UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 23-846-GW-MARx	Date	July 5, 2023
Title	*Iola Favell et al v. University of Southern California, et al.*		

Present: The Honorable	GEORGE H. WU, UNITED STATES DISTRICT JUDGE	
Javier Gonzalez	None Present	
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
None Present	None Present

PROCEEDINGS: IN CHAMBERS - TENTATIVE RULING ON DEFENDANT UNIVERSITY OF SOUTHERN CALIFORNIA'S MOTION TO DISMISS [42]; and 2U, INC.'S MOTION TO DISMISS FIRST AMENDED CLASS ACTION COMPLAINT [43]

Attached hereto is the Court's Tentative Ruling on the above-entitled Motions [42, 43], set for hearing on July 6, 2023 at 8:30 a.m.

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Initials of Preparer JG

Iola Favell et al v. University of Southern California et al.; Case No. 2:23-cv-0846-GW-(MARx)
Tentative Ruling on: (1) Defendant University of Southern California's Motion to Dismiss First Amended Class Action Complaint; (2) Defendant 2U, Inc.'s Motion to Dismiss Case; and (3) Defendant 2U, Inc.'s Request for Judicial Notice and Incorporation by Reference

On December 20, 2022, Plaintiffs Iola Favell, Sue Zarnowski, and Mariah Cummings ("Plaintiffs") filed this putative class action against Defendants University of Southern California ("USC") and 2U, Inc. ("2U")[1] (together, "Defendants") in the Superior Court of the State of California, County of Los Angeles. *See* Complaint, ECF No. 1-1. Plaintiffs allege that Defendants artificially inflated their U.S. News & World Report ("US News") rankings by submitting incomplete data to US News. *See id.* The Complaint asserted four causes of action for: (1) violation of California's False Advertising Law ("FAL"), Cal. Bus. & Prof. Code § 17500 et seq.; (2) violation of California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200 et seq.; (3) violation of the Consumer Legal Remedies Act ("CLRA"), Cal. Bus. & Prof. Code § 17500 et seq.; and (4) unjust enrichment. *See id.*

On February 3, 2023, 2U removed the case to federal court pursuant to the Class Action Fairness Act. *See* Notice of Removal, ECF No. 1. 2U and USC each moved to dismiss, arguing, in part, that Plaintiffs' claims for equitable relief could not be heard in federal court. *See* ECF Nos. 28, 30. Before those motions were decided, Plaintiffs filed a First Amended Complaint ("FAC") on March 29, 2023. *See* ECF No. 32. The FAC drops Plaintiffs' equitable claims and instead asserts a single cause of action for damages under the CLRA. Plaintiffs also filed a separate action in state court asserting their equitable claims, which Defendants also removed. *See Iola Favell et al v. University of Southern California et al*, Case No. 2:23-cv-03389-GW-MAR (C.D. Cal.), ECF No. 1.

Now before the Court are USC's and 2U's motions to dismiss the FAC. *See* USC's Motion to Dismiss ("USC Mot."), ECF No. 42; 2U's Motion to Dismiss ("2U Mot."), ECF No. 43.[2] Plaintiffs filed oppositions. *See* Plaintiffs' Opposition to USC's Motion to Dismiss ("USC Opp."),

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[1] 2U is described in the Complaint as a "for-profit, publicly-traded corporation" which "offers technology platforms for the provision of online programs and uses the name and branding of schools like USC, which can charge students top dollar. USC hired 2U not only to provide technical support, but to run the advertising and recruiting for those online programs." *See* Complaint ¶ 2.

[2] In connection with its motion, 2U also filed a request for judicial notice and incorporation by reference of two documents. *See* ECF No. 44. Plaintiffs filed an opposition, ECF No. 52, and 2U filed a reply, ECF No. 55.

ECF No. 50; Plaintiffs' Opposition to 2U's Motion to Dismiss ("2U Opp."), ECF No. 51. Defendants replied. *See* USC's Reply in Support of Motion to Dismiss ("USC Reply"), ECF No. 53; 2U's Reply in Support of Motion to Dismiss ("2U Reply"), ECF No. 54.

