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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

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

Plaintiffs,

v.

UNIVERSITY OF SOUTHERN CALIFORNIA and 2U, INC.,

Defendants.

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

PLAINTIFFS' OPPOSITION TO DEFENDANT 2U, INC.'S MOTION TO DISMISS FIRST AMENDED COMPLAINT

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

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I. INTRODUCTION

Defendant 2U, Inc. ("2U") is a publicly traded, for-profit "online program management" company that supports, promotes, and markets online degree programs on behalf of the schools with which it partners. In exchange for its services, 2U receives most of the tuition paid by students in these programs. 2U has made clear to its investors that its business model depends on maintaining and increasing student enrollment in its programs.

This lawsuit concerns misrepresentations made by 2U—along with Defendant University of Southern California ("USC") (collectively, "Defendants"), 2U's first, and one of its most lucrative, clients throughout the Class Period—regarding the USC Rossier School of Education's standing in U.S. News & World Report's ("US News") annual ranking of the United States' Best Education Schools. 2U and USC each had their role to play. USC intentionally submitted false data to US News designed to boost USC Rossier's standing in the rankings, and 2U—as the party responsible for marketing USC Rossier's online degree programs—led the effort to disseminate this fraudulent ranking to prospective students.

2U's Motion to Dismiss relies on a litany of meritless arguments.

First, 2U misstates the law, asserting that Plaintiffs must allege its "actual knowledge" of the falsity of the rankings to state a claim under the Consumer Legal Remedies Act, Civ. Code § 1750 *et seq*. In doing so, 2U relies exclusively on caselaw in the inapposite product defects context, and ignores the text of the CLRA itself and federal caselaw outside the product defects context that makes clear that (1) under the text of the CLRA, Plaintiff need not make ***any*** allegations regarding 2U's state of mind for six of the seven CLRA violations Plaintiffs have asserted and (2) at most, Plaintiffs needed only show that 2U knew or should have known that USC Rossier's US News ranking was false. 2U's argument also ignores the numerous allegations in the FAC regarding the nature of 2U's relationship with USC, its primary responsibility for

marketing USC Rossier's online degree programs, and other facts that support an inference that 2U knew of the data manipulation.

Second, 2U argues that Plaintiffs failed to comply with Federal Rule of Civil Procedure Rule 9(b)'s "particularity" requirement, dramatically misconstruing Plaintiffs' burden at the pleading stage. As required by Rule 9(b), the FAC sets forth the details of the fraudulent scheme necessary to put 2U on notice of its role in the fraudulent scheme. Further, undermining 2U's handwringing about improper "group pleading," Plaintiffs articulate 2U's particular role in the fraudulent scheme in detail, discussing 2U's implementation of various online marketing tools designed to broadly disseminate USC Rossier's fraudulently obtained ranking to prospective students.

Third, contrary to 2U's argument, the misrepresentations alleged in the FAC are actionable. Plaintiffs have adequately alleged that 2U's advertising statements were likely to deceive members of the public, and this renders 2U liable under the CLRA regardless of whether its advertising statements were "literally true."

Fourth, the Court should ignore 2U's challenge to Plaintiffs' "omissions theory" because Plaintiffs' CLRA claim is predicated on 2U's affirmatively false advertising statements, not its omissions. Even if the Court does consider 2U's omissions theory, 2U's arguments should be rejected because the FAC alleges facts that establish liability for omissions under California law: (1) 2U has "exclusive knowledge of material facts not known to" Plaintiffs; and (2) 2U has made partial representations to prospective students that are misleading because of material facts that it omitted. *LiMandri v. Judkins*, 52 Cal. App. 4th 326, 336 (1997).

For these reasons, the Court should deny 2U's Motion to Dismiss in its entirety.

II. FACTUAL BACKGROUND

Plaintiffs incorporate by reference the "Factual Background" discussion from their concurrently filed Opposition to USC's Motion to Dismiss, Opp. to USC Br., § II, and include the following additional factual background regarding 2U.

A. 2U's Relationship with USC

2U was created as an education technology start-up in 2008. First Amended Complaint ("FAC") ¶ 22. USC was 2U's first client and remained one of 2U's most lucrative clients throughout the Class Period. *Id.* ¶¶ 22, 78, 97-98.

Defendants' October 29, 2008 Services Agreement—which provides that 2U would obtain a percentage of revenue from students enrolled in USC Rossier's online degree programs in exchange for providing support and marketing services for the programs—paved the way for the fraud at issue in this case. FAC ¶¶ 25-27.

The Services Agreement handed 2U primary responsibility for promoting and marketing USC Rossier's online degree programs. Under the Services Agreement, 2U was responsible for creating and executing "marketing and promotional strategies" (defined in the Services Agreement as "Promotion Strategies") to attract students to the online programs and was even allowed to use USC's intellectual property in these efforts to ensure that the online degree programs were seen as the same as the rest of USC Rossier. FAC ¶ 42 & *id.*, Ex. A §§ 1(A), 4(C). While USC had "the right to review and approve all marketing and other materials" regarding the online degree programs, it could not independently implement "Promotion Strategies," but was instead required to "consult with 2tor [2U's prior name] in the development of" these marketing efforts. FAC ¶ 43 & *id.* Ex. A § 2(a). Moreover, the Services Agreement required 2U to "target its promotional efforts to students likely to be accepted" into Defendants' online degree programs. FAC ¶ 34 & *id.*, Ex. A § 2(B).

2U's yearly reporting of its business expenses once it went public in 2014 underscores the extent of its involvement in developing and executing "Promotion Strategies" on behalf of the online degree programs—including marketing strategies that 2U created and strategies that USC created and shared with 2U as part of the Service Agreement's required "consult[ation]" regarding Promotion Strategies. FAC ¶ 78. In 2014, when 2U became a publicly traded corporation, 2U's most significant expense was "program sales and marketing." FAC ¶ 78. 2U spent more than half of

what it earned in revenue on "program sales and marketing" from 2015 through 2021, and just under half of its revenue in 2022. *Id.* A significant portion of these marketing expenses were attributable to promoting USC Rossier's online degree programs, given that during the Class Period, 2U's partnership with USC made up a disproportionate share of its revenue. *See* FAC ¶ 98 (70% of 2U's 2014 revenue came from USC Rossier and USC's Dworak-Peck School of Social Work; and even by 2019, after 2U had formed partnerships with numerous universities, USC still made up one-fifth of its income).

B. 2U Aggressively Marketed USC Rossier's US News Ranking Because It Knew That US News School Rankings Are Important to Prospective Students

2U has long known that partnering with elite institutions like USC was important to its business model, which was to enroll as many students as possible in the online degree programs that it supported so that it could increase its take from the tuition sharing agreements between 2U and its university partners. 2U has repeatedly acknowledged the importance of rankings to this strategy, telling its investors that "a school's "ranking" could impact its reputation, which is "critical to [2U's] ability to enroll students," and that "any decline in the ranking of one of our clients' programs . . . could have a disproportionate effect on our business." FAC ¶ 47.

