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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 **[REDACTED] PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION TO EXCLUDE TESTIMONY OF PLAINTIFFS' EXPERT WITNESS SARA NEHER UNDER FED. R. EVID. 702**

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1   **I.   <u>INTRODUCTION</u>**

2   This Court should deny USC's Motion to Exclude Plaintiffs' Expert Witness Sara

3   Neher (ECF No. 145). Neher has worked in higher education administration for nearly

4   twenty years, during which time she was involved in managing and submitting rankings

5   data to US News & World Report. She currently works as an expert consultant for

6   higher education clients, who pay her to reconstruct US News rankings to gauge the

7   effect of new programs and enrollment strategies. Neher developed the kind of model

8   that she uses in her professional life to calculate the rankings USC's Rossier School of

9   Education ("Rossier") would have received had it not submitted fraudulent data to US

10   News. Her opinion provides a but-for ranking that Plaintiffs' conjoint-survey expert

11   will use to determine damages arising from Rossier's advertising of its fraudulently

12   obtained ranking.

13   Given the record evidence, the drops in Rossier's rankings that Neher calculates

14   are not surprising—least of all to USC. USC has acknowledged it submitted the wrong

15   data to US News in order to procure a higher rank; the Rossier staffer charged with

16   preparing its submissions called its practices "fraudulent." USC's data expert found that

17   Rossier submitted incorrect data affecting more than half of the metrics upon which

18   US News bases its rankings. Both recognized that if Rossier reported correctly, its

19   ranking would fall "significantly." Rather than find out *how significantly*, USC withdrew

20   Rossier from the rankings.

21   USC does not dispute that Neher has access to most of the data and

22   methodology that US News uses to calculate rankings but argues that her model can't

23   be reliable because US News maintains the secrecy of some of its proprietary data. USC

24   does not dispute the direction of Rossier's ranking with the correct data (down), or the

25   magnitude ("significant"). All it really quarrels with is the model's precision—that she

26   can't replicate Rossier's ranking exactly. But that's not the test—legally or for the

27   purpose it's being used. Plaintiffs' conjoint expert will survey subjects about the

28   1

comparative value of Rossier being ranked 11–19 (as it was promoted) versus the 30–59 range that Neher's model indicates it would have fallen in (or below), if the correct data were submitted. Neher's recalculated rankings don't need to be exact to serve their purpose.

Under these circumstances, the "hidden-data constant" (HDC) adjustment Neher uses to compensate for not having the exact same data as US News is reasonable—it accounts for the difference between her results and those US News would have produced if Rossier had submitted the data it was supposed to. On that front, USC argues, with all the chutzpah of the person who murders his parents and throws himself on the mercy of the court because he is now an orphan, "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."[1] US News *couldn't do that* because Rossier never gave US News an opportunity to rank it based on the substitute data—even after Rossier acknowledged that the substitute data was *the correct data.*

II.   BACKGROUND

A.   USC's Ranking Fraud

Rossier submitted false data to US News for years, in practically every category.[2] It flouted express instructions from US News to include data from its large EdD program in response to survey questions regarding selectivity and GRE scores, including in direct communications from US News,[3] and even after US News added explicit instructions that questions seeking data regarding doctoral students "should include both Ph.D. and Ed.D. students."[4]

Rossier defied these instructions from US News because it knew that the

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[1] Dkt. 145 at 17 (docket refers to 23-cv-00846).
[2] Ex. 1 at 95877, 95896–99.
[3] *Id.* at 95885–86; Ex. 2; Ex. 3 at 107–114.
[4] Ex. 1 at 95880–81.

noncompliant data it submitted would be more favorable for its ranking than the requested data. In 2012, a USC official noted that "[Rossier] reports applications and GRE scores only for Ph.D. Students and not Ed.D. Students. The US News question is about Doctoral students…. Our strong recommendation is that all doctoral students should be reported." Rossier's Dean, Karen Gallagher, refused, saying "we would look terrible if they counted the EdDs the same as PhDs."[5]

A few years later, she proposed to go a step further: "I plan to begin a campaign with USNWR this spring that will explain why we are not going to continue giving <u>any</u> information about <u>any</u> of our EdD programs," otherwise "we will drop like a rock in the rankings, particularly when the OCL has over 500 EdDs enrolled at any one time and that number is combined with our on campus ed leadership program."[6] And indeed, rather than comply with US News's instruction to include EdD students, Rossier withheld data from its large online programs in response to questions regarding enrollment and completions.[7] Even when it reported EdD students from its much smaller on-campus programs, it falsely designated them as part-time, not full-time.[8]

In response to survey questions about research grants received by the school, which inform two of the more important metrics, Rossier included ███████████████ ██[9] Nobody at USC can explain why these expenditures were included.[10]

Jacob Garrison, the Rossier staffer responsible for preparing submissions to US News, repeatedly raised to Dean Gallagher and her replacement, Pedro Noguera, that Rossier was not complying with US News's instructions regarding doctoral students.[11]

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[5] Ex. 4.
[6] Ex. 5.
[7] Ex. 6; Ex. 7 at slide 2.
[8] Ex. 4.
[9] Ex. 8 (exhibit includes only the relevant tab).
[10] Ex. 9 at 101.
[11] Ex. 7.

