Li Yu (*pro hac vice)*
DiCELLO LEVITT LLP
485 Lexington Avenue, Suite 1001
New York, New York 10017
Tel. (646) 933-1000
lyu@dicellolevitt.com

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

TANNER SMITH; QIMIN WANG; SABRINA PALMER; and KIMELE CARTER, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

GRAND CANYON EDUCATION, INC.,

Defendant.

Civil Action No. 2:24-cv-1410-SPL

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS THE FIRST AMENDED COMPLAINT

Adam J. Levitt (Ariz. Bar. No. 038655)
DiCELLO LEVITT LLP
Ten North Dearborn Street, Sixth Floor
Chicago, Illinois 60602
Tel. (312) 214-7900
alevitt@dicellolevitt.com

Peter C. Soldato*
Joseph Frate*
DiCELLO LEVITT LLP
8160 Norton Parkway
Mentor, Ohio 44060
Tel. (440) 953-8888
psoldato@dicellolevitt.com
jfrate@dicellolevitt.com

**Admitted Pro Hac Vice*

Christopher J. Bryant*
Eric Rothchild*
Madeline Wiseman*
NATIONAL STUDENT LEGAL DEFENSE NETWORK
1701 Rhode Island Avenue NW
Washington, DC 20036
Tel. 202-734-7495
chris@defendstudents.org
eric@defendstudents.org
madeline@defendstudents.org

TABLE OF CONTENTS

PRELIMINARY STATEMENT 1
LEGAL STANDARD 2
ARGUMENT 3
I. The FAC Plausibly Alleges That GCE Made Deceptive Statements About Doctoral Program Costs at Grand Canyon University 3
II. GCE's Attacks on Plaintiffs' RICO Claims on Distinctness, Participation, Standing, Limitations, and Reinvestment Grounds All Lack Merit 7
A. The FAC Does Not Allege an "Association-in-Fact" Enterprise, But Rather That GCE Established the Current Version of GCU as a Distinct RICO Enterprise 7
B. The FAC Plausibly Alleges GCE's Participation in the RICO Enterprise .. 8
C. The FAC Plausibly Alleges Plaintiffs' RICO Standing 10
D. The FAC Plausibly Alleges Plaintiffs Were Injured by GCE's Use of Fraud Proceeds to Establish the GCU Enterprise in 2018 11
E. Plaintiffs' RICO Claims Are Within RICO's 4-Year Limitations Period . 11
III. The FAC Plausibly Pleads GCE's State Consumer Protection Law Violations ... 13
A. The FAC Sufficiently Pleads the "Unlawful" and "Unfair" Prongs of UCL Claim 13
B. The FAC Plausibly Alleges Reliance and Causation for Plaintiffs Palmer and Smith 15
CONCLUSION 17

TABLE OF AUTHORITIES

Page(s)

Cases

Advanced Reimbursement Sols. LLC v. Aetna Life Ins. Co.,
2022 WL 889058 (D. Ariz. Mar. 25, 2022) 9

Ashcroft v. Iqbal,
556 U.S. 662 (2009) 2

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007) 2

Calcagno v. Kipling Apparel Corp.,
2024 WL 3261205 (S.D. Cal. July 1, 2024) 14

Carriuolo v. GM Co.,
823 F.3d 977 (11th Cir. 2016) 16

Cederic Kushner Promotions, Ltd. v. King,
533 U.S. 158 (2001) 8

Cohen v. Trump,
200 F. Supp. 3d 1063 (S.D. Cal. 2016) 5

Diaz v. Gates,
520 F.3d 897 (9th Cir. 2005) (*en banc*) 10

FTC v. DeVry Educ. Grp., Inc.,
2016 WL 6821112 (C.D. Cal. 2016) 5

FTC v. Five-Star Auto Club, Inc.,
97 F. Supp. 2d 502 (S.D.N.Y. 2000) 4

FTC v. Gill,
71 F. Supp. 2d 1030 (C.D. Cal. 1999) 6

FTC v. Grand Canyon Educ., Inc.,
--- F. Supp. 3d ----, 2024 WL 3825087 (D. Ariz. Aug. 15, 2024) ..... *passim*

FTC v. Medical Billers Network, Inc.,
543 F. Supp. 2d 283 (S.D.N.Y. 2008) 7

Gold v. Lumber Liquidators, Inc.,
323 F.R.D. 280 (N.D. Cal. 2017) 16

Itamar Med. Ltd. v. Ectosense NV,
2021 WL 12095092 (S.D. Fla. Jan. 4, 2021).....3

Just Film, Inc. v. Buono,
847 F.3d 1108 (9th Cir. 2017).....10

Larsen v. Lauriel Invs., Inc.,
161 F. Supp. 2d 1029.....11

Lawson-Ross v. Great Lakes Higher Educ. Corp.,
955 F.3d 908 (11th Cir. 2020).....4

Living Designs, Inc. v. E.I. DuPont de Nemours & Co.,
431 F.3d 353 (9th Cir. 2005).....12

Lozano v. AT & T Wireless Servs., Inc.,
504 F.3d 718 (9th Cir. 2007).....15

Moore v. Mars Petcare US, Inc.,
966 F.3d 1007 (9th Cir. 2020).....3

MSP Recovery Claims, Series LLC v. Lundbeck LLC,
664 F. Supp. 3d 635 (E.D. Va. 2023).....17

Murguia v. Langdon,
61 F.4th 1096 (9th Cir. 2023).....3

Nelson v. Great Lakes Educ. Loan Servs., Inc.,
928 F.3d 639 (7th Cir. 2019).....14

Newcal Indus., Inc. v. Ikon Office Sols. Inc.,
513 F.3d 1038 (9th Cir. 2008).....5

Nugget Hydroelectric L.P v. Pac. Gas & Elec. Co.,
981 F.2d 429 (9th Cir. 1992).....11

Ogdon v. Grand Canyon Univ., Inc.,
2024 WL 1344455 (D. Ariz. Mar. 29, 2024).....9, 10

Orshan v. Apple Inc.,
804 Fed. App'x. 675 (9th Cir. 2020).....5

Painters & Allied Trades Dist. Council v. Takeda Pharms. Co.,
943 F.3d 1243 (9th Cir. 2019).....10

