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UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 OAKLAND DIVISION

ORACLE USA, INC., *et al.*,

Plaintiffs,

v.

SAP AG, *et al.*,

Defendants.

Case No. 07-CV-01658 PJH (EDL)

PLAINTIFF'S TRIAL BRIEF

Date: June 18, 2012
 Time: 8:30 a.m.
 Place: 3rd Floor, Courtroom 3
 Judge: Hon. Phyllis J. Hamilton

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1 **I. SUMMARY OF CASE**

2 As the Court knows, on October 29, 2010, SAP AG and its wholly owned subsidiary,
3 SAP America, admitted that they “knew or had reason to know of the infringing activity of
4 TomorrowNow” and “intentionally and materially contributed to TomorrowNow’s infringing
5 activity.” These admissions, and the associated ones from SAP subsidiary TomorrowNow
6 (“TN”), became Orders of the Court, exhibits at trial, and were included in the juror notebooks.¹

7 Almost a year after trial, on September 14, 2011, SAP America Chief Operating Officer
8 Mark White pled guilty on behalf of TN to multiple criminal charges.² These included criminal
9 copyright infringement in violation of 17 U.S.C. § 506(a)(1)(A) and 18 U.S.C. § 2319(b)(1) and
10 unauthorized access to a protected computer in violation of 18 U.S.C. § 1030(a)(4).³ White
11 admitted that TN “knowingly accessed Oracle’s computer servers . . . without authorization, or in
12 excess of authorized access, that it did so with the intent to defraud, and that by such conduct, it
13 furthered the intended fraud and obtained things of value, which included Oracle software and
14 related documentation.”⁴ TN pled guilty that it “willfully infringed” Oracle’s copyrights “for the
15 purpose of commercial advantage and private financial gain.”⁵ By virtue of their liability
16 stipulations, SAP AG and its wholly-owned subsidiary, SAP America, both admit they
17 “intentionally and materially contributed” to that willful infringement.⁶ As established at the
18 first trial, this knowledge and contribution came from the very highest levels of SAP AG – its
19 Executive Board of Directors. For this trial, SAP has refused to bring as witnesses any of its
20 non-U.S. directors, leaving only co-CEO Bill McDermott as a Board-level witness.

21 _____
22 ¹ See generally Dkt. Nos. 910-912, 965-966 (JTX0001 to JTX0005).

23 ² See also Plea Agreement, *USA v. TomorrowNow, Inc.*, No. 4:11-cr-642 (N.D. Cal. Sept. 14,
2011), Dkt. No. 13, pp. 2-5.

24 ³ As the Court will recall, SAP agreed in the course of the liability stipulations regarding TN’s
25 conduct that Oracle “may present evidence at trial related to the stipulated claims as background
26 or context for the stipulated claims, and/or as relevant to damages or other claims and defenses
27 not stipulated to or dismissed by the Parties.” Dkt. No. 965 (JTX0004).

28 ⁴ *TomorrowNow, Inc.*, Dkt. No. 13, at 4.

⁵ *Id.* at 5.

⁶ Dkt. No. 965 (JTX0004); Trial Tr. at 1448:12-21.

1 The only thing left to do in this trial is determine the damages that Oracle is entitled to
2 recover. Oracle maintains that it has a right to pursue actual damages measured by the fair
3 market value of the rights infringed, and has separately moved the Court to clarify Oracle’s right
4 to present evidence of the hypothetical license that establishes that value.⁷ If the Court precludes
5 Oracle from pursuing that measure of damages, Oracle will pursue (under objection) actual
6 damages based on lost sales and support revenue, as well as infringers’ profits. *See* 17 U.S.C.
7 § 504(b). In that case, Oracle will show it is entitled to recover at least \$656 million of
8 infringers’ profits, and that it suffered at least \$120.7 million in lost profits as a result of
9 defendants’ infringement.

