BINGHAM MCCUTCHEN LLP
DONN P. PICKETT (SBN 72257)
GEOFFREY M. HOWARD (SBN 157468)
HOLLY A. HOUSE (SBN 136045)
ZACHARY J. ALINDER (SBN 209009)
BREE HANN (SBN 215695)
Three Embarcadero Center
San Francisco, CA 94111-4067
Telephone: 415.393.2000
Facsimile: 415.393.2286
donn.pickett@bingham.com
geoff.howard@bingham.com
holly.house@bingham.com
zachary.alinder@bingham.com
bree.hann@bingham.com

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

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

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-01658 PJH (EDL)

PLAINTIFFS' OBJECTIONS TO EVIDENCE FILED IN SUPPORT OF DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Date: May 5, 2010
Time: 9:00 am
Place: Courtroom 3, 3rd Floor
Judge: Hon. Phyllis J. Hamilton

Plaintiffs Oracle USA, Inc. (now known as Oracle America, Inc.), Oracle International Corporation, Oracle EMEA Limited, and Siebel Systems, Inc. (together, "Oracle") hereby object to certain portions of the Defendants' Motion for Partial Summary Judgment (the "Motion"), the Declaration of Tharan Gregory Lanier (the "Lanier Declaration"), and the Declaration of Elaine Wallace (the "Wallace Declaration") filed in support of the Motion, and specifically to Exhibits H, I, and N to the Lanier Declaration and Exhibit 1 to the Wallace Declaration, all offered by Defendants SAP AG, SAP America Inc., and TomorrowNow, Inc. (together, "Defendants") in support of their Motion filed on March 3, 2010. These objections are made without prejudice to Oracle's right to make further written and oral objections at the hearing on the instant motions and/or to the evidence at trial.

***The Lanier Declaration, Exhibits and Motion*:** Oracle objects on the grounds that paragraphs 8, 9 and 14 of the Lanier Declaration, and corresponding attached Exhibits H, I and N, are inadmissible because: (1) Exhibits H, I and N are irrelevant to the Motion; and (2) Exhibit N (*Guy v. IASCO*) is an unpublished California state court opinion that may not be cited to or relied upon. *See* Fed. R. Evid. §§ 401, 402; *see also Beyene v. Coleman Sec. Servs. Inc.*, 854 F.2d 1179, 1181 (9th Cir. 1988) ("It is well settled that only admissible evidence may be considered by the trial court in ruling on a motion for summary judgment."); *Smith v. Cardinal Logistics Management Corp*., No. 07-2104, 2008 WL 4156364, * 6 n. 5 (N.D. Cal., Sept. 5, 2008) (noting that citation to the very unpublished opinion at issue – *Guy v. IASCO* – is improper under Civil Local Rule 3-4(e), and that California Rule of Court 977(a) prohibits courts and parties from citing or relying on opinions not certified for publication).

Oracle further objects to the Motion to the extent Defendants rely on the above referenced Exhibits and paragraphs of the Lanier Declaration as evidentiary support for their Motion. *See* Motion at 9:14-21 (Exs. H and I) & 3:20–4:2 (Ex. N).

***The Wallace Declaration, Exhibits and Motion*:** Oracle objects on the grounds that the Wallace Declaration and Exhibit 1 are inadmissible because: (1) Exhibit 1 does not fairly or accurately represent the evidence it purportedly summarizes; (2) the Wallace Declaration and Exhibit 1 fail to meet the requirements of Federal Rule of Evidence 1006 ("Rule 1006") and

1002; (3) Exhibit 1 does not constitute a Rule 1006 summary; and (4) Exhibit 1 is based on inadmissible hearsay, speculation, and improper opinion. *See* Fed. R. Evid. §§ 401, 402, 601, 602, 701, 801(c), 802, 1002 & 1006; s*ee, e.g.*, *Beyene*, 854 F.2d at 1182 (hearsay evidence cannot be used to support summary judgment).

Oracle further objects to the Motion to the extent Defendants rely on the Wallace Declaration and Exhibit 1 as evidentiary support. *See* Motion at 5:4-7.

