UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

EFRAIN MUNOZ, *individually and on behalf of all others similarly situated, et al.*,

Plaintiffs,

v.

PHH MORTGAGE CORPORATION, *et al.*,

Defendants.

No. 1:08-cv-00759-MMB-BAM

ORDER RESPECTING DEFENDANTS' MOTION *IN LIMINE* #6

Defendants' sixth motion *in limine* (ECF 474) seeks to preclude certain expert testimony Plaintiffs intend to offer at trial that Defendants contend either fails to meet Federal Rule of Evidence 702's standards for "being grounded in reliable facts and methods" or that is "prejudicial or otherwise inadmissible under Rule 403." ECF 474, at 1.

Specifically, Defendants seek to preclude the following five categories of testimony and other evidence from the expert witnesses identified as to each category:

- "Confusing and Prejudicial Accounting Standard Evidence" (Kent Barrett and Allan Schwartz)
- "Confusing and Prejudicial Use of Evidence Outside the Class Period" (Schwartz and J. David Cummins)
- "Unsupported Speculation/Subjective Beliefs Regarding Defendants' and the Mortgage Insurers' Motivations" (Barrett, Schwartz, Cummins, and Andrew Barile)

- "Unqualified Legal Conclusions/Interpretations of RESPA" (Barrett, Schwartz, and Cummins)
- "Opinions Supported by Inadmissible Evidence" (Barile)

Id. at 3.[1] The court addresses each category in turn.

I. Accounting standard evidence

Defendants object to Plaintiffs' experts testifying that Atrium's reinsurance agreements did not sufficiently transfer risk under certain accounting principles. ECF 474, at 7 *et seq.* Defendants contend that "whether the reinsurance agreements qualify for insurance accounting treatment is not at issue in this case . . . because neither RESPA nor the guidance in the HUD Letter requires compliance with those accounting standards." *Id.* at 8 (emphasis removed). They further contend that both Barrett and Schwartz acknowledge that the HUD Letter does not incorporate accounting or actuarial requirements. *Id.* at 9 (citing deposition testimony and Barrett's expert report).

Plaintiffs respond that the court previously rejected Defendants' motion to strike the portions of the Barrett and Schwartz reports that apply actuarial and accounting standards to evaluate risk transfer, and they note that the HUD Letter does not adopt any particular standards for assessing "real

[1] A footnote in Defendants' motion mentions their separate motion to strike (ECF 475) Plaintiffs' proposed expert Robert Hoyt. *See* ECF 474, at 2 n.1. The court will address the motion to strike in a separate order.

transfer of risk." ECF 485, at 5 (discussing *Munoz v. PHH Mortg. Corp.*, 478 F. Supp. 3d 945, 965 (E.D. Cal. 2020) (ECF 417)).

Defendants reply that while the court denied the motion to strike, the court did not find the expert testimony admissible, instead finding Defendants' Rule 403 arguments premature at the summary judgment stage because there was no jury to be misled or confused. ECF 496, at 3 (discussing *Munoz*, 478 F. Supp. 3d at 965). They contend that with the case set for a jury trial, the issue is now ripe because there is a "substantial likelihood" that the jurors will confuse the standards set forth in RESPA and the HUD Letter with the accounting and actuarial standards on which Barrett and Schwartz base their opinions. *Id.*

Plaintiffs are correct that in the summary judgment ruling, the court explained that the experts applied actuarial and accounting standards "in reaching the conclusion that the CRAs exhibited a 'lack of real transfer of risk,' " which the court then noted is directly relevant to the HUD Letter's requirement that there be a "real transfer of risk." 478 F. Supp. 3d at 965. Defendants' objection to the "accounting standard evidence" category is similar to—but not the same as—the issues raised in their motion *in limine* #4, which involves evidence about Atrium's 2009 internal audit for compliance with documentation requirements imposed by statutory accounting principles for property and casualty reinsurance. *See generally* ECF 472. In ruling on that motion,

the court concluded that Federal Rule of Evidence 703 resolved the issue because it permits an expert witness to rely on the sorts of facts or data upon which an expert in the particular field would reasonably rely, even if the facts or data themselves would not be admissible. Rule 703 distinguishes between the *expert's opinion*—which may be admissible even though the underlying facts may not be—and the *underlying facts or data*, and provides that "if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect." Fed. R. Evid. 703.

