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18 TOMORROWNOW, INC.

19 UNITED STATES DISTRICT COURT
20 NORTHERN DISTRICT OF CALIFORNIA
21 OAKLAND DIVISION

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

Case No. 07-CV-1658 PJH (EDL)

**REPLY IN SUPPORT OF DEFENDANTS'
RENEWED MOTION FOR JUDGMENT
AS A MATTER OF LAW AND NEW
TRIAL MOTION**

Date: July 13, 2011
Time: 9:00 a.m.
Courtroom: 3, Third Floor
Judge: Hon. Phyllis J. Hamilton

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1 **I. INTRODUCTION**

2 The jury's \$1.3 billion verdict should be set aside because it was based not on reliable,
3 objective evidence of Oracle's actual damages, but on speculation, prejudice and confusion.
4 Oracle asked for "hypothetical" lost license fees, even though it could not (and did not) offer
5 evidence of lost licensing opportunities with defendants or third parties due to TN's infringement
6 or proof of market benchmarks for comparable transactions. Instead, Oracle relied on aggregate
7 values of corporate acquisitions, after-the-fact and self-interested opinions of its own executives,
8 SAP's marketing goals for its overall competition with Oracle (not limited to TN's use of the
9 works) and a cascade of now admittedly irrelevant "contextual" evidence of billions invested in
10 research and development. Oracle piled on days of prejudicial and inflammatory liability
11 evidence, even though liability had been conceded. And Oracle steadfastly insisted—and still
12 insists in its Opposition—that the evidence of its minimal actual losses (evidence that the U.S.
13 Supreme Court calls "a book of wisdom that courts may not neglect") should be ignored in favor
14 of speculation about the result of a hypothetical pre-infringement negotiation that all agree never
15 would have yielded any license, let alone a reasonable one.

16 This injustice occurred because Oracle insisted on pursuing "actual" damages that, based
17 on the trial evidence, are not available as a matter of law. Oracle conflates a lost license fee
18 award under copyright law—a form of actual damage requiring proof of actual pecuniary loss—
19 with a reasonable royalty under patent law, an alternative, statutorily required remedy in patent
20 cases when one cannot prove actual damages. Oracle's actual pecuniary loss in this case cannot
21 be measured by "hypothetical" lost license fees because Oracle admittedly never has licensed—
22 and never would license—the works to a third party support provider. Oracle's actual loss was
23 support revenue from customers who left for TN, which is why lost profits (supplemented by
24 non-duplicative infringer's profits) is the appropriate measure of actual damage.

25 For these reasons, the verdict cannot stand. The jury's award of a lost license fee is
26 legally impermissible under Rule 50(b) because Oracle did not actually lose license fees. The
27 Court's previous summary judgment ruling, which did not have the benefit of the full trial
28 evidence, does not dispose of this issue. Even if the law permits Oracle to seek lost license fees

1 here, the award in this case is still legally impermissible under Rule 50(b) because Oracle failed
2 to present sufficient evidence, resulting in a damages award based on undue speculation. Finally,
3 the award also fails the new trial standard under Rule 59 because the jury's award was grossly
4 excessive, against the weight of the evidence and resulted in a miscarriage of justice. The Court
5 should remit the verdict to no more than \$408.7 million or order a new trial to determine
6 damages based on Oracle's actual lost profits and Defendants' infringer's profits.

7 **II. REPLY ARGUMENT: RENEWED MOTION FOR JMOL**

8 The dispute with respect to Defendants' motion for judgment as a matter of law boils
9 down to two legal issues: (1) whether every copyright plaintiff may seek a lost license fee
10 remedy, or only those plaintiffs who actually lost a license fee and (2) whether Oracle's evidence,
11 which did not include objective benchmarks, is legally sufficient to establish a non-speculative
12 license price. As shown in Defendants' Motion, and not refuted by Oracle, no court has ever
13 awarded a lost license fee ("hypothetically" measured or otherwise) to a copyright plaintiff who
14 did not actually lose license fees, and no court has ever awarded a lost license fee absent evidence
15 of benchmark transactions. Mot. at 16. The Copyright Act and Ninth Circuit precedent mandate
16 the same result here. Oracle is not entitled to a lost license fee award because it did not suffer
17 damage in the form of lost license fees. And because the license award Oracle sought is
18 unprecedented, no real-world benchmarks exist (or could exist) to prove objective market value.
19 As a result, the jury's verdict is based on speculative evidence of subjective "negotiation
20 perspectives," which could never properly support a non-speculative verdict, particularly one that
21 was many times larger than Oracle's actual harm.

22 **A. JMOL 1 - Oracle Is Not Entitled to Hypothetical License Fees as Actual**
23 **Damages Because It Did Not Lose License Fees.**

24 Oracle does not dispute that it never would have licensed the copyrights to any third party,
25 much less its arch-rival, to provide maintenance services. This concession should end the inquiry,
26 as it establishes that Oracle never lost a license fee, and therefore is not entitled to a license
27 award. Oracle argues that, upon proof of infringement, copyright plaintiffs are automatically
28 entitled to seek "hypothetical" license damages because they are presumed to have suffered harm

1 in the form of lost license fees. Opp. at 13, 17. This extreme position has no support in the law.

2 **1. The Copyright Act Requires that a Plaintiff Prove that It Lost a**
 3 **License Fee as a Result of Infringement to Recover Damages in the**
 4 **Form of Lost License Fees.**

5 As discussed in Defendants' Motion, the most common and well-accepted way to
 6 measure "actual damages" under the Copyright Act is to prove a plaintiff's lost profits. Mot. at
 7 15; *see also Baker v. Urban Outfitters, Inc.*, 254 F. Supp. 2d 346, 356 (S.D.N.Y. 2003).
 8 However, when a plaintiff's injury consists of lost or reduced license fees from the defendant or
 9 third parties, courts have permitted plaintiffs to seek lost license fees as actual damages. *Jarvis*
 10 *v. K2 Inc.*, 486 F.3d 526, 533 (9th Cir. 2007); *Cream Records, Inc. v. Jos. Schlitz Brewing Co.*,
 11 754 F.2d 826, 827-28 (9th Cir. 1985). As a form of actual damages, license fee awards are
 12 subject to the Copyright Act's requirement that "actual damages" be limited to those "suffered
 13 by [the owner] as a result of the infringement." 17 U.S.C. § 504(b). Accordingly, the Copyright
 14 Act does not support Oracle's contention that a plaintiff is "automatically" presumed to have
 15 suffered harm in the form of a lost license fee, such that "[o]nly valuation remains for the jury to
 16 determine." Opp. at 17. The plain statutory language requires, without exception, that plaintiffs
 17 prove actual damages suffered as a result of the infringement. Absent that proof, a plaintiff has
 18 no right under the statute to recover actual damages. 17 U.S.C. § 504(b).

19 In effect, Oracle asks this Court to judicially amend Section 504(b) by reading in the
 20 Patent Act's requirement that an award of patent infringement damages be "in no event less than
 21 a reasonable royalty for the use of the invention by the infringer" 35 U.S.C. § 284. Of
 22 course, that requirement appears nowhere in the Copyright Act. And that Congress chose not to
 23 include a minimum recovery of "hypothetical" license damages in the Copyright Act indicates
 24 that Congress did not intend to guarantee recovery of license fees as it did in the Patent Act.
 25 *National Fed'n of Fed. Employees, Local 1309 v. Dep't of Interior*, 526 U.S. 86, 104 (1999) (in
 26 comparing Federal Labor Act to the National Labor Relations Act, noting that lack of
 27 comparable duty-to-bargain language in Federal Labor Act "indicates that Congress did not
 28 intend to include a similar duty in the Federal Labor Statute"); *cf. Russello v. U.S.*, 464 U.S. 16,
 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits

1 it in another section of the same Act, it is generally presumed that Congress acts intentionally
2 and purposefully in the disparate inclusion or exclusion.” (citation omitted)).

3 Oracle’s argument that the Copyright Act does not explicitly prohibit recovery of actual
4 damages by competitors or by plaintiffs who have not previously licensed their works misses the
5 mark. Opp. at 16. The statute only allows plaintiffs to recover the actual pecuniary loss suffered
6 as a result of infringement. In considering whether infringement caused lost license fees, courts
7 have found proof of benchmark transactions by the plaintiff and competitive relationships
8 between the parties important, and usually determinative. Mot. at 18; *Polar Bear Prods., Inc. v.*
9 *Timex Corp.*, 384 F.3d 700, 711 (9th Cir. 2004) (allowing license award where parties had past
10 licensing history); *Business Trends Analysts, Inc. v. Freedonia Grp., Inc.*, 887 F.2d 399, 405-06
11 (2d Cir. 1989) (precluding license award where direct competitors would not have agreed to
12 license); *National Conference of Bar Examiners v. Multistate Legal Studies, Inc.*, 458 F. Supp. 2d
13 252, 261 (E.D. Pa. 2006); *Encyclopedia Brown Prods., Ltd. v. Home Box Office, Inc.*, 25 F. Supp.
14 2d 395, 401-02 (S.D.N.Y. 1998). Absent proof that it suffered a lost license fee “as a result of the
15 infringement”—proof that cannot be made where there is no evidence of past licensing and where
16 the parties never would have agreed to such a license—a copyright plaintiff cannot recover actual
17 damages in the form of lost license fees, even “hypothetical” ones. 17 U.S.C. § 504(b).

