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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)

JOINT STATEMENT REGARDING EXHIBIT OBJECTIONS

PUBLIC REDACTED VERSION

Pursuant to the Court's guidance at the May 24, 2012 pretrial conference and the Court's Final Pretrial Order (ECF No. 1171), Plaintiff Oracle International Corporation ("Oracle," or "Plaintiff") and Defendants SAP AG, SAP America, Inc. (together, "SAP") and TomorrowNow, Inc. ("TomorrowNow") (collectively, "Defendants") submit this Joint Statement Regarding Exhibit Objections. The Parties each present a short introductory statement about the issues to be addressed. Defendants then present their issues for the Court to decide, followed in each instance by Oracle's response. Oracle then presents its issues for the Court to decide, followed in each instance by Defendants' response. The Parties jointly file this brief and separately submit the exemplar documents and foundational materials discussed in their separate position statements. To avoid burdening the Court with the need to make numerous rulings on confidentiality issues and to permit the organization of the exemplar documents and foundational materials in a form most convenient for the Court, the Parties are lodging, rather than formally filing, these other materials. The Parties will work with the Court's clerk to determine the best manner of filing these materials to preserve their respective positions on appeal.

I. ORACLE'S INTRODUCTORY STATEMENT

Oracle understood the Court to permit briefing on only two categories identified by Defendants at the pre-trial conference – the At Risk report and the evidence Defendants sought to exclude through their second motion *in limine* – and a comparable number of categories identified by Oracle (which had not identified any categories prior to or at the pre-trial conference). Dkt. 1171 at 5 ("The parties may also submit further briefing on the two evidentiary issues discussed at the conference – the other portions of the At-Risk report not addressed during the first trial and the evidence defendants believe is irrelevant to the remaining theory of damages."). Rather than restrict themselves to what they identified and the Court permitted at the pre-trial conference, Defendants instead now present three categories (with seven subcategories and 18 individual documents that supposedly exemplify these categories. Defendants' briefing alone runs 32 pages, and requires a comparable response from Oracle. As the Court will see as it reviews this lengthy brief, Defendants' categories merely collect long lists of individual documents that, by their

nature, mostly require individual consideration.[1] By contrast, Oracle has identified three categories consisting of five total documents for the Court to consider. In comparison to Defendants' 32 page submission, Oracle presents its evidence in 6 pages.

Despite all this, Oracle has not actually responded to each of Defendants' arguments. The Parties agreed to exchange briefing on their affirmative categories the day before the Court-set deadline, and their responses the following afternoon. Despite SAP's represented agreement to the process - a process they initially proposed - at 8:00 pm on June 5, the night the filing was due SAP sent Oracle 10 pages of new argument. As a result, Oracle will be prepared to respond to any of Defendants' unanswered arguments at the June 8 hearing.

Oracle also proposed, for the Court's convenience, that the Parties jointly submit a single set of the exemplar documents identified by each party so that the Court and the Parties could work off of one highlighted copy of the documents at the hearing. Defendants refused this proposal. In order to highlight for the Court the language in Defendants' exemplars to which Oracle refers in its responsive sections of the accompanying brief, Oracle will submit an accompanying set of materials with highlighted versions of each of the documents at issue. The Parties' exemplars (i.e. the documents at issue) are labeled by Trial Exhibit number (e.g. A-0059)), and Oracle's supporting documents are listed by exhibit letter.

In addition, SAP seeks relief on topics not permitted by the Court. In the final pretrial order, the Court allowed the Parties to further brief their respective positions on objections to *exhibits* and held that it will "rule on objections to *certain exhibits* at a further pretrial conference on June 8, 2012." Dkt. 1171 at 5 (emphasis supplied). The Court's intent was clear, the June 8 conference (and the Parties' briefing) was limited to exhibits and, moreover, to the exhibits raised by Defendants at the pre-trial conference. Nonetheless, SAP seeks exclusion of trial and

[1] For example, even if the Court agrees that Oracle adopted a particular piece of customer hearsay contained in one of the emails Defendants identify, that decision is necessarily specific to the statements made in that particular email; that ruling cannot be extrapolated to cover different statements in other documents. Thus, the Court should reject Defendants' requested relief as overbroad, regardless of how it rules on a given document. The Court should not rule that all "statements by Oracle's senior executives and sales/support employees concerning selling Oracle software and support are party admissions" and all "statements by the relevant Oracle customers about their then-existing state of mind are not hearsay or are excepted from the hearsay rule." SAP's Introductory Statement. This is far too broad.

deposition testimony, and demonstratives Oracle used during its opening and with its expert. Specifically, SAP asks the Court to exclude portions of: (a) Oracle's opening statement; (b) Oracle's closing statement; (c) McDermott's trial testimony; (d) Screven's trial testimony; (e) Ellison's trial testimony; (f) Catz's trial testimony; (g) Brandt's deposition testimony; and (h) Ritchie's deposition testimony played at the last trial. Not only did the Court's order not permit argument on these topics, a separate process addresses many of these items (such as deposition designations). There is no reason why these issues could not have been raised in SAP's motions *in limine*. Finally, Oracle only received notice about these additional items 24 hours before this brief was due, in violation of the Parties' agreed deadlines to exchange materials for the brief.

Oracle shares the Court's desire to streamline the evidentiary issues in advance of trial. However, Oracle does not believe the Court contemplated this volume of evidence, or the extent of the briefing it would require, when the Court set the June 8 hearing or in its Final Pretrial Order (Dkt. 1171). The process that the Defendants anticipate is not an efficient use of the Court's or the Parties' time.

Thus, while Oracle will be prepared to wade through this morass on June 8, it respectfully suggests that the Court may wish to order a reduction in the number of documents argued on June 8 to eight per side, and reject briefing that exceeds the scope permitted by the Final Pretrial Order (that is, restrict Defendants' briefing to exhibits and to the two categories Defendants identified at the hearing from its trial brief and second motion *in limine)*. However it proceeds, Oracle does not expect the Court will need to make many evidentiary decisions at trial, just as the Court did not need to do so at the last trial.

II. DEFENDANTS' INTRODUCTORY STATEMENT

The June 8 hearing is necessary because Oracle persists in objecting to the most basic, probative testimony about the core issue in this case—whether customers left Oracle support or picked SAP software because of TomorrowNow.[2] By way of example, Oracle objects to

[2] Although, at the May 24 hearing, Oracle's counsel suggested that there would be ten or fewer exhibits per side in dispute following meet and confer (*see* Vol. 3 (5/24/12 Hrg. Tr.) at 123:17-124:7), Oracle continues to object to 280 out of Defendants' 345 exhibits (81%), asserting hearsay objections for 267 exhibits. This is consistent with the last trial, in which Oracle objected to hundreds of documents on hearsay grounds and is precisely why Defendants raised these issues with the Court and Oracle nearly one and a half months ago in their April 26 Trial Brief.

statements made by its Chairman of the Board, other senior executives, and employees acting within the scope of their duties—classic party admissions—as hearsay. Likewise, Oracle refuses to concede that emails by Oracle employees plainly indicating acceptance of forwarded contents are adoptive admissions. And Oracle inexplicably objects to admission of customer statements reflecting their contemporaneous motives and intent, despite such evidence qualifying as non-hearsay or under the "state of mind" exception to the hearsay rule. This evidence goes to the heart of the case and comes from Oracle employees that work in software and support sales and from Oracle's customers.

The June 8 hearing is also necessary because, despite the Court's repeated guidance to the contrary (including rulings on the April 26 motions *in limine*), Oracle continues to offer exhibits and testimony previously offered only in support of the now excluded "hypothetical license" theory and/or impermissible evidence of SAP's alleged willful infringement. In fact, up until Oracle revised its exhibit list at 2:55 p.m. Pacific today, it still listed "hypothetical license" as a purpose for 51 exhibits; Oracle's belated change, after the Court's repeated guidance, only emphasizes Oracle's true purpose in offering these exhibits—mislead the jury, inflame it with alleged willfulness evidence, and incite it to punish, all to inflate damages.[3]

Given the volume of Oracle's improper hearsay objections and the volume of Oracle exhibits offered despite the Court's rulings excluding such evidence, it is necessary to consider issues by category—hearsay exceptions/exemptions, evidence of alleged willful infringement, and evidence of excluded damages theories. For the "hearsay" category, Defendants identify four types of exhibits (statements by Oracle senior executives, statements by Oracle sales and support

[3] Oracle complains that the June 8 hearing should not address the evidence Defendants seek to exclude by their MIL No. 2 (filed April 26, and on which the Court partially deferred ruling in the Final Pretrial Order). Not so. Covering those issues was specifically discussed at the pretrial conference, with Oracle even suggesting that the issues it intended to raise "overlap[ped]" with Defendants' motion. Vol. 3 (5/24/12 Hrg Tr.) at 126:9-127:3. And despite Oracle's complaints to the contrary, it acknowledges that Defendants' categories are significant; Oracle postponed meet and confer regarding deposition designations on the premise that the Court's guidance will substantially affect whether Oracle will continue to designate certain testimony. *See* Vol. 3 (6/4/12 email from N. Jindal to J. Fuchs) (stating "Oracle is committed to efficiently completing the pre-trial tasks in preparation for trial. However, this Friday's hearing will address many of the issues raised in the parties' deposition designation objections. As you noted, the 2010 trial included too much needless effort related to objections. To avoid letting that happen again, Oracle proposes that we begin the meet and confer process after the hearing.").

employees, customer statements, and At-Risk Report statements), present the legal issue underlying the objection, and then apply the legal principles to exemplar exhibits in each category. Defendants also discuss foundational material lodged with the Court; although the foundational materials submitted with this brief are voluminous, Oracle's hearsay objections require filing basic information such as Oracle's organizational charts and deposition testimony about job titles and responsibilities. Defendants then request a specific ruling on each exemplar and category, as discussed in detail below. For Defendants' other two categories, Defendants ask the Court to exclude the exemplars, with the understanding that such rulings should provide Oracle guidance as to what will not be permitted at trial and will assist the Parties further narrow their exhibit lists and deposition designations.[4]

III. DEFENDANTS' CATEGORY ONE – HEARSAY EXCEPTIONS/EXEMPTIONS

DEFENDANTS' POSITION

This case is about software customers and the business and economic factors that explain their purchasing decisions, specifically their decisions to terminate Oracle support or purchase SAP software. Statements by Oracle's senior executives and sales and support employees as to specific customers and business activities related to selling software and support are relevant and extremely probative, as are customers' own statements concerning their purchasing decisions.[5] Oracle asserts that many of these highly probative, relevant documents are barred as hearsay. Oracle is incorrect. For the reasons explained below, Defendants request that the Court admit the exemplars offered by Defendants and specifically find:

[4] Defendants understand that this approach is precisely what the Court had in mind for this further pretrial hearing. At the May 24 pretrial conference the Court specifically stated, "What I would like is representative exhibits or categories so I don't have to rule on each one, but that if they fall within a certain type or have certain characteristics or fall within a certain subject area, I would like to be able to make a sort of an umbrella ruling with regard to a set of documents. . . . I just want you all to use your best judgment and give me the categories that are the most important here." Vol. 3 (5/24/12 Hrg. Tr.) at 123:23-124:3, 124:8-12.

[5] Oracle's expert, Paul Meyer, concedes this, as he reviewed and considered most, if not all, of the statements by Oracle employees and customers at issue, and Defendants may use these documents to cross-examine him. Additionally, as both experts considered these statements, the documents and materials at issue are the most reliable evidence and independently can be admitted under Rule 703 because their probative value substantially outweighs any prejudicial effect of the claimed hearsay. If the Court determines that any of the proposed evidence is inadmissible hearsay, Defendants ask that the Court admit the evidence under Rule 703.

- ***Statements by Oracle's senior executives***, including, but not limited to, Larry Ellison (CEO), Safra Catz (co-President and former CFO), Charles Phillips (then-co-President), Jeff Henley (Chairman of the Board), Juergen Rottler (Executive Vice President of Oracle Customer Services), and Keith Block (Executive Vice President of North America Sales), concerning the selling of Oracle software and support are party admissions.

- ***Statements by Oracle sales and support employees***, including, but not limited to, Juan Jones (Senior Vice President Customer Services North America Support), Richard Cummins (Senior Direct Support Renewals), Robert Lachs (Senior Regional Manager Support Sales), James McLeod (Regional Support Sales Manager), and other sales and support sales managers and representatives concerning specific customers and business activities regarding the selling of Oracle software and support are party admissions.

- ***Statements by Oracle's customers*** about their then-existing state of mind are not hearsay or are excepted from the hearsay rule under Rule 803(3).

- As previously conceded by Oracle, the ***At-Risk Report itself*** is admissible as a business record, including the lists of customers, contract revenue amounts, and win/loss statistics. The ***specific excerpts from the contested "notes" field*** that Defendants seek to admit also are admissible as party admissions.

Defendants believe that this guidance should resolve many of the Parties' outstanding evidentiary issues and help to streamline this case and the presentation of evidence at trial.

Additionally, although in its response below Oracle maintains that Defendants must lay the proper foundation for each document Defendants seek to admit (forcing Defendants to provide the Court with voluminous foundational materials referenced above), Oracle notably does not challenge the foundation that supports admission of the proposed exemplars. Rather, Oracle's only objection appears to be to statements by customers—telling, in a case that centers on customers' reasons for leaving Oracle for TomorrowNow support or SAP software. To derive maximum benefit from this objection, Oracle attempts to turn every statement *related to or concerning* a customer into a statement *by* a customer, and objects on that basis. But Oracle's strategy misses an important point: For the hearsay exclusion to apply, there must be a "statement" by an out-of-court declarant—that is, there must be an oral or written assertion by the customer that is repeated by the Oracle employee. Fed. R. Evid. 801(a)-(c).

Oracle's argument reads out this limitation and would make all of Oracle's employees' perceptions, understandings, beliefs, and analysis based on information received from a customer a statement by a customer. This is simply not the law. Where an employee makes a statement

relating to the scope of his or her employment, that statement is admissible against the employee's employer, whatever the basis. *See, e.g.*, *Arista Records LLC v. Lime Group LLC*, 784 F. Supp. 2d 398, 420 (S.D.N.Y 2011) (finding admissible under Rule 801(d)(2)(D) emails and Internet forum postings by LimeWire employees concerning customer activities because "[t]he emails and postings pertain to infringement being committed by LimeWire users, and thus relate directly to matters within the scope of the employees' employment with LW"); *Harris v. Itzhaki*, 183 F.3d 1043, 1054 (9th Cir. 1999) (finding real estate agent's statement, "'[t]he owners don't want to rent to Blacks,'" was admissible against owners because it "relates to a matter within the scope of the agency, *i.e.*, showing empty apartments"). Moreover, where there is an actual customer statement that Defendants seek to admit, Defendants articulated the basis for support and admission of the statement, including showing where the Oracle employee manifested a belief in the truth and adopted any customer statement. Where Defendants contend that the Oracle statement is direct and contains no customer statement, and Oracle contends that the source of the statement must have been a customer, this statement would necessarily qualify as an adoptive admission. *See, e.g.,* Vol. 1 (A-6329-1); Vol. 1 (A-5042); Vol. 1 (A-5997).

Further, Oracle's responsive statement conflates theories of admissibility. There are three different theories set forth and discussed at length below, each with its own independent requirements: (1) employee party admissions, which are defined out of the hearsay rule and require only that the admission be made by an employee acting within the scope of his or her employment, (2) adoptive admissions, which are defined out of the hearsay rule and require only that the employee have manifested a belief in the trust of the statement, and (3) state of mind evidence, which qualifies as both non-hearsay and as an express exception to the hearsay rule. The vast majority of what Defendants seek to admit are admissions, and, on this point, Oracle provides no cogent rebuttal. Party admissions—including employee party admissions like those at issue here—are admissible as substantive evidence against the party because "a party cannot seriously claim that his or her own statement should be excluded because it was not made under oath or subject to cross-examination. Moreover, the party is present in court to explain, deny, or rebut the authored statement." 801 Weinstein's Federal Evidence § 801.30[1]. The same is true

here. Oracle is permitted to offer at trial "counterexamples" to rebut its employees' admissions, but this goes to the weight of the evidence and not admissibility.

A. Statements by High-Level Oracle Employees.

Statements by Oracle's senior executives about software and support sales, customer tracking, customer relations, and the impact of the third party support market, are admissions and not hearsay. Yet Oracle objects to admission of statements by the likes of Jeff Henley (Chairman of the Board), Charles Phillips (President), Keith Block (Executive Vice President of North America Sales), and others. Oracle never has contended, and cannot contend, that the statements were not made by Oracle employees, and it is beyond doubt that such statements concern or relate to a senior executive's responsibilities and thus are employee party admissions.

For a statement to be exempted from hearsay as an employee party admission under Rule 801(d)(2)(D), courts require only that: (1) the declarant was an employee of the party at the time the statement was made; and (2) the statement "concern[s] a matter within the scope of the agency or employment." *Sea-Land Serv., Inc. v. Lozen Int'l, LLC*, 285 F.3d 808, 821 (9th Cir. 2002); *see also* 5-801 Weinstein's Federal Evidence § 801.33[1]. The Ninth Circuit broadly construes what "concern[s]" a matter within the scope of employment. *Itzhaki*, 183 F.3d at 1054; *United States v. Kirk*, 844 F.2d 660, 663 (9th Cir. 1988); 5-801 Weinstein's Federal Evidence § 801.33[2][c] ("Simply put, to qualify as nonhearsay under Rule 801(d)(2)(D), the statement need only be related to the declarant's duties"). The Ninth Circuit also has held that the foundational threshold for Rule 801(d)(2)(D) can be met by as little as (1) an email signature showing a declarant's job title, (2) a list of employees including a declarant's name, and (3) an email's contents indicating that it appeared to be a matter with the scope of a declarant's employment. *Sea-Land*, 285 F.3d at 821. These statements are important and enjoy generous treatment of admissibility because they are statements made by an opponent's employee concerning that employee's job—"Simply put, to qualify as an admission, the statement need only be related to the declarant's duties." 5-801 Weinstein's Federal Evidence § 801.33[2][c]. Admissions are generally defined out of the hearsay rule, and the concerns underlying hearsay generally, as a matter of estoppel and do not require or implicate any independent reliance. 5-801 Weinstein's

Federal Evidence § 801.33[1] (". . . there is no additional requirement that the proponent show that the statement is trustworthy, or that the declarant had personal knowledge of the facts underlying the statement").

