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21   UNITED STATES DISTRICT COURT

                    NORTHERN DISTRICT OF CALIFORNIA
22
                           OAKLAND DIVISION

23	ORACLE USA, INC., *et al*.,	No. 07-CV-01658 PJH (EDL)
24	Plaintiffs,	**NOTICE OF MOTION AND MOTION NO. 3: TO EXCLUDE TESTIMONY OF DEFENDANTS' EXPERT DAVID GARMUS**
25	v.	
26	SAP AG, *et al*.,	Date: September 30, 2010
27	Defendants.	Time: 9:00 a.m. Place: Courtroom 3 Judge: Hon. Phyllis J. Hamilton
28		

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1   PLEASE TAKE NOTICE that on September 30, 2010, at 9:00 a.m., in the courtroom of

2   the Honorable Phyllis J. Hamilton, of the above-entitled Court, Plaintiffs Oracle USA, Inc.,

3   Oracle International Corporation, Oracle EMEA Limited, and Siebel Systems, Inc. (collectively,

4   "Oracle") shall and hereby do move for an order excluding opinions and testimony of David P.

5   Garmus, ("Garmus") designated by Defendants SAP AG, SAP America, Inc., and

6   TomorrowNow, Inc. ("SAP TN") (collectively "Defendants") as an expert witness in this matter,

7   on the grounds that Garmus' proposed expert opinion testimony is inadmissible on the basis of

8   the authorities and evidence set forth herein and in the accompanying declaration.

9   I.   INTRODUCTION AND RELIEF REQUESTED

10   Oracle's expert, Paul C. Pinto, has estimated the amount that SAP would have spent to

11   develop software of similar functionality to what it infringed here. Pinto's estimation of what

12   SAP would have spent to avoid infringement, along with his opinions about the considerations of

13   avoided time delay and avoided risk, are part of the "build" analysis portion of the classic "buy

14   vs. build" decision that companies consider every day to determine whether to license software

15   or whether to develop a non-infringing solution themselves. As the evidence will show, any

16   reasonable party in a license negotiation, hypothetical or not, would consider this trade-off.[1]

17   To estimate what SAP would have spent, Mr. Pinto uses standard principles and methodologies

18   from two different cost estimation fields – function point and Constructive Cost Modeling

19   ("COCOMO") – but tempers both with his own real-world experience. That real-world

20   software cost estimating experience stands in stark contrast to Defendants' expert, David

21   Garmus, whose opinions and testimony Defendants offer in rebuttal. Mr. Garmus is an expert in

22   counting by hand "function points" described in software documentation to arrive at an estimated

23   size for the software, which must then be further analyzed to reach an estimated software cost.

24   _____

25   [1] Consistent with the Court's 8/17/2010 Order, none of Pinto's opinions, or Oracle's damages,
26   seek to "recoup" Oracle's research and development costs as actual damages for Defendants'
     infringement. Dkt. 762 at 22-23. Instead, one of Pinto's opinions estimates what SAP would
27   have spent to create a non-infringing alternative and add further expert input into the reasonable
     expectations of Parties for the hypothetical license negotiation.

28

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1   The opinions he expressed, however, were not bounded by that expertise. While Garmus'

2   opinions for the most part take pot-shots at Pinto's use of function point principles and

3   methodologies, at least four of Garmus' opinions are improper under Federal Rules of Evidence

4   401-403 and 702-703, as well as *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579

5   (1993) and its progeny, and should be excluded.

6   ***SAP TN's Use of Oracle Software.*** First, Garmus purports to testify about "facts"

7   concerning the extent of SAP TN's "use" of Oracle software. Garmus claims that Pinto counted

8   "applications and components within applications that were not utilized by TN in the course of

9   TN's business," which Garmus claims Pinto should have excluded for the purpose of estimating

10   the cost of developing the software at issue. Alinder Decl., Ex. A (Garmus Report) at 9. This

11   opinion by Garmus is central to the conclusions reached by Defendants' damages expert,

12   Stephen Clarke, who claims that the fair market value measure of damages for copyright

13   infringement must be adjusted to exclude use of applications and components that Garmus

14   claimed were not used by SAP TN. *See* Alinder Decl., Ex. H (Clarke Report) at 2 n.10, 33-34,

15   58-59, 116; Ex. I (Clarke Depo.) at 144:13-21.

16   This opinion by Garmus – and the opinion by Clarke that relies upon it – is offered

17   without any expertise, personal knowledge or foundation, and is flatly contradicted by

18   undisputed facts and even Defendants' concessions. Garmus admitted during his deposition that

19   he ignored virtually all of the relevant evidence concerning the actual scope of Oracle intellectual

20   property that SAP TN used to support its customers:

21   Q. So you ignored what TomorrowNow could have told you about
                 their support; you ignored the documentation that was on
22   TomorrowNow's system; ignored the software that was on
                 TomorrowNow's system; you ignored the support materials
23   that were on TomorrowNow's system; and you ignored the
                 admissions that they have made in the case, including their
24   answer; is that right?

25   [Objection Omitted]

26   A: I think it was beyond the scope of what I was assigned to do.

27   Alinder Decl., Ex. B (Garmus Depo.) at 281:17-282:5.

28   The facts and admissions that Garmus ignored indisputably establish that SAP TN

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1   accessed, copied, downloaded, and used Oracle software and related support materials across all

2   of Oracle's suites of software, including the software applications that Garmus opined "were in

3   fact not being used by TN…." Alinder Decl., Ex. A (Garmus Report) at 10. Thus, Garmus'

4   opinions and testimony regarding the scope of SAP TN's use of Oracle intellectual property are

5   not accurate, based on sufficient facts or data, or based on reliable methods or principles under

6   Rules 702 and 703. Nor do these opinions meet the standard under Rules 401-403, as they

7   would, at best, confuse and mislead the jury. These improper opinions are particularly

8   prejudicial, because Clarke uses Garmus' unfounded opinions to argue that the value of the

9   infringed intellectual property is significantly lower than Oracle's damages expert, Paul Meyer,

10 estimates. Garmus' opinions about the scope of use of Oracle intellectual property at SAP TN,

11 and Clarke's opinions to the extent he relies on this, must be excluded.

12   ***"Academic" Function Point Counts.*** Second, Garmus offers an opinion concerning the

13 size of two Oracle software modules, not analyzed by Pinto, which Garmus purports to derive by

14 performing his own independent function point count. *See* Alinder Decl., Ex. A (Garmus

15 Report) at 27-28. These opinions should also be excluded for two reasons. First, Garmus

16 admitted at deposition that this opinion relates to software that Pinto did not analyze. *See id*., Ex.

