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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. 4:07-CV-1658 PJH (EDL)

DEFENDANTS' RESPONSE TO PLAINTIFFS' OBJECTIONS TO ORDER FOR SANCTIONS

Date: N/A
Time: N/A
Courtroom: N/A
Judge: Hon. Phyllis J. Hamilton

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I. INTRODUCTION

Oracle's assertion that it notified Defendants "early and often" of its intent to seek lost profits damages for alleged lost license sales is not supported by the facts. Objs. at 1. Magistrate Judge Laporte, following a thorough review of the record (including the complaints, disclosures, and discovery responses on which Oracle relies in its objections), and based on her "hands-on management of" and "deep familiarity with" discovery in this case (Order at 25-26, 2), correctly found that:

> [F]rom the inception of this case, through two years of hard fought litigation and repeated discovery conferences and hearings, Plaintiffs have limited their lost profits damages to lost support revenue for Oracle software application products from Plaintiffs' 358 former customers that had received support from Plaintiffs, but switched to receiving support for Oracle products from TomorrowNow. It was not until Plaintiffs' recent supplemental disclosures, in May 2009 … that Plaintiffs first expressly stated that they were seeking other, additional lost profits damages based on lost up-sell and cross-sell licensing opportunities for new and different Oracle products ….

Order at 3. None of the facts on which Oracle relies undermines this finding, including the new material that Oracle has improperly submitted to this Court.

Oracle fails to discuss, much less rebut, Magistrate Judge Laporte's finding that for two years Oracle affirmatively *disclaimed* the relevance of license revenue and refused to provide discovery on it. Order at 9-12. Aside from a single unpersuasive footnote (Objs. at 10, n.6), Oracle omits any discussion of the following key aspect of the Order:

> Plaintiffs chose to bring this case and focus damages discovery from its inception on lost support revenue from customers that switched from Oracle to TomorrowNow for their software support needs … Plaintiffs' attempts to demonstrate that Defendants were nonetheless on notice that Plaintiffs also sought other major categories of lost profits from different customers and different revenue sources are not persuasive. To the contrary, Defendants reasonably relied in preparing their defense on Plaintiffs' initial disclosures (which were not updated for over two years), Plaintiffs' discovery responses, and Plaintiffs' representations to the Court and counsel. Fundamental fairness as well as effective case management require that damages discovery not be dramatically expanded at this late date; otherwise, this already complex case may never be ready for trial.

Order at 5. The burden is on Oracle to demonstrate that it meets one of the two exceptions to the mandatory sanctions of Rule 37(c)(1). Order at 6. Oracle's objections neither acknowledge nor satisfy that burden. Moreover, Oracle ignores the serious potential prejudice Defendants face if

the evidence is not precluded. Order at 5.

Magistrate Judge Laporte's Order is thorough, well reasoned, and fully supported by the facts and the law. This Court should deny Oracle's objections and adopt the Order in its entirety. In addition, the Court should deny Oracle's request that it be permitted to offer the precluded evidence to bolster its other claims and damage theories. As discussed below, the prejudice to Defendants is the same regardless of the purpose for which the precluded evidence is offered.

II. STANDARD OF REVIEW

A ruling by a magistrate judge on a non-dispositive motion may be set aside or modified by the district court only if "clearly erroneous" or "contrary to law." Fed. R. Civ. P. 72(a); *see also Celano v. Marriott Int'l, Inc.*, No. C 05-4004 PJH, 2007 U.S. Dist. LEXIS 54707, at *9-10 (N.D. Cal. July 13, 2007) (Hamilton, P.). The "clearly erroneous" standard applies to findings of fact, while conclusions of law are reviewed *de novo*. *Id.* at *10. A ruling on a dispositive motion is reviewed *de novo*, including findings of fact. Fed. R. Civ. P. 72(b)(3).

III. ARGUMENT

A. THE ORDER IS NON-DISPOSITIVE.

Magistrate Judge Laporte properly held that Defendants' motion, and her ruling on that motion, were non-dispositive. Order at 7-9. The relevant statute lists the motions that are considered dispositive and it does not include sanctions motions. 28 U.S.C. § 636(b)(1)(A). Moreover, the Ninth Circuit has held that sanctions motions generally are not analogous and are considered non-dispositive. *Maisonville v. F2 Am., Inc.*, 902 F.2d 746, 747-48 (9th Cir. 1990); *see also* 14 J. Moore, *Moore's Federal Practice – Civil* § 72.02(7)(b) (2009).

Other courts agree. *See, e.g., Phinney v. Wentworth Douglas Hosp.*, 199 F.3d 1, 6 (1st Cir. 1999) ("Motions for sanctions premised on alleged discovery violations are not specifically excepted under 28 U.S.C. § 636(b)(1)(A) and, in general, they are not of the same genre as the enumerated motions. We hold, therefore, that such motions ordinarily should be classified as nondispositive."). Only in "rare" instances in which the sanction "fully disposes" of a claim or defense is it considered dispositive. *Id.*; *see also Ocelot Oil Corp. v. Sparrow Indus.*, 847 F.2d 1458, 1462 (10th Cir. 1988) (striking of pleadings reviewed *de novo*); *North Am. Watch Corp. v.*

Princess Ermine Jewels, 786 F.2d 1447, 1450 (9th Cir. 1986) (dismissal of counterclaim reviewed *de novo*); *Banks v. Modesto City Schs. Dist.*, No. CV-F-04-6284, 2006 U.S. Dist. LEXIS 94274, at *9 (E.D. Cal. Dec. 18, 2006) (referring sanctions motion to trial court because of request for terminating sanction). Here, the sanction does not terminate Oracle's right to pursue any of the causes of action it has plead. Reply Brief at 2-3;[1] *see also* Order at 7. It merely limits *portions* of one form of alleged damage. *Id.*

Oracle contends that if a sanction limits any portion of any demand for money, it must be dispositive. Objs. at 4. This claim is inconsistent with the relevant statute and Ninth Circuit law discussed above. Moreover, Oracle cites no authority in support of its position other than a partial definition of the word "claim" in *Black's Law Dictionary*.[2]

