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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

ORACLE USA, INC.; a Colorado
corporations; ORACLE AMERICA, INC.; a
Delaware corporation; and ORACLE
INTERNATIONAL CORPORATION, a
California corporation,

Plaintiffs,

v.

RIMINI STREET, INC., a Nevada
corporation; and SETH RAVIN, an
individual,

Defendants.

Case No. 2:10-cv-00106-LRH-VCF
ORDER

Before the Court are several pending motions. Rimini Street, Inc. and Seth Ravin (collectively “Rimini”) move this Court for (1) an order enforcing the Court’s orders and judgment separating the instant action¹ from *Rimini Street, Inc. v. Oracle International Corp.*, Case No. 2:14-cv-01699-LRH-DJA (ECF Nos. 1323); (2) an order excluding the declaration and opinions of Oracle’s expert, Barbara Frederiksen-Cross (ECF Nos. 1390, 1392-s);² and (3) a jury

¹ To be consistent with the Court’s orders in both causes of action, the Court uses “*Oracle I*” to refer to the entirety of the above captioned case and “*Rimini II*” to refer to the entirety of case number 2:14-cv-01699-LRH-DJA. Unless otherwise indicated, ECF Numbers articulated throughout this Order refer to the *Oracle I* docket.

² The parties filed portions of their briefing and attached exhibits under seal. The Court will refer to the sealed pleadings with an “-s” designation and, for clarity, will cite to the sealed document for pinpoint citations unless otherwise noted. While the Court would prefer to keep all the sealed information confidential, some of it is necessary to resolve the pending motions. The Court will therefore include the information unredacted in this Order where appropriate. The Court recognizes that the parties have privacy interests in the confidential information, but the public has an even greater interest in the reasoning behind the Court’s Order.

1 trial (ECF No. 1387, 1389-s). Oracle USA, Inc., Oracle America, Inc., and Oracle International
2 Corporation (collectively “Oracle”) moves this Court for an order to show cause why Rimini
3 should not be held in contempt for violating the permanent injunction operable in this case (ECF
4 Nos. 1365, 1368-s) and for Rule 11 sanctions (ECF No. 1348). Oracle also moves this Court for
5 Rule 37(e) sanctions against defendants (ECF Nos. 1359). This issue was referred to Magistrate
6 Judge Cam Ferenbach, who issued a Report and Recommendation to deny Oracle’s motion for
7 sanctions (ECF No. 1431). Accordingly, Oracle objected (ECF No. 1434). Finally, due to the
8 sensitive nature of the information contained within the briefing and exhibits, the parties move to
9 seal numerous documents. ECF Nos. 1325, 1334, 1367, 1384, 1388, 1391, 1394, 1404, 1408, 1413,
10 1417, 1427, 1435, 1439. The parties have properly responded and replied to all pending motions,
11 and each is ripe for review. For the reasons contained within this Order, the Court grants in part
12 and denies in part the parties’ substantive motions and grants the parties’ motions to seal *nunc pro*
13 *tunc*.

14 **I. BACKGROUND**

15 This action has an extensive 11-year history that includes two causes of action. In brief,
16 and relevant to the pending motions, Oracle develops, manufactures, and licenses computer
17 software, particularly Enterprise Software Programs. Oracle also provides after-license software
18 support services to customers who license its copyrighted software. Rimini is a company that
19 provides similar after-license software support services to customers licensing Oracle’s
20 copyrighted software and competes directly to provide those services. Seth Ravin is the owner and
21 CEO of Rimini.

22 **A. Oracle I Litigation**

23 Oracle first sued Rimini in 2010, alleging that Rimini infringed several of Oracle’s
24 copyrights when it, *inter alia*, used work that it completed for one client for the benefit of other
25 clients, which Oracle claimed was a violation of its software copyrights. Following the filing of
26 dispositive motions, the Court granted summary judgment to Oracle on some of its copyright
27 infringement claims. Of importance to these proceedings was the Court’s finding that Rimini
28 violated the “facilities restriction” within PeopleSoft’s standard licensing agreement when it

1 hosted its clients' development environments on its own computer systems, a process called "local
2 hosting." ECF No. 474; *Oracle USA, Inc. v. Rimini Street, Inc.*, 6 F.Supp.3d 1086, 1096–98 (D.
3 Nev. 2014). The Court further held that Rimini was infringing on Oracle's copyrights for Oracle
4 Database when it downloaded many copies of the software off Oracle's network and failed to
5 adhere to the Developer License. ECF No. 476; *Oracle USA, Inc. v. Rimini Street, Inc.*, 6 F.Supp.3d
6 1108, 1115–20 (D. Nev. 2014). Later, after a month-long trial, a jury found in favor of Oracle on
7 other copyright infringement claims related to Oracle's J.D. Edwards and Siebel software.

8 On appeal, the Ninth Circuit affirmed both this Court's grant of summary judgment and all
9 of the jury's verdict on infringement violations under the Copyright Act, only reversing regarding
10 violations of the California Computer Data Access and Fraud Act ("CDAFA") and the Nevada
11 Computer Crimes Law ("NCCL").³ *Oracle USA, Inc. v. Rimini Street, Inc.*, 879 F.3d 948, 962
12 (9th Cir. 2018). Given its rulings, the Ninth Circuit vacated this Court's issuance of a permanent
13 injunction and remanded to the Court to determine whether it would again issue a permanent
14 injunction based solely on Rimini's copyright infringement and without reference to the reversed
15 state law computer claims. *Id.* at 964.⁴

16 On August 14, 2018, this Court granted Oracle's renewed motion for a permanent
17 injunction, which enjoins Rimini from continuing to infringe on Oracle's copyrighted software.
18 ECF No. 1164; *Oracle USA, Inc. v. Rimini Street, Inc.*, 324 F.Supp.3d 1157 (D. Nev. 2018). In
19 relevant part, the injunction provides:

20 ///

21 ///

22 ///

23 _____
24 ³ The Ninth Circuit upheld the jury's \$35.6 million judgment against Rimini for its infringement and the
25 Court's award of approximately \$22.4 million in prejudgment interest against Rimini, while reversing the
26 jury's \$14.4 million award associated with the state law computer access claims. *Oracle USA, Inc. v. Rimini
27 Street, Inc.*, 879 F.3d 948, 953, 962–64 (9th Cir. 2018).

28 ⁴ The Ninth Circuit also upheld this Court's decision to grant Oracle the "full costs" of the litigation, which
included expert witness fees, e-discovery expenses, and jury consultant fees. *Id.* at 965–66. The Supreme
Court granted certiorari on this issue, reversing the Ninth Circuit and holding that the Copyright Act only
allows a district court to authorize awards for litigation expenses expressly listed in the costs statute. *Rimini
Street, Inc. v. Oracle USA, Inc.*, 139 S. Ct. 873 (2019).

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a. Rimini Street shall not reproduce, prepare derivative works from, or distribute PeopleSoft, J.D. Edwards, or Siebel software or documentation unless solely in connection with work for a specific customer that holds a valid, written license agreement for the particular PeopleSoft, J.D. Edwards, or Siebel software and documentation authorizing Rimini Street’s specific conduct;
...

PeopleSoft

- 3. Rimini Street shall not distribute PeopleSoft software or documentation or any derivative works created from or with PeopleSoft software or documentation;
- 4. Rimini Street shall not reproduce, prepare derivative works from, or use a specific licensee’s PeopleSoft software or documentation other than to support the specific licensee’s own internal data processing operations;
- 5. Rimini Street shall not reproduce, prepare derivative works from, or use PeopleSoft software or documentation on, with, or to any computer systems other than a specific licensee’s own computer systems;
- 6. Rimini Street shall not reproduce, prepare derivative works from, or use PeopleSoft software or documentation on one licensee’s computer systems to support, troubleshoot, or perform development or testing for any other licensee, including specifically, that Rimini Street shall not use a specific licensee’s PeopleSoft environment to develop or test software updates or modifications for the benefit of any other licensee[.]

J.D. Edwards

- 7. Rimini Street shall not distribute J.D. Edwards software or documentation or any derivative works created from or within J.D. Edwards software or documentation;
- 8. Rimini Street shall not copy J.D. Edwards software source code to carry out development and testing of software updates;
- ...

10. Rimini Street shall not reproduce, prepare derivative works from, or use J.D. Edwards software or documentation on one licensee’s computer systems to support, troubleshoot, or perform development or testing for any other licensee, including, specifically, that Rimini Street shall not use a specific licensee’s J.D. Edwards environment to develop or test software updates or modifications for the benefit of any other licensee;

...

Oracle Database

15. Rimini Street shall not reproduce, prepare derivative works from, or distribute Oracle Database software.

ECF No. 1166 (modified per the Ninth Circuit’s order).

///

1 In granting the permanent injunction, the Court noted that the balance of the hardships
2 weighed in favor of its issuance because Oracle was only seeking to enjoin acts that had already
3 been determined to be unlawful and that had been affirmed on appeal. ECF No. 1164 at 9. The
4 Ninth Circuit affirmed this permanent injunction, except instructing the Court to strike paragraphs
5 nine and thirteen, and the words “or access” in paragraphs eight and twelve. ECF No. 1236; *Oracle*
6 *USA, Inc. v. Rimini Street, Inc.*, 783 Fed.Appx.707, 710–11 (9th Cir. 2019) (unpublished) (“The
7 injunction enjoins ‘local hosting’ as to PeopleSoft, J.D. Edwards, and Siebel. But only the
8 PeopleSoft license limits the licensee to using the licensed Software ‘at its facilities’
9 (emphasis added), which is the basis for the local hosting requirement. . . . ‘Accessing’ a
10 copyrighted work is not an infringing activity under the Copyright Act.”).⁵

11 On April 4, 2019, the Court granted Oracle’s motion to reopen discovery to determine if
12 Rimini has been complying with the permanent injunction. ECF Nos. 1199; 1215; 1218. The
13 parties engaged in discovery for approximately a year and a half. ECF No. 1354. Following close
14 of discovery, the parties filed the six now pending substantive motions.

15 **B. Rimini II Litigation**

16 In October 2014, Rimini filed a separate complaint against Oracle for declaratory
17 judgment. *Rimini II*, ECF No. 1. This complaint stemmed from the Court’s granting of summary
18 judgment to Oracle in *Oracle I* on the issue of whether Rimini infringed six of Oracle’s PeopleSoft
19 and Database copyrights. At the time of filing the second action, Rimini maintained that by July
20 31, 2014, it had changed its company policies to comply with the Court’s February 13, 2014
21 summary judgment Order, by transitioning to something it dubbed “Process 2.0” support services.
22 *Id.* at 3. Despite Rimini’s assertions that it had ceased infringing on Oracle’s copyrights, Oracle
23 was skeptical and counterclaimed, alleging eight causes of action, including copyright
24 infringement, regarding Rimini’s new Process 2.0. *Rimini II*, ECF Nos. 21, 22-s.