Further, Rule 801(d)(2)(D) does not require evidence that an employee was "authorized" to make the statement—that is the province of Rule 801(d)(2)(C). *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 906 F.2d 432, 458 (9th Cir. 1990); *Mendoza v. Marriott Hotel Servs.*, No. CV 10-6384 (FFMx), 2011 U.S. Dist. LEXIS 102946, at *7-8 (C.D. Cal. Sept. 9, 2011). And, ultimately, Rule 801(d)(2)(D) does not even require a certain level of seniority for employee statements to qualify as a party admission. *See MGM Studios, Inc. v. Grokster, Ltd.*, 454 F. Supp. 2d 966, 972-74 (C.D. Cal. 2006); *EEOC v. Timeless Invs., Inc.*, 734 F. Supp. 2d 1035, 1043 & n.4 (E.D. Cal. 2010). Statements made by senior executives about Oracle's business are thus indisputably admissible, including:

Defendants' Trial Exhibit A-6329-1: This email chain contains a November 2, 2004 email from Jeff Henley to Keith Block titled "Re: ca/jeff clarke," in which Henley states that, in Oracle customer Computer Associates' ("CA") evaluation of Oracle versus SAP software, "SAP is leading in functionality pretty much across the board in [CA's] mind . . . [n]et, net I think we'll lose because of the functionality . . . ." Vol. 1 (A-6329-1) at ORCL00647146-47. This is evidence that the jury is entitled to consider in deciding that SAP won CA's business in 2004, based on its superior software, not because of TomorrowNow (which SAP had not yet acquired). Henley is Oracle's Chairman of the Board and has held this position since 2004. *Id.* (Found. for A-6329-1) at ORCL00034267; ECF No. 1141 (Joint Pretrial Statement) at 13. Oracle CEO Larry Ellison testified that, to the extent he has a boss, it is Henley. Vol. 1 (Found. for A-6329-1) at 11/8/10 Trial Tr. at 781:10-14. Block was Oracle's Executive Vice President of North America Sales, and the email reported on Oracle's chances of getting a sales deal with CA. *Id.* at ORCL00034185; *id.* at 9/17/09 Block Tr. at 17:7-18:2, 21:4-21; *id.* at 7/23/08 Blotner Tr. at 18:10-18; *id.* at 2/23/10 Meyer Report at 37 n.129. Where Oracle's Chairman of the Board responds to the Executive Vice President of North America Sales and reports about the status of a potential deal for Oracle software, both he and the vice president of sales are speaking within the

scope of their employment and, thus, these statements are admissible against Oracle.[6]

Response to Oracle's Argument: Defendants offer this document as an employee party admission. Contrary to Oracle's assertion, the email does not contain customer "statements" merely because Henley recites his interpretation of customer "feedback"; rather, Henley reports facts and his beliefs about CA's evaluation of the two competing software vendors. Vol. 1 (A-6329). Indeed, in reporting "net, net, I think we'll lose because of functionality," Henley demonstrates his interpretation and analysis. *Id.* Oracle does not even argue that any aspect of Keith Block's email, which states Block's "belie[fs]" contain hearsay. *Id.* Just because the underlying information comes from a third party does not convert an admission into hearsay.

B. Statements by Oracle's Sales and Support Employees.

Oracle has a sales group that markets and sells software and one year of support for that software. Vol. 2 (Sales & Sppt. Found.) at 7/23/08 Blotner Tr. at 11:19-12:2 (Rule 30(b)(6) testimony). Oracle also has a support group that attempts to secure customer support renewals. *Id.* at 4/24/09 Jones Tr. at 25:3-20; *id.* at 9/16/09 Van Boening Tr. at 152:10-15. As part of this process, and as evidenced by the documents below, these employees have internal discussions at Oracle and with customers regarding the customers' status, purchase options, factors for deciding to purchase more (or less) software, factors for deciding not to purchase support, and potential market influences, including third party service providers. *See id.* at 9/16/08 Cummins Tr. at 27:16-23 (Rule 30(b)(6) deposition testimony) ("The general outline is that customers are contacted regarding their renewal for the upcoming time frame. We then work with the customer . . . and if there are any questions on contracts or questions about services, we answer those questions."); *id.* at 8/7/09 Duggan Tr. at 23:16-24 (Rule 30(b)(6) deposition testimony) ("The support sales representative, and in some cases the manager, would be in constant contact with that customer and tracking the sales cycle, from quotation, to communications with the customer,

[6] ***Defendants' Trial Exhibits A-0277 and A-0441***: In the mass of objections Oracle served on Defendants, Oracle also initially objected on hearsay grounds to two emails from Charles Phillips and Juergen Rottler, and withdrew these objections (without agreeing that the documents are admissible without Oracle's consent) only when Defendants proposed to raise them with the Court. These documents further demonstrate the basic point that such statements by Oracle's senior executives are admissible.

to eventually getting a purchase order."). Defendants seek to admit statements directly concerning and relating to the responsibilities of sales and support employees—employees who deal with the very factors and customers at issue—and also statements expressly adopted by these employees.

In addition to the employee party admissions discussed above, an adoptive party admission is exempted from hearsay under Rule 801(d)(2)(B) where a party manifested that it adopted a statement "or believed [it] to be true." Fed. R. Evid. 801(d)(2)(B). This occurs where the party "uses the statement or takes action in compliance with the statement." *Sea-Land*, 285 F.3d at 821 (citing Weinstein's Federal Evidence § 801.31[3][b] at 801.56 (2d ed. 2002)). The Ninth Circuit has held that where a statement is sent via email to a party's employee and that employee "incorporates" and forwards the contents in compliance with the statement, it is an adoptive admission. *Id.*; *see also Grokster*, 454 F. Supp. 2d at 973; *Wagstaff v. Protective Apparel Corp. of Am., Inc*., 760 F.2d 1074, 1078 (10th Cir. 1985). For example, a statement, forwarded in its entirety via email by an employee with the prefacing statement "Yikes, Pls note the rail screwed us up . . ." constituted an adoptive admission because the employee "manifested an adoption or belief" in the truth of the information that she forwarded. *Sea-Land*, 285 F.3d at 821. The same rule applies to email attachments. *Boyer v. Gildea*, No. 1:05-CV-129-TLS, 2012 U.S. Dist. LEXIS 21310, at *22-23 (N.D. Ind. Feb. 21, 2012).

Oracle refuses to concede the admissibility of the prototypical employee party admissions or adoptive admissions; thus, Defendants seek the Court's guidance on this category and ruling on the following exemplars:

Defendants' Trial Exhibit A-0367: Admitted at the last trial (Vol. 1 (Found. for A-0367) at 4/29/09 Jones Tr. (played on 11/15/10) at 96:18-22, 96:23-97:13), this is an email from Juan Jones, Senior Vice President Customer Services North America Support for Oracle, regarding support renewals. Vol. 1 (A-0367); Vol. 1 (Found. for A-0367) at ORCL00034304-5. Support renewals are plainly within the scope of Jones' responsibilities, which relate to support sales and includes leading (1) the North American support sales team, (2) the North American customer services management team, and (3) a small group that monitors acquisition and customer success. *See id.* at 4/29/09 Jones Tr. (played on 11/15/10) at 24:10-18, 25:3-20, 43:7-10.

Response to Oracle's Argument: Defendants seek to admit this as a party admission. The statements Defendants seek to offer contain no customer statements. Jones states "I am not supportive of the proposal . . . for the following reasons," and proceeds to list those reasons, which are by definition his analysis. Vol. 1 (A-0367). That analysis is admissible against Oracle.

Defendants' Trial Exhibit A-5042: This Oracle email chain contains a June 19, 2006 email from Barbara Allario to Robert Lachs, in which Allario reports that Stora Enso likely will cancel support because its "parent is an SAP shop in Finland and has been pushing SAP" and "[t]hey have been told that they will be going to SAP over the next 2 years." Vol. 1 (A-5042). This is evidence that Stora Enso's purchase of SAP software was caused not by TomorrowNow, but by its parent company's directive to switch to SAP. Allario was an Oracle senior support sales manager in 2006. Vol. 1 (Found. for A-5042) at 4/21/09 Cummins Tr. at 244:25-245:1; *id.* at ORCL00034318. A support sales manager's responsibilities relate to selling support and include managing support sales representatives, participating in customers' software support renewals, reviewing sales representatives' performance, creating support sales forecasts, and overseeing customer communications, support sales tracking, and support sales negotiations. *Id.* at 9/16/08 Cummins Tr. at 34:5-25; *id.* at 8/7/09 Duggan Tr. at 21:23-22:25, 23:16-24. Reporting to the regional manager on why a customer planned to discontinue support was entirely within Allario's duties as a support sales manager, and such statements are admissible against Oracle.[7]

Response to Oracle's Argument: Defendants seek to admit this document as a party admission. This document does not contain the "multiple levels" of hearsay that Oracle alleges—it contains only Oracle statements. Here, an Oracle employee, Zeman, who is listed on an Oracle organizational chart, reported his understanding that a customer had been instructed by its parent company to migrate. All knowledge comes from somewhere; the important fact in this case is

[7] Oracle argues that this document contains hearsay within hearsay. Although Allario references a conversation with another Oracle employee, Derek Zeman, she does not quote or recount any statements from him. Further, Zeman is an Oracle sales representative, as indicated on Oracle's organizational chart, and statements about a customer on whose account he is working would be within the scope of his employment. Vol. 1 (Found. for A-5042) at ORCL00034218. At a minimum, Allario adopted any statements by Zeman, as she took the affirmative action of reporting to the regional manager about this customer based on the conversation with Zeman, and the email was then incorporated into the At-Risk Report. Fed. R. Evid. 801(d)(2)(B).

that Oracle's employees reported their understanding, and statements reflecting that understanding are admissible against Oracle. Oracle may, of course, present evidence challenging the understanding and analysis, but that is a question of weight for the jury.

Defendants' Trial Exhibit A-5997: This Oracle email chain contains a May 4, 2006 email from Craig Tate to Jeff Henley regarding Oracle customer Haworth. Tate stated:

> *[Haworth has] implemented SAP in Europe (originally acquired thru acquisition) and senior leadership views it as more succcessful [sic] than the Orcl project in North America - broader footprint, less time, less money. They are facing major directional decision on standardizing on one platform or the other going forward.*

This shows that Haworth was standardizing its ERP systems and chose SAP because of previous good experiences with SAP, not because of TomorrowNow. Tate was the Oracle Group Vice President, North Central Applications in 2006. Vol. 1 (Found. for A-5997) at ORCL00160564; *id.* at 7/23/08 Blotner Tr. at 118:4-5. Tate's sales team was specifically responsible for the Haworth account. Vol. 1 (A-5995) (Oracle employee reporting that "Haworth has been a very challenging account to retain . . .[t]his has been a combined effort between Craig Tate's sales team and ours."). Reporting to his superiors on a customer for whom he was responsible was manifestly related to the scope of Tate's employment and thus is admissible against Oracle.[8]

Response to Oracle's Argument: Defendants seek to admit this document as a party admission. First, Oracle admits that it does not contain customer statements, arguing that the "content" of Tate and Henley's emails "necessarily" must come from the customer. But this is not enough to establish that the statements themselves are hearsay. Both Henley and Tate are reporting their understanding and belief about the status of the customer account; that their understating is informed by the fact that Henley and Tate were participants in discussions with the customer does not render their admissions "statements" from the customer.

Defendants' Trial Exhibit A-6042-1: This is a PeopleSoft Executive Summary that describes the timeline on which CA cancelled support. Betsy Steelman, an Oracle Services

[8] This document also is admissible as an adoptive admission. Here, Jeff Henley, Oracle's Chairman of the Board, expressly manifested a belief in the truth of the statements when he incorporated the statements and responded, "[g]ot it. I agree we should try to salvage this account and not lose it to SAP." Vol. 1 (A-5997). Oracle objects on the grounds that the document contains hearsay within hearsay, but it does not appear that there are any additional out-of-court statements; even if there were, Tate and Henley adopted these statements.

Support Manager (Vol. 1 (Found. for A-6042-1) at ORCL00039277), is identified as the Oracle employee who submitted the document for approval through Oracle's OSSINFO group. Vol. 1 (A-6042-1) at ORCL00316128. According to Juan Jones, OSSINFO is part of Oracle's administrative approval process that reports to Jones' boss, Juergen Rottler, Executive Vice President Oracle Customer Services. Vol. 1 (Found. for A-6042-1) at Jones Tr. at 21:24-22:5, 29:12-17, 40:17-41:6, 41:20-42:2, 43:7-17. OSSINFO is an internal Oracle group that serves a gate-keeping function at Oracle by deciding whether to approve special terms or other deviations from the standard Oracle support offering. *Id.* at 5/13/09 Rottler Tr. at 22:5-21, 25:6-25, 31:8-33:17. Therefore, materials prepared and sent through this process by support managers are done within the scope of their employment and, here, are directly related to a then-Oracle customer, CA, for which approval was needed to terminate support. Additionally, Allison Adams, a Business Planning Manager in the OSSINFO group at Oracle (Vol. 1 (Found. for A-6042-1) at ORCL00653682), sent the approval to Steelman; both Adams, acting on behalf of OSSINFO, and Steelman manifested a belief in the truth of the statements by taking affirmative action and seeking and receiving the required approvals for cancellation of support services. Vol. 1 (A-6042-1); Vol. 1 (Found. for A-6042-1) at ORCL00034303; *id.* at Jones Tr. at 58:6-17. This and similar approval documents are admissible against Oracle.

Response to Oracle's Argument: Defendants seek to admit the statements in the Executive Briefing document as party admissions and adoptive admissions. Oracle fails to identify any customer "statements" reported in the Executive Summary. Rather, Betty Steelman reports the fact that the customer was converting to an all SAP shop, which is what she understood "per" her discussions with the customer. Vol. 1 (A-6042-1). Again, just because facts originate, and are identified as originating, from the customer does not make them customer statements. Further, by taking action based on the "justification" provided in the Executive Summary, the OSSINFO email adopts those statements as true. *Id.*

Defendants' Trial Exhibit A-6205-1: This is the "Maintenance At Risk Analysis" presentation (not to be confused with Oracle's "At-Risk" Report), which contains Oracle's internal analysis of customer concerns with Oracle products. Richard Cummins, Senior Director

of Support Renewals, authored the presentation and emailed it to his boss Chris Madsen, Vice President of North America Support Sales and Juan Jones. Vol. 1 (Found. for A-6205-1) at ORCL00034305; *id.* at 9/16/08 Cummins Tr. at 14:3-23, 14:25-15:11, 49:11-13. Providing this presentation to senior support group members clearly was within the scope Cummins' employment, whose responsibilities included assisting customers to renew support, contacting customers about their renewal for the upcoming time frame, working with customers to ensure that Oracle got a purchase order before the start date of the contract, and answering customer questions. *Id.* at 9/16/08 Cummins Tr. at 27:6-23. This document is both an employee party and adoptive admission, as Cummins manifests a belief in the truth of the statements in the presentation by attaching and sending it to senior employees.

Response to Oracle's Argument: Defendants seek to admit this document as a party admission; Oracle's description is misleading. The Power Point contains what Madsen characterizes as "a thorough analysis" of "At-Risk" accounts, not a single customer statement. Vol. 1 (A-6205-1). The "customer concerns" slide identified by Oracle is in fact merely a list of factors that generally indicate a customer might be "at risk" of leaving Oracle support, which arises out of that "thorough analysis." *Id.* The slide repeats no customer statements.

Defendants' Trial Exhibit A-5193: Admitted at the prior trial (Vol. 1 (Found. for A-5193) at 11/16/10 Trial Tr. at 1625:9-10), this is an email from James McLeod to Richard Cummins on the status of certain Oracle customers, to which Cummins responds with an action plan. McLeod was a regional manager in the support sales group under Cummins. *Id.* at 9/16/08 Cummins Tr. at 82:22-83:2, 85:10-12. His statements all relate to Oracle customers at issue, including Honeywell and Acushnet, and to his support sales responsibilities. *Id.* at Pls.' Resp. & Objs. to Interrogatory No. 98 at 6, 18. Cummins was the Senior Director of Support Renewals at Oracle and McLeod's boss at the time.[9] *Id.* at 9/16/08 Cummins Tr. at 82:22-83:8. Thus, this document and McLeod's statements are directly related to his responsibilities. Further, Cummins affirmatively responds to McLeod's email and manifests a belief in the truth of his statements.

[9] Cummins oversaw regional support sales managers, including, but not limited to, James McLeod, Robert Lachs, James Blackford, and Jordan Rowe-McCune. Vol. 1 (Found. for A-5193) at 9/16/08 Cummins Tr. at 82:22-83:8.

Response to Oracle's Argument: Defendants seek to admit this document as a party admission and do not seek to "circumvent" the Court's previous rulings on the At-Risk Report. Rather, the statements identified in this email—not the At-Risk Report—are recitations of facts and beliefs about the customers. Here, an Oracle sales representative was reporting to his boss the reasons he understood the identified customers cancelled Oracle support. Oracle's understanding is some evidence of why those customers cancelled.

C. Statements by Customers.

Contemporaneous communications and business records by customers provide relevant evidence of the economic factors in play when customers chose to cancel Oracle support or purchase SAP software. In addition to adoptive admissions, these statements by customers are admissible either as non-hearsay evidence of state of mind or under the "state of mind" exception to the hearsay rule. If the statement supports an inference about a customer's state of mind, it may be admitted for this non-hearsay purpose. *CytoSport, Inc. v. Vital Pharms., Inc*., 617 F. Supp. 2d 1051, 1074 (E.D. Cal. 2009) (finding consumers' and dealers' statements admissible evidence of their "then-existing state of mind" and not hearsay). Or if the statement is a direct "statement of the declarant's then-existing state of mind . . . such as motive, intent, or plan," it may be admissible under the hearsay exception set forth by Rule 803(3). Fed. R. Evid. 803(3). This hearsay exception rule has three requirements: (1) that the statement be contemporaneous with the state of mind described, (2) that the declarant had no time or motive to misrepresent his or her thoughts, and (3) that the declarant's state of mind is relevant. *United States v. Ponticelli*, 622 F.2d 985, 991 (9th Cir. 1980); *Rite-Hite Corp. v. Kelley Co., Inc*., 774 F. Supp. 1514, 1526 (E.D. Wis. 1991), *vacated in part and remanded in part on other grounds*, 56 F.3d 1538, 1555-56 (Fed. Cir. 1995). Courts frequently admit such statements to prove customers' motivations for ceasing to do business with a party. *Lahoti v. Vericheck*, 636 F.3d 501, 509 (9th Cir. 2011) (affirming admissibility of testimony regarding substance of customer telephone calls "for the truth of the matter asserted" under state of mind exception); *CytoSport*, 617 F. Supp. 2d at 1074; *Inventory Locator Serv., LLC v. Partsbase, Inc.*, No. 02-2695 Ma/V, 2005 U.S. Dist. LEXIS 32680, at *21 (W.D. Tenn. Sept. 6, 2005). And, importantly, Defendants need only establish that

the declarants were Oracle customers at the time the statements were made; no other identifying evidence is required. *See Callahan v. A.E.V., Inc.*, 182 F.3d 237, 252 (3d Cir. 1999) ("The relevance of [customers'] statements depends only on the fact that they were the plaintiffs' customers, not their particular identities . . . [and] we do not think that the admissibility of their statements under [ ] Rule 803(3) . . . depends on [the individual declarants] being identified."). As illustrated in the exemplars below, these statements can take the form of communications with Oracle or internal customer communications.

Defendant's Trial Exhibit A-5995: This email chain contains a May 10, 2006 email from Ann Harten, an employee of Oracle customer Haworth, to Craig Tate and others at Oracle, titled "Haworth response to Oracle proposal." Vol. 1 (A-5995). Harten expressed disappointment with Oracle and concerns about whether Oracle will be a "good long term partner for Haworth," which evidences the reason Haworth chose SAP software over Oracle software. *Id.* Harten's email was forwarded up the Oracle chain to Juan Jones, who stated on May 12, 2006, "[a]s per our conversation, please work with Ian/Saleem to assign temporary coverage for Haworth. We need to turn this account around and we need to do it fast." *Id.* Jones was a Senior Vice President of Customer Services, North America Support at Oracle from at least 2005 to 2009; his responsibilities related to support sales and included leading (1) the support sales team for North America, (2) the customer services management team for North America, and (3) a small group that monitors acquisition and customer success. Vol. 1 (Found. for A-5995) at ORCL00034305; *id.* at 9/24/09 Jones Tr. (played 11/15/10) at 20:3-6, 24:10-18, 25:3-20, 43:7-10; *id.* at 9/24/09 Jones Tr. at 29:12-17. By forwarding the entire contents of Harten's statements, Jones incorporated them; by acting to assign temporary coverage to the account, he manifested an adoption in the truth of them. His statement, "[w]e need to turn this account around and we need to do it fast" indicates his acceptance that Oracle's product offering may not fit Haworth's needs, and the entire document is admissible against Oracle.

Response to Oracle's Argument: Defendants seek to admit the Haworth email as an adoptive admission. Although Oracle's argument about this document is unclear, Oracle misses the fundamental point articulated above. The email from the customer signals its concerns about

its future with Oracle, and Jones manifests his belief that these threats are true by taking the action of assigning employees to the account and indicating the need to "turn this account around" fast. Vol. 1 (A-5995).

