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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

TERADATA CORPORATION, TERADATA US, INC., and TERADATA OPERATIONS, INC.,

Plaintiffs,

v.

SAP SE, SAP AMERICA, INC., and SAP LABS, LLC,

Defendants.

Case No. 3:18-CV-03670-WHO

DEFENDANTS' NOTICE OF MOTION AND MOTION TO DISMISS FIRST AMENDED COMPLAINT

Date: **October 24, 2018**
Time: **2:00 p.m.**
Judge: **Hon. William H. Orrick**
Courtroom: **2, 17th Floor**

REDACTED VERSION OF DOCUMENT SOUGHT TO BE SEALED

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on October 24, 2018 at 2:00 p.m., or as soon thereafter as the matter may be heard, before the Honorable William H. Orrick, District Judge of the United States District Court for the Northern District of California, San Francisco Division, located at 450 Golden Gate Avenue, San Francisco, California, Defendants SAP SE, SAP America, Inc. and SAP Labs, LLC (collectively "SAP" or "Defendants") will, and hereby do, move the Court for an Order under Federal Rule of Civil Procedure 12(b)(6) dismissing with prejudice all claims asserted in the First Amended Complaint by Plaintiffs Teradata Corporation, Teradata US, Inc., and Teradata Operations, Inc. (collectively "Teradata"). The motion is made and based upon this Notice of Motion and Motion to Dismiss, the accompanying Declaration of Tharan Gregory Lanier and exhibits attached thereto, the complete files and records in this action, oral argument of counsel, and such other and further matters as the Court may consider.

Dated: August 31, 2018

JONES DAY

/s Tharan Gregory Lanier
Tharan Gregory Lanier

Counsel for Defendants
SAP SE, SAP AMERICA, INC., AND SAP LABS, LLC

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INTRODUCTION

Teradata's First Amended Complaint ("FAC") should be dismissed. SAP disagrees with many of the FAC's factual allegations. But even if those allegations are assumed to be true, there are fundamental flaws in the claims that mandate dismissal with prejudice.

Teradata sells databases stored on hard drives that support the operation of separate analytics applications. More than nine years ago, Teradata and SAP engaged in a short-term, limited collaboration to build a "bridge" between Teradata's database and SAP's data warehousing product. Teradata had a limited customer base and wanted to access SAP's users. Teradata approached SAP to request assistance in building the "Bridge Project." The so-called "bridge" was necessary because SAP's software and Teradata's software had vastly different architectures. However, despite the efforts of the parties, only one customer signed up for the joint offering.

For years before the Bridge Project, SAP had been independently developing its own database product, later coined HANA. HANA, which was designed to work seamlessly with all of SAP's products, is a fast, revolutionary database that is successfully competing against product offerings from Oracle, IBM, Microsoft, and Teradata, among others. The latest generation of the HANA product family—S/4HANA, released in February 2015—is a huge success. It is a complete customer solution with transaction services (such as Enterprise Resource Planning ("ERP") software) and analytical services all integrated into one system. Teradata has not been able to compete effectively with S/4HANA because it only focuses on its flagship analytical database and has failed to offer innovative and relevant compelling products. Having fallen behind, Teradata has now elected to sue SAP, making time-barred and conclusory claims for theft of trade secrets and copyright violations related to the parties' unsuccessful collaboration nearly a decade ago. Teradata also has tacked on antitrust allegations that fail to state a claim for tying or attempted monopolization and fail to plausibly allege anticompetitive effects in any properly defined antitrust market.

With respect to the intellectual property claims, the assertion that HANA is the result of anything but SAP's technological innovation, investment, and development is factually

groundless. But even taking the allegations of the FAC as true, Teradata fails to state a valid trade secret or copyright infringement claim. To begin, Teradata does not identify with particularity what the "trade secrets" at issue involve. The FAC vaguely alleges that, during the Bridge Project, Teradata identified "certain inefficiencies" in SAP's own software. But even if this conclusory allegation identified Teradata's trade secret with particularity—and it does not—Teradata's theory contravenes the contractual language that governed the sharing of information between Teradata and SAP. As the FAC acknowledges, several contracts—which are incorporated by reference into the FAC and may be considered on a motion to dismiss—governed the Bridge Project and the parties' sharing and use of information. [redacted] Yet the FAC fails to allege that Teradata actually designated any information confidential or that SAP exceeded its use rights. Where, as here, the parties enter into a confidentiality agreement regarding a particular subject matter, a plaintiff cannot use a trade secret claim to circumvent the contractual rules the parties have chosen for themselves.

Teradata's intellectual property claims also are time-barred. [redacted], and the FAC's allegations make clear that Teradata was on notice of the events underlying its claims well more than two years before filing suit. The FAC itself cites a German media report from more than two years before filing as purportedly revealing SAP's alleged misconduct to Teradata. Indeed, the claims are time-barred even if the statutory three-year statute of limitations applies because the FAC makes it clear that Teradata was on notice of its claims by the time SAP terminated the Bridge Project in 2011. Last, the federal trade secret claim also fails because the DTSA was not enacted until 2016 and does not have retroactive effect.

The antitrust claims fare no better. The FAC alleges that S/4HANA "ties" HANA to ERP software. Yet S/4HANA is not two separate products at all: it is one technologically-integrated product offering advantages that would be unavailable if consumers attempted to combine an

ERP Application and a database on their own. Moreover, the FAC does not plausibly allege that SAP coerces its customers into purchasing HANA, and the FAC's allegations regarding the relevant product market are hopelessly contradictory.

The FAC also claims that SAP is attempting to monopolize the so-called "Enterprise Data Analytics and Warehousing" ("EDAW") market, but the FAC alleges nothing more than that Teradata now has to compete in its favored marketplace. The attempted monopolization claim fails, at the least, because the FAC has not plausibly alleged a dangerous probability of monopolization. Indeed, the FAC does not identify SAP's power in the EDAW market at all.

BACKGROUND AND THE FAC'S ALLEGATIONS

A. The Bridge Project and the Governing Agreements.

The FAC alleges that beginning in 2008, SAP and Teradata worked together to develop a "bridge" between certain SAP software and Teradata databases. Dkt. 24 ¶¶ 16, 30, 31. During this "Bridge Project," *id.* ¶ 31, and pursuant to certain contracts, Teradata allegedly shared trade secrets and copyrighted software with SAP, *id.* ¶¶ 29, 32, 34–36. The Bridge Project had only limited success and throughout its lifetime served only a single customer. *Id.* ¶ 37. SAP terminated the Bridge Project in 2011 and announced an innovative in-memory database product, known as HANA, that introduced a "new, faster database architecture." *Id.* ¶¶ 38-40.

