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15 **UNITED STATES DISTRICT COURT**
16 **CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION**

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

21 Plaintiffs,

22 v.

23 UNIVERSITY OF SOUTHERN
CALIFORNIA,

24 Defendant.

Case No. 2:23-cv-00846-GW-MAR;
Case No. 2:23-cv-03389-GW-MAR

CLASS ACTION

PLAINTIFFS' MEMORANDUM
OF POINTS AND AUTHORITIES
IN OPPOSITION TO
DEFENDANT'S MOTION TO
EXCLUDE TESTIMONY OF
PLAINTIFFS' EXPERT WITNESS
DR. J. MICHAEL DENNIS
UNDER FED. R. EVID. 702

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I. INTRODUCTION

This Court should deny USC’s Motion to Exclude the Testimony of Plaintiffs’ Expert Witness, Dr. J. Michael Dennis (Dkt.¹ Nos. 146, 146-1) (“Motion” or “Mot.”). Courts have routinely approved of choice-based conjoint survey designs like the one Dr. Dennis proposes here for purposes of supporting class certification, including the Ninth Circuit in *Lytle v. Nutramax Lab’s, Inc.*, __ F.4th __, No. 22-55744, 2024 WL 3915361, at *12 (9th Cir. Aug. 23, 2024). In addition, caselaw from this Circuit—including a district court decision just last year rejecting USC’s similar *Daubert* challenge to a price premium conjoint survey—are emphatic that the market-based arguments USC raises with Dr. Dennis’s survey design “go to the weight given the survey, not its admissibility.” *MacDongall v. Am. Honda Motor Co.*, No. 20-56060, 2021 WL 6101256, at *1 (9th Cir. Dec. 21, 2021) (internal quotation marks omitted); *In re Univ. of S. California Tuition & Fees COVID-19 Refund Litig.*, 695 F. Supp. 3d 1128, 1146 (C.D. Cal. 2023) (hereinafter “*In re USC*”); *In re Pepperdine Univ. Tuition and Fees Covid-19 Refund Litig.*, No. CV 20-4928-DMG, 2023 WL 6373845, at *3 (C.D. Cal. Sept. 23, 2023) (same).

The Court should thus deny USC’s Motion in its entirety.

II. FACTUAL BACKGROUND

USC does not challenge the qualifications of Dr. Dennis, who is the Senior Vice President of one of the premier survey research organizations in the United States, the National Opinion Research Center (“NORC”), where he leads the online panel survey research business. Dkt. 146-1, Dr. Dennis Decl. and Report, ¶ 13 (hereafter “Dennis Rep.”). NORC, which is affiliated with the University of Chicago, has conducted research for federal, foundation, and academic clients for 75 years, and is responsible for some of the most prestigious survey projects in the United States, including the General Social Survey and the Survey of Consumer Finance. *Id.* ¶ 13.

¹ Dkt. refers to the docket in *Favell, et al., v. Univ. of S. Cal.*, No. 2:23-cv-00846-GW-MAR.

1 Dr. Dennis has been a survey research expert for more than 20 years, authoring
2 more than 60 articles, conference and seminar papers, and book chapters. *Id.* ¶ 14. He
3 is recognized as an expert in survey research methods and is a frequent speaker at the
4 annual meetings of the American Association for Public Opinion Research (“AAPOR”)
5 and the American Statistical Association. *Id.* In recognition of his expertise in online
6 surveys, he was appointed as a member of the AAPOR Task Force on Online Panels
7 that published recommendations for researchers regarding online surveys. *Id.* ¶ 14.

8 Dr. Dennis has been involved in the design and implementation of hundreds of
9 internet-based statistical surveys, and numerous courts have found him qualified to
10 provide expert opinions. *See id.* at ¶¶ 5-7 (collecting cases) and Attachment A
11 (qualifications). In this case, Dr. Dennis has designed a reliable choice-based conjoint
12 survey to measure, using market simulation software, the market price premium, if any,
13 attributable to USC Rossier’s fraudulently procured US News ranking. Dennis Rep. ¶¶
14 28-29, 78, 80, 108-115. In other words, Dr. Dennis will test whether market prices
15 would have been lower than the tuition actually paid by putative class members in a
16 but-for world where USC had not falsified data to obtain and promote a fraudulent US
17 News ranking. *Id.*

18 A choice-based conjoint survey is a “standard marketing research technique for
19 quantifying consumer preferences for products and for the component features that
20 make up a product.” Dennis Rep. ¶ 67. Survey participants are presented with a “choice
21 task” that they repeat 12-20 times, where they are asked to select for purchase among
22 multiple hypothetical products that contain 6-8 attributes reflecting features that
23 consumers typically consider in making real-life purchasing decisions, such as brand,
24 advertising claims, product size, and, of course, price. Dennis Rep. ¶¶ 68, 71-77. In
25 making their choices, respondents are mimicking shopping in the real world by
26 considering which features matter the most and making trade-off decisions among
27 competing priorities (e.g., performance versus price). Dennis Rep. ¶ 76. After

administering these tasks multiple times to hundreds of respondents, researchers have thousands of consumer choice data points from which they can isolate the market price premium attributable to a particular feature using conjoint-specific market simulation data collection and analysis software. Dennis Rep. ¶¶ 77, 108-111.

The type of conjoint survey and analysis methodology Dr. Dennis proposes has been widely accepted by courts as being capable of measuring the price premiums associated with misrepresentations in false advertising class actions across a wide range of industries in accordance with the requirements of *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013). *See, e.g.*, Dennis Rep. ¶ 66, n.25 (collecting cases), n.26 (same).

