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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 REPLY IN SUPPORT OF MOTION TO EXCLUDE OPINIONS & TESTIMONY OF PLAINTIFFS' EXPERT WITNESS J. MICHAEL DENNIS

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

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

USC's Motion points out that there is no evidence supporting Dennis's assumption that tuition is set at market price. Plaintiffs do not dispute this. USC's Motion also points out that there is no evidence supporting Dennis's assumption that tuition responds to changes in US News's rankings. Plaintiffs do not dispute this, either.

Instead of defending the factual sufficiency of Dennis's ***assumptions*** (a Rule 702(b) matter), Plaintiffs merely defend the reliability of Dennis's purported ***methodology*** (a Rule 702(c) matter). Plaintiffs spend most of their Opposition espousing the virtues of conjoint surveys, insisting courts have already rejected USC's methodological challenges. The problem for Plaintiffs, though, is that USC is not making a methodological challenge at this time. As USC made clear in its Motion, Dennis hasn't actually done anything, so there is currently no methodology to challenge yet. Dennis has only offered a concept of a proposed methodology that remains woefully undeveloped.

Accordingly, this Motion is not a difficult one for the Court. Because Plaintiffs have chosen to attack a strawman rather than address USC's actual arguments, it is now uncontested that Dennis's assumptions are unsupported by any evidence. His opinions, therefore, should be excluded under Rule 702(b). "An expert opinion is properly excluded where it relies on an assumption that is unsupported by evidence in the record and is not sufficiently founded on facts." *Nuveen Quality Income Mun. Fund Inc. v. Prudential Equity Grp., LLC*, 262 Fed. App'x 822, 824 (9th Cir. 2008); *see also McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 807 (9th Cir. 1988) (affirming exclusion of expert's study that "rests on unsupported assumptions"); *Townsend v. Monster Beverage Corp.*, 303 F. Supp. 3d 1010, 1032 (C.D. Cal. 2018) (excluding expert opinion that was based on an assumption not "grounded in anything other than [the expert's] unsupported speculation").

LEGAL STANDARD

Plaintiffs begin their analysis by misstating the legal standard. There is no "presumption that expert testimony is admissible," as Plaintiffs erroneously suggest. *See* Doc. 151, p. 3.[1] Plaintiffs have ***the burden*** to prove Dennis's testimony is admissible, and nothing within Rule 702 gives them the benefit of a presumption. To the contrary, Rule 702 "has been amended to clarify and emphasize that expert testimony may not be admitted ***unless the proponent demonstrates*** to the court that it is more likely than not that the proffered testimony meets the admissibility requirements set forth in the rule." Fed. R. Evid. 702 advisory committee's note to 2023 amendment (emphasis added). "This is the preponderance of the evidence standard that applies to most of the admissibility requirements set forth in the evidence rules." *Id.* Given their lack of supporting evidence, it is understandable that Plaintiffs want to fall back on a presumption to save them. But any notion of a presumption of admissibility is irreconcilable with the express language of Rule 702, as amended in 2023.

ARGUMENT

I. Dennis's Proposed Methodology Relies on Neher's Inadmissible Opinions.

Plaintiffs do not dispute the conclusion that, if this Court excludes Neher's opinions, it must also exclude any opinions from Dennis that rely on Neher's excluded opinions. *See* Doc. 151, p. 7-8.

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

A. Plaintiffs identify no evidentiary support for Dennis's assumption that tuition is set at the market price.

Plaintiffs mischaracterize USC's argument, suggesting "USC's primary challenge is that a conjoint survey cannot reliably measure price premiums in the context of higher education." *Id.* at p. 8. That is not USC's challenge. USC is not currently making a methodological challenge. *See* Doc. 146, p. 10 n.2. Plaintiffs'

[1] Page numbers cited herein refer to the document's original numbering.

defense of conjoint analysis as an appropriate methodology, focusing on "supply-side factors" and irrelevant case law on the same—including *In re University of Southern California Tuition & Fees Covid-19 Refund Litigation*, 695 F. Supp. 3d 1128, 1146-1149 (C.D. Cal. 2023) ("*In re USC*")—is an obvious strawman. *See* Doc. 151, p. 8-12.

