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18 TOMORROWNOW, INC.

19 UNITED STATES DISTRICT COURT
20 NORTHERN DISTRICT OF CALIFORNIA
21 OAKLAND DIVISION

22 ORACLE USA, INC., et al.,
23 Plaintiffs,
24 v.
25 SAP AG, et al.,
26 Defendants.

Case No. 07-CV-1658 PJH (EDL)

**DEFENDANTS' OBJECTIONS TO
EVIDENCE FILED IN SUPPORT OF
PLAINTIFFS' MOTION FOR
PARTIAL SUMMARY JUDGMENT**

Date: May 5, 2010, Time: 9:00 a.m.
Courtroom: 3, 3rd Floor
Judge: Hon. Phyllis J. Hamilton

1 Defendants SAP AG, SAP America, Inc., and TomorrowNow, Inc. (“Defendants”) object
 2 on the grounds set forth below to the following evidence, declarations, and exhibits submitted by
 3 Plaintiffs Oracle USA, Inc., Oracle International Corporation (“OIC”), Oracle EMEA Limited,
 4 and Siebel Systems, Inc. (together “Plaintiffs”) in support of Plaintiffs’ Motion for Partial
 5 Summary Judgment (“Plaintiffs’ Motion”) and attached thereto:

- 6 • **D.I. 650:** Declaration of Norm Ackermann in Support of Plaintiffs’ Motion for
 7 Partial Summary Judgment (“Ackermann Declaration” or “Ackermann Decl.”) ¶¶
 8 17-26 and Appendix B;
- 9 • **D.I. 651:** Declaration of Mark Fallon in Support of Plaintiffs’ Motion for Partial
 10 Summary Judgment (“Fallon Declaration” or “Fallon Decl.”) ¶¶ 1-12;
- 11 • **D.I. 652:** Declaration of Uwe Koehler in Support of Plaintiffs’ Motion for Partial
 12 Summary Judgment (“Koehler Declaration” or “Koehler Decl.”) ¶ 4;
- 13 • **D.I. 653:** Declaration of Brady Mickelsen in Support of Plaintiffs’ Motion for
 14 Partial Summary Judgment (“Mickelsen Declaration” or “Mickelsen Decl.”) ¶¶ 2-3;
- 15 • **D.I. 657-27:** Declaration of Zachary J. Alinder in Support of Plaintiffs’ Motion for
 16 Partial Summary Judgment (“Alinder Declaration” or “Alinder Decl.”), Exhibit 27
 17 at 21:1-2, 34:3-12, 49:23-24, 50:3-51:6, 52:16-53:5, 55:16-57:4, 62:11-22, 73:1-2;
- 18 • **D.I. 657-103:** Alinder Declaration, Exhibit 102;
- 19 • **D.I. 649:** Plaintiffs’ Motion at 9;
- 20 • **D.I. 657-117, 657-118:** Alinder Declaration, Exhibits 116-117; and
- 21 • All evidence of pre-March 1, 2005 conduct alleged to constitute copyright
 22 infringement.

23 **A. Ackermann Declaration ¶¶ 17-26 and Appendix B Should Be Excluded as**
 24 **Improper Lay Opinion that Cannot Be Introduced as Expert Opinion.**

25 Defendants object to paragraphs 17-26 and Appendix B of the Ackermann Declaration as
 26 constituting improper lay opinion that cannot otherwise be introduced as expert testimony
 27 because Plaintiffs did not properly disclose Ackermann as an expert in this case.

28 Defendants object to these portions of the Ackermann Declaration to the extent that they

1 constitute improper and inadmissible lay opinion “based on scientific, technical, or other
 2 specialized knowledge.” Fed. R. Evid. 701. Specifically, in paragraphs 17 through 26,
 3 Ackermann describes having engaged in technical analysis by conducting a code comparison of
 4 computer files and then opining on his results. *See* D.I. 650 (Ackermann Decl.) ¶ 17.

