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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

MONTEREY BAY MILITARY HOUSING,
LLC, et al.,

 Plaintiffs,

 v.

PINNACLE MONTEREY LLC, et al.,

 Defendants.

Case No. [14-cv-03953-BLF](#)

ORDER ON MOTIONS *IN LIMINE*
[Re: ECF 260-86, 288, 290-91, 294]

This Order addresses the motions *in limine* submitted by both sides in the above-captioned action. For the reasons explained below and on the record at the pretrial conference held from July 16 to 17, 2015, the motions are decided as follows:

- Plaintiffs’ Motion *in Limine* No. 1: GRANTED IN PART and DENIED IN PART.
- Plaintiffs’ Motion *in Limine* No. 2: GRANTED IN PART and DENIED IN PART.
- Plaintiffs’ Motion *in Limine* No. 3: GRANTED IN PART and DENIED IN PART.
- Plaintiffs’ Motion *in Limine* No. 4: GRANTED IN PART and DENIED IN PART.
- Plaintiffs’ Motion *in Limine* No. 5: GRANTED IN PART and DENIED IN PART.
- Plaintiffs’ Motion *in Limine* No. 6: GRANTED IN PART and DENIED IN PART.
- Plaintiffs’ Motion *in Limine* No. 7: DENIED.
- Plaintiffs’ Motion *in Limine* No. 8: DENIED.
- Plaintiffs’ Motion *in Limine* No. 9: DENIED.
- Defendants’ Motion *in Limine* No. 1: GRANTED IN PART and DENIED IN PART.
- Defendants’ Motion *in Limine* No. 2: DENIED.
- Defendants’ Motion *in Limine* No. 3: GRANTED IN PART and DENIED IN PART.
- Defendants’ Motion *in Limine* No. 4: DENIED IN PART and DEFERRED IN PART.

- 1 Defendants' Motion *in Limine* No. 5: GRANTED.
2 Defendants' Motion *in Limine* No. 6: DENIED.
3 Defendants' Motion *in Limine* No. 7: GRANTED.
4 Defendants' Motion *in Limine* No. 8: GRANTED IN PART and DENIED IN PART.
5 Defendants' Motion *in Limine* No. 9: GRANTED IN PART and DENIED IN PART.
6 Defendants' Motion *in Limine* No. 10: DENIED as moot.
7 Defendants' Motion *in Limine* No. 11: GRANTED IN PART and DENIED IN PART.
8 Defendants' Motion *in Limine* No. 12: DENIED.
9 Defendants' Motion *in Limine* No. 13: GRANTED.
10 Defendants' Motion *in Limine* No. 14: GRANTED IN PART and DENIED IN PART.
11 Defendants' Motion *in Limine* No. 15: DENIED as moot.
12 Defendants' Motion *in Limine* No. 16: DENIED.
13 Defendants' Motion *in Limine* No. 17: DENIED.
14 Defendants' Motion *in Limine* No. 18: DENIED as moot.
15 Defendants' Motion *in Limine* No. 19: GRANTED.
16 Defendants' Motion *in Limine* No. 20: DENIED.
17 Defendants' Motion *in Limine* No. 21: DENIED.
18 Defendants' Motion *in Limine* No. 22: GRANTED.

19 **I. LEGAL STANDARDS**

20 The parties' motions *in limine* largely concern the admissibility of evidence under Federal
21 Rules of Evidence 401, 403, and 702. Rule 401 provides that evidence is relevant if "it has a
22 tendency to make a fact more or less probable than it would be without the evidence" and "the fact
23 is of consequence in determining the action." However, "[t]he court may exclude relevant
24 evidence if its probative value is substantially outweighed by a danger of one or more of the
25 following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time,
26 or needlessly presenting cumulative evidence." Fed. R. Evid. 403. A district court has "wide
27 discretion" in making Rule 403 decisions but must exclude evidence of slight probative value if
28 there is a modest likelihood that the evidence would cause unfair prejudice or mislead the jury.

1 *United States v. Hitt*, 981 F.2d 422, 424 (9th Cir. 1992).

2 Federal Rule of Evidence 702 provides that a qualified expert may testify if “(a) the
3 expert’s scientific, technical, or other specialized knowledge will help the trier of fact to
4 understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient
5 facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert
6 has reliably applied the principles and methods to the facts of the case.” Fed. R. Evid. 702. In
7 *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993), the Supreme Court held
8 that Rule 702 requires the district court to act as a gatekeeper to “ensure that any and all scientific
9 testimony or evidence admitted is not only relevant, but reliable.” In *Kumho Tire Co., Ltd. v.*
10 *Carmichael*, 526 U.S. 137, 147 (1999), the Supreme Court clarified that the “basic gatekeeping
11 obligation” articulated in *Daubert* applies not only to scientific testimony but to all expert
12 testimony. The Supreme Court also made clear that the reliability inquiry is a flexible one, and
13 “whether *Daubert*’s specific factors are, or are not, reasonable measures of reliability in a
14 particular case is a matter that the law grants the trial judge broad latitude to determine.” *Id.* at
15 153. So long as an expert’s methodology is sound and his opinions satisfy the requirements of
16 Rule 702, underlying factual disputes and how much weight to accord the expert’s opinion are
17 questions for the jury. *Primiano v. Cook*, 598 F.3d 558, 565 (9th Cir. 2010).

18 **II. PLAINTIFFS’ MOTIONS *IN LIMINE***

19 Plaintiffs bring nine motions *in limine*, which the Court addresses in turn.

20 **1. Plaintiffs’ Motion *in Limine* No. 1 to “Exclude Arguments and Evidence
21 Concerning Irrelevant or Otherwise Inadmissible Insurance Issues.” GRANTED
IN PART and DENIED IN PART.**

22 Plaintiffs seek to exclude reference to all other insurance matters that are not connected to
23 the Master Insurance Program (“MIP”) administered by Defendants, through which Defendants
24 procured property and general liability insurance for the parties’ military housing projects. While
25 the MIP is at the heart of many of Plaintiffs’ claims, Plaintiffs seek to exclude reference to each of
26 the following subjects on the ground that each is irrelevant to the MIP and would potentially
27 confuse the jury: (1) construction-related insurance coverage at the military housing projects; (2)
28 Plaintiffs’ consideration of a potential insurance captive of their own to take over insuring the

1 projects; and (3) argument or evidence that the projects' asset managers approved the MIP. Pls.'
2 MIL #1, ECF 260. Defendants counter that evidence on each of these subjects is relevant to
3 Plaintiffs' knowledge of how such insurance programs work, their awareness of the alleged
4 overcharges under the MIP, Plaintiffs' unclean hands, and Defendants' claims for breach of
5 fiduciary duties. Defs.' Opp. #1, ECF 331.

