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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)

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION NO. 5 TO EXCLUDE EXPERT TESTIMONY OF STEPHEN GRAY

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

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I. INTRODUCTION

Plaintiffs seek to wholly exclude the testimony of Stephen Gray, who has over 35 years of experience in the computer software industry and is Defendants' primary rebuttal expert to Kevin Mandia.[1] Gray's report and testimony are quintessential examples of relevant, reliable, and narrowly tailored rebuttal expert testimony from a highly qualified expert in the field.

Mandia's report and testimony fit into three categories: (1) counting items or instances of alleged conduct; (2) characterizing those items or instances of alleged conduct; and (3) comparing and analyzing certain items to some of the registered works Plaintiffs assert in this case. Gray's report and testimony rebut all three categories. Specifically, Gray exposes numerous flaws in Mandia's methodology, including many issues regarding the overbreadth of Mandia's conclusions. Mandia conducted a limited, albeit complicated, analysis focused primarily on one of TomorrowNow's service lines and then attempts to paint the rest of TomorrowNow's services with a broad brush. Gray dissected and analyzed Mandia's analysis and opinions and demonstrated that Mandia has proven far less than his conclusions suggest. Gray determined that Mandia ignored 55 of Plaintiffs' alleged registered works. Further, Gray identified several of TomorrowNow's customers that are not implicated by Mandia's opinions. That customer analysis, which is in Appendix 4 to Gray's report, is the focus of Plaintiffs' attack on Gray.

This Court should deny Plaintiffs' motion to exclude Gray. Although Plaintiffs disagree with Gray's analysis, they fail to show a basis to exclude it. Gray is highly qualified to offer rebuttal opinions in response to Mandia's overreaching report and testimony. Moreover, Gray's opinions are relevant, reliable, and admissible and thus should be presented to the jury to assist it in sifting through Mandia's complicated technical analysis and identifying the flaws contained therein.

II. SUMMARY OF GRAY'S QUALIFICATIONS AND REBUTTAL OPINIONS

Gray is an expert qualified by "knowledge, experience, skill, expertise, training, or education" in computer software. *See* Fed. R. Evid. 702. He has over 35 years of experience in

[1] Gray's report and testimony, to a limited extent, also rebut the analyses of Plaintiffs' damages expert Meyer and Plaintiffs' statistical expert Levy. Plaintiffs' motion does not challenge Gray's testimony related to these two experts.

the computer software industry, with a background in systems and software architecture, design, and development. *See* Declaration of Joshua L. Fuchs iso Defs.' Opp. to Pls.' Mot. to Exclude Expert Testimony of Stephen Gray ("Fuchs Decl.") ¶¶ 1-2, Ex. A (6/8/10 Gray Tr.) at 209:10-25; Ex. B (Appendix 1 to Gray Report). Gray has been the Chief Technical Officer at numerous companies, in addition to holding senior management positions in development, marketing, and general management, where he made decisions in purchasing, managing, and licensing software. *See* Fuchs Decl. ¶ 2, Ex. B (Appendix 1 to Gray Report); *see also* Fuchs Decl. ¶ 1, Ex. A (6/8/10 Gray Tr.) at 198:7-21. He has knowledge in various software code languages, including many of the languages at issue in this matter, and has authored two technical seminars on relational database management and published several articles in trade journals. *See* Fuchs Decl. ¶ 2, Ex. B (Appendix 1 to Gray Report) (describing experience in C, C++, SQL, COBOL, RPG, Basic, Java, HTML, XML, and other languages).

Further, Gray has been received by several courts as a computer software expert, including providing expert testimony in multiple copyright cases. *See* Fuchs Decl. ¶ 1, Ex. A (6/8/10 Gray Tr.) at 36:3-37:2, 44:5-21, 47:4-18, 83:18-85:17, 109:19-113:6, 121:22-123:12, 123:24-127:3, 127:20-129:25, 213:16-215:11. And he has conducted source code comparisons to determine protected expression, including through use of the abstraction-filtration-comparison method. *See id.* at 88:18-89:8, 96:24-97:20, 111:5-9, 114:5-115:8.

In this case, Gray serves as a rebuttal expert, who was asked to "analyze and opine on the opinions, work product, and analysis contained" in the Mandia report. D.I. 772 (Declaration of John A. Polito iso Pls.' Mot. to Exclude Testimony of Defs.' Expert Stephen Gray ("Polito Decl.")) ¶ 1; D.I. 772-1 (Ex. A to Polito Decl.) at Gray Report § 1. Gray opines that Mandia's methodology and proffered testimony are flawed because Mandia: (1) makes assumptions regarding protected expression that lead to overbroad conclusions, such as the conclusion that materials contained on TomorrowNow's systems are "protected by the copyrights Oracle asserts in this action;"[2] (2) uses other assumptions, including but not limited to, assumptions related to derivative works, distribution, environments, and "improper activity," that call into question the

[2] *Id.* at § 6.4.1.

analysis, findings, and opinions contained throughout his report;[3] (3) relies on opinions of interested Oracle employees as an improper basis for statements related to protected expression and other topics;[4] (4) bases many of his conclusions on a complete lack of work or analysis;[5] (5) fails to consider relevant and admissible evidence, such as the deposition testimony of several Oracle witnesses related to Titan's impact on Oracle support websites;[6] (6) predicates his conclusions on a disproportionate analysis of different product lines supported by TomorrowNow;[7] (7) neglects to discuss any harm caused to Plaintiffs by activities conducted by TomorrowNow;[8] (8) overstates his Oracle database server software counts that were located on TomorrowNow's systems;[9] and (9) omits consideration or analysis of 55 of the copyright registrations asserted by Plaintiffs.[10]

III. LEGAL STANDARD FOR REBUTTAL OPINIONS

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 trial court acts as a "gatekeeper" to ensure that expert testimony is "reliable" and "relevant to the task at hand." *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 gate keeping function created by *Daubert* applies to evaluating technical experts). Rule 702 is applied consistent with "the 'liberal thrust' of the Federal Rules and their 'general approach of relaxing the traditional barriers

[3] *Id.* at § 7.

[4] *Id.* at § 8.1.1.

[5] *See, e.g., id.* at §§ 6.4.1 (no protected expression analysis), 6.4.2 (no analysis related to license agreements), 7.7 (no review of terms of use), 8.1.3 (no copyright analysis), 8.2 (limited analysis of software lines and models other than PeopleSoft), 9.3 (no analysis of licenses and terms of use for access), 12.1 (no analysis of post-complaint conduct), 13 (summarizing lack of analysis throughout report).

[6] *Id.* at §§ 9.5.2, 9.5.3.

[7] *Id.* at § 8.

[8] *Id.* at § 9.8.

[9] *Id.* at § 10.6.

[10] *See, e.g., id.* at § 10.5.

to 'opinion testimony.'" *See Daubert*, 509 U.S. at 588; *see also* Fed. R. Evid. 702 advisory committee's notes (confirming that "rejection of expert testimony is the exception rather than the rule").