Defendants' Trial Exhibit A-5058: This email chain contains a January 29, 2007 email from Oracle customer Vanguard Managed Solutions to Oracle employee Lori Sanabria titled "Re: VanguardMS – Oracle JDE Renewal." Vol. 2 (A-5058). The customer states that Vanguard is cancelling Oracle support because "we did not need support last year, except one time that was minor. Our company is shrinking and splitting into 2, and we are not likely to continue forward with JDE upgrades in the future"; this is evidence that Vanguard had a motive to leave Oracle support other than TomorrowNow. *Id.* Such statements are admissible under Rule 803(3) to demonstrate the customer's motive to leave: The customer's state of mind is relevant to causation of damages, the statements were made contemporaneously with the communication to cancel support, and there is no evidence of an intent to misrepresent, given the casual and spontaneous style of the email. *Id.*

Response to Oracle's Argument: Defendants seek to introduce the customer email under Rule 803(3). Oracle's only argument is that the Oracle employee did not believe the customer statements, but Defendants are not required to demonstrate a lack of "skepticism" from the person who received a statement for the statement to be admissible under Rule 803(3).

Defendants' Trial Exhibit A-5002-1: Oracle objects that this document is hearsay and not authentic, but it is neither. The document, produced pursuant to a subpoena, contains internal Amgen communications and communications with TomorrowNow regarding support service negotiations.[10] It is admissible as non-hearsay because Defendants seek to admit it not for the truth of any statement, but for the purpose of demonstrating the date on which Amgen decided to

[10] Regarding authenticity, Amgen's Executive Director Enterprise Records Management, Shelia Martin, submitted a Declaration of Custodian of Records establishing that the documents produced in response to a subpoena are "true, correct, and complete copes and prepared by Amgen's personnel in the ordinary course of their duties at or near the time of the events recorded." Vol. 2 (A-5002-1) at 5. Because it is undisputed that these documents were produced in response to a subpoena, they are deemed authentic under Rule 901. *MGM Studios,* 454 F. Supp. 2d at 972-73; *FTC v. Willms*, No. C11-828, 2011 WL 4103542, at *13 (W.D. Wash. Sept. 13, 2011).

contract with TomorrowNow. Specifically, the emails demonstrate that, as of late October 2005, Amgen was still choosing between Oracle and TomorrowNow for support. Vol. 2 (A-5002-1). This is significant because Amgen was undecided on a support provider several months *after* Amgen had purchased SAP software, supporting Defendants' claim that Amgen did not purchase SAP software because of TomorrowNow. Further, the customer statements in this email chain are admissible under Rule 803(3) because they reflect the customer's then-existing state of mind. These are internal Amgen employee statements, so there is no motive for fabrication, and the information is directly relevant to when Amgen selected TomorrowNow.

Response to Oracle's Argument: Defendants seek to introduce this document as non-hearsay or under Rule 803(3). First, contrary to Oracle's assertion, this evidence is relevant to why customers such as Amgen should be excluded from the damages calculation, even though Oracle's damages expert fails to exclude many customers with the same fact patterns. Further, the document is being offered for the non-hearsay purpose of showing the date on which a decision was pending, to show that the SAP decision came first. Finally, the state of mind Defendants plan to show with the email is "undecided," which is entirely relevant to the question of causation, as TomorrowNow did not cause the SAP sales where the customer remained undecided on TomorrowNow even after purchasing SAP.

D. <u>At-Risk Report.</u>

The At-Risk Report contains several categories of information, such as the number of customers at risk of leaving Oracle, contract revenue amounts, win/loss statistics, and a "notes" field with Oracle employee statements and customer statements, both relating to customers' reasons for leaving Oracle. Although it is now convenient for Oracle to cast doubt on the trustworthiness of the At-Risk Report statements, during discovery, Oracle's counsel argued that discovery regarding customers should be limited because the Report was sufficient and "ha[d] enormous detail about all customers lost to third parties. This is a gift . . . [it] goes a very long way in compiling, in one unit . . . the various customers that were actually in play; what happened to them; what kind of financial losses on a one-year period were associated with them." Vol. 2 (At-Risk Found.) at 2/13/08 Hrg. Tr. at 152:24-153:3. Oracle further agreed that the Report is a

business record and previously objected only to "transcribed customer statements" in the "notes" field. Vol. 2 (At-Risk Found.) at 9/30/10 Hrg. Tr. at 10:15-12:14 (stating "[w]e're not contending that the reports themselves are not . . . business records").[11] Defendants will offer (1) unchallenged portions of the Report (*i.e.*, all fields except the "notes" field), (2) portions on which Meyer relied to form his opinions, which the Court previously found admissible (ECF No. 914 (9/30/10 Order) at 1-2), and (3) select excerpts of the "notes" field under the three evidentiary bases discussed above.

With regard to the select excerpts of the "notes" field, contrary to Oracle's assertion, this is not a retread of previously presented issues. Before the first trial, Oracle moved *in limine* to categorically exclude only the portions of the At-Risk Report containing "transcribed comments from customers." ECF No. 737 (O's MIL) at 13-17; Vol. 2 (At-Risk Found.) at (9/30/10 Hrg. Tr.) at 10:15-12:14 ("We're focused on just this one part of the report which are transcribed comments from customers."). Oracle did not seek to exclude specific transcribed customer statements or statements by Oracle employees recorded in the report. The Court granted Oracle's motion to categorically exclude "transcribed customer statements" in the Report on the basis that Defendants had not "articulated any applicable exception to the hearsay rule." ECF No. 914 (9/30/10 Order) at 1-2. The Court did not rule on the admissibility of any specific transcribed customers statements or any Oracle employee comments contained in the report. *See id.*

At trial, Defendants filed a "Motion Regarding Admissibility of Plaintiff's At-Risk Report," which asked the Court to revisit its motion *in limine* ruling and admit the Report in its

[11] Oracle conceded that the At-Risk Report is a business record, as evidenced by Rule 30(b)(6) testimony from employees Cummins and Elizabeth Shippy, Special Programs Manager. Shippy created report entries "at or near the time . . . from information transmitted by [] someone with knowledge," and did so as part of "a regularly conducted activity of a business." Fed. R. Evid. 803(6)(A)-(B); *see also* Vol. 2 (At-Risk Found.) at 9/25/08 Shippy Tr. at 88:12-23, 89:4-11. The Report was kept in the course of "a regularly conducted activity of a business" because it was "a regular practice" of the sales division to track cancellations. Fed. R. Evid. 803(6)(B)-(C); *see* also Vol. 2 (At-Risk Found.) at 9/25/08 Shippy Tr. at 106:4-14. And "[n]either the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness." Fed. R. Evid. 803(6)(E); Vol. 2 (At-Risk Found.) at 9/23/08 Cummins Tr. at 305:7-18 (sales representatives knew customer's information "because it was . . . their account"). Indeed, Oracle management required the data to be collected and regularly reported. Vol. 2 (At-Risk Found.) at 9/25/08 Shippy Tr. at 82:2-3, 82:5-12 ("The management team has requested that if a contract is at risk that the renewal rep needs to document what's been going on with the account, what steps have been taken, and that once again goes in as notes . . . .").

entirety, including transcribed customer statements. *See* ECF No. 986 (Defs.' Mot. re: Admissibility of Pls.' At-Risk Report). The Court denied this motion from the bench, explaining that "the customer statements still, in my view, are hearsay . . . ." *See* Vol. 2 (At-Risk Found.) at (11/16/10 Trial Tr.) at 1528:10-1529:1. The Court noted, however, that it "did not read the voluminous documents that you all submitted because I didn't have an opportunity to do so." *Id.* Consequently, the Court did not make a specific ruling as to the admissibility of any specific entry, which is what Defendants now request, and Defendants will establish that those excerpts qualify under applicable hearsay exceptions or exemptions, as described below. Notably, Oracle does not challenge the information in the narrow entries Defendants now seek to admit as untrustworthy or unreliable; rather, Oracle takes the position that they are not party admissions.

Party Admission—Merck Excerpt: This entry states, "A little over a year ago, Merck signed a deal with SAP for 27M. This is a multi-year migration over the next several years to one instance . . . The SAP deal was about relationships and Oracle did not even bid on the deal. Merck did not provide information in the discovery stage to allow our involvement." Vol. 2 (A-0059 (Merck)). This excerpt is relevant because it tends to prove that TomorrowNow was not the cause of Merck's SAP software purchase. It does not record a "transcribed customer statement," but rather is an Oracle employee's recitation of facts about Merck's support renewal. Barbara Sharp-Moore is identified as the support sales manager for this entry. *Id.* This is corroborated by Oracle's discovery response stating that Sharpe-Moore was involved with the Merck account. Vol. 2 (A-0059 (Merck)) at Pls.' Resp. & Objs. to Interrogatory No. 98 at 22. Because all of the entries in the Report were provided by an Oracle support sales representative for the particular account for which he or she was responsible, this entry is a statement made by an Oracle employee related to the scope of his or her employment. Vol. 2 (At-Risk Found.) at 9/25/08 Shippy Tr. at 82:2-3, 82:5-12, 88:12-23, 89:4-11; *id.* at 3/5/09 Shippy Tr. at 40:3-41:10; *id.* at 9/23/08 Cummins Tr. at 303:15-304:3, 305:7-18, 309:21-23. Because the Report itself is admissible as a business record, this entry is admissible under Rule 801(d)(2)(D).

Response to Oracle's Argument: Oracle admits that this entry contains no customer quotes, but nonetheless continues to argue that it is hearsay. However, as with many of the

admissions, the Oracle sales representative provides her understanding of the account's status. The fact that this understanding comes from her conversations with the customer indicates only that these admissions in fact were within the scope of her employment. Further, the case cited by Oracle is inapposite. It does not concern the use of a party's own documents as party admissions, which is the situation here, but rather the attempt to use a third-party's handwritten transcription of a telephone conversation with the defendants as a party admission against the defendants. *See In re Cirrus Logic Secs. Litig.*, 946 F. Supp. 1446, 1468-70 (N.D. Cal. 1996).

Adoptive Admission—Stora Enso Excerpt: This entry states:

Vol. 2 (A-0059 (Stora Enso)) (emphasis added). This excerpt is relevant because it tends to prove that the customer purchased SAP software because of a parent company mandate, not because of TomorrowNow. Importantly, the comments appear to originate from a June 19, 2006 Oracle email from Barbara Allario to Robert Lachs. Vol. 1 (A-5042). These statements are employee party admissions. Lachs is identified as the support sale manager for this entry. Vol. 2 (A-0059 (Stora Enso)). This is consistent with Oracle's discovery response stating that he was involved with the Stora Enso account. Vol. 2 (Found. for A-00591 (Stora Enso)) at Pls.' Resp. & Objs. to Interrogatory No. 98 at 22. Incorporating these admissible comments into the Report further shows they were "adopted" by Oracle. This illustrates a key point: The At-Risk Report entries were taken directly from typical communications authored by support sales employees about customer activities. That these communications were imported into a separate document does not change their nature and admissibility; it reinforces the reliability and admissibility of the

information contained in them.

Response to Oracle's Argument: Oracle focuses on one specific line entry to argue that this entire excerpt is inadmissible. The entry Oracle focuses on notes that the customer felt that Oracle could not match the TomorrowNow offering was clearly adopted by Oracle as in a subsequent entry (dated 7-14-06) the statement is that Oracle could not match the offering. Vol. 2 (A-0059 (Stora Enso)). For all of these reasons, this entry is admissible.

E. Response to Oracle's Counter-Examples Below.

Below, Oracle lists "counter-examples" to the At-Risk Report entries and the other exemplars described above. With regard to the At-Risk entries cited by Oracle, Defendants are not offering any of these as substantive evidence. Defendants, of course, reserve the right to use the entries relied on by Meyer during his cross-examination, as allowed by the Court's prior orders, but Oracle does not appear to dispute this point here. As for the other exemplars, Oracle argues only that they are not adoptive admissions. Defendants briefly respond as follows:

Defendants' Trial Exhibit A-5663: Although Defendants do not agree with Oracle's position, at this time, Defendants do not plan to offer this document in their case-in-chief. Should Oracle open the door to the statements made in the document through cross-examination of Defendants' witnesses or otherwise contradict the statements in the document, Defendants may seek to admit this document at that time as impeachment or rebuttal evidence.

Defendants' Trial Exhibit A-0225: This is an email and list of customers that "reinstated" Oracle support, generated from the At-Risk Report. Oracle's objection, therefore, is the same as that discussed above regarding the "notes" fields. Defendants believe the Court's guidance on whether the types of entries proposed above are admissible will resolve this issue.

Defendants' Trial Exhibit A-4089: As indicated on Defendants' exhibit list, the email exchange Defendants seek to admit is the top exchange between Jeff Henley, Chairman of the Board, and Safra Catz, Oracle's CFO. Even under Oracle's expansive theory of customer statements, there are none here, as Oracle completely ignores this exchange and focuses on one part of one earlier email from Richard Cummins and requests wholesale preclusion of the document. Vol. 2 (A-4089). Although Defendants do not believe Oracle's reading of this email

is correct (the email shows that Cummins believes that there is not a legitimate concern for this customer, as the customer "did not indicate a threat of TomorrowNow" and so adopts the statement), Defendants are not seeking to admit this portion of the document.

Defendants' Trial Exhibit A-6086: This document is admissible as an employee party admission. Brian Mitchell is a Senior Vice President, License and Consulting, in Oracle's Asia Pacific region, and he is providing this information to Charles Phillips, Oracle's then-co-President. Vol. 2 (A-6080); Vol. 2 (Found. for A-6086) at ORCL00034188. Oracle identifies no customer statement and what it does point to shows that this is Mitchell's understanding and analysis based on the information he has received. This objection underscores how the Court's guidance will help resolve additional disputes.

ORACLE'S POSITION

A. The At Risk Report

SAP asks the Court to admit into evidence instances of customer hearsay contained within the "notes" column of the At Risk report. The Court has considered and rejected this same motion twice before and should do so again.

In its motion *in limine* prior to the first trial – which this Court granted – Oracle detailed the nature of the customer hearsay in the At Risk report notes column. Dkt. 737 (Pls.' 8/5/10 Mot. *in Limine*) at 13-17. The At Risk report "only list[s] customers *who tell us* they are evaluating other 3rd party support providers." Motamed Decl. Ex. E at ORCL00132444 (internal Oracle email from Elizabeth Shippy) (emphasis supplied). If a customer told an Oracle support sales representative any reasons for dropping or considering dropping support, the representative was supposed to email that information to Elizabeth Shippy, who then "cut and pasted it directly from the e-mail into the database." Motamed Decl. Ex. F (Cummins 9/23/08 Rule 30(b)(6) Depo.) at 269:5-10, 269:16-18; *see also id.*, Ex. G (Shippy 3/5/09 Depo.) at 49:3-5, 54:19-22, 56:2-11. Customer comments in the notes field were simply a record of what the representative reported the customer said. Oracle did not verify whether the comments were accurate, and they were not particularly or uniformly reliable. Motamed Decl. Ex. F (Cummins 9/23/08 Rule 30(b)(6) Depo.) at 269:21-25 ("[T]he information came from customers as best we could get it.

Customers were not, you know, customers give you what they want -- want you to have. So there's certainly limitations with that."). Customers sometimes gave inaccurate information to Oracle on the subject. *E.g.*, Motamed Decl. Ex. H at ORCL00127354 (internal Oracle email from Robert Lachs to Rick Cummins stating, "It turns out [customer] was purposefully dishonest (or 'vague' as they elect to phrase it) keeping us at bay while a) not telling us the renewal was at risk . . ."); Motamed Decl. Ex. I at ORCL00033223 (internal Oracle email from Steve Boulton regarding Electrolux, a customer who went to TomorrowNow stating, "This is a big loss. Electrolux say they are not going to a competitor . . . but time will tell."). The information in the At Risk report notes column is classic, unreliable hearsay.

1. Procedural History

The Court previously ruled on two fully briefed requests on this issue, in which Defendants made the exact same arguments as they do now. On both occasions, the Court rejected SAP's request to admit customer hearsay, and the Court should do so again here. Before the first trial, Oracle moved *in limine* to exclude customer hearsay contained in the At Risk report. Dkt. 737 at 13-17. In their opposition, Defendants argued for admission of the At Risk report because, according to them, the customer statements it contains are "adoptive admissions and not hearsay; . . . offered for other non-hearsay purposes including the customer's state of mind . . . ; and [because] Meyer relied on the At Risk report . . . ." Dkt. 791 at 7. The Court rejected Defendants' arguments and held "[t]he customer statements are hearsay, and SAP has not articulated any applicable exception to the hearsay rule." Dkt. 914 (9/30/10 Final Pretrial Order) at 1.

During trial, Defendants asked for leave to move for reconsideration regarding the admissibility of the notes section in the At Risk report, leading to this exchange:

> Court: "My understanding was you were raising a different ground than you raised before. I haven't had a chance to read it, but it appears to me that you are now arguing that the appropriate hearsay exception would be for adoptive admission?
>
> Mr. Lanier: That's correct, Your honor.
>
> Court: Which is not something you argued before; is that the position you are taking?

Mr. Lanier: Yes, Your Honor."

Motamed Decl. Ex. J (11/15/10 Trial. Tr.) at 1510:3-10. Defendants' statement to the Court was untrue – in fact, Defendants' opposition to Oracle's motion *in limine* regarding the At Risk report identified the adoptive admission exception as a basis for admissibility in an *argument heading*, and the Court had rejected that argument. Dkt. 791 at 9-10. On Defendant's motion for reconsideration, the Court again denied Defendants' request, holding " these customer comments weren't adopted by Oracle . . . [s]o, therefore, the customer comments still, in my view, are hearsay, and they're not sufficiently reliable . . . ." Motamed Decl. Ex. J at (11/16/10 Trial Tr.) at 1528:18-1529:1.

Now, Defendants ask for a third time to admit the customer hearsay in the notes section of the At Risk report.[12] *See* Section III(D); Dkt. 1139 ("Defs. Trial Brief") at 17-20. As the Court noted at the pre-trial conference, it has previously ruled on this very issue, and it should not revisit its previous rulings excluding the customer hearsay. *See* Motamed Decl. Ex. K (5/24/12 Hrg. Tr.) at 127:19-128:5. However, even if the Court were to consider this issue a third time, without requiring Defendants to meet the Local Rule 7-9 criteria to move for reconsideration, Defendants' arguments would still fail on the merits.

2. Hearsay within Hearsay

The customer comments in the At Risk report are hearsay within hearsay under Fed. R. Evid. 805. *See United States v. Arteaga*, 117 F.3d 388, 396 n.12 (9th Cir. 1997) ("The problem of customer-supplied information can be analyzed as 'hearsay within hearsay.' In such 'double hearsay' situations, each statement must qualify under some exemption or exception to the hearsay rule."); *see also id*. at 395 ("Courts that have applied this principle to [business] records have generally held that customer-supplied information on [the recorded forms], which is not verified, should be excluded . . . .").

