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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)

**[PROPOSED] ORDER DENYING  
PLAINTIFFS' MOTION NO. 6: TO  
EXCLUDE TESTIMONY OF  
DEFENDANTS' EXPERT BRUCE  
SPENCER**

1 Having considered Plaintiffs' Motion No. 6: To Exclude Testimony of Defendants' Expert  
2 Bruce Spencer, Defendants' Opposition to Plaintiffs' Motion No. 6: To exclude Testimony of  
3 Defendants' Expert Bruce Spencer, the memoranda and declarations in support, and exhibits  
4 attached thereto:

5 IT IS HEREBY ORDERED THAT: Plaintiffs' motion is DENIED.

6 **DISCUSSION**

7 Plaintiffs seek to wholly exclude the testimony of Defendants' expert statistician, Dr.  
8 Bruce Spencer, who is the primary rebuttal expert to Plaintiffs' expert, Dr. Daniel Levy. Rule  
9 702 permits experts qualified by "knowledge, experience, skill, expertise, training, or education"  
10 to testify "in the form of an opinion or otherwise" based on "scientific, technical, or other  
11 specialized knowledge" if that knowledge will "assist the trier of fact to understand the evidence  
12 or to determine a fact in issue." Fed. R. Evid. 702. The Court serves as the "gatekeeper" in  
13 excluding expert testimony that fails to clear the threshold hurdles of relevance and reliability.  
14 *Daubert v. Merrell Dow Pharms, Inc.*, 509 U.S. 579, 589 (1993); *see also Kumho Tire Co. v.*  
15 *Carmichael*, 526 U.S. 137, 147 (1999). "This entails a preliminary assessment of whether the  
16 reasoning or methodology is scientifically valid and of whether that reasoning or methodology  
17 properly can be applied to the facts in issue." *Daubert*, 409 U.S. at 592-93.

18 To make this determination, the Court must apply a three-part test: (1) Is the proffered  
19 expert qualified to testify in the area on which he is opining based on his knowledge, skill,  
20 experience, training, or education (qualification requirement)?; (2) Is the proffered expert  
21 testimony based on reliable scientific or specialized knowledge that is reliably applied to the facts  
22 of this case (reliability requirement)?; and (3) Will the proffered expert testimony assist the trier  
23 of fact in understanding the evidence or determining a fact in issue (relevancy requirement)? *See*  
24 *Fed. R. Evid. 702; Daubert*, 509 U.S. at 592-93.

25 Rule 702 is applied consistent with "the 'liberal thrust' of the Federal Rules and their  
26 'general approach of relaxing the traditional barriers to 'opinion testimony.'"  
27 *Daubert*, 509 U.S. at 588 (citations omitted); *see also* Fed. R. Evid. 702 Advisory Committee's notes (2000  
28 Amendments) ¶ 6 (confirming that "rejection of expert testimony is the exception rather than the

1 rule”). Opining on the flaws in another expert’s methodology is a common, and admissible, form  
2 of expert testimony. *See generally, e.g., Kennedy v. Collagen Corp.*, 161 F.3d 1226, 1230-31 (9th  
3 Cir. 1998) (“In arriving at a conclusion, the fact finder may be confronted with opposing experts,  
4 additional tests, experiments, and publications, all of which may increase or lessen the value of  
5 the expert’s testimony. But their presence should not preclude the admission of the expert’s  
6 testimony—they go to the *weight*, not the admissibility.”). When the threshold for admissibility  
7 is met, differences in the experts’ opinions simply go to the weight of the testimony and not the  
8 admissibility. *See id.*

9 Additionally, the Court must evaluate the proposed evidence under Rule 403, which  
10 requires that evidence be excluded where its probative value is substantially outweighed by the  
11 risk of unfair prejudice, confusion of the issues, and potential to mislead to the jury. *See Fed. R.*  
12 *Evid.* 403; *Daubert*, 409 U.S. at 595.

13 **Rule 702: Qualifications.** Dr. Bruce Spencer has over 30 years of experience in the field  
14 of statistics. He has a Ph.D. from Yale University and is a tenured professor in Northwestern  
15 University’s Department of Statistics, which he helped found in 1987 and for which he served as  
16 Department Chair for 17 years. Moreover, it is not disputed that he has extensive experience in  
17 both the public and private sector related to sampling. The Court finds that Spencer is qualified  
18 to provide testimony evaluating and rebutting Levy’s statistical analysis.

19 **Rule 702: Relevancy and Reliability.** Having alleged copyright infringement by  
20 TomorrowNow, Plaintiffs hired Levy, an economist, to try and support those allegations by  
21 having him count certain files located at TomorrowNow and purport to offer analyses regarding  
22 particular technical actions taken by TomorrowNow. In his report, Levy presents two types of  
23 counts: (1) sums where the total value is allegedly known, and (2) estimates based on sampling  
24 where the total value is not known. With regard to (2), Levy made certain choices about how he  
25 designed and selected the sample as well as how he calculated his totals from the sample.  
26 Spencer opines that these choices show a general lack of familiarity with sampling techniques,  
27 raise questions as to the sample itself, and impact some of Levy’s numerical conclusions. Those  
28

1 criticisms (and others) are the subject of Spencer's 44-page rebuttal expert report. Spencer's  
2 opinions, therefore, are relevant and will assist the trier of fact.

3 Moreover, Plaintiffs do not argue that Spencer has invented some new, untested form of  
4 statistical analysis. Rather, they simply disagree with Spencer's evaluation Levy's attempted  
5 application of statistical theories. At bottom, these are all challenges that go to the weight of the  
6 testimony and not the admissibility. The Court finds that, by relying on well-known, standard  
7 statistical practices to evaluate Levy's opinions, Spencer's opinions are reliable.

8 **Rule 403: Probative Value of the Evidence.** As a catchall, Plaintiffs add in several Rule  
9 403 challenges throughout their motion. In applying Rule 403, district courts enjoy wide latitude.  
10 *Hemmings v. Tidyman's Inc.*, 285 F.3d 1174, 1184 (9th Cir. 2002). Much like the expert in  
11 *Hemmings*, all of Spencer's opinions, including those on precision ranges, sample sizes, and  
12 measurement error, are probative evidence in this case and are based on reliable methods.  
13 Further, Spencer does not opine on the burden of proof in this case, or make any legal arguments  
14 regarding what Oracle must prove at trial. There is nothing unfairly prejudicial, or misleading, in  
15 allowing Spencer to opine on his evaluation of Levy's counts, including the choices Levy made  
16 and the consequences of those choices in arriving at these counts. Plaintiffs failed to provide any  
17 specific grounds that warrant shifting the balance to exclusion. Finally, Spencer does not cast any  
18 unwarranted aspersions on Levy; he provides a relevant, statistical evaluation and rebuttal to  
19 Levy's work.

### 20 CONCLUSION

21 For the reasons stated above, the Court concludes that Plaintiffs' Motion No. 6: To  
22 Exclude Testimony of Defendants' Expert Bruce Spencer must be DENIED.

23 **IT IS SO ORDERED.**

24  
25  
26 DATED: \_\_\_\_\_

By: \_\_\_\_\_  
Hon. Phyllis J. Hamilton