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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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

Plaintiffs,

vs.

UNIVERSITY OF SOUTHERN
CALIFORNIA and 2U, INC.,

Defendants.

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

Assigned to: Hon. George H. Wu

**DEFENDANT UNIVERSITY OF
SOUTHERN CALIFORNIA'S
NOTICE OF MOTION AND
MOTION TO EXCLUDE OPINIONS
& TESTIMONY OF PLAINTIFFS'
EXPERT WITNESS J. MICHAEL
DENNIS**

Date: October 24, 2024
Time: 8:30 a.m.
Ctrm: 9D

MOTION AND NOTICE OF MOTION

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on October 24, 2024, at 8:30 a.m., or as soon thereafter as the matter may be heard, in Courtroom 9D of the First Street Courthouse, located at 350 West 1st Street, Los Angeles, California, 90012, Defendant University of Southern California (“USC”) will, and hereby does, move the Court for an order excluding the opinions and testimony of Plaintiffs’ expert Dr. J. Michael Dennis for purposes of class certification, summary judgment, and trial.

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

This motion is made following the videoconference of counsel under L.R. 7-3, which took place on September 6, 2024.

Dated: September 13, 2024

Respectfully submitted,

SHOOK HARDY & BACON L.L.P.

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

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **INTRODUCTION**

3 Plaintiffs' expert Dr. J. Michael Dennis proposes (but has not yet developed or
4 executed) conjoint surveys and analysis aimed at estimating the purported market price
5 that USC's Rossier School of Education ("Rossier") tuition would have been had
6 Rossier received the U.S. News & World Report ("US News") ranking Sara Neher
7 opines Rossier should have received. Dennis suggests that the difference between
8 Rossier's actual tuition and what the market price for Rossier's tuition would have been
9 based on Neher's adjusted ranks is a "price premium" that students paid.

10 Because Neher's opinions regarding the adjusted ranks should be excluded, so
11 should any opinion from Dennis that is based on those adjusted ranks. Further, Dennis's
12 proposed methodology is based on multiple unfounded assumptions, including: (1) that
13 tuition is set at market price; and (2) that Rossier's tuition was, or would have been,
14 responsive to US News's rankings. Dennis's proposed methodology, lacking crucial
15 details, is also too undeveloped at this stage to be considered sufficiently reliable. For
16 any or all of these reasons, USC respectfully requests this Court exclude Dennis's
17 opinions and testimony.

18 **BACKGROUND**

19 Plaintiffs bring a putative class action against USC, alleging that Rossier's high
20 ranks on U.S. News's annual list of "Best Graduate Schools of Education" were inflated
21 by Rossier's misreporting of data to US News. *See* Dkt. 67. Plaintiffs allege that, "[a]s
22 a result, students paid tuition price premiums that they otherwise would not have." *Id.*
23 at ¶ 49. Plaintiffs allege they "would not have attended had USC Rossier been ranked
24 in a lower position given the high price tag of the school and/or would not have paid
25 nearly as much." *Id.* at ¶¶ 127, 139, 149; *see also id.* at ¶ 157.

26 Plaintiffs retained Dennis to "propose a reliable methodology for measuring any
27 price premium paid by Class Members that is solely attributable to" USC's "advertising
28 and marketing" that allegedly "misled Class Members into overpaying for tuition ...

1 because of their belief that the [*sic*] USC Rossier was a highly ranked graduate
2 program.” **Exhibit (“Ex.”) 1**, Dennis Report, p. 9. Dennis suggests the “market price
3 premium attributable to” USC’s alleged “misrepresentation can be determined through
4 one or more choice-based conjoint surveys.” *Id.* at p. 17.