SPECIFIC OBJECTIONS TO EVIDENCE

Oracle specifically objects to that evidence and portions of the Motion relying on that evidence, and requests both be stricken by the Court, as follows:

LANIER DECLARATION, EXHIBIT H AND MOTION	
MATERIAL OBJECTED TO	**GROUNDS FOR OBJECTION**
July 6, 2009 Fourth Amended and Restated Cost Sharing Agreement ("Cost Sharing Agreement"), submitted as Exhibit H to the Lanier Declaration at ¶ 8, and Motion at 9:14-17 (citing same).	***Exhibit H*** The cited Exhibit H is objectionable and inadmissible to support Defendants' Motion for two reasons. First, Defendants claim that section IV of their Motion, which argues that Plaintiffs may not recover damages of related nonparties, concerns a question of law. *See* Motion 6:26-28. Evidence offered in support of a question of law is irrelevant. *Fisher v. Dees*, 794 F.2d 432, 438 n. 4 (9th Cir. 1986) (affidavits are irrelevant to question of law); *see e.g., Sun-Land Nurseries, Inc. v. Southern California Dist. Council of Laborers*, 793 F.2d 1110, 1122 -1123 (9th Cir. 1986) (Wiggins, J., dissenting) (party did not offer evidence because summary judgment motions presented pure questions of law and the evidence was therefore irrelevant to them). To the extent this is a question of law, Exhibit H is irrelevant. Fed. R. Evid. §§ 401 & 402. Second, Exhibit H is also irrelevant because it does nothing to resolve the factual issue of whether Plaintiffs seek lost profits of related nonparties. The objectionable exhibit 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. Specifically, the Cost Sharing Agreement makes no mention of Plaintiffs' intent

LANIER DECLARATION, EXHIBIT H AND MOTION	
MATERIAL OBJECTED TO	**GROUNDS FOR OBJECTION**
	with respect to recovering damages in this action. For this reason, the 2009 Cost Sharing Agreement does not tend to prove that Plaintiffs purportedly intend to recover lost profits of related nonparties in this action. As such, it is irrelevant and therefore inadmissible. Fed. R. Evid. §§ 401 & 402. ***The Motion*** The parts of the Motion relying on Exhibit H are also objectionable and inadmissible, and should be stricken. Exhibit H is offered by Defendants in support of section IV. B. of their Motion, which argues that "Plaintiffs' "organization as a whole" approach impermissibly seeks lost profits of related nonparties." Motion 8:26-27. Further to this argument, and without citing to any evidence other than a later cite to Exhibit H, Defendants assert that "Oracle's organizational structure undoubtedly confers various corporate advantages, such as favorable tax treatment and limited liability." Motion 9:10-11. Defendants continue this line of argument by citing Exhibit H as authority for the proposition that "Oracle's corporate structure allows it to conduct its operations through various cost-sharing agreements." Motion 9:14-17. The Exhibit H citations in the Motion are objectionable because Exhibit H does not provide evidentiary support for Defendants' Exhibit H citations. Exhibit H makes no mention of Oracle's corporate structure, operations, tax treatment, limited liability, or any other "various" cost-sharing agreements. Furthermore, the Exhibit H citations in the Motion are not based on personal knowledge. Instead, the Exhibit H citations are based upon improper speculation. Neither Exhibit H nor the Lanier Declaration establish any basis for the Exhibit H citation that "Oracle's corporate structure allows it to conduct its operations through various cost-sharing agreements." *See* Motion at 9:14-17. Thus, the Exhibit H citations in the Motion are inaccurate, not based on personal knowledge, improper opinion, and speculative. For these reasons, the above referenced parts of the Motion relying on Exhibit H are objectionable, inadmissible, and should be stricken. *See* Fed. R. Evid. §§ 401, 402, 403, 602 & 701.

LANIER DECLARATION, EXHIBIT I AND MOTION	
MATERIAL OBJECTED TO	**GROUNDS FOR OBJECTION**
Brief for Respondent-Appellant filed in *Sarhank Group v. Oracle Corp.*, 404 F.3d 657 (2nd Cir. 2005) (No. 92-9383) submitted as Exhibit I to the Lanier Declaration at ¶ 9, and Motion at 9:17-21 (citing same).	***Exhibit I*** Similar to Exhibit H, Exhibit I is objectionable and inadmissible to support Defendants' Motion for two reasons. First, Oracle incorporates by reference the first objection to Exhibit H, above. To the extent this is a question of law, Exhibit I is irrelevant. Fed. R. Evid. §§ 401 & 402. Second, Exhibit I is irrelevant for another reason. The objectionable exhibit does not have any tendency to make the existence of whether "Plaintiffs' . . . approach impermissibly seeks lost profits of related nonparties" more probable or less probable than it would be without Exhibit I. *See* Fed. R. Evid. § 401. Specifically, Exhibit I – an appellate brief filed in the Second Circuit on July 19, 2004 – makes no mention of Plaintiffs' intent with respect to recovering damages in the present action. It does not tend to prove that Plaintiffs purportedly intend to recover lost profits of related nonparties in this action. As such, it is irrelevant and therefore inadmissible. Fed. R. Evid. §§ 401 & 402. ***The Motion*** The parts of the Motion relying on Exhibit I are also objectionable and inadmissible, and should be stricken. Similar to Exhibit H, Exhibit I is offered by Defendants in support of section IV. B. of their Motion, which argues that "Plaintiffs' "organization as a whole" approach impermissibly seeks lost profits of related nonparties." Motion 8:26-27. Further to this argument, and without citing to any evidence other than later cites to Exhibits H and I, Defendants assert that "Oracle's organizational structure undoubtedly confers various corporate advantages, such as favorable tax treatment and limited liability." Motion 9:10-11. Defendants continue this line of argument by citing Exhibit I as authority for the proposition that "Oracle has successfully avoided an arbitration judgment by arguing that Oracle Corporation and its foreign subsidiary are "separate corporate entities" and that their relationship alone "cannot justif[y] ignoring their separate corporate

