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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

ORACLE USA, INC., *et al.*,
Plaintiffs,
v.
SAP AG, *et al.*,
Defendants.

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

**ORACLE'S RESPONSES TO
DEFENDANTS' OBJECTIONS TO
EVIDENCE FILED IN SUPPORT OF
PLAINTIFFS' 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 respond to Defendants SAP AG, SAP America, Inc., and TomorrowNow, Inc.’s (together
4 “Defendants”) Objections to Evidence Filed in Support of Plaintiffs’ Motion for Partial
5 Summary Judgment (“Objections”) (Dkt. 672) as follows. For the following reasons, the Court
6 should deny Defendants’ Objections to Evidence:

7 **A. Defendants’ Objection to ¶¶ 17-26 of Mr. Ackermann’s**
8 **Declaration and Exhibit B Is Moot and These Portions Are**
9 **Admissible as Fact Testimony or Under FRE 7010**

10 Defendants make no objection to two-thirds of the Declaration of Norm
11 Ackermann in Support of Oracle’s Motion for Partial Summary Judgment (“Ackermann
12 Declaration”) and no objection to ten of the eleven exhibits the Ackermann Declaration. All of
13 that evidence should be admitted by the Court. The Court should overrule Defendants’ objection
14 that the remainder is inadmissible because:

- 15 (1) the objection is moot in light of Defendants’ concession of liability for the copyright
16 infringement claims related to Defendants’ copies of PeopleSoft HRMS, the software that
17 Mr. Ackermann’s testimony addresses;
18 (2) these paragraphs contain fact testimony regarding personal observation and are not
19 opinion testimony at all;
20 (3) any testimony that the Court could construe as opinion is admissible lay opinion
21 testimony under Fed. R. Evid. 701; and
22 (4) any failure to formally designate Mr. Ackermann as an expert witness is substantially
23 justified and/or harmless (even if it had been necessary), in light of Defendants’ failure to
24 object to related testimony from other portions of the Ackermann Declaration and both
25 parties’ treatment of very similar testimony as factual in nature throughout discovery.

26 **1. Mootness**

27 Oracle submitted the Ackermann Declaration in anticipation of certain arguments
28 it expected Defendants may make regarding its copyright claims, in particular the issue of
protected expression. *See* Oracle’s Motion for Partial Summary Judgment (“Motion”) at 6, 11.

1 However, Defendants concede their liability for copyright infringement for the post-March 1,
2 2005 copies of Oracle software identified Oracle's Motion. *See* Defendants' Cross Motion for
3 Partial Summary Judgment and Opposition to Oracle's Motion for Partial Summary Judgment
4 ("Cross Motion and Opposition," "Opposition" or "Opp."). Opp. at 5. By conceding that
5 infringement, Defendants concede that they copied protected expression, mooting their objection
6 to Mr. Ackermann's declaration on that topic. Defendants only oppose the pre-March 1, 2005
7 copyright claims in Oracle's Motion on grounds of ownership. Opp. at 2-3. The Ackermann
8 Declaration does not speak to the issue of ownership. Thus, Defendants' objection to the
9 Ackermann Declaration no longer has any bearing on the outcome of the Motion, and the
10 objection is moot. *See, e.g. Assoc. Students of the Univ. of Cal. at Santa Barbara v. Regents of*
11 *the Univ. of Cal.*, No. C 05-04352, 2007 U.S. Dist. LEXIS 5470 at *7, fn. 3 (N.D. Cal. Jan. 23,
12 2007) (declaring objections to evidence moot where "none of the evidence plaintiffs object to
13 [was] relied on by the Court in deciding [the] motion"); *Wallace v. Countrywide Home Loans,*
14 *Inc.*, No. SACV 08-1463, 2009 U.S. Dist. LEXIS 110140 at *8 (C.D. Cal Nov. 23, 2009) (same).