To further its goal of maximizing student enrollment at USC Rossier, 2U, armed with its massive marketing budget, worked tirelessly to market USC Rossier's fraudulently obtained Best Education Schools ranking to prospective online degree students. FAC ¶ 78. For instance, as described in Plaintiffs' Opposition to USC's Motion to Dismiss, 2U marketed USC Rossier's US News rankings to students by, among other things, using paid online advertising, including the use of Google search terms, display ad networks, and cookies embedded on USC Rossier's webpages, so that 2U could ensure that advertisements regarding USC Rossier's US News ranking were shown to students searching for education graduate programs. FAC ¶ 77. USC Rossier's US News ranking was also regularly displayed on the Rossier Online Website, of which USC and 2U "shared responsibility for managing." FAC ¶¶ 45, 84.

2U's dissemination of USC Rossier's US News ranking paid off. 2U continued working with USC as Defendants expanded USC Rossier's online offerings, adding additional degree programs—and consequently, thousands of tuition-paying students—during the Class Period. For instance, in 2015, USC Rossier unveiled its Organizational Change and Leadership Doctorate in Education ("EdD") program, which had "over 500 EdDs enrolled at any one time." FAC ¶¶ 64-66; *see id.* ¶ 96 ("[M]any thousands of students enroll[ed]" in USC Rossier's online degree programs during the Class Period). 2U successfully disseminated Defendants' deceptive messaging to the putative class, doing its part to further Defendants' fraudulent scheme. *See*, *e.g.*, FAC ¶¶ 115-16, 118, 131-32 (Ms. Zarnowski and Ms. Cummings each saw targeted advertisements displaying USC Rossier's US News ranking that 2U cased to be disseminated through its purchase of tracking tools designed to broadly distribute these advertisements).

III. ARGUMENT

A. Legal Standard

To survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a complaint need only plead "enough facts to state a claim [for] relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is plausible on its face "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "In determining whether sufficient facts are stated such that the claim is plausible, the court must presume all factual allegations are true and draw all reasonable inferences in favor of Plaintiff." *Theranos, Inc. v. Fuisz Pharma, LLC*, 876 F. Supp. 2d 1123, 1136 (N.D. Cal. 2012) (citing *Twombly*, 550 U.S. at 570; *Iqbal*, 556 U.S. at 678; *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987)). "Any ambiguities must be resolved in favor of the pleader." *Thailight Semiconductor Lighting (HK) Co., Ltd.*, 2023 WL 3150079, at *2 (C.D. Cal. Mar. 21, 2023) (citing *Walling v. Beverly Enters.*, 476 F.2d 393, 396 (9th Cir. 1973)). "If there are two alternative explanations, one advanced by defendant and the other advanced by plaintiff, both of which are plausible, plaintiff's

complaint survives a motion to dismiss under Rule 12(b)(6)." *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011).

The claims alleged in this action—premised on 2U's unfair and deceptive conduct—are unsuitable for resolution at the pleading stage. *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 938-39 (9th Cir. 2009) ("[W]hether a business practice is deceptive will usually be a question of fact not appropriate for decision on demurrer."). For the reasons discussed below, Plaintiffs have sufficiently alleged each of those causes of action, and none of 2U's challenges have merit.

B. Plaintiffs have stated a claim under the Consumer Legal Remedies Act.

2U makes a variety of arguments attacking the sufficiency of Plaintiffs' CLRA claim by inventing unsupported legal standards and misrepresenting the claims and facts in the complaint. But viewed against the plain text of the statute and applicable case law, Plaintiffs' CLRA claims are adequately pled.

The CLRA broadly prohibits "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 . . . of goods or services to any consumer. . . ." *Colgan v. Leatherman Tool Grp., Inc.*, 135 Cal. App. 4th 663, 679-80 (2006). In light of this broad prohibition, to state a claim under the CLRA, Plaintiffs need only allege that Defendants' acts, statements, and/or omissions were likely to deceive a reasonable consumer. *Id.*; *accord Capaci v. Sports Research Corp.*, 445 F. Supp. 3d 607, 620 (C.D. Cal. 2020). The elements of a CLRA violation are different than common law fraud; as one court explained, "only three of the five elements of a fraud claim are necessary to state a claim under the CLRA: misrepresentation, reliance, and damages." *Marolda v. Symantec Corp*, 672 F. Supp. 2d 992, 1003 (N.D. Cal. 2009). Moreover, "a defendant can violate the UCL, FAL, and CLRA by acting with mere negligence." *Moore v. Mars Petcare US, Inc.*, 966 F.3d 1007, 1019, n.11 (9th Cir. 2020). *See also, e.g.*, *Chamberlan v. Ford Motor Co.*,

369 F. Supp. 2d 1138, 1144 (N.D. Cal. 2005) (noting that a CLRA claim need not "fulfill all of the elements of a fraud tort claim.").

Section 1770(a) of the CLRA lists the types of unfair and deceptive misrepresentations and practices prohibited by the statute. Plaintiffs allege that the deceptive advertising campaign here violates seven of those prohibitions, sections 1770(a)(1), (2), (3), (5), (7), (9), and (14). FAC ¶¶ 147-153.[1] And they have alleged facts that are more than sufficient to show that 2U violated each subsection in carrying out the rankings-centered advertising campaign with USC. *See, e.g.,* FAC ¶¶ 57-74 (detailing US News' Best Education Schools methodology and USC Rossier's submission of false survey data to US News to further Defendants' scheme of boosting the school's standing in the rankings); ¶¶ 75-87 (detailing 2U and USC's relentless marketing of the Best Education Schools rankings to prospective students); ¶¶ 88-94 (explaining that Defendants knew that prospective students relied on these rankings); ¶¶ 95-134 (explaining that prospective students, including Plaintiffs, were deceived by Defendants' fraudulent advertisements regarding USC Rossier's US News ranking). And the FAC specifically identifies examples of the specific advertising, disseminated as part of this broader campaign, that misled each Plaintiff. *Id.* ¶¶ 106, 117-18, 130-32. These allegations are more than sufficient to survive a Rule 12(b)(6) motion.

