLA. CLC's tortious interference claims arise out of SMS's refusal to complete and return, as required by FFELP regulations, LVCs that CLC submitted to SMS as third-party servicer for SLM-affiliated entities and securitization trusts. The latter claims seek relief against (1) SMS as the servicer for the holder of the loans to be consolidated in denying the LVCs at issue; (2) SLMA as the holder for whom SMS acted as servicing agent in denying many of the LVCs; and (3) SMI and SLM, for their direct participation in the misconduct.

Defendants moved to dismiss these claims, arguing that the Court should not entertain CLC's claims because "they all boil down to, and turn on, an alleged violation of the HEA" and the HEA does not create a private right of action. Defs.' Mem. of Points & Auth. in Support of Defs.' Mot. to Dismiss at 5 (Docket No. 13). Thus, Defendants argued that the want of a private right of action under the HEA precluded the Court from deciding the merits of any otherwise valid state law claim involving a violation of the HEA.

In opposition, CLC agreed that the HEA does not create a private right of action but explained that its claims arose, not under the HEA itself, but rather under state contract and tort law. See CLC Opp. to Mot. to Dismiss at 1-2 (Docket No. 25). CLC contended that, even if adjudicating CLC's state law claims "may require the Court to interpret the HEA, this does not -- and cannot -- trigger the sweeping preemption of state-law remedies Defendants implicitly propose." Id. at 6.

The District Court's Preemption Ruling. The District Court began its analysis with the observation that "the HEA does not create a private right of action." Dec. 10, 2002 Mem. Op. at 5 (J.A. __). But "less settled," said the court, "is the issue of whether the HEA, by virtue of its extensive administrative regulation of the student loan field, preempts state common law claims, elements of which are proven by violation of the HEA." Id. (footnote omitted). After conceding that "the HEA does not expressly preempt state law," id. at 5 n.3 (J.A. __) (emphasis added), the District Court stated that "the issue before the Court in this case" is "whether the state law at issue [stands] 'as an obstacle to the accomplishment of the objectives of Congress.'" Id. at 6 (quoting Brannan v. United Student Aid Funds, Inc., 94 F.3d 1260, 1265 (9th Cir. 1996)) (J.A. __). The District Court concluded that it does.

The District Court reasoned that "Congress created a specific and extensive framework governing the consolidation of loans authorized under the HEA" and provided "rather detailed conditions under which consolidation loans are made, serviced, insured, and ultimately collected." Id. at 7 (J.A. __). The court also pointed out that "a detailed structure of regulations governs the remedial actions that the Secretary of Education may take against lenders and third-party servicers for violations of the statutes, rules and regulations governing FFELP loans." Id.

The Court found that the Secretary's promulgation of this remedial framework -- which the Court acknowledged was a "regulatory decision" by the Secretary -- "was prompted by the need for uniform law governing the relations between lenders and servicers, rather than subjecting that relationship to the currents and eddies of conflicting state tort and contract remedies." Id. at 8 (J.A. __). 3/ On this basis, the District Court ruled that "the HEA preempts state law remedies that implement the HEA to satisfy an element of a common law claim between lenders and servicers." Id. As the court stated:

> Congress intended to create a uniform remedial framework for lenders and servicers who violate the terms of the FFELP, by encouraging comprehensive administrative

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3/ In so stating, the District Court did not cite regulations governing the Secretary's authority to take remedial action against lenders or against lenders' third-party servicers, but rather cited regulations governing remedial actions against third-party servicers of guaranty agencies. See Dec. 10, 2002 Mem. Op. at 7-8 (citing 34 C.F.R. § 682.413(c) (J.A. __)). Such servicers are not, however, at issue in this case. The remedial regulations for lenders' third-party servicers are located at 34 C.F.R. §§ 682.413(a), 682.700-711.

> enforcement as a means of resolving disputes between lenders and servicers. However, this intent is compromised when the remedies are administered according to the ebbs and flows of state law. Consequently, because state law in this case stands "as an obstacle to the accomplishment of the objectives of Congress," state law remedies are impliedly preempted by the HEA. [Id.]

Although ruling that CLC "cannot employ the purported violations of the HEA to satisfy elements of its state law claims," the Court did not dismiss CLC's contract and tort claims, concluding that "the Complaint still sets forth substantial factual allegations in support of many of Plaintiff's state law claims." Id. at 9 (J.A. __).

The District Court's Subsequent Rulings. Based on the restrictions imposed by the District Court, CLC filed an amended complaint that asserted its state law claims without relying on Defendants' HEA violations in any way as an element of those claims. J.A. __. The Defendants then filed a motion in limine to exclude evidence regarding loan applications and LVCs that were purportedly denied pursuant to the Defendant's asserted interpretation of the Single Holder Rule. In its ruling on that motion, the District Court made clear that its preemption ruling meant that CLC "may not prove that the Single Holder Rule was a pretext by showing that Defendants' invocation of the Single Holder Rule was -- on the merits of the Single Holder Rule -- incorrect." May 13, 2003 Mem. Op. at 13-14 (J.A. __-__). The relevant issue, the court said, "is whether Defendants invoked the Single Holder Rule in good faith or whether they invoked it as part of some bad faith scheme to harm the Plaintiff." Id. at 14 (J.A. __).

To meet this higher burden of showing bad faith, CLC sought to depose a corporate designee concerning Defendants' tortuous path toward their current interpretation of the Single Holder Rule. The District Court, however, denied CLC's motion to compel Defendants to produce a witness to testify, finding that

> Defendants' interpretation of the Single Holder Rule is irrelevant to the determination of this case. Indeed, discovering what Defendants believed to be the correct interpretation of the Single Holder Rule would only be beneficial if [the] Court were resolving a good faith dispute between the parties concerning the correct interpretation of the Single Holder Rule. [Id. at 16 (J.A. at __).]

Defendants then moved for summary judgment, which the District Court denied with respect to the claims at issue here, while reaffirming its prior rulings restricting CLC's claims. See June 10, 2003 Mem. Op. (J.A. __). Thus, for the claim that SMS breached its contract by improperly denying applications from CLC's would-be borrowers, CLC could not "litigate the issue of whether these denials were proper, based on the good faith interpretation of the HEA." Id. at 12 (J.A. __). Likewise, to establish tortious interference with prospective contractual relations based on Defendants' refusal to process the LVCs, CLC would have to prove that Defendants "conceived and implemented a scheme to willfully disregard federal regulations." Id. at 26

(J.A. __) (emphasis added). The District Court made clear that that standard is not required under state law, but rather springs from "the nettlesome issue of HEA preemption." Id.

Thus, the District Court continued to refuse to allow CLC to prove any element of its contract and tort claims by showing that Defendants violated the HEA. For example, to prove the elements of tortious interference, CLC was required to show that Defendants' interfering conduct was "wrongful." See id. at 24-27 (J.A. __-__). Were it not for the District Court's restriction, CLC would have shown that Defendants' conduct was "wrongful" because it violated the FFELP regulation requiring that a holder return a completed LVC within ten business days of receipt, and thus wrongfully interfered with CLC's consummation of well over 10,000 prospective consolidation loans. See 34 C.F.R. § 682.209(j). CLC would have further shown that Defendants' interpretation of the Single Holder Rule was both wrong as a matter of law, and did not, in any case, excuse them from complying with Section 682.209(j). See id. (providing that a lender's inability to certify that a loan was guaranteed, enforceable, and properly serviced is the only permissible reason for not certifying an LVC, without mentioning the Single Holder Rule).