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.

Further, opining on the flaws in another expert's methodology is a common and admissible form of expert testimony. *See, e.g., Kennedy v. Collagen Corp.*, 161 F.3d 1226, 1230 (9th Cir. 1998).

> Judges in jury trials should not exclude expert testimony simply because they disagree with the conclusions of the expert. The *Daubert* duty is to judge the reasoning used in forming an expert conclusion. The test is whether or not the reasoning is scientific and will assist the jury. If it satisfies these two requirements, then it is a matter for the finder of fact to decide what weight to accord the expert's testimony. 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.

Id. When the threshold for admissibility is met, differences in the experts' opinions simply go to the weight of the testimony and not the admissibility. *Id*. at 1230-31.

The scope of testimony for rebuttal experts is narrow compared to that of initial experts. *See* Fed. R. Civ. P. 26(a)(2)(C). Rebuttal experts are intended to provide context and insight into the opposing experts' opinions. *See Scientific Components Corp. v. Sirenza Microdevices, Inc.*, No. 03 CV 1851 (NGG) (RML), 2008 WL 4911440, at *2 (E.D.N.Y. Nov. 13, 2008) (noting that rebuttal experts should provide background information to illustrate their opinions related to the initial expert's analysis); *Crowley v. Chait*, 322 F. Supp. 2d 530, 551 (D.N.J. 2004) ("Rebuttal evidence is properly admissible when it will 'explain, repel, counteract or disprove the evidence of the adverse party.'"). Put another way, the purpose of rebuttal testimony of an expert is to

"poke holes" in the theories of the opposing party's expert. *See, e.g.*, *Minebea Co., Ltd. v. Papst*, No. Civ. A. 97-0590 (PLF), 2005 WL 1459704, at *6 (D.D.C. June 21, 2004); *Long Term Capital Holdings v. U.S.*, No. 3:01 CV 1290 (JBA), 2003 WL 21518555, at *2 (D. Conn. May 15, 2003).

IV. GRAY'S "NON-ACCUSED CONDUCT" REBUTTAL OPINIONS SHOULD NOT BE EXCLUDED

Appendix 4 to Gray's report contains a comprehensive analysis that applies Mandia's conclusions to TomorrowNow's support model on a customer-by-customer basis. It is designed to rebut and narrow the breadth of Mandia's overreaching conclusions by identifying those customers that are not implicated by Mandia's analysis. Appendix 4 requires technical and specialized knowledge and expertise to create, is based on reliable methods and data, will assist the trier of fact, and will not cause prejudice, confusion, or take undue time to explain. Moreover, Appendix 4 is the proper subject of rebuttal testimony.

A. Appendix 4 Requires Technical and Specialized Knowledge to Create and Is Based on Reliable Methods and Data.

Appendix 4 is a spreadsheet that Gray created to assist the jury in understanding which of TomorrowNow's 357 customers are implicated by the allegations in Mandia's report.[11] *See* D.I. 772 (Polito Decl.) ¶¶ 8, 10; D.I. 772-5 (Ex. E to Polito Decl. ("Appendix 4")); D.I. 772-7 (Ex. G to Polito Decl. ("Appendix 5")). For the purpose of creating the spreadsheet, Gray assumed (without conceding) that the allegations in the Mandia report were true, and he extensively analyzed mountains of evidence to determine how those allegations impacted each of TomorrowNow's customers. *See, e.g.*, D.I. 772 (Polito Decl.) ¶ 10; D.I. 772-7 (Appendix 5). Appendix 4 is not simply a "cross-tabulation of data reported by Mandia" because Mandia did not undertake the extreme effort or utilize the technical expertise necessary to categorize the types of conduct he deemed "improper" on a customer-by-customer basis. D.I. 771 (Pls.' Mot. to Exclude Gray) at 6; *see also* Fuchs Decl. ¶ 3, Ex. C (Mandia Report) ¶¶ 4, 5, 16, 38-40, 172, 193-94, 212, 215, 296 (referencing alleged "improper" or "inappropriate" activities by TomorrowNow).

[11] Appendix 4, also called the "Non-Accused Conduct" spreadsheet, is accurately named. It contains a detailed analysis of the customers for which Mandia is not accusing TomorrowNow of conducting any "improper" or "inappropriate" activity.

The following example further explains the breadth and importance of Gray's analysis contained in Appendix 4. Mandia concludes in his report that TomorrowNow "improperly accessed the Oracle websites" in part by downloading software and support materials ("SSMs") for its customers. *See* Fuchs Decl. ¶ 3, Ex. C (Mandia Report) ¶ 172. Appendix 4 takes Mandia's conclusion related to downloading and applies it to each of TomorrowNow's customers by determining for which customers TomorrowNow downloaded—something Mandia should have done, but failed to do. *See* D.I. 772 (Polito Decl.) ¶¶ 8, 10; D.I. 772-5 (Appendix 4); D.I. 772-7 (Appendix 5) at § 3. Gray then determined the customers for which TomorrowNow conducted no downloads by reviewing numerous sources, including over ten servers in the Data Warehouse, deposition testimony, and TomorrowNow's internal SAS database. *See* D.I. 772 (Polito Decl.) ¶ 10; D.I. 772-7 (Appendix 5) at § 3. If TomorrowNow did not conduct any downloads for a customer, the customer was placed on Gray's list of 51 customers that are "non-accused" by Mandia. *See* D.I. 772 (Polito Decl.) ¶¶ 8, 10; D.I. 772-5 (Appendix 4); D.I. 772-7 (Appendix 5) at § 3.

The purpose of the "non-accused conduct" spreadsheet is not for Gray to opine on the propriety of conduct related to TomorrowNow customers; rather, the purpose is to identify where Mandia's analysis falls short. Gray neither opines regarding the propriety of TomorrowNow's business model, nor does he rely on Appendix 4 to reach a conclusion on the legality or appropriateness of TomorrowNow's activities. Instead, Mandia's repeated attempts to mask unfounded assumptions as conclusions prompted Gray, as the rebuttal expert, to stand in Mandia's shoes and point out what analysis would be necessary to reach these conclusions. *See* Section V, below. One of the most glaring instances in which Mandia overreaches in his conclusions, despite his limited analysis, is Mandia's opinion that all of TomorrowNow's customers are implicated by his analysis. *See* Fuchs Decl. ¶ 3, Ex. C (Mandia Report) ¶¶ 373-78.

