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18 TOMORROWNOW, INC.

19 UNITED STATES DISTRICT COURT  
20 NORTHERN DISTRICT OF CALIFORNIA  
21 OAKLAND DIVISION

22 ORACLE USA, INC., et al.,  
23 Plaintiffs,  
24 v.  
25 SAP AG, et al.,  
26 Defendants.

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

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

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

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

5 Defendants argue that the Court should exclude the expert testimony of Plaintiffs' expert,  
6 Paul C. Pinto, because it is irrelevant and unreliable, and because Pinto is not qualified to render  
7 an opinion on the topics on which he proposes to testify. Rule 702 of the Federal Rules of  
8 Evidence ("Rule 702") "permits experts qualified by 'knowledge, experience, skill, expertise,  
9 training, or education' to testify 'in the form of an opinion or otherwise' based on 'scientific,  
10 technical, or other specialized knowledge' if that knowledge will 'assist the trier of fact to  
11 understand the evidence or to determine a fact in issue.'" *Salinas v. Amteck of Ky., Inc.*, 682 F.  
12 Supp. 2d 1022, 1029 (N.D. Cal. 2010) (Hamilton, J.) (quoting Fed. R. Evid. 702). The proponent  
13 of expert testimony bears the burden to establish "by a preponderance of the evidence that the  
14 admissibility requirements are met." *Id.*; see also *Pierson v. Ford Motor Co.*, No. C 06-6503  
15 PJH, 2009 U.S. Dist. LEXIS 65297, at \*7 (N.D. Cal. Apr. 16, 2009) (Hamilton, J.); *Redfoot v.*  
16 *B.F. Ascher & Co.*, No. C 05-2045 PJH, 2007 U.S. Dist. LEXIS 40002, at \*11 (N.D. Cal. June 1,  
17 2007) (Hamilton, J.). Under Rule 702, the trial court is obliged to act as a "gatekeeper" to ensure  
18 that expert testimony is both reliable and relevant to the issues being tried. *Salinas*, 682 F. Supp.  
19 2d at 1029-30 (quoting *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 597 (1993));  
20 *Pierson*, 2009 U.S. Dist. LEXIS 65297, at \*7; *Redfoot*, 2007 U.S. Dist. LEXIS 40002, at \*11-12.

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

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

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

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

1 about both FPA and COCOMO at his deposition.

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

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

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

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

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

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

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

1 U.S. at 597; *see also United States v. Mirama Enters., Inc.*, No. 00-cv-2269-K (LAB), 2002 WL  
2 34364408, at \*1 (S.D. Cal. June 17, 2002). Courts have excluded the testimony of experts who  
3 rely on undisclosed data that is thereafter destroyed and unavailable for examination. *See*  
4 *Unigard Sec. Ins. Co. v. Lakewood Eng'g and Mfg. Corp.*, 982 F.2d 363, 368 (9th Cir. 1992);  
5 *Fidelity Nat'l Title Ins. Co. of N.Y. v. Intercounty Nat'l Title Ins. Co.*, 412 F.3d 745, 751 (7th Cir.  
6 2005); *Barker v. Bledsoe*, 85 F.R.D. 545, 549 (W.D. Okla. 1979).

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

8 **IT IS SO ORDERED.**

9  
10 DATED: \_\_\_\_\_

By: \_\_\_\_\_  
Hon. Phyllis J. Hamilton

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