Parker & Parsley,
972 F.2d 580 (5th Cir. 1992).....8

Patenaude v. Equitable Life Assurance,
290 F.3d 1020 (9th Cir. 2002) 14

Phillips v. MERS, Inc.,
2011 WL 587097 (D. Ariz. Feb. 8, 2011) 12

RJ v. Cigna Health & Life Ins. Co.,
625 F. Supp. 3d 951 3

*Silvas v. E*Trade Mortg. Corp.*,
421 F. Supp. 2d 1315 (S.D. Cal. 2006), *aff'd*, 514 F.3d 1001 (9th Cir. 2008).....14

Simon v. Value Behavioral Health,
208 F.3d 1073 (9th Cir. 2000) *overruled on other grounds*,
Odom v. Microsoft, 486 F.3d 541 (9th Cir. 2003) 11

Tatung v. Shu Tze Hsu,
217 F. Supp. 3d 1138 (S.D. Cal. 2016) 12

United States v. Green,
745 F.2d 1205 (9th Cir. 1984) 3

Watts v. Allstate Indem. Co.,
2009 WL 1905047 (E.D. Cal. July 1, 2009).....8

Williams v. Gerber Prods. Co.,
552 F.3d 934 (9th Cir. 2008) 5, 14

Young v. Grand Canyon Univ., Inc.,
57 F.4th 861 (11th Cir. 2023) 7

Zwicky v. Diamond Resorts, Inc.,
2021 WL 2685585 (D. Ariz. June 30, 2021) 9

Statutes & Other Authorities

18 U.S.C. §
1962.....*passim*

20 U.S.C. § 1092 3

34 C.F.R. §§ 668.71-73 .....3, 14

Plaintiffs respectfully submit this brief in opposition to Defendant Grand Canyon Education, Inc.'s ("GCE" or "Defendant") motion, Dkt. 24, to dismiss the First Amended Complaint ("FAC"), Dkt. 18. For the reasons set forth below, GCE's motion should be denied.

PRELIMINARY STATEMENT

For years, as alleged in the FAC, GCE deceived thousands of prospective doctoral students about the tuition costs for obtaining their degrees at Grand Canyon University. Specifically, "GCE falsely told prospective students like Plaintiffs . . . that they could obtain their doctoral degrees by paying a total tuition amount equal to 60 or 65 times the cost per credit." Dkt. 18 ¶ 4. In truth, however, "98% of students ended up paying [more] to complete" their doctoral degrees due to "artificial bottlenecks . . . created by GCE's doctoral program policies and practices." *Id.* ¶¶ 6–8. In light of the clear contrast, a court in this District readily found that GCE's statements about doctoral tuitions "qualify as deceptive representations." *FTC v. Grand Canyon Educ., Inc.*, --- F. Supp. 3d ----, 2024 WL 3825087, at *19 (D. Ariz. Aug. 15, 2024). Tellingly, GCE wholly ignores the *FTC* decision and its on-point holding. *See infra* at 4.

GCE also tries to downplay its misrepresentations by wrongly asserting that disclaimers strewn across different forms somehow cured its deception. *See* Dkt. 24-1 at 2–5. This argument fails for two reasons. First, as a matter of law, whether disclaimers suffice to cure GCE's deceptive representations "is an intensely factual inquiry ill-suited for resolution at the pleading stage." *Grand Canyon Educ.*, 2024 WL 3825087, at *19. Second, even if the Court were to engage in such a factual inquiry, the disclaimers proffered by GCE fall well short of dispelling its deceptive claims about the doctoral program costs. *See infra* at 3–7.

The FAC further alleges that GCE's scheme to defraud doctoral students violated RICO because in 2018, GCE used proceeds of fraud to establish a nominally independent RICO enterprise and because after 2018, GCE exploited its control over that enterprise to continue its fraud. *See* Dkt. 18 ¶¶ 9, 65–89. GCE takes a "kitchen sink" approach to Plaintiffs' RICO claims and perfunctorily attacks them on, variously, distinctness, participation, standing, statute of limitations, and pleading sufficiency grounds. *See* Dkt. 24-1 at 4-10.

GCE's RICO arguments all have a common, and fatal, flaw. Ignoring Plaintiffs' allegations, GCE improperly asks the Court to rely on *its* version of facts and draw inferences in *its* favor. *See infra* at 7–12. For example, even though the FAC spells out the elaborate process by which GCE, the RICO defendant, created a distinct RICO enterprise—the nominally independent, non-profit Grand Canyon University, s*ee* Dkt. 18 ¶¶ 71–89, GCE disingenuously asserts that Plaintiffs allege an "association-in-fact enterprise" in which the "one and the same" party is both the RICO defendant and the enterprise. *See* Dkt. 24-1 at 4-6. Similarly, the FAC details how GCE's policies and practices created "artificial bottlenecks" that prevented Plaintiffs from getting doctoral degrees with just 60 credits. *See* Dkt. 18 ¶¶ 6–8, 147-153. Yet, GCE alleges that Plaintiffs' losses were "caused by their own failure to complete the dissertation." Dkt. 24-1 at 8. Arguments like these based on disputed facts are inappropriate under Rule 12(b)(6).

GCE's RICO arguments also fail because they repeatedly misstate controlling law. For example, GCE makes the bogus claim that "the Ninth Circuit measures the statute of limitations [for RICO claims] from the earlier-in-time misrepresentation" before there is even an injury. Dkt. 24-1 at 9. This is directly contrary to the "discovery rule" enunciated in Ninth Circuit decisions like *Pincay v. Andrews*, under which "the civil RICO limitations period begins to run when a plaintiff know or should know of [his] injury." 238 F.3d 1106, 1110 (9th Cir. 2001).

Finally, insofar as GCE attacks Plaintiffs' state law consumer protection claims based on a supposed lack of misrepresentations, reliance, or causation, the FAC sufficiently pleads each of these elements. In addition, GCE's challenges to the California unfair competition claim on preemption, pleading sufficiency, and overlap grounds fail as a matter of law. *See infra* at 13-17.

