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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

STEPHANIE LUNA, SANDRA CAMPOS, and DEONTE SIMPKINS, *individually and on behalf of all others similarly situated*,

Plaintiffs,

vs.

UNIVERSITY OF SOUTHERN CALIFORNIA,

Defendant.

Case No. 23STCV09981

DEFENDANT UNIVERSITY OF SOUTHERN CALIFORNIA'S REPLY BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO STRIKE PURSUANT TO CODE OF CIVIL PROCEDURE SECTION 436

Judge:	Kenneth Freeman
Dept.:	014
Date:	March 27, 2024
Time:	11:00 A.M.
Action Filed:	May 4, 2023

CLASS ACTION COMPLAINT

[Reply Brief in Support of Defendant's Demurrer to the First Amended Class Action Complaint filed concurrently herewith]

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I. INTRODUCTION

USC moved to strike Plaintiffs' allegations that rely on plainly nonactionable advertising statements so that the parties could focus discovery and litigation on advertising statements that at least theoretically could support a misrepresentation claim. Plaintiffs spend most of their opposition urging the Court to kick the can down the road—which would only serve to expand discovery and complicate the case.

Statements that USC's online Masters of Social Work program is, for example, "elite" and of the "same quality" as its in-person program are subjective opinion statements, and amount to nothing more than nonactionable puffery. Even if such statements could support an otherwise viable claim, which they cannot, the educational malpractice doctrine and California public policy preclude the Court from passing judgment on the "quality" of the online MSW program or the relative value and efficacy of the online and in-person MSW programs.

Plaintiffs also lack standing to assert an Unruh Act claim for discrimination against veterans, so all allegations related to alleged discrimination against veterans should be stricken. There is no need to wait until class certification for the Court to determine that there is no named Plaintiff who can purport to bring a claim for discrimination based on veteran status.

USC's motion to strike is procedurally proper, will streamline this litigation, and will reduce the burden on the parties and the Court. It should be granted.

II. ARGUMENT

A. Defendant's Motion to Strike is Procedurally Proper

It is telling that Plaintiffs' primary argument seeks to prevent the Court from addressing, at all, the overbroad and nonactionable theories woven into Plaintiffs' Complaint. California law, however, is clear that USC's motion to strike is procedurally proper.

Plaintiffs incorrectly castigate USC's motion as "novel." (Plaintiffs' Opposition ("Opp.") at p. 13.) Not so. Under California Civil Procedure § 435, a party may move to strike "the whole *or any part*" of a pleading. (Code Civ. Proc., § 435, subd. (b), italics added.) The purpose of a motion to strike is to allow a party to object to "any irrelevant, false, or improper matter inserted in any pleading." (Code Civ. Proc., § 436, subd. (a).) The California Supreme Court has recognized

that "[t]he bench and bar are used to thinking of motions to strike as a way of challenging particular allegations within a pleading." (*Baral v. Schnitt* (2016) 1 Cal. 5th 376, 393-394.) That makes good sense: as the Court of Appeal has observed, "defendant(s) should not have to suffer discovery and navigate the often dense thicket of proceedings in summary adjudication" for those portions of a cause of action that are "substantively defective on the face of the complaint." (*PH II, Inc. v. Superior Court* (1995) 33 Cal.App.4th 1680, 1682.)

That is precisely what USC's motion to strike seeks to accomplish. USC challenges the particular allegations in Plaintiffs' Complaint that are improper *because they are not legally actionable*. Plaintiffs allege, for example, that they were defrauded because USC advertised that the School of Social Work's "curriculum places a strong emphasis on the science of social work and preparing graduates to become leaders within the profession" and that "[s]ocial work students at USC receive the most up-to-date education because we are a top-tier research institution, and community-based research informs our curriculum." (FAC ¶ 30.) These statements are accurate; but more importantly, no reasonable consumer would be deceived by this obvious puffery. These statements—e.g., "emphasis on the science of social work," "preparing graduates to become leaders," and "top-tier research institution"—are vague tag lines, lacking specificity or concrete comparison. As discussed further below, Plaintiffs' allegations that they were misled by these advertising statements therefore are not actionable, and the allegations should be stricken.