3

1 In 2021, the Rossier staffer told Dean Noguera that Rossier's reporting practices were

2 "fraudulent."[12] Despite this, Dean Noguera directed him to report the same way, i.e.,

3 fraudulently.[13]

4   Eventually, the Provost's office intervened, assigning USC Director of

5 Institutional Research Ray Gonzales to investigate. He reported that "the School of Ed

6 has been fudging their US News submissions" and "their completions data have been

7 cooked."[14] Gonzales and Garrison thereafter worked together to submit a corrected

8 2022 statistical survey that conformed with US News's instructions.[15] They both

9 recognized that Rossier would fall "significantly" in the rankings.[16] Others concurred,

10 including the provost.[17] The metrics that were affected by USC's corrections included

11 more than half of the ranking inputs: admissions, GRE scores, enrollment, completions,

12 and research. Accordingly, before US News could calculate that ranking, USC

13 withdrew, preventing anyone from learning what Rossier's ranking would have been

14 with non-fraudulent data.[18]

15   Although schools often submit updated data to US News to correct mistakes,[19]

16 there is no evidence that Rossier did so, even though Gonzales had prepared a

17 spreadsheet comparing what Rossier submitted to US News over the years to what it

18 should have submitted had it followed the approach he used when preparing the 2022

19 submission.[20]

20   Around the same time Rossier withdrew from the rankings, USC retained the

21 law firm Jones Day to conduct an investigation of Rossier's responses to US News

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23 [12] Ex. 3 at 158.
   [13] Ex. 10.
24 [14] Exs. 6, 11.
   [15] Ex. 3 at 185; Ex. 9 at 113–14.
25 [16] Exs. 12, 18.
   [17] *See, e.g.*, Exs. 13-17.
26 [18] Ex. 19.
   [19] *See* Dkt. 145-4 at ¶ 29 n.43.
27 [20] Ex. 20; Ex. 9 at 115-17.

28   4

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surveys.[21] Jones Day "was asked to examine, in particular, whether the School misrepresented information about the 'selectivity' of its doctoral programs by reporting data only on … its more selective PhD program."[22] Jones Day found that it had.[23] Jones Day also "identified and/or confirmed other potential data misreporting issues"— including the exclusion of online EdD Data, designation of EdD students as part-time when they were recorded by USC as full-time, and overstatement of research expenditures.[24] Jones Day recommended "that the University further examine these additional metrics for possible reporting errors."[25] Other than the spreadsheet prepared by Dr. Gonzales before Jones Day was retained, there is no evidence that USC did this either.

B. Neher's Background

Neher is a partner at Kennedy & Company, a higher education consulting firm. She has an MBA and has worked in higher education for over twenty years, including as Interim Dean at Longwood University College of Business and Economics and as an Assistant Dean at the University of Virginia Darden School of Business. In her current role, she provides expert consulting to her higher education clients about their US News rankings.[26] She has constructed numerous models for university and professional school clients using a model like she used in this case.[27] She has also participated in the submission of data for multiple schools, including an education school, and completed US News peer assessments of other schools.[28]

C. Neher's Model

Neher constructed a model to project the ranking Rossier would have received

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[21] Ex. 1 at 95879.
[22] *Id.* at 95877.
[23] *Id.*
[24] *Id.* at 95896–99.
[25] *Id.* at 95899.
[26] Dkt. 145-3 at 70–72.
[27] Dkt. 145-2 at ¶ 22.
[28] Dkt. 145-3 at 79–81, 95, 98–99.

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in the 2018-2022 rankings had it submitted the data that USC Director of Institutional

Research Ray Gonzales compiled in 2022.[29] Her methodology tracks the aspects of the

methodology and data made available to schools by US News. US News's methodology

for ranking education schools is straightforward, and remained unchanged during the

class period, with one exception.[30] US News distributes a survey, in which each school

provides data about its own programs. It also distributes surveys to public school

superintendents and other deans to measure schools' reputations. US News uses that

information to compare schools on ten different criteria. They publish their

methodology each year, explaining the inputs and identifying the relative weights of

each. They also publish each school's data for nine of the ten metrics, omitting only the

percentage of faculty with awards. Schools are assigned a rank based on their overall

score on a 100-point scale.[31]

Neher's model starts with the data published by US News and conducts the same

four steps that US News does. First, the model standardizes the data in each category

using z-scores, a common statistical tool. Second, the z-scores are multiplied by US

News's published weights. Third, the weighted z-scores are added together to create a

total for each school. Fourth, that total is indexed so that the top score always equals

100. Throughout the process, Neher's model follows the steps disclosed by US News.[32]

Although US News is quite transparent about its process, it does not reveal every

element. One category, percent of faculty with awards, is left unpublished. In addition,

US News has indicated that the data for another category, student-faculty ratio,

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[29] Dkt. 145-2 at ¶¶ 7-9, 17-21. For research expenditures, Neher used a more conservative basis for her recalculations than Gonzales' recalculation. Ex. 8.

[30] In 2019, US News instituted a penalty for schools that submitted GRE scores for a low percentage of their enrollees. Dkt. 145-1 at 2637.

[31] Exs. 21, 22; Dkt. 145-1.

[32] "Standardized scores, or z-scores, reflected the number of standard deviations each variable was from the mean value. The z-scores were weighted, totaled, and rescaled so the top school received 100; other schools received their percentage of the top score." Ex. 21 at 13098.

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1   undergoes a logarithmic transformation.[33] US News also does not display scores or

2   ranks for the lowest quartile of the rankings.[34] In 2018, US News published data for

3   only 130 schools.[35]

4   Neher tested how close the raw scores produced by her model (using the data

5   schools actually submitted and which is public) come to the scores published by US

6   News. She labels the difference between those scores a "hidden-data constant"

7   ("HDC"), as it reflects the amount her raw scores deviate from those of US News

8   because she does not have every piece of information. As shown below, in the case of

9   USC, her raw scores were close every year, meaning the non-public data accounted for

10   very little of US News's total score for Rossier.[36]

Edition Year	2018	2019	2020	2021	2022
US News Score	81.0	87.0	87.0	81.0	84.0
Neher Initial Score	81.33	86.84	85.98	79.70	80.25
Hidden-Data Constant	-0.33	0.16	1.02	1.30	3.75

      Once the model was constructed, Neher replaced the data that Rossier submitted

to US News with accurate data from USC's internal documents. Neher substituted data

in five categories: acceptance rate, student-faculty ratio, doctorates granted per faculty

member, research expenditures, and research expenditures per faculty member. USC

does not challenge the data inputs Neher used to calculate Rossier's adjusted rankings.