LEGAL STANDARD

On a motion to dismiss, a complaint needs only plead "enough facts to state a claim [for] relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A plausible claim "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). To assess plausibility, "the

court must take all factual allegations as true and draw all reasonable inferences in favor of the nonmoving party." *Murguia v. Langdon*, 61 F.4th 1096, 1106 (9th Cir. 2023).

ARGUMENT

I. The FAC Plausibly Alleges That GCE Made Deceptive Statements About Doctoral Program Costs at Grand Canyon University

Plaintiffs predicate their civil RICO claims on wire and mail fraud violations. The crux of wire and mail fraud is "to deprive the victim of money or property by means of deception." *RJ v. Cigna Health & Life Ins. Co.*, 625 F. Supp. 3d 951, 961 (quoting *United States v. Miller*, 953 F.3d 1095, 1102 (9th Cir. 2020)).[1] Similarly, Plaintiffs' state law false advertising and consumer protection claims arise from GCE's deceptive statements.[2] *See, e.g.*, *Moore v. Mars Petcare US, Inc.*, 966 F.3d 1007, 1017 (9th Cir. 2020) (California false advertising and consumer protection claims focus on whether a "reasonable consumer" is "likely to be deceived"); *Itamar Med. Ltd. v. Ectosense NV*, 2021 WL 12095092, at *9 (S.D. Fla. Jan. 4, 2021) (Florida's consumer protection statute focuses on unfair and deceptive practices).

Here, Plaintiffs allege that GCE lured prospective doctoral students with promises of an "affordable tuition rate." *See* Dkt. 18 ¶¶ 41-45. Critically, GCE gave prospective students *specific* estimates of their tuition and total cost. *See id.* ¶¶ 46-49, 97-100. Plaintiffs all received cost estimates from GCE based on completing 60 credits, and each Plaintiff relied on these estimates in deciding to enroll at Grand Canyon University. *See id.* ¶¶ 90-101, 115-124, 135-144, 154-164. Federal laws, moreover, require those estimates to "accurately describe . . . tuition and fees." *Id.* ¶¶ 28-32 (summarizing the accuracy requirements in 20 U.S.C. § 1092 and 34 C.F.R. § 668.73).

However, as detailed in the FAC, the cost estimates distributed by GCE were deceptive. Although GCE touted "an accelerated path" in which doctoral students can "begin the

---

[1] *See also United States v. Green*, 745 F.2d 1205, 1207 (9th Cir. 1984) (mail fraud requires "the existence of a scheme [that is] reasonable calculated to deceive persons or ordinary prudence and comprehension").

[2] As discussed below, *see infra* at 15, Plaintiffs also allege *unfair* practices under California's unfair competition statute, Cal. Bus. & Prof. C. § 17200.

dissertation process at the start," *see* Dkt. 18 ¶¶ 43-44, GCE's actual policies and practices erected "artificial bottlenecks in the doctoral dissertation process," *id*. ¶ 6. For example, GCE's policies required doctoral students to "fulfill nine [dissertation] milestones," *id.* ¶¶ 62, 108, 151, but "did not allow [them] to communicate directly with the content advisor" on their dissertation committees, *id*. ¶ 62, 149. GCE's delay tactics also included dissertation reviewers making students repeatedly "submit and resubmit drafts [] in response to minor and insignificant edits" and then habitually waiting two full weeks to respond. *Id*. ¶¶ 62, 107, 127,150, 170.

Through these artificial bottlenecks, GCE made it practically impossible for doctoral students like Plaintiffs to graduate with just 60 credits and compelled them to pay for continuation courses, which in turn increased GCE's profits.[3] *See id*. ¶¶ 51-53, 60-62. According to a federal investigation, GCE's own data showed only ***1.7%*** of doctoral students completed doctoral programs without needing to pay for additional courses. *See id*. ¶ 54.

In a pending case against GCE in this District, the court analyzed the same disparity between GCE's statements to prospective students "suggesting that 60 credits would be required to obtain a doctoral degree" and the reality that "GCU very rarely awards doctoral degrees to students upon completion of 60 credits" and "98.5% of the doctoral students" had to pay for additional courses. *Grand Canyon Educ*., 2024 WL 3825087, at *19. In light of the contrast, Judge Lanza found that the "challenged statements" by GCE "qualify as deceptive representations" at the pleadings stage. *Id*.; *accord, e.g.*, *FTC v. Five-Star Auto Club, Inc*., 97 F. Supp. 2d 502, 528 (S.D.N.Y. 2000) (marketing materials were deceptive where reasonable consumer could conclude that results were achieved by typical participants). Tellingly, GCE fails to cite—let alone address—this on-point holding from this District.

GCE wrongly posits that certain disclaimers cured its deceptive claims about doctoral program costs. *See* Dkt. 24-1 at 2-4. This argument fails legally and factually. First, the Ninth

[3] As alleged, continuation courses are "especially profitable" because GCE charges the same price without having to provide active instruction. *See* Dkt. 18 ¶ 61.

Circuit has repeatedly emphasized that deciding whether disclaimers and additional information are sufficient to cure statements that "could likely deceive" typically raises "a question of fact" inappropriate for a motion to dismiss. *Williams v. Gerber Prods. Co*., 552 F.3d 934, 938-39 (9th Cir. 2008) (reversing motion to dismiss in a false advertising case); *accord Orshan v. Apple Inc*., 804 Fed. App'x. 675 (9th Cir. 2020) (reversing dismissal of unfair competition and false advertising claims); *Cohen v. Trump*, 200 F. Supp. 3d 1063, 1072-74 (S.D. Cal. 2016) (relying on *Williams* to deny request to dismiss RICO claim on the ground that RICO defendant's alleged misrepresentations were not deceptive in context).[4] In the *FTC* case, GCE made a similar, disclaimer-based argument to seek dismissal of claims targeting its deceptive statements about doctoral program costs. The court rejected that argument, correctly noting that whether GCE's deceptive statements are "altered by a disclaimer . . . is an intensely factual inquiry ill-suited for resolution at the pleading stage." *Grand Canyon Educ.*, 2024 WL 3825087, at *19.

