No. 12-2817

IN THE ILLINOIS APPELLATE COURT
FIRST DISTRICT

JONATHAN PHILLIPS, BRIAN LOKER, ADAM SMESTAD, XAVIER HAILEY, BRENT DAVIDSON, SHELLYE TAYLOR, ALLISON LEARY, JAIME WALSH, MADISON MULLADY, on behalf of themselves and all others similarly situated,	*Plaintiffs-Appellants.*
v.	
DePAUL UNIVERSITY, a/k/a DePAUL UNIVERSITY COLLEGE OF LAW, and DOES 1-20,	*Defendants-Appellees.*

Appeal from the Circuit Court of Cook County, Illinois,
County Department, Chancery Division, Case No. 12 CH 003523
The Honorable Neil H. Cohen, Judge Presiding

BRIEF AND ARGUMENT OF DEFENDANTS-APPELLEES

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ORAL ARGUMENT REQUESTED

POINTS AND AUTHORITIES

NATURE OF THE CASE

Nine recent graduates of DePaul College of Law bring this case against their alma matter. Plaintiffs are all members of the bar who graduated sometime between 2007 and 2011. They do not allege that DePaul failed to provide them what they paid for—a legal education—or that DePaul promised them lucrative legal employment in one of the worst legal markets in memory. Nor could they. Like generations of law graduates before them, these nine graduates were expected to supply the hustle and determination needed to first achieve success in the classroom and then land entry-level jobs after law school graduation.

Faced with an economic recession, and unable to find the work that they wanted, they instead filed suit against their law school for fraud and negligent misrepresentation. Plaintiffs allege that DePaul misrepresented its historical employment data, which they further allege to have relied on in enrolling or staying enrolled at the school. All of the claims rest on Plaintiffs' reading of DePaul's historical employment data to suggest that most recent graduates found full-time, lucrative legal work and Plaintiffs could expect to find the same a few years later.

The trial court dismissed the action in its entirety under 735 ILCS 5/2-615 and 5/2-619(a)(1), (9). In a comprehensive opinion, the court explained that numerous required legal elements—actionable conduct, causation, damages, reliance—were wholly lacking. These legal defects, with others, doomed Plaintiffs' claims. Plaintiffs never sought leave to amend. This appeal followed, together with the related appeals in *Evans v. Illinois Institute of Technology*, No. 12-3611, and *Johnson v. The John Marshall Law School*, No. 12-3610.

Plaintiffs' action against DePaul is one of numerous virtually identical actions that their counsel has filed nationwide. Most have been dismissed, with only a few, primarily in California, going beyond the pleading stage. *Compare, e.g., MacDonald v. Thomas M. Cooley Law Sch.*, 880 F. Supp. 2d 785 (W.D. Mich. 2012) (dismissed), *aff'd* 724 F.3d 654 (6th Cir. 2013); *Austin v.*

Albany Law Sch. of Union Univ., 957 N.Y.S.2d 833 (Sup. Ct. 2013) (dismissed); *Evans v. Ill. Inst. of Tech.*, No. 12-CH-3522 (Ill. Cir. Ct. Nov. 9, 2012) (dismissed); *Johnson v. The John Marshall Law Sch.*, No. 12-CH-3494 (Ill. Cir. Ct. Nov. 9, 2012) (dismissed); *Gomez-Jimenez v. N.Y. Law Sch.*, 36 Misc. 3d 230 (N.Y. Sup. Ct. 2012) (dismissed), *with, e.g.*, *Harnish v. Widener Univ. Sch. of Law*, --- F. Supp. 2d ----, 2013 WL 1149166 (D.N.J. Mar. 20, 2013) (dismissal denied); *Alaburda v. Thomas Jefferson Sch. of Law*, No. 37-2011-00091898 (Cal. Super. Ct. (San Diego) Nov. 16, 2012) (demur overruled); *Hallock v. Univ. of San Fran.*, No. 12-517861 (Cal. Super. Ct. (San Fran.) July 19, 2012) (demur overruled); *Arring v. Golden Gate Univ.*, No. 12-517837 (Cal. Super. Ct. (San Fran.) July 19, 2012) (demur overruled).

COUNTER-STATEMENT OF THE ISSUES

1. Whether the Court should affirm the dismissal of this action under 735 ILCS 5-2/615, where numerous required legal elements of Plaintiffs' claims are lacking.

2. Whether the Court should affirm the dismissal of the statutory fraud claims under 735 ILCS 5/2-619(a)(9), where DePaul reported its employment data as required by the American Bar Association.

3. Whether the Court should affirm the dismissal with prejudice, where Plaintiffs never sought leave to amend their amended complaint.

COUNTER-STATEMENT OF FACTS

A. The Parties.

DePaul University is a not-for-profit educational institution with over 25,000 students. (*See* S.II[1] at C00337-C00375, Pls.' First Amended Complaint ("Am. Compl.") ¶ 24.) Its law school—the DePaul University College of Law ("DePaul")—is accredited by the American Bar Association ("ABA") and "is in the business of educating students to qualify them to work as lawyers." (*Id.* ¶¶ 26, 28, 32.)

Plaintiffs are nine individuals who "enrolled in DePaul to obtain a J.D. degree and become lawyers." (Brief and Argument for Plaintiffs-Appellants ("Pls.' Br.") at 7 (citing Am. Compl. ¶¶ 10-18).) They each graduated from DePaul sometime between 2007 and 2011 and are now licensed attorneys:

Plaintiff	Graduation	Enrollment	Bar Admission
Allison Leary	2011	2007	2011 (Ill.)
Madison Mullady	2011	2008	2011 (Ill.)
Xavier Hailey	2010	2007	2010 (Ill.)
Jonathan Phillips	2010	2007	2010 (Ill.)
Brian Loker	2009	2007	2010 (Calif.)
Adam Smestad	2009	2007	2010 (Ill.)
Shellye Taylor	2010	2006	2010 (Ill.)
Brent Davidson	2009	2006	2009 (Ill.)
Jaime Walsh	2007	2003	2007 (Ill.)

(*See* Am. Compl. ¶¶ 10-18; Pls.' Br. at 8-10.)

B. The Employment Information.

As an ABA-accredited law school, DePaul must publish basic consumer information each year. (Am. Compl. ¶¶ 33, 47 (citing Section 509 of the ABA Standards and Rules of Procedure for Approval of Law Schools).) To satisfy this obligation, DePaul at all relevant times compiled employment data based on voluntary surveys sent to recent graduates. (*Id.* ¶¶ 35, 39(c)(ii).)

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[1] Citations to "S._" refer to the Supplemental Record on Appeal, which has four volumes. Citations to "R._" refer to the Record on Appeal, which has three volumes.

DePaul reported this data in publications and to third parties like the ABA and *U.S. News & World Report*. (*Id.* ¶ 41.)

