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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.
27
28

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

**DEFENDANTS' OPPOSITION TO
PLAINTIFFS' MOTION NO. 2 TO
EXCLUDE TESTIMONY OF
DEFENDANTS EXPERT BRIAN
SOMMER**

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

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1 **I. INTRODUCTION**

2 Through their damages expert, Paul Meyer, Plaintiffs seek \$2.15 billion in damages based
3 primarily on the assumptions that: (1) the reason Plaintiffs' former customers switched to
4 TomorrowNow's support services *must have been* because those services were less expensive,
5 and (2) those customers would have remained with Plaintiffs for support and software if
6 TomorrowNow had not offered less-expensive support. *See* Declaration of Jason McDonell in
7 support of Defendants' Opposition to Plaintiffs' Motion No. 2 to Exclude Expert Testimony of
8 Brian Sommer ("McDonell Decl.") ¶ 1, Ex. 1 (Meyer Report) at ¶¶ 232, 233, 361, 370. Meyer
9 further assumes that many customers were alerted to this lower price point and wooed to
10 TomorrowNow and SAP through a marketing program called Safe Passage. *See* McDonell Decl.
11 ¶ 1, Ex. 1 (Meyer Report) at ¶ 65.

12 Meyer's assumptions are flawed. As Defendants' rebuttal expert, Brian Sommer details
13 (in a rebuttal report supported by over 750 references) how customers in the enterprise resource
14 planning ("ERP") industry, like the ones at issue in this case, are not so simply motivated. *See*
15 McDonell Decl. ¶ 2, Ex. 2 (Sommer Report) at 3-4 (summary of opinions). As Sommer explains,
16 choosing a company's ERP software and support services is a critical business decision involving
17 substantial capital, numerous considerations that vary from company to company, and an
18 extended and individualized decision-making process. *See id.* In his extensive experience, the
19 decision to move to a new ERP vendor generally is not affected much by the vendor's marketing
20 programs. *See id.* Moreover, it is common for businesses to independently re-evaluate their ERP
21 support options and pursue alternative support options such as self-support and support provided
22 by other third-party vendors. *See id.* In contrast to Meyer's "assume causation and then calculate
23 damages" approach, Defendants' damages expert, Stephen Clarke, conducted a customer by
24 customer analysis of why certain customers would have ceased using Oracle's support services
25 even if TomorrowNow had never existed. *See* McDonell Decl. 3, Ex. 3 (Clarke Report) at 209-10,
26 217-18. The industry insights offered with Sommer's rebuttal opinions will provide the jury with
27 the context to further assess Plaintiffs' damages theory, as well as Clarke's rebuttal, in this highly
28 technical case.

1 Plaintiffs' criticisms are fourfold.

2 First, Plaintiffs claim that Sommer is not qualified to offer some of his opinions about the
3 ERP industry. This argument fails to adequately consider Sommer's extensive qualifications,
4 including: (a) working in the ERP industry for nearly 30 years on both the buyer's and the
5 seller's side (McDonnell Decl. ¶ 2, Ex. 2 (Sommer Report) at App. A; Declaration of Brian
6 Sommer ("Sommer Decl.") ¶ 2); (b) directly participating in dozens of buyers' decisions to
7 purchase ERP software (Sommer Decl. ¶¶ 18-23, 26, 29, 30 and 65); (c) publishing and speaking
8 extensively on various topics concerning the industry (*id.* ¶¶ 33-35, 37-41); and (d) making his
9 living in substantial part by using his extensive experience and industry insight to advise sellers of
10 ERP software and support services who hope to better reach their target markets. *Id.* ¶¶ 42-58.
11 Moreover, Plaintiffs implicitly concede that Sommer has extensive expertise in the ERP
12 industry—and in particular, the support aspect of that industry—because they do not challenge
13 the admissibility of the first third of his report.

14 Second, Plaintiffs incorrectly assert that Sommer's opinions are irrelevant and do not "fit"
15 the facts of this case because they concern the *industry* at issue instead of the *specific customers,*
16 *parties, and products* at issue. This argument is contrary to extensive precedent and common
17 sense. The nuances of the ERP market are not common knowledge, and the jury is not required
18 to evaluate Meyer's damages theory in a vacuum. Although the realities of the ERP industry may
19 be inconvenient for Plaintiffs, they are relevant to Plaintiffs' astronomical damages claim.

20 Third, Plaintiffs' claims that Sommer's opinions are not sufficiently reliable do not
21 survive scrutiny. For example, Plaintiffs argue that Sommer's opinions lack a sufficient factual
22 basis. That argument ignores not only the hundreds of documents which Sommer considered in
23 forming his opinions, but also the voluminous precedent that authorizes an expert such as
24 Sommer to testify on the basis of his extensive experience. And Plaintiffs' implication that
25 Sommer's report is *per se* unreliable because it is based in part on internet sources should be
26 disregarded. Time and again, courts have rejected that argument. This court should as well.

27 Finally, Plaintiffs assert Sommer's opinions are not proper rebuttal opinions. That claim
28 rings hollow. Meyer's report asks the jury to indulge in large assumptions about the ERP

1 industry. Sommer's report directly contradicts and undermines those assumptions by supplying
 2 important information that Meyer's analysis omits. That is precisely the province of a rebuttal
 3 report.

4 In sum, Sommer's opinions comply with this Court's orders and meets the admissibility
 5 requirements of the Federal Rules of Evidence. Oracle asks this Court both to muzzle an expert
 6 who can explain the realities of the ERP industry and, in so doing, to limit the jury's
 7 understanding of the business it will be tasked with considering. There is no basis in fact or law
 8 for the Court to accept that invitation.

