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

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

25 Plaintiffs,

26 v.

27 SAP AG, *et al.*,

28 Defendants.

No. 07-CV-01658 PJH (EDL)

**REPLY MEMORANDUM IN SUPPORT OF
 MOTION NO. 2: TO EXCLUDE TESTIMONY
 OF DEFENDANTS' EXPERT BRIAN SOMMER**

Date: September 30, 2010
 Time: 2:30 p.m.
 Place: 3rd Floor, Courtroom 3
 Judge: Hon. Phyllis J. Hamilton

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1 I. INTRODUCTION

2 SAP never responds to Oracle’s fundamental points: that Brian Sommer lacks *relevant*
3 expertise, uses flawed or no methodology, and renders opinions based not on evidence from this
4 case but on unreliable and untested inputs. Instead SAP pretends Oracle’s concern is that Sommer
5 is not a professional witness. But Oracle does not dispute that a witness may be qualified as an
6 expert based on experience; Oracle complains because Sommer’s experience is irrelevant to the
7 issues in the case. SAP offers Sommer to provide generalized opinions on the motivations of ERP
8 support customers he never consulted, to make aftermarket support decisions he is unfamiliar
9 with, based on reading Internet articles he never confirmed, while ignoring the actual evidence.
10 Sommer also offers baseless and legally irrelevant conclusions about support options purportedly
11 available to customers (also an improper affirmative opinion disguised as rebuttal) on the efficacy
12 of customer switching programs in general and SAP’s Safe Passage in particular where he has no
13 metrics by which to evaluate them. Literally all of Sommer’s untested (and untestable) opinions
14 are just his say-so. They do not deserve the imprimatur of being deemed reliable “expert”
15 opinions and would confuse and mislead the jury.

16 SAP also mischaracterizes the subject on which it offers Sommer as an expert, in an effort
17 to evade Oracle’s motion rather than respond to it. SAP has offered Sommer as an expert on,
18 among other things, customer aftermarket support decisions, including decisions about retaining
19 third-party support or using self-support in place of support from Oracle.¹ However, Sommer
20 admitted in deposition that he has no relevant experience about support decisions; he has literally
21 never assisted customers with the purchase of aftermarket software support. Rather than
22 addressing this problem, SAP tries to obscure it by submitting a 22-page declaration from
23 Sommer, which SAP quotes at length in its brief. Most of the declaration recounts experience that
24 Sommer supposedly has with the selection and implementation of unnamed ERP software

25 ¹ See Dkt 765 (MacDonald Decl.) ¶ 2 Ex. A (Sommer Report) at p. 1 section I (“This rebuttal
26 report . . . covers . . . how companies . . . support such software; and . . . how and why customers
27 make decisions to buy, maintain and replace . . . support services The Meyer report failed
28 to adequately define . . . the state of the market for that . . . support and the relationship between .
. . . customers and third-party support providers.”)

1 applications – but not with software *support* options, which SAP offers Sommer as an expert on,
2 and about which Oracle contends he is unqualified to opine. This lengthy and untimely
3 declaration, and the way SAP uses it to side step Oracle’s motion, are a tacit admission that
4 Sommer lacks relevant experience on the subject of customer support options. SAP’s remaining
5 arguments have no merit either. Sommer should not be allowed to testify at trial.²

6 **II. SOMMER’S OPINIONS ABOUT HOW ERP CUSTOMERS MAKE DECISIONS**
7 **ABOUT AFTERMARKET SUPPORT SHOULD BE EXCLUDED**

8 Sommer’s “general” opinions about customers’ aftermarket support decision-making are
9 based on “experience” he does not have, augmented with some material he downloaded from the
10 Internet, in disregard of the actual evidence. This is not the basis of admissible expert testimony.

11 **A. Sommer Lacks Relevant Expertise**

12 Sommer lacks relevant experience. He testified that he has *never* helped a customer with
13 the purchase of aftermarket support. MacDonald Decl., Ex. B (Sommer Tr.) at 34:12-16; 36:1-17;
14 300:6-16. He also testified that his work with ERP-related vendors did not involve the provision
15 of aftermarket support for their products. *Id.* at 17:3-19; 19:18-20:14; 22:4-9; 23:6-24:5; 24:9-
16 25:1; 26:11-27:4; 68:17-69:7.

17 Having no response to Sommer’s admitted lack of experience assessing third-party support
18 options, SAP tries to change the subject to a company’s initial decision to purchase ERP products
19 or the ERP industry generally. Opp. 4:19-21; 9:10-12; 11:1-8. Thus, they say, Sommer
20 characterizes “the general dynamics of what’s going on in the marketplace and how these
21 different kinds of software decisions are made by customers.” Opp. 3:20-21. That doesn’t cure
22 the problem that Sommer admittedly has no knowledge of the *aftermarket software support*
23 decisions by SAP TN’s customers that are actually relevant here. By shifting the focus, SAP
24 tacitly concedes Sommer has no experience on the subject on which he is offered as an expert.

