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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

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

Plaintiffs,

vs.

UNIVERSITY OF SOUTHERN CALIFORNIA and 2U, INC.,

Defendants.

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

Assigned to: Hon. George H. Wu

DEFENDANT UNIVERSITY OF SOUTHERN CALIFORNIA'S NOTICE OF MOTION AND MOTION TO EXCLUDE OPINIONS & TESTIMONY OF PLAINTIFFS' EXPERT WITNESS SARA NEHER

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

MOTION AND NOTICE OF MOTION

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

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

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

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

Dated: September 13, 2024

Respectfully submitted,

SHOOK HARDY & BACON L.L.P.

By: /s/ *Michael L. Mallow*
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MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Plaintiffs' expert Sara Neher purports to undertake what scholars have deemed an "essentially impossible" task: replicating one of U.S. News & World Report's ("US News") proprietary rankings models. *See* William D. Henderson & Andrew P. Morriss, *Student Quality as Measured by LSAT Scores: Migration Patterns in the U.S. News Rankings Era*, 81 IND. L.J. 163, 168 (2006); *see also* Karen L. Wallace & Rebecca Lutkenhaus, *Measuring Scholarly Impact in Law*, 28 WIDENER L. REV. 145, 173 (2022) (noting US News's "published methodology omits details required to replicate" the law school rankings model); Bernard S. Black & Paul L. Caron, *Ranking Law Schools: Using SSRN to Measure Scholarly Performance*, 81 IND. L.J. 83, 87 (2006) (noting US News "does not release data from which an outsider could replicate its results"). Plaintiffs' case hinges on the premise that the rank for USC's Rossier School of Education ("Rossier") in US News's "Best Graduate Schools of Education" would have plummeted had Rossier provided certain alternative data to US News. But, rather than turning to US News for such evidence, Plaintiffs turn to Neher.

Neher has not pulled off the impossible here—not even close. Neher is missing both necessary data and key insights into the methodology US News used to compile the 2018 through 2022 editions of its rankings. As a result, there is no consistency, predictability, or reliability to Neher's model; sometimes her results are close to US News's results, but other times they deviate dramatically. Her model may produce a rank for one school that is spot on with US News's rank, but also produce a rank for another school that is more than 100 places off. In fact, ***her model fails to match US News's ranks 72% of the time***, including being off by 10 or more places a whopping 25% of the time. This is not replication, but a sham imitation.

Despite these obvious shortcomings, Neher claims she can determine an "adjusted rank" for Rossier, *i.e.*, the rank Rossier would have had but for misreporting of certain data, based on her novel use of a supposed "hidden-data constant." Neher's

"hidden-data constant" does not cure the many ills of her model. It is nothing more than a varying, unpredictable, and backwards-looking margin of error between Neher's model and US News's methodologically-different model. Neher's "hidden-data constant" has no predictive capacity whatsoever that would allow Neher to arrive at a rank for Rossier based on data and methodology that US News has never used. Due to her faulty methodology—which has no basis in sound mathematical principles and which fails to satisfy every relevant factor—the numbers produced by Neher's model are entirely meaningless. For these reasons, and others discussed herein, USC requests this Court exclude Neher's opinions and testimony.

BACKGROUND

Plaintiffs bring a putative class action against USC, alleging that Rossier's high ranks on U.S. News's annual list of "Best Graduate Schools of Education" were inflated, *i.e.*, that "Rossier would have been lower ranked" had it not misreported certain data to US News. *See* Dkt. 67, ¶ 62. "To determine its rankings, US News employs a specific methodology which assigns weights to [ten metrics] based on their perceived importance to determining academic quality." Dkt. 63, p. 3. These ten metrics consist of:

- Quality assessment metrics, including peer assessment (accounting for 25% of a school's score) and expert assessment (15%);
- Faculty resources metrics, including student-faculty ratio (4.5%), percentage of faculty with awards (2.5%), and doctoral degrees granted (5%);
- Research activity metrics, including total research expenditures (15%) and average expenditures per faculty member (15%); and
- Student selectivity metrics, including acceptance rate (6%), mean GRE verbal scores (6%), and mean GRE quantitative scores (6%).

Exhibit ("Ex.") 1, US News 2019 Methodology, at USC_FAV_000002636-38; **Ex. 2**, Neher Report, p. 4.

For each of the ten metrics, US News standardizes data "so that each school's value [is] compared with the mean and standard deviations of all other schools." **Ex. 2**, p. 7. US News "uses logarithmic transformations in the calculation of certain [metrics]." *Id.* at p. 8. "This transformation of the data is ***essential*** when combining diverse information into a single ranking because it allows for fair comparisons between the different types of data." **Ex. 1**, at USC_FAV_000002638 (emphasis added). A school's "z-score" for a particular metric reflects the number of standard deviations that the school is from the mean value. **Ex. 2**, p. 7. The z-scores for all metrics are then weighted as noted above and totaled. *Id.* The z-score totals are then indexed, so that the school with the highest total receives a final score of 100. *Id.* US News's final scores for the other schools are then based on each school's percentage of the highest z-score total, rounded to the nearest whole number. *Id.* at p. 7-8.