2U does not argue that the rankings-centered advertising campaign is not the sort of misrepresentation that is covered by the CLRA or otherwise take issue with the applicability of any sub-section here. Rather, relying on inapplicable case law, 2U re-imagines the CLRA as a common law fraud claim, for which not only knowledge of

[1] *See* Civ. Code § 1770(a)(1) ("Passing off goods or services as those of another."); (2) ("Misrepresenting the source, sponsorship, approval, or certification of goods or services."); (3) ("Misrepresenting the affiliation, connection, or association with, or certification by, another."); (5) ("Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that the person does not have."); (7) ("Representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another."); 14 ("Representing that a transaction confers or involves rights, remedies, or obligations that it does not have or involve, or that are prohibited by law.").

falsity is required, but which is also subject to a pleading standard far more stringent than any court has required. It then makes various arguments challenging the actionability of the statements at issue, mischaracterizing both law and fact. Contrary to 2U's arguments, discussed further below, Plaintiffs need to have done nothing more to survive a motion to dismiss.[2]

C. While Knowledge is Not a Necessary Element of the CLRA, Plaintiffs Plausibly Allege It.

1. Plaintiffs Do Not Need to Plead 2U's Knowledge to Allege a CLRA Claim.

2U first attempts to distance itself from the fraudulent scheme described in the FAC by asserting that it knew nothing of the years-long manipulation of survey data that began just after 2U and USC began their business relationship. 2U Br. at 18-21. In doing so, 2U improperly conflates the state of mind requirement for a CLRA claim with that of a common law fraud claim. 2U also ignores large swaths of the FAC that make clear that 2U knew, or with the exercise of reasonable care should have known, that USC Rossier's US News rankings were fraudulently obtained for years. 2U's assertion that "actual knowledge of falsity" is required for a CLRA claim sounding in fraud misstates the law. 2U Br. at 18. The requisite state of mind for a CLRA violation, if any, is determined by reference to the 28 enumerated violative acts listed in Civil Code, Section 1770. Of the seven subsections of Section 1770 that Plaintiffs allege 2U violated, only Section 1770(a)(9) contains a state of mind requirement. Civ. Code § 1770(a)(9) ("Advertising goods or services with intent not to sell them as advertised."). Plaintiffs did not need to plead ***anything*** regarding 2U's state of mind to allege a CLRA claim with respect to six of the seven enumerated violations they allege. *See*, *e.g.*, *In re Sony PS3 Other OS Litig.*, 551 F. App'x 916, 920 (9th Cir. 2014) ("Section 1770(a)(9) is the only subsection that requires pleading fraud, since it specifically requires intent to

[2] 2U also briefly argues, in a footnote, that Plaintiffs did not adequately plead an economic injury because "they received the education and degree for which they paid." 2U Br. at 26 n.7. For the reasons discussed at length in response to USC's Motion to Dismiss, Opp. to USC Br. at 20-24, this argument is meritless and is no basis to grant 2U's Motion.

defraud, which, in turn, implies knowledge of the falsity.") (quoting *Marolda*, 672 F. Supp. at 1003).[3]

2U relies heavily on *Wilson v. Hewlett-Packard Co.*, 668 F.3d 1136 (9th Cir. 2012) which held that knowledge of falsity was required to state a violation of the CLRA in the limited context of the defendant's ***failure to disclose*** a product defect where the defect arose outside of the warranty period, *id.* at 1145, as well as other defective product cases from the district courts. 2U Br. at 18-19 (citing two product defect cases in support of its conclusion that "knowledge of a defect" is required). The *Wilson* Court's conclusion followed a lengthy discussion of courts "limit[ing] the duty to disclose" in product defect cases for policy reasons. *Wilson*, 668 F.3d at 1141.

This is not a product defect case. And as discussed further below, Plaintiffs bring their CLRA claims based on Defendants' affirmative misrepresentations, not on omissions that would make any such policy considerations relevant. 2U cites no district court case applying *Wilson* outside of the product defect context, and many district courts have noted how *Wilson* means exactly what it says. *See, e.g., Acedo v. DMAX, Ltd.*, 2015 WL 12912365, at *11 (C.D. Cal. July 31, 2015) (collecting cases in which courts have interpreted *Wilson* to apply only to omission based claims for product defects arising outside of the warranty period); *In re Hydroxycut Marketing & Sales Practice Litig.*, 299 F.R.D. 648, 658 (S.D. Cal. 2014) (noting that "*Wilson* concerned a fraudulent omission—i.e., failure to disclose a defect—and its language about awareness of defect arguably only applies to cases involving omission as opposed to active misrepresentation"); *Stanwood v. Mary Kay, Inc.*, 941 F. Supp. 2d 1212, 1221 (C.D. Cal.

[3] Civil Code, Section 1770(a) states. before listing any of the CLRA's enumerated violations, that the enumerated violations "are unlawful" if "undertaken by any person in a transaction intended to result or that results in the sale or lease of goods or services to any consumer. . . ." But this use of the word "intended" only means that the defendant must have intended for its conduct to cause consumers to purchase its goods or services. It does not supply any state of mind requirement for the specific acts alleged to have violated the CLRA. The FAC sufficiently alleges that 2U disseminated false advertisements to entice students to purchase its "services" by enrolling in USC Rossier's online degree programs. *E.g.*, FAC ¶¶ 25-31, 47, 63, 75. 2U does not—and could not—argue otherwise.

2012) (reasoning that *Wilson* did not apply outside of the product defect context).[4] *See also Racies v. Quincy Bioscience, LLC*, 2016 WL 5746307, at *6 (N.D. Cal. Sept. 30, 2016) ("Under these California Supreme Court and Ninth Circuit precedents, the Court finds that Plaintiff did not need to present evidence that Defendant knew the affirmative label representations at issue were false."); *Kowalsky v. Hewlett-Packard Co.*, 2011 WL 3501715, at *6-7 (N.D. Cal. Aug. 10, 2011) (noting that product defect cases under the UCL and CLRA have a different state of mind requirement than other cases).[5]

Regardless, the plain text of all but one of the CLRA sub-sections at issue makes clear that, as was the case in *Sony PS3,* there is no state of mind requirement. Only Plaintiffs' claims under Civil Code, Section 1770(a)(9) requires Plaintiffs to plausibly plead an *intent* not to sell as advertised. And even if *Wilson* were read to require Plaintiffs to allege 2U's state of mind for the other six violations, Plaintiffs need only allege that 2U knew or should have known that its advertising statements regarding USC Rossier's US News rankings were false, and need only raise a plausible inference of 2U's state of mind. *See, e.g.*, *Coffelt v. Kroger Co.*, 2017 WL 10543343, at *10 (C.D. Cal. Jan. 27, 2017) ("[T]o seek damages under the CLRA, plaintiffs must allege that a defendant had knowledge, or should have had knowledge that advertising or a business practice was deceptive or misleading."). At a minimum, 2U was negligent here, and can therefore be held liable under the CLRA. *Cf. Moore,* 966 F.3d at 1019 n.11.

