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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

**PLAINTIFFS' MEMORANDUM
 OF POINTS AND AUTHORITIES
 IN OPPOSITION TO
 DEFENDANT'S MOTION TO
 EXCLUDE TESTIMONY OF
 PLAINTIFFS' EXPERT WITNESS
 DR. JOHN CHANDLER
 UNDER FED. R. EVID. 702**

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1 **I. INTRODUCTION**

2 For over a decade, USC Rossier participated in the U.S. News & World Report’s
3 Best Graduate Schools of Education survey and ranking process. During that time, USC
4 Rossier falsified survey data to obtain a higher ranking from U.S. News than it would
5 have received had it submitted accurate data. USC Rossier and 2U, the online program
6 manager that provided USC with marketing and recruiting services, featured these
7 fraudulently procured rankings across emails, websites, social media platforms, paid
8 advertisements, and printed media marketing copy—all directed at prospective
9 students. None of these facts are seriously in dispute.

10 Dr. John Chandler, Plaintiffs’ marketing expert witness, offers opinions in this
11 case about USC Rossier students’ exposure to the rankings, which Defendant USC now
12 moves to exclude. Dkt. 144¹ (“Motion” or “Mot.”). USC does not challenge Dr.
13 Chandler’s qualifications. Nor does USC seek to exclude Dr. Chandler’s opinions
14 regarding general marketing principles or the specifics of the extensive, multichannel
15 marketing strategy 2U and USC employed, which featured USC’s fraudulent rankings
16 as a key differentiator.

17 Rather the thrust of USC’s arguments against Dr. Chandler is “quantitative,” not
18 qualitative, namely that he is unable to *exactly* quantify and identify which specific
19 students were exposed to which specific websites, emails, or other marketing materials
20 containing USC Rossier’s fraudulent ranking based on data like email open rates and
21 log-level site traffic data. But *Daubert* does not require the type of quantitative exactness
22 Defendant demands.

23 The extensive nature of 2U and USC’s marketing campaign ensured the
24 fraudulent rankings were prominently featured across various channels, times, and
25 stages spanning the entire enrollment journey (all opinions USC does not seek to
26

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¹ In this response, “Dkt.” refers to the docket in *Favell v. Univ. of S. Cal.*, No. 2:23-cv-00846-GW-MAR.
28

1 exclude)—such that Dr. Chandler is able to draw on his 25 years of marketing
2 experience and knowledge to reliably conclude and opine that “all or nearly all students
3 at USC Rossier in the MAT and OCL programs during the period of ranking
4 manipulations were exposed to the fraudulent rankings.” Dkt. 144-1, Chandler Rep. ¶
5 14.

6 For the reasons discussed below, the Court should thus deny the Motion in its
7 entirety.

8 **II. FACTUAL BACKGROUND**

9 Dr. John Chandler is a professor of marketing at the University of Montana.
10 Chandler Rep. ¶ 1. He also holds affiliations with Universidad ORT Uruguay and the
11 University of San Diego, where he is a visiting professor of marketing and adjunct
12 professor, respectively. *Id.* ¶ 1. In addition to his academic roles, Chandler has worked
13 in analytics and data science for 25 years with a focus on digital marketing, including
14 extensive work in every marketing channel he addresses within his report. *Id.* ¶¶ 1, 7, 9,
15 14. He also has experience working in student recruiting for higher education
16 institutions. Chandler Rep. ¶ 56; Dkt. 144-2, Chandler Dep. 123:13-126:18 (noting work
17 related to online student recruiting both in the private sector and while at the University
18 of Montana). Chandler has been admitted as an expert in the field of digital marketing
19 and marketing reach. *In re Juul Labs, Inc. Mktg., Sales Pracs. & Prod. Liab. Litig.*, No. 19-
20 MD-02913-WHO, 2022 WL 1814440, at *18–19 (N.D. Cal. June 2, 2022).

21 Chandler applies his expertise in this case to explain (1) digital marketing
22 practices related to student recruitment for online graduate programs; (2) the stages of
23 the student recruitment and enrollment “customer journey” through the “marketing
24 funnel;” (3) the marketing channels and strategies relevant to online recruitment; and
25 (4) USC Rossier’s application of these principles. *See* Chandler Rep. p. 3.

26 Chandler offers 10 opinions in his report, which may be categorized as either (1)
27 marketing opinions or (2) exposure opinions. Chandler’s marketing opinions—
28

1 opinions 1, 2, 3, 4, 5, and 10—address 2U and USC’s actions in the context of marketing
2 practices and principles. For example, Chandler opines that 2U and USC Rossier
3 “engaged in a sophisticated, multichannel marketing strategy,” that “featured the
4 rankings across various channels, times, and stages of the marketing funnel,” including
5 “extensive email marketing campaigns,” which used rankings as “a key differentiator.”
6 *Id.* ¶ 14.

7 Chandler’s exposure opinions—6, 7, 8, and 9—discuss the reach of marketing
8 materials containing rankings information. *Id.* ¶ 14. The thrust of Chandler’s exposure
9 opinions is that all or nearly all of the students who ultimately enrolled in USC Rossier’s
10 MAT or OCL online programs between 2017 and 2022 were exposed to rankings
11 through email, websites, or other marketing materials and sources due to the nature of
12 2U’s marketing practices and the process students went through when applying to and
13 enrolling in these programs.

14 **III. LEGAL STANDARD UNDER *DAUBERT* AND RULE 403**

15 “The Ninth Circuit has emphasized *Daubert*’s guidance that FRE 702 ‘should be
16 applied with a ‘liberal thrust’ favoring admission.’” *In re NFL’s “Sunday Ticket” Antitrust*
17 *Litig.*, No. ML 15-02668 PSG, 2024 WL 2165676, at *2 (C.D. Cal. May 13, 2024)
18 (quoting *Messick v. Novartis Pharm. Corp.*, 747 F.3d 1193, 1196 (9th Cir. 2014)). Courts
19 thus “begin from a presumption that expert testimony is admissible.” *Spintouch, Inc. v.*
20 *Outform, Inc.*, 2022 WL 17363902, at *2 (C.D. Cal. Sept. 28, 2022).