18 **2. Ninth Circuit Law Confirms that a Copyright Plaintiff Must Prove**
19 **that It Lost a License Fee as a Result of Infringement to Recover**
20 **License Fees as Damages.**

21 In addition to contradicting the plain language of the Copyright Act, Oracle’s argument
22 that infringement “automatically and immediately deprives the [copyright] owner of the license
23 fee it was entitled to receive” conflicts with Ninth Circuit precedent. Opp. at 17. The Ninth
24 Circuit has never upheld an award of lost license fees absent proof that the plaintiff actually
25 would have licensed the infringed work to the defendant or a third party for the use at issue, and
26 that the infringement caused the loss of that opportunity. See *Polar Bear*, 384 F.3d at 704, 709
27 (affirming license award where parties previously licensed work); *Jarvis*, 486 F.3d at 528, 533-
28 34 (same); *Mackie v. Reiser*, 296 F.3d 909, 913, 917 (9th Cir. 2002); *Cream Records*, 754 F.2d
at 827-28. Further, the Ninth Circuit expressly rejected the argument that damage in the form of

1 lost licensing opportunities may be presumed as a “natural and probable result” of infringement.
2 *Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc.*, 772 F.2d 505, 514 n.8 (9th Cir. 1985).

3 In *Frank Music*, the district court declined to award actual damages for the unauthorized
4 use of a portion of a musical in a Las Vegas show, having found no evidence that infringement
5 diminished the work’s market value. *Id.* at 513-14. In affirming this ruling, the Ninth Circuit
6 rejected plaintiff’s argument that it was not required to prove causation and that “actual damages
7 to the Las Vegas market should be presumed, that such damages are the ‘natural and probable
8 result’ of an unauthorized performance.” *Id.* at 514 n.8. Contrary to Oracle’s argument, the
9 Ninth Circuit made clear that, in seeking to recover value of use damages, a copyright owner is
10 not “relieved from or aided in proving actual damages by some presumption.” *Id.*

11 Faced with a lack of Ninth Circuit authority permitting recovery of “hypothetical” license
12 damages in this case, Oracle instead misconstrues Defendants’ argument and proceeds to attack a
13 straw man. *Opp.* at 16-17. Defendants do not claim, as Oracle argues, that direct competitors
14 may never recover actual damages in the form of lost license fees or that copyright plaintiffs
15 must license their copyrighted works as a prerequisite to recovery of lost license fee damages.
16 Rather, Defendants argue that these circumstances are compelling evidence that no license fees
17 were lost, particularly in the absence of benchmark transactions or other evidence to show that
18 the particular competitors would have agreed to a license. Again, absent evidence that the
19 plaintiff would have granted a license for the infringing use, actual damages in the form of
20 alleged lost license fees are impermissible. *Jarvis*, 486 F.3d at 533; *Sid & Marty Krofft*
21 *Television Prods., Inc. v. McDonald’s Corp.*, 562 F.2d 1157, 1174 (9th Cir. 1977); *Business*
22 *Trends*, 887 F.2d at 405, 407; *National Conference of Bar Examiners*, 458 F. Supp. 2d at 261.

23 **3. Oracle Provides No Authority to Support Its Recovery of Hypothetical**
24 **License Damages.**

25 Oracle is unable to provide any basis in law or equity to support its purported entitlement
26 to hypothetical lost license fees. Oracle’s reliance on the district court opinion in *Getaped.com,*
27 *Inc. v. Cangemi*, 188 F. Supp. 2d 398, 405-06 (S.D.N.Y. 2002) is misplaced. Notably,
28 *Getaped.com* acknowledges the statutory requirement, articulated in other Second Circuit cases,

1 that a plaintiff seeking to recover lost license fees must generally show that the parties would
2 have agreed to a license. *Id.* Nevertheless, *Getaped.com* holds that there is an exception to this
3 rule where “a licensing fee may be the only way to approximate actual damages because proof of
4 more traditional damages (such as lost sales) is not possible or readily accessible.” *Id.* at 405.
5 Even assuming the use of such an exception were permissible under the Copyright Act and Ninth
6 Circuit law (which we submit it is not), this carve-out clearly would not apply here, since Oracle
7 itself offered proof of “traditional damages” in the form of lost profits.

8 Similarly, and contrary to Oracle’s assertion, *On Davis v. The Gap, Inc.*, 246 F.3d 152,
9 161-62 (2d Cir. 2001), does not permit recovery of lost license fee damages without evidence
10 that the plaintiff would have licensed use of its work but for infringement. Rather, in *On Davis*,
11 the Second Circuit permitted recovery of a license fee award for the defendant’s unauthorized
12 use of copyrighted eyewear in its advertising campaign where the parties were not competitors
13 and the plaintiff presented evidence of a benchmark transaction—a \$50 royalty for use of the
14 sunglasses in a magazine feature. *Id.* In so holding, the court distinguished its facts from those
15 in *Business Trends*, in which the Second Circuit denied recovery of a license award where “the
16 plaintiff and defendant were competitors . . . —not a relationship where the defendant was a
17 potential licensee of the plaintiff.” *Id.* at 162-63 (distinguishing *Business Trends* as being
18 “heavily influenced by the particular facts of that case”).

19 In arguing that *On Davis* endorses recovery of hypothesized license damages even where
20 the parties would not have agreed to a license and no market benchmarks exist, Oracle
21 misunderstands the role, and *On Davis*’ application, of the required willing buyer/willing seller
22 test. Courts consider “what a willing buyer would have been reasonably required to pay to a
23 willing seller for plaintiffs’ work” to determine the price of an actually lost license—not to
24 permit recovery without proof of whether license fees were actually lost (or the substitution of a
25 “hypothesis” for such proof). *Jarvis*, 486 F.3d at 533 (quoting *Krofft*, 562 F.2d at 1174). Further,
26 courts employ an “objective, not a subjective analysis” to ensure that the amount of license-
27 based damages is grounded in objective evidence, such as the parties’ past course of dealing,
28 rather than on undue speculation. *Mackie*, 296 F.3d at 917; *see also On Davis*, 246 F.3d at 166

1 (“The question is not what the owner would have charged, but rather what is the fair market
2 value.”); Section II.B.1, *infra*. That the amount of lost license fees must be proven with
3 objective evidence does not mean, as Oracle suggests, that a plaintiff seeking such damages is
4 exempt from the burden of proving actual loss. Instead, objective evidence is considered only if
5 the plaintiff can surmount the threshold issue of proving that there would have been a license.

6 Oracle makes no effort to distinguish key cases that, consistent with Ninth Circuit
7 authority, preclude license awards absent evidence that the plaintiff would have actually licensed
8 its copyrighted work. Mot. at 17-18 (citing *Business Trends*, 877 F.2d at 407; *National*
9 *Conference of Bar Examiners*, 458 F. Supp. 2d at 261; *Frank Music*, 722 F.3d at 513-14;
10 *Encyclopedia Brown*, 25 F. Supp. 2d at 401-02). Instead, Oracle argues that the Court should
11 disregard these cases—in particular, *Business Trends*—because they purportedly conflict with the
12 *On Davis* holding. Opp. at 17 n.7. Oracle is mistaken. For the reasons described above,
13 *Business Trends* and *On Davis* are consistent, together instructing that a lost license fee award
14 may be appropriate in cases like *On Davis*, where “the defendant [is actually] a potential licensee
15 of the plaintiff” and not a competitor, but is inappropriate in cases like *Business Trends*, where
16 the plaintiff would not have licensed use of the works to defendant (for example, because of the
17 parties’ competitive status) and there is no evidence to the contrary. *On Davis*, 246 F.3d at 161-
18 62. Subsequent cases within and outside the Second Circuit are in accord. *Baker*, 254 F. Supp.
19 2d at 357-58 (license award allowed in cases “factually similar to the situation in *On Davis*,” *i.e.*,
20 cases where, “unlike in *Business Trends*, the parties are not direct competitors”); *Encyclopedia*
21 *Brown*, 25 F. Supp. 2d at 401-02; *National Conference of Bar Examiners*, 458 F. Supp. 2d at 261.

22 Finally, Oracle’s argument that fairness dictates the award of a non-existent lost license
23 fee is unpersuasive. Oracle argues that automatically permitting recovery of hypothetical license
24 damages is necessary to “compensate the owner for the actual harm suffered at the time of
25 infringement” and to avoid “reward[ing]” infringers who do not profit from the infringement.
26 Opp. at 14. According to Oracle, allowing such an award is consistent with the principle that
27 “[c]ourts should ‘broadly construe’ available damages to ‘favor victims of infringement.’” Opp.
28 at 17 (quoting *On Davis*, 264 F.3d at 164). Fairness, however, does not militate in favor of an

1 unsupported license award in this case because Oracle has a remedy. Indeed, Oracle could have
 2 recovered lost profits *and* non-duplicative infringer's profits (the purpose of which is to ensure
 3 there is no incentive to infringe) or, prior to trial, elected statutory damages. 17 U.S.C. §§ 412(2),
 4 504(c); *Polar Bear*, 384 F.3d at 708; *see also On Davis*, 246 F.3d at 159. No inequity results
 5 from limiting Oracle's recovery to the only damages it proved at trial.

