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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
OPPOSITION TO PLAINTIFFS'
MOTION FOR CLASS
CERTIFICATION**

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

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INTRODUCTION

Plaintiffs seek to represent a class of students in certain USC Rossier School of Education (“Rossier”) programs, alleging that they enrolled because supposedly incorrect data submitted by Rossier had caused U.S. News & World Report to issue Rossier a higher rank than it otherwise would have received. Class certification should be denied because materiality, exposure, and injury are all individual issues not susceptible to common proof, and Plaintiffs therefore cannot satisfy the typicality and predominance requirements. *First*, school rank is only one of numerous factors that may or may not influence an enrollment decision, depending on the particular student. Indeed, Plaintiffs’ own evidence demonstrates that rank was actually immaterial to most enrollees. *Second*, the named Plaintiffs’ testimony makes clear that their core complaint is the quality of their education—a theory wholly barred by the educational malpractice doctrine, even if they attempt to reframe it as about ranking. *Third*, many enrollees were not exposed to an actionable rank-based representation in the first place. And *fourth*, because there is no rank-based impact on their degrees or employment, Plaintiffs’ only claim of injury is that they overpaid for tuition due to Rossier’s rank. But the undisputed evidence shows that Rossier’s tuition is simply not responsive to rank, a necessary precondition for that theory of injury.

BACKGROUND

I. Rossier’s Programs

Rossier has offered a variety of graduate programs in education since 1918 (<https://rossier.usc.edu/about>), only two of which are at issue: (1) Rossier’s online Doctorate of Education (“EdD”) in Organizational Change and Leadership (“OCL”); and (2) a sub-portion of Rossier’s online Master of Arts in Teaching (“MAT”) program.¹ Plaintiffs don’t seek to represent students in Rossier’s other online programs,

¹ Plaintiffs seek to represent students in Rossier’s online MAT-Multi-Subject and online MAT-Single Subject programs. They don’t seek to represent students in Rossier’s online MAT-TESOL (Teaching English as a Second Language) program.

1 Rossier's in-person programs, or Rossier's PhD program (which is a small in-person
2 program for students focused on fulltime research and becoming tenured-track
3 professors).²

4 In 2008, USC's provost mandated every dean implement one online program.
5 **Ex.1**, p.51:17-22. Rossier was highly skeptical of online programs because existing
6 models weren't interactive and had a poor reputation. *Id.*, p.52:4-9, 56:5-12, 73:10-
7 74:18. Rossier became intrigued, however, after Dean Karen Gallagher met with an
8 education entrepreneur who had just left Princeton Review to found a new company
9 (2tor, which became 2U, Inc.) offering an innovative technology platform able to
10 facilitate live faculty-student interactions. *Id.*, p.53:19-54:22. Rossier also realized an
11 online option would enable it to credential more, much-needed California teachers. *Id.*,
12 p.68:13-20. It selected the MAT program for its online offering because Rossier was
13 already reworking that curriculum and could ensure consistency across modalities in
14 the process. *Id.*, p.57:8-12, 68:16-69:1. Rossier's online MAT program launched in
15 2009. *Id.*, 50:22-51:11; **Ex.3**, Response #9. It lacked competitors for several years, but,
16 by 2020, dozens of online MAT programs existed. **Ex.1**, p.95:8-96:6.

17 Rossier launched its OCL program in 2014. **Ex.2**, p.23:13-16; **Ex.3**, Response
18 #9. This program is designed for professionals (mostly in non-education fields) looking
19 to lead change in their organizations. **Ex.1**, p.96:14-97:18. Rossier offers the OCL
20 program exclusively online because OCL students are expected to continue working
21 fulltime in their respective fields. *Id.*, p.47:23-48:11, 50:2-11. OCL students take 6
22 credits per term, while PhD students take 12 credits. *Id.*, p.47:23-48:14. Very few
23 schools offer a program akin to Rossier's OCL program. **Ex.4**, Response #21.

24 **II. USN Rankings**

25 U.S. News and World Report ("USN") began ranking the doctoral programs of
26 graduate schools of education in the mid-1990s. **Ex.1**, p.137:2-4. Rossier was already
27

28 ² **Ex.1**, p.104:25-105:4.

1 participating in USN’s surveys when it hired Dean Gallagher in 2000. *Id.*, p.135:12-18,
2 348:18-20. Contrary to Plaintiffs’ allegations, Rossier had been ranked in the top 20
3 before it partnered with 2U. Dkt.#177-39 (#18 in 2006; #19 in 2008).

4 Roughly 250 education schools participate in USN’s survey each year. **Ex.1**,
5 p.190:20–21. USN’s ranking “is designed for prospective students seeking a doctorate
6 in education....” **Ex.5**, p.1. The doctoral programs of participating schools vary wildly:
7 some have only PhD programs; some have large PhD programs and small EdD
8 programs; others (like Rossier) have large EdD programs and small PhD programs; and
9 some (unlike Rossier) offer research-based EdD programs. **Ex.21**, ¶¶3-7. Despite these
10 variations, USN ranks the schools together. Participating schools don’t have access to
11 each other’s data, but certain information can be gleaned from the published metrics.
12 For example, Dean Gallagher could determine, by looking at faculty-to-student ratio
13 reported in the 2016 edition, that other schools with large EdD programs weren’t
14 submitting their EdD data to USN. **Ex.1**, p.188:17-21.

15 USN’s rankings formula is proprietary and often changes. **Ex.6**, ¶18; **Ex.7**,
16 p.81:13-24. Once surveys are submitted, it’s “opaque” and “like a black box” in terms
17 of what USN does with the data. **Ex.7**, p.47:7-10; **Ex.1**, p.218:24-219:6. That said,
18 certain general aspects are known. For instance, 40% of a school’s score comes from
19 surveys completed by the deans of competitor schools and superintendents, meaning
20 Rossier’s submission doesn’t impact 40% of its score. **Ex.1**, p.202:15-17. The
21 remaining 60% utilizes data collected from participating schools about their GRE
22 scores, acceptance rates, doctoral student/faculty ratio, percent of faculty with awards,
23 doctoral degrees granted per full-time faculty, and total research expenditures per
24 faculty member. **Ex.6**, ¶15.

25 The undisputed record evidence establishes that the “general view” of the deans
26 of participating graduate schools of education “was that U.S. News was kind of naïve
27 about how higher education functions and ... from the deans’ perspective the feeling
28 was U.S. News is interested in the – the profit side of their work ... and less concerned

1 about trying to understand the nuances of higher education.” **Ex.7**, p.30:24-31:6.³ For
2 instance, the deans repeatedly informed USN “that an Ed.D. and a Ph.D. are very
3 different kinds of degrees” that should not be “tangled” together. *Id.*, p.31:7-32:25;
4 *accord Ex.1*, p.185:10-188:8. As explained by Rossier’s Associate Dean for Academic
5 Programs, “[t]he goals of the Ph.D. program is to conduct research, publish, obtain
6 tenure track positions as researchers. And the goals of the EdD program is to support
7 [the student’s] professional goals to be a practitioner scholar.” **Ex.2**, p.25:6-10.⁴

8 For the 2019 edition,⁵ USN added a new instruction mandating the inclusion of
9 EdD, not just PhD, selectivity data. **Ex.8**, p.118:13-17, 119:25-121:9. Rossier promptly
10 informed USN that Rossier would submit only its PhD data, consistent with its past
11 practice. *Id.*, p.48:18-51:1, 109:25-110:14. Despite this disclosure, USN ranked Rossier
12 #10 that year (up from #15 the year before). **Ex.9**. For the 2020 and 2021 editions,
13 however, Rossier neither included its EdD data nor informed USN of that exclusion.⁶

14 In February 2022, USC retained Jones Day to investigate Rossier’s reporting to
15 USN and to provide related legal advice to USC. In April 2022, USC voluntarily
16 published Jones Day’s report, which concluded that Rossier excluded EdD selectivity
17 data from its 2013-2021 USN submissions, despite an express instruction that appeared
18 starting with the 2019 edition and instructed “doctoral should include both Ph.D. and
19 Ed.D. students.” Dkt.#177-2, p.1. It also observed some irregularities in Rossier’s
20 calculation and reporting of research expenditures, and flagged some “other potential

21 _____
22 ³ USC’s expert David Monk served as the dean of Penn State’s graduate school of
education during the same timeframe Dean Gallagher served Rossier. *Id.*, p.29:7-25.