21 Rule 702 allows admission of expert opinions based on “scientific, technical, or
22 other specialized knowledge” when they would “help the trier of fact to understand the
23 evidence or to determine a fact in issue.” *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S.
24 579, 589 (1993). “The district court is not tasked with deciding whether the expert is
25 right or wrong, just whether his testimony has substance such that it would be helpful
26 to a jury.” *Alaska Rent-A-Car, Inc. v. Avis Budget Grp., Inc.*, 738 F.3d 960, 969–70 (9th Cir.
27 2013). “The inquiry into the admissibility of expert testimony is a ‘flexible one’ in which

1 “[s]haky but admissible evidence is to be attacked by cross examination, contrary
2 evidence, and attention to the burden of proof, not exclusion.” *Nat’l Fire Prot. Ass’n,*
3 *Inc. v. UpCodes, Inc.*, No. 2:21-cv-05262-SPG-E, 2023 WL 6194385, at *1 (C.D. Cal. Sept.
4 7, 2023) (quoting *Primiano v. Cook*, 598 F.3d 558, 564 (9th Cir. 2010)). “In evaluating
5 expert testimony, the trial court is a gatekeeper, not a fact finder. The judge is supposed
6 to screen the jury from unreliable nonsense opinions but not exclude opinions merely
7 because they are impeachable.” *Id.* (cleaned up and citations omitted).

8 Furthermore, when considering expert opinions in the context of class
9 certification, the Ninth Circuit cautions courts that “[m]erits questions may be
10 considered to the extent—but only to the extent—that they are relevant to determining
11 whether the Rule 23 prerequisites for class certification are satisfied.” *Lytle v. Nutramax*
12 *Lab’ys, Inc.*, __ F.4th __, No. 22-55744, 2024 WL 3915361, at *12 (9th Cir. Aug. 23,
13 2024) (quoting *Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds*, 568 U.S. 455, 466 (2013)).
14 “A court is merely to decide whether a class action is a suitable method of adjudicating
15 the case.” *Id.* (quoting *Edwards v. First Am. Corp.*, 798 F.3d 1172, 1178 (9th Cir. 2015)).

16 Although USC cites the unpublished case *Boyer v. City of Simi Valley*, No. 19-CV-
17 00560, 2024 WL 993316, at *1 (C.D. Cal. Feb. 13, 2024), for the proposition that
18 amendments to Fed. R. Evid. 702 in 2023 created a more exacting standard for expert
19 proof, the standard has not changed. Rather, “the amendment merely ‘codified what
20 was already the prevailing understanding of Rule 702’s requirements.’” *U.S. v. Medtronic,*
21 *Inc.*, 2024 WL 4002842, at *9 (C.D. Cal. July 22, 2024) (quoting *Le v. Zuffa, LLC*, 2024
22 WL 195994, at *5 (D. Nev. Jan. 18, 2024)); *see also In re*, 2024 WL 2165676, at *3. *Boyer*,
23 moreover, was not a class action and was decided shortly prior to trial. At class
24 certification, the Ninth Circuit has made clear that “there is no requirement that the
25 [expert] evidence relied upon by Plaintiffs to support class certification be presented in
26 an admissible form at the class certification stage.” *Nutramax*, 2024 WL 3915361 at *7.

1 **IV. ARGUMENT**

2 USC's motion to exclude does not challenge Chandler's qualifications or the
3 marketing opinions that he offers. Instead, USC seeks to exclude only Chandler's
4 exposure opinions, namely that all or nearly all students who enrolled in Rossier's online
5 MAT and ED OCL programs were exposed to the fraudulent U.S. News rankings by
6 email, USC's websites, or other marketing channels. However, USC does not engage in
7 the relevant question at hand—whether this Court should admit and consider Dr.
8 Chandler's opinions when analyzing the propriety of class certification. The evidence
9 that underlies his opinions is common to the class and the type of evidence that courts
10 consider at the class certification stage. *See, e.g., In re PFA Ins. Mktg. Litig.*, 696 F. Supp.
11 3d 788, 816–17 (N.D. Cal. 2021) (finding classwide exposure where “common evidence
12 suggests that defendants’ marketing and training activities were highly orchestrated and
13 centrally controlled” such that the court could “infer that the proposed class members
14 were exposed to the same misrepresentations and omissions that flowed from
15 defendants’ centrally controlled marketing and training activities”). Likewise, Dr.
16 Chandler's opinions apply equally to all putative class members. This commonality
17 plainly supports class certification here.

18 As a merits question—which is not yet before this Court—Plaintiffs intend to
19 offer Dr. Chandler's marketing opinions, which USC does not challenge, to assist the
20 jury in understanding how the various pieces of evidence in this false advertising case
21 fit into an overall marketing campaign and strategy that USC used to promote USC
22 Rossier's rank through a sophisticated, multichannel approach. This brief begins with
23 Chandler's unchallenged marketing opinions, from which his exposure opinions flow:
24 2U, on behalf of USC, employed marketing best practices to ensure that every student
25 who enrolled in the online MAT and OCL programs did so only after passing through
26 the 2U marketing funnel.