LANIER DECLARATION, EXHIBIT I AND MOTION	
MATERIAL OBJECTED TO	**GROUNDS FOR OBJECTION**
	forms"." Motion 9:17-21. Exhibit I is an appellate brief. It does not include any evidence concerning an arbitration judgment. It also does not include any evidence concerning the basis for any avoidance of an arbitration judgment. Thus, neither Exhibit I nor the Lanier Declaration establish grounds for the Exhibit I citation that "Oracle has successfully avoided an arbitration judgment . . . " on the basis of the arguments contained in that brief. *See* Motion 9:17-21. Exhibit I also does not otherwise support the Exhibit I citations on whether Plaintiffs' purported "organization as a whole" approach impermissibly seeks lost profits of related nonparties. For these reasons, the Exhibit I citations in the Motion are based on improper speculation and opinion. As a result, the above referenced parts of the Motion relying on Exhibit I are objectionable, inadmissible, and should be stricken. *See* Fed. R. Evid. §§ 401, 402, 602 & 701.

LANIER DECLARATION, EXHIBIT N AND MOTION	
MATERIAL OBJECTED TO	**GROUNDS FOR OBJECTION**
Nonpublished / Noncitable case: *Guy v. IASCO*, No. B168339, 2004 WL 1354300 (Cal. App. 2 Dist., June 17, 2004) submitted as Exhibit N to the Lanier Declaration at ¶ 14, and Motion at 3:26–4:2 (citing same).	***Exhibit N*** Exhibit N is objectionable and inadmissible to support Defendants' Motion. *Guy v. IASCO* is a nonpublished decision of the California Court of Appeals. It cannot be cited to or relied upon under Civil Local Rule 3-4(e). Indeed, a recent Northern District of California Court opinion held that citing to this exact same case was improper. *See Smith v. Cardinal Logistics Management Corp.*, No. 07-2104, 2008 WL 4156364, * 6 n. 5 (N.D. Cal., Sept. 5, 2008) (noting that citation to the unpublished opinion *Guy v. IASCO* is improper under Civil Local Rule 3-4(e), and California Rule of Court 977(a) prohibits courts and parties from citing or relying on opinions not certified for publication). For this reason, it is inadmissible. ***The Motion*** The parts of the Motion relying on Exhibit N are also objectionable and inadmissible, and should be stricken. Exhibit N is improperly offered by Defendants in support of

LANIER DECLARATION, EXHIBIT N AND MOTION	
MATERIAL OBJECTED TO	**GROUNDS FOR OBJECTION**
	section III. A. of their Motion, which argues that California law does not apply to extraterritorial claims. Further to this argument, Defendants rely on Exhibit N as authority for the proposition that "[e]ven if some complained-of conduct or injuries occurred in California, they must give the claim more than a superficial connection to the state. Courts have declined to permit claims based primarily on out-of-state conduct to proceed under California law." Motion 3:20-22. Defendants proceed to state that the court in *Guy v. IASCO* "held that California's Industrial Welfare Commission could not regulate wages paid outside California to non-resident plaintiffs; that the defendant was a California corporation that prepared its payroll in California did not justify applying the regulations extraterritorially." Motion 3:26–4:2. For the reasons stated above, the Exhibit N citations in the Motion are improper under Civil Local Rule 3-4(e) and *Cardinal Logistics Management Corp.*, 2008 WL 4156364 at * 6 n. 5. As a result, the above referenced parts of the Motion relying on Exhibit N are objectionable, inadmissible, and should be stricken.