25 After extensive, lengthy, and contentious discovery and motion practice, including the
26 filing of amended complaints by both Oracle and Rimini, the parties filed seven motions for
27 summary judgment, consisting of more than 2,800 pages of briefing and 43,000 pages of

28 ⁵ *Denying cert.*, 140 S.Ct. 850 (Jan. 13, 2020) (Mem).

1 supporting exhibits, declarations, and appendices. On September 14, 2020, the Court issued its 94-
2 page order granting in part and denying in part these motions. *Rimini II*, ECF No. 1253; *Rimini*
3 *Street, Inc. v. Oracle International Corp.*, 473 F.Supp.3d 1158 (D. Nev. 2020). In relevant part,
4 the Court held that Rimini had infringed four of Oracle’s copyrights—PeopleSoft HRMS 8.9 (TX
5 7-065-381); PeopleTools 8.46.17 (TX 7-092-772); PeopleSoft HRMS 8.3 (TX 5-469-032); and
6 PeopleTools 8.48.10 (TX 7-092-819)—while following its new Process 2.0 support services for
7 its clients Campbell Soup and City of Eugene. *Rimini II*, ECF No. 1253 at 65–66. First, the Court
8 held that when Rimini “prototyped” a PeopleSoft update in Campbell Soup’s development
9 environment that the client did not want, and then provided that update to another of Rimini’s
10 clients, Toll Brothers, without separately developing the update in Toll Brothers development
11 environment, Rimini had violated the “internal data processing operations” provision of the
12 PeopleSoft license. Second, the Court held that Rimini created a derivative work when it created
13 an update using Oracle’s PeopleTools Application Designer utility in the City of Eugene’s system.
14 While creation of that derivative work was licensed for City of Eugene, the Court found that
15 because Rimini was using City of Eugene’s development environment to “prototype” the update,
16 and then distributed that update to multiple other clients without separate development, Rimini
17 was violating the “internal data processing operations” provision of the license.

18 The parties filed their 935-page proposed joint pretrial order on December 19, 2020, but
19 due to the parties’ inability to agree on a proposed trial date, trial has not yet been set.

20 **II. THE PARTIES’ MOTIONS TO SEAL**

21 There is a general presumption that court records should be open and accessible to the
22 public. *Hagestad v. Tragesser*, 49 F.3d 1430, 1434 (9th Cir. 1995). With non-dispositive motions,
23 this presumption is automatically overcome by a showing that the material to be filed under seal
24 is being done so pursuant to a valid protective order. *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331
25 F.3d 1122, 1135 (9th Cir. 2003) (citing *Phillips ex rel. Estates of Byrd v. General Motors Corp.*,
26 307 F.3d 1206, 1213 (9th Cir. 2002)). The parties seek to seal the following non-dispositive filings,
27 pursuant to the operative protective order in this case (ECF No. 55), and the protective order in
28 place in *Rimini II* (*Rimini II*, ECF No. 58):

- 1 • Exhibit A and portions of Exhibit B to the Declaration of Eric D. Vandeveld, filed in
2 support of Rimini’s motion to enforce the Court’s orders and judgment separating *Oracle*
3 *I* from *Rimini II* (ECF No. 1325)
- 4 • Portions of Oracle’s opposition to Rimini’s motion to enforce the Court’s orders and
5 judgment separating *Oracle I* from *Rimini II* and accompanying exhibits (ECF No. 1334)
- 6 • Portions of Rimini’s motion to exclude the declaration and opinions of Oracle’s expert,
7 Barbara Frederiksen-Cross, and accompanying exhibits (ECF No. 1391); portions of
8 Oracle’s opposition to the motion and accompanying exhibits (ECF No. 1408); and
9 portions of Rimini’s reply to the motion (ECF No. 1417)
- 10 • Portions of Rimini’s motion for a jury trial and accompanying exhibits (ECF No. 1388)
11 and its reply to the motion (ECF No. 1413)
- 12 • Portions of Oracle’s motion for an order to show cause why Rimini should not be held in
13 contempt and accompanying exhibits (ECF No. 1367); portions of Rimini’s opposition to
14 Oracle’s motion and accompanying exhibits (ECF No. 1384); and portions of Oracle’s
15 reply to its motion and accompanying exhibits (ECF No. 1404).
- 16 • Video presentation titled “BengeDeclarationProcess2.0.pm4” and contained on the DVD
17 and USB drive manually filed (ECF No. 1393) in connection with its opposition to Oracle’s
18 motion for an order to show cause (ECF No. 1394)
- 19 • Oracle’s objections to Magistrate Judge Ferenbach’s Report and Recommendation on
20 Oracle’s motion for Rule 37 sanctions (ECF No. 1435); Rimini’s opposition to Oracle’s
21 objections to the Report and Recommendation (ECF No. 1439)⁶
- 22 • Oracle’s response and objections to Rimini’s Notice of Demonstratives (ECF No. 1427)

23 The Court has reviewed these motions to seal and the underlying documents and finds that
24 the filings should be sealed as requested. The information the parties seek to seal consists of “non-
25 public, technologically and commercially sensitive information,” and proprietary business and
26 technical information, that has been designated “Confidential” or “Highly Confidential
27 Information – Attorneys’ Eyes Only” under the protective orders. The Court recognizes the
28 significant risk of competitive injury and potential prejudice to the parties if their proprietary
information is released to the public. *See Center for Auto Safety v. Chrysler Group, LLC*, 809 F.3d
1092, 1097 (9th Cir. 2016) (quoting *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 598 (1978))
(articulating that compelling reasons may exist to seal a record if it may be used “as sources of
business information that might harm a litigant’s competitive standing.”); *Hologram USA, Inc. v.*
Pulse Evolution Corp., Case No. 2:14-cv-00772-GMN-NJK, 2015 WL 105793, at * 1-2 (D. Nev.

⁶ The Court notes that Oracle’s objection and Rimini’s corresponding opposition contain similar information as that already sealed in relation to Oracle’s motion for Rule 37(e) sanctions. *See* ECF No. 1425.

1 Jan. 7, 2015) (granting the plaintiff’s motion to seal when the underlying filing contained
2 “sensitive, proprietary, and technical information,” disclosure of which was likely to injure the
3 plaintiff’s competitive posture). The Court further notes that the parties have filed redacted
4 versions of the sealed filings (where appropriate) in the public record, narrowly tailoring their
5 requests to seal and limiting any harm to the public. Accordingly, the Court grants the parties’
6 motions to seal *nunc pro tunc*.

7 **III. THE PARTIES’ SUBSTANTIVE MOTIONS**

8 **A. Rimini’s motion to enforce the Court’s orders and judgment separating *Oracle I* 9 from *Rimini II* is denied.**

10 Before the Court is Rimini’s motion to enforce the Court’s orders and judgment separating
11 *Oracle I* from *Rimini II*. ECF No. 1323. Oracle opposed (ECF Nos. 1333, 1335-s) and Rimini
12 replied (ECF No. 1347). For the reasons below, the Court denies Rimini’s motion.

13 In April 2019, the Court reopened discovery in this case so that Oracle could determine
14 whether Rimini was/is complying with the permanent injunction. Following the close of fact
15 discovery, Oracle served Rimini with Barbara Frederiksen-Cross’s Post-Injunction Expert Report
16 on January 31, 2020. ECF No. 1324 ¶ 2. This report provides, in relevant part, that three processes
17 at issue in *Rimini II* violate the permanent injunction: cloud hosting (“Rimini consistently violates
18 the Injunction by reproducing and creating derivative works based upon PeopleSoft software on
19 servers and virtual machines hosted by Windstream.”); cross-use by prototyping updates in one
20 customer’s environment for the use and benefit of other Rimini customers; and Rimini’s use of its
21 AFW Tools software to send the prototyped updates to its clients. ECF Nos. 1324-1; 1326-s at
22 6–8. Believing that these issues are not covered by the injunction, Rimini motions the Court to
23 prohibit Oracle from arguing that Rimini should be held in contempt for violating the injunction
24 as it relates to any Process 2.0 support services. In support, Rimini argues that the Court has
25 previously drawn a stark divide between this case, *Oracle I*, which can only deal with Process 1.0
26 claims and issues, and *Rimini II*, which can only deal with Process 2.0 claims and issues.

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28 ///

1 Rimini points to four of the Court's orders to support its contention:

- 2 • Order regarding case management conference, in relevant part:

3 This case has been pending for nearly five years and, under the Court's
4 supervision, fact and expert discovery has been completed. The parties require
5 leave of Court to engage in any further discovery other than the supplementation
6 required by Rule 26(e). Moreover, Oracle has offered to stipulate not to seek
7 damages in this case for the period on or after the District Court's February 13,
8 2014 order, and the Court will hold Oracle to that offer. Accordingly, the February
9 13, 2014 order is not a basis to reopen discovery, and the Court declines to do so.
10 While the District Court will decide the admissibility of Rimini's expert's opinion
11 on the proposed method of calculating damages, the full discovery on that theory
12 has been conducted. Discovery will remain closed, and the case will remain as it
13 was put in at the close of discovery, not thereafter.

9 ECF No. 515 at 3.

- 10 • Order denying consolidation of *Oracle I* and *Rimini II*, in relevant part:

11 Here, though commonality exists between the two actions, the court,
12 nevertheless, finds consolidation inappropriate because of the distinct litigation
13 postures the cases are currently in. (citation omitted). In the present action,
14 consolidation would lead to an unreasonable delay of trial, as this case is currently
15 set for trial in September and has been pending on the court's docket since 2010.
16 In contrast, the *Rimini* action was just initiated in the fall of 2014 and has yet to
17 begin discovery, let alone pre-discovery motions. Such an unreasonable delay in a
18 trial is sufficient cause to deny consolidation.

16 ECF No. 669 at 5.

- 17 • Order granting of Oracle's motion in limine to exclude evidence and argument related to
18 Rimini's Process 2.0 support service, in relevant part:

19 The court has reviewed Oracle's motion and finds that Rimini's new service
20 support model is not relevant to any claim or issue in this action. In their opposition,
21 defendants argue that Rimini's new support model constitutes a non-infringing
22 alternative to its old process and that evidence of this process is relevant to show
23 that non-infringing alternatives were available to Rimini at the time of the alleged
24 infringement. However, the court finds that defendants' claim that the new support
25 model is non-infringing is speculative. . . . Further, all claims, issues, and evidence
26 related to the new support model are being addressed solely in [*Rimini II*].
27 Therefore, the court finds that evidence of Rimini's new service model is not
28 relevant to this action and the court shall grant Oracle's motion accordingly.