The FAC alleges that the Bridge Project was governed by four contracts (collectively, the "Bridge Project Agreements"): (1) the Software Development Cooperation Agreement ("SDCA"), (2) the Technology Partner Agreement ("TPA"), (3) the 2008 Mutual Non-Disclosure Agreement ("2008 MNDA"), and (4) the 2009 Mutual Non-Disclosure Agreement ("2009 MNDA"). Dkt. 24 ¶ 33. In connection with the Bridge Project, Teradata also provided SAP with access to its database systems for experimental and research purposes; SAP's access was governed by Teradata's "standard" end user license ("End User License" or "EUL"). *Id.* ¶ 36. Teradata fails to attach these contracts to the FAC, but the Court may consider them on a motion to dismiss because they form the basis for its claims. *See id.* ¶¶ 33-36; *Khoja v. Orexigen Therapeutics, Inc.*, --- F.3d ----, 2018 WL 3826298, at *9 (9th Cir. Aug. 13, 2018); *Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005).

SDCA (Lanier Decl. Ex. A): [redacted]

TPA (Lanier Decl. Ex. B): [redacted]

MNDAs (Lanier Decl. Exs. C-D): [redacted]

SAP believes that the FAC's reference to a "December 2008 MNDA," Dkt. 24 ¶ 33, is an error, because [redacted] Moreover, the only copy of a 2008 MNDA that SAP has located

(Lanier Decl. Ex. D) is dated June and not December 2008. SAP has been unable to locate an executed copy of the 2008 MNDA, but the 2009 MNDA has substantively identical terms and supersedes any prior MNDAs. *See* Lanier Decl. Ex. C § 15; *id.* Ex. A § 14.7.

End-User License (Lanier Decl. Ex. E): The EUL provides the terms of use for Teradata Express, the limited trial version of Teradata Database that the FAC alleges SAP reverse engineered. Dkt. 24 ¶¶ 36, 46. The EUL only prohibits reverse engineering "for purposes of illegally obtaining the Software's source code." Lanier Decl. Ex. E § 3. It provides that "[a]ny claim or action must be brought within two years after the cause of action accrues." *Id.* § 10.

* * *

Notably, Teradata does not allege that SAP breached any provision in the Bridge Project Agreements, including the confidentiality provisions. Nor does the FAC allege that any of Teradata's purported trade secrets were identified as confidential at the time of disclosure. Nonetheless, the FAC alleges in conclusory form that Teradata shared "trade secrets" with SAP during the Bridge Project, including unidentified "innovative techniques" for optimizing speed and efficiency. Dkt. 24 ¶¶ 34–35.

B. SAP HANA & S/4HANA

In 2011, SAP terminated the Bridge Project, with only one installed customer. During the same year, SAP officially announced and demonstrated HANA for SAP BW "to create what purported to be an EDAW-type environment." Dkt. 24 ¶¶ 37-40. HANA is "both types of database required by" large customers: "a transactional database that allows for the processing of transactional data in real-time," and a database "that can enable enterprise analytics." *Id.* ¶ 42.

Initially, there was allegedly relatively little demand for HANA because of the "size and complexity of [large customers'] database needs," Dkt. 24 ¶ 81, and the expense of hardware costs to host large in-memory databases. In February 2015, however, SAP introduced a fully-integrated product known as S4/HANA, *id.*, which combines ERP applications and "a database solution with integrated software to perform data analytics." *Id.* ¶ 42.

The FAC alleges that because S/4HANA purports to offer "some or all of the functionality offered by Teradata," the "vast majority" of large-scale customers who choose to purchase

S/4HANA will also choose to abandon Teradata, Dkt. 24 ¶ 92, and thus SAP has hindered Teradata's ability to compete in the EDAW market, *id.* ¶ 55.

LEGAL STANDARD

To avoid Rule 12(b)(6) dismissal, the plaintiff must "state a claim to relief that is plausible on its face," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007), with "more than a sheer possibility that a defendant has acted unlawfully," *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The Court presumes the plaintiff's allegations to be true and draws all reasonable inferences in its favor. *See Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). But the court is not required to accept as true "allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008). Moreover, "[t]hough a court generally is obligated to regard the well-pleaded facts of a complaint as true when deciding a Rule 12(b)(6) motion, that principle gives way when the allegations contradict documents attached to the complaint or incorporated by reference." *Groves v. Kaiser Found. Health Plan, Inc.*, 32 F. Supp. 3d 1074, 1079-80 n.4 (N.D. Cal. 2014).

ARGUMENT

I. TERADATA'S TRADE SECRET CLAIMS SHOULD BE DISMISSED.

A. The FAC Fails to Allege That SAP Engaged in Conduct Prohibited By the Bridge Project Agreements.

To state a claim for trade secret misappropriation, a plaintiff must plausibly allege that the defendant knew or had reason to know that the purported trade secret was acquired by improper means, or under circumstances giving rise to a duty to maintain its secrecy or limit its use. *See* 18 U.S.C. § 1839(5)(A)-(B); Cal. Civ. Code § 3426.1(b)(1)-(2). This is fatal to Teradata's claims.

A "written non-disclosure agreement supplant[s] any implied duty of confidentiality that may have existed." *Marketel Int'l, Inc. v. Princeline.com, Inc.*, 36 Fed. App'x 423, 425 (Fed. Cir. 2002) (California law) (applying *Union Pac. R.R. Co. v. Mower*, 219 F.3d 1069, 1076 (9th Cir. 2000) (Oregon law)). Trade secret claims are subject to dismissal if the disclosing party failed to comply with a contractual requirement to designate the allegedly-misappropriated information as confidential upon disclosure, *see Convolve Inc. v. Compaq Computer Corp.*, 527 Fed. App'x 910,

924-25 (Fed. Cir. 2013), or if the alleged misconduct complied with a governing agreement, *see S. Cal. Inst. of Law v. TCS Educ. Sys.*, 2011 WL 1296602, at *8 (C.D. Cal. Apr. 5, 2011).

In *Convolve*, the plaintiff failed to designate its information as confidential at the time of disclosure, as required by the underlying agreements. 527 Fed. App'x at 924-25. Applying "general principles of California contract law," the Federal Circuit held that when parties have "contracted the limits of their confidential relationship," one cannot "circumvent its contractual obligations or impose new ones . . . via some implied duty of confidentiality." *Id.* Thus, if a plaintiff fails to allege compliance with the disclosure terms of the parties' confidentiality agreement, the trade secret claim necessarily fails because the defendant has not acquired or used the allegedly-proprietary information *improperly*. *See id.*[1]

The FAC alleges that Teradata disclosed its trade secret information "subject to the terms of the parties' agreements." *See* Dkt. 24 ¶¶ 33-35. The FAC also alleges that those contracts governed permissible use of information shared by the parties, including the information SAP allegedly misappropriated. *Id.* ¶ 45. Critically, however, the FAC does not assert a breach of contract claim, and the FAC fails to supply factual allegations sufficient to raise a plausible inference that SAP breached any of its contractual obligations. To the contrary, much of what the FAC alleges as purported misconduct (which SAP denies) is expressly permitted by the relevant provisions of the Bridge Project Agreements.