6 The challenged evidence is minimally relevant to the parties' claims but is highly relevant
7 to Defendants' statute of limitations defense, which this Court has determined must be tried to a
8 jury. Am. Order on Summ. J. ("SJ Order") at 37-40, ECF 397. Defendants contend that Plaintiffs
9 were aware of the operation of the MIP and the alleged overcharges thereunder long before they
10 brought their claims. Plaintiffs disclaim such awareness. Defendants must therefore be afforded
11 an opportunity to cross-examine Plaintiffs' witnesses concerning these issues. As such, and for
12 the reasons stated on the record, Plaintiffs' Motion *in Limine* No. 1 is GRANTED with respect to
13 introduction of the challenged evidence in any party's case in chief but DENIED with respect to
14 Defendants' use of the evidence to cross-examine Plaintiffs' witnesses concerning notice and
15 knowledge of the alleged MIP fraud.

16 **2. Plaintiffs' Motion *in Limine* No. 2 to "Exclude Argument and Evidence Related to**
17 **Irrelevant Conduct and Motives by Clark Realty Capital LLC." GRANTED IN**
18 **PART and DENIED IN PART.**

19 Plaintiffs seek to exclude evidence concerning Clark Realty Capital LLC's ("Clark
20 Realty") internal audits of the Clark entities that performed construction and development services
21 at the parties' Monterey and Irwin projects on the ground that such evidence is irrelevant to the
22 claims and defenses in this action. Pls.' MIL #2 at 2-3, ECF 261. Defendants contend that the
23 audits reveal that Clark Realty overlooked billing and conduct irregularities committed by the
24 Clark entities similar to the ones that Plaintiffs identify as the basis for terminating defendant
25 American Management Services California Inc.'s ("AMSC") property management agreements
26 ("PMAs") at Monterey and Irwin. Defs.' Opp. #2 at 2-3, ECF 339. Such evidence thus has direct
27 bearing on Defendants' counterclaims for breach of the implied covenant of good faith and fair
28 dealing. *Id.* at 3-4. Plaintiffs' Motion *in Limine* No. 2 is accordingly DENIED with respect to
Clark Realty's internal audits, but the evidence shall be limited to evidence of overlooked

1 irregularities.

2 Plaintiffs also seek to exclude reference to or suggestions that Plaintiffs, Clark Realty, or
3 any of their affiliates intend to assume or take over property management duties at the Monterey
4 and Irwin projects. Pls.' MIL #2 at 3-4. The facts have changed since the filing of the motions *in*
5 *limine*. As of July 13, 2015, a third party has taken over property management duties at the
6 Monterey and Irwin projects. Although the parties disputed on the record whether the new
7 property manager is affiliated with or controlled by Clark Realty, the Court finds such disputes
8 inapposite to the issues in this action. Plaintiffs' Motion *in Limine* No. 2 to exclude reference to
9 Plaintiffs, Clark Realty, or their affiliates taking over property management duties at the Monterey
10 and Irwin projects is therefore GRANTED.

11 **3. Plaintiffs' Motion *in Limine* No. 3 to "Exclude Arguments and Evidence Related**
12 **to Unrelated Military Projects and Pursuits with Pinnacle." GRANTED IN**
13 **PART and DENIED IN PART.**

14 Plaintiffs in their third motion *in limine* seek to exclude reference to the parties' other
15 agreements and pursuits that Plaintiffs contend are not relevant to the projects and contracts
16 implicated in this action. Specifically, Plaintiffs move to preclude all reference to a 2001 Term
17 Sheet between Clark Realty and American Management Services ("AMS") and to Clark Pinnacle
18 Family Communities LLC ("CPFC"), an entity formed by Clark and AMS in 2001 to pursue
19 military housing contracts. Pls.' MIL #3 at 2-4, ECF 262. As the Court previously found, the
20 2001 Term Sheet is not binding, by its own terms. Corrected Order Denying Mot. to Dissolve
21 Prelim. Inj. ("Inj. Order") at 16-17, ECF 169. Furthermore, the Court denied Defendants' belated
22 motion to introduce a claim based upon the CPFC relationship. Order Denying Mot. for Leave to
23 Conform Evidence to Pleadings, ECF 352. The challenged evidence is therefore of minimal
24 relevance to the parties' claims but is relevant to understanding their complex relationship. This
25 portion of Plaintiffs' Motion *in Limine* No. 3 is therefore DENIED, but the evidence of the Term
26 Sheet and of CPFC is limited to general background information to explain the parties'
27 relationship.

28 Plaintiffs also seek to exclude reference to other project bids submitted by CPFC,
particularly a successful bid at the Pacific Beacon naval project where Defendants' affiliates were

1 subsequently terminated from the project. Plaintiffs assert that evidence relating to the Pacific
2 Beacon project is irrelevant to any claim or defense in this action and that Defendants' apparent
3 assertion that the Pacific Beacon termination was part of a concerted effort to oust Defendants at
4 the various Clark-Pinnacle projects is unproven. Pls.' MIL # 4-5. Despite Defendants' arguments
5 to the contrary, the Court agrees with Plaintiffs. The probative value of the evidence regarding the
6 Pacific Beacon project is miniscule and greatly outweighed by the undue consumption of time that
7 presenting and distinguishing the features of this project would necessitate. Fed. R. Evid. 403. As
8 such, the portion of Plaintiffs' Motion *in Limine* No. 3 addressed to the Pacific Beacon project is
9 GRANTED.

10 **4. Plaintiffs' Motion *in Limine* No. 4 to "Exclude Specific Hearsay and Otherwise**
11 **Inadmissible Evidence." GRANTED IN PART and DENIED IN PART.**

12 Plaintiffs' fourth motion *in limine* contains three parts.

13 First, Plaintiffs seek to exclude reference to the "Executive Summary of Clark/Pinnacle
14 Lockbox Review" prepared by third party consultant Jones Lang LaSalle ("JLL") and the
15 Memorandum prepared by Army officials Ivan Bolden and Rhonda Hayes, which summarizes the
16 Clark/Pinnacle Lockbox Review. Plaintiffs assert that these documents are hearsay without
17 sufficient indicia of reliability to allow admission into evidence. Pls.' MIL #4 at 1-2, ECF 263.
18 Defendants urge that these documents are reliable and that they are admissible public records
19 under Federal Rule of Evidence 803(8) or business records under Rule 803(6). Defs.' Opp. #4 at
20 2-4, ECF 342. Plaintiffs have, however, provided the Court with evidence that the Executive
21 Summary and Memorandum were preliminary, repudiated by the Army, and deemed
22 untrustworthy by them. As such, Plaintiffs' Motion *in Limine* No. 4 to exclude reference to these
23 documents is GRANTED.