17 B (Garmus Depo.) at 39:8-10 ("Q. You weren't intending to find a size for the same applications

18 as Mr. Pinto, correct? A. No, I was not."). Had Garmus truly wanted to rebut Pinto, he would

19 have analyzed the same software analyzed by Pinto. Instead, Garmus intentionally analyzed

20 different software, and conceded the lack of relevance of his analysis, dubbing the entire opinion

21 an "academic exercise." *Id*. at 37:12-18. Second, Garmus' function point count alone is

22 irrelevant, because a function point count only provides an estimate of ***size***. Garmus never did

23 the additional work needed to estimate a ***cost*** associated with developing a software application

24 of that size. The simple, bare assertion of function point size for software that Pinto did not

25 analyze cannot help the trier of fact and would only confuse or mislead the jury. Garmus'

26 opinions about his function point counts should be excluded under Federal Rules of Evidence

27 401-403 and 702. They should also be excluded under Federal Rule of Civil Procedure 37 as

28 improper and untimely affirmative expert opinions, as they do not rebut any part of Pinto's

1   opinions or testimony.

2   ***The Opinions of IFPUG and IFPUG Membership.*** Third, Garmus attempts to offer

3   testimony that neither the International Function Point User's Group ("IFPUG") nor its

4   membership "agree with Mr. Pinto's approach." Alinder Decl., Ex. A (Garmus Report) at 17-

5   21. These statements are not based on scientific principles, sufficient facts, or sufficient

6   foundation. Garmus admitted during his deposition that no one from IFPUG approved his report

7   or assertions. *See* Alinder Decl., Ex. B (Garmus Depo.) at 242:1-14. Instead, Garmus simply

8   claimed authority to speak for the entire User's Group as a past president and committee

9   member. Further, he offered 8 self-selected bulletin board messages, which he claims show that

10   the IFPUG membership does not support Pinto's approach. These posts do not reflect Garmus'

11   purported expertise and Garmus did not provide the identities of and cannot vouch for the

12   expertise of the posters. Moreover, with these eight self-selected posts, Garmus cannot and does

13   not show that all or even most IFPUG members disagree with Pinto; indeed, Pinto is an IFPUG

14   member and certainly does not agree with Garmus. Garmus' assertions about what IFPUG

15   would think about Pinto are not reliable, and should be excluded Federal Rules of Evidence 401-

16   403 and 702.

17   ***Legal Conclusions About Saved Development Costs.*** Fourth, throughout his Report,

18   Garmus opines that "determining the cost for independently developing the four underlying

19   application suites is not appropriate for the case in question." *See, e.g.,* Alinder Decl., Ex. A

20   (Garmus Report) at 1. Garmus conceded at deposition that he is neither a copyright nor a

21   damages expert, so he does not have sufficient expertise to provide such an opinion. *See* Alinder

22   Decl., Ex. B (Garmus Depo.) at 60:4-12 & 213:19-214:24. In any event, Garmus cannot offer a

23   legal opinion concerning whether cost of development of software is an appropriate or available

24   measure of damages. Those opinions would usurp the roles of the jury and the Court, and should

25   be excluded as well under Federal Rules of Evidence 401-403 and 702-703.

26 **II.   WHAT DEFENDANTS MUST SHOW TO DEMONSTRATE THE
           ADMISSIBILITY OF GARMUS' OPINIONS**
27

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

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

4 The party proffering an expert opinion must demonstrate it meets the Rule 702 admissibility

5 standards by a "preponderance of proof." *Daubert v. Merrell Dow Pharm. Inc*., 509 U.S. 579,

6 593 (1993); *Salinas v. Amteck of Kentucky, Inc.*, 682 F. Supp. 2d 1022, 1029 (N.D. Cal. 2010)

7 (Hamilton, J.,); *Perry v. Schwarzenegger*, 2010 WL 3025614, at *21 (N.D. Cal.) ("The party

8 proffering the evidence 'must explain the expert's methodology and demonstrate in some

9 objectively verifiable way that the expert has both chosen a reliable . . .method and followed it

10 faithfully.'") (quoting *Daubert v. Merrell Dow Pharm.*, 43 F3d 1311, 1319 n11 (9th Cir 1995)

11 ("*Daubert II*")). As the court made clear in *Carnegie Mellon Univ. v. Hoffman-Laroche, Inc.*, 55

12 F. Supp. 2d 1024, 1035 (N.D. Cal. 1999):

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

18 Absent an explicit finding by the court of admissibility of a challenged opinion, the

19 opinion may not properly be offered at trial. Fed. R. Civ. P. 104(a) (Preliminary questions

20 concerning the qualifications of a person to be a witness. . .shall be determined by the court.");

21 *United States v. Jawara*, 474 F.3d 565, 583 (9th Cir. 2007) ("failure to make explicit reliability

22 finding was an error"); *Mukhtar v. California State University*, 299 F.3d 1053, 1066-68 (9th Cir.

23 2002) (district court prejudicially erred by admitting expert testimony without explicit reliability

24 determination), *as amended*, 319 F.3rd 1073 (9th Cir. 2003); *Claar v. Burlington R.R.*, 29 F.3d

25 499, 501 (9th Cir. 1994) (courts are both "authorized and obligated to scrutinize carefully the

26 reasoning and methodology underlying" expert testimony). As the Supreme Court has made

27 clear, "the trial judge must ensure that any and all [expert] testimony . . .is not only relevant but

28 reliable." *Daubert*, 509 U.S. at 595. This "gatekeeper" role "entails a preliminary assessment of

1 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

        nothing in either *Daubert* or the Federal Rules of Evidence

7   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

8   conclude that there is simply too great an analytical gap between

        the data and the opinion offered.

9

10 *Id.*; *accord Heller v. Shaw*, 167 F.3d 146, 153 (3d Cir. 1999) ("district court must examine the

11 expert's conclusions in order to determine whether they could reliably follow from the facts

12 known to the expert and the methodology used").

13 **III. LEGAL STANDARDS MANDATING EXCLUSION OF GARMUS'
      OPINIONS**

14

      A. Inadequate Factual Support

15

16   The proffering party cannot carry its burden under the *Daubert* standard where the expert

17 opinion has ***no factual basis or ignores undisputed contrary facts*** (*e.g.*, Garmus' conclusions

18 about the scope of SAP TN's use of Oracle's intellectual property, SAP TN's business model,

19 and the opinions of the International Function Point User's Group and its membership). "An

20 opinion based on unsubstantiated and undocumented information is the antithesis of the

21 scientifically reliable expert opinion admissible under *Daubert* and Rule 702." *Cabrera v.*

22 *Cordis Corp.*, 134 F.3d 1418, 1423 (9th Cir. 1998); *accord, Guidroz-Brault v. Mo. Pac. R.R. Co.*,

23 254 F.3d 825, 830-31 (9th Cir. 2001) (affirming exclusion of multiple experts because

24 conclusions based on factually unsupported assumptions); *Nuveen Quality Income Mun. Fund*

25 *Inc. v. Prudential Equity Group, LLC*, 262 Fed. Appx. 822, 824 (9th Cir. 2008) ("An expert

26 opinion is properly excluded where it relies on an assumption that is unsupported by the

27 evidence in the record and is not sufficiently founded upon the facts"); *QR Spex, Inc. v.*

28 *Motorola*, 2004 WL 5642907, at *9 (C.D. Cal.) (excluding expert report and opinion where

1 expert didn't review relevant underlying evidence); *Robinson v. G.D. Searle & Co.*, 286 F. Supp.