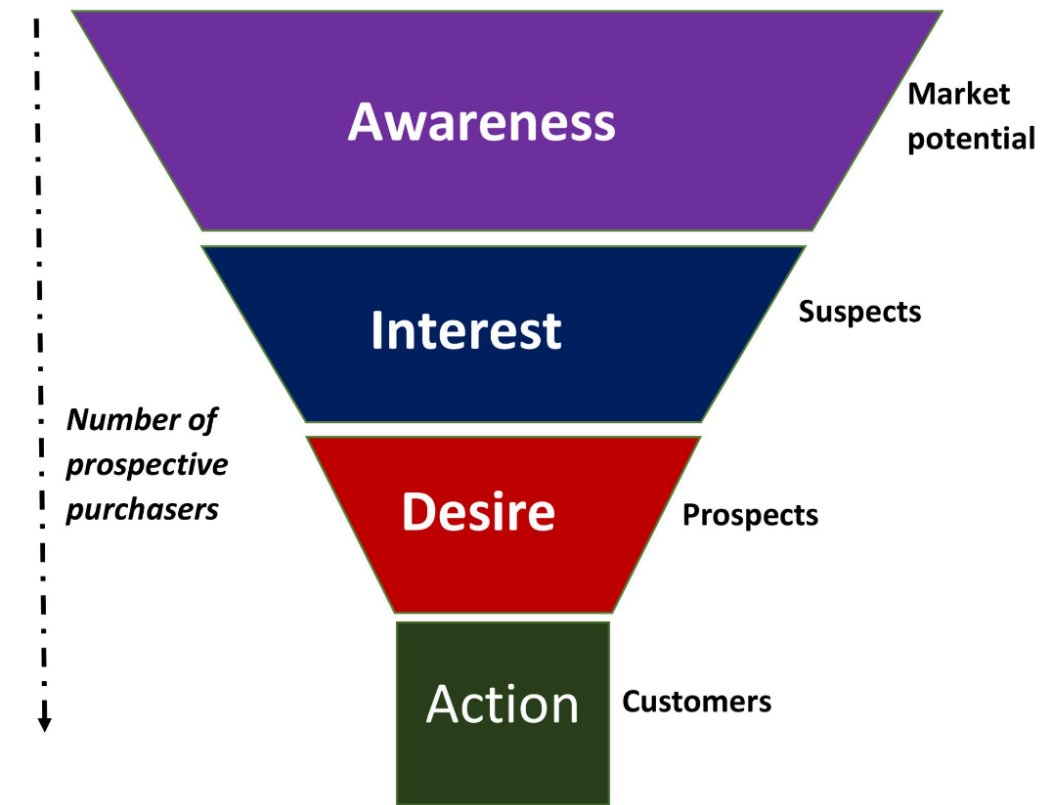
1 Next, this brief addresses the record evidence—including 2U’s 30(b)(6)
2 deposition testimony and marketing materials from both 2U and USC—which provides
3 ample support for the jury to find that USC fraudulently misrepresented USC Rossier’s
4 rank to the class as a whole such that, if the misrepresentation is also found to be
5 material (it was), reliance can be inferred. Dr. Chandler’s exposure opinions support
6 such a finding.

7 **A. Record evidence supports Chandler’s opinion that 2U, on USC’s**
8 **behalf, employed a sophisticated marketing strategy consistent with**
9 **marketing best practices, which USC does not challenge.**

10 USC does not seek to exclude the following testimony of Dr. Chandler discussed
11 in this Section A, which helpfully explains—drawing on his wealth of experience with
12 and knowledge of general digital marketing principals and campaigns—the extent and
13 nature of 2U and USC’s marketing of USC Rossier’s fraudulent ranking as part of a
14 sophisticated, multichannel marketing strategy.

15 **i. Chandler’s report explains how the marketing funnel moves**
16 **prospective student-consumers along the enrollment journey**
from interest in a program to enrollment.

17 The marketing funnel is a framework that helps an entity selling a product to
18 guide consumers from first learning about a product through the point of purchase.
19 Chandler Rep. ¶ 21. The classic framework moves the potential purchaser from
20 awareness to interest to desire and, ultimately, to action. *Id.* ¶ 22. The funnel is a visual
21 representation showing how the number of prospective purchasers decreases at each
22 stage, with actual customers making up the final and smallest number of individuals:
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Chandler Rep. ¶ 22.

Marketers who sell online graduate programs employ the marketing funnel to guide students through the “enrollment journey.” *Id.* ¶ 55. The marketing funnel for recruiting students proceeds in the following stages:

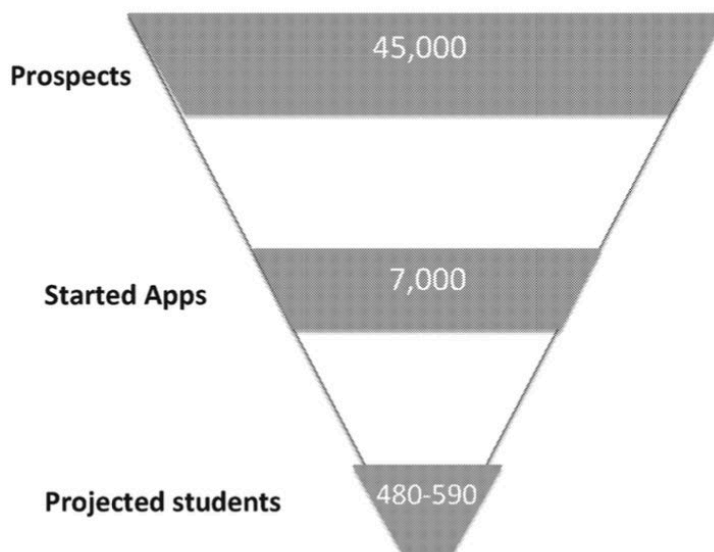
- Awareness: At this stage, “institutions aim to capture the attention of potential students and inform them about the existence and benefits of their programs,” ¶ 59, which they do through, among other things, digital media, ¶¶ 60-61.
- Interest: At this stage, “[i]nstitutions employ personalized communication strategies to maintain and heighten this interest.” ¶ 64. At this stage, they send tailored emails that highlight important selling points about the program. ¶ 64.
- Consideration: At this stage, students begin to dig deeper into a program’s specifics. Institutions use tailored emails, online consultations, and targeted digital advertising to continue to deliver their messaging at even more depth. ¶¶ 67-68.

- Application: At this stage, students submit an application to the program. ¶ 69. The institution's primary goal is facilitating the submission of applications. ¶ 70.
- Decision: At this stage, an admitted student makes their decision about whether to accept an offer of admission. ¶ 72. Institutions send direct mailers, use personalized follow-ups, and provide in-person and virtual events. ¶¶ 73-74.
- Enrollment: At the final stage, institutions focus on helping students complete the necessary administrative tasks; marketing is typically not a part of this stage. ¶¶ 75-76.

ii. **2U's marketing strategy ensured that every student who ultimately enrolled in the online MAT and OCL programs did so only after passing through a marketing funnel that emphasized USC Rossier's rankings.**

2U applied the funnel. Its 2015 marketing plan displays its marketing funnel for Rossier's online programs, which Dr. Chandler discusses in depth as an example of 2U's sophisticated marketing efforts over the years:

2015 Funnel



Funnel highlights:

- Close to \$6 MM in total spend across all channels
- Growth expected in Paid Search and Web – two of our best converting channels

1 Chandler ¶¶ 91-102.

2 As 2U’s 30(b)(6) witness explained, 2U’s “marketing and recruiting [admissions
3 team] would be communicating with prospective students who [had] identified
4 themselves as potentially interested in the program after they have either filled out [an
5 interest form] or started an application and [keep] communicating with them until they
6 either exit the funnel or apply to the program.” Dkt. 144-3, Gerber Dep. 152:5-12. To
7 the extent a prospect did not enter 2U’s marketing funnel through a “2U-powered
8 channel”—which a majority did—but instead went directly to USC, the prospect would
9 still be included in 2U’s marketing funnel. Gerber Dep. 49:18-50:21 (explaining the
10 general process, her expectation that most individuals would arrive through a “2U-
11 powered channel,” and noting that if an individual came directly to USC, 2U would
12 request the information so that they would be “included in the overall prospect
13 funnel”). There was no way to enroll in the online MAT or OCL programs without
14 passing through the 2U marketing funnel.

