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15 IN THE UNITED STATES DISTRICT COURT
16 FOR THE NORTHERN DISTRICT OF CALIFORNIA
17 OAKLAND DIVISION

18 ORACLE AMERICA, INC., a Delaware
19 corporation, and ORACLE INTERNATIONAL
CORPORATION, a California corporation,

20 Plaintiffs,

21 v.

22 HEWLETT PACKARD ENTERPRISE
23 COMPANY, a Delaware corporation; and
DOES 1-50,

24 Defendants.

Case No. 4:16-cv-01393-JST

**DEFENDANT HEWLETT PACKARD
ENTERPRISE COMPANY'S
RENEWED MOTION FOR
JUDGMENT AS A MATTER OF LAW
OR, IN THE ALTERNATIVE, FOR
NEW TRIAL**

Judge: Hon. Jon S. Tigar

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that Defendant Hewlett Packard Enterprise Company (“HPE”) will and hereby does move for judgment as a matter of law under Federal Rule of Civil Procedure 50(b) on all of Oracle’s claims, including:

1. Oracle’s claims for direct and indirect copyright infringement, as there is no legal or sufficient evidentiary basis to support a finding that Oracle’s Solaris patches and updates are covered by valid copyright registrations;
2. Oracle’s claim for direct infringement, as there is no legal or sufficient evidentiary basis to support a finding that any purportedly installed patch is copyrighted;
3. Oracle’s claim for vicarious infringement, as there is no legal or sufficient evidentiary basis to support a finding that HPE had the right and ability to control Terix’s purported infringement;
4. Oracle’s claim for intentional interference with contractual relations (“IICR”), as Oracle’s theory based on alleged breaches of Oracle’s support contracts, which purportedly incorporate Oracle’s support policies, is preempted by the Copyright Act;
5. Oracle’s claim for intentional interference with prospective economic advantage (“IIPEA”), as Oracle’s theory that HPE conspired with Terix to commit copyright infringement is preempted by the Copyright Act;
6. Oracle’s claims for IICR and IIPEA based on an agency theory, as no court has endorsed an agency theory of intentional interference, an agent cannot conspire with its principal, and there is no legal or sufficient evidentiary basis to support a finding that Terix was HPE’s agent or that any of Terix’s purported wrongful conduct occurred within the scope of any such agency relationship;
7. Oracle’s claims for IICR and IIPEA, as there is no legal or sufficient evidentiary basis to support a finding or calculation of damages for Oracle’s intentional interference claims;

- 1 8. Oracle’s claim for direct infringement, as there is no legal or sufficient evidentiary
2 basis to support a finding of infringement relating to 17 direct support customers;
- 3 9. Oracle’s claim for vicarious infringement, as there is no legal or sufficient evidentiary
4 basis to support a finding of underlying direct infringement by Terix;
- 5 10. Oracle’s claim for vicarious infringement, as there is no legal or sufficient evidentiary
6 basis to support a finding that HPE derived a direct financial benefit from Terix’s
7 alleged infringement;
- 8 11. Oracle’s claim for copyright infringement relating to Symantec, as there is no legal or
9 sufficient evidentiary basis to support a finding that any patch provided to Symantec
10 is copyrighted;
- 11 12. Oracle’s claim for IICR, as there is no legal or sufficient evidentiary basis to support
12 a finding that any customer at issue agreed to a support contract incorporating Oracle’s
13 support policies, that HPE knew any customer entered into a support contract or
14 policy, that HPE induced customers to breach their alleged support contracts that
15 purportedly incorporate Oracle’s support policies; or that HPE interfered with its
16 contracts with Oracle;
- 17 13. Oracle’s claim for IIPEA, as Oracle’s theory based on IICR fails for the same reasons
18 Oracle’s IICR claim fails;
- 19 14. Oracle’s claim for lost profits damages, as there is no legal or sufficient evidentiary
20 basis to support a finding of lost profits caused by alleged fraud or misrepresentations,
21 lost profits relating to Comcast, lost profits relating to customers for which there is no
22 evidence of infringement occurring during the limitations period, or lost profits based
23 on the assumption that every customer would have placed every Sun server under an
24 Oracle support contract but for the alleged misconduct;
- 25 15. Oracle’s claim for unjust enrichment, as there is no legal or sufficient evidentiary basis
26 to support a finding that HPE earned profits because of its alleged wrongdoing; and
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16. Oracle's claim for damages relating to international customers, as there is no legal or sufficient evidentiary basis to support a finding that any wrongful conduct relating to those customers occurred within the United States.

In the alternative, HPE moves for a new trial under Federal Rule of Civil Procedure 59 on Oracle's copyright infringement claims.

This motion is based upon this Notice of Motion, the accompanying Memorandum of Points and Authorities, the pleadings on file in this matter, all testimony and evidence admitted at trial, and such argument as the Court may consider.

Dated: July 29, 2022

Respectfully submitted,

GIBSON, DUNN & CRUTCHER LLP

By: /s/ Jeffrey T. Thomas
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HEWLETT PACKARD ENTERPRISE COMPANY

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I. INTRODUCTION

HPE is entitled to judgment as a matter of law on all of Oracle’s claims.

As to Oracle’s copyright claims, judgment is warranted for at least the following reasons:

1. Oracle failed to prove its patches are covered by valid copyright registrations.

Registration is an element of all of Oracle’s copyright infringement claims. There is no dispute Oracle did not register the patches it claims were infringed. Oracle witnesses testified code from the patches was *later* incorporated into versions of Solaris or firmware that were registered, but that is insufficient because previously published code cannot be registered in a later computer program.

2. Oracle failed to prove any patches provided to direct support customers are copyrighted.

Oracle’s expert did not analyze whether any patch installed on servers belonging to the direct support customers contains protectable or registered source code, as required, and thus there was insufficient evidence from which the jury could have found infringement as to those customers. In fact, neither Oracle nor its experts identified *any* of the allegedly installed patches.

3. Oracle failed to prove HPE controlled Terix’s conduct. Oracle did not prove HPE had

control over Terix’s alleged wrongful conduct—an element of its vicarious infringement claim. The joint customers constitute less than 5% of Terix’s 700+ independent customer relationships. And even if HPE could have terminated its contracts with Terix for the joint customers, HPE could not have stopped Terix from providing patches to customers not authorized to receive them.

As to Oracle’s interference claims, judgment is warranted for at least the following reasons:

1. Oracle’s interference claims are preempted. Oracle’s interference claims are based on

the same conduct as its copyright infringement claims—the alleged download, delivery, and installation of patches outside the scope of authorized use. In fact, Oracle and its expert admitted Oracle’s interference theory is “HPE was interfering by infringing.” Tr. 693:16; Tr. 1166:11-15.

2. Oracle failed to prove that Terix was HPE’s agent. As this Court observed during trial,

“the evidence of agency” was “underwhelming.” Tr. 1129:17-18. Oracle failed to present sufficient evidence that Terix had authority to alter the legal relations between HPE and third parties, Terix owed a fiduciary obligation to HPE, or HPE had in effect taken over Terix’s day-to-day operations. In any event, Terix’s alleged conduct occurred outside the scope of any agency.

1 3. Oracle failed to prove the amount of its interference damages. Oracle did not present
2 any evidence from which the jury could calculate damages on its interference claims. Its damages
3 expert presented a figure based on the May 6, 2012 cutoff date for Oracle’s copyright claims, but
4 he failed to present *any* number for interference. See *City of Vernon v. S. Cal. Edison Co.*, 955 F.2d
5 1361, 1371 (9th Cir. 1992) (plaintiff must prove amount of damages).

6 Oracle’s claims also fail because Oracle did not prove underlying infringement, did not
7 prove customers agreed to Oracle’s support policies purportedly incorporated into Oracle’s support
8 contracts, and did not prove causation between the alleged wrongdoing and damages.
9 Alternatively, the Court should order a new trial on only the copyright infringement claims (and
10 not the interference claims) because the jury instructions erroneously relieved Oracle from proving
11 the elements of its claims, and several erroneous evidentiary rulings—including admission of Terix
12 executives’ criminal pleas and hearsay statements of Terix employees under the agency
13 exception—substantially prejudiced HPE.

14 **II. ARGUMENT**

15 **A. HPE Is Entitled To Judgment As A Matter Of Law**

16 Judgment as a matter of law is appropriate where, as here, “a reasonable jury would not
17 have a legally sufficient evidentiary basis to find for the party” on a claim or issue presented at trial.
18 Fed. R. Civ. P. 50(a)(1), (b).

19 **1. Oracle’s Copyright Infringement Claims Fail Because There Is No Evidence**
20 **That Oracle’s Patches Are Covered By Any Valid Copyright Registrations**

21 A copyright plaintiff is “required to show registration as an element of an infringement
22 claim.” *Unicolors, Inc. v. Urban Outfitters, Inc.*, 853 F.3d 980, 988 (9th Cir. 2017). Oracle’s
23 failure to prove *any* patches are covered by valid registrations warrants judgment on all of Oracle’s
24 copyright claims. *Gold Value Int’l Textile, Inc. v. Sanctuary Clothing, LLC*, 925 F.3d 1140, 1148
25 (9th Cir. 2019); *Synopsys, Inc. v. Atoptech, Inc.*, 2016 WL 80549, at *1–2 (N.D. Cal. Jan. 7, 2016).

26 Oracle registered major versions of the “Solaris operating system Versions 8, 9, 10 and 11”
27 and “system firmware” (Tr. 625:13–627:8), which Oracle does not contend HPE or Terix copied.
28 Oracle contends HPE and Terix copied patches for which “Oracle has not filed separate

1 registration[s] with the copyright office” (Tr. 657:10-12 (Armes)), because it decided to “deal[]
2 with” registration through “the next [major] release” of Solaris (Tr. 663:8-12 (Armes)), since “[a]ll
3 the code changes that were made in patches are incorporated into the next major release.” Tr.
4 656:4-7 (Armes); Tr. 373:8-9 (Eder); Tr. 595:25–596:2 (Armes); Tr. 1286:14-17 (Goldberg).
5 Oracle contends that code released in patches was registered in a *later* Solaris or firmware version.
6 This is insufficient as a matter of law to satisfy the registration requirement. Dkt. 1327.

