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

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

CASE NO. 07-CV-01658 PJH (EDL)

**ORACLE’S OBJECTIONS TO
 EVIDENCE FILED IN SUPPORT OF
 DEFENDANTS’ CROSS-MOTION
 AND OPPOSITION TO ORACLE’S
 MOTION FOR PARTIAL
 SUMMARY JUDGMENT**

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

1 Plaintiffs Oracle USA, Inc. (now known as “Oracle America, Inc.”), Oracle
2 International Corporation, Oracle EMEA Limited, and Siebel Systems, Inc. (together, “Oracle”)
3 hereby object to the admission of certain evidence submitted with Defendants SAP AG, SAP
4 America, Inc., and TomorrowNow, Inc.’s (together, “Defendants”) Cross Motion and Opposition
5 to Oracle’s Motion for Partial Summary Judgment (“Cross Motion and Opposition” or “Opp.”)
6 in the Declaration of Tharan Gregory Lanier filed in support of the Cross Motion and Opposition
7 (“Lanier Declaration”). These objections are made without prejudice to Oracle’s right to make
8 further written and oral objections at the hearing on the instant motions and/or to the evidence at
9 trial. Specifically, Oracle hereby requests a ruling that **Exhibits 4, 5, 8, 9, 10, 14, 15, 17, 18, 21,**
10 **22, 23, 24, 25, and 26** to the Lanier Declaration are irrelevant to the issues before the Court for
11 the purposes of the Cross Motion and Opposition and therefore inadmissible; **Exhibit 4** is also
12 inadmissible for lack of authentication when offered by Defendants; **Exhibit 8** is also
13 inadmissible hearsay when offered by Defendants and an improper compilation that does not
14 satisfy Rule 1006; and **Exhibit 10** is also inadmissible hearsay when offered by Defendants.

15 **I. ORACLE’S OBJECTIONS TO EVIDENCE**

16 **A. Certain Evidence in Support of Section III.C. of Defendants’**
17 **Cross Motion and Opposition is Irrelevant and Inadmissible**

18 Oracle objects to Exhibits 4, 5, 8, 10, 15, 17, 21, 22, 23, 24, 25, and 26 to the
19 Lanier Declaration as irrelevant. Defendants submitted these exhibits in support of Section III.C.
20 of Defendants’ Cross Motion and Opposition, titled “A Ruling Regarding the Copyright
21 Registrations Asserted in Plaintiffs’ Motion Should Not Serve as a Template for Litigating the
22 Rest of this Case.” Opp. at 11-14.

23 Oracle’s Motion for Partial Summary Judgment (“Motion”) notes that the Court’s
24 ruling on the issues presented will serve as a useful template to make trial more focused and
25 efficient. Motion at 2. However, the role of the Court’s decision on streamlining the trial is not
26 a legal issue before the Court at this time. Neither party’s “Relief Requested” section seeks an
27 order on the role of this Motion in streamlining the trial. See Opp. at 1; Motion at 1. That
28 subject is properly the province of the pretrial process, during which Oracle will show why the

1 facts established in Oracle’s Motion, Defendants’ concessions, and the Court’s ultimate rulings
2 will assist the Court in rendering decisions on similar claims based on similar facts. That time
3 will come. Defendants should not *now* be permitted to offer evidence to support an issue not
4 currently before the Court. *See, e.g., Stanton v. Couturier*, No. 2:05-cv-02046, 2007 U.S. Dist.
5 LEXIS 95515 at *6, fn.1 (E.D. Cal. Dec. 26, 2007) (declining to address party’s argument on an
6 issue not currently before the Court). Relevant evidence is defined as “evidence having any
7 tendency to make the existence of any fact that is **of consequence to the determination** of the
8 action more probable or less probable than it would be without the evidence.” Fed. R. Evid. 401
9 (emphasis supplied). These Exhibits are irrelevant because they are not of any consequence to
10 the determination of Oracle’s Motion or Defendants’ Cross Motion and Opposition. Irrelevant
11 evidence cannot be considered in summary judgment proceedings. *See* Fed. R. Evid. 402
12 (“Evidence which is not relevant is not admissible”); *Protect Lake Pleasant, LLC v. McDonald*,
13 609 F. Supp. 2d 895, 923, fn.15 (D. Ariz. 2009) (holding evidence not pertaining to issue before
14 the Court on summary judgment was irrelevant under Fed. R. Evid. 402 and inadmissible);
15 *Romero v. Hennessey*, No. C 08-4675, 2010 U.S. Dist. LEXIS 1398 at *4 (N.D. Cal. Jan. 5,
16 2010) (“factual disputes that are irrelevant or unnecessary will not be counted [as disputed
17 issues].”).