25 SAP attempts to bolster Sommer’s credentials by submitting a long and belated declaration
26 from Sommer.³ This declaration, though objectionable, confirms Sommer’s lack of relevant

27 ² Contrary to SAP’s assertion, Oracle seeks to exclude Sommer’s opinions in their entirety. *See*
28 Dkt. 764, Mot. at 1:1-8; 2:26-28; 25:22; Dkt. 766, Proposed Order.

³ Oracle separately and simultaneously objects and moves to strike Sommer’s declaration.

1 experience. Sommer now claims that he began his career “as a programmer and software
2 designer” for ERP software implementation. Dkt. 849, Sommer Decl., ¶ 4. He “assisted with
3 systems implementations” by “redesign[ing]” applications “of one ERP application software
4 solution” to make it work with another. *Id.* ¶ 7. Later, he worked for Arthur Anderson to provide
5 consulting services to clients about purchasing and implementing ERP software and training their
6 employees to use it. *Id.* ¶¶ 10-20. He attended marketing events where ERP vendors were
7 present, *id.* ¶¶ 33-36, and gave talks about ERP software. *Id.* ¶¶ 37-40. Then he left Anderson to
8 sell ERP software. *Id.* ¶¶ 42-58. By its very definition, the original sale/purchase of and
9 implementation of an ERP system is not relevant to aftermarket decisions on support. Today he is
10 also a part-time blogger about “the application software space (including ERP).” *Id.* ¶ 60.

11 What is missing from this declaration is the **relevant** experience: how ERP customers
12 make aftermarket support decisions. There are a few spots in his declaration where Sommer
13 vaguely adds the word “support” in a longer sentence describing either what he or his department
14 at Arthur Anderson did. *E.g., id.* ¶ 18 (“In the Software Intelligence role at Anderson Consulting,
15 my staff and I requested at client sites globally to assist their ERP software and support services
16 selection decision-making.”), ¶¶ 19, 20. Even then, Sommer cannot bring himself to claim he has
17 any experience with aftermarket support decisions – at issue here, and the subject of his supposed
18 “expert” testimony. If Sommer is now trying to imply that he personally has experience with
19 customer decisions about aftermarket support, such an implication is barred by his sworn
20 testimony in deposition that he has no such experience. *See, e.g.,* MacDonald Decl., Ex. B
21 (Sommer Tr.) 33:25-34:16 (Q: Okay. Do you believe you have actually helped anybody with the
22 purchase of after-market support? A: I don’t believe I have.); 36:10-17; 37:2-16; 38:18-39:5
23 (never hired to advise nor has assisted any client on whether to self-support or stay with vendor
24 maintenance). Sommer is simply not an expert on anything relevant, and his belated effort to add
25 more (irrelevant) experience via declaration does not resuscitate him. *See, e.g., Salinas v. AmTeck*
26 *of Kentucky, Inc.*, 682 F. Supp. 2d 1022, 1030 (N.D. Cal. (PJH) 2010) (rejecting opinions on
27 warnings by proffered expert who “had no professional training or expert qualifications to opine
28 on the formulation or design of warning or safety labels” and had never “investigated a case with

1 similar facts” and never “testified as a warnings expert”).

2 The one case SAP relies on actually supports Oracle. In *Thomas v. Newton Int’l Enters.*,
3 42 F.3d 1266, 1269-70 (9th Cir. 1994), the plaintiff sued a stevedoring company for negligence
4 over a hatch opening near a ladder. Plaintiff’s expert was a longshore worker with 29 years
5 experience in every job category within the industry and for every stevedoring company. After
6 reviewing all record documents and photographs of the accident site at issue, he declared that an
7 uncovered hatch opening is an extremely unusual and hazardous condition. *Thomas* confirms that
8 a witness may be qualified as an expert only based on *relevant* expertise, informed by the
9 evidence in the case. SAP cannot show Sommer is so qualified or steeped in the case record.

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

11 Sommer premises his opinions about customer support purchasing decisions entirely on a
12 few web pages he downloaded, the assertions in which he did not investigate, that say nothing
13 about that subject to begin with. Mot. 7:15-8:7. “An opinion based on . . . unsubstantiated and
14 undocumented information is the antithesis of the scientifically reliable expert opinion admissible
15 under *Daubert* and Rule 702.” *Cabrera v. Cordis Corp.*, 134 F.3d 1418, 1423 (9th Cir. 1998).

