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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART COM 2

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ADAM BEVELACQUA, LEILA LUCEVIC, ALAN LISKOV, GREG MCGREEVY, and TYLER CROCKETT, on behalf of themselves and all others similarly situated,

Plaintiffs,

Index No. 500175/2012
DECISION and ORDER

-against-

BROOKLYN LAW SCHOOL and DOES 1-20,

Defendants.

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SCHMIDT, DAVID, J.:

Defendant Brooklyn Law School (BLS) moves to dismiss the Amended Class Action Complaint (Complaint or Compl.), pursuant to CPLR 3211 (a) (7) and CPLR 3016.

Similar to the complaints brought against numerous other law schools across the country, the Complaint alleges that BLS, during the relevant time period, published, on its website and in marketing materials, misleading (if not fraudulent) post-graduate employment and salary information that plaintiffs, five graduates of BLS, relied on in choosing to enroll and then remain at BLS. Specifically, plaintiffs allege that BLS, to justify its high tuition, inflated post-graduate employment rates by concealing or failing to disclose the percentage of graduates who obtained permanent, full-time employment for which a JD degree is required or preferred. Instead, to paint a more positive picture of its graduates' success, BLS lumped this group together with the percentage of graduates who obtained jobs that had nothing to do with the practice of law, or were temporary, part-time or voluntary – to produce an *overall* employment rate. In addition, plaintiffs claim that BLS reported median salaries that were misleading because the calculations

were based on information provided by a small pre-selected group of well-compensated graduates that BLS actively pursued to respond to its annual graduate survey.

As a result of these misstatements, plaintiffs claim they were duped into believing that it would be easier than it has turned out for them to find legal employment, and were prevented "from realizing the obvious – that attending [BLS] and forking over nearly $150,000 in tuition payments is a terrible investment which makes little economic sense and, most likely, will never pay off." Compl. ¶ 3. Plaintiffs seek damages and equitable relief, including refund and reimbursement of a portion of their tuition.[1]

For the following reasons, the motion to dismiss the Complaint is granted.

I. Background

Plaintiffs are five BLS graduates. Compl. ¶¶ 10-14. Plaintiff Adam Bevelacqua graduated from BLS in 2011 and is a member of the New York Bar. *Id.* ¶ 10. After searching in vain for full-time legal employment, Mr. Bevelacqua recently started his own solo practice. *Id.*

Plaintiff Leila Lucevic also graduated from BLS in 2011 and recently passed the New York Bar Exam. *Id.* ¶ 11. Following graduation, BLS allegedly gave Ms. Lucevic a post-graduate fellowship that provided a $2,000 stipend for her to perform 120 hours of work at a non-profit organization. *Id.* She has also worked on a two-month document-review project and continues to look for full-time permanent employment. *Id.*

Plaintiff Alan Liskov graduated from BLS in June 2009 and is a member of the New York Bar. *Id.* ¶ 12. He was first able to secure a full-time position as an associate in February

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[1] Plaintiffs allege that they are acting on behalf of themselves and "[a]ll persons who are either presently enrolled or have attended [BLS] in order to obtain a JD degree within a six-year period prior to February 1, 2012." Compl. ¶ 38.

2010. *Id.* That position ended in October 2010, and Mr. Liskov proceeded to work in a series of temporary attorney positions, primarily engaged in document review. *Id.* He currently works as an investigator for the Taxi and Limousine Commission – a position he alleges does not require a JD degree. *Id.*

Plaintiff Greg McGreevy graduated from BLS in 2009 and was unable to secure full-time legal employment for nearly a year. *Id.* ¶ 13. Mr. McGreevy works as a Litigation Research Associate with an in-house corporate law department in Maryland, where he lives. *Id.*

Plaintiff Tyler Crockett graduated from BLS in 2008 and is a member of the New York Bar. *Id.* ¶ 14. Following his graduation, Mr. Crockett worked as a contract attorney on a series of temporary document review assignments until July 2011. *Id.* He currently works as a private tutor and ice skating coach. *Id.*

The common allegations are that, in applying and deciding to remain enrolled at BLS, plaintiffs: (i) "relied on salary data and employment information posted on [BLS]'s website, marketing material and/or disseminated to third-party data clearinghouses and publications . . ., and specifically relied on [BLS]'s representations that, depending on the year, well over 90 percent of [BLS] graduates secured employment within nine months of graduation"; (ii) "[were] unaware that the school's reported placement rates included temporary and part-time employment and/or employment for which a JD was not required or preferred – employment [plaintiffs] would have been eligible for even without obtaining a JD degree and paying [BLS]'s tuition"; and (iii) "would have elected to either pay less to [BLS] or perhaps not attend the school at all," had they been aware of the kinds of positions the reported placement rates consisted of. *Id.* ¶¶ 10-14.

