LATHAM & WATKINS LLP
Elizabeth L. Deeley (CA Bar No. 230798)
elizabeth.deeley@lw.com
Melanie M. Blunschi (CA Bar No. 234264)
melanie.blunschi@lw.com
505 Montgomery Street, Suite 2000
San Francisco, California 94111-6538
Telephone: +1.415.391.0600
Facsimile: +1.415.395.8095

Roman Martinez (*pro hac vice*)
roman.martinez@lw.com
555 Eleventh Street, NW, Suite 1000
Washington, D.C. 20004-1304
Telephone: +1.202.637.2200
Facsimile: +1.202.637.2201

Attorneys for Defendant 2U, Inc.

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(MARx);
Case No. 2:23-cv-03389-GW(MARx)

CLASS ACTION

2U, INC.'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS SECOND AMENDED 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

[Reply in Support of Request for Judicial Notice concurrently filed herewith]

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

RULES

OTHER AUTHORITIES

I. INTRODUCTION

Plaintiffs' Opposition does not overcome the numerous fatal pleading deficiencies that 2U identified in its Motion to Dismiss. For three key reasons, Plaintiffs' claims still fail.

First, Plaintiffs cannot escape binding precedent establishing that neither of the categories of challenged statements is actionable against 2U. Advertisements that generically tout USC Rossier as "top ranked" are textbook puffery—and Plaintiffs cannot salvage claims based on these advertisements by asking the Court to recast the statements as "top ranked" *by US News* when the statements do not make that additional assertion and, in any event, would remain puffery. Advertisements that do mention USC Rossier's specific US News ranking fare no better, as this Court already recognized that Ninth Circuit precedent establishes that such third-party rankings are statements of *opinion*—meaning they are actionable only against a defendant who "has knowledge" that the data underlying that ranking was false. *PhotoMedex, Inc. v. Irwin*, 601 F.3d 919, 931 (9th Cir. 2010); *Favell I* ECF No. 63 ("Order") at 8. But Plaintiffs have now concededly abandoned any allegations that 2U knew that USC Rossier's US News rankings were false—allegations that this Court rightly rejected as unsupported—so these opinion statements are not actionable against 2U as a matter of law.

Second, this Court should reject Plaintiffs' attempts to evade the well-established standards for pleading reliance. Despite what Plaintiffs argue, it is not enough to point to *USC's* advertisements and gesture at a purported "holistic" campaign by USC and 2U—without ever identifying a misleading *2U* statement Plaintiffs relied on. Even the cases Plaintiffs cite make clear that a plaintiff always must describe at least one statement they saw by each defendant—which Plaintiffs have not done.

Third, Plaintiffs still fail to allege that 2U knew or should have known the rankings were false. Even after retreating to the lower "should have known"

standard, Plaintiffs still do not point to a single alleged fact that would put a reasonable person on notice that something was amiss. Plaintiffs' Opposition simply parrots back conclusory allegations about 2U's industry knowledge and its purported access to some subset of admissions data, but Plaintiffs never articulate how any of this would put 2U on notice that USC Rossier's rankings were wrong. Plaintiffs' speculative assertions do not move these claims from possible to plausible, as is necessary to keep 2U in this case.

II. ARGUMENT

Plaintiffs' Opposition does not overcome any of the independent reasons that this Court should dismiss Plaintiffs' claims against 2U. Plaintiffs have not pled (1) an actionable misstatement; (2) reliance on a 2U statement; or (3) that 2U knew or should have known USC Rossier's rankings were false. All of these issues are suitable for resolution at the pleading stage. *See, e.g.*, *Newcal Indus., Inc. v. Ikon Office Sol.*, 513 F.3d 1038, 1053 (9th Cir. 2008) (whether a statement is actionable is "a legal question that may be resolved on a Rule 12(b)(6) motion"); *Perfect 10, Inc. v. Visa Int'l Serv. Ass'n*, 494 F.3d 788, 808-10 (9th Cir. 2007) (same for whether the defendant made the false statements); *Williams v. Tesla, Inc.*, No 20-cv-08208-HSG, 2023 WL 1072000, at *3-5 (N.D. Cal. Jan. 27, 2023) (same for whether the defendant "should have known" of falsity). In addition, Plaintiffs still do not explain how they have pled the express requirements of the CLRA subsections they invoke. And Plaintiffs now make clear (at 25) that their UCL "unfairness" claim is based solely on alleged false advertising, so it fails for the same reasons as the other false-advertising claims.

A. Plaintiffs' Claims All Fail Because Plaintiffs Still Have Not Pled An Actionable Statement

At the threshold, Plaintiffs' claims all fail because neither of the two categories of statements—that USC Rossier was "top ranked" or that USC Rossier held particular US News rankings—is actionable against 2U. Plaintiffs' effort to

transform the "top-ranked" statements into something actionable would require this Court to add additional words to these advertisements that are not there. In any event, Plaintiffs' reimagined misrepresentations still remain black-letter puffery. And because the numerical US News rankings themselves are opinion statements under Ninth Circuit precedent, Plaintiffs' failure to plead that 2U actually *knew* those rankings were false means that the rankings cannot serve as the basis for a claim against 2U either.

1. Plaintiffs Do Not Explain How The "Top-Ranked" Statements Are Actionable

Plaintiffs did not provide a single case contradicting the steady line of precedent confirming that describing something as "top-ranked" is "classic puffery." *In re Century 21-RE/MAX Real Est. Advert. Claims Litig.*, 882 F. Supp. 915, 928 (C.D. Cal. 1994) (dismissing statement that RE/MAX was "#1 in the United States" as puffery); *CollegeNet, Inc. v. Embark.com, Inc.*, 230 F. Supp. 2d 1167, 1177 (D. Or. 2001) (dismissing "top universities" statement as puffery); *McLaughlin v. Homelight, Inc.*, No. 2:21-cv-05379-MCS, 2021 WL 5986913, at *4 (C.D. Cal. Sept. 17, 2021) (collecting cases where "top"-based statements constituted puffery); *King Tuna, Inc. v. Anova Food, Inc.*, No. 07-7451-ODW, 2008 WL 11338617, at *7 (C.D. Cal. March 18, 2008) (dismissing "top condition" statement as puffery). Nor did they explain how such statements communicate any "specific factual assertion," as is necessary for a statement to be actionable. *Anunziato v. eMachines, Inc.*, 402 F. Supp. 2d 1133, 1140-41 (C.D. Cal. 2005).