Oracle's reliance on *Network Appliance, Inc. v. Bluearc Corp.*, No. C 03-5665, 2005 U.S. Dist. LEXIS 16726 (N.D. Cal. June 27, 2005) is similarly unpersuasive. Objs. at 4. *Network Appliance* states that "under certain circumstances, the imposition of preclusive sanctions may be tantamount to dismissal of a plaintiff's claims or entry of default judgment against a defendant." *Id.* at *9. The sanction here is not "tantamount to dismissal," as Magistrate Judge Laporte noted at the hearing and in the Order. Wallace Resp. Decl. ¶ 1, Exh. A (Tr. at 62:10-66:6);[3] *see also* Order at 6. Nor is it "critical in shaping the nature of litigation," as Oracle contends (Objs. at 4), citing to Magistrate Judge Laporte's decision in *Keithley v. Home Store.com, Inc.*, No. C-03-04447, 2008 U.S. Dist. LEXIS 70246 (N.D. Cal. Sept. 16, 2008). Magistrate Judge Laporte correctly distinguished *Keithley* on several grounds, including that the sanctions in that case were more "severe" and "potentially dispositive of liability …." Order at 8-9. By contrast, "the sanctions Defendants seek [here] do not affect liability or preclude recovery of many millions of

[1] All references to "Reply Brief" are to Defendants' Reply in Support of Motion for Sanctions Pursuant to Fed. R. Civ. P 37(c) and 16(f), filed on August 4, 2009 (Dkt. No. 399). For the Court's convenience, Defendants have provided a binder containing a complete copy of each side's submissions to Magistrate Judge below, along with the hearing transcript and Order.

[2] *Black's Law Dictionary* contains numerous other definitions of "claim" that are inconsistent with Oracle's position, including "cause of action." *Black's Law Dictionary* 247 (6th ed. 1991).

[3] All references to "Wallace Resp. Decl." are to the Declaration of Elaine Wallace in Support of Defendants' Response to Plaintiffs' Objections to Order for Sanctions, filed herewith.

dollars of damages, but instead affect only a portion of potential damages, leaving Plaintiffs free to pursue their originally estimated 'likely at least a billion dollars.'" *Id.*

Reynoso v. Constr. Protective Servs., Inc., No. 06-56381, 2008 U.S. App. LEXIS 19681 (9th Cir. Sept. 16, 2008) also does not apply here. In *Reynoso*, the Ninth Circuit held that Local Rule 37-1, which requires a meet and confer before filing a discovery motion, does not apply to a motion *in limine* to exclude evidence. *Id.* at *5-8. *Reynoso* did not involve any ruling by a magistrate judge or determination of whether a sanctions motion is dispositive.

Finally, Oracle is incorrect that because the Order precludes evidence, it "is not a discovery sanction." Objs. at 4. The purpose of Rule 37 is to enable a Court to impose discovery sanctions, and evidence preclusion is one such sanction. Fed. R. Civ. P. 37(c)(1); *see also* Schwarzer, Tashima, & Wagstaffe, *Federal Civil Procedure Before Trial* ¶ 16:279.5 (The Rutter Group 2009) ("A magistrate judge's evidentiary rulings, even where they ultimately affect the outcome of the case, are 'nondispositive' orders under 28 USC § 636(b)(1)(A) ….").

In short, Defendants' motion, and Magistrate Judge Laporte's Order on that motion, are non-dispositive. This Court would have to conclude that Magistrate Judge Laporte's factual findings are clearly erroneous before sustaining Oracle's objections. Even if the Court were to hold that Defendants' motion and the Order are dispositive and review the findings *de novo*, however, the findings and related sanctions are fully supported by the record.

B. THE ORDER IS SUPPORTED BY THE RECORD.

Oracle does not object to the preclusion of lost profits for customers that did not become TomorrowNow customers. Objs. at 1-2, 14. Accordingly, Oracle's objections relate to: (1) alleged lost profits relating to license revenue, as opposed to support revenue; and (2) alleged lost profits for products not supported by TomorrowNow.

Magistrate Judge thoroughly considered – and properly rejected – the same facts and arguments Oracle presents to this Court. Moreover, even though Oracle has improperly submitted additional evidence to this Court, Oracle has not presented any new facts or argument that undermine Magistrate Judge Laporte's findings. As Oracle notes, a party may not present new evidence on objections to a non-dispositive motion absent some compelling justification.

Objs. at 9, n.5. For dispositive motions, new evidence is permitted only upon a proper motion. Local Rule 72-3(b). Oracle has done neither. Its argument that it did not submit this material to Magistrate Judge Laporte because it did not believe additional evidence was needed to defeat Defendants' motion is not sufficient justification to warrant an expansion of the record on appeal. *See Favoured Devs. Ltd v. Lomas*, No. C06-02752 MJJ, 2007 U.S. Dist. LEXIS 78599, at *6 (N. D. Cal. Oct. 23, 2007) (litigants "may not … use the magistrate judge as a mere sounding-board for the sufficiency of the evidence.") (citation omitted). Regardless, even the improperly expanded record supports Magistrate Judge Laporte's findings.

1. The Complaints.

Oracle argues that a single sentence in its various complaints was sufficient to put Defendants on notice of its intent to seek alleged lost license revenue in addition to alleged lost support revenue. Objs. at 5-6. Oracle made the same argument to Magistrate Judge Laporte, who properly rejected it. Order at 9-11; *see also* Reply Brief at 7-8, 10.

First, Magistrate Judge Laporte correctly noted the "very general" nature of the language on which Oracle relies. Order at 9; *see also id.* at 13 ("Plaintiffs seek to rely on the vague, very general damages allegations in their initial complaint to preserve their new, more extensive damages theories, even though they failed to disclose those theories in discovery for over two years, despite Defendants' efforts from the outset to flesh out Plaintiffs' sketchy damages allegations through appropriate discovery tools."). Second, and more importantly, Defendants took note of this language in Oracle's complaint and immediately served discovery requests designed to elicit more detail on Oracle's damages claims. Order at 9; Opening Brief at 6-8;[4] Reply Brief at 7-8. In response, as Magistrate Judge Laporte correctly noted, Oracle *disclaimed* the relevance of license revenue and *refused to produce* documents beyond those relating to support revenue:

> Defendants took notice of this very general language and on the day discovery opened, they served discovery requests designed to ferret out precisely what damages were really at issue. In September 2007, Plaintiffs responded to these early discovery requests exclusively in terms of lost support revenue, without any

[4] All references to "Opening Brief" are to Defendants' Motion for Sanctions Pursuant to Fed. R. Civ. P 37(c) and 16(f), filed on July 14, 2009 (Dkt. Nos. 342 & 464).

