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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)

**DEFENDANTS' REPLY IN SUPPORT
OF DEFENDANTS' MOTION TO
EXCLUDE EXPERT TESTIMONY OF
PAUL C. PINTO**

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

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1 **I. PINTO'S OPINIONS ARE IRRELEVANT**

2 Pinto's opinions and testimony are completely irrelevant and should be excluded in their
 3 entirety as a result of this Court's August 17, 2010 Order granting Defendants' motion to
 4 preclude Plaintiffs from "recover[ing] damages based on 'saved development costs' for any of
 5 their claims," including copyright infringement. ECF No. 762 (8/17/10 Order) at 18-23.
 6 Specifically, citing a lack of "case law supporting a theory of copyright damages *based on 'saved*
 7 *development costs,'*" the Court "decline[d] to permit plaintiffs to seek such damages" as actual
 8 damages for copyright infringement. ECF No. 762 (8/17/10 Order) at 22-23 (emphasis added).
 9 Moreover, the Court specifically noted "that no court in this Circuit has considered 'saved costs'
 10 when calculating a fair market value license, and the Ninth Circuit's 'value of use' analysis says
 11 nothing about 'saved costs.'" ECF No. 762 (8/17/10 Order) at 22.

12 This Court granted the order after considering both Parties' arguments. Defendants
 13 specifically requested that this Court hold that "'[s]aved development costs' are an improper
 14 measure of copyright damages, and as a matter of law, may not be *used to calculate* a 'fair market
 15 value' license form of actual damages." ECF No. 640 (MSJ) at 19 (emphasis added). Plaintiffs
 16 understood that Defendants sought to exclude saved development costs as a matter of law, and
 17 argued in opposition that "[t]he R&D costs SAP saved by using Oracle's software and support
 18 materials are directly relevant to the FMV of Oracle's hypothetical license damages," and that
 19 these costs were "among the *many factors* relevant to FMV of the hypothetical license" ECF No.
 20 677 (Pls.' Opp. to MSJ) at 17-18, 19 (emphasis added). Moreover, Plaintiffs' counsel argued at
 21 the May 5, 2010 hearing that saved development costs are, as a matter of law, relevant to a fair
 22 market value license calculation. *See, e.g.*, Declaration of Tharan Gregory Lanier in Support of
 23 Defendants' Reply ("Lanier Decl.") ¶ 1, Ex. 1 (5/5/2010 Hearing Tr.) at 45-47 (stating, *inter alia*,
 24 that "and of course, value of use would be, well, I'm going to *save*, you know, hundreds and
 25 hundreds of millions, if not more, in *not developing the software*" and that therefore, "we think
 26 it's a legitimate question for the jury to decide, whether a hypothet [sic] – in that *hypothetical*
 27 *negotiation, avoided cost* would be relevant"). Defendants addressed these arguments in reply,
 28 stating "[i]n an apparent attempt to circumvent this problem, Plaintiffs argue that a defendant's

1 saved costs ‘are directly relevant to the FMV of Oracle’s hypothetical license damages’ . . . But
2 Plaintiffs cannot use a fair market value license as a vehicle to recover otherwise impermissible
3 costs.” ECF No. 691 (MSJ Reply) at 4. The Court need go no further. Because Plaintiffs
4 designated Pinto exclusively to “analyze, calculate, and testify to the costs associated with
5 software product development,” excluded saved development costs, Pinto’s opinions should be
6 precluded in their entirety as irrelevant. *See* ECF No. 775-1 (Pls.’ Supp. Expert Disclosures) at 3.

7 Plaintiffs’ attempts to salvage Pinto’s testimony and keep their damages numbers inflated
8 all fail. First, Plaintiffs erroneously argue that, although the Court precluded Plaintiffs from
9 asserting saved development costs as a measure of damages, the Court did not address whether
10 Plaintiffs’ damages expert could use such purported saved costs as a component in one of the four
11 methods to calculate a fair market value license. However, the Court’s order clearly states that
12 Plaintiffs may not recover damages based on saved development costs “as actual damages for
13 infringement” (ECF No. 762 (8/17/10 Order) at 22-23); there is no doubt that, under this Court’s
14 Order, Plaintiffs may no more rely on saved development costs as a *component* in calculating a
15 fair market value license using a particular method than as a stand-alone measure of actual
16 damages. Indeed, Plaintiffs’ argument that Defendants’ motion did not seek to preclude use of
17 saved development costs as a component of a fair market value license calculation is
18 disingenuous in light of the plain language of Defendants’ motion and reply, as well as Plaintiffs’
19 own arguments to this Court. *See infra*.