15 2. Admissible Fact Testimony

16 Defendants only object to ¶¶ 17-26 and Exhibit B to the Ackermann Declaration
17 to the extent they contain "opinion" testimony. Objections at 2. However, these paragraphs do
18 not constitute opinions at all. Instead, they contain factual observations regarding a subject
19 matter that has been covered in depositions of multiple SAP TN witnesses without objection
20 from Defendants – namely, changes in code between different versions of Software and Support
21 Materials. *See, e.g.,* Declaration of Chad Russell in Support of Oracle's Reply ("Russell Decl.")
22 at ¶¶ 8-10, Ex. 8 at 195:7-197:2 (Feb. 7, 2008 Deposition of John Baugh); Ex. 9 at 58:24-60:12
23 (April 1, 2008 Deposition of Catherine Hyde); Ex. 10 at 205:8-206:16 (May 12, 2009 Deposition
24 of Catherine Hyde) (all excerpts from Depositions of SAP TN employees discussing code
25 comparisons similar to the objected to portions of the Ackermann Declaration). Indeed, in
26 response to a Rule 30(b)(6) topics on the almost identical subject – the development of code
27 objects within a PeopleSoft HRMS payroll tax update – Defendants proffered their own
28 employee developers as non-expert witnesses on those topics. *Id.* at ¶ 15, Ex. 15. As just one

1 example among many, SAP TN employee and litigation consultant Catherine Hyde testified
2 about the contents of a document containing a very similar analysis as the one discussed in Mr.
3 Ackermann’s declaration and objected to by Defendants. *See, e.g.*, Russell Decl. at ¶¶ 10, 12 &
4 Exs. 10, 12. The Court should deny Defendants’ objection because ¶¶ 17-26 and Exhibit B are
5 fact testimony.

6 3. Admissible Lay Opinion Testimony

7 Defendants’ objection that ¶¶ 17-26 and Exhibit B are inadmissible “to the
8 extent” they contain opinion testimony is also overbroad. Objections at 1. Because Defendants
9 do not identify which portions they actually assert are opinions, the Court should overrule their
10 objection on that ground alone. However, if the Court is inclined to parse Mr. Ackermann’s
11 testimony for Defendants, any statements that *could* reasonably be construed as “opinion”
12 testimony are still admissible as lay opinion testimony under Federal Rule of Evidence 701.¹
13 This is not testimony based on technical or specialized knowledge, as Defendants argue.

14 Defendants mischaracterize the content of Mr. Ackermann’s Declaration,
15 asserting that “Ackermann describes having engaged in a technical analysis...,” and citing ¶ 17
16 of the Ackermann Declaration in support. First, Mr. Ackermann does not describe the work in
17 ¶¶ 17-26 as a “technical analysis” – and it is not – it is a simple compare akin to running a
18 “redline” between two Microsoft Word documents. Paragraphs 17-26 do not involve a
19 complicated code comparison in order to provide an opinion about technical details. Mr.
20 Ackermann’s comparison is for illustrative purposes, to provide an example of the same basic
21 characteristics of the code that he describes earlier in the portion of his declaration to which
22 Defendants do not object.² Thus, to “illustrate” the fact that “SAP TN’s installations and
23

24 ¹ “If the witness is not testifying as an expert, the witness’ testimony in the form of opinions or
25 inferences is limited to those opinions or inferences which are (a) rationally based on the
26 perception of the witness, (b) helpful to a clear understanding of the witness’ testimony or the
27 determination of a fact in issue, and (c) not based on scientific, technical, or other specialized
28 knowledge within the scope of Rule 702.” Fed. R. Evid. 701.

² Defendants make no objection to Paragraphs ¶¶ 1-16 and ¶ 27 of the Ackermann Declaration.

1 reproductions of HRMS created copies of HRMS code that had the creative characteristics”
2 described earlier in his Declaration, he compared three files from each HRMS install CD to SAP
3 TN back-up files, noted that “[a] cursory visual inspection...will show that the vast majority of
4 the original Oracle code is present in the SAP TN backup file,” and summarized the line counts
5 and percentage of Oracle lines appearing in the SAP TN file in Exhibit B. *Id.* at ¶¶ 17-20.

6 This is not opinion testimony at all, but rather illustrative testimony of percipient
7 factual qualities that, even if considered opinion, would constitute admissible lay opinion
8 testimony under Federal Rule of Evidence 701. Where lay opinion testimony is based on
9 particularized knowledge of the witness’ own business, then such opinion testimony is
10 appropriate under Federal Rule of Evidence 701. *See Medforms, Inc. v. Healthcare Mgmt.*
11 *Solutions, Inc.*, 290 F.3d 98, 110-111 (2d Cir. 2002) (affirming trial court’s admission of lay
12 opinion testimony under Fed. R. Evid. 701 regarding a computer programmer’s work on the
13 products at issue and the non-expert witness’ use of “a programming utility that highlights the
14 similarities and differences between source code files.”); *Hynix Semiconductor, Inc. v. Rambus,*
15 *Inc.*, No. CV-00-20905, 2008 U.S. Dist. LEXIS 16716 at *32-36 (N.D. Cal. Feb. 19, 2008)
16 (discussing the “particularized knowledge” carve-out to the Fed. R. Evid. 701 limitation on lay
17 opinion testimony requiring specialized or technical knowledge); Fed. R. Evid. 701 Advisory
18 Committee’s Notes (2000) (Lay opinion testimony admissible where not admitted based on
19 “experience, training or specialized knowledge within the realm of an expert, but because of the
20 particularized knowledge that the witness has by virtue of his or her position in the business.”).³

