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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

CHARLES MATTHEW ERHART,
Plaintiff,

v.

BOFI HOLDING, INC.,
Defendant.

Case No. 15-cv-02287-BAS-NLS
consolidated with
15-cv-02353-BAS-NLS

**ORDER GRANTING IN PART
AND DENYING IN PART
CHARLES ERHART’S
MOTION TO EXCLUDE
EXPERT TESTIMONY
(ECF No. 128)**

And Consolidated Case

Presently before the Court is Charles Erhart’s motion to exclude the opinions of two experts that BofI Federal Bank plans to call at trial. (ECF No. 128.) BofI opposes. (ECF No. 152.) The Court finds this motion suitable for determination on the papers submitted and without oral argument. *See* Fed. R. Civ. P. 78(b); Civ. L.R.

1 7.1(d). For the following reasons, the Court **GRANTS IN PART** and **DENIES IN**
2 **PART** Erhart’s motion.

3 **BACKGROUND**

4 The Court and the parties are well versed in the background of these
5 consolidated actions. The Court incorporates its summary of the parties’ evidence
6 and their remaining claims from the Court’s order resolving the cross-motions for
7 summary judgment (“Summary Judgment Order”). (*See* ECF No. 192.) The Court
8 further provides below a snapshot of the parties’ claims and additional background
9 regarding the two proposed experts.

10 Charles Erhart was an internal auditor for BofI Federal Bank.¹ After Erhart
11 discovered conduct he believed to be wrongful, he reported it to BofI’s principal
12 regulator. BofI responded by allegedly defaming and terminating him. Erhart then
13 brought federal and state whistleblower retaliation claims against the Bank. At the
14 heart of Erhart’s federal claims is whether he reasonably believed the conduct he was
15 reporting violated certain enumerated laws. His state law retaliation claims are
16 broader; they hinge on whether Erhart disclosed a reasonable belief of a violation of
17 *any* law. For the reasons explained in the Summary Judgment Order, there are triable
18 issues on all of Erhart’s whistleblower retaliation claims.

19 To confront these claims, BofI has designated a retained expert, Guido van
20 Drunen, as its “Internal Audit Expert.” (Rule 26 Expert Disclosure (Nov. 26, 2018),
21 ECF No. 188-1.) Van Drunen is expected to offer various opinions at trial, including
22 his opinion that Erhart’s allegations of wrongdoing “are not supported with
23 information and/or evidence.” (*Id.* Ex. A.) Erhart moves to exclude all of van
24 Drunen’s testimony, arguing he is unqualified to render these opinions. (Mot. 14:8–
25 16:4.) Erhart also claims van Drunen’s opinions are improper because they
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28 ¹ The Court uses “BofI” and “the Bank” to refer to either BofI Holding or BofI Federal Bank. (*See* Summary Judgment Order 2 n.1.)

1 impermissibly invade the province of the jury, contain disguised legal conclusions,
2 and speculate about Erhart’s motivations. (*Id.* 8:6–21:17.)

3 In addition, after Erhart sued the Bank, it filed a countersuit against him, which
4 the Court has consolidated with Erhart’s action. The Bank’s countersuit portrays
5 Erhart as an internal auditor gone rogue—a loose cannon who recklessly handled
6 confidential information and conducted unauthorized investigations. Boff claims it
7 suffered harm when Erhart took confidential information outside the Bank’s
8 controlled systems, disclosed confidential information to third parties, and deleted
9 data from a Bank-owned computer. The Court similarly determined there are triable
10 issues on the Bank’s lone federal claim and all but one of its barrage of state law
11 claims.

12 To support these claims, the Bank has disclosed that its Chief Financial Officer
13 (“CFO”), Andrew Micheletti, is expected to testify as an expert at trial. (Rule 26
14 Expert Disclosure (Nov. 5, 2018), ECF No. 135-2.) The proposed expert testimony
15 will involve the damages the Bank has purportedly suffered due to Erhart’s conduct.
16 (*Id.*) Erhart moves to exclude this testimony, arguing it is not expert testimony,
17 Micheletti is not qualified to testify as an expert, and his damage assessments are
18 improper. (Mot. 17:22–19:9.)

19 ANALYSIS

20 Both of Erhart’s challenges involve the requirements for expert opinion
21 testimony under Federal Rule of Evidence 702. However, in resolving his challenge
22 to Micheletti’s testimony on damages, the Court reasons that some of the proposed
23 testimony may be admitted as lay witness opinion testimony under Rule 701. Hence,
24 the Court reviews the two types of opinion testimony before assessing Boff’s
25 proposed experts.

1 **I. Opinion Testimony**

2 **A. Lay Witnesses**

3 The Federal Rules of Evidence differentiate between opinion testimony
4 provided by lay and expert witnesses. Fed. R. Evid. 701, 702. Under Rule 701, a lay
5 witness may provide opinion testimony if it is: “(a) rationally based on the witness’s
6 perception; (b) helpful to clearly understanding the witness’s testimony or to
7 determining a fact in issue; and (c) not based on scientific, technical, or other
8 specialized knowledge within the scope of Rule 702.” *Id.* 701.

9 “Rule 701(a) contains a personal knowledge requirement.” *United States v.*
10 *Lopez*, 762 F.3d 852, 864 (9th Cir. 2014); *see also* Fed. R. Evid. 602 (noting that
11 except for expert testimony under Rule 703, “[a] witness may testify to a matter only
12 if evidence is introduced sufficient to support a finding that the witness has personal
13 knowledge of the matter”). “In presenting lay opinions, the personal knowledge
14 requirement may be met if the witness can demonstrate firsthand knowledge or
15 observation.” *Lopez*, 762 F.3d at 864. “A lay witness’s opinion testimony
16 necessarily draws on the witness’s own understanding, including a wealth of personal
17 information, experience, and education, that cannot be placed before the jury.”
18 *United States v. Gadson*, 763 F.3d 1189, 1209 (9th Cir. 2014). “But a lay opinion
19 witness ‘may not testify based on speculation, rely on hearsay or interpret
20 unambiguous, clear statements.’” *United States v. Lloyd*, 807 F.3d 1128, 1154 (9th
21 Cir. 2015) (quoting *United States v. Vera*, 770 F.3d 1232, 1242 (9th Cir. 2014)).