For example, if Harvard University has the highest z-score total of 4.00 and the University of Kansas has a z-score total of 2.01 (which is 50.25% of Harvard's total), Harvard receives a final score of 100 and Kansas receives a final score of 50. *See id.* US News numerically ranks the top 75% of schools based on their final scores. **Ex. 1**, at USC_FAV_000002638. US News does not assign a rank to, or provide final scores for, the bottom 25% of schools. *Id.*; **Ex. 2**, at p. 8.

Although this general process is no secret, US News's precise model and how it is executed from year-to-year is highly proprietary and, thus, not publicly known. **Ex. 2**, p. 7; **Ex. 3**, Neher Deposition, p. 111:15-18; **Ex. 4**, Monk Report, p. 6-7 (noting US News's "description of the methodology falls short of providing guidance regarding the treatment of data that is not publicly disclosed"). US News, for example, does not disclose "exactly how [it] applies a logarithmic transformation." **Ex. 3**, p. 199:4-5. Similarly, US News does not disclose all the data it receives. Rather, it "treats certain information it gathers as its proprietary data," including percentage of faculty with awards and percentage of entering doctoral students that submitted GRE scores. **Ex. 2**, p. 7. Additionally, for the bottom 25% of schools, "many do not have complete data

released." *Id.* at p. 8. And, because the final scores that US News releases to the public are rounded to the nearest whole number, the exact final scores remain unknown. *Id.*

Despite all these unknowns, Plaintiffs retained Neher "to build a model that could reliably project the ranking that USC Rossier would have received had it correctly reported Ed.D. data and research expenditures." *Id.* at p. 3. Neher, as part of her work in higher education, has been involved in submitting data to US News. *Id.* at p. 2. Neher, however, has never worked for, or been trained by, US News. **Ex. 3**, p. 110:13-20. She does not "know the exact formulas, the exact calculations, or adjustments that U.S. News makes to the model it uses." *Id.* at p. 112:19-24. She has never "been granted access to U.S. News' full methodology for any of its rankings" and does "not have access to information that U.S. News does not publicly disclose." *Id.* at p. 113:16-25. Prior to this litigation, Neher had never tried to replicate US News's model for the "Best Graduate Schools of Education" rankings. *Id.* at 193:1-13.

Nevertheless, Neher set about trying to do just that for the 2018 through 2022 editions of the rankings. *Id.* at p. 198:3-6, 205:9-11. She does so by offering a one-of-a-kind model that has never been peer reviewed, tested for accuracy, or accepted as a reliable methodology for replicating US News's model. *See id.* at p. 161:22-162:23, 193:1-4, 11-13. Neher admittedly fell short in her attempted replication. *Id.* at p. 116:2-5 (agreeing her model "is not [an] exact replica of what [US News's] model is"); p. 188:3-4 ("I'm not claiming it is identical.").

Unlike US News's model, Neher's model calculates z-scores for only nine out of the ten metrics; her model does not include the metric for percentage of faculty with awards. **Ex. 2**, p. 7. Unlike US News's model, Neher's model does not apply logarithmic transformations to any of the data when calculating z-scores. **Ex. 3**, p. 204:8-9. Unlike US News's model, Neher's model—because it lacks a complete data set for the bottom 25% of schools—is unable to "find the true means and standard deviation of each population set that *U.S. News* uses to calculate the z-scores." **Ex. 2**, p. 8. Unlike US News's model, Neher's model lacks sufficient data from the 2018

edition of the rankings (because US News "only provided data for the top 130" schools), causing her to use a "proxy" for the 2018 edition that is based on data from the 2019 edition. *Id.* at p. 9. Unlike US News's model, this "lack of full data from the 2018 edition also affects the 2019 edition" in Neher's model with respect to the research activity metrics. *Id.*

Given all these differences, it should come as no surprise that Neher's model does not come particularly close to matching US News's model. Other than the top school (which, by definition, has to receive a perfect score of 100), the scores that Neher's model produces deviate from US News's scores ***for every school in every edition of the rankings***. *See* **Ex. 4**, p. 10 n.34; **Ex. 5**, Neher 2018 Final Calculations; **Ex. 6**, Neher 2019 Final Calculations; **Ex. 7**, Neher 2020 Final Calculations; **Ex. 8**, Neher 2021 Final Calculations; **Ex. 9**, Neher 2022 Final Calculations.[1] These deviations can be positive (undervaluing the score) or negative (overvaluing the score), and they vary wildly school-to-school. *See id.* The following are just a few examples.