> mention of licensing revenue … Significantly, Plaintiffs specifically disclaimed the relevance of revenue from sources other than support for PeopleSoft and J.D. Edwards applications ….

Order at 9-11 (text of requests and responses omitted);[5] *see also* Reply Brief at 7. Magistrate Judge Laporte's decision was based not only on Oracle's failure to timely disclose the nature and extent of its damages claims, but on Oracle's prior position that the precluded evidence was irrelevant and would not be produced. Oracle fails to rebut this key aspect of the Order.

Magistrate Judge Laporte rejected Oracle's argument that these discovery responses were made before Oracle could develop its damages theory, finding it to be "inconsistent with their other argument that one sentence in their March 22, 2007 complaint was sufficient to put Defendants on notice as to the extent and nature of the damages at issue." Order at 11; *see also* Reply Brief at 10. Magistrate Judge Laporte also found that Oracle continued to disclaim the relevance of license revenue "even many months after these initial discovery responses…." Order at 12; *see also* Reply Brief at 10-11. Moreover, Oracle conceded in its opposition to the motion that it has never supplemented its responses to these requests, arguing that it made the information known by other means. *Id.* Magistrate Judge Laporte disagreed:

> Tellingly, however, Plaintiffs have pointed to no written communication to Defendants, written discovery responses, deposition testimony, or submission to the Court from their responses in July 2007, which expressly limited their damages to support revenue from the products at issue in this case, until April 2009, when Plaintiffs first sought to greatly expand the categories of damages at issue beyond those set forth in their initial discovery responses.

Order at 12. Oracle has provided no basis in its objections for rejecting these findings.

2. <u>The Disclosures</u>.

Oracle's argument regarding its August 2007 Initial Disclosures does not support a finding of error. Oracle's only contention is that its Initial Disclosures contain the term "lost profits" and do not expressly limit that claim to support revenues. Objs. at 6. Oracle fails to respond to Defendants' argument, and Magistrate Judge Laporte's finding, that this general term does not provide the specificity required by Rule 26 and that the only category of damages

[5] Complete copies of Oracle's responses to the requests are attached as Exhibit E to the Declaration of Elaine Wallace in Support of Defendants' Motion for Sanctions Pursuant to Fed. R. Civ. P. 37(c) and 16(f), filed on July 14, 2009 (Dkt. Nos. 343 & 467).

documents identified in the Initial Disclosures relate to "the loss of customer support revenue." Opening Brief at 3; Reply Brief at 8; Order at 12-13. Oracle also fails to address the fact that, one month after its Initial Disclosures, it served the discovery responses discussed above, limiting its production to documents relevant to support revenue. Reply Brief at 8. Finally, Oracle fails to justify the two year delay in supplementing its Initial Disclosures. Order at 13; *see also id.* at 18 ("The fact that Plaintiffs finally revealed in April 2009 that their damages claims extended to non-TomorrowNow customers and to revenue from sources other than support does not absolve them from their failure to make adequate initial disclosures or to respond with information already in their possession to the specific discovery requests propounded early in this case. To the contrary, these disclosures are too little, too late.").

3. The Interrogatory Responses.

Oracle relies (Objs. at 6) on its September 2007 response to Interrogatory No. 5, which asks Oracle to "[d]escibe in as much detail as possible" all ways in which Oracle alleges it was harmed by the conduct alleged in the Complaint. Order at 11. Magistrate Judge Laporte correctly found that Oracle's response contained "only general categories of harms …." *Id.*; *see also* Reply Brief at 9. The fact that the response references "customers of Oracle support services and software programs" was not sufficient to inform Defendants that Oracle's damages claims included alleged lost license revenue, particularly since the response was served along with the document request responses discussed above, which disclaimed the relevance of license revenue and refused to produce related documents. Similarly, the fact that Oracle's interrogatory response "points Defendants to the contract files and other documents" was also insufficient given Oracle's refusal to produce documents relating to license revenue. *Id.*

Defendants asked Oracle to supplement its response to Interrogatory No. 5 to provide a meaningful description of its damages claims. Opening Brief at 5. After an extensive meet and confer, Oracle supplemented its response in October 2007 but the supplement consisted of no more than a reference, pursuant to Rule 33(d), to previously produced customer contract files. *Id.*; *see also* Order at 11. Oracle failed to provide any information indicating that its damages claim extended to alleged lost license revenue.

Oracle also relies on its responses to interrogatories served in February 2009. Objs. at 7. These interrogatories were not damages related, as Oracle contends, but preemption related, intended to flesh out the differences between conduct alleged in support of Oracle's copyright and non-copyright claims. Reply Brief at 9-10; Order at 18. Oracle's April 2009 responses "at last disclosed a vastly expanded scope of damages …." Order at 18. Far from supporting Oracle's argument that it timely disclosed the full nature and extent of its damages claims, Magistrate Judge Laporte correctly found that these April 2009 responses and Oracle's May 2009 Supplemental Disclosures, two years into discovery, were "too little, too late." *Id.*

4. The June 24, 2008 Discovery Conference Statement.

Oracle contends that a portion of a single sentence in the parties' June 24, 2008 Joint Discovery Statement is sufficient to undermine Magistrate Judge Laporte's finding that Oracle did not timely disclose its intent to seek alleged lost license revenue. Objs. at 7 (referring to the phrase "revenue streams reasonably associated with its customers who left for SAP TN."). However, Oracle fails to put this language in context. At the time the Discovery Conference Statement was submitted, Oracle had been disclaiming the relevance of license revenue, and refusing to provide any related discovery, for almost a year. Opening Brief at 6-8. As discussed above, Oracle never amended its discovery responses or otherwise communicated any change in position to Defendants during this time. Defendants cannot reasonably have divined from this language that Oracle had now decided to pursue such damages. Moreover, Oracle's argument is inconsistent with the position it took two months after the June 2008 Discovery Conference Statement regarding the scope of the customer-specific financial reports and product pricing information it was willing to produce. In an email from its counsel, Oracle expressly limited that production to support, pricing, and contract information for PeopleSoft and J.D. Edwards products only, *i.e.* the products *already licensed* by TomorrowNow customers:

> (1) Customer-Specific Financial Reports: Oracle has located and will produce reports for the relevant customers and for the relevant time periods showing, among other information, the following: (a) Customer names; (b) Customer numbers; (c) The names of the PSFT and JDE products each customer was licensed to; (d) Whether a customer licensed support for a given product; (e) The contract number and license order numbers; (f) The support contract start and end

> dates for the first year of support and renewals; (g) The current contract status; (h) The amounts paid for support and licenses; and (i) The date of cancellation of support.