      After generating a new overall score for Rossier using the substitute data, she

added the HDC to that total—to reflect elements of Rossier's score that she can't

recreate—and then derived the rank that Rossier would have received with that new

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[33] *Id.* at 13097.

[34] Dkt. 145-2 at ¶ 27.

[35] *Id.* at ¶ 30.

[36] Dkts. 145-5, 145-6, 145-7, 145-8, 145-9; October 1, 2024 Neher Declaration (Ex. 23).

score if all other schools' scores were held constant. Her conclusions were that the
rankings would change as follows:[37]

Edition Year	2018	2019	2020	2021	2022
US News Initial Score	81.0	87.0	87.0	81.0	84.0
Adjusted Score	55.3	62.8	54.4	48.5	49.1
Initial Rank	15	10	12	11	11
Adjusted Rank	47	33	60	62	63

Neher also offers opinions about ranking inputs that she cannot incorporate into
her model because of data limitations, that would have tended toward an even lower
ranking than she was able to quantify.[38] Prominent among these is the GRE score. As
with the selectivity metrics, USC responded to questions regarding the GRE scores for
all new doctoral students with data from its PhD programs only—resulting in a
different average GRE than if it had answered properly.[39] Starting with the 2019
rankings, US News applied a penalty for this metric depending on the percentage of
doctoral enrollees that reported GRE scores.[40] Rossier reported 100% submission every
year, when the actual percentages were █████████████████████████████[41]
Because US News does not publish this data, Neher was not able to recreate this metric
with substitute data.[42]

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[37] Dkt. 145-2 at Table 2; August 22, 2024 Neher Declaration (Ex. 24).
[38] Dkt. 145-2 at ¶¶ 44–48.
[39] Ex. 7 at slide 5.
[40] Dkt. 145-1 at 2637.
[41] Ex. 20.
[42] Dkt. 145-2 at ¶ 45.

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III.   LEGAL STANDARD

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

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"The Ninth Circuit has emphasized *Daubert*'s guidance that FRE 702 "should be

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applied with a 'liberal thrust' favoring admission." *In re NFL's "Sunday Ticket" Antitrust*

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Litig., 2024 WL 2165676, at *2 (C.D. Cal. May 13, 2024) (quoting *Messick v. Novartis*

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Pharm. Corp., 747 F.3d 1193, 1196 (9th Cir. 2014)); *San Bernardino Cnty. v. Insurance Co. of*

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State of Pennsylvania, 2024 WL 1137959, at *2 (C.D. Cal. Feb. 27, 2024). "Courts begin

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from a presumption that expert testimony is admissible." *Spintouch, Inc. v. Outform, Inc.*,

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2022 WL 17363902, at *2 (C.D. Cal. Sept. 28, 2022).

11

Rule 702 allows admission of expert opinions based on "scientific, technical, or

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other specialized knowledge" when they would "help the trier of fact to understand the

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evidence or to determine a fact in issue." *Daubert v. Merrell Dow Pharms., Inc.*, 509 US

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579, 589 (1993). The Ninth Circuit has identified "the basic function of expert

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testimony: to help the trier of fact understand highly specialized issues that are not

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within common experience." *Elosu v. Middlefork Ranch Inc.*, 26 F.4th 1017, 1026 (9th Cir.

17

2022) (citing *Kumho Tire Co., Ltd. v. Carmichael*, 526 US 137, 148–49, 156–57 (1999)).

18

The Rule 702 inquiry is "flexible." *Cadena v. American Honda Motor Co., Inc.*, 2024

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WL 4005097, at *5 (C.D. Cal. Jul. 2, 2024) (quoting *Primiano v. Cook*, 598 F.3d 558, 564

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(9th Cir. 2010)). "In evaluating expert testimony, the trial court is a gatekeeper, not a

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fact finder. The judge is supposed to screen the jury from unreliable nonsense opinions

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but not exclude opinions merely because they are impeachable." *Daubert*, 509 US at 589

23

(cleaned up). The focus "must be solely on principles and methodology, not on the

24

conclusions that they generate." *Id.* at 594–95. "The district court is not tasked with

25

deciding whether the expert is right or wrong, just whether his testimony has substance

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such that it would be helpful to a jury." *Alaska Rent-A-Car, Inc. v. Avis Budget Grp., Inc.*,

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738 F.3d 960, 969–70 (9th Cir. 2013).

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1   When considering expert opinions in the class certification context, the Ninth

2   Circuit cautions courts not to confuse class certification with summary judgment:

3   "[m]erits questions may be considered to the extent—but only to the extent—that they

4   are relevant to determining whether the Rule 23 prerequisites for class certification are

5   satisfied." *Lytle v. Nutramax Lab'ys, Inc.*, 2024 WL 3915361, at *12 (9th Cir. Aug. 23,

6   2024) (quoting *Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds*, 568 US 455, 466 (2013)).

7   "A court is merely to decide whether a class action is a suitable method of adjudicating

8   the case." *Id.* (quoting *Edwards v. First Am. Corp.*, 798 F.3d 1172, 1178 (9th Cir. 2015)).

9   Although USC cites *Boyer v. City of Simi Valley*, 2024 WL 993316, at *1 (C.D. Cal.

10   Feb. 13, 2024), for the proposition that the 2023 amendments to Fed. R. Evid. 702

11   created a more exacting standard for expert proof, most courts agree that the standard

12   has not changed. "[T]he amendment merely 'codified what was already the prevailing

13   understanding of Rule 702's requirements." *U.S. v. Medtronic, Inc.*, 2024 WL 4002842, at

14   *9 (C.D. Cal. July 22, 2024) (quoting *Le v. Zuffa, LLC*, 2024 WL 195994, at *5 (D. Nev.

15   Jan. 18, 2024)); *see also In re NFL's "Sunday Ticket,"* 2024 WL 2165676, at *3; *McCoy v.*

16   *DePuy Orthopaedics, Inc.*, 2024 WL 1705952, at *8–9 (C.D. Cal. Apr. 19, 2024). *Boyer*,

17   moreover, was not a class action and was decided shortly prior to trial. At class

18   certification, the Ninth Circuit has made clear that "there is no requirement that the

19   [expert] evidence relied upon by Plaintiffs to support class certification be presented in

20   an admissible form at the class certification stage." *Lytle*, 2024 WL 3915361, at *7.

