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

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

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

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

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

15 Plaintiffs fail to set forth a sufficient basis for exclusion of Reifer's opinion regarding
16 source lines of code (SLOC) counts under Rule 702 of the Federal Rules of Evidence ("Rule
17 702"). Plaintiffs argue that Reifer's testimony should be excluded because it is irrelevant and
18 unreliable, and because Reifer is not qualified to render an opinion on the topics on which he
19 proposes to testify. Rule 702 permits experts qualified by "knowledge, experience, skill,
20 expertise, training, or education" to testify "in the form of an opinion or otherwise" based on
21 "scientific, technical, or other specialized knowledge" if that knowledge will "assist the trier of
22 fact to understand the evidence or to determine a fact in issue." *See* Fed. R. Evid. 702. The Court
23 serves as the "gatekeeper" in excluding expert testimony that fails to clear the threshold hurdles
24 of relevance and reliability. *Daubert v. Merrell Dow Pharms, Inc.*, 509 U.S. 579, 589-90, 597
25 (1993); *see also Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147-48 (1999) (holding that the
26 gatekeeping function created by *Daubert* applies to evaluating technical experts). "This entails a
27 preliminary assessment of whether the reasoning or methodology is scientifically valid and of
28 whether that reasoning or methodology properly can be applied to the facts in issue." *Daubert*,

1 409 U.S. at 592-93.

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

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

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

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

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

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

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

13 Moreover, Reifer's methodology is based on his extensive experience and expertise in the
14 COCOMO model. Any alleged defects in the replica counters do not affect the overall relevance
15 or reliability of Reifer's methodology or opinion. *See Stilwell v. Smith & Nephew, Inc.*, 482 F.3d
16 1187, 1192 (9th Cir. 2007) ("The test for reliability, however, 'is not the correctness of the
17 expert's conclusions but the soundness of his methodology.'" (citing *Daubert v. Merrell Dow*
18 *Pharms., Inc.*, 43 F.3d 1311, 1318 (9th Cir. 1995))).

19 Plaintiffs' additional argument that Reifer is unqualified and that his opinion will not
20 assist the trier of fact similarly fails. "An expert must be qualified by virtue of his or her
21 'knowledge, skill, experience, training, or education.'" *Rambus Inc. v. Hynix Semiconductor Inc.*,
22 254 F.R.D. 597, 600 (N.D. Cal. 2008) (citing Rule 702). Reifer has over 40 years of experience
23 in the field of software, has managed the development of software-intensive systems, helped
24 calibrate COCOMO (the most widely used software estimation model in the world), co-authored
25 a book on the COCOMO method, and led teams that developed code counters for use in software
26 estimation. Given his training and experience, Reifer is qualified to analyze Pinto's SLOC counts
27 and his overall use of the COCOMO model. Further, because SLOC count is the primary input
28 for a COCOMO analysis, Reifer is highly familiar with methods for counting SLOC and could be

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

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

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

8 **IT IS SO ORDERED.**

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DATED: _____

By: _____
Hon. Phyllis J. Hamilton