

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK**

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ALEXANDRA GOMEZ-JIMENEZ,  
SCOTT TIEDKE, and  
KATHERINE COOPER, on behalf of  
themselves and all others similarly situated,

Plaintiffs,

v.

NEW YORK LAW SCHOOL, and  
DOES 1-20,

Defendants.

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Index No. 652226/2011

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT  
OF RULE 3211(a)(1) AND (7) MOTION TO DISMISS  
BY DEFENDANT NEW YORK LAW SCHOOL**

October 13, 2011

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Defendant New York Law School, through its undersigned counsel, respectfully submits this memorandum of points and authorities in support of its motion to dismiss Plaintiffs' Complaint dated August 10, 2011 (the "Complaint") in its entirety, pursuant to New York Civil Practice Law and Rules 3211(a)(1) and (7).

### **PRELIMINARY STATEMENT**

*The Constitution is not a panacea for every blot upon the public welfare, nor should this Court, ordained as a judicial body, be thought of as a general haven for reform movements.*

*Reynolds v. Sims*, 377 U.S. 533, 624-25 (1964) (Justice John Marshall Harlan, II, NYLS Class of 1924, dissenting).

Plaintiffs are three lawyers who received the intrinsic value of a three-year post-graduate education and law degree from defendant New York Law School ("NYLS"), an accredited 120 year-old law school located a few blocks from this courthouse. Plaintiffs superficially seek restitution of all tuition they paid for this education because of allegedly accurate but somehow misleading employment data that the school published concerning its graduates. In reality, however, Plaintiffs and their counsel are using this case and similar litigations against other law schools as part of their crusade against the entire legal-education process, generally, and against the American Bar Association ("ABA"), in particular. *See* Compl. ¶ 15 ("Plaintiffs now seek to vindicate their interests through the judicial system.").

The cardinal "wrong" alleged in the Complaint is that the ABA's rules, which Plaintiffs readily concede govern every accredited law school in the country, do not require detailed post-graduate information. Plaintiffs do not allege that NYLS ever failed to comply with these ABA guidelines. According to the Complaint, the battle to reform the guidelines is already being waged in the United States Senate and within the ABA itself.

These attacks on the ABA rules are wholly insufficient to state claims for the three individual Plaintiffs against NYLS. There are several reasons why the Complaint should be dismissed. The Complaint fails to allege facts that would show how NYLS's compliance with ABA guidelines could possibly constitute a violation of section 349 of New York's General Business Law ("GBL"), common-law fraud or negligent misrepresentation, particularly given the heightened pleading standard applicable to the fraud-based claims. Critical allegations are missing from the Complaint. There are no allegations about why Plaintiffs applied to law school; which law schools accepted their applications; how and why they chose to attend NYLS instead of their other options; what particular statements by NYLS they ever saw, read or relied on; when and where they saw that information; what they would have done differently if they had not gone to law school; what their grades were at NYLS; what legal industry jobs they applied for and did not get; how *they* allegedly suffered any harm, and countless more absent facts that render their individual and putative class claims meaningless.<sup>1</sup>

There are independent reasons why each of Plaintiffs' claims fails as a matter of law. First, the GBL section 349 claim is a nonstarter because the Complaint does not—and cannot—plausibly allege that NYLS's employment and salary information amount to materially misleading statements. There is also no alleged causal link between the information allegedly published by NYLS and any alleged harm. Indeed, injury is not plausibly alleged at all. Second, black-letter New York law applying GBL section 349 holds that Plaintiffs cannot recover the

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<sup>1</sup> Plaintiffs seek to pursue their claims on behalf of a class of all present and former NYLS graduates since some unspecified time, without regard to the reasons why these lawyers and law students chose to attend NYLS, whether they ever saw and relied on any statements by NYLS in deciding to enroll, and their employment after law school. Although not necessary to the resolution of this motion to dismiss the Complaint, these critical individual issues of fact presented for each of these would-be class members would prevent a class from ever being certified in this case. In addition, class treatment is not the superior means of addressing claims purportedly seeking more than \$100,000 per absent class member, especially when those individuals may not want to be associated with a suit against their alma mater.

“refund[] and reimburse[ment]” of tuition demanded in the Complaint. Lastly, Plaintiffs concede that the information NYLS published complied with ABA and industry reporting standards. NYLS’s compliance with governing standards precludes any assertion that its statements are misleading.

These patent deficiencies are also fatal to the fraud and negligent misrepresentation claims, as is the failure to adequately plead scienter (fraud) or the existence of a special relationship between NYLS and the universe of prospective law school applicants who allegedly reviewed the law school’s published employment statements (negligent misrepresentation). Because these failures cannot be cured in any amended pleading, the Complaint should be dismissed in its entirety and with prejudice.

#### **STATEMENT OF RELEVANT ALLEGATIONS**

Every allegation in the Complaint, except the few allegations concerning Plaintiffs’ own purported actions, is made entirely on Plaintiffs’ “information and belief.” Compl. Preamble.

#### **Plaintiffs and the Putative Class**

Plaintiff Gomez-Jimenez “is a practicing attorney in Manhattan who is currently a member in good standing of the New York Bar.” *Id.* ¶ 18. She attended NYLS between 2004 and 2007. *Id.* Ms. Gomez-Jimenez opened her own firm in 2009, and “enjoys a thriving practice.” *Id.* Plaintiff Tiedke also “is a practicing attorney in Manhattan who is currently a member in good standing of the New York Bar.” *Id.* ¶ 19. Since graduating from NYLS in 2009, Mr. Tiedke has been “a legal and compliance officer at an investment management firm.” *Id.* Plaintiff Cooper graduated from NYLS in 2010. *Id.* ¶ 20. Ms. Cooper alleges that, in the “devastation that the Great Recession has wrought” in the year since she graduated from NYLS,

she has been unable to secure a “permanent position in the legal industry.” *Id.* ¶¶ 20, 48. The Complaint suggests that Ms. Cooper is currently employed in a non-legal field.