24 ECF No. 723 at 3.

- 25 • Order granting the permanent injunction, in relevant part:

26 Finally, because Oracle seeks to enjoin only acts that have already been determined
27 to be unlawful, and which have been affirmed on appeal, the balance of hardships
28 weighs in favor of issuing a permanent injunction.

...

1 Further, an injunction against future copyright infringement would not harm the
2 public's access to competitive after-license software support services because
3 Rimini Street has repeatedly represented to the court that its current business model
4 is not based on its prior infringing conduct.

4 ECF No. 1164 at 9.

5 The Court has reviewed its prior orders, the permanent injunction, and the lengthy record
6 before it. The Court agrees with Rimini that certain issues related to Process 2.0 are currently being
7 litigated in *Rimini II*: whether cloud hosting or Rimini's AFW Tools software constitute copyright
8 infringement are open questions for the jury to decide in that case. As the Court made clear in its
9 Order granting the permanent injunction, the injunction does not enjoin conduct that has yet to be
10 adjudicated unlawful. *See id.*

11 However, the Court does not agree that the stark divide between the two cases—that
12 *Oracle I* only concerns Process 1.0 while *Rimini II* only concerns Process 2.0—exists. The Court
13 issued the above relevant orders, in part, because this case has such a lengthy history. The Court
14 found it necessary, in its inherent discretion to manage its caseload, to place some stopping point on
15 discovery and the pre-trial process in *Oracle I*. Had it not, this case would not yet have gone to
16 trial and would still be languishing in pre-trial motion practice more than eleven years since its
17 filing. Additionally, issues related to Process 1.0 are being litigated in *Rimini II*: the Court's
18 September 14, 2020 summary judgment order specifically permits Oracle to argue for either lost
19 profits or fair market value license damages for Oracle's so-called "gap customers."⁷ *See Rimini*
20 *II*, ECF No. 1253 at 75-81. As Rimini did not change its support services to Process 2.0 until the
21 end of July 2014, necessarily, these gap customers were serviced following Process 1.0, and the
22 stark line Rimini argues exists between the two cases clearly does not.

23 Moreover, the permanent injunction does not just enjoin Process 1.0. Rather, the injunction
24 enjoins Process 1.0 *conduct* that has been adjudicated (and upheld on appeal) is infringing Oracle's
25 copyrights. The conduct enjoined includes violating Oracle's software licenses by reproducing or
26 preparing derivative works not solely for the support of a client's internal data processing

27
28 ⁷ "Gap customers" is defined as clients Rimini gained from December 5, 2011 (the close of fact discovery
in *Oracle I*) to February 13, 2014 (the end of the *Oracle I* damages period). *Rimini II*, ECF No. 1253 at 75.

1 operations, local hosting, and cross using one client’s Oracle software environment to develop and
2 test updates and modifications for the benefit of another licensee. Process 2.0 could include such
3 conduct, just as Process 1.0 did.

4 If the Court has been unclear in its prior rulings, it will not be so here. In no uncertain
5 terms, there is no separate and delineated line between *Oracle I* and *Rimini II* based solely on
6 Process 1.0 and 2.0. Accordingly, the Court cannot grant Rimini’s motion to enforce an order that
7 does not exist. However, the permanent injunction only enjoins conduct that has been adjudicated
8 unlawful. The Court made this clear in its Order granting the permanent injunction, and on Oracle’s
9 assurance that it would not seek to hold Rimini in contempt for conduct not yet adjudicated in
10 *Rimini II*. See ECF No. 1117 at 18, 25 n.3, 28 (“Because Oracle seeks only to enjoin illegal actions
11 or copying that this Court has found to be outside the scope of any license, and because Rimini
12 claims that it no longer infringes, the balance of hardships tips entirely in favor of Oracle. . . . To
13 be clear, Oracle is not asking now for a ruling on the merits of the issues in dispute in *Rimini II*.
14 Instead, Oracle asks the Court for a permanent injunction restraining Rimini from continuing to
15 commit the infringement that this Court and the jury have already determined to constitute
16 copyright infringement. . . . Oracle’s requested relief is appropriately tailored to prevent future
17 occurrences of the conduct adjudged to constitute copyright infringement in this case.”); ECF No.
18 1174 at 23-24 (articulating that it would be “bad faith” for Oracle to go beyond the clear terms of
19 the injunction). Both parties are bound by their respective representations to this Court. While it
20 should not need to rule on such an obvious fact, the Court expects all parties in this litigation to
21 follow its orders and judgments and comport themselves with the professionalism their positions
22 require. The Court will tolerate no less. Accordingly, if *Rimini II* results in findings that Rimini’s
23 Process 2.0 conduct is still infringing Oracle’s copyrights, Oracle could then move for contempt
24 and argue that Rimini’s later conduct is “the same type or class as the unlawful acts which the
25 court has found to have been committed” in *Oracle I*. See *Orantes-Hernandez v. Thornburgh*, 919
26 F.2d 549, 564 (9th Cir. 1990) (quoting *N.L.R.B. v. Express Publ’g Co.*, 312 U.S. 426, 435 (1941))
27 (articulating that the “district court has ‘broad powers to restrain acts which are of the same
28 type or class as unlawful acts which the court has found to have been committed or whose

1 commission in the future, unless enjoined, may be fairly anticipated from the defendant’s conduct
2 in the past.”).

3 **B. Rimini’s motion to exclude the declaration and opinions of Oracle’s expert, Barbara**
4 **Frederiksen-Cross, is denied.**

5 Before the Court is Rimini’s motion to exclude the declaration and opinions of Oracle’s
6 expert Barbara Frederiksen-Cross because (1) her opinions are unreliable because she did not apply
7 “analytic dissection”; and (2) her opinions are irrelevant because they pertain to unadjudicated
8 conduct. ECF Nos. 1390, 1392-s. Oracle opposed (ECF Nos. 1407, 1409-s), and Rimini replied
9 (ECF Nos. 1416, 1418-s). For the reasons below, the Court denies Rimini’s motion.

10 Federal Rule of Evidence 702 governs the admissibility of expert testimony, providing:

11 A witness who is qualified as an expert by knowledge, skill, experience, training,
12 or education may testify in the form of an opinion or otherwise if: (a) the expert’s
13 scientific, technical, or other specialized knowledge will help the trier of fact to
14 understand the evidence or to determine a fact in issue; (b) the testimony is based
on sufficient facts or data; (c) the testimony is the product of reliable principles and
methods; and (d) the expert has reliably applied the principles and methods to the
facts of the case.

15 FED R. EVID. 702. Expert testimony must rest on a reliable foundation and be relevant to the task
16 at hand. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597 (1993).

17 To determine the reliability of the principles and methods used, the court looks to: (1)
18 whether a theory or technique can be or has been tested; (2) whether it has been subjected to peer
19 review and publication; (3) the known or potential rate of error; (4) whether there are standards
20 controlling the technique’s operation; and (5) whether the theory or technique has general
21 acceptance within the relevant scientific community. *Id.* at 592–94. “These factors are ‘meant to
22 be helpful, not definitive, and the trial court has discretion to decide how to test an expert’s
23 reliability as well as whether the testimony is reliable, based on the particular circumstances of the
24 particular case.’” *Pyramid Techs., Inc. v. Hartford Cas. Ins. Co.*, 752 F.3d 807, 814 (9th Cir. 2014)
25 (quoting *Primiano v. Cook*, 598 F.3d 558, 564 (9th Cir. 2010)). However, the Court notes that
26 “*Daubert* is meant to protect *juries* from being swayed by dubious scientific testimony. When the
27 district court sits as the finder of fact, there is less need for the gatekeeper to keep the gate when
28 the gatekeeper is keeping the gate only for himself.” *United States v. Flores*, 901 F.3d 1150, 1165

1 (9th Cir. 2018) (quoting *David E. Watson, P.C. v. United States*, 668 F.3d 1008, 1015 (8th Cir.
2 2012)) (emphasis in original). Thus, when the Court is the trier of fact, and not just the gatekeeper,
3 it may admit evidence, even if it may later exclude it or disregard it if it fails to meet the Rule 702
4 standard. *Id.* (quoting *In re Salem*, 465 F.3d 767, 777 (7th Cir. 2006)).

5 There can be no dispute that Ms. Frederiksen-Cross is an expert in forensic software
6 analysis—she has 45 plus years of experience as a software developer and consultant and is trained
7 in forensic analysis of computer software in the context of copyright infringement. ECF
8 No. 1368-1-s ¶¶ 3–4. Her expert opinions have been considered in *Rimini II*, among other cases in
9 this Circuit,⁸ and the Court sees no reason, based on her qualifications or experience, that her
10 opinions should be excluded here.⁹ Rather, Rimini argues that her opinions are unreliable because
11 she used “unsound methodologies” and “applied the wrong legal standard.”

12 The Court sits as the trier of fact in this contempt proceeding and as such may admit
13 evidence that it may later disregard if it finds that it does not meet the Rule 702 standard.
14 Additionally, the Court need not find that an expert articulated the correct legal standard in her
15 opinion because it is the Court’s purview to decide the law. *See Plexikon Inc. v. Novartis Pharms.*
16 *Corp.*, 2020 WL 2301213, at * 2 (N.D. Cal. May 8, 2020) (slip copy). The Court has reviewed
17 Frederiksen-Cross’s declaration and expert report and finds that it will likely help the Court decide
18 the issues of fact in these contempt proceedings. The Court is in the unique position to consider
19 her opinions in relation to the law and will not exclude her opinions outright even if it may
20 disregard them when reaching its final decision.

21 Rimini further argues that Frederiksen-Cross’s entire declaration and opinion is irrelevant
22 and therefore should be excluded because she failed to analyze how Rimini’s support Process 1.0,
23 enjoined in *Oracle I*, is “more than colorably different” than its new support Process 2.0, currently

24 ⁸ *See DropzoneMS, LLC v. Cockayne*, Case No. 3:16-cv-02348-YY, 2019 WL 7630788, at *6 (D. Or. Sept.
25 12, 2019) (“Frederiksen-Cross is undoubtedly an expert in forensic software analysis. . . . (detailing 44
26 years of experience designing, developing, and analyzing computer software; listing extensive publication
and presentation history; and analyzing computer software as an expert witness in arbitrations and federal
district courts across the country).”).

27 ⁹ Rimini argues for the first time in its reply that Frederiksen-Cross is unqualified. This argument was never
28 made in its original motion and Rimini only points to her not having a bachelor’s degree in support. The
Court sees no reason to address this argument further.