5 Moreover, these portions of the Ackermann Declaration cannot be admitted as expert
 6 testimony under Rule 702 of the Federal Rules of Evidence (“Rule 702”), because Plaintiffs did
 7 not properly disclose Ackermann as an expert witness as required by Rule 26(a)(2)(A) of the
 8 Federal Rules of Civil Procedure (“Rule 26(a)(2)(A)”). *See* Declaration of Tharan Gregory
 9 Lanier in Support of Defendants’ Cross Motion for Partial Summary Judgment and Opposition to
 10 Plaintiffs’ Motion for Partial Summary Judgment (“Lanier Decl.”) ¶ 12, Ex. 12 (Plaintiffs’
 11 Supplemental Initial Expert Disclosures (“Expert Disclosures”)) at 1-3. As a result, Rule 37(c)(1)
 12 of the Federal Rules of Civil Procedure (“Rule 37(c)(1)”) prohibits Plaintiffs from using
 13 Ackermann to supply expert evidence on a motion. Fed. R. Civ. P. 37(c)(1); *see also Hanger*
 14 *Prosthetics & Orthotics, Inc. v. Capstone Orthopedic, Inc.*, No. 2:06-cv-2879-GEB-KJM, 2008
 15 U.S. Dist. LEXIS 91373, at *4-14 (E.D. Cal. June 13, 2008) (excluding witness under Rule 37 for
 16 failure to timely disclose as an expert as required by Rule 26 where witness’ testimony regarding
 17 results of computer forensic analysis constituted expert testimony, not lay opinion); *Laser Design*
 18 *Int’l, LLC v. BJ Crystal, Inc.*, No. C 03-1179 JSW, 2007 U.S. Dist. LEXIS 21329, at *10-20 (N.D.
 19 Cal. Mar. 7, 2007) (refusing to consider on summary judgment a declaration containing improper
 20 lay opinion requiring “scientific, technical, or other specialized knowledge” when witness was
 21 not disclosed as an expert as required by Rule 26).

22 **B. Fallon Declaration ¶¶ 1-12 Should Be Excluded Because Fallon Was Not**
 23 **Timely Disclosed as Required under Rule 26.**

24 Defendants object to the Fallon Declaration in its entirety because Plaintiffs did not timely
 25 disclose Fallon as an “individual likely to have discoverable information,” as required by Rule
 26 26(a)(1)(A)(i). *See* Lanier Decl. ¶ 11, Ex. 11 (Plaintiffs’ Third Supplemental and Amended
 27 Initial Disclosures) at 1-8. Plaintiffs are barred by Rule 37(c)(1) from using Fallon to supply
 28 evidence on a motion. Fed. R. Civ. P. 37(c)(1); *see also, e.g., Raymonde v. Mirant Cal., LLC*, No.

1 C 08-03733 WHA, 2010 U.S. Dist. LEXIS 5362, at *16-17 n.4 (N.D. Cal. Jan. 25, 2010) (striking
2 corroborating declaration of plaintiff's attorney because he failed to disclose himself as a witness
3 as required by Rule 26(a)); *Cambridge Elecs. Corp. v. MGA Elecs., Inc.*, 227 F.R.D. 313, 323-24
4 (C.D. Cal. 2004) (refusing to consider declarations submitted on summary judgment because,
5 *inter alia*, the witnesses were not disclosed as required under Rule 26(a)); *Gastelum v. Abbott*
6 *Labs.*, No. CV 05-645 PHX NVW, 2006 WL 2456199, at *2-3 (D. Ariz. Aug. 22, 2006) (holding
7 that exhibits consisting of interviews with undisclosed witnesses were inadmissible and would not
8 be considered on summary judgment).