Plaintiffs purport to represent a class of every individual who is enrolled in, or graduated from, NYLS “within the statutory period.” *Id.* ¶ 78. Plaintiffs principally claim entitlement to a “refund[] and reimburse[ment]” of the tuition paid by all law students who have graduated from NYLS dating back to some unspecified time, along with “attorneys’ and experts’ fees.” *Id.* ¶ 15.

### **NYLS and the “Law School Industry”**

The Complaint makes numerous allegations regarding negative conditions in the legal job market and the economy generally. *See, e.g., id.* ¶¶ 3, 6, 48, 49, 52. There is no allegation that NYLS is somehow responsible for these conditions, or that information regarding those economic conditions is anything but publicly available.

Defendant NYLS is one of the largest law schools in the country, ABA-accredited, and a not-for-profit corporation. *Id.* ¶ 21. Plaintiffs allege that “nearly every [law] school to a certain degree blatantly manipulates their [sic] employment data. . . . It is a dirty industry secret that law schools employ a variety of deceptive practices and legerdemain.” *Id.* ¶ 10. Thus, the fraud alleged in this action is not specific to NYLS, but rather is “systemic” and “ubiquitous in the legal education industry” as a whole. *Id.* ¶ 1; *see also id.* ¶¶ 10 (fraud is “endemic in the law school industry”), 11 (“the law school industry today is much like a game of three-card monte”), 77 (“law schools are no different than the proverbial fox guarding the henhouse”).

Plaintiffs further contend that the employment and salary data NYLS publishes is fraudulent because it is “based on a skewered [sic] and non-representative sampling” of students. *Id.* ¶ 63. The Complaint alleges that the NYLS data is misleading for two specific years: 2009 and 2010. *See id.* ¶¶ 30-31. Plaintiffs Gomez-Jimenez and Tiedke had both graduated from

NYLS by the time the 2009 data was published, and could not have relied on this data in deciding to attend or stay enrolled in NYLS. Plaintiff Cooper enrolled at NYLS in 2007, and completed at least two years of law school before the 2009 data was published. While the Complaint asserts in a conclusory manner that NYLS published “fraudulent” data in years prior to 2009, none of these earlier statements are included or even described in the Complaint.

NYLS’s alleged 2009 disclosure, attached as Exhibit 3 to the Complaint, expressly states that only: “[a]pproximately 20% of our 2009 graduates reported salary information.” *Id.* Ex. 3. NYLS’s alleged 2010 employment and salary disclosure, attached as Exhibit 2 to the Complaint, states:

The press has been covering law graduate employment statistics with great attention and controversy. Some of the confusion stems from the various methods used to calculate “employment rates.” There are several approaches to calculating the single number that blends *all the things law graduates do in their first year after graduation*, whether it is working, pursuing another degree, not seeking employment for personal reasons (such as starting a family), or continuing to search for a job. As you can see, *post-graduate activities are varied*. For instance, New York Law School’s employment rate could be calculated based on four different formulas . . . . *Salary information was available for approximately 26 percent of those who were employed (representing 105 salaries).*

Compl. Ex. 2 (emphases added).

Plaintiffs do not contend that any of NYLS’s statements about the 2009 or 2010 data are inaccurate. Nevertheless, Plaintiffs maintain that NYLS’s data is misleading because NYLS counts as “employed” those graduates who have “transitory” employment, or employment for which a law degree is not required. *Id.* ¶ 33. Plaintiffs want NYLS, and every other law school in the United States, to provide prospective students with a “more pertinent employment statistic”: a single jobs figure reflecting the number of graduates who secure a full-time, permanent position for which a law degree is required “or preferred.” *Id.* ¶ 4; *see also id.* ¶¶ 14

(ABA committee recently promulgated rules requiring schools to report “true post-graduate employment rate, by disclosing the type of information Plaintiffs are seeking here”), 70-71 (Plaintiffs, along with two members of Congress and others, believe that the ABA should require all law schools to independently audit and verify employment data and salary information).

### **The ABA and Its Regulations**

As the Complaint alleges, NYLS publishes its employment and salary statistics “[p]ursuant to” the requirements of the ABA, which “mandate” that such information be published by “all” accredited law schools. *Id.* ¶¶ 28-29; *see also id.* ¶¶ 73 (“The ABA’s Section of Legal Education and Admissions to the Bar is responsible for accrediting and regulating all accredited legal institutions. . . . [The Section of Legal Education] is directly responsible for regulating the reporting of post-graduate placement data.”), 76 (ABA is law schools’ accrediting agency), 35 n.4 (“All ABA-accredited and provisionally-accredited law schools are *required* to provide employment data to the ABA”) (emphasis added).

“As mandated by Section 509(a) of the ABA’s 2010-2011 Standards for Approval of Law Schools (‘Section 509(a)’), an accredited law school must ‘publish basic consumer information’ in a ‘fair and accurate manner reflective of actual practice.’” *Id.* ¶ 28. According to the Complaint, “the ABA simply require[s] law schools to report an overall employment number, and do[es] not require schools to distinguish between part-time and full-time jobs or temporary and permanent employment.” *Id.* ¶ 35.<sup>2</sup>

Notably, the Complaint does *not* allege any of the following: (i) that the employment and salary data NYLS published violated the ABA’s standards, rules or policies; (ii) the actual

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<sup>2</sup> The Complaint does not indicate that there are any other current or past mandates governing NYLS’s publication of employment or salary data. Neither NYLS nor “any law school” is “required by the ABA, Department of Education or any other governing body to independently audit or verify their employment data.” Compl. ¶ 57.

“information posted on NYLS’s website and/or disseminated to third-party data clearinghouses and publications” that any of the Plaintiffs allegedly saw, read or relied on, *id.* ¶¶ 18-20; or (iii) that Plaintiffs would have forgone a law school education or gone to a different ABA-compliant law school had NYLS published different statistics.