As Gray describes in his report, despite the fact that Mandia's analysis "is limited in scope of services and products analyzed," Mandia offers "conclusions that are ostensibly applicable to all of TomorrowNow's products and all of TomorrowNow's services." D.I. 772 (Polito Decl.) ¶ 1; D.I. 772-1 (Ex. A to Polito Decl.) at Gray Report § 13. Thus, "the Mandiant Report

disregards the customers that were not implicated by the accused conduct identified in the Mandiant Report." D.I. 772-1 (Ex. A to Polito Decl.) at Gray Report § 13.2. Specifically, Section X of Mandia's report purports to extrapolate certain limited counts and comparisons Mandia made to all of the copyright registrations Plaintiffs assert, and thereby to all TomorrowNow customers. *See* Fuchs Decl. ¶ 3, Ex. C (Mandia Report) ¶¶ 373-78. The purpose of Appendix 4 is to identify the customers to which Mandia's overreaching conclusions do not apply. Explaining the other experts' methodological flaws is an appropriate use of rebuttal expert testimony. *See, e.g., Smith v. Wal-Mart Stores, Inc*., 537 F. Supp. 2d. 1302, 1321-30 (N.D. Ga. 2008) (in a trademark dispute, allowing a rebuttal expert to testify regarding overly broad assumptions and factors not considered in another expert's website study survey methodology).

Plaintiffs' attempts to minimize the intense effort, technical and specialized knowledge, and expertise required to create Appendix 4 miss the mark.[12] Plaintiffs acknowledge that the "review of directories on [TomorrowNow]'s computers" requires "expert, scientific or specialized knowledge," and Plaintiffs do not challenge Gray's qualifications to conduct such an analysis. D.I. 771 (Pls.' Mot. to Exclude Gray) at 9. However, Plaintiffs claim that the remaining columns in the spreadsheet are a "re-listing of pre-existing lists." *Id.* at 10.

Even a glance at Appendix 5 to Gray's report, which describes in detail the methodology employed by Gray to create Appendix 4, reveals the numerous sources consulted in the creation of Appendix 4 and the technical and specialized knowledge and expertise required to understand and interpret those sources. *See* D.I. 772 (Polito Decl.) ¶ 10; D.I. 772-7 (Appendix 5) at §§ 3.2 (describing two-step analysis required to determine which PeopleSoft customers had downloads in master download pool), 3.3 (summarizing server file paths reviewed and methodology employed to determine whether downloads existed for particular TomorrowNow customers), 4.2 (reciting methodology used to determine whether a customer had CDs in TomorrowNow's CD jukebox), 5.3 (describing methodology employed to determine whether a PeopleSoft HRMS fix was delivered to a customer based on a review of Mail03 and Web01), 5.4 (same with respect to

[12] Plaintiffs' motion muddles the distinction between scientific and technical experts. *See, e.g.*, D.I. 771 (Pls.' Mot. to Exclude Gray) at 6, 9-10. Gray is a technical expert, not a scientific expert in the nature of *Daubert*. *See Kumho Tire*, 526 U.S. at 148.

JD Edwards World fix). Appendix 4 is far more than a compilation of pre-existing data. Gray's technical and specialized knowledge gained in running and making decisions regarding computer software at numerous companies, analyzing source code in various languages, and testifying in multiple copyright cases was instrumental in the interpretation of the numerous sources of information used to create the spreadsheet. *See* Fuchs Decl. ¶ 1, Ex. A (6/8/10 Gray Tr.) at 36:3-37:2, 44:5-21, 47:4-18, 83:18-85:17, 109:19-113:6, 121:22-123:12, 123:24-127:3, 127:20-129:25, 213:16-215:11.

Moreover, Gray reviewed dozens of hours of deposition testimony, numerous discovery responses and produced documents, multiple databases including TomorrowNow's internal SAS database, and over ten servers in the Data Warehouse to design the methodology he used to create the spreadsheet. This painstaking process could not have been accomplished by someone without expertise in computer systems and software. *See Cook v. Rockwell Int'l Corp.*, 580 F. Supp. 2d 1071, 1106-07 (D. Col. 2006) (in a diminution of value case involving nuclear radiation exposure, allowing testimony of scientist who applied knowledge of nuclear radiation exposure to gathering and reviewing large quantity of scientific literature on topic). Expert testimony used to counter the other parties' claims is admissible under Rule 702 if it concerns matters beyond the understanding of the average person. *See United States v. Cohen*, 510 F.3d 1114, 1123-27 (9th Cir. 2007) (reversing criminal conviction and remanding case for new trial where district court improperly excluded psychiatrist's testimony offering a counter explanation to State's *mens rea* argument).

Plaintiffs further argue that Appendix 4 did not require scientific, technical, or other specialized knowledge to create because Defendants' counsel populated some columns in the spreadsheet at Gray's direction. Plaintiffs' motion contains numerous references to defense counsel's cooperation with Gray in creating Appendix 4. *See* D.I. 771 (Pls.' Mot. to Exclude Gray) at 5-6, 9-10. To be clear, Gray expressly testified that it was his decision to include all of the information in Appendix 4, and that the columns were populated either by Gray himself or at his direction and under his oversight; it is his work product. *See* Fuchs Decl. ¶ 4, Ex. D (6/9/10 Gray Tr.) at 324:13-326:22, 330:1-331:24, 345:10-348:23, 492:16-24, 495:5-16, 507:20-509:1;

D.I. 772 (Polito Decl.) ¶ 10; D.I. 772-7 (Appendix 5). As Gray stated in his deposition, Defendants' counsel only assisted with certain very basic tasks related to Appendix 4. *See* Fuchs Decl. ¶ 4, Ex. D (6/9/10 Gray Tr.) at 324:13-326:5, 327:19-23, 330:1-332:21, 344:25-345:24 (describing populating customer name and services columns at Gray's direction). Such cooperation between counsel and experts is routine, often necessary, and not proper grounds to exclude an expert's testimony.[13] *See Crowley*, 322 F. Supp. 2d at 543-44 (refusing to exclude expert report on grounds that plaintiff's attorney had drafted report because expert had substantial input in contents of report); *Advisory Committee Notes to Amendments to the Federal Rules of Civil Procedure*, 146 F.R.D. 401, 634 (1993) ("Rule 26(a)(2)(B) does not preclude counsel from providing assistance to experts in preparing the reports . . .".).

Gray's "non-accused conduct" spreadsheet and testimony satisfy the liberal standard of admissibility and reliability. Supreme Court precedent establishes a broad standard for admitting expert opinion testimony. *See Daubert*, 509 U.S. at 588 (holding Federal Rules, including Rule 702, have a "liberal thrust" and a "general approach" to relaxing traditional barriers to "opinion testimony"); *see also* Fed. R. Evid. 702 advisory committee's notes ("[R]ejection of expert testimony is the exception rather than the rule."). Federal courts further establish a broad standard for evaluating whether an expert's method is reliable. *See In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 744 (3d Cir. 1994) (finding that proponents of expert testimony "do not have to demonstrate to the judge by a preponderance of the evidence that the assessments of their experts are correct, they only have to demonstrate by a preponderance of evidence that their opinions are reliable. . . . The evidentiary requirement of reliability is lower than the merits standard of correctness."). Gray's analysis in Appendix 4 is a relevant and reliable method to attack the overreaching nature of Mandia's analysis of, and opinions regarding, TomorrowNow's business model. Gray utilized his extensive experience with computer software to conduct the

[13] Notably, Plaintiffs arguments are in stark contrast with their own practice. For example, ORCLX-MAN-000216 is the primary supporting spreadsheet for Mandia's HRMS fix analysis and is crucial to many of the measures in Mandia's report. *See* Fuchs Decl. ¶ 5, Ex. E (Mandia Appendices) at 96, 107-10, 112, 119. Plaintiffs acknowledge that ORCLX-MAN-000216 "contains data that Mandiant received from Oracle's counsel" that was simply "spot-checked" by Mandia. *Id.* ¶ 6, Ex. F (4/12/10 Letter from J. Polito).

analysis and interpret the various sources needed to reach his conclusions in Appendix 4.