9 **II. SUMMARY OF SOMMER'S OPINIONS AND REPORT**

10 Defendants engaged Sommer to review and evaluate a portion of the expert report of Paul
 11 Meyer. *See* McDonell Decl. ¶ 2, Ex. 2 (Sommer Report) at 1. Oracle's damages expert, Meyer,
 12 assumes that Plaintiffs' support customers who switched to TomorrowNow made that decision
 13 primarily based on TomorrowNow's lower price. *See* McDonell Decl. ¶ 1, Ex. 1 (Meyer Report)
 14 at ¶¶ 361, 370, 440. Meyer further assumes that those support customers would have continued
 15 using Oracle support if they had not gone to TomorrowNow and that many of them were wooed
 16 to TomorrowNow and SAP by Defendants' "Safe Passage" marketing program. McDonell Decl.
 17 ¶ 1, Ex. 1 (Meyer Report) ¶¶ 65, 370. Sommer rebuts Meyer's description of the ERP industry
 18 and his assumptions about ERP customers' decision making process. More specifically, Sommer
 19 explains:

20 This rebuttal report, in response to the Meyer Report, covers the
 21 general dynamics of the ERP software industry and market
 22 including: (1) how companies market, sell and support such
 23 software; and (2) the factors that explain how and why customers
 24 make decisions to buy, maintain and replace ERP application
 25 software and support services. The Meyer Report failed to
 26 adequately define the class of software in question, the state of the
 27 market for that software and related support and the relationship
 28 between software vendors (companies that create and sell ERP
 application software), their customers and third-party support

providers (companies that provide support services for application
 software sold by ERP software vendors). Thus, this rebuttal report
 provides substantial context that the Meyer Report should have, but
 did not provide.

1 McDonell Decl. ¶ 2, Ex. 2 (Sommer Report) at 3-4. Sommer continues, “[t]his rebuttal report
 2 identifies the general factors that should be considered in determining how and why customers
 3 make ERP purchasing decisions, which is necessary to place into context the alleged damages
 4 claimed in the Meyer Report.” *Id.* Sommer then identifies six aspects of the ERP industry that
 5 Meyer fails to adequately consider:

- 6 (1) Software customers do not select their future ERP software vendor
 7 simply because of a lower-cost support offering on their existing
 8 ERP software;
- 8 (2) At some point in a customer’s relationship with its ERP software
 9 vendor, the customer will evaluate its support options;
- 9 (3) Competitive switching marketing programs are not unusual in the
 10 ERP industry and generally do not produce significant gains,
 11 especially among well known competitors with large market shares;
- 10 (4) ERP vendors’ one-size-fits-all approach to support creates
 11 incentives for customers to consider alternative support solutions;
- 11 (5) ERP software license and support contracts tend to charge
 12 customers ever-greater sums of money regardless of the direction of
 12 the customer’s business; and
- 12 (6) Corporate acquisitions and consolidations in the ERP industry
 13 frequently result in fear, uncertainty, and doubt in the minds of
 14 customers and can cause customers to question their long-term
 14 commitment to using a vendor’s software and support.

15 *Id.*

16 Sommer did not opine on the reason that any particular customer in this case switched
 17 support services from Plaintiffs to TomorrowNow, and he does not proffer an opinion regarding
 18 the appropriate damages figure in this case. *See* McDonell Decl. ¶ 7, Ex. 7 (Sommer Tr.) at 89:9-
 19 17; 121:13-18.¹ Sommer’s rebuttal opinions are offered to explain the context of Plaintiffs’
 20 alleged damages that Meyer failed to offer, and by so doing, assist the jury’s understanding of the
 21 ERP industry at issue.

22 **III. LEGAL STANDARD**

23 Rule 702 permits experts qualified by “knowledge, skill, experience, expertise, training, or
 24 education” to testify “in the form of an opinion or otherwise” based on “scientific, technical, or
 25 other specialized knowledge” if that knowledge will “assist the trier of fact to understand the
 26 evidence or to determine a fact in issue.” *See* Fed. R. Evid. 702. To make this determination, the

27 _____
 28 ¹ Clarke—Defendants’ damages expert—considered, *inter alia*, the voluminous record in
 this case to perform a customer-by-customer damages analysis.

1 Court must apply a three-part test: (1) Is the proffered expert qualified to testify in the area on
2 which he is opining based on his knowledge, skill, experience, training, or education
3 (qualification requirement)?; (2) Is the proffered expert testimony based on reliable scientific or
4 specialized knowledge that is reliably applied to the facts of this case (reliability requirement)?;
5 and (3) Will the proffered expert testimony assist the trier of fact in understanding the evidence or
6 determining a fact in issue (relevancy requirement)? *See* Fed. R. Evid. 702;
7 *Daubert v. Merrell-Dow Pharms., Inc.*, 509 U.S. 579 at 592-93 (1993).

8 The 2000 Advisory Committee Notes to Rule 702 emphasize that “Nothing in this
9 amendment is intended to suggest that experience alone—or experience in conjunction with other
10 knowledge, skill, training or education—may not provide a sufficient foundation for expert
11 testimony.” Fed. R. Evid. 702, Advisory Committee's Notes (2000). The Committee continued,
12 “To the contrary, the text of Rule 702 expressly contemplates that an expert may be qualified on
13 the basis of experience. In certain fields, experience is the predominant, if not sole, basis for a
14 great deal of reliable expert testimony.” *Id.*; *see also Kumho Tire Co., Ltd., et al. v. Carmichael*
15 *et al.*, 526 U.S. at 156 (1999) (“No one denies that an expert might draw a conclusion from a set
16 of observations based on extensive and specialized experience.”). In *Thomas v. Newton Int'l*
17 *Enters.*, for example, the Ninth Circuit affirmed the decision to qualify a longshoreman with 29
18 years of experience as an expert on the custom and practice in that industry. 42 F.3d 1266, 1269
19 (9th Cir. 1994).

