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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

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

Plaintiffs,

v.

UNIVERSITY OF SOUTHERN CALIFORNIA,

Defendant.

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

CLASS ACTION

REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

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I. INTRODUCTION

In its Opposition to Plaintiffs' Motion for Class Certification, USC largely seeks to relitigate this Court's Daubert Order under the guise of predominance and typicality based on issues this Court already considered and rejected in finding the opinions of Plaintiffs' class certification experts reliable and well-supported. Dkt. 173. USC also seeks to take a second run at the Court's prior rulings at the motion to dismiss stage, which held, *inter alia*, that Plaintiffs overpayment theory of harm constitutes an economic injury, one that does not implicate the educational malpractice doctrine. Dkt. 63. Finally, USC seeks to spin the facts to tell a different story than the record evidence supports, while asking this Court to ignore or discredit the mountains of evidence supporting Plaintiffs' claims.

In short, USC's disputes going to questions of fact and the persuasive weight of Plaintiffs' expert testimony supporting materiality, exposure, and injury in this case are for resolution by a factfinder. They do not defeat class certification. Rather, if anything, USC's arguments and factual disputes *support* class certification as they address common questions that both parties seek to resolve, which will be answered in one fell swoop for all Class Members, based on common evidence.

Class certification should be granted here. Nothing in USC's opposition dictates otherwise.

II. USC RELIES ON UNSUPPORTED AND IRRELEVANT FACTS TO CONTEST CLASS CERTIFICATION

USC's facts section is rife with retreads of its unsuccessful *Daubert* arguments (*see, e.g.*, Opp'n at 17, challenging reliability of Neher's model; comparing McCrary damages approach to Dennis),[1] red herrings (*id*. at 11, "the 'general view' of the

[1] USC was adamant that expert issues be addressed before class certification, rather than at the same time. Dkt. 107 at 5. Having secured that scheduling arrangement, it

deans . . . 'was that U.S. News was kind of naïve about how higher education functions'"), and contentions that are at most disputed issues of fact or just plain unsupported by and inconsistent with the record (*id.* at 13, "even a major influx of grants and research dollars doesn't much impact a ranking").[2]

Most glaringly, the linchpin of USC's typicality and exposure arguments is a narrative that *after* US News formally amended its survey instructions in 2017 to explicitly clarify that "doctoral should include both Ph.D. and Ed.D. students," USC told US News that it would not abide by that instruction. Opp'n at 12, 17, 24, 30. As a result, USC argues, the "only (potentially) actionable representations" are those made by USC following publication of the 2020 US News edition, truncating the class period. Opp'n at 30. If there was support for this assertion in the record, it would (at most) create a disputed issue of fact. In actuality, the record contradicts the sequence of events USC has constructed.

The Jones Day Report, which USC has adopted, *see* Ex. 3 (Courtney Dep. at 238) ("The university supports the Jones Day report as do I."), describes a sequence in which USC's communications to US News about its intentions *preceded* the change to the US News instructions, not followed it:

> US News confirmed to Jones Day that [Garrison] sent emails to US News in November 2017. According to US News, [Garrison] noted in the email that the School intended to exclude EdD students from the definition of "doctoral" in response to certain survey questions, but a

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now rehashes all of the disagreements and battles of the experts that it lost the first go round.

[2] USC relies on its expert Dr. Monk, the former Dean of Penn State's graduate school of education, for this proposition. Opp'n at 13 (citing Monk Dep. 46-47). Later in the deposition, however, Monk acknowledged that as the research dollars Penn State reported declined, its rankings got worse. Ex. 1 (Monk Dep. 76-77), Ex. 2 (Monk Dep. Ex. 148). He also agreed that as Dean, the inclusion of research dollars "outside of education accounts" [as Rossier did] would "invite questions." *Id*. at 73-74.