Thus, there are two issues relating to the court's prior ruling. It is indisputable that the court found the *expert reports* relevant under Rule 401 because their "analyses of the evidence tend[ ] to make it more probable than not that: (1) the CRAs did not affect a real transfer of risk; (2) Atrium did not actually furnish reinsurance services; and (3) the premiums paid by the captive MIs were not commensurate with the services provided." *Munoz*, 478 F. Supp. 3d at 965. However, it is also clear that the court's discussion did not address whether *the underlying facts and data* are themselves admissible. In other words, while the court's prior ruling strikes a presumption in favor of allowing the experts to testify about their conclusions, that presumption does not mean the experts must be allowed to testify about the underlying facts and data.

The issue presented here is not exactly the same as the one presented in Defendants' motion #4 because there, the question involves internal discussions concerning whether an auditor had been provided with sufficient documentation to use in a risk transfer analysis under accounting standards, whereas here the issue involves the actual application of those standards. In other words, motion #4 is a step further removed from the issue presented here. As to the relevance of the application of accounting standards, Defendants are correct that the HUD Letter does not specifically incorporate those standards into its analysis, *see* ECF 474, at 8–9, but Plaintiffs are also correct that the HUD Letter does not set forth any specific criteria for determining what constitutes a "real transfer of risk," *see* ECF 485, at 5.

The court therefore cannot conclude that the accounting standards Barrett and Schwartz examined are irrelevant or inadmissible in the context of this case. In their reply brief, Defendants argue that "[t]here is a substantial likelihood that the jury will be unable to meaningfully distinguish the standard set forth in RESPA and the HUD Letter from the accounting and actuarial standards on which Plaintiffs' experts opine." ECF 496, at 3. As the court has previously noted, however, "Rule 403 favors the admissibility of relevant evidence," *Munoz*, 478 F. Supp. 3d at 964, and the party invoking Rule 403 has to carry a "significant" burden because "exclusion under Rule 403 is an extraordinary remedy to be used sparingly," *id.* (cleaned up). Given that standard, the

court cannot conclude that Defendants have carried their burden by offering a single paragraph of argument in their reply brief that lacks substantive discussion of the particular reasons why they contend the accounting standards are "separate and distinct, but substantially similar" to the HUD Letter standards, ECF 496, at 3 (quotation marks omitted), much less specific reasons why the jury will be confused. In other words, Defendants' argument for why the jury will be confused is simply *ipse dixit*. That is not enough under Rule 403, so the court will deny Defendants' motion as to the accounting standard evidence relied on by Barrett and Schwartz, but the denial is without prejudice to Defendants' right to object at trial to particular pieces of evidence (as opposed to the category of evidence as a whole).

II. Use of evidence outside the class period

Defendants object to testimony by Schwartz and Cummins that uses "data from outside the class period to make comparisons and draw conclusions about Atrium's profits and average premium cede during the class period," and they ask the court to "preclude evidence and testimony based on this apples to oranges comparison because it risks affirmatively misleading the jury," whose task is to "evaluate whether Defendants' conduct complied with RESPA during the class period." ECF 474, at 10.

Defendants explain that the evidence demonstrates that Atrium paid out more in claims than it received in premium payments during the class period,

so they object to Schwartz opining that Atrium's agreements did not transfer risk because it received more in premiums than it paid out in claims over a 16-year period, such that it was not actually at risk of losing money during the class period. *Id.* Similarly, they object to Cummins's comparison of industry-wide mortgage premium data between 1998–2014 with Atrium's premiums received during the class period (2007–2009) to support his conclusion that Atrium received too much money in premiums, as they note that an analysis of premiums during the class period reflects a figure in line with industry averages. *Id.* at 11.