Whether conjoint analysis is a reliable methodology in this context (*see* Rule 702(c)) is a separate and distinct question from whether Dennis's proposed conjoint analysis is based on sufficient facts (*see* Rule 702(b)). *In re USC* (which involved a conjoint survey that had actually been conducted) and Plaintiffs' other cases address reliability of methodology, not factual sufficiency.[2] USC, however, is challenging the latter, including Dennis's assumption that tuition is set at the market price of education. Doc. 146, p. 5-6. Dennis makes this critical assumption without any supporting evidence. *See id.* "The proponent of an expert is required to show that the witness's testimony"—***including an underlying assumption***—"is based on something more than subjective belief or unsupported speculation." *Townsend*, 303 F. Supp. 3d at 1032 (quotations omitted). And as the amendments to Rule 702 were meant to clarify, the "sufficiency of an expert's [factual] basis" ***is a question of admissibility***, not weight. Fed. R. Evid. 702 advisory committee's note to 2023 amendment.

Tellingly, Plaintiffs make no effort to identify any evidence supporting Dennis's assumption. *See* Doc. 151, p. 8-12. While they argue conjoint analysis has previously been performed in the higher education context, they do not suggest any of their cited sources state that tuition is set at the market price. *See id.* at p. 6, 9. Plaintiffs' observation is simply an argument regarding reliability of methodology in this context, and is not the same as actually identifying evidence supporting Dennis's assumption that tuition is set at the market price. "An expert opinion is properly excluded where it

[2] *See, e.g., MacDougall v. Am. Honda Motor Co.*, No. 20-56060, 2021 WL 6101256, at *1 (9th Cir. Dec. 21, 2021); *Maldonado v. Apple, Inc.*, No. 16-CV-4067, 2021 WL 1947512, at *21-*23 (N.D. Cal. May 14, 2021); *Hadley v. Kellogg Sales Co.*, 324 F. Supp. 3d 1084, 1104-06 (N.D. Cal. 2018).

relies on an assumption that is unsupported by evidence in the record and is not sufficiently founded on facts." *Nuveen*, 262 Fed. App'x at 824. An "expert's testimony may not be based on assumptions of fact without evidentiary support." *Endy v. Cty. of L.A.*, No. 16-CV-3344, 2019 WL 4233572, at *6 n.7 (C.D. Cal. May 28, 2019) (quotations omitted). As Plaintiffs' own Opposition confirms, there is no "evidentiary support" for Dennis's assumption that tuition is set at the market price. For this reason alone, Dennis's opinions and testimony should be excluded. *See id.*; *Townsend*, 303 F. Supp. 3d at 1032.

B. Plaintiffs identify no evidentiary support for Dennis's assumption that tuition responds to US News's rankings.

Plaintiffs make the same mistake with USC's point that there is no evidence supporting Dennis's assumption that tuition responds to US News's rankings. Rather than try to identify supporting evidence for this assumption, Plaintiffs respond by defending the reliability of Dennis's proposed methodology. *See* Doc. 151, p. 13. Neither Plaintiffs' argument addressing a non-existent methodological challenge, nor their irrelevant case law on the same (*see id.*), does anything to carry Plaintiffs' burden "to show that [Dennis's] testimony is based on something more than subjective belief or unsupported speculation." *Townsend*, 303 F. Supp. 3d at 1032 (quotations omitted).

Given Plaintiffs' lack of evidence supporting Dennis's assumption that tuition responds to US News's rankings, this case is materially indistinguishable from *Harnish v. Widener University School of Law*, No. 12-608, 2015 WL 4064647 (D.N.J. July 1, 2015). While Plaintiffs try to evade *Harnish* on a purported difference in damages theory (*see* Doc. 151, p. 13), the fact remains that Plaintiffs here—just like the *Harnish* plaintiffs—propose expert opinion that "relies on a market dynamic that they have not proved to exist." *Harnish*, 2015 WL 4064647, at *7. In *Harnish*, the plaintiffs "offer[ed] no evidence that a … market dynamic adjusts law school tuition levels to reflect public disclosures about the schools' employment rates." *Id.* Likewise,

Plaintiffs here have "offer[ed] no evidence that a … market dynamic adjusts [graduate] school tuition levels to reflect public disclosures about the schools' [ranks]." *Id.*