20 **IV. ARGUMENT**

21 Oracle has not challenged the admissibility of the first portion of Sommer’s report.²
22 Instead, Oracle challenges some of Sommer’s individual rebuttal opinions, claiming they are not
23 relevant, not reliable, procedurally infirm, or that Sommer is unqualified to give them. As set
24 forth below, however, a proper examination reveals that Sommer has extensive experience,
25 applies that experience reliably to this case, and renders procedurally proper opinions that are
26 relevant to this dispute. In sum, Sommer’s opinions meet the admissibility requirements of Rule

27 ² Plaintiffs did not challenge the sections entitled “Overview of the ERP Industry” and
28 “The nature of an ERP software and support sale,” which are contained on pages 4-24 of the
report.

1 702.

2 **A. Sommer Is Well Qualified to Render His Rebuttal Opinions.**

3 Sommer's "extensive and specialized experience" is sufficient to qualify him as an expert.
4 *Kumho Tire*, 526 U.S. at 156. He has worked in the ERP industry for approximately 30 years, in
5 various capacities, all of which gave him an understanding of how ERP software and support
6 services are bought, the decision process companies go through in selecting new ERP software
7 and support services, why companies change their ERP software and support services, the costs
8 behind such decisions, and the value companies expect to receive from the software and the
9 timing of such decisions. *See Sommer Decl.* ¶ 2, 20.

10 Sommer's first involvement in the ERP industry began in 1981 at Andersen Consulting,
11 where he provided ERP related consulting services to oil and gas companies. *See id.* ¶ 3. For the
12 next eight years, he consulted extensively on ERP implementation and software evaluation
13 projects. *See id.* ¶¶ 4-10.

14 In 1988, Sommer was promoted to the head of Andersen Consulting's Software
15 Intelligence Unit, which was responsible for: developing in-depth computer based training for
16 Andersen Consulting personnel worldwide on popular large ERP application software products,
17 providing in-depth product reviews on a variety of application software products in use or being
18 considered by Andersen Consulting clients, advising clients and consulting teams on the best or
19 most appropriate ERP solutions for a given client; and maintaining relationships with major ERP
20 vendors and their top executives. *See id.* ¶¶ 10-11.

21 Sommer was in charge of that unit for almost a decade. *See id.* ¶ 11. He created and led
22 several projects to develop new ERP software practice aids. *See id.* ¶¶ 12-15. He and his team
23 created a compendia of hundreds of functions and features present in dozens of major finance and
24 human resources ERP software products. *See id.* In the course of developing these compendia,
25 Sommer personally contacted top executives at leading ERP application software companies,
26 including Oracle, PeopleSoft, and SAP. He and his team visited the headquarters of these
27 companies to perform in-depth reviews of the specific ERP modules marketed by these vendors.
28 *See id.* Sommer's team then produced several hundred-page product assessments that were

1 frequently used by Andersen Consulting executives to sell ERP software selection projects and by
2 Andersen Consulting software implementation personnel to complete ERP software evaluations
3 for clients. *See id.* Sommer's team also developed practice aids for mainframe financial software,
4 financial software for the DEC VAX and AS/400 platform, human resource applications software,
5 life insurance software and other software product areas. *See id.*

6 While running the Software Intelligence Unit, Sommer was also tasked with producing six
7 major trade shows for an audience of approximately 500 or more top client executives. *See id.*

8 ¶ 17. The trade shows were titled "The Finance and Human Resources Software Spectacular,"
9 and were aimed at top executives in major corporations globally to help them decide which ERP
10 solutions they should consider for their short list of new application software technology. *Id.*

11 Sommer also chaired panels with CEOs of major ERP software companies that were of interest to
12 ERP software and support buyers. *See id.* Dave Duffield, then the CEO of PeopleSoft (now
13 owned by Oracle), and Hasso Plattner, currently the Chairman of the Supervisory Board of SAP,
14 both participated. *See id.*

15 All of these experiences made Sommer a particularly valuable resource to clients who
16 sought to purchase ERP software and support services. During his time in Andersen's Software
17 Intelligence Unit, Sommer gained extensive experience in advising and assisting many companies
18 making ERP software purchases. *See id.* ¶¶ 17-26. He made hundreds of trips to clients
19 worldwide to assist them in the ERP software selection process. *Id.* He had extensive
20 discussions with a variety of clients regarding their selection of ERP software and support
21 services. *See id.* ¶¶ 27-29. Among the topics he discussed with these clients were support-related
22 concerns. *See id.* ¶¶ 27-28. Indeed, PeopleSoft believed so strongly in Sommer's insights into
23 the factors affecting ERP software purchasing decisions that CEO Dave Duffield invited Sommer
24 to present a sales training keynote address for the PeopleSoft sales organization in 1999. *See id.*
25 ¶ 25.

26 In 1999, Sommer moved from Andersen Consulting to a startup company called IQ4Hire.
27 *See id.* ¶ 42. That company assisted ERP software and support buyers in finding the best project
28 team to implement their solution from thousands of potential service providers. *See id.* Investors

1 in IQ4Hire included: Ken Ross (of Ross Systems and Pillar (now part of Oracle)), Ray Lane
2 (former Oracle COO) and Dave Duffield of PeopleSoft.

