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10  
11 **UNITED STATES DISTRICT COURT**  
12 **CENTRAL DISTRICT OF CALIFORNIA**  
13 **CENTRAL DIVISION**  
14

15 IOLA FAVELL, SUE ZARNOWSKI,  
16 and MARIAH CUMMINGS, on behalf  
of themselves and all others similarly  
17 situated,

18 Plaintiffs,

19 v.

20 UNIVERSITY OF SOUTHERN  
CALIFORNIA and 2U, INC.,

21  
22 Defendants.  
23  
24  
25  
26  
27  
28

Case No. 2:23-cv-00846 SPG (MARx)

CLASS ACTION

**2U, INC.'S NOTICE OF MOTION  
AND MOTION TO DISMISS FIRST  
AMENDED CLASS ACTION  
COMPLAINT; MEMORANDUM OF  
POINTS AND AUTHORITIES**

Judge: Hon. Sherilyn Peace Garnett  
Date: May 31, 2023  
Time: 1:30 P.M.  
Place: Courtroom 5C

*[Request for Judicial Notice; Declaration  
in Support; Proposed Orders concurrently  
filed herewith]*

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**NOTICE OF MOTION AND MOTION TO DISMISS**

PLEASE TAKE NOTICE that on May 31, 2023 at 1:30 p.m., or as soon thereafter as the parties may be heard, before the Honorable Sherilyn Peace Garnett, District Judge, United States District Court for the Central District of California, in the First Street Courthouse, Courtroom 5C, 350 W. 1st Street, Los Angeles, CA 90012, Defendant 2U, Inc. (“2U”) will, and hereby does, move to dismiss the First Amended Class Action Complaint (“FAC”) brought by Plaintiffs Iola Favell, Sue Zarnowski, and Mariah Cummings (collectively, “Plaintiffs”) pursuant to Federal Rules of Civil Procedure (“FRCP”) 9(b) and 12(b)(6).

Pursuant to Local Rule 7-3 and Rule G(1) of Judge Garnett’s Standing Order for Newly Assigned Civil Cases, the Parties thoroughly discussed the arguments raised in this motion, including in videoconferences on March 1 and 13, 2023, and via email on April 4 and 5, 2023. This motion is based on this Notice of Motion and Motion to Dismiss, the following Memorandum of Points and Authorities, 2U’s Request for Judicial Notice, the Declaration of Melanie M. Blunschi and the exhibits thereto, all pleadings and papers in this action, and any oral argument of counsel.

Dated: April 17, 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.*

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**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. INTRODUCTION**

The allegations in Plaintiffs’ First Amended Complaint (“FAC”) are identical to those in the original complaint; only the causes of action have changed. Following 2U’s first Motion to Dismiss, Plaintiffs dropped their claims for equitable relief from this lawsuit in favor of a single claim for damages under California’s Consumers Legal Remedies Act (“CLRA”)—and then filed a *separate lawsuit* in state court seeking equitable relief based on the exact same allegations.<sup>1</sup> But the arguments in 2U’s prior Motion to Dismiss bar the current CLRA claim too.

As before, this lawsuit arises out of revelations that the University of Southern California (“USC”) allegedly submitted incomplete data about the graduate programs offered at its education school, USC Rossier, to U.S. News & World Report (“US News”) in order to achieve a higher ranking. But as 2U explained in its first Motion to Dismiss, the US News ranking process has nothing to do with 2U, an education technology company that provides USC technology, marketing, and other services to support its online degree programs. Plaintiffs still do not claim that 2U ever submitted survey responses or program data to US News as part of its ranking process for USC Rossier, or that 2U knew USC’s rankings were allegedly based on misleading or incomplete data. Indeed, Plaintiffs’ own allegations continue to make clear that the US News survey process involves only US News and the participating schools. Plaintiffs nonetheless accuse 2U of fraud based on marketing materials that included USC Rossier’s US News rankings or characterized USC Rossier as “top ranked.” As before, this claim fails as a matter of law.

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<sup>1</sup> This Motion to Dismiss is limited to the CLRA claim pled in the FAC. However, 2U objects to Plaintiffs’ attempt to bring a second action in state court concerning the exact same events, and reserves all rights in connection with that second lawsuit, including to remove the case to federal court under the Class Action Fairness Act and to bring challenges based on Plaintiffs’ impermissible claim splitting and continued failure to state a claim against 2U, regardless of forum.

1           Although Plaintiffs have narrowed their causes of action (in this lawsuit, at  
2 least) and changed the form of relief requested, Plaintiffs have not attempted to cure  
3 *any* of the pleading deficiencies that 2U identified. Quite the contrary: The factual  
4 allegations in the FAC are *identical*—for the most part, verbatim—to those in the  
5 prior complaint. Thus, for the reasons 2U stated in its first Motion to Dismiss and  
6 sets forth below, Plaintiffs’ CLRA claim against 2U lacks merit and should be  
7 dismissed.

8           To recap: Plaintiffs are three former students of USC Rossier online degree  
9 programs supported by 2U. The crux of their CLRA claims against 2U and USC is  
10 that *USC* misled *US News* to achieve a higher ranking of USC Rossier. Plaintiffs  
11 say that after US News awarded and published high rankings for USC Rossier,  
12 “Defendants” misled them by reposting those rankings and referring to USC as “top  
13 ranked” in marketing materials. But Plaintiffs still have not included a single well-  
14 pled allegation that *2U* played any role in obtaining the rankings, knew (or even  
15 should have known) that the rankings were purportedly based on incomplete data,  
16 or made any of the rankings-related statements they claim to have relied on, which  
17 are statements on the “main Rossier website” that they concede was maintained by  
18 USC and not 2U. As they did in the original complaint, Plaintiffs use improper  
19 group pleading to try to stretch USC’s allegedly fraudulent interactions with US  
20 News into a claim against 2U, but the FAC remains devoid of any facts tying 2U to  
21 that conduct. Plaintiffs made no attempt whatsoever to correct these critical  
22 deficiencies in the FAC.

23           Plaintiffs’ continued failure to plead that 2U knew that the US News rankings  
24 were the product of alleged misconduct by USC is especially troubling here, where  
25 each of the statements at issue was literally true: USC Rossier *was* top ranked by  
26 US News. Plaintiffs do not—and cannot—dispute that US News awarded USC  
27 Rossier the precise rankings that were included in the marketing materials. And to  
28 the extent Plaintiffs argue that the US News rankings *themselves* were the

1 misstatements, that argument cannot make it out of the gate. Under Ninth Circuit  
2 precedent, a publication’s ranking of colleges is a statement of opinion, not fact, that  
3 cannot form the basis of a false advertising claim. *See Ariix, LLC v. NutriSearch*  
4 *Corp.*, 985 F.3d 1107, 1121 (9th Cir. 2021). Publications like US News must rely  
5 on inherently subjective decision-making to determine which criteria to consider  
6 when ranking schools and how much weight to give them. *Id.* These flaws pervade  
7 the FAC and are fatal to Plaintiffs’ claim against 2U.

8 Despite 2U’s first Motion to Dismiss highlighting the problems with  
9 Plaintiffs’ allegations, Plaintiffs still do not plead multiple essential elements of their  
10 CLRA claim. Specifically, Plaintiffs fail to plausibly allege, let alone with the  
11 particularity required by Rule 9(b): (1) that 2U knew the statements were false,  
12 (2) that any statement was actionable, or (3) that 2U made any of the statements on  
13 which Plaintiffs claim to have relied. In light of Plaintiffs’ persistent failure to state  
14 a claim, 2U respectfully seeks dismissal with prejudice.

