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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**

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9 Martin Valenzuela,

10 Plaintiff,

11 v.

12 Equifax Information Services LLC, et al.,

13 Defendants.

No. CV-13-02259-PHX-DLR

ORDER

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15 Before the Court is Defendant Equifax Information Services LLC's ("Equifax")
16 Motion to Exclude Plaintiff's Proposed Expert Witness. (Doc. 114.) The motion is fully
17 briefed. For the following reasons, Equifax's motion is granted in part.

18 **BACKGROUND**

19 In May 2013, Plaintiff Martin Valenzuela applied for a home loan with Gencor
20 Mortgage. (Doc. 1, ¶ 36.) As part of the application process, Gencor requested
21 Valenzuela's consumer credit information. (*Id.*, ¶¶ 38-39.) Equifax supplied a tri-merge
22 consumer report containing Valenzuela's consumer report, consumer information, and
23 credit score. (*Id.*, ¶¶ 40-41.) Valenzuela alleges that the Equifax report contained
24 "derogatory and inaccurate" information about his credit history. (*Id.*, ¶ 32.)
25 Specifically, the report contained four open mortgage loan accounts, four closed
26 mortgage loan accounts, and eleven credit/charge card accounts, none of which belonged
27 to Valenzuela. (*Id.*, ¶ 33.) The report also listed several aliases/former names and a date
28 of birth of August 21, 1969 – all of which were incorrect. (*Id.*) Gencor and Quicken

1 Loans Inc. subsequently denied Valenzuela’s loan applications. (*Id.*, ¶¶ 51, 64.)

2 Valenzuela claims Equifax used “loose match criteria” when determining what
3 information was placed in his consumer report. (*Id.*, ¶ 46.) He contends that the loose
4 match criteria created a mixed-file and caused the inaccurate report. (*Id.*) These
5 inaccuracies, Valenzuela claims, negatively affected his credit score and were a
6 “substantial factor” in the denial of his loan applications. (*Id.*, ¶¶ 49-51.)

7 Valenzuela sued Equifax under the Fair Credit Reporting Act (“FCRA”), 15
8 U.S.C. § 1681, alleging that Equifax willfully and/or negligently failed to prevent and
9 correct the inaccurate credit report, and seeking statutory, punitive, and actual damages.
10 (*Id.* at 13-15.) To prove Equifax’s alleged noncompliance and the resulting damages,
11 Valenzuela intends to offer the testimony of Evan Hendricks as an expert witness. (Doc.
12 115 at 4-5.) Equifax moves to exclude Hendricks’ testimony. (Doc. 114.)

13 **LEGAL STANDARD**

14 Federal Rule of Evidence 702 governs expert witness testimony and provides that:

15 A witness who is qualified as an expert by knowledge, skill, experience,
16 training, or education may testify in the form of an opinion or otherwise if:

- 17 (a) the expert’s scientific, technical, or other specialized knowledge will
18 help the trier of fact to understand the evidence or to determine a fact in
19 issue;
- 20 (b) the testimony is based on sufficient facts or data;
- 21 (c) the testimony is the product of reliable principles and methods; and
- 22 (d) the expert has reliably applied the principles and methods to the facts of
23 the case.

24 Fed. R. Ev. 702. The trial judge serves as a gatekeeper to ensure that expert testimony is
25 relevant and reliable, and has broad discretion when exercising this function. *United*
26 *States v. Hankey*, 203 F.3d 1160, 1167-68 (9th Cir. 2000). When considering the
27 admissibility of expert testimony based on specialized knowledge, Rule 702 is “construed
28 liberally.” *Id.* at 1168. Expert testimony is relevant when it has a “valid . . . connection
to the pertinent inquiry,” and reliable when “it ‘has a reliable basis in the knowledge and
experience of [the relevant] discipline.’” *United States v. Sandoval-Mendoza*, 472 F.3d

1 645, 654 (9th Cir. 2006) (quoting *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 149
2 (1999)). The trial judge also considers whether the probative value of the proffered
3 testimony “is substantially outweighed by the risk of unfair prejudice, confusion of
4 issues, or undue consumption of time.” *Hankey*, 203 F.3d at 1168. The proponent of the
5 expert has the burden of proving admissibility. *Lust v. Merrell Dow Pharm., Inc.*, 89
6 F.3d 594, 598 (9th Cir. 1996).