From at least 2006 to 2012, the data that DePaul compiled for each graduating class included the following data types, all of which mirrored data types required, collected, and published by the ABA:

- the total percentage of graduates who "reported employment" within nine months of graduation.
- of these graduates, the percentage who worked in general "employment categories" (*i.e.*, private practice, business, government, public interest, judicial clerkships, academia, and unknown).
- the "average starting salary" for graduates reporting employment in private practice and business respectively.
- the "total starting salary range" for graduates reporting employment.

(*See id.* ¶¶ 35-39, 47 & R.I at C00070, C00073; R.II at C00326, C00328.[2]) The "reported employment" included legal and non-legal positions; full-time and part-time, permanent and temporary positions; and positions with any employer including DePaul. (*See* Am. Compl. ¶ 39(a).) For the respective general "employment categories," the "average starting salary" was for full-time positions. (*See id.* ¶ 39(b).) The "total starting salary range" was for all graduates reporting employment. (*See id.* ¶ 36; R.I at C00070, C00073; R.II at C00326, C00328.)

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[2] These documents report the employment data upon which Plaintiffs' claims appear to be based. Because Plaintiffs did not attach them to the Amended Complaint, DePaul properly presented the documents on its motion to dismiss and this Court, like the trial court, may consider them under either 2-615 or 2-619. *See* 735 ILCS 5/2-606; *Kirchner v. Greene*, 294 Ill. App. 3d 672, 677 (1st Dist. 1998) (documents discussed and quoted in the complaint); *Lagen v. Balcor Co.*, 274 Ill. App. 3d 11, 17 (2d Dist. 1995); *accord Bryson v. News Am. Publ'ns, Inc.*, 174 Ill. 2d 77, 92 (1996) (converting motion from section 2-615 to section 2-619 where movant presented outside materials).

1. DePaul Reported Employment Data to the American Bar Association, Which Published It Every Year.

From at least 2006 to the present, DePaul like other accredited law schools, annually reported employment data to the ABA. (*See* Am. Compl. ¶¶ 32-33, 41, 47.) The ABA then published this data in the comprehensive *Official Guide to ABA-Approved Law Schools*, an annual publication of the ABA and the Law School Admissions Council. (*E.g.*, *ABA Official Guides*, S.III at C00575-C00602 (2006); *id.* at C00603-C00627 (2007); *id.* at C00628-C00652 (2008); *id.* at C00653-C00678 (2009); *id.* at C00679-C00704 (2010); *id.* at C00705-C00730 (2011); *id.* at C00731-C00749 (2012).)

In reporting employment data, including DePaul's, each annual edition of the *ABA Official Guide* expressly stated that: (i) employment reported includes legal, non-legal, full-time, and part-time jobs (*e.g.*, *id.* at C00584); (ii) jobs reported in private practice include law clerk, paralegal and administrative positions (*e.g.*, *id.*); (iii) jobs reported in business include those in retail establishments (*e.g.*, *id.*); (iv) jobs reported do not necessarily require a J.D. and may not make specific use of legal skills (*e.g.*, *id.*); (v) starting salaries by category reflect full-time job (*e.g.*, *id.* at C00585); and (vi) data is based on voluntary reports and "may not be a very accurate reflection . . . of the class as a whole," (*e.g.*, *id.* at C00598). (*See generally id.* at C00575-C00749, *ABA Official Guides* (2006-2012).)

2. DePaul Published Employment Data.

In addition to reporting employment data to the ABA, DePaul published employment data "in its print and electronic marketing materials." (Am. Compl. ¶ 41.) Depending on the year, DePaul's publications represented that (i) between 88% to 98% of DePaul graduates "reported employment" within nine months of graduation; (ii) the "average starting salary" for graduates reporting employment in business or private practice was between $57,127 and

$74,267; and (iii) the "starting salary range" had a low end of $20,000 to $30,000 per year. (*See id.* ¶¶ 35-36; R.I at C00070, C00073; R.II at C00326, C00328.)

C. Plaintiffs Enroll at DePaul College of Law.

Plaintiffs allege that they enrolled at DePaul in "reliance" on the employment information that DePaul published. (*E.g.*, Am. Compl. ¶¶ 10(d), 62, 64.) They further allege to have "investigated the Employment Information they received to the extent reasonably necessary." (*Id.* ¶ 63.) Between 2007 and 2011, each Plaintiff graduated from DePaul with a J.D. degree and then passed the bar and became a licensed attorney. (*Id.* ¶¶ 10-18.) Though some Plaintiffs found jobs as lawyers, others did not, and all of them say that their salaries are "far too low" to service their student loan debt. (*Id.*)

D. Unable to Quickly Secure The Lucrative Employment They Wanted, Plaintiffs Filed Suit.

On February 1, 2012, Plaintiffs filed this putative class action against DePaul and certain fictitious DePaul employees referred to as "Does 1-20." (*See* R.I at C00003-C00059, Compl.) Plaintiffs' original 57-page complaint took on the entire academy in the course of alleging that DePaul manipulated its post-graduate employment data. (*See id.* ¶ 1 ("This action seeks to remedy a systemic, ongoing fraud that is ubiquitous in the legal education industry and threatens to leave a generation of law students in dire financial straits."); *id.* ¶ 81 (alleging that the ABA "has been largely derelict in its duties").)

Their current pleading is different and more modest. On April 6, 2012, before DePaul answered or otherwise pleaded. Plaintiffs filed an Amended Complaint—now 38-pages—that shed many factual allegations, re-tooled their legal theories, and dispensed with exhibits.[3] (*See*

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[3] The Amended Complaint was filed in the U.S. District Court during the brief period between removal to federal court and remand to this Court. (R.I at C00237; R.II at C00360.)

S.II at C00337-C00375, Am. Compl.) It has five counts: violation of the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1 *et seq.* (Count I); common law fraud (Counts II & IV); and negligent misrepresentation (Counts III & V).

Plaintiffs complain that DePaul represented that its graduates had high post-graduate employment rates, but did not identify the number of graduates with full-time permanent jobs requiring or preferring a law degree. (Am. Compl. ¶¶ 35-40.) Plaintiffs further complain that they were misled by DePaul's publication of certain salary information reported by recent graduates. (*Id.*) Plaintiffs also contend that DePaul misrepresented their chances or odds of obtaining legal employment. (*Id.* ¶ 67.) As for damages, Plaintiffs allege that they each overpaid for their legal education and have diminished lifetime earning potential resulting from DePaul's actions. (*Id.* ¶¶ 65-69.)

E. The Trial Court Dismissed this Action.

DePaul thereafter moved to dismiss and on September 11, 2012, the trial court dismissed the action with prejudice under 735 ILCS 5/2-615 and 2-619(a)(1), (9). (*See* R.II at C00347-C00359, Cir. Ct. Memo. & Opinion ("Order").) Under Section 2-615, the court explained that Plaintiffs do not allege that any of the employment data was false and that their allegations that the data was misleading fail as a matter of law. (Order at 3-4.) To the extent Plaintiffs also claimed fraudulent concealment, the court rejected that claim too, holding that they failed to plead the existence of any duty to speak. (*Id.* at 4-6.)