First, [redacted] The FAC does not allege, however, that Teradata ever designated as confidential or proprietary any of the

[1] *Convolve* noted that "[c]ommon sense leads to the same conclusion," 527 Fed. App'x at 925, and courts applying other states' enactments of the Uniform Trade Secrets Act agree. "It should be obvious" that "the party choosing to apply or not to apply the label cannot later claim confidentiality for unlabeled material." *Nilssen v. Motorola, Inc.*, 963 F. Supp. 664, 680 n.17 (N.D. Ill. 1997) (Illinois law). "There can be no misappropriation where acquisition, disclosure, and use of a trade secret have been expressly authorized by contract." *Babcock & Wilcox Co. v. Areva NP, Inc.*, 788 S.E.2d 237, 260 (Va. 2016) (Virginia law).

information it allegedly shared and SAP purportedly misappropriated. Therefore, this information was not "[a]cquired under circumstances giving rise to a duty to maintain its secrecy or limit its use." 18 U.S.C. § 1839(5)(B)(ii)(II); Cal. Civ. Code § 3426.1(b)(2). [redacted], Teradata cannot at this late date retroactively assert that information it freely shared actually was secret.

Second, the FAC alleges that "during the Bridge Project, Teradata identified certain inefficiencies in SAP's software" and "suggested solutions," Dkt. 24 ¶ 35, but it does not say what they were or that Teradata identified them as confidential or proprietary. Moreover, [redacted], and the FAC does not allege SAP breached this license. Likewise, the FAC purports to assert misappropriation of trade secret techniques for optimizing data storage and retrieval, Dkt. 24 ¶¶ 101-103, 110-112, but it fails to mention that [redacted] The FAC also ignores [redacted] Thus, "the Complaint alleges no facts that suggest anything other than Agreement-compliant use." *S. Cal. Inst. of Law*, 2011 WL 1296602, at *7–8.

B. The FAC Fails to Identify Trade Secrets with Sufficient Particularity.

Dismissal is warranted when "[t]he allegations identifying the purported trade secret are vague and conclusory, and consist of a generic list of categories of various types of information." *BladeRoom Grp. Ltd. v. Facebook, Inc.*, 2015 WL 8028294, at *3 (N.D. Cal. Dec. 7, 2015).

> Before a defendant is compelled to respond to a complaint upon claimed misappropriation or misuse of a trade secret and to embark on discovery which may be both prolonged and expensive, the complainant should describe the subject matter of the trade secret with sufficient particularity to separate it from matters of general knowledge in the trade or of special knowledge of those persons who are skilled in the trade, and to permit the defendant to ascertain at least the boundaries within which the secret lies.

Farhang v. Indian Inst. of Tech., 2010 WL 2228936, at *13 (N.D. Cal. June 1, 2010) (citing *Diodes, Inc. v. Franzen*, 260 Cal.App.2d 244, 253 (1968)).

As noted above, the FAC alleges that during the Bridge Project, Teradata identified "certain inefficiencies" in SAP's software and offered "suggested solutions," but does not identify what these inefficiencies or solutions were. Dkt. 24 ¶ 35. The FAC also alleges that Teradata "conveyed numerous other trade secrets" to SAP, but it does not narrow this catch-all phrase other than to allege unspecified "innovative techniques" for "optimizing . . . speed and efficiency," *id.*, and it does not explain how optimization techniques could have been misappropriated when [redacted] These vague descriptions fall well short of the reasonable particularity required to state a valid claim for trade secret misappropriation. *Cf. Loop AI Labs Inc. v. Gatti*, 195 F. Supp. 3d 1107, 1114-15 (N.D. Cal. 2016).

C. The Trade Secret Claims Are Time-Barred.

Teradata did not bring its claims within [redacted] or even within the statutory three-year limitations period that would apply in absence of the SDCA.

1. [redacted] *Because Teradata Became Aware of the Events Giving Rise to Its Claims More than Two Years Before Filing Suit.*

Parties may contract to a specific limitations period. *See, e.g.*, *Tompkins v. 23andMe, Inc.*, 840 F.3d 1016, 1032 (9th Cir. 2016). [redacted] But Teradata became aware of the acts underlying its claims no later than September 2015, more than two years before Teradata filed this action in June 2018.

According to the FAC, the German news magazine *Der Spiegel* published an article in September 2015 disclosing that an internal SAP auditor had alleged that "SAP misappropriated proprietary and confidential information from Teradata that SAP engineers obtained during the Bridge Project." Dkt. 24 ¶ 47. Teradata was aware of this at the time. Paragraph 51 of the FAC alleges that "[a]s a result of *Der Spiegel*'s probe and the resulting article, Teradata began investigating these allegations." Dkt. 24 ¶ 51. There is thus no question that by September 2015—more than two years before filing suit—Teradata suspected or should have suspected wrongdoing, and thus was forced to decide "whether to file suit or sit on [its] rights." *Jolly v. Eli Lilly & Co.*, 44 Cal. 3d 1103, 1110-11 (1988).

2. The FAC Fails to Allege Facts Sufficient to Invoke [redacted] But as noted above, the FAC does not allege a theft of trade secrets claim at all, let alone one that could be adjudged "willful misconduct."

"Willful misconduct" involves a "positive intent actually to harm another or to do an act with a positive, active and absolute disregard for its consequences." *Manuel v. Pac. Gas & Elec. Co.*, 173 Cal.App.4th 927, 947 (2009) (quotation marks and citation omitted). Willfulness must be alleged with particularity under Rule 9(b). *See Cooper Interconnect, Inc. v. Glenair, Inc.*, 2015 WL 13722129, at *4 n.4 (C.D. Cal. Feb. 3, 2015). Generalized allegations are insufficient where the complaint does not plead willfulness or malice by specific individuals with particularity. *See Taiwan Semiconductor Mfg. Co. v. Tela Innovations, Inc.*, 2014 WL 3705350, at *6 (N.D. Cal. July 24, 2014).

