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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

IOLA FAVELL, SUE ZARNOWSKI, MARIAH CUMMINGS, and AHMAD MURTADA, *on behalf of themselves and all others similarly situated*,

Plaintiffs,

v.

UNIVERSITY OF SOUTHERN CALIFORNIA and 2U, INC.,

Defendants.

Case No. 2:23-cv-00846-GW-MAR;
Case No. 2:23-cv-03389-GW-MAR

PLAINTIFFS' OPPOSITION TO DEFENDANT 2U, INC.'S MOTION TO DISMISS SECOND CLASS ACTION COMPLAINT IN *FAVELL I* AND FIRST AMENDED CLASS ACTION COMPLAINT IN *FAVELL II*

Judge: Hon. George H. Wu
Date: November 16, 2023
Time: 8:30 a.m.
Place: Courtroom 9D

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I. INTRODUCTION

Defendants 2U and USC worked together in a lengthy campaign to advertise USC Rossier School of Education's ranking in US News & World Report's annual Best Education Schools. This campaign was successful (and lucrative) for both Defendants; Rossier was consistently ranked in the top 20 schools of education by US News, enrollment boomed, and 2U collected the lion's share of tuition for Rossier's online students. But those rankings were false. USC submitted fraudulent data to US News to artificially boost Rossier's ranking and thereby deceive Plaintiffs and putative class members.

Plaintiffs have adequately alleged each of their claims against 2U. Nevertheless, 2U returns to rehash the same arguments that the Court considered—and rejected—in its order on 2U and USC's first motions to dismiss ("MTD Order"), while also manufacturing a few new ones. In this Court's MTD Order, the Court rejected Defendants' arguments that their rankings-centric advertising campaign contained non-actionable opinions or puffery and that Plaintiffs must plead that 2U had actual knowledge of the campaign's falsity to state any claims. Although the Court dismissed Plaintiffs' claims against 2U at that time, it did so because they suggested fraud. The amended Complaints clarify Plaintiffs' theory against 2U, making clear that 2U should have known of the falsehoods because of its close relationship with USC and intimate knowledge of their joint advertising campaign. 2U does not argue that Plaintiffs have not carried their Rule 9(b) burden, thus indicating that Plaintiffs have addressed this Court's concerns.

Instead, 2U mounts new arguments that ignore both the allegations in the Complaints and fundamental principles of California law. None of the statutes at issue here require actual knowledge, and while the False Advertising Law ("FAL") requires that a defendant "should have known" its advertising was misleading, that standard is readily met as to 2U, a co-partner with access to resources to verify their claims.

Although 2U tries to escape liability by cherry-picking singular ads to complain they are not actionable, it ignores Plaintiffs' allegations that 2U coordinated a far-reaching and continuous advertising campaign with USC that caused all Plaintiffs to be exposed to the misleading representations multiple times. Finally, as to Plaintiffs' claims arising under the unfairness prong of California's Unfair Competition Law ("UCL"), 2U ignores the actual theory alleged, attacking instead a different UCL theory advanced only against USC.

This Court should deny 2U's motion in full.

II. FACTUAL BACKGROUND

In 2008, 2U formed and began its business relationship with USC, working as an online program manager ("OPM") to develop online graduate programs at USC Rossier's School of Education. *Favell I*, Second Amended Compl., Dkt. No. 67, ¶ 24.[1] Around that time, 2U entered an agreement with USC (the "Services Agreement"), which provides that 2U would receive a substantial percentage of tuition revenue from students enrolled in Rossier's online degree programs in exchange for handling recruitment and other work supporting the online programs. *Id.* ¶¶ 28-29. USC was 2U's first client and remained one of 2U's most lucrative clients throughout the Class Period. *Id.* ¶ 24.

Under the Services Agreement, 2U was responsible for creating and executing "marketing and promotional strategies" to attract students to the online programs and was even allowed to use USC's intellectual property to ensure that the online programs were seen as the same as the rest of Rossier. *Id.* ¶ 44 & Ex. A §§ 1(A), 4(C). While USC had "the right to review and approve all marketing and other materials" regarding the online degree programs, it could not independently implement "Promotion Strategies," but was instead required to "consult with 2tor [2U's prior name] in the development

[1] As Paragraphs 1-170 in the SAC and FAC are nearly identical, for clarity, this Opposition cites to the SAC unless there is a substantive reason to cite to the FAC. The primary differences between the Complaints are their causes of action, which begin at Paragraph 171 in each.

of" these marketing efforts. *Id.* ¶ 45 & Ex. A § 2(a). Moreover, the Services Agreement required 2U to "target its promotional efforts to students likely to be accepted" into Defendants' online degree programs. *Id.* ¶ 36 & Ex. A § 2(B).

In 2008, USC began doctoring the data it submitted to US News in connection with its annual Best Education Schools ranking. While Rossier was once ranked #38, which was based on a "doctoral acceptance rate" of 50.7%, SAC ¶¶ 58-60, it jumped to #22 once it excluded its EdD students from the submission and only counted Ph.D. students. *Id.* ¶¶ 57-60. That pattern continued, even after 2U and USC introduced an online doctoral degree program in 2015 and began admitting hundreds more students. *Id.* ¶¶ 65-66. Without online students being counted, USC consistently finished in the top 20 schools in US News' Best Education Schools rankings from 2009-2021, reaching a high of #10 in 2018. *Id.* ¶ 57.

Although 2U disclaims knowledge of USC's fraud, 2U saw dollar signs in Rossier's high ranking. 2U repeatedly acknowledged the importance of rankings to its own bottom line, telling investors that a school's "ranking" could impact its reputation, which is "critical to [2U's] ability to enroll students," and that "any decline in the ranking of one of our clients' programs . . . could have a disproportionate effect on our business." *Id.* ¶ 102. USC was one of 2U's largest clients and was such a critical component of its revenue that at one point, 2U even told investors, "any decline in USC's reputation" would impact profitability. *Id.* ¶¶ 5, 64.

Knowing USC's ranking was material to students, and by extension, its bottom line, 2U worked with USC to make those rankings a centerpiece of their advertising strategy. *Id.* ¶¶ 76-90. While Defendants agreed to perform different tasks under the Services Agreement, their roles in promoting the rankings to prospective students was in furtherance of their shared goal of maximizing enrollment in online programs. *Id.* ¶ 79. For example, USC advertised the rankings to a general audience (including both to online and in-person applicants) on its website and in press releases, consistent with

the parties' agreement that online and in-person degrees be marketed as comparable to one another. *Id.* ¶¶ 83-87. 2U focused its efforts specifically on finding online applicants through paid online advertising where it ensured that advertisements regarding Rossier's US News ranking were shown to students searching for education graduate programs. *Id.* ¶¶ 79-82. All the while, 2U had access to resources and information to verify the claims it was making to recruit students. *Id.* ¶¶ 92-100.

Plaintiffs Iola Favell, Sue Zarnowski, Mariah Cummings, and Ahmad Murtada—former Rossier students—each relied to their detriment on the false and deceptive Rossier ranking that was promoted by 2U, alongside USC, including the advertising featuring that ranking. *Id.* ¶¶ 127, 139, 149, 157.

III. ARGUMENT

A. Legal Standard

On a Rule 12(b)(6) motion to dismiss, a plaintiff need only "plead 'enough facts to state a claim to relief that is plausible on its face.'" *Johnson v. Riverside Healthcare Sys., LP*, 534 F.3d 1116, 1122 (9th Cir. 2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim has "facial plausibility" so long as the plaintiff "pleads factual content that 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).