2 2d 1216, 1221 (N.D. Cal. 2003) (expert's testimony inadmissible when based on factual premise

3 directly contradicted by evidence on the record); *accord General Electric v. Joiner*, 522 U.S.

4 136, 146 (1997).

5 **B. No Expert Analysis or No Methodology**

6 As a corollary, where a purported expert's opinions are ***premised on nothing more than***

7 ***reading*** (*e.g*., Garmus' conclusions about the scope of SAP TN's use of Oracle's intellectual

8 property, SAP TN's business model, and the opinions of the International Function Point User's

9 Group and its membership) they do not assist the trier of fact because they are not premised on

10 any expertise, or reliable methodology, and thus are inadmissible. *See, e.g., Perry*, 2010 WL

11 3025614, at *22 ("mere recitation of text in evidence does not assist the court in understanding

12 the evidence because reading, as much as hearing, 'is within the ability and experience of the

13 trier of fact.'") (quoting *Beech Aircraft Corp v. United States*, 51 F.3d 834, 842 (9th Cir. 1995));

14 *Kilgore v. Carson Pirie Holdings, Inc*., 205 Fed. Appx. 367, 372 (6th Cir. 2006) (finding internet

15 article an unreliable basis for methodology where expert did not know what research

16 methodology the article was based on and conducted no independent research); *Matrix Motor*

17 *Co. v. Toyota Jidosha Kabushiki Kaisha*, 290 F. Supp. 2d 1083, 1086 (C.D. Cal. 2003) (expert

18 reports "irrelevant" where they "merely recite hearsay statements, often verbatim, culled from a

19 variety of Internet websites"); *Diviero v. Uniroyal Goodrich Tire Co.*, 114 F.3d 851, 853 (9th

20 Cir. 1997) ("Rule 702 demands that expert testimony relate to scientific, technical, or other

21 specialized knowledge, which does not include unsubstantiated speculation and subjective

22 beliefs").

23 **C. No Relevant Expertise**

24 Where an expert offers opinions regarding a field as to which ***he or she is not an expert***,

25 (*e.g*., Garmus' conclusions about damages or copyright infringement, as well as his conclusions

26 about the scope of SAP TN's use of Oracle's intellectual property and about SAP TN's business

27 model), those opinions are not admissible under Rule 702. *See, e.g., United States v. Chang*, 207

28 F.3d 1169, 1172-73 (9th Cir. 2000) (expert "qualified" in one topic properly excluded from

1   testifying on topic where didn't have expertise); *United States v. Cook*, 261 Fed. Appx. 52, 54

2   (9th Cir. 2007) (same); *Salinas*, 682 F.Supp.2d at 1030 (rejecting opinions on warnings by

3   proffered expert who had no "professional training or expert qualifications to opine on the

4   formulation or design of warning or safety labels" and had never "investigated a case with

5   similar facts" and never "testified as a warnings expert"); *Redfoot v. B. F. Ascher & Co.*, 2007

6   WL 1593239, at *10-11 (N.D. Cal.) (Hamilton, J.,) (rejecting testimony on medical subjects and

7   conclusions of what caused victim's autism for which expert had neither training nor

8   qualifications to opine).

9   **D.   Improper Legal Opinion**

10   Where the expert seeks to testify to ***legal issues, particularly where his opinions***

11   ***contradict the law*** (*e.g.* Garmus' opinions about whether saved development costs are an

12   "appropriate" measure of damages here), those opinions cannot aid the trial of fact and are not

13   admissible. *See, e.g., Crow Tribe of Indians v. Racicot*, 87 F.3d 1039, 1045 (9th Cir. 1996) (role

14   of experts is to interpret and analyze factual evidence and not to testify about legal holdings); *see*

15   *also Regents of Univ. of California v. Montsanto Co.*, 2006 WL 5359055, at *1 (N.D. Cal.)

16   ("Where an expert proposes to testify, however, to legal issues that may contradict the law to be

17   presented to the trier of fact, such testimony cannot purport to aid the trier of fact").

18   **E.   Irrelevant or Improper Rebuttal**

19   Where the expert seeks to opine on issues that are ***not relevant*** or to add ***affirmative***

20   ***opinions*** in the guise of rebuttal (*e.g.* Garmus' purported analysis of software modules that Pinto

21   did not analyze), those opinions cannot assist the trier of fact and should also be excluded as

22   untimely and improper rebuttal. *See, e.g., Daubert*, 509 U.S. at 589, ("the trial judge must

23   ensure that any and all [expert] testimony . . .is not only relevant but reliable"); s*ee also* Fed. R.

24   Civ. P. 26(a)(2)(C)(ii) (Rebuttal must be "intended solely to contradict or rebut evidence on the

25   same subject matter identified by another party under Rule 26(a)(2)(B)); *see also* Fed. R. Civ. P.

26   37(c).

27

28

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IV. STATEMENT OF FACTS

A. Paul C. Pinto's Expert Opinion on the Amounts of SAP Would Have Spent to Develop Similar Software

On November 16, 2009, Oracle served the expert report of Paul C. Pinto, which contained his affirmative expert opinions and analysis, including estimates of the amounts that it would have cost Defendants to independently develop software similar to the Oracle software that they instead accessed, took, and used. *See generally* Alinder Decl., Ex. C (Pinto Report). Pinto has worked in the field of software development for 24 years. *Id*. at 3 & Attachment A. He has been a senior executive at software companies that compete directly with Oracle and SAP. *Id*. He has also worked at software firms to develop software development cost estimates, bid on those projects, and then delivered on those bids by building the actual software. *Id*., Ex. D (Pinto Depo.) at 112:24-113:16. Over the course of his career, Pinto has personally been involved with conducting at least 100 software estimating efforts, applying a variety of estimating models and techniques, including at least 50 using function point analysis. *Id*., Ex. E. (Pinto Rebuttal Notes) at 1; *id*., Ex. D (Pinto Depo.) at 100:4-22.

