

John V. Picone III, Bar No. 187226
 jpicone@hopkinscarley.com
 Jeffrey M. Ratinoff, Bar No. 197241
 jratinoff@hopkinscarley.com
 Arthur E. Rothrock, Bar No. 312704
 arothrock@hopkinscarley.com
 HOPKINS & CARLEY
 A Law Corporation
 The Letitia Building
 70 South First Street
 San Jose, CA 95113-2406

mailing address:

P.O. Box 1469
 San Jose, CA 95109-1469
 Telephone: (408) 286-9800
 Facsimile: (408) 998-4790

Attorneys for Plaintiffs and Counter-Defendants
 NEO4J, INC. and NEO4J SWEDEN AB

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

NEO4J, INC., a Delaware corporation, and
 NEO4J SWEDEN AB, a Swedish
 corporation,

Plaintiff,

v.

PURETHINK LLC, a Delaware limited
 liability company, IGOV INC., a Virginia
 corporation, and JOHN MARK SUHY, an
 individual,

Defendants.

CASE NO. 5:18-cv-07182-EJD

**PLAINTIFFS' NOTICE OF MOTION AND
 MOTION TO STRIKE THE REPORT AND
 EXCLUDE THE TESTIMONY OF
 DEFENDANTS' EXPERT WITNESS
 BRADLEY M. KUHN; MEMORANDUM
 OF POINTS AND AUTHORITIES IN
 SUPPORT THEREOF**

Date: July 27, 2023
 Time: 9:00 AM
 Dept. Courtroom 4, 5th Floor
 Judge: Hon. Edward J. Davila

Trial Date: November 14, 2023

AND RELATED COUNTERCLAIM.

NOTICE OF MOTION AND MOTION

TO THE COURT, ALL PARTIES, AND COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on July 27, 2023, at 9:00 a.m., before the Honorable Edward J. Davila, in Courtroom 4, 5th floor, 280 S. First Street, San Jose, CA 95113, Plaintiffs and Counter-Defendants Neo4j, Inc., and Neo4j Sweden AB (“Plaintiffs”) will and hereby do move the Court for an order striking the December 22, 2022 Expert Report of Bradley M. Kuhn served by Defendants and Counterclaimants PureThink LLC, iGov Inc. and John Mark Suhy (collectively “Defendants”) and excluding the testimony and opinions of Bradley M. Kuhn identified and expressed therein on both summary judgment and at trial.

This motion is made pursuant to Fed. R. Evid. 702 and 703 and *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993) on the grounds that the opinions Mr. Kuhn expresses in his report fail under the standard set by the Supreme Court in *Daubert* as they are irrelevant, are inadmissible, not helpful to the jury, and not reliably applied to the facts and remaining issue in the case. Mr. Kuhn opines on issues previously decided on summary judgment and affirmed by the Ninth Circuit Court of Appeals, and are thus barred by the law of the case doctrine.

This motion is based on this Notice of Motion and Motion, the Memorandum of Points and Authorities below, the accompanying Declaration of Jeffrey M. Ratinoff, all pleadings, records and papers on file in this action, and upon such further oral and documentary evidence as may be presented at the hearing on this Motion.

REQUESTED RELIEF

Plaintiffs respectfully requests that the Court strike the entirety of Mr. Kuhn’s December 22, 2022 Expert Report and exclude him from testifying on all opinions express in or contemplated by that report.

STATEMENT OF ISSUES TO BE DECIDED

1. Whether Mr. Kuhn’s expert report and proposed testimony improperly seeks to relitigate the interpretation of Sections 7 and 10 of the Neo4j Sweden Software License, the interpretation of which was previously decided by this Court and affirmed by the Ninth Circuit.

2. Whether the law of the case doctrine prohibits Defendants’ from offering expert

1 testimony on the interpretation of the Neo4j Sweden Software License and thereby renders Mr.
2 Kuhn's proposed testimony irrelevant to the remaining issues in the case.

3 3. Whether Mr. Kuhn's opinions are inadmissible because they impinge on the Court's
4 exclusive province of interpreting the contractual language of the Neo4j Sweden Software License.

5 4. Whether Mr. Kuhn's opinions are inadmissible because he impermissibly opines on
6 and speculates about Defendants' intent, motive and knowledge in removing the Commons Clause
7 from the Neo4j Sweden Software License.

8 5. Whether Mr. Kuhn's opinions are inadmissible because he impermissibly opines on
9 and speculates about Neo4j Sweden's state of mind at the time it drafted the Neo4j Sweden
10 Software License.

11 6. Whether Mr. Kuhn seeks to introduce inadmissible hearsay evidence regarding the
12 drafting of the GPLv3 and AGPLv3.

13 7. Whether the Court should exclude Mr. Kuhn's testimony pursuant to Federal Rule
14 of Evidence 403 because he is acting as an advocate rather than as an independent expert, which
15 will confuse the jury and is more prejudicial than probative.

16 8. Whether Defendants can offer Mr. Kuhn's testimony to justify filing a motion
17 pursuant to Rule 59(e) for the reconsideration of the Court's summary judgment order.

18

19

20

21

22

23

24

25

26

27

28

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. FACTUAL AND PROCEDURAL BACKGROUND.....	2
A. Plaintiffs’ Lanham Act, UCL and Digital Millennium Copyright Act Claims	2
B. The Court Finds Defendants Engaged in False Advertising.....	3
C. Defendants Appeal the Summary Judgment and Preliminary Injunction.....	3
D. Defendants Seek to Circumvent the Ninth Circuit’s Affirmation of this Court’s Interpretation of the Neo4j Sweden Software License via Purported Expert Testimony from Bradley M. Kuhn	3
E. Defendants Refuse to Voluntarily Withdraw Mr. Kuhn’s Report	5
III. APPLICABLE LEGAL STANDARDS	6
IV. ARGUMENT	7
A. The Law of the Case Doctrine Bars Defendants From Using Expert Testimony to Relitigate Whether Sections 7 and 10 of the Neo4j Sweden Software License Permitted Defendants to Remove the Commons Clause	7
B. Mr. Kuhn Cannot Opine on the Meaning of Contractual Provisions.....	13
C. Mr. Kuhn’s Opinions on Defendants’ State of Mind is Inadmissible.....	14
D. Mr. Kuhn Improperly Speculates on Neo4j Sweden’s State of Mind.....	15
E. Mr. Kuhn’s Report Seeks to Introduce Inadmissible Hearsay Evidence	17
F. Mr. Kuhn is Acting as an Advocate Rather than an Independent Expert	18
G. Defendants Cannot Use Mr. Kuhn’s Opinion to Bolster a FRCP 59(e) Motion	19
V. CONCLUSION	21

TABLE OF AUTHORITIES

Page

Cases

<i>AMTAX Holdings 279, LLC v. Montalvo Assocs.,</i> LLC, 2022 WL 2784456 (S.D. Cal. June 6, 2022)	13
<i>Aquino v. Cnty. of Monterey Sheriff's Dep't,</i> No. 5:14-CV-03387-EJD, 2018 WL 3845718 (N.D. Cal. Aug. 12, 2018)	12
<i>Arista Networks, Inc. v. Cisco Sys. Inc.,</i> No. 16-CV-00923-BLF, 2018 WL 8949299 (N.D. Cal. June 15, 2018)	15, 16
<i>Backlund v. Barnhart,</i> 778 F.2d 1386 (9th Cir. 1985).....	20
<i>CZ Servs., Inc. v. Express Scripts Holding Co.,</i> No. 3:18-CV-04217-JD, 2020 WL 4518978 (N.D. Cal. Aug. 5, 2020).....	7
<i>Daubert v. Merrell Dow Pharms., Inc.,</i> 509 U.S. 579 (1993).....	6, 7, 16, 18, 21
<i>Dolby Labs. Licensing Corp. v. Adobe Inc.,</i> No. 18-CV-01553-YGR, 2019 WL 6327210 (N.D. Cal. Nov. 26, 2019).....	13, 14
<i>Exxon Shipping Co. v. Baker,</i> 554 U.S. 471 (2008).....	20
<i>Garcia v. Biter,</i> 195 F. Supp. 3d 1131 (E.D. Cal. 2016).....	20
<i>Herrington v. County of Sonoma,</i> 12 F.3d 901 (9th Cir. 1993).....	7, 12
<i>Ins. Grp. Comm. v. Denver & R. G. W. R. Co.,</i> 329 U.S. 607 (1947).....	12
<i>Interior Glass Sys., Inc. v. United States,</i> No. 5:13-CV-05563-EJD, 2017 WL 1153012 (N.D. Cal. Mar. 28, 2017)	21
<i>Kona Enters., Inc. v. Estate of Bishop,</i> 229 F.3d 877 (9th Cir. 2000).....	20
<i>Kumho Tire Co. v. Carmichael,</i> 526 U.S. 137 (1999).....	6, 7
<i>Lust v. Merrill Dow Pharma., Inc.,</i> 89 F.3d 594 (9th Cir. 1996).....	7