21   **B.   USC's *Daubert* Challenges to Neher Relate to Damages**

22   Neher's opinions pertain primarily to damages—her ranking calculations provide

23   the predicate for the range of rankings that Plaintiffs' conjoint expert will be testing in

24   his proposed survey. At the class certification stage, Plaintiffs need only show that

25   "damages are capable of measurement on a classwide basis." *Just Film, Inc. v. Buono*, 847

26   F.3d 1108, 1120 (9th Cir. 2017) (quoting *Comcast Corp. v. Behrend*, 569 US 27, 34 (2013));

27   *Nutramax*, 2024 WL 3915361, at *7 ("[The Ninth Circuit has] repeatedly found class

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1 treatment to be appropriate … based upon a showing that damages could be calculated

2 on a classwide basis, even where such calculations have not yet been performed.").

3   Although USC argues that Neher's rankings opinions are not reliable because

4 she does not purport to calculate the exact or identical ranking Rossier would have

5 received had it submitted accurate data to US News, California law does not require

6 more than a reasonable basis to estimate damages: "In calculating damages …,

7 California law 'requires only that some reasonable basis of computation of damages be

8 used, and the damages may be computed even if the result reached is an

9 approximation.'" *Pulaski & Middleman, LLC v. Google, Inc.*, 802 F.3d 979, 989 (9th Cir.

10 2015) (quoting *Marsu, B.V. v. Walt Disney Co.*, 185 F.3d 932, 938–39 (9th Cir. 1999)).

11 **IV.**   **ARGUMENT**

12   **A.**   **Neher Is Qualified to Recalculate US News Rankings**

13   USC makes a short and superficial argument that Neher is not qualified to offer

14 the opinions in her report—and no one else is either.[43] But "[u]nder Ninth Circuit law,

15 an expert may be qualified through either practical training or academic experience. The

16 threshold for qualification is low for purposes of admissibility; minimal foundation …

17 suffices." *Oddo v. Arocaire Air Conditioning & Heating*, 2020 WL 5267917, at *6 (C.D. Cal.

18 May 18, 2020) (quoting *PixArt Imaging, Inc. v. Avago Tech. Gen. IP (Singapore) Pte. Ltd.*,

19 2011 WL 5417090, at *4 (N.D. Cal. Oct. 27, 2011)). Courts routinely admit experts

20 based on their professional experience. *See Linares v. Crown Equipment Corp.*, 2017 WL

21 10403454, at *9–10 (C.D. Cal. Sept. 13, 2017); *Hobbs v. Brother Int'l Corp.*, 2016 WL

22 7647674, at *4 (C.D. Cal. Aug. 31, 2016); *T-Mobile West Corp. v. City of Thousand Oaks*,

23 2011 WL 13186267, at *1 (C.D. Cal. June 6, 2011); *Empire Land, LLC v. Empire Partners,*

24 *Inc.*, 2017 WL 6496432, at *2 (C.D. Cal. Dec. 18, 2017) ("An expert's experience alone

25 can provide a sufficient foundation for expert testimony.").

26

27 [43] Dkt. 145 at 19–20 ("Where there is no field of expertise, nobody will qualify as an expert witness
on the subject.").

28   11

1   The case that USC relies on, *In re Canvas Specialty, Inc.*, 261 B.R. 12, 19 (Bankr.

2   C.D. Cal. 2001), lists two examples of subjects for which experts cannot qualify:

3   "astrology and necromancy." *Id.* In the real world, major institutions of higher

4   education pay Neher and her colleagues to do the kind of ranking modeling she did

5   here.[44] And not just her. There is an entire industry of enrollment management

6   professionals, both inside and outside of universities, with other firms offering similar

7   services to the ones provided by Neher.

8   For instance, the consulting firm Hanover Research promotes its ranking

9   "Reconstruction Tool": "The US News & World Report (USNWR) goes to great

10   lengths to conceal its rankings calculation process; however, the Hanover Research

11   experts have carefully dissected every criterion to map the scores and ranks with

12   incredible precision and accuracy."[45] USC is well aware that Hanover offers these

13   services, as the firm marketed them to Rossier.[46] Other consultants offer similar

14   services.[47]

15   USC expert Jonathan Smith also built a ranking model and published on it. *See*

16   Michael Luca & Jonathan Smith, *Salience in Quality Disclosure: Evidence from the U.S. News*

17   *College Rankings*, 22 J. ECON. & MGMT. STRATEGY 58, 65–66 (2017). Like Neher, he

18   "created a prediction of the rankings with the data that they provided, which was not

19   complete data that they use in their actual rankings."[48] He deemed his work very

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[44] Dkt. 145-2 at ¶ 4; Dkt. 145-3 at 22–24. The fact that she has not done this specifically for graduate

22   schools of education (Dkt. 145 at 4) is not disqualifying. "A court abuses its discretion when it excludes
expert testimony solely on the ground that the witness's qualifications are not sufficiently specific if

23   the witness is generally qualified." *In re Silicone Gel Breast Implants Products Liab. Litig.*, 318 F. Supp. 2d
879, 889 (C.D. Cal. 2004) (quoting *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717 (3d Cir. 1994)).

24   [45]*Improve   Your   US   News   College   Ranking,*   HANOVER   RSCH.,
https://www.hanoverresearch.com/media/Improve-Your-US-News-Report-Ranking.pdf.

25   [46] *See* Exs. 25, 26, and 27 at 66532.

26   [47]   *See, e.g., Rankings   Analysis   &   Predictive   Modeling*,   SPIVEY   CONSULTING,
https://www.spiveyconsulting.com/rankings-analysis/; *Rankings   Consultancy*,   BLUESKY   PR,

27   https://www.bluesky-pr.com/rankings-consultation.

