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United States District Court
Northern District of California

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MARIA KARLA TERRAZA,
Plaintiff,
v.
SAFEWAY INC., et al.,
Defendants.

Case No. 16-cv-03994-JST

**ORDER DENYING MOTION TO
EXCLUDE OPINION OF EXPERT
WITNESS ROGER LEVY**

UNDER SEAL

Re: ECF No. 157

In this ERISA¹ case, defendants Safeway Inc., the Safeway Benefit Plans Committee (erroneously sued herein as Benefit Plans Committee Safeway Inc. n/k/a Albertsons Companies Retirement Benefit Plans Committee), Peter J. Bocian, David F. Bond, Michael J. Boylan, Robert B. Dimond, Laura A. Donald, Dennis J. Dunne, Robert L. Edwards, Bradley S. Fox, Bernard L. Hardy, Russell M. Jackson, Peggy Jones, Suz-Ann Kirby, Robert Larson, Melissa C. Plaisance, Paul Rowan, and Andrew J. Scoggin (collectively “the Safeway Defendants”) now move to exclude the expert report of Plaintiff’s expert witness Roger L. Levy. ECF No. 157. Plaintiff opposes the motion. ECF No. 165.

For the reasons set forth below, the Court will deny the motion.²

I. FACTUAL BACKGROUND

Roger Levy is a fiduciary consultant. For the past 30 years he has provided consulting

¹ ERISA refers to the Employee Retirement Income Security Act.

² The Court has filed this order under seal because it contains or refers to material subject to sealing orders. Within seven days of the filing date of this order, the parties shall provide the Court a stipulated redacted version of this order, redacting only those portions of the order containing or referring to material for which the Court has granted a motion to seal and for which the parties still request the material be sealed. The Court will then issue a redacted version of the order.

1 services with respect to fiduciary best practices, including consulting with retirement plan
2 sponsors and investment advisors. ECF No. 158-2 ¶ 3. He has a Master of Laws degree from
3 Temple University Law School and has been designated as an Accredited Investment Fiduciary
4 Analyst by the Center for Fiduciary Studies. Id. ¶ 2. He has published numerous articles on the
5 topic of fiduciary best practices and lectures on the topic at industry conferences. Id. at 49-52. In
6 1986, he founded a firm called Cambridge Financial Services, Inc., which he operated until 2013.
7 Id. ¶ 3; see also id. at 48. His clients at Cambridge Financial included plan sponsors of defined
8 benefit and defined contribution plans. Id. ¶ 3. Among other services, he rendered advice to
9 Cambridge Financial’s clients “on matters of process and the applicable standard of care, and was
10 also responsible for ensuring that Cambridge Financial conformed to an appropriate standard of
11 care in rendering investment advice to its clients.” Id.

12 Since 2009, Levy has been an Analyst for the Centre for Fiduciary Excellence, LLC,
13 performing fiduciary assessments and advising clients on fiduciary best practices, including best
14 practices relating to defined contribution plans like the one at issue here. Id. ¶ 4. In that capacity,
15 he reviews plan documents, committee charters, minutes, investment reports, and other materials,
16 and makes a finding regarding whether his clients (including plan fiduciaries and investment
17 advisors) are conforming to the fiduciary standard of care. Id. Collectively, his clients “are
18 responsible for more than \$72 billion in investment assets, apart from independent broker/dealer
19 clients with investment advisory responsibilities involving an additional \$70 billion in assets.” Id.

20 Plaintiff retained Levy in this case “to provide expert opinions regarding whether the
21 actions, procedures, and processes of the defendants . . . were consistent with the standards of care
22 of a fiduciary acting exclusively for the purpose of providing benefits to participants and
23 beneficiaries, and to describe the practices, as well as minimum standards of care, that
24 investment/benefit plan committee members and other fiduciaries to defined contribution plans
25 should apply based upon [his] experience and expertise in the field.” Id. ¶ 1. Levy thereafter
26 reached the opinion that the Safeway Plan’s fiduciaries did not meet the applicable standard of
27 care of a prudent retirement plan fiduciary. Id. ¶ 7. He concluded that the Safeway Defendants:
28 (a) failed to obtain fiduciary training, thereby rendering themselves vulnerable to nonconformity

1 with the standard of care to which they were subject and resulting in multiple departures from such
2 standard; (b) failed to familiarize themselves with the basic Safeway Plan documents, including
3 the Summary Plan Description, the Plan Document, applicable IPSs, master trust agreements, and
4 service provider agreements, thereby precluding the Safeway Benefit Plans Committee members
5 from appropriately performing their duties; (c) failed to adequately monitor the reasonable cost of
6 recordkeeping services necessary for the proper administration of the Safeway Plan, made no
7 effort to identify the cost of unbundled services and performed no competitive bidding; and (d)
8 failed to adequately evaluate the investment characteristics of certain investments and allowed
9 their decisions to be motivated primarily by the opportunity to reduce expenses. *Id.*

