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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

v.

ASHFORD UNIVERSITY, LLC, a California limited liability company; ZOVIO, INC., a Delaware corporation; and DOES 1 through 50, INCLUSIVE,

Defendants.

Case No.: 37-2018-00046134-CU-MC-CTL

DEFENDANTS' PROPOSED STATEMENT OF DECISION

Trial Date: November 8, 2021
Action Filed: November 29, 2017
Dept.: C-67
Judge: Hon. Eddie C. Sturgeon

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I. INTRODUCTION

The California Attorney General (the "AG") sued Ashford University, LLC and Bridgepoint Education, Inc. (which later changed its name to Zovio, Inc.) (collectively, "Zovio"[1] or Defendants) in November 2017 alleging that, from 2009 to the present, Zovio violated California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code section 17200 *et seq.*, and False Advertising Law ("FAL"), Cal. Bus. & Prof. Code section 17500 *et seq.*, by systematically making false or deceptive statements to prospective students in order to induce them to enroll. The AG specifically alleged that Zovio's admissions counselors made false or deceptive statements during telephone calls with prospective students regarding (1) financial aid and the cost to attend Ashford, (2) whether a student's prior college credits may transfer into or out of Ashford, (3) the length of time to earn a degree, and (4) whether an Ashford degree would help achieve prospective students' career goals (the "Four Topics"). In the Complaint, the AG sought unspecified restitution, civil penalties, and injunctive relief.

The case proceeded to bench trial before this Court on November 8, 2021. During 18 trial days, the parties had a full opportunity to present evidence and arguments. The Court heard and assessed the credibility of 23 live witnesses—13 offered by the AG, 10 offered by Zovio, and 3 offered by both parties—and reviewed designated deposition testimony of 17 witnesses. Over fifteen hundred (1,514) exhibits were admitted into evidence.

At closing argument, by way of relief, the AG asked this Court to impose judgment against Zovio as follows: (a) $25 million in restitution to students, which the AG would have this Court deposit into a fund subject to a post-trial "claims-made" procedure for students who would demonstrate that they were financially harmed by Zovio's alleged practices; (b) $75 million in civil penalties; and (c) injunctive relief.

This is not a typical law enforcement UCL or FAL case. That is because the evidence presented at trial did not show that Zovio engaged in any corporate or management-level deceptive

[1] The Court refers to Defendants collectively herein as "Zovio," the parent company of Ashford. In December 2020, Zovio sold the assets of Ashford to the University of Arizona which thereafter operated the online school as the University of Arizona Global Campus ("UAGC"). As of that date, Ashford entirely ceased operations. UAGC is not party to this action. Zovio assumed the financial liability, if any, attendant to this matter, and the AG is not seeking injunctive relief against Ashford.

or unfair conduct, as was the case in, for example, *People v. Johnson & Johnson* (Cal. Super. Jan. 30, 2020, No. 37-2016-00017229-CU-MC-CTL 2020 WL 603964) ["*Johnson & Johnson*"]. Specifically, as explained below, there was no reliable, credible, or admissible evidence that Zovio executives or management authorized or condoned any false or misleading statements to prospective students or that admissions counselors were instructed, trained, compelled, or incentivized to mislead students. Nor was there any reliable, credible, or admissible evidence that Zovio ratified or knowingly accepted the benefits of any false or misleading statements that did occur. To the contrary, the evidence overwhelmingly showed that Zovio did not violate the UCL or FAL; it actively prohibited admissions counselors from making false or misleading statements to prospective students, provided affirmative training and retraining to help ensure that admissions counselors made truthful and accurate statements about an Ashford education, made clear and truthful disclosures about the Four Topics (including some in a manner required by regulators), and implemented a robust compliance program to detect, deter, and remedy noncompliant behavior by admissions counselors, including deceptive statements. Nor did the AG present reliable evidence that admissions counselors made false or deceptive statements on a systematic basis, such that the Court could reasonably infer Zovio management condoned or accepted such behavior.

Unsurprisingly, as conceded by Zovio, given the literally millions of direct telephonic communications between admissions counselors and prospective students during the relevant time period (some of which lasted for more than an hour), there is no dispute that some admissions counselors made isolated false or misleading statements. The Court first finds that there was insufficient evidence presented showing that these isolated misstatements were likely to deceive a significant portion of reasonable consumers under the circumstances here, considering the nature of the product (an education), how prospective students signed up for it, the repeated and clear disclosures, and the various sources of information available to these students. Thus, the Court next analyzes whether Ashford and Zovio are effectively strictly liable for isolated instances of such statements under a principal-agent theory of UCL or FAL liability, even when those statements were (1) clearly prohibited by management; (2) trained against by management;

(3) never ratified by management; and (4) subject to remedial action if detected by Zovio's compliance department.

This factual scenario has not, to this Court's knowledge, been squarely addressed from a liability perspective under the UCL or FAL by any California court. It was, however, anticipated by the California Supreme Court in *dicta* in *Ford Dealers Assn. v. Dept. of Motor Vehicles* (1982) 32 Cal. 3d 347 ["*Ford Dealers*"], 361 fn. 8. In that case, the Court articulated an exception to general principal-agent liability, stating it would be inappropriate and unfair to hold a company liable for employee misstatements if it: (1) "made every effort to discourage misrepresentations"; (2) "had no knowledge of salespeople's misleading statements"; (3) "when so informed, refused to accept the benefits of any sales based on misrepresentations"; and (4) "took action to prevent a reoccurrence." The evidence presented at trial showed that Zovio falls within this exception to strict principal-agent liability, for the reasons described herein. Thus, the Court finds Zovio is not liable.

Even if this Court were to decline to apply the *Ford Dealers* criteria in favor of Zovio on the issue of *liability*, the same facts discussed above would cause the Court, in its discretion, to decline to order any equitable relief and to reject the civil penalties that the AG seeks because Zovio acted in good faith. For yet further, independent reasons, the AG has failed to meet its burden of proof on the remedies sought. The AG has not provided the substantial evidence required to support its requested $25 million in restitution, and it has not shown that the Court may legally create the post-trial claims fund it seeks. Nor has the AG provided reliable expert testimony from which this Court can reasonably ascertain the number of violations that actually occurred for purposes of imposing penalties. Moreover, the civil penalties requested by the AG would not only punish Zovio, but would effectively destroy the company as demonstrated by the undisputed evidence of Zovio's financial condition. Finally, the AG has not proven that an injunction is necessary to prevent ongoing or imminent misconduct by Zovio.

Based upon the conclusions of law and findings of fact described below, the Court enters judgment for Ashford and Zovio on all counts in the Complaint.

II. PROCEDURAL BACKGROUND

A. The Pleadings

The AG filed a Complaint against Zovio on November 29, 2017. The AG's Complaint alleged that for over a decade, Zovio authorized its admissions counselors to mislead prospective students and these admissions counselors did in fact systematically mislead students in order to induce them to enroll at Ashford in violation of the UCL and FAL. The AG requested a permanent injunction pursuant to Business and Professions Code sections 17535 and 17203 and civil penalties pursuant to Business and Professions Code sections 17206 and 17536. The AG also requested restitution pursuant to Business and Professions Code sections 17203 and 17535.

B. Stipulations By The Parties

Prior to the commencement of this action, the parties entered a tolling agreement with an effective date of February 6, 2013. Accordingly, the relevant period for the AG's UCL claims, which are subject to a four-year statute of limitations, begins on February 6, 2009. (Bus. & Prof. Code, § 17208; *People v. Overstock.com, Inc.* (2017) 12 Cal.App.5th 1064, 1077 [four-year statute of limitations for UCL claims].) The relevant period for the AG's FAL claims, which are subject to a three-year statute of limitations, begins on February 6, 2010. (Code Civ. Proc. § 338, subd. (h); *Overstock.com*, *supra*, 12 Cal.App.5th at p. 1074, fn. 8 [three-year statute of limitations for FAL claims].)

III. PRELIMINARY STATEMENT OF FACTS

A. Background on Ashford, Zovio, and UAGC

Ashford University was a limited liability company organized and existing under the laws of the state of California. Ashford University's principal place of business was in San Diego, California, in San Diego County. Ashford University was a wholly owned subsidiary of Zovio, Inc. On August 1, 2020, the University of Arizona acquired the assets of Ashford from Zovio and began operating the University as UAGC. Ashford University no longer operates in any capacity. (Ex. 9024 at 5.)

Zovio, Inc. is a publicly traded corporation organized and existing under the laws of the

State of Delaware.[2] (Ex. 9024.) Zovio's principal place of business is Arizona, since it moved its headquarters in spring 2019. (Ex. 9024.) Today, Zovio operates as a Title IV Third-Party Servicer to UAGC, a special status under the U.S. Department of Education ("DOE") regulations that requires compliance with Title IV and the other regulations that correspond to Title IV and also requires a special audit. UAGC is an independent third-party owned by the University of Arizona and is not a party to this action. Pursuant to the Asset Purchase and Sale Agreement, UAGC has sole control over the registrar, financial aid, student dispute resolution, academics, and tuition, among all the other functions of a university. Zovio provides education support services pursuant to UAGC's control. (Ex. 9024 at 5)

B. Zovio's 2014 Nationwide Assurance Of Voluntary Compliance With Iowa Covers Issues Raised In The AG's Complaint And Was Monitored

In May 2014, Zovio and Iowa entered into an Assurance of Voluntary Compliance ("AVC"). In order to ensure that prospective students were not deceived, the Iowa AVC required Zovio to make specific disclosures to prospective students on each of the Four Topics at issue in this case. In addition, the Iowa AVC required specific compliance program elements and compliance reporting.

The AVC was overseen by an independent administrator, Thomas J. Perrelli, a former senior Department of Justice official. Mr. Perrelli worked with a team of experienced attorneys to evaluate Zovio's compliance with the AVC. (See Ex. 280 [May 5, 2014 AVC].) His team of lawyers visited Zovio's headquarters and observed the admissions counselors, reviewed Zovio's training materials, analyzed Zovio's recorded calls. Mr. Perrelli memorialized his compliance review in three yearly reports issued to the Iowa Attorney General in 2015, 2016, and 2017. Mr. Perrelli's compliance report found that (a) Zovio did not engage in a pattern or practice of misleading students; (b) Zovio did not operate its admissions department as a "boiler room" focused on high pressure or coercive sales tactics; (c) Zovio's trained admissions counselors to provide accurate information to prospective students; and (d) Zovio never instructed its

[2] In 2019, Bridgepoint Education, Inc. changed its name to Zovio.

admissions counselors or the marketing group to lie. (Ex. 3750, Tr. 50:6-13; 132:17-133:3, 134:3-22 [Perrelli]; Exs. 1153 at 35; 1154; 1155 at 64-65.) During the monitorship, Mr. Perrelli was duty bound under the AVC to report to the Iowa Attorney General any pattern or practice of misrepresentations to students. He never made any such report. (Ex. 3750, Tr. 50:6-13 [Perrelli].)

C. Zovio's Nationwide 2016 Consent Order With CFPB Required Zovio To Inform All Students Of The Potential Financial Impact Of Attending Ashford

In September 2016, Zovio entered into a Consent Order with the Consumer Financial Protection Bureau ("CFPB"). This Order required Zovio to disclose to every prospective student a financial aid disclosure that was created and maintained by the CFPB, the U.S. federal agency responsible for protecting students. Zovio ensured that every prospective student reviewed and completed this financial aid disclosure prior to matriculating at Ashford.

IV. STATEMENT OF APPLICABLE LAW

A. Legal Standard Under The UCL And FAL

California's UCL prohibits "unfair, deceptive, untrue, or misleading advertising and any act prohibited by [the FAL]." (Bus. & Prof. Code, § 17200 *et seq*.) The FAL prohibits disseminating "any statement ... which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading[.]" (Bus. & Prof. Code, § 17500 *et seq*.)

An *untrue* statement is a literally false statement. (*Johnson & Johnson, supra*, 2020 WL 603964 at *17.) A *deceptive* statement is one that can be literally true, but "likely to deceive" "the ordinary consumer acting reasonably under the circumstances." (*Lavie v. Procter & Gamble Co.* (2003) 105 Cal.App.4th 496, 512, 513; *Kasky v. Nike, Inc*. (2002) 27 Cal.4th 939, 951.) A statement is likely to deceive if "a ***significant portion*** of the general consuming public or of targeted consumers, ***acting reasonably*** in the circumstances, could be misled." (*Lavie*, *supra*, 105 Cal.App.4th at p. 508 [emphases added].)

"'Likely to deceive' implies more than a mere possibility that the advertisement might conceivably be misunderstood by some few consumers viewing it in an unreasonable manner." (*Lavie*, *supra*, 105 Cal.App.4th at p. 508.) "Rather, the phrase indicates that the ad is such that it

is probable that a ***significant portion*** of the general consuming public or of targeted consumers, ***acting reasonably*** in the circumstances, could be misled." (*Ibid*. [emphases added].)