Claims based on allegations of unfair and deceptive conduct, such as alleged violations of the CLRA, FAL, or UCL, are generally unsuitable for resolution at the pleading stage. *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 938-39 (9th Cir. 2009) ("[W]hether a business practice is deceptive will usually be a question of fact not appropriate for decision on demurrer."). As set forth below, Plaintiffs have adequately pleaded their claims against 2U, and none of 2U's challenges have merit.

B. The Scienter Allegations in the Complaints Exceed What is Required by Law.

In its MTD Order, the Court properly recognized that "as a general matter, actual knowledge is not a requisite element under most subsections" of the CLRA. MTD

Order at 11. The Court further found that Plaintiffs' claims "raise[d] the inference of at least negligence." *Id.* at 13. But because Plaintiffs' claims "sounded in fraud," the Court held that Rule 9(b)'s pleading standard applied and required sufficiently particular allegations of knowledge of falsity. *Id.* at 11. On this narrow basis—which the Court described as a "relatively minor" pleading deficiency that "can be cured through amendment"—the Court dismissed Plaintiffs' CLRA claims with leave to amend. *Id.*

Consistent with this Court's guidance, Plaintiffs have amended both Complaints so that none of their claims sound in fraud against 2U, leading 2U to effectively abandon its 9(b) arguments for all elements but for reliance, instead spending seven pages on manufactured factual disputes relating to scienter that cannot be considered at this stage of the proceedings. Nor can 2U's factual denials overcome Plaintiffs' extensive allegations that 2U should have known its rankings-centric advertising campaign was false. *See* Mot. at 25-31.

1. The Complaints Address the Concerns Identified by the Court in its First Order.

In light of the Court's prior concerns, Plaintiffs cabin their allegations about the rankings fraud itself to USC. As to 2U, the focus is on its instrumental role in disseminating those rankings to the online students, *see, e.g.*, SAC ¶ 10, and additional allegations establishing that 2U should have known of the rankings' falsity. *See, e.g.*, *id.* ¶¶ 92-100. For example, Plaintiffs allege that USC "knew the [US News] rankings to be false" in violating the FAL, whereas 2U "should have known" they were false "by the exercise of reasonable care." *Id.* ¶ 176. Likewise, the FAC alleges that USC violated the UCL's "fraudulent" prong, whereas the allegations against 2U are brought under the statute's "unlawful" prong (for violating the FAL and CLRA) and "unfair" prongs. FAC ¶¶ 184-192.

As to all claims, 2U makes no specific contention that Plaintiffs' scienter allegations do not satisfy the allegations of Rule 9(b), *see* Motion at 25-32.[2] Accordingly, Plaintiffs have addressed the Court's concerns, which the Court noted were "relatively minor." MTD Order at 13 (quoting *U.S. v. Corinthian Colleges*, 655 F.3d 984, 997 (9th Cir. 2011). That alone is enough to deny 2U's Motion.

2. The CLRA and UCL Do Not Require Scienter.

As this Court previously observed, the CLRA does not impose a knowledge requirement. MTD Order at 11 (citing *Racies v. Quincy Bioscience, LLC*, No. 15-cv-00292, 2016 WL 5746307, at *6 (N.D. Cal. Sept. 30, 2016). Indeed, neither the UCL nor the CLRA require scienter, as the California Supreme Court has held that they are strict liability statutes. *See Serova v. Sony Music Entm't*, 13 Cal. 5th 859, 887-88 (2022) (analogizing the CLRA and UCL to the Lanham Act and Federal Trade Commission Act; noting that an "innocent state of mind does not diminish the false advertiser's unfair advantage over competitors") (internal quotations omitted); *Cortez v. Purolator Air Filtration Prod. Co.*, 23 Cal. 4th 163, 181 (2000) ("The UCL imposes strict liability when property or monetary losses are occasioned by conduct that constitutes an unfair business practice.").

Still, 2U briefly argues actual knowledge is a required element of the CLRA and UCL, noting that this Court did not discuss *Wilson v. Hewlett-Packard Co.*, 668 F.3d 1136 (9th Cir. 2012). But this Court's original decision was correct; as Plaintiffs' opposition to 2U's previous motion to dismiss sets forth, there are many reasons to conclude that *Wilson* has no relevance outside of the narrow context of product defect cases. *See* Dkt. #51 at 8-10.

2U next argues that Plaintiffs failed to plead negligence, contending that they must establish "facts showing 2U had a duty to investigate the rankings and that it should have known they were false." Mot. at 25-26. As discussed herein, Plaintiffs have

[2] 2U mentions only that Rule 9(b) applies in introductory boilerplate, Mot. at 14-15, and again when discussing reliance. *Id.* at 23.

plead such facts. But 2U is wrong that they are required to do so. As strict liability statutes, the CLRA and UCL contain no statutory language requiring that a defendant "should have known," and the same reasoning that led this Court to conclude that actual knowledge is not a required element applies with equal force here.

At most, Plaintiffs' CLRA and UCL claims *sound in negligence*, but they are not the legal equivalent of common law negligence. *See, e.g.*, *Cal. Med. Ass'n v. Aetna Health of Cal Inc.*, 14 Cal. 5th 1075, 1096-97 (2023) (explaining that the acts "at which the UCL takes aim are not markedly similar to the conduct that can give rise to a negligence action"); *Serova*, 13 Cal. 5th 859, 887-88. In an improper effort to mischaracterize them as negligence claims, 2U cites product defect cases, such as *Kowalsky v. Hewlett-Packard Co.*, 2011 WL 3501715, at *7 (N.D. Cal. Aug. 10, 2011). But the *Kowalsky* court only imposed the "known or should have known" test into the CLRA and UCL after determining that "California courts have not always applied the language of strict liability to product defect claims." *Id.* at *7; *see also Acedo v. DMAX, Ltd.*, 2015 WL 12912365, at *11 (C.D. Cal. July 31, 2015) (describing unique nature of product defect cases).[3] As this case is not a product defect case, 2U's cited caselaw is inapplicable.

Furthermore, the UCL does not import any specific duty of care, as the law reflects the impossibility of "draft[ing] in advance detailed plans and specifications of all acts and conduct" that might violate the statute "since unfair or fraudulent business practices may run the gamut of human ingenuity and chicanery." *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 181 (1999) (internal quotations omitted). Because of the UCL's "chameleon" nature—courts look to the theory pled to guide them on whether a claim is plausible. *Aryeh v. Canon Bus. Sols., Inc.*, 55 Cal. 4th 1185, 1196 (2013). As discussed in more detail in section III(F), *infra*, Plaintiffs allege that 2U

[3] Indeed, the CLRA puts the burden on the *defendant* to show that it could not have reasonably known that it was violating the statute. *See* Cal. Civ. Code § 1784(a). In its affirmative defense provisions, the CLRA provides that a defendant may escape liability for "damages" if it "proves that [its] violation was not intentional and resulted from a bona fide error notwithstanding the use of reasonable procedures adopted to avoid any such error." *Id.*

violated the unfair prong when it "recklessly and negligently" recruited students to Rossier's online program, did not verify the truth of the advertising it disseminated, and accepted the lion's share of tuition, which was often in the form of taxpayer-backed federal student loan money. FAC ¶ 189. Although Plaintiffs allege that 2U "knew or should have known" the rankings were doctored, *id.*, the essence of Plaintiffs' UCL theory is not common law negligence per se, but unfairness. They seek restitution to redress the inequities caused by allowing a profit-motivated company to disseminate advertisements without regard for the truth, while receiving an outsized share of students' tuition money, including federal student loans, regardless of whether 2U did so negligently, recklessly, or in a way that otherwise violated public policy. *Cf. Cal. Med. Ass'n*, 14 Cal. 5th at 1096-97 (explaining that the UCL does not import wholesale "the substantive law of negligence," and its text and purpose often deviate from the law of negligence). Even though Plaintiffs would satisfy a common law negligence standard here, *see* section III(B)(3), *infra*, Plaintiffs theory is informed by broader public policy considerations as well. *See* FAC ¶¶ 189-92.