The court further held that Plaintiffs failed to allege sufficient facts to support the elements of reasonable reliance and causation (*id.* at 6-7), and that they failed to allege any actual damages, much less any that could be quantified without inviting rank speculation (*id.* at 7-9). Plaintiffs' claims of negligent misrepresentation, the court explained, failed because Plaintiffs

cannot plead that DePaul is "in the business" of providing historical employment data for the guidance of others in their business transactions. (*Id.* at 10-11.)

Additionally, under Section 2-619(a)(9), the court held that Plaintiffs' statutory fraud claim failed because DePaul reported its employment data as required by ABA rules enacted pursuant to federal law. (*Id.* at 9-10.) And under Section 2-619(a)(1), the court held that it lacked subject-matter jurisdiction over Plaintiffs' claims against the fictitious defendants referred to as "Does 1-20." (*Id.* at 11.)

STANDARD OF REVIEW

A. Motion to Dismiss Under 735 ILCS 5/2-615 (*Issue 1*).

This Court reviews *de novo* the circuit court's ruling on a motion to dismiss for failure to state a cause of action under 735 ILCS 5/2-615. *E.g.*, *Dratewska-Zator v. Rutherford*, 2013 IL App (1st) 122699, ¶ 16 (2013). "Because Illinois is a fact-pleading jurisdiction, a plaintiff must allege facts, not mere conclusions, to establish his or her claim as a viable cause of action." *Napleton v. Vill. of Hinsdale*, 229 Ill. 2d 296, 305 (2008). A motion to dismiss under Section 2-615 treats "well-pleaded facts" as true, but ignores "conclusions of law or factual conclusions that are unsupported by allegations of specific facts." *Barille v. Sears Roebuck & Co.*, 289 Ill. App. 3d 171, 174 (1st Dist. 1997). Dismissal is appropriate "[i]f after disregarding any legal and factual conclusions the complaint does not allege sufficient facts to state a cause of action." *Id.*

Claims of statutory and common-law fraud must be pleaded with specificity and particularity. *See Sklodowski v. Countrywide Home Loans, Inc.*, 358 Ill. App. 3d 696, 703 (1st Dist. 2005) ("An action under the Consumer Fraud Act must be pleaded with the same specificity that has always been a prerequisite to an action for common law fraud . . . the complaint must state with particularity and specificity the deceptive manner of defendant's acts or practices . . . .") (internal citations and quotations omitted).

B. Motion to Dismiss Under 735 ILCS 5/2-619(a) (*Issue 2*).

This Court reviews *de novo* the circuit court's ruling on a motion to dismiss under 735 ILCS 5/2-619(a). *E.g.*, *Rutherford*, 2013 IL App (1st) 122699, ¶ 16. "The purpose of a section 2-619 motion to dismiss . . . is to dispose of issues of law and easily proven issues of fact at the outset of litigation." *Id.* Under the statute, a defendant may move to dismiss on bases including that "the court does not have jurisdiction of the subject matter of the action" and "the claim

asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a)(1), (9).

C. Motion for Leave to Amend (*Issue 3*).

"A trial court is free to exercise its discretion in granting motions to amend and its decision will not be reversed absent an abuse of discretion." *1515 N. Wells, LP v. 1513 N. Wells, LLC*, 392 Ill. App. 3d 863, 870 (1st Dist. 2009); *accord Hume & Liechty Veterinary Assocs. v. Hodes*, 259 Ill. App. 3d 367, 370 (1st Dist. 1994) ("we will not disturb a trial court's decision dismissing a complaint with prejudice absent an abuse of discretion"). In reviewing for abuse of discretion, this Court will consider whether the amendment would be futile; whether there were earlier opportunities to amend; and also the timeliness of the amendment and its potential prejudice and surprise to the other party. *See 1515 N. Wells, LP*, 392 Ill. App. 3d at 870. An action is properly dismissed with prejudice where the plaintiff never requested leave to amend. *See LaSalle Nat'l Bank v. City Suites, Inc.*, 325 Ill. App. 3d 780, 791 (1st Dist. 2001) ("the circuit court cannot be said to have abused its discretion in denying a request that was never made"); *accord* 735 ILCS 5/2-616 (amendment allowable "any time before final judgment").

ARGUMENT

Plaintiffs strain to rescue their claims. Rather than demonstrate any legal error below, they resort to hyperbolic mischaracterization in an attempt to recast the record. Plaintiffs make wild analogies—to lottery tickets in the trial court and to *Enron* now on appeal—and accuse the trial court of erring in rulings that it never made. (*See* Pls.' Br. at 22, 27, 32, 34 ("erred" in "treating this case as a promissory fraud case," in "requiring predictions of [the] future [for fraud]," in "holding that the [data] was not a 'material' fact," and in "holding that DePaul's disclosure of some truthful information gave DePaul immunity for false statements").)

This case, of course, is not *Enron*—it has nothing to do with publicly traded securities and turns on the legal sufficiency of Plaintiffs' allegations under Illinois law. (*Cf. id.* at 22 ("it is important to focus on what Plaintiffs actually alleged . . . .").) Instead of exposing another great American fraud, this lawsuit is just another example of misplaced blame in the shadows of a painful economic recession. (*See* Order at 8.)

For numerous independent reasons, the trial court's judgment of dismissal should be affirmed. Initially, Plaintiffs have abandoned their claims against "Does 1-20" and for negligent misrepresentation and fraudulent concealment. (*See infra* § I.) All of their claims were properly dismissed for lack of any actionable conduct, damages, and causation. (*See infra* §§ II(A), (B).) The common-law claims were properly dismissed on the additional basis that Plaintiffs cannot plead reliance. (*See infra* § II(C).) If the Court reaches the issue, the statutory fraud claims were properly dismissed under Section 2-619(a)(9) because DePaul falls within the safe harbor provision of the statute. (*See infra* § III.) Finally, because Plaintiffs never sought leave to amend their amended complaint, and amendment would not be appropriate anyway, the trial court did not abuse its discretion in dismissing this action with prejudice. (*See infra* § IV.)

I. PLAINTIFFS HAVE ABANDONED THEIR CLAIMS AGAINST "DOES 1-20" AND FOR NEGLIGENT MISREPRESENTATION AND FRAUDULENT CONCEALMENT.

A. Plaintiffs Do Not Challenge the Dismissal of Their Claims Against the Fictitious Defendants, "Does 1-20."

The trial court held that it lacks subject-matter jurisdiction over Plaintiffs' claims against "Does 1-20" because "Illinois does not allow a plaintiff to sue a fictitious defendant," making "[s]uch suits . . . a legal nullity." (Order at 11 (citing *Bogseth v. Emanual*, 166 Ill. 2d 507, 513 (1995); *Ohio Millers Mut. Ins. Co. v. Inter-Ins. Exch. of Ill.*, 367 Ill. 44, 54 (1937).) Plaintiffs do not challenge the trial court's ruling on appeal and this Court should therefore "not address" the issue. *Timothy Whelan Law Assocs. v. Kruppe*, 409 Ill. App. 3d 359, 365 (2d Dist. 2011); *see also Aliano v. Ferriss*, 2013 IL App (1st) 120242, ¶ 29 (2013) (declining to review aspect of dismissal where the appellant "did not present any argument regarding this issue in his brief").