16 Sommer’s nearly sole reliance on information from the Internet is insufficient in the Ninth
17 Circuit. See e.g., *Doan v. Astrue*, 2010 WL 234935, at *4 (S.D. Cal.) (excluding expert testimony
18 because his methodology was based on a newspaper article, “not from a primary source”; he did
19 not engage in an analysis, but simply reached conclusions subjectively after examining data from
20 the newspaper; and he did not mention or try to account for the myriad factors involved.); *Matrix*
21 *Motor Co. v. Toyota Jidosha Kabushiki Kaisha*, 290 F. Supp. 2d 1083, 1086 (C.D. Cal. 2003)
22 (Expert reports are irrelevant where they “merely recite hearsay statements, often verbatim, culled
23 from a variety of Internet websites.”); *Perry v. Schwarzenegger*, 2010 WL 3025614, at *22 (N.D.
24 Cal.) (“mere recitation of text in evidence does not assist the court in understanding the evidence
25 because reading, as much as hearing, is within the ability and experience of the trier of fact.”)
26 (internal quotation and citation omitted).⁴

27 ⁴ SAP mischaracterizes *Hangarter v. Provident Life and Acc. Ins. Co.*, 373 F.3d 998, 1016-18
28 (9th Cir. 2004), implying it holds it is for the jury not the Court to assess Sommer’s untested

(Footnote Continued on Next Page.)

1 SAP, ignoring that law, asserts that Internet sources can form the basis of reliable expert
2 opinions if experts in the field typically rely on such information. However, SAP’s two cited
3 authorities do not support this broad proposition. *See* Opp. 14:2-14. The court in *Boim v. Holy*
4 *Land Foundation for Relief and Development*, 549 F.3d 685 (7th Cir. 2008) held that the trial
5 court did not abuse its discretion in admitting an expert opinion that Hamas was responsible for
6 the murder at issue. The expert on terrorism in the Arab world relied in part on admissions found
7 on websites he concluded were controlled by Hamas, and explained that “terrorist organizations
8 rely on the web to deliver their messages to their adherents and the general public.” *Id.* at 704.
9 As foundation for his reliance on the websites, the expert submitted an extensive report published
10 by The United States Institute for Peace, a nonpartisan federal institution created by Congress, on
11 the use of the Internet by terrorists. Sommer does not rely on information from the Internet
12 owned or controlled by a party or non-party customer in this case for the purpose of establishing
13 an admission, and provides no foundation of reliability for the sources he relies on.

14 In *Semerdjian v. McDougal Littell*, 641 F. Supp. 2d 233, 242-43 (S.D. N.Y. 2009), the
15 plaintiff did not argue that the expert’s reliance on the Internet rendered his opinion unreliable,
16 and the court did not hold that Internet sources form the basis of reliable expert opinion. Rather,
17 the *Semerdjian* court found that the expert based his analysis on a review of publisher Houghton-
18 Mifflin Harcourt’s licenses for copyrighted images in two other textbooks (also the subject of
19 litigation), conversations with the a director at defendant’s affiliated textbook publisher, and visits
20 to websites of distributors of copyrighted images that were close substitutes for the images at
21 issue. Sommer did not supplement his web-surfing with research or interviews and does not
22 purport to have relied on websites of affiliates of the parties, or distributors of “comparable”

23 _____
(Footnote Continued from Previous Page.)

24 selection of reading materials. Opp. 13:19-14:1. It does not. Bad faith cases brought against
25 insurance companies uniquely require an expert on the standard of care in the insurance industry.
26 *See id.* (and internal citations). Such experts must rely on evidence concerning the industry to
27 formulate an applicable industry standard of care. ERP industry norms – a dubious concept to
28 begin with – are not at issue in this case, and Sommer is not a standard of care expert. Moreover,
Hangarter provides no analysis or detail about what knowledge or experience the expert
possessed, what evidence he reviewed, or the basis for his opinion; thus SAP cannot claim it
endorsed allowing through the gate equally inexpert, ill-founded and untested opinion.

1 software support because he testified that he had no idea whether the other vendors he considered
2 offered comparable support or not. *See* Mot. 11:16-26.

3 SAP asserts the blanket generality that “experts within the ERP industry rely upon the
4 Internet to gather and disseminate information.” Opp. 14:2-14. The suggestion that an expert’s
5 unquestioned reliance on the Internet passes muster is contrary to the case law in this circuit. It
6 also misses the point: “the Internet” is a big place. SAP’s generic assertion says nothing about
7 the actual Internet sources Sommer relied upon without investigation, let alone why they are a
8 reliable source for opinions about customers’ aftermarket support purchase decisions. Sommer’s
9 last-minute declaration does not either. Sommer Decl., ¶ 61. Sommer’s declaration is further
10 unavailing, because courts have held that Internet articles are an unreliable basis for *any* opinion
11 where, as here, an expert does not know “on what research or methodology the [information] was
12 based” and “did not conduct any independent research on the subject.” *See, e.g., Kilgore v.*
13 *Carson Pirie Holdings, Inc.*, 2006 WL 3253490, at *4 (6th Cir.).