## 15 **II. BACKGROUND**

### 16 **A. 2U’s Relationship With USC**

17 USC is a private, nonprofit research university located in Los Angeles. FAC  
18 ¶ 14 (Dkt. 32). USC Rossier is USC’s graduate school of education. *Id.* ¶ 21. USC  
19 Rossier offers both masters and doctoral degrees, including a Masters in Teaching  
20 (“**MAT**”), a Doctor of Philosophy (“**PhD**”), and a Doctor of Education (“**EdD**”).  
21 *See id.* ¶¶ 58, 68. USC Rossier originally offered these programs exclusively on  
22 campus, but, like many other universities, USC Rossier now offers online degrees,  
23 including an online MAT and EdD. *See id.* ¶ 25.

24 USC has sole responsibility for administering its in-person programs, but it  
25 relies on 2U for certain services related to the administration of its online MAT and  
26 EdD programs. *See id.* 2U is an education technology company that helps colleges  
27 and universities build and deliver online degree and alternative credential programs.  
28

1 Ex. A to the FAC (“Ex. A”) at 1-4 (Dkt. 32-1);<sup>2</sup> *see also* FAC ¶ 23. USC first  
 2 contracted with 2U in 2008 to help support the online MAT program, and in 2015,  
 3 2U agreed to support the online EdD program as well. Ex. A at 1; FAC ¶ 25.

4 2U provides USC with an online learning platform, technology infrastructure  
 5 support, and enrollment, marketing, and other student and faculty support services  
 6 for USC Rossier’s online MAT and EdD programs. Ex. A at 1-3. But USC expressly  
 7 retains ultimate control over any marketing materials and promotional strategies.  
 8 For example, the parties’ contract states that 2U must develop and execute “a written  
 9 plan and appropriate marketing materials” for the online programs, but that this  
 10 “plan and all materials related to the [online programs] shall be subject to USC’s  
 11 written approval prior to any use thereof.” *Id.* at 1; *see also id.* at 7 (“USC shall have  
 12 the right to review and approve all marketing [materials] ... prior to their use.”). The  
 13 contract further states that “USC shall promote the [online programs] on the Rossier  
 14 website (including, but not limited to, the homepage of that site).” *Id.* at 6 (emphasis  
 15 added).

### 16 **B. The U.S. News & World Report Rankings**

17 Each year, US News publishes rankings of the country’s leading academic  
 18 degree programs. Participation in the US News rankings is voluntary, and not every  
 19 accredited school participates each year. To generate these rankings, US News  
 20 solicits and “collect[s] statistical and reputation data directly from education  
 21 schools.” Ex. 1 at 1.<sup>3</sup> Schools who wish to participate complete “a lengthy survey  
 22 that seeks information for all education programs offered by the school, including  
 23 post-baccalaureate, non-degree granting programs, master’s programs, educational  
 24 specialist degree programs, and doctoral programs.” Ex. 2 at 3. USC submits data  
 25 on its own behalf, including for the online programs 2U helps administer. *See* Ex. 1

26 \_\_\_\_\_  
 27 <sup>2</sup> Exhibits A-E are attached to the FAC (Dkts. 32-1 to 32-5).

28 <sup>3</sup> Exhibits 1 and 2 are attached to the concurrently filed Declaration of Melanie M. Blunsch and are incorporated into the FAC and subject to judicial notice, as detailed in 2U’s concurrently filed Request for Judicial Notice.

1 at 1 (noting that data feeding US News rankings comes “directly from education  
2 schools”); Ex. 2 at 5 (“US News required schools to verify the accuracy of their  
3 submissions”). Plaintiffs do not allege that 2U was ever involved in USC Rossier’s  
4 submission of data to US News, much less that 2U itself submitted data on USC  
5 Rossier’s behalf. *See* Ex. A at 1 (detailing 2U’s role in administering the online  
6 programs, with no mention of the rankings process); Ex. 2 at 1 (USC had exclusive  
7 responsibility for US News rankings submissions).

8 Each US News ranking is based on different factors called “indicators,” which  
9 vary from year to year. For example, the 2023 “Best Education School” ranking  
10 considered eleven different indicators, including “selectivity” criteria such as test  
11 scores and acceptance rates, “faculty resource” information such as student-teacher  
12 ratios, “quality” metrics that included reputational assessments from peer  
13 institutions and educators, and “research activity” measures that assessed a  
14 university’s research spend. Ex. 1 at 1.

15 USC Rossier participated in the 2009 through 2021 editions of US News’s  
16 “Best Education School” rankings. *See* FAC ¶ 57. In 2010, US News ranked USC  
17 Rossier #22. *Id.* And from 2017 to 2021, US News ranked USC Rossier #15 (2017),  
18 #10 (2018), #12 (2019), #12 (2020), and #11 (2021). *Id.*<sup>4</sup>

### 19 **C. USC’s Counsel Investigates USC Rossier’s US News Rankings**

20 In January 2022, USC’s Office of the General Counsel learned of potential  
21 inaccuracies in USC Rossier’s survey submissions to US News. Ex. 2 at 3; *see also*  
22 FAC ¶ 49. USC initiated an internal review and retained the Jones Day law firm to  
23 investigate. Ex. 2 at 3. USC asked Jones Day to examine “whether [USC]  
24 misreported information about the ‘selectivity’ of its doctoral programs by reporting  
25 data on only one of its doctoral programs (its more selective PhD program) and  
26

27  
28 <sup>4</sup> When USC Rossier participated in the program-specific “Best Online Master’s in  
Education” rankings in 2013, US News ranked its online MAT program #44. FAC  
¶ 68.

1 omitting data on its other doctoral programs (its less selective EdD programs),” and,  
2 if so, “whether there was a persuasive justification for doing so.” *Id.* at 1.

3 In April 2022, the firm issued a report (the “**Jones Day Report**”), concluding  
4 that “[f]rom at least 2013 to 2021, the School misrepresented data to US News about  
5 the selectivity of its doctoral programs.” *Id.* More specifically, Jones Day found  
6 that USC had failed to “report [selectivity] data on its EdD programs,” instead  
7 reporting “data on only its PhD program, which made the School’s doctoral  
8 programs appear to be more selective than they actually were.” *Id.* Jones Day also  
9 found that USC “did not typically include data relating to online EdD students in US  
10 News surveys” at all, which it suggested “was a deliberate decision on the part of  
11 [the Dean].” *Id.* at 20. Jones Day concluded that “the explanations provided ... by  
12 the responsible leaders of the School do not provide a persuasive justification for not  
13 reporting EdD data.” *Id.* at 3.

14 Jones Day assigned full responsibility for this course of conduct to USC: “The  
15 ultimate decision-making authority and responsibility for the School’s survey  
16 submissions rested with the School’s dean, who reviewed and approved the  
17 submissions before they were transmitted to US News.” *Id.* The Jones Day Report  
18 does not even mention 2U once.

#### 19 **D. Plaintiffs’ Lawsuits**

20 On December 20, 2022, Plaintiffs Iola Favell, Sue Zarnowski, and Mariah  
21 Cummings, former online USC Rossier students, filed their original complaint  
22 against USC and 2U on behalf of themselves and other former USC Rossier online  
23 students. Then, as now, Plaintiffs alleged that “Defendants engaged in a two-part  
24 scheme” to (1) “submit[] inaccurate, incomplete data to US News to increase USC  
25 Rossier’s Best Education Schools ranking,” and (2) “use[] the[] fraudulently-  
26 procured Best Education Schools ranking to market the online degrees, all the while  
27 withholding data from those online degrees that would have affected their rankings.”  
28 Class Action Complaint (“*Compl.*”) ¶ 50 (Dkt. 1-1); FAC ¶ 50.