24 Second, Plaintiffs seek to exclude as hearsay emails and other out of court statements from
25 Mr. Glenn Ferguson and Mrs. Gerri Ferguson to defendant Stanley Harrelson. Pls.' MIL #4 at 2-
26 4. Defendants indicated at the pretrial conference that they do not intend to offer Mrs. Ferguson's
27 emails into evidence and Plaintiffs' motion is therefore GRANTED on that ground. Mr.
28 Ferguson's out of court statements were made at a time when he was employed as senior manager

1 of Clark Realty and president of Clark Realty Builders. As such, they are admissible as party-
2 opponent statements under Rule 801(d)(2)(D), and Plaintiffs' motion as to these statements is
3 accordingly DENIED.

4 Finally, Plaintiffs seek to exclude as hearsay a March 7, 2008 email from Deb Stratton to
5 Chuck McDaniel, Tate McCoy, and Kay Lynn Keimig concerning an upcoming meeting with
6 Plaintiffs to discuss the MIP. Pls.' MIL #4 at 4-5. Defendants argue that the email and testimony
7 related to the email is admissible as Ms. Stratton's then-existing state of mind and relevant to her
8 lack of intent to deceive Plaintiffs concerning the MIP. *See* Defs.' Opp. #4 at 5. The Court agrees
9 with Defendants and accordingly DENIES this aspect of Plaintiffs' Motion *in Limine* No. 4.

10 **5. Plaintiffs' Motion *in Limine* No. 5 to "Exclude Improper Attacks and Legal**
11 **Arguments." GRANTED IN PART and DENIED IN PART.**

12 Plaintiffs seek to exclude (1) all attacks on counsel and auditors; (2) argument that actual
13 wrongdoing by Defendants would have resulted in criminal charges; (3) reference to the
14 availability of treble damages and attorneys' fees under 18 U.S.C. §§ 1961 *et seq.* ("RICO"); and
15 (4) any reference to privileged communications. Pls.' MIL #5, ECF 264.

16 Defendants agree that no party should be permitted to argue that wrongdoing would have
17 resulted in criminal charges or to reference treble damages and attorneys' fees available under
18 RICO. Defs.' Opp. #5 at 2-3, ECF 340. Plaintiffs' motion on those issues is accordingly
19 GRANTED.

20 As to attacks on counsel and auditors, the Court GRANTS Plaintiffs' motion with respect
21 to attacks on counsel but DENIES the motion with respect to the forensic audits at Monterey and
22 Irwin and the alleged improper motivation for those audits, which the Court finds relevant to
23 Defendants' claims for breach of the covenant of good faith and fair dealing.

24 Finally, Defendants acknowledge that they will not invade attorney-client privilege but
25 assert that Plaintiffs' privilege logs are relevant to Defendants' statute of limitations defense and,
26 in particular, to show when Plaintiffs became aware of the alleged MIP overcharges. Defs.' Opp.
27 #5 at 3-4. Defendants point to a May 15, 2009 entry on the log, which indicates that Mr. Jenkins
28 and Mr. Caputo called counsel "seeking/giving legal advice regarding Pinnacle insurance

1 program.” *Id.* at 3. This entry, by itself, is of little probative value to Defendants’ statute of
2 limitations defense, as Plaintiffs’ knowledge of the fraud alleged in this action can only be probed
3 by knowing the substance of Mr. Jenkins’s and Mr. Caputo’s communication with counsel. As the
4 Court noted on the record, it would be fundamentally unfair to allow the introduction of a
5 document that would require Plaintiffs to waive their attorney-client privilege to defend
6 themselves. As such, Plaintiffs’ Motion *in Limine* No. 5 is GRANTED with respect to attorney-
7 client communications and with respect to Defendants’ intended use of Plaintiffs’ privilege log.

8 **6. Plaintiffs’ Motion *in Limine* No. 6 to “Exclude the Report, Opinions, and**
9 **Testimony of Defendants’ Expert Jeff George.” GRANTED IN PART and**
10 **DENIED IN PART.**

11 Plaintiffs seek to exclude the report, opinions, and testimony of defense expert witness Jeff
12 George, an experienced fraud investigator, who has been designated to opine regarding: (1) the
13 deficiencies in the analysis of AMS’s manipulation of work order data conducted by Plaintiffs’
14 expert Louis Dudney; (2) the manner in which AMS employees used the Yardi software system
15 that was used to maintain work order data; and (3) that the PMAs at Monterey and Irwin did not
16 require the submission of certain information. Pls.’ MIL #6, ECF 265.

17 Plaintiffs assert that Mr. George’s criticism of Mr. Dudney’s analysis is unreliable because
18 it is based upon “pure speculation” concerning “potential alternative explanations” for the work
19 order data inconsistencies that Mr. Dudney uncovered. *Id.* at 2-3. Although it is undisputed that
20 Mr. George did not test these potential alternative explanations for himself, Defendants have
21 identified sufficient factual foundation for his opinion, which include his review of documents
22 produced in discovery, technical descriptions of the Yardi system, and interviews with AMS
23 employees. Defs.’ Opp. #6 at 3-5, ECF 320. Of course, at trial, Defendants must place this
24 foundation into evidence and establish that each alternative is real and not speculative. Whether
25 these alternative explanations should have been considered by Mr. Dudney and whether they
26 would have had any effect on Mr. Dudney’s analysis are issues that go to the weight of Mr.
27 Dudney’s and Mr. George’s testimony and are better addressed on cross-examination. Plaintiffs’
28 Motion *in Limine* No. 6 is therefore DENIED with respect to Mr. George’s opinions criticizing
Mr. Dudney’s analysis of the work order data.

1 Similarly, although Mr. George is not himself a software engineer, he has spent
2 considerable time learning the Yardi system and the jury may benefit from a description of the
3 system’s functionality from a lay perspective. Mr. George may accordingly offer high level
4 testimony concerning the operation of the Yardi system—i.e., how employees would use the
5 system—but may not offer any technical explanation of the software. As addressed on the record,
6 this high level explication includes testimony concerning a script change to the Yardi system in
7 2010 that Mr. George opines should have been considered and factored into Mr. Dudney’s
8 analysis. This aspect of Plaintiffs’ motion is thus DENIED.

9 Finally, some language in Mr. George’s report suggests that he is opining regarding the
10 legal conclusion of what the PMAs require in terms of work order data. *See* Pls.’ MIL #6 Exh. 1
11 (George Report) at 17, 18, 26. Defendants assert that his opinion was not intended to trespass on
12 contract interpretation and that Mr. George will not offer any opinions on legal conclusions at
13 trial. As such, the Court GRANTS Plaintiffs’ Motion *in Limine* No. 6 with respect to Mr.
14 George’s opinions concerning the interpretation of the PMAs.