I. Background

As alleged, USC is a private nonprofit university located in Los Angeles, California. FAC ¶ 14. USC offers graduate education programs through the USC Rossier School of Education ("USC Rossier"). *Id.* ¶ 21. In or around 2008, USC began its business relationship with 2U, an education technology company, to develop an online Master of Arts in Teaching program – the first of USC Rossier's online degree programs – which went live in June 2009. *Id.* ¶ 22. When launching USC Rossier's first online degree program, 2U and USC each recognized that online education programs had a negative reputation and that maintaining USC's reputation as an "elite" school despite its online degree offerings was crucial to maximizing tuition revenue. *Id.* ¶¶ 41-43.

US News calculates its annual Best Education Schools rankings using data sent by graduate education schools who choose to participate in the rankings. *Id.* ¶ 54. US News develops and provides to participating school instructions to ensure that they collect and report data in a consistent way. *Id*. To determine its rankings, US News employs a specific methodology which assigns weighs to eleven criteria based on their perceived importance to determining academic quality. *Id.* ¶ 55. Relevant here, "student selectivity" accounts for 18% of the school's total score and is comprised of three objective sources of admittance data: (1) the school's doctoral acceptance rate (6%); (2) mean GRE quantitative scores (6%); and (3) mean GRE verbal scores (6%). *Id.*

Throughout the relevant period (2009 through 2021), US News has required schools to submit the data used in the rankings, including student selectivity data, from all the school's education doctoral programs. *Id.* ¶ 59. The methodology does not distinguish between data from in-person and online programs. *Id.* ¶ 56. However, USC submitted student selectivity data only for its highly selective, in-person Ph.D. program, but not from its less-competitive EdD program (which was offered online after 2015). *Id.* ¶ 58. For example, from the 2009 rankings to the 2010 rankings, USC Rossier's reported doctoral acceptance rate dropped forty percentage points (from 50.7% to 10.5%) which thereby resulted in its ranking rising 16 places (from #38 to #22). *Id.* ¶¶ 57-60.

US News also began publishing a specialty ranking of online master's degrees in education in 2013. *Id.* ¶ 68. USC Rosier's online Master of Arts in Teaching program ranked #44 that year.

Id. USC did not participate in those rankings in at least 2014 and 2016, nor did the program appear on the publicly available list in 2015, 2017, 2018-2020, or 2021.

Plaintiffs allege that Defendants knew the importance of the rankings on prospective students' school choice and engaged in a scheme to capitalize on the fraudulently obtained rankings to boost enrollment in the online programs. *Id.* ¶¶ 75-76. 2U engaged in online advertising to promote USC Rossier's ranking to more applicants, including by purchasing search terms from Google. *Id.* ¶ 77. Between 2015 and 2021, 2U spent more than half of its revenue on program sales and marketing. *Id.* ¶ 78. For its part, USC regularly touted USC Rossier's ranking in press releases and on social media. *Id.* ¶¶ 79-81. USC, with 2U's knowledge, also promoted the ranking (and that USC Rossier was "top-ranked") on the Rossier Website and in other promotional materials. *Id.* ¶¶ 82-84. In these advertisements, Defendants did not disclose that USC Rossier was ranked lower or not ranked at all in US News' online master's degrees in education rankings, or that the data submitted to US News was incomplete or inaccurate. *Id.* ¶¶ 85-86.

The three named Plaintiffs saw Defendants' advertisements in different locations and over different periods of time. Each saw the ranking displayed on USC Rossier's website, and two saw targeted advertisements caused by 2U's purchase of targeted advertising tools. *Id.* ¶¶ 106, 115-18, 130-32. Plaintiffs relied on these advertisements and on USC Rossier's ranking when deciding which school to attend. *Id.* ¶¶ 95-96, 105, 110, 112, 120, 129, 133, 134. Each Plaintiff attended an online degree program at USC and paid tuition, but allege they would not have done so if USC Rossier had been ranked lower. *Id.* ¶¶ 112, 124, 134. Plaintiffs bring this action on behalf of the following putative class: "All students who were enrolled in an online graduate degree program at USC Rossier, from April 1, 2009, through April 27, 2022." *Id.* ¶ 135.