III. LEGAL STANDARD UNDER DAUBERT

A. The Daubert Inquiry at Class Certification is Limited and Permissive

“The Ninth Circuit has emphasized *Daubert*’s guidance that FRE 702 ‘should be applied with a ‘liberal thrust’ favoring admission.’” *In re NFL’s “Sunday Ticket” Antitrust Litig.*, No. ML 15-02668 PSG, 2024 WL 2165676, at *2 (C.D. Cal. May 13, 2024) (quoting *Messick v. Novartis Pharm. Corp.*, 747 F.3d 1193, 1196 (9th Cir. 2014)); *San Bernardino Cnty. v. Ins. Co. of State of Pa.*, No. CV 21-01978 PSG, 2024 WL 1137959, at *2 (C.D. Cal. Feb. 27, 2024) (same). Courts thus “begin from a presumption that expert testimony is admissible.” *Spintouch, Inc. v. Outform, Inc.*, No. SA CV 8:21-00840-DOC-ADS, 2022 WL 17363902, at *2 (C.D. Cal. Sept. 28, 2022).

Rule 702 allows admission of expert opinions based on “scientific, technical, or other specialized knowledge” when those opinions would “help the trier of fact to understand the evidence or to determine a fact in issue.” *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589 (1993). “The district court is not tasked with deciding whether the expert is right or wrong, just whether his testimony has substance such that it would be helpful to a jury.” *Alaska Rent-A-Car, Inc. v. Avis Budget Grp., Inc.*, 738 F.3d 960, 969–70 (9th Cir. 2013). “The inquiry into the admissibility of an expert opinion under Rule 702 is a ‘flexible one.’” *Cadena v. Am. Honda Motor Co., Inc.*, No. CV 18-4007-MWF, 2024

1 WL 4005097, at *5 (C.D. Cal. Jul. 2, 2024) (quoting *Primiano v. Cook*, 598 F.3d 558, 564
2 (9th Cir. 2010)). “In evaluating expert testimony, the trial court is a gatekeeper, not a
3 fact finder. The judge is supposed to screen the jury from unreliable nonsense opinions
4 but not exclude opinions merely because they are impeachable.” *Daubert*, 509 U.S. at
5 589 (cleaned up and citations omitted). A court’s focus thus “must be solely on
6 principles and methodology, not on the conclusions that they generate.” *Id.* at 594–95.

7 Furthermore, when considering expert opinions in the context of class
8 certification, the Ninth Circuit cautions courts not to confuse class certification with
9 summary judgment, reiterating that “[m]erits questions may be considered to the
10 extent—but only to the extent—that they are relevant to determining whether the Rule
11 23 prerequisites for class certification are satisfied.” *Nutramax*, 2024 WL 3915361, at
12 *12 (quoting *Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds*, 568 U.S. 455, 466 (2013)).
13 “A court is merely to decide whether a class action is a suitable method of adjudicating
14 the case.” *Id.* (quoting *Edwards v. First Am. Corp.*, 798 F.3d 1172, 1178 (9th Cir. 2015)).

15 USC cites *Boyer v. City of Simi Valley*, No. 19-CV-00560, 2024 WL 993316, at *1
16 (C.D. Cal. Feb. 13, 2024), for the proposition that amendments to Fed. R. Evid. 702 in
17 2023 create a more exacting standard for expert proof. Mot. at 3–4. But the standard
18 under Rule 702 has not changed. Rather, “the amendment merely ‘codified what was
19 already the prevailing understanding of Rule 702’s requirements.” *U.S. v. Medtronic, Inc.*,
20 No. LA CV15-01212 JAK, 2024 WL 4002842, at *9 (C.D. Cal. July 22, 2024) (quoting
21 *Le v. Zuffa, LLC*, No. 2:15-cv-01045-RFB-BNW, 2024 WL 195994, at *5 (D. Nev. Jan.
22 18, 2024). See also *In re NFL*, 2024 WL 2165676, at *3; *McCoy v. DePuy Orthopaedics, Inc.*,
23 No. 22-CV-2075 JLS, 2024 WL 1705952, at *8–9 (C.D. Cal. Apr. 19, 2024). Moreover,
24 *Boyer* was not a class action and was decided shortly prior to trial. At class certification,
25 the Ninth Circuit recently reiterated that “there is no requirement that the [expert]
26 evidence relied upon by Plaintiffs to support class certification be presented in an
27 admissible form at the class certification stage.” *Nutramax*, 2024 WL 3915361, at *7

(collecting cases); *see also Willis v. Colgate Palmolive Co.*, No. CV 19-8542 JGB, 2023 WL 11915708, at *3 (C.D. Cal. Jan. 5, 2023) (“Limiting class-certification-stage proof to admissible evidence risks terminating actions before a putative class may gather crucial admissible evidence.”).

B. USC’s *Daubert* Challenges to Dr. Dennis Relate to Damages

Dr. Dennis’s opinions are offered to show that “damages are capable of measurement on a classwide basis.” *Just Film, Inc. v. Buono*, 847 F.3d 1108, 1120 (9th Cir. 2017) (quoting *Comcast Corp. v. Behrend*, 569 U.S. 27, 34 (2013)). The Ninth Circuit has “repeatedly found class treatment to be appropriate . . . based upon a showing that damages could be calculated on a classwide basis, even where such calculations have not yet been performed.” *Nutramax*, 2024 WL 3915361, at *7. Further, “[i]n calculating damages . . . , California law ‘requires only that some reasonable basis of computation of damages be used, and the damages may be computed even if the result reached is an approximation.’” *Pulaski & Middleman, LLC v. Google, Inc.*, 802 F.3d 979, 989 (9th Cir. 2015) (quoting *Marsu, B.V. v. Walt Disney Co.*, 185 F.3d 932, 938–39 (9th Cir. 1999)). “The standard for ‘[c]lass wide damages calculations under the UCL, FAL, and CLRA are particularly forgiving.” *Woodard v. Labrada*, No. EDCV 16-189 JGB, 2021 WL 4499184, at *38 (C.D. Cal. Aug. 31, 2021) (quoting *Lambert v. Nutraceutical Corp.*, 870 F.3d 1170, 1183 (9th Cir. 2017), *rev’d on other grounds*).