> US News employee promptly responded and informed [Garrison] that the definition of "doctoral" should include both PhD students and EdD students. According to [Garrison], ***sometime after his exchange with US News***, [Garrison] received the updated US News 2018 survey instructions, which instructed that "doctoral should include both Ph.D. and Ed.D students" for several questions. Mot. at Ex. 2 at 95886 (emphasis added).[3]

The emails described above were never located by Jones Day, or by USC in response to Plaintiffs' requests for production. The only evidence that has surfaced is an updated, garbled draft document without an identified recipient, which Jacob Garrison located and USC produced shortly before his deposition. Ex. 4 (USC_FAV_000095914). It lends no credence to the narrative USC presents in its brief. And Garrison's own testimony, which USC cites for its supposed "notification" to US News, is consistent with Jones Day's account, not the one USC has invented in its Opposition brief. Ex. 5 (Garrison Dep. 107:23-108:3, 109:25-110:17; 115:4-18).

USC's narrative does not even address other ways it misled US News, such as its nearly doubling of research dollars without any explanation. Nor has USC produced any evidence that US News approved of its deviation from the instructions. To the contrary, the evidence shows that US News told USC on multiple occasions that it must include *all* doctoral students. *See Id*. at 109:25–111:15; Mot. at Ex. 2

[3] This is not the only instance where USC characterizes the evidence differently from the Jones Day report. For instance, USC continues to claim, without evidence, that other education schools engaged in similar misreporting. Opp'n at 11. However, the Jones Day Report rejected this justification. Mot. at Ex. 2 (USC_FAV_000095876 at 95893 n.11) ("Even if other schools have engaged in similar behavior, that would not excuse the School's choice to exclude EdD data where it was explicitly requested by US News. Further, during an interview with Jones Day, [Gallagher] acknowledged that some other schools likely were reporting data as to their EdD students.") Among the Deans that complied with US News's instructions to provide data for all doctoral students is USC's expert David Monk, who was the Dean at Penn State throughout the rankings period. Ex. 1 (Monk Dep. at 58:20–59:17).

(USC_FAV_000095876 at 95885–86); Mot. at Ex. 22 (USC_FAV_000024470). And USC certainly never notified Plaintiffs or other Class Members that its ranking was inflated by reporting the wrong numbers.

III. THE ISSUE OF MATERIALITY SUPPORTS CLASS CERTIFICATION AS IT WILL BE RESOLVED THE SAME FOR ALL CLASS MEMBERS UNDER THE OBJECTIVE REASONABLE CONSUMER STANDARD.

A. Plaintiffs have presented more than sufficient evidence of class-wide materiality; USC's arguments otherwise mischaracterize the evidence and law.

USC disputes the materiality of Rossier's US News ranking, arguing that it was only one of a "wide variety of motivating factors" for students in enrolling at Rossier. *See* Opp'n at 14. But a "plaintiff is not required to allege that [the challenged] misrepresentations **were the sole or even the decisive cause of the injury-producing conduct**" to establish materiality. *Kwikset Corp. v. Super. Ct.*, 246 P.3d 877, 888 (Cal. 2011) (quoting *In re Tobacco II Cases,* 207 P.3d 20, 40) (emphasis added); *see also In re JUUL Labs, Inc., Mktg. Sales Pracs. & Prods. Liab. Litig.*, 609 F. Supp. 3d 942, 991 (N.D. Cal. 2022) (finding that a consumer may consider many factors in determining whether to purchase a product, but that does not mean the misrepresented or omitted information cannot be material).

Rather, "materiality is generally a question of fact unless the 'fact misrepresented is so obviously unimportant that the jury could not reasonably find that a reasonable man would have been influenced by it.'" *In re Tobacco II Cases*, 207 P.3d 20, 39 (Cal. 2009). That is far from the case here. Whether Rossier's rank was ***objectively*** material is a merits dispute that will be answered the same for all class members under the reasonable consumer standard, which only supports class certification. *See* Mot. at 22; *see also Hadley v. Kellogg Sales Co.*, 324 F. Supp. 3d 1084, 1118 (N.D. Cal. 2018) (quoting *Amgen Inc. v. Conn. Ret. Plans and Tr. Funds*,

568 U.S. 455, 467 (2013)) (recognizing that the defendant's "argument about 'consumers hav[ing] a variety of reasons for purchasing cereal' is 'a merits dispute as to materiality,' and therefore a dispute 'that can be resolved classwide,'… because . . . materiality is a ''common question' for purposes of Rule 23(b)(3)").