In the 2019 rankings, Neher's replicated score for the University of Maryland is off by only 0.19 points; however, her score for Marquette University is off by 10.31 points and her score for Johns Hopkins University is off by -16.40 points. **Ex. 6**. In the 2020 rankings, Neher's score for the University of Washington is off by only -0.11 points; however, her score for the University of Illinois is off by -7.35 points and her score for Baylor University is off by -7.78 points. **Ex. 7**. In the 2021 rankings, Neher's score for the University of California-Santa Barbara is off by only -0.11 points, but her score for Virginia Tech is off by -6.47 points and her score for William & Mary is off by 20.53 points. **Ex. 8**.

The amount by which Neher's scores deviate from US News's scores also varies year-to-year for the same school. For example, from 2020 to 2021, Neher's score for the University of Rhode Island jumps from being off by -1.18 points to being off by

[1] These deviations are shown in the column labeled "Proprietary Data Constant" in Exhibits 5, 6, 7, 8, and 9.

16.23 points. **Ex. 7**; **Ex. 8**. And from 2021 to 2022, Neher's score for Rutgers drastically changes from being off by 24.48 points to being off by 2.84 points. **Ex. 8**; **Ex. 9**.

In addition to score deviations, Neher's model does not remotely produce the same ranks as US News's model. On average, Neher's model fails to produce the same rank for a school as US News's model 72% of the time. **Ex. 4**, p. 43 (Monk Report's exhibit 1). These are not all near misses, either. On average, Neher's model produces a rank that is ***more than 10 places off*** from US News's rank 25% of the time, including some extreme deviations. *Id.* For example, Neher's model ranks Rutgers 182nd in the 2021 edition, but US News's model ranks Rutgers 43rd. *Id.* at p. 9. In that same edition, Neher's model ranks William & Mary 183rd and the University of North Carolina-Charlotte 194th. *Id.* US News's model, however, ranks those same schools 58th and 79th, respectively. *Id.*

Neher acknowledges her model has a "margin of error," *i.e.*, there is a difference between the scores that her model produces and the scores that US News's model produces. **Ex. 2**, p. 9. Neher chalks this up to the information she does not know about US News's model. *Id.* Yet, she does not tweak her model in an effort to better replicate US News's model. Instead, Neher renames the margin of error a "hidden-data constant" and claims the value of such can be used to determine what Rossier's "adjusted score" would have been had Rossier not misreported certain data to US News. *Id.* at p. 9-11. To be clear, though, Neher is not only lacking "hidden data" (*e.g.*, the data for the 2.5% metric relating to percentage of faculty with awards), but also hidden, and "essential," methodology (*e.g.*, logarithmic transformations). **Ex. 1**, at USC_FAV_000002638; **Ex. 2**, p. 7; Ex**. 3**, p. 204:8-9; **Ex. 10**, Monk Deposition, p. 80:8-13. As a result, the methodology that Neher applies to the nine metrics for which she has some data does not match US News's methodology for those same nine metrics. *See id.*

Neher, nevertheless, treats her margin of error as though it represents the value of hidden data between her nine-metric model and US News's ten-metric model, as

opposed to what it truly represents—the unpredictable difference in output of two methodologically-divergent models. **Ex. 2**, p. 11. After obtaining a score and "hidden-data constant" for Rossier based on the original data that Rossier submitted, Neher then substitutes what she believes to be the correct data for five different metrics,[2] plugs that substitute data into her model, gets a score, and then adjusts that score by the value of the "hidden-data constant," *i.e.*, the backwards-looking amount by which her model was off when she used the ***original data*** with ***her*** methodology. *Id.* at p. 9-11. In other words, Neher's "adjusted score" for Rossier = (score produced by Neher's model using substitute data) + (margin of error produced by Neher's model using original data). *Id.* Based on this adjusted score, Neher assigns Rossier an "adjusted rank" for the 2018 through 2022 editions. *Id.*

Neher also provides "other observations," which generally opine that Rossier's adjusted rank "would have been lower" had she not kept constant the metrics for GRE scores, peer assessment, and expert assessment. *Id.* at p. 11-12. Neher, though, admittedly provides no "detailed analysis" (indeed ***any*** analysis) to support these "other observations." **Ex. 3**, p. 249:2-9.

LEGAL STANDARD

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

[2] Neher substitutes data for the following metrics: acceptance rate, student-faculty ratio, doctoral degrees granted, total research expenditures, and average expenditures per faculty members. *Id.* at p. 10-11.

expert, and that such testimony meets the requirements of Rule 702." *Jinro Am. Inc. v. Secure Invs., Inc.*, 266 F.3d 993, 1004 (9th Cir. 2001).

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

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the proponent demonstrates to the court that it is more likely than not that:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert's opinion reflects a reliable application of the principles and methods to the facts of the case.