22 **B. Expert Witnesses**

23 Whereas Rule 701 governs lay opinion testimony, Rule 702 covers expert
24 opinion testimony. Fed. R. Evid. 702. This rule establishes several requirements for
25 this testimony: (1) the witness must be sufficiently qualified as an expert by
26 knowledge, skill, experience, training, or education; (2) the scientific, technical, or
27 other specialized knowledge must “assist the trier of fact” either “to understand the
28 evidence” or “to determine a fact in issue”; (3) the testimony must be “based on

1 sufficient facts and data”; (4) the testimony must be “the product of reliable principles
2 and methods”; and (5) the expert must reliably apply the principles and methods to
3 the facts of the case. *Id.*

4 Under *Daubert* and its progeny, the trial court is tasked with assuring that
5 expert testimony “both rests on a reliable foundation and is relevant to the task at
6 hand.” *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993). “Expert
7 opinion testimony is relevant if the knowledge underlying it has a valid connection
8 to the pertinent inquiry. And it is reliable if the knowledge underlying it has a reliable
9 basis in the knowledge and experience of the relevant discipline.” *Primiano v. Cook*,
10 598 F.3d 558, 565 (9th Cir. 2010). Shaky but admissible evidence is to be attacked
11 by cross-examination, contrary evidence, and careful instruction on the burden of
12 proof, not exclusion. *Daubert*, 509 U.S. at 596. The court is “to screen the jury from
13 unreliable nonsense opinions, but not exclude opinions merely because they are
14 impeachable.” *Alaska Rent-A-Car, Inc. v. Avis Budget Grp., Inc.*, 738 F.3d 960, 969
15 (9th Cir. 2013). In its role as gatekeeper, the court “is not tasked with deciding
16 whether the expert is right or wrong, just whether his [or her] testimony has substance
17 such that it would be helpful to a jury.” *Id.* at 969–70.

18 The tests for admissibility in general, and reliability in particular, are flexible.
19 *Primiano*, 598 F.3d at 564. The court “has discretion to decide how to test an expert’s
20 reliability as well as whether the testimony is reliable, based on the particular
21 circumstances of the particular case.” *Id.* (quoting *Kumho Tire Co. v. Carmichael*,
22 526 U.S. 137, 150 (1999)). “[T]he test under *Daubert* is not the correctness of the
23 expert’s conclusions but the soundness of [the expert’s] methodology.” *Daubert v.*
24 *Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1318 (9th Cir. 1995). Once the
25 threshold established by Rule 702 is met, the expert may testify and the fact finder
26 decides how much weight to give that testimony. *Primiano*, 598 F.3d at 565.

27 Further, Rule 703 “relaxes, for experts, the requirement that witnesses have
28 personal knowledge of the matter to which they testify.” *Claar v. Burlington N. R.*

1 Co., 29 F.3d 499, 501 (9th Cir. 1994). Experts may offer opinions based on otherwise
2 inadmissible testimonial hearsay if “experts in the particular field would reasonably
3 rely on those kinds of facts or data in forming an opinion on the subject,” Fed. R.
4 Evid. 703, and if they are “applying [their] training and experience to the sources
5 before [them] and reaching an independent judgment,” as opposed to “merely acting
6 as a transmitter for testimonial hearsay,” *United States v. Gomez*, 725 F.3d 1121,
7 1129 (9th Cir. 2013) (quoting *United States v. Johnson*, 587 F.3d 625, 635 (4th Cir.
8 2009)).

9 **II. The Proposed Damages Expert—Micheletti**

10 The Court first considers Erhart’s challenge to BofI’s non-retained expert CFO
11 Micheletti. BofI discloses that Micheletti “is expected to present evidence under
12 Federal Rules of Evidence 702, 703, or 705” on the subject matter of “BofI’s
13 damages.” (Rule 26 Expert Disclosure (Nov. 5, 2018) 1:26–2:1.) There are two parts
14 to this testimony.

15 BofI’s Expenses and Costs. First, Micheletti seeks to testify regarding the
16 economic injury BofI suffered “in the form of expenses and costs that BofI incurred
17 in responding to, investigating, and assessing” Erhart’s alleged removal and deletion
18 of confidential information. (Rule 26 Expert Disclosure (Nov. 5, 2018) 2:3–6; *see*
19 *also* Micheletti Dep. 70:20–71:21, ECF No. 135-4.) BofI identifies two types of costs
20 that Micheletti will discuss. (Rule 26 Expert Disclosure (Nov. 5, 2018) 2:7–14.) The
21 first cost is the amount BofI paid to an outside firm for “digital forensic examination
22 and analysis” to help BofI assess and mitigate the harm purportedly caused by
23 Erhart’s conduct. (*Id.* 2:7–10; *see also* Micheletti Dep. 71:17–21.) The second cost
24 is the “internal labor” that BofI expended “in assessing and mitigating harm caused
25 by” the alleged misconduct. (Rule 26 Expert Disclosure (Nov. 5, 2018) 2:10–13; *see*
26 *also* Micheletti Dep. 71:10–16.)

27 In the Summary Judgment Order, the Court recognized that BofI may be able
28 to recover these costs as damages on its remaining claims. (*See* Summary Judgment

1 Order 74:7–28; 85:11–26; 87:1–11; 88:6–17.) For example, there is a triable issue
2 as to whether Erhart knowingly accessed and deleted data from one of Boff’s
3 computers outside the scope of his employment. (*Id.* 84:1–85:10.) A jury could
4 conclude Boff is entitled to recover the costs “reasonably and necessarily incurred by
5 [Boff] . . . to verify that . . . data was or was not altered, damaged, or deleted by the
6 access.” *See* Cal. Penal Code § 502(e)(1); *see also Copart, Inc. v. Sparta Consulting,*
7 *Inc.*, 277 F. Supp. 3d 1127, 1162 (E.D. Cal. 2017) (denying summary judgment
8 where company submitted evidence indicating it had spent over eighty hours
9 investigating the defendants’ unauthorized access to its computer systems).
10 Accordingly, Micheletti’s testimony is relevant to Boff’s claims.

11 That said, just because Micheletti’s testimony involves the subject of damages
12 does not mean it requires either expert or lay opinion testimony. For instance,
13 opinion testimony is unnecessary to prove that Boff paid an outside firm for digital
14 forensic services to investigate Erhart’s “data breach.” Micheletti is not providing
15 lay opinion testimony when reporting the amount the Bank paid for these services.
16 *See* Fed. R. Evid. 701. Nor is Micheletti relying on his “scientific, technical, or other
17 specialized knowledge” to do so. *See id.* 702. Boff can prove these damages through
18 other means, including a witness with personal knowledge of the expense or
19 appropriate documentary evidence.

20 Erhart argues Micheletti’s proposed testimony regarding the second cost Boff
21 identifies—its internal labor costs—similarly does not fall under Rule 702. Erhart
22 argues Rule 702 is inapplicable because Micheletti’s analysis is not “based on
23 scientific, technical, or other specialized knowledge.” (Mot. 19:2–6.) The Court
24 agrees. To summarize Boff’s labor costs, Micheletti claims he “obtained the hours
25 by day of specific individuals who worked in the process of mitigating and
26 determining the cause/and or magnitude of Mr. Erhart’s taking of confidential
27 information.” (Micheletti Dep. 71:11–16.) Micheletti provides a spreadsheet where
28 he tallies up the time allegedly spent on these tasks. (Summary of Personnel Costs,

1 BofI’s Opp’n Ex. G, ECF No. 152-8.) Micheletti then multiplies the employees’
2 respective costs by the time they spent and adds all the costs together—to reach a
3 sum of \$147,981.71 in internal labor costs. (*Id.*)

4 This summary of personnel costs does not fall under Rule 702. BofI argues
5 Micheletti’s “model” involves technical or specialized knowledge because the
6 “internal cost must itself be derived mathematically from other data” and requires
7 “familiarity with employee compensation data.” (Opp’n 20:2–5.) The Court is
8 unconvinced. BofI fails to demonstrate that Micheletti’s summary of its alleged
9 employee costs involves anything other than basic arithmetic. *Cf. LifeWise Master*
10 *Funding v. Telebank*, 374 F.3d 917, 929 (10th Cir. 2004) (noting “damages model”
11 involved “technical, specialized subjects” where model “concerned moving
12 averages, compounded growth rates, and S-curves”). There is no need to allow
13 Micheletti to come “before the jury cloaked with the mantle of an expert” to provide
14 this testimony under Rule 702. *See Jinro Am. Inc. v. Secure Investments, Inc.*, 266
15 F.3d 993, 1004 (9th Cir. 2001); *see also United States v. Freeman*, 498 F.3d 893, 903
16 (9th Cir. 2007) (noting that by qualifying a witness as an expert, the “witness attains
17 unmerited credibility when testifying about factual matters from first-hand
18 knowledge” (quoting *United States v. Dukagjini*, 326 F.3d 45, 53 (2d Cir. 2003))).