7 *First*, a copyright registration for a computer program (like a Solaris or firmware version)
8 does not cover code previously published in a *prior* program (like a patch). A registration for a
9 computer program may cover only *new* code—“a registration for a specific version of a computer
10 program does not cover any unclaimable material that may appear in that version. . . . [U]nclaimable
11 material includes: Previously published material.” United States Copyright Office, *Compendium*
12 *of U.S. Copyright Office Practices, Third Edition* § 721.8 (2014). Thus, “a registration for version
13 1.30 of a computer program does not cover version 1.20 or any previously published or previously
14 registered content that appears in the later version of that program.” *Id.* § 504.3; *see Gold Value*,
15 925 F.3d at 1145; *Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1447 (9th Cir. 1994).

16 *Second*, Oracle cannot claim the patches were “effectively” registered when the later Solaris
17 or firmware versions were registered. *None* of the registrations expressly identifies the *patches* that
18 are “the foundation of this action” (*I.M.S. Inquiry Mgmt. Sys., Ltd. v. Berkshire Info. Sys., Inc.*, 307
19 F. Supp. 2d 521, 529–30 (S.D.N.Y. 2004)) with “sufficient specificity” (*Synopsys*, 2016 WL 80549,
20 at *1; *see Oravec v. Sunny Isles Luxury Ventures, L.C.*, 527 F.3d 1218, 1229–30 (11th Cir. 2008);
21 *UAB “Planner5D” v. Facebook, Inc.*, 2020 WL 4260733, at *4 (N.D. Cal. July 24, 2020)). Some
22 registrations even *expressly disclaim* previously published patches, stating all “[p]rior works by
23 claimant” are “excluded from this claim.” Tr. Ex. 1396 at 17; Tr. Ex. 1551 at 1; Tr. Ex. 1552 at 1;
24 Tr. Ex. 1553 at 1; Tr. Ex. 1554 at 1; Tr. Ex. 1555 at 1; Tr. Ex. 1556 at 1; Tr. Ex. 1557 at 1; Tr. Ex.
25 1558 at 1; Tr. Ex. 1559 at 1; Tr. Ex. 1786 at 17. The effective registration doctrine does not apply
26 where the allegedly copied work “is not listed in any copyright registration.” *Well-Made Toy Mfg.*
27 *Corp. v. Goffa Int’l Corp.*, 354 F.3d 112, 116 (2d Cir. 2003); *Oravec*, 527 F.3d at 1229–30.

28 *Third*, there is no evidence any patch contained code first published in a registered version

1 of Solaris or firmware. Dkt. 1327 at 3–4. Oracle’s expert Dr. Goldberg did not examine more than
2 90 percent of the patches, analyze *when* patches were released, or know whether any protectable
3 code function was first published in a patch or registered version of Solaris or firmware. Tr. 1280:9-
4 12, 1281:12-14, 1282:13-17, 1286:2-24 (Goldberg); Tr. 623:5-7 (Armes). Oracle has suggested
5 the jury could have trawled through hundreds of pages of appendices and cross-compared patch
6 IDs with the tens of thousands of rows in Tr. Ex. 1839 to determine when patches were released
7 and whether patches contained registered code. Dkt. 1325; Tr. 1818:3-6. This kind of analysis is
8 what experts must do—but one Dr. Goldberg did not do. *DropzoneMS, LLC v. Cockayne*, 2019
9 WL 7630788, at *7 (D. Or. Sept. 12, 2019). Dr. Goldberg is the only witness who could have
10 conducted that analysis, and his failure to do so means there is no evidence of registration.

11 **2. Oracle’s Claims Regarding The Direct Support Customers Fail Because There**
12 **Is Insufficient Evidence Any Patch HPE Purportedly Installed Is Protectable**

13 Oracle’s infringement claims for the direct support customers fail because Oracle did not
14 present sufficient evidence that any patch HPE purportedly installed onto a direct support
15 customer’s unsupported server is *protectable* or *registered*. See *Oracle Am., Inc. v. Hewlett*
16 *Packard Enter. Co.*, 971 F.3d 1042, 1052–54 (9th Cir. 2020); *Swirsky v. Carey*, 376 F.3d 841, 844
17 (9th Cir. 2004). In fact, Oracle did not identify *any* of the patches that were allegedly installed onto
18 direct support customers’ unsupported servers. Tr. 1680:9-12 (Schnell) (“I didn’t see a patch
19 identified in [Hicks’s] direct customer exhibit”). That is because the Court precluded Oracle’s
20 forensic expert from belatedly supplementing his report to “identif[y] Solaris patches installed by
21 HPE without an Oracle support contract.” Dkt. 880 at 3. As a result, Dr. Goldberg did not (and
22 could not) analyze whether any patch allegedly installed by HPE contains protectable or registered
23 source code. Tr. 1278:19-21, 1283:19-22, 1293:25–1294:11. Indeed, he admitted he had “no
24 information” and was “not offering any opinions” on “whether any patch that was allegedly
25 installed on a customer’s server was protectable.” Tr. 1294:2-11. Because there is insufficient
26 evidence from which the jury could find infringement, the Court should enter judgment or, at
27 minimum, order a new trial because the verdict is “contrary to the clear weight of the evidence.”
28 *Murphy v. City of Long Beach*, 914 F.2d 183, 186–87 (9th Cir. 1990).

1 **3. Oracle’s Vicarious Infringement Claim Fails Because There Is Insufficient**
 2 **Evidence That HPE Had The Right And Ability To Stop Terix’s Conduct**

3 There is insufficient evidence that HPE had “a legal right to stop or limit the directly
 4 infringing conduct, as well as the practical ability to do so.” *Perfect 10, Inc. v. Amazon.com*, 508
 5 F.3d 1146, 1173 (9th Cir. 2007). A contractual relationship is not enough. *Perfect 10, Inc. v. Visa*
 6 *Int’l Serv. Ass’n*, 494 F.3d 788, 803 (9th Cir. 2007). Nor is the ability to “reduce the number” of
 7 alleged infringements. *Id.* Oracle was required to show HPE had the “ability to directly control
 8 [the infringing] activity” (*id.*), and “directly put an end to that conduct.” *Routt v. Amazon.com*,
 9 *Inc.*, 584 F. App’x 713, 714 (9th Cir. 2014); *Zillow*, 918 F.3d at 746. Oracle did not make that
 10 showing. The 26 joint customers constitute less than 5% of Terix’s 700+ Sun customers. *E.g.*, Tr.
 11 1312:1-20 (Farlin); Tr. 1683:8-13 (Schnell). HPE had no control over Terix’s independent
 12 contractual relationships. Dkt. 1222-1 at 108:25–109:7; Dkt. 1222-5 at 73:7-13. Terix even took
 13 steps to keep HPE out of independent customer meetings. Dkt. 1330-4 at 62:20–63:2; Dkt. 1274-
 14 1 at 251:12–252:01. Terix’s statements of work established Terix had “exclusive control over the
 15 means, method and details of fulfilling” its obligations to customers. Tr. Ex. 1130 at 9; Tr. Ex.
 16 1150 at 38; Tr. 758:6–759:2; Dkt. 1278-1 at 178:3-8; Tr. 1361:1–1362:10 (Farlin). At most, Oracle
 17 showed HPE could “terminate partnerships” with Terix (*Amazon*, 508 F.3d at 1173); but it did not
 18 show HPE could “directly put an end to” Terix’s alleged conduct (*Routt*, 584 F. App’x at 714; *Visa*,
 19 494 F.3d at 803).

20 **4. Oracle’s Interference Claims Are Preempted By The Copyright Act**

21 **a. Oracle’s IICR Claim Is Preempted**

22 Oracle claims HPE induced customers to breach Oracle support contracts that purportedly
 23 incorporated Oracle’s support policies. This claim is preempted by the Copyright Act.

24 *Software falls within the subject matter of copyright*, satisfying the first preemption
 25 element. *See Johnson Controls, Inc. v. Phx. Control Sys., Inc.*, 886 F.2d 1173, 1175 (9th Cir. 1989).