9 Plaintiffs' eleventh-hour attempt to remedy their non-disclosure does not suffice to render
10 the Fallon Declaration admissible. On March 30, 2010, Plaintiffs belatedly disclosed Fallon as a
11 potential witness, nearly four months after the December 4, 2009 close of fact discovery and
12 deadline to supplement and correct all disclosures. *See* Lanier Decl. ¶ 12, Ex. 12 (3/30/10 Letter
13 from A. Donnelly to J. McDonell); *see also* D.I. 325 (6/11/2009 Order) at 1. Plaintiffs did not
14 attempt to amend their disclosures at the time they attached and submitted the declaration of this
15 undisclosed witness to their Motion, but rather, only sought to amend over three weeks later, and
16 only after Defendants put Plaintiffs on notice of the issue by informing them of Defendants'
17 intent to file Plaintiffs' Initial Disclosures in support of Defendants' Cross Motion for Partial
18 Summary Judgment and Opposition to Plaintiffs' Motion. Such a clear contravention of this
19 Court's Scheduling Order warrants exclusion of the Fallon Declaration under Rules 16(f)(1)(c)
20 and 37(b)(2)(A)(ii) of the Federal Rules of Civil Procedure. *See also* *Gastelum*, 2006 WL
21 2456199, at *2 (affirming that an attempt to supplement initial disclosures in violation of a case
22 management order constitutes a failure to timely disclose under Rule 26 and warrants sanctions
23 under Rule 37).

24 C. **Koehler Declaration ¶ 4 Should Be Excluded as Improper Lay Opinion that**
25 **Cannot Be Introduced as Expert Opinion.**

26 Defendants object to paragraph 4 of the Koehler Declaration as constituting improper lay
27 opinion that cannot otherwise be introduced as expert testimony because Plaintiffs did not
28 properly disclose Koehler as an expert in this case.

1 Defendants object to paragraph 4 of the Koehler Declaration as constituting improper lay
 2 opinion “based on scientific, technical, or other specialized knowledge.” Fed. R. Evid. 701;
 3 *Hanger Prosthetics*, 2008 U.S. Dist. LEXIS 91373, at *4-8; *Laser Design Int’l, LLC*, 2007 U.S.
 4 Dist. LEXIS 21329, at *10-13. In his declaration, Koehler purports to examine reverse proxy log
 5 files and opines on his interpretation of those logs files, as well as on what those files reveal about
 6 TN’s alleged access to Plaintiffs’ website, thereby engaging in inappropriate technical analysis.
 7 See D.I. 652 (Koehler Decl.) ¶ 4. Indeed, when Defendants’ counsel asked Koehler at his
 8 deposition for his analysis of those same files, Plaintiffs’ counsel objected that the question called
 9 for expert testimony. See, e.g., Lanier Decl. ¶ 20, Ex. 20 (12/5/08 Koehler Tr.) 56:2-16; 60:20-
 10 61:3.

11 Furthermore, this portion of the Koehler Declaration cannot be admitted as expert
 12 testimony under Rule 702. First, Plaintiffs did not properly disclose Koehler as an expert as
 13 required by Rule 26(a)(2)(A). See Lanier Decl. ¶ 12, Ex. 12 (Expert Disclosures) at 1-3. As a
 14 result, Rule 37(c)(1) prohibits Plaintiffs from using Koehler to supply expert evidence on a
 15 motion. Fed. R. Civ. P. 37(c)(1); see also *Hanger Prosthetics*, 2008 U.S. Dist. LEXIS 91373, at
 16 *8-14; *Laser Design Int’l, LLC*, 2007 U.S. Dist. LEXIS 21329, at *13-20. Second, Koehler
 17 himself admitted that his conclusions regarding the log files were not the product of sufficiently
 18 reliable analysis (of the type admissible as expert testimony under Rule 702) when he stated at his
 19 deposition that he was not an expert and that his conclusion regarding the significance of the log
 20 files are “just what I believe.” Lanier Decl. ¶ 20, Ex. 20 (12/5/08 Koehler Tr.) 56:2-23.

21 **D. Mickelsen Declaration ¶¶ 2-3 Should Be Excluded Because Mickelsen Was**
 22 **Not Timely Disclosed as Required under Rule 26.**

23 Defendants object to paragraphs 2 through 3 of the Mickelsen Declaration because
 24 Plaintiffs did not timely disclose Mickelsen as an “individual likely to have discoverable
 25 information,” as required by Rule 26(a)(1)(A)(i). See Lanier Decl. ¶ 11, Ex. 11 (Plaintiffs’ Third
 26 Supplemental and Amended Initial Disclosures) at 1-8. Plaintiffs are barred by Rule 37(c)(1)
 27 from using Mickelsen to supply evidence on a motion. Fed. R. Civ. P. 37(c)(1); see also, e.g.,
 28 *Raymonde*, 2010 U.S. Dist. LEXIS 5362, at *16-17 n.4; *Cambridge Elecs. Corp.*, 227 F.R.D. at

1 323-24; *Gastelum*, 2006 WL 2456199, at *2-3.

