

1 SHOOK, HARDY & BACON L.L.P.
 2 Michael L. Mallow (SBN: 188745)
 mmallow@shb.com
 3 Mark. D. Campbell (SBN: 180528)
 4 mdcampbell@shb.com
 Nalani L. Crisologo (SBN: 313402)
 5 ncrisologo@shb.com
 6 2049 Century Park East, Suite 3000
 Los Angeles, California 90067
 7 Telephone: 424-285-8330
 8 Facsimile: 424-204-9093

9 Holly Pauling Smith (admitted *pro hac vice*)
 hpsmith@shb.com
 10 Taylor B. Markway (admitted *pro hac vice*)
 11 tmarkway@shb.com
 12 2555 Grand Boulevard
 Kansas City, Missouri 64108
 13 Telephone: 816-474-6550
 14 Facsimile: 816-421-5547

15 Attorneys for Defendant University of Southern California

16 UNITED STATES DISTRICT COURT
 17 CENTRAL DISTRICT OF CALIFORNIA
 18

19 IOLA FAVELL, SUE ZARNOWSKI, and)
 20 MARIAH CUMMINGS, *on behalf of*)
 21 *themselves and all others similarly*)
situated,)

22 Plaintiffs,

23 vs.

24 UNIVERSITY OF SOUTHERN)
 CALIFORNIA and 2U, INC.,)

25 Defendants.)

Case No.: 2:23-cv-00846-SPG-MAR

Judge: Hon. Sherilyn Peace Garnett

**DEFENDANT UNIVERSITY OF
 SOUTHERN CALIFORNIA'S
 NOTICE OF MOTION AND
 MOTION TO DISMISS**

Date: May 31, 2023

Time: 1:30 p.m.

Ctrm: 5C

Complaint filed: December 20, 2022

First Amended Complaint filed:

March 29, 2023

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

MOTION AND NOTICE OF MOTION

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on May 31, 2023, at 1:30 p.m., or as soon thereafter as the matter may be heard, in Courtroom 5C of the First Street Courthouse, located at 350 West 1st Street, Los Angeles, California, 90012, Defendant University of Southern California (“USC”) will, and hereby does, move the Court for an order dismissing the claim asserted against USC in Plaintiffs’ First Amended Class Action Complaint for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6).

This motion is based on this Notice of Motion, the Memorandum of Points and Authorities, the pleadings, and such argument as the Court may allow.

This motion is made following the videoconference of counsel under L.R. 7-3, which took place on March 1, 2023.

Dated: April 17, 2023

Respectfully submitted,

SHOOK HARDY & BACON L.L.P.

By: /s/ Michael L. Mallow
Michael L. Mallow
Attorney for Defendant
University of Southern California

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

INTRODUCTION 1

BACKGROUND 2

I. The Rankings..... 2

II. Plaintiffs 3

III. The Claim..... 5

LEGAL STANDARD..... 6

ARGUMENT 6

I. Plaintiffs’ Claim Fails Under the “Reasonable Consumer” Standard..... 6

A. Plaintiffs rely on mere opinion or puffery. 8

B. College graduates, acting reasonably, would not place undue importance on the rankings. 10

II. Plaintiffs Fail to Plead an Economic Injury-in-Fact. 13

A. Plaintiffs’ alleged overpayment is conclusory and unsupported, in that there is no allegation they bargained for any particular ranking..... 14

B. Plaintiffs’ alleged overpayment is conclusory and unsupported, in that there are no facts showing a lost benefit..... 14

C. Plaintiffs’ alleged overpayment is contrary to common sense..... 16

III. Plaintiffs’ Claim is Barred by the Educational Malpractice Doctrine..... 18

CONCLUSION..... 19

TABLE OF AUTHORITIES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page(s)

Cases

Antonyan v. Ford Motor Co.,
No. CV-21-0945, 2022 WL 1299964 (C.D. Cal. Mar. 30, 2022) 7

Ariix, LLC v. NutriSearch Corp.,
985 F.3d 1107 (9th Cir. 2021) 9

Aviation Charter, Inc. v. Aviation Research Grp./US,
416 F.3d 864 (8th Cir. 2005) 9

Banks v. N. Tr. Corp.,
929 F.3d 1046 (9th Cir. 2019) 6

Becerra v. Dr Pepper/Seven Up, Inc.,
945 F.3d 1225 (9th Cir. 2019) 6, 12

Beyer v. Symantec Corp.,
No. 18-CV-02006, 2019 WL 935135 (N.D. Cal. Feb. 26, 2019)..... 15, 16

Bezirganyan v. BMW of N. Am., LLC,
562 F. Supp. 3d 633 (C.D. Cal. 2021) 8

Cahen v. Toyota Motor Corp.,
717 Fed. App’x 720 (9th Cir. 2017) 14, 15, 16

Casey v. Fla. Coastal Sch. of Law, Inc.,
No. 3:14-CV-1229, 2015 WL 10096084 (M.D. Fla. Aug. 11, 2015) 12

In re Century 21-RE/MAX Real Estate Advert. Claims Litig.,
882 F. Supp. 915 (C.D. Cal. 1994) 8, 10

Charbonnet v. Omni Hotels & Resorts,
No. 20-CV-01777, 2020 WL 7385828 (S.D. Cal. Dec. 16, 2020)..... 13

Ebner v. Fresh, Inc.,
838 F.3d 958 (9th Cir. 2016) 16

Fowler v. Univ. of Phoenix, Inc.,
No. 18-CV-1544, No. 2019 WL 1746576 (S.D. Cal. April 18, 2019)..... 10

1 *Gardiner v. Walmart, Inc.*,
 No. 20-CV-04618, 2021 WL 4992539 (N.D. Cal. July 28, 2021)..... 14

2

3 *Gomez-Jimenez v. N.Y. Law Sch.*,
 943 N.Y.S.2d 834 (N.Y. Sup. Ct. 2012)..... 11, 12, 13

4

5 *Guzman v. Polaris Indus., Inc.*,
 No. 8:19-CV-01543, 2020 WL 2477684 (C.D. Cal. Feb. 13, 2020)..... 6, 7

6

7 *Hall v. SeaWorld Entm’t, Inc.*,
 747 Fed. App’x 449 (9th Cir. 2018)..... 7

8

9 *Heimrich v. Dep’t of the Army*,
 947 F.3d 574 (9th Cir. 2020) 6

10 *Hologram USA Inc. v. Arena3d Indus. Illusions LLC*,
 No. CV-14-03072, 2014 WL 12560619 (C.D. Cal. July 23, 2014) 11

11

12 *Jackson v. Loews Hotels, Inc.*,
 No. CV-18-827, 2019 WL 6721637 (C.D. Cal. July 24, 2019) 13

