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 16

17 UNITED STATES DISTRICT COURT
 18 NORTHERN DISTRICT OF CALIFORNIA
 19 OAKLAND DIVISION
 20

21 ORACLE USA, INC., *et al.*,
 22 Plaintiffs,
 23 v.
 24 SAP AG, *et al.*,
 Defendants.
 25

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

ORACLE'S RESPONSES TO
 DEFENDANTS' OBJECTIONS TO
 EVIDENCE FILED IN SUPPORT OF
 PLAINTIFFS' OPPOSITION TO
 DEFENDANTS' MOTION FOR
 PARTIAL SUMMARY JUDGMENT

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

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1 Plaintiffs Oracle USA, Inc. (now known as Oracle America, Inc.), Oracle
2 International Corporation, Oracle EMEA Limited (“OEMEA”), and Siebel Systems, Inc.
3 (together “Oracle”) respond to Defendants SAP AG’s, SAP America, Inc.’s, and TomorrowNow,
4 Inc.’s (together “Defendants”) Objections to Evidence Filed in Support of Plaintiffs’ Opposition
5 to Defendants’ Motion for Partial Summary Judgment (“Objections or “Objs.”) (Dkt. 693) as
6 follows.

7 **A. The House Declaration Does Not Violate Civil Local Rules 7-**
8 **4(b) & 7-5(b), Nor Does it Violate Rule 56(e)(1) of the Federal**
9 **Rules of Civil Procedure**

10 The House Declaration is consistent with this Court’s Civil Local Rules and the
11 Federal Rules of Civil Procedure. Despite Defendants’ mischaracterizations to the contrary (*e.g.*,
12 Objs. at 1:12-19), the House Declaration does not consist of impermissible arguments or
13 conclusions, but contains only statements of fact and explanatory parentheticals based on the
14 evidence that is attached to the Declaration. That those voluminous cites yield a multi-page
15 declaration does not violate the page limits of the accompanying Opposition. Nor does the fact
16 that, due to the large volume of undisputed and admissible evidence, Oracle organized the House
17 Declaration by subject and provided non-argumentative parenthetical explanations to assist the
18 Court in identifying relevant evidence for each topic. Providing a roadmap for the evidence in
19 support of a motion for the convenience of the Court and the Parties is not only permitted under
20 the local rules and federal rules, it is consistent with the Court’s expressed preference for
21 organization and roadmaps to summary judgment evidence. *See* Transcript of October 28, 2009
22 hearing, Declaration of Joy C. Sherrod ¶ 2, Ex. A thereto, at 2:13-4:22 (“I need a road map [*sic*]
23 with your papers . . . [I]t would certainly help me in terms of being able to devote my time to
24 reading your papers and thinking about your argument.”); *see also* N.D. Cal. Civ. L. R. 7-4(b) &
25 7-5(b); Fed. R. Civ. P. 56(e)(1). Finally, as shown below, nothing in the House Declaration
26 authenticating documents was outside of the declarant’s knowledge. All of Defendants’
27 Objections to the House Declaration and to any of the cited exhibits should be overruled and
28 Defendants’ overbroad request to strike the entire House Declaration rejected.

1 **1. The House Declaration Does Not Violate Civil Local**
2 **Rule 7-5(b)**

3 N.D. Cal. Civ. Local Rule 7-5(b) states that declarations “may contain only facts”
4 and “must avoid conclusions and argument.” The House Declaration is consistent with this rule.
5 It contains non-argumentative factual summaries of the evidence. Defendants’ assertions to the
6 contrary fail.

7 ***OEMEA Evidence Parentheticals.*** First, Defendants assert that the House
8 Declaration contains “impermissible argument and conclusions” because it contains excerpts
9 from Plaintiffs’ Opposition. Objs. at 2:7-12. What Defendants fail to point out is that the House
10 Declaration only excerpts the short umbrella assertions of fact in Plaintiffs’ Opposition as a
11 prelude to show the relevance of the then-cited and attached supporting evidence. For example,
12 House Decl. ¶ 21 starts: “The following attached evidence supports Oracle’s argument at Opp.
13 6:1-3: ‘Each of the three Defendants had meetings *in California* during the relevant period, and
14 SAP TN’s business model, its role in Safe Passage and its expansion into Europe were discussed
15 at some of those.’” This is the exact same format used in each of the paragraphs 7-24 that
16 Defendants cite. Objs. at 2:12. As is clear from this exemplar, the House Declaration makes no
17 conclusion or argument itself – it simply explains what factual assertions from the Opposition the
18 following cited evidence is cited to support. That does not violate Civil Local Rule 7-5(b).