19 In the same vein, the Court finds it inappropriate to allow Micheletti to place
20 this evidence before the jury by taking advantage of Rule 703’s relaxed personal
21 knowledge and hearsay requirements. *See Fed. R. Evid. 703*; *see also Jinro Am. Inc.*,
22 266 F.3d at 1004 (noting that allowing a witness to come before a jury as an expert
23 is significant because it allows the witness “to testify based on hearsay information,
24 and to couch . . . observations as generalized ‘opinions’ rather than as firsthand
25 knowledge”). BofI can prove this component of its damages claim through other
26 evidence, including testimony by its employees, business records, and appropriate
27 lay witness opinion testimony. *See Allied Sys., Ltd. v. Teamsters Auto. Transp.*
28 *Chauffeurs, Local 604*, 304 F.3d 785, 790, 792 (8th Cir. 2002) (noting employee who

1 was internal accountant and vice-president of internal audit appropriately provided
2 lay opinion testimony regarding damages that was based on personal knowledge of
3 the company’s books and financial status); *but see United States v. Albertelli*, 687
4 F.3d 439, 447 (1st Cir. 2012) (highlighting the “danger” that lay witness opinion
5 testimony may allow “the witness [to] act as a summary witness without meeting the
6 usual requirements”). The Court will require, however, that any lay witness opinion
7 testimony not be based on mere speculation or inadmissible hearsay. *See Lloyd*, 807
8 F.3d at 1154.

9 Lost Profits. Aside from describing its costs, BofI proposes that Micheletti
10 provide expert testimony under Rule 702 regarding its lost profits. (Rule 26 Expert
11 Disclosure (Nov. 5, 2018) 2:15–22.) BofI claims it “suffered economic injury in the
12 form of [a] lost investment opportunity caused by the withdrawal and loss of
13 deposited funds . . . as a result of Erhart’s” alleged misconduct. (*Id.* 2:15–17.) BofI
14 claims it “earned less net interest income than it would have earned absent loss of the
15 deposit funds.” (*Id.* 2:20–21.) Specifically, Micheletti testified that “[t]he lifetime
16 history of” the type of account lost is “approximately four years,” and the “difference
17 between the four-year fixed rate” and the amount that would have been paid had BofI
18 retained the account “for that period was approximately \$1,022,000.” (Micheletti
19 Dep. 74:9–14.)

20 The Court did not address this component of BofI’s alleged damages in its
21 Summary Judgment Order. And there is an issue of fact as to whether these
22 “damages” were caused by Erhart’s protected whistleblower activity. If, however,
23 the Bank can demonstrate these damages are not speculative and flow from Erhart’s
24 purportedly wrongful conduct, then it may be able to recover its lost profits. (*See*
25 Summary Judgment Order 67:4–22; 74:7–28.)

26 Even though this evidence may be relevant, Erhart contends Micheletti’s
27 proposed testimony should be excluded because he “is not qualified as an expert”
28

1 under Rule 702. (Mot. 18:13.) Boff does not submit evidence to address this point.²
2 Erhart also argues Micheletti’s testimony is improper because it is based “on mere
3 hearsay and his own legal conclusions and interpretations of what he was told.” (*Id.*
4 18:14–16.)

5 The Court agrees that this testimony should not be admitted under Rule 702.
6 Beyond neglecting to provide the Court with Micheletti’s qualifications, Boff does
7 not give the Court sufficient information to assess the remaining considerations under
8 Rule 702. The Court thus will not permit Micheletti to testify as an expert under Rule
9 702. *See Daubert*, 509 U.S. at 593 n.10 (noting the proponent of the expert testimony
10 bears the burden to establish its admissibility).

11 That said, the Court recognizes that Micheletti may be able to testify regarding
12 the Bank’s lost profits under Rule 701 instead. “[T]here is an abundance of case law
13 where corporate employees are permitted to testify about damages or company
14 valuation without qualifying as an expert.” *Joshua David Mellberg LLC v. Will*, 386
15 F. Supp. 3d 1098, 1105 (D. Ariz. 2019); *see also* McCormick on Evidence § 10 (8th
16 ed. 2020) (collecting cases). As the advisory committee notes to Rule 701 recognize,
17 “most courts have permitted the owner or officer of a business to testify to the value
18 or projected profits of the business, without the necessity of qualifying the witness as
19 an accountant, appraiser, or similar expert.” Fed. R. Evid. 701 advisory committee’s
20 note to 2000 amendment. This opinion testimony is admitted “because of the
21 particularized knowledge that the witness has by virtue of his or her position in the
22 business.” *Id.*; *see In re Palmdale Hills Prop., LLC*, 577 B.R. 858, 868–69 (Bankr.
23 C.D. Cal. 2017) (reasoning business owner and manager could testify about lost
24

25 ² Although Erhart briefly argues Micheletti is not qualified to testify as an expert, the Bank
26 does not submit a declaration from Micheletti or otherwise demonstrate he is qualified under Rule
27 702. The Bank’s opposition mentions that Micheletti has “finance and accounting knowledge” and
28 that he “is qualified to give [his opinion],” but these statements are insufficient under Rule 702.
(*See* Opp’n 1:23–26; 20:21.) *See also Daubert*, 509 U.S. at 593 n.10 (requiring the proponent of
the expert testimony to establish its admissibility by a “preponderance of proof”). The Court
assumes that Boff’s CFO is an accomplished accountant and financier, but arguments of counsel
are simply not evidence. *See, e.g., Carrillo-Gonzalez v. I.N.S.*, 353 F.3d 1077, 1079 (9th Cir. 2003).

1 profits or damages); *Bright Harvest Sweet Potato Co. v. H.J. Heinz Co., L.P.*, No.
2 1:13-cv-296-BLW, 2015 WL 1020644, at *5–6 (D. Idaho Mar. 9, 2015) (permitting
3 president and CFO of company to “testify about lost profits to the extent that they
4 have personal and particularized knowledge of the facts that form their opinions”);
5 *see also, e.g., Miss. Chem. Corp. v. Dresser–Rand Co.*, 287 F.3d 359, 373 (5th Cir.
6 2002); *HM Compounding Servs., LLC v. Express Scripts, Inc.*, 349 F. Supp. 3d 781,
7 792 (E.D. Mo. 2018).

