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UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 OAKLAND DIVISION

23 ORACLE USA, INC., *et al.*,
 24 Plaintiffs,
 25 v.
 26 SAP AG, *et al.*,
 27 Defendants.
 28

No. 07-CV-01658 PJH (EDL)
**REPLY MEMORANDUM IN SUPPORT OF
 ORACLE’S MOTION NO. 1: TO EXCLUDE
 TESTIMONY OF DEFENDANTS’ EXPERT
 STEPHEN CLARKE**

 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 has now stipulated to “all liability on all claims,” including the extensive infringing
3 use of Oracle’s PeopleSoft, J.D. Edwards, Siebel and database program copyrights as Oracle
4 alleged. Dkt. 866. Yet, SAP seeks to avoid fully compensating Oracle for that infringement by
5 proffering unsound and inadmissible damages approaches through its expert, Stephen Clarke. In
6 its Opposition (“Opp.”), SAP does not refute the fundamental flaws in Clarke’s methodologies
7 and inputs. Instead, SAP confirms that over and over, and in core respects, Clarke ignores the
8 facts and the law and substitutes his own views of what they should be, claims expertise where he
9 has none, and makes up unreliable and result-driven damages approaches.

10 ***Clarke’s PeopleSoft/Siebel Random Royalty Rates and Artificial Caps.*** Clarke values
11 use of the PeopleSoft and Siebel copyrights at 50% of SAP TN’s actual support revenues and
12 50% of the profits on SAP sales to just two customers. This arbitrary formula has no basis in any
13 cognizable methodology. Clarke’s royalty rates and caps flatly ignore SAP’s expectations and
14 plans to use SAP TN’s discount support pricing to drive SAP applications sales, and are pure *ipse*
15 *dixit*, untethered to any record evidence and improper under all applicable law. Clarke then
16 exacerbates these errors by assuming a scope of use that is narrower than Oracle alleged *and SAP*
17 *has conceded*. This analysis also is admittedly “affirmative” and late.

18 ***Clarke’s Improper Database Use Valuation.*** Clarke’s valuation of SAP TN’s infringing
19 use of Oracle’s database software is based only on Clarke’s interpretation of what the terms of
20 Oracle’s standard license allow. His opinion has no basis in fact, as he ignores the undisputed
21 record evidence that Oracle has never used that standard license to permit a competitor to support
22 multiple customers, as SAP TN did. Further, Clarke’s counter-factual “do-over,” pretending that
23 SAP reconfigured its servers to get a cheaper license, is impermissible under the law, which
24 mandates a valuation based on how SAP TN’s used Oracle’s database software.

25 ***Clarke’s Unprecedented Customer Exclusion Formulae.*** Clarke’s “automatic exclusion
26 criteria” and “A or B plus at least one of Cs” formula for excluding customers from Oracle’s lost
27 profits and SAP’s infringer’s profits damages and the SAP royalty base is admittedly invented for
28 this case by Clarke. Clarke’s fundamental assumptions for exclusion are rejected by SAP’s

1 proffered industry expert, Brian Sommer, and its application yields demonstrably unreliable
2 results. If SAP has evidence that a SAP TN customer would have left Oracle anyway, that
3 evidence – not the unreliable end product of Clarke’s unreliable exclusion methodology – should
4 be submitted at trial.

5 ***Clarke’s Third Party Providers “Market Study.”*** Nothing in Clarke’s background equips
6 him to assess whether support offerings of other companies were technically comparable to SAP
7 TN’s support at any relevant time. Moreover, Clarke’s “study” relies on nothing more than
8 untested sales puffery on company websites. The jury should consider any admissible evidence
9 of alternative offerings and reach its own conclusions; it should not be misled by the gloss of
10 purported “expertise” that would arise if the product of Clarke’s casual web-browsing is allowed.

11 ***Clarke’s Flawed Regression Analyses.*** As Oracle’s statistical expert, Dr. Levy, showed
12 in his opening declaration (and confirms in his accompanying reply declaration), Clarke’s profit
13 margin conclusions are founded on fundamentally erroneous regression analyses, betraying
14 Clarke’s lack of expertise in statistics.

15 ***Clarke’s Legal Opinions.*** SAP cannot refute that Clarke repeatedly testifies as to his own
16 interpretation of contracts, case law and this Court’s orders. His legal opinions are improper –
17 doubly so when they contradict the law. The Court should preclude any such testimony.

18 ***Clarke’s Reliance on Late Customer Declarations.*** Clarke’s post-report changes to his
19 lost profits and infringer’s profits calculations ,and SAP’s royalty calculation based on post-
20 report declarations, flout the case schedule and leave Oracle no meaningful way to investigate
21 this new “evidence.” SAP does not even try to justify the delay. Clarke’s reliance on late-
22 produced declarations should be precluded.

23 **II. CLARKE’S ROYALTY RATE APPROACH SHOULD BE PRECLUDED**

24 Clarke’s affirmative opinion is that a 50% royalty on SAP TN’s insubstantial actual
25 revenues and 50% of SAP’s actual profits on SAP application sales to only two customers fairly
26 compensates Oracle for SAP’s massive infringing use of Oracle’s PeopleSoft and Siebel
27 copyrights. He simply backs into the desired result without regard for the facts established in the
28 record, including what the law requires be the focus: SAP’s and Oracle’s stated goals and

1 expectations at the times the PeopleSoft and the Siebel hypothetical licenses would have been
2 negotiated. Instead, Clarke relies on his own professed “judgment” – precisely what *Daubert*
3 forbids.