Plaintiffs again respond by citing the summary judgment opinion, in which the court stated that "the validity of those expert conclusions are not necessarily vitiated by the consideration of data outside of the class period. This is especially true here because defendants have not alleged or shown that the practices at issue in this case changed materially between the relevant class period and the additional period examined by plaintiffs' experts." *Munoz*, 478 F. Supp. 3d at 965–66, *cited in* ECF 85, at 7. Plaintiffs fail to mention that the court described Defendants' concerns as "well-taken, especially because plaintiffs attempted unsuccessfully to certify a class that included borrowers who fell outside of RESPA's one-year statute of limitations." *Id.* at 965.

Plaintiffs further point to the opinion's discussion of the "safe harbor" issue, in which the court concluded that it would be misleading to "conduct a

risk transfer analysis by looking only at individual 'snapshots' of Atrium's cash flow from the 2007–09 book years, which fall within the certified class period," because

> [e]valuating whether there was an actual transfer of risk requires the court to look at multiple factors, such as the structure and contractual terms of a CRA, the rationale for and effects of cross-collateralization, *and the way defendants' own actuaries analyzed the CRAs*. But under the methodology advocated by defendants, the court would be limited to examining an individual book year in a vacuum. Indeed, it is somewhat perplexing that defendants continue to insist that the court adopt their myopic book year approach when it is undisputed that *defendants themselves analyze and distribute risk across multiple book years*.

Id. at 978 (emphasis added), *cited in* ECF 485, at 9–10.

In reply, Defendants assert that they are not attempting to relitigate the issue of examining "book years" in isolation and instead simply wish to preclude Schwartz and Cummins from testifying about using data from outside the class period to draw conclusions about Atrium's financial performance during the class period. ECF 496, at 5. They then offer a paragraph, prefaced with the word "specifically," describing two particular categories of evidence they seek to preclude—(1) Schwartz's opinion, based on using data from outside the class period, that Atrium was "extremely profitable" during the class period even though it paid out more in claims than it received in premiums during that time and (2) Cummins's opinion, again based on data from outside the class period, that Atrium's premium cedes were "unusually large" during the

class period even though evidence shows that its premiums were in line with industry averages during the class period. *Id.* at 5–6. The court interprets the word "specifically" as an indication that these two categories of evidence are the particular things Defendants wish to exclude.

Nothing in Defendants' briefing contends that the "outside the class period" evidence is *inadmissible*—rather, Defendants contend that the court should exclude the evidence because it would confuse the jury and therefore be prejudicial to Defendants, which the court construes as a Rule 403 argument. The reason the distinction matters is that Rule 703 inverts the burden on the "prejudice versus probativity" issue only "if the facts or data would otherwise be inadmissible"—that is, if they would be inadmissible, the proponent of the opinion (here, Plaintiffs) may disclose those facts or data to the jury only if that party can demonstrate that their probative value "substantially" outweighs their prejudicial effect, Fed. R. Evid. 703, but if the evidence is not otherwise inadmissible, the standard Rule 403 analysis applies and the party objecting to the evidence must carry the "significant" burden of showing that prejudice or confusion "substantially" outweighs its probative value, Fed. R. Evid. 403; *see also Munoz*, 478 F. Supp. 3d at 965.

The court concludes that Defendants have failed to carry that burden. The analysis in Defendants' briefing is simply too conclusory to demonstrate the "substantial" aspect of Rule 403's analysis. Instead, their reply brief seeks

to invert the burden, arguing that "Plaintiffs offer no reason why such evidence should be allowed at trial." ECF 496, at 5. That is not enough. The court will therefore deny Defendants' motion to preclude references to evidence from outside the class period, but, as with the accounting standard evidence, that denial is without prejudice to Defendants' right to object to specific pieces of evidence at trial.

III. Motivation testimony

Defendants argue that "Plaintiffs' experts litter their reports with unsubstantiated and unsupported statements regarding the motives for Defendants' and the four mortgage insurance companies' conduct," ECF 474, at 12, citing as examples Barrett's opinion that a reinsurance agreement "was intended to . . . limit Atrium's liability," *id.*; Schwartz's conclusion that Atrium's actions were "consistent with the intent not to contribute additional capital" and that Atrium "wanted to do the exact opposite" of putting in more money, *id.*; Cummins's testimony about what mortgage insurers wanted to do and Atrium's motivation for taking actions, *id.* at 12–13; and Barile's statement that Atrium had "another agenda" aside from reinsurance, *id.* at 13. Defendants contend that these statements are inadmissible because "they are conclusory statements reflecting the witnesses' subjective beliefs as to someone else's state of mind rather than well-supported opinions." *Id.*