15 **7. Plaintiffs’ Motion *in Limine* No. 7 to “Exclude the Report, Opinions, and
16 Testimony of Defendants’ Expert Brian Potter.” DENIED.**

17 Plaintiffs seek to exclude the opinions of Defendants’ expert witness Brian Potter
18 pertaining to fraudulent transfer and the “investment value” of the PMAs at the Monterey and
19 Irwin projects. Plaintiffs contend that the former is an unreliable legal opinion from an
20 inexperienced expert and that the latter is irrelevant. Pls.’ MIL #7, ECF 268. Plaintiffs have
21 alleged that a 2014 transaction between AMS and Hunt Companies, Inc. involved a transfer of
22 substantially all of AMS’s assets, rendering it insolvent and judgment-proof. Defendants offer
23 Mr. Potter to opine that AMS remains solvent and, indeed, he is qualified to offer such an opinion.
24 Defs.’ Opp. #7 at 1-2. Defendants moreover clarify that Mr. Potter is only being offered to rebut
25 the fraudulent transfer analysis of Plaintiffs’ expert, Louis Dudney, and that Mr. Potter will not
26 testify concerning the legal standard for a fraudulent transfer or whether the Hunt transaction
27 satisfies that standard. *Id.* at 2-4. With that understanding, the Court DENIES Plaintiffs’ Motion
28 *in Limine* No. 7 with respect to Mr. Potter’s opinion regarding AMS’s solvency.

1 As to Mr. Potter’s opinion regarding the investment value of the PMAs, Defendants
2 contend that this evidence is relevant to their claims that Plaintiffs breached their duty of good
3 faith and fair dealing as well as to Plaintiffs claim for damages and any setoff that may be
4 applicable to that claim. *Id.* at 4. Although the Court will not preclude Defendants from offering
5 this evidence, Defendants are aware that placing the value of the PMAs at issue to suggest
6 Plaintiffs’ bad faith, improper motive, and commercial unreasonableness may open the door to
7 rebuttal evidence of Plaintiffs’ good faith that, as discussed below, the Court will exclude from
8 Plaintiffs’ case in chief. With that proviso, Plaintiffs’ Motion *in Limine* No. 7 is DENIED with
9 respect to Mr. Potter’s opinion concerning the value of the PMAs.

10 **8. Plaintiffs’ Motion *in Limine* No. 8 to “Exclude the Report, Opinions, and**
11 **Testimony of Defendants’ Expert David Stegall.” DENIED.**

12 Plaintiffs move to exclude the opinions and testimony of defense expert David Stegall on
13 the ground that his opinions concerning customary practices and use of a MIP and the duties and
14 responsibilities of an insurance risk management administrator are either based upon cherry picked
15 facts or lack factual foundation altogether. Pls.’ MIL #8, ECF 269. On review of Mr. Stegall’s
16 report, the Court concludes that he has disclosed sufficient factual basis for his opinions. That he
17 may not have considered evidence that Plaintiffs would deem “highly relevant” goes to the weight
18 and credibility of his opinion. Plaintiffs had ample opportunity to depose Mr. Stegall and can
19 readily point out the evidentiary flaws in his analysis on cross-examination.

20 The Court does agree with Plaintiffs that Mr. Stegall has disclosed no authority to support
21 his understanding of the “usual and customary practice” in the industry. *Id.* at 4-5. It is
22 undisputed that Mr. Stegall has sufficient professional experience to testify regarding the
23 customary practice in the insurance industry. *See* Defs.’ Opp. #8 at 4, ECF 323. As such, the
24 Court will allow Mr. Stegall to testify on this subject but will expect Defendants to lay a proper
25 foundation for this testimony at trial.

26 Finally, Plaintiffs appear to have elicited testimony from Mr. Stegall during his deposition
27 regarding individual parties’ intent and the proper interpretation of the PMAs. Defendants
28 acknowledge that Mr. Stegall will not offer such improper testimony at trial. The Court therefore

1 need only reiterate that an expert witness may not testify concerning any party's state of mind or
2 the interpretation of the PMAs.

3 Based on the foregoing, Plaintiffs' Motion *in Limine* No. 8 is DENIED.

4 **9. Plaintiffs' Motion *in Limine* No. 9 to "Exclude the Report, Opinions, and**
5 **Testimony of Defendants' Expert Roberta Garland." DENIED.**

6 Finally, Plaintiffs move to exclude the opinions and testimony of defense expert Roberta
7 Garland, who is offered to rebut the testimony of Plaintiffs' expert, Nancy Watkins, regarding the
8 allocation of MIP costs made by AMS and its insurance broker, Lockton. Plaintiffs contend that
9 Ms. Garland, an experienced actuary in the insurance industry, offers unreliable opinions
10 unsupported by evidence or by her own expertise. Pls.' MIL #9, ECF 271. As discussed below,
11 the parties' experts dispute whether an actuarial approach was necessary or appropriate in
12 determining the proper allocation of costs under the MIP. On that subject, the Court agrees with
13 Defendants that Ms. Garland is qualified to opine that actuarial analysis is not necessary within the
14 MIP context. Defs.' Opp. #9 at 2-3, ECF 338. With respect to Ms. Garland's failure to consider
15 each allocation year or certain "relevant" data, these are challenges to the sufficiency of Ms.
16 Garland's sample size and go to the weight of her opinion and not its reliability. Plaintiffs'
17 Motion *in Limine* No. 9 is accordingly DENIED.

18 **III. DEFENDANTS' MOTIONS IN LIMINE**

19 Defendants bring twenty-two motions *in limine*, which the Court addresses in turn.

20 **1. Defendants' Motion *in Limine* No. 1 to "Exclude References to Other Civil and**
21 **Criminal Legal Proceedings." GRANTED IN PART and DENIED IN PART.**

22 Defendants move to exclude reference to four other legal actions involving the parties: (1)
23 the parties' litigation in Georgia involving the Fort Benning and Fort Belvoir projects ("Georgia
24 Action"), which was partially resolved on summary judgment and affirmed on appeal; (2) a recent
25 fraudulent transfer action that Plaintiffs filed in Gwinnett County, Georgia; (3) the guilty plea by
26 former AMS maintenance director Eddie Hudspeth, who pled guilty to soliciting and accepting
27 kickbacks from vendors at Fort Belvoir; and (4) ongoing grand jury investigation proceedings
28 involving other current and former employees of Defendants. Defs.' MIL #1, ECF 266.

1 Plaintiffs indicated that they do not intend to introduce evidence of the Gwinnett County
2 action or of the ongoing criminal investigation. Pls.' Opp. #1 at 1 n.1, ECF 329. Defendants'
3 motion is therefore GRANTED as to these two subjects, and neither party may reference these
4 matters at trial.