5 Dennis proposes two “choice-based conjoint surveys,” to be conducted at a future
6 date, for the purpose of estimating “what USC Rossier’s prices would have been ‘but
7 for’ the harmful act.” *Id.* at p. 9-10. In these proposed conjoint surveys, respondents
8 would be presented with sets of three hypothetical graduate school programs. *Id.* at p.
9 27, 30. The hypothetical programs would be described using different characteristics
10 or attributes, including, for example, “ranking” of the program (*e.g.*, “1 to 9,” “10 to
11 19,” etc.), “school type” (*e.g.*, “public,” “private, non-profit,” “private, for profit”), and
12 a dollar value representing the “program costs” (*e.g.*, “\$50,000”). *Id.* at p. 25, 29.
13 Respondents would be asked to select which of the programs presented they prefer, and
14 whether they would “actually be willing to choose” the selected program at the indicated
15 cost. *Id.* at p. 26, 27. Dennis proposes that the survey results can then be used to conduct
16 a “market simulation” to estimate “the price premium that reasonable consumers paid,
17 if any, as a result of [USC’s] use of the alleged deception to market its programs as
18 highly ranked.” *Id.* at p. 33-35.

19 According to Dennis, his methodology would allow him to calculate the
20 difference between the actual tuition prices paid by putative class members and the
21 estimated “market-clearing price in [the] but-for world,” which Dennis defines “as a
22 world where the actual U.S. News rankings [for Rossier] were in fact between 34 and
23 64.” *Id.* at p. 36. The “actual U.S. News rankings” that Dennis refers to are the
24 purported “adjusted ranks” that Plaintiffs’ expert Sara Neher opines Rossier would have
25 had in the 2018 through 2022 editions of US News’s rankings if Rossier had not
26 misreported certain data. *Id.* at p. 8. Dennis admits that, if Neher’s adjusted ranks for
27 Rossier are inaccurate, he “wouldn’t go forward” with his conjoint surveys absent
28 “accurate re-estimations” of ranks. **Ex. 2**, Dennis Deposition, p. 49:22-24.

LEGAL STANDARD

This Court acts as a “gatekeeper” for expert testimony, ensuring the proposed expert’s testimony “both rests on a reliable foundation and is relevant to the task at hand.” *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993); *see also Grodzitsky v. Am. Honda Motor Co., Inc.*, 957 F.3d 979, 984 (9th Cir. 2020) (“In evaluating challenged expert testimony in support of class certification, a district court should evaluate admissibility under the standard set forth in *Daubert*....”) (quotations/brackets omitted). Before a person can be “cloaked with the mantle of an expert,” “care must be taken to assure that [the] proffered witness truly qualifies as an expert, and that such testimony meets the requirements of Rule 702.” *Jinro Am. Inc. v. Secure Invs., Inc.*, 266 F.3d 993, 1004 (9th Cir. 2001).

Plaintiffs have the burden of proving that Dennis’s testimony is admissible under Federal Rule of Evidence 702. *Cooper v. Brown*, 510 F.3d 870, 942 (9th Cir. 2007). Rule 702 provides:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the proponent demonstrates to the court that it is more likely than not that:

- (a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert’s opinion reflects a reliable application of the principles and methods to the facts of the case.

“Rule 702 was amended recently to clarify and emphasize that expert testimony may not be admitted unless the proponent demonstrates to the court that it is more likely than not that the proffered testimony meets the admissibility requirements set forth” in the Rule. *Boyer v. City of Simi Valley*, No. 19-CV-00560, 2024 WL 993316, at *1 (C.D.

1 Cal. Feb. 13, 2024) (quotations omitted). “[P]revious holdings that the critical question
2 of the sufficiency of an expert’s basis, and the application of the expert’s methodology,
3 are questions of weight and not admissibility are an incorrect application of Rules 702
4 and 104.” *Id.* (quotations omitted). “The Court is required to analyze the expert’s data
5 and methodology at the admissibility stage more critically than in the past.” *Id.*

