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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. 1 TO  
EXCLUDE EXPERT TESTIMONY  
OF STEPHEN K. CLARKE**

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

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

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7 Plaintiffs' arguments to exclude Clarke's analysis go to weight, not admissibility. Clarke  
8 is qualified to offer the opinions at issue and his methodology satisfies the requirements of Rule  
9 702. Clarke's rebuttal report, supplemental report, and accompanying disclosures were timely  
10 and did not prejudice Plaintiffs. For these reasons, the Court denies Plaintiffs' motion in its  
11 entirety.

12 Further, Defendants have been prejudiced by Plaintiffs' untimely disclosure of the Levy  
13 declaration. For these reasons, the Court excludes the Levy declaration.

14 **Clarke's Georgia-Pacific Analysis:** First, Plaintiffs argue that Clarke goes beyond the  
15 scope of permissible rebuttal testimony by performing his own *Georgia-Pacific* analysis.  
16 However, Clarke's analysis is appropriate because it rebuts evidence "on the same subject matter  
17 identified by another party . . . ." Fed. R. Civ. P. 26(a)(2)(C)(ii); *see also, In re REMEC Inc. Sec.*  
18 *Litig.*, No. 04-CV-1948, 2010 U.S. Dist. LEXIS 48415, at \*28-29 (S.D. Cal. Apr. 21, 2010);  
19 *Humphreys v. Regents of Univ. of Cal.*, No. C-04-03808, 2006 U.S. Dist. LEXIS 47822, at \*17-  
20 18 (N.D. Cal. Jul. 6, 2006). Therefore, Clarke may perform his own *Georgia-Pacific* analysis on  
21 rebuttal because it is the "same subject matter."

22 Second, Plaintiffs challenge the reliability of Clarke's *Georgia-Pacific* analysis and allege  
23 that it is unsupported by the facts. Although Plaintiffs may disagree with Clarke's approach, this  
24 does not make it unreliable. It is "not the role of the trial court to evaluate the correctness of facts  
25 underlying one's expert testimony." *DSU Med. Corp. v. JMS Co., Ltd*, 296 F. Supp. 2d 1140,  
26 1147-48 (N.D. Cal. 2003) (internal citation omitted); *see also* Fed. R. Evid. 702 Advisory  
27 Committee Note (trial court may not "exclude an expert's testimony on the ground that the court  
28

1 believes one version of the facts and not the other”). When experts rely on conflicting facts, “an  
2 expert may testify on his party’s version of the disputed facts,” *DSU Med.*, at 1148.

3 Finally, Plaintiffs assert that they have been prejudiced by the alleged untimely disclosure  
4 of Clarke’s *Georgia-Pacific* analysis. However, Clarke’s *Georgia-Pacific* analysis was disclosed  
5 at the appropriate time for rebuttal opinions and, in any event, Plaintiffs have suffered no  
6 prejudice because they have had ample time and notice to prepare for Clarke’s rebuttal analysis.

7 **Clarke’s Causation Analysis:** Plaintiffs similarly challenge the reliability of Clarke’s  
8 causation analysis. Again, although Plaintiffs may disagree with Clarke’s approach and  
9 conclusions, this does not make Clarke’s analysis unreliable. *DSU Med.*, at 1147-48; *Salinas v.*  
10 *Amteck of Ky., Inc.*, 682 F.Supp. 2d 1022, (N.D. Cal. 2010) (“[R]eliability is not determined  
11 based on the ‘correctness of the expert’s conclusions but the soundness of his methodology.’”).  
12 Plaintiffs’ disagreement with Clarke’s approach and conclusions do not justify the exclusion of  
13 Clarke’s analysis on this point.

14 Plaintiffs also allege that they suffered prejudice because five of the declarations upon  
15 which Clarke relies were produced after his expert report. Changes or additions to expert reports  
16 may be made up until the date of pre-trial disclosures, provided they do not include new theories  
17 or opinions. Fed. R. Civ. P. 26(e)(2); *see also Capitol Justice LLC v. Wachovia Bank, N.A.*,  
18 No.07-2095, 2009 U.S. Dist. LEXIS 126573, at \*6-10 (D.D.C. Apr. 8, 2010); *United States v.*  
19 *14.3 Acres of Land*, No. 07CV886, 2008 U.S. Dist. LEXIS 66667, at \*15-24 (S.D. Cal. Aug. 29,  
20 2008). Pre-trial disclosures were due on August 5, 2010. All of the declarations, and Clarke’s  
21 related supplementation of his report, were produced prior to that date. Therefore, Plaintiffs  
22 cannot claim they were prejudiced.

23 **Clarke’s Database Value of Use Analysis:** Plaintiffs seek to exclude Clarke’s analysis  
24 of the fair market value of Defendants’ use of Oracle’s database software. Despite Plaintiffs’  
25 arguments, however, Clarke’s analysis on this point is not is an improper legal interpretation of  
26 Oracle’s standard database end user license. Instead, Clarke attempts to compare Defendants’ use  
27 with other comparable conduct in an effort to define an established royalty. *DSU Med.*, at 1147-  
28 48 (citing *Monsanto v. McFarling*, 488 F.3d 973, 979 (Fed. Cir. 2007). Although Plaintiffs

1 disagree with the evidence upon which Clarke bases his analysis, any such arguments go to  
2 weight, and not admissibility, of Clarke's analysis.

3 **Clarke's Regression Analysis:** Plaintiffs challenge Clarke's qualifications to perform his  
4 regression analysis and contend that his methods and results are unreliable. However, Clarke's  
5 education and experience sufficiently qualify him to provide a regression analysis on this issue.  
6 Plaintiffs fail to establish that Clarke's regression analysis should be excluded.

7 **Clarke's Legal Opinions:** Plaintiffs contend that Clarke provides impermissible expert  
8 legal opinion. However, Plaintiffs have failed to establish that Clarke's analysis is legal in nature  
9 and should be excluded.

10 **Clarke's Qualifications to Provide Expert Testimony:** Throughout their motion,  
11 Plaintiffs contend that Clarke is not qualified to provide expert testimony. Clarke is an  
12 economist, damages expert, and a CPA accredited in business valuation. Clarke's education and  
13 experience sufficiently qualify him to provide analysis regarding the aforementioned topics. To  
14 the extent Plaintiffs argue that Clarke is otherwise unqualified, "courts routinely allow experts to  
15 testify as to subject areas related to, although not conterminous, with their expertise." *Industrial*  
16 *Automation Supply, LLC v. United Rentals Highway Techs.*, No. 3:04-CV-99, 2006 WL 5219390,  
17 at \* 1-2 (D.N.D. Feb. 8, 2006). Plaintiffs fail to establish that Clarke's qualifications warrant  
18 excluding him or his analysis.

19 **The Levy Declaration:** Further, Plaintiffs rely on a declaration by Levy, a witness  
20 Plaintiffs have not previously disclosed on the subject of regression analysis, econometrics, or  
21 damages. Plaintiffs' failure to disclose the Levy until now is untimely. *Luke v. Family Care and*  
22 *Urgent Med. Clinics*, 323 Fed. Appx. 496, 498-499 (9th Cir. 2009) (affirming exclusion of expert  
23 declaration in opposition to summary judgment). The Levy declaration will require significant  
24 time and effort in order for Defendants to evaluate and respond. Defendants have been  
25 prejudiced as a result. The Court hereby excludes the Levy declaration.

26 **IT IS SO ORDERED.**

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DATED: \_\_\_\_\_

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

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