TABLE OF AUTHORITIES
(continued)

	Page
<i>Magadia v. Wal-Mart Assocs., Inc.</i> , 2018 WL 6003376 (N.D. Cal. Nov. 15, 2018).....	12
<i>MAI Sys. Corp. v. Peak Computing, Inc.</i> , 991 F.2d 511 (9th Cir. 1993).....	12
<i>Marvel Characters, Inc. v. Kirby</i> , 726 F.3d 119 (2d Cir. 2013).....	18
<i>McHugh v. United Serv. Auto. Ass'n</i> , 164 F.3d 451 (9th Cir. 1999).....	13
<i>Miranda v. U.S. Sec. Assocs., Inc.</i> , No. 18-CV-00734-LHK, 2019 WL 2929966 (N.D. Cal. July 8, 2019)	12
<i>Nationwide Transport Fin. v. Cass Info. Sys., Inc.</i> , 523 F.3d 1051 (9th Cir. 2008).....	13, 15, 17
<i>Neo4j, Inc. v. Graph Found., Inc.</i> , No. 5:19-CV-06226-EJD, 2020 WL 6700480 (N.D. Cal. Nov. 13, 2020)	3, 11
<i>Oracle Am., Inc. v. Hewlett Packard Enter. Co.</i> , No. 16-CV-01393-JST, 2018 WL 6511146 (N.D. Cal. Dec. 11, 2018)	15
<i>In re Rezulin Products Liab. Litigation</i> , 309 F. Supp. 2d 531 (S.D.N.Y. 2004).....	18
<i>Richardson v. United States</i> , 841 F.2d 993 (9th Cir. 1988).....	7
<i>Rissetto v. Plumbers and Steamfitters Local 343</i> , 94 F.3d 597 (9th Cir. 1996).....	11
<i>SA Music LLC v. Apple, Inc.</i> , 592 F. Supp. 3d 869 (N.D. Cal. 2022)	15, 17
<i>Sec. Inv. Prot. Corp. v. Vigman</i> , 74 F.3d 932 (9th Cir. 1996).....	8
<i>Tessera, Inc. v. Toshiba Corp.</i> , No. 15-CV-02543-BLF, 2019 WL 5395158 (N.D. Cal. Oct. 22, 2019).....	15, 17
<i>United States v. King Features Ent., Inc.</i> , 843 F.2d 394 (9th Cir. 1988).....	11

TABLE OF AUTHORITIES
(continued)

	Page
<i>United States v. Park Place Assoc.</i> , 563 F.3d 907 (9th Cir. 2009).....	7
<i>United States v. Shafi</i> , No. 15-CR-00582-WHO-1, 2018 WL 3159769 (N.D. Cal. June 28, 2018)	18
<i>White v. California</i> , No. 5:15-CV-03521-EJD, 2017 WL 4642571 (N.D. Cal. Oct. 17, 2017)	20, 21
 Statutes	
15 U.S.C. § 1114(1)	2
15 U.S.C. § 1125(a)	2
17 U.S.C. § 1202	2, 3, 15
 Other Authorities	
Ninth Circuit Rule 36-3.....	12
Fed. R. Civ. Proc. 59	6
Fed. R. Civ. Proc. 59(e)	1, 11, 20, 21
Fed. R. Evid. 403	18, 21
Fed. R. Evid. 702	6, 18, 21
Fed. R. Evid. 703	17, 21

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Defendants PureThink LLC, iGov Inc. and John Mark Suhy (collectively “Defendants”) have disclosed Bradley Kuhn as a purported expert who will opine on: (1) the meaning of the provisions in the Neo4j Sweden Software License and the propriety of Defendants’ removal of the Commons Clause from that license as a “further restriction;” (2) Defendants’ purported understanding of Section 7 of that license was “reasonable, customary, in good faith, and correct;” (3) Defendants “acted in a reasonable, customary, good faith, and correct manner” when removing Commons Clause from the Neo4j Sweden Software License as a “further restriction;” and (4) Neo4j should have expected the Commons Clause to have been removed based on the same. Defendants claim that they are entitled to offer his testimony to justify revisiting the Court’s summary judgment order under Federal Rule of Civil Procedure 59(e) (“Rule 59(e)"). However, Mr. Kuhn’s testimony amounts to an improper attempt by Defendants to seek a *third* bite at the apple.

This Court previously determined that Sections 7 and 10 of the Neo4j Sweden Software License *precluded* the removal of the Commons Clause. Defendants agreed this issue could be decided as a matter of law and ultimately lost that argument on summary judgment. Mr. Kuhn’s report parrots Defendants’ incorrect interpretation of that license under the guise of “industry custom” and that Suhy’s removal of the Commons Clause mirrored his understanding thereof. In doing so, Mr. Kuhn exclusively relies on “evidence” that was available to Defendants at the time of summary judgment. Defendants thus cannot use his proposed testimony to circumvent the law of the case doctrine, which precludes revisiting an issue previously decided by a higher court in the same case. Likewise, they cannot use a Rule 59(e) motion to re-litigate old matters by raising arguments or presenting evidence that they could have raised in opposition to Plaintiffs’ prior summary judgment motion.

Even if the meaning of the relevant provisions in the Neo4j Sweden Software License were not settled law of the case, Mr. Kuhn’s opinions would still be inadmissible because his opinions all hinge on the interpretation of Section 7 of that license. The Ninth Circuit has made clear that an expert witness cannot opine on the legal meaning of contracts as written. It is also settled law

1 that an expert may not opine or speculate regarding a party's mental state, such as intent, motive,
 2 or knowledge. Consequently, his opinions on Suhy's purported good-faith belief in removing the
 3 Commons Clause is inadmissible. For the same reason, Mr. Kuhn's opinions about Neo4j
 4 Sweden's reasons for creating the Neo4j Sweden Software License and using the Commons Clause
 5 amounts to inadmissible gross speculation.

6 Finally, allowing Mr. Kuhn to testify would confuse the jury and would be prejudicial to
 7 Plaintiffs because Mr. Kuhn is not a qualified expert. Rather, he is admittedly an open source
 8 software advocate that has been a vocal critic of this Court's interpretation of Neo4j Sweden
 9 Software License. This is evident from an April 2022 online article Mr. Kuhn authored expressing
 10 his displeasure with the Ninth Circuit's affirmation of it. He has also made his expert report
 11 publicly available on the internet via an open source advocacy website in a thinly veiled attempt to
 12 taint the jury pool. Accordingly, the Court should strike Mr. Kuhn's improper and inadmissible
 13 report and preclude him from testifying on the matters discussed therein at trial.

14 **II. FACTUAL AND PROCEDURAL BACKGROUND**

15 **A. Plaintiffs' Lanham Act, UCL and Digital Millennium Copyright Act Claims**

16 In this lawsuit, Plaintiffs assert Lanham Act claims against Defendants for trademark
 17 infringement, false advertising and false designation of origin claims under the Lanham Act
 18 (15 U.S.C. §§ 1114(1), 1125(a)) and mirror claims under California's Unfair Competition Law
 19 (UCL). See, generally, Dkt. No. 90. Plaintiffs based these claims, in part, on Defendants' improper
 20 use of the NEO4J mark and falsely promoting ONgDB as a "free and open source" versions of or
 21 alternatives to commercially licensed Neo4j EE. *See id.*, ¶¶ 99-133.

