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21 UNITED STATES DISTRICT COURT
 22 NORTHERN DISTRICT OF CALIFORNIA
 23 OAKLAND DIVISION

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

25 Plaintiffs,

26 v.

27 SAP AG, *et al.*,

28 Defendants.

No. 07-CV-01658 PJH (EDL)

**OPPOSITION TO DEFENDANTS' MOTION
 TO PARTIALLY EXCLUDE TESTIMONY OF
 KEVIN MANDIA AND DR. DANIEL LEVY**

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

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1 **I. INTRODUCTION**

2 SAP TN has now stipulated to “all liability on all claims” that Oracle asserted against it
3 for downloading over 9 million files from Oracle’s website in violation of federal and state
4 computer fraud laws and making many thousands of copies of Oracle’s copyrighted software in
5 violation of the Copyright Act.¹ SAP AG and SAP America have stipulated to vicarious liability
6 for SAP TN’s copyright infringement and accepted financial responsibility for any judgment
7 against them or SAP TN. The parties have stipulated (subject to the Court’s approval) that the
8 jury will be instructed as to this liability, and that each party may introduce evidence relating to it
9 during trial.²

10 Mandia’s and Levy’s testimony will concern the nature and scope of Defendants’
11 activities that underlie the now admitted liability and contribute to the damages that Oracle has
12 suffered in this case. This testimony is not called into question by Defendants’ motion, which
13 expressly does not challenge Mandia’s or Levy’s analysis of the extent of the activities in
14 question. (Neither Defendants nor their experts even attempted to replicate Mandia’s years-long
15 effort to review and analyze over 12 terabytes of Oracle’s software on Defendants’ systems).
16 Instead, the motion questions only whether Mandia and Levy are sufficiently qualified or have
17 sufficient basis to opine on various predicate issues for SAP TN’s now-conceded direct liability
18 – for example, that the millions of downloaded and copied materials Mandia counted contain
19 “protected expression,” that they were downloaded and used without regard to licensing and
20 terms of use, that they are covered by Oracle’s copyright registrations, and that they evidence
21 violation of *all* the asserted copyrights. In light of the parties’ stipulations, there is no good
22 reason for Defendants to object to this sort of explanatory testimony. However, Defendants have
23 refused to withdraw their motion. Oracle accordingly submits this opposition.

24 Defendants also seek to preclude Mandia and Levy from using a handful of words and
25 phrases that (mostly) appear in their reports, either under Fed. R. Evid. 403 or as “improper legal

26 ¹ See Dkt. 837 (Trial Stipulation No. 1) at ¶ 1.

27 ² *Id.* at ¶ 4 (stipulating that Oracle is permitted to present evidence “related to the stipulated
28 claims as background or context for the stipulated claims, and/or as relevant to damages or other
claims and defenses not stipulated to or dismissed by the Parties.”)

1 conclusions” (which is simply a prejudice argument in disguise). The terms Defendants find
2 offensive include such things as “cross-use,” “contamination,” and references to copyright
3 infringement, breach of a license agreement or terms of use, and statements that SAP TN acted
4 “inappropriately” or “improperly.” But the stipulation that SAP TN is liable on all claims has
5 removed any possibility of undue prejudice from the use of these terms, since Defendants have
6 conceded liability for the conduct these terms address.

7 Moreover, Mandia’s and Levy’s use of these terms is fully justified. For example,
8 Defendants seek to exclude references to “cross-use” of software. Cross-use refers to SAP TN’s
9 use of one customer’s software to support another customer (which no license permits). Mandia
10 and Levy analyzed and quantified this highly probative activity and use this descriptive term to
11 refer to it. Defendants claim in their motion that the term is “unsupported” and “improper (and
12 prejudicial) legal opinion.” Defendants even assert that Oracle’s counsel invented the term. Not
13 true. Defendants invented the term, and still used it nearly a year after Oracle filed the litigation,
14 in meetings to discuss their own continued “cross-use” of “one HRMS 7.5 environment” to
15 support multiple customers. The email excerpted below (sent to the SAP AG project lead Martin
16 Breuer and copying SAP TN’s General Counsel, Tom Nolan), introduces the minutes from one
17 such meeting to discuss “Cross-Use” environments:

18 **From:** Julio Guzman
19 **Sent:** Friday, February 08, 2008 3:12 PM
20 **To:** Martin Breuer; Tim Harper; Rod Russell; John Baugh
21 **Cc:** Tom Nolan; Kathy Williams; John Sullivan; Shelley Nelson
22 **Subject:** Privileged and Confidential: Level Set - "Cross-Use" Environments - Meeting Minutes - 8-Feb-08

23 **TOMORROW NOW Global Project Management Office**

24 **Meeting:** Level Set - "Cross-Use" Environments - Meeting Minutes - 8-Feb-08

25 [Summary](#)

26 Four clients are using one HRMS 7.5 environment.

27 **These clients need to be prioritized to the front of the line in the Environments project and
28 get completed immediately.**

29 Defendants’ other challenges also ignore the facts and the law, and are rendered
30 inconsequential by the liability stipulation. For example, Defendants argue that Mandia should
31 not be permitted to reference the “Terms of Use,” alleging he never sought to understand them.
32 But they redact from their evidence as “NOT RELEVANT TO MOTION” Mandia’s testimony

1 that he *did* review them “to understand that my assumptions seemed reasonable to me.” They
2 also seek to exclude the words “inappropriate” and “licensed products,” even though SAP stated
3 publicly in July 2007 (and countless times since then) that SAP TN had “inappropriately”
4 downloaded products “not licensed” by its customers. And they continue to challenge the
5 “reliability” of Mandia’s conclusion (informed by knowledgeable witnesses) that the enterprise
6 software applications he analyzed contained at least a “modicum” of creative expression
7 protected by Oracle’s copyrights, despite stipulating that Oracle may remind the jury at any time
8 that SAP TN *infringed 120 Oracle copyrights*.³

9 All told, Defendants ask the Court to exclude nine categories of testimony (six for
10 Mandia and three for Levy). Mot. at pp. 5, 16. Defendants lump various categories of testimony
11 into generalized arguments about 1) qualifications, 2) reliable methods, and/or 3) prejudice. To
12 facilitate more focused consideration of the testimony at issue, this Opposition is organized by
13 the subject matter of Defendants’ requested relief rather than the order of their generalized
14 arguments. The Court should deny Defendants’ motion in its entirety as a waste of time and
15 counter to their liability stipulation. Alternatively (or additionally), the Court should deny
16 Defendants’ motion in its entirety for the reasons explained below.

17 **II. THE LEGAL STANDARDS**

18 To avoid repetition, Oracle has set forth the legal standards applicable to its opposition
19 briefs in the Opposition to Defendants’ Motion to Exclude Testimony of Paul Pinto, at Sec. III.
20 Additional relevant authorities are referenced below. Mandia and Levy are well qualified, and
21 their testimony reliable and admissible, under all relevant standards.

22 **III. FACTS RELEVANT TO MANDIA’S EXPERT OPINIONS**

23 **A. Mandia’s Qualifications**

24 Mandia, Oracle’s computer forensics and security expert, is the founder and CEO of

25
26 ³ Defendants separately seek to exclude the testimony of these Oracle witnesses as “undisclosed
27 experts” in their Motion *in Limine* No. 5. That motion is also now beside the point. Whether
28 Oracle’s employees are fact witnesses or “undisclosed experts” (whom Defendants have
deposed), their testimony would only provide background or context for the copyright
infringement that Defendants now do not dispute in their liability stipulation.

1 Mandiant Corporation (“Mandiant”), which performs computer forensics and high technology
2 investigations, and currently employs over 100 computer forensics consultants and software
3 engineers. Decl. of Scott Cowan in Supp. of Defs.’ Mot., Dkt. 782 (“Cowan Decl.”), Ex. A
4 (Mandia Report) at ¶¶ 26, 29.⁴ Mandia received a B.S. in computer science from Lafayette
5 College in 1992, with concentrations in software engineering, the C programming language, and
6 database development, and an M.S. in forensic science from The George Washington University
7 in 1995. *Id.*, Ex. G (Mandia C.V.) at 5; Russell Decl., ¶ 4 & Ex. B (Mandia Depo.) at 163:17-
8 168:1. He is the principal architect of Mandiant’s enterprise forensic software, written in
9 multiple programming languages. He has supervised a team of 20 software developers in the
10 continued development, licensing and successful distribution of that software. Cowan Decl.,
11 Ex. A (Mandia Report) at ¶ 29; Russell Decl., Ex. B (Mandia Depo.) at 177:9-178:18.