USC's argument otherwise strains credulity and flies in the face of the evidence amassed in this case. Why would USC—at the direction of the highest levels of Rossier administration—consistently engage in ranking manipulation for years if it didn't matter? The simple answer: it did. First, USC claims that a survey cited by Plaintiffs "establishes that 70% of students … do not consider ranking to be an important factor when enrolling." Opp'n at 27 (emphasis omitted). But the results don't say that. The survey asked respondents to identify the ***most important*** factors when it came to choosing a school, not *all* important or material factors. Dkt. No. 177-43 at 8. That nearly a third of students identified rankings or reputation as one of the most important factors does not mean it was an unimportant or insignificant factor for the remaining 70% of students. USC repeats this logical error with a survey of Rossier students that asked for the top 2-3 factors that "were most important in selecting USC Rossier." Dkt. 177-45 at 11. Again, that 31% named rankings or prestige as one of their top reasons for selecting USC Rossier does not mean rankings were unimportant to 69% of students.

Most egregiously, USC selectively excerpts raw data from a survey of Rossier alumni to argue that "none of [the surveyed] absent putative class members" mentioned rankings in response to the question: "what are the main reasons you decided to earn your degree from USC Rossier?" Opp'n at 21-22; Opp'n at Ex. 23. USC's summary exhibit obscures that the survey (1) asked students to identify the "main reasons" why they "decided to earn [their] degrees from USC Rossier," and (2) provided a list of 8 options to choose from, *none* of which specifically mentions rankings, prestige, or reputation. Ex. 6 (USC_FAV_000075992). Although

respondents could have ostensibly written in "ranking," the absence of such responses speaks more to the survey's design than the materiality of rank to students' decision to attend, as only 5% of respondents chose to write in any reason at all. *Id.* That a multiple-choice or check-all-that-apply survey question with a list of answers that omits "ranking" resulted in no one answering "ranking" is not the least bit surprising.

USC also leans on its own interpretation of certain marketing plans in an attempt to minimize the importance of rankings, but, in fact, many of these plans reference USC's rank.[4] And they do not nullify the other evidence Plaintiffs present on materiality, including that rank was plastered on Rossier's homepage (the primary repository of information for students deciding whether to apply or enroll), that USC and 2U extensively used US News rankings in other advertising materials because it was a "leading differentiator," that Rossier's rank was important to the Named Plaintiffs' enrollment decisions, and that USC considered it important enough to be worth falsifying data for more than a decade. Mot. at 3-12.[5]

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[4] For example, although USC seeks to downplay the importance of rank in the 2020 MAT Plain as only mentioned "once in 32 pages," this plan in fact recognized "rankings" as one of the three "most significant factors for choosing a program," as well as a "program value prop" and a "differentiator." Mot. at Ex. 49 at 2U_FAVELL_00000020-21.

[5] USC also seeks to minimize ranking vis-à-vis other factors, writing, for example, that "the 'Trojan Family' network . . . is particularly important here because over 80% of California's superintendents are Rossier alumni." Dkt. 168 at 15. But again, even if this network were particularly important, that would not render rank immaterial. And, as a matter of factual accuracy, this figure should be 8% (not 80%) as Rossier's publications indicate that the school has "80 alumni who are active superintendents," out of about 1,000 such positions in the state. Ex. 7 (Brian Soika, Ask an Expert: What's It Like to Be a Superintendent?, USC ROSSIER (Sep. 3, 2019), available at https://rossier.usc.edu/news-insights/news/ask-expert-whats-it-be-superintendent); *see also* Ex. 8 (List of School Districts, CAL. DEP'T OF

As previously set forth by this Court, Ninth Circuit precedent establishes that a representation is material if (1) "a reasonable consumer would attach importance to it" *or* (2) "'the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important in determining his choice of action.'" Dkt. 63 (Motion to Dismiss Order) at p.10 (citing *Hinojos v. Kohl's Corp.*, 718 F.3d 1098, 1107 (9th Cir. 2013), as amended on denial of reh'g and reh'g en banc (July 8, 2013) (quoting *Kwikset Corp. v. Super. Ct.*, 246 P.3d 877, 885 (Cal. 2011)); *see also Kumar v. Salov N. Am. Corp.*, No. 14-cv-2411-YGR, 2016 WL 3844334, at *8 (N.D. Cal. July 15, 2016) (explaining that "[m]ateriality can be shown by a third party's, or defendant's own, market research showing the importance of such representations to purchasers"). This Court should decline USC's invitation to ignore all of its own and 2U's documents and communications recognizing the importance of rankings on student enrollment.