Unlike its tort claims, CLC's breach of contract claims did not depend on asserted violations of the HEA by Defendants. Yet, the District Court held those claims also were preempted as long as Defendants defended their actions by asserting that they had refused to process CLC's applications based on a good faith interpretation of the Single Holder Rule. See June 10, 2003 Mem. Op. at 11-12 (J.A. __-__). But for the court's ruling, Defendants would have borne the burden of showing that their refusal to process CLC consolidation applications was justified by both 34 C.F.R. § 682.209(j) and the Single Holder Rule in order to avoid liability for breaching their obligations under the MLA.

The Trial and Verdict. At trial, CLC sought to introduce evidence that in Student Loan Marketing Association v. Riley, 104 F.3d 397 (D.C. Cir 1997), SLMA had successfully advocated an interpretation of the Single Holder Rule directly contrary to its position in dealing with CLC. In that case, also concerning the definition of "holder" under the HEA, 20 U.S.C. § 1085(i), SLMA argued -- and the D.C. Circuit agreed -- that SLMA is not the "holder" of loans it sells to securitization trusts. Evidence of SLMA's convenient flip-flop in positions on the HEA definition of "holder" as part of a strategy to rebut CLC's claims with a Single Holder Rule defense would have belied Defendants' claim of good faith. Nevertheless, the District Court excluded that evidence on grounds that "the position that Defendants took in 1997 with regard to the Single Holder Rule is so remote to the 2001 bad faith campaign that it is irrelevant." Tr. 15-16 (J.A. __-__).

After presentation of the evidence, the District Court instructed the jury as follows:

> If you find that defendants' interpretation of the single-holder rule was undertaken in good faith and did not employ wrongful means, then you must find the defendants are not liable for rejecting or refusing to provide payoff information in response to LVCs if the rejections or refusals were based on the defendants' good faith interpretation of the rule.
>
> Similarly, if you find the defendants' interpretation of the rule was undertaken in good faith and did not employ wrongful means, then you must find the defendants are not liable for redirecting or declining to process loan applications if defendants' actions were based on their good faith interpretation of the rule.
>
> However, if you find that defendants' interpretation of the rule was not taken in good faith and that the rejection of the LVCs and/or loan application was based in bad faith or use of wrongful means, then you must find for the plaintiff. [Tr. 1509 (J.A. __).]

The court below thus instructed the jury that it could find for CLC only if it found that Defendants had acted in bad faith or willful disregard of the HEA. So instructed, the jury returned a verdict in favor of Defendants, and the District Court entered judgment accordingly. This appeal followed.

SUMMARY OF ARGUMENT

The District Court's conclusion that the HEA and the Secretary's regulations preempt CLC's state law claims finds no support in the text of the HEA or the regulations, and runs counter to the Secretary's own understanding of the role of state law remedies in the FFELP, as evidenced by his regulations and other statements. CLC's claims do not, therefore, "stand as an obstacle" to FFELP objectives. On the contrary, claims such as CLC's are critical to the operation of the FFELP.

To the extent that the District Court's preemption analysis rested on or resembled a theory of field preemption rather than obstacle preemption, it departed from the uniform view of every other court rejecting field preemption in the HEA context, and did so without statutory or regulatory support.

Finally, even if this Court were to affirm the District Court's preemption ruling, the judgment below should still be vacated and CLC afforded: (1) a new trial in which it is permitted to introduce evidence wrongly excluded by the District Court that is highly probative of Defendants' bad faith, and (2) further discovery on that issue that was improperly denied by the District Court.

STANDARD OF REVIEW

Whether federal law preempts state law is a question of law which this Court reviews de novo. Cox v. Shalala, 112 F.3d 151, 153 (4th Cir. 1997).

This Court reviews a district court's evidentiary and discovery rulings for abuse of discretion. Schultz v. Butcher, 24 F.3d 626, 631 (4th Cir. 1994) (evidence); Lone Star Steakhouse & Saloon, Inc. v. Alpha of Va., Inc., 43 F.3d 922, 929 (4th Cir. 1995) (discovery). A district court will be found to have abused its discretion if its "conclusion is guided by erroneous legal principles," or if, after considering all the evidence, this Court possesses a "definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors." Westberry v. Gislaved Gummi AB, 178 F.3d 257, 261 (4th Cir. 1999) (quotation omitted).

ARGUMENT

I. THE DISTRICT COURT ERRED IN HOLDING THAT THE HIGHER EDUCATION ACT PREEMPTS COLLEGE LOAN CORPORATION'S STATE LAW CLAIMS.

Under the Supremacy Clause, U.S. Const., art. VI, cl. 2, state law, including common law causes of action, may be preempted by federal law in three circumstances:

> first, when Congress, in enacting a federal statute has expressed a clear intent to pre-empt state law; second, when it is clear, despite the absence of explicit pre-emptive language, that Congress has intended, by legislating comprehensively, to occupy an entire field of regulation * * *; and, finally, when compliance with both state and federal law is impossible, or when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. [Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 699 (1984) (internal quotations and citations omitted).]

Of the three species of preemption, the first -- express preemption -- does not apply here because, as the District Court recognized, "the HEA does not expressly preempt state law." Dec. 10, 2002 Mem. Op. at 5 n.3 (J.A. __).

As to field preemption: Every single court to have considered the issue has concluded -- and rightly so -- that the HEA does not occupy the relevant field. See Part I-B, infra. And although, as shown below, the District Court's mode of analysis closely resembled field preemption analysis, the court did not claim to rule that the HEA occupied the field so as to preempt CLC's claims.

The third variety of preemption -- obstacle preemption -- is the one on which the District Court expressly relied. But careful analysis of the HEA and the Secretary's regulations shows that allowing CLC's state law claims to proceed would not, in fact, stand as an obstacle to achieving the objectives of the HEA or the regulations. Accordingly, the District Court's preemption ruling constitutes reversible error.

A. CLC's Claims Are Not An Obstacle To Achieving The Objectives Of The HEA Or The Secretary of Education's Regulations And Thus Are Not Impliedly Preempted.

The purposes of the FFELP -- as expressly set forth in the HEA itself -- are not at all hindered by allowing state law claims of which HEA violations are an element against lenders or servicers. See 20 U.S.C. § 1071(a)(1) (listing purposes of FFELP statute as, inter alia, encouraging guaranty agencies to establish adequate student loan insurance programs). Indeed, the sole FFELP "objective" that the District Court identified as conflicting with CLC's claims was the alleged goal of establishing a uniform remedial scheme in which the Secretary is the sole enforcer of the HEA against servicers and lenders. As shown below, however, there is no support in the HEA or the Secretary's regulations for the existence of such an "objective" -- much less for the finding that it represents the "clear and manifest purpose" of Congress or the "very clear" intent of the Secretary that is a prerequisite for preemption. In finding otherwise, the District Court proceeded in precisely the opposite direction from that required by three interpretive presumptions: the presumption against preemption; the presumption in favor of the Secretary's interpretation of the HEA; and the presumption in favor of the Secretary's interpretation of his own regulations. Furthermore, state law claims such as CLC's not only do not conflict with the regulations, but also are critical to the ability of the FFELP to attract capital in the financial markets. CLC's claims therefore do not stand as an obstacle to any federal objective in the FFELP and are not preempted.