12 Mandia has investigated unauthorized access to computer systems, theft of intellectual
13 property, computer intrusions, and other computer crimes like those in this case for over 15
14 years, including forensic investigation of Oracle databases and “comparison of registered,
15 original computer programming source code with alleged stolen source code” using widely-
16 accepted MD5 hashing and “diff” comparison tools. Cowan Decl., Ex. A (Mandia Report) at ¶
17 31 & Ex. G (Mandia C.V.) at 5; Russell Decl., Ex. B (Mandia Depo.) at 505:16-506:10, and ¶ 5
18 & Ex. C (Mandia Appendices) at 1-2, 42-51. He has served as an expert in 10 criminal cases,
19 eight civil cases and one international tribunal matter. Cowan Decl., Ex. G (Mandia C.V.) at 7-
20 10; Russell Decl., Ex. B (Mandia Depo.) at 7:23-11:17. Mandia is a preferred computer security
21 and forensic investigation expert for the CIA and FBI, and for dozens of public and private
22 companies. Cowan Decl., Ex. A (Mandia Report) at ¶ 31, Ex. G (Mandia C.V.) at 3-4. He has
23 taught at Carnegie Mellon University and The George Washington University. He is the co-
24 author of a leading textbook on intrusions to computer systems. *Id.*, Ex. A (Mandia Report) at ¶
25 27. He has trained hundreds of law enforcement officials, including Assistant U.S Attorneys,

26 _____
27 ⁴ Mandia was assisted in various aspects of his analysis and review in this case by a team of
28 Mandiant employees. *See* Russell Decl., Ex. B (Mandia Depo.) at 131:25-132:18, 133:15-
134:17, 142:24-144:11, 485:4-486:18.

1 FBI agents and Secret Service agents, in computer forensics and security incident response. *Id.*,
2 Ex. G (Mandia C.V.) at 3-4, Ex. A (Mandia Report) at ¶ 27.

3 In short, Mandia is a pre-eminent expert in computer forensics investigations of matters
4 like Defendants' activities in this case.⁵

5 **B. The Facts And Defendants' Admissions Shaped Mandia's Task**

6 Few copyright defendants acknowledge widespread, literal copying of registered works,
7 as Defendants did early in this case. SAP AG admitted in July 2007, not long after Oracle
8 caught SAP TN red-handed, that SAP TN had downloaded "inappropriately" from Oracle's
9 websites. Russell Decl., ¶ 6 & Ex. D (July 3, 2007 Press Release). Then SAP TN admitted in
10 October 2007 it had made literal copies of entire Oracle enterprise software applications. *Id.*, ¶¶
11 7-8 & Ex. E (Kreutz 30(b)(6) Depo.) at 94:7-18 (J.D. Edwards World and J.D. Edwards
12 EnterpriseOne environments), Ex. F (Shelley Nelson 30(b)(6) Depo.) at 13:10-14:7 (PeopleSoft
13 environments). It took three more years, but Defendants eventually admitted they had
14 downloaded at least 5 million Oracle files and cross-used thousands of Oracle application copies
15 to deliver the vast majority of their fixes and updates.

16 Defendants slowly began producing certain portions of SAP TN's systems in August
17 2008, with the bulk coming after Judge Laporte ordered a scheduled, rolling production on
18 November 26, 2008. Dkt. 222 (Disc. Conf. Order); *see, e.g.*, Dkt. 291 (Jt. Disc. Conf. St.) at
19 10:17-13:7 (summary of production history). They eventually produced over 12.9 terabytes of
20 software and support materials from approximately 46 servers (in addition to millions of other
21 documents), much of which Mandia had to decompress, adding many more terabytes and
22 millions of files. *See* Russell Decl., Ex. C (Mandia Appendices) at 2; Cowan Decl., Ex. A
23 (Mandia Report) at ¶¶ 171, 259-260. (The entire printed collection of the Library of Congress
24 would translate to about ten terabytes of data. *See* Russell Decl., ¶ 9 & Ex. G. In response to
25 Oracle's discovery requests to explain how they cross-used this vast library of copyrighted
26 material, Defendants stated "it would be impossible and unreasonable to expect TomorrowNow

27 ⁵ Dr. Levy's qualifications are addressed in Sec. V, below. Since Defendants included both
28 experts in one motion, Oracle does the same.

1 to provide a detailed description of the support provided with each local environment,” and then
2 consistently referred Oracle *back* to the colossal data set citing Fed. R. Civ. P. 33(d). *See, e.g.,*
3 *id.*, ¶ 10 & Ex. H (Rogs. 12 & 14). This left Mandia with an analytical task unprecedented in the
4 annals of software theft. It required painstaking searches to identify and quantify Defendants’
5 copying, and – due to the data volume – even *one* file comparison search against SAP TN’s
6 servers took days or weeks. *See, e.g.,* Dkt. 349 (Mandia Decl. re Mot. to Amend Complaint).

7 C. Mandia’s Methods

8 Mandia’s task was to make sense of this mass of data and “to render [his] opinions
9 regarding the means and methods by which SAP TN accessed and downloaded from Oracle’s
10 customer support websites, as well as the nature and extent of SAP TN’s copying, modification,
11 distribution, and use of Oracle intellectual property to support SAP TN’s customers.” Cowan
12 Decl., Ex. A (Mandia Report) at ¶ 2. His methodology had three essential parts:

13 Mandia reviewed evidence, including documents and SAP TN employee testimony, to
14 understand generally SAP TN’s business model and the manner in which it used Oracle’s
15 materials. He combed Defendants’ data productions for evidence of downloading, installing,
16 backing up, restoring, and other copying of Oracle materials. Among other things, he compared
17 materials found on SAP TN’s systems to Oracle materials produced in the case to confirm the
18 scope of Defendants’ admitted copying. In this manner, Mandia formed opinions about the
19 amount of Oracle software and support materials on SAP TN’s computers, and the nature and
20 extent of SAP TN’s use of those copies. For certain analyses of materials too voluminous for
21 actual counting, Mandia collaborated with Oracle’s statistical expert, Dr. Daniel Levy, to select
22 valid samples that would reasonably represent the broader universe of SAP TN’s copies. *See id.*,
23 ¶¶ 9, 108, 295, 296 n.152; *see generally id.* at ¶¶ 292-347 & Ex. D (Levy) Report at pp. 1-6.

24 Mandia also undertook to understand the nature of Oracle’s software and support
25 materials at issue. He discussed their development and installation with Oracle’s knowledgeable
26 employees, and reviewed the software and support materials he was provided.⁶ In addition,

27 ⁶ For discussions with Oracle employees, *see, e.g.,* Cowan Decl., Ex. A (Mandia Report) at ¶ 108
28 & n.7, ¶¶ 112-113 & n.8, ¶¶ 120-123, ¶ 270 n.130, ¶ 274 n.133, ¶ 280 n.139, ¶ 284; Russell
(Footnote Continued on Next Page)

1 Mandia spoke with Oracle’s expert Douglas Lichtman about what qualifies computer code for
2 copyright protection. *See, e.g.*, Cowan Decl., Ex. A (Mandia Report) at ¶¶ 115. Then, relying on
3 his own experience building enterprise software, his computer science background, his
4 discussions with Oracle employees and Lichtman, and his review of Oracle materials, Mandia
5 formed opinions about the creativity expressed in the Oracle software he found in Defendants’
6 production. *See, e.g., id.*, ¶¶ 116, 123.

7 Finally, to relate the results of his analysis to the issues in the case, Mandia applied to his
8 technical results assumptions that he determined were 1) justified based on the information he
9 learned and the evidence he reviewed, and 2) appropriate in the context of his analysis. In
10 particular, as any expert would do, he used assumptions based on what he determined was
11 reasonable, and verified information that others would prove at trial. These included terms of
12 Oracle’s customers’ license agreements and the Terms of Use on Oracle’s websites. Mandia
13 incorporated these assumptions in his conclusions that various SAP TN activities he analyzed
14 were inappropriate or improper (as SAP TN had already admitted). *See, e.g., id.*, ¶¶ 38-40, 46-
15 47 (stating the improper activity assumptions); *id.* at ¶¶ 190-216 (conclusions based on applying
16 these assumptions to his analysis). Similarly, he applied an assumption about which Oracle
17 software and support materials the copyright registrations asserted in this case cover, as
18 summarized in Tables 35 and 36 of his Report, in concluding that the copies of those materials
19 he located on SAP TN’s systems were covered by Oracle’s copyrights-in-suit. *See id.*, Ex. A
20 (Mandia Report) at ¶ 45 (stating the scope assumption), ¶¶ 373-374, 376-377 (conclusions based
21 on applying the assumption to his analysis).