Plaintiffs' suggestion that the Third Circuit's opinion in *Harnish* somehow supports them is ludicrous. Although the Third Circuit noted there was "some plausibility to [the plaintiffs'] theory," it also explained plausibility was not enough. *See Harnish v. Widener Univ. School of Law*, 833 F.3d 298, 312, 313 n.10 (3d Cir. 2016). According to the Third Circuit, "the plaintiffs would still be required to do more than propose it as an economically plausible theory; they would need to provide ***proof*** that price inflation ***actually occurred*** on this occasion, as a result of the specific misrepresentation at issue." *Id.* at 313 n.10 (emphasis added). The *Harnish* plaintiffs did not do that, as "they offer[ed] no direct evidence that Widener changed its prices in response to the employment statistics that it published and their anticipated effect on the overall market." *Id.* Likewise, Plaintiffs here have "offer[ed] no direct evidence that [Rossier] changed its prices in response to the [rankings] that [US News] published and their anticipated effect on the overall market." *Id.*

The Third Circuit's observation in *Harnish* is perfectly in line with the unquestioned principle that an "expert's testimony may not be based on assumptions of fact without evidentiary support." *Endy*, 2019 WL 4233572, at *6 n.7 (quotations omitted). As Plaintiffs' own Opposition confirms, there is no "evidentiary support" for Dennis's assumption that tuition responds to US News's rankings.[3] For this additional reason, Dennis's opinions and testimony should be excluded. *See id.*

[3] Plaintiffs, without citation, include a bare, conclusory assertion that Dennis is not making such an assumption, but rather "that is what his survey is expressly designed to test." Doc. 151, p. 12-13. This is nonsensical. If Dennis is not assuming that tuition is responsive to US News's rankings, then he cannot purport to measure a "price premium" as he defines that term. *See* Doc. 146-1, p. 35 (defining "price premium" as "the fraction of the total price paid by" students "as a result of Defendant's use of the alleged deception to market its programs as highly ranked"). Put another way, absent such assumption, Dennis could only show that Rossier "*should* have had lower tuition prices," not "that it *would* have had lower tuition prices." *See Harnish*, 2015 WL 4064647, at *8.

As USC's opening Memorandum points out, Plaintiffs not only lack evidence supporting Dennis's assumption, but there is also empirical evidence ***directly contradicting*** his assumption and showing that tuition is not responsive to changes in US News's rankings. *See* Doc. 146, p. 8-9. Plaintiffs do not dispute this empirical evidence, or the fact that it contradicts Dennis's assumption. Instead, Plaintiffs argue the existence of such "real world" evidence does not go to admissibility, but merely the weight given Dennis's surveys. Doc. 151, p. 15-16. That might be true if Plaintiffs had any evidence of their own to support Dennis's assumption. *See* Fed. R. Evid. 702 advisory committee's note to 2023 amendment.

But that is not the situation here. Rather than a case of competing evidence, this is a case of no evidence on the one hand (Plaintiffs) ***and*** empirical evidence on the other (USC). Plaintiffs' lack of supporting evidence, alone, renders Dennis's opinions and testimony inadmissible. *See id.* USC's uncontested empirical evidence is a cherry on top. Expert testimony is "inadmissible when the facts upon which the expert bases his testimony contradict the evidence." *Greenwell v. Boatwright*, 184 F.3d 492, 497 (6th Cir. 1999); *see also Mier v. CVS Health*, No. 22-55665, 2023 WL 4837851, at *1 (9th Cir. July 28, 2023) (rejecting damages model, in part, because it was based on a supply curve that was contradicted by "record evidence"); *In re: NFL "Sunday Ticket" Antitrust Litig.*, No. 15-ML-2668, 2024 WL 3628118, at *6 (C.D. Cal. Aug. 1, 2024) (excluding expert opinion where his assumption "contrasted with the real world").

III. Dennis's Proposed Methodology is Too Undeveloped.

Continuing their theme, Plaintiffs once again mischaracterize USC's argument, as they insist that "USC tries to undermine Dr. Dennis's survey design" and "challenges to an expert's attribute selection … go to the weight given the survey, not its admissibility." Doc. 151, p. 17 (quotations omitted). But USC is not, at this time, challenging Dennis's survey design or his attribute selection, as Dennis fails to put forth any definitive design or attribute selection to challenge.