6 **4. The Court's Ruling on Summary Judgment Does Not Dispose of**
 7 **Defendants' Motion.**

8 Despite Oracle's assertion otherwise, precluding Oracle from recovering license fees
 9 where it lost none is not contrary to this Court's summary judgment ruling. *Opp.* at 14. The
 10 Court held that "[g]eneral tort principles of causation and damages apply when analyzing
 11 compensatory damage awards for copyright infringement," including actual damages. ECF No.
 12 628 (Order) at 2-3. In the face of evidence that Oracle characterized as going only to valuation—
 13 that Oracle and SAP would have radically different perspectives on the value of a "hypothetical"
 14 license—the Court denied Defendants' motion, stating that "the fact that the Oracle executives
 15 and the SAP executives testified to different views on the value of a potential license is not
 16 sufficient to remove a market value license from the damages available." *Id.* at 5. The Court
 17 cautioned, however, that Oracle could claim lost license fees only if it "present[ed] evidence
 18 sufficient to allow the jury to assess fair market value without 'undue speculation.'" *Id.* at 4.
 19 Oracle failed to present such evidence. The additional and unequivocal trial testimony by Oracle
 20 executives—who testified clearly that they never would have granted a license to SAP or anyone
 21 else—confirmed that Oracle did not lose license fees. Based on the complete record, the Court
 22 can and should grant judgment as a matter of law that Oracle cannot recover a license award.¹

23 _____
 24 ¹ Defendants' Motion is also not contrary to the Court's statement that Oracle "is not
 25 required to prove that it would have successfully negotiated a license with SAP, nor is it
 26 precluded from seeking license damages simply because it has never before licensed what SAP
 27 infringed." ECF No. 628 (Order) at 4. Defendants do not argue that the law requires proof of
 28 successful negotiation between the parties or previous licenses of the works for a plaintiff to
 recover lost licensing fees. Rather, the law requires proof that the plaintiff actually suffered
 harm in the form of lost license fee. Here, the trial evidence conclusively established that Oracle
 is not entitled to recover a license award, because of the testimony that Oracle never would have
 licensed the works (or even considered negotiating a license) to anyone for the infringing use at
 issue, which is further supported by the absence of any comparable market benchmarks.

1 **B. JMOL 2 - Oracle Failed to Offer Legally Sufficient Evidence to Value a Lost**
2 **License Fee Award.**

3 The parties agree that no benchmark licenses comparable to the license awards Oracle
4 sought at trial exist. Absent objective evidence of benchmarks, Oracle should not be permitted
5 to recover a lost license fee award and should be limited to damages in the form of lost profits.
6 Oracle’s argument that the evidence it presented at trial relating to the parties’ so-called
7 “negotiation perspectives” was sufficient to establish a non-speculative license price is wrong
8 and exposes internal inconsistency in Oracle’s reasoning. Specifically, Oracle argues that a
9 license award is available even where the parties never would have agreed to a license because
10 the only test relevant to a “hypothetical” license analysis is the “willing buyer/willing seller” test
11 to quantify the license. Opp. at 13-15. According to Oracle, this “objective” test ignores the
12 specific characteristics of the parties and seeks only to determine the license price to which an
13 abstracted willing buyer and willing seller would have agreed. *Id.* In practice, however, Oracle
14 seeks to value the hypothetical license based not on objective evidence of market value—which
15 evidence is lacking here—but on evidence that purports to reflect the very specific, subjective
16 viewpoints of Oracle and SAP immediately following Oracle’s acquisitions of PeopleSoft, JDE
17 and Siebel. *Id.* at 20. As courts have repeatedly cautioned, such subjective evidence alone is
18 legally insufficient to establish an objective, non-speculative damages amount.

19 **1. The Lack of Objective Evidence of Benchmark Transactions Renders**
20 **Oracle’s Hypothetical License Claims Unduly Speculative.**

21 Oracle does not dispute the absence of benchmark licenses to price the PeopleSoft/JDE,
22 Siebel and Oracle database licenses. Indeed, it has always been Oracle’s position that no such
23 benchmarks exist. ECF No. 256 (Kelly Decl.) ¶¶ 3-4 (stating that Oracle has never given any
24 entity a license to “copy Oracle’s application software and support materials in order to create
25 their own fixes, patches or updates for customers”); Mot. at 5-6. Oracle’s only response is to
26 claim that the absence of benchmark transactions cannot preclude recovery of a license award
27 “because the right not to license is as important as the right to license.” Opp. at 16. Oracle’s
28 argument misses the point. There is no dispute that copyright owners may elect not to license

1 their copyrighted works. But in the absence of any benchmark transactions to establish how
2 parties have valued comparable rights for comparable works, fact-finders are left with no
3 objectively reasonable basis on which to price a license fee and instead are forced to speculate
4 based on how these parties might have valued the infringed rights.

5 As Defendants describe in their Motion, it is exactly this guesswork that courts aim to
6 prevent by requiring objective evidence of a license price. Mot. at 22-23. Recognizing the
7 inherently speculative nature of calculating a fair license price based on what the parties claim
8 they would have demanded in a hypothetical negotiation, courts require an “objective, not a
9 subjective” analysis of fair market value. *Jarvis*, 486 F.3d at 534. This objective analysis
10 uniformly involves considering benchmark transactions, such as licenses previously negotiated
11 for comparable uses of the infringed or similar works. *Id.* at 533 (affirming award based on what
12 defendant typically paid to license photographs, prior dealings with plaintiff and what plaintiff
13 typically charged to license photographs); *Polar Bear*, 384 F.3d at 709; *Interplan Architects, Inc.*
14 *v. C.I. Thomas, Inc.*, No. 4:08-cv-03181, 2010 U.S. Dist. LEXIS 114306, at *36 (S.D. Tex. Oct.
15 27, 2010) (“Fair market value may be established where ‘(1) a plaintiff demonstrates that he
16 previously received compensation for use of the infringed work; or (2) the plaintiff produces
17 evidence of benchmark licenses, that is, what licensors have paid for use of similar work.’”).
18 Courts acknowledge that without objective evidence of benchmarks to establish that the rights
19 infringed had a “fair market value,” plaintiffs “may claim unreasonable amounts as the license
20 fee.” *On Davis*, 246 F.3d at 161, 166 (rejecting “wildly inflated” \$2.5 million license claim and
21 affirming \$50 award based on past licensing); *see also Mackie*, 296 F.3d at 917 (rejecting \$85,000
22 license claim and affirming \$1,000 award where evidence showed plaintiff had granted
23 permission for others to use work for free); *Jarvis*, 486 F.3d at 534 (“[e]xcessively speculative
24 claims of damages are to be rejected”).

25 As shown in Defendants’ Motion, absent evidence of benchmark transactions, courts
26 preclude recovery of license fees. *See, e.g., Technologies, S.A. v. Cyrano, Inc.*, 460 F. Supp. 2d
27 197, 200-03 (D. Mass. 2006) (holding unreliable evidence of projections too speculative to
28 support license award); *Bi-Rite v. Button Master*, 578 F. Supp. 59, 60 (S.D.N.Y. 1983) (holding

1 license award not appropriate where sole evidence offered was non-comparable benchmarks);
 2 *Interplan Architects*, 2010 U.S. Dist. LEXIS 114306, at *34-37 (dismissing license award based
 3 on price plaintiff claims he would have charged). Indeed, the Ninth Circuit has never permitted a
 4 lost license award absent evidence of benchmarks on which to calculate a non-speculative license
 5 price. *Jarvis*, 486 F.3d at 533; *Polar Bear*, 384 F.3d at 709; *Mackie*, 296 F.3d at 913, 917.

6 **2. Evidence Relating to the Parties' Purported "Negotiation Perspectives"**
 7 **Is Insufficient as a Matter of Law to Establish a Reasonable, Non-**
 8 **Speculative License Price for the PeopleSoft/JDE and Siebel Licenses.**

9 Oracle's concession that all of its evidence adds up to no more than the parties'
 10 "negotiation perspectives" establishes that the jury lacked the required objective evidence on
 11 which to calculate a reasonable, non-speculative license price. As a result, the parties' disputes as
 12 to what Oracle's trial evidence proves (or does not prove) about the parties' negotiation
 13 perspectives does not change the analysis. Whatever the evidence shows about the parties' hopes,
 14 goals, expectations, projections, need, competitiveness or risk acceptance, it does not—indeed,
 15 cannot—show how use of the infringed works is valued on the open market.² Oracle's labeling
 16 such evidence "objective" does not change this fact.³

17 This is because, as a matter of law, evidence of the parties' negotiation perspectives—
 18 whether in the form of purported "goals and expectations of benefits from the infringed
 19 materials," executives' claims as to what they would have charged for licenses or a defendant's
 20 alleged need for the works—cannot independently establish objective market value.⁴ Opp. at 19.
 21 Rather than providing objective indicia of fair market value, such evidence focuses on how each
 22 side values use of the works given its particular circumstances—an inquiry that is necessarily

23 ² See Section III.B.3, *infra*, for analysis of this evidence under the new trial standard.

24 ³ Opp. at 24 n.10 (characterizing Meyer's per-customer valuation as "the same type of
 25 objective evidence that a benchmark license provides"), 28 (characterizing executives' claims as
 to the price they would have demanded to license use of the infringed works as "objective
 because it reflects the contemporaneous value placed on PeopleSoft and Siebel at the time Oracle
 acquired those companies").

26 ⁴ Indeed, the range of valuations purportedly supported by Oracle's evidence is so wide—
 27 from \$897 million to over five times that sum—that it confirms the impermissibly speculative
 28 nature of the evidence. If the most the evidence can do is place the value somewhere between
 less than \$1 billion and five times that amount, the jury by necessity must speculate as to value.
 Declaration of Tharan Gregory Lanier iso Defs.' Renewed Mot. for Judgment as a Matter of Law
 and New Trial Mot. (ECF No. 1045) (hereafter, "Lanier Decl.") ¶¶ 151-152, Exs. 1, 40.