19 Second, Defendants imply that the included parentheticals are impermissibly
20 argumentative. Objs. at 2:11-12. Yet Defendants fail to provide a *single* example of the
21 allegedly offending parentheticals in paragraphs 7-24. The reason is that these parentheticals
22 simply summarize the evidence, often using exact and undisputed quotes.¹ On its face, the
23 _____

24 ¹ For example, in paragraph 10, the House Declaration identifies Exhibit 707 as “December 29,
25 2004 email forwarding a December 28, 2004 email Zepecki sent to various individuals at SAP
26 following his meeting with SAP TN executives detailing his preliminary assessment of SAP TN
27 and identifying ‘access rights to the PeopleSoft software . . . very likely to be challenged by
28 Oracle” as a potential weakness.” Similarly, in paragraph 13, Exhibit 36 is identified as
“January 25-26, 2005 TomorrowNow Integration Meeting PowerPoint presentation listing Seth
Ravin ‘ex-President; Responsible for Business Development & Sales - Pleasanton, CA;’
Business and Resource Planning slide includes this item: ‘Build/Extend Pleasanton [*sic*] Support

(Footnote Continued on Next Page.)

1 House Declaration does not try to explain the significance or meaning of the documents, other
2 than in stating that Oracle cites them in support of the referenced factual umbrella statement in
3 its Opposition. *See* House Decl. ¶¶ 7-24.²

4 **Paragraph 33.** Defendants next contend that paragraph 33 (which authenticates a
5 cited excerpt from the Financial Accounting Standards Board referenced in the Opposition)
6 “contains a stand-alone argument about the meaning of the document attached.” *Objs.* at 2:12-
7 14. Paragraph 33 contains no such “argument”; it simply quotes from the text of the cited
8 Standards (“[f]rom the perspective of the market participant (seller), the price that would be
9 received for the asset is determined based on the cost to a market participant (buyer) to acquire
10 or construct a substitute asset of comparable utility, adjusted for obsolescence”) and then it
11 explains that: “[t]hese accounting standards expressly contemplate SAP’s saved costs in
12 connection with the cost approach to fair market valuation.” *See* House Decl. ¶ 33. A minor
13 explanatory phrase like that does not violate Rule 7-5(b). Nor does that single example begin to
14 support Defendants’ assertion that such explanations “comprise the bulk of the House
15 Declaration.” *Objs.* at 2:16-17.

16 **Inapposite Cases.** Further, the cases Defendants cite in support of their

17 _____
18 (Footnote Continued from Previous Page.)

19 and Development Center (eventually move to Palo Alto => 20+).” The many other
20 parentheticals in the House Declaration are comparably short and accurate descriptions of the
21 cited relevant evidence highlighted in the attached Exhibits. *See* House Decl. ¶¶ 7-24.

22 ² Moreover, in making this argument Defendants ignore their own comparable and indeed far
23 more argumentative (and non-knowledge-based) practice, including in the very Reply
24 Declaration submitted simultaneously with their Objections. *See, e.g.,* Lanier Declaration in
25 Support of Reply to Opp. to MSJ (Dkt. No. 692) at ¶¶ 2-4 (describing the contents of each
26 attached exhibit and some exhibits to the House Declaration and arguing what each means,
27 including, for example, that Ex. 1 purportedly “lists Nick Rawls as a TN Senior Account
28 Executive for the EMEA region, located in Maidenhead, UK, and Hendrik Zwart as a TN Senior
Account Executive for the EMEA region, located in Germany. TN’s counsel, Tom Nolan, is,
and has been at all relevant times, located in Stamford, Connecticut”; that Ex. 69 to the House
Declaration “lists Mr. Dunfee’s location as Pleasanton, California because he reported to Bob
Geib, who was located in Pleasanton, California. Mr. Dunfee’s actual location was Ohio, as
listed in the TN organization chart produced at TN-OR00000007”; the dates Mr. Lanier believes
that the contracts attached as Exs. 2 and 4 “became effective”; and that Ex. 3 “indicat[es] that
Harley-Davidson was a customer of SAP at least as early as December 9, 2005”).

1 objections are inapposite. *Id.* at 1-2. In *Brae Asset Funding*, the Court struck two declarations,
2 which were both unsigned and late. *Brae Asset Funding, L.P., v. Applied Fin., LLC*, No. 05-
3 02490 WHA, 2006 WL 2355474 (N.D. Cal. Aug. 14, 2006). The Court provided further
4 reasoning for striking the Christensen Declaration – it was “full of legal argument and
5 conclusions by the hearsay declarant” in violation of Rule 7-5(b) and referred “throughout to
6 exhibits that were never filed.” *Id.* at *5. In addition to being filed timely and properly e-signed,
7 the House Declaration does not contain improper legal argument, conclusions or hearsay, nor
8 does it refer to exhibits that were not filed. Instead, the House Declaration contains factual
9 descriptions of exhibits that were specifically attached to the Declaration to aid the Court in
10 discerning the relevant facts from the underlying documents. The *Brae Asset Funding* case does
11 not apply here.