20 Second, relying on the language in an explanatory footnote, Plaintiffs incorrectly assert
21 that this Court’s Order precluded recovery of what *Oracle spent* on R&D (which has never been
22 sought and was not at issue in Defendants’ motion), but not what Plaintiffs estimate *SAP would*
23 *have spent* on R&D (which is what Pinto purports to estimate). Plaintiffs mischaracterize the
24 Court’s footnote, which, in full, states:

25 Even were there some authority for calculating actual damages
26 under the Copyright Act using a “saved development costs”
27 calculation, the court finds plaintiffs’ calculations to be highly
28 speculative, as they are based on the amounts that Oracle allegedly
spent to develop and/or acquire the intellectual property at issue,
not on what it would have cost SAP for research and development.
As noted above, actual damages based on “value of use” are

1 derived from “the value of an infringer’s use,” and plaintiffs have
2 provided no evidence of what SAP would have spent.

3 ECF No. 762 (8/17/10 Order) at 23 n.5. Contrary to Plaintiffs’ suggestion, this footnote is fully
4 consistent with the Court’s holding, which grants Defendants’ motion to preclude Plaintiffs from
5 seeking what SAP allegedly would have spent to develop the asserted registered works; indeed,
6 the footnote acknowledges that there is no authority for calculating actual damages under the
7 Copyright Act using a “saved development costs” calculation. *See id.* at 23 n.5. That the Court
8 also raises concerns about the “highly speculative” nature of Plaintiffs’ saved development costs
9 calculations does not impact the Court’s holding.¹ *Id.*

10 Third, Plaintiffs seek to save Pinto’s testimony by implausibly asserting that he not only
11 provides an estimate of such prohibited saved costs, but that he also opines on the “other factors”
12 used to evaluate a fair market value license, “including the risks involved in building an
13 alternative product and the added time to market.” ECF No. 843 (Pinto Opp.) at 11. But the so-
14 called “risks involved in building an alternative product and the added time to market” simply
15 amount to the estimated cost savings of not having to build an alternative product—*i.e.*, a
16 defendant’s saved development costs. Indeed, Plaintiffs’ own arguments in summary judgment
17 briefing make this point, when Plaintiffs stated in opposition that Pinto, “explains the relevance”
18 of using saved development costs in a hypothetical license calculation by opining that:

19 the *time and technical and litigation risks* associated with such
20 development would, in my opinion, and based on my experience,
21 significantly factor into a decision by a potential licensee whether
22 to license a product . . . In negotiating the price of licenses, I would
23 regularly consider the avoided costs, *including saved time and*
24 *avoided risks* . . . associated with licensing productized software, as
25 opposed to independently developing software. *Time and cost*, are
26 indeed, the most important considerations to potential licensees in
27 my experience.

25 ¹ Additionally, Plaintiffs’ authority regarding admissibility of damages-related expert
26 testimony is inapposite to the issues at hand, because the experts involved in each case opined
27 about live damages issues. *See, e.g., Jaasma v. Shell Oil Co.*, 412 F.3d 501, 513-14 (3d Cir. 2005);
28 *Smith v. Ingersoll-Rand Co.*, 214 F.3d 1235, 1246 (10th Cir. 2000); *Semerdjian v. McDougal*
Littell, 641 F. Supp. 2d 233, 242 (S.D.N.Y. 2009); *R.A. Mackie & Co. v. PetroCorp Inc.*, 329 F.
Supp. 2d 477, 512-14 (S.D.N.Y. 2004). In contrast, Pinto opines on saved development costs, an
issue that is no longer live in this matter.

1 ECF No. 677 (Opp. to MSJ) at 18. Plaintiffs also stated that their damages expert had concluded
 2 “that the costs, *risks and delays* SAP avoided are relevant to the value of the materials it
 3 infringed.” *Id.* Just as Plaintiffs cannot recover saved development costs for copyright
 4 infringement by calling them a “component” in a fair market value license, neither can Plaintiffs
 5 do so by re-naming Pinto’s saved development cost calculations as “risks” and “time to market.”
 6 Pinto’s opinions regarding, *inter alia*, these purported risks and delays, which Plaintiffs propose
 7 will be used as factors in a fair market value license calculation, do not “logically advance[] a
 8 material aspect of the proposing party’s case” and must also be excluded. *See Daubert v. Merrell*
 9 *Dow Pharms., Inc.*, 43 F.3d 1311, 1315 (9th Cir. 1995).

10 Finally, Plaintiffs’ cases purporting to demonstrate that saved costs are appropriate and
 11 may be considered in calculating a fair market value license are irrelevant in light of this Court’s
 12 Order. Saved development costs have been precluded by this Court for use as a damages measure,
 13 including in a hypothetical license calculation, and it is not appropriate to attempt to re-litigate the
 14 merits of this issue on *Daubert*.²

15 **II. EVEN IF PINTO IS NOT IRRELEVANT, HE IS NOT QUALIFIED AND HIS**
 16 **METHODOLOGY IS UNRELIABLE**

17 Pinto lacks the requisite “knowledge, skill, experience, training, or education” to be
 18 sufficiently qualified as an expert in either Function Point Analysis (“FPA”) or the Constructive
 19 Cost Model (“COCOMO”), and this lack of expertise results in Pinto’s using outdated models
 20 and improper techniques, rendering his ultimate opinions unreliable.

