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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. 2: TO
EXCLUDE TESTIMONY OF
DEFENDANTS' EXPERT BRIAN
SOMMER**

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

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

6 **DISCUSSION**

7 Plaintiffs seek to exclude the rebuttal opinions of Defendants' expert, Brian Sommer.
8 Rule 702 of the Federal Rules of Evidence permits experts qualified by "knowledge, experience,
9 skill, expertise, training, or education" to testify "in the form of an opinion or otherwise" based on
10 "scientific, technical, or other specialized knowledge" if that knowledge will "assist the trier of
11 fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702. Rule 702
12 specifically envisions testimony about an industry or market from an expert with extensive
13 experience in the area. The 2000 Advisory Committee Notes to Rule 702 state:

14 Nothing in this amendment is intended to suggest that experience
15 alone—or experience in conjunction with other knowledge, skill,
16 training or education—may not provide a sufficient foundation for
17 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.

18 Fed. R. Evid. 702, Advisory Committees' Notes. Experience-based testimony is thus admissible
19 so long as the witness can explain how his experience leads to the conclusions reached, why his
20 experience is a sufficient basis for the opinions, and how his experience is reliably applied to the
21 facts. *Id.*

22 **Qualifications.** Sommer is an expert qualified by "knowledge, experience, skill,
23 expertise, training or education" to opine about the enterprise resources planning ("ERP")
24 industry. Fed. R. Evid. 702. Sommer has worked in the ERP industry for almost 30 years on
25 both the buyer and the seller's side of the industry. His opinions about ERP-related software and
26 support are highly valued. He makes his living in substantial part by sharing his insights on the
27 industry with the sophisticated clients of his consulting business. He is also a sought-after
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1 speaker, author, and blogger in the ERP industry. The Court finds that Sommer is qualified to
2 provide testimony regarding the topics in his report.

3 **Relevancy.** Sommer’s opinions assist the trier of fact and “fit” the facts of this case. The
4 Court rejects Plaintiffs’ argument that Sommer’s opinions are irrelevant to the extent they
5 concern the *industry* at issue in this case instead of the *specific customers, parties, and products*
6 at issue. The nuances of the ERP market are not common knowledge. Sommer’s knowledge of
7 the highly complex and technical ERP industry will thus assist the jury by providing appropriate
8 context to weigh the validity of Meyer’s assumptions underlying Meyer’s damages calculations.
9 *See, e.g., United States v. Brooks*, 610 F.3d 1186, 1195-96 (9th Cir. 2010) (detective’s testimony
10 properly admitted where it placed other witness’s testimony into context and could help the jury
11 assess witness credibility); *Larson v. Trowbridge*, 153 F.3d 368, 376 (7th Cir. 1998) (expert
12 testimony regarding police training appropriately admitted to give context to officer’s actions at
13 issue in the case). Sommer’s rebuttal opinions also “logically advance” Clarke’s rebuttal opinion
14 regarding damages calculations, which do not indulge in the same assumptions as Meyer’s
15 calculation.

16 Rule 702 does not require Sommer to advance an opinion specific to every customer,
17 every product, or every party to this litigation. Rather, he need only hold a rebuttal opinion on the
18 areas of the case where he intends to assist the jury—here, a general industry background that
19 Meyer, by use of the incorrect assumptions that Sommer challenges, omitted from his opinions.
20 *See e.g., United States v. Rahm*, 933 F.2d 1405, 1411 (9th Cir. 1993) (“Thus, not every expert
21 need express, nor even hold, an opinion with regard to the issues involved in a trial.”).

22 Moreover, Sommer’s opinions are not irrelevant because he opines that lower-cost support
23 services would not ‘trigger’ a customer to switch software. Plaintiffs claim that this testimony
24 embodies the wrong legal standard for copyright damages. However, under Ninth Circuit case
25 law, there must be a *causal nexus* between the *infringement* and disgorged profits. *Polar Bear*
26 *Prods., Inc. v. Timex Corp.*, 384 F.3d 700, 711-14 (9th Cir. 2004). Sommer’s testimony matches
27 the relevant Ninth Circuit standard. And in any event, Sommer does not purport to instruct the
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1 jury on the nuances of copyright law. The jury will be perfectly capable of applying Sommer's
2 testimony to whatever jury instruction on damages it will receive from this Court.