21 _____
22 ³ The two cases cited by Defendants also support Oracle’s position. In *Laser Design Int’l, LLC*
23 *v. BJ Crystal, Inc.*, No. 03-1179, 2007 U.S. Dist. LEXIS 21329 at *13 (N.D. Cal. March 7, 2007)
24 the Court **refused** to strike one employee’s declaration as improper expert testimony because the
25 witness “merely describes how the images were produced and does not provide specialized
26 explanations or interpretations of the images.” *See also Hanger Prosthetics & Orthotics, Inc. v.*
27 *Capstone Orthopedic, Inc.*, No. 06-cv-2879, 2008 U.S. Dist. LEXIS 91373 at *2, *7-8 (E.D. Cal.
28 June 13, 2008) (excluding testimony where the witness at issue was not testifying based on his
own business experience (such as through the course of employment) but was instead a
“computer forensics investigator” that provided a detailed forensic analysis using “forensic
software.”)

1 Mr. Ackermann's particularized knowledge of the HRMS product, rather than
2 technical expertise, is the basis for his declaration. *See id.* at ¶ 2 (describing Mr. Ackermann's
3 14-year history with and involvement in HRMS development). Mr. Ackermann used his
4 particularized knowledge of the underlying HRMS software gained through his longtime
5 employment by Oracle to explain how he did or could have written that code in the paragraphs to
6 which Defendants object. *See Ackermann Declaration* at ¶ 17 (noting "I extracted three files
7 with which I am personally familiar") and ¶ 26 ("based on my personal experience writing
8 COBOL code in general and editing this file in particular, this exact same functionality could
9 have been written by checking a different variable..."). Thus, the Ackermann Declaration at
10 ¶¶ 17-26 and Exhibit B is admissible under Federal Rule of Evidence 701 to the extent that the
11 content is considered opinion testimony at all.

12 **4. Alternatively, the Failure to Disclose Mr. Ackermann as**
13 **an Expert is Harmless and Substantially Justified**

14 Even if the Court found that challenged portions of Mr. Ackermann's Declaration
15 should be considered expert opinion testimony under Federal Rule of Evidence 702, any failure
16 to disclose Mr. Ackermann as an expert witness is harmless for five reasons. *See Fed. R. Civ. P.*
17 37(c)(1). First, Defendants do not contest the substantive points Mr. Ackermann raised in ¶¶ 17-
18 26 and Exhibit B. Second, Mr. Ackermann was disclosed in Oracle's Initial Disclosures. *See*
19 Lanier Declaration in Support of Defendants' Cross Motion and Opposition ("Lanier Decl.") at
20 ¶11, Ex. 11. Third, even if disclosed as an expert witness under Federal Rule of Civil Procedure
21 26(a)(2), Mr. Ackermann, as an employee whose duties do not include regular testimony, would
22 not have been required to provide a report describing his testimony. *See Fed. R. Civ. P.*
23 26(a)(2)(B). Fourth, Defendants took Mr. Ackermann's deposition in the course of fact
24 discovery regarding his discussions with Oracle's expert witnesses, and thus have had an
25 opportunity to cross-examine him. *See Russell Decl.* at ¶ 7, Ex. 7. Defendants were even put on
26 notice of a code compare conducted by Mr. Ackermann through questioning on re-direct at Mr.
27 Ackermann's deposition. *Id.* at 50:4-21. As a result, even if Mr. Ackermann had been disclosed
28 as an expert, Defendants would be in no different position. Fifth, Defendants make no objection

1 to Exhibits C-K to the Ackermann Declaration, which contain the actual results of the code
2 comparison discussed in ¶¶ 17-26.