B. Plaintiffs Do Not Challenge the Dismissal of Their Negligent Misrepresentation Claims.

The trial court held that Plaintiffs failed to state a cause of action for negligent misrepresentation because they "have not, and cannot, allege [that DePaul is] in the business of providing information for the for the guidance of others in their business transactions." (Order at 10 (citing, *e.g.*, *Fox Assocs., Inc. v. Robert Half Int'l, Inc.*, 334 Ill. App. 3d 90, 94-95 (1st Dist. 2002); *Lozosky v. Illinois*, 54 Ill. Ct. Cl. 470, 474-75 (2001).) Here too, Plaintiffs do not challenge the trial court's ruling (*cf.* Pls.' Br. at 44-45), so this Court should "not address" the issue. *Kruppe*, 409 Ill. App. 3d at 365; *see also Ferriss*, 2013 IL App (1st) 120242, ¶ 29.

C. Plaintiffs Have Abandoned Any Claims of Fraudulent Concealment.

The trial court liberally construed the Amended Complaint to assert claims of both fraudulent misrepresentation and fraudulent concealment or omission. (*See* Order at 3-4.) The court dismissed the latter because Plaintiffs failed to plead any duty to speak, an element of the

claim.[4] (*Id.* at 4-6.) On appeal, Plaintiffs "disagree" with the trial court's alternative treatment of this matter as "a case of fraud by omission," explaining that "this is a routine fraud case where DePaul made false statements of material fact . . . ." (Pls.' Br. at 39.) In light of Plaintiffs' express abandonment of any fraudulent concealment claim, any challenge to the trial court's disposition of the claim is moot and appellate review is unnecessary. Though Plaintiffs "nonetheless" invite a ruling on the merits (*id.*), no live controversy exists and the Court should not play ball. *E.g.*, *People v. Beard*, 301 Ill. App. 3d 279, 283 (4th Dist. 1998) (declining to consider issues that were abandoned in appellate brief).

II. THIS COURT SHOULD AFFIRM THE DISMISSAL OF THE ENTIRE ACTION FOR FAILURE TO STATE A CAUSE OF ACTION.

The pleading defects in this case are stark. Though failure to plead just one element is fatal, Plaintiffs fail to plead three elements common to all of their claims—actionable conduct, damages, and causation. They also fail to plead the required element of reliance for their common law claims. For these reasons, this Court should affirm the trial court's dismissal of the action in its entirety. *See Dloogatch v. Brincat*, 396 Ill. App. 3d 842, 850 (1st Dist. 2009) (liberal construction cannot overcome failure to plead sufficient facts); *Behr v. Club Med, Inc.*,

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[4] As the trial court explained more fully, the parties are not fiduciaries, and "[a]s prospective students, Plaintiffs had no relationship with DePaul . . . . Nor have Plaintiffs alleged any facts, as opposed to legal conclusions, showing that a special relationship existed after they became DePaul students. . . . Plaintiffs allege facts showing nothing more than a contractual relationship between themselves and DePaul. Plaintiffs paid DePaul tuition and DePaul provided a legal education in return." (Order at 4-5 (citing, *e.g.*, *Benson v. Stafford*, 407 Ill. App. 3d 902, 918 (1st Dist. 2010); *Carey Elec. Contracting, Inc. v. First Nat'l Bank of Elgin*, 74 Ill. App. 3d 233, 238 (2d Dist. 1978); *Steinberg v. Chi. Med. Sch.*, 69 Ill. 2d 320 (1977)); *accord Valente v. Univ. of Dayton*, 438 F. App'x 381, 386-87 (6th Cir. 2011); *Ohio Univ. Bd. of Trs. v. Smith*, 132 Ohio App. 3d 211, 220 (Ct. App. 1999).) Nor has DePaul assumed any duty to speak—as the trial court explained, they make no argument in that regard and merely cite a handful of inapt cases involving concealment following specific requests for information. (*See* Pls.' Br. at 39-44; *see also* Order at 5-6 (persuasively distinguishing the cited cases).)

190 Ill. App. 3d 396, 409 (1st Dist. 1989) ("all . . . essential elements must be specifically alleged in the complaint").

A. The Employment Information Was Not False, Misleading or Deceptive (All Counts).

Plaintiffs' claims depend on the existence of a false or materially misleading statement or some other deception. Their allegations are the same for all claims[5]—namely, that DePaul's employment information was materially misleading because: (1) "the context . . . made it reasonably appear . . . that the jobs reported represented full-time permanent employment for which a J.D. degree was required or preferred"; (2) the "statistics purported to be a reasonable projection by DePaul of Plaintiffs' post-graduate prospects if he or she enrolled in DePaul rather than elsewhere"; and (3) the average salary by category included only full-time employment, which generally pays more than part-time employment. (*See* Am. Compl. ¶¶ 37, 39(b), 45, 67.)

As explained below, none of DePaul's representations were false (that is, literally untrue), nor were they materially misleading or deceptive under the circumstances as alleged. *See Bober v. Glaxo Wellcome PLC*, 246 F.3d 934, 938-40 (7th Cir. 2001) (affirming dismissal of Illinois statutory fraud claim where statements at issue could not be reasonably read as misrepresentations in light of all available information).

1. Plaintiffs Cannot Plead Falsity.

Plaintiffs attack the trial court for stating that the Amended Complaint "'does not allege that any of the Employment Information was false.'" (Pls.' Br. at 17 (quoting Order at 4).) But

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[5] (*See, e.g.*, Am. Compl. ¶¶ 35-40, 90, 105, 115, 129, 136.) Plaintiffs do not distinguish between the common-law element of a false or misleading statement, and the statutory element of deception. DePaul accordingly addresses these elements together, as Plaintiffs did below. (*See, e.g.*, S.II at C00472, Pls.' Resp. to DePaul's Mot. to Dismiss (stating that the element of material misrepresentation for common law fraud was satisfied for all of the reasons argued as to the element of deception for statutory fraud).)

it plainly does not. Plaintiffs themselves said below that "the issue is not what DePaul disclosed but rather what it did not disclose." (S.II at C00460, Pls.' Resp. to DePaul's Mot. to Dismiss.) Indeed, the Amended Complaint does not identify any affirmative statement by DePaul that was factually untrue; it instead alleges misrepresentations as the basis for liability. (*E.g.*, Am. Compl. § IV(B) (heading: "Misrepresentations").)