10 The Safeway Defendants now argue that Levy’s report should be excluded because (1) he
11 offers improper legal opinions; (2) he “characteriz[es] the facts of the case in the guise of expert
12 opinion”; and (3) his opinions regarding the reasonableness of the recordkeeping fees incurred by
13 the Safeway 401(k) Plan are inadmissible because he did not use a sufficiently similar comparator
14 to establish a reasonable fee. ECF No. 157 at 7, 9, 11.

15 **II. LEGAL STANDARD**

16 Federal Rule of Evidence 702 provides:

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

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

25 Trial courts serve a “gatekeeping” role “to ensure the reliability and relevancy of expert
26 testimony.” *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152 (1999) (citing *Daubert v.*
27 *Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993)). They should screen “unreliable nonsense
28 opinions, but not exclude opinions merely because they are impeachable.” *City of Pomona v.*
SQM N. Am. Corp., 750 F.3d 1036, 1044 (9th Cir. 2014). The reliability test under Rule 702 and

1 Daubert “is not the correctness of the expert’s conclusions but the soundness of his methodology.”
2 Id. “Shaky but admissible evidence is to be attacked by cross examination, contrary evidence, and
3 attention to the burden of proof, not exclusion.” *Primiano v. Cook*, 598 F.3d 558, 564 (9th Cir.
4 2010). The proponent of the expert testimony has the burden of proving admissibility. *Lust By &*
5 *Through Lust v. Merrell Dow Pharm., Inc.*, 89 F.3d 594, 598 (9th Cir. 1996).

6 “Motions in limine are usually unnecessary in a bench trial.” See Standing Order for Civil
7 Bench Trials (“Standing Order”) ¶ E. However, if a party chooses to file such motion, the moving
8 party “must first seek a stipulation from the opposing party or parties to the relief
9 requested in the motion.” Id. Here, Defendants did not seek a stipulation with respect to the
10 relief they now request. ECF No. 165-1 ¶ 6.

11 **III. DISCUSSION**

12 **A. Levy Does Not Offer Improper Legal Opinions**

13 The Safeway Defendants argue that Levy offers improper legal opinions, and specifically
14 that he opines on the ultimate issue in the case: whether the Safeway Defendants breached their
15 fiduciary duties under ERISA. The Safeway Defendants note that Levy opines that the Safeway
16 Defendants breached “minimum standards of care,” and contend the only “minimum standards” to
17 which he could be referring “are in fact the fiduciary duties described in ERISA §404 (29 U.S.C.
18 §1104).” ECF No. 157 at 4. Thus, they argue, “[i]n testifying that Defendants have ‘deviated’
19 from those ‘minimum standards,’ Mr. Levy is in fact opining that they breached their fiduciary
20 duties under ERISA.” Id.

21 “[A]n expert witness cannot give an opinion as to her legal conclusion, i.e., an opinion on
22 an ultimate issue of law.” *Nationwide Transp. Fin. v. Cass Info. Sys., Inc.*, 523 F.3d 1051, 1058
23 (9th Cir. 2008) (quoting *Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1016 (9th
24 Cir. 2004), and upholding the district court’s exclusion of expert testimony that invaded the
25 province of the trial judge). However, provided that an expert opinion does not give an
26 impermissible legal opinion, “[a]n opinion is not objectionable just because it embraces an
27 ultimate issue.” Fed. R. Evid. 704(a); see also *Nationwide*, 523 F.3d at 1058.

28 Levy’s opinions fall on the admissible side of that line. In his report, Levy states his

1 opinions with respect to whether the actions, procedures, and process of the Safeway Defendants
2 “were consistent with the standards of care of a fiduciary acting exclusively for the purpose of
3 providing benefits to participants and beneficiaries . . . based upon my experience and expertise in
4 the field.” ECF No. 158-2 ¶ 1. These opinions are consistent with well-established standards for
5 expert witness testimony. “[E]xpert witnesses, in all types of litigation, render an opinion as to
6 what the applicable standard of care is and whether it has been complied with.” *Harris v. Koenig*,
7 Civil Action No. 02-618 GK, 2011 WL 1838483, at *1 (D.D.C. May 16, 2011). This is just as
8 true in ERISA cases as it is in others. See, e.g., *id.* Thus, “[a]lthough [Levy] may not opine as to
9 the ultimate legal issue of whether [Safeway] violated ERISA, he may testify about the duty to act
10 prudently, the standard of care applicable to a fiduciary in this situation, [and] how [Safeway’s]
11 actions deviated from the applicable standard of care.” *Hans v. Tharaldson*, No. 3:05-CV-115,
12 2011 WL 6937598, at *5 (D.N.D. Dec. 23, 2011).