For the reasons set forth below, Plaintiffs have satisfied this lenient standard.

[4] In any event, the Ninth Circuit recently cast doubt on the viability of *Wilson*'s knowledge requirement by concluding that the CLRA can be violated "by acting with mere negligence." *Moore v. Mars Petcare US, Inc.,* 966 F.3d 1007, 1019 n.11 (9th Cir. 2020).

[5] 2U relies on *Stewart v. Electrolux Home Prods., Inc.*, 2018 WL 1784273, at *4 (E.D. Cal. Apr. 13, 2018) and *Coleman-Anacleto v. Samsung Elecs. Am., Inc.*, 2017 WL 86033, at *6 (N.D. Cal. Jan. 10, 2017). 2U Br. at 19. Not only do both of these cases arise in the distinguishable product defects context, but neither meaningfully analyze whether *Wilson*'s holding can reasonably extend to affirmative misrepresentation cases.

2. Plaintiffs Have Sufficiently Alleged that 2U Knew or Should Have Known That Its Advertising Statements Were False.

2U argues that the FAC fails to plead that it knew the advertising that it broadly and aggressively disseminated for years was false. But the FAC alleges facts sufficient to raise a plausible inference that 2U knew or should have known that USC Rossier's US News rankings were fraudulently obtained. Moreover, even if 2U's narrative were believable, on a Rule 12(b)(6) motion, where both parties advance plausible inferences, the motion must be denied. *Starr*, 652 F.3d at 1216.

***First*, the circumstances surrounding the initiation of the fraudulent advertising campaign support an inference that 2U was well aware of the data manipulation.**

USC Rossier's ascent in the rankings began with the 2010 edition of the rankings, which used data gathered by USC in Fall 2008—***just as USC and 2U entered into their original Services Agreement*** (in October 2008). FAC ¶¶ 57-60. At a minimum, 2U knew that the USC Rossier rankings vaulted between 2009 and 2010 and soared to a high in 2018. 2U used this increase to its benefit, rendering it implausible that 2U was oblivious to the reason behind the rankings jump.

Further, at the time that Defendants began their business relationship, online schools were not widely trusted or administered by elite institutions, and both Defendants knew the success of their joint endeavor depended on public trust, a concern that 2U repeated over the years. FAC ¶¶ 3, 41 (2U acknowledged to its investors in 2014 that "[s]tudents may be reluctant to enroll in online programs for fear that the learning experience may be substandard. . . ."), ¶ 47 (2U explained to its investors that "the reputations of our clients are critical to our ability to enroll students"), ¶¶ 47, 65, 88. 2U also specifically emphasized the importance of USC's ranking to its revenue stream. FAC ¶¶ 47, 63.

Finally, Defendants' Services Agreement gave ***2U***—not USC—primary responsibility for developing "Promotion Strategies" to market the online degree

programs. And Defendants' scheme to fraudulently obtain stellar US News rankings for USC Rossier is just such a "Promotion Strateg[y]." FAC ¶ 42 & *id.*, Ex. A § 1(A). The Agreement also ***required*** USC to "consult with" 2U regarding the development of Promotion Strategies. FAC ¶ 43 & *id.* Ex. A § 2(A).

These allegations taken together—the rankings fraud began just as Defendants launched the online programs, 2U had an incentive to participate in the fraudulent scheme, knew that the school had risen in the rankings, ***and*** was primarily responsible for developing marketing strategies for the online programs—raise a plausible inference that 2U knew or should have known that USC Rossier's US News rankings were false.

Second, 2U was more than just an ordinary vendor, but USC's partner in every sense of the word. Its outsized role, and the duties it performed, would have necessarily caused it to know the rankings were doctored. This is enough to plausibly infer knowledge. For example:

Defendants' Services Agreement requires that 2U target its Promotion Strategies toward those "students likely to be accepted" into Defendants' online degree programs, suggesting that 2U knew (or at least should have known) USC Rossier's actual mediocre admittance data (e.g., its doctoral acceptance rate and GRE scores). FAC ¶ 34 & *id.*, Ex. A § 2(B).

Further, 2U oversaw the rapid expansion of student enrollment in USC Rossier's online degree programs during the Class Period, which 2U must have recognized would negatively impact USC Rossier's student selectivity. FAC ¶¶ 78 (2U spent over half of what it earned in revenue on "program sales and marketing" from 2015 through 2021); 98 (a large portion of 2U's revenue was attributable to USC throughout the Class Period). It strains credulity that 2U would spend so much during this time and never inquire into how USC Rossier obtained such a high selectivity driven US News' ranking when the School's admittance data was so mediocre. This is especially true after Defendants launched USC Rossier's online Organizational Change and Leadership program in 2015, which enrolled over ***500 students per year***, and USC Rossier's US

News ranking remained in the top 20 despite the obvious decline in selectivity. FAC ¶ 66.

Moreover, 2U, which received an estimated 60% of the tuition paid by USC Rossier's online degree programs, was heavily involved in other aspects of the online degree programs, including "cooperat[ing]" with USC regarding "the admissions process and the application of Admissions Standards." FAC ¶ 34 & *id.*, Ex. A § 1(B), 2(B); FAC ¶ 97. It is reasonable to assume that 2U was therefore intimately familiar with information regarding the students who eventually enrolled in the online degree programs, including admittance data relating to these students.

Third, it is reasonable to infer that 2U, leading the charge on promoting USC Rossier's online degree programs, would have observed the difference between USC Rossier's high Best Education Schools Ranking on the one hand, and the School's mediocre #44 ranking in the 2013 edition of US News' separate Best Online Education Schools rankings (the only public record of USC Rossier's participation in this ranking) on the other hand. FAC ¶ 68. It is further reasonable to infer that this caused 2U to learn that USC Rossier's Best Education Schools ranking was inflated, or to infer at the very least that, if 2U had exercised reasonable care, it would have investigated this discrepancy and learned of the ranking's falsity. It would have been negligent not to.

3. 2U's Other Legal Challenges Regarding Plaintiffs' Allegations of its State of Mind Are Meritless.

2U unpersuasively asserts that even if it knew that the data submitted to US News was manipulated, it was still conceivable that 2U did not also know that "the rankings were wrong." 2U Br. at 20. But even if Plaintiffs were required to allege 2U's knowledge (and they are not), the Court still must draw all reasonable inferences in Plaintiffs' favor at the pleading stage. *Theranos, Inc.*, 876 F. Supp. 2d at 1136. Student selectivity—including the doctoral acceptance rate and GRE scores—makes up 18% of an education school's total score in US News' Best Education Schools rankings. FAC ¶ 55. If 2U knew that USC Rossier's survey submissions dramatically undercounted each

of these figures, it is reasonable to infer that 2U also knew that the School's resulting US News ranking was false.