3. The Complaints Plausibly Allege that 2U Should Have Known the Representations Were False Sufficient to State a FAL Claim.

Of Plaintiffs' claims, only the FAL imposes a scienter requirement, but it is a low one, requiring merely that the "untrue or misleading" nature of an advertisement must have been "known, ***or*** which by the exercise of reasonable care should be known." *See* Cal. Bus. & Prof. Code § 17500 (emphasis added).[4] Indeed, 2U does not argue that actual knowledge is required either as a matter of statutory interpretation or under Rule 9(b). *See* Mot. at 25.[5] And Plaintiffs sufficiently allege that 2U should have known of the falsity. In arguing otherwise, 2U mischaracterizes the applicable legal test.

[4] For the same reasons, even if this standard were required for the CLRA and UCL, Plaintiffs undoubtedly meet it.

[5] The FAL requires that Rule 8 governs pleading claims under the FAL's "should have known" theory, in contrast to Rule 9(b)'s control over FAL theories based on actual knowledge. *IPS Grp., Inv. v. CivicSmart, Inc.*, No. 17-cv-632, 2017 WL 4810099, at *3 (S.D. Cal. Oct. 25, 2017) (Rule 9(b) applies

First, 2U mischaracterizes what Plaintiffs must plead regarding 2U's "duty to investigate" the advertising campaign's claims. Mot. at 26. But there is no independent "duty" element; the FAL's "reasonable care requirement 'imposes a duty of investigation'" on its own. *People v. Forest E. Olson, Inc.*, 137 Cal. App. 3d 137, 139 (1982)). *See also POM Wonderful LLC v. Purely Juice, Inc.*, 362 F. App'x 577, 580 (9th Cir. 2009) ("§ 17500 imposes a duty to investigate and verify facts that would put a reasonable person on notice of possible misrepresentations."). Thus, by virtue of the fact that 2U was making the claims (including agreeing with USC about the claims that could be made to advertise the online degree programs for 2U's financial gain), 2U had a duty to investigate—no other special circumstances need be present. Moreover, this is not a case in which Plaintiffs are seeking to hold 2U liable for "statements made *by others*," Mot. at 26, but for 2U's own failure to investigate the truth of its own joint advertising campaign. *See, e.g.*, FAC ¶¶ 130, 133; *see also* section III(D)(1), *infra*.

Next, 2U argues that Plaintiffs must establish that: (1) "2U was aware of facts that 'would put a reasonable person on notice of possible misrepresentation,'" and (2) "it was possible for 2U to verify the advertising." Mot. at 26 (quoting *Forest E. Olson*, 137 Cal. App. 3d at 139). Neither *Forest E. Olson* nor any other case it cites imposes the latter requirement. As for the former, the standard is not as high as 2U suggests, as the case holds that the "duty of reasonable care is not satisfied by blind reliance on representations made by others," and imposes liability when a defendant does not exercise its obligation to investigate "when facts are present." *Id.*; *accord. POM Wonderful*, 362 F. App'x at 580-81 (holding that the defendant should have known that its advertisements were false when it had general industry knowledge about the possibility of falsity but "blindly" relied on its supplier's representations); *Park v. Cytodyne Techs., Inc.*, 2003 WL 21283814, at *7 (Cal. Super. Ct. May 30, 2003) (finding defendant should have known that the data it published in its advertisements was manipulated because it

only "[w]here a plaintiff alleges fraud as the basis" for FAL violation) (quotation omitted); *see also Moore v. Mars Petcare US, Inc.*, 966 F.3d 1007, 1019 & n.11 (9th Cir. 2020).

had communicated with source of the data and had opportunity to investigate its truthfulness). Although the "should have known" standard cannot be met under *Forest E. Olson* in instances where facts disproving the truth do not exist at all, that is not the situation here.

Ample facts existed that would have reasonably put 2U on notice had it investigated the claims. Indeed, 2U's own partner USC knew of the rankings fraud, and 2U had a right to get admissions data from USC. SAC ¶ 92. Its role in handling recruiting and admissions would have caused it to know that recruited applicants were being admitted at a rate far higher than those of elite schools. *Id.* ¶ 98. And 2U had sophisticated industry knowledge, including work on behalf of comparable schools of education. *Id.* ¶ 94.[6] Indeed, the Ninth Circuit highlighted industry knowledge in *Pom Wonderful* as a basis to have known of falsity, finding that the defendant, a pomegranate juice brand, "should have known" that its representations of 100% pomegranate juice were misleading when it failed to verify its supplier's purity claims, knowing that falsification of juice purity was possible, and with every opportunity to double-check. 362 F. App'x at 580.[7]

Finally, 2U engages in a lengthy factual debate about the reasonable conclusions and inferences that can be drawn from Plaintiffs' allegations regarding why 2U should have known of the falsity. Mot. at 26-30. 2U largely invents alternative explanations and relies on documents that cannot be considered here, *see* Plaintiffs' Opposition to 2U's Request for Judicial Notice, filed concurrently, but these arguments are not suitable for resolution under Rule 12(b)(6). *See Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011) ("If

[6] 2U also told investors that ranking and reputation of its clients, especially USC, had a material impact on its revenue stream, SAC ¶ 102, and thus, had fiduciary obligations to investigate as well.

[7] While *Forest E. Olson* suggests that the duty to investigate "is particularly applicable" in instances where the information needed to verify a claim belongs to the advertiser, nothing in the opinion indicates that no duty exists where advertisers have to look outside their office to verify the claims they make. Moreover, because 2U had a contractual right to obtain this information, it effectively had control over it.

there are two alternative explanations, one advanced by defendant and the other advanced by plaintiff, both of which are plausible, plaintiff's complaint survives.").

For example, 2U contends that it is implausible that its industry knowledge and experience administering programs should have alerted it to fraud because Plaintiffs do not allege 2U was engaged in US News reporting at other schools. But it still had "an unusual level of access to admissions data and practices at other institutions, including those directly competing with USC Rossier," SAC ¶ 94, as well as access to USC's data, *Id.* ¶¶ 95, 98. This access to data creates a plausible inference that 2U would have been familiar with the patterns of selectivity at schools of different rankings. While 2U claims that the right to obtain key admissions data does not mean it actually obtained it, that is precisely the kind of battle of plausible inferences that this Court cannot reach at this stage. And 2U suggests the opacity of the US News ranking process might have shielded it from becoming aware of the fraud, but that opacity is why 2U should not have blindly relied on it.

Likewise, Plaintiffs allege that 2U knew that student selectivity was an important factor in the US News ranking. *Id.* ¶¶ 60, 96-97. Plaintiffs further allege that 2U knew that a large increase in enrollment (from which 2U would receive the bulk of the profit) was likely to correlate to a *decrease* in rankings position (which 2U likewise knew could jeopardize its long-term profitability). SAC ¶ 98. Yet, despite this apparent catch-22, even as Rossier's online enrollment exploded throughout and because of 2U's involvement with the advertising campaign, Rossier received a stunning #17 rank in US News' Best Education Schools 2013 ranking, and it remained in the top 20 for years to come. *Id.* ¶¶ 98-99. This happened even as Rossier received a mediocre #44 ranking in the Best Online Education Schools list in 2013. *Id.* ¶ 99. In light of its knowledge and experience in the industry and with USC's data, 2U should have known something was wrong. 2U's only response to this is to introduce inadmissible extrinsic evidence and posit that alternative explanations exist. But the fact that 2U has to turn to inadmissible

outside sources, *see* Opp. to 2U RFJN, to invent alternative explanations just underscores the plausibility of what Plaintiffs have alleged.