2 Plaintiffs' late attempt to remedy their non-disclosure will not suffice to render
3 Mickelsen's declaration admissible. Just as with Fallon, Plaintiffs belatedly disclosed Mickelsen
4 as a potential witness on March 30, 2010. *See* Lanier Decl. ¶ 13, Ex. 13 (3/30/10 Letter); *see also*
5 D.I. 325 (6/11/2009 Order) at 1. Again, Plaintiffs did not attempt to amend their disclosures at
6 the time they attached and submitted the declaration of this undisclosed witness for consideration
7 with their Motion; rather they did so only after Defendants' put them on notice of the issue. Their
8 clear contravention of the Court's Scheduling Order warrants exclusion of the Mickelsen
9 Declaration under Rules 16(f)(1)(c) and 37(b)(2)(A)(ii) of the Federal Rules of Civil Procedure.
10 *See also* *Gastelum*, 2006 WL 2456199, at *2.

11 E. **Exhibit 27 to the Alinder Declaration at 21:1-2, 34:3-12, 49:23-24, 50:3-51:6,**
12 **52:16-53:5, 55:16-57:4, 59:2-12, 62:11-22, and 73:1-2 Should Be Excluded as**
13 **Lacking Personal Knowledge and Constituting Improper Lay Opinion.**

14 Defendants object to the deposition testimony of former TN employee John Ritchie found
15 at pages 21:1-2, 34:3-12, 49:23-24, 50:3-51:6, 53:4-5, and 73:1-2 of Exhibit 27 to the Alinder
16 Declaration as lacking foundation because Ritchie does not have personal knowledge regarding
17 any alleged crash or impairment of Plaintiffs' servers. *See* Fed. R. Evid. 602; *Boyd v. City of*
18 *Oakland*, 458 F. Supp. 2d 1015, 1031 (N.D. Cal. 2006) (“[U]nder FRE 602, a witness must have
19 personal knowledge of the subject matter attested to . . . [the declarant] was admittedly not
20 present at the alleged event and therefore has no personal knowledge of when it ended. Her
21 assertion is thus inadmissible [on summary judgment] under FRE 602.”); *see also* Lanier Decl. ¶
22 27, Ex. 27 (12/2/09 Ritchie Tr.) at 166:19-167:11.

23 Defendants also object to the Ritchie testimony found at pages 21:1-2, 34:3-12, 49:23-24,
24 50:3-51:6, 52:16-53:5, 55:16-57:4, 62:11-22, 73:1-2 of Exhibit 27 to the Alinder Declaration as
25 constituting improper lay opinion “based on scientific, technical, or other specialized
26 knowledge.” Fed. R. Evid. 701; *Hanger Prosthetics*, 2008 U.S. Dist. LEXIS 91373, at *4-8;
27 *Laser Design Int'l, LLC*, 2007 U.S. Dist. LEXIS 21329, at *10-13. In the identified portions,
28 Ritchie testified that he “looked at” and evaluated Titan's server logs, and opined on his
interpretation of those logs files. *See* D.I. 657-27 (Alinder Decl.) ¶ 3, Ex. 27 at 50:10-51:6.

1 Moreover, he purported to testify as to what he believed, “in [his] mind” and “based on his
2 experience,” those log files and his connectivity to Plaintiffs’ website demonstrated about the
3 alleged effect of TN’s access to Plaintiffs’ website. *See id.* at 34:3-12, 49:23-24, 50:3-51:6,
4 52:16-53:5, 55:16-57:4, 62:11-22, 73:1-2. Thus, Ritchie’s opinion testimony is based on an
5 inappropriate “technical” analysis and should be excluded under Fed. R. Evid. 701.