1 subjective. Opp. at 31 (Oracle admitting that it offered evidence of purported goals and
2 expectations to show “the value the parties placed in the infringed works”); 30-31 (Oracle
3 admitting that it offered evidence of value of intellectual property as a whole to show “how that
4 value would influence [Oracle executives’] approach to a near-simultaneous license negotiation
5 with SAP”); 33-34 (Oracle admitting that it offered evidence of the competitive relationship,
6 SAP’s purported need for the works and SAP’s alleged risk acceptance to show “the high value
7 SAP placed on the rights it infringed”).⁵

8 Accordingly, as shown in Defendants’ Motion, courts preclude recovery of lost license
9 fees based on evidence relating to the parties’ respective “negotiation perspectives,” rather than
10 on objective evidence in the form of benchmark transactions. Mot. at Section V.B. (citing
11 *DaimlerChrysler Servs. v. Summit Nat’l*, No. 02-71871, 2006 WL 208787, at *1-2 (E.D. Mich.
12 Jan. 26, 2006); *Leland Med. Ctrs., Inc. v. Weiss*, No. 4:07cv67, 2007 WL 2900599, at *6-8 (E.D.
13 Tex. Sept. 28, 2007); *Smith v. Rush*, No. C04-2280Z, 2006 U.S. Dist. LEXIS 27412, at *2-3
14 (W.D. Wash. Apr. 7, 2006)). Oracle’s superficial attempt to criticize and distinguish these cases
15 fails to detract from their holdings. Opp. at 31, 33, 39. In each case, a plaintiff attempted to
16 recover an award of lost license fees quantified not on the basis of benchmark licenses, but on the
17 basis of factors that might influence the parties’ respective approaches to a hypothetical
18 negotiation. In each case, the court rejected that attempt. Individually and together, these cases
19 serve as a powerful demonstration that evidence of the parties’ negotiation perspectives is
20 insufficient to ground a non-speculative license claim.

21 By contrast, Oracle fails to cite a single copyright case in which a court permitted
22 recovery of lost license fee damages based solely on evidence relating to the parties’ negotiation
23 perspectives. See *Frank Music*, 772 F.2d at 513-14 (declining to award license damages

24 _____
25 ⁵ Much of the evidence relating to the parties’ negotiation perspectives cannot even
26 establish a *subjective* valuation of use of the infringed works. Indeed, Oracle does not dispute
27 that evidence of the parties’ status as competitors, SAP’s supposed need for the infringed works
28 and SAP’s alleged risk acceptance can, at best, provide only upward or downward pressure to a
“hypothetical” license price. Opp. at 33-34 (claiming that SAP’s “need” and parties’ competitive
relationship “affect the fair market value of the IP” and that SAP’s “willingness to accept
litigation and reputational risk indicates high value SAP placed on rights it infringed”). At worst,
and realistically, such evidence is irrelevant and prejudicial. Mot. at 27-28.

1 calculated on basis of subjective testimony by copyright owner regarding value of use);
2 *Getaped.com*, 188 F. Supp. 2d at 406 (precluding license award in absence of sufficient proof “as
3 to what an appropriate licensing fee should be”); *cf. Leland Med. Ctrs.*, 2007 WL 2900599, at *7
4 (noting that “this Court has found no cases to support” recovery of license damages based on
5 evidence of parties’ goals and expectations for exploitation of the infringed works).

6 Moreover, the patent cases on which Oracle relies do not support the proposition that “the
7 parties’ contemporaneous goals and expectations of benefits from the infringed materials . . . are
8 the ideal evidence to value a hypothetical license.” *Opp.* at 19. Contrary to Oracle’s assertion,
9 none of these cases expresses preference for evidence of goals and expectations to price a
10 reasonable royalty. *Hanson v. Alpine Valley Ski Area, Inc.*, 718 F.2d 1075, 1081 (Fed. Cir. 1983)
11 (in the absence of evidence of established royalty, permitting reliance on estimated cost savings
12 to determine reasonable royalty); *Snellman v. Ricoh Co.*, 862 F.2d 283, 289-90 (Fed. Cir. 1988)
13 (permitting reliance on comparable licenses and projected sales to calculate reasonable royalty);
14 *Interactive Pictures Corp. v. Infinite Pictures, Inc.*, 274 F.3d 1371, 1385 (Fed. Cir. 2001)
15 (permitting, but expressing no preference for, consideration of non-speculative evidence of
16 expected sales as one factor in calculating a reasonable royalty). Rather, even in calculating a
17 patent-law reasonable royalty, “the best measure of reasonable and entire compensation” is an
18 “established royalty rate.” *Hanson*, 718 F.2d at 1078. Likewise, subsequent actual results are
19 inherently less speculative than speculative goals, and decades of precedent—beginning with a
20 1933 United States Supreme Court decision—establish that the jury’s calculation of a reasonable
21 licensing fee should be informed by the actual financial results from sales of infringing products
22 and the nature and extent of consumers’ actual use of the infringing technology. *Sinclair Ref. Co.*
23 *v. Jenkins Petroleum Process Co.*, 289 U.S. 689, 698 (1933) (“But a different situation is
24 presented if years have gone by before the evidence is offered [at trial]. Experience is then
25 available to correct uncertain prophecy. Here is a book of wisdom that courts may not neglect.”);
26 *see also Trans-World Mfg. Co. v. Al Nyman & Sons, Inc.*, 750 F.2d 1552, 1568 (Fed. Cir. 1984);
27 *W.L. Gore & Assocs., Inc. v. Tetratex Corp.*, 15 U.S.P.Q. 2d (BNA) 1048, 1052 (E.D. Pa. 1989)
28 (same); *Locklin v. Switzer Bros., Inc.*, 235 F. Supp. 904, 906-07 (N.D. Cal. 1964).

1 Finally, Oracle fails to rebut Defendants’ argument that the license award impermissibly
 2 exceeds damages traceable to copyright infringement. Oracle primarily argues that Defendants
 3 waived any argument as to the scope of damages by stipulating to copyright liability, but in the
 4 very stipulation on which Oracle relies, Defendants specifically “retain[ed] all defenses to
 5 damages as described in paragraph 5 below.” ECF No. 965 (Amended Trial Stip. and Order)
 6 ¶ 1.⁶ Far from waiving this issue, Defendants expressly preserved it. And Oracle is also wrong
 7 on the merits. Copyright law permits only the award of damages as a result of the infringement.
 8 17 U.S.C. § 504. The cases Defendants cite highlight that basic premise—a plaintiff cannot
 9 recover damages that are not tied to copyrightable elements. *Apple Computer, Inc. v. Microsoft*
 10 *Corp.*, 35 F.3d 1435, 1439 (9th Cir. 1994); *Sheldon v. Metro-Goldwyn Pictures Corp.*, 309 U.S.
 11 390, 405-06 (1940). Nonetheless Oracle’s Opposition openly concedes that Meyer did not value
 12 the right to use the copyrightable elements of the infringed works, but instead “look[ed] to the
 13 value placed on the intellectual property during those acquisitions [PeopleSoft and Siebel].”
 14 Opp. at 30-31. The deficiencies in Meyer’s approach are most evident when Oracle attempts to
 15 fault Defendants for failing to offer evidence that “the value of a hypothetical license would
 16 change if a given work contained five unprotectable elements or 500” Opp. at 29. It is
 17 Oracle’s burden, not Defendants’, to present evidence that tied the value of the license sought to
 18 use of protectable elements. Having failed to do so, Oracle cannot fault Defendants for not
 19 challenging apportionment evidence that Oracle failed to present in the first place.

20 **3. Evidence Offered in Support of Oracle’s Database Damages Claim**
 21 **Suffers from Similar Deficiencies.**

22 As with the PeopleSoft/JDE and Siebel license claims, Oracle did not offer objective
 23 evidence of benchmark transactions to calculate a reasonable price for the database license. The
 24 absence of benchmark licenses alone renders Oracle’s database license damages claim unduly
 25 speculative. *Bi-Rite*, 578 F. Supp. at 60; *Interplan Architects*, 2010 U.S. Dist. LEXIS 114306, at
 26 *34-37; *Technologies, S.A.*, 460 F. Supp. 2d at 200-03. None of the evidence Oracle cites as the

27 _____
 28 ⁶ Paragraph 5 states that “SAP and TN retain all defenses to the alleged causation, fact or amount of or entitlement to disgorgement, actual or punitive damages” *Id.* ¶ 5.

1 basis for its database license calculation compensates for this lack of objective evidence.⁷

2 As explained in Defendants' Motion, testimony by Oracle executive Richard Allison on
3 the structure and price he claims Oracle would have demanded for an unprecedented license to
4 use its database software does not comprise objective evidence of value. Mot. at 36-38.
5 Regardless of Allison's asserted credibility, such one-sided testimony, unsupported by evidence
6 of benchmarks, is exactly the type of evidence courts criticize as unduly speculative. Opp. at 37;
7 *see also Jarvis*, 486 F.3d at 534; *Bruce v. Weekly World News, Inc.*, 310 F.3d 25, 29-30 (1st Cir.
8 2002) (rejecting per-use license award and expert's contention that license "could be whatever we
9 feel is fair"); *Gaylord v. U.S.*, No. 06-539C, 2011 U.S. Claims LEXIS 613, at *6-9 (Fed. Cl. Apr.
10 22, 2011) (rejecting plaintiff's over \$3 million license fee claim based on 10% of "assumed
11 revenue" because no evidence supported plaintiff's assertion that the license would be structured
12 in that way, and instead awarding \$5,000 license fee based on past licensing history); *Interplan*
13 *Architects*, 2010 U.S. Dist. LEXIS 114306, at *34-37 (dismissing license claim based solely on
14 plaintiff's statement regarding price he would have charged to use work); *Smith*, 2006 U.S. Dist.
15 LEXIS 27412, at *2-3 (same). Further, Oracle's admission that Meyer "confirm[ed] underlying
16 facts concerning database licenses, policies, pricing, and industry practices" with Allison, rather
17 than with first-hand, objective evidence of benchmark transactions underscores the subjective and
18 speculative nature of Meyer's approach. Opp. at 37.