C. Plaintiffs Have Stated a claim Regarding 2U's Participation in the Rankings-Centric Advertising Campaign.

In its Motion, 2U also argues that, even if Rossier's false ranking is actionable *in theory*, it cannot be held liable because the specific advertising it ran, standing alone, is not actionable and was not relied upon by the Plaintiffs. But Plaintiffs' theory turns on the broader advertising campaign that Defendants coordinated and jointly ran, and not the individual misrepresentations made in isolation.

California law has long recognized that long term, coordinated false advertising campaigns are actionable. Where defendants operate a long-term campaign comprised of multiple advertisements and misrepresentations, the focus of the inquiry remains on the defendants' *conduct*, regardless of a plaintiff's ability to recount all of the ways they were exposed to it. *See, e.g, In re Tobacco II Cases*, 46 Cal. 4th 298, 327-28 (2009) (UCL and FAL); *In re Ferrero Litig.*, 2011 WL 5438979, at *3 (S.D. Cal. Aug. 29, 2011) (similar, UCL, FAL, and CLRA); *Krueger v. Wyeth, Inc.*, 310 F.R.D. 468, 479 (S.D. Cal. 2015) (explaining in CLRA and UCL case that a long term campaign need not be "absolutely uniform").

2U ignores these bedrock principles of California consumer protection law. While Plaintiffs detail a broad, multi-part effort by both Defendants to advertise the rankings in a unified and coordinated way, 2U seeks to artificially break up the entire advertising campaign into tiny parts, suggesting that each individual component must be examined independent of its broader context. But that is contrary to California law, which calls for a holistic review of the advertising campaign. When viewed through the proper lens, it is clear that: (1) Plaintiffs state a claim against 2U for the ranking-centric advertising campaign it operated with USC; (2) statements about the rankings, including that the school was "top-ranked," are actionable when viewed in the context of the larger campaign; and (3) Plaintiffs have each pled reliance.

1. Plaintiffs Plausibly Plead that 2U is Liable for the Advertising Campaign as a Whole.

Although USC is the party known to have fraudulently doctored the rankings, 2U and USC jointly caused students to be exposed to those rankings through a multi-part, far-reaching advertising campaign. Not only are Defendants liable for the ads each separately disseminated; they are responsible for the advertising campaign as a whole because they carried out that campaign "pursuant to the 2U/Rossier Services Contract and its requirements that Defendants consult one another on promotional strategies, and that the online and in-person degrees be marketed as comparable to one another." FAC ¶ 76. And both Defendants profited when students enrolled in the online degree programs, regardless of whose specific advertisement hit home with a particular student. Courts in California recognize joint liability under California's consumer protection laws in situations such as this one. *See, e.g.*, *Dorfman v. Nutramax Labs., Inc.*, 2013 WL 5353043, at *14 (S.D. Cal. Sept. 23, 2013) (explaining how "participation" in an "advertising scheme" involving multiple actors can be unlawful) (quoting *In re Jamster Mktg. Litig.*, 2009 WL 1456632, at *9 (S.D. Cal. May 22, 2009)); *Germain v. J.C. Penney Co.*, 2009 WL 1971336, at *5 (C.D. Cal. July 6, 2009) (allegations of "marketing, distribution and sale" and of "manufacturing, marketing and distribution" stated claims against co-defendants).

To determine whether a theory of joint liability is viable, courts look at defendant's "personal participation in" and "unbridled control over the practices." *Emery v. Visa Int'l Serv. Ass'n*, 95 Cal. App, 4th 952, 960 (2002). Those factors are met here. The Complaints plausibly describe an extensive, joint campaign, and detail the many ways in which 2U personally participated in, and had unbridled control over, the campaign as a whole. *See, e.g.*, SAC ¶¶ 77, 79-91. Indeed, 2U stood to profit the most from the program, *id.* ¶ 93, and drafted its contract with USC to protect that interest. Although USC may have published some of the advertising, *see, e.g.*, *id.* ¶¶ 83-85, 2U contracted with USC to divide the advertising work and USC was required to (1) market

the online programs "in a manner comparable to" the in-person programs, *id.* ¶ 44; (2) "consult with [2U]" in the development of additional Promotional Strategies," *id.* ¶ 45; and (3) provide 2U "with access to information pertaining to both classroom-based and online students' admissions, performance, and post-graduation outcomes." *Id.* ¶ 95. Moreover, 2U's approval of USC's messaging and participation in the joint campaign is evidenced by the fact that it chose to reinforce USC's rankings-centric advertising in its own ads. Regardless of the duties each assumed, the campaign was a joint effort.

The degree of 2U's involvement here is even more extensive than in *Dorfman*, 2013 WL 5353043, in which the court found a plaintiff adequately pled that multiple defendants could be found jointly liable for a single, broader campaign. *Id* at *14-15. The court found the participation and control test in *Emery* satisfied where the plaintiff alleged that two retailers "entered into marketing and sales agreements" with the manufacturer of a falsely packaged and labeled product, provided pictures of the false packaging and labels, and made statements on their websites repeating and reinforcing the falsehoods. *Id.* at *14. 2U did all those things and more. *See, e.g.*, SAC ¶¶ 77, 79-91. 2U was not simply a storefront for USC to display its program, but a co-developer of the program whose finances rose and fell on its success. Thus, while the retailers in *Emery* "adopted [the manufacturer's] representations as their own," here, 2U was a co-manufacturer who made the rankings a selling point knowing they were particularly material to applicants. *See, e.g.*, ¶¶ 43-44, 101-109.

2U agrees that the *Emery* participation and control test applies. But the cases it cites stand in stark contrast to those here and in *Dorfman*. *See* Mot. at 21-22 (citing *Reed v. NBTY, Inc.*, 2014 WL 12284044 (C.D. Cal. Nov. 18, 2014) and *Perfect 10, Inc. v. Visa Int'l Serv. Ass'n*, 494 F.3d 788, 808-09 (9th Cir. 2007)). In *Perfect 10*, the plaintiff alleged copyright infringement, but sued the credit card company that unwittingly processed infringing sales rather than the infringing party, and thus, found the credit card company did not have "unbridled control" over the infringement. *See Perfect 10, Inc.*, 494 F.3d at

808-09. In *Reed*, which was decided on a full record, the facts were also inapposite. *See Reed*, 2014 WL 12284044. The court found a manufacturer was not liable for a third-party retailer's advertisement, because the representation diverged from the representations made by the manufacturer, no joint marketing agreement was produced, and there was no evidence the defendant knew of the third party's statements or had a policy of reviewing them. *See id.* at *7-8. By contrast, the above facts detailing the nature of the agreement and the two Defendants' synergistic representations here readily satisfy a Rule 12(b)(6) standard of plausibility.

2. The Various Statements about the Rankings Are Actionable.

2U makes several flawed arguments about the actionability of the advertising itself. First, ignoring the broader campaign, it tries to isolate a few representations about the "top-ranked" nature of the degree as being too generalized to be actionable. Second, it rehashes the argument rejected by this Court regarding the "opinion" nature of US News rankings. Last, it mischaracterizes this Court's order to suggest that it cannot be liable since it did not engage in the reporting of data to US News. All fail.

a. The "Top-Ranked" Representations Are Part of an Actionable Campaign.