3 After spending over 20 years advising buyers of ERP software, in 2001, Sommer moved
4 to the seller's side of the ERP software market. He founded his own consulting firm,
5 TechVentive, which advises software companies on better ways to succeed in the marketplace.
6 *See id.* ¶ 43-44. Sommer now makes his living by using his significant experience with how
7 buyers behave toward, think about, and approach ERP software, in order to assist sellers of ERP
8 software and support services to sell more of their products and services. *See id.*

9 Sommer's opinions about ERP-related software and support are highly valued in his
10 industry. He is a heavily published ERP software market experts in the field. For example, he
11 wrote four articles for *Optimize* magazine and often co-authors academic articles on the subject of
12 ERP software. *See id.* ¶¶ 62, 64. He was recently quoted in a magazine regarding his experience
13 with ERP support services. *See id.* ¶ 63. He is also a sought-after speaker, having spoken at
14 numerous trade conferences, university, and marketing groups. *See id.* ¶¶ 33-41. Among these
15 conferences is the Sapience conference, which specifically focuses on third party support and
16 maintenance issues. *See id.* ¶ 36. These engagements, as well as the various trade show events
17 that he regularly attends, continue to expand Sommer's knowledge of the ERP software industry
18 and keep his existing knowledge current. *Id.* Indeed, Sommer is paid to author an industry blog
19 whose target audience is providers of ERP software and support services. *See id.* ¶¶ 59-61.

20 Sommer's experience in the ERP industry is unassailable. Plaintiffs' claims that Sommer
21 lacks the experience to opine about what motivates ERP software buyers during their purchase
22 decision is belied by the fact that Sommer is paid by ERP software vendors to provide them with
23 his extensive expertise on many of the same topics that are the subject of his report, and by the
24 fact that he is frequently invited to speak on such topics. And Sommer's interaction with
25 hundreds of ERP software customers who are actually making software purchase decisions
26 provides him with more than enough qualifications to determine what influences their purchasing
27 decisions and whether ERP software marketing programs have an impact on such purchasers.
28 Moreover, Plaintiffs implicitly concede that Sommer has extensive expertise in the ERP industry

1 because they do not challenge the admissibility of the first third of his report. Sommer's
 2 experience qualifies him to issue his rebuttal opinions to Meyer's report. *See Thomas*, 42 F.3d at
 3 1269.

4 **B. Sommer's Rebuttal Opinions are Relevant and Will Assist the Trier of Fact**

5 Contrary to Plaintiffs' claims, Sommer's rebuttal opinions will assist the trier of fact.
 6 Plaintiffs are wrong in repeatedly asserting that Sommer's opinions are useless because they
 7 describe the *industry* at issue in this case, as opposed to the *specific industry participants* or
 8 *specific parties and products* involved in the case. D.I. 764 (Sommer Mot.) at 8, 12-13, 16-19, 22,
 9 24. Sommer's rebuttal opinions "logically advance[s] a material aspect of the proposing party's
 10 case." *See Daubert v. Merrell Dow Pharms., Inc.*, 43 F.3d 1311, 1315 (9th Cir. 1995). They
 11 provide a general overview of the ERP industry that Meyer's opinions should have, but
 12 admittedly do not. *See* D.I. 764 (Sommer Mot.) at 14 ("Meyer did not offer general opinions on
 13 what non-specific EAS (sic) customers care about or catalog purported support options
 14 generally."). Instead, as Sommer points out, Meyer makes erroneous assumptions in a vacuum
 15 and encourages the fact finder to do the same. *See* McDonell Decl. ¶ 2, Ex. 2 (Sommer Report) at
 16 3-4.

17 Sommer's knowledge of the highly complex and technical ERP industry will thus assist
 18 the jury by providing appropriate context to weigh the validity of the assumptions underlying
 19 Meyer's damages calculations. *See United States v. Brooks*, 610 F.3d 1186, 1195-96 (9th Cir.
 20 2010) (detective's testimony properly admitted where it placed other witness's testimony into
 21 context and could help jury assess witness credibility); *Larson v. Trowbridge*, 153 F.3d 368, 376
 22 (7th Cir. 1998) (expert testimony regarding police training appropriately admitted to give context
 23 to officer's actions at issue in the case). Sommer's rebuttal opinions also "logically advance"
 24 Clarke's rebuttal opinion damages calculations, which do not indulge in the same assumptions as
 25 Meyer's calculation. The "fit" of Sommer's testimony to this case is undeniable.

26 Indeed, the Federal Rules of Evidence specifically envision the type of testimony
 27 Sommer plans to offer. The 2000 Advisory Committee Notes to Rule 702 state:

28 **[I]t might also be important in some cases for an expert to**

1 **educate the fact finder about general principles, without ever**
2 **attempting to apply these principles to the specific facts of the**
3 **case.** For example, experts might instruct the fact finder on the
4 principles of thermodynamics, or bloodclotting, or on how financial
5 markets respond to corporate reports, without ever knowing about
6 or trying to tie their testimony into the facts of the case. **The**
7 **amendment does not alter the venerable practice of using**
8 **expert testimony to educate the fact finder on general principles.**

9 Fed. R. Evid. 702, Advisory Committee's Notes (2000) (emphasis added).

10 None of the cases that Plaintiffs cite come close to challenging the “venerable practice of
11 using expert testimony to educate the fact finder on general principles.” *Id.* For example, in
12 *Jinro Am., Inc. v. Secure Invs., Inc.*, the majority excluded an expert's testimony about the
13 purported proclivities of Korean businessmen because the expert did not have sufficient
14 experience with Korean culture or business and because his testimony amounted to a prejudicial
15 stereotype of Koreans (including the plaintiff) as corrupt. 266 F.3d 993, 1005-09 (9th Cir. 2001).
16 Judge Wallace, in a concurrence, noted that the expert should also have been excluded because
17 “[n]o serious effort was made at trial, or in any brief on appeal, to link [the expert's] generalized
18 testimony about Korean businessmen and the Korean financial and regulatory landscape to [the
19 plaintiff] or the particular transaction at issue here.” *Id.* at 1011. The holding of *Jinro* is
20 obviously not applicable here, and the case's non-binding concurrence is clearly against the
21 weight of the authority.