Second, even if the Court were to engage in this kind of intensely factual inquiry disfavored by the Ninth Circuit, the disclaimers proffered by GCE fall well short of curing its deception against Plaintiffs. The "Doctoral Disclaimers Acknowledgement"—the only form GCE proffers for all four Plaintiffs—provides no specific information on program costs. *See* Dkt. 24-4, 25-5, 24-6, 24-7. The *only* reference to costs in this acknowledgement tells students that if they "need additional time beyond Research Continuation V," they "can repeatedly take a Dissertation Research Continuation course, which is 0 credits *but has a small fee attached*." *See, e.g.*, Dkt. 24-6 (emphasis added). Thus, nothing about the disclaimers in this acknowledgement informs prospective students that they would need to spend thousands of dollars in tuition above the estimates given to them by GCE.

[4] *Accord Newcal Indus., Inc. v. Ikon Office Sols. Inc.*, 513 F.3d 1038, 1053 (9th Cir. 2008) (reversing dismissal of Lanham Act claims); *FTC v. DeVry Educ. Grp., Inc*., 2016 WL 6821112, *4-5 (C.D. Cal. 2016) (denying motion to dismiss notwithstanding "clarifying language" because the contextual determination of "whether [the] advertisements make implicit misleading representations is an issue for the trier of fact")

Further, the Doctoral Disclaimers Acknowledgement is itself misleading. This form tells prospective students that they have "the opportunity to finish within the listed 60 credits." Dkt. 24-6. But, as a federal investigation revealed, this in fact almost never happened. *See* Dkt. 18 ¶ 44. This form also makes no disclosure about the GCE policies and practices that, as the FAC alleges, create artificial bottlenecks in the dissertation process, *see id.* ¶ 62; instead, it disingenuously suggests that the dissertation process "is unique" to each student. Dkt. 24-6.

The enrollment agreements proffered by GCE for Plaintiffs Smith and Wang, *see* Dkt. 24-8, 25-9, are similarly misleading. As the court recognized in the *FTC* case, these agreements "include a list of twenty courses . . . and an itemized list of per credit costs and fees, and then state a specific amount as the 'Total Program Tuition and Fees.'" *Grand Canyon Educ.*, 2024 WL 3825087, at *19. Although the disclaimer section on the second page of these agreements mentions that "[s]tudents may need to take continuation courses" and the average number of continuation courses, it does not provide any actual cost estimates. *See, e.g.*, Dkt. 24-8 at 2. Nor does this form disclose the artificial bottlenecks GCE created to delay the dissertation process.

GCE also points to language in the doctoral program price sheets it sent to Plaintiffs Smith and Wang regarding continuation courses. *See* Dkt. 24-2, 25-3. This is the *only* form that mentions the actual cost of the continuation courses; but it does not factor that cost into either the "Estimated Tuition" or "Total Estimated Cost" that is prominently shown in a table across five academic years. This form also fails to disclose the GCE policies and practices that, as alleged, prevent doctoral students like Plaintiff Smith from completing their degrees with just 60 credits despite adhering to the timeline outlined in GCE's marketing materials. *See* Dkt. 18 ¶¶ 103-108.

While GCE may be entitled to ask a trier of fact to conclude that these threadbare disclaimers somehow cure GCE's deceptive statements about doctoral program costs, this is not a conclusion that the Court should reach "in Defendant's favor in this stage of the case." *Grand Canyon Educ.*, 2024 WL 3825087, at *19; *see also, e.g.*, *FTC v. Gill*, 71 F. Supp. 2d 1030, 1044 (C.D. Cal. 1999) (lack of "guarantee" does not negate that misleading nature of deceptive

claims); *FTC v. Medical Billers Network, Inc*., 543 F. Supp. 2d 283, 304-07 (S.D.N.Y. 2008) (deceptive claims about annual salary not cured by qualifying statements that purchasers "could expect" to obtain such income).

Finally, GCE incorrectly asserts that an Eleventh Circuit decision in a breach of contract case, *Young v. Grand Canyon Univ., Inc*., 57 F.4th 861 (11th Cir. 2023), supports dismissal of the RICO and state law consumer protection claims here. But this case is not about breach of contract; instead, Plaintiffs allege a scheme by GCE to deceive doctoral students to induce them to enroll. Accordingly, as the court correctly noted in the *FTC* case, *Young* is distinguishable because claims alleging breach of contract and deception are "governed by different standards." *Grand Canyon Educ.*, 2024 WL 3825087, at *19.

II. GCE's Attacks on Plaintiffs' RICO Claims on Distinctness, Participation, Standing, Limitations, and Reinvestment Grounds All Lack Merit

A. The FAC Does Not Allege an "Association-in-Fact" Enterprise, But Rather That GCE Established the Current Version of GCU as a Distinct RICO Enterprise

The main argument GCE directs against Plaintiffs' RICO claims are premised on the disingenuous assertion that "Plaintiffs attempt to allege an association-in-fact enterprise." Dkt. 24-1 at 4. From this implausible premise, GCE incorrectly posits that the "RICO person" and "RICO enterprise" alleged in the FAC are "one and the same" and that "Plaintiffs do not identify who or what comprises the alleged 'GCU Enterprise.'" *See id*. at 5.

This is wrong. The FAC clearly defines the GCU Enterprise as "the current iteration of Grand Canyon University," which "is supposedly independent from GCE" but in fact has been under GCE's control. Dkt. 18 ¶ 24. The FAC also specifies that the GCU Enterprise is the "RICO enterprise" in question and distinct from GCE, as the RICO "person." *See id*. ¶ 190-92. The FAC further details how GCE used proceeds of this fraud to establish the GCU Enterprise in 2018 through "Project Gazelle," *see id*. ¶¶ 66–83, and how after 2018, GCE leveraged its de facto control over the GCU Enterprise to carry out its doctoral program fraud, *see id*. ¶¶ 84–89.