1 Nearly all of Plaintiffs’ allegations were (and still are) made broadly about  
2 “Defendants,” without identifying any specific conduct by 2U. As for 2U in  
3 particular, Plaintiffs alleged only that 2U “acted in concert with” USC to  
4 “aggressively advertise[] USC Rossier’s fraudulent rankings to grow enrollment in  
5 the school’s online programs.” Compl. ¶ 2; *see also id.* ¶ 75 (“USC carried out this  
6 [advertising] campaign, both on its own, and through its partner and agent, 2U”).  
7 Plaintiffs asserted that 2U “knew” that USC posted advertisements touting the USC  
8 Rossier rankings and that 2U was “consulted” on those advertisements. *Id.* ¶¶ 82-  
9 83. According to Plaintiffs, the supposedly misleading rankings were primarily  
10 promoted on two websites—USC’s “main Rossier website” (rossier.usc.edu) (the  
11 “**USC Rossier Website**”) and the Rossier Online Webpage “specific to the online  
12 degrees” (rossieronline.usc.edu) (the “**USC Rossier Online Webpage**”). *Id.* ¶¶ 45,  
13 82, 84. Plaintiffs also alleged that 2U used “paid online advertising to expand the  
14 reach of USC Rossier’s rankings to more prospective students.” *Id.* ¶ 77. Plaintiffs  
15 then claimed that they would not have “paid tuition”—or would have paid  
16 “substantially less”—but for “USC Rossier’s fraudulently obtained US News  
17 ranking.” *Id.* ¶ 10.

18 In their original complaint, Plaintiffs sought equitable relief under  
19 California’s False Advertising Law (“**FAL**”), Cal. Civ. Code § 17500; Consumers  
20 Legal Remedies Act (“**CLRA**”), Cal. Civ. Code § 1770; and Unfair Competition  
21 Law (“**UCL**”), Cal. Civ. Code § 17200; as well as for unjust enrichment. *See id.* ¶¶  
22 147-78. Each claim was based on Defendants’ allegedly false and deceptive  
23 advertising promoting US News’s high ranking of USC Rossier. *See id.* ¶ 148  
24 (FAL); *id.* ¶ 165 (CLRA); *id.* ¶ 156 (UCL); *id.* ¶ 170 (unjust enrichment). Plaintiffs  
25 stated that they intended to amend their complaint to add a claim for damages  
26 pursuant to the CLRA—although they declined to do so before Defendants filed their  
27 first Motions to Dismiss on March 8, 2023. *Id.* ¶ 167.

28

1 In their first Motions to Dismiss, both Defendants argued that all of Plaintiffs’  
2 claims were deficient because, among other reasons: (1) Plaintiffs entirely failed to  
3 plead essential elements of their claims plausibly, and certainly not with the  
4 particularity required by Rule 9(b); and (2) Plaintiffs’ requests for equitable relief  
5 were barred by *Sonner v. Premier Nutrition Corp.*, 971 F.3d 834 (9th Cir. 2020),  
6 because Plaintiffs could recover legal remedies under the CLRA for the exact same  
7 conduct. *See* 2U Mot. to Dismiss Compl. (Dkt. 28); USC Mot. to Dismiss Compl.  
8 (Dkt. 30). Prior to filing their Motions to Dismiss, and pursuant to Local Rule 7-3  
9 and Rule G(1) of Judge Garnett’s Standing Order for Newly Assigned Civil Cases,  
10 Defendants met and conferred with Plaintiffs about these arguments, and asked  
11 whether Plaintiffs would amend. Blunski Decl. ¶ 4. Plaintiffs told Defendants that  
12 they would not. *Id.* Plaintiffs and Defendants then discussed these arguments a  
13 second time on March 13, 2023, after the prior Motions to Dismiss were on file. *Id.*  
14 ¶ 5. Again, Plaintiffs confirmed that they did not plan to amend their complaint. *Id.*

15 Nonetheless, on March 28, 2023, Plaintiffs filed the FAC, which is the subject  
16 of the instant motion. The FAC does not assert any claims for equitable relief under  
17 the FAL, CLRA, UCL, or for unjust enrichment. Instead, it includes only a claim  
18 for damages under the CLRA. *See* FAC ¶¶ 147-153. But despite taking the  
19 opportunity to amend their complaint to assert different causes of action, Plaintiffs  
20 have not cured a single factual deficiency Defendants identified in their first Motions  
21 to Dismiss. Instead, the FAC leaves the factual allegations from the original  
22 complaint untouched.

23 On the same day that Plaintiffs filed the FAC, they filed a new case in state  
24 court. That complaint reasserts Plaintiffs’ requests for equitable relief under the  
25 FAL, CLRA, and UCL. *See* Notice of Los Angeles County Superior Court Filings  
26 (Dkt. 34). Plaintiffs no longer bring an unjust enrichment claim in either forum. The  
27 factual allegations underlying the state court complaint are identical to those asserted  
28 in the FAC.



1 **III. LEGAL STANDARDS**

2 A court must dismiss claims under Rule 12(b)(6) where a plaintiff fails to  
 3 allege “factual content that allows the court to draw the reasonable inference that the  
 4 defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678  
 5 (2009). Plaintiffs’ allegations are taken as true on a Rule 12(b)(6) motion, but a  
 6 court need not accept “legal conclusion[s] couched as [] factual allegation[s],” and  
 7 “[t]hreadbare recitals of the elements of a cause of action, supported by mere  
 8 conclusory statements, do not suffice.” *Id.* (citation omitted).

9 Rule 9(b) further requires that fraud-based claims “state with particularity the  
 10 circumstances constituting [the] fraud.” Fed. R. Civ. P. 9(b). Under that standard,  
 11 Plaintiffs “must identify the who, what, when, where, and how of the misconduct  
 12 charged, as well as what is false or misleading about the purportedly fraudulent  
 13 statement, and why it is false.” *Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956,  
 14 964 (9th Cir. 2018) (citation omitted). Group pleading is improper; instead, Rule  
 15 9(b) requires that a plaintiff “inform each defendant separately of the allegations  
 16 surrounding his alleged participation in the fraud.” *Swartz v. KPMG LLP*, 476 F.3d  
 17 756, 764-65 (9th Cir. 2007) (citation omitted); *see also Hilsley v. General Mills*, 376  
 18 F. Supp. 3d 1043, 1051 (S.D. Cal. 2019) (dismissing claims against advertiser  
 19 defendants where plaintiffs did not explain their participation in the misconduct); *In*  
 20 *re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Pracs. & Prods. Liab.*  
 21 *Litig.*, 826 F. Supp. 2d 1180, 1201 (C.D. Cal. 2011) (dismissing complaint that  
 22 “impermissibly ascrib[ed] conduct to ... ‘Defendants’ generally”).

23 Here, Plaintiffs’ claim sounds in fraud and therefore must meet Rule 9(b)’s  
 24 heightened bar. Indeed, Plaintiffs themselves admit that the heart of their case is  
 25 *fraud*. *See, e.g.*, FAC ¶ 2 (“This Complaint centers on that rankings fraud[.]”); *id.*  
 26 (“[F]raud is exactly what happened here.”); *id.* ¶ 95 (“Defendants’ fraudulent  
 27 scheme to climb the US News rankings has benefited them tremendously[.]”).  
 28 Plaintiffs’ claim is based on alleged “misrepresentations” about USC Rossier’s

1 “true” US News ranking, and misrepresentations are a “species of fraud.” *Meridian*  
 2 *Project Sys. v. Hardin Constr. Co.*, 404 F. Supp. 2d 1214, 1219 (E.D. Cal. 2005);  
 3 *see Davidson*, 889 F.3d at 964 (holding that a CLRA claim based on  
 4 misrepresentations was grounded in fraud); *Kearns v. Ford Motor Co.*, 567 F.3d  
 5 1120, 1125 (9th Cir. 2009) (same).<sup>5</sup>

#### 6 **IV. ARGUMENT**

7 Plaintiffs’ allegations do not state a CLRA claim under Rule 8’s plausibility  
 8 standard, much less under the heightened bar of Rule 9(b). Plaintiffs allege that  
 9 statements reposting USC Rossier’s numerical US News ranking or declaring that  
 10 USC Rossier was “top-ranked” were false and misleading. But each of these  
 11 allegations falls short. Most importantly, Plaintiffs fail to plead three essential  
 12 elements of their CLRA claim: (1) that 2U knew that any statement was false, (2)  
 13 that the statements are actionable, or (3) that 2U made any of the statements on which  
 14 Plaintiffs allegedly relied. 2U has nothing to do with USC’s alleged misconduct,  
 15 and it should never have been made part of this case.