13

14 *Knowles v. ARRIS Int’l PLC*,
 847 Fed. App’x 512 (9th Cir. 2021) 8

15

16 *Lindner v. Occidental College*,
 No. CV-20-8481, 2020 WL 7350212 (C.D. Cal. Dec. 11, 2020) 18, 19

17

18 *Makaryan v. Volkswagen Grp. of Am., Inc.*,
 No. CV-17-5086, 2017 WL 6888254 (C.D. Cal. Oct. 13, 2017)..... 13

19

20 *Mendoza v. Amalgamated Transit Union Int’l*,
 30 F. 4th 879 (9th Cir. 2022) 11

21

22 *Newcal Indus., Inc. v. Ikon Office Sol.*,
 513 F.3d 1038 (9th Cir. 2008) 8

23

24 *Parents for Privacy v. Barr*,
 949 F.3d 1210 (9th Cir. 2020) 6

25

26 *Phillips v. DePaul University*,
 19 N.E.3d 1019 (Ill. App. 2014)..... 17, 18

27

28 *Prime Healthcare Servs., Inc. v. Humana Ins. Co.*,
 230 F. Supp. 3d 1194 (C.D. Cal. 2017)..... 6

1 *Ransom v. M. Patel Enters., Inc.*,
 2 859 F. Supp. 2d 856, 860 (W.D. Tex. 2012) 11
 3 *Rhine v. Loyola Univ. of Chicago*,
 4 No. 96-C-4125, 1998 WL 456550 (N.D. Ill. July 31, 1998)..... 11
 5 *Robie v. Trader Joe’s Co.*,
 6 No. 20-CV-07355, 2021 WL 2548960 (N.D. Cal. June 14, 2021) 10
 7 *In re SAIC, Inc. Secs. Litig.*,
 8 No. 12-Civ-1353, 2013 WL 5462289 (S.D.N.Y. Sept. 30, 2013)..... 10
 9 *Saroya v. Univ. of the Pac.*,
 10 503 F. Supp. 3d 986 (N.D. Cal. 2020)..... 19
 11 *Stickrath v. Globalstar, Inc.*,
 12 527 F. Supp. 2d 992 (N.D. Cal. 2007)..... 6
 13 *TYR Sport Inc. v. Warnaco Swimwear Inc.*,
 14 679 F. Supp. 2d 1120 (C.D. Cal. 2009)..... 8, 9
 15 *ZL Techs., Inc. v. Gartner, Inc.*,
 16 709 F. Supp. 2d 789 (N.D. Cal. 2010)..... 9, 11
 17 **Statutes**
 18 California’s Consumer Legal Remedies Act.....*passim*
 19 **Court Rules**
 20 Federal Rule of Civil Procedure 8(a)..... 6
 21 Federal Rule of Civil Procedure 12(b)(6)..... 1, 6, 8, 13
 22 **Other Authorities**
 23 College Factual
 24 (<https://www.collegefactual.com/majors/education/rankings/best-graduate-schools/masters-degrees/>)..... 11
 25 The Higher Education
 26 (<https://www.timeshighereducation.com/student/best-universities/best-universities-education-degrees>) 11
 27
 28

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **INTRODUCTION**

3 Plaintiffs Iola Favell, Sue Zarnowski, and Mariah Cummings bring this putative
4 class action against USC based on their alleged reliance on U.S. News and World
5 Report’s (“U.S. News”) subjective annual school rankings. Plaintiffs, who graduated
6 from a fully online degree program in the USC Rossier School of Education (“Rossier”),
7 claim that they were harmed because Rossier’s high rankings on U.S. News’s annual
8 list of “Best Graduate Schools of Education” were allegedly inflated in part by Rossier’s
9 misreporting of data to U.S. News.

10 Of course, any alleged inaccuracy in Rossier’s high U.S. News rankings could
11 not and did not impact the education and career preparation that Plaintiffs received at
12 Rossier or harm their post-graduation career prospects—and Plaintiffs do not attempt
13 to allege as much. Plaintiffs also acknowledge U.S. News issues a separate annual list
14 of “Best Online Education Programs” that is specifically applicable to the types of
15 programs attended by Plaintiffs. Nevertheless, based on Rossier’s allegedly inflated
16 rankings in U.S. News’s Best Graduate Schools of Education—and nothing else—
17 Plaintiffs allege they overpaid to attend Rossier’s online programs and did not receive
18 the benefit for which they bargained. Plaintiffs assert a single claim against USC under
19 California’s Consumer Legal Remedies Act (“CLRA”).¹

20 For any or all of the following separate and independent reasons, Plaintiffs’ claim
21 should be dismissed, pursuant to Federal Rule of Civil Procedure 12(b)(6), for failure
22 to state a claim upon which relief can be granted:

23
24 _____
25 ¹ Plaintiffs’ original Complaint also included equitable claims for restitution and
26 injunctive relief. USC moved to dismiss the restitution claims on the basis that Plaintiffs
27 have an adequate remedy at law, *i.e.*, this Court lacks equitable jurisdiction over
28 Plaintiffs’ restitution claims. Doc. 30, p. 15-16. USC separately moved to dismiss the
injunctive claims as moot. *Id.* at p. 16-17. In response, Plaintiffs voluntarily dismissed
all of their equitable claims, including the injunctive claims that USC moved to dismiss
only on the basis of mootness. *See* First Amended Complaint, ¶ 20.

1 1. Plaintiffs cannot satisfy the “reasonable consumer” standard. The rankings
2 by U.S. News (as well as displays of such) are quintessential non-actionable opinions
3 or puffery and, further, the target consumers (college graduates)—acting reasonably
4 under the circumstances—would not place undue importance on the rankings.

5 2. Plaintiffs fail to plead an economic injury-in-fact necessary for statutory
6 standing under the CLRA because their alleged injury of overpayment is speculative,
7 conclusory, and unsupported, in terms of both the bargain and the lost benefit, and also
8 contrary to common sense because Plaintiffs received exactly what they paid for, *i.e.*, a
9 USC education.

10 3. Plaintiffs’ claim is barred by the educational malpractice doctrine in that
11 they seek to have this Court make a judgment about the quality or value of the education
12 they received from Rossier.²

13 **BACKGROUND**

14 **I. The Rankings**

15 According to Plaintiffs, Rossier was ranked #38 in U.S. News’s 2009 rankings of
16 Best Graduate Schools of Education, but then rapidly rose in those annual rankings (to
17 a high point of #10 in the 2018 rankings) because USC allegedly started misreporting
18 “student selectivity” data. (First Amended Complaint (“FAC”), ¶¶ 3, 57, 58). Rossier
19 withdrew from the Best Graduate Schools of Education rankings in 2022 and is
20 currently listed as “unranked.” (*Id.* at ¶ 58).

