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21 UNITED STATES DISTRICT COURT  
 22 NORTHERN DISTRICT OF CALIFORNIA  
 23 OAKLAND DIVISION

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

24 Plaintiff,

25 v.

26 SAP AG, *et al.*,

27 Defendants.

No. 07-CV-01658 PJH (EDL)

**NOTICE OF MOTION AND MOTION NO. 5:  
 TO EXCLUDE TESTIMONY OF  
 DEFENDANTS' EXPERT STEPHEN GRAY**

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

TABLE OF CONTENTS

Page

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

I.	SUMMARY OF INADMISSABLE OPINIONS AND RELIEF REQUESTED .....	1
II.	WHAT DEFENDANTS MUST SHOW TO JUSTIFY GRAY’S OPINIONS AND WHAT THE COURT MUST DO TO TEST THEM.....	3
III.	THE COURT SHOULD EXCLUDE EVIDENCE OF “NON-ACCUSED CONDUCT” .....	5
A.	Appendix 4 Is Based On Unreliable Data and Methods, And Not A Proper Subject of Expert Testimony.....	5
1.	Gray’s Lack of Expert Analysis Renders Appendix 4 Improper .....	6
2.	Gray’s Failure To Consider Available Evidence Renders Appendix 4 Improper .....	8
3.	The Majority of Appendix 4 Does Not Deal With Expert, Scientific or Specialized Knowledge .....	9
B.	Appendix 4 Would Cause Prejudice, Confusion and Take Undue Time To Explain .....	11
C.	Appendix 4 is Not Proper Rebuttal .....	12
IV.	THE COURT SHOULD EXCLUDE GRAY’S TESTIMONY CONCERNING OPINIONS MANDIA DID NOT OFFER AND ANALYSES MANDIA DID NOT DO.....	12
V.	THE COURT SHOULD EXCLUDE ANY TESTIMONY ABOUT CONTRACTS OR INDUSTRY STANDARD PRACTICES.....	15
A.	Gray Is Not An Expert in Software Licenses, Website Terms of Use, Or Industry Practices.....	15
B.	Specifically, The Court Should Preclude Any Testimony Suggesting That SAP TN Or Its Customers May Have Been Entitled To Oracle Software And Support Materials Without Regard To Their Source .....	17
C.	The Court Should Also Preclude Testimony That SAP TN Properly Accessed Oracle Software And Support Materials As Its Customers’ Agent.....	18
VI.	THE COURT SHOULD PRECLUDE MR. GRAY’S TESTIMONY BECAUSE HE FAILED TO DISCLOSE MATERIALS HE RELIED ON OR CONSIDERED .....	18
VII.	CONCLUSION .....	20

TABLE OF AUTHORITIES

Page

**CASES**

*American Booksellers Ass’n v. Barnes & Noble, Inc.*,  
135 F. Supp. 2d 1031 (N.D. Cal. 2001) ..... 15

*Burnham v. U.S.*,  
2009 WL 2169191 (D.Ariz.)..... 12

*Carnegie Mellon Univ. v. Hoffman-Laroche, Inc.*,  
55 F. Supp. 2d 1024 (N.D. Cal. 1999) ..... 4

*Claar v. Burlington R.R.*,  
29 F.3d 499 (9th Cir. 1994)..... 4, 9

*Crow Tribe of Indians v. Racicot*,  
87 F.3d 1039 (9th Cir. 1996)..... 14

*Daubert v. Merrell Dow Pharm. Inc.*,  
509 U.S. 579 (1993)..... passim

*Diviero v. Uniroyal Goodrich Tire Co.*,  
114 F.3d 851 (9th Cir. 1997)..... 7

*Ellis v. Costco Wholesale Corp.*,  
240 F.R.D. 627 (N.D. Cal. 2007)..... 16

*General Electric Co. v. Joiner*,  
522 U.S. 136 (1997)..... 5

*Heller v. Shaw*,  
167 F.3d 146 (3d Cir. 1999)..... 5

*i4i Ltd. P’ship v. Microsoft*,  
670 F. Supp. 2d 568 (E.D. Tex. 2009),  
*aff’d on reh’g*, 598 F.3d 831 (Fed. Cir. 2010) ..... 14

*IBM Corp. v. Fasco Industries, Inc.*,  
1995 WL 115421 (N.D. Cal.)..... 12

*In re Ready-Mixed Concrete Antitrust Litig.*,  
261 F.R.D. 154 (S.D. Ill. 2009)..... 12

*Mukhtar v. California State University*,  
299 F.3d 1053 (9th Cir. 2002),  
*as amended*, 319 F.3rd 1073 (9th Cir. 2003) ..... 4

TABLE OF AUTHORITIES  
(continued)

Page

1		
2		
3	<i>Nationwide Transp. Fin. v. Cass Info. Sys., Inc.</i> ,	
4	523 F.3d 1051 (9th Cir. 2008).....	14
5	<i>Perry v. Schwarzenegger</i> ,	
6	2010 WL 3025614 (N.D. Cal.).....	4, 13
7	<i>Salinas v. Amteck of Kentucky, Inc.</i> ,	
8	682 F. Supp. 2d 1022 (N.D. Cal. 2010) .....	4, 7
9	<i>United States v. Conn</i> ,	
10	297 F.3d 548 (7th Cir. 2002).....	10
11	<i>United States v. Jawara</i> ,	
12	474 F.3d 565 (9th Cir. 2007).....	4
13	<i>United States v. San Diego Gas &amp; Elec. Co.</i> ,	
14	2009 WL 4824489 (S.D. Cal.) .....	11
15	<b>RULES</b>	
16	Fed. R. Civ. P. 26 .....	3, 12, 14, 20
17	Fed. R. Civ. P. 37 .....	3, 16, 18, 20
18	Fed. R. Evid. 104 .....	4
19	Fed. R. Evid. 403 .....	11, 15, 18
20	Fed. R. Evid. 702 .....	passim
21	Fed. R. Evid. 703 .....	15

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23  
24  
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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 (predecessor to Oracle America, Inc.), Oracle International Corporation, Oracle EMEA Limited,  
4 and Siebel Systems, Inc. (collectively, “Oracle”) shall and hereby do move for an order  
5 excluding opinions and testimony of Stephen Gray (“Gray”) designated by Defendants SAP AG,  
6 SAP America, Inc., and TomorrowNow, Inc. (“SAP TN”) (collectively “Defendants”) as an  
7 expert witness in this matter, on the grounds that Gray’s proposed expert opinion testimony is  
8 inadmissible on the basis of the authorities and evidence set forth herein and in the  
9 accompanying declarations.