4 ***Clarke’s Royalty Rate Approach Has No Basis Beyond Clarke and Ignores the***
5 ***Determinative Contemporaneous Party Expectations.*** SAP admits, as it must, that “the proper
6 form of royalty is dependent upon what would have been the most likely agreement during the
7 hypothetical negotiation.” Opp. 8:24-25 (quoting *Linkco, Inc. v. Fujitsu Ltd.*, 232 F. Supp. 2d
8 182, 188 (S.D.N.Y. 2002)); accord Oracle’s Initial Motion to Exclude Clarke (“Mo.”) 8 n.5
9 (quoting, e.g., *Hanson v. Alpine Valley Ski Area, Inc.*, 718 F.2d 1075, 1081 (Fed. Cir. 1983)
10 (“The issue of the infringer’s profit is to be determined not on a basis of a hindsight evaluation of
11 what actually happened, but on the basis of what the parties to the hypothetical negotiation would
12 have considered at the time of the negotiation”). What would have been “most likely” depends
13 on *facts* that existed at the time of the negotiation. SAP does not even address that Clarke
14 disregards those determinative facts and cannot change that the royalty he invents has no factual
15 basis whatsoever.

16 As Oracle has established, Clarke admits his 50% rates are based only on his “judgment,”
17 not “quantitative analysis” or “specific facts,” and admits he assumes SAP TN’s support would
18 be priced differently in the but-for world, contrary to what the law requires. Mo. III.A.1. SAP’s
19 Opposition does not refute any of this. SAP can point to nothing in Clarke’s analysis linking any
20 record evidence to his selection of a 50% royalty rate on SAP TN’s actual revenues and a 50%
21 royalty rate on SAP’s profits on applications sales. See Opp. III.B.1. Clarke has no benchmark
22 or existing license that supports this arbitrary approach; no party endorsed any such model at the
23 time, and he cannot cite or rely on even post-litigation testimony or interviews that show his
24 proposed license model would ever be considered, let alone agreed to.¹ In contrast, the

25 _____
26 ¹See Dkt. 783 (House Decl. ISO Mo. No. 1 to Exclude Clarke (“House Opening Decl.”)), Ex. A
27 (Clarke Report) at 202-205 (citing no case facts, only Clarke’s bare assumptions); Mo. 5:19-21 &
28 n.3; Declaration of Holly House ISO Reply (“House Reply Decl.”), Ex. A (Clarke Depo.) at
116:14-19 (“Q: In considering what a willing buyer would pay for the license of what was
stolen, did you talk with any SAP personnel? A: In terms of the value of use? Q: Yes. A: No.”).

1 contemporaneous party evidence Oracle’s expert relies on reflects the parties’ significant
2 financial and strategic expectations for the relevant subject IP. Mo. III.A.2; *see also* Dkt. 846
3 (Opp. to Mo. to Exclude Meyer) at 3-5, 12.

4 Plucking a number out of the air is not science. Clarke’s results-driven opinion offered in
5 disregard of the legal standard and the parties’ expectations at the time² cannot assist the jury.
6 *Compare Bowling v. Hasbro, Inc.*, 2008 WL 717741, at *4-7 (D.R.I.) (condemning “superficial
7 and results-oriented” royalty rate analysis that “begins and ends with [the expert’s] reliance on
8 and reference to his own expertise” and did not “apply available information and data”; “mere
9 reference to the *Georgia-Pacific* factors, cannot change the sow’s ear of rank speculation into a
10 silk purse of reliable expert opinion.”);³ *see also Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146
11 (1997) (“nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to
12 admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert”);
13 *Varni Bros. Corp. v. Archer Daniels Midland Co.*, 191 F.3d 1090, 1102 (9th Cir. 1999) (“[A]ny

14 _____
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15 SAP’s claim that “the highest royalty rate that would allow TN the possibility of making a profit
16 is 25% of Oracle’s support fees,” Opp. 5:3-6, is also not supported by any record evidence.
House Opening Decl., Ex. A (Clarke Report) pp. 202-205.

17 ² As confirmed by the above cases, a proper FMV analysis must be based on the parties’
18 expectations at the time of the hypothetical negotiation. *See also* Mo. 8:6-9 & n.5 (citing, in part,
19 the “rule that recognizes sales expectations at the time when infringement began as a basis for a
20 royalty base as opposed to after-the-fact counting of actual sales” (quoting *Interactive Pictures*
21 *Corp. v. Infinite Pictures, Inc.*, 274 F.3d 1371, 1384-85 (Fed. Cir. 2001))). But Clarke focuses
22 only on Defendants’ after-the-fact sales and utterly fails to consider the parties’ contemporaneous
23 expectations of the value of the subject IP and how SAP TN’s low cost support offer would drive
24 SAP applications sales and otherwise hurt Oracle. It is his utter disregard for and opining against
25 the use of this legally determinative contemporaneous party evidence (Mo. 8, n.4) that makes his
26 valuation improper, not the selection of a running royalty *per se*.