"Rule 702 was amended recently to clarify and emphasize that expert testimony may not be admitted unless the proponent demonstrates to the court that it is more likely than not that the proffered testimony meets the admissibility requirements set forth" in the Rule. *Boyer v. City of Simi Valley*, No. 19-CV-00560, 2024 WL 993316, at *1 (C.D. Cal. Feb. 13, 2024) (quotations omitted). "[P]revious holdings that the critical question of the sufficiency of an expert's basis, and the application of the expert's methodology, are questions of weight and not admissibility are an incorrect application of Rules 702 and 104." *Id.* (quotations omitted). "The Court is required to analyze the expert's data and methodology at the admissibility stage more critically than in the past." *Id.*

ARGUMENT

I. Neher's Opinions are Not the Product of Reliable Principles and Methods.

A. Neher's opinions regarding Rossier's adjusted scores and ranks are the result of an unreliable methodology.

Expert "opinions derived from an unsound or invalid methodology are without any evidentiary value." *In re Ford Motor Co. DPS6 Powershift Transmission Prods. Liab. Litig.*, No. 17-CV-06654, 2022 WL 17080164, at *2 (C.D. Cal. Sept. 29, 2022). An expert opinion that "is the result of a faulty methodology or theory" is inadmissible. *City of Pomona v. SQM N. Am. Corp.*, 750 F.3d 1036, 1047 (9th Cir. 2014) (quotations omitted); *see also Grodzitsky*, 957 F.3d at 987 (affirming exclusion of the plaintiff's expert opinion in putative class action because it "was not predicated on reliable scientific methodology"). Such is the case here.

To arrive at Rossier's purported adjusted scores and ranks, Neher begins by plugging the original data into her model, which, unequivocally and admittedly, does not match US News's model. **Ex. 2**, p. 6-9; **Ex. 3**, p. 116:2-5, 188:3-4, 204:8-9. Among other discrepancies, Neher's model calculates z-scores for only nine out of the ten metrics used by US News's model, Neher's model is missing data from the bottom 25% of schools that US News's model uses to calculate z-scores, and, unlike US News's model, Neher's model does not apply the "essential" logarithmic transformations. **Ex. 1**, at USC_FAV_000002638; **Ex. 2**, p. 6-8; **Ex. 3**, p. 204:8-9. Notwithstanding these and other discrepancies, Neher compares her nine-metric model's score to US News's methodologically-different ten-metric model's score, calculates the amount by which these scores differ, and calls this margin of error a "hidden-data constant" that she says "capture[s] the value of the items hidden by U.S. News in each ranking year." **Ex. 2**, p. 11. Neher next plugs the substitute data into her nine-metric model, gets a score from her nine-metric model, and then adds the "hidden-data constant" to get an adjusted score that she believes US News's ten-metric model would have produced. *Id.* at p. 9-11.

This approach has no basis in sound mathematical principles. To begin, Neher's use of the term "hidden-data constant" is misleading. The "hidden-data constant" represents only a backwards-looking margin of error, not the value of any "hidden data." *See id.* at p. 9. Neher "cannot match the scores provided by U.S. News and, therefore … her method includes adding a 'hidden-data constant' to force her score to match the [published] U.S. News score for any given school." **Ex. 4**, p. 8. As discussed, this margin of error is also anything but constant; it varies both school-to-school and year-to-year. *Id.* at p. 10. Sometimes Neher's model can produce a score that is close to US News's score; other times, it is dramatically far off, or a result can come out somewhere in between. *See* **Ex. 5**; **Ex. 6**; **Ex. 7**; **Ex. 8**; **Ex. 9; Ex. 10**, p. 90:2-4 ("[T]here are some schools where she gets pretty close but a large number of schools where she doesn't."). There is no consistency or predictability whatsoever to her "hidden-data constant." *Id.*; **Ex. 4**, p. 10. It is nothing more than a "plug … that takes on a different value for each school in each year." **Ex. 4**, p. 4.

Nevertheless, Neher claims, "if we were to recalculate the school's score but with a changed value in one of the metrics, we would still add the previously calculated hidden-data constant to their final ranking as we are holding every unknown piece of information constant." **Ex. 2**, p. 9-10. This reasoning plainly conflates a margin of error with the "value of the items hidden by U.S. News." *See id.* at p. 11. Yes, Neher has no data for an entire metric (percentage of faculty with awards), but that metric makes up only 2.5% of a school's score. *Id.* at p. 4, 6-7. If the only difference between Neher's nine-metric model and US News's ten-metric model were this missing 2.5% metric, then there would not be large school-to-school and year-to-year variances in Neher's "hidden-data constant" and Neher's reasoning might make sense. In that hypothetical case, the "hidden-data constant" would truly represent the value of that missing, or hidden, metric, because Neher's value of the shared nine metrics would seemingly equal US News's value of the shared nine metrics.