8 Moreover, the Court’s decision to funnel Micheletti’s testimony under Rule
9 701 addresses Erhart’s complaints about Micheletti grounding his opinion in
10 “unsubstantiated assumptions.” (Reply 5:20–21, ECF No. 159.) The Court will
11 require opinion testimony under Rule 701 to be based on “personal and particularized
12 knowledge of the facts” underlying any opinions. *See Bright Harvest Sweet Potato*
13 *Co.*, 2015 WL 1020644, at *6. Boff will also have to establish sufficient foundation
14 for any lost profits testimony, and this testimony must not be based on pure
15 speculation. *See Lloyd*, 807 F.3d at 1154; *see also Express Scripts*, 349 F. Supp. 3d
16 at 792 (“Personal knowledge acquired through review of records prepared in the
17 ordinary course of business, or perceptions based on industry experience, is a
18 sufficient foundation for such testimony.”).

19 In sum, the Court concludes allowing Boff’s CFO Micheletti to provide expert
20 testimony under Rule 702 is neither appropriate nor necessary. However, for the
21 reasons described above, the Court’s conclusion does not prevent the Bank from
22 seeking to prove its alleged damages through other evidence, including potentially
23 lay opinion testimony.

24 **III. The Proposed Internal Audit Expert—Van Drunen**

25 The Court next considers Erhart’s challenge to Guido van Drunen—Boff’s
26 retained internal audit expert. Van Drunen’s opinions and qualifications are set forth
27 in his amended expert report (ECF No. 188-1). Erhart raises an assortment of
28 challenges to van Drunen’s proposed testimony.

1 **A. Qualified as an Expert**

2 Preliminarily, Erhart argues van Drunen is not qualified to testify as an expert
3 on the subjects his opinions address. (Mot. 14:18–15:4.) As mentioned, a witness
4 who will offer expert opinion testimony must be “qualified as an expert by
5 knowledge, skill, experience, training, or education.” Fed. R. Evid. 702. This inquiry
6 depends on whether the witness has “expertise and experience” that “is relevant to
7 the issues on which” the witness will opine. *See Pyramid Techs., Inc. v. Hartford*
8 *Cas. Ins. Co.*, 752 F.3d 807, 814 (9th Cir. 2014). For example, an accountant was
9 not qualified to testify as an appraisal expert where he testified “that he had no
10 appraisal experience and had never conducted a discounted cash flow analysis of real
11 estate” and “did not develop the numbers he used in his analysis.” *United States v.*
12 *99.66 Acres of Land*, 970 F.2d 651, 657 (9th Cir. 1992).

13 Erhart argues van Drunen is unqualified because he “does not appear to have
14 any specialized knowledge about internal audits or whistleblowing, and certainly no
15 specialized knowledge about how BofI specifically ran its internal audit department.”
16 (Mot. 15:24–26.) The Bank counters that van Drunen is “no doubt qualified” because
17 he “has worked in the internal audit department of a Fortune 100 company and, as a
18 Principal in KPMG’s Forensic Advisory Services practice, has performed and
19 supervised engagements directly for, or in conjunction with, internal audit
20 departments at Fortune 500 companies.” (Opp’n 4:16–19 (citing Am. van Drunen
21 Report Ex. 2).)

22 The Court rejects Erhart’s qualification challenge. Given his experience,
23 credentials, and education, van Drunen is plainly qualified to testify about internal
24 auditing standards and practices. Van Drunen has been a Certified Internal Auditor
25 since 1997. (Van Drunen Decl. ¶ 2, ECF No. 152-15.) And his resume reflects over
26 thirty-five years of internal auditing and investigatory experience. (Am. van Drunen
27 Report Ex. 2.) Further, although Erhart raises other objections to van Drunen’s
28

1 testimony while discussing his qualifications, (*see* Mot. 16:5–17:21), the Court will
2 instead consider these arguments while discussing van Drunen’s opinions below.

3 **B. Reliable and Admissible Opinions**

4 Beyond challenging whether van Drunen is qualified, Erhart raises a storm of
5 objections to van Drunen’s opinions. To guide its analysis, the Court will summarize
6 and categorize van Drunen’s opinions. The Court will then rule on the admissibility
7 of the opinions in each category.

8 **1. Internal Audit Objectives and Standards**

9 Van Drunen’s report initially provides opinions regarding the purpose of an
10 internal audit system. (Am. van Drunen Report §§ 3.0–3.1) In doing so, van Drunen
11 relies on guidance from the Institute of Internal Auditors (“IIA”) and the International
12 Standards for the Professional Practice of Internal Auditing (“IIA Standards”). (*Id.*)
13 He explains that the goal of an “effective internal audit function” is to provide
14 “assurance to an organization’s board of directors, audit committee, and senior
15 management as to the quality and effectiveness of the organization’s internal control,
16 risk management, and governance systems and processes.” (*Id.* § 3.1.)

17 Further, van Drunen notes that Boff’s Internal Audit Policy “specifically
18 references the IIA Standards’ definition for internal auditing” and that guidance from
19 the Bank’s primary regulator similarly describes the “primary role” of internal
20 auditors. (Am. van Drunen Report § 3.1.) He then opines that internal auditors
21 “should be independent from the activities they audit, thereby enabling them to
22 perform their assignments with objectivity.” (*Id.*) In addition, van Drunen opines
23 that the “development and implementation of internal controls should also remain the
24 responsibility of management and the internal audit function should not be involved
25 in designing . . . or operating specific internal control measures.” (*Id.*)

26 Van Drunen further describes the duties and responsibilities of internal
27 auditors. (Am. van Drunen Report § 3.1.) He opines that internal auditors
28 “commonly have access to sensitive and confidential information . . . and thus have

1 an enhanced obligation to maintain confidentiality of that information.” (*Id.*) In
2 relying on the IIA Code of Ethics, van Drunen also opines that internal auditors
3 should “not use information for any personal gain” and should “respect the value and
4 ownership of information they receive and . . . not disclose information without
5 appropriate authority unless there is a legal or professional obligation to do so.” (*Id.*)

6 The Court finds van Drunen’s opinions regarding internal audit objectives and
7 standards are admissible under Rule 702. Many of the events underlying these
8 consolidated actions occurred while Erhart was working as an internal auditor in the
9 Bank’s Internal Audit Department. The objectives and standards for internal audit
10 systems are not matters of common knowledge. Hence, van Drunen’s specialized
11 knowledge about these topics “will help the trier of fact to understand the evidence.”
12 *See* Fed. R. Evid. 702. Further, these opinions are reliably derived from van Drunen’s
13 specialized knowledge and experience and the IIA Standards.