21 Beginning in 2013, U.S. News also published separate “publicly available”
22 rankings for Best Online Education Programs. (*Id.* at ¶¶ 68, 89). Plaintiffs allege that,
23 in these separate rankings of online programs, including those from which Plaintiffs

24 _____
25 ² Plaintiffs base their claim on the Jones Day report, which USC voluntarily
26 commissioned and made publicly available. Nothing in the Jones Day report—whether
27 information, conclusion, or otherwise—provides any indication that the conduct
28 discussed in the Jones Day report had any negative impact on the quality of the
education provided by Rossier and received by Plaintiffs, or their post-graduation career
prospects. Simply put, the Jones Day report does not support the notion that Plaintiffs
were damaged or have a private cause of action. They were not, and they do not.

1 graduated, Rossier’s online program always ranked “below a number of state schools,”
2 made a “poor showing,” or was entirely outside the reported rankings. (*Id.* at ¶ 68).
3 Plaintiffs, all former online students, do not allege USC misreported any data for the
4 Best Online Education Programs rankings.

5 **II. Plaintiffs**

6 Iola Favell alleges that, after graduating from the University of Alabama in 2019,
7 she “planned to return to California to begin her teaching career and to pursue a master’s
8 degree.” (*Id.* at ¶¶ 102, 104). Favell allegedly “became interested in USC Rossier
9 because it was ranked highly (number 12)” in U.S. News’s 2021 rankings for Best
10 Graduate Schools of Education. (*Id.* at ¶ 105). In “or about the first part of 2020,”
11 Favell purportedly visited Rossier’s website (rossier.usc.edu) and saw that the website
12 “prominently displayed its US News [#12] ranking on its homepage.” (*Id.* at ¶ 106).
13 Displayed with equal prominence on this same website were statements that Rossier
14 had four “faculty members among Education Week’s top 200 scholars influencing
15 education policy and practice,” and that “91% of alums said their USC Rossier
16 education prepared them to be more effective in their career.” (*Id.*). Favell does not
17 dispute the accuracy of these statements or suggest they were not appealing to her.
18 Favell also does not allege that she saw any U.S. News ranking displayed on Rossier’s
19 website for online programs (rossieronline.usc.edu), or any other content that was
20 misleading or inaccurate. Favell, nevertheless, asserts: “The US News rankings were
21 the most important reason that [she] accepted the offer of admission to USC Rossier’s
22 online Master of Arts in Teaching (MAT) program.” (*Id.* at ¶ 110). Favell allegedly
23 began Rossier’s online program in August 2020, graduated in May 2021, and currently
24 works as a public elementary school teacher in Los Angeles. (*Id.* at ¶¶ 110-11).

25 Sue Zarnowski alleges that, after receiving her master’s degree in 2012 from the
26 University of New Haven and then holding “a variety of positions in the higher
27 education space” for the next several years, she became interested in obtaining her
28 doctorate via online classes. (*Id.* at ¶¶ 113-15). “In or around April of 2018,”

1 Zarnowski allegedly “received an advertisement stating that USC Rossier was ranked
2 as a Top 10 graduate school by US News.” (*Id.* at ¶ 116). Zarnowski purportedly visited
3 Rossier’s website (rossier.usc.edu) and saw that the website “prominently displayed its
4 US News [#10] ranking on its homepage.” (*Id.* at ¶ 117). Displayed with equal
5 prominence on this same website were statements that Rossier had five “faculty
6 members among Education Week’s top 200 scholars influencing educational policy and
7 practice,” and that Rossier had a “#4 2017 Diverse rank for conferring the most
8 education doctoral degrees to students of color.” (*Id.*). Zarnowski does not dispute the
9 accuracy of these statements or suggest they were not appealing to her. Zarnowski
10 alleges that, “[a]round that same time,” she received advertisements on Facebook “that
11 said the school was top ranked by US News.” (*Id.* at ¶ 118). Zarnowski, however, does
12 not allege that she saw any U.S. News ranking displayed on Rossier’s website for online
13 programs (rossieronline.usc.edu), or that any advertisement specified any particular
14 ranking for Rossier’s online programs. Zarnowski, nevertheless, asserts that the U.S.
15 News ranking she saw was the “most significant factor” in deciding to enroll in
16 Rossier’s online doctoral program. (*Id.* at ¶ 120). Zarnowski purportedly began
17 Rossier’s online doctoral program in August 2018, graduated in 2021, and is currently
18 employed in some (unstated) capacity. (*Id.* at ¶¶ 122-23, 125).

19 Mariah Cummings alleges that, after graduating from San Francisco State
20 University in 2018, she decided to pursue an online master’s degree in teaching. (*Id.* at
21 ¶¶ 126, 128). In “or around the end of 2018 or the beginning of 2019,” Cummings
22 allegedly reviewed U.S News’s 2018 rankings of Best Graduate Schools of Education
23 and learned Rossier was ranked #10. (*Id.* at ¶ 129). Cummings purportedly visited
24 Rossier’s website (rossier.usc.edu) around the same time and saw that the website
25 “prominently displayed its US News [#10] ranking on its homepage.” (*Id.* at ¶ 130.).
26 Displayed with equal prominence on this same website were statements that Rossier
27 had five “faculty members among Education Week’s top 200 scholars influencing
28 educational policy and practice,” and that Rossier had a “#4 2017 Diverse rank for

1 conferring the most education doctoral degrees to students of color.” (*Id.*). Cummings
2 does not dispute the accuracy of these statements or suggest they were not appealing to
3 her. Cummings alleges she “conducted at least one Google search to identify
4 prestigious graduate education schools” around the same time, and “the paid search
5 results advertised USC Rossier as a top-ranked school.” (*Id.* at ¶ 131). Cummings,
6 however, does not allege that she saw any U.S. News ranking displayed on Rossier’s
7 website for online programs (rossieronline.usc.edu), or that any advertisement specified
8 any particular ranking for Rossier’s online programs. Cummings, nevertheless, asserts:
9 “The US News rankings were the most important reason that [she] accepted the offer
10 of admission to USC Rossier’s online Master of Arts in Teaching (MAT) program.”
11 (*Id.* at ¶ 133). Cummings purportedly began Rossier’s online program in May 2019 and
12 graduated in May 2021, though she does not plead her current employment status. (*Id.*)

13 Each Plaintiff alleges she now “regrets her decision to attend USC Rossier
14 because of the false rankings information. She would not have attended had USC
15 Rossier been ranked in a lower position ... and/or would not have paid nearly as much.”
16 (*Id.* at ¶¶ 112, 124, 134). No Plaintiff alleges USC ever promised her that Rossier would
17 maintain a particular ranking in U.S. News’s Best Graduate Schools of Education
18 throughout her attendance, or that USC represented any particular ranking was included
19 in exchange for the Plaintiff’s payment of tuition and fees. No Plaintiff alleges USC
20 agreed to charge less for tuition or fees if Rossier fell in such rankings during her
21 attendance. Nor does any Plaintiff allege how Rossier’s allegedly inflated ranking could
22 have affected the quality of the education she received, or that Rossier’s allegedly
23 inflated ranking negatively impacted her post-graduation employment or salary.