Here, the FAC summarily alleges that SAP engaged in "willful and malicious" misappropriation and "willful" copyright infringement. Dkt. 24 ¶¶ 104, 113, 122. Yet these conclusory allegations are unsupported by factual allegations that any SAP leader acted with the intent to harm Teradata. Paragraphs 43-44 allege that Dr. Vishal Sikka and other unnamed "HANA developers" and "key SAP employees" either used Teradata's alleged trade secrets or "were aware of and supported SAP's misappropriation," but they do not allege intent or conscious

disregard of harm to Teradata. *See Manuel*, 173 Cal.App.4th at 947. And, as explained in Part I.A above, [redacted] These are not plausible allegations of any misconduct at all, let alone "willful misconduct."

3. Teradata's Claims Are Time-Barred Under the Statutory Three-Year Limitations Period Even if [redacted] Does Not Apply.

Even if [redacted] does not apply, Teradata's claims are untimely under the three-year statute of limitations. *See* 18 U.S.C. § 1836(d); Cal. Civ. Code § 3246.6. Because Teradata alleges that SAP misappropriated trade secrets before the 2011 announcement of HANA for SAP BW in direct competition with Teradata's EDAW product (Dkt. 24 ¶¶ 38-46), its claims are time-barred unless saved by the delayed discovery rule.

To plead delayed discovery, the plaintiff bears the burden of "specifically plead[ing] facts to show (1) the time and manner of discovery *and* (2) the inability to have made earlier discovery despite reasonable diligence." *Grisham v. Philip Morris U.S.A., Inc.*, 40 Cal. 4th 623, 638 (2007) (quotation marks and citation omitted). Teradata, however, fails to allege facts supporting either requirement. In particular, Teradata fails to allege facts demonstrating that, "despite diligent investigation of the circumstances of the injury, [it] could not have reasonably discovered facts supporting the cause of action within the applicable statute of limitations period." *Fox v. Ethicon Endo-Surgery*, 35 Cal. 4th 797, 809 (2005). Teradata must show that it conducted a diligent investigation and that such an investigation would not have revealed the cause of its injuries because it lacked "the opportunity to obtain knowledge from sources open to [its] investigation." *Id.* at 807-08 (quotation marks and citation omitted).

SAP publicly announced that it was working on "new, faster database architecture" (HANA) in "2009, just months after the Bridge Project formally began." Dkt. 24 ¶ 38. Teradata believed (even if erroneously) that SAP developed and deployed HANA in less than a year, and determined that "SAP could not have so quickly developed … HANA … without its theft of Teradata's trade secrets." *Id.* ¶¶ 3, 38-39. And SAP allegedly disclosed by 2011 that HANA created "an EDAW-type environment," which Teradata concluded had "a similar type of database

architecture as that pioneered by Teradata." *Id.* ¶ 39. Indeed, SAP announced HANA for SAP BW—designed to do "the same thing" as the Bridge Project's Teradata Foundation—in September 2011, "just days" after SAP terminated the Bridge Project in August 2011. *Id.* ¶ 40.

Despite awareness of these facts well before the *Der Spiegel* article was published in September 2015, the FAC contains no allegations showing that Teradata "conduct[ed] a reasonable investigation of all potential causes of [its] injury," and did not simply "wait for the facts." *Fox*, 35 Cal. 4th at 815; *Jolly*, 44 Cal. 3d at 1111. Having failed to conduct a reasonably diligent investigation, Teradata cannot now speculate what such an investigation might have revealed. *Doe v. Roman Catholic Bishop of Sacramento*, 189 Cal.App.4th 1423, 1432-34 (2010). Instead, Teradata's "failu[re] to take the steps a reasonably diligent plaintiff would take in investigating its claims"—such as investigating the finished HANA product and any components potentially containing Teradata confidential information—dooms its claims. *Gabriel Techs. Corp. v. Qualcomm Inc.*, 857 F. Supp. 2d 997, 1006 (S.D. Cal. 2012) (citation omitted).

D. The DTSA Does Not Have Retroactive Effect.

A further reason to dismiss Count 1, the DTSA claim, is that the DTSA was enacted on May 11, 2016, *see* Pub. L. No. 114–153, § 2(e), 130 Stat. 376, 381-82, long after the alleged misappropriation in 2008–2011. The FAC's conclusory allegation that SAP "continues to use Teradata's trade secrets," Dkt. 24 ¶¶ 102–103, is insufficient to trigger the DTSA.

Courts dismiss DTSA claims that do not allege post-enactment use or disclosure of new protected information that is different from information allegedly misappropriated pre-enactment. In *Avago Techs. U.S. Inc. v. Nanoprecision Prods., Inc.*, 2017 WL 412524, at *9 (N.D. Cal. Jan. 31, 2017), the Court found no "authority suggesting that the DTSA allows a misappropriation claim to be asserted based on the continued use of information that was disclosed prior to the effective date of the statute." In *Space Data Corp. v. X*, 2017 WL 3007078, at *3 (N.D. Cal. July 14, 2017), the Court dismissed DTSA claims based on pre-enactment misappropriation, stating that "[e]ven assuming that [the complaint] has alleged 'continuing use,' . . . this is insufficient." And in *Cave Consulting Grp., Inc. v. Truven Health Analytics, Inc.*, 2017 WL 1436044, at *5 (N.D. Cal. Apr. 24, 2017), the Court dismissed DTSA claims for failure to allege specific "facts

about when post-enactment use occurred and whether the information disclosed was new or somehow different from the prior [pre-enactment] misappropriation." DTSA claims alleging continuing use have only survived motions to dismiss when they included specific allegations naming particular actors and post-enactment conduct. *See*, *e.g.*, *Becton, Dickinson & Co. v. Cytek Biosciences Inc.*, 2018 WL 2298500, at *4-5 (N.D. Cal. May 21, 2018). The conclusory allegation that SAP "continues to use Teradata's trade secrets," Dkt. 24 ¶¶ 111-112, is insufficient and should be dismissed. *See Cave Consulting*, 2017 WL 1436044 at *4-5.

II. TERADATA'S COPYRIGHT CLAIM SHOULD BE DISMISSED.

The FAC alleges that SAP committed copyright infringement by reverse engineering in violation of the Bridge Project Agreements and End User License, Dkt. 24 ¶¶ 36, 46, 121, but the copyright claim is no more viable than the trade secret claims.

