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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 DEFENDANTS'  
MOTION TO EXCLUDE THE  
TESTIMONY OF MARTIN DIRKS**

Re: ECF No. 155

In this ERISA<sup>1</sup> 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 Martin Dirks. ECF No. 155. Plaintiff opposes the motion. ECF No. 168.

For the reasons set forth below, the Court will deny the motion.<sup>2</sup>

**I. FACTUAL BACKGROUND**

Martin Dirks is the founder and manager of an expert witness and consulting firm called

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<sup>1</sup> ERISA refers to the Employee Retirement Income Security Act.

<sup>2</sup> 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 Investment Strategy & Analysis, based in San Francisco. ECF No. 156-2 at 2. He is also a Board  
2 Member of the Federated Retirement System for the City of San Jose, California and an Adjunct  
3 Professor in the Master in Business Administration program at Golden Gate University in San  
4 Francisco, California. Id. Prior to starting his own firm, he spent several years as an investment  
5 consultant advising defined benefit and defined contribution state and municipal pension plans,  
6 endowments, and corporate pension plans, among other clients. Id. at 3. He received an M.B.A.  
7 from Harvard Business School in 1987 and a B.S. in Physics from Bemidji State University in  
8 1979. Id.

9 Plaintiff's counsel retained Dirks "to provide an opinion on the selection and monitoring of  
10 investment managers for [Safeway's 401(k)] Plan and to calculate the economic damages  
11 sustained by the Plan and its participants." Id.

12 The Safeway Defendants now move to exclude Dirks' opinion. They argue that his  
13 opinion that "an investment option should have been removed from the Plan if it was not within  
14 the top quartile of its peer group for six consecutive quarters" is "completely arbitrary[] and not  
15 rooted in any industry standards or academic analysis," ECF No. 155 at 3; and that his testimony  
16 regarding the alleged unreasonableness of the Plan's recordkeeping fees is similarly unreliable"  
17 because Dirks did not use a sufficiently similar comparator to establish a reasonable fee, id. at 4.

18 **II. LEGAL STANDARD**

19 Federal Rule of Evidence 702 provides:

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

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

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

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

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

28 Trial courts serve a "gatekeeping" role "to ensure the reliability and relevancy of expert  
testimony." *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152 (1999) (citing *Daubert v.*

1 Merrell Dow Pharm., Inc., 509 U.S. 579 (1993)). They should screen “unreliable nonsense  
2 opinions, but not exclude opinions merely because they are impeachable.” *City of Pomona v.*  
3 *SQM N. Am. Corp.*, 750 F.3d 1036, 1044 (9th Cir. 2014). The reliability test under Rule 702 and  
4 *Daubert* “is not the correctness of the expert’s conclusions but the soundness of his methodology.”  
5 *Id.* “Shaky but admissible evidence is to be attacked by cross examination, contrary evidence, and  
6 attention to the burden of proof, not exclusion.” *Primiano v. Cook*, 598 F.3d 558, 564 (9th Cir.  
7 2010). The proponent of the expert testimony has the burden of proving admissibility. *Lust By &*  
8 *Through Lust v. Merrell Dow Pharm., Inc.*, 89 F.3d 594, 598 (9th Cir. 1996).

9 “Motions in limine are usually unnecessary in a bench trial.” See Standing Order for Civil  
10 Bench Trials (“Standing Order”) ¶ E. However, if a party chooses to file such motion, the moving  
11 party “must first seek a stipulation from the opposing party or parties to the relief requested in the  
12 motion.” *Id.* Here, Defendants did not seek a stipulation with respect to the relief they now  
13 request. ECF No. 168-1 ¶ 8.

14 **III. DISCUSSION**

15 As an initial matter, as stated above, the Court does not typically need motions in limine  
16 regarding exclusion of evidence before a bench trial. Nothing about Martin Dirks’ testimony  
17 warrants deviation from the Court’s ordinary practice.

18 Turning to the merits, the Court first addresses the Safeway Defendants’ arguments  
19 regarding Dirks’ opinion that an investment option investment option offered by the Plan should  
20 have been removed if it was not within the top quartile of its peer group for six consecutive  
21 quarters. ECF No. 156-2 at 57; ECF No. 155 at 3. Safeway argues that Dirks’ criteria are  
22 “completely arbitrary[] and not rooted in any industry standards or academic analysis.” ECF No.  
23 155 at 3.

