

1 BINGHAM MCCUTCHEN LLP
 DONN P. PICKETT (SBN 72257)
 2 GEOFFREY M. HOWARD (SBN 157468)
 HOLLY A. HOUSE (SBN 136045)
 3 ZACHARY J. ALINDER (SBN 215695)
 BREE HANN (SBN 215695)
 4 Three Embarcadero Center
 San Francisco, CA 94111-4067
 5 Telephone: 415.393.2000
 Facsimile: 415.393.2286
 6 donn.pickett@bingham.com
 geoff.howard@bingham.com
 7 holly.house@bingham.com
 zachary.alinder@bingham.com
 8 bree.hann@bingham.com

9 BOIES, SCHILLER & FLEXNER LLP
 DAVID BOIES (Admitted *Pro Hac Vice*)
 10 333 Main Street
 Armonk, NY 10504
 11 Telephone: 914.749.8200
 dboies@bsflp.com
 12 STEVEN C. HOLTZMAN (SBN 144177)
 1999 Harrison St., Suite 900
 13 Oakland, CA 94612
 Telephone: 510.874.1000
 14 sholtzman@bsflp.com

15 DORIAN DALEY (SBN 129049)
 JENNIFER GLOSS (SBN 154227)
 16 500 Oracle Parkway, M/S 5op7
 Redwood City, CA 94070
 17 Telephone: 650.506.4846
 Facsimile: 650.506.7114
 18 dorian.daley@oracle.com
 jennifer.gloss@oracle.com

19 Attorneys for Plaintiffs
 20 Oracle USA, Inc., *et al.*

21 UNITED STATES DISTRICT COURT
 22 NORTHERN DISTRICT OF CALIFORNIA

23 OAKLAND DIVISION

24 ORACLE USA, INC., *et al.*,

25 Plaintiffs,

26 v.

27 SAP AG, *et al.*,

28 Defendants.

No. 07-CV-01658 PJH (EDL)

**NOTICE OF MOTION AND MOTION
 NO. 2: TO EXCLUDE TESTIMONY
 OF DEFENDANTS' EXPERT BRIAN
 SOMMER**

Date: September 30, 2010
 Time: 9:00 a.m.
 Place: 3rd Floor, Courtroom 3
 Judge: Hon. Phyllis J. Hamilton

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1 PLEASE TAKE NOTICE that on September 30, 2010, at 9:00 a.m., in the courtroom of the
2 Honorable Phyllis J. Hamilton, of the above-entitled Court, Plaintiffs Oracle USA, Inc.
3 (predecessor to Oracle America, Inc.), Oracle International Corporation, Oracle EMEA Limited
4 and Siebel Systems, Inc. (collectively “Oracle” or “Plaintiffs”) shall move for an order excluding
5 opinions and testimony of Brian S. Sommer, (“Sommer”) designated by Defendants SAP AG, SAP
6 America, Inc., and TomorrowNow, Inc. (“SAP TN”) (collectively “Defendants”) as an expert
7 witness in this matter, on the grounds that his proposed expert opinion testimony is inadmissible on
8 the basis of the authorities and evidence set forth herein and in the accompanying declaration.

9 **I. SUMMARY OF INADMISSABLE OPINIONS AND RELIEF REQUESTED**

10 Defendants’ expert Brian Sommer is offered in supposed rebuttal to certain portions of the
11 testimony of Plaintiffs’ damages expert Paul Meyer. His report opines on certain topics related to
12 causation of damages, namely, whether SAP TN’s customers would more likely than not have
13 stayed with Oracle absent the infringement that enabled SAP TN to offer support services, and
14 whether SAP TN’s discounted or free support helped enable SAP to convert Oracle customers to
15 SAP applications. He also opined for the first time at his deposition that SAP’s forecasts for its
16 Safe Passage program (SAP’s marketing program to entice Oracle’s acquired PeopleSoft, J.D.
17 Edwards (“JDE”) and then Siebel customers with SAP TN as its “cornerstone”) were unreasonable.

18 Virtually all of Sommer’s opinions are objectionable under the threshold requirements for
19 expert testimony. First, *he admittedly lacks the experience* to qualify him to opine on enterprise
20 resource planning (“ERP”) customers’ selection of support providers or consideration of low cost
21 support in making their applications purchases. He has never participated in an ERP customer’s
22 support selection decision, and has helped in only one ERP application selection since the turn of
23 the century – and that was for a vendor and customer not involved here. He has never advised any
24 ERP customer where discounted support on the customer’s current applications was an available
25 enticement. He has also not consulted for any of the parties in this case – the leading ERP
26 companies – or any other company he identified as a major ERP software vendor, or evaluated the
27 success or failure of any ERP vendor’s marketing efforts to switch customers from another vendor.

28 In addition, Sommer’s *opinions are based on insufficient, unreliable and/or irrelevant*

1 ***information and data.*** In connection with his opinions on what matters to ERP applications and
2 support customers and what support options they had besides SAP TN, Sommer relied almost
3 exclusively on untested information he found on company websites and other material he found on
4 the internet. He did no ERP or support vendor or customer surveys or interviews. And he failed to
5 consider considerable evidence that contradicted his conclusions, including the testimony and
6 declarations of customers at issue in the case and the parties' contemporaneous assessments that
7 SAP TN was the only viable alternative to Oracle. Admissible expert opinions cannot be so poorly
8 grounded.

9 Sommer's ***negative opinions about the actual or likely success of ERP vendors'***
10 ***"switching" programs, and in particular, about SAP's Safe Passage program, have literally no***
11 ***basis.*** Sommer had no information about actual conversion rates or any other metric of success for
12 any such switching program. Again he relied on no actual case information. His opinions that such
13 programs generally and Safe Passage particularly are ineffectual and thus that SAP's expectations
14 for Safe Passage were unreasonable are pure *ipse dixit*, and unreliable.

15 Sommer's ***general overview of third-party and self-support options*** supposedly available to
16 ERP software users ***also is not proper rebuttal*** to Oracle's damages expert's opinions. His
17 observations are not bounded by the relevant time period or needs of the SAP TN customers at
18 issue and consider no case evidence. Meyer's causation conclusions were, in contrast, entirely tied
19 to the specific customer facts and the evidence about support options presented in the case
20 evidence. Thus Sommer does not rebut Meyer. If Defendants had wanted to offer a general market
21 study, they should have presented it when initial reports were due, which would have given Oracle
22 adequate opportunity to assess and rebut it. Incredibly, Defendants have filed a motion *in limine* to
23 bar Meyer from even responding to Sommer's disguised affirmative report because he didn't have
24 that opportunity. For untimeliness alone, Sommer's purported market overview should be excluded
25 under Fed. R. Civ. Proc. 37.

26 For these reasons – his inexpertise, his unscientific methods, his failure to consider any case
27 evidence, and the untimeliness of his analysis – virtually all of Sommer's testimony should be
28 precluded.

1 **II. WHAT DEFENDANTS MUST SHOW TO JUSTIFY SOMMER’S OPINIONS AND**
2 **WHAT THE COURT MUST DO TO TEST THEM**

3 Fed. R. Evid. 702 requires exclusion of expert testimony unless:

4 (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product
5 of reliable principles and methods, and (3) the witness has applied the principles and
6 method reliably to the facts of the case.

7 The party proffering an expert opinion must demonstrate it meets the Rule 702 admissibility
8 standards by a “preponderance of proof.” *Daubert v. Merrell Dow Pharm. Inc.*, 509 U.S. 579,
9 593 (1993); *Salinas v. Amteck of Kentucky, Inc.*, 682 F.Supp.2d 1022, 1029 (N.D. Cal. (PJH)
10 2010); *Perry v. Schwarzenegger*, 2010 WL 3025614 at *21 (N.D. Cal.) (“The party proffering the
11 evidence ‘must explain the expert’s methodology and demonstrate in some objectively verifiable
12 way that the expert has both chosen a reliable . . . method and followed it faithfully.’”) (quoting
13 *Daubert v. Merrell Dow Pharm.*, 43 F.3d 1311, 1319 n11 (9th Cir 1995) (“*Daubert II*”). As the
14 court made clear in *Carnegie Mellon Univ. v. Hoffman-Laroche, Inc.*, 55 F.Supp.2d 1024, 1034-
15 35 (N.D. Cal. 1999):

16 The Ninth Circuit has repeatedly stated that where evidence of pre-litigation research
17 or peer review is not available, the experts must (1) “explain precisely how they went
18 about reaching their conclusion” and (2) “point to some objective source – a learned
19 treatise, the policy statement of a professional association, a published article in a
20 reputable science journal or the like – to show that they have followed the scientific
21 method as practiced by (at least) a recognized minority of the scientists in their field.”
22 [quoting *Daubert II*, 43 F.3d at 1319].