2U also cites a number of cases to make the unremarkable point that conclusory allegations regarding a defendant's state of mind are insufficient. *See* 2U Br. at 19-20. Not only are these cases irrelevant given Plaintiffs' detailed allegations establishing 2U's knowledge, but several of these cases arise from entirely distinguishable circumstances. *See United States v. Corinthian Colleges*, 655 F.3d 984, 997 (9th Cir. 2011) (analyzing whether Relators sufficiently pled "fraudulent intent" under the False Claims Act, which requires scienter); *In re Samsung Galaxy Smartphone Mktg. & Sales Pract. Litig.*, 2020 WL 7664461, at *6 (Dec. 24, 2020) (analyzing state of mind requirement in CLRA claim alleging omission of product defect). And *In re Hydroxycut*, on which Defendant perplexingly relies, expressly concludes that knowledge of falsity is not required under the CLRA, as discussed above. 2U Br. at 19; 299 F.R.D. at 658.

D. 2U's Rule 9(b) challenges fail.

Rule 9(b) requires a party to plead with particularity "the who, what, when, where, and how" of the alleged fraud. *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124 (9th Cir. 2009). A complaint need only be "specific enough to give defendants notice of the particular misconduct . . . so that they can defend against the charge." *Id.* These requirements "may be relaxed as to matters within the opposing party's knowledge." *Moore v. Kayport Package Express*, 885 F.2d 531, 540 (9th Cir. 1989).

First, 2U argues that Plaintiffs have not alleged the details of how 2U deceived them with the particularity required by Rule 9(b). *E.g.*, 2U Br. at 18. Not so. Plaintiffs have alleged the "who" (USC and 2U); "what" (deceptive advertising regarding USC Rossier's Best Education Schools rankings); and "when" (from the inception of Defendants' business relationship in or around Fall 2008 through 2021, the last year that USC Rossier was ranked in US News' list of the Best Education Schools). FAC ¶¶ 47-134. Plaintiffs have also alleged the "where" (both 2U and USC disseminated to members of the proposed class false advertising statements celebrating USC Rossier's

misleading Best Education Schools ranking through press releases, social media posts, advertisements on the Rossier Website and the Rossier Online Website, and targeted advertisements delivered as a result of Defendants' use of tracking tools and purchased Google search terms). FAC ¶¶ 75-84, 106, 115-118, 130-132. And Plaintiffs detail the "how," setting forth details regarding USC's manipulation of the data it sent to US News for purposes of obtaining a higher Best Education Schools ranking for USC Rossier, how 2U and USC exposed members of the class to the fraudulently obtained rankings, and how Plaintiffs were deceived into believing that USC Rossier's online degree programs were higher ranked than they were. *See*, *e.g.*,, FAC ¶¶ 57-74, 102-34. Numerous courts have used this same framework to find Rule 9(b) satisfied in false advertising cases. *See, e.g., Kearns*, 567 F.3d at 1124 (stating that allegations satisfy Rule 9(b) if they are "accompanied by 'the who, what, when, where, and how' of the misconduct charged").

Second, 2U asserts that its role in the fraudulent scheme described in the Complaint is limited to "speculative group allegations." 2U Br. at 20. But the Ninth Circuit has acknowledged the difficulties of "attribut[ing] particular fraudulent conduct to each defendant as an individual," and noted that, "where possible," plaintiffs should identify "the roles of the individual defendants in the misrepresentations." *Kayport Package Express*, 885 F.2d at 540; *see also Advanced Reimbursement Sols. LLC v. Aetna Life Ins. Co.*, 2022 WL 889058, at *3 (D. Ariz. Mar. 25, 2022) ("[I]n fraud suits involving multiple defendants it is sufficient for a pleader to identify the role each defendant played in the alleged fraudulent scheme.").

Here, Plaintiffs articulate 2U's role in the scheme in detail. The FAC details 2U's critical role in developing the online programs, as well as recruiting for them, with specific references to 2U's responsibilities set forth in the Services Agreement. FAC ¶¶ 26-27, 33-44. Chief among them was 2U's lead role in designing and implementing "Promotion Strategies," FAC ¶ 42 & *id.*, Ex. A § 1(A), which Defendants agreed needed to be consistent with the marketing of the in-person programs at the school. FAC ¶¶

42-47. The FAC explains how 2U made the rankings central to Defendants' joint marketing efforts. FAC ¶¶ 47-50, 77-78, 84(c), 89. Thus, in addition to operating a portion of USC Rossier's website and the online advertising it disseminated, these facts establish that 2U played an integral role in marketing USC Rossier, even if some advertising was disseminated by USC.

Moreover, Plaintiffs specifically detail 2U's work carrying out online advertising campaigns. Specifically, the FAC pleads that 2U, exercising its duties under the Services Agreement and using its massive marketing and promotion expenses, "purchased search terms from Google" to ensure that advertisements regarding USC Rossier's fraudulently obtained US News ranking reached prospective students using Google to search for education graduate programs, and "invested in advertising via display ad networks" that similarly allowed advertisers to display targeted ads featuring USC Rossier's US News ranking to prospective online degree students. FAC ¶ 77.

2U argues that its purchasing of search terms and targeted advertisements are general "marketing strategies" and not "statements." 2U Br. at 31-32. This distinction is meaningless. 2U is just as responsible for the false statements it delivers to consumers via purchased search terms and paid advertising as if it paid a television network to air misleading commercial advertisements.[6] Unsurprisingly, courts regularly find that a defendant can be held liable for false advertising for causing advertisements to be disseminated through the purchase of Google Ads or search engine keywords. *See LegalForce RAPC Worldwide P.C. .v UpCounsel, Inc.*, 2019 WL 160355, at *5-6 (N.D. Cal. Jan. 10, 2019) (finding "unpersuasive at the motion to dismiss stage" argument that

[6] The only case 2U cites in support of this argument, *GhostBed, Inc. v. Casper Sleep, Inc.*, undermines it. 2U Br. at 32 (citing *GhostBed, Inc. v. Casper Sleep, Inc.*, 2018 WL 2213002, at *7 (S.D. Fla. May 3, 2018). *GhostBed, Inc.* does not shield defendants from liability for alleged Google search term and targeted advertisement purchases; it instead found only that the particular "statements" at issue in the case before it were unactionable statements of opinion. *Id.* Further, while *Ghostbed* analyzed whether "search engine optimization ('SEO')" techniques that "increase[d] the visibility of [the defendant's] content on the Internet" could constitute a "statement," *id.* at *2, Plaintiffs instead allege that 2U purchased "search terms from Google" ***that enabled them to target consumers with targeted advertisements***, which are indisputably "statements." FAC ¶ 77.