Though Plaintiffs now say that this is a case of falsity, they point only to rote recitations of the word "false" strewn about the Amended Complaint. (*E.g.*, Pls.' Br. at 17 (citing Am. Compl. ¶¶ 10(e), 11(e), 12(e), 13(e), 14(e), 15(e), 16(e), 17(e), 18(e), 39, 46).) Plaintiffs on appeal still do not identify any false statement and their arguments only confirm that their claims are of misrepresentation, not falsity. (*See* Pls.' Br. at 6 (equating "false" with "inherently misleading"); *id.* at 20 (equating "false" with "false impression")); *accord Aliano*, 2013 IL App (1st) 120242, ¶ 14 (discussing concept of true but misleading). Accordingly, Plaintiffs have not adequately pleaded any false statement. *See MacDonald v. Thomas M. Cooley Law Sch.*, 724 F.3d 654, 663 (6th Cir. 2013) (so holding on similar allegations).

2. Plaintiffs Cannot Plead Any Misrepresentation or Other Deception.

Not only have Plaintiffs failed to plead falsity, they have also failed to plead any misrepresentation or other deception. Their allegations are considered in turn.

a. "Employment" Means "Employment."

DePaul never represented that the percentage of its graduates who "reported employment" meant anything other than just that. Plaintiffs, however, contend that the "context" of the statistics made it "reasonably appear" that "employment" actually meant "employment in full-time permanent employment for which a J.D. degree was required or preferred." (*See* Am. Compl. ¶¶ 37, 39-40; Pls.' Br. at 6.) On this basis they conclude that the employment totals are misleading and deceptive.

These allegations fail as a matter of law. Plaintiffs do not identify any statement that was factually untrue nor do they allege how the "context" of the data made it "reasonably appear" to be so limited in scope, particularly where DePaul clearly stated that percentages referred to "employment." *See* WEBSTER'S II, NEW COLLEGE DICTIONARY (2001) (defining employment as the "act of employment or state of being employed"; the "work in which one is engaged: business"; and an "activity to which one devotes time"). This is not a case like *Harnish*, where the law school's website "displayed" employment data "directly above" the phrase "Full Time Legal Employers." (*Cf.* Pls.' Br. at 47-48 (citing *Harnish v. Widener Univ. Sch. of Law*, --- F. Supp. 2d ----, 2013 WL 1149166, at *6 (D.N.J. Mar. 20, 2013).)

Plaintiffs' reading of "employment" to mean something else amounts to a "subjective misunderstanding" that depends on their unreasonable assumption that 100% of recent graduates returning employment surveys held full-time legal positions. *See MacDonald*, 724 F.3d at 663. Not only did DePaul report starting salaries as low as $20,000, and employment in general categories like "business" and "unknown," but each annual edition of the *ABA Official Guide* expressly stated that (i) the total employment data includes non-legal and part-time jobs; (ii) the jobs reported in private practice includes administrative positions; (iii) the jobs reported in business include those in retail; and (iv) some reported jobs do not require legal training. (*See* S.III at C00575-C00749); *accord Bevelacqua v. Brooklyn Law Sch.*, 39 Misc. 3d 1216(A), at *6 (N.Y. Sup. Ct. Apr. 22, 2013) (table) (graduates unreasonably assumed that employment categories like corporation excluded non-legal positions); *Robinson v. Toyota Motor Credit Corp.*, 315 Ill. App. 3d 1086, 1095 (1st Dist. 2000) (full information defeats claims of deception).

b. DePaul Made No Representation About Plaintiffs' "Odds" or "Chances" of Securing Employment.

Plaintiffs also contend that DePaul "misrepresented their odds" of success in the legal market soon after graduation. (Pls.' Br. at 22; *see also* Am. Compl. ¶¶ 45, 67.) But as the trial court recognized, Plaintiffs have not identified "any statement made by DePaul which predicted Plaintiffs' odds of obtaining employment as a full-time lawyer [or] which suggested that Plaintiffs would obtain full-time employment as a lawyer at a certain salary within nine months of graduation." (Order at 4.) Nor have they identified any promise whatsoever about their future employment prospects.

No reasonable person could glean such a suggestion or promise from the employment data, which consists entirely of historical data from students nine months after their graduation (and a few years before Plaintiffs would enter the job market). (*See* Am. Compl. ¶ 35.) The reasonable college-educated person would understand that aggregate, historical data about recent graduates cannot predict a law student's employment prospects, both because market conditions change (as they did) and myriad other factors are at play, including personal choice and effort, law school performance and grades, membership on law review, and professional connections. (*See, e.g.*, S.III at C00583, *ABA Official Guide* (2006) ("Future demand for people with legal training is almost impossible to predict.")); *accord Blane v. Ala. Commercial Coll., Inc.*, 585 So. 2d 866, 868 (Ala. 1991) (fraud claim alleging that student was unable to find employment upon graduation failed because the college did not guarantee employment, but merely promised to provide the student with a minimum skill set to obtain employment in the pertinent field).

c. DePaul Expressly Disclosed the Range of Salaries Reported.

Finally, Plaintiffs allege that DePaul misrepresented the average reported starting salary in particular employment categories by including only full-time workers. (*See* Am. Compl. ¶

39(b); Pls.' Br. at 6.) Here too, Plaintiffs cannot plead any false or misleading statement or other deception. DePaul clearly disclosed "a range of salaries, which included salaries as low as $20,000" (Order at 4), and indeed, the *ABA Official Guide* as early as 2006 stated that the "highest paying jobs were the exception rather than the rule." (S.III at C00585.) The only reasonable take-away from DePaul's salary data is that some graduates secured high-paying jobs and that others secured significantly more modest salaries. *See Bober*, 246 F.3d at 939-40 (rejecting claim that defendant falsely stated that Zantac 75 and Zantac 150 were substitutes, where "examining the statements at issue, together and in the context of the other information available to Zantac users, eliminate[d] any possibility of deception").

3. Plaintiffs' Discussion of Recent ABA Activities is Irrelevant.

In their section on deception, Plaintiffs argue that "because law schools such as DePaul were deceiving students and the public, the ABA instituted reforms." (Pls.' Br. at 20.) Plaintiffs do not connect this argument to the law or to DePaul. If they are arguing that recent ABA reforms inform the "deceptiveness" of DePaul's prior actions for purposes of stating a cause of action, their argument would fail for numerous reasons. Plaintiffs never so argued below; they cite no legal authority and rely exclusively instead on a 2013 law review article not in the record; and they neither plead nor cite any facts connecting the ABA's actions to DePaul specifically.

B. Plaintiffs Cannot Plead Damages or Causation (All Counts).

Plaintiffs allege harm in that they overpaid for their legal education and will have diminished lifetime earnings, as this chart summarizes:

Alleged Injury	Proposed Measure of Damages
Overpaid for Legal Education	Damages = (total tuition payment) *multiplied by* ("X"). "X" equals the % that "DePaul inflated its employment statistics"
Diminished Lifetime Earnings	Damages = (expected "lifetime income" based on represented data) *minus* (expected "lifetime income" based on "true" data)

(Am. Compl. ¶¶ 65-69.) The trial court held that Plaintiffs' alleged damages fail as a matter of law and that Plaintiffs further could not establish the element of causation. (Order at 7-9.) On either basis—want of cognizable damages or proximate causation, elements common to all claims[6]—the trial court's judgment of dismissal should be affirmed. *See Rogalla v. Christie Clinic, P.C.*, 341 Ill. App. 3d 410, 420 (4th Dist. 2003) (affirming dismissal where "no particular factual allegations link[ed] the alleged misrepresentations . . . to the alleged injury").