1. Congress Did Not Intend For The HEA To Preempt CLC's Claims.

Contrary to the District Court's conclusion, Congress did not intend to preempt state law tort and contract claims like those asserted by CLC in this case, even if they incorporate a violation of the HEA as an element thereof or give rise to a defense that is based on the HEA. 4/

4/ It is important to recognize that CLC's contract claim did not depend on an HEA violation. Rather, SMS raised the HEA to defend against that claim. SMS argued that it was complying with

Because preemption analysis is at bottom a matter of statutory construction, Congress' intent is "the ultimate touchstone." Medtronic, 518 U.S. at 485 (quotations omitted). In ascertaining that intent, "courts [should] never 'assume[] lightly that Congress has derogated state regulation.'" Coyne & Delany Co. v. Selman, 98 F.3d 1457, 1467 (4th Cir. 1996) (quoting New York State Conference of Blue Cross & Blue Shield Plans v. Travelers, 514 U.S. 645, 654 (1995)). Instead, courts should "'address claims of preemption with the starting presumption that Congress does not intend to supplant state law.'" Id. (quoting Travelers, 514 U.S. at 655). This "strong presumption against federal preemption of state law," WLR Foods, Inc. v. Tysons Foods, Inc., 65 F.3d 1172, 1179 (4th Cir. 1995), gains additional strength in cases, like this one, "involving fields of traditional state regulation, including common law tort liability." Coyne, 98 F.3d at 1467 (citing Travelers, 514 U.S. at 655). Thus, all preemption cases "'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.'" Medtronic, 518 U.S. at 485

[Footnote continued]

the Single Holder Rule in refusing to process CLC's applications, as the MLA required. In any event, no matter how the contract claim is viewed, it is not preempted by the HEA or the Secretary's regulations.

(quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)) (emphasis added).

In enacting the HEA, Congress did not give any sign that its intent -- much less its "clear and manifest purpose" -- was to displace traditional tort and contract claims under state law. Were that Congress' intent, "its failure even to hint at it is spectacularly odd." Medtronic, 518 U.S. at 491 (plurality opinion). On the contrary, Congress gave every indication that it intended to preserve such claims.

First, the text of the HEA evinces Congress' intent to preserve state law claims. The HEA not only does not expressly preempt the state law claims at issue here, but it also does expressly displace state law in a number of other areas. See 20 U.S.C. § 1078(d) (usury laws); id. § 1091a(a) (statutes of limitations); id. § 1091a(b) (infancy defenses); id. § 1099 (disclosure requirements). Those express preemption provisions raise the natural inference, expressio unius est exclusio alterius, that Congress did not intend to impliedly preempt other state law claims. Indeed, those express provisions for preempting some state laws "imply that Congress intentionally did not preempt state law generally, or in respects other than those it addressed." Keams v. Tempe Tech. Inst., Inc., 39 F.3d 222, 225 (9th Cir. 1994).

In fact, numerous HEA provisions demonstrate that Congress affirmatively intended for state law to operate in the FFELP.

For example, an HEA consolidation loan will be insurable only if the loan is evidenced by a note or other agreement that is a "binding obligation * * * under applicable law." 20 U.S.C. § 1078-3(b)(4)(A). See Tipton v. Secretary of Educ., 768 F. Supp. 540, 553-554 (D.W. Va. 1991) (noting that such provision "negates any inference that Congress intended to stake out the entire field and leave no room for supplementary state laws"); Morgan v. Markerdowne Corp., 976 F. Supp. 301, 318 (D.N.J. 1997) (same). The HEA also provides that no statute of limitations, state or federal, "shall terminate the period within which suit may be filed" to collect an FFELP loan. 20 U.S.C. § 1091a(a)(2). And the HEA clearly contemplates state suits to recover moneys loaned under the program. See id. § 1091a(c). See also 20 U.S.C. § 1082(m)(1)(E)(i) (providing for attachment and perfection of security interests "in the manner provided by the applicable State's law"); id. (statutory liens in securitized loans may be created under state law). These and other provisions leave little doubt that "Congress expected state law to operate in much of the field in which it was legislating." Keams, 39 F.3d at 225-226.

Second, the lack of any statutory remedy for program participants injured by the HEA violations of others indicates that Congress intended to preserve remedies under state law in such circumstances. Although the HEA does not create a private right of action, the absence of such a right or other federal remedy for injuries caused by HEA violations strongly implies that Congress did not intend to displace state law remedies for such injuries. See Abbot, 844 F.2d at 1112 ("The presumption against preemption is even stronger against preemption of state remedies, like tort recoveries, when no federal remedy exists."). As the Supreme Court explained when it considered whether state law remedies for harms resulting from the nuclear energy program were preempted:

> [T]here is no indication that Congress ever seriously considered precluding the use of such remedies either when it enacted the Atomic Energy Act in 1954 or when it amended it in 1959. This silence takes on added significance in light of Congress' failure to provide any federal remedy for persons injured by such conduct. It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct. [Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 251 (1984).]

The District Court supported its preemption decision with the observation that "Congress created a specific and extensive framework governing the consolidation of loans authorized under the HEA." Dec. 10, 2002 Mem. Op. at 7 (J.A. __). But "the mere existence of a detailed regulatory scheme does not by itself imply preemption of state remedies." Keams, 39 F.3d at 226. Preemption does not ineluctably follow from extensive regulation of consolidation loans, just as, in this Court's words, "[p]reemption does not follow immediately from the comprehensive federal regulation of prescription biological products. Every subject that merits congressional legislation is, by definition, a subject of national concern. That cannot mean, however, that every federal statute ousts all related state law." Abbot, 844 F.2d at 1112.

2. The Secretary's Interpretation Of The HEA And His Regulations Evince His Understanding That CLC's Claims Are Not Obstacles To The HEA Or The Regulations.

That the District Court erred in preempting CLC's state law claims is confirmed by the conspicuous absence of any suggestion by the Secretary in his regulations and accompanying explanatory material that the HEA or the regulations have such preemptive effect. Nowhere in his public pronouncements has the Secretary indicated that he has ever even considered preempting state law claims against lenders and servicers turning on HEA violations -- much less that he affirmatively decided to do so in his FFELP regulations. On the contrary, although the Secretary has not directly addressed the specific question whether the HEA or its regulations preempt such state law remedies, his regulations and other published materials evince an understanding that such state law remedies are indeed available and play an important role in the program.

The Secretary is authorized by 20 U.S.C. § 1082 to administer the HEA, and his statements interpreting the preemptive effect of the statute are therefore to be accorded "substantial weight." Medtronic, 518 U.S. at 496 (citing Chevron

U.S.A. Inc. v. NRDC, 467 U.S. 837 (1984)). See also id. at 506 (Breyer, J., concurring) (noting that "regulations, preambles, interpretive statements, and responses to comments" are entitled to deference because the agency has a "special understanding of the impact of both state and federal requirements, as well as an understanding of whether (or the extent to which) state requirements may interfere with federal objectives") (quotation omitted); Brannan, 94 F.3d at 1264 ("the Secretary is uniquely qualified to determine whether a particular form of state law stands as an obstacle to the accomplishment and execution of [the FFELP]") (quotations omitted)). And the Supreme Court has made it clear that, in determining whether an agency's regulations have preemptive effect, the agency's interpretation is "dispositive." Medtronic, 518 U.S. at 496 (citing Hillsborough County v. Automated Medical Labs., Inc., 471 U.S. 707, 714 (1985)).