### **STANDARD OF REVIEW**

A complaint must do more than assert conclusions that the elements of a cause of action are met; it must actually allege facts supporting those elements. *See, e.g., Maas v. Cornell Univ.*, 94 N.Y.2d 87, 91-92 (1999). It is “axiomatic that factual allegations which fail to state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or unequivocally contradicted by documentary evidence, are not entitled to [deferential] consideration.” *Leder v. Spiegel*, 31 A.D.3d 266, 267 (1st Dep’t 2006) (affirming dismissal under 3211(a)(7)); *see also Biondi v. Beekman Hill House Apartment Corp.*, 257 A.D.2d 76, 81 (1st Dep’t 1999) (granting 3211(a)(1) dismissal and noting that “[a]llegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence are not presumed to be true and accorded every favorable inference” (internal quotation marks omitted)); *Zanett Lombardier, Ltd. v. Maslow*, 29 A.D.3d 495, 496 (1st Dep’t 2006).

In determining whether Plaintiffs have pled sufficient facts to support their claims, the Court should disregard conclusory allegations and unwarranted favorable inferences. *O’Donnell Fox & Gartner, P.C. v. R-2000 Corp.*, 198 A.D.2d 154, 154 (1st Dep’t 1993); *Mark Hampton, Inc. v. Bergreen*, 173 A.D.2d 220 (1st Dep’t 1991), *leave to appeal denied*, 80 N.Y.2d 788 (1992).

## ARGUMENT

On a motion to dismiss, the claims of all putative class members rise and fall with the claims of the named plaintiffs. *See Goldberg Weprin & Ustin, LLP v. Tishman Constr. Corp.*, 275 A.D.2d 614 (1st Dep't 2000). Therefore, Plaintiffs are required to plead facts showing that they themselves have viable claims against NYLS. As set forth below, the Complaint is bereft of facts about the NYLS statements that the Plaintiffs saw, read or relied on. Similarly, Plaintiffs do not even attempt to describe their own alleged damages. Because Plaintiffs cannot plead any viable claim for themselves, they cannot purport to represent a class going forward. *See id.* at 614 (“Since the complaint is legally insufficient insofar as it purports to assert a claim on behalf of plaintiff individually, the motion court correctly denied the motion for class certification as academic.”).

### POINT I

#### THE COMPLAINT FAILS TO STATE A CLAIM UNDER GBL SECTION 349

GBL section 349(a) prohibits “[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state.” N.Y. Gen. Bus. Law § 349(a). To plead a GBL section 349 claim, a complaint must allege each of the following three elements: (1) the challenged act or practice was consumer-oriented; (2) that it was misleading in a material way; and (3) that the plaintiff suffered injury as a result of the deceptive act. *Stutman v. Chem. Bank*, 95 N.Y.2d 24, 29 (2000) (affirming dismissal of complaint for failure to allege materially misleading conduct); *see also Hicksville Dry Cleaners v. Stanley Fastening Sys. LP*, 37 A.D.3d 218 (1st Dep't 2007) (same); *Dweck v. Oppenheimer Co.*, 30 A.D.3d 163 (1st Dep't 2006) (affirming dismissal for failure to allege injury).

Here, Plaintiffs have failed to allege facts that NYLS made materially misleading statements concerning post-graduation employment and salary prospects. Separately, Plaintiffs have not alleged a legally-cognizable injury. In addition, Plaintiffs have utterly failed to allege any facts showing a causal connection between the post-graduate employment statements identified in the Complaint and any purported harm. Finally, even those few allegations that are fact-based fall squarely within GBL section 349(d)'s express "complete defense" provision.<sup>3</sup>

**A. There Is No Alleged Act Or Practice That Is Deceptive Or Misleading In A Material Way.**

Plaintiffs must plead that NYLS has engaged "in an act or practice that is deceptive or misleading in a material way . . . to a reasonable consumer." *Goshen v. Mut. Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 324 (2002) (internal quotation marks omitted); *Small v. Lorillard Tobacco Co.*, 94 N.Y.2d 43, 55-56 (1999) ("consumer-oriented conduct" must be materially misleading "to a reasonable consumer acting reasonably under the circumstances"); *Stutman*, 95 N.Y.2d at 29.

Here, the Complaint lists a series of purportedly misleading acts or statements regarding post-graduation employment prospects. *See* Compl. ¶ 89(a)-(f). The majority of these alleged acts or statements are mentioned only at the end of the Complaint, are not supported by any factual detail at all, and are therefore insufficient to sustain a GBL section 349 claim. *See Freefall Express Inc. v. Hudson River Park Trust*, No. 602901/06, 2007 WL 2582222, at \*4 (Sup. Ct. N.Y. County Sept. 7, 2007) (dismissing GBL section 349 claim where complaint failed

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<sup>3</sup> Plaintiff Gomez-Jimenez's GBL section 349 claim also must be dismissed on the additional and independent ground that it is time-barred. *See* CPLR 214[2] (providing three-year statute of limitations for "an action to recover upon a liability, penalty or forfeiture created or imposed by statute except as provided in sections 213 and 215"). *See also, e.g., Gaidon v. Guardian Life Ins. Co. of Am.*, 96 N.Y.2d 201, 211-12 (2001); *Chais v. Technical Career Inst.*, No. 0114949/01, 2002 WL 34433891, at 8 (Sup. Ct. N.Y. County Mar. 1, 2002) (dismissing as time-barred under CPLR 214[2] *pro se* alumna's GBL section 349 claims that technical school used deceptive advertisements to promise her certain training and job placement). It is likely that most or all of Plaintiffs Tiedke's and Cooper's claims are time-barred as well, but it is difficult to ascertain when their purported claims accrued due to the sparsity of the Complaint's allegations.

to include “reference to statements, acts, or omissions that purportedly deceived, or caused [plaintiff] to be misled in a material way”).

The sole alleged deceptive acts for which Plaintiffs include any factual support at all are: (1) NYLS’s alleged failure to differentiate among types of employment when publishing its employment statistics, and (2) NYLS’s alleged publication of post-graduation salary data disclosed as, and based on, information provided by a small group of self-selected students rather than a larger group. *See, e.g.*, Compl. ¶¶ 4-5. These allegations cannot withstand this motion to dismiss.

