CITY AND COUNTY OF SAN FRANCISCO

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June 20, 2023

**VIA FIRST CLASS MAIL, EMAIL, AND
PERSONAL SERVICE ON REGISTERED AGENT**

Eric Gertler
Executive Chairman and Chief Executive Officer
U.S. News & World Report, L.P.
120 Fifth Avenue
New York, NY 10011
egertler@usnews.com

Re: Concerns with U.S. News & World Report Hospital Rankings

Dear Mr. Gertler:

I write to express significant concerns about the rankings of hospitals produced by U.S. News & World Report ("USNWR"). USNWR holds itself out as an expert on ranking hospitals, but medical experts have recently raised concerns that USNWR's rankings suffer from poor and opaque methodology, mislead those using the rankings, and create perverse incentives for hospitals nationwide. Indeed, one hospital network recently withdrew from USNWR citing many of these issues. In addition, USNWR fails to disclose the fact that it receives payments from at least some of the ranked hospitals, which deprives the public of key information in considering the reliability of the rankings. In the recent wake of public scrutiny of USNWR's ranking methodology of other institutions, which has led law schools, medical schools, and colleges to withdraw from its rankings, the public deserves answers to many questions.

As the City Attorney for the City and County of San Francisco, I have a duty to ensure San Franciscans and Californians have access to accurate information as they make critical healthcare decisions. To that end, my Office asks for three things. First, we request evidence supporting USNWR's assertions about the quality of its hospital rankings. Second, we seek specific information about the basis for the hospital rankings methodology and apparent deficiencies in the rankings. And third, we demand that USNWR take immediate steps to comply with Federal Trade Commission ("FTC") regulations requiring that it prominently disclose the hospitals from which it receives payments.

A. Request for Substantiation of Advertising (Cal. Bus. & Prof. Code § 17508)

USNWR advertises itself as an authoritative resource in comparing hospitals overall, regionally, and with respect to specialties, procedures, and specific medical conditions. USNWR refers to its Best Hospitals rankings as "authoritative" and describes itself as "the global authority in hospital rankings." It claims that it has been "[h]elping patients and families find the best healthcare for more than 30 years." It describes its hospital rankings as "a tool that can help these patients find sources of skilled inpatient care." And it encourages patients to follow its rankings even over physician referrals, claiming "[t]he hospital the doctor suggested for you might be right for you – but maybe not." Across its rankings, including rankings of hospitals, USNWR says it uses "world-class data and technology to publish independent reporting, rankings, journalism and advice."

These statements constitute advertising claims supporting the asserted usefulness of USNWR's hospital rankings. And they appear to be working across USNWR's rankings. In 2013, USNWR had 20 million viewers a month and made 20% of its revenue from online searches for rankings. Today, USNWR claims more than 40 million users visit its site every month "during moments when they are most in need of expert advice and motivated to act on that advice directly on our platforms."

Despite USNWR's apparent success at driving website views, these representations of authority, expertise, and rigor appear to lack support and may therefore violate California law. Under California Business and Professions Code section 17508, any city attorney may request substantiation of any advertising claims made to California consumers that purport to be based on "any fact" or on "factual, objective, or clinical evidence." Under this authority, and in light of the concerns expressed by medical experts and discussed below, I request that USNWR provide all evidence of the facts on which USNWR bases its claims that:

- USNWR is "the global authority in hospital rankings";
- USNWR's hospital rankings are "authoritative" and based on "world-class data and technology"; and
- USNWR's hospital rankings help patients and families "find the best healthcare," "make data-informed decisions," and "find sources of skilled inpatient care."

B. Request for Information About USNWR's Hospital Ranking Methodology

Recent medical research—some of it behind paywalls and therefore inaccessible to those using USNWR's rankings—has highlighted many ways USNWR's hospital rankings may mislead the public and create perverse incentives for hospitals. That research, described in Attachment A and cited in the endnotes, indicates that USNWR's ranking methodology is seriously flawed for many reasons, including:

- USNWR's Honor Roll rankings—which purports to rank the 20 "best" overall hospitals in the country simply by adding up points USNWR assigns based on its own rankings for certain specialties, procedures, and conditions—warps the provision of healthcare by incentivizing hospitals to invest disproportionately in areas where they will accrue the most points over other specialties or primary and preventive care. This also results in skewing additional research funding and consumer demand towards already prosperous specialty hospitals and away from community and safety net hospitals at a time when 20% of California hospitals are at risk of closure.

- The USNWR ranking methodology creates and perpetuates health equity disparities. For example, USNWR's rankings award far more points in the children's hospital rankings for treatment of cystic fibrosis ("CF") than sickle cell disease ("SCD") when the former disease disproportionately affects White children and the latter disproportionately affects African American children. USNWR fails to incorporate indicators of health equity into its adult rankings in any way.