Pinto was very conservative in his estimate of the amount that Defendants would have spent on a non-infringing alternative in at least three ways: (1) Pinto only estimated the cost to develop software with functionality similar to the most current versions of PeopleSoft, J.D. Edwards and Siebel software, rather than every version of software that Defendants infringed; *id*., Ex. C (Pinto Report) at 10-11; *id*., Ex. D (Pinto Depo.) at 27:9-29:20 & 125:10-126:18; *see also* Dkt. 745 (Joint Pretrial Statement) at 24-25, Undisputed Facts ¶¶ 68-91; (2) Pinto did not include the value of the millions of Oracle support materials that Defendants infringed, rather than develop themselves; *see id*.; and, (3) Pinto did not quantify what Defendants would have spent to develop a product of similar functionality to the Oracle Database software, rather than infringing it. Alinder Decl., Ex. C (Pinto Report) at 5; *id*., Ex. D (Pinto Depo.) at 27:9-29:20 &

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1   125:10-126:18.[2]

2   **B.   Garmus' "Rebuttal" Expert Report to Pinto**

3   Defendants chose not to serve affirmative expert reports, but on March 26, 2010, served

4   Garmus' report in purported rebuttal to Paul Pinto. *See* Alinder Decl., Ex. A (Garmus Report) at

5   1. Four of Garmus' opinions are inadmissible under Rule 702 because they are unreliable and

6   not based on sufficient or accurate facts or data, improperly offer legal conclusions in the guise

7   of expert opinion, and are beyond the scope of expert rebuttal. At his deposition on June 4,

8   2010, Garmus confirmed the inadmissibility of these four opinions.

9   **V.   ARGUMENT**

10   **A.   Garmus' Opinions and Testimony Regarding the Scope of**
             Oracle Software Used by SAP TN Must be Excluded
11

12   Garmus devotes more than four pages of his Report listing the Oracle software that he

13   claims Pinto should have excluded from Defendants' cost of development, because according to

14   Garmus, those software applications "were in fact not being used by TN…." Alinder Decl., Ex.

15   A (Garmus Report) at 10-14. The Oracle software applications on the "not being used" list

16   include many portions of Oracle's PeopleSoft and EnterpriseOne software applications. *Id.*

17   Despite this detailed listing of Oracle software applications and claimed expert opinion about

18   what SAP TN "in fact" used, Garmus' opinions are inaccurate at best. He admitted at deposition

19   that he does not have a sufficient basis to testify regarding these opinions, expert or otherwise,

20   and that he ignored virtually all of the relevant evidence.

21   **1.   Garmus is Not Even Remotely an Expert, on the Scope**
                      of Oracle Software Used by SAP TN
22

23   Garmus admitted at deposition that that he had "no idea" what Oracle intellectual

24   property SAP TN actually used. *See id.*, Ex. B (Garmus Depo.) at 92:2-4 ("I have no idea what

25   _____

26   [2] Defendants conceded their liability for copying the Oracle Database software in their
     opposition to Oracle's summary judgment motion, and the Court granted summary judgment in
27   Oracle's favor on those claims. *See* Dkt. 762 (MSJ Order) at 24.

28

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1   TomorrowNow was using, or I have no -- I didn't talk to anybody from TomorrowNow.").

2   Rather than "talk to anybody from TomorrowNow," Garmus derived a listing of Oracle software

3   products that he claimed SAP TN did not "in fact" use by looking at five customer contract

4   spreadsheets that were provided to him by defense counsel. *See id.* at 73:21-75:12 & 64:7-15

5   ("Q. Did you talk with any employees of SAP or TomorrowNow before issuing your report? A.

6   None. Q. You didn't ask them to confirm your understanding of facts as you've stated in your

7   report? A. No, the only people that I've dealt with have been people that work for Jones Day.").

8   Garmus received these spreadsheets after asking defense counsel for information about "what

9   work was being done by TomorrowNow, and what modules they were providing support for."

10   *Id.* at 74:13-15. Not surprisingly, at his deposition, Garmus conceded that he personally had "no

11   idea what TomorrowNow was using," *Id.* at 91:25-93:6 ("Q. Right. So your knowledge is

12   limited to the spreadsheets that [defense counsel] provided to you? A. That's correct."). He

13   further conceded he did *nothing* to test the spreadsheets' accuracy:

14
       Q. Right. You assumed that they were factual and that they
          constitute everything that TomorrowNow did, and there wasn't
15   anything else, correct?

16   [Objection Omitted]

17   A: It was my belief that that was the work that TomorrowNow
          did, yes.
18

19   Q. And you didn't do any checking or question anyone to make
          sure that was a well-founded belief?

20   [Objection Omitted]

21   A: I doubt that Mr. Pinto did, either.

22   *Id.* at 200:1-17. Instead, Garmus simply "relied upon Jones Day." *Id.* at 284:8-286:4; *see Lyman*

23   *v. St. Jude Medical S.C., Inc.,* 580 F. Supp. 2d 719, 726 (E.D. Wis. 2008) ("[Expert] should have

24   independently verified the reliability of the data before opining on plaintiffs' future sales, as

25   opposed to accepting it at the word of [counsel]. Therefore, the Court must exclude [the expert's]

26   testimony with regard to his projections.")

27   Nor is there any dispute that Garmus ignored virtually all of the available evidence that

28   he could have analyzed in an attempt to understand the true scope of use of Oracle software by

1   TomorrowNow in support its customers:

2   Q. So you ignored what TomorrowNow could have told you about
             their support; you ignored the documentation that was on
3   TomorrowNow's system; ignored the software that was on
             TomorrowNow's system; you ignored the support materials
4   that were on TomorrowNow's system; and you ignored the
             admissions that they have made in the case, including their
5   answer; is that right?

6   [Objection Omitted]

7   A: I think it was beyond the scope of what I was assigned to do.

8   Alinder Decl., Ex. B (Garmus Depo.) at 281:17-282:5.[3]

9   This type of straight insertion of a lawyer's untested and selective view of the "facts"

10   through an expert mouthpiece is precisely why the courts serve as gate-keepers of purported

11   expert opinion. *See* Section II. above; *see also Crowley v. Chait,* 322 F. Supp. 2d 530, 542 (D.

12   N.J. 2004) ("The information upon which an expert bases his testimony must be reliable, and the

13   selective furnishing of information by counsel to an expert runs afoul of Fed. R. Evid. 703,

14   which, in addition to Rule 702, must be considered by a court for *Daubert* purposes."); *see also*

15   *Sommerfield v. City of Chicago,* 254 F.R.D. 317, 324 (N.D. Ill. 2008) ("Those courts that have

16   considered the issue raised in this case have concluded that summaries of depositions or data

17   prepared by a party's lawyer are not sufficiently reliable that they may form the basis of an

18   expert's opinion.").