1. Plaintiffs Cannot Allege Actual and Determinable Damages.

Plaintiffs make two assignments of error relating to the element of damages. *First*, they say the trial court erred in "premature[ly]" considering their damages allegations because they have not yet had discovery. (Pls.' Br. at 27, 30.) Not only did Plaintiffs fail to squarely present this argument to the trial court,[7] *see Universal Underwriters Insurance Co. v. Judge & James, Ltd.*, 372 Ill. App. 3d 372, 387 (1st Dist. 2007) (issues not adequately presented below cannot be raised on appeal), but the trial court properly considered the legal sufficiency of their damages allegations on a motion to dismiss, *see Yu v. Int'l Bus. Mach. Corp.*, 314 Ill. App. 3d 892, 897

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[6] Damages are a required element for each of Plaintiffs' claims. *see Doogatch*, 396 Ill. App. 3d at 847 (common-law fraud); *Petty v. Chrysler Corp.*, 343 Ill. App. 3d 815, 823 (1st Dist. 2003) (statutory fraud); *Jeffrey v. Chi. Transit Auth.*, 37 Ill. App. 2d 327, 336 (1st Dist. 1962) (negligence), and even then speculative damages are "not recoverable in a lawsuit." *Johnson Bank v. George Korbakes & Co. LLP*, 472 F.3d 439, 444 (7th Cir. 2006). Causation is additionally required for of each of Plaintiffs' claims. *See Lewis v. Lead Indus. Ass'n*, 342 Ill. App. 3d 95, 104-05 (1st Dist. 2003) (common law fraud); *Adler v. William Blair & Co.*, 271 Ill. App. 3d 117, 128 (1st Dist. 1995) (statutory fraud); *Zahorik v. Smith Barney, Harris Upham & Co.*, 664 F. Supp. 309, 313 (N.D. Ill. 1987) (negligent misrepresentation).

[7] Plaintiffs below pasted a block quote that contained a short reference to premature dismissal in another case, without any legal analysis or argument whatsoever. (S.II at C000471.)

(1st Dist. 2000) ("Failure to state sufficient facts to constitute a legally cognizable present injury or damage mandates dismissal . . . .").

Second, Plaintiffs argue that the trial court erred in holding that they failed to adequately plead actual and ascertainable damages. (Pls.' Br. at 27-30.) But they make no argument about actual damages, merely concluding that they suffered harm, without any supporting record or legal citation.[8] (*Id.* at 27.) Because "mere contentions, without argument or citation of authority, do not merit consideration on appeal," the argument is waived. *Palm v. 2800 Lake Shore Drive Condo. Ass'n*, 401 Ill. App. 3d 868, 881 (1st Dist. 2010).

Waiver aside, Plaintiffs cannot plead any actual harm, as the trial court held. (Order at 7-8.) Unlike personal injury plaintiffs, these graduates remain physically and mentally whole and their innate economic potential continues unabated. Plaintiffs paid tuition to DePaul in exchange for a legal education; that is what they got, and DePaul made no promise of anything more. Historical employment data has no bearing on the legal education they received. *See City of Chi. v. Mich. Beach Hous. Coop.*, 297 Ill. App. 3d 317, 324 (1st Dist. 1998) ("To show injury, plaintiffs must allege facts which show the value of what they received was not equal to the value of what they were promised.").

Additionally, the damages that Plaintiffs seek are indeterminable as a matter of law and their award would invite rank speculation. *See Petty v. Chrysler Corp.*, 343 Ill. App. 3d 815, 823 (1st Dist. 2003) ("[D]amages may not be predicated on mere speculation, hypothesis, conjecture or whim"); *accord Gomez-Jimenez v. N.Y. Law Sch.*, 36 Misc. 3d 230, 248 n.9, 260 (N.Y. Sup. Ct. 2012) ("*Gomez*") (dismissing analogous claim for damages as "too speculative and remote to

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[8] Plaintiffs cite three journal articles, none of which are referenced in the Amended Complaint or relate to DePaul specifically. One even post-dates this case. (Pls.' Br. at 27 n.6.)

be quantified as a remedy under the law"). Plaintiffs "identify no mechanism" to calculate the value of a law degree; assign a portion of tuition payments to the employment data; or assess the lifetime earning potential of a law graduate based on a snapshot of historical employment data reported by recent graduates. (*See* Order at 7-8.) The trial court's reasoning is spot on:

> Even assuming that the worth of a J.D. degree is based solely upon what the holder of the degree is able to earn as a lawyer, a highly dubious proposition, what a lawyer earns, upon graduation and over a lifetime, is based on [] myriad [] factors. These factors include, but are not limited to, the state of the economy, the overall availability of jobs in the legal profession, the overall academic record of the graduate, any practical experience of the graduate such as summer associate positions, internships and clinics, the efforts put into obtaining legal employment, whether the graduate interviews well, and the geographic area in which employment is sought. Additional factors impacting the amount a lawyer may or may not earn over a lifetime include, but are not limited to, whether the lawyer chooses to practice in the private or public sector; whether the lawyer takes time off for childrearing or other reasons, whether the lawyer, if in private practice, makes partner, economic conditions over the course of the lawyer's lifetime, etc. None of these factors can be determined with any kind of certainty, and, therefore, the amount of damages, if any, sustained by Plaintiffs is wholly speculative.

(*Id.*) *Cf. In re Marriage of Weinstein*, 128 Ill. App. 3d 234, 244-45 (1st Dist. 1984) (stating that a professional degree "is at most a mere expectancy of some future income or earnings" and has no "present assignable value" and does not "represent a guarantee of receipt of a set amount in the future"); *accord Gomez*, 36 Misc. 3d at 248 n.9, 260 (holding that damages for lost value of the education, which depend on the intrinsic worth of a law degree, are "far too speculative to formulate a valid claim for damages").

2. There Is No Causal Connection Between Post-Graduation Employment Data and Any Injury.

On the critical element of proximate causation, the trial court correctly held that "Plaintiffs do not allege facts, as opposed to legal conclusions, connecting DePaul's alleged

fraud to their inability to obtain full-time legal employment sufficient to repay their loans." (Order at 7); *see also Mulligan v. QVC, Inc.*, 382 Ill. App. 3d 620, 630 (1st Dist. 2008) (stating that the conduct must be "the cause-in-fact or the 'but for' cause of the injury").