But that is not the reality here. In addition to missing a metric, Neher's model (which, *inter alia*, lacks data from the bottom 25% of schools and lacks logarithmic transformations) employs a different methodology for the nine metrics that both models share. **Ex. 10**, p. 80:8-13 (explaining there are "two fundamental problems" with Neher's model: (1) "the missing data;" and (2) "we don't know what U.S. News does with the data"). Thus, the initial score that Neher's model produces for the shared nine metrics is not, in any way, reflective of a score that US News's model would have produced for those same nine metrics. *Id.* at p. 80:16-17 (noting the difference in methodology can "have pretty important impacts on" the results). That means Neher is not capturing "the value of the items hidden by U.S. News" with her "hidden-data constant." *See id.* at p. 11. Rather, her "hidden-data constant" represents nothing more than an apples-to-oranges comparison: the score produced by her nine-metric model and the score produced by US News's methodologically-different ten-metric model. In other words, Neher is capturing only an arbitrary margin of error between two divergent models—and that divergence is exactly why the margin of error is so inconsistent and unpredictable.

Accordingly, there is no logic behind plugging this margin of error back in when Neher then substitutes data for Rossier with respect to five of the metrics. Because Neher's model is not using the same methodology as US News's model for these five metrics, there is no basis to assume the margin of error between the two models will hold steady when different data is used. *See* **Ex. 4**, p. 7 n.22 (illustrating "the implications of not following the exact methodology used by U.S. News"), p. 10 ("Past values of the 'hidden-data constant' would not be a guide given that the 'hidden-data constant' varies for each iteration of her model even for the same school across years."); **Ex. 10**, p. 112:13-15 ("I don't think we can speculate as to what the differences would have been because we don't know the ins and outs of that [US News] model."). Put another way, just because Neher's model is off by a certain amount using the original data does not mean that Neher's model will be off by that same amount when using the

substitute data. *See id.* Again, Neher's "adjusted score" for Rossier = (score produced by Neher's model using ***substitute*** data) + (margin of error produced by Neher's model using ***original*** data). This is a nonsensical mishmash.

The problem for Neher is that she does not know the margin of error between her nine-metric model and US News's methodologically-different ten-metric model whenever the substitute data is used. Because US News has never released any score for Rossier based on the substitute data, the margin of error based on the substitute data is unknowable to Neher and everyone else outside of US News. Nothing about Neher's "hidden-data constant," *i.e.*, the backwards-looking margin of error based on the ***original*** data, allows her to overcome this inescapable limitation of her model. *See* **Ex. 4**, p. 10. "[A]bsent knowledge of the algorithm that … U.S. News uses, it's just hazardous to try to speculate as to what a change in -- any change in the data would do to the ranking." **Ex. 10**, p. 123:15-18.

In short, Neher's application of a "hidden-data constant" to arrive at Rossier's adjusted scores and ranks is just "a fudge factor here, something that looks like an explanation but is not one." *Mondis Tech. Ltd. v. LG Elecs., Inc.*, No. 15-CV-4431, 2023 WL 3749992, at *14 (D.N.J. June 1, 2023). "Fudge factors fail under *Daubert* for the same reason that ipse dixit expert opinions fail, namely because there is no methodology to connect the expert's conclusion to the facts." *Navarro v. Procter & Gamble Co.*, No. 17-CV-406, 2021 WL 868586, at *16 (S.D. Ohio Mar. 8, 2021). Because Neher's opinions regarding Rossier's adjusted scores and ranks (*see* **Ex. 2**, p. 11) are "the result of a faulty methodology or theory," they are inadmissible. *City of Pomona*, 750 F.3d at 1047; *see also Grodzitsky*, 957 F.3d at 987.

B. Neher's opinions regarding Rossier's adjusted scores and ranks fail to satisfy the *Daubert* factors.

The *Daubert* factors further confirm that Neher's opinions regarding Rossier's adjusted scores and ranks are not the product of reliable principles and methods. *See Daubert*, 509 U.S. at 593-94. "Under *Daubert*, the district court judge must ensure that

all admitted expert testimony is both relevant and reliable." *Grodzitsky*, 957 F.3d at 984 (quotations omitted). "Scientific evidence is reliable if the principles and methodology used by an expert are grounded in the methods of science." *Id.* (quotations omitted). "In conducting this analysis, the district court may consider whether the theory or technique employed by the expert is generally accepted in the scientific community; whether it's been subjected to peer review and publication; whether it can be and has been tested; and whether the known or potential rate of error is acceptable." *Id.* at 985 (quotations omitted).

Although these factors are not "a definitive checklist or test," *Daubert*, 509 U.S. at 593, they can still be informative on reliability. *See Grodzitsky*, 957 F.3d at 985 (holding the "district court properly excluded [the expert's] opinion under *Daubert*"); *Laux v. Mentor Worldwide, LLC*, 295 F. Supp. 3d 1094, 1099-1100 (C.D. Cal. 2017) ("[T]he lack of reliability of Dr. Kolb's methodology is further evidenced by the fact that none of her theories have been tested, peer reviewed, or generally accepted by the scientific community."). Here, Neher's opinions fail to satisfy every single one of the *Daubert* factors.

