UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

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ANN HERNANDEZ; LORI PELLIGRI; CAROLINE ALLEN; DIANE ELMS; SUSAN SUHR-GIBSON; MARIBEL RODRIQUEZ-GOING; FRANK LOPP; BRIDGET MOONEY; NICK NAPIER; MARGIE PACHECO; and ADRIANA WILSON, Individually and on behalf of all others similarly situated,

Plaintiffs,

v.

LAMAR ALEXANDER, in his capacity as SECRETARY OF EDUCATION OF THE UNITED STATES; HIGHER EDUCATION ASSISTANCE FOUNDATION, INC., a Minnesota Corporation; TEXAS EDUCATION CORPORATION, d/b/a SOUTHERN TECHNICAL INSTITUTE; WAYNE GILPIN, Individually, and in his capacity as Officer of Texas Education Corporation, d/b/a Southern Technical Institute; DAVID REASOR, Individually and as Officer of Texas Education Corporation d/b/a Southern Technical Institute; UNION BANK & TRUST CO.,

Defendants.

CV-S-91-705-PMP (LRL)

ORDER

Before the Court is the Motion to Dismiss (#29) of Defendants Higher Education Assistance Foundation ("HEAF") and Union Bank and Trust Co. ("Union Bank"), filed December 11, 1991. On February 3, 1992, Plaintiffs filed their Opposition (#37). Defendants filed their Reply (#49) on March 3, 1992. On March 4, 1992, the Secretary of Education filed a Memorandum in Opposition to Dismissal on the Basis of General Preemption (#51) with the permission of the Court. Order (#50) of March 4, 1992.

Also before the Court is the Secretary of Education's Motion to Dismiss, or in the Alternative, for Summary Judgment (#34), filed January 17, 1992. On February 24, 1992, Plaintiffs filed their Memorandum in Opposition (#43). On March 31, 1992, the Secretary of Education filed his Reply (#55).

Facts

Plaintiffs all attended Southern Technical Institute in Las Vegas, Nevada, between April 1989 and April 1990 to participate in a program for "Psychiatric Assistants." Plaintiffs now claim to have been defrauded by the school with regard to both the quality of education and the marketability of their degrees. Plaintiffs claim that STI worked exclusively with Defendant Union Bank, the bank through which all Plaintiffs obtained Guaranteed Student Loans ("GSL's").

In their Complaint, Plaintiffs seek a Court order that they may use school-related defenses against the lenders and guarantors of the loans and are not otherwise required to repay their loans under state and federal law.

HEAF and Union Bank seek dismissal of Plaintiffs' claims on the basis that Nevada law is wholly preempted by federal law and federal law does not recognize any remedy for Plaintiffs.

The Secretary of Education urges the Court to find that Nevada law is not wholly preempted by federal law, but seeks dismissal or summary judgment for a variety of other reasons.

Southern Technical Institute ("STI") of Birmingham, Alabama, has been in existence at least since 1956. Exhibit E to Motion (#34). The institution was fully accredited in 1981 and its accreditation was reaffirmed in 1986. Exhibit C to Motion (#34).

Prior to July 1988, the trade school located in Las Vegas which has become the subject of this suit was owned by Texas Educational Institution ("TEC"). On July 18, 1988, the school became a branch of STI's main campus in Birmingham. The Southern Association of Colleges and Schools ("SACS"), an accreditation agency, approved STI-Las Vegas as a branch location of STI-Birmingham on October 21, 1988. The Department of Education ("DOE") sent an Institution Eligibility Notice to STI-Birmingham specifically informing it that its "non-main campus" branch in Las Vegas was included within the designation of STI-Birmingham as an institution eligible for participation in the Guaranteed Student Loan Program ("GSLP"). Plaintiffs claim and Defendants deny that the school was sold back to TEC on September 1, 1988, and, consequently, that as of the date of certification the Las Vegas institution had ceased to be a branch of STI-Birmingham. Defendants claim that at all times

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relevant to this action STI-Las Vegas was fully affiliated with STI-Birmingham.

Secretary's Motion to Dismiss or for Summary Judgment (#34)

I. Standard of Review.

The Secretary of Education has moved this Court to dismiss certain counts of Plaintiffs' Complaint. Alternatively, the Secretary urges the Court to enter summary judgment in its favor. Federal Rule of Civil Procedure 12 provides that when the parties present to the Court matters outside the pleadings, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56. Because the Court finds that the parties have done so, and further finds that all parties have had an adequate opportunity to respond to the outside matters, the Court will construe the motion as one for summary judgment.

Pursuant to Federal Rule of Civil Procedure 56, summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

The party moving for summary judgment has the initial burden of showing the absence of a genuine issue of material fact. See Adickes v S.H. Kress & Co., 398 U.S. 144 (1970); Zoslaw v. MCA Distrib. Corp., 693 F.2d 870, 883 (9th Cir. 1982). Once the movant's burden is met by presenting evidence which, if uncontroverted, would

entitle the movant to a directed verdict at trial, the burden then shifts to the respondent to set forth specific facts demonstrating that there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). If the factual context makes the respondent's claim implausible, that party must come forward with more persuasive evidence than would otherwise be necessary to show that there is a genuine issue for trial. Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986); California Arch. Bldg. Prod. v. Franciscan Ceramics, 818 F.2d 1466, 1468 (9th Cir. 1987), cert. denied, 484 U.S. 1006 (1988).