Specifically, plaintiffs allege that BLS reported, depending on the year, that between 88 and 98 percent of its graduates secured employment within nine months of graduation throughout the relevant time period, including 98 percent for the classes of 2004-2005, 94 percent for the class of 2007, 92 percent for the class 2008, 91 percent for the class of 2009, and 88 percent for the class of 2010.[2] *Id.* ¶¶ 22-24, 26. Plaintiffs contend that the context of these representations make it appear to reasonable consumers, such as themselves, that the jobs reported are full-time, permanent positions for which a law degree is required or preferred. *Id.* ¶ 4.

As it turns out, these placement rates included any type of employment, including jobs that did not require a JD degree, or were temporary, part-time or voluntary.[3] *Id.* ¶¶ 4, 29. Plaintiffs speculate that if BLS had disclosed the number of graduates who secured full-time, permanent positions for which a JD degree is required or preferred, the reported numbers would drop dramatically, and could be lower than 40-50 percent throughout the class period. *Id.*

More specifically, plaintiffs allege that BLS inflates its reported placement rates by including the following types of employment within its aggregate percentage figure: (a) jobs that have absolutely nothing to do with the use of a JD degree; (b) positions that are part-time, temporary or voluntary in nature; (c) "research assistant" or "make-work" temporary positions

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[2] The only documentary evidence plaintiffs provide to substantiate these allegations are BLS's Employment Reports for class years 2009 and 2010, annexed to the Complaint as Exs. 1 and 2, respectively. Plaintiffs also acknowledge that the 2010 Employment Report was first posted in September 2011 and was not relied on by any of the putative class members when deciding to enroll. The Employment Reports for class years 2004-2005 and 2007-2008 are alleged, on "information and belief," to have been posted on BLS's website.

[3] Plaintiffs' definition of a "voluntary" job is "graduates who work in non-legal jobs and volunteer in government offices to gain at least some practical experience." Compl. ¶ 30b. Presumably, and plaintiffs do not contend otherwise, BLS's inclusion of a graduate who fits this description in its aggregate employment rate, is based on that graduate's non-legal job.

funded by the school; (d) jobs in which graduates were employed at any point within nine months of the graduate survey, even if they are not employed as of the survey's reporting date; and (e) graduates who have been forced to start "solo" practices due to their inability to secure any type of employment and have earned little or no money. *Id.* ¶ 30.

Additionally, plaintiffs allege that BLS provides the same misleading statistics to U.S. News & World Report (US News) and the American Bar Association (ABA), the two primary sources of information for law school data. *Id.* ¶¶ 5, 25. Plaintiffs acknowledge, however, that US News and the ABA "count as 'employed' those who have secured employment in *any* capacity in *any* kind of job, no matter how unrelated to the legal field." *Id.* (emphases in original). Plaintiffs also allege that BLS violated the ABA's reporting standards. *Id.* ¶ 30f. Nonetheless, plaintiffs concede that the criteria by which the ABA measures compliance with those standards is "virtually meaningless and nonexistent." *Id.* ¶ 20.[4]

BLS also provides employment and salary information to a third source, the National Association for Law Placement (NALP). *Id.* ¶ 25. The NALP, in contrast to US News and the ABA, requires a "specific[ ] break down [of] the exact type of employment their graduates have obtained, differentiating between part-time and full-time jobs or whether a position requires a JD degree. Unfortunately, NALP does not either publish or make available to the public these questionnaires, and instead compiles and tabulates their data into a single document which contains aggregate statistical information from all ABA-approved law schools." *Id.* ¶ 27. Plaintiffs complain that, despite BLS "breaking down its employment data into various

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[4] As mandated by Section 509(a) of the ABA's 2010-2011 Standards for Approval of Law Schools, an accredited law school must "publish basic consumer information" in a "fair and accurate manner reflective of actual practice."

disaggregated categories" for the NALP, "the school presented highly misleading [aggregated] data to prospective and current students... ." *Id.* ¶ 28.

Plaintiffs reference various indicia attesting to the questionable nature of BLS's placement rates, including: (a) BLS's reported placement rates have, in the aftermath of the "Great Recession," remained "eerily steady" at 92 percent for the class of 2008, 91 percent for the class of 2009, and 88 percent for the class of 2010; (b) BLS's reported placement rates are impossible to reconcile with a 2011 study by a consulting group, which details how across the nation there were twice as many people who passed the bar in 2009 as there were job openings, and how in New York the multiple was significantly greater; (c) the fact that only 40 percent of BLS's 2010 class supplied salary information strongly suggests that the school's true employment rate is below 50, let alone 95 percent; and (d) an article by a law professor, based on an analysis of the NALP's 2009 Employment Report, concluding that the percentage of law school graduates nationally who have obtained full-time, permanent legal employment could be lower than 40 percent; plaintiffs claim that this number is likely to be even lower for BLS, with its relatively lenient admissions standards, lackluster ranking by US News and its location in a highly-saturated legal market. *Id.* ¶ 32.