22 The other cases that Oracle cites are similarly distinguishable. In those cases, the
23 proffered testimony did not address any fact actually relevant to a dispute in the case. *See United*
24 *States v. Walker*, 217 Fed. Appx. 714 (9th Cir. 2007) (defense expert's proposed testimony
25 regarding interrogation practices not at issue in the case was irrelevant and unreliable); *Trout v.*
26 *Milton S. Hershey Med. Ctr.*, 576 F. Supp. 2d 673 (M.D. Pa. 2008) (doctor's testimony about a
27 variety of abstract medical risks from various amputation-related procedures and conditions that
28 plaintiff never showed were associated with his own post-amputation treatment); *Nebraska*
 Plastics, Inc. v. Holland Colors Ams., Inc., 408 F.3d 410, 41 (8th Cir. 2005) (rejecting expert
 testimony that relied on assumptions as to future damages that were contradicted by all record
 evidence).

1 Thus, contrary to Plaintiffs' position, Rule 702 does not require Sommer to advance an
2 opinion specific to every customer, every product, or every party to this litigation. Rather, he
3 need only hold a rebuttal opinion on the areas of the case where he intends to assist the jury—
4 here, critical industry information that Meyer inappropriately failed to consider. *See United*
5 *States v. Rahm*, 993 F.2d 1405, 1411 (9th Cir. 1993) ("Thus, not every expert need express, nor
6 even hold, an opinion with regard to the issues involved in a trial.").

7 Plaintiffs also assert Sommer's opinions on how ERP customers make decisions about
8 purchases of ERP software relies on the wrong legal standard. *See* D.I. 764 (Sommer Mot.) at 24-
9 25. By comparison, Meyer assumed that so long as low cost support was a "factor" in a
10 customer's decision to switch from Oracle to SAP software, SAP would be required to disgorge
11 any profits it gained from the customer's switch. *Id.* at 24 (citing Meyer Report and Transcript).
12 Sommer responded that lower-cost support services would not "trigger" a customer to switch
13 software. *Id.* (citing Sommer Report and Transcript). Plaintiffs claim that Sommer's "trigger"
14 standard is legally incorrect and that his opinion should be excluded on that basis. But in fact, it
15 is Meyer's opinion and Plaintiffs' understanding that are incorrect. The Ninth Circuit requires a
16 causal nexus between the infringement and disgorged profits, *Polar Bear Prods., Inc. v. Timex*
17 *Corp.*, 384 F.3d 700, 711-14 (9th Cir. 2004), while the Second Circuit merely requires that the
18 "infringing" activity and profits be "reasonably related." *On Davis v. The Gap, Inc.*, 246 F.3d
19 152, 160 (2d Cir. 2001); *see also Thornton v. J Jargon Co.*, 580 F. Supp. 2d 1261, 1279 (M.D.
20 Fla. 2008) (noting difference between Ninth and Second Circuit causation standards for
21 disgorgement). Sommer's testimony hews to the relevant Ninth Circuit standard and should be
22 admitted. And in any event, Sommer does not purport to instruct the jury on the nuances of
23 copyright law. The jury will be perfectly capable of applying Sommer's testimony to whatever
24 jury instruction on damages it will receive from this Court.

25 **C. Sommer's Rebuttal Opinions are Reliable**

26 Plaintiffs' argument that various of Sommer's rebuttal opinions are unreliable is equally
27 wrong. Rule 702 is intended to codify the reliability standards from the Supreme Court's
28 *Daubert* and *Kumho Tire* decisions. Those standards continue to apply to experience-based

1 opinions like Sommer’s, expressly permitting these opinions. *Kumho Tire* 526 U.S. at 156 (“no
 2 one denies that an expert might draw a conclusion from a set of observations based on extensive
 3 and specialized experience.”). As the Advisory Committee Notes to the 2000 Amendment
 4 explain:

5 Nothing in this amendment is intended to suggest that experience
 6 alone—or experience in conjunction with other knowledge, skill,
 7 training or education—may not provide a sufficient foundation for
 8 expert testimony. **To the contrary, the text of Rule 702 expressly
 contemplates that an expert may be qualified on the basis of
 experience. In certain fields, experience is the predominant, if
 not sole, basis for a great deal of reliable expert testimony.**

9 Fed. R. Evid. 702 , Advisory Committee’s Notes (2000) (emphasis added). Experience-based
 10 testimony is admissible so long as the witness can explain how his or her experience leads to the
 11 conclusions reached, why his or her experience is a sufficient basis for the opinions, and how his
 12 or her experience is reliably applied to the facts. *Id.*

13 The Ninth Circuit notes “the *Daubert* factors (peer review, publication, potential error
 14 rate, etc.) simply are not applicable to [non-scientific] testimony, whose reliability depends
 15 heavily on the *knowledge and experience* of the expert, rather than the methodology or theory
 16 behind it.” *Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1017 (9th Cir. 2004);
 17 (citing *United States v. Hankey*, 203 F.3d 1160, 1169 (9th Cir. 2000)). Instead, courts are
 18 permitted to conclude that a witness’s “experience, training, and education provid[e] a sufficient
 19 foundation of reliability for his testimony.” *Hangarter*, 373 F.3d at 1018 (affirming admission of
 20 insurance industry expert where expert had 20 years of experience in industry as consultant and
 21 employee).