Because "incorporation's basic purpose is to create a distinct legal entity." *Cederic Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 163 (2001), RICO's "distinctness" requirement is satisfied when a RICO enterprise has a separate corporate existence from the RICO defendant. This is so even where, as here, the RICO defendant holds ownership in or exercise control over the RICO enterprise. *See id.* at 163-64 (reversing Second Circuit's decision that the owner of a RICO enterprise is not distinct from the enterprise); *see also Watts v. Allstate Indem. Co*., 2009 WL 1905047, at *6 (E.D. Cal. July 1, 2009) (a "separately-incorporate subsidiary satisfies" distinctiveness under Ninth Circuit law).

GCE's motion cites decisions where, unlike here, the RICO enterprise does *not* have a separate corporate existence from the RICO defendant. *See* Dkt. 24-1 at 5-6. In *Doan v. Singh*, for example, the Ninth Circuit recognized that a RICO "enterprise may be a legal entity[] or [] an association-in-fact," but affirmed dismissal because "the complaint [did] not allege a legal entity" as the RICO enterprise or "an association-in-fact." 617 Fed. App'x. 684, 686 (9th Cir. 2015). *Kraft v. Gainey Ranch Community Association* does not mention, let alone analyze, RICO's distinctness element. *See* 2021 WL 535527, at *2-3 (D. Ariz. Feb. 12, 2021). Finally, the *Malasky v. Julian* did not allege that "Defendants form an enterprise[.]" 2018 WL 4635862, at *9 (N.D. Cal. Sept 24, 2018). These cases, therefore, are wholly inapposite and do not support dismissal.[5]

B. The FAC Plausibly Alleges GCE's Participation in the RICO Enterprise

To establish a RICO violation, a plaintiff needs to show a defendant "hav[ing] some part in directing [the] affairs" of the RICO enterprise. *Reves v. Ernst & Young*, 507, U.S. 170, 183 (1993). Here, the FAC sets forth both how GCE exercised *de facto* control over the GCU

[5] The *Ray v. Spirit Airlines*, *Parker & Parsley Petro v. Dresser Indus.*, and *Bd. of Cnty. Com'rs v. Liberty Grp.* decisions cited by GCE all address "association-in-fact" enterprises, and none involves "a legal entity" distinct from the RICO defendants. *Ray*, 836 F.3d 1340, 1352 (11th Cir. 2016); *see also Liberty Grp.*, 965 F.2d 879, 885 (10th Cir. 1992); *Parker & Parsley*, 972 F.2d 580, 583-84 (5th Cir. 1992). Accordingly, these out-of-Circuit decisions do not support dismissal.

Enterprise and how GCE was directly involved with defrauding doctoral students like Plaintiffs through the GCU Enterprise.

Specifically, Plaintiffs allege that GCE's CEO, Brian Mueller, was personally involved in establishing the GCU Enterprise as a supposedly independent, non-profit entity. *See* Dkt. 18 ¶¶ 65-67. The FAC also details how GCE played a key role in creating and distributing the deceptive marketing materials about program costs, *see id*. ¶¶ 37-50, and how GCE implemented policies and practices that created artificial bottlenecks that delayed doctoral students' ability to graduate and increased GCE's profits. *See id*. ¶¶ 61-64. In short, contrary to GCE's suggestion, *see* Dkt. 24-1 at 6-7, Plaintiffs do not just allege that GCE executives "routinely reviewed" documents or had been vaguely "aware" of suspicious facts. *Cf. Zwicky v. Diamond Resorts, Inc.*, 2021 WL 2685585, at *23 (D. Ariz. June 30, 2021).

GCE also incorrectly posits that Plaintiffs cannot allege GCE's "conduct" or "participation" based on GCE staff performing "the ordinary affairs of an education business." Dkt. 24-1 at 6. This conflicts with the law in this District, which recognizes that a RICO defendant can participate in a RICO enterprise's affairs while pursuing "conduct that may be consistent with [the defendant's] own interests" because the "interests of the enterprise are congruent" with those of the defendant. *Ogdon v. Grand Canyon Univ., Inc*., 2024 WL 1344455, at *2 (D. Ariz. Mar. 29, 2024); *accord Advanced Reimbursement Sols. LLC v. Aetna Life Ins. Co*., 2022 WL 889058, at *8 (D. Ariz. Mar. 25, 2022). This is the case here because GCE's interests and GCU Enterprise's interests are closely aligned.

Decisions cited by GCE do not alter this conclusion. *River City Markets, Inc. v. Fleming Foods West, Inc*. did not turn on the RICO defendants' conduct or participation, *vel non*, in the RICO enterprise, but instead on whether there was any evidence of actions that "violate any federally protected rights of the plaintiffs." 960 F.2d 1458, 1463 (9th Cir. 1992). *United Food & Commercial Workers Union v. Walgreens* likewise is inapplicable because the RICO claims in that case failed due to a lack of allegations of misconduct beyond "parallel, uncoordinated fraud."

719 F.3d 849, 855 (7th Cir. 2013). Finally, *Gomez v. Guthy-Renker, LLC* involves a plaintiff who tried to impose RICO liability on "an individual" racketeer solely based on its utilization of ordinary service providers. *See* 2015 WL 4270042, at *7-8 (C.D. Cal. July 13, 2015). This case is the opposite—as alleged, GCE created the GCU Enterprise and then utilized it to commit fraud.

C. The FAC Plausibly Alleges Plaintiffs' RICO Standing

To establish RICO standing, a plaintiff needs to allege (1) "injury to his business or property" that is (2) "by reason of the RICO violation," *i.e.*, "proximate causation." *Just Film, Inc. v. Buono*, 847 F.3d 1108, 1119 (9th Cir. 2017).[6] Here, the FAC amply sets forth the causal nexus between GCE's fraud and Plaintiffs' financial losses by alleging both that Plaintiffs relied on GCE's deceptive claims about doctoral program costs when they enrolled at Grand Canyon University, *see* Dkt. 18 ¶¶ 90-101, 115-124, 135-144, 154-164, and that GCE's policies and practices created artificial bottlenecks, which caused Plaintiffs to pay thousands of dollars for courses they did not expect to take, *see id*. ¶¶ 106-08, 126-128, 147-151, 169-171.