B. Appendix 4 Will Assist the Trier of Fact and Will Not Cause Prejudice, Confusion, or Take Undue Time to Explain.

Plaintiffs' motion reads too much into the purpose of Appendix 4. Gray created Appendix 4 to identify those customers for which Mandia failed to offer any opinions regarding whether the customers were supported "improperly" or "inappropriately." Viewing Appendix 4 in this light, it is relevant to circumscribe the scope of Mandia's opinions, and thus it will be helpful to the trier of fact in determining the proper breadth and applicability of Mandia's opinions.

Contrary to Plaintiffs' contention, there is no requirement that an expert's testimony reach to the entire factual base of the case. Rather, an expert's testimony need only assist the trier of fact and relate to, or "fit," the underlying facts of the case. *Daubert*, 509 U.S. at 591. "Fit" implies that the expert's testimony "logically advances a material aspect of the proposing party's case." *Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311, 1315 (9th Cir. 1995). The district court must determine whether the "particular expert ha[s] sufficient specialized knowledge to assist the jurors 'in deciding the particular issues in the case.'" *Kumho Tire*, 526 U.S. at 156. Moreover, Rule 702 does not require Gray, a rebuttal expert, to advance an opinion on every aspect of the case; rather, he need only understand the facts and hold an opinion on the areas of the case where his opinions will assist the jury. Specifically,

> [N]ot every expert need express, nor even hold, an opinion with regard to the issues involved in a trial. Indeed, in certain cases, we will not allow an expert to express an opinion as to specific issues even if he or she has formed one. Thus, the decision whether to admit expert *testimony* does not rest upon the existence or strength of an expert's *opinion*. Rather, the key concern is whether expert *testimony* will assist the trier of fact in drawing its own conclusion as to a "fact in issue."

United States v. Rahm, 993 F.2d 1405, 1411 (9th Cir. 1993) (footnote omitted). The purpose of Gray's report is simply to assist the jury in determining whether certain of Mandia's opinions are unreliable.

Plaintiffs' Rule 403 argument for exclusion similarly fails.[14] First, Plaintiffs acknowledge in their motion that Appendix 4 has probative value. *See* D.I. 771 (Pls.' Mot. to Exclude Gray) at 11. Thus, Plaintiffs should not be permitted to encourage Mandia to overreach in his conclusions while seeking to prevent—based on claimed "confusion"—Defendants from presenting Gray's probative evidence properly narrowing those conclusions. Gray must be permitted to explain to the jury that Mandia's counts and comparisons do not implicate all of TomorrowNow's customers or the products it serviced. Such testimony directly rebuts Section X of the Mandia report and can be presented efficiently at trial (as it is in Appendix 4). This testimony will assist, rather than confuse, the jury in understanding the overbreadth of Mandia's conclusions.

C. Appendix 4 Is the Proper Subject of Rebuttal Testimony.

Plaintiffs cannot cleanly argue that Appendix 4 does not properly rebut Mandia's conclusions. Gray repeatedly testified in his deposition that the purpose of Appendix 4 is to rebut the conclusions contained in Section X of Mandia's report. *See* Fuchs Decl. ¶ 4, Ex. D (6/9/10 Gray Tr.) at 550:20-552:3 (describing Gray's opinions related to Section X of Mandia's report and purpose of Appendix 4 in rebutting that section), 552:7-23 (discussing in detail portion of Section X that Appendix 4 rebuts and contradicts), 555:21-556:10 (stating that Appendix 4 "may rebut certain aspects of the conclusion . . . that is in the Mandiant Report"), 588:1-8 (stating that "my report and [Appendix] 4 in particular identify areas which are being rebutted or contradicted or limited by . . . the Mandiant report"). Further, even the portion of Gray's testimony Plaintiffs cite in their motion confirms that the purpose in offering Appendix 4 is to "limit" and "provide insights" into Mandia's opinions—both of which are the proper subject of rebuttal testimony. *Id.* at 558:6-24; *see also Crowley*, 322 F. Supp. 3d at 551. In fact, nothing in Appendix 4 goes outside the scope of the Mandia report. *See* D.I. 772 (Polito Decl.) ¶¶ 8, 10; D.I. 772-5

[14] Plaintiffs sprinkle Rule 403 challenges throughout their motion. *See* D.I. 771 (Pls.' Mot. to Exclude Gray) at 11, 15, 18. Specifically, in addition to challenging Appendix 4, Plaintiffs also attack on Rule 403 grounds Gray's opinions on the work Mandia did not conduct and Gray's testimony related to licensing and terms of use. *See id.* For the reasons stated throughout this opposition, all of Gray's opinions and proffered testimony are based on probative and reliable evidence that will assist the trier of fact. Further, there is nothing unfairly prejudicial or misleading in allowing Gray to opine on Mandia's methodology. In fact, it will be Defendants who are prejudiced if Mandia is permitted to offer his overreaching conclusions and Gray is not allowed to rebut those conclusions by identifying flaws in Mandia's analysis.

(Appendix 4); D.I. 772-7 (Appendix 5); *see also Minebea Co.*, 2005 WL 1459704, at *6 (allowing rebuttal expert to testify who was "simply using his acknowledged expertise, training and knowledge to identify flaws in Minebea's damages theories").

V. GRAY'S OPINIONS ON THE FLAWS IN MANDIA'S CONCLUSIONS ARE PROPER REBUTTAL AND WILL ASSIST THE TRIER OF FACT

Mandia's report is over 100 pages, his appendices are 126 pages, and he references over 378 Mandia-created electronic files purporting to support his report and appendices. *See* Fuchs Decl. ¶¶ 3, 5 Ex. C (Mandia Report); Ex. E (Mandia Appendices). It defies reason that a lay jury could wade through the complex conclusions Mandia offers in order to determine "what [Mandia's opinions do] not contain" when the omissions relate to highly technical topics such as protected expression, analysis related to copyright registrations, licenses and terms of use, disproportionate treatment of software lines, and software code comparisons. D.I. 771 (Pls.' Mot. to Exclude Gray) at 13. Gray has the technical expertise to identify and reliably describe those omissions; he should be permitted to assist the jury at trial in understanding the gaps in Mandia's analysis.