To analyze whether conduct is misleading, courts do not consider a single statement in isolation, but rather consider the entire context of the statement. (See *Emery v. Visa Internat. Serv. Assn.* (2002) 95 Cal.App.4th 952, 965 ["seal of approval" reference "cannot be divorced from the context in which it is used" and is not false or misleading upon review of full advertising and website]; see *Hill v. Roll Internat. Corp.* (2011) 195 Cal.App.4th 1295, 1304-1305 [context is "vitally important"]; see also *F.T.C. v. Sterling Drug, Inc.* (2d Cir. 1963) 317 F.2d 669, 674 ["The entire mosaic should be viewed rather than each tile separately"].)[3]

B. Legal Standard For Corporate Liability Under The UCL And FAL

Courts have held that companies are liable for UCL and FAL violations based on the conduct of its employees or agents when corporate management directs or authorizes misrepresentations or when misrepresentations are so systematic that courts can infer that the corporation condoned the misconduct. For example, in *People v. JTH Tax, Inc*. (2013) 212 Cal.App.4th 1219, 1246, the court held a company liable for false advertising because it directly "controlled all of the advertising and disclosures made by franchisees." In *People v. Conway* (1974) 42 Cal.App.3d 875, 886, the chief executive was held liable for his employees' misleading statements because the evidence showed "a repeated pattern of illegal conduct" that was sufficient to infer corporate "toleration, ratification, or authorization of [the] illegal actions." Similarly, in *Johnson & Johnson*, this Court found the company was liable under the UCL and FAL where it engaged in "serious, knowing, and willful misconduct over a period of close to twenty years" based on a top-down "consistent, nationwide marketing scheme." (*Johnson & Johnson*, *supra*, 2020 WL 603964, at *2-5, *32, *39.) In reaching this conclusion, this Court highlighted that

[3] (See also *Freeman v. Time, Inc.* (9th Cir. 1995) 68 F.3d 285, 290 [affirming dismissal of FAL and UCL claims where "[a]ny ambiguity that [plaintiff] [c]ould read into any particular statement [was] dispelled by the promotion as a whole"]; *In re Sony Gaming Networks & Customer Data Sec. Breach Litig.* (S.D. Cal. 2014) 996 F.Supp.2d 942, 990 [dismissing FAL and UCL claims where defendant's website directed consumers to clarifying material, including user agreement and privacy policy].)

"sales representatives nationwide received the same training and documents" and were "trained to and [] did convey deceptive or misleading information" to patients and physicians about the safety risks of its products, and such marketing was delivered with "company-wide consistency." (*Ibid.*)

However, the California Supreme Court has stated that corporations are ***not*** and should not be held invariably liable for false or misleading statements by its employees or agents in other circumstances. (*Ford Dealers Assn.*, *supra,* 32 Cal.3d at p. 361 fn. 8.) Specifically, a corporation may not be liable for its employee misstatements if it: (1) "made every effort to discourage misrepresentations"; (2) "had no knowledge of salespeople's misleading statements"; (3) "when so informed, refused to accept the benefits of any sales based on misrepresentations"; and (4) "took action to prevent a reoccurrence." (*Ibid.*)

C. Legal Standard for Restitution

Under California law, a deceived consumer may be entitled to restitution, which is calculated as the difference between the amount the consumer paid and the value the consumer received. (*In re Tobacco Cases II* (2015) 240 Cal.App.4th 779, 790, 795-802 [citing Bus. & Prof. Code, §§ 17200, 17203]; see also *Day v. AT&T* (1998) 63 Cal.App.4th 325, 339-40.) To support its claim for restitution, the AG must introduce "substantial evidence" of "a measurable amount" necessary to restore to the plaintiff what has been acquired by violations of the statutes—*i.e.*, the AG must show that the "relief is based on a specific amount found owing." (*Colgan v. Leatherman Tool Grp., Inc.* (2006) 135 Cal.App.4th 663, 698-99 [italics added] [vacating restitution award that was not supported by ***substantial evidence***]; see also *Kraus v. Trinity Mgmt. Servs., Inc*. (2000) 23 Cal.4th 116, 126-127 [restitution is only proper for those who lost money due to unfair business practices].)

D. Legal Standard for Civil Penalties

Under California law, law enforcement officials are authorized to seek civil penalties pursuant to Business & Professions Code sections 17206 and 17536. To obtain civil penalties, the AG must first meet its burden of establishing the number of violations and then courts consider a number of factors to determine the level of penalty for each violation, including "the nature and seriousness of the misconduct, the number of violations, the persistence of the misconduct, the

length of time over which the misconduct occurred, the willfulness of the defendant's misconduct, and the defendant's assets, liabilities, and net worth." (Bus. & Prof. Code, § 17206(b).) The Court may assess a penalty "not to exceed" $2,500 per violation. (Bus. & Prof. Code, §§ 17206(a), 17536(a).)

E. Legal Standard for Injunction

Injunctive relief is a form of prospective relief designed to prevent imminent injury. (*W. Electroplating Co. v. Henness* (1959) 172 Cal.App.2d 278, 283 [citations omitted].) "An injunction cannot issue in a vacuum based on the proponents' fears about something that may happen in the future." (*Korean Phila. Presbyterian Church v. Cal. Presbytery* (2000) 77 Cal.App.4th 1069, 1084, *as modified* [Feb. 9, 2000].) Rather, an injunction is only available when it is "supported by actual evidence that there is a realistic prospect that the party enjoined ***intends to engage in the prohibited activity***." (*Ibid.* [emphasis added].) An injunction is not a remedy available to right completed wrongs or punish the wrongdoer. (*Madrid v. Perot Systems Corp*. (2005) 130 Cal.App.4th 440, 464–465; *Feitelberg v. Credit Suisse First Boston, LLC* (2005) 134 Cal.App.4th 997, 1012.)

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Zovio Did Not Make, Approve, Or Permit Misrepresentations To Prospective Students

1. Zovio's Financial Dependence On Regulatory Approval And Accreditation Incentivized Management To Prevent And Prohibit False And Deceptive Statements To Prospective Students

Like every university in the country, the viability of Zovio's business model depended on the ability of students to access federal funds to help pay their tuition to the institution. The institution was eligible to receive tuition from federal sources only if it operated in a manner consistent with the extensive standards set forth by federal, regional, and state regulators. The uncontradicted evidence presented in this case demonstrated that Zovio was required to comply with the DOE's regulations, the standards set forth by its accreditor, the Western Association of Schools and Colleges ("WASC") Senior College and University Commission, and state rules and regulations. Each of these layers of regulatory oversight expressly prohibited deceptive

statements to students. (12/6 Tr. 216:3-220:20, 221:10-222:10, 224:18-225:6 [Pattenaude]; 12/7 Tr. 10:23-27 [Pattenaude]; 12/7 Tr. 179:10-16 [Ogden]; see also Exs. 942, 7533, 7539.) Additionally, some of Zovio's regulators (CFPB, Iowa, and WASC) specifically mandated when and how Zovio disclosed information on the Four Topics to prospective students.[4] Remaining in compliance with such regulations was imperative to Zovio's business model.

Specifically, the uncontradicted evidence presented on the record was that management believed it contrary to Zovio's business interests to recruit a student through deception because it would put the school's accreditation at risk, which, in turn, would prohibit the school from accessing any federal funds for tuition. (12/6 Tr. 217:23-218:17, 224:14-17 [Pattenaude]; 12/7 Tr. 113:23-114:15, 116:4-27,145:12-20 [Ogden].)

As a result, Zovio had a mission-critical business incentive to prohibit and prevent false and deceptive statements being made to students. As described more fully below, that business incentive—to prevent and prohibit false and deceptive statements to prospective students—manifested itself in the behavior of the company's management and compliance department and in its culture, training, policies, and procedures.

2. There Was No Evidence Of Authorized Misrepresentations.

The evidentiary record is clear. Zovio corporate management did not authorize misrepresentations. The company never approved recruitment or advertising messages that were false or misleading. The AG did not present evidence at trial that Zovio management ever instructed admissions counselors to lie or mislead. In fact, the evidence is to the contrary. Zovio management witnesses each testified uniformly that they did not condone or authorize any false statements.

Indeed, from the top-down, Zovio management made clear that misrepresentations were not tolerated. Andrew Clark, founder and former CEO of Zovio, testified that during his tenure he "communicated on many occasions that [Zovio] had no tolerance for any kind of policy violations." (Ex. 3743, Tr. 120:4-121:9 [Clark].) Dr. Richard Pattenaude, former Zovio president

[4] This Court is not the forum to challenge the adequacy of Zovio's compliance with these regulatory standards or to second guess the standards promulgated by the regulatory agencies.

from October 2012 through May 2016, testified that the culture was such that "[y]ou lie to a student, you're gone." (12/7 Tr. 42:1-2.) Mark Johnson, former vice president of Zovio's ethics and compliance department, testified that the compliance department did "everything [it] could" to prevent misrepresentations to students. (12/14 Tr. 72:3-8.) Jeanne Chappell, manager of compliance operations, testified that Zovio never tolerated, condoned, authorized, or instructed admissions counselors to mislead students. (12/9 Tr. 223:12-28.) Similarly, Alice Parenti, the head of the admissions group from 2010 – 2013 and then compliance official, testified that Zovio never "authorize[d] a misrepresentation or a misleading statement to a prospective student," (11/10 Tr. 14:5-15:4, 113:26-114:13), and Zovio never "trained [admissions counselors] to mislead students in order to hit enrollment targets." (11/10 Tr. 119:9-12.)

In fact, the AG's witnesses who were former employees agreed that Zovio's management never authorized false statements to students. Eric Dean, a former admissions counselor, admitted that no one at Zovio ever told him to lie. (11/9 Tr. 97:15-17.) Matthew Hallisy, associate director of enrollment compliance, testified that he was "absolutely not" authorized to mislead or deceive prospective students. (11/30 Tr. 200:8-20; 12/1 Tr. 44:4-15 ["[T]he idea of being ethical and doing things the right way was [] stressed from the very beginning, the first day, maybe even the first hour of training."].) Former admissions counselor Molly McKinley testified she was "never told to lie by Zovio management in order to increase [he]r enrollment numbers." (12/1 Tr. 204:13-16.)

Moreover, every expert, including those proffered by the AG, testified that they did not see *any* evidence that Zovio ever authorized a single admissions counselor to make a misrepresentation. (11/15 Tr. 212:12-17 [Dr. Lucido offered no opinion regarding whether alleged misrepresentations were authorized]; 11/29 Tr. 111:18-21 [Dr. Siskin offered no opinion regarding whether Zovio authorized misrepresentations]; 12/2 Tr. 110:9-16 [Mr. Regan offered no opinion whether Zovio authorized noncompliant statements]; 12/6 Tr. 88:27-89:2 [Dr. Cellini offered no opinion whether Zovio management authorized false or misleading statements].)

Because the alleged misleading statements were not "created or approved by" the company, a finding of corporate liability is not appropriate. (*People v. JTH Tax*, *supra*, 212

Cal.App.4th at p. 1226; see also *People v. Dollar Rent-A-Car Sys., Inc.* (1989) 211 Cal.App.3d 119, 132 [the company's chief executive "personally approved the continued use of deceptive and ambiguous rental agreements."].)

3. Zovio Management Acted To Prevent Misrepresentations

Far from authorizing false or deceptive statements, Zovio's management trained its employees not to mislead prospective students. Every former Zovio employee testified that Zovio trained admissions counselors to provide truthful and accurate information to ensure that students were fully informed prior to enrolling.

The evidence presented at trial showed that Zovio implemented three types of training: (1) new hire training; (2) periodic refresher trainings; and (3) focused corrective training.

First, Zovio required newly hired admissions counselors to complete a rigorous 12-week formal training program, with three weeks of classroom training and nine weeks of on-the-job training.[5] (12/8 Tr. 148:8-15 [Curran]; 11/10 Tr. 119:1-5 [Parenti: "[The training] was very intense. It went over the entire student life cycle, policies, procedures, compliance."].)

Second, Zovio continued to train its student-facing employees throughout their careers at Zovio. (11/10 Tr. 23:2-15 [Parenti: Zovio provided training to admissions counselors "on an ongoing basis"]; 12/14 Tr. 88:26-89:11 [Johnson: "[W]e did training modules on each of the areas under the [Guiding Principles of Success] that would be important as well as things like Do's and Don'ts or Say This /Not That ... [W]e improved training not to be just classroom training or new employee training, but memos that would go out."]; 12/1 Tr. 43:18-22 [Hallisy testified that "training never really stopped" between new hire training, programmatic training, refresher training, and online modules].)

Third, Zovio provided additional feedback and training as a form of corrective action to admissions counselors that were identified by Zovio's compliance program as making noncompliant statements. When the compliance department identified a noncompliant call, they

[5] No expert analyzed, let alone critiqued, Zovio's admissions counselor training program at all. (11/15 Tr. 201:8-20 [Dr. Lucido admitted that he "did not examine their training program."]; 12/2 Tr. 110:17-23 [same for Mr. Regan]; 11/29 Tr. 103:2-11 [same for Dr. Siskin]; 12/6 Tr. 91:23-25 [same for Dr. Cellini].)

would contact the admissions counselor and direct them to redo "all the trainings," including how to accurately advise students. (12/14 Tr. 69:9-18.) The compliance department then followed up and made sure the advisor completed the recommended retraining. (12/14 Tr. 69:9-18; 11/10 Tr. 154:6-10; 12/9 Tr. 230:23-231:7; 12/13 Tr. 41:23-42:7 [Chappell].)

