

1 BINGHAM MCCUTCHEM LLP
 2 DONN P. PICKETT (SBN 72257)
 3 GEOFFREY M. HOWARD (SBN 157468)
 4 HOLLY A. HOUSE (SBN 136045)
 5 ZACHARY J. ALINDER (SBN 209009)
 6 BREE HANN (SBN 215695)
 7 Three Embarcadero Center
 8 San Francisco, CA 94111-4067
 9 Telephone: 415.393.2000
 10 Facsimile: 415.393.2286
 11 donn.pickett@bingham.com
 12 geoff.howard@bingham.com
 13 holly.house@bingham.com
 14 zachary.alinder@bingham.com
 15 bree.hann@bingham.com

9 DORIAN DALEY (SBN 129049)
 10 JENNIFER GLOSS (SBN 154227)
 11 500 Oracle Parkway, M/S 5op7
 12 Redwood city, CA 94070
 13 Telephone: 650.506.4846
 14 Facsimile: 650.506.7114
 15 dorian.daley@oracle.com
 16 jennifer.gloss@oracle.com

14 Attorneys for Plaintiffs
 15 Oracle USA, Inc., Oracle International Corporation,
 16 Oracle EMEA Limited, and Siebel Systems, Inc.

16 UNITED STATES DISTRICT COURT
 17 NORTHERN DISTRICT OF CALIFORNIA
 18 OAKLAND DIVISION

20 ORACLE USA, INC., *et al.*,
 21 Plaintiffs,
 22 v.
 23 SAP AG, *et al.*,
 24 Defendants.

Case No. 07-CV-01658 PJH (EDL)

**PLAINTIFFS' OBJECTIONS TO
 EVIDENCE FILED IN SUPPORT OF
 DEFENDANTS' MOTION FOR
 PARTIAL SUMMARY JUDGMENT
 REGARDING PLAINTIFFS'
 HYPOTHETICAL LICENSE [FAIR
 MARKET VALUE] DAMAGES
 CLAIM**

Date: October 28, 2009
 Time: 9:00 am
 Place: TBD
 Judge: Hon. Phyllis J. Hamilton

Case No. 07-CV-01658 PJH (EDL)

1 Plaintiffs Oracle USA, Inc., Oracle International Corporation, Oracle EMEA
 2 Limited, and Siebel Systems, Inc. (together, “Oracle”) hereby object to certain portions of the
 3 Defendants’ Motion for Partial Summary Judgment Regarding Plaintiffs’ Hypothetical License
 4 Damages Claim (the “Motion”), the Declaration of Tharan Gregory Lanier (the “Lanier
 5 Declaration”) filed in support of the Motion, and specifically to the Exhibits attached to the
 6 Lanier Declaration, all offered by Defendants SAP AG, SAP America Inc., and TomorrowNow,
 7 Inc. (together, “Defendants”) in support of their Motion filed on August 26, 2009. These
 8 objections are made without prejudice to Oracle’s right to make further written and oral
 9 objections at the hearing on the instant motions and/or at trial.

10 Oracle objects on the grounds that the Motion, the Lanier Declaration, and its
 11 attached Exhibits are predicated on testimonial evidence from the Depositions of Larry Ellison,
 12 Safra Catz and Charles Phillips that is not admissible, because the cited testimony (a) is
 13 irrelevant to the Motion; (b) is vague, ambiguous and/or too speculative; (c) is based on
 14 incomplete hypotheticals; (d) lacks proper foundation; and/or, (e) constitutes improper lay
 15 witness opinion testimony. *See* Fed. R. Evid. §§ 401, 402, 602, 701, and 901; *see also Orr v.*
 16 *Bank of America*, 285 F.3d 764, 773 (9th Cir. 2002); *Beyene v. Coleman Sec. Servs. Inc.*, 854
 17 F.2d 1179, 1181 (9th Cir. 1988) (“It is well settled that only admissible evidence may be
 18 considered by the trial court in ruling on a motion for summary judgment.”).

19 Oracle specifically objects to that evidence, and requests such evidence be
 20 stricken by the Court, as follows:

21

<u>EXHIBIT A TO THE LANIER DECLARATION</u>	
MATERIAL OBJECTED TO	GROUND FOR OBJECTION
22 23 24 25 26 27 28 Deposition of Safra Catz, submitted as Exhibit A to the Lanier Declaration (“Catz Depo.”) at 23:4- 25:18, 160:3-161:5 & Motion at 4:6-9; 13:15-20	The cited testimony is objectionable and inadmissible to support Defendants’ Motion for three reasons. First, it is not relevant to the Motion, and is therefore inadmissible. Fed. R. Evid. §§ 401, 402. The objectionable