Wallace Decl. ¶ 10, Exh. F (August 27, 2008 email from Oracle's counsel, also limiting production of pricing information to "the products at issue in the litigation."); *see also* Order at 16. In the email, Oracle's counsel stated that this information would "more than allow defendants to determine 'Oracle's revenues, expenses, and profits from the customers it claims to have lost.'" *Id.* at Exh. F. Notably absent for the list of information Oracle agreed to provide is any information relating to the other products Oracle claims these customers would have licensed.

Finally, the June 24 Discovery Conference Statement is only one of many such Statements and a small part of a record that Oracle acknowledges is "extensive." Objs. at 9, n.5. As Magistrate Judge Laporte noted, her Order is based, in part, on "repeated discovery conferences and hearings" and her view that damages discovery has been raised "at numerous discovery conferences" and that "Plaintiffs' focus has consistently been on support revenue from customers lost to TomorrowNow …." Order at 3-4.

5. <u>The Testimony Of Oracle Witnesses.</u>

Oracle argues that the testimony of Oracle witnesses put Defendants on notice of Oracle's intent to seek alleged lost license revenue. Objs. at 7 (citing Ellison and Phillips depositions). However, this is the same testimony that Magistrate Judge Laporte found to have disclosed too late that support revenue was just the "tip of the iceberg" of Oracle's alleged harm. Order at 17 ("It was not until very recently, after over two years of discovery at a cost of millions of dollars to each side, when Defendants deposed Plaintiffs' top executives in April and May, 2009, that Defendants learned that Plaintiffs now contend that lost support revenue was not the primary economic harm.") (citing Ellison and Phillips testimony). Oracle provides no basis on which to find error with this finding.

Oracle also improperly relies on evidence not presented to Magistrate Judge Laporte. Even if the Court considers that evidence, however, it does not undermine Magistrate Judge Laporte's findings. First, Oracle contends that Charles Homs' testimony put Defendants on

notice of Oracle's expanded damages claims. Objs. at 7-8. However, his testimony was limited to describing what he believed to be the impact on Oracle customers of "fear, uncertainty, and doubt" allegedly caused by SAP. Mr. Homs did not indicate that Oracle had now decided to expand its discovery claims to include alleged lost license revenue. House Decl., Exh. L.[6] Moreover, his deposition was on February 26, 2009, just weeks before the Ellison and Phillips depositions discussed above. *Id.* Thus, even assuming Hom's testimony could conceivably have put Defendants on notice of the expanded claims, the disclosure was just as untimely.

Second, Oracle misleadingly suggests that Defendants have "used long-ago produced cross-sell and up-sell documents in examining Oracle witnesses." Objs. at 8. However, the deposition on which Oracle relies did not occur until August 28, 2009, *after* the hearing on Defendants' motion. House Decl., Exh. M. Moreover, the documents to which Oracle refers are neither "cross-sell and up-sell documents" nor "long-ago produced." Exhibit 596 is an email and attached "scorecard" that Oracle uses to track its progress on integrating acquired companies. Wallace Resp. Decl. ¶ 2. It was produced on July 1, 2009, two weeks before Defendants filed their motion. *Id.* The witness specifically testified that this document does not "track or reflect" cross-sell or up-sell information. House Decl., Exh. M (Tr. 202:21-204:3). Exhibit 591 is a standard PeopleSoft, Inc. financial forecast for 2004/2005. Wallace Resp. Decl. ¶ 3. It was produced on February 6, 2009, almost two years into discovery. *Id.* Nothing in it indicates that it is a "cross-sell and up-sell document." *Id.* Moreover, the witness disclaimed any knowledge of its contents. House Decl., Exh. M (Tr. 92:8-97:18). Neither of these documents and none of the testimony cited by Oracle undermines Magistrate Judge Laporte's findings.[7]

[6] All references to "House Decl." are to the Declaration of Holly A. House in Support of Oracle's Objections to Order of Discovery Magistrate Granting Defendants' Motion for Preclusion of Certain Damages Evidence Pursuant to Federal Rules of Civil Procedure 37(c) and 16(f).

[7] Oracle did not submit Exhibits 591 and 596 with its objections so that the Court could evaluate their contents for itself. Nor would Oracle agree to permit Defendants to file them absent a motion to seal. Instead, Oracle intends to review Defendants' response and determine whether to submit the documents itself, under seal. Wallace Resp. Decl. ¶ 3.

6. The List Of SAP Customers.

Oracle's discussion of the subset of 86 TomorrowNow customers who purchased SAP software has no bearing on Magistrate Judge Laporte's findings. Objs. at 8-9. Defendants do not dispute that Oracle made clear its intent to seek damages relating to SAP's sales, or that the issue of SAP sales to TomorrowNow customers has been discussed at numerous discovery conferences.[8] However, SAP sales to TomorrowNow customers are part of Oracle's claim for disgorgement of alleged infringer's profits, not its lost profits claim. *See* 17 U.S.C. § 504(b) (permitting copyright owner to seek actual damages suffered as a result of the infringement, such as lost profits, and to the extent not duplicative, profits of the infringer attributable to the infringement). Oracle's disgorgement claim was not at issue in Defendants' motion. Opening Brief at 13, n.9. The fact that SAP agreed to (and did) provide discovery concerning its sales to those 86 customers is irrelevant to the positions Oracle took with respect to discovery of its own documents for the 358 TomorrowNow customers for its lost profits claim.

Oracle states that the transcripts of these discussions contain admissions by Defendants' counsel regarding "Oracle's up-sell and cross-sell damages." That is not the case. Objs. at 8. A review of the submitted excerpts makes clear that the discussions pertain solely to Oracle's unrelated claim for disgorgement of SAP profits from sales of SAP products. House Decl., Exhs. A, C-F. The same applies to Oracle's discussion of SAP's alleged forecasts of potential sales of SAP products to TomorrowNow customers. Objs. at 10-11. This has no bearing on Magistrate Judge Laporte's findings regarding Oracle's failure to disclose the nature and extent of its lost profits claim and refusal to produce documents regarding its own alleged lost license revenue for the 358 TomorrowNow customers.