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

11 Defendants designated Stephen Gray as a rebuttal expert to Oracle’s expert witnesses  
12 Kevin Mandia, Daniel S. Levy, Paul Meyer, and Paul Pinto on January 22, 2010. Gray provided  
13 the first version of his 80-page expert report on March 26, 2010, the date the parties agreed to  
14 provide rebuttal reports. Declaration of John A. Polito (“Polito Decl.”) ¶ 3. He produced an  
15 updated version of his expert report on June 3, 2010. *Id.* His report and testimony principally  
16 address Mandia’s report, with a few pages directed to the portion of Meyer’s damages report that  
17 concerns Defendants’ illegal use of Oracle database software. Polito Decl., Ex. A (“Gray  
18 Report”) §§ 10.6.5-10.6.7.1.<sup>1</sup>

19 Mandia is a highly regarded expert in computer forensics who performed extensive  
20 investigation and forensic analysis of the means and methods by which SAP TN accessed and  
21 downloaded from Oracle’s websites, and the nature and extent of SAP TN’s copying,  
22 modification, distribution and use of Oracle’s intellectual property to support its customers. *Id.*,  
23 Ex. C (“Mandia Report”) at ¶ 2. Mandia identified several categories of SAP TN’s conduct that  
24 Oracle contends were wrongful, including but not limited to mass downloading of Oracle  
25 Software and Support Materials (SSMs), improper access to Oracle’s systems, making thousands

26 \_\_\_\_\_  
27 <sup>1</sup> Gray does not address Pinto’s testimony at all, and does not criticize Levy’s report other than  
28 noting its interdependence with Mandia’s testimony.

1 of unauthorized copies of Oracle enterprise application and database software, and using the  
2 downloaded materials and copies of software in ways prohibited by licenses and terms of use to  
3 support its customers. *Id.* at ¶ 16.

4 Gray’s proposed testimony is deficient in four respects.

5 **First**, although Defendants did not disclose Gray as an affirmative expert, he nonetheless  
6 purports to submit a long list of customers for which SAP TN supposedly did not wrongfully  
7 take and use Oracle’s intellectual property. The basis for this testimony is Appendix 4 to his  
8 report, one of only three trial exhibits for which he is the designated sponsor. However,  
9 Appendix 4 suffers from multiple problems, including that it does not rebut or contradict  
10 Mandia’s analysis and is therefore not proper rebuttal. Gray would not vouch for Appendix 4 as  
11 a reliable summary, stressing the limited information on which he based it (it includes sections  
12 prepared by Defendants’ attorneys or with information supplied only by them). Its minimal or  
13 nonexistent probative value is far outweighed by the danger of confusing the issues and  
14 misleading the jury, and the undue trial time it, and Oracle’s responses to it, would consume.  
15 Gray further disclaimed any actual opinion regarding the propriety of SAP TN’s conduct or  
16 business model, thus further limiting the possible value of Appendix 4 to the jury.

17 **Second**, Gray also reports repetitively and at length that Mandia did not undertake  
18 analysis or provide opinions on various subjects. The most repeated observations concern a  
19 litany of particular items on which Mandia did no analysis of protected expression under  
20 copyright law. Because Mandia did not express opinions on these ultimate issues because he  
21 was not asked to, Gray’s testimony listing Mandia’s supposed omissions does not contradict or  
22 rebut the work Mandia did or the opinions he offered, and it is not proper expert rebuttal. In fact,  
23 it is not expert testimony at all, but legal argument as to which Gray himself admittedly has no  
24 expertise. Indeed, while criticizing Mandia’s assumptions as to issues such as whether SAP  
25 TN’s activities infringed “protected expression,” Gray himself admitted in his deposition that he  
26 himself has no definition of “protected expression” and has merely relied on lawyers for  
27 guidance as to how to define it. His critique of Mandia’s assumptions should not be permitted.

28 **Third**, the Court should exclude Gray’s testimony interpreting software licenses and

1 website terms of use, or opining on the propriety of conduct under their terms. He is, by his own  
2 admission, not an expert on such subjects and not competent to testify about them. In particular,  
3 Gray should not be permitted to suggest, as he does in his report, that SAP TN’s customers may  
4 have been “entitled” to Oracle software or support materials without regard to their source, or  
5 that SAP TN’s conduct was permitted because SAP TN was its customers’ agent. These are  
6 legal questions Mr. Gray is not qualified to answer.

7 *Fourth*, the Court should exclude Gray’s testimony and exhibits in their entirety pursuant  
8 to Fed. R. Civ. P. 37(c) because of Defendants’ failure to make meaningful disclosure, as  
9 required by Fed. R. Civ. P. 26(a)(2)(B)(ii), of materials that Gray considered in forming his  
10 opinions. Gray’s testimony makes clear that the eight-page single-spaced listing Defendants  
11 provided to Oracle was a list of materials Gray received from counsel. It contains substantially  
12 more than the materials he considered. The documents Gray considered in forming his opinions  
13 are buried somewhere in that voluminous information, and it is not possible to reconstruct which  
14 ones they are. As a result, Oracle cannot test Gray’s opinions as it is entitled to do. Oracle  
15 cannot show that Gray ignored important evidence when he formed an opinion because there is  
16 no way to know what he considered or ignored. Oracle cannot cross-examine Gray at trial with  
17 the particular logs and code versions he relied on to show the jury that his opinions lack merit,  
18 because there is no record of what he considered, and Gray himself did not remember at his  
19 deposition. Defendants’ violation of Fed. R. Civ. P. 26(a)(2)(B)(ii) hinders meaningful cross-  
20 examination at trial and warrants exclusion under Rule 37.

21 Accordingly, the Court should exclude Gray’s testimony and exhibits in their entirety  
22 under Rule 37. Alternatively, the Court should exclude: (i) Gray’s Appendix 4 and all testimony  
23 that refers to it; (ii) Gray’s testimony stating that Mandia did not take certain steps or render  
24 certain opinions in his analysis, and (iii) Gray’s testimony interpreting licenses and terms of use,  
25 or opining on the propriety of conduct under their terms.

26 **II. WHAT DEFENDANTS MUST SHOW TO JUSTIFY GRAY’S OPINIONS AND**  
27 **WHAT THE COURT MUST DO TO TEST THEM**

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

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

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

14 The Ninth Circuit has repeatedly stated that where evidence of pre-  
15 litigation research or peer review is not available, the experts must  
16 (1) “explain precisely how they went about reaching their  
17 conclusion” and (2) “point to some objective source – a learned  
18 treatise, the policy statement of a professional association, a  
19 published article in a reputable science journal or the like – to  
20 show that they have followed the scientific method as practiced by  
21 (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. Evid. 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 an explicit  
27 reliability finding was error”); *Mukhtar v. California State University*, 299 F.3d 1053, 1066-68  
28 (9th Cir. 2002) (district court prejudicially erred by admitting expert testimony without explicit  
reliability determination), *as amended*, 319 F.3rd 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. at 589. This “gatekeeper” role “entails a preliminary

1 assessment of whether the reasoning or methodology underlying the testimony is . . . valid and of  
2 whether the reasoning or methodology properly can be applied to the facts in issue.” *Id.* at 592-  
3 93.