22 **IV. MANDIA’S OPINIONS AND TESTIMONY ARE ADMISSIBLE**

23 Defendants asserted throughout the litigation that the source of their admitted literal
24 copies was Oracle-issued software they obtained directly from customers. Accordingly,

25 Decl., Ex. C (Mandia Appendices) at p. 8 n.21, pp. 17, 120. For review of software and support
26 materials provided by Oracle, *see* Cowan Decl., Ex. A (Mandia Report) at ¶ 224 & Table 21
27 (PeopleSoft and J.D. Edwards support materials), ¶ 266 n.128 (J.D. Edwards software), ¶ 276
28 n.135 (Siebel software), ¶ 283 (Oracle Database software); Russell Decl., Ex. C (Mandia
Appendices) at pp. 17-18 & Table 10 (PeopleSoft software), pp. 38-39 (J.D. Edwards,
PeopleSoft, and Siebel support materials).

1 Mandia’s overarching task was to find, quantify, and correlate the copies of Oracle software and
2 support materials on SAP TN’s systems.

3 **Mandia opinions not challenged:** The majority of Mandia’s report describes his counts
4 of copies of Oracle software on SAP TN systems. He reports counts of Oracle enterprise
5 software applications (environments), files taken from those environments for distribution to
6 SAP TN customers, and Oracle Database software; and explains his counting methods, including
7 through collaboration with Levy. *Defendants do not challenge these aspects of Mandia’s*
8 *testimony in their motion.* Mot. at 1:19-22 (“This motion does not seek to exclude Mandia’s or
9 Levy’s counts.”). By analyzing SAP TN’s copies and the other evidence in the case, Mandia
10 gained substantial insight into SAP TN’s business methods. Cowan Decl., Ex. A (Mandia
11 Report) at ¶¶ 102-158 (Mandia’s 18-page analysis of SAP TN’s business model across all major
12 products at issue). *Defendants do not challenge these business methods opinions, either.*

13 Indeed, although Defendants’ motion once asserts “irrelevance” as a basis for excluding
14 Mandia’s testimony, Defendants never offer supporting evidence or argument. *Compare* Mot. at
15 8:4-5 (“[T]he Court should exclude these portions of Mandia and Levy’s testimony as both
16 unreliable and irrelevant.”) *with* Mot. at 7:20-15:4 (never explaining how Mandia’s opinions are
17 “irrelevant” to the case). They could not. Mandia’s testimony concerns downloading, copying,
18 and cross-use of Oracle’s software, activity that is at the heart of the case. Cowan Decl., Ex. A
19 (Mandia Report) at ¶¶ 2, 4-13.

20 **Summary of argument against Mandia:** Instead, Defendants’ motion seeks primarily
21 to limit Mandia’s testimony concerning the creativity and protectability of Oracle’s five product
22 lines and the multiple versions of its copyrighted software that he looked for and found on SAP
23 TN’s systems. Defendants’ sole *Daubert* challenges to that testimony are to Mandia’s
24 qualifications and the reliability of his methods of obtaining certain information he used:
25 interviewing knowledgeable Oracle employees, collaborating with other experts, gathering
26 information through his own employees, and making use of assumptions that he investigated and
27 expects others will prove up at trial. All these matters have now been made academic by
28 Defendants’ stipulation to liability.

1 Defendants also wish to prevent Mandia from uttering five phrases: 1) “infringement,”
2 which appears nowhere in his report; 2) “cross-use,” a factual and highly probative term
3 describing the use of one customer’s software, support materials or credentials to support other
4 customers; 3) “contamination,” another factual and highly probative term describing software or
5 support materials resulting from cross-use; 4) “inappropriately,” a term used by, among others,
6 SAP AG’s then-CEO, Henning Kagermann in July 2007 to describe SAP TN’s downloads; and
7 5) “improperly,” a synonym for “inappropriately” that Mandia uses in his report. Mot. at 5. As
8 to these terms, Defendants’ motion is properly construed as a motion *in limine* under Fed. R.
9 Evid. 403. Seeking to shift the burden of persuasion to Oracle, however, Defendants incorrectly
10 call these terms “legal conclusions” or “unverified assumptions” that Mandia is not qualified to
11 present. Defendants lose under either the Fed. R. Evid. 403 or *Daubert* standard.

12 **A. Mandia’s Testimony About Protected Expression Is Admissible**

13 Mandia concluded that copies of Oracle materials on SAP TN’s systems contain
14 protected expression. Defendants’ stipulation of “all liability on all claims” concedes this point.
15 Defendants attack this testimony in two ways. *See* Mot. at 5, exclusion requests Nos. 2 & 5.
16 First, they argue Mandia is not qualified to offer these opinions. *Id.* at 7:12-15. Second, they
17 argue he uses unreliable methods. *Id.* at 10:10-15. Both arguments are wrong.

18 **1. Mandia is qualified to offer testimony about the creativity**
19 **expressed in the software he found SAP TN copied**

20 Defendants argue that Mandia is not “qualified to opine that Plaintiffs’ registered works
21 contain creative expression” because he does not have “any expertise in the software lines at
22 issue in this case.” Mot. at 7:12-15. This argument contradicts the facts, the law and the
23 methodology of Defendants’ own expert. Defendants also misconstrue the role of a Rule 702
24 expert. He is not required to have personal experience with each specific aspect of every case,
25 but to reliably apply relevant expertise to an investigation of the facts, including those that others
26 will prove, thereby generating opinions helpful to the jury. That is exactly what Mandia did.

27 First, Mandia has relevant, first-hand experience in software engineering that qualifies
28 him to assess the creativity in Oracle’s software. Second, Mandia supplemented his own

1 knowledge – sufficient by itself – with information from other reliable product-specific
2 resources. That combination suffices for him to offer opinions about portions of the Oracle
3 source code with which he may have been less familiar. *See Computer Assocs. Int’l v. Quest*
4 *Software, Inc.*, 333 F. Supp. 2d 688, 693-94 (N.D. Ill., 2004) (permitting testimony by an expert
5 who “refer[red] to reasonable sources for assistance” with analysis of certain programming
6 languages). Again, it is what experts do. *See Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137,
7 156 (1999) (“[A]n expert [may] “draw a conclusion from a set of observations based on
8 extensive and specialized experience.”).⁷ Defendants’ software expert, Gary Funck, operates
9 under the same principle. Russell Decl., ¶ 11 & Ex. I (Funck Depo.) at 45:9-46:10; 48:18-53:3
10 (“[With] sufficient access to resources and perhaps other people that I can use as resources, then
11 I might feel that I’ve gained sufficient experience and expertise to offer an opinion.”).

12 2. Mandia’s methods and opinions are reliable.

13 Mandia drew on multiple sources of information to conclude SAP TN copied protected
14 expression. He considered his own software development experience. Cowan Decl., Ex. A
15 (Mandia Report) at ¶¶ 26-32; *see also id.*, Ex. G at 3-10. He examined terabytes of software
16 copies residing on SAP TN’s systems. *See, e.g., id.*, Ex. A at ¶ 168 (identifying 4,062,617
17 downloaded Oracle files) & ¶ 259 (more than 10 terabytes of over 20 million files). He analyzed
18 other discovery materials detailing SAP TN’s processes and procedures for copying and
19 installing Oracle’s software. *See, e.g., id.* at ¶ 126 n.10. Defendants dispute none of this.
20 However, he also relied on two more sources of information that Defendants argue render his
21 testimony inadmissible: 1) assumptions to be supported by other evidence at trial, and 2) facts
22 about the software provided by knowledgeable and percipient Oracle employees.