The Secretary has recognized that the HEA and his regulations thereunder preserve state law remedies against program participants. For instance, the Secretary in 1992 declined an invitation "to prescribe by regulation a uniform Federal rule regarding borrower defenses [against loan holders] that would preempt State law otherwise applicable to FFEL program loans." 57 Fed. Reg. 60280, 60283 (Dec. 18, 1992). See also 51 Fed. Reg. 40886, 40939 (Nov. 10, 1986) (recognizing that a lender can recover from a guaranty agency losses incurred by the lender due to the guarantor's failure to pay a claim within the regulatory 90-day timeframe); 61 Fed. Reg. 60426, 60427 (Nov. 27, 1996) (noting guaranty agencies "long-standing obligations under State and common law").

With respect to servicers, the Secretary's explanatory statements accompanying the final third-party servicer regulations reveal his view that agreements between third-party servicers and program participants are "enforceable contracts." See 59 Fed. Reg. 22348, 22364 (Apr. 29, 1994) (oral contracts between schools and their servicers are "enforceable contracts," just like written contracts). Yet, under the District Court's reasoning, a servicer could not be sued for breaching the most basic and important of its contractual obligations to a client -- to carry out the client's HEA responsibilities -- since to do so the client necessarily would have to claim that the servicer's conduct amounted to an HEA violation, and such a claim would be preempted. Thus, the District Court's view conflicts with the Secretary's own understanding of the HEA and his regulations as allowing agreements between servicers and their clients to function as ordinary, "enforceable contracts."

The Secretary's regulations and explanatory statements similarly reflect his underlying understanding that state law remedies are available against lenders who violate the HEA. Specifically, since 1986 the Secretary has recognized the ability of an FFELP loan buyer to enforce state contract law remedies against the selling lender based on the latter's HEA violations. See 34 C.F.R. § 682.212(f) (loan buyer may obtain a contractual warranty from seller to protect against a guarantor's denial of a default claim payment based on seller's HEA violations); 51 Fed. Reg. at 40945 (same for seller of federally insured FFELP loans). To obtain such a remedy, the buyer must prove that the selling lender breached its obligation to comply with the HEA. Under the District Court's approach, however, such claims are preempted by the HEA. Thus, the court's ruling runs counter to the Secretary's understanding that his regulations permit state law remedies against lenders who violate the HEA, and would even nullify specific remedies of that nature (i.e., enforcement of contractual warranties) expressly approved in his regulations and explanatory materials.

It would be wrong to infer preemption, as the District Court did, from the level of detail of the Secretary's regulations. 5/ As this Court has recognized, "[c]ourts are more reluctant to infer preemption from the comprehensiveness of regulations than from the comprehensiveness of statutes." Abbot, 844 F.2d at

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5/ Furthermore, SLMA itself has questioned the District Court's view that the Secretary's regulations provide for "comprehensive administrative enforcement" -- at least where SLMA is concerned. See Brief of Student Loan Marketing Association at 11 n.9, In re Student Loan Marketing Association, U.S. Dep't of Educ., Docket No. 96-23-SL ("Since Sallie Mae was established by Congress under Section 439 of the HEA and specifically named as a lender in Section 435 of the HEA, the Secretary arguably has no authority to limit, terminate or suspend Sallie Mae from participating in the FFELP.") (Ex. 3 to CLC Opp. to Mot. to Dismiss (J.A. __)).

1112. Indeed, "courts are reluctant to find preemption by federal regulations when the agency does not make very clear an intent of preemption since agencies normally address problems in a detailed manner." Id. (emphasis added). As the Supreme Court has cautioned:

> As a result of their specialized functions, agencies normally deal with problems in far more detail than does Congress. To infer pre-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. Such a rule, of course, would be inconsistent with the federal-state balance embodied in our Supremacy Clause jurisprudence. [Hillsborough County, 471 U.S. at 717.]

A reluctance to infer preemptive intent merely from detailed regulations is particularly appropriate in the FFELP context, where the Secretary has demonstrated that he knows how to clearly and unambiguously express preemptive intent. See 55 Fed. Reg. 40120, 40121 (Oct. 1, 1990) (publishing Secretary's express interpretation of his FFELP regulations as preempting certain state debt collection laws). 6/

6/ If the Secretary had intended the third-party servicer regulations to preempt state law remedies, he would have been required under the 1987 executive order on Federalism to consult with "appropriate officials and organizations representing the States" and to "provide all affected States notice and an opportunity for appropriate participation in the proceedings." Exec. Order No. 12,612, §§ 4(d)-(e), 52 Fed. Reg. 41685, 41686 (Oct. 26, 1987). There is no evidence that the Secretary ever took these mandatory steps. Nor is there any evidence that he included a Federalism Assessment in his submission of the

In concluding that the Secretary's regulations were intended to displace state law remedies against lenders and servicers, the District Court cited solely to a page from the preamble of the proposed regulations governing third-party servicers. See Dec. 10, 2002 Mem. Op. at 7-8 (J.A. __-__). The court did not quote any language from that page, and CLC can find none that supports an inference of preemption or even a preference for uniformity. See 59 Fed. Reg. 8044, 8055 (1994). Moreover, the preamble to the third-party servicer regulations -- indeed those regulations themselves -- are irrelevant to CLC's tort claims against the various Defendants. Those claims do not involve a lender/servicer relationship between CLC and SMS, but rather are based on SMS' actions on behalf of the lenders holding the loans to be consolidated, SLMA's breach of its duties as one of those lender/holders, and the actions of SMI and SLM as management provider and parent company, respectively.

To the extent the District Court implicitly relied on (although it did not cite) the Secretary's remedial regulations for lenders to justify preempting the tort claims against SLMA, such reliance was also misplaced. See 34 C.F.R. §§ 682.413(a), 682.700-711. Those regulations do little more than reflect sanctions already authorized by statute and precedent. See 20

[Footnote continued]

regulations to the Office of Management and Budget for review. See id. at § 6(c), 52 Fed. Reg. at 41686.

U.S.C. § 1082(g)(civil fines); id. § 1082(h) (limitation, suspension, and termination); LTV Educ. Sys., Inc. v. Bell, 862 F.2d 1168, 1175 (5th Cir. 1989) (authority to recover payments from lenders); American Bank of San Antonio v. United States, 633 F.2d 543, 553 (Ct. Cl. 1980) (same). It would strain credulity to suggest that the Secretary made a "regulatory decision" to preempt state law remedies merely by including in his regulations language reflecting already existing remedial powers. See Dec. 10, 2002 Mem. Op. at 8 (J.A. __).

Finally, contrary to the District Court's ruling, the Secretary does not enforce the HEA alone. In fact, Congress has recognized that the FFELP is "largely operated through" state and private nonprofit guaranty agencies, and that such agencies "occupy a central place" in the program. S. Rep. 102-204, at 9, 53 (1991). In keeping with this decentralized structure, the Secretary's regulations specifically require each guaranty agency to "take such measures and establish such controls as are necessary to ensure its vigorous enforcement of all Federal, State, and guaranty agency requirements." 34 C.F.R. § 682.410(c) (emphasis added).