Due to the extremely technical nature of Mandia's report, Gray's testimony related to gaps in Mandia's analysis is the proper subject of expert opinion. For example, Mandia conducts no independent analysis related to whether the materials he counted and compared contain protected expression. *See* Fuchs Decl. ¶ 3, Ex. C (Mandia Report) ¶¶ 44-45. Mandia acknowledged in his deposition that he has never "analyzed source code to determine if it includes protected expression," and Mandia was not tasked with conducting a protected expression analysis in this case. Fuchs Decl. ¶ 7, Ex. G (5/20/10 Mandia Tr.) at 169:1-13, 170:7-172:10. Despite the fact that Mandia conducted no analysis related to protected expression, Mandia's report is replete with conclusions that Plaintiffs' registered works contain protected expression. *See* Fuchs Decl. ¶ 3, Ex. C (Mandia Report) ¶¶ 6-7, 12, 14-15, 35, 44-45, 254, 264, 270, 280, 291, 373-78. Gray rightly identifies in his report that Mandia's methodology for reaching his conclusions related to protected expression are flawed, and Gray's testimony related to gaps in Mandia's analysis is the proper subject of rebuttal opinion. *See, e.g.*, D.I. 772 (Polito Decl.) ¶ 1; D.I. 772-1 (Ex. A to

Polito Decl.) at Gray Report §§ 6.4.1, 7.1, 7.5, 11.4.1; *see also* Fuchs Decl. ¶ 1, Ex. A (6/8/10 Gray Depo.) at 88:18-89:8, 96:24-97:20, 111:5-9, 114:5-115:8 (describing Gray's previous experience with determining protected expression).

Gray offers no specific opinions about "standard expert practices in copyright cases," protected expression analysis, or terms of use or licensing analysis simply by pointing out the gaps in Mandia's analysis. Instead, Gray notes that Mandia's lack of analysis on certain topics weakens the reliability of several of Mandia's conclusions because they are not supported by proper analysis. Gray simply points out the alternatives Mandia did not consider in his analysis as part of his overall criticism of Mandia's methodology. *See, e.g.*, *Smith*, 537 F. Supp. 2d. at 1321-30; *Minebea Co.*, 2005 WL 1459704, at *6 (D.D.C. June 21, 2004) (allowing economic rebuttal expert to give testimony that "poked holes" in plaintiff's expert testimony).

Moreover, Gray's proffered testimony will assist the jury interpret Mandia's opinions. Expert testimony assists the trier of fact "if it concerns matters that are beyond the understanding of the average lay person." *United States v. Frazier*, 387 F.3d 1244, 1262-63 (11th Cir. 2004). Mandia's testimony explores many technical aspects of Oracle's software—something that is likely beyond the lay knowledge of the average juror. Even if it were not, courts have held that expert testimony is not necessarily excludable if it covers areas that are "within the average juror's comprehension." *See United States. v. Hall*, 93 F.3d 1337, 1342 (7th Cir. 1996); *United States v. Perkins*, 470 F.3d 150, 155 (4th Cir. 2006) (stating that subject matter of expert testimony does not need to be "arcane or especially difficult to comprehend" in order to be admissible).

Plaintiffs' arguments are similar to those rejected by the court in *Cook v. Rockwell Int'l Corp.*, a class action lawsuit regarding reduced property values near a nuclear weapons storage facility. *Cook*, 580 F.Supp.2d at 1079, 1106. The defendant sought to exclude an epidemiologist retained by the plaintiffs with experience in nuclear radiation exposure. *See id*. at 1106. The expert testified about the state of knowledge concerning health effects of plutonium exposure and the adequacy of current radiation exposure standards. *See id*. The defendant argued that this would not assist the jury and would usurp its role as fact finder because the jury could review all

the scientific materials the expert had gathered and draw its own conclusions. *See id*. The court disagreed, finding "[t]he scientific expertise and experience utilized by [the expert] in his review cannot be duplicated by the jury." *Id.* Similarly, Gray is applying his 35-plus years of experience as a computer software expert in distilling Mandia's complex report and identifying the flaws in his methodology. Gray's work is not something that can be duplicated by the jury.

Moreover, Plaintiffs' reliance on *Perry v. Schwarzenegger* is misplaced; there the plaintiff's expert simply read into the record quotations by other scholars rather than performing any analysis. No. C 09-2292 VRW, 2010 WL 3025614, at *22 (N.D. Cal. Aug. 4, 2010). By contrast, Gray has conducted substantial analysis in preparing Appendix 4 as part of his rebuttal of the opinions contained in Mandia's report. Gray's rebuttal opinions on the work Mandia did not perform are a proper criticism of Mandia's methodology because identifying the information not considered in an expert's methodology is an appropriate use of rebuttal expert testimony. *See, e.g.*, *Smith*, 537 F. Supp. 2d. at 1321-30.

Finally, Gray never opined about Plaintiffs' burden of proof, and Gray has not applied legal analysis to his evaluation of Mandia's conclusions. In fact, Gray expressly confirmed in his deposition that he is not qualified to provide legal conclusions regarding the issues in this case. *See* Fuchs Decl. ¶ 4, Ex. D (6/9/10 Gray Tr.) at 440:1-441:20, 444:9-445:10, 472:11-474:6, 582:24-583:13. Gray has not and will not offer any testimony related to burden of proof. Moreover, the Court will undoubtedly offer an instruction on the burden of proof, which will alleviate any confusion. *See Daubert*, 509 U.S. at 596 ("Vigorous cross-examination, presentation of contrary evidence, *and careful instruction on the burden of proof* are the traditional and appropriate means of attacking shaky but admissible evidence.") (emphasis supplied).

VI. GRAY PROPERLY REBUTS MANDIA'S CONCLUSIONS AND OPINIONS RELATED TO TERMS OF USE AND LICENSING

Gray does not offer opinions on legal topics; rather, Gray criticizes Mandia's conclusions related to terms of use and licensing by pointing out that Mandia conducted no work in order to reach these conclusions. Plaintiffs simply misunderstand the purpose of Gray's testimony.

Mandia "opines" on the propriety or appropriateness of certain TomorrowNow activities by simply passing off opinions of Plaintiffs' lawyers related to software license agreements and Oracle website terms of use as his own, without any independent analysis or expertise. A review of Mandia's report demonstrates the misleading nature of some of his conclusions:

- "[A] limited review of Oracle's log files and Data Warehouse for five [] TN customers identified over 20,000 files downloaded for these customers *for which they had no license*." Fuchs Decl. ¶ 3, Ex. C (Mandia Report) ¶ 5.
- "TN programmed Titan to allow automated, mass downloading from Oracle *without regard to any license restrictions a customer may have*." *Id.* ¶ 174.
- TomorrowNow "improperly" accessed Oracle SSMs, systems, and websites to "improper[ly] download[]" from the systems using "inappropriate customer credentials." *See id.* ¶¶ 16, 172, 193-94, 212, 215.