5 On the subject of the Georgia Action, two orders from that action are implicated: a
6 summary judgment order by the court and a discovery and sanctions order compelling Defendants
7 to produce insurance-related documents in that action. On balance, the Court finds that the
8 Georgia court's summary judgment order is highly relevant to RICO predicate acts, Plaintiffs'
9 good faith in rebuttal to Defendants' claims of breach of the covenant of good faith and fair
10 dealing and breach of fiduciary duty, and of Defendants' motive to engage in the allegedly
11 fraudulent Hunt transaction. Furthermore, the probative value of the order to the aforementioned
12 issues outweighs any prejudice to Defendants, particularly with appropriate limiting instructions to
13 the jury. Defendants' Motion *in Limine* No. 1 is accordingly DENIED with respect to the
14 summary judgment order from the Georgia Action. Plaintiffs shall identify specific RICO
15 predicate acts to which the order is relevant. Defendants shall prepare appropriate limiting
16 instructions so that the jury understands that the order is not being used to prove liability in this
17 case *per se*, but that it is only being used as a defense to the good faith and fair dealing claim and
18 as evidence of motive for the Hunt transaction and other RICO predicate acts.

19 At the pretrial conference, the parties further disputed the admissibility of a discovery
20 sanctions order imposed against Defendants by the Georgia court; a subject that neither party
21 briefed, nor did any party provide a copy of the disputed order. Based on the parties'
22 representations on the record, there appears to have been a December 12, 2012 consent order by
23 which Defendants agreed to produce the insurance-related documents, followed by a later
24 sanctions order. The Court finds the December 12, 2012 consent order relevant and probative of
25 the timing of Plaintiffs' knowledge of the alleged MIP fraud, which rebuts Defendants' statute of
26 limitations defense. The later order imposing monetary sanctions must be excluded because the
27 unfair prejudice to Defendants outweighs its probative value. Fed. R. Evid. 403. Accordingly,
28 Defendants' Motion *in Limine* No. 1 is DENIED with respect to the Georgia court's December 12,

1 2012 consent order regarding production of documents. Defendants shall prepare an appropriate
2 limiting instruction that the jury should consider the order only in connection with Defendants’
3 statute of limitations defense and Plaintiffs’ rebuttal to that defense. Counsel for individual
4 defendants Stanley Harrelson and John Goodman may also prepare a limiting instruction that the
5 order shall not be considered to implicate the individual defendants in any wrongful concealment.

6 Finally, Plaintiffs contend—and the Court agrees—that the Hudspeth plea is relevant to
7 Plaintiffs’ RICO claim and is admissible under Federal Rule of Evidence 803(22). The Court
8 finds that the plea is probative of Plaintiffs’ RICO claim and may be admitted with a limiting
9 instruction that the jury may only consider it as evidence of a pattern of racketeering activity in
10 connection with Plaintiffs’ RICO claim. Defendants’ Motion *in Limine* No. 1 is therefore
11 DENIED with respect to the Hudspeth plea and Defendants shall draft an appropriate limiting
12 instruction.

13 **2. Defendants’ Motion *in Limine* No. 2 to “Exclude Evidence of Alleged Misconduct**
14 **at Fort Benning or Fort Belvoir.” DENIED.**

15 Defendants seek to exclude evidence relating to the alleged misconduct by Defendants’
16 East Coast affiliates at Fort Benning or Fort Belvoir, which is the basis of the parties’ lawsuit in
17 Georgia. Defendants contend that the evidence of misconduct at those other projects is irrelevant,
18 highly prejudicial, confusing, and invites the jury to infer that Defendants acted in conformity
19 therewith at the Monterey and Irwin projects. Defs.’ MIL #2, ECF 267. Plaintiffs counter that
20 this evidence is probative and relevant to the enterprise and pattern of racketeering activity
21 elements of their RICO claims. Pls.’ Opp. #2, ECF 306. The Court agrees with Plaintiffs and
22 further finds that the misconduct at Fort Benning and Fort Belvoir is not precluded by Federal
23 Rule of Evidence 404(b). In any case, any undue prejudice to Defendants can be mitigated by
24 limiting the purposes for which this evidence may be used and by requiring a limiting instruction.
25 Defendants’ Motion *in Limine* No. 2 is therefore DENIED with the caveat that evidence of the
26 misconduct at Fort Benning and Fort Belvoir may only be used to prove Plaintiffs’ RICO claim.
27 Defendants shall prepare an appropriate limiting instruction to that effect.

28

1 **3. Defendants’ Motion *in Limine* No. 3 to “Exclude Evidence that the Army**
2 **Supports Plaintiffs’ Case.” GRANTED IN PART and DENIED IN PART.**

3 Defendants in their third motion *in limine* seek to exclude any reference to the Army’s
4 support of Plaintiffs’ case or the removal of AMSC from its position as property manager for the
5 Monterey and Irwin projects. Defendants also request that no uniformed Army personnel be
6 allowed to sit at counsel table or introduced to the jury. Defs.’ MIL #3, ECF 270.

7 Plaintiffs indicate that they do not intend to have any uniformed officials seated at counsel
8 table, nor do they presently intend to call any witnesses who will be wearing a uniform. Pls.’ Opp.
9 #3 at 4 n.2, ECF 307. The Court accordingly GRANTS this portion of Defendants’ motion.

10 As to references to the Army’s support, Plaintiffs assert that such evidence is relevant to
11 rebut Defendants’ assertions of bad faith and to provide context for Stanley Harrelson’s statement
12 to the Army that “there would be ‘nothing left to collect’ at the end of the litigation” which, in
13 turn, is relevant to Plaintiffs’ allegation of fraudulent transfer as a predicate RICO act. *Id.* at 2-4.
14 The Court, however, finds that the imprimatur of Army “approval” or “support” on this litigation
15 is not probative of any of Plaintiffs’ claims and is so highly prejudicial that it must be excluded
16 from Plaintiffs’ case in chief. With that said, the requirement for Army consent to certain actions
17 may be introduced to establish background context for certain evidence and is certainly relevant to
18 rebut Defendants’ claims for breach of the covenant of good faith and fair dealing. As such,
19 Defendants’ Motion *in Limine* No. 3 is GRANTED with respect to reference to the Army’s
20 support of this litigation in Plaintiffs’ case in chief but DENIED with respect to Plaintiffs’ use of
21 this evidence in rebuttal to Defendants’ bad faith claim. To a very limited extent, Plaintiffs’
22 witness Joseph F. Calcara may describe the context in which Mr. Harrelson made the alleged
23 “nothing left to collect” statement to him but may not testify to the Army’s approval of Plaintiffs’
24 actions in general in Plaintiffs’ case in chief. Plaintiffs shall moreover have leave to revisit this
25 ruling on rebuttal should Defendants attempt to make an emotional appeal to the jury regarding the
26 impact of the litigation on soldiers and residents at the projects.