19 Oracle's remaining evidence regarding the scope and duration of infringement (in the
20 form of testimony by Oracle's computer forensics expert Kevin Mandia), SAP's purported need
21 for the database works and alleged "numbers of customers benefiting from SAP's infringement
22 of Oracle's Database software" likewise cannot establish a non-speculative license value. Opp.
23 at 37. As addressed above, if relevant at all, such evidence can at most only provide upward or
24 downward pressure on a license price once calculated, but cannot establish that price. Mot. at
25 27-28; *DaimlerChrysler*, 2006 WL 208787, at *1-2.

26 ⁷ Oracle's claim that "Oracle's historical Database price lists were a reasonable
27 benchmark in calculating the hypothetical license value" (Opp. at 38) does not establish the
28 existence of appropriate benchmark licenses, particularly in light of Oracle's admissions, in its
Opposition and at trial, that "Oracle has never licensed a competitor to use its Database software
to compete for its customers." Opp. at 26; *see also Lanier Decl.* ¶¶ 33, 157.

1 That the evidence Oracle offered in support of its database license calculation resulted in
 2 a claimed license fee almost equivalent to TN's revenues for its entire seven year history only
 3 highlights the need for objective evidence of benchmark transactions to avoid "wildly inflated"
 4 license claims. *On Davis*, 246 F.3d at 161, 166; *see also Mackie*, 296 F.3d at 917; *Jarvis*, 486
 5 F.3d at 534. Because such evidence was lacking here, Oracle's database license claim was
 6 unduly speculative and cannot support the jury's award.

7 **III. NEW TRIAL**

8 No basis exists for Oracle or the jury to value a license award at more than *10 times*
 9 Oracle's expert's calculation of actual damages measured by lost profits. Oracle fails to identify
 10 evidence to measure the harm resulting from TN's use of the copyrighted works as distinct from
 11 SAP's assumptions and goals for its broader Safe Passage marketing program. And Oracle fails
 12 to justify the award on the basis of its "other harms," which are either lost profits by another
 13 name or too poorly defined to measure at all. Oracle's Opposition confirms that the award was
 14 based not on evidence of actual damages, but on passion, prejudice and utter confusion.

15 **A. Standards for New Trial**

16 Despite Oracle's rhetoric to the contrary, the Court has ample authority to order a new
 17 trial. A jury award cannot be upheld if "it is clearly not supported by the evidence or only based
 18 on speculation or guesswork." *In re First Alliance Mortg. Co.*, 471 F.3d 977, 1001 (9th Cir.
 19 2006), *aff'd*, 616 F.3d 1357 (Fed. Cir. 2010).⁸ Indeed, and as Oracle concedes, "[i]n contrast to
 20 JMOL motions, in determining whether a verdict is contrary to the clear weight of the evidence,
 21 the court has the duty to weigh the evidence as the court saw it and may set aside the verdict even
 22 if it is supported by substantial evidence." *Funai Elec. Co. v. Daewoo Elecs. Corp.*, 593 F. Supp.
 23 2d 1088, 1093 (N.D. Cal. 2009); *Opp.* at 39; *Gasperini v. Center for Humanities, Inc.*, 518 U.S.

24 ⁸ Oracle's quibbles with Defendants' other authorities have no bearing on the applicable
 25 standards. *Opp.* at 39 n.18. Oracle asserts that *Drew v. Equifax Info. Servs., LLC*, No. C-07-
 26 00726 SI, 2010 WL 5022466, at *4 (N.D. Cal. Dec. 3, 2010), is inapposite because the trial court
 27 declined to remit a damages award, but that is an irrelevant distinction. Oracle asserts that
 28 Defendants' inclusion of a Section 1983 damages case is "off-point," but Oracle itself relied on
 two Section 1983 cases. *See Opp.* at 39. (citing *Guy v. City of San Diego*, 608 F.3d 582, 585 (9th
 Cir. 2010); *Venegas v. Wagner*, 831 F.2d 1514, 1519 (9th Cir. 1987)). Oracle mischaracterizes
Anglo-American Gen. Agents v. Jackson Nat'l Life Ins. Co., 83 F.R.D. 41, 45 (N.D. Cal. 1979),
 as vacating an award of punitive damages, but the court actually remitted the "excessive" award.

1 415, 433 (1996) (“The trial judge in the federal system, we have reaffirmed, has discretion to
 2 grant a new trial if the verdict appears to the judge to be against the weight of the evidence”);
 3 *Moist Cold Refrigerator Co. v. Lou Johnson Co.*, 249 F.2d 246, 256 (9th Cir. 1957) (holding that
 4 it is appropriate to weigh damages evidence when granting a new trial); 11 Charles A. Wright,
 5 Arthur R. Miller, Mary K. Kane, *Federal Practice and Procedure* § 2806 (2d Ed. 1995) (“The
 6 judge is not required to take that view of the evidence most favorable to the verdict-winner.”).
 7 Oracle does not dispute that a new trial may be granted where the damages are excessive, to
 8 prevent a miscarriage of justice or, for other reasons, the trial was unfair to the moving party.
 9 Fed. R. Civ. P. 59(a); *see also Molski v. M.J. Cable, Inc.*, 481 F.3d 724, 729 (9th Cir. 2007).

10 **B. The Court Should Grant SAP’s Motion for New Trial or Remittitur.**

11 Oracle boasts that the jury’s \$1.3 billion verdict is the “largest amount ever awarded for
 12 software piracy.” Oracle Press Release, November 23, 2010. The award was so large only
 13 because it was founded on an imaginary negotiation framed with subjective, speculative and
 14 prejudicial evidence. In its Opposition, Oracle still cannot identify a legally sufficient basis for
 15 the grossly excessive award.

16 **1. Oracle Cannot Distinguish Federal Circuit Cases Rejecting**
 17 **“Reasonable Royalty” Awards Based on Insufficient, Speculative**
 18 **Evidence.**

19 Oracle gives short shrift to the Federal Circuit cases cited in Defendants’ Motion, which
 20 reflect a growing line of patent cases rejecting “reasonable royalty” calculations premised on
 21 speculative evidence. Opp. at 42-44; Mot. at 41 n.8. Even in patent cases, where a “reasonable
 22 royalty” is meant to be a damages floor, courts are more frequently and firmly rejecting awards
 23 based on a hypothetical negotiation that bear insufficient relationship to reality. This approach is
 24 even more applicable in the context of copyright law’s lost license fee awards, which must
 25 represent actual damages.

26 Oracle concedes that these cases impose a burden to prove the existence of benchmark
 27 transactions that are “sufficiently comparable” to the infringing use in order to support the award.
 28 Opp. at 42 (citing *Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1329 (Fed. Cir. 2009)).
 Oracle concedes that it is error for an expert to encourage the jury to speculate about future use.

1 *Id.* at 43 (citing *ResQNet.com, Inc. v. Lansa, Inc.*, 594 F.3d 860, 868 (Fed. Cir. 2010)). Oracle
 2 concedes that it is error to rely on running royalty benchmarks that could not be compared to the
 3 lump-sum award without speculation. *Id.* at 43 (citing *Wordtech Sys., Inc. v. Integrated Network*
 4 *Solutions, Inc.*, 609 F.3d 1308, 1320 (Fed. Cir. 2010)). And Oracle does not dispute that in
 5 January, the Federal Circuit continued this trend in *Uniloc USA, Inc. v. Microsoft Corp.*, 632
 6 F.3d 1292, 1316-18 (Fed. Cir. 2011), reiterating the reasoning in *Lucent* and its progeny that
 7 reasonable royalty awards must be supported by evidence “tied to the relevant facts and
 8 circumstances of the particular case at issue” and that unrelated evidence “does not support
 9 compensation for infringement that punishes beyond the reach of the statute.”⁹

10 Rather, Oracle argues that these concerns are absent here because Meyer supposedly
 11 relied on contemporaneous projections of future sales. *Opp.* at 44. As shown below, Meyer
 12 relied on wholly speculative assumptions and goals for SAP’s broader Safe Passage program and
 13 did not have projections of any kind measuring TN’s limited use of the copyrighted works.
 14 Instead, he encouraged rank speculation.

15 **2. The Disparity Between the Award and Actual Lost Profits Plus**
 16 **Infringer’s Profits Shows that the Award Is Clearly Excessive.**

17 Oracle’s expert calculated \$120.7 million in lost profits and \$288 million in infringer’s
 18 profits. Lanier Decl. ¶¶ 2, 11, Exs. 1, 15. Nevertheless, Oracle claims that the \$1.3 billion award
 19 is not grossly excessive because it purportedly compensates Oracle for harms not measurable as
 20 lost profits. These amorphous “downstream impacts” purportedly include limiting Oracle’s
 21 ability to pay for the PeopleSoft acquisition or invest in research and development for next
 22 generation products. *Opp.* at 45. Oracle’s argument has three fatal flaws.

23 First, there is no evidence that Oracle actually suffered any of these harms. Second, there
 24 is no evidence with which to measure these future harms within a license valuation. None of

25 ⁹ These cases have drawn a great deal of legal, academic and political commentary
 26 because of the Federal Circuit’s clear message to the district courts that reasonable royalty
 27 awards are out of control and must be carefully scrutinized to ensure they are adequately
 28 supported by the facts and appropriate evidence. *See, e.g.*, Reply Declaration of Tharan Gregory
 Lanier (“Reply Lanier Decl.”) ¶ 1, Ex. A, FTC, *The Evolving IP Marketplace: Aligning Patent
 Notice and Remedies with Competition* (2011), at 23-24. Oracle mischaracterizes these
 authorities as cases merely “about expert reliance on benchmark licenses.” *Opp.* at 42.

