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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

ORACLE USA, INC., et al., Plaintiffs, v. SAP AG, et al., Defendants.	Case No. 07-CV-1658 PJH (EDL) **DEFENDANTS' OBJECTIONS TO PLAINTIFFS' EVIDENCE FILED IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING PLAINTIFFS' HYPOTHETICAL [FAIR MARKET VALUE] LICENSE DAMAGES CLAIM**

Defendants SAP AG, SAP America, Inc. and TomorrowNow, Inc. ("Defendants") object on the grounds set forth below to the declarations and exhibits attached thereto submitted by Plaintiffs Oracle USA, Inc., Oracle International Corporation, Oracle EMEA Limited and Siebel Systems, Inc. ("Plaintiffs") in support of Plaintiffs' Opposition to Defendants' Motion for Partial Summary Judgment Regarding Plaintiffs' Hypothetical [Fair Market Value] License Damages Claim ("Opposition").

Meyer Declaration: The Declaration of Paul K. Meyer and all exhibits attached thereto submitted in support of Plaintiffs' Opposition ("Meyer Declaration" or "Meyer Decl.") are entirely irrelevant to Defendants' Motion for Partial Summary Judgment Regarding Plaintiffs' Hypothetical License Damages Claim ("Motion") and for this reason should be disregarded. *See* Fed. R. Evid. 401, 402. The Meyer Declaration purports to describe how Plaintiffs' damages expert would calculate and value Plaintiffs' claimed actual damages in the form of a hypothetical lost license. The exhibits attached to the Meyer Declaration are examples of the evidence Mr. Meyer declares he would take into account when performing this calculation. However, as explained in Defendants' Motion and Reply to Plaintiffs' Opposition to Defendants' Motion for Partial Summary Judgment Regarding Plaintiffs' Hypothetical License Damages Claim ("Reply"), evidence regarding the amount of a hypothetical license is irrelevant to Defendants' Motion, which attacks not the alleged price of a hypothetical license, but its very availability in light of Plaintiffs' inability to prove that, but for the alleged infringement, the parties would have agreed to a license. *See* Motion at § III(B); Reply at §§ II, III(D), filed concurrently.

Additionally, Defendants object to the Meyer Declaration as an improper and incomplete expert opinion, which is not based on "sufficient facts or data" as required by the Federal Rules of Evidence. Fed. R. Evid. 702. As Mr. Meyer has declared, his analysis of Plaintiffs' damages case is "on-going," and Mr. Meyer has admittedly "not yet reached conclusions, nor [has he] reviewed all of the documentation and information" at issue in the case. Meyer Decl. ¶ 6.

Defendants also object to the Meyer Declaration to the extent that it relies upon evidence of lost licensing opportunities in its calculations of a hypothetical lost license. *See, e.g.*, Meyer Decl. ¶ 31 (noting that Meyer would consider in his calculations "the value to Oracle of the

copyrighted materials in generating sales of its other products."). In her recent Order Granting Defendants' Motion for Preclusion of Certain Damages Evidence Pursuant to Federal Rules of Civil Procedure 37(c)(1) and 16(f), Magistrate Judge Laporte found that Plaintiffs had untimely disclosed evidence of lost licensing opportunities and precluded Plaintiffs from basing a claim of lost profits on such evidence. *See* D.I. 482 at 1-2, 17-18. Should Plaintiffs ultimately be permitted to present evidence regarding the price of a hypothetical license, any attempt to rely on this very same evidence would be inconsistent with Magistrate Judge Laporte's Order.

The foregoing objections to the Meyer Declaration and attached exhibits are made insofar as the declaration and exhibits are offered in support of Plaintiffs' Opposition. Defendants reserve the right to object on additional grounds to any of the statements made in the Meyer Declaration or to any of the exhibits attached thereto, should that evidence be offered by Plaintiffs for any other purpose in this litigation.

Ellison Declaration: The Declaration of Larry Ellison in support of Plaintiffs' Opposition to Defendants' Motion for Partial Summary Judgment Regarding Plaintiffs' Hypothetical License Damages Claim ("Ellison Declaration" or "Ellison Decl.") is also objectionable. Defendants object to the Ellison Declaration to the extent that it describes how Mr. Ellison would calculate a hypothetical license for copyright damages purposes. *See, e.g.*, Ellison Decl. ¶ 5 ("When presented with the final parameters of licenses . . . from Oracle's damages experts, I will analyze those parameters rigorously before opining on what I believe the fair value would be."); *see also id.* at ¶ 4. Any evidence regarding the manner in which Mr. Ellison would calculate a hypothetical lost license for damages purposes is irrelevant, as the instant motion only concerns whether Plaintiffs have met their burden to prove that the parties would have agreed to this license in the first place. *See* Fed. R. Evid. 401, 402; Motion at § III(B); Reply at §§ II, III(B)(3).

