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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' OPPOSITION TO
DEFENDANTS' 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 submitted by Plaintiffs Oracle USA, Inc.,
3 Oracle International Corporation, Oracle EMEA Limited (“OEMEA”), and Siebel Systems, Inc.
4 (together “Plaintiffs”) in support of Plaintiffs’ Opposition to Defendants’ Motion for Partial
5 Summary Judgment (“Plaintiffs’ Opposition”), the Declaration of Holly A. House in Support of
6 Plaintiffs’ Opposition to Defendants’ Motion for Partial Summary Judgment (“House
7 Declaration” or “House Decl.”), and identified exhibits attached thereto.

8 **A. The House Declaration Should Be Excluded Because it Violates Civil Local**
9 **Rule 7-5(d) and Rule 56(e)(1) of the Federal Rules of Civil Procedure.**

10 The Court should strike in its entirety the House Declaration because it violates Civil
11 Local Rule 7-5(b) (“L.R. 7-5(b)”), Civil Local Rule 7-4(b) (“L.R. 7-4(b)”), and Rule 56(e)(1) of
12 the Federal Rule of Civil Procedure (“Rule 56(e)(1)”). The House Declaration violates Local
13 Rule 7-5(b) because it largely consists of impermissible arguments and conclusions. Furthermore,
14 although many of these arguments appear to have been imported directly from Plaintiffs’
15 Opposition, a significant number are not otherwise contained in Plaintiffs’ briefing; as a result,
16 Plaintiffs’ reliance on the House Declaration also undermines the page limits set forth in Local
17 Rule 7-4(b). Finally, the House Declaration violates Rule 56(e)(1) because it includes a number
18 of statements not based on personal knowledge. For these reasons, the Court should exclude the
19 House Declaration.

20 **1. The House Declaration Violates L.R. 7-5(b).**

21 Local Rule 7-5(b) states that a declaration “may contain only facts, must conform as much
22 as possible to the requirements of FRCivP 56(e), and must avoid conclusions and argument.” L.R.
23 7-5(b). It further provides that declarations violating this rule may be stricken. *See id.* Courts
24 have excluded declarations that contain impermissible argument, including where declarants
25 simply include argument from the briefing they purport to support. *Brae Asset Funding, L.P. v.*
26 *Applied Fin., LLC*, No. C 05-02490 WHA, 2006 WL 2355474, at *5 (N.D. Cal. Aug. 14, 2006)
27 (striking declaration for various reasons, including that “declaration [was] full of legal argument
28 and conclusions” by the declarant in violation of L.R. 7-5(b)); *Page v. Children’s Council*, No. C

1 06-3268 SBA, 2006 WL 2595946, at *5 (N.D. Cal. Sept. 11, 2006) (finding that much of
2 plaintiff's declaration "simply repeat[ed] portions of the Plaintiff's memo" and striking portions
3 of declaration that "contain[ed] improper argument" in violation of L.R. 7-5(b)); *Brew v. City of*
4 *Emeryville*, 138 F. Supp. 2d 1217, 1227 (N.D. Cal. 2001) (Hamilton, J.) (striking declaration
5 because many of the statements by declarant were hearsay, lacked foundation and "form[ed]
6 conclusions as opposed to stat[ing] facts").

7 Here, the House Declaration contains numerous impermissible arguments and conclusions
8 forbidden by L.R. 7-5(b). Rather than simply identifying true and correct copies of attached
9 exhibits, the House Declaration contains excerpts of arguments copied from Plaintiffs'
10 Opposition, which it supplements with lists of evidence that allegedly "support[]" each argument
11 and argumentative parenthetical statements purporting to explain the significance and/or meaning
12 of the documents. D.I. 679 (House Decl.) ¶¶ 7-24. Moreover, paragraph 33 of the House
13 Declaration contains a stand-alone argument about the purported meaning of the document
14 attached. *See* D.I. 679 (House Decl.) ¶ 33 (referencing the attached document and arguing that
15 "[t]hese accounting standards expressly contemplate SAP's saved costs in connection with the
16 cost approach to fair market valuation"). Such statements and "explanations," which comprise
17 the bulk of the House Declaration, constitute arguments and conclusions that are prohibited by
18 Local Rule 7-5(b); this Court should strike the declaration in its entirety on these grounds. *See*
19 L.R. 7-5(b); *see also Brae Asset Funding, L.P.*, 2006 WL 2355474, at *5; *Page*, 2006 WL
20 2595946, at *5.