21 **A. Pinto’s “Real-World” Experience Does Not Qualify Him as an Expert.**

22 Pinto’s background is in consultancy, not software valuation, he has no special training in
 23 FPA or COCOMO, he has not published articles on either methodology, and he only recently
 24 joined the International Function Point Users Group (“IFPUG”) after Defendants challenged his

25 ² Plaintiffs’ authority, all patent cases, are inapposite. In *Fresenius*, the non-infringing
 26 alternative was not a product that could hypothetically have been *developed* but a product that
 27 already existed; its existence was used to lower proposed royalty rate. *Fresenius Med. Care*
 28 *Holdings, Inc. v. Baxter Int’l, Inc.*, No. C 03-01431 SBA(EDL), 2006 WL 1646113, at *1 (N.D.
 Cal. June 12, 2006). In *Hanson*, the “saved costs” were the *energy* costs saved by using a more
 energy-efficient product, not any kind of saved *development* costs. *Hanson v. Alpine Valley Ski*
Area, Inc., 718 F.2d 1075, 1077, 1081 (Fed. Cir. 1983).

1 qualifications. *See* ECF No. 774 (Pinto Mot.) at 4-5.

2 Plaintiffs attempt to overcome Pinto's lack of technical training and expertise by relying
3 heavily on his purported "real world" qualifications. However, whether or not an expert uses
4 particular methods in his or her "real" work, he or she must meet the specific legal requirements
5 to qualify as an expert. *See* Fed. R. Evid. 702 (must be "qualified by knowledge, skill, experience,
6 training, or education"); *Sega Enters. Ltd. v. MAPHIA*, 948 F. Supp. 923, 929 (N.D. Cal. 1996)
7 (holding exclusion of expert justified where foundational facts demonstrating qualification not
8 shown); *In re Canvas Specialty, Inc.*, 261 B.R. 12, 17-19 (Bankr. C.D. Cal. 2001) (holding that
9 proponent of testimony must present *evidence* to "show that the expert witness possesses the
10 appropriate expertise"). A witness is not qualified as an expert merely by his or her practical
11 experience. *See Hynix Semiconductor Inc. v. Rambus Inc.*, Nos. CV-00-20905 RMW, C-05-
12 00334 RMW, C-05-02298 RMW, C-06-00244 RMW, 2008 WL 73681, at *1 (N.D. Cal. Jan. 5,
13 2008) ("An expert who relies on experience, however, must 'explain how that experience leads to
14 the conclusion reached, why the experience is a sufficient basis for the opinion, and how that
15 experience is reliably applied to the facts.' The court may not 'simply tak[e] the expert's word
16 for it.'") (quoting Fed. R. Evid. 702, 2000 Advisory Committee Note); *Walsh v. City of Richland*,
17 No. CV-02-5067 EFS, 2005 WL 6201455, at *2 (E.D. Wash. Feb. 24, 2005) (finding expert
18 unqualified to opine on value of economic losses, despite his assertion that calculating salary
19 damages was type of opinion he regularly reached in his work as a vocational consultant); *Morin*
20 *v. McCulloch Corp.*, No. CV 01-6431 SVW (SHx), 2002 WL 34357202, at *3-4 (C.D. Cal. July 3,
21 2002) (holding that purported expert's experience designing warning labels for various products
22 at different points in his career did not qualify him as an expert in the design and evaluation of
23 warning labels); *Fechtig v. Sea Pac. Inc.*, No. C 03-4056 JL, 2006 WL 2982148, at *11 (N.D. Cal.
24 Oct. 17, 2006). Cases in which courts find that an expert is qualified based on practical
25 experience are limited to situations in which the expertise at issue specifically derives from
26 practical experience and does not involve the type of complicated methodologies at issue here.
27 *See, e.g., U.S. ex rel. Suter v. National Rehab Partners Inc.*, Nos. CV-03-015-S-BLW, CV-03-
28 128-S-BLW, 2009 WL 3151099, at *5-6 (D. Idaho Sept. 24, 2009) (allowing expert to opine on

1 manner in which hospital delivered services); *In re Guam Asbestos Litig.*, No. 92-00064A, 1993
2 WL 470426, at *4 (D. Guam Oct. 19, 1993) (allowing expert opinion on hazards of asbestos).
3 Pinto's alleged "real world" experience, which Plaintiffs say "tempers" his analysis, is
4 unscientific (neither FPA nor COCOMO calls for any tempering), and is a cover for his lack of
5 sound, scientific understanding of the models.