26 *Oracle’s IICR claim does not protect different rights.* “Claims for tortious interference
 27 are ... preempted when they involve acts of unauthorized use of copyrighted work.” *Ass’n for Info.*
 28 *Media & Equip. v. Regents of the Univ. of Cal.*, 2012 WL 7683452, at *10 n.1 (C.D. Cal. Nov. 20,

2012). That is true where, as here, the claim is based on an alleged breach of a contract provision limiting the permitted scope of use of the copyrighted work. *Compare Del Madera Props. v. Rhodes & Gardner, Inc.*, 820 F.2d 973, 976 (9th Cir. 1987), *overruled on other grounds by Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994) (claim based on alleged violation of “promise not to use or copy materials within the subject matter of copyright” “preempted”), *with MDY Indus., LLC v. Blizzard Entm’t, Inc.*, 629 F.3d 928 (9th Cir. 2010) (“We conclude that since [plaintiff] seeks to enforce contractual rights that are not equivalent to any of its exclusive rights of copyright, the Copyright Act does not preempt its tortious interference claim.”). Oracle’s infringement and IICR claims are identical. For both, Oracle alleges (1) customers’ right to use patches is governed by the support policies’ Unsupported Hardware provision, (2) customers (through HPE or Terix) violated that provision by copying patches for unsupported systems, and (3) this copying infringed Oracle’s copyrights and breached support agreements. Dkt. 991 at 12, 19, 21, 24; Tr. 693:16, 699:20-22; *see Oracle Am., Inc. v. Hewlett Packard Enter. Co.*, 823 F. App’x 516, 518 (9th Cir. 2020). Because the alleged use of patches “outside the scope of permitted use” (*Oracle*, 823 F. App’x at 518) is “part and parcel of [Oracle’s] copyright claim,” the interference claim is preempted. *Del Madera*, 820 F.2d at 977. In fact, Oracle argued “HPE was interfering *by infringing*” (Tr. 693:16 (emphasis added)), and that it was “the unlawful provision [of patches] that ... interfered with the contract.” Tr. 699:20-22; *see also* Tr. 1162:1-3, 1166:11-15 (Pampinella) (testifying HPE “offered ... copyrighted works inappropriately and, *as a result* of that, [HPE] interfered”) (emphasis added).¹

b. Oracle’s IIPEA Claim Is Preempted

An IIPEA plaintiff must prove “the defendant engaged in an independently wrongful act.” *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1158 (2003). Oracle’s claim is based on (i) interference with contract (preempted for the reasons stated above); and (ii) conspiracy to commit infringement (preempted because it does not protect rights “qualitatively different from the copyright rights”). *Laws v. Sony Music Entm’t, Inc.*, 448 F.3d 1134, 1143 (9th Cir. 2006). In

¹ Oracle tried to backtrack, saying its “interference theory is premised on” the “fraudulent business practices” HPE and Terix allegedly used to make “Oracle’s software available day in and day out.” Tr. 960:20-24. But Oracle cannot rely on fraud. Dkt. 1183 at 5; *Oracle*, 823 F. App’x at 518.

1 *Sybersound Records, Inc. v. UAV Corp.*, 517 F.3d 1137, 1151 (9th Cir. 2008), the Ninth Circuit
 2 held that the state claims were preempted because the plaintiff “would have to prove that copyright
 3 infringement occurred” to prevail—and “to the extent an alleged wrongful act by the [defendant]
 4 is based on copyright infringement, it is preempted.” *See also Oracle*, 823 F. App’x at 519 (“UCL
 5 claims predicated on infringement” preempted). The same is true here, as Oracle’s conspiracy to
 6 infringe theory requires it to show the “underlying wrongful act”—copyright infringement.
 7 *MedImpact Healthcare Sys., Inc. v. IQVIA Inc.*, 2020 WL 5064253, at *19 (S.D. Cal. Aug. 27,
 8 2020); *Everest Invs. 8 v. Whitehall Real Estate Ltd. P’ship XI*, 100 Cal. App. 4th 1102, 1106 (2002);
 9 *see also Tire Eng’g & Distrib., LLC v. Shandong Linglong Rubber Co.*, 682 F.3d 292, 311–12 (4th
 10 Cir. 2012) (reversing liability verdict: “the core of the claim for conspiracy to infringe copyrights
 11 is identical to that under the Copyright Act, and the extra element of agreement or combination
 12 does not make it otherwise”); *Laws*, 448 F.3d at 1144–45; *Millenium TGA, Inc. v. Doe*, 2011 WL
 13 1812786, at *2 (N.D. Cal. May 12, 2011); *Idema v. Dreamworks, Inc.*, 162 F. Supp. 2d 1129, 1192–
 14 94 (C.D. Cal. 2001).²

15 **5. Oracle’s Agency Theory of Interference Fails As A Matter of Law**

16 *No court has endorsed an agency theory of interference.* An interference claim requires
 17 evidence of “wrongful conduct on the part of *the defendant.*” *Overstock.com, Inc. v. Gradient*
 18 *Analytics, Inc.*, 151 Cal. App. 4th 688, 713 (2007) (emphasis added). There is no legal support for
 19 Oracle’s argument that HPE can be held liable for *Terix’s* alleged interference. Dkt. 1177 at 5.

20 *An agent cannot conspire with its principal.* Oracle says HPE conspired with *Terix*, but
 21 “[a]gents ... cannot conspire with their corporate principal ... where they act in their official
 22 capacities.” *Moreland v. Ad Optimizers, LLC*, 2013 WL 3786311, at *4 (N.D. Cal. July 18, 2013);
 23 *Villains, Inc. v. Am. Economy Ins. Co.*, 870 F. Supp. 2d 792, 795–96 (N.D. Cal. 2012).³

24 *Oracle failed to prove an agency relationship.* Oracle had to establish: (1) the purported
 25 agent “holds a power to alter the legal relations between the principal and third persons and between

26 ² The intent element of the claim does not supply the “extra element.” *Harper & Row Publishers,*
 27 *Inc. v. Nation Enters.*, 723 F.2d 195, 201 (2d Cir. 1983), *rev’d on other grounds*, 471 U.S. 539
 (1985); *Media.net Advert. FZ-LLC v. NetSeer, Inc.*, 156 F. Supp. 3d 1052, 1073 (N.D. Cal. 2016).

28 ³ To be clear, HPE was not *Terix’s* corporate principal.

1 the principal and himself”; (2) the “agent is a fiduciary with respect to matters within the scope of
 2 the agency”; and (3) the “principal has the right to control the conduct of the agent with respect to
 3 matters entrusted to him.” *Garlock Sealing Techs., LLC v. NAK Sealing Techs. Corp.*, 148 Cal.
 4 App. 4th 937, 964 (2007). Oracle failed to do so. Tr. 1129:17-18.

5 *First*, there is insufficient evidence Terix had “authority to act for and in the place of [HPE]
 6 for the purpose of bringing [it] into legal relations with third parties.” *Violette v. Shoup*, 16 Cal.
 7 App. 4th 611, 620 (1993). HPE subcontracted with Terix, but Terix could not “bind ... [HPE] to
 8 contracts” or “negotiate” on HPE’s behalf. Restatement (Third) of Agency § 1.01 cmt. c.

9 The Master Consolidated Services Agreement (“Master Agreement”) said Terix would “act
 10 solely as an independent contractor,” and “[n]othing contained herein will be construed to create
 11 the relationship of principal and agent.” Tr. Ex. 1080 at 13; Tr. Ex. 1050 at 12; Dkt. 1274-4
 12 (3.19.2015) at 19:15-21, 25:1-4; *id.* (5.16.2017) at 283:5–284:13; *see ING Bank, FSB v. Chang*
 13 *Seob Ahn*, 758 F. Supp. 2d 936, 943 (N.D. Cal. 2010). And it prohibited Terix from “hav[ing] any
 14 direct contact or communication with a Customer” during “the proposal/bid phase” (Tr. Ex. 1080
 15 at 7)—so Terix could not negotiate with customers on HPE’s behalf. Tr. at 1358:9–1359:5 (Farlin).

16 *Second*, there is insufficient evidence Terix “owe[d] a fiduciary obligation to [HPE].”
 17 Restatement (Third) of Agency § 1.01 cmt. e. The “[m]ere contractual relationship[]” between
 18 HPE and Terix “do[es] not give rise to a fiduciary relationship[]” (*Parrish v. Nat’l Football League*
 19 *Ass’n*, 534 F. Supp. 2d 1081, 1097 (N.D. Cal. 2007)), and there is insufficient evidence HPE
 20 reposed trust and confidence in Terix. *See Wolf v. Superior Court*, 107 Cal. App. 4th 25, 31 (2003)
 21 (“implied covenant cannot create a fiduciary relationship”). Terix was an *independent* TPM that
 22 served more than 700 customers (Tr. 1312:1-20 (Farlin); Tr. 1162:20-22 (Pampinella)) and
 23 “*competed* against HP.” Dkt. 1252-4 at 108:15–109:7; Dkt. 1252-2 at 73:7-13; Tr. 1310:23–
 24 1311:1, 1366:6-12 (Farlin). There is no agency relationship where entities have “oppos[ing] ...
 25 interests.” *Am. Airlines, Inc. v. Mawhinney*, 904 F.3d 1114, 1124 (9th Cir. 2018).

26 *Third*, there is insufficient evidence HPE had “the right to control the manner and means of
 27 accomplishing the result desired.” *ING Bank*, 758 F. Supp. 2d at 941. HPE did not “manage how
 28 [Terix] did the work,” as Terix was “responsible for defining [its] own processes and how they do

1 it.” Dkt. 1278-1 (5.16.2017) at 178:3-8; Tr. 1361:1–1362:10 (Farlin); Tr. Ex. 1050 at 37. To be
2 sure, the Master Agreement prohibited Terix from commencing any work until it received an HPE
3 purchase order, and granted HPE the right to supervise and assess Terix’s performance, audit Terix,
4 and terminate statements of work. Tr. Ex. 1080 at 6–7, 17. But one who hires a contractor “may
5 retain a broad general power of supervision and control as to the results of the work so as to insure
6 satisfactory performance of the independent contract—including the right to inspect, the right to
7 stop the work, [and] the right to make suggestions or recommendations as to the details of the
8 work”—“without changing the relationship” to an agency relationship. *ING Bank*, 758 F. Supp. 2d
9 at 941. The level of “control that gives rise to an agency [relationship] is comprehensive,
10 immediate, and day-to-day” (*id.* at 941–42)—such that the principal has “in effect taken over
11 performance of the [agent’s] day-to-day operations in carrying out that policy.” *Sonora Diamond*
12 *Corp. v. Superior Court*, 83 Cal. App. 4th 523, 542 (2000). Oracle did not prove that HPE took
13 over Terix’s day-to-day operations in supporting the joint customers. Tr. 1361:1–1362:10 (Farlin).