Unlike the At Risk report itself, the customer comments in the notes column are not business records because "[t]hat exception applies only if the person furnishing the information to

[12] Unlike during trial, this time Defendants have not asked the Court for leave to file a motion for reconsideration and have violated Civil Local Rule 7-9 as a result.

be recorded is acting routinely, under a duty of accuracy, with employer reliance on the result, or in short in the regular course of business." *United States v. Pazsint*, 703 F.2d 420, 424 (9th Cir. 1983) (internal quotations omitted). As described above, there is no evidence that the various (and sometimes unidentified) customer personnel who supplied the underlying information acted under that duty, or that they had final or influential decision-making authority for that customer. To the contrary, it is to be expected that in any negotiation in which millions of dollars are at stake, customer representatives will bluff or exaggerate in an effort to obtain the most favorable terms. *See, e.g.*, Motamed Decl. Ex. A (A-5663) at ORCL00131232 (internal Oracle document discussing customer Quad/Graphics, stating "8-26-04: Customer has informed me they will keep support on Merant and ePay only. Too weird. . . We are dealing with purchasing so *never really sure if they are going for a better price or really will leave us*. 8-12:04: Customer is considering TomorrowNow. . . AE will be organizing a face-to-face with CIO and VP HR *to see if TomorrowNow is really a threat or [if] purchasing is using it as leverage to receive discount on maintenance.*") (emphasis supplied). In addition, Oracle did not verify the accuracy of customer comments. Oracle employees simply pasted or paraphrased the customer statements into the notes field of the At Risk reports, and the evidence shows that these customers' comments may not be truthful. The Court should not permit SAP to present this unreliable evidence to the jury.

In addition, in at least some cases, Defendants seek to admit untested hearsay regarding customers that the Parties actually deposed. For example A-5002-1 relates to Amgen, and A-5193 relates to Honeywell, both of whom gave deposition testimony in this case. If Defendants want to submit evidence related to those customers' motives and states of mind, they should rely on their actual testimony, not second- or third-hand reports of what the customers may have said or intimated during negotiations. Indeed, Judge Legge directed Defendants to do exactly that. *See* Motamed Decl. Ex. L (2/13/08 Hrg. Tr.) at 112:21-113:01 (Judge Legge: "If you are going to . . . raise lack of causation -- aren't you going to have to go to the individual clients . . . ? [T]hat's where the evidence is going to be.").

As before, Defendants only offer two hearsay exemptions or exceptions under which the Court could admit this unreliable second level of hearsay: as an adoptive admission, or as state of

mind evidence.[13] Neither applies here.

3. Adoptive Admissions

Last trial, this Court ruled that "these customer comments weren't adopted by Oracle" and "[i]n fact, to the extent that some of the comments were complaints, it would be odd to find that Oracle adopted them as their own." Motamed Decl. Ex. J (11/16/10 Trial Tr.) at 1528:20-22. Defendants nevertheless resurrect this same argument, and it must fail again.

An Oracle employee does not "incorporate" or "adopt" customer hearsay merely by forwarding customer comments in an email or compiling them in a chart; adoption requires an affirmative acceptance of the statement. *See In re Oil Spill*, MDL No. 2179, 2012 WL 85447 (E.D. La. 2012) ("[A] forwarded email is only an adoptive admission *if it is clear* that the forwarder adopted the content or believed in the truth of the content.") (emphasis supplied); *MGM Studios, Inc. v. Grokster, Ltd.*, 454 F. Supp. 2d 966, 973 (C.D. Cal. 2006) (third-party statements incorporated into a party's emails are only admissible as vicarious admissions "*to the extent the [party] agent expresses approval thereof*") (emphasis supplied). Defendants cite as an example a case where a party adopted, by forwarding with approving commentary, an email written by its own employee (as opposed to an unverified third party statement). *See Sea-Land Servs., Inc. v. Lozen Int'l,* LLC, 285 F.3d 808, 821 (9th Cir. 2002).[14] Here, by contrast, Oracle employees do not know whether what a customer said is true, especially in the context of negotiations where customers often misrepresent facts. *See* Motamed Decl. Ex. F (Cummins 9/23/08 Rule 30(b)(6) Depo.) at 269:21-25; *id.*, Ex. H at ORCL00127354; *id.,* Ex. A (A-5663) at

[13] Defendants also argue that Oracle employees' *own* statements are admissible as party admissions under Fed. R. Evid. 801(d)(2)(D). Dkt. 1139 (Defs.' Trial Brief) at 10-13. A document does not qualify as a party admission under Fed. R. Evid. 801(d)(2) simply because it was written by an Oracle employee. For each purported admission, Defendants must "lay a foundation to show that an otherwise excludable statement relates to a matter within the scope of the agent's employment." *Breneman v. Kennecott Corp.*, 799 F.2d 470, 473 (9th Cir. 1986); *see also* Motamed Decl. Ex. O (11/12/2010 Trial Tr.) at 1209:9-12. Customer statements, however, are not admissible as *Oracle* party admissions. Even if Defendants can lay the foundation that an Oracle employee's statement is an Oracle admission under Fed. R. Evid. 801(d)(2)(D), Fed. R. Evid. 805 prohibits the introduction of customer hearsay contained in the Oracle document unless Defendants can prove it falls within another applicable hearsay exception.

[14] The other case Defendants cite, *Boyer v. Gildea*, is inapposite. The adopted admission at issue was a *party-authored* attachment, which *a party employee* had revised. Its inclusion as an attachment to a third party's email was irrelevant to the court's holding. *See Boyer v. Gildea*, Case No. 1:05-CV-129-TLS, 2012 U.S. Dist. LEXIS 21310, at *22-23 (N.D. Ind. Feb. 21, 2012).

ORCL00131232. Thus, as the Court has acknowledged, it would be "odd" for Oracle to approve of or adopt such unverified statements as its own. *Id.,* Ex. J (11/16/10 Trial Tr.) at1528:19-22.

4. State of Mind

Like Defendants' adoptive admission claims, the Court previously rejected the argument that the At Risk notes constitute non-hearsay reflections of the customers' state of mind or admissible state-of-mind evidence under Fed. R. Evid. 803(3). Dkt. 914 at 1. The Court should do so again, for four reasons.

First, as the Court previously recognized, Defendants offer state of mind evidence to prove the truth of the matter asserted. Defendants intend to offer customer hearsay "to prove customers' motivations for ceasing to do business" with Oracle. Section III(C), *supra*; Dkt. 1139 (Defs. Trial Brief) at 16. In this case, because the customers' reasons for leaving Oracle are a central issue, offering a customer's statement to show customer "motive" is simply offering it for the truth of the matter. Motamed Decl. Ex. M (9/30/10 Hrg. Tr.) at 16:6-8 (Court observing that "state of mind" and "truth of the matter" "tend[] to meld in these circumstances").

Second, for the same reason, Defendants cannot invoke Fed. R. Civ. 803(3) to admit factual assertions by customers under the auspices of "customer motive" statements. "The exclusion of 'statements of . . . belief to prove the fact . . . believed' is necessary to avoid the virtual destruction of the hearsay rule which would otherwise result from allowing state of mind, provable to a hearsay statement, to serve as the basis for an inference of the happening of the event which produced the state of mind." Fed. R. Evid. 803(3) advisory committee note (citing *Shepard v. United States*, 290 U.S. 96 (1933)). For example, Defendants cannot offer a customer's out-of-court statement that it was in the process of transitioning to SAP – a factual assertion – as evidence of that customer's "motive" to cancel Oracle support. *See* discussion re A-5997 & A-6042-1. Otherwise, Fed. R. Evid. 803(3) would be an exception that swallows the entire hearsay rule in a case like this where customer motive is at issue.

Third, Defendants concede that the state of mind exception requires evidence that the declarant "had no . . . motive to misrepresent himself." Section III(C); Dkt. 1139 (Defs. Trial Brief) at 16 (citing *U.S. v. Ponticelli*, 622 F.2d 985, 991 (9th Cir. 1980)). However, these

statements occur in the context of renewal negotiations, where customers had a clear motive to – and routinely did – posture and misrepresent their positions. *See, e.g.*, Motamed Decl. Ex. H at ORCL00127354 (internal Oracle email from Robert Lachs to Rick Cummins stating, "It turns out [customer] was purposefully dishonest (or 'vague' as they elect to phrase it) keeping us at bay while a) not telling us the renewal was at risk . . ."); *id.,* Ex. A (A-5663) at ORCL00131232 (internal Oracle document doubting the veracity of a customer employee's statements about their intention to and stated reasons for wanting to leave Oracle).

Fourth, it is doubtful that individual employee statements can be used under Fed. R. Evid. 803(3) to prove the state of mind of corporate entities like the customers in this case. To the extent they reflect anything, the comments in the At Risk report reflect at most only the *then-existing* state of mind of a single customer employee. Defendants offer this evidence as proof of a future or speculative event: whether the corporate customer entity *would have left or eventually did leave Oracle support anyway*, for reasons unrelated to TN's conduct. This makes the comments even more attenuated, and even less reliable.

Moreover, Defendants' cited authorities are inapposite. Their primary cases, *CytoSport* and *Lahoti*, are trademark cases that discuss the unrelated narrow issue of whether customer statements are admissible to prove the element of customer "confusion" in trademark cases. *See CytoSport, Inc. v. Vital Pharms., Inc.*, 617 F. Supp. 2d 1051, 1074 (E.D. Cal. 2009); *Lahoti v. Vericheck*, 636 F.3d 501, 509 (9th Cir. 2011). Furthermore, as the *CytoSport* court explains, most courts that admit a customer statement as evidence of "customer confusion" do so because it is "not being offered for the truth of the matter asserted by the confused customer . . . , but rather for the fact that the confusing statement was observed by the employee." *Cytosport*, 671 F. Supp. 2d at 1074. That is not the case here; Defendants offer these statements for the truth of the matter asserted by a customer employee – why the employer might have left Oracle – not the fact that a customer was confused or considered leaving.

5. Defendants' Examples

In their trial brief, Defendants cite two hand-picked "exemplars" from the At Risk report notes. Even these examples – which do not fairly represent the overall customer comments in the

At Risk report – demonstrate why the Court should continue to exclude this hearsay.

a. Entry Regarding Merck

Defendants argue their first example is a party admission that contains no "'transcribed customer statement,' but rather is an Oracle employee's recitation of the facts about Merck support renewal." Section III(D) (Party Admission—Merck Excerpt). Extensive testimony by Oracle employees about the nature of At Risk reports and the source of its notes field contradicts that characterization. Even in the absence of direct quotations, these are inadmissible notes reflecting a sales rep's conversations with customers. *See, e.g.*, Motamed Decl. Ex. N (9/25/08 Shippy Depo.) at 81:4-13 (asking where notes of "communications [that] have happened between the sales rep and the customer" would be collected); *Id.* Ex. G (3/5/09 Shippy Depo.) at 92:15-17 ("[T]his report was as good as the information that we received from the rep, which then received the information directly from the customer.")

The language in the Merck entry supports this view. It describes a scheduled upcoming conference call and details how an Oracle representative visited (and spoke with) Merck about the renewal. A-0059 (Merck & Company Incorporated entry). Written notes that paraphrase customer hearsay are just as unreliable as direct quotations by out-of-court declarants. *See, e.g.*, *In re Cirrus Logic Securities Litigation*, 946 F. Supp. 1446, 1468-70 (N.D. Cal. 1996) (analyst's notes "representing his interpretation of what was said [by the other party to the conversation] may not be considered trustworthy evidence of [the other party's] statements" and are inadmissible hearsay).

b. Entry Regarding Stora Enso

Defendants' other exemplar, the Stora Enso entry, exemplifies the hearsay nature of the At Risk report notes column. A-0059 (Stora Enso North America Corp entry). Contrary to Defendants' assertions, the May 22, 2006 entry identifies an email and a phone call with the customer as the information source. Later updates reference more calls with the customer. *Id.* [redacted] This entry also demonstrates the unreliability of treating statements by an individual customer contact as an indication of a customer's state of mind; [redacted]

[redacted] Moreover, this entry includes references to a parent company and communications between the parent company and Stora Enso, which implicates yet another level of unreliable hearsay.

Defendants' argument that these statements are "adoptive admissions" fails for the reasons set forth above. Defendants emphasize a "key point," "[t]hat these communications were imported into a separate document does not change their nature and admissibility. . . ." Section III(D) (Adoptive Admission—Stora Enso Excerpt). Oracle agrees: merely compiling customer hearsay into a report does not constitute an adoption. No evidence suggests Oracle employees approved or adopted these statements; rather, evidence indicates Oracle regarded such statements with suspicion. Defendants have the burden to lay the foundation that (a) the customer representative had authority to make these statements and (b) Oracle verified or expressly approved of them. Defendants have provided no evidence in support of either prong.

6. Oracle's Counter-Examples

Many At Risk report notes include direct recitations of inadmissible customer statements that were transcribed, paraphrased or copy-and-pasted by sales reps. *E.g.*, A-0059 (Vornado Realty entry) ([redacted] These examples further demonstrate why, the Court should abide by its prior rulings and categorically exclude the At Risk report notes column as unreliable

hearsay that does not fit within any applicable exception.

B. Defendants' Other Examples

In addition to the At Risk report customer notes, SAP has identified ten other "examples" of customer hearsay that it asks this Court to admit. To admit as much unverifiable, unreliable customer evidence as possible, Defendants oversimplify the issue by effectively asking the Court to consider only one question for most of their "exemplar" emails: did an Oracle executive or sales person author an email about a customer? If so, Defendants ask the Court to admit that entire email (and in some cases, multiple prior emails in the email thread) as a party admission. By characterizing any and all content in Oracle internal emails as "party admissions," Defendants obscure the fact that many of these internal Oracle emails – just like the notes section of the At Risk report – merely relay inadmissible customer hearsay. Such emails (or, at the very least, such reported customer statements) are not admissible as party admissions, just as the notes section of the at-risk report is inadmissible. *See* Section III(A)(1), above.

To the extent Defendants' "examplar" Oracle emails contain customer statements and/or relay statements from customers, Fed. R. Evid. 805 requires Defendants to offer an independent hearsay exception that permits the admission of the underlying customer hearsay. For this and the other reasons set forth in detail above regarding customer hearsay in the At Risk report notes column, the Court should exclude this inadmissible hearsay. *See* Section III(A)(2)-(4), above.

1. Party Admissions & Adoptive Admissions

a. A-6329-1

Defendants urge the Court to admit as a party admission a November 2, 2004 internal Oracle email about customer Computer Associates ("CA"). A-6329. Defendants argue this email is evidence that "SAP won CA's business . . . not because of TomorrowNow." Section III(A); *see also* Dkt. 1139 (Defs. Trial Brief) at 12. As a general matter, a statement in an Oracle internal email qualifies as a party admission only if it satisfies the foundational requirements of Fed. R. Evid. 801(d)(2)(D). Defendants therefore urge the Court to admit this email in its entirety because the Oracle executives in this email "are speaking within the scope of their employment . . . ." Section III(A). However, A-6329-1 includes five separate, specific assertions about the

customer, which are not – and cannot be –party admissions. The first line of the email indicates that these assertions are "feedback" that the author of this Oracle internal email got from "Jeff," an unidentified individual who presumably worked in an unknown position at CA. A-6329 at ORCL00647146-47. Just like the At Risk report notes, these paraphrased customer statements are inadmissible hearsay for which Defendants have articulated no applicable hearsay exception.

b. A-0367

Exhibit A-0367 is another internal Oracle email that Defendants would have this court admit as a party admission, even though it contains inadmissible customer hearsay. This email contains relayed statements that a Home Depot employee made to Oracle: "they have communicated to us their intent to have TomorrowNow support them in the interim as they migrated HCM to SAP"; "[t]hey have . . . already communicated to me today, their intent to have TomorrowNow support them in the interim as they migrate HRMS to SAP"; "[they] . . . believe there is piece of mind to having Oracle support, if we can match TomorrowNow's pricing and provide the above").

Some statements by Oracle employees could, with proper foundation, be admitted as party admissions. However, Fed. R. Evid. 801(d)(2)(D) does *not* extend to paraphrased, unverified out-of-court statements by unidentified customer personnel, the veracity and basis of which Oracle would have no opportunity to challenge, if admitted into evidence. The Court should not categorically admit any and all customer hearsay just because it appears in the same email as a statement by an Oracle employee about something within the scope of his or her employment.

c. A-5042

Exhibit A-5042 contains multiple levels of hearsay. This internal Oracle email about customer Stora Enso is an out-of-court statement offered for the truth of the matter that contains multiple levels of inadmissible hearsay under Fed. R. Evid. 805. The customer's parent shop (in Finland) spoke to the customer. *Id*. ("They have been told that they will be going to SAP. . . ."). The customer, in turn, passed along that statement to Derek Zeman, an Oracle employee. Like the prior examples, these paraphrased customer statements are inadmissible levels of hearsay for which Defendants have articulated no applicable exception, even if they can lay the foundation

for other statements in this Oracle internal email as party admissions. There is no evidence about the customer representative's authority or scope of responsibilities, and no evidence Oracle verified the information (despite evidence that Oracle did not trust statements like this).

Defendants' conclusory statement that "[a]t a minimum, Allario adopted any statements by Zeman" because "she took the affirmative action of reporting to the regional manager about this customer . . . and the email was then incorporated into the At-Risk Report" falls short. Section III(B), n.3. As discussed above, the mere act of forwarding an email – the only act Defendants identify to support their argument – does not constitute an adoption of its content; it requires something more. *See In re Oil Spill*, no. 2179, 2012 WL 85447, at *4 (E.D. La. Jan. 11, 2012); *MGM Studios, Inc. v. Grokster, Ltd.*, 454 F. Supp. 2d 966, 973 (C.D. Cal. 2006).

d. A-5997

A-5997 is another Oracle email that contains inadmissible customer statements and relays un-adopted, customer-provided information. In an email to Jeff Henley, Craig Tate lists descriptions of what an employee of customer Haworth told him about Haworth's relationship with Oracle and SAP. He discusses what Haworth believes and what it asked Oracle: content that necessarily came from out-of-court statements by Haworth. *E.g.*, *id.* at ORCL00272885 ("In their minds, they have over-spent $1m/yr in Support over the past 5 yrs"). These are not Oracle party admissions; they are customer statements relayed by Oracle personnel.

Both Tate and Henley expressed skepticism that Haworth's statements accurately represented its position. Tate placed some of Haworth's comments in quotation marks, explicitly declining to adopt them. *E.g., id*. ("they are 'asking' (strongly demanding actually) that we 'park' the support on the balance of the 2400 licenses they have on the shelf now"). In response to Tate's description of the situation, Henley suggested that Oracle should ask for a "multi year contract on support that they can't cancel to show good long term faith that they won't ultimately switch to SAP." Henley's belief that Oracle needed to take extra measures to ensure that Haworth was acting in "good long term faith" indicates doubt that Haworth's negotiating position was sincere. These reactions further demonstrate that Oracle employees frequently doubted customers' statements during negotiations.

e. A-6042-1

Defendants assert that A-6042-1 is an OSSINFO approval email that "adopts" an executive summary containing customer hearsay because it is attached to the approval email. This is not an adoptive admission, as explained above. Nothing in OSSINFO's email indicates an adoption of the customer statements in the Executive Summary, which is unambiguous hearsay. A-6042-1 at ORCL00316127 ("Per discussions with . . . the customer, Comupter [sic] Associates is converting to an all SAP shop.") To the extent the email sent by OSSINFO constitutes a party admission, it merely indicates that the contract has been cancelled, and nothing more. Thus, Defendants have articulated no exception to justify admitting the customer statements in the Executive Summary (as distinct from the email) which, much like the At Risk report, contains inadmissible notes of unreliable and unverifiable customer statements.

f. A-6205-1

Defendants offer A-6205-1 in an attempt to circumvent the Court's exclusion of the customer hearsay in the At Risk report notes column. This internal Oracle email attaches a PowerPoint presentation with At Risk report analysis. The final three slides include bullet-point summaries of "customer concerns" for JDE customers. A-6205 at ORCL00424025-27. These slides summaize inadmissible hearsay in the At Risk report notes column. Neither the slides, nor the email that forwards them, adopt the customers' concerns as true or verify whether the stated concerns are legitimate. Furthermore, Defendants cannot attribute these summarized concerns to any customers relevant to this case. The "customer concerns" slides of this June 2005 document do not identify any customer by name, which means each described concern may come from customers not at issue in this lawsuit.

g. A-5193

Like A-6205-1, Defendants offer Exhibit A-5193 to circumvent the Court's exclusion of the customer hearsay in At Risk report notes. This internal Oracle email between Rick Cummins and James McLeod includes notes about four At Risk customers. All four customer entries include statements that indicate Oracle received the information from out-of-court customer statements: "Customer believes they are unable to upgrade . . . [and] [c]ustomer also has grave

concerns over Fusion . . . ; Client informed us as of 3/27 that they want to renew and have offered to pay flat fee . . . ; Client has stated that they want us to come back in with the team to present roadmap . . . ; Executives don't like the PeopleSoft apps [and] [t]hey are looking to go with TomorrowNow . . . ." Neither Mr. Cummins' nor Mr. McLeod's statements adopt the truth of the customers' statements; rather, they merely identify these as At Risk accounts. Yet again, there is no evidence about the customer representatives' authority or the scope of their responsibilities, and no evidence that Oracle verified the information (in contrast to the evidence cited multiple times above that Oracle did not trust statements like these).

h. A-5995

Defendants argue that the customer statements in A-5995 – emails sent from customer Haworth to Oracle representatives – are adoptive admissions because they were forwarded by Oracle employees. Once again, the simple act of forwarding an email does not, without more, constitute an adoption of the forwarded hearsay statement.