6 **B. Pinto is Not Qualified to Opine on Function Point Analysis.**

7 Pinto claims to apply FPA, but he was unable to answer numerous, basic questions
8 regarding FPA at his deposition, and Plaintiffs fail to mention or explain this defect. *See* ECF No.
9 775-4 (Pinto Tr.) at 66:17-67:3 (unable to explain IFPUG rules for distinguishing between output
10 and inquiry), 213:24-217:7 (unable to identify which of the major components used in FPA would
11 be assigned to particular data), 231:11-236:7 (unable to answer basic questions about FPA steps),
12 237:20-239:4 (admitting that his responses may be interpreted as his not knowing the answers).
13 Nor do Plaintiffs address Pinto's admission that he is not a function point specialist, nor a
14 Certified Function Point Specialist. *See* Lanier Decl. ¶ 2, Ex. 2 (Pinto Tr.) at 217:13-17, 217:23-
15 24; ECF No. 775-4 (Pinto Tr.) at 53:2-4. This unrefuted testimony, demonstrates Pinto's lack of
16 FPA qualifications.

17 Although Plaintiffs assert that Pinto does not need these qualifications because he did not
18 use IFPUG-approved FPA, instead using his own, tailor-made 10-Step process as well as the
19 known-inaccurate technique called backfiring (*see* ECF No. 843 (Pinto Opp.) at 11-12), this
20 attempt to excuse Pinto's lack of qualifications fails. In addition to the fact that backfiring is an
21 unreliable methodology, Pinto himself identifies FPA as promulgated by IFPUG as his chosen
22 methodology. *See* ECF No. 775-2 (Pinto Report) at 8 (stating that "[t]he method of Function
23 Point Analysis . . . is actively maintained by the International Function Point Users Group
24 ("IFPUG") . . . I chose to use Function Point Analysis for this assessment because it is recognized
25 by the International Standards Organization ("ISO") as a valid method for assessing the size of a
26 software product and for deriving the associated cost of product development."). Pinto cannot
27 seek to bolster his credibility by claiming to use IFPUG-approved FPA, only to later argue that he
28 does not need the requisite FPA qualifications, because he actually uses his own made-up method.

1 Either Pinto must be qualified to use FPA as approved by IFPUG—a fact that Plaintiffs cannot
2 prove—or Pinto’s report is misleading as to what methodology he uses, and therefore unreliable.³

3 Further, Plaintiffs incorrectly argue that Defendants rely on rebuttal expert David Garmus’
4 opinion that IFPUG-approved FPA is the “better way[,]” and that a dispute between IFPUG-
5 approved FPA and backfiring merely “presents a credibility fight between experts.” *See* ECF No.
6 843 (Pinto Opp.) at 13. Defendants do not rely on Garmus’ opinions when moving to exclude
7 Pinto. Because Pinto claims to use IFPUG-approved FPA (ECF No. 775-2 (Pinto Report) at 8,
8 11), Plaintiffs must demonstrate that he was qualified to do so.

9 **C. Pinto is Not Qualified to Opine on COCOMO.**

10 Just as Pinto is unqualified in FPA, so too is he unqualified in COCOMO, as evidenced by
11 his inability to answer basic questions about COCOMO equations. *See* ECF No. 843 (Pinto Opp.)
12 at 13-14. Pinto’s bald assertions to the contrary do not save him. *See Hynix Semiconductor, 2008*
13 *WL 73681, at *1.* Such evidence of Pinto’s inability to answer questions about equations and
14 variables used in a COCOMO analysis is not misleading; in fact, it demonstrates his lack of
15 facility and expertise with the methodology. *See* ECF No. 775-4 (Pinto Tr.) at 302:15-304:7
16 (unable to identify variables or answer multiple questions about COCOMO equations).⁴

17 Moreover, after failing to identify the equations and variables, Pinto later admitted that
18 these equations were used in his own COCOMO spreadsheet. *See* Lanier Decl. ¶ 2, Ex. 2 (Pinto
19 Tr.) at 305:13-306:16 (discussing a manual cited in his report which also includes the equations).
20 Thus, the formulas discussed during Pinto’s deposition were not “arcane” and do not “only appear
21 in textbooks” as Plaintiffs assert (ECF No. 843 (Pinto Opp.) at 13-14), they were used (but not
22 understood) by Pinto himself. Moreover, Pinto’s inability to recognize and answer questions
23 about these equations is not excused because they are generally “not visible to the user of

24 _____
25 ³ Plaintiffs’ characterization of IFPUG as a group that only Defendants’ expert, David
26 Garmus, endorses implies that Pinto does not need to conform to IFPUG’s requirements. *See*
27 ECF No. 843 (Pinto Opp.) at 12. It is Pinto’s own assertion that he used FPA as “actively
28 maintained by IFPUG” that requires him to conform with its rules and requirements, not the
assertions of Defendants’ expert. *See* ECF No. 775-2 (Pinto Report) at 8.