In all of this training, Zovio trained its admissions counselors not to lie or make misrepresentations to prospective students. (11/9 Tr. 99:26-100:2; Ex. 614.) Most fundamentally, the training prohibited counselors from making *any* misrepresentation, which was defined as any false or "misleading statements" that have "the tendency or likelihood to deceive or confuse." (See Exs. 614, 615; 11/9 Tr. 102:1-3, 138:11-18 [Dean recounted receiving training that misrepresentations could lead to termination and admitted he knew of employees who were fired for compliance violations].) Zovio rules explained that any misrepresentations were "unacceptable and will result in disciplinary action up to and including termination." (*Id.*) Simply put, Zovio trained its admissions counselors "[n]ot to lie or mislead." (12/7 Tr. 30:15-17 [Pattenaude].)

In addition to this general training about providing truthful information to prospective students, Zovio provided its admissions counselors with clear, easy-to-understand training materials on how to accurately and fully advise prospective students on each of the Four Topics. These included "Say This, Not That" guidance that trained counselors on the language that was permitted and the language that was prohibited the Four Topics. (Exs. 7480 [Cost of Attending]; 1328 [Financial Aid]; 1332 [Transfer Credits]; 1040 [Career Goals]; 11/9 Tr. 102:1-19, 99:3-21.) [6]

As the former President of Ashford testified: "There was very clear direction to Zovio admissions counselors about what to say and what not to say." (12/7 Tr. 29:18-28 [Pattenaude].) The AG never contended that *any* of this training by Zovio was false or misleading. To the contrary, the AG argued that statements made by admissions counselors that failed to comply with

[6] For example, see the following exhibits:
Financial aid and cost to attend training: Exs. 615, 7519.
Transfer credits training: Exs. 615, 1332
Length of time to earn a degree training: Ex. 1330.
Employment Prospects training: Exs. 615, 1040.

this training were, in fact, false or misleading.[7] Thus, any inaccurate or incomplete information provided by admissions counselors was not reflective of Zovio's extensive training.

4. Zovio Made Clear And Unavoidable Written Disclosures To Prospective Students Prior To Enrollment To Ensure Prospective Students Were Not Misled

The Court also analyzed the written information that Zovio provided to prospective students to determine whether, in context, any mistakes or misstatements by an admissions counselor were likely to deceive "a ***significant portion*** of the general consuming public or of targeted consumers, ***acting reasonably*** in the circumstances." (*Lavie*, *supra*, 105 Cal.App.4th at p. 508 [emphasis added].) The Court recognizes that an oral communication may be found misleading even if truthful disclosures are provided elsewhere (*e.g.*, buried in fine print somewhere). At the same time, it is certainly relevant to consider the course of dealing as a whole and what other information a reasonable consumer would read or consider in making a decision about whether to enroll. (See, *e.g.*, *Freeman v. Time, Inc.*, *supra*, 68 F.3d at p. 290 [conduct was not false or misleading when viewing "the promotion as a whole"].) Here, after considering all of the circumstances—including but not limited to the nature of the product (an education), how students signed up for it, the repeated written disclosures provided by Zovio to students, and the availability of information from different sources—this Court concludes that prospective students acting reasonably were not likely to be misled even if the student received incomplete information from an admissions counselor on the phone.

The evidence presented at trial showed that Zovio provided substantial written information to every prospective student prior to their enrollment, including its website, a virtual tour, academic catalogs, enrollment agreements, financial aid disclosures, and reminder emails. The AG did not even allege that any of this written information was false or misleading; and the Court's review shows that it is not. To the contrary, the written information provided by Zovio to

[7] For example, the AG argued that admissions counselor statements on the phone were misleading because the statements were inconsistent with Zovio's training. (See 11/8 Tr. 25:23-26:11 ["Defendants' formal training materials confirmed that it is misleading to say that Ashford's degrees would lead to certification careers. ... The problem, of course, was that admissions counselors didn't follow the paper training they received"].)

prospective students clearly disclosed the key details the Four Topics along with other helpful information.[8] Many of these written disclosures were in fact mandated and approved by the Iowa Attorney General and the CFPB. (See Ex. 280 [AVC]; Ex. 1078 [CFPB Consent Order].)

Each of the AG's former student witnesses confirmed that they received the clear written and accurate information that Zovio provided to them. Many in fact confirmed that they read the disclosures. For example, Alison Tomko, who complained that her degree did not lead to immediate teacher licensure in Pennsylvania, testified that Zovio's Academic Catalog and Enrollment Agreement informed her prior to enrollment that an "online degree from the Zovio University does not lead to immediate licensure in any state" and that she should contact her state licensing authority for information about the requirements. (11/8 Tr. 178:5-22; Ex. 166 at 7.) Zovio not only told Ms. Tomko in writing to contact her state's education authorities to determine the requirements for teacher licensure in the Enrollment Agreement, (11/18 Tr. 178:18-24), but her admissions counselor also orally told her to do so and provided her the phone number to Pennsylvania's Division of Certification for Teacher Licensure. (11/8 Tr. 173:8-15; Ex. 165.) After she enrolled, Zovio sent Ms. Tomko annual reminders that her degree does not lead to immediate licensure and that she should contact her state's education authorities. (Exs. 175, 176, 177.) Ms. Tomko did not check with her licensing authority until she was almost done with her degree program.[9] The AG's other student witnesses also confirmed they received the written

[8] Examples of the types of student-facing documents containing information on the Four Topics include:
Website & Virtual Tour: Exs. 7740 at 30020, 27075, 23522-23525, 27072; 1047 at 2-4; 2397 at 14:24-15:7, 17:4-12 [admissions call transcript discussing virtual tour with prospective student].
Academic Catalog: Exs. 9025-9049.
Enrollment Agreement: See, *e.g.*, Ex 1122.
Financial Aid Disclosure Designed By The Federal Government: Known as the Electronic Financial Impact Platform ("EFIP"), Exs. 7798; 7811A at 33.
Other Core Financial Aid Documents: See description of these documents at Ex. 7740 at 30020 and 12/8 Tr. 188:10-189:27 [Curran]; see also Ex. 7825.
Reminder Emails: Exs. 118, 175, 176, 177, 7811A; 7347; 7350.

[9] Ms. Tomko's assertion that her admissions counselor told her she did not need to call right away is not credible. Ms. Tomko's notes of the call were very detailed and included the phone number of the Pennsylvania state licensing authority, but nowhere did they indicate that she was not instructed to call until later.

disclosures on the topics they complained about.[10]

5. Zovio Maintained An Effective Compliance Program To Prevent, Detect, And Remedy Noncompliant Statements

The evidence also showed that Zovio is not directly liable for any UCL or FAL violation because it maintained an effective compliance program which is highly probative of Zovio's intent to ensure students were not misled. While the AG argued that Zovio's compliance department was a "sham," the evidence at trial—from four Zovio compliance officials and dozens of documents—showed the opposite. The record evidence showed that Zovio implemented a compliance program designed to prevent, detect, and remedy noncompliant statements, including misrepresentations on the Four Topics.

The most relevant part of Zovio's compliance department was its call monitoring program, which monitored admissions counselor calls with students in a number of ways. **First**, Zovio conducted random call monitoring of approximately 14,000 calls per year. (11/10 Tr. 65:8-28, 119:24-28; Ex. 942 at 8.) **Second**, Zovio used speech analytics technology to search for statements by admissions counselors that were noncompliant. (11/10 Tr. 154:23-155:9 [Parenti].) **Third**, Zovio used focused monitoring to monitor a higher proportion of calls from admissions counselors that had prior instances of noncompliant conduct. (11/10 Tr. 153:27-154:2 [Parenti].) These levels of significant call monitoring show that Zovio was serious about enforcing compliance with its training and procedures.

When Zovio's compliance department "monitored" a call, the department listened to a recording of the call and coded whether the call was "noncompliant" on hundreds of criteria, including whether there were any false or misleading statements made on the Four Topics.

The evidence also showed that Zovio's compliance department took corrective action

[10] (11/18 Tr. 65:16-21, Exs. 112, 118, 119 [Pamela Roberts read and understood her Enrollment Agreement and Academic Catalog's disclosures about her career options]; 11/30 Tr. 64:13-65:2; Exs. 7811A, 7825 [Loren Evans completed U.S. government mandated disclosure about cost to attend and she received 10 separate financial aid award letters]; Ex. 3766, Tr. 88:7-10, 91:2-14, 107:14-23 [Jasmine Cox received emails and phone calls warning her that she would soon reach her aggregate loan limit]; 11/17 Tr. 41:19-25, 42:23-43:9; Ex. 7822 [Roberta Perez reviewed her Enrollment Agreement's disclosure about career licensure before she enrolled].)

whenever it identified noncompliant behavior on these calls. This corrective action included coaching, verbal warnings, discussion memos, written warnings, suspension, or termination. (12/9 Tr. 217:21-222:26 [Chappell].) Zovio assigned corrective action depending on the severity of the noncompliant conduct. There was no rigid formula; certain conduct would lead to immediate termination. (12/9 Tr. 192:8-14, 217:24-218:12 [Chappell].) Moreover, Zovio's compliance department took disciplinary action against misconduct, regardless of whether or not the counselor was a high performer. (See, *e.g.*, 11/10 Tr. 215:22-217:9; Ex. 1204; 12/9 Tr. 228:13-16 [Zovio firing a known high performing admissions counselor].)

The former Zovio employees called by the AG confirmed the effectiveness of the compliance department, as many of those witnesses were disciplined by Zovio's compliance department. For example, Molly McKinley and Eric Dean were disciplined multiple times by Zovio for misadvising students. (12/1 Tr. 208:10-14; 11/9 Tr. 138:19-139:4; Exs. 617, 618.) The compliance department made clear to Ms. McKinley that her statements were "completely unacceptable" and that "further corrective action may occur, up to and including termination" if she continued misadvising students. (Ex. 2029.) Eric Dean admitted that not only did he face discipline three times, but he knew Zovio would, and in fact did, terminate counselors for lying to students. (11/9 Tr. 137:7-138:3, 138:11-14; see also 11/10 Tr. 68:28-70:12 [Parenti].)

The Court's conclusion that Zovio had an effective compliance program to prevent misrepresentations is confirmed by testimony of Mr. Perrelli. He assessed Zovio's compliance department and determined it was effective, and not a sham. (Ex. 3750, Tr. 114:6-10, 114:15-21, 130:5-13 [Perrelli].)

6. Zovio Did Not Maintain A Culture That Caused Or Condoned Deception

The AG alleges that Zovio's corporate management created a "boiler room" culture that incentivized and encouraged deception. The evidence, however, is to the contrary. The record showed that Zovio created and maintained a culture that put students first, not one that induced or condoned deceptive behavior. Admissions counselors did not operate in a high-pressure, "boiler room" environment and Zovio did not implement enrollment quotas.

When asked if the admissions floor felt like a boiler room, Ms. Parenti testified: "Not at all. It was a team environment ... . [I]t was very vibrant, very energetic." (11/10 Tr. 146:21-147:12 [Parenti].) Likewise, Kyle Curran testified that based on his years of experience at Zovio sitting on the admissions floor from 2017 through 2020, the admissions department was not "a high pressure, intense environment or anything like that that I would associate with a boiler room." (12/8 Tr. 126:1-11 [Curran]; 12/1 Tr. 60:18-61:8 [Hallisy: "it was a lot of fun ... absolutely it was not a boiler room"].) Dr. Pattenaude similarly testified that the admissions department "was a pretty energetic, go-go kind of place with a fairly good vibe." (12/7 Tr. 32:15-19.) And the Settlement Administrator, Mr. Perrelli, confirmed "[b]ased on numerous visits and observations" that Zovio's "call centers do not have the feel of a boiler room." (Ex. 1153 at 35.)

Zovio's corporate culture was embodied in the motto "SAY," which stood for, "Student Ashford You." Admissions counselors were taught to always "put[] the student first, then the university, and then yourself last." (11/10 Tr. 137:7-9; 12/1 Tr. 62:3-24 [SAY "was the order on when you had to make a decision on what to do, it was the priority one what to do. The first one was student. The student comes first. They're number one."].) SAY "was drilled in" at Zovio such that all employees understood that students came first. (12/1 Tr. 62:3-24.)

Moreover, the evidence did not show that Zovio had enrollment quotas that counselors had to meet. (See 11/10 Tr. 120:21-24 [Ms. Parenti testified that Zovio never had student enrollment quotas for its admissions counselors]; 12/7 Tr. 37:9-11 [Dr. Pattenaude testified the same]; 12/7 Tr. 203:28-204:3 [Jim Smith testified that budgetary enrollment targets did not create quotas for admissions counselors]; 12/1 Tr. 57:26-58:2 [When asked whether there was ever a quota on enrollments, Mr. Hallisy responded: "No. The last quota I've ever had in my life was in banking."].)