Plaintiffs object to USC's precision in requesting that the Court strike only specific, nonactionable allegations, but the law is clear that motions to strike can be (and in fact are meant to be) so targeted. "[A] motion to strike can be used to attack the entire pleading, or any part thereof—i.e. *even single words or phrases* (unlike demurrers)." (Weil et al., Cal. Practice Guide, Civil Procedure Before Trial (The Rutter Group 2016) ¶ 7:156, p. 7(I)-70 [cited in *Baral*, *supra*, 1 Cal.5th at p. 394]; see also *Cho v. Chang* (2013) 219 Cal.App.4th 521, 527 [describing the "historic effect of a motion to strike: 'to reach certain kinds of defects in a pleading that are not subject to demurrer'"] [citing 5 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 1008, p. 420].) Here, USC was careful to move to strike only those allegations that are clearly nonactionable—i.e., those allegations that rest on advertising words or phrases that are obvious puffery—leaving

intact the rest of Plaintiffs' allegations. Indeed, if USC had moved to strike whole sections of the Complaint, Plaintiffs surely would have objected that USC's motion was *overbroad*.

USC has good reason for seeking to clarify the scope of Plaintiffs' causes of action at this juncture. Plaintiffs surely will seek discovery regarding the genesis of, basis for, and circumstances surrounding each purported advertising statement by which they allege they were misled. As noted above, motions to strike are specifically intended to avoid subjecting a party (here, USC) to "discovery and . . . the often dense thicket of proceedings in summary adjudication" regarding particular, defective allegations or legal theories. (*PH II*, *supra*, 33 Cal.App.4th at p. 1682.) The parties ought to be expending their resources on conducting discovery into, and litigating, only those allegations that are, at least in theory, *legally valid*. USC's motion to strike is designed to achieve precisely that outcome.

B. Mere Puffery Is Nonactionable And Should Be Stricken

It is black letter law that a deceptive advertising claim cannot be based on statements that are unlikely to induce consumer reliance. (*Demetriades v. Yelp, Inc.* (2014) 228 Cal.App.4th 294, 311.) While statements of fact may support a claim, "mere puffery or opinion" is not actionable. (*Ibid.*) The distinction between fact and puffery comes down to the specificity or generality of an alleged misrepresentation. (See *ibid.*) On one hand, statements regarding "specific or absolute" characteristics may be actionable statements of fact; on the other hand, "general, subjective" statements constitute nonactionable puffery. (*Ibid.*)[1]

The Court need not, and should not, wait until some later date to decide whether the

[1] As noted in USC's opening memorandum, and contrary to Plaintiffs' arguments, USC's advertising statements could be relevant to the unjust enrichment and Unruh Act claims only on the theory that the challenged statements amount to deceptive advertising. (See Mot. to Strike at p. 9, fn.1; Opp. at p. 15, fn.2.) The particular advertising statements USC asks the Court to strike are mere puffery. They cannot amount to deceptive advertising, no matter the technical cause of action, because they are unlikely to deceive the relevant consumers (college graduates seeking graduate-level education). Plaintiffs cannot base a claim on these statements by shoehorning them into causes of action not intended to address false advertising. Plaintiffs plead no facts suggesting that the advertising statements at issue are discriminatory statements, and thus the particular allegations identified in USC's Motion to Strike should be stricken as an improper basis for any of Plaintiffs' claims. (See Opp. at p. 15, fn.2.)

specified advertising phrases are actionable. (See Opp. at p. 14.) Courts routinely, and rightly, determine whether an alleged misrepresentation is a statement of fact or mere puffery in the early stages of a case. (*Murphy v. Twitter, Inc.* (2021) 60 Cal.App.5th 12, 37; *Newcal Industries, Inc. v. Ikon Office Solution* (9th Cir. 2008) 513 F.3d 1038, 1053.) Because the challenged statements do not make up an entire cause of action, USC cannot demur to the statements and instead has moved to strike. (See *Pointe San Diego Residential Community, L.P. v. Procopio, Cory, Hargreaves & Savitch, LLP* (2011) 195 Cal.App.4th 265, 274.)