27 ³ SAP attempts to distinguish *Bowling* by pointing to the length of Clarke’s *Georgia-Pacific*
28 discussion. Opp. 7:4-19. But the issue is not the length of the report, it is Clarke’s failure to link
his conclusions to case facts. SAP then claims Clarke’s unilateral decision to cap Oracle’s FMV
of use damages by using SAP TN’s actual revenues as a ceiling is not “results-oriented” as was
the expert’s in *Bowling* but instead is “the maximum *his client could pay*.” Opp. 7:16-17. There
is no evidentiary support for this either; indeed Clarke’s approach is flatly contradicted by SAP’s
funding of SAP TN as a loss leader throughout its existence and SAP’s funding of SAP TN’s
damages in this case. Mo. 9:3-5 & n.6. Finally, SAP professes Oracle didn’t say how Clarke
backpedaled (another indicia of unreliability of the *Bowling* expert). Opp. 7:17-19. But Oracle
clearly explained Clarke’s rejection of his report’s limited scope of use “delta” at deposition.
Mo. 10:7-10. Clarke’s royalty approach is indistinguishable from the unreliable, ungrounded and
results-oriented royalty approach rejected in *Bowling* and should suffer the same fate.

1 inference founded upon [a] factual assertion [unsupported by the record] – even one drawn by an
2 economic expert – is necessarily unreasonable”).

3 ***SAP’s Claim That SAP TN Must Actually Make a Profit Is Wrong.*** SAP itself projected
4 almost one billion dollars in additional revenues in the first three years of its ownership of SAP
5 TN, by using SAP TN as a low cost support provider to help migrate Oracle customers to SAP.
6 Dkt. 846 (Opp. to Mo. to Exclude Meyer) at 14:5-18. Clarke, however, ignores these (and other)
7 actual, contemporaneous party projections and statements of expected benefits in calculating the
8 value of a license. SAP appears to defend Clarke’s approach by arguing that a royalty would be
9 reasonable only if it allowed SAP TN to make a profit. Opp. 4:11-18. That is not the law. Mo. 8
10 n.5 (citing *Radio Steel & Mfg. Co. v. MTD Products, Inc.*, 788 F.2d 1554, 1557 (Fed. Cir. 1986)
11 (“The determination of a reasonable royalty . . . is not based on the infringer’s profit, but on the
12 royalty to which a willing licensor and a willing licensee would have agreed at the time the
13 infringement began”); *Snellman v. Ricoh Co., Ltd.*, 862 F.2d 283, 289-90 (Fed. Cir. 1989)
14 (upholding recovery based on infringer’s expected sales though expectations far exceeded actual
15 sales)). Copyright damages are not means-tested for low-income infringers. And even if they
16 were, SAP TN would be disqualified by the subsidies it received from SAP.

17 SAP ignores these cases and ignores that the court in *Georgia-Pacific* held that the FMV
18 must be based on the infringer’s *expected* profits at the time of the negotiation – “a different
19 question from the amount of infringing profits that GP actually did make” – and viewed the
20 infringer’s expectations of “substantial additional profits from collateral sales” as “a significant
21 factor to be considered by the Court in determining the reasonable royalty because it has the
22 logical tendency, as a matter of simple economics, to increase the amount of the reasonable
23 royalty.” 318 F. Supp. 1116, 1131-32 (S.D.N.Y. 1970).⁴ Clarke’s focus on SAP TN’s actual

24
25 ⁴ Contrary to SAP’s intimation (Opp. 6:4-9), *Georgia-Pacific* does not endorse Clarke’s factual
26 do-over of SAP’s express plan to continue SAP TN’s low cost support model to drive SAP sales
27 at the time of the hypothetical negotiation. The paragraph SAP cites provides the general
28 overview of the hypothetical negotiation approach and, indeed, in part SAP omits, reaffirms
that Clarke should have looked at “the anticipated amount of net profits that the prospective
licensee reasonably thinks he will make.” 318 F. Supp. at 121. No authority allows Clarke to
pretend SAP would change its contemporaneous business plans for SAP TN.

1 profits alone, rather than SAP’s profits and expectations, is an impermissible results-driven
2 approach, contrary to the law, that ignores the record facts and should be excluded. *Bowling*,
3 2008 WL 717741 at *4-7.

4 ***SAP Cannot Dispute Clarke Valued A Narrower Use than Oracle Alleged and***
5 ***Defendants Have Now Conceded Based on His Own Inexpert Analysis.*** SAP cannot deny that,
6 contrary to the now-conceded scope of infringement, Clarke testified that in valuing the “Subject
7 IP” he did not accept Oracle’s allegations, but rather assumed “certain intellectual property
8 owned by Oracle was not used.” House Reply Decl., Ex. A (Clarke Depo.) at 124:1-127:23.
9 SAP also does not dispute that Clarke’s royalty values only *some* (what Clarke calls the “delta”)
10 of the conceded infringing activity and further values use only insofar as SAP TN received
11 support revenue from customers. Opp. 12:16-19. Nor does SAP dispute that Clarke’s “delta” is
12 far less activity than the broad copying and use Oracle alleged and Meyer quantifies (*e.g.*, SAP
13 TN used the vast materials it copied to create a master library which allowed Defendants to
14 globally market SAP TN’s comprehensive support capabilities and attack Oracle across the
15 vulnerable acquired customer bases; inflicting pain on Oracle with SAP TN was SAP’s goal
16 regardless of revenues earned). Mo. 9:17-10:10 & n.7, n.8; Dkt. 847, Ex. A (Meyer Report) ¶ 61.
17 Instead SAP argues “Plaintiffs do not explain how a royalty based on customer revenues would
18 fail to compensate” for that broader infringement. Opp. 10:19-20. In fact, Meyer explains in
19 detail and provides the extensive factual support showing why the expected value of the benefits
20 to SAP and harm to Oracle from SAP’s infringing use would not be capped by SAP TN’s actual
21 customer revenues. *See, e.g.*, Dkt. 847 (Jindal Decl. ISO Opp. to Exclude Meyer), Ex. A (Meyer
22 Report) ¶¶ 232-233; Ex. B (Meyer Depo.) 460:13-461:24; House Reply Decl, Ex. B (Meyer
23 Depo.) at 561:17-563:18, 564:18-565:6; *see also* Dkt. 846 (Oracle’s Opp. to Mo. to Exclude
24 Meyer) at 6:22-7:6 (ability to use Oracle IP to compete for all 9920 customers). Moreover, it is
25 SAP’s burden to show that its expert will not mislead the jury by quantifying less than what the
26 law requires, namely the value to Defendants of all infringing copies.⁵ Mo. 4:2-8; *Abuan v. Gen.*