24 The Court rejects the argument. Evaluating whether to keep a fund in a retirement plan  
25 based on that fund’s performance over a set number of consecutive quarters is both a common-  
26 sense and well-established practice in the field of retirement investment advice. For example, a  
27 2002 article in the *Journal of Compensation and Benefits* described the following approach:

28 Trustees should define responses to changes in a fund by designating the funds to a

1 watch list or to terminate that fund as an option under the plan. The watch list may  
2 be based upon performance, three-year peer ranking below the medium for three  
3 consecutive quarters, three-year index under performance for three consecutive  
4 quarters, violating risk guidelines, style drift for three quarters or loss of key  
5 investment people.

6 Sheldon M. Geller, Prudent Management of 401(k) Plan Fund Selection, 18 J. Compensation &  
7 Benefits (July/August 2002). Similarly, a treatise on retirement law and plan administration  
8 provides a model investment policy containing the following provision:

9 “If at any time, any of the following criteria are triggered, the Investment Manager  
10 shall be notified of the Board's concerns or shall be terminated, in the discretion of  
11 the Board, in consultation with the Investment Performance Consultant: . . . Four  
12 consecutive quarters of performance below the \_\_\_th percentile in performance  
13 rankings for the Investment Manager's specified universe.”

14 Robert D. Klausner, State and Local Government Retirement Law: A Guide for Lawyers,  
15 Trustees, and Plan Administrators § 17:15 (2017) (blank underscore in original).

16 Thus, it is clear that Dirks’ methodology in measuring a fund’s performance by quartile  
17 over a period of consecutive quarters is neither new nor exotic. The Court will not exclude his  
18 testimony under Rule 702. Safeway can address on cross-examination whether the particular  
19 number of quarters or the particular performance quartile Dirks selected were appropriate or  
20 optimal.

21 Safeway also argues that Dirks’ opinion regarding the allegedly excessive nature of the  
22 Plan’s record-keeping expenses is unreasonable because he uses the Albertsons 401(k) Plan as a  
23 comparator. ECF No. 155 at 4. They contend that Dirks did not compare the services provided to  
24 the Safeway plan versus the services provided to the Albertsons plan; he does not know whether  
25 the services were the same; and he failed to take into account the difference in size between the  
26 two plans. ECF No. 155 at 7.

27 The Court finds this argument unpersuasive also. As an initial matter, the Safeway  
28 Defendants overlook the additional bases for Dirks’ opinion regarding excessive record-keeping  
fees. There were four: (1) investment adviser Aon Hewitt Investment Consulting, Inc. advised  
the Safeway Defendants that the “recordkeeping costs could be reduced by at least \$9 per  
participant, based upon peer group recordkeeping comparisons”; (2) a comparison between  
recordkeeping fees of the Safeway Plan, the Albertsons LLC plan, and the New Albertsons plan;

1 (3) the reduction in recordkeeping fees after the request for proposal (“RFP”) process after the  
2 Safeway and Albertsons plans were combined; and (4) the discovery of between \$3.1 and 4.5  
3 million in accumulated plan assets available to pay recordkeeping fees about which the Safeway  
4 Plan was unaware until the transfer to Vanguard. ECF No. 152-5 at 5 n.5, 11 n.14. In the  
5 aggregate, these facts – if established – adequately support Dirks’ opinion that the Safeway Plan’s  
6 “recordkeeping fees were unreasonable compared to what was available in the market.” Trout v.  
7 Oracle Corp., No. 16-CV-00175-REB-SKC, 2019 WL 1006019, at \*8 (D. Colo. Mar. 1, 2019);  
8 see also George v. Kraft Foods Glob., Inc., 641 F.3d 786, 798-99 (7th Cir. 2011) (finding issue of  
9 disputed fact where expert opined that prudent fiduciaries would have solicited competitive bids  
10 before extending record-keeping contract).

11 Moreover, even if Dirks’ opinion were based solely on comparisons to the Albertsons  
12 plans, the Court would admit the testimony. The Court has already found the New Albertsons  
13 plan to be a similar comparator. ECF No. 200 at 6. Any remaining criticisms would be bases for  
14 cross-examination, not grounds for exclusion. The Court denies this portion of the Safeway  
15 Defendants’ motion also.

16 **CONCLUSION**

17 For the reasons set forth above, the Safeway Defendants’ motion to exclude the testimony  
18 of Martin Dirks is denied.

19 **IT IS SO ORDERED.**

20 Dated: March 18, 2019

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23 JON S. TIGAR  
24 United States District Judge  
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