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

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

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

### 16 **III. THE COURT SHOULD EXCLUDE EVIDENCE OF “NON-ACCUSED 17 CONDUCT”**

#### 18 **A. Appendix 4 Is Based On Unreliable Data and Methods, And 19 Not A Proper Subject of Expert Testimony**

20 Appendix 4 to the Gray Report (“Appendix 4”) is a spreadsheet entitled “Non-Accused  
21 Conduct.” Polito Decl., Ex. E. The first two tabs of this spreadsheet purport to enumerate 51  
22 SAP TN customers “to which the accusations that are identified in the Mandiant report do not  
23 apply.” *Id.*, Ex. B (Gray Depo.) at 551:12-15. Phrased slightly differently, the spreadsheet  
24 purports to identify “TomorrowNow customers for which product support was provided which  
25 did not fall within the Mandiant rules, for lack of a better term,” *id.* at 260:10-19, where “the  
26 Mandiant rules” refers to “the accusations that the Mandiant report makes regarding  
27 TomorrowNow’s behavior.” *Id.* at 261:24-262:7.

28 In assembling Appendix 4, Gray (and the six attorneys from Jones Day who assisted him

1 in writing his report) ignored relevant facts, and did not perform a reliable investigation.<sup>2</sup>  
2 Furthermore, most of Appendix 4 required no expert, scientific or specialized knowledge  
3 because it is primarily a cross-tabulation of data reported by Mandia. Yet, Appendix 4  
4 nonetheless forms the basis for all of Gray’s opinions about SAP TN’s supposedly proper  
5 business model. Indeed, Appendix 4 is one of only three exhibits on Defendants’ list for which  
6 Gray is listed as the sponsoring witness. Dkt. 733 (Defs’ Trial Ex. List) at 60.

7 For the reasons explained below, the Court should exclude Appendix 4 in its entirety, and  
8 should similarly exclude any derivative testimony or exhibits.<sup>3</sup>

9 **1. Gray’s Lack of Expert Analysis Renders Appendix 4**  
10 **Improper**

11 The title of Appendix 4, “Non-Accused Conduct,” is a misnomer. Gray analyzed the  
12 contents of Mandia’s report, not SAP TN’s conduct:

13 Q. To be clear, your list of 51 customers is not intended to be a  
14 summary of all available evidence relating to TomorrowNow’s  
support of its customers?

15 [Objection omitted]

16 A. **I didn’t look for evidence outside the Mandiant report’s**  
17 **identification of improper conduct.** I didn’t look outside that.  
18 My assignment was to analyze the Mandiant report and offer  
19 comments relative to the Mandiant report. So I didn’t -- I didn’t  
try to do what -- I mean, I didn’t try to do that other thing that --  
you know, the other job.

20 Polito Decl., Ex. B (Gray Depo.) at 285:16-286:3 (emphasis supplied); *see also id.* at 261:19-23  
21 (confirming that “the universe of information that [Gray] looked at was the information  
22 described in Mr. Mandia’s report”); *id.* at 259:19-25 (defining the list of 51 customers in terms of

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23  
24 <sup>2</sup> *See, e.g.,* Polito Decl., Ex. B (Gray Depo.) at 321:5-322:2, 326:15-22, 490:22-493:8 (discussing  
25 the contributions of Briana Bassler, Scott Cowan, Josh Fuchs, Sean McCarthy, Nicole Perry and  
Laurens Wilkes to Mr. Gray’s report); *id.* at 11:19-25; 321:5-322:2; 331:25-332:7 (testifying that  
these six individuals were attorneys employed by Jones Day).

26 <sup>3</sup> Derivative testimony and exhibits include, but are not limited to, Polito Decl., Ex. A (Gray  
27 Report) § 13.2, which largely duplicates the second tab of Appendix 4, and any other portion of  
the Gray Report that expressly refers to Appendix 4, § 13.2, “non-accused conduct” or “non-  
28 accused customers.”

1 “the conduct . . . [described] in the Mandiant report”). Gray testified that he “was not . . . asked  
2 to analyze” data other than Mandia’s report. *Id.* at 261:10-18.

3 In fact, Gray has no opinion about TomorrowNow’s conduct:

4 Q. Do you presently have an opinion that any conduct by  
5 TomorrowNow was proper or improper?

6 [Objection omitted]

7 A. . . . I don’t have an opinion -- you’re asking me the opinion  
8 -- the way you asked that question is very difficult to answer. I  
9 don’t have an opinion -- **I don’t have an opinion regarding the**  
10 **proprietor -- propriety or impropriety or permissibility in a**  
11 **general sense of how TomorrowNow conducted their affairs**  
12 **with their customers or conducted their business with their**  
13 **customers. I don’t have an opinion about the general -- the**  
14 **broader question. My opinions are confined to the Mandiant**  
15 **report and appendices and work that he did and comments**  
16 **and critiques of his report, is really what my opinions in my**  
17 **report pertain to. . .**

18 *Id.* at 443:9- 444:8 (emphasis supplied).

19 Because Gray testified at deposition that he was neither instructed to perform nor did  
20 perform any independent analysis of SAP TN’s business model in assembling Appendix 4, he  
21 may not use Appendix 4 to testify that SAP TN’s business model was appropriate; such  
22 testimony should be excluded as unreliable speculation. *See Diviero v. Uniroyal Goodrich Tire*  
23 *Co.*, 114 F.3d 851, 853 (9th Cir. 1997) (“Rule 702 demands that expert testimony relate to  
24 scientific, technical or other specialized knowledge, which does not include unsubstantiated  
25 speculation and subjective beliefs.”) (citation omitted); *cf. Salinas v. Amteck of Kentucky, Inc.*,  
26 682 F. Supp. 2d 1022, 1031 (N.D. Cal. 2010) (noting, in excluding under *Daubert* expert  
27 testimony that a warning was defective, that the expert had previously “testified that he ha[d] no  
28 criticism of the warning”).<sup>4</sup> Moreover, because Appendix 4 has no purpose or relevance other

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25 <sup>4</sup> For the same reasons, the Court should exclude those sections of Gray’s report opining on the  
26 propriety of SAP TN’s business model. *See, e.g.*, Polito Decl., Ex. A (Gray Report) § 8.2.1  
27 (suggesting that aspects of SAP TN’s support of retrofit customers was appropriate and “Oracle-  
28 approved”); *id.* § 8.4 (same); *id.* § 8.3 (suggesting that SAP TN may have been permitted to use  
software “regardless of the source” to support its customers). Gray expressly disclaimed any  
such opinions at deposition. *See, e.g., id.*, Ex. B (Gray Depo.) at 441:9-12 (“I’m not intending in

(Footnote Continued on Next Page.)

