

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN**

JOHN T. MACDONALD JR., CHELSEA A. PEJIC,
SHAWN HAFF, and STEVEN BARON,

Plaintiffs,

Case No. 11-cv-00831

vs.

Hon. Gordon J. Quist

THOMAS M. COOLEY LAW SCHOOL and
DOES 1-20,

**ORAL ARGUMENT
REQUESTED**

Defendants.

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**DEFENDANT THOMAS M. COOLEY LAW SCHOOL'S
MOTION TO DISMISS**

Defendant Thomas M. Cooley Law School (“Cooley”), through its attorneys Miller, Canfield, Paddock and Stone, PLC, hereby submits this Motion to Dismiss pursuant to Federal Rules of Civil Procedure 12(b)(6) and 9(b).

1. In support of this Motion, Cooley respectfully submits the incorporated Brief in Support.

2. Pursuant to Local Rule 7.1(d), Cooley contacted counsel for Plaintiffs on October 19, 2011 in an effort to obtain concurrence in this Motion. On October 19, 2011, Counsel for Plaintiffs refused to concur.

WHEREFORE, Cooley respectfully requests that this Court grant this Motion, dismiss Plaintiffs’ action in its entirety with prejudice, and order such other and further relief this Court deems appropriate.

Respectfully submitted,

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October 20, 2011

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**BRIEF IN SUPPORT OF
DEFENDANT THOMAS M. COOLEY LAW SCHOOL'S
MOTION TO DISMISS**

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INTRODUCTION

Plaintiffs allege that they are “naïve, relatively unsophisticated consumers” who misinterpreted Defendant Thomas M. Cooley Law School’s accurate post-graduate employment and salary reports when they applied to Cooley. (Compl. ¶ 6.) Plaintiffs allege that, as a result, they did not obtain “the kind of job that they thought would be waiting for them upon graduating from law school.” (Compl. ¶ 62.)

Plaintiffs—four former Cooley students purporting to represent a class of all current and former Cooley students within an undefined statutory class period—do not allege that *any* of Cooley’s reported employment and salary numbers were false or inaccurate. And Plaintiffs do not allege that Cooley failed to comply with any rule or standard of the American Bar Association (ABA) or National Association for Law Placement (NALP) governing law-school employment and salary reporting. Indeed, Plaintiffs acknowledge that Cooley reported its numbers the same way that “nearly every” other law school in the country reports them. Plaintiffs allege instead that Cooley’s truthful, accurate numbers were misleading to them because the employment numbers included part-time and non-legal employment and the salary numbers were based on voluntary graduate surveys—even though that is exactly what the ABA and NALP standards call for.

Plaintiffs’ Complaint fails as a matter of law for several reasons. First, Plaintiffs’ 42-page, 111-paragraph Complaint violates Federal Rule of Civil Procedure 8. Complete with a six-page “preliminary statement,” an entire three-page section aimed solely at a party not before the Court (the ABA), metaphors blatantly plagiarized from a *New York Times* article, and, attached as exhibits, a half-dozen articles, press releases, and letters that have nothing to do with Cooley, the Complaint reads more like a free-form rant on an Internet blog than Rule 8’s required “short and plain statement of the claim.”

Second, one thing becomes clear on a journey through Plaintiffs' Complaint: Plaintiffs' claims are aimed at ABA and NALP standards, not Cooley's compliance with them. Plaintiffs ask for an "industry"-wide rewrite of those standards, but fail to name as defendants the very entities whose standards they want the Court to rewrite. Absent joinder of the ABA and NALP as parties, the Court should dismiss the Complaint for failure to join indispensable parties.

Third, Plaintiffs' claims are preempted by federal law. Congress has implemented a comprehensive and uniform national scheme governing law-school employment reporting requirements, and Plaintiffs may not disrupt that scheme through the assertion of state-law tort claims. Under the existing uniform system, prospective students weighing law school choices know that all law-school employment and salary data is calculated and reported the same way. The remedy Plaintiffs seek would impose law-school- and state-specific requirements, and would leave prospective law students sorting through a mass of methodologies to figure out what the numbers meant for each law school in each state. That is not what Congress intended.

Fourth, the claims of at least two of the named Plaintiffs are barred, in whole or in part, by the statute of limitations. Two of the Plaintiffs applied to Cooley well before August 2005, the outer edge of the six-year limitations periods for Michigan Consumer Protection Act and fraud claims, and thus their claims are barred.

Fifth, in addition to all of the fatal structural defects with the Complaint, each of Plaintiffs' three claims fails on its own as a matter of law. Plaintiffs' purported Michigan Consumer Protection Act (MCPA) claim fails because the MCPA does not apply to Plaintiffs' acquisition of a legal education from Cooley, and because the MCPA *exempts* from its coverage any transaction or conduct already regulated by a state or federal agency, like the federal and Michigan departments of education here. Plaintiffs' fraud and negligent-misrepresentation claims fail because Plaintiffs fail to allege with Federal Rule 9(b)'s required specificity: (i) any

false statement; (2) *any* specific statement that any one of them relied on—false, misleading, or otherwise; (iii) any legal duty to provide the specific data “breakdown” they allege Cooley should have provided; (iv) reasonable reliance; and (v) any damages cognizable at law.

In sum, Plaintiffs simply fail to state any plausible claim for relief. They say they were “naïve” and “unsophisticated,” but one of them is a former officer of the United States Navy. They complain that they did not get the “kind of job” they thought would be “waiting” for them after law school, but three of the four of them have been employed since graduating from Cooley, two of them own and operate (apparently successful) law firms, and all of them admit that they graduated into “one of the grimmest legal job markets in decades” where salaries for new lawyers have “dropped precipitously.” (Compl. ¶ 48, 50).

Plaintiffs’ Complaint should be dismissed.

FACTS

A. The Lawsuits Filed Against Thomas Jefferson School of Law, New York Law School, and Cooley

Plaintiffs are four former Cooley students purporting to represent a class of all current and former Cooley students within an undefined statutory class period. (ECF 1, Compl. ¶ 77.) In a 111-paragraph Complaint, Plaintiffs assert claims for alleged violations of the Michigan Consumer Protection Act, MCL § 445.901 et seq. (Count I), common-law fraud (Count II), and negligent misrepresentation (Count III). Plaintiffs allege that Cooley made “misrepresentations” and “omissions” relating to its post-graduate employment and salary statistics. (Compl. ¶¶ 4-5.)

Plaintiffs’ Complaint has its roots in a similar action filed in California in May 2011 against the Thomas Jefferson School of Law. (*See Alaburda v. Thomas Jefferson School of Law*, Case No. 2011-00091898, San Diego (California) Superior Court, Complaint attached as Exhibit A.) There, as here, the plaintiff alleges that post-graduate employment and salary statistics

produced by her law school pursuant to Department of Education, ABA, and NALP rules and regulations were misleading because the statistics included part-time and nonlegal positions and were calculated based on student surveys. (*See* Ex. A ¶ 4.)

Following the filing of the Thomas Jefferson complaint, Plaintiffs' lawyers here, the Kurzon Strauss firm of New York, began posting online solicitations for a suit of their own, targeting graduates of New York Law School and Cooley, among others.¹ In the solicitations, Kurzon Strauss and its lawyers falsely accused Cooley of "grossly inflat[ing] its post-graduate employment data and salary information," among other things, and asked Cooley graduates to sign up for a class action against Cooley. Cooley alleges that Kurzon Strauss's statements were false, defamatory, and unethical in a separate defamation action in this Court, which Cooley filed on July 14, 2011. (*See Cooley v. Kurzon Strauss et al.*, W.D. Mich. Case No. 11-cv-0844.)

On August 10, 2011, Kurzon Strauss filed purported class-action complaints against Cooley and New York Law School. (*See Gomez-Jimenez v. New York Law School*, Supreme Court of the State of New York Case No. 652226/2011, Complaint attached as Exhibit B.) The complaints echo the Thomas Jefferson complaint, and mirror each other. Indeed, the two Kurzon complaints repeat the same allegations from the Thomas Jefferson complaint that the law schools employment and salary data were misleading. (*See* Compl. ¶¶ 4-5; NYLS Compl. ¶¶ 5.) And each Kurzon complaint is a copy-and-paste job of the other—no fewer than 77 paragraphs of the complaints are nearly identical save the swapping of school names. (*Compare* Compl. ¶¶ 1, 4-5, 7-8, 10-15, 24, 29, 33-40, 42-45, 47-52, 54-56, 58, 61-71 and 81-111, *with* NYSL Compl. ¶¶ 1, 4-5, 7-8, 10-15, 23, 28, 34-41, 43-46, 48-53, 56-58, 61, 67-77 and 81-111.)