II. Legal Standard

Under Rule 12(b)(6), a court must: (1) construe the complaint in the light most favorable to the plaintiff, and (2) accept all well-pleaded factual allegations as true, as well as all reasonable inferences to be drawn from them. *See Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir.), *amended on denial of reh'g*, 275 F.3d 1187 (9th Cir. 2001); *Pareto v. F.D.I.C.*, 139 F.3d 696, 699 (9th Cir. 1998). The court need not accept as true "legal conclusions merely because they are cast in the form of factual allegations." *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003). In its consideration of the motion, the court is limited to the allegations

on the face of the complaint (including documents attached thereto), matters which are properly judicially noticeable and "documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading." *See Lee v. City of Los Angeles*, 250 F.3d 668, 688-89 (9th Cir. 2001); *Branch v. Tunnell*, 14 F.3d 449, 453-54 (9th Cir. 1994), *overruling on other grounds recognized in Galbraith v. County of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002).

Dismissal pursuant to Rule 12(b)(6) is proper only where there is either a "lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990); *Johnson v. Riverside Healthcare Sys., LP*, 534 F.3d 1116, 1121-22 (9th Cir. 2008); *see also Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 561-63 (2007) (dismissal for failure to state a claim does not require the appearance, beyond a doubt, that the plaintiff can prove "no set of facts" in support of its claim that would entitle it to relief). However, a plaintiff must also "plead 'enough facts to state a claim to relief that is plausible on its face.'" *Johnson*, 534 F.3d at 1122 (quoting *Twombly*, 550 U.S. at 570); *see also William O. Gilley Enters., Inc. v. Atlantic Richfield Co.*, 588 F.3d 659, 667 (9th Cir. 2009) (confirming that *Twombly* pleading requirements "apply in all civil cases"). A complaint does not "suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 556). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

While Rule 8(a)(2) of the Federal Rules of Civil Procedure requires only that a party's pleading contain "a short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 8(a)(2), "Rule 9(b) requires that, when fraud is alleged, 'a party must state with particularity the circumstances constituting fraud . . . ." *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124 (9th Cir. 2009). "Rule 9(b) demands that the circumstances constituting the alleged fraud 'be specific enough to give defendants notice of the particular misconduct . . . so that they can defend against the charge and not just deny that they have done anything wrong." *Id.* (quoting *Bly-Magee v. California*, 236 F.3d 1014, 1019 (9th Cir. 2001)) (omitting internal quotation marks). "A party alleging fraud must 'set forth more than the neutral facts necessary to identify the transaction.'" *Id.* (quoting *In re GlenFed, Inc. Sec. Litig.*, 42 F.3d 1541, 1548 (9th Cir. 1994)). "Averments of fraud must be accompanied by 'the who, what, when, where,

and how' of the misconduct charged." *Id.* (quoting *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1102 (9th Cir. 2003)) (omitting internal quotation marks); *see also U.S. ex rel. Anita Silingo v. WellPoint, Inc.*, 904 F.3d 667, 677 (9th Cir. 2018). Moreover, "[t]o satisfy Rule 9(b), a fraud suit against differently situated defendants must 'identify the role of each defendant in the alleged fraudulent scheme.'" *Silingo*, 904 F.3d at 677 (quoting *Swartz v. KPMG LLP*, 476 F.3d 756, 765 (9th Cir. 2007)).

III. Discussion

A. USC's Motion to Dismiss

USC moves to dismiss Plaintiffs' CLRA claim on the following three grounds: first, Plaintiffs fail to satisfy the "reasonable consumer" standard, as the US News' rankings are non-actionable opinions or puffery and the target consumer would not reasonably place undue importance on the rankings when selecting schools; second, Plaintiffs have not pleaded statutory standing under the CLRA; and third, Plaintiffs' claim is barred by the educational malpractice doctrine. *See* USC Mot. at 1-2. The Court will address each contention in turn.