24 **III. The Claim**

25 Plaintiffs assert one claim against USC for violations of the CLRA, which is
26 based on USC’s and Defendant 2U, Inc.’s (“2U”) alleged promotion of Rossier’s
27 allegedly inflated U.S. News’s Best Graduate Schools of Education rankings. (*Id.* at
28 ¶¶ 147-53).

LEGAL STANDARD

1
2 “Under Federal Rule of Civil Procedure 8(a), a complaint must contain a short
3 and plain statement of the claim showing that the plaintiff is entitled to relief.” *Prime*
4 *Healthcare Servs., Inc. v. Humana Ins. Co.*, 230 F. Supp. 3d 1194, 1202 (C.D. Cal.
5 2017) (quotations and brackets omitted). “If a complaint fails to do this, the defendant
6 may move to dismiss it under Rule 12(b)(6).” *Id.* “Under Rule 12(b)(6), a complaint
7 must be dismissed when a plaintiff’s allegations fail to set forth a set of facts that, if
8 true, would entitle the complainant to relief.” *Parents for Privacy v. Barr*, 949 F.3d
9 1210, 1221 (9th Cir. 2020). “To survive a motion to dismiss, a complaint must contain
10 sufficient factual matter, accepted as true, to state a claim to relief that is plausible on
11 its face.” *Heimrich v. Dep’t of the Army*, 947 F.3d 574, 577 (9th Cir. 2020) (quotations
12 omitted). A complaint must “contain enough factual matter indicating plausible
13 grounds for relief, not merely conceivable ones.” *Banks v. N. Tr. Corp.*, 929 F.3d 1046,
14 1055-56 (9th Cir. 2019) (quotations omitted).

ARGUMENT

15
16 **I. Plaintiffs’ Claim Fails Under the “Reasonable Consumer” Standard.**

17 Plaintiffs fail to state a claim for relief because their allegations do not satisfy the
18 “reasonable consumer” standard governing their CLRA claim. *See Becerra v. Dr*
19 *Pepper/Seven Up, Inc.*, 945 F.3d 1225, 1228 (9th Cir. 2019). Representations “are only
20 actionable ... if they are likely to deceive a reasonable consumer.” *Stickrath v.*
21 *Globalstar, Inc.*, 527 F. Supp. 2d 992, 998 (N.D. Cal. 2007). This standard “requires a
22 probability that a significant portion of ... targeted consumers, **acting reasonably in the**
23 **circumstances**, could be misled.” *Becerra*, 945 F.3d at 1228-29 (emphasis added).

24 While Plaintiffs’ First Amended Complaint is filled with a number of alleged
25 statements or representations from USC, very few are relevant to their claim and
26 actually at issue. This is because the CLRA has “independent requirements for
27 standing, which mandate allegations of actual reliance.” *Guzman v. Polaris Indus., Inc.*,
28 No. 8:19-CV-01543, 2020 WL 2477684, at *3 (C.D. Cal. Feb. 13, 2020). So, a plaintiff

1 must “plead ‘actual reliance’ on the alleged misrepresentation.” *Id.* There can be no
 2 actual reliance when the plaintiff never saw or heard the alleged representation. *Id.*; *see*
 3 *also, e.g., Antonyan v. Ford Motor Co.*, No. CV-21-0945, 2022 WL 1299964, at *4
 4 (C.D. Cal. Mar. 30, 2022). Plaintiffs do not allege to have seen or heard, let alone relied
 5 on, most of the alleged representations identified in their First Amended Complaint.
 6 (*See* FAC, ¶¶ 77, 79-87). These alleged representations, not relied on by Plaintiffs,
 7 should be disregarded. *See Guzman*, 2020 WL 2477684, at *3.

8 Plaintiffs identify only a handful of representations that they allegedly saw and
 9 relied on in choosing to enroll in Rossier’s online programs:

- 10 (1) U.S. News’s Best Graduate Schools of Education rankings for 2018
 11 (Cummings) and 2021 (Favell) (FAC, ¶¶ 105, 129);
- 12 (2) the homepage for Rossier’s website (rossier.usc.edu) displaying
 13 Rossier’s ranking in U.S. News’s Best Graduate Schools of
 14 Education for 2018 (Zarnowski and Cummings) and 2021 (Favell)
 15 (*Id.* at ¶¶ 106, 117, 130); and
- 16 (3) internet advertisements in 2018 or 2019 stating Rossier was “ranked
 17 as a Top 10 graduate school” or “top ranked” (Zarnowski and
 18 Cummings) (*Id.* at ¶¶ 116, 118, 131).³

19
 20
 21 ³ According to Plaintiffs, the “[s]pecific misrepresentations and omissions on which
 22 the Plaintiffs relied are as follows: Iola Favell (Paragraphs 105-108, 110), Sue
 23 Zarnowski (Paragraphs 115-121), and Mariah Cummings (Paragraphs 129-32).” (*Id.* at
 24 ¶ 150). The only allegations of omission included in those cited paragraphs concern an
 25 alleged failure to disclose advisors’ affiliations with 2U. (*Id.* at ¶¶ 107, 119). Unlike
 26 the rankings issue, however, there is no allegation any Plaintiff would have declined to
 27 attend Rossier, or would have paid less to attend, had she known about the allegedly
 28 omitted affiliations with 2U. Further, “for a fraud by omission claim under California’s
 consumer protection laws, the omitted fact must relate to the central functionality of the
 product [or service]” rather than a plaintiff’s “subjective preferences.” *Hall v.*
SeaWorld Entm’t, Inc., 747 Fed. App’x 449, 451 (9th Cir. 2018) (quotations omitted).
 Plaintiffs do not plead any omission (relied on or otherwise) that relates to the central
 functionality—as opposed to Plaintiffs’ subjective preferences—of their education. *See*
id.

1 Plaintiffs' claim should be dismissed for failure to state a claim for relief because,
2 as a matter of law, no reasonable consumer in this context would be misled by these
3 representations, in that: (1) they are mere opinion or puffery; and (2) college graduates
4 interested in online education programs, acting reasonably under the circumstances,
5 would not select a school solely or primarily because of U.S. News's subjective ranking
6 of the school, particularly when there were separate U.S. News rankings specifically
7 applicable to online education programs.