⁴ Plaintiffs misleadingly argue that Pinto “recognized a number of these variables.” *See*
ECF No. 843 (Pinto Opp.) at 13; ECF No. 775-4 (Pinto Tr.) at 302:15-304:7 (recognizing only
one of the variables in *one* of the three equations presented).

1 COCOMO” (*see* ECF No. 843 (Pinto Opp.) at 14), because Plaintiffs are offering Pinto, not as a
 2 lay witness who uses COCOMO, but as an expert witness, and Plaintiffs must qualify him as such.
 3 Plaintiffs’ argument that failure to answer basic questions about COCOMO is acceptable requires
 4 the Court to take Pinto’s word that he knows what he is doing, despite the evidence to the
 5 contrary; the Court is under no such obligation.

6 A purported expert who has been proved unqualified cannot be allowed to testify simply
 7 because of he can be cross-examined at trial. Though Defendants certainly would question
 8 Pinto’s “competence to estimate software development costs . . . before the jury” (*see id.*),
 9 admitting such an unqualified expert on such a basis would render the Court’s gate-keeping role
 10 meaningless. Plaintiffs fail to meet their burden to demonstrate that Pinto is a qualified expert.
 11 Accordingly, Pinto should be excluded.

12 **D. Pinto’s Use of Outdated COCOMO II.1997 Renders His Opinion Unreliable.**

13 Pinto’s opinions are unreliable because he uses an outdated model for his COCOMO
 14 analysis. *See* Fed. R. Evid. 702; *Salinas v. Amteck of Ky., Inc.*, 682 F. Supp. 2d 1022, 1029-30
 15 (N.D. Cal. 2010); *IMA N. Am., Inc. v. Maryln Nutraceuticals, Inc.*, No. CV-06-344-PHX-LOA,
 16 2008 U.S. Dist. LEXIS 109623, at *10 (D. Ariz. Oct. 17, 2008) (finding experts must apply
 17 method “as it is practiced by (at least) a recognized minority of scientists in their field”) (citation
 18 omitted). The COCOMO method is updated and maintained by the USC Center for Systems and
 19 Software Engineering (*See* ECF No. 775-2 (Pinto Report) at 9 n.5), but Pinto does not use the
 20 current model, COCOMO II.2000, which includes the most up-to-date data set and cost and scale
 21 drivers, and instead erroneously employs an outdated version of COCOMO (known as
 22 COCOMO II.1997). *See* ECF No. 775-4 (Pinto Tr.) at 16:5-13, 111:1-3.

23 Plaintiffs do not (and cannot) argue that COCOMO II.1997 is not outdated; the only
 24 evidence they offer to show that the use of COCOMO II.1997 is reliable is Pinto’s own self-
 25 serving testimony which carries no weight given his lack of expertise. *See* ECF No. 843 (Pinto
 26 Opp.) at 15; *see also Competitive Techs., Inc. v. Fujitsu Ltd.*, 333 F. Supp. 2d 858, 880 (N.D. Cal.
 27 2004) (“the expert’s bald assurance of validity is not enough. Rather, the party presenting the
 28 expert must show that the expert’s findings are based on sound science, and this will require some

1 objective, independent validation of the expert's methodology.") (quoting *Daubert*, 43 F.3d at
2 1316). Moreover, Pinto's testimony demonstrates that use of this version of COCOMO is highly
3 questionable; he admitted that he is not aware of any publications supporting his departure from
4 the published, up-to-date COCOMO II.2000 model. *See* ECF No. 775-4 (Pinto Tr.) at 114:9-14.
5 And relying on Pinto's assertions is especially inappropriate where, as here, evidence has been
6 presented that the model is outdated and unreliable. *See, e.g.*, ECF No. 775-11 (*Software Cost*
7 *Estimation With COCOMO II* (Prentice Hall, July 2000)) at 141-42.

8 Finally, Plaintiffs' argument that Defendants' expert Donald Reifer cannot "question"
9 Pinto's use of the COCOMO model is both a distraction and nonsensical. *See* ECF No. 843
10 (Pinto Opp.) at 16. Defendants do not rely on Reifer's testimony to support the exclusion of Pinto,
11 so this point is irrelevant. Moreover, Reifer was a member of the core team that helped to
12 calibrate COCOMO II and one of the authors of the official release of COCOMO II; certainly he
13 can "question" use of an outdated version. *See* Lanier Decl. ¶ 3, Ex. 3 (Reifer Report) at 8.
14 Reifer has never used COCOMO II.1997 to develop an estimate for a customer precisely because
15 it is superseded and known to be inaccurate. *See* Lanier Decl. ¶ 4, Ex. 4 (Reifer Tr.) at 110:13-20
16 (stating that COCOMO II.1997 is an antiquated model none of the 43 USC affiliate firms use),
17 192:19-25 (explaining that COCOMO II.1997 is unreliable because it inflates costs upward).