7. Oracle's Production Of Customer Documents.

Oracle also relies on its alleged inclusion of licensing purchase histories in its customer-specific financial reports. Objs. at 9-10. Oracle concedes, however, that it never informed Defendants why it was producing this information. *Id.* at 10. Moreover, the meet and confer

[8] Defendants do, however, dispute the accuracy of Oracle's statements regarding when SAP provided the names of these SAP customers to Oracle. Wallace Resp. Decl. ¶ 4.

letter on which Oracle relies was sent in response to a letter from Defendants' counsel that made clear Defendants did not understand why Oracle was producing this irrelevant material instead of the material the parties had agreed would be produced. Wallace Resp. Decl. ¶ 5, Exh. B (February 12, 2009 letter complaining about Oracle's failure to produce reports for certain customers on the products at issue and instead producing reports on irrelevant products). Oracle's only response was the language cited in its objections. Objs. at 10 ("To clarify, Oracle did not limit reports by date or product line."). As Oracle impliedly admits, this was not sufficient to inform Defendants that Oracle was now seeking damages for alleged lost license revenue despite its disclaimers during the previous two years. Nor does it undermine Magistrate Judge Laporte's finding that Oracle failed to disclose it in any written communication. Order at 12.

C. THE ORDER IS SUPPORTED BY THE LAW.

Under Rule 37(c)(1), preclusion is a self-executing, automatic sanction for failure to comply with the discovery obligations imposed by Rule 26. Fed. R. Civ. P. 37(c), Advisory Committee Notes (1993); *see also Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001) (the "Advisory Committee Notes describe it as a 'self-executing,' 'automatic' sanction to 'provide[] a strong inducement for disclosure of material ….") (citation omitted). Two express exceptions apply to this automatic sanction. Evidence may be introduced if the party facing sanctions can prove that its failure to disclose it was "substantially justified" or "harmless." Fed. R. Civ. P. 37(c)(1), Advisory Committee Notes (2000); *see also Yeti by Molly*, 259 F.3d at 1106. The Ninth Circuit gives "particularly wide latitude to the district court's discretion to issue sanctions under Rule 37(c)(1)." 259 F.3d at 1106.

Oracle contends that the five factor test adopted in *Wendt v. Host Int'l, Inc.*, 125 F.3d 806, 814 (9th Cir. 1997) also applies. Objs. at 13. That test, however, was developed to determine whether the sanction of dismissal by default is proper under Rule 37. 125 F.3d at 814 (citing *Wanderer v. Johnston*, 910 F.2d 652, 656 (9th Cir. 1990), which states "[o]ur own court has fashioned a set of factors for the district court to apply in considering whether a dismissal of default is appropriate as a Rule 37 sanction."); *see also Northwest Pipeline Corp. v. Ross*, No. C05-1605RSL, 2008 U.S. Dist. LEXIS 32984, at *40-41, n.10 (W.D. Wash. Apr. 11, 2008)

(noting that the *Wendt* test was developed for the sanction of default and following "the Ninth Circuit's more recent decisions in *Yeti by Molly Ltd.* and *Wong* in imposing the Rule 37(c)(1) exclusionary remedy.").[9]

The five factor test does not apply to evidentiary sanctions and Oracle has cited no case establishing that it does. Regardless, the Order is supported by the law under either test. It was also well within Magistrate Judge Laporte's discretion under Rule 16(f) to issue any "just" sanctions order "it feels is appropriate under the circumstances." Fed. R. Civ. P. 16(f), Advisory Committee Notes (1983). Magistrate Judge Laporte made clear that the ordered sanctions were warranted under both Rule 16(f) and Rule 37(c)(1). Thus, if the standard under either rule is met, the Order should remain undisturbed.

1. Magistrate Judge Laporte Correctly Applied The Relevant Legal Standards.

Magistrate Judge Laporte did not make her ruling in a vacuum. The Order is based on the Court's "hands-on management of" and "deep familiarity with" discovery in this case. Order at 25-26, 2. As noted in the Order: "The Court has closely monitored discovery in this complex litigation, holding thirteen discovery conferences addressing the progress of discovery and providing guidance on the numerous complex issues that have arisen, and six contested hearings on discovery motions." *Id*. at 2. Based on this extensive involvement in and familiarity with the case, Magistrate Judge Laporte properly concluded that the requirements of Rules 37 and 16 were met:

> [T]he Court concludes that Plaintiffs' discovery responses failed without substantial justification for over two years to inform Defendants that Plaintiffs were seeking lost profit damages relating to non-TomorrowNow customers and to revenue from sources other than support in violation of Rule 37. Further, Plaintiffs failed to timely supplement their initial disclosures to update their damages theory until May 2009, even though facts supporting such damages were known to Plaintiffs before filing this lawsuit, in violation of this Court's May 2, 2008 Order and Rule 16. (Citation omitted). Moreover, Plaintiffs' failure was not harmless because Defendants would suffer prejudice if Plaintiffs were allowed to proceed on their new damages claims because Defendants' expert would not be able to conduct the required analysis within the time limits set by Judge Hamilton, and the cost of the additional analysis would be exorbitant. In addition, expanding the damages case significantly as Plaintiffs belatedly attempt to do would severely prejudice the Court's ability to manage this case to resolution in

[9] *But see United States v. 14.3 Acres of Land*, No. 07cv886-W(NLS), 2009 U.S. Dist. LEXIS 7148, at *7 (S.D. Cal. Jan. 30, 2009) (applying five factor test to preclusionary sanction).

> anything approaching a just, speedy, and inexpensive manner. Thus Rule 37 mandates preclusion sanctions, and Rule 16 also counsels such sanctions in the sound exercise of the Court's discretion."

Order at 25-26.

Assuming the *Wendt* five factor test applies, the Order meets that test as well. 125 F.3d at 814. The first factor – the public interest in the expeditious resolution of litigation – was a key consideration for Magistrate Judge Laporte in deciding Defendants' motion. *See, e.g.,* Order at 4 ("While refinement of the details of the damages at issue may well be appropriate as the case proceeds, a major shift in the basic nature and order of magnitude of damages many months into the case poses a much greater threat to the just, speedy and inexpensive resolution of the case."); *id.* at 13 ("To allow the belated disclosure of the new theories to trigger large waves of expensive discovery and expert analysis at this late date based on vague allegations that Plaintiffs previously refused to elaborate on despite their ability to do so, would be simultaneously unfair to Defendants, very expensive and hugely time consuming, slowing down what is already very lengthy litigation. Such a result would run directly contrary to the mandate of Rule 1, achieving a dubious trifecta of unfair, glacially slow and exorbitantly expensive litigation.").