Because Mandia offers overreaching opinions provided by counsel without conducting any independent work or analysis, Gray points out that Mandia is not qualified to make these opinions.[15]

Gray's report properly criticizes Mandia's overreaching conclusions. For example, Plaintiffs' motion claims that in Section 7.7 of his report, Gray offers opinions on terms of use applicable to this case. *See* D.I. 771 (Pls.' Mot. to Exclude Gray) at 16. However, in Section 7.7, Gray is actually criticizing Mandia's lack of analysis of Oracle's terms of use, noting, "the Mandiant Report offers only broad general assertions about the Oracle website Terms of Use and does not indicate that any such Terms of Use were reviewed in reaching any conclusions." D.I. 772 (Polito Decl.) ¶ 1; 772-1 (Ex. A to Polito Decl.) at Gray Report § 7.7. In fact, contrary to Plaintiffs' assertion, Gray said multiple times during his deposition that he was not offering his opinion on licensing and terms of use issues related to this case and that he is not qualified to do

[15] Defendants filed a motion to partially exclude Mandia's testimony based on Mandia's use of assumptions and legal conclusions that he was not qualified to make and for which he performed no analysis. *See* D.I. 780 (Defs.' Mot. to Partially Exclude Testimony of Mandia and Levy). Section V of Plaintiffs' Motion to Exclude Gray attacks Gray's rebuttal to these assumptions and legal conclusions offered by Mandia. Should this Court grant Defendants' motion, the testimony by Gray that Plaintiffs criticize in Section V becomes moot.

so. *See* Fuchs Decl. ¶ 4, Ex. D (6/9/10 Gray Tr.) at 440:1-441:20, 444:9-445:10, 472:11-474:6, 582:24-583:13. Gray's intent was to focus on Mandia's report and the flaws he found therein. *Id.* at 441:13-20, 473:25-474:6. Gray is not offering his opinion on Oracle's terms of use; rather, as a rebuttal expert witness, he is offering his opinion on Mandia's methodology.

As another example, Mandia claims in his expert report that TomorrowNow downloaded materials "without regard to licensing" and that TomorrowNow's business model relied on "improper access to Oracle's systems." Fuchs Decl. ¶ 3, Ex. C (Mandia Report) ¶¶ 4-5. However, in his deposition, Mandia admitted that he is not a lawyer and not a copyright expert. *See* Fuchs Decl. ¶ 7, Ex. G (5/20/10 Mandia Tr.) at 168:2-11. Mandia also admitted that he did not review any software licensing agreements at any time before he submitted his expert report, his use of the term "improper access" conveys that TomorrowNow exceeded the terms of use and was an assumption Plaintiffs' counsel told him to make, and he has no independent expert opinion on whether the terms of use assumption he was told to make is actually valid. *Id.* at 196:2-18, 198:18-199:25; *see also* Fuchs Decl. ¶ 8, Ex. H (5/21/10 Mandia Tr.) at 304:22-306:5. Gray's rebuttal report necessarily includes commentary regarding this glaring problem with Mandia's lack of analysis and overreaching conclusions. *See* D.I. 772 (Polito Decl.) ¶ 1; D.I. 772-1 (Ex. A to Polito Decl.) at Gray Report §§ 7.7, 9.3. Commenting on Mandia's lack of analysis on these topics is not equivalent to offering affirmative opinions on these topics. Gray's comments are relevant, reliable, and entirely appropriate and necessary in his capacity as a rebuttal expert.

Plaintiffs misleadingly claim that Gray suggests TomorrowNow's customers may have been entitled to Oracle's software "regardless of the source of the software." D.I. 771 (Pls.' Mot. to Exclude Gray) at 17. That is not the opinion Gray offers. Rather, Gray identifies a gap in Mandia's analysis: "What the Mandiant Report fails to disclose is whether TomorrowNow's customers were entitled to the allegedly Copyright protected software that TomorrowNow allegedly acquired on their behalf. In other words, the Mandiant report does not address whether TomorrowNow's customers were entitled to the software regardless of the source of the software." D.I. 772 (Polito Decl.) ¶ 1; D.I. 772-1 (Ex. A to Polito Decl.) at Gray Report § 8.3. Gray does not opine on the propriety of TomorrowNow's conduct; rather, he criticizes Mandia's

improper conclusions, such as the conclusion for which Mandia has done no analysis that TomorrowNow acted "without regard to licensing." Fuchs Decl. ¶ 3, Ex. C (Mandia Report) at ¶ 5.

Plaintiffs also claim that Gray asserts that TomorrowNow, as its customers' agent, properly downloaded thousands of SSMs, so long as it was acting on behalf of an Oracle customer. *See* D.I. 771 (Pls.' Mot. to Exclude Gray) at 18. Again, Plaintiffs' claim is wholly misleading. Gray simply points out inconsistencies he found in Mandia's report. Mandia admitted in his report that agents of Oracle's customers can download files from Oracle's websites, but he then made broad assertions about the illegality of TomorrowNow's conduct. *See* D.I. 772 (Polito Decl.) ¶ 1; D.I. 772-1 (Ex. A to Polito Decl.) at Gray Report §§ 7.7, 9.2 (quoting ¶ 173 in Mandia report). Gray does not opine that TomorrowNow acted properly or improperly. In fact, Gray testified several times in his deposition that he is not offering his opinion on the legality of TomorrowNow's activities and that he is not qualified to do so. *See* Fuchs Decl. ¶ 4, Ex. D (6/9/10 Gray Tr.) at 440:1-441:20, 442:22-445:10, 477:13-479:4, 496:11-497:12, 582:24-583:13. Gray merely performs his duties as a rebuttal expert by noting the problems he found with another expert's analysis. Plaintiffs' disagreement with Gray's opinions regarding these inconsistencies is not grounds for exclusion.

VII. GRAY'S "LIST OF MATERIALS CONSIDERED" IS NOT IMPERMISSIBLY BROAD

A. Plaintiffs Cannot Credibly Claim That They Do Not Know the Materials on Which Gray Relies.

Gray's "list of materials considered" (Appendix 3 to his report) must be read in conjunction with his report and the footnotes therein. In that context, it is clear that Gray specifically identifies each document, database, server, file, transcript, or exhibit on which he relies in each of the 213 footnotes to his report. *See* D.I. 772 (Polito Decl.) ¶ 1; D.I. 772-1 (Ex. A to Polito Decl.) at Gray Report; Fuchs Decl. ¶ 1, Ex. A (6/8/10 Gray Tr.) at 250:14-24 (confirming that his report contains or refers to all data and other information on which he relied in forming opinions contained in his report). Moreover, Gray testified that the citations in his

report were the best source of information for the materials on which he relied. *See* Fuchs Decl. ¶¶ 1, 4, Ex. A (6/8/10 Gray Tr.) at 239:19-25 (referring to documents identified in report in response to questioning on materials on which Gray relied), 250:14-24; Ex. D (6/9/10 Gray Tr.) at 382:2-383:11 (confirming that "the citations that are in the body of my report are things that I relied upon").