14 Erhart, however, claims van Drunen’s opinions improperly rely on
15 publications by the IIA. (Mot. 16:5–25.) He argues “there is no evidence that [he]
16 was ever trained on or required to apply the IIA’s guidelines and publications in his
17 job, and his own supervisor, Mr. Ball, admitted that he did not directly require his
18 auditors to adhere to the IIA best practices standards.” (*Id.*; *see also* Erhart Dep.
19 357:6–16, ECF No. 152-2; Ball Dep. 50:19–51:1, ECF No. 135-5.) Erhart’s
20 challenge is unpersuasive. There is evidence suggesting that BofI’s internal audit
21 system incorporated the IIA Standards. Hence, Erhart’s disagreement bears on the
22 weight of these opinions rather than their admissibility. *See Primiano*, 698 F.3d at
23 565. Erhart can challenge the applicability and persuasiveness of these standards
24 through cross-examination and the presentation of contrary evidence. *See Daubert*,
25 509 U.S. at 596.

26 **2. Internal Audit Procedures**

27 The next category of van Drunen’s opinions consists of his description of
28 internal audit procedures. (Am. van Drunen Report § 3.2.) He describes the “typical

1 phases and procedures for conducting internal audits,” including “pre-fieldwork
2 procedures, fieldwork procedures, and reporting results.” (*Id.* §§ 3.2.1–3.2.3.) For
3 example, van Drunen opines that upon completing the fieldwork portion of an
4 internal audit, “internal auditors typically prepare a draft report which describes the
5 scope of the procedures performed, the information gathered, the observations, and
6 [the] recommendations and basis for such observations.” (*Id.* § 3.2.3.) He also
7 opines that there is usually then a meeting “with the auditee and other internal
8 stakeholders (which can include senior management) to share and review the draft
9 report.” (*Id.*) Van Drunen explains that “it is not unusual to have disagreements
10 regarding the accuracy of the potential audit observations.” (*Id.*)

11 The Court similarly finds van Drunen’s opinions regarding internal audit
12 procedures are admissible under Rule 702. The parties’ evidence involves these
13 procedures at BofI, and several of Erhart’s allegations concern draft audit reports and
14 his interactions with senior management concerning these reports. Van Drunen’s
15 testimony about these specialized topics “will help the trier of fact to understand the
16 evidence.” *See* Fed. R. Evid. 702. And his testimony is reliably derived from his
17 specialized knowledge and experience, making it admissible.

18 3. Erhart’s Conduct

19 Next, van Drunen’s opinions turn to discussing Erhart’s conduct in this case.
20 For example, van Drunen opines that Erhart’s allegations of “malfeasance” at the
21 Bank are not founded “on information and/or evidence as required by IIA Standards.”
22 (Am. van Drunen Report § 4.1.) Most of Erhart’s objections concern these
23 particularized opinions. He argues van Drunen’s opinions “directly invade[] the
24 province of the jury” and “consist merely of legal conclusions, speculation, and his
25 own assessment of facts.” (Mot. 8:6–14:17.) BofI responds that van Drunen’s
26 opinions are “highly probative of the issues” at hand and should be permitted because
27 they address whether “a reasonable person in Erhart’s internal auditing position under
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1 the same circumstances [would] have formed the same” beliefs about Boff’s
2 purported wrongdoing. (Opp’n 1:12–18.)

3 Having reviewed these opinions, the Court agrees that some of them should be
4 excluded. Because these opinions largely concern the allegations underlying Erhart’s
5 whistleblower retaliation claims, the Court incorporates its discussion of the
6 standards for these claims from the Summary Judgment Order. (*See* Summary
7 Judgment Order 19:6–22:18; 51:3–52:5; 53:1–54:8; 63:10–64:2.) To recap, Erhart’s
8 Sarbanes–Oxley whistleblower retaliation claim requires him to demonstrate he
9 “provide[d] information . . . regarding any conduct which [he] reasonably believe[d]
10 constitute[d] a violation of section 1341 [mail fraud], 1343 [wire fraud], 1344 [bank
11 fraud], or 1348 [securities or commodities fraud], any rule or regulation of the
12 Securities and Exchange Commission, or any provision of Federal law relating to
13 fraud against shareholders” 18 U.S.C. § 1514A(a)(1). Hence, Erhart does “not
14 have to prove that he reported an actual violation.” *See Wadler v. Bio-Rad Labs.,*
15 *Inc.*, 916 F.3d 1176, 1186–87 (9th Cir. 2019). Rather, Erhart has “to prove only that
16 he ‘reasonably believed that there might have been’ a violation.” *See id.* at 1187
17 (quoting *Van Asdale v. Int’l Game Tech.*, 577 F.3d 989, 1001 (9th Cir. 2009)).

18 The “reasonable belief” standard includes both a subjective component and an
19 objective component. *E.g.*, *Wadler*, 916 F.3d at 1187–88, *Van Asdale*, 577 F.3d at
20 1000. For the subjective component, Erhart must demonstrate he believed the
21 conduct he reported violated one of the categories of laws in § 1514A. *Van Asdale*,
22 577 F.3d at 1000. “The objective reasonableness component . . . ‘is evaluated based
23 on the knowledge available to a reasonable person in the same factual circumstances
24 with the same training and experience as the aggrieved employee.’” *Wadler*, 916
25 F.3d at 1188 (quoting *Sylvester v. Parexel Int’l LLC*, No. 07-123, 2011 WL 2517148,
26 at *12 (Dep’t of Labor May 25, 2011)). This evaluation “requires an examination of
27 the reasonableness of a complainant’s beliefs, but *not* whether the complainant
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1 actually communicated the reasonableness of those beliefs to management or the
2 authorities.” *Id.* (quoting *Sylvester*, 2011 WL 2517148, at *13).

3 Moreover, “[t]o encourage disclosure, Congress chose statutory language
4 which ensures that ‘an employee’s reasonable but mistaken belief that an employer
5 engaged in conduct that constitutes a violation of one of the six enumerated
6 categories is protected.’” *Van Asdale*, 577 F.3d at 1001. Therefore, an employee is
7 not required to “essentially prove the existence of fraud before suggesting the need
8 for an investigation,” as such a requirement “would hardly be consistent with
9 Congress’s goal of encouraging disclosure.” *Id.* at 1002.

10 Accordingly, the jury will be tasked with determining whether Erhart
11 reasonably believed he was reporting a violation of the laws listed in Sarbanes–
12 Oxley’s whistleblower retaliation provision. Similarly, for Erhart’s state law
13 whistleblower retaliation claim, the jury will have to determine whether Erhart had
14 “reasonable cause to believe that the information” he disclosed to the government
15 revealed “a violation of [a] state or federal statute, or a violation of . . . a local, state,
16 or federal rule or regulation.” *See* Cal. Labor Code § 1102.5(b); *see also Ross v. Cty.*
17 *of Riverside*, 36 Cal. App. 5th 580, 592 (2019) (noting an employee engages in
18 conduct “protected by the statute when the employee discloses ‘reasonably based
19 suspicions’ of illegal activity” (quoting *Green v. Ralee Eng’g Co.*, 19 Cal. 4th 66, 87
20 (1998))). With these standards as a backdrop, the Court turns to van Drunen’s
21 proposed opinions regarding Erhart’s conduct.