18 The Court should sustain Oracle’s objection and exclude Exhibits 4, 5, 8, 10, 15,
19 17, 21, 22, 23, 24, 25, and 26 offered in support of Section IIIC of Defendants’ Cross Motion and
20 Opposition. In addition, Oracle objects to a subset of these documents (Exhibits 4, 8, and 10) on
21 additional grounds as follows:

22 **1. Exhibit 4 to the Lanier Declaration Should be Excluded**
23 **for Lack of Authentication**

24 Oracle objects to Exhibit 4 to the Lanier Declaration. Defendants do not properly
25 authenticate this document. According to the Lanier Declaration, Exhibit 4 is a document
26 produced by Defendants - not Oracle - during discovery in this matter. Lanier Decl., ¶ 4. This is
27 insufficient to establish the authenticity of the document. *See, e.g.,* Fed. R. Evid. 901
28 (suggesting means of properly authenticating document). Unauthenticated documents and

1 documents for which an inadequate foundation has been laid cannot be considered to oppose a
2 motion for summary judgment. *See Orr v. Bank of Am.*, 285 F.3d 764, 773 (9th Cir. 2002)
3 (affirming summary judgment where plaintiffs’ opposing evidence was unauthenticated and
4 therefore inadmissible). Courts have accepted the authenticity of documents produced by the
5 opposing party in litigation as statements of party opponents, but that is not the case here. *Cf.*
6 *Maljack Prods. v. Goodtimes Home Video Corp.*, 81 F.3d 881, 889 (9th Cir. 1996). Here,
7 Defendants have offered their own self-serving document produced during discovery without
8 properly authenticating it. Oracle accordingly objects to Exhibit 4 on this basis.

9 **2. Exhibit 8 Should Also be Excluded as Inadmissible**
10 **Hearsay and an Impermissible Rule 1006 Summary**

11 Oracle objects to Exhibit 8 to the Lanier Declaration as inadmissible hearsay and
12 as an improper compilation under Federal Rule of Evidence 1006.

13 Exhibit 8 is a table allegedly reflecting Defendants’ customer names and support
14 dates and details. Defendants attempt to offer foundational testimony for this document through
15 deposition testimony of Michael Garafola, who described the document as “a note sheet
16 specifying customers, prospects, and server names.” Lanier Decl. ¶ 17, Ex. 17 at 16:1-2. Mr.
17 Garafola testified that he “believe[d]” Deposition Exhibit 1623 was created by “counsel.” *Id.* at
18 16:9. He explained, “I did not draft this, but the information that was -- is represented in this
19 note sheet was discussed during the [deposition] preparation.” *Id.* at 16:4-6. Mr. Garafola
20 testified that “the information [underling the document] was discussed and remembered during
21 our [deposition] preparation sessions.” *Id.* at 16:12:15. Thus, Exhibit 8 is an out of court
22 statement, created by counsel for Defendants, ostensibly recording “remembered” statements
23 made out of court during deposition preparation, and introduced with Defendants’ Cross Motion
24 and Opposition to prove the “truth of the matter asserted,” namely, that Siebel customers were
25 typically supported remotely. *Opp.* at 13. This is impermissible. Fed. R. Evid. 801, Fed. R.
26 Evid 802. Exhibit 8 to the Lanier Declaration should be excluded as inadmissible hearsay.

27 Nor is Exhibit 8 an admissible summary or compilation of voluminous writings
28 under Federal Rule of Evidence 1006. A summary of other materials is admissible only if the

1 proponent makes a showing that the underlying documents are also admissible. Fed. R. Evid.
2 1006; *see e.g., Paddock v. Dave Christensen, Inc.*, 745 F.2d 1254, 1259 (9th Cir. 1984); *Amarel*
3 *v. Connell*, 102 F.3d 1494, 1516 (9th Cir. 1996) (“[a] proponent of a summary exhibit must
4 establish a foundation that . . . the underlying materials on which the summary exhibit is based
5 are admissible in evidence). Defendants do not even show that the summary is based on
6 voluminous documents, much less identify the underlying documents, still less show the
7 documents are admissible. This failure alone renders the summary inadmissible under Federal
8 Rule of Evidence 1006. *See Paddock*, 745 F.2d at 1259.