1 **4. Defendants’ Motion *in Limine* No. 4 to “Exclude Argument of Purported**
2 **Spoliation.” DENIED IN PART and DEFERRED IN PART.**

3 Defendants move to exclude any reference or argument that they spoliated or destroyed
4 hard copy work orders with fraudulent intent at the Monterey and Irwin projects on the ground
5 that there has been no proof of spoliation and that references to such alleged spoliation would be
6 unfairly prejudicial. Defs.’ MIL #4, ECF 272. Defendants’ motion, once unpacked, addresses
7 three distinct but related issues: (1) whether Plaintiffs should be permitted to introduce evidence
8 that there are missing hard copy work orders; (2) whether Plaintiffs may argue that the missing
9 hard copies evince Defendants’ intent to defraud; and (3) whether the destruction of the hard copy
10 work orders constitutes spoliation sufficient to warrant an adverse inference instruction. As to the
11 first two issues, the Court agrees with Plaintiffs that evidence that Defendants turned off controls
12 in the Yardi system and destroyed hard copy work orders is relevant to Defendants’ intent to
13 defraud and may be presented and argued to the jury. *See* Pls.’ Opp. #4 at 1-3, ECF 316. The
14 Court therefore DENIES Defendants’ motion insofar as it seeks to exclude evidence of missing
15 hard copy work orders. As to whether the term “spoliation” (and all of its connotations) can be
16 attached to the work order destruction, the Court DEFERS ruling on the propriety of a spoliation
17 or adverse inference instruction because there is no evidence before the Court on which to base
18 such a determination. *See id.* at 4-5. In the meantime, the parties may not use the term
19 “spoliation” in connection with the missing hard copy work orders.

20 **5. Defendants’ Motion *in Limine* No. 5 to “Bar Argument that Residents’ Lives**
21 **Were Put in Danger.” GRANTED.**

22 Defendants seek to bar argument that the alleged work order manipulation at the Monterey
23 and Irwin projects endangered resident lives. Defs.’ MIL #5, ECF 273. The Court finds that
24 characterizations that the work order data manipulation at these projects created life-threatening
25 conditions or anything similar are potentially misleading and likely to lack foundation and
26 therefore lack any probative value in contrast to the high likelihood that such characterizations
27 would enflame the passions of the jury and unfairly prejudice Defendants. Thus, on balance, such
28 arguments must be excluded. Fed. R. Evid. 403. Plaintiffs may, however, provide factual

1 evidence allowing the jury to understand the nature of the affected work orders and the
2 designations/categorizations attached to those work orders, such as whether they are urgent or
3 emergencies. With that proviso, Defendants' Motion *in Limine* No. 5 is GRANTED.

4 **6. Defendants' Motion *in Limine* No. 6 to "Exclude Evidence of Alleged Work Order
5 Misconduct Outside the Relevant Time Period." DENIED.**

6 Defendants seek in their sixth motion *in limine* to exclude evidence concerning alleged
7 work order misconduct after 2008 at the Irwin project and after 2010 at the Monterey project on
8 the ground that work order data manipulation is irrelevant past those dates because the Irwin and
9 Monterey PMAs were respectively amended in 2008 and 2010 to remove work order data as a
10 metric for AMSC's incentive fees. Defs.' MIL #6, ECF 274. Plaintiffs dispute the assertion that
11 work order performance became completely irrelevant to AMSC's incentive payments after the
12 amendments to the PMAs and also contend that Defendants' continued manipulation of work
13 order data evinces intent to defraud and to conceal past fraud. Pls.' Opp. #6, ECF 322. The Court
14 agrees with Plaintiffs and accordingly DENIES Defendants' Motion *in Limine* No. 6.

15 **7. Defendants' Motion *in Limine* No. 7 to "Exclude Reference to Cash Deposits in
16 Bank Accounts of AMS Employees and Vendor Donations to Extravaganza." GRANTED.**

17 Based on the Court's ruling on summary judgment, Defendants' Motion *in Limine* No. 7 is
18 GRANTED. *See* SJ Order 40-42, 43-44.

19 **8. Defendants' Motion *in Limine* No. 8 to "Exclude Improper Opinion Testimony
20 From Lay Witnesses." GRANTED IN PART and DENIED IN PART.**

21 Defendants seek to exclude five categories of lay opinions that Plaintiffs have elicited from
22 witnesses: (1) Jennifer Fraser's opinion regarding overcharges by vendor Mainscape; (2) Jodi
23 George's opinion that the pricing of vendors Five Star and Mainscape "seemed high"; (3) Joanne
24 Garrett's opinion that the historical allocation model for the MIP was not fair; (4) Joanne Garrett's
25 opinion that Lockton (Defendants' insurance broker) was being overcompensated; and (5) Melissa
26 Meyer's opinion that she was instructed by upper management to falsify work order data and that
27 she knew the data was being falsified. Defs.' MIL #8, ECF 276. Defendants withdrew their
28 objections to Joanne Garrett's two opinions and Melissa Meyer's opinion on the record and

1 Defendants' motion on those opinions is DENIED accordingly. In light of the Court's ruling on
2 summary judgment, the Court GRANTS the remainder of Defendants' Motion *in Limine* No. 8
3 with respect to Jennifer Fraser's and Jodi George's opinions regarding vendor relationships. *See*
4 SJ Order 40-42, 43-44.

5 **9. Defendants' Motion *in Limine* No. 9 to "Exclude Any Reference, Evidence, or**
6 **Testimony Concerning Prior Misconduct of David Krull." GRANTED IN PART**
7 **and DENIED IN PART.**

8 Defendants seek to exclude reference to prior misconduct by former AMS employee David
9 Krull, who was fired in 2008 for setting up a fictitious vendor account and diverting AMS vendor
10 payments to himself. The specific instances of prior misconduct include this fictitious vendor
11 account and a 2004 charge of sexual harassment. Defs.' MIL #9, ECF 277. Plaintiffs indicated
12 that they do not presently plan to introduce evidence of the sexual harassment allegation. Pls.'
13 Opp. #9 at 1 n.1, ECF 332. In any case, the Court finds that that incident lacks probative value
14 and is unfairly prejudicial to Defendants. Defendants' Motion *in Limine* No. 9 to exclude
15 evidence of the 2004 sexual harassment allegation against Mr. Krull is therefore GRANTED.

16 With regard to evidence of Mr. Krull's embezzlement from AMS, Defendants
17 acknowledge that such evidence has direct bearing on Mr. Krull's character for truthfulness and
18 modified their motion at the pretrial conference to seek exclusion only of extrinsic evidence of
19 prior misconduct. This motion would therefore pertain only to an affidavit and confidential
20 agreement that Mr. Krull signed in June 2008 admitting to his misconduct and agreeing to repay
21 the funds to AMS. Plaintiffs aver that the confidential agreement also contains provisions that are
22 relevant to Mr. Krull's credibility as a witness, as well as to the alleged MIP fraud. *See generally*
23 Pls.' Opp. #9. On inspection of the agreement, the Court agrees. Defendants' Motion *in Limine*
24 No. 9 is therefore DENIED with respect to evidence concerning Mr. Krull's prior embezzlement,
25 including the confidential agreement that he signed in 2008.