23 ⁴ Rossier offers three EdD programs, including OCL. *Id.*, p.22:24-23:7.

24 ⁵ Edition dates can be confusing. USN sent its survey with this new instruction in
25 November 2017 for a survey due in early 2018 that fed into its 2019 edition (published
in March 2018).

26 ⁶ USN still creates ambiguity as to whether EdD selectivity data matters, as illustrated
27 by this 2024 statement: “Many education schools were ranked in both [the Best
Graduate Education and the Best Online Master’s in Education surveys], but the online
28 degree ranking is specific to master’s degree programs, while this [Best Graduate
Education] ranking is **Ph.D.-focused**.” **Ex.5**, p.5 (emphasis added).

1 data misreporting issues.” *Id.*, p.3.⁷

2 Eight months later, Plaintiffs filed their lawsuit. Whereas Jones Day spent two
3 months interviewing dozens of witnesses, Plaintiffs have spent two years not only with
4 full access to Jones Day’s non-privileged materials but also having had their own search
5 terms executed against the same and additional document sources, issuing multiple
6 rounds of written discovery, and deposing numerous witnesses (but not USN). Jones
7 Day interviewed Dean Gallagher for two hours; Plaintiffs deposed her for two days.

8 Plaintiffs’ robust discovery uncovered nothing beyond Jones Day’s findings in
9 terms of doctoral selectivity misreporting, and only a slightly more-specific (albeit
10 misguided) critique of Rossier’s reporting of research expenditures. Dkt.#177, p.16-17.
11 As explained by former Penn State Education Dean David Monk, even a major influx
12 of grants and research dollars doesn’t much impact a ranking. **Ex.7**, p.46:7-47:10. As
13 for the other potential misreporting topics Jones Day flagged, Plaintiffs and their experts
14 offer no actual analysis. Plaintiffs’ discovery has clarified, however, that 2020 was the
15 first edition in which USN specifically requested EdD selectivity data and USC neither
16 provided such data nor informed USN that the data was withheld.

17 **III. The Record on Materiality**

18 USN emphasizes that “[i]t’s important that you use the rankings to supplement,
19 not substitute for, careful thought and your own research,” **Ex. 25**, p.24, and that “[a]
20 school’s Best Education Schools rank should be one consideration and not the lone
21 determinant in where a student applies.” **Ex.26**, p.1. In fact, USN’s rankings are only
22 one small part of an expansive information mix available to prospective students.
23 Dr. Ronald Wilcox, USC’s marketing expert, explains that academic research shows
24 students consider a broad array of financial, academic, social, and geographic factors
25 when selecting a program, with the three most important being (1) faculty quality,
26 (2) research quality, and (3) faculty access. **Ex.10**, ¶32. For online programs, students

27 ⁷ These other potential issues related to certain online and part-time EdD data, faculty
28 metrics, and placement and retention statistics. *Id.*

1 look for programs “with higher levels of interactivity between professors and students”
2 and consider “lifestyle choices, convenience, personal referral, affordability, length of
3 time for degree completion, access to video content (both synchronous and
4 asynchronous), and even the types of technology that are utilized.” *Id.*, ¶33.

5 Plaintiffs argue Rossier’s marketing plans and “talking points” for recruiters
6 prove the rankings are of the utmost importance. These documents (Dkt.#177-48, -49,
7 and -54–56) actually accentuate the wide variety of motivating factors for prospective
8 students:

- 9 ➤ 2013 MAT Plan: Mentions Rossier’s #17 rank twice in 31 pages. Its “key
10 messages” include Rossier’s Tier-1 research institution status and its “100-
11 year history of preparing educational leaders,” plus the program’s hands-on
12 experience and “game-changing” online technology.
- 13 ➤ 2015 MAT/OCL Plan: Never mentions Rossier’s specific USN rank in its 47
14 pages, and only references Rossier as “top ranked” a few times.
- 15 ➤ 2019 OCL Plan: This 11-page draft identifies student outcomes, curriculum,
16 program flexibility, and the immersion experience as “core value
17 propositions.”
- 18 ➤ 2020 MAT Plan: Mentions the #12 rank once in 32 pages. It embeds images
19 of the “top performing ads,” none of which show the USN logo or mention a
20 ranking. It lists “differentiators,” including Rossier’s credentialing program,
21 its world-renowned faculty, good student outcomes, and “the renowned
22 Trojan Family alumni network.”
- 23 ➤ 2021 MAT Plan: This 63-page document mentions Rossier’s #11 rank only in
24 its appendices, among a similar list of “differentiators.”

25 The recruiter “talking points” (Dkt.#177-26–28, 177-57) similarly reveal the variety of
26 key factors for prospective students, including Rossier’s: status as a Tier-1 research
27 institution; CAEP- and WASC-accreditation; socio-cultural approach; 100-year history;
28 “thought leader” faculty; curriculum; and collaborative platform. The talking points

1 also emphasize the “Trojan Family” network, which includes USC alumni, faculty,
2 staff, students, and supporters. Ex.11, p.156:22-160:11. The network is particularly
3 important here because over 80% of California’s superintendents are Rossier alumni.
4 *Id.*

5 USC retained Dr. Jonathan Smith to clarify Plaintiffs’ mischaracterization of his
6 research on the importance of USN rankings. Plaintiffs cite Smith’s 2013 article
7 (Dkt.#177-42) in their Complaint and briefing to argue a one-rank improvement in USN
8 ranking leads to a 1-2 percent increase in applicants. Plaintiffs, though, allege injury
9 from *enrolling*, not applying (Dkt.#66, ¶¶127, 139, 149, 157), and they seek to represent
10 *enrollees*, not applicants. Dkt.#177, p.12-13. As Smith explains, rankings have a
11 moderate impact on the number of applicants, *not on enrollment decisions*. Ex.12, ¶12.
12 “[R]ankings might matter to some people in some places at some times, certainly on the
13 application side and possibly on the enrollment side. But I don’t know of any strong
14 evidence that suggests that ranking matters on the enrollment side, particularly in – in
15 graduate school.” Ex.13, p.73:11-17.

16 Plaintiffs cite a survey (Dkt.#177-43) finding the most important factors in
17 students’ enrollment decisions are affordability, student outcomes, flexibility, and
18 accessibility. Only 30% identified “rankings *or* reputation” as a factor at all, which is
19 consistent with another Plaintiffs-cited survey finding “Rankings and USC prestige”
20 were important to only 31% of Rossier students’ enrollment decision. Dkt.#177, p.18;
21 Dkt.#177-45, p.11.

