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

8
9 Bryan Hunton,

10 Plaintiff,

11 v.

12 American Zurich Insurance Company,

13 Defendant.

No. CV-16-00539-PHX-DLR

ORDER

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16 Plaintiff Bryan Hunton accuses Defendant American Zurich Insurance Company
17 (“American Zurich”) of handling his worker’s compensation claim in bad faith. Before
18 the Court is American Zurich’s Motion to Exclude Testimony of Elliot Flood. (Doc.
19 204.) The motion is fully briefed and neither party requested oral argument. For reasons
20 that follow, the motion is granted in part and denied in part.

21 **I. Legal Standard**

22 The district court determines whether expert testimony is admissible. *See Estate*
23 *of Barabin v. AstenJohnson, Inc.*, 740 F.3d 457, 464-65 (9th Cir. 2014).

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

26 (a) the expert’s scientific, technical, or other specialized
27 knowledge will help the trier of fact to understand the
evidence or to determine a fact in issue;

28 (b) the testimony is based on sufficient facts or data;

1 (c) the testimony is the product of reliable principles and
2 methods; and

3 (d) the expert has reliably applied the principles and methods
4 to the facts of the case.

5 Fed. R. Evid. 702. Thus, Rule 702 requires expert testimony to be both relevant and
6 reliable. *Barabin*, 740 F.3d at 463. Testimony is relevant if “[t]he evidence . . . logically
7 advance[s] a material aspect of the party’s case,” *Cooper v. Brown*, 510 F.3d 870, 942
8 (9th Cir. 2007), and reliable if it has “a reliable basis in the knowledge and experience of
9 the relevant discipline,” *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 149 (1999).

10 When assessing the reliability of expert witness testimony, the court should
11 consider the non-exhaustive factors identified by the Supreme Court in *Daubert v.*
12 *Merrell Dow Pharmaceuticals, Inc.*: (1) whether the method “can be (and has been)
13 tested;” (2) whether the method “has been subjected to peer review and publication;” (3)
14 the method’s “known or potential rate of error;” (4) whether there are “standards
15 controlling the technique’s operation;” and (5) whether the method has “general
16 acceptance” within the “relevant scientific community.” 509 U.S. 579, 592-94 (1993).
17 “[T]he test of reliability is ‘flexible,’ and *Daubert*’s list of specific factors neither
18 necessarily nor exclusively applies to all experts or in every case.” *Kumho Tire*, 526 U.S.
19 at 141.

20 Federal Rule of Evidence 403 allows the district court to “exclude relevant
21 evidence if its probative value is substantially outweighed by a danger of . . . unfair
22 prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or
23 needlessly presenting cumulative evidence.” “Rule 403 and *Daubert* address different
24 aspects of evidence and therefore act independently.” *United States v. Ramirez-Robles*,
25 386 F.3d 1234, 1246 (9th Cir. 2004). Thus, evidence found reliable under Rule 702 may
26 nonetheless be excluded under Rule 403 “if its probative value is outweighed by its
27 prejudicial impact.” *Id.*

28 **II. Discussion**

Hunton retained Robert Hommel to opine on the standards of good faith and fair

1 dealing in the administration of worker’s compensation claims. He also retained Flood
2 to: (1) “obtain American Zurich’s public regulatory filings and conduct an analysis based
3 on those filings and Zurich’s business records produced in this case,” (2) “provide [his]
4 opinions on the root causes of the compliance failures identified by Bob Hommel in his
5 report dated April 5, 2017,” (3) “[p]rovide basic background on American Zurich . . .
6 before assessing [the] company’s compliance with industry standards for claim
7 handling,” (4) “[s]ummarize American Zurich’s financial wealth as reported in its most
8 recent financial statements . . .,” and (5) “[p]rovide an analysis of the control and
9 governance issues underlying American Zurich’s compliance issues experienced in
10 handling the Hunton claim.” (Doc. 204-1.) American Zurich does not attack Flood’s
11 qualifications. Instead, it argues that Flood’s opinions are not based on sufficient facts or
12 data, unreliable, unhelpful to the jury, and prejudicial. (Doc. 204.)

13 **A. Reliability and Methodology**

14 American Zurich’s main criticism is that Flood relies heavily on Hommel’s
15 opinions in reaching his own. That is, Flood’s opinions concerning the root causes of
16 claims handling failures at American Zurich are based on the assumption that the claims
17 handling failures Hommel opined to are present. But “an expert is permitted wide
18 latitude to offer opinions, including those that are not based on firsthand knowledge or
19 observation.” *Daubert*, 509 U.S. at 592. Moreover, as used by Rule 702, “the language
20 ‘facts or data’ is broad enough to allow an expert to rely on hypothetical facts that are
21 supported by the evidence,” and “encompasses the reliable opinions of other experts.”
22 Fed. R. Civ. P. 702 advisory committee’s note to 2000 amendment. Notably, American
23 Zurich does not challenge the reliability of Hommel’s expert opinions under Rule 702.
24 Flood may therefore offer his opinions based on the hypothetical assumption that
25 Hommel’s findings and conclusions are true. If a jury finds Hommel not credible,
26 Flood’s opinions would suffer a similar fate.