In addition, "California courts have explicitly ''reject[ed] [the] view that a plaintiff must produce'' extrinsic evidence 'such as expert testimony or consumer surveys' in order 'to prevail on a claim that the public is likely to be misled by a representation under the FAL, CLRA, or UCL." *Hadley*, 324 F. Supp. 3d at 1115 (quoting *Colgan v. Leatherman Tool Grp., Inc.*, 38 Cal. Rptr. 3d 36, 47–48 (Cal. App. 2d Dist. 2006)); *see also Krommenhock v. Post Foods, LLC*, 334 F.R.D. 552, 566 (N.D. Cal. 2020). Here, Plaintiffs have offered more than sufficient evidence to support a presumption of reliance, which "arises wherever there is a showing that a misrepresentation was material." *In re Tobacco II Cases*, 207 P.3d at 39; *see also* Mot. at 3-10. It will be the factfinders' job to weigh that evidence to determine

EDUC., available at https://www.cde.ca.gov/re/lr/do/schooldistrictlist.asp (showing a range of 937 to 945 school districts in California each year from 2016 to 2025)).

whether USC's fraudulent ranking was material. But, given the objective standard that applies, the answer will be the same for all class members.

B. USC's ranking misrepresentations referred to its US News rank, the single source of educational school rankings; uniformity in how individual Class Members interpreted that rank is not required.

Nor is the individual meaning a particular class member may have attached to a specific representation determinative. *See* Mot. at 22. "[D]eception and materiality under the FAL, CLRA, and UCL are governed by an objective 'reasonable consumer' test," such that Plaintiffs "'ha[ve] no burden to establish that there is a uniform understanding among putative class members as to the meaning of" the challenged . . . statements, "or that all or nearly all of the [class members] shared any specific belief." *Hadley*, 324 F. Supp. 3d at 1116 (quoting *Pettit v. Procter & Gamble Co.*, No. 15-cv-02150-RS, 2017 WL 3310692, at *3 (N.D. Cal. Aug. 3, 2017)).

USC argues that Plaintiffs cannot show commonality or predominance because different Class Members may have had different perceptions about how rank was calculated or what it meant, for example, in terms of quality of education or teachers. *See* Opp'n at 29. But none of the cases USC cites stretch that far. USC's misrepresentations are markedly different than those examined in *Townsend v. Monster Beverage Corp.*, 303 F. Supp. 3d 1010 (C.D. Cal. 2018), *Astiana v. Kashi Co.*, 291 F.R.D. 493, 508 (S.D. Cal. 2013), and *In re 5-Hour Energy Mktg. and Sales Prac. Litig.*, No. 13-ml-2438, 2017 WL 2559615, at *9 (C.D. Cal. June 7, 2017). Each of these cases involved a key "term" that lacked a common definition, unlike the misrepresentation USC made concerning Rossier's rank, which is a quantifiable metric.

In *Townsend*, for example, the court noted that "Hydrates like a sports drink" did not have a common meaning, and Plaintiffs had not offered any admissible

evidence of materiality or a common understanding. 303 F. Supp. 3d at 1045-46. The court in *Astiana* in fact certified classes based on the misrepresentations "Nothing Artificial" and "All Natural," albeit omitting from the latter class products with ten challenged ingredients that were permitted in certified "organic" foods, given there was no definitive industry standard or definition informing whether these specific ingredients would be considered "all natural" and even the named plaintiffs "equate[d] 'natural' with 'organic.'" 291 F.R.D. at 508-10. In *In re 5-Hour Energy*, Plaintiffs offered "no evidence" of a prevailing definition of "energy," a key and highly disputed term in the alleged misstatement. 2017 WL 2559615, at *9.

USC's rankings representations referred to a specific ranking, for which there was only one source—US News, the public brand for school rankings. Ex. 9 (Gallagher Dep. 141:15-18) (testifying USC did not participate in any other external ranking of graduate educational schools).[6] There is no lack of clarity as to what USC was referring to.