23 Absent an explicit finding by the court of admissibility of a challenged opinion, the
24 opinion may not properly be offered at trial. Fed. R. Civ. P. 104(a) (Preliminary questions
25 concerning the qualifications of a person to be a witness . . . shall be determined by the court.”);
26 *United States v. Jawara*, 474 F.3d 565, 583 (9th Cir. 2007) (“failure to make explicit reliability
27 finding was an error”); *Mukhtar v. California State University*, 299 F.3d 1053, 1066-68 (9th Cir.
28 2002) (district court prejudicially erred by admitting expert testimony without explicit reliability
determination), *as amended*, 319 F.3d 1073 (9th Cir. 2003); *Claar v. Burlington R.R.*, 29 F.3d
499, 501 (9th Cir. 1994) (courts are both “authorized and obligated to scrutinize carefully the
reasoning and methodology underlying” expert testimony). As the Supreme Court has made
clear, “the trial judge must ensure that any and all [expert] testimony . . . is not only relevant but
reliable.” *Daubert*, 509 U.S. 589, 595. This “gatekeeper” role “entails a preliminary assessment

1 of whether the reasoning or methodology underlying the testimony is . . . valid and of whether the
2 reasoning or methodology properly can be applied to the facts in issue.” *Id.* at 592-93.

3 While the *Daubert* reliability analysis focuses on an expert’s methodology, the Supreme
4 Court has also noted that “conclusions and methodology are not entirely different from one
5 another.” *General Electric Co. v. Joiner*, 522 U.S. 136, 146 (1997).

6 Trained experts commonly extrapolate from existing data. But
7 nothing in either *Daubert* or the Federal Rules of Evidence
8 requires a district court to admit opinion evidence that is connected
to existing data only by the *ipse dixit* of the expert. A court may
conclude that there is simply too great an analytical gap between
the data and the opinion offered.

9 *Id.*; accord *Heller v. Shaw*, 167 F.3d 146, 153 (3d Cir. 1999) (“district court must examine the
10 expert’s conclusions in order to determine whether they could reliably follow from the facts
11 known to the expert and the methodology used”).

12 III. LEGAL STANDARDS MANDATING EXCLUSION OF SOMMER’S TESTIMONY

13 A. **No Relevant Expertise.** Defendants cannot satisfy Rule 702 for opinions that
14 Sommer offers **on which he is not an expert in the specific field** about which he seeks to testify
15 (e.g., customers’ decisions about ERP support, alternate ERP support vendors, ERP “switching
16 programs”). See, e.g., *United States v. Chang*, 207 F.3d 1169, 1172-73 (9th Cir. 2000) (expert
17 “qualified” in one topic excluded from testifying on topic where didn’t have expertise); *Salinas*,
18 682 F.Supp.2d at 1030 (rejecting opinions on warnings by proffered expert who “had no
19 professional training or expert qualifications to opine on the formulation or design of warning or
20 safety labels” and had never “investigated a case with similar facts” and never “testified as a
21 warnings expert”); *Redfoot v. B. F. Ascher & Company*, 2007 WL 1593239 at *10-11 (N.D. Cal.
22 (PJH)) (rejecting testimony on medical subjects and conclusions of what caused victim’s autism
23 for which expert had neither training nor qualifications to opine).

24 B. **No Expert Analysis.** As a corollary, where Sommer’s opinions are **premised on**
25 **nothing more than reading information provided by counsel or pulled off the internet** (e.g.,
26 his purported third party alternatives analysis) they do not assist the trier of fact because they are
27 not premised on any expertise and thus are inadmissible. See, e.g., *Perry*, 2010 WL 3025614 at
28 *22 (“mere recitation of text in evidence does not assist the court in understanding the evidence

1 because reading, as much as hearing, ‘is within the ability and experience of the trier of fact.’”)
2 (quoting *Beech Aircraft Corp v. United States*, 51 F.3d 834, 842 (9th Cir. 1995)); *Kilgore v.*
3 *Carson Pirie Holdings, Inc.*, 2006 WL 3253490 at *4 (6th Cir.) (finding internet article an
4 unreliable basis for methodology where expert did not know what research methodology the
5 article was based and conducted no independent research); *Matrix Motor Co. v. Toyota Jidosha*
6 *Kabushiki Kaisha*, 290 F.Supp.2d 1083, 1086 (C.D. Cal. 2003) (expert reports “irrelevant” where
7 they “merely recite hearsay statements, often verbatim, culled from a variety of internet
8 websites”).

9 **C. Flawed or No Methodology.** Defendants also cannot meet their burden of support
10 for any of Sommer’s opinions premised on **junk science**. *Daubert II*, 43 F.3d at 1319, n.11 (party
11 must demonstrate in some objectively verifiable way that its expert has chosen a reliable method
12 and followed it properly, particularly where no independent, pre-litigation analysis to rely on);
13 *Perry*, 2010 WL 3025614 at *21 (same); *Salinas*, 682 F.Supp.2d at 1029 (“the court must
14 determine whether an expert’s testimony reflects “scientific knowledge,” whether the findings are
15 “derived by the scientific method,” and whether the work product is “good science”- that is,
16 whether the testimony is reliable and trustworthy) (citing *Daubert*, 509 U.S. at 590 & n.9). Where
17 there is **no methodology at all** behind an opinion (*e.g.*, Sommer’s opinion that customer
18 switching programs are generally ineffectual) the opinion is not admissible. *See, e.g., Ahlberg v.*
19 *Chrysler Corp.*, 481 F.3d 630, 635-36 (8th Cir. 2007) (affirming exclusion of expert opinion
20 because expert “employed no methodology whatsoever – reliable or otherwise”); *Diviero v.*
21 *Uniroyal Goodrich Tire Co.*, 114 F.3d 851, 853 (9th Cir. 1997) (“Rule 702 demands that expert
22 testimony relate to scientific, technical, or other specialized knowledge, which does not include
23 unsubstantiated speculation and subjective beliefs”).

24 **D. Inadequate Factual Support.** The proffering party also cannot carry its burden
25 where **the expert opinion has no factual basis or ignores undisputed contrary facts** (*e.g.*,
26 Sommer’s conclusions about multiple alternatives to Oracle support when party and customer
27 evidence is to the contrary, Sommer’s condemnation of Safe Passage when analysts and SAP
28 endorsed its goals and likely success). “An opinion based on unsubstantiated and undocumented

1 information is the antithesis of the scientifically reliable expert opinion admissible under *Daubert*
2 and Rule 702.” *Cabrera v. Cordis Corp.*, 134 F.3d 1418, 1423 (9th Cir. 1998); *accord, Guidroz-*
3 *Brault v. Mo. Pac. R.R. Co.*, 254 F.3d 825, 830-31 (9th Cir. 2001) (affirming exclusion of multiple
4 experts because conclusions based on factually unsupported assumptions); *Nuveen Quality Income*
5 *Mun. Fund Inc. v. Prudential Equity Group, LLC*, 262 Fed. Appx. 822, 824-25 (9th Cir. 2008)
6 (“An expert opinion is properly excluded where it relies on an assumption that is unsupported by
7 the evidence in the record and is not sufficiently founded upon the facts”); *QR Spex, Inc. v.*
8 *Motorola*, 2004 WL 5642907 at *9 (C.D. Cal.) (excluding expert report and opinion where expert
9 didn’t review relevant underlying evidence); *Robinson v. G.D. Searle & Co.*, 286 F.Supp.2d 1216,
10 1221 (N.D. Cal. 2003) (expert’s testimony inadmissible when based on factual premise directly
11 contradicted by evidence on the record).