8 **A. Plaintiffs rely on mere opinion or puffery.**

9 Plaintiffs' claim is based on non-actionable opinion or puffery not relied on by
10 reasonable consumers. "Puffery is a general claim of superiority or exaggeration which
11 is expressed in broad, vague or commendatory language." *In re Century 21-RE/MAX*
12 *Real Estate Advert. Claims Litig.*, 882 F. Supp. 915, 926 (C.D. Cal. 1994) (quotations
13 omitted). "Puffery is distinguishable from misdescription or false representations of
14 specific characteristics of a product." *Id.* (quotations omitted). A representation "which
15 merely states in general terms that one product is superior, or that a product's attribute
16 is far superior to that of other products, constitutes puffery and is not actionable."
17 *Knowles v. ARRIS Int'l PLC*, 847 Fed. App'x 512, 513 (9th Cir. 2021) (quotations
18 omitted). For example, "better than" statements are "the most innocuous form" of
19 puffery. *TYR Sport Inc. v. Warnaco Swimwear Inc.*, 679 F. Supp. 2d 1120, 1137 (C.D.
20 Cal. 2009).

21 "According to California law, a party cannot be held liable for falsity on the basis
22 of 'mere puffing,' *i.e.* merely for making statements of opinion." *Bezirganyan v. BMW*
23 *of N. Am., LLC*, 562 F. Supp. 3d 633, 643 (C.D. Cal. 2021). "Statements of this kind
24 cannot ground liability for falsity because no reasonable consumer would be inclined to
25 think of them as statements of fact, rather than as statements of opinion." *Id.* Whether
26 "an alleged representation is a statement of fact or is instead mere puffery is a legal
27 question that may be resolved on a Rule 12(b)(6) motion." *Newcal Indus., Inc. v. Ikon*
28 *Office Sol.*, 513 F.3d 1038, 1053 (9th Cir. 2008) (quotations omitted).

1 U.S. News’s rankings of Best Graduate Schools of Education are simply U.S.
2 News’s subjective opinions regarding which schools are superior or “better than” other
3 schools—not representations of specific facts about the schools. *See TYR Sport*, 679 F.
4 Supp. 2d at 1137. These rankings are “classic, non-actionable opinions.” *See Ariix,*
5 *LLC v. NutriSearch Corp.*, 985 F.3d 1107, 1121 (9th Cir. 2021) (quotations omitted).

6 In *Ariix*, a nutritional supplement company (“Ariix”) brought a false advertising
7 claim against NutriSearch, the publisher of a guide “that compares and reviews
8 nutritional supplements” in part “using a five-star rating system based on 18 criteria.”
9 *Id.* at 1111-13. Ariix alleged the guide’s ratings were rigged to favor Ariix’s competitor.
10 *Id.* The Ninth Circuit, however, held that the “comparative five-star ratings in the Guide
11 are not actionable” because the ratings “are simply statements of opinion about the
12 relative quality of various nutritional supplement products.” *Id.* at 1121. The Ninth
13 Circuit flatly rejected Ariix’s argument that the ratings were representations of fact
14 merely “because the Guide purports to rely on scientific and objective criteria.” *Id.* In
15 doing so, the Ninth Circuit offered a very notable analogy: “[T]here is an inherently
16 subjective element in deciding which scientific and objective criteria to consider. For
17 example, ***publications that rank colleges or law schools purportedly rely on objective***
18 ***criteria (e.g., acceptance rates, test scores, class size, endowment), but selecting those***
19 ***criteria involves subjective decision-making.***” *Id.* (emphasis added). In other words,
20 the five-star ratings were no different than the non-actionable opinion-based school
21 rankings, such as U.S. News’s Best Graduate Schools of Education rankings. *Id.*⁴

22 Any alleged displays of those rankings by USC, either on the Rossier website or
23 via internet advertising, are nothing more than a repetition of U.S. News’s opinions,

24 _____
25 ⁴ *See also, e.g., Aviation Charter, Inc. v. Aviation Research Grp./US*, 416 F.3d 864,
26 871 (8th Cir. 2005) (holding comparative rating based on “subjective interpretation of
27 multiple objective data points” was “not a provably false statement of fact”) (quotations
28 omitted); *ZL Techs., Inc. v. Gartner, Inc.*, 709 F. Supp. 2d 789, 798 (N.D. Cal. 2010)
 (“The use of a rigorous mathematical model to generate a ranking of software
 companies based upon this subjective data does not transform Gartner’s opinion into a
 statement of fact that can be proved or disproved.”).

1 based on U.S. News’s subjective criteria, that Rossier is superior or “better than” other
2 schools—not representations of specific facts about Rossier. “Alleged statements
3 regarding the quality of academic advising, the quality of education, the program’s
4 convenience and simplicity for working adults, or increased earning potential, are not
5 actionable representations of fact for purposes of fraud or misrepresentation.” *Fowler*
6 *v. Univ. of Phoenix, Inc.*, No. 18-CV-1544, No. 2019 WL 1746576, at *12 (S.D. Cal.
7 April 18, 2019). “Instead, they are boasts, all-but-meaningless superlatives ... which
8 no reasonable consumer would take as anything more weighty than an advertising
9 slogan.” *Id.*; *see also, e.g., In re SAIC, Inc. Secs. Litig.*, No. 12-Civ-1353, 2013 WL
10 5462289, at *12-*13 (S.D.N.Y. Sept. 30, 2013) (ruling that references in shareholder
11 reports to company’s high ranking on “*Fortune’s* list of the World’s Most Admired
12 Companies”—*a ranking which the company allegedly knew was not accurate*—
13 “amount to inactionable puffery”); *Century 21-RE/MAX*, 882 F. Supp. at 928 (ruling
14 allegedly false assertions that RE/MAX is “#1 in the United States—and the World”
15 and “the No. 1 position RE/MAX is now widely thought to hold in the United States”
16 were non-actionable as “mere opinion” or “classic puffery”).

17 Accordingly, Plaintiffs’ claim should be dismissed because no “reasonable
18 consumer” can or would rely on the subjective, opinion-based U.S. News rankings or
19 USC’s alleged puffery boasting about those rankings.

20 **B. College graduates, acting reasonably, would not place undue**
21 **importance on the rankings.**

22 Even if the rankings and related representations relied on by Plaintiffs were not
23 mere opinion or puffery (which they are), the target consumers, *acting reasonably*
24 *under the circumstances*, would not rely on the representations. Courts have granted
25 motions to dismiss CLRA claims “on the basis that the alleged representations were not
26 false, misleading, or deceptive as a matter of law.” *Robie v. Trader Joe’s Co.*, No. 20-
27 CV-07355, 2021 WL 2548960, at *5 (N.D. Cal. June 14, 2021).