22 Plaintiffs also assert a claim against Defendants under Section 1202(b) of the Digital
 23 Millennium Copyright Act (DMCA). *See* Dkt. No. 90, ¶¶ 166-173. Plaintiffs base their DMCA
 24 claim on Defendants' removal of the Commons Clause from the Neo4j Sweden Software License,
 25 as well as the removal and alteration of Neo4j Sweden's CMI in at least 28 separate source code
 26 files. *See id.*, ¶¶ 45, 68, 76-78, 112-115, 166-173. Defendants also violated the DMCA by
 27 promoting and distributing altered versions of Neo4j® graph database platform with the knowledge
 28 that doing so would induce, enable, facilitate, or conceal an infringement of Neo4j Sweden's rights

1 under the DMCA. *See id.*

2 **B. The Court Finds Defendants Engaged in False Advertising**

3 After Phase 1 of this case, Neo4j USA moved for summary judgment on its Lanham Act
4 and mirror claims under the UCL. On May 18, 2021, the Court granted the motion. *See* Dkt. No.
5 118. The Court held, *inter alia*, that Defendants’ statements and advertisements - that ONgDB was
6 a free and open source version of Neo4j® EE with no limitations or restrictions - were false and
7 misleading. *See* Dkt. No. 118 at 22:23-28:24. The Court necessarily interpreted Sections 0, 7 and
8 10 of the Neo4j Sweden Software License to conclude that Defendants had engaged in false
9 advertising by wrongfully removing the Commons Clause and promoting ONgDB as free and open
10 source Neo4j® EE. *Id.* at 24:7-25:19 (citing *Neo4j, Inc. v. Graph Found., Inc.*, No. 5:19-CV-06226-
11 EJD, 2020 WL 6700480, at *4 (N.D. Cal. Nov. 13, 2020)). Along with granting the motion, the
12 Court issued a preliminary injunction prohibiting Defendants from engaging in such false
13 advertising. Dkt. No. 118 at 32:16-36:5

14 **C. Defendants Appeal the Summary Judgment and Preliminary Injunction**

15 On June 16, 2021, Defendants sought immediate appellate review of this Court’s May 18,
16 2021 order. *See* Dkt. No. 121. After extensive briefing by the parties, the Ninth Circuit issued a
17 Memorandum Disposition affirming summary judgment for Plaintiffs and the issuance of the
18 preliminary injunction on February 18, 2022. Dkt. No. 140. Defendants then unsuccessfully sought
19 a rehearing, which resulted in the Ninth Circuit making minor amendments to its Memorandum
20 Disposition and issuing a formal mandate on March 22, 2022. Dkt. Nos. 141-142.

21 **D. Defendants Seek to Circumvent the Ninth Circuit’s Affirmation of this**
22 **Court’s Interpretation of the Neo4j Sweden Software License via Purported**
23 **Expert Testimony from Bradley M. Kuhn**

24 On December 22, 2022, Defendants served the Export Report of Bradley M. Kuhn, which
25 “primarily discusses the issues of the removal of the Commons Clause (“CC”) from the ‘Neo4j
26 Sweden Software License’ and Suhy’s and/or PureThink, LLC’s and/or IGOV, Inc.’s redistribution
27 of the Neo4j software under the AGPLv3 with CC removed.” Declaration of Jeffrey M. Ratinoff
28 (“Ratinoff Decl.”), Ex. 1 (“Kuhn Report”).

Mr. Kuhn claims to be an “expert” in “interpreting the requirements and details of [free and

open source software] licenses.” Kuhn Report, ¶ 13. Yet Mr. Kuhn is not a licensed attorney nor has he ever attended law school. Rather, his qualifications mainly consist of: (1) an undergraduate and graduate computer science degree [*id.*, ¶ 6, 11]; (2) working as a computer programmer [*id.*, ¶¶ 7-11]; (3) “work related to software licensing and compliance with the [GPL] ... and other related and similar licenses” at the Free Software Foundation, Inc. (“FSF”) between 2000 and 2005, as well as serving on its board between 2010 and 2019 [*id.*, ¶¶ 12-16, 19 and Exhibit I]; and (4) a founder and the president of the Software Freedom Conservancy (“SFC”), which “promotes and defends these rights through fostering free and open source software (FOSS) projects, driving initiatives that actively make technology more inclusive, and advancing policy strategies that defend FOSS (such as copyleft)” [*id.*, ¶¶ 4, 17 and Exhibit I].

Mr. Kuhn also claims to have participated first-hand in a public process to comment on, evaluate, and make suggestions for the new version of the GPL (version 3). Kuhn Report, ¶¶ 18, 21. While not one of the actual authors of the GPLv3, he allegedly had discussions with unidentified persons responsible for drafting the GPLv3. *Id.*, ¶ 23. Though Mr. Kuhn’s prior departure from the FSF meant he did not play an active role in the drafting of the AGPLv3, he claims that he is the author of its Section 13 – an irrelevant provision related to remote network interaction. *See id.*, ¶¶ 21-26.

Mr. Kuhn further claims to be an “expert” on the issue of “further restrictions” in copyleft licenses. *See id.*, ¶¶ 27-28. This is based on moderating “community discussions” about the imposition of non-military use restrictions with the GPLv2, which was later replaced by the aforementioned GPLv3. *See id.*, ¶¶ 34-42. Mr. Kuhn also cites to his participation in the public drafting process for the GPLv3 and the FSF’s collection of anonymous comments on a least three drafts that took place between January 2006 and November 2007. *See id.*, ¶¶ 44-50. Citing to specific comments on these drafts, Mr. Kuhn then summarizes his recollection of the evolution of the “further restrictions” clause in Section 7 of the GPLv3 through this process. *See id.*, ¶¶ 51-59.

Mr. Kuhn finally concludes that the community discussions about drafts of the GPLv3 are somehow relevant to the AGPLv3 since it contains the same “further restrictions” clause, and

///

conclude[s] based on these documents, plus my recollection of the GPLv3 and AGPLv3 drafting process in which I participated, and my extensive work with the FSF and SFC in copyleft licensing, that the Further Restrictions Clause [in Section 7] was specifically design to allow removal of an additional term when a licensor chose to use the text of the GPLv3 and/or AGPLv3 along with a term that the licensee viewed as a “Further Restriction”.

Kuhn Report, ¶ 61. Mr. Kuhn then provides additional opinions based on his interpretation of this clause as it appears in the Neo4j Sweden Software License, of which he has no knowledge regarding Neo4j Sweden’s drafting thereof. Without citing to any facts documents or evidence produced in the underlying action, Mr. Kuhn further speculates that Neo4j Sweden would violate the APGLv3 if it failed to obtain permission from contributors to the source code licensed under Neo4j Sweden Software License. *See* Kuhn Report, ¶¶ 99-107, 113.

E. Defendants Refuse to Voluntarily Withdraw Mr. Kuhn’s Report

On January 13, 2023, Plaintiffs sent a letter requesting that they withdraw Mr. Kuhn’s report. *See* Ratinoff Decl., Ex. 2. In particular, Plaintiffs explained that Defendants’ attempt to use Mr. Kuhn’s “expert opinions” to reargue that Section 7 of the Neo4j Sweden Software License permitted the removal of the Commons Clause violated the law of the case doctrine. *Id.* This was a settled issue as confirmed by the Ninth Circuit’s affirmation of the Court’s interpretation of Sections 7 and 10 in granting summary judgment on Plaintiffs’ false advertising claim. *Id.*

Plaintiffs also explained that controlling authority makes clear that Mr. Kuhn’s proposed testimony was inadmissible because contractual interpretation is a question of law—one that the Court again correctly determined as affirmed by the Ninth Circuit. *See* Ratinoff Decl., Ex. 2. Likewise, his proposed testimony on Suhy’s the state of mind at the time he removed the Commons Clause was inadmissible because courts in the Ninth Circuit have held that expert testimony about the state of mind and/or intent of a party is inadmissible. For this same reason, Mr. Kuhn’s proposed testimony about Neo4j Sweden’s intent, motive, and knowledge at the time it created the Neo4j Sweden Software License was speculative and inadmissible. Finally, Plaintiffs warned Defendants that attempting to offer Mr. Kuhn’s testimony would constitute an improper end-around of a dispositive ruling in the case. This was not the first time that Defendants ignored the law of the

///

1 case doctrine in an attempt to revive a claim or defense that had been subject to a dispositive ruling.¹
 2 See Dkt. No. 110 at 6:6-7:12.