23 a. Mandia appropriately relied on Lichtman

24 To understand how his work fit within the context of an analysis Defendants had

25 ⁷ Mandia’s reliance on verified facts and reasonable assumptions for his analysis of the software
26 on SAP TN’s systems contrasts with the cases cited by Defendants. *See, e.g., Salinas v. Amteck*
27 *of Ky., Inc.*, 682 F. Supp. 2d 1022, 1030-31 (N.D. Cal. 2010) (Hamilton, J.) (excluded expert had
28 not “employed a methodology that would allow him to opine as an expert on warnings,” because
he never examined the most relevant evidence, never interviewed percipient witnesses, and
“conducted no vetting”). *Salinas* confirms the propriety of Mandia’s witness interviews. *Id.*

1 dismissed as “impossible,” (Russell Decl., ¶ 10 & Ex. H (Rog. 14)), Mandia properly consulted
2 Professor Lichtman, a copyright expert with a computer science background, *among several*
3 *other resources*, to help him decide what to look for in Defendants’ massive production. *See*
4 *e.g.*, *Computer Assocs.*, 333 F. Supp. 2d at 694 (finding that an expert’s “methodology ... in
5 searching for copying was reliable” where the expert reviewed “the areas of the program in
6 which [the plaintiff] (and its attorneys) believed copying would be found”).

7 From Lichtman, Mandia understood “that computer code in various forms qualifies for
8 legal protection as long as it demonstrates a modicum of creativity.” Cowan Decl., Ex. A
9 (Mandia Report) at ¶ 115. That is indisputable. *See Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*,
10 499 U.S. 340, 346 (1991) (“modicum of creativity.”); *Johnson Controls, Inc. v. Phoenix Control*
11 *Sys., Inc.*, 886 F.2d 1173, 1175 (9th Cir. 1989) (“Source and object code, the literal components
12 of a program, are consistently held protected by a copyright on the program.”); Dkt. 747 (Defs.’
13 Proposed Jury Instructions) at 60 (No. 5, stating that software incorporating “original
14 expression” is protected); *id.* at 80 (No. 13, “The original parts of [Oracle’s] work are the parts
15 created ... by use of at least some minimal creativity.”). Even if it were disputed, Mandia could
16 properly rely on Lichtman in these circumstances. Fed. R. Evid. 702 advisory committee’s note
17 (2000) (expert opinion may be based on “the reliable opinions of other experts”); *see also*
18 *Autoskill Inc. v. Nat’l Educ. Support Sys., Inc.*, 793 F. Supp. 1557, 1561, 1568-71 (D.N.M. 1992)
19 (relying upon the creativity testimony of an expert in software use who “reviewed cases and the
20 Nimmer treatise on copyright infringement” prior to testifying), *aff’d*, 994 F.2d 1476 (10th Cir.
21 1993); *id.* at 1567 (same, with respect to protected expression testimony). In light of these facts,
22 Defendants’ refrain that Mandia is not a “copyright expert” does not disqualify him from
23 expressing the opinions he does about SAP TN’s copying of protected expression.

24 Nor is it true that Mandia “simply parrots the unverified assumptions” of others. Mot. at
25 8:7-9:9. Mandia combined Lichtman’s correct advice with the input of knowledgeable
26 witnesses, his own programming experience, and his own analysis of the terabytes of copies on
27 SAP TN’s systems, to conclude for himself that SAP TN copied protected expression. *See, e.g.*,
28 Cowan Decl., Ex. A (Mandia Report) ¶ 373 (SAP TN’s copies contain protected expression

1 “[b]ased on information received from Mr. Screven and Mr. Lichtman, and based on my own
2 experience relating to software development.”). This approach falls squarely within the most
3 routine type of expert analysis. There is no basis to exclude it.

4 **b. Mandia appropriately relied on facts from**
5 **knowledgeable Oracle employees**

6 Mandia properly sought information from Oracle employees knowledgeable about the
7 software. *See Lanard Toys Ltd. v. Novelty, Inc.*, 2010 WL 1452527 at *4 (9th Cir. 2010) (stating
8 that copyright validity was “reinforced” by testimony of designer that he “could have designed
9 [the copyrighted work] in ‘a million’ other ways”); *Evolution, Inc. v. Suntrust Bank*, 2004 WL
10 5684007 at *1-2 (D. Kan. 2004) (admitting testimony from expert who relied upon information
11 from company president where no suggestion of “better or more accurate information” about the
12 ‘business or software’ existed”). Oracle’s products are written in multiple computer languages.
13 *See, e.g.*, Cowan Decl., Ex. A (Mandia Report) at ¶¶ 65, 109. Mandia has “an in-depth
14 understanding of computer programming,” including two languages at issue – C and COBOL.
15 *Id.*, ¶¶ 26, 29-30; Russell Decl., Ex. B (Mandia Depo.) at 177:9-181:5. As he states:

16 [B]ased on my own experience with shell scripts and other interpreted
17 languages, and based on my own experience with COBOL and other
18 compiled languages, I understand that development in these languages
19 involves a developer’s particular choices and embodies creative expression.

20 Cowan Decl., Ex. A (Mandia Report) at ¶ 114; *see also id.* at ¶ 122.

21 Mandia confirmed his independent understanding of software development with Oracle
22 employees knowledgeable about the specific languages and products SAP TN copied.⁸ *Id.* at ¶
23 108. He interviewed employee Norm Ackermann about PeopleSoft software. Ackermann joined
24 PeopleSoft in December 1995, and helped develop more than 75 tax and regulatory updates
25 (each of which contained several to dozens of individually developed program files). Russell
26 Decl., ¶ 12 & Ex. J (Ackermann Depo.) at 5:25-6:1, 44:6-8. Mandia explained:

27 ⁸ Mandia’s employees also appropriately assisted him. For instance, contrary to Defendants’
28 claim that Mandia relied “solely on the opinion of Oracle employee Greg Story” when analyzing
SAP TN’s AS/400 (Mot. at 13:7-12), Mandia collaborated with his employee, Cory Altheide,
who had relevant expertise, to analyze information gathered by Altheide and Story. *See* Russell
Decl., Ex. B (Mandia Depo.) at 485:4-486:25, and ¶ 14 & Ex. L (Story Depo.) at 20:4-17, 57:5-
12 & 72:2-21. Altheide’s working notes were produced to Defendants. *Id.*, ¶ 15.

1 One reason why I spoke to [Ackermann] was, I was asked to make an
2 assumption about file-based objects being protected expression, and I *wanted*
3 *to know if that was a reasonable assumption*. So speaking to Mr. Ackermann,
4 who was a PeopleSoft developer, I asked him some questions about choice
5 and creativity, things of that nature. . . . *I think he was providing me facts.*

6 *Id.*, ¶ 4 & Ex. B (Mandia Depo.) at 274:25-278:12 (emphasis supplied). Similarly, Mandia
7 interviewed Edward Screven, Oracle’s Chief Corporate Architect, who regularly participates in
8 “technical discussions” about how Oracle software products at issue in this case “are built [and]
9 the way they should be built.” Russell Decl., ¶ 13 & Ex. K (Screven Depo.) at 15:7-16, 16:19-
10 17:16 (redacted by Defendants as “NOT RELEVANT TO MOTION” at Cowan Decl., Ex. B).
11 Screven verified, among other things, 1) aspects of Oracle’s development process, 2) ways to
12 identify software on SAP TN’s systems, and 3) how the code in fixes, updates, and prior
13 software versions gets incorporated into later releases. Cowan Decl., Ex. A (Mandia Report) at
14 ¶¶ 109-123, 269 & fns. 7, 8, 106, 130, 133, 137, 139.

15 Mandia’s interviews of knowledgeable Oracle employees was proper methodology;
16 interviewing knowledgeable witnesses is what experts should do. *Computer Assocs.*, 333 F.
17 Supp. 2d at 693-94 (source code report admitted as “helpful” when expert had “significant
18 experience working with database systems” but not “the same level of expertise in C or C++”
19 where he “was able to refer to reasonable sources for assistance”); *see also Int’l Adhesive*
20 *Coating Co. v. Bolton Emerson Int’l, Inc.*, 851 F.2d 540, 545-46 (1st Cir. 1988) (“obvious” that
21 an expert would rely on “interviews with company personnel.”)⁹ Mandia did not obtain
22 “unchecked assumptions” from these employees (Mot. at 12:13-15), but rather informed his
23 analysis and confirmed his conclusions with *multiple* reliable sources.¹⁰

24 ⁹ Defendants’ expert Gray uses the same methodology as Mandia. He relied upon conversations
25 with SAP TN employees and assumptions about protected expression in his own report. He
26 testified that he relied on party employees in prior copyright litigation engagements and, indeed,
27 could not evaluate protected expression without guiding assumptions and further information
28 from Oracle employees (which Defendants never sought). Russell Decl., ¶¶ 17-18 & Ex. M
(Gray Report) at 44 n.110 & 63-64 nn.167-168 (Gray’s analysis is “based on conversation[s]
with” SAP TN former employees and consultants), and 24-25 (needing “Oracle employee’s [sic]
opinions” to “fully evaluate” protected expression), Ex. N (Gray Depo.) at 115:18-118:6 &
119:3-120:3 (prior expert engagements where Gray relied on conversations with employees).