The statutory enforcement authority of the guaranty agencies also undermines the District Court's conclusion that "Congress intended to create a uniform remedial framework for lenders and servicers who violate the terms of the FFELP." Dec. 10, 2002 Mem. Op. at 8 (J.A. __) (emphasis added). Congress has assigned to each of the 36 guaranty agencies discretionary authority to limit, suspend, or terminate a lender that violates the HEA from participating in its loan guaranty program when it deems such action "warranted." See 20 U.S.C. § 1078(b)(1)(U); 34 C.F.R. §§ 682.401(b)(7)(i)(A), 682.706(b)(3)(iii). As entities independent of the Secretary, the 36 state guaranty agencies potentially have 36 different interpretations of when such a sanction is "warranted." Thus, a "uniform remedial framework" providing for enforcement exclusively by the Secretary neither exists under, nor is contemplated by, the HEA. 7/

As interpretations of the HEA, the Secretary's regulations and other statements reflecting his understanding that contract and tort remedies based on HEA violations by lenders and servicers are not preempted must be given "substantial weight." Medtronic, 518 U.S. at 496. Given the presumption against preempting such traditional state law remedies absent a "clear and manifest purpose" on the part of Congress, id. at 485, the District Court's reliance on the HEA to support its preemption ruling cannot be sustained. Nor can the District Court's discovery of a preemptive purpose lurking silently in the subtext of the Secretary's regulations withstand scrutiny. The requisite

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7/ This lack of uniformity extends beyond enforcement to the substantive regulation of the FFELP itself. See 34 C.F.R. § 682.413(a)(1)(ii); id. App. D, § B; 51 Fed. Reg. at 40944 ("the regulations do not prohibit * * * a guarantee agency from requiring additional activities by its lenders").

"very clear" expression of the Secretary's alleged intent is very clearly lacking here. See Hillsborough County, 471 U.S. at 717; Abbot, 844 F.2d at 1112. In fact, as shown above, the Secretary understands his regulations to contemplate precisely the opposite. 8/

3. The District Court's Ruling, Not CLC's Claims, Stands As An Obstacle To Achieving Congress' Objectives.

Contrary to the decision below, allowing state law contract and tort claims seeking to enforce HEA obligations actually furthers Congress' goals in the HEA. Congress intended that "students and institutions benefit from a competitive environment" in the FFELP, and that there be "investment in the student loan market by a broad range of investors." S. Rep. No. 105-81, at 2 (1998); H.R. Rep. No. 96-520, at 33 (1979). See also GAO Report, "Trustee Arrangements Serve Useful Purposes in Student Loan Market," GAO/HEHS-00-170 at 5 (2000) (competition among lenders "helps to enhance the products and services lenders offer to students"). State contract and tort law remedies for violations of the HEA increase the confidence of lenders and

8/ The District Court relied on the Ninth Circuit's decision in Brannan to support its preemption ruling. See Dec. 10, 2002 Mem. Op. at 8 (J.A. __). In Brannan, however, the court deferred to the Secretary's official interpretation that certain claims brought under a state unfair debt collection practices statute were preempted by federal regulations governing loan collection activities by guaranty agencies and their agents. See 94 F.3d at 1263-66. Here, by contrast, neither the Secretary nor Congress has ever suggested that state law claims based on HEA violations are preempted by the HEA.

investors that they will not have to bear catastrophic loss at the hands of others in the program. This confidence, in turn, paves the way for the competitive environment sought by Congress. Thus, in this case, "private litigation would assist the Secretary in carrying out the purposes of the statute." Keams, 39 F.3d at 227. Claims such as CLC's do not conflict with federal law, but rather "provide[ ] another reason for [Defendants] to comply with * * * existing 'requirements' under federal law." Medtronic, 518 U.S. at 495.

The District Court's ruling, by contrast, threatens the viability of the FFELP. The FFELP's success depends on a complex matrix of contractual relationships among numerous private commercial entities, including, for example, lenders, guaranty agencies, third-party servicers, secondary market purchasers, and investors. See, e.g., MLA (J.A. __). Under the District Court's ruling, none of those parties to the FFELP commercial matrix would have a remedy for a breach of contract by a lender or servicer based on a violation of the HEA, even where, as is invariably the case, the contract expressly requires the breaching party to comply with the HEA. Id. at ¶ 4.3 (J.A. __). 9/ The financial institutions that participate voluntarily in the FFELP would run the risk of suffering uncompensated

9/ Compliance with the HEA and the Secretary's regulations is a condition for receipt of federal benefits on FFELP loans. See 34 C.F.R. §§ 682.406, 682.413.

catastrophic loss if, for example, their servicers or loan sellers violated the HEA, or if, as here, a competing lender engaged in systematic violations of the HEA in order to prevent the lender from consummating lending relationships with its customers. Faced with this risk of injury without redress, banks and other private entities would become less willing to participate in the FFELP. If that were to happen, the continued viability of the FFELP would be in serious jeopardy.

That the District Court's preemption of state law claims would interfere with the objectives of the FFELP is also demonstrated by the public statements of the securitization trusts created by Defendants and their affiliates. Indeed, those statements illustrate the central role that the availability of state law remedies plays in the ability of FFELP lenders to attract investor support in the financial markets.

Specifically, in prospectuses for securities backed by FFELP loans sold to securitization trusts by SLM affiliates, the trusts assume the availability of state law claims based on a servicer's HEA violation when they assure prospective investors that enforceable contractual obligations exist on the part of the SLM-affiliate responsible for servicing the securitized loans to ensure that, in the event such servicer breaches its HEA compliance-related covenants, the trusts will be made whole. 10/

10/ *See* SLM Student Loan Trusts Prospectus, at 16-17, 23, 43-44 (Nov. 5, 2002) (available at http://salliemae.com/investor

Similarly, the same prospectuses assume the availability of state law claims based on a lender's HEA violation when they assure prospective investors that enforceable contractual obligations exist on the part of the SLM-affiliated lender selling the loans to the trusts to ensure that, in the event the loans are tainted by HEA violations committed by the selling lender, the trusts will be able to recover their losses from the selling lender. See Nov. 5, 2002 Prospectus at 23, 38-39. The trusts have continued to provide these assurances since the District Court's ruling in this case, notwithstanding the fact -- and, moreover, without even mentioning -- that the District Court held that state law claims against lenders and servicers based on HEA violations are preempted. 11/

The assurances provided by the securitization trusts underscore the role of state law remedies in the complex commercial structure of the FFELP and demonstrate how the District Court's preemption ruling imposes a serious threat to the FFELP. In that regard, it is important to recognize that the

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/slmtrust/prospect/pdf/200206.pdf) ("Nov. 5, 2002 Prospectus"). CLC relied on the preliminary version of this prospectus in the proceedings below. See CLC Opp. to Mot. to Dismiss at 14 n.26. Later, the prospectus was finalized and the preliminary version removed from the website.