3 On January 20, 2023, Defendants sent a letter in response where they refused to withdraw
 4 Mr. Kuhn's report. See Ratinoff Decl., Ex. 3. Their refusal was primarily based on ignoring the
 5 Ninth Circuit affirming the Court's summary judgment order, and then mischaracterizing it as an
 6 interlocutory order that was not subject to the law of case. Defendants also argued that because
 7 partial summary judgments are interlocutory orders and the interpretation of Section 7 was "not
 8 fully litigated," they could offer Mr. Kuhn's testimony at trial and file a post-trial motion under
 9 FRCP 59. Yet they addressed *none* of the controlling authority to the contrary.

10 Defendants even *confirmed* that they intended to offer Mr. Kuhn's testimony to establish
 11 that "Mr. Suhy was *legally correct* in removing the terms as the AGPL provides." See Ratinoff
 12 Decl., Ex. 3 (emphasis added). This was a remarkable admission given that Plaintiffs pointed
 13 Defendants to controlling Ninth Circuit case law that made clear that Mr. Kuhn's opinions on the
 14 interpretation of the Neo4j Sweden Software License were clearly inadmissible. Defendants also
 15 ignored the express language of Mr. Kuhn's report and claimed that he was not opining on the state
 16 of mind of either Plaintiffs or Suhy. Plaintiffs thus had no other option than to file this motion.

17 **III. APPLICABLE LEGAL STANDARDS**

18 Rule 702 of the Federal Rules of Evidence requires that district court act as a "gatekeeper"
 19 to ensure that proposed expert testimony are valid and reliable, and will "assist the trier of fact to
 20 understand the evidence or to determine a fact in issue." *Daubert v. Merrell Dow Pharms., Inc.*,
 21 509 U.S. 579, 590-91, 597 (1993) (quoting FRE 702). This gatekeeping function "applies not only
 22 to testimony based on 'scientific' knowledge, but also to testimony based on 'technical' and 'other
 23 specialized' knowledge." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999). Ultimately,
 24 the objective of *Daubert* is "to make certain that an expert, whether basing testimony upon

25 ¹ As detailed in Plaintiff's previously filed motion to dismiss (Dkt. No. 172), Defendants have
 26 engaged in a pattern and practice of disregarding the Court's directives and ignoring controlling
 27 Ninth Circuit authority in attempt to maintain what are clearly frivolous legal theories and claims.
 28 See Dkt. No. 110 at 6:5-7:12.

professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.” *Id.* at 152. Expert testimony is only admissible if the expert is testifying as to knowledge of the “relevant discipline,” which in turn must be more than “subjective belief or unsupported speculation.” *Daubert*, 509 U.S. at 589-590; *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

Relevance is as much a precondition of admissibility as reliability. Expert testimony must be “relevant to be admissible.” *Daubert*, 509 U.S. at 589. “Expert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful.” *Id.* at 590-91. The testimony must “fit” the case, and be tied to the claims and facts in a way that helps the jury decide the parties’ dispute. *Id.*; accord *CZ Servs., Inc. v. Express Scripts Holding Co.*, No. 3:18-CV-04217-JD, 2020 WL 4518978, at *1 (N.D. Cal. Aug. 5, 2020) (citing same). The party seeking to admit expert testimony bears the burden of proving that the proffered testimony of its expert is admissible. *Daubert*, 509 U.S. at 592 fn 10; accord *Lust v. Merrill Dow Pharma., Inc.*, 89 F.3d 594, 598 (9th Cir. 1996).

IV. ARGUMENT

A. The Law of the Case Doctrine Bars Defendants From Using Expert Testimony to Relitigate Whether Sections 7 and 10 of the Neo4j Sweden Software License Permitted Defendants to Remove the Commons Clause

Mr. Kuhn’s proposed expert testimony is irrelevant to the remaining issues here because it relates to matters that were decided on summary judgment and affirmed by the Ninth Circuit in Phase 1 of this action. Under the law of the case doctrine, “when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.” *United States v. Park Place Assoc.*, 563 F.3d 907, 925 (9th Cir. 2009); see also *Richardson v. United States*, 841 F.2d 993, 996 (9th Cir. 1988) (“Under the ‘law of the case’ doctrine, a court is ordinarily precluded from reexamining an issue previously decided by the same court, or a higher court, in the same case.”). Further, “[t]he law of the case doctrine states that the decision of an appellate court on a legal issue must be followed in all subsequent proceedings in the same case.” *Herrington v. County of Sonoma*, 12 F.3d 901, 904 (9th Cir. 1993) (internal quotations omitted). A party also cannot “offer up successively different legal or factual theories that could have been

presented in a prior request for review.” *Sec. Inv. Prot. Corp. v. Vigman*, 74 F.3d 932, 937 (9th Cir. 1996) (quotations and citations omitted). Defendants violate these principles by offering Mr. Kuhn as a purported expert witness in an effort to re-litigate whether Section 7 of the Neo4j Sweden Software License authorized their removal the Commons Clause.

Mr. Kuhn’s opinions are premised on his layperson view of the language in Section 7 of the Neo4j Sweden Software License (derived from the AGPLv3), which he calls the “Further Restriction Clause,” and the propriety of Defendants’ removal of the Commons Clause as a “further restriction.” *See, e.g.*, Kuhn Report, ¶ 61 (“the Further Restrictions Clause [in Section 7] was specifically design [sic] to allow removal of an additional term when a licensor chose to use the text of the GPLv3 and/or AGPLv3 along with a term that the licensee viewed as a ‘Further Restriction’”).

The excerpts below from Mr. Kuhn’s report reaffirms that he is providing his interpretation of Section 7 of the Neo4j Sweden Software License under the guise of “industry custom” and that Mr. Suhy’s removal of the Commons Clause from the Neo4j Sweden Software License aligns with his understanding thereof:

In my professional opinion, the Neo4j Sweden Software License is structured and presented precisely in the manner that the Further Restrictions Clause anticipated.

Specifically, I believe that the AGPLv3 contemplated this precise situation: namely, a licensor licenses under the unmodified text of the AGPLv3, but also includes another term that contradicts, limits, and/or restricts the permissions granted under the AGPLv3.

If I had encountered the “Neo4j Sweden Software License” during the normal course of my work as a FOSS activist and FOSS licensing expert, I would have felt removal of the [Commons Clause], upon redistribution of the software, was permitted by the AGPLv3’s Further Restrictions Clause.

In my opinion, when John Mark Suhy encountered the Neo4j Sweden Software License, his removal of the [Commons Clause] and redistribution of the Covered Work under pure AGPLv3 would be considered customary, permissible, and even widely encouraged in the field of FOSS.

Kuhn Report, ¶¶ 72-74. The rest of Mr. Kuhn’s report is replete with opinions and conclusions based on his personal and unqualified interpretation of Section 7:

///

- 1 • In my professional opinion, the Neo4j Sweden Software License is structured
2 and presented precisely in the manner that the Further Restrictions Clause
anticipated. Kuhn Report, ¶ 75.
- 3 • “In my opinion, the Neo4j Sweden Software License itself gave Suhy,
4 PureThink, LLC, and IGOV, Inc. this permission explicitly. Specifically, even
5 if one firm is the only copyright holder and therefore sole licensor of the
6 work....” *Id.*, ¶ 76
- 7 • “In my opinion ... any reasonable party would determine that the Neo4j Sweden
8 Software License intends — given that it was intentionally drafted to include
9 the Further Restrictions Clause — that the [Commons Clause] can be removed
10 by anyone who engages in redistribution [] of the software covered by the Neo4j
11 Sweden Software License.” *Id.* at ¶ 78.
- 12 • “Therefore, if a license that has the full text of the unmodified AGPLv3, users
13 and/or redistributors have a good faith basis to exercise any and all clauses of
14 the AGPLv3 — including the Further Restrictions Clause and its permission to
15 strike and remove additional restriction clauses.” *Id.* at ¶ 89.
- 16 • “In my opinion ... the Neo4j Sweden Software License was structured and
17 promoted to give users the incorrect impression that the [Commons Clause]
18 could not be removed from those terms — even though the Further Restrictions
19 Clause was present.” *Id.* at ¶ 97.
- 20 • “In my opinion, there is widespread understanding in the FOSS community of
the purpose and function of the Further Restrictions Clause. As such, Suhy
acted in a reasonable, customary, good faith, and correct manner when
removing [Commons Clause] from the Neo4j Sweden Software License and
licensing the software under AGPLv3 to his customers and/or the public.” *Id.*
at ¶ 110.
- 21 • “In my opinion, it is reasonable, customary, in good faith, and correct for
redistributors to believe that the Neo4j Sweden Software License intentionally
included the Further Restrictions Clause. The authors of the Neo4j Sweden
Software License should have expected that the Further Restrictions Clause
would be used to remove [Commons Clause] from the Neo4j Sweden Software
License.” *Id.* at ¶ 112.