12 Nor does the House Declaration resemble the declaration in *Page v. Children’s*
13 *Council*. In *Page*, the Court struck paragraphs 2-10 of a declaration because it “*simply repeats*
14 *portions of the Plaintiff’s memo in support of her Motion to Remand.*” *Page v. Children’s*
15 *Council*, No. C 06-3268 SBA, 2006 WL 2595946, at *5 (N.D. Cal. Sept. 11, 2006) (emphasis
16 supplied). Unlike in *Page*, where the memorandum was “*simply*” repeated and was therefore
17 “*unnecessary and duplicative,*” the House Declaration refers to portions of Oracle’s Opposition
18 only to provide a roadmap linking the attached evidence to the Opposition Brief, not to make any
19 legal argument. *Id.* Similarly, the *Page* Court struck paragraph 17 of the declaration, because it
20 contained clear argument “*that [defendant] was not entitled to participate in the litigation . . . so*
21 *the Court lacks subject matter jurisdiction and should remand to the state court.*” *Id.* Defendants
22 cite no similar legal argument in the House Declaration, as there is none.

23 Finally, the *Brew* case is also inapposite. *See* *Objs.* at 2; *see also Brew v. City of*
24 *Emeryville*, 138 F. Supp. 2d 1217, 1227 (N.D. Cal. 2001). In *Brew*, the plaintiff submitted a
25 declaration from a declarant who admitted that “*he was out of the country*” on the date of the
26 incident, which was “*the sole basis for plaintiff’s claims.*” 138 F. Supp 2d at 1227. The Court
27 struck the declaration pursuant to Fed. R. Civ. P. 56(e), concluding that the declarant’s “*previous*
28 *or later observations have no relevance,*” and that the declaration contained “*hearsay, lack[ed]*

1 foundation, and form[ed] conclusions as opposed to stat[ing] facts.” *Id.* In contrast to *Brew*, the
2 House Declaration does not contain hearsay, legal conclusions or statements without foundation.
3 Parenthetical factual summaries submitted to be helpful and explain the relevance of the
4 evidence to Oracle’s Opposition do not run afoul of Rule 7-5(b) or Fed. R. Civ. P. 56(e).

5 The Court should deny Defendants’ Objection that the House Declaration violates
6 Local Rule 7-5(b).

7 **2. The House Declaration Does Not Violate Civil Local**
8 **Rule 7-4(b)**

9 Defendants next baldly claim that including in a declaration “argumentative
10 parentheticals” identifying the attached evidence that are not otherwise in the briefing
11 “undermines [the] page limits” of N.D. Cal. Civ. L. R. 7-4(b). *Objs.* at 2:25-26. But the rule on
12 its face does not apply to declarations in support of opposition briefs, and Defendants cite no
13 case holding that it does. Moreover, their argument would preclude the Court’s consideration of
14 any non-argumentative factual descriptors contained in declarations, which is not the law and
15 runs counter to the Court’s above-cited request for roadmaps to assist in complicated filings.

16 There is no recognized penalty for including parenthetical evidence summaries in
17 declarations attaching the underlying evidence – let alone the penalty of preclusion of the
18 underlying evidence that Defendants’ request. Rather, Defendants’ cases concern exclusion of
19 improper arguments in declarations. But, as explained above, Defendants fail to identify a single
20 parenthetical that is argumentative. Nor do or can they explain how including plain summaries
21 of evidence in parentheticals does anything but assist the Court.

22 Moreover, Defendants’ argument that factual summaries undermine the pleading
23 page limits would preclude any evidence in a declaration that was not fully contained and
24 described in the body of the brief itself. This is not the law nor is it the parties’ practice. This is
25 shown by the Lanier Declaration in support of Defendants’ MSJ cited in footnote 2 above, as
26 well as by, *e.g.*, the Rule 1006 summary of evidence in support of Defendants’ MSJ included
27 within the Wallace Declaration. While the Wallace Declaration’s Rule 1006 summary is
28 improper for a number of reasons, described in Oracle’s Objections to Evidence (Dkt. No. 682),

1 the page limit requirement for briefs under Rule 7-4(b) is not and should not be one of them.
2 Yet, by SAP’s own argument, both these Declarations (and others they have made in the case)
3 would undermine the page limits, and be excluded.

4 In short, the inclusion of parenthetical summaries of factual evidence in the House
5 Declaration for the convenience of the Court and the Parties does not violate Local Rule 7-4(b)
6 and the Court should deny Defendants’ objection on that basis.

7 **3. The House Declaration Does Not Violate Federal Rule**
8 **of Civil Procedure 56(e)(1)**

9 Defendants’ next objection that the House Declaration violates Rule 56(e)(1) is
10 similarly without merit. Rule 56(e)(1) requires that declarations in support of summary
11 judgment motions “be made on personal knowledge” and “show that the affiant is competent to
12 testify on the matters stated.” Fed. R. Civ. P. 56(e)(1). The House Declaration satisfies the
13 standard. All three arguments that Defendants make in support of their claim that the House
14 Declaration violates Rule 56 fail.