22 In sum, regarding materiality, Plaintiffs fail to account for substantial
23 heterogeneity affecting the decision-making of the putative class. **Ex.15, ¶16.**

24 **IV. The Record on Exposure**

25 Plaintiffs rely on Dr. John Chandler’s opinions to establish exposure to ranking
26 representations. Dkt.#177, p.34-35. USC moved to exclude Chandler’s testimony
27 (Dkt.#144, #159) because he fails to perform any quantitative analysis to support his
28 conclusory opinions. As discussed below, while the Court denied USC’s motion to

1 exclude Chandler's testimony, the inclusion of that testimony does not help Plaintiffs
2 satisfy their Rule 23 burden of establishing the putative class was broadly exposed to
3 allegedly incorrect USN *numerical* rankings. "Dr. Chandler has conducted no analysis
4 of the reach of USC's marketing messages, and his claim that 'all or nearly all' putative
5 class members were exposed," while admissible at this stage, is simply not persuasive.
6 See **Ex.10**, ¶19. Absent meaningful analysis, Dr. Chandler's testimony does not
7 establish the vast majority of putative class members were exposed to an incorrect USN
8 numerical ranking. *Id.*

9 Moreover, to achieve the Court's admissibility ruling, Plaintiffs' counsel
10 misrepresented that Chandler *couldn't* quantitatively analyze 2U's emails for mentions
11 of USN rankings because "the e-mails weren't preserved. That is why Dr. Chandler
12 didn't have access to them." **Ex.22**, p.22:22-23. The Court relied on this
13 misrepresentation in allowing Chandler's testimony. Dkt.#173, p.9 (noting "those
14 emails (or exemplars of those emails) were not preserved and therefore not disclosed
15 during class discovery"). As a dismissed party, 2U wasn't at the hearing to correct the
16 record regarding its production,⁸ but it now provides the attached Declaration clarifying
17 that 2U produced at least 800 documents containing template emails to Plaintiffs before
18 Chandler served his report. **Ex.27**, ¶¶5-6. Only 4 (0.5%) of those mentioned a specific
19 USN ranking. *Id.*, ¶7. Not only *could* Chandler have provided a quantitative analysis,
20 doing so would have generated evidence supporting this Court's denial of class
21 certification.

22 **V. The Record on Impact or Injury**

23 There's no single answer to the question of how, if at all, putative class members
24 were impacted or injured by Rossier's misreporting.

25 Plaintiffs proffer Sara Neher's rankings model as evidence that Rossier's ranks
26 would have dropped 24 to 53 places had Rossier submitted purportedly corrected data

27 ⁸ At the hearing, USC explained it wasn't involved in 2U's production, so it couldn't
28 speak to preservation. **Ex.22**, p.23:25-24:7.

1 to USN. Beyond USC’s challenge to that model’s reliability (which USC incorporates
2 by reference, *see* Dkt.#145, #160), problems exist with connecting Neher’s model to
3 evidence of actual injury. For example, she has Rossier dropping 24 places for the 2019
4 edition (Dkt.#145-2, ¶43) even though, as explained above, USN knew Rossier
5 excluded EdD data that year. Further, neither Neher nor Plaintiffs’ damages expert,
6 Dr. Michael Dennis, present any *actual*, let alone reliable, evidence as to whether a drop
7 in Rossier’s ranks would have caused Rossier’s tuition to decrease in price. Neither
8 offers an opinion on such. Dennis proposes only the concept of conjoint surveys to test
9 the existence of a supposed rank-based price premium—but not to establish the
10 necessary precondition of an efficient market, *i.e.*, that tuition is responsive to rank in
11 the first place. *See* **Ex.15**, ¶14.⁹

12 Dr. Justin McCrary, USC’s expert economist, did something non-economist
13 Dennis didn’t, namely look at empirical evidence. McCrary’s “empirical analysis of the
14 relationship between tuition and rankings shows that worse school rankings are not
15 associated with lower tuition” for schools, generally. *Id.*, ¶27. Rossier is no different—
16 its tuition was unaffected by changes in rank. *Id.*, ¶¶28-37. Not only did Rossier’s tuition
17 not increase when rank improved, it in fact increased after Rossier became unranked.
18 *Id.*, ¶¶33-34. No conjoint survey can persuasively counter this real-world evidence.

19 Further, the record evidence on injury establishes the following. **First**, each
20 named Plaintiff and eligible putative class member received their degrees. **Second**,
21 Plaintiffs offer no evidence these degrees have less value than they did before questions
22 about Rossier’s rank arose. Rather, the evidence shows the opposite is true. Plaintiff
23 Murtada, who received his EdD in May 2022 after USC published the Jones Day report,
24 lists his EdD on his resume because he is proud of his accomplishment. **Ex.16**, p.177:6-
25 17. His employer promoted him into his first leadership position while he was in the

26 ⁹ Dennis’s proposal also ignores net tuition, which includes financial factors such as
27 loan forgiveness and employer-provided tuition assistance. **Ex.15**, ¶26. “It would be
28 inappropriate to ignore the influence of these factors in determining the harm alleged
by Plaintiffs.” *Id.*

1 OCL program and promoted him again after graduation. *Id.*, p.27:23-30:10. Similarly,
2 the Los Angeles Unified School District offered Plaintiff Favell a permanent job while
3 she was student teaching as a Rossier student, she's changed jobs twice since
4 graduating, and no prospective employer has ever mentioned Rossier's rank or the
5 misreporting. **Ex.17**, p.22:4-23:22, 135:12-15, 139:2-5. **Third**, as the Plaintiff-specific
6 testimony profiled below shows, the price-premium proposal is at odds with the
7 damages the named Plaintiffs really want.

8 **VI. The Named Plaintiffs**

9 **A. Zarnowski**

10 Sue Zarnowski applied to Rossier's OCL program in June 2018. Rossier's rank
11 wasn't the only factor important to her. She liked the program length and its West Coast
12 location. **Ex.18**, p.153:21-154:9. She told her admissions advisor that "USC is my #1
13 choice based on classes and structure," and they also discussed immersion days and the
14 lack of a GRE requirement. *Id.*, p.148:10-22; **Ex.19**. Her essay explained, "USC's
15 program is of great interest due to the online and in-person format, but more
16 importantly, the curriculum." **Ex.18**, p.159:6-160:10. And, in a video she prepared for
17 classmates, she said it was "the technology ... infused in all the courses" and the
18 opportunity for creativity that attracted her. *Id.*, p.259:6-263:15.

19 Zarnowski used USN's rankings as an indicator of the "quality of education" at
20 Rossier. *Id.*, p.111:16-18, 112:12-19, 116:12-18. She believed (incorrectly) the rank
21 was specific to the online OCL program and USN determines rankings by evaluating
22 the "learning outcomes," selectivity, graduation rates, and faculty credentials and
23 accolades. *Id.*, p.65:1-5, 118:16-121:16.

24 Zarnowski has "[q]uality of education complaints" because she had "a poor
25 experience," in that Rossier's OCL program didn't feel like "a top-ranked program" to
26 her. *Id.*, p.137:10-14, 234:9-12. She grew increasingly dissatisfied with the OCL
27 program, complaining of insufficient faculty feedback, a K-12 focus, and an emphasis
28 on diversity. *Id.*, p.86:18-87:25, 137:10-138:16.