Plaintiffs further allege that BLS grossly inflates its graduates' reported median salaries by calculating them based on a small, intentionally selected subset of well-compensated graduates who actually reported their salary information, and not on a broad, statistically meaningful representation of its graduates. *Id.* ¶ 33. This has the effect of ensuring that well-compensated graduates are disproportionately over-represented in its reported salary information, and that underemployed or poorly compensated graduates are disproportionately under-

represented. *Id.*

Based on these allegations, plaintiffs assert four causes of action against BLS.[5]

In their first and second causes of action, plaintiffs allege that BLS violated General Business Law (GBL) §§ 349 and 350's prohibition against "deceptive acts" and "false advertising," respectively, by "engag[ing] in a pattern and practice of knowingly and intentionally making numerous false representations and omissions of material facts," including: (i) falsely representing that 88-98 percent of BLS graduates secured employment within nine months of graduation; (ii) manipulating "post-graduate employment data, so as to give the appearance that the overwhelming majority of recent graduates secure full-time, permanent employment for which a JD degree is required or preferred"; and (iii) making deceptive representations and omissions concerning the pace at which recent graduates can obtain gainful employment in a legal job upon graduation from BLS. *Id.* ¶¶ 48-49, 55-56. Plaintiffs further allege that they (and members of the putative class) "enrolled at [BLS] for the purpose of securing upon graduation full-time, permanent employment for which a JD degree is required or preferred" and that the challenged representations or omissions, therefore, were material to their "decision to enroll and attend [BLS], and further proximately caused [them] to pay inflated tuition." *Id.* ¶¶ 50, 57.

In their third and fourth causes of action, for common law fraud and negligent misrepresentation, plaintiffs additionally allege that they justifiably relied upon BLS's alleged misrepresentations and omissions, which plaintiffs maintain are "part of a common scheme, practice and plan conceived and executed by [BLS] to mislead, deceive and defraud" current and

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[5] In addition, plaintiffs assert their claims against unnamed defendants, "Does 1-20," claiming that each unidentified defendant contributed to the alleged wrongful conduct. Compl. ¶ 16.

prospective students. *Id.* ¶¶ 63-64, 71-72. In this connection, plaintiffs claim that BLS "know[s] that the overwhelming majority of their graduates fail to secure gainful employment following graduation, and are forced to take jobs incommensurate to their education level." *Id.* ¶¶ 64, 72. Plaintiffs further allege that "[h]ad [they] known of the dire financial straits faced by the overwhelming majority of BLS students following graduation, they would have elected to either pay less to [BLS] or perhaps not attend the school at all." *Id.* ¶¶ 65, 73.

Additionally, plaintiffs maintain that BLS owed them an affirmative duty of disclosure, because it occupies a "fiduciary position" as an educator and because BLS has a financial aid office through which it provides advice and assistance to students. *Id.* ¶¶ 66, 74.[6]

The relief plaintiffs seek on behalf of themselves and the putative class includes: refunding and reimbursing current and former students for a portion of the tuition paid to BLS due to the inflated tuition; an order enjoining BLS from continuing to market its false and inaccurate employment data; an order requiring that BLS retain a third party to independently audit all employment and salary data; and any additional relief that this court determines to be necessary or appropriate to provide complete relief to plaintiffs. *Id.* ¶¶ 7, 50-53, 57-59, 65-67, 73-75.

II. Discussion

On a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211 (a) (7), "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action

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[6] Plaintiffs, in their opposition, appear to have abandoned their claim that BLS also owed them a "heightened duty of care," by virtue of the fact that many of BLS's staff and faculty are attorneys and members of the New York Bar. *See* Opposition Br. at 28-29.

cognizable at law a motion for dismissal will fail." *Morris v Morris*, 306 AD2d 449, 451 (2d Dept 2003) quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977). When reviewing the pleadings, the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v Martinez*, 84 NY2d 83, 87-88 (1994). Further, "[w]hether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss." *EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 (2005). Nevertheless, the court will not accept as true factual and legal conclusions that are "either inherently incredible or flatly contradicted by documentary evidence." *Ullmann v Norma Kamali, Inc.*, 207 AD2d 691, 692 (1st Dept 1994).

A. First and Second Causes of Action: Violation of GBL §§ 349 and 350

"General Business Law §§ 349 and 350 are consumer protection statutes that prohibit deceptive acts and practices and false advertising, respectively, in the conduct of any business, trade or commerce or in the furnishing of any service in this state... ." *Scott v Bell Atl. Corp.*, 282 AD2d 180, 183 (1st Dept 2001), *affd as mod sub nom. Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314 (2002) (internal quotation marks and citations omitted).