27 _____
28 ⁵ *See, e.g., Wall Data, Inc. v. L.A. County Sheriff’s Dept.*, 447 F.3d 769, 775 n.3, 786-87 (9th Cir. 2006) upholding damages award based on infringing software copies where evidence showed

1 *Elec.*, 3 F.3d 329, 332 (9th Cir. 1993) (affirming preclusion of testimony that did not “comply
2 with relevant legal standard”). Clarke’s royalty rate calculations necessarily quantify the value of
3 only some of the copying, not all, and for that reason also are unreliable and inadmissible.
4 *Powell v. Carey Int’l, Inc.*, 2007 WL 1068487, at *3 (S.D. Fla.) (“[B]ecause the premise of
5 [expert’s] opinion [was] fundamentally flawed and directly contrary to the law of the case, his
6 report and testimony would not aid a trier of fact . . .”).⁶

7 Clarke’s valuation of use is also defective because his narrow “delta,” defining the scope
8 and duration of SAP TN’s infringement, is, in part, the result of his “own analysis,” including his
9 legal interpretation of customer contracts. Mo. 11:5-7, n.9. SAP does not deny this; indeed, it
10 confirms it. Opp. 11:24-26 (Clarke’s “analysis related to the infringement start and end dates, its
11 geographic scope, and how TN’s support services compared to the services of other third party
12 support providers”). Clarke, an accountant with no claimed expertise in either technical
13 infringement or the third party support market (Mo. 11 n.10; 19:15-16 & n.29), is doubly
14 unqualified to present any such testimony. *United States v. Chang*, 207 F.3d 1169, 1172-73 (9th
15 Cir. 2000). And he cannot offer opinions based on his legal interpretation of contract terms. *In*
16 *re W. Asbestos Co.*, 416 B.R. 670, 704 (N.D.Cal. 2009) (PJH).

17 Finally, Clarke’s opinion is based on a scope of use that is refuted by SAP’s concession of
18 “all liability on all claims.” Dkt 866 ¶ 1. SAP has conceded far more infringing use than Clarke
19 purported to value, and there is no way to translate Clarke’s truncated analysis into a damages
20 number that corresponds to the conceded liability.⁷ The combination of these scope of use

21 _____
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22 some copies of the valued “software would remain installed, but unused” in defendant’s
23 workstations). SAP implies the court in *Wall Data* may not have allowed valuation of unused
24 copies. Opp. 11:14-17. But the court explained the copies that formed the starting pool for
25 damages included “installed, but unused” software copies and the ranges of potential infringing
26 copies were the result of the number of *licensed* copies, not how many copies were used or
27 unused. *Id.* at 775 n.3, 786-87.

28 ⁶ Clarke’s demonstrable expansion of his scope of use at deposition (Mo. 10:7-10) further renders
his opinion unreliable. *Compare Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311, 1319 (9th
Cir. 1995) (“Any such tailoring of the experts’ conclusions would, at this stage of the
proceedings, fatally undermine any attempt to show that these findings were ‘derived by the
scientific method.’ Plaintiffs’ experts must, therefore, stand by the conclusions they originally
proffered, rendering their testimony inadmissible under the second prong of Fed. R. Evid. 702.”)

⁷ Clarke’s ability to rely on SAP expert Garmus as further support for the narrow scope of

1 problems mandate exclusion of Clarke’s royalty opinions and calculations.

2 *Clarke’s “Georgia-Pacific” Analysis Is Not “Rebuttal.”* SAP cannot escape Clarke’s
3 concession at deposition of what is apparent in his report: his *Georgia-Pacific* analysis yielding
4 his royalty rates calculations is an “affirmative” opinion separate and apart from his rebuttal of
5 Meyer’s FMV analysis. Mo. 12:1-7 & n.12. Clarke admittedly had been working on it since he
6 was hired by SAP in December 2007. Mo. 12:10-13. Because those opinions do not respond to
7 Meyer’s analysis, SAP does not and cannot offer an excuse for not providing them when
8 affirmative opinions were due in November 2009. The unjustifiable untimeliness of Clarke’s
9 royalty rate analysis is further cause for preclusion. *See, e.g., Burnham v. United States*, 2009
10 WL 2169191, at*5-7 (D. Ariz.) (precluding as “rebuttal” opinions based on long known case
11 evidence where expert deadlines provided ample time to produce an initial expert report).