15 First, Defendants claim that the House Declaration “contains many statements for
16 which Ms. House cannot possibly demonstrate the requisite personal knowledge,” but the small
17 excerpts Defendants cite do not support their claim and are taken out of context. *Objs.* at 2:7-16.
18 For example, Defendants argue that the House Declaration “purports to state what one SAP
19 employee allegedly ‘asked’ another employee to do in 2004.” *Id.* at 3:15-16. The House
20 Declaration “purports” to do no such thing. The House Declaration summarizes the facts from a
21 long string of testimony attached to the Declaration, using actual quotes from the documents:
22 “Agassi asked Zepecki to join the SAP TN acquisition team ‘asap’ and tasked him with assessing
23 SAP TN’s business model and ‘identify[ing] any risks.’ Zepecki then met with SAP TN
24 executives, ‘quizzed’ them on ‘more tactical things,’ and provided his findings to Agassi and the
25 SAP board.” *House Decl.* ¶ 9. Moreover, the declarant does not, as Defendants claim, need to
26 demonstrate personal knowledge of “the interactions between two SAP employees,” only
27 personal knowledge of the source and accuracy of the cited, quoted and attached testimony to the
28 Declaration. Defendants do not and cannot dispute that the House Declaration properly does

1 that. *See, e.g.*, House Decl. ¶ 3.

2 Second, Defendants claim that “Ms. House purports to detail what various
3 individuals did, what those individuals ‘were involved in,’ where they lived and/or worked, who
4 they ‘communicated with,’ and even what an organization’s ‘key goal has always been.’” *Objs.*
5 at 3:21-24. They ignore that the complained-of detail arises directly from the properly
6 authenticated and admissible evidence and quotes from Defendants’ own employee testimony
7 and discovery responses, which Defendants then take out of context. For example, for the
8 description of Exhibit 41 (SAP AG’s Fourth Amended and Supplemental Responses to Oracle
9 Corp.’s 1st Set of Interrogatories, Response to Interrogatory No. 3), the House Declaration
10 states: “Zepecki and Agassi were involved in investigation and due diligence associated with the
11 acquisition of SAP TN.” House Decl. ¶ 9. The interrogatory response – an admission by
12 Defendants – confirms this simple factual recitation, and Defendants do not dispute it. The
13 House Declaration confirms that a true and correct copy of the document itself containing those
14 facts is attached. *Id.* ¶ 3. Personal knowledge of the source of the factual statements quoted is
15 all that is required, and that is exactly what the House Declaration sets forth.

16 Third, Defendants mischaracterize the House Declaration in claiming that it
17 “purport[s]” to know where various individuals lived and/or worked. *Objs.* at 3:22-23. In
18 reality, the House Declaration again just describes the factual statements in various (mostly
19 Defendant-produced) documents showing where certain SAP/TN employees were located. For
20 example, the House Declaration provides the following factual Exhibit summaries: Exhibit 19
21 (“Agassi has been a resident of California since 1995”); Exhibit 33 (“confirming Trainor’s office
22 was located in Palo Alto”); and Exhibit 55 (“March 16, 2005 meeting request from Faye to
23 Andrew Nelson to discuss post-acquisition action items . . . Faye’s signature block confirms his
24 office was located in Palo Alto, CA”). House Decl. ¶¶ 9, 11. Those plain descriptions of
25 relevant and undisputed facts contained in the attached documents are based on the attached
26 Exhibit itself. Nor (in contrast to the Lanier Declaration described in footnote 2 above) does the
27 House Declaration “purport” to establish direct knowledge of what Defendants’ employees were
28 “involved in” or “communicated.” *Objs.* at 3:22-23. For example, the description of Exhibit 38

1 (“Crean and Faye were involved in the drafting, review and promulgation of the Rules of
2 Engagement”) is a nearly verbatim recitation of TomorrowNow’s 8th Amended and
3 Supplemental Response to Interrogatory No. 6, just as the description of Exhibit 41 (“Faye
4 communicated with TN employees about policies, procedures, practices or abilities related to
5 downloading materials from Customer Connection”) is a recitation of SAP AG’s Fourth
6 Amended and Supplemental Response to Interrogatory No. 4. House Decl. ¶ 11 and Exs. 38 and
7 41 thereto.

8 In short, all of the complained-of content in the House Declaration is non-
9 argumentative, non-conclusory, undisputed factual recitations from Defendants’ own documents,
10 testimony and discovery responses. Defendants’ unsupported request that the Court not consider
11 such descriptions – let alone not consider the underlying admissible and relevant evidence –
12 should be denied.

13 **4. Defendants’ Request to Exclude the House Declaration**
14 **Should Be Denied Because it is Overbroad**

15 Though the Court should deny Defendants’ request to exclude the House
16 Declaration pursuant to Local Rules 7-4 and 7-5 and Federal Rule of Civil Procedure 56(e) on
17 the merits, their request should also be denied because it is overbroad. Defendants raise specific
18 objections to only certain portions of the House Declaration, yet they request the Court exclude
19 the entire declaration, or in the alternative, ¶¶ 7-24 and 33 of the Declaration. Objs. at 4:1-7.
20 The Court should deny Defendants’ overbroad requests.

21 Even if Defendants could support their argument that any specific parentheticals
22 in the House Declaration could or should not be considered (which they do not) or that any
23 statement in the House Declaration was beyond the declarant’s knowledge (which they also do
24 not), as set forth below, the law is clear that only those specifically objectionable statements in
25 the Declaration should be stricken. Yet Defendants would have the Court strike the entire House
26 Declaration – including the attached underlying evidence about which they do not and cannot
27 object. This would deny the Court the ability to determine the merits of Defendants’ MSJ on the
28 undisputed evidence and would be unfair and unprecedented.