The Ninth Circuit consistently embraces the use of conjoint analysis to measure damages in class action cases. *Nutramax*, 2024 WL 3915361, at *13 (“[C]onjoint analysis is a well-accepted technique that is frequently used to establish damages in CLRA actions.”); *see also Cadena*, 2024 WL 4005097, at *5 (“Courts have confirmed [and] recogniz[ed] that conjoint analyses are now a well-recognized economic method used to study and quantify consumer preferences.”) (internal quotation marks and citations omitted). Not only is conjoint analysis widely accepted for measuring class damages based on price premium theories in general, courts in this District have approved of its

1 use as “a reasonable method for measuring value in the higher education context,”
2 including in a case against USC. *In re USC*, 695 F. Supp. 3d 1128, 1146 (C.D. Cal. 2023)
3 (hereinafter “*In re USC*”); *see also In re Pepperdine*, 2023 WL 6373845, at *3. This is
4 consistent with the academic literature, in which researchers have used conjoint surveys
5 and analysis to understand the higher education marketplace.²

6 Importantly, “as a general rule, an expert’s survey is admissible provided it is: (1)
7 conducted according to accepted principles and (2) relevant to the issues in the case.”
8 *MacDougall*, 2021 WL 6101256, at *1 (internal quotation marks and citation omitted).
9 “Technical inadequacies in a survey, including the format of the questions or the
10 manner in which it was taken, bear on the weight of the evidence, not its admissibility.”
11 *In re NFL’s Sunday Ticket Antitrust Litig.*, No. ML 15-2668 PSG, 2023 WL 1813530, at
12 *5 (C.D. Cal. Feb. 7, 2023) (quoting *Keith v. Volpe*, 858 F.2d 467, 480 (9th Cir. 1988))
13 (internal quotation marks omitted).³ Likewise, challenges to supply-side factors used,
14

15 ² Andrew Dunnett, Jan Moorhouse, Caroline Walsh, and Cornelius Barry, 2012,
16 “Choosing a University: A conjoint analysis of the impact of higher fees on students
17 applying for university in 2012,” TERTIARY EDUCATION AND MANAGEMENT, Vol. 18,
18 No. 3 (September 2012) at pp. 199–220 (using attribute for annual tuition to determine
19 the extent increased tuition fees would have an impact on applicants’ selection
20 decisions); Kevin Duncan, *Using Conjoint Analysis to Prioritize College Student Preferences in*
21 *the Time of COVID19*, 35(3) JOURNAL OF HIGHER EDUCATION MANAGEMENT (2020)
22 (examining various levels of cost and course delivery attributes on prospective students
23 preferences); Matthew M. Anderson, Andrew N. Garman, Tricia J. Johnson et al.,
24 “Understanding Student Preferences in the Selection of a Graduate Allied Health
25 Program: A Conjoint Analysis Study,” JOURNAL OF ALLIED HEALTH Vol. 49, No. 3,
26 208-214c (2020) (using conjoint analysis to “estimate utilities and importance scores of
27 six attributes: program ranking, cost, work experience, geography, distance to home,
28 and salary,” finding expected salary, US News and World Report ranking, and program
costs most significant attributes); Alison Munsch, “College Choice Criteria Utilizing
Conjoint Analysis Enabled on a SaaS Platform,” JOURNAL OF INTERNATIONAL
TECHNOLOGY AND INFORMATION MANAGEMENT, Vol. 28, No. 1, Article 4 (May 1,
2019) (testing attribute for annual tuition costs).

³ *See also Willis*, 2023 WL 11915708, at *3 (“[Defendant’s] objections to the [conjoint]

e.g., failure to rely on the actual price a product was sold for or to consider whether defendant would have sold for lower price “can [be] raise[d] on cross-examination . . . and [are] therefore not a basis for the Court to exclude Plaintiffs’ damages model.” *Cadena*, 2024 WL 4005097, at *6 (cleaned up). Methodological challenges, such as whether “an incomplete and inaccurate range of choices and risks, improper survey population, and an exaggeration of the weight consumers would give to the disclosure of the defect in real-life purchase decisions[,] . . . [also] go only to the weight of the evidence and not the admissibility.” *Id.* (concluding the conjoint survey methodology relied upon by plaintiffs’ damages experts was “sufficiently reliable for purposes of evaluating the Certification Motion,” notwithstanding defendants’ challenges to methodology, supply-side considerations, and that experts had not yet conducted the survey).

IV. ARGUMENT

In moving to exclude Dr. Dennis, USC argues that because he proposes to use the adjusted rankings submitted by Plaintiffs’ expert Sara Neher, who USC has moved to exclude, Dr. Dennis’s opinion should also be excluded. But as set forth in Plaintiffs’ Opposition to USC’s motion to exclude Neher, USC’s motion to exclude Dr. Dennis

study’s . . . methodology are ‘objections to the inadequacies of a study’ which go to ‘the weight of the evidence rather than its admissibility.’” (quoting *Hemmings v. Tidyman’s Inc.*, 285 F.3d 1174, 1188 (9th Cir. 2002)); *In re ConAgra Foods, Inc.*, 90 F. Supp. 3d 919, 947 (C.D. Cal. 2015) (experts’ disagreements on appropriateness of a certain methodology “go to the weight of the results produced by . . . [the] methodology, not to its reliability”); *Shahinian v. Kimberly-Clark Corp.*, No. CV 14-8390-DMG, 2017 WL 11595343, at *4 (C.D. Cal. Mar. 7, 2017) (disagreement among experts regarding survey design goes to weight, not admissibility, of testimony, and critiques of “expert’s survey methods are more properly addressed through cross-examination, not exclusion”); *MoroccanOil, Inc. v. Marc Anthony Cosms., Inc.*, No. CV 13-2747-DMG, 2014 WL 5797541, at *4 (C.D. Cal. Oct. 7, 2014) (“[I]t is well established that criticism of an expert’s report goes to the weight, not admissibility, of that evidence.”).

on this basis should likewise be denied. USC’s other bases for seeking to exclude Dr. Dennis are addressed below and should also be rejected.