22 **1. Sommer’s Rebuttal Opinions Rest On Sufficient Facts And Data.**

23 One of Plaintiffs’ principal attacks on the reliability of Sommer’s rebuttal opinions is that
 24 they are not “supported by sufficient facts or data” to pass muster under Rule 702. Plaintiffs
 25 attack Sommer’s rebuttal opinions on customer behavior, third-party support, self-support, and
 26 switching programs as unreliable because, in forming those rebuttal opinions, Sommer did not
 27 review customer specific or third party vendor specific information in this case. *See* D.I. 764
 28 (Sommer Mot.) at 7-11, 16-19, 21-22. Plaintiffs further claim that this customer information

1 “contradicts” Sommer’s rebuttal opinions to such a degree that they simply cannot be reliable.
2 But Sommer does not purport to provide a customer by customer analysis, and his opinions are
3 consistent with the full record in this case.³ Again, Plaintiffs’ criticism boils down to a complaint
4 that Sommer rendered an industry-specific rebuttal opinion instead of the customer specific
5 analysis that Clarke undertook. If Sommer did not think he needed customer-specific information
6 to render his rebuttal opinions, then he is not required to review it. “Experts are expected to make
7 inferences and state opinions and they are granted wide latitude in determining what data is
8 needed to reach a conclusion.” *Brill v. Marandola*, 540 F. Supp. 2d 563, 568 (E.D. Pa. 2008)
9 (quoting *JMJ Enters. v. Via Veneto Italian Ice, Inc.*, No. Civ. A. 97-CV-0652, 1998 WL 175888
10 at *6 (E.D. Pa. Apr. 15, 1998)).

11 When the threshold for admissibility is met, differences in the experts’ opinion simply go
12 to the weight of the testimony and not the admissibility. *See generally, e.g., Kennedy v. Collagen*
13 *Corp.*, 161 F.3d 1226, 1230-31 (9th Cir. 1998). Plaintiffs’ argument that Sommer does not have
14 sufficient factual basis stems from their flawed assumption that his opinion should address the
15 specific customers/transactions at issue here. That is not the case, as shown above. His opinion
16 properly covers general information about the ERP industry relevant to this case. His factual
17 basis is the voluminous material he reviewed and his extensive knowledge and experience in the
18 industry, which clearly meet the threshold admissibility requirement.

19 The Ninth Circuit rejected an argument similar to Plaintiffs’ in *Hangarter*. In that case,
20 the Ninth Circuit affirmed the district court’s admission of testimony from an expert on the
21 insurance industry. The Ninth Circuit noted that defendants had questioned the expert’s
22 “selection of documents to review” and argued that the issue went to the “reliability of his
23 ‘methodology’ as an expert.” *Hangarter*, 373 F.3d at 1017 n.14. The Ninth Circuit agreed with
24 the district court, however, that the expert’s analysis was actually “dependent upon the witness’s
25 knowledge of, and experience within, the insurance industry.” *Id.* Accordingly, the “questions
26 regarding the nature of [the expert’s] evidence went more to the ‘weight’ of his testimony—an

27 ³ For example, Clarke’s report summarizes the voluminous record evidence that confirms
28 that many of the customers in this case acted exactly as Sommer’s rebuttal opinions would predict
they would.

1 issue properly explored during direct and cross-examination.” *Id.*

2 **2. Internet Sources Do Not Render Sommer’s Opinion Unreliable.**

3 Plaintiffs challenge Sommer’s rebuttal opinions about the third party support market and
4 switching programs by arguing that they are unreliable to the extent they depend on sources from
5 the internet. *See* D.I. (764) (Sommer Mot.) at 7-8, 11-12, 17-18. This argument fails for two
6 reasons. First, internet sources can form the basis for reliable expert opinions, if experts in the
7 field typically rely on such information. *See* Fed. R. Evid. 703; *Boim v. Holy Land Found. for*
8 *Relief & Dev.*, 549 F.3d 685, 702-04 (7th Cir. 2008) (allowing terrorism expert to use postings
9 from websites associated with Hamas as the basis for testimony that Hamas was responsible for
10 plaintiffs’ son’s death); *Semerdjian v. McDougal Littell*, 641 F. Supp. 2d 233, 243 (S.D.N.Y.
11 2009) (finding copyright expert’s testimony that rested in part on the website pages from
12 distributors of copyright images reliable). Experts within the ERP industry rely upon the internet
13 to gather and disseminate information about the industry. Sommer Decl. ¶ 61. Thus, Sommer’s
14 sources are not inherently unreliable simply because they came from the internet.

15 Second, Plaintiffs do not attempt to explain why the particular internet sources that
16 Sommer reviewed are inherently unreliable, or why members of his industry would not typically
17 rely on them. In fact, the internet sources Mr. Sommer relied upon have indicia of reliability, as
18 the internet is likely the primary medium through which sophisticated, technology-based
19 companies like those in the ERP support industry communicate with their customers. Indeed,
20 with respect to internet sources, Plaintiffs seem to place a higher burden on Sommer—who has
21 extensive background knowledge of the industry about which he opines—than their own expert,
22 Meyer. Both Sommer *and* Meyer rely on internet sources. *See* McDonell Decl. ¶ 1, Ex. 1 (Meyer
23 Report) at ¶ 368 fn. 695 citing ORCLX-NAV-000020 (McDonell Decl. ¶ 8, Ex. 8) and 369 fn.
24 700 citing ORCLX-NAV-000054 (McDonell Decl. ¶ 9, Ex. 9). Plaintiffs, however, freely offer
25 Meyer’s report (with its reliance on internet sources) while insisting that Sommer’s report is
26 invalid unless he “independently verified” each and every source. D.I. 764 (Sommer Mot.) at 18.