1. The Reasonable Consumer Test

The CLRA prohibits certain "unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer." Cal. Civ. Code § 1770(a). Plaintiffs' claim under the CLRA is governed by the "reasonable consumer" test. *Becerra v. Dr Pepper/Seven Up, Inc.*, 945 F.3d 1225, 1228 (9th Cir. 2019). Under the reasonable consumer standard, a plaintiff must show that "members of the public are likely to be deceived" by the alleged misrepresentation. *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 938 (9th Cir. 2008) (quoting *Freeman v. Time, Inc.,* 68 F.3d 285, 289 (9th Cir.1995)). "'Likely to deceive' implies more than a mere possibility that the advertisement might conceivably be misunderstood by some few consumers viewing it in an unreasonable manner." *Lavie v. Procter & Gamble Co.*, 105 Cal. App. 4th 496, 508 (2003). "Rather, the phrase indicates that the ad is such that it is probable that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled." *Id*. The "reasonable consumer" is "an ordinary consumer acting reasonably under the circumstances, who is not versed in the art of inspecting and judging a product, or in the process of its preparation or manufacture." *Viggiano v. Hansen Natural Corp.*, 944 F. Supp. 2d 877, 885 (C.D. Cal. 2013) (internal quotation marks and alterations omitted).

Whether a business practice is deceptive is generally a question of fact unfit for decision on a motion to dismiss. *See, e.g.*, *Williams*, 552 F.3d at 938-39; *Kim v. Benihana, Inc.*, No. 5:19-cv-02196-JWH-KKx, 2021 WL 1593248, at *4 (C.D. Cal. Feb. 24, 2021). In some instances, however, whether a business practice is deceptive can be answered by an objective review of the advertisement itself. *See Williams*, 552 F.3d at 938–39. Thus, for purposes of this order, the Court need only decide whether it is plausible that "a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled." *Ebner v. Fresh, Inc.*, 838 F.3d 958, 965 (9th Cir. 2016) (quoting *Lavie*, 105 Cal. App. 4th at 508).

a. Whether the Advertisements Are Non-Actionable Opinion or Puffery

Both USC and 2U argue that Plaintiffs' CLRA claim fails because it is based on non-actionable opinion or puffery upon which a reasonable consumer cannot rely. *See* USC Mot. at 14-16; 2U Mot. at 22-24. The Ninth Circuit has emphasized that "'a false advertising claim may be based on implied statements' as long as those statements are specific and deceptive." *Ariix, LLC v. NutriSearch Corp.*, 985 F.3d 1107, 1121 (9th Cir. 2021) (quoting *Prager Univ. v. Google LLC*, 951 F.3d 991, 1000 (9th Cir. 2020)). "Statements of opinion and puffery, however, are not actionable." *Id.* "Ultimately, the difference between a statement of fact and mere puffery rests in the specificity or generality of the claim." *Newcal Indus., Inc. v. Ikon Office Sol.*, 513 F.3d 1038, 1053 (9th Cir. 2008). "The common theme that seems to run through cases considering puffery in a variety of contexts is that consumer reliance will be induced by specific rather than general assertions." *Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc.*, 911 F.2d 242, 246 (9th Cir. 1990). "Thus, a statement that is quantifiable, that makes a claim as to the 'specific or absolute characteristics of a product,' may be an actionable statement of fact while a general, subjective claim about a product is non-actionable puffery." *Newcal Indus., Inc. v. Ikon Office Sol.*, 513 F.3d 1038, 1053 (9th Cir. 2008) (citing *Cook*, 911 F.2d at 246). For a statement to be quantifiable and therefore actionable, it must be "a specific and measurable claim, capable of being proved false or of being reasonably interpreted as a statement of objective fact." *Ariix, LLC*, 985 F.3d at 1121 (citing *Coastal Abstract Serv., Inc. v. First Am. Title Ins. Co.*, 173 F.3d 725, 731 (9th Cir. 1999)). "[T]the determination of whether an alleged misrepresentation 'is a statement of fact' or is instead 'mere puffery' is a legal question that may be resolved on a Rule 12(b)(6) motion." *Newcal Indus.*, 513 F.3d at 1053 (9th Cir. 2008) (citing *Cook*, 911 F.2d at 245).