26 **10. Defendants' Motion *in Limine* No. 10 to "Strike Improperly Added Breach of**
27 **Contract Claim and to Exclude Any Evidence Related Thereto." DENIED as**
28 **moot.**

All parties apparently agree that Plaintiffs have not alleged a breach of contract claim in
connection with the PMAs. As such, this motion is DENIED as moot. As the Court stated on the

1 record, evidence of the Hunt transaction is to be introduced only in connection with Plaintiffs’
2 RICO claims and Defendants are free to object if the testimony elicited at trial appears to be going
3 in another direction.

4 **11. Defendants’ Motion *in Limine* No. 11 to “Exclude Reference to or Evidence of**
5 **‘Ghost Letter’ and AMS October 2002 Response.” GRANTED IN PART and**
6 **DENIED IN PART.**

7 All parties agreed on the record at the pretrial conference that the so-called “ghost letter,”
8 an anonymous letter written in 2002 by a purported AMS employee, should be excluded as
9 inadmissible hearsay. They likewise agreed that AMS’s October 2002 response to the ghost letter
10 is relevant and admissible. Accordingly, Defendants’ Motion *in Limine* No. 11 is GRANTED
11 with respect to the ghost letter and DENIED with respect to AMS’s response.

12 **12. Defendants’ Motion *in Limine* No. 12 to “Exclude the 3/9/2005 Robert Trompeter**
13 **Memo and His Testimony About the Memo.” DENIED.**

14 In light of Defendants’ acknowledgment on the record that the subject of this motion is
15 better handled on cross-examination, the Court DENIES Defendants’ Motion *in Limine* No. 12.

16 **13. Defendants’ Motion *in Limine* No. 13 to “Exclude Improper Character Evidence**
17 **Attacking AMS’s Site Manager Rick Wimer.” GRANTED.**

18 In light of the Court’s ruling on summary judgment, *see* SJ Order 40-42, 43-44, Plaintiffs
19 have withdrawn their opposition to this motion. Defendants’ Motion *in Limine* No. 13 is
20 accordingly GRANTED.

21 **14. Defendants’ Motion *in Limine* No. 14 to “Exclude Evidence Attacking Character**
22 **of AMS Managers at Monterey.” GRANTED IN PART and DENIED IN PART.**

23 Defendants in their fourteenth motion *in limine* seek to exclude evidence and argument
24 concerning (1) emails and related deposition testimony regarding banter that AMS Investment
25 Manager Shawn Somerville engaged in with other employees including Community Director
26 Stacia Schuster; and (2) an August 11, 2010 anonymous letter to Clark Realty alleging that the
27 AMS management staff at Monterey engaged in “sex parties” and other improper behavior. Defs.’
28 MIL #14, ECF 282. Plaintiffs indicated both in their papers and on the record that they do not
intend to introduce the 2010 letter or emails including Michelle Calloway into evidence. Pls.’

1 Opp. #14 at 4 n.1, ECF 313. Plaintiffs contend, however, that the emails between Mr. Somerville
2 and Ms. Schuster evidence a close personal relationship that is relevant to their credibility and
3 possible motive to exonerate one another of wrongdoing. *Id.* at 2-3. The Court finds that Mr.
4 Somerville’s and Ms. Schuster’s relationship is probative of their credibility and of the alleged
5 conspiracy to defraud Plaintiffs, but that the emails documenting this relationship are highly likely
6 to enflame the passions of the jury and unfairly prejudice Defendants. Plaintiffs may accordingly
7 question Mr. Somerville and Ms. Schuster regarding their relationship and emails but may not
8 introduce the emails into evidence unless they become necessary for impeachment purposes.
9 Defendants’ Motion *in Limine* No. 14 is accordingly GRANTED as to all of the evidence that
10 Defendants seek to exclude. To the extent the motion was intended to preclude any reference,
11 argument, or questioning concerning Mr. Somerville’s and Ms. Schuster’s relationship, that aspect
12 of the motion is DENIED.

13 **15. Defendants’ Motion *in Limine* No. 15 to “Exclude Evidence of Personal Finances**
14 **of Goodman and Harrelson.” DENIED as moot.**

15 The parties have agreed that Plaintiffs may introduce evidence of the individual
16 defendants’ net worth and relevant assets (namely, real estate assets). Plaintiffs have agreed that
17 they will not refer to “lifestyle” or personal assets (such as cars, yachts, vacations, etc.) that might
18 be owned by the individual defendants. With that agreement, the individual defendants have
19 withdrawn their Motion *in Limine* No. 15, including the request to bifurcate, and the Court
20 accordingly DENIES the motion as moot.

21 **16. Defendants’ Motion *in Limine* No. 16 to “Exclude Evidence Pertaining to**
22 **Pinnacle’s Interactions with Other Clients.” DENIED.**

23 Defendants seek to exclude evidence that in 2010-2011, two of its other clients—
24 PERSI/CS Capital and Hunt—accused AMS of not disclosing the existence of a risk management
25 fee paid to AMS in the course of administering the MIP. Defendants primarily object to the
26 evidence on the ground that its probative value is outweighed by the risk of delay, confusion, and
27 unfair prejudice, though Defendants also suggest that the evidence is also improper under Federal
28 Rule of Evidence 404(b). Defs.’ MIL #16, ECF 284. The Court agrees with Plaintiffs that this

1 evidence of other allegations of hidden fees in connection with the MIP is highly probative of a
2 pattern of racketeering activity in connection with Plaintiffs' RICO claim and is not precluded by
3 Rule 404(b). Any prejudice to Defendants may be mitigated by a limiting instruction and does not
4 overwhelm the probative value of the evidence. Fed. R. Evid. 403. Defendants' Motion *in Limine*
5 No. 16 is therefore DENIED. Defendants may prepare an appropriate limiting instruction if they
6 find it necessary.

7 **17. Defendants' Motion *in Limine* No. 17 to "Exclude Evidence of 2014 Hunt**
8 **Transaction." DENIED.**

9 This motion is largely moot in light of the Court's ruling on summary judgment. SJ Order
10 at 47-50. As will be discussed in connection with Defendants' Motion *in Limine* No. 20,
11 Plaintiffs' expert Louis Dudney will testify to actual fraudulent intent—not constructive fraud—in
12 connection with the Hunt transaction, which is alleged to be a predicate act fraudulent transfer in
13 furtherance of Defendants' racketeering enterprise. On the record, Plaintiffs confirmed that Mr.
14 Dudney will not testify that the \$30 million price of the Hunt transaction was not enough for the
15 transferred assets, only that the manner in which the \$30 million was paid did not amount to fair
16 value. With that understanding, Defendants' Motion *in Limine* No. 17 is DENIED.