Plaintiffs claim that salary data provided by NYLS was misleading because it was based on a small sample size of recent graduates. *Id.* ¶¶ 5, 30, 31, 34. In fact, the 2009 and 2010 data—the only NYLS statements attached to the Complaint or otherwise alleged with any specificity at all—clearly state that the average, minimum, and maximum salaries reported were based on approximately 26% and 20%, respectively, of employed graduates.<sup>4</sup> *See* Compl. Exs. 2, 3. A reasonable consumer therefore *must* have known that the salary data did not represent the entire class, and therefore, as a matter of law, the information cannot be deceptive. *See Sands v. Ticketmaster-N.Y., Inc.*, 207 A.D.2d 687 (1st Dep’t 1994) (holding “challenged business practices do not violate the prohibition against deceptive business practices under General Business Law § 349, since the record shows that these practices are fully disclosed”) (internal quotation marks omitted); *see also Zuckerman v. BMG Direct Mktg., Inc.*, 290 A.D.2d 330, 330-31 (1st Dep’t 2002) (affirming dismissal of GBL section 349 claim where alleged material misstatement was not deceptive as a matter of law because of clear disclosure); *Shovak v. Long*

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<sup>4</sup> Plaintiffs have not pled facts to support any allegations of misrepresentations based on data prior to 2009 under GBL section 349, or that would satisfy the heightened pleading standard discussed *infra* for fraud and negligent misrepresentation. Plaintiffs’ claim that “[t]he 2009 Employment Report is emblematic of the kind of employment data NYLS disclosed to prospective students during the class period” is conclusory. Compl. ¶ 32.

*Island Commercial Bank*, 50 A.D.3d 1118, 1120 (2d Dep't 2008) (affirming dismissal of GBL section 349 claim and denying leave to amend fraud claim where there "was no materially misleading statement, as the record indicated that the [allegedly deceptive brokerage fee] was fully disclosed to the plaintiff"); *Linsky v. NYNEX Corp.*, No. 6003300/95, 1997 WL 1048597, at \*2 (Sup. Ct. N.Y. County Jan. 9, 1997) (dismissing putative class claims under GBL section 349 where "defendants fully disclosed the rates and terms for the services offered"); *Ballas v. Virgin Media, Inc.*, No. 600014/07, 2007 WL 4532509, at \*5 (Sup. Ct. Nassau County Dec. 6, 2007) (granting dismissal where allegedly deceptive information (a certain phone charge) was "fully revealed and explained" in the terms of service booklet that accompanied cell phone). NYLS revealed the very fact that Plaintiffs claim made the salary data misleading.<sup>5</sup> The GBL section 349 claim should be dismissed on this ground alone.<sup>6</sup>

**B. The Complaint Fails to Allege A Cognizable Injury.**

The Complaint does not identify the "actual injury" that Plaintiffs supposedly suffered as a result of any allegedly misleading statements. The quintessential allegation in the Complaint is that "many NYLS graduates . . . have not obtained . . . the kind of job that they thought would be waiting for them upon graduating from law school." Compl. ¶ 68 (complaining of "dead-end jobs, doing document review and other menial, mindless drudgery, essentially functioning as glorified paralegals or secretaries with little control over their careers"). Such generalized, conclusory and unsubstantiated assertions do not amount to "injury" under GBL section 349. *See Frank v. DaimlerChrysler Corp.*, 292 A.D.2d 118, 128 (1st Dep't 2002) (dismissing GBL

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<sup>5</sup> Further, as discussed in pages 21-22, *infra*, NYLS also disclosed data by field of employment. *See* Compl. Ex. 2, 3.

<sup>6</sup> As detailed in pages 16 and 23-24 *infra*, the Complaint's failure to adequately allege that NYLS made any materially misleading statement requires dismissal of the fraud and negligent misrepresentation claims as well.

section 349, fraud and negligent concealment claims for failure to allege any actual injury where named plaintiffs in putative class action alleged that certain type of automobile seat *may* malfunction in the future).

Here, the Complaint lacks a coherent theory of injury. If Plaintiffs claim that their injury was the money they paid NYLS in tuition, black-letter New York law holds that GBL section 349 does not provide a cause of action to seek “a refund of the purchase price of [a product or service] on the ground that [the plaintiff] would not have purchased [it] absent defendant’s deceptive practices.” *Baron v. Pfizer, Inc.*, 42 A.D.3d 627, 629 (3d Dep’t 2007) (affirming dismissal of GBL section 349 claim for failure to allege injury absent a “manifestation of pecuniary or ‘actual harm’”) (citation omitted); *see also Small*, 94 N.Y.2d at 55-56 (holding that plaintiffs failed to allege actual injury from deceptive cigarette advertising because they claimed that they were induced to purchase a product, not that the product caused them any health-related harm or was sold at an inflated price); *Donahue v. Ferolito, Vultaggio & Sons*, 13 A.D.3d 77, 78 (1st Dep’t 2004) (holding that alleged deception cannot be “both act and injury” under GBL section 349(a)). Accordingly, Plaintiffs’ GBL section 349 claim should be dismissed on the separate and independent ground that the Complaint fails to allege an injury that is cognizable under New York law.

**C. Plaintiffs Have Not Adequately Pled Causation.**

GBL section 349 requires Plaintiffs to establish a causal connection between the purported deception and whatever their claimed loss is. *Stutman*, 95 N.Y.2d at 29 (holding that the plaintiff “must show that the defendant’s material deceptive act caused [the injury]” alleged in the complaint); *Gale v. IBM Corp.*, 9 A.D.3d 446, 447 (2d Dep’t 2004) (affirming dismissal of putative class action complaint for failure to allege causation with sufficient specificity); *Wells*

*Fargo Bank, N.A. v. Robinson*, No. 1179/08, 2009 WL 3210306, at \*4 (Sup. Ct. Queens County Oct. 7, 2009); *Sutherland v. Remax*, No. 22405/07, 2008 WL 3307201, at \*4-5 (Sup. Ct. Nassau County Aug. 7, 2008); *see also Small*, 94 N.Y.2d at 56 (requiring plaintiff to show a “connection between the misrepresentation and any harm from, or failure of, the product.”). The Complaint sets forth no facts that show a causal relationship between any of NYLS’s alleged employment or salary statements, on the one hand, and Plaintiffs’ alleged loss of the money they spent to attend the school. Plaintiffs do not claim that NYLS’s alleged misrepresentations caused them to take out loans to attend NYLS. Nor do they allege that NYLS’s statements caused them to languish in the post-graduate job market.