1. Neher's opinions are not testable.

"In order for a scientific technique to be reliable, there must be evidence in the record indicating the methodology can be [and] has been tested." *City of Pomona*, 750 F.3d at 1046 (quotations omitted). "The question is whether an expert's methodology can be challenged in some objective sense, or whether it is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability." *Id.* (quotations omitted).

"Daubert described the 'testability' prong in the context of a hypothesis that is falsifiable." *Id.* "A proposition is falsifiable if it is capable of being proved false; defeasible." *United States v. Mitchell*, 365 F.3d 215, 235 (3d Cir. 2004) (quotations omitted). "Proving a statement false typically requires demonstrating a counterexample empirically—for instance, the hypothesis 'all crows are black' is falsifiable (because an

albino crow could be found tomorrow), but a clairvoyant's statement that he receives messages from dead relatives is not (because there is no way for the departed to deny this)." *Id.* Expert "conclusions that are not falsifiable aren't worth much to either science or the judiciary." *Zenith Elecs. Corp. v. WH-TV Broad. Corp.*, 395 F.3d 416, 419 (7th Cir. 2005).

Neher's conclusions, *i.e.*, her adjusted scores and ranks for Rossier based on using substitute data (**Ex. 2**, p. 11), are not falsifiable. **Ex. 4**, p. 11. As Plaintiffs made only minimal effort to obtain discovery from US News,[3] neither Neher, USC, nor anyone else outside of US News has access to the complete data and methodology that US News utilized for the 2018 through 2022 editions of the rankings. *See id.* at p. 6-9; **Ex. 3**, p. 112:19-24, 113:16-25. Neher, admittedly, failed to exactly replicate US News's methodology for the shared nine metrics. **Ex. 3,** p. 116:2-5, 188:3-4. And US News has never provided scores or rankings that incorporate Neher's substitute data into ***US News's methodologically-different model*** because Plaintiffs "didn't approach U.S. News itself to ask U.S. News to conduct that analysis." **Ex. 10**, p. 84:23-24. Neher is only speculating that her margin of error, based on plugging the original data into a model that diverges from US News's methodology, would remain the same when substitute data is used. *Id.* at p. 123:15-18. Absent US News plugging Neher's substitute data into US News's model, "there is no way for [US News] to deny" Neher's conclusions. *See Mitchell*, 365 F.3d at 235.

Neher's adjusted scores and ranks, therefore, are not falsifiable (although, as discussed above, there is no reason to believe they are true, as opposed to arbitrary). *Cf. Dominguez v. Yahoo!, Inc.*, No. 13-CV-1887, 2017 WL 390267, at *19-*20 (E.D. Pa. Jan. 27, 2017) (ruling that experts' conclusions about a computer program's capability were not falsifiable because the program was "no longer operable, and could not be

[3] Plaintiffs served a subpoena to produce documents on US News, but apparently received only published rankings in response. Plaintiffs thereafter failed to pursue any further discovery from US News.

resuscitated"). Neher's model—using data and a methodology that US News has never used—is "simply a subjective, conclusory approach that cannot reasonably be assessed for reliability." *City of Pomona*, 750 F.3d at 1046.

2. Neher's opinions are not peer reviewed, supported by any objective source, or based on a generally accepted approach.

Neher's model has not been subjected to peer review and publication; it was created solely for this litigation. **Ex. 3**, p. 162:6-23, 193:11-13. "Where peer review and publication are absent, the experts must explain precisely how they went about reaching their conclusions and point to some objective source—a learned treatise, the policy statement of a professional association, a published article in a reputable scientific journal or the like—to show that they have followed the scientific evidence method, as it is practiced by (at least) a recognized minority of scientists in their field." *Clausen v. M/V NEW CARISSA*, 339 F.3d 1049, 1058 (9th Cir. 2003) (quotations omitted); *see also, e.g.*, *Crescenta Valley Water Dist. v. Exxon Mobile Corp.*, No. 07-CV-2630, 2013 WL 12116333, at *8 (C.D. Cal. Jan. 8, 2013) ("Dr. Wheatcraft's modified model and his Report were created solely for litigation purposes. Plaintiff is therefore required to come forward with other objective, verifiable evidence that the testimony is based on scientifically valid principles.") (quotations omitted).

Neher points to no such objective source. In particular, she offers no support for her use of a "hidden-data constant" to determine Rossier's adjusted scores and ranks based on the substitute data. *See* **Ex. 2**, p. 9-11. Far from being generally accepted, Neher's "hidden-data constant" approach is entirely novel; for example, searches for that term on Google, Westlaw, and LexisNexis turn up nothing. This is unsurprising, given that Neher's application of the "hidden-data constant" does not rest on sound mathematical principles, but rather, as discussed above, conflates a margin of error between two divergent models with US News's value of the hidden data.