Contrary to the AG's assertion, Zovio's student-first culture neither induced nor condoned deceptive behavior of any kind. While a few former Zovio admissions employees testified that they felt pressure to enroll students, the Court recognizes that it is not uncommon for employees to feel pressure to perform in their jobs, and not every person is the right fit for certain jobs. For example, Molly McKinley and Wesley Adkins both worked briefly as admissions counselors prior

to 2012. McKinley testified that she felt pressure to enroll, but that was because she needed health insurance to afford her epilepsy medications. (12/1 Tr. 130:17-26, 142:4-6, 192:14-19.) Adkins similarly testified via designation that he quit in part because the job was too "stressful." (Ex. 3769, Tr. 107:4-17 [Adkins].) There was simply no evidence that Zovio fostered a culture that would cause admissions counselors to lie to prospective students. Indeed, as described above, such a culture would be contrary to the business incentives of the company operating in such a heavily regulated industry.

In sum, Zovio management (1) prohibited misrepresentations, (2) trained admissions counselors to honestly disclose complete information, (3) made mandatory written disclosures to all prospective students, (4) implemented an effective compliance program, and (5) created a culture that did not incentivize deception.

* * *

The evidence presented in this case is nothing like the cases where courts find a company liable under the UCL or FAL for corporate-directed statements and practices. (See, *e.g.*, *Johnson & Johnson*, *supra*, 2020 WL 603964, at *3-5, at *39 [finding that "J&J engaged in serious, knowing, and willful misconduct over a period of close to twenty years" based on a top-down "consistent, nationwide marketing scheme"]; *Dollar Rent-A-Car Sys., Inc., supra*, 211 Cal.App.3d at p. 129 [finding liability because the misconduct was *not* "sporadic statements made by lower level employees" but rather was a long "history of false and misleading business practices and training procedures," authorize by the CEO].) In those cases, there was a corporate-wide directive for employees to make false or misleading statements. In contrast, Zovio management prohibited the isolated misstatements that were presented at trial. And the Court concludes that, based on all the facts presented, even those isolated misstatements were not likely to mislead students acting reasonable under the circumstances, much less any significant portion of them.

B. <u>There Was No Reliable Evidence That Deception Was Systematic</u>

After concluding that Zovio's corporate-level policies and practices did not permit or authorize misrepresentations and that Zovio's culture did not incentivize or require deceptive

practices, the Court analyzed whether the AG proved its allegations that Zovio admissions counselors engaged in a level of deception that was systematic. In a large organization with millions of prospective customer contacts, the Court cannot view isolated instances of misstatements as a violation of the law, when those statements were prohibited and trained against. Those are simply mistakes. If, on the other hand, there was a high level of misrepresentations—systematic deception—that would imply that the corporation's formal training and policies were ineffective, and that the company at least implicitly condoned misrepresentations.

For the reasons discussed below, the AG did not meet its burden of proving anything more than isolated instances of false or potentially misleading statements by admissions counselors. The AG did not show that deception was widespread or systematic.

1. The Expert Testimony In the Record Was Insufficient To Prove Zovio Systematically Deceived Prospective Students

The evidence offered to prove that Zovio admissions counselors systematically deceived students was proffered through expert testimony. However, none of the expert testimony reliably or credibly demonstrated any systematic deception to prospective students.

a. Mr. Regan's Compliance Scorecard Analysis Offered No Probative Evidence Of False Or Misleading Statements

The AG's expert, Mr. Regan, performed an analysis of the percentage of ***compliance*** scorecards where Zovio's compliance department concluded that an admissions counselor made a ***noncompliant*** statement on a phone call. (12/2 Tr. 38:23-39:2.) Mr. Regan concluded that 20.5% of scorecards were "noncompliant" under Zovio's broad compliance requirements, but his analysis cannot and does not provide any evidence about the percentage of calls that contained "false" or "misleading" statements.

First, despite the fact that he is a certified fraud examiner, Mr. Regan did not analyze the number of false or deceptive calls at Zovio. Rather, he only tallied the number of ***noncompliant*** calls. (12/2 Tr. 71:16-17 [Regan: "My analysis was 'compliant' versus 'noncompliant.'"], 68:11-12 ["I didn't attempt to figure out whether a noncompliant statement was a false [deceptive, or

misleading] statement."].) The evidence showed that calls were noncompliant, even when they were not false, misleading, or deceptive. This is because Zovio's compliance department monitored for many factors unrelated to deception (including exemplary customer service and best practices). (12/13 Tr. 20:25-21:1 [Chappell: "[We] monitor for best practices, policies, procedures of our company, regulations from [] the Department of Ed and other different outside organizations."]; 11/10 Tr. 16-28 [Parenti].) For instance, a call was noncompliant (and thus included in Mr. Regan's calculation) if the "[admissions counselor] did not ask the approved standard questions to determine if the student is eligible to apply for financial aid," which appeared on 2,938 distinct scorecards in Mr. Regan's analysis. (Ex. 3727.) An admissions counselor's failure to ask the company's standard financial aid eligibility questions does not mean that the admissions counselor actually said anything false, misleading, or deceptive. (For example, financial aid could have not been discussed at all on these calls). A violation of Zovio's internal compliance policy is not a violation of law, much less proof that a false or deceptive statement has been made.

Second, Mr. Regan erroneously counted noncompliant topics that were irrelevant to the issues in this case. For example: "[counselor] advised the student to complete an admission application without adhering to the MAPS qualifying sequence" (appeared on 1,147 distinct scorecards); "[counselor] provided detailed information regarding another school/university" (appeared on 957 distinct scorecards); "Student was not made aware that they can run their own NSLDS report" (appeared on 877 distinct scorecards); "A representative advises student about detailed information regarding TR terms instead of referring the student to the HR Department of their company"; "AC recommended a password for the student to use"; "Representative referred to the University as a 'company'"; and "Representative advised student that classes are easy." (See Ex. 3727.) Mr. Regan counted all of these irrelevant categories in his analysis because the AG told him to do so.

Third, Mr. Regan counted "development opportunity" calls as noncompliant, even though calls designated as a development opportunity merely indicated an area for improvement, not a noncompliant statement.

Fourth, Mr. Regan's analysis was faulty because he used the wrong scorecards for his analysis. The database that held the final compliance scorecards at Zovio was the SQL database. (12/13 Tr. 11:22-28 [Chappell: "SQL contains only completed, finalized scorecards,"]; see also Ex. 3432.) Yet Mr. Regan combined the SQL database with scorecards that were in random Excel files, even though he could not and did not ensure the Excel file included only final, non-duplicative scorecards. (12/2 Tr. 79:6-15 [Regan].)

Fifth, Mr. Regan's analysis was unreliable because his denominator of scorecards (from which his noncompliance percentage was calculated) was artificially depressed, since it did not capture all relevant, compliant scorecards. By depressing his denominator (based upon assumptions provided by the AG), Mr. Regan inflated the percentage of noncompliant calls.

Specifically, Mr. Regan admitted that the denominator should be the number of all Zovio calls about relevant topics. But, because Zovio's compliance department was focused on finding *noncompliant* calls, it did not code all calls that were *compliant* as such. Thus, Mr. Regan excluded approximately 70,000 calls that should have been included. (12/2 Tr. 140:21-141:5;12/9 Tr. 208:1-14 [Chappell: "[W]hen [compliance specialists are] marking it, they would mark only the statements that were incorrect and the rest would be compliant."]; 12/13 Tr. 34:25-35:7.) By excluding the 70,000 scorecards, Mr. Regan did not take into account that admissions counselors may have made many *relevant*, *compliant* statements on the calls represented by those 70,000 scorecards. (12/2 Tr. 140:27-141:5.) If Mr. Regan had used the proper denominator, it would have significantly decreased the percentage of noncompliant scorecards out of the total relevant scorecards that he found.

Due to these flaws, Mr. Regan overstated the percentage of noncompliant scorecards to be 20.5%. In contrast, Dr. Jerry Wind, an expert in marketing, consumer behavior, consumer research, and marketing-driven business strategy, and current Lauder Professor Emeritus at the Wharton School of the University of Pennsylvania, used the correct dataset of calls and used only verbiages that were actually relevant to this case. (12/13 Tr. 139:18-141:6.) With this correct analysis, ***Dr. Wind testified that only 2.7% of scorecards were noncompliant on relevant topics.*** (12/13 Tr. 141:24-143:1.) The head of the compliance department similarly testified that the

compliance department had a rating of "93% fairly regularly. It picked up to 98, 99 percent." (12/14 Tr. 98:9-99:11.) This low level of noncompliance does not tell the Court what the level of false or deceptive calls was because "noncompliant" has a much broader meaning than false or deceptive. But, it does put a cap on the level of false or deceptive calls: because less than 3% of calls were noncompliant, less than 3% of calls were false or deceptive. This shows that Zovio's admissions counselors did not engage in systematic deception.

Sixth, Mr. Regan expressly admitted he was not offering any opinion on whether Zovio systematically lied to or deceived students. (12/2 Tr. 71:2-17, 109:8-11.)

b. Dr. Lucido's Flawed Recorded Call Analysis Was Insufficient To Prove Any False Or Misleading Statements Were Made To Prospective Students And Did Not Demonstrate Any Systematic Deception

The AG had the burden of proving by a preponderance of the evidence that Zovio made either untrue or deceptive statements. (Bus. & Prof. Code, §§ 17200, 17500 *et seq*.) An untrue statement is one that is ***literally false***. (*Johnson & Johnson*, *supra*, 2020 WL 603964, at *17.) A deceptive statement can be one that is literally true, but is "likely to deceive" "the ordinary consumer acting reasonably under the circumstances." (*Lavie v. Procter & Gamble Co.* (2003) 105 Cal.App.4th 496, 512, 513; *Kasky v. Nike, Inc*. (2002) 27 Cal.4th 939, 951.) A statement is likely to deceive if "a ***significant portion*** of the general consuming public or of targeted consumers, ***acting reasonably*** in the circumstances, could be misled." (*Lavie*, *supra,* 105 Cal.App.4th at 508 [emphases added].)

To analyze whether conduct is misleading, courts do not consider a single statement in isolation, but rather consider the entire context of the statement. (See *Emery v. Visa Int'l Serv. Ass'n* (2002) 95 Cal.App.4th 952, 965 ["seal of approval" reference "cannot be divorced from the context in which it is used" and is not false or misleading upon review of full advertising and website]; see *Hill v. Roll Internat. Corp.* (2011) 195 Cal.App.4th 1295, 1304-05 [context is "vitally important"]; see also *F. T. C. v. Sterling Drug, Inc.* (2d Cir. 1963) 317 F.2d 669, 674

["The entire mosaic should be viewed rather than each tile separately"].)[11] Thus, ***context is critical*** in analyzing whether a statement is ***false by omission*** or ***impliedly false***.

Evidence of false statements being made to prospective students was presented in the record through a recorded call analysis conducted by Dr. Jerome Lucido, executive director of the Center for Enrollment Research, Policy and Practice at the University of Southern California. Dr. Lucido's analysis, however, was flawed on many levels that rendered his conclusions unreliable to establish the frequency that Zovio's employees made false statements to prospective students.

The AG tasked Dr. Lucido with reviewing 565 preselected transcripts of admissions counselor phone calls and identifying false or misleading statements. (11/15 Tr. 240:7-15, 25-28.) To do that, Dr. Lucido engaged his colleague, Dr. Emily Chung, to read each call transcript and elevate to Dr. Lucido those she thought contained at least one misrepresentation according to six categories provided by the AG's office. (11/15 Tr. 93:13-28.) Dr. Lucido did not listen to any of the recorded calls; instead, he and his colleague reviewed only call transcripts. (11/15 Tr. 240:10-12.) Dr. Lucido had no objective criteria or coding sheet to guide his review. He opined that there were deceptive statements in 126 of the 565 calls (25%). (11/15 Tr. 245:7-18, 245:7-23.)

Dr. Lucido's opinion is entitled to no weight and fails to show that Zovio systematically deceived students.

First, the most fundamental flaw with Dr. Lucido's recorded call analysis is that he was unable to discern or articulate which calls contained, literally, false statements, which statements were false by omission, or which statements were impliedly false. And, for statements that were false by omission or impliedly false, he impermissibly ignored the entire context of the student's enrollment journey. (11/15 Tr. 261:25-262:7.) Dr. Lucido read only the transcript of a single call—he did not listen to any of the recorded calls, he ignored the other multiple phone calls

[11] See also *Freeman v. Time, Inc.* (9th Cir. 1995) 68 F.3d 285, 290 [affirming dismissal of FAL and UCL claims where "[a]ny ambiguity that [plaintiff] [c]ould read into any particular statement [was] dispelled by the promotion as a whole"]; *In re Sony Gaming Networks & Customer Data Sec. Breach Litig.* (S.D. Cal. 2014) 996 F.Supp.2d 942, 990 [dismissing FAL and UCL claims where defendant's website directed consumers to clarifying material, including user agreement and privacy policy].

prospective students had with Zovio, he ignored the written materials Zovio provided while talking on the phone, he ignored the written material provided to students before and after the calls, and he ignored all of the pre-existing information students bring to the call. (11/15 Tr. 240:10-12, 220:25-221:12, 248:9-13; Ex. 2397 at 14-15; 11/16 Tr. 101:15-102:17 [Dr. Lucido admitted he "did not look at the online tour" that the admissions counselor walked through with the student while on the call].) Dr. Lucido ignored all of this context, but under cross-examination he conceded that context was critical when analyzing whether a statement was deceptive. (See 11/15 Tr. 218:9-13 ["[T]he notion of a misrepresentation would be dependent upon the context of the conversation and the call and – and the discussion being made."], 248:9-13.) Dr. Lucido's concession is consistent with California law which makes clear that context must be considered when analyzing whether a statement is misleading. (See *Hill v. Roll Internat. Corp*., *supra*, 195 Cal.App.4th at p. 1304-1305 [context is "vitally important"].)