1 being adjudicated in *Rimini II*. This standard is based on the Federal Circuit’s opinion in the patent
2 case, *TiVo Inc. v. EchoStar Corp.*, 646 F.3d 869 (Fed. Cir. 2011). However, the Court agrees with
3 its sister court in the Central District of California and finds that the “more than colorably different”
4 standard articulated in *TiVo* is only used to determine “whether an injunction against *patent*
5 infringement has been violated.” *TiVo*, 646 F.3d at 881 (emphasis added); *Disney Enters., Inc. v.*
6 *VidAngel Inc.*, Case No. CV 16-04109-AB(PLAx), 2017 WL 6820015, at *2 (C.D. Cal. Sept. 13,
7 2017).¹⁰ Accordingly, the Court does not need to determine whether Rimini’s new support Process
8 2.0 is more than colorably different than its prior Process 1.0 to proceed with these contempt
9 proceedings. And whether Frederiksen-Cross conducted such an analysis is not relevant to the
10 Court’s ruling. The Court is well equipped to determine what in Frederiksen-Cross’s declaration
11 and opinion is relevant to its rulings, and as the fact finder, the Court may later exclude the opinion
12 or disregard it if it fails to meet federal evidentiary standards. Rimini’s motion is therefore denied.

13 **C. Oracle’s motion for an order to show cause why Rimini should not be held in**
14 **contempt is granted in part and denied in part.**

15 Before the Court is Oracle’s motion for an order to show cause why Rimini should not be
16 held in contempt for violating the Court’s permanent injunction. ECF Nos. 1365, 1368-s. Rimini
17 opposed (ECF Nos. 1382, 1385-s), and Oracle replied (ECF Nos. 1401, 1405-s). For the reasons
18 below, the Court grants in part and denies in part Oracle’s motion.

19 1. Legal Standard

20 Pursuant to Title 18, United States Code, Section 401, a court may hold any party in civil
21 contempt who fails to comply with or violates a court order. 18 U.S.C. § 401(3). A party “fails to
22 act as ordered by the court when [it] fails to take ‘all the reasonable steps within [its] power to

23 _____
24 ¹⁰ The *VidAngel* Court found:

25 [T]he act sought to be restrained in the instant case was not VidAngel’s use of a technology
26 that infringed upon a patent. The Order sought to restrain VidAngel from using Plaintiffs’
27 copyrighted works without a license or otherwise engaging in activities that violated
28 Plaintiffs’ exclusive rights under the Copyright Act and the Digital Millennium Copyright
Act. Thus, the injunction is proper in scope as it only restrains “acts which are the same
type or class as [the likely] unlawful acts which the court has found to have been committed
or whose commission in the future, unless enjoined, may be fairly anticipated from the
defendant’s conduct in the past.” *Orantes-Hernandez*, 919 F.2d at 564.

VidAngel Inc., 2017 WL 6820015, at *2.

1 [e]nsure compliance with the court’s order.” *In re Crystal Palace Gambling Hall, Inc.*, 817 F.2d
2 1361, 1365 (9th Cir. 1987) (quoting *Shuffler v. Heritage Bank*, 720 F.2d 1141, 1146–47 (9th Cir.
3 1983)). “The party alleging civil contempt must demonstrate that the alleged contemnor violated
4 the court’s order by ‘clear and convincing evidence,’ not merely a preponderance of the evidence.”
5 *In re Dual-Deck Video Cassette Recorder Antitrust Litigation*, 10 F.3d 693, 695 (9th Cir. 1993)
6 (quoting *Vertex Distrib., Inc. v. Falcon Foam Plastics, Inc.*, 689 F.2d 885, 889 (9th Cir. 1982)). In
7 doing so, the moving party must cite to specific provisions of the injunction the enjoined party has
8 allegedly violated and allegations of noncompliance. *Reynolds v. Roberts*, 207 F.3d 1288, 1298
9 (11th Cir. 2000). If the moving party has stated a case of noncompliance, the Court shall issue an
10 order to show cause why the enjoined party should not be held in contempt for violating its order,
11 and schedule a hearing on the issue. *Id.*

12 2. Discussion

13 Oracle asserts that Rimini is violating the permanent injunction as to three of its software
14 systems: PeopleSoft, J.D. Edwards, and Oracle Database. As the provisions of the permanent
15 injunction vary based on software, the Court will address each in turn.

16 *i. PeopleSoft*

17 First, Oracle alleges that Rimini is violating paragraphs 4 and 6 of the permanent injunction
18 by continuing to impermissibly and unlawfully cross-use its PeopleSoft software through (1)
19 Rimini’s prototype/retrofit support service model; (2) Rimini’s creation and use of “Dev
20 Instructions”; (3) Rimini’s use of its AFW Tools software (TransferFiles); and (4) by continuing
21 to test updates in one client’s environment that are then reused for other clients. As a preliminary
22 matter, neither Rimini’s Dev Instructions nor its AFW Tools software were before the Court or
23 held to be unlawful in *Oracle I*. Moreover, whether these support services constitute copyright
24 infringement is squarely before the Court in *Rimini II* and the Court has not yet ruled on the
25 lawfulness of these support processes. It is inappropriate to make a determination as to the validity
26 of these services for the first time in contempt proceedings, and therefore, the Court denies
27 Oracle’s motion as it relates to the Dev Instructions and AFW Tools software outright.

28 ///

1 Whether Rimini’s prototype/retrofit support service model constitutes copyright
2 infringement is also squarely before the Court in *Rimini II*—specifically, whether this support
3 process uses one client’s environment under color of license for another client. Oracle alleges that
4 two updates constitute unlawful cross-use under this support model: HCM200443 and
5 HCM200440. Oracle argues that Rimini prototyped the development of HCM200443 in 10 client
6 environments, which took approximately 9 days of developer time (averaging 1 day per client),
7 and then retrofitted that update in 72 client environments between February 27 and April 1, 2019
8 (averaging .44 days per client). Update HCM200440 was prototyped in 11 client environments
9 over approximately a month and half (averaging 4.2 days per client) and then retrofitted in 74
10 client environments between June 4 and 17, 2019 (averaging .2 days per client). Because
11 retrofitting the update was more streamlined and took a fraction of the time as prototyping the
12 update, including not requiring QA analysis, Oracle argues that Rimini’s conduct constitutes
13 unlawful cross-use.

14 The Court has made no ruling at this time that the prototype/retrofit support process always
15 constitutes unlawful cross-use. And the Court will not make a blanket finding that whenever an
16 update is built quicker for one client than another, that means that Rimini uses one client’s
17 environment under color of license for another client, and violates the permanent injunction. It is
18 common sense that Rimini’s engineers would get better and faster at conducting a task with more
19 experience. Indeed, both parties in this case likely picked their respective counsel for the exact
20 reason that each had experience in copyright litigation. It would be inapposite to find that simply
21 because Rimini’s developers are able to develop updates faster, with less testing, after they have
22 built the update for another client, Rimini is violating the permanent injunction against cross-use.
23 *See In re Dual-Deck Video Cassette Recorder Antitrust Litigation*, 10 F.3d at 695 (“Indeed,
24 lawyers who learn from and use their experience obtained in discovery under such an order would
25 have to change fields, and never do antitrust work again, lest they ‘use’ what they learned in a
26 prior case ‘in any way whatsoever’ in any ‘other action.’”). Such a finding is outside the scope of
27 the permanent injunction and outside the scope of any factual or legal findings from *Oracle I* which
28 form the basis and reasoning for the permanent injunction.

1 However, in *Rimini II*, the Court did find that this prototype/retrofit support service
2 constituted copyright infringement as it related to Rimini's work with two specific clients:
3 Campbell Soup and City of Eugene. *Rimini II*, ECF No. 1253 at 39-55; *Rimini Street, Inc. v. Oracle*
4 *International Corp.*, 473 F.Supp.3d 1158 (D. Nev. 2020). First, when Rimini created and tested its
5 PPACA Phase 1 update HCM104286 in Campbell Soup's environment, even knowing that
6 Campbell Soup did not want the update, such copying was not for Campbell Soup's sole "internal
7 data processing operations." *Id.* at 43–44. And, when this update was then sent to Rimini's client
8 Toll Brothers (without any *separate development or testing* in a Toll Brothers environment), the
9 Court held that Rimini used Campbell Soup's development environment, under color of Campbell
10 Soup's license, to develop the update for the benefit of Toll Brothers in violation of the "internal
11 data processing operations" provision of the license. *Id.* at 45–46. It is clear to the Court that such
12 conduct violates the permanent injunction; specifically, paragraph 4 ("reproduce, prepare
13 derivative works from, or use a specific licensee's PeopleSoft software or documentation other
14 than to support the specific licensee's *own internal data processing operations.*"); and paragraph
15 6 ("use [of] a specific licensee's PeopleSoft environment to develop or test software updates or
16 modifications *for the benefit* of any other licensee."). ECF No. 1166 ¶¶ 4, 6 (emphasis added).
17 Because the Court finds, by clear and convincing evidence, that Rimini is violating the permanent
18 injunction, the Court issues an order to show cause why Rimini should not be held in contempt.
19 Consequently, at the hereafter hearing, the parties will not be permitted to re-argue the at-issue
20 conduct; rather, the parties are only permitted to argue whether Rimini should be held in contempt
21 for such a violation, and what sanctions are appropriate, taking into account that damages will be
22 assessed by the jury in *Rimini II* for this conduct.

23 The next was in relation to Rimini's development and testing of its PPACA Phase 3 update
24 HCM104288 in City of Eugene's development environment. The Court first held that the update
25 incorporated into the development environment was a derivative work, the creation and testing of
26 which was licensed. *Rimini II*, ECF No. 1253 at 51–52; *Rimini Street, Inc. v. Oracle International*
27 *Corp.*, 473 F.Supp.3d 1158 (D. Nev. 2020). Next, the Court looked at the individual update and
28 held that it too was a derivative work: it substantially incorporated protected material from the

1 preexisting work because Rimini used the PeopleTools Application Designer utility (which is part
2 of Oracle’s PeopleTools software) to create the update, and the update could not be used with any
3 software programs other than PeopleSoft. *Id.* at 52–53. This update was also expressly licensed
4 for use by City of Eugene. *Id.* at 53. However, what was not expressly licensed was when Rimini
5 “prototyped” the update in City of Eugene’s environment, and then sent it to three other clients
6 without any testing or development in their respective environments—such development could not
7 be solely for City of Eugene’s “internal data processing operations.” *Id.* Of particular note to the
8 Court’s analysis was that City of Eugene’s license also included provision 4.1, which prohibits the
9 marketing or distribution of any updates developed under City of Eugene’s license. *Id.* at 54.
10 Accordingly, the Court held that in that instance, Rimini’s prototyping of the update and later
11 distribution of the update to other clients, also violated section 4.1 of the license (a provision not
12 included in all PeopleSoft licenses). *Id.* Again, it is clear to the Court that this conduct also violates
13 the permanent injunction; specifically, paragraph 4 (“reproduce, prepare derivative works from, or
14 use a specific licensee’s PeopleSoft software or documentation other than to support the specific
15 licensee’s *own internal data processing operations.*”); and paragraph 6 (“use [of] a specific
16 licensee’s PeopleSoft environment to develop or test software updates or modifications *for the*
17 *benefit* of any other licensee.”). ECF No. 1166 ¶¶ 4, 6 (emphasis added). Because the Court finds,
18 by clear and convincing evidence, that Rimini is violating the permanent injunction, the Court
19 issues an order to show cause why Rimini should not be held in contempt. Consequently, at the
20 hereafter hearing, the parties will not be permitted to re-argue the at-issue conduct; rather, the
21 parties are only permitted to argue whether Rimini should be held in contempt for such a violation,
22 and what sanctions are appropriate, taking into account that damages will be assessed by the jury
23 in *Rimini II* for this conduct.