GCE makes two meritless challenges to RICO standing. First, GCE wrongly posits that causation "is stopped" because Plaintiffs signed certain disclaimers. *See* Dkt. 24-1 at 8. This simply regurgitates GCE's falsity argument, which cannot be resolved at the pleadings stage. *See Ogdon*, 2024 WL 1344455, at *4 (rejecting Grand Canyon's proximate causation argument on motion to dismiss because it raises a factual dispute). Second, GCE disingenuously alleges that Plaintiffs' losses were "caused by their own failure to complete the dissertation." Dkt. 24-1 at 8. But this factual assertion is belied by Plaintiffs' detailed allegations that artificial bottlenecks created by GCE caused their delays. Events that are readily foreseeable by a RICO defendant do not break the causal chain for purposes of establishing RICO standing. *See Painters & Allied Trades Dist. Council v. Takeda Pharms. Co.*, 943 F.3d 1243, 1257 (9th Cir. 2019).

[6] *See generally Diaz v. Gates*, 520 F.3d 897, 900-901 (9th Cir. 2005) (*en banc*) (declining to add to the RICO standing analysis a requirement that a plaintiff's injury must be "the 'direct target'" of the RICO violation so long as the injury is "by reason of" the RICO violation).

D. The FAC Plausibly Alleges Plaintiffs Were Injured by GCE's Use of Fraud Proceeds to Establish the GCU Enterprise in 2018

To plead a civil RICO violation under § 1962(a), Plaintiffs must specifically allege "that [they] were injured by the use or investment of racketing income." *Nugget Hydroelectric L.P v. Pac. Gas & Elec. Co.*, 981 F.2d 429, 437 (9th Cir. 1992). Here, the FAC alleges that GCE not only used proceeds of fraud to continue engaging in RICO violations, but also that GCE used the fraud proceeds to establish a RICO enterprise—the current version of Grand Canyon University—through which it defrauded Plaintiffs.

These allegations satisfy *Nugget Hydroelectric*'s requirement that GCE's use of its racketeering proceeds caused injuries to Plaintiffs. *See Simon v. Value Behavioral Health*, 208 F.3d 1073, 1083 (9th Cir. 2000), *overruled on other grounds*, *Odom v. Microsoft*, 486 F.3d 541, 551 (9th Cir. 2003) (recognizing that injury resulting from a defendant's investment of fraud proceeds into a RICO enterprise can satisfy § 1962(a)'s reinvestment requirement); *see also Larsen v. Lauriel Invs., Inc.*, 161 F. Supp. 2d 1029, 1045-46 (denying motion to dismiss § 1962(a) claim where plaintiff "alleges proceeds of the racketeering activity were used by the defendants to sustain their conduct" through the RICO enterprise).

The decisions cited by GCE involve entirely distinct allegations. In *Sybersound Records, Inc. v. UAV Corp.*, the plaintiff's "injury stem[med] from the alleged copyright infringement," rather than investment of the ill-begotten gains into a RICO enterprise. 517 F.3d 1137, 1149 (9th Cir. 2008). In *Wagh v. Metris Direct, Inc.*, the plaintiff "did not include more than the vaguest allusions to the acquisition or maintenance of any interest in or control of the alleged enterprise." 348 F.3d 1102, 1111 (9th Cir. 2003). These decisions do not support dismissal.[7]

E. Plaintiffs' RICO Claims Are Within RICO's 4-Year Limitations Period

The statute of limitations for civil RICO claims is four years. *See Agency Holding Corp.*

[7] Further, neither *Vemco, Inc. v. Camardella* or *Pyke v. Laughling*—two out-of-Circuit decisions—involves allegations, as here, that the RICO enterprise "itself was built with racketeering proceeds." *Vemco*, 23 F.3d 129, 133 (6th Cir. 1994); *see also Pyke*, 1998 WL 37599, at *4 (N.D.N.Y. Jan. 26, 1998).

v. Malley-Duff & Assocs. Inc., 483 U.S. 143, 156 (1987). The Ninth Circuit follows the "discovery rule," under which the "limitations period for civil RICO actions begins to run when a plaintiff knows or should know of the injury which is the basis for the action." *Living Designs, Inc. v. E.I. DuPont de Nemours & Co.*, 431 F.3d 353, 365 (9th Cir. 2005).

Here, the RICO injuries alleged are the financial losses caused by GCE's deception—specifically, the FAC alleges that Plaintiffs each had to pay thousands of dollars for continuation courses beyond the 60 credits that GCE touted when they first enrolled. *See* Dkt. 18 ¶¶ 114, 133, 153, 174. The FAC also details how GCE delayed the progress of Plaintiffs' dissertations with artificial bottlenecks. Finally, the FAC makes clear that none of the Plaintiffs took or paid for continuation courses until July 2021. *See id.* ¶¶ 152 (Plaintiff Palmer started her first continuation course in July 2021), 109 (Smith started in September 2021), 168-174 (Carter started in late 2022), 129 (Wang started in March 2023). In short, none of the Plaintiffs suffered any injury, or had any knowledge of GCE's deception, before July 2021. It follows that the four-year limitations period for Plaintiffs' civil RICO claims—which "begins to run when a plaintiff knows or should know of *the injury*," *Living Designs*, 431 F.3d at 365 (emphasis added)—could not have started until after July 2021.

GCE absurdly claims that that "when a party is injured later in time based on a misrepresentation made earlier in time, the Ninth Circuit measures the statute of limitations [for RICO claims] from the earlier-in-time misrepresentation." Dkt. 24-1 at 9. This not only is directly contrary to the Ninth Circuit's discovery rule under *Living Designs* and *Pincay*, *see Tatung v. Shu Tze Hsu*, 217 F. Supp. 3d 1138, 1157 (S.D. Cal. 2016) (relying on *Pincay* to deny summary judgment as to RICO claims on statute of limitations grounds), but also finds no support in the *Phillips v. MERS, Inc.* decision GCE cites. Notably, *Phillips* does not involve a civil RICO claim, nor does it purport to overrule the discovery rule. *See* 2011 WL 58707 (D. Ariz. Feb. 8, 2011).[8]

[8] At most, *Phillips* suggests that if an alleged mortgage fraud "was apparent from the face of loan documents," then the plaintiff would have had knowledge of the fraud at that point. *See* 2011 WL 587097, at *2. That, of course, is not what is being alleged here.