12 **IV. SOMMER’S OPINIONS ABOUT HOW ERP CUSTOMERS MAKE DECISIONS**
13 **ABOUT AFTER-MARKET SUPPORT SHOULD BE EXCLUDED**

14 Sommer should be precluded from providing testimony and opinions about what ERP
15 customers generally consider (*i.e.*, their thoughts, intent and motivations) in making after-market
16 support purchasing decisions. Declaration of Lucia MacDonald (“MacDonald Decl.”), Ex. A
17 (Sommer Report) at 35-46. He lacks relevant experience qualifying him as an expert on this
18 specific subject. His generalized opinions, which are purportedly based on his “experience,”
19 “expertise,” and materials found on the internet do not concern or consider the specific customers
20 involved in this case, consider very little of the relevant evidence in this case, and are contradicted
21 by evidence in this case. His testimony is unreliable and misleading and should not be permitted.

22 **A. Sommer Lacks Relevant Experience**

23 Sommer has never been an expert witness and never qualified as an expert on any subject.
24 MacDonald Decl., Ex. B (Sommer Depo.) at 12:9-23. He has no relevant experience with EAS
25 customers’ decisions concerning after-market support for their ERP products either from the
26 perspective of a customer or vendor. *Id.* at 34:12-16; 36:1-17; 300:6-16 (has never helped a
27 customer with the purchase of after-market support). The only personal experience Sommer cited
28 to support his purported after-market support expertise was (1) that he provided a “tiny bit” of a
lecture to some Arizona State graduate students on cost of support (*id.* at 301:1-12), and (2) that

1 he had some dealings with and interviews of CIOs and other software buyers about the cost of
2 support for products not at issue in this case. *Id.* at 301:16-302:8; 303:8-20.

3 Though he purports to be an ERP industry expert, Sommer has never worked for SAP,
4 Oracle, PeopleSoft or JDE (*id.*, Ex. B at 13:8-15; 15:5-15), which are not only the ERP vendors
5 whose customers are involved in this case, but are admittedly the very big ERP players. *Id.* at
6 244:23-245:5. Moreover, Sommer’s experience with other ERP-related vendors did not involve
7 the provision of support for their products. *Id.* at 17:3-19; 19:18-20:14; 22:4-9; 23:6-24:5; 24:9-
8 25:1; 26:11-27:4; 68:17-69:7.

9 Sommer’s experience is far from sufficient to carry Defendants’ burden to show that
10 Sommer is an expert on how ERP customers make post deal support purchasing decisions. *See*,
11 *e.g.*, *Salinas*, 682 F.Supp.2d at 1030 (rejecting opinions on warnings by proffered expert who
12 “had no professional training or expert qualifications to opine on the formulation or design of
13 warning or safety labels” and had never “investigated a case with similar facts” and never
14 “testified as a warnings expert”); *see also* Section III.A above.

15 **B. Sommer’s Opinions Are Not Based On Sufficient Information And Data**

16 Sections VI.D 1-3 of Sommer’s Report (MacDonald Decl., Ex. A at 35-41) purport to
17 describe how a customer makes decisions about purchasing support after it has purchased and
18 implemented ERP software, why it will reconsider its support provider, and factors that influence
19 its decision. *See also id.*, Ex. B at 298:5-19. Until the last subsection, 3(d), this portion of
20 Sommer’s report cites nothing whatsoever in support of the opinions he expresses, and at his
21 deposition Sommer could not identify any specific evidence to support his opinions. *Id.* at
22 298:20-300:5. It is fundamental that “expert testimony [must be] based on sufficient facts and
23 data.” FRE 702(1). This testimony is not. “An opinion based on unsubstantiated and
24 undocumented information is the antithesis of the scientifically reliable expert opinion admissible
25 under *Daubert* and Rule 702.” *Cabrera*, 134 F.3d at 1423; *see also* Section III.D, above.

26 In the final subsection (titled “The third-party support market may influence a support
27 decision”), Sommer merely cites half a dozen web pages about a few third party support
28 providers’ attendance at industry meetings (MacDonald Decl., Ex. A § D. (3)(d) at 40-41), but

1 nothing about the influence of any factor on the purchasing decision, which is the subject of the
2 section. Moreover, Sommer did no independent investigation of the third-party materials he relied
3 on to verify whether the facts they recited were accurate. *Id.*, Ex. B at 181:5-14; 182:10-19. Such
4 information is insufficient to support a reliable opinion. *See, e.g., Kilgore*, 2006 WL 3253490 at
5 *4 (finding internet article an unreliable basis for methodology where the expert did not know
6 what research methodology the article was based and conducted no independent research); *see*
7 *also* Section III.B above.

8 **C. Sommer’s Opinions Neither Consider Nor Concern The Facts Of This Case**

9 Sommer testified “my charter for this report was to discuss the general dynamics of what’s
10 going on in the marketplace and how these different kinds of software decisions are made by
11 customers.” MacDonald Decl., Ex. B at 126:20-127:5. Sommer does not opine about the
12 motivation or behavior of any of SAP TN’s 358 specific customers, yet these are the only
13 customers relevant to SAP damages expert, Stephen Clarke’s lost profits analysis, which Sommer
14 purportedly supports with these opinions. *Id.* at 195:14-22; *see also* Declaration of Holly House
15 in Support of Motion to Exclude Clarke Testimony at Ex. A (Clarke Report) at 217 n. 1036.
16 Sommer testified repeatedly that he did not do any customer-by-customer analysis in this case
17 (MacDonald Decl., Ex. B at 89:11-17; 104:9-17; 191:25-192:8; 193:21-194:1; 200:19-201:2;
18 230:6-10; 232:2-12; 267:17-268:9; 327:16-23; 336:17-23; 342:6-24) and admittedly has no
19 knowledge what influenced the SAP TN customers’ support decisions. *Id.* at 230:6-10.

20 Thus, as a starting point, Sommer’s opinions about the behavior and motivation in general
21 of ERP software customers are inadmissible because they are not relevant to prove the
22 motivations of the specific customers actually involved in this case. *See, e.g., Jinro America, Inc.*
23 *v. Secure Investments, Inc.*, 266 F.3d 993, 1010-1011 (9th Cir. 2001) (Wallace, J., concurring in
24 result) (generalized expert testimony, not based on personal knowledge of specific party or
25 transaction involved in case, about behavior of Korean businesses is inadmissible because not
26 relevant to prove behavior of the specific Korean business in specific transaction in suit); *U.S. v.*
27 *Walker*, 217 Fed.Appx. 714, 716-717 (9th Cir. 2007) (expert’s testimony of general account of
28 interrogation practices based on a 10 year old article inadmissible as unreliable and lacking

1 sufficient nexus to case facts); *Trout v. Milton S. Hershey Medical Center*, 576 F.Supp.2d 673,
2 678 (M.D. Pa. 2008) (expert’s testimony based on generalizations excluded because opinions not
3 applied to the specific case).

4 Even if they were relevant, Sommer’s general opinions about ERP customers’ support
5 motivations are inadmissible because they are unreliable. Sommer did not consider any customer
6 depositions or declarations or information from this case (*see* MacDonald Decl., Ex. B at 160:25-
7 161:19; *see also id.*, Ex. A at App. C); he did not list as considered and does not rely on the one
8 deposition he attended (*id.*; *see also id.*, Ex. B at 161:20-162:9); and he does not rely on the one
9 customer interview he did. *Id.* at 89:18-90:1. When faced with examples from the depositions
10 and declarations of actual SAP TN customers that contradict his opinions about how ERP
11 customers are supposed to think and behave,¹ Sommer admitted: “It’s interesting information.
12 And were I doing a customer-by-customer review, that would definitely be an interesting
13 document.” *Id.* at 176:9-15.