IV. THE COURT ALREADY CONSIDERED AND REJECTED USC'S CHALLENGES TO DR. CHANDLER'S CLASSWIDE EXPOSURE OPINION, AND USC PROVIDES NO BASIS TO REVISIT THAT DECISION.

In arguing there is insufficient evidence of exposure, USC tries to relitigate this Court's ruling admitting Plaintiffs' expert Dr. John Chandler, which found reliable and admissible his opinion that all Class Members would have been exposed to USC's fraudulent US News ranking. USC now wants to argue that although admissible, Dr. Chandler's opinion is not "persuasive." Opp'n at 16, 31. But even if USC were right—it is not—"[a] district court may not . . . 'decline certification

[6] Prior to the class period, USC Rossier once participated in a US News ranking of one aspect of the education school: its online master's program. Rossier did not continue participating, however, because it was ranked number 44. Ex. 10 (USC_FAV_000002122).

merely because it considers plaintiffs' evidence relating to the common question to be unpersuasive and unlikely to succeed.'" *Lytle v. Nutramax Lab'ys, Inc.*, 114 F.4th 1011, 1032 (9th Cir. 2024). Class action plaintiffs are "not required to actually prove their cases through common proof at the class certification stage." *Id.* at 1024.

USC misreads what *Lytle* and *Olean* instruct. Although the Ninth Circuit has explained that "[w]eighing conflicting expert testimony" and "[r]esolving expert disputes" "may" be "necessary to ensure that Rule 23(b)(3)'s requirements are met," a court is still "limited to resolving whether the evidence establishes that a common question is *capable* of class-wide resolution, not whether the evidence in fact establishes that plaintiffs would win at trial." *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 666-67 (9th Cir. 2022); *see also Lytle*, 114 F.4th at 1031 (noting this is "consistent with the Supreme Court's general rule that 'merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied").

This Court has already conducted the relevant inquiry and determined that Dr. Chandler's ultimate opinion of class-wide exposure is well supported and reliable. Daubert Order (Dkt. 173) at 9. USC does not engage with whether Dr. Chandler's testimony and underlying analysis is *capable* of showing class-wide resolution relative to exposure—it clearly is; instead, USC points to its own expert's testimony in an attempt to discredit Dr. Chandler's conclusions on their merits. *See* Opp'n at 30-31. Whether or not these arguments find purchase at trial, they do not matter for a class certification inquiry. USC's arguments amount to a dispute over facts and the weight of the evidence, properly reserved for the factfinder. *See, e.g.*, *In re JUUL*, 609 F. Supp. 3d at 993 (finding "disputed but admissible expert opinions," including of Dr. Chandler, showing "the pervasiveness of JLI's successful marketing strategy

and the consistency of the message . . . support[ed] a presumption of reliance for absent class members").

In a last-ditch effort to have the Court reconsider its admission of Dr. Chandler, USC casts aspersions at Plaintiffs' counsel that are not well founded. It remains the case that there is not a representative or complete set of emails and associated metrics (i.e., sends, opens, clicks) from which Dr. Chandler could perform a quantitative analysis.[7] If such information exists, as USC insinuates, then USC and/or 2U should have produced it. The newly offered 2U Declaration does not support USC's suggestion that Dr. Chandler ignored evidence produced in this case that would have allowed a quantitative analysis of USC's dissemination of emails.[8] The 800 email templates and marked up drafts lack any helpful information such as (1) whether the document became an email that was sent, (2) the email addresses of any recipients, (3) when any email was sent, (4) open rates, and (5) click-through data. The Declaration's noncommittal representation that they "appear" to be

[7] Although USC's counsel now seeks to introduce uncertainty about the record, they did not contradict Plaintiffs' understanding at the time. Opp'n at Ex. 22 (Daubert Tr. at 23:25-24:11). When questioning Dr. Chandler, USC also acknowledged that "welcome e-mails were written over" (Ex. 11 (Chandler Dep. Tr. 229:18-25)), which is consistent with Joanna Gerber's testimony that 2U does "not [track] the version of the content" but instead tracks campaign level data and "do[es] not update Google tags." *See generally*, Ex. 12 (Gerber Dep. Tr. 137:15-138:7). Her recent Declaration at issue is conspicuously vague as to 2U's document preservation practices; stating only that 2U produced some documents in this case, which is not disputed.