¹ Kurzon Strauss LLP has apparently disbanded, but Plaintiffs' lawyers to date have not filed a substitution of counsel in this action. *See* <http://www.kurzonstrauss.com> (last accessed on October 19, 2011).

In both complaints, Kurzon Strauss seeks to rewrite in gross the reporting requirements mandated by Congress, the Department of Education, and the law-school-accrediting body recognized by the Department of Education, the ABA. No fewer than 23 paragraphs of the Complaint do not so much as mention Cooley (*see* Compl. ¶¶ 1, 11, 13, 14, 35-37, 42-44, 47, 49-51, and 63-71), instead targeting allegedly misleading employment- and salary-reporting methods that are “endemic in the law school industry” and followed by “nearly every school.” (Compl. ¶ 10.) An entire three-page section of the Complaint, titled “Role of the ABA,” is leveled solely against the ABA, currently a non-party. (*See* Compl. ¶¶ 67-71.) Plaintiffs’ claims against Cooley, in other words, could have been lodged against any other law school in the country that complies with the ABA’s reporting requirements.²

B. The Claims Against Cooley

Plaintiffs’ claims against Cooley center on allegations that Cooley made “two basic, uniform misrepresentations” relating to its post-graduate employment and salary statistics. (Compl. ¶ 4.) Plaintiffs allege that, “[f]irst, the school during the class period claims that a substantial majority of its graduates—roughly between 75 and 80 percent—secure employment within nine months of graduation.” (*Id.*) Second, Plaintiffs allege that Cooley “grossly inflates its graduates’ reported mean salaries by calculating them based on a small, mostly self-selected subset of graduates who actually submit their salary information.” (Compl. ¶ 5.)

Plaintiffs do not allege that Cooley’s employment or salary statistics were inaccurate. With respect to the post-graduate employment information, Plaintiffs allege instead that “the reality of the situation is that these seemingly robust numbers include *any* type of employment,

² Indeed, Plaintiffs’ lawyers have recently announced plans to sue an additional 15 law schools, and also plan to sue nearly every other law school by the end of next year. *See, e.g.*, http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202517930210&Another__law_schools_targeted_over_jobs_data (last accessed October 19, 2011).

including jobs that have absolutely nothing to do with the legal industry, do not require a JD degree or are temporary or part-time in nature.” (Compl. ¶ 4; emphasis in original.) Plaintiffs allege that Cooley should have broken down the numbers further to show the percentages of full-time, part-time, legal, and non-legal jobs. (*Id.*) With respect to salary information, Plaintiffs allege that the numbers would be lower if they were based on information collected from a larger number of graduates rather than from voluntary graduate surveys. (Compl. ¶ 5.)

Plaintiffs do not identify the precise statistics or data that any one of them specifically relied upon in deciding to attend Cooley. (*See* Compl. ¶¶ 19-22, alleging generally that each of them “relied on salary data and employment information posted on Thomas Cooley’s website and/or disseminated to third-party data clearinghouses and publications, such as the ABA and *US News.*”) Although this information was supposedly central to each Plaintiff’s decision to attend Cooley, Plaintiffs also nowhere allege or even suggest that they made any inquiries of anyone relating to any of Cooley’s data or reports. The only Cooley-specific data or report Plaintiffs identify in the Complaint is a document titled, “Thomas M. Cooley Law School Employment Report and Salary Survey: 2010 Graduates,” which Plaintiffs attach as Exhibit 1 to the Complaint. (Compl. Ex. 1.) That document, as its title suggests, provides a summary of employment and salary information for Cooley’s 2010 graduates who responded to employment surveys. None of the Plaintiffs alleges that he or she relied on the 2010 summary—indeed, none of them could have, because it was created after any of them applied to or attended Cooley. (*See* Compl. ¶¶ 19-22.)

The document attached as Exhibit 1 to the Complaint is a summary of more detailed data that Cooley provided to the National Association of Law Placement. (*See* Compl. ¶ 37.) The summary document itself, however, provides detailed information about the September 2009, January 2010, and May 2010 Cooley graduating classes. (Compl. Ex. 1.) The document

specifies the number of graduates (934), and the “[n]umber of graduates with employment status known” (780). (*Id.*) The document provides the “[p]ercentage of graduates employed” among those who reported an employment status (76%), and the “[a]verage starting salary for all graduates” who provided salary information (\$54,796). (*Id.*)

The document then breaks down those numbers for reporting graduates entering private practice, government, public interest, academia, judicial clerkships, and business. (*Id.*) The document details, for example, that 50% of the employed reporting graduates went into private practice, earning an average starting salary of \$52,318. (*Id.*) The document then gives further information about the names and sizes of the law firms that employed the reporting Cooley graduates, detailing, for example, that 157 of the graduates worked for firms with 2 to 10 attorneys, 21 worked at firms with 11-25 lawyers, and so on. (*Id.*)

Plaintiffs do not allege that any of those numbers were false or inaccurate.

C. The Federally Mandated Reporting Requirements

The summary employment report and salary survey Plaintiffs attach as Exhibit 1 is part of Cooley’s—and every other ABA-accredited law school’s—reporting requirements mandated by federal law pursuant to the Higher Education Act, 20 U.S.C. § 1001 et seq., the Department of Education (the federal agency appointed by the Act to regulate institutions of higher education, including law schools), and the ABA (the law-school national accrediting body recognized by the Department of Education), and NALP (a law graduate employment data clearinghouse). As detailed below, those federal accreditation-related reporting requirements are comprehensive and specific, and direct law schools precisely how to collect, calculate, and report their post-graduation employment and salary data. These standards do not leave room for Cooley to wander in reporting its data. Cooley complied with every one of the requirements. Plaintiffs do not allege otherwise.

D. The Plaintiffs

The four named Plaintiffs—who include a “commissioned Naval Officer who served for four years with distinction” prior to law school—allege that they were “naïve, relatively unsophisticated consumers” who relied on unspecified employment and salary information in deciding to attend Cooley. (Compl. ¶¶ 6, 19.) Plaintiffs allege that they could not find full-time legal employment following graduation from Cooley and were “forced” to seek other employment arrangements. (Compl. ¶¶ 19-22.) Three out of the four named Plaintiffs passed state bar examinations upon graduating from Cooley. (Compl. ¶¶ 19-21.) (Plaintiffs do not allege either way whether the fourth, Steven Baron, passed a state bar examination.) (Compl. ¶ 22.) Three out of the four have been employed after graduating from Cooley. (Compl. ¶¶ 19-21.) Two of them own and operate their own law firms. (Compl. ¶ 19, 21.) Another used to own and operate her own firm. (Compl. ¶ 20.) All of them complain only that they did not obtain “the kind of job that they thought would be waiting for them upon graduating from law school.” (Compl. ¶¶ 62.)

MOTION TO DISMISS STANDARDS

“[T]o survive a motion to dismiss a complaint must contain (1) ‘enough facts to state a claim to relief that is plausible,’ (2) more than ‘a formulaic recitation of a cause of action’s elements,’ and (3) allegations that suggest a ‘right to relief above a speculative level.’” *Tackett v. M & G Polymers, USA, LLC*, 561 F.3d 478, 488 (6th Cir. 2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)). “In deciding a Rule 12(b)(6) motion, a district court must (1) view the complaint in the light most favorable to the plaintiff and (2) take all well-pleaded factual allegations as true.” *Tackett*, 561 F.3d at 488.

ARGUMENT

I. PLAINTIFFS' COMPLAINT VIOLATES RULE 8

Plaintiffs' 42-page, 111-paragraph rant of a Complaint violates Federal Rule of Civil Procedure 8. Rule 8 provides that a Complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief," and that "[e]ach allegation must be simple, concise, and direct." Fed. R. Civ. P. 8(a)(2), 8(d)(1).