3 Even if Oracle should have disclosed Mr. Ackermann under Federal Rule of Civil
4 Procedure 26(a)(2), that failure would also be substantially justified. Oracle *did* disclose Mr.
5 Ackermann as a fact witness, and Oracle's belief that Mr. Ackermann offered admissible lay
6 testimony is supported by the fact that Defendants have repeatedly offered testimony and
7 declarations through their own lay witnesses regarding issues at least equivalent in complexity to
8 the challenged portions of the Ackermann Declaration. *See* Russell Decl. ¶¶ 8-9, 13, 15, Ex. 8
9 at 195:7-197:2 (Feb. 7, 2008 Deposition of John Baugh); Ex. 9 at 205:8-206:16 (May 12, 2009
10 Deposition of Catherine Hyde); Ex. 13 at ¶ 4 (Declaration of Mark Kreutz Filed in Support of
11 Defendants' Reply to Oracle's Opposition to Defendants' Motion to Compel); Ex. 15 (Oracle's
12 30(b)(6) Notice of TomorrowNow, Inc.).

13 In sum, even if the Court found that ¶¶ 17-26 and Exhibit B constitute undisclosed
14 expert testimony, the evidence should still be admitted on the ground that the failure to disclose
15 Mr. Ackermann as an expert was both harmless and substantially justified, based on Defendants'
16 concessions in their Opposition, Defendants' own contrary positions with respect to expert
17 testimony, and Defendants' previous deposition of Mr. Ackermann as a fact witness.

18 **B. Defendants' Objection to Mr. Fallon's Declaration Is Moot,**
19 **and Any Late Disclosure Is Harmless**

20 Defendants object to the Declaration of Mark Fallon in Support of Oracle's
21 Motion ("Fallon Declaration") on the basis that Oracle failed to "timely disclose Fallon as an
22 'individual likely to have discoverable information,'" as required by Rule 26(a)(1)(A)(i). *See*
23 Objections at 2-3. Defendants' objection is moot, and any failure to timely disclose Mr. Fallon
24 as a witness was substantially justified and/or harmless.

25 **Mootness:** Defendants' objection to Mr. Fallon's Declaration is moot. The
26 Fallon Declaration pertains to the copyright infringement claims in Oracle's Motion related to
27 Defendants' copies of Oracle's Database products. Motion at 6, 9, 11. Defendants have not
28 contested the substantive points made in the Fallon Declaration in their Cross Motion and

1 Opposition, and Defendants concede liability for the Database-related copyright infringement
2 claims in Oracle’s Motion. Opp. at 5. That concession encompassed the issues on which Oracle
3 proffered Mr. Fallon’s Declaration. See Motion at 6, 9, 11. As a result, Defendants’ objection is
4 moot. See *Assoc. Students of the Univ. of Cal.*, 2007 U.S. Dist. LEXIS 5470 at *7, fn. 3
5 (declaring objections to evidence moot where “none of the evidence plaintiffs object to [was]
6 relied on by the Court in deciding [the] motion”).

7 ***Substantially Justified and/or Harmless:*** Failure to disclose a witness under Fed.
8 R. Civ. P. 26(a)((1)(A)(i) does not preclude admission of the evidence or testimony if the failure
9 was either substantially justified or harmless. See Fed. R. Civ. P. 37(c). Here, the late disclosure
10 of Mr. Fallon is harmless because Defendants have not contested the points made in Fallon’s
11 declaration, and in fact concede liability for the Database-related copyright infringement claims
12 in Oracle’s Motion. See Opp. at 5; Oracle’s Reply in Support of Motion for Partial Summary
13 Judgment and Opposition to Defendants’ Cross Motion (“Reply”) at 1.

14 Further, the Court permitted Oracle to add its Database claims over Defendants’
15 objections late in the fact discovery period, and Oracle’s Database-related depositions of SAP
16 witnesses by Oracle did not occur until the final week of discovery (including the critical Rule
17 30(b)(6) witness on the last day of fact discovery). See August 14, 2009 Order Granting Motion
18 For Leave to File a Fourth Amended Complaint (Dkt. 414); Russell Decl. at ¶ 16. In sum,
19 Oracle’s delay in identifying Mr. Fallon as a witness was harmless, and it was substantially
20 justified in light of the late timing of Database related discovery generally. Defendants’
21 objection should be denied.

22 **C. Mr. Koehler’s Declaration Contains Admissible Lay Opinion**
23 **Testimony**

24 Defendants object to ¶ 4 from the Declaration of Uwe Koehler in Support of
25 Oracle’s Motion for Partial Summary Judgment (“Koehler Declaration”) on the basis that this
26 paragraph contains improper expert testimony. Dr. Koehler is Senior Director of Oracle’s
27 Global Information Security Organization (“GIS”). This group is responsible for the detection,
28 investigation and prevention of threats to Oracle systems and related intellectual property. See

1 Koehler Declaration at ¶ 2. Dr. Koehler led the technical investigation into SAP’s illegal
2 downloading. His knowledge about the Oracle websites and the impact of SAP’s actions on
3 those websites was obtained in the course and scope of his employment duties investigating
4 website intrusion and reviewing the resulting log files, through his job at Oracle. *See e.g., id.* at
5 ¶¶ 1, 4.