To state a claim for a violation of either of these statutes, a plaintiff must allege: (1) consumer-oriented conduct that was (2) materially misleading (3) and resulted in injury. *Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d 20, 25 (1995). While justifiable reliance is not an element of a claim under either of these provisions (*Koch v Acker, Merrall & Condit Co.*, 18 NY3d 940, 941-42 [2012]), a plaintiff must, nevertheless, "show that the defendant's material deceptive act caused the injury." *Stutman v Chemical Bank*, 95 NY2d

24, 29 (2000) (internal quotation marks and citation omitted).

Because there is no dispute that the conduct complained of is consumer oriented, the court turns to the question of whether the information BLS reported with respect to its graduates' employment and salary experience, is materially misleading within the meaning of New York's consumer protection statutes. In this regard, the Court of Appeals, concerned about a "tidal wave of litigation that was not intended by the Legislature" under GBL § 349, adopted "an objective definition of deceptive acts and practices, whether representations or omissions, limited to those likely to mislead a reasonable consumer acting reasonably under the circumstances" (*Oswego,* 85 NY2d at 26), a determination which can be made "as a matter of law" in appropriate cases. *Id.*

Applying these principles to the allegations in the Complaint, this court concludes that the challenged statements are not objectively deceptive, and therefore, BLS's conduct does not violate GBL §§ 349 and 350.

At the outset, it must be noted that nowhere in the Complaint do plaintiffs allege that the aggregated statistics were literally false. Rather, plaintiffs claim that it was misleading for BLS to report aggregate results (though truthful on their face), both because BLS did not disclose that the employment data included temporary, part-time and non-legal jobs, and because, with respect to salary data, BLS did not reveal that the limited number of graduates who responded were targeted because of their success.

However, the exhibits attached to the Complaint as evidence of BLS's duplicity appear to give more information than plaintiffs acknowledge. While BLS does report, as plaintiffs allege, an overall employment rate, BLS further breaks out the employment data into 6 employer types, including, Law Firm, Judicial Clerkship, Corporation, Government, Public Interest and

Academia, and provides the percentage of responding graduates who were employed in each of these six categories.[7] *See* 2009 and 2010 Employment Reports. With the exception of Law Firm and Judicial Clerkship, however, the court does not see why plaintiffs assumed that the remaining categories excluded positions other than those for which a JD is required. Indeed, it has long been conventional wisdom that a law degree affords its owner much greater flexibility than most other graduate degrees and that many people pursue a law degree without ever intending to practice law, a consideration for which plaintiffs' narrow interpretation of the aggregated statistic makes no allowance. Another New York court, faced with similar allegations against a law school, has gone further, criticizing those plaintiffs' definition of "employment" as too "subjective" and observing that "it is difficult to envision how [plaintiffs] could reasonably have expected any single published statistic to comport with all of their assumptions and expectations regarding legal employment." *See Austin v Albany Law Sch. of Union Univer.*, 2013 NY Slip Op 23000, 957 NYS2d 833, 841 (Sup Ct, Albany County 2013).

Putting aside this consideration, the interpretation that plaintiffs attribute to a generalized employment statistic, which does not differentiate among legal and non-legal and full-time and temporary positions, has been ruled as unreasonable as a matter of law. *See Gomez-Jimenez v New York Law Sch.*, 103 AD3d 13, 17 (1st Dept 2012) (affirming dismissal of similar GBL §§ 349 and 350 claims against law school because, in part, "defendant made no express representations as to whether the work was full-time or part-time"), *lv denied* 2013 NY Slip Op

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[7] BLS provides an additional breakdown for those graduates working in law firms and gives the percentages based on the size of the law firms, as follows: self-employed, 2-10 attorneys, 11-25 attorneys, 26-50 attorneys, 51-100 attorneys, 101 or more attorneys, and size of firm unknown.

68698 (Mar 28, 2013); *see also Andre Strishak & Assoc., P.C. v Hewlett Packard Co.*, 300 AD2d 608, 609-10 (2d Dept 2002) (manufacturer's switch from large-size to economy-size ink cartridges was not a deceptive act when box containing printer simply stated, without further details, that an ink cartridge was included). To the contrary, "basic deductive reasoning, informs a reasonable person that the employment statistic includes all employed graduates, not just those who obtained or started full-time legal positions." *MacDonald v Thomas M. Cooley Law Sch.*, 880 F Supp 2d 785, 794 (WD Mich 2012) (internal quotation marks and citation omitted).[8]