10 These figures exceed the \$272 million dollar award of lost profits and infringers’ profits
11 the Court approved in its post-trial orders, for three reasons.⁸ First, Oracle presented limited
12 evidence on these theories in the first trial because Oracle chose to focus on the hypothetical
13 license measure. In this trial, Oracle will present an updated analysis and additional evidence to
14 support the infringers’ profits and lost profits amounts. Second, Oracle’s infringers’ profits
15 number in the first trial measured profits through 2008 only. Oracle’s damages expert has now
16 updated those numbers for the passage of time, and will present additional evidence of
17 infringers’ profits generated after 2008. Third, defendants’ admissions of willful infringement
18 now prevent them from deducting expenses from the gross revenue associated with infringement,
19 resulting in a substantially higher measure of infringers’ profits.

20 **II. PLAINTIFF’S DAMAGES**

21 The Parties have briefed the Court at length regarding the availability of, and sufficient
22 evidentiary support for, the fair market value (FMV) measure of actual damages. Oracle will
23 only briefly summarize that discussion below, but refers the Court primarily to its previously
24

25 ⁷ Dkt. No. 1120 (Oracle’s Motion for Clarification, filed on April 17, 2012).

26 ⁸ Dkt. No. 1081 (Order Granting Defendants’ Motion for JMOL, and Motion For New Trial;
27 Order Denying Plaintiffs’ Motion For New Trial; Order Partially Vacating Judgment, dated
28 September 1, 2011).

1 filed Motion for Clarification.⁹ Oracle focuses here on the infringers’ profits and lost profits
2 measures of damages.

3 **A. Infringers’ Profits**

4 Oracle is entitled to infringers’ profits in addition to actual damages, so long as its
5 recovery is not duplicative. *See* 17 U.S.C. § 504(b). To establish infringers’ profits, “the
6 copyright owner is required to present proof only of the infringers’ gross revenue” and the
7 “infringer is required to prove his or her deductible expenses and the elements of profit
8 attributable to factors other than the copyrighted work.” *Id.*; *see Polar Bear Prods., Inc. v. Timex*
9 *Corp.*, 384 F.3d 700, 711 n. 8 (9th Cir. 2004); Ninth Circuit Manual of Model Jury Instructions,
10 Instructions 17.24, 17.27.

11 **1. Oracle Has Identified The Gross Revenue Associated**
12 **With The Infringement**

13 To establish infringers’ profits, Oracle must identify “the gross revenue associated with
14 the infringement.” *Polar Bear*, 384 F.3d at 711 n. 8; *see also* Ninth Circuit Manual of Model
15 Jury Instructions, Instruction 17.24 (“The defendant’s gross revenue is all of the defendant’s
16 receipts . . . [associated with the infringement]. The plaintiff has the burden of proving the
17 defendant’s gross revenue by a preponderance of the evidence.”). That requires “a causal nexus
18 between the infringement and the gross revenue.” *Polar Bear*, 384 F.3d at 711. A sufficient
19 nexus is established where there is “some evidence . . . [that] the infringement at least partially
20 caused the [revenue]” or where the “revenue stream . . . bear[s] a legally significant relationship
21 to the infringement.” *Id.* (recognizing sufficient nexus where infringing photographs were used
22 to promote sales of non-infringing watches).

23 Here, all revenues related to TN, including Safe Passage sales, other SAP sales, and TN
24 sales, tie to defendants’ infringement. Defendants long ago conceded that TN was corrupt to its
25 core. The SAP AG Executive Board’s business case, which the Board used to approve the TN
26 acquisition, called out the illegality of the TN model that relied on local copies of Oracle

27 ⁹ Dkt. No. 1120 (Oracle’s Motion for Clarification, filed on April 17, 2012).
28

1 software.¹⁰ Oracle’s expert, Kevin Mandia, identified software copies – thousands in total – and
2 SAP admitted that each of them infringed Oracle’s copyrights. Internal TN documents make
3 clear that TN’s entire business relied on these copies. “Technically, TNow is currently green (it
4 has local and remote copies that it uses), with a ratio of 99% Yellow (local) and 1% Blue
5 (remote).”¹¹ SAP knew this was true, as it has now confessed. In a “risk management”
6 document, SAP admitted that TN’s entire business model relied at least upon a “marginal legal
7 area” and, accordingly, could not be evaluated for legal liability on a customer-by-customer
8 basis.¹²