1 Moreover, Defendants’ suggested remedy – the exclusion of the entire House
2 Declaration – is overbroad on its face. Defendants make no specific objection to paragraphs 1-6,
3 25-32 and 34-43 of the House Declaration, yet ask the Court to strike the entire House
4 Declaration purportedly because “the bulk . . . contains objectionable material.” Objs. at 4:1.
5 That is not how evidentiary objections work. *See, e.g., Tijerino v. Regents of the Univ. of Cal.*,
6 No. C-95-0598 MMC, 1996 U.S. Dist. LEXIS 18938, at *7-8 (N.D. Cal. Dec. 16, 1996) (denying
7 a motion to strike an entire declaration despite argument “that the allegedly inadmissible
8 evidence contained therein ‘so predominate[s] [the] Declaration’” even though the declaration
9 contained “a substantial quantity of inadmissible evidence”); *Heiberg v. United States*, No. CS-
10 94-0167-FVS, 1994 U.S. Dist. LEXIS 17090, at *2-3 (E.D. Wash. Nov. 15, 1994), *aff’d by* 87
11 F.3d 1319 (9th Cir. 1996) (declining to strike declarations in their entirety and instead striking
12 only those portions specifically objected to); *Highland Dev., Inc. v. Duchesne County*, 505 F.
13 Supp. 2d 1129, 1135 n.11, 1148 n.30 & n.32 (D. Utah 2007) (declining to strike declaration in its
14 entirety and instead striking specific paragraphs on the basis that those portions lacked
15 foundation, were argumentative and/or were speculative); *see also Allegro Corp. v. Only New*
16 *Age Music, Inc.*, No. 01-790-HU, 2002 U.S. Dist. LEXIS 27449, at *4-5 (D. Or. Oct. 4, 2002)
17 (declining to strike declaration in its entirety and instead striking those portions that “contain
18 legal arguments and conclusions, and those portions which refer to facts not part of the
19 summary judgment record”).³

20 Finally, even if Defendants had some legitimate argument against some statement
21 in or exhibit to the House Declaration (which they do not), they do not provide the Court or
22 Oracle the means to apply the appropriate excising approach. They completely fail to identify
23

24 ³ Even as to the paragraph 33, the one paragraph where Defendants make a specific argument,
25 Defendants over-request. They ask that the Court strike all of paragraph 33 because of one
26 allegedly objectionable sentence that provides context for a quoted and attached accounting
27 standards document. Objs. at 2:12-16 & 4:3-6. But the explanatory sentence is only part of the
28 paragraph, and if the Court were to find that sentence improper, per the above-cited cases, the
appropriate remedy would be to strike that sentence, not the whole paragraph or the attached
evidence.

1 with specificity the portions of the House Declaration that are objectionable, instead referencing
2 an undifferentiated 21 pages and the Index. Objs. at 4:1-2. It is not Oracle’s or the Court’s
3 obligation to do Defendants’ work on a motion and to sift through that undifferentiated mass to
4 find what may actually be objectionable. *Andrews v. Whitman*, No. 06-2447-LAB (NLS), 2009
5 WL 857604, at *10 (S.D. Cal. Mar. 27, 2009) (“Objections must be specific, not vague and
6 general . . .”). Rather, Defendants were to clearly cite the specific statements in the House
7 Declaration and the specific attached exhibits to which they objected and the bases for each such
8 objection. *See id.*

9 In sum, Defendants do not attempt to appropriately tailor their objections, but
10 instead seek an overbroad remedy which neither the law nor the facts support. The Court should
11 deny Defendants’ overbroad request to strike the House Declaration in its entirety, including its
12 alternative request to strike paragraphs 7-24 and 33. Rather, should the Court find any portion of
13 the House Declaration improper or any exhibit to it inadmissible, it should strike only that
14 limited portion of the Declaration or that limited evidence.

15 **B. The Documents Oracle Submitted as Proof That OEMEA’s**
16 **Claims Are Properly Before This Court and Relevant**

17 Faced with overwhelming evidence that OEMEA’s claims are properly before this
18 Court and that OEMEA’s claims have an ample nexus to Defendants’ California conduct,
19 Defendants nonetheless argue in their Objections that evidence of Defendants’ extensive
20 California contacts and conduct is irrelevant. Obj. at 4:8-5:28.⁴ Not so. The documents and
21 testimony Oracle submitted in support of Section III of its Opposition establish that, contrary to
22 Defendants’ assertion, OEMEA’s claims are not “wholly extraterritorial” and that any conduct
23 by Defendants giving rise to OEMEA’s claims occurred in California, which is the admitted
24 legal test. *See* MSJ at III.A, & B; Opp. to MSJ at III.C (citing, *e.g.*, *Diamond Multimedia Sys.*,

25 ⁴ The proper place for such argument was in Defendants’ MSJ Reply, but Defendants instead
26 flout the 15-page limitation of Civ. L-R 7-4(b) by making these arguments here. This approach
27 is inconsistent with Defendants’ criticism of Oracle for purportedly evading the MSJ Opposition
28 page limits by including factual descriptors of evidence (not argument such is made here) in the
House Declaration.