1 than suggesting that SAP TN's conduct was proper for the "Non-Accused Conduct" – when that  
2 is the very determination that Gray admits he did not actually make – the Appendix should be  
3 excluded entirely.

4                   **2. Gray's Failure To Consider Available Evidence**  
5                   **Renders Appendix 4 Improper**

6                   The second tab of Appendix 4 is labeled "51 Non-Accused Customers." As discussed  
7 above, Gray specifically declined to state an opinion regarding the propriety of SAP TN's  
8 support model. He was accordingly unwilling to express an opinion that, for the 51 customers  
9 listed in his Appendix 4 as "not implicated by the accused conduct," SAP TN in fact provided  
10 support to them properly or correctly:

11                   Q.       Do you intend to testify in trial that the list of 51 customers  
12 represents a list of 51 customers for whom TomorrowNow  
13 provided support properly and correctly?

14                   [Objection omitted]

15                   A:       I don't think I, sitting here today, prepared to offer an --  
16 that I'd necessarily offer an opinion that states that the 51 were or  
17 were not -- that either the 51 were or -- the 51 were customers for  
18 which there was not improper activity. What I am talking about is  
improper activity which Mandiant defines. I didn't look at that  
other -- I didn't make a determination with regard to the other, so I  
don't think I can testify about it.

19                   Polito Decl., Ex B (Gray Depo.) at 287:4-22. Gray would not vouchsafe that for those 51  
20 customers characterized in his Appendix 4 as not implicated by the accused conduct, SAP TN in  
21 fact had provided support to them in a proper manner. When asked whether "the presence or  
22 absence of a customer on [his] list of 51" could support "an assertion that a customer was -- was  
23 or was not supported in an infringing or an improper manner," Gray replied: "Well, once again, I  
24 haven't done that work. . . . So it's hard for me to make a declarative statement about that. I

25 \_\_\_\_\_  
26 (Footnote Continued from Previous Page.)

27 my report to try and talk about the general case of how TomorrowNow dealt with their customers  
28 or the propriety or impropriety of their behaviors.").

1 know -- I don't feel comfortable answering it. I just don't know." *Id.* at 286:11-287:3.

2 Evidence not considered by Gray indicates that SAP TN did support those 51 customers  
3 improperly. *Compare, e.g., id.*, Ex. E (Appendix 4) (listing US Oncology and BBS Electronics  
4 as "non-accused customers") *with id.*, Ex. F (Baugh Depo.) at 140:17-141:3 (admitting that  
5 Baugh, an SAP TN employee, had used the software of customer Norwegian Cruise Lines when  
6 testing an upgrade for US Oncology) *and id.*, Ex. B (Gray Depo.) at 274:24-275:18  
7 (acknowledging that Plaintiffs' Deposition Exhibit 3120, regarding a support case for BBS  
8 Electronics, discussed a simulated test in customer Praxair's environment).

9 Regardless, Gray testified that it "wouldn't be necessarily appropriate" to remove a  
10 customer from Appendix 4's list of 51 "non-accused" customers, even if it were demonstrated  
11 that SAP TN had improperly supported a customer on the list. *See id.* at 284:7-24. According to  
12 Gray, the data summarized in Appendix 4 is and will continue to be limited to Gray's reading of  
13 Mandia's report, to the exclusion of any other evidence in the record. *See id.* Thus, Appendix 4  
14 and Gray's opinions derived from it are neither based on sufficient facts and data nor the results  
15 of reliable application of principles and methods to the record in the case. *See, e.g., Claar*, 29  
16 F.3d at 501-03. In short, Gray's opinion does not "fit" the facts, *Daubert*, 509 U.S. at 595, and  
17 should be excluded.

18 **3. The Majority of Appendix 4 Does Not Deal With**  
19 **Expert, Scientific or Specialized Knowledge**

20 To create Appendix 4, Gray and the attorneys who worked at his direction did nothing  
21 more than assemble lists of the customer names in Mandia's report, the customer names listed in  
22 various documents, depositions and discovery materials that Mandia cited, and the customer  
23 names found in directories on SAP TN's computers. *See* Polito Decl., Ex. G (Appendix 5 to  
24 Gray Report) (listing the materials reviewed in constructing Appendix 4). Only the last of these,  
25 requiring the review of directories on SAP TN's computers, plausibly requires expert, scientific  
26 or specialized knowledge. Simply taking customer names from Mandia's tables and  
27 spreadsheets (or from spreadsheets created by Defendants in the course of discovery) and  
28 copying them into various columns is a ministerial task that does not rise to the level of expert

1 opinion. *See* Fed. R. Evid. 702 (requiring that “scientific, technical, or other specialized  
2 knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue”  
3 as a predicate to expert testimony).

4 As further evidence that no scientific, technical or other specialized knowledge was  
5 required, Gray testified that Jones Day attorneys, instead of or in addition to Gray, populated  
6 certain columns on Appendix 4. *See, e.g.*, Polito Decl., Ex. B (Gray Depo.) at 324:19-325:10  
7 (testifying that Appendix 4 was “jointly developed,” with Gray “asking for certain columns and  
8 certain analyses to be performed”); *id.* at 326:6-22 (“Q. To be clear, you asked [Jones Day  
9 attorney] Mr. Fuchs to create certain columns and to perform certain analyses for your Appendix  
10 4? A. Well, that’s where it started, and then there was a collaborative effort that went back and  
11 forth . . .”). Gray identified five columns as jointly populated by Gray and Jones Day attorneys.  
12 *See id.* at 330:1-332:7 (Gray and Jones Day attorneys Bassler and McCarthy populated the  
13 “PeopleSoft Customer” column); *id.* at 344:25-345:9 (same); *id.* at 345:25-346:24 (same, for the  
14 “JDE World Customer,” “JDE OneWorld Customer” and “Siebel Customer” columns). Jones  
15 Day attorneys populated one column entirely. *Id.* at 327:8-23 (someone other than Gray  
16 populated the Customer column and related footnotes); *id.* at 593:18-20 (no one else from Gray  
17 & Yorg worked on the matter). Twelve of the eighteen remaining substantive columns consist of  
18 nothing more than tabulated lists of customer names found in deposition testimony, spreadsheets,  
19 or tables in Mandia’s report. *See* Polito Decl., Ex. G (Appendix 5 to Gray Report) §§ 3.1, 4.6,  
20 4.7, 4.8, (stating that four of the remaining columns are lists of customer names from identified  
21 portions of depositions and related exhibits); *id.* §§ 4.1, 4.3, 4.4, 4.5, 5.1 & n.37, 5.2 & n.38, 5.3  
22 & n.39 (stating that seven of the remaining columns are lists of customer names (or customer  
23 codes converted to customer names) taken from spreadsheets produced by Mandia or by  
24 Defendants); *id.* §5.5 (stating that one of the remaining columns is a list of customer names from  
25 a table in Mandia’s report).