Courts routinely recognize Dr. Dennis as a qualified expert in the area of conjoint design and analysis and admit his survey designs for purposes of calculating actual damages to support class certification.⁴ Because Dr. Dennis’s proposed conjoint survey is designed to measure the price premium all class members paid as a result of USC’s fraudulently procured ranking, his opinion is readily admissible for class certification purposes.

A. Dr. Dennis’s Conjoint Is Capable of Measuring the Price Premium Associated With the Rankings of USC Rossier

USC does not challenge Dr. Dennis’s qualifications or the decisions he made in his survey design. Rather, USC’s primary challenge is that a conjoint survey cannot reliably measure price premiums in the context of higher education, so *no one* can assess classwide damages attributable to USC’s fraud—not just Dr. Dennis. The Ninth Circuit,

⁴ See, e.g., *Cabrera v. Bayer Healthcare LLC*, No. LA CV17-08525 JAK, 2024 WL 1699357, at *12 (C.D. Cal. Feb. 23, 2024) (multi-vitamin marketing); *Cadena*, 2024 WL 4005097 (car defect); *Willis*, 2023 WL 11915708, at *20 (“deeply whitens” toothpaste label misrepresentation); *Banks v. R.C. Bigelow, Inc.*, Case No. 20-cv-06208-DDP, 2023 WL 4932894 (C.D. Cal. Jul. 31, 2023) (“manufactured in the USA 100% family owned” tea misrepresentation); *Fitzhenry-Russell v. Dr. Pepper Snapple Grp., Inc.*, 326 F.R.D. 592, 606 (N.D. Cal. 2018) (“real ginger” labeling case); *Corbett v. PharmaCare U.S., Inc.*, No. 21cv137-JES, 2024, WL 1356220, at *26 (S.D. Cal. Mar. 2024) (elderberry health claims); *McMorrow v. Modeler Int’l Inc.*, No. 17-cv-2327-BAS-JLB, 2021 WL 859137 (S.D. Cal. Mar. 8, 2021) (“nutritious” label case); *Sinatro v. Barilla Am., Inc.*, Case No. 22-cv-03460-DMR, 2024 WL 2750018 (N.D. Cal. May 28, 2024) (“Italy’s #1 Brand of Pasta” label case); *Vizcarra v. Unilever United States, Inc.*, No. 4:20-cv-02777 YGR, 2023 WL 2364736 (N.D. Cal. Feb. 24, 2023) (“natural vanilla” Breyer’s ice cream case); *Martinelli v. Johnson & Johnson*, No. 2: 15-cv-01733-MCE-DB, 2019 WL 1429653 (E.D. Cal. Mar. 29, 2019) (butter substitute label misrepresentation); *Sharpe v. A&W Concentrate Co.*, No. 1:19-cv-00768-BMC, 2021 WL 3721392 (E.D.N.Y. Jul. 23, 2021) (“vanilla” cream soda labeling case); *Dzielak v. Whirlpool Corp.*, No. 2:12-0089, 2017 WL 1034197, at *6-8 (D.N.J. Mar. 17, 2017) (improperly labeled washing machines).

however, recently confirmed that such challenges to the methodology of a conjoint survey, including the specific “market considerations” leveraged in a survey’s design, all “go to the weight given the survey, not its admissibility.” *MacDougall*, 2021 WL 6101256, at *1 (quoting *Wendt v. Host Int’l, Inc.*, 125 F.3d 806 (9th Cir. 1997)) (internal citations omitted); *see also Maldonado v. Apple, Inc.*, No. 16-cv-04067-WHO, 2021 WL 1947512, at *22 (N.D. Cal. May 14, 2021) (“[A]rguments about . . . market realities are for rebuttal experts, cross-examination, and argument.”); *Cadena*, 2024 WL 4005097, at *6 (“[P]urported [methodological] flaws [of experts’ conjoint survey] go only to the weight of the evidence and not the admissibility.”).

And in the higher education context specifically, USC conspicuously ignores an on point case in this District in which USC unsuccessfully made these same market-based arguments. *See In re USC*, 695 F. Supp. 3d at 1146–49. In that case, the court granted class certification and denied a similar *Daubert* challenge by USC to a conjoint survey measuring price premium damages between an on-campus versus online experience at USC during the COVID-19 pandemic. *Id.* at 1140–42. Relying on Dr. Ronald Wilcox, one of the experts USC presents to this Court, USC argued the plaintiffs’ expert misunderstood that tuition is not set at the market clearing level, that his analysis improperly omitted supply-side factors, such that his model would only capture students’ willingness-to-pay, and that real-world evidence made the whole exercise unreliable. *See id.* at 1147–49. Consistent with Ninth Circuit law, the court rejected these arguments, finding USC could present them to the jury but that they did not render the expert’s opinions inadmissible. *Id.* at 1149; *see also In re Pepperdine*, 2023 WL 6373845, at *3–*4 (same).

Rather than address this holding, USC leans on a case addressing the entirely distinct prescription drug market⁵ and in which the plaintiffs were advancing a “novel

⁵ Unlike in the higher education context, the prescription drug market is “complicated

theory of damages.” *See Saavedra v. Eli Lilly & Co.*, No. 12-cv-9366-SVW, 2014 WL 7338930, at *3 (C.D. Cal. Dec. 18, 2014). Unlike the typical price premium case, including this one, the plaintiffs in *Saavedra* were not asserting “that class members were harmed by being overcharged or by being induced to purchase something that they would not have otherwise purchased.” *Id.* at *3. Rather, they sought to use a conjoint survey to measure “the benefit that consumers were *deprived* of by [defendant’s] deception rather than price.” *Id.* at *4 (internal quotation marks and citation omitted). The court rejected the expert’s conjoint analysis for prescription drugs after concluding that the consumer’s perceived “value” or “benefit” of the drug was “a subjective concept distinct from the fair market value concept commonly used when calculating benefit-of-the-bargain damages.” *Id.* at *4.