In arguing that Plaintiffs' claims involve non-actionable statements of opinion, Defendants

rely heavily on the Ninth Circuit's recent decision in *Ariix*. In that case, a nutritional supplement company brought a false advertising claim against the publisher of a nutritional supplement guide "that compares and reviews nutritional supplements" by "using a five-star rating system based on 18 criteria," which the defendants stated was "an evidence-based book" without any "particular bias." 985 F.3d at 1112. The plaintiff alleged that the guide was in fact "rigged" to favor plaintiff's competitors and that the defendants had an undisclosed financial arrangement with one of the plaintiff's competitors to boost its rating. *Id*. at 1111-14. In analyzing whether the defendant could be liable for false advertising, the Ninth Circuit recognized that defendant's guide "must include false or misleading representations of fact, not simply statements of opinion." *Id.* at 1121 (citing *Coastal Abstract*, 173 F.3d at 730). On appeal from a district court order granting defendant's motion to dismiss, the Ninth Circuit held that defendant's "comparative five-star ratings in the Guide are not actionable" because they are "simply statements of opinion about the relative quality of various nutritional supplement products." *Id.* The plaintiff argued that the defendant's "'star' ratings are factual because the Guide purports to rely on scientific and objective criteria." *Id.* The Ninth Circuit rejected that argument, explaining that "there is an inherently subjective element in deciding which scientific and objective criteria to consider." The court likened the defendant's guide to "publications that rank colleges or law schools [that] purportedly rely on objective criteria (*e.g*., acceptance rates, test scores, class size, endowment), but selecting those criteria involves subjective decision-making." *Id.* The court held that, as a matter of law, "such unquantifiable assertions are 'classic, non-actionable opinions or puffery.'" *Id.* (citing *Prager Univ.*, 951 F.3d at 1000).

Despite Defendants' attempts to liken this case to *Ariix*, the gravamen of Plaintiffs' claim is distinguishable from the one at issue there. In support of their argument, Defendants repeatedly point to the above-quoted line from *Ariix* that "publications that rank colleges or law schools purportedly rely on objective criteria (*e.g.*, acceptance rates, test scores, class size, endowment), but *selecting* those criteria involves subjective decision-making." *Id.* (emphasis added). Plaintiffs' allegations, however, do not target US News' *selection* or *weighing* of the objective criteria which determine the rankings.[3] Plaintiffs do not claim, as the plaintiff did in *Ariix*, that US News "rigged"

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[3] This fact distinguishes this case from another case relied on by USC, which employed essentially the same reasoning as *Ariix*. In *ZL Technologies, Inc. v. Gartner, Inc.*, the court found that a ranking of different software companies was not actionable, notwithstanding that the rankings were "fact-based" and involved the use of a "rigorous mathematical model." 709 F. Supp. 2d 789, 797 (N.D. Cal. 2010), *aff'd*, 433 F. App'x 547 (9th Cir. 2011). The court

its methodology to favor USC, or that US News' rankings gave a false sense of impartiality. Were that the case, the Court would agree that the representations at issue would be non-actionable statements of opinion. Instead, Plaintiffs claim that Defendants knowingly *reported false data* to US News. Those underlying data are entirely falsifiable, and the weight that they were to be assigned by US News was predetermined. The fact that such data were considered alongside other subjective considerations to produce a final ranking does not render USC's promotion of the allegedly fraudulently obtained ranking non-actionable. As Plaintiffs note, if the law were otherwise, "any business that submits false information to get a certification . . . could not be held liable because each of those certifications would have at their core a methodology based on an opinion as to which data points should be considered." USC Opp. at 17.

b. Whether a Reasonable Consumer Would Be Deceived

Next, USC argues that the target consumers – college graduates applying to online graduate degree programs – would not reasonably assign US News' rankings the level of importance that Plaintiffs did here. USC Mot. at 11. Nor, according to USC, would such a reasonable consumer fail to diligently investigate the accuracy of US News' rankings, including by comparing them to US News' publicly available rankings for Best Online Education Programs (which ranked Rossier much lower). *Id.* at 12.