12 **III. CLARKE’S DATABASE FMV LICENSE BASES ARE PREMISED ON**
13 **IMPROPER LEGAL OPINIONS AND UNRELIABLE METHODOLOGY**

14 *Clarke’s First FMV License Is Based On Erroneous License Interpretation:* SAP does
15 not dispute that Clarke’s first proposed \$1.9M license fee for SAP TN’s infringing use of
16 Oracle’s database software is based on Oracle’s standard *customer* License and Services
17 Agreement (“OLSA”) for an Enterprise Edition database and related price lists; SAP also does
18 not dispute that Clarke presupposes those provide an “established royalty” so pricing based on a
19 single license would allow SAP TN’s infringing use. Mo. 15:14-20. But “established royalties”
20 exist only where the owner “has consistently licensed others to engage in conduct comparable to
21 the defendant’s.” Mo. 16:1-5 (quoting *Monsanto Co. v. McFarling*, 488 F.3d 973, 979 (Fed. Cir.
22 2007)). Oracle has never used its OLSA to license conduct comparable to SAP’s, and the OLSA
23 does not permit conduct comparable to SAP’s. The OLSA provides, in relevant part, that:

24 “Upon payment for services, you will have a perpetual, non-
25 exclusive, non-assignable, royalty free license to use for your
26 *internal business operations* anything developed by Oracle”

27 Dkt. 865 (Wallace Decl.), Ex. 21 at 1(emphasis supplied). But SAP TN admitted it used Oracle’s
28 database software to support other customers, not to run its own administrative or other internal

29 _____
(Footnote Continued from Previous Page.)

30 infringing use he valued disappears if Garmus’ analysis is precluded. Mo. 11 n.11; Dkt. 767.

1 business operations. Mo. 15:19-21 (citing Thomas 30(b)(6) testimony). In his report and
2 deposition, Clarke ignored his client’s testimony as well as the undisputed record evidence from
3 Richard Allison (Oracle’s 30(b)(6) witness on license terms) that Oracle’s OLSA would not have
4 allowed SAP TN to support *other* customers and that Oracle has never licensed a competitor to
5 do that.⁸ Ignoring the undisputed record evidence alone merits preclusion of this Clarke opinion.
6 *See, e.g., Nuveen Quality Income Mun. Fund Inc. v. Prudential Equity Group, LLC*, 262 Fed.
7 Appx. 822, 824-25 (9th Cir. 2008) (“An expert opinion is properly excluded where it relies on an
8 assumption that is unsupported by the evidence in the record and is not sufficiently founded upon
9 the facts.”); *Robinson v. G.D. Searle & Co.*, 286 F. Supp. 2d 1216, 1221 (N.D. Cal. 2003)
10 (expert’s testimony inadmissible when based on factual premise directly contradicted by
11 evidence on the record).⁹

12 The preclusion of this opinion is further mandated because, as SAP admits (Opp. 21:3-5),
13 Clarke not only disregards the evidence, he substitutes his own unqualified, inexpert legal
14 interpretation of the OLSA that relies on an irrelevant comparison of the OLSA with a Microsoft
15 Excel license he happened to have. Mo. 16:8-15 & nn. 16-19. It is undisputed that an expert
16 may not interpret contract terms. Mo. 16:16-20 (citing cases). SAP instead argues that the

17 _____
18 ⁸ *See* House Reply Decl. Ex. D (Allison Depo.) at 45:12-55:12; 60:15-62:25; 147:17-149:25;
19 229:17-231:22 (OLSA covers standard database licensing; OLSA’s “internal business” provision
20 does not cover “the business of hosting software or actually running software and services for
21 third parties”; Oracle has never agreed to license “that allowed someone to create a master library
22 of Oracle software in order to support additional customers,” or “that would allow a customer or
23 third-party support provider to use software for which one customer is licensed to create support
24 materials for other customers” or “make a copy of one customer’s software to create a generic
25 software environment for use to provide support to other customers” and Allison “absolutely”
26 would have to agree to any approval for such exceptions to Oracle’s standard licensing terms).
27 Allison is Oracle’s Senior Vice President, Global Practices and Risk Management and has
28 extensive experience assessing and applying what Oracle’s licenses do and do not allow end
users to do. *Id.*, Ex. D at 7:11-18; 21:2-13, 29:7-19, 30:13-16, 31:4-16, 31:23-32:7, 33:11-23;
see also id., Ex. D at 16:22-17:18, 18:8-19:7; Ex. E (Defs.’ 30(b)(6) Depo. Notice).

⁹ Through the new declarations of John Baugh and William R. Thomas (Dkts. 855, 856), SAP
tries to create an issue of fact as to whether an OLSA would have cured SAP TN’s infringement.
Neither declaration can or does establish that Oracle ever licensed a competitor to use its database
to support customers as SAP TN did. Moreover, Clarke obviously did not rely on these after-the-
fact declarations and he cannot now expand his opinion to include them. *See* Section VIII below.
Finally, even if the declarations did create a dispute of fact (which they don’t), late-secured
contrary declarations cannot save Clarke’s flawed opinion. *Cf. Radobencko v. Automated Equip.
Corp.*, 520 F.2d 540, 544 (9th Cir.1975) (party cannot defeat summary judgment with after-the-
fact contradictory declarations).

1 interpretation of the OLSA should be governed by the Second Circuit’s interpretation of a wholly
2 unrelated statutory provision. Opp. 20:25-21:3. This obviously is not the relevant inquiry.
3 Rather, if there is any contractual ambiguity, Oracle’s historical licensing practices govern
4 whether the OLSA “internal use” provision would allow SAP TN’s use. *Energy Oils, Inc. v.*
5 *Mont. Power Co.*, 626 F.2d 731, 737 (9th Cir. 1980) (allowing evidence of custom and usage to
6 resolve contract ambiguity). The only evidence on that is Allison’s testimony, which Clarke
7 ignores. Because Clarke has no proper basis for opining a single standard OLSA would suffice
8 to cover SAP TN’s use of Oracle’s database software to support multiple customers, his opinion
9 should be excluded as based on the wrong legal standard. *Abuan*, 3 F.3d at 332.