First, the FAC fails to make allegations sufficient to raise a plausible inference that SAP breached any of its obligations under those contracts; to the contrary, SAP's alleged conduct is expressly permitted. [redacted] the EUL allows reverse engineering that is not "illegal," *id.* Ex. E § 3; and the Copyright Act permits reverse engineering for interoperability, *see* 17 U.S.C. § 1201(f)(2). This is particularly noteworthy because the FAC alleges "fast and efficient interoperation" was "a key challenge of the Bridge Project." Dkt. 24 ¶ 32. Moreover, [redacted]

Second, any copyright claim would be time-barred. Not only does [redacted] apply, but the EUL also sets forth a two-year limitation that broadly applies to "[a]ny claim or action"—including "claims for misuse or infringement of a party's intellectual

property rights"—and contains no exception [redacted] Lanier Decl. Ex. E § 10; *see Entous v. Viacom Int'l, Inc.*, 151 F. Supp. 2d 1150, 1155 (C.D. Cal. 2001) (applying contractual limitations period). The FAC does not allege any reverse engineering by SAP within the two years prior to its filing of this lawsuit or facts that would plausibly establish Teradata was not, or did not have reason to be, on notice of any reverse engineering until sometime within the two years preceding its filing.

Even if the two-year limitation did not apply, Teradata's claim would be time-barred under the three-year copyright statute of limitations, 17 U.S.C. § 507(b), which begins to run when the copyright owner discovers, or reasonably could have discovered, the alleged infringement. *See Polar Bear Prods., Inc. v. Timex Corp.*, 384 F.3d 700, 706 (9th Cir. 2004). The FAC asserts infringement based on alleged reverse engineering before the 2011 launch of HANA for SAP BW. *See* Dkt. 24 ¶¶ 40, 46, 121. Yet the FAC identifies no new facts, discovered in the three years preceding this action, underlying Teradata's infringement claim that could not reasonably have been discovered well before 2015. Teradata has thus failed to plead, as it must, that despite diligent investigation, it could not reasonably have discovered facts supporting its claim within the three-year limitations period. *See Fox*, 35 Cal. 4th at 809.

III. TERADATA ANTITRUST CLAIMS SHOULD BE DISMISSED.

A. The FAC Fails to State a Claim for Unlawful Tying.

The FAC alleges that S/4HANA unlawfully ties SAP's HANA to its ERP applications. Dkt. 24 ¶ 129. "Tying is a form of marketing in which a seller insists on selling two distinct products or services as a package." *Jefferson Par. Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 33 (1984) (O'Connor, J., concurring). "Like other vertical restraints, tying arrangements may promote rather than injure competition." *Brantley v. NBC Universal, Inc.*, 675 F.3d 1192, 1200 (9th Cir. 2012). To establish *unlawful* tying, Teradata must prove: (1) two separate products are involved, the sale of one being conditioned upon the purchase of the other; (2) SAP must have forced the buyer to purchase a tied product "the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms"; (3) SAP must possess economic power in the market for the tying product; and (4) the tying arrangement must significantly and negatively

impact competition in the tied product market. *See Cascade Health Sols. v. PeaceHealth*, 515 F.3d 883, 913-14 (9th Cir. 2008); *Sidibe v. Sutter Health*, 4 F. Supp. 3d 1160, 1179 (N.D. Cal. 2013).

Teradata fails to plausibly allege a tying claim: the FAC does not identify two separate products, but one technologically-integrated product; the FAC does not plausibly allege that SAP coerces customers into purchasing HANA; and the FAC fails to identify a relevant tying market in which SAP has market power. Moreover, Teradata's claim is subject to the "Rule of Reason" but the FAC does not plausibly allege that SAP's purported conduct unreasonably harms competition in any relevant and properly-defined EDAW market.

1. The FAC Does Not Identify a Tie Because S/4HANA is One Integrated Product.

The first element of a tying claim requires the plaintiff to plead and prove that the purported tying product is "separate and distinct" from the alleged tied product. *Rick-Mik Enters., Inc. v. Equilon Enters. LLC*, 532 F.3d 963, 974 (9th Cir. 2008). Teradata's claim fails at the threshold because S/4HANA is one technologically-integrated product.

"[I]t is not an unlawful tying arrangement for a seller to include several items in a single mandatory package when the items may be reasonably considered to constitute parts of a single distinct product." *Int'l Mfg. Co. v. Landon, Inc.*, 336 F.2d 723, 730 (9th Cir. 1964). A single product should be found if the defendant "integrate[s] previously unbundled inputs into a new product design that results in better combined performance than could be obtained if the items were offered unbundled and combined by purchasers or intermediaries." X P. Areeda, H. Hovenkamp & E. Elhauge, *Antitrust Law*, ¶ 1746b, p. 208 (3d ed. 2007). This analysis does *not* call for the Court to "balance[e] the benefits or worth of a product improvement against its anticompetitive effects," for there are no criteria "that courts can use to calculate the 'right' amount of innovation, which would maximize social gains and minimize competitive injury." *Allied Orthopedic Appliances Inc. v. Tyco Health Care Grp. LP*, 592 F.3d 991, 1000 (9th Cir. 2010). Rather, the question—evaluated "narrow[ly] and deferential[ly]"—is simply whether there is a *plausible* claim that the new product combines functionalities in a way that offers

advantages "unavailable if the functionalities are bought separately and combined by the purchaser." *United States v. Microsoft Corp.*, 147 F.3d 935, 948, 950 (D.C. Cir. 1998); *see also Allied*, 592 F.3d at 1000; *Response of Carolina, Inc. v. Leasco Response, Inc.*, 537 F.2d 1307, 1330 (5th Cir. 1976) (holding that an antitrust "violation must be limited to those instances where the technological factor tying the hardware to the software has been designed for the purpose of tying the products, rather than to achieve some technologically beneficial result").

The FAC asserts in conclusory form that there is no justification for SAP's decision to "combine" an ERP application, a transactional database, and analytics capability into "a single product offering." Dkt. 24 ¶ 88. The FAC alleges no facts to support that conclusion and the facts it does allege identify multiple benefits of SAP's integrated product.

Teradata admits that the market desires "fast and efficient interoperation" between ERP applications and analytics; indeed, ensuring such interoperability was the purpose of the Bridge Project. Dkt. 24 ¶ 32; *see also id.* ¶ 75. When a seller is able to ensure that back-end systems can efficiently access ERP-derived data, and the ERP-derived data can be integrated into the back-end systems, both marketability and desirability increase. *Id.* ¶ 80. According to Teradata's own allegations, SAP's S/4HANA product satisfies exactly this market demand by integrating SAP's ERP applications with the company's own database with "various data processing engines." *Id.* ¶¶ 39, 86. S/4HANA thus accomplishes what Teradata itself recognized as a technological boon.