3. Neher's opinions are based on a model with either a high or unknown error rate.

In terms of matching the real-world results of US News's model, Neher's model has an extraordinarily high error rate. Outside of the top school (which must receive a perfect score of 100), Neher's model fails to produce the same score as US News's model 100% of the time. **Ex. 4**, p. 10 n.34; **Ex. 5**; **Ex. 6**; **Ex. 7**; **Ex. 8**; **Ex. 9**. On average, Neher's model also fails to produce the same rank as US News's model 72% of the time, including being more than 10 places off 25% of the time. **Ex. 4**, p. 43 (Monk Report's exhibit 1). This high error rate "makes [Neher's model] a highly unreliable instrument" when it comes to trying to match US News's model. *See United States v. Birdsbill*, 243 F. Supp. 2d 1128, 1135-36 (D. Mont. 2003).

Neher, though, contends her model has no known error rate. **Ex. 3**, p. 191:6-8. In terms of producing an adjusted score or rank based on the substitute data, USC agrees. There can be no error rate because, as discussed above, Neher's adjusted scores and ranks are not testable. A "non-testable hypothesis cannot have an error rate." David W. Barnes, *General Acceptance Versus Scientific Soundness: Mad Scientists in the Courtroom*, 31 FLA. ST. U. L. REV. 303, 315 (2004). Like a high error rate, an unknown error rate makes Neher's model a highly unreliable instrument. *See United States v. Cordoba*, 194 F.3d 1053, 1062 (9th Cir. 1999).

Undeterred, Neher claims, "the accuracy [of her model] is evident. We have calculated a score, but it only is able to get so close to the actual score. In this case, in most years, extremely close to the actual score. And that is the reliability test." **Ex. 3**, p. 191:25-192:5. Specifically, Neher is referring to her model getting "close" to US News's score for Rossier based on the original data. *Id.* at p. 256:14-21. But Neher's explanation ignores that her model is not close at all to US News's score for many other schools. For example, by Neher's reasoning, her model is reliable for Rossier in 2019 (off by only 0.16 points), but unreliable for Western Kentucky University (off by 15.66 points) that same year. **Ex. 6**. And, according to Neher, her model is reliable for Rossier

in 2021 (off by 1.29 points), but unreliable for the University of Rhode Island (off by 16.23 points) that same year. **Ex. 8**. Similarly, by Neher's reasoning, her model is reliable for Johns Hopkins University in 2018 (off by 0.64 points), but then unreliable for that same school the next year (off by -16.40 points). **Ex. 5**; **Ex. 6**. And, according to Neher, her model is reliable for the University of North Carolina-Charlotte in 2020 (off by -0.62 points), but then unreliable for that same school the next year (off by 20.68 points). **Ex. 7**; **Ex. 8**.

These are not the hallmarks of reliability. *See* **Ex. 4**, p. 10 ("The hallmark of a scientific model is the ability to predict outcomes given a new set of input data."). A model that can closely replicate US News's score for some schools, but not others, and can closely replicate US News's score one year, but not the next, is patently unreliable. *See San Bernardino Cty. v. Ins. Co. of State of Pa.*, No. 21-CV-01978, 2024 WL 1137959, at *5 (C.D. Cal. Feb. 27, 2024) ("A well-calibrated model is one that can replicate real-world conditions…. A half-calibrated model is, by definition, inadequately calibrated and excluded under *Daubert*.") (quotations omitted). There is no rhyme or reason to whether or not Neher's model produces a score close to the score produced by US News's model. The fact that her model got somewhat close for Rossier appears to be pure happenstance. After all, "even a broken clock is right twice a day." *USS-POSCO Indus. v. Contra Costa Cty. Bldg. & Constr. Trades Council, AFL-CIO*, 31 F.3d 800, 811 (9th Cir. 1994).

Moreover, Neher's explanation ignores that there is no way of knowing how close her adjusted score is for Rossier based on the substitute data because US News has never released an adjusted score based on the substitute data. **Ex. 4**, p. 10. Neher's "model is helpful only if it is predictive; if it cannot be predictive … then it fails in its purpose." *See Crescenta Valley*, 2013 WL 12116333, at *4. Neher's model has demonstrated absolutely no predictive capacity. The "structure of Ms. Neher's model precludes such predictions because she adds the 'hidden-data constant' *ex post*, to make her calculated score match the U.S. News score." **Ex. 4**, p. 10. "This approach would

not work for future years where there is no U.S. News score to match to because Ms. Neher would not know what 'hidden-data constant' to add to her calculated score." *Id.* For all we know, her adjusted—or predicted—score for Rossier based on the substitute data might be 5, 10, or 20+ points off from what US News's score would be based on the substitute data (which, in turn, would also mean Neher's predicted rank is off). Neher's bare "conclusions and … assurances of reliability" are "not enough." *Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311, 1319 (9th Cir. 1995) ("*Daubert II*").