10 ***Clarke’s Second FMV License Opinion Is Contrary to the Facts.*** SAP does not dispute
11 that Clarke’s second proposed license fee for SAP TN’s infringing use of Oracle’s database
12 software pretends that SAP TN reconfigured its servers to get a cheaper license, and assumes that
13 this invented reconfiguration would be covered by Oracle’s less expensive Standard Edition
14 license. Mo. 17:6-10 & n.20. Instead, relying on incomplete snippets of Meyer’s Report, SAP
15 claims Meyer opened the door to made-up server counts. Opp. 22:1-17 & n.26. In fact, though
16 Meyer learned from Allison that, in a hypothetical negotiation, Oracle would have “priced the
17 license based on [SAP TN’s] largest server configuration,” Meyer nonetheless used a smaller and
18 cheaper measure based on how SAP TN used Oracle’s database software, basing his calculation
19 on the actual SAP TN server with the majority of SAP TN local environments running on it.¹⁰
20 Unlike Clarke, Meyer did not assume that SAP TN would have done anything differently (other
21 than the necessary assumption that SAP would have paid license fees for Oracle database
22 programs, instead of stealing them). Clarke, on the other hand, admittedly priced his license as if
23 SAP TN had changed its actual hardware by buying only single-processor servers for its copies of
24

25 ¹⁰ Dkt. 847 (Jindal Decl. ISO Opp. to Mo. to Exclude Meyer), Ex. A (Meyer Report) pp. 165-166
26 (“The server with the majority of TomorrowNow local environments running on Oracle database
27 was purchased in January 2005 and was a 4 processor Unix server with dual-cores, or effectively
28 8 processors, based upon which Oracle would price a license for 6 processors (Oracle applies a
“.75 processor factor to Unix processors, so 8 * .75 = 6 processors priced in the license.”);
“Therefore, I have assumed that Oracle would require SAP to purchase no less than a license that
covered each customer accessing Oracle database priced at 6 processors per license.”)

1 Oracle’s database program, even though it did not. Mo. 17 n.20; Opp. 22:9-11. Clarke must
2 value SAP TN’s actual infringing use, not what SAP now wishes it might have done. *Hanson*,
3 718 F.2d at 1081-82 (rejecting argument that defendant “could have avoided infringement, and
4 paying royalties therefore, by purchasing non-infringing machines” because defendant “chose . . .
5 to purchase and use [] infringing machines. Having followed that course, it cannot invalidate an
6 otherwise reasonable royalty on the claim that by hindsight it would have been better off if it had
7 purchased the non-infringing [] machines.”). Clarke’s results-driven alternative database license
8 fee is contrary to the law because it is contrary to the facts and therefore must be excluded.
9 *Nuveen*, 262 Fed. Appx. at 824-25.

10 **IV. CLARKE’S LOST PROFITS AND INFRINGERS’ PROFITS CAUSATION**
11 **METHODOLOGY IS UNSCIENTIFIC AND UNRELIABLE**

12 SAP does not dispute that Clarke’s “A or B plus at least one of Cs” and “automatic”
13 customer exclusion methodologies for lost and infringer’s profits damages were invented for this
14 case, that Clarke has no relevant ERP industry experience to support them, or that the jury will be
15 misled to believe that Clarke’s method properly excludes customers. Mo. 17:25-18:3, 19:15-
16 20:1. SAP claims Oracle’s disputes are with Clarke’s conclusions, not his method. Opp. 13:2-3,
17 14:6-7. Not so. Oracle complains about the unreliability of an accountant with no ERP expertise
18 telling the jury that almost half of SAP TN’s support customers and all but two of SAP’s
19 applications customers would have left Oracle no matter what,¹¹ based on his inexpert
20 categorizing of customers and application of a made-up formula when case evidence – and SAP’s
21 purported industry expert – confirms the exclusion criteria are untrustworthy. Mo. 19:15-19 &
22 n.29 (Clarke lacks industry experience to judge what motivates ERP support customer); 18:3-5 &
23 n.23 (SAP expert Sommer confirms nonsensical to assume customer would leave just because
24 evaluated another third party support vendor or self-support); 19:2-8 (method presumes
25 customers who actually stayed with Oracle would have left); 19 n.28 (method unreliable because
26 admittedly things “slipped through the cracks”); 18:6-14 (method unreliable in excluding

27 ¹¹ House Reply Decl., Ex. A (Clarke Depo.) at 682:5-10 (“Q: As a result of the exclusion
28 analysis, the causation analysis, you ultimately calculated lost profits . . . as 179 of the 358
customers at issue. Does that sound about right? A: That sounds about right.”); at 908:22-
909:16 (only two SAP/SAP TN overlapping customers left in infringer’s profits damages).

1 customers based on facially flawed analysis by SAP expert, Stephen Gray (an attack SAP ignores
2 in its Opposition)).

3 Clarke’s assignment of customers to exclusion pools and application of his novel
4 formulae is not just a “logical method” of summarizing evidence for the jury (Opp. 13:6-7); it is
5 an unscientific method for excluding customers from damages. The purported “practicality” of
6 using Clarke’s flawed exclusion pools methodology (Opp. 13:14-15) cannot trump its
7 unreliability. *See Daubert v. Merrell Dow Pharm.*, 43 F.3d 1311, 1317-19 (9th Cir. 1995)
8 (excluding causation testimony where court was “presented with only the experts’ qualifications,
9 their conclusions and their assurances of reliability. Under *Daubert*, that’s not enough.”).