In response, Plaintiffs concede that expert testimony regarding intent, motive, or state of mind is often excludable, but they argue that "the statements to which Defendants refer in their motion are proper opinion evidence supported by the facts and evidence in the case" and assert that any objections should be raised at trial. ECF 485, at 14. They contend that Barrett was opining as to "the import of" the contractual provision at issue and that Schwartz's opinion was based on comparing Atrium's actions with Defendants' e-mail messages and concluding that Atrium's actions were consistent with that discussion. *Id.* at 15.

Defendants reply that regardless of whether the experts' testimony is consistent with record evidence, it is improper for an expert witness to opine about motives or intent, as any such testimony would be impermissible speculation.

"Expert testimony as to intent, motive, or state of mind offers no more than the drawing of an inference from the facts of the case. The jury is sufficiently capable of drawing its own inferences regarding intent, motive, or state of mind from the evidence, and permitting expert testimony on this subject would merely be substituting the expert's judgment for the jury's and would not be helpful to the jury." *Siring v. Or. State Bd. of Higher Educ. ex rel. E. Or. Univ.*, 927 F. Supp. 2d 1069, 1077 (D. Or. 2013). However, "[t]here is an important difference between an expert's testimony that a specific individual

possessed a specific intent, and testimony that gives meaning to the defendant's actions." *Alcantar v. Foulk*, No. 1:14-cv-00747 LJO MJS (HC), 2016 WL 3001242, at *12 n.17 (E.D. Cal. May 25, 2016) (cleaned up). Thus, it may be appropriate for Plaintiffs' experts to testify about whether Defendants' actions were *consistent with* (or inconsistent with) what is discussed in the documentary evidence, but it would be inappropriate for Plaintiffs' experts to ascribe an *intent* or *motivation*.

Accordingly, the court will grant Defendants' motion on the "motivation testimony" insofar as Plaintiffs' experts might seek to ascribe an intent, motivation, agenda, or similar finding to actions taken by Defendants. However, this order does not preclude Plaintiffs' experts from discussing documentary evidence and opining on whether Defendants acted consistently therewith.

IV. Legal Conclusions/Interpretations of RESPA

Defendants contend that the Schwartz and Cummins expert reports "contain legal conclusions that purport to define or interpret the applicable law and offer legal interpretations of the reinsurance agreements at issue," and they seek to exclude those portions of the reports. ECF 474, at 13–14. Specifically, Defendants refer to Schwartz's opinion that Atrium's liability was limited to a particular amount based on his review and interpretation of the contracts, *id.* at 14, and they refer to Cummins's opinions that (a) "the HUD criteria are consistent with the usual legal and economic definition of insurance,"

id.; (b) "the legal and economic definitions would add a second criterion, risk distribution (diversification or pooling)," *id.*; (c) the existence of a trust cap was based on his interpretation of the insurance agreements, *id.*; and (d) "the Atrium agreements do not satisfy the criteria set forth in the HUD Letter of August 6, 1997[,] for legitimate contracts of reinsurance," *id.*

Plaintiffs respond that while they agree that expert witnesses generally may not give legal opinions, in this case their witnesses are not doing so. First, they contend that Schwartz's testimony about Atrium's liability being limited is consistent with what they characterize as the court's prior determination that Atrium's liability was "limited strictly to the funds contained within each of the associated trust accounts," ECF 485, at 16 (quoting *Munoz*, 478 F. Supp. 3d at 979), and they contend that "he is appropriately interpreting and analyzing factual evidence," *id.* Second, they contend that Cummins's testimony relies on analyzing the captive reinsurance agreements and Atrium's financial records to use "his wealth of experience in the field to opine that the CRAs are not legitimate contracts of reinsurance because they do not result in a real transfer of risk and, in various ways, are contrary to the usual regulatory and operating practices in the insurance and reinsurance industry." *Id.* at 17.