##### 16 **A. Plaintiffs Have Not Alleged 2U Knew The Statements Were False**

17 Plaintiffs still have not pled that 2U knew any statements at issue were false  
 18 or misleading. The CLRA requires proof that the defendant had actual knowledge  
 19 of falsity. *See, e.g., Wilson v. Hewlett-Packard Co.*, 668 F.3d 1136, 1145 (9th Cir.  
 20

---

21  
 22 <sup>5</sup> Plaintiffs assert that Defendants violated seven different provisions of the CLRA,  
 23 which make unlawful passing off goods or services as those of another;  
 24 misrepresenting the affiliation, connection, or association with, or certification by,  
 25 another; representing that a transaction confers or involves rights, remedies, or  
 26 obligations that it does not have; and generally misrepresenting the quality or  
 27 approval of a good or service. *See* Cal. Civ. Code §§ 1770(a)(1), (2), (3), (5), (7),  
 28 (9), (14). Plaintiffs do not allege any facts to explain how 2U “pass[ed] off” its  
 services as those of another, § 1770(a)(1), “misrepresent[ed]” its “affiliation[s]” and  
 “connection[s],” § 1770(a)(3), or represented that a transaction involved “rights,  
 remedies, or obligations that it does not have,” § 1770(a)(14). In any event, each of  
 these allegedly deceptive practices involved 2U making purported  
 misrepresentations, and therefore triggers Rule 9(b). *See, e.g., Pirozzi v. Apple Inc.*,  
 913 F. Supp. 2d 840, 850 (N.D. Cal. 2012) (CLRA claim that relies on  
 misrepresentations sounds in fraud and is subject to Rule 9(b)’s heightened bar).

1 2012) (“[U]nder the CLRA, plaintiffs must sufficiently allege that a defendant was  
 2 aware of a defect at the time of sale to survive a motion to dismiss.”); *see also*  
 3 *Stewart v. Electrolux Home Prods., Inc.*, No. 17-cv-01213-LJO, 2018 WL 1784273,  
 4 at \*4 (E.D. Cal. Apr. 13, 2018) (“[A] representation will not violate the CLRA if the  
 5 defendant did not know of the facts that rendered the representation misleading.”);  
 6 *Coleman-Anacleto v. Samsung Elecs. Am., Inc.*, No. 16-cv-02941-LHK, 2017 WL  
 7 86033, at \*6 (N.D. Cal. Jan. 10, 2017) (holding that actual knowledge of falsity is a  
 8 required element for a CLRA claim based on fraudulent misrepresentation and  
 9 omission-based theories).<sup>6</sup> But here, 2U had no actual (or even constructive)  
 10 knowledge that USC Rossier’s rankings were allegedly based on incomplete data.  
 11 USC alone—not 2U—submits survey responses and program data to US News, and  
 12 Plaintiffs do not plead otherwise. Nor do they offer any facts indicating that 2U  
 13 knew (or even had access to information that would have revealed) that USC  
 14 Rossier’s rankings were in any way misleading. Plaintiffs cannot avoid this problem  
 15 by lumping “Defendants” together using impermissible group pleading.

16 Although knowledge may be averred “generally” under Rule 9(b), a plaintiff  
 17 still must allege “sufficient facts to support ... or render plausible” an inference of  
 18 knowledge as to each defendant. *United States v. Corinthian Colleges*, 655 F.3d  
 19 984, 997 (9th Cir. 2011); *In re Hydroxycut Mktg. & Sales Pracs. Litig.*, 299 F.R.D.  
 20 648, 659 (S.D. Cal. 2013) (dismissing fraud claims because plaintiff did not “plead  
 21 circumstances providing a factual basis for scienter for each defendant”) (citation  
 22 \_\_\_\_\_)

23 <sup>6</sup> A handful of district courts have suggested that a lower “should have known”  
 24 standard could apply to a CLRA claim. *See Williams v. Tesla, Inc.*, No. 20-cv-  
 25 08208-HSG, 2023 WL 1072000, at \*4 n.6 (N.D. Cal. Jan. 27, 2023) (recognizing  
 26 the uncertainty and holding that plaintiffs failed to plausibly allege either actual  
 27 knowledge or that defendants should have known of an alleged defect); *Resnick v.*  
 28 *Hyundai Motor America, Inc.*, No. 16-00593-BRO, 2017 WL 1531192, at \*14-17  
 (C.D. Cal. Apr. 13, 2017) (same). But the Ninth Circuit has never held that a  
 defendant could be liable under the CLRA for making a misrepresentation without  
 actual knowledge of its falsity. And regardless, for reasons discussed *infra*—  
 namely, 2U is not involved in USC’s dealings with US News—Plaintiffs plead no  
 facts from which to plausibly infer that 2U should have known that USC submitted  
 incomplete data to US News, let alone that it had actual knowledge.

1 omitted). Plaintiffs have entirely failed to do so here. Plaintiffs simply assert that  
2 “Defendants knew the data submissions [to US News] were fraudulent.” FAC ¶ 144;  
3 *see also id.* ¶ 50. But these group allegations do not specify that 2U had that  
4 knowledge—or how and when it was acquired. They are too speculative and  
5 conclusory to meet Plaintiffs’ burden. *See, e.g., In re Samsung Galaxy Smartphone*  
6 *Mktg. & Sales Pracs. Litig.*, No. 16-cv-06391-BLF, 2020 WL 7664461, at \*8 (N.D.  
7 Cal. Dec. 24, 2020) (finding “merely conclusory” allegations of knowledge  
8 insufficient); *Spencer v. Cal. Bus. Bur., Inc.*, No. 16-cv-0399-AJB, 2016 WL  
9 11779144, at \*6 (S.D. Cal. Aug. 16, 2016) (rejecting conclusory allegations that  
10 defendant “knew or should have known”). And *even if* Plaintiffs adequately alleged  
11 that 2U knew about problems with USC’s data submissions (they did not), those  
12 allegations still would not state a claim because they fail to connect the dots to 2U’s  
13 knowledge *of the false advertising*. Instead, Plaintiffs ask the Court to make the  
14 logical leap that, if Defendants knew the data submissions were incomplete,  
15 Defendants also must have known the rankings were wrong. But that does not  
16 necessarily follow.

17 Plaintiffs’ speculative group allegations, in any event, are not even plausible  
18 as applied to 2U. Plaintiffs have not alleged that 2U submitted survey responses or  
19 program data to US News, such that 2U could have been on notice that USC had  
20 submitted allegedly incomplete responses to US News’s questions. To the contrary,  
21 the FAC and the documents it incorporates underscore the lack of *any* connection  
22 between 2U and this supposed fraud.

23 For example, Plaintiffs’ allegations of ranking-related fraud rely exclusively  
24 on the Jones Day Report. *See* FAC ¶¶ 1, 49, 58, 60, 67, 69-73. But the Jones Day  
25 Report makes clear that USC submitted data to US News, and it states that “[t]he  
26 ultimate decision-making authority and responsibility for the School’s survey  
27 submissions [to US News] rested with the School’s dean.” Ex. 2 at 1; *see also id.* at  
28 7 (“Dean 1 reviewed and approved the School of Education’s 2001 through 2020

1 survey submissions to US News,” and “Dean 1 directed the exclusion of EdD from  
2 selectivity metrics”); *id.* at 10 (“Dean 1 directed School Administrator 1 and the  
3 Rankings Staff Member to continue to exclude EdD data from responses”); *id.* at 20  
4 (noting Dean 1’s “decision” not to submit online program data); *see, e.g., In re*  
5 *Eventbrite, Inc. Secs. Litig.*, No. 5:18-cv-02019-EJD, 2020 WL 2042078, at \*7 (N.D.  
6 Cal. Apr. 28, 2020) (documents incorporated by reference may be considered on  
7 motion to dismiss). The Jones Day Report *never* references 2U and certainly does  
8 not suggest 2U knew of USC’s alleged misconduct. The contract between USC and  
9 2U, moreover, says nothing about any ranking process, and does not provide 2U  
10 with authority to submit data to US News on USC’s behalf or even review USC’s  
11 submissions. *See* Ex. A.