1 Zarnowski hopes to recover “most” of her tuition and thousands she paid to a
2 third-party dissertation service. *Id.*, p. 201:15-202:23, 248:10-251:7. She, like the other
3 named Plaintiffs, received her Rossier degree. *Id.*, p.211:11-15. She is exploring loan
4 forgiveness. *Id.*, p.206:16-24.

5 **B. Murtada**

6 Ahmad Murtada applied, was accepted, and signed his intent to enroll in the OCL
7 program in February 2019. **Ex.16**, p.118:14-120:2. Important to him were the program’s
8 online format and its lack of a testing or GPA requirement. *Id.*, p.56:21-57:7, 59:14-18.
9 He decided on Rossier after: speaking to an OCL student; attending an information
10 session about faculty, class size, and coursework; and determining the percent of OCL
11 students who, like himself, weren’t educators. *Id.*, p.61:1-7, 96:1-24, 99:3-11, 100:11-
12 103:11. His advisor may have mentioned a specific rank once, and he remembers seeing
13 “top ranked” on a LinkedIn advertisement and on Rossier’s website, which, in turn,
14 linked to USN’s website showing Rossier’s #10 rank in the 2019 edition. *Id.*, p.54:6-
15 55:18, 56:15-16, 231:12-234:4.

16 Murtada believed USN’s rankings signified Rossier’s OCL program was “one of
17 the best in the country” and he incorrectly assumed USN rated the program’s faculty,
18 curriculum, and post-graduate opportunities. *Id.*, p.62:4-8, 63:24-64:9, 64:10-19, 66:7-
19 25. Murtada was highly dissatisfied with the OCL program’s quality, complaining of
20 “bad professors,” “busy work,” students who “didn’t carry their weight,” and “horrible
21 communication.” *Id.*, p.76:2-10, 80:4-6, 162:21-163:17. He filed his lawsuit because he
22 “didn’t get what [he] signed up for.” *Id.*, p.131:2-7. Rankings aside, he would still want
23 a refund because he thinks “the program was not good.” *Id.*, p.215:23-216:1.

24 Unlike Murtada, his classmate and putative class member still thinks USC is a
25 prestigious school: “I hope we all get money back. But no one is going to think our
26 degrees are less-than because of this. I’d also enroll in the program all over again if it
27
28

1 meant meeting all of you.” *Id.*, p.197:11-199:20.¹⁰

2 **C. Cummings**

3 Mariah Cummings applied to the MAT program in February 2019 after seeing
4 Rossier ranked #10 in USN’s 2019 edition. Dkt.#67, ¶144; **Ex.14**, p.85:18-23. Various
5 other factors mattered to her, including the program’s lack of a GRE requirement, its
6 online format, and knowing the online and in-person MAT programs were otherwise
7 identical. **Ex.14**, p.76:14-90:13.

8 Cummings looked to USN’s rankings to assess “the quality of education” and
9 believed Rossier’s rank reflected its high quality. *Id.*, p.118:14-17, 126:17-23. She
10 understood USN’s rank applied to Rossier as a school (as opposed to the MAT program,
11 specifically), but she inaccurately assumed USN bases its rankings on student grades
12 and specific professors. *Id.*, p.69:25-70:16, 113:1-13. She also incorrectly believes
13 Rossier’s misreporting related to admissions data for master’s, not doctoral, students.
14 *Id.*, p.120:17-23.

15 Cummings, like her fellow named Plaintiffs, has quality of education complaints.
16 She believes the MAT program was “a complete joke,” Rossier failed to provide her
17 with the “quality of education” commensurate with its rank, and she paid for an
18 education of “lesser quality” than she associated with Rossier’s rank. *Id.*, p.96:19-20,
19 125:18-23, 127:6-9. Cummings wants the putative class to receive a 100% refund of
20 tuition, fees, living expenses, loan interest, and books. *Id.*, p.150:20-153:17, 179:22-
21 180:11.

22 **D. Favell**

23 Iola Favell, who applied in March 2020, is the only named plaintiff who applied
24 after Rossier failed to disclose its exclusion of explicitly requested EdD data to USN.

25 _____
26 ¹⁰ Plaintiffs initially produced only 21 redacted pages from Murtada’s texts, but
27 Chandler’s reliance materials revealed the existence of hundreds of additional relevant
28 pages that USC finally obtained, which contained statements complimenting OCL
faculty and making observations such as “[f]or the most part, the OCL profs have
facilitated a great experience,” and “Hells yeah! Trojan Family is legit.” **Ex.20**.

1 Dkt.#67, ¶¶123-24. Favell searched online for “best education programs” because she
2 wanted to become a teacher. **Ex.17**, p.47:2-48:19. Unlike the other plaintiffs, she
3 maintains Rossier’s ranking was the **only** factor she considered. *Id.*, p.53:13-17.¹¹

4 Favell used USN’s rankings to “gauge a quality of a school” and “as the thing to
5 determine what was a rigorous and good school.” *Id.*, p.114:24-115:2, 123:5-18. She
6 realized Rossier’s rank “represent[ed] all of the programs” (not just the MAT program),
7 but she incorrectly believed USN’s rankings were based on “job placement, and, like,
8 student satisfaction, and, like, the courses, and the rigor.” *Id.*, p.101:16-18, 134:18-24.
9 She never researched whether, in fact, these factors are considered. *Id.*, p.102:6-8. She
10 struggled to explain what Rossier misreported because she didn’t “want to say the
11 wrong thing.” *Id.*, p.128:25-135:11.

12 According to Favell, she “didn’t get the experience [she was] hoping” for based
13 on Rossier’s rank and her “money was spent on a product [she] didn’t receive” because
14 the “quality of education wasn’t what was represented by the school and by [USN].”
15 *Id.*, p.121:23-123:3. She found the MAT program to be “exceptionally horrible,”
16 “miserable,” “awful,” “actually horrific,” and “irrelevant,” with teachers who “were
17 mean to [her].” *Id.*, p.80:8-82:9.

18 Favell would like a full refund of her tuition and fees, despite the fact she intends
19 to seek loan forgiveness once she’s taught 10 years. *Id.*, p.66:5-10, 117:12-21. At that
20 point, she will have paid only \$24,000 for her Rossier education, as her income-driven
21 payments are less than \$200/month. *Id.*, p.192:20-21.

22 **VII. Putative Class Members**

23 Besides Murtada’s classmate and their group text (discussed above), the record
24 evidence contains statements from absent putative class members regarding why they
25 selected Rossier and their views on Rossier’s “biggest strength.” This comes from a
26

27 ¹¹ Favell’s testimony is at odds with the fact she did not apply to UCLA, even though it
28 was higher ranked at the time, also offered an online master’s program, and was once
her dream school. *Id.*, p.104:13-107:22.

1 2019 survey of Rossier alumni who were asked open-ended questions by a third-party
2 consultant. USC attaches as **Exhibit 23** an extract from this survey’s data, filtered to
3 show only the at-issue programs during the proposed class period.

4 None of these absent putative class members mentioned USN’s rankings as a
5 reason they selected Rossier, instead identifying: “university prestige,” “life goal,” “no
6 GRE requirement,” and “because Dr. Sandra Kaplan was going to be my dissertation
7 chair.” *Id.* Contrary to the named Plaintiffs’ experiences, these putative class members
8 considered Rossier’s biggest strengths to be: “quality of the material taught and the
9 usefulness on the job;” “great professors;” “[i]t provided a solid theoretical framework
10 for understanding any organization, analyzing its effectiveness and making
11 recommendations for improvement;” “USC opens doors;” “the amount of support you
12 receive;” and “[t]he program is amazing. The professors were knowledgeable,
13 accessible, and helpful. The classes were practical and I use the skills I learned there in
14 my classroom each day.” *Id.*; see also **Ex.4**, Response #20 (summarizing Rossier’s
15 research on why students select Rossier).