Moreover, to the extent that the Ellison Declaration directly contradicts Mr. Ellison's previous deposition testimony, it should be disregarded as a "sham" declaration. *See* Ellison Decl. ¶¶ 4, 6. A "party cannot submit a declaration flatly contradicting its prior deposition . . . in an attempt to 'create' an issue of fact and avoid summary judgment." *Persistence Software, Inc. v.*

Object People, Inc., 128 F. Supp. 2d 623, 628 (N.D. Cal. 2000) (Hamilton J.) (citing *Kennedy v. Allied Mutual Ins. Co.*, 952 F.2d 262, 266-67 (9th Cir. 1991)), *vacated on other grounds*, 200 F.R.D. 626 (N.D. Cal. 2001) (Hamilton, J.); *see also* Reply at § III(B)(3). For this reason, Mr. Ellison's declaration that the license value Oracle would have demanded from SAP would be "significantly lower" than his estimate during his deposition, as well as Mr. Ellison's declaration contradicting his deposition testimony that Oracle would have demanded a "prohibitively" expensive price from SAP, should both be disregarded as "sham" attempts to manufacture an issue of fact. *See* Ellison Decl. ¶¶ 4, 6; Declaration of Tharan Gregory Lanier in Support of Defendants' Motion For Partial Summary Judgment Regarding Plaintiffs' Hypothetical License Damages Claim ("Lanier Decl.") ¶ 3, Ex. C (Ellison Depo.) at 74:12-75:9, 78:8-11, 80:3-24.

Defendants also object to the Ellison Declaration to the extent that it purports to describe Oracle's database reseller agreement with SAP or SAP's supposed motives in the database market. *See* Ellison Decl. ¶ 7. First, this evidence lacks foundation, as no evidence was introduced to establish that Mr. Ellison has or had personal knowledge of the negotiation and terms of the database reseller agreement or SAP's supposed plan to undermine Oracle's market share in the database market. *See* Fed. R. Evid. 602. Second, Defendants object to the extent that the Ellison Declaration violates the best evidence rule. *See* Fed. R. Evid. 1002. Specifically, the declaration improperly seeks to prove the contents of the database reseller agreement. *See* Ellison Decl. ¶ 7 (purporting to speak to the "purpose and allowed uses under" the agreement). Third, to the extent that the Ellison Deposition references the terms of the database reseller agreement, Defendants also object to those statements as hearsay, as they are out of court statements introduced to prove the truth of the matter asserted. *See* Fed. R. Evid. 801, 802.

Catz Declaration: Defendants also object to the Declaration of Safra Catz in Support of Plaintiffs' Opposition to Defendants' Motion for Partial Summary Judgment Regarding Plaintiffs' Hypothetical License Damages Claim ("Catz Declaration" or "Catz Decl.") to the extent that it describes how Ms. Catz would calculate a hypothetical license for copyright damages purposes. *See, e.g.*, Catz Decl. ¶ 4 ("The factual assumptions I made base on the broad questions asked were in fact different from what I now understand to be the necessary inquiry, in determining a

hypothetical license *value* . . . .") (emphasis added); *see also id.* at ¶ 5. Any evidence regarding the manner in which Ms. Catz would calculate a hypothetical lost license for damages purposes is irrelevant, as the instant motion only concerns whether Plaintiffs have met their burden to prove that the parties would have agreed to this license in the first place. *See* Fed. R. Evid. 401, 402; Motion at § III(B); Reply at §§ II, III(B)(3).

Moreover, to the extent that the Catz Declaration directly contradicts Ms. Catz's previous deposition testimony, it should be disregarded as a "sham" declaration. A "party cannot submit a declaration flatly contradicting its prior deposition . . . in an attempt to 'create' an issue of fact and avoid summary judgment." *Persistence Software*, 128 F. Supp. 2d at 628 (Hamilton J.); *see also* Reply at § III(B)(3). For this reason, Ms. Catz's declaration that the license value Oracle would have demanded from SAP would be "significantly lower" than the billions she estimated during her deposition should be disregarded as a "sham" attempt to manufacture an issue of fact. *See* Catz Decl. ¶ 4; Lanier Decl. ¶ 1, Ex. A (Catz Depo.) at 159:16-23.

For the forgoing reasons, the documents described above should be excluded from evidence.

Dated: October 7, 2009

JONES DAY

By: /s/ Tharan Gregory Lanier
Tharan Gregory Lanier

Counsel for Defendants
SAP AG, SAP AMERICA, INC., and
TOMORROWNOW, INC.