6 ARGUMENT

7 **I. Dennis’s Proposed Methodology Relies on Neher’s Inadmissible Opinions.**

8 An “expert whose proffered testimony relies on another expert’s theories that
9 have been or may be excluded as unreliable should also be excluded.” *Masimo Corp.*
10 *v. Apple Inc.*, No. 20-CV-00048, 2023 WL 2633961, at *4 (C.D. Cal. Feb. 10, 2023)
11 (quotations omitted). As noted, Dennis’s proposed methodology relies on Neher’s
12 opinions regarding Rossier’s purported “adjusted ranks.” **Ex. 1**, p. 8, 36; **Ex. 2**,
13 p. 49:22-24. Indeed, Neher’s opinions are essential to Dennis calculating any supposed
14 price premium¹ because “to calculate any price premium estimate,” he must “have
15 information on that but for world of what the rankings would have been if not for the
16 alleged deception.” **Ex. 2**, p. 50:1-10. Because Dennis has not calculated any adjusted
17 ranks, himself, he must rely on Neher’s opinions. *Id.* at p. 58:13-19.

18 For the reasons discussed in USC’s separate Motion to Exclude Opinions &
19 Testimony of Plaintiffs’ Expert Witness Sara Neher, Neher’s opinions regarding
20 Rossier’s adjusted ranks are inadmissible and should be excluded. If this Court
21 excludes Neher’s opinions, then Dennis admittedly will not go forward with his
22 proposed surveys (*Id.* at p. 49:22-24), so he will have no opinions to offer. However,
23 in the event Dennis decides to nevertheless proceed, any price premium opinion or

24 ¹ Although Dennis refers to a “price premium,” his proposed methodology, “at best,
25 can only measure survey respondents’ willingness to pay” because it “does not capture
26 any ‘supply side’ considerations such as USC’s ability to change its admissions policy,
27 the costs of providing the educational services, or the reactions of competitors.” **Ex. 3**,
28 McCrary Report, p. 18-19; **Ex. 4**, Wilcox Deposition, p. 102:20-23 (“[T]he price
premium that he constructed is the -- first of all, is a willingness to pay, not a price
premium, and I want to be clear about that.”).

1 testimony from Dennis that is based on Neher's excluded opinions would have to be
2 excluded, as well. *See Masimo*, 2023 WL 2633961, at *4.

3 **II. Dennis's Proposed Methodology Relies on Unfounded Assumptions.**

4 Because expert testimony must be based on sufficient facts or data, "expert
5 opinion is properly excluded where it relies on an assumption that is unsupported by
6 evidence in the record and is not sufficiently founded on facts." *Nuveen Quality Income*
7 *Mun. Fund Inc. v. Prudential Equity Grp., LLC*, 262 Fed. App'x 822, 824 (9th Cir.
8 2008); *see also McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 807 (9th Cir. 1988)
9 (affirming exclusion of expert's study that "rests on unsupported assumptions and
10 unsound extrapolation"). Dennis's proposed methodology relies on such assumptions.

11 **A. Dennis improperly assumes tuition is set at the market price.**

12 First, Dennis assumes that tuition is set at the market price (or "market-clearing"
13 price) of education, *i.e.*, the price at which supply equals demand. **Ex. 1**, p. 17, 22;
14 **Ex. 3**, p. 4. Dennis seemingly makes this assumption because, without it, a conjoint
15 analysis is inappropriate. "[C]onjoint analysis cannot be used ... in markets that don't
16 operate in normal supply-and-demand conditions." **Ex. 4**, p. 60:19-23.

17 Higher education does not operate in normal supply-and-demand conditions. *Id.*
18 The supply of higher education is different from the supply of typical products. **Ex. 3**,
19 p. 7. Typically, scarcity of a product is resolved by price, meaning that when consumers
20 demand more of a product than what is available, sellers can increase profits by raising
21 their prices to the point where supply will match demand. *Id.* at p. 7-8.

22 In the context of higher education, universities often address scarcity a different
23 way, via selective admissions, not price. *Id.* at p. 8. As a result, changes in demand
24 will not necessarily impact tuition—more demand may be addressed by reducing the
25 admissions rate, while less demand may be addressed by increasing the admissions rate.
26 *Id.* at p. 8-9. That "is clearly not a market in which prices are set using market-clearing
27 prices." **Ex. 4**, p. 69:23-24; *id.* at p. 78:4-5 ("Universities don't set market-clearing
28 prices ..."). Accordingly, absent supporting evidence, one cannot simply assume (as

1 Dennis does) that tuition is set at the market price. *See Saavedra v. Eli Lilly & Co.*, No.
2 12-CV-9366, 2014 WL 7338930, at *5 (C.D. Cal. Dec. 18, 2014) (rejecting conjoint
3 analysis for prescription drugs because, “[u]nlike markets for ordinary consumer
4 goods,” the “prescription drug market is not an efficiently functioning market”).