14 ***Terix’s wrongful conduct was outside the scope of any purported agency.*** HPE’s customer
15 contracts made clear that customers were responsible for having the necessary entitlements. Tr.
16 Ex. 1119 at 40; Dkt. 1274-2 at 62:8–63:10; Dkt. 1274-4 (3.19.2015) at 76:25–77:10, 89:15-20; *id.*
17 (5.16.2017) at 81:3-23; Tr. 755:19–756:4, 765:10-13, 775:6-8 (Klevickis); Tr. Ex. 1076B at 16–
18 17; Dkt. 1274-3 at 136:5–137:2; Dkt. 1316-2 21:7-12, 46:5-17, 52:8–53:22, 78:25–79:11; Dkt.
19 1316-3 at 14:19–15:2; Tr. Ex. 2031 at 7–8. HPE’s policy was that customers needed support
20 contracts to obtain patches. Dkt. 1252-2 72:20–74:2; Dkt. 1252-3 107:18–108:02; Dkt. 1274-4
21 (3.19.2015) at 76:25–77:10; Tr. Ex. 1234 at 1; Tr. Ex. 1323 at 1. And many of HPE’s contracts
22 with Terix excluded patching. Tr. 1355:10–1356:23, 1359:2–1360:7 (Farlin); Dkt. 1252-3 at
23 26:12–17, 133:07–133:12; Dkt. 1252-4 at 47:11–23; Tr. Ex. 1074 at 39; Tr. Ex. 1731 at 13; Tr. Ex.
24 3248 at 6–7. Indeed, HPE’s “corporate directive” was to provide “break-fix advisory support” and
25 not to “bring [Terix] in if the customer needs Solaris patches and updates” (Dkt. 1259-3 at 74:20–
26 75:8)—particularly since Terix executives hid Clearvision (and Snoe Wight) from HPE employees
27 (and other Terix employees) and concealed whether Terix provided patches for unsupported
28 servers. Tr. Ex. Nos. 2916 & 3574 (Snoe Wight); Tr. Ex. 3183; Tr. Ex. 1676; Tr. 1389:15-23

1 (Farlin); Tr. 765:20–766:6 (Klevickis); Dkt. 1252-4 at 41:17-23, 410:1-15; Dkt. 1252-3 at 94:13-
 2 22, 170:11-18, 181:17-22, 225:12–226:13; Dkt. 1252-2 at 73:1–74:2, 79:1-16, 285:16-21, 286:4-6,
 3 372:11-20; Dkt. 1330-4 at 62:20–63:2; Dkt. 1259-2 at 154:12-23, 192:5-7; Dkt. 1274-1 at 251:16–
 4 252:1; Dkt. 1274-4 (3.19.2015) at 76:5-9, 95:4–96:8; Dkt. 1278-2 at 81:5-24, 112:22–113:2.

5 HPE thus contracted with Terix only to provide hardware support, not software support.
 6 Dkt. 1252-4 at 47:11-23, 108:15–109:7; Dkt. 1252-3 at 25:12–26:17, 133:7-12; Dkt. 1259-2 at
 7 103:22-24; Dkt. 1274-4 (5.16.2017) at 178:16–179:2; Tr. 1309:25–1310:2 (Farlin). And Terix told
 8 HPE it “will not download any patches and fixes for a customer nor will [it] install them on their
 9 hardware” (Tr. Ex. 2164 at 1), and any agreement concerning Solaris patches was “strictly between
 10 Terix and the customer.” Dkt. 1252-2 at 313:24–314:3. In fact, customers independently
 11 concluded they were entitled to patches from Terix for servers without a support contract. Dkt.
 12 1274-3 at 40:2-14; Tr. 1557:13-23, 1559:4-16, 1560:5-8, 1596:10-13 (Buckland).

13 Thus, any patching Terix provided to unsupported servers was without HPE’s involvement
 14 and outside the scope of any agency relationship. *See van’t Rood v. Cty. of Santa Clara*, 113 Cal.
 15 App. 4th 549, 573 (2003). Indeed, once HPE learned more about Terix’s processes, it terminated
 16 its relationship with Terix and began rolling customers off Terix. Tr. 1362:13–1363:9, 1364:11–
 17 1370:15, 1374:21–1375:5, 1375:21–1387:21, 1453:25–1454:14 (Farlin); Tr. Ex. 3225 at 2.

18 **6. Oracle Presented Insufficient Evidence of Damages On Its Interference Claims**

19 Oracle’s damages expert James Pampinella did not offer any calculation of damages on
 20 Oracle’s interference claims. He offered only a \$73 million *infringement* number. Although
 21 Pampinella admitted Oracle’s interference claims had a later statute of limitations “cutoff” than its
 22 infringement claims (Tr. 1246:12-18), he did not provide any guidance about how the jury could
 23 calculate interference damages. “[B]ecause no damages ha[ve] been properly shown” for
 24 interference, the claims fail. *City of Vernon*, 955 F.2d at 1371; *In re First All. Mortg. Co.*, 471 F.3d
 25 977, 1002 (9th Cir. 2006); *Faria v. M/V Louise*, 945 F.2d 1142, 1143 (9th Cir. 1992).⁴

26
 27 ⁴ During closing, Oracle argued the jury could award \$56.1 million for interference. Tr. 1912:14–
 28 1913:4. But Pampinella did not testify about that figure, which was never even mentioned during
 the presentation of evidence, as this Court observed. Tr. 1915:23–1916:3.

1 **7. HPE Is Entitled To Judgment On Several Additional Grounds**

2 **a. Oracle Admitted It Had No Evidence Of Infringement For Most Direct**
 3 **Support Customers**

4 At summary judgment, Oracle relied on 35 spreadsheets it said showed 210 instances—
 5 corresponding to only 10 direct support customers—in which a patch may have been installed after
 6 a support contract ended. Dkt. 955 at 3. Oracle appealed from summary judgment, but the Ninth
 7 Circuit’s remand was directed solely to those 210 instances; the court concluded that a trial was
 8 necessary to resolve whether the 210 “entries” in HPE’s spreadsheets “reflected an actual
 9 installation” that occurred while a server was not on contract, and whether “HPE” (as opposed to
 10 the customer, Oracle, or someone else) “applied the patch[es]” to those servers. *Oracle*, 971 F.3d
 11 at 1052–53; Dkt. 955 at 3–9. Despite the Ninth Circuit’s limited remand for a trial as to those 210
 12 entries, Oracle improperly pursued infringement claims as to direct support customers for which it
 13 indisputably had no evidence of infringement. But Oracle failed to present *any* evidence at trial
 14 concerning 17 of the 27 direct support customers for which Oracle sought damages—much less
 15 “evidence that HPE installed a patch on a server that was not supported by an Oracle support
 16 contract” (*Oracle*, 971 F.3d at 1052) belonging to those 17 customers.⁵ Of the “35 direct support
 17 customers” Hicks analyzed (Tr. 894:14-17), he found evidence of purported unauthorized
 18 installations for only 11 (Tr. 896:21-24),⁶ and admitted there is no “evidence of any improper
 19 patching on any other” customers’ servers. Tr. 896:21-24; *see* Tr. 877:1-23, 907:18-25, 908:14-
 20 16, 979:21–980:14.⁷ Oracle should not have been permitted to claim infringement beyond the 210

21 ⁵ Pampinella and Hicks offer opinions about different sets of customers. Pampinella testified about
 22 damages for 26 joint support customers and 27 direct support customers, while Hicks testified about
 23 33 joint support customers and 35 direct support customers. Not all the customers for which Hicks
 24 identifies evidence of alleged infringement are customers for which Pampinella opines on damages.

25 ⁶ Hicks said he found evidence of wrongful installations for 11 direct support customers: AGCO
 26 Corporation; Allison Transmission; California Physicians’ Service, Inc.; Bristol Myers Squibb; BP
 27 PLC; Ericsson; Grupo Bimbo; Alcatel-Lucent; Owens-Illinois; and Sabre Corp. Tr. 974:11-17.

28 ⁷ The direct support customers for which Oracle seeks damages but has no evidence of
 infringement are Airgas, Inc., Ally Financial Inc., American Airlines Inc., Athene USA, Black &
 Veatch, Blue Cross Blue Shield of Massachusetts, Clorox, Dr. Pepper Snapple Group, Kraft Foods
 Group, Mercedes-Benz Financial Services USA LLC, MERSCORP Holdings, Inc., Molson Coors
 Brewing Company, Pegasus Solutions, Phoenix Companies, Universal Music Group, US Airways
 (fka USAir), and Virgin America. *Compare* Tr. 1199:8–1200:23 (Pampinella), *with* Tr. 974:11-17
 (Hicks).

1 instances for which the Ninth Circuit found there was a triable issue of fact. Nor should Oracle
 2 have been permitted to ask the jury to assume infringement as to customers for which it presented
 3 no evidence based on its evidence relating to the 11 customers Hicks identified. *See* Dkt. 955 at 7–
 4 8 (citing cases).

5 **b. Oracle Failed to Prove HPE Committed Vicarious Infringement**

6 ***Oracle failed to prove Terix committed direct infringement.*** Oracle had to show that Terix
 7 downloaded, copied, or delivered a patch “with the intent to install [the] patch on an unsupported
 8 server for a particular [joint HPE-Terix] customer.” Dkt. 991 at 19.⁸ Oracle failed to do so.