Nevertheless, plaintiffs contend that the question of whether or not BLS's expansive definition of "employment" is materially misleading to a prospective student, is a question of fact that cannot be determined at this early stage. In making this argument, plaintiffs rely especially on *Gotlin v Lederman*, 483 Fed Appx 583 (2d Cir 2012), a case which involved deceptive marketing claims (dismissed by the trial court) against a group of cancer doctors who advertised a "success rate" of greater than 90 percent in treating pancreatic cancer. In vacating the lower court's dismissal, the Second Circuit held that there were "genuine issues of material fact . . . as to whether defendants' marketing of [the treatment's] 'success rates' was materially deceptive to a reasonable consumer," and remanded the claims for further consideration. *Id.* at 589. As plaintiffs read the case, the issues of fact sprang from defendants' definition of "success," which included cases in which a tumor stopped growing or shrunk. By analogy, plaintiffs argue that

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[8] In passing, the court notes that the ABA defines "employed" as employment in a position "that requires bar passage, in a position for which a JD is preferred, in a position in another profession, or in a non-professional position." *See* ABA 2011 Annual Questionnaire at 7, annexed as Ex. C to affirmation of J. Russell Jackson dated June 8, 2012. Presumably, the last category would include a law school graduate working as a barista at a Starbucks, a definition of employment that plaintiffs, understandably, find particularly galling. *See* Compl. ¶ 30.

BLS's definition of "employment," yielding a similarly high percentage of success, presents a similar issue of fact, namely, whether including non-JD or temporary positions in an aggregated employment statistic is materially deceptive to a reasonable consumer. However, as this court observed during extensive oral argument, it was not the defendants' circumscribed definition of "success" that the Second Circuit found potentially actionable. *See* Tr. at 68-69. Rather, the *Gotlin* court held that dismissal of the claims was unwarranted because there was expert testimony in the record, not addressed below, which concluded that the treatment had *no* curative potential for the particular condition plaintiffs were suffering from. *Gotlin*, 483 Fed Appx at 588-89.[9]

For these reasons, plaintiffs' decision to enroll and remain in school, predicated solely, as they allege, on the strength of a bare-bones employment statistic, was unreasonable under the circumstances.

Furthermore, as plaintiffs themselves concede, in the absence of any Second Department authority to the contrary, this court would be bound by a First Department affirmance of Justice Schweitzer's decision in *Gomez-Jimenez v New York Law Sch.*, 36 Misc 3d 230, 241 (Sup Ct, NY County 2012) (hereinafter, *NYLS*). *See* Opp. Br. at 1 n 1 ("The decision of the First Department will be binding upon this Court until such time as the Second Department reaches a different decision. People v. Turner, 5 N.Y.3d 476, 482 [2005]."). In the intervening time since the instant motion was argued, the *NYLS* decision was affirmed by a unanimous First Department panel and the *NYLS* plaintiffs' motion for leave to appeal was denied by a 4-1 majority of the

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[9] The *Gotlin* Court additionally found that defendants' brochures contained numerous hyperbolic statements (*e.g.*, "possibilities never dreamt before") that suggested "broader successes than merely arresting the growth of cancer." *Gotlin*, 483 Fed Appx at 589.

Court of Appeals. *See Gomez-Jimenez v New York Law Sch.*, 103 AD3d 13 (1st Dept 2012), *lv denied* 2013 NY Slip Op 68698 (Mar 28, 2013). Pertinently, the First Department held that:

> "although there is no question that the type of employment information published by defendant (and other law schools) during the relevant period likely left some consumers with an incomplete, if not false, impression of the school's job placement success, Supreme Court correctly held that this statistical gamesmanship, which the ABA has since repudiated in its revised disclosure guidelines, does not give rise to a cognizable claim under [GBL] § 349."

Id. at 17. Consequently, this court is constrained, in any event, from concluding otherwise.

Plaintiffs' claims based on BLS's published salary data also cannot survive this motion. Essentially, plaintiffs assert that they could not discern from the reported salary statistics whether their investment in attending BLS made "economic sense." Compl. ¶ 3. However, plaintiffs' own exhibits refute their claims. Indeed, they provide sufficient information that would enable a reasonable person to determine that most graduates were earning modest incomes. For example, in the 2009 Employment Report (Ex. 1 to the Complaint) – for which plaintiffs reserve their sharpest criticism (Compl. ¶ 34b) – BLS reported:

Law Firms	**Median Starting Salary**	**Salary Range (25th -75th percentile)**
501or more attorneys	$160,000	$160,000 - $160,000
251-500 attorneys	$160,000	$145,000 - $160,000
101-250 attorneys	$150,000	$120,000 - $160,000
51-100 attorneys	$75,000	$65,000 - $138,000
26-50 attorneys	$66,625	$63,000 - $140,000
11-25 attorneys	$65,000	$50,000 - $80,000
2-10 attorneys	$60,000	$44,000 - $67,000
Corporations	$78,000	$66,000 - $97,500

Government	$55,000	$50,000 - $59,000
Judicial Clerks		$44,000 - $63,000
Public Interest	$50,000	$50,000 - $50,000