[48] Ex. 28 at 100.

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1 useful[49]—just like Neher's. Other academic articles include ranking modeling similar to

2 what USC's expert Smith and Plaintiffs' expert Neher have done.[50]

3   USC cites to three law journal articles for the proposition that replicating US

4 News rankings is "an 'essentially impossible' task."[51] None of these articles purport to

5 be trying to recreate the law school rankings—the comments quoted by USC are asides,

6 not analysis.[52] Far from being impossible to reproduce, within those very articles are

7 citations to other scholars who *have* reconstructed law school rankings.[53]

8   **B.   Neher's Methodology Is Reliable**

9   USC begins with the faulty proposition that because Neher can't *exactly* recreate

10 the US News model, her opinions are necessarily unreliable.[54] That isn't the view in her

11 industry, or of USC's expert Smith. The Ninth Circuit has advised that "the requirement

12 of 'sufficient facts or data' does not preclude an expert from making projections based

13 on reliable methodology." *Elosu v. Middlefork Ranch Inc.*, 26 F.4th 1017, 1025 (9th Cir.

14 2022). And it has noted that "[e]xperts working in specialized, scientific, and uncertain

15 fields regularly 'extrapolate from existing data' and generate novel hypotheses about

16 complex issues." *Id.* at 1026 (quoting *General Elec. Co. v. Joiner*, 522 US 136, 146 (1997)).

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18 [49] *Id.* at 105.

19 [50] Shari L. Gnolek et al., *Modeling Change and Variation in* US News & World Report *College Rankings: What Would It Really Take to Be in the Top 20?*, 55 RSCH. HIGHER EDUC. 761, 765–66 (2014); Huaying Qiu & Wenxin Du, *A True Lie About Reed College: US News Ranking*, https://github.com/huayingq1996/Reed-College-Ranking/blob/master/paper.pdf.

20 [51] Dkt. 145 at 1.

21 [52] The passage cited appears to apply specifically to the peer assessment measure, not the entire score. Bernard S. Black & Paul L. Caron, *Ranking Law Schools: Using SSRN to Measure Scholarly Performance*, 81 IND. L.J. 83, 87 (2006).

22 [53] *See* Dkt. 145 at 1; Black & Caron at 87 n.9 (2006) ("Tom Bell claims that he has successfully deconstructed the U.S. News rankings."); Tom W. Bell, *Gory Details, by Demand*, AGORAPHILIA (May 4, 2005), https://agoraphilia.blogspot.com/2005/05/gory-details-by-demand.html; Tom W. Bell, Curriculum Vitae at 1, http://www.tomwbell.com/BellCV.pdf. *See also* Dkt. 145 at 1; Karen L. Wallace & Rebecca Lutkenhaus, *Measuring Scholarly Impact in Law*, 28 WIDENER L. REV. 145, 173 n.171 (2022); WENDY NELSON ESPELAND & MICHAEL SAUDER, ENGINES OF ANXIETY: ACADEMIC RANKINGS, REPUTATION, AND ACCOUNTABILITY 34–35 ("reverse engineering describes a tactic that almost all law schools use to improve their rankings").

27 [54] Dkt. 145 at 1, 9.

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An expert's "analysis need not be perfect to be received in evidence—it need only rest on a reliable foundation that is relevant to the task at hand." *Hart v. Rick's Cabaret Intern., Inc.*, 60 F. Supp. 3d 447, 467 (S.D.N.Y. 2014). *Hartle v. FirstEnergy Generation Corp.*, 7 F. Supp. 3d 510, 525 (W.D. Pa. 2014) (admitting expert testimony because the expert "adequately considered the limitations inherent in the … model … and had logical grounds for concluding that the limitations did not affect the accuracy of the model"); *U.S. v. H & R Block, Inc.*, 833 F. Supp. 2d 36, 88 (D.D.C. 2011) (relying on an expert's model that it found "is an imprecise tool, but nonetheless has some probative value"); *In re Chocolate Confectionary Antitrust Litig.*, 289 F.R.D. 200, 213 (M.D. Pa. 2012) (admitting expert testimony despite missing data).

USC's argument also ignores the purpose for which Neher calculated the rankings. Her adjusted rankings were calculated in service of Plaintiffs' damages expert's proposed conjoint survey to determine the price premium associated with Rossier's misrepresented ranking versus what students should have been told.[55] His survey contemplates ranges of rankings—11–19 for the misrepresentations and 30–59 for the corrected rankings. California courts have consistently recognized that damages calculations need not be exact. "Under California law, the standard for '[c]lass wide damages calculations under the UCL, FAL, and CLRA are particularly forgiving.'" *Woodard v. Labrada*, 2021 WL 4499184, at *38 (C.D. Cal. Aug. 31, 2021) (quoting *Lambert v. Nutraceutical Corp.*, 870 F. 3d 1170, 1183 (9th Cir. 2017), *rev'd on other grounds*). "To obtain certification, Plaintiffs must merely establish 'some reasonable basis of computation of damages … and the damages may be computed even if the result reached is an approximation.'" *Id.* (quoting *Nguyen v. Nissan N. Am., Inc.*, 932 F.3d 811, 818 (9th Cir. 2019)).

Not only do Neher's rankings need not be exact to be reasonable, as she explains,

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[55] Dkt. 146-1 at ¶¶ 21, 90.

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1   her projected rankings err conservatively in favor of Rossier because they don't

2   incorporate the GRE metric that would have dragged its score down even more. Even

3   USC's opposing expert acknowledged that her work was honest and transparent.[56] Any

4   limitations are imposed by US News's close hold on a small segment of its proprietary

5   methodology, not a shortcoming in Neher's model.[57]

6   To the extent that Neher's model does not recreate Rossier's scores exactly, that

7   is a result of USC's own bad acts, not the reliability of Neher's work. USC tries to hold

8   Plaintiffs and Neher accountable for not being able to run the substitute data through

9   US News's complete methodology: "there is no way of knowing how close her adjusted

10 score is for USC Rossier based on the substitute data because US News has never

11 released an adjusted score based on the substitute data."[58]

12   But the reason US News has never calculated a score based on the substitute

13 data is because USC withheld it: first, by submitting false information to US News for

14 over a decade; then by withdrawing its submission of correct information in 2022; and,

15 finally, by failing to update US News with the correct data after recognizing it had

16 submitted noncompliant data. "If plaintiff's inability to prove his damages with

17 certainty is due to defendant's actions, the law does not generally require such proof."