11/ See SLM Student Loan Trusts Prospectus at 15-16, 22, 37-38, 42-43 (July 25, 2003) (available at http://salliemae.com/investor/slmtrust/prospect/pdf/200309.pdf).

statutory and regulatory provisions governing guaranty agencies are more detailed and extensive than those governing lenders and servicers. See, e.g., 20 U.S.C. §§ 1072, 1072a, 1072b, 1078(b), 1078(c); 34 C.F.R. §§ 682.400-682.423 (regulating virtually every aspect of guaranty agency finances, operations, and requirements, and, in Section 682.413(c)(1), providing the Secretary with broad authority to limit, suspend or terminate the agency's FFELP agreements with the Secretary if the agency violates the HEA). Thus, there is every reason to believe that the District Court's analysis, if upheld, would be applied to preempt state law contract and tort remedies based on HEA violations by guaranty agencies. At that point, a lender's ability to enforce the central contractual underpinning of the FFELP -- the guaranty agency's duty to honor the guaranty on defaulted loans that have been administered in compliance the HEA -- would be called into question. A lender trying to enforce its right to payment from the guarantor on a defaulted FFELP loan would have to prove that it complied with the HEA, since such compliance is invariably a condition precedent to the lender's right to payment from the guarantor. See, e.g., MLA § 1.12 (J.A. _). If the guarantor raised a good faith dispute as to the lender's HEA compliance, the District Court's reasoning in this case would require that the lender's claim be dismissed as preempted by the HEA. The FFELP would have great difficulty operating effectively in the face of such a result.

B. Neither Congress Nor The Secretary Preempted CLC's Claims By Occupying The Field.

Although the District Court's based it preemption holding on obstacle preemption, its analysis walked the classic path of field preemption, relying on the extensiveness and specificity of the HEA, the alleged need for uniformity of remedies, and the level of detail in the Secretary's remedial regulations. See Cox v. Shalala, 112 F.3d at 154 (Congress "'occup[ies] the field' by regulating so pervasively that there is no room left for the states to supplement federal law"); Morgan v. Markerdowne Corp., 976 F. Supp. at 318 (analyzing whether state law remedies are preempted by the HEA under field preemption analysis).

Moreover, the District Court found that CLC's claims would "stand as an obstacle" to an alleged federal objective of precluding all remedies for HEA violations by lenders and servicers other than those set forth in the Secretary's regulations. In other words, the Court found that CLC's claims would "stand as an obstacle" to the alleged federal goal of occupying the entire field of remediation of HEA violations by lenders and servicers. Every field preemption analysis, however, can be cast in such terms.

Finally, the District Court abjured any inquiry into the merits of the Defendants' substantive federal law argument, i.e., their attempt to justify their misconduct based on the Single Holder Rule. This aspect of the District Court's ruling is perhaps the clearest sign that the Court blurred the line between obstacle preemption and field preemption. Such abstention is expected in field preemption cases because Congress has occupied the regulatory zone and therefore left no room for state regulation, consistent or otherwise. But conflict preemption -- whether direct, where compliance with both state and federal law is impossible, or implied, where state law stands as an obstacle to achieving federal objectives -- requires a comparison of substantive requirements under state and federal law to determine whether, in fact, a conflict requiring preemption actually exists.

To the extent that the District Court employed field preemption analysis, its finding of preemption runs up against the hard fact that every court to consider the issue has concluded that the HEA does not "occup[y] the field and leav[e] no room for state law to operate." Keams, 39 F.3d at 226. See, e.g., Armstrong v. Accrediting Council for Continuing Educ. & Training, Inc., 168 F.3d 1362, 1369 (D.C. Cir. 1999); Morgan v. Markerdowne Corp., 976 F. Supp. at 318; Williams v. National Sch. of Health Tech., Inc., 836 F. Supp. 273, 282 n.7 (E.D. Pa. 1993), aff'd, 37 F.3d 1491 (3d Cir. 1994); Tipton, 768 F. Supp. at 552-553. The notion that Congress intended the HEA to broadly preempt state law "cannot be reconciled with the narrow and precise preemptions expressed" throughout the HEA, Keams, 39 F.3d at 225, in targeted provisions expressly preempting state usury laws, statutes of limitations, infancy defenses, and disclosure requirements. See 20 U.S.C. §§ 1078(d), 1091a(a), 1091a(b), 1099. 12/ As the Supreme Court has stated, "[w]hen Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a reliable indicum of congressional intent with respect to state authority, there is no need to infer congressional intent to preempt state laws from the substantive provisions of the legislation." Cipollone v. Liggett Group, Inc., 505 U.S. 504, 517 (1992) (internal quotations and citations omitted). The lack of such an inference is particularly strong here, where the HEA contains not a general preemption clause but rather a number of specific preemption provisions. "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." Keams, 39 F.3d at 225-226 (internal quotations and citations omitted). Finally, all of reasons cited above for concluding under obstacle preemption analysis that neither the Congress nor the Secretary intended to preempt CLC's

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12/ See also H.R. Conf. Rep. No. 102-630, at 508 (1992) (rejecting proposal to preempt state law claims and defenses by FFELP borrowers against lenders, holders, guaranty agencies, and the Secretary and indicating Congress' intention that "defrauded students retain viable remedies" and "to leave to the courts the complex determination as to when a student should and should not be able to raise the school's fraud or other misconduct as a defense to the student's loans").

claims apply with even greater force to field preemption analysis of those claims. See Part I-A, supra.

Nor does the mere existence of a detailed statutory scheme governing consolidation imply field preemption in this case. See Abbot, 844 F.2d at 1112 ("Every subject that merits congressional legislation is, by definition, a subject of national concern. That cannot mean, however, that every federal statute ousts all related state law."). Indeed, both the Supreme Court and this Court have held in other contexts that state law claims are not preempted simply because they are based on a violation of a federal statutory or regulatory requirement. That is so even where the federal scheme is detailed and extensive, as it is here, and even where, unlike here, the federal law has partial, or even complete, field preemption effect by virtue of an express statutory preemption provision. See, e.g., Medtronic, 518 U.S. at 481 (rejecting the argument that the Medical Devices Amendments ("MDA") to the Food, Drug and Cosmetics Act and FDA regulations preempt all common law claims against manufacturers of medical devices, even though the MDA expressly preempts state "requirements" relating to the safety or effectiveness of a medical device that are "'different from, or in addition to,'" the requirements of the Act or of the FDA); Worm v. American Cyanamid Co., 970 F.2d 1301, 1305 (4th Cir. 1992)(Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA") does not preempt state tort claims for violations of FIFRA's requirements, even though FIFRA is a "comprehensive regulatory statute" that expressly preempts state law labeling or packaging requirements "in addition to or different from" federal requirements) (emphasis in original); Worm v. American Cyanamid Co., 5 F.3d 744, 748 (4th Cir. 1993) ("If a state elects to recognize that a breach of a FIFRA-created duty forms the basis for a state remedy, we have held that it is permitted to do so"); Lowe v. Sporicidin Int'l, 47 F.3d 124, 129-130 (4th Cir. 1995) (same). See also Moss v. Parks Corp., 985 F.2d 736, 740 (4th Cir. 1993)(Federal Hazardous Substances Labeling Act ("FHSLA") does not preempt state tort claims for violations thereof).

Even in field preemption cases, where Congress has carved out a zone of exclusive federal regulation, courts have nevertheless held that state law claims based on a violation of the federal law at issue are not preempted. For instance, in Silkwood, the Supreme Court held that the Atomic Energy Act does not preempt state tort claims for punitive damages, even though the Act occupies the entire field of nuclear energy safety. See 464 U.S. at 249, 258. See also Abdullah v. American Airlines, Inc., 181 F.3d 363, 370 (3d Cir. 1999) (holding that state law claims based on violations of federal aviation safety standards are not preempted even though "federal control is intensive and exclusive"). Thus, even if Congress had broadly intended to occupy the entire student loan field -- which it clearly did not -- the court below still would have erred in holding that state law claims based on a violation of the HEA are preempted. The logic of these cases is simple: State law remedies based on a federal statutory violation, even in areas of exclusive and uniform federal regulation, need not conflict with, but rather can coexist with and complement, the federal regulatory framework.