If the party seeking summary judgment meets this burden, then summary judgment will be granted unless there is significant probative evidence tending to support the opponent's legal theory. Long v. Bureau of Economic Analysis, 646 F.2d 1310, 1321 (9th Cir. 1981); Commodity Futures Trading Commission v. Savage, 611 F.2d 270 (9th Cir. 1979).

A material issue of fact is one that affects the outcome of the litigation and requires a trial to resolve the differing versions of the truth. See Admiralty Fund v. Hugh Johnson & Co., 677 F.2d 1301, 1305-06 (9th Cir. 1982); Admiralty Fund v. Jones, 677 F.2d 1289, 1293 (9th Cir. 1982).

All facts and inferences drawn must be viewed in the light most favorable to the responding party when determining whether a genuine issue of material fact exists for summary judgment purposes. Poller v. CBS, Inc., 368 U.S. 464 (1962). After drawing inferences

favorable to the respondent, summary judgment will be granted only if all reasonable inferences defeat the respondent's claims. Admiralty Fund v. Tabor, 677 F.2d 1297, 1298 (9th Cir. 1982).

The recent trilogy of Supreme Court cases cited above establishes that "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" Celotex Corp., 477 U.S. at 327, quoting Fed. R. Civ. P. 1. See also Avia Group Int'l, Inc. v. L.A. Gear Cal., 853 F.2d 1557, 1560 (Fed. Cir. 1988).

II. Counts I-VI and IX.[1]

A. Counts I-V.

1. Certification of Branch Office.

a. two-year requirement

Plaintiffs claim in Counts I and II that the Secretary of Education failed in his duties by certifying STI-Las Vegas as an institution eligible for participation in the GSLP. Under § 435 of Higher Education Act ("HEA"), a school is a 'vocational school' and thus meets one factor towards eligibility when, among other requirements, it has been established for more than two years or otherwise certified as eligible:

> The term "vocational school" means a business or trade school, or technical institution or other technical or vocational school, in any State, which--
> . . .

[1] The Secretary does not seek summary judgment as to Count VII of Plaintiffs' Complaint.

> (3) has been in existence for 2 years or has been specially accredited by the Secretary as an institution meeting the other requirements of this subsection;

20 U.S.C. § 1085(c)(3) (1989). The Secretary does not claim that he specially accredited STI-Las Vegas as an institution under this section. Instead, it is his position that STI-Las Vegas is eligible because it has been in existence for 2 years by virtue of its relationship with the long-standing institution STI-Birmingham.

It is the Secretary's position that branch campuses are automatically eligible under the two-year requirement if the main campus of the institution has been in existence for at least that length of time. Motion (#34) at p. 5. Plaintiffs claim that the Secretary's interpretation of the regulations implementing the GSLP is erroneous. Plaintiffs claim that the Court should declare that STI-Las Vegas was not an institution eligible for participation in the GSLP as a 'vocational school' and should declare the guarantees a nullity.

Plaintiffs point to the legislative history of the two-year requirement in support of their position that one purpose behind the HEA was to eliminate from eligibility any school which had no true history of teaching:

> With respect to the definition of "eligible institution," it was intended that the bill be as liberal as possible by including varieties of institutions as authorized to provide, and providing, "a program of postsecondary vocational or technical education designed to fit individuals for useful employment in recognized occupations." It was the determined intent, however, that the "fly by night" institutions of the post-World War II era be explicitly eliminated from eligibility. The subcommittee resolved this problem by adding an

> eligibility feature which requires an institution to have been in existence for two years.

1965 U.S. Code Congressional & Administrative News 3742, 3753. According to Plaintiffs, the Secretary's rules and regulations must be consonant with this purpose. To the extent that they are not, they may be found arbitrary and capricious and therefore invalid under the Administrative Procedures Act ("APA"), 5 U.S.C. § 706(2)(A). The APA provides that a Court may only overturn agency action when it is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Id.; see also Esmeralda County v. Department of Energy, 925 F.2d 1216, 1219 (9th Cir. 1991).

The Secretary has made certain statements in a Notice of Proposed Rulemaking to which Plaintiffs point as evidence that even the Secretary recognizes that the Secretary's current policies are not fulfilling Congressional policy. Plaintiffs note that the Secretary has recognized hypothetical situations which cannot be effectively dealt with under the existing regulations. Plaintiffs argue that if there are better ways of implementing regulations than those currently employed by the Secretary, then this Court should find the current implementation inadequate. To the contrary, this Court will not 'cast the administrative process in concrete' as feared by the Secretary by punishing the agency for coming up with better solutions and publishing them as notices of proposed rule-makings. Application of an agency's regulations to complex or changing circumstances calls upon an agency's unique expertise and policy-making prerogatives. Martin v. Occupational Safety and Health

Review Comm'n, 111 S. Ct. 1171, 1176 (1991). Changes which better fit new or newly-recognized circumstances should be encouraged. Id. It would run counter to public policy to hold the Secretary to a higher standard simply because he has recognized flaws in current rules and is trying to change them.