9 Due to the capabilities and cost savings TN could offer based on these illegal practices,
10 SAP saw great opportunity to make TN the “centerpiece” of its Safe Passage marketing program,
11 designed to follow SAP’s “1-2-3” plan: commit customers to maintenance with TN, cross-sell
12 them into SAP applications, and up-sell them into other products.¹³ It also knew that, without
13 TN, it would lose “maintenance and license revenue as well as customers.”¹⁴ SAP did not target
14 just a subset of Oracle customers, it went after *all* of Oracle’s new PeopleSoft and J.D. Edwards
15 (and, later, Siebel) customers. It logically started with those with whom SAP had pre-existing
16 relationships, knowing that those customers would pick up the phone and listen to the too-good-
17 to-be-true TN maintenance offer. Indeed, SAP in some cases secured these deals by offering TN
18 services for free. The Safe Passage program “justif[ied] the cost of the [TN] acquisition,” and its
19 role as a loss leader.¹⁵

20 With the illegal TN model as the “key part,” “major cornerstone,” and a “strong[]
21 weapon,”¹⁶ SAP used Safe Passage to take Oracle customers, deprive Oracle of the associated

22
23 ¹⁰ PTX 19.

24 ¹¹ PTX 196 (TN-OR02942461-80 at 79).

25 ¹² PTX 35.

26 ¹³ PTX 6.

27 ¹⁴ PTX 256 (SAP-OR00136760-68 at 66).

28 ¹⁵ PTX 43, p. 1.

¹⁶ Hurst Dep. at 78:8-20; Ziemen Dep. at 302:9-17; 326:18-23; 485:3-14; 504:8-14; 505:6-10;

(Footnote Continued on Next Page.)

1 revenue, and generate hundreds of millions of dollars in SAP license sales. SAP established its
2 Safe Passage program for “all Oracle customers running PSFT/JDE software.”¹⁷ SAP bragged
3 that “TomorrowNow features prominently in everything we’re doing.”¹⁸ In 2006, SAP reported
4 the success of Safe Passage, confirming that the “[p]ipeline [was] steadily increasing in all
5 regions.”¹⁹ SAP expanded the program to include Siebel software promptly after Oracle
6 acquired Siebel Systems, Inc. in 2006. In early 2007, just prior to the filing of Oracle’s lawsuit,
7 SAP had 403 open Safe Passage opportunities as a result of TN’s role as the “cornerstone” of the
8 program.²⁰ Even Oracle’s lawsuit did not stop SAP, as SAP continued to leverage TN to its
9 benefit after acknowledging publicly in July 2007 that TN was engaged in illegal activities.²¹

10 In the second trial, Oracle will show that at least \$656 million in gross revenue is
11 associated with TN, including from SAP related sales and SAP’s Safe Passage program, and
12 therefore attributable to defendants’ infringement.²² This includes maintenance, new license, and
13 consulting revenue from customers associated with TN’s infringing business model through
14 2008, as well as projections of further maintenance revenue through 2012.²³

15 If anything, this is a conservative estimate. Paul Meyer’s calculations for post-2008
16 revenue include only maintenance revenue generated by SAP from TN customers now on SAP
17 software, not new license or consulting revenue from those same customers, even though it is
18 certain SAP did earn new license and consulting revenue attributable to its infringement. Indeed,
19

20 _____
(Footnote Continued from Previous Page.)

21 PTX 161, p. 4; PTX 404, p. 28.

22 ¹⁷ PTX 671.

23 ¹⁸ PTX 435 (emphasis in original).

24 ¹⁹ PTX 275 (SAP-OR-TEMP 00853-68 at 59).

25 ²⁰ PTX 404, p. 28.

26 ²¹ PTX 44.

27 ²² See Supplemental Expert Report of Paul K. Meyer, February 23, 2010, Schedule 41.U.;
Second Supplemental Report of Paul K. Meyer, April 20, 2012, Schedule 50.SSU.

28 ²³ *Id.*

1 the total revenues SAP has earned related to the illegal TN business model, including as the
2 centerpiece of Safe Passage, has likely exceeded \$1 billion over time.