Thus, the mere fact that a state law claim has as an element a violation of a provision found in a detailed federal statutory or regulatory scheme -- even one with full field preemption effect -- is insufficient to find that the claim is preempted. In each of the cases cited above permitting state law remedies based on violation of a federal statute, the statutory scheme included a detailed framework of remedial powers for the administrative agency at least as comprehensive as the Secretary's remedial regulations in the FFELP. 13/ Yet, in none of these decisions is there even the faintest hint of the District Court's premise in this case that the existence of a detailed framework of administrative remedies suffices to preempt

13/ See, e.g., 21 U.S.C. § 360h (to enforce MDA, FDA may order a device manufacturer to notify the public if a device creates an unreasonable risk of substantial harm to the public health, and, if additional criteria are met, FDA may order the manufacturer to repair or replace the device or refund the purchase price); 7 U.S.C. § 136k(a), (b) (EPA can forbid sale of pesticides, and can impose civil and criminal penalties for violations of FIFRA or its implementing regulations); 15 U.S.C. § 1265(a) (if product fails to conform to an applicable FHSLA safety standard or ban, the Consumer Product Safety Commission may seize the product and initiate an action for condemnation in federal district court).

state law claims based on violations of the statute for which such remedies are provided.

In sum, the District Court's ruling that CLC's claims were preempted –- whether based on obstacle or field preemption analysis –- was legal error and should be reversed.

II. THE DISTRICT COURT ERRED IN EXCLUDING KEY EVIDENCE AND IN BARRING CRITICAL DISCOVERY OF DEFENDANTS' BAD FAITH.

Even if this Court were to affirm the District Court's preemption rulings, this Court should still vacate the judgment below so as to afford CLC (a) a new trial in which it is permitted to introduce evidence highly probative of Defendants' bad faith that was improperly excluded below, and (b) further discovery on the pretextual nature of Defendants' Single Holder Rule defense.

A. The District Court Erred In Excluding Evidence Of Defendants' Prior Inconsistent Interpretation Of The Single Holder Rule.

In this litigation, Defendants have argued that dozens of entities affiliated with SLM, as well as securitization trusts to which SLMA and other SLM-affiliates have sold loans, all comprise a single "holder" for purposes of the Single Holder Rule, even though each is a "holder" in its own right. Ex. 315 (J.A. __). But Defendants' present interpretation of the Rule contradicts an interpretation SLMA advanced in recent litigation in the D.C. Circuit -- an interpretation that SLMA to this day continues to rely on to avoid paying millions of dollars in fees to the Secretary.

In Student Loan Marketing Association v. Riley, 104 F.3d 397 (D.C. Cir. 1997), SLMA argued that it was not required to pay an HEA-imposed 0.3% "offset fee" on loans it had conveyed to securitization trusts, even though the HEA mandated that SLMA pay that fee on all loans SLMA "holds." See 20 U.S.C. § 1087-2(h)(7). Relying the statutory definition of "holder," see 20 U.S.C. § 1085(i) ("The term 'holder' means an eligible lender who owns a loan"), SLMA argued that it no longer owns -- and hence is not the holder of -- the loans it sells to a securitization trust. See Brief for the Student Loan Marketing Association at 22 n.6, Student Loan Marketing Ass'n v. Riley, 104 F.3d 397 (D.C. Cir. 1997) (Nos. 95-5428 & 96-5016) ("The trustee holds legal title to the loans for the benefit of the trust's security holders and, under the [Act], is an 'eligible lender' and the 'holder' of the loans transferred to the trust.") (Ex. 1 to CLC's Opp. to Defs.' Mot. to Quash Subpoena Issued to Robert S. Lavet (Docket No. 212) (J.A. __)). 14/

14/ When Riley was decided, 20 U.S.C. § 1078-3(b)(1)(A)(i) required a consolidation loan lender to be the holder of the loans to be consolidated. In 1998, the HEA was amended to allow borrowers to consolidate with lenders other than those holding their loans if the borrower had FFELP loans held by "multiple holders." Pub. L. No. 105-244, § 420(c)(1), 112 Stat. 1695 (1998). The 1998 amendment did not, however, change the meaning of "holder" in Section 1078-3. In fact, it used the word again while leaving undisturbed the definition in Section 1085(i) --

In fact, SLMA specifically asserted in Riley that it did not "hold" the loans it had sold for purposes of the Single Holder Rule. When asked at oral argument how SLMA can make consolidation loans to borrowers of existing loans sold by SLMA to a securitization trust if SLMA is not the "holder" of those loans, SLMA explained that if such a borrower wishes to obtain a consolidation loan from SLMA, SLMA simply buys back the loan from the trust. Then, "having secured ownership of the loan," SLMA makes the consolidation loan to the borrower without violating the Single Holder Rule. Transcript of Jan. 31, 1997 Oral Argument Hrg. at 19-21, Student Loan Marketing Ass'n v. Riley, 104 F.3d 397 (D.C. Cir. 1997) (Nos. 95-5428 & 96-5016).

The D.C. Circuit accepted SLMA's argument that SLMA is not the "holder" of the loans it sells to securitization trusts and rejected the Secretary's contrary view. See Riley, 104 F.3d at 409 ("we cannot sustain his conclusion that a securitized portfolio is held by Sallie Mae"). The Riley court ordered the case remanded to the Secretary, see id., who is now bound by and follows that D.C. Circuit precedent. And SLMA, since its victory in Riley, has paid no offset fees on such loans. See Tr. at 325 (J.A. __).

[Footnote continued]

which applies to the entire FFELP statute, including Section 1078-3.

Defendants' position in this case -- that SLMA "holds" loans it and other SLM affiliates have sold to securitization trusts -- thus directly contradicts the position SLMA convinced the D.C. Circuit to adopt in Riley. Defendants' shifting interpretation is plainly relevant to their good faith in invoking the Single Holder Rule to justify their misconduct in this case. "Relevant" evidence is that having "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. See also United States v. Leftenant, 341 F.3d 338, 346 (4th Cir. 2003) ("[R]elevance typically presents a low barrier to admissibility. Indeed, to be admissible, evidence need only be worth consideration by the jury, or have a plus value.") (quotation omitted). Defendants' prior inconsistent interpretation easily meets that threshold. Indeed, that evidence is highly probative of Defendants' bad faith. As this Court has held in the Title VII context, the fact that a Defendant's position has vacillated over time is, "in and of itself, probative of pretext." EEOC v. Sears Roebuck & Co., 243 F.3d 846, 852-853 (4th Cir. 2001). 15/

15/ See also Dominguez-Cruz v. Suttle Caribe, Inc., 202 F.3d 424, 432 (1st Cir. 2000) ("[W]hen a company, at different times, gives different and arguably inconsistent explanations, a jury may infer that the articulated reasons are pretextual."); Thurman v. Yellow Freight Sys., Inc., 90 F.3d 1160, 1167 (6th Cir.), amended, 97 F.3d 833 (6th Cir. 1996); EEOC v. Ethan Allen, Inc., 44 F.3d 116, 120 (2d Cir. 1994).