24 Finally, Oracle argues that Rimini is violating paragraph 6 of the permanent injunction
25 when it creates a single “test plan,” that it uses with multiple clients, and consists of Rimini running
26 an update in a client’s PeopleSoft environment, taking screenshots of that customer’s environment
27 to show what a successful update looks like, and saving the screenshots to Rimini’s SpiraTeam
28 system. ECF No. 1368-1-s ¶ 49. Rimini’s expert, Owen Astrachan provides:

1 A “test case” is “a Rimini-created document (typically in the Spira database)
2 that is essentially a plan for testing a client’s PeopleSoft (or JD Edwards) software
3 to make sure than [sic] an update was implemented correctly. For example, if a tax
4 regulation change required a reporting form to have an additional box containing
5 an employee’s health insurance election, the update would change the code so that
6 when the report is generated, the new box is included. A test plan would likely
7 include having a tester generate the report and then checking to see if the report has
8 the box. The plan could also include generating other reports to make sure they do
9 *not* have the extra box—*i.e.*, to make sure that the update did not cause problems
10 with other functions. There could be many tests that a tester should perform to
11 ensure that the required update functionality exists and that no other functionality
12 “broke” in the process, and the “test case” sets forth those tests so that a Quality
13 Assurance employee can run through them.

14 ECF No. 1386-1-s ¶ 264 (emphasis in original). If a subsequent Rimini client needs the same or a
15 similar update, Rimini may use the same test plan, *i.e.*, the same list of tests to run to ensure the
16 functionality of the update, for the subsequent client. *Id.* ¶ 265. The parties agree that these test
17 cases may contain screenshots of the Oracle software successfully running the update, but neither
18 believes these screenshots constitute infringing conduct. *Id.* ¶ 266; ECF No. 1368-1-s ¶ 52.

19 Oracle argues that because Rimini may use the test case for multiple customers, Rimini is
20 violating paragraph 6 of the permanent injunction because the testing “benefits” multiple Rimini
21 clients. The Court disagrees. The Court finds that the test case is not “testing” as provided for in
22 paragraph 6 of the permanent injunction; rather, the test case is simply the plan for how Rimini
23 will test a specific update. To be unlawful cross-use under this permanent injunction and the law
24 of *Oracle I*, Rimini must use one client’s environment under color of license for *another* client.
25 Nothing in the record would support a finding that Rimini is prohibited from using the same tests
26 to ensure functionality of an update. Like above, it is common sense that Rimini’s engineers would
27 use the same tests to ensure functionality of an update. Therefore, so long as Rimini is testing the
28 update in its client’s individual environments, the testing itself (and necessarily, the copies made
29 in the process of testing the update) is for the benefit of each individual client.

30 However, that was not always the case—in at least two instances, Rimini used City of
31 Eugene’s Windstream environment (“COEX” or “COE”) for the general purpose of testing updates
32 for other customers. Frederiksen-Cross provides that a W-2 update was tested in COEX for Rimini
33 client JHN and that it was not tested in JHN’s environment. ECF No. 1368-1-s ¶ 70. Frederiksen-
34 Cross further provides that Rimini update “rsi940.sqr” was tested in COE and then sent to all

1 clients in scope. *Id.* ¶ 71. This appears to be a classic example of unlawful cross-use and Rimini
2 using one client’s environment under color of license for another client. Further, while Rimini does
3 not dispute this cross-use testing in its opposition, its expert Owen Astrachan disagrees with both
4 points in his Rebuttal Expert Report, dated March 13, 2020. ECF No. 1386-1-s ¶¶ 278-279. Given
5 the conflicting accounts from the parties’ experts, the Court finds that an evidentiary hearing on
6 this issue is required. The Court, as fact finder, must hear from both parties competing experts to
7 determine if Rimini’s testing in this context constitutes unlawful cross-use in violation of the
8 permanent injunction. Accordingly, the Court issues an order to show cause as to this conduct.

9 Second, Oracle argues that Rimini is violating paragraph 5 of the permanent injunction
10 through its use of Windstream cloud-hosting to facilitate its support services. This is an issue
11 squarely before the Court in *Rimini II* and the Court has made no ruling on the lawfulness of such
12 conduct. Indeed, in the Court’s September 2020 order on summary judgment in *Rimini II*, the Court
13 specifically held that it is a disputed question of material fact as to whether the license agreements
14 expressly allow for cloud hosting, and if they do, whether the client exercised control such that the
15 cloud constituted the client’s “facility.” *Rimini II*, ECF No. 1253 at 90–91; *Rimini Street, Inc. v.*
16 *Oracle International Corp.*, 473 F.Supp.3d 1158 (D. Nev. 2020). Paragraph 5 of the permanent
17 injunction provides that Rimini will not provide support services other than on the “licensee’s own
18 computer systems.” ECF No. 1166 ¶ 5. This provision was included specifically because Rimini
19 was unlawfully hosting its client’s software on its own servers and the client had no control over
20 what Rimini was doing. It was this conduct that was held unlawful and in violation of the facilities
21 provision of the client’s license. It has never been adjudicated whether cloud hosting is permitted
22 under either a specific client’s license or under the general facilities provision of the PeopleSoft
23 license. Nor has it been adjudicated whether a client’s own computer systems would include its
24 cloud-based servers. Accordingly, Oracle’s motion for an order to show cause as it relates to
25 Windstream, and/or cloud hosting in general, will not be considered in these contempt
26 proceedings.

27 Oracle also argues that Rimini is violating paragraph 5 of the permanent injunction because
28 it maintains Oracle software and support materials on its systems: (1) one third of the lines of code

1 in Rimini's "RSPCMPAY.cbl" file was copied from Oracle's PeopleSoft PSPTARRY.cbl source
2 code file; (2) Rimini saved this "RSPCMPAY.cbl" file to its system and distributed it 14 times to
3 7 customers; (3) Oracle's "psptaxdt.dms" source code (including the Oracle copyright notice)
4 modified only slightly with Rimini added code; (4) internal emails containing PeopleSoft
5 copyrighted documentation; and (5) two PeopleSoft Payroll update documents bearing copyright
6 notices.

7 As to the RSPCMPAY.cbl file, Rimini argues that Oracle's expert, Barbara Frederiksen-
8 Cross, did not properly conduct an analytical dissection, as required by the Ninth Circuit, *citing*
9 *Rentmeester v. Nike, Inc.*, 883 F.3d 1111, 1118 (9th Cir. 2018); *Apple Comput., Inc. v. Microsoft*
10 *Corp.*, 35 F.3d 1435, 1443 (9th Cir. 1994), and in a separate motion, requests the Court exclude
11 her declaration and opinions for this reason. As addressed above, the Court declines to exclude her
12 declaration and opinions and considers this issue on its merits.

13 It is well settled that not all copying violates the Copyright Act; but rather, a plaintiff must
14 prove "copying of protectable expression beyond the scope of the license." *MAI Systems Corp. v.*
15 *Peak Computer, Inc.*, 991 F.2d 511, 517 (9th Cir. 1993) (quoting *S.O.S., Inc. v. Payday, Inc.*, 886
16 F.2d 1081, 1085 (9th Cir. 1989)). "Copying may be shown by circumstantial evidence of access
17 and substantial similarity of both the general ideas and expression between the copyrighted work
18 and the allegedly infringing work." *Apple Comput.*, 35 F.3d at 1442. Analytic dissection refers to
19 the process of determining whether the allegedly similar features are "elements of a work that are
20 protectable and used without the author's permission." *Id.* at 1442-43.

21 In pertinent part, the permanent injunction prohibits Rimini from distributing PeopleSoft
22 software or documentation, and from reproducing and preparing derivative works outside the
23 scope of the license. Frederiksen-Cross analyzed the discovery and provided that:

24 Rimini also copied substantial portions of the PeopleSoft file PSPTARRY.cbl into
25 its 'RSPCMPAY.cbl' file, which was saved to Rimini's internal system and
26 distributed at least 14 times to 7 different clients between December 19, 2018 and
27 July 2, 2019. Comparing these two files shows that 32.74% of lines from the Rimini
28 file match lines from the GA version of the Oracle file. . . . I provided a "complete
side-by-side comparison of these files, with Rimini's RSPCMPAY.cbl on the [right] and Oracle's PSPTARRY.cbl on the [left] and highlighting content in the
Rimini file matching the Oracle file, which shows substantial similarities between

1 these files and protected expression copied from the Oracle file to the RS-prefixed
2 file.

3 ECF No. 1368-1-s ¶ 77 (cleaned up). She goes on to provide that she reviewed the matching lines
4 of code and determined that there was no programing rational or standard that would require using
5 the same code and they are “idiosyncrasies” from the Oracle code. *Id.* ¶ 78.

6 Rimini does not dispute that the RSPCMPAY.cbl file is on its computer systems, but just
7 disputes that it copied substantial portions from Oracle’s PSPTARRY.cbl file. Rimini’s expert,
8 Owen Astrachan, opines:

9 I note that the two files look very different and are designed to accomplish different
10 tasks. The Oracle file is almost four times as long as the Rimini file. Moreover, the
11 Oracle file is designed to “load the tax array with the YTD balances” while the
12 Rimini file performs different functions[.] . . . In other words, the Rimini file is
13 designed to augment the functionality of an Oracle file by loading additional, more
14 detailed data. Given the differences between these two files, in my opinion the
15 overall concept and feel of the Rimini file is different from the Oracle file.

16 . . .
17 In my opinion, the similar code in both columns is dictated by external
18 constraints and therefore is not indicative of copying. The procedures in both blocks
19 of code are designed to pull data from a database using the PTPSQLRT API. To
20 use the API, the code must refer to its name—“PTPSQLRT”—which is why
21 “PTPSQLRT” appears multiple times in both columns. Moreover, both programs
22 must use standard programing language constructs (e.g., CALL, USING, FETCH,
23 SET) to instruct the program how to use the API to find the data (e.g., “SET
24 FETCH-YTD-END of S-YTD TO TRUE”).