6 Defendants object to ¶ 4 of Dr. Koehler’s Declaration as constituting opinion
7 “based on scientific technical, or other specialized knowledge” that is improper for a lay witness,
8 and assert that Dr. Koehler “purports to examine reverse proxy log files and opines on his
9 interpretation of those log files, as well as on what those files reveal about TN’s alleged access to
10 Plaintiffs’ website, thereby engaging in inappropriate technical analysis.” Objections at 3-4. In
11 fact, Dr. Koehler’s Declaration is significantly more limited than Defendants’ characterization.
12 Paragraph 4 of the Koehler Declaration explains that Dr. Koehler:

13
14 “reviewed the reverse proxy log files...prior to my deposition in
15 this matter, and those log files reflect that on certain days between
16 September 2006 and April 2007, TomorrowNow downloaded more
17 bytes of data from Customer Connection and used more computer
18 resources on those computer systems than all other users from the
19 rest of the world combined. From my experience working with
20 GIS and the Customer Connection computer systems, I believe that
21 it is very likely that customers using the Customer Connection
22 systems during these periods of high downloads from
23 TomorrowNow experienced slowness and latency issues.”

20 This is not expert testimony based on experience, training or specialized knowledge within the
21 realm of an expert. Defendants’ own Objections note that Mr. Koehler “stated at his deposition
22 that he was not an expert and that his conclusion regarding the significance of the log files are
23 ‘just what I believe.’” Objections at 4.⁴ Paragraph 4 is thus based on “particularized knowledge
24

25 ⁴ Plaintiffs’ objections during the deposition to any questioning of Koehler as calling for expert
26 testimony (see Objections at 4), go to a different point. Oracle objected to Defendants
27 attempting to obtain early expert testimony before Oracle had disclosed its separate expert
28 testimony regarding Defendants’ intrusion into Oracle’s websites. Oracle now withdraws those
objections.

1 that [Mr. Koehler] has by virtue of his or her position in the business.”— a type of opinion
2 testimony that is admissible under Federal Rule of Evidence 701. *See, e.g.*, Fed. R. Evid. 701
3 Advisory Committee’s Notes (2000) (“Lay opinion testimony admissible where not based on
4 “experience, training or specialized knowledge within the realm of an expert, but [instead based
5 on] the particularized knowledge that the witness has by virtue of his or her position in the
6 business.”); *In re: Perry H. Koplik & Sons*, 382 B.R. 599, 602 (S.D.N.Y. 2008) (permitting “lay
7 opinion testimony that reflects the perceptions of the witness...as to what happened (including,
8 inter alia, what the defendants did)--even if [the witness] was aided in forming his perceptions by
9 an ability, aided by his training and experience, to understand what he saw”); *Hynix*
10 *Semiconductor, Inc.*, 2008 U.S. Dist. LEXIS 16716 at *32-36 (discussing the “particularized
11 knowledge” carve-out to the FRE 701 limitation on lay opinion testimony requiring specialized
12 or technical knowledge). Defendants’ objection should be denied.

13 **D. Defendant’s Objection to ¶¶2-3 of Mr. Mickelsen’s Declaration**
14 **Is Moot and Any Late Disclosure is Substantially Justified**
15 **and/or Harmless**

16 Defendants assert that “Plaintiffs are barred by Rule 37(c)(1)” from using ¶¶ 2-3
17 from the Declaration of Brady Mickelsen in Support of Oracle’s Motion because Plaintiffs did
18 not “timely disclose” Mickelsen as a witness. Objections at 4-5. Defendants’ objection is moot,
19 and any failure to timely disclose Mr. Mickelsen as a witness was substantially justified and/or
20 harmless.

21 **Mootness:** Defendants’ objection to ¶¶ 2-3 of Mr. Mickelsen’s Declaration is
22 moot. Defendants concede liability on certain of Oracle’s Computer Fraud and Abuse Act
23 (CFAA) claims. Those conceded claims include the element of ownership of the computers,
24 which is the point supported by ¶ 2 of Mr. Mickelsen’s Declaration. Opp. at 5. Defendants also
25 do not contest Oracle’s statement regarding the February 15, 2010 merger of Oracle USA, Inc.
26 into Sun Microsystems, Inc., concurrently renamed Oracle America, Inc., supported by ¶ 3. *See*
27 Motion at 1, fn.1, 18.