III. The FAC Plausibly Pleads GCE's State Consumer Protection Law Violations

Plaintiffs Wang, Palmer, and Smith also assert claims under state consumer protection laws of California, Florida, and West Virginia, where they, respectively, resided. Each of these Plaintiffs also specifically allege having on GCE's misrepresentations about doctoral program costs in deciding to whether to enroll at Grand Canyon and suffered financial losses as a result of the misrepresentations. *See* Dkt. 18 ¶¶ 90-101, 113-114, 115-124, 133-134, 135-144, 152-153.

GCE makes four meritless arguments as to Plaintiffs' state law claims. *First*, GCE wrongly attacks the California law claims on the ground that the FAC does not adequately plead any misrepresentation. *See* Dkt. 24-1 at 11-12. This duplicates GCE's argument as to Plaintiffs' RICO claims and fails for the same reasons. *See supra* at 3-7. Second, in the same vein, GCE argues that Plaintiffs Smith and Wang do not allege actual reliance because no misrepresentation was made to them. *See* Dkt. 24-1 at 12-13. This—a mere rehash of GCE's "no deception" argument—fails because the FAC adequately pleads falsity, *see supra* at 3-7, and also alleges actual reliance by Plaintiffs Wang and Smith, *see* Dkt. 18 ¶¶ 90-101, 115-124.

GCE's third and fourth arguments challenge the legal sufficiency of the California unfair competition law ("UCL") claim and the Florida and West Virginia claims. Both arguments fail.

A. The FAC Sufficiently Pleads the "Unlawful" and "Unfair" Prongs of UCL Claim

GCE posits that its deceptive claims do not constitute "unlawful" or "unfair" practices under California UCL. *See* Dkt. 24-1 at 13-15. GCE is wrong on both scores.

First, insofar as GCE argues that Plaintiffs fail to plead predicate violations to satisfy the UCL "unlawful" prong, *see id*. 13-14, that claim is belied by the fact that the FAC specifies that GCE's deceptive statements violate California's false advertising law ("FAL"), civil RICO, U.S. Department of Education ("ED") regulations requiring accurate disclosure of program costs, and other federal and state laws and regulations. *See* Dkt. 18 ¶ 225. As discussed above, *see supra* at 3-7, and as the court in the *FTC* case already found, GCE's claims about doctoral program costs "qualify as deceptive representations," *Grand Canyon Educ.*, 2024 WL 3825087, at *19. The

FAC, therefore, sufficiently pleads FAL and RICO violations by GCE. *See Williams*, 552 F.3d at 938 (a "violation of the false advertising law ... necessarily violates the UCL").

The FAC also identifies applicable ED regulations, 34 C.F.R. §§ 668.71-73,[9] that GCE contravened by giving inaccurate program costs to prospective students like Plaintiffs. *See* Dkt. 18 ¶¶ 27-32 (detailing the legislative history for federal laws and regulations protecting students from "false advertising" and why GCE's marketing agreement with Grand Canyon University subjected it to the regulations requiring accurate disclosure of program costs). It is well-settled that a UCL claim may be predicated on federal law unless there is complete federal preemption. *See Silvas v. E*Trade Mortg. Corp.*, 421 F. Supp. 2d 1315, 1319 (S.D. Cal. 2006), *aff'd*, 514 F.3d 1001 (9th Cir. 2008). No such complete preemption exists under either the Higher Education Act ("HEA") or the ED regulations at issue. *See, e.g.*, *Nelson v. Great Lakes Educ. Loan Servs., Inc.*, 928 F.3d 639, 652 (7th Cir. 2019) ("Courts have consistently held that field preemption does not apply to the HEA, and we do as well."); *Lawson-ross v. Great Lakes Higher Educ. Corp.*, 955 F.3d 908, 923 (11th Cir. 2020) (rejecting defendant's HEA "field preemption argument").

Tellingly, the cases GCE cites do not support its position; they show the opposite. In *Rose v. Bank of America*, the court held that because the federal statute at issue was not the exclusive remedy, a UCL claim premised on that statute could proceed. 304 P.3d 181, 184-87 (Cal. 2013). The language quoted by GCE, *see* Dkt. 24-1 at 14, is not the court's holding but rather its rejection of the defendant's argument. *See* 304 P.3d. at 186. Similarly, *Patenaude v. Equitable Life Assurance* addresses only SLUSA preemption, which is not relevant to this case. *See* 290 F.3d 1020, 1028 (9th Cir. 2002).

Second, GCE errs in arguing that Plaintiffs fail to plead "unfair" practices under the UCL. Because the FAC sufficiently pleads fraudulent and unlawful practices, the court does not need to separately address the "unfair" prong at the pleading stage. *See Calcagno v. Kipling Apparel*

[9] Due to a scrivener's error, paragraph 225 of the FAC refers to 34 C.F.R. § *688*.71, instead of 34 C.F.R. § *668*.71-73, which are correctly identified in paragraphs 31 and 32.

Corp., 2024 WL 3261205 at *10 (S.D. Cal. July 1, 2024) (denying motion to dismiss the "unfair" prong because dismissal is warranted only "when unfair competition claims overlap entirely with unlawful claims and all of the claims under the unlawful prong did not survive").[10]

GCE is also wrong in asserting that the unfair prong of Plaintiffs' UCL claim does not satisfy the "balancing" and "tethering" tests that California courts apply to such claims. *See* Dkt. 24-1 at 14-15. The balancing test asks the court to weigh "the harm to the consumer against the utility of the defendant's practice," while the tethering test requires the unfairness to be tied to a legislatively declared policy. *Lozano v. AT & T Wireless Servs., Inc.*, 504 F.3d 718, 735 (9th Cir. 2007). Although an unfairness claim in the consumer action context need only satisfy the balancing test, *see id.* (affirming decision applying the balancing test), the FAC satisfies both.