From a cursory review of these figures and their accompanying pie charts, one can (if so inclined) easily calculate that for those graduates outside of private practice, which was 44.5% of the class of 2009 (as established by the first pie chart in the Employment Report), the median starting salary was less than $79,000. Moreover, 49.1% of those class members who were in private practice were employed by firms of less than 100 attorneys (as established by the second pie chart in the Employment Report), for which the median starting salary was $75,000. Thus, it was clear from the information BLS provided that for over two thirds of the 2009 graduates, the starting salary was significantly less than $138,000 – the number that plaintiffs allege a graduate "needs to make . . . to repay $100,000 without enduring financial hardship." Compl. ¶ 19 n 3.[10]

In addition, the limitations of the salary data were clearly disclosed. With respect to the 2009 salary information, BLS disclosed that it received salary information from 71% of graduates in private practice, implicitly acknowledging what plaintiffs accuse it of hiding – that it was not reporting "the overall percentage of graduates who reported salary information and exact percentage of graduates in each job category who reported salary information." *Id.* ¶ 34b. In addition, BLS alerted the reader to the fact that "[t]hese figures vary from year to year based upon market conditions as well as the number of graduates reporting salary information to us." *See* 2009 and 2010 Employment Reports. Further, BLS cautions the reader that "[t]he range of salaries presented below is intended simply as a guideline to the approximate salaries you might

[10] Plaintiffs allege that the average debt of a BLS graduate is nearly $100,000.

expect to receive." *Id.* In the court's view, these disclaimers are sufficient to warn off a reasonable purchaser of a legal education from drawing any conclusions about the earning capacity of *all* graduates in any particular year or from using the information as a springboard from which to derive his or her own expected income. Certainly, one could not reasonably have relied on this data to believe that he or she could expect upon graduation to earn a six-figure salary, notwithstanding plaintiffs' unsupported claim that the salary numbers were skewed higher by a small group of successful graduates.

Plaintiffs' claims based on the 2010 salary data are even less convincing, given that BLS disclosed that the salary information in that year was based on "40% of employed graduates overall." *See* 2010 Employment Report. Reasonable college graduates would quickly conclude that the reported information was not a statistically meaningful measure of the salary experience of all graduates for that year, or assume that they could extrapolate from the data the income level they might expect 3-4 years down the road.

In short, there is simply no statement in any of the Employment Reports plaintiffs attach to the Complaint that would allow a reasonable college graduate to conclude that BLS was making a representation as to the salary experience of all its employed graduates in a reported year.[11]

Even assuming, arguendo, that plaintiffs' interpretation of the aggregate employment rates was reasonable, their claims would in all probability fail because of the insuperable difficulties plaintiffs will encounter in trying to establish their damages. Whatever plaintiffs'

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[11] Of course, reasonable college graduates would also recognize the impact that BLS's ranking and their own GPAs would have on their employment options and salary expectations.

allegations, the court simply cannot overlook the effect the severe downturn in the economy – a significant supervening event – had on plaintiffs' employment prospects. *See People v Darby*, 263 AD2d 112, 114 (1st Dept 2000) (finding courts may take judicial notice of "notorious facts" that are within the common knowledge). Regardless of the effect BLS's Employment Reports may allegedly have had on plaintiffs' decision to enroll and remain in school, plaintiffs graduated into what is universally recognized as one of worst job markets in recent memory.[12]

Significantly, plaintiffs themselves acknowledge the fallout caused by the severely weakened economy, noting that "legal jobs [were] becoming increasingly scarce" and "since 2008 alone the largest 250 law firms in the country have eliminated 10,000 positions and the legal sector in general has eliminated 45,000 jobs." *See* Compl. ¶¶ 6a, 32a. Given the staggering loss of jobs across and at all levels of the entire legal sector, plaintiffs' claim that the damages they suffered were a result of BLS's conduct, is simply not susceptible to proof. *See also NYLS*, at 252 ("The alleged misstatements in [defendant's] marketing materials themselves became obsolete statements as a result of the bleak prospects for legal employment as a result of the Great Recession."). Thus, plaintiffs' inability to establish a direct connection between their injury and BLS's conduct is an additional reason to dismiss the GBL §§ 349 and 350 claims.[13]

B. Third Cause of Action: Fraud

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[12] There has been no shortage of articles discussing the challenges facing law school graduates resulting from the rapidly contracting economy. *See e.g.* Defendant's Reply Br., at 10 n 3 (listing numerous articles published between 2007 and 2009).

[13] In addition, the manner in which plaintiffs measure their damages, *i.e.*, the "difference between the inflated tuition paid by Class members based on [BLS's] material misrepresentations . . . and the true value of a [BLS] degree" (Prayer for Relief ¶ 3), adds yet another layer of "improper speculation," requiring dismissal of the claims. *See Mikhalakis v Cabrini Med. Ctr. (CMC)*, 151 AD2d 345, 346 (1st Dept 1989), *lv dismissed* 75 NY2d 790 (1990).