Plaintiffs point to five items that they believe Gray did not sufficiently identify as materials he considered: (1) "Plaintiffs' Deposition Exhibits - 1-1880," which is simply a folder containing separate .pdf files for each of Plaintiffs' deposition exhibits; (2) Titan log files; (3) Titan source code; (4) several deposition transcripts; and (5) "additional documents." D.I. 771 (Pls.' Mot. to Exclude Gray) at 18-20. But Gray does describe all of these items with specificity.

First, the materials on which Gray relies can be precisely determined because Gray specifically identified each of these items in footnotes to his report. *See* D.I. 772 (Polito Decl.) ¶ 1; D.I. 772-1 (Ex. A to Polito Decl.) at Gray Report nn. 61 (Pls.' Tr. Ex. 23), 107 (Titan Log File), 113 (4/1/08 Williams Tr.), 119 (TN-OR00051207); *see also* Fuchs Decl. ¶ 1, Ex. A (6/8/10 Gray Tr.) at 224:23-226:20 (stating that Gray did not rely on Titan source code in forming his opinions). For example, while Plaintiffs assert that Gray cannot "credibly" claim to have reviewed the documents cited in Appendix 3, a comparison of the documents in this Appendix to the documents cited in the footnotes to his report reveals that Gray did review and rely on numerous documents in support of his opinions. *Compare* D.I. 772 (Polito Decl.) ¶ 1; D.I. 772-1 (Ex. A to Polito Decl.) at Gray Report *with* D.I. 772 (Polito Decl.) ¶ 11; D.I. 772-8 (Ex. H to Polito Decl. (Appendix 3 to Gray Report)). As another example, Gray expressly identifies in his report the Titan log file on which he relies. *See* D.I. 772 (Polito Decl.) ¶ 1; D.I. 772-1 (Ex. A to Polito Decl.) at Gray Report n. 107.

Second, Plaintiffs have the information to precisely determine what Gray relies on in forming his opinions. Defendants provided Plaintiffs with an exact copy of "Plaintiffs' Deposition Exhibits - 1-1880" as referenced in Gray's Appendix 3 and deposition testimony. *See* Fuchs Decl. ¶ 9, Ex. I (6/15/10 e-mail from J. Fuchs). Gray testified that he likely reviewed the deposition exhibits that correspond with the deposition transcripts he listed in Appendix 3. *See id.*

¶ 1, Ex. A (6/8/10 Gray Tr.) at 238:1-19. Thus, Gray identified the deposition transcripts and exhibits he considered in the same manner Mandia identified the materials he considered. *See id.* ¶ 10, Ex. J (ORCLX-MAN-000208 – Mandiant: Materials Considered) (citing the 36 full depositions Mandia considered along with each and every exhibit to those depositions). Despite Plaintiffs' sheer speculation to the contrary, Gray also testified expressly that he reviewed "some or all of each of these depositions" listed in Appendix 3. Fuchs Decl. ¶¶ 1, 4, Ex. A (6/8/10 Gray Tr.) at 238:20-23; Ex. D (6/9/10 Gray Tr.) at 534:17-535:24 (testifying that he spent between 10 and 20 hours reviewing just seven of the depositions on his list of materials considered). Finally, Gray specifically identified in Appendix 5 (in step-by-step fashion) the substantial supporting materials on which he relied to reaching his opinions related to "non-accused conduct." D.I. 772 (Polito Decl.) ¶¶ 8, 10; D.I. 772-5 (Appendix 4); D.I. 772-7 (Appendix 5).

B. Appendix 3 Complies with the Requirements of Rule 26.

Gray testified that the materials he considered (listed in Appendix 3) likely have a "bias towards over-inclusion." Fuchs Decl. ¶ 1, Ex. A (6/8/10 Gray Tr.) at 229:15-230:3. Even if Plaintiffs are correct that Appendix 3 is not a proper list of the materials Gray considered and/or relied on, Plaintiffs cite no case law to support the premise that an expert should be excluded for providing a list of the materials received rather than a list of just the materials considered.

In fact, the converse is true. Rule 26 of the Federal Rules of Civil Procedure calls for broad disclosure of the documents considered by a testifying expert. Rule 26(a)(2)(B)(ii) requires disclosure of any documents provided to and reviewed the expert, even if the documents are attorney work product. *See Trigon Ins. Co. v. United States*, 204 F.R.D. 277, 282-83 (E.D. Va. 2001). In *Trigon*, the court discussed the broad disclosure requirements of Rule 26(a)(2)(B), noting that "considered" means "'to reflect on' or 'to think of, come to view, judge or classify'" and concluding that this rule requires disclosure of "all documents that were provided to and reviewed by the expert." *Id.* The court held that the defendant was required to produce attorney work product relied upon by its testifying expert. *See id.* at 284; *see also Fidelity Nat'l Title Ins. Co. of N.Y. v. Intercounty Nat'l Title Ins. Co.*, 412 F.3d 745, 751 (7th Cir. 2005) ("A testifying expert must disclose and therefore retain whatever materials are given him to review in preparing

his testimony, even if in the end he does not rely on them in formulating his expert opinion, because such materials often contain effective ammunition for cross-examination."); *Long Term Capital Holdings v. United States*, No. 3:01 CV 1290 (JBA), 2003 WL 21518555, at *2-3 (D. Conn. May 15, 2003) (finding that rebuttal expert had complied with Rule 26(a)(2)(B) disclosure requirements despite not listing a pricing database as a source he considered, even though his knowledge of the database informed some of his opinions). Gray satisfied the Rule 26 requirements by providing a list of the materials that were provided to him and on which he generally considered in formulating his opinions.

Further, whether or not a party complies with Rule 26(a)(2)(B)(ii) is not a proper subject of a motion to exclude. *See McReynolds v. Sodexho Marriott Serv., Inc.*, 349 F. Supp. 2d 30, 43 (D.D.C. 2004) (holding that "any failure to produce documents is not a basis for invoking exclusion under *Daubert*" where plaintiff's expert destroyed documents he was required to produce under Rule 26(a)(2)(B)).

C. Plaintiffs' Own Experts Have Unclean Hands.

Plaintiffs' experts engaged in the exact same conduct for which Plaintiffs now accuse Gray. For example, Mandia fails to identify with specificity the Titan log files or source code on which he relied in forming his opinions. Instead, Mandia's list of materials considered, which is a ten page, single-spaced exhibit containing reference to over 1,350 documents and other data, identifies the same disk of Titan log files that Gray lists in Appendix 3. Fuchs Decl. ¶ 10, Ex. J (ORCLX-MAN-000208 – Mandiant: Materials Considered). Nowhere in Mandia's report does he specify whether or how he used these specific log files to support his opinions. *See* Fuchs Decl. ¶ 3, Ex. C (Mandia Report). Moreover, while Mandia broadly refers to "Titan source code" in support of his opinions related to Titan, Mandia fails to specifically identify any source code in either his report or list of materials considered. *See id.* at ¶¶ 23, 189; *see also* Fuchs Decl. ¶ 10, Ex. J (ORCLX-MAN-000208 – Mandiant: Materials Considered).