When reviewing an agency's interpretation of a statute it is charged with administering, a court must give the agency considerable deference. Bresgal v. Brock, 843 F.2d 1163, 1168 (9th Cir. 1987). However, the judiciary remains the final authority on issues of statutory interpretation. Id. "Courts should not 'rubber-stamp . . . administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.'" Id., (quoting Bureau of Alcohol, Tobacco & Firearms v. FLRA, 464 U.S. 89, 97 (1983) (other cites omitted)). Thus, while this Court must in part defer to the Secretary's interpretation that branch locations of an eligible institution are automatically eligible for participation in the GSLP without themselves having been in existence for at least two years, the Court may depart from that interpretation if it finds that it is clearly erroneous or inconsistent with the statutory scheme.

The Court finds that as a general matter, the Secretary's position is neither clearly erroneous nor inconsistent with the statutory scheme. There is no language in the regulatory framework which explicitly or implicitly requires the Secretary to conduct a new investigation of each branch campus of every single institution. Additionally, there is no specific language to which Plaintiffs point

which runs contrary to the position that some branch campuses may become automatically eligible because of their affiliation with a vocational school which has been in existence for two or more years.

Nevertheless, the Court finds that there remains a genuine issue of material fact regarding whether the Secretary acted arbitrarily or capriciously in this particular instance. If the facts are as alleged by Plaintiffs, then the Secretary's actions substantially contributed to creating an environment in which the Plaintiffs became victims of corporate greed. The facts as alleged by Plaintiffs establish that STI-Las Vegas shared little or no common faculty, programs, or curricula with STI-Birmingham, and no institutional concern for reputation in its community which may help to safeguard the students of more reputable vocational schools. The facts are not sufficiently developed for the Court to determine whether or not the Secretary acted arbitrarily and capriciously, and thus contrary to law, in certifying STI-Las Vegas as eligible for participation in the GSLP. The Secretary's Motion will be denied in this respect.

b. possible inaccuracy as to status of branch campus

There remains a material question of fact as to whether the Las Vegas institution remained part of STI-Birmingham at the time of its certification in November 1988. Plaintiffs claim that by the date of certification STI-Las Vegas had been sold back to TEC and had no continuing affiliation with any eligible institution. 34 C.F.R. § 600.40(b) states that if the Secretary designated an institution as eligible on the basis of inaccurate information, the Secretary's

designation is void from the date of the designation. It is clear to the Court that if STI-Las Vegas was in no way affiliated with any eligible institution at the time of its designation, the information on which the Secretary made his determination that it satisfied the two-year requirement of 20 U.S.C. § 1085(c)(3) was "inaccurate" within the meaning of 34 C.F.R. § 600.40(b). Thus, if there was no such affiliation, the Secretary's designation of the institution as eligible was void from its implementation. If it was void, and the Secretary can produce no further information which would save the eligibility status of STI-Las Vegas, then each federal loan guarantee in dispute must be declared a nullity.

The documents supplied by the parties do not unambiguously establish either that STI-Las Vegas retained or relinquished its affiliation with STI-Birmingham by the date of certification. The Court finds that there is a genuine issue of material fact which precludes summary judgment. The Secretary's Motion will be denied in this respect.

2. Certification of Psychiatric Assistant Program.

The First, Third, and Fourth Counts in Plaintiffs' Complaint allege that the Secretary's certification of the Psychiatric Assistant program at STI-Las Vegas violated 20 U.S.C. § 1071 and 34 C.F.R. § 600.7 because the institution did not meet federal regulations and because the program did not provide training for useful employment. Plaintiffs also claim that the Secretary violated the Administrative Procedures Act ("APA") because the Secretary's certification was contrary to law and arbitrary and capricious.

The Secretary responds that he does not have to certify specific programs within an institution once the institution has been declared eligible for participation. The HEA requires the Secretary to recognize as a "vocational school" only an institution which "is legally authorized to provide, and provides within that State, a program of postsecondary vocational or technical education designed to fit individuals for useful employment in recognized occupations." 20 U.S.C. § 1085(c)(2). It is the job of the licensing bodies of the states in which the schools are located to oversee particular programs, according to the Secretary.

The Department's own regulations, set forth at 34 C.F.R. § 600.10(c), allow schools to add programs as "eligible programs" without prior approval by the Department:

> (c) Subsequent additions of educational programs. (1) If an institution that has been designated by the Secretary as an eligible institution adds educational programs after that designation, the institution need not apply to the Secretary to have those additional programs designated as eligible programs but may determine on its own whether those programs satisfy the relevant statutory and regulatory eligibility requirements.

34 C.F.R. § 600.10(c) (1988). Thus, there is no preclearance of programs which are initiated after the institution has been declared eligible for participation in the GSLP.

Instead of preclearing such programs, the regulations provide that if the school has made an incorrect determination that the program satisfies the applicable statutes and regulations,

> the institution shall be liable to repay to [the Department of Education] all the student financial assistance and other [Department of Education]

> program funds it or its students received who were enrolled in that educational program.

34 C.F.R. § 600.10(c)(2). Plaintiffs claim that there is no legislative authority for the Secretary to depend on after-the-fact audits rather than a preclearance scheme. However, the Court finds that there is nothing in the HEA or its legislative history which explicitly or implicitly prevents such an interpretation. Congress left many decisions regarding how best to implement the statute to the Secretary's expertise. The Court finds that the Secretary's chosen method of relying on audits is neither arbitrary and capricious nor contrary to law within the meaning of the Administrative Procedures Act, 5 U.S.C. § 706(2)(A).