"Google search results" are "not statements made by" the defendant); *Buckeye Tree Lodge & Sequoia Village Inn, LLC v. Expedia, Inc.*, 2017 WL 8948733, at *1 (N.D. Cal. Oct. 11, 2017) (denying motion to dismiss where plaintiffs allege "fraudulent scheme" premised on placement of "advertisements through search engines"); *Miller v. Ghirardelli Chocolate Co.*, 912 F. Supp. 2d 861, 872 (N.D. Cal. 2012) (finding allegations that Ghirardelli placed allegedly misleading advertisements "on its Website ***and in the keywords it purchased online***" sufficient to state fraud claim) (emphasis added).

Regardless, Rule 9(b) only requires that plaintiffs "inform each defendant separately of the allegations surrounding his alleged participation in the fraud," and Plaintiffs are not required to "identify *false statements* made by each and every defendant." *Swartz v. KPMG LLP*, 476 F.3d 756, 764-65 (9th Cir. 2007) (emphasis in original). Plaintiffs have clearly alleged 2U's role in disseminating Defendants' fraudulent message to prospective online degree students.

Relying on *Perfect 10, Inc. v. Visa International Service Association*, 2U also suggests that it can only be held liable if it had "unbridled control" over the unlawful practice, thus immunizing itself from liability for any false statements published on the Rossier Online Website. 2U Br. at 28-31; 494 F.3d 788, 808-09 (9th Cir. 2007). Perfect 10 did not involve CLRA claims; its holding is irrelevant. But even if it did apply, its reference to "unbridled control" was meant only to emphasize that an "unfair practices claim . . . cannot be predicated on vicarious liability. . . ." *Perfect 10*, 494 F.3d at 808. It has no bearing on 2U's liability for statements made on the Rossier Online Website, particularly when 2U is a major partner of USC's, receiving an estimated 60% of revenues from the advertising. Taken to its logical conclusion, 2U's absurd argument would immunize any fraudulent scheme from CLRA liability so long as two people shared responsibility for the advertising instead of just one.[7] In this case, it would also mean that neither USC nor 2U could be held responsible for their misconduct.

[7] 2U also misconstrues *Woodard v. Labrada*, which has no bearing on this case. 2U Br. at 29-30. *Woodard*

Third, 2U supplements its faulty Rule 9(b) challenge by arguing that Plaintiffs did not sufficiently describe the "advertisements [they saw] that resulted from 2U's use of" Google search purchases and paid targeted advertising. 2U Br. at 31-32. This is not true. Ms. Zarnowski alleges that, in 2016 and again in or around April 2018, she saw 2U's paid search advertising "that promoted USC Rossier's ranking" and Ms. Cummings saw 2U's "paid search result advertisements highlighting USC Rossier's rankings" in late 2018 or early 2019. FAC ¶¶ 115, 118, 131. This is more than enough to allow 2U to investigate and understand the claims alleged against it. More importantly, Plaintiffs have alleged that 2U's use of paid search terms and targeted advertising to deliver Defendants' fraudulent message was part of a comprehensive and years-long advertising campaign marshaled by both Defendants. FAC ¶¶ 75-87. Plaintiffs need not allege that they actually relied on all statements resulting from this campaign. *See*, *e.g.*, *Opperman v. Path, Inc.*, 84 F. Supp. 3d 962, 978-983 (N.D. Cal. 2015) (allowing CLRA claim to proceed where class members were exposed to different ads that contained similar messaging about a consistent theme) (citing *In re Tobacco II Cases*, 46 Cal. 4th 298, 328 (2009)); *see also* Plaintiffs' USC Opposition, § III.B.2.[8]

E. 2U's Deceptive Advertising is Actionable.

2U makes two assertions to support its argument that the deceptive acts and practices underlying Plaintiffs' CLRA claims are not actionable: (1) 2U's advertising statements regarding USC Rossier's published US News rankings were "literally true"; and, alternatively, (2) the US News rankings themselves cannot be actionable

analyzed whether Sony had "secondary liability" for misrepresentations allegedly made by "Dr. Oz" based on a "joint enterprise" theory. 2017 WL 1018307, at *8, 12 (C.D. Cal. Mar. 10, 2017). The court observed that, to be liable, "Sony must have equal control rights over Dr. Oz's conduct as the Other Media Defendants." *Id.* at 12. The plaintiffs' allegation that Sony and Harpo (one of the Media Defendants) "agreed 'to collaborate on a website'" could not establish the high standard of Sony's "equal control," especially because the operative contract stated that "Harpo will control any broader joint venture/web project with Dr. Oz." *Id.*

[8] For this same reason, it does not matter that Plaintiffs did not specifically allege reliance "on any false or misleading statements made on" the Rossier Online Website, as 2U complains. 2U Br. at 30-31.

"statements" because they are merely opinions, not actionable assertions of fact.[9] 2U Br. at 23-24. The latter argument is addressed in section III.B.3 of Plaintiffs' Opposition to USC's Motion to Dismiss, incorporated herein, and 2U's arguments fail for the same reasons.[10]

2U's argument that it "cannot be held liable" under the CLRA for advertising USC Rossier's US News rankings just because the rankings were "literally true"—in that 2U advertised the actual rankings that US News published—vastly understates the scope of the statute. 2U Br. at 23. CLRA liability extends to "advertising that is literally true, but which is 'actually misleading or which has a capacity, likelihood or tendency to deceive or confuse the public.'" *Capaci v. Sports Research Corp.*, 445 F. Supp. 3d 607, 620 (C.D. Cal. Mar. 26, 2020) (quoting *Dachauer v. NBTY, Inc.*, 913 F.3d 844, 848 (9th Cir. 2019)); *see also*, *e.g.*, *Tryan v. Ulthera, Inc.*, 2018 WL 3955980, at *6 (E.D. Cal. Aug. 17, 2018) (permitting CLRA deception claim to proceed because, even though defendant's use of the phrase "FDA cleared" on the label for a medical device was "perfectly true", it was designed to mislead customers into incorrectly thinking that the device had been "FDA approved") (quoting *Morgan v. AT&T Wireless Servs., Inc.*, 177 Cal. App. 4th 1235, 1255 (2009)).

[9] 2U also argues that advertising statements that simply refer to USC Rossier as "'top-ranked'—without reference to any objective basis for that claim" are not actionable. 2U Br. at 22-23. To be clear, Plaintiffs' CLRA claim only seeks to hold Defendants liable for misrepresentations that refer to USC Rossier's standing in US News' Best Education Schools ranking. *See* FAC ¶ 149 (stating that "Defendants' untrue or misleading representations . .. include" statements "regarding USC Rossier's status as a school with in-person and online degree programs that are highly ranked by ***US News***") (emphasis added).