1 Oracle's cases permit a plaintiff to rely on an unidentified, unproven and unquantifiable
2 collection of alleged "downstream impacts" to justify a hypothetical license recovery. Asking
3 the jury to speculate about the value of such future harms is comparable to the abuse prohibited
4 by *Lucent*. 580 F.3d at 1327, 1329-30 (rejecting royalty benchmark licenses where expert
5 testified that jury should "speculat[e] as to the extent of future use"). Third, a lost profits award
6 would, in fact, compensate Oracle for these harms. Although it is true that if Oracle lost a profit
7 it would be unable to invest those funds in future research (or in anything else), it would be
8 double-counting to permit recovery of the lost profit *and* the value of the thing that would be
9 purchased with the profit. If Oracle suffered any harm that would not be compensated by a lost
10 profits measure of damages, it is only because the Court's sanctions order precluded Oracle from
11 seeking compensation for such undisclosed harms. ECF No. 532 (Order) at 1 ("The court
12 furthermore clarifies that the precluded evidence will NOT be admitted through the back door in
13 order that 'Oracle's witnesses can testify to all impacts they perceived from Defendants'
14 unlawful activities.'"). Thus, Oracle's "other harms" argument merely confirms that what
15 Oracle sought and received went beyond the actual damages recovery permitted by Congress.
16 Moreover, accepting Oracle's position—that lost profits are inadequate to compensate for a
17 plaintiff's inability to invest in future growth—would open up dangerous floodgates. Oracle's
18 argument would apply to virtually every company, given that every company depends on income
19 from current operations to fund investment in future growth. Oracle's argument would thus
20 justify a hypothetical license award in every case—an outcome contrary to established law.

21 Oracle's assertion that case law permits such double recovery for downstream impacts is
22 wrong. *Opp.* at 45. In *Polar Bear*, the Ninth Circuit rejected as "too 'pie-in-the-sky'" the
23 plaintiff's attempt to recover lost profits based on its assertion that, had the defendant paid for its
24 unauthorized use of the plaintiff's video, the plaintiff would have been able to use those proceeds
25 to sell additional videos.¹⁰ 384 F.3d at 709-10. Instead, the Court permitted recovery of lost

26 ¹⁰ Oracle's characterization of *Polar Bear* as "finding non-speculative a valuation based
27 in part on a price quote that the infringer had rejected" is misleading. *Opp.* at 16. In *Polar Bear*,
28 the Ninth Circuit rejected the jury's verdict of \$2.4 million, throwing out all but \$115,000. 384
F.3d at 705 n.3, 708. That amount derived from what the plaintiff actually charged the defendant
in the past for use of its copyrighted video footage, as well as evidence of the parties' subsequent
negotiations for a modified version of the footage. *Id.* at 704, 709.

1 license fees priced according to the parties' previous licensing practices. *Id.* Thus, *Polar Bear*
2 not only confirms that the type of "other harms" for which Oracle seeks compensation are lost
3 profits by another name, but also makes clear that courts do not allow such speculative claims.¹¹

4 **3. Oracle Failed to Identify Sufficient, Non-Speculative Evidence to**
5 **Support the Hypothetical License Award.**

6 To manufacture a large damages claim, Oracle relied on evidence that bore no relation to
7 its actual losses or to Defendants' non-duplicative profits gained by virtue of infringement.
8 Defendants' opening brief shows why this evidence was insufficient to quantify at \$1.3 billion
9 the value of a license for TN's use of the copyrighted works. Mot. at 24-25. Oracle's Opposition
10 reviews the evidence that it claims supports the award, and, as it did at trial, Oracle devotes much
11 time discussing SAP's plans to disrupt "Oracle's marketplace momentum," SAP's use of TN as a
12 "strategic weapon," SAP's "needs" and the "direct liability evidence." Opp. at 39-40, 46.

13 But none of this evidence provides a basis to *quantify* the value of a license. Indeed,
14 Oracle now concedes that much of its so-called "contextual evidence," like the billions of dollars
15 it invested in R&D, provides no basis for valuing a license. *Id.* at 30 ("Oracle never argued, and
16 no witness testified, that the hypothetical license value was or should be based on Oracle's total
17 R&D investment."); 44 ("Oracle did not offer this evidence to support its damages claim.").
18 Oracle's concession that much of the evidence it offered was mere "context," not offered to
19 quantify its damage claim, underscores the lack of evidentiary support for the \$1.3 billion award
20 and Oracle's apparent strategy of confusing the jury with this voluminous evidence.

21 To quantify the license, Oracle relied on its "negotiating perspective," as purportedly
22 reflected in its costs to acquire PeopleSoft and Siebel, and SAP's "negotiating perspective," as
23 allegedly measured by SAP's assumptions and goals for its Safe Passage marketing program. *Id.*
24 at 20-21. Even were this evidence the "objective" evidence on which a non-speculative award

25 _____
26 ¹¹ *Hanson* is also inapposite. 718 F.2d at 1078. *Hanson* is a patent case that permitted
27 recovery of a reasonable royalty calculated by reference to the defendant's cost savings. It did
28 not permit double-recovery for "downstream impacts." *Id.* Moreover, as addressed above,
Hanson is distinguishable because it addresses calculation of a patent law reasonable royalty, not
a copyright-law hypothetical license, and permits recovery based on saved costs, which this
Court has prohibited. ECF No. 762 (Order) at 20-23.

1 must be based (which it is not, *see* Section II.B.2, *supra*), it would still fail to provide the
2 necessary link between TN’s limited actual use of the copyrighted works and the jury’s award.

3 The amount Oracle paid to acquire PeopleSoft and Siebel is insufficient as a matter of law
4 to quantify a hypothetical license. On their face, those were acquisitions of entire companies, not
5 comparable license transactions. Lanier Decl. ¶¶ 33-34, Ex. 1. It speaks volumes that, after three
6 years of litigation, neither Oracle nor its expert has been able to identify precedent in which the
7 value of a corporate acquisition served as a benchmark to value a limited use license for
8 intellectual property owned by the corporation. It is thus no surprise that Oracle presented no
9 evidence from which a jury could reasonably extrapolate from the price of those corporate
10 acquisitions to the value of the limited use license at issue. Indeed, the *only* connection Oracle
11 offered was the biased, after-the-fact and superficial testimony of its executives, Phillips and
12 Ellison, about how many customers they would have “expected” to lose to SAP. Opp. at 21:2-11.

13 Oracle admits that statements made “years [after the litigation] in preparation for
14 litigation” are less credible than contemporaneous evidence. Opp. at 19 (citing *Monster Content,*
15 *LLC v. Homes.com, Inc.*, No. C 04-0570 FMS, 2005 WL 1522159, at *9 (N.D. Cal. June 28,
16 2005). Oracle nevertheless relies on Phillips’ testimony that 35-40 percent of customers were
17 likely to go to SAP. But his testimony is a conclusion that is based on no facts or reliable
18 methodology. He opined that because SAP had 35-40 percent market share, SAP would take 35-
19 40 percent of PeopleSoft’s customers. ECF No. 1058 (Chin Decl.), Ex. A-1 (Phillips) at 532:25-
20 533:13. Alternatively, Phillips opined that because 40 percent of PeopleSoft’s customers also
21 owned SAP products, those customers would drop Oracle support for their Oracle products. *Id.*
22 at 533:14-534:9. Each of these opinions is a *non sequitur*, and each is wholly unsupported by
23 facts. Phillips presented no study, no empirical evidence and no logic substantiating why this
24 necessarily follows. Instead, this is pure *ipse dixit*. Phillips’ unfounded assumptions about TN’s
25 effect on the market are exactly the type of evidence on which a license price may not be based.
26 *Childress v. Taylor*, 798 F. Supp. 983, 991-92 (S.D.N.Y. 1992) (rejecting as unduly speculative a
27 license claim where the plaintiff’s proposed royalty rate was “unsupported by the evidence,” as it
28 required several “tenuous” assumptions, including that the infringed work (a play) would have

1 been highly successful with another producer). With even less support, Ellison testified that SAP
2 would have been able to get 20-30 percent of PeopleSoft's customers. ECF No. 1058 (Chin
3 Decl.), Ex. A-1 (Ellison) at 764:15-765:22. Again, there is no factual support for that opinion,
4 and he might as well have said between zero and 100 percent. SAP repeatedly objected to this
5 executive testimony as unduly speculative.¹² Without these executives' testimony, Oracle
6 literally had no basis upon which to translate its acquisition costs into any particular assumed
7 license value. Even with the executives' testimony, it is on its face a comparison of apples
8 (corporate acquisitions) and oranges (a limited use license) that is prohibited by the case law.

9 If anything, the executives' testimony illustrates the speculative nature of Oracle's
10 approach. According to Phillips, the PeopleSoft license was worth \$3-4 billion, with an
11 additional unquantified "billions" due for the Siebel license; Ellison claimed the licenses were
12 worth a combined \$4-5 billion. Lanier Decl. ¶¶ 42-44, Exs. 1, 40. How then was this a reliable
13 metric to justify the jury's award of \$1.3 billion? There is no answer to that question in the
14 record. Indeed, even Meyer questioned the reliability of this testimony. Reply Lanier Decl. ¶ 3,
15 Ex. C (Meyer) at 1133:3-8 ("Obviously I knew that [Ellison's] company had an interest in the
16 litigation. And so whatever information I take from executives like that, I have to temper back
17 and consider, but come to my own opinions.")