The Secretary concedes that he did not review STI-Las Vegas' "Psychiatric Assistant" program in which Plaintiffs enrolled. It is the Secretary's position that no such review was warranted under the applicable statutes and regulations. He claims that as long as the institution had been certified, any subsequently-added programs satisfied the law as long as they (1) were licensed by the State in which they were located, and (2) educated students for useful employment in recognized occupations.

There is agreement among the parties that the Psychiatric Assistant program was properly licensed by the State of Nevada. The parties disagree, however, that the program educated students for useful employment in a recognized occupation. The Secretary contends that an occupation is 'recognized' if it is found within the Dictionary of Occupational Titles ("Dictionary") published by the United States Department of Labor. 34 C.F.R. § 600.2. While the

Dictionary does not have a specific listing for "Psychiatric Assistant," there is a listing for "Psychiatric Aide" which the Secretary claims, and Plaintiffs deny, is an interchangeable term.

It is properly a question for the trier of fact whether the terms 'assistant' and 'aide,' as used by STI-Las Vegas in its brochures and the Department of Labor in its Dictionary, respectively, are interchangeable. This factual issue precludes the Court from entering summary judgment at this stage. If the terms are not interchangeable such that the fact-finder determines that "Psychiatric Assistant" as the term was used by STI-Las Vegas was not a "recognized occupation," then 34 C.F.R. § 600.10(c)(2) suggests that the institution must repay the Department of Education the amounts loaned to the students through the GSL. Such repayment would, of course, extinguish the students' debts. If the terms are determined to be interchangeable, then the Psychiatric Assistant program did provide education for a "recognized occupation" within the statutory context.

There remains an issue as to whether STI-Las Vegas' program for "Psychiatric Assistant" provided "useful employment." 20 U.S.C. § 1085(c)(2). This issue is one for the finder of fact such that summary judgment is precluded.

The Secretary's Motion will, therefore, be denied as to these claims.

3. Promulgation of Eligibility Regulations.

Plaintiffs' Fifth Count alleges that the Secretary's establishment of the certification system described above constitutes

final agency action that is arbitrary and capricious. The Court finds that the Secretary's certification program as set forth in its regulations is not an arbitrary and capricious interpretation of the statute. However, as noted above, the Court may find that specific applications of those regulations represent an abuse of discretion. Therefore, to the extent that genuine issues of material fact preclude the Court from making a determination as to whether specific applications of the regulations were arbitrary and capricious, the Court will deny summary judgment. With respect to those issues already noted where the Court finds that the regulations are not arbitrary and capricious, the Court will grant summary judgment in favor of the Secretary regarding the Fifth Count in Plaintiffs' Complaint.

B. Administrative Procedures Act.

As noted above, the APA authorizes courts to overturn agency action only when it is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The Court finds that Plaintiffs have stated a claim under Counts I and III of their Complaint to the extent that the Secretary's refusal to declare STI and its Psychiatric Assistant program ineligible is found to be an abuse of discretion. See Northern Ind. Pub. Serv. Co. v. Federal Energy Regulatory Comm'n, 782 F.2d 730, 745 (7th Cir. 1986); Iowa ex rel. Miller v. Block, 771 F.2d 347, 350-52 (8th Cir. 1985), cert. denied sub nom Iowa ex rel. Miller v. Lyng, 478 U.S. 1012 (1986). This finding will be dependent on a factual showing and is one which is properly before the Court.

Although the Secretary contends that his actions are judicially unreviewable under Heckler v. Chaney, 470 U.S. 821 (1985), this case is distinguishable because it does not involve the types of prosecutorial discretion contemplated therein. Additionally, Ninth Circuit and Supreme Court cases have clarified that Chaney is inapplicable where there are objective, meaningful standards against which to measure agency action. Webster v. Doe, 486 U.S. 592, 600 (1988); Assiniboine and Sioux Tribes of Fort Peck Indian Reservation v. Bd. of Oil and Gas Conservation of Montana, 792 F.2d 782, 791 (9th Cir. 1986).

The Court finds that Plaintiffs' claims properly state a claim under the APA in that they allege that the Secretary did not follow his own policies and failed to formulate policies necessary to implement the statute he was charged with enforcing.

Furthermore, Chaney was concerned primarily with an agency's failure to take action. In the instant case, Plaintiffs' allegations stem largely from the Secretary's affirmative actions of certifying STI-Las Vegas as eligible to participate in the GSLP. See Chaney, 470 U.S. at 831. Rather than a failure to act, Plaintiffs allege that the Secretary abused his discretion by acting in a manner inconsistent with the applicable statutes and regulations. Even under Chaney such abuses are judicially reviewable.

Summary judgment as to Counts I and III is, therefore, inappropriate at this time.

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c. Petition for Mandamus.

In both Counts I and VI of their Complaint, Plaintiffs request the Court to issue a writ of mandamus against the Secretary. As the Secretary correctly points out, the mandamus jurisdiction of this Court is limited to requiring federal officials to perform plainly described ministerial duties. Dahl v. Clark, 600 F. Supp. 585, 596 (D. Nev. 1984). Plaintiffs seek to compel the Secretary to issue a designation that STI never qualified as an eligible institution and to compel the Secretary to order STI to repurchase their student loans.