The cases USC cited in its opening memorandum explain what constitutes nonactionable puffery. (See, e.g., *People v. Johnson & Johnson* (2022) 77 Cal.App.5th 295, 318-319 [stating the legal standards for claims of advertising deception]; *Skinner v. Ken's Foods, Inc.* (2020) 53 Cal.App.5th 938, 948 [same]; *Demetriades*, *supra*, 228 Cal.App.4th at p. 311 [explaining the difference between "representations of fact" and "puffery"]; *Consumer Advocs. v. Echostar Satellite Corp.* (2003) 113 Cal.App.4th 1351, 1361 [affirming trial court's decision that reasonable consumers would view advertising statement that satellite television had "CD quality" audio as "advertising slogan"]; *Osborne v. Subaru of America, Inc.* (1988) 198 Cal.App.3d 646, 660 fn.8 ["Sellers are permitted to 'puff' their products by stating opinions about the quality of the goods so long as they do not cross the line and make factual representations about important characteristics like a product's safety."].) Plaintiffs protest that these cases involved a variety of procedural postures (see Opp. at pp. 13-14), but the determination of whether a particular statement is puffery—and, thus, whether it can give rise to a viable legal claim—does not turn on the stage of the case.

USC's motion seeks to do precisely that: strike particular allegations in Plaintiffs' Complaint that are improper because they cannot support a viable legal claim. For example, college graduates seeking advanced degrees are unlikely to be deceived by the statement that they "will form real connections with distinguished faculty who are leaders in social work." (FAC ¶ 38; see also *Consumer Advocs.*, *supra*, 113 Cal.App.4th at p. 1361 ["'Crystal clear' and 'CD quality' are not factual representations that a given standard is met. Instead, they are boasts, all-but-meaningless superlatives."].) Similarly, the statement that "an accredited online MSW from

USC will carry significant value in any organization's hiring and advancement decisions," while true, is so general and non-specific as to preclude any form of reasonable reliance. (FAC ¶ 42; see also *Consumer Advocs.*, *supra*, 113 Cal.App.4th at p. 1361.) And the statement that the online MSW program will "give[] you the opportunity to earn the same quality education on-campus students receive" is an amorphous statement of the program's caliber, with no specific representation as to any particular characteristic that could mislead a reasonable prospective graduate student. (FAC ¶ 42; see also *Demetriades*, *supra*, 228 Cal.App.4th at p. 311.)

Plaintiffs attempt to link the amorphous, puffery statements that USC seeks to strike with more concrete advertising statements that USC does not seek to strike, but this merely confirms that the broad statements are not actionable on their own. USC has not sought to strike allegations that it allegedly misrepresented concrete features of the online program as compared with the in-person program. USC denies, of course, that those statements were misleading; but importantly, those comparisons (such as whether the two programs had the same faculty) can be litigated. Broad statements that allegedly implied that the online program had the same prestige and quality of education as the in-person program, by contrast, are not actionable.

For example, Plaintiffs argue that advertising the online MSW program as having the "same quality field experience" is a concrete description and different from statements, like "high quality," that other courts have found to be nonactionable puffery. (See Opp. at p. 16-17.) Plaintiffs' case, however, is premised on the allegation that USC "market[ed] its online MSW program . . . on the reputation of . . . its in-person MSW program and the Suzanne-Dworak-Peck School of Social Work," linking the online program to the in-person program's rank and prestige. (See FAC ¶ 3.) Based on Plaintiffs' allegations, an advertising statement that the online program is of the "same quality" as the in-person program is similar to saying the online program is of "high quality." As such, allegations regarding the statement, "same quality," should be stricken as nonactionable puffery—similar to statements like "high quality," "superior quality," and "outstanding quality" that courts have found to be nonactionable puffery. (See *In re Sony Grand Wega KDF-E A10/A20 Series Rear Projection HDTV Television Litigation* (S.D.Cal. 2010) 758