5 Further, unlike typical markets, the price charged in this context (tuition) is not
6 necessarily the price paid by the consumers (students). In *Saavedra*, the Court
7 observed, “The market [for prescription drugs] is further complicated by insurance
8 plans’ (or their absen[c]e’s) determinative effect on the price that an individual pays.”
9 *Id.* “[D]epending on her insurance plan, an individual might pay nothing, a percentage
10 of a ‘full price’ determined by a contract between her insurance provider and another
11 entity, a flat co-payment, or some other ‘full’ price. *Id.* As a result, “the numerous
12 complicating factors in the prescription drug market sever the relationship between
13 price and [consumers’] value.” *Id.*

14 Similarly, here, “USC Students are offered a variety of financial aid and other
15 economic incentives, including scholarships, fellowships, and grants, provided by USC
16 or by external entities.” **Ex. 3**, p. 9. “These financial incentives can break Plaintiffs’
17 presumed economic relationship between the tuition posted by USC and the factors that
18 affect students’ decisions in the but-for world.” *Id.* In other words, much like the
19 prescription drugs in *Saavedra*, “student decisions are affected not by the tuition the
20 university charges, but by the net tuition students pay.” *Id.* at p. 4.

21 **B. Dennis improperly assumes tuition responds to US News’s rankings.**

22 Second, Dennis also relies on Plaintiffs’ assumption that tuition responds to
23 changes in US News’s rankings. **Ex. 1**, p. 9-10, 16-17; **Ex. 3**, p. 6. This is another
24 unfounded assumption. *See Harnish v. Widener Univ. Sch. of Law*, No. 12-00608, 2015
25 WL 4064647, at *6-*8 (D.N.J. July 1, 2015). In *Harnish*, alumni of Widener Law
26 School (“Widener”) brought a putative class action, alleging that Widener “violated
27 consumer fraud statutes by misrepresenting the employment success of its graduates.”
28 *Id.* at *1. Much like Plaintiffs here, the *Harnish* plaintiffs’ “theory of damages [was]

1 that Widener’s alleged misrepresentations inflated its tuition prices above what they
2 should have been, and all Widener students suffered damages when they paid the extra,
3 ‘inflated’ tuition amount.” *Id.* at *6. And, much like Plaintiffs’ supposed price
4 premium here, the *Harnish* plaintiffs “intend[ed] their expert’s analysis to prove that all
5 class members paid a certain extra amount of tuition due to Widener’s alleged
6 misrepresentations about its graduates’ employment success.” *Id.*

7 The district court rejected this approach, in part, because the *Harnish* plaintiffs’
8 “theory of damages still relies on a market dynamic that they have not proved to exist,”
9 in that they “offer no evidence that a ... market dynamic adjusts law school tuition
10 levels to reflect public disclosures about the schools’ employment rates.” *Id.* at *7. The
11 district court reasoned, “The problem with this analysis is that Widener sets its tuition
12 prices, not active traders in a market for seats in its classes.” *Id.* at *8. “The [expert’s]
13 analysis may show that without the alleged misrepresentations ... Widener *should* have
14 had lower tuition prices, but it does not show that it *would* have had lower tuition
15 prices.” *Id.* On appeal, the Third Circuit affirmed on the alternative basis that the
16 *Harnish* plaintiffs’ price-inflation theory was not cognizable under state law, but it also
17 indicated its agreement with the district court’s reasoning about lack of factual support
18 for Plaintiffs’ theory:

19 Even if a price-inflation theory were cognizable under state law, the
20 plaintiffs would still be required to do more than propose it as an
21 economically plausible theory; they would need to provide proof that price
22 inflation actually occurred on this occasion, as a result of the specific
23 misrepresentation at issue. We have serious doubts about whether they
24 could do so. They offer no direct evidence that Widener changed its prices
25 in response to the employment statistics that it published and their
26 anticipated effect on the overall market.