Dr. Lucido's failure to consider context not only violates California law, it clearly led him to reach erroneous conclusions, most notably for calls that he claimed had material omissions or implied misrepresentations. It is impossible to know whether the omission of a fact on a single call was an "actual" omission or likely to mislead any prospective student without analyzing whether Zovio provided that information during a separate call or writing, or even in writing during the very call he was analyzing. Yet Dr. Lucido conceded that he never analyzed whether the fact omitted on a single call was provided at one or more other points to prospective students. (11/15 Tr. 220:25-221:5, 225:13-16.)

Context is equally crucial to determine if calls Dr. Lucido called "impliedly misleading" were actually deceptive. For an implied misrepresentation, actual empirical evidence of consumer understanding is needed to determine how any single (or surely many) consumers will interpret the statement. Yet, Dr. Lucido provided no empirical evidence to support his statement that some calls were impliedly misleading.

As mentioned, this clearly led Dr. Lucido to reach erroneous results. For example, Dr. Lucido identified implied misrepresentations regarding financial aid in a call transcript because the admissions counselor failed to make certain disclosures on that call. (11/16 Tr. 63:16-28 &

Exhibit 2356.) However, Dr. Lucido ignored the context of this call—he ignored that Zovio made unavoidable disclosures to that student about financial aid that were drafted by the CFPB. (11/16 Tr. 22:19-23:5.) Likewise, Dr. Lucido identified an implied misrepresentation regarding transfer credits in Exhibit 2398, where the admissions counselor referenced a number of credits "potentially" transferring into Zovio. The counselor expressly stated that he would send "an email, so you have all the information" but Dr. Lucido did not actually review what was sent in this email. (Ex. 2398 at 10:13-19, 12:14-17.)

Dr. Lucido failed to identify how many of the calls he coded as deceptive were deceptive due to omission or implied misrepresentations, as opposed to a literally false statement. (Although he could not identify any calls that had a literally false statement while on the stand). Therefore, the Court is not able to use Dr. Lucido's testimony to extrapolate to a number of deceptive statements across the population, even as to literally false statements.

Second, Dr. Lucido failed to apply the reasonable student standard in his analysis. (See *Lavie*, *supra*, 105 Cal.App.4th at p. 508 ["'Likely to deceive' implies more than a mere possibility that the advertisement might conceivably be misunderstood by some few consumers viewing it in an unreasonable manner."].) Rather, he applies his own personal opinion about "good standard practice." (11/15 Tr. 184:19-21.) But Dr. Lucido's opinion about whether Zovio's admissions counselors followed best practices is not relevant to whether something is false or misleading. (11/15 Tr. 249:8-250:4 ["It was based on my experience, the studies I've read, the studies I've done, the totality of – of the expertise in this profession, and—and the standard-setting documents that I've read."].) Dr. Lucido is not an expert on consumer perception or on the perception of a reasonable student, and, therefore, the Court cannot give weight to his opinion on what would be misleading.

Third, when confronted on cross-examination with actual examples of calls that he claimed were misleading, Dr. Lucido could not identify what was misleading about them. He repeatedly said he would need to review his notes. (11/16 Tr. 54:5-8 ["It's a possible misrepresentation ... . I don't know if it's the one I coded, but – because I don't have my notes"], 49:22-23 ["I can't tell you based upon this. I would have to see it again and see my notes."].) In

the few instances where Dr. Lucido purported to identify the misrepresentation, it was clear that he had not actually identified anything false or misleading. For example, he claims that it was misleading for an admissions counselor to go through educational costs and potential loans with a prospective student rather than transferring the student to a financial aid advisor (including when the admissions counselor actually did, in fact, transfer the call to a financial aid advisor). (11/16 Tr. 63:19-66:28; Ex. 2356.) Dr. Lucido claimed it was misleading for Zovio to discuss transfer credits without offering a formal pre-evaluation, even though there is nothing actually misleading about what was said on the call—a formal pre-evaluation may be Zovio's best practice, but failing to offer one is not a lie or a misrepresentation. (11/15 Tr. 179:9-16; 11/16 Tr. 11:27-12:3.) Dr. Lucido also claimed it was misleading to provide students with a "ballpark" of the cost to attend Zovio, even where the understated ballpark was still too expensive for the student. (11/16 Tr. 103:11-105:4; Ex. 2399.)

Fourth, Dr. Lucido failed to use a reliable methodology for his recorded call analysis. The scientific standard for a recorded call analysis requires double-blind coders who do not know the purpose or sponsor of the study, an objective coding sheet, and a review of the audio of the calls. (Judicial Conference Study Grp. on Procedure in Protracted Litig. (U.S.), Handbook of Recommended Procedures for Trial of Protracted Cases, Judicial Conference of the United States, 25 F.R.D. 351, 429 (1960) ["Interviewers should have no knowledge ... of the purposes for which the survey is to [be] used."].) Yet here, Drs. Lucido and Chung knew they were hired by the AG to analyze call transcripts for misleading and accepted the premise of all the underlying facts the AG gave to him as true. (11/15 Tr. 231:9-16, 231:24:-232:3, 232:24-28.) They had no objective coding sheet and did not listen to any of the actual calls.

Fifth, Dr. Wind, conducted his own analysis of Zovio's recorded calls with proper procedures—using independent, double-blinded coders listened to the audio of a statistically significant sample of recorded calls to determine, using objective criteria, whether false or deceptive statements were made. Dr. Wind's scientific study showed that ***only 2% of recorded calls were potentially noncompliant***. (12/13 Tr. 141:7-23; 147:11-19; 152:18-26; 156:2-6; 158:6-159:2; 159:23-160:15; Ex. 1474A.)

Sixth, even if Dr. Lucido's analysis was reliable, there is no evidentiary link between Dr. Lucido's analysis and the broader factual conclusion offered by the AG that false statements were being systematically made to prospective students. None of the live student witnesses in this case were included in any of Dr. Lucido's calls and Dr. Lucido expressly admitted he was not offering any opinion on whether Zovio systematically lied to students. (11/15 Tr. 246:21-247:10.)

This Court finds Dr. Lucido's testimony to be unreliable and gives no weight to his analysis. In addition, Dr. Wind's testimony was credible and effectively rebutted Dr. Lucido's analysis.

c. Dr. Siskin's Sampling Process and Extrapolation Analysis Was Fundamentally Flawed And Cannot Be Relied Upon To Extrapolate Dr. Lucido's Findings

i. Dr. Siskin's Sampling Process and Extrapolation Analysis Was Flawed

Dr. Lucido's conclusions are flawed for another reason—they rely entirely on a sample created by the AG's statistician, Dr. Bernard Siskin. Dr. Siskin was instructed to (1) create a random sample of calls that Dr. Lucido could analyze, (2) identify the number of calls needed in the sample, and (3) extrapolate the results of Dr. Lucido's call analysis. Dr. Siskin provided an unreliable opinion for two reasons.

First, Dr. Siskin could not show that the sample he produced was random. Instead, it was produced by a consulting firm hired by the AG, trained by the AG, and that worked with the AG. No one from Epiq testified, and Epiq's results may have biased the sample.

Second, the sample size was tainted by confirmation bias. The AG told Dr. Siskin that they expected about 25% of the calls to be deceptive, and that was exactly what he and Dr. Lucido found. (11/29 Tr. 127:16-26, 129:19-21, 134:12-24.)

For these reasons, and because of the flaws in Dr. Lucido's analysis explained above, Dr. Siskin's extrapolation using Dr. Lucido's conclusions are invalid.

ii. Even if Dr. Siskin's Extrapolation Analysis Was Proper, There Was Insufficient Evidence To Draw A Conclusion That Any False Statements Were Made Systematically

Even if Dr. Siskin's extrapolation analysis was done correctly, the Court still cannot reach the proffered conclusion that Zovio systematically lied to prospective students. As discussed above, no witness or documentary evidence was presented in this record showing any corporate knowledge or ratification of deceptive conduct. Instead, the evidence in the record regarding corporate-level conduct demonstrated that Zovio acted in good faith to prohibit misrepresentations. Thus, there was no top-down scheme to deceive.

Accordingly, even a valid extrapolation could show, at most, how some admissions counselors behaved. However, because the AG never connected that behavior to any conduct (or misconduct) by Zovio, even a valid extrapolation—without an evidentiary link to corporate management—would be insufficient to make the attenuated factual leap that Zovio engaged in such behavior on a systematic basis.

d. Dr. Cellini's Return On Investment Analysis Did Not Analyze Misrepresentations Or Deception

The AG's final expert was Dr. Stephanie Cellini, a labor economist and professor at George Washington University. Dr. Cellini performed a cost/benefit analysis to determine whether students in Ashford's school of education, just one school at Ashford, earned a positive return. Dr. Cellini conceded that she had no opinion on whether any Zovio student was deceived, misled, or lied to. (12/6 Tr. 88:19-90:15.) Thus her testimony did not show that Zovio engaged in systematic deception.

2. The AG's Former Employee And Student Witnesses Did Not Prove That Zovio Systematically Misled Students

With no expert testimony, the only evidence the AG's only remaining testimony that could possible show that Zovio engaged in systematic deception was the AG's fact witnesses. But these witnesses also similarly failed to provide sufficient evidence that there was systematic deception.

To begin, the AG only presented evidence from four former admissions counselors out of

thousands and nine students out of the 691,699 students who attended Ashford University. This miniscule percentage of complaining students and former counselors does not come anywhere close to showing systematic or pervasive deception. Moreover, none of the employees or students could testify beyond their own experiences.

In sum, the Court finds that the evidence presented at trial does not show that Zovio systematically deceived or misled students and there is accordingly no basis to infer that Zovio encouraged or condoned deception.

3. Zovio's Student And Alumni Surveys Evidenced That Zovio Did Not Systematically Deceive Students

If this were not enough, Zovio presented substantial credible evidence showing that it did not engage in systematic deception. Beyond the testimony from its employees, Zovio presented empirical survey data showing that far from being deceived, "over 90 percent of students" reported they were satisfied with their experience at Zovio. (Ex. 744 at 4; 12/9 Tr. 140:3-20.)

Zovio presented a number of other student surveys; each of which showed that Zovio did not systematically deceive students. (See Exs. 742 [survey summaries]; 764B [withdrawal survey summaries].) The survey data showed the following:

- Over 90% of respondents from 2012-2020 reported they were satisfied with their experience at Zovio. (Exs. 744; 745 at 4; 1434; 12/9 Tr. 140:3-20, 150:23-151:6.)
- Over 70% of respondents reported that Zovio prepared them for their current occupation. (Ex. 744; 12/9 Tr. 142:16-20.)
- Over 90% of respondents agreed that their Zovio degree was worth the time commitment. (Ex. 744; 12/9 Tr. 145:8-16.)
- Over 90% of respondents reported that their Zovio degree made them more employable. (Ex. 745; 12/9 Tr. 150:15-19.)
- The primary reason students withdrew from Zovio was for "personal or family emergencies or issue." (12/9 Tr. 154:17-19; Ex. 764B [withdrawal survey summaries].)
- From 2012-2020, Zovio's Net Promoter Score was 50 or higher, meaning half would

recommend Ashford University to a friend or a colleague. Zovio's lead internal consumer expert, Mr. Steve Nettles explained that even "40 is a high positive response," so Zovio's consistent scores of 50 or more were "very high ... particularly in comparison to other educational institutions." (12/9 Tr. 121:19-23, 116:10-14; Ex. 7330.)

Zovio's survey data showed that students were not systematically deceived. Mr. Nettles also testified that, throughout his entire time at Zovio and after reviewing hundreds of studies, he never saw any evidence that students felt deceived. (12/9 Tr. 130:16-25, 131:18-26, 157:8-25.)

In addition to Zovio's business surveys, Dr. Wind designed and fielded a survey of actual Zovio students to determine whether they were deceived. (12/13 Tr. 161:14-27.) The objective was to analyze if the AG's allegations of systematic deception were true. (12/13 Tr. 161:14-162:7.) Dr. Wind's survey showed that:

- Many of the reasons Zovio students considered online education and enrolled at Zovio were not related to the AG's allegations (for example, convenience/flexibility, life circumstances, personal and family goals, and employer sponsorship). (12/13 Tr. 170:8-14.)
- Zovio students considered a wide variety of information when making their enrollment decisions. The most commonly considered information came from sources independent of Zovio (and therefore not subject to the AG's Complaint), including third-party websites (37.6%), web searches and social media (70.1%), conversations with friends/trusted sources (47.9%), conversations with students/alumni (34%), and websites of other schools (67.3%). (12/13 Tr. 170:2-20, 171:4-22; Wind Demonstrative at 35.)
- Basically no Zovio students exclusively considered information from Zovio advisors (0.3%) and very few students considered only information from Zovio sources (3.3%). (12/13 Tr. 171:23-172:5.)
- Only 2% of Zovio student respondents indicated that they felt deceived/lied to. (12/13 Tr. 176:4-10.)