14 In fact, Sommer considered almost none of the evidence developed in this case. Appendix
15 C to his Report lists all the evidence he considered. MacDonald Decl., Ex. A at App. C; *id.*, Ex. B
16 at 31:14-21; 113:24-114:11. He looked at unidentified parts of only two SAP depositions. *Id.* at
17 124:13-24. Apart from glancing at the exhibits to the two depositions, he considered only two
18

19 ¹ *Id.*, Ex. B at, *e.g.*, 170:4-171:6 (TravelCenters testified that it didn’t consider any support
20 options other than Oracle or TN); 173:10-16 (Spokane County declared: “There was no other
21 third-party service provider for Spokane’s PeopleSoft software that Spokane would have
22 contracted with other than TomorrowNow in June 2007. Spokane also did not have the skills or
23 interest to self-support, and it would never have taken time.”); 175:2-176:17 (BrainLab declared:
24 “There was no other third-party service provider for BrainLAB’s JDE services that BrainLAB
25 considered for that transition period before its SAP applications were fully functioning other than
26 TN. Had TN not been an available option to BrainLAB for that transitional service on its JDE
27 applications (including because BrainLAB would not have contracted with TN if in fact TN was
28 infringing Oracle-owned intellectual property as alleged by Oracle and BrainLAB knew of such
infringement) BrainLAB likely would have continued to contract with Oracle for support
services on its JDE applications until its SAP applications were up and running. BrainLAB had
not identified or received proposals from any other third-party.”); 176:18-178:11 (Harley-
Davidson declared: “Harley-Davidson did not have and did not seriously consider any other
service options for the PeopleSoft applications Oracle was servicing at that time in 2006 besides
Oracle and TomorrowNow. In addition, Harley-Davidson did not seriously consider self-support
for its PeopleSoft applications.”).

1 documents produced in discovery. *Id.* at 160:11-14. Except in Appendix C, his report cites
2 neither deposition, none of the two depositions' exhibits, and only one of the two documents (on
3 an incidental point). *Id.*, Ex. A at 54 n. 80; *see also id.*, Ex. B at 128:16-129:13. With respect to
4 Meyer's report (to which Sommer purports to respond), though Sommer looked at the report, he
5 did not review any of the source documents or schedules that Meyer cited. *Id.* at 120:19-121:7;
6 183:2-184:3.

7 Expert testimony unrelated to the facts of the case, much less contradicted by the evidence
8 that was not considered, is inadmissible. *See, e.g., QR Spex*, 2004 WL 5642907 at *9 (excluding
9 expert report and opinion where expert didn't review relevant underlying evidence); *Robinson.*,
10 286 F.Supp.2d at 1221 (expert's testimony inadmissible when based on factual premise directly
11 contradicted by evidence on the record); *see also* Sections III.C & D above.

12 In sum, Sommer's opinions and testimony about how ERP customers make support
13 decisions should be excluded because he has no relevant expertise on this specific subject and his
14 opinions are not based on sufficient facts and data to be reliable. In addition, they cannot help the
15 trier of fact understand the evidence or determine a fact in issue, because Sommer's opinions did
16 not consider and do not concern the evidence and issues in this case.

17 **V. SOMMER'S TESTIMONY RELATED TO ALTERNATIVE THIRD-PARTY**
18 **SUPPORT OPTIONS SHOULD BE EXCLUDED AS UNRELIABLE AND**
19 **UNTIMELY AFFIRMATIVE OPINION**

20 Section D.4 of Sommer's Report purports to catalog alternate support options to Oracle
21 vendor support. MacDonald Decl., Ex. A at 41-46. Sommer's opinions and testimony about
22 alternative support options should be excluded because (a) Sommer lacks necessary expertise to
23 offer the opinions; (b) the data supporting them is scant and contradicted by evidence Sommer
24 ignored; (c) Sommer's methodology (compiling untested and irrelevant material from the internet)
25 is unreliable; (d) the generalized opinions Sommer offers did not consider and do not concern the
26 facts of this case; and (e) Sommer's analysis does not rebut Meyer but instead is an untimely and
27 prejudicial affirmative analysis.

28 **A. Sommer Lacks Relevant Experience**

As shown in Section IV.A above, Sommer has never assisted any client with the purchase

1 of after-market support and has no relevant expertise or real world experience helping customers
2 determine their options, which is the subject of this section. None of his work during the time
3 period relevant to this case (2004-2008) with his company TechVentive was relevant or assisted
4 him. *Id.*, Ex. B at 65:1-5; 73:10-18. Nor did he rely on any publications that he has authored. *Id.*
5 at 77:10-18. Because he has no specific personal experience to form any of his opinions on third-
6 party vendor options in this case, he admittedly did not rely on any. *Id.* at 77:19-78:2.

7 Having no expertise, Sommer testified he instead relied on random encounters with
8 unnamed third party vendors to validate his conclusions. *Id.* at 72:10-73:2 (“And I run into these
9 companies frequently at different software events and trade shows and those kind of things
10 That’s how I know this information.”); *see also id.* at 35:2-4. That does not make him an expert.
11 *See, e.g., Wallach v. Longevity Network, Ltd.*, 2006 WL 5106208 at *2 (C.D. Cal.) (expert
12 precluded from testifying about likelihood of confusion and damages in a trademark infringement
13 action because “his experience is limited to the trademark and color scheme of one company in
14 one industry”); *see also* Section III.A above. Sommer’s lack of expertise alone precludes his
15 offering of opinions on third party support alternatives. Fed. R. Evid. 702.

16 **B. Sommer’s Opinions Are Not Based On Sufficient Information And Data**

17 Sommer’s menu of purported third party support options is again the regurgitated product
18 of his internet searches. MacDonald Decl., Ex. A at 40-41, nn. 35-59 (cited support in footnotes
19 all from internet searches, including a blog entry); *id.*, Ex. B at 179:23-180:4; 318:2-319:13;
20 325:12-16. Sommer admittedly did no in-depth analysis of individual vendors. *Id.* at 319:14-24.
21 He did not know the specifics of any of the alternative support vendors he lists – not the products
22 they cover, not the geography they operated in, not whether they were financially stable, and not
23 what they charged. *Id.* at 215:5-216:15. A particular deficit was his lack of analysis to determine
24 what level of support any third-party support vendor provided during the relevant time, a
25 necessary input in order to evaluate whether such vendor was comparable to SAP TN or Oracle.
26 *Id.* at 338:22-339:5. In addition, his opinions are not based on any Oracle customer studies about
27 what an Oracle ERP customer would likely care about in an alternate support vendor or actually
28 do in terms of switching. *Id.* at 322:15-21.

1 The Ninth Circuit has repeatedly stated that where evidence of pre-litigation research
2 or peer review is not available, the experts must . . . “point to some objective source –
3 a learned treatise, the policy statement of a professional association, a published article
4 in a reputable science journal or the like – to show that they have followed the
5 scientific method as practiced by (at least) a recognized minority of the scientists in
6 their field.”

7 *Carnegie Mellon*, 55 F.Supp.2d at 1034-35 (quoting *Daubert II*, 43 F.3d at 1319). Defendants
8 cannot begin to satisfy this requirement for Sommer’s third party vendor analysis. Sommer’s lack
9 of rigorous inquiry and lack of relevant factual input makes his study unreliable. It should not be
10 allowed before the jury as “expert” analysis. See Section III.A, B & D above.

11 **C. Sommer’s Opinions Are Based On An Unreliable Methodology**

12 Sommer faults Meyer for assuming that no third party could provide the same level of
13 support as Oracle or SAP TN. MacDonald Decl., Ex. A at 46. However, while Sommer lists
14 some third-party vendors, he is not prepared to opine that they offer comparable or better service
15 than Oracle or SAP TN in the relevant time period. *Id.*, Ex. B at 311:18-312:9. Sommer does not
16 offer *any* comparison between SAP TN’s support offering and that of any purported alternatives.
17 *Id.* at 98:16-99:4; 216:2-15. He also does not know and did not analyze what level of support the
18 customers at issue in this case would have accepted as compared to SAP TN’s service. *Id.* at
19 232:4-22. On the defensive, Sommer testified that comparing services between vendors is not as
20 important as what the customers thought of the service – but he also did no analysis of the
21 attractiveness of any particular options to the customers in this case. *Id.* at 99:5-16; 224:1-10.