¹⁰ Mandia’s years of independent work and reliance on knowledgeable witnesses whom
Defendants have deposed (and who are on Oracle’s witness list, Dkt. 742) contrasts with the
(Footnote Continued on Next Page)

1 Defendants deposed both Mandia and, with one exception, every Oracle employee of
2 whom they complain. *See* Russell Decl., ¶ 16; Dkt. 790 (Oracle’s Opp. to Defs.’ MIL) at 15:17-
3 16:27 (details of Defendants’ access to and depositions of these employees). If Defendants
4 disputed the *accuracy* of the information the employees provided, then that would be an issue for
5 trial, not grounds for exclusion. *See Humetrix, Inc. v. Gemplus S.C.A.*, 268 F.3d 910, 919 (9th
6 Cir. 2001) (“[T]he reasonableness of the assumptions underlying the experts’ ... analysis, [and]
7 criticisms of an expert’s method of calculation [are] matter[s] for the jury’s consideration in
8 weighing that evidence.”); *Sun Microsystems Inc. v. Hynix Semiconductor Inc.*, 608 F. Supp. 2d
9 1166, 1208-09 (N.D. Cal. 2009) (Hamilton, J.) (“[T]o the extent that defendants challenge the
10 accuracy or propriety of these variables, it is an issue that goes to the weight, rather than the
11 admissibility”); *Int’l Adhesive*, 851 F.2d at 545 (“especially significant” that other party had
12 access to information relied on and were “rehashing . . . the central factual disputes of the case
13 dressed up as attacks on the expert’s testimony through Rule 703.”). Attacks on Mandia’s
14 *methodology* of interviewing and relying on knowledgeable witnesses would be unwarranted and
15 improper, even if Defendants had not effectively stipulated to his conclusions.

16 **B. Mandia’s Testimony About The Terms Of Use, Licensing, And**
17 **Improper Or Inappropriate Activity Is Admissible**

18 Defendants make two unmeritorious attacks on the admissibility of Mandia’s opinions
19 related to SAP TN’s downloading activity. *See* Mot. at 5, exclusion requests Nos. 1 & 5. First,
20 Defendants argue Mandia is not qualified to offer them. *Id.* at 7:10-12. Second, Defendants
21 argue they are based on assumptions counsel provided, with no independent analysis by Mandia.
22 *Id.* at 10:10-15, 11:26-12:11. Both are wrong, and also academic in light of Defendants’
23 stipulation to SAP TN’s liability for the downloads.

24 cases Defendants cite. *See In re TMI Litig.*, 193 F.3d 613, 713-16 (3d Cir. 1999) (excluding
25 testimony where expert “never made any attempt to assess the validity of any of [his]
26 assumptions”); *United States v. Mejia*, 545 F.3d 179, 195-98 (2d Cir. 2008) (testimony of a
27 police officer's who did not "piece[] together bits of information from different sources and
28 reach[] a studied conclusion" but instead "repeat[ed] their contents" violated Rule 702); *Arista
Records LLC v. Usenet.com, Inc.*, 608 F. Supp. 2d 409, 425-26 (S.D.N.Y. 2009) (expert “merely
accepted” what defendants told him, reviewed “none” of the relevant “objective evidence” in the
record, and “was operating under a factually incorrect assumption”).

1 **1. Mandia is qualified to analyze SAP TN’s downloads using the**
2 **parties’ licensed product information**

3 Mandia is eminently qualified to identify the downloaded software and other materials on
4 SAP TN’s systems, to categorize the downloads according to the licensed product information
5 from both parties, and thereby assist the trier of fact in understanding the extent to which SAP
6 TN disregarded licensed product representations from its customers when downloading Oracle
7 materials. *See* Section III.A., above; Cowan Decl., Ex. A (Mandia Report) at ¶ 198-218 &
8 Russell Decl., Ex. C (Mandia Appendices) at pp. 124-127 (explaining Mandia’s methodology);
9 *Kumho Tire*, 526 U.S. at 156 (stating that an expert may “draw a conclusion from a set of
10 observations based on extensive and specialized experience.”).

11 **2. Mandia verified his assumptions**

12 To identify downloads representative of Oracle’s claims (of the more than 9 million on
13 SAP TN’s systems), Mandia made two strategic choices. First, he searched for downloads
14 related to products for which customers had not purchased a license, according to licensing
15 information obtained from Oracle and, separately, similar contractual information from SAP
16 TN’s own records. Cowan Decl., Ex. A (Mandia Report) at ¶¶ 205-211. Second, he made an
17 informed assumption about Oracle’s websites’ Terms of Use (which incorporate a customer’s
18 license terms), so he could analyze which downloads were consistent or inconsistent with them.
19 *Id.* at ¶ 46-47. These choices squarely reflect Defendants’ early concessions about SAP TN’s
20 “inappropriate” access and downloading.¹¹ *See* Russell Decl., ¶¶ 6, 19, 20 & Ex. D (July 3, 2007
21 Press Release) (admitting “some *inappropriate* downloads”), Ex. O (July 3, 2007
22 Teleconference, SAP CEO Henning Kagermann) (“With *inappropriate*, I meant ... they
23 downloaded support material where they were *not allowed to download according to the support*
24 *contract of the customer.*”), Ex. P (Rog. 13) at 66 (Certain downloads “were considered by
25 TomorrowNow to be ‘*inappropriate*’ because it was TomorrowNow’s policy to only download
26 materials for customers *related to those products for which the customer had informed*

27 ¹¹ “Improper,” another word Defendants challenge, is simply a synonym for “inappropriate.”
28 *See, e.g.,* Cowan Decl., Ex. A (Mandia Report) at ¶¶ 193-194 (using “inappropriate” and
 “improper” interchangeably).

1 *TomorrowNow they were licensed.”*) (all emphasis supplied).¹²

2 Mandia *also* independently evaluated what the Terms of Use permitted. Defendants
3 assert Mandia had “no independent expert opinion regarding whether the terms of use
4 assumption that counsel provided is valid.” Mot. at 3:21-23. But they redact as “NOT
5 RELEVANT TO MOTION” Mandia’s testimony that he “read [the Terms of Use] from a
6 layperson’s perspective to understand them, to understand that my assumptions seemed
7 reasonable to me.” *Compare* Russell Decl., Ex. B (Mandia Depo.) at 197:9-198:14 *with* Cowan
8 Decl., Ex. B (Mandia Depo.). Defendants also assert Mandia conducted “no independent
9 analysis to support his opinions” about licensed products (Mot. at 9:20-22, 10:10-15), but they
10 *again* redact as “NOT RELEVANT TO MOTION” Mandia’s testimony stating, “I want to
11 clarify that answer. . . . It was not my task to look at licenses. However, I did look at what
12 people gave me as license information.” *Compare* Russell Decl., Ex. B (Mandia Depo.) at
13 196:20-197:3 *with* Cowan Decl., Ex. B (Mandia Depo.).

14 Then, Mandia testified, “we took licensing information provided to us from Carlos
15 Barradas . . . and we looked at the [SAP TN] customer-labeled [download] folders to see where
16 the things in the customer-labeled folders aligned with the licensing that we had [for those
17 customers].”¹³ Russell Decl., Ex. B (Mandia Depo.) at 348:19-349:9. Mandia also conducted a
18 similar analysis using Defendants’ “Download Request Forms,” which, according to SAP TN,
19 recorded products “that the customer stated it was licensed to download.”¹⁴ Cowan Decl., Ex. A
20 (Mandia Report) ¶ 209-11 & n.91. Using both the Oracle and the SAP TN sources, Mandia
21 determined which downloads on SAP TN’s servers fit or did not fit Defendants’ admissions
22 about what was “inappropriate.” *Id.*, ¶ 205-28. His conclusions about downloading “without

23 ¹² At least one million of these downloads violated computer fraud laws, so were obviously
24 “inappropriate” and “improper.” *See, e.g.*, Dkt. 762 (Order re Mots. for Partial Summary
Judgment) at 24:21-23.