22 The trial court and appellate record here makes clear that the parties fully and conclusively
23 litigated the meaning of “further restrictions” within the context Neo4j Sweden Software License
24 as a whole. *See* Dkt. No. 98 at 30:19-31:9; Dkt. No. 100 at 27:18-30:16; Dkt. No. 109 at 18:13-
22:3. In particular, Plaintiffs argued on summary judgment:

25 The Neo4j Sweden Software License did not permit Defendants to remove the
26 commercial restrictions imposed by the Commons Clause and replace that
27 license with a “pure” AGPL. This is confirmed by the plain language of the
28 license. Section 10 states: “You may not impose any further restrictions on the
exercise of rights granted or affirmed under this License.” Rathle Decl., Ex. 3.
Section 7 states: “[i]f the Program as you received it, or any part of it, contains
a notice stating that it is governed by this License along with a term that is a

1 further restriction, you may remove that term.” *Id.* Importantly, the AGPLv3
 2 defines “you” as the licensee, not the licensor. *Id.*, Ex. 3 at § 0 (“Each licensee
 3 is addressed as ‘you’”). Thus, read correctly, Sections 7 and 10 did not prohibit
 Neo4j Sweden as the copyright holder and licensor from adding the Commons
 Clause. *See* GFI Dkt. No. 88 at 5:23-8:9.

4 Dkt. No. 98 at 30:19-28.

5 In their opposition and cross-motion for summary judgment, Defendants argued:

6 the Neo4J Sweden Software License defines “you” as the “licensee.” Neo4J
 7 Sweden Software License, Section 0 (“Each licensee is addressed as ‘you’.”)

8 * * *

9 Section 7 of the Neo4J Sweden Software License states: “If the Program as you
 10 received it, or any part of it, contains a notice stating that it is governed by this
 License along with a term that is a further restriction, you may remove that
 11 term.” Neo4J Sweden Software License, Section 7. Substituting the matching
 language for the defined terms in this provision, Section 7 of the Neo4J [sic]
 12 Sweden Software License states: “If the Program as [GFI] received it, or any
 part of it, contains a notice stating that it is governed by [the AGPLv3 license]
 along with a term that is a further restriction, [GFI] may remove that term.”

13 The Neo4J Sweden Software License states that the software is “subject to the
 14 terms of the GNU AFFERO GENERAL PUBLIC LICENSE Version 3, with
 the Commons Clause . . .” Therefore, the Neo4J Sweden Software License has
 15 a notice stating that the software is governed by the AGPLv3 license plus a
 further restriction, i.e. the Commons Clause. Because the Neo4J software, i.e.
 16 “the Program”, contained a notice stating that it is governed by “this License”
 (the AGPLv3 license) along with a term that is a further restriction (the
 17 Commons Clause), then, under Section 7, GFI as the licensee, i.e. “you”, may
 remove that term. Removal of the Commons Clause is expressly permitted
 under the terms of the Neo4J Sweden Software License.

18 * * *

19 Sweden chose to control its license under the AGPL license model. And, the
 20 AGPL, by its terms, allows a licensee to remove restrictive terms. If Sweden
 21 did not want the Commons Clause removed, they could have used a different
 license form. They chose to use the well-known AGPL license form and USA
 22 cannot complain of the impact of the terms Sweden choose.

23 Dkt. No. 100 at 28:15-29:7, 30:9-16.

24 The Court held this was an issue of contractual interpretation properly decided as a matter
 25 of law on summary judgment because “[t]he parties agree that the truth or falsity of Defendants’
 26 statements hinge on ‘the interpretation of Section 7 [of the Neo4j Sweden Software License], and

27 ///

28 ///

GFI's right to remove the Commons Clause from the Neo4j Sweden Software License.”² Dkt. No. 118 at 24:10-15 (quoting Defendants' cross-motion, emphasis added). The Court then considered Defendants' arguments and rejected them: “Defendants argue that there is a reasonable interpretation of the Neo4j Sweden Software License that permits licensees, like GFI or Defendants, to remove the Commons Clause and redistribute the software under the standardized AGPL license. Cross-Motion at 27-30. The Court disagrees.” *Id.* at 24:7-25:12.

The Court agreed with Plaintiff's interpretation of relevant provisions of Neo4j Sweden Software License, and reiterated that

Neither of the two provisions in the form AGPLv3 that Defendants point to give licensees the right to remove [the Commons Clause]. Section 10 of the AGPLv3, which is incorporated into the Neo4J Sweden Software License, states: “You may not impose any further restrictions on the exercise of rights granted or affirmed under this License.” . . . Section 7 states: “[i]f the Program as you received it, or any part of it, contains a notice stating that it is governed by this License along with a term that is a further restriction, you may remove that term.” [] Defendants argue that these provisions mean that “there can be no liability for removing the further licensing restrictions which Neo4j incorporated into the license,” namely the Commons Clause. [] As Plaintiffs point out, however, the AGPLv3 defines “you” as the licensee, not the licensor. Ex. 1 at § 0 (“Each licensee is addressed as ‘you’”). Thus, read correctly, Sections 7 and 10 prohibit a licensee from imposing further restrictions, but do not prohibit a licensor from doing so.

Dkt. No. 118 at 25:16-19 (quoting *Neo4j, Inc. v. Graph Found., Inc.*, No. 5:19-CV-06226-EJD, 2020 WL 6700480, at *4 (N.D. Cal. Nov. 13, 2020)).

Defendants did not wait until the conclusion of this case to file a motion pursuant to Rule 59(e) and then file an appeal. Rather, Defendants made a strategic decision to use the Court's

² This is consistent with the long-recognized principle that “[s]ummary judgment is appropriate when the contract terms are clear and unambiguous, even if the parties disagree as to their meaning.” *United States v. King Features Ent., Inc.*, 843 F.2d 394, 398 (9th Cir. 1988). Defendants are also judicially estopped from taking a contrary position that the Court could not make that determination on summary judgment simply because they did not like the outcome resulting from their prior position. *See Rissetto v. Plumbers and Steamfitters Local 343*, 94 F.3d 597, 600 (9th Cir. 1996) (doctrine of judicial estoppel “precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position”).

1 issuance of a preliminary injunction as a means to obtain immediate appellate review, *inter alia*, as
 2 to whether the provisions of the Neo4j Sweden Software License permitted Defendants to remove
 3 the Commons Clause as a further restriction. To be sure, Defendants’ opening appellate brief
 4 characterized the underlying legal and factual basis of this Court’s interpretation of the provisions
 5 of Neo4j Sweden Software License as being “‘inextricably bound up’ with its legal resolution of
 6 the summary judgment” and therefore sought *de novo review* thereof. *See* Ratinoff Decl., Ex. 4
 7 at 17 (citing to *MAI Sys. Corp. v. Peak Computing, Inc.*, 991 F.2d 511, 516 (9th Cir. 1993) and
 8 arguing that “the court’s preliminary injunction is ‘inextricably bound up’ with its legal resolution
 9 of the summary judgment; this Court therefore exercises plenary review.”); *see also id.* at 8, fn 3
 10 (“The propriety of adding the Commons Clause to the AGPL license was a matter of dispute and
 11 is discussed further in the Argument”).