26 Thus, at least 75% of this chart is a re-listing of pre-existing lists, rather than the result of  
27 any expert analysis. This type of material is not properly admitted under Fed. R. Evid. 702. *See,*  
28 *e.g., United States v. Conn*, 297 F.3d 548, 554 (7th Cir. 2002) (distinguishing expert testimony

1 from lay testimony on grounds that the former “provide[s] specialized explanations or  
2 interpretations that an untrained layman could not make if perceiving the same acts or events”  
3 (citation omitted).

4 **B. Appendix 4 Would Cause Prejudice, Confusion and Take**  
5 **Undue Time To Explain**

6 Even relevant evidence should be excluded if its probative value is substantially  
7 outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or  
8 by considerations of undue delay, waste of time, or needless presentation of cumulative  
9 evidence. Fed. R. Evid. 403. In particular, because, expert testimony “can be both powerful and  
10 quite misleading because of the difficulty in evaluating it” courts exclude otherwise relevant  
11 expert testimony ““if its probative value is substantially outweighed by the danger of unfair  
12 prejudice, confusion of the issues, or misleading the jury.”” *Daubert*, 509 U.S. 589, 595 (quoting  
13 Jack Weinstein, *Rule 702 of the Federal Rules of Evidence is Sound; It Should Not Be Amended*,  
14 138 F.R.D. 631, 632 (1991)). The Court should exclude Mr. Gray’s “non-accused conduct”  
15 exhibit and testimony under these standards.

16 Appendix 4 has limited probative value to begin with. Even if it were reliable, a  
17 tabulation of customers supposedly *not* the subject of Oracle’s contentions of wrongdoing does  
18 not negate Defendants’ liability for those that are. It is simply an exercise in misdirection, and  
19 likely (in fact designed) to lead to confusion of the issues and mislead the jury. Fed. R. Evid.  
20 403. Moreover, because Gray’s analysis is both complicated and flawed, the required  
21 explanation, cross-examination, rebuttal and arguments relating to it would consume an undue  
22 amount of the very limited trial time available. “Explaining this complex and convoluted thicket  
23 to a trier of fact clearly invites undue prejudice and confusion of issues, in addition to a very real  
24 possibility that the jury will be misled.” *United States v. San Diego Gas & Elec. Co.*, 2009 WL  
25 4824489, at \*14 (S.D. Cal.). Because these considerations far outweigh any probative value  
26 Gray’s exhibit and testimony might have, the exhibit and testimony should be excluded. Fed. R.  
27 Evid. 403.

1           **C.     Appendix 4 is Not Proper Rebuttal**

2           Gray admitted that he did not intend Appendix 4 to rebut or contradict Mandia’s analysis:

3                   Q.     So would you agree that Appendix 4 provides context, but  
4                   does not contradict or rebut the conclusions in Mr. Mandia’s  
5                   report?

6                   [Objection omitted]

7                   A.     **I don’t think the purpose or intent of Exhibit 4 is to**  
8                   **contradict or rebut.** It is rather to provide some insights in -- I  
9                   think I’d use that word -- provide insights into the conclusions that  
10                  he has. Again, with respect to Section X of the Mandiant report,  
11                  again, as I say, there are ... some things that can be read as broad  
12                  assertions here, or broad opinions, and to that extent, it might limit  
13                  some of that. But there’s nothing specific other than that that I can  
14                  think of. And as a matter of fact, it is intended to try and provide  
15                  insights and adopt what the Mandiant report reported.

16           Polito Decl., Ex. B (Gray Depo.) at 558:6-24 (emphasis supplied).

17           If Defendants wished to offer a technical expert’s opinions about customers to which  
18           Oracle’s claims of wrongdoing do not apply, they should have offered it in an initial expert  
19           report. Fed. R. Civ. Proc. 26(a)(2)(C)(ii) allows the admission of rebuttal testimony “solely to  
20           contradict or rebut evidence on the same subject matter identified by another party. . . .” It does  
21           not permit as “rebuttal” expert testimony affirmative matter that does not respond to evidence  
22           offered by the other party. A rebuttal expert “must restrict [his] testimony to attacking theories  
23           offered by the adversary’s experts.” *IBM Corp. v. Fasco Industries, Inc.*, 1995 WL 115421, at  
24           \*3 (N.D. Cal.) (granting in part motion to exclude “rebuttal” opinions); *accord In re Ready-*  
25           *Mixed Concrete Antitrust Litig.*, 261 F.R.D. 154, 159 (S.D. Ill. 2009) (rebuttal report must rebut,  
26           not offer affirmative opinions); *Burnham v. U.S.*, 2009 WL 2169191, at \*5 (D.Ariz.) (“[R]ebuttal  
27           experts shall be limited to responding to opinions stated by initial experts.”). The Court should  
28           exclude Gray’s Appendix 4 and his testimony that refers to it because they are not proper rebuttal  
29           expert testimony.

30           **IV.    THE COURT SHOULD EXCLUDE GRAY’S TESTIMONY CONCERNING**  
31           **OPINIONS MANDIA DID NOT OFFER AND ANALYSES MANDIA DID NOT**  
32           **DO**

33           A large part of Gray’s report, perhaps most of it, consists of repetitive assertions that  
34           Mandia did not undertake certain analyses or express certain opinions in his report. *E.g.*, Polito