Plaintiffs make only scant argument on appeal. (*See* Pls.' Br. at 25-27.) They argue that they adequately pleaded causation because "[e]ach plaintiff alleged that, had he/she known that the [employment information was] false, he/she would not have attended DePaul." (*Id.* at 25 (citing Am. Compl. ¶¶ 10(e), 11(e), 12(e), 13(e), 14(e), 15(e), 16(e), 17(e), 18(e), 60-62).) The allegations that Plaintiffs cite, however, are bare conclusions that do not come close to being well-pleaded allegations of causation.[9] *See Cove Mgmt. v. AFLAC, Inc.*, 2013 IL App (1st) 120884, ¶ 21 (2013) ("a court cannot accept as true mere conclusions unsupported by specific facts"); *Barham v. Knickrehm*, 277 Ill. App. 3d 1034, 1037 (3d Dist. 1996) ("A complaint . . . is insufficient if it states mere conclusions, whether of fact or law.").

Even if Plaintiffs enrolled in DePaul based on their reading of DePaul's employment data, the causal link to their alleged injuries is still missing. Plaintiffs do not allege that they would have realized their desired lifetime earnings but-for DePaul's conduct. They do not even allege that they applied (must less were accepted) to another law school. Plaintiffs cannot explain how the value of their legal education (if quantifiable at all) depends on a snapshot of the historical experience of graduates nine months after their graduation. It challenges common sense to suggest, as Plaintiffs do, that there is marginal lifetime income to be gained or lost based on

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[9] (*See* Am. Compl. ¶¶ 10(e), 11(e), 12(e), 13(e), 14(e), 15(e), 16(e), 16(e), 18(e) ("Had [the particular plaintiff] known that the Employment Information was incomplete, false and materially misleading, [he or she] would not have enrolled or continued [his or her] enrollment at DePaul."); *id.* ¶ 60 ("In summary, Defendants knew and intended that Plaintiffs and other students would refer to and rely on the Employment Information."); *id.* ¶ 61 ("Such reliance was reasonable."); *id.* ¶ 62 ("Plaintiffs did rely on the Employment Information.").)

historical employment data from recent graduates that the school reports on its website. So too does Plaintiffs' suggestion that the value of their legal education is tied to employment data about other graduates nine months after their graduation.

C. Plaintiffs Cannot Allege Actual or Reasonable Reliance (Counts II & IV).

Plaintiffs challenge the trial court's holding that they failed to plead actual and reasonable reliance (Pls.' Br. at 36-39), a requirement of their common law claims. *See Simmons v. Campion*, 2013 IL App (3d) 120562, ¶ 35 (2013). *First*, as to actual reliance, Plaintiffs argue that they "read and relied upon the Employment Information published by DePaul" in deciding to enroll and continued to be enrolled at DePaul. (Pls.' Br. at 36.) But the Amended Complaint makes no allegation that Plaintiffs "read" anything. It does not even identify the particular materials that each Plaintiff allegedly received and relied upon. Instead, the Amended Complaint offers only threadbare conclusions of reliance (*e.g.*, Am. Comp. ¶¶ 10(d), 11(d), 12(d), 13(d), 14(d), 15(d), 16(d), 17(d), 18(d), 51-52, 58, 61-62, 64-65), which give "no insight into facts that plaintiffs would ever be able to prove supporting that claim." *Dloogatch*, 396 Ill. App. 3d at 849-50 (conclusion of reliance on audit opinions insufficient).

Second, as to reasonable reliance, Plaintiffs offer the same conclusions (*e.g.*, Am. Compl. ¶¶ 51-52, 58, 61-62, 64-65), and further argue that their reliance on DePaul's materials was reasonable because DePaul "is a pillar of the legal community" and the "sole source" of information. (Pls.' Br. at 36-37.) This will not do. *See Weis v. State Farm Mut. Auto. Ins. Co.*, 333 Ill. App. 3d 402, 410 (2d Dist. 2002) (affirming dismissal of common law fraud claim where plaintiff failed to allege any facts supporting reasonable reliance).

The Amended Complaint—in addition to being short on facts—conspicuously ignores critical information. It ignores the economic recession and the express statements in the *ABA Official Guides* that would have cleared up any subjective misunderstanding of DePaul's

materials. *See Treuhand-Und Verwaltungsgesellschaft Mbh v. Arbor*, 295 Ill. App. 3d 567, 575 (1st Dist. 1998) ("it is necessary to consider all of the facts within a plaintiff's actual knowledge as well as those that he could have discovered by the exercise of ordinary prudence."). As the trial court stated, Plaintiffs cannot simply "close their eyes to publicly available information on employment opportunities for lawyers . . . ." (Order at 6); *accord Austin v. Albany Law Sch. of Union Univ.*, 957 N.Y.S.2d 833, 844 (Sup. Ct. 2013) (holding that "plaintiffs could not have justifiably relied upon the omission of disaggregated employment data as the basis for assuming that the . . . employment rate . . . fit their particular definition of 'employment'"); *Gomez*, 36 Misc. 3d at 256 (holding that given the recession and the cost of law school, it is "simply not plausible" that law students could have relied on the law school's data—whatever it said—to conclude they would find a job in "the legal profession, commensurate with their education, within nine months of graduation").

More fundamentally, Plaintiffs' blind reliance on relative employment data in "deciding to apply to, enroll and continue to be enrolled at DePaul" (Am. Compl. ¶¶ 10-18) goes against the published advice of almost every law school dean in the nation:

> The idea that all law schools can be measured by the same yardstick ignores the qualities that make you and law schools unique, and is unworthy of being an important influence on the choice you are about to make. As the deans of schools that range across the spectrum of several ratings systems, we strongly urge you to minimize the influence of rankings on your own judgment. In choosing the best school for you, we urge you to get information about all the schools in which you might have some interest . . . . Law schools may all have met the same standards of quality to become accredited, but they are quite different from each other. The unique characterizations of each law school will inform you why one school may be best for you and another school best for someone else. We want you to make the best choice for you.

(*E.g.*, S.III at C00579, *ABA Official Guide* (2006) (published statement of 178 law school deans, reprinted in the introduction to each annual edition of the *ABA Official Guide*).)

III. BECAUSE THE SAFE HARBOR PROVISION APPLIES, THIS COURT SHOULD AFFIRM THE SECTION 2-619 DISMISSAL OF PLAINTIFFS' STATUTORY FRAUD CLAIMS.

The Consumer Fraud and Deceptive Business Practices Act has a safe-harbor provision that "exempt[s] from liability . . . conduct authorized by federal statutes and regulations." *Weatherman v. Gary-Wheaton Bank of Fox Valley, N.A.*, 186 Ill.2d 472, 480 (1999) (citing 815 ILCS 505/10b(1) (exempting "actions or transactions specifically authorized by laws administered by any regulatory body or office acting under statutory authority of . . . the United States")). Here, the trial court correctly held that the safe harbor provision defeats Plaintiffs' statutory fraud claims because (1) DePaul reported its employment data as required by ABA Standard 509; and (2) the ABA acts under the statutory authority of the Higher Education Act, 20 U.S.C. §§ 1001 *et seq.*, as administered by the Department of Education. (*See* Order at 9-10.)