Further, statements in the Oracle emails indicate that Oracle employee Juan Jones's follow-up actions – which purportedly show that he adopted the customer statements – are not necessarily based on the forwarded customer email. Juan Jones' May 12, 2006 email to Yamilet Torres, the last email in the thread, starts: "*As per our conversation*, please work with Ian/Saleem to assign temporary coverage for Haworth." A-5995 at ORCL00272832 (emphasis supplied). Ms. Torres did not receive of any of the prior emails and there is no evidence regarding the conversation she had with Mr. Jones, or (contrary to Defendants' assertions) whether that conversation had anything to do with, or adopted or rejected, any of the statements in the original Haworth email. Rather, it could have been based on the "last submission for concessions," which "has since been rejected by Haworth," but about which Defendants offer no information. Similarly, Haworth's May 10, 2006 email to Oracle indicates there were "multiple other touch points" (*i.e.*, conversations) with Oracle (*id.* at ORCL00272834), but Defendants have no evidence regarding the topics of the conversations or whether they influenced Oracle's subsequent actions or informed the conversation Mr. Jones had with Ms. Torres. It would be an error to allow the jury to consider such unreliable hearsay evidence where there is no clear

indication that Oracle adopted these customer statements.

2. State of Mind

a. A-5058

Defendants only offer two examples of emails which they claim the Court should admit as customer "state of mind" evidence. A-5058 contains a January 29, 2007 email from customer Vanguard Managed Solutions ("VMS") to Oracle. Despite the customer's assertion that it is cancelling support because "it is just too expensive" and describing complications caused by structural changes in the company (*id.* at ORCL00012139), its assigned Oracle representative (John Russnok) expresses skepticism about whether VMS will "in fact split." *Id.* at ORCL00012138. This is another indication that, in the eyes of Oracle personnel, customer statements are unreliable indications of the customer's motivations.

In addition, Defendants' argument that "there is no evidence of an intent to misrepresent given the casual and spontaneous style of the email" is a speculative, unsupported assertion that contradicts contrary evidence in the record, as discussed above.

b. A-5002-1

Unlike Defendants' other examples, which are internal Oracle emails, A-5002-1 is an email thread that includes emails spanning more than two months of customer Amgen's communications both internally and with TomorrowNow. Defendants offer this exhibit to support their claim "that Amgen did not purchase SAP software because of TomorrowNow." Section III(C). Because Amgen was excluded from Oracle's damages figures at the last trial (and still is), A-5002-1 is not relevant if offered for this purpose. Fed. R. Evid. 401 & 402. It should be excluded.[15]

To the extent Defendants offer this exhibit for any other purpose, it is inadmissible hearsay in its purest form: unverified, unreliable, unchallengeable out-of-court statements offered by a party to support its own case. These emails include numerous factual assertions about pricing, proposed service terms, and the status of negotiations with TomorrowNow and Oracle.

[15] This is true of any exhibits that Defendants intend to introduce related only to customers who have been excluded from Oracle's damages calculations. They have no relevance and should be excluded under Fed. R. Evid. 401 & 402.

Defendants make no representation of what "state of mind" they would offer these statements to demonstrate. Rather, they seem to argue that any hearsay in this email thread (and, by extension, any out-of-court statement made by customers in internal customer emails) is admissible under Fed. R. Evid. 803(3) because this case concerns customer decision-making.

3. Oracle's Counter-Examples

Defendants offer the examples discussed above as "prototypical" examples of emails that, despite containing customer hearsay, they seek to admit as Oracle party admissions or state of mind evidence. Section III(B). Close scrutiny of Defendants' Trial Exhibit List (Dkt. 1136), however, reveals that Defendants' hand-picked examples (themselves inadmissible) are not representative of their own proposed exhibits. To the contrary, Defendants seek to admit many documents – including internal emails written by Oracle executives and sales reps – that contain unambiguous, inadmissible customer hearsay to which Defendants' offered hearsay exceptions cannot apply.

The following counter- examples show that even where Oracle employees forwarded emails relaying customers' stated concerns or even recommended taking action in response to a stated concern, Oracle did not adopt the statements or view them as reliable evidence of the customer's state of mind. *E.g.*, Motamed Decl. Ex. A (A-5663) at ORCL00131232 (internal Oracle document discussing customer Quad/Graphics) ("8-26-04: Customer has informed me they will keep support on Merant and ePay only. Too weird. . . We are dealing with purchasing so never really sure if they are going for a better price or really will leave us. 8-12:04: Customer is considering TomorrowNow. . . AE will be organizing a face-to-face with CIO and VP HR to see if TomorrowNow is really a threat or [if] purchasing is using it as leverage to receive discount on maintenance."); Motamed Decl. Ex. B (A-0225) at p. 18/28 (11/1/06 internal Oracle email from Elizabeth Shippy forwarding a reinstatement spreadsheet to Oracle personnel including customer comments) ("1/20/2006 ~ Client went to third party, will not say which provider they are going with. They claim it was not just based on cost (I believe they told me this to end the conversation)."); Motamed Decl. Ex. C (A-4089) at ORCL00744447-48 (3/25/05 internal Oracle email passing along customer concerns) ("As we suspected, many of these are not currently

legitimate concerns . . . Bob [at customer Equitable Life] did not indicate a threat of TomorrowNow . . . he did mention in the past that SAP was 'all over them' . . ."); Motamed Decl. Ex. D (A-6086) at ORCL00361642 (2/20/07 internal Oracle email from Brian Mitchell to Charles Phillips) ("We have now had a number of discussions with Starhub, and the messages continue to be a little mixed. . . If we want to do this, and keep SAP out we should assume the worst case outcome and work for a better result.").

Defendants respond to these counter-examples and argue they have no current plans to seek to admit several of these documents at trial. Yet this has no bearing on whether the documents are inadmissible hearsay. Defendants do not deny what these documents illustrate - that every document is unique and must be addressed individually. Defendants also argue Oracle's counter-examples are similar to the At Risk report, so "the Court's guidance on whether the types of entries proposed above are admissible will resolve this issue." Oracle agrees; each of these documents that relay or paraphrase customer statements are inadmissible hearsay just like the notes column to the At Risk report.

Consequently, Oracle's counter-examples demonstrate that, to the extent the Parties do not agree on the categorical treatment of documents containing customer hearsay, the Court should address admissibility on a document-by-document basis and deny Defendants' request for categorical rulings that apply to (1) all "statements by Oracle's senior executives and sales/support employees concerning selling Oracle software and support are party admissions" and (2) all "statements by the relevant Oracle customers about their then-existing state of mind." Section I.

IV. DEFENDANTS' CATEGORY TWO – EVIDENCE OF ALLEGED WILLFUL INFRINGEMENT

DEFENDANTS' POSITION

The Court's Final Pretrial Order precludes Oracle from presenting a "willful copyright infringement" case at the new trial. ECF No. 1171 (5/29/12 Order) at 2-3. Defendants stipulated to liability, and only damages in the form of lost and infringer's profits are at issue. As the Court made clear, willfulness is not relevant to damages. *See id.* Nevertheless, Oracle's exhibit list

reveals that Oracle still plans to present a "willfulness" case. This is also demonstrated in Oracle's deposition designations where, by Defendants' count, Oracle has in excess of 8 hours of designations solely related to "willfulness." The Court should enforce its previous ruling and exclude evidence of alleged willfulness as irrelevant under Rule 402, including, but not limited to, the exemplars offered below and documents offered for a similar purpose. Vol. 3 (Chart of Willfulness Evidence). The only plausible purpose for this irrelevant and inflammatory evidence is to waste time, mislead the jury, and incite the jury to punish; thus, exclusion also is warranted under Rule 403.

A. Willfulness Plays No Role in Calculating Deductible Expenses.

In its Motion *in Limine* No. 5, Oracle moved to exclude evidence of deductible expenses on the theory that willful infringers may not deduct expenses. ECF No. 1145 (O's MIL No. 5) at 15-16. Finding "no support for this proposition," the Court denied the motion and granted Defendants' related motion on this issue. ECF No. 1171 (5/29/12 Order) at 2-3. Based on the clear language of 17 U.S.C. § 504(b), the Court concluded that "[s]ection 504(b) makes no distinction between willful and innocent infringers." *Id.* Nor has any Ninth Circuit case or model instruction adopted this distinction. *Id.* at 3.

Contrary to this Court's ruling, Oracle persists in arguing that a penalty applies to willful infringers—specifically, it requests an instruction that the jury "'should give extra scrutiny to the categories of overhead expenses claimed by the infringer.'" Vol. 3 (5/24/12 Hrg Tr.) at 98:14-99:22 (quoting *Hamil Am., Inc. v. GFI*, 193 F.3d 92, 107 (2d Cir. 1999)). Oracle seeks to use this theory as a hook for introducing willfulness evidence to inflate the jury's award, and to convince the jury that Defendants' alleged willfulness is directly tied to damages. Oracle's theory is wrong for four independent reasons.

First, Oracle's theory is inconsistent with the text of Section 504(b) and with this Court's May 29, 2012 Order. Applying "extra scrutiny" to willful infringers, and not to non-willful infringers, cannot be squared with the fact that "Section 504(b) makes no distinction between willful and innocent infringers." ECF No. 1171 (5/29/12 Order) at 2-3. There is no statutory basis—nor is there any Ninth Circuit support—for Oracle's theory. The careful statutory analysis

of this Court, and of the court in *ZZ Top v. Chrysler Corp.*, 70 F. Supp. 2d 1167, 1168-69 (W.D. Wash. 1999), compels the conclusion that willfulness-based distinctions have no place in an infringer's profits calculation.

Second, even assuming that Section 504(b) permits "extra scrutiny" of some sort, such scrutiny is a role for the Court, not the jury. *See* ECF No. 1171 (5/29/12 Order) at 3 (stating "which categories of expenses can be deducted . . . is a matter for the court, not the jury, to decide"). *Hamil* involved a bench trial, not a jury trial, *see* 193 F.3d at 97, and thus the Court had no occasion to consider the implications of an "extra scrutiny" instruction in a jury case. Indeed, Defendants are unaware of any court that has given this instruction in a jury case. The Ninth Circuit's Model Jury Instructions clearly state that "[t]he defendant has the burden of proving the defendant's expenses by a preponderance of the evidence." Ninth Circuit Manual of Model Jury Instructions, Instruction 17.24. Oracle's request for an instruction on "extra scrutiny" would undermine this standard and invite confusion.

Third, *Hamil* applied "extra scrutiny" only in determining whether "fixed" overhead expenses may be deducted. 193 F.3d at 104. There is no dispute that "variable" expenses may be deducted. *See Kamar Int'l, Inc. v. Russ Berrie & Co.*, 752 F.2d 1326, 1332 (9th Cir. 1984) (discussing requirements for "deducting fixed overhead costs"); 6 Patry on Copyright § 22:141. Through a sophisticated regression analysis, Clarke separated fixed and variable expenses, and he made a conservative calculation that counted only variable expenses. Because Defendants do not seek to deduct "fixed" overhead, *Hamil*, 193 F.3d at 104, this question is moot.

Fourth, as discussed in Defendants' first motion *in limine* (*see* ECF No. 1142 at 1-12), Oracle's stark change in position on deductible expenses violates the disclosure requirements of Rule 26 of the Federal Rules of Civil Procedure and triggers the automatic preclusive sanctions of Rule 37. A party is required to disclose its damages calculations under Rule 26(a)(1)(iii) and to supplement its damages calculations "in a timely manner," Fed. R. Civ. P. 26(e)(1)(A). It is far too late for Oracle to increase its damages calculation by presenting new theories of deductible expenses, particularly given that deductible expenses never have been in dispute.

For all of these reasons, Oracle's new theory of deductible expenses cannot justify the

admission of willfulness evidence in a case that is solely focused on lost and infringer's profits.

B. Evidence of Alleged Willfulness Was Previously Offered Only to Support the Now Excluded "Hypothetical" License Theory.

At the first trial, Oracle offered evidence of alleged willful infringement in the guise of SAP's alleged "Risk Acceptance," which it claimed was a factor weighing in favor of awarding billions in hypothetical license fees. Vol. 3 (Oracle Opening) at 30; Vol. 3 (Meyer Demo.) at 4. To prove "Risk Acceptance," Oracle offered evidence purporting to show that SAP knew the consequences of acquiring TomorrowNow, *see, e.g.*, Vol. 3 (PTX 0008), willingly accepted the risk of liability, *see, e.g.*, Vol. 3 (PTX 0014), and intended to use TomorrowNow as a "liability shield," *see, e.g.*, Vol. 3 (PTX 0161). Oracle's only justification for admitting such evidence, over Defendants' objection, was that it "relate[s] directly to Oracle's hypothetical license damages." ECF No. 976 (Pls.' Opp. to Defs.' Mot. to Exclude Evidence) at 3. But with Oracle's license theory out of the case, and evidence of alleged willful infringement having no relevance to a lost and infringer's profits case, this evidence should be excluded. Fed. R. Evid. 402. Oracle's purported reasons for introducing this evidence—causation, background, and context—do not justify admitting evidence of willfulness, which will only distract the jury from the facts of the case and ultimately result in an inflated, speculative damages award.

C. Exemplars.

Each exemplar is impermissible evidence of SAP's alleged willful infringement, which Oracle previously offered solely in support of the hypothetical license to show "Risk Acceptance." The Court should exclude each of these exhibits, as well as all other exhibits offered for the same impermissible purpose. *See* Vol. 3 (Chart of Willfulness Evidence).

PTX 0008: This a December 22, 2004 email from SAP employee Arlen Shenkman to SAP employee James Mackey, forwarding an email from SAP employee John Zepecki. At the first trial, Oracle offered PTX 0008 through testimony of SAP executives Shai Agassi and Gerhard Oswald; their testimony focused exclusively on portions of the exhibit relating to SAP's knowledge of the legality of TomorrowNow service. Vol. 3 (1/5/09 Agassi Tr., played 11/4/10) at 162:11-214:18 (testimony regarding portions of exhibit stating, "I'm not sure how

TomorrowNow gets access to PeopleSoft software, but it's very likely that TomorrowNow is using the software outside the contractual use rights granted to them, and these use rights could be terminated by Oracle" and "the liability of providing system access is pushed onto the PeopleSoft customer"); Vol. 3 (12/10/09 Oswald Tr., played 11/4/10) at 34:7-35:13 (same). That Oracle has designated identical deposition testimony for the new trial shows that it plans to offer PTX 0008 for the same purpose, s*ee, e.g.*, ECF No. 1175 at 2, 37, and Oracle's statement below confirms that it will do so. The Court should exclude this email because Defendants' alleged willingness to accept liability risk is irrelevant to calculating lost profits and infringer's profits, and its prejudicial value far outweighs its minimal probative value. Moreover, any minimal probative value is outweighed by the prejudicial effect of inflating the jury award, particularly given that Defendants already have stipulated to liability.

PTX 0014: This is a December 30, 2004 email from Zepecki to Shenkman and Mackey and SAP employee Torsten Geers. Oracle previously offered PTX 0014 during its examination of Zepecki and focused on the portion of the exhibit relating to Zepecki's assessment of "legal liability" and "legal issues" relating to the TomorrowNow acquisition. Vol. 3 (11/4/10 Trial Tr.) at 621:11-623:2 (Oracle counsel asking witness "One of the comments you provided was a comment that you didn't think that the prior version was strong enough in advising the Board about the legal problems, correct, sir?"). Oracle again seeks to introduce this exhibit as evidence of Defendants' alleged willingness to accept the risk of liability, and the Court should exclude this email on the same grounds as PTX 0008.

PTX 0161: This is a January 2005 Power Point presentation titled "TomorrowNow Integration Meeting." This exhibit contains SAP's assessment of the liability risk associated with acquiring TomorrowNow, *see, e.g.*, Vol. 3 (PTX 0161) at SAP-OR00009808 ("[T]he liability of providing system access is pushed onto the Peoplesoft customer"), SAP-OR00009810 ("The access rights to the Peoplesoft software is very likely to be challenged by Oracle and past operating issues may be a serious liability if Oracle challenges . . . ."), and refers to TomorrowNow as a "liability shield." *Id.* at SAP-OR00009811. Oracle's latest deposition designations confirm that Oracle intends, again, to present evidence of SAP's alleged knowledge

of risk and use of a "liability shield," *see, e.g.*, ECF No. 1175 at 10-11 (11/12/08 Brandt Tr.) at 114:2-115:2, 120:19-121:2, and Oracle admits below that it intends to introduce this as evidence of willful infringement.

This evidence should be excluded. It is not relevant to causation for lost and infringer's profits because Defendants' alleged willingness to accept the risk of liability and purported intent to use TomorrowNow as a "liability shield" have nothing to do with whether or why customers left Oracle. Fed. R. Evid. 401. Further, its prejudicial effect outweighs its probative value. Fed. R. Evid. 403. Injecting willfulness evidence into the case would distract the jury from the real issues: the calculation of lost and infringer's profits. Vol. 3 (5/24/12 Hrg. Tr.) at 89:1-2 ("This is not a punitive damages trial. This is a copyright infringement trial."). This is exactly the sort of "speculative" evidence that Oracle used at the last trial to "urg[e] the jury to disregard evidence of Oracle's actual customer losses resulting from infringement." ECF No. 1081 (9/1/11 Order) at 17; *see also, e.g.*, Vol. 3 (11/22/10 Trial Tr.) at 2054:14-16 (Mr. Boies arguing to jury that "SAP's willingness to assume risk of infringement liability is an admission of value."), 2080:14-16 ("[T]hey knew there were serious liability risks. Why did they take it on? They took it on because of the value of the program. There's no other explanation."). And willfulness evidence is wholly unnecessary given Defendants' stipulation to liability. *Cf.* ECF No. 1171 (5/29/12 Order) at 4 ("Any evidence of willfulness that would be reflected by the guilty plea or conviction is irrelevant to any issue being tried in the case in light of defendants' stipulation to liability.").

Trial Testimony Regarding Defendants' Alleged Failure to Discipline and Defendants' Apology to Oracle: Oracle also should be precluded from eliciting trial testimony on willfulness. At the last trial, Oracle elicited testimony regarding Defendants' alleged failure to discipline employees, as well as an apology to Oracle. Vol. 3 (11/15/10 Trial Tr.) at 1473:13-1479:21. Specifically, Oracle's counsel elicited testimony from SAP CEO Bill McDermott that he had not yet disciplined SAP employees, officers, or directors for events relating to TomorrowNow. *Id.* 1473:13-1479:2. Oracle also asked Mr. McDermott for an apology:

> Q: [H]as SAP ever apologized to Oracle for taking its software?
> A: I am not aware of an apology.
> Q: Would you like to do that now, sir?