9 **3. Exhibit 10 to the Lanier Declaration is also**
10 **Inadmissible Hearsay**

11 Oracle also objects to Exhibit 10 to the Lanier Declaration, containing
12 Defendants’ own self-serving interrogatory responses to Plaintiff Oracle USA, Inc.’s
13 Interrogatory No. 14, as inadmissible hearsay. Defendants offer Exhibit 10 to prove “the truth of
14 the matter asserted.” Opp. at 13; Fed. R. Evid. 801(c). This is impermissible. Fed. R. Evid.
15 801; Fed. R. Evid 802; *Avila v. Willits Envtl. Remediation Trust*, No. C 99-3941, 2008 U.S. Dist.
16 LEXIS 19742 at *57-58 (N.D. Cal. Feb. 6, 2008) (a party’s own interrogatory answers are
17 hearsay); *Grace & Co. v. City of Los Angeles*, 278 F.2d 771, 776 (9th Cir. 1960), citing *Haskell*
18 *Plumbing & Heating Co. v. Weeks*, 237 F.2d 263, 267 (9th Cir. 1956) (“Normally, a party may
19 not introduce his self-serving answers to an opponent’s interrogatories”).

20 **B. Exhibits 9 and 14 are Irrelevant and Inadmissible**

21 Oracle objects to Exhibits 9 and 14 to the Lanier Declaration as irrelevant to the
22 issues currently before the Court. Defendants introduced Exhibit 9 to the Lanier Declaration
23 (Oracle’s Responses and Objections to Defendants’ Interrogatory No. 10) and Exhibit 14 to the
24 Lanier Declaration (excerpts of testimony from the Deposition of Richard Allison) in support of
25 arguments in Section III.B. of Defendants’ Cross Motion and Opposition, entitled “Plaintiffs Are
26 Not Entitled to Summary Judgment Dismissing Defendants’ Second and Third Affirmative
27 Defenses Relating to Licensed Use.” Opp. at 9-10. However in response to Oracle’s Motion,
28 Defendants *abandoned* these defenses “relating to licensed use” as to the copyright claims

1 addressed in Oracle’s Motion. *See* Opp. at 10 (“Defendants elect not to assert their license-based
2 defenses as to the limited and specific conduct associated with the particular registrations
3 identified in Plaintiffs’ Motion.”).

4 Because Defendants have thus withdrawn their license defense as to any issues
5 now pending before the Court, the proffered evidence is irrelevant for purposes of this motion
6 and inadmissible. *See* Fed. R. Evid. 402; *Protect Lake Pleasant*, 609 F. Supp. 2d at 923, fn.15;
7 *Romero*, 2010 U.S. Dist. LEXIS 1398 at *4.

8 **C. Exhibit 18 to Lanier Declaration is Irrelevant and Inadmissible**

9 Oracle objects to Exhibit 18 to the Lanier Declaration as containing irrelevant
10 evidence. Exhibit 18 contains deposition testimony from Jason Kees, an Oracle Rule 30(b)(6)
11 witness on the issue of access to Oracle’s *Siebel* computer systems. *See* Lanier Decl. ¶ 18, Ex.
12 18 at 17:10-12.

13 Defendants attempt to misuse Mr. Kees’ testimony as reflective of *all* of Oracle’s
14 computer systems. Opp. at 16, 19. Specifically, Mr. Kees focused on “Oracle’s Siebel-related
15 Customer Support Website.” *See* Ex. 18 at 193:15. As the cited testimony notes, Mr. Kees
16 “would only have knowledge specific to systems that are related to Siebel Systems
17 Incorporated.” *Id.* at 17:10-12. Defendants’ counsel even noted “I’m not trying to broaden the
18 topic past anything other than the Siebel product line.” *Id.* at 17:21-23. While Mr. Kees’
19 testimony addresses only Oracle’s Siebel product line and thus the Siebel Customer Support
20 Website (SupportWeb), Oracle’s Motion addresses damage and harm to Oracle’s Customer
21 Connection support website, which is a different website for PeopleSoft and JD Edwards
22 materials – two other product lines entirely. *See* Motion at 17. Thus Mr. Kees’ Siebel-related
23 testimony is irrelevant to the issues currently before the Court, and should be excluded. *See* Fed.
24 R. Evid. 402; *Protect Lake Pleasant*, 609 F. Supp. 2d at 923, fn.15; *Romero*, 2010 U.S. Dist.
25 LEXIS 1398 at *4 .

26 **II. CONCLUSION**

27 Oracle respectfully requests that the Court sustain these objections to evidence
28 introduced by Defendants in support of their Cross Motion and Opposition.