The Rule 8 pleading requirements "are for the benefit of both the parties and the court," and when "the rambling and disjointed nature of [a] plaintiff's complaint makes it virtually impossible to find that the allegations state a claim for relief," the Court may dismiss it. *Gora v. Gelabert*, 2009 WL 3233849 (W.D. Mich. Sept. 30, 2009). "Unnecessary prolixity in a pleading places an undue burden on the court and the party who must respond to it because they are forced to select the relevant material from a mass of verbiage." *Id.* (quoting Wright & Miller, Federal Practice and Procedure § 1281 at 709 (3d ed. 2004)). "When faced with voluminous pleadings, neither the Court nor opposing counsel should be required to expend time and effort searching through large masses of conclusory, argumentative, evidentiary and other extraneous allegations in order to discover whether the essentials of claims asserted can be found in such a mélange." *Id.* (internal quotation marks omitted).

Plaintiffs' Complaint is neither short nor plain, and their allegations are neither simple, concise, nor direct. Plaintiffs' Complaint instead contains "large masses of conclusory, argumentative" and "other extraneous allegations" that Cooley and the Court are left to sort through to discover Plaintiffs' purported claims.

Plaintiffs start with a melodramatic quote that alleges nothing at all, and then launch into a six-page "preliminary statement" that hurls untethered and sweeping allegations of "ubiquitous" and "systemic" fraud. (Compl. ¶ 1.) From there, Plaintiffs devote an entire three-

page section of the Complaint, titled “Role of the ABA,” to attacking a party not before the Court, the ABA. (Compl. ¶¶ 67-71.) Plaintiffs do not so much as mention Cooley in that section of the Complaint. Plaintiffs tack on another section devoted to “public hand-wringing,” “media scrutiny,” congressional letters, and legislation proposed by a student bar association. (Compl. ¶¶ 63-66.) Plaintiffs do not mention Cooley in that section, either. Indeed, Plaintiffs do not even mention Cooley in 23 paragraphs of the Complaint. (See Compl. ¶¶ 1, 11, 13, 14, 35-37, 42-44, 47, 49-51, and 63-71.)

Along the way, Plaintiffs throw extraneous allegations by the fistful. Plaintiffs take aim at the *US News & World Report* (Compl. ¶ 7), tuition increases (¶¶ 11-12), “exorbitant” salaries and “lavish perks” of Cooley’s president and founder (in two separate paragraphs of the Complaint, ¶¶ 12, 23), Cooley’s law-school rankings (¶ 28), and proverbial foxes guarding proverbial henhouses (¶ 71). In purported support of all those extraneous allegations, Plaintiffs attach to the Complaint a half-dozen news articles, press releases, and letters that are irrelevant to any of their claims against Cooley. (See Compl. Exs. 2, 4, 5, 6, 7, 8, 9, 10.)

Plaintiffs’ Complaint hardly presents a “short and plain statement” of their claims, and nowhere can a “simple, concise, and direct” allegation be found. The following allegation is typical: “Thus, the law school industry today is much like a game of three-card monte, with law schools flipping ace after ace, while a phalanx of non-suspecting players wager mostly borrowed money based on asymmetrical information on a game few of them can win.” (Compl. ¶ 11.) The allegation is bad enough on its own—it says nothing about Cooley, nothing about any of the Plaintiffs, and nothing about any of the Plaintiffs’ supposed claims against Cooley. It’s worse because it appears to be shamelessly plagiarized from a January 8, 2011 New York Times article, in which author David Segal wrote: “Or perhaps this is more like a game of three-card monte, with law schools flipping the aces and a long line of eager players, most wagering borrowed

cash, in a contest that few of them can win.” (See Ex. C, David Segal, “Is Law School a Losing Game?” *The New York Times*, Jan. 8, 2011.) Indeed, it appears that Plaintiffs borrowed quite liberally from Mr. Segal’s article without attribution throughout the Complaint. (Compare, e.g., Compl. ¶ 3, alleging “‘Enron-style’ accounting techniques,” with Segal at 2, quoting a source stating that “Enron-type accounting standards have become the norm.”)

Amidst all of that bloat, Plaintiffs fail to state a claim against Cooley. As discussed in detail below, Plaintiffs purport to bring fraud and misrepresentation claims against Cooley, but Plaintiffs fail to identify a specific false statement or omission by Cooley that any one of them relied on in applying to Cooley. The only specific statement they do identify—a summary employment and salary report for 2010 graduates—was made after all of them graduated from Cooley, and thus was not a statement any of them could have relied on “[i]n applying and deciding to remain enrolled at Cooley.” (Compl. ¶¶ 19-22, Ex. 1.) And Plaintiffs vague allegations—tucked in a footnote no less—that they relied on “similar” reports fall far short of federal pleading standards for fraud claims. (Compl. ¶¶ 31 n.2, 19-22.) In other words, despite spewing 111 paragraphs over 42 pages on topics ranging from card games to Congress, Plaintiffs fail to allege the very statements on which their claims purportedly are based.

Plaintiffs’ Complaint flagrantly violates Rule 8, and the Court should dismiss it. See *Gora*, 2009 WL 3222849 at *9-10 (dismissing complaint for violating Rule 8); *Schied v. Daughtrey*, 2008 WL 5422680 (E.D. Mich. 2008) (same).

II. FAILURE TO JOIN THE ABA AND NALP

A. Plaintiffs’ Claims Are Aimed at ABA and NALP Standards, Not at Cooley’s Compliance With Them

One thing is clear in Plaintiffs’ Complaint: Although Cooley appears in the caption, Plaintiffs really take aim at the ABA and NALP. Indeed, Plaintiffs have an entire section of the

Complaint titled, “Role of the ABA,” and several paragraphs of the Complaint are aimed primarily or entirely at the ABA and NALP—not Cooley. (See Compl. ¶¶ 67-71.) Plaintiffs acknowledge that their underlying claims are not Cooley-specific—Plaintiffs note that “nearly every school” calculates and reports its employment and salary data the same way Cooley does (the way the ABA and NALP direct all ABA-accredited law schools to report the data). (Compl. ¶ 10.) And Plaintiffs allege in the first paragraph of their Complaint that “[t]his action seeks to remedy a *systemic*” issue relating to reporting that is “*ubiquitous* in the legal education industry.” (Compl. ¶ 1; emphasis added.) Plaintiffs, in other words, take aim at the rules themselves, not Cooley’s compliance with them.

Federal Rule of Civil Procedure 19 provides that a person or entity “*must* be joined as a party” if “in that person’s absence, the court cannot accord complete relief among existing parties[.]” Fed. R. Civ. P. 19(a)(1)(A) (emphasis added). Here, the Court cannot accord to Plaintiffs the system-wide remedy they seek with the parties currently before the Court.

B. An Overview of Federal Law and ABA and NALP Standards Governing Law School Reporting Requirements

Specifically, the Court cannot order a rewrite of the uniform, national employment- and salary-reporting standards applicable to ABA-accredited law schools without joining the bodies responsible for those standards. The ABA, as the accrediting body recognized by the federal Department of Education pursuant to Congressional authority in the Higher Education Act, imposes standards for all law schools to meet to maintain accreditation. Those standards, which adopt NALP employment data reporting rules, are comprehensive and specific, and govern the precise methodologies law schools must employ in calculating and disclosing employment and salary information.

The scheme of reporting rules starts with a federal statute, the Higher Education Act, 20 U.S.C. § 1001 et seq. (“HEA”), and specifically Section 1092 in Title IV of the HEA. Section 1092(a), titled, “Information dissemination activities,” provides that “institutions of higher learning”—defined in the HEA to include law schools—“shall carry out information dissemination activities for prospective and enrolled students.” 20 U.S.C. § 1092(a)(1). The statute provides that the “information required by this section shall be produced and be made readily available upon request, through appropriate publications, mailings, and electronic media, to an enrolled student and to any prospective student.” *Id.* The statute further provides that each law school “shall, on an annual basis, provide to all enrolled students a list of the information that is required to be provided by institutions to students by this section . . . together with a statement of the procedures required to obtain such information.” *Id.*

The statute then specifically provides that a law school “shall accurately describe” in those reports its graduates’ employment information, and specifically provides the methods by which a law school may gather such information. *Id.* § 1092(a)(1)(R). The HEA provides that a law school “shall accurately describe” in its mandated information dissemination “the placement in employment of, and types of employment obtained by, graduates of the institution’s degree or certificate programs[.]” *Id.* The HEA also specifically describes the methods a law school must use to gather such information, providing specifically that the information “shall” be “gathered from such sources as alumni surveys, student satisfaction surveys . . . or other relevant sources.” *Id.* The HEA also requires law schools to designate employees “who shall be available on a full-time basis to assist students or potential students in obtaining” the mandatory reporting information. *Id.* § 1092(c).