22 Topic No. 1: Erhart’s Allegations Are Not Supported by Evidence. First, under
23 the guise of internal audit and fraud investigation standards, van Drunen opines that
24 Erhart’s complaint “includes a number of allegations that do not appear to be founded
25 on information and/or evidence.” (Am. van Drunen Report § 4.1.) To support this
26 opinion, van Drunen first references IIA Standards that provide internal auditors: (1)
27 are to “identify, analyze, evaluate, and document sufficient information to achieve
28 the engagement’s objectives”; and (2) “must identify, sufficient, reliable, relevant,

1 and useful information to achieve the engagement’s objectives.” (*Id.*) It is
2 questionable whether these standards even apply in those circumstances where
3 Erhart’s beliefs did not arise in the context of an assigned audit with “objectives,”
4 but that concern alone does not doom these opinions’ admissibility.

5 Curiously, however, van Drunen also introduces a second set of standards in
6 this section—the Certified Fraud Examiners (“CFE”) Standards. (Am. van Drunen
7 Report § 4.1.) One of these CFE Standards requires that “[c]onclusions shall be
8 supported with evidence that is relevant, competent and sufficient.” (*Id.*) Further,
9 van Drunen notes the CFE Standards state that “[t]he *Certified Fraud Examiner’s*
10 objective shall be to obtain evidence and information that is complete, reliable and
11 relevant.” (*Id.* (emphasis added).) Van Drunen then goes on to examine Erhart’s
12 various allegations, and he concludes based on his review of testimony and
13 documentary evidence that Erhart’s allegations “are not supported with information
14 and/or evidence.” (*Id.*)

15 This proposed testimony does not pass muster under Rule 702. For one, van
16 Drunen references CFE Standards to critique Erhart’s conduct, but Erhart
17 indisputably was not a Certified Fraud Examiner. He was an entry-level internal
18 auditor that had previously not done internal audit work. (Summary Judgment Order
19 3:25–4:5.) Whereas van Drunen’s report at least feasibly connects the IIA Standards
20 to Erhart’s circumstances, there is no explanation for why Erhart’s beliefs should be
21 assessed in the context of CFE Standards. *See Wadler*, 916 F.3d at 1188 (“The
22 objective reasonableness component . . . ‘is evaluated based on the knowledge
23 available to a reasonable person in the same factual circumstances with *the same*
24 *training and experience as the aggrieved employee.*” (emphasis added) (quoting
25 *Sylvester*, 2011 WL 2517148, at *12)). This testimony will not help the jury; its task
26 will be to determine whether an entry-level internal auditor could reasonably form
27 Erhart’s beliefs, not a CFE. And because there is also not a sufficient basis for relying
28 on these standards to critique Erhart’s conduct, the Court will preclude van Drunen

1 from mentioning the CFE Standards or rendering opinions on Erhart’s conduct based
2 on these standards.

3 Moreover, aside from this standards issue, the Court will not permit van
4 Drunen to simply rehash the evidence and assert that his analysis of the evidence
5 leads to a particular conclusion. On this point, the Court finds helpful the district
6 court’s decision in an analogous case, *Sharkey v. J.P. Morgan Chase & Co.*, 978 F.
7 Supp. 2d 250 (S.D.N.Y. 2013). There, an employee brought suit under Sarbanes–
8 Oxley’s whistleblower retaliation provision, alleging she reported fraudulent activity
9 because she believed a suspicious bank client “was violating one or more of the [laws
10 enumerated in Sarbanes–Oxley] in addition to money laundering.” *Id.* at 252. She
11 thus had also recommended that the banking relationship with this client be
12 terminated. *See id.* at 253; *see also Sharkey*, 805 F. Supp. 2d 45, 57–58 (S.D.N.Y.
13 2011) (summarizing the plaintiff’s allegations).

14 To support her whistleblower retaliation claim, the plaintiff sought to rely on
15 an expert under Rule 702 who had “vast experience” in Sarbanes–Oxley compliance
16 and “other areas of financial compliance.” *Sharkey*, 978 F. Supp. 2d at 253. This
17 expert opined that the plaintiff had a “reasonable belief” that the suspicious client
18 was engaged in wrongdoing and that “there [was] sufficient, competent evidential
19 matter to support” the plaintiff’s belief that the banking relationship should have been
20 terminated. *Id.*

21 The defendants moved to exclude these opinions for a host of reasons,
22 including that the opinions improperly usurped the jury’s factfinding function.
23 *Sharkey*, 978 F. Supp. 2d at 253. The court agreed. It determined the expert could
24 not testify whether the plaintiff had a “reasonable belief” of wrongdoing or whether
25 the plaintiff’s recommendation to terminate the client relationship was “reasonable.”
26 *Id.* The court further ruled that it would not permit the expert to “merely bolster [the
27 plaintiff]’s testimony as to the internal processes of [her employer] of which [the
28 expert] ha[d] no personal knowledge.” *Id.* Hence, the court excluded “[a]ll testimony

1 as to these issues, including any opinion as to whether the evidence in th[e] case
2 reasonably supported a termination of [the suspicious client]’s relationship with” the
3 bank.³ *Id.*

4 Van Drunen’s proposed opinions are more skillfully drafted than the expert’s
5 opinions in *Sharkey*, but they are still unacceptable. Like the expert in *Sharkey*, van
6 Drunen proposes to testify whether the documents and evidence in the case support
7 Erhart’s beliefs.⁴ This testimony is both improper and unnecessary under Rule 702
8 for the same reasons expressed in *Sharkey*. *See* 978 F. Supp. 2d at 253–54; *see also*
9 *id.* at 252 (“Simply rehashing evidence about which an expert has no personal
10 knowledge is impermissible under Rule 702.”). The jury is capable of determining
11 this issue on its own. *See Nationwide Transp. Fin. v. Cass Info. Sys., Inc.*, 523 F.3d
12 1051, 1060 (9th Cir. 2008) (“Under either [Rule 701 or Rule 702], evidence that
13 merely tells the jury what result to reach is not sufficiently helpful to the trier of fact
14 to be admissible.” (alteration in original) (quoting *Kostelecky v. NL Acme Tool/NL*
15 *Indus., Inc.*, 837 F.2d 828, 830 (8th Cir. 1988))). The Court also finds this
16 testimony’s probative value is substantially outweighed by the danger of unfair
17 prejudice and this testimony’s potential to waste time and lead to the needless
18 presentation of cumulative evidence. *See* Fed. R. Evid. 403. Hence, the Court
19 excludes all of these opinions.

20 Topic No. 2: Erhart Made Improper Legal Conclusions. Next, van Drunen
21 opines that Erhart “appears to have made legal conclusions regarding the Bank’s
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23 ³ In contrast, the court determined that in light of the plaintiff’s expert’s qualifications, the
24 expert could “testify as to the type of transactions which might be subject to concern as an
25 accountant, and those matters which she believes, and why, are worthy of [Sarbanes–Oxley]
26 consideration (or so called ‘red flags’).” *Sharkey*, 978 F. Supp. 2d at 254. Further, the court
permitted the expert to testify “why these various types of conduct would be considered ‘red flags’
within the industry, and the types of fraudulent activity they suggested.” *Id.*

27 ⁴ (*See, e.g.*, Van Drunen Report § 4.1 (“Based on the documentation provided to me, I have
not observed information and/or evidence that Mr. Erhart provided to support his allegations.”) (“I
28 also did not observe evidence that other employees of the Bank thought Mr. Tolla’s changes were
material/inappropriate.”) (“After reviewing these allegations, I note that Mr. Erhart’s allegations
are not supported by audit evidence.”).)