27 *Harnish v. Widener Univ. Sch. of Law*, 833 F.3d 298, 313 n.10 (3d Cir. 2016).

1 Likewise, there is no evidence that Rossier’s tuition was, or would have been,
2 responsive to US News’s rankings. To the contrary, “empirical analysis of the
3 relationship between tuition and rankings shows that worse school rankings are not
4 associated with lower tuition.” **Ex. 3**, p. 17. For example, Boston University had a rank
5 between 30th and 64th in the subject US News rankings from 2009 to 2022, while
6 Harvard University was consistently ranked in the top 10 during that time. *Id.* at p. 13.
7 Yet, Boston University, the lower-ranked school, “reported a higher average tuition
8 over [that period] (\$48,693 per year), than Harvard (\$44,232 per year).” *Id.* at p. 13-
9 14. Similarly, Loyola Marymount University (ranked between 57th and 131st) reported
10 a higher average tuition than New York University (consistently ranked in the top 20)
11 during the same period. *Id.* at p. 14. “In other words, better-ranked schools do not
12 always charge higher tuitions, and schools ranked below the top 20 can charge a higher
13 tuition than schools ranked in the top 20.” *Id.* Simply put, “empirical analysis shows
14 that EdD tuition is not affected by changes in school rankings.” *Id.* at p. 10.

15 Rossier is no exception. From 2009 to 2022, the increase in Rossier’s EdD tuition
16 is “consistent with the growth in tuition of other schools that USC considers as its
17 competitors” and, “accounting for the general trend in tuition for competitor schools,
18 Rossier’s tuition did not increase as Rossier’s ranking improved.” *Id.* at p. 11, 15. The
19 “correlation between the growth rate of Rossier’s tuition net of the average growth rate
20 of competitor schools, and its ranking over the period of 2009 through 2021 was 0.55,
21 indicating that tuition growth tended to be *lower* when Rossier had better rankings.” *Id.*
22 at p. 15. In fact, Rossier’s “tuition **increased** after USC decided to withdraw Rossier
23 from the U.S. News rankings.” *Id.* at p. 16 (emphasis added). “Indeed, Rossier’s tuition
24 grew in 2022 (5.0 percent), 2023 (5.0 percent), and 2024 (4.9 percent) despite it not
25 having any ranking at all—in line with the average growth rate for competitor schools.”
26 *Id.* This “real-life example” refutes any notion of a rankings-based price premium and
27 renders Dennis’s proposed conjoint analysis useless. *See Briseño v. Henderson*, 998
28 F.3d 1014, 1029 (9th Cir. 2021) (observing that an expert “had a real-life example he

1 could have examined: ConAgra dropped the ‘100% Natural’ label years ago, so he could
2 have studied whether that led to the removal of the price premium”).

3 In sum, not only is there a lack of any evidence supporting the assumption that
4 Rossier’s tuition was, or would have been, responsive to US News’s rankings, *see*
5 *Harnish*, 833 F.3d at 313 n.10, but actual empirical evidence (which neither Plaintiffs
6 nor Dennis have bothered to offer) directly contradicts such an assumption. There “was
7 no price premium at all” based on Rossier’s rank in US News’s rankings; Rossier’s
8 tuition would have been the same no matter its rank. *See Mier v. CVS Health*, No. 22-
9 55665, 2023 WL 4837851, at *1 (9th Cir. July 28, 2023). If the tuition “were the same
10 regardless of the alleged misrepresentation, then there would be no difference between
11 what the [students] paid for the [tuition] and what the market price of the [tuition] would
12 have been but for the statement.” *Id.*

