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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

ORACLE USA, INC., et al.,

Plaintiffs,

v.

SAP AG, et al.,

Defendants.

Case No. 07-CV-1658 PJH (EDL)

[PROPOSED] ORDER GRANTING MOTION TO EXCLUDE EXPERT TESTIMONY OF PAUL C. PINTO

Having considered Defendants' Motion to Exclude Expert Testimony of Paul C. Pinto, the supporting Declaration of Tharan Gregory Lanier, and exhibits thereto, which were filed with the Court on August 19, 2010:

IT IS HEREBY ORDERED THAT: Defendants' motion is GRANTED.

Defendants argue that the Court should exclude the expert testimony of Plaintiffs' expert, Paul C. Pinto, because it is irrelevant and unreliable, and because Pinto is not qualified to render an opinion on the topics on which he proposes to testify. Rule 702 of the Federal Rules of Evidence ("Rule 702") "permits experts qualified by 'knowledge, experience, skill, expertise, training, or education' to testify 'in the form of an opinion or otherwise' based on 'scientific, technical, or other specialized knowledge' if that knowledge will 'assist the trier of fact to understand the evidence or to determine a fact in issue.'" *Salinas v. Amteck of Ky., Inc.*, 682 F. Supp. 2d 1022, 1029 (N.D. Cal. 2010) (Hamilton, J.) (quoting Fed. R. Evid. 702). The proponent of expert testimony bears the burden to establish "by a preponderance of the evidence that the admissibility requirements are met." *Id.*; *see also Pierson v. Ford Motor Co.*, No. C 06-6503 PJH, 2009 U.S. Dist. LEXIS 65297, at *7 (N.D. Cal. Apr. 16, 2009) (Hamilton, J.); *Redfoot v. B.F. Ascher & Co.*, No. C 05-2045 PJH, 2007 U.S. Dist. LEXIS 40002, at *11 (N.D. Cal. June 1, 2007) (Hamilton, J.). Under Rule 702, the trial court is obliged to act as a "gatekeeper" to ensure that expert testimony is both reliable and relevant to the issues being tried. *Salinas*, 682 F. Supp. 2d at 1029-30 (quoting *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 597 (1993)); *Pierson*, 2009 U.S. Dist. LEXIS 65297, at *7; *Redfoot*, 2007 U.S. Dist. LEXIS 40002, at *11-12.

Irrelevance. On August 17, 2010, this Court held that Plaintiffs may not seek damages in the form of "saved development costs" for any cause of action in this case. *See* D.I. 762 (8/17/10 Order) at 18-23. Accordingly, the opinions of Paul C. Pinto, who purports to "analyze, calculate, and testify to the costs associated with software product development," are irrelevant to the issues that will be tried in this case. D.I. 762 (8/17/10 Order) at 18-23. Pinto's opinions relate exclusively to alleged "saved development costs" damages. Expert Report of Paul C. Pinto ("Pinto Report") at 1 (Pinto purports to "estimate what it would have cost [Defendants] to independently develop" certain software suites). Because Pinto's opinions purport to estimate

saved development costs, the Court excludes Pinto's testimony in its entirety as irrelevant.

Lack of qualification. Pinto proposes to testify regarding "the costs associated with software product development" based on his use of Function Point Analysis ("FPA") and Constructive Cost Model ("COCOMO") methodologies for software sizing/estimating. FPA was developed in the 1970's at IBM as a method to estimate the "functional size" of software. When properly derived, that functional size can be used to estimate the time and cost it would take to develop a given software application. Standards for FPA have been and continue to be developed and published by the International Function Points User Group ("IFPUG"). Similarly, COCOMO is an algorithmic model that determines an estimated size of a software program based on the number of source lines of code ("SLOC") found in that program. The COCOMO model was originally published in 1981 by Barry Boehm and is updated and maintained by the USC Center for Systems and Software Engineering. The COCOMO algorithm utilizes "cost drivers" and "scale drivers" that have been updated and calibrated over time as the Center has been able to collect more data points and engage in further research. The most recent and up-to-date version of COCOMO is COCOMO II.2000, as published in *Software Cost Estimation With COCOMO II* (Prentice Hall, July 2000).

Despite offering expert testimony regarding the costs associated with software product development, Pinto does not have a background in software valuation; rather, his background is in software consultancy. Additionally, Pinto has never provided any expert testimony on the estimated size or value of a software product. Moreover, although Pinto claims to use FPA and COCOMO to estimate what it would have cost Defendants to independently develop certain software suites, Pinto is not qualified to render such opinions, in light of his lack of training, certification, or relevant experience. According to his Curriculum Vitae, Pinto has no specific training in or experience with FPA or COCOMO. Pinto has not published any articles on FPA, COCOMO, or the sizing of software, and his only training regarding FPA or COCOMO consisted of a few one- or two-day courses, several years ago. Also, Pinto was not a member of any peer organizations related to software estimation until he joined IFPUG in April of this year, months after he submitted his report. Most significantly, Pinto was unable to answer basic questions

about both FPA and COCOMO at his deposition.