1 Decl., Ex. A (Gray Report), § 6.4.1 (no analysis of protected expression); *id.* § 6.4.2 (no analysis  
2 of licenses); *id.* § 7.5.1 (no analysis of protected expression); *id.* § 7.5.4.1 (no analysis of  
3 protected expression in downloads); *id.* § 7.5.4.2 (no analysis of protected expression in  
4 backups); *id.* § 7.5.4.3 (no analysis of protected expression in One World copies); *id.* § 7.5.4.4  
5 (no analysis of protected expression in World copies); *id.* § 7.5.4.5 (no analysis of protected  
6 expression in Oracle databases); *id.* § 7.5.4.6 (no analysis of protected expression in fixes); *id.*  
7 § 7.6 (no analysis of protected expression in cross-used environments); *id.* § 7.7 (no review of  
8 terms of use); *id.* § 7.8 (no sources of definitions used); *id.* § 8.1.3 (no copyright analysis); *id.*  
9 § 8.2 (little analysis of software lines and models other than PeopleSoft); *id.* § 8.2.2 (no  
10 discussion of call support); *id.* § 8.2.3 and its subsections (little or no analysis of various product  
11 lines and versions); *id.* § 8.2.4 and its subsections (little analysis of JDE customers and  
12 services); *id.* § 8.5 and its subsections (no analysis of Siebel services); *id.* § 8.2.6 (no discussion  
13 of certain copyright registrations); *id.* § 9.3 (no analysis of licenses and terms of use for access);  
14 *id.* § 9.4.1 (no analysis of how credentials are issued and modified); § 11.2 (no analysis of  
15 various product lines and services); *id.* § 11.4.1 (no analysis of protected expression); *id.* § 11.4.2  
16 (no analysis of de minimis copying); *id.* § 11.5.1 (no code comparison for JDE); *id.* § 11.6 (no  
17 fix analysis of certain JDE and Siebel versions); *id.* § 12.1 (no analysis of post-complaint  
18 conduct); *id.* § 13 (summarizing all the above).

19         These potshots are immaterial and improper, several times over. First, they require no  
20 special technical expertise to make a list of what the Mandia report does not contain; the jury is  
21 just as competent to make it as is Gray. *See* Fed. R. Evid. 702 (requiring that experts “assist the  
22 trier of fact” with “scientific, technical or other specialized knowledge”); *cf.*, *e.g.*, *Perry*, 2010  
23 WL 3025614 at \*22 (“Blankenhorn’s mere recitation of text in evidence does not assist the court  
24 in understanding the evidence because reading, as much as hearing, ‘is within the ability and  
25 experience of the trier of fact.’”) (quoting *Beech Aircraft Corp v United States*, 51 F.3d 834, 842  
26 (9th Cir 1995)). Gray’s laundry list is thus inadmissible because it does not satisfy the  
27 requirements of Rule 702.

28         Second, Gray’s litany of things that Mandia’s report does not include (because Mandia

1 was not asked to include them), such as analysis of protected expression, in no way “rebutts or  
2 contradicts” the technical work that Mandia performed or his opinions based on that work as a  
3 computer forensics expert. Gray’s proposed testimony on this subject is therefore not proper  
4 expert rebuttal. *See* Fed. R. Civ. P. 26(a)(2)(C)(ii).

5 Third, this litany in fact is not expert testimony at all, but smuggled-in legal argument  
6 meant to suggest that Oracle failed to meet its evidentiary burden. *See, e.g., Nationwide Transp.*  
7 *Fin. v. Cass Info. Sys., Inc.*, 523 F.3d 1051, 1058 (9th Cir. 2008) (“[A]n expert witness cannot  
8 give an opinion as to her legal conclusion”) (internal citations and quotations marks omitted);  
9 *Crow Tribe of Indians v. Racicot*, 87 F.3d 1039, 1045 (9th Cir. 1996) (“Experts interpret and  
10 analyze factual evidence. They do not testify about the law”) (internal citations and quotations  
11 marks omitted). It is also an illogical argument, as Oracle need not prove its entire case through  
12 one witness.

13 Fourth, even if not considered improper legal conclusions, Gray cannot testify about  
14 standard expert practices in copyright cases, both because he was not disclosed on that subject  
15 matter and because he is not qualified on it: Gray has testified in only two copyright matters in  
16 his 35-year career. *Polito Decl., Ex. B (Gray Depo.)* at 109:19-25. He testified that he did not  
17 (and could not) perform protected expression analysis in the absence of assumptions provided by  
18 counsel, and that he did not (and could not) interpret terms of use or license arrangements  
19 without guidance from others. *See, e.g., id.* at 82:12-21 (protected expression); *id.* at 472:11-  
20 474:25 (terms of use and license agreements). Thus, Gray’s criticism that Mandia did not  
21 undertake the same analyses is unintentionally ironic, and lacking any probative value. *Cf. i4i*  
22 *Ltd. P’ship v. Microsoft*, 670 F. Supp. 2d 568, 585, 607 (E.D. Tex. 2009) (finding, in denying  
23 post-trial motions for judgment as a matter of law and for a new trial in a patent case, that Mr.  
24 Gray’s testimony on anticipation was “simply unpersuasive” and “failed to approach the  
25 specificity or detail that was applied by the [other] parties”), *aff’d on reh’g*, 598 F.3d 831 (Fed.  
26 Cir. 2010).

27 Mandia, like Gray, is a computer forensics expert. *Polito Decl., Ex. D (Mandia Depo.)* at  
28 164:17-24. Like most experts, he was provided assumptions to use for aspects of his report

1 (specifically, about protected expression, *see id.* at 172:14-19) that are expressly stated in his  
2 report. *E.g.*, Polito Decl., Ex. C (Mandia Report) ¶¶ 35, 41, 42, 44, 45. He did not conduct  
3 protected expression analysis because he quite properly assumed it would be others who would  
4 back the assumptions up. *See American Booksellers Ass’n v. Barnes & Noble, Inc.*, 135 F. Supp.  
5 2d 1031, 1038 (N.D. Cal. 2001) (observing that an expert “is permitted to base his expert opinion  
6 on evidence that will be proved by other witnesses at trial”) (citing Fed. R. Evid. 703).

7 Finally, for all of these reasons, Gray’s testimony concerning what Mandia did not do  
8 should also be excluded because it is unfairly prejudicial and likely to confuse a jury. Gray is  
9 attempting to usurp the jury’s role by asserting that Mandia failed to meet his burden of proof,  
10 offering an “expert’s” imprimatur on a simple and substantively meaningless list of omissions  
11 from the Mandia report, or both. The jury may give untoward weight to such statements, even  
12 though they are unfounded, because they come from a purported technical expert. Because this  
13 testimony’s unfairly prejudicial effects, and the likelihood that the testimony will confuse the  
14 jury, both substantially outweigh the probative value of this testimony, it should be excluded.  
15 Fed. R. Evid. 403.

16 **V. THE COURT SHOULD EXCLUDE ANY TESTIMONY ABOUT CONTRACTS**  
17 **OR INDUSTRY STANDARD PRACTICES**

18 **A. Gray Is Not An Expert in Software Licenses, Website Terms of**  
19 **Use, Or Industry Practices**

20 Gray is not a lawyer. Polito Decl., Ex. B (Gray Depo.) at 31:22-25; 351:21-23. He also  
21 does not hold himself out as an expert “in industry practices about Web site policies in terms of  
22 use.” *Id.* at 207:15-208:5. In “the terms of use and licensing arena,” he is “not an expert [and]  
23 not competent really to analyze those things,” *id.* at 472:16-22, and he has never held himself out  
24 as an expert in the interpretation of software licenses. *Id.* at 198:22-199:5.