7 DISCUSSION

8 Hendricks’ testimony concerns four subjects: (1) the reasonableness of Equifax’s
9 credit reporting policies and procedures; (2) Equifax’s motivations and intentions; (3)
10 Valenzuela’s damages; and (4) past FCRA cases and agreements involving Equifax.
11 Equifax argues that Hendricks is not a qualified expert, does not use a reliable
12 methodology or offer testimony helpful to the trier of fact, and that the probative value of
13 his testimony is substantially outweighed by the danger of unfair prejudice. (Doc. 114 at
14 1.) Valenzuela contends that Hendricks’ thirty-three years researching and writing on
15 FCRA matters, testifying before both houses of the United States Congress, and
16 admission as an expert witness in over twenty-five trials in state and federal courts
17 qualifies him as an expert. (Doc. 115 at 4, 7.) He asserts that Hendricks will assist the
18 jury by explaining: (1) the inner-workings of the credit reporting industry; (2) the context
19 for damages from similar credit reporting inaccuracies; (3) the nature and calculation of
20 credit scores; and (4) the reasonableness of Equifax’s policies and procedures in light of
21 repeated notice regarding possible FCRA violations. (*Id.* at 2.) Finally, Valenzuela
22 argues that Hendricks’ methods are reliable because his analysis is thoroughly explained
23 and his conclusions are based on his years of experience. (*Id.* at 12-13.)

24 **I. Reasonableness of Equifax’s Policies and Procedures**

25 Hendricks is qualified to testify about Equifax’s “inner workings” and opine on
26 the reasonableness of its credit reporting policies and procedures. For thirty-three years,
27 Hendricks researched, wrote, edited, and published a bi-weekly newsletter covering
28 various aspects of the FCRA. (Doc 114-2 at 28.) For ten years, he served as a privacy

1 expert consultant for the Social Security Administration, where he reviewed policies and
2 practices regarding use and disclosure of personal data. (*Id.*) Hendricks also has a FCRA
3 certification from the National Credit Reporting Association. (Doc. 114-2 at 32.)
4 Additionally, Hendricks has testified about the FCRA and related matters before the
5 United States House Financial Services Committee and Senate Banking Committee, and
6 has been admitted as an expert witness to testify on similar matters in both state and
7 federal courts.¹ (*Id.* at 28-29, 33-41.) These experiences qualify Hendricks to offer
8 expert witness testimony on certain topics in this case. For example, Hendricks may
9 testify about the indicia of a mixed file, typical and best practices for identifying and
10 correcting a mixed file, and the FCRA’s standards for correcting a mixed file. Contrary
11 to Equifax’s assertions, this information is not common sense or within a layperson’s
12 knowledge. Indeed, a layperson is not likely to have independent knowledge of the
13 intricacies of a partial matching algorithm, the role it plays in developing a credit report,
14 and the reasonableness of the Automated Consumer Dispute Verification Exchange
15 (“ACDV”). Hendricks’ specialized knowledge on these topics will assist the trier of fact.

16 Equifax contends that Hendricks’ testimony is unreliable because Hendricks does
17 not explain the methods used to derive his conclusions. (Doc. 114-1 at 7.) “As a
18 prerequisite to making the Rule 702 determination that an expert’s methods are reliable,
19 the court must assure that the methods are adequately explained.” *United States v.*
20 *Hermanek*, 289 F.3d 1076, 1094 (9th Cir. 2002). There must be a connection between
21 the witness’ knowledge and the particular conclusions drawn. *Id.* at 1095. Hendricks
22 will opine on the reasonableness of Equifax’s actions and/or inactions. (Doc. 115 at 12-
23 13.) His testimony is based on his experience and research in FCRA matters. (*Id.*) Thus,
24 his method is simply an application of his experience with and understanding of the

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27 ¹ Although one cannot “become an expert simply by accumulating experience
28 testifying,” *Elcock v. Kmart Corp.*, 233 F.3d 734, 744 n.5 (3d Cir. 2000) (quoting
Thomas J. Kline, Inc. v. Lorillard, Inc., 878 F.2d 791, 800 (4th Cir. 1989)), Hendricks has
done more than simply accumulate experience testifying.

1 FCRA and the credit reporting industry to the facts at hand. Although his methods are
2 not meticulously detailed for every conclusion, they can be understood and are reliable.
3 Moreover, “shaky but admissible evidence is to be attacked by cross examination,
4 contrary evidence, and attention to the burden of proof, not exclusion.” *Primiano v.*
5 *Cook*, 598 F.3d 558, 564 (9th Cir. 2010).

6 Additionally, Equifax claims Hendricks is not qualified to discuss Equifax’s
7 current policies and procedures because he does not directly cite the current policies and
8 procedures in his expert opinion. Although Hendricks does not cite the depositions of
9 Pamela Smith and Margaret Leslie,² or to any of Equifax’s written policies and
10 procedures related to mixed consumer files and reinvestigations, he is qualified to discuss
11 Equifax’s “inner workings” because of his experience with credit reporting agencies,
12 including his expert witness experience in previous Equifax cases. Moreover, to the
13 extent Hendricks’ statements about Equifax’s relevant policies and procedures are
14 inaccurate, Equifax can explore such inaccuracies on cross examination. Accordingly,
15 Hendricks may opine on the reasonableness of Equifax’s credit reporting policies and
16 procedures.