9 *First*, as with the direct support customers, it was undisputed at summary judgment that
 10 Oracle had no evidence of direct infringement by Terix for the majority of the joint support
 11 customers for which Oracle seeks damages, and thus Oracle should not have been permitted to ask
 12 the jury to speculate that infringement occurred as to those customers despite the total absence of
 13 evidence for those customers. *See* Dkt. 955 at 12–13. Indeed, at trial, Oracle failed to prove that
 14 Terix downloaded, copied, or delivered a patch “with the intent to install [the] patch on an
 15 unsupported server” belonging to 15 of the 26 joint-support customers for which Oracle seeks
 16 damages. Dkt. 991 at 19. Hicks testified that he found downloads for “eleven” of the 33 joint
 17 support customers he analyzed, but did not identify any of the 11 customers aside from
 18 Sungard/Fidelity. Tr. 914:8-24. And he identified only 12 of the 33 customers as having received
 19 allegedly unlawful deliveries (including Sungard). Tr. 921:21–922:17. He further conceded he
 20 identified no evidence of improper downloads or deliveries for any other customer for which Oracle
 21 seeks damages, and Oracle did not present any other evidence of infringement for those customers.
 22 Tr. 922:5-8, 922:18-21, 981:14-20.⁹ Oracle had to prove infringement for each joint customer for

23 _____
 24 ⁸ HPE respectfully disagrees with the infringement standard the Court adopted at summary
 25 judgment, as the Copyright Act does not regulate a party’s state of mind. *See* Dkt. 955 at 10–11;
 26 *Religious Tech. Ctr. v. Netcom On-Line Commc’n Servs., Inc.*, 907 F. Supp. 1361, 1367 (N.D. Cal.
 27 1995) (copyright infringement does not turn on “intent or any particular state of mind”).

28 ⁹ The joint-support customers for which Oracle seeks damages but has no evidence of infringement
 are Astra Zeneca Pharmaceutical, Bell Canada, Bharti Telecom, Boeing, BSNL, Equant, GE
 Treasury, Midwest ISO (MISO), ON Semiconductor, TATA (TCS), Texas Instruments (Japan),
 and Time Warner Cable. *Compare* Tr. 1198:6 – 1199:7 (Pampinella), *with* Tr. 914:8-24, 922:5-21,
 981:14-20 (Hicks). The customers for which Oracle has no evidence of post-statute of limitations

1 which it seeks damages, but failed to present *any* evidence—through Hicks or otherwise—of
2 infringement for 15 such customers. *Malibu Media, LLC v. Doe*, 82 F. Supp. 3d 650, 658 (E.D.
3 Pa. 2015); *Energy Intel. Grp., Inc. v. Jeffries, LLC*, 101 F. Supp. 3d 332, 342 (S.D.N.Y. 2015);
4 *ACCO Brands, Inc. v. ABA Locks Mfrs. Co.*, 501 F.3d 1307, 1312–13 (Fed. Cir. 2007).

5 *Second*, the evidence Oracle presented is insufficient to support the verdict. Hicks identified
6 6,051 **downloads** by Terix, but Hicks admitted that “over 90% of those” downloads were for
7 Symantec (not a joint support customer), and that he “can’t tell” whether Terix or the customer
8 downloaded the patches from MOS. Tr. 912:16-23, 915:2-10, 916:11-23 (Hicks). And Oracle’s
9 ARU database does not track which customer a patch was downloaded on behalf of. Dkt. 1321-1
10 at 136:17-20. Nor is there evidence for which server a patch was downloaded, much less whether
11 the server was or was not under a support contract. Tr. 418:3-9, 441:6-23 (Eder); Dkt. 1316-5 at
12 216:25–217:4. There also is insufficient evidence each downloaded patch is protectable. Tr.
13 1288:12–1290:9 (Goldberg). Oracle admitted there is no evidence tying downloads to deliveries
14 or installations for specific servers, let alone unsupported ones. Tr. 915:11-16; Tr. 918:7–919:6
15 (Hicks); Tr. 867:3-13; Dkt. 1321-1 at 85:16–86:1. And Hicks admitted that, as a result, there is no
16 way to tell what happened to any patch after it was downloaded. Tr. 867:3-13 (Hicks). Oracle
17 cannot prove Terix downloaded a patch with the *intent of installing* it on an *unsupported* server.

18 Oracle also failed to meet its burden on **deliveries**. Hicks testified that 118 such deliveries
19 occurred over the course of several years. Tr. 921:13–923:24 (Hicks). But Oracle failed to present
20 evidence of *who* pulled any given patch from an FTP site, that any patch was delivered for use on
21 an unsupported server, or that each delivered patch was protectable. Tr. 920:1-7 (Hicks). Oracle
22 did not prove Terix delivered a patch with the *intent of installing* it on an *unsupported* server. Dkt.
23 991 at 19.

24 ***Oracle failed to prove HPE derived a direct financial benefit.*** In addition to failing to
25 prove HPE could control Terix’s conduct, Oracle failed to present sufficient evidence HPE derived
26 a “direct financial benefit” from Terix’s specific infringing acts. *Amazon*, 508 F.3d at 1173; *Perfect*

27 _____
28 infringement are Bristol-Myers Squibb, Time, Inc., and Verizon. *Id.*; see also Dkt. 1060-2 at 3.

1 *10, Inc. v. Giganews, Inc.*, 847 F.3d 657, 673–74 (9th Cir. 2017); *Erickson Prods., Inc. v. Kast*, 921
 2 F.3d 822, 829 (9th Cir. 2019). Customers were not drawn to HPE because of free patches; HPE
 3 never told customers it could provide free Solaris patches. Dkt. 1316-2 at 45:18–46:17, 72:10–
 4 73:6; Dkt. 1316-3 at 34:9-13, 52:17–54:10; Dkt. 1316-4 at 296:6-10, 13-14; Dkt. 1321-5 at 29:12-
 5 18, 30:4-9. HPE’s contracts with Terix and the joint customers often excluded patching and
 6 specified it was the customer’s responsibility to maintain necessary entitlements. *E.g.*, Tr. Ex. 1119
 7 at 40; Tr. Ex. 1731 at 13; Tr. Ex. 3248 at 6–7; Tr. Ex. 1074 at 39.

8 **c. Oracle Failed to Prove Its Copyright Claims Concerning Symantec**

9 HPE is entitled to judgment as a matter of law or, at minimum, a new trial on Oracle’s
 10 infringement claims concerning Symantec because Dr. Goldberg failed to testify any patch
 11 purportedly provided to Symantec contains protectable or registered code.

12 **d. Oracle Failed to Prove Its Intentional Interference Claims**

13 **(i) Oracle’s IICR Claim Fails**

14 *Oracle failed to prove any customer agreed to a support contract incorporating the*
 15 *support policies.* Oracle had to prove the existence and breach of “a valid contract between plaintiff
 16 and a third party.” *Pac. Gas & Elec. Co. v. Bear Stearns & Co.*, 50 Cal. 3d 1118, 1126 (1990);
 17 CACI 2201. Oracle’s sole theory of breach is that the copying of patches breached the support
 18 policies purportedly *incorporated* into the customer’s support contracts. Oracle was required to
 19 prove customers entered into binding support contracts validly incorporating the support policies.

20 Oracle failed to present sufficient evidence that a *single customer* assented to the terms of
 21 Oracle’s support policies. Oracle introduced several versions of its support policies (Tr. Ex. Nos.
 22 1350, 1529–30), but never claimed the *policies themselves* are a “contract”—nor do they have the
 23 necessary indicia of a binding contract. *See Altera Corp. v. Clear Logic, Inc.*, 424 F.3d 1079, 1092
 24 (9th Cir. 2005). And while Oracle’s SVP of Global Business Practices Ellen Eder testified that
 25 Oracle’s support policies are “available publicly on [Oracle’s] website” (Tr. 378:24), and
 26 “incorporated” into the “orders ... for the support listing what [customers are] buying” (Tr. 444:8-
 27 23; *id.* at 384:13-20), her bald assertion of incorporation is insufficient.

28 The “principles of contract formation apply with equal force to contracts formed online”; a

1 plaintiff that “offers contractual terms to those who use [its] site” must show the “user engage[d]
2 in conduct that manifests her acceptance of those terms.” *Berman v. Freedom Fin. Network, LLC*,
3 30 F. 4th 849, 855–56 (9th Cir. 2022); *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1176–77
4 (9th Cir. 2014). Further, a document cannot be incorporated into a contract unless (1) there is a
5 “clear and unequivocal” statement in the contract incorporating the document, (2) the document is
6 “called to the attention of the other party and he must consent thereto,” and (3) “the terms of the
7 incorporated document” are “known or easily available.” *Woods v. Google Inc.*, 2011 WL
8 3501403, at *3 (N.D. Cal. Aug. 10, 2011); *Avery v. Integrated Healthcare Holdings, Inc.*, 218 Cal.
9 App. 4th 50, 66 (2013); *Shaw v. Regents of the Univ. of Cal.*, 58 Cal. App. 4th 44, 54 (1997). There
10 is insufficient evidence any customer saw, much less affirmatively assented to, the support policies.

11 Eder’s testimony that the support policies are “incorporated” into contracts violates the best
12 evidence rule, HPE properly objected to that testimony (Tr. 384:23-24), and it cannot salvage
13 Oracle’s argument. The terms of a written contract cannot be established without the written
14 contract itself. Fed. R. Evid. 1002; Dkt. 1299 at 1; *United States v. Bennett*, 363 F.3d 947, 953 (9th
15 Cir. 2004); *Acumed LLC v. Adv. Surgical Servs., Inc.*, 561 F.3d 199, 222 (3d Cir. 2009).

16 Without evidence *any* customer—much less all of them—executed a support contract that
17 validly incorporated Oracle’s support policies, Oracle cannot show breach and its IICR claim fails.

18 ***Oracle failed to prove HPE knew of any contract.*** There is insufficient evidence HPE
19 knew any customer entered into to a support contract or policy effective while receiving support
20 from HPE. The jury could not find HPE knew “interference was certain or substantially certain to
21 occur as a result of [its alleged] action.” *Reeves v. Hanlon*, 33 Cal. 4th 1140, 1148 (2004).