18 **E. Pinto's Use of Backfiring Is Unreliable.**

19 The "backfiring" methodology Pinto uses in his purported FPA estimates is unreliable;
20 Plaintiffs' assertions to the contrary are but more self-serving statements from Pinto and
21 denigrating comments about IFPUG.

22 Plaintiffs cannot satisfactorily explain why Pinto's *own source* for backfiring states that
23 backfiring "is (on average) significantly less accurate than normal function point counting" and
24 varies as much as plus or minus 25%. ECF No. 775-12 (ORCLX-PIN-000019) at 3. Instead,
25 they attempt to explain away these reliability concerns through Pinto's self-serving statements
26 that "as I applied it here, [backfiring] is much more accurate, and thus has a considerably tighter
27 accuracy range." ECF No. 845 (Pinto Decl.) at ¶11. However, Pinto must provide more than his
28 word that backfiring is reliable (particularly when there is unrefuted evidence indicating that it is

1 unreliable). *See Daubert*, 43 F.3d at 1315-16 (“[S]omething doesn’t become ‘scientific
2 knowledge’ just because it’s uttered by a scientist; nor can an expert’s self-serving assertion that
3 his conclusions were ‘derived by the scientific method’ be deemed conclusive”) (quoting *Daubert*
4 *v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 590 (1993)); *Competitive Techs.*, 333 F. Supp. 2d at
5 880. Plaintiffs do not provide any objective evidence to support backfiring.

6 Additionally, Plaintiffs try to bolster the reliability of backfiring by pointing to statements
7 made by or about Defendants’ experts, Garmus and Reifer, but both attempts fail. *See* ECF No.
8 843 (Pinto Opp.) at 17. The fact that Garmus’ consulting group sometimes supplies backfiring
9 tables to customers who request them does not render backfiring reliable; Garmus specifically
10 testified that his company only provides backfiring tables for limited situations, tells customers
11 that backfiring has a “huge range,” and includes warnings to customers. *See* ECF No. 844-8
12 (Garmus Tr.) at 246:21-247:25. And Plaintiffs incorrectly imply that Reifer, who is not an FPA
13 expert, endorsed backfiring in a previous case. The exact opposite is true.⁵ When asked whether
14 it would be appropriate use SLOC and backfire to function points, Reifer stated, “I believe it
15 would be *inappropriate* because one is a spec base measure of size, and the other is a physical
16 measure of size.” *See* Lanier Decl. ¶ 5, Ex. 5 (Evolution Tr.) at 96:15-97:8 (emphasis added).

17 Finally, Pinto supports his supposed selection of FPA by citing to IFPUG and its
18 promulgated standards (*see* ECF No. 775-2 (Pinto Report) at 8, 11), and he cannot now escape the
19 fact that his use of backfiring is not a proper step in an IFPUG-approved FPA. *See* ECF No. 774
20 (Pinto Mot.) at 9. Plaintiffs, unable to counter the disapproval of “backfiring,” instead denigrate
21 IFPUG as an organization. ECF No. 843 (Pinto Opp.) at 16. This tactic, of course, completely
22 ignores Plaintiffs’ expert’s own reliance on IFPUG in his report.

23 **F. Pinto’s Purported FPA Methodology Is Unreliable.**

24 Pinto’s 10-Step methodology is unreliable and is not, as Pinto asserts in his report, proper
25 FPA; Plaintiffs do not present sufficient evidence otherwise. Specifically, Plaintiffs do not
26 counter Defendants’ arguments that Pinto’s “Ten-Step Analysis to Determine the Cost of

27 ⁵Reifer did not even purport to use FPA in the *Evolution* case cited by Plaintiffs; rather, he
28 counted SLOC and used COCOMO to evaluate software costs. *See* Lanier Decl. ¶ 5, Ex. 5
(Evolution Tr.) at 95:13-96:3.