2U argues both that the phrase "top-ranked" is puffery that merely suggests the program is superior in the abstract and that the phrase is "literally true" since inadmissible evidence not appearing in the complaint suggests that other rankings organizations aside from US News ranked Rossier highly. Mot. at 16-17. But 2U overlooks that liability turns on the overall campaign, including the advertising disseminated by USC. *See* section III(D)(1), *infra.* And it's "the overall message conveyed" by that campaign that matters, "not parsed out segments of that message, which have been selected by a party based on a desire to substantiate a particular argument." *Johns v. Bayer Corp.*, No. 09-cv-1935, 2013 WL 1498965, at *22 (S.D. Cal. Apr. 10, 2013).

Plaintiffs allege a coordinated campaign to convey an overall message that Rossier was more highly ranked by US News than it was in fact. Occasional references to the program being "top-ranked" must be read in that context; consumers would reasonably understand the phrase as shorthand that reinforces the overall message. And like the Plaintiffs, SAC ¶¶ 117-158, students are likely to have been exposed to the broader campaign on multiple occasions, such as when visiting Rossier's homepage, where the full representation appeared, and the many other ways Defendants pushed the rankings-centric campaign out to prospective students. *See* SAC ¶¶ 7, 10, 78-91; *cf. In re First Alliance Mortg. Co.*, 471 F.3d 977, 992 (9th Cir. 2006)("The class action mechanism would be impotent if a defendant could escape much of his potential liability for fraud by simply altering the wording or format of his misrepresentations across the class of victims.").

Second, even if the top-ranked representation was the only representation a consumer saw, higher education consumers place tremendous weight on US News rankings, SAC ¶¶ 52-54, and thus, it is plausible they would understand any representation about a school being "top-ranked," to mean that it is top ranked by US News. *Cf. Williams*, 552 F.3d at 938-39 (resolution of question of deceptiveness of advertising not appropriate for motion to dismiss). And even if this Court were to consider at this stage 2U's outside evidence suggesting that other ranking systems might have ranked Rossier highly at one point in time, that evidence is irrelevant because advertising can still be deceptive even if it is literally true. *See Shaeffer v. Califa Farms, LLC*, 44 Cal. App. 5th 1125, 1138 (2020) ("[S]tatements which, while literally true or ambiguous, convey a false impression or are misleading in context, as demonstrated by actual consumer confusion' are actionable.") (internal quotations omitted).

The twenty-year old Oregon case cited by 2U, *CollegeNet, Inc. v. Embark.Com, Inc.*, 230 F. Supp. 2d 1167 (D. Or. 2001), does not change this analysis. In *CollegeNet*, the court found that statements that a company held a "50% market share of the top United

States universities" were puffery under the Lanham Act. *Id.* at 1177. The court determined that a list of "top universities" varied based on individual opinion and between different rankings organizations. *Id.* It contrasted this finding against another case, *Southland Sod Farms*, where the statement "50% less mowing" was specific and measurable because the number was determined by "[t]ests conducted by our research farm." *Id.* (quoting *Southland Sod Farms*, 108 F.3d 1134, 1145 (9th Cir. 1997). As the "top universities" claim had no such caveat, it was too vague to be actionable. *Id.*

By contrast, the allegations here come with detailed context. Much like *Southland Sod*, in which "50% less mowing" was actionable because, in context, it meant "50% less mowing [according to] tests conducted by our research farm," here "top-ranked" is actionable because, in context, it means "top-ranked by US News," a claim that one can prove to be false and deceptive. *See* 108 F.3d at 1145.

b. This Court Already Rejected the "Subjective Opinion" Argument.

2U next rehashes its argument—already rejected by this Court—that US News' Best Education Schools rankings are "subjective opinions regarding which schools are superior" to other schools. To the contrary, as this Court previously explained, Plaintiffs' allegations "do not target US News's *selection* or *weighing* of the objective criteria which determine the rankings." MTD Order at 7. This still holds true. As regards to 2U, Plaintiffs challenge both Defendants' "subsequent promotion" of the allegedly fraudulently obtained rankings. *Id.* at 8. Plaintiffs do not challenge the validity of the US News' methodology itself, but rather 2U's deceptive promotion of a fraudulently obtained ranking that 2U should have known was fraudulent.

Here again, 2U focuses its argument on *Ariix, LLC v. NutriSearch Corporation*, 985 F.3d 1107 (9th Cir. 2021), and one of the two rating systems the plaintiff there challenged under the Lanham Act as rigged. Mot. at 18. As to that five-star rating system, the Ninth Circuit concluded the plaintiff's theory was not actionable because it was puffery and involved an opinion that was not capable of being proven true or false.

Id. at 1121. But the lawsuit there was against the *publication* for *its own* opinions, and the ratings were found to be non-actionable *because of the methodology the defendant-publication chose. Id.* ("[T]here is an inherently subjective element in deciding which scientific and objective criteria to consider."). In other words, the "opinion" is the methodology, not the rating. Because of that, the competitor's claims in *Ariix* were incapable of being true or false because it would be impossible to evaluate the falsity of the publication's subjective decisions about how and why it designed the methodology the way it did.

The situation here is markedly different, as this Court recognized. *See* MTD Order at 6-7 ("Plaintiffs' allegations, however, do not target US News' *selection* or *weighing* of the objective criteria which determine the rankings."). Plaintiffs do not challenge the opinion that was at issue in *Ariix*, *i.e.*, the methodology used by US News, nor are their claims against US News. Instead, the rank here,—and with it, 2U and USC's advertising campaign—can be proven false because it does not require an inquiry into the subjective, opinion portion (the methodology), but the objective information that USC submitted and 2U could access and should have known was false. *See* section III.B.3, *supra.* Indeed, these facts are in accord with the second rating in *Ariix,* which the Ninth Circuit did find to be actionable. *Id.* at 1122. For that rating, the methodology was not at issue, and thus, the rating was actionable because the inquiry involved a "binary determination," of whether the information supplied was true or false. *Id.* Like that rating, the ranking here is also a "binary determination" of whether USC would have ranked where it did but for the falsified data submissions.

2U's other cases are identical to *Ariix*, in that they are against the publication over the publications' opinions, *i.e.*, their ratings methodology. *See* Mot. at 19 (discussing *Aviation Charter, Inc. v. Aviation Res. Group*, 416 F.3d 864, 870-71 (8th Cir 2005) and *ZL Technologies, Inc. v. Gartner, Inc.*, 709 F. Supp. 2d 789, 791-92 (N.D. Cal. May 3, 2010)). This Court already rightly distinguished them. See MTD Order at 6-7 & n. 3.

c. The Question of Who Submitted Data to US News Is Irrelevant to the False Advertising Inquiry.

Finally, 2U mischaracterizes the MTD Order by contending that it cannot be held liable for any dissemination of the false advertising because Plaintiffs did not allege 2U actually submitted the data to US News.