C. Neher's "other observations" are inadmissible ipse dixit and irrelevant.

An expert opinion "cannot be connected to existing data only by the *ipse dixit* of the expert." *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Pracs., & Prods. Liab. Litig.*, 978 F. Supp. 2d 1053, 1067 (C.D. Cal. 2013) (quotations omitted). Ipse dixit is a "bare assertion," *United States v. Barnes*, 295 F.3d 1354, 1362 (D.C. Cir. 2002), or a "'because I said so' conclusion." *Laux*, 295 F. Supp. 3d at 1103. That perfectly describes Neher's "other observations" regarding the metrics for GRE scores, peer assessment, and expert assessment. *See* **Ex. 2**, p. 11-12. Neher provides no "detailed analysis" to support her opinions that Rossier's adjusted rank "would have been lower" had she not kept these metrics constant. **Ex. 3**, p. 249:2-9. She is just speculating that: (1) these metrics were affected by misreported data; and/or (2) these metrics were affected to the extent that it would impact Rossier's score enough to make a difference to Rossier's rank. **Ex. 2**, p. 11-12.

Further, Neher's "other observations" are vague and irrelevant. Neher offers no indication as to how much "lower" Rossier's rank would have been based on these other metrics (*e.g.*, 1 place, 5 places, etc.), *see id.*, so her "other observations" do not assist Plaintiffs, or any of their other experts, in establishing Plaintiffs' theories of liability or damages. *See Daubert II*, 43 F.3d at 1321 (rejecting experts' "vague assertions that there is a statistically significant relationship between Bendectin and birth defects"); *id.* at 1321 n.17 (explaining courts "must therefore exclude proffered" expert testimony

"unless they are convinced that it speaks ***clearly and directly*** to an issue in dispute in the case") (emphasis added).

II. Neher is Not Qualified.

The foregoing analysis assumes Neher is qualified to offer her opinions in the first place. She is not. Rule 702 provides that "a witness may offer an expert opinion only if he or she draws on some special knowledge, skill, experience, training or education to formulate that opinion." *Gable v. Nat'l Broad. Co.*, 727 F. Supp. 2d 815, 833 (C.D. Cal. 2010) (quotations omitted). The "opinion must be an expert opinion (that is, an *opinion informed by the witness' expertise*) rather than simply an opinion broached by a purported expert." *Id.* (quotations omitted). "Thus, to determine whether a proposed expert is qualified, the court must examine whether the witness's qualifying training, experience, or specialized knowledge is sufficiently related to the subject matter upon which the witness offers an opinion." *Id.*

Neher does not have the training, experience, or specialized knowledge to qualify as an expert in statistical modeling. **Ex. 3**, p. 57:4-6, 241:5-23, 246:23-247:6. Even if she did, Neher has no training, experience, or specialized knowledge when it comes to replicating US News's model for the "Best Graduate Schools of Education" rankings. She has never worked for, or been trained by, US News, she has never before tried to replicate US News's model for such rankings, and she does not have any specialized knowledge concerning US News's model—she knows only what US News has publicly disclosed, and nothing more. *Id.* at p. 110:13-20, 112:19-24, 113:16-25, 193:1-13.

Moreover, "there must be a recognized body of knowledge, learning or expertise upon which the witness relies." *In re Canvas Specialty, Inc.*, 261 B.R. 12, 19 (Bankr. C.D. Cal. 2001). "Where there is no field of expertise, nobody will qualify as an expert witness on the subject." *Id.* Replicating US News's model is not a "field of expertise." Absent insider knowledge—which Plaintiffs made very little effort to obtain from US News, *see* note 3, *supra*—any attempted replication is a pure guessing game. *See* Wallace & Lutkenhaus, *supra*, at 173; Henderson & Morriss, *supra*, at 168; Black &

Caron, *supra*, at 87. It simply is not possible "to reliably reproduce the U.S. News ranking" without the "complete data and knowledge of the actual methodology used by U.S. News." **Ex. 10**, p. 84:16-21. Neher's own unpredictable model demonstrates as much. Simply put, Neher is not an expert on replicating US News's model because ***no one*** outside of US News is an expert on such.

CONCLUSION

For any or all of the foregoing reasons, USC respectfully requests this Court exclude the opinions and testimony of Plaintiffs' expert Sara Neher for purposes of class certification, summary judgment, and trial.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned counsel of record for the University of Southern California certifies that this brief contains 6,876 words, which complies with the word limit of L.R. 11-6.1.

By: /s/ *Michael L. Mallow*
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