19   Moreover, as detailed below, the evidence that Garmus ignored establishes that SAP TN

20   accessed, copied, downloaded, and used Oracle software and related support materials across all

21   of Oracle's suites of software, specifically including the applications that Garmus claimed "were

22   in fact not being used by TN" based on the spreadsheets provided to him by counsel. Alinder

23   Decl., Ex. A (Garmus Report) at 10.

24

25

26   ────────────────

27   [3] Nor did Mr. Garmus review the actual contracts with TN's customers. *See, e.g.,* Alinder Decl.,
     Ex. B (Garmus Depo.) at 75:6-12.

28

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2. Garmus Failed to Consider the Undisputed Wider Use by SAP TN of Oracle IP

Even if the proffered scope of SAP TN's use were Garmus' opinion (and not SAP's counsel's), it would have to be excluded because it is contradicted by the undisputed facts, none of which Garmus knew. *See* Section III. A.-C. above. In contrast to Garmus' limited scope of use opinion, Defendants have conceded that SAP TN copied and used Oracle software, related support materials and documentation *across all product families*.[4] *Compare* Dkt. 745 (Joint Pretrial Statement) at 23, Undisputed Facts ¶¶ 51-55 (identifying PeopleSoft HRMS, CRM, Financials, Enterprise Performance Management and Student Administration software copies at SAP TN), *with* Alinder Decl., Ex. A (Garmus Report) at 10-11 (claiming that TN did not use portions of these same applications); *see also* Dkt. 748-1 (Defs.' Press Release) (SAP taking "decisive step" and "would not contest the liability of TomorrowNow for copyright infringement and downloading conduct alleged in Oracle's complaint"). These specifically include the applications that Garmus claimed " were in fact not being used by TN" based on the spreadsheets provided to him by counsel. Alinder Decl., Ex. A (Garmus Report) at 10. Garmus did not know about or consider either these concessions or the underlying facts showing the reasons for them, *e.g.,* that SAP TN had *thousands* of copies of Oracle software sitting on its computer systems:

> Q. You're not aware of the fact that TomorrowNow had thousands of copies of Oracle software in its systems?
>
> A. No, I am not.

See id., Ex. B (Garmus Depo.) at 96:10-13.

> Q. Your understanding isn't that these copies of software were on

---

[4] Garmus' claimed scope of "use" by SAP TN is far less than Oracle alleged, but also is far less than (and contradicts) Defendants concessions at summary judgment and more recently in a press release coordinated with the Parties' pretrial filings. *Compare* Dkt. 418 (Pls.' 4th Am. Compl.) filed on August 18, 2009, *with* Dkt. 670 (Defs.' Opp. to Pls.' MSJ.) at 4:28-5:7 (conceding infringement of six of Oracle's registrations, related to hundreds of copies on Defendants' systems of Oracle's PeopleSoft HRMS application and Oracle's Database Software); *see also* Dkt. 727 (Defs.' Tr. Br.) at 1:27-2:8 (same, but purporting to preserve various defenses).

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1	TomorrowNow's systems?
2	A. I have no idea of that, whether they were or they weren't.
3	Q. So your opinion doesn't take into account copies that
	TomorrowNow made of Oracle software sitting on their
4	systems?
5	A. That wasn't -- the purpose of my report was to determine Mr.
	Pinto's use of a ten step method that he claimed used Function
6	Point Analysis.

7 *See id.* at 101:25-102:9.

8   Garmus also did not know the details of the laborious analysis of SAP TN's computer

9 systems by Oracle's liability expert, Kevin Mandia, who identified thousands of copies of

10 Oracle's PeopleSoft software, including the PeopleSoft software applications identified by

11 Garmus as not having been used by SAP TN. *See* Alinder Decl., Ex. F (Mandia Report) at

12 Section VII, ¶¶ 227, 233, 234, including Table 22, & 263 including Table M; *see also id.,* Ex. B

13 (Garmus Depo.) at 96:10-13 & 101:25-102:9.

14   In addition, in the months leading up to Garmus' deposition, Defendants turned over

15 thousands of instant messages ("IMs") that reveal that SAP TN employees kept and used copies

16 of EnterpriseOne software. *See* Alinder Decl., ¶ 8. These IMs also contradicted Garmus'

17 opinion about the scope of Oracle intellectual property that SAP TN did not "in fact" use. For

18 instance, Garmus lists Oracle's EnterpriseOne 8.12 software applications as being outside SAP

19 TN's scope of use. *See* Alinder Decl., Ex. A (Garmus Report) at 11-14. But, an IM between two

20 SAP TN employees (Pete Surette and Ashis Ghosh) makes it clear Garmus is wrong:

21   petsur (06:51:08 PM): do you have one running in a shed behind
the house?

22

23   ashis5228 (06:52:53 PM): :) yeah I have XE, ERP8, 8.10, 8.12 and
8.11 running with all ESUs applied to them, except for XE I think
every single instance has all ESUs till last month applied to them.

24

25   petsur (06:53:13 PM): sweet !

26   petsur (06:53:24 PM): how many computers are they running on/

27   petsur (06:53:26 PM): ?

28   ashis5228 (06:53:54 PM): a couple of servers... I have the
deployment and the databases on one server and the other one is

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1	the enterprise server..
2	Alinder Decl., ¶ 9 & Ex. G (Ghosh IM October 24, 2006).[5]

3   That Garmus was not even aware that any of these software copies existed on SAP TN's

4 computers, let alone that they included the same software applications that he opined that SAP

5 TN didn't use, shows that his opinions and testimony are not supported by sufficient or accurate

6 facts and data to be admissible. *See* Sections II. and III.A.-C. above; *see also Nebraska Plastics,*

7 *Inc. v. Holland Colors Americas, Inc*., 408 F.3d 410, 416 (8th Cir. 2005) (affirming trial court's

8 preclusion of expert's opinions because "an expert opinion that fails to consider the relevant facts

9 of the case is fundamentally unsupported" and "should not be admitted if it does not apply to the

10 specific facts of the case.").

11   **3.   Garmus Failed to Consider Evidence of Downloaded
              Support Materials on SAP TN's Systems**
12

13   Garmus also impermissibly ignores the fact that SAP TN's business model required it to

14 download millions of Oracle support materials, including software updates, across all of Oracle's

15 software families. *See, e.g.,* Dkt. 745 (Joint Pretrial Statement) at 24-25, Undisputed Facts ¶¶

16 68, 70, 71, & 80-81 (acknowledging TN's mass downloading of Oracle IP for customer support).

17 Despite Defendants' admissions that SAP TN used these Oracle downloads to support

18 customers, Garmus again had no knowledge of, and did not consider, SAP TN's downloads of

19 software and support materials from Oracle's customer support websites at all in his analysis:

20   Q. So you didn't take into account any of those downloads in the
              opinions that you've put into your report, correct?
21
            [Objection Omitted]
22
            A: Can you testify that they downloaded? I mean, I certainly
23   can't. I have no evidence that they did -- in fact, did.