16 **VIII. Timeline**

17 To help track the “who, what, and when” presented above, USC provides a
18 timeline demonstrative (**Exhibit 24**) showing the proposed class period, Rossier’s
19 USN-related actions, Rossier’s ranks, Plaintiffs’ dates at Rossier, and Rossier’s tuition.

20 **LEGAL STANDARD**

21 Class certification requires Plaintiffs to satisfy two steps. *Wal-Mart Stores, Inc.*
22 *v. Dukes*, 564 U.S. 338, 345 (2011). First, Plaintiffs have the burden to prove, by a
23 preponderance of the evidence, that they satisfy all Rule 23(a) requirements. *Id.*; *Olean*
24 *Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 665 (9th Cir.
25 2022). Second, Plaintiffs have the burden to prove, by a preponderance of the evidence,
26 that they satisfy at least one Rule 23(b) requirement. *Wal-Mart*, 564 U.S. at 345; *Olean*,
27 31 F.4th at 665. This Court may grant class certification only if, “after a rigorous
28

analysis,” the Court determines Plaintiffs have carried their burdens on both steps. *Wal-Mart*, 564 U.S. at 350-51.

ARGUMENT

I. Plaintiffs Fail the Typicality Requirement.

Rule 23(a)(3) requires Plaintiffs demonstrate they “are typical class representatives.” *DZ Reserve v. Meta Platforms, Inc.*, 96 F.4th 1223, 1238 (9th Cir. 2024). “A named plaintiff is not typical if ‘there is a danger that absent class members will suffer if their representative is preoccupied with defenses unique to it.’” *Id.* Even “an arguable defense peculiar to the named plaintiff or a small subset of the plaintiff class may destroy the required typicality of the class.” *Cholakyan v. Mercedes-Benz, USA, LLC*, 281 F.R.D. 534, 557 (C.D. Cal. 2012).

One such defense is the educational malpractice doctrine, which bars claims that a university failed “to provide [students] with an education of a certain quality.” *Saroya v. Univ. of the Pac.*, 503 F. Supp. 3d 986, 995 (N.D. Cal. 2020). At the motion-to-dismiss stage, this Court observed:

The crux of Plaintiffs’ [pleaded] claim is not that USC failed to instruct them adequately. Plaintiffs do not challenge, at least not explicitly or in any level of detail, the quality of the education they received. The crux of Plaintiffs’ claim is instead that USC intentionally misreported student selectivity data to artificially inflate its US News rankings. That claim centers on the rankings as such, not as a proxy for the quality of education actually provided.

Dkt.#63, p.12.

As USC suspected, however, the named Plaintiffs’ pleading was not representative of their actual complaints with USC. Though they avoided dismissal, Plaintiffs’ “artful pleading,” ultimately, “cannot be used as an end-run around [California’s] bar on claims for educational malpractice.” *Bhatnagar v. New Sch.*, No. 22-cv-363, 2023 WL 4072930, at *3 (2d Cir. June 20, 2023). Plaintiffs cannot “recover

1 by ‘dressing up the substance’ of one claim ... in the ‘garments’ of another.” *United*
2 *Nat’l Ins. Co. v. Tunnel, Inc.*, 988 F.2d 351, 354 (2d Cir. 1993); *see also Tacon Mech.*
3 *Contractors, Inc. v. Aetna Cas. & Sur. Co.*, 65 F.3d 486, 488 (5th Cir. 1995) (noting
4 “federal summary judgment procedure requires [courts] to pierce through the pleadings
5 and their adroit craftsmanship to reach the substance of the claim”). Depositions
6 revealed the true nature of the named Plaintiffs’ grievances—they are dissatisfied with
7 the quality of education they received. *See* Background, §VI, *supra*.

8 For the named Plaintiffs, the crux of their claims *is* “that USC failed to instruct
9 them adequately” and they *are* using USN’s rankings “as a proxy for the quality of
10 education actually provided.” *See* Dkt.#63, p.12. In contrast, many putative class
11 members have no complaints, but only praises, regarding Rossier’s quality of education.
12 *See* Background, §VII, *supra*. To the extent viable rank-based claims exist, the named
13 Plaintiffs—who’ve confirmed they are really pursuing barred quality-of-education
14 claims masquerading as something else—are not the aggrieved students to pursue them.

15 Additionally, the only representations at issue are those containing Rossier’s
16 specific numerical rank. Dkt.#101, p.12. This Court ruled “top-ranked” representations
17 are non-actionable “puffery.” *Id.*, p.11. According to this Court, representations of
18 Rossier’s specific numerical rank are actionable only to the extent USC “knew of that
19 falsity or lacked a good faith belief in the accuracy of the rankings.” *Id.*, p.14. As
20 discussed, *the 2020 edition* of USN’s rankings demarks the first time during the class
21 period when USC did not submit explicitly requested EdD selectivity data without
22 informing USN it was withholding such data. *See* Background, §II, *supra*. Zarnowski,
23 however, enrolled prior to the 2020 edition being published, while Murtada and
24 Cummings seemingly relied only on the 2019 edition. *See id.*, §VI. Consequently, these
25 named Plaintiffs appear to lack an actionable representation for their claims.

26 There are also unique damage defenses for the named Plaintiffs. For example,
27 Zarnowski and Favell have indicated they may seek loan forgiveness, which could moot
28 or reduce their potential recovery. *Id.* at §§VI.A, VI.D.

1 Given these “arguable defense[s] peculiar to the named plaintiff[s],” Plaintiffs
2 fail the typicality requirement. *See Cholakyan*, 281 F.R.D. at 557. For this reason alone,
3 class certification should be denied. *See id.* at 558.

4 **II. Plaintiffs Fail the Predominance Requirement.**

5 For the second step, Plaintiffs rely on Rule 23(b)(3), which requires them to show
6 “questions of law or fact common to class members predominate over any questions
7 affecting only individual members.” The predominance requirement is more demanding
8 than the commonality requirement¹² “because not only must there be common issues,
9 but the common issues must predominate.” *DZ Reserve*, 96 F.4th at 1233.

10 In assessing predominance, this Court “must proceed ‘just as the judge would
11 resolve a dispute about any other threshold prerequisite for continuing a lawsuit.’”
12 *Olean*, 31 F.4th at 666. “This means that the court must make a ‘rigorous assessment of
13 the available evidence and the method or methods by which plaintiffs propose to use
14 the [class-wide evidence] to prove’ the common question in one stroke.” *Id.* To carry
15 their burden, Plaintiffs “must show that the common question relates to a central issue
16 in [their] claim.” *Id.* at 665. “Therefore, considering whether questions of law or fact
17 common to class members predominate begins, of course, with the elements of the
18 underlying cause of action.” *Id.* (quotations/brackets omitted).