3 The Court will recall that SAP itself forecasted \$897 million in financial benefits from
4 owning TN from 2005 through 2007 alone. It projected that 3,000 to 5,000 Oracle customers –
5 perhaps half of the 10,000 newly acquired PeopleSoft and J.D. Edwards customers – would leave
6 Oracle in response to Safe Passage.²⁴ SAP Board Member Shai Agassi believed SAP could do
7 even better.²⁵ If realized, defendants’ use of TN would yield SAP billions of dollars, undermine
8 Oracle’s \$11.1 billion investment in PeopleSoft, and confer countless other strategic benefits.²⁶

9 By its own account, SAP came quite close to these projections. At the November 2010
10 trial, SAP’s damage expert admitted what Oracle will prove: that SAP earned hundreds of
11 millions of dollars from just a subset of the TN customers it took.

12 When I looked at the customers, I found that the total revenue was
13 the 703 million, the number right at the top there. That’s 703
14 million is that total. So this is revenue of SAP after the
15 TomorrowNow start date [until only December 2008]. So that’s
16 important. We are only looking at the revenue that they generated
17 after the TomorrowNow start date.²⁷

18 In short, Mr. Meyer and Mr. Clarke nearly agree on the right revenue number. The issue
19 is what deductions the law permits and SAP can prove are appropriate.

20 2. Deductions For Defendants’ Expenses Are Not 21 Permitted

22 Since defendants have pled guilty to willful infringement, defendants’ profits are deemed
23 equal to all of defendants’ gross revenue that is associated with the stipulated infringement; no
24 deduction for defendants’ expenses is permitted. *See* Ninth Circuit Manual of Model Jury
25

26 ²⁴ PTX 12, p. 10 (SAP-OR00253288); PTX 24. In April 2008, months before SAP finally shut
27 down TN, “[o]ver 800 customers ha[d] agreed to leave Oracle since Safe Passage program was
28 introduced in early 2005.” PTX 519 (SAP-OR 00098932-33 at 32). In discovery, SAP provided
data for only a small fraction of these customers.

²⁵ Agassi Dep. at 311:12-312:12.

²⁶ PTX 24; PTX 43 (SAP-OR00141570-81 at 71).

²⁷ Clarke Trial Tr. at 1631:4-9.

1 Instructions, Instructions 17.27 (“[g]enerally, deductions of defendant’s expenses are denied
2 where the defendant’s infringement is willful or deliberate”) (citing *Kamar Int’l, Inc. v. Russ*
3 *Berrie & Co.*, 752 F.2d 1326, 1331-32 (9th Cir.1984)); *see also Frank Music Corp. v. Metro-*
4 *Goldwyn-Mayer, Inc.*, 772 F.2d 505, 515 (9th Cir. 1985) (“A portion of an infringer’s overhead
5 properly may be deducted from gross revenues to arrive at profits, at least where the
6 infringement was not willful, conscious, or deliberate.”).

7 **3. The Court’s Previous Judgment Cannot Cap Oracle’s**
8 **Recovery**

9 In its post-trial rulings, the Court determined that the evidence at the first trial supported a
10 judgment of \$272 million against SAP.²⁸ That figure cannot cap Oracle’s recovery here for two
11 reasons. First, that number included deductions for expenses that are no longer available in light
12 of TN’s guilty plea. Second, Oracle introduced limited evidence of infringers’ profits in the first
13 trial because it chose to focus its proof on the hypothetical license measure. Specifically, it
14 limited its evidence to profits through 2008. Those revenues consisted of maintenance, new
15 license, and consulting revenue from customers associated with TN’s infringing business model.
16 SAP obviously has continued to earn revenue from some or all of these customers since 2008.
17 Although SAP’s “goal [wa]s to move customers to mySAP as rapidly as possible,”²⁹ for
18 customers who did not want to purchase SAP licenses right away, SAP used TN to “[n]urture the
19 customer into a migration discussion” over time.³⁰ SAP expected that by “the end of the
20 decade . . . most customers will have migrated to an SAP solution.”³¹ Oracle is entitled to the
21 revenues SAP earned from post-2008 migrations of TN customers to SAP (and the maintenance
22 paid by those customer to SAP) as infringers’ profits.