2U argues that the MTD Order denied USC's motion to dismiss based on allegations "'that USC knowingly reported false data to US News,' not on [USC's] public dissemination of the US News rankings themselves." Mot. at 20 (quoting MTD Order at 8). In 2U's view, the Court implicitly rejected the theory that "public dissemination of the US News rankings" could form a basis for Plaintiffs' claims. But nothing in the Court's decision suggests that it is limited to what USC caused to appear in the publication. Rather, the MTD Order accurately characterizes the broader advertising campaign to promote those rankings. MTD Order at 2-3. Indeed, after observing that USC reported the false data, the Court explained that the overall process of creating that rank "does not render USC's ***promotion*** of the allegedly fraudulently obtained ranking non-actionable." *Id.* at 8 (emphasis added). As this is a case about false and deceptive advertising, the advertising is what matters.[8] While USC's efforts to get US News to publish doctored rankings may be relevant to how liability gets apportioned, at this stage, what matters is that the class, including all Plaintiffs, were exposed to the advertising that followed the publication of the results by both Defendants. SAC ¶¶ 77, 83-91; 121-23 (Favell), 130-35 (Zarnowski); 144-47 (Cummings); 152-54 (Murtada), 175.

Further, to the extent 2U contends it can only be held liable for disseminating the false rankings if it participated in the data submissions, nothing in the Court's order nor the case law suggests this is the case. Rather, this argument is little more than a

[8] 2U builds a strawman with this language, suggesting that Plaintiffs have stated a claim "based on the alleged reports of false data," and then elaborately unwinds all the reasons that would fail. Mot. at 21. The argument is bluster; 2U knows full well what Plaintiffs are claiming, namely that USC laundered false information through US News to get a higher result, then worked with 2U to disseminate the higher result.

backdoor attempt to force a knowledge requirement into the statutes when there is none. *See* section III(B)(2), *supra*.

3. The Complaints Plausibly Allege Reliance on 2U's Participation in the Rankings-Centric Advertising Campaign.

2U also tries to slice up the broader campaign by claiming that Plaintiffs did not plead "reliance on a 2U advertisement." Mot. at 21. While Plaintiffs each detail how they were exposed to the rankings-centric advertising in multiple ways on multiple occasions, 2U goes through each advertisement and points the finger at USC or manufactures frivolous Rule 9(b) challenges.[9]

2U's reliance arguments fail. As explained in section III(D)(1), above, 2U is jointly liable for the promotional advertisements regardless of whether USC was the publisher, and all Plaintiffs relied on the campaign as a whole. *See also Dorfman*, 2013 WL 5353043, at *15 (S.D. Cal. Sept. 23, 2013) (finding one retailer's advertising could inform a consumer's reliance on a product purchased from a different retailer where the campaigns were coordinated).

In cases involving multiple advertisements made as part of a longer term, coordinated campaign to which a plaintiff would have been exposed on multiple occasions, one need not plead with specificity the details of each advertisement viewed to comply with Rule 9(b). Rather, courts undertake a holistic assessment. *See, e.g.*, *Opperman v. Path, Inc.*, 84 F. Supp. 3d 962, 976-82 (N.D. Cal. 2015) (applying *Tobacco II*, 46 Cal. 4th at 324-29). The relevant factors include: (1) the plaintiff pleads they actually saw or heard the defendant's advertising campaign; (2) the advertising campaign was sufficiently lengthy and widespread that it would be unrealistic to require a plaintiff to plead every misrepresentation relied upon; (3) the plaintiff described in the complaint a representative sample of the at-issue advertising; (4) the alleged misrepresentations in the campaign are sufficiently similar; (5) each plaintiff pled separately, with particularity,

[9] Given that Plaintiffs' claims do not sound in fraud, Rule 9(b) does not even apply here, *see* n.5, *supra,* but Plaintiffs still satisfy the test.

examples of when and how they were exposed to the advertising campaign; and (6) each plaintiff pled a time frame in which they relied upon the advertising campaign. *Id.* (applying *Tobacco II*, 46 Cal. 4th at 324-29); *see also In re Ferrero Litig.,* 2011 WL 5438979, at *3 (S.D. Cal. Aug. 29, 2011) (undertaking similar analysis in case under CLRA, UCL, and FAL).

These factors are all present. First, each Plaintiff alleges exposure to advertising about the rankings. *See, e.g.*, SAC ¶¶ 121-23 (Favell); ¶¶ 130-35 (Zarnowski); ¶¶ 144-47 (Cummings); ¶¶ 152-54 (Murtada). Further, the campaign was broad and long lasting, dating as far as 2008. *E.g. id.* ¶¶ 7, 79-91; *see Morgan v. AT&T Wireless Servs., Inc.*, 177 Cal. App. 4th 1235, 1258 (2009) (18-month campaign actionable when performed across "several different media"). While Plaintiffs themselves did not view the advertising over years, the campaign lasted years, and they were exposed to the advertising multiple times, which is enough. *See Dodson v. Tempur-Sealy Int'l, Inc.*, 2014 WL 1493676, at *7 (N.D. Cal. Apr. 16, 2014) (finding reliance under FAL where consumers purchased mattresses after being exposed to a variety of advertising in a variety of places). In addition, the advertising forming the campaign, both generally and what the Plaintiffs saw specifically, is all similar in nature, and representative samples are alleged throughout. The advertising all focuses on the US News ranking or referential shorthand, like "top-ranked."[10]

Although 2U complains that certain allegations, such as Ms. Cummings' and Ms. Zarnowski's are too vague, Plaintiffs need not and thus do not allege the exacting details of every advertisement. Plaintiffs' allegations are specific. The Plaintiffs were exposed to the campaign in the months leading up to their enrollment. All had multiple interactions through their application cycle and saw advertising about the rankings on various occasions. They have all made specific allegations, including the "what," "when," and "how" regarding Plaintiffs' exposure to them. *See* SAC ¶¶ 83-91; 121-23

[10] 2U contends this is puffery, but it is wrong for the reasons discussed in section III(D)(2)(a), *supra.*

(Favell), 130-35 (Zarnowski); 144-47 (Cummings); 152-54 (Murtada).

While it is true that in some instances, the Plaintiffs could not recall the exacting details of every advertisement, it would be unrealistic to require them to remember the precise text, date, and time of every banner display advertisement or search result, and every visit they made to the USC website (main or online portion only) during the course of applying to the school and finalizing enrollment. 2U's contention that Ms. Cummings and Ms. Zarnowski's descriptions of the advertising that 2U caused to be disseminated to them via ad display networks are too vague are not well taken. In addition to all the specifics above, the Complaints allege that 2U paid third party ad display networks to track prospective students' activity on the web and display advertising on third party websites, *id.* ¶¶ 80-82, and how Plaintiffs viewed these networks' rankings-centric advertising throughout the time period during which they researched schools. *Id.* ¶¶ 132-33, 143-147. Given the proliferation of internet advertising, it is hardly surprising a consumer cannot remember exactly on what website a display ad service caused the ad to be shown to them during the course of applying to the school and finalizing enrollment, but Rule 9(b) is satisfied, as 2U has ample facts here to investigate whether it caused its display ad network to publish ads on USC's ranking during this time period. Reliance is satisfied.

D. Plaintiffs Have Pled the Remaining Elements of their CLRA Claims.

Plaintiffs allege CLRA violations based on five subsections of that statute: Sections 1770(a)(1), (2), (3), (5), and (7). While the CLRA claim survives so long as any one of those five subsections is properly pled here, all five are satisfactory and 2U's challenges fail.

1770(a)(1). 2U played a role in passing off Rossier's services as those of another by representing that Rossier was highly ranked by US News when it was not. This subsection protects against a defendant "exploit[ing] a competitor's reputation in the market," with the purpose of protecting consumers from being "confus[ed]" by false

similarity. *Perkins v. Philips Oral Health Care, Inc.*, 2012 WL 12848176, at *6 (S.D. Cal. Dec. 7, 2012) (quoting *Bank of the W. v. Super. Ct.*, 2 Cal. 4th 1254, 1263 (1992)). The advertising campaign here exploited the reputations of legitimately highly ranked programs, deceiving would-be applicants into believing Rossier belonged in that group. But Rossier did not belong; it was riding the reputational coattails of other programs.