Nor can Teradata plausibly deny that S/4HANA results in better performance than could be obtained by purchasers attempting to achieve similar results on their own. Teradata itself notes that SAP's S/4HANA was "natively written" to operate seamlessly with HANA. Dkt. 24 ¶ 86. Customers were enthusiastic about S/4HANA following its introduction in February 2015 – use of HANA "took off," with sales reaching $2 billion in 2016. *Id*. ¶ 41. The industry "lauded" the head of the SAP development effort and "credited [him] with reversing SAP's stagnant product offerings." *Id*. Teradata's real complaint is that SAP chose to offer this integrated system with HANA, rather than integrating with Teradata's database; the antitrust laws, however, are designed to prevent injury to *competition*, rather than injury to *competitors*. *See Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 734 (9th Cir. 1987).

At root, Teradata's tying claim seeks to challenge product innovation, which is "the essence of competitive conduct," particularly in high-tech industries like computer software. *Foremost Pro Color, Inc. v. Eastman Kodak Co.*, 703 F.2d 534, 542 (9th Cir. 1983). But new product designs are "precisely what the antitrust laws were meant to encourage." *ILC Peripherals Leasing Corp. v. IBM*, 458 F. Supp. 423, 443-44 (N.D. Cal. 1978). Given that there is more than "a plausible claim" that the integration embodied in S/4HANA "brings some advantage," *Microsoft*, 147 F.3d at 950, Teradata's tying claim must fail.

2. The FAC Does Not Plausibly Allege that SAP Coerced Customers into Purchasing HANA.

Teradata's tying claim fails also because the FAC fails to plausibly allege that SAP "coerced a buyer to purchase the tied product," here HANA. *Paladin Assocs., Inc. v. Montana Power Co.*, 328 F.3d 1145, 1159-60 (9th Cir. 2003).

The "essential characteristic" of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product "to *force* the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms." *Cascade Health*, 515 F.3d at 913-14 (citation omitted); *see also Paladin*, 328 F.3d at 1159 ("A plaintiff must present evidence that the defendant went beyond persuasion and coerced or forced its customer to buy the tied product in order to obtain the tying product.").

"[P]roducts are not tied unless the supplier refuses to accommodate those who prefer one without the other." IX *Antitrust Law*, ¶ 1700i, p. 9. If a buyer is free to purchase either product by itself, "there is no tying problem." *N. Pac. R.R. Co. v. United States*, 356 U.S. 1, 6 n.4 (1958). Thus, absent an allegation that the purchase of the alleged tied product is *required* as a condition of sale of the alleged tying product, "rather than as a prerequisite to practical and effective use of the tying product[]," the coercion element is not satisfied. *Foremost Pro*, 703 F.2d at 541-42.

The FAC alleges that SAP tied HANA to its Top-Tier ERP Applications. Dkt. 24 ¶ 129. But Teradata also admits that customers can still buy stand-alone versions of SAP's Top-Tier ERP Applications without also purchasing HANA, and that customers can simply continue using their current stand-alone ERP applications with support from SAP (at least until 2025). *Id.* ¶¶ 67,

89. To be sure, the FAC alleges many of the world's leading companies prefer to migrate to SAP's fully-integrated S/4HANA product, in which ERP applications are "natively written" to operate most efficiently on HANA. Dkt. 24 ¶¶ 59, 86. Given that customers are still able to purchase prior ERP applications without the HANA database, the fact that sophisticated companies are voluntarily choosing to update their software now does not amount to an antitrust violation. *See* X *Antitrust Law*, ¶ 1756b, pp. 298-99 ("Products *A* and *B* are not tied together when buyers choose the bundle from a defendant who also offers the products separately.").

Teradata's contention that customers have no choice but to upgrade to S/4HANA because SAP has announced that it is "ending support for prior versions of its ERP Applications by 2025" is facially implausible. Dkt. 24 ¶¶ 59, 89. The FAC acknowledges that customers of SAP's Top-Tier ERP Applications—which are the largest and most sophisticated companies in the world—are capable of transitioning to alternative ERP applications within "months or years." *Id.* ¶ 65. The seven years that SAP has committed to support its stand-alone ERP applications, *id.* ¶ 89, provides ample time for companies to transition to another ERP provider if they wish. The fact that customers are voluntarily choosing to adopt S/4HANA now may result in harm to Teradata, as a competitor, as the result of increased competition. But there is no coercion and no harm to competition itself. *See Allied*, 592 F.3d at 1002 (holding that defendant "did not force consumers to purchase" its new technology "simply by discontinuing its support" of an older one that had been compatible with plaintiff's products, and explaining that even "a monopolist has no duty to help its competitors survive or expand when introducing an improved product design").

3. The FAC Fails to Allege a Plausible Relevant Tying Market in Which SAP Has Market Power.

Teradata's tying claim should be dismissed additionally because the FAC's "'relevant market' definition is facially unsustainable." *Newcal Indus., Inc. v. Ikon Office Solution*, 513 F.3d 1038, 1044-45 & n.3 (9th Cir. 2008). The relevant product market identifies the products or services that compete with each other. *See Los Angeles Mem'l Coliseum Comm'n v. NFL*, 726 F.2d 1381, 1392-93 (9th Cir. 1984). "The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product

itself and substitutes for it." *Brown Shoe v. United States*, 370 U.S. 294, 325 (1962). Failure to plead a relevant, valid market in the complaint is grounds for dismissal. *See Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1063 (9th Cir. 2001). Thus, when a complaint makes relevant market "allegations [that] are internally contradictory," it must be dismissed. *Apple Inc. v. Psystar Corp.*, 586 F. Supp. 2d 1190, 1200 (N.D. Cal. 2008).

The FAC's allegations regarding the relevant market plainly are internally contradictory. On the one hand, the FAC alleges that there is a product market for "ERP Applications" used by large-scale, complex enterprises (the "Top-Tier ERP Applications Market"). Dkt. 24 ¶ 56; *see also id.* ¶ 131. Teradata acknowledges that this market—which includes all providers of Top-Tier ERP Applications—contains "significant competitor[s]" to SAP, such as Oracle. *Id.* ¶ 67.

Other allegations in the FAC, however, refer to a much narrower, brand-specific "market." For example, the FAC alleges that "*SAP's* Top-Tier ERP Applications" are themselves a "separate and distinct" market. *Id.* ¶ 129 (emphasis added). Likewise, the FAC alleges that "there are no reasonable or adequate economic substitutes for *upgrades* of *SAP* ERP Applications," suggesting that the outer boundaries of the relevant market do not include ERP applications offered by competing providers. *Id.* ¶ 60 (emphasis added). Teradata's internally contradictory market allegations render the FAC fatally flawed.