1 compliance with state and federal regulations, outside his skills, experience, and role
2 as an internal auditor within the Bank which is inconsistent with the IAA Standards.”
3 (Am. van Drunen Report § 4.2.) Van Drunen explains that internal audit “is not
4 responsible for drawing any legal conclusions as to whether the Bank has violated
5 any laws, as this is the responsibility of management and the Audit Committee
6 assisted by qualified legal counsel.” (*Id.*) Thus, van Drunen opines that it was not
7 “appropriate” for Erhart to draw legal conclusions regarding the Bank’s compliance
8 with laws. (*Id.*)

9 While this analysis may ring true in the corporate arena, its relevance and
10 helpfulness to the jury is questionable. The federal whistleblower retaliation statutes
11 at issue expressly protect Erhart’s disclosures that provide information regarding
12 believed violations of certain laws, *see* 15 U.S.C. § 78u-6(h)(1)(A), 18 U.S.C. §
13 1514A(a)(1), and California’s whistleblower retaliation statute similarly protects
14 Erhart’s disclosures of reasonably believed violations of law, “regardless of whether
15 disclosing the information is part of [Erhart’s] job duties,” *see* Cal. Labor Code §
16 1102.5(b). Indeed, these statutes require that Erhart demonstrate he subjectively
17 believed the conduct he reported violated either enumerated laws or any law,
18 respectively. *See Van Asdale*, 577 F.3d at 1000; Cal. Labor Code § 1102.5(b). There
19 is no requirement that Erhart serve in a legal capacity with his employer or be
20 permitted to make legal conclusions as part of his job duties to engage in protected
21 activity. *See Nielsen v. AECOM Tech. Corp.*, 762 F.3d 214, 221 (2d Cir. 2014)
22 (noting the reasonable person standard recognizes that “[m]any employees are
23 unlikely to be trained to recognize legally actionable conduct by their employers”).⁵
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26 ⁵ The Court notes that the Bank has claimed Erhart was an employee who should have been
27 expected to know “whether the conduct [he] reported in fact constituted an enumerated violation”
28 because he was “an internal auditor.” (*See* BofI’s Summ. J. Mot. 30 n. 25, ECF No. 127-1.)
Interestingly, the Bank now oscillates to relying on testimony that it was improper for Erhart to
make “legal conclusions regarding the Bank’s compliance with state and federal regulations.” (Am.
van Drunen Report § 4.2.)

1 The potential for confusion is apparent. The Court will be instructing the jury
2 that Erhart must demonstrate he subjectively believed the law was being violated, but
3 van Drunen seeks to opine that it was inappropriate for Erhart to even make legal
4 conclusions at the Bank. The Court finds the probative value of this opinion is
5 minimal in these circumstances. The Court further concludes that this probative
6 value is substantially outweighed by the potential to confuse the issues and mislead
7 the jury. *See* Fed. R. Evid. 403. Hence, the Court will exclude van Drunen’s opinion
8 about the appropriateness of Erhart’s conduct on this topic but will otherwise allow
9 van Drunen to generally opine regarding the role of the internal audit function as
10 compared to management and the audit committee.

11 Topic No. 3: Erhart Raised Issues Unrelated to Assigned Audits. Van Drunen
12 next opines that based on his review of the evidence, “there appears to be a number
13 of instances where Mr. Erhart appears to either insert himself into audits or conduct
14 adhoc, random inquiries.” (Am. van Drunen Report § 4.3.) Van Drunen opines that
15 when internal auditors “act in this manner without the approval or knowledge of
16 senior management, it can result in:” (1) “Duplication of efforts,” (2) “Negative
17 results with respect to achieving and completing the annual audit plan,” (3)
18 “Confusion amongst auditees,” (4) “Reduced audit quality, and” (5) “A variety of
19 other issues that could negatively impact the audit process.” (*Id.*) Van Drunen then
20 summarizes his interpretation of the evidence and the instances where he believes
21 Erhart improperly inserted himself into audits. (*Id.*)

22 The Court will permit van Drunen to testify that Erhart appeared to deviate
23 from auditing practices and to discuss the impacts this type of conduct may have on
24 an internal audit system and audit results. The Court cautions, however, that it will
25 not permit van Drunen to merely rehash the evidence and bolster Boff’s anticipated
26 testimony regarding Erhart’s assigned job duties and the Bank’s internal policies
27 under the guise of expert testimony. *See Sharkey*, 978 F. Supp. 2d at 253; *see also*
28 Fed. R. Evid. 403 (allowing the court to exclude needlessly cumulative evidence).

1 In addition, the Court will not permit van Drunen to opine that Erhart acted
2 inappropriately in calling an “external regulatory agency regarding a legal matter,”
3 which he opines did not follow “the Bank’s procedures and protocols with respect to
4 communicating with external regulatory agencies.” (Am. van Drunen Report § 4.3.)
5 This opinion concerns Erhart’s belief that the Bank was providing a misleading
6 response to a subpoena issued by the Securities and Exchange Commission, which
7 led him to contact the SEC. As mentioned above, the laws at issue protect Erhart
8 from retaliation if he provides certain information to government agencies regarding
9 believed wrongdoing. The permissiveness of these laws is not on trial. *See Van*
10 *Asdale*, 577 F.3d at 1001 (noting Congress chose statutory language that
11 “encourage[s] disclosure”); *see also Lawson v. FMR LLC*, 571 U.S. 429, 432 (2014)
12 (explaining that Sarbanes–Oxley’s whistleblower protection provision was designed
13 to address the problems caused by Enron Corporation’s “corporate code of silence,”
14 which “discourage[d] employees from reporting fraudulent behavior . . . to the proper
15 authorities, such as the FBI and the SEC”). The issue for the jury to decide is whether
16 Erhart’s belief of wrongdoing was reasonable, not whether corporate policies or
17 auditing practices made it appropriate for Erhart to directly contact a regulator. The
18 Court finds this opinion is subject to exclusion because it is not helpful for the jury
19 to determine a fact in issue and its probative value is substantially outweighed by the
20 danger that it will confuse or mislead the jury. *See Fed. R. Evid.* 403, 702.

21 Topic No. 4: Erhart Lacked Independence. Van Drunen opines that “[t]he IAA
22 Standards require internal audit activity to be independent” and that internal auditors
23 “be ‘objective in performing their work.’” (Am. van Drunen Report § 4.3.) He
24 further opines that Erhart’s “allegations into Bank activities appear to be influenced
25 by personal reasons, which has the potential to impact his impartiality and
26 independence.” (*Id.*) Van Drunen then reviews some of Erhart’s allegations and
27 auditing conduct and explains why he believes Erhart’s conduct lacked the
28 independence required by IIA Standards. (*Id.*) For example, van Drunen concludes

1 that Erhart appears to have targeted certain individuals in his Lottery and Structured
2 Settlements Audit. (*Id.*) Van Drunen opines that “the likelihood of both of these
3 individuals being selected as part of a random sample is remote.” (*Id.*)

4 The Court will permit this testimony under Rule 702. Erhart’s alleged lack of
5 independence in conducting his audits may bear on the objective reasonableness of
6 his beliefs, and therefore this testimony may help the jury determine a fact in issue.
7 The Court also finds this testimony is based on sufficient information and is reliably
8 derived from the IIA Standards and van Drunen’s specialized knowledge. Finally,
9 this testimony is not otherwise subject to exclusion under Rule 403.