Instead, Plaintiffs ask the Court (at 15-16) to import additional language into the general "top-ranked" statements to make them actionable, arguing that any "top-ranked" statement would be understood to mean "top ranked" *by US News*. But it is undisputed that many different sources rank universities such as USC Rossier, *see* Mot. at 16—which means there is no basis to blindly assume that consumers would think vague "top-ranked" statements necessarily refer to US News's ranking.

Rather, where a "top-ranked" statement does not state "which ranking system governs," *CollegeNet*, 230 F. Supp. 2d at 1177, or even "the category in which [USC Rossier]" was "top-ranked," *In re Century 21*, 882 F. Supp. at 928, it remains too vague to be verified and therefore is classic puffery.[1] That makes this case fundamentally unlike the main case Plaintiffs cite (at 17)—*Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1145 (9th Cir. 1997)—where the statement that sod required "50% less mowing" was capable of being proven false because it used both a number ("50%") and a specifically quantifiable product characteristic ("less mowing").

Plaintiffs then argue (at 12, 15-16)—without any legal support—that advertisements stating only that USC Rossier was "top ranked" can be rendered actionable if they are read in the "context" of USC's "broader campaign," which also included advertisements with the US News ranking. They theorize (at 12, 16) that whether particular statements are actionable depends not on their words, but on the "overall message" of an advertising campaign—so even if an advertisement is not actionable by itself, the Court can supposedly keep it in the case because of what *other* advertisements said. But Plaintiffs' "overall message" approach is not the law. While a court must review each *individual* advertisement "in its entirety" to determine the meaning of a statement, a court is not at liberty to combine different advertisements made at different times when determining whether particular statements are puffery. *Johnson & Johnson Vision Care, Inc. v. 1-800 Contacts, Inc.*, 299 F.3d 1242, 1248 & n.4 (11th Cir. 2002) (rejecting a district court's "campaign"-based approach). As the Eleventh Circuit explained in *Johnson*, "[e]ven if a consumer saw each advertisement in a campaign, it is unlikely that the consumer

[1] Plaintiffs' suggestion (at 16) that it is enough that these statements could "plausibl[y]" be interpreted their way misstates the law. Plaintiffs must show that a reasonable consumer was "likely" to be deceived, which means "more than a mere possibility that the advertisement might conceivably be misunderstood by some few consumers." *Lavie v. Proctor & Gamble Co.*, 105 Cal. App. 4th 496, 508 (2003).

would use the elements of Advertisement A seen on a Monday to interpret Advertisement B seen on a Thursday." *Id.* at 1248 n.4. For that reason, this Court and others consider whether *each* alleged misstatement is actionable on its own terms, dismissing claims based on nonactionable statements. *See, e.g.*, *Barry v. Colony NorthStar Inc.*, No. 18-2888-GW, 2019 WL 13237710, at *13-14 (C.D. Cal. Jan. 24, 2019); *Weiss v. Trader Joe's Co.*, No. 8:18-cv-01130-JLS, 2018 WL 6340758, at *4-7 (C.D. Cal. Nov. 20, 2018). The sole case Plaintiffs cite for their "overall message" argument, *Johns v. Bayer Corp.*, No. 09-cv-1935-AJB, 2013 WL 1498965, at *22 (S.D. Cal. Apr. 10, 2013), is not to the contrary: it too was focused on individual advertisements—not the entire advertising "campaign"—when weighing whether particular statements within that advertisement were deceptive.

But even if a court could read these "top-ranked" statements as referring to US News, Plaintiffs had no response to 2U's argument that a qualifier such as "top" is too vague to imply that USC Rossier achieved any particular spot in US News's ranking, such that these statements could be verifiable. Mot. at 16-17. Plaintiffs still do not explain what cut-off constitutes a "top" school, even though this is an essential piece of their argument that this statement could be proven false and be the basis of a false-advertising claim. *See, e.g.*, *Anunziato*, 402 F. Supp. 2d at 1140. Plaintiffs quibble (at 23) with whether the ranking USC Rossier held before the alleged fraud—#38 out of hundreds—qualifies as a "top" ranking, but the fact that opinions may differ on this illustrates why courts have uniformly held that "top"-based statements are mere puffery.

2. The US News Rankings Are Not Actionable Against 2U Because Plaintiffs Do Not Allege 2U Knew They Were False

Plaintiffs continue to assert (at 17-20) that the US News ranking itself is an actionable false statement of fact. But Ninth Circuit precedent treats the ranking as an opinion statement, and as this Court recognized in its initial ruling, such statements cannot give rise to liability unless the defendant *knows* they are based on

an objectively false fact. Order at 7-8. Plaintiffs have abandoned any such allegation of knowledge by 2U, so their claims against 2U based on the ranking fail.

Under binding Ninth Circuit precedent, US News rankings are statements of *opinion*, not fact. *See, e.g.*, *Ariix, LLC v. NutriSearch Corp.*, 985 F.3d 1107, 1121 (9th Cir. 2021); *Enigma Software Grp. USA, LLC v. Malwarebytes, Inc.*, 69 F.4th 665, 673-74 (9th Cir. 2023) (claims that one "product [i]s better than" another are opinion statements fully "covered by *Ariix*"); *Budget Van Lines, Inc. v. Better Bus. Bureau of the Southland, Inc.*, No. B235338, 2013 WL 4494318, at *10 (Cal. Ct. App. Aug. 20, 2013) (citing cases holding that "rating systems are opinions").[2] This Court already confirmed that under *Ariix*, "comparative … ratings" are generally "not actionable" because they are "*simply statements of opinion*." Order at 7 (quoting *Ariix*, 985 F.3d at 1121 (emphasis added)).