13 This portion of the Safeway Defendants’ motion is denied.

14 **B. Levy’s Opinions Regarding the Reasonableness of Recordkeeping Fees Are**
15 **Not Improper**

16 The Safeway Defendants next argue that the Court should exclude Levy’s opinions about
17 the allegedly excessive size of the Safeway 401(k) Plan’s recordkeeping fees because Levy only
18 compared the recordkeeping expenses of the Plan to the plans of one other employer – the
19 Albertsons 401(k) plan (“Albertsons Plan”) – before and after Albertsons’ 2015 acquisition of
20 Safeway and the consolidation of the Albertsons Plan with the Safeway Plan. Thus, they contend,
21 “[t]he paltry number of comparators employed by Mr. Levy by itself renders his opinion
22 unreliable.” ECF No. 157 at 3. They further argue that the Albertsons Plan is not an appropriate
23 comparator because “the Albertsons Plan was larger – both in the number of participants and the
24 amount of assets – than the Safeway Plan, which necessarily explains some of the difference in the
25 recordkeeping expense. Indeed, the post-consolidation Albertsons Plan had approximately three
26 times the amount of assets of the Safeway Plan.” *Id.* Finally, they argue that Levy fails to identify
27 whether the services offered by the Albertsons Plan recordkeeper were the same as those offered
28 by the Safeway Plan recordkeeper. *Id.* at 3-4.

1 As to the first point, there are fundamental factual errors in the Safeway Defendants’
2 motion. First, Levy did not use the pre-consolidation Albertsons Plan (that had 1.2 times the
3 number of participants and approximately 1.8 times the assets of the Safeway Plan) as a
4 comparator. Instead, Levy compared the Safeway Plan – which had approximately 37,000
5 participants and \$1.9 billion in total Plan assets, and was paying \$52 per participant in
6 recordkeeping fees – with the new Albertsons Plan – which had approximately 32,000 participants
7 and \$1.1 billion in Plan assets, and was paying \$35 per participant. See ECF Nos. 143-3 at 5; 165-
8 3 at 13-14 (“I made the comparison simply with the single new Albertsons plan”). These two
9 plans are thus sufficiently similar. Second, these were not the only two points of comparison.
10 Levy also relied on a 2012 Aon report, in which Aon appears to have acknowledged the excessive
11 nature of the recordkeeping fees paid by the Safeway Plan in January 2012, when it reported in
12 connection with a 401(k) Total Plan Cost Analysis that the Safeway Plan was paying \$65 per
13 participant, when a “Best-Fit Universe” of similar plans were paying \$56 per participant. See ECF
14 Nos. 143-25 at 11; 165-3 at 11.

15 Thus, there simply is no factual basis for the Safeway Defendants’ motion.³ This portion
16 of their motion is also denied.

17 **C. The Safeway Defendants’ Remaining Arguments**

18 The Court last addresses the Safeway Defendants’ contentions that “[t]he Levy Report
19 should be excluded because it is not helpful to the Court” and that the report “consists merely of a
20 characterization of the facts of the case in the guise of expert opinion.” ECF No. 157 at 9. As to
21 the latter point, the Court finds that what the Safeway Defendants describe as “characterization[s]
22 of the facts” are the factual conclusions, based on the evidence, that undergird Levy’s opinions.
23 As to the former point, the Court disagrees.

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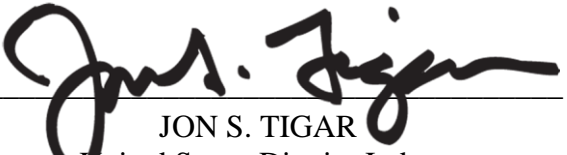
27 ³ Even if the Safeway Defendants had stated the facts correctly, this portion of their motion would
28 still be denied. The asserted flaws as to Levy’s opinion regarding recordkeeping fees do not
require exclusion and are matters best left for cross-examination, particularly in a bench trial.

1 **CONCLUSION**

2 For the reasons set forth above, the Safeway Defendants' motion to exclude the testimony
3 of Roger Levy is denied.

4 **IT IS SO ORDERED.**

5 Dated: February 27, 2019

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7 _____
8 JON S. TIGAR
9 United States District Judge