12 The rest of Plaintiffs’ allegations likewise confirm that USC alone was  
13 responsible for submitting data to US News. *See, e.g.,* FAC ¶ 58 (“USC ...  
14 submitted data” to US News); *id.* ¶ 67 (“USC [did] not provid[e] US News with any  
15 selectivity data from its online programs”); *id.* ¶ 71 (“[Dean 2] again authorized the  
16 submission of survey data to US News that excluded EdD data”). Indeed, Plaintiffs  
17 do not allege that 2U even had access to information from which it could or should  
18 have discovered issues with USC’s submissions. *See, e.g., Wilson*, 668 F.3d at 1147  
19 (declining to credit allegations that defendant was “on notice” of problems through  
20 its “access to the aggregate data”).

21 That 2U played no role in the alleged fraud is fatal to Plaintiffs’ claim under  
22 any pleading standard, and especially Rule 9(b). *See, e.g., Swartz*, 476 F.3d at 764-  
23 65 (plaintiff must “inform each defendant separately of the allegations surrounding  
24 his alleged participation in the fraud”) (citation omitted). Because Plaintiffs have  
25 not pled facts from which to plausibly infer that 2U knew any rankings-related  
26 statement in its advertising was misleading, their CLRA claim against 2U must be  
27 dismissed. *See, e.g., In re Hydroxycut Mktg. & Sales Pracs.*, 299 F.R.D. at 659.

28

1           **B. Plaintiffs Do Not Allege Any Actionable Misstatements Or**  
 2           **Omissions**

3           Plaintiffs have not pled a single actionable misstatement or omission, as they  
 4 must for their misrepresentation-based CLRA claims. *See Hodsdon v. Mars, Inc.*,  
 5 891 F.3d 857, 865 (9th Cir. 2018) (affirming dismissal of CLRA claim for failure to  
 6 plead an actionable misstatement or omission). Only “specific factual assertion[s]”  
 7 that are capable of being proven false are actionable. *Anunziato v. eMachines, Inc.*,  
 8 402 F. Supp. 2d 1133, 1140 (C.D. Cal. 2005); *see also Edmundson v. Proctor &*  
 9 *Gamble Co.*, 537 F. App’x 708, 709 (9th Cir. 2013) (dismissing false advertising-  
 10 based CLRA claim). Plaintiffs allege two categories of purported  
 11 misrepresentations: (1) statements that USC Rossier was “top-ranked,” *see, e.g.*,  
 12 FAC ¶¶ 82, 83; and (2) statements that reposted the numerical US News rank USC  
 13 Rossier held at the time of the advertising, *see, e.g., id.* ¶ 83. Neither supports a  
 14 claim, whether considered under an affirmative misrepresentation theory or as the  
 15 basis of Plaintiffs’ related omissions theory.

16           1. Plaintiffs’ Affirmative Misstatement Theory Fails

17           Affirmative statements that USC Rossier was “top-ranked”—without  
 18 reference to any objective basis for that claim—are nonactionable “puffery.” *See,*  
 19 *e.g., Edmundson*, 537 F. App’x at 709; *McLaughlin v. Homelight, Inc.*, No. 2:21-cv-  
 20 05379-MCS, 2021 WL 5986913, at \*4 (C.D. Cal. Sept. 17, 2021) (holding that a list  
 21 of “top” real estate agents a website compiled using both subjective and objective  
 22 measures was “nonactionable puffery too nebulous and ambiguous to support a  
 23 claim of false advertising”) (collecting cases where “top”-based statements  
 24 constituted puffery). “Advertising which merely states in general terms that one  
 25 product is superior is not actionable” because “consumer reliance” is induced by  
 26 “specific rather than general assertions.” *Viggiano v. Hansen Nat. Corp.*, 944 F.  
 27 Supp. 2d 877, 894 (C.D. Cal. 2013). Here, statements that USC Rossier was “top-  
 28 ranked” are too general to be actionable because they say nothing about the school’s

1 “specific characteristics,” and ultimately are no “more weighty than an advertising  
2 slogan.” *Elias v. Hewlett-Packard Co.*, 903 F. Supp. 2d 843, 855 (N.D. Cal. 2012)  
3 (citation omitted); *see also Fowler v. Univ. of Phoenix, Inc.*, No. 18-cv-1544-WQH,  
4 2019 WL 1746576, at \*12 (S.D. Cal. Apr. 18, 2019) (statements regarding the  
5 “quality of education” are mere puffery).

6 Advertising statements noting USC Rossier’s numerical US News ranking are  
7 not actionable either. Plaintiffs claim that USC Rossier’s US News rankings were  
8 inflated as a result of USC’s incomplete survey submissions, and that “Defendants”  
9 committed fraud by including those rankings in their marketing materials. *See, e.g.*,  
10 FAC ¶ 84. But each statement noting USC Rossier’s numerical US News ranking  
11 was *literally true*, and 2U cannot be held liable for “presenting accurately [US  
12 News’s] allegedly inaccurate conclusions” about USC Rossier. *Biolase, Inc. v.*  
13 *Fotona Proizvodnja Optoelektronskih Naprav D.D.*, No. 14-0248-AG, 2014 WL  
14 12579802, at \*4 (C.D. Cal. June 4, 2014) (citation omitted). Although Plaintiffs take  
15 issue with the data underlying the US News rankings, it is entirely undisputed that  
16 US News *did* give USC Rossier the precise ranking advertised, which provided 2U  
17 with a factual basis for any marketing materials it developed containing those  
18 rankings. *See, e.g., Royal Holdings Techs. Corp. v. FLIR Sys., Inc.*, No. 2:20-cv-  
19 09015-SB, 2021 WL 945246, at \*6 (C.D. Cal. Jan. 8, 2021) (finding no liability for  
20 alleged misuse of a truthful statement). Simply reposting the US News rankings,  
21 without more, is neither false nor a misrepresentation of US News’s subjective  
22 conclusions about USC Rossier. *See Express Gold Cash, Inc. v. Beyond 79, LLC*,  
23 No. 1:18-cv-00837-EAW, 2019 WL 4394567, at \*6 (W.D.N.Y. Sept. 13, 2019)  
24 (holding that statements that defendant was “ranked #1 by NBC’s Today Show”  
25 could not form basis of false advertising claim where literally true).

26 To the extent Plaintiffs argue that the US News rankings *themselves* were the  
27 false advertising, that theory fails too. Setting aside that Defendants did not make  
28 the rankings (and that 2U did not contribute to them in any way), US News’s

1 rankings are statements of opinion, not fact. *See Ariix, LLC v. NutriSearch Corp.*,  
 2 985 F.3d 1107, 1121 (9th Cir. 2021). In *Ariix*, the Ninth Circuit explained that  
 3 although “publications that rank colleges or law schools purportedly rely on  
 4 objective criteria (e.g., acceptance rates, test scores, class size, endowment),”  
 5 selecting those criteria “involves subjective decision-making.” *Id.* The product thus  
 6 is an “unquantifiable assertion,” which is a “classic” example of a “non-actionable  
 7 opinion[]” that cannot form the basis of a fraud claim. *Id.* (citation omitted). So too  
 8 here. US News uses “subjective decision-making” to form its Best Education School  
 9 rankings. *Id.* But that “subjective decision-making,” which encompasses the  
 10 decision whether to weigh data from online or EdD programs in its selectivity  
 11 indicators, renders its rankings “unquantifiable assertion[s]” that cannot give rise to  
 12 a fraud claim. *Id.*; *see also ZL Techs., Inc. v. Gartner, Inc.*, 709 F. Supp. 2d 789,  
 13 796-801 (N.D. Cal. 2010) (ranking software companies was a non-actionable  
 14 opinion, and defendant had no duty to disclose the basis for the rankings).