Plaintiffs respond (at 17-18) that because the alleged misconduct in *Ariix* involved the "selection or weighing of" particular criteria, *Ariix* should be read as holding only that the "methodology" at issue was the opinion, not the resulting rating. That makes no sense; *Ariix* clearly held that the "comparative … *ratings*" at issue were the "statements of opinion." 985 F.3d at 1121 (emphasis added). The Ninth Circuit did not purport to consider whether the *methodology* behind those ratings was a statement of fact; that was irrelevant because the *Ariix* plaintiffs did not claim to have seen that methodology, so they would not have been able to establish reliance on it. And regardless, a number of cases beyond just *Ariix* confirm that third-party rankings are opinion statements. *See supra* at 6.

The real question is whether liability can ever attach for making such an opinion statement. As this Court recognized earlier, the answer is yes—but *only* if

[2] *See also*, *e.g.*, *Seaton v. TripAdvisor, LLC*, No. 3:11-cv-549, 2012 WL 3637394, at *7 (E.D. Tenn. Aug. 22, 2012), *aff'd*, 728 F.3d 592 (6th Cir. 2013) (rankings of "law schools" are not "objective assertion[s] of fact"); *Browne v. Avvo Inc.*, 525 F. Supp. 2d 1249, 1252 (W.D. Wash. 2007) (rating is subjective even if based on "underlying objective facts").

the defendant who reposted that ranking *knew* the underlying data was false or incomplete. *See* Order at 8. That rule is consistent with Ninth Circuit precedent which recognizes that one "well-established exception" to the general principle that opinions are not actionable is when "the speaker has knowledge of facts not warranting the opinion." *PhotoMedex*, 601 F.3d at 931-32; *see also In re Countrywide Fin. Corp. Mort.-Backed Sec. Litig.*, 943 F. Supp. 2d 1035, 1055-56 (C.D. Cal. 2013) (holding defendants who "knowingly" "provided … false information" to a "rating" company liable for "repeat[ing]" that ranking). This Court applied that rule in its initial order, holding that the subjective US News ranking could nonetheless be "actionable" *against USC* because Plaintiffs had alleged that USC "*knowingly* reported false data to US News." Order at 8. This Court's opinion thus clarified that opinion statements can nonetheless be "actionable" when a defendant (like USC) repeats a third party's opinion statement while knowing it is based on an objectively false fact. *Id.* If the law were otherwise, this Court recognized, "any business that submits false information to get a [ranking] … could not be held liable" simply because the ranking is an opinion. *Id.* (quoting *Favell I* ECF No. 50 ("USC Opp.") at 17).

This principle may allow a claim to proceed against USC, Order at 8, but it cannot be applied here against 2U. Plaintiffs acknowledge (at 5) that they have abandoned their arguments that 2U *knew* these opinion statements were false, opting instead to pursue a theory that 2U "should have known" as much. That decision makes sense, because Plaintiffs cannot in good faith allege that 2U played any role in providing information about USC Rossier to US News. *See* Order at 12 (holding that Plaintiffs did not allege "that *2U* was involved in any way in the submission of data to US News"). But because Plaintiffs do not allege that 2U knew the ranking or data that USC submitted was false, these opinion statements cannot give rise to liability on 2U's part, under either this Court's initial ruling or well-established law. That should be the end of the matter.

Plaintiffs argue (at 19-20) that this straightforward resolution of the case is a "backdoor attempt to force a knowledge requirement into [these] statutes when there is none." But that assertion cannot be squared with Plaintiffs' arguments to the Court before its last order, where Plaintiffs acknowledged that opinion statements are actionable only against defendants who "lack[] a good faith belief in the truth of the statement.'" USC Opp. at 19. Plaintiffs explained earlier that because "USC advertised USC Rossier's US News rankings to prospective students while *knowing* that the rankings were fraudulently obtained," USC lacked a "good faith belief in the truth of the statement" and could be held liable. *Id.* (emphasis added). They reiterated that "even if US News rankings, by themselves, are statements of opinion regarding a school's quality, USC's advertisements regarding these rankings are still actionable" because USC "intentionally submitted false data to obtain a ranking that was based on objective inputs." *Id.* at 19 & n.3. But while this principle of law may give rise to a claim against USC, it cannot be applied against 2U given the lack of any similar allegations of knowing misconduct.

B. Plaintiffs' Claims All Fail Because Plaintiffs Still Have Not Identified A 2U Advertisement They Relied On Containing A Ranking

Plaintiffs' claims also fail because they still have not identified a single misleading statement *by 2U* on which they relied, even though 2U flagged this deficiency in earlier Motions to Dismiss. *See, e.g.*, *Favell I* ECF No. 43 at 28-33. Plaintiffs do not even attempt to identify one in their Opposition. Instead, Plaintiffs argue (at 12) that because their claims supposedly turn on a "broader advertising campaign," they need not identify any "individual misrepresentation" by 2U because it can be liable for *USC*'s advertising. That is not the law. To survive a motion to dismiss, Plaintiffs must describe a specific false statement they saw "made" or "controlled" by *each defendant*. *Musgrave v. Taylor Farms Pac., Inc.*, No. 18-cv-02841-JSW, 2018 WL 11033583, at *5 (N.D. Cal. Oct. 17, 2018); *In re Hydroxycut*

Mktg. & Sales Pracs. Litig., 299 F.R.D. 648, 656 (S.D. Cal. 2014) (citing *Emery v. Visa Int'l Serv. Ass'n*, 95 Cal. App. 4th 952, 960 (2002)); *In re ZF-TRW Airbag Control Units Prods. Liab. Litig.*, 601 F. Supp. 3d 625, 745-46 (C.D. Cal. 2022). And because Rule 9(b)'s heightened pleading requirements apply to *all* misrepresentation-based claims, even ones based on negligence, Plaintiffs also must describe that 2U advertisement with particularity. *See, e.g., Avakian v. Wells Fargo Bank, N.A.*, 827 F. App'x 765, 766 (9th Cir. 2020) (applying Rule 9(b) to negligent-misrepresentation claims); *European Travel Agency Corp. v. Allstate Ins. Co.*, No. 22-11410-DSF, 2022 WL 4243955, at *4 (C.D. Cal. Sept. 12, 2022) (explaining that although false-advertising claims do not always require knowledge, plaintiffs still must plead misleading statements with particularity).[3] Plaintiffs' failure to do so is another reason to dismiss their claims.