21 **2. The House Declaration Violates Civil Local Rule 7-4(b).**

22 Local Rule 7-4(b) states that "briefs or memoranda filed with opposition papers may not
23 exceed 25 pages of text," unless a party has been given prior permission by the court. L.R. 7-4(b).
24 By including the above-referenced arguments and conclusions in the House Declaration, many of
25 which are not contained in any of the 25 pages of Plaintiffs' Opposition, Plaintiffs undermine
26 these page limits. By way of example, none of the argumentative parentheticals characterizing
27 the attached documents are found in the Opposition brief. For this reason, the House Declaration
28 is objectionable in its entirety.

1 **3. The House Declaration Violates Fed. R. Civ. P. 56(e)(1).**

2 Rule 56(e)(1), which governs the content of affidavits submitted in support of summary
3 judgment motions, requires that any such affidavit “must be made *on personal knowledge*, set out
4 *facts* that would be admissible in evidence, and show that the *affiant is competent to testify on the*
5 *matters stated.*” Fed. R. Civ. P. 56(e)(1) (emphasis added). Courts have excluded declarations
6 submitted on summary judgment that contain statements lacking the proper foundation. *Brew*,
7 138 F. Supp. 2d at 1227.

8 Here, the House Declaration should be stricken as violating Rule 56(e)(1), as it contains
9 numerous argumentative statements for which Ms. House has not demonstrated that she has
10 personal knowledge of the purported facts or that she is “competent to testify on the matters
11 stated.” Fed. R. Civ. P. 56(e)(1). Indeed, the House Declaration contains many statements for
12 which Ms. House cannot possibly demonstrate the requisite personal knowledge to comply with
13 Rule 56(e)(1); in these instances, Ms. House merely characterizes and provides an interpretation
14 of the purported contents of various documents.

15 For example, in paragraph 9, Ms. House purports to state what one SAP employee
16 allegedly “asked” another employee to do in 2004. D.I. 679 (House Decl.) ¶ 9 at 4:4-7. Even to
17 the extent that such a statement is “factual” and not an impermissible argument or conclusion
18 forbidden by L.R. 7-5(b), Ms. House has not demonstrated that she has any personal knowledge
19 of the interactions between two SAP employees many years past; instead, it is clear that Ms.
20 House provides only her interpretation of the document. Similarly, throughout her declaration,
21 Ms. House makes equally inappropriate statements that lack foundation. For example, Ms. House
22 purports to detail what various individuals did, what those individuals “were involved in,” where
23 they lived and/or worked, who they “communicated with,” and even what an organization’s “key
24 goal has always been.” *See, e.g.*, D.I. 679 (House Decl.) ¶¶ 7, 9, 11, 12, 15. Such statements
25 contained in numerous paragraphs of the House Declaration completely lack foundation; Ms.
26 House is not “competent to testify on the matters stated” as required by Rule 56(e)(1). Fed. R.
27 Civ. P. 56(e)(1); D.I. 679 (House Decl.) ¶¶ 7-24. On those grounds, the declaration should be
28 disregarded and stricken in its entirety. *See, e.g., Brew*, 138 F. Supp. at 1227.

1 Because the bulk of the House Declaration contains objectionable material—over 21
 2 pages of the 27 page document, excluding the “Index of Attached Exhibits”—the declaration
 3 should be disregarded and stricken in its entirety. In the alternative paragraphs 7-24 and 33 of the
 4 House Declaration, which contain impermissible arguments, conclusions, and/or statements for
 5 which Ms. House has no personal knowledge should be stricken under Local Rules 7-5 and 7-4
 6 and Rule 56(e)(1). Moreover, any discussion of these paragraphs in Plaintiffs’ Opposition should
 7 be disregarded.