14 Next, SAP argues that Oracle must explain why the Internet sources Sommer relies upon
15 are unreliable. Opp. 14:15-17. But it is indisputably SAP’s burden to show, under Fed. R. Evid.
16 702, that Sommer’s testimony is based upon sufficient facts or data and is the product of reliable
17 principles and methods that Sommer has applied reliably to the facts of the case. *See* Mot. 3:1-
18 4:11.⁵ SAP’s attempted burden-shifting is another tacit admission that it cannot carry its burden.

19 **C. Sommer’s Opinions Are Not Relevant Because They Neither Consider Nor
20 Concern The Facts Of This Case**

21 Sommer consciously disregarded the voluminous evidence in the case, which, not
22 coincidentally, contradicts his opinions. Mot. 9:4-10:6. Sommer’s testimony is thus irrelevant,
23 unreliable, and inadmissible several times over. *See, e.g., U.S. v. Walker*, 217 Fed. Appx. 714,

24 ⁵ SAP asserts that Meyer too “relies” on Internet sources, based on two out of approximately
25 857 footnotes in his report. Opp. 14:19-26. Meyer’s first citation is to an Internet article about
26 Seth Ravin for the simple acknowledgment that Meyer understood Oracle was seeking additional
27 discovery from Ravin and Rimini Street and he reserved the right to supplement his report
28 pending such further discovery. Meyer’s second citation to an Internet article contains a public
admission from Andrew Nelson, SAP TN’s founder and CEO, downplaying the significance of
Rimini Street as a competitor. By contrast, Sommer’s report, when there are citations at all, is
almost entirely based on Internet sources. *See* MacDonald Decl., Ex. A (Sommer Report).

1 716-17 (9th Cir. 2007) (generalized expert testimony inadmissible as unreliable and lacking
2 sufficient nexus to case facts); *Trout v. Milton S. Hershey Medical Center*, 576 F. Supp. 2d 673,
3 678 (M.D. Pa. 2008) (expert testimony based on generalizations excluded because opinions not
4 applied to the specific case); *Robinson v. G.D. Searle & Co.*, 286 F. Supp. 2d 1216, 1221 (N.D.
5 Cal. 2003) (expert’s testimony inadmissible when based on factual premise contradicted by the
6 evidence).

7 SAP’s assertion that Sommer need not consider customer specific evidence because he
8 covers “general information about the ERP industry” doesn’t save him. Opp. 13:13-16.

9 Sommer’s factual deficit is not limited to his failure to consider customer specific evidence, but
10 includes the fact that he ignored **contrary** evidence and testimony (Mot. 9:4-10:6) from the two
11 companies (Oracle and SAP TN) whose competition in the support aftermarket (not in “general”
12 ERP, which SAP TN did not even offer) is at issue. *See e.g., Nuveen Quality Income Mun. Fund*
13 *Inc. v. Prudential Equity Group, LLC*, 262 Fed. Appx. 822, 824-25 (9th Cir. 2008) (“An expert
14 opinion is properly excluded where it relies on an assumption that is unsupported by the evidence
15 in the record and is not sufficiently founded upon the facts”); *Robinson*, 286 F. Supp. 2d at 1221;
16 *see also* Mot. 9:4-10:6.

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

20 Sommer’s opinions about alternative support options are inexpert, unsupported, unreliable,
21 untethered to the facts, and untimely. They should be excluded.

22 **A. Sommer Lacks Relevant Experience and His Opinions Are Not Based On**
23 **Sufficient Information And Data**

24 With no relevant personal or professional experience to rely on, Sommer based his third-
25 party support opinions on unspecified conversations with people he “ran into” at trade shows, and
26 his research consisted of web-surfing. Mot. 10:27-11:15. But SAP cannot deny that Sommer did
27 not follow up on what he found on the Internet verify its reliability. He did not independently
28 analyze particular vendors, so knows little about any vendor’s competitive capabilities, the period
of time for which such capabilities may have existed, and how they compared (or failed to
compare) with SAP TN or Oracle in important respects. Mot. 11:16-28. His uninformed opinion,

1 based on Internet research lacking any scientific rigor, is unreliable and unhelpful. *See Carnegie*
2 *Mellon Univ. v. Hoffman-Laroche, Inc.*, 55 F. Supp. 2d 1024, 1034-35 (N.D. Cal. 1999); *see also*
3 above at 4:10-6:13.