Because Pinto is not qualified to render an opinion regarding software valuation or based upon FPA or COCOMO software sizing/estimating methodologies, the Court also excludes Pinto as unqualified expert. *See Sega Enters. Ltd. v. MAPHIA*, 948 F. Supp. 923, 929 (N.D. Cal. 1996) (exclusion of expert testimony is justified where foundational facts demonstrating qualification are not established) (citing *LuMetta v. U.S. Robotics*, 824 F.2d 768, 771 (9th Cir. 1987)).

Unreliable Methodology. Pinto also used unreliable and inappropriate methodologies. Courts may determine reliability of expert testimony by referring to "the existence and maintenance of standards controlling the technique's operation." *Daubert*, 509 U.S. at 594; *see also Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 150 (1999). This means that an expert's testimony may be found reliable where that expert applies a technique that has been "maintained," but not if he or she uses an outdated version. *Daubert*, 509 U.S. at 594; *see also IMA N. Am., Inc. v. Maryln Nutraceuticals, Inc.*, No. CV-06-344-PHX-LOA, 2008 U.S. Dist. LEXIS 109623, at *10 (D. Ariz. Oct. 17, 2008) (experts must show that they have followed a method "as it is practiced by (at least) a recognized minority of scientists in their field") (quoting *Clausen v. M/V New Carissa*, 339 F.3d 1049, 1056 (9th Cir. 2003)). Courts may also consider the "error rate" of a technique and whether "there are standards controlling the technique's operation" when determining the reliability of expert testimony. *Daubert*, 509 U.S. at 594; *Kumho Tire*, 526 U.S. at 150. Furthermore, where an expert has extrapolated from data to his conclusions, "nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered." *General Elec. v. Joiner*, 522 U.S. 136, 146 (1997); *see also In re: Bextra & Celebrex Mktg. Sales Practices & Prod. Liab. Lit.*, 524 F. Supp. 2d 1166, 1180 (N.D. Cal. 2007) (extrapolating effects of a drug at one dosage to another based solely on expert's "judgment" was unreliable, rendering opinion inadmissible). In determining the reliability of an expert's extrapolation, courts must consider whether an expert "unjustifiably extrapolated from an accepted premise to an unfounded conclusion." *Salinas*, 682 F. Supp. 2d at 1030.

Pinto's opinions are predicated on unreliable and inappropriate methodologies. First, Pinto inexplicably based his analysis on an outdated COCOMO model. Fed. R. Evid. 702; *Daubert*, 509 U.S. at 594. Pinto has admitted that he is not aware of any publications that would support his departure from the published, up-to-date COCOMO II.2000 model.

Second, in his purported FPA analysis, Pinto used an inappropriate and unreliable method known as "backfiring," which is subject to an unacceptable margin of error. Specifically, the conversion tables on which Pinto relies detail an error rate of plus or minus 25% for backfiring. *See United States v. Birdsbill*, 243 F. Supp. 2d 1128, 1135 (D. Mont. 2003) (error rates as low as in the low 20 percents found to be "poor").

Third, Pinto utilized an unreliable and unverified "10-Step Process" for his alleged FPA. This process has never been shown to a certified function point specialist, has never been published in a peer reviewed journal, and, according to Pinto, has not been approved by any standards setting organization. *See* Pinto Tr. at 176:24-177:18.

Fourth, Pinto improperly extrapolated results for two of the software suites at issue to develop unfounded cost estimates for the J.D. Edwards World and Siebel software suites. To arrive at his results for the J.D. Edwards World software line (which Pinto did not individually count), Pinto simply extracted his results for the J.D. Edwards EnterpriseOne software line, without confirming the similarity (or dissimilarity) of the software lines. In fact, the two different software lines are written in different programming language. Similarly, Pinto extrapolated his results for the PeopleSoft software line to arrive at results for the Siebel software line, despite the fact that the products were written in different source code and developed by different companies. The extrapolation from a SLOC count for one software suite to a SLOC count for a different software suite, without support or justification, is too great an "analytical gap" to be justifiable.

Finally, Pinto failed to disclose, and in fact destroyed, data forming the basis of his opinions. The data was destroyed before Defendants or the Court could test the veracity of Pinto's SLOC counts, and thereby the rest of his analysis. Pinto's destruction of this evidence makes it impossible for the Court to properly perform its "gatekeeping" role and determine whether Pinto based his opinion on a "reliable foundation" of "sufficient data." *See Daubert*, 509

U.S. at 597; *see also United States v. Mirama Enters., Inc.*, No. 00-cv-2269-K (LAB), 2002 WL 34364408, at *1 (S.D. Cal. June 17, 2002). Courts have excluded the testimony of experts who rely on undisclosed data that is thereafter destroyed and unavailable for examination. *See Unigard Sec. Ins. Co. v. Lakewood Eng'g and Mfg. Corp.*, 982 F.2d 363, 368 (9th Cir. 1992); *Fidelity Nat'l Title Ins. Co. of N.Y. v. Intercounty Nat'l Title Ins. Co.*, 412 F.3d 745, 751 (7th Cir. 2005); *Barker v. Bledsoe*, 85 F.R.D. 545, 549 (W.D. Okla. 1979).

For these reasons, the Court excludes Pinto's testimony pursuant to Rule 702.

IT IS SO ORDERED.

DATED: _____ By: _____
Hon. Phyllis J. Hamilton