13 **III. Dennis’s Proposed Methodology is Too Undeveloped.**

14 Finally, even if the aforementioned assumptions were somehow supported,
15 Dennis “has yet to design the survey[s] and method he will use in his conjoint analysis”
16 beyond vague generalities. *See Saavedra*, 2014 WL 7338930, at *6. Like the expert in
17 *Saavedra*, Dennis “has not decided which attributes will be included in his model.” *Id.*
18 Dennis has merely suggested some attributes and “levels” of attributes that he *may*
19 include for his hypothetical graduate school programs (**Ex. 1**, p. 25, 29), but these are
20 far from settled. According to Dennis, he still needs to work on “the finer details around
21 the selection of levels,” *id.* at p. 22, as well as conduct cognitive interviews to determine
22 “whether [his] selection of attributes and levels is complete.” *Id.* at p. 32. In this
23 respect, Dennis has not even done the bare minimum, *i.e.*, the “preresearch” that is
24 “typically done with a conjoint analysis in order to determine the attributes that should
25 be included in the conjoint analysis.” **Ex. 4**, p. 36:8-15.

26 Dennis also still needs to “word the survey instructions ... and the choice survey
27 questions,” **Ex. 1**, p. 23, as well as conduct cognitive interviews to determine “whether
28 [his] survey questionnaire was appropriately designed and worded, whether [he]

1 provided respondents the appropriate context for making choices,” and “whether any
2 design changes are needed to assure that [he] ha[s] a properly worded and constructed
3 survey questionnaire.” *Id.* at p. 32. Dennis then needs to “pretest” his surveys, which
4 “is, in a sense, a dress rehearsal for the data collection.” *Id.* at p. 31-33. Otherwise,
5 Dennis cannot be “sure that individuals understand the wording in the ... survey
6 instrument itself, are not confused by what’s going on in the survey, and generally can
7 make their way through the survey in an effective manner or whether [Dennis] need[s]
8 to make changes in the survey prior to fielding it.” **Ex. 4**, p. 88:14-20.

9 Dennis should have already completed these basic, preliminary steps. *Id.* at p.
10 88:25-89:4. At this point, Dennis has not “done anything to test whether” the
11 incomplete “model [he] ha[s] created is actually a good model for this case.” **Ex. 2**, p.
12 47:1-5. Even if he “need not fully execute his” proposed methodology at this stage,
13 Dennis cannot put forth “a proposed conjoint analysis [that is] insufficiently detailed or
14 thorough.” *See Lytle v. Nutramax Labs., Inc.*, No. 22-55744, 2024 WL 3915361, at *10
15 & n.5 (9th Cir. Aug. 23, 2024). Absent “more concrete details,” Dennis’s proposed
16 methodology—or, more accurately, his **concept** of a proposed methodology—is too
17 “undeveloped” to allow this Court to determine that it “is sufficiently reliable to pass
18 muster under *Daubert*.”² *See Miller v. Fuhu Inc.*, No. 14-CV-06119, 2015 WL
19 7776794, at *22 (C.D. Cal. Dec. 1, 2015). Put another way, given the paucity of work
20 he has performed in this case, Dennis offers little more than a speculative guess that
21 choice-based conjoint surveys could reliably identify a classwide tuition price premium.

22 **CONCLUSION**

23 For the foregoing reasons, USC respectfully requests this Court exclude the
24 opinions and testimony of Plaintiffs’ expert Dr. J. Michael Dennis for purposes of class
25 certification, summary judgment, and trial.

26
27 ² Because Dennis’s methodology is not fully developed at this point, USC also reserves
28 the right to later challenge Dennis’s methodology should this Court permit Dennis to
finalize and execute his methodology.

1 Dated: September 13, 2024

2 Respectfully submitted,

3 **SHOOK, HARDY & BACON L.L.P.**

4
5 By: /s/ Michael L. Mallow

6 Michael L. Mallow

7 **Attorney for Defendant**
8 **University of Southern California**

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16 **CERTIFICATE OF COMPLIANCE**

17 The undersigned counsel of record for the University of Southern California
18 certifies that this brief contains 3,539 words, which complies with the word limit of
19 L.R. 11-6.1.

20 By: /s/ Michael L. Mallow

21 Michael L. Mallow