18 SAP's assumptions and goals that supposedly prove "SAP's negotiation perspective" also
19 provide no basis from which to extrapolate the value of a limited use license. First, there is no
20 evidence from SAP or any creator of any of these documents that they were intended to serve as
21 the basis for valuing and purchasing a limited use license, for the relevant works. To the
22 contrary, the only witness in a position to know, Brandt, testified that such marketing documents
23 did not provide such a basis. ECF No. 1058 (Chin Decl.), Ex. A-1 (Brandt) at 731:7-13. Thus,
24 while Oracle asserts that "SAP intended to convert some 5,000 PeopleSoft customers to SAP
25 software, maybe more," it never comes to grips with the fact these were goals and not firm

26 _____
27 ¹² Defendants objected to this testimony at trial, in their Rule 702 motion to exclude
28 Meyer and their motion in limine to exclude testimony from undisclosed experts. Lanier Decl. ¶¶
46-47, Ex. 1; ECF No. 798 (Mot. to Exclude Meyer) at 11; ECF No. 728 (Defs.' Mots. in Limine)
at 10-11.

1 commitments that would justify paying billions of dollars. Opp. at 22. Indeed, Oracle admits
2 that these were mere “goals.” *Id.* (“SAP’s goal was to convert 50% of PeopleSoft customers”).

3 In its Opposition, as at trial, Oracle relied heavily on the so-called “Ziemen document” as
4 proof that a reasonable licensor would have expected TN’s use of the works to generate \$897
5 million in revenues in the first three years and thereby agree to pay a license fee on that basis.
6 Opp. at 22 (citing ECF No. 1058 (Chin Decl.), Ex. SS (PTX 4814)). The document says no such
7 thing. Oracle fails to mention that the very page containing that number describes the analysis as
8 based on “Assumptions.” ECF No. 1058 (Chin Decl.), Ex. SS (PTX 4814) at SAP-OR00493910.
9 This document does not even specifically concern TN, but contemplates that support might be
10 provided by TN “or other vendors” that SAP was investigating when the document was drafted.
11 Lanier Decl. ¶ 107, Ex. 20 at SAP-OR00253280. Oracle also fails to mention that Meyer was
12 forced to concede on cross-examination that he took “a series of statements about goals” and
13 reclassified them as “expectations.” Reply Lanier Decl. ¶ 4, Ex. D at 1354:21-1355:5.

14 Moreover, Oracle has failed to show how evidence of SAP’s goals for Safe Passage (*i.e.*,
15 the broader marketing of support services and SAP software) provides a basis to quantify the
16 value attributable to TN’s use of the copyrighted works. Mot. at 10. Oracle’s response is to
17 point to puffery in certain marketing documents characterizing TN as “key” and the
18 “cornerstone” of Safe Passage. Opp. at 23. Those terms are at best vague and general and do not
19 provide a metric for a quantitative valuation of the limited use license for TN. For example,
20 Oracle relies on PTX 404 as purported proof of the value of TN’s use of the works because it
21 refers to TN as a “cornerstone.” *Id.* In fact, the document relates not to TN’s projected impact,
22 but to the “Safe Passage Offering,” a marketing program in which the sale of SAP products and
23 services were the main objective and technical support for Oracle products was only an optional
24 component. Reply Lanier Decl. ¶ 6, Ex. F (PTX 404) at SAP-OR00007485; compare with ECF
25 No. 1058 (Chin Decl.), Ex. HH (PTX 404). For similar reasons, the other documents to which
26 Meyer referred the jury did not establish the value, if any, that TN’s use of the copyrighted
27 works lent to Safe Passage. Oracle has no response to this fact.

28 It was apparent to all that Meyer was an evasive and argumentative witness, especially

1 prior to the Court’s admonition about his testifying style. Reply Lanier Decl. ¶ 3, Ex. C at
 2 1170:8-1171:6. He was evasive for a reason: He had been assigned the task of making a silk
 3 purse out of a sow’s ear. Oracle rested its hypothetical license claim on Meyer’s ability to
 4 somehow “synthesize” the parties’ supposed negotiating positions by “[c]onsidering a ranges of
 5 values, and the evidence as a whole” Opp. at 25-26. That, however, was a garbage-in-
 6 garbage-out exercise. Meyer started with speculative and incomplete evidence and had no basis
 7 upon which to covert that evidence into a reliable valuation of TN’s limited use of Oracle’s
 8 support materials. As a another court found with respect to Meyer’s testimony, “plus or minus a
 9 guess is, after all, still a guess.” Lanier Decl. ¶ 103, Ex. 1.

10 Oracle fails to support its claim that Meyer “closely followed” the *Georgia-Pacific*
 11 factors. Opp. at 41-42. Oracle simply reiterates the *Georgia-Pacific* factors and Meyer’s list of
 12 purportedly corresponding factors without addressing Defendants’ argument that, to the extent
 13 Meyer’s factors even resemble the *Georgia-Pacific* factors, he failed to properly apply them.
 14 Mot. at 27-29, 41. As discussed in Defendants’ Motion, Meyer relied almost exclusively on one
 15 factor—the parties’ purported goals and expectations—the evidence of which was speculative,
 16 subjective and insufficient to support his hypothetical license opinion.¹³ *Id.* With respect to his
 17 other “background factors,” such as SAP’s alleged “need for the works,” its “competitive
 18 relationship” with Oracle and “risk acceptance,” Oracle fails to respond to the cases cited by
 19 Defendants showing that his reliance on these factors was improper. Moreover, Oracle makes
 20 the remarkable—and unsupported—assertion that it is “irrelevant” that Meyer failed to actually
 21 follow the test he purported to apply in providing his hypothetical license opinion. Opp. at 41. It
 22 plainly is relevant; it goes directly to the reliability of his opinion and whether it is sufficient to
 23 support a \$1.3 billion verdict. Fed. R. Evid. 702 (expert must apply “the principles and methods
 24 reliably to the facts of the case”).

25 **4. The Award Is Not Based on Actual Use.**

26 Oracle claims that the award is based on “SAP’s actual use,” but its argument again

27 ¹³ As described *supra* at Section II.B.2, even were Meyer’s conclusions about the parties’
 28 purported goals and expectations supported by reliable evidence, “goals” and “expectations” are
 insufficient as a matter of law to establish a non-speculative license price.

1 misses the mark. Opp. at 40. Meyer did not value the way in which TN used Oracle's support
2 materials. In fact, because of the speculative and irrelevant nature of the evidence on which he
3 relied, he had no basis to isolate and calculate the value of that use. SAP's approach of
4 identifying specific lost customers and infringer's profits directly measured the impact and thus
5 the value of the use. Oracle's hypothetical license approach has no reliable counterpart. Indeed,
6 Oracle's assertion that the number of customers on whose behalf TN used the copies is irrelevant
7 demonstrates Oracle's fundamental mistake. As in *Lucent*, Oracle has failed to show that TN's
8 actual use of the infringing works supported a substantial license. 580 F.3d at 1335 ("Lucent had
9 the burden to prove that the extent to which the infringing method has been used supports the
10 lump-sum damages award.").

11 **5. Oracle's Reliance on Prejudicial Arguments and Evidence**
12 **Contributed to the Miscarriage of Justice.**

13 Oracle flooded the record with irrelevant and prejudicial evidence and arguments that
14 made the trial unfair and the outcome an award of grossly excessive damages. Oracle recasts
15 these concerns as questions of admissibility of specific evidence and alleged waivers of
16 objections thereto. For purposes of this motion, however, the Court need not address those
17 evidentiary issues. Defendants do not here advance an evidence exclusion argument, but rather
18 argue that evidence Oracle presented to the jury led to an award bearing insufficient relation to
19 the damages authorized by the Copyright Act. Here, the Court's charge is to weigh the evidence
20 and argument as a whole and determine whether the award was "based on speculation or
21 guesswork," the damages are excessive, or a new trial is necessary to prevent a miscarriage of
22 justice. *In re First Alliance Mortg. Co.*, 471 F.3d at 1001 (citation omitted); *see also* Fed. R. Civ.
23 P. 59(a). Oracle's reliance on the prejudicial evidence provided no objective basis for the jury to
24 measure the value of a license award and inflamed the jury to render a large, but unsubstantiated,
25 award. Similarly, Defendants' argument that Oracle executives improperly testified regarding
26 R&D expenses, acquisition costs for PeopleSoft and Siebel and "size of the software industry" is
27 not an admissibility argument, but rather an argument that such evidence provided an improper
28 and insufficient basis for the damages award and led the jury astray.

1 In defending its closing argument directing the jury to ignore facts about what actually
2 happened after 2005, Oracle argues that it was within the “wide latitude” given to closing
3 argument and that any objection was waived. Opp. at 41. Oracle does not, however, deny that
4 its argument influenced the jury to ignore the actual facts of damages, as shown by the book-of-
5 wisdom evidence of actual results, and instead to award a massive hypothetical license.

6 Similarly, as to Oracle’s “contextual evidence” of the billions invested in R&D and the
7 “size of the software industry,” Oracle retreats to the position that it did not offer this evidence to
8 support its damages claims. Opp. at 30, 44. While it is true that such evidence is not probative
9 of its damages claim and does not provide a metric by which to measure a license award, the
10 running narrative about these “billions of dollars” skewed the overall trial.