18 *Patriot Rail Corp. v. Sierra R.R. Co.*, 2015 WL 4662707, at *14 (E.D. Cal. Aug. 5, 2015)

19

20 [56] Dkt. 145-4 at 86, 97.

21 [57] USC complains that Plaintiffs "didn't approach US News itself to ask US to conduct [the] analysis"
    of what Rossier's score and rank would have been with the substitute data, as if it was students'
22 responsibility to submit valid data, not their university. Dkt. 145 at 14. Plaintiffs can't compel US
    News, a non-party, to recalculate the rankings. Furthermore, US News zealously protects its right to
23 protect the unpublicized aspects of its methodology--when the San Francisco City Attorney
    subpoenaed US News about its hospital rankings, the magazine sued for an injunction. Complaint,
24 *US News & World Report, L.P. v. Chiu*, 3:24-cv-00395-WHO (N.D. Cal. Jan. 23, 2024). *See also Shoen v.
    Shoen*, 5 F.3d 1289, 1292 (9th Cir. 1993); *Mitchell v. Super. Ct.*, 690 P.2d 625, 628 (Cal. 1984) (finding
25 that nonparty witnesses have "virtually absolute protection against compelled disclosure"). The
    reporter's privilege has been extended to rating agencies with business models similar to US News.
26 *See, e.g., Compuware Corp. v. Moody's Invs. Servs., Inc.*, 222 F.R.D. 124, 131 (E.D. Mich. 2004); *In re Pan
    Am Corp.*, 161 B.R. 577, 582-83 (S.D.N.Y. 1993).
27 [58] Dkt. 145 at 17.

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1 (quoting *Clemente v. California*, 40 Cal. 3d 202, 219 (Cal. 1985)); *see also Mitsui O.S.K. Lines,*

2 *Ltd. v. SeaMaster Logistics, Inc.*, 2015 WL 5782349, at *8 (N.D. Cal. Oct. 5, 2015).

3   USC derides Neher's calculation of the HDC, the difference between what her

4 model concluded and what US News determined, as a "fudge factor."[59] But the cases it

5 cites for this proposition starkly illustrate it is not. *Mondis Tech. Ltd. v. LG Elecs., Inc.*,

6 2023 WL 3749992, at *14 (D.N.J. June 1, 2023), was about the basis for the amount of

7 damages awarded by a jury, an entirely different context than the expert admissibility

8 issues before this court. Nevertheless, the *Mondis* court cited the dictionary definition

9 of "fudge factor" as "[a] term or factor *inserted into a calculation* to compensate for

10 anticipated errors, or to arbitrarily make the result conform to some desired

11 conclusion." *Id.* at *14 n.13 (emphasis added). The HDC is *the result of a calculation*, not

12 a value arbitrarily inserted into a calculation.

13   Defendant also cites *Navarro v. Procter & Gamble Co.*, 2021 WL 868586, at *16

14 (S.D. Ohio Mar. 8, 2021), where the court rejected the argument that an expert's

15 adjustment was an impermissible fudge factor. The court credited the expert because

16 he was "transparent about exactly how, and why, he adjusted" the values and because

17 he explained the adjustment's "application in this case." *Id.* at *16–17. Neher has been

18 similarly transparent[60] and has explained the application of the HDC in this case.

19   The *Navarro* court distinguished the expert it considered from one that provided

20 "a good illustration of the kind of 'fudge factor' that *Daubert* prohibits." *Id.* at *16 (citing

21 *Dow Corning Corp. v. Jie Xiao*, 2013 WL 992773 (E.D. Mich. Mar. 13, 2013)). In *Dow*

22 *Corning*, the expert compared the sizes of two products: "if one took the estimated

23 diameter [of the plaintiff's reactor]…, then added 10%, and then rounded to the nearest

24 foot, the resulting answer matched the actual dimensions of the defendant's reactor."

25 *Id.* (citing *Dow Corning*, 2013 WL 992773, at *8). The expert was asked why he made that

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27 [59] *Id.* at 12.
   [60] Dkt. 145-10 at 86, 97.

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1 estimate and responded, "You know it's not zero. And if you don't put something in

2 you're going to be wrong for sure. So 10 percent is [] reasonable." *Dow Corning*, 2013

3 WL 993773, at *8. He didn't make the necessary calculations to check his estimate and

4 acknowledged that his approach was inconsistent with what he would do in professional

5 consulting work. *Id.* at *16. There is no evidence that Neher failed to complete

6 important calculations or that her model was less careful than her consulting work.

7   **C.**   **Neher's Methodology Satisfies *Daubert* Requirements**

8   **1.**   **Neher's Model Is Testable**

9   USC argues that Neher's model must be excluded because "[a]bsent US News

10 plugging Neher's substitute data into US News's model, 'there is no way for [US News]

11 to deny' Neher's conclusions."[61] As discussed above, running the correct data through

12 US News's complete model isn't possible, because USC did not provide it to US

13 News—over the years as it responded to surveys, and even in 2022 as it confronted its

14 fraudulent behavior. "[G]iven that the inputs for these schools are relatively constant

15 across years,"[62] it stands to reason that if Rossier had not withdrawn its submission of

16 compliant data in 2022, the rank it received would have illustrated how big a benefit it

17 got in previous years' rankings from submitting fraudulent data in ***seven of the ten US***

18 ***News categories***. In any event, USC can hardly deny the significant drop that Neher

19 calculated—it's exactly what its personnel predicted.[63] The big ranking drop is not truly

20 a contested issue; the fight is just over how close Neher got. USC's position that "*no one*

21 *outside of US News*" could ever replicate the US News model,[64] when combined with

22 US News's First Amendment privilege, would mean that rankings fraud could never be

23 proven in court—even when it as blatant as it is here.