By excluding this probative evidence, the court abused its discretion. Although a "trial court's discretion to admit or exclude evidence is generally broad, * * * competent evidence cannot be excluded without a sound and acceptable reason." Davidson Oil Country Supply Co. v. Klockner, Inc., 908 F.2d 1238, 1245 (5th Cir. 1990). See also United States v. Upper Potomac Properties Corp., 448 F.2d 913, 917 (4th Cir. 1971) ("[F]ederal courts favor a broad rule of admissibility * * * of all evidence which is relevant and material to the issues in controversy, unless there is a sound and practical reason for excluding it.") (quotations omitted). The District Court provided no sound reason here.

In excluding evidence of Defendants' volte-face, the District Court relied solely on the time that had elapsed since the Riley case. The court's overly cramped approach failed to consider the probative value of such evidence to CLC's case. In determining the admissibility of prior bad acts evidence -- which is less probative yet far more prejudicial than the evidence at issue here -- courts have declined to adopt an absolute rule concerning the number of years separating acts and have instead considered the facts and circumstances of each case. See, e.g., United States v. Mejia-Uribe, 75 F.3d 395, 398 (8th Cir. 1996) ("There is no absolute rule regarding the number of years that can separate offenses [but] [r]ather, the court applies a reasonableness standard and examines the facts and circumstances of each case.") (quotation omitted). 16/

Moreover, the District Court's conclusion that four-year-old evidence was too "remote" stands in contrast to holdings by other courts that incidents occurring as long as eighteen years earlier were not too remote to be probative of a Defendant's state of mind. See United States v. Hernandez-Guevara, 162 F.3d 863 at 873. 17/

In any event, since SLMA continues to rely on its inconsistent interpretation to avoid paying fees to the government, SLMA's position in Riley is part of a course of conduct that is not four years old, but rather has been going on for four years. Because decisions of the D.C. Circuit are binding on the Secretary, that Court's decision interpreting the HEA definition of "holder" continues to have nationwide binding

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16/ See also United States v. Hernandez-Guevara, 162 F.3d 863, 872 (5th Cir. 1998) ("The age of a prior conviction has never been held to be a per se bar to its use"); United States v. Spillone, 879 F.2d 514, 519 (9th Cir. 1989) ("We * * * decline to adopt an inflexible rule excluding evidence of prior bad acts after a certain amount of time elapses."); United States v. Fields, 871 F.2d 188, 198 (1st Cir. 1989) ("reasonableness" standard); United States v. Scott, 701 F. 2d 1340, 1345-46 (11th Cir. 1983) (remoteness test not mechanical).

17/ See also United States v. Johnson, 132 F.3d 1279, 1283 (9th Cir. 1997) (13-year gap); United States v. Rude, 88 F.3d 1538, 1550 (9th Cir. 1996) (7- or 8-year gap); United States v. Wimberly, 60 F.3d 281, 285 (7th Cir.1995) (13-year gap); United States v. Pollock, 926 F.2d 1044, 1047-48 (11th Cir. 1991) (5-year gap); United States v. Burkett, 821 F.2d 1306, 1308-10 (8th Cir. 1987) (7-year gap).

effect on the Secretary's administration of the FFELP. Accordingly, since its victory in Riley, SLMA has quite properly treated that ruling as the authoritative word on the definition of "holder" in the HEA, and, as noted above, has not paid the 0.3% fee on loans it has securitized.

The exclusion of evidence is not harmless error where "a party [i]s prevented from fully developing evidence relevant to a material issue." Schultz v. Butcher, 24 F.3d at 632. Here, the District Court prejudiced CLC's case by excluding evidence highly probative of Defendants' bad faith. Because it is impossible to say, "with fair assurance," that the judgment below was not "substantially swayed by the error," the judgment cannot stand. Bank of Montreal v. Signet Bank, 193 F.3d 818, 834 (4th Cir. 1999) (exclusion of evidence fundamental to transaction between the parties was not harmless error) (quotations omitted). For this reason alone, CLC is entitled to a new trial.

B. The District Court Erred In Refusing To Allow CLC To Depose A Corporate Designee Concerning Defendants' Interpretation Of The Single Holder Rule.

The District Court also prevented CLC from developing other evidence of Defendants' bad faith. Prior to trial, CLC sought to depose a corporate designee concerning Defendants' current understanding of the Single Holder Rule. Specifically, CLC sought testimony regarding "the identity of each entity that Defendants contend, together with Defendants, constitute(s) a single holder for purposes of applying the Single Holder Rule and the basis for Defendants' contention in that regard." CLC's Am. Notice of Depo. of Defs. at 4 (Ex. 2 to CLC's Mot. to Compel Deposition Testimony of Corporate Designee (Docket No. 105) (J.A. __)).

Such discovery was reasonably calculated to yield probative evidence of Defendants' bad faith. After Defendants launched their "consolidation counteroffensive," their list of entities purportedly affiliated with SLM -- and thus the universe of the purported Single Holder -- grew with alacrity. In August 2002, Defendants claimed that a list of entities corresponding to 45 Department of Education lender identification numbers were affiliated with SLM or securitization trusts created by those entities, and therefore fell under the umbrella of a single "holder". See Ex. 145 (J.A. __). By October 2002, the entities on Defendants' list corresponded to 63 identification numbers. Ex. 31 (J.A. __). And by February 2003, Defendants considered entities corresponding to 83 identification numbers to constitute a single "holder". Ex. 315 (J.A. __). There were no intervening changes to the Single Holder Rule or any of its associated regulations that would explain the dramatic expansion of the scope of the Defendants putative "holder" during that six-month period.

Had a corporate designee been deposed and been unable to provide a credible justification for Defendants' continually expanding list, such testimony (or lack thereof) would have been probative evidence that Defendants had invoked the Single Holder Rule with less than good faith. The District Court, however, refused to compel Defendants to produce a witness. Although the court recognized that the issue "is whether Defendants invoked the Single Holder Rule in good faith or whether they invoked it as part of some bad faith scheme to harm Plaintiff," the court nevertheless held that "discovering what Defendants believed to be the correct interpretation of the Single Holder Rule would only be beneficial if this Court were resolving a good faith dispute between the parties concerning the correct interpretation of the Single Holder Rule." May 13, 2003 Mem. Op. at 16 (J.A. __).

Contrary to the District Court's conclusion, "what Defendants believed to be the correct interpretation of the Single Holder Rule" was indeed quite relevant to "whether Defendants invoked the Single Holder Rule in good faith." To prove bad faith, CLC had to show that Defendants were not acting consistently with their own understanding of the Rule -- irrespective of whether that interpretation was in fact right or wrong. To do that, CLC needed evidence of Defendants' understanding of the Single Holder Rule. 18/ In denying CLC the

18/ For example, it may turn out that, in addition to including expansively within its "single" holder all of their affiliates and securitization trusts, Defendants also included other wholly unaffiliated lenders for whom SMS serviced loans.

opportunity to discover such evidence, the District Court abused its discretion. See Schultz v. Butcher, 24 F.3d at 632.

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be vacated and the case remanded for further proceedings.

Respectfully submitted,

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November 10, 2003

REQUEST FOR ORAL ARGUMENT

Pursuant to 4th Cir. R. 34(a), Appellant respectfully requests that this case be scheduled for oral argument. This case of first impression raises substantial issues concerning federal preemption of state law under the Higher Education Act, 20 U.S.C. §§ 1001 et seq. Oral argument would aid the Court in its de novo review of the District Court's ruling.

CERTIFICATE OF COMPLIANCE

[insert]

ADDENDUM

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of November, 2003, I served the foregoing Brief for Appellant College Loan Corporation by hand on:

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