Indeed, the Complaint identifies numerous factors outside of NYLS’s control that may have caused economic losses for Plaintiffs and other NYLS graduates, including “one of the grimmest legal job markets in decades” (Compl. ¶ 49), “the overall employment rate for new law school graduates is the lowest it has been since 1996” (*id.* ¶ 50), and the surplus of newly graduated attorneys in the marketplace and the “lost generation” of lawyers (*id.* ¶¶ 52, 59), which may make employment difficult for recent NYLS graduates. Lacking the requisite allegations tying specific statements by NYLS to any actual injury, however, Plaintiffs have failed to state a claim under GBL section 349.

**D. Plaintiffs Admit that NYLS’s Data Complies with ABA Standards, Which were Created Pursuant to U.S. Government Regulations.**

GBL section 349(d) provides that “it shall be a complete defense that the act or practice is . . . subject to and complies with the rules and regulations of . . . any official department, division, commission or agency of the United States.” Here, the Complaint concedes—as it must—that NYLS’s employment reporting has been consistent with ABA Standard 509, which is in turn implemented pursuant to U.S. Department of Education regulations. *See* 20 U.S.C. §

1099b (2011) (providing criteria for Secretary of Education’s recognition of accrediting agencies); Nationally Recognized Accrediting Agencies, 73 Fed. Reg. 11404, 11405 (Mar. 3, 2008) (noting that the Department of Education recognizes the ABA as the accrediting agency for law schools); *see also* Compl. ¶¶ 28, 35 (alleging that the employment reporting is consistent with ABA Standard 509 and that the ABA “simply require[s] law schools to report an overall employment number.”).

Since 1952, the Department of Education has recognized the Council of the Section of Legal Education and Admissions to the Bar (the “Council”) of the ABA as the official national agency for the accreditation of programs leading to the juris doctor degree. *See* American Bar Association Section of Legal Education and Admissions to the Bar, *Standards and Rules of Procedure for Approval of Law Schools 2011-2012*, at iv.<sup>7</sup>

The Council issues the *Standards and Rules of Procedure for Approval of Law Schools* (the “Standards”), rules to which law schools must adhere in order to be ABA-approved. The Standards are designed, developed and implemented for the purpose of advancing the basic goal of providing a sound program of legal education. *See* American Bar Association, *ABA Law School Accreditation – Reporter Resources*.<sup>8</sup> The law school approval process established by the Council is designed to provide a careful and comprehensive evaluation of a law school and its

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<sup>7</sup> Unpublished authorities cited in this submission are attached as exhibits to the Affirmation of Michael J. Volpe dated October 13, 2011 (“Volpe Aff.”).

*See* Volpe Aff. Ex. A. This publication is available at [http://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/2011\\_2012\\_aba\\_standards\\_preface.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2011_2012_aba_standards_preface.authcheckdam.pdf) (last visited Oct. 12, 2011).

<sup>8</sup> Volpe Aff. Ex. B. This publication is available at <http://www.abanow.org/2011/06/aba-law-school-accreditation-reporter-resources/> (last visited Oct. 12, 2011).

compliance with the Standards. *See* American Bar Association Section of Legal Education and Admissions to the Bar, *The Law School Accreditation Process* 3.<sup>9</sup>

Department of Education regulations also require the Council to demonstrate that its standards for accreditation ensure the quality of education provided by the schools accredited by the Council. *See* 34 C.F.R. § 602.16(a) (2011). Concerning career placement standards in law schools, the Council meets the Department requirement only if its accreditation standards effectively address the “success with respect to student achievement in relation to the institution’s mission, which may include different standards for different institutions or programs, as established by the institution, *including, as appropriate, consideration of course completion, State licensing examination, and job placement rates.*” *See id.* § 602.16(a)(1)(i) (emphasis added).

As alleged in the Complaint, no law school “is required by the ABA, Department of Education or any other governing body to independently audit or verify their employment data.” Compl. ¶ 57. The Complaint alleges that NYLS publishes “basic consumer information,” including employment data, in accordance with applicable standards and industry practice. *Id.* ¶¶ 28-29, 36-37. Plaintiffs’ dissatisfaction with the sufficiency of the disclosed employment information mandated by Department of Education regulations, or even their allegation that the ABA is changing its future reporting requirements, does not change the fact—acknowledged in the Complaint—that NYLS has complied with accreditation rules promulgated pursuant to federal government regulation. *Id.* ¶¶ 69-77.<sup>10</sup> Accordingly, pursuant to GBL section 349(d),

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<sup>9</sup> Volpe Aff. Ex. C. This publication is available at [http://www.abanow.org/wordpress/wp-content/files\\_flutter/1307552148ABAlawschacredproc.pdf](http://www.abanow.org/wordpress/wp-content/files_flutter/1307552148ABAlawschacredproc.pdf) (last visited Oct. 12, 2011).

<sup>10</sup> Indeed, to the extent Plaintiffs seek injunctive relief to change or improve the law school employment data that is reported, that request may be mooted by actual changes being implemented by the ABA. Compl. ¶ 74. Plaintiffs’ preoccupation with legislative proposals and the publication of NYLS employment data (pursuant to ABA requirements) reveals Plaintiffs’

Plaintiffs' claims under this statute must be dismissed. *See Polzer v. TRW, Inc.*, 256 A.D.2d 248, 249 (1st Dep't 1998) (affirming grant of summary judgment because acts and practices complied with rules and regulations of Federal Trade Commission); *Flagg v. Yonkers Sav. & Loan Ass'n.*, 307 F. Supp. 2d 565, 581 n.19 (S.D.N.Y. 2004) (granting motion to dismiss putative class claims under GBL section 349 where defendant complied with "applicable federal requirements").