10 Topic No. 5: Failure to Close Out Audits and Improper Remediation Efforts.

11 Van Drunen provides several opinions on this topic. He initially opines that in “year
12 2014,” Erhart “completed four audits, in comparison to his [two] colleagues . . . who
13 completed 14 and 16 audits, respectively.” (Am. van Drunen Report § 4.5.) Further,
14 van Drunen expresses that “[i]t appears that the reason for [Erhart’s] failure to close
15 out and/or delay [in] filing his audit reports may be because he was not doing what
16 he was assigned and authorized to do and he was taking on unauthorized management
17 responsibilities.” (*Id.*)

18 The Court finds this testimony is not admissible under Rule 702. Determining
19 whether Erhart completed less audits than his colleagues does not involve “scientific,
20 technical, or other specialized knowledge.” *See* Fed. R. Evid. 702. Similarly, the
21 Bank can introduce admissible evidence regarding what Erhart was assigned and
22 authorized to do at the Bank. There is no need for expert testimony on this subject.
23 *See Jinro Am. Inc.*, 266 F.3d at 1004 (cautioning that allowing a witness to come
24 before a jury as an expert is significant because it allows the witness “to testify based
25 on hearsay information, and to couch . . . observations as generalized ‘opinions’
26 rather than as firsthand knowledge”); *see also* Fed. R. Evid. 403.

27 In contrast, van Drunen also opines about the role of remediation efforts in
28 internal auditing based on “his experience and understanding.” (Am. van Drunen

1 Report § 4.5.) Van Drunen opines that “if remediation is required as a result of
2 findings that an internal auditor has noted in the audit reports, there is a process to be
3 followed.” (*Id.*) He explains that “internal audit’s role in the remediation process is
4 to report on whether the other [organizational] functions are making required changes
5 within a defined time period.” (*Id.*) Van Drunen further opines that because Erhart
6 directed remedial actions in some instances, he placed “the internal audit department
7 in a position where in the future it might [have been] required to audit its own work.”
8 (*Id.*) He also opines it is unusual for an auditor like Erhart “to make
9 recommendations to remediate issues that have already been or are in the process of
10 being remediated.” (*Id.*)

11 This proposed testimony regarding the role of an internal audit system and
12 Erhart deviating from common practice is adequately based on van Drunen’s
13 specialized knowledge. *See* Fed. R. Evid. 702. The Court also finds it will help the
14 jury to understand the evidence and Erhart’s role in the Bank’s internal audit system.
15 Hence, the Court finds this testimony is admissible.

16 Topic No. 6: Failure to Conform to Chain of Command. Van Drunen next
17 opines that Erhart “failed to conform to chain of command / reporting structure in
18 various ways.” (Am. van Drunen Report § 4.6.) He highlights that Erhart “sent
19 information to regulators” regarding certain allegations of believed wrongdoing.
20 (*Id.*) Van Drunen opines that he believes Erhart did not take “the appropriate action
21 by escalating the matters to regulators” and that he should have instead presented his
22 concerns to the Bank’s audit committee “per normal protocols and per the
23 instructions in the Bank’s Employee Handbook.” (*Id.*)

24 The Court will not admit this proposed testimony for the same reasons the
25 Court discussed above. The laws at issue protect Erhart’s disclosures to appropriate
26 regulators regarding believed wrongdoing, and these laws and the value judgments
27 Congress made are not on trial. The issue for the jury is whether Erhart’s beliefs of
28 wrongdoing were reasonable, not whether Boff’s Employee Handbook or auditing

1 protocols made it “inappropriate” for him to reach out to regulators directly. The
2 Court finds this testimony will not assist the jury in the task at hand. Moreover, the
3 probative value of these opinions is substantially outweighed by their potential to
4 confuse the issues and mislead the jury. *See* Fed. R. Evid. 403. Hence, the Court
5 excludes these opinions.

6 Topic No. 7: Failure to Comply with IIA’s Confidentiality Requirements.
7 Finally, van Drunen references the IIA’s Code of Ethics discussed above and its
8 confidentiality requirements. (Am. van Drunen Report § 4.7.) Van Drunen then
9 opines that Erhart “failed to apply and uphold the IIA’s Code of Ethics with respect
10 to confidentiality,” including by storing confidential bank information in a bag buried
11 in his closet. (*Id.*)

12 The Court will admit this testimony under Rule 702. Van Drunen’s testimony
13 is relevant to Boff’s claims in its countersuit regarding Erhart’s alleged mishandling
14 of confidential bank information. This testimony also may assist the jury in
15 determining whether Erhart breached his duty of care to the Bank on this basis. Last,
16 the testimony is based on sufficient information and is reliably derived from van
17 Drunen’s experience and his application of the IIA’s Code of Ethics and industry
18 standards. That said, the Court will not permit van Drunen to opine on the
19 interpretation of Boff’s Confidentiality Agreement and whether Erhart breached the
20 contract. (*See* Am. van Drunen Report § 4.7.) *See, e.g., McHugh v. United Serv.*
21 *Auto. Ass’n*, 164 F.3d 451, 454 (9th Cir. 1999) (noting expert testimony cannot “be
22 used to provide legal meaning” or interpret contractual language).

23 Overall, the Court grants in part and denies in part Erhart’s request to exclude
24 all of van Drunen’s proposed testimony under Rule 702.

25 **CONCLUSION**

26 In light of the foregoing, the Court **GRANTS IN PART** and **DENIES IN**
27 **PART** Erhart’s motion to exclude expert testimony. Boff fails to demonstrate that
28 its non-retained expert CFO Micheletti’s proposed testimony is admissible under

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Rule 702. Consequently, the Court grants Erhart’s request to preclude Micheletti from testifying as an expert, but the Court recognizes that Micheletti may be able to provide lay opinion testimony on the Bank’s lost profits under Rule 701.

The Court also grants in part and denies in part Erhart’s request to exclude Boff’s retained expert Guido van Drunen. The Court finds van Drunen’s proposed testimony regarding (1) internal audit objectives and standards and (2) internal audit procedures is admissible under Rule 702. This testimony is reliably based on van Drunen’s specialized knowledge and will help the jury understand the evidence. As for van Drunen’s more specific opinions on Erhart’s conduct, the Court reaches a mixed result. Some of these opinions are appropriate under Rule 702; other opinions either fail to meet Rule 702’s requirements or are subject to exclusion under Rule 403 for the reasons outlined above.

IT IS SO ORDERED.

DATED: April 1, 2020


Hon. Cynthia Bashant
United States District Judge