8 **B. The Documents on which Plaintiffs Rely to Argue that OEMEA’s Claims are**
 9 **Properly Brought in California Are Irrelevant.**

10 The vast majority of documents Plaintiffs cite in Section III of their Opposition (entitled
 11 “OEMEA’S Claims are Properly Before this Court”) and attached as exhibits are irrelevant and
 12 inadmissible under Rule 402 of the Federal Rules of Evidence (“Rule 402”) because those
 13 documents do not make it “more probable or less probable” that OEMEA, a non-resident
 14 plaintiff, sustained injuries in California or that the conduct giving rise to OEMEA’s claims
 15 occurred in California, as required to support the application of California law. Fed. R. Evid.
 16 401, 402; see D.I. 640 (Def.’ Mot.) at 2-4 (citing *Standfacts Credit Serv., Inc. v. Experian Info.*
 17 *Solutions, Inc.*, 405 F. Supp. 2d 1141, 1148 (C.D. Cal. 2005); *Arabian v. Sony Elec. Inc.*, No. 05-
 18 CV-1741 WGH (NLS), 2007 U.S. Dist. LEXIS 12715, at *30 (S.D. Cal. Feb. 22, 2007);
 19 *Tidenberg v. Bidz.com, Inc.*, No. CV 08-5553 PSG (FMOx), 2009 U.S. Dist. LEXIS 21916, at
 20 *11-13 (C.D. Cal. Mar. 4, 2009)).

21 For reasons identified below and further described in Section III.A. of Defendants’ Reply,
 22 the following exhibits attached to the House Declaration should be excluded as irrelevant under
 23 Rule 402. See, e.g., *Romero v. Hennessey*, No. C 08-4675 RMW (PR), 2010 WL 135185, at *2
 24 (N.D. Cal. Jan. 5, 2010) (“A district court can only consider admissible evidence in ruling on a
 25 motion for summary judgment.”):

26 **Evidence of Defendants’ California Operations:** The following exhibits are irrelevant
 27 because they demonstrate only that Defendants have operations in California, without any indicia
 28 that a sufficient connection exists between those operations and OEMEA’s claims: Exs. 37, 45,

1 46, 53, 57, 58, 96, 97, 473 (Defendants have board and other meetings in California); Exs. 210,
2 225 (TN had offices in California); Exs. 1 (¶ 106), 2 (¶ 106), 19, 21, 22, 23, 33, 44, 395, 738
3 (some of Defendants' employees are located in California); D.I. 156 (same). Absent this required
4 nexus—which none of these documents show—the evidence is irrelevant.

5 **Evidence Regarding Certain of SAP's California Employees:** The following exhibits
6 related to the involvement of SAP's California-based employees in the decision to acquire TN are
7 irrelevant because TN did not market or provide support services to any EMEA customer until
8 *after* it was acquired, and the exhibits only touch on conduct that occurred before OEMEA's
9 claims even arose: Exs. 19, 22, 32, 35, 36, 41, 208, 210, 212, 219, 225, 390, 392, 395, 707, 738.
10 Conduct occurring before OEMEA's claims arose cannot provide the required California nexus
11 with OEMEA's claims, and thus, this evidence is irrelevant.

12 **Evidence Regarding Seth Ravin:** The following exhibits concerning Seth Ravin are also
13 irrelevant because Mr. Ravin joined TN three years before OEMEA's claim arose and left within
14 weeks of the SAP acquisition, also before (or very shortly after) OEMEA's claims arose: Exs. 36,
15 40, 455. Conduct occurring before OEMEA's claims arose cannot provide the required
16 California nexus with OEMEA's claims, and thus, this evidence is irrelevant.