22 A methodology that presumes third-party service providers to be “alternatives” to SAP
23 TN’s without considering how their relevant characteristics compare is fundamentally flawed and
24 unreliable. See, e.g., *Daubert II*, 43 F.3d at 1319, n.11 (party must demonstrate in some
25 objectively verifiable way that its expert has chosen a reliable method and followed it properly,
26 particularly where no independent, pre-litigation analysis to rely on); see also Section III.C above.

27 **D. Sommer’s Generalized Opinions Are Not Relevant Because They Neither
28 Concern Nor Consider The Facts Of This Case**

Sommer’s analysis is also untethered to the facts, an independent basis for exclusion. His
opinions on EAS support options are high-level generalizations. They are not specific to the time
period in this case (MacDonald Decl., Ex. B at 319:25-320:6); they are not specific to the products

1 in this case (*id.* at 320:7-14); they are not specific to vendors supporting the products in this case
2 (*id.* at 320:15-24); and they are not limited to vendors offering comparable support to SAP TN.
3 *Id.* at 321:4-19.

4 Sommer did not rely on any of the contemporaneous evidence from those actually in the
5 market, including SAP TN, Oracle, SAP, and customers. *Id.* at 216:18-217:11; 323:23-325:2.
6 Sommer thus did not know what Oracle, SAP or SAP TN thought of third-party vendors and
7 whether or not they were serious competition. *Id.* at 315:1-14; 316:8-317:4. And, while he had
8 access to information about the specific customers in this case, Sommer disregarded it.²

9 As a result, Sommer’s generalizations about third-party support have little if anything to
10 do with this case. They cannot help the trier of fact understand the evidence or determine a fact in
11 issue, because Sommer’s opinions did not consider and do not concern the evidence and issues in
12 this case. They do not satisfy the relevance requirements for expert testimony and should be
13 excluded. *See* Section II. D above; *see also Jinro*, 266 F.3d at 1010-1011 (generalized expert
14 testimony, not based on personal knowledge of specific party or transaction involved in case
15 inadmissible because not relevant to prove behavior of the specific actors in the specific
16 transaction in suit); *Perry*, 2010 WL 3025614 at *25 (finding unreliable expert opinion that
17 “failed to consider evidence contrary to his view”); *Nebraska Plastics, Inc. v. Holland Colors*
18 *Americas, Inc.*, 408 F.3d 410, 416 (8th Cir. 2005) (affirming trial court’s preclusion of expert’s
19 opinions because they did not fit the facts of the case and addressed none of the relevant facts,
20 noting that “if the expert’s opinion is so fundamentally unsupported that it can offer no assistance
21 to the jury, it must be excluded (citations omitted) and that “an expert opinion that fails to

22
23 ² Sommer’s team gathered public material for Clarke about SAP TN’s customers in this case
24 “separately” from his work on his report (*see* MacDonald Decl., Ex. A at 1, n.1), but Sommer did
25 not rely on any of it. *Id.*, Ex. B at 86:4-24; 89:2-8. Similarly, while Sommer interviewed one
26 former SAP TN customer to assist Clarke (*see id.*, Ex. A at 1 n.1), and the customer had not
27 heard of SAP TN (*id.*, Ex. B at 91:19-20), Sommer did not use that information in reaching the
28 conclusions in his report. *Id.* at 89:18-90:1; 92:5-21. Sommer also did not review any customer
deposition transcripts or declarations from this case in forming his opinions, including those that
contradict his conclusions about the viability of his listed third party support options. *Id.* at
160:25-161:13; *see* n. 3 above. And he does not know how many, if any, customers in this case
seriously considered any of the alternative support providers he lists. *Id.* at 314:16-25.

1 consider the relevant facts of the case is fundamentally unsupported” and “should not be admitted
2 if it does not apply to the specific facts of the case.”); *accord Sunstar, Inc. v. Alberto-Culver Co.,*
3 *Inc.*, 2004 WL 1899927 at *26-27 (N.D. Ill.); *Trout*, 576 F.Supp.2d at 678.

4 **E. Sommer’s Testimony About General Support Options Is Not Rebuttal And**
5 **Should Be Excluded Pursuant To FRCP 37**

6 Defendants produced Sommer’s single-spaced 61-page report on March 26, 2010, the date
7 the parties agreed to provide rebuttal reports. *See* Oracle’s 8/19/2010 Opp. to Defs’ Motion in
8 Limine (“MIL”) No. 4. Sommer’s report purports to respond to opinions or analyses of Oracle
9 damages expert, Paul Meyer, but it clearly contains portions that do not. *See* MacDonald Decl.,
10 Ex. A at 1, 3-4, 9-12, 15-32, 37, 41-61.

11 Specifically, Sommer includes a “general overview of alternatives to Oracle-provided
12 support” that “identified general classes of third-party and self-support options available to
13 customers as a substitute for vendor-provided support.” MacDonald Decl., Ex. A at 3, Opinion 2;
14 at 41-46. But Meyer did not offer general opinions on what non-specific EAS customers care
15 about or catalog purported support options generally. Using the evidence in the case, Meyer
16 instead relied on the demonstrated lack of *support alternatives comparable to SAP TN’s support*
17 (which was claimed to be equal to or better than Oracle’s) contemporaneously available for Oracle
18 customers who had switched to SAP TN. MacDonald Decl., Ex. C (Meyer Report) at ¶¶ 364, 366,
19 372. Sommer’s general overview, however, describes a different category of support options for
20 ERP customers who are *not* looking for support comparable to Oracle’s and SAP TN’s. As he
21 states in the Summary of this section of his Report (MacDonald Decl., Ex. A at 46):

22 [S]ome ERP customers have limited support needs, thus, such a customer may
23 have its support needs met by a company with a limited level of support services.
24 In that situation, a customer has viable alternatives to vendor-provided support,
25 regardless of whether the third party provides the precise level of support services
26 as the customer’s ERP vendor.

27 Sommer did nothing to make his “general overview” of options even relevant to, much
28 less rebuttal to, Meyer’s case-specific analysis. *Id.*, Ex. B at 98:16-99:4; 311:18-312:9 (Sommer
does not opine that any of the third-party vendors he lists offered comparable or better service
than Oracle or SAP TN in the relevant period: “that was not part of my assignment”).

There is no provision in the case schedule for Meyer to provide a sur-rebuttal report. *See*

1 Oracle's 8/19/2010 Opp. to Defs' MIL No. 4. Defendants' decision to spring on Oracle new non-
2 rebuttal analyses rather than presenting them on November 16, 2009 when affirmative reports
3 were due prejudiced Oracle. Indeed, Defendants are now trying to silence any response to
4 Sommer by Meyer at trial through an *in limine* motion because Meyer didn't have comprehensive
5 responses to Sommer's Report ready or memorized, although Meyer did testify that he responded
6 to Sommer through Clarke's reference or reliance on Sommer. *Id.*

7 Defendants have it backwards. It is Sommer who should be silenced, not Meyer. Fed. R.
8 Civ. Proc. 26(a)(2)(C)(ii) allows the admission of rebuttal expert testimony only if it is "intended
9 solely to contradict or rebut evidence on the same subject matter identified by another party. . . ."
10 A rebuttal expert "must restrict his testimony to attacking theories offered by the adversaries'
11 experts." *IBM Corp. v. Fasco Industries, Inc.*, 1995 WL 115421 at *3 (N.D. Cal.); *accord In re*
12 *Ready-Mix Concrete Antitrust Litig.*, 2009 U.S. Dist. LEXIS 82043 at *19 (S.D. Ill.) (rebuttal
13 report must rebut, not offer affirmative opinions); *Burnham v. U.S.*, 2009 WL 2169191 at *5 (D.
14 Ariz.) ("Rebuttal experts shall be limited to responding to opinions stated by initial experts.").
15 Where, as here, a party mislabels affirmative opinions as "rebuttal" opinions and the opposing
16 party has no meaningful opportunity to respond, the courts can and do preclude those non-rebuttal
17 opinions under Rule 37. The courts in all the above-cited cases did just that.