17 **II. Equifax’s State of Mind**

18 Hendricks’ testimony about Equifax’s motivations, intentions, objective state of
19 mind, and subjective beliefs is improper because it usurps the province of the fact-finder,
20 which is responsible for drawing reasonable inferences about Equifax’s state of mind
21 from the evidence presented at trial. Hendricks’ opinion will not assist the fact-finder in
22 drawing these inferences. He will not be permitted to opine on these subjects.

23 **III. Valenzuela’s Damages**

24 Hendricks intends to discuss the negative effects of inaccurate credit reports,
25 which could affect damages. (Doc. 114-2, ¶¶ 60-62.) These include: (1) effects of
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27 ² Hendricks acknowledges that he wrote his report before any depositions were
28 taken; however, he reserved the right to supplement the report. (Doc. 114-2 at 1.)

1 inaccurate credit reports, (2) improper denial of credit, (3) the value of time and energy to
2 correct errors, (4) wrongfully received debt collection calls, (5) the chilling effect in
3 applying for credit, (6) sleeplessness and physical symptoms, (7) sense of helplessness,
4 and (8) emotional distress. (*Id.*, ¶ 61.) Equifax contends Hendricks “lacks the expertise
5 necessary to opine that a ‘sense of helplessness’ leads to monetary damages.” (Doc. 114-
6 1 at 6.) Likewise, because he is not an “accountant, economist, or financial planner,” he
7 does not have “the expertise necessary to opine that a consumer may be damaged based
8 on ‘the time and energy required to solve’ his purported ‘problem’” (*Id.*)
9 Valenzuela responds that Hendricks’ testimony will provide “helpful context” for
10 determining damages, and that Hendricks is qualified to address these topics because they
11 are “typical consequences of false credit reports.” (Doc. 115 at 11.)

12 Hendricks is not qualified to address physical, emotional, or economic effects of
13 an inaccurate credit report, or to estimate the value of “expended time and energy to
14 correct errors . . . in addition to loss of time and energy, loss of opportunity.” Moreover,
15 his testimony will not assist the fact-finder because Valenzuela may testify about how the
16 alleged credit reporting inaccuracies impacted him physically, emotionally, and
17 economically, and about the time and energy he spent to resolve the alleged credit
18 reporting inaccuracies. Hendricks will not be permitted to opine on Valenzuela’s
19 damages.

20 **IV. Past FCRA Cases and Agreements Involving Equifax**

21 Equifax objects to Hendricks’ testimony concerning previous FCRA cases,
22 consent decrees, and administrative actions involving Equifax. (Doc. 114-1 at 14.)
23 Hendricks and Valenzuela assert that the purpose of introducing these prior acts is to
24 show that Equifax had notice of the potential FCRA violations at issue. (Doc. 114-2, ¶
25 86.) Regardless of whether these prior actions are admissible to establish notice,
26 Valenzuela does not explain why expert testimony is necessary to establish their
27 existence. It appears that Hendricks merely is recounting the facts of prior cases in which
28 he offered expert witness testimony. No specialized knowledge, skill, or experience is

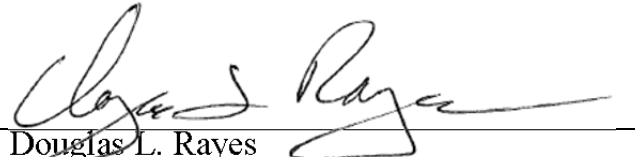
1 necessary to understand the existence and subjects of these prior cases, consent decrees,
2 and administrative actions. Nor would Hendricks' testimony assist the fact-finder in
3 learning of these actions and drawing reasonable inferences from them. Accordingly,
4 regardless of whether evidence of these prior actions is admissible to establish notice,
5 Hendricks will not be permitted to testify about them.

6 **CONCLUSION**

7 For the foregoing reasons, the Court finds that Hendricks is qualified to offer
8 certain expert witness testimony regarding the reasonableness of Equifax's credit
9 reporting policies and procedures. However, his testimony concerning Equifax's state of
10 mind, Valenzuela's damages, and the facts of other cases involving Equifax is not proper.

11 **IT IS ORDERED** that Equifax's Motion to Exclude Plaintiff's Proposed Expert
12 Witness, (Doc. 114), is **GRANTED IN PART**.

13 Dated this 6th day of November, 2015.

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18 Douglas L. Rayes
19 United States District Judge
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