## POINT II

### THE FRAUD CLAIM IS FATALLY DEFICIENT

To plead fraud under New York law, Plaintiffs must allege: (1) a false representation of material fact or material omission, (2) scienter, (3) reliance and (4) injury. *Small*, 94 N.Y.2d at 57 (affirming dismissal of fraud claim because plaintiff failed to allege legally cognizable injury caused by purported deception); *Vermeer Owners, Inc. v. Guterma*n, 78 N.Y.2d 1114, 1116 (1991) (affirming dismissal of fraud claim where plaintiffs failed to allege detrimental reliance on any misrepresentation).

#### **A. As A Matter of Law, NYLS's Compliance with ABA Requirements Cannot be Materially Misleading.**

Concerning the first element, as detailed in pages 13-15 *supra*, NYLS's compliance with ABA and industry reporting standards precludes the assertion that NYLS made any material misrepresentation. *See Saunders v. AOL Time Warner, Inc.*, 18 A.D.3d 216, 217 (1st Dep't 2005) (cable company's allegedly misleading notice complied with FCC regulations and thus was not fraudulent); *see also In re Morgan Stanley & Van Kampen Mut. Fund Sec. Litig.*, No. 03 Civ. 8208(RO), 2006 WL 1008138, at \*7-8 (S.D.N.Y. Apr. 18, 2006) (holding that defendants did not omit material information by failing to break down compensation data because no

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motivations in this litigation—namely, changing ABA policy. *Id.* ¶¶ 7, 13-14, 35-39. None of this is relevant to the claims against NYLS.

regulation required such a breakdown and information would not have been material to a reasonable investor). The fraud claim, therefore, should be dismissed.

**B. Plaintiffs Fail to Plead Fraud with the Required Particularity.**

Under New York law, claims of fraud must be pled with particularity. *See* CPLR § 3016(b); *see also LaSalle Nat'l Bank v. Ernst & Young*, 285 A.D.2d 101, 109 (1st Dep't 2001); *Dumas v. Fiorito*, 13 A.D.3d 332 (2d Dep't 2004). Generalized and conclusory allegations do not satisfy the heightened 3016(b) standard. *Apfelberg v. E. 56th Plaza, Inc.*, 78 A.D.2d 606, 607 (1st Dep't 1980) (CPLR 3016 specificity requirements not met when “the complaint is almost entirely grounded ‘upon information and belief’”). That is what Plaintiffs have fabricated here: a complaint “almost entirely grounded ‘upon information and belief.’” Accordingly, without indication of the sources of said “information and belief,” the fraud claim fails as a matter of law. *Id.*; *see also, e.g.*, Compl. ¶ 67.

**1. Plaintiffs Do Not Adequately Plead the Misrepresentation Element.**

Plaintiffs have failed to allege a material misrepresentation with particularity and no specific facts are pled that satisfy the basic pleading requirements for scienter. *See NYU v. Cont'l Ins. Co.*, 87 N.Y.2d 308, 319 (1995) (affirming dismissal of fraud claim against insurer where allegations of “sham” investigation and “fraudulent scheme” were conclusory and were “merely evidence [of] plaintiff’s dissatisfaction with defendants’ performance”); *see also Chais*, 2002 WL 34433891, at \*5 (Sup. Ct. N.Y. County Mar. 1, 2002) (dismissing alumna’s fraud claim against school based on allegations that she was fraudulently induced “to enroll, and to remain, in the school with false promises that its associate degree in electronic engineering could significantly enhance her income-earning potential and ensure her a career in technology” for failure to establish scienter).

In a case involving allegations nearly identical to those at issue here, the court in *Bank v. Brooklyn Law School* dismissed the fraud claims of an alumnus for failure to plead a material misstatement with specificity. No. 97 Civ. 7470 (JG), 2000 WL 1692844, at \*6 (E.D.N.Y. Oct. 6, 2000). Like Plaintiffs here, Bank claimed that Brooklyn Law School “authorized the publication of . . . salary information despite its knowledge that the information was false.” *Id.* at \*1. Bank also claimed that “true” data available to the school revealed “a starting salary ‘materially lower’ than . . . the figure published in the *U.S. News* report.” *Id.* Finally, the Brooklyn Law graduate alleged that he “reasonably relied” on the average salary data published by *U.S. News* and “was persuaded by the false salary information to attend Brooklyn Law School.” *Id.* at \*2. The court dismissed the fraud claim for, *inter alia*, failure to plead the alleged fraud with particularity. *Id.* at \*6-7.

The same result is required here. Plaintiffs allege that they “believe that perhaps fewer than 30 percent—if not fewer—of recent NYLS graduates secure full-time, permanent employment for which a JD degree is required or preferred within nine months of graduating.” Compl. ¶ 41 (emphases added). Plaintiffs concede that this allegation is premised entirely on anecdotal information from an unknown number of former NYLS students and unspecified “other investigatory work.” *Id.*; see *Orix Credit Alliance, Inc. v. R.E. Hable Co.*, 256 A.D.2d 114, 116 (1st Dep’t 1998) (dismissing fraud claims where complaint “offered nothing but general second-hand or third-hand” information and court would not allow “pre-trial discovery as a fishing expedition”); see also Compl. ¶ 67 (“Upon information and belief, Plaintiffs believe that a substantial portion of recent NYLS graduates make significantly less than the reported mean salaries.”). Tellingly, every allegation in the Complaint, save three, is based only on Plaintiffs’

“information and belief.” Compl. Preamble. Thus, Plaintiffs’ allegations are considerably less detailed than those held inadequate in the *Brooklyn Law School* case.

While these allegations are purportedly based on Plaintiffs’ information and belief, the Complaint does not disclose any detail whatsoever about the so-called information. *See, e.g., Stern v. Gen. Elec. Co.*, 924 F.2d 472, 477 (2d Cir. 1991) (fraud allegations based on information and belief are insufficient if they “do not identify with particularity the facts upon which the belief is founded”). Likewise, in attacking the use of self-reporters to compile NYLS’s compensation statistics, Plaintiffs can do no more than speculate that a larger pool of graduates might produce a statistically significant deviation from the reported information. Compl. ¶¶ 5, 61-63. Because these speculative allegations do not begin to approach the particularity requirements of Rule 3016(b), the fraud claim should be dismissed.