Defendants reply that regardless of how Plaintiffs characterize the testimony, it consists of legal conclusions. They argue that Schwartz's testimony does not focus on how the captive reinsurance agreements' terms are commonly

understood in the industry but rather interprets the agreements themselves to conclude that Atrium's liability is limited. ECF 496, at 9. They similarly contend that Cummins's testimony that the agreements do not satisfy the HUD Letter's criteria is an obvious legal conclusion. *Id.* at 9–10.

Defendants are correct that contract interpretation is a question of law. *See, e.g.*, *Mendler v. Winterland Prod., Ltd.*, 207 F.3d 1119, 1121 (9th Cir. 2000). "Generally, contract interpretation is not an appropriate subject for expert testimony, because it requires an expert to make conclusions of law." *U.S. Postal Serv. v. Jamke*, No. 1:15-cv-01806, 2017 WL 131991, at *5 (E.D. Cal. Jan. 12, 2017) (citing *Hangarter v. Provident Life & Acc. Ins. Co.*, 373 F.3d 998, 1016 (9th Cir. 2004)); *see also Aerojet Rocketdyne, Inc. v. Global Aerospace, Inc.*, No. 2:17-cv-1515 KJM-AC, 2021 WL 1839695, at *3 (E.D. Cal. May 7, 2021) (Mueller, C.J.) (excluding portions of expert's proposed testimony that reflected contracted interpretation because they were "inadmissible as treading on ultimate issues of law"). Schwartz's testimony that the agreements limit Atrium's liability is a conclusion of law. Likewise, Cummins's testimony that the Atrium agreements do not satisfy the HUD Letter's criteria is a conclusion of law. He even testified that he concluded the captive reinsurance agreements had a trust cap "because there was one, according to my interpretation," which—in response to counsel's follow-up question—he confirmed meant according to *his interpretation of the agreements*. ECF 474-8, at 86:20–87:5.

On the other hand, Plaintiffs are correct that "[e]xpert testimony is allowed where the expert testifies that an insurer violated customs and practices in the insurance industry." *Edmark Auto, Inc. v. Zurich Am. Ins. Co.*, No. 1:15-cv-00520-BLW-CWD, 2019 WL 1002952, at *7 (D. Idaho Mar. 1, 2019) (citing *Hangarter*, 373 F.3d at 998). The *Hangarter* court affirmed a district court's decision to allow an expert witness to testify about how an insurance carrier's conduct deviated from industry norms, without stating that it constituted bad faith under the law, "because he (1) identified specific conduct of the insurer, (2) explained its consequences for the insured, and (3) demonstrated how that conduct deviated from industry standards, all without rendering a conclusion on the legal significance of the conduct." *Id.* (citing *Hangarter*, 373 F.3d at 1016).

Therefore, the court will grant Defendants' motion as to the "legal conclusions" issue to the extent Schwartz and Cummins intend to interpret the captive reinsurance agreements, discuss whether they comply with the HUD Letter's criteria, opine that they limit Atrium's liability, or offer other similar testimony. However, the court will deny the motion to the extent Schwartz and Cummins intend to testify about whether the captive reinsurance agreements are contrary to the usual regulatory and operating practices in the insurance and reinsurance industry—they may so testify as long as they do so without interpreting the agreements or otherwise offering a legal conclusion.

V. Opinions supported by inadmissible evidence

Defendants seek to exclude evidence and testimony from Barile that is based on reinsurance agreements between Radian and "three unknown reinsurers based in Turks & Caicos, Bermuda[,] and Pennsylvania." ECF 474, at 15. Defendants contend that the agreements are inadmissible hearsay, so they should be excluded and no reference to them should be admitted, and they seek to exclude Barile's testimony based on those agreements because they contend the agreements' prejudicial effect outweighs any probative value. *Id.* They object to Barile's testimony because he opines that the three reinsurance agreements are typical of the industry standard and then compares provisions of Atrium's agreements to them despite "not provid[ing] any information on the provenance of these three agreements, who created them, when they were created, or any other information necessary both to lay the foundation for why those three agreements would be admissible in court and allow Defendants to challenge his conclusions about the agreements." *Id.* at 15–16.