18 Sommer's "general overview" of alternative support options for ERP customers is not
19 appropriate rebuttal, and it should be excluded for that reason as well.

20 **VI. SOMMER'S OPINIONS AND TESTIMONY CONCERNING SELF-SUPPORT AS** 21 **A "VIBRANT ALTERNATIVE" SHOULD BE EXCLUDED**

22 Sommer opines that self-support is a "vibrant alternate support option" that "should have
23 been mentioned" in Meyer's report. MacDonald Decl., Ex. A at 3, item (2); 42-45. Sommer's
24 opinions and testimony about self-support should be excluded because they are unreliable.

25 **A. Sommer Lacks Relevant Expertise**

26 Once again, Sommer proffers opinions on topics about which he has no expertise.
27 Sommer has never been hired by a client to assist in deciding whether to self-support software.
28 *Id.*, Ex. B at 37:2-16. The only experience with self-support in the after-market for ERP software
that Sommer was able to describe in his deposition was limited to a single occasion where a CIO

1 of a Midwest manufacturer (he couldn't remember the name of the person or the company)
2 ruminated over whether or not to self-support. *Id.* at 38:18-39:5. Whatever other qualifications
3 Sommer may have on other topics, his self-support opinions cannot be presented as "expert" to a
4 jury. *See, e.g., Chang*, 207 F.3d at 1172-73 (expert "qualified" in one topic excluded from
5 testifying on topic where didn't have expertise); *see also* Section III.A above.

6 **B. Sommer's Generalized Opinions Are Not Based On Sufficient**
7 **Information And Are Not Relevant Because They Neither**
8 **Concern Nor Consider The Facts Of This Case**

9 Sommer's opinion that self-support is a "vibrant alternative" is based on virtually no data
10 or support. MacDonald Decl., Ex. A at 42-43. His Report lists a number of attributes that he
11 speculates might make a customer capable of self-support, but cites nothing to support those
12 factors. *Id.* He does not know whether a large percentage or a small percentage of ERP
13 customers could self-support. *Id.*, Ex. B at 330:3-11. He opined that the only way to determine
14 customers' ability to self-support would be to look at the record on every single customer (*id.* at
15 330:21-24), but Sommer, of course, did not do that; he didn't look at any of them. *Id.* at 217:2-6;
16 332:8-14; 336:21-23. Sommer also did not consider any of the evidence from Oracle or SAP TN
17 about whether self-support was a realistic alternative for SAP TN's customers. *Id.* at 216:18-
18 217:11; 219:5-13. Thus Sommer has no idea whether or not any of SAP TN's customers fit the
19 profile he outlined for customers capable of self-support. *Id.* at 328:2-19.

20 Sommer also lacks information to support his characterization of the self-support
21 alternative as "vibrant" even for customers who could do it. He admitted that just being capable
22 of self-support does not necessarily mean that a customer would choose to self-support. *Id.* at
23 328:20-329:4. He is ignorant of factors that would influence that choice. Among other things, he
24 does not know whether hiring consultants on his list of alternative support options to assist self-
25 support customers would be more or less expensive than using SAP TN for service. *Id.* at 330:25-
26 332:25; 334:17-335:19. And though he opines that software customers could use less automated
27 resources to support their payroll requirements, such as using reference manuals he lists, Sommer
28 also does not know whether any SAP TN customer fits the profile to do that. *Id.* at 335:20-337:8.

In short, Sommer's opinion that self-support is a "vibrant alternative" for ERP customers

1 is unreliable *ipse dixit* speculation by someone who has no experience with self-support.
2 Moreover, it does not take into account any information about the SAP TN customers in this case,
3 or specifically apply to them. Sommer’s opinion is not based on sufficient data, it is irrelevant
4 because it is not applied to the facts of this case and it is not the result of rigorous analysis. It
5 should be excluded. *See* Sections II, III A, C & D above.

6 **VII. SOMMER’S OPINIONS AND TESTIMONY REGARDING THE GENERAL
EFFECTIVENESS OF SWITCHING PROGRAMS SHOULD BE EXCLUDED**

7 In his report, Sommer offers the opinion that marketing programs designed to entice
8 customers to switch from another ERP vendor’s products are not unusual in the ERP industry but
9 “rarely produce the kinds of major changes vendors hope to achieve.” MacDonald Decl., Ex. A at
10 48; *see also id.* at 3, item(3); 47-49; 50-52. His opinions and testimony about the general success
11 of ERP switching programs should be excluded.

12 **A. Sommer Lacks Relevant Qualifications**

13 Sommer cites no personal experience with or knowledge of ERP vendors switching
14 programs that would qualify him to express an expert opinion about whether they are successful.
15 Sommer has never assisted a client in developing a market program akin to SAP’s Safe Passage
16 switching program and none of his work had anything to do with evaluating the success or failure
17 of any ERP vendor’s marketing programs. *Id.*, Ex. B at 62:17-63:4; 64:18-65:1. An unqualified
18 expert cannot testify. *See, e.g., Rambus, Inc. v. Hynix Semiconductor, Inc.*, 254 F.R.D. 597, 603-
19 05 (N.D. Cal. 2008) (finding inadmissible testimony of electrical engineer on “commercial
20 success” because he had no marketing or business training in commercial aspects of claimed
21 invention); *see also* Section III.A above.

22 **B. Sommer’s Opinion Is Not Based On A Reliable Methodology
Applied To Sufficient Data**

23 Sommer cited seven examples of switching programs in his Report. MacDonald Decl.,
24 Ex. A at 48-49. Four have nothing to do with the products or customers in this case. *Id.*, Ex. B at
25 238:21-239:15. For the other three, Sommer based his opinion on information he got off the
26 internet. *Id.*, Ex. A at 48-49 nn. 63-70; *id.*, Ex. B at 239:16-21. But none of the internet sources
27 Sommer cites details the success of any of the seven programs; he admitted he has no metrics
28 whatsoever on the actual success or failure of any ERP vendors’ switching program. *Id.* at

1 241:14-242:25 (“Q. Now, you’ve provided no materials from which one could gauge [any of] the
2 program[s’] success, correct?” “A. That is correct. I did not provide that detail.” “Q. Do you have
3 it? A. No. That was not part of the scope of my assignment.”).

4 Literally the only support for Sommer’s opinion is a comment he found in an internet
5 article interview with an analyst, Jim Shepherd, that switching programs generally have “limited
6 success.” *Id.*, Ex. A at 48 & n. 63; *id.*, Ex. B at 73:19-74:13; 242:11-243:23.³ But Sommer did
7 not interview the authors of any of the articles he considered in forming his opinions and did no
8 independent investigation to verify whether the facts recited were accurate. *Id.* at 179:23-181:14;
9 182:10-19. This is not acceptably rigorous and “expert” analysis or reliable expert support. *See*,
10 *e.g.*, *Ollier v. Sweetwater Union High School Dist.*, 267 F.R.D. 339, 341-42 (S.D. Cal. 2010)
11 (excluding expert testimony for lacking a reliable methodology applying to the facts of the case);
12 *see also* Section III.B above.

13 Because Sommer provides no information and uses no metric for gauging the success of
14 these programs, his methodology for concluding that switching programs are generally
15 unsuccessful cannot be tested. It is mere *ipse dixit*, and it should be excluded as unreliable.
16 *Joiner*, 522 U.S. at 146; *see also* Section III.C above.

17 **C. Sommer’s General Opinions Of Switching Programs Do Not
18 Consider And Are Not Relevant To The Facts Of This Case**

19 Sommer never spoke with anyone at SAP or SAP TN about this case in preparing his
20 opinions. MacDonald Decl., Ex. B at 82:17-21. His opinion that most marketing programs by
21 either Oracle or SAP have had limited impact on their customers is based solely on his experience
22 as “an industry watcher” and he has no data or analysis of any of the marketing programs of either
23 Oracle or SAP to support this statement. *Id.* at 344:6-346:19.