- Less than 5% of Zovio's voluntary dropouts reported feeling deceived/lied to and only 4% had unmet expectations.

Zovio's empirical surveys showed that students were not deceived by admissions counselors, and certainly were not deceived on a pervasive or systematic basis.[12]

4. Independent, Contemporaneous Third-Party Evaluators Confirmed Zovio's Corporate Conduct Was Not Deceptive

Testimony from independent third parties further confirms that Zovio did not engage in systematic deception. Each of these organizations conducted a detailed "boots-on-the ground" review of Zovio and its practices.

First, from 2012 to 2014, Zovio retained a consulting firm (Norton Norris) that provides admissions and compliance services to colleges. (Ex. 3760, Tr. 17:7-14, 18:6-9, 28:11-19, 21:3-21:24 [Norton].) Norton Norris conducted many "mystery shopping" analyses of Zovio. From all of Norton Norris's mystery shopping efforts, Mr. Vince Norton, the managing partner of Norton Norris, testified that Zovio's admissions department was "not pushy," did "not exhibit[] bad behavior," and did "not coerc[e] students to enroll." (Ex. 3760, Tr. 102:6-10 [Norton].) In fact, Mr. Norton described Zovio's admissions department as "one of the more compliant [his company] worked with." (Ex. 3760, Tr. 102:6-10 [Norton].) Norton Norris also reported that Zovio's admissions department did not operate as a boiler room and did not apply pressure on prospective students. (Ex. 3760, Tr. 130:2-131:9 [Norton].) These conclusions were based on the Norton Norris quantitative review of Zovio's admissions counselors calls and the overall "quality of the reps" at Zovio, including their "willingness to be helpful," because "good admissions people are helpful [and they] ... try to be genuinely interested in their prospect." (Ex. 3760, Tr. 102:11-102:22 [Norton].) The fact that Zovio hired Norton Norris and paid the company to investigate its admissions department, and testimony of Mr. Norton, buttresses this Court's

[12] Because Dr. Wind surveyed Zovio students (and not just a panel of survey participants), the response rate in the survey was relatively low, but it was sufficient to be reliable and free from nonresponse bias. (12/13 Tr. 167:19-169:10 [the number of responses was sufficient to "draw statistical conclusions from"].) In order to ensure that the results of his survey were both valid and reliable, Dr. Wind did a number of analyses and sensitivity tests, all of which showed that his data was reliable and free from bias.

conclusion that there was no authorization or approval by management to mislead students and no systematic deception.

Second, the parties presented testimony from Mr. Perrelli, the Settlement Administrator who, from 2015 through 2017, oversaw Zovio's adherence to its settlement with Iowa. (Ex. 3750, Tr. 18:6-15, 35:11-15 [Perrelli].) In the Iowa AVC, Zovio voluntarily settled claims by the Iowa Attorney General that were nearly identical to the California AG's claims here. (Ex. 280 [AVC], Ex. 277 [AG's Complaint]; 12/14 Tr. 112:15-24, 115:18-117:27.)

Mr. Perrelli conducted a three-year, rigorous "boots-on-the-ground" evaluation of Zovio's compliance with the terms of the AVC by visiting Zovio's offices, interviewing its employees, analyzing recorded calls, reviewing its compliance scorecards, and understanding its training materials. (Ex. 3750, Tr. 97:1-17, 93:17-94:6 [Perrelli].) Mr. Perrelli never reported that Zovio authorized any misrepresentations in any of his reports to the Iowa Attorney General.[13] (Exs. 1153, 1154, 1155.) Mr. Perrelli also did "not report a pattern or practice of admissions counselors making misrepresentations to students," as he would have been required to do under the AVC if such conditions existed. (Ex. 3750, Tr. 50:6-13; 132:17-133:3 [Perrelli].)

Mr. Perrelli did report, however, that Zovio had *no* boiler room atmosphere, imposed *no* admissions quotas that counselors had to meet, and had a culture of compliance. (Exs. 1153 at 35; 1154; 1155 at 64-65.) Having reviewed Mr. Perrelli's lengthy reports and listened to his designated deposition, this Court finds credible his assessment that there was no pattern or practice of misleading students at Zovio.

Third, in April 2019, Zovio underwent a thorough investigation by its accreditor, WASC. In assessing schools, accrediting bodies like WASC—which are overseen by the National Advisory Committee on Institutional Quality and Integrity ("NACIQI"), a committee under the auspices of the DOE—ensure schools adhere to DOE regulations. (12/7 Tr. 92:6-12; 116:9-27; 178:15-179:16.) As part of the 2019 review, WASC assembled an independent review team, led

[13] Notably, the AG provided scant evidence of Zovio's wrongdoing post-AVC monitorship, discussed *infra*.

by national expert and founder of the National Institute for Learning Outcomes Assessment, Dr. George Kuh, to conduct an "extensive evaluation of the university." (12/7 Tr. 102:9-19, 135:19-24 [Dr. Kuh is a "very well-known person in the field—in higher education broadly, but specifically in assessment."].) The evaluation included "30 meetings with more than 140 students, faculty, staff, and administrative leaders." (Ex. 7539 at 4-5.) The WASC team also reviewed student, faculty, staff, and alumni email responses submitted to a confidential WASC email account. (*Id.*; see also Ex. 929 at 1 ["The evaluation process used for this Special Visit was extensive and involved multiple stages."]; 12/6 Tr. 221:18-27 [Pattenaude].) WASC also examined Zovio's compliance function. (See 12/7 Tr. 152:7-12 [Ogden].)

After this review, WASC reaffirmed Zovio's accreditation. (Ex. 7539.) The review team concluded that Zovio "operat[ed] with integrity and dedication to its mission" and that Zovio complies with the federal requirements on recruiting students, including by informing students about the length of time to obtain a degree, the overall cost of a degree, as well as the kinds of jobs a Zovio graduate is quailed for. (Ex. 7539 at 52, 58; 12/7 Tr. 155:9-16 [Ogden].)

In sum, each outside evaluation, conducted over separate periods of time, showed that Zovio did not engage in systematic or authorized deception, and it worked to ensure that prospective students were truthfully informed.

* * *

This Court concludes that the evidence at trial did not show that Zovio engaged in company-wide or management-authorized false or misleading conduct. The evidence showed that the few misstatements identified by the AG were unauthorized by management, contrary to training, and were what Zovio's compliance department worked to identify and remediate. Lastly, the AG's attempts to show that deceptive conduct was systematic through expert and fact witness testimony fail; the expert testimony is irreparably flawed and/or irrelevant and it is impossible to draw broad conclusions about Zovio from the testimony of a handful of former employees and students, especially when all other evidence—including evidence from independent third-party reviewers—is to the contrary. Thus, the Court concludes that there is no corporate-level liability.

C. Zovio Is Not Liable For The Few Identified Misstatements By Its Admissions Counselors.

Having established that Zovio's management did not authorize or permit any misstatements to students, the next question is whether Zovio is liable under the UCL or FAL for isolated instances of incorrect or potentially deceptive statements made by admissions counselors where those statements were neither company-wide nor approved by management. As explained above, the Court finds that even those statements, viewed in context of the students' enrollment decision as a whole, were not likely to deceive reasonable students. But even if they were, the Court still finds that Zovio cannot be held liable for those counselors' isolated conduct.

The California Supreme Court predicted this situation might arise and gave clear guidance in *Ford Dealers Assn. v. Dept. of Motor Vehicles* (1982) 32 Cal.3d 347. Specifically, while the California Supreme Court held that licensed automobile dealers could be penalized for their employees' misleading statements in some circumstances, the Court noted that it would be "unfair to hold that dealer liable for the misrepresentations of salespeople" in certain circumstances. (*Id.* at p. 361 fn. 8.) The Court stated, albeit in dictum, that a corporation would not be liable for its employees misstatements if the following four factors were met: "[1] demonstrating that it made every effort to discourage misrepresentations; [2] had no knowledge of salespeople's misleading statements; and, [3] when so informed, refused to accept the benefits of any sales based on misrepresentations and [4] took action to prevent a reoccurrence." (*Ibid.*) Applying the factors articulated in that case, Zovio is not liable under the UCL and FAL.

1. Zovio Made Every Effort To Discourage Misrepresentations, Including False Or Misleading Statements

The record in this case demonstrates that Zovio made every effort to discourage misrepresentations to prospective students. As described above in Sections V.A.2, Zovio had an extensive training program for all admissions counselors that prohibited misrepresentations and provided guidance on how counselors should make truthful statements to prospective students. As described in Section V.A.4, Zovio also created a compliance department that prevented, detected, and deterred any noncompliant conduct, including deceiving student. The evidence in this case is

nothing like the cases where courts have found principals liable for acts of agents.

In *People v. JTH Tax*, the court held a franchisor liable for false advertising where it had "controlled all of the advertising and disclosures made by franchisees." (*JTH Tax, Inc.*, *supra*, 212 Cal.App.4th at p. 1246.) There, the franchisor, Liberty, required "that any and all franchisee advertising had to be submitted to Liberty for approval prior to being used." (*Ibid.*) The court found that Liberty did *not* make every effort to prevent false advertising, in part because it in fact controlled and authorized the false advertising. (*Id*. at p. 1248.)

Similarly, in *Rob-Mac, Inc. v. Dep't of Motor Vehicles* (1983) 148 Cal.App.3d 793, 799, the court held a corporation liable for misleading statements made by an independent contractor. The court found that the *Ford Dealers* exception did not apply because there was "no evidence that [corporate management] took any affirmative steps to discourage" unlawful conduct. Moreover, the corporation "created a climate in which wrongdoing is likely to occur." (*Id.* at pp. 796, 799.)

In *People v. Dollar Rent-A-Car*, the court held a corporation liable under the UCL and FAL for where the corporation engaged in a long "history of false and misleading business practices and training procedures." (*Dollar Rent-A-Car Sys.*, *supra*, 211 Cal.App.3d. at p. 129.) Unlike in this case, the corporation's chief executive "authorized the [misleading] practice" and "personally approved the continued use of deceptive and ambiguous rental agreements." (*Id.* at p. 132.) And, the court found the senior executive "knew or reasonably should have known that agents were" misleading customers.

The AG also cited *People v. Conway* (1974) 42 Cal.App.3d 875 for the proposition that that the right to control an employee renders the principal liable for the agent's actions, but that case is inapposite. In *Conway*, the court found "sufficient evidence that [the business owner] authorized the unlawful activity." (*Id.* at p. 886.) Even after being informed of his employees' illegal practices, the owner "allowed these subordinates to continue in their positions and carry on their unlawful practices for the benefit of" the company. (*Ibid.*) The evidence showed "a repeated pattern of illegal conduct" which suggested Conway's "toleration, ratification, or authorization of their illegal actions." (*Ibid*.) Unlike in *Conway*, here there was zero evidence that Zovio

management tolerated, ratified, or authorized any unlawful activity.

The Court finds the first *Ford Dealers* factor is met.

2. Zovio Had No Contemporaneous Knowledge Of Admissions Counselors' Misleading Statements

The second *Ford Dealer* factor is met because there was no evidence that Zovio management had contemporaneous knowledge of any purported misstatements by admissions counselors.

Zovio's witnesses uniformly testified that management was not aware of misrepresentations made to prospective students, aside from rare, isolated events. The AG's only argument that Zovio knew of the misstatements is based on evidence that Zovio's own compliance department caught isolated misstatements. But this argument fails. **First**, the compliance department's work did not lead to contemporaneous knowledge, rather it was *after the fact* knowledge. **Second**, it would be perverse to use the company's good faith compliance efforts to impute contemporaneous knowledge.

But even if the Court were to consider knowledge by the compliance department as contemporaneous, the evidence still showed that the compliance department did not have knowledge of any significant level of misrepresentations. Zovio compliance management testified that any misrepresentations by Zovio employees to prospective students were uncommon, one-off instances. (12/14 Tr. 112:15-113:5 [Johnson: "I do not believe that we had a systematic really anything ... . We had things that were one-offs. I'm confident we didn't have leaders training employees in doing the wrong thing."]; Only 2 – 3% of calls were noncompliant, and an even smaller percentage were false/misleading, because noncompliance covered a lot of other topics. (11/10 Tr. 114:24-116:6 [Parenti].) 12/9 Tr. 131:27-132:26 [Nettles]; 12/14 Tr. 190:8-23 [Swenson]; 12/8 Tr. 195:26-196:2 [Curran]; Ex. 3743, Tr. 55:10-57:1 [Clark]; 12/7 Tr. 41:21-42:21 [Pattenaude].)