28 **Substantially Justified and/or Harmless:** Even if the Court reached the merits of
Defendants’ objection, the Court should not exclude ¶¶ 2-3 of Mr. Mickelsen’s Declaration,

1 because the late disclosure was substantially justified or harmless. *See* Fed. R. Civ. P. 37(c)(1).
2 First, the late disclosure here is substantially justified because the acquisition of Sun
3 Microsystems, Inc, and the resultant impact on Oracle corporate structure, was not completed
4 until February 15, 2010. *See* Declaration of Zachary J. Alinder in Support of Oracle’s Motion
5 for Partial Summary Judgment (“Alinder Decl.”) ¶ 81, Ex. 114. Immediately after this change,
6 Oracle contacted Defendants to try to reach a stipulation regarding the impact of the completed
7 acquisition on Oracle’s corporate structure. Russell Decl. ¶ 16. Defendants would not stipulate
8 without discovery from Oracle, forcing Oracle in the meantime to submit a declaration from Mr.
9 Mickelsen regarding Oracle’s resulting corporate structure. *Id.* at ¶ 16, Ex. 16. Second, Federal
10 Rule of Civil Procedure 26(e) only requires that a party update initial disclosures where “the
11 additional or corrective information has not otherwise been made known to the other parties
12 during the discovery process or in writing.” Mr. Mickelsen’s general knowledge regarding
13 corporate ownership issues was made known to Defendants through the course of discovery at
14 the April 9, 2009 Deposition of Oracle’s Controller. Russell Decl. ¶ 11, Ex. 11 at 40:16-41:1
15 (April 9, 2009 Deposition of Corey West). In response to a question from Defendants’ counsel
16 asking “[i]s there someone within Oracle that you believe is an expert on the corporate
17 organization of Oracle, in terms of how the entities relate to each other on an ownership basis?,”
18 Mr. West identified only Mr. Mickelsen. *Id.*

19 Thus the disclosure is harmless because Defendants have known about Mr.
20 Mickelsen as a “corporate ownership” witness since April 2009, did not depose him, and now do
21 not contest the substance of Mr. Mickelsen’s assertion in ¶ 3 regarding Oracle America, Inc.’s
22 corporate ownership or Mr. Mickelsen’s statements in ¶ 2 regarding ownership of the computers
23 at issue. Defendants also do not request relief under Rule 56(f) due to an inability to present
24 contrary evidence. As a result, the failure to disclose Mr. Mickelsen on these subjects at an
25 earlier date is both substantially justified and harmless (if not mooted entirely by Defendants’
26
27
28

concession of liability).⁵ The Court should deny Defendants’ objection to Mr. Mickelsen’s Declaration.

E. The Ritchie Testimony in Exhibit 27 Reflects Personal Knowledge and Constitutes Admissible Lay Opinion

Defendants object to portions of testimony introduced from the deposition of John Ritchie, a former SAP TN employee. Objections at 5. This testimony consists of Mr. Ritchie’s personal observations during the course of specific tasks undertaken at Defendants’ request and within the scope of his employment at the direction of SAP TN management. While objecting to this testimony, Defendants nevertheless rely on related testimony from Mr. Ritchie regarding his observations about the impact of Titan on the Oracle website. *See* Opp. at 15 (citing Ritchie testimony discussing how to “prove...a break caused by overload of the Oracle website.”). Defendants’ reliance is the correct evidentiary position; their objections are not. Defendants also fail to note that Oracle is compelled to rely on Mr. Ritchie’s testimony regarding his testing of Titan – the program he wrote for SAP TN to scrape the content of Oracle’s customer support websites – because Defendants did not preserve the one million downloads resulting from the testing process or the computer logs of the testing. *See* Alinder Decl., ¶ 3, Ex. 27 at 78:21-25.

Personal Knowledge: Defendants object to portions of Mr. Ritchie’s deposition testimony at pages 21:1-2; 34:3-12; 49:23-24; 50:3-51:6; 53:4-5; and 73:1-2 as “lacking foundation because Ritchie does not have personal knowledge regarding any alleged crash or impairment of Plaintiffs’ servers.” Objections at 5.