Plaintiffs argue (at 12-15) that 2U should nonetheless remain in this case because it "jointly ran" USC's marketing, and thus exercised "unbridled control" over misleading statements that *USC* published and Plaintiffs allegedly relied on (namely, the statements on USC Rossier's homepage). For this, Plaintiffs rely on two provisions in the Services Agreement between 2U and USC, but neither supports a plausible inference that 2U had any control over statements made on the USC Rossier homepage. These provisions simply state that *USC* will promote the online programs 2U ran "in a manner comparable to" the in-person programs, Compls. ¶ 44,[4] and that although "USC shall promote the [MAT program] on the Rossier website," it will "consult with [2U] in the development of *additional* Promotion Strategies," *id.* ¶¶ 44, 45 (emphasis added). The fact that *USC* planned to promote its online and in-person programs consistently says nothing about *2U*'s involvement

[3] Plaintiffs state in a footnote (at 20 n.9) that "Rule 9(b) does not even apply here," but they do not cite any case allowing a plaintiff to survive a motion to dismiss without pleading the alleged misstatements with particularity. Regardless, Plaintiffs have not sufficiently described a misleading 2U statement under any pleading standard.

[4] "Compls." refers to both the *Favell I* SAC and the *Favell II* FAC.

in such marketing. And whether USC would "consult with" 2U in developing "*additional*" strategies—while promoting the programs "on the Rossier website," including the "homepage," itself—does not somehow suggest that 2U had "unbridled control" over statements USC made on its own website, which are the only statements Plaintiffs described that they claim to have relied on. *Perfect 10,* 494 F.3d at 808-09; *Tortilla Factory, LLC v. Better Booch, LLC*, No. 2:18-cv-02980-CAS, 2018 WL 4378700, at *11 (C.D. Cal. Sept. 13, 2018) (dismissing FAL and UCL claims).

In any event, notwithstanding Plaintiffs' new attempts to stretch these contractual terms beyond their plain meaning, Plaintiffs recognize in the Complaints—as they must—that "*USC* maintained the main Rossier website" where the allegedly misleading statements were posted. Compls. ¶¶ 47, 87; *see also* Opp. at 3-4 (recognizing that "USC" advertised the rankings "on its website," while 2U "focused its efforts" on "paid online advertising"). Because Plaintiffs have not plausibly alleged that 2U could "control[] the language on [this] third-party website," 2U cannot be liable for any misstatements made there. *Reed v. NBTY, Inc.*, No. 13-0142-JGB, 2014 WL 12284044, at *11 (C.D. Cal. Nov. 18, 2014).

Plaintiffs' reliance on *Dorfman v. NutraMax Labs., Inc.*, No. 13-cv-0873-WQH, 2013 WL 5353043 (S.D. Cal. Sep. 23, 2013), for their joint-control theory is misplaced. *Dorfman* simply held that defendants could be liable *for their own false advertising*, which involved (1) "disseminat[ing]" and "adopt[ing] … as their own" particular false statements; (2) "provid[ing] pictures" of those false statements; *and* (3) making misleading statements on their *own* websites. *Id.* at *14. But unlike in *Dorfman*, Plaintiffs do not identify *any* of the advertisements 2U supposedly disseminated. And that is fatal; a plaintiff must provide, "at a minimum, the specifics regarding (including an example of) each type of allegedly false or misleading

advertisement." *Asis Internet Servs. v. Consumerbargaingiveaways, LLC*, 622 F. Supp. 2d 935, 945 (N.D. Cal. 2009); Mot. at 23 (citing similar cases).[5]

Plaintiffs ultimately pivot (at 12-14) to allegations that 2U "stood to profit" from USC's own advertising. But the fact that 2U might indirectly benefit financially from USC's advertisements is a far cry from showing it had "unbridled control" over those advertisements. "[K]nowingly receiv[ing] the benefits of a fraud" and being "'inextricably intertwined' with another who engaged in the wrongful conduct" is not enough to be liable; the defendant must have "issued [its] own advertisements" or "controlled the [other's] advertising," which Plaintiffs do not allege as to 2U. *In re Hydroxycut*, 299 F.R.D. at 656. Were the law otherwise, all of USC's business partners could be liable for its false advertising simply because they stood to benefit financially from those advertisements too.

Finally, Plaintiffs' extended arguments (at 12, 20-22) that they need not recount "all of the ways they were exposed" to 2U's advertisements or the specific "details of each advertisement" by 2U miss the point. The issue here is *not* Plaintiffs' inability to recount every rankings-related statement 2U made, or which precise 2U advertisement caused them to attend USC Rossier. The issue is failing to describe *any* advertisement by 2U they saw that contained an actionable misstatement.