<u>EXHIBIT A TO THE LANIER DECLARATION</u>	
MATERIAL OBJECTED TO	GROUND FOR OBJECTION
(citing same).	<p>testimony does not have “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Fed. R. Evid. §401; <i>see</i> Oracle’s Opposition to Defendants’ Motion for Partial Summary Judgment (“Opposition”) at 5:5-9:16; 20:7-21:5 & 25:15-19 (establishing that the fair market license value is an objective test based on a hypothetical negotiation between a willing buyer and seller, such that executive testimony showing uncertainty concerning whether such a negotiation would have occurred is not relevant).</p> <p>Second, Defendants mischaracterize Ms. Catz’s testimony by citing it out of context. <i>See</i> Motion at 4:6-9; 5:28-6:2; <i>cf.</i> Declaration of Safra Catz submitted in support of Oracle’s Opposition to Defendants’ Motion for Partial Summary Judgment (“Catz Decl.”) at ¶¶ 3-4. For this reason, and in general, the line of questioning in the cited testimony is vague, ambiguous, called for speculation and is based upon an incomplete hypothetical. For example, Defense counsel failed to furnish relevant facts that Ms. Catz indicated she would need to understand the questions. <i>See</i> Catz. Depo. at 25:14-16. Further, Defense counsel admitted the line of questioning was hypothetical and speculative, but did not rephrase, withdraw or otherwise correct his improper question. <i>See</i> Catz. Depo. at 160:13-161:5. As a result, the cited testimony lacks proper foundation and is inadmissible. Fed. R. Evid. §§ 602, 701 & 901.</p> <p>Third, due to the lack of clarity of the questioning, the failure to furnish sufficient basis for the witness to form a proper opinion, the impact and relevance of expert testimony to these issues, and the irrelevance of the cited testimony to the Motion as described above, the cited testimony also constitutes an improper lay witness opinion. <i>See</i> Fed. R. Evid. § 701; <i>see also</i> <i>U.S. v. Durham</i>, 464 F.3d 976, 982 (9th Cir. 2006) (requiring “opinion testimony of lay witnesses” to be predicated on “concrete facts within their own observation”). It is inadmissible on that ground as well.</p>

<u>EXHIBIT B TO LANIER DECLARATION</u>	
MATERIAL OBJECTED TO	GROUND FOR OBJECTION
<p>Deposition of Charles Phillips, submitted as Exhibit B to the Lanier Declaration (“Phillips Depo.”) at 117:9-120:18 & Motion at 4:6-9; 11:20-23; 13:15-20 (citing same).</p>	<p>Similar to the Catz testimony, the cited testimony from the Deposition of Charles Phillips is objectionable and inadmissible to support Defendants’ Motion for three reasons.</p> <p>First, it is not relevant to the Motion, and is therefore inadmissible. Fed. R. Evid. §§ 401, 402. The objectionable testimony does not have “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Fed. R. Evid. §401; <i>see</i> Opposition at 5:5-9:16; 20:7-21:5 & 25:15-19 (establishing that the fair market license value is an objective test based on a hypothetical negotiation between a willing buyer and seller, such that executive testimony showing uncertainty concerning whether such a negotiation would have occurred is not relevant).</p> <p>Second, Defendants mischaracterize Mr. Phillips’ testimony by citing it out of context. <i>See</i> Motion at 5:25- 28. Further, Defense counsel failed to furnish relevant facts Mr. Phillips would have needed to understand the questions. For these reasons, and in general, the line of questioning in the cited testimony is vague, ambiguous, called for speculation and is based upon an incomplete hypothetical. As a result, the cited testimony lacks proper foundation and is inadmissible. <i>See</i> Fed. R. Evid. §§ 602, 701 & 901.</p> <p>Third, due to the lack of clarity of the questioning, the failure to furnish sufficient facts for the witness to form a proper opinion, the impact and relevance of expert testimony to these issues, and the irrelevance of the cited testimony to the Motion as described above, the cited testimony also constitutes an improper lay witness opinion. <i>See</i> Fed. R. Evid. § 701; <i>see also U.S. v. Durham</i>, 464 F.3d 976, 982 (9th Cir. 2006) (requiring “opinion testimony of lay witnesses” to be predicated on “concrete facts within their own observation”). It is inadmissible on that ground as well.</p>

<u>EXHIBIT C TO LANIER DECLARATION</u>	
MATERIAL OBJECTED TO	GROUND FOR OBJECTION
<p>Deposition of Larry Ellison, submitted as Exhibit C to the Lanier Declaration (“Ellison Depo.”) at 73:25-87:17, 114:16-25 & Motion at 4:9-25; 6:2-8; 11:18-23 12:9-16; 13:15-20; 14:3-6 (citing same).</p>	<p>Similar to the Catz and Phillips testimony discussed above, the cited testimony from the Deposition of Larry Ellison is objectionable and inadmissible to support Defendants’ Motion for three reasons.</p> <p>First, it is not relevant to the Motion, and is therefore inadmissible. Fed. R. Evid. §§ 401, 402. The objectionable testimony does not have “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Fed. R. Evid. §401; <i>see</i> Opposition at 5:5-9:16; 20:7-21:5 & 25:15-19 (establishing that the fair market license value is an objective test based on a hypothetical negotiation between a willing buyer and seller, such that executive testimony showing uncertainty concerning whether such a negotiation would have occurred is not relevant).</p> <p>Second, Defendants mischaracterize Mr. Ellison’s testimony by citing it out of context. <i>See</i> Motion at 2:13-17; 4:6-25; 6:2-8; <i>cf.</i> Declaration of Larry Ellison in Support of Oracle’s Opposition to Defendants’ Motion for Partial Summary Judgment (“Ellison Decl.”), submitted concurrently with these Objections, at ¶¶ 3-4. Defense counsel failed to furnish relevant facts Mr. Ellison would have needed to understand and properly respond to the questions posed to him. <i>See id.</i> For these reasons, and in general, the line of questioning in the cited testimony is vague, ambiguous, called for speculation and is based upon an incomplete hypothetical. As a result, the cited testimony lacks proper foundation and is inadmissible. <i>See</i> Fed. R. Evid. §§ 602, 701 & 901.</p> <p>Third, due to the lack of clarity of the questioning, the failure to furnish sufficient facts for the witness to form a proper opinion, the impact and relevance of expert testimony to these issues, and the irrelevance of the cited testimony to the Motion as described above, the cited testimony also constitutes an improper lay witness opinion. <i>See</i> Fed. R. Evid. § 701; <i>see also</i> <i>U.S. v. Durham</i>, 464 F.3d</p>