22 ***Oracle failed to prove HPE induced breach.*** HPE told “customer[s] that an Oracle contract
23 needs to be in place” to access Solaris patches and “work[ed] with Oracle to put the right contracts
24 in place” for customers that wanted patches. Dkt. 1259-2 at 99:4–99:20, 101:7–103:19; Dkt. 1274-
25 4 (5.16.2017) at 35:14-20; *id.* (3.19.2015) at 76:25–77:10; Tr. 755:19–756:4 (Klevickis); Tr. Ex.
26 1119 at 40; Tr. Ex. 1076B at 16–17. Terix purported to offer a solution for patches without an
27 Oracle contract, but did not share the details with HPE; HPE did not know what the solution was
28 and did not sponsor or promote it. Dkt. 1252-2 at 70:14-17, 73:1–74:2, 323:7-16; Dkt. 1259-2 at

1 103:22-24; Tr. 1389:18-23 (Farlin). And Oracle cannot argue HPE misrepresented to customers
 2 that HPE could provide free patches. Dkt. 1183 at 5. If customers obtained patches from Terix for
 3 unsupported servers, it is because they *chose* to do so in the wake of much confusion. Tr. 369:19-
 4 21, 375:17-22, 387:13-21, 393:4-7, 397:20-22, 402:14-22, 406:23–407:15 (Eder); Tr. at 516:19-20
 5 (Edwards); Tr. at 634:24–635:3, 636:24–638:7, 641:1-18 (Armes); Tr. 1050:1-11, 1054:2-3
 6 (Jones); Tr. Ex. 3220; Tr. Ex. 2421; Dkt. 1252-2 at 246:19-24, 303:25–304:1; Tr. Ex. 2700_A; Tr.
 7 Ex. 2379; Tr. Ex. 2700; Tr. Ex. 2416; *compare* Tr. Ex. 2610, *with* Dkt. 1316-4 at 101:12–103:9;
 8 Tr. 642:21–645:7 (Armes); Tr. Ex. 2383; Dkt. 1252-4 at 138:13-25; Dkt. 1274-3 at 40:2-14, 136:5–
 9 137:1; Dkt. 1274-1 at 180:22–181:6; Tr. 1557:13-23, 1559:4-16, 1560:5-8, 1596:10-13, 1564:18–
 10 1569:12, 1569:20-22 (Buckland); Tr. Ex. 2944; Tr. Ex. 1096; Tr. 1391:10-19 (Farlin).

11 ***HPE cannot interfere with its contracts with Oracle.*** For direct support customers, “HPE
 12 is the prime contractor and Oracle is the subcontractor”—meaning HPE, not the customer, is the
 13 contracting party. Tr. 1084:21-23 (Jones); Tr. 1610:18–1612:9, 1623:19–1624:7, 1626:6-8,
 14 1630:7-16 (Marek); Dkt. 1274-4 (5.16.2017) at 35:14–36:04, 47:11-18; Dkt. 1316-3 at 15:3-9,
 15 21:8-25; Tr. Ex. 2313. A party to a contract cannot interfere with its own contract. *Applied Equip.*
 16 *Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal. 4th 503, 513–14 (1994).

17 **(ii) Oracle’s IIPEA Claim Fails**

18 Oracle predicated its IIPEA claim on its IICR claim and the theory that HPE conspired with
 19 Terix to commit copyright infringement. Oracle’s IICR claim fails for all the reasons stated above,
 20 and Oracle’s conspiracy-to-infringe theory is preempted by the Copyright Act, as discussed above.

21 **e. Oracle Failed to Prove Its Damages Claims**

22 The jury awarded Oracle \$30 million on its copyright infringement claims and alternatively
 23 \$24 million on its intentional interference claims. Dkt. 1349 at 2–3. Neither award is supported
 24 by the evidence, and the damages theories Oracle relied on fail as a matter of law. If the Court
 25 concludes that any portion of the damages award is unsupported, the Court should grant judgment
 26 to HPE. *See City of Vernon v. S. Cal. Edison Co.*, 955 F.2d 1361, 1373 (9th Cir. 1992).

27 **(i) Oracle’s Claim For Lost Profits Fails**

28 A copyright plaintiff seeking lost profits must present evidence “establish[ing] [a] causal

1 connection” “between the infringement and the monetary remedy sought.” *Polar Bear Prods., Inc.*
2 *v. Timex Corp.*, 384 F.3d 700, 708, 710 (9th Cir. 2004). Lost profits “damages may be recovered
3 only if there is a necessary, immediate and direct causal connection between the wrongdoing and
4 the damages.” *Big Seven Music Corp. v. Lennon*, 554 F.2d 504, 509 (2d Cir. 1977). Where a
5 plaintiff seeks lost profits based on loss of customers, the plaintiff must connect *each* lost customer
6 and *each* lost sale to a proven act of infringement. *Oracle Corp. v. SAP AG*, 765 F.3d 1081, 1087
7 (9th Cir. 2014); *Crunchyroll, Inc. v. Pledge*, 2014 WL 1347492, at *3 (N.D. Cal. Mar. 31, 2014);
8 *Oracle USA, Inc. v. Rimini St., Inc.*, 2:10-cv-0106-LRH-PAL, Dkt. 880 at 35 (D. Nev. Oct. 6, 2015).
9 These rules apply in both the copyright and interference context. *Sole Energy Co. v. Petrominerals*
10 *Corp.*, 128 Cal. App. 4th 212, 232 (2005). Oracle failed to meet this standard.

11 ***Oracle cannot recover lost profits caused by alleged fraud or misrepresentations.***

12 Pampinella attempted to quantify the profits lost “for the customers HPE unlawfully diverted from
13 Oracle’s support through false representations.” Dkt. 619-2 ¶ 45; Tr. 1168:16-20 (Pampinella).
14 But “Oracle may not present the theory that HPE committed IICR or IIPEA based on HPE’s
15 misrepresentations to Oracle customers” (Dkt. 1183 at 5), so Oracle could not recover damages
16 under this theory. *E.g., Comprehensive Toxicology Billing, LLC v. Nord*, 2017 WL 11639175, at
17 *3–4 (C.D. Cal. Feb. 3, 2017) (excluding damages expert on “already-dismissed diversion claims”).

18 ***Comcast damages are time-barred.*** Oracle could not pursue “copyright infringement
19 claims ... for conduct before May 6, 2012,” or interference claims “for conduct before May 6,
20 2013.” *Oracle*, 971 F.3d at 1047. Nor could Oracle seek interference damages for conduct before
21 May 6, 2013. *Little v. Amber Hotel Co.*, 202 Cal. App. 4th 280, 304 (2011). Pampinella testified
22 Comcast paid Oracle \$7.2 million per year in fees before cancelling its contract with Oracle, and
23 that it would have paid Oracle \$21.6 million more if that cancellation had not occurred (resulting
24 in more than \$15 million in purported lost profits). Tr. 1180:6–1181:5, 1198:20-22 (Pampinella);
25 Tr. 1008:7-19 (Jones). But Comcast terminated its Oracle contract in April 2012 and signed a
26 three-year contract with HPE that month. Tr. 1240:7-17 (Pampinella); Tr. Ex. 1286; Tr. Ex. 1253.
27 Any purported misconduct *after* May 6, 2012, could not have caused Oracle to lose Comcast’s
28 business in April 2012. The verdict cannot be supported by any damages attributable to Comcast.

1 **Oracle is not entitled to damages for customers with no evidence of infringement within**
 2 **the statute of limitations.** Oracle sought damages for 49 different customers (Tr. 1175:18-25), but
 3 failed to present sufficient evidence of within-limitations infringement for the vast majority of
 4 them. *Infra* Parts II.A.2, II.A.7.a–b. Pampinella conceded he did not limit his “damages [opinions]
 5 to servers for which there’s evidence” of infringement. Tr. 1224:24–1225:7 (Pampinella); Tr.
 6 1717:3-6 (McGavock); *SAP*, 765 F.3d at 1094; *Polar Bear*, 384 F.3d at 708. For example, Oracle
 7 sought more than \$5 million in damages for Boeing (Tr. 1198:6–1200:10, 1226:6-13), but Oracle
 8 has no evidence of infringement as to Boeing after May 6, 2012. Tr. 896:21-24, 914:8-24, 922:5-
 9 17, 974:11-17 (Hicks); *see supra* n.9 (listing joint support customers for which Oracle seeks
 10 damages but has no evidence of infringement, either before or after the statute of limitations cutoff).

11 **Oracle failed to prove every customer would have placed every server under Oracle**
 12 **support but for the alleged wrongdoing.** Oracle’s entire damages theory was predicated on the
 13 assumption that it would have sold support contracts for every Sun server HPE or Terix supported,
 14 for every day under support, at whatever price Oracle charged, whether or not the server received
 15 or needed a patch. Tr. 1200:11-20 (Pampinella). This theory is speculative and unsupported. *See*
 16 *SAP*, 765 F.3d at 1094; *Polar Bear*, 384 F.3d at 708.