15 Once in the funnel, prospective students received a series of tailored email
16 messages—known as a “drip” email campaign. Gerber Dep. 109:9-16. A prospective
17 student’s status in the student enrollment journey determined the types of emails they
18 received; 2U crafted a distinct series of messages for a “prospect” drip, a “started app”
19 drip, a “submitted app” drip, and a “reengagement” drip (to those whose engagement
20 had stalled). Gerber Dep. 109:4–111:5; 111:10-11 (noting use of similar program for
21 OCL and MAT programs).

22 The content was designed to appeal to prospective students both as they entered
23 and moved down the funnel, regardless of where they entered. As 2U’s corporate
24 representative explained, individuals who entered the “prospect pool,” either through
25 filling out a request for information or starting an application, were placed into a drip
26 email campaign, with the key difference between the two groups being which email in
27 the drip campaign they received. Gerber Dep. 109:17-110:115 (explaining that the drip
28

1 email campaign is customized/individualized based on where an individual is in the
2 funnel). For example, those who filled out a request for information would receive the
3 “prospect drip,” and those who started an application would receive the “started app
4 drip.”

5 These email campaigns highlighted Rossier’s U.S. News ranking—which 2U’s
6 corporate representative characterized as “definitely a leading differentiator,” or selling
7 point—early and often. Gerber Dep. 106:6-9. Far from equivocating, 2U’s corporate
8 representative repeatedly indicated the importance of including rankings throughout
9 email campaigns to prospective students. She testified that she “believed” rankings
10 information was included in initial campaign emails, and that it “would surprise [her]”
11 if it was not part of both the initial and subsequent emails. Gerber Dep. 113:13–114:1.
12 Further, rankings were “an absolute inclusion” in paid emails because 2U considered it
13 “a key differentiator that we would want to communicate to the prospective student
14 when we developed [Rossier’s marketing] copy.” Gerber Dep. 108:15–109:3; 105:14-17
15 (“Q: [D]id any of the paid e-mail campaigns that 2U ran ever mention USC Rossier’s
16 U.S. News & World Report ranking? A: I believe so, yes.”). Gerber “[could not] think
17 of a reason why [2U] would remove [USC Rossier’s U.S. News ranking]” from the
18 emails before 2022, when USC Rossier withdrew from the rankings; instead, she
19 clarified that it was 2U’s practice to update rankings information in email copy only as
20 “new information” became available. Gerber Dep. 113:9-11.

21 And, as discussed more fully below, email was just one of several channels 2U
22 and USC used to market the online programs to prospective students in the marketing
23 funnel.

B. Marketing principles and record evidence support Chandler’s exposure opinions, including his ultimate opinion that all or nearly all students who matriculated in USC’s online programs were exposed to the fraudulent rankings.

Like the marketing opinions that USC does not seek to exclude, Dr. Chandler’s exposure opinions are based on sufficient facts and data. Although the original email text and individual, log-level tracking data are not available,² Dr. Chandler can still provide evidence-grounded exposure opinions that rely on his decades of marketing experience and the available evidence in this case. *See e.g., Elosu v. Middlefork Ranch Inc.*, 26 F.4th 1017, 1024 (9th Cir. 2022) (“An expert’s specialized knowledge and experience can serve as the requisite ‘facts or data’ on which they render an opinion.”); *JH Kelly, LLC v. AECOM Tech. Services, Inc.*, 605 F. Supp. 3d 1295, 1315 (N.D. Cal. 2022) (“Because [expert] claims that he relied on project documents . . . to support his opinion, the Court finds that, at least at this stage . . . expert opinion is based on sufficient facts to meet the standard of FRE 702(b).”).

As noted above, all students who matriculated in the online MAT and OCL programs passed through the marketing funnel. Record evidence thus supports Dr. Chandler’s conclusion that all students who matriculated at USC Rossier received emails containing rankings. Chandler Rep. ¶ 213 (“Gerber has testified that it would be in keeping with 2U’s practices to include the rankings [in 2U’s email campaign] and she believes they did. I concur with those beliefs based on my marketing experience and my review of the materials in this case—the fraudulent rankings were central to the marketing strategy of the programs. Therefore, I can say with a reasonable degree of

² 2U did not maintain historical versions of marketing content, instead updating old content to meet present needs. *See* Gerber Dep. 183:1-10 (discussing historical marketing copy). In addition, the absence of log-level records does not allow for site traffic figures tied to identified emails. Chandler Rep. ¶ 215.

1 scientific certainty that the fraudulent rankings were disseminated to all or nearly all
2 matriculating students via these welcome emails.”).

3 Further, 2U and USC included rankings in other marketing copy that targeted
4 prospective students in the funnel. Chandler Rep. ¶ 14(9) (“I can state with a reasonable
5 degree of scientific certainty that all or nearly all students at USC Rossier in the MAT
6 and OCL programs during the period of ranking manipulations were exposed to the
7 fraudulent rankings. The pervasiveness of these rankings across multiple touchpoints
8 ensured their near-universal reach.”); *see also Primiano*, 598 F.3d at 565 (“Lack of certainty
9 is not, for a qualified expert, the same thing as guesswork.”) (internal citation omitted).