27 **3. Sommer’s Experience And Training Reliably Supports His Rebuttal**
28 **Opinions.**

1 Finally, Plaintiffs argue that Sommer's decades of experience in the ERP software
2 industry do not support certain of his rebuttal opinions. In fact, Sommer's experience and
3 training provide him with more than enough background knowledge to reliably render the
4 opinions he offers. *See Hangarter*, 373 F.3d at 1018 (experience and training can provide
5 sufficient foundation of reliability for expert testimony).

6 **ERP Software Purchasing Decisions.** Sommer is paid by sophisticated business entities
7 to provide them with his insights regarding customers' decisions to purchase ERP software. Yet
8 Oracle claims that he cannot reliably render similar opinions to the Court in this case. *See* D.I.
9 764 (Sommer Mot.) at 23-25. Plaintiffs are wrong. Sommer has spent most of his career directly
10 assisting ERP software buyers to choose the best vendor and software for their business. *See*
11 Sommer Decl. ¶¶ 17-29, 65. It is crucial to his continuing viability as a consultant, author, and
12 blogger that he remains thoroughly familiar with market drivers for ERP software and support
13 services. *See id.* ¶¶ 43-44, 61, 62, 64. Indeed, even today, he continues to meet with the chief
14 information officers of large companies to discuss their ERP software needs. *See id.* ¶¶ 17-28,
15 65. Sommer's opinion is thus well-supported by his significant, on-point experience in the ERP
16 software industry.

17 **Switching Programs and Safe Passage.** Plaintiffs further argue that even if Sommer
18 knows what motivates buyers, he cannot reliably use that experience to opine about what *does not*
19 motivate buyers. *See* D.I. 764 (Sommer Mot.) at 17-23. As discussed above, Sommer has
20 extensive experience in the various factors that cause a company to choose its ERP software and
21 support services vendor. *See* Sommer Decl., ¶¶ 17-29, 65. A necessary corollary of that
22 experience is that he also has relevant experience supporting his rebuttal opinions as to what *does*
23 *not* motivate them. In his hundreds of discussions with ERP software and support services buyers
24 over the course of his nearly 30-year career, Sommer has not observed switching programs as
25 being a significant factor in their software or support services choice. McDonell Decl. ¶ 2, Ex. 2
26 (Sommer Report) at 48-55. Sommer has observed several such programs fail and researched
27 them to confirm his understanding. *Id.* He has also observed that, due to the significant capital
28 investment in ERP software, customers are typically most concerned with the software's

1 functionality, not the relatively minimal price difference between vendors. *See id.* at 56. That
2 experience amply supports his rebuttal opinions about the effectiveness of switching programs
3 generally and Safe Passage specifically.

4 **Third-Party Support Options and Nature of Third Party Support Market.** Plaintiffs
5 also claim that Sommer has no reliable basis on which to opine about the third party support
6 market. *See* D.I. 764 (Sommer Mot.) at 10-17. Sommer is paid, as a consultant, author, and
7 blogger, to have in-depth knowledge of the ERP software industry. *See* Sommer Decl. ¶¶ 43-44,
8 62, 64. His experience includes both how his own clients use third-party support options and
9 self-support, as well as speaking directly with third-party support vendors at trade shows and
10 conferences. *See id.* ¶¶ 17-29, 36, 60, 65. His knowledge and experience directly support his
11 rebuttal opinions on this issue.

12 **After-Market Support Decisions.** Finally, Plaintiffs claim that Sommer cannot reliably
13 testify regarding third-party support options and what might motivate a company's choice. *See*
14 D.I. 764 (Sommer Mot.) at 6-10. Over the course of his career, Sommer frequently met with top
15 executives to discuss the manner in which the client's current ERP software and support products
16 were not meeting their needs and the reasons why those customers wanted to switch software or
17 vendors. *See* Sommer Decl. ¶¶ 17-28. He needed to be familiar with after-market support
18 options to, for example, properly advise clients regarding whether to renew their current support
19 agreements before switching software. *Id.* Sommer's extensive technological knowledge of ERP
20 software also provides him with a basis to opine that some companies use software that is so
21 heavily modified that self-support is almost necessary. *See* Sommer Decl. ¶¶ 6-9; McDonell
22 Decl. ¶ 2, Ex. 2 at 43. Moreover, Sommer has kept abreast of the after-market support market at
23 conferences, trade shows, and as part of his authorship of an industry blog. *See* Sommer Decl.
24 ¶¶ 36, 59-61. Such research, which Sommer either relied upon or considered in his report, is
25 consistent with his opinions regarding support services decision making. *See* McDonell Decl.
26 ¶¶ 10, 11, Exs. 10, 11 (articles). Sommer understands, and can reliably opine upon, customers'
27 after market support decisions.