24 Alinder Decl., Ex. B (Garmus Depo.) at 109:24-110:6; *see also id*. at 275:16-278:16.

25

26 [5] Due to the late production of these IMs by Defendants, Oracle was unable to question SAP TN
27 about these additional EnterpriseOne copies. In any event, they stand unrebutted as evidence of
    software copies that Garmus opines that SAP TN didn't use for customer support.

28

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1   The testimony and opinions of Garmus also ignore and contradict the undisputed facts

2   about TN's use of Oracle software updates and support materials to support its customers.

3   *Compare* Dkt. 745 (Joint Pretrial Statement) at 24-25, Undisputed Facts ¶¶68-79, 80 ("TN used

4   information downloaded from the Oracle Websites to help support customers in competition with

5   Oracle.") & 81-91, *with* Alinder Decl., Ex. A (Garmus Report) at 10-14. Indeed, Garmus

6   testified that he had never seen, had not considered, and would not even agree with, Defendants'

7   Answer conceding SAP TN's use of downloaded materials for customer support:

8
9   Q. Right. Under the answer -- this whole document is the answer
                  and affirmative defenses, so we number the paragraphs
                  consecutively. On Page 2, you'll see Paragraph Number 16. It
                  starts on Line 23. Can you read into the record the first

10   sentence of Paragraph 16?

11   [Objection Omitted]

12   A: I certainly can read any paragraph, not that I would agree with
                  what the paragraph says. But Paragraph 16 of the report that I

13   was just handed and haven't read before says, "Defendants
                  admit that TN, on behalf of its customers, downloaded and

14   stored a large quantity of Software and Support Materials, and
                  further admit that TN used those materials for customer

15   support."

16   Q. You've never seen this document before, though, correct?

17   A. Not to the best of my knowledge, right.

18   Alinder Decl., Ex. B (Garmus Depo.) at 111:11-112:5; *see also* Dkt. 448 (Defs.' Answer) ¶ 16.

19   **4.**   **Garmus Failed to Consider Support Documentation**
                       Libraries Built By SAP TN

20

21   Garmus' list of materials considered includes copies of two massive libraries of Oracle

22   software support documentation sitting on SAP TN's computers. Alinder Decl., Ex. A (Garmus

23   Report) at 4 (identifying "PeopleBooks located on TomorrowNow's BU01 Servers"). But

24   despite having them in his possession, Garmus did not consider them in reaching his opinions

25   about the scope of Oracle intellectual property SAP TN "used":

26   Q. And you don't know how TomorrowNow used the
                  documentation that was on its systems, correct?

27

28   [Objection Omitted]

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1	A: No, I do not know how TomorrowNow used any of the documentation it had. That's correct.
2	
3	Q. And you weren't aware when you wrote this report that TomorrowNow had these large documentation libraries on its systems?
4	
5	A. No --
	[Objection Omitted]
6	
7	A. -- I was not.

8 Alinder Decl., Ex. B (Garmus Depo.) at 26:3-16. When faced with support documentation from

9 the same Oracle software applications that he excluded, Garmus then conceded that he "had no

10 idea what TomorrowNow had":

11	Q. Well, we were just looking at the PeopleSoft HRMS 8.8 PeopleBooks. Do you recall?
12	
13	A. Yeah, but we didn't look and see if it had Global Payroll for U.S. on it, right.
14	Q. No, we found Global Payroll for Brazil on it, which is one of your modules on Page 10. You remember that?
15	
16	A. Yes, I remember it's in my Page 10 that TomorrowNow was not using -- not providing support for Global Payroll for Brazil.
17	Q. And you didn't take into account the fact that TomorrowNow had copies of the PeopleBooks for Global Payroll for Brazil in doing your analysis? [Objection Omitted]
18	
19	A. I had no idea what TomorrowNow had.

20 Alinder Decl., Ex. B (Garmus Depo.) at 161:16-162:8.

21   5.   **Garmus Failed to Consider Concessions of SAP TN Employees**

22

23   Garmus also was unaware of, and did not consider, the representations made by SAP

24 TN's CEO in documents about the scope of Oracle software that SAP TN supported. *See, e.g.,*

25 *id*. at 135:9-139:2. If Garmus had reviewed the evidence produced and attested to by SAP TN,

26 including its former CEO, he would have learned that SAP TN represented that they supported

27 *all of the software applications* that Garmus claimed SAP TN did not "in fact" use. *See id*.; *see*

28 *also id*. at 138:20-139:1 ("Q. You understand it's TomorrowNow's CEO and president, and this

1 states the software he claims they can support, correct? [Objection Omitted] A: I see that that's

2 what that page says, yes….").

3   **6.**   **Garmus' Unsupported and Erroneous Opinion and**
        Conjecture About the Scope of SAP TN's Actual Use

4   **Are Inadmissible**

5   An expert cannot testify in disregard of the facts. *See*, *e.g.*, *Guidroz-Brault*, 254 F.3d at

6 830-31. Garmus' failure to consider the thousands of copies of Oracle software and millions of

7 downloads on SAP TN's systems, his failure to consider the massive support documentation

8 libraries that SAP TN used for Oracle software support, and his failure to review the evidence

9 and testimony and concessions by Defendants, make any testimony he could provide regarding

10 SAP TN's infringing use unreliable, and hence inadmissible, under Rule 702. *See* Sections II.

11 and III. A.-C. above.

12   Among the many cases that mandate preclusion of Garmus' opinion, the Court's decision

13 in *QR Spex, Inc. v. Motorola,* 2004 WL 5642907 (C.D. Cal.) illustrates why Garmus' ignorance

14 of the underlying facts of SAP TN's actual use must bar his opinion testimony on that topic. In

15 *QR Spex*, the Court excluded an expert report and opinion where the expert failed to review key

16 relevant underlying evidence. *See id*. In ruling that the testimony did not meet the standard for

17 reliability under Rule 702, the Court found that "the crucial predicate 'fact' upon which [the

18 expert's] opinion is based is not only inaccurate, it is contradicted by the direct evidence

19 submitted by Frog Design in support of its Motions. In the absence of this 'fact,' Dr. Goodman's

20 opinion lacks foundation." *Id*. at *9. The Court further found that the expert ignored evidence

21 that would have been "useful" in formulating his opinions, and found that opinion was therefore

22 "founded upon nothing more than Dr. Goodman's own conjecture and speculation, [and] simply

23 fails to meet the test for reliability set forth in Rule 702." *Id*. at *9-10.