17 **Evidence Regarding SAP Legal Advice:** The following exhibits concerning legal advice
18 regarding acquisition due diligence, given by SAP's California-based attorneys and pre-dating
19 OEMEA's claims, is irrelevant to whether a sufficient nexus exists between the alleged California
20 conduct and OEMEA's claims: Exs. 21, 22, 39, 40, 41. The following exhibits concerning legal
21 advice purportedly given by California lawyers are irrelevant because they do not evince any
22 connection between the lawyers and EMEA, or the legal advice and OEMEA's claims: Exs. 21,
23 22, 23, 28, 33, 34, 38, 86, 87, 97, 1684.

24 **Evidence Regarding Safe Passage:** The following exhibits are irrelevant because they
25 do not demonstrate any connection between California and OEMEA's claims and/or they pre-date
26 OEMEA's claims: Exs. 22, 24, 36, 41, 54, 59, 436, 473, 934, 1684.

27 **Other Documents:** The following documents are irrelevant because they fail to
28 demonstrate any nexus between California and OEMEA's claims: Exs. 48, 52, 63, 71, 82, 83, 84.

1 C. **Exhibit 5 to the House Declaration Should be Disregarded as Inadmissible**
2 **Hearsay, Improper Opinion of a Witness not Qualified as an Expert in this**
3 **Matter, and Irrelevant.**

4 Exhibit 5 to the House Declaration (D.I. 679-5) and all references to Exhibit 5 in
5 Plaintiffs' Opposition should be disregarded and stricken on three grounds: (1) Exhibit 5 is
6 inadmissible hearsay barred by Rules 801(c) and 802 of the Federal Rules of Evidence ("Rule
7 801(c)" and "Rule 802"); (2) Exhibit 5 is improper opinion evidence offered by an individual not
8 qualified as an expert in this matter and thus barred by Rules 701 and 702 of the Federal Rules of
9 Evidence ("Rule 701" and "Rule 702"); and (3) Exhibit 5 and the entire section of the Opposition
10 in which it is discussed is irrelevant and thus barred by Rule 402.

11 First, Exhibit 5 should be stricken as inadmissible hearsay. *See* Fed. R. Evid. 801(c), 802;
12 *In re Cygnus Telecomms. Tech., LLC, Patent Litig.*, No. C-04-04247 RMW, 2007 WL 2261543,
13 at *3 n.6 (N.D. Cal. Aug. 6, 2007) (finding an article to be inadmissible hearsay that could not
14 support a party's position on summary judgment). Exhibit 5 is an article on the subject of patent
15 damages written by an individual who is not a party or witness to this case and containing
16 conclusions about the propriety of certain amounts of damages in the patent context. D.I. 679-5.
17 Plaintiffs offer this article for the truth of the matter asserted—namely a certain price for a fair
18 market value license is appropriate. *See* D.I. 677 (Pls.' Opp.) at 12 (quoting Exhibit 5 and
19 arguing that its conclusion "is particularly true" in this case). Because Exhibit 5 consists entirely
20 of out-of-court statements offered for the truth of the matter asserted, and because the statements
21 do not fall under any exceptions to the Rule prohibiting hearsay, Exhibit 5 and all references to it
22 in Plaintiffs' Opposition are objectionable and should be disregarded under Rules 801(c) and 802.

23 Second, Exhibit 5 is improper opinion evidence offered by an individual who is not
24 qualified or disclosed as an expert in this case. *See* Fed. R. Evid. 701, 702; Fed. R. Civ. P.
25 26(a)(2)(A). The entire article sets forth the opinion of third party Jonathan T. Tomlin regarding
26 the propriety of certain court decisions and what types of damages should be available for patent
27 infringement. *See* D.I. 679-5. Such opinions do not satisfy the requirements of Rule 701, which
28 governs the limited admissibility of opinion evidence, that opinions be "rationally based on the
 perception of the witness." Fed. R. Evid. 701. Furthermore, Mr. Tomlin was not, as required,

1 qualified as an expert under Rule 702, or even disclosed as an expert by Plaintiffs as required by
2 Rule 26 of the Federal Rules of Civil Procedure and this Court's Case Management Order. Fed.
3 R. Evid. 702; Fed. R. Civ. P. 26(a)(2)(A); D.I. 325 (6/11/09 Order) at 1. Therefore, Exhibit 5,
4 and all references to it in Plaintiffs' Opposition, should be disregarded and stricken on these
5 grounds. *See, e.g., Zottola v. City of Oakland*, 32 Fed. App'x 307, 313 (9th Cir. 2002) (affirming
6 exclusion of evidence that could not come in under Rule 701 because it would constitute expert
7 opinion by a non-expert witness).