1 *Inc. v. Superior Court*, 19 Cal. 4th 1036, 1059 (1999) (anyone who has suffered harm “from
2 unlawful acts or omissions in California may recover damages [in California] from the person at
3 fault”). As explained in Oracle’s MSJ Opposition and again briefly below, the business
4 practices and decisions by Defendants which the cited evidence links to California caused
5 OEMEA’s ultimate customer losses just as they caused the customer losses of other Oracle
6 plaintiffs in the United States about which Defendants do not dispute jurisdiction. Given the
7 relevance of the cited evidence to the admitted legal test, the objected-to evidence is clearly
8 relevant. *See* Fed. R. Evid. 401, 402.

9 For the reasons identified below, all of Defendants’ objections to the evidence
10 Oracle submitted in support of Section III of its Opposition should be denied.

11 ***Evidence of Defendants’ California Operations:*** Exhibits 46, 53, 57, 58, 96, 97,
12 and 473 show that, during the relevant period, Defendants had board and other meetings in
13 California where the very SAP TN business practices that allowed the SAP Defendants to hurt
14 Oracle and take away customers (including OEMEA customers) were discussed; Exhibits 210
15 and 225 show that SAP and SAP TN had offices in California; Exhibits 1 (¶ 106), 19, 21, 22, 23,
16 33, 44, 395, 738 show that SAP and SAP TN not only had employees in California, but that SAP
17 and SAP TN employees relevant to the success of SAP’s plans to hurt Oracle through SAP TN
18 were located in California. All these Exhibits demonstrate that SAP and SAP TN had a
19 significant presence in California and that the harm that OEMEA suffered originated in
20 substantial part from the business operations and conduct of SAP’s and SAP TN’s California-
21 based employees. Moreover, Exhibit 738 also demonstrates that California-based SAP Board
22 member, Shai Agassi, likened the purchase of SAP TN to a “bomb going off on the eleventh
23 floor” [of Oracle’s California headquarters]; this document and all those discussed above are also
24 relevant because they are probative of whether SAP/TN had a reasonable expectation that
25 California law would govern OEMEA’s claims. *Cf. Roesgen v. Am. Home Prods. Corp.*, 719
26 F.2d 319, 321 (9th Cir. 1983) (California Supreme “[C]ourt w[ould] decline to apply California
27 law when the facts indicate that the parties’ only reasonable expectations were that the law of a
28 foreign state would apply.”). The Court should deny Defendants’ objections to this evidence.

1 *Evidence Regarding John Zepecki and Shai Agassi's Role in the TN*

2 **Acquisition:** Defendants next assert that Exhibits 19, 22, 32, 35, 36, 41, 208, 212, 219, 225, 390,
3 392, 395, 707 and 738 are irrelevant because SAP and SAP TN did not market or provide
4 support to OEMEA customers until after the acquisition. Objs. at 5:5-11. In making this
5 objection, Defendants mischaracterize the evidence and the relevant inquiry. First, much of the
6 evidence cited above relates specifically to the critical actions of California-based SAP Board
7 member Shai Agassi and SAP Vice President John Zepecki. This evidence shows that highly
8 positioned SAP executives assessed the legality of TN, suspected TN was misusing Oracle's IP
9 and advised the SAP Board before they decided to nonetheless acquire TN that this activity was
10 "very likely to be challenged by Oracle." *See e.g.*, House Decl. Exs. 19, 32, 35, 36, 41, 208, 212,
11 219, 225, 390, 392, 395, 707 and 738. These documents show that SAP's California executives
12 knew about the improper business practices that eventually led to Oracle customer losses
13 (including OEMEA customer losses) and that they anticipated the TN acquisition would lead to
14 legal action by Oracle and that both SAP and OEMEA (as an Oracle subsidiary) would
15 reasonably expect that the Oracle parent company headquartered in California would control this
16 litigation. *Cf. Hertz Corp. v. Friend*, No. 08-1107, 130 S. Ct. 1181, 1185-86 (2010) (holding that
17 jurisdictional phrase "principal place of business" means the place where the corporation's high
18 level officers direct, control, and coordinate the corporation's activities). For these reasons, the
19 evidence is relevant and the Court should deny Defendants' objections to it.

20 *Evidence of Seth Ravin's Role in Developing the TN Business Model and*

21 **Involvement in SAP TN:** Defendants objections to Exhibits 36, 40 and 455 mischaracterize
22 those Exhibits by describing them simply as "[e]vidence regarding Seth Ravin." Objs. at 5:12-
23 16. But Exhibits 36, 40 and 455 evidence his roles in TN and then SAP TN and the resulting
24 harm to OEMEA. These exhibits show that Seth Ravin was the architect of TN's illegal business
25 model, was instrumental in the integration of TN into SAP and that SAP planned to expand the
26 existing TN office (where Mr. Ravin worked) to Palo Alto. These exhibits also show that the
27 harm to OEMEA was conceived and orchestrated by California employees and that SAP TN had
28 a significant presence in California; thus, SAP and SAP TN cannot claim surprise at having to

1 defend themselves in California. The Court should also deny Defendants’ objections to these
2 relevant exhibits.