F.Supp.2d 1077, 1088-1089; *Oestreicher v. Alienware Corp.* (N.D.Cal. 2008) 544 F.Supp.2d 964, 973; *Anunziato v. eMachines, Inc.* (C.D.Cal. 2005) 402 F.Supp.2d 1133, 1139-1140.)[2]

Plaintiffs urge the Court to interpret the phrase "same quality field experience" as meaning that the online MSW program's field placements "hav[e] the same attributes or features" as the on-campus program ones, but this interpretation makes no sense. (See Opp. at p. 16.) An online, nationwide program necessarily has different attributes compared to an in-person, Los Angeles-based program. No reasonable consumer would think otherwise.

Plaintiffs cite the Merriam-Webster Dictionary as supposed proof of their interpretation of the term "quality" as meaning no more than "an inherent feature." (Opp. at p. 16.) But that proves too much. The Merriam-Webster Dictionary also defines "quality" as referencing "a degree of excellence" or "superiority in kind." (Merriam-Webster's Dictionary, s.v. quality.) That is exactly how the term "quality" is used in the alleged advertising statements about which Plaintiffs complain, as the broader context of Plaintiffs' Complaint makes clear. Plaintiffs' baseline theory is that they relied on USC's "reputation" as an "elite" institution when deciding to enroll, (see FAC ¶¶ 50, 143, 164, 182), yet received an "inferior" education. (See, e.g., *id.* ¶¶ 60, 116, 206; see also *id.* ¶ 40 ["USC intends to portray its online MSW program this way to induce as many students as possible to apply for and enroll in its online program, banking on the reputation and representations about the quality of its in-person program."].) Notably, in defining "quality" as "degree of excellence," the Merriam-Webster Dictionary provides as an example "the *quality* of competing air service." (Merriam-Webster's Dictionary, s.v. quality, italics in original.) That is directly analogous to the allegedly misleading advertising statement Plaintiffs rely upon here: the "same *quality* field experience." (See, e.g., FAC ¶ 38, italics added.) The example given for "an inherent feature"—Plaintiffs' chosen, and inapt, definition—(see Opp. at p. 16)—on the other hand, is plainly inapplicable here: "had a quality of stridence, dissonance." (Merriam-Webster's Dictionary, s.v. quality.)

[2] In paragraphs 56 and 60 of the Complaint, Plaintiffs describe the advertisements Plaintiffs allege they relied upon, and thus the same reasoning applies, even though it is not a direct quote of an advertisement.

It is clear that USC understood—as a reasonable consumer would have—that the phrase "same *quality* field experience" means something more amorphous than merely identical features. As the alleged advertisements quoted in Plaintiffs' Complaint demonstrate, in many instances USC used only the word "same" and in other instances USC referenced the "same quality." In the list "same USC faculty," "same curriculum," "same quality field experience," and "same career development services," the *only* time the word quality appears is in the phrase "same quality field experience." (See FAC ¶ 2; see also *id.* ¶ 38.) A reasonable consumer would understand "same quality" to mean something other than strictly identical.

Plaintiffs argue that a defendant makes an actionable, factual representation when it "compares" a product to another. (See Opp. at p. 17.) But the details matter. USC is not seeking to strike Plaintiffs' theories that make concrete comparisons, such as "same curriculum." USC is only seeking to strike amorphous puffery comparisons, like "same quality." Plaintiffs cite *People v. Overstock.com, Inc.* (2017) 12 Cal.App.5th 1064, but there the First District Court of Appeal determined that Overstock's inflation of "compare at" prices for items purportedly being sold at discount on its website was likely to mislead consumers. (*Id.* at p. 1081 ["Specifically, the use of strikethrough font ('Compare at ~~$190.00~~') followed by 'Today's Price' and then a precise calculation of the purported savings, clearly suggests the actual item's price has been reduced."].) Alleged misrepresentations about price are actionable—they can be proven or disproven; USC advertising that the online MSW program's field experience was of the "same quality" as the in-person program's is not actionable because it is inherently subjective. USC's statements are akin to the representation held to be nonactionable puffery in *Consumer Advocates, supra*—that a satellite television service had the same "quality" audio as a compact disc. (113 Cal.App.4th at pp. 1356, 1361.) The same goes for the statement here that the online program has the same "quality" field experience as the in-person program: it is nonactionable puffery.