24   For these same reasons, the Court should exclude Garmus' opinions and testimony about

25 the scope of Oracle intellectual property used by SAP TN. The crucial predicate "facts"

26 underlying Garmus' opinion and testimony are contradicted by undisputed facts that Garmus

27 ignored, and Garmus readily concedes he does not have the foundation or expertise to support

28 such testimony. Like the expert in *QR Spex*, Garmus' testimony fails to meet the tests for

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1   reliability and admissibility under Rule 702.

2   **7.   Garmus' Improper Opinions Also Cannot be Used By
              Defendants' Damages Expert, Stephen Clarke**
3

4   Defendants' damages expert, Stephen Clarke, relies on Garmus' erroneous and unreliable

5   opinions on the scope of SAP TN's infringing use to reduce Oracle's damages by excluding

6   customers from damages who Garmus (or, more accurately, Jones Day) identified as having no

7   infringing use. *See* Alinder Decl., Ex. H (Clarke Report) at 2 n.10, 33-34, 58-59, 116; *see id.,*

8   Ex. I (Clarke Depo.) at 144:13-21 ("And so this becomes very important if the subject IP doesn't

9   include any of the rights and ownership benefits that Oracle acquired in the transaction. They

10   should be analyzed out of his calculations. And this is just one of them that I think is an

11   appropriate subtraction to start making the adjustment from the acquisition metric to a metric

12   that's more appropriate to the subject IP that we're talking about.").[6] With the exclusion of

13   Garmus' opinions, Clarke's reliance on them, and opinions based on them, must also be

14   precluded. *See, e.g., McNamara v. Kmart Corp.*, 2010 WL 1936268, at *4 (3d Cir.) ("Because

15   McKenzie [the first expert] was not permitted to testify about these expenses, Johnson's

16   testimony [the second expert], which was dependent on McKenzie's, was also properly

17   excluded."); s*ee also* Fed. R. Evid. 401-403 & 702.

18   **B.   Garmus' New Function Point Counts Should be Excluded as
              an Irrelevant "Academic Exercise" Or An Undisclosed
19   Affirmative Opinion**

20   On pages 27-28 of Garmus' expert report, Garmus purports to perform a function point

21   count of two modules of Oracle software, as "an exercise." Alinder Decl., Ex. A (Garmus

22   Report) at 27-28. Garmus' testimony and opinions on these two function point counts should be

23   excluded for two reasons. First, they are irrelevant and would not help the trier of fact, so should

24   be excluded under Fed. R. Evid. 401-403 and 702. Second, even if they were relevant, they

25   ───────────────

26   [6] Despite the importance of Garmus' scope of use opinion to Clarke's reduction of Oracle's
     damages, Garmus testified that he was not aware that Clarke was relying at all on his opinions,
27   had not provided Clarke with any information, and had never even met Clarke. *See* Alinder
     Decl., Ex. B (Garmus Depo.) at 213:3-18.

28

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1 would constitute improper affirmative opinions, and would be properly excluded as untimely

2 under Fed. R. Civ. P. 37. *See* Section III. E. above.

3   **1.   Garmus' Function Point Counts Are Not Relevant and
             Would Not Assist the Trier of Fact**
4

5   In his expert report, Garmus performs function point counts of one module of J.D.

6 Edwards 8.0 Accounts Payable software and one module of PeopleSoft Enterprise version 8.9

7 software for Global Payroll for U.S. *See* Alinder Decl., Ex. A (Garmus Report) at 27-28. Both

8 of these function point counts are irrelevant to any issue in the case, and were conceived of as

9 purely academic exercises:

10   Q. For both of these function point counts, you say, "As an
              exercise, to demonstrate how to properly perform an FPA." Do
11   you see that?

12   A. Yes.

13   Q. So these are exercises for you, sort of academic exercises?

14   A. They were.

15 *See id*., Ex. B (Garmus Depo.) at 37:12-18. Indeed, Garmus admitted that he did not intend to

16 count any of the applications relevant to the Pinto Report. *See id*. at 39:8-10 ("Q. You weren't

17 intending to find a size for the same applications as Mr. Pinto, correct? A. No, I was not.").

18 Further, Garmus' function point counts only provide the claimed *size* of the irrelevant software

19 modules – they do not go the additional step of determining the *cost* of development as Pinto

20 does. *See id*. at 55:13-22.

21   These academic exercises are irrelevant to the issues in the case and could not possibly

22 help any trier of fact. *See, e.g.*, *Daubert II*, 43 F.3d at 1320 ("Rule 702's 'helpfulness' standard

23 requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility.").

24 Garmus' irrelevant function point counts should be excluded under Fed. R. Evid. 401-403 and

25 702.

26   **2.   Garmus' Function Point Counts Are Also Improper
             Affirmative Opinions**
27

28   Defendants produced Garmus' 29-page "Expert Rebuttal Report" on March 26, 2010,

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1 four months after the Parties agreed to exchange affirmative expert reports. Alinder Decl., Ex. A

2 (Garmus Report) at 1. On that same day, Defendants produced Donald Reifer's 91-page report.

3 *See* Alinder Decl., ¶ 2. Both of these reports purport to respond to opinions or analyses of Oracle

4 expert, Paul Pinto. Both contain portions that do not. *See, e.g.,* Alinder Decl., Ex. A (Garmus

5 Report) at 27-28. As relates to Garmus, Pinto never attempted to analyze or develop a cost of

6 development estimate for either of the software modules, for which Garmus provided hand

7 counts. *Compare* Alinder Decl., Ex. C (Pinto Report) at 10, *with* Alinder Decl., Ex. A. (Garmus

8 Report) at 27-28; *see also id*., Ex. B (Garmus Depo.) at 39:8-10 ("Q. You weren't intending to

9 find a size for the same applications as Mr. Pinto, correct? A. No, I was not."). Garmus'

10 opinions and testimony on those analyses thus do not rebut any part of Pinto's opinion.

11   Faced with this new analysis and without the provision of additional time in the case

12 schedule for Pinto to provide a sur-rebuttal report, Pinto scrambled to digest and provide detailed

13 responses to both the Garmus and Reifer Rebuttal Reports in the limited time he had prior to his

14 deposition. *See* Plaintiffs' Opposition to Defendants' Motions in Limine, No. 5, filed

15 concurrently with this motion, at Section C. Though Defendants should have presented their

16 affirmative opinions when affirmative reports were due, and despite Defendants having the

17 opportunity to examine Pinto on his responses to Garmus during Pinto's deposition, Defendants

18 are now trying to silence Pinto's responses to Garmus' rebuttal, including Garmus' new function

19 point counts, through an in limine motion. *Id.*

20   Defendants have it backwards. It is Garmus whose testimony should be excluded, not

21 Pinto. Fed. R. Civ. P. 26(a)(2)(C)(ii) allows the admission of rebuttal expert testimony only if it

22 is "intended solely to contradict or rebut evidence on the same subject matter identified by

23 another party. . . ." A rebuttal expert "must restrict [his] testimony to attacking theories offered

24 by the adversary's experts." *IBM Corp. v. Fasco Industries, Inc*., 1995 WL 115421, at *3 (N.D.