10 **i. Students who enrolled in USC Rossier would have been**
11 **exposed to the rankings through 2U’s marketing emails.**

12 As discussed above, all prospective students who expressed an interest through
13 either requesting information about or applying to USC Rossier were included in the
14 marketing funnel and thus began receiving tailored email messages. Every student who
15 ultimately matriculated passed through to the end of the funnel, receiving emails
16 throughout the process. 2U’s corporate representative testified that given 2U’s
17 practices, she believed these emails included the fraudulent rankings—because “the
18 rankings were central to the marketing strategy of the programs.” Chandler Rep. ¶¶
19 212-13. This is consistent with Chandler’s marketing experience about how such a key
20 differentiator would be disseminated. Chandler Rep. ¶ 213. Nor does USC seek to
21 exclude Dr. Chandler’s opinions that the use of rankings in 2U and USC’s marketing
22 efforts was a key differentiator that was strategically placed and prominently featured
23 across various channels, times, and stages of the marketing funnel, such that the
24 fraudulent rankings were highly visible and influential throughout the marketing and
25 recruitment process. *Id.* ¶ 14.

26 Although USC argues that Dr. Chandler is mistaken in concluding “that every
27 person who started an online application with Rossier was added to drip email

campaigns” (Mot. at 4), record evidence supports his conclusion. Indeed, USC acknowledges that drip email campaigns were sent to those who requested information about USC Rossier. *Id.* And 2U’s representative was clear that the majority of students enter 2U’s marketing funnel through a “2U-powered pathway.” Gerber Dep. at 48:1-49:20. But USC ignores testimony from 2U’s representative that all “prospects” entered 2U’s marketing funnel and thus would have received drip emails, including direct applies, whose first touch point is a submitted application, rather than a request for information. *See, e.g.*, Gerber Dep. at 47:19-22 (noting that “prospects” refers to any individual who identified an interest in USC Rossier through a request for information or directly to the institution), 49:18-52:8 (explaining that even the relatively small number of prospects who identify themselves through non-2U channels are entered into 2U’s “overall prospect funnel”); 53:20–54:11 (explaining that “direct apply” simply means an individual whose first touch point is a submitted application and who would thus be part of the relatively small number of prospects who entered 2U’s funnel but “did not come in through a 2U-powered channel”); 110:12-15 (noting that students who submit an application are started on the “submitted apps” drip).

The handful of excerpts USC cites from the testimony of 2U’s representative weave together distinct discussions with the effect of obscuring the extensive nature of 2U’s email campaigns and their collective emphasis on rankings. For example, USC highlights 2U’s testimony that “not every individual would receive all of these e-mails,” Mot. at 4 (citing Gerber Dep. 109:13-14), but 2U’s representative went on to say in the very same sentence that “dependent on their stage [of the funnel], if they had consented to receive information, they would be *put into one of these categories* [of email drip campaigns] and moved through them.” Gerber Dep. 109:13-16 (discussing Ex. 104 at 0000456). This makes sense; it wouldn’t be effective to send an email that says, “Start your application today!” to someone who had already submitted one. Rather, as discussed above, those who started an application would receive the “started app drip”

1 emails instead of the “prospect drip” emails, but that is a distinction without a difference
2 as both categories of emails included, according to 2U, the fraudulent rankings.

3 USC’s attempt to discredit Dr. Chandler’s exposure opinions based on email
4 open rates also falls flat. Nor does USC’s focus on whether a student opted in or
5 unsubscribed to the email campaigns make any sense given the record facts. Any
6 prospective student who requested information effectively opted in to the USC Rossier
7 email campaigns. *Id.* at 114:7-10. As 2U’s representative testified, had the prospective
8 student merely done nothing after requesting such information, they would have
9 continued to receive emails. *Id.* at 109:20-110:2. And anyone who received these emails
10 must necessarily have opened them to unsubscribe. *Id.* at 114:7-10.

11 That not every individual would have opened every email does not render Dr.
12 Chandler’s exposure opinions unreliable³—in fact, the marketing funnel and general
13 email marketing practices are designed to account for that reality. By design and
14 definition, a significantly larger number of people entered the marketing funnel than
15 matriculated to USC Rossier. For example, a 2U internal marketing document shows a
16 reach of 45,000 individuals at the prospect level for a yield of 480-590 applications. *See*
17 Chandler Rep. ¶ 95. And those individuals most likely to move through the funnel are
18 those most interested in USC Rossier’s programs—and therefore most motivated to
19 engage with marketing materials by opening emails. *See* Chandler Depo. 224:15-17
20 (noting that to avoid rankings, a student would have to delete without opening the initial
21 and subsequent emails—and yet be interested enough to apply and enroll). Precisely
22 because not every recipient opens every email, marketing best practice is to repeatedly
23 include key indicators in materials, with the goal of eventually ensuring message
24 saturation.

25
26
27 ³ Chandler notes that a review of certain data suggested that “welcome” emails had a
59.4% open rate, but noted that the figure was unreliable. Chandler Rep. ¶ 212.

1 Nor is USC correct that Plaintiff Favell undermines the reliability of Chandler's
2 exposure opinions. *See* Mot. at 5. To the contrary, Favell testified that she received
3 immediate emails and calls upon expressing interest in USC Rossier, which 2U's
4 representative testified would have included the fraudulent rankings, although Favell
5 did not specifically recall that fact. Dkt. 144-4, Favell Dep. 106:17-18; Gerber Dep.
6 113:13–114:1. Her testimony thus confirms 2U's aggressive use of email drip campaigns
7 and receipt of the same. Favell Dep. 106:17-18. Moreover, Favell *did* specifically recall
8 seeing the rankings on USC's website and the US News website, Favell Dep. 113:11-
9 16, which is consistent with Chandler's opinion that students also would have seen the
10 rankings on USC's websites, and further supports that Chandler's opinion is not
11 speculative. Finally, Favell believed she may have seen additional advertisements
12 promoting USC's ranking when looking at other websites, Favell Dep. at 115:21-116:10,
13 which again is consistent with Dr. Chandler's conclusion that students who enrolled in
14 USC's online programs were exposed to the rankings through channels besides email
15 and websites, and in particular that students who completed the enrollment journey
16 necessarily would have been exposed.