A separate section of the HEA provides additional employment reporting requirements. Section 1094 provides that each school participating in Title IV federal financial aid programs

shall “enter into a program participation agreement” with the Secretary of the Department of Education (“DOE”). The agreement “shall condition the initial continuing eligibility of an institution . . . upon compliance” with a list of requirements. 20 U.S.C. § 1094(a). The list includes, “[i]n the case of an institution that advertises job placement rates as a means of attracting students to enroll in the institution, the institution will make available to prospective students, at or before the time of application . . . the most recent available data concerning employment statistics, graduation statistics, and any other information necessary to substantiate the truthfulness of the advertisements[.]” *Id.* § 1094(a)(8).

The DOE picks up from there. Pursuant to HEA authorization to promulgate regulations governing law schools (among other institutions of higher education), the DOE publishes extensive reporting requirements in the Code of Federal Regulations. Under regulations titled, “Reporting and disclosure of information,” the DOE requires law schools to make “[g]eneral disclosures for enrolled or prospective students.” 34 C.F.R. § 668.41(d). The regulations provide that a law school “must make available to any enrolled student or prospective student through appropriate publications, mailings or electronic media, information concerning . . . the placement of, and types of employment obtained by, graduates of the institution’s degree or certificate programs.” *Id.* § 668.41(d)(5). The regulations provide that the “information provided in compliance with this paragraph may be gathered from . . . alumni or student satisfaction surveys; or . . . other relevant sources.” *Id.* § 668.41(d)(5)(i). “The institution must identify the source of the information provided in compliance with this paragraph, as well as any time frames and methodology associated with it,” and the “institution must disclose any placement rates it calculates.” *Id.* § 668.41(d)(5)(ii)-(iii).

The DOE then hands off to the ABA. Through specific regulatory grant of authority as the accrediting body of the DOE, the ABA—as a “quasi-administrative” agency, *see Found. for*

Int. Design Ed. Research v. Savannah Coll. of Art & Design, 244 F.3d 521, 527-28 (6th Cir. 2001)—adds additional and more detailed reporting standards. The ABA mandates that all law schools seeking, or seeking to retain, accreditation “shall publish basic consumer information” in “a fair and accurate manner reflective of actual practice.” ABA Standard 509, ABA Interpretation 509-1. That information includes employment “placement rates and bar passage data.” *Id.*

More specifically, and related to the ABA’s “placement rates” reporting requirement, law schools are required to submit detailed employment data to the ABA in an “Annual Questionnaire” the ABA provides. Questions and data categories that solicit job-placement data are drawn from NALP’s “Graduate Survey Form,” which most law schools voluntarily submit to NALP each year. Using the same data law schools report to NALP, the ABA, on its own and in conjunction with the Law School Admission Council (LSAC), publishes an “Official Guide” to ABA-approved law schools, which contains, among many other types of data, standardized information about each law school’s graduate employment status, type of employment, and geographic location of employment.

Both the ABA and NALP issue extensive and detailed instructions that govern precisely how law schools are to calculate and report job-placement data. (*See* Ex. D, ABA 2010 Annual Questionnaire Part I; Ex. E, NALP 2010 Methodology for Calculating Graduate Employment Rate.)³ These instructions are publicly available on the ABA and NALP websites. (*See* http://www.americanbar.org/groups/legal_education/resources/questionnaire.html; <http://www.nalp.org/erssinfo>.) The ABA, for example, instructed for 2010 that post-graduate

³ The Court may consider these documents in this motion to dismiss because the ABA and NALP standards and methodologies are “referred to in the Complaint and are central to the claims contained therein.” *Bassett v. National Collegiate Athletic Association*, 528 F.3d 426, 430 (6th Cir. 2008).

employment numbers “should include graduates employed on a part-time or full-time basis in a legal or non-legal job.” (Ex. D.) NALP, for its part, provides a specific “Methodology for Calculating Employment Rate,” which for 2010 included a specific “formula” instructing law schools to disclose the “Number employed divided by the number whose status is known.” (Ex. E.) NALP instructed that the “numerator (number employed)” is defined as “[a] graduate who has a job as of February 15 The job may be *full-time, part-time, temporary, permanent, law-related or not.*” (Ex. E; emphasis added.) The “denominator (number whose status is known)” is defined as “those who are employed, those pursuing an advanced degree full-time, those not working and seeking a job, and those neither working nor seeking a job.” (*Id.*) NALP states that “[a]ll employment rates published by NALP in its national reports, and rates reported back to individual schools in their school report, are calculated using this methodology.” (*Id.*)

C. Plaintiffs Seek to Rewrite ABA and NALP Standards, But Fail to Join the ABA and NALP

Plaintiffs seek to rewrite all of that. But instead of engaging the democratic processes to amend the reporting requirements expressly detailed in a federal statute, federal regulations, and standards and rules promulgated by the ABA and NALP, Plaintiffs seek to amend them through the back door with a tort suit—a tort suit, at that, that does not even name as parties the very entities whose standards and rules Plaintiffs seek to rewrite. Instead of the comprehensive national regulations and standards Cooley follows, Plaintiffs want Cooley to “break down” its employment numbers further in all reports of that data (Compl. ¶ 32), and to stop calculating its salary numbers based on voluntary student surveys (Compl. ¶ 33.) Plaintiffs demand this relief despite the express federal laws and regulations directing law schools exactly how to calculate and report their employment data, which expressly *direct* that salary data “shall” be gathered from sources such as student surveys. *See, e.g.*, 20 U.S.C. § 1092(a)(1)(R).

The Court should reject that improper attempt. Federal Rule of Civil Procedure 19 provides that a person or entity “*must* be joined as a party” if, “in that person’s absence, the court cannot accord complete relief among existing parties[.]” Fed. R. Civ. P. 19(a)(1)(A) (emphasis added). Here the Court cannot accord the complete relief Plaintiffs seek—a rewrite of the ABA and NALP employment and salary reporting rules—without joining the ABA and NALP. Cooley should not stand on its own to answer for the perceived malfeasance (or nonfeasance) of the ABA and NALP. Unless the ABA and NALP are joined as parties, the Court should dismiss this action against Cooley. *See Boles v. Greeneville Housing Auth.*, 468 F.2d 476 (6th Cir. 1972) (holding that a plaintiff failed to join an indispensable party, the federal Department of Housing and Urban Development, where the plaintiff challenged a building project approved by HUD).

III. A COMPREHENSIVE SCHEME OF FEDERAL REGULATION GOVERNING LAW SCHOOL EMPLOYMENT AND SALARY REPORTING PREEMPTS PLAINTIFFS’ CLAIMS

A. Field and Conflict Preemption Standards

Plaintiffs’ claims also fail because the comprehensive and uniform national federal scheme of regulation set forth above preempts the field of law school employment and salary reporting requirements, which Plaintiffs seek to regulate here through a scattershot of state tort laws. Extensive regulations promulgated pursuant to federal statute by layers of federal administrators and regulators expressly govern these reporting requirements. Cooley complied with every one of them, and Plaintiffs do not allege otherwise. Plaintiffs cannot, through assertions of state-law tort claims, impose additional and conflicting requirements.

Congress’s intent is the “ultimate touchstone in every preemption case.” *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). “Preemption can be express or implied.” *Fednav, Ltd. v. Chester*, 547 F.3d 607, 618 -619 (6th Cir. 2008). Express preemption does not apply here because Congress did not “explicitly state” either way in the relevant statute—the HEA—

whether it intended to preempt state reporting (or tort) laws. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). “Implied preemption comes in two forms, field and conflict preemption.” *Fednav*, 547 F.3d at 618. Field preemption occurs when either (1) “the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress ‘left no room’ for supplementary state regulation”; or (2) “a statute’s text indirectly reveals [that] Congress intended its rules to be exclusive in a particular field.” *Id.* at 618, 620 (quoting *Ohio Mfrs. Assoc. v. City of Akron*, 801 F.2d 824, 828 (6th Cir.1986) and *Hillsborough Cty, Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985)). Conflict preemption in turn “occurs when a provision of state law ‘actually conflicts with federal law.’” *Fednav*, 547 F.3d at 619 (quoting *City of Akron*, 801 F.2d at 828).