## 15 2. Plaintiffs’ Omissions Theory Fails

16 Plaintiffs half-heartedly attempt to recast their affirmative-misstatement claim  
 17 under an omissions theory, briefly asserting that Defendants are liable for failing to  
 18 disclose three things on USC’s websites: (1) USC Rossier’s “lower (or non-existent)  
 19 position in US News’ rankings of online master’s degrees in education,” FAC ¶ 85;  
 20 (2) “that the data used to obtain the US News ranking excluded EdD students, both  
 21 online and in-person,” *id.* ¶ 86; and (3) “things like selectivity information, or  
 22 average GRE scores,” *id.* This omissions theory is equally meritless.

23 In the absence of an affirmative and contrary misrepresentation, Plaintiffs  
 24 must plead with particularity that the defendant omitted a “fact the defendant was  
 25 obliged to disclose.” *Hodsdon*, 891 F.3d at 865 (citation omitted). The duty to  
 26 disclose in the absence of a contrary affirmative misrepresentation is narrow:  
 27 “California courts have generally rejected a broad obligation to disclose.” *Wilson*,  
 28 668 F.3d at 1141 (citing *Daugherty v. Am. Honda Co.*, 144 Cal. App. 4th 824, 835



1 (2006)). That duty extends only to facts that are “material” and relate to the “central  
2 functionality” of the product or service at issue. *Hodsdon*, 891 F.3d at 863. In  
3 addition, the defendant must bear a special responsibility to disclose the information  
4 under the factors set forth in *LiMandri v. Judkins*, 52 Cal. App. 4th 326 (1997). *See*,  
5 *e.g.*, *Sud v. Costco Wholesale Corp.*, 731 F. App’x 719, 720 (9th Cir. 2019)  
6 (requiring that a plaintiff allege central functionality and a *LiMandri* factor). Here,  
7 Plaintiffs’ omission theory fails because there is no duty to disclose information  
8 about USC Rossier’s US News ranking or the selectivity of the online programs, for  
9 two reasons: (1) these purported omissions do not relate to the “central functionality”  
10 of a USC education, and (2) none of the *LiMandri* factors applies.

11 *First*, Plaintiffs nowhere allege that the purported omissions were so  
12 important that they affected the “central functionality” of their USC education.  
13 Under this test, a company’s failure to disclose information about its product or  
14 service is not actionable unless the omitted information rendered the product or  
15 service “incapable of use.” *Hodsdon*, 891 F.3d at 864 (explaining “central  
16 functionality” doctrine under *Collins v. eMachines, Inc.*, 202 Cal. App. 4th 249  
17 (2011), and *Rutledge v. Hewlett-Packard Co.*, 238 Cal. App. 4th 1164 (2015)). This  
18 bright-line rule is “sound policy,” given the “difficulty of anticipating exactly what  
19 information some customers might find material to their purchasing decisions,” *Sud*  
20 *v. Costco Wholesale Corp.*, 229 F. Supp. 3d 1075, 1086 (N.D. Cal. 2017), and the  
21 fact that “courts are not suited to determine which [information] must occupy the  
22 limited surface area” of a brochure or other marketing material, *Dana v. Hershey*  
23 *Co.*, 180 F. Supp. 3d 652, 665 (N.D. Cal. 2016). In California, a duty to disclose  
24 thus arises only when the omitted information “obliterate[s]” the product or service’s  
25 function such that it becomes “unusable.” *Ahern v. Apple Inc.*, 411 F. Supp. 3d 541,  
26 568 (N.D. Cal. 2019); *see also Knowles v. Arris Int’l PLC*, No. 17-cv-01834-LHK,  
27 2019 WL 3934781, at \*16 (N.D. Cal. Aug. 20, 2019) (finding no centrality where  
28 latency defects slowed down performance but did not render a modem unusable).

1 Here, as discussed, Plaintiffs fault USC and 2U for failing to disclose USC  
 2 Rossier’s “lower (or non-existent) position in US News rankings of online master’s  
 3 degrees in education,” FAC ¶ 85; “that the data used to obtain the US News ranking  
 4 excluded EdD students,” *id.* ¶ 86; and “things like selectivity information, or average  
 5 GRE scores,” *id.* But none of this information has any bearing on the education and  
 6 graduate degrees that Plaintiffs actually received. Plaintiffs’ “subjective  
 7 preferences” about how US News, a third party, ranked USC Rossier (based on its  
 8 own subjective assessment of selectivity data) simply did not affect the educational  
 9 instruction they actually received, let alone render those services “incapable of use.”  
 10 *Hodsdon*, 891 F.3d at 864; *Hall v. SeaWorld Ent., Inc.*, 747 F. App’x 449, 451 (9th  
 11 Cir. 2018) (affirming no duty to disclose information on orca treatment where it did  
 12 not relate to the central function of Seaworld’s services, but instead reflected  
 13 “Plaintiffs’ ‘subjective preferences’” on how orcas were treated). Nor did Plaintiffs’  
 14 subjective preferences about USC Rossier’s *voluntary* participation in different US  
 15 News rankings (or ranking inputs like admission rates or average GRE scores of  
 16 other students in particular years) in any way affect the education Plaintiffs received  
 17 or the degrees they earned.<sup>7</sup> Plaintiffs’ omission theories do not meet the high  
 18 “central functionality” bar and accordingly fail.

19 *Second*, and independently, 2U had no duty to disclose any of this information  
 20 because Plaintiffs fail to adequately allege any *LiMandri* factor. Under California  
 21 law, a duty to disclose material facts relating to the central function of a good or  
 22 service arises only in four instances: “(1) when the defendant is the plaintiff’s  
 23 fiduciary; (2) when the defendant has exclusive knowledge of material facts not  
 24

25  
 26 <sup>7</sup> As noted in 2U’s prior Motion to Dismiss, Plaintiffs do not dispute that they  
 27 received the education and degree for which they paid, so they have also failed to  
 28 adequately plead how they were economically damaged by the rankings-related  
 statements, a required element of their CLRA claim. *See Charbonnet v. Omni Hotels  
 & Resorts*, No. 20-cv-01777-CAB, 2020 WL 7385828, at \*4-5 (S.D. Cal. Dec. 16,  
 2020) (dismissing CLRA claim for failure to plead economic injury-in-fact).  
 Plaintiffs added no allegations in the FAC to correct this deficiency.

1 known or reasonably accessible to the plaintiff; (3) when the defendant actively  
2 conceals a material fact from the plaintiff; and (4) when the defendant makes partial  
3 representations that are misleading because some other material fact has not been  
4 disclosed.” *Hodsdon*, 891 F.3d at 862 (citing *LiMandri*, 52 Cal. App. 4th at 336).

5 Plaintiffs still do not allege that any of these four factors are present here:

6 Plaintiffs nowhere allege that 2U was their fiduciary (nor could they).

7 Plaintiffs also do not (and cannot) allege that 2U had knowledge—let alone  
8 “exclusive knowledge”—of either (1) the fact that USC Rossier was not included in  
9 US News’s specialized “Best Online Master’s in Education” ranking for many years  
10 (which could have been ascertained by visiting US News’s website); or (2) the data  
11 behind USC Rossier’s US News rankings (which USC compiled and submitted).  
12 *Id.*; see *Elias v. Hewlett-Packard Co.*, 950 F. Supp. 2d 1123, 1138-39 (N.D. Cal.  
13 2013) (dismissing claims that defendant concealed or suppressed information it did  
14 not know). And Plaintiffs’ theory that 2U allegedly omitted “selectivity  
15 information” on the online programs also fails. FAC ¶ 86. Plaintiffs’ own  
16 allegations that *USC* should have submitted this data to US News, *see id.* ¶ 6, belie  
17 any argument that *2U* had “exclusive knowledge” of that data.