A: I would. Yes, I am. I am sorry to Oracle.
Q: Okay. And I appreciate that. Because I think it's important . . . that that sort of thing happen.
A: I agree with you.

Id. at 1479:12-21. Oracle cannot argue that this evidence is relevant to calculating lost and infringer's profits; evidence of Defendants' actions *after* the infringement is not related to damages. Whether and when SAP disciplined its employees or apologized to Oracle does not relate to customers' decisions to leave Oracle. Further, the prejudicial effect of this evidence outweighs its probative value. Fed. R. Evid. 403. It improperly suggests to the jury that Defendants have not expressed sufficient remorse for their conduct and that the jury's damages award is a proper vehicle for punishment. This testimony is the same sort of inflammatory evidence that the Court previously excluded. *See, e.g.*, ECF No. 1171 (5/29/12 Order) at 5. Furthermore, for the reasons Defendants discuss in Part VII below (Oracle's Category Two), Oracle's intent to introduce evidence to undermine SAP's stipulations as a "ruse and a tactic," *infra*, proves why this evidence is irrelevant and highly prejudicial.

Evidence of Willfulness Is a Recurring Issue: Oracle's improper attempt to offer willfulness evidence will resurface in the Parties' June 13 submission regarding deposition designations. For example, Oracle has designated testimony of SAP AG CFO Werner Brandt regarding the SAP Executive Board's alleged willingness to accept the risk of infringement liability, decision to use TomorrowNow as a "liability shield," and certain disciplinary actions. Vol. 3 (11/12/08 Brandt Tr.) at 113:22-25, 114:2-25, 115:2-21, 120:19-25, 121:2-7, 123:7-15; Vol. 3 (11/13/08 Brandt Tr.) at 386:12-16, 390:6-20, 393:19-25, 394:2-7, 398:12-17. Oracle also has designated deposition testimony of TomorrowNow employee John Ritchie to show alleged willfulness, including testimony that Ritchie's superiors warned him not to put anything in writing, that he "constantly" voiced his concerns about the legality of TomorrowNow's activities, and that he was advised to "shut up and do [his] job or else look for other employment." Vol. 3 (12/2/09 Ritchie Tr.) at 16:15-17:3, 19:16-20, 21:10-14, 22:6-10, 29:8-11. This evidence is not necessary to prove lost and infringer's profits; its only purpose is to prove Defendants' alleged willfulness and inflate the jury's damages award. Because willfulness is not at issue in the case,

this Court should exclude Oracle's evidence on this issue.

ORACLE'S POSITION

In its order, the Court granted in part Defendants' first motion *in limine* "to preclude plaintiff[] from reversing [its] approach to deductible expenses in connection with the infringers' profits claim." Dkt. 1171 at 3:22-233. The Court found that "17 U.S.C. § 504 (b) does not support a rule that overhead expenses cannot be deducted from gross revenues to arrive at profits where the infringement was deliberate or willful." *Id.* at 2:19-21. However, contrary to Defendants' position, the Court *did not* categorically rule that willfulness has no relevance in this case, nor did the Court exclude evidence that Defendants willfully infringed Oracle's IP. In fact, willfulness evidence relates to the scrutiny applied to Defendants' burden regarding expenses, to the causation Oracle must prove to recover damages, and for background and context.

To establish infringers' profits, Oracle must identify "the gross revenue associated with the infringement." *Polar Bear*, 384 F.3d at 711 n.8. To recover infringer's profits, there must be "a causal nexus between the infringement and the gross revenue." *Id*. at 711. A sufficient nexus exists where there is "some evidence . . . [that] the infringement at least partially caused the [revenue]" or where the "revenue stream . . . bear[s] a legally significant relationship to the infringement." *Id*. (recognizing sufficient nexus where infringing photographs were used to promote sales of non-infringing watches).

Oracle's position on retrial will be that all revenues related to TN, including Safe Passage sales, other SAP sales, and TN sales themselves, are sufficiently associated with Defendants' infringement to create the required nexus. To support its position, Oracle will inform the jury what SAP long ago conceded: TN was built upon a foundation of infringement, it could not compete against Oracle without taking Oracle's IP, and SAP knew those facts and relied on them (and the cost savings they enabled) to lure customers to SAP. Motamed Decl. Ex. O (PTX 0196) at TN-OR02942463, TN-OR02942479); *id.* Ex. P (PTX 0035) at SAP-OR00156479. Oracle will explain that SAP knew about TN's infringement, and used it to make TN the centerpiece of its Safe Passage program, designed to follow SAP's "1-2-3" plan: commit customers to cheap TN maintenance, cross-sell them into SAP applications, and up-sell them into other products.

Motamed Decl. Ex. Q (PTX 0006). TN's ability to offer below-cost maintenance rested on its infringement and other illegal conduct. SAP knowingly availed itself of TN's model through Safe Passage, recognizing the connection between TN and SAP revenues. By showing that SAP's business model (built on infringement) was central to its ability to generate massive revenues, Oracle will meet -and exceed- *Polar Bear*'s causation standard.

A. Willfulness Related to Infringers' Profits

The Court acknowledged that Defendants have the burden to "prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work." 17 U.S.C. § 504(b); Dkt. 1171 at 2:23-24. In the very case defendants cited to articulate the rule that they may deduct overhead expenses, the court held that willfulness informs Defendants' burden:

> *When infringement is found to be willful, the district court should give extra scrutiny to the categories of overhead expenses claimed by the infringer to insure that each category is directly and validly connected to the sale and production of the infringing product.* Unless a strong nexus is established, the court should not permit a deduction for the overhead category.

Hamil v. GFI, 193 F. 3d 92, 107 (2nd Cir. 1999) (emphasis supplied).[16] In support of this conclusion, *Hamil* cites the Ninth Circuit case *Kamar Int'l Inc. v. Russ Berrie & Co.*, 752 F.2d 1326, 1332 (9th Cir. 1984) for the proposition that an infringer can deduct expenses "only when the infringer can demonstrate it was of actual assistance in the production, distribution or sale of the infringing product." Defendants acknowledge that *Hamil* is the latest Federal Circuit Court to address the issue. Motamed Decl. Ex. K (5/24/12 Hrg. Tr.) at 12:13-21.

Therefore, under the very law Defendants (and the Court) rely on to allow Defendants to deduct expenses at all, a willful infringer has a higher burden to prove that its expenses "directly and validly" connect to the infringement. Accordingly, the Court should permit Oracle to present willfulness evidence related to the calculation of infringers' profits.[17]

[16] Defendants claim *Hamil* is inapplicable because Clarke does not deduct overhead expenses, but instead uses a "sophisticated regression analysis" to deduct only variable expenses. Contrary to Defendants uncited assertion, Clarke's report states that "[r]elevant costs include overhead expenses as well as direct and indirect costs." Dkt. 1146-2 at 241. Whether Clarke did in fact separate "fixed" overhead expenses is an issue in dispute and will be addressed at trial.

[17] Contrary to Defendants' position, regardless of whether the issue of which expenses are deductible is one for the jury or for the Court, certainly the issue of whether Defendants' have

B. Defendants' Cited Evidence Of Willfulness Is Also Evidence Of Causation and Context

Even if the Court disagrees that a willful infringer bears a higher burden in deducting its expenses, the Court should nonetheless admit the evidence SAP seeks to exclude because it provides critical causation and context evidence.

SAP argues in its trial brief (and will presumably argue at trial) that Oracle cannot meet its "burden of proving a causal relationship between the infringement and lost [and infringers'] profits that resulted from the infringement." Dkt. 1139 at 9. The example documents that SAP seeks to exclude on willfulness grounds help to answer that challenge. Among other things, the documents establish that SAP itself specifically examined – and quantified – its own gains and Oracle's losses that would result from SAP's exploitation of TomorrowNow's infringing business. Although SAP's trial strategy is to argue that such a causal link is incredible, its business strategy, beginning in 2005 and continuing for years, was based on SAP's own conclusion that very causal link was real and reliable. *See Andreas v. Volkswagen of Am., Inc*., 336 F.3d 789, 796-97 (8th Cir. 2003) (evidence sufficient to uphold a jury verdict on causation of infringer's profits where, among other things, the defendant "enthusiastically presented the commercial to its dealers as an important and integral part of its launch of the TT coupe into the U.S. market."). Further, SAP argues that evidence of willfulness should be excluded because it relates only to the hypothetical license remedy. This is wrong. As discussed above, and as the examples below illustrate, evidence of SAP's acceptance of risk demonstrates its confidence in the effectiveness of its strategy to convert Oracle customers through TN's infringing business. As SAP makes clear in its trial brief, it intends to argue at trial that it is not credible to believe that significant numbers of Oracle customers would have switched to SAP as a result of the heavily discounted support offering that SAP provided through TN. Dkt. 1139 at 8-10. Again, SAP's

(continued…)

met their burden is one for the jury. The authority on which Defendants rely provides that the standard that governs that burden changes according to the degree of willfulness. *See Hamil*, 193 F.3d at 107. Thus, this evidence is still relevant and admissible.

business strategy, expressed in its contemporaneous documents, is contrary to its legal strategy, expressed now. The fact that SAP accepted the risk of infringement in order to pursue the TomorrowNow strategy provides further corroboration SAP reasonably believed that the strategy would work. Contrary to Defendants argument, they will not be unfairly prejudiced if Oracle is allowed to inform the jury what they did and why. Yet Oracle will be significantly prejudiced if it is not permitted to submit relevant evidence of willfulness to meet its causation burden.[18]

The examples SAP identifies only illustrate these points, as each is directly relevant to infringers' profits causation:

1. PTX 0008: PeopleSoft 1-2-3

SAP asks the Court to exclude PTX 0008. This is one of Oracle's most important causation documents because it spells out the business plan that SAP then followed to convert Oracle's customers to its own using the infringing TN business model. PTX 0008 demonstrates that SAP had an initial plan to 1) offer support/maintenance to Peoplesoft Customers; 2) integrate existing xApps and create new xApps/composites that integrate with Peoplesoft product; and 3) provide upgrades from Peoplesoft to SAP. PTX 0008 at SAP-OR91726-27. This explains the business strategy that SAP then followed, and which it measured by harm inflicted on Oracle (in dollars) and customers gained by SAP over the ensuing years. Indeed, SAP executive board member Shai Agassi's comments show that SAP's PeopleSoft 1-2-3 plan was "well thought out" and the "recipe" for getting Oracle customers. *Id.* at SAP-OR91723; SAP-OR91725. For these reasons, Meyer relies on a similar version of this same document in his lost and infringers' profits portions of his report. *See* Motamed Decl. Ex. R (2/23/10 Meyer Report) at ¶¶ 361-362; 439 (explaining how SAP acknowledged that access and use of Oracle's proprietary Software and Support Materials was necessary to provide the level of support that TomorrowNow offered and that SAP's goal was to convert PeopleSoft customers to SAP applications).

The document also reveals SAP knew that "it's very likely that TomorrowNow is using

[18] Defendants also argue Oracle should be precluded from admitting evidence of willfulness because, they claim, Oracle somehow violated the "disclosure rules of Rule 26 . . ." But this issue was already argued at the May 24 hearing, and the Court did not agree Oracle was somehow barred- instead the Court requested proposed jury instructions on the issue. *See e.g.* Motamed Ex. K (5/24/12 Hrg. Tr.) at 100:20-21.

the software outside the contractual use rights granted to them . . . ." PTX 0008 (at SAP-OR91724. Thus, the plan rested on knowing infringement from the beginning, providing further evidence of the link between the infringement and SAP's later measurements of the plan's success.

2. PTX 0014

SAP also asks the Court to exclude PTX 0014, an email in which SAP employee John Zepecki notes that the acquisition of TN presents a "question of legal liability" and notes that it will take "legal wrangling" to convert TN's service delivery model into one that is "legally sound." Thus, it not only shows SAP was aware of TN's infringement prior to the acquisition, but also that customers converted through the 1-2-3 plan on which SAP based Safe Passage also result from that same infringement. Thus, contrary to SAP's assertion, PTX 0014 is not solely relevant to the hypothetical license - it will rebut SAP's assertion that TN was not a factor in the revenues SAP generated, and that SAP never thought it would be. Accordingly, the Court should not exclude this exhibit.

3. PTX 0161: "TomorrowNow Integration"

SAP also asks the Court to exclude Oracle's PTX 0161 because it shows Defendants willfully infringed Oracle's software. It does, and it is therefore relevant to the case, but it is also admissible for other, independent reasons as well. Oracle relies on this document to illustrate the causal link between SAP's Safe Passage plan, which had the illegal TomorrowNow business model as its "major cornerstone" (according to this document), and the customers Oracle now claims SAP converted to SAP's software using this same plan. *Id.* at 4. Not surprisingly, Meyer expressly relies on this document in the infringers' profits section of his report. *See* Motamed Decl. Ex. R (2/23/10 Meyer Report) at ¶ 439 (incorporating § IV.B.3 of his report, which references PTX 0161 (Meyer's n.144)). For example, this document states that as of January 2005, SAP believed it could convert 2000 or 4000 customers to TN by 2009, and that this was 2.5 to 5 times Defendants' original projections. PTX 0161-0001 at 24. In other words (and contrary to what SAP now argues), SAP's plan to generate infringing revenues was so successful, SAP increased its expectations of TN's success during the execution phase of the plan. SAP's

assessment of TomorrowNow as a successful part of it strategy to convert Oracle customers stands in sharp contrast to the four customers SAP's expert, Clarke, now claims bought software from SAP related to the infringement.

Further, the document evidences the single most important reason that TN's customers left Oracle for TN: "[s]upport fees [were] 50% of the PeopleSoft support price." *Id.* at 15. Since TN could only offer this discount because it infringed Oracle's intellectual property on a massive scale, this document provides a direct link between the infringement and Oracle's losses and SAP's gains. The Court should allow this document because it shows willful infringement, and also because it relates directly to Oracle's causation case and provides helpful context for the jury.

4. McDermott trial testimony on willfulness

SAP also wants to "preclude [Oracle] from eliciting trial testimony" on willfulness. For the reasons discussed above, any testimony on willfulness that Oracle wishes to present at trial is proper and relevant to calculating infringers' profits. Further, despite the fact that SAP indentified this trial testimony for the first time 24 hours before Oracle had to prepare a response, this testimony directly corroborates the arguments raised in Oracle's section VII below. SAP claimed in the first trial, and will likely argue again, that it intends to take responsibility for its misdeeds. *See, e.g.*, Motamed Decl. Ex. J (11/2/10 Trial Tr.) at 385:10-12. However, evidence that SAP apologized but has not yet disciplined the responsible employees rebuts this assertion and further supports the theory that SAP stipulated to liability solely as a ruse and trial tactic. *See id.* (11/15/10 Trial Tr.) at 1473:13-1479:21. This evidence rebuts SAP's assertions of responsibility which it has placed at the heart of its damages defense.

5. Deposition designations on willfulness

Finally, SAP's attempt to exclude deposition designation testimony is an issue that is not ripe for consideration by the Court. The Parties have agreed to a separate procedure for resolving deposition designations and objections. Any disputes related to those designations will come before the court when the designations are filed with the Court. The June 8, 2012 evidentiary hearing is not the appropriate time for SAP to dispute these deposition designations for the first

time, particularly since (as also happened with the trial brief), Oracle had no notice that this category would come before the Court. For the reasons above, the mere fact that the testimony relates to willfulness is not a reason to exclude it.

V. DEFENDANTS' CATEGORY THREE – EVIDENCE RELATING TO EXCLUDED DAMAGES THEORIES

DEFENDANTS' POSITION

Despite the Court's May 18, 2012 Order instructing the Parties to narrow their exhibit and witness lists "[s]ince no evidence relating to the hypothetical license measure of damages will be permitted at the upcoming trial," ECF No. 1164, Oracle continues to list as potential trial exhibits numerous documents that it offered at the first trial solely to support its license theory, including evidence of Defendants' so-called "Risk Acceptance" (addressed above), alleged "Risk to Oracle's Investment in PeopleSoft [and Siebel]," the Parties' purported "Expected Financial Benefits/Impacts" from the license, and the "Scope and Duration of the License." Vol. 3 (Meyer Demo.) at 4, 16, 38; Vol. 3 (Oracle Opening) at 30.

Although Oracle claims that it will offer such evidence at the new trial to support its lost and infringer's profits theories, none of this evidence is probative of the key issue to be tried—why customers left Oracle to purchase TomorrowNow support or SAP software. Thus, it does not provide "context" or "background" for the stipulated claims. The link that Oracle attempts to draw between its "license factors" evidence and Oracle's actual losses is speculative at best. The real purpose of this evidence is not to help the jury determine which customers Oracle lost to TomorrowNow and SAP because of the infringement, but to present inflated, inflammatory, and unrelated dollar and customer figures to the jury in the hopes that it will disregard the evidence of actual customer losses in favor of a large, punitive damages award. The Court should preclude Oracle from offering such irrelevant and unfairly prejudicial evidence at the new trial, including the exemplars offered below, as well as all other exhibits offered for the same purpose. *See* Vol 3. (Chart of "Hypothetical" License Evidence).

A. "Risk to Oracle's Investment" Evidence.

At the first trial, Oracle used its license claim to rationalize introducing evidence of

Oracle's research and development ("R&D") costs and the PeopleSoft and Siebel acquisition prices, claiming that such evidence was relevant to show investment risks Oracle would have considered in negotiating a license price. Vol. 3 (11/2/10 Trial Tr.) at 339:20-340:4; Vol. 3 (Oracle Opening) at 12; Vol. 3 (11/22/10 Trial Tr.) at 2093:13-24; Vol. 3 (Meyer Demo.) at 38, 42. Not only is such evidence unrelated to computing Oracle's actual customer losses due to the infringement, but also—as at the first trial—it would have the unfairly prejudicial effect of inflating the damages claim. ECF No. 1081 (9/1/11 Order) at 17 (vacating award where, *inter alia*, "[r]ather than providing evidence of SAP's actual use of the copyrighted works, and objectively verifiable number of customers lost as a result, Oracle presented evidence of the purported value of the intellectual property as a whole"); *cf. Uniloc USA, Inc. v. Microsoft Corp.*, 632 F.3d 1292, 1320 (Fed. Cir. 2011) (finding that disclosure of large but irrelevant figures "cannot help but skew the damages horizon for the jury"). Specifically, Oracle's claimed purpose for such evidence at the new trial—namely, to show "how and why SAP believed it could use TN to damage Oracle and drain its profits" and to show that both sides valued software customers—has no connection to determining why specific customers opted to leave Oracle. The real effect that such evidence would have on the jury would be to distract from, not help resolve, that narrow issue and to confuse the jury about the type of harm for which Oracle is entitled to compensation (*i.e.*, actual lost support and software customers versus alleged, undisclosed harm to R&D and acquisition efforts). Such excludable evidence includes:

Counsel Argument and Witness Testimony Regarding Oracle R&D Costs and Acquisition Prices: At the first trial, Oracle's counsel and witnesses repeatedly referenced the billions that Oracle spends on R&D. Vol. 3 (11/2/10 Trial Tr.) at 339:20-340:4, 452:6-12 (Screven testifying regarding Oracle's $4 billion R&D budget), 453:12-455:1 (same); Vol. 3 (11/8/10 Trial Tr.) at 760:13-22 (Ellison testifying that Oracle has invested $4 billion in R&D); Vol. 3 (11/19/10 Trial Tr.) at 1886:1-11 (Catz testifying that one of the harms from infringement was that "we can't pay for existing R&D"); Vol. 3 (11/22/10 Trial Tr.) at 2093:13-24; Vol. 3 (Oracle Opening) at 12. They also mentioned the PeopleSoft purchase price no less than 77 times. Vol. 3 (11/2/10 Trial Tr.) at 341:15, 341:23; Vol. 3 (11/4/10 Trial Tr.) at 522:20-22; Vol. 3

(11/8/10 Trial Tr.) at 846:17, 846:18, 846:21; Vol. 3 (11/22/10 Trial Tr.) at 2087:10. Oracle's deposition designations continue to reference the amounts Oracle spends on R&D and the price it paid to acquire PeopleSoft, as they relate to the excluded license claim. *See, e.g.*, ECF No. 1175 at 42 (11/4/10 Phillips Tr. at 531:21-532:24) (testifying that Oracle would not license software, as it would be tantamount to "giving the thing you just bought for $11 billion away to your largest competitor"). Oracle should not be permitted to advance argument and elicit testimony on this irrelevant, unfairly prejudicial topic.