To the extent that the AG is suggesting that a company must have 100% compliance rates, that is simply not what the law or common sense require. In a large company with frequent consumer interactions, perfect compliance is impossible. (12/14 Tr. 99:7-11 [Johnson: "I don't

think we ever saw a month of 100[% compliance] because [] you're working with people, and there's always going to be someone who says something wrong."], 99:22-27 [Johnson: "It would just be almost impossible to have [perfect compliance with] a thousand different iterations of the verbiages handled correctly in every call."].)

The evidence is clear that Zovio management had no knowledge of anything other than isolated instances of purported misrepresentations, meeting the second *Ford Dealers* factor.

3. When Made Aware Of Potentially Misleading Statements, Zovio Followed Up With Students And Refused To Accept Benefits Based On Those Statements

The third *Ford Dealers* factor is met because the evidence showed that Zovio's compliance department and Student Dispute Resolution Committee ("SDRC") ensured that it refunded any money to students who were deceived or lied to.

Zovio's compliance department had a policy and practice to follow up with students who received inaccurate or potentially misleading information. Whenever the compliance group identified a potentially false or misleading statement on a call, it would see whether that prospective student had actually filled out an application. (12/13 Tr. 24:12-20 [Chappell].) If the student did apply, a Zovio representative would reach out to the student with the accurate information and correct any misperception. (12/13 Tr. 24:23-25:4 [Chappell]; 12/14 Tr. 78:12-21 [Johnson]; Ex. 1297 ["I want to follow up on this communication ... . If you have already let the student know that our programs do not lead to licensure, please let me know the date of the communication so that we can document it on our side."].)

If Zovio received benefits (*i.e.*, tuition payments) based on a misrepresentation to a student it would return the balance to the student.

More specifically, when a student submitted a complaint, it would go to the SDRC's investigation team.[14] (12/8 Tr. 43:25-44:2 [Smith].) The investigation team would research the claim(s) being made by the student, interview the appropriate department members to discover "the root cause of the dispute," and prepare a fact sheet with the student's request for relief and the

[14] Students were made aware that this process existed from the time of enrollment. (12/7 Tr. 23:6-27 [Pattenaude].)

research done on the issue. (12/8 Tr. 43:21-44:12 [Smith].) The goal of the SDRC was to ensure that students were "provided an avenue for resolution," acknowledging that Zovio's processes were not perfect and mistakes could occur. (12/8 Tr. 45:5-13 [Smith].)

If the SDRC determined a student was deceived or charged in error, that student was reimbursed for the amount charged due to the mistake or deception. (11/10 Tr. 166:22-26 [Parenti]; 12/7 Tr. 21:25-27 [Pattenaude: "[T]here was a sincere effort to try to resolve [student complaints] at each level and vast — and typically they were."].) For example, the SDRC found that Ms. Pamela Roberts was incorrectly advised to take one class twice and received a stipend in error, so Zovio credited Ms. Roberts' account for these errors. (Ex. 112 at 3-5 [SDRC response to Pamela Roberts' complaint and submitting an account adjustment for $1,406]; see also Ex. 113 [Zovio Settlement Agreement crediting Pamela Roberts' student account $1,918].)

Further, Zovio leadership oversaw appeals of unresolved SDRC complaints. (12/7 Tr. 25:6-27:15 [Pattenaude]; see Ex. 1241 [Dr. Pattenaude approved financial aid's recommendation to write off student account balance of $4,841]; 12/8 Tr. 45:15-26 [Smith explaining the presidential appeal process].) Even where an investigation did not substantiate a student's claim of misrepresentation, Zovio would often still refund the money "as a good faith measure." (Ex. 1255 [refunding a student for all costs related to university attendance in response to student's complaint].)

The evidence indicates Zovio refused to accept the benefits of purported misrepresentations, even when it was not clear whether a student had indeed been misled, satisfying the third *Ford Dealers* factor.

4. Zovio Took Actions To Prevent Further Misrepresentations

The evidence showed that fourth *Ford Dealers* factor is met because Zovio's compliance department took substantial actions to prevent further misrepresentations: it monitored employees' conversations and it delivered corrective action to employees who did not follow Zovio's policies and procedures in those conversations.

As described above, Zovio's compliance department monitored all student-facing departments and assigned appropriate trainings and corrective actions to remedy any identified

noncompliant conduct. (12/9 Tr, 191:27-192:14 [Chappell].) A corrective action could be a coaching, a verbal warning, a discussion memo, a written warning, a suspension, or termination. (12/9 Tr. 217:21-222:26 [Chappell].) Such remediation was not always necessarily progressive; if conduct was sufficiently egregious, an employee could immediately be terminated. (12/9 Tr. 218:3-12 [Chappell].)

In finding that the fourth *Ford Dealers* factor is met, the Court concludes that Zovio is not liable for the isolated instances of misstatements made by admissions counselors. This Court therefore **GRANTS** Zovio judgment on liability.

D. Findings of Fact and Conclusions of Law For Remedies

While this Court finds there is no liability, even if there were liability, the AG has not met its burden of showing that it is entitled to any remedy. The Court adopts and reiterates, in full, all of the facts set forth above reflecting (a) the lack of deceptive conduct by management, (b) the lack of any evidence of any systematic deception, and (c) management's extensive efforts to provide truthful disclosures, train against any misstatements, and ensure compliance with its policies to provide students complete and accurate information. Based on those facts, even if the Court were required to find liability as to the isolated statements of certain admissions counselors, the Court would still exercise its discretion to find that the AG is not entitled to relief it seeks, including any equitable relief because of Zovio's good faith.

Independently of the foregoing, the Court finds that the AG has not carried its burden of proof as to any of the three categories of relief it requested: (1) $25 million in restitution; (2) $75 million in civil penalties; and (3) an injunction. As to restitution, the AG has not provided any basis or calculation for its $25 million request, nor is restitution appropriate because none of its experts or fact witnesses support an award of $25 million. As to penalties, the AG did not provide this Court with a probative number from which to calculate penalties, and, even if it had, and even if penalties were an appropriate remedy here, the penalty factors instruct that this Court must assess a very low penalty amount. The AG is not entitled to an injunction because it has not demonstrated any ongoing harm and Zovio has undertaken most, if not all, of the changes demanded in the AG's injunction.

1. Zovio Acted In Good Faith

As described above, the record is replete with evidence that Zovio acted in good faith by implementing a training program and corporate compliance program to guard against noncompliant statements to students, including the type of conduct challenged by the AG in this case. Based on that evidence this Court, in its equitable discretion, declines to assess any remedies against Zovio.

To highlight some of the key evidence of good faith discussed above, Zovio hired a top compliance official with extensive experience, Mark Johnson, to "build and maintain a compliance program." (12/14 Tr. 53:19-54:4 [Johnson].) Under Mr. Johnson's leadership, Zovio built a compliance program designed to comply with Department of Justice guidance and the Federal Sentencing Guidelines for organizational defendants. (12/14 Tr. 58:22-63:23 [Johnson]; Ex. 7282 [Ethics and Compliance Mission Statement].) Beyond the operations of the compliance department, the company voluntarily hired an external mystery shopping service to further assess and improve the admissions and compliance departments. (Ex. 3760, Tr. 30:11-25 [Norton].)

Zovio also dedicated significant time and efforts to creating a rigorous admissions training program. This training prohibited admissions counselors from making misstatements and it also provided practical advice for how counselors should properly disclose information to prospective students. And to ensure that prospective students were also fully informed, Zovio made repeated, clear, and unavoidable disclosures of key information.

Zovio's good faith is both relevant and persuasive in the assessment of relief in this case. (*People ex rel. Lockyer v. R.J. Reynolds Tobacco Co* (2005) 37 Cal.4th 707, 730 ["[A] defendant's good faith or bad faith is relevant to the evaluation of the fine assessed against the defendant"]; *Cortez v. Purolator Air Filtration Prods. Co.* (2000) 23 Cal.4th 163, 180-181 ["[I]n addition to those defenses which might be asserted to a charge of violation of the statute that underlies a UCL action, a UCL defendant may assert equitable considerations. In deciding whether to grant the [] remedies sought by a UCL plaintiff, the court must permit the defendant to offer such considerations."].) In this equitable action, Zovio's good faith demonstrates that even if there were liability, no relief is appropriate. (See *Leoni v. State Bar* (1985) 39 Cal.3d 609, 630.)

2. The AG Is Not Entitled To Restitution

Independent of this Court's determination that Zovio acted in good faith, the AG has not met its burden of proof to the establish that it is entitled to restitution. The AG is seeking $25 million in restitution for students who were allegedly misled into enrolling at Zovio. As described below, this Court finds that the AG presented no calculation or other evidence to support this figure, nor do the analyses of the AG's experts or the testimony of the AG's fact witnesses support this award. Therefore, even if the AG were entitled to restitution, the AG failed to prove it is eligible for the $25 million it requested.

To begin, the AG's request for $25 million in restitution is invalid under California law because the AG did not offer any calculation to support or demonstrate how it reached that number. The AG has offered no reliable method for determining (a) the number of students who enrolled after receiving a false or misleading statement, (b) the value of the benefits received from the education, or (c) the specific amount allegedly deceived students paid Zovio. Because the AG did not offer any calculation to support or demonstrate how it reached $25 million, the request must be denied. (See *Colgan v. Leatherman Tool Grp., Inc.*, *supra,* 135 Cal.App.4th at pp. 698-99 [vacating restitution award that was not "based on a specific amount found owing."].)

But the Court also extensively analyzed the record to determine if there is any evidentiary basis for the $25 million demand, and there is none.

To begin, none of the AG's expert testimony provides any basis, let alone the necessary substantial evidence to reach $25 million in restitution. In addition to the reliability and credibility flaws discussed for liability, each expert has additional flaws rendering the testimony unacceptable for purposes of restitution.

Mr. Regan's compliance scorecard analysis cannot support restitution, because he did not consider whether any of the students on the noncompliant calls actually enrolled at Zovio or the value they received/price they paid. (12/2 Tr. 109:22-110:6.) Obviously prospective students that did not enroll are not part of a restitution analysis.

Dr. Lucido's call analysis cannot be used for restitution either, because he similarly never identifies whether any of the prospective students he claims were deceptive on the calls actually

enrolled and paid tuition or costs. Dr. Lucido, in fact, conceded that he does not know if a single one of the prospective students on those calls actually enrolled at Zovio (or paid Zovio a single penny). (11/15 Tr. 223:4-8, 250:23-28.)

Finally, Dr. Cellini, the AG's retained expert on students' return on investment, also fails to provide an appropriate basis for the restitution. She did not analyze the actual value received or amount paid by students that were supposedly deceived. (12/6 Tr. 85:3-21, 86:20-88:3.) Indeed, for the school that Dr. Cellini analyzed, the AG only identified 37 students that it contends were deceived related to licensure or certification, but yet Dr. Cellini did not analyze restitution facts specific to any of them. (12/6 Tr. 85:3-21, 86:20-88:3.)

Given that none of the experts support the AG's restitution demand, this Court examined the testimony of the AG's fact witnesses and determined that they, too, did not justify such an award because (a) each admitted the received some value from their Zovio education, and (b) the AG did not provide this Court with any evidence or methodology by which this Court could assign any dollar figure to that value, thereby prohibiting this Court from calculating restitution. For example, Ms. Roberts' bachelor degree from Zovio was a prerequisite to obtaining her master's degree in addiction counseling, and served as a first step to achieving licensure as a clinical addiction specialist. She also "learned a lot" at Zovio and received value from being able to take one subject at a time, fully online, which "helped out a lot" with her severe anxiety. Ms. Tomko used her Zovio bachelor's degree to get a job as a private school teacher and doubled her prior salary, and her online Zovio education led her to discover a passion for education technology. Ms. Perez told her admissions counselor that her "long-term plan [wa]s to become a therapist, or something in the psychology career." After she earned her master's in psychology from Zovio, Ms. Perez received a job as a vocational evaluator and assessor—a job within the psychology field. Finally, Ms. Evans and Ms. Embry benefitted from being able to take online classes while continuing to work and raise their children. Yet, because it failed to provide this Court with any means to assess this value received, the AG has rendered this Court unable to calculate restitution, and therefore has not met its burden of establishing how to calculate restitution in this case. And there is simply no basis for this Court to extrapolate to a figure like

$25 million based on the testimony of these student's individualized experiences.

Moreover, the AG also cannot obtain $25 million to use in an undefined and extra-judicial claims process. California courts have rejected the process the AG proposes here. In *Kraus*, the California Supreme Court rejected the idea of a fluid recovery for representative UCL claims. (*Kraus v. Trinity Mgmt. Servs., Inc*., *supra*, 23 Cal.4th at p. 127.) Likewise, in *In re Vioxx* the court held that a class-wide restitution award was not available where there was no valid market formula to value the loss to consumers, but instead required individual inquiries. (*In re Vioxx Class Cases* (2009) 180 Cal.App.4th 116, 136 [finding that "[e]ven if plaintiffs establish, class-wide," that the defendant made misrepresentations in violation of the UCL and FAL, "no plaintiff would be able to recover without first identifying" the "actual value" received].)