[8] As Dr. Chandler notes in his Report, there are spreadsheets indicating the presence of thousands of additional templates that have not been produced. *See* Mot. at Ex. 51 (Chandler Rep. ¶ 212 n.166); *see also* Ex. 13 (2U_FAVELL_00011797) (listing 1,826 email campaign templates in a "USC-MAT-Delete (552022)" tab that were never produced, apparently due to 2U's migration to a new system); Ex. 12 (Gerber Dep. 174:9-22) (noting that 2U chose "not [to] do the work of transitioning them into the new operational process and system").

examples that "could be sent" underscores these unknowns. Opp'n at Ex. 27 ¶ 5. In short, these documents would not enable the analysis USC now demands.

Regardless, as this Court recognized in its Daubert Order, the law does not require such quantification. "The relevant analysis under California law does not consider whether each class member saw and relied on each of the Challenged Statements and in what combination, but instead whether the Challenged Statements were used consistently through the Class Period, supporting an inference of classwide exposure, and whether the Challenged Statements would be material to a reasonable consumer." *Krommenhock v. Post Foods, LLC*, 334 F.R.D. 552, 563-64 (N.D. Cal. 2020) ("[T]he question is how an objective 'reasonable consumer" would react to a statement, and not whether individual class members saw or were deceived by statements[]. Those are common questions, supported at this juncture by plaintiffs' experts and subject to attack at trial by defendant's experts.") (quoting *Hadley*, 324 F. Supp. 3d at 1095.

And although USC wants to elevate the importance of email communications to the exclusion of all other media channels, this was merely one channel of many. USC fails to acknowledge or even address all of the other evidence of ranking being disseminated through additional channels used in the multi-level marketing campaign in which 2U and USC engaged. US News itself is well-known as a ranking source, and USC prominently featured its inflated rank on Rossier's homepage each year of the Class period, as well as in social media posts, social media advertising, and print media that it disseminated, all of which, as this Court noted previously, is extensively documented and discussed in Dr. Chandler's expert report, providing a strong foundation for the conclusions he reached. *See* Mot. at Ex. 51 (Chandler Rep.); *see also* Daubert Order (Dkt. 173) at 8. The "evidence" USC waited months to raise before the Court, and never questioned Dr. Chandler about, would not change

his opinions; nor is it cause for the Court to revisit its decision finding them reliable for class-wide exposure purposes.

This Court has correctly rejected USC's quantitative arguments in considering whether "Dr. Chandler's opinion that 'all or virtually all' students were exposed to rankings information is a supportable *qualitative* position." Daubert Order (Dkt. 173) at 8. In reaching the conclusion that it is, the Court agreed with Plaintiffs that "the thrust of Dr. Gerber's testimony and Dr. Chandler's report is that 2U orchestrated an extensive marketing strategy designed to move all prospective students through the marketing funnel." *Id.* This more than meets Plaintiffs' burden on exposure at this stage of the proceedings. *See, e.g.*, *In re JUUL*, 609 F. Supp. 3d at 993 (finding "disputed but admissible expert opinions," including of Dr. Chandler, showing "the pervasiveness of JLI's successful marketing strategy and the consistency of the message . . . support[ed] a presumption of reliance for absent class members").

USC's argument that Plaintiffs cannot demonstrate actionable exposure across the entire class period also cannot withstand close inspection of the record. As described above (Section II, *supra*), the reprieve from liability that USC claims to have earned by telling US News that it would not follow its instructions was discredited by the Jones Day report—or at best is a disputed issue of fact for the jury. And in any event, as to the relevant inquiry before this Court, this dispute of fact would only weigh in favor of certification given that it relies on common evidence and would be answered the same for all Class Members pre-2020.

V. THIS COURT HAS ALREADY HELD THAT PLAINTIFFS' EXPERT CAN MEASURE ECONOMIC INJURY CLASSWIDE USING A CONJOINT SURVEY EXECUTED AFTER CERTIFICATION.