8 Finally, Exhibit 5 and the section of the Opposition from 11:23-12:23, in which Exhibit 5
9 is discussed, should be disregarded and stricken as irrelevant. *See* Fed. R. Evid. 401, 402.
10 Plaintiffs attempt to use the impermissible opinion of a non-party concerning appropriate patent
11 infringement damages to bolster a claim that a hypothetical (or "fair market value") license is a
12 proper measure of damages in this case. *See* D.I. 677 (Pls.' Opp.) at 11:23-12:23. However, the
13 Court has already addressed whether Plaintiffs can seek a hypothetical license as actual damages
14 for copyright infringement, and Defendants have not raised that issue in their Motion for Partial
15 Summary Judgment. *See* D.I. 628 (1/28/10 Order); D.I. 640 (Def's.' Mot.). Plaintiffs' claim that
16 a hypothetical license is appropriate does not in fact respond to Defendants' argument that non-
17 party entities cannot recover lost profits. *See* D.I. 640 (Def's.' Mot.) at 6-10. Because the
18 propriety of a fair market value license does not have any tendency to make the availability of lost
19 profits for certain entities "more probable or less probable," this evidence is irrelevant under Rule
20 401; and because only admissible evidence may be considered on summary judgment and
21 irrelevant evidence is inadmissible under Rule 402, Exhibit 5 and the section of Plaintiffs'
22 Opposition from 11:23-12:23 should be disregarded and stricken on these grounds. *See, e.g.,*
23 *Romero v. Hennessey*, 2010 WL 135185, at *2.

24 **D. Exhibits 44, 45, and 46 to the House Declaration Should Be Disregarded as**
25 **Inadmissible Hearsay.**

26 Exhibits 44, 45, and 46 to the House Declaration are inadmissible hearsay and should be
27 disregarded on these grounds. *See* Fed. R. Evid. 801(c), 802; *see also In re Cygnus Telecomms.*
28 *Tech., LLC, Patent Litig.*, 2007 WL 2261543, at *3 n.6. All three exhibits are third party news

1 articles, the relevant statements of which are offered by Plaintiffs to prove the truth of the matter
2 asserted—namely that Shai Agassi was a California resident or that SAP held board meetings in
3 Palo Alto. D.I. 679-44 (Ex. 44) at 3; D.I. 679-45 (Ex. 45) at 1; D.I. 679-46 (Ex. 46) at 2; D.I. 679
4 (House Decl.) ¶ 21 (citing Exhibits 45 and 46). Because the cited portions of Exhibits 44, 45, and
5 46 are comprised entirely of out-of-court statements offered for the truth of the matter asserted,
6 and because the statements do not fall under any exceptions to the rule prohibiting hearsay,
7 Exhibits 44, 45, and 46 are objectionable and should be stricken under Rules 801(c) and 802.

8 * * *

9 The foregoing objections to the evidence contained in Plaintiffs’ Motion, declarations and
10 attached exhibits are made insofar as the evidence is offered in support of Plaintiffs’ Motion for
11 Partial Summary Judgment. Defendants reserve the right to object on additional grounds to any
12 of the statements made in any of the declarations or any of the exhibits attached thereto, should
13 that evidence be offered by Plaintiffs for any other purpose in this litigation.

14 For the forgoing reasons, the documents or portions of documents described above should
15 be excluded from the evidence considered in support of Plaintiffs’ Opposition.

16 Dated: April 14, 2010

JONES DAY

18 By: /s/ Tharan Gregory Lanier
19 Tharan Gregory Lanier

20 Counsel for Defendants
21 SAP AG, SAP AMERICA, INC., and
22 TOMORROWNOW, INC.