24 Safe Passage, the particular program relevant in this case, differed in significant respects
25 from the other switching programs Sommer mentions; in particular Safe Passage alone featured an

26 ³ Ironically, contrary to Sommer’s newly hatched opinion that SAP’s Safe Passage expectations
27 were unreasonable discussed below, Mr. Shepherd praised SAP’s Safe Passage switching
28 program as “great strategy.” MacDonald Decl., Ex. B at 249:2-250:9; *id.*, Ex. E (Sommer Depo.
Exhibit 595).

1 established support alternative (SAP TN), subsidized by a venerable ERP parent (SAP) as an
2 enticement. *Id.* at 346:20-347:12; 352:3-11; *id.*, Ex. A at 48-50. Thus whatever the merits of
3 other switching programs, and even if Sommer had any acceptable expertise or basis for opining
4 about them (which he doesn't), his opinion should be excluded because it is irrelevant to the only
5 switching program at issue here (Safe Passage). *See, e.g., Jinro*, 266 F.3d at 1010-1011; *Nebraska*
6 *Plastics, Inc.*, 408 F.3d at 416 (affirming preclusion of expert opinion that did not apply to
7 specific case facts); *Trout v. Milton S. Hershey Medical Center*, 576 F.Supp.2d at 678 (expert's
8 testimony based on generalizations excluded because opinions not applied to specific case facts).

9 **VIII. SOMMER'S OPINIONS REGARDING THE EFFECTIVENESS OF SAP'S SAFE**
10 **PASSAGE PROGRAM AND THE REASONABLENESS OF SAP'S**
11 **EXPECTATIONS ABOUT IT SHOULD BE EXCLUDED**

12 Sommer opined in his report that SAP's Safe Passage program (which offered Oracle
13 customers discounts on SAP's ERP software and provided discounted or free SAP TN support for
14 their Oracle products while they transitioned from Oracle to SAP), was an ineffectual marketing
15 strategy. MacDonald Decl., Ex. A at 50-56. Further, he opined that sales of SAP TN support for
16 Oracle products were at cross-purposes with and a barrier to SAP's sales of its own applications to
17 those customers. *Id.* at 56 ¶ (3). In addition, as detailed below, in his deposition, Sommer
18 testified to a previously undisclosed opinion that SAP's stated goals for its Safe Passage switching
19 program were unreasonable. These opinions and testimony should be excluded.

20 **A. Sommer's Opinion On Whether SAP's Stated Goals For The**
21 **Safe Passage Program Were Reasonable Should Be Excluded**

22 **1. Sommer's opinion about the unreasonableness of SAP's**
23 **goals was not timely disclosed**

24 Sommer's Report contains no opinion that the financial or strategic goals SAP had for Safe
25 Passage were unreasonable or unrealistic. *Id.*, Ex. A. His initial description in his deposition of
26 his opinions pertinent to Safe Passage also did not include such an opinion. *Id.*, Ex. B at 151:1-
27 24; 154:3-16. In fact, Sommer initially testified that the number of customers SAP was intending
28 to move, the amount of revenue SAP expected to get from Safe Passage, and SAP's strategic goals
were not within the scope of his report. *Id.* at 137:21-138:24; 143:2-21.

Sommer accordingly testified during the morning session of his deposition that he did not

1 intend to offer any opinion about the reasonableness of SAP’s financial goals for Safe Passage (*id.*
2 at 139:25-140:7) or to offer an opinion that SAP’s financial or strategic goals for Safe Passage
3 were unreasonable or unrealistic. *Id.* at 142:4-19; 145:1-10. After lunch with SAP’s attorneys,
4 however, Sommer changed his tune. He offered a new opinion, not stated in his report, that
5 SAP’s goal of converting 50% of PeopleSoft customers to SAP was unreasonable. *Id.* at 184:4-
6 20; 185:4-12; 189:18-25. The 50% goal was not even cited in Sommer’s Report, much less
7 discussed or opined about. *Id.* at 185:4-25; 186:22-187:2.

8 Rule 26(a)(2)(B) requires that an expert report “contain a complete statement of all the
9 opinions to be expressed and the basis and reasons therefore,” as well as “the data and other
10 information considered by the witness in forming the opinions.” Failure to satisfy this rule
11 precludes use of this information under Fed. Rule of Civ. Proc. 37 unless the failure is substantially
12 justified or harmless. Defendants’ failure is neither.

13 Defendants do not and cannot justify springing this opinion on Oracle two and a half
14 months after Sommer’s Report, after expert discovery had closed, and after Sommer denied
15 having any such opinion during half his deposition. The late disclosure prejudices Oracle because
16 it had no opportunity to test the opinion with further discovery or to respond to it or properly
17 prepare for cross-examination of Sommer. Under the “wide latitude [for] imposing sanctions
18 under Rule 37(c)(1)” for failures in expert disclosures, *Maionchi v. Union Pacific Corp.*, 2007 WL
19 2022027 at *1 (N.D. Cal.), Oracle asks that the Court exclude Sommer’s eleventh hour,
20 apparently attorney-driven opinion that SAP’s expectations for Safe Passage were unreasonable.

21 2. Sommer Lacks Relevant Experience

22 Even if Sommer’s new opinion on the reasonableness of SAP’s financial and strategic
23 goals for Safe Passage were timely, it should still be excluded as unreliable, in part because he
24 possesses no relevant expertise on this specific subject. As set forth in Section VII.A above,
25 Sommer has no personal experience developing or assessing switching programs. Sommer also
26 does not rely on any engagement that he has personally been involved in to support his opinions
27 on the reasonableness of SAP’s expectations for its Safe Passage program. MacDonald Decl., Ex.
28 B at 76:22-77:5. He has never assisted a client in evaluating the purchase of SAP software

1 through the Safe Passage program. *Id.* at 48:10-14. He has never worked with a customer
2 considering any ERP software that offered free support on the existing product. *Id.* at 293:10-18.
3 He has authored no publications he can rely on to support his positions regarding the
4 reasonableness of SAP's expectations for its Safe Passage program. *Id.* at 76:9-21. Again,
5 Sommer's lack of expertise should block Defendants' attempt to offer his Safe Passage opinions
6 to the jury as "expert." *See* Section III. A above.

7 **3. Sommer's Opinions Are Not Based On Sufficient Data**
8 **And Information**

9 Prior to being retained to work on this case, the only personal experience Mr. Sommer had
10 with SAP's and SAP TN's Safe Passage program came from reading publicly available press
11 releases or other news sources. MacDonald Decl., Ex. B at 48:15-49:1. Other than references in
12 Meyer's report to SAP's Safe Passage goals (the support for which he did not look at), Sommer
13 had no other information about SAP's Safe Passage goal of converting 50% of PeopleSoft and
14 JDE customers to SAP. *Id.* at 187:22-188:4.

15 Sommer can provide no support whatsoever for his opinion that SAP's Safe Passage goals
16 were unreasonable. He admittedly did no analysis on this topic. *Id.* at 192:9-193:20. He never
17 spoke to anyone at SAP about or read any of the SAP executives' testimony on SAP's Safe
18 Passage expectations or goals and the reasons for them. *Id.* at 124:13-125:24; 128:7-15; 82:17-21.
19 Indeed, he agreed that SAP executives believed that Safe Passage, with the SAP TN support
20 "cornerstone", was going to be a good deal for SAP. *Id.* at 354:19-355:6 ("I believe SAP
21 executives believed it was going to be a good deal, or a good deal for them to do this."). He can't
22 say one way or another whether he would have agreed with opinions SAP executives held about
23 the likely achievements of Safe Passage's SAP TN offerings (*id.* at 355:22-357:19), but
24 acknowledged that SAP was the leading EAS vendor and that he would expect they knew what
25 they were doing and had researched their Safe Passage projections. *Id.* at 146:21-148:17; 220:1-9.
26 He is not aware of any document around the beginning of 2005 that said Safe Passage was not a
27 good idea. *Id.* at 254:23-255:7. Indeed, as noted above, an article he cited on switching programs
28 generally quotes the contemporaneous praise of an analyst he respects and cites that SAP's Safe