1 The “target consumers” of Rossier’s online master’s and doctoral programs (the
2 only Rossier programs at issue) were college graduates. “By anyone’s definition,
3 reasonable consumers—college graduates—seriously considering [graduate] schools
4 are a sophisticated subset of education consumers, capable of sifting through data and
5 weighing alternatives before making a decision regarding their post-college options,
6 such as applying for [graduate] school.” *Gomez-Jimenez v. N.Y. Law Sch.*, 943
7 N.Y.S.2d 834, 843 (N.Y. Sup. Ct. 2012). “These reasonable consumers have available
8 to them any number of sources of information to review when making their decisions.”
9 *Id.*

10 Reasonable consumers in this context, therefore, would not place the undue
11 importance on U.S. News’s rankings that Plaintiffs allege they did. (FAC, ¶¶ 110, 120,
12 133). In addition to being a single source of information,⁵ U.S. News’s rankings “are
13 notoriously questionable.” *Rhine v. Loyola Univ. of Chicago*, No. 96-C-4125, 1998 WL
14 456550, at *3 n.4 (N.D. Ill. July 31, 1998); *see also Ransom v. M. Patel Enters., Inc.*,
15 859 F. Supp. 2d 856, 860 (W.D. Tex. 2012) (describing U.S. News’s rankings as “an
16 arbitrary and relatively unpersuasive source”). Plaintiffs even acknowledge U.S.
17 News’s rankings have been “plagued” with “fraud scandals.” (FAC, ¶ 94). Further, a
18 “reasonable person would understand that two people looking at the same underlying
19 data could come up with vastly different [rankings] depending on their *subjective views*
20 of what is relevant and what is important.” *ZL Techs.*, 709 F. Supp. 2d at 798
21 (quotations omitted).

22 ⁵ Plaintiffs’ First Amended Complaint seems to suggest that U.S. News’s rankings are
23 the only rankings available to prospective graduate students. This is not the case. For
24 example, graduate school programs are also ranked by The Higher Education
25 (<https://www.timeshighereducation.com/student/best-universities/best-universities-education-degrees>);
26 and College Factual
27 (<https://www.collegefactual.com/majors/education/rankings/best-graduate-schools/masters-degrees/>). On a motion to dismiss, this Court may consider matters
28 subject to judicial notice. *Mendoza v. Amalgamated Transit Union Int’l*, 30 F. 4th 879, 884 (9th Cir. 2022). Such matters include the existence of these other rankings. *See Hologram USA Inc. v. Arena3d Indus. Illusions LLC*, No. CV-14-03072, 2014 WL 12560619, at *3 (C.D. Cal. July 23, 2014).

1 But even if the target consumers do place such importance on the rankings, they
2 are still expected to act reasonably under the circumstances. *Becerra*, 945 F.3d at 1228-
3 29. That means a college-educated person looking at online graduate schools “may be
4 reasonably expected to perform some due diligence that goes beyond glancing at” a
5 “self-serving” ranking listed on a school’s website or advertisement. *Casey v. Fla.*
6 *Coastal Sch. of Law, Inc.*, No. 3:14-CV-1229, 2015 WL 10096084, at *15 (M.D. Fla.
7 Aug. 11, 2015).

8 Here, a reasonable prospective online student would not ignore U.S. News’s
9 separate, equally public rankings for Best Online Education Programs, especially if U.S.
10 News’s rankings are claimed to be particularly important to the student. Plaintiffs allege
11 that U.S. News released *separate* and “publicly available” rankings for Best Online
12 Education Programs, including rankings for 2018 and 2021 (the years of the Best
13 Graduate Schools of Education rankings allegedly relied on by Plaintiffs). (FAC, ¶¶ 68,
14 89). Plaintiffs also allege that, in the separate Best Online Education Programs
15 rankings, Rossier did not crack the top 60 for the 2018 rankings or the top 40 for the
16 2021 rankings. (*Id.* at ¶ 68). If Plaintiffs were as myopically focused on school rankings
17 as they allege, it strains credulity that they would not have looked deeper into the
18 ranking that pertained to the program they were contemplating. “One would think that
19 reasonable consumers, armed with the publicly available information from *US News*
20 that [P]laintiffs cite, thus would avail themselves of [P]laintiffs’ own logic as stated in
21 their complaint” and check the separate U.S. News rankings that specifically applied to
22 online programs. *See Gomez-Jimenez*, 943 N.Y.S.2d at 844.

23 Accordingly, Plaintiffs’ claim should be dismissed because target consumers
24 acting reasonably under these circumstances, *i.e.*, college graduates doing their due
25 diligence in choosing a university at which to pursue a post-graduate education in an
26 online modality, would not singularly or primarily rely on U.S. News’s rankings of Best
27 Graduate Schools of Education, particularly given the existence of U.S. News’s separate
28 annual rankings for Best Online Education Programs and Rossier’s alleged lower-to-

1 non-existent showing in those separate rankings. *See Gomez-Jimenez*, 943 N.Y.S.2d at
2 856-57 (dismissing claims brought by law school graduates alleging they relied on
3 school’s misleading representations regarding employment prospects because the
4 representations were not misleading to a reasonable consumer).

5 **II. Plaintiffs Fail to Plead an Economic Injury-in-Fact.**

6 Plaintiffs’ claim also fails because Plaintiffs cannot plead an economic injury-in-
7 fact, which is required to establish statutory standing under the CLRA. *Charbonnet v.*
8 *Omni Hotels & Resorts*, No. 20-CV-01777, 2020 WL 7385828, at *4 (S.D. Cal. Dec.
9 16, 2020). “The Ninth Circuit has recognized that statutory standing is a question of
10 merits rather than subject matter jurisdiction and is properly analyzed under
11 Rule 12(b)(6).” *Id.* at *5 n.6.

12 To “establish economic injury-in-fact, a plaintiff must show that by relying on a
13 misrepresentation[,] they paid more for a product than they otherwise would have paid
14 or bought it when they otherwise would not have done so.” *Id.* (quotations and ellipses
15 omitted). This is essentially a theory that the plaintiff lost the benefit of her bargain.
16 *See Jackson v. Loews Hotels, Inc.*, No. CV-18-827, 2019 WL 6721637, at *1 (C.D. Cal.
17 July 24, 2019). While “overpayment” (or lost benefit of the bargain) is a “theoretically
18 cognizable” economic injury-in-fact, “a plaintiff must still plead facts sufficient to
19 establish” such injury-in-fact. *Makaryan v. Volkswagen Grp. of Am., Inc.*, No. CV-17-
20 5086, 2017 WL 6888254, at *5 (C.D. Cal. Oct. 13, 2017).

21 Here, each Plaintiff asserts she would not have attended Rossier, or would have
22 paid less to attend, if Rossier had accurately “been ranked in a lower position” than the
23 #10 ranking (Zarnowski and Cummings) or #12 ranking (Favell) that she saw. (FAC,
24 ¶¶ 112, 124, 134). This alleged injury should be rejected as insufficient to establish
25 statutory standing because it is conclusory and not plausible—both as to bargain and
26 benefit—as well as contrary to common sense.