1 Development Using Function Point” is unreliable because, *inter alia*, it was not a proper FPA
2 methodology, it was “specifically written and tailored for this case,” has not been published in a
3 peer reviewed journal, and has never been approved by a Certified Function Point Specialist or
4 *any* standards setting organizations, including ISO. *See* ECF No. 774 (Pinto Mot.) at 10. Rather,
5 Plaintiffs seek to denigrate the importance of IFPUG to the field of FPA and to recast the dispute
6 as an argument between the experts. *See* ECF No. 843 (Pinto Opp.) at 3, 18-19. However, it is
7 Pinto who put IFPUG and its standards at issue, by specifically relying on those standards to
8 bolster his report (*see* ECF No. 775-2 (Pinto Report) at 8, 11) and it is disingenuous for Plaintiffs
9 to imply that Pinto’s failure to conform to IFPUG standards is irrelevant. *See* ECF No. 843
10 (Pinto Opp.) at 18. Pinto admitted the faults in his 10-Step Process (*see* ECF No. 775-4 (Pinto Tr.)
11 at 57:14-20, 61:2-9, 176:24-177:18, 177:25-178:1, 212:18-21); no “dispute between the experts”
12 is involved. Plaintiffs’ additional argument that Reifer “used the 10-step methodology in his
13 report” (*see* ECF No. 843 (Pinto Opp.) at 19) grossly mischaracterizes Reifer’s obligatory review
14 of portions of Pinto’s 10-Step process in order to rebut Pinto’s COCOMO analysis. ECF No.
15 844-4 (Reifer Report) at 17 (“Because of its potential impact on the factors used in the COCOMO
16 II model, I *reviewed* Mr. Pinto’s ten-step estimating approach.”) (emphasis added).

17 Moreover, though Pinto admitted that his methodology was “specifically written and
18 tailored for this case,” (*see* Lanier Decl. ¶ 2, Ex. 2 (Pinto Tr.) at 173:6-17, 176:7-14) Plaintiffs
19 erroneously argue that the 10-Step Process was not created for the litigation, and in fact is pre-
20 litigation research that should be admissible. However, Plaintiffs’ authority regarding pre-
21 litigation research is inapposite, as there is no evidence, and Plaintiffs do not provide any, that
22 Pinto sized the PeopleSoft, J.D. Edwards, and Siebel products using his 10-Step Process before he
23 was hired in this case. *See Daubert*, 43 F.3d at 1317 (holding that reliable pre-litigation research
24 existed when “an expert prepares reports and findings before being hired as a witness”).

25 Further, none of the authorities Plaintiffs cite in their motions support the reliability of
26 Pinto’s methodology. While it is true that the three articles cited by Plaintiffs include methods
27 with multiple, numbered steps, almost none of those actual steps are included in Pinto’s own
28 10-Step Process. For example, ORCLX-PIN-000100, cited by Plaintiffs, lists seven steps for the

1 developing a software estimate, but *none* of these seven steps are included in Pinto's 10-Step
 2 Process; the same is true for ORCLX-PIN-000102.⁶ And ORCLX-PIN-000101 contains ten steps,
 3 only four of which are similar, though not identical, to certain of Pinto's steps.⁷ Not only does
 4 Pinto not use the other six steps, meaning that this article does *not* endorse Pinto's 10 Step-
 5 Process, but also the article specifically endorses IFPUG as the authority on FPA. *See* ECF No.
 6 844-12 (ORCLX-PIN-000102) at .002 (stating that "[i]n the [U.S.], the function point metric by
 7 IBM, and now maintained by [IFPUG], is most commonly used for software estimates.").

8 Finally, Pinto's self-serving statements that he "use[d] a variant" of this method at other
 9 firms (*see* Lanier Decl. ¶ 2, Ex. 2 (Pinto Tr.) at 173:11-17) is insufficient to show reliability;
 10 Plaintiffs must point to some objective evidence of reliability. *See Daubert*, 43 F.3d at 1315-16;
 11 *Competitive Techs.*, 333 F. Supp. 2d at 880. Because Plaintiffs' purported "objective" evidence
 12 does not support the reliability of Pinto's methodology, Plaintiffs fail to provide any evidence that
 13 Pinto's 10-Step Process is reliable other than Pinto's say-so.

14 **G. Pinto's Opinion Regarding Software He Failed to Analyze Is Unreliable.**

15 Pinto's improper extrapolation of SLOC counts for two of the four software suites he
 16 purports to estimate, J.D. Edwards World and Siebel, are not reliable, and Plaintiffs provide no
 17 evidence or authority to the contrary. *See* ECF No. 774 (Pinto Mot.) at 11-12; *Salinas*, 682 F.
 18 Supp. 2d at 1030 (extrapolation improper if expert "unjustifiably extrapolated from an accepted
 19 premise to an unfounded conclusion"). First, the fact that Pinto "ran out of time" is irrelevant to
 20 the reliability of his extrapolation. *See* ECF No. 843 (Pinto Opp.) at 19. Whatever Pinto's time
 21 constraints, it was still incumbent on him to apply reliable methodologies.⁸ Moreover, the case

22 ⁶ *Compare* ECF No. 844-11 (ORCLX-PIN-000100) at .003 with ECF No. 775-2 (Pinto
 23 Report) at i (listing the 10 Steps Pinto used); *compare* ECF No. 844-13 (ORCLX-PIN-000102)
 at .002-.009 (listing several different methods of analysis) with ECF No. 775-2 (Pinto Report) at i.