1770(a)(2). 2U misrepresented the sponsorship, approval, or certification of Rossier by US News when it touted a US News rank achieved through fraud. 2U's defense is that the US News ranking cannot, as a matter of law, be a sponsorship, approval, or certification. It cites no case law to this effect. Plaintiffs allege that the high rank that US News assigned to Rossier each year is a mark of approval, or a certification, that 2U marketed and advertised to Plaintiffs in violation of this section. The "official document" or "formal sanction" that 2U attempts to read into this subsection is atextual and not recognized by courts. *See, e.g.*, *Haddix v. Gen. Mills, Inc.*, 2016 WL 2901589, at *7 (E.D. Cal. May 17, 2016) (denying motion to dismiss when "sponsorship, approval, or certification" was the defendant's statement regarding cereal gluten content).

1770(a)(3). 2U misrepresented Rossier's affiliation, connection, association with, or certification by US News when it claimed Rossier had a connection with US News's highly ranked programs, but did not. 2U argues that Plaintiffs must allege the precise line at which "highly ranked" begins and ends in the US News rankings. This is wrong. First, at this stage, no magic number is required, because Plaintiffs have plausibly pled that prior to the data manipulation, USC was ranked #38, and it is plausible that students would not perceive that as highly ranked in contrast to where USC did ultimately land (*e.g.*, #15 or #10). SAC ¶ 58. As the Complaints explain, a school's improvement in the US News Rankings by just one spot (*e.g.*, from #19 to #18) raises the number of its applicants by nearly one percent, *id.* ¶ 52; a jump of two dozen or more spots would plausibly lead students to put it in a higher value category. Thus, for

purposes of stating a claim, Rossier's placement was a misrepresentation of its affiliation, connection, association with, or certification by US News and the highly ranked schools named next to it. Through fact and expert discovery, Plaintiffs will advance theories as to the price premiums associated with each increase in rank and/or the price premium associated with "highly ranked" schools versus other schools. But for now, Plaintiffs have pled sufficient facts to state a claim and put 2U on notice of the false nature of their advertising.

1770(a)(5) and (a)(7). 2U represented that Rossier had sponsorship, approval, or characteristics that it did not have—namely, those of a US News highly ranked school (Section 1770(a)(5))—and 2U represented that Rossier was of a particular standard, quality, or grade (a US News highly ranked school) when it was of another (Section 1770(a)(7)). 2U argues that these claims fail because of the educational malpractice doctrine. Mot. at 33. But the Court already rejected those arguments. MTD Ord. at 10-11. Because Plaintiffs do not challenge "the quality of the education they received," the doctrine is inapplicable. *Id.* Plaintiffs' allegations are based on USC's "intentional[] misreport[ing of] student selectivity data to artificially inflate its US News rankings." *Id.* at 11. As the Court already held, the educational malpractice doctrine is not implicated by that theory. *Id.* 2U nonetheless argues that, under these subsections, Plaintiffs must challenge the quality of their education. Not so. Plaintiffs' theory is much simpler: USC's submission of data, and 2U's subsequent advertising of the ranking obtained through that data, misrepresented the approval and characteristics of Rossier and misrepresented that it was of a particular standard, quality, or grade (namely, the US News ranking). This requires no examination of the quality of the education, and 2U does not (or cannot) explain why these subsections necessarily would require it.

E. Plaintiffs State a UCL Unfairness Claim.

Plaintiffs allege that 2U violated the "unfair" prong of the UCL, Cal. Bus. & Prof. Code § 17200, because, incentivized by the revenue sharing provision in the Services

Agreement, it disseminated materially false information to increase enrollment and profits without regard to the truth of what it was saying. FAC ¶¶ 30, 182, 186-87, 189–192; *see also id.* ¶ 2 (alleging that 2U received an estimated 60% of tuition paid by each Rossier online student for recruiting, admissions, and other services, it plainly violates the ban.). "Unfair" is an "intentionally broad" concept under the UCL, covering any business practice that "offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." *Podolosky v. First Healthcare Corp.*, 50 Cal. App. 4th 632, 647 (1996) (citations omitted). "[A] practice is prohibited as 'unfair' or 'deceptive' even if not 'unlawful' and vice versa." *Id.* Against this capacious standard, Plaintiffs have adequately pled that students are harmed by the aggressive recruiting promoted by 2U's contract with USC, satisfying their burden at the pleading stage.

2U does not directly challenge this unfairness theory. Instead, it asserts that Plaintiffs' claim is predicated entirely on the "insinuat[ion] that 2U's contract violates federal law," which 2U fiercely disputes. Mot. at 34. 2U also challenges Plaintiffs' standing. But the theory 2U attacks is not the theory Plaintiffs have pled. While Plaintiffs assert an *unlawfulness* claim against USC regarding its violation—through the Services Agreement—of the federal "incentive compensation ban," 20 U.S.C. § 1094(a)(20) (the "Ban"), they do not bring that claim against 2U. *Compare* FAC ¶ 185 (unlawful allegations) *with id.* ¶ 189 (2U's unfair acts).

Apart from not addressing the unfairness claim actually pled, 2U's defense—that federal law permits the incentive component of the Services Agreement and thereby provides a safe harbor from UCL liability—should be foreclosed as a matter of law. The Services Agreement violates the plain language of the Ban and Department regulations, which prohibits USC from making "any" payment to "any persons or entities" based "directly or indirectly" on success in securing enrollments in "any"

recruiting activities. 20 U.S.C. § 1094(a)(20); 34 C.F.R. § 668.14(b)(22).[11] 2U cannot dispute this. Nevertheless, 2U argues that its Services Agreement is saved by subregulatory guidance: the 2011 "Dear Colleague Letter" ("DCL").[12] As discussed below, that argument ignores basic principles of administrative law.

1. Plaintiffs' UCL Theory Is Adequately Pled Irrespective of the Legality of the Services Agreement.

Plaintiffs' unfairness theory is independent of the legality of the Service Agreement under federal law. 2U unfairly spread materially false information to induce enrollment and increase profits. FAC ¶ 189. Although the Ban reinforces the unfairness of 2U's conduct, so too do other general public policy considerations. *Id.* ¶ 190.

2U does not carry its burden to identify any federal law, regulation, or policy in conflict with Plaintiffs' UCL theory.[13] Instead, the Higher Education Act ("HEA") reinforces the importance of state consumer protection laws. *See generally* U.S. Dep't of Education, Statement of Interest, *Sanchez v. ASA College*, No. 1:14-cv-05006, Dkt. 54 (S.D.N.Y. Jan 23, 2015). Unlike in *Gregory v. Albertson's, Inc.*, 104 Cal. App. 4th 845, 855 (2002), 2U's unfairness liability is consonant with, not contradictory to, federal policy. *Compare* 75 Fed. Reg. at 34,817 (June 18, 2010) (discussing the Ban's policy rationale), *with* FAC ¶¶ 30-33, 189. At best, the DCL sets parameters for how a school shares tuition with a partner; it is silent about that partner's obligations under state consumer protection laws. *See* n.18, *infra*.

Finally, 2U asserts that Plaintiffs have not alleged statutory standing under the UCL, contending there is no "causal connection between the bundled services arrangement and their claimed losses." Mot. at 37. Under Plaintiffs' actual unfairness

[11] *See also* GAO 11-10 at 1, https://www.gao.gov/assets/gao-11-10.pdf; FAC ¶¶ 25, 30-34 (discussing the Ban and its policy rationales).

