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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' RESPONSES TO
PLAINTIFFS' OBJECTIONS TO
EVIDENCE FILED IN SUPPORT OF
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”) hereby
2 respond to Plaintiffs’ Objections to Evidence Filed in Support of Defendants’ Motion for Partial
3 Summary Judgment D.I. 682 (“Pls.’ Objs. to Evid.”) as follows.

4 **A. Exhibit H to the Lanier Declaration.**

5 Plaintiffs object on relevance grounds to the July 6, 2009 Fourth Amended and Restated
6 Cost Sharing Agreement (“Cost Sharing Agreement”) attached as Exhibit H to the Declaration of
7 Tharan Gregory Lanier in Support of Defendants’ Motion for Partial Summary Judgment (“Lanier
8 Declaration”). Plaintiffs argue that Exhibit H is irrelevant because the question of whether
9 Plaintiffs may recover damages for nonparties is a purely legal question. Pls.’ Objs. to Evid. at 2.
10 They further argue that Exhibit H is irrelevant because it does not “resolve the factual issue of
11 whether Plaintiffs seek lost profits of related nonparties.” *Id.* at 2-3. However, Plaintiffs
12 misunderstand the purpose of Exhibit H. Exhibit H goes to the foundational issue of the
13 relationships among the entities at issue in Plaintiffs’ “Oracle organization as a whole” damages
14 theory. It is relevant to show, as a foundational matter, that they are separate entities as well as
15 nonparties.

16 Plaintiffs also object to related portions of Defendants’ motion on the ground that they
17 purportedly consist of speculation and improper opinion. However, Plaintiffs’ only specific
18 complaint is that Exhibit H purportedly does not establish any basis for the contention that
19 “Oracle’s corporate structure allows it to conduct its operations through various cost-sharing
20 agreements.” Pls.’ Objs. to Evid. at 3. This clearly is incorrect. Exhibit H, on its face, is a cost-
21 sharing agreement among various Oracle corporate entities.

22 The Court should deny Plaintiffs’ objections to Exhibit H, and the portions of Defendants’
23 motion to which it relates, because they lack merit. In addition, since Plaintiffs now concede, as a
24 matter of fact and law, that they may not seek damages for the nonparties at issue, the Court
25 should deny Plaintiffs’ objections as moot.

26 **B. Exhibit I to the Lanier Declaration.**

27 Plaintiffs object to the Brief for Respondent Appellant filed in *Sarhank Group v. Oracle*
28 *Corp.*, 404 F.3d 657 (2nd Cir. 2005) (No. 92-9383), attached as Exhibit I to the Lanier

1 Declaration, on the same grounds discussed above with regard to Exhibit H. Plaintiffs' objections
2 to Exhibit I should be denied for the same reasons. Exhibit I goes to the same foundational fact as
3 Exhibit H, and, in addition, Plaintiffs' objections to Exhibit I should be denied as moot now that
4 Plaintiffs have conceded that they may not attempt to seek damages for nonparties.

5 **C. Exhibit N to the Lanier Declaration.**

6 Defendants inadvertently included in their motion a cite to unpublished decision *Guy v.*
7 *IASCO*, No. B168339, 2004 WL 1354300 (Cal. Ct. App. June 17, 2004). Defendants withdraw
8 that citation. However, Plaintiffs' request that portions of Defendants' motion be stricken based
9 on citation to the *Guy* case should be denied. Defendants cited *Guy* as one example of a legal
10 principle that is amply supported by the other authority in Defendants' brief (*i.e.*, that even if
11 some of the complained-of conduct occurred in California, there must be more than a superficial
12 connection to the state). *See* D.I. 640 (Defs.' Mot.) at 3-4. For example, *Speyer v. Avis Rent a*
13 *Car Sys., Inc.*, which Defendants cite on the same page, stands for the same proposition. *See* 415
14 F. Supp. 2d 1090, 1099 (S.D. Cal. 2005). Moreover, Plaintiffs do not dispute that this is an
15 accurate statement of the law. D.I. 677 (Pls.' Opp.) at 6 ("California law still applies where there
16 are *adequate* California connections, a proposition affirmed by each case SAP cites.") (emphasis
17 added). Thus, Defendants' citation to *Guy* was harmless, and Plaintiffs' request to strike any
18 portion of Defendants' motion on that ground should be denied.