4 **B. Sommer's Opinions Are Based On An Unreliable Methodology**

5 Unfamiliar with the customers at issue, Sommer does not know the level of support they
6 would have demanded or found attractive, and does not purport to compare the service offerings
7 of the vendors he found on the Internet to those of SAP TN, he simply assumes customers would
8 have found them comparable. Mot. 8:10-19, 9:4-10:3, 11:16-28, 12:9-18. Had he considered the
9 evidence, he would know they are not the same. *See, e.g., id.* at 9 n.1 (actual customer opinions);
10 MacDonald Decl., Ex. B (Sommer Tr.) 220:10-221:10 (Sommer acknowledges SAP TN differed
11 from other vendors). Assuming without research, testing or knowledge is the opposite of reliable
12 science. *See, e.g., Daubert v. Merrell Dow Pharm.*, 43 F.3d 1311, 1319 n.11 (9th Cir. 1995)
13 (*Daubert II*) (party must demonstrate in some objectively verifiable way that its expert has chosen
14 a reliable method and followed it properly, particularly where no independent, pre-litigation
15 analysis to rely on). And ignoring the facts that inform (and contradict) his opinion on
16 comparability of support offerings makes Sommer's opinion inadmissible. *Nebraska Plastics,*
17 *Inc. v. Holland Colors Americas, Inc.*, 408 F.3d 410, 416 (8th Cir. 2005) ("An expert opinion that
18 fails to consider the relevant facts of the case is fundamentally unsupported" and "should not be
19 admitted if it does not apply to the specific facts of the case") (internal citation omitted).

20 SAP does not defend the reliability of Sommer's methodology but contends that a reliable
21 methodology is not part of the *Daubert* inquiry as long as Sommer has relevant experience. Opp.
22 at 13. Leaving aside the fact that Sommer does not have the relevant experience, SAP is wrong
23 about the law. Sommer's purported experience is not a substitute for a reliable methodology.
24 *Daubert II*, 43 F.3d at 1317-19 (excluding causation testimony where, as here, court was
25 "presented with only the experts' qualifications, their conclusions and their assurances of
26 reliability. Under *Daubert*, that's not enough.").

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

Sommer studiously avoided the voluminous evidence in the record, including documents

1 and testimony from the parties and their customers. Thus, his opinions about supposedly
2 available alternatives are not tied to the relevant time period, products, or competition among
3 support vendors actually at issue. He does not know whether customers would have considered
4 the vendors he identifies, whether those vendors even existed at the time the customers considered
5 aftermarket support, or the level of support they offered. He ignores the evidence showing
6 customers would not have considered alternatives to SAP TN or Oracle. Mot. 9:4-16 and n.1.
7 SAP's effort to offer Sommer as a "general ERP industry expert" does not cure, or even address,
8 the problem. Sommer's "fundamentally unsupported" generalizations are legally irrelevant to the
9 issues in this case. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 153-55 (1999) (deposition of
10 tire failure analyst supported exclusion where expert could not answer basic questions about the
11 specific tire at issue in the case); *Jinro America, Inc. v. Secure Investments, Inc.*, 266 F.3d 993,
12 1010-1011 (9th Cir. 2001) (generalized expert testimony, not based on personal knowledge of
13 specific party or transaction at issue inadmissible).

14 SAP's authorities do not suggest Sommer's opinions are relevant and, instead, support
15 exclusion. Opp. 9:17-25. First, *U.S. v. Brooks*, 610 F.3d 1186 (9th Cir. 2010) affirmed the
16 admission of expert testimony because, unlike Sommer, the expert had extensive experience
17 directly relevant to the specific issues in the case and helped place other witnesses' testimony into
18 *specific* context: "[The expert's] testimony concerning the role of . . . a pimp's most senior
19 prostitute, who often trains new prostitutes . . . potentially helped the jury evaluate [the senior
20 prostitute's] testimony that she was acting at [the pimp's] direction, not on her own accord," and
21 testimony that pimps isolate new prostitutes from familiar areas "provided context for evaluating
22 Appellants' intentions" in transporting the girls across state lines. *Id.* at 1196. In *Lawson v.*
23 *Trowbridge*, 153 F.3d 368 (7th Cir. 1998), a § 1983 action brought against an arresting police
24 officer and others, the appellate court found the expert testimony concerning the complained-of
25 officer's police training (an issue in the case) proper because the experts actually trained the
26 arresting officer on the conduct at issue. *See id.* at 375 ("What made them experts in the district
27 court's eyes was that [they] had specialized knowledge concerning . . . how police officers such as
28 [the complained-of officer] are trained to approach knives in varying contexts."). SAP's

1 authorities do not support its argument that Sommer’s generalized opinions – which do not
2 concern nor consider the facts of this case – are relevant or would aid (as opposed to mislead) the
3 jury.