In support of its proposal, the AG cites to *People ex rel. Bill Lockyer v. Fremont Life Ins. Co.* (2002) 104 Cal.App.4th 508, 531 and *People ex rel. Harris v. Sarpas* (2014) 225 Cal.App.4th 1539, 1572. However, neither *Fremont Life* nor *Sarpas* awarded restitution in the manner the AG seeks here. In *Fremont Life*, the court awarded restitution calculated as the full value for an annuity policy where every annuity policy had the same deceptive language, and the consumers uniformly received zero value in return. Similarly, in *Sarpas*, the court awarded restitution in the amount paid by every customer because every customer was deceived and "received no services in return" or "anything of value." Importantly, both cases presented specific evidence of the amount paid and owing to deceived consumers. (*e.g.*, *Sarpas*, 225 Cal.App.4th at p. 1546 [finding that consumers paid "over $2.22 million"].) There is no such evidence here and no such basis for a claims process.[15]

Accordingly, the Court **DENIES** the AG's request for restitution.

3. Civil Penalties Are Not Warranted

In analyzing the AG's request for $75 million in civil penalties, the Court took into

[15] Yet another reason restitution is not equitable in this case is because students who believe they enrolled at Ashford based on a misrepresentation have a way to get restitution: they can apply to the Department of Education for borrower defense to loan repayment and have their student loans forgiven. (34 CFR § 685.206.) The Department of Education is the proper forum to determine whether a purportedly deceived student's loans should be discharged. The AG's proposed undefined claims process is not the proper forum.

account all evidence presented at trial, as described above in Sections V.A-C, and finds that the AG presented no basis for to assess civil penalties and no means to calculate civil penalties. To obtain civil penalties, the AG needed to first meet its burden of establishing the number of violations and then courts consider a number of factors to determine the level of penalty for each violation, including "the nature and seriousness of the misconduct, the number of violations, the persistence of the misconduct, the length of time over which the misconduct occurred, the willfulness of the defendant's misconduct, and the defendant's assets, liabilities, and net worth." (Bus. & Prof. Code, § 17206(b).) The AG failed to meet its burden of proving the number of violations and, even if it had, the penalty factors would weigh in favor of assigning a nominal penalty.

As an initial matter, the AG failed to provide a reliable method to quantify the number of violations such that the Court could determine an amount of civil penalties. The AG attempted to quantify the number of civil penalties on a "per act" basis, which follows the minority approach to calculating penalties under the UCL. (See *The People v. Beaumont Inv., Ltd*. (2003) 111 Cal.App.4th 102, 129 [upholding penalties on a "per act" basis].) A majority of California courts have calculated the number of violations under the UCL using a "per victim" approach. (See *People v. Toomey* (1984) 157 Cal.App.3d 1, 23; *People v. Sup. Ct. (Olson)* (1979) 96 Cal.App.3d 181, 198; *People v. Bestline Prods., Inc*. (1976) 61 Cal.App.3d 879, 922-24; *People v. Sup. Ct. (Jayhill Corp.)* (1973) 9 Cal.3d 283, 288-289.) To calculate the number of "per act" penalties, the AG relied on the testimony of Mr. Regan, Dr. Lucido, and Dr. Siskin, but that testimony is unreliable for the reasons explained above.

Mr. Regan's evidentiary failure is particularly notable. The AG argued that the Court should impose a civil penalty (of $5,000) on Zovio based upon every noncompliant call that Zovio's own compliance department identified (as calculated by Mr. Regan). Not only is Mr. Regan's calculation inaccurate for the reasons explained, the AG's argument is unprecedented. Many, if not most, good companies have compliance departments, and every compliance department inevitably identifies some noncompliant behavior (and addresses it). There is no legal or logical basis to impose a civil penalty every time a compliance department identifies a

noncompliant incident. To impose civil penalties in such circumstances would disincentivize compliance programs. Not to mention it would be punitive to award penalties here, and there is no basis to impose punitive penalties on this record where, as described above, there was no intentional misconduct by a "managing agent" (Civ. Code § 3294)—and, in fact, management worked to ensure no misrepresentations were made to students.

The AG failed to calculate the total number of false or deceptive calls, thus there is no basis to apply the "per act" calculation. Nor is there any basis to apply a "per victim" calculation. The AG has at most identified 518 students who may have felt deceived.

Finally, even if the AG had provided this Court with a means to establish a number of violations, every civil penalty factor weighs in favor of minimal penalties. (Bus. & Prof. Code, §§ 17206(a), 17536(a) [the Court may assess a penalty "not to exceed" $2,500 per violation].) **First**, "the nature and seriousness of the misconduct" weighs against the assessment of civil penalties because—based on the testimony and the thousands of documents—there was no company-wide systematic campaign to deceive prospective students. Quite the opposite, there was a company-wide effort to instill a culture of compliance. **Second**, the length of time over which the misconduct occurred weighs against assessing civil penalties because the AG failed to show evidence of ongoing or recent misconduct. **Third**, the evidentiary record made clear that any misconduct was not intentional or willful. **Fourth**, as for Zovio's financial status, the AG's requested relief would ruin the company.

The Court finds that the AG has failed to carry its burden of proving any specific number of violations and all of the penalty factors weigh in favor of no penalty. Accordingly, the Court **DENIES** the AG's request for civil penalties.

4. No Injunction Is Necessary

The evidence at trial demonstrated that there is no basis to impose an injunction on Zovio. The AG has not presented any, let alone sufficient, evidence of current or ongoing misconduct to support its demand for an injunction. It presented no evidence of any conduct from the past year, and meager evidence postdating 2017. No student who enrolled after 2017 testified. No admissions counselor who worked after 2017 testified. The AG's case-in-chief consisted of dated

emails, dated testimony, and ceased conduct. The AG's expert analysis similarly ended in 2018 (Dr. Cellini), 2020 (Mr. Regan), 2020 (Dr. Siskin), and 2020 (Dr. Lucido). Dr. Lucido only identified ***four*** allegedly deceptive calls in 2020 (Exs. 2397-2400), which falls far short of what is required to establish an imminent threat of misconduct entitling the AG to an injunction.[16] Moreover, Ashford University no longer exists, and Zovio no longer serves the role it did previously; it now provides support services subject to the direction of UAGC. (Ex. 1320.) The AG has introduced no evidence of Zovio's current practices—how it trains admissions counselors, how it monitors admissions counselors, or how it administers financial aid. Tellingly, despite a decade-long investigation, the AG never sought a preliminary injunction against Zovio, which shows that the AG did not even believe there was ongoing harm that needed to be stopped.

In fact, to argue that purported misconduct continues to the present, the AG cited *a single* email from corporate compliance director Emiko Abe from 2021 describing one exit interview, but that email comes nowhere close to justifying an injunction. Ms. Abe testified that during her entire time monitoring exit interviews, she only saw *one* exit interview that mentioned feeling pressure. (Ex. 3759, Tr. 81:25-82:4; 85:23-25; 97:13-22 [Abe: "I had reviewed several in the course of my evaluation of exit interviews and do not recognize any other reports of any other concerns ... . It is my opinion that this was an anomaly[]."].) Ms. Abe investigated the situation and determined that there was no issue remaining. (Ex. 3759, Tr. 89:16-90:6, 95:9-11 [Abe].) Ms. Abe even attempted "several times" to follow-up with the author of the exit survey to "gain more insight from him or her into what might have led to them feeling that pressure," but the former employee did not respond. (Ex. 3759, Tr. 95:22-25 [Abe].) If anything, this email demonstrates that Zovio's compliance department took seriously any sign of concerning behavior.

Not only did the AG provide insufficient current evidence entitling it to an injunction, Zovio demonstrated that it previously made most, if not all, of the changes the AG seeks via injunction. (12/9 Tr. 69:18-21 [Dr. Farrell testified we followed AVC disclosure requirements on

[16] In one of those 2020 calls, (Ex. 2399), Dr. Lucido conceded that the student did not even rely on the admissions counselor's alleged misrepresentation in order to enroll, and the student indicated he "felt that Ashford was more than they were willing to pay at this point in their search." (11/16 Tr. 102:18-105:13.)

licensure]; 12/14 Tr. 120:2-20, 121:28-123:6 [Mr. Johnson testified that Zovio already addressed and implemented the AG's requested injunctive relief].) An injunction is not equitable when the allegedly deceptive conduct has ceased. (*People v. Nat. Assn. of Realtors* (1981) 120 Cal.App.3d 459, 476.)

Finally, the AG argues that Zovio maintains the same for-profit motive that it previously had. But, there is nothing illegal or wrongful about having a profit motive, and a profit motive is no justification under California law for an injunction. (See *Barquis v. Merchants Collection Ass'n* (1972) 7 Cal.3d 94, 111 [only "wrongful business conduct" can be enjoined].) Because the AG presented no credible evidence that Zovio will engage in deceptive marketing practices in the future, there is no evidentiary basis to impose any injunction.

Accordingly, the Court **DENIES** the AG's request for an injunction.

E. There is Insufficient Evidence To Support Any Remedy For The AG's Debt Collection Claims And Demands

The AG seeks penalties, restitution of fees paid, and an injunction based on Zovio's debt collection practices that lasted from March 2008 until December 19, 2013. (12/15 Tr. 185:21-23; Ex. 3642 at ¶ 6.) While the AG argues that Zovio illegally profited by charging students unlawful debt collection fees, even if the AG had presented any evidence of an actual legal violation, the evidence showed that Zovio almost never recovered the money students owed it, and the AG did not present any calculation to support the remedies or relief sought.

First, the fee was not a source of profit for Zovio. The collection fee was approved as a pass-through cost so that Zovio "would be made whole" on the student's debt owed, not so that Zovio would receive any sort of payment above what it was owed. (Ex. 3758, Tr. 180:12-14, 194:21-195:1 [Moore].) Students were asked to pay the debt that was owed to Zovio, as well as the collection fee that Zovio incurred due to the student's failure to timely pay, as a pass-through charge. (Ex. 3758, Tr. 183:6-17 [Moore].) Zovio did not "pad[] their bottom line" or generate increased profit by charging students debt collection fees, but added the 33.33% fee only so Zovio could collect the full amount of debt, accounting for the collection agency's commission rate. (12/15 Tr. 9:9-11; Ex. 3758, Tr. 194:15-195:3 [Moore].)

In fact, very few students paid any part of their debt owed to Zovio once they were assessed a debt collection fee (4,413 students between March 1, 2009 and September 30, 2014), and very few of those students paid (472) their entire balance. (Ex. 3642 at ¶¶ 9, 10.) This does not amount to a practice warranting penalties because, aside from the 472 students who paid their balance in full, all students paid *less* than the amount they owed to Zovio plus the fee, and most students who were assessed a fee did not pay the amounts they owed Zovio at all.

Second, in signing the enrollment agreement, students agreed to pay the reasonable collection costs incurred by Zovio in collecting any unpaid balance due to the Zovio on the student's account. (Ex. 1122 at 9.)

Third, the record does not support the AG's requested relief. As a preliminary matter, the debt collection stipulation entered into by the parties at Exhibit 3642 does not concede liability, as the AG attested. This stipulation cannot be used to establish a penalty violation count, especially where no student testified in this case that they paid a collection fee in response to an allegedly unlawful debt collection letter. As to an injunction, Zovio voluntarily ceased the debt collection practices in 2013. (Ex. 3758, Tr. 179:13-16, 187:1-23 [Moore].) There is therefore no evidentiary support in the record that an injunction is warranted. As to restitution for the fees paid, the AG did not present at trial any calculation of the fees paid, and the evidence showed that all but 472 of the students who were assessed a debt collection fee did not pay Zovio the amount they owed Zovio.

Accordingly, this Court **GRANTS** Zovio judgment on liability as to its debt collection practices and the Court **DENIES** the AG's request for penalties, restitution of fees paid, and an injunction based on Zovio's debt collection practices.

VI. CONCLUSION

For all of the foregoing reasons, the Court enters Judgment for Zovio.

Dated: January 28, 2022

SIDLEY AUSTIN LLP

By: *Chad S. Hummel*
CHAD S. HUMMEL

Attorney for Defendants
Ashford University, LLC and Zovio, Inc

PROOF OF SERVICE

STATE OF CALIFORNIA)
) SS
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action. My business address is 555 W. Fifth Street, Suite 4000, Los Angeles, California 90013.

On January 28, 2022, I served the following document described as: **DEFENDANTS' PROPOSED STATEMENT OF DECISION** on all interested parties in this action as follows:

Vivian Wang; Vivian.Wang@doj.ca.gov
Emily C. Kalanithi; Emily.Kalanithi@doj.ca.gov
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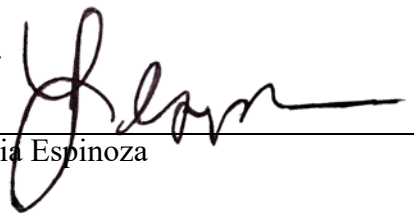
☒ (VIA E-MAIL OR ELECTRONIC TRANSMISSION) Based on agreement of the parties to accept service by e-mail or electronic transmission, I caused the document(s) to be sent to the person(s) at the e-mail address(es) listed above. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on January 28, 2022 at Los Angeles, California.



Leticia Espinoza