B. Field Preemption

1. A comprehensive scheme of federal regulation occupies the field of law-school employment and salary reporting.

The first step in a field-preemption analysis is to define the relevant “field” a plaintiff seeks to regulate. *See Fednav*, 547 F.3d at 619. In their Complaint, Plaintiffs seek to impose additional employment and salary reporting requirements nationally on accredited law schools across the entire “legal industry” through their state-law tort claims. (*See* Compl. ¶ 1) (alleging that Plaintiffs seek to compel law schools in general to “make critical, material disclosures” that will bring “transparency to the way law schools report post-graduate employment data and salary information”). The relevant field, therefore, is the field of uniform national law-school employment and salary reporting.

A comprehensive scheme of federal regulations occupies that field. As set forth in great detail above, the federal regulatory scheme is so comprehensive that providing even a summary of the regulations takes some leg-work. The scheme starts with a federal statute, the HEA,

which provides that a law school “shall accurately describe” in its mandated reporting “the placement in employment of, and types of employment obtained by, graduates of the institution’s degree or certificate programs,” and *specifically* describes the methods a law school must use to gather such information, providing that the information “shall” be “gathered from such sources as alumni surveys, student satisfaction surveys . . . or other relevant sources.” 20 U.S.C. § 1092(a)(1). The DOE then echoes those requirements in its own regulations. 34 C.F.R. § 668.41(d)(5)(i)-(iii). From there, the ABA—as a quasi-administrative agency, *see Found. for Int. Design*, 244 F.3d at 527-28—and NALP add more detailed reporting standards, including standards governing “placement rates and bar passage data.” ABA Standard 509, ABA Interpretation 509-1.

The “scheme of federal regulation” governing law-school employment and salary reporting “is sufficiently comprehensive to make reasonable the inference that Congress ‘left no room’ for supplementary state regulation.” *Fednav*, 547 F.3d at 618. Indeed, the comprehensive federal scheme *specifically* governs the precise reporting standards Plaintiffs seek to amend here. Federal law therefore preempts the field, and the Court should reject Plaintiffs’ attempt to rewrite the United States Code, the Code of Federal Regulations, and the ABA and NALP’s reporting standards promulgated pursuant thereto.

2. The text of the HEA reveals that Congress intended its rules to be exclusive and uniform in the field of law-school employment and salary reporting.

Moreover, the text of the HEA demonstrates Congress’s intent to occupy the field. Even where federal regulation is not comprehensive and even where Congress has not expressly stated its intent to preempt, federal law preempts state law where “a statute’s text indirectly reveals [that] Congress intended its rules to be exclusive in a particular field.” *Fednav*, 547 F.3d at 620.

The text of the HEA indirectly reveals that Congress intended its rules to be exclusive in the field of law-school employment and salary reporting. In some cases, Congress contemplates federal and state cooperation and coordination in carrying out the purposes of a federal statute, indicating that state laws or regulations may supplement federal law in a federal-state regulatory regime. In such cases, Congress indirectly expresses its intent not to preempt state law. *See Fednav*, 547 F.3d at 620 (holding that federal statute did not preempt state law where the statute expressly noted that carrying out the statute’s purposes would “require the participation and cooperation of the Federal Government and State governments”).

This is not such a case. The text of the HEA does not contemplate any federal-state regulatory regime governing law-school employment and salary reporting. To the contrary, the text of the HEA indicates that Congress intended the law-school reporting rules to be uniformly applied at a national level to all accredited law schools, and uniformly enforced by a federal agency, the DOE. The reporting rules apply to “[e]ach eligible institution”—meaning all accredited law schools nationwide—and provide that each law school “shall” disclose employment and salary in a uniform way, detailed in the statute. 20 U.S.C. § 1092(a)(1). In the HEA, Congress then expressly appoints the Secretary of the federal DOE—as opposed to any state body such as state bar associations or state boards of education—to uniformly enforce those uniform reporting requirements, including by requiring each law school to “enter into a program participation agreement” with the Secretary, who “condition[s] the initial continuing eligibility of an institution [to participate in Title IV federal financial aid programs] . . . upon compliance” with the reporting requirements. *Id.* § 1094(a).

In short, the comprehensiveness of federal regulation and the text of the HEA both demonstrate Congress’s desire for a uniform federal scheme of regulation governing law-school employment and salary reporting. That mandate of uniformity makes good sense. Uniform

reporting requirements provide prospective students deciding which of the many law schools throughout the nation to attend with uniform data that has been collected and presented in the same way across the board. A prospective student should know that the employment and salary data for Northwestern University Law School in Illinois was calculated based on the same methodology and presented in the same way as the data for Tulane Law School in Louisiana or Cooley in Michigan. Uniformity promotes informed decision-making.

Allowing a plaintiff to impose additional requirements and change reporting methodologies through state-law tort suits one law school at a time would turn that uniform system on its head. Plaintiffs here, for example, seek to impose special reporting requirements on Cooley in Michigan based on Michigan statutory and common law, and Plaintiffs' lawyers have filed a separate suit in New York seeking to impose similar reporting requirements on New York Law School through New York tort claims. A third suit is pending in California, seeking to impose requirements on Thomas Jefferson School of Law based on California tort claims.⁴ If this suit and the ones like it were permitted to proceed, instead of a uniform national set of law-school reporting requirements, there would be a patch-work of law-school- or state-specific requirements. And prospective students—instead of being able to pull up the ABA website to see exactly how the employment and salary numbers are calculated by every ABA-accredited law school—would be left to sort through numbers and methodologies that differed across the law schools they apply to. That is not what Congress intended.

C. Conflict Preemption Bars this State Law Action

Plaintiffs' claims are also preempted because the reporting requirements they propose flatly conflict with federal law. Conflict preemption occurs when either "a provision of state law

⁴ See also *supra* note 3.

‘actually conflicts with federal law,’” or where the state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Fednav*, 547 F.3d at 619, 623 (quoting *City of Akron*, 801 F.2d at 828, *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

Here, Plaintiffs’ proposed employment and salary reporting requirements conflict with federal law and stand as an obstacle to the objectives of Congress, the DOE, the ABA, and NALP of creating a national uniform set of job data reporting requirements for all ABA-accredited law schools. Plaintiffs’ proposed requirement that law schools not be permitted to gather salary information from graduate surveys plainly conflicts with Congress’s directive in the HEA that such information “shall” be “gathered from such sources as alumni surveys [and] student satisfaction surveys[.]” 20 U.S.C. § 1092(a)(1)(R) (emphasis added). Yet alumni surveys and student satisfaction surveys are precisely what Plaintiffs say is wrong with reporting within the “legal industry.” (See Compl. ¶ 5.) And, as detailed above, Plaintiffs’ proposed requirements—which would be uniquely thrust upon Cooley in this action via state-law statutory and tort claims and perhaps upon other law schools in other states on an ad hoc basis via similar tort suits—would stand as a hulking obstacle in the way of uniformity in law-school employment and salary reporting. Federal law preempts Plaintiffs’ claims.

IV. THE STATUTE OF LIMITATIONS BARS PLAINTIFF PEJIC AND PLAINTIFF BARON’S CLAIMS

At least two of the Plaintiffs’ claims suffer yet another defect: Plaintiff Pejic and Plaintiff Baron’s claims are plainly barred in whole or in part by the relevant statutes of limitation. The statute of limitations for both MCPA and fraud claims is six years. See MCL 445.911(7) (MCPA); *Laura v. DaimlerChrysler Corp.*, 269 Mich. App. 446 (2006); MCL 600.5813 (fraud); *Boyle v GMC*, 468 Mich. 226 (2003). Such claims accrue “when the wrong is

done,” not when a plaintiff discovers the alleged wrong. *Boyle*, 468 Mich. at 231. That means here that any claims relating to alleged statements made more than six years prior to August 10, 2011, the date Plaintiffs filed their Complaint—meaning statements made prior to August 10, 2005—are barred by the statute of limitations.