25 ¹³ Barradas is “Senior Principal Critical Accounts” manager with “in-depth knowledge regarding
the licensing of specific Oracle products.” Cowan Decl., Ex. A (Mandia Report) ¶ 108.

26 ¹⁴ Defendants criticize Mandia’s reliance on the same customer representations SAP TN
27 allegedly relied on for five years to download over 9 million files. *See, e.g.*, Russell Decl., ¶¶ 17,
20 & Ex. M (Gray Report) at 41-42 (SAP TN relied on licensed product representations from
28 customers.), Ex. P (Rog. 13) (downloads based on “licensed” products).

1 regard to licensing” rely on this analysis as well as his review of other SAP TN evidence.¹⁵

2 Under these circumstances, the fact that Mandia did not visually inspect each of the
3 voluminous underlying license agreements does not render his testimony inadmissible, or even
4 unusual. It was proper for him to assume for the purpose of his analysis that the licensed product
5 information he obtained from both parties was correct and would be proved up at trial. *See*
6 *Barefoot v. Estelle*, 463 U.S. 880, 903 (1983) (“[Experts’ opinions] need not be founded upon
7 their own personal knowledge of [the] facts, but may be founded upon the statement of facts
8 proved in the case.”) (citing *Spring Co. v. Edgar*, 99 U.S. 645, 657 (1878)); *Am. Booksellers*
9 *Ass’n v. Barnes & Noble, Inc.*, 135 F. Supp. 2d 1031, 1038 (N.D. Cal. 2001) (permitting an
10 expert “to base his expert opinion on evidence that will be proved by other witnesses at trial”).

11 C. Mandia May Testify About “Cross-Use” and “Contamination”

12 As implicitly conceded by Defendants’ stipulation to “all liability on all claims,” no
13 Oracle customer license allows a customer to copy or use the software other than to support that
14 particular customer. Mandia defined “cross-use” to mean the use of one customer’s licensed
15 Oracle materials to support another customer, and “contamination” to refer to a fix SAP TN
16 provided to a customer that was the product of such cross-use. Cowan Decl., Ex. A (Mandia
17 Report) at ¶ 54-55. Defendants concede that these terms “have a particular meaning in the
18 context of this case and are intended to indicate whether certain copies or conduct fall within the
19 scope of license rights” – that is, the testimony using these terms is highly probative. Mot. at 2
20 n.3. Mandia’s analysis showed that SAP TN’s customer support involved extensive
21 “contamination” by “cross-use” of Oracle software and support materials. Cowan Decl., Ex. A
22 (Mandia Report) at ¶¶ 8, 292-305. He focused on these activities because Oracle contends (and
23 Defendants concede) they are infringing.¹⁶ “Cross-use” and “contamination” factually describe

24 ¹⁵ *See, e.g.*, Russell Decl., Ex. B (Mandia Depo.) at 363:4-25 (relying on SAP TN employee John
25 Ritchie’s testimony), and ¶ 21 & Ex. Q (Ritchie Depo.) at 79:15-82:8, 118:15-119:11 (“[T]here’s
26 nothing within Titan that checks whether PeopleSoft CRM is licensed to that particular
27 customer’s credential that’s being used. ... There is no checking whatsoever.”).

28 ¹⁶ *Compare* Dkt. 670 (SAP’s Opp’n to Mot. for Partial Summary Judgment) at 12:16-25
(describing Oracle’s motion as related to using “CDs to build environments *for customers other*
than the customer from whom the CDs were obtained”) with Russell Decl., ¶ 23 & Ex. R
(Hearing re Mot. for Partial Summary Judgment) at 28:17-29:11 (counsel for Defendants
(Footnote Continued on Next Page)

1 specific ways SAP TN used Oracle software. Mandia uses these terms to simplify and explain
2 SAP TN’s conduct to the jury. Defendants seek to preclude these helpful and probative
3 descriptors by a meritless (frankly, nonsensical) attack on his qualifications and methodology.¹⁷

4 **Qualifications.** Mandia is eminently qualified forensically to piece together the copying
5 and use of software across SAP TN’s servers and/or eventually to a customer. *See* Sec. III.A.,
6 above. “Cross-use” and “contamination” are factual descriptors of the activities he investigated.
7 Mandiant does not become less qualified to testify about those subjects when he uses words that
8 Defendants dislike (but use themselves).

9 **Methodology.** Defendants equate Mandia’s *definitions* of “cross-use” and
10 “contamination” with *assumptions* (supposedly supplied by counsel) and then argue Mandia did
11 nothing to “verify” his “assumptions.” Mot. at 12:4-9. However, Mandia’s definitions are not
12 assumptions, so there was nothing to “verify.” Moreover, and though it does not matter for a
13 definition, Mandia defined his terms based on many sources in addition to “conversations with
14 counsel,” including Defendants’ own admissions and characterizations of their conduct. *See,*
15 *e.g.,* Russell Decl., Ex. B (Mandia Depo.) at 220:19-225:10 (“Almost every one of these
16 definitions were terms we used for years. . . . it’s an aggregation of many different things that
17 came from multiple sources.”) (redacted by Defendants as “NOT RELEVANT TO MOTION” at
18 Cowan Decl., Ex. B). Defendants’ methodological challenge is way off base.¹⁸

19 conceding “the specific conduct in the motion . . . *was infringement of the registration they put in*
20 *the motion.*”) (emphasis supplied).

21 ¹⁷ *See* Mot. at 5, exclusion request No. 6, 7:15-19, 14:6-18. Defendants do not include “cross-
22 use” or “contamination” in the Fed. R. Evid. 403 section of their motion, likely because they use
23 such words to describe the same activity, for the same reasons. *See, e.g.,* Russell Decl., ¶¶ 3, 24-
24 25 & Ex. A (Depo. Ex. 1549) (one environment used for four customers is a “Cross-Use”
environment.), Ex. S (Mot. to Dismiss Hearing) at 40:10-20 (defendants’ counsel arguing,
“cross-use is copying, providing it to someone else and using it for someone else – it’s a copy.”),
Ex. T (NextLabs Website) at 2 (SAP Certified Partner offering a product that helps prevent
“cross-contamination” of software across multiple customers).

25 ¹⁸ Defendants use the same flawed logic to challenge Mandia’s use of these terms related to his
26 reliance on Levy’s statistics. Mot. at 14:9-18 (“Mandia cannot manufacture a reliable basis for
27 his opinions on the volume and existence of ‘contamination’ and ‘cross-use’ by passing his own
28 assumptions (provided by Plaintiffs’ counsel) through Levy.”). Defendants “manufacture” their
argument by re-labeling Mandia’s definitions as “assumptions.” Moreover, Defendants cannot
dispute Mandia’s reliance on Levy’s extrapolation of his data when Defendants expressly do not
challenge the methodology or conclusions reflected by *either expert’s counts*. Mot. at 1:19-22.

1 **D. Mandia’s Testimony Regarding Copied Material Covered by Oracle’s**
2 **Asserted Registrations is Admissible**

3 Defendants seek to exclude Mandia testimony related to Oracle’s copyrights-in-suit in
4 two ways. *See* Mot. at 5, exclusion requests Nos. 3 & 4. Their arguments lack force in light of
5 their stipulation to “all liability” on Oracle’s copyright claims, but both are also wrong.