12 The correctness of this Court’s interpretation of the relevant provisions of the Neo4j Sweden
 13 Software License was the subject of extensive briefing by the parties before the Ninth Circuit.
 14 Ratinoff Decl., Ex. 4 at 36-40; Ex. 5 at 47-54; Ex. 6 at 15-17. The Ninth Circuit then *expressly*
 15 *affirmed* that “Defendants’ representation that ONgDB is a ‘free and open-source’ version of
 16 Neo4j® EE was literally false, because **Section 7 of the Sweden Software License only permits a**
 17 **downstream licensee to remove ‘further restrictions’ added by an upstream licensee to the**
 18 **original work.**” Dkt. No. 140 at 3 (emphasis added). The Ninth Circuit also removed all doubt as
 19 to the conclusiveness of its decision by indicating that the opinion was precedential for the purpose
 20 of the doctrine of law of the case “as provided by Ninth Circuit Rule 36-3.” *See id.* at 1.

21 Defendants’ attempt to offer testimony from Mr. Kuhn on the meaning of Section 7 is thus
 22 a blatant violation of the law of the case doctrine. It is beyond inappropriate for Defendants to ask
 23 this Court to ignore the Ninth Circuit affirming its interpretation of the Neo4j Sweden Software
 24 License. *See Herrington*, 12 F.3d at 904; *accord Aquino v. Cnty. of Monterey Sheriff's Dep't*, No.
 25 5:14-CV-03387-EJD, 2018 WL 3845718, at *1 (N.D. Cal. Aug. 12, 2018) (citing same); *see also*
 26 *Ins. Grp. Comm. v. Denver & R. G. W. R. Co.*, 329 U.S. 607, 612 (1947) (“When matters are decided
 27 by an appellate court, its rulings, unless reversed by it or a superior court, bind the lower court.”).

28 Finally, even if the law of the case did not apply, courts in this District “exclude testimony

on issues already ruled on at summary judgment.” *Miranda v. U.S. Sec. Assocs., Inc.*, No. 18-CV-00734-LHK, 2019 WL 2929966, at *3 (N.D. Cal. July 8, 2019) (collecting cases); *accord Magadia v. Wal-Mart Assocs., Inc.*, 2018 WL 6003376, at *2 (N.D. Cal. Nov. 15, 2018) (granting motion in limine because “the Court has already ruled on these matters in its summary judgment orders,” thus “testimony on these issues would have no probative value, and would merely waste time”). The Court should therefore strike Mr. Kuhn’s expert report in its entirety, as well as exclude him from testifying on his opinions therein because they have no probative value and are irrelevant to the remaining issues to be tried in this case.

B. Mr. Kuhn Cannot Opine on the Meaning of Contractual Provisions

Besides violating the law of the case doctrine, Mr. Kuhn’s proposed testimony on the interpretation of the provisions detailed above are inadmissible. The Ninth Circuit has made clear that “[expert] testimony cannot be used to provide legal meaning or interpret the [contracts] as written.” *McHugh v. United Serv. Auto. Ass’n*, 164 F.3d 451, 454 (9th Cir. 1999)); *accord Dolby Labs. Licensing Corp. v. Adobe Inc.*, No. 18-CV-01553-YGR, 2019 WL 6327210, at *2 (N.D. Cal. Nov. 26, 2019) (“[t]hat a dispute has arisen regarding contract interpretation does not mean that a third party may offer ‘opinions’ to support one party’s interpretation”); *AMTAX Holdings 279, LLC v. Montalvo Assocs., LLC*, 2022 WL 2784456, at *4 (S.D. Cal. June 6, 2022) (“[t]he interpretation of the contract is a matter of law, one this Court is more than capable of handling without the assistance of a so-called expert witness testimony”) (citing *Nationwide Transport Fin. v. Cass Info. Sys., Inc.*, 523 F.3d 1051, 1058 (9th Cir. 2008)). “To claim that a person dressed as an expert can opine in court and seek to interpret the contracts at the core of the parties’ dispute would usurp the [fact-finder’s] role of resolving contract disputes and open the door to ‘legal experts’ frequenting the courtroom.” *Dolby Labs.*, 2019 WL 6327210, at *2 (emphasis added). This is exactly what Defendants are seeking to do with Mr. Kuhn’s proposed testimony.

Mr. Kuhn’s report leaves no doubt that his opinions are “merely attorney argument dressed in the guise of ‘custom and practice.’” *Dolby Labs.*, 2019 WL 6327210, at *2. As detailed above, his interpretation of Section 7 parrots Defendants’ unsuccessful legal arguments made on summary judgment and on appeal – and are equally erroneous because he also fails to reconcile Section 7

1 with Sections 0 and 10 of the Neo4j Sweden License. Kuhn even repackages Defendants’ failed
 2 argument that Neo4j Sweden could have used a different license form if it wanted to add the
 3 Commons Clause instead of simply adding it to the AGPLv3. *Compare* Kuhn Report, ¶¶ 76-89,
 4 96 *and* Dkt. No. 100 at 30:9-16.

5 Mr. Kuhn’s opinion on what is “customary” in the “open source community” and the
 6 correctness of removing “further restrictions” based thereon cannot override the Court’s exclusive
 7 province to determine the meaning of this term within the context of Section 7 and Section 10. *See*
 8 *Dolby Labs.*, 2019 WL 6327210, at *2 (excluding expert opinion on whether plaintiff’s
 9 “interpretation of the agreements at issue in this case is ‘commercially reasonable relative to
 10 customs and practices in the software industry’”). Likewise, Mr. Kuhn’s attempt to introduce his
 11 recollection of the drafting history of the GPLv3, as well hearsay from anonymous commenters
 12 and unnamed persons at the FSF does not override the Court’s exclusive province of interpreting
 13 the plain language of the provisions in Neo4j Sweden Software License – especially after
 14 Defendants *agreed* that the Court could do so. Mr. Kuhn conceded as much in an article he authored
 15 that criticized the Ninth Circuit’s affirmation of the Court’s interpretation of the Neo4j Sweden
 16 Software License: “*the intent of the original drafter of a license text is not dispositive over the*
 17 *text as it actually appears in the license.*” Ratnoff Decl., Ex. 7 at 4 (emphasis added).
 18 Accordingly, the opinions in Paragraphs 51-61, 71-75, 76-78, 79-89, 96-97, 109-110 and 112 in
 19 Mr. Kuhn’s report are inadmissible because they are rooted in and dependent on the *legal*
 20 *interpretation* of provisions in the Neo4j Sweden Software License.

21 C. Mr. Kuhn’s Opinions on Defendants’ State of Mind is Inadmissible

22 Based on the same impermissible interpretation of “further restrictions” and what he
 23 speculates is a wide-spread understanding in the open source community, Mr. Kuhn concludes that
 24 “Suhy acted in a reasonable, customary, good faith, and correct manner when removing CC from
 25 the Neo4j Sweden Software License and licensing the software under AGPLv3 to his customers
 26 and/or the public.” Kuhn Report, ¶ 110; *see also id.*, ¶ 75 (“In my opinion, when John Mark Suhy
 27 encountered the Neo4j Sweden Software License, his removal of the CC and redistribution of the
 28 Covered Work under pure AGPLv3 would be considered customary, permissible, and even widely

encouraged in the field of FOSS.”). Paragraphs 71-74, 76-78, 79-89 of Mr. Kuhn’s report seek to support that conclusion or offer related opinions on Suhy’s subjective intent in removing the Commons Clause from the Neo4j Sweden Software License.

It is well-settled law in the Ninth Circuit and this District that an expert may not opine or speculate regarding a party’s mental state, such as intent, motive, or knowledge. *See, e.g., Nationwide Transp. Fin. v. Cass Info Sys. Inc.*, 523 F.3d 1051, 1058 (9th Cir. 2008) (excluding, *inter alia*, sections of expert report that identify the parties’ actions as “wrongful” or “intentional” under the law); *SA Music LLC v. Apple, Inc.*, 592 F. Supp. 3d 869, 903 (N.D. Cal. 2022) (excluding expert opinion that concluded infringement was willful because experts cannot opine about a party’s mental state); *Tessera, Inc. v. Toshiba Corp.*, No. 15-CV-02543-BLF, 2019 WL 5395158, at *14 (N.D. Cal. Oct. 22, 2019) (striking portions of an expert report that plaintiff’s intent, motive, and state of mind because “[s]uch testimony is not appropriate expert testimony”; *Arista Networks, Inc. v. Cisco Sys. Inc.*, No. 16-CV-00923-BLF, 2018 WL 8949299, at *3 (N.D. Cal. June 15, 2018) (excluding expert testimony because “[e]xperts may not speculate about the state of mind . . . of others”). “Expert testimony as to intent, motive, or state of mind offers no more than drawing an inference from the facts of the case,” an exercise that the jury is “sufficiently capable” of doing without the help of expert testimony, and thus “permitting expert testimony on this subject . . . merely substitut[es] the expert’s judgment for the jury’s and would not be helpful to the jury.” *Oracle Am., Inc. v. Hewlett Packard Enter. Co.*, No. 16-CV-01393-JST, 2018 WL 6511146, at *3 (N.D. Cal. Dec. 11, 2018) (internal citation and quotations omitted).