1 **A. Plaintiffs’ alleged overpayment is conclusory and unsupported, in that**
 2 **there is no allegation they bargained for any particular ranking.**

3 A plaintiff fails to plead injury based on lost benefit of the bargain when there is
 4 no allegation that the defendant “made any affirmative representation that [the supposed
 5 benefit] was included in the cost of the goods” or service. *Gardiner v. Walmart, Inc.*,
 6 No. 20-CV-04618, 2021 WL 4992539, at *5 (N.D. Cal. July 28, 2021). In such a case,
 7 the plaintiff did not bargain for the supposed benefit. *See id.*

8 Plaintiffs here make no allegation that USC affirmatively represented that any
 9 particular U.S. News ranking, the supposed “benefit,” would be included in the cost of
 10 Plaintiffs’ online educations at Rossier. Of course, USC could not guarantee Plaintiffs
 11 they would receive an education from the #10 or #12 ranked school (or any other
 12 ranking) in exchange for paying tuition and fees, as the rankings are issued by a third-
 13 party, not USC, and are always subject to annual change. Further, Plaintiffs make no
 14 allegation that USC affirmatively represented that it would charge less for tuition or
 15 fees if Rossier fell in U.S. News’s rankings during Plaintiffs’ attendance. Plaintiffs,
 16 therefore, fail to plead a cognizable economic injury-in-fact because they plead no facts
 17 suggesting they actually bargained for the “benefit” they purportedly lost. *See id.* at *5-
 18 *6. For this reason alone, their claim should be dismissed for lack of statutory standing.

19 **B. Plaintiffs’ alleged overpayment is conclusory and unsupported, in that**
 20 **there are no facts showing a lost benefit.**

21 Even more revealing, Plaintiffs also plead no facts showing they actually lost any
 22 benefit at all, let alone one for which they bargained. In *Cahen v. Toyota Motor Corp.*,
 23 717 Fed. App’x 720, 722-23 (9th Cir. 2017), the plaintiffs brought a CLRA claim on
 24 the basis that they were deceived into buying vehicles with an undisclosed vulnerability
 25 to being hacked. Though their vehicles had not actually been hacked, the plaintiffs
 26 alleged “they suffered an injury because they either would not have purchased their
 27 vehicles or would have paid less for them had they known about these hacking risks.”
 28 *Id.* The Ninth Circuit held this alleged injury was “not credible,” as the plaintiffs “only

1 made conclusory allegations that their cars are worth less.” *Id.* at 723-24. The Ninth
2 Circuit noted the “plaintiffs have not, for example, alleged a demonstrable effect on the
3 market for their specific vehicles based on documented recalls or declining Kelley
4 Bluebook values.” *Id.* at 723 (quotations omitted).

5 Similarly, in *Beyer v. Symantec Corp.*, the plaintiffs brought a CLRA claim on
6 the basis that they were deceived into buying software with undisclosed security
7 vulnerabilities. No. 18-CV-02006, 2019 WL 935135, at *1, *3 (N.D. Cal. Feb. 26,
8 2019). Though they had not suffered any actual hacking, the plaintiffs alleged that, but
9 for the defendant’s misrepresentations and omissions, they would not have bought the
10 software or would have paid substantially less for it. *Id.* at *3. The district court rejected
11 the plaintiffs’ “bare assertion that they overpaid for the” software, noting the plaintiffs
12 did “not allege that disclosure of the alleged defects had a demonstrable effect on the
13 market for the” software. *Id.* at *4 (quotations omitted). In the absence of such
14 allegations, the plaintiffs’ alleged injury was “not credible, as the allegations that the
15 [software is] worth less are conclusory and unsupported by any facts.” *Id.* (quotations
16 omitted).

17 Like the plaintiffs in *Cahen* and *Beyer*, Plaintiffs here make only a bare assertion
18 that their education is worth less than they paid because Rossier’s ranking was not
19 accurate. (*See* FAC, ¶¶ 76, 150(d)). But Plaintiffs do not explain how or why U.S.
20 News’s subjective rankings impact tuition cost or the inherent value of their education
21 or degrees. There are no (nor could there credibly be any) allegations that Plaintiffs
22 could have somehow paid less tuition for their Rossier education if the U.S. News
23 rankings were different. There are no factual allegations showing the alleged rankings
24 issue has had any “demonstrable effect” on the market for Rossier degrees. *Cf. Cahen*,
25 717 Fed. App’x at 723; *Beyer*, 2019 WL 935135, at *4. And there is no allegation that
26 any Plaintiff was unable to obtain a particular job, or that any Plaintiff is earning a lower
27 salary, because of Rossier’s allegedly inflated ranking. There are also no factual
28 allegations showing how Rossier’s allegedly inflated ranking could have lessened the

1 quality of the education that Plaintiffs received. A third-party ranking—whether “true”
2 or not—has no impact on what Plaintiffs were taught at Rossier, how they were taught
3 at Rossier, or whether Rossier succeeded in effectively preparing them for a career in
4 education.

5 Accordingly, like *Cahen* and *Beyer*, Plaintiffs’ alleged injury of overpayment is
6 not credible. Plaintiffs’ bare assertion that they lost their alleged “benefit” because their
7 education is somehow worth less is conclusory and unsupported by any facts. Plaintiffs,
8 therefore, fail to sufficiently allege the economic injury-in-fact necessary for statutory
9 standing and their claim should be dismissed.

10 **C. Plaintiffs’ alleged overpayment is contrary to common sense.**

11 Plaintiffs’ alleged injury of overpayment should also be rejected as contrary to
12 common sense. “Determining whether a complaint states a plausible claim for relief is
13 a context-specific task that requires the reviewing court to draw on its judicial
14 experience *and common sense.*” *Ebner v. Fresh, Inc.*, 838 F.3d 958, 963 (9th Cir.
15 2016) (quotations omitted) (emphasis added).

16 Again, Plaintiffs contend they would not have attended Rossier, or would not
17 have paid as much to attend, if Rossier had “been ranked in a lower position.” (FAC,
18 ¶¶ 112, 124, 134). Essentially, Plaintiffs allege they overpaid because they paid to
19 attend a school that was ranked #10 or #12 (depending on the Plaintiff), but that ranking
20 was inflated and not accurate. As a matter of common sense, though, a student cannot
21 overpay based on an inaccurate ranking because a student cannot, and does not, actually
22 pay for any particular ranking in the first place—rather, they pay for an education.