None of the cases Plaintiffs cites suggests that courts are free to ignore this requirement. *In re Tobacco II Cases*, 46 Cal. 4th 298, 328 (2009), *Opperman v. Path, Inc.*, 84 F. Supp. 3d 962, 982 (N.D. Cal. 2015), and *In re Ferrero Litig.*, No 11-cv-205-H, 2011 WL 5438979, at * 3 (S.D. Cal. Aug. 29, 2011), simply recognized that plaintiffs exposed to a long-term advertising campaign do not need

[5] As 2U explained in its Motion, the only statements *by 2U* that Plaintiffs claim to have seen or heard—online paid advertisements and one statement by a 2U advisor—are insufficient to state a claim. Mot. at 21-24. Plaintiffs have not described the contents of the paid 2U advertisements they supposedly saw, which makes it impossible to tell whether these advertisements contained USC Rossier's numerical ranking. *Id.* at 23-24. And the "top-ranked" statement a 2U advisor allegedly made to Ahmad Murtada is mere puffery. *Id.* at 25.

to plead with an "unrealistic degree of specificity" *which* precise advertisement they identified caused them to make a purchase. But these cases confirm that a plaintiff still must allege that she "actually saw" an advertisement by "the defendant" and "must describe in the complaint, and preferably attach to it, a representative sample of" one of that defendant's allegedly misleading advertisements. *Opperman*, 84 F. Supp. 3d at 976. Requiring Plaintiffs to plead the details of *even one* 2U advertisement is not asking for an "unrealistic degree of specificity," particularly when Plaintiffs were able to provide examples of multiple USC advertisements.

C. Plaintiffs' Claims All Fail Because Plaintiffs Have Not Pled Any Fact Indicating That 2U Knew Or Should Have Known The Rankings Were False

Plaintiffs' claims independently fail because they have not pled any facts to back up their conclusory assertions that 2U knew or should have known the rankings were false. Plaintiffs argue (at 6) that they need not plead any state of mind whatsoever because the CLRA is "strict liability," but that argument is foreclosed by Ninth Circuit authority imposing an actual-knowledge requirement. *See Wilson v. Hewlett-Packard Co.*, 668 F.3d 1136, 1145-46 (9th Cir. 2012). And even under the lower "should-have-known" standard, Plaintiffs have failed to plead a particular suspicious *fact* that would put 2U on notice of the false nature of the rankings and trigger a duty to investigate that 2U breached.

1. The CLRA Requires Actual Knowledge Of Falsity

Plaintiffs argue (at 6) that the CLRA does not contain an actual-knowledge requirement. But instead of grappling with the Ninth Circuit precedent 2U cited in its Motion establishing that the CLRA requires actual knowledge, *see* Mot. at 25 (citing *Wilson*, 668 F.3d at 1145-46; *Tomek v. Apple*, 636 F. App'x 712, 713 (9th Cir. 2016); *Nolan v. Ford Motor Co.*, No. E073850, 2022 WL 1513308, at *27 (Cal. Ct. App. May 13, 2022)), Plaintiffs simply rely (at 6) on one sentence of dicta in this Court's order, which stated that the CLRA "appear[s]" not to require actual

knowledge, Order at 11, but ultimately did not resolve the issue because Plaintiffs' claims sounded in fraud at the time. This Court is not bound by its previous observation, which was based on a nonbinding district court decision that did not mention *Wilson*.

Plaintiffs briefly suggest (at 6) that *Wilson* and the other precedent outlined above apply only in product-defect cases. But Plaintiffs provide zero reasoning for drawing this line. Many courts have applied *Wilson*'s knowledge requirement outside the product-defect context. *See, e.g.*, *Shu v. Toyota Motor Sales USA, Inc.*, No. 3:22-cv-04661-LB, 2023 WL 3028071, at *9-10, 11 (N.D. Cal. Apr. 19, 2023) (misrepresentations over whether a product had a particular feature); *Philadelphia Indem. Ins. Co. v. IEC Corp.*, No. 16–0295–DOC, 2017 WL 2903260, at *7-8 (C.D. Cal. June 5, 2017) (misrepresentations involving services). And the cases Plaintiffs cite do not draw this line: *Kowalsky v. Hewlett-Packard Co.*, No. 10-cv-02176-LHK, 2011 WL 3501715, at *7 (N.D. Cal. Aug. 10, 2011), recognized broadly that "a representation will not violate the CLRA if a defendant did not know" it was misleading, and *Acedo v. DMAX, Ltd.*, No. 15–02443-MMM, 2015 WL 12912365, at *11 (C.D. Cal. July 31, 2015), merely explained that omissions claims involving a product defect generally require a "safety concern."

2. At A Minimum, Plaintiffs' Claims Require Showing That 2U "Should Have Known" That The Rankings Were False

Even if this Court disagrees that the CLRA contains an actual-knowledge requirement, that would not then mean that the CLRA is a strict-liability statute, as Plaintiffs argue. *See* Opp. at 6-8. The CLRA requires at least that the defendant "through the exercise of reasonable care should have known" that its representations were false. *Kowalsky v. Hewlett-Packard Co.*, 771 F. Supp. 2d 1156, 1162-63 (N.D. Cal. 2011); *cf. Moore v. Mars Petcare U.S., Inc.*, 966 F.3d 1007, 1019 n.11 (9th Cir. 2020) (recognizing in dicta that the CLRA requires at least "negligence"). Requiring that the defendant be on notice that its statement was false "serve[s] the purpose of

the CLRA," which is to protect consumers only "from 'unfair or deceptive' business practices." *Kowalsky*, 771 F. Supp. 2d at 1163; *Coleman-Anacleto v. Samsung*, No. 16-CV-02941-LHK, 2017 WL 86033, at *7, 11 (N.D. Cal. Jan. 10, 2017) (same). Courts thus routinely analyze claims under the CLRA and FAL together, holding that a defendant can be liable under both *only* if it "should have known" representations were false. *Williams*, 2023 WL 1072000, at *3-5 & n.6. The only case Plaintiffs cite for their suggestion that the CLRA is a strict-liability statute *declined* to address whether the CLRA contains a knowledge requirement because the parties had both assumed that it did not. *See Serova v. Sony Music Entm't*, 13 Cal. 5th 859, 887 n.13 (2022).