Plaintiff Pejic alleges that she graduated from Cooley in 2006. (Compl. ¶ 20.) That means she likely applied to Cooley no later than 2003. Pejic’s claims relate to “salary data and employment information posted on Thomas Cooley’s website and/or disseminated to third-party clearinghouses” that she allegedly relied on “[i]n applying and deciding to remain enrolled at Thomas Cooley.” (Compl. ¶ 20.) But any claim that Pejic relied on any such information “[i]n applying to” Cooley in 2003 is plainly barred by the statute of limitations. MCL 445.911(7); MCL 600.5813. So, too, is any claim that she relied on any such information in “deciding to remain enrolled” at Cooley prior to August 10, 2005. *Id.*

The same goes for Plaintiff Baron. He alleges that he graduated from Cooley in 2008, meaning that he likely applied to Cooley no later than 2005. (Compl. ¶ 22.) To the extent his claims relate to alleged statements made prior to August 10, 2005, his claims are barred by the statute of limitations. MCL 445.911(7); MCL 600.5813.

V. EACH OF PLAINTIFFS’ CLAIMS FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

The claims themselves fare no better. Underneath the Complaint’s overarching structural defects—failure to comply with Rule 8, failure to join indispensable parties, preemption, and statute-of-limitations bars—each of the Complaint’s three claims fails on its own as a matter of law.

A. The Michigan Consumer Protection Act Does not Apply

Plaintiffs allege in Count I that Cooley violated the Michigan Consumer Protection Act, MCL 445.901 et seq. (“MCPA”), by allegedly making misrepresentations relating to its postgraduate employment and salary statistics, which allegedly deceived Plaintiffs and induced them to pay for a legal education at Cooley. The claim fails as a matter of law for two reasons.

First, the MCPA does not apply to the acquisition or providing of legal education. The MCPA applies only to the “conduct of trade or commerce,” which is defined in the statute as “providing goods, property, or service primarily for *personal, family, or household purposes*.” MCL 445.903(1); MCL 445.902(1)(g) (emphasis added). The MCPA “does not supply protection” if the goods or services are purchased “primarily for business or commercial rather than personal purposes.” *Zine v. Chrysler Corp.*, 236 Mich. App. 261, 273 (1999). Courts applying the MCPA have determined—in cases involving a plaintiff seeking to obtain a law degree from Cooley no less—that “the MCPA does not apply” to a former law student’s acquisition of a legal education, in part because the student’s admitted purpose in attending law school was “to obtain work and start his own business.” *See Baptichon v. Thomas M. Cooley Law School*, 2009 WL 5214911, *6-7 (W.D. Mich. Dec. 28, 2009); *see also Baptichon v. Thomas M. Cooley Law School*, Ingham County Circuit Court Case No. 03-1784-CZ, Nov. 2, 2004 Order Granting Summary Disposition at 9-11 (rejecting MCPA claim because the legal “education purchased from [Cooley] was clearly intended for a commercial or business purpose”) (opinion attached as Ex. F).

Here, Plaintiffs admit by their own allegation that they sought a legal education from Cooley “for the purpose of securing upon graduation full-time, permanent employment for which a JD degree is required or preferred.” (Compl. ¶ 90) (*see also* Compl. ¶ 56, “These prospective students are applying to law school with *one objective* in mind: to attain the kind of job that

provides compensation and a lifestyle that is commensurate with and worthy of the enormous time, money and personal sacrifice invested in a legal education”) (emphasis added). Plaintiffs, in other words—just like the student in *Baptichon*—admit they obtained a legal education with for “commercial rather than personal purposes.” *Zine*, 236 Mich. App. at 273; MCL 445.903(1); MCL 445.902(1)(g). The MCPA therefore does not apply, and Plaintiffs’ purported MCPA claim fails as a matter of law. *Id.*

Second, the MCPA does not apply because it expressly “exempts any ‘transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States.’” *Liss v. Lewiston-Richards, Inc.*, 478 Mich. 203, 205-06 (2007) (quoting MCL 445.904(1)(a)). The purpose of the MCPA is to protect consumers by regulating transactions not otherwise subject to regulation. *See id.* at 205-06. Thus, where a transaction is already regulated by a state or federal regulatory body, the MCPA specifically excludes it from the statute’s coverage, and the courts have held that the MCPA exempts a wide variety of regulated transactions. *See id.*, 478 Mich. at 206 (rejecting MCPA claim relating to the construction of a residential home because the “general transaction of residential homebuilding” was specifically authorized and licensed by the Michigan Occupational Code); *Smith v. Globe Life Ins. Co.*, 597 N.W.2d 28, 38 (Mich. 1999) (sale of credit life insurance); *Kraft v. Detroit Entertainment*, 683 N.W.2d 200, 204 (Mich. App. 2004) (operation of slot machines); *Newton v. Bank West*, 686 N.W.2d 491, 493 (Mich. App. 2004) (sale of residential mortgage loans). To determine whether the MCPA exempts a transaction from its coverage, “[t]he relevant inquiry is whether the general transaction is specifically authorized by law, regardless of whether the specific misconduct alleged is prohibited.” *Liss*, 478 Mich. at 206 (internal quotation marks omitted).

Here, the relevant general transaction is the providing of legal education, the service Cooley provided to Plaintiffs. (See Compl. ¶¶ 19-22.) That transaction is “specifically authorized under law administered by a regulatory board or officer acting under statutory authority of this state or the United States”—namely, the Michigan Department of Education and Michigan Board of Law Examiners acting under statutory authority of the State of Michigan, *see, e.g.*, MCL § § 450.2123(2)(e) and 600.943, and, as explained in detail above, the federal Department of Education acting under statutory authority of the United States. The MCPA therefore exempts the transaction from its coverage. *Liss*, 478 Mich. at 205-06; MCL 445.904(1)(a). Plaintiffs’ MCPA claim fails as a matter of law and must be dismissed.

B. Plaintiffs Fail To State A Claim For Fraud

Plaintiffs’ fraud claim (Count II) fails to state a claim upon which relief can be granted. To state a claim for fraud, plaintiffs must establish *all* of the following: (1) That defendant made a material representation; (2) that it was false; (3) that when he made it he knew that it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that he made it with the intention that it should be acted upon by plaintiff; (5) that plaintiff acted in reliance upon it; and (6) that he thereby suffered injury. *U.S. Fidelity and Guaranty Co. v. Black*, 412 Mich. 99, 114; 313 N.W.2d 77, 83 (1981); *see also Bennett v. MIS Corp.*, 607 F.3d 1076, 1101 (6th Cir 2010). Plaintiffs must also establish that their reliance upon the false representation was reasonable. *See Bennett*, 607 F.3d at 1101. Each of these elements is essential, and the absence of any one of them is fatal. *U.S. Fidelity*, 412 Mich. at 114.

A plaintiff alternatively may satisfy the second requirement, a false statement, by alleging “the failure to divulge a fact or facts the defendant has a duty to disclose.” *McMullen v. Joldersma*, 174 Mich. App. 207, 213 (1988). So-called “silent fraud” or “fraudulent concealment” arises where the defendant has a legal duty to speak but fails to disclose material

facts, causing the plaintiff to have a false impression. *Id.*; see *Quality Mfg., Inc. v. Mann*, 2009 WL 4827068, *10 (Mich. App. 2009) (“The elements of silent fraud are the same as those of fraudulent misrepresentation except that the misrepresentation supporting a claim of silent fraud is based on the defendant’s suppression of a material fact that he was legally bound to disclose, rather than on an affirmative representation”). When a plaintiff brings such a claim, however, the plaintiff must allege a specific “legal duty to make a disclosure,” which usually arises when a plaintiff makes an inquiry, and the defendant gives an incomplete reply that is truthful in itself but omits material information. *Hord v. Environmental Research Inst.*, 463 Mich 399, 412 (2000). In fact, the Michigan Supreme Court has noted that “in every case” it had reviewed, “the fraud by nondisclosure was based upon statements by the vendor that were made in response to a specific inquiry by the purchaser[.]” *Id.* at 409 (emphasis added).