Specifically, the FAC explains how doctoral students have suffered injuries in the form of "thousands, sometimes tens of thousands, of dollars in unanticipated costs for continuation courses," Dkt. 18 ¶ 226, which collectively resulted in tens of millions of dollars in financial losses, *id.* ¶ 213. These are not "conclusory statements" as GCE misleadingly claims, *see* Dkt. 24-1 at 15, but factual allegations based on both Plaintiffs' own experiences and the findings of a federal investigation resulting in a $37 million fine against Grand Canyon. *See* Dkt. 18 ¶¶ 37-174. In short, the FAC amply pleads both why the harm to students from GCE's alleged deception outweighs the utility to GCE and why this is tethered to the clear legislative policy against misrepresentations in higher education in the HEA.

B. The FAC Plausibly Alleges Reliance and Causation for Plaintiffs Palmer and Smith

GCE's attacks on the sufficiency of Plaintiffs' Florida and West Virginia consumer protection law claims are equally disingenuous and incorrect. As with its RICO arguments, GCE ignores Plaintiffs' detailed factual allegations and, instead, asks the court to adopt *GCE's* version

[10] In any event, the unfairness prong of Plaintiff's UCL Claim, which focuses the thousands of dollars in unanticipated costs doctoral students were unfairly induced to pay, *see* Dkt. 18 ¶ 226), does not overlap entirely with the unlawful and fraudulent prongs, which focus on the violations of specified laws and misleading representations and omissions, *see id.* ¶¶ 225, 227.

of facts and construe all inferences in *its* favor. *See, e.g.*, Dkt. 24-1 at 16-17. Although GCE would have the Court find, at the pleadings stage, that Plaintiffs' "own conduct caused [their] financial losses," the allegations show otherwise.

Specifically, the FAC alleges that Plaintiffs Palmer and Smith each "would not have enrolled" but for GCE's misrepresentations. *See* Dkt. 18 ¶¶ 90 (Smith), 135 (Palmer). In Plaintiff Palmer's case, she even expressed "concerns . . . about the cost" of the doctoral program to a counselor, who sent her estimated cost based on 60 credits in response. *Id.* ¶¶ 138-39. Further, both Plaintiffs describe how GCE's improper policies and practices caused artificial bottlenecks in their dissertation processes that delayed their ability to finish their degrees with just 60 credits. See id. ¶¶ 106-108 (Smith); 148-151 (Palmer). Finally, the FAC alleges that GCE's "repeated misrepresentations and omissions" caused each Plaintiff to incur thousands of dollars in additional tuition costs to obtain their doctoral degrees. *See id.* ¶¶ 113-114 (Smith); 153 (Palmer).

These allegations are more than sufficient to satisfy the elements of the Florida Deceptive and Unfair Trade Practices Act and the West Virginia Consumer Credit and Protection Act. To succeed on a claim under the Florida statute, a plaintiff "need not show actual reliance," but only that the alleged practice was likely to deceive a consumer acting reasonably in the same circumstances." *Carriuolo v. GM Co.*, 823 F.3d 977, 983-84 (11th Cir. 2016). To show causation under West Virginia law, a plaintiff only needs to establish "a causal connection between the alleged unlawful conduct and [plaintiff's] ascertainable loss." *Gold v. Lumber Liquidators, Inc.*, 323 F.R.D. 280, 293 (N.D. Cal. 2017). The FAC goes well beyond those minimal requirements.

Insofar as GCE suggests that Plaintiffs must allege that "GCE's conduct *alone*" caused their losses, *see* Dkt. 24-1 at 17 (emphasis added), such a requirement is nowhere in either the applicable statutes or caselaw. The court, therefore, should reject GCE's improper entreaty to judicially inject a heightened pleading requirement into Florida and West Virginia consumer protection statutes.

The *MSP Recovery* decision GCE cites underscores this point. There, the court dismissed

the Florida consumer protection claim after MSP failed to "specify how an estimated thousands of independent actors, like physicians and pharmacists, played into these injuries, or how Defendants' actions influenced these economic injuries." *MSP Recovery LLC v. Lundbeck LLC*, 664 F. Supp. 3d 635, 659 (E.D. Va. 2023). In short, there was "no direct causal chain [] between Plaintiffs' injuries and Defendants' actions." *Id.* at 660. By contrast, Plaintiffs Palmer's and Smith's claims involve no outside "independent actors," and they allege a direct link between GCE's misrepresentations and their losses. Accordingly, GCE's motion to dismiss the Florida and West Virginia claims for lack of reliance or causation should be denied.

CONCLUSION

For the reasons set forth above, GCE's motion to dismiss should be denied.

Dated: December 19, 2024

_/s/ *Li Yu*_____
LI YU

Li Yu*
DICELLO LEVITT LLP
485 Lexington Avenue, Suite 1001
New York, New York 10017
Tel. (646) 933-1000
lyu@dicellolevitt.com

Adam J. Levitt (Ariz. Bar. No. 038655)
DICELLO LEVITT LLP
Ten North Dearborn Street, Sixth Floor
Chicago, Illinois 60602
Tel. (312) 214-7900
alevitt@dicellolevitt.com

Peter C. Soldato*
Joseph Frate*
DICELLO LEVITT LLP
8160 Norton Parkway
Mentor, Ohio 44060
Tel. (440) 953-8888
psoldato@dicellolevitt.com
jfrate@dicellolevitt.com

Counsel for Plaintiffs and the Proposed Class

**Admitted Pro Hac Vice*

Christopher J. Bryant*
Eric Rothchild*
Madeline Wiseman*
NATIONAL STUDENT LEGAL DEFENSE NETWORK
1701 Rhode Island Avenue NW
Washington, DC 20036
Tel. 202-734-7495
chris@defendstudents.org
eric@defendstudents.org
madeline@defendstudents.org

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of December 2024, I caused to be electronically transmitted the attached document entitled Plaintiff's Memorandum of Points and Authorities in Opposition to Defendant's Motion to Dismiss the First Amended Complaint to the Clerk of the Court using the CM/ECF System, which will send notification of such filing and transmittal of a Notice of Electronic Filing to all registered CM/ECF users.

/s/ Li Yu
Li Yu