Saavedra is thus not an apt analogy. Although USC seeks to leverage language in this decision, in which the plaintiffs’ expert “readily admit[ted]” that “the prescription drug market is not an efficiently functioning market”—with Dr. Dennis making no such admission here—the court acknowledged that “[i]n an ordinary market, . . . the price paid for a good that was misrepresented to have a given characteristic can serve as a proxy for the value of a product with the misstated characteristic.” *Id.* at *5. And as discussed above, academic researchers have used conjoint analysis to test the value of various attributes in the higher education industry, including tuition and fees, US News rankings, and course delivery (in-person vs. remote). *See* n.1, *supra*. *In re USC* thus correctly held that “conjoint analysis is a reasonable method for measuring value in the higher education context” and “within the realm of what is accepted in the academic

by insurance plans’ (or their absense’s) determinative effect on the price that an individual pays. This price, in turn, relies on prices set by a complex array of contracts between such entities as health plan sponsors, third-party payers, pharmacy benefit managers, retail pharmacy chains, and the drug manufacturer.” *Saavedra*, 2014 WL 7338930, at *5 (cleaned up).

literature.” *In re USC*, 695 F. Supp. 3d at 1146 (citing, *inter alia*, Esteban M. Aucejo et al., Estimating Students’ Valuation for College Experiences, 224 J. PUB. ECON. 104926 (2023)).

In addition, unlike the expert in *Saavedra*, Dr. Dennis has designed his survey⁶ and considered numerous market factors relevant to USC’s programs, including the actual tuition prices paid by class members to USC, so that his survey will accurately measure “the intersection between demand-side factors (willingness to pay) and supply-side factors (willingness to sell)] to determine the actual effect of the alleged deception on market price.”⁷ Dennis Rep. ¶¶ 82, 113. Rather than assume the supply side would change in response to changes in student demand—and forecasting what those changes would be, and how they might further impact the demand side, Dr. Dennis reasonably maintains the supply side constant. *See Hadley v. Kellogg Sales Co.*, 324 F. Supp. 3d 1084, 1108 (N.D. Cal. 2018) (noting that keeping supply-side factors constant was adequate because “all the factors that affected [the defendant’s] willingness to sell—i.e., supply—

⁶ The court in *Saavedra* noted, “perhaps most importantly, [the expert] [had] yet to design the survey and method he [would] use in his conjoint analysis . . . [and accordingly] Plaintiffs have done worse than not even advancing a reliable method of calculating classwide damages—they have advanced no damages model at all.” *Id.* at *6 (internal quotation marks and citation omitted) (criticizing expert for not having identified appropriate, relevant attributes). In contrast, Dr. Dennis has “already prepared the structure and overall design” of the conjoint survey here and advances a reliable damages model through lengthy description of its design and methodology, including the attributes he would use and ranges of attribute levels. *Compare* Dennis Rep. ¶¶ 71-106 *with Saavedra*, No. 12-cv-9366-SVW (Dkt. 83 at ¶ 20) (Decl. of Dr. Joel W. Hay).

⁷ Specifically, Dr. Dennis will use the results of his survey along with the “actual real-world tuition pricing of the MAT and EdD services sold during the class period,” which incorporates supply-side factors, such as the “actual number of units sold, the costs of delivering the services, the costs for advertising, and marketing, and margin.” Dennis Rep. ¶¶ 65, 82.

1 during the class period, like cost of goods, are reflected in the sales [quantity] and prices
2 that were actually extant in the market during that time”) (cleaned up).

3 Courts routinely approve conjoint survey designs that include real-life supply-
4 side data, like Dr. Dennis’s design does. *See, e.g., Banks v. R.C. Bigelow, Inc.*, Case No. 20-
5 cv-06208-DDP, 2023 WL 4932894, at *8 (C.D. Cal. Jul. 31, 2023) (finding Dr. Dennis’s
6 conjoint survey “admissible and adequate, at the class certification stage . . . [where he]
7 used actual historic prices and quantities as the basis for his survey, thus sufficiently
8 accounting for supply-side factors”) (cleaned up); *Maldonado*, 2021 WL 1947512, at *22
9 (“One reasonable assumption [in calculating damages]—that can be cross-examined,
10 rebutted, and argued over—is the use of the historical supply-side data.”); *Hadley*, 324
11 F. Supp. 3d at 1105–06. The type of challenges USC raises to Dr. Dennis’s methodology
12 are squarely of the type that the Ninth Circuit recently explained “go to the weight given
13 the survey, not its admissibility.” *MacDougall*, 2021 WL 6101256, at *1 (quoting *Wendt*,
14 125 F.3d at 814) (internal citations omitted); *see also Cadena*, 2024 WL 4005097, at *6
15 (“[P]urported [methodological] flaws [of experts’ conjoint survey] go only to the weight
16 of the evidence and not the admissibility).

17 In short, if Dr. Dennis’s conjoint survey reveals a price premium attributable to
18 the inflated rank, then his analysis will “reliably capture[] what it set out to capture: a
19 change in price as a result of a change in consumer behavior.” *Maldonado*, 2021 WL
20 1947512, at *22.