“[B]ecause the nature of the evidence in cases involving allegations of fraud is often circumstantial, and claims of fraud can be fabricated easily,” Federal Rule 9(b) requires that fraud be pled with particularity. *Bennett*, 607 F.3d at 1101. The Sixth Circuit interprets Rule 9(b) “as requiring plaintiffs to allege the time, place, and content of the alleged misrepresentation on which he or she relied; the fraudulent scheme; the fraudulent intent of the defendants; and the injury resulting from the fraud.” *Id.* at 1100; see *Frank v. Dana Corp.*, 547 F.3d 564, 569–70 (6th Cir. 2008) (to satisfy Rule 9(b) a plaintiff must “(1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent”) (internal quotation marks and citation omitted). If a plaintiff fails to meet those standards—that is, if a plaintiff fails to plead each and every element of a fraud claim with 9(b) particularity—the claim must be dismissed.

1. Plaintiffs fail to plead a false statement.

Plaintiffs fail to meet those standards. First, Plaintiffs fail to allege a false statement. The “statements” at issue, as defined the Complaint section titled “Statements Constituting Fraud,” are Cooley’s federally mandated post-graduate employment and salary reports. (Compl. ¶ 31.) But the only specific report Plaintiffs identify in that section—or anywhere else in the Complaint for that matter—is Cooley’s reporting summary for the class of 2010. (See Compl. ¶ 31; Compl. Ex. 1.) Not a single one of the Plaintiffs alleges that he or she relied on that summary—nor could they have, since each of them *graduated* from Cooley in or before 2010 and thus could not have relied upon any statements in that report in deciding to apply to or even remain enrolled at Cooley. (See Compl. ¶¶ 19-22.)

Plaintiffs allege generally in a footnote that, “[u]pon information and belief, Thomas Cooley posted similar reports in its website and marketing material during the class period, and further disseminated the raw information that served as the basis for such reports to various third-party data clearinghouses and publications, such as the ABA and *US News*.” (Compl. ¶ 31 n.2.) Plaintiffs further allege generally that each of them “relied on salary data and employment information posted on Thomas Cooley’s website and/or disseminated to third-party data clearinghouses and publications, such as the ABA and *US News*.” (Compl. ¶¶ 19-22.)

That’s not nearly good enough for Rule 9(b). Rule 9(b) requires a plaintiff to plead *with specificity* “the time, place, and content of the alleged misrepresentation on which he or she relied.” *Bennett*, 607 F.3d at 1100. Plaintiffs fail to allege the specific statements on which they relied, fail to allege specifically when and where those statements were made, and fail to allege specifically what the statements actually said. Plaintiffs do not even narrow it down to a month or year. Plaintiffs have thus failed to plead a false statement with Rule 9(b)’s required particularity.

Even with respect to the one report Plaintiffs *do* identify—the summary report for 2010—Plaintiffs fail to allege a single false statement within that report. The report includes the statement that 76% of Cooley’s reporting 2010 graduates were employed. (*See* Compl. ¶¶ 31-32.) Plaintiffs do not allege that statement was false. (*Id.*) The report also includes the statement that the average starting salary for Cooley’s 2010 graduates who provided salary information was \$54,796. (Compl. ¶ 33.) Plaintiffs do not allege that statement was false, either. (*Id.*) A claim for “[f]raudulent misrepresentation, of course, requires a *false representation* by the defendant.” *Hord*, 463 Mich. at 411 (emphasis in original). Plaintiffs fail to plead one here.⁵

Plaintiffs’ failure to plead a false statement here is much like the plaintiff’s failure in *Hord v. Environmental Research Inst.*, 463 Mich 399, 412 (2000). In *Hord*, the plaintiff alleged that he relied to his detriment on an earlier year’s financial statement that his employer had given him at a job interview. *Id.* at 406-07. The plaintiff alleged that the financial statement gave him the false impression that the company was doing well, when in fact once he got there the financial situation at the company had deteriorated.

The Michigan Supreme Court rejected the plaintiff’s fraud claim. The court reasoned that “[f]raudulent misrepresentation, of course, requires a *false representation* by the defendant.” *Id.* at 411 (emphasis in original). But there was “no claim that the financial statement covering

⁵ Despite not alleging any false statements in the section of the Complaint titled, “Statements Constituting Fraud,” Plaintiffs tack on a few conclusory allegations of false statements in the recitation of the elements of a fraud claim. Plaintiffs allege that the “false representations” include “[s]tating false placement rates during the recruitment process,” and “[d]isseminating false post-graduate employment data and salary information.” (Compl. ¶ 97.) Those allegations fall far short of the pleading standards. To the extent Plaintiffs are referring to Cooley’s employment and salary report in Exhibit 1 to the Complaint, the allegations fail for all the reasons detailed above. To the extent Plaintiffs are referring to some other unpleaded instances of stating or disseminating employment and salary information, the allegations fail even more starkly—Plaintiffs fail to plead a single fact supporting them. These conclusory allegations of “false” statements therefore do not meet the 9(b) pleading standards.

the fiscal year 1991 was in any way false[.]” *Id.* at 410. “The plaintiff says he inferred from it that [the company’s] current financial condition was consistent with that statement[, but] the statement itself is not a representation to that effect.” *Id.* “A *plaintiff’s subjective misunderstanding of information that is not objectively false or misleading cannot mean that a defendant has committed the tort of fraudulent misrepresentation.*” *Id.* at 411 (emphasis added). “Thus the claim of fraudulent misrepresentation must fail because [the company] did not make any false statement.” *Id.* at 410.

So it is here. There is no claim that Cooley’s employment and salary reports are false, and Plaintiffs’ alleged subjective misunderstanding of information in those reports that was not objectively false or misleading cannot give rise to a claim for fraud. Plaintiffs fail to allege a false statement, and thus their fraud claim fails. *Id.*

2. Plaintiffs fail to plead silent fraud.

Plaintiffs also fail to plead “silent” fraud. Plaintiffs’ “fraud” claim, although titled “Fraud,” if anything is a so-called “silent fraud” claim—Plaintiffs allege not that Cooley’s employment and salary statements were false, but that the statements were “misleading” because the data allegedly contained “omissions” that would have given prospective students “a more accurate picture of their post-graduate employment prospects.” (Compl. ¶ 32.) Specifically, Plaintiffs allege that the (truthful, accurate) 76%-employed number was misleading because it “fail[ed] to break down what percentage of graduates were employed in either part-time or temporary positions, or whether a job requires a JD degree.” (Compl. ¶ 32.) Plaintiffs further allege that the (truthful, accurate) \$54,796 average-salary number was misleading because it was calculated based on a “mostly self-selected subset of graduates who actually submit their salary information.” (Compl. ¶ 33.)

That's not silent fraud. "[M]ere nondisclosure is insufficient." *Hord*, 463 Mich. at 412. To plead silent fraud, a plaintiff must plead a "legal *duty* to make a disclosure." *Id.* (emphasis added). Such a legal duty arises "most commonly in a situation where inquiries are made by the plaintiff, to which the defendant makes incomplete replies that are truthful in themselves but omit material information." *Id.* Indeed, the Michigan Supreme Court has noted that its "review of Michigan Supreme Court precedent regarding this issue reveals that, in *every* case, the fraud by nondisclosure was based upon statements by the vendor that were made in response to a specific inquiry by the purchaser[.]" *Id.* at 409 (emphasis added).

Plaintiffs plead nothing of the sort. Nowhere in the Complaint do the Plaintiffs allege that they made any inquiry of Cooley for a "breakdown" of the employment data, and nowhere in the Complaint do the Plaintiffs allege that Cooley made any incomplete reply to any inquiry by Plaintiffs. Plaintiffs certainly fail to allege any such inquiry or reply with the specificity required by Rule 9(b), which requires plaintiffs to allege, among other facts, the "time, place, and content" of the inquiry and the reply. *Bennett*, 607 F.3d at 1100.

Nor did any other legal duty require Cooley to provide the breakdown Plaintiffs now ask for in this action. To the contrary, as detailed above, Cooley fully complied with the legal duties it *did* have, including the reporting duties expressly spelled out in Title IV, DOE regulations, and ABA and NALP standards. Those rules and standards required that Cooley present its employment and salary information exactly the way it did.⁶

⁶ Plaintiffs make vague allegations in paragraph 102 of the Complaint that Cooley "occupies a fiduciary position as educators, and owes a heightened duty of care to Plaintiffs and members of the Class to act in good faith and engage in fair dealings" and that "by virtue of the fact that many of Thomas Cooley's staff and faculty are attorneys" they purportedly have "certain ethical obligations and responsibilities to Plaintiffs and members of the Class." (Compl. ¶ 102.) It is entirely unclear what those allegations mean but, at any rate, they are insufficient to allege a specific legal duty to disclose, particularly given Cooley's full compliance with its actual legal duties to disclose mandated by the DOE and ABA.