25 ECF No. 1386-1-s ¶¶ 197–199.

26 Given these conflicting accounts of the two files, the Court finds that an evidentiary hearing
27 on this issue is required. The Court, as fact finder, must hear from both parties competing experts
28 to determine if Rimini’s file contains protected Oracle expression that Rimini is prohibited from
having on its systems. Accordingly, the Court issues an order to show cause as to this file.

 As to the “psptaxdt.dms” source code file and emails containing PeopleSoft copyrighted
documentation and PeopleSoft Payroll update documents, Rimini does not dispute that such
content is on its systems. Rather, it contends that the content was sent to it by a client, contrary to
express instructions. However, “[t]he absence of willfulness does not relieve from civil contempt.”
McComb v. Jacksonville Paper Co., 336 U.S. 187, 191 (1949). While Rimini may not have
willfully intended to violate the permanent injunction by having such content on its computer

1 systems, it is uncontradicted that such content is on its systems and that it is a violation of the
2 permanent injunction. Rimini's intent may affect what sanction the Court finds is appropriate for
3 the violation, but the Court still finds it necessary to issue an order to show cause why Rimini
4 should not be held in contempt for these violations of paragraph 5 of the permanent injunction.
5 *See TiVo*, 646 F.3d at 880 (“Although a defendant’s diligence and good faith efforts are not a
6 defense to contempt, these factors may be considered in assessing penalties, a matter as to which
7 the district court has considerable discretion.”). Because the Court finds, by clear and convincing
8 evidence, that Rimini is violating the permanent injunction, the Court issues an order to show cause
9 why Rimini should not be held in contempt. Consequently, at the hereafter hearing, the parties will
10 not be permitted to re-argue the at-issue conduct; rather, the parties are only permitted to argue
11 whether Rimini should be held in contempt for such a violation, and what sanctions are
12 appropriate.

13 Third, Oracle argues that Rimini's updates and modifications are derivative works, the
14 creation of which violates paragraphs 4, 5 and 6 of the permanent injunction. Oracle argues that
15 every single update and modification of Oracle's software constitutes a derivative work and is
16 therefore a violation of the permanent injunction. The Court disagrees. Preliminarily, whether a
17 particular stand-alone update or modification is a derivative work is a fact specific inquiry, and the
18 Court will not make a blanket ruling that every modification and every update that Rimini has
19 created for PeopleSoft is a derivative work. The Court and the parties agree that when that update
20 or modification is applied to the PeopleSoft environment, the entire environment is a derivative
21 work—Rimini conceded this point and the Court specifically held so in its September 2020
22 summary judgment order in *Rimini II*. *Rimini II*, ECF No. 1253 at 51–52; *Rimini Street, Inc. v.*
23 *Oracle International Corp.*, 473 F.Supp.3d 1158 (D. Nev. 2020). But the Court further held that
24 such creation of derivative works may be expressly authorized by a client's license. *Id.*

25 The Court has made clear that the permanent injunction enjoins *unlawful*, infringing
26 conduct. And Rimini is not enjoined from creating derivative works—paragraph 4 of the
27 permanent injunction specifically provides that derivative works may be made so long as they are
28 for the licensee's own internal data processing operations. What is unlawful, and thus prohibited

1 by this permanent injunction, is the creation of derivative works that are outside the scope of, or
2 in violation of the client’s license.

3 Here, Oracle points to only one example of a derivative work that violates the permanent
4 injunction: Rimini’s 1099 update that was emailed to Easter Seals in 2018. It is not clear from the
5 record before the Court where this update came from, where it was developed, and for what client.
6 If the update was developed for Easter Seals, in Easter Seals environment, and Easter Seals is
7 permitted under its license to create derivative works and have a third-party servicer create those
8 derivative works for it, then the Court could not find Rimini’s conduct was a violation of the
9 permanent injunction. However, because the Court lacks necessary information to make this
10 finding, an evidentiary hearing is needed to determine if the creation and distribution of the update
11 violated the permanent injunction. Accordingly, the Court issues an order to show cause on this
12 issue.

13 *ii. J.D. Edwards*

14 First, Oracle argues that Rimini is violating paragraph 8 of the permanent injunction by
15 copying J.D. Edwards source code when it develops and tests updates. Oracle articulates that J.D.
16 Edwards “source code” includes software files “.h” and “.c” files (written in the C programming
17 language), Business Functions, Interactive Applications, Batch Applications, and Event Rules
18 code. ECF No. 1368-s at 29. There are two types of J.D. Edwards software at-issue here—J.D.
19 Edwards EnterpriseOne and J.D. Edwards World. As to J.D. Edwards EnterpriseOne, Rimini
20 allegedly copies source code (1) whenever it uses Oracle’s Object Management Workbench, i.e.,
21 whenever Rimini opens the program (“checked out”), closes the program (“checked in”), or the
22 contents of the program are displayed; (2) when it “promotes” source code files between
23 environments (i.e., from a development to a testing environment); and (3) when Rimini copied
24 source code file, prvtsidx.plb onto its own systems where it was then modified. As to J.D. Edwards
25 World, Rimini is allegedly copying source code when (1) Rimini developers display the source
26 code in source editors; and (2) when they promote source code from one environment to another.
27 Finally, Oracle alleges that Rimini violates the injunction as to both J.D. Edwards programs when
28 it creates technical specification documents (like the “Dev Instructions” discussed above): the

1 technical specification document for Rimini's JDE105328 update copied source code from Oracle
2 file R89078652 and from J.D. Edwards World A9.3 source code file P06767.

3 The parties dispute the meaning of the term "source code" within the injunction: Oracle
4 maintains that "source code" refers to both "open code" (code that the licensee may modify to
5 create tax, legal, and regulatory updates to its software) and "closed code" (code that the licensee
6 does not have access to and would need to reverse engineered or "decompile"), while Rimini
7 maintains that the term only refers to closed code. Rimini further argues that reading the injunction
8 to mean both open and closed code would make paragraph 10 of the injunction superfluous and
9 would operate as a total ban on Rimini support services for J.D. Edwards software because every
10 time Rimini accesses the software, copies of source code are made.

11 The Court finds that the parties dispute over the definition of source code is material to the
12 Court's ruling, and therefore, an evidentiary hearing on the issue is necessary before the Court can
13 determine whether Rimini's conduct violates the injunction. As to the technical specification
14 documents, this was not previously before the Court or held to be unlawful in *Oracle I*, and like
15 with the Dev Instructions, the Court has not yet ruled on the lawfulness of this support process.
16 However, Rimini fails to address this content in its opposition, though its expert, Owen Astrachan,
17 addressed it in his Supplemental Expert Report, dated June 26, 2020, opining that the at-issue code
18 was not copied. ECF No. 1368-2-s ¶ 22. Given the conflicting expert opinions, the Court finds that
19 evidentiary hearing is needed to determine if this technical instruction did in fact copy Oracle
20 source code in violation of the permanent injunction.

21 Second, Oracle alleges that Rimini is violating paragraph 10 of the permanent injunction
22 by unlawfully cross using Oracle's software and creating derivative works. Oracle argues that
23 Rimini is committing unlawful cross-use by copying source code into technical specification
24 documents and copying testing procedures. Like above with PeopleSoft, the Court has made no
25 ruling at this time that the prototype/retrofit support process always constitutes unlawful cross-use.
26 And the Court will not make a blanket finding that whenever an update is built quicker for one
27 client than another, that means that Rimini uses one client's environment under color of license
28

1 for another client and violates the permanent injunction. It is common sense that Rimini's
2 engineers would get better and faster at conducting a task with more experience.

3 As to creating derivative works, the Court has made clear that the permanent injunction
4 enjoins *unlawful*, infringing conduct. And Rimini is not enjoined from creating derivative works—
5 paragraph 10 of the permanent injunction specifically provides that derivative works may be made
6 so long as it is not for the benefit of another licensee. What is unlawful, and thus prohibited by this
7 permanent injunction, is the creation of derivative works that are outside the scope of, or in
8 violation of the client's license. Accordingly, Oracle has failed to show by clear and convincing
9 evidence that Rimini is violating the paragraph 10 of the permanent injunction.

10 Finally, Oracle argues that Rimini is violating paragraphs 3 and 17 of the permanent
11 injunction, pertaining to both PeopleSoft and J.D. Edwards, by distributing updates to its clients.
12 As discussed above, the Court has not ruled on whether Rimini's distribution software programs,
13 particularly TransferFiles, are unlawful or violate the Copyright Act. But the Court need not rule
14 on that specific issue to deny Oracle's motion—to read the injunction to prohibit all distribution
15 of Rimini updates to its client's would be a complete ban on Rimini support services. That was
16 neither the intention nor the purpose of the permanent injunction and such a reading would be
17 outside its scope. Further, such a reading would render other provisions of the injunction
18 superfluous—to say that Rimini is permitted to create derivative works within the scope of the
19 license but that it can't distribute the derivative work to its client would be an absurd result.

20 As to the specific examples Oracle provides, the Court finds that an order to show cause
21 may issue in part. As to one client, Petco, Rimini was unable to conduct QA testing due to an issue
22 with the client's environment; Rimini chose to not test the update because it had previously been
23 tested and worked for other clients before distribution. ECF No. 1368-1-s ¶ 114. Rimini is not
24 required to test updates and if Rimini chooses to send a client an untested update, developed in
25 that client's environment, the Court cannot find that conduct violates the injunction. However, as
26 to update HCM200049, delivered to Rimini's client Matheson Trucking, without any indication it
27 was developed or tested in that client's environments, is a clear violation of the permanent
28 injunction. *See id.* ¶ 115. Because the Court finds, by clear and convincing evidence, that Rimini

1 is violating the permanent injunction, the Court issues an order to show cause why Rimini should
2 not be held in contempt. Consequently, at the hereafter hearing, the parties will not be permitted
3 to re-argue the at-issue conduct; rather, the parties are only permitted to argue whether Rimini
4 should be held in contempt for such a violation, and what sanctions are appropriate. As to update
5 HCM2000105, delivered to clients Rockefeller Group International and Home Shopping Network,
6 is not clear whether the update was sent directly to these clients or developed and tested in their
7 own environments. Therefore, the Court finds an evidentiary hearing is required to determine
8 whether Rimini's conduct violates the permanent injunction.