23 _____
24 ²⁸ Dkt. No. 1081 (Order Granting Defendants’ Motion for JMOL, and Motion For New Trial;
25 Order Denying Plaintiffs’ Motion For New Trial; Order Partially Vacating Judgment, dated
26 September 1, 2011).

27 ²⁹ PTX 34 (TN-OR00003204-05 at 05).

28 ³⁰ PTX 24, p. 7 (SAP-OR00299501).

³¹ PTX 300 (SAP-OR00042962-67 at 64).

1 Despite Oracle’s requests for post-2008 financial information, SAP has refused to
2 provide updated revenue numbers. As a result, Oracle was forced to project post-2008
3 maintenance revenue based on existing data.³² Having refused to cooperate in providing updated
4 revenue numbers, the Court should not allow SAP to challenge or complain about Oracle’s
5 updated projections.

6 **B. Lost Profits**

7 In addition, Oracle is entitled to recover the actual damages Oracle suffered as result of
8 defendants’ infringement. *See* 17 U.S.C. § 504(b); *Polar Bear*, 384 F.3d at 708. One way to
9 measure actual damages is by measuring Oracle’s lost profits.³³ While it is Oracle’s burden to
10 establish its lost profits, it may meet that burden by establishing with “reasonable probability the
11 existence of a causal connection between the infringement and a loss of revenue.” *Harper &*
12 *Row Publishers, Inc. v. The Nation Enters.*, 471 U.S. 539, 576 (1985); *see also Data Gen. Corp.*
13 *v. Grumman Sys. Support Corp.*, 36 F.3d 1147, 1170-77 (1st Cir. 1994) (affirming the jury’s
14 damages award and finding that the jury was adequately equipped to determine lost profits based
15 on their consideration of “diverse factors” including plaintiff and defendant’s relationship as
16 competitors, plaintiff’s capability to service vendors, the uniqueness of defendants’ offering, and
17 related expert testimony), *overruled on other grounds by Reed Elsevier, Inc. v. Muchnick*, 130 S.
18 Ct. 1237 (2010).

19 Once Oracle establishes a causal connection, the burden “shifts to the infringer to show
20 that the damage would have occurred had there been no” infringement. *Id.*; *Stevens Linen*
21 *Assocs., Inc. v. Mastercraft Corp.*, 656 F.2d 11, 15 (2d Cir. 1981) (“once [plaintiff] established
22 that it had been damaged, and that its customers purchased both the infringed and the infringing
23 products, the burden shifted to the infringer . . . to prove that the customers . . . would not have
24

25 ³² Sales revenues could not be projected, so that the measure of infringers’ profits is inherently
26 conservative.

27 ³³ Dkt. No. 628, p. 3 (Order Denying Defendants’ Motion for Partial Summary Judgment, dated
28 January 28, 2010).

1 acquired from [plaintiff] alone . . . had there been no infringement”); *Sunset Lamp Corp. v. Alsy*
2 *Corp.*, 749 F. Supp. 520, 524-25 (S.D.N.Y. 1990) (plaintiff may recover lost profit damages
3 where defendant used infringing product as a “door opener” to take further sales away from
4 plaintiff).

5 Here, Oracle will demonstrate that it lost \$120.7 million in profits as a result of SAP’s
6 infringement. While Oracle’s proof of these lost profits will focus mainly on expert testimony,
7 SAP admissions confirm the causal link between defendants’ infringement and Oracle’s losses.

8 SAP set out to acquire TN as a “strategic weapon” not only to make billions of dollars in
9 license sales, but also to deprive Oracle of its highly profitable maintenance revenue. SAP knew
10 that if it failed to acquire this weapon it would “[m]iss the unique increased opportunity to take
11 away Maintenance revenue from Oracle.”³⁴ SAP knew that “Oracle’s deal assumptions [would
12 be] challenged by [the TN] support model – losing support revenue stream forces actions or
13 reactions and is a distraction.”³⁵ Depriving Oracle of maintenance profits would also “[d]isrupt
14 Oracle’s ability to pay for [its acquisitions] out of cash flow,” “[s]hrink their share of the
15 application market,” and “[d]iscredit their efforts to create a next-generation application
16 platform.”³⁶ SAP did not believe these losses would occur without TN. SAP consistently
17 measured TN’s success by its ability to deprive Oracle of maintenance revenue. TN also
18 recognized the impact it was having on Oracle’s performance and believed it would deprive
19 Oracle of over \$1 billion in maintenance revenues alone.³⁷