Federal law provides "[t]he district courts shall have original jurisdiction of any action in the nature of mandamus to compel any officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 U.S.C. § 1361.

The Secretary argues that there is no applicable, nondiscretionary statutory or regulatory duty requiring it to perform these acts. Therefore, he argues, Plaintiffs' Complaint should be dismissed for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted.

This Court may issue a writ of mandamus to "compel an officer or employee of the United States or any agency thereof to perform a duty owed to the Plaintiff." 28 U.S.C. § 12361. As the Secretary notes, mandamus is proper only when "(1) the plaintiff has a plain right to have an act performed, (2) the defendant has a plain duty to perform it, and (3) there is no other adequate remedy available to the plaintiff." 1 Moore's Federal Practice ¶ 0.62[17] at 700.51

(1991) (notes and citations omitted). See also Azurin v. Von Raab, 803 F.2d 993, 995 (9th Cir. 1986), cert. denied, 483 U.S. 1021 (1987); Stang v. Internal Revenue Service, 788 F.2d 564, 565 (9th Cir. 1986); Gifford Pinchot Alliance v. Butruille, 742 F. Supp. 1077, 1082-83 (D. Ore. 1990).

> This concept of 'plain' right to have the act performed and 'plain' duty to perform it does not relate to obviousness of the arguments made to the court, but rather to the question whether the duty to act is imposed by law, or left to the judgment or discretion of the officer, agent, or agency.

Id.

In Count I, Plaintiffs allege that STI did not meet the eligibility requirements which state that a vocational school should be "designed to provide occupational skills to fit individuals for useful employment in recognized occupations," 34 C.F.R. § 600.7(a)(3)(i), and that a vocational school should be "[i]n existence for two years," 34 C.F.R. § 600.7(a)(5)(i). Furthermore, as noted above, 34 C.F.R. § 600.40(b) states that if the Secretary designated an institution as eligible on the basis of inaccurate information, the Secretary's designation is void from the date of the designation. While there is no specific directive to the Secretary to declare the designation void, there is neither any discretion given to the Secretary to determine that a designation based on inaccurate information is not void. In this context, the Court finds that mandamus relief might be appropriate should the fact-finder determine that the Secretary's determination was based on inaccurate information. The writ would then require the Secretary to declare the designation void.

In Count VI of their Complaint Plaintiffs seek further mandamus relief against the Secretary. The regulations require that when a school wrongly determines that a particular program is eligible and satisfies the applicable statutory and regulatory eligibility provisions, "the institution shall be liable to repay to [the Department of Education] all the student financial assistance and other [Department of Education] program funds it or its students received who were enrolled in that educational program." 34 C.F.R. § 600.10(c)(2). The use of the mandatory "shall" language suggests that despite the fact that there is no language requiring the Secretary to take any specific action, the Department of Education has no discretion but to enforce this provision by requiring the school to repay the loans under the proper circumstance.

In light of the mandatory language of § 600.10(c)(2), the Court finds that the Secretary acts contrary to law when he states that his position is that he has discretion to determine whether or not a school will be required to repay the loans. Mandamus relief against the Secretary is appropriate where a school has made an incorrect determination that its program satisfies the applicable regulatory and statutory provisions. In such a case, the Secretary would be required to force the school to repay all program funds borrowed on its or its students' behalf.

The Secretary's Motion will, therefore, be denied as it relates to Plaintiffs' claim for mandamus relief.

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D. Injunctive Relief.

Plaintiffs have requested injunctive relief against the Secretary. Injunctive relief is expressly barred by § 432(a)(2) of the HEA. 20 U.S.C. § 1082(a)(2). The statute unequivocally states that "no attachment, injunction, garnishment, or other similar process, mesne or final, shall be issued against the Secretary" with respect to his duties under the GSLP, including enforcement of guaranteed student loans. Id.

Furthermore, the Court has confidence in the Secretary's consistent statements that injunctive relief is unnecessary. According to the Secretary, "[i]f the Court declares that the students' loan obligations are null and void, the Secretary will discontinue its collective efforts." Motion (#34) at 22 n.7.

The Secretary's Motion will, therefore, be granted as to Plaintiffs' claim for injunctive relief.

E. FTC Holder Rule.

The Secretary urges the Court to dismiss Count XI of Plaintiffs' Complaint. In that Count, Plaintiffs argue that the Court should imply the existence of a warning set out in the Federal Trade Commission's ("FTC") Holder Rule, 16 C.F.R. § 433.2(b),

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which would render each defendant subject to any defense which could have been raised against the school.[2]

Recently, several courts have considered whether or not § 433.2(b) applies to educational loans. See, e.g., Jackson v. Culinary School of Washington, 1992 W.L. 60136 at 11 et seq. (D.D.C. March 26, 1992). The Jackson Court exhaustively examined the legislative and administrative treatment of § 433.2(b) and related code provisions and concluded that the FTC Holder Rule does not provide any relief for students. This Court finds the reasoning of Jackson persuasive and hereby adopts that reasoning as its own.

The Secretary's Motion will be granted as to Count XI.