WALLACE DECLARATION, EXHIBIT 1 AND MOTION	
MATERIAL OBJECTED TO	**GROUNDS FOR OBJECTION**
The Wallace Declaration in entirety and Exhibit 1, submitted as a Rule 1006 Summary of Evidence, and Motion at 5:4-7 (citing same).	***Wallace Declaration and Exhibit 1*** The Wallace Declaration and Exhibit 1 are objectionable and inadmissible to support Defendants' Motion for four reasons. First, the Exhibit 1 summary is inadmissible under Rule 1002 and is not within the exception provided by Rule 1006 because it does not fairly or accurately represent the evidence, as the rules require. At the very least, the Exhibit 1 summary omits Durr AG, a customer in whom OEMEA had an interest and expectancy, and targeted by Defendants' wrongful conduct occurring in California. *See* Declaration of Holly House filed in support of Plaintiffs' Opposition to Defendants' Motion for Partial Summary Judgment, at ¶ 42, Exs. 18, 69, 80 & 99. For this reason, Exhibit 1 fails to accurately summarize or reflect the underlying evidence, and is inadmissible. *See Bannum, Inc. v. U.S.*, 59 Fed. Cl. 241, 245 (Fed. Cl. 2003) ("summary (or chart or calculation) must accurately summarize (or reflect) the underlying document(s)").

WALLACE DECLARATION, EXHIBIT 1 AND MOTION	
MATERIAL OBJECTED TO	**GROUNDS FOR OBJECTION**
	Second, the Exhibit 1 summary is inadmissible under Rule 1002 and is not within the exception provided by Rule 1006 because Defendants' submissions fail to establish the basis of admissibility for the underlying evidence referenced in Exhibit 1, as required by Rule 1006. Instead, Defendants' submissions merely state that the source documents were produced by Plaintiffs. This statement does not cure the failure to establish the basis of admissibility for the underlying evidence. *See e.g., Paddack v. Dave Christensen, Inc*., 745 F.2d 1254, 1259 (9th Cir. 1984) (Rule 1006 summary is admissible only if the proponent makes a showing that the underlying documents are admissible); *Amarel v. Connell*, 102 F.3d 1494, 1516 (9th Cir. 1996) ("[a] proponent of a summary exhibit must establish a foundation that . . . the underlying materials on which the summary exhibit is based are admissible in evidence); *Bannum, Inc.*, 59 Fed. Cl. at 244-245 (underlying evidence must itself be admissible). This failure alone is fatal and renders the purported Rule 1006 summary inadmissible. *See Paddack*, 745 F.2d at 1259. Third, Exhibit 1 is inadmissible under Rule 1002 and is not a Rule 1006 summary because, in part, it is based on assumptions not rooted in the evidence it cites. *Cf.* Fed. R. Evid. 1006 ("the contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation"). The parts of Exhibit 1 concerning the territories for the following 4 customers: Allianz Life Insurance Company of North America, Al Nisr Publishing, Baxter International, and Yazaki Europe (collectively, the "4 Customer(s)") provides that the "***territories are assumed*** . . ." by Elaine Wallace. (Emphasis supplied). For this reason, Exhibit 1 is not a Rule 1006 summary – no territory evidence is being summarized for the 4 Customers. In addition, the assumptions are hearsay, speculation, and improper opinion. As a result, the Exhibit 1 summary is inadmissible in its entirety. *See Bannum, Inc.*, 59 Fed.Cl. at 245 ("summary (or chart or calculation) must accurately summarize (or reflect) the underlying document(s) ***and only the underlying document(s)***") (emphasis supplied); *Paddack*, 745 F.2d at 1259; Fed. R. Evid. §§ 401, 402, 601, 602, 701, 801(c), 802 & 1006; *see e.g., Beyene*, 854 F.2d at 1182 (hearsay evidence cannot be used to support summary judgment). Fourth, Exhibit 1 is hearsay that is inadmissible under Rule 802 and falls within no hearsay exception.

WALLACE DECLARATION, EXHIBIT 1 AND MOTION	
MATERIAL OBJECTED TO	**GROUNDS FOR OBJECTION**
	The Motion For the reasons stated above, the parts of the Motion relying on Exhibit 1 are also objectionable and inadmissible, and should be stricken. Exhibit 1 is offered by Defendants in support of section III. B. of their Motion, which argues that OEMEA's claims are wholly extraterritorial. *See* Motion at p. 4. Further to that argument, Defendants provide: "For the Court's reference, Defendants identify the relevant OEMEA customers, distributors, and their respective territories in a summary of evidence per Fed. R. Evid. 1006" and offer the Wallace Declaration and Exhibit 1. *See* Motion 5:4-7. However, as stated above, Exhibit 1 fails to satisfy the requirements of Rule 1006, and as a result, page 5:4-7 of Defendants' Motion is objectionable, inadmissible, and should be stricken.

DATED: March 31, 2010

Bingham McCutchen LLP

By: _____
Zachary J. Alinder
Attorneys for Plaintiffs
Oracle USA, Inc., Oracle International Corporation, Oracle EMEA Limited, and Siebel Systems, Inc.