20 SAP knew TN’s unique (and infringing) role in the market was integral to SAP’s ability
21 to harm Oracle. SAP recognized TN as “the only meaningful North American provider of third
22 party PeopleSoft maintenance services.”³⁸ TN’s infringement was key to this success, and

23 _____
24 ³⁴ PTX 256, p. 6.

25 ³⁵ PTX 7.

26 ³⁶ PTX 24, p. 6 (SAP-OR 00299500).

27 ³⁷ PTX 970.

28 ³⁸ PTX 19, p.2.

1 infected its entire support model. Certainly, every installed piece of Oracle software TN had on
2 its systems when Oracle sued – and there were thousands – defendants have admitted infringed.
3 Indeed, SAP and TN have admitted to infringing all of Oracle’s major PeopleSoft, J.D. Edwards,
4 Siebel, and Database software and support materials. And it was that same locally installed
5 software that TN claimed gave it the dominant position in the third party service market for
6 Oracle software, allowing TN to provide the level of support it did at cut-rate prices.³⁹ When it
7 came time to operate without the now-admitted infringing local copies, SAP instead decided just
8 to shut TN down.⁴⁰ Absent that infringement and SAP’s support of it, Oracle would have
9 retained its customers.⁴¹

10 SAP and TN’s ability to take customers caused far more harm than the immediate loss in
11 yearly support revenue. Oracle will submit evidence that SAP and Oracle value their customer
12 relationships as 10-year profit streams because of the high likelihood that customers will renew
13 their maintenance contracts. Mr. Meyer measured the loss of these profits for the customers TN
14 took from Oracle, and this is the method by which he arrived at his calculation of \$120.7 million
15 in lost profits. Much of SAP’s response to Oracle’s lost profits analysis purportedly comes
16 through its damages expert, Mr. Stephen Clarke. However, as demonstrated in Oracle’s
17 accompanying motions *in limine*, Clarke is not qualified to perform the customer causation
18 analysis upon which he relies, or assess the third party market options in the way he does. As a
19 result, the Court should exclude his causation testimony.

20 C. Hypothetical License

21 As Oracle has explained, it believes it is entitled to introduce objective evidence of the
22 FMV of a license to Oracle’s copyrights as evidenced by the parties’ expectations regarding the
23 _____

24 ³⁹ See Supplemental Expert Report of Paul K. Meyer, February 23, 2010, ¶¶ 356, 361-362; see
25 also PTX 29 (TN-OR01018370-71 at 71, p. 6) (describing that TN’s business model is built on
26 “major assumption[s]” assumption #1 – that client environments had to stay local to create
“efficiencies” – if that assumption changed then TN would need “major headcount increases”).

27 ⁴⁰ Apotheker Dep. at 32:19-22.

28 ⁴¹ See Supplemental Expert Report of Paul K. Meyer, February 23, 2010, ¶¶ 356-372.

1 value of a license to those copyrights at the time of infringement.⁴² Oracle should be
2 compensated with the FMV of the license that SAP would have had to bargain for if it had asked
3 to use Oracle’s copyrighted materials in the way it did.⁴³ *Polar Bear*, 384 F.3d at 709; *Frank*
4 *Music Corp. v. Metro-Goldwyn-Mayer, Inc.*, 772 F.2d 505, 513 (9th Cir. 1985); *see also On*
5 *Davis v. The Gap Inc.*, 246 F.3d 152, 171-72 (2d Cir. 2001). Courts have found that “an
6 objective, not subjective analysis” is an appropriate measure of these damages. *Jarvis v K2, Inc.*,
7 486 F.3d 526, 534 (9th Cir. 2007). The parties’ contemporaneous projections of defendants’
8 anticipated gains or plaintiff’s anticipated losses are the ideal kind of objective evidence from
9 which to value a license for defendants’ infringing use of plaintiff’s intellectual property. *See,*
10 *e.g., Georgia-Pacific Corp. v. United States Plywood Corp.*, 318 F. Supp. 1116, 1130-31
11 (S.D.N.Y. 1970) (relying on defendant’s profit expectations)⁴⁴; *Interactive Pictures Corp. v.*
12 *Infinite Pictures, Inc.*, 274 F.3d 1371, 1385 (Fed. Cir. 2001) (by relying on defendant’s
13 contemporaneous business plan to establish a range of anticipated sales for the infringing
14 products, plaintiff appropriately analyzed defendant’s position at the time of the hypothetical
15 negotiation).