- The USNWR rankings rely on imprecise data, fail to consider the cost of care, and place an undue emphasis on mortality, penalizing and disincentivizing providing care for sicker and poorer patients.

- Three of the USNWR specialty rankings are based entirely on subjective opinion surveys. For others, opinion surveys form a significant portion of the rankings. Reliance on these surveys introduces a range of potential biases. Doctors have incentives to vote for their own hospitals and against competitors in the same region or specialty. And doctors from

a different region or specialty generally lack direct experience or knowledge of hospitals where they have not practiced, meaning their opinions could be based on speculation or lobbying by well-resourced institutions.

The questions in Attachment A relate to these and other issues that have been raised with USNWR's rankings. For example, why does the method USNWR uses to generate the Honor Roll result in an "authoritative" overall ranking of hospitals? What plans does USNWR have to expand and develop its measures of health equity? And how has USNWR checked that the variables it uses accurately reflect a hospital's quality of care? To facilitate my Office's investigation into the veracity of USNWR's representations regarding the quality of its rankings, I request that USNWR respond to each of the questions set forth in Attachment A to this letter.

C. Requirement for Disclosure of Funding Relationships

USNWR appears to violate FTC regulations by not disclosing payments that it receives from the hospitals it ranks. USNWR receives money from ranked hospitals in at least three ways: (1) through fees to license USNWR's Best Hospitals badges (or Best Children's Hospitals badges) to display on ranked hospitals' advertising; (2) through subscriptions to the Hospital Data Insights database to get "instant access to the unpublished granular data that underpins the U.S. News Best Hospitals Rankings & Ratings"; and (3) through payments for online and print advertisements on USNWR's website and its Best Hospitals Guidebook. These revenue streams are significant for USNWR. Although many hospitals refuse to state how much they pay to use a "Best Hospital" badge on their website or advertising because of a "contractual agreement," Children's Mercy Hospital in Kansas acknowledged that it paid $42,000 to use the logo for one year in 2014. And the Washington Post reported that in 2013, licensing of the "best of" badges accounted for 15% of the company's total revenue. But USNWR does not disclose with its rankings—or seemingly anywhere else—which hospitals in its rankings have paid for badges or hospital data.

The FTC has interpreted the Federal Trade Commission Act to require disclosure of material connections between an endorser and the subject of the endorsement. 16 C.F.R. §§ 255.0, 255.5. The broad definition of an "endorser" includes USNWR. 16 C.F.R. § 255.0. USNWR's many statements encouraging reliance on its hospital rankings (and the "Best Hospital" name) confirm that the rankings are endorsements (notwithstanding a perplexing disclaimer on the website that "USNews.com does not recommend or endorse . . . information found on USNews.com"). The relevant test for whether disclosure is required is whether "there exists a connection between the endorser and the seller of the advertised product that might materially affect the weight or credibility of the endorsement (i.e., the connection is not reasonably expected by the audience)." 16 C.F.R. § 255.5. The responsibility to disclose material connections falls on the endorser along with the recipient of the endorsement. *See, e.g.*, 16 C.F.R. § 255.0, Example 8. Because the public would not reasonably expect that some ranked hospitals are paying USNWR for badge licensing, data subscriptions, or advertising, USNWR is required to disclose prominently that it receives these payments.

To facilitate my Office's investigation into the scope of your violations, please provide us with a list of the hospitals that have paid USNWR or its agents as well as the number of website impressions for the hospital rankings in the last four years. In addition, please confirm that USNWR has added the required disclosures to prevent further violations of the law.

* * *

Thank you in advance for your responses about substantiation of USNWR's representations, answers to the questions in Attachment A, and prompt disclosure of hospital

funding relationships. Please direct any questions and provide the requested documentation, information, and confirmation by July 5, 2023, to Chief of Complex and Affirmative Litigation Sara Eisenberg, Office of the City Attorney, 1390 Market Street, 7th Floor, San Francisco, CA 94102 (sara.eisenberg@sfcityatty.org; 415-554-3874).

Very truly yours,

DAVID CHIU
City Attorney

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Attachment A

1. *Questionable Honor Roll method.* To produce its Honor Roll ranking of top hospitals, USNWR simply adds up points it assigns to hospitals based on its own rankings for specialties, procedures, and conditions. For example, the hospitals USNWR ranks as #1 in Orthopedics and in Neurology & Neurosurgery each receive 25 points, the #1-ranked hospital in Psychiatry receives 10 points, and all 4,127 hospitals rated as "High Performing" in Diabetes receive 12 points. This methodology rewards hospitals' investment in the specialties and procedures that will accumulate them the greatest number of points to the exclusion of other specialties and procedures and critical primary care.[i]

   a. Why does the method USNWR uses to generate the Honor Roll result in an "authoritative" overall ranking of hospitals?
   b. How did USNWR set this method?
   c. Who at USNWR or RTI International, which we understand partners with USNWR for the hospital rankings, was involved in setting this method?
   d. How has USNWR modified or changed this method in the last ten years?
   e. Has USNWR considered other modifications or changes, whether suggested by hospitals or otherwise, and declined to make those changes? If so, why?