Plaintiffs also argue (at 6-7) that their UCL claims are strict liability, but that is wrong too. As with the CLRA, false advertising cannot be considered "unfair" under the UCL absent allegations that the defendant "should have known" its advertising was false. *Coleman-Anacleto*, 2017 WL 86033, at *11; *Williams*, 2023 WL 1072000, at *3-5; *Klein v. Earth Elements, Inc.*, 59 Cal. App. 4th 965, 970 (1997) (finding the "unwitting" and "unintentional" distribution of contaminated dog food did not constitute an "unfair" practice); *Kowalsky*, 771 F. Supp. 2d at 1159-60 (imposing a "should-have-known" requirement and distinguishing *Cortez v. Purolator Air Filtration Prods. Co.*, 23 Cal. 4th 163, 181 (2000)). And because Plaintiffs' UCL unlawful-prong claims are all based on violations of the CLRA and FAL, they require at the very least that 2U "should have known" of the rankings' falsity. *See Beaver v. Tarsadia Hotels*, 816 F.3d 1170, 1177 (9th Cir. 2016) (UCL "unlawful" prong "borrows violations of other laws" and incorporates their requirements).

3. Plaintiffs Still Have Not Identified A Single Alleged Fact That Put 2U On Notice The Rankings Were False

Plaintiffs have no answer to 2U's argument that they have not pled a single alleged fact that would show why 2U "should have known" USC's rankings were

false. Plaintiffs' Opposition—like their Complaints—contains only vague speculation and conclusory assertions that do not contain *any* "factual enhancement" that would allow them to cross the line between "possibility and plausibility" to meet even Rule 8's pleading standards. *Eclectic Props. E., LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 995-97 (9th Cir. 2014) (affirming dismissal where plaintiff's allegations were consistent with two theories—liability and no liability—but did not include "facts tending to exclude the possibility that the [no liability] explanation [wa]s true").

At the outset, Plaintiffs' arguments (at 7-9) over whether the CLRA and UCL require the same elements as common-law negligence are a distraction. 2U has never argued that Plaintiffs must plead all the elements of common-law negligence here. Rather, 2U's position is simple: To be liable under a "should have known" theory, a defendant must have had a "duty to investigate" that it ignored. *People v. Forest E. Olson, Inc.*, 137 Cal. App. 3d 137, 139-40 (1982). But no such duty could have arisen here because "there is no duty to investigate the truth of statements made by others." *Parent v. Millercoors LLC*, No. 3:15-cv-1204-GPC, 2016 WL 3348818, at *7 (S.D. Cal. June 16, 2016) (dismissing FAL, CLRA, and UCL claims). Plaintiffs have not pled that 2U made the supposedly misleading statements, *see supra* at 8-12, so these claims fail for lack of a duty.

Even if Plaintiffs had pled that 2U made the statements, that still would not be enough to establish a duty to investigate here. Plaintiffs are wrong to argue (at 9) that the mere "fact that 2U was making the claims" automatically gives it a "duty to investigate" without any "other special circumstances" present. If that were the law, then these statutes would be strict liability. Instead, to be liable under a "should have known" theory, a defendant must be aware of "facts" that would put "a reasonable person on notice of possible misrepresentations"—thus triggering a "duty to investigate" that the defendant breached. *Olson*, 137 Cal. App. 3d at 140; *POM Wonderful LLC v. Purely Juice, Inc.*, 362 F. App'x 577, 580 (9th Cir. 2009) (same).

Plaintiffs have pled no such facts here. In their Opposition, Plaintiffs parrot back the speculative theories from their Complaints, which are based on 2U's supposed industry knowledge, unsupported allegations that 2U had a right to get unspecified admissions "data" from USC and other schools, and Plaintiffs' opinion that USC Rossier's #17 ranking in 2013—which was a decline from its #14 ranking the year before—was "stunning." None of these theories contains a single alleged *fact* that would put a reasonable person on notice of fraud. *Olson*, 137 Cal. App. 3d at 139.

As explained in 2U's Motion, Plaintiffs' arguments (at 11) that 2U's supposed "access to admissions data" would have made it familiar "with the patterns of selectivity" at other schools do not somehow lead to a reasonable inference that 2U was on notice that USC Rosser's overall ranking was *wrong*. Mot. at 27-29. This theory is missing a number of critical components. For one thing, Plaintiffs do not allege that USC Rossier's pattern of selectivity was any different than that of any other school; to the contrary, they recognized that the number of online programs nationwide skyrocketed around the time of the alleged fraud. Compls. ¶ 5. Although Plaintiffs state in their Opposition that "recruited applicants [at USC Rossier] were being admitted at a rate far higher than those of elite schools," Opp. 10 (citing SAC ¶ 98), that allegation does not appear in either complaint, including in the cited paragraph.

In any event, this unpled allegation still would not suffice because, as 2U argued earlier, merely knowing selectivity data would not be enough for 2U to estimate where each school should have landed in the rankings. Mot. at 29. Selectivity is just one of four factors that US News considers, making up only 18% of the ranking. Compls. ¶ 56. But Plaintiffs do not allege that 2U had access to the *other* data USC or any other school submitted for the *non-selectivity* factors, such that it would have been on notice that USC Rossier's overall ranking was comparatively too high.

Plaintiffs rely (at 9-10) on *Pom Wonderful* to argue that 2U's general "industry knowledge" created a duty to investigate, but that case simply confirms that there was no such duty here. There, the Ninth Circuit held that a manufacturer had a duty to investigate its statements that its pomegranate products had "no added sugar" because the manufacturer *knew* that (1) suppliers in the industry routinely blended pomegranate with other juices; and (2) a lack of refrigeration at processing plants caused suppliers to add sugar. 362 F. App'x at 580. That industry-wide behavior put the manufacturer on notice its claims could be wrong. But Plaintiffs have not pointed to any similar industry-wide facts here—such as a pattern of submitting false data to US News—that would put 2U on notice that it should investigate USC Rossier's rankings.