1 Passage program was a “great strategy.” *Id.* at 249:2-250:9 & Exhibit 595.

2 Not surprisingly, given the nature of Sommer’s Safe Passage opinion’s lunch-hour genesis,
3 Sommer was not aware of other significant facts. Before being told by Oracle’s counsel in the
4 deposition, he did not know (and *a fortiori* did not consider) that the Safe Passage program
5 involved offering SAP TN support for free to customers migrating to SAP. *Id.*, Ex. B at 236:9-19;
6 238:7-20. He was also not aware that several other analysts he considers reliable praised Safe
7 Passage and described SAP’s acquisition of SAP TN as its “cornerstone.” *Id.* at 248:14-252:22.
8 He did no investigation to see how analysts reacted to it (*id.* at 247:16-248:13) and agrees that, if
9 he had known about their opinions, he would have factored them into his opinion. *Id.* at 252:10-
10 22. That industry analysts at the time and SAP itself thought Safe Passage made good business
11 sense further underscores the unreliability of Sommer’s opinions. *See* Fed. R. Evid. 702,
12 Advisory Note (“if an expert purports to apply principles and methods in accordance with
13 professional standards, and yet reaches a conclusion that other experts in the field would not
14 reach, the trial court may fairly suspect that the principles and methods have not been applied
15 faithfully.”).

16 In light of the information Sommer ignored, the information he did not know, and the
17 information he got wrong, Sommer’s late-proffered opinion on the reasonableness of SAP’s Safe
18 Passage expectations it should be excluded. *See* Sections II & III.D above; *see also, Adams v.*
19 *U.S.*, 2009 WL 1324231 at *1 (D. Idaho) (precluding expert from testifying at trial about
20 DuPont’s intent because being an expert in the industry did not make him an expert on defendant
21 DuPont; he never worked for DuPont and had never done any consulting work for it).

22 **4. Sommer’s Safe Passage Opinions Are Not Based On A
23 Reliable Methodology**

24 As is clear from the above, Sommer used no reliable methodology in formulating his new-
25 found opinions that SAP’s Safe Passage marketing strategy was ineffectual and SAP’s
26 expectations for it were unreasonable. He did not analyze and does not know what role SAP TN’s
27 support pricing played in the decision-making of any of the specific SAP TN customers in this
28 case that also purchased SAP applications. MacDonald Decl., Ex. B at 195:14-22. He did no
analysis and does not know whether the actual evidence supports his opinion that SAP’s offering

1 of SAP TN support may have caused some customers to actually stay on Oracle’s software
2 products and not move over to SAP’s. *Id.* at 193:10-194:1. He has not analyzed and has no
3 opinion to offer about what percentage of customers it *would* have been reasonable for SAP to
4 have expected to convert. *Id.* at 194:14-195:13. He has nothing on the actual conversion rate for
5 Safe Passage, and no other metric for its success by which his assertion that it was ineffectual can
6 be tested. *Id.* at 242:15-25.

7 Sommer’s methodology for arriving at his opinions about the unreasonableness of SAP’s
8 Safe Passage program is not just unreliable; it is nonexistent. His testimony on Safe Passage must
9 be excluded. *See, e.g., Ahlberg*, 481 F.3d at 635-36 (affirming exclusion of expert opinion
10 because expert “employed no methodology whatsoever – reliable or otherwise”); *see also* Section
11 III.C above.

12 **IX. SOMMER’S OPINIONS AND TESTIMONY REGARDING HOW ERP**
13 **CUSTOMERS IN GENERAL MAKE DECISIONS ABOUT PURCHASING OF**
14 **ERP SOFTWARE ALSO SHOULD BE EXCLUDED**

14 **A. Sommer Lacks Relevant Experience Or Factual Support**

15 Sommer has not worked on engagements involving the major ERP market players
16 including SAP, PeopleSoft, JDE or Oracle. *Id.* at 13:8-15; 15:5-15. His work with ERP vendors
17 is limited to companies that have some software on the periphery of the core ERP industry
18 (Syspro, Workday, Primavera, Open Rating, Salesforce.com, NetSuite and Deltek). MacDonald
19 Decl., Ex. B at 17:3-19; 18:22-19:17; 21:14-22:9; 23:6-24:5; 24:9-25:1; 26:11-27:4, 67:10-68:16.
20 Moreover, Sommer’s experience with NetSuite, Primavera and Salesforce.com only involved the
21 companies buying an article or sponsoring his involvement in a conference or blog. *Id.* at 21:14-
22 22:3; 24:9-25:1; 26:11-27:13.

23 Most of Sommer’s experience assisting clients informally with ERP or other software
24 purchasing decisions occurred when he was employed by Accenture, which ended in October
25 1999, over 5 years prior to the relevant facts in this case. *Id.* at 40:15-41:13; 57:20-58:11; 61:3-
26 12; *id.*, Ex. A at App. A. Sommer’s subsequent work in 1999-2001 for IQ4Hire did not involve
27 assistance to clients in ERP purchasing decisions. *Id.*, Ex. B at 63:5-64:10. Since leaving
28 Accenture in 1999 Sommer has been involved in only one ERP purchasing decision by one

1 customer not in this case and that involved software which is not at issue in this case and is not
2 sold by any of the parties to this case. *Id.* at 42:2-43:5.

3 Sommer has interacted with only a few of the 358 SAP TN customers at issue in this
4 matter and those interactions had nothing to do with their EAS purchasing decisions at issue in
5 this matter and were well before the relevant time period.⁴ Sommer is not relying on his
6 experience with any these customers in forming his opinions. *Id.* at 49:2-5. He has no relevant
7 experience on which to opine, so he should not be allowed to. *See* Section III.A, above.

8 **B. Sommer’s Opinion That ERP Customers Do Not Select Their**
9 **Future ERP Vendor Simply Because Of A Lower-Cost Support**
10 **Offering On Their Existing ERP Software Should Be Excluded**

11 Sommer characterized Meyer as assuming that a reduction in support costs of a customer’s
12 preexisting ERP software would likely “trigger” a large-scale replacement with a competitor’s
13 ERP software. MacDonald Decl., Ex. A at 3, Opinion 1; Ex. B at 197:11-198:11. In fact,
14 Meyer’s assumption (based on the legal standard for recovery of infringers’ profits⁵) was that
15 price was a “factor,” not necessarily a trigger, and he did not assume price was the only factor that
16 caused customers to leave Oracle and go to SAP TN. *Id.*, Ex. C (Meyer Report) at ¶ 361; Ex. D
17 (Meyer Depo.) at 857:19-24; 859:3–860:1. Sommer understood that a “factor” would be different
18 from a “trigger” and acknowledged that cost was a factor in customers’ support decision-making.
19 *Id.*, Ex. B at 199:4-10; 358:8-21. He further admitted that if Meyer had it right, he would
20 “certainly” change his own opinion about it. *Id.* at 198:12-199:3. Because his opinion is
21 premised on the wrong legal standard it should not be presented to the jury. *See, e.g., Abuan v.*
22 *General Elec. Co.*, 3 F.3d 329, 332 (9th Cir. 1993) (upholding rejection of expert reports which

23 ⁴ *Id.* at 46:14-47:16 (A.O. Smith - 1 day meeting regarding ERP software selection in the 1990’s;
24 Harley Davidson – 1 day meeting with CIO and team doing a software selection in the 1990’s;
25 Rockwell Automation – attended a briefing for the client, but did not recall if it was a formal
26 engagement; Progress Software – training for resellers or executives, nothing to do with software
27 evaluation; Safeway – vendor evaluation in 1990’s).

28 ⁵ *See, e.g., On Davis v. Gap*, 246 F.3d 152, 160 (2d Cir. 2001) (“the copyright owner is required
to present proof only of the infringer’s gross revenue,’ 17 U.S.C. § 504(b), leaving it to the
infringer to prove what portions of its revenue are not attributable to the infringement.
Nonetheless we think the term ‘gross revenue’ under the statute means gross revenue *reasonably*
related to the infringement, not unrelated revenues.”) (emphasis added).