2. *Disparate weighting of childhood diseases.* USNWR's methodology gives disproportionate weight to cystic fibrosis ("CF") treatment versus sickle cell disease ("SCD") treatment in the children's hospital rankings. CF "affects 1 in 3,500 White Americans and 1 in 17,000 Black Americans. In contrast, SCD affects 1 in 365 Black or African American newborns and is rare enough among White newborns that the Centers for Disease Control and Prevention does not report a prevalence rate."[ii] USNWR awards 19 points specifically for CF care but only one point for SCD care.[iii]

   a. Why does USNWR accord much greater weight to CF treatment than SCD treatment in ranking children's hospitals?
   b. What plans does USNWR have to address this disparity?

3. *Lack of inclusion of health equity in adult rankings.* USNWR in recent years has begun including indicators of health equity on the pages for each hospital but has not incorporated that information into its adult rankings in any way.[iv]

   a. When will USNWR include health equity in its adult rankings?
   b. What plans does USNWR have to expand and develop its measures of health equity?

4. *Data limitations.* In 2021, a group of surgeons concluded that variability in USNWR's ear, nose, and throat surgery specialty rankings reflected "unreliable or imprecise methods rather than factual changes in program quality."[v] The surgeons observed that the modeling method used by USNWR "favors higher-volume programs, as their outcomes are presumed to be more reliable" but that this method for modeling may not be appropriate particularly in specialties involving large year-to-year variation in numbers of patients. Furthermore, USNWR's rankings and ratings are based in large part on data from a limited subset of patients—inpatient fee-for-service Medicare patients that constituted only 11% of surgical cases in the authors' department—rather than outpatient, Medicaid, Medicare managed care, or privately insured patients. And USNWR attributes mortality to a particular specialty based on Medicare Severity Diagnosis Related Groups ("MS-DRG") data designed as a hierarchy of diseases, not a classification of medical specialties or hospital departments. Based on these concerns, the authors explained the "rankings may have the unintended effect of promoting a system of coding

gamesmanship to minimize falsely attributed negative outcomes and of penalizing hospitals that treat the sickest of the sick."[vi] Another group of scholars used a representative clinical data set to examine mortality and other outcomes in the USNWR specialty of gastroenterology and gastrointestinal surgery and strikingly found no statistically significant differences in in-hospital mortality or serious morbidity between USNWR-ranked and unranked hospital programs.[vii] Meanwhile, the researchers found statistically significant increased costs and lengths of hospitalization at USNWR-ranked hospitals compared to unranked hospitals.[viii]

a. Are hospitals that treat poorer and sicker patients disadvantaged in the USNWR rankings based on the issues discussed above?
b. How, if at all, does USNWR ensure data submitted by hospitals is accurate?
c. How does USNWR adjust the Medicare fee-for-service dataset to reflect actual patient populations?
d. We understand that the Medicare fee-for-service dataset is shrinking as the Medicare managed care dataset expands but that USNWR does not use the latter, growing dataset. What further adjustments, if any, does USNWR make to account for the shrinking size of the Medicare dataset on which it relies?

5. *Inaccurate proxies for important measures of care.* The Nurse Staffing Index ("NSI") indicator that USNWR uses to reflect nurse staffing may not "be a valid measure of actual nurse staffing or hospital quality."[ix] For example, it was inversely related to actual nurse staffing in two of three states considered in a recent study. The NSI "appeared to be more of a reflection of hospital structural factors (larger teaching hospitals) than an actual indicator of clinical quality."[x]

a. What steps has USNWR taken to ensure that NSI reflects actual nurse staffing?
b. How has USNWR checked that other variables it uses accurately reflect a hospital's quality of care?

6. *Continued role of peer opinion surveys.* In ophthalmology, psychiatry, and rheumatology, USNWR's rankings are based entirely on opinion surveys.[xi] For other specialties, opinion surveys form a significant portion of the rankings.[xii] This creates an incentive for doctors "to vote for their own hospitals and to avoid voting for competitor hospitals in the same region."[xiii] Meanwhile, specialist physicians from outside of a specific region likely do not have direct experience with patient care at hospitals where they have not practiced, making them poor judges of care.[xiv] We also understand that USNWR distributes its surveys only to doctors who use the physician network Doximity, in which USNWR appears to hold an equity interest. With its equity holding, USNWR makes money based on doctors using Doximity, raising concerns about self-dealing.

a. Why are opinion surveys the appropriate exclusive method for ranking hospitals in ophthalmology, psychiatry, and rheumatology?
b. For other specialties, why is the quality of care best measured by giving significant weight to opinion surveys?
c. What is the response rate for each survey?
d. What steps is USNWR taking to reduce the effects on the rankings of inherent biases physicians have in ranking competitor institutions?
e. Does USNWR distribute its opinion surveys exclusively or significantly to physicians enrolled in Doximity? Why does USNWR distribute its surveys in the way it does?
f. Does USNWR hold an equity interest in Doximity?

g. Does USNWR disclose anywhere that its survey data is based on responses from physicians enrolled in a company in which USNWR has or had an equity interest?