11 Further, the liability evidence prejudiced Defendants and led inexorably to an unfairly
12 large award. In response, Oracle argues that the evidence was relevant and that “any error was
13 harmless, and SAP cannot prove otherwise.” Opp. at 46. There is only one reasonable
14 interpretation of the impact this evidence had, and that was to inflame the jury against Defendants
15 and to encourage a punitive element to its award—it was not a harmless error. *In re First*
16 *Alliance Mortg.*, 471 F.3d at 999-1000 (an error is harmless only if it is more likely than not that
17 the error did not affect the trial’s outcome). In addition, under the “cumulative error” doctrine,
18 the cumulative effect of errors that, individually, might have been harmless can be sufficient to
19 cause prejudice. *Id.* Here, even if the admission of some liability evidence would have been
20 harmless, the cumulative effect of the continuous presentation of inflammatory, prejudicial and
21 irrelevant liability evidence easily meets the more-likely-than-not standard for harmless error.

22 Finally, Defendants did not waive their arguments, but conscientiously attempted to
23 exclude the improper evidence and argument presented. Defendants repeatedly objected,
24 including in motion practice, to the onslaught of improper liability evidence, Meyer’s speculative
25 testimony and other irrelevant evidence, and properly objected to evidence and argument with
26 criminal overtones, which covered Catz’s theft analogies. *Larson v. Neimi*, 9 F.3d 1397, 1399
27 (9th Cir. 1993) (“It is pellucid that the district court was well aware of Neimi’s position and that
28 further objection would have been unavailing. The fact that counsel courteously refrained from

1 carrying on about [its objection] did not, and does not, change the posture of the case.”).¹⁴

2 Ultimately, however, much of Oracle’s presentation—particularly of irrelevant and
3 prejudicial evidence and argument—was incurable. Opp. at 48 (noting Defendants’ objection that
4 Best Buy analogy in closing resulted in incurable prejudice); *see also Floyd v. Meachum*, 907
5 F.2d 347, 356 (2d Cir. 1990) (finding “some occurrences at trial may be too clearly prejudicial
6 for . . . a curative instruction to mitigate their effect” and rejecting argument that failure to object
7 suggests lack of prejudice) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 644 (1974)); *Ek v.*
8 *McDonald*, No. 2:08-cv-00962-JWS, 2010 WL 843760, at *3 (E.D. Cal. Mar. 9, 2010) (“Failure
9 to object does not bar [] review of an issue when an objection would have been futile.”); *U.S. v.*
10 *Garza*, 608 F.2d 659, 666 (5th Cir. 1979) (acknowledging “at some point . . . objection to []
11 extremely prejudicial comments would serve only to focus the jury’s attention on them”). Only
12 remittitur or a new trial can remedy the resulting unfairness.

13 **C. Remittitur Is Appropriate Because the Award Is Grossly Excessive and**
14 **Clearly Unsupported by the Evidence.**

15 Oracle argues that a higher standard applies for a remittitur, while conceding that this
16 higher standard does not apply for purposes of ordering a new trial under Rule 59 based on an
17 excessive damages award. Opp. at 39, 48; *see also Moist Cold Refrigerator*, 249 F.2d at 256
18 (holding that it is appropriate to weigh evidence when granting a new trial based on an excessive
19 damages award). Oracle relies on *Fenner v. Dependable Trucking Co.*, 716 F.2d 598, 603 (9th
20 Cir. 1983) and *Buritica v. United States*, 8 F. Supp. 2d 1188, 1191 (N.D. Cal. 1998), a district
21 court decision that follows *Fenner*. Opp. at 48-49. However, *Fenner* is distinguishable and has

22 ¹⁴ *See, e.g.*, ECF No. 930 (Mot. to Exclude Meyer) at 16 (objecting to Meyer’s
23 application of *Georgia-Pacific* factors); ECF No. 1058 (Chin Decl.), Ex. A-1 at 892:7-21
24 (renewing all Daubert arguments, including Defendants’ motion to exclude Meyer); Reply
25 Lanier Decl. ¶ 4, Ex. D (11/12/10 Trial Tr.) at 1260:15-24 (Meyer admitting that he used only a
26 “*Georgia-Pacific*-type analysis. It’s not exactly the same, but many of the same factors.”); ECF
27 No. 1058 (Chin Decl.) Ex. A-1 at 257:16-22, 258:21-259:17 (objection to inclusion of R&D
28 costs in opening slides), 762:17-24 (objecting to Ellison testimony on development costs); ECF
No. 930 (Mot. to Exclude Meyer) at 3-5 (objecting to hypothetical license calculation based on
acquisition price); Lanier Decl. ¶ 75 (objections to liability evidence) ¶¶ 90-91 (objections to
“theft” and “steal”); Reply Lanier Decl. ¶¶ 2, 5, Ex. B (11/1/10 Trial Tr.) at 243:18-20, (same);
Ex. E (11/23/10 Trial Tr.) at 2255:7-2257:16 (request for curative instruction on
characterizations of theft and steal); Ex. E (11/23/10 Trial Tr.) at 2257:7-16 (raising issue of
“incurable” error resulting from reference to stealing from Best Buy in closing).

1 been misinterpreted by some courts, including *Buritica*. See also *Seymour v. Summa Vista*
2 *Cinema, Inc.*, 809 F.2d 1385, 1388 (9th Cir. 1987).

3 In *Fenner*, the Ninth Circuit held that the trial court abused its discretion in denying
4 alternative motions for judgment notwithstanding the verdict (“JNOV”) and for a new trial.
5 Consistent with the standard for JNOV, the trial court had reviewed the evidence “in a light most
6 favorable to the prevailing party” and found that the damages award was excessive. 716 F.2d at
7 602-03. However, the trial court nevertheless refused to order a new trial and, instead,
8 conditioned a remittitur upon the parties’ agreement to forfeit their rights to appeal. *Id.* On
9 appeal, the Ninth Circuit reversed, stating that once the trial court had determined that damages
10 were excessive, it had only two alternatives: order the new trial, or deny the new trial, conditioned
11 on the prevailing party accepting a remittitur. *Id.* The trial court could not condition acceptance
12 of the remittitur on waiver of the right to appeal. *Id.* The Ninth Circuit did not hold that the trial
13 court must draw all inferences in favor of the prevailing party when deciding the issue of
14 remittitur. *Id.* In fact, the Ninth Circuit did not even reach the issue of the standard of remittitur
15 because the trial court had already found the damages award to be excessive even under the more
16 stringent JNOV standard. *Id.* Oracle, and the *Buritica* court, simply misinterpret *Fenner*.

17 The standard for remittitur of an excessive damage award is the same as that for a motion
18 for a new trial based on excessive damages. *Gasperini*, 518 U.S. at 433. This is not surprising,
19 given that the issue in both instances is the excessiveness of the award. As Oracle concedes, that
20 standard is well established. In *Gasperini*, for example, the Supreme Court held that the district
21 court “has discretion to grant a new trial if the verdict appears to the judge to be against the
22 weight of the evidence. This discretion includes overturning verdicts for excessiveness and
23 ordering new trial without qualification, or conditioned on the verdict winner’s refusal to agree to
24 a reduction (remittitur).” 518 U.S. at 433. Indeed, *Fenner* itself implicitly recognizes that this is
25 the standard for a new trial motion based on an excessive damages award. 716 F.2d at 603-04
26 (quoting language from *Moist Cold Refrigerator*’s discussion of the standard for a new trial based
27 on an excessive damages award).

28 *Buritica* and its ilk are inconstant with—and fail to even consider—this Supreme Court

1 precedent and the many other decisions recognizing the trial court's discretion to weigh the
 2 evidence on a motion for remittitur. *See, e.g., Anglo-American Gen. Agents*, 83 F.R.D. at 41
 3 (remitting award of damages despite "no precise evidence" to base award upon); *Blakely v.*
 4 *Continental Airlines, Inc.*, 992 F. Supp. 731, 740 (D.N.J. 1998) (in granting motion for remittitur,
 5 court "endeavored to follow [Third] Circuit's instructions[,] evaluate the evidence and determine
 6 a damages figure that is rationally related to the evidence . . ."); *Hill v. Airborne Freight Corp.*,
 7 212 F. Supp. 2d 59, 73-74 (E.D.N.Y. 2002) (weighing evidence upon motion for new trial or
 8 remittitur and ordering remittitur); *Kelleher v. New York State Trooper Fearon*, 90 F. Supp. 2d
 9 354, 64 (S.D.N.Y. 2000) (same).

10 The maximum amount of lost profits and infringer's profits supported by the evidence—
 11 to which the Court should remit damages—is Clarke's \$28 million. In no event, however, could
 12 remitted damages be higher than Meyer's \$408.7 million. Both experts offered opinions on
 13 Oracle's actual lost support profits and Defendants' infringer's profits resulting from TN's use of
 14 the copyrighted works. Meyer calculated lost profits of \$120.7 million and infringer's profits of
 15 \$288 million, totaling \$408.7 million. Lanier Decl. ¶¶ 2, 11, Exs. 1, 15. He also presented
 16 alternative calculations of \$36 million of lost profits and \$236 million of infringer's profits,
 17 totaling \$272 million. Lanier Decl. ¶¶ 14-15, Ex. 1. Clarke calculated Oracle's lost profits of
 18 \$19.3 million and SAP's infringer's profits of \$8.7 million, totaling \$28 million. Lanier Decl.
 19 ¶¶ 2, 22, Exs. 1, 15. The Court should remit the verdict to \$28 million (or no more than \$408.7
 20 million) or order a new trial to determine damages based on lost profits and infringer's profits.

21 **IV. CONCLUSION**

22 For these reasons, the Court should grant Defendants' motion for judgment as a matter of
 23 law, or, alternatively, the new trial motion, and order remittitur or a new trial.

24 Dated: April 27, 2011

JONES DAY

25 By: /s/ Tharan Gregory Lanier
 26 Tharan Gregory Lanier

27 Counsel for Defendants
 28 SAP AG, SAP AMERICA, INC., and
 TOMORROWNOW, INC.

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