19 **D. Exhibit 1 to the Wallace Declaration (Rule 1006 Summary).**

20 Plaintiffs purport to object to Defendants' Rule 1006 Summary on accuracy grounds (Pls.'
21 Objs. to Evid. at 6) but fail to identify any inaccuracy with respect to the 39 customers included in
22 the summary. Instead, Plaintiffs complain that the summary omits one customer, Durr, which
23 Plaintiffs contend is an OEMEA customer. *Id.* However, Plaintiffs are mistaken that Durr should
24 be included on the list of OEMEA customers. Plaintiffs rely on Schedule 31.SU to the Meyer
25 Report for their contention, in which "Mr. Meyer assigns certain Durr AG support contracts to
26 Oracle GB (also known as Oracle Corporation UK Limited) in Oracle's EMEA region." D.I. 679
27 (House Decl.) ¶ 42. However, the contracts that Meyer assigns to Oracle GB (contracts P-JD-
28 M07051-1-000-3 and P-04-05153-000-70) are not the relevant contracts. The contract for

1 products supported by TN (contract P-JD-M00434-000-97) was assigned to Oracle USA, Inc., not
2 Oracle GB or OEMEA. Thus, for purposes of this case and Defendants' motion, Durr is not an
3 OEMEA customer, and Plaintiffs' objection is not well-founded.

4 Plaintiffs point to no other purported inaccuracy. Indeed, Plaintiffs do not dispute any of
5 the facts contained within the Rule 1006 Summary. Plaintiffs' objection on that ground should be
6 denied.

7 Plaintiffs' objection that the Rule 1006 Summary is based on inadmissible evidence should
8 also be denied. The source documents are not hearsay, as Plaintiffs contend. Pls.' Objs. to Evid.
9 at 7. As set forth in the Declaration of Elaine Wallace in Support of Defendants' Fed. R. Evid.
10 1006 Summary of Evidence ("Wallace Decl."), the information in the summary is derived from
11 three sources: (1) the OKI3 database, in which Plaintiffs record information relating to their
12 customer contracts; (2) commissionaire, undisclosed agency, and other agreements among the
13 relevant Oracle entities; and (3) a spreadsheet in which Plaintiffs listed multiple entities that
14 shared Oracle revenue under certain revenue sharing agreements. *Id.* at 1. Each of these
15 documents was produced by Plaintiffs. *Id.* In addition, Plaintiffs' expert, Meyer, has relied on
16 them for his damages analysis. None of these documents are hearsay because they constitute
17 admissions of a party-opponent under Rule 801(d)(2) of the Federal Rules of Evidence. They are
18 also business records under Rule 803(6) of the Federal Rules of Evidence and thus would be
19 excepted from the rule against hearsay in any event. In addition, Meyer's reliance on the same
20 documents precludes Plaintiffs from denying that the documents have sufficient indicia of
21 reliability to be admissible under Rule 807 of the Federal Rules of Evidence. Thus, there is no
22 basis for Plaintiffs' hearsay objection, and it should be denied.

23 Plaintiffs' sole remaining objection (Pls.' Objs. to Evid. at 7) is to a statement in the Rule
24 1006 Summary that for four customers, the "territories are assumed" to be in EMEA because,
25 while the customer contracts at issue were assigned by Plaintiffs to OEMEA, Plaintiffs failed to
26 produce the relevant agreements so that Defendants could ascertain the precise territories of the
27 commissionaires at issue. This objection should also be denied. First, by failing to produce the
28 relevant agreements, Plaintiffs have waived any right to object to the fact that Defendants did not

1 include them in the Rule 1006 Summary. Second, Plaintiffs do not dispute that Defendants'
2 assumption is correct, *i.e.*, that the territories of the commissionaires for these four customers are,
3 in fact, in EMEA. Not surprisingly, for example, Plaintiffs do not dispute that the territory for
4 Oracle Belgium includes Belgium, the territory for Oracle Spain includes Spain, and the territory
5 for Oracle Denmark includes Denmark. *See, e.g.*, Rule 1006 Summary at 3 (entry for Allianz Life
6 Insurance of North America).

7 In short, none of Plaintiffs' objections to the Rule 1006 Summary have any merit. The
8 objections, and Plaintiffs' request that the Court strike the Rule 1006 Summary and the portions of
9 Defendants' motion that cite to it, should be rejected.

10 Dated: April 14, 2010

JONES DAY

11 By: /s/ Tharan Gregory Lanier

Tharan Gregory Lanier

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13 Counsel for Defendants
14 SAP AG, SAP AMERICA, INC., and
15 TOMORROWNOW, INC.
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