21 **B. USC’s “Market Realities” Arguments About Tuition Pricing Do Not**
22 **Make Dr. Dennis’s Methodology Unreliable**

23 Dr. Dennis’s survey is designed to test whether and, “if any,” then what price
24 premium is attributable to USC’s fraudulent rankings. Dennis Rep. ¶ 78; *see generally, id.*
25 ¶¶ 63-82. USC wrongly asserts that Dr. Dennis *assumes* tuition responds to changes in
26
27
28

1 US News rankings. *See* Mot. at 6–9. To the contrary, that is what his survey is expressly
2 designed to test.

3 And as discussed above, USC’s “market reality” arguments (that in the real world,
4 tuition price does not change as rankings change), are proper subjects for cross
5 examination, but they do not make Dr. Dennis’s methodology unreliable. *See e.g.*,
6 *Maldonado*, 2021 WL 1947512, at *22-23 (explaining that “an expert may express an
7 opinion that is based on facts that the expert assumes, but does not know, to be true,
8 and holding that “arguments about . . . market realities are for rebuttal experts, cross-
9 examination, and argument”); *In re USC*, 695 F. Supp. 3d at 1148–49 (“Although a jury
10 may find this argument persuasive, it is not a basis to prevent Plaintiffs from attempting
11 to prove fair market value on a different theory.”); *see also Nutramax*, 2024 WL 3915361,
12 at *13 (approving a conjoint analysis over the defendant’s objection that the
13 “assumptions underlying his economic model may not account for real-world factors”
14 (internal quotation marks omitted)); *Hadley*, 324 F. Supp. 3d at 1108 (“[C]riticisms about
15 a survey’s failure to replicate real world conditions – valid as they may be – go to issues
16 of methodology, design, reliability, and critique of conclusions, and therefore go to the
17 weight of the survey”) (internal quotation marks and citation omitted) (cleaned up).

18 USC’s extensive reliance on a District of New Jersey case is equally perplexing as
19 it is nothing more than a single, irrelevant, out-of-circuit decision specific to New Jersey
20 state law, and which did not involve conjoint analysis. The plaintiffs in *Harnish* were
21 advancing a different theory of damages specific to the securities context—and which
22 required proof of an efficient market—in an attempt to end-run individual reliance
23 requirements that prevented class certification under New Jersey and Delaware state
24 law. *See Harnish v. Widener Univ. Sch. of L.*, 833 F.3d 298 (3d Cir. 2016). Although the
25 Third Circuit affirmed the district court’s denial of class certification on grounds
26 specific to New Jersey state law, the Third Circuit actually indicated significant
27 disagreement with the district court below. *Id.* at 302, 306, 308-09 (repeatedly, albeit

1 tactfully, identifying numerous “harmless” errors by the district court, which had
2 “labored under a few misconceptions about the plaintiffs’ theory of the case,” including
3 introducing irrelevant questions into the case that were never at issue, invoking a
4 benefit-of-the-bargain theory of damages that the plaintiffs were not seeking, and
5 improperly analyzing the plaintiffs’ damages theory under a “fraud-on-the-market”
6 framework).

7 Yet, USC cites the district court’s flawed reasoning as if the Third Circuit
8 approved it. But in the footnote cited by USC, the Third Circuit merely questioned
9 whether the *Harnish* plaintiffs would have been able to prove their price inflation theory
10 in the higher education context after having offered a “rather brief” regression analysis
11 to support it. *Id.* at 313 n.10. Notably, the Third Circuit in *Harnish* did not question the
12 efficiency of the higher education market. To the contrary, the Third Circuit recognized
13 the “plausibility” of the plaintiffs’ price-inflation theory, “insofar as law schools operate
14 in largely fixed-price markets,” such that “[o]ne would imagine that [the defendant law
15 school] guesses the wisest across-the-board tuition to charge based on a reading of the
16 market and a self-assessment of how prospective students, as a whole, perceive the
17 school, including its employment statistics,” or here its rankings. 833 F.3d at 312.

18 Indeed, a fair reading of the Third Circuit’s opinion in *Harnish* is actually more
19 favorable to Plaintiffs than USC. The Third Circuit “perceive[d] no conceptual problem
20 with the plaintiffs’ proposed theory” of “‘out-of-pocket’ damages” seeking “the
21 difference between the price paid and the actual [market] value” in the higher education
22 context. 833 F.3d at 307. It further recognized that “[i]n an ordinary fraud case, this
23 would require the plaintiffs to prove that the misrepresentation entered their decision-
24 making and induced them to pay more for something than they would have otherwise—
25 in other words, prove reliance.” *Id.* at 309. However, under New Jersey law, “reliance
26 is nearly always an individualized question.” It can rarely be presumed on a class-wide
27 basis absent “the aid of [a] broad presumption” of reliance, such as that afforded by the

1 fraud-on-the-market theory, for which proof of an efficient market is required. *Id.* at
2 310-11.

3 By contrast, under California law, “class members in CLRA . . . actions are not
4 required to prove their individual reliance on the allegedly misleading statements.”
5 *Bradach v. Pharmavite, LLC*, 735 F. App’x 251, 254 (9th Cir. 2018). California courts often
6 find predominance satisfied in CLRA cases because “[i]f the trial court finds that
7 material misrepresentations have been made to the entire class, an inference of reliance
8 arises as to the class.” *Lytle v. Nutramax*, 2024 WL 3915361, at *14 (quoting *In re Vioxx*
9 *Class Cases*, 180 Cal. App. 4th 116, 129 (2009)). Proof of an efficient market is not
10 required to support a presumption of reliance here or, as previously discussed, for
11 admission of conjoint surveys at the class certification stage here. *See In re USC*, 695 F.
12 Supp. 3d at 1148–1149. In addition, “the standard for [c]lass wide damages calculations
13 under the UCL, FAL, and CLRA are particularly forgiving.” *Woodard v. Labrada*, No.
14 EDCV 16-189 JGB, 2021 WL 4499184, at *38 (C.D. Cal. Aug. 31, 2021) (quoting
15 *Lambert v. Nutraceutical Corp.*, 870 F. 3d 1170, 1183 (9th Cir. 2017), *rev’d on other grounds*).