28 **D. Sommer's Rebuttal Opinions are Procedurally Proper**

1 **1. Sommer’s Opinions Are Within The Proper Scope Of Rebuttal.**

2 Plaintiffs’ complain that portions of Sommer’s opinions are not proper rebuttal to
 3 Meyer’s expert report. *See* D.I. 764 (Sommer Mot.) at 14-15. Plaintiffs argue that because
 4 “Meyer did not offer general opinions on what non-specific [ERP] customers care about or
 5 catalog purported support options generally,” Sommer cannot discuss these topics either. *Id.* at
 6 14. But Oracle is missing the forest for the trees. It is *precisely because* Meyer does not address
 7 these topics—instead assuming that no customer would switch from Oracle support services
 8 absent the alleged infringement—that Sommer’s testimony on these topics is not only rebuttal,
 9 but necessary for the jury to understand the infirmities of Meyer’s assumptions. Without
 10 understanding how ERP support customers choose their software and support provider, their
 11 options for support, and non-price-related reasons why they might choose to switch from Oracle,
 12 the jury is only getting half of the story from Meyer. Thus, Sommer’s opinions are squarely
 13 within the realm of proper rebuttal. *See Benedict v. United States*, 822 F.2d 1426, 1428-29 (6th
 14 Cir. 1987) (rebuttal testimony proper where it “served the permissible rebuttal function of
 15 counteracting the testimony of the opposing expert witness”); *In re REMEC Inc. Sec. Litig.*, 702
 16 F.Supp. 2d 1202, 1220 (S.D. Cal. 2010) (rebuttal testimony proper where it “contradicts [the
 17 defense expert’s] opinion on the same subject matter”); *MMI Realty Servs., Inc. v. Westchester*
 18 *Surplus Lines Ins. Co.*, No. 07-00466 BMK, 2009 WL 649894, at *2 (D. Haw. Mar. 10, 2009)
 19 (holding that the rebuttal expert’s discussion of categories and guidelines not found in affirmative
 20 report were proper to refute affirmative expert’s overall analysis).

21 Plaintiffs’ procedural arguments ring hollow in light of the history of this litigation.
 22 Plaintiffs had the opportunity to contradict all of Sommer’s rebuttal opinions when—at Plaintiffs’
 23 insistence—the parties’ experts could provide sur-rebuttal opinion at their depositions. *See*
 24 McDonell Decl. ¶ 4, Ex. 4. At his deposition, however, Meyer could not refute a single fact or
 25 opinion in Sommer’s report, despite repeated invitations by Defendants’ counsel to do so. *See id.*
 26 ¶¶ 5-6, Ex. 5 (5/12/10 Meyer Tr.) at 37:21-22, 37:19-41:17, 38:18-39:3, 39:17-20, 56:23-57:15;
 27 Ex. 6 (5/14/10 Meyer Tr.) at 828:11-22, 829:12-831:8, 856:25-857:18, 934:13-19. Indeed, he had
 28 not even bothered to read it. *See id.* ¶ 6, Ex. 6 (5/14/10 Meyer Tr.) at 828:11-22.

1 **2. Sommer's Rebuttal Opinions Are Timely**

2 Plaintiffs complain about a purported "late opinion" regarding the reasonableness of
3 SAP's aspirations for the success of its Safe Passage program, but their complaint is based on a
4 misunderstanding of the testimony that Defendants intend to offer through Sommer. D.I.
5 (Sommer Mot.) 764 at 19-22. Plaintiffs portray the "new opinion" as some sort of scheme that
6 Sommer hatched with Defendants' attorneys during the lunch hour of his deposition. The reality
7 is far less interesting (and, if one actually reads the deposition transcript, infinitely more tedious).

8 During Sommer's deposition, he repeatedly reiterated that his opinions about Safe Passage
9 were included in his report. *See* McDonell Decl. ¶ 7, Ex. 7 (Sommer Tr.) at 157:21-25 ("I just
10 don't know any other way to answer it other than the way I've answered it before. I have three
11 main opinions about Safe Passage, and they're right here in these pages in the report."). Indeed,
12 Sommer's opinions about Safe Passage are clearly articulated in his report. For example, a large
13 section of his report (containing the opinions that Oracle seeks to exclude) is titled, "Safe Passage
14 was an ineffectual ERP sales strategy." McDonell Decl. ¶ 2, Ex. 2 (Sommer Report) at 50-52.
15 Additionally, Sommer criticized Meyer's mere recitation of the goals of Safe Passage and his
16 failure to evaluate them. *Id.* Thus, Sommer's criticisms of Meyer's opinion regarding Safe
17 Passage are that it was an ineffectual way, for three different reasons, to sell ERP software and
18 support services, and Meyer should have critically examined SAP's goals regarding it. *Id.*

19 Apparently unhappy with that response and opinion, Plaintiffs' counsel asked, in varying
20 forms, whether Sommer was opining that it would have been unreasonable for SAP to have a goal
21 to convert 50% of the PeopleSoft/JD Edwards customers. *See* McDonell Decl. ¶7, Ex. 7
22 (Sommer Tr.) at 130:14-159:2, 183:6-189:25. While Sommer responded that such a purported
23 goal would be unreasonable, that does mean that he has a "new opinion." *Id.* at 183:6-189:25.
24 Rather, he was simply responding to Plaintiffs' counsel's questioning. Although Sommer will
25 testify that marketing programs generally, and Safe Passage specifically, are not particularly
26 effective in the industry, Defendants will not offer his testimony regarding the 50% issue. Thus,
27 this argument is moot.

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V. CONCLUSION

For the reasons stated above, the Court should deny Plaintiffs' motion.

Dated: September 9, 2010

JONES DAY

By: /s/ Jason McDonell

Jason McDonell

Counsel for Defendants

SAP AG, SAP AMERICA, INC., and TN, INC.