PTX 4809: This is a January 26, 2005 e-mail from Oracle employee Judith Sim to various Oracle employees, attaching Power Point presentations relating to the PeopleSoft acquisition. The exhibit references "Oracle's $1.3B annual R&D investment" and the PeopleSoft purchase price.[19] *See, e.g.*, Vol. 3 (PTX 4809) at ORCL00229123, ORCL00229211, ORCL00229216. This document, which Oracle claims reflects Oracle's "intention[s]" and "expectation[s]" at the time of the PeopleSoft acquisition, has no bearing on customers' motives for leaving Oracle and thus is wholly irrelevant to calculating lost and infringer's profits. Any probative value is outweighed by the prejudice of misleading the jury and improperly inflating damages.

PTX 4819: This is a demonstrative titled "Billions of Dollars in R&D Investment Each Year," which purports to reflect the amount Oracle invests in R&D by year. Oracle essentially concedes that the sole purpose for this demonstrative is "context." But this document does not provide context—it invites confusion. Oracle's claimed R&D costs over the years has nothing to do with lost and infringer's profits and could serve only to impermissibly inflate damages.

B. <u>"Expected Financial Benefits/Impacts" Evidence.</u>

To support its license claim at the first trial, Oracle also offered evidence of Defendants' alleged projections of potential customer conversions, which Oracle argued was relevant to the parties' expected financial gains or losses when negotiating a license. *See, e.g.*, Vol. 3 (Meyer Demo.) at 24, 28, 29, 55-56. Even if such evidence actually reflected Defendants' expected

[19] The exhibit also makes a prohibited reference to cross-sales and up-sales, which the parties redacted from the previously-admitted version of the exhibit and which the Court should exclude again based on its previous orders. Vol. 3 (PTX 4809) at ORCL00229216; *see also, e.g.*, ECF No. 1162 (5/15/10 Order).

customer gains (as opposed to mere hopes or aspirations), Defendants' expectations are irrelevant to prove Oracle's actual, limited customer losses. Evidence of lofty (but ultimately unrealized) hopes, aspirations, assumptions, or expectations could serve only to confuse and mislead the jury as to the proper method to calculate lost and infringer's profits and to improperly inflate the damages award. Such excludable evidence includes:

PTX 0012: This is a December 23, 2004 document titled "A Roadmap for PSFT Customers to SAP." Oracle's expert relied on this document as supposed proof that SAP expected to obtain 3,000 software customers from PeopleSoft as a result of the TomorrowNow offering. *See, e.g.*, Vol. 3 (11/9/10 Trial Tr.) at 978:6-980:3, 996:19-997:19; Vol. 3 (Meyer Demo.) at 17, 21, 24, 31-32, 34-36, 44-46, 60, 61, 66. Oracle's current deposition designations make clear that it intends to use this document to show SAP's so-called expectations at the new trial as well. *See, e.g.*, ECF No. 1175 at 58 (9/30/08 Ziemen Tr. at 77:16-77:23).

***PTX 0024*:** This is a January 2005 document titled "Safe Passage: Winning Customers and Markets from Oracle-PeopleSoft-J.D. Edwards." Oracle's expert relied on this document as evidence that SAP expected to convert 450 PeopleSoft customers in the first 30 days of Safe Passage, and then 50% or a "majority" thereafter. Vol. 3 (11/9/10 Trial Tr.) at 984:10-986:12, 988:23-990:10; Vol. 3 (Meyer Demo.) at 17, 21, 28, 31, 34, 44.

PTX 0161: This is a January 25-26, 2005 document titled "TomorrowNow Integration Meeting." Oracle's expert relied on this document as evidence that SAP believed TomorrowNow could attract and convert 2,000 to 4,000 PeopleSoft customers. *Id.* (11/9/10 Trial Tr.) at 990:11-991:9; Vol. 3 (Meyer Demo.) at 17, 21, 29-31, 34, 44. Oracle claims that the alleged projections in this exhibit are relevant to show that TomorrowNow "was working" to drive software sales. But Oracle's point underscores how this exhibit will confuse the jury: Oracle plans to offer guesses about SAP's expectations to prove actual customer losses—a wholly speculative and unsupportable basis for a damages award.

PTX 0960: This is a document titled "Siebel Safe Passage Program Playbook." Oracle's expert relied on this document as evidence that SAP expected to convert 300 Siebel customers. Vol. 3 (11/9/10 Trial Tr.) at 1028:5-14; Vol. 3 (Meyer Demo.) at 54-55. As with Oracle's other

evidence of alleged customer projections, this exhibit will encourage speculation about what Oracle might have lost and SAP might have gained, not help the jury determine what Oracle actually lost and SAP actually gained.

C. "Scope and Duration of the License" Evidence.

At the first trial, Oracle also offered evidence of the "Scope and Duration of the License" as a "negotiation factor" bearing on the license price. Vol. 3 (Meyer Demo.) at 4. There can be no question that evidence of the purported scope and duration of a hypothetical license is irrelevant to lost and infringer's profits and could serve only to mislead and confuse the jury. Such excludable evidence includes:

PTX 7028: This is a document prepared by Oracle expert Paul Meyer to set forth, in Oracle's words, "a list of rights Meyer determined Defendants would have needed to do what they in fact did." Vol. 3 (11/18/10 Trial Tr.) at 1863:1-8. The scope of rights of a hypothetical license is irrelevant to calculate lost and infringer's profits and cannot help but confuse the jury.

ORACLE'S POSITION

In its second motion *in limine*, SAP asked the Court to exclude evidence "previously offered solely to support the hypothetical license theory or any other excluded theory of damages." Dkt. 1142 at 16. In support of its motion, SAP identified certain categories of evidence it contended Oracle previously offered solely to support the hypothetical license theory of damages. *Id.* at 16-18. SAP was wrong. As explained in Oracle's opposition to SAP's motion, each of SAP's categories is directly relevant to infringers' and/or lost profits, as well as provides necessary context to the jury. *See* Dkt. 1154 at 15-20. In fact, several of the exhibits SAP cites were referenced in the sections of Meyer's report related to lost or infringers' profits.

SAP attempts to prove its claim that Oracle cites this evidence solely to support the hypothetical license by claiming that, until today Oracle "listed 'hypothetical license' as a purpose" for offering 51 exhibits on its Amended Trial Exhibit List. Defendants' Introductory Statement. SAP argues this somehow proves Oracle's true purpose "in offering these exhibits [is to] mislead the jury . . ." *Id.* SAP neglects to mention that every single such document had at least one other stated purpose, and most had even more. Furthermore, Oracle informed SAP that

the reference to the hypothetical license was mistakenly left over from before the Court's most recent rulings on that subject and that there are other purposes for each of these exhibits. Yet, Defendants persisted in their efforts to ask the Court to exclude these documents, and referenced the hypothetical license language so, for the sake of clarity, Oracle re-filed its exhibit list to remove the hypothetical license reference. Consequently, SAP's claim that Oracle proposes to admit these documents "solely" to support the hypothetical license is affirmatively false. These documents simply relate to multiple theories.

At the pre-trial conference, the Court observed that it could not address SAP's motion in the general, non-document specific manner in which SAP presented its argument. Motamed Decl. Ex. K (5/24/12 Conf. Tr.) at 80:11-17 ("This is a waste of time . . . . I need to see a list of what specific evidence it is that there's an objection to . . . ."). In response, SAP argued it had identified certain specific documents, and that the Court could rule on those. SAP also clarified that it sought to exclude only evidence that relates "*solely*" to the hypothetical license theory. *See id.* at 76:10-15 (where SAP's counsel argued "[i]t's entirely appropriate to say . . . don't offer a piece of evidence that relates solely to the hypothetical license theory."). However, the Court should admit each of these documents because none relates "solely" to the hypothetical license; each also provides crucial causation evidence, as well as important background and context. In fact, Meyer cites many of these documents in the portions of his report related to lost and infringers' profits. As the Court recognized, no rule precludes Oracle from using the same evidence it used last time to support a different theory. *See* Dkt. 1154 at 15-20.

Finally, both sides previously agreed that liability evidence is admissible as "background or context" and as "relevant to damages," and further agreed not to object on the basis of Rule 402 or 403:

> Subject only to the trial time limits set forth in paragraph 8 below, the Parties may present evidence at trial related to the stipulated claims as background or context . . . as relevant to damages . . . . *The Parties will not object to evidence related to the stipulated claims pursuant to Federal Rules of Evidence 401-403* (including that the evidence is irrelevant, cumulative, unduly time consuming or prejudicial) on grounds that the evidence relates to the stipulated claims.

Dkt. 965 (JTX 4) at 2 (emphasis supplied). Accordingly, the Court should deny SAP's requests.

A. Evidence of Risk to Oracle's Investment

SAP argues that, as a category, the Court should exclude exhibits and testimony of Oracle's R&D costs and the PeopleSoft acquisition price, although it concedes the evidence "may be relevant." Dkt. 1142 at 17-18. Indeed it is. This evidence shows how and why SAP believed it could use TN to damage Oracle and drain its profits. It also explains why both sides valued the customers that SAP sought to convert through the Safe Passage plan using TN as the "cornerstone." On the Oracle side, it based the PeopleSoft purchase price on the $1.2 billion annual maintenance revenue from the 9,920 PeopleSoft customers. Oracle was able to justify the PeopleSoft acquisition price because exclusive ownership of the copyrighted intellectual property ensured that – absent infringement – Oracle would remain the only company able to support those customers and earn that revenue stream. These were the same customers, and the same dollars, that SAP sought to take from Oracle through TN's infringement. On the SAP side, SAP sought to use TN not just to gain customers for itself, but to take revenue away from Oracle to prevent it from reinvesting that money in R&D to develop more competitive products. Thus, this evidence provides crucial causation links to both lost profits and infringers' profits, it explains SAP's motives in undertaking the Safe Passage program, and it helps explain why infringement would cause customers who would normally be expected to stay with Oracle to leave instead. This evidence is not unfairly prejudicial, as SAP claims, instead it will be used to show SAP's executives believed in the very causation its attorneys now dispute.

Thus, the Court should allow PTX 0970, in which TN CEO Andrew Nelson forecasted that over 10 years, TN "would takeaway approximately $1.1 billion from Oracle" and that every dollar of business TN won would represent "$20 taken from any 10-year maintenance-based justification for the PeopleSoft/JDE takeover." Motamed Decl. Ex. S (PTX 0970). Similarly, the Court should permit Oracle to inform the jury that SAP AG Board Member Shai Agassi said, "these customers represent [a] potential future set of customers for SAP applications [whose] value was estimated by Oracle . . . as $10 billion . . . this customer base is not necessarily captive by Oracle." Motamed Decl. Ex. T (PTX 0023) at 14. This evidence demonstrates that SAP believed (contrary to what it argues now) the TN acquisition would cause Oracle customers to

defect to SAP, and is therefore relevant to lost and infringers' profits causation. These facts are critical to understanding Oracle's lost profits claim and the Court should permit them. *See, e.g.*, Dkt. 1143 (Lanier Decl. Ex. 18 at 339:20-340:4 (explaining that maintenance revenues pay for future R&D); *Id*. Ex. 12 at 12 ("Oracle's Business Relies On Innovation, Research, and Development")).

1. PTX 4809

SAP also argues PTX 4809 should be excluded because it supposedly relates solely to the hypothetical license theory. However, this document reflects one of Oracle's reasons for the acquisition – the reliable, renewable maintenance stream. *See, e.g.*, PTX 4809 at ORCL00229123. This is important lost profits evidence because it was this revenue stream SAP sought to derail, and the Court should permit to so inform the jury. *See, e.g.*, PTX 0970 ("In replacing Oracle maintenance with 50% savings, this component of TomorrowNow's business translates to nearly $20M in lost Oracle revenues in 2005. Over 10 years time, this lost annual revenue adds up to $200M [for Oracle].")

PTX 4809 also is relevant to rebut SAP's argument that customers left Oracle because of uncertainty surrounding the PeopleSoft acquisition, and not because of its infringement. *See, e.g.*, Motamed Decl. Ex. J (11/15/10 Trial Tr.) at 1466:15-25 ("If a customer invested in PeopleSoft and JDE and had those systems, liked those systems . . . when they realized that they were uncertain what Oracle's intentions might be [after the acquisition], they then were in a situation of exploring their options.")). For example, the document reflects Oracle's contemporaneous intention to reassure customers that its support infrastructure would remain unchanged, as well as its expectation that 95% of customers would remain with Oracle. PTX 4809 at ORCL00229072, ORCL00229124.

Finally, PTX 4809 provides important context evidence that will help inform the jury of the events of January 2005, and why SAP felt Oracle was vulnerable at that time.

2. PTX 4819

SAP asks the Court to exclude PTX 4819 related to Oracle's considerable research and development investments, on the grounds that it is relevant solely to the hypothetical license

theory. However, this information provides crucial context. SAP sought to harm Oracle by taking its maintenance revenue (causing Oracle to lose profits) precisely so Oracle could not reinvest those revenues in research and development for new products to compete with SAP, and also so that Oracle could not pay for the PeopleSoft and Siebel acquisitions. *See, e.g.,* Motamed Decl. Ex. U (PTX 0141) at SAP-OR00092050 ("SAP will siphon off the cash flow that Oracle needs to build or acquire its next generation applications."). *See also* PTX 0024 at SAP-OR00299500 ("The goal" of Safe Passage was to "disrupt Oracle's ability to pay for the acquisition out of cash flow."). Those were SAP's motives, the reasons it hatched its plan to use TN to convert customers from Oracle. The jury needs to understand this critical piece of the story to further understand why Oracle expends enormous sums each year on research and development to remain competitive, and to understand how the loss of support revenues undermines Oracle's ability to make the investment necessary to earn profits in the first place. This information is not irrelevant, or unfairly prejudicial, it is a key piece of the story and the Court should permit it.

B. SAP's Expected Financial Benefits/Impacts

SAP also argues the Court should exclude a category of evidence it describes as the financial gains SAP expected to receive from TN. SAP's expectation that TN would generate revenues for SAP relates directly to causation for infringers' profits. Oracle will show SAP acquired TN and capitalized on its infringing business model to lure away customers and generate revenues. Though SAP argues now that its scheme to generate large infringers' profits was neither successful nor credible, its contemporaneous documents contradict that litigation position.

The specific documents SAP cites emphasize this point.

1. PTX 0012

SAP asks the Court to exclude PTX 0012, a document entitled "A Roadmap for PSFT Customers to SAP." This document is literally a "roadmap" of how SAP planned to use TN and its infringing business model to convert customers to SAP. As a result, it relates directly to Oracle's infringers' profits claim that SAP used TN to convert customers to SAP and generate license revenues. In a trial that SAP argues is primarily about causation, the document contains the theory of causation developed by SAP's most senior executives. It also shows SAP believed

this process would work (contrary to what it argues now). For example, this document lists SAP's expected ability to "upswitch" and "cross sell" the customers SAP took from Oracle to SAP products and therefore it relates directly to the causation Oracle must show to meet its burden on infringers' profits. *Id.* at SAP-OR00253288. Consequently, and contrary to SAP's assertion, this document is not "solely" related to the hypothetical license. In fact, Meyer references this document in the section of his report related to infringers' profits. *See* Motamed Decl. Ex. R (2/23/10 Meyer Report) at n.819 (citing PTX 0012). *See also id.* ¶ 439 (incorporating § IV.B.3 of Meyer's report, which references PTX 0012 (Meyer's n.147 & n.154).

2. PTX 0024

PTX 0024 also relates to causation. The document explicitly states that SAP's goal in safe passage was "to convert approximately 50% of the PeopleSoft and J.D. Edwards customer installations to SAP." *Id.* at SAP-OR00299500. It is therefore directly relevant to infringers' profits causation as it shows SAP believed the Safe Passage program (based around TN) would cause customers to migrate to SAP and generate infringers' profits. The same page reflects that another of SAP's goals was to disrupt Oracle's ability to pay for the acquisition out of cash flow. It is therefore relevant to lost profits causation as well. *See also id.* at SAP-OR00299501 ("The Safe Passage Strategy . . . customer care is the entry point for the discussion . . . nurture the customer into a migration discussion.").

Finally, contrary to SAP's assertion that Oracle used this document solely to support the hypothetical license, Meyer references this document in the infringers' profits section of his report. *See* Motamed Decl. Ex. R (2/23/10 Meyer Report) at ¶ 439 n.815. *See also id.* (incorporating § IV.B.3 of his report, which references PTX 0024 (Meyer's n.140, n.151 & n.158)).

3. PTX 0161

SAP also asks the Court to exclude PTX 0161, the SAP "TomorrowNow Integration" presentation. This is a crucial causation document. It demonstrates that SAP planned to integrate TN to generate additional revenues for SAP, and to harm Oracle by taking away maintenance revenue, and the document reflects SAP's admission that TN was a "major cornerstone" to this

Safe Passage program by which it sought to achieve both goals. *See id*. at 4, 15, 17, and 18; *see also* Section IV(B)(3), above.

SAP argues the document should be excluded because it reflects SAP's expectation that its infringement would generate enormous financial benefits. *See, e.g.*, PTX 0161 at 24 (stating that as of January 2005, SAP believed it could convert 2000 or 4000 customers to TN by 2009, and that this was 2.5 to 5 times Defendants' original projections.). However, this fact only establishes that this document is relevant to causation. Defendants were increasing their expectations of TN's success *because it was working*. Thus, this document is direct evidence that SAP's infringing plan was successful (contrary to Defendants' assertions at the last trial).

Also, contrary to SAP's assertion that this document was used "solely" to support the hypothetical license theory, Meyer specifically references this document in the portion of his report related to infringers' profits. *See* Motamed Decl. Ex. R (2/23/10 Meyer Report) at ¶ 439 (incorporating § IV.B.3 of his report, which references PTX 0161 (Meyer's n.144). Accordingly, this document is relevant to causation, lost and infringers' profits, and will provide helpful context to the jury. The Court should not exclude it.

4. PTX 0960

SAP also seeks to exclude PTX 0960, the "Siebel Safe Passage Program Playbook". However, the Court should permit Oracle to admit this document because it is relevant to infringers' profits and causation. It shows SAP believed expanding TN's services to cover Siebel products presented an "opportunity . . . to move the 300+ SAP customers SAP and Siebel have in common and migrate them to mySAP CRM." *Id.* at SAP-OR00790354. It therefore shows SAP believed (contrary to what it now says) that its plan to harm Oracle and generate its own revenues from these customers was working so well it should expand the scheme when faced with a new competitive threat. It also shows SAP believed it could use TN in the future to generate license revenues for Siebel TN customers. *Id.* at SAP-OR00790355 ("Program objectives . . . Generate new enterprise license opportunities targeted at Siebel customers where there is an existing SAP footprint.") *See also id.* ("It is important to sell the value that SAP brings to these targeted customers and not simply push the financial incentive of the program.") This is directly relevant

to causation and the Court should permit Oracle to use this document.