18 Plaintiffs also have not alleged a single fact to support an inference that 2U  
19 actively concealed any information. See *Milman v. FCA U.S., LLC*, No. 18-00686-  
20 JVS, 2018 WL 5867481, at \*11 (C.D. Cal. Aug. 30, 2018) (dismissing omission-  
21 based claims centered on “mere nondisclosure”).

22 Finally, because Plaintiffs have failed to plead that any affirmative  
23 representation by 2U is actionable, they “cannot proceed on the basis of misleading  
24 partial representations.” *Kavehrad v. Vizio, Inc.*, No. 8:21-cv-01868-JLS, 2022 WL  
25 16859975, at \*6-7 (C.D. Cal. Aug. 11, 2022) (dismissing omissions claims where  
26 affirmative representations were puffery).

27 \* \* \*

28 Without a duty to disclose, Plaintiffs’ omissions-based theory against 2U must

1 be rejected.<sup>8</sup>

2 **C. Plaintiffs Fail To Allege That 2U Made An Actionable**  
 3 **Misstatement Or Omission On Which They Relied**

4 Plaintiffs’ CLRA claim against 2U also suffers multiple additional dispositive  
 5 deficiencies, all of which persist from the prior complaint. Plaintiffs complain that  
 6 “Defendants” posted the “falsified US News ranking” and made statements that USC  
 7 Rossier was “top-ranked” on the main homepage of the USC Rossier Website,  
 8 rossier.usc.edu, FAC ¶¶ 79, 82-84, 106, 117, 130, and the USC Rossier Online  
 9 Webpage specific to the online degrees, rossieronline.usc.edu, *id.* ¶ 84. They also  
 10 claim that 2U generated interest in USC Rossier’s online programs using “paid  
 11 search result advertisements” on Google, “targeted advertising on Facebook,” and  
 12 “additional advertising” on unrelated sites “via a display advertising network.” *Id.*  
 13 ¶¶ 115-16, 118, 131-32. But these allegations do not give rise to liability on 2U’s  
 14 part. 2U did not make any of the allegedly misleading statements on the main USC  
 15 Rossier Website. 2U also did not exert “unbridled control” over the statements on  
 16 USC Rossier’s *Online* Webpage—and, in any event, Plaintiffs still do not allege they  
 17 relied on statements made there. Finally, 2U’s commonplace marketing techniques  
 18 are not false or misleading statements of fact, and Plaintiffs do not identify with  
 19 particularity any misleading advertisement that resulted from those techniques.

20 1. Plaintiffs Have Not Alleged That 2U Made Any Statements On  
 21 The USC Rossier Website

22 A defendant may not be held liable for false advertising and unfair  
 23 competition claims absent its “*personal participation* in the unlawful practices and  
 24

---

25 <sup>8</sup> Plaintiffs briefly suggest that 2U advisors failed to disclose their affiliation with  
 26 2U, *see, e.g.*, FAC ¶¶ 46, 107, 119, but as noted in 2U’s prior Motion to Dismiss,  
 27 they do not allege either that 2U advisors affirmatively represented their affiliation  
 28 or had a duty to disclose more. And while Plaintiffs claim that *they* made rankings-  
 related statements to their advisors, they do not allege that the *advisors* made any  
 such statements or had a duty to disclose anything about third-party rankings of USC  
 Rossier. *See Hodsdon*, 891 F.3d at 862.

1 unbridled control over th[ose] practices.” *Perfect 10, Inc. v. Visa Int’l Serv. Ass’n*,  
 2 494 F.3d 788, 808 (9th Cir. 2007) (emphasis added) (quoting *Emery v. Visa Int’l*  
 3 *Serv. Ass’n*, 95 Cal. App. 4th 952, 960 (2002)) (dismissing FAL and UCL claims)<sup>9</sup>;  
 4 *Prudencio v. Midway Importing, Inc.*, 831 F. App’x 808, 811 (9th Cir. 2020)  
 5 (dismissing CLRA claim); *see also In re Jamster Mktg. Litig.*, No. 05-cv-0819-JM,  
 6 2009 WL 1456632, at \*8 (S.D. Cal. May 22, 2009) (same). As California courts  
 7 have made clear, “there is no duty to investigate the truth of statements made by  
 8 others.” *Emery*, 95 Cal. App. 4th at 964. Rather, the defendant must have “exercised  
 9 [] control over the preparation or distribution of” a statement to be liable for a  
 10 misrepresentation contained within that statement. *Id.* at 960.

11 Here, Plaintiffs do not (and cannot) allege that 2U made any of the statements  
 12 on the USC Rossier Website. In fact, they expressly acknowledge the opposite,  
 13 declaring that “USC maintained the main Rossier website, rossier.usc.edu.” FAC  
 14 ¶ 45 (emphasis added); *see also* Ex. A at 6. That is fatal to their allegations against  
 15 2U based on these webpages. *See, e.g., Emery*, 95 Cal. App. 4th at 960.<sup>10</sup>

16 To be sure, Plaintiffs assert that USC displayed rankings on the USC Rossier  
 17 Website “with 2U’s consultation,” FAC ¶ 83, but that is not enough to state a claim  
 18 against 2U. Mere “consultation”—without “unbridled control”—is plainly  
 19 insufficient for liability. *Perfect 10*, 494 F.3d at 808-09 (citation omitted); *see also*  
 20 *Tortilla Factory, LLC v. Health-Ade LLC*, No. 17-9090-MWF, 2018 WL 6174708,  
 21 at \*11 (C.D. Cal. July 13, 2018) (same). Indeed, courts have recognized that a

22 \_\_\_\_\_  
 23 <sup>9</sup> This Court should consider FAL and UCL caselaw when analyzing Plaintiffs’  
 24 misrepresentation-based CLRA claim. The standard for determining liability under  
 25 all three is similar. *See, e.g., Kearns*, 567 F.3d at 1125 (considering CLRA and UCL  
 26 claims together and affirming dismissal of both for failure to meet Rule 9(b)); *Elias*,  
 27 903 F. Supp. 2d at 854 (“[C]ourts often analyze these three statutes [the FAL, CLRA,  
 28 and UCL] together.”); *Chapman v. Skype Inc.*, 220 Cal. App. 4th 217, 230 (2013)  
 (recognizing that the “standard for determining whether a defendant” made a  
 misrepresentation under the CLRA “is the same as that for determining whether  
 there was false advertising under the UCL and the [FAL]”).

<sup>10</sup> The same is true for any allegations based on news releases “USC published” and  
 “authored,” FAC ¶ 79, and tweets posted by USC or its Dean, *id.* ¶¶ 80-81, which,  
 in any event, Plaintiffs do not claim to have seen or relied on, *see infra*.

1 general agreement to “collaborate on a website” is not enough to allege “direct  
2 involvement” in curating its content, such that a defendant would be liable for any  
3 misrepresentations made there. *Woodard v. Labrada*, No. 16-0189-JGB, 2017 WL  
4 1018307, at \*12 (C.D. Cal. Mar. 10, 2017).

5 2. Plaintiffs’ Allegations Based On The USC Rossier Online  
6 Webpage Do Not State A Claim

7 Plaintiffs also allege that 2U and USC shared responsibility for a *different*  
8 website specific to the online degrees, the USC Rossier Online Webpage located at  
9 rossieronline.usc.edu, and that *this* webpage included USC Rossier’s numerical US  
10 News rankings, as well as statements that the school was “top-ranked.” FAC ¶¶ 45,  
11 84, 86. Allegations based on this webpage fare no better.

12 As noted, California consumer protection law imposes liability for false or  
13 misleading statements only when the defendant exercises “unbridled control” over  
14 the content of those statements. *Perfect 10*, 494 F.3d at 808 (quoting *Emery*, 95 Cal.  
15 App. 4th at 960). Here, though, *USC* exercised ultimate control over the USC  
16 Rossier Online Webpage, not 2U. As the contract between 2U and USC made clear,  
17 *all* of 2U’s marketing materials pertaining to the online programs, including  
18 materials that ended up on the USC Rossier Online Webpage, were “subject to  
19 *USC’s* written approval prior to any use.” Ex. A at 1 (emphasis added).