19 Plaintiffs’ CLRA, UCL, and FAL claims all require proving reliance on the
20 alleged misrepresentations. *Wilson v. Frito-Lay N. Am., Inc.*, 260 F. Supp. 3d 1202,
21 1208 (N.D. Cal. 2017). Reliance entails both a materiality inquiry and an exposure
22 inquiry. *Ono v. Head Racquet Sports USA, Inc.*, No. 13-cv-4222, 2016 WL 6647949, at
23 *10 (C.D. Cal. Mar. 8, 2016). Plaintiffs’ claims also require proving “economic injury
24

25
26 ¹² Rather than address Rule 23(a)(2)’s commonality requirement separately, USC
27 addresses commonality within this predominance analysis. *See Salinas v. Cornwell*
28 *Quality Tools Co.*, 635 F. Supp. 3d 954, 963 (C.D. Cal. 2022) (“Because predominance
‘supersedes’ commonality and involves a similar analysis, the court will address both
requirements together.”).

1 as a result of that reliance.” *Wilson*, 260 F. Supp. 3d at 1208. Neither materiality, nor
2 exposure, nor injury are common issues here.

3 **A. Materiality is a predominating individual issue.**

4 Plaintiffs “must put forth at least some evidence that the challenged statements
5 were material.” *Shanks v. Jarrow Formulas, Inc.*, No. 18-cv-9437, 2019 WL 4398506,
6 at *5 (C.D. Cal. Aug. 27, 2019). A misrepresentation is material “if a reasonable man
7 would attach importance to its existence or nonexistence in determining his choice of
8 action.” *Townsend v. Monster Beverage Corp.*, 303 F. Supp. 3d 1010, 1043 (C.D. Cal.
9 2018). “If the misrepresentation or omission is not material as to all class members, the
10 issue of reliance would vary from consumer to consumer and the class should not be
11 certified.” *Lytle v. Nutramax Labs., Inc.*, 114 F.4th 1011, 1035 (9th Cir. 2024)
12 (quotations omitted).

13 **1. Rank was immaterial to a sizable portion of the putative class.**

14 Reliance varies from consumer to consumer when multiple factors may motivate
15 consumers’ purchasing decisions and “the misrepresentation was not ‘a substantial
16 factor’ in a large percentage of consumers’ purchasing decisions.” *Id.* at 1036; *see also*
17 *Pierce-Nunes v. Toshiba Am. Info. Sys., Inc.*, No. 14-cv-7242, 2016 WL 5920345, at *8
18 (C.D. Cal. 2016). Class certification should be denied when “a sizable portion of the
19 class ... would not have found the misrepresentations to be material had they known
20 the truth.” *Lytle*, 114 F.4th at 1038.

21 Research reveals numerous factors other than rank motivate students’ enrollment
22 decisions, *e.g.*, research quality, faculty access, convenience, affordability, and program
23 length. *See* Background, §III, *supra*. Even the named Plaintiffs identified motivating
24 factors other than rank, *e.g.*, location, online format, and no GRE requirement. *Id.*, §VI.
25 Evidence from the putative class also indicates motivating factors other than rank, *e.g.*,
26 “university prestige,” “life goal,” and specific faculty. *Id.*, §VII.

27 Given these other factors, class certification should be denied if Rossier’s rank
28 was “not ‘a substantial factor’ in a large percentage,” or “a sizable portion,” of the

1 putative class members' enrollment decisions. *See Lytle*, 114 F.4th at 1036, 1038. As to
2 what constitutes a "large percentage" or "sizable portion," the Ninth Circuit's *Lytle*
3 opinion discusses the California Court of Appeal's opinion in *Fairbanks v. Farmers*
4 *New World Life Insurance Co.* *See Lytle*, 114 F.4th at 1137-38. *Fairbanks* affirmed
5 denial of class certification where the "plaintiffs' own evidence [showed] that roughly
6 half," specifically, 47.4%, of the putative class members did not consider the
7 misrepresentation material. 197 Cal. App. 4th 544, 555, 565 (2011). So, if the
8 misrepresentation was immaterial to roughly half (or more) of the putative class
9 members, then reliance varies and class certification should be denied. *See id.*; *Lytle*,
10 114 F.4th at 1038.

11 Such is the case here. In arguing for class certification, Plaintiffs cite a survey
12 finding rankings *or* reputation to be an important factor for 30% of students in choosing
13 a university. *See* Background, §III, *supra*. Putting aside that ranking and reputation are
14 not synonymous, *see Ex.14*, p.123:24-124:8, the evidence proffered by Plaintiffs
15 establishes that **70% of students**—a "sizable portion," *see Lytle*, 114 F.4th at 1036,
16 1038—***do not consider ranking to be an important factor*** when enrolling.

17 Plaintiffs also cite a survey finding "Rankings and USC prestige" were important
18 to only 31% of Rossier students in deciding to enroll. Dkt.#177, p.18; Dkt.#177-45,
19 p.11. Again, even (mistakenly) treating rankings and prestige as synonymous, that
20 means **69% of Rossier students**—a "sizable portion," *see Lytle*, 114 F.4th at 1036,
21 1038—***did not consider ranking to be an important factor*** when enrolling.¹³

22 Plaintiffs' own survey evidence "illustrates that numerous class members may
23 have been [or were] unconcerned" with Rossier's rank. *In re Countrywide Fin. Corp.*
24 *Mortg. Mktg. & Sales Pracs. Litig.*, No. 10-cv-257, 2011 WL 6325877, at *10 (S.D.
25 Cal. Dec. 16, 2011). This evidence—***suggesting Rossier's rank was material to less***

26 ¹³ Plaintiffs also cite a bare, unverified statement that "50-55% of high-ability students
27 choose to enroll in the highest ranking university." Dkt.#177, p.18; Dkt.#177-44, p.7.
28 Besides being inadmissible hearsay, this purported statistic is irrelevant, as Plaintiffs do
not seek to represent only "high-ability" enrollees.

1 **than one-third of the putative class**—supports denying class certification, not granting
2 it. *See Townsend*, 303 F. Supp. 3d at 1047-48 (denying class certification where “only
3 25.2% of [survey] respondents selected hydration as a purchase motivator”); *Fairbanks*,
4 197 Cal. App. 4th at 565.

5 Aside from survey evidence, Plaintiffs cite USC and 2U’s alleged subjective
6 beliefs that USN’s rankings were material to **some** students. *See* Dkt.#177, p.34.
7 Plaintiffs’ misleading characterization of Rossier’s internal documents is addressed
8 above. *See* Background, §III, *supra*. In any event, “the materiality analysis focuses on
9 whether a reasonable *consumer*—not [the defendant]—would have considered” the
10 misrepresentation to be material. *Oddo v. Arcoaire Air Conditioning & Heating*, No.
11 15-cv-1985, 2019 WL 1460627, at *9 (C.D. Cal. Mar. 22, 2019). Whatever USC or 2U
12 may have believed about USN’s rankings does not change Plaintiffs’ own evidence
13 demonstrating that Rossier’s rank, while material to **some**, was immaterial to **most**
14 enrollees. *See Ono*, 2016 WL 6647949, at *13.

15 In sum, “Plaintiffs have not shown that there is a common answer to the question
16 of whether a reasonable consumer would consider [Rossier’s rank] a material
17 misrepresentation.” *Townsend*, 303 F. Supp. 3d at 1048. “In other words, there are
18 significant individualized issues related to proof of reliance.” *Id.* These “grounds alone
19 are enough to defeat Plaintiffs’ motion for class certification” under Rule 23(b)(3). *Id.*;
20 *see also In re 5-Hour Energy Mktg. & Sales Pracs. Litig.*, No. 13-ML-2438, 2017 WL
21 2559615, at *9 (C.D. Cal. June 7, 2017); *Pierce-Nunes*, 2016 WL 5920345, at *8;
22 *Countrywide*, 2011 WL 6325877, at *10.