3 ***Evidence that SAP/TN’s legal advice came from their California lawyers:***

4 Defendants ask the Court to exclude Exhibits 21, 22, 39, 40 and 41 claiming “legal advice
5 regarding acquisition due diligence, given by SAP’s California-based attorneys and pre-dating
6 OEMEA’s claims is irrelevant to whether a sufficient nexus exists between the alleged California
7 conduct and OEMEA’s claims.” Objs. at 5:17-20. To the contrary, these documents show that
8 SAP’s California based attorneys knew about TN’s bad business practices and directed the initial
9 actions – and inactions – of all Defendants as concerns those practices. This is the very
10 unchecked conduct that caused all the Oracle plaintiffs’ ultimate harm. Defendants next ask the
11 Court to ignore Exhibits 21, 22, 23, 28, 33, 34, 38, 86, 87, 97 and 1684, claiming these exhibits
12 showing admitted “legal advice by [SAP] California lawyers are irrelevant because they do not
13 evince any connection between the lawyers and EMEA, or the legal advice and OEMEA’s
14 claims.” Objs. at 5:20-23. Again, Defendants are being obtuse. These exhibits show the
15 continued, pivotal role of SAP’s California lawyers in the central matters of the case, and the
16 impact of what they did and did not do on the continued harm to Oracle through SAP TN’s
17 illegal business model. In other words, this evidence demonstrates a nexus between SAP TN’s
18 continued misdeeds, supervised by SAP’s California attorneys and the resulting harm to
19 OEMEA. This evidence is also relevant and the Court should deny Defendants’ objections to it.

20 ***Evidence Regarding Safe Passage:*** Defendants argue that Exhibits 22, 24, 36,

21 41, 54, 59, 436, 473, 934 and 1684 do not demonstrate “any connection between California and
22 OEMEA’s claims and/or they pre-date OEMEA’s claims.” Here again, Defendants
23 mischaracterize the evidence. These exhibits demonstrate that Safe Passage – SAP’s marketing
24 program against Oracle with SAP TN as its “cornerstone” – was designed by SAP’s California
25 employees to wrongfully interfere with Oracle’s (and OEMEA’s) customers. They also
26 demonstrate that SAP TN was integral to the Safe Passage program. Therefore, these Exhibits
27 are relevant and the Court should deny Defendants’ objections to them.

28 ***“Other” Documents:*** In this catch-all objection, Defendants ask the Court

1 exclude Exhibits 48, 52, 63, 71, 82, 83 and 84 on the nebulous contention that these exhibits “fail
2 to demonstrate any nexus between California and OEMEA’s claims.” Objs. at 5:27-28. The
3 Court should not entertain this objection because it is overbroad and conclusory. To the extent
4 Defendants had a legitimate objection to any of these exhibits, they failed to make it here and,
5 again, it is not Oracle’s or the Court’s job to parse the evidence and do Defendants’ objections
6 for them. *Whitman*, 2009 WL 857604, at *10. Moreover, on their face, these exhibits
7 demonstrate that OEMEA’s customer relationships were wrongfully interfered with by several
8 SAP and SAP TN California employees. Exhibit 48 shows that the California-based SAP
9 executive in charge of the Safe Passage program, Terry Hurst, approved inviting “the 5 VP’s
10 from [OEMEA Customer] Baxter to the Safe Passage Executive Breakfast.” Exhibit 52 shows
11 that OEMEA customer Harley Davidson was (California SAP employee) Brian Dudley’s
12 account. Exhibit 63 is an SAP Apollo Safe Passage Message Brief, listing OEMEA customer
13 Holland Casino as a “Safe Passage Mentionable Customer.” Exhibits 71, 82, 83 and 84 all
14 demonstrate that California SAP TN employee Bob Geib was heavily involved in luring and
15 keeping (OEMEA customer) Baxter. None of these relevant Exhibits should be excluded.

16 **C. Exhibit 5 to the House Declaration Should Not Be Excluded**
17 **And Defendants’ Objection to Exhibit 5 Constitutes Improper**
18 **Legal Argument**

19 Paragraph 27 of the House Declaration identified the attached Exhibit 5 as a true
20 and correct copy of an article authored by a colleague of Defendants’ damages expert on the
21 *Mars v. Coin Acceptors* case that Defendants cite in their opening brief on the topic of its use in
22 the hypothetical license negotiation that defendants continue to attack. *See* MSJ (Dkt. No 640) at
23 6:27-28; 17:2-19:17. Oracle cites to this article for the author’s analysis of cases relevant to
24 quantification of the fair market value license amount the Court has already ruled Oracle may
25 seek, which is the very legal issue Defendants have put into play with their repeated argument
26 against the relevance of avoided costs as a metric for that valuation. *See* MJS Opp. (Dkt No.
27 677) at 12:9-23.