16 USC’s analogy to the efficient market requirement in *Harnish* is a red herring, and
17 USC’s “real-life example” here that USC’s tuition increased after USC withdrew Rossier
18 from the US News rankings does not justify exclusion of Dr. Dennis’s conjoint survey.
19 In *In re USC*, the court rejected a similar argument by USC, holding that USC’s “real-
20 world evidence” that student attrition did not fall when it increased tuition was “not a
21 basis to exclude [the expert’s] opinions.” 695 F. Supp. at 1149. In fact, that court held
22 that precisely *because* USC argued that the “fair market value of a USC education is
23 whatever USC decides to charge . . . [and] tuition is essentially unmoored from ordinary
24 market forces,” the plaintiffs’ expert’s exclusion of traditional, real-world market factors
25 from his conjoint survey design did “not justify exclusion of his opinion.” *Id.* at 1149.
26 This holding likewise comports with various courts’ findings that in a conjoint survey
27 design, the selection of “market considerations [that may factor into the product’s

pricing] . . . ‘go to the weight given the survey, not its admissibility.’” *MacDougall*, 2021 WL 6101256, at *1 (quoting *Wendt*, 125 F.3d at 814).

USC’s attempt to analogize to *Mier v. CVS Health*, No. 22-55665, 2023 WL 4837851 (9th Cir. July 28, 2023), is similarly unpersuasive. In that case, the plaintiff’s expert actually relied on the defendant’s testimony that its label claims were not factored into its product pricing, such that the expert’s own opinion “could reasonably suggest there was no price premium at all.” *Id.* at *1. And in *Briseño v. Henderson*, 998 F.3d 1014 (9th Cir. 2021), the court rejected the expert’s hedonic regression analysis valuing injunctive relief (not the conjoint analysis that was never submitted), because the expert himself “effectively admit[ted] that [the regression analysis] turn[ed] on unverifiable evidence.” *Id.* at 1019–20, 1029 (internal quotation marks and citation omitted). No proper analogy to any aspect of that expert’s unverifiable testimony at the class settlement stage can be drawn to Dr. Dennis’s proposed conjoint methodology, which follows accepted principles for measuring price premium and which *does* consider “numerous real-world, supply-side factors,” offered to support class certification. Dennis Rep. ¶ 82.

C. Dr. Dennis’s Proposed Methodology Is Sufficiently Developed And Shows That Damages Are Calculable on a Classwide Basis

In *Nutramax*, the Ninth Circuit confirmed that the type of expert report submitted by Dr. Dennis is sufficient to support class certification. It affirmed the district court’s grant of class certification, rejecting defendant’s arguments that the expert had not yet written the survey questions and that the expert’s “assumptions underlying his economic model may not account for real-world factors.” 2024 WL 3915361, at *13 (internal quotation marks omitted); *see also Lytle v. Nutramax Lab’y, Inc.*, No. ED CV 19-0835 FMO (SPX), 2022 WL 1600047 (C.D. Cal. May 6, 2022). The Ninth Circuit further concluded that “unanswered questions . . . and . . . attendant

possibility of errors . . . [were] insufficient to defeat class certification.” *Nutramax*, 2024 WL 3915361, at *14.

In reaching this conclusion, the Ninth Circuit also noted that the expert’s “qualifications [were] undisputed, he [had] successfully conducted conjoint analyses in the past, and [he] testified he did not ‘envision anything particularly unique about this survey.’” *Id.* The same is true here. USC does not dispute Dr. Dennis’s qualifications; Dr. Dennis has successfully conducted conjoint analyses in the past, as evidenced by dozens of courts that have approved of or relied on his surveys in granting class certification; and Dr. Dennis articulated numerous reasons why “[t]he conjoint survey design for this study, in [his] expert opinion, will be relatively simple from the perspective of respondents and will be cognitively easy for respondents compared to standard market research conjoint surveys.” Dennis Rep. ¶ 84. He also detailed best practices he will employ in administering the survey. *Id.* ¶¶ 44, 81-98.

Largely ignoring the Ninth Circuit’s opinion in *Nutramax*, USC tries to undermine Dr. Dennis’s survey design. For example, USC challenges Dr. Dennis’s proposed methodology as “vague” because he has not finalized the attributes of his conjoint survey, but challenges to an expert’s “attribute selection . . . go to the weight given the survey, not its admissibility.” *MacDougall*, 2021 WL 6101256, at *1 (internal quotations and citation omitted). And USC overlooks pages and pages of Dr. Dennis’s report in which he describes the “the structure and overall design of the conjoint survey,” such that, notably, all that remains are “fine[] details around the selection of levels of the attributes”—not the attributes themselves. *Id.* ¶ 83.

For example, Dr. Dennis includes a table of attributes (e.g., school type, ranking, modality, etc.) he will use and which reflect the features prospective students consider when deciding which higher education program to attend across competitors, as well as descriptions of the attributes and different sample levels of each attribute, totaling at this point in his design 32 distinct choice sets. *Id.* ¶¶ 86, 90, 92, 94. He further describes

1 that each respondent will be presented with 12 choice tasks and that each choice task
2 will present 3 different products and include 8 different attributes for each, *id.* ¶ 84, and
3 he includes mock-ups of the choice tasks respondents will be required to perform for
4 both conjoint surveys, *id.* ¶¶ 89, 93.⁸ His survey design is far from “vague.”

5 USC also criticizes Dr. Dennis for not conducting a pretest, Mot. at 10, but
6 whether an expert has conducted a pretest is likewise a “bas[i]s for cross-examination
7 at trial, not exclusion.” *In re USC*, 695 F. Supp. 3d at 1149. And once again, Dr. Dennis
8 provides detailed methodology for conducting cognitive interviews, followed by
9 pretests. Dennis Rep. ¶¶ 98-103 (cognitive interviews), ¶¶ 104-106 (pretests).