25 Gray reviewed only four of SAP TN’s customer contracts, *id.* at 335:12-18, and does not  
26 refer to any specific set of Terms of Use for Oracle’s websites in his report. *Id.* at 209:2-9. He  
27 did not do any license analysis regarding the downloading of materials using another customer’s  
28 credentials, *id.* at 474:13-19, and disclaimed any opinion about whether SAP TN’s downloading  
from Customer Connection was permissible under any applicable licenses or Terms of Use. *Id.*

1 at 444:9-18. He also disclaimed any opinions about whether the local environments on SAP  
2 TN’s machines were permitted under the applicable customer licenses. *Id.* at 444:19-445:10. He  
3 testified that he did not intend to testify at trial about “the propriety or impropriety”<sup>5</sup> of SAP  
4 TN’s behavior in dealing with its customers. *Id.* at 440:24-442:13.

5 However, Gray equivocated about whether he intends to offer any opinion about the  
6 interpretation of any of Terms of Use or policies at issue in this case, *id.* at 208:6-209:1, and  
7 noted that there are comments in his report about Terms of Use. *Id.* at 208:20-23. Indeed, there  
8 are references within the Report on these topics (*e.g.*, Polito Decl., Ex. A (Gray Report) §§ 7.7,  
9 9.2), as well as statements regarding the propriety of SAP TN’s conduct. *E.g., id.* §§ 7.4; 7.7.

10 For two reasons, Gray should not be permitted to opine about the interpretation of  
11 software licenses and Terms of Use, the propriety of any conduct under licenses or terms of use,  
12 or industry standard practices for support of enterprise software. First, he admits he is not an  
13 expert on those subjects, a basic requirement for offering expert testimony. Fed. R. Evid. 702.  
14 Second, he has disclosed no opinions on those subjects. Fed. R. Civ. P. 37(c)(1) precludes use of  
15 any such undisclosed information at trial, absent a showing that the failure to disclose it is  
16 substantially justified or harmless. There is no excuse for failing to disclose expert opinions  
17 when sought by direct questions. The failure to disclose them at a time when there was  
18 opportunity for questioning and time to prepare to meet them is not harmless. *See, e.g., Ellis v.*  
19 *Costco Wholesale Corp.*, 240 F.R.D. 627, 645 (N.D. Cal. 2007) (striking late-disclosed expert  
20 materials where the opposing party “had no opportunity to determine the basis . . . through  
21 deposition or other discovery methods”).

22  
23  
24  
25  
26 \_\_\_\_\_  
27 <sup>5</sup> Gray testified that to him, propriety and impropriety – whether behavior was proper or  
28 improper – have to do with Terms of Use and licenses. Polito Decl., Ex. B (Gray Depo.) at  
583:3-6.

1           **B. Specifically, The Court Should Preclude Any Testimony**  
2           **Suggesting That SAP TN Or Its Customers May Have Been**  
3           **Entitled To Oracle Software And Support Materials Without**  
4           **Regard To Their Source**

4           Mandia’s report documents thousands of copies of Software and Support Materials that  
5           SAP TN downloaded with one customer’s credentials ostensibly on behalf of that customer and  
6           then used to support other customers, as well as SAP TN’s extensive use of copies of one  
7           customer’s local environment to support other customers. *See, e.g.*, Polito Decl., Ex. C (Mandia  
8           Report) ¶ 215 & Table 19 (discussing SAP TN’s downloading with another customer’s  
9           credentials)); *id.* ¶¶ 296-299 (discussing SAP TN’s cross-use of local environments). Mandia  
10          assumed (but did not opine) that such cross-use was prohibited by Oracle’s license agreements  
11          and website terms of use. *Id.* ¶¶ 38-40, 46. It was. *See, e.g.*, Dkt. 649 (Oracle’s Mot. for Partial  
12          Summ. J.) at 12-13 (demonstrating, with respect to direct infringement of certain copyrights, that  
13          Defendants’ cross-use was not excused by any license); Dkt. 754 (Joint Statement per August 6,  
14          2010 Order) at 1-2 (stating the parties’ agreement that summary judgment should be granted in  
15          favor of Oracle as to direct infringement of those copyrights).

16          Gray suggests in his report, however, that SAP TN’s customers may have been “entitled  
17          to the software regardless of the source of the software.” Polito Decl., Ex. A (Gray Report)  
18          § 8.3. However, as Gray concedes, determining whether an SAP TN customer was entitled to  
19          the software requires a customer by customer, license by license analysis. *Id.* § 8.3. Gray did  
20          not do that. At deposition he testified he had no opinion whether a customer properly could  
21          receive software and support material that had been downloaded using another customer’s  
22          credentials. Polito Decl., Ex. B (Gray Depo. at 440:12-441:12).

23          Gray should be precluded from suggesting in his testimony at trial, as he did in his report,  
24          that SAP TN’s customers may have been entitled to the Oracle materials SAP TN obtained to  
25          support them, regardless of the source of the materials. As discussed above, Gray has no  
26          qualifications as an expert to offer such an opinion, which, as he admits, requires interpretation  
27          of licenses and terms of use. Even if Gray had appropriate expertise, any such suggestion would  
28          not be not based on sufficient information and would be pure speculation on his part, since he

1 has not reviewed the relevant license agreements and terms of use. Speculation without regard to  
2 the facts is unreliable and inadmissible. *Daubert*, 509 U.S. at 591 (expert testimony must “fit”  
3 the facts of the case). In any event, no such analysis or opinion was disclosed. Fed. R. Civ. P.  
4 37(c)(1). Under these circumstances, Gray should be precluded from making any such  
5 misleading suggestion to the jury. Fed. R. Evid. 403.

6 **C. The Court Should Also Preclude Testimony That SAP TN**  
7 **Properly Accessed Oracle Software And Support Materials As**  
8 **Its Customers’ Agent**

9 Gray also asserts that SAP TN, as the customer’s agent, properly downloaded the  
10 thousands of SSMs that Mr. Mandia documented, as long as SAP TN acted on behalf of an  
11 Oracle customer. Polito Decl., Ex. A (Gray Report) §§ 7.7, 9.2.

12 Gray offers no analysis of his own<sup>6</sup> in support of this assertion, and he could not have  
13 any. As discussed in the prior section, he admits he is not competent to analyze software  
14 licenses and website Terms of Use, Polito Decl., Ex. B (Gray Depo.) at 472:16-22, and he did  
15 not review the pertinent licenses and terms of use. *Id.* at 444:9-445:10.