Plaintiffs elsewhere focus on 2U's supposed access to data regarding the USC Rossier programs it helps support, but they never specify *what* information 2U could access or *how* that information would have put 2U on notice of fraud. *See, e.g.*, Opp. 10 at n.7 (asserting without citation that "2U had a contractual right to obtain [the] information" needed to verify its claim); *id.* at 11 (claiming 2U had "access to USC's data"); *id.* at 1, 4 (vaguely stating that 2U had "access to resources to verify" USC's claims). As 2U explained in its Motion, receiving some subset of data on particular USC Rossier programs 2U helped support would not put 2U on notice that the *overall* ranking—which covered four doctoral programs 2U did *not* help support—was false. Mot. at 28. That is particularly true where 2U did not even support any doctoral program that impacted the overall ranking until *2015*—years after Plaintiffs say the fraud started. *Id.* Plaintiffs did not respond to these points in their Opposition.

Plaintiffs ultimately fall back (at 11) on worn-out rhetoric that USC Rossier's "stunning" #17 overall rank in 2013 should have put 2U on notice of fraud when compared to the school's "mediocre" #44 ranking in the separate ranking for online master's programs. That inference is completely "unwarranted." *Fayer v. Vaughn*,

649 F.3d 1061, 1064 (9th Cir. 2011). This #17 rank was not "stunning"; it was a *decrease* from the #14 spot the prior year. Mot. at 12; Compls. ¶ 83. And Plaintiffs have never disputed that the Best Online Education Schools ranking Plaintiffs attempt to use as a comparator takes into account the selectivity of *entirely different programs*, *see* Mot. at 12; Compls. ¶ 57, nor have they explained why a difference between the two would put 2U on notice that one was falsified. The online master's 2U helped support in 2013 impacted the *lower* online ranking, not the *higher* overall ranking that considered the selectivity of doctoral programs only—further confirming this difference in rankings would not in any way signal fraud. Mot. at 28-30. Again, Plaintiffs had no response to these points in their Opposition. There is simply nothing behind Plaintiffs' speculative conclusions that these 2013 rankings would, without more, put *anyone* on notice of potential fraud.[6]

Beyond all this, Plaintiffs also still do not explain how 2U even *could have* verified the rankings, when they have not alleged that anyone other than USC held the information necessary to do so. *See* Mot. at 31 (citing *Olson*); *Park v. Cytodyne Techs., Inc.*, No. GIC 768364, 2003 WL 21283814, at *7 (Cal. Super. Ct. May 30, 2003) ("Failure to investigate when the information was within the control of defendant satisfies the [*Olson*] test."). Despite arguing (at 9) that this is not a requirement, Plaintiffs were unable to cite a single case imposing a duty to investigate where the defendant did not have access to the information necessary to verify the claim.

[6] Plaintiffs' main response (at 10-12) is to urge the Court not to consider the outside sources 2U cited in its Motion. But while each of the sources is appropriately subject to judicial notice, none is even necessary to conclude that Plaintiffs have not pled the necessary facts to take their allegations from speculative to plausible. These sources merely demonstrate why the Court cannot accept Plaintiffs' "unwarranted" and "unreasonable inferences" as true. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001); *see, e.g.*, *Baker v. Meiling*, No. 3:20-cv-00518-MMD, 2021 WL 2062900, at *7 (D. Nev. Apr. 28, 2021), *aff'd*, 2022 WL 1797338 (9th Cir. June 2, 2022) (judicially noticed facts confirmed that plaintiffs' allegations were "implausible").

D. Plaintiffs' CLRA Claim Fails For Additional Reasons

Plaintiffs' Opposition also does not overcome the fact that Plaintiffs have not pled the express elements of the five CLRA subsections they invoke.

Plaintiffs argue (at 22-23) that their Section 1770(a)(1) claim—which requires that 2U "pass[ed] off" its goods as those of another—should survive because they alleged that 2U "exploited the reputations of legitimately highly ranked programs." But even if true, that does not establish that 2U "wrongful[ly] exploited" a competitor's "trade names and common law trademarks" in a way that risked confusing consumers over "similar products" *Perkins v. Philips Oral Health Care, Inc.*, No. 12-cv-1414-H, 2012 WL 12848176, at *6 (S.D. Cal. Dec. 7, 2012); *accord Stover Seed*, 108 F.3d at 1147 (comparative advertisements "do not amount to 'passing off'" goods). Plaintiffs' allegations do not square with the conduct Section 1770(a)(1) covers.

Plaintiffs also fail to explain how comparative US News rankings constitute an "approval" or "certification" under Sections 1770(a)(2) and (a)(5). Their only response (at 23) is to ask this Court to ignore the plain meaning of these terms—but that is contrary to law and common sense. *See Cleveland v. City of L.A.*, 420 F.3d 981, 989 (9th Cir. 2005) (consulting dictionary definitions of undefined statutory terms); *Torres v. Adventist Health System/West*, 77 Cal. App. 5th 500, 515 (2022) (Poochigian, J. concurring) (rejecting Section 1770(a)(5) claim "pursuant to the plain language of the statute").

Nor have Plaintiffs explained what constitutes a "highly ranked" program, which means they have not stated a Section 1770(a)(3) claim that 2U misrepresented USC Rossier's "affiliation, connection, [or] association" with one. Plaintiffs' only answer (at 24) is to argue that they will supplement this claim with discovery, but that gets things backwards: Plaintiffs must plausibly plead a claim *before* obtaining discovery. *Mujica v. AirScan, Inc.*, 771 F.3d 580, 593 (9th Cir. 2014).

Finally, Plaintiffs are wrong to argue (at 24) that their Sections 1770(a)(5) and (a)(7) claims do not run afoul of the education malpractice doctrine. To state a claim against 2U for misrepresenting that USC Rossier had the "characteristics" or met the "standard, grade, or style" of a highly ranked program, Plaintiffs must identify the characteristics and style of a highly ranked school—and must explain why USC Rossier fell short. That requires this Court to wade into the quality of a USC Rossier education.