To state a cause of action for fraudulent misrepresentation, "a plaintiff must allege a misrepresentation or omission of material fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury." *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 (2011) (internal quotation marks and citation omitted). "A cause of action for fraudulent concealment requires, in addition to the four foregoing elements, an allegation that the defendant had a duty to disclose material information and that it failed to do so." *P.T. Bank Cent. Asia, N.Y. Branch v ABN AMRO Bank N.V.*, 301 AD2d 373, 376 (1st Dept 2003). Finally, each of the elements of a fraud claim must be supported by factual allegations sufficient to satisfy CPLR 3016 (b), which requires that "the circumstances constituting the wrong shall be stated in detail."

In support of the first element of their claim, plaintiffs allege that BLS: (1) published misleading and inflated employment rates, which included part-time, temporary, voluntary, or non-JD preferred or required positions, and (2) published misleading and inflated salary information that was based on a small, intentionally-selected subset of BLS graduates. *See* Compl. ¶ 4 (BLS "makes two uniform written misrepresentations").

However, as previously discussed, the employment and salary statistics BLS published may have been incomplete, but they were not false. Therefore, the published statistics cannot, standing alone, serve as the predicate of a fraud claim.[14] *Pappas v Harrow Stores,* Inc., 140

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[14] Plaintiffs' unsupported allegation that BLS violated ABA reporting standards because it "tallie[d] the raw data inputted in the job surveys filled out by recent graduates in a shoddy, slipshod manner," is completely undercut by plaintiffs' admission that the ABA simply requires law schools to report an overall employment number and that the so-called standards are "non-existent." *Compare* Compl. ¶ 30f *with* Compl. ¶ 20.

AD2d 501, 504 (2d Dept 2008). Thus, the only question remaining is whether BLS had an affirmative duty to disclose disaggregated employment data to plaintiffs and provide a more complete picture of its graduates' salary and employment experience.

"[A]bsent a fiduciary relationship between the parties, a duty to disclose arises only under the 'special facts' doctrine, where one party's superior knowledge of essential facts renders a transaction without disclosure inherently unfair." *Jana L. v West 129th St. Realty Corp.*, 22 AD3d 274, 277 (1st Dept 2005) (internal quotation marks and citation omitted). "[T]he doctrine requires satisfaction of a two-prong test: that the material fact was information peculiarly within the knowledge of [defendant], and that the information was not such that could have been discovered by [plaintiff] through the exercise of ordinary intelligence." *Id.* at 278 (internal quotation marks omitted), quoting *Black v Chittenden*, 69 NY2d 665, 669 (1986), quoting *Schumaker v Mather*, 133 NY 590, 596 (1892) ("[if] the other party has the means available to him of knowing . . . he must make use of those means, or he will not be heard to complain that he was induced to enter into the transaction by misrepresentations").

Here, had plaintiffs exercised reasonable diligence, they could have uncovered other sources of information against which to evaluate BLS's published statistics. Significantly, in dismissing similar claims against New York Law School, the trial court recognized the fact that plaintiffs there had available to them much more information than just the school's aggregate placement rate – a view confirmed by the *NYLS* plaintiffs' own allegations:

> "Plaintiffs cite NALP's employment reports and various studies, initiatives and news articles . . . According to NALP, the percentage of graduates who found full-time legal employment on a national level is considerably more modest, i.e. 40 percent, than NYLS's allegedly misleading employment data for NYLS would suggest. That this statistic provides context for the reasonable

> consumer of a legal education also suggests that more detailed employment information is available to the law school consumer through NALP's reports."

NYLS, at 241-42.

Likewise, plaintiffs here assert that BLS's representations were "demonstrably false" because the employment rates it reported were sharply higher than the national percentage reported by the NALP for graduates who secured full-time legal employment, and were all the more suspect when viewed against the backdrop of BLS's "modest" ranking by US News and its location in a highly-saturated legal market. Compl. ¶ 6. Had plaintiffs here reviewed the publicly available information they identify in the Complaint, it would have been readily apparent that BLS was reporting an aggregated employment rate that included graduates employed in non-legal positions, as well as in part-time or temporary positions. *See also NYLS*, at 242 ("One would think that reasonable consumers, armed with the publicly available information from *U.S. News* that plaintiffs cite, thus would avail themselves of plaintiffs' own logic as stated in their complaint when it comes to evaluating their chances of obtaining the full-time legal job of their choice within nine months postgraduation.").