10 **V. CLARKE’S THIRD PARTY MARKET SURVEY IS BEYOND CLARKE’S
11 EXPERTISE, UNRELIABLE AND NOT REBUTTAL**

12 Contrary to SAP’s assertions, Clarke did not perform a “detailed, 50 page analysis of the
13 third party support market.” Opp. 15:18-19. Clarke, admittedly not an expert on ERP software
14 or support, performed a “study” by reading “what [vendors] say about themselves” on the
15 Internet, and on that basis concluded that competition for third-party software support was so
16 “vibrant” that many of SAP TN’s customers would have left Oracle for another vendor. Mo.
17 20:3-21:5. Clarke conceded that such marketing materials require “healthy skepticism,” but
18 failed to apply any; indeed, he did nothing to verify with any of the purported alternative support
19 providers what support they really provided, on what products or for any specific period of time.
20 *Compare* Mo. 21:6-16 *with* Opp. 16:13-22 (no claim of vendor verification). As confirmed by
21 another SAP expert, this is a recipe for unreliability. House Reply Decl., Ex. C (Garmus Depo.)
22 119:12-16 (his firm “advertised that we could do practically anything, you know, including fly
23 you to the moon, but that doesn’t mean that we had a spaceship on hand”); 139:14-17 (“most
24 software companies advertise they can provide support for doing things that they currently don’t
25 have the capabilities for”). SAP does not deny that Clarke relies on advertising materials, but
26 baldly claims that Clarke’s accounting or valuation expertise somehow allows him to identify
27 puffery in ERP software and support marketing. Opp. 16:20-22. That is nonsense.¹² And even if

28 ¹² That Clarke is an economist, damages expert and CPA who has valued numerous unrelated
businesses (Opp. 14:21-15:4) doesn’t qualify him to be able to discern whether the claims of any

1 Clarke had the industry knowledge to test vendor claims (which he admittedly doesn't), he failed
2 to do so, making his conclusions unreliable. *Kilgore v. Carson Pirie Holdings, Inc.*, 2006 WL
3 3253490, at *4 (6th Cir.) (internet article unreliable basis for methodology where expert did not
4 know on what research or methodology the article was based and conducted no independent
5 research); *Matrix Motor Co. v. Toyota Jidosha Kabushiki Kaisha*, 290 F. Supp. 2d 1083, 1086
6 (C.D. Cal. 2003) (expert reports "irrelevant" where they "merely recite hearsay statements, often
7 verbatim, culled from a variety of Internet websites").¹³

8 SAP argues that Clarke also relied on materials besides vendor websites to reach his
9 "vibrant" third party market conclusion (Opp. 15:18-16:3), but this was the exception not the
10 rule. *See, e.g.*, House Initial Decl., Ex. A (Clarke Report) at 149-50 (Citagus). Also, without
11 technical knowledge or confirmation, his "study" was still no more than a layman's "recitation of
12 text in evidence [which] does not assist [] in understanding the evidence because reading, as
13 much as hearing, 'is within the ability and experience of the trier of fact.'" *Perry v.*
14 *Schwarzenegger*, 2010 WL 3025614, at *22 (N.D. Cal.). The jury can assess any admissible
15 evidence Clarke read and reach their own conclusions. To avoid misleading the jury, Clarke's
16 unreliable opinions on ERP support vendor comparability and ERP customer preferences must be
17 precluded. *Rambus, Inc. v. Hynix Semiconductor, Inc.*, 254 F.R.D. 597, 603-05 (N.D. Cal. 2008).

18 VI. CLARKE'S UNRELIABLE REGRESSION ANALYSES SHOULD BE EXCLUDED

19 Clarke purports to present a regression analysis to estimate Oracle's profit margins, a key
20

21 (Footnote Continued from Previous Page.)

22 ERP support vendor make that vendor's support comparable to SAP TN's or Oracle's at any
23 relevant time or place or whether any SAP TN customer would have selected that vendor over
24 Oracle. That takes specialized ERP industry knowledge plus follow up. Clarke admittedly has
25 no such knowledge and did no follow up. Mo. 19:15-19 & n.29; 21:6-16. SAP's only cite in
26 support, *Indus. Automation Supply, LLC v. United Rentals Highway Techs.*, 2006 WL 5219390,
27 at *1-2 (D.N.D.), is inapposite, allowing an opinion by a business valuation expert on *pricing* in
28 the market, not the underlying market, which was "related to, although not conterminous with,
[his] expertise." Clarke's testimony on technical ERP support equivalencies and ERP customer
motivators is not remotely related to his accounting or business valuation expertise.
¹³ *Semerdjian v. McDougal Littell*, 641 F. Supp. 2d 233, 242-43 (S.D.N.Y. 2009), is inapposite.
The expert did not stop at website claims; he looked at specific relevant licenses of the same
scope at issue in the case and talked to persons in the industry who handled licensing of similar
copyrights; Clarke did no comparable testing of third party vendors' actual abilities or SAP TN's
customers' willingness to substitute any support vendor other than SAP TN for Oracle support.

1 foundation for his lost profits opinion. As Oracle showed through the Opening Declaration of
2 Dr. Daniel Levy, Clarke makes fundamental errors in the design and application of his statistical
3 models that no expert would make, but that serve his apparent goal to drive damages down. Mo.
4 VIII. Dr. Levy concluded: “[t]he depth of the errors in Mr. Clarke’s calculations goes far beyond
5 creating numbers that are biased, or flawed or ones that could have been estimated much better.
6 The numbers Mr. Clarke calculates are completely useless for his purposes because they simply
7 do not measure how costs change with revenues.” Levy Opening Decl. ¶ 32.