23 U.S. News’s rankings are issued by U.S. News, not USC, and they are always
24 subject to annual change, including due to circumstances out of USC’s control (*e.g.*, if
25 schools behind Rossier improve their relevant statistics enough to pass Rossier or if
26 U.S. News tweaks its formula in a manner unfavorable to Rossier). The rankings are
27
28

1 also based on *past* data and are thus necessarily *backward* looking;⁶ they are not future
2 projections, let alone promises, of any ranking a school may have throughout a student’s
3 future attendance. The mere fact that Rossier was ranked #10 or #12 prior to Plaintiffs
4 enrolling provided no guarantee it would maintain those rankings throughout Plaintiffs’
5 attendance, nor do Plaintiffs allege otherwise. Undeniably, there was always the risk
6 that Rossier would drop in the rankings after Plaintiffs enrolled and Plaintiffs thus
7 would not receive an education from a #10 or #12 ranked school, regardless of whether
8 or not that ranking was ever accurate. Plaintiffs, accordingly, could not and did not pay
9 USC for a #10 or #12 ranking.

10 This situation is very similar to *Phillips v. DePaul University*, 19 N.E.3d 1019
11 (Ill. App. 2014). In *Phillips*, graduates of DePaul’s law school sued the university,
12 alleging “that DePaul’s employment information for the 2005, 2007, and 2009 classes
13 was ‘incomplete, false and materially misleading’ in that the employment rate of its
14 graduates within nine months of graduation was ‘substantially overstated.’” *Id.* at 1024.
15 The plaintiffs alleged “they each relied on the employment information for the 2005,
16 2007, and 2009 classes when choosing to apply to, enroll, and continue to be enrolled
17 in DePaul.” *Id.* at 1025. The Illinois Appellate Court affirmed dismissal of the
18 plaintiffs’ claims, explaining they failed to identify any injury:

19 [T]he employment and salary statistics listed in the employment
20 information for the 2005, 2007, and 2009 classes consisted of generalized,
21 historical averages for those particular classes and did not constitute any
22 type of promise or projection for the individual plaintiffs here; thus, even
23 assuming for the sake of argument that the employment information for
24

25 ⁶ According to Plaintiffs, “The Best Education School rankings are published annually,
26 typically in March, *using data collected for the academic year that begins the prior*
27 *fall*. Each edition, however, uses the following calendar year in its title. For example,
28 US News published the ‘2021’ rankings in March of 2020 using data collected in the
fall of 2019 for those students enrolled during the fall 2019 semester.” (FAC, ¶ 54)
(emphasis added).

1 the 2005, 2007, and 2009 classes did not recite DePaul’s “true”
2 postgraduation employment statistics for those classes, plaintiffs have
3 failed to adequately plead how they were damaged thereby given that these
4 statistics did not apply to plaintiffs or make any promises or projections
5 regarding their future employment and salary prospects.

6 *Id.* at 1035.

7 Like the employment information in *Phillips*, the rankings here were based on
8 past data, did not apply to Plaintiffs (as they were necessarily subject to change after
9 Plaintiffs enrolled), and “did not constitute any type of promise or projection” for
10 Plaintiffs. *See id.* Thus, “even assuming for the sake of argument” that Rossier’s
11 rankings were inaccurate and should have been lower, Plaintiffs fail “to adequately
12 plead how they were damaged thereby.” *Id.*

13 In short, Plaintiffs could not pay for, did not pay for, and had no entitlement to, a
14 particular ranking, as their theory of overpayment suggests. Rather, they paid for an
15 education—which they admittedly received—and could not have suffered injury merely
16 because that education allegedly was not from a “true” #10 or #12 ranked school
17 (assuming such a ranking could ever be “true”). *See id.* This Court should, therefore,
18 dismiss Plaintiffs’ claim for lack of statutory standing because their alleged injury based
19 on a mere third-party ranking is contrary to common sense.

20 **III. Plaintiffs’ Claim is Barred by the Educational Malpractice Doctrine.**

21 Finally, Plaintiffs do not state a claim for relief because their claim is barred by
22 the educational malpractice doctrine. “Courts in California and across the country have
23 repeatedly rejected claims that seek damages for an allegedly ‘subpar’ education, or
24 ‘educational malpractice’ claims, whether those claims sound in contract or tort.”
25 *Lindner v. Occidental College*, No. CV-20-8481, 2020 WL 7350212, at *6 (C.D. Cal.
26 Dec. 11, 2020). Under the educational malpractice doctrine, a court will not entertain
27 claims that “would require the Court to make judgments about the quality and value of
28 the education” that a university provides to a student. *Id.* at *7. Thus, if a plaintiff

1 makes a claim that a university failed “to provide him with an education of a certain
2 quality”—as opposed to failed to deliver on a specific promise—that claim is barred by
3 the educational malpractice doctrine. *Saroya v. Univ. of the Pac.*, 503 F. Supp. 3d 986,
4 995 (N.D. Cal. 2020).

5 Such is the case here. There is no allegation that USC breached any specific
6 promise to provide a particular service. Instead, Plaintiffs’ claim is based on the
7 allegation that USC “misled prospective students into believing that they were applying
8 to online programs that were more competitive and **higher quality** than in reality.”
9 (FAC, ¶ 76) (emphasis added). Plaintiffs allege they paid “tuition at an inflated price”
10 because Rossier’s ranking was not accurate and should have been lower. (*Id.* at
11 ¶ 150(d)). As discussed above, these allegations of injury are not credible. But even if
12 they were, Plaintiffs are undoubtedly making a claim that USC failed to provide
13 Plaintiffs “with an education of a certain quality,” *i.e.*, one commensurate with a #10 or
14 #12 ranking—which is a claim that would “require the Court to make judgments about
15 the quality and value of the education” that Plaintiffs received at Rossier. *See Saroya*,
16 503 F. Supp. 3d at 995; *Lindner*, 2020 WL 7350212, at *7. Plaintiffs are essentially
17 asking this Court to determine whether Rossier truly was the tenth or twelfth best
18 school. Such a determination is not only practically impossible, but legally prohibited.
19 *See Linder*, 2020 WL 7350212, at *7. Plaintiffs’ claim, resting on the notion that they
20 somehow received a lower quality or less valuable education, should be dismissed as
21 barred by the educational malpractice doctrine. *See id.*

22 CONCLUSION

23 For any or all of the foregoing reasons, this Court should dismiss Plaintiffs’ claim
24 against USC.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Dated: April 17, 2023

Respectfully submitted,

SHOOK, HARDY & BACON L.L.P.

By: /s/ Michael L. Mallow
Michael L. Mallow

**Attorney for Defendant
University of Southern California**

CERTIFICATE OF SERVICE

I certify that on April 17, 2023, the foregoing document was filed electronically using the CM/ECF system, causing copies of the same to be served on all parties of record to this action.

By: /s/ Michael L. Mallow
Michael L. Mallow

**Attorney for Defendant
University of Southern California**