17 The undisputed evidence—including from Oracle’s own witnesses—established that many
 18 customers did not purchase support because they did not need or want patches for many servers.
 19 Dkt. 1316-1 at 85:24–87:1, 98:19–99:8; Tr. Ex. 2418; Tr. Ex. 2412; Tr. Ex. 2439_A at 2; Tr. Ex.
 20 3257 at 14; Tr. 630:18-20, 654:4-13 (Armes); Tr. 1482:18-25 (Swartout). Customers with aging,
 21 stable servers had no need for patches and chose to self-support or contracted with a TPM for
 22 support. Tr. 1051:15-23, 1081:3-17 (Jones); Tr. Ex. 2432; Tr. Ex. 2757; Tr. Ex. 2439_A; Tr. Ex.
 23 2643; Dkt. 1316-1 at 98:19–99:22; Dkt. 1321-4 at 79:22–80:12; Dkt. 1316-6 at 233:2-10; Dkt.
 24 1321-5 at 73:16–74:14. Roughly 80% of the servers Oracle seeks damages for were end of service
 25 life. Tr. 1746:3–1747:7 (McGavock). Oracle had *thousands* of Sun servers not under support. Tr.
 26 Ex. 3257 at 60; Tr. Ex. 2647 at 95. And Oracle never supported thousands of Sun servers belonging
 27 to the customers for which Oracle seeks damages—either before or after those customers contracted
 28 with HPE. *See* Tr. 653:22–654:3 (Armes); Ex. 3614; Tr. 1715:10-13, 1728:24–1730:11, 1731:5-

1 12 (McGavock). The undisputed evidence squarely contradicted Pampinella’s unsupported
 2 assumption that customers would have purchased support for *every last server* at issue.¹⁰

3 **(ii) Oracle’s Claim For Unjust Enrichment Fails**

4 Oracle also sought damages under an unjust enrichment theory, but failed to “show a causal
 5 connection” “between [any] infringement and the monetary remedy sought.” *Polar Bear Prods.*,
 6 384 F.3d at 708; *see also Mackie v. Rieser*, 296 F.3d 909, 915 (9th Cir. 2002). Pampinella based
 7 his direct infringement figure on HPE’s sales order data, but failed to account for the myriad ways
 8 this data does not “bear a legally significant relationship to the [alleged] infringement.” *Polar Bear*,
 9 384 F.3d at 711. The sales order data is not limited to HPE’s revenues related to supporting Sun
 10 servers, and includes revenue earned by supporting IBM servers, Dell servers, and other systems
 11 that are wholly irrelevant to this case. Tr. 1192:25–1193:15, 1232:2-11 (Pampinella); *On Davis v.*
 12 *The Gap, Inc.*, 246 F.3d 152 (2d Cir. 2001). The data also includes customers for which there is
 13 no evidence of infringement. *See infra* Parts II.A.7.a–b.

14 **(iii) Oracle May Not Seek Damages For International Customers**

15 The Copyright Act does not apply to conduct outside the United States. *Allarcom Pay Tel.*
 16 *Ltd. v. Gen. Instrument Corp.*, 69 F.3d 381, 387 (9th Cir. 1995). Oracle did not present any
 17 evidence—through Hicks or any other witness—that wrongful conduct occurred in the United
 18 States relating to the following international customers: Bank of Baroda, Bell Canada, Bharti
 19 Telecom (TNG), BSNL (Embee Software), Ericsson, TATA (TCS), and Texas Instruments. Tr.
 20 1173:24–1174:4, 1192:25–1193:15 (Pampinella); Tr. Ex. 1954 at 6, 8–9, 11–13. As a result, HPE
 21 is entitled to judgment as to these customers, and Oracle could not seek \$5.3 million in related
 22 damages. Tr. 1192:25–1194:10 (Pampinella).

23 _____
 24 ¹⁰ During trial, the Court denied HPE’s motion to preclude Pampinella from (1) testifying about
 25 damages relating to customers for which Oracle has no evidence of allegedly improper copying,
 26 (2) testifying about damages relating to direct support customers for which Oracle has no evidence
 27 of infringement of a copyrighted work, and (3) testifying that, but for HPE’s alleged misconduct,
 28 every server HPE supported would have been under an Oracle support contract. Dkt. 1280-1; Tr.
 963:23. HPE renews its objection to the admission of Pampinella’s testimony, without which the
 jury’s damages finding could not stand given the centrality of the identified testimony to his overall
 damages opinion. *See Weisgram v. Marley Co.*, 528 U.S. 440, 453–54, 457 (2000); *Brooke Grp.*
Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 242 (1993).

1 **B. HPE Is Alternatively Entitled To A New Trial On The Infringement Claims**

2 **1. Several Instructional Errors Warrant A New Trial**

3 “[E]rroneous jury instructions, as well as the failure to give adequate instructions, are ...
4 bases for a new trial.” *Murphy v. City of Long Beach*, 914 F.2d 183, 187 (9th Cir. 1990).

5 **a. HPE Was Entitled To An Authorized Copying Instruction**

6 Both Oracle and this Court have expressly recognized that copying patches for supported
7 servers is *not* infringement. Dkt. 1113 at 2; Dkt. 991 at 3. Thus, as HPE’s proposed instructions
8 explained, HPE and Terix were authorized to copy patches for servers under an Oracle support
9 contract. Dkt. 1082 at 184, 189, 205; Dkt. 1336 at 2, 8. Yet the jury was not given HPE’s authorized
10 copying instructions, and was instead told that they should find copyright liability if HPE or Terix
11 “copied original expression from the copyrighted work” (Dkt. 1334 at 23, 29)—i.e., if HPE or Terix
12 copied *any* copyrighted patch, even if for a server under an Oracle support contract. Given that
13 patch copies made for servers under Oracle support are not infringing, and that the evidence
14 established HPE copied patches for servers under Oracle support contracts (Tr. 1084:14-23
15 (Jones)), it was wrong to tell the jury *any* copy of a copyrighted patch was infringing.

16 This error is presumed to be prejudicial, and Oracle cannot carry its burden of proving that
17 it was not. *See Galdamez v. Potter*, 415 F.3d 1015, 1025 (9th Cir. 2005). Whether HPE or Terix
18 unlawfully copied patches was the central question in the case. And the erroneous instruction
19 misled the jury into believing it could find for Oracle on this central issue merely because HPE or
20 Terix made *lawful* copies—i.e., copies made for servers under support contracts. This instruction
21 would necessitate a new trial on its own, given the evidence of lawful copying at trial (Tr. 1084:14-
22 23 (Jones); Dkt. 1316-4 at 220:3-4; Tr. 907:18-25 (Hicks))—but it was particularly prejudicial here
23 because it followed other, mid-trial instructions that also erroneously suggested that *any* copying
24 was infringing, even if for a supported server. Tr. 439:14–440:8, 518:9-12. Because Oracle cannot
25 show the jury would have found for Oracle even if it were properly instructed, a new trial is
26 required. *BladeRoom Grp. Ltd. v. Emerson Elec. Co.*, 20 F.4th 1231, 1245 (9th Cir. 2021).

27 **b. HPE Was Entitled To Copyright Registration Instructions**

28 Copyright registration is a separate “element” of an infringement claim. *Unicolors, Inc. v.*

1 *Urban Outfitters, Inc.*, 853 F.3d 980, 988 (9th Cir. 2017); *Olander Enters., Inc. v. Spencer Gifts,*
2 *LLC*, 2011 WL 13225062, at *3 (C.D. Cal. Oct. 21, 2011). There was at the *very least* a disputed
3 issue regarding whether Oracle’s patches were registered—in fact, the evidence established they
4 were *not*. Dkt. 1327. The failure to give HPE’s proffered instructions on registration—and to
5 instead take the registration question out of the jury’s hands completely (Tr. 1818:20–1819:5)—
6 was erroneous. *See* Dkt. 1336 at 2; Dkt. 1082 at 70; Dkt. 1318 at 9–10, 15. It also was indisputably
7 prejudicial, as there was no evidence to support the registration element of Oracle’s infringement
8 claims. Oracle cannot establish the jury would have found its patches were registered if it had been
9 properly instructed, and a new trial is required. *See BladeRoom*, 20 F.4th at 1245.

10 **c. The Direct Infringement Instructions Were Incorrect**

11 Instruction 17.5 on direct infringement as to the direct customers and Instruction A.3 on
12 direct infringement as to the joint customers incorrectly articulated Oracle’s burden of proof on the
13 copying element of its copyright claims. Dkt. 1334 at 23, 29; Dkt. 1336 at 2, 8; Dkt. 1082 at 184,
14 205. Although the instructions were based on Ninth Circuit Model Instruction 17.5, “the use of a
15 model jury instruction does not preclude a finding of error” where “the substance of the applicable
16 law was not fairly and correctly covered.” *Dang v. Cross*, 422 F.3d 800, 805 (9th Cir. 2005).

17 Instruction 17.5 said Oracle had the burden of proving that “HPE copied original expression
18 from the copyrighted work.” Dkt. 1334 at 23. Although copying is an element of every copyright
19 infringement claim (*Range Road Music, Inc. v. East Coast Foods, Inc.*, 668 F.3d 1148, 1153 (9th
20 Cir. 2012), the Ninth Circuit held that to prove “the copying element” as to “the direct infringement
21 claims” against HPE, Oracle had to prove “that HPE installed a patch on a server that was not
22 supported by an Oracle support contract” (*Oracle*, 971 F.3d at 1052). But no instruction informed
23 the jury that it could not hold HPE liable for direct infringement as to the direct support customers
24 unless it found that HPE *installed* a patch on an unsupported server. Instruction A.3 likewise failed
25 to instruct the jury that Oracle had to prove that Terix downloaded, copied, or delivered patches
26 with the intent to install them on unsupported servers. Dkt. 991 at 19–21; *see* Dkt. 1082 at 30.

27 Instructions 17.5 and A.3 thus “misstated the law” (*Clem v. Lomeli*, 566 F.3d 1177, 1181
28 (9th Cir. 2009)), and were “incomplete” (*Dang*, 422 F.3d at 806), precluding the jury from

1 “determin[ing] the issues presented intelligently” (*Fikes v. Cleghorn*, 47 F.3d 1011, 1013 (9th Cir.
2 1995)). The error was clearly prejudicial, as no instruction accurately articulate Oracle’s burden to
3 prove unlawful “copying” and allowed the jury to hold HPE liable for conduct neither this Court
4 nor the Ninth Circuit has held is infringing. *Gantt v. City of L.A.*, 717 F.3d 702, 707 (9th Cir. 2013).

5 **2. Several Evidentiary Rulings Warrant A New Trial**

6 An evidentiary error is grounds for a new trial if it “more probably than not tainted the
7 verdict.” *Crawford v. City of Bakersfield*, 944 F.3d 1070, 1077 (9th Cir. 2019).