C. Evidence of Scope and Duration of Licenses (PTX 7028)

Defendants also ask the Court to exclude evidence of the scope and duration of the license SAP would have required to license the rights it infringed. Specifically, SAP asks the Court to exclude PTX 7028, a list of the rights Meyer determined Defendants would have needed to legally do what they in fact did. Clarke agreed with this list. *See, e.g.*, Motamed Decl. Ex. V (6/8/10 Clarke Depo. Tr.) at 176:11:17 ("Q: "You're saying there's no meaningful distinction between Mr. Meyer's [description in PTX 7028] and your description on page 116 [of Clarke's report]? . . . A: I don't see -- I don't see much difference between the two.")

The scope of the license SAP and TN required is, by definition, the scope of SAP's and TN's infringement. The scope of the infringement is relevant, not just for context, but also to prove damages. Pursuant to the Court's orders, Oracle will not present evidence of what would have transpired in a hypothetical negotiation. However, Defendants have criticized Oracle for purportedly failing to tie damages directly to TN's infringing conduct. Indeed, Clarke previously sought to remove customers from his calculations on the ground that there supposedly is no evidence of infringement related to those customers. *See e.g.*, Motamed Decl. Ex. V (Clarke Depo. Tr.) at 178:8-18 ("[B]ecause I took out the [customers] that had no accused conduct. So yes, those that remained were the ones with accused conduct.").

PTX 7028 makes clear that *everything* TN did infringed Oracle's IP. That is, there is no category of accused conduct by which TN acquired or retained customers that does not fall within this admitted scope of license. *See also* Motamed Decl. Ex. W (6/4/12 Clarke Supplement) at n.1 ("Based on the assumption that *the entire TomorrowNow business model was infringing*, all of TomorrowNow's expenses are deductible and TomorrowNow Infringer's Profits are zero.") (emphasis supplied). The Court should allow Oracle to use this document to demonstrate that TN's entire business model was built upon infringement, and that this how it could offer 50% maintenance. This is the activity that caused the loss, and it is therefore directly relevant to causation and context.

In fact, the only reason SAP can have for asking the Court to exclude the document is to

hide the full extent of its infringement – and the harm it caused – from the jury. Because Clarke adopted the document, and because the jury will hear no argument and receive no instructions related to hypothetical license, there is no risk that this document will confuse the jury or unfairly prejudice SAP. SAP has already stipulated that it would not object to liability evidence entered for context. Dkt.965 (JTX 4) at 2 ("The Parties will not object to evidence related to the stipulated claims pursuant to Federal Rules of Evidence 401-403 (including that the evidence is irrelevant, cumulative, unduly time consuming or prejudicial) on grounds that the evidence relates to the stipulated claims."). Accordingly, the Court should not exclude this document, or other evidence of the scope of Defendants' infringement.

D. The Court Should not Make Any Categorical Ruling on this Issue

Finally, even if the Court disagrees with Oracle and excludes any of the above documents, its ruling should not extend to additional documents as there is no way to make the determination SAP asks for without examining each exhibit. The Court has already ruled as much. Motamed Decl. Ex. K (5/24/12 Hrg. Tr.) at 80:11-17 ("I need to see a list of what specific evidence it is that there's an objection to, then I need to hear you out, and then make a decision. But theoretically, any bit of evidence could arguably be used to support one theory or another. I need to be able to put it in context.")

E. SAP Improperly Includes Arguments Regarding Oracle's Demonstratives

SAP also asks the Court to exclude certain of Oracle's demonstratives (many of which excerpt the documents discussed above) because, it claims, they relate "solely" to the hypothetical license. However, each of the demonstratives SAP cites is relevant to lost and infringers' profits, and helpful background and context. For example, SAP asks the Court to exclude Oracle's opening slide 12, which relates to Oracle's considerable research and development investments. Dkt. 1143 (Lanier Decl. Ex. 12) at 12. This information provides crucial context. SAP sought to harm Oracle by taking its maintenance revenue (causing Oracle to lose profits) precisely so Oracle could not reinvest those revenues in research and development for new products to compete with SAP, and also so that Oracle could not pay for the PeopleSoft and Siebel acquisitions. *See, e.g.*, Motamed Decl. Ex. U (PTX 0141) at SAP-OR00092050 ("SAP will

siphon off the cash flow that Oracle needs to build or acquire it's next generation applications."); *see also* PTX 0024 at SAP-OR00299500 ("The goal" of Safe Passage was to "disrupt Oracle's ability to pay for the acquisition out of cash flow.") Those were SAP's motives, the reasons it hatched its plan to use TN to convert customers from Oracle. The jury needs to understand this critical piece of the story, and further understand why Oracle expends enormous sums each year on research and development to remain competitive.

VI. ORACLE'S CATEGORY ONE – ORACLE INCOME STATEMENTS AND CANCELLATIONS REPORTS

ORACLE'S POSITION

Oracle offers its business records that it: (a) made at or near the time of the occurrence of the matters set forth in them, by, or from information transmitted by, a person with knowledge of those matters; (b) kept in the course of regularly conducted business activity; and (c) made by the regularly conducted business activity as a regular practice. Fed. R. Evid. 803(6). Oracle intends to offer such documents at trial, including, but not limited to, the following categories:

Income statements. To support its lost profits claim, Oracle may introduce detailed income statements that document OIC's quarterly profit margins. *E.g.*, PTX 8040 (DIS SUPPORT TOTAL 110909.XLS). Meyer relies on these documents to calculate lost profits. *See* Motamed Decl. Ex. R (2/23/10 Meyer Report) at ¶¶ 430-432, n.799; *id.* at Schedule 40.2. If Defendants persist in their objection to admission of these exhibits, Oracle will produce a sworn business records declaration by a qualified Oracle employee that lays the foundation required by Fed. R. Evid. 803(6). *See generally* Motamed Decl. Ex. X (11/20/09 Claire Sebti Rule 30(b)(6) Depo.) at 40:08-67:02 (testifying at length about the information contained in PTX 8040); *id*. at 70:09-15 (identifying PTX 8040 and a related income statement as Oracle business records ("Q: . . . by the way, all these reports are reports that you just pull off the system in the normal course of business. These were not specially created for this case or anything. Is that right? A: This is correct.") (objections omitted).[20] *See also S.E.C. v. Leslie*, No. 5:07-cv-03444-JF, 2012 WL

[20] Defendants' arguments below, do not challenge whether Oracle's two exemplars are business records. Rather, Defendants argue only that the *cited deposition testimony*, standing alone, is not sufficient to satisfy Fed. R. Evid. 803(6)'s foundational requirements. This cited deposition testimony, which includes questions by SAP's counsel aimed at identifying the

116562, at *3 (N.D. Cal. Jan. 13, 2012) (holding a company's "restated financials . . . are admissible as business records" and distinguishing between "special audit reports prepared in anticipation of litigation" and "restated quarterly and annual reports . . . prepared in the ordinary course of business.") (internal citations omitted).

Renewal rate reports. To support its lost profits claim, Oracle may introduce renewal rate reports that document the renewal rates of Oracle customers for the relevant products at issue in this case. *E.g.*, PTX 2582. Meyer relies on these documents to calculate lost profits and infringers' profits figures. *See* Motamed Decl. Ex. R (2/23/10 Meyer Report) at ¶ 388; *id.* at Schedule 34.2. If Defendants persist in their objection to admission of these exhibits, Oracle will produce a sworn business records declaration by a qualified Oracle employee that lays the foundation required by Fed. R. Evid. 803(6). *See generally* Motamed Decl. Ex. Y (8/12/09 Eileen McMillan Rule 30(b)(6) Depo.) at 22:01-18, 23:04-23 ("Q: Same question with respect to cancellation reports. . . . Are those reports that you work with in your normal job? A: Yes. Q: In what way do you work with them? A: I produce those reports for the business as the end of every quarter. . . . Q: So is there a cancellation report that's specific to PeopleSoft products? A: Yes. Q: Is there also a regular quarterly report that you prepare with respect to JD Edwards products? A: We split PeopleSoft out by PeopleSoft and JD Edwards, yes. Q: And is there also a split of the Siebel product line? A: Yes. Q: To whom do you provide those on a quarterly basis? A: I provide them to Gary Miller and to Linda Hartig.") (objections omitted).

(continued…)

document as a business record, is simply illustrative. This testimony demonstrates that, if needlessly forced to produce a sworn business records declaration laying proper foundation, Oracle can and will do so.

In addition, Defendants' insistence that Oracle can resolve Defendants' objections by stipulating to the admissibility of SAP's purportedly "comparable" business records is besides the point. SAP did not identify its documents as part of this process and is unwilling to clarify whether it contends Oracle's documents are objectionable. In fact, Oracle is unable to stipulate to the admissibility of Defendants' documents because there is no deposition testimony, much less Rule 30(b)(6) corporate testimony, identifying them, how they were created, or what they purport to be. They were simply produced by Defendants without foundation. Therefore they are hearsay. This has nothing to do with Oracle's documents, which are supported by ample foundation. Though Defendants are wrong about their documents, Defendants' assertion that their purportedly comparable documents are admissible is an implicit acknowledgment that Oracle's two exemplars are, in fact, proper business records under Fed. R. Evid. 803(6).

DEFENDANTS' POSITION

The Parties continue to engage in ongoing meet and confer on potential fact stipulations, including stipulating to the admissibility of each side's proposed business records, and have reached agreements on several documents. As part of that ongoing meet and confer, Defendants requested additional information about both of the purported business records that Oracle now presents to the Court to understand the basis for admission. The foundational support is not readily apparent from the documents themselves, and these are complex materials.

Defendants do not believe that the deposition testimony Oracle cites herein satisfies the requirements of Rule 803(6). Specifically, the renewal rate report (PTX 2582) does not appear to be the same document used in the cited McMillan 30(b)(6) deposition and may be a compilation of summary sheets of cancellation rates without the back-up data that was in the materials discussed in the deposition. *See* Vol. 3 (8/12/09 McMillan Tr.) at 41:21-43:12. With regard to the income statement, although there is a lengthy discussion regarding this document (now labeled PTX 8020) in the Sebti 30(b)(6) deposition, among other things, the testimony does not establish that the entire record was made at or near the time by—or from information transmitted by—someone with knowledge, as the witness testified that she did not know the origin of at least some of the underlying information. *See, e.g.*, 11/20/09 Claire Sebti Rule 30(b)(6) Depo. at 53:18-21, 56:13-17, 58:21-59:11, 62:10-23 (lodged by Oracle).

Nevertheless, and as Defendants explained to Oracle in meet and confer communications, Defendants will agree to admission of these two purported business records without requiring Oracle to prove the business records foundation, so long as comparable SAP exhibits also are admitted as business records. Specifically, the substance of the income statement above (*i.e.*, Oracle financial statement purportedly used to calculate Oracle's profit margin) is similar to certain financial statements from SAP—namely, SAP's "trial balances" (SAP financial statements used to calculate SAP's profit margin), which are exhibits A-6623 to A-6643. Vol. 2 (A-6624 excerpt). SAP's trial balances are standard, regularly maintained reports of the company's accounting data. Trial balances are simply lists of the balances in companies' general ledger accounts at a given point in time. Most companies, including SAP, produce trial balances on a

routine basis as part of the companies' financial management and accounting process. These are classic business records under Rule 803(6).

Oracle has been unwilling to accept this mutually fair proposal. Although Defendants agree that the parties may present business record declarations as contemplated by Rule 803(6)(D) (and Defendants can meet their obligations with a declaration), for convenience and to streamline presentation of the evidence, Defendants would stipulate to the Court pre-admitting PTX 8040 and PTX 2582, provided that A-6623 to A-6643 also are admitted as business records.

VII. ORACLE'S CATEGORY TWO – POST-TRIAL STATEMENTS BY SAP EXECUTIVES

ORACLE'S POSITION

At the last trial, SAP claimed it intended to take responsibility for its misdeeds. *See, e.g.*, Motamed Decl. Ex. J (11/2/10 Trial Tr.) at 385:11-12 ("We admit all of that. And more important, we acknowledge responsibility for it."). Oracle expects SAP to make the same argument at the coming trial, and SAP has confirmed that it will do so. It is a common enough strategy for a defendant that cannot avoid liability to claim that it accepts responsibility for the harm it has caused. The purpose of that time-honored tactic is to build credibility with the jury by establishing that the defendant is not hiding anything, and asks only that it be held to a just account. SAP is entitled to tell the jury that story. But trials are about credibility, and Oracle is entitled to tell the jury the different story that SAP's top two executives have told the world (and what SAP reconfirms below): SAP does not really accept responsibility, but stipulated to liability as a litigation tactic to minimize damages.

For instance, at an SAP Shareholders' Meeting on May 25, 2011, SAP's Co-CEO, Bill McDermott, claimed SAP decided to admit "vicarious and contributory liability" as a tactical maneuver "to limit the litigation to the question of damages, which we hoped would result in a lower amount of damages." PTX 8112 (SAP S'holders' Mtg. Tr. at 4, *available at* http://www.sap.com/corporate-en/investors/governance/meetings/pdf/2011-05-25-ShareholderMeeting-e-mcdermott.Pdf (last visited May 8, 2012)). At the same meeting, Hasso Plattner, a founder of the company and the Chairman of SAP AG's Supervisory Board, claimed

that SAP admitted to contributory copyright infringement as a mere legal tactic: "SAP accepted responsibility on the advice of our lawyers primarily in order to be able to concentrate on the question of damages in the civil proceedings in the USA." PTX 8111 (SAP S'holders' Mtg. Webcast at 20:16, *available at* http://www.sap.com/company/media/ 110525_ ShareholdersMeeting_EN_250.asx (last visited May 8, 2009)). Mr. Plattner also claimed the press "often interpreted this procedural admittance, wrongly, I might add, to mean that the SAP executive board had admitted it had known about TN's breaches of copyright in the USA," and that, in fact, "the ongoing investigations have not uncovered any signs that any duty was breached." *Id*. at 20:40.

The Court should allow Oracle to challenge the credibility of SAP's assertion, which is a cornerstone of its defense, that the damages it claims it owes represent "taking responsibility" for its admitted infringement. In fact, that assertion is false. Outside of Court, when they thought trial had ended, SAP's executives boasted publicly that SAP's offer to take responsibility for its misdeeds is nothing more than a self-serving gambit to reduce the damages it owes. Thus, these out of court statements directly contradict the positions SAP took at the last trial and will take again at the coming trial. This evidence relates directly to SAP's primary defense at trial, and to its executives' credibility. Accordingly, the Court should allow these statements into evidence as admissions.

DEFENDANTS' POSITION

Oracle's focus on these post-trial statements confirms that Oracle plans to present a case about liability and punishment, not damages. Descriptions of Defendants' business and legal reasons for stipulating to liability are not probative of any issue related to damages. *See* Fed. R. Evid. 401. They do not concern whether, why, or how many customers left Oracle as a result of the infringement. SAP executives made these statements after trial in the course of explaining a strategic legal decision to an audience of German shareholders at a meeting in Germany pursuant to German law. The statements relate to that legal decision, not to the facts underlying the litigation. They do not change the fact that Defendants stipulated to liability—they merely cite strategic reasons for that decision, consistent with Defendants' previous representations to this

Court. *See, e.g.*, ECF No. 727 (Defs.' Trial Brief) at 2 (proposing liability stipulations to "focus on . . . damages" because "Plaintiffs' damages claims are untethered to the facts or law"); Vol. 3 (11/8/10 Trial Tr.) at 831:13-14 (stipulations were made for "business or legal reasons").

Moreover, these statements would cause unfair prejudice, confuse the issues, and mislead the jury. *See* Fed. R. Evid. 403. Oracle will use these statements to conflate the issues of liability and damages, and it will attempt to convince the jury that liability has not been fully resolved—all in an effort to increase the jury's award.

VIII. ORACLE'S CATEGORY THREE – STATEMENTS FROM THE TOMORROWNOW PLEA AGREEMENT

ORACLE'S POSITION

At the pre-trial conference, the Court granted SAP's motion to exclude evidence of TN's criminal plea agreement. However, at that conference, the Court noted the distinction between the facts and statement contained within the plea, and the fact of the plea itself. Motamed Decl. Ex. K (5/24/12 Hrg. Tr.) at 85:3-5 ("The conviction doesn't, in and of itself, doesn't establish the causation. It's the actual admissions made at the time of the plea that go to that effect.") Accordingly, the Court should allow Oracle to introduce the admissions relating to causation contained within the plea agreement without referencing that the admissions came from the guilty plea.

For example, in the plea agreement, TN admitted that "[d]uring approximately the 2005-2007 time period, TOMORROWNOW was engaged in an effort to convince Oracle customers that had licensed Oracle's software to terminate their use of Oracle's maintenance and support services for that software and instead to retain TOMORROWNOW to provide those maintenance and support services. *As a result of these efforts, a number of Oracle customers did switch from using Oracle's maintenance and support services to using TOMORROWNOW for such services*." PTX 8108 at 3 (emphasis supplied). This evidence relates directly to lost profits and the causation that Defendants and their expert contest. Oracle should be allowed to tell the jury that Defendants have admitted the very facts they now deny, without referencing the fact that this admission came in a criminal plea.

The Court has already provided a mechanism for this. At the pretrial conference, the Court approved referring to testimony from the first trial as coming from a "previous proceeding." Motamed Decl. Ex. K (5/24/12 Hrg. Tr.) at 93:15-24. The admissions from the plea agreement can be handled in a similar fashion, and Oracle should be allowed to inform the jury, for instance, that TN previously admitted that "it willfully infringed the copyrights of Oracle's copyrighted works . . . . and that it did so for the purpose of commercial advantage and private financial gain." PTX 8108 at 5.

Consequently, the Court should allow Oracle to reference these admissions without referencing the plea agreement itself. This will avoid causing any undue prejudice or potential confusion, and allow Oracle to fairly dispute Defendants' contentions contrary to their plea.

DEFENDANTS' POSITION

The Court should reject Oracle's back-door attempt to introduce evidence of TomorrowNow's guilty plea. The Court already has excluded evidence of the guilty plea and conviction, *see* ECF No. 1171 (5/29/12 Order) at 4, and this ruling naturally encompasses "admissions relating to causation contained within the plea agreement," *supra*. As Oracle recently argued, the conviction and the admissions in the plea agreement "are wrapped up in each other," and the Court should not "separate the basis for the conviction from the conviction itself." Vol. 3 (5/24/12 Hrg. Tr.) at 85:6-12.

The same considerations that justify excluding the conviction also warrant excluding admissions in the plea agreement. As the Court ruled, admitting the TomorrowNow guilty plea would "be unduly prejudicial to SAP who did not enter a plea of guilty." *Id.* at 88:14-16. The statements in the plea agreement were made by TomorrowNow, not SAP. Admitting these statements in a trial about SAP's infringer's profits, creates a serious risk of confusing the issues and misleading the jury. These statements would cause undue prejudice to SAP, which did not make them and did not plead guilty. *See* Fed. R. Evid. 403.

The dangers far outweigh the minimal probative value of the statements. *See id.* The plea agreement contains only general statements of causation about unnamed "customers," without attempting to quantify the number of customers that left Oracle for TomorrowNow or the

damages at stake. But Defendants agree that a "number" of customers left Oracle for TomorrowNow maintenance support, resulting in some amount of damages. The dispute in this case, and the focus of the new trial, is *which* customers should be counted. The statements in the plea agreement provide no insight into those disputed issues in the new trial and are cumulative of the broader causation point. Given the inextricable link between these statements and the guilty plea, the unfairly prejudicial effect of TomorrowNow's statements to SAP, and their minimal probative value, these statements should be excluded under Rule 403.

DATED: June 5, 2012

JONES DAY

By: /s/ Tharan Gregory Lanier
Tharan Gregory Lanier

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

In accordance with General Order No. 45, Rule X, the above signatory attests that concurrence in the filing of this document has been obtained from the signatory below.

DATED: June 5, 2012

Bingham McCutchen LLP

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