The second factor – the Court's need to manage its docket – was also a key consideration. *See, e.g.,* Order at 3 ("From the first discovery conference … the Court has repeatedly emphasized that the scope of this case required cooperation in prioritizing discovery … Judge Hamilton's order in April 2008 that damages discovery should not be delayed further underscored the importance of getting a prompt handle on the scope and nature of the damages at issue."); *id.* at 23 ("Judge Hamilton's and this Court's efforts to manage the case to resolution in a manner that complies with the fundamental requirement of Federal Rule of Civil Procedure 1 to administer the Federal Rules so as to 'secure the just, speedy and inexpensive determination of every action' would be thwarted.").

The third factor – the risk of prejudice to Defendants – involves the same facts discussed above that Magistrate Judge Laporte properly considered in connection with the Rule 37(c)(1) "harmlessness" test. The fourth factor – the public policy favoring disposition of cases on their

merits – does not apply here. As discussed in Section A above, the Order is not a terminating sanction or "tantamount to dismissal" and does not preclude consideration of Oracle's claims on the merits as Oracle contends. Magistrate Judge Laporte considered and properly rejected the fifth factor – the availability of a lesser sanction – for the reasons discussed in Section D below. Moreover, as also discussed in Section D, the fact that Oracle has limited its objections to the license revenue issue does not undermine Magistrate Laporte's conclusion that Oracle's "wait and see" approach should be rejected.

2. Magistrate Judge Laporte Correctly Distinguished Oracle's Cases.

In opposition to Defendants' motion, Oracle cited numerous distinguishable cases to support its argument that preclusion of damages evidence is unwarranted on these facts and at this stage in the case. Opp. at 6-7; Objs. at 13. Oracle contends that preclusion was denied in these cases on less egregious facts and at a later juncture in the case. *Id.* In each of these cases, however, the court found that the conduct was harmless and/or substantially justified because there was good reason for it, the receiving party identified no prejudice, the late disclosed material was minimal or not materially different from previously disclosed material, and/or any potential prejudice was easily cured. *See, e.g., United States v. Rapanos*, 376 F.3d 629, 645 (6th Cir. 2004) (late disclosure harmless because defendants were already aware of the data and the data was beneficial to them); *Primrose Operating Co. v. Nat'l Am. Ins. Co.*, 382 F.3d 546, 564 (5th Cir. 2004) (failure to provide report harmless because plaintiffs informed defendant of the witness and nature of his testimony six months before trial and the testimony consisted of simple calculations); *Reiner v. Warren Resort Hotels, Inc.*, No. CV 06-173, 2008 U.S. Dist. LEXIS 102047, at *28 (D. Mont. Oct. 1, 2008) (no evidence plaintiff knew the information prior to disclosure and defendant's allegation regarding "buried" documents was false, thus defendant suffered no harm); *Pierce v. CVS Pharmacy, Inc.*, No. CV 06-823, 2007 U.S. Dist. LEXIS 69006, at *11 (D. Ariz. Sept. 17, 2007) (defendant could not identify any prejudice and any that existed could be cured by short extension of time); *The Christensen Firm v. Chameleon Data Corp.*, No. C06-337Z, 2006 U.S. Dist. LEXIS 79710, at *16-17 (W.D. Wash. Nov. 1, 2006) (supplemental disclosures followed detailed initial disclosures); *Network Appliance*, 2005 U.S. Dist. LEXIS

16726, at *10-11 (plaintiff could only establish a three week delay in receiving a limited number of documents); *Semtech Corp. v. Royal Ins. Co.*, No. CV 03-2460, 2005 WL 6192906, at *2 (C.D. Cal. Sept. 8 2005) (delay in making supplemental disclosure resulted from court's ruling and was harmless because the supplement contained no new information); *Tracinda Corp. v. DaimlerChrysler AG*, 362 F. Supp. 2d 487, 506-11 (D. Del. 2005) (late disclosure of expert material harmless because late disclosed information was not materially different from timely disclosed information).

None of those circumstances applies here, as Magistrate Judge Laporte correctly held. Order at 21, 24-25. In the Court's words, the magnitude of this case "dwarfs" those cited by Oracle in terms of the complexity of the claims and amount of damages sought (*id.* at 21):

> [F]ar more time is already necessary for adequate trial preparation in light of the existing complexity and scope of this case; the expansion in damages discovery that would be necessitated by Plaintiffs' new categories of damages would prejudice Defendants and almost certainly derail the trial schedule.

Id. at 22. Magistrate Judge Laporte also properly rejected the same suggestion Oracle makes to this Court (Objs. at 13) that the better approach would be to allow it to pursue its late disclosed and greatly expanded damages claims and wait to see if Defendants and their expert can catch up. Order at 23 ("Left unsaid is that in the highly likely event that Defendants cannot, the trial schedule would yet again be derailed.").

Oracle contends that it is being held to an unprecedented new standard for damages disclosures. Objs. at 14. It is not. Contrary to Oracle's argument, preclusion is not limited to circumstances where information is disclosed after the close of discovery, shortly before trial. Rather, preclusion is appropriate whenever disclosure occurs late enough in the case to cause prejudice. *Payne v. Exxon Corp.*, 121 F.3d 503, 508 (9th Cir. 1997) ("The issue is not whether [defendants] eventually obtained the information they needed, or whether plaintiffs are now willing to provide it, but whether plaintiffs' repeated failure to provide documents and information in a timely fashion prejudiced the ability of [defendants] to prepare their case for trial."); *see also SPX Corp. v. Bartec USA, LLC*, 574 F. Supp. 2d 748, 755-58 (E.D. Mich. 2008) (upholding magistrate's decision to preclude prior art evidence although defendant disclosed it

two months before the close of discovery and the plaintiff had a "substantial opportunity" for, and did, in fact, conduct, "significant discovery" after disclosure; preclusion was proper because the information was known to the defendant for nearly a year prior to disclosure and the plaintiff "plainly was disadvantaged by the late disclosures.").