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

5 Sommer’s “general overview” of alternative “third-party and self-support options available
6 to customers as a substitute for vendor-provided support” is not proper rebuttal to begin with.
7 Meyer did not offer a “general overview,” but a specific opinion as to the demonstrated lack of
8 support alternatives comparable to SAP TN’s support (allegedly equal to or better than Oracle’s)
9 contemporaneously available for Oracle customers who had switched to SAP TN, based on the
10 voluminous evidence in this case. Sommer’s generalized musings about more “limited” support
11 “alternatives” expressly do not rebut Meyer’s specific opinion — indeed, that was “not part of
12 [his] assignment” — but constitute a new (albeit legally irrelevant) and impermissible affirmative
13 opinion. Mot. 14:5-27; *IBM Corp. v. Fasco Industries, Inc.*, 1995 WL 115421 at *3 (N.D. Cal.)
14 (rebuttal report must rebut, not offer affirmative opinions).

15 SAP’s claim that Meyer had an opportunity but was unprepared to contradict all of
16 Sommer’s opinions at deposition is incorrect (and irrelevant) for three reasons. Opp. 17:21-28.
17 First, there was no agreement that Meyer would offer sur-rebuttal testimony in a further report or
18 at deposition. Second, Meyer was not designated as a sur-rebuttal expert. Finally, Sommer’s
19 report was not rebuttal in the first place, but an untimely affirmative report that should itself be
20 precluded. See Dkt 790 (Plaintiffs’ Opp. to Defs’ Motion *In Limine*) at Section V. Oracle is
21 prejudiced because, had it gotten Sommer’s opinion in November, Meyer would have had time to
22 address and rebut per the case schedule or Oracle could have secured a new rebuttal expert.

23 **IV. SOMMER’S OPINIONS AND TESTIMONY CONCERNING SELF-SUPPORT AS
A “VIBRANT ALTERNATIVE” SHOULD BE EXCLUDED**

24 Sommer’s self-support opinions are similarly inexpert, untested, and unreliable.

25 **A. Sommer Lacks Relevant Expertise**

26 Sommer’s sole experience with self-support is a single chat he once had with an unnamed
27 CIO of an unspecified company. Mot. 15:24-16:5. One chat does not constitute expertise. Mot.
28 4:13-23 (citing authorities). SAP attempts to buttress Sommer’s experience by claiming

1 “Sommer’s extensive technological knowledge of ERP software also provides him with a basis to
2 opine that some companies use software that is so heavily modified that self-support is almost
3 necessary.” Opp. 16:19-21. SAP’s attempt to cure fails. Neither Sommer’s declaration, nor his
4 deposition testimony, reveals any relevant experience with self-support. To the contrary, Sommer
5 testified he has never been hired by a client to assist in deciding whether to self-support software.
6 Mot. 15:24-16:5; *see also* above at 3:18-25, 8:5-18.

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

10 Sommer did not know how many customers at issue, if any, were capable of self-support
11 based on the attributes he identified (albeit lacking the expertise to do so). He admitted one would
12 have to study the question for customers individually, but also admitted he did not do so. He also
13 admitted capability is different from actually choosing to self-support, but did not know the
14 factors that influence that choice, including, fundamentally, relative cost. In short, Sommer
15 admitted he did not ask, and cannot answer, the relevant questions – which SAP does not dispute.
16 His opinions are inapplicable to any question before the jury. Mot. 16:8-17:5.

17 **V. SOMMER’S OPINIONS AND TESTIMONY REGARDING THE GENERAL**
18 **EFFECTIVENESS OF SWITCHING PROGRAMS SHOULD BE EXCLUDED**

19 Sommer’s generalized opinion that customer switching programs “rarely produce the
20 kinds of major changes vendors hope to achieve” is uninformed, untied to the facts, not based on
21 any methodology, speculative, and inherently unreliable.

22 **A. Sommer Lacks Relevant Qualifications**

23 Sommer has never worked on a switching program like SAP’s Safe Passage or evaluated
24 one’s success. Mot. 17:12-21. Indeed, none of his work had anything to do with evaluating the
25 success or failure of any ERP vendor’s marketing programs. *Id.* He is unqualified to testify on
26 this topic. *See, e.g., Rambus, Inc. v. Hynix Semiconductor, Inc.*, 254 F.R.D. 597, 603-05 (N.D.
27 Cal. 2008) (testimony of electrical engineer on “commercial success” inadmissible because he had
28 no marketing or business training in commercial aspects of claimed invention); *see also* Mot.
4:13-23 (citing authorities).