Whether a business practice is deceptive is generally a question of fact unfit for decision on a motion to dismiss. *See Williams*, 552 F.3d at 938-39. Here, the FAC contains allegations showing the significance of the rankings on students' enrollment decisions;[4] indeed, the FAC cites a study showing that an increase in the US News rankings by a single point increases a school's total applications by 0.9%. *See* FAC ¶¶ 51-53. Drawing all reasonable inferences in favor of Plaintiffs, one could conclude from these allegations that the target consumer population places great weight on the rankings and could have reasonably been deceived by advertisements claiming that USC was ranked higher than it should have been. In sum, at this early pleading stage, the

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noted that "[m]ost opinions are based at least in part on facts," but that "[t]he *weight* [defendant] applies to these facts is not verifiable, as it is reflective of [defendant's] *subjective assessment* of what is important." *Id.* at 798 (emphasis added); *see also Aviation Charter, Inc. v. Aviation Rsch. Grp./US*, 416 F.3d 864, 871 (8th Cir. 2005) (employing similar reasoning). Plaintiffs here are not challenging the "weight [US News] applies to" the schools' data or its "subjective assessment of what is important," but rather the submission of inaccurate falsifiable data and subsequent promotion of the resulting ranking.

[4] The FAC alleges the importance which the Defendants themselves placed on the rankings as a means of maintaining and/or increasing enrollment in the online programs.

Court cannot say that Plaintiffs' allegations fail as a matter of law under the reasonable consumer test.

2. Statutory Standing

Second, USC argues Plaintiffs have not sufficiently pleaded that they suffered an economic injury in fact. A plaintiff satisfies the CLRA's standing requirement "by alleging[ ] . . . that he or she would not have bought the product but for the misrepresentation" at issue. *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 330 (2011). Such allegations are sufficient to show standing because they permit the reasonable inference that "the consumer (allegedly) was made to part with more money than he or she otherwise would have been willing to expend, *i.e.*, that the consumer paid more than he or she actually valued the product." *Id.* According to the *Kwikset* court, "the extra money paid[] is economic injury and affords the consumer standing to sue." *Id.* This is the case even if "the marketplace would continue to value the product as highly as the amount the consumer paid for it." *Id.* at 333.

Here, Plaintiffs have alleged that they would not have attended USC's Rossier program, or would have paid less to do so, if not for the misrepresentations. *See* FAC 112, 124, 134. These allegations suffice under *Kwiskset* and the cases applying it. *See, e.g.*, *Moore v. Mars Petcare US, Inc.*, 966 F.3d 1007, 1020 (9th Cir. 2020) (standing adequately pleaded where the complaint alleged that "[a]s a result of the false and fraudulent prescription requirement, each Plaintiff paid more for Prescription Pet Food than each Plaintiff would have paid in the absence of the requirement, or would never have purchased Prescription Pet Food" (alterations in original)). For the same reason, USC's claim that Plaintiffs must plead that the education they received was inferior or otherwise worth less (for example, by showing diminished job prospects) is also unavailing.[5] *See Stanwood v. Mary Kay, Inc.*, 941 F. Supp. 2d 1212, 1218 (C.D. Cal. 2012) (noting that like in *Kwikset*, "[t]he harm was not that the product was somehow inferiorly made, but simply that the consumer would not have purchased it at the price he paid, but for the misrepresentations.").

Nevertheless, USC invokes the "benefit of the bargain" theory of standing, arguing that because Plaintiffs do not allege USC affirmatively represented that any particular ranking would

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[5] The same is true for USC's "common sense" argument that students "cannot overpay based on an inaccurate ranking because a student cannot, and does not, actually pay for any particular ranking in the first place." USC Mot. at 16.

be maintained or that the rankings were included in the cost of attendance, Plaintiffs cannot show that they were deprived of any benefit for which they bargained. *See* USC Mot. at 14. As explained by the Ninth Circuit:

> [T]he "benefit of the bargain" defense is permissible only if the misrepresentation that the consumer alleges was not "material." A representation is "material," however, if a reasonable consumer would attach importance to it *or* if "the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important in determining his choice of action.

Hinojos v. Kohl's Corp., 718 F.3d 1098, 1107 (9th Cir. 2013) (citations omitted), *as amended on denial of reh'g and reh'g en banc* (July 8, 2013). Misrepresentations considered to be material include: "meat falsely labeled as kosher or halal, wine labeled with the wrong region or year, blood diamonds mislabeled as conflict-free, and goods falsely suggesting they were produced by union labor." *Id.* at 1105 (citing *Kwikset Corp.*, 51 Cal. 4th at 328-29). "Furthermore, the materiality of a misrepresentation is typically an issue of fact, and therefore should not be decided at the motion to dismiss stage." *Id.* at 1107 n.7 (citing *In re Steroid Hormone Product Cases,* 181 Cal. App. 4th 145 (2010)).