Here, Oracle's new damages theories had been known to it since the outset of the case but were not disclosed until more than two years after the complaint was filed, on the eve of the original fact discovery cut-off. Moreover, for two years Oracle had expressly disclaimed the relevance of these theories, which, if it were allowed to pursue them, would require massive additional discovery and an additional year of expert analysis. Under these circumstances, Magistrate Judge Laporte correctly distinguished the cases on which Oracle relied and correctly concluded that preclusion is warranted. The fact that the Court "consider[ed] Defendants' motion in the context of the unusual scope and complexity" of the case (Order at 2) does not mean that Oracle is being held to some unprecedented new legal standard. Objs. at 14. On the contrary, it merely demonstrates Magistrate Judge Laporte's proper consideration of the same factors Oracle urges this Court to consider in connection with the *Wendt* test, such as the public interest in the expeditious resolution of litigation and the Court's need to manage its docket.

3. *Wendt* And *Network Appliances* Are Inapposite.

In *Wendt*, the district court issued a sanctions order against plaintiffs' first trial counsel, precluding expert testimony based on counsel's failure to disclose damages evidence and late disclosure of experts. 125 F.3d at 814. Four years later, following two appeals on other issues and a substitution of counsel, the Ninth Circuit vacated the sanctions order because expert discovery had been re-opened and the defendants were "no longer prejudiced by the actions of appellants' former counsel." *Id.* The court found the imposition of a lesser sanction appropriate as "[b]oth parties now have ample opportunity to begin the expert disclosure process anew." *Id.*

These facts do not apply here. The prejudice to Defendants of Oracle's belated disclosures and about-face on the scope of relevant discovery is the same (or greater) now as it was when Magistrate Judge Laporte issued the Order. The only lesser "sanction" Oracle has suggested is a "wait and see" approach, which Magistrate Judge Laporte rightly rejected as

inevitably derailing the trial schedule when it becomes clear that Defendants cannot make up the time lost due to Oracle's discovery misconduct.

Network Appliances also does not apply here. Objs. at 13. As discussed above, the preclusion sanction here is not "tantamount to dismissal" because it does not prevent Oracle from pursuing any of its ten causes of action or its other damages claims. As Magistrate Judge Laporte noted, Oracle remains free "to pursue the many millions (perhaps over a billion) of dollars in damages they have claimed all along based on lost support revenue for customers that left Oracle for TomorrowNow." Order at 26.

D. ORACLE'S PREJUDICE ARGUMENT IS NOT SUPPORTED BY THE RECORD.

Oracle erroneously contends that because its objections are limited to the portions of the Order precluding evidence of alleged lost license revenue, prejudice to Defendants is no longer a concern. Objs. at 11. That is not the case.

First, Oracle contends that Defendants' expert, Stephen Clarke, is already reviewing the alleged lost license data "by analyzing the documents provided by the parties related to the TN Customers as well as a subset of those customers that also bought software and services from SAP." Objs. at 11-12. However, Mr. Clarke made clear in his declaration in support of Defendants' motion that his analysis has been confined to the damages claims Oracle timely disclosed. Clarke Decl. ¶¶ 4-5.[10] It has not included the claims Oracle failed to disclose – and expressly disclaimed – because, until recently, he and Defendants were unaware of them. Thus, to the extent that Oracle's production of, for example, customer contract files (approximately 92,000 pages), customer-specific financial reports (approximately 2000 files containing 600 megabytes of data), and custodian productions (approximately half a million pages) contain information relevant to calculating alleged lost license revenue, Mr. Clarke has not analyzed it for that purpose. His analysis has focused on the damages claim Oracle did timely disclose – alleged lost support revenue. As Magistrate Judge Laporte noted, the extensive time required to re-review data for the purpose of calculating alleged lost license revenue cannot be made up without

[10] All references to "Clarke Decl." are to the Declaration of Stephen Clarke in Support of Defendants' Motion for Sanctions Pursuant to Fed. R. Civ. P. 37 (c) and 16(f), filed on July 14, 2009 (Dkt. No. 344 & 465).

derailing the trial schedule. Order at 23.

Second, Oracle's argument fails to account for the documents Mr. Clarke says are necessary to calculate alleged lost license revenue that Oracle has *not* produced. Clarke Decl. ¶¶ 17, 26. Oracle's argument that there are no such documents and that the up-sell and cross-sell analysis is "purely expert analysis" (Objs. at 12) is inconsistent with its own expert's declaration in opposition to Defendants' motion. As Magistrate Judge Laporte noted:

> Plaintiffs' own documents indicate that, far from having decided on and disclosed the basic components of damages they were seeking at the outset of this case and produced the supporting documents … they have only recently begun collecting the documents needed to support their expanded damages relating to non-TomorrowNow customers and revenue other than for support services. For example, Plaintiffs' expert, Paul Meyer … states in his July 2009 declaration … that "In connection with NCI's analysis of lost cross-sell and up-sell opportunities, we are directing Oracle personnel to gather information." (Citation omitted). There is no excuse for only now gathering information for a major aspect of damages that Plaintiffs argue was part of this case from the outset. The likely explanation is that Plaintiffs did not attempt to pursue these additional damages until recently. This information should have been gathered long ago, well prior to the former June 19, 2009 discovery cutoff date in this case."

Order at 20-21. Moreover, the record does not support Oracle's claim that two witnesses have subsequently confirmed the absence of such documents. Objs. at 12. When asked whether Oracle analyzes up-sell and cross-sell opportunities, Judith Sim testified "I'm sure that there are groups who take a look at that" but that she would be "speculating" as to which groups and does not know who at Oracle would have that information. House Decl., Exh. N (Sim Tr. at 68:1-69:7). Keith Block testified only that he personally does not know of or receive reports that track up-sell or cross-sell opportunities. *Id.*, Exh. O (Block Tr. 133:12-134:23).

Similarly, the record does not support Oracle's claim that Defendants have suffered no prejudice because Defendants have "repeatedly" questioned witnesses about up-sell and cross-sell damages. Objs. at 12. The three witnesses on whom Oracle relies are former TomorrowNow customers who were asked about their plans to purchase SAP software. House Decl., Exhs. I-K. As discussed in Section B.6 above, these questions are relevant to Oracle's disgorgement claim for SAP's alleged infringer's profits, a claim not at issue in Defendants' motion. It has no bearing on Oracle's failure to disclose its "vastly expanded" lost profits damages claim (Order at 18) and subsequent about-face on the relevance of documents relating to its own alleged lost license

revenue for the 358 TomorrowNow customers. Moreover, these depositions took place in July, August, and September 2009, *after* Oracle's belated disclosure of the full scope of its lost profits claims in May 2009 and while the decision on Defendants' motion was pending.