16 As a result, Gray lacks the expertise, the data and information, and the use of any reliable  
17 methodology required by *Daubert* and Fed. R. Evid. 702 for offering an opinion regarding what  
18 the relevant licenses and Terms of use permitted SAP TN to do. Whether SAP TN was an agent  
19 of a customer does not matter. Any such testimony should be excluded.

20 **VI. THE COURT SHOULD PRECLUDE MR. GRAY’S TESTIMONY BECAUSE HE**  
21 **FAILED TO DISCLOSE MATERIALS HE RELIED ON OR CONSIDERED.**

22 Gray testified that the materials listed in Appendix 3 to his Report, plus the references in  
23 the Report, were the ones he relied on or considered in forming his opinions. Polito Decl., Ex. A  
24 (Gray Report) § 4; *id.*, Ex. B (Gray Depo.) at 227:12-228:3. Appendix 3 is an eight-page, single-  
25 spaced list. Polito Decl., Ex. H (Appendix 3). This list has “a bias for over-inclusion,” that is,

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26 <sup>6</sup> Gray cites only a single parenthetical in one sentence in Mr. Mandia’s report: “The password  
27 protection and Terms of Use [on certain Oracle support websites] restricted access to a customer  
28 (or agent) with an active maintenance contract with Oracle.” Polito Decl., Ex. C (Mandia  
Report) ¶ 173, quoted twice in Polito Decl., Ex. A (Gray Report) §§ 7.7, 9.2.

1 “if there was a document that [he] may or may not have considered very carefully or that was  
2 cumulative to some other document that was on there” he included it. *Id.* at 229:15-230:3. In  
3 fact, his listing contains a large amount of material that Gray did not actually review. As a  
4 result, Oracle cannot determine what he did and did not consider.

5 Among the items in Appendix 3 is the entry “Plaintiffs’ Deposition Exhibits 1-1880.”  
6 Gray testified that this entry does not refer to individual deposition exhibits, as it appears to, but  
7 to a single electronic document containing all of them, and that he had not “touched” each  
8 individual exhibit. *Id.* at 229:22-232:4; *id.* at 233:4-19 (“I don’t think that I’ve looked at each  
9 and every file.”). Rather than considering them all, he estimated he had spent approximately 20  
10 hours looking at more than 100 of them (i.e., less than 10%). *Id.* at 234:6-25. Ultimately Gray  
11 agreed that what “Plaintiffs’ Deposition Exhibits 1-1880” describes is materials he had received  
12 from counsel, not all of which he actually considered in forming his opinions, and there is no  
13 way for anyone to determine which of the nearly two thousand deposition exhibits he actually  
14 considered in creating his report. *Id.* at 237:19-238:19; *see also id.* at 232:19-233:3.

15 Similarly, Gray’s Appendix 3 listed “Titan Logs,” with Bates numbers “TN-  
16 OR02193737, TN(Disc).82,” and “Titan Source Code,” with Bates numbers “TN-OR  
17 004198347, TN (Disc).39.” Polito Decl., Ex. H (3rd Appendix to Gray Report) at 5th  
18 unnumbered page. “Titan” refers to a computer program SAP TN used to scrape Oracle’s  
19 websites, and “there were a lot of versions” of Titan on Disc 39. *Id.*, Ex. B (Gray Depo.) at  
20 241:17-24. The Titan Logs are detailed records the program created of its activity every time it  
21 ran. Did Mr. Gray look at every log file and every piece of source code on the disks? He could  
22 not say. *Id.* at 240:17-241:3; *id.* at 241:17-24. He ran searches on both disks, but he did not  
23 keep a list of the searches or the results and could not remember them. *Id.* at 241:10-16; 241:25-  
24 243:1. There is thus no way to determine which log files or versions of source code he actually  
25 considered.

26 Similarly, Gray’s list of materials allegedly considered further includes over 200 hours of  
27 deposition testimony and over 200 additional documents. Polito Decl., ¶ 12. Given that  
28 Mr. Gray spent no more than 500-600 hours, combined, in writing his report and preparing for

1 his deposition, it is simply not credible that he reviewed even a fraction of these materials.  
2 Polito Decl., Ex. B (Gray Depo.) at 592:6-11.

3 Thus, in fact, Appendix 3 is a list of materials Gray received, not a list of materials he  
4 considered in forming his opinions. *Id.* at 243:13-21. It is not possible to determine which  
5 documents and information Gray actually reviewed and considered. They are supposedly buried  
6 somewhere in the enormous volume of information counsel provided and Gray listed, but no one  
7 can say where.

8 That state of affairs significantly prejudices Oracle. Oracle cannot establish that Gray  
9 formed an opinion without considering particular relevant exhibits. Oracle also cannot confront  
10 Gray with the particular logs and source code versions he considered and relied on in connection  
11 with his opinions that undermine his opinions. As a result, Oracle cannot test Gray’s core  
12 opinions.

13 Fed.R.Civ.P. 26(a)(2)(B)(ii) requires an expert such as Gray to provide “the data or other  
14 information considered by the witness in forming” his opinions. Producing an indistinguishable  
15 mass of other matter that the expert did not consider along with the required materials thwarts  
16 thorough analysis and testing of whether the expert adequately accounted for relevant  
17 information and defeats the purpose of the rule.

18 Fed.R.Civ.P. 37(c)(1) provides the remedy:

19 **If a party fails to provide information or identify a witness as**  
20 **required by Rule 26(a) or 26(e), the party is not allowed to use**  
21 **that information or witness to supply evidence** on a motion, at a  
hearing, or at a trial, unless the failure was substantially justified or  
is harmless.

22 (emphasis supplied). “Paragraph (1) prevents a party from using as evidence any witnesses or  
23 information that, without substantial justification, has not been **disclosed as required by Rules**  
24 **26(a) and 26(e)(1).**” Fed. R. Civ. P 37(c), 1993 Advisory Committee’s Note (emphasis  
25 supplied). Because Defendants’ disclosure for Gray fell well short of all that is “required by  
26 Rule[] 26(a),” his testimony should be excluded.

27 **VII. CONCLUSION**

28 For the reasons stated above, the Court should (1) exclude Appendix 4 and related

1 testimony; (2) preclude Gray from testifying about opinions that Mandia did not offer; (3)  
2 preclude testimony about software licenses, website Terms of Use and industry practices; and (4)  
3 preclude any testimony as a result of failing to disclose materials relied upon.

4 DATED: August 19, 2010

Bingham McCutchen LLP

5

By: \_\_\_\_\_ /s/ Geoffrey M. Howard

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Geoffrey M. Howard  
Attorneys for Plaintiffs  
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