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[2] The FTC's Holder Rule provides:

> In connection with any sale or lease of goods or services to consumers, in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, it is an unfair or deceptive act or practice within the meaning of section 5 of that Act for a seller, directly or indirectly, to:
>
> (b) Accept, as full or partial payment for such sale or lease, the proceeds of any purchase money loan (as purchase money loan is defined herein), unless any consumer credit contract made in connection with such purchase money loan contains the following provision in at least ten point, bold face, type:
>
> **NOTICE**
>
> **ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.**

16 C.F.R. § 433.2(b).I

Motion to Dismiss of HEAF and Union Bank (#29).

I. Nevada Law.

A. Nevada Statutory Remedy.

1. Partial Federal Preemption of State Law Claims.

In their Eighth Count, Plaintiffs claim that under Nevada law all Defendants are subject to any defenses which could have been raised against the school. Nevada law specifically includes such protection:

> Whether or not the notation "loan for study" appears on the document of indebtedness, and notwithstanding any agreement to the contrary, the lending agency extending credit and any transferee, assignee or holder of the document of indebtedness are subject to all defenses and claims which may be asserted against the private school or postsecondary educational institution which was to render the educational services, by any person that was a party to the document of indebtedness or the person to whom the educational services were to be rendered to the extent of the unpaid portion of the indebtedness.

Nev. R. Stat. § 394.590(4).

Defendants HEAF and Union Bank claim that Plaintiffs' state law claims, based primarily on § 394.590(4), are preempted by federal law under the Supremacy Clause of Article VI of the United States Constitution. Plaintiffs, the Secretary, and this Court disagree. The Court in Tipton v. Secretary of Education, 768 F. Supp. 540, 551-554 (S.D. W. Va. 1991), has exhaustively analyzed and correctly determined that not all state law claims are preempted under the HEA. See also Veal v. First American Savings Bank, 914 F.2d 909, 914-15 n.7 (7th Cir. 1990); United States v. Griffin, 707 F.2d 1477, 1482-83 (D.C. Cir. 1983); Jackson v. Culinary School of Washington, No. CV-A-91-782 (CRR), 1992 WL 2634 (D.D.C. March 26, 1992). But see Graham

v. Security Sav. & Loan, 125 F.R.D. 687, 693 (N.D. Ind. 1989), aff'd on other grounds sub nom Veal, 914 F.2d 909 (7th Cir. 1990) (where Seventh Circuit refused to uphold the general proposition that all borrower state law defenses to repayment of GSLP loans are preempted); Molina v. Crown Business Institute, No. 24332/88 (N.Y. Sup. Ct. Sept. 10, 1990). There is no need for a novel exegesis on the subject. The Tipton Court's analysis is hereby adopted by this Court.

While some state laws governing the enforceability of student loans are not preempted by the HEA, preemption does occur to the extent that there is an actual conflict between state law and federal law. California Fed'l Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 280-81 (1987); Tipton, 768 F. Supp. at 554. In Guerra, the Supreme Court held that a Court should consider whether it is impossible to comply with both the state and federal regulations, and whether state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." 479 U.S. at 280-81. See also California v. ARC America Corp., 490 U.S. 93 (1989); Tipton, 768 F. Supp. at 554.

The Secretary urges the Court to find that while state law is not generally preempted by the HEA, § 394.590(4) is preempted. According to the Secretary, the Nevada statute is preempted because it would "allow student borrowers to assert school-related defenses against lenders, without regard to the conduct of the lender, merely because the loan is an educational loan. As a threshold matter, state laws are preempted that purport to impose potential liability

on banks for functions that are required by, or central to, the GSLP process." Memorandum at 18-19 (citing Tipton, 768 F. supp. at 558). The Court agrees that to the extent Nevada law is too broad in that it renders all holders of the loan documents subject to any and all defenses which could be raised against the school, it conflicts with the HEA and is preempted.

However, to the extent that a close connection exists between the school and the lender such that there is an "origination relationship," both Nevada law, Nev. R. Stat. § 394.590(4), and federal law, 34 C.F.R. § 682.206(a), would permit defenses to be asserted against the lender. To this extent, then, Nevada law is consistent with the federal requirements and therefore is not preempted.

As discussed below, the Court finds that whether or not an origination relationship existed between Union Bank and STI-Las Vegas is an issue to be determined by the trier of fact. The Court cannot at this time determine whether all applicable Nevada law is preempted by the federal scheme. The Court will, therefore, deny the Motion to Dismiss of Defendants Union Bank and HEAF on this issue.

B. Joint Venture.

In their Ninth Count, Plaintiffs claim that Union Bank and TEC were joint venturers. Specifically, Plaintiffs claim:

> Defendant [Union Bank] and Defendant Doe banks entered into a relationship with Defendant [TEC] such that [TEC] would perform lending duties. In exchange, the Defendant used Union Bank and Trust almost exclusively as its lender.
>
> Such a relationship constitutes a joint venture.
>
> . . .

> As a joint venturer with Defendant [TEC], Defendant [Union Bank] is liable for all acts of Defendant [TEC].

Complaint (#1) at 15. Defendant Union Bank argues that Plaintiffs have not pled all the necessary elements of a joint venture and that the Court should accordingly strike the Ninth Count. This Court agrees.

There are specific elements of joint ventureship which are essential to the theory. These include the "intent to enter into a joint venture, community of interest in the performance of a common purpose, a joint proprietary interest in the subject matter, a mutual right to control, a right to share in the profits, and a duty to share in any losses which may be sustained . . ." 48A Corpus Juris Secundum - Joint Ventures § 10 at 406 (1981). See also Bruttomesso v. Las Vegas Metropolitan Police Dept., 95 Nev. 151, 154, 591 P.2d 254, 256 (1979).