To the extent Teradata seeks to avoid pleading and proving that SAP has market power in the ERP Applications market generally—by relying on a product market that includes only SAP's ERP applications—Teradata's gambit must be rejected. "[C]ourts generally conclude that single brands do not constitute separate markets." *Commercial Data Servers, Inc. v. IBM Corp.*, 262 F. Supp. 2d 50, 66 (S.D.N.Y. 2003) (citing cases); *see also Domed Stadium Hotel, Inc. v. Holiday Inns, Inc.*, 732 F.2d 480, 488 (5th Cir. 1984) ("[A]bsent exceptional market conditions, one brand in a market of competing brands cannot constitute a relevant product market."); *Datel Holdings, Ltd. v. Microsoft Corp.*, 712 F. Supp. 2d 974, 986 (N.D. Cal. 2010) ("In general, single brand markets do not constitute a relevant market."). The reason is straightforward: SAP is the world's leading producer of SAP products, "just as the Coca-Cola Company is undoubtedly the leading

producer of Coca-Cola. But it is an established maxim that antitrust law protects competition, not competitors." *Commercial Data Servers*, 262 F. Supp. 2d at 66.

The Supreme Court has adopted a limited exception when the plaintiff identifies a single-brand "aftermarket" to which customers' previous purchases have removed all alternative options. In these cases, market imperfections prohibit customers from imposing market discipline in the aftermarket by switching among competitors in the primary market. *See Eastman Kodak Co. v. Image Tech. Servs.*, 504 U.S. 451, 464-78 (1992); *Psystar*, 586 F. Supp. 2d at 1201.

But the limited *Kodak* exception does not apply here, for several reasons. To begin, "a valid single-brand, derivative aftermarket follows a particular model": a consumer purchases a particular brand of a good, and the nature of that good requires the same consumer to purchase a follow-on good in a derivative aftermarket. *In re ATM Fee Antitrust Litig.*, 2010 WL 2557519, at *7 (N.D. Cal. June 21, 2010). The single-brand market theory thus may be appropriate where an "aftermarket" product (such as repair parts) is "wholly derivative from and dependent upon the primary market" (such as a new copier). *Newcal*, 513 F.3d at 1049.

Teradata, however, does not plausibly allege the existence of a derivative aftermarket. The FAC alleges that customers are forced to "upgrade" their SAP ERP Applications. Dkt. 24 ¶ 98. But the term "upgrade" is simply Teradata's characterization of SAP's S/4HANA product. *See id.* ¶ 86. This application is not wholly derivative of and dependent upon prior ERP applications; it is a stand-alone product integrating ERP applications, analytics, and an in-memory database. "*Kodak* simply does not map onto the facts here…." *Aerotec Int'l, Inc. v. Honeywell Int'l, Inc.*, 836 F.3d 1171, 1179 (9th Cir. 2016); *see also Lee v. Life Ins. Co. of N. Am.*, 23 F.3d 14, 20 (1st Cir. 1994) (declining to extend *Kodak* beyond the "derivative aftermarket" context).

Even if *Kodak* could be extended to the circumstances here, Teradata does not plausibly allege that conditions necessary for a single-brand market are present. Single brand aftermarkets are limited to where a "substantial number" of customers are "too ignorant of 'lifecycle' prices to protect themselves by judicious interbrand comparisons or by contract before they become locked in." *Universal Avionics Sys. Corp. v. Rockwell Int'l Corp.*, 184 F. Supp. 2d 947, 955 (D. Ariz.

2001). Teradata does not allege that the most sophisticated businesses on the planet—"Fortune 1000 companies in the United States, FTSE 100 companies in Europe, and similarly-sized privately-held entities" (Dkt. 24 ¶ 57)—are unable to protect themselves during the lifecycle of their initial ERP application. Its theory, rather, is that once the lifecycle of a customer's initial ERP application has concluded, customers prefer to purchase SAP's newest stand-alone product. But this is simply not the type of "information cost" *Kodak* addressed.

4. Teradata's Tying Claim Must be Assessed Under the Rule of Reason, Which the FAC's Allegations Fail to Meet.

Finally, Teradata's tying claim should be dismissed because—even if it could somehow show that the alleged "tie" was something other than a product improvement that therefore is *per se* legal (*see supra* Part III.A.1)—its claim must be assessed under the Rule of Reason, and the FAC both fails to identify a relevant tied market, and fails to plausibly allege that SAP *unreasonably* harms competition in that tied market.

The FAC alleges that SAP's conduct is *per se* unlawful given its market power[2] and that, alternatively, SAP's conduct constitutes a Rule of Reason violation because it unreasonably restrains competition in the market for EDAW products. *See* Dkt. 24 ¶¶ 135-136.

As a general proposition, the Rule of Reason should be used where alleged conduct presents novel circumstances and uncertain economic effects. *See California ex rel. Harris v. Safeway, Inc.*, 651 F.3d 1118, 1139 (9th Cir. 2011). That is the case here. The *per se* rule is not appropriate in software cases where "the tied good physically and technologically [is] integrated with the tying good." *United States v. Microsoft Corp.*, 253 F.3d 34, 90 (D.C. Cir. 2001). In *Microsoft*, for example, the defendant was accused of integrating its web browser with its Windows operating system: two products that historically were sold separately. *Id.* at 84. In these circumstances, the court explained, application of the *per se* rule would improperly condemn "the first firm to merge previously distinct functionalities." *Id.* at 92. In light of the

[2] Of course, even if Teradata had adequately pled that SAP has market power in a relevant market—and it has not for the reasons explained in Part III.A.3—that would not absolve Teradata from pleading and proving an anticompetitive effect in the tied market to establish a *per se* claim. *See Sidibe*, 4 F. Supp. 3d at 1178-79.

"pervasively innovative character" of software markets, the court held that judicial experience "provides little basis" for believing that "a software firm's decisions to sell multiple functionalities as a package" should be conclusively presumed unreasonable "without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *Id.* at 90-92 (citation and internal quotations omitted); *cf. Foremost Pro*, 703 F.2d at 542–43 (characterizing the development "of a system of technologically interrelated products" as a *per se* unlawful tie "would unjustifiably deter the development and introduction of those new technologies so essential to the continued progress of our economy").

As in *Microsoft*, it cannot safely be concluded that integrating SAP's ERP applications into its in-memory database has so little "redeeming virtue," *N. Pac. R.R.*, 356 U.S. at 5, that there would be so "very little loss to society from [its ban]," such that "an inquiry into its costs in the individual case [can be] considered [] unnecessary." *Jefferson Par.*, 466 U.S. at 33-34 (O'Connor, J., concurring). Teradata's tying claim, if it is to proceed at all, must proceed under a Rule of Reason analysis.