USC likewise seeks to relitigate this Court's order admitting the opinions of

Plaintiffs' expert Dr. Mike Dennis, arguing yet again—based on the same case law previously presented to this Court—that Plaintiffs have not established an efficient market as a necessary precondition to demonstrating a price premium tied to ranking. But this Court, as others have before it, rejected USC's market realities arguments. *See* Daubert Order (Dkt. 173) at 17-18. Recently, a California state trial court held similarly, admitting the same expert used by the plaintiffs in the *In re USC* case over similar objections of Defendant California State University, which, like USC in this case, argued that the university was immune from supply and demand economics. Ex. 14, Transcript from *Vakilzadeh v. Trs. of Cal. State Univ.*, Case No. 20STCV23134 (L.A. Superior Court Dec. 24, 2024) at 16-24 (CSU's argument to exclude Dr. Singer), 42-47 (the Court's ruling denying CSU's motion to exclude).

USC tries to recast plaintiffs' damages theory in the *In re USC* Covid case as wholly different from Plaintiffs' approach in this one. Opp'n at 34. But it isn't—in both cases the experts are using a Choice-Based Conjoint survey to ascertain the dollar value attributable to particular attributes. *See In re Univ. of S. Cal. Tuition & Fees COVID-19 Refund Litig.*, 695 F. Supp. 3d 1128, 1141 (C.D. Cal. 2023). Of course, plaintiffs in *In re USC* were measuring the fair market value associated with a different characteristic of the university—an in-person as opposed to online educational format. But that is a distinction without a difference for purposes of class certification. USC nevertheless argues that Plaintiffs' must offer evidence that tuition is responsive to ranking, but the court in *In re USC* rejected USC's similar argument and real-word evidence that its pricing decisions were immune from market forces, holding that "logic finds no support in the case law." *Id*. at 1148-49. The bottom line is that "a conjoint analysis is a reasonable method for measuring value in the higher education context." *Id*. at 1146.

The cases USC relies on to argue that Plaintiffs must show an efficient market invoked a "fraud on the market" damages theory, an entirely different theory of

damages that is specific to the context of securities fraud litigation. USC selectively quotes excerpts from these cases that have no bearing on the issues before this Court.

For example, although the plaintiffs in *In re POM Wonderful LLC* referred to their alternate theory of damages as a "Price Premium" model, their damages expert did not actually conduct a conjoint survey or isolate a price premium associated with a specific misrepresentation or attribute. No. ML 10-02199 DDP, 2014 WL 1225184, at *3, 5 (C.D. Cal. Mar. 25, 2014). Rather, the expert simply "quantifie[d] damages 'by comparing the price of Pom with other refrigerated juices of the same size," attempting to construct a "fraud on the market" theory to advance their claims. *Id.* at **3, 5 (finding alternative damages model inadmissible because the plaintiffs' expert "simply observed that Pom's juices were more expensive than certain other juices" and then "assumed that 100% of that price difference was attributable to Pom's alleged misrepresentations," without any sound methodology to support such a leap). The discussion about "efficient markets" quoted by USC (Opp'n at 33) was specific to the "fraud on the market" theory that both parties agreed should apply, notwithstanding the Court's reservations about that theory in a consumer action as it is not generally applicable to all damages approaches. *Id.* at 4. By contrast, here, Plaintiffs are not advancing a fraud on the market theory, nor does their damages model depend on one.

USC's resurrection of *Harnish v. Widener Univ. Sch. of L.*, 833 F.3d 298 (3d Cir. 2016), fares no better at contesting class certification than it did in its motion to exclude Dr. Dennis. Dkt. 151 at 13-15. As the Court will recall, the plaintiffs in that case were seeking to end-run individual reliance requirements that prevented class certification under New Jersey and Delaware state law, under which "reliance is nearly always an individualized question" absent "the aid of [a] broad presumption," such as that afforded by the fraud-on-the-market theory, for which proof of an efficient market is required. *Id.* at 310-11. Under California law, however, there is

no need to proceed under a "fraud on the market" theory as "class members in CLRA . . . actions are not required to prove their individual reliance on the allegedly misleading statements." *Bradach v. Pharmavite, LLC*, 735 F. App'x 251, 254 (9th Cir. 2018).