Sommer’s purported generalized experience about what doesn’t motivate switching, based

1 on non-case-related “discussions” he has had (Opp. 15:17-16:3), does not provide him with expert
2 qualifications or yield reliable opinions on Safe Passage, the switching program at issue here. His
3 opinion is inadmissible. *See, e.g., Ollier v. Sweetwater Union High School Dist.*, 267 F.R.D. 339,
4 341-42 (S.D. Cal. 2010) (excluding expert testimony for lacking a reliable methodology applying
5 to the facts of the case).

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

7 Sommer’s report mentioned four switching programs irrelevant to this case, and three
8 others he read about on the Internet. Sommer admitted it was “not part of [his] assignment” to
9 understand whether those three succeeded or failed, so he does not know. He relied instead on an
10 analyst interview he read that such programs generally have “limited success,” but did nothing to
11 investigate that claim or evaluate it in light of the facts here. Mot. 17:22-18:16. Repeating vague,
12 untested generalizations is not a reliable methodology. *See, e.g., Ollier*, 267 F.R.D. at 341-42; *see*
13 *also* Mot. 4:24-5:8. Again, Sommer’s limited experience (Opp. 15-16) cannot compensate for his
14 lack of a reliable, or any, methodology. *See, e.g., Daubert II*, 43 F.3d at 1317-19.

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

16 Sommer made no effort to tie his generalized opinion on marketing programs to this case.
17 He did not speak to any of SAP’s employees or evaluate any Oracle or SAP switching program,
18 much less Safe Passage itself, which was unique in important respects (and which his primary
19 Internet source called a “great strategy”). Mot. 17:23-19:8. His generalized opinion is irrelevant
20 to the specific facts at issue here. *See, e.g., Jinro*, 266 F.3d at 1010-11. SAP does not respond.

21 **VI. SOMMER’S OPINIONS REGARDING THE EFFECTIVENESS OF SAP’S SAFE
22 PASSAGE PROGRAM AND THE REASONABLENESS OF SAP’S
EXPECTATIONS ABOUT IT SHOULD BE EXCLUDED**

23 The opinion Sommer first hatched at deposition about the effectiveness of SAP’s Safe
24 Passage program and the reasonableness of SAP’s expectations about Safe Passage is uninformed
25 by any expertise or the evidence and is pure *ipse dixit*. Mot. VIII. Significantly, SAP offers no
26 substantive defense of Sommer’s late-proffered opinion about Safe Passage. Indeed, SAP now
27 retreats from Sommer’s opinion that it would have been unreasonable for SAP to have had a goal
28 to convert 50% of the PeopleSoft/JD Edwards customers. Opp. 18:11-27 (“Although Sommer

1 will testify that marketing programs generally, and Safe Passage specifically, are not particularly
2 effective in the industry, Defendants will not offer his testimony regarding the 50% issue”).

3 SAP claims this withdrawal “moot[s]” Oracle’s *Daubert* attack. *Id.* Not so. Oracle
4 moved to exclude the *entirety* of Sommer’s opinions about Safe Passage. Mot. VIII. SAP does
5 not respond to those problems, which concern more than Sommer’s now-withdrawn attack on the
6 reasonableness of his own client’s specific Safe Passage goals. Specifically, Sommer opined in
7 his report that SAP’s Safe Passage program (which offered Oracle customers discounts on SAP’s
8 ERP software and provided discounted or free SAP TN support for their Oracle products while
9 they transitioned from Oracle to SAP), was an ineffectual marketing strategy and that sales of
10 SAP TN support for Oracle products were at cross-purposes with and a barrier to SAP’s sales of
11 its own applications to those customers. Mot. 19:11-18. SAP does not state Sommer’s opinion
12 concerning the **effectiveness** of Safe Passage is withdrawn entirely. Opp. 18:11-27. Oracle
13 therefore again addresses the problems with that part of Sommer’s opinion below.

14 **A. Sommer Lacks Relevant Experience**

15 Oracle showed that Sommer is unqualified to offer his opinions regarding the effectiveness
16 of Safe Passage. He has no experience with any switching program, much less with Safe Passage
17 or any program that offered free software support. Mot. 20:21-21:6. Having no knowledge or
18 experience with the very program about which he wants to opine would yield an unreliable
19 opinion that would not aid but would instead mislead the jury. *Rambus*, 254 F.R.D. at 603-05.