9 *iii. Oracle Database*

10 Finally, Oracle argues that Rimini is violating paragraph 15 of the permanent injunction
11 when it develops and tests updates in J.D. Edwards and PeopleSoft environments that contain
12 Oracle Database because that results in copying Oracle Database. ECF No. 1368-1-s ¶ 120.
13 Oracle's expert, Barbara Frederiksen-Cross, estimated that this occurred in 305 of Rimini's
14 customers' environments. *Id.* ¶ 121. In opposition, Rimini argues that paragraph 15 does not
15 prohibit it from copying Oracle Database if it is doing so pursuant to a valid Oracle License and
16 Service Agreement or a Developer License; to do otherwise would be a ban on all copying of
17 Oracle Database.¹¹

18 On summary judgment, the Court held that Rimini was infringing on Oracle's copyrights
19 for Oracle Database. *See* ECF No. 476. Specifically, the Court held that the Developer License,
20 under which authorization Rimini downloaded Oracle Database, did not permit Rimini to make
21 unlimited copies of the software on Rimini's systems, use that software to create updates and bug
22 fixes for Oracle's Enterprise Software programs, or use those copies to create commercial support
23 services for its clients. *Id.* at 9–12. The Court also found that, although many of Rimini's clients
24 are authorized to use Oracle Database under their Oracle License and Service Agreement
25 (“OLSA”), because Rimini downloaded Oracle Database directly from Oracle, rather than receive
26 access through its clients, Rimini's use of the software was restricted to the provisions of the
27

28 ¹¹ The Court notes that this is the same argument Rimini made when it initially objected to the permanent
injunction. *See* ECF No. 1130 at 28.

1 Developer License. *Id.* at 12–13. The Ninth Circuit upheld the Court’s summary judgment ruling.
2 *Oracle USA, Inc. v. Rimini Street, Inc.*, 879 F.3d 948, 960 (9th Cir. 2018).

3 The Court entered the at-issue permanent injunction, with the following provision
4 pertaining to Oracle Database:

5 15. Rimini Street shall not reproduce, prepare derivative works from, or distribute
6 Oracle Database software.

7 ECF No. 1166 ¶ 15. When the Court implemented this provision, the Court reasoned that the
8 balance of the hardships weighed in favor of the permanent injunction, in part, because Oracle was
9 only seeking to enjoin acts that had been determined to be unlawful and upheld on appeal. ECF
10 No. 1164 at 9. The Ninth Circuit upheld the permanent injunction, specifically holding that it was
11 not overly broad, but did not address the Oracle Database provision specifically. *Oracle USA, Inc.*
12 *v. Rimini Street, Inc.*, 783 Fed.Appx.707, 710–11 (9th Cir. 2019).

13 Given the extensive record in this case and the Court’s previous orders, it is clear that this
14 provision does not prohibit all copying of Oracle Database. To read paragraph 15 to prohibit all
15 copying, would make previous paragraphs of the permanent injunction related to PeopleSoft and
16 J.D. Edwards superfluous—Rimini is permitted to make copies of these software programs when
17 doing so is within the scope of the software license. If copies of Oracle Database are necessarily
18 made when Rimini is providing support services for these other Enterprise Software programs,
19 and those copies are expressly permitted under their respective licenses, the Oracle Database
20 copies cannot be prohibited by the permanent injunction. Here, Oracle has not provided clear and
21 convincing evidence that the copies of Oracle Database, made in the approximately 305 client
22 systems, were not expressly authorized by the clients’ licenses, or that Rimini violated the
23 permanent injunction. Therefore, the Court shall not issue an order to show cause as to Oracle
24 Database.

25 **D. Rimini’s motion for a jury trial is denied.**

26 Before the Court is Rimini’s motion for a jury trial. ECF Nos. 1387, 1389-s. Oracle
27 opposed (ECF No. 1403, *errata* ECF No. 1411) and Rimini replied (ECF Nos. 1412, 1414-s). For
28 the reasons below, the Court denies Rimini’s motion.

1 Generally, civil contempt proceedings only require notice and an opportunity to be heard.
2 *International Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821, 826–27, 831
3 (1994). It is only when contempt proceedings are criminal that heightened due process protections
4 are required. *Id.* at 831. “[W]hether a contempt is civil or criminal turns on the ‘character and
5 purpose’ of the sanction involved.” *Id.* at 827. A sanction is “civil if it coerces compliance with a
6 court order or is a remedial sanction meant to compensate the complainant for actual losses. A
7 criminal sanction, in contrast, generally seeks to punish a completed act of disobedience.” *Parsons*
8 *v. Ryan*, 949 F.3d 443, 455 (9th Cir. 2020) (cleaned up).

9 Oracle requests the following sanctions under the Court’s inherent authority for Rimini’s
10 alleged violations of the permanent injunction: (1) an order barring Rimini from providing support
11 services for Oracle’s PeopleSoft or J.D. Edwards product lines; (2) impoundment of the infringing
12 copies and Rimini’s computer systems, or alternatively, require that they be placed in escrow so
13 that Oracle can monitor Rimini’s compliance and until Rimini demonstrates compliance with the
14 permanent injunction; (3) attorneys’ fees and costs for successfully mounting these contempt
15 proceedings; and (4) compensatory damages. Oracle further requests that it be permitted to reopen
16 discovery for the narrow purpose of determining the amount of compensatory damages Oracle
17 should be awarded. ECF No. 1368 at 34-35. Rimini argues that a complete ban on Rimini providing
18 support services and the impoundment of its computers are punitive sanctions and thus, a jury trial
19 and heightened due process protections are required in these contempt proceedings. ECF No. 1387
20 at 15–19. Oracle, in its response to this motion, withdrew its request for a complete ban on Rimini
21 support services, but argues that impoundment is a coercive sanction, routinely permitted in civil
22 contempt proceedings. ECF No. 1411-2 at 22-24

23 As Oracle has withdrawn its first requested sanction, the Court sees no reason to address
24 whether a complete ban on Rimini support services would be a punitive or compensatory sanction.
25 Second, impoundment is a statutory remedy permitted under the Copyright Act for copyright
26 infringement. 17 U.S.C. § 503. In a civil contempt proceeding, the Court may find impoundment
27 appropriate if Rimini willfully violated the Court’s orders, but heightened due process protections
28 are not required to reach such a finding. *See National Research Bureau, Inc. v. Kucker*, 481 F.Supp.

1 612, 615–16 (S.D.N.Y. 1979). Third, it is well established that the prevailing party may be awarded
2 attorneys’ fees and costs in civil contempt proceedings and the Court has discretion to determine
3 if a fee award is an appropriate remedial measure. *See Perry v. O’Donnell*, 759 F.2d 702, 705-06
4 (9th Cir. 1985). Finally, compensatory damages may be awarded for Oracle’s actual damages and
5 any additional profits of the infringer. 17 U.S.C. § 504. Oracle’s motion for an order to show cause
6 does not address a specific amount in damages it has suffered due to Rimini’s alleged
7 contumacious conduct but asks the Court to reopen discovery if Rimini is held in contempt. If the
8 Court finds Rimini in contempt, the Court will determine at that time how to fashion equitable and
9 appropriate sanctions and reopen discovery if it sees fit to do so. At this time, the Court does not
10 find that these requested sanctions are punitive; therefore, heightened due process protections and/or
11 a jury trial are not required.

12 Rimini’s further arguments as to why it is entitled to a jury trial pertain to Rimini’s position
13 that the complained of conduct is currently being adjudicated in *Rimini II*. As the Court found
14 above, there are material issues of fact and a jury trial will be held in *Rimini II* on a number of
15 issues Oracle has raised in its motion for an order to show cause. Because the Court declines to
16 entertain those issues in this contempt proceeding, the Court need not address Rimini’s additional
17 arguments for a jury trial. Accordingly, Rimini’s motion for a jury trial is denied.

18 **E. Oracle’s motion for Rule 11 sanctions is denied.**

19 Oracle moves this Court, under its inherent authority, Federal Rule of Civil Procedure 11,
20 and 28 U.S.C. § 1927, to impose sanctions on Rimini and its outside counsel, Gibson, Dunn &
21 Crutcher, LLP (“Gibson Dunn”) because Rimini filed its motion to enforce (discussed above in
22 Part III.A) in an attempt to re-litigate (for the seventh time) the scope of the permanent injunction.
23 ECF No. 1348. Rimini opposed (ECF No. 1350) and Oracle responded (ECF No. 1353). For the
24 reasons below, the Court denies Oracle’s motion.

25 1. Legal Standard

26 There are three sources of sanctioning power: Rule 11 of the Federal Rules of Civil
27 Procedure, 28 U.S.C. § 1927, and the Court’s inherent power to regulate itself. *See United States*
28 *v. Int’l Bhd. of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO*, 948

1 F.2d 1338, 1342–43 (2d Cir. 1991) (“*Brotherhood*”). Oracle seeks sanctions against Rimini
2 pursuant to all three.

3 Under Rule 11, the Court may, on a party’s motion, after notice and a reasonable
4 opportunity to respond, impose appropriate sanctions against another party for any violation of
5 Rule 11(b) of the Federal Rules of Civil Procedure. *See* FED. R. CIV. P. 11(c)(1). Here, Oracle
6 represents that on April 20, 2020, it served Rimini with notice it intended to file a motion for
7 sanctions unless Rimini withdrew its above discussed motion to enforce (ECF No. 1323). ECF No.
8 1348 at 6. When Rimini had not withdrawn its motion within 21-days, Oracle filed this motion for
9 sanctions on May 12, 2020. *Id.* Accordingly, Oracle has satisfied the procedural requirements of
10 Rule 11(c)(2).

11 “One of the fundamental purposes of Rule 11 is to ‘reduce frivolous claims, defenses or
12 motions and to deter costly meritless maneuvers, . . . thereby avoiding delay and unnecessary
13 expense in litigation.’” *Christian v. Mattel, Inc.*, 286 F.3d 1118, 1127 (9th Cir. 2002) (quoting
14 *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1536 (9th Cir 1986)). Rule 11
15 provides, in pertinent part,

16 **(b) Representations to the Court.** By presenting to the court a pleading, written
17 motion, or other paper--whether by signing, filing, submitting, or later advocating
18 it--an attorney or unrepresented party certifies that to the best of the person’s
19 knowledge, information, and belief, formed after an inquiry reasonable under the
20 circumstances:

19 (1) it is not being presented for any improper purpose, such as to harass,
20 cause unnecessary delay, or needlessly increase the cost of litigation;

20 (2) the claims, defenses, and other legal contentions are warranted by
21 existing law or by a nonfrivolous argument for extending, modifying, or
22 reversing existing law or for establishing new law; . . .

21 . . .
22 (c)(4) . . . The sanction may include nonmonetary directives; an order to pay a
23 penalty into court; or, if imposed on motion and warranted for effective deterrence,
24 an order directing payment to the movant of part or all of the reasonable attorney’s
25 fees and other expenses directly resulting from the violation.

24 FED. R. CIV. P. 11. By its terms, Rule 11 sanctions apply only to documents parties submit to the
25 court, not to the conduct of those parties. *Christian*, 286 F.3d at 1130. Prior to filing a document,
26 each party has a duty to “conduct a reasonable factual investigation” and to “perform adequate
27 legal research” confirming that the positions taken in the document are “warranted by existing law
28 or a good faith alteration of existing law.” *Id.* at 1127 (quoting *Golden Eagle*, 801 F.2d at 1537).