17 In short, Favell's testimony confirms 2U's and USC's success at saturating the
18 market with its fraudulently procured rank, as do all of Plaintiffs' other experiences. *See*,
19 *e.g.*, Ex 1., Plaintiff Murtada's Interrogatory Resp. No. 4 and Ex. 2, Murtada Dep. 54:11-
20 55:18, 230:6-231:15 (testifying, *inter alia*, that he saw a paid advertisement for USC
21 Rossier touting a US News top 10 ranking, with a link taking him to the USC Rossier
22 website, where he likewise saw advertisements and references to USC Rossier's US
23 News ranking, that he spoke with an admissions counsel, who promoted USC Rossier's
24 rank, and that he received emails from USC Rossier promoting its rank); Ex. 3, Plaintiff
25 Zarnowski's Interrogatory Resp. No. 4 and Ex 4., Zarnowski Dep. 48:10-50:7; 58:22-
26 23, 59:5-60:1; 63:6-14, 284:22-286:9 (testifying that, while researching top EdD
27 programs, she viewed paid search results on Google promoting USC Rossier's US News
28

1 ranking, that she saw advertisements promoting USC Rossier’s rank on her social
2 media, that she received an email from USC promoting its US News top 10 ranking,
3 that she then visited USC Rossier’s website, where she saw the ranking, which she then
4 confirmed via US News’s website, and that she also saw the rank on the
5 rossieronline.usc.edu website).

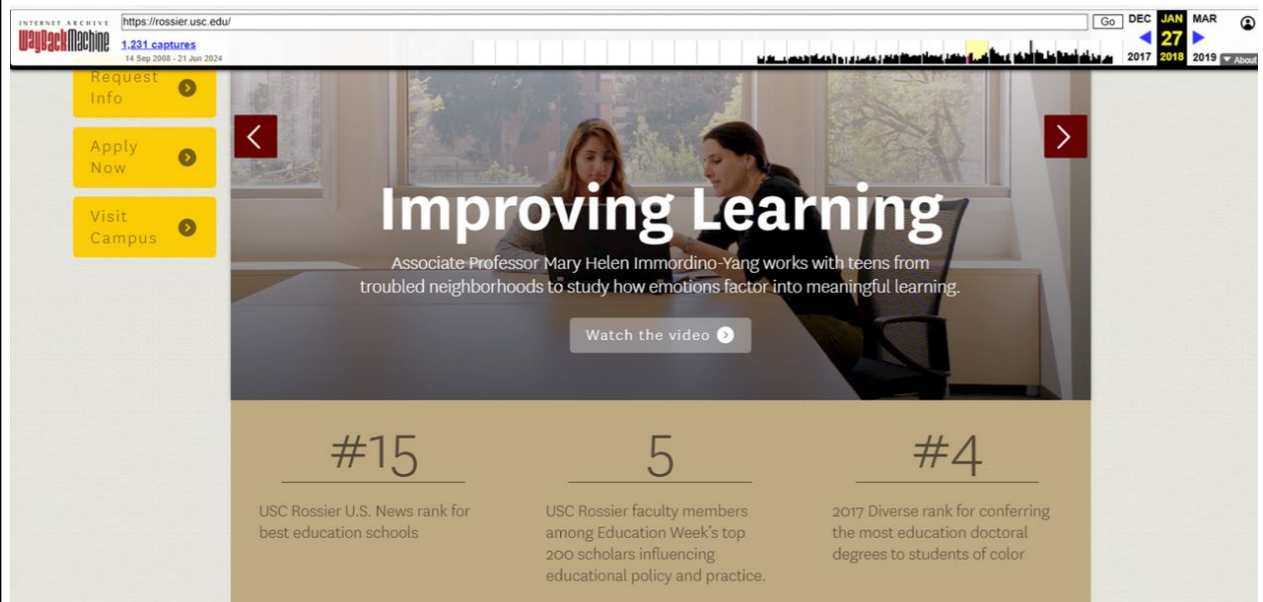
6 USC’s view of testimony on email campaigns may differ from Plaintiffs, but USC
7 will have the chance to present that view at trial. USC’s interpretation of the evidence
8 does not render Chandler’s interpretation wrong or his opinions unsupported, and it is
9 precisely “the job of the fact finder, not the trial court, to determine which [testimony]
10 is more credible and reliable.” *City of Pomona v. SQM North Am. Corp.*, 750 F.3d 1036,
11 1043 (9th Cir. 2014). Moreover, even “[i]f incorrect, [expert] opinions can be easily
12 rebutted at trial through cross-examination or other testimony.” *McCrary v. Elations Co.*
13 *LLC*, No. EDCV 13–0242 JGB, 2014 WL 12589137, at *15 (C.D. Cal. Dec. 2, 2014);
14 *see also Elosu*, 26 F.4th at 1023–24 (concluding the district courts’ concerns about
15 whether the expert’s “conclusion conflicted with . . . [other] testimony[,]” *inter alia*, are
16 properly addressed through impeachment before a jury at trial—not exclusion by a
17 district judge at the admissibility stage). In addition, whether an expert “made improper
18 or unsupported assumptions and reached faulty or irrelevant conclusions plainly bear
19 on the weight of his testimony, not its admissibility.” *JH Kelly*, 605 F. Supp. 3d at 1318.
20 “Although ‘[a] court may conclude that there is simply too great an analytical gap
21 between the data and the opinion proffered,’ Rule 702 does not license a court to engage
22 in freeform factfinding, to select between competing versions of the evidence, or to
23 determine the veracity of the expert’s conclusions at the admissibility stage.” *Id.*
24 (quoting *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997)).

25 Dr. Chandler reliably opined that all or nearly all students who matriculated in
26 the online MAT or OCL programs were exposed to rankings through emails. Not only
27 are his exposure opinions supported by sufficient facts and a wealth of marketing
28

experience and knowledge, but his opinions assist “with the basic function of expert testimony: to help the trier of fact understand highly specialized issues that are not within common experience.” *Elosu*, 26 F.4th at 1023-24 (9th Cir. 2022) (finding that the district court abused its discretion when it concluded that the expert “report [was] too speculative, that his conclusion conflicted with the [other] testimony, and that he relied too heavily on the testimony of the plaintiffs[,]” and therefore was not “based on sufficient facts or data,” because in doing so, “the district court assumed a factfinding role in its analysis”).

ii. USC Rossier websites included rankings information in areas that would have exposed students in the marketing funnel to the numerical ranking.