## **2. Plaintiffs Fail to Allege Reliance and Reasonable Reliance with Particularity.**

The Complaint also is wholly devoid of details concerning Plaintiffs’ individual choices to attend NYLS. Each Plaintiff makes the identical, naked assertion that “[i]n applying and deciding to remain enrolled at NYLS, [he or she] relied on salary data and employment information posted on NYLS’s website and/or disseminated to third-party data clearinghouses and publications, such as the ABA and US News.” Compl. ¶¶ 18-20 (emphasis added); see also *id.* ¶ 13 (“Defendants’ acts and practices . . . were material to Plaintiffs’ decision to enroll and attend NYLS, and were justifiably relied upon by Plaintiffs.”).

Plaintiffs do not allege: 1) what “salary data and employment information” they actually saw or read; 2) when they saw or read it; 3) where they saw or read it; 4) what, if any, impact the unspecified information might have had on their respective decisions to enroll at NYLS; and 5) what, if any, impact the unspecified information might have had on their respective decisions to

remain enrolled at NYLS. Thus, the Complaint does *not* allege how, specifically, Plaintiffs relied on NYLS employment data—namely its relative influence amongst a number of factors that students weigh when choosing a law school. *See Small v. Lorillard Tobacco Co., Inc.*, 252 A.D.2d 1, 8-9 (1st Dep’t 1998), *aff’d* 94 N.Y.2d 43 (1999) (dismissing fraud claim where a variety of factors could have influenced plaintiff’s decision to engage in transaction alleged to have caused harm); *see also Bank v. Brooklyn Law Sch.*, No. 97 Civ. 7470, slip op. at 10 (E.D.N.Y. Mar. 28, 2000) (holding that “too many variables enter into the determination of the salary a beginning student may expect to earn on graduation to make his income on graduation something that can be reasonably foreseen or anticipated as a natural consequence of a lack of candor in attracting an incoming law student” in dismissing RICO claims for failure to sufficiently allege fraud) (attached hereto as Volpe Aff. Ex. D).

Plaintiffs’ mere recitation of the legal term “reliance” is entirely inadequate to survive this motion to dismiss. *See Hernandez v. N.Y. City Law Dept. Corp. Counsel*, 258 A.D.2d 390, 390 (1st Dep’t 1999) (failure to “specify the misrepresentation on which she relied to her detriment or the details of the other circumstances constituting the wrongs for which she would recover” warrants dismissal of fraud claim); *see also Weaver v. Chrysler Corp.*, 172 F.R.D 96, 100-01 (S.D.N.Y. 1997) (dismissing fraud, negligent misrepresentation and GBL section 349 claims where pleadings, “pled entirely on information and belief,” lacked requisite specificity).

Additionally, New York law requires that the alleged reliance be reasonable. *Dragon Inv. Co. II LLC v. Shanahan*, 49 A.D.3d 403, 404 (1st Dep’t 2008) (affirming dismissal of fraud claim brought by “sophisticated party” where there was no justifiable reliance on alleged misrepresentations because plaintiff failed to make use of the means of verification that were available). Reasonableness is evaluated in the context of the circumstances. *See, e.g., Serino v.*

*Lipper*, 47 A.D.3d 70, 78 (1st Dep’t 2007). Therefore, a plaintiff’s intelligence, experience and acts are relevant. See *Peach Parking Corp. v. 346 West 40th Street, LLC*, 42 A.D.3d 82, 87 (1st Dep’t 2007).

The Complaint outlines the relevant context here: Plaintiffs were, at the time of the alleged fraud, among the elite few college graduates who are accepted for law school admission. Compl. ¶ 3.<sup>11</sup> In choosing to enroll at NYLS, Plaintiffs were making what may have been the most significant economic “investment” of their lives. *Id.* ¶ 58. These highly-educated Plaintiffs made this investment during the “Great Recession,” in which they faced “the grimmest job market[] in decades,” and notwithstanding reports in *U.S. News* that “NYLS students graduate on average with a whopping \$119,437 in loans.” *Id.* ¶¶ 8, 9. In the context alleged in the Complaint, Plaintiffs could not have reasonably relied on any data as a guarantee that they would secure a lucrative legal job. *Small*, 252 A.D.2d at 9 (reliance on defendant’s misrepresentations would not be presumed when plaintiffs’ claim of ignorance was implausible in light of years of press coverage); *Peach Parking Corp.*, 42 A.D.3d at 87 (“where one to whom alleged misrepresentation is made has means to discover the truth by the exercise of ordinary intelligence, yet fails to do so, there can be no showing of justifiable reliance” (citation omitted)).

Finally, the exhibits attached to the Complaint reveal that the NYLS data contained extensive and specific disclosures concerning the varying methods of calculating the post-graduation “employment rate”; the percent and absolute number of graduates reporting salary data; full versus part-time employment statistics; disaggregated data by field of employment; and minimum and maximum salary ranges. Compl. Exs. 2, 3. No reasonable person could read

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<sup>11</sup> The self-serving allegations that Plaintiffs were “naïve, relatively unsophisticated consumers” or part of a “phalanx of non-suspecting players” are patently ludicrous and a grievous insult to NYLS applicants, students and graduates. Compl. ¶¶ 11, 58.

these disclosures and rely on them for the proposition that Plaintiffs were guaranteed a job in the legal field that was “[c]ommensurate to [*sic*] their education level.” Compl. ¶ 100; *see also Shovak*, 50 A.D.3d 1118 (dismissing fraud claim where allegedly misleading statement, “which was not per se illegal, was fully disclosed to the plaintiff”).

**C. Plaintiffs Fail to Allege Proximate Causation and Injury.**

As with the GBL section 349 claim discussed above, Plaintiffs’ failure to plead a legally-cognizable injury proximately caused by NYLS’s published employment data also dooms their fraud claim. *See Small*, 94 N.Y.2d at 57 (“[A]n act of deception, entirely independent or separate from any injury, is not sufficient to state a cause of action under a theory of fraudulent concealment.”). Moreover, nowhere do Plaintiffs allege specific facts to show *how* they were injured by the specific published statements, as opposed to any number of other intervening causes.