8 **a. Terix Evidence Was Erroneously Admitted Under The Agency 9 Exception To The Hearsay Rule**

10 Oracle introduced a mass of evidence from *Terix* to prove infringement, including 40 pages
11 of Terix discovery responses, three depositions of Terix employees (among other depositions), and
12 myriad documents from *Terix*. Tr. 564:9-20; Dkts. 1252-4, 1259-1, 1284-1.¹¹ HPE was saddled
13 with this evidence under the mistaken theory that Terix was HPE’s agent. Dkt. 1183 at 8.

14 Oracle should have been precluded from introducing Terix’s discovery responses. *See*
15 *Thompson v. TRW Auto, Inc.*, 2014 WL 12781291, at *13 (D. Nev. June 2, 2014).¹² Because Terix
16 was not HPE’s agent, the discovery responses were not party admissions. Fed. R. Evid. 801(d)(2).
17 Nor were they admissible as statements against interest under Rule 804(b)(3) (Dkt. 1171 at 2),
18 because Oracle failed to show Terix was unavailable, and there was nothing inculpatory about
19 Terix’s discovery responses “at the time [they were] made.” *Chambers v. Mississippi*, 410 U.S.
20 284, 299 (1973). Moreover, the discovery responses were irrelevant, or at least highly misleading,
21 because the vast majority of Terix’s customers were not HPE customers. Fed. R. Evid. 401, 403.
22 Their probative value also was substantially outweighed by the risk of unfair prejudice because
23 they allowed Oracle “to insinuate and the jury to conclude, wrongly,” that because Terix made
24 certain admissions for purposes of a separate lawsuit, Oracle’s claims here were more likely to be
25 true. *In re Southeastern Milk Antitrust Litig.*, 2011 WL 13122688, at *6 (E.D. Tenn. July 15, 2011).

26 ¹¹ *See, e.g.*, Tr. Exs. 1342, 1611, 1619, 1621, 1623, 1625, 1629, 1635, 1673, 1675-1677, 1692,
27 1709, 1958-1960.

28 ¹² *See also, e.g.*, *Diodem, LLC v. Lumenis, Inc.*, 2017 WL 5764187, at *2 (C.D. Cal. May 24,
2007); *Proctor & Gamble Co. v. Haugen*, 2007 WL 701812, at *3 (D. Utah Mar. 2, 2007).

1 Similarly, the depositions taken in *Terix* should not have been treated as having been taken
 2 in this case. Dkt. 224. HPE was not a party in *Terix*, was not present at any of the depositions, and
 3 had no opportunity to defend itself in that case. Dkt. 161. *Terix* also did not have the same motive
 4 to cross-examine. Indeed, during many of the depositions, Oracle asked questions relevant only to
 5 HPE’s liability and not *Terix*’s, even though HPE was not a defendant and *Terix* had every incentive
 6 to shift blame to unrepresented HPE. *Akamai Techs., Inc. v. Limelight Networks, Inc.*, 2008 WL
 7 364401, at *3 (D. Mass. Feb. 8, 2008). In any event, the deposition testimony of *Terix* employees
 8 should not have been admitted under the agency exception to the hearsay rule. Fed. R. Evid.
 9 801(d)(2)(D); Dkt. Nos. 1171 & 1183.

10 This evidence prejudiced HPE because it contained statements *Terix* supposedly told HPE
 11 and its customers about whether *Terix* could provide patches and updates, communications between
 12 customers and *Terix* regarding the provision of patches, and more, all without opportunity for cross-
 13 examination by HPE. The blanket admission of *Terix* evidence under Oracle’s agency theory
 14 “tainted the verdict” and warrants a new trial. *Crawford*, 944 F.3d 1077.

15 **b. Terix Executives’ Guilty Pleas Were Erroneously Admitted**

16 Oracle attempted to establish its indirect infringement claims against HPE by citing guilty
 17 pleas from *United States v. Appleby*, No. 2:17-CR-138-JLG (S.D. Ohio). Those pleas are irrelevant
 18 because the four *Terix* executives merely pleaded guilty to the “essential elements” of conspiracy
 19 to commit wire fraud. Tr. Exs. 1475, 1476, 1477, 1478. That four *Terix* executives willfully joined
 20 in an agreement to commit *wire fraud* does not make it any more (or less) likely that *Terix*
 21 committed *copyright infringement*—let alone with respect to the joint customers at issue in this
 22 case. The evidence should have been excluded on Rule 401 grounds alone. *See In re: Cathode*
 23 *Ray Tube (CRT) Antitrust Litig.*, 2016 WL 5871243, at *8 (N.D. Cal. Oct. 7, 2016) (Tigar, J.).

24 The *Appleby* evidence also should have been excluded under Rule 403 because evidence of
 25 plea agreements “invite[s] jurors to find against [the defendant] because of association, rather than
 26 because of evidence demonstrating [the defendant’s] involvement in the conduct at issue.” *United*
 27 *States v. Hawley*, 562 F. Supp. 2d 1017, 1054 (N.D. Iowa 2008). Admitting the guilty pleas allowed
 28 Oracle mislead the jury into erroneously finding that because the *Terix* executives plead guilty, and

1 HPE had a business relationship with Terix, HPE must have similarly engaged in wrongful conduct.

2 The *Appleby* evidence also should have been excluded under the rule against hearsay. Fed.
3 R. Evid. 802. The guilty pleas do not meet the exception for “evidence of a final judgment of
4 conviction” under Rule 803(22) because they are not “final judgment[s] of conviction.” Fed. R.
5 Evid. 803(22); *Lloyd v. Am. Exp. Lines, Inc.*, 580 F.2d 1179, 1190 (3d Cir. 1978); *Hartford Fire*
6 *Ins. Co. v. Clark*, 727 F. Supp. 2d 765, 781 (D. Minn. 2010). Nor did Oracle use the pleas to “prove
7 any fact essential to the judgment.” Fed. R. Evid. 803(22)(C); Tr. 1870:13-20, 1873:8-24, 1902:3-
8 8. The only “fact essential to the judgment[s]” was that each defendant willfully joined an
9 agreement to commit wire fraud—not whether Terix committed *copyright infringement*.

10 Finally, evidence relating to the plea agreements is independently inadmissible under Rule
11 408 as evidence of a “compromise” of a disputed claim. *United States v. Verdoorn*, 528 F.2d 103,
12 107 (8th Cir. 1976); *United States v. Davis*, 596 F.3d 852, 860 & n.6 (D.C. Cir. 2010).

13 The erroneous admission of the guilty pleas prejudiced HPE. There was insufficient
14 evidence Terix downloaded, copied, or delivered a patch “with the intent to install [the] patch on
15 an unsupported server for a particular [joint HPE-Terix] customer.” Dkt. 991 at 19; *supra* Part
16 II.A.7.b. To circumvent that hole in its case, Oracle told the jury to ignore that there was “minimal
17 evidence of infringement” because “four executives, through Terix, pleaded guilty.” Tr. 1870:13-
18 20; *see also* Tr. 275:7-12. The importance of the guilty pleas to Oracle’s case is underscored by
19 the fact that Oracle referenced the guilty pleas at least four times in its opening statement (Tr. 275:7-
20 12, 290:23-291:7, 297:18-24, 298:14-17) and three times in closing argument (Tr. 1870:13-20,
21 1873:8-24, 1902:3-8). It is “more probabl[e] than not” that the guilty pleas “tainted the verdict.”
22 *Crawford*, 944 F.3d 1077; *Jaramillo v. Ford Motor Co.*, 116 F. App’x 76, 79 (9th Cir. 2004).

23 **c. The Terix Stipulated Judgment Was Erroneously Admitted**

24 Oracle has repeatedly characterized the stipulated judgment from *Terix* as having
25 “established liability on all of Oracle’s claims.” Dkt. 305 ¶ 40; Tr. 290:14-22. But as the Ninth
26 Circuit recognized, “Terix stipulated to a judgment for Oracle on the infringement and fraud claims
27 without admitting liability.” *Oracle*, 971 F.3d at 1046. Yet, Oracle was improperly allowed to
28 introduce the judgment and to mischaracterize it before the jury. Tr. Ex. 1491; Tr. 1153:12-19.

1 The stipulated judgment was entered into pursuant to a settlement, and should have been
2 excluded under Rule 408. *McGary v. Inslee*, 2018 WL 3747921, at *3 (W.D. Wash. July 13, 2018).
3 Oracle’s use of the judgment at trial—to argue to the jury that “Terix ... admitted to its [alleged]
4 wrongdoing” (Tr. 290:14-22)—was barred by Rule 408(a)’s prohibition on admission of settlement
5 documents “to prove or disprove the validity ... of a disputed claim.” *McHann v. Firestone Tire*
6 *& Rubber Co.*, 713 F.2d 161, 167 (5th Cir. 1983). And the stipulated judgment was irrelevant to
7 the claims and defenses in this case and allowing Oracle to introduce it mislead the jury and unfairly
8 prejudiced HPE. Fed. R. Evid. 401–403. It contains no findings of fact or admissions that Terix
9 infringed Oracle’s copyrights. *Oracle Am.*, 971 F.3d at 1046. At trial, Oracle used the judgment
10 to mislead the jury into thinking Terix’s underlying infringement has already been “established”
11 for purposes of Oracle’s secondary infringement claims against HPE. Fed. R. Evid. 403. This
12 “more probably than not tainted the verdict” and warrants a new trial. *Crawford*, 944 F.3d 1077;
13 *Jaramillo*, 116 F. App’x at 79.

14 III. CONCLUSION

15 The Court should grant judgment to HPE on all claims or, at minimum, order a new trial on
16 Oracle’s copyright infringement claims.

17
18 Dated: July 29, 2022

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19
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