17 **18. Defendants' Motion *in Limine* No. 18 to "Exclude Portions of Plaintiffs' Expert**
18 **Louis Dudney's Testimony on Work Orders." DENIED as moot.**

19 In light of Defendants' acknowledgment that they withdraw this motion and will address
20 their objections to Mr. Dudney's testimony concerning work orders on cross examination,
21 Defendants' Motion *in Limine* No. 18 is DENIED as moot.

22 **19. Defendants' Motion *in Limine* No. 19 to "Exclude Plaintiffs' Expert Louis**
23 **Dudney's Testimony on Vendors." GRANTED.**

24 In light of the Court's ruling on summary judgment, *see* SJ Order 40-42, 43-44,
25 Defendants' Motion *in Limine* No. 19 is GRANTED. Plaintiffs shall have leave, on rebuttal, to
26 revisit this ruling with respect to Mr. Dudney's opinion regarding vendor cost savings should
27 Defendants open the door by introducing evidence of the investment value of the PMAs or the
28 tremendous cost of this litigation to suggest Plaintiffs' bad faith or motive.

1 **20. Defendants’ Motion *in Limine* No. 20 to “Exclude Plaintiffs’ Expert Louis**
2 **Dudney’s Testimony on Fraudulent Transfer.” DENIED.**

3 Defendants seek to exclude Mr. Dudney, Plaintiffs’ designated expert, from testifying
4 concerning the 2014 Hunt transaction, which Plaintiffs allege to be fraudulent transfer.
5 Defendants’ objection to Mr. Dudney’s testimony is twofold: first, that he offers opinions on
6 theory of constructive fraud that is incongruous with Plaintiffs’ allegations and therefore
7 substantively irrelevant and second, that his methodology in assessing AMS’s insolvency after the
8 transaction is unsound. Defs.’ MIL #20, ECF 294. The first of these challenges is moot because
9 Plaintiffs have clarified that Mr. Dudney will only opine regarding actual fraudulent intent and
10 have assured the Court that they will not elicit testimony from him regarding constructive
11 fraudulent transfer. *See* Pls.’ Opp. #20 at 2-3, ECF 325. To the extent insolvency is a badge of
12 fraud probative of fraudulent intent, the Court will permit Mr. Dudney to testify concerning that
13 subject. As to Defendants’ objections to Mr. Dudney’s methodology, the Court finds his cash
14 flow and balance sheet analysis sufficiently reliable to reach the jury and that Defendants’
15 arguments go to the weight of the evidence and are better addressed on cross-examination.
16 Finally, as already noted, Mr. Dudney will not offer an opinion that \$30 million is not fair value
17 for the assets involved in the Hunt transaction, only that the actual manner of payment was not fair
18 value. As such, Defendants’ Motion *in Limine* No. 20 is DENIED.

19 **21. Defendants’ Motion *in Limine* No. 21 to “Exclude Expert Opinions and Testimony**
20 **from Nancy P. Watkins.” DENIED.**

21 Defendants seek to exclude the opinion and testimony of Plaintiffs’ expert witness Nancy
22 P. Watkins, who has been designated to testify concerning the annual allocation of costs in
23 Defendants’ MIP and to offer the opinion that the allocation was not fair and equitable.
24 Defendants contend that Ms. Watkins’s testimony is not relevant because her analysis begins with
25 the assumption that the MIP allocation is “like rate-making” and therefore warrants an actuarial
26 model, which she then developed to approximate the actual allocation that took place. Defendant
27 further challenges the reliability of Ms. Watkins’s model and the information and assumptions that
28 she relied upon in her analysis. Defs.’ MIL #21, ECF 286.

1 Fundamentally, however, this comes down to a question of relevance. It is undisputed that
2 Defendants and Lockton did not use an actuarial analysis in their allocation of the MIP costs. It is
3 not apparent, however, that Ms. Watkins will testify that Lockton *should* have used an actuarial
4 analysis. Rather, as Plaintiffs argue, she conducted an independent allocation analysis using well-
5 known standards (here, actuarial methods) to compare to the allocation that Lockton actually made
6 to offer her opinion regarding whether the actual allocation was fair. *See* Pls.’ Opp. #21 at 1-3,
7 ECF 328. Such testimony is relevant and proper to the jury’s understanding of the alleged MIP
8 fraud and Defendants’ alleged breach of fiduciary duty. Ms. Watkins is moreover an experienced
9 insurance actuary with thirty years of relevant experience and is qualified to opine regarding the
10 highly relevant issue of the fairness of Lockton’s allocation of MIP costs. To the extent
11 Defendants differ with Ms. Watkins conclusion, that is a subject more appropriately left for cross-
12 examination and rebuttal experts. Defendants’ Motion *in Limine* No. 21 is therefore DENIED.

13 **22. Defendants’ Motion *in Limine* No. 22 to “Exclude Excerpts of Robertson Expert**
14 **Reports and Preclude Testimony Regarding Same.” GRANTED.**

15 Defendants seek to exclude portions of the report and testimony of Plaintiffs’ expert
16 witness James A. Robertson, who is designated to opine regarding the custom and practices and
17 standard of care in the insurance industry. Mr. Robertson is unquestionably qualified, but
18 Defendants argue (and the Court agrees) that his report is rife with impermissible opinions
19 wherein he vouches for Plaintiffs’ version of the facts, concludes the applicable law and the proper
20 application of that law, infers the mental states of individual actors, and opines on ultimate issues
21 reserved for the factfinder. *See* Defs.’ MIL #22, ECF 288. Plaintiffs acknowledge these
22 shortcomings in Mr. Robertson’s report and have assured the Court that he will testify only to
23 matters within the province of an expert witness and that they will not elicit testimony concerning
24 individual actors’ mental states from Mr. Robertson. As such, the Court GRANTS Defendants’
25 Motion *in Limine* No. 22 with respect to the objectionable opinions in Mr. Robertson’s report in
26 the form that they are written. Mr. Robertson will be allowed to testify concerning the custom and
27 practice in the insurance industry and, upon a proper factual foundation and in the proper form, his
28 opinion concerning Defendants’ observance of the standard of care in the industry. Mr. Robertson

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may not testify to matters or offer opinions that are not in his report.

IV. LIMITING INSTRUCTIONS

Where the Court has ordered a party to prepare a limiting instruction in connection with the rulings above, that party shall submit the proposed instruction to the Court no later than **one trial day** before the evidence to which the instruction pertains is to be offered at trial. The parties are encouraged to meet and confer ahead of time to arrive at an agreement on the wording of the instruction. During trial, the party proposing the limiting instruction shall inform the Court when the instruction is to be read.

IT IS SO ORDERED.

Dated: July 30, 2015


BETH LABSON FREEMAN
United States District Judge