28 In the first place, that Defendants attack the practice of relying on and attaching
cited third party legal commentary is both unsupported and disingenuous, given that Defendants

1 liberally rely on and attach to their declarations such analysis. *Compare with* Lanier Decl. in
2 Support of MSJ (Dkt. No. 641 at Exs. V, W and X) (attaching cited excerpts of *Black’s Law*
3 *Dictionary, Fletcher’s Cyclopedia of the Law of Private Corporations* and Smith & Parr’s
4 *Intellectual Property Valuation* treatise); Lanier Declaration in Support of Reply re MSJ (Dkt.
5 No. 692) at Exs. 31-34 (attaching cited excerpts of *Milgram on Trade Secrets, Nimmer on*
6 *Copyright, Patry on Copyright* and Smith & Parr’s *Intellectual Property Valuation* treatise).

7 Second, contrary to Defendants’ assertion (Objs. at 6:10-21), Exhibit 5 is not out
8 of court hearsay being used to prove facts in this case; indeed, the author has no connection to
9 this litigation and offers no analysis of the facts in this case. Rather, per paragraph 2 of the
10 House Declaration, Oracle attaches the article for the Court’s convenience in making its legal
11 analysis. As with all cited authorities, the Court can and will give whatever weight to the
12 analysis it deems appropriate.⁵

13 Moreover, it is absurd to argue that a party cannot rely on such third party legal
14 commentary in a brief without disclosing the authors as retained experts, as Defendants next
15 argue Oracle failed to do. Objs. at 6:22-7:7. Not surprisingly, the only authority in support,
16 *Zottola v. City of Oakland*, 32 Fed. Appx. 307, 313 (9th Cir. 2002) is inapposite, standing only
17 for the recognized rule that expert testimony cannot come at trial from a lay witness not
18 otherwise disclosed as an expert. Further, pursuant to Ninth Circuit Rule 36-3, this unpublished
19 case may not be cited.

20 Defendants’ final argument that Exhibit 5 should be stricken as irrelevant (Objs.
21 at 7:8-23) is belied by its reference to the *Mars* case Defendants cite and its explanation of why
22 avoided costs are highly relevant to fair market valuation of a hypothetical license – which
23 counters the very argument Defendants again make. Moreover, Oracle objects to this

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25 _____
26 ⁵ Defendants’ only purported legal support for their claim that Exhibit 5 is hearsay is *In re*
27 *Cygnus Telecomms. Tech., LLC Patent Litig.*, No C-04-04247 RMW, 2007 WL 2261543, at *3
28 n.6 (N.D. Cal. Aug. 6, 2007), an inapposite case where the Court ruled that a party’s attempt to
use an article’s analysis of the facts of the explicit case at hand (“that AT & T’s Multi-Option
Calling Plan infringed the patents-in-suit”) was inadmissible hearsay.

1 “irrelevance” argument as an improper attempt to expand upon the 15-page limit on reply briefs.
2 If Defendants wanted to dispute the relevance of the Tomlin commentary to the arguments in
3 play in their MSJ, that is where that argument belonged. Defendants’ substantive legal argument
4 against Exhibit 5 is improper here and should not be considered. *See Hanger Prosthetics &*
5 *Orthotics, Inc. v. Capstone Orthopedic, Inc.*, 556 F. Supp. 2d 1122, 1126 n.1 (E.D. Cal. 2008)
6 (refusing to consider objections to evidence that were not directed at the evidence itself).

7 **D. The Cited News Articles (Exhibits 44-46) Are Not Hearsay**
8 **and/or Are Redundant of Undisputed Facts**

9 Defendants final objections concern articles confirming facts about California
10 connections that Defendants do not dispute: namely that, at the relevant time, former SAP AG
11 board member Shai Agassi was a California resident and that the SAP AG board had board
12 meetings in California. Specifically, Exhibit 44 is an interview with Shai Agassi while he was an
13 SAP AG board member; the relevant portions confirming his California connection are direct
14 quotes from Mr. Agassi and constitute party admissions. *See Fed. R. Evid. 801(d)(2)*.
15 Moreover, those admissions are confirmed in the numerous other pieces of evidence Oracle
16 cited and to which Defendants do not object. *See House Decl.* ¶ 7.

17 Exhibits 45 and 46 simply state what Defendants’ counsel Scott Cowan has
18 already confirmed in court: that SAP AG holds Board meetings in Palo Alto California. *See*
19 *Dkt. No. 176 (August 28, 2008 Discovery Hearing before Magistrate Judge Elizabeth LaPorte)* at
20 42:13-19. Oracle cited and attached that admission and other evidence supporting this
21 undisputed fact in paragraph 21 to the House Declaration. Defendants’ objections thus have no
22 impact and are unnecessary make-work for the Court, which can and should take judicial notice
23 of the articles pursuant to Federal Rule of Evidence 201(b) as further confirmation of the
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1 undisputed fact that SAP held Board meetings in California during the relevant period.

2 DATED: April _____, 2010

Bingham McCutchen LLP

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4 By: _____

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Attorneys for Plaintiffs

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SYSTEMS, INC.

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