This Court previously rejected USC's "real-world and market realities" arguments as "speak[ing] to the weight of Dr. Dennis's analysis." Daubert Order (Dkt. 173) at 18. The Court further pointed out that Dr. Dennis's survey design does account for "numerous real-world, supply-side factors" in measuring "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." *Id.* at 17-18. Given that the Court has already examined and dispensed with USC's market arguments, with the benefit of the same case law it recycles here, there is no reason to revisit the Court's well-reasoned opinion that Dr. Dennis's proposed surveys to quantify damages is an adequate way to measure class-wide damages in this case, supporting certification.

VI. USC'S POTENTIAL DEFENSES DO NOT RENDER PLAINTIFFS ATYPICAL OR DEFEAT CERTIFICATION.

USC mounts a series of arguments against Plaintiffs' "typicality"—each one flimsier than the next. As discussed above, the immunity it confers upon itself for having purportedly informed US News before 2020 that USC would defy its instruction (which the record does not support) at best raises a merits question not properly resolved at this stage of the proceedings. *See* Sec. II, *supra*. Regardless, whether USC gave notice to US News is not a fact peculiar to individual Class Members, but instead focuses on evidence going to USC's actions and state of mind that is common to all class members. This defense thus only weighs in favor of

certification as its resolution would be the same for large swaths of the Class (*i.e.*, all Class Member in the pre-2020 time period).

Next, USC seeks to recast Plaintiffs' claims as complaints about education quality, based on testimony elicited during their deposition regarding whether they were satisfied with the education they received. But Plaintiffs' answers to those questions do not change the nature of this case, the claims they are advancing, or the damages they are seeking. At the time they filed their Complaint and still today, Plaintiffs specifically challenge and seek relief tied to any price-premium paid as a result of USC's fraudulent ranking representation. As this Court found at the motion to dismiss stage, the "crux of Plaintiffs' claim is not that USC failed to instruct them adequately." Dkt. 63 at 11. Rather, "[t]he crux of Plaintiffs' claim is instead that USC intentionally misreported . . . 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." *Id.* Nothing has changed since the Court issued this order. None of Plaintiffs' experts or evidence submitted in support of class certification centers on or materially discusses (if it even touches on it at all) the quality of Plaintiffs' educational experience. Plaintiffs' forthright answers to *Defendant's* questions about their academic experience isn't evidence for claims they never brought—it's just honesty. The educational malpractice doctrine is simply not implicated here.

Finally, the possibility of loan forgiveness at some distant point in the future does not provide unique damages defenses that would apply only to the named Plaintiffs. Nor does USC offer any actual analysis or authority supporting this claim, which it makes in passing with citation to other portions of the brief that do not actually address this argument. Affirmative defenses rarely defeat certification and "simply asserting an affirmative defense, without more, does not undermine typicality." *Beaver v. Omni Hotels Mgmt. Corp.*, No. 20-cv-00191-AJB-DEB, 2023 WL 6120685, at *7 (S.D. Cal. Sep. 18, 2023); *see also* 2 Newberg on Class Actions

§ 4:55 (5th ed.) ("[T]he general rule, regularly repeated by courts in many circuits, is that 'courts traditionally have been reluctant to deny class action status under Rule 23(b)(3) simply because affirmative defenses may be available against individual members.'"). Furthermore, at best for USC, any such affirmative defense would go to variations in the amount of damages among Class Members, which is not a basis to deny class certification, as even USC recognizes. *See* Opp'n at 31, *see also Pulaski & Middleman, LLC v. Google, Inc.*, 802 F.3d 979, 986-87 (9th Cir. 2015) (finding that the amount of damages is often an individual question and does not defeat class certification). Instead, the broadly applicable availability of a statutory loan forgiveness opportunity weighs in favor of class certification, not against it.

VII. CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs' Motion for Class Certification and appoint Plaintiffs as Class Representatives and their counsel as Class Counsel.

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CERTIFICATE OF COMPLIANCE

The above signed counsel of record for the Plaintiffs certifies that this brief 5,830 words, which complies with the word limit established by the Court. *See* Dkt. 169 at Pg. 6375.