Removing all doubt that Defendants are using Mr. Kuhn’s testimony for this improper purpose, Defendants admitted that Mr. Kuhn intends to testify that Suhy did not have the requisite intent to remove the Commons Clause in violation of the DMCA. *See Ratinoff Decl.*, Exh. 3 at p. 2. The Court should therefore strike Paragraphs 71-75, 76-78, 79-89, 97, 110, and 112 of Mr. Kuhn’s report and preclude him from testifying on Mr. Suhy’s state of mind in removing the Commons Clause from the Neo4j Sweden Software license.

D. Mr. Kuhn Improperly Speculates on Neo4j Sweden’s State of Mind

Mr. Kuhn also impermissibly seeks to opine on Neo4j Sweden’s state of mind at the time it

1 drafted the Neo4j Sweden Software License:

- 2 • “In my opinion, *it seems highly unlikely that the drafters of the Neo4j Sweden*
3 *Software License were unaware* of MongoDB’s approach to their license
4 change. As such, *drafters of the Neo4j Sweden Software License was almost*
5 *surely aware* that they had the options presented under ¶ 85 to produce a fully
6 modified AGPLv3 — sans the preamble and with no mention of FSF’s
7 trademark “GNU” — instead of the Neo4j Sweden Software License.” Kuhn
8 Report, ¶ 96 (emphasis added).
- 9 • “In my opinion, *this speaks to clear intentionally [sic] in choosing* a license
10 that included the Further Restrictions Clause.” *Id.* at ¶ 97 (emphasis added).
- 11 • In my opinion ... the Neo4j Sweden Software License *was structured and*
12 *promoted to give users the incorrect impression* that the [Commons Clause]
13 could not be removed from those terms — even though the Further Restrictions
14 Clause was present.” *Id.* (emphasis added).
- 15 • “In essence, *my opinion is that the Neo4j Sweden Software License attempted*
16 *to inappropriately capitalize* on the goodwill, power, and notoriety of the
17 “GNU” and ‘AGPLv3’ brands while also frightening commercial redistributors
18 with the addition of the [Commons Clause].” *Id.*, ¶ 98 (emphasis added).
- 19 • “*I firmly believe that Neo4j hoped that no one would notice the Further*
20 *Restrictions Clause remained included*, and thereby realize that [Commons
21 Clause] could, in fact, be removed and that commercial activity by downstream
22 redistributors could therefore continue under pure AGPLv3.” *Id.* (emphasis
added).
- “In my opinion, given the extensive publicity of MongoDB’s SS Public
License, FSF’s FAQ, and other widely understood licensing knowledge
regarding AGPLv3, *those who promulgated the Neo4j Sweden Software*
License were (or should have been) aware that they could construct their own
license, picking and choosing their preferred clauses from the AGPLv3 under
the rules outlined by the FSF in ¶ 85.” *Id.*, ¶ 111 (emphasis added).
- “*The authors of the Neo4j Sweden Software License should have expected*
that the Further Restrictions Clause would be used to remove CC from the
Neo4j Sweden Software License. *If they wanted to prevent that behavior, they*
should have (and could have, provided they had sufficient rights to all
contributions to be licensed) removed the Further Restrictions Clause.” *Id.*,
¶ 112 (emphasis added).

23 His proposed testimony on Neo4j Sweden’s motivation and intent in using the AGPLv3 as
24 a starting place, as well as its reasoning for adding the Commons Clause, is rife with gross
25 speculation. Mr. Kuhn does not cite a single internal email produced by Plaintiffs that could support
26 any of his assumptions or conclusions as to Plaintiffs’ motives or intent. The Supreme Court has
27 made clear that expert testimony cannot be based on “subjective belief or unsupported speculation.”
28 *Daubert*, 509 U.S. at 590, 597; *see also Arista Networks, Inc. v. Cisco Sys. Inc.*, 2018 WL 8949299,

at *3 (N.D. Cal. June 15, 2018) (excluding expert testimony because “[e]xperts may not speculate about the state of mind . . . of others”). Even if he had cited to any such emails, as discussed above, his proposed testimony about Neo4j Sweden’s intent, motive, and knowledge in drafting the Neo4j Sweden Software License remains inadmissible. *See Nationwide Transp.*, 523 F.3d at 1058; *SA Music*, 592 F. Supp. 3d at 903; *Tessera*, 2019 WL 5395158, at *14. Accordingly, the Court should strike Paragraphs 96-98 and 111-112 of Mr. Kuhn’s report and exclude him from testifying on Neo4j Sweden’s state of mind at the time it drafted the Neo4j Sweden Software License, and its alleged intent and motivation for adding the Commons Clause to the AGPLv3.

E. Mr. Kuhn’s Report Seeks to Introduce Inadmissible Hearsay Evidence

Mr. Kuhn’s opinions are largely based on inadmissible hearsay consisting of his internal discussions with unnamed “staff and Board members of the FSF” persons at the FSF, including “the GPLv3 drafters themselves” (Kuhn Report, ¶¶ 18, 23-24, 26, 52, 81), as well as comments from anonymous persons during that drafting process of the GPLv3 (*id.*, ¶¶ 44-48, 52-56, 58 and Exs. B-F). Mr. Kuhn also speculates on how the FSF viewed Neo4j Sweden using the Commons Clause with the AGPLv3. *See id.* at ¶¶ 81-85. Mr. Kuhn offers this testimony for the truth of the matters stated and no exception to the hearsay rule applies.

Expert opinions based on otherwise inadmissible hearsay are admissible *only* if the facts or data are “of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject.” Fed. R. Evid. 703. There is nothing in Mr. Kuhn’s report to suggest that hearsay statements from anonymous persons are the type of evidence that an industry expert or an expert in license agreements (of which he is neither) could reasonably rely on. None of the markups and comments from the GPLv3 were produced by Defendants during discovery. Ratinoff Decl., ¶ 12. Defendants also did not subpoena the FSF to authenticate these materials and to obtain its views on the AGPLv3. In fact, Mr. Suhy reached out to the FSF multiple times in the fall of 2020 where he attached this Court’s initial ruling in the GFI action that Sections 7 and 10 did not permit the removal of the Commons Clause. *Id.*, Exs. 7-9. Defendants did not produce any responses from the FSF. *Id.*, ¶ 13. Thus, it appears that FSF was not concerned about the Court’s

///

1 interpretation of Sections 7 and 10, or had any interest in expressing any contrary viewpoint.³

2 Defendants cannot now offer Mr. Kuhn as an expert witness to fix these admissibility issues
3 and substitute his personal views for those of the FSF after it chose to remain silent. *See United*
4 *States v. Shafi*, No. 15-CR-00582-WHO-1, 2018 WL 3159769, at *5 (N.D. Cal. June 28, 2018)
5 (“[a]n expert may not serve ‘simply as a conduit for introducing hearsay under the guise that the
6 testifying expert used the hearsay as the basis of his testimony’”) (internal citation omitted); *Marvel*
7 *Characters, Inc. v. Kirby*, 726 F.3d 119, 136 (2d Cir. 2013) (excluding expert testimony on
8 historical perspective concerning relationship between comic book publishers and freelance artist
9 whose artworks depicted iconic characters where experts' testimony “was by and large undergirded
10 by hearsay statements”).