6 **1. Mandia Should Be Permitted To Testify That SAP TN’s**
7 **Copies Relate To The Registered Works**

8 In part to determine what software and support materials to count as relevant to his
9 forensic analysis of Defendants’ systems, Mandia made an informed assumption about which
10 Oracle software products are covered by the copyrights-in-suit. Those products are listed in
11 Tables 35 and 36 of his Report. Cowan Decl., Ex. A (Mandia Report) ¶ 45 (stating this
12 assumption); *see also* Russell Decl., Ex. B (Mandia Depo.) at 453:14-454:2 (referring to ¶ 45 in
13 explaining the assumption). They represent the baseline materials Oracle provided Mandia to
14 define his search for copies within the 12+ terabytes of data on SAP TN’s systems. Russell
15 Decl., Ex. B (Mandia Depo.) at 455:3-457:3 (“I was looking for software and support materials
16 that were listed in Table 36, and then different product lines and releases that were in Table
17 35.”). Mandia’s assumption that these products embody Oracle’s Registered Works, now
18 effectively conceded by Defendants’ liability stipulation, was reasonable for a number of
19 reasons, including Oracle’s representation to him (to be proved up at trial) that the software it
20 provided him was covered, and Mandia’s confirmation of the product names with titles in the
21 Registrations. *Id.* at 457:22-459:22. Again, that is what experts do. *See* Fed. R. Evid. 703 (“The
22 facts or data ... upon which an expert bases an opinion ... may be those perceived by or made
23 known to the expert at or before the hearing.”); *see also* Fed. R. Evid. 104(b).

24 After his extensive forensic analysis, Mandia applied his assumption of what Oracle will
25 prove at trial to the copies of Oracle software he found on SAP TN’s systems to form
26 conclusions about which copies lined up with the Registered Works. When he found literal
27 copies (for instance, exact code matches based on forensic MD5 hash comparisons), he
28 concluded they were covered by the copyrights-in-suit. Cowan Decl., Ex. A (Mandia Report) at
¶ 373-374 (describing the three forensic approaches used to compare SAP TN’s copies of Oracle

1 applications to the Registered Works), ¶¶ 376-377 (same for support materials).

2 Defendants do not dispute Mandia’s forensic investigation expertise to search for the
3 materials in Tables 35 and 36 *or* the accuracy of his summary, *or* the correctness of his
4 assumption. *See, e.g.*, Mot. at 1:19-22. In fact, even before their stipulation to liability,
5 Defendants had already largely conceded that Mandia’s assumption is *correct*. *See* Dkt. 762
6 (Order re Mots. for Partial Summary Judgment) at 7:8-17 (granting summary judgment “[b]ased
7 on defendants’ concessions”); Dkt. 745 (Jt. Pretrial Statement) at ¶¶ 42-51 (undisputed facts re
8 Oracle’s Registered Works and SAP TN copies of same products and versions).

9 Instead, Defendants complain that “Mandia opines that all 120 of the copyright
10 registrations put at issue by Plaintiffs are implicated by his findings,” and therefore infringed.
11 Mot. at 9:23-24. ***Mandia did not say that***, though he now could in light of Defendants’
12 stipulation. Rather, Mandia’s assumption, combined with his extensive experience, input from
13 Lichtman and input from knowledgeable Oracle employees, led him to conclude the inverse:
14 that “each SAP TN Environment or installation of Oracle Database” that matches a product listed
15 in Table 35 contains protectable expression from a Registered Work. *Compare id. with* Cowan
16 Decl., Ex. A (Mandia Report) at ¶ 373, 376; *see also* Sec. IV.E., below (no “infringement” in
17 Mandia’s Report). Even absent Defendants’ stipulation, Mandia’s testimony about the copies of
18 Registered Works he found is admissible because it rests on reliable assumptions and facts to be
19 proven at trial (now stipulated), and will assist the jury in untangling Defendants’ massive
20 infringement. Fed. R. Evid. 702, 703. The Court should reject Defendants’ criticism of Mandia
21 on these grounds.

22 **2. Mandia Should Not Be Precluded From Offering Opinions**
23 **With Which Defendants’ Expert Disagrees**

24 Defendants also seek to prevent Mandia from testifying as to *any* Oracle software *or* SAP
25 TN copies related to 55 registrations that Defendants’ expert Gray asserts are not implicated by
26 Mandia’s Report. Mot. at 5, exclusion request No. 4 & 9:28-10:9. This issue is rendered
27 inconsequential by Defendant’s stipulation to “all liability on all claims” by SAP TN. Even if
28 still of any importance, the fact that Defendants resort to Gray’s interpretation of Mandia’s

1 Report is enough to deny their request; it would have been, if anything, a battle of the experts.
2 *See Humetrix*, 268 F.3d at 919 (“Authority to determine the victor in such a ‘battle of expert
3 witnesses’ is properly reposed in the jury.”). Regardless, Defendants are wrong. Defendants
4 ignore what were open questions of law in the case, now superseded by Defendants’ liability
5 stipulation, about whether infringement of a derivative work also infringes earlier registrations.
6 *See, e.g.*, Dkt. 745 (Jt. Pretrial Statement) at 75, ¶¶ 2-5. Moreover, Gray’s report does not
7 address registrations implicated by Defendants’ recent (and late) production of hundreds of
8 thousands of software and support materials and thousands of instant messages, which Oracle
9 and Mandia are currently analyzing and are the subject of a potential sanctions motion with
10 Judge Laporte. *See*, Dkt. 826 (Jt. Statement re Sanctions Mots.). For these reasons, the Court
11 should deny Defendants’ motion to exclude the list of registrations derived from Gray’s
12 characterization of Mandia’s report.

13 **E. Mandia’s Testimony Is Not Unduly Prejudicial**

14 Finally, Defendants seek to exclude multiple, significant aspects of Mandia’s testimony
15 under Fed. R. Evid. 403 in two short paragraphs at the end of their brief. Mot. at 15:7-16:7.
16 Defendants make two conclusory statements. First, they assert that Mandia’s testimony about
17 “copyright infringement and legality . . . comprise[s] improper and unfairly prejudicial legal
18 opinion.” Mot. at 15:18-21. Second, Defendants restate their qualifications and assumptions
19 arguments as to “subjects on which [Mandia and Levy] have no applicable expertise and
20 conclusions they undertook no independent analysis to verify.” Mot at 16:4-7. As to the first
21 point, Defendants’ stipulation to liability has negated any prejudice. Moreover, Defendants seek
22 to exclude a phantom. Mandia never used the word “infringement” in his Report, used it *one*
23 *time* in his two-day deposition with reference to *not* knowing a legal definition, and never
24 asserted in either his Report or his deposition that any activity was legal or illegal. Russell Decl.,
25 ¶ 22 & Ex. B (Mandia Depo.) at 169:25-170:6 (redacted by Defendants as “NOT RELEVANT
26 TO MOTION” at Cowan Decl., Ex. B). Defendants thus have no basis whatsoever to claim that
27 Mandia “offer[s] opinions on the ultimate issue of copyright infringement.” Mot. at 15:16-18.

28 Defendants’ second point cites no authority, and nothing in support of the stated

1 underlying premises. Such cursory treatment, and the absence of even a passing reference to the
2 probative value of the testimony, does not carry Defendants’ burden under Rule 403 to show that
3 any testimony’s “probative value is *substantially outweighed* by” any hypothetical prejudice.

4 If Defendants mean to refer to Mandia’s analysis of SAP TN’s unlicensed or
5 “inappropriate” downloads, that is not an “ultimate issue.” And the ultimate issue – liability –
6 has been stipulated. Moreover, since as explained above (*see* Sec. IV.B.), Mandia’s analysis
7 applied lists of licensed products obtained from Oracle *and* SAP TN to the SAP TN downloads
8 he found, there is no reasonable or fair way to exclude the word “license” in this context. That
9 language cannot be unfairly prejudicial when it is 1) the same language SAP TN used as part of
10 its routine onboarding of each customer, and 2) the supposed foundation for SAP TN’s alleged
11 downloading policies. *See, e.g.*, Russell Decl., ¶¶ 19-20 & Ex. O (July 3, 2007 Teleconference,
12 SAP CEO Henning Kagermann) (“inappropriate” downloads “according to the support contract
13 of the customer”), Ex. P (Rog. 13) (downloads based on “licensed” products). The same is true
14 for “inappropriate” use of software, since Mandia focused his investigation in part on what
15 Defendants had admitted (and have now fully conceded) was “inappropriate.” Finally, the
16 relevance of Mandia’s licensing analysis outweighs any unfair prejudice. Fed. R. Evid. 403.