23 **2. Plaintiffs offer no evidence of a common understanding.**

24 Materiality also requires Plaintiffs show Rossier’s rank “has a common
25 meaning,” *i.e.*, a shared understanding of the rank among class members.¹⁴ *Townsend*,

26
27 ¹⁴ To the extent some district court decisions have rejected such a requirement, they are
28 inconsistent with California law on materiality. *See Caro v. Procter & Gamble Co.*, 18
Cal. App. 4th 644, 668 (1993) (holding individual issues predominated for CLRA claim

1 303 F. Supp. 3d at 1045. Absent a common understanding, “courts have found that
2 materiality is not susceptible to common proof.” *5-Hour Energy*, 2017 WL 2559615, at
3 *8 (collecting cases).

4 Plaintiffs offer no evidence showing a common understanding of Rossier’s rank.
5 Nor could they, as “[e]ven the named plaintiffs disagree about” what Rossier’s rank
6 meant. *See Astiana v. Kashi Co.*, 291 F.R.D. 493, 508 (S.D. Cal. 2013). There is
7 variance among the named Plaintiffs’ understandings, both in terms of what the rank
8 applied to and what criteria it was based on. Cummings and Favell believed it applied
9 to Rossier, generally, while Zarnowski and Murtada believed it applied to their specific
10 OCL program. *See Background*, §VI, *supra*. And each of them offered a different basis
11 for the rank—some with a kernel of accuracy (Zarnowski suggesting selectivity), and
12 others way off (Cummings suggesting student grades and specific professors; Favell
13 suggesting job placement, student satisfaction, and course rigor; Murtada suggesting
14 faculty, curriculum, and post-graduate opportunities). *Id.*

15 The lack of “any single common understanding of [Rossier’s rank] across the
16 class ... indicates that claims related to this [representation] require an individual
17 inquiry.” *Townsend*, 303 F. Supp. 3d at 1046. “Without a common definition or
18 common understanding of [Rossier’s rank], the Court cannot conclude that materiality
19 is susceptible to common proof.” *5-Hour Energy*, 2017 WL 2559615, at *9. For this
20 additional reason, materiality is not a common issue.

21 **B. Exposure is a predominating individual issue.**

22 Plaintiffs must also “demonstrate that the class was exposed to the challenged
23 [representations] in order to demonstrate commonality and predominance.” *Opperman*
24 *v. Kong Techs., Inc.*, No. 13-cv-453, 2017 WL 3149295, at *6 (N.D. Cal. July 25, 2017)
25 (quotations/brackets/citation omitted). “In other words, Plaintiffs must show that the
26 class members were exposed to the alleged misrepresentations in the first place.” *Id.* It

27 _____
28 where *understanding* of the subject representations “would vary from consumer to
consumer”).

1 “might well be that there was no cohesion among the members because they were
2 exposed to quite disparate information from various [representations] of the defendant.”
3 *Id.* (quotations omitted).

4 **1. Some enrollees were exposed to only pre-2020 rankings.**

5 As discussed above, the only (potentially) actionable representations should be
6 those concerning Rossier’s specific numerical rank, beginning with the 2020 edition of
7 USN’s rankings. However, much of the putative class—which includes enrollees going
8 back to 2017—would have been exposed to only pre-2020 editions prior to enrollment.
9 That is, some enrollees would have been exposed only to Rossier’s specific numerical
10 rank in the 2018 and 2019 editions, which should not be actionable. *See* Dkt.#101, p.14.
11 There is “no cohesion among the members” because some were exposed to (potentially)
12 actionable misrepresentations, while others were not. *See Opperman*, 2017 WL
13 3149295, at *6. For this reason alone, exposure is not a common issue and Plaintiffs
14 fail to satisfy the predominance requirement. *See Dunn v. Costco Wholesale Corp.*, No.
15 21-cv-1751, 2021 WL 4205620, at *6 (C.D. Cal. July 30, 2021) (not all class members
16 “saw or relied on” the subject representation).

17 **2. There is an expert dispute on exposure.**

18 Even if representations of Rossier’s specific numerical rank in pre-2020 editions
19 were actionable, there remains an expert dispute on exposure. As noted, Plaintiffs rely
20 on Chandler’s exposure opinions. Dkt.#177, p.34-35. But, according to USC’s expert
21 Wilcox, “Chandler has conducted no analysis of the reach of USC’s marketing
22 messages, and his claim that ‘all or nearly all’ putative class members were exposed is
23 entirely unfounded speculation.” **Ex.10**, ¶19.

24 Although this Court ruled Chandler’s opinions are admissible, that does not mean
25 they satisfy the predominance requirement for exposure. *See Ellis v. Costco Wholesale*
26 *Corp.*, 657 F.3d 970, 982 (9th Cir. 2011). When, as here, there are conflicting expert
27 opinions, “a district court must resolve expert disputes at class certification;” failure to
28 do so may be reversible error. *Lytle*, 114 F.4th at 1033 n.9 (quotations/brackets omitted).

1 To illustrate, Chandler opines virtually all prospective students were exposed to
2 Rossier's rank via 2U's emails. However, only 0.5% (4 of 800) of the 2U-produced
3 documents containing template emails mentioned Rossier's specific numerical rank.
4 *See* Background, §IV, *supra*. Chandler makes no attempt to establish the open rate for
5 this small portion of emails that actually matter. As Wilcox points out, "even if all or
6 virtually all prospective students had received [2U's] emails ... it is highly likely that a
7 substantial fraction were still not exposed, by virtue of the fact that they never opened
8 or read those emails." **Ex.10, ¶24.**

9 Likewise, Wilcox disagrees with Chandler's opinions regarding webpage and
10 "other channels" exposure. As Wilcox concludes, Chandler has not only failed to
11 establish how many prospective students visited the subject webpages, but also how
12 many of those visits were made at times when the webpages included Rossier's specific
13 numerical rank. *Id.*, ¶25. Similarly, Chandler "does not estimate or attempt to estimate
14 how many Putative Class Members, if any, were actually exposed" to Rossier's specific
15 numerical rank via "other channels." *Id.*, ¶26.

16 In conducting its "rigorous assessment," this Court must weigh the
17 persuasiveness of Chandler's and Wilcox's conflicting opinions—taking into account
18 ***Plaintiffs have the burden of proof***—and resolve the experts' dispute on exposure, so
19 as "to ensure that Rule 23(b)(3)'s requirements are met." *Olean*, 31 F.4th at 666; *see*
20 *also Lytle*, 114 F.4th at 1033 n.9.

21 **C. Injury is a predominating individual issue.**

22 Plaintiffs' claims also require economic injury. *See Wilson*, 260 F. Supp. 3d at
23 1208. If Plaintiffs fail to "provide common proof of ... injury," class certification should
24 be denied. *Andrews v. Plains All Am. Pipeline, L.P.*, 777 Fed. App'x 889, 892 (9th Cir.
25 2019). While variations in the ***amount*** of damages may not preclude class certification,
26 certification is properly denied when ***entitlement*** to damages—including "injury in
27 fact"—is a predominating individual issue. *Lucas v. Breg, Inc.*, 212 F. Supp. 3d 950,
28 970 (S.D. Cal. 2016).