[12] U.S. Dep't of Educ., Dear Colleague Letter: Implementation of Program Integrity Regulations, Gen-11-05 (March 17, 2011), https://fsapartners.ed.gov/sites/default/files/attachments/dpcletters/GEN1105.pdf.

[13] *See, e.g.*, *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (instructing courts to "start with the assumption that a state's historic police powers will not be superseded absent a 'clear and manifest purpose' of Congress").

theory (not 2U's), Plaintiffs plead sufficient facts to establish standing because they made enrollment decisions based on false information that 2U disseminated. *See* FAC ¶¶ 127, 139, 149, 157. The UCL requires only an "injury in fact" and a loss of "money or property as a result of the unfair competition," which Plaintiffs' monetary losses in reliance on the advertising campaign satisfies. Cal. Bus & Prof. § 17204.

2. 2U's "Preemption" Defense is Baseless Because the Revenue Sharing Arrangement Violates the Higher Education Act and Its Regulations.

2U asserts a legal immunity to the unfairness claim because, in its view, the Department interpreted the Ban through a "series of regulatory actions," to "clearly permit[]" agreements like its own with USC. SAC ¶ 34. But 2U skirts the clear text of the HEA and regulations, arguing that contradictory subregulatory guidance condones its contract with USC. 2U is wrong.

The Ban was adopted in 1992. In 2002, using procedures required by the HEA and the Administrative Procedures Act, the Department adopted "safe harbors" for conduct that institutions could "carry out without violating" the ban, including for "tuition sharing arrangements" like the one between 2U and USC. 34 C.F.R. § 668.14(b)(22)(ii)(L) (adopted 2002; repeal eff. July 1, 2011). But in June 2010, the Department issued a Notice of Proposed Rulemaking to *eliminate* the safe harbors, explaining that doing so would "align [the regulations] more closely with the [S]tatutory [Ban]," because the ban was "clear" and "obstructed" by the safe harbors. 75 Fed. Reg. at 34,817 (June 18, 2010). In October 2010, the Department eliminated the safe harbors, effective July 2011, to "align institutional practices with the goals intended by Congress."[14]

In March 2011, the Department issued the DCL, purporting to permit revenue sharing agreements with bundled service providers under certain circumstances, as previously allowed by repealed safe harbor L. But the DCL was an anomaly insofar as

[14] *See* 75 Fed. Reg. 66,832, 66969 (Oct. 29, 2010).

it contradicts both statute and regulation and was issued without heeding procedural requirements used to adopt and repeal the safe harbors. Nor did it explain how this change comported with the 2010 final rule. The Inspector General opposed the guidance.[15]

2U asserts that the UCL must yield to the DCL under *Auer v. Robbins*, 519 U.S. 452 (1997). But subregulatory guidance is not entitled to deference when it expressly contradicts a lawfully promulgated regulation, particularly when the guidance "does not make any changes to the regulations"—and says so. DCL at 1; *Hall v. United States Dep't of Agric.*, 984 F.3d 825, 835 (9th Cir. 2020) (declining dereference to guidance that expressly disclaimed altering a regulation). Statutes and regulations are controlling.

Auer is inapplicable for three additional reasons: (1) the DCL interprets the HEA, not the Department's regulations;[16] (2) the DCL is clearly contrary to law, *see Reid v. Johnson & Johnson*, 780 F.3d 952, 962 (9th Cir. 2015);[17] and (3) *Auer* does not apply where there is inadequate consideration by the agency, shown through "conflicts between the agency's current and previous interpretations." *I-TAP v. Calif. Dept. of Indus. Relations*, 730 F.3d 1024, 1034 (9th Cir. 2014).

3. Holding 2U Liable Does Not Violate Due Process.

Imposing liability on 2U does not violate due process because, as discussed above, 2U's liability does not arise from the Services Agreement itself, but from 2U's

[15] *See, e.g.*, U.S. Dep't of Educ. Office of Inspector General Semiannual Report to Congress 11 (May 2011), https://www.oversight.gov/sites/default/files/oig-sa-reports/sar62.pdf (highlighting the Inspector General's 2002 "non-concurre[nce]" with the safe harbor allowing incentive payments if part of a bundle of services as unlawful under the Ban.) ("OIG Report").

[16] Interpretations of regulations that parrot statutes do not receive *Auer* deference. *Gonzalez v. Oregon*, 546 U.S. 243, 257 (2006).

[17] Each of the cases cited by 2U on pages 35-36 of its Motion are inapposite because they involved agency interpretations that were not inconsistent with the respective regulatory and statutory frameworks.

related advertising thereafter.[18]

In any event, regardless of the legal status of the DCL, 2U carries the burden to prove "justifiable reliance" on the DCL. Mot. at 37. Plaintiffs are not required to plead facts rebutting an affirmative defense. *McMillan v. Lowe's Home Centers, LLC,* 2016 WL 2346941, at *6 (E.D. Cal. May 4, 2016). Their defense is indeed questionable, given that 2U told investors that the DCL had "not been codified by statute and regulation," may be "subject to change," and had an "uncertain" future, particularly in "litigation [involving] the propriety of any specific compensation arrangements." 2U, Inc., Registration Statement (SEC Form S-1) 27 (Feb. 21, 2014) at 27. 2U also understands the relevant administrative law principles, having recently argued that different guidance was unlawful because (a) it "squarely contradicts the text of the HEA and its implementing regulations"; (b) the Department issued it without acknowledging "a change in position and offer[ing] a reasoned explanation for it"; and (c) it was a "legislative rule in the guise of informal guidance," issued without "statutorily prescribed rulemaking procedures"—all the same arguments Plaintiffs make here. *2U et al. v. Cardona et al.*, No. 23-cv-00925, Dkt. No. 9-1 at 27, 30 (D.D.C. April. 7, 2023).

2U's only due process case, *PHH Corp. v. CFPB*, 839 F.3d 1 (D.C. Cir. 2016), forbids an agency from holding a party liable for conduct that the agency itself had previously permitted. *Id.* at 47.[19] That has not happened here. Also, the agency "guidance" referenced in *PHH* was in "accord with," not in contradiction to, regulations. *Id.* at 45. Similarly, in *Davis v. HSBC Bank Nevada*, 691 F.3d 1152, 1170-71 (9th Cir. 2012), the "federal guidance" defendants relied on was regulatory, not subregulatory. *Id.*

[18] The DCL applies only if the institution "[pre]determines the number of enrollments." *Id.* at 11. Plaintiffs alleged that USC "did not set strict and meaningful enrollment limits," FAC ¶ 39. Even if the DCL is lawful, 2U's compliance with the DCL cannot be decided on the pleadings.

[19] Even if 2U prevails that it would be unfair to impose restitution given the DCL, its "fairness" argument has no merit for declaratory or injunctive relief.

IV. CONCLUSION

For all the reasons above, the Court should deny 2U's Motion to Dismiss Plaintiffs' claims against 2U. If the Court grants the Motion in full or part, it should do so without prejudice and with leave to amend.

Date: September 29, 2023

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CERTIFICATE OF COMPLIANCE

The undersigned, counsel of record for Plaintiffs, certifies that this brief contains <10,000 words, which complies with the word limit set in the Court's August 24, 2023 Orders. *See Favell I* Dkt. 75; *Favell II* Dkt. 65.

Date: September 29, 2023

/s/ Kristen G. Simplicio
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