Again, Plaintiffs' claim here is similar to the plaintiff's silent-fraud claim in *Hord*. There, as noted above, the plaintiff alleged that he had relied to his detriment on an earlier year's financial statement his employer had provided him at a job interview. The plaintiff alleged that, although accurate, the report was misleading because it gave him the impression that the company was in good financial health, even though it later turned out not to be so. The Michigan Supreme Court outright rejected the plaintiff's silent-fraud claim, holding that the employer had no legal duty to disclose any additional financial information not provided in the report. Quoting favorably from a lower-court opinion, the Supreme Court noted that the "most disconcerting aspect" of the plaintiff's claim "is that it expects that defendant will anticipate plaintiff's inference and then requires defendant to take appropriate remedial action." *Id.* at 407. "To elevate an inference made by another party's interpretation of a document that, on its face, is clear and unambiguous, *puts every supplier of information in jeopardy for the unforeseen misinterpretation of that information.*" *Id.* (emphasis added). The court rejected that construction of silent fraud, noting that the plaintiff "simply had to ask" if he was confused about the information provided, and could not "expect[] the courts to bail him out because his assumption about [the information] was incorrect." *Id.*

Plaintiffs' claim here is similarly disconcerting. Plaintiffs do not allege that *any* of Cooley's employment or salary data is false or inaccurate. The methodology used to calculate and present that data was fully available to Plaintiffs, and Plaintiffs do not allege otherwise. Plaintiffs allege only that they were supposedly naïvely misled by that truthful and accurate data because the data was not broken down or gathered the specific way Plaintiffs now wish it had been. Plaintiffs cannot "expect[] the courts to bail [them] out" for their "unforeseen misinterpretation" of accurate data. *Id.* Plaintiffs' silent-fraud claim—to the extent Plaintiffs have actually asserted one within their "Fraud" claim—therefore fails and must be dismissed.

3. Plaintiffs fail to plead reasonable reliance.

For many of those same reasons, Plaintiffs' alleged reliance on the allegedly omitted data was unreasonable. "[T]o establish a claim of fraudulent misrepresentation, the plaintiff must have reasonably relied on the false representation" or omission. *Cummins v. Robinson Twp.*, 283 Mich. App 677, 696 (2009). But "alleged misrepresentations regarding the terms of written documents that are available to the plaintiff cannot support the element of reasonable reliance," and "[t]here can be no fraud where a person has the means to determine that a representation is not true." *Id.* at 698; *see also Webb v. First of Michigan Corp.*, 195 Mich. App. 470 (1992) ("there can be no fraud where the means of knowledge regarding the truthfulness of the representation are available to the plaintiff and the degree of their utilization has not been prohibited by the defendant").

Here, Plaintiffs' claim rests on the proposition that they assumed Cooley's summary report that 76% of its surveyed graduates were employed nine months after graduation and earned an average salary of approximately \$54,000 to mean that 76% of the graduates were actually employed in full-time legal jobs and that the salary number was based on data from all of Cooley's graduates in a given year, rather than from voluntary student surveys. That assumption was entirely unreasonable. The report is plainly labeled a "summary," which tells the reasonable reader that every conceivable breakdown of the data is not contained in the report. Neither does the summary report actually say that the jobs reported were full-time legal ones or that the salary was based on data from all graduates. Instead, the summary report says that the 76% number is the "[p]ercentage of graduates employed" and that the "[n]umber of graduates with employment status known" is less than the total number of graduates. (Compl. Ex. 1.) It was not reasonable to assume that the numbers meant something other than what they said.

Moreover, the publicly available and readily accessible ABA and NALP methodologies explaining the data clearly state, in detail, precisely how law schools are to calculate that data. With respect to employment data, those methodologies specifically explain that the data “include graduates employed on a part-time or full-time basis in a legal or non-legal job,” and “may be full-time, part-time, temporary, permanent, law-related or not.” (Exs. D, E; emphasis added.) With respect to salary, the ABA, NALP, and the *United States Code itself* provide that salary data “shall” be “gathered from such sources as alumni surveys.” 20 U.S.C. § 1092(a)(1)(R). It was thus entirely unreasonable for Plaintiffs to believe that Cooley’s data reflected only full-time legal jobs and was not gathered from voluntary alumni surveys.

4. Plaintiffs fail to plead injury and causation with particularity.

Finally, Plaintiffs also fail to plead injury and causation with the particularity required by Rule 9(b). *See Bennett*, 607 F.3d at 1101. Three of the four named Plaintiffs specifically allege that they have been employed since graduating from Cooley. (Compl. ¶¶ 19-21.) Two of them own and operate their own law firms. (Compl. ¶¶ 19, 21.) A third used to own her own law firm. (Compl. ¶ 20.) They all allege that they did not obtain “the kind of job that they thought would be waiting for them upon graduating from law school,” (Compl. ¶ 62), but they fail to allege how that purported injury resulted from any alleged omissions in Cooley’s employment and salary data—or even how it is a legally cognizable injury at all.

C. Plaintiffs Fail to State a Claim for Negligent Misrepresentation

Plaintiffs’ claim for negligent misrepresentation (Count III) fails for many of the reasons detailed in Section B above. Under Michigan law, “[t]he elements of negligent misrepresentation are: (1) justifiable and detrimental reliance on (2) information provided without reasonable care (3) by one who owed a duty of care.” *Chesterfield Exchange, LLC v. Sportsman’s Warehouse, Inc.*, 572 F. Supp.2d 856, 866 (E.D. Mich. 2008) (citing *Law Offices of*

Lawrence J. Stockler v. Rose, 174 Mich. App. 14, 33 (1989)); see *Fejedelem v. Kasco*, 269 Mich. App. 499, 502 (2006) (“A claim for negligent misrepresentation requires plaintiff to prove that a party justifiably relied to his detriment on information prepared without reasonable care by one who owed the relying party a duty of care”).

Plaintiffs have not pled justifiable and detrimental reliance for the same reasons explained above. See *Fejedelem*, 269 Mich. App. at 503 (“Whether a person *justifiably* relies on a document is indistinguishable from whether the person *reasonably* relies on it. Indeed, courts sometimes treat the two words essentially as synonyms”) (emphasis in original). It was not reasonable or justifiable for Plaintiffs to think that the employment and salary numbers meant something other than what they said, or to believe that the numbers were gathered or presented in a way other than the way expressly spelled out in a federal statute, federal regulations, and ABA and NALP instructions.

Moreover, Plaintiffs have wholly failed to establish that Cooley provided the employment and salary reports “without reasonable care” or that Cooley breached any duty of care. *Id.*⁷ It is undisputed that Cooley reported its employment and salary numbers in full compliance with ABA and NALP standards, federal law, and federal regulations. Cooley therefore provided its employment and salary numbers in full and reasonable compliance with its duty of care. *Chesterfield Exchange*, 572 F. Supp. at 866. Plaintiffs do not allege otherwise.⁸

⁷ Indeed, the fact that Plaintiffs failed to plead the elements of negligent misrepresentation is clear from the fact that Plaintiffs’ purported negligent-misrepresentation claim is word-for-word the same as Plaintiffs’ purported fraud claim. (Compare Compl. ¶¶ 96-103 with ¶¶ 104-111.)

⁸ In Plaintiffs’ prayer for relief, they purportedly seek punitive damages. (See Compl. at 42.) Punitive damages, however, are not recoverable under Michigan law. See *Casey v. Auto-Owners Ins. Co.*, 273 Mich. App. 388, 400 (2006).

CONCLUSION

Plaintiffs have failed to state any claim upon which relief can be granted, the claims are preempted by federal law and are barred in whole or in part by the applicable statutes of limitations, and the Complaint violates Rule 8. The Court therefore should dismiss this action with prejudice.

Respectfully submitted,

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October 20, 2011

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CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that on October 20, 2011, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system which will automatically send e-mail notification of such filing to the attorneys of record:

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