Contrary to Plaintiffs' misrepresentation, Dennis has not identified the attributes "he will use" (*id.*), but has only tentatively selected attributes he ***may*** use, depending on the results of cognitive interviews he has yet to conduct. Doc. 146-1, p. 22, 32. Thus, while Dennis has suggested eight illustrative attributes, he might end up replacing two, four, or even seven of the attributes by the time he runs his surveys. *Id.* No one—not Dennis, Plaintiffs, or USC—actually knows what attributes Dennis will end up using. The same is true for levels of attributes, which need to be determined after cognitive interviews are completed. *Id.* Dennis has done even less work with respect to survey instructions and questions. He is yet to even tentatively word the instructions and questions, which he admits are also subject to change based on cognitive interviews he has not conducted. *Id.* at p. 23, 32. This is why Dennis offers only a concept of a plan, or a proposed proposal, unlike other cases in which an actual-but-unexecuted plan or proposal is before the court.

And on that note, Plaintiffs' excuse that "cognitive interviewing may be conducted at any time" (Doc. 151, p. 18) does not hold up. Plaintiffs seem to suggest that cognitive interviews will have no effect on Dennis's (tentative and incomplete) design. *Id.* Dennis's report recognizes, however, that he needs to conduct cognitive interviews ***before*** he is able to finalize the most crucial details of his surveys, including the attributes, levels of attributes, survey instructions, and survey questions. Doc 146-1, p. 32. By his own admission, Dennis has not "done anything to test whether" the incomplete "model [he] ha[s] created is actually a good model for this case." Doc. 146-2, p. 47:1-5.

USC agrees. Dennis's concept of a proposed methodology—which remains entirely unsettled on attributes, levels of attributes, survey instructions, and survey questions—is far too nebulous for this Court to determine that it could be reliable. "The fact that a model is underdeveloped may weigh against a finding that it will provide a reliable form of proof." *Lytle v. Nutramax Labs., Inc.*, 114 F.4th 1011, 1032 (9th Cir.

2024). "Merely gesturing at a model or describing a general method will not suffice to meet this standard." *Id.* That is all Dennis has done here.

Plaintiffs' reliance on *Lytle* is, therefore, misplaced. The only deficiency preserved for appeal in *Lytle* was the expert's failure to collect certain data, which the expert planned to remedy. *Id.* at 1032-33. The Ninth Circuit held the district court did not abuse its discretion in ruling such a failure was insufficient to render the expert's model undeveloped. *Id.*

Like *Lytle*, Dennis has failed to collect certain data, specifically, data on attributes that would be informed by necessary "preresearch."[4] But, unlike *Lytle*, Dennis's failure to collect data is not the only deficiency. As discussed above, Dennis is not just missing data, but also missing ***design***, in that no one, including Dennis, knows what his surveys will ultimately look like in the most important respects—attributes, levels of attributes, survey instructions, and survey questions—until ***after*** he gets around to doing the groundwork that he should have already done. Consequently, Dennis offers only the type of "insufficiently detailed or thorough" proposal that *Lytle* recognizes is too "underdeveloped" to pass muster. *Id.* at 1029 n.5.

CONCLUSION

USC respectfully requests this Court exclude the opinions and testimony of Plaintiffs' expert Dr. J. Michael Dennis for purposes of class certification, summary judgment, and trial.

[4] Plaintiffs argue Dennis did preresearch by reviewing 2U and USC documents. Doc. 151, p. 18-19. Preresearch contemplates conducting (non-conjoint) purchase factor surveys to determine the most important attributes to consumers. Doc. 146-4, p. 39:5-40:18. There is no indication Dennis has attempted any such surveys.

Dated: October 10, 2024

Respectfully submitted,

SHOOK, HARDY & BACON L.L.P.

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CERTIFICATE OF COMPLIANCE

The undersigned counsel of record for the University of Southern California certifies that this brief contains 2,657 words, which complies with the word limit of L.R. 11-6.1.

By: /s/ *Michael L. Mallow*
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