E. Plaintiffs Have Not Pled A UCL Unfairness Claim

Plaintiffs' Opposition also illustrates the inadequacy of their UCL unfairness claim. Plaintiffs now expressly disclaim the sole theory they pled in support of this claim, *i.e.*, that 2U's tuition-sharing arrangement is "unfair" because it violates the spirit or policy of the Higher Education Act ("HEA"). *Compare* FAC ¶¶ 187, 190 (identifying "Defendants' Contract" as unfair because it "violate[s] the spirit and policy" of the Higher Education Act's ban on incentive compensation), *with* Opp. at 25 (explaining that Plaintiffs do not bring a claim against 2U predicated on a "violation … of the federal 'incentive compensation ban'" and describing their theory as based on 2U's "disseminat[ion] of materially false ads" and "aggressive recruiting"). And for good reason: 2U's contract accords with the HEA and the Department of Education's longstanding position that compensating companies like 2U who provide a bundle of services with a share of tuition revenue is not a prohibited incentive compensation. *See* Mot. at 34-37.

Despite disclaiming this theory, Plaintiffs nonetheless spend pages (at 25, 27-29) arguing over whether 2U's contract actually is consistent with federal law. Setting aside that these arguments are irrelevant in light of Plaintiffs' disclaimer, Plaintiffs never explain how 2U's bundled-services contract actually conflicts with the HEA or its regulations. They only make conjectures based on regulatory history, while ignoring the fact that the culmination of this history produced the Dear Colleague Letter ("DCL") establishing that educational institutions can compensate

a contractor when it "provides a set of services that may include recruitment"—*i.e.*, the terms of 2U's contract.[7] And despite what Plaintiffs claim (at 28), the DCL is controlling—its purpose was to offer an authoritative interpretation of new "regulations" that were part of a 2010 regulatory overhaul.[8] *See Reid v. Johnson & Johnson*, 780 F.3d 952, 962 (9th Cir. 2015) (explaining the deference an agency's interpretation of its rules receives). So any claim centered on how 2U is compensated would be precluded as a matter of law because the DCL expressly permits 2U's contract. *See Webb v. Smart Document Sols., LLC*, 499 F.3d 1078, 1082 (9th Cir. 2007) (explaining that activities an agency "intended to permit . . . cannot be 'unfair'"); *Steinhebel v. L.A. Times Commc'ns, LLC*, 126 Cal. App. 4th 696, 712 (2005) ("[When a practice] is lawful and permissible, there is no basis for relief under the unfair competition law."). Moreover, as 2U explained in its Motion, allowing this sort of claim to proceed also would violate due process because 2U relied on the Department's DCL in constructing its contracts. *See* Mot. at 36. That is not an "affirmative defense," Opp. at 29; it is a reason why Plaintiffs' unfairness theory is wrong.

In any event, this case ultimately is about false advertising—not the HEA, and not the particularities of the Administrative Procedure Act. So this Court need not, and should not, concern itself with Plaintiffs' sideshow about the DCL or the contractual terms of how 2U is compensated, especially now that Plaintiffs have conceded (at 25) their claim is *not* based on those terms.[9]

---

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

[8] *See id.* at 1 ("This guidance is provided to assist institutions with understanding the changes to the regulations . . .").

[9] Nor is that dispute even relevant to Plaintiffs' claims *against USC*. Contrary to what Plaintiffs claim (at 25), Plaintiffs did not bring an unlawfulness claim based on violations of the HEA against USC. *Compare* Opp. at 25 (claiming that Plaintiffs "assert an unlawfulness claim against USC regarding its violation … [of] 20 U.S.C. § 1094(a)(20)") (citing FAC ¶ 185), *with* FAC ¶ 185 (simply claiming that USC

Plaintiffs' re-packaged "unfairness" theory appears to be based on nothing more than what they describe as "aggressive" false advertising by 2U. Opp. at 25. But that means this claim fails for all the same reasons as Plaintiffs' other false-advertising-based claims: There is no actionable misstatement; Plaintiffs did not allege reliance on a 2U statement; and Plaintiffs did not allege that 2U knew or should have known the statements were false. *See, e.g.*, *Kowalsky*, 771 F. Supp. 2d at 1160–62 (dismissing UCL unfairness claim because plaintiff offered no facts to show defendant's knowledge); *Coleman-Anacleto*, 2017 WL 86033, at *11 (same); *Punian v. Gillette Co.*, No. 14-cv-05028-LHK, 2016 WL 1029607, at *17 (N.D. Cal. Mar. 15, 2016) (dismissing UCL unfairness claim because it "overlap[ped]" with deficient CLRA and FAL false-advertising claims).[10] Ultimately, Plaintiffs have not adequately pled any claim against 2U.

III. CONCLUSION

2U respectfully seeks dismissal of Plaintiffs' Second Amended Complaint in *Favell I* and First Amended Complaint in *Favell II*—their fourth and fifth attempts to state a claim against 2U—with prejudice.

violated 34 CFR 668.72, which broadly prohibits "misrepresentations concerning the nature of an eligible institution's educational programs").

[10] At minimum, consistent with Federal Rule of Civil Procedure Rule 12(f), this Court should strike all references to the "Incentive Compensation Ban" from Paragraphs 187-191 of the FAC. These references are "immaterial" and "impertinent" because they have no remaining "bearing" or "relevance" on Plaintiffs' claims. *In re 2TheMart.com, Inc. Secs. Litig.*, 114 F. Supp. 2d 955, 965 (C.D. Cal. 2000).

Dated: October 20, 2023

Respectfully submitted,

LATHAM & WATKINS LLP
Elizabeth L. Deeley
Melanie M. Blunschi
Roman Martinez

By /s/ *Melanie M. Blunschi*
Melanie M. Blunschi
Attorneys for Defendant 2U, Inc.

CERTIFICATE OF COMPLIANCE

The undersigned, counsel of record for Defendant 2U, Inc. ("2U"), certifies that this brief contains 7,487 words, which complies with the word limit set in the Court's August 24, 2023 Orders. *See Favell I* ECF No. 75, *Favell II* ECF No. 65.

Dated: October 20, 2023

/s/ *Melanie M. Blunschi*
Melanie M. Blunschi