24 ⁷ *Compare* ECF No. 844-12 (ORCLX-PIN-000102) at .002-.005 with ECF No. 775-2
 (Pinto Report) at i.

25 ⁸ Plaintiffs cannot rely on the fact that Reifer operated under time constraints as proof that
 26 Pinto was justified in unreliably extrapolating source code counts. Pinto is required to perform a
 27 reliable analysis, regardless of time pressures. Reifer's time was limited by Plaintiffs' failure to
 28 produce Pinto's code counters until a month before Reifer's report was due and because Reifer
 spent half his remaining time trying to make these inoperable files work. *See* ECF No. 831
 (Reifer Opp.) at 5. Conversely, Pinto's team had the source code for six months. *See* ECF No.
 775-4 (Pinto Tr.) at 46:5-10 (NIIT had the source code from June 2009 to November 2009).

1 law offered by Plaintiffs involves extrapolating the effects of a drug based on different
2 populations or dosages to determine causation, and say nothing about extrapolating for damages.
3 *See In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 289 F. Supp. 2d 1230, 1246 (W.D.
4 Wash. 2003); *Metabolife Int'l, Inc. v. Wornick*, 264 F.3d 832, 843 (9th Cir. 2001). Indeed, the
5 question is not whether extrapolation is sometimes permitted in certain situations, but whether
6 Pinto's extrapolation of SLOC counts was appropriate in this case.

7 Similarly, general assertions within the articles cited in Plaintiffs motion that "estimation
8 by analogy" is sometimes appropriate within organizations does not prove the reliability of
9 extrapolating specific SLOC counts of millions of lines of code—SLOC counts that are then used
10 as inputs in complex and precise mathematical equations. *See* ECF No. 845-1 (Ex. A to Pinto
11 Decl.); 845-2 (Ex. B to Pinto Decl.). Indeed, none of the relevant sections appear to advocate
12 estimation of SLOC counts by analogy. Further, even were extrapolation regarding SLOC counts
13 appropriate in certain situations, something Plaintiffs have not shown, Plaintiffs do not
14 demonstrate that it was reliable in a situation such as this where Pinto extrapolated between
15 software that was written in different languages (J.D. Edwards World and J.D. Edwards
16 EnterpriseOne)⁹ and between software that was written in different languages by different
17 companies (PeopleSoft CRM and Siebel). *See* ECF No. 775-4 (Pinto Tr.) at 284:5-16, 286:11-23.
18 Finally, Plaintiffs' assertion that Pinto's technique of extrapolating a SLOC count between
19 PeopleSoft and Siebel based on the tables in each product is, again, supported only by Pinto's
20 say-so. *See* ECF No. 843 (Pinto Opp.) at 20-21. Despite citing several articles throughout the
21 brief, Plaintiffs are unable to provide one objective source demonstrating that this method is
22 acceptable and reliable; this is insufficient. *See Competitive Techs., Inc.*, 333 F. Supp. 2d at 880.

23 **H. Garmus and Reifer Are Irrelevant to the Question of Pinto's Lack of**
24 **Qualifications and Unreliable Methodology.**

25 In an attempt to distract from Pinto's lack of qualifications and to manufacture a dispute
26

27 ⁹ Plaintiffs' extraneous argument that Pinto's extrapolation may undervalue the product
28 lines fails to prove Pinto's reliability. Arguing that their expert's flawed methodology may
actually benefit Defendants does nothing to satisfy Plaintiffs' burden to show that Pinto's
methodology was reliable under Rule 702.

1 “between the experts,” Plaintiffs imply throughout their brief that Defendants “relied” on their
2 rebuttal experts, Reifer and Garmus, to challenge Pinto’s lack of qualifications and unreliable
3 methodologies. *See* ECF No. 843 (Pinto Opp.) at 2, 12, 13, 16-19. However, Defendants make
4 no mention of their own experts’ preferences for particular methodologies in their motion to
5 exclude Pinto, because such reliance is unnecessary. Rather, Defendants simply assert, based on
6 the evidence presented in the motion, that Pinto is not qualified in COCOMO or FPA and did not
7 apply reliable methodologies in his analysis. Plaintiffs’ assertions regarding Defendants’ experts
8 are merely a ruse to distract from the real issue—Pinto.

9 **III. CONCLUSION**

10 For the foregoing reasons, Defendants’ motion to exclude Pinto should be granted.

11 Dated: September 16, 2010

JONES DAY

12 By: /s/ Tharan Gregory Lanier

13 Tharan Gregory Lanier

14 Counsel for Defendants
15 SAP AG, SAP AMERICA, INC., and
16 TOMORROWNOW, INC.