In *Mihalakis v. Cabrini Medical Center*, the First Department examined the fraud allegations of a medical student who claimed that a hospital had “misrepresented various aspects of [its] internship program, making it out to be better than it actually was.” 151 A.D.2d 345, 346 (1st Dep’t 1989). The plaintiff alleged that, “had she known the truth about the program, she would have rejected Cabrini and selected another hospital at which to do her internship.” *Id.* (holding that failure to allege sufficient facts showing a direct, out-of-pocket loss as a result of the alleged misrepresentations required dismissal of fraud claim). The First Department reasoned that the alleged loss was fatally speculative because it “would have to be measured by the difference between the value of the internship program provided . . . and the value of [a program] having the characteristics defendant represented to plaintiff [that defendant’s program] had but did not.” *Id.* (holding that “it would be to indulge in impermissible speculation to

assume that had plaintiff not entered [defendant's] program she would have done better in another"); *see also Bank*, slip op. at 10 (denying leave to replead "claims for the diminished value of plaintiff's law degree or loss of earnings following graduation" as "futile"). Here, Plaintiffs' allegations are similarly flawed, requiring dismissal of the fraud claim without leave to replead.

### POINT III

#### THE NEGLIGENT MISREPRESENTATION CLAIM LACKS ESSENTIAL ELEMENTS

The elements of a claim for negligent misrepresentation are: (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. *See J.A.O. Acquisition Corp. v. Stavitsky*, 8 N.Y.3d 144, 148 (2007); *see also Parrott v. Coopers & Lybrand, LLP*, 95 N.Y.2d 479, 484 (2000) (requiring "some conduct by the maker of the statement linking it to the relying party and evincing its understanding of that reliance"); *Hudson River Club v. Consol. Edison Co.*, 275 A.D.2d 218, 220 (1st Dep't 2000) ("A claim for negligent misrepresentation can only stand where there is a special relationship of trust or confidence, which creates a duty for one party to impart correct information to another, the information given was false, and there was reasonable reliance upon the information given." (citation omitted)).

Thus, negligent misrepresentation "involves most of the same elements as fraud, with a negligence standard substituted for the scienter requirement." *Mia Shoes, Inc. v. Repub. Factors Corp.*, No. 96 Civ. 07974 (TPG), 1997 WL 525401, at \*3 (S.D.N.Y. Aug. 21, 1997).

Accordingly, like common-law fraud, a claim for negligent misrepresentation must be pled with particularity. *See* CPLR § 3016(b) ("Where a cause of action or defense is based upon misrepresentation . . . the circumstances constituting the wrong shall be stated in detail.");

*Nicosia v. Bd. of Managers of Weber House Condo.*, 77 A.D.3d 455, 456 (1st Dep't 2010). The

conclusory pleading that dooms Plaintiffs' fraud claim also requires dismissal of the negligent misrepresentation cause of action.

Moreover, as discussed *supra*, the employment and salary information was not false, because it complied with the requirements of the ABA. *See Hudson River Club*, 275 A.D.2d at 220. Indeed, the exhibits to the Complaint state, in clear and unmistakable terms, that the published salary data reflects only a small percentage of self-reporting graduates: "Salary information was available for approximately 26 percent of those who were employed (representing 105 salaries)." Compl. Ex. 2. The only non-conclusory allegations in the Complaint are that NYLS has attempted to "'pretty up' their [sic] employment numbers, by, among other things, hiring unemployed graduates." Compl. ¶ 47. In addition to the fact that this allegation is made solely upon information and belief, *see* Compl. Preamble, the exhibits to the Complaint demonstrate that, far from omitting or concealing its own employment of some of its graduates, NYLS has fully disclosed it: "A total of 5.6 percent of employed graduates were in positions funded through the NYLS Fellowship program."<sup>12</sup> Compl. Ex. 2.

Additionally, Plaintiffs' negligent misrepresentation claim is premised on the same conclusory allegations of reliance that require dismissal of the fraud claim. *See* discussion at pp. 19-22 *supra*; *see also* Compl. ¶¶ 106-07.

Finally, in the commercial context, a claim for negligent misrepresentation necessarily fails if there is no special duty owed by a defendant to the plaintiff. *See, e.g., FAB Indus., Inc. v. BNY Fin. Corp.*, 252 A.D.2d 367 (1st Dep't 1998). The First Department defines the duty narrowly as the "functional equivalent of privity," found in fiduciary and confidential relationships. *Parrott*, 263 A.D.2d at 321 (1st Dep't 2000); *Sykes v. RFD Third Ave. 1 Assocs.*,

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<sup>12</sup> Notably, under the governing ABA standards, NYLS is not required to indicate whether or not it employs alumni after graduation.

*LLC*, 67 A.D.3d 162, 165 (1st Dep't 2009); *Silvers v. State*, 68 A.D.3d 668, 669 (1st Dep't 2009). Notwithstanding the fact that NYLS did communicate accurate information to prospective and actual students, the relationship alleged in the Complaint—between prospective student and law school—does not give rise to any “special duty” for negligent misrepresentation purposes. *See, e.g., Glanzer v. Keilin & Bloom LLC*, 281 A.D.2d 371, 371-72 (1st Dep't 2001) (dismissing employees' claims that they were recruited to investment banking firm through false promises and that they suffered the loss of career growth, their potential, and various professional opportunities); *Harris v. Seward Park Hous. Corp.*, No. 112406/08, 2009 WL 1905147, at \*11 (Sup. Ct. N.Y. County June 29, 2009) (dismissing claim because prospective apartment purchaser had no special relationship of trust or confidence with real estate broker.). For all of these reasons, the negligent misrepresentation claim should be dismissed as well.

### **CONCLUSION**

For all of the foregoing reasons, New York Law School respectfully requests that the Complaint be dismissed in its entirety, without leave to replead.

Dated: New York, New York  
October 13, 2011

**VENABLE LLP**

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