3 **Reliability.** The Ninth Circuit has noted that “the *Daubert* factors (peer review,
4 publication, potential error rate, etc.) simply are not applicable to [non-scientific] testimony,
5 whose reliability depends heavily on the *knowledge and experience* of the expert, rather than the
6 methodology or theory behind it.” *Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d
7 998, 1017 (9th Cir. 2004); *United States v. Hankey*, 203 F.3d 1160, 1169 (9th Cir. 2000). Instead,
8 courts are permitted to conclude that a witness’s “experience, training, and education provid[e] a
9 sufficient foundation of reliability for his testimony.” *Id.* at 1018 (affirming admission of
10 insurance industry expert where expert had 20 years of experience in industry as consultant and
11 employee).

12 Plaintiffs attack Sommer's rebuttal opinions on customer behavior, third-party support,
13 self-support, and switching programs as unreliable because, in forming those rebuttal opinions,
14 Sommer did not review customer-specific or third-party-vendor-specific information in this case.
15 In fact, the Ninth Circuit rejected a nearly identical argument to the one Oracle makes here in
16 *Hangarter*. In that case, the Ninth Circuit affirmed the district court's admission of testimony
17 from an expert on the insurance industry. The Ninth Circuit noted that Defendants had
18 questioned the expert’s “selection of documents to review” and argued that the issue went to the
19 “reliability of his ‘methodology’ as an expert.” *Hangarter*, 373 F.3d at 998 n.4. The Ninth
20 Circuit agreed with the district court, however, that the expert’s analysis was actually “dependent
21 upon the witness’s knowledge of, and experience within, the insurance industry.” *Id.*
22 Accordingly, “the questions regarding the nature of [the expert's] evidence went more to the
23 weight of his testimony—an issue properly explored during direct and cross-examination.” *Id.*

24 Sommer’s sources are not inherently unreliable simply because they came from the
25 internet. Internet sources can form the basis for reliable expert opinions, if experts in the field
26 typically rely on such information. *See, e.g.*, Fed. R. Evid. 703; *Boim v. Holy Land Found. for*
27 *Relief & Dev.*, 549 F.3d 685, 702-04 (7th Cir. 2008) (allowing an expert on terrorism to use
28 postings on websites associated with Hamas as the basis for his testimony that Hamas was

1 responsible for plaintiffs' son's death); *Semerdjian v. McDougal Littell*, 641 F. Supp. 2d 233, 243
 2 (S.D.N.Y. 2009) (copyright expert's testimony deemed reliable although resting in part on the
 3 website of distributors of copyright images). Plaintiffs do not explain why the particular internet
 4 sources that Sommer reviewed are inherently unreliable, or why members of his industry would
 5 not typically rely on them. In fact, many of the internet sources at issue have strong indicia of
 6 reliability, as the internet is likely the primary medium through which sophisticate, technology-
 7 based companies like those in the ERP support industry communicate with their customers.

8 Accordingly, Sommer's opinions are reliable and supported by his extensive experience in
 9 the ERP industry, as well as the more than 750 sources referenced in conjunction with his report.

10 **Procedural Attacks.** The Court also rejects Plaintiffs' claim that Sommer's report is
 11 improper rebuttal testimony. Plaintiffs rest this claim on the fact that Meyer's report has no
 12 information on the ERP industry, arguing that Sommer's report does not offer proper rebuttal.
 13 However, it is *precisely because* Meyer does not address these topics—instead assuming that no
 14 customer would switch from Oracle support services unless it was lured away by copyright-
 15 violation-induced lower prices—that Sommer's testimony on these topics is not only rebuttal, but
 16 necessary for the jury to understand the infirmities of Meyer's assumptions. Sommer's opinions
 17 are squarely within the realm of proper rebuttal. *See, e.g., Benedict v. United States*, 822 F.2d
 18 1426, 1428-29 (6th Cir. 1987) (testimony of plaintiff's rebuttal expert was proper where it “served
 19 the permissible rebuttal function of counteracting the testimony of the opposing expert witness”);
 20 *MMI Realty Servs., Inc. v. Westchester Surplus Lines Ins. Co.*, No. 07-00466 BMK, 2009 WL
 21 649894, at *2 (D. Haw. Mar. 10, 2009) (holding that the rebuttal expert's discussion of categories
 22 and guidelines not found in affirmative report were proper to refute affirmative experts' overall
 23 analysis).

24 Plaintiffs' argument regarding Sommer's “late opinion” regarding the 50% issue is moot,
 25 since SAP has represented that it will not present such an opinion at trial.

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CONCLUSION

For the reasons stated above, the Court concludes that Plaintiffs' Motion to Exclude Expert Testimony of Brian Sommer must be DENIED.

IT IS SO ORDERED.

DATED: _____

By: _____
Hon. Phyllis J. Hamilton