8 SAP tries to rebut Levy’s criticisms through a new declaration from Clarke (which Oracle
9 objects to and moves to strike), but he only confirms his errors. Clarke mistakenly asserts Levy
10 used the Chart Tool in Microsoft Excel to do his calculations (Opp. 24:11-16), but Levy used the
11 LINST function, which is the same function in the Analysis ToolPak function used by Clarke.
12 Levy Reply Decl. ¶ 14. Levy *replicated* Clarke’s results with the function. *Id.* Levy also makes
13 none of the “fundamental errors” Clarke asserts (Opp. 24:17-23). *Id.* ¶¶ 4-10, 11-31. Clarke’s
14 criticisms of Levy are a sideshow to distract from Clarke’s inability to address the fundamental
15 issues with his analyses Levy exposed: that Clarke constructed his regression in a way that it
16 cannot measure the relationship he was interested in, that his regression is not anchored in reality
17 because it measures an identical cost/revenue relationship in a broad range of cases where that
18 relationship is dramatically different, and that it measures a different cost/revenue relationship for
19 sets of data where that relationship is literally identical. *Id.* ¶¶ 4-10. Clarke’s misleading and
20 useless regression analyses must be stricken and his reliance on them for reduced profits margins
21 precluded.

22 VII. CLARKE SHOULD BE PRECLUDED FROM OFFERING LEGAL OPINIONS

23 Instructing the jury is for the Court, not an expert. Clarke, “not a lawyer,” exacerbates the
24 problem by offering legal conclusions that are contrary to the law stated by the Ninth Circuit and
25 this Court. Mo. IV. SAP cannot deny that Clarke proffers his own, incorrect, interpretations of
26 the law on copyrights and the law of the case in criticizing Meyer’s damages approach and inputs
27 and in justifying his own. *Id.* Rather SAP asserts – without support – that Clarke’s opinions are
28 “economic opinion[s]” or “based on the professional standards applicable to damages experts.”

1 Opp. 25:3-8. But on their face, Clarke’s numerous cited statements and analyses intend to tell the
2 jury what the law is or means. Mo. 8 n.4, 14:1-15 & n.14.¹⁴ “Where an expert proposes to testify
3 [] to legal issues that may contradict the law to be presented to the trier of fact, such testimony
4 cannot purport to aid the trier of fact.” *Regents of Univ. of Cal. v. Monsanto Co.*, 2006 WL
5 5359055, at *1 (N.D. Cal.) (PJH). Clarke cannot offer his legal opinions at trial;

6 **VIII. CLARKE’S RELIANCE ON LATE PRODUCED CUSTOMER DECLARATIONS
7 IS BARRED BY RULE 37**

8 SAP contradicts itself in seeking to rely on customer declarations secured *five, six and eight*
9 months after the December 2009 close of fact discovery. SAP successfully precluded Oracle’s use
10 of evidence produced *in April 2009* based on untimely disclosure. Dkt. 482. When Meyer
11 supplemented his initial report to rely on customer declarations *obtained before the close of fact*
12 *discovery*, SAP counsel asserted: “Certainly the customer declarations you reference do not
13 provide a basis for supplementation since there was nothing to prevent Oracle from obtaining them
14 before November 16 and including them in Mr. Meyer’s initial report.” Dkt. 853 (Wallace Decl.),
15 Ex. 11 at 2.¹⁵ Fed. R. Civ. P. 26(a)(2)(b) required Clarke’s March 26, 2010 report to provide all his
16 opinions and all bases for them. Yet SAP now argues it had until August 5, 2010 to spring new
17 evidence on Oracle that Clarke can use to change his damages calculations. Opp. 17:5-12. Not
18 only is this unfair, it is incorrect.¹⁶ Moreover, SAP ignores its obligation to show its untimely
19 disclosure “was substantially justified or is harmless.” Fed. R. Civ. P. 37(c)(1). SAP does not even
20 attempt to justify its delay in securing the five declarations. Opp. 19 n.23. Given when it got them,
21 Oracle had no meaningful opportunity to test the declarations. Under Rule 37 and the case
22 standards for disclosure, Clarke should be barred from referring or relying on the late declarations.

23 ¹⁴ SAP’s contention that Meyer does the same (Opp. 25:17-19) fails upon examination: Meyer
24 takes as starting assumptions certain quoted legal holdings provided by counsel; he does not
25 himself interpret the law. Dkt. 800 (Wallace Decl.), Ex. 22 (Meyer Report) ¶¶ 91-94, 157-158.

26 ¹⁵ SAP implies Oracle disagreed with SAP’s (now reversed) position. Opp. 17 n.20. But
27 Oracle’s counsel rejected SAP’s argument only insofar as supplementation of Meyer’s report was
28 required for material produced before the fact discovery cut-off or produced as a result of
outstanding motions to compel. *Id.* at 1. The late-produced customer declarations Clarke relies
on fall within neither exception.

¹⁶ SAP’s authorities are distinguishable. The expert in *Capitol Justice LLC v. Wachovia Bank,*
N.A., 2009 U.S. Dist. LEXIS 126573, at *6 (D.D.C.) “made corrections to provide a more correct
and complete report,” not to add new evidence. He also was available for a second deposition,
and there was time for the opposing party to file a rebuttal report. *Id.* at *4. The supplementation
in *United States v. 14.3 Acres of Land*, 2008 U.S. Dist. LEXIS 66667 (S.D. Cal.) occurred during
discovery, where both parties could seek additional facts and or rebuttal information.