[10] As fully detailed in § III.B.3 of Plaintiffs' Opposition to USC's Motion to Dismiss, the rankings that courts tend to find unactionable are generally determined by reference to subjective, immeasurable characteristics, whereas rankings with measurable criteria that do not rely on "such inherently subjective sources"—such as US News' Best Education Schools rankings—are actionable. *Anschutz Corp. v. Merrill Lynch & Co., Inc.*, 785 F. Supp. 2d 799, 823 & n.23 (N.D. Cal. Mar. 27, 2011). Moreover, *Ariix, LLC v. NutriSearch Corporation* and *ZL Techs., Inc.*, which 2U relies on, are distinguishable for the same reasons discussed in response to USC's Motion to Dismiss. *See* Opp. to USC Br. at 17-18. And finally, even if US News rankings are an opinion, 2U can still be held liable for disseminating an opinion that it did not honestly believe. *E.g.*, *LightMed Corp. v. Ellex Med. Pty., Ltd.*, 2014 WL 12586075, at *5 (C.D. Cal. May 20, 2014) (statements that company "would have provisional rights upon the issuance of a patent . . . can constitute actionable misrepresentations" because they were alleged to have been "made in bad faith").

As set forth above, Plaintiffs have sufficiently alleged that 2U's advertising statements were likely to deceive members of the public, and in fact did deceive members of the public, because, at the very least, 2U advertised USC Rossier's "literally true" US News ranking to prospective students even though the statements were the product of USC Rossier's deliberately false survey submissions and were therefore deceptive. This is sufficient to establish CLRA liability. In fact, at least one federal court has affirmed a jury verdict—in the significantly more demanding context of a criminal fraud action—finding the former dean of Temple University's Fox School of Business guilty of *criminal* wire fraud and *criminal* conspiracy to commit wire fraud for "devis[ing] a scheme to defraud Fox students, applicants and donors of money by touting fraudulently obtained [US News] rankings. . . ." *United States v. Porat*, 2022 WL 685686, at *1 (E.D. Pa. Mar. 8, 2022).

None of the cases on which 2U relies support 2U's unfounded proposition that a defendant is not liable for false advertising when it communicates a literally true but deceptive statement just because the statement was initially published by someone else.

F. 2U's Omissions Challenge Fails

2U spends four pages of its Motion challenging Plaintiffs' "omissions theory" based on two paragraphs of the FAC that mention the word "omitted." 2U Br. at 24-27 (citing FAC ¶¶ 85, 86). To be clear, Plaintiffs are not currently alleging a free-standing omissions theory of liability under the CLRA. In the paragraphs 2U cites, Plaintiffs explain that Defendants hid from prospective students information regarding USC's low-ranked or non-existent position in US News' separate Best Online Education rankings, the fact that the data used to obtain USC Rossier's US News ranking excluded EdD students, and data regarding USC Rossier's actual doctoral acceptance rate and GRE scores. FAC ¶¶ 85, 86. But Plaintiffs do not contend that these omissions are independently actionable. Rather, the omissions are evidence in support of Plaintiffs' affirmative misrepresentation-based theories; class members would have reasonably understood Defendants' advertising to apply to online education because Defendants

never actually disclosed that it did not apply to their programs. Accordingly, the Court need not consider 2U's "omissions theory" arguments, as there is currently no free-standing omissions theory in this case.

If the Court opts to address 2U's challenge, it should reject it.

First, 2U incorrectly asserts that, to be held liable on an omissions theory, Plaintiffs must allege ***both*** that (1) 2U made omissions regarding material facts that relate to the "central functionality" of a good or service; ***and*** (2) 2U has a duty to disclose based on one of the four circumstances enumerated in *LiMandri v. Judkins*, 52 Cal. App. 4th 326 (1997).[11] 2U Br. at 24-25. But the "central functionality" test and *LiMandri* factors are "*alternative* means of pleading a pure-omission claim." *In re Toyota RAV4 Hybrid Fuel Tank Litig.*, 534 F. Supp. 3d 1067, 1102 (N.D. Cal. 2021) (emphasis in original). In support of its position, 2U only cites a non-binding, page-long memorandum opinion by the Ninth Circuit that makes no mention of *LiMandri*. 2U Br. at 25 (citing *Sud v. Costco Wholesale Corp.*, 731 F. App'x 719, 720 (9th Cir. 2019)); *see Grimm v. City of Portland*, 971 F.3d 1060, 1067 (9th Cir. 2020) ("[T]his Court's memorandum dispositions are not only officially nonprecedential but also of little use to district courts . . . in predicting how this Court . . . will view any novel legal issues in the case on appeal.").

Second, Plaintiffs have alleged that 2U made partial representations to prospective students (advertising USC Rossier's US News ranking) while omitting material facts that render the partial representations misleading (USC Rossier's US News ranking is the product of sham student selectivity data). Accordingly, the "central functionality" test is irrelevant because, as the Ninth Circuit observed, a partial representation creates a duty to disclose by virtue of 2U's decision to make

[11] *LiMandri* states: "There are 'four circumstances in which nondisclosure or concealment may constitute actionable fraud: (1) when the defendant is in a fiduciary relationship with the plaintiff; (2) when the defendant had exclusive knowledge of material facts not known to the plaintiff; (3) when the defendant actively conceals a material fact from the plaintiff; and (4) when the defendant makes partial representations but also suppresses some material facts." *LiMandri*, 52 Cal. App. 4th 326, 336 (1997).

representations that it was under no obligation to make, which is separate from the disclosure duty arising out of an omission regarding a defect material to the central functionality of a product. *See Hodsdon v. Mars, Inc.*, 891 F.3d 857, 863 n.3 (9th Cir. 2018) (distinguishing "partial representations" cases from the "purely omissions-based" cases that require a defect to relate to the central functionality of a product).

Third, 2U argues that omissions are only liable if the omitted facts concern a service's "central functionality"—*i.e.*, a fact concerning "a central feature of the" service rather than a fact that goes to an attribute that is only important due to the plaintiff's "subjective preferences." 2U Br. at 24-26; *Hall v. SeaWorld Entertainment, Inc.*, 747 F. App'x 449, 451, 453 (9th Cir. 2018). But 2U provides no support for its suggestion that the Court can answer as a matter of law the lofty question of what facts relate to the "central functionality" of a graduate education versus what facts relate to Plaintiffs' "subjective preferences." *E.g.*, *Bledsoe v. FCA US, LLC*, 2023 WL 2619132, at *27 (E.D. Mich. Mar. 23, 2023) (stating that, even where plaintiffs did not allege that product defects were "safety concerns," and did not "claim that the defects are part of a product's central functionality," the defendant had "not met its burden to show that the defects alleged cannot be considered safety-related, central to functionality, or otherwise immaterial as a matter of law").