24   Moreover, it's simply not the case that Neher's methodology can't be tested—

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26 [61] Dkt. 145 at 14 (citation omitted).
    [62] Dkt. 145-4 at 9.

27 [63] *See supra* Part II.A at 4 n.16.
    [64] Dkt. 145 at 20.

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1 it's an open book. Neher has described the methodology in sufficient terms, and
2 provided her worksheets so that USC, its experts, or anyone else, can check the results
3 she reported, substitute different data than she did, or assert a different corrective for
4 the missing data than the HDC. If USC disputed a certain assumption, it could test
5 what Rossier's ranking would be using Neher's model with that data input changed.
6 The issue is not that Neher's model can't be tested—it is that USC hasn't.

2.   Neher's Model Is Well-Supported

8   Neher can readily point to an objective source in developing her model—US
9 News and World Report.[65] Neher is not inventing a new method for ranking education
10 schools; she's following the methods that have been used for years, and published by
11 US News: the metrics used; the percentage weights assigned to them; the use of z-
12 scoring, etc., subject to the modest limitations caused by the limited data and
13 methodological aspects not disclosed by US News.[66] USC has not challenged her
14 adherence to this methodology.

15   The one aspect of her work that is not part of US News's methodology is the
16 "hidden-data constant."[67] But even if the name is novel, the concept certainly isn't.
17 Neher ran her model with the originally submitted data to determine how close her
18 model came to replicating US News's score for Rossier even though some data is
19 "hidden" from her. It was very close—USC does not dispute this. The only
20 methodological step she took beyond that was to hold that difference "constant" by
21 adding or subtracting it from the score derived when running the substitute data
22 through her model—a reasonable, transparent means of accounting for the small
23 difference between what her model can replicate and what US News determined.

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[65] The *Daubert* Court held that publication with peer review is "not a *sine qua non* of admissibility; it does not necessarily correlate with reliability." 509 US at 593. *See also Orange Cnty. Water Dist. v. Unocal Corp.*, 2017 WL 11626204, at *14 (C.D. Cal. Jan. 31, 2017) (custom models "constructed consistently with standard modeling procedure" "do not lend themselves to peer review").
[66] Ex. 21; Ex. 22 at 1327.
[67] Dkt. 145 at 15.

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3.   Neher's Model Has an Acceptable Error Rate

USC argues that Neher's method has an unacceptable error rate. But it accepts that her model comes close to replicating US News's score for Rossier, which is, after all, the school whose ranking is at issue. Since she is holding all other schools' data constant while substituting data for Rossier, this is what matters.
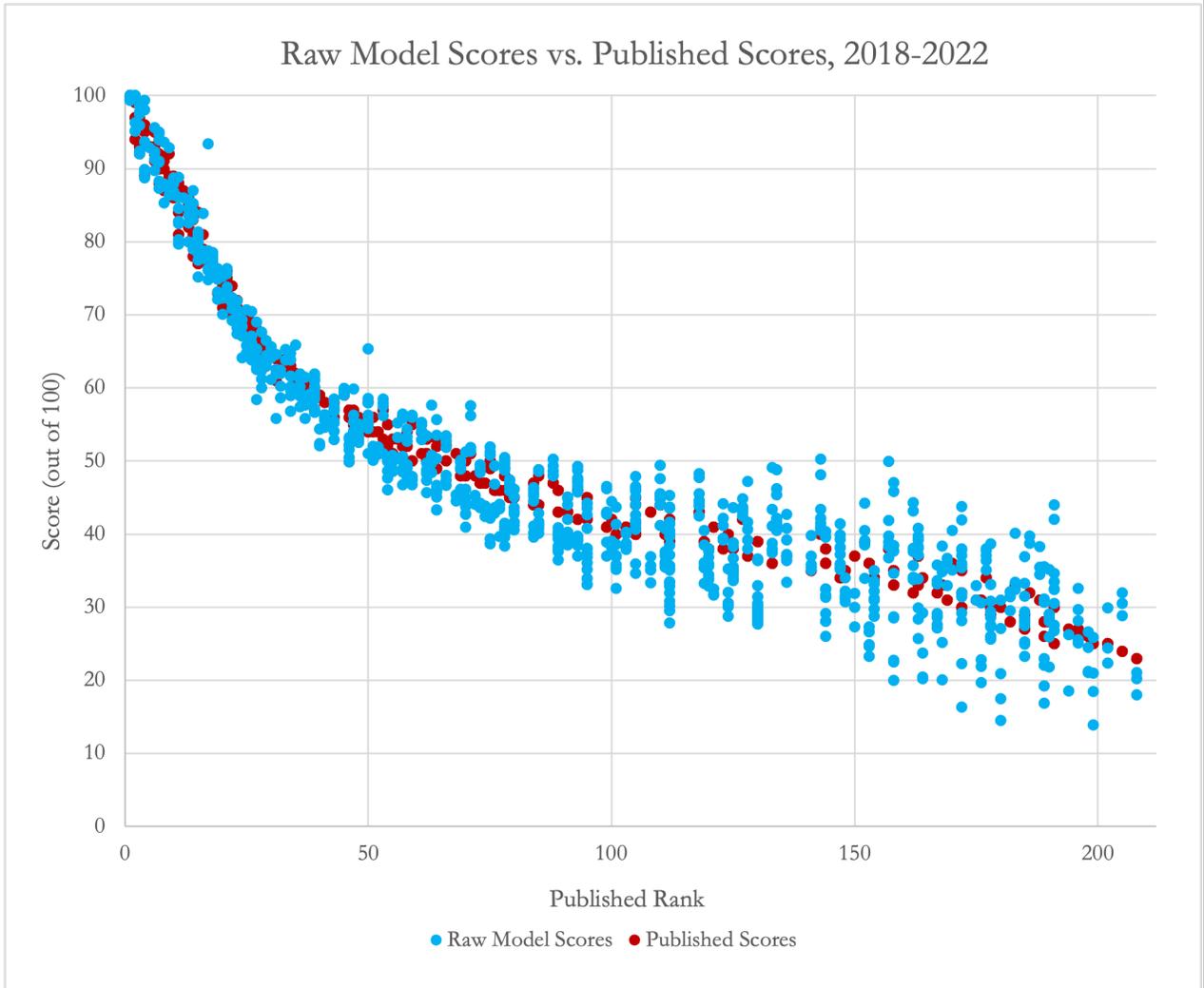
Beyond that, USC has identified a few schools where the model was close one year, but far off the next year.[68] Two examples are Rhode Island and UNC-Charlotte, where the difference between the Neher model and US News was the result of input errors.[69] Another is Western Kentucky, which was ranked 172 that year. As Neher explained, at the bottom end of the ranking distribution, many schools do not have complete data, affecting the ability to calculate z-scores.[70] In other words, there is more hidden data for lower-ranked schools than higher-ranked—thus as a general rule the HDC, representing the difference between Neher's score and US News's score, is larger for lower-ranked schools.