Taking all of Plaintiffs' factual allegations as true, the scheme alleged by Plaintiffs fails to establish the existence of a joint venture. Plaintiffs have not alleged that Union Bank and TEC shared a mutual right to control, a right to share in the profits, or a duty to share any losses. Thus, Plaintiffs have failed to state a claim upon which relief may be granted. The motion of Defendants HEAF and Union Bank will be granted in this respect.

II. **FTC Holder Rule**.

The Court will dismiss Count XI of Plaintiffs' Complaint for the reasons articulated above at pages 20-21.

III. Origination Relationship.

In their Seventh Count, Plaintiffs claim that all defenses which may be asserted against STI-Las Vegas may also be asserted against the other Defendants. The Secretary agrees and has consistently stated that if the Court finds that a special relationship existed between the school and Union Bank and that there was some underlying defense to the loans made to the students (i.e., fraud), he will not seek to collect on any of those loans. Union Band and HEAF vigorously disagree. According to these Defendants, there is neither a statute nor a regulation which would subject any lender or holder of the loans to defenses which may be asserted against the school.

Plaintiffs' claim rests on the allegation that the school and Union Bank had developed a special relationship where the school effectively made all lending decisions for Union Bank with respect to the student loans at issue. As a preliminary matter, the Court finds that Plaintiffs have sufficiently pled the existence of such a special relationship to withstand a motion to dismiss.

The Department of Education has promulgated regulations which set forth a definition for this special relationship which is alleged to have existed between Union Bank and STI-Las Vegas:

> A special relationship between a school and a lender, in which the lender delegates to the school, or to an entity or individual affiliated with the school, substantial functions or responsibilities normally performed by lenders before making loans. In this situation, the school is considered to have 'originated' a loan made by the lender. The secretary determines that 'origination' exists if, for example-

> (1) A school determines who will receive a loan and the amount of the loan; or
>
> (2) The lender has the school verify the identity of the borrower or complete forms normally completed by the lender.

34 C.F.R. § 682.200(b) (1986).

The Secretary has further set out some of the consequences which a lender must deal with if there is such an origination relationship:

> Except as may be authorized by the Secretary, a lender may not delegate its loan-making functions to a school unless the school has an origination relationship with the lender. If that relationship exists, the lender may rely in good faith upon statements of the borrower contained in the loan application, but may not rely upon statements made by the school in the application . . .

34 C.F.R. § 682.206(a)(2) (1986). In other words, in order to satisfy its due diligence responsibilities under the GSLP, a bank which has an origination relationship with a school must independently verify statements made by the school in any loan application. Such lenders "have the responsibility of making prudent professional judgments about the quality of such loans including the practices of financial stability of the schools originating the loans." 41 Fed. Reg. 4496 (January 29, 1976) (explaining a regulation under the Federal Insured Student Loan ("FISL") program which is

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identical to § 682.206(a)(2) at issue here).[3] See Tipton at 567. The Secretary further elaborated:

> While a 'specially-related' lender must, therefore, bear additional risks in making such loans, the special relationship should provide the lender with a unique ability to make a comprehensive and accurate evaluation of the school's ability to meet its responsibilities, both educationally and relating to the loan program, and to assure that the certifications by the school are reliable.

41 Fed. Reg. 4496 (January 29, 1976).

In the context of yet another regulation the Secretary again implies that borrowers have additional defenses when their loans are originated by the school:

> (2) In conducting the initial counseling, the school must . . . (iii) In case of a student borrower of a GSL or SLS program loan (other than a loan made or originated by the school), emphasize that the borrower is obligated to repay the full amount of the loan even if the borrower does not complete the program, is unable to obtain employment upon completion, or is otherwise dissatisfied with or does not receive the educational or other services that the borrower purchased from the school.

34 C.F.R. § 682.604(f)(2)(iii) (1986).

The intent of the Secretary throughout these pronouncements is clear: lenders who are in a special origination relationship with a bank have special responsibilities. If they fail to meet these

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[3] Defendants correctly point out that this statement is followed in the Federal Register by a comment from the Secretary that while "[s]everal commenters seemed to think that the proposed rules applied to loans guaranteed by State or private non-profit agencies . . . [t]hese regulations apply only to loans insured by the Commissioner under the [FISLP]." Nevertheless, the Court finds that because the Secretary later implemented a GSLP regulation using identical language, the only proper conclusion is that by the time the GSLP regulation was promulgated, the Secretary had changed positions and meant the comments to apply to both programs.

responsibilities, they will bear the additional risks attendant to their failure.

This intent is further detailed in Department letters responding to requests for clarification of the loan forgiveness under the GSLP. For instance, in a May 19, 1988, letter from Kenneth D. Whitehead, Acting Assistant Secretary for Postsecondary Education to Stephen J. Solarz of the House of Representatives, the Department wrote:

> If a loan is not legally enforceable, it is not reinsurable by the Department, and the Department would not encourage or require a lender or guaranty agency to attempt to collect such a loan. As a legal matter, however, a student who borrows under the GSL program from a third party lender remains responsible for repaying the loan even if the school closes, unless a relationship exists between the lender and the school that would make the school's failure to render educational services a defense to repayment of the loan to the lender. This kind of relationship can arise when the lender makes the school its agent for certain functions in the loan making process. The Department has termed such an agency relationship an 'origination relationship.' 34 C.F.R. 682.200.