Plaintiffs sufficiently allege for purposes of this motion to dismiss that the alleged misrepresentations regarding the US News rankings were material to their decision-making. As discussed above, the FAC contains allegations showing the importance of the rankings to applicants' selection decisions – in other words, Plaintiffs have plausibly alleged that "a reasonable consumer would attach importance to" the rankings and/or that USC had "reason to know that its recipient regards or is likely to regard the matter as important in determining his choice of action." *Hinojos*, 718 F.3d 1098. Accordingly, the benefit of the bargain theory is inapplicable. *See id.*

3. <u>The Educational Malpractice Doctrine</u>

Finally, USC contends that Plaintiffs' claim is barred by the educational malpractice doctrine. Under that doctrine, courts reject "claims that seek damages for an allegedly 'subpar' education" that "would require the Court to make judgments about the quality and value of the education" provided. *Lindner v. Occidental Coll.*, No. CV 20-8481-JFW-(RAOx), 2020 WL 7350212, at *6 (C.D. Cal. Dec. 11, 2020). According to USC, Plaintiffs' claim essentially amounts to a claim that they were provided a lower quality education than they were led to believe they would receive. In support of that argument, USC cites a single sentence in the FAC stating that USC "misled prospective students into believing that they were applying to online programs that were more competitive and ***higher quality*** than in reality." USC Mot. at 19 (quoting FAC ¶ 76)

(alternation in original).

The Court disagrees that the doctrine is applicable here. The crux of Plaintiffs' claim is not that USC failed to instruct them adequately. Plaintiffs do not challenge, at least not explicitly or in any level of detail, the quality of the education they received. The crux of Plaintiffs' claim is instead that USC intentionally misreported student selectivity data to artificially inflate its US News rankings. That claim centers on the rankings *as such*, not as a proxy for the quality of education actually provided. The Court fails see, at least at this early stage, how adjudication of that claim would necessarily require the Court or the jury to make any judgments into the quality and value of the education USC provides.

Based on the foregoing, the Court would **DENY** USC's motion to dismiss.

B. 2U's Motion to Dismiss

2U separately moves to dismiss on the grounds that the FAC fails to allege that 2U knew the allegedly misleading statements were false, that those statements are actionable, and that Plaintiffs saw and relied upon any statements made by 2U.

First, 2U argues that Plaintiffs have failed to plead that 2U knew any of the statements at issue were false or misleading. According to 2U, actual knowledge of falsity is required under the CLRA. *See* 2U Mot. at 18-19 (collecting cases). Plaintiffs contest this characterization of the law, arguing that in most cases the CLRA requires only that the plaintiff plead negligence – *i.e.*, that the defendant should have known that the advertisement was deceptive. 2U Opp. at 10.

Plaintiffs appear to be correct that, as a general matter, actual knowledge is not a requisite element under most subsections of the CLRA. *See Racies v. Quincy Bioscience, LLC*, No. 15-CV-00292-HSG, 2016 WL 5746307, at *6 (N.D. Cal. Sept. 30, 2016). Here, however, Plaintiffs' claim is premised on allegations that Defendants collectively engaged in a fraudulent scheme. *See, e.g.*, FAC 2 ("This Complaint *centers on . . . rankings fraud*, and in particular, the way in which USC – *in concert with* its partner and for-profit, publicly-traded corporation, Defendant 2U – aggressively advertised USC Rossier's fraudulent rankings to grow enrollment in the school's online programs." (emphasis added)). Accordingly, Plaintiffs' claim sounds in fraud and must meet the heightened pleading requirements of Rule 9(b). *See Kearns*, 567 F.3d at 1125 ("While fraud is not a necessary element of a claim under the CLRA . . . , a plaintiff may nonetheless allege that the defendant engaged in fraudulent conduct," in which case the pleading "as a whole must satisfy the particularity requirement of Rule 9(b)." (citing *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d