27 In a related vein, American Zurich contends that Flood’s opinions merely adopt
28 Hommel’s conclusions and are not themselves based on any methodology. But Flood

1 summarizes his methodology both in his expert report and during his deposition. (Doc.
2 204-1 at 6; Doc. 209-1.) American Zurich does not address this testimony in its motion
3 and, therefore, has not shown that Flood rendered his opinions without *any* methodology.

4 American Zurich's remaining arguments over the reliability of Flood's testimony
5 go more to the weight to which these opinions are entitled than to whether Flood may
6 properly testify to the matters. "Rejection of expert testimony is the exception rather than
7 the rule. *Daubert* did not work a 'seachange over federal evidence law,' and 'the trial
8 court's role as gatekeeper is not intended to serve as a replacement for the adversary
9 system.'" Rule 702 advisory committee note to the 2000 amendment (quoting *United*
10 *States v. 14.38 Acres of Land Situated in Leflore Cty., Mississippi*, 80 F.3d 1074, 1078
11 (5th Cir. 1996)). Instead, "[v]igorous cross-examination, presentation of contrary
12 evidence, and careful instruction on the burden of proof are the traditional and
13 appropriate means of attacking shaky but admissible evidence." *Daubert*, 509 U.S. at
14 596. The Court concludes that Flood's opinions, though they might be open to vigorous
15 and perhaps fruitful cross-examination, are nonetheless sufficiently reliable to satisfy
16 Rule 702's gatekeeping function.

17 **B. Helpfulness**

18 American Zurich also argues that at least two aspects of Flood's opinions are not
19 appropriate areas for expert testimony and are not helpful to the jury: (1) opinions
20 concerning American Zurich's state of mind and (2) opinions concerning American
21 Zurich's finances. The Court agrees in part.

22 Flood opines that the root causes of American Zurich's alleges claims handling
23 failures "are pervasive enough to support the conclusion that upper management had to
24 have known of, and approved, the deficient staffing levels, inadequate training,
25 inadequate oversight by middle management, and the ethics-related lapses related to the
26 financial incentives granted to the employees." (Doc. 204-1 at 13.) "Courts routinely
27 exclude as impermissible expert testimony as to intent, motive, or state of mind." *Siring*
28 *v. Oregon State Bd. of Higher Educ. ex rel. E. Oregon Univ.*, 927 F. Supp. 2d 1069, 1077

1 (D. Or. 2013). This is so because:

2 Expert testimony as to intent, motive, or state of mind offers
3 no more than the drawing of an inference from the facts of the
4 case. The jury is sufficiently capable of drawing its own
5 inferences regarding intent, motive, or state of mind from the
6 evidence, and permitting expert testimony on this subject
7 would be merely substituting the expert's judgment for the
8 jury's and would not be helpful to the jury.

9 *Id.* Though Hunton may present evidence, including in the form of expert opinions, of
10 pervasive claims handling failures, it is the jury that decides whether the pervasiveness of
11 these alleged failures warrant an inference that American Zurich acted knowingly.
12 Accordingly, Flood will not be permitted to testify as to American Zurich's knowledge or
13 state of mind.

14 As for Flood's opinions concerning American Zurich's financial condition, the
15 Court finds that his opinions could help a lay jury better understand the complex finances
16 of an insurance claims handler. American Zurich's motion to preclude Flood from
17 testifying as to these matters therefore is denied.

18 **C. Probative Value and Prejudice**

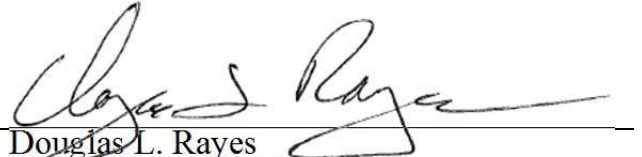
19 Lastly, American Zurich argues that the probative value of Flood's testimony
20 does not outweigh its prejudicial effects because of its questionable reliability and
21 cumulative nature. On the latter point, American Zurich argues that Flood's testimony is
22 cumulative because he merely adopts Hommel's conclusions. The Court disagrees.
23 Although Flood's opinions are based, at least in part, on the assumption that Hommel's
24 conclusions about claims handling failures are true, Flood nonetheless was retained to
25 opine on different subjects. Indeed, American Zurich's own motion acknowledges the
26 different areas of inquiry. As for the reliability of Flood's testimony, the Court already
27 has determined that Flood satisfies Rule 702's gatekeeping function, though his
28 testimony remains subject to vigorous cross-examination.

29 **III. Conclusion**

30 For these reasons, the Court will preclude Flood was testifying as to American
31 Zurich's knowledge or state of mind, but will otherwise deny American Zurich's motion.

1 **IT IS ORDERED** that American Zurich's Motion to Exclude Testimony of Elliot
2 Flood (Doc. 204) is **GRANTED IN PART** and **DENIED IN PART** as explained herein.

3 Dated this 6th day of March, 2018.

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8 Douglas L. Rayes
9 United States District Judge

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