Accordingly, the Court should strike allegations referencing nonactionable advertising statements from the First Amended Complaint, specifically the nonactionable superlatives and advertising slogans in Paragraphs 2, 30, 38, 42, 47, 48, 49, 50, 56, 60, 161, and 184.

C. The Educational Malpractice Doctrine Bars Any Claim Based on the Relative Quality of USC's Online MSW Program

Even if statements about a program's "quality" or "eliteness" could be actionable in some contexts, they are not actionable in the context of an education program. The educational malpractice doctrine bars any claim by Plaintiffs that requires an assessment of the educational or pedagogical quality of USC's online MSW program. California courts do not entertain claims against schools that require "judgments about pedagogical methods or the quality of the school's classes, instructors, curriculum, textbooks, or learning aids." (*Wells v. One2One Learning Foundation* (2006) 39 Cal.4th 1164, 1212.) Here, Plaintiffs' allegations directly implicate the educational malpractice doctrine because they allege that the online MSW program did not offer students the "same quality" education or field experience as the in-person MSW program. At their core, Plaintiffs' claims would require the factfinder to assess the educational characteristics, features, value, and relative worth of the online and in-person programs and assess whether any alleged differences between the two affect the quality of the online program, resulting in "inferior" classroom instruction. (See, e.g., FAC ¶ 60.)

Plaintiffs' arguments to the contrary are unavailing. First, *Wells* does not stand for the proposition that the educational malpractice doctrine does not apply to statutory claims. (See Opp. at p. 18.) In *Wells*, the California Supreme Court held that the plaintiffs' California False Claims Act claim was not barred by the doctrine *only* "[i]nsofar as the complaint allege[d]" that the defendants (i) "offered *no* significant educational services" at all, (ii) committed or wholly failed to do "specific, quantifiable acts" in violation of their charters or the law, or (iii) improperly charged for educational materials or equipment. (*Wells*, *supra*, 39 Cal.4th at pp. 1210-1211.) The Court explained that the key consideration for applicability of the educational malpractice doctrine is whether the claims "challenge the *educational quality or results* of the school's programs." (*Id.* at p. 1212.) That is exactly what Plaintiffs ask here.[3]

[3] Plaintiffs' argument that they received no "classroom instruction . . . at all" (see Opp. at pp. 18-19) is not an allegation they make in their operative Complaint. Instead, the Complaint alleges that the "online MSW program offers classroom instruction" that is "substantially different from and categorically inferior to, USC's in-person classroom instruction." (FAC ¶ 60.)

Plaintiffs' rebuttal that the word "quality" means only "having the same characteristics, attributes or features," (see Opp. at p. 18), is wrong for the reasons discussed above. (See *supra*, p. 9.) And for purposes of the educational malpractice doctrine, it misses the point. At bottom, Plaintiffs allege that the online MSW is "categorically inferior" to the on-campus program due to differences "with respect to the classes, curriculum, faculty, access and resources for clinical placements, and admissions standards." (Opp. at p. 18, citing FAC ¶¶ 60-85.) The finder of fact cannot evaluate Plaintiffs' claims without assessing whether any alleged differences between the online and in-person programs result in an "inferior" or significantly different quality education.

Accordingly, the Court should strike allegations related to the quality of the online MSW program in Paragraphs 2, 38, 42, 48, 56, 60, 161, and 184 of the First Amended Complaint.