10 USC also mistakenly points to Dr. Dennis’s planned-for cognitive interviews as
11 evidence that his proposed methodology is not “complete.” But, according to one of
12 the foremost experts, cognitive interviewing may be conducted at any time, “even after
13 the survey has been administered . . . [because they function] as a quality assurance
14 procedure,” and have no bearing on “providing reliable data for quantitative analysis”
15 due to their informal and unstandardized nature. Dennis Rep. ¶ 98 n.41, 100; *see also id.*
16 at ¶¶ 44, 104 (referencing following Professor Shari Diamond’s best practices, including
17 for pretesting).

18 Nor can this Court credit USC’s assertion that Dr. Dennis has not conducted
19 any “preresearch.” Mot. at 9. To the contrary, in developing his conjoint survey,
20 including the attributes he selected in his design, Dr. Dennis reviewed various
21 marketing-related documents produced by 2U, including 2U’s market plan documents
22 advising USC representatives on how to present USC Rossier’s program offerings to
23

24 ⁸ Dr. Dennis’s proposed conjoint survey design is also readily distinguishable from the
25 expert’s design in *Edwards v. Walmart, Inc.*, No. 2:18-cv-09655-GW-FFM, 2020 WL
26 13133009 (C.D. Cal. August 4, 2020) (tentative ruling denying Plaintiffs’ Motion for
27 Class Certification), where he had not yet reviewed documents provided to plaintiffs in
discovery to develop a list of attributes or attribute levels he would include in his survey.

1 prospective students, as well as dozens of documents produced by USC, including its
2 surveys of admitted students and alumni—all of which are cited in his expert report at
3 Attachment B, “List of Considered Materials.” *See also* Dennis Tr. 36:15-37:17 (Dkt.
4 No. 146-2). He also benefited from a discussion with Plaintiff’s higher education
5 consulting expert. Dennis Rep. ¶¶ 80, 86, 92. In short, he has “reached the point . . .
6 where the design is sufficiently specific,” such that he is ready “to actually test the design
7 with research subjects.” Dennis Tr. 47:12-21.

8 USC grasps at language in *Nutramax* that a conjoint analysis cannot be
9 insufficiently detailed or thorough. But Dr. Dennis’s model in this case is much more
10 similar to that in *Nutramax*, and readily distinguishable from the one he submitted in
11 *Miller*, where he was not asked to design or conduct a survey. Accordingly, in *Miller*, he
12 merely stated it was “possible and practical to design and conduct” a survey, but did
13 not actually put forth a survey design, as he has done here. *Nutramax*, 2024 WL 3915361,
14 at *10 (citing *Miller v. Fuhu Inc.*, No. 2:14-cv-06119-CAS-AS, 2015 WL 7776794, at *21–
15 22 (C.D. Cal. Dec. 1, 2015)).

16 Here, Dr. Dennis has already “prepared the structure and overall design of the
17 conjoint survey” that he will conduct in this case if the Court grants certification. *See*
18 Dennis Rep. ¶¶ 78-83. He includes a breadth of details about the types of interviews he
19 will conduct (e.g., cognitive interviews and pretest questionnaires), the materials he has
20 used in his design, and the survey population. Dr. Dennis also describes extensively the
21 “choice task” he would present to survey participants, *id.* ¶¶ 71-77, lists the “best
22 practices” he would employ in working directly with respondents, *id.* ¶ 84, provides a
23 list of attributes and levels, followed by an example of a choice task and a brief
24 description of each attribute, for both the MAT- and EdD-specific conjoint surveys, *id.*
25 ¶¶ 86-98, details specific design elements of the choice exercise that will help further
26 the reliability of his conjoint survey, *id.* ¶ 87, and lays out how he will conduct cognitive
27 interviews, *id.* ¶ 101.

Nothing in the case law suggests that all features of an expert’s conjoint survey design must be “settled.” Indeed, experts routinely refine their original design prior to conducting their final surveys. *See Willis*, 2023 WL 11915708, at *12 (denying motion to exclude expert on the basis that he “made changes to the design between his pretest and his final survey” at class certification stage). Thus, even if Dr. Dennis ultimately refines survey questions, the attributes, or attribute levels, USC’s challenges “are better directed at the weight of [expert’s] opinion, rather than admissibility.” *Id.* Because Dr. Dennis’s conjoint surveys are designed “according to accepted principles, . . . [they] should . . . be found sufficiently reliable under [*Daubert*].” *Cadena*, 2024 WL 4005097, at *5 (admitting conjoint survey designed with analogous supply-side factors); *see also* Dennis Rep. ¶¶ 44, 81, 84, 89, 93, 98 (discussing the “best practices” employed in his survey design).

Even prior to *Nutramax*, courts routinely approved conjoint survey designs similar to what Dr. Dennis offered here, including those offered by Dr. Dennis himself. *See, e.g., Willis*, 2023 WL 11915708, at *20 (concluding that plaintiff “ha[d] put forth an appropriate model for calculating damages” by way of Dr. Dennis’s proposed conjoint survey design, where he incorporated transaction data, “thus reflect[ing] the actual prices set in the marketplace by both supply and demand factors for the Colgate Products and for the competitor brands”); *see also Corbett v. PharmaCare U.S., Inc.*, No. 21cv137-JES, 2024 WL 1356220, at *26 (S.D. Cal. Mar. 2024) (rejecting challenges to Dr. Dennis similar to those USC advances here where Dr. Dennis provided analogous details about his survey design and had only prepared the structure and overall design of the conjoint survey at class certification). There is no reason this Court should not do the same here.

V. CONCLUSION

For the reasons discussed herein, USC’s Motion should be denied.

1 Dated: October 1, 2024

Respectfully submitted,

2
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CERTIFICATE OF COMPLIANCE

The undersigned, counsel of record for the Plaintiffs, certifies that this brief contains 6,999 words which complies with the word limit of L.R. 11-6.1.

Date: October 1, 2024

/s/ Annick M. Persinger

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