Mr. Ritchie’s testimony indicates the opposite. Mr. Ritchie testified in the portions of Exhibit 27 objected to by Defendants that he observed evidence of the impact of the Titan program on Oracle’s servers; thus Mr. Ritchie’s testimony about the impact, *which he*

⁵ Though Defendants have not requested it, if the Court finds the failure to disclose Mr. Mickelsen at an earlier date was not substantially justified or harmless, Oracle offers to make Mr. Mickelsen available for a two hour deposition regarding the corporate structure issues to address any prejudice perceived by Defendants.

1 *witnessed*, is admissible. *See* Fed. R. Evid. 602 (“Evidence to prove personal knowledge may,
2 but need not, consist of the witness’ own testimony”); Alinder Decl., ¶ 3, Ex. 27 at 34:5-7
3 (noting that “I could see how many times the servers would crash by how many times my
4 program had to break the connection and then reestablish it”); *id.* at 50:17-19 (“I would get
5 errors out of the Oracle website and Titan was documenting those errors”); *id.* at 53:2-5 (“While
6 Titan was running, I would try to manually log on to Oracle’s website; and I couldn’t...”).

7 ***Admissible Lay Opinion Testimony:*** Defendants also object to portions of Mr.
8 Ritchie’s testimony at 21:1-2; 34:3-12; 49:23-24; 50:3-51:6; 52:16-53:5; 55:16-57:4; 62:11-22;
9 and 73:1-2 as constituting improper lay opinion because it is “based on scientific, technical , or
10 other specialized knowledge.” Objections at 5. Defendants state that “[i]n the identified
11 portions, Ritchie testified that he ‘looked at’ and evaluated Titan’s server logs, and opined on his
12 interpretation of those log files,” and Defendants also assert that Mr. Ritchie “purported to testify
13 as to what he believed, ‘in [his] mind’ and ‘based on his experience’ those log files and his
14 connectivity to Plaintiffs’ website demonstrated about the alleged effect of TN’s access to
15 Plaintiffs’ website.”

16 This is not expert testimony. A lay witness is permitted to offer opinions based
17 on his or her own business-based particularized knowledge gained during employment. *See*
18 *Hynix Semiconductor, Inc.*, 2008 U.S. Dist. LEXIS 16716, at*35 (noting “the rules of evidence
19 have long permitted a person to testify to opinions about their own businesses based on their
20 personal knowledge of their businesses”); *see also Laser Design Int’l*, 2007 U.S. Dist. LEXIS
21 21329, at *12-13 (holding that the declaration of a company employee describing facts known to
22 him as part of his employment would not be excluded on the ground that it was expert
23 testimony). Any of Ritchie’s testimony which is arguably “opinion” does not constitute expert
24 testimony and should be admitted properly under Federal Rule of Evidence 701. Moreover,
25 Defendants themselves rely on other “opinions” and conclusions by Ritchie as part of their
26 Opposition. Opp. at 15.

F. Defendants’ Objection to Exhibit 102 is Moot and Goes to A Non-Material Issue

Defendants object to Exhibit 102 and the corresponding text of Oracle’s Motion as containing inaccurate summaries of testimony and as unfairly prejudicial. Objections at 6.

Mootness: Defendants’ objection to Exhibit 102 is moot. Defendants concede liability for copyright infringement with respect to Oracle’s database software and do not take issue with the instances of copying identified Exhibit 102, thus the Court need not reach the issue at all. Opp. at 5.

Accuracy: Defendants object that Exhibit 102 (and the references to its content on page 9 of Plaintiffs’ Motion) contains “an inaccurate summary of evidence and is thus inadmissible” for the sole reason that Oracle describes installations of Oracle database software by SAP TN as “functional” for certain entries in the compilation. Objections at 6. Defendants assert that the “term [functional] is not used in the underlying data” and that the term is “misleading and mischaracterize[s] the facts” and therefore, “these assertions in the exhibit and in Plaintiffs’ Motion [should be] inadmissible as unfairly prejudicial.” *Id.* at 6-7.

Defendants make no objection to the compilation beyond its use of the term “functional.” This term is not material to the underlying purpose for which the compilation was introduced, namely, to show the (now admitted) infringing copies of Oracle’s database software found on Defendants’ systems. Motion at 9. Oracle used “functional” in place of “installed” in order to avoid confusion between the terms “install media” (software that is not ready for use until installed on a computer) and “installed” (software present on a computer and ready for use). If Defendants object to Oracle’s use of this alternative term for purposes of clarification, Oracle is willing to substitute “installed” for all references to “functional” within the brief and Exhibit 102. But regardless of the semantic debate, Defendants concede liability for infringement of Oracle’s database software. Opp. at 5.