1 In determining whether the factual and legal inquiry was reasonable, the court applies an objective
2 standard of reasonableness. *Brotherhood*, 948 F.2d at 1344 (citing *Business Guides, Inc. v.*
3 *Chromatic Commc'ns Enter.s., Inc.*, 498 U.S. 533, 549–50 (1991)).

4 Alternatively, sanctions are available under 28 U.S.C. § 1927, which provides:

5 Any attorney or other person admitted to conduct cases in any court of the United
6 States or any Territory thereof who so multiplies the proceedings in any case
7 unreasonably and vexatiously may be required by the court to satisfy personally the
8 excess costs, expenses, and attorney's fees reasonably incurred because of such
9 conduct.

8 A section 1927 sanction differs from a Rule 11 sanction by requiring the heightened showing of
9 bad faith, by allowing the court to impose an award of fees *sua sponte*, and by bringing conduct
10 outside of the pleadings within the ambit of sanctionable activities. See GEORGENE M. VAIRO,
11 RULE 11 SANCTIONS: CASE LAW, PERSPECTIVES, AND PREVENTATIVE MEASURES 760–62 (Richard
12 G. Johnson ed., 3d ed. 2003). As a penal statute, section 1927 discourages unnecessary delays in
13 litigation by requiring the offending party to compensate other litigants for costs due to the dilatory
14 conduct. See *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 759–60 (1980). To award sanctions,
15 the movant must show that the offending party (1) multiplied the proceedings (2) in a vexatious
16 and unreasonable manner, causing (3) an increase in the cost of the proceedings. *Shields v. Shetler*,
17 120 F.R.D. 123, 127 (D. Colo. 1988). A “vexatious” multiplication of the proceedings occurs when
18 the party acts recklessly, plus “something more,” such as frivolousness, harassment, or an improper
19 purpose. *Fink v. Gomez*, 239 F.3d 989, 993–94 (9th Cir. 2001) ([R]ecklessness suffices for § 1927,
20 but bad faith is required for sanctions under the court's inherent power.”); see *B.K.B. v. Maui*
21 *Police Dep't*, 276 F.3d 1091, 1107 (9th Cir. 2002) (finding recklessness plus knowledge sufficient
22 for section 1927 sanctions). Before a court imposes section 1927 sanctions, the offending party
23 must be given notice and an opportunity to be heard. *T.W. Elec. Serv., Inc v. Pacific Elec.*
24 *Contractors Ass'n*, 809 F.2d 626, 638 (9th Cir. 1987).

25 Finally, the court may sanction an offending party pursuant to its inherent power “to
26 manage [its] own affairs so as to achieve the orderly and expeditious disposition of cases.”
27 *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) (quoting *Link v. Wabash R. Co.*, 370 U.S. 626,
28 630–31 (1962)). In this circuit, a showing of bad faith is required to support sanctions under the

1 Court's inherent authority. *Fink*, 239 F.3d at 993. Due to the “very potency” of the Court's inherent
2 power—encompassing, for example, the imposition of attorneys' fees if a court finds that “the
3 very temple of justice has been defiled,” *Chambers*, 501 U.S. at 44–46 (quoting *Universal Oil*
4 *Products Co. v. Root Refining Co.*, 328 U.S. 575, 580 (1946))—courts favor restraint and
5 discretion in its exercise and require a particularized showing of bad faith, *Brotherhood*, 948 F.2d
6 at 1345.

7 2. Discussion

8 Oracle motions this Court for sanctions against Rimini for vexatious litigation because
9 Rimini filed its motion to enforce the court's orders and judgment separating *Oracle I* from *Rimini*
10 *II*. Oracle argues that this motion is improperly duplicative and an attempt to relitigate (for the
11 seventh time) the scope of the permanent injunction, which this Court (and the Ninth Circuit on
12 appeal) held was not overly broad. In opposition, Rimini argues that it was compelled to file the
13 at issue motion because it appeared that Oracle would violate the Court's orders and attempt to
14 litigate issues currently being adjudicated in *Rimini II* in these contempt proceedings.

15 The Court is concerned with both parties' conduct. It agrees with Oracle that Rimini's
16 motion is procedurally improper—if Oracle decided to raise issues in contempt proceedings
17 outside the scope of the permanent injunction, that should be discussed in relation to Oracle's
18 motion for an order to show cause, not some preemptive strike styled motion. However, it does
19 not agree with Oracle that Rimini's conduct is completely baseless. At the time Rimini filed its
20 motion to enforce, it appeared, based on Oracle's expert's post-injunction report, that Oracle
21 intended to bring contempt proceedings relating to issues currently being adjudicated in *Rimini*
22 *II*—specifically related to cloud hosting and Rimini's AFW Tools software. Given that Oracle has
23 made multiple representations to the Court that it would not attempt to expand the scope of the
24 injunction to issues not yet adjudicated unlawful, and this Court's specific ruling that the injunction
25 was narrowly tailored to only enjoin acts that have already been adjudicated unlawful, Rimini's
26 concern was, to some extent, founded.

27 Both sides appear to have behaved improperly, but the Court finds that sanctions are not
28 appropriate under Rule 11, section 1927, or the Court's inherent authority. The Court does not find

1 that anything in the record supports a finding that Rimini acted in bad faith by filing its motion.
2 Nor does the Court find that Rimini's motion was vexatious or unreasonable given Oracle's
3 conduct, or that it was for an improper purpose, such as to harass, cause unnecessary delay, or
4 needlessly increase the cost of litigation. The Court has been previously impressed with the way
5 the parties have been able to work together professionally throughout this case's eleven-year
6 history, even with highly contentious matters. The Court is greatly concerned that these two
7 motions indicate a breakdown in amicable proceedings and strongly cautions the parties against
8 reaching a point that zealous advocacy overshadows professional conduct.

9 **F. The Court adopts and accepts Magistrate Judge Ferenbach's Report and**
10 **Recommendation and overrules Oracle's objections. Accordingly, Oracle's motion**
11 **for Rule 37(e) sanctions is denied.**

12 Before the Court is Oracle's motion for Rule 37(e) sanctions. ECF Nos. 1359; 1363-s.
13 Rimini opposed (ECF Nos. 1372; 1374-s), and Oracle replied (ECF Nos. 1376; 1379-s). This
14 pending motion was referred to Magistrate Judge Cam Ferenbach under 28 U.S.C. § 636(b)(1)(B)
15 and Local Rule IB 1-4, who issued a Report and Recommendation that this Court deny Oracle's
16 motion. ECF No. 1431. Accordingly, Oracle objected (ECF Nos. 1434; 1436-s), and Rimini replied
17 (ECF Nos. 1438; 1440-s).

18 The Court conducted a *de novo* review of the matter and has fully considered the pleadings
19 and memoranda of the parties, including Oracle's objection to the Report and Recommendation
20 and Rimini's response, and other relevant matters of record under 28 U.S.C. § 636(b)(1)(B) and
21 Local Rule IB 3-2. Accordingly, the Court accepts and adopts Judge Ferenbach's Report and
22 Recommendation, overrules Oracle's objections, and accordingly, denies Oracle's motion for Rule
23 37(e) sanctions.

24 **IV. CONCLUSIONS**

25 IT IS THEREFORE ORDERED that the parties' motions to seal (ECF Nos. 1325, 1334,
26 1367, 1384, 1388, 1391, 1394, 1404, 1408, 1413, 1417, 1427, 1435, 1439) are **GRANTED *nunc***
27 ***pro tunc***.

28 IT IS FURTHER ORDERED that Rimini's motion to enforce the Court's orders and
judgment separating *Oracle I* from *Rimini II* (ECF Nos. 1323) is **DENIED**.

1 IT IS FURTHER ORDERED that Rimini's motion to exclude the declarations and
2 opinions of Oracle's expert, Ms. Frederiksen-Cross, (ECF Nos. 1390, 1392-s) is **DENIED**.

3 IT IS FURTHER ORDERED that Oracle's motion for an order to show cause why Rimini
4 should not be held in contempt (ECF Nos. 1365, 1368-s) is **GRANTED in part and DENIED in**
5 **part**. In accordance with this Order, Rimini is ORDERED to **SHOW CAUSE** why it should not
6 be held in contempt for violating the permanent injunction, no later than Monday, May 10, 2021.
7 Oracle shall file any response within 30 days of Rimini's filing; Rimini shall file any reply within
8 10 days of Oracle's response. Rimini's show cause brief and Oracle's response shall not exceed
9 30 pages and Rimini's reply shall not exceed 15 pages, excluding non-substantive portions of the
10 filing, including tables of contents, tables of authorities, and signature pages. Exhibits are not to
11 exceed 100 pages. No extensions will be granted for either party unless extenuating circumstances
12 are shown.

13 IT IS FURTHER ORDERED that a hearing on the above discussed issues will be held in
14 a courtroom to be designated at the Bruce R. Thompson Courthouse in Reno, Nevada, commencing
15 on September 20, 2021, at 9:00 a.m. Each side will have 1 hour for opening and closing statements,
16 and presentation of evidence/witness testimony shall not exceed 3 days per side. Participating
17 counsel must appear in-person, but it is left to the parties' discretion to have any of its witnesses
18 appear by ZOOM video conferencing. The parties are directed to contact Courtroom Deputy Katie
19 Sutherland, at Katie.Sutherland@nvd.uscourts.gov, for ZOOM connectivity instructions. In
20 accordance with this Order, the parties should not re-argue conduct the Court has found, by clear
21 and convincing evidence, violates the permanent injunction, and the Court cautions the parties to
22 strictly stay within the bounds articulated above for its argument and evidence presentation;
23 violations will not be tolerated.

24 IT IS FURTHER ORDERED that the parties are to submit a proposed joint pre-hearing
25 order no later than Friday, August 20, 2021, which should include: a brief statement of the issues
26 to be tried; a list of admitted facts and contested facts to be tried; stipulated exhibits; any exhibits
27 objected to and why; depositions to be offered and/or objections; and witnesses to be called. No
28 motions in limine will be heard without leave of the Court.

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IT IS FURTHER ORDERED that Rimini’s motion for a jury trial (ECF Nos. 1387, 1389-s) is **DENIED**.

IT IS FURTHER ORDERED that Oracle’s motion for Rule 11 sanctions (ECF No. 1348) is **DENIED**.

IT IS FURTHER ORDERED that Judge Ferenbach’s Report and Recommendation (ECF No. 1431) is **ADOPTED and ACCEPTED**. Oracle’s objections to the Report and Recommendation (ECF Nos. 1434; 1436-s) are **OVERRULED**. Accordingly, Oracle’s motion for Rule 37(e) sanctions (ECF Nos. 1359; 1363-s) is **DENIED**.

IT IS SO ORDERED.

DATED this 31st day of March, 2021.



LARRY R. HICKS
UNITED STATES DISTRICT JUDGE