Robert A. Mittelstaedt (SBN 060359)
Jason McDonell (SBN 115084)
Elaine Wallace (SBN 197882)
JONES DAY
555 California Street, 26th Floor
San Francisco, CA 94104
Telephone: (415) 626-3939
Facsimile: (415) 875-5700
ramittelstaedt@jonesday.com
jmcdonell@jonesday.com
ewallace@jonesday.com

Tharan Gregory Lanier (SBN 138784)
Jane L. Froyd (SBN 220776)
JONES DAY
1755 Embarcadero Road
Palo Alto, CA 94303
Telephone: (650) 739-3939
Facsimile: (650) 739-3900
tglanier@jonesday.com
jfroyd@jonesday.com

Scott W. Cowan (Admitted *Pro Hac Vice*)
Joshua L. Fuchs (Admitted *Pro Hac Vice*)
JONES DAY
717 Texas, Suite 3300
Houston, TX 77002
Telephone: (832) 239-3939
Facsimile: (832) 239-3600
swcowan@jonesday.com
jlfuchs@jonesday.com

Attorneys for Defendants
SAP AG, SAP AMERICA, INC., and
TOMORROWNOW, INC.

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 DENYING PLAINTIFFS' MOTION NO. 4 TO EXCLUDE EXPERT TESTIMONY OF DONALD REIFER**

Having considered Plaintiffs' Motion No. 4: To Exclude Testimony of Defendants' Expert Donald Reifer (D.I. 769), Defendants' Opposition to Plaintiffs' Motion No. 4: To Exclude Testimony of Defendants' Expert Donald Reifer, the memoranda and declarations in support, and exhibits attached thereto:

IT IS HEREBY ORDERED THAT: Plaintiffs' motion is DENIED.

Plaintiffs' expert Paul Pinto, designated solely to testify on so-called "saved development costs," as well as Defendants' experts Donald Reifer and David Garmus (designated solely to rebut Pinto), are no longer relevant to this case as a result of this Court's August 17, 2010 order holding that Plaintiffs may not seek damages in the form of "saved development costs" for any cause of action in this case. Because it seeks to exclude certain specific opinions of Reifer that rebut Pinto's opinions on saved development costs, Plaintiffs' motion is moot and is therefore DENIED. Even were it not moot, Plaintiffs' motion would be denied for failing to offer any suitable basis for excluding discrete portions of Reifer's opinion.

**RULE 702 OF THE FEDERAL RULES OF EVIDENCE**

Plaintiffs fail to set forth a sufficient basis for exclusion of Reifer's opinion regarding source lines of code (SLOC) counts under Rule 702 of the Federal Rules of Evidence ("Rule 702"). Plaintiffs argue that Reifer's testimony should be excluded because it is irrelevant and unreliable, and because Reifer is not qualified to render an opinion on the topics on which he proposes to testify. 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." *See* Fed. R. Evid. 702. The Court serves as the "gatekeeper" in excluding expert testimony that fails to clear the threshold hurdles of relevance and reliability. *Daubert v. Merrell Dow Pharms, Inc.*, 509 U.S. 579, 589-90, 597 (1993); *see also Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147-48 (1999) (holding that the gatekeeping function created by Daubert applies to evaluating technical experts). "This entails a preliminary assessment of whether the reasoning or methodology is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Daubert*,

409 U.S. at 592-93.

To make this determination, the Court must apply a three-part test: (1) Is the proffered expert qualified to testify in the area on which he is opining based on his knowledge, skill, experience, training, or education (qualification requirement)?; (2) Is the proffered expert testimony based on reliable scientific or specialized knowledge that is reliably applied to the facts of this case (reliability requirement)?; and (3) Will the proffered expert testimony assist the trier of fact in understanding the evidence or determining a fact in issue (relevancy requirement)? *See* Fed. R. Evid. 702; *Daubert*, 509 U.S. at 592-93.

Rule 702 is applied consistent with "the 'liberal thrust' of the Federal Rules and their 'general approach of relaxing the traditional barriers to 'opinion testimony.'" *Daubert*, 509 U.S. at 588 (citations omitted); *see also* Fed. R. Evid. 702 Adv. Comm. Notes (2000 Amendments) ¶ 6 (confirming that "rejection of expert testimony is the exception rather than the rule"). Opining on the flaws in another experts' methodology is a common, and admissible, form of expert testimony. *See* generally, *e.g.*, *Kennedy v. Collagen Corp.*, 161 F.3d 1226, 1230-31 (9th Cir. 1998) ("In arriving at a conclusion, the fact finder may be confronted with opposing experts, additional tests, experiments, and publications, all of which may increase or lessen the value of the expert's testimony. But their presence should not preclude the admission of the expert's testimony-they go to the weight, not the admissibility."). When the threshold for admissibility is met, differences in the experts' opinions simply go to the weight of the testimony and not the admissibility. *See id.*

Courts have declined to admit expert testimony where the basis of the expert's opinion is an unreliable source; for example, courts have rejected expert testimony where an expert relied on facts in a news article, based opinion on a mistake regarding the plaintiff's medical history, made calculations based on the wrong highway ramp, and assumed without basis that train engineers should have seen that a railroad track was tampered with. *See QR Spex, Inc. v. Motorola, Inc.*, No. CV 03-6284-JFW (FMOx), 2004 WL 5642907, at *9 (C.D. Cal. Oct. 28, 2004); *Robinson v. G.D. Searle & Co.*, 286 F. Supp. 2d 1216, 1221 (N.D. Cal. 2003); *Andrews v. E.I. Du Pont De Nemours and Co.*, 447 F.3d 510, 513 (7th Cir. 2006); *Guidroz-Brault v. Missouri Pac. R.R. Co.*, 254 F.3d 825, 830-31 (9th Cir. 2001). Here, the situation is markedly different.