Plaintiffs contend that Barile's testimony is appropriate because it relates to industry standards and is "highly probative of whether the CRAs at issue conform to industry custom and constitute valid reinsurance." ECF 485, at 13. They argue that Defendants' "concern over the provenance" of the agreements is "overblown" because the documents were produced during discovery and were a subject about which he was questioned at his deposition. *Id.*

Finally, they assert that Rule 703 renders Barile's opinions admissible because the underlying data need not be. *Id.* at 13–14.

Notably, despite invoking Rule 703, Plaintiffs do not address whether the three reinsurance agreements themselves are actually admissible, instead seeming just to assume that they are. Nor do they respond in any way to Defendants' contention that the agreements are inadmissible hearsay. Defendants' reply brief argues, correctly, that Rule 703 requires that where an expert relies on otherwise-inadmissible evidence, the party seeking to introduce the evidence must demonstrate how its probative value substantially outweighs its prejudicial effect. ECF 496, at 11.

Moreover, even outside of the Rule 703 context, as a general rule the proponent of evidence has the burden of establishing its admissibility. *Shorter v. S. Cal. Buick Pontiac GMC Dealers Inc.*, No. CV 16-7181-DMG (FFMx), 2018 WL 6075324, at *3 (C.D. Cal. Mar. 26, 2018) (citing *In re Extradition of Santos*, 228 F. Supp. 3d 1034, 1037 (C.D. Cal. 2017)). Because Plaintiffs have failed to attempt to demonstrate that the three reinsurance agreements are admissible and have not responded at all to Defendants' argument that the agreements are inadmissible hearsay, they have failed to carry their burden, and the court will construe their silence as a tacit admission that the agreements would be inadmissible. That does not mean that Barile cannot rely on those documents, but it does mean that neither he nor Plaintiffs can disclose them to the jury

because Plaintiffs have also not attempted to demonstrate that their probative value substantially outweighs their prejudicial effect. Accordingly, the court will grant Defendants' motion as to the "inadmissible evidence" issue insofar as Barile's testimony would refer to the three reinsurance agreements. To the extent he is able to testify about industry standards without referring to those agreements or comparing the ones at issue here to them, he may still do so without prejudice to Defendants' right to raise other objections if necessary.

Conclusion

For the foregoing reasons, it is hereby **ORDERED** that Defendants' motion *in limine* #6 is **GRANTED IN PART and DENIED IN PART** as follows:

1. The motion is **DENIED** as to the accounting standard evidence relied on by Barrett and Schwartz, but that denial is without prejudice to Defendants' right to object at trial to particular pieces of evidence (as opposed to the category of evidence as a whole).

2. The motion is **DENIED** as to Defendants' request to preclude references to evidence from outside the class period, again without prejudice to Defendants' right to object to specific pieces of evidence at trial.

3. The motion is **GRANTED** as to "motivation testimony" insofar as Plaintiffs' experts might seek to ascribe an intent, motivation, agenda, or similar finding to actions taken by Defendants. However, this order does not

preclude Plaintiffs' experts from discussing documentary evidence and opining on whether Defendants acted consistently therewith.

4. The motion is **GRANTED** as to the "legal conclusions" issue to the extent Schwartz and Cummins intend to interpret the captive reinsurance agreements, discuss whether they comply with the HUD Letter's criteria, opine that they limit Atrium's liability, or offer other similar testimony, but the motion is **DENIED** as to that issue to the extent Schwartz and Cummins intend to testify about whether the captive reinsurance agreements are contrary to the usual regulatory and operating practices in the insurance and reinsurance industry.

5. The motion is **GRANTED** as to the "inadmissible evidence" issue insofar as Barile's testimony would refer to three reinsurance agreements to which he seeks to compare Atrium's agreements as a basis for opining that they do not comply with industry standards, but the motion is **DENIED** to the extent it seeks to preclude Barile's testimony as to compliance with industry standards insofar as he is able to offer that testimony without referring to those agreements or comparing the ones at issue here to them.

Dated: January 14, 2022

/s/ *M. Miller Baker*
M. Miller Baker, Judge[2]

[2] Judge of the United States Court of International Trade, sitting by designation.