Further, Plaintiffs' expert Daniel Levy testified that while he may have reviewed some files from various servers in the Data Warehouse, he could not recall which specific files he reviewed or the servers on which the files were located. *See* Fuchs Decl. ¶ 11, Ex. K (4/30/10

Levy Tr.) at 78:3-79:1. Likewise, Levy did not include materials from the Data Warehouse on his own list of "Information Considered." Fuchs Decl. ¶ 12, Ex. L (Appendix 4 to Levy report). Additionally, when asked to pinpoint specific sources supporting his opinions, Plaintiffs' law professor expert Douglas Lichtman testified that the basis of his opinions are "much more broad than what the cases have explicitly said," instead referring counsel to well over a decade's "wealth of scholarship." Fuchs Decl. ¶ 13, Ex. M (4/20/10 Lichtman Tr.) at 88:24-89:22. In support of another opinion, Lichtman directed counsel to his "countless" sources—referring to them as "seeds planted everywhere." *Id.* at 189:21-190:8. In response to a request for whether his source is a book, case, or treatise, Lichtman explained that his report "relies on this whole world you reference." *Id.* at 210:22-211:22. And Lichtman could not identify the number, size, languages, or "rough" translations of the code excerpts on which he relied. *Id.* at 304:17-305:14. Thus, Plaintiffs' own experts have been over-inclusive in their lists of materials considered, have omitted relevant information from these lists, and have had difficulty pinpointing specific sources on which they rely.

D. Plaintiffs Have Suffered No Prejudice.

Plaintiffs have knowledge of and access to all of the materials Gray considered. Contrary to Plaintiffs' assertion, Gray did not "fail[] to provide information" as required by Rule 26; the extreme sanction of preclusion under Rule 37 is entirely inappropriate. *See* D.I. 771 (Pls.' Mot. to Exclude Gray) at 20. Even were this Court to determine that Defendants failed to comply with Rule 26(a)(2)(B)(ii), there is no evidence that Plaintiffs have been prejudiced. Factors courts consider when determining whether a discovery violation is harmless include: (1) prejudice or surprise to the party against whom the evidence is offered, (2) the ability of that party to cure the prejudice, (3) the likelihood of disruption of the trial, and (4) bad faith or willfulness involved in not timely disclosing the evidence. *See Lanard Toys Ltd. v. Novelty, Inc.*, No. 08-55795, 2010 WL 1452527, at *6 (9th Cir. Apr. 13, 2010).

None of these factors apply to Gray's alleged over-inclusion in his list of materials considered. Plaintiffs have not been prejudiced because they have a list of everything Gray considered while drafting his report, and they have had the opportunity to cross-examine him on

these materials. Further, the contents of Gray's Appendix 3 will not disrupt trial because Plaintiffs have all of the information they need to assess Gray's opinions in the remaining months before trial begins. Finally, there is no willfulness on Defendants' part to deny Plaintiffs any information. If anything, Gray's "over-inclusiveness" is part of his effort to make absolutely certain he complies with Rule 26(a)(2)(B)(ii). District courts in the Ninth Circuit have shown a reluctance to exclude experts for non-compliance with Rule 26(a)(2)(B) for actions far more egregious than Gray's alleged non-compliance. *See United States ex rel. O'Connell v. Chapman Univ.*, 245 F.R.D. 652, 655-56 (C.D. Cal. 2007) (refusing to exclude expert who was disclosed late and who did not produce complete report); *Paulissen v. U.S. Life Ins. Co.*, 205 F. Supp. 2d 1120, 1126 (C.D. Cal. 2002) (same). There is no prejudice regarding the method in which Gray disclosed the documents he considered that justifies the draconian remedy of entirely excluding his testimony.

VIII. PLAINTIFFS' DISAGREEMENT WITH GRAY'S CONCLUSIONS GOES TO THE WEIGHT OF GRAY'S TESTIMONY, NOT ITS ADMISSIBILITY

The Court should not exclude Gray's testimony because Plaintiffs' complaints are properly addressed by the weight the jury assigns to Gray's testimony. Specifically, Plaintiffs' attacks on Gray's opinions related to the "non-accused conduct" spreadsheet, the work Mandia did not conduct, and Mandia's unsupported conclusions on licensing and terms of use are all challenges to the weight to be assigned to such testimony. *See Clicks Billiards, Inc. v. Sixshooters, Inc.*, 251 F.3d 1252, 1262-63 (9th Cir. 2001) (allowing expert opinion into evidence despite its flaws because faults in methodology, calculations, and critiques of conclusions go to weight and not admissibility). The Ninth Circuit has concluded that courts should not exclude testimony when it will assist the jury and is based on reliable principles. *See Kennedy*, 161 F.3d at 1230-31 (stating that test for determining admissibility of expert testimony is "whether or not the reasoning is scientific and will assist the jury" and confirming that "it is a matter for the finder of fact to decide what weight to accord the expert's testimony" if testimony satisfies these two requirements). Gray's proffered testimony is both reliable and helpful to the jury.

Moreover, Plaintiffs' criticism of the sources on which Gray relies in order to draw his

conclusions are criticisms that go to the weight of this evidence. For example, Plaintiffs' argument that there exists evidence that neither Mandia nor Gray considered to suggest that TomorrowNow may have "improperly" supported two of the customers identified as "non-accused" goes directly to the weight rather than the admissibly of Appendix 4. *See* D.I. 771 (Pls.' Mot. to Exclude Gray) at 9; *see also United Nat'l Maint., Inc. v. San Diego Convention*, No. 07-cv-2172, 2010 U.S. Dist. LEXIS 79541, at *11-12 (S.D. Cal. Aug. 3, 2010) (denying motion to exclude expert because dispute on source of expert's calculation went to weight of opinion and not admissibility). Numerous courts have also held that the sources on which an expert relies can be explored through cross-examination. *See Daubert*, 509 U.S. at 596; *Kennedy*, 161 F.3d at 1230-31; *Pfizer Inc. v. Teva Pharms. USA, Inc.*, 461 F. Supp. 2d 271, 279 (D.N.J. 2006) (in a patent action, noting that defendant's expert "failed to consider some documents that might have affected his opinions" but concluded this was "an issue best addressed by cross-examination"); *Trekeight, LLC v. Symantec Corp.*, No. 04-CV-1479, 2006 WL 5201349, at *6 (S.D. Cal. May 23, 2006) (in commercial dispute over computer security software, allowing plaintiff's technical expert despite defendant's complaints that he "cherry-picked" information supporting his conclusions, noting that such criticisms are more properly handled on cross-examination).

IX. CONCLUSION

For the reasons stated above, the Court should deny Plaintiffs' motion and allow Gray to testify on all opinions expressed in his report, including, but not limited to, on: (1) Appendix 4 and the implications of Mandia's analysis on a customer-by-customer basis; (2) flaws and gaps in Mandia's conclusions; and (3) opinions on Mandia's unsupported conclusions on licensing and terms of use.

Dated: September 9, 2010

JONES DAY

By: /s/ Tharan Gregory Lanier
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