16 The testimony related to determining a FMV for Oracle’s copyrighted works at the
17 November 2010 trial presented objective evidence as to the value of a hypothetical license
18 whether determined under a *Georgia Pacific* Approach (expected profits or profit inputs from
19 SAP’s own documents) or the Income Approach within established valuation methodology. For
20 example, SAP’s own contemporaneously prepared documents provide objective evidence to
21 establish the value of the hypothetical license to Oracle’s copyrights. SAP’s Executive Board

22 ⁴² Dkt. No. 1120 (Oracle’s Motion for Clarification, filed on April 17, 2012).

23 ⁴³ Dkt. No. 628 at 3-5 (Order Denying Defendants’ Motion for Partial Summary Judgment, dated
24 January 28, 2010).

25 ⁴⁴ Both parties agree that the *Georgia-Pacific* framework, which allows reliance on projections
26 and anticipated profits as objective evidence of valuation, is a sufficiently objective method for
27 valuing the hypothetical license. Trial Tr. at 1982:1-24 (SAP conceding that “[o]nce you get to
28 the valuation, *Georgia-Pacific* is appropriate.”). SAP’s own damages expert placed a value on
the hypothetical license, using the *Georgia-Pacific* framework, although he arrived at a different
value than did the jury or Mr. Meyer. Clarke Trial Tr. at 1566:19-1573:12.

1 and senior management projected the value SAP could gain from its infringing use and acted on
2 that valuation by purchasing TN. Likewise, Oracle valued its ability to use the copyrighted
3 software, and then acted on that valuation, when it spent \$11.1 billion and \$6 billion to purchase
4 PeopleSoft and Siebel. There could be no better objective evidence of value than what these
5 highly sophisticated parties actually calculated at the time the infringement began. Oracle's
6 damages expert, Mr. Meyer, analyzed the information that was available to Oracle and SAP at
7 the time those negotiations would have occurred. Mr. Meyer will testify to the FMV of a license
8 to use the infringed copyrighted works with the support of that objective evidence.

9 In addition, Oracle will present, and Mr. Meyer will rely on, further objective evidence of
10 the FMV of a hypothetical license. First, Oracle will present additional evidence of relevant
11 Oracle licenses and willingness to license, including an actual license between the same parties
12 relating to Oracle's crown-jewel software and testimony from its executives, both of which
13 further establish that the parties would in fact be willing to license the software at issue, at the
14 right price. Second, Oracle will present additional evidence of the parties' expectations at the
15 time of infringement, including additional testimony from SAP AG Executive Board members
16 and other SAP and Oracle witnesses. If permitted, Oracle will also present evidence of its
17 projections related to its expected sales of additional software licenses to the PeopleSoft and
18 Siebel customer bases, and of SAP's saved development costs, both of which categories are
19 relevant to FMV and, Oracle contends, were improperly excluded in the first trial.

20 **III. DEFENDANTS' AFFIRMATIVE DEFENSES**

21 Defendants have stipulated to liability and preserve no defenses as to liability.⁴⁵

22 **IV. TIME OF TRIAL**

23 The time allocated for trial puts severe restrictions on Oracle's ability to present
24 customer-related evidence for infringers' profits and lost profits. Although Oracle is mindful
25 that the Court found Oracle's evidence sufficient to support \$272 million in infringers' and lost
26

27 ⁴⁵ Dkt. No. 965 (JTX0004).