25 Cal.); *accord In re Ready-Mix Concrete Antitrust Litig.*, 261 F.R.D. 154, 159 (S.D. Ill. 2009)

26 (rebuttal report must rebut, not offer affirmative opinions); *see also Burnham v. U.S.,* 2009 WL

27 2169191, at *5 (D. Ariz.) ("[R]ebuttal experts shall be limited to responding to opinions stated

28 by initial experts."). Where, as here, a party mislabels affirmative opinions as "rebuttal"

1   opinions and the opposing party has no meaningful opportunity to respond, the courts can and do

2   preclude those non-rebuttal opinions under Rule 37. The courts in all the above-cited cases did

3   just that.

4   Because Garmus' function point analyses do not rebut anything Pinto did, and were not

5   disclosed until four months after the affirmative expert report deadline, they should also be

6   excluded under Rule 37 as improper and untimely affirmative expert opinions. *See* Fed. R. Civ.

7   P. § 37(c).

8   **C.   Garmus' Claimed Opinions on Behalf of IFPUG And Its
               Membership Should be Excluded**
9

10   In his expert report, Garmus also attributes his own opinions to the International Function

11   Point User's Group ("IFPUG") and the IFPUG membership in general, stating "IFPUG does not

12   agree…" and "IFPUG membership does not agree…." Alinder Decl., Ex. A (Garmus Report) at

13   17-21. Garmus' opinions and testimony about what IFPUG and its membership purportedly

14   agree about should be excluded, because they are not reliable, are without foundation, and would

15   likely confuse and mislead the jury. *See* Section III. A.-B.; Fed. R. Evid. 401-403 & 702-703.

16   Garmus claimed at his deposition that, as a past president and committee member, he could

17   speak for IFPUG, but later admitted that no one from IFPUG had reviewed his report to confirm

18   the accuracy of his assertions. *See* Alinder Decl., Ex. B (Garmus Depo.) at 242:1-14. Claiming

19   that other experts not present or identified would offer or support an opinion is not proper expert

20   testimony. *See, e.g., U.S. v. Grey Bear*, 883 F.2d 1382, 1392-1393 (8th Cir. 1989) ("We are

21   persuaded that Fed. R. Evid. 703 does not permit an expert witness to circumvent the rules of

22   hearsay by testifying that other experts, not present in the courtroom, corroborate his views.");

23   *see also Goomar v. Centennial Life Ins. Co.*, 855 F. Supp. 319, 326 (S.D. Cal. 1994) ("If

24   proffered expert testimony is no more than unsupported speculation, the trial judge should

25   exclude it."). Even if the purported opinion of IFPUG as a whole were probative, which it is not,

26   Garmus' hearsay testimony about it would more than likely mislead and confuse the jury,

27   particularly since Garmus tries to use these unfounded assertions to bolster his own credibility.

28   Garmus' opinions about what the IFPUG membership "agrees" with is even farther

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1   afield. Alinder Decl., Ex. A (Garmus Report) at 17-21. Garmus inserts in his expert report eight

2   comments that he claims to have pulled from the IFPUG bulletin board regarding an estimation

3   method called "backfiring." *Id., see also* Alinder Decl., Ex. B (Garmus Depo.) at 254:15-24.

4   Garmus did not provide the full posts, did not provide the identities of the posters, and cannot

5   vouch for the expertise of the posters. *See id*. at 256:11-260:1. Regurgitating unverified

6   statements from unidentified speakers with unknown expertise is not reliable expert analysis;

7   indeed, it is not analysis at all. *See, e.g., Kilgore*, 2006 WL 3253490, at *4 (6th Cir.) (finding

8   internet article an unreliable basis for methodology where expert did not know what research

9   methodology the article was based and conducted no independent research); *see also* Section

10 III.B. above. Moreover, these eight self-selected bulletin board posts do not show that all or

11 even most IFPUG members disagree with Pinto, as Garmus seeks to opine. Indeed, Pinto is part

12 of the IFPUG membership, and certainly does not agree with Garmus. *See* Alinder Decl., Ex. D

13 (Pinto Depo.) at 103:6-21. Garmus cannot speak for IFPUG or its membership. His testimony

14 and opinions are his own and nothing more. He should be precluded from asserting the contrary

15 to the jury. *See* Fed. R. Evid. 401-403 & 702.

16   **D.   Garmus' Improper Legal Conclusions on Cost of Development
                       Damages Should be Excluded**
17

18   Finally, Garmus inserts an opinion in multiple places in his expert report that

19 "determining the cost for independently developing the four underlying application suites is not

20 appropriate for the case in question." *See, e.g.,* Alinder Decl., Ex. A (Garmus Report) at 1 & 26.

21 Garmus conceded at his deposition that he is not a damages expert, is not a copyright expert, is

22 not an avoided costs expert, and is not an unjust enrichment expert. *See* Alinder Decl., Ex. B

23 (Garmus Depo.) at 60:4-12 & 213:19-214:24. His opinions and testimony concerning what cases

24 are "appropriate" for a cost of development damages analysis is improper legal opinion, has no

25 foundation, and would usurp the role of the Court and the jury. *See* Section III. D. above; *see*

26 *also Hebert v. Lisle Corp.,* 99 F.3d 1109, 1117 (Fed. Cir. 1996) ("We encourage exercise of the

27 trial court's gatekeeper authority when parties proffer, through purported experts, not only

28 unproven science, [citation to *Daubert* omitted], but markedly incorrect law. Incorrect

1 statements of law are no more admissible through 'experts' than are falsifiable scientific

2 theories."). Any opinion or testimony by Garmus about the propriety or legal availability of

3 saved development costs as a measure of Oracle's damages should be excluded under Fed. R.

4 Evid. §§ 401-403 & 702.

5 **VI.   CONCLUSION**

6   For the foregoing reasons, the Court should grant Oracle's motion to exclude four

7 improper opinions of David Garmus, as well as testimony on those opinions, including from

8 Defendants' other experts, like Stephen Clarke, relying on those improper opinions.

9 DATED: August 19, 2010

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11   Bingham McCutchen LLP

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13   By:_____/s/ Zachary J. Alinder_____

14   Zachary J. Alinder
                                        Attorneys for Plaintiffs
15   Oracle USA, Inc., *et al*.

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NOTICE AND MOT. NO. 3: TO EXCLUDE TESTIMONY OF DEFENDANTS' EXPERT DAVID GARMUS