Plaintiffs make two unavailing arguments on appeal. (Pls.' Br. at 30-32.) *First*, they argue without citation that the ABA is not a "regulatory body" under the statute because its federal purpose is limited. (*Id.* at 31.) The trial court properly rejected this argument. (Order at 10.) As the court explained, the U.S. Department of Education recognizes the ABA under the Higher Education Act as the national accreditation agency for law schools. *See* 20 U.S.C. § 1099b; 73 Fed. Reg. 11404, 11405 (Mar. 3, 2008). In that regard, the ABA promulgated Section 508 pursuant to the Act's disclosure provisions, 20 U.S.C. §§ 1092(a)(1)(R) and 1094(a)(8), thereby transforming the ABA into a qualified "regulatory body." *See Chi. Sch. of Automatic Transmissions, Inc. v. Accreditation Alliance*, 44 F.3d 447, 449 (7th Cir. 1994); *accord Thomas M. Cooley Law Sch. v. Am. Bar Ass'n*, 459 F.3d 705, 712 (6th Cir. 2006) (the ABA acts "on behalf of the Secretary and wields the quasi-governmental power").

Second, Plaintiffs argue that the trial court erred "in applying the safe harbor provision to statements" that DePaul made voluntarily to the public because these statements are not

"specifically authorized" by law. (Pls.' Br. at 31-32.) But Plaintiffs never made this or any similar argument below (*see* C00456-C00480), and cannot do so now. *See Chi. Title Ins. Co. v. Aurora Loan Servs., LLC*, 2013 IL App (1st) 123510, ¶ 32 (2013) (argument waived if "made for the first time on appeal"). Even on appeal, Plaintiffs cite no authority for such a distinction or even discuss how their proposed rule would play out on this record, where DePaul reported the same materials to the ABA that it disclosed on its website. (*Cf.* Am. Compl. ¶ 47 (alleging without more that DePaul "had an obligation to report certain data to the ABA").)

IV. THE COURT SHOULD AFFIRM THE DISMISSAL WITH PREJUDICE.

Finally, in the alternative, Plaintiffs appeal "the denial of their request for leave to amend the complaint" (S.IV at C00946, Pls.' Am. Not. of Appeal) and seek remand for "an opportunity to amend." (Pls.' Br. at 45.) But leave to amend was never "denied" because, in fact, Plaintiffs never asked for it. Whether to permit amendment "rests within the sound discretion of the trial court" and there can be no abuse of discretion where, as here, "no exercise of that discretion was requested." *Matanky Realty Grp., Inc. v. Katris*, 367 Ill. App. 3d 839, 844 (1st Dist. 2006) (rejecting as "completely without merit" plaintiff's argument that "the trial court should have offered or encouraged it to amend the pleading without plaintiff initiating such a request"); *LaSalle Nat'l Bank*, 325 Ill. App. 3d at 791 ("the circuit court cannot be said to have abused its discretion in denying a request that was never made").

Moreover, Plaintiffs have "waived any right to question" the prejudice attached to the judgment by never seeking leave to amend or proposing any amendment. *LaSalle Nat'l Bank*, 325 Ill. App. 3d at 791 ("Illinois courts demand that a plaintiff offer an amendment to the trial court before requesting a review of the trial court's discretion in not allowing an amendment to a complaint."); *see also Bajwa v. Metro. Life Ins. Co.*, 208 Ill. 2d 414, 435 (2004) ("where a trial court dismisses a complaint and plaintiff does not seek leave to amend, the cause of action must

stand or fall on the sufficiency of the stricken pleading"). Plaintiffs point to no exceptional circumstances—there are none—warranting relief from waiver. *Cf. People v. Scullark*, 325 Ill. App. 3d 876, 888 (1st Dist. 2001) (remanding for amendment where the appellate court resolved an issue of first impression); *Miller v. Gupta*, 174 Ill. 2d 120, 128-29 (1996) (remanding for amendment in light of developments in the law while the case was on appeal).

Plaintiffs do not need another opportunity to amend their amended complaint. They have already amended their complaint once by *removing* twenty pages of allegations and modifying their legal theories. (*Compare* R.I at C00003-C00065 (original) *with* S.II at C00337-C00375 (amended).) This prior amendment belies any suggestion that Plaintiffs were denied the opportunity to fully present their case. In fact, their pleadings are virtually identical to those used by their counsel in other cases. Amendment additionally would be futile in light of the numerous fundamental legal defects that doom all of Plaintiffs' claims, as explained throughout this brief. There is no set of facts—Plaintiffs indeed point to none—that would entitle them to relief. (*See* Pls.' Br. at 45.)

CONCLUSION

DePaul regrets whenever any of its law graduates fail to realize what they had hoped their legal education would provide. But Plaintiffs were not naive or easily exploitable. They were college-educated adults seeking to become lawyers, which they became. They knew that tuition was a sizable investment for which they would incur substantial debt. More fundamentally, Plaintiffs knew, or should have known, that a professional education is nothing more than the gateway into the profession, not a guarantee of any particular level of professional satisfaction or any amount of lifetime, or near-term, professional earnings.

That these nine DePaul graduates were unable to secure the jobs they wanted early in their professional careers does not translate into legal liability for DePaul. DePaul's obligation

was to provide Plaintiffs with a quality legal education, which they received. Like the generations of wide-eyed law graduates before them, Plaintiffs had the responsibility, if they wanted it, to achieve success in the classroom and land their desired entry-level job after graduation. The Court should affirm the judgment of the circuit court.

Dated: October 9, 2013

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 30 pages.

Dated: October 9, 2013

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CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing **Brief and Argument of Defendants-Appellees** to be served this 9th day of October, 2013, by depositing a copy of the same in the United States mail, first class postage prepaid, and properly addressed to the following counsel of record:

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NO. 12-2817

IN THE ILLINOIS APPELLATE COURT
FOR THE FIRST DISTRICT

JONATHAN PHILLIPS, BRIAN LOKER, ADAM SMESTAD, XAVIER HAILEY, BRENT DAVIDSON, SHELLYE TAYLOR, ALLISON LEARY, JAIME WALSH, MADISON MULLADY, on behalf of themselves and all others similarly situated, Plaintiffs-Appellants, v. DePAUL UNIVERSITY, a/k/a DePAUL UNIVERSITY COLLEGE OF LAW, and DOES 1-20. Defendants-Appellees.	Appeal from the Circuit Court of Cook County, Illinois, County Dept., Chancery Div. Circuit Court Case No. 12 CH 003523 Circuit Court Judge: Hon. Neil Cohen Date of Final Circuit Court Order: September 11, 2012

NOTICE OF FILING

To: All Counsel of Record

PLEASE TAKE NOTICE that on October 9, 2013, the undersigned caused to be filed with the Clerk of the Court of the Illinois Appellate Court for the First District, the attached Brief and Argument of Defendants-Appellees.

Dated: October 9, 2013

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