Letter attached as Exhibit A to Opposition (#37) (emphasis added).

Furthermore, the Department has begun the process of promulgating a new regulation which addresses this very issue. See 55 Fed. Reg. 48324, 48327 (1990). While the regulation is not yet effective, the wording of the regulation clarifies that the Secretary intends merely to codify existing Department policy:

> Defenses to a Borrower's Liability to Repay a GSL Loan (Section 682.215)
>
> The Secretary is proposing to codify his longstanding view regarding the defenses to a borrower's liability for repayment of a GSL loan. Generally, a student who borrows under the GSL Program from a third-party lender remains legally

> responsible for repaying the loan, even if the school fails to provide the student with the services purchased by the student. However, if an origination relationship exists between the lender and the school, the school's failure to deliver those services provides the student with a defense against the obligation to repay the lender all or part of the loan, absent a disclaimer by the lender as discussed below.

55 Fed. Reg. 48324-01 (1990).

As Defendants correctly point out, many courts which have previously considered the issue of origination have not imposed potential liability on any lender. However, all of those cases are easily distinguishable.

In Veal v. First American Savings Bank, 914 F.2d 911 (7th Cir. 1990), the Seventh Circuit restricted the concept of 'origination relationship' to the FISL program, where the government acts as a direct guarantor of loans rather than a reinsurer. In a letter to the Tipton Court on November 9, 1990, from Fred J. Marinucci of the Department of Education Office of General Counsel, the Department specifically rejected this analysis:

> The [Veal] court notes that those regulations [setting forth the definition of an 'origination relationship'] that specifically address the existence and affect of borrower defenses on loans made by a bank with an origination relationship apply to the FISLP. 34 C.F.R. §§ 682.500-682.515. However, certain other limitations attendant to the relationship are found in that portion of the regulations that applies to all lenders and guarantee agencies. 34 C.F.R. §§ 682.200-682.213. The fact that the specific consequences of an origination relationship are spelled out only in those regulations that govern the amount a lender must be paid by the Department does not, we submit, require or prohibit use of the concept in other contexts on other kinds of loans.

Letter attached as Exhibit B to Opposition (#37) (emphasis in the

original). Where an agency has issued an interpretation of the regulations it is charged with enforcing, Courts should grant great deference to that interpretation. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 380-81 (1969). The Court finds that such deference is appropriate here.

Defendants further rely on HEAF v. Merritt, No. 91-1576, Second Judicial Circuit, Leon County, Florida (September 19, 1991), as a case upholding the logic of Veal that the federal regulations do not increase the potential liability for lenders in origination relationships within the context of the GSLP. Merritt is distinguishable. The Merritt plaintiffs did not allege any special relationship existed between the lender and the school, so any statement by that court reflecting on the validity of an origination agreement was pure dicta.

Finally, in Tipton v. Secretary of Education, the Court found that the loans at issue in that suit were issued before the Secretary had promulgated the 1986 regulations clearly stating an intent to subject lenders who had entered into an origination relationship with a school to defenses which could be raised against the school. While the Court found that the additional defenses could be raised against the Secretary and HEAF, it found that given this factual context they could not be asserted against the lender. The Court inferred that if the loans had been made after these regulations had been published in 1986, the Court would have allowed Plaintiffs in that case to assert the defenses against the lender. Tipton is thus factually dissimilar from the instant case because the earliest loan at issue

in this case was made in June 1989, long after the regulations had been published.

As a matter of general principle, agency "[s]tatements whose language, context and application suggest an intent to bind agency discretion and private party conduct . . . will have that effect if valid . . . " Vietnam Veterans v. Secretary of the Navy, 843 F.2d 528, 537 (D.C. Cir. 1988) (emphasis deleted). No party has made an argument that the Secretary's "long-standing view" of origination relationships and their attendant duties and responsibilities is invalid as not authorized by statute. Instead, the argument posed by Defendants Union Bank and HEAF is that the language of the regulations, letters, and statements by the Department is not enough to create additional liability for these Defendants. The Court disagrees.

The Secretary's unwaivering position, at least since the promulgation of the regulations in 1986, has been to subject lenders who are in an origination relationship with a school to defenses which could be raised against that school. All of the loans at issue here were made June 1989 or later. Thus, all were made after the Secretary had published his binding position on this subject. The Court will deny the Motion to Dismiss (#29) of Defendants HEAF and Union Bank as it relates to this issue.

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ORDER

IT IS THEREFORE ORDERED that the Motion to Dismiss (#29) of Defendants HEAF and Union Bank is granted in part and denied in part in a manner consistent with this Order.

IT IS FURTHER ORDERED that the Secretary of Education's Motion to Dismiss or for Summary Judgment (#34) is granted in part and denied in part in a manner consistent with this Order.

IT IS FURTHER ORDERED that Counts IX and XI of Plaintiffs' Complaint are hereby dismissed. Furthermore, no injunctive relief will be allowed against the Secretary.

DATED: May 18, 1992

PHILIP M. PRO
United States District Judge