D. Plaintiffs Have No Standing to Assert an Unruh Act Claim for Veteran-Status Discrimination

Plaintiffs lack standing to assert an Unruh Act claim for intentional discrimination based on veteran status because they have not alleged that they are veterans or have been discriminated against based on their veteran status. Under the Unruh Act, only "the victims of the discriminatory practices and certain designated others, i.e. district or city attorneys or the Attorney General," have standing to sue. (*Midpeninsula Citizens for Fair Housing v. Westwood Investors* (1990) 221 Cal.App.3d 1377, 1386; Civ. Code, § 52, subd. (c).) Individual plaintiffs must be "the victim of the defendant's discriminatory act." (*Angelucci v. Century Supper Club* (2007) 41 Cal.4th 160, 175.) Here, since no named Plaintiff alleges that he or she was a victim of veteran-based discrimination (and could not), none has standing to assert that claim.

Plaintiffs assert that they have standing because the discriminatory act at issue—broadly—is "USC's policy/practice of targeting hard-sell techniques" at people of color *and* veterans. (Opp. at p. 19.) But that argument ignores the plain language of the Unruh Act, which grants standing only to "the Attorney General, any district attorney or city attorney, *or any person aggrieved*" by the discriminatory conduct at issue. (Civ. Code, § 52, subd. (c), italics added.) While "the Attorney General, any district attorney or any city attorney" might advance a broad-based claim based on a "policy/practice" of the sort Plaintiffs (wrongly) posit, the statute is clear that a private

plaintiff advancing an Unruh Act claim must be "a[] person aggrieved" by the alleged wrong. Insofar as no named Plaintiff is a veteran, Plaintiffs plainly cannot satisfy that requirement with respect to alleged claims of discrimination based on veteran status. (See *ibid.*; see also *Midpeninsula Citizens for Fair Housing*, *supra*, 221 Cal.App.3d at p. 1386 ["In California . . . the state Legislature has specifically conferred standing to sue under the Unruh Act upon the victims of the discriminatory practices and certain designated others, i.e., district or city attorneys or the Attorney General. The California courts have not seen fit to endorse a more expansive interpretation of these standing requirements, and we decline to do so in this case."].)

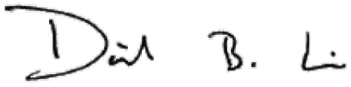
Perhaps tellingly, the bulk of Plaintiffs' argument ignores the question of standing and instead asserts that USC's motion prematurely raises class certification issues. But that is not USC's argument at all; USC's point is that the named Plaintiffs cannot themselves assert any claim for discrimination against veterans. To the extent Plaintiffs suggest that they must have standing because courts have permitted a member of one minority group to assert claims on behalf of other affected groups, that assertion is wholly unsupported. Plaintiffs do not cite a single case addressing standing to assert an Unruh Act claim. (See Opp. at p. 20, citing *Floyd v. City of New York* (S.D.N.Y. 2012) 283 F.R.D. 153, 177 [Fourth and Fourteenth Amendment claims]; *Jaffe v. Morgan Stanley & Co.* (N.D.Cal., Dec. 12, 2007, No. C 06-3903) 2007 WL 4934323, at *2 [Title VII, Fair Employment and Housing Act, and Elliot-Larsen Civil Rights Act claims]; *Gutierrez v. Johnson & Johnson* (D.N.J. 2006) 467 F.Supp.2d 403, 413 [Section 1981, Title VII, and New Jersey Law Against Discrimination claims]; see also *Sanchez v. Standard Brands, Inc.* (5th Cir. 1970) 431 F.2d 455, 459-460, 464 [Title VII claim].) And under California law, there cannot be a class action without a named class representative who could themselves bring the claim. (See *First American Title Ins. Co. v. Superior Court* (2007) 146 Cal.App.4th 1564, 1573-1574 ["It is elementary that the named plaintiff in a class action must be a member of the class he purports to represent."]; *Wallace v. GEICO General Ins. Co.* (2010) 183 Cal.App.4th 1390, 1398.)

III. CONCLUSION

For the reasons stated above and in USC's opening brief, USC respectfully requests that the Court grant its Motion to Strike.

DATED: January 12, 2024

MUNGER, TOLLES & OLSON LLP

By: 

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