11 **F. Mr. Kuhn is Acting as an Advocate Rather than an Independent Expert**

12 When assessing a proffer of expert testimony for both reliability and relevance under
13 Rule 702, courts must “be mindful of other applicable rules,” including Rule 403. *Daubert*, 509
14 U.S. at 595. Because “[e]xpert evidence can be both powerful and quite misleading because of the
15 difficulty in evaluating it[,] . . . the judge in weighing possible prejudice against probative force
16 under Rule 403 . . . exercises more control over experts than over lay witnesses.” *Id.* (citation and
17 internal quotation marks omitted). Courts must also be “mindful” of the other prongs of Rule 403,
18 including waste of time and confusion of the issues, which each independently may warrant
19 exclusion of expert testimony. Fed. R. Evid. 403. When an expert’s report is more accurately
20 characterized as lawyerly advocacy, exclusion is appropriate. *See, e.g., In re Rezulin Products Liab.*
21 *Litigation*, 309 F. Supp. 2d 531, 546 (S.D.N.Y. 2004) (excluding expert testimony where expert
22 was acting as an advocate rather than as an expert who could assist the trier of fact).

23 Allowing Mr. Kuhn to testify would confuse the jury and would be prejudicial to Plaintiffs

24
25 ³ Plaintiffs are not conceding that the FSF’s views on the AGPLv3 would be admissible or relevant
26 for purposes of interpreting the Neo4j Sweden Software License. However, the FSF’s silence is
27 indicative of Mr. Kuhn having contrary views to the FSF and is seeking a forum to express his
28 personal views on open source licensing. As discussed below, his personal views not amount to
admissible expert testimony.

1 because Mr. Kuhn is not acting an impartial expert witness. Rather, he is a self-described “FOSS
 2 activist” and is acting as advocate for Defendants. *See* Kuhn Report, ¶¶ 34, 74. Mr. Kuhn is
 3 personally invested in this case as reflected by his March 30, 2022 article published on the SFC’s
 4 website titled, “An Erroneous Preliminary Injunction Granted in Neo4j v. PureThink” and with the
 5 byline, “Bad Early Court Decision for AGPLv3 Has Not Yet Been Appealed.” Ratinoff Decl.,
 6 Ex. 10. Mr. Kuhn first touts that “We at Software Freedom Conservancy proudly and vigilantly
 7 watch out for your rights under copyleft licenses such as the Affero GPLv3.” *Id.* Mr. Kuhn then
 8 warns readers “we’re not a law firm, our lawyers are not your lawyers, and this is not legal advice.”
 9 *Id.* Reaffirming he is unqualified to provide an expert opinion on contractual provisions, Mr. Kuhn
 10 then provides an inaccurate assessment of the case and the impact of the Ninth Circuit’s ruling. *Id.*
 11 He eventually concludes from an admitted layperson’s view “that Suhy’s removal of the ‘Commons
 12 Clause’ was fully permitted by the terms of the AGPLv3, and that Neo4j gave him that permission
 13 in that license.” *Id.* Mr. Kuhn also offered similar unqualified views on how to interpret contracts
 14 to the author of a news article published days later, entitled “Court erred in Neo4j source license
 15 ruling, says Software Freedom Conservancy.” *Id.*, Ex. 11.

16 Finally, Defendants and Mr. Kuhn are proliferating his criticisms of this Court’s rulings in
 17 an apparent effort to unduly influence witnesses and jurors. Shortly after Mr. Kuhn published his
 18 opinion piece, Suhy sent a link to the article to Mike Dunn at the IRS. Ratinoff Decl., Ex. 12. On
 19 February 9, 2023, the SFC posted a “press release” about Mr. Kuhn’s report (replete with
 20 mischaracterizations about this case) on its website, “SFC’s Policy Fellow Files Expert Report in
 21 Neo4j v. PureThink.” *Id.*, Ex. 13. This article also includes a link to his expert report. *Id.* Since
 22 his report was not publicly filed, it seems that Defendants and Mr. Kuhn are hoping to sway
 23 potential jurors in the Silicon Valley, which are likely to read tech-centric publications. They
 24 appear to have already succeeded as evidenced by a recent article published by a technology news
 25 outlet, which also includes a link to his report. *Id.*, Ex. 14. The Court should thus exclude
 26 Mr. Kuhn’s testimony because he is acting as an advocate for Defendants, rather than as an expert
 27 who could assist the jury on the remaining issues here.

28 ///

1 **G. Defendants Cannot Use Mr. Kuhn’s Opinion to Bolster a FRCP 59(e) Motion**

2 Lastly, there is no basis for Defendants to offer Mr. Kuhn’s testimony to justify filing a
3 motion pursuant to Rule 59(e). As detailed above, the Court already decided on summary judgment
4 the issues on which he opines. As recognized by this Court, “[a]rguments that a court was in error
5 on the issues it considered should be directed to the court of appeals.” *White v. California*, No.
6 5:15-CV-03521-EJD, 2017 WL 4642571, at *1 (N.D. Cal. Oct. 17, 2017) (internal quotations and
7 citation omitted). Since Defendants did exactly that—and lost—there is nothing for this Court to
8 reconsider under Rule 59(e).

9 Even if this were not the case, Defendants still cannot meet the requirements of Rule 59(e).
10 A Rule 59(e) motion “may not be used to relitigate old matters, or to raise arguments or present
11 evidence that could have been raised prior to the entry of judgment.” *Exxon Shipping Co. v. Baker*,
12 554 U.S. 471, 486 fn 5 (2008) (internal quotations and citations omitted); *accord White*, 2017 WL
13 4642571, at *1 (citing same). The rule’s purpose “is **not** to give an unhappy litigant one additional
14 chance to sway the judge.” *Garcia v. Biter*, 195 F. Supp. 3d 1131, 1133 (E.D. Cal. 2016), (internal
15 quotation omitted; emphasis preserved); *accord White*, 2017 WL 4642571, at *1 (citing same);
16 *Backlund v. Barnhart*, 778 F.2d 1386, 1388 (9th Cir. 1985) (affirming denial of Rule 59(e) motion
17 which “presented no arguments that had not already been raised in opposition to summary
18 judgment”). As detailed above, Mr. Kuhn’s otherwise inadmissible opinions recycle arguments
19 that this Court **and** the Ninth Circuit already considered.

20 A Rule 59(e) motion also “may not be used to raise arguments or present evidence for the
21 first time when they could reasonably have been raised earlier in the litigation.” *Kona Enters., Inc.*
22 *v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000). Mr. Kuhn’s alleged personal knowledge of
23 the drafting of the GPLv3 and the drafting comments he relies on are not new evidence. All were
24 available when Defendants opposed Plaintiff’s summary judgment motion filed in January 2021.
25 As confirmed by Mr. Kuhn, “the FSF has also continuously made available ... [the] discussion
26 drafts, license texts, and rationale documents” from 2016 to 2017 that he relies on “in an easily
27 accessible and browsable format on the website <https://gplv3.fsf.org> — from their publication dates
28 until present day.” Kuhn Report, ¶¶ 44-50. As recognized by the Court, however, Defendants

chose to argue the plain meaning of the language in the Neo4j Sweden Software License as a matter of law. *See* Dkt. No. 118 at 24:10-15. Consequently, “[t]his new way to frame the evidence cannot be considered under Rule 59(e).” *White*, 2017 WL 4642571, at *1; *accord Interior Glass Sys., Inc. v. United States*, No. 5:13-CV-05563-EJD, 2017 WL 1153012, at *3 (N.D. Cal. Mar. 28, 2017) (recognizing that a party “cannot prevail under Rule 59(e) with new arguments or evidence it could have submitted previously, but did not”).

V. CONCLUSION

For the reasons discussed above, the Court should exclude Mr. Kuhn’s expert report, testimony, and opinions in their entirety under Rules 702 and 703 and *Daubert* because they are unreliable, irrelevant and not within the proper scope of expert testimony. The Court should also exclude them under Rule 403 because they will only confuse the issues and will waste the time and resources of the Court, the jury, and the parties.

Dated: April 20, 2023

HOPKINS & CARLEY
A Law Corporation

By: /s/ Jeffrey M. Ratinoff

Jeffrey M. Ratinoff
Attorneys for Plaintiffs and Counter-
Defendants NEO4J, INC. and NEO4J
SWEDEN AB