Fourth, even without pleading an omissions theory of CLRA liability, Plaintiffs have alleged facts to establish at least two of the four *LiMandri* factors:

Plaintiffs have alleged that 2U has "exclusive knowledge of material facts not known or reasonably accessible to" Plaintiffs—specifically, that USC Rossier's US News ranking was the product of USC Rossier's improper exclusion of EdD data from its survey submissions to US News. 2U Br. at 26-27. As stated above, Plaintiffs have alleged that 2U knew or should have known that this data was fraudulent, and that Defendants hid this fraudulent practice from the public for over a decade. § III.C.2, *supra*. 2U also hints that it does not have "exclusive knowledge" of this fact because "USC compiled and submitted" the data. 2U Br. at 27. But *LiMandri's* "exclusive

knowledge" factor cannot be interpreted to mean that a defendant only has a duty to disclose when it is the only entity on the planet that knows the omitted facts. This would mean that any defendant could nullify this factor simply by sharing relevant omitted facts with a co-conspirator or even with outside counsel. *See Czuchaj v. Conair Corp.*, 2014 WL 1664235, at *4 (S.D. Cal. Apr. 18, 2014) ("Exclusivity is not applied with rigidity, and is analyzed in part by determining whether the defendant has 'superior' knowledge of the defect. Courts have persuasively found that exclusive knowledge is not automatically defeated by the presence of information online.") (quoting *Johnson v. Harley-Davidson Motor Co. Grp., LLC*, 285 F.R.D. 573, 583 (E.D. Cal. 2012)).

Finally, as stated above, Plaintiffs have also alleged that 2U has made partial representations to prospective students "that are misleading because some other material fact has not been disclosed" (USC Rossier's US News ranking is the product of sham data regarding USC Rossier's student selectivity, and USC is either low-ranked or unranked in US News' Best Online Education Schools ranking). *Hodsdon*, 891 F.3d at 862 (citing *LiMandri*, 52 Cal. App. 4th at 336)); FAC ¶¶ 57-74, 85.

Accordingly, if the Court chooses to consider 2U's omissions theory challenge, it should reject it entirely.

G. If the Court Does Decide to Dismiss Plaintiffs' Claims Against 2U, It Should Do So Without Prejudice

2U asserts that Plaintiffs' claims against 2U be dismissed *with prejudice* because Plaintiffs have already amended their original complaint, and further argues (with no support) that amendment "would be futile." 2U Br. at 33. As demonstrated above, Plaintiffs have sufficiently alleged a CLRA claim against 2U, and the FAC should survive dismissal in its entirety. But if the Court does decide to dismiss Plaintiffs' claims against 2U, it should do so without prejudice.

Dismissal with prejudice is only appropriate in rare circumstances that are not present here. *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990)

("[Leave to amend 'shall be freely given when justice so requires,' and this policy is to be applied with extreme liberality.") (quoting Fed. R. Civ. P. 15(a)).

To begin, just because Plaintiffs have amended their original complaint one time—to remove Plaintiffs' equitable claims, and nothing more—does not mean, as 2U suggests, that further amendment should not be permitted. 2U Br. at 33; *compare* Compl. *with* FAC. In *Loos v. Immersion Corp.*, relied on by 2U, the Ninth Circuit affirmed the district court's dismissal of an amended complaint with prejudice because the district court had dismissed the original complaint in an order giving the "[p]laintiff a detailed explanation of why his original theory of loss causation was deficient," and the plaintiff's amended complaint "essentially re-pled the same facts and legal theories" that the district court already rejected. 762 F.3d 880, 891 (9th Cir. 2014) (quoting *U.S. Mortg., Inc. v. Saxton*, 494 F.3d 833, 834 n.11 (9th Cir. 2007)). This decision is inapplicable here, as Plaintiffs have not repleaded claims that this Court previously found to be insufficiently alleged.

Further, 2U provides no support at all for its assertion that "any further amendment would be futile." 2U Br. at 33. "Courts rarely deny a motion for leave to amend because of futility. Indeed, before discovery is complete, such as here, a proposed amendment is futile only if ***no set of facts can be proved that would constitute a valid claim for relief***." *Lemar v. CVS Pharm., Inc.*, 2014 WL 12725107, at *3 (C.D. Cal. July 7, 2014) (emphasis added); *Q Indus., Inc. v. O'Reilly Automotive, Inc.*, 2023 WL 2189046, at *3 (C.D. Cal. Feb. 22, 2023) (same)

That is plainly not the case here. On the contrary, even if the Court chooses to dismiss Plaintiffs' claims against 2U, 2U and its representatives will remain essential third-party witnesses in this action given 2U's involvement in the development and marketing of USC's online degree programs. The extent of 2U's involvement in the false advertising campaign described in the FAC will be clarified in discovery that Plaintiffs will propound to both USC and 2U. Plaintiffs anticipate that facts will be

adduced during discovery that further implicate 2U in the false advertising scheme.[12] And in any event, the very real possibility that discovery will uncover facts further supporting a CLRA claim against 2U means this is not one of the are situations where there is "no set of facts [that] can be proved that would constitute a valid claim for relief." *Lemar*, 2014 WL 12725107, at *3; *see Q Indus.*, 2023 WL 2189046, at *3 (same).

Accordingly, because it would not be futile to amend the FAC after having the benefit of further discovery in this action, if the Court chooses to dismiss Plaintiffs' claims against 2U (it should not), it should dismiss these claims without prejudice to Plaintiffs amending their complaint to rename 2U as a defendant in this action after conducting discovery. *See Galaxia Electronics Co., Ltd. v. Luxmax, U.S.A.*, 2017 WL 2903182, at *13 (C.D. Cal. May 10, 2017) (dismissing breach of contract claim against defendant in first amended complaint for failure to allege "alter ego liability," but dismissing "without prejudice to a request to amend to state a claim against him based on further discovery in this matter").

IV. CONCLUSION

For the foregoing reasons, the Court should reject 2U's Motion to Dismiss in its entirety.

Respectfully submitted,

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[12] 2U's observation that the April 2022 Jones Day Report that outlined USC's manipulation of the US News rankings "does not even mention 2U once" is legally irrelevant at the pleading stage, where ambiguities are construed in Plaintiffs' favor. 2U Br. at 14. In addition, the Jones Day Report states that it only "focused on the School's reporting of doctoral selectivity metrics," but that it confirmed other irregularities and "other potential data misreporting issues, such as issues relating to the exclusion of online EdD programs," that may have also impacted USC Rossier's ranking. FAC ¶ 70 (quoting Ex. B. at 3). While USC has not yet made public the details of this additional misreporting, until more is known, the possibility of 2U's involvement cannot be foreclosed.

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