The FAC, however, fails to plausibly allege an antitrust violation under the Rule of Reason. Under the Rule of Reason, "the factfinder must analyze the anti-competitive effects along with any pro-competitive effects to determine whether the practice is unreasonable on balance." *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1413 (9th Cir. 1991). Teradata bears the burden of pleading facts showing a negative impact on competition in the tied market, *Sidibe*, 4 F. Supp. 3d at 1178-79, which requires delineating a relevant market and showing that SAP "plays enough of a role in that market to impair competition significantly." *Bhan*, 929 F.3d at 1413.

As with its definition of the tying product market, the FAC's allegations regarding the tied product market are internally contradictory. The FAC defines the tied product market as the market for EDAW products, which "enable Top-Tier ERP Applications customers to retain, and more importantly to perform complex analytical operations on, vast amounts of data from a wide variety of data streams." Dkt. 24 ¶ 68. Yet the FAC fails to allege that the relevant market—the EDAW market generally—has suffered anticompetitive harm.

Instead, the FAC alleges that SAP has foreclosed competition in only a small subset of this market: the EDAW market for *existing SAP customers*. *Id.* ¶ 129; *see also id.* ¶ 133 (SAP's conduct forecloses competition "in the EDAW Market for SAP's Top-Tier ERP Applications customers."). For the reasons explained above, limiting the tied market to a single-brand product is impermissible.

Nor has the FAC plausibly alleged that SAP's conduct *unreasonably* harms competition in the EDAW market, even when limited to existing SAP customers. As discussed above, the FAC's allegations show that S/4HANA was a significant product innovation, which customers perceived as a benefit. At most, the FAC alleges that, at some point in the future, customers who choose to stay with SAP and adopt S/4HANA may have fewer choices when it comes to EDAW products. *Id.* ¶¶ 77, 92. But "allegations that an agreement has the effect of reducing consumers' choices or increasing prices to consumers does not sufficiently allege a harm to competition. Both effects are fully consistent with a free, competitive market." *Brantley*, 675 F.3d at 1202. Nowhere does the FAC allege, as it must, any "actual anticompetitive effect," *id.*, much less attempt to quantify the anticompetitive harm allegedly resulting from SAP's conduct or show that it outweighs the undeniable pro-competitive benefits the FAC describes.

B. Teradata's Attempted Monopolization Claim Fails Because the FAC Does Not Plausibly Allege a Dangerous Probability of Monopolization.

Finally, the FAC alleges that SAP violated Section 2 of the Sherman Act (15 U.S.C. § 2), by attempting to "monopolize the EDAW market for SAP's Top-Tier ERP Applications customers." Dkt. 24 ¶ 143. This claim fails because the conduct alleged is not anticompetitive, for all the reason discussed above, and because the FAC does not plausibly allege a "dangerous probability" of SAP achieving monopoly power in the EDAW market.

To make out its claim for attempted monopolization, Teradata must specify the market threatened by SAP and SAP's economic power within that market. *United Energy Trading, LLC v. Pac. Gas & Elec. Co.*, 200 F. Supp. 3d 1012, 1020 (N.D. Cal. 2016). Teradata also must demonstrate, *inter alia*, "a dangerous probability of achieving monopoly power." *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1432–33 (9th Cir. 1995) (internal quotation marks omitted).

Monopoly power is "the power to control prices or exclude competition." *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966). Thus, "to determine whether there is a dangerous probability of monopolization," courts "consider the relevant market and the defendant's ability to lessen or destroy competition in that market." *Spectrum Sports, Inc. v. McQuillan,* 506 U.S. 447, 456 (1993).

Once again, the FAC's confused allegations regarding the relevant market—here the market SAP allegedly intends to monopolize—doom its attempted monopolization claim. According to Teradata, the market threatened by monopolization from SAP is the "market for EDAW products." Dkt. 24 ¶ 68. Yet the FAC does not include *any* factual allegations regarding SAP's market share in the EDAW market.

While the market share necessary to show a dangerous probability of monopolization is difficult to quantify, claims involving less than 50% market share in the targeted market generally are rejected. *See M & M Med. Supplies & Serv., Inc. v. Pleasant Valley Hosp., Inc.*, 981 F.2d 160, 168 (4th Cir. 1993); III *Antitrust Law*, ¶ 835c, p. 350.[3] The FAC is bereft of any allegations about competitive conditions in the EDAW Market at all, other than to acknowledge that there are multiple competitors within the market, of which Teradata is one. *See* Dkt. 24 ¶¶ 74-75. The absence of any credible allegation regarding SAP's current or threatened power in the EDAW Market is fatal. *See, e.g.*, *Unigestion Holding*, 305 F. Supp. 3d at 1150-51; *see also RealPage, Inc. v. Yardi Sys., Inc.*, 852 F. Supp. 2d 1215, 1228 (C.D. Cal. 2012).

Rather than allege any "dangerous probability" that SAP will monopolize the EDAW Market, Teradata once again shifts its focus, alleging that SAP is attempting to monopolize "the EDAW Market for *SAP's* Top-Tier Applications customers." Dkt. 24 ¶¶ 143, 147 (emphasis added). Teradata then alleges that "60% of SAP's largest ERP Applications customers . . . are employing or preparing to employ HANA" over some undefined period of time. *Id.* ¶ 148. But

[3] Although the Ninth Circuit has expressed reluctance to adopt "bright-line rules regarding market share in deciding whether a defendant has market power," *Rebel Oil*, 51 F.3d at 1438 n.10, demonstrating a dangerous probability of monopolization requires *some* showing of the defendant's market share in the targeted market. *See, e.g.*, *Unigestion Holding, S.A. v. UPM Tech., Inc.*, 305 F. Supp. 3d 1134, 1151 (D. Or. 2018).

the FAC never alleges that EDAW "for SAP's Top-Tier ERP Applications customers" or EDAW for "SAP's largest ERP Applications customers" is a relevant market.

Nor could such a market—consisting only of SAP's existing customers—constitute a proper relevant market under the antitrust laws, as explained above. "By defining the market in terms of a single class of consumers," Teradata has improperly "create[d] an artificially narrow market which is defined essentially in terms of the practice of which they complain." *Hamilton Chapter of Alpha Delta Phi, Inc. v. Hamilton Coll.*, 106 F. Supp. 2d 406, 413 (N.D.N.Y. 2000). A monopolization claim must be dismissed where, as here, the plaintiff seeks "to limit a product market to a single brand, franchise, institution, or comparable entity that competes with potential substitutes." *Todd v. Exxon Corp.*, 275 F.3d 191, 200 (2d Cir. 2001); *see, e.g.*, *Tanaka*, 252 F.3d at 1063–64 (UCLA women's soccer program does not constitute its own market because other college programs compete to recruit student-athletes).

CONCLUSION

For these reasons, SAP's motion to dismiss should be granted with prejudice.

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Respectfully submitted,

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