As stated above, Reifer's opinion on SLOC counts serves to rebut the opinion of Pinto, who engaged in a saved development cost analysis. In performing this analysis, Pinto purportedly used the Constructive Cost Model (COCOMO), a methodology employed to determine the size and correlating development cost of software. Reifer, identified by Defendants as an expert in the COCOMO method, reviewed Pinto's COCOMO analysis and his use of SLOC counts, which are an important factor in the calculation of software development cost. Both Pinto and Reifer obtained SLOC counts by using software counting utilities ("counters"). Thus, part of Reifer's analysis in determining the accuracy of Pinto's final calculations included determining the accuracy of Pinto's SLOC counts by evaluating Pinto's counters.

Reifer was not provided with Pinto's counters until a month before his rebuttal report was due; he was *never* provided with *usable* versions of these counters. As a result, Reifer created replica counters using the counting and parsing rules disclosed by Pinto in his report. While both parties acknowledge that the creation of accurate replica counters is possible, Plaintiffs assert that the counters Reifer used gave him erred results because he did not engage "an experienced expert" to design the replicas. However, Plaintiffs offer no evidence that either Reifer or the Ph.D. student he engaged to assist him, Tom Tan, were unqualified to build counters. To the contrary, the evidence shows that Tan writes code counters as part of the code counting project at the University of Southern California and that Reifer has led teams of code counters. Furthermore, the Court finds Plaintiffs' argument that the replica counters caused Reifer to commit errors unpersuasive, given the fact that Reifer built the counters by following Pinto's own rules. In sum, Plaintiffs have failed to provide sufficient basis for doubting the accuracy of Reifer's replica counters.

However, even if the replica counters suffered from defects, this would not provide sufficient basis to exclude Reifer's opinion. "[A]s a general rule, questions relating to the bases and sources of an expert's opinion affect the weight to be assigned that opinion rather than its admissibility and should be left for the jury's consideration." *Primrose Operating Co. v. National Am. Ins. Co.*, 382 F.3d 546, 562 (5th Cir. 2004) (citation omitted). *See, e.g., Clicks Billiards, Inc. v. Sixshooters, Inc.*, 251 F.3d 1252, 1262-63 (9th Cir. 2001) (holding faults in

methodology and calculations, and critiques of conclusions, go to weight and not admissibility of expert opinions); *United States v. Elkins*, 885 F.2d 775, 786 (11th Cir. 1989) (holding weakness of basis for opinion by qualified expert goes to weight not to credibility); *Microfinancial, Inc. v. Premier Holidays Int'l, Inc.*, 385 F.3d 72, 81 (1st Cir. 2004) (holding that objection regarding the scope of expert's investigation went to weight, not admissibility, of his testimony). To the extent that the counters suffer from any defects, this goes to the weight, not admissibility, of Reifer's opinion on SLOC counts, and is best addressed on cross-examination. *See Butler v. Home Depot, Inc.*, 984 F. Supp. 1257, 1265 (N.D. Cal. 1997) (where expert's conclusions lack foundation, opposing party "may attack such statements through vigorous cross-examination, presentation of contrary evidence, and requests for limiting instructions"); *Walker v. Soo Line R.R. Co.*, 208 F.3d 581, 586-87 (7th Cir. 2000) (where expert employs proper methodology, reliance on inaccurate data is to be explored through cross-examination).

Moreover, Reifer's methodology is based on his extensive experience and expertise in the COCOMO model. Any alleged defects in the replica counters do not affect the overall relevance or reliability of Reifer's methodology or opinion. *See Stilwell v. Smith & Nephew, Inc.*, 482 F.3d 1187, 1192 (9th Cir. 2007) ("The test for reliability, however, 'is not the correctness of the expert's conclusions but the soundness of his methodology.'") (citing *Daubert v. Merrell Dow Pharms., Inc.*, 43 F.3d 1311, 1318 (9th Cir. 1995)).

Plaintiffs' additional argument that Reifer is unqualified and that his opinion will not assist the trier of fact similarly fails. "An expert must be qualified by virtue of his or her 'knowledge, skill, experience, training, or education.'" *Rambus Inc. v. Hynix Semiconductor Inc.*, 254 F.R.D. 597, 600 (N.D. Cal. 2008) (citing Rule 702). Reifer has over 40 years of experience in the field of software, has managed the development of software-intensive systems, helped calibrate COCOMO (the most widely used software estimation model in the world), co-authored a book on the COCOMO method, and led teams that developed code counters for use in software estimation. Given his training and experience, Reifer is qualified to analyze Pinto's SLOC counts and his overall use of the COCOMO model. Further, because SLOC count is the primary input for a COCOMO analysis, Reifer is highly familiar with methods for counting SLOC and could be

of great use to the trier of fact in explaining Pinto's use of SLOC counts and the impact of this count on Pinto's conclusions.

In sum, Plaintiffs' Motion No. 4 has been rendered moot by this Court's order excluding saved development costs as recoverable damages. In addition to being moot, Plaintiffs' motion offers no suitable basis for excluding Reifer's opinion. Reifer is qualified to opine about Pinto's critical SLOC count and his opinions are sufficiently supported in accordance with Rule 702.

For these reasons, the Court denies Plaintiffs' motion to exclude Reifer.

**IT IS SO ORDERED.**

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