That such information was available to plaintiffs is demonstrated by the NALP National Summary Report for 2009 (2009 Summary) plaintiffs annex as Exhibit 3 to the Complaint. Though plaintiffs allege that they had no means by which they could adduce the true nature of BLS's placement rate, the 2009 Summary provides information, based on responses from ABA-approved schools, including BLS, that would have alerted a college-educated reader to the fact that BLS's published rate was likely an overall employment figure and that the rate for full-time legal employment might be markedly lower. In this regard, the 2009 Summary indicates a total

employment rate nationally of 88.3 %, a percentage just slightly lower than BLS's reported employment rate of 91% for the same year. A review of the 2009 Summary also indicates that the national employment rate was derived from different categories of employment including, significantly, part-time positions, "Other Professional" and "Non-professional," and that nationally, only 70.8% of graduates reported employment in positions for which Bar passage was required. As such, plaintiffs' contention that they could not have reasonably known that BLS's reported employment rate included positions other than full-time legal positions does not bear out. Accordingly, plaintiffs may not rely on the "special facts" doctrine as a basis of liability for BLS's incomplete disclosure of information.

Furthermore, and contrary to plaintiffs' assertion otherwise, "the relationship between an institution of higher education, and its students is contractual, rather than fiduciary, in nature." *Austin v Albany Law Sch. of Union Univer.*, 2013 NY Slip Op 23000, 957 NYS2d at 844; *see also Sweeney v Columbia Univ.*, 270 AD2d 335, 336 (2d Dept 2000) ("The relationship between a university and a student is contractual in nature"); *Gomez-Jimenez*, 103 AD3d 13, 18-19 (1st Dept 2012) ("A fiduciary relationship does not exist between parties engaged in an arm's length business transaction") (inner quotation marks and citation omitted); *Moy v Adelphi Institute, Inc.*, 866 F Supp 696, 708 (ED NY 1994) ("New York law does not allow for a cause of action based on negligent misrepresentation in the educational context").[15] Nor is the court convinced by

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[15] The cases plaintiffs cite to counter this line of authority, do not help them. *Matter of Blank v Board of Higher Educ. of City of N.Y.*, 51 Misc 2d 724 (Sup Ct, Kings County 1966) and *Matter of Healy v Larsson*, 67 Misc 2d 374 (Sup Ct, Schenectady County 1971) are cases whose holdings turn on principles of agency law and do not even broach the subject of fiduciary duties. If anything, *Matter of Healy* supports the view that the relationship that exists between a college student and a university is contractual. *Id.* at 375. To the extent that plaintiffs rely on *Paladino v Adelphi Univ.*, 89 AD2d 85, 94 (2d Dept 1982), that case, involving elementary school students –

plaintiffs' authorities, involving lenders, that the existence of BLS's financial aid office somehow creates a special relationship between BLS and its students.

In short, plaintiffs have not sufficiently alleged the existence of a special or confidential relationship between them and BLS, giving rise to an affirmative duty of disclosure on BLS's part. Thus, the fraud claim, to the extent it is based on concealment, cannot be sustained.

In addition, plaintiffs' reliance on BLS's published statistics – as the sole criterion on which they based their decision to enroll and remain in school – was not justifiable as a matter of law, given the other sources of information that were available to plaintiffs. "[R]easonable reliance is a condition which cannot be met where . . . a party has the means to discover the true nature of the transaction by the exercise of ordinary intelligence, and fails to make use of those means." *Arfa v Zamir*, 76 AD3d 56, 59 (1st Dept 2010), *affd* 17 NY3d 737 (2011) (internal quotation marks and citations omitted); *Colasacco v Robert E. Lawrence Real Estate*, 68 AD3d 706, 708 (2d Dept 2009) (plaintiffs' reliance on defendant's alleged misrepresentations was "unreasonable as a matter of law" where plaintiffs "could easily have ascertained [the] facts through the use of ordinary means").

Accordingly, the fraud claim is dismissed.

C. Fourth Cause of Action: Negligent Misrepresentation

To state a claim for negligent misrepresentation, a plaintiff must allege "(1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information." *Mandarin Trading*, 16 NY3d at 180 (internal quotation marks and citation

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as opposed to graduate school students – must be limited to its facts.

omitted). As already discussed, this claim cannot be maintained insofar as it is based on allegations that BLS's representations were outright falsehoods. To the extent the claim is based on BLS's concealment of information, plaintiffs have not established, for the reasons stated in the previous section of this decision, that BLS owed them a heightened duty of care. Apart from this pleading defect, plaintiffs cannot allege justifiable reliance in light of the information plaintiffs themselves acknowledge they had access to. Consequently, this claim is dismissed.

Accordingly, it is

ORDERED that defendant Brooklyn Law School's motion to dismiss the Amended Class Action Complaint, dated May 17, 2012, is granted.

Dated: April 22, 2013

ENTER:

J.S.C.

HON. DAVID I. SCHMIDT