7. *Focus on specialty care.* USNWR explains in a methods document that "[i]t is essential to use the Best Hospital rankings for their intended purpose—to help consumers determine, together in consultation with their physicians, which hospitals provide the best care for the most serious or complicated medical conditions and procedures"—reflecting a focus on specialty care.[xv] Yet the Best Hospitals main page does not appear to reflect this limitation in the purpose of the rankings. Nor do even the procedure/condition ratings meaningfully account for the importance of high-quality primary and preventive care.

a. How, if at all, does USNWR incorporate quality primary and preventive care in its rankings?

b. Why are these critical services not given greater weight?

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[i] *See* Curtis Warfield, Eugene Lin & Malika L. Mendu, *Nephrology and the US News and World Report Hospital-Based Specialty Rankings*, 5 Kidney Med., Mar. 3, 2023, at 1 (raising concerns with the elimination of nephrology as a specialty in the USNWR rankings).

[ii] Madeline Wozniak & Chinenyenwa Mpamaugo, *It's Time for US Hospitals to Withdraw from the US News and World Report Rankings*, Health Affs. Forefront (Mar. 17, 2023).

[iii] Murrey G. Olmsted, et al., *Methodology: U.S. News & World Report Best Children's Hospitals 2022-23* at 86, 121, RTI Int'l (July 21, 2022), https://health.usnews.com/media/best-hospitals/BCH_Methodology_2022-23.pdf.

[iv] Tavia Binger & Ben Harder, *Health Equity and Measures Hospital Rankings—Reply*, 329 JAMA 764 (2023); Ge Bai, Kosali Simon & Peter Cram, *Health Equity Measures and Hospital Rankings*, 329 JAMA 764 (2023); Tavia Binger, Harold Chen & Ben Harder, *Hospital Rankings and Health Equity*, 328 JAMA 1805 (2022); Mary I. O'Connor, *Equity360: Gender, Race, and Ethnicity: Our "Best Hospitals" Rank Poorly in Health Equity*, 479 Clinical Orthopaedics & Related Research 2366 (2021).

[v] Kaitlyn M. Frazier, Christine G. Gourin & C. Matthew Stewart, *Fatally Flawed—Making Sense of US News & World Report Mortality Scores*, 147 JAMA Otolaryngology – Head & Neck Surg. 317, 317 (2021).

[vi] *Id.* at 318.

[vii] Sahil Gambhir, et al., *Association of US News &World Report Top Ranking for Gastroenterology and Gastrointestinal Operation with Patient Outcomes in Abdominal Procedures*, 154 JAMA Surgery 861 (2019).

[viii] *Id.*; *see also* Oliver K. Jawitz et al., *Comparing Consumer-Directed Hospital Rankings with STS Adult Cardiac Surgery Database Outcomes*, 115 Annals of Thoracic Surgery 533 (2023) (finding no agreement between the USNWR's hospital rankings of hospitals and the risk-adjusted morbidity and mortality for cardiac surgery).

[ix] Ryan Merkow, et al., *Correlation of the US News and World Report–Calculated Nurse Staffing Index with Actual Hospital-Reported Nurse Staffing*, 37 J. Nursing Care Quality 195, 198 (2022).

[x] *Id.* at 197.

[xi] Andrew A. Nierenberg, *US News and World Report Rankings of Psychiatry: A Misleading, Anachronistic Exercise*, 53 Psychiatric Annals 54 (2023) (raising concerns about this use of opinion surveys).

[xii] *See also* Santino Cua, et al., *Reputation and the Best Hospital Rankings: What Does It Really Mean?*, 32 Am. J. Medical Quality 632 (2007) (finding that "reputation has a more significant influence on total *U.S. News* score than its objective counterparts" and that methods changes "failed to lessen reputation's impact").

[xiii] Timothy J. Daskivich & Bruce L. Gewertz, *Campaign Reform for US News and World Report Rankings*, 158 JAMA Surg. 114, 114 (2023).

[xiv] *Id.* at 115.

[xv] Olmsted et al., *Methodology U.S. News & World Report 2022-23 Best Hospitals: Specialty Rankings*, *supra* at 1.