6 **F. Exhibit 102 to the Alinder Declaration and Portions of Plaintiffs’ Motion at 9**
7 **Should Be Excluded as Inaccurate Summaries of Testimony and Unfairly**
8 **Prejudicial.**

9 Defendants object that Exhibit 102 to the Alinder Declaration, as well as all references to
10 its content on page 9 of Plaintiffs’ Motion, is an inaccurate summary of evidence and is thus
11 inadmissible. *See Davis & Cox v. Summa Corp.*, 751 F.2d 1507, 1516 (9th Cir. 1985),
12 *superseded by statute on other grounds* (affirming the trial court’s exclusion of one of
13 defendant’s compilations that “was not a summary under Rule 1006 because it did not ‘fairly
14 represent’ the underlying documents.”). Plaintiffs assert that Exhibit 102 summarizes
15 Defendants’ interrogatory responses, parts of the December 4, 2009 Deposition of William
16 Thomas, and TN documents produced at TN-OR01361328 and TN-OR01361337. Based on
17 these documents and this testimony, Plaintiffs enumerate certain alleged installations of Oracle
18 database server software on TN’s network and describe those installations as “functional.”
19 However, this term is not used in the underlying data purportedly being summarized, for good
20 reason. As explained by Defendants in their responses to Interrogatories 122 and 124, some of
21 these instances “were not accessed by TomorrowNow employees as part of TomorrowNow’s
22 servicing of its customers.” *See* D.I. 657-102 (Alinder Decl.) ¶ 67, Ex. 101 (Defendants’ First
23 Supplemental Responses and Objections to Plaintiffs’ Fifth Set of Interrogs. to Defendant
24 TomorrowNow, Inc. and Fourth Set of Interrogs. to Defendants SAP AG and SAP America, Inc.)
25 at 11-12, 26-27. Furthermore, former TN employee John Baugh specifically testified that at least
26 one of these instances was never completely installed. *See* Lanier Decl. ¶ 16, Ex. 16 (12/3/09
Baugh Tr.) at 186:7-22.

27 In addition, Exhibit 102 and references in Plaintiffs’ Motion thereto are unfairly
28 prejudicial under Rule 403 of the Federal Rules of Evidence. To imply in Exhibit 102 and in

1 Plaintiffs' Motion that these installations were "functional" is misleading and mischaracterizes
2 the facts outlined in Defendants' discovery responses and in deposition testimony. Because the
3 term "functional" does not exist in the data Plaintiffs claim to summarize and is not defined by
4 Plaintiffs, this mischaracterization allows Plaintiffs to argue and imply that there were more
5 database installations on TN's network being used by TN employees than the underlying
6 evidence supports, rendering these assertions in the exhibit and in Plaintiffs' Motion inadmissible
7 as unfairly prejudicial.

8 **G. Exhibit 116 and 117 to the Alinder Declaration Should Be Excluded As**
9 **Inadmissible Hearsay and Irrelevant.**

10 Defendants object that Exhibits 116 and 117 to the Alinder Declaration are inadmissible
11 hearsay that cannot support summary judgment. *See* Fed. R. Evid. 801(c); Fed. R. Evid. 802; *In*
12 *re Cygnus Telecomms. Tech., LLC, Patent Litig.*, No. C-04-04247 RMW, 2007 WL 2261543, at
13 *3 n.6 (N.D. Cal. Aug. 6, 2007) (finding an article inadmissible hearsay that could not support a
14 party's position on summary judgment). Exhibit 116 is an excerpt from Schedule 34.SU of the
15 February 24, 2010 Supplemental Expert Report of Paul K. Meyer, and Exhibit 117 consists
16 entirely of statements from that schedule. Both exhibits purport to identify customers and the
17 amounts of support revenue allegedly lost to TN; in their Motion, Plaintiffs reference both
18 exhibits as evidencing the customers and corresponding revenues Plaintiffs allege they lost to TN.
19 D.I. 649 (Plaintiffs' Motion) at 23. Thus, both Exhibits 116 and 117 constitute out-of-court
20 statements being introduced by Plaintiffs to prove the truth of the matter asserted, and both are
21 inadmissible hearsay. *See* Fed. R. Evid. 801(c); Fed. R. Evid. 802.