1097, 1103-04 (9th Cir. 2003))). Although Rule 9(b) provides that "intent, knowledge, and other conditions of a person's mind may be alleged generally," *see* Fed. R. Civ. P. 9(b), the complaint must nevertheless set forth "sufficient facts to support . . . or render plausible" that the defendant acted knowingly. *United States v. Corinthian Colleges*, 655 F.3d 984, 997 (9th Cir. 2011); *see also In re Hydroxycut Mktg. & Sales Pracs. Litig.*, 299 F.R.D. 648, 659 (S.D. Cal. 2013) ("Plaintiffs argue that knowledge and intent may be averred generally. Although that is true, the circumstances of fraud must be stated with particularity.").

The FAC asserts that "*Defendants* knew the data submissions were fraudulent," FAC ¶ 144 (emphasis added), but it does not specify that *2U* was involved in any way in the submission of data to US News. In fact, the Jones Day Report (part of an internal investigation undertaken by USC) states that "responsibility for the School's survey submissions rested with the School's dean." *See* ECF No. 43-3 at 1.[6] Accordingly, Plaintiffs have not provided sufficient facts to infer 2U's knowledge of the falsity.

In response, Plaintiffs point to several allegations they claim show 2U "knew or should have known that USC Rossier's US News' rankings were fraudulently obtained." 2U Opp. at 11. They point out that USC Rossier's rise in the rankings occurred around the time USC partnered with 2U, that 2U had a monetary incentive in the success of the program, and that 2U had responsibility for developing marketing strategies for the online program. While those allegations

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[6] As Plaintiffs concede, the Jones Day Report is referenced extensively in the FAC, and its authenticity is not in dispute. *See* ECF No. 52 at 2. As a result, the Court may consider it in deciding 2U's motion.

"Although generally the scope of review on a motion to dismiss for failure to state a claim is limited to the Complaint, a court may consider evidence on which the complaint necessarily relies if: (1) the complaint refers to the document; (2) the document is central to the plaintiffs' claim; and (3) no party questions the authenticity of the copy attached to the 12(b)(6) motion." *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010) (internal quotation marks and citations omitted). The Court may "treat such a document as 'part of the complaint, and thus may assume that its contents are true for purposes of a motion to dismiss under Rule 12(b)(6).'" *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006) (quoting *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003)). The incorporation by reference doctrine "prevents plaintiffs from selecting only portions of documents that support their claims, while omitting portions of those very documents that weaken – or doom – their claims." *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 1002 (9th Cir. 2018).

Plaintiffs do not object to the relevance or authenticity of Jones Day Report. They do, however, take issue with 2U's *use* of the document in support of its motion. That argument, however, goes to the merits of 2U's motion, not whether the document can be incorporated in the first instance. *See SEB Inv. Mgmt. AB v. Symantec Corp.*, No. C 18-02902 WHA, 2019 WL 2491935, at *10 (N.D. Cal. June 14, 2019) ("To be sure, 'it is improper to assume the truth of an incorporated document if such assumptions only serve to dispute facts stated in a well-pleaded complaint,' but that does not preclude consideration of the document under the incorporation by reference doctrine for any purpose." (citing *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d at 1003)).

The Court's order does not rely on the other document 2U seek to judicially notice and so does not decide 2U's request as to that document.

would raise the inference of at least negligence, they fall short of pleading that 2U in fact knew the submission of data to US News was false or that the ranking was fraudulently obtained. For instance, that 2U was responsible for much of the marketing of the online program does not speak to 2U's role in preparing or reviewing the alleged false submissions to US News, nor otherwise show the circumstances by which 2U would have come to learn of the falsity. To satisfy the pleading requirements of their fraud claim, Plaintiffs must plead those circumstances with greater particularity as to 2U. However, such a "relatively minor deficienc[y] can be cured through amendment." *Corinthian Colleges*, 655 F.3d at 997.

Accordingly, the Court would **DISMISS** Plaintiffs' claim against 2U but with leave to amend.

IV. Conclusion

For the foregoing reasons, the Court **DENIES** USC's motion to dismiss and **GRANTS** 2U's motion to dismiss with leave to amend.