20 In any event, Plaintiffs have not pled an actionable claim based on the USC  
21 Rossier Online Webpage because—as with the original complaint and pointed out  
22 in 2U’s prior Motion to Dismiss—Plaintiffs do not allege that they relied on any  
23 false or misleading statements made on *that* webpage. Reliance is a required element  
24 for claims based on fraud or misrepresentation.<sup>11</sup> *Kwan v. SanMedica Int’l*, 854 F.3d  
25 1088, 1095 (9th Cir. 2017); *see also Cork v. CC-Palo Alto, Inc.*, 534 F. Supp. 3d  
26

27 <sup>11</sup> Plaintiffs’ lack of reliance is also fatal to Plaintiffs’ statutory standing under the  
28 CLRA. *See Rothman v. Equinox Holdings, Inc.*, No. 2:20-cv-09760-CAS, 2021 WL  
124682, at \*4-6 (C.D. Cal. Jan. 13, 2021).

1 1156, 1184 (N.D. Cal. 2021) (dismissing CLRA claim where the plaintiff failed to  
 2 plead “that they would have made a different consumer decision but for the alleged  
 3 misstatements at issue.”); *Shaeffer v. Califia Farms, LLC*, 44 Cal. App. 5th 1125,  
 4 1143 (2020) (same). Reliance “is proved by showing that [the] defendant’s  
 5 misrepresentation is an ‘immediate cause’ of the plaintiff’s conduct,” which means  
 6 that “the plaintiff ‘in all reasonable probability’ would not have engaged in the  
 7 injury-producing conduct” if the misrepresentation had not been made. *Kwan*, 854  
 8 F.3d at 1095 (citations omitted).

9 Here, Plaintiffs still do not allege that they saw—let alone relied on—a single  
 10 representation made on the USC Rossier Online Webpage. Indeed, Plaintiffs make  
 11 clear that the “[s]pecific misrepresentations and omissions on which the[y] relied are  
 12 set forth” in paragraphs 105-132 of the FAC, FAC ¶ 150, yet those paragraphs never  
 13 mention any statement that appeared on the USC Rossier Online Webpage.  
 14 Needless to say, a plaintiff cannot rely on an alleged misrepresentation to which she  
 15 was not exposed. *See, e.g., Schwartz v. Bai Brands, LLC*, No. 19-06249-SPG, 2022  
 16 WL 16935267, at \*7 (C.D. Cal. Aug. 19, 2022) (dismissing CLRA claim where the  
 17 plaintiff did not allege that they saw the relevant advertisements prior to purchase).<sup>12</sup>

### 18 19 3. Plaintiffs’ Allegations About 2U’s Use Of Search Engine Optimization Do Not State A Claim

20 Finally, Plaintiffs do not state a claim based on 2U’s search-engine  
 21 optimization techniques, such as purchasing Google search terms and targeted  
 22

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23  
24 <sup>12</sup> Plaintiffs fail to plead reliance on the purported omissions for the same reason.  
 25 For an omissions claim, Plaintiffs must plead that “had the omitted information been  
 26 disclosed, [they] would have been aware of it and behaved differently.” *Daniel v.*  
 27 *Ford Motor Co.*, 806 F.3d 1217, 1225 (9th Cir. 2015) (citation omitted). But because  
 28 Plaintiffs do not allege that they ever viewed the USC Rossier Online Webpage, they  
 likewise have not alleged that they would have seen “selectivity information, or  
 average GRE scores,” FAC ¶ 86, had it been posted there. *Daniel*, 806 F.3d at 1225;  
*see also Barrett v. Apple Inc.*, 523 F. Supp. 3d 1132, 1151-53 (N.D. Cal. 2021)  
 (dismissing omissions-based claims for lack of causation). Plaintiffs also do not  
 allege—even in conclusory terms—that they would have behaved differently if they  
 saw this information. *Daniel*, 806 F.3d at 1225.

1 advertisements on Facebook, and disseminating advertisements on other sites via a  
 2 display advertising network. *See* FAC ¶¶ 115-16, 118, 131-32. The first element of  
 3 Plaintiffs’ misrepresentation-based claim is a false or misleading *statement* of fact,  
 4 *see, e.g., Edmundson*, 537 F. App’x at 709, but search engine techniques and  
 5 marketing strategies do not constitute “statements” in any sense of the term. *See,*  
 6 *e.g., GhostBed, Inc. v. Casper Sleep, Inc.*, No. 15-cv-62571-WPD, 2018 WL  
 7 2213002 at \*7 (S.D. Fla. May 3, 2018) (holding as a matter of law that search engine  
 8 techniques and marketing strategies do not constitute “statements” on which a false  
 9 advertising claim can be based).

10 Nor do Plaintiffs state a claim based on the advertisements that resulted from  
 11 2U’s use of these commonplace marketing techniques. Crucially, Plaintiffs still do  
 12 not identify any advertisements they saw or the links they clicked on. *See* FAC  
 13 ¶¶ 115-16, 118, 131-32. That lack of specificity is fatal under Rule 9(b). *See, e.g.,*  
 14 *Kearns*, 567 F.3d at 1126 (dismissing where plaintiff did not specify the  
 15 advertisements he saw, when he saw them, or which was material); *In re Apple Inc.*  
 16 *Device Performance Litig.*, 347 F. Supp. 3d 434, 458 (N.D. Cal. 2019) (generally  
 17 alleging an advertising campaign fails to plead “with particularity” the “statements  
 18 [plaintiffs] ... actually saw and relied upon”). In addition, Plaintiffs again fail to  
 19 allege that 2U made any of the alleged misrepresentations. *See BHRS Grp., LLC v.*  
 20 *Brio Water Tech., Inc.*, 553 F. Supp. 3d 793, 799-801 (C.D. Cal. 2021) (dismissing  
 21 false advertising claim absent allegation the defendant made the misstatement).

22 \* \* \*

23 In the end, Plaintiffs’ fraud claim rests entirely on their theory that USC made  
 24 misleading statements to US News to enhance USC Rossier’s ranking. But 2U is  
 25 not responsible for this alleged misconduct. Indeed, Plaintiffs’ own sources make  
 26 clear that 2U did not participate in the US News survey process or submit program  
 27 data to US News. Worse, Plaintiffs’ sources also confirm that 2U did not make the  
 28



1 allegedly false statements they claim to have seen and relied on. Plaintiffs have no  
2 basis for dragging 2U into this case based on USC’s allegedly deceptive conduct.

3 **D. Plaintiffs’ FAC Should Be Dismissed With Prejudice**

4 Dismissal with prejudice is proper here because Plaintiffs have already  
5 availed themselves of an opportunity to amend their original complaint, yet have  
6 failed to address multiple dispositive deficiencies. *See Loos v. Immersion Corp.*,  
7 762 F.3d 880, 890-91 (9th Cir. 2014) (affirming dismissal with prejudice of first  
8 amended complaint that “failed to correct the deficiencies identified in” the original  
9 complaint). Nor could they do so in good faith—Plaintiffs have no factual basis for  
10 any claim against 2U, and thus any further amendment would be futile. *See*  
11 *Leadsinger, Inc. v. BMG Music Pub.*, 512 F.3d 522, 532 (9th Cir. 2008) (recognizing  
12 futility and bad faith as reasons to deny leave to amend, and affirming dismissal with  
13 prejudice where no amendment could cure the complaint’s failure to state a claim).

14 **V. CONCLUSION**

15 For the foregoing reasons, 2U respectfully seeks dismissal of Plaintiffs’ FAC  
16 with prejudice.

17 Dated: April 17, 2023

Respectfully submitted,

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