1 Plaintiffs, unmistakably, have an injury conundrum. As discussed, the named
2 Plaintiffs perceive injury because they did not receive the quality of education they
3 expected based on Rossier's rank, an injury theory the educational malpractice doctrine
4 bars. Further, Plaintiffs received their degrees and there is absolutely no evidence that
5 Rossier's misreporting has affected Plaintiffs' employment. Simply put, Plaintiffs have
6 utterly failed to establish any diminishment in the value of their degree after disclosure
7 of the Jones Day report. Unable to either rely on their actual perceived injury or point
8 to any impact on their credentials or careers, Plaintiffs resort to a price-premium theory,
9 *i.e.*, that "class members overpaid for tuition at Rossier as a result of USC's ranking
10 misrepresentations." Dkt.#177, p.35-36.

11 The Third Circuit addressed a nearly identical theory in a case where alumni
12 alleged Widener law school "defrauded a putative class of law students by publishing
13 misleading statistics about its graduates' employment, which caused the students to pay
14 'inflated' tuition." *Harnish v. Widener Univ. Sch. of Law*, 833 F.3d 298, 302 (3d Cir.
15 2016). The plaintiffs theorized "that publishing misleading employment statistics
16 enabled Widener to charge its students 'inflated' tuition," so "Widener's
17 misrepresentations caused them to pay more for their education than it was truly worth."
18 *Id.* at 302, 309. The Third Circuit held this theory was non-cognizable under state law,
19 meaning injury was not resolvable "in class-wide fashion." *Id.* at 312-13.

20 The Third Circuit observed that, even if the plaintiffs' inflated-tuition theory were
21 cognizable, they had "to prove that the market that determines law school tuition prices
22 is an 'efficient' market, meaning a market in which price responds to publicly available
23 information about the value of the product." *Id.* at 310-12. The plaintiffs "would still be
24 required to do more than propose it as an economically plausible theory; they would
25 need to provide proof that price inflation actually occurred on this occasion, as a result
26 of the specific misrepresentation at issue." *Id.* at 313 n.10. The Third Circuit had
27 "serious doubts about whether they could do so," as the plaintiffs offered "no direct
28

1 evidence that Widener changed its prices in response to the employment statistics that
2 it published and their anticipated effect on the overall market.” *Id.*

3 Similarly, in *In re POM Wonderful LLC*, the plaintiffs relied on a price-premium
4 theory for their CLRA, FAL, and UCL claims. *See* No. 10-ML-2199, 2014 WL
5 1225184, at *1, *3-*4 (C.D. Cal. Mar. 25, 2014). Specifically, they theorized the
6 defendant’s misrepresentations about juices caused consumers to pay more for the
7 juices than they otherwise would have. *Id.* at *4. Like *Harnish*, the *POM* plaintiffs’
8 theory required them to prove an “efficient market.” *Id.* The plaintiffs offered no
9 evidence of such and this Court denied class certification, explaining:

10 Efficiency ... is not demonstrated simply by any change in price, but
11 rather, in large part, by a change in price that has some empirically
12 demonstrable relationship to a piece of information. In an inefficient
13 market, in contrast, some information is not reflected in the price of an
14 item. In such a market, even a material misrepresentation might not
15 necessarily have any effect on prices. Absent such traceable market-wide
16 influence, and where, as here, consumers buy a product for myriad reasons,
17 damages resulting from the alleged misrepresentations will not possibly be
18 uniform or amenable to class proof.

19 *Id.* (citations omitted).

20 Here, Plaintiffs insist Dennis’s proposed (but unexecuted) conjoint surveys will
21 reveal “whether and by how much” a price premium for Rossier tuition exists based on
22 the ranking representations. Dkt.#177, p.35-36. But Plaintiffs put the cart before the
23 horse. They offer no evidence of an efficient market, *i.e.*, that Rossier’s tuition would
24 have indeed responded to a change in Rossier’s rank. Simply calculating a purported
25 price premium—which Dennis has not even done yet—does not mean the requisite
26 efficient market actually exists to make a price premium possible in the first place. *See*
27 *Harnish*, 833 F.3d at 310, 313 n.10; *POM*, 2014 WL 1225184, at *4.

1 The **only** evidence on this threshold issue shows the absence of an efficient
2 market. *See* Background, §V, *supra*. McCrary’s empirical analysis indicates tuition is
3 not responsive to USN’s rankings, either for schools generally, or Rossier specifically.
4 *Id.* And, to be clear, this isn’t a situation of conflicting expert opinions. Rather, one
5 expert (McCrary) has **demonstrated** no efficient market exists, and the other expert
6 (Dennis) simply **ignores** the issue altogether.

7 Plaintiffs misplace reliance on *In re University of Southern California Tuition &*
8 *Fee COVID-19 Refund Litigation*, 695 F. Supp. 3d 1128 (C.D. Cal. 2023) (“*In re USC*”).
9 The *In re USC* plaintiffs did not rely on a price-premium theory; their expert instead
10 purported to calculate the difference in value between an on-campus experience USC
11 allegedly promised and the online experience students received. *Id.* at 1140-42. The
12 expert calculated damages “by comparing the decline in value experienced by proposed
13 class members with the net tuition and fees actually paid.” *Id.* at 1142. This theory did
14 not depend on an efficient market—the plaintiffs did not need to show tuition would
15 have been lower absent any misrepresentation, but only that they experienced a decline
16 in value via the pandemic-induced transition to an online experience. *See id.*

17 In contrast, Plaintiffs’ theory of injury here is specifically premised on showing
18 “what USC Rossier’s prices **would have been** ‘but for’ the” representations of Rossier’s
19 rank. Dkt.#146-1, p.10-11 (emphasis added). This price-premium theory, unlike the *In*
20 *re USC* theory, requires an efficient market, which means Plaintiffs must offer “direct
21 evidence that [Rossier] changed its prices in response” to its USN rank. *See Harnish*,
22 833 F.3d at 313 n.10. Absent an efficient market, any rank-based misrepresentation—
23 even assuming materiality—does “not necessarily have any effect on prices.” *See POM*,
24 2014 WL 1225184, at *4.

25 Aside from being factually distinguishable, *In re USC* employed reasoning that
26 was, respectfully, a non sequitur. The Court ruled injury was a common issue by
27 concluding the expert’s opinions were admissible and, therefore, the plaintiffs proposed
28 a “plausible” theory. 695 F. Supp. 3d at 1159-60. But plaintiffs do not carry their burden

1 on class certification merely by offering admissible expert opinions. *Ellis*, 657 F.3d at
2 982. Nor do plaintiffs carry their burden on class certification merely by offering a
3 “plausible” theory. *Harnish*, 833 F.3d at 313 n.10.

4 Plaintiffs are “required to do more than propose” their price-premium theory “as
5 an economically plausible theory.” *Id.* Plaintiffs must offer evidence of an efficient
6 market, a threshold requirement for a price premium to be possible. *Id.*; *POM*, 2014 WL
7 1225184, at *4. Plaintiffs have not done so and, as the empirical evidence demonstrates,
8 they cannot do so because Rossier’s tuition was not responsive to USN’s rankings.
9 Accordingly, Plaintiffs have not carried their burden of showing injury is a common
10 issue. *See id.*

11 **CONCLUSION**

12 USC respectfully requests this Court deny Plaintiffs’ Motion for Class
13 Certification.

14 Dated: January 7, 2024

15 Respectfully submitted,

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

17
18 By: /s/ Michael L. Mallow

19 Michael L. Mallow

20 **Attorney for Defendant**
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