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

21 Sommer came to his opinions without benefit of facts or analysis. He did not know the
22 basis for SAP’s Safe Passage customer conversion goals, did not talk to any SAP employees or
23 read their depositions, and did not review the relevant materials Meyer’s report identified. He did
24 not even know, until told at deposition, that the Safe Passage program provided customers with
25 free software support. He did, however, acknowledge that SAP executives thought Safe Passage
26 was a good idea — as did industry analysts Sommer finds reliable and relies on — and agreed
27 they knew what they were doing. His opinions that they did not ignores and contradicts the facts,
28 and is therefore inadmissible. Mot. 21:8-22:21; *see also*, *Adams v. U.S.*, 2009 WL 1324231 at *1

1 (D. Idaho) (precluding expert from testifying at trial about DuPont’s intent because being an
2 expert in the industry did not make him an expert on defendant DuPont; he never worked for
3 DuPont and had never done any consulting work for it).

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

5 Lacking relevant information, Sommer did not follow a reliable methodology, or any at
6 all, to reach his opinions. He did not analyze, and does not know, how SAP TN’s low-cost
7 support — a Safe Passage “cornerstone” — affected customers’ decisions whether to convert from
8 Oracle’s products to SAP’s. He has nothing on the actual conversion rate for Safe Passage, and
9 no other metric for its success by which his assertion that it was ineffectual can be tested. Mot.
10 22:23-23:11. SAP does not and cannot cure these gaping deficiencies. Sommer’s unreliable *ipse*
11 *dixit*, created for litigation, is why *Daubert*’s gatekeeper role was created. *See Daubert II*, 43 F.3d
12 at 1317.

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

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

17 Sommer’s involvement with ERP purchasing decisions is marginal, outdated, and in any
18 case irrelevant. He has no experience with the major ERP vendors involved in this case or their
19 interactions with the relevant SAP TN customers. His limited experience with ERP purchasing
20 decisions, except one (not involving the products or parties here) occurred more than five years
21 before the relevant time period here. In any event, the issue here is not general ERP purchases.
22 Sommer has no basis to opine about how the relevant customers’ choices among the relevant
23 *support* products and vendors here impacted their ERP purchasing decisions. Mot. 23:14-24:7.

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

27 Sommer’s opinion is based on the wrong legal standard and so is inadmissible. *See, e.g.,*
28 *Abuan v. General Elec. Co.*, 3 F.3d 329, 332 (9th Cir. 1993). SAP does not dispute that Sommer
will opine that “lower-cost support services would not ‘trigger’ a customer to switch software.”
Opp. 11:7-13. This opinion is based on the wrong legal standard for infringer’s profits and

1 therefore should be excluded as irrelevant and misleading. *Nationwide Transport Finance v. Cass*
2 *Information Sys., Inc.*, 523 F.3d 1051, 1055-64 (9th Cir. 2008) (affirming preclusion of expert
3 testimony based on “erroneous or inapplicable legal theories” in part because it “may confuse or
4 mislead the jury”). It is not Oracle’s burden to show that SAP’s license sales or profits were
5 “triggered” by SAP’s infringement. Rather, Oracle need only show it is targeting SAP’s revenues
6 that were “attributable” to SAP’s infringement. *See* 17 U.S.C. § 504(b).⁶ Meyer’s opinion meets
7 Oracle’s statutory and causal burden. *See* Dkt. 846 (Pltfs.’ Opp. to Defs’ Mot. to Exclude Meyer)
8 at pp. 21-25. The burden thus shifts to SAP to “prov[e] apportionment (i.e., the contribution to
9 profits of elements other than the infringed property).” *Andreas v. Volkswagen of Am., Inc.*, 336
10 F.3d 789, 796 (8th Cir. 2003); 17 U.S.C. § 504(b). For Sommer to rebut Meyer and support
11 SAP’s contention that no portion of the relevant SAP sales are recoverable infringer’s profits,
12 Sommer must opine that SAP TN’s infringing use of Oracle’s software was not even a factor in
13 contributing to the relevant sales. *See* Dkt. 853 (Wallace Decl.), Ex. 1 (Clarke Report) at 217
14 (eliminating purchases from infringer’s profit analysis, even where infringing support was
15 provided for free). Sommer does not and cannot offer that opinion. Mot. 24:9-25:20.

16 Sommer does not opine on the legally relevant question. He failed to consider how SAP
17 TN’s low prices for its infringing services actually affected its customers’ switching decisions, but
18 said cost didn’t matter in the unrelated customer choices he is familiar with, none of which
19 involved SAP TN-like “equal or better support” to Oracle’s at half Oracle’s price or less.” Mot.
20 25:4-20. Sommer’s disregard of the relevant facts exposes an analytical gap between his opinion
21 and the issues before the jury that makes his opinion inadmissible. *Nebraska Plastics*, 408 F.3d at
22 416.

23
24
25
26
27 ⁶ Oracle also must “present a modicum of proof linking the infringement to the profits sought.”
28 Dkt. 846 (quoting *Polar Bear Prods., Inc. v. Timex Corp.*, 384 F.3d 700, 715 (9th Cir. 2004).