Chandler’s report thoroughly discusses two different USC Rossier websites, one of which USC maintained (www.rossier.usc.edu), and the other of which was maintained by 2U (www.rossieronline.usc.edu). Chandler Rep. ¶¶ 124-160. It also includes historical screenshots of the USC-maintained www.rossier.usc.edu landing page from 2017 to 2022. Chandler Rep. ¶¶ 145-159. As seen in the example below, the U.S. News ranking features prominently:



1 Chandler Rep. ¶ 145.

2
3 As Chandler explained, the decision to place the numerical ranking in a large
4 font with significant negative space around it on the left-hand side and toward the
5 middle of the page is no fluke and reflects the emphasis USC Rossier sought to place
6 on it:

7 The placement on a Web page and website design has an influence
8 on what content people see on that page. There's well-established research
9 on the way in which people read information online. Typically, people
10 start at the top left and will move down the left-hand side and then across
11 from there. And so, people tend to read much like we read books. And
12 will see the information kind of in the order it's displayed, going left to
13 right and top to bottom. Things like font size influence whether or not an
14 element of a page is viewed. Colors can influence whether or not part of
15 a page is viewed.

16 And so, in this case specifically, like the example that we're on here
17 in paragraph 145, the number 15, beneath that it says USC Rossier U.S.
18 News rank for best education schools. And that number 15 is prominently
19 displayed with a lot of white space around it. And kind of toward the
20 middle of page in a large font. Very easy for people to see.

21

22 If you knew you wanted to apply, you would presumably click the
23 apply now button. But this entire page would be visible to you.

24 Chandler Dep. 310:14-311:14, 313:9-12.

25 USC's partial quote from Chandler's report (and liberal use of ellipses) eliminates
26 important content and context to suggest he somehow concedes that his website
27 exposure opinion is mere "commonsense." *See* Mot. at 6. Not so. Chandler opines that
28 "[s]tudents who were serious about Rossier, who were making progress down the
funnel that 2U was focused on promoting, were likely to visit" USC Rossier webpages
that contained rankings information, which provided an additional source of exposure.

Chandler Rep. ¶ 217. Dr. Chandler does recognize that it is “reasonable, *from both a marketing and a commonsense perspective*, to assume that the vast majority of matriculating students visited these pages at least once during their consideration process.” Chandler Rep. ¶ 208 (emphasis added). “To exclude an expert report simply because it also employs common sense—in addition to expertise—is not supported by the caselaw.” *Droplets, Inc. v. Yahoo! Inc.*, No. 12-cv-03733-JST, 2021 WL 11701485 (N.D. Cal. Nov. 29, 2021) (internal quotation marks and citation omitted).

Dr. Chandler’s website exposure opinion is no *ipse dixit*, nor does it fall within common layperson understanding. Rather, his opinion is based on his review of the evidence, a substantial review of the USC websites, significant marketing experience, academic research, and plaintiff testimony. *See generally*, Chandler Rep. ¶ 14 (methodology overview); *id.* p. 40-55 (review of USC Rossier’s websites); pp. 57-77 (review of USC’s display, social media, online, and print marketing); pp. 85-90 (list of USC provided documents, USC websites, and academic resources Chandler reviewed to arrive at conclusions). This type of opinion, which combines website design, consumer behavior, and marketing principles, is precisely the type of opinion that courts routinely permit experts to provide because it is helpful to the jury and not within the “areas believed to be within the jurors’ common understanding.” *United States v. Rahm*, 993 F.2d 1405, 1413 (9th Cir. 1993) (“Our ‘proper subject’ inquiry has generally focused upon whether the expert testimony improperly addresses matters within the understanding of the average juror.”); *Montera v. Premier Nutrition Corp.*, No. 16-cv-06980-RS, 2022 WL 1225031, at *5–*6 (N.D. Cal. Apr. 26, 2022) (admitting expert testimony where expert “synthesized Defendant’s internal documents about marketing strategies,” general marketing principles, and advertising strategy of defendant, recognizing that courts often admit marketing expert’s testimony regarding a company’s marketing strategy).

Lincare Holdings Inc. v. Doxo, Inc., provides a particularly apt example. No. 8:22-

CV-2349-VMC-AEP, 2024 WL 243646, at *3–4 (M.D. Fla. Jan. 23, 2024). In that case, the defendant sought to exclude an expert who offered opinions touching on website design, online marketing, and search engine optimization. *Id.* at *3. The defendant in *Lincare* challenged the expert’s qualifications to opine about consumer behavior, his methodology, and whether the opinions themselves were helpful to a jury. *Id.* The court held that the expert’s decades of experience in the field qualified him to offer the opinions. *Id.* It also held that his methodology was sound because he “applied his experience to his review of relevant materials, including, among other things, [the defendant’s] website, various search engines, and [regulatory agency] reports.” *Id.* Finally, the court held that the opinions were helpful to a jury because juries were likely unfamiliar with website design and advertising techniques. *Id.* at *4.⁴

None of the cases USC cites in its motion support their argument against Dr. Chandler’s website exposure opinion. In *Alves v. Riverside County*, for example, the court excluded expert testimony that consisted only of “an unhelpful recitation of facts viewable on video” punctuated by the expert’s own spin. No. EDCV192083JGBSHKX, 2023 WL 2983583, at *11 (C.D. Cal. Mar. 13, 2023). That is not comparable to Chandler’s application of his decades of experience to an in-depth review of websites and the record evidence.

Similarly, in *Townsend v. Monster Beverage Corporation*, the court excluded an expert’s

⁴ *Accord Karpilovsky v. All Web Leads, Inc.*, No. 17 C 1307, 2018 WL 3108884, at *4 (N.D. Ill. June 25, 2018) (“As with [expert’s] ‘best practices opinion’ described above, the basis for the ‘typical user opinion’ is [expert’s] considerable experience in the website design industry. He admits he conducted no empirical testing of how typical users ... actually behaved. But again, [expert] may present expert opinions predicated upon his years of experience in web design.”); *Georgian v. Zodiac Grp., Inc.*, No. 10-CIV-60037, 2011 WL 13214041, at *3 (S.D. Fla. June 24, 2011) (finding expert qualified to opine about online directories and potential confusion they cause where the expert had “ten years of experience in online marketing with a specialty in search marketing strategy” and had “created an online marketing program for a start-up company from scratch”).