22 Exhibits 116 and 117 are further irrelevant in that they are cited by Plaintiffs to support a
23 claim of "loss" under the Computer Fraud and Abuse Act (CFAA). 18 U.S.C. § 1030(g). Under
24 the CFAA, "loss" is defined as "any reasonable cost to any victim, including the cost of
25 responding to an offense, conducting a damage assessment, and restoring the data, program,
26 system, or information to its condition prior to the offense, *and any revenue lost, cost incurred, or*
27 *other consequential damages incurred because of interruption of service."* 18 U.S.C. § 1030
28 (e)(11) (emphasis added). Lost profits that are not connected to interruption in service may not be

1 considered for calculation of “loss” under the CFAA. *See, e.g., Nexans Wires S.A. v. Sark-USA,*
 2 *Inc.*, 166 F. Appx. 559, 562 (2d Cir. 2006) (holding that the plain language of the statute “permits
 3 recovery of [lost revenue] only where connected to an ‘interruption in service.’”) (citation
 4 omitted); *L-3 Comms. Westwood Corp. v. Robichaux*, No. 06-0279, 2007 WL 756528, at *3-4
 5 (E.D. La. Mar. 8, 2007) (finding that lost profits are not contemplated by the CFAA where they
 6 are “not related to computer impairment or computer damages” and holding that loss “has
 7 consistently meant a cost of investigating or remedying damage to a computer or a cost incurred
 8 because the computer’s service was interrupted.”). Because Exhibits 116 and 117 cannot support
 9 a finding of “loss” under the CFAA, Defendants object to these exhibits as irrelevant and
 10 excludable under Rules 401 and 402 of the Federal Rules of Evidence.

11 **H. All Evidence of Pre-March 1, 2005 Conduct Alleged to Constitute Copyright**
 12 **Infringement Should Be Excluded As Irrelevant.**

13 Defendants object to all evidence Plaintiffs offer regarding pre-March 1, 2005 conduct
 14 alleged to constitute copyright infringement because such evidence is irrelevant and excludable
 15 under Rules 401 and 402 of the Federal Rules of Evidence. As described in detail in Section II of
 16 Defendants’ Cross Motion, OIC, the plaintiff-entity asserting copyright claims, lacks standing to
 17 pursue claims for pre-March 1, 2005 infringement of the PeopleSoft and JDE copyrights.
 18 Therefore, any evidence Plaintiffs present related to such pre-March 1, 2005 conduct will not
 19 make the “existence of any fact that is of consequence to the determination of the action more
 20 probable or less probable,” and is thus irrelevant. Fed. R. Evid. 401. Because only admissible
 21 evidence may be considered on summary judgment and irrelevant evidence is inadmissible under
 22 Rule 402, any evidence of alleged pre-March 1, 2005 should not be considered by this Court. *See,*
 23 *e.g., Romero v. Hennessey*, No. C 08-4675 RMW (PR), 2010 WL 135185, at *2 (N.D. Cal. Jan. 5,
 24 2010) (“A district court can only consider admissible evidence in ruling on a motion for summary
 25 judgment.”).

26 * * *

27 The foregoing objections to the evidence contained in Plaintiffs’ Motion, declarations and
 28 attached exhibits are made insofar as the evidence is offered in support of Plaintiffs’ Motion for

1 Partial Summary Judgment. Defendants reserve the right to object on additional grounds to any
2 of the statements made in any of the declarations or any of the exhibits attached thereto, should
3 that evidence be offered by Plaintiffs for any other purpose in this litigation.

4 For the forgoing reasons, the documents or portions of documents described above should
5 be excluded from the evidence considered in support of Plaintiffs' Motion.

6
7 Dated: March 31, 2010

JONES DAY

8
9 By: /s/ Tharan Gregory Lanier

Tharan Gregory Lanier

10
11 Counsel for Defendants
12 SAP AG, SAP AMERICA, INC., and
13 TOMORROWNOW, INC.
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