17 Defendants’ complaint that Mandia offers opinions on “the fact question of whether
18 creative/protected expression exists” (Mot. at 15:16-18) is academic in light of Defendants’
19 stipulation to “all liability on all claims” of copyright infringement. It also ignores the same
20 evidence as their claim that Mandia’s methods were unreliable. As detailed in Sec. IV.A., above,
21 Mandia has ample applicable expertise, verified assumptions, and relied on undisputed
22 information from multiple witnesses covering every product line at issue to support these
23 opinions.¹⁹ Defendants say nothing about, and appear to concede, the probative value of the

24 ¹⁹ These facts distinguish Mandia’s testimony from Defendants’ cases. *See, e.g., Nationwide*
25 *Transp. Fin. v. Cass Info. Sys., Inc.*, 523 F.3d 1051, 1059 (9th Cir. 2008) (stating that courts
26 permit “experts to refer to terminology from applicable law in expressing their opinions” but
27 excluding testimony that “constituted erroneous statements of law”); *SEC v. Leslie*, No. C 07-
28 3444, 2010 U.S. Dist. LEXIS 76826, at *27, 30 (N.D. Cal. July 29, 2010) (excluding testimony
that had “minimal probative value”); *TK-7 Corp. v. Estate of Barbouti*, 993 F.2d 722, 732, 736
(10th Cir. 1993) (affirming a directed verdict for defendants where plaintiffs failed to present
evidence tending to establish the assumption upon which plaintiff’s expert relied); *see also*

(Footnote Continued on Next Page)

1 evidence concerning how Oracle creates its software. Defendants offer no reason why Mandia’s
2 methodology creates unfair prejudice that outweighs this relevance. *See* Fed. R. Evid. 403.

3 **V. THE COURT SHOULD DENY DEFENDANTS’ MOTION TO**
4 **PARTIALLY EXCLUDE DR. LEVY’S TESTIMONY**

5 Levy is the National Managing Director of Advanced Analytical Consulting Group, Inc.
6 Cowan Decl., Ex. D (Levy Report) at 7. He has a Ph.D. in Economics from the University of
7 Chicago, and has previously testified on statistical sampling issues in numerous matters. *Id.* at
8 43-45. Oracle engaged him to design a statistically valid sample of SAP TN’s fixes and updates
9 for PeopleSoft HRMS, and to calculate population and sample statistics based on data about
10 those fixes and updates gathered by Mandia. *Id.* at 7.

11 Defendants make no plausible challenge to Levy’s qualifications, methods or
12 conclusions. As with Mandia, Defendants challenge Levy’s reliance on another expert, namely,
13 Mandia. Defendants also claim that the descriptive and probative terms used in Levy’s report
14 and discussed above are excludable legal opinions. Last, Defendants move to exclude sentences
15 in Levy’s report which contain the word “infringement” and its variants, or any of the phrases
16 “infringed Oracle copyrights,” “breached other laws,” and “impermissible cross-use.” All of
17 these challenges are meritless, and should be denied.

18 **A. Levy Properly Analyzed Mandia’s Data Without Independently**
19 **Recollecting That Data**

20 Defendants challenge Levy’s reliance on Mandia’s data under Fed. R. Evid. 702 and 403,
21 complaining that Levy “did not independently verify the reliability of that data.” Mot. at 11:6-7.
22 Defendants have conceded that Mandia’s and Levy’s counts are reliable, making this challenge
23 completely abstract. Mot. at 1:21-22. As support for the proposition that experts testifying about
24 statistical analyses may analyze only data they personally collected, Defendants cite only an
25 unpublished case where an economist adopted, without analysis, a named party’s estimate of her
26 own expenses and a pre-existing sales projection as the conclusions of his own report. *See*

27 *Hangarter v. Provident Life and Accident Ins. Co.*, 373 F.3d 998, 1017 (9th Cir. 2004) (“[A]
28 witness may properly be called upon to aid the jury in understanding the facts in evidence even
though reference to those facts is couched in legal terms.”).

1 *Mooring Capital Fund v. Knight*, 2010 U.S. App. LEXIS 15114, at *10-*13 (10th Cir. July 22,
2 2010). Defendants offer no support for the proposition that expert conclusions based on
3 statistical analysis are improper if the underlying data was gathered by another expert.

4 Defendants’ “independent verification” proposition is a fiction. As Defendants admit, an
5 expert may rely upon facts and data “of a type reasonably relied upon by experts in the particular
6 field in forming opinions or inferences upon the subject.” Fed. R. Evid. 703. “Statisticians often
7 advise experts in substantive fields on the procedures for collecting data and often analyze data
8 collected by others. As a result, cases involving statistical evidence often are (or should be)
9 ‘two-expert’ cases of interlocking testimony.” Russell Decl., ¶ 26 & Ex. U, Federal Judicial
10 Center, *Reference Manual on Scientific Evidence*, 87 (2d ed. 2000). Levy’s reliance on Mandia
11 is a simple and appropriate collaboration between experts.

12 **B. Levy’s Report Contains Descriptive Context, But Not Legal Conclusions**

13 Defendants challenge introductory and context-providing sentences *containing no*
14 *conclusions* from Levy’s report as improper legal “opinions” under Fed. R. Evid. 702 and 403.

15 Just as with Mandia, Defendants move to exclude a phantom. Levy formed opinions
16 about *measurements* quantifying SAP TN activities, not about infringement or other legal
17 violations:

18 Q. What if any is your basis for saying that TomorrowNow infringed Oracle
19 copyrights in this sentence [on p. 7]?

20 A. Well, I’m saying that I’ve been retained to do a sample to investigate
21 data related to that. I’m not saying in this sentence that there was a – that –
22 I’m not making a claim here. I’m describing what I was asked to to [sic] do.

23 Russell Decl., ¶ 27 & Ex. V (Levy Depo.) at 44:19-45:1; *see also id.* at 48:10-49:20 (Levy
24 “quantif[ied]” measures from Mandia, without “assuming contamination”).

25 Despite Levy’s clear testimony, Defendants move to exclude conclusions he did not
26 make. Defendants cite no evidence for their assertion that Levy “offer[s] opinions on the
27 ultimate issue of copyright infringement,” Mot. at 15:16-21, and there is none.

28 Levy does use the word “infringement” in his report (unlike Mandiant), but only for
background and context. For example, in opening sections titled “Executive Summary” and

1 “Introduction and Assignment,” Levy reports that he was engaged “to *design* a statistically-valid
2 sample . . . that *can be used* to scientifically estimate the number of Fixes delivered to customers
3 by SAP TN that infringed Oracle copyrights or otherwise resulted from impermissible cross-use
4 of Oracle’s software.” Cowan Decl., Ex. D (Levy Report) at 7 (emphasis supplied) & 1 (same,
5 replacing “scientifically” with “reliably”). Similarly, he references in passing in his “Protocol”
6 section, “the kind of information necessary for determining the extent of infringement by SAP
7 TN.” *Id.* at 13 & n.33.

8 These phrases merely provide context to explain why Oracle hired Levy and how his
9 conclusions about Mandia’s measurements might be used. This makes them appropriate subject
10 matter for expert testimony. *See* Fed. R. Evid. 702 (permitting “technical, or other specialized
11 knowledge [that] will assist the trier of fact to understand the evidence or to determine a fact in
12 issue”). Defendants are merely attempting to convert explanatory context into legal opinion.
13 Defendants advance no other prejudice theory – there is none in light of their stipulation to
14 liability – and say nothing about probative value.

15 **C. Levy Discusses “Contamination” And “Cross-use” Only To Refer To**
16 **Measures And Terms Defined By Mandia**

17 Defendants seek to exclude Levy’s use of the words “contamination” and “cross-use”
18 under Fed. R. Evid. 702 as improper legal opinion. Mot. at 3:24-4:15. Levy’s choice of these
19 terms is “based on conversations with Mr. Mandia,” and his definitions track Mandia’s report.
20 *Compare* Cowan Dec., Ex. D (Levy Report) at 5 & n.22 *with id.*, Ex. A (Mandia Report) at
21 ¶¶ 54-55. Mandia also provided Levy with the measure definitions in Levy’s report, some of
22 which contain the words “contamination” and “cross-use.” *See id.*, Ex. D (Levy Report) at 17-
23 18, Table 2 (measure definitions) & 14 n.34. These are highly probative, factually descriptive
24 terms, not legal conclusions. *See* Sec. IV.C., above; *see also* Fed. R. Evid. 702. For the same
25 reasons the Court should allow Mandia to use them, it should also allow Levy to use them.

26 **VI. CONCLUSION**

27 For the reasons stated above, the Court should deny Defendants’ motion in its entirety.
28

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2 Bingham McCutchen LLP

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4
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7 Attorneys for Plaintiffs
8 Oracle USA, Inc., *et al.*
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