Third, Magistrate Judge Laporte's finding that Oracle failed to meet its burden of showing harmlessness was not limited to the other aspects of Oracle's lost profits claim. Order at 22-24; *see also Yeti by Molly*, 259 F.3d at 1107. That finding included the claim for alleged lost license revenue. Order at 22 ("Defendants' economic damages expert testified that analysis of the new categories of Plaintiffs' damages claim would take an additional year beyond the current expert discovery schedule and would cost at least $5 million more in added expert fees and costs … For example, Mr. Clarke states that to analyze new damages claims based on current and future lost profits related to the loss of additional licensing, non-support revenue to TomorrowNow customers ….''). Magistrate Judge Laporte expressly found, therefore, that a portion of Mr. Clarke's estimate of an additional year and $5 million for expert analysis is attributable to Oracle's late disclosure of its alleged lost license revenue claim and refusal to produce documents relevant to that claim. Oracle has provided no basis in its objections for this Court to reject that finding and conclude that the license claim accounts for none of that additional time and cost. Certainly, Oracle's flawed argument that Mr. Clarke has already analyzed the relevant data and its submission of the irrelevant deposition testimony discussed above cannot justify that outcome.

Finally, Oracle's argument assumes that prejudice was the only basis for preclusion of evidence on alleged lost license revenue. However, as discussed above, Magistrate Judge Laporte properly precluded that evidence on the separate ground that Oracle's failure to timely disclose that aspect of its damages claim was not "substantially justified." *See, e.g.*, Order at 3-4 ("As the issue of damages discovery has been raised at numerous discovery conferences, and Plaintiffs' focus has consistently been on support revenue from customers lost to TomorrowNow, the Court was surprised to be told at this late date that Plaintiffs' damages theory included non-TomorrowNow customers and revenue from sources other than support service. This lack of prompt disclosure to Defendants about the scope and nature of Plaintiffs' damages case and the failure to cooperate on defining the contours of appropriate discovery accordingly threatens the

fair and cost-effective exchange of discovery.").

E. ORACLE SHOULD NOT BE PERMITTED TO OFFER THE PRECLUDED EVIDENCE TO BOLSTER ITS OTHER CLAIMS.

The Court should deny Oracle's request for clarification that its damages expert and other witnesses may offer the precluded evidence for other purposes. Objs. at 15-16. As discussed above, Magistrate Judge Laporte precluded the evidence because Oracle's failure to timely disclose the nature and extent of its damages claims and refusal to produce requested discovery has prejudiced Defendants. Order at 25-26. Defendants' ability to rebut Oracle's claim that it lost license sales as a result of the conduct alleged in the complaint or that it suffered harm even as to customers that never went to TomorrowNow has been compromised as a result. *Id.* That is true regardless of the purpose for which Oracle may offer the evidence.

Oracle's request is effectively a "back door" damages claim whereby Oracle seeks to further inflate its non-excluded damage claims. But regardless of how Oracle intends to use the excluded evidence, Defendants would still need to fully discover and analyze all relevant documents, discovery responses, and testimony related to the excluded evidence. The Order clearly states that "Plaintiffs are precluded from presenting evidence at a hearing or at trial that their lost profits damages include [listing the precluded categories of lost profits damages]." Order at 26. If Oracle's expert is permitted to testify on the amount of the precluded lost profits damages for purposes of, for example, supporting his opinion on the value of a hypothetical license (or any other damages theory), the prejudice to Defendants is the same as if he was testifying for purposes of the lost profits claim. Defendants will have been deprived of a full and fair opportunity to rebut that evidence by Oracle's discovery misconduct.

The cases on which Oracle relies do not support the relief Oracle requests. Objs. at 15. None of them involves evidence precluded as a discovery sanction or suggests that an expert may offer testimony based on such evidence. Indeed, the court's decision in *Triton* was based on the fact that the damages expert's calculation was *not* based on undisclosed evidence. *Triton Corp. v. Hardrives, Inc.*, 85 F.3d 343, 347 (8th Cir. 1996) ("Thus, his final calculation was not based on undisclosed evidence ….). Moreover, Oracle cites no case law (presumably because there is

none) establishing that a plaintiff can make its damages look "reasonable" by introducing evidence of damages it allegedly suffered, but does not seek (or in this case is precluded from seeking). Objs. at 14-15. The propriety of any damage claim must rise and fall on the evidence of the damages claimed, not evidence of other damages that could have been, but for whatever reason were not, sought in the case. Otherwise, plaintiffs could introduce evidence of unplead damages or liability theories simply to make their plead claims seem more reasonable. That is not permitted under the Federal Rules of Evidence, and for good and logical reasons should not be permitted here. Fed. R. Evid. 403 (evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.").

Oracle's complaint that it will not be able to fully describe the "relevant facts" is also unfounded. Objs. at 14. Because the Order precludes Oracle from quantifying these damages, the facts relating to them are no longer relevant and thus are inadmissible under Rule 402 in addition to being precluded by the Order. Fed. R. Evid. 402 ("Evidence which is not relevant is not admissible."). Oracle's witnesses should not be permitted to "testify to all impacts they perceived" (Objs. at 16) because Oracle failed to disclose and failed to permit discovery on "all impacts they perceived." That is why Magistrate Judge Laporte imposed the preclusion sanction. Order at 25-26.

Defendants disagree with Oracle's suggestion that this Court defer its decision on what uses, if any, Oracle may make of the excluded evidence until the Court considers the parties' motions in limine. That suggestion ignores the harm to Defendants that would be caused by the introduction of the excluded evidence. The potential prejudice to Defendants warrants consideration of this issue now (before fact discovery closes in five weeks and expert discovery begins) rather than on the eve of trial.

IV. CONCLUSION

For the above reasons, the Court should deny Oracle's objections and adopt the Order in its entirety. The Court should also deny Oracle's request that it be permitted to offer the precluded evidence for other purposes.

DATED: October 29, 2009

JONES DAY

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