Prejudice: Defendants’ assertion that Exhibit 102 should be excluded as “unfairly prejudicial” due to Oracle’s use of the term “functional” is hyperbole. While Federal Rule of Evidence 403 allows for the exclusion of relevant evidence if its “probative value is

1 substantially outweighed by the danger of unfair prejudice,” Rule 403 is “an extraordinary
2 remedy to be used sparingly” and “the danger of prejudice must not merely outweigh the
3 probative value of the evidence, but must substantially outweigh it.” *United States v. Mende*, 43
4 F.3d 1298, 1302 (9th Cir. 1995). There is simply no such danger here with respect to Oracle’s
5 use of the term “functional” in Exhibit 102.

6 **G. Objections to Exhibits 116 and 117 Are Moot and Constitute**
7 **Improper Legal Argument**

8 Defendants object to Exhibits 116 and 117 because they “purport to identify
9 customers and the amounts of support revenue allegedly lost to TN” and “Plaintiffs reference
10 both exhibits as evidencing the customers and corresponding revenues Plaintiffs allege they lost
11 to TN.” Objections at 7-8. Defendants also object that these exhibits constitute inadmissible
12 hearsay.

13 **Mootness:** Oracle cites Exhibits 116 and 117 to show that its expenses “far
14 exceeded \$5,000” for purposes of demonstrating “loss” under 18 U.S.C. 1030(e)(11).
15 Defendants concede liability on this element. Opp. at 1, 14; Reply at 1. Thus, Defendants’
16 objection is moot. *See, e.g. Assoc. Students of the Univ. of Cal.*, 2007 U.S. Dist. LEXIS 5470 at
17 *7, fn. 3 (declaring objections to evidence moot where “none of the evidence plaintiffs object to
18 [was] relied on by the Court in deciding [the] motion”).

19 **Improper Legal Argument:** Defendants also make a legal argument in their
20 Objections that the evidence of lost profits contained in Exhibits 116 and 117 does not constitute
21 “loss” under the CFAA because “lost profits that are not connected to interruption in service may
22 not be considered for calculation of ‘loss’ under the CFAA.” Objections at 7-8. Substantive
23 legal argument is improper here. *See Hanger Prosthetics & Orthotics, Inc. v. Capstone*
24 *Orthopedic, Inc.*, 556 F. Supp. 2d 1122, 1126 fn.1 (E.D. Cal. 2008) (refusing to consider
25 objections to evidence that were not directed at the evidence itself). This appears to be a
26 misplaced objection based on relevance. The relevance of this evidence is addressed in Oracle’s
27 Motion. Motion at 22-23.

H. Pre-March 1, 2005 Conduct Is Relevant to Oracle's Motion

Defendants state that they “object to all evidence Plaintiffs offer regarding pre-March 1, 2005 conduct alleged to constitute copyright infringement because such evidence is irrelevant and excludable...” Objections at 8. The Court should deny this “objection” for three reasons.

First, the objection is overbroad because Defendants fail to identify any specific evidence which it believes falls into this category, forcing the Court and Oracle to parse through and make the determination on a page-by-page and line-by-line basis. *Id.*

Second, the evidence is clearly relevant on the issue of ownership if Oracle prevails on Defendants’ Cross-Motion, and even if Defendants prevailed on their Cross-Motion regarding OIC’s standing to assert claims for pre-March 1, 2005 infringement of *PeopleSoft and J.D. Edwards copyrights*, Defendants would still have no basis to argue for the exclusion of evidence of infringement of *Oracle database copyrights* that predates March 1, 2005. *See* Reply at 1.

Third, the evidence of pre-March 1, 2005 conduct alleged to constitute copyright infringement – regardless of the Court’s determination on Defendants’ Cross-Motion – is relevant (among other reasons) to show Defendants’ overall level of knowledge, encouragement and material contribution to SAP TN’s business model, and later infringement, in support of Oracle’s contributory infringement claim. *See, e.g., MGM Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 926 (2005) (in evaluating contributory liability, Court considered that “the business models employed by Grokster and StreamCast confirm that their principal object was use of their software to download copyrighted works”); Fed. Rule. Evid. 401 (allowing “evidence having 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.”)

Thus, the Court should deny Defendants’ objection to evidence of pre-March 1, 2005 infringement.

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