This isn't the case for higher-ranked schools—both at the very high end that US News ranked Rossier based on fraudulent data, as well as the range that Neher placed them after substituting the data that should have been reported.[71] As depicted in the graph below, Neher's model is particularly precise in replicating the rank of schools like Rossier.

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[68] Dkt. 145 at 16–17.
[69] *See* Ex. 23 at ¶ 3–4.
[70] Dkt. 145-2 at ¶ 27.
[71] *Id.*

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Raw Model Scores vs. Published Scores, 2018-2022

18   USC also mocks Neher's model for inconsistent scores of Johns Hopkins.[72] But

19 the reason for that is well understood by USC, and consistent with Neher's

20 methodology. As explained, the 2019 rankings incorporated a new GRE penalty.[73]

21 Neher has been transparent that US News does not publish the data necessary to

22 incorporate this penalty into the model, thus it constitutes hidden data.[74]

23   USC understood that in 2019, "a few schools that dropped out of the top 10 …

24 (most notably Johns Hopkins) were hit by this penalty," causing Hopkins to fall from

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26 _____
[72] Dkt. 145 at 17.
27 [73] *See supra* Part II.C at 8.
[74] Dkt. 145-2 at ¶ 45.

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6 in 2018 to 17 in 2019.[75] Not surprisingly, Neher calculates a much higher score for Hopkins than its rank would suggest, because the model can't recreate the large effect of this penalty.

The model did not produce a similarly large HDC for Rossier because it avoided the penalty by continuing to falsely assert that 100% of enrollees submitted GRE scores.[76] In other words, Rossier was able to enjoy both the flexibility of its preferred policy (no GRE requirement for EdDs) and the prestige of a higher rank by concealing the former in the calculation of the latter. It knowingly avoided the penalty because it "reported 100% of our entering doctoral students took the GREs" even though only █% had done so.[77]

4. The "Best-Case Scenario" Aspect of Neher's Opinion Is Well-Grounded in her Expert Review of Record Evidence

Finally, USC claims that Neher lacks a sufficient basis for her conclusion that Rossier's ranking likely would have been even lower than she calculated had she not kept certain metrics constant, specifically, Rossier's GRE scores, peer assessment, and expert assessment.[78] To be clear, Neher is not changing her model outcomes as a function of these non-quantitative observations—she is simply explaining that there is a sound basis in the record and her experience that Rossier's rankings could have only gotten worse. Her statement that "three other categories in the U.S. News ranking would have been worse for USC Rossier if they had properly shared their data during [this] time period"[79] is not mere *ipse dixit*.

The most obvious example is the GRE penalty. It's not just Neher saying that penalty would have materially affected Rossier's ranking if it had reported its percentage

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[75] Ex. 29; *see also* Ex. 7 at slides 5–6. USC also recognized that Hopkins adjusted its GRE policy for the 2020 rankings, avoiding the penalty. Ex. 29.

[76] Ex. 20.

[77] Ex. 29; Ex. 7 at slide 5.

[78] Dkt. 145 at 18.

[79] Dkt. 145-2 at ¶ 44.

21

1 of GRE takers honestly—Rossier does too.[80] Hopkins complied with US News's

2 reporting instructions and dropped 11 spots; Rossier defied those instructions, suffered

3 no GRE penalty, and ascended to the top 10 in the rankings.[81] It's nearly axiomatic that

4 Rossier would have suffered a drop similar to its peer school Johns Hopkins[82] if it had

5 reported the data US News requested; it's just not something that Neher can model

6 because of the data US News hides.

7   Neher's opinion that Rossier's peer and expert assessment scores were also likely

8 to drop is supported by experience and data. As she explained, schools in Rossier's

9 projected range do not get peer assessments as high as Rossier did during these years

10 when it submitted fraudulent data.[83]

11 **V. CONCLUSION**

12   Neher has reliably quantified the rankings decline USC knew was on the other

13 side of its fraud. The Court should refuse USC's invitation to apply *Daubert* so narrowly

14 as to insulate it from liability for this decades-long scheme.

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16 Dated: October 1, 2024   Respectfully submitted,

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26 [80] Ex. 29; Ex. 7 at slides 5–6.
[81] Ex. 29.

27 [82] Ex. 30 at 165, 169.
[83] Dkt. 145-2 at ¶ 47.

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1   **CERTIFICATE OF COMPLIANCE**

2   The undersigned, counsel of record for the Plaintiffs, certifies that this brief

3   contains 6,826 words which complies with the word limit of L.R. 11-6.1.

4

5   Date: October 1, 2024   */s/ Annick M. Persinger*
                                                                  Annick M. Persinger
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