1 opinion because the expert failed to connect his ultimate opinion (that energy drink
2 consumers were energy drink purchasers) to anything more than his “unsupported
3 speculation.” 303 F. Supp. 3d 1010, 1032 (C.D. Cal. 2018). Again, Chandler’s ultimate
4 opinion is supported by his experience, a thorough review of the website, and a review
5 of the record evidence.

6 **iii. Chandler’s opinion that enrolled students would have been**
7 **exposed to rankings via channels besides emails and websites**
8 **is based on record evidence and bolsters his exposure**
9 **opinion.**

10 In addition to its email and website copy, 2U exposed individuals in the
11 marketing funnel to USC’s numerical ranking in a wide variety of ways. It was 2U’s
12 practice to also include ranking across other marketing channels: on social media pages,
13 Gerber Dep. 66:5-15, 75:10-18, 142:20-25 (testifying she believed that some social
14 media advertisements for the programs included numerical rank),⁵ in webinars, *id.*
15 115:2-22, through external advertising, *id.* 91:19-92:11, and contextual partnerships, *id.*
16 97:7-20. It was also 2U’s practice to include USC Rossier’s fraudulent ranking in talking
17 points prepared for 2U admissions counselors who spoke with prospective students. *Id.*
18 153:15-25, 155:10–16; *see also id.* 161:10-14 (describing ranking as “one of the key
19 differentiators of the program,” which would be part of the education of admissions
20 counselors).

21 Chandler discusses these additional “other channel” sources of marketing that
22 include references to the rankings in his report. Chandler Rep. ¶¶ 162-199 (reviewing
23 search, print, and social media marketing examples). USC’s motion to exclude
24 demonstrates a fundamental misunderstanding of Chandler’s opinions regarding these
25 exposures. In support of its effort to exclude Chandler’s exposure opinion, USC cites

26 ⁵ It was part of 2U’s marketing strategy to maintain social media accounts (Gerber Dep.
27 66:5–15), including Facebook (*id.* 68:25–69:7), LinkedIn (*id.* 69:9–16), Twitter (*id.*
69:18–23), Instagram (*id.* 70:9–14), and Google+ (*id.* 69:25–70:7).

1 *Ono v. Head Racquet Sports USA, Inc.*, No. CV134222FMOAGR, 2016 WL 6647949
2 (C.D. Cal. Mar. 8, 2016). But instead of supporting exclusion, a comparison with *Ono*
3 illustrates why Chandler’s opinion meets *Daubert*’s requirements.

4 In *Ono*, the plaintiff filed a class action against a tennis racket manufacturer
5 because he purchased a racket that he believed a professional tennis player used after
6 watching the tennis player compete in a tournament. *Id.* at *2. The plaintiff
7 acknowledged that he had not interacted with any of the advertising and made a spur-
8 of-the-moment purchase because he believed that a particular player used the racket.
9 *Id.* The plaintiff’s sports marketing expert provided a declaration that identified general
10 marketing principles and offered general observations about the role of things like press
11 releases, marketing expenditures, and the raw number of social media fans and video
12 views—but failed to connect any of this information to the alleged deceptive advertising
13 at issue. *Id.* at *16 n.10. Instead, supported only by “broad generalizations from general
14 marketing and advertising principles,” he opined that a large percentage of consumers
15 who purchased the rackets had been exposed to the racket company’s “marketing and
16 advertising messages.” *Id.* The court understandably found the expert’s opinion
17 unpersuasive.

18 Chandler’s opinion that students who enrolled in USC’s online MAT and OCL
19 programs were also exposed to the rankings through channels besides email and
20 websites stands in stark contrast. Unlike the *Ono* expert, Chandler does not simply
21 review general marketing principles, identify a collection of general 2U/USC marketing
22 efforts, and conclude that a large percentage of individuals who enrolled in USC’s MAT
23 and OCL programs were exposed to rankings advertising. Instead, Chandler’s “other
24 sources” exposure opinion provides additional support to his additive email and website
25 exposure opinions. And those additive opinions stand firmly on the unchallenged
26 marketing explanations and opinions Chandler has provided.

27 Chandler does far more than provide a general overview of general marketing
28

1 principles. Rather, he describes how general marketing principles apply to online
2 graduate student recruiting, analyzes the available information to determine that 2U
3 followed marketing best practices, including emphasizing ranking, and—unlike the
4 spur-of-the-moment racket purchaser in *Ono*—that 2U’s marketing strategy ensured
5 that those individuals who purchased the 2U/USC product (that is, enrolled in the
6 online MAT or OCL program) could do so only after passing through 2U’s marketing
7 funnel. Because Chandler’s “other sources” exposure opinion does not stand alone, it
8 should not be analyzed alone.

9 Because of Chandler’s knowledge of marketing principles and 2U’s adherence to
10 marketing best practices that ensured every student who enrolled in the MAT and OCL
11 programs did so only after passing through 2U’s marketing funnel, Chandler can opine
12 that all or almost all USC Rossier students were exposed to the fraudulent rankings
13 through emails, and that those who may not have been exposed through emails were
14 likely exposed through website copy. *See, e.g.*, Chandler Rep. ¶ 224. Any additional
15 opportunities for exposure only serve to further solidify Chandler’s ultimate opinion
16 that all or almost all students who matriculated in the online MAT or OCL programs
17 were exposed to rankings.

18 **V. CONCLUSION**

19 Chandler’s exposure opinions withstand scrutiny under *Daubert* because they are
20 grounded in a review and analysis of record evidence helpfully understood with the
21 benefit of Chandler’s extensive marketing experience and expertise. After discussing
22 marketing principles and reviewing evidence from the record to opine that 2U followed
23 marketing best practices when it moved students through its marketing funnel and to
24 enrollment, Chandler thoroughly reviewed evidence of marketing that involved
25 rankings and analyzed that evidence in the context of his observations and unchallenged
26 opinions about 2U’s marketing practices to reach his exposure opinions. The crux of
27 his exposure opinions is that it would have been virtually impossible for a student to

enroll in USC's online MAT or OCL programs without being exposed to the rankings.
Chandler's exposure opinions are reasoned and reliable, not mere *ipse dixit*.

For all the reasons discussed above, USC's motion to exclude Chandler's
exposure opinions should be denied.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned, counsel of record for the Plaintiffs, certifies that this brief contains 6,949 words which complies with the word limit of L.R. 11-6.1.

Date: October 1, 2024

/s/ Annick M. Persinger

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