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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 OBJECTIONS TO EVIDENCE FILED IN SUPPORT OF DEFENDANTS' REPLY TO ORACLE'S OPPOSITION TO DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND TO DEFENDANTS' UNTIMELY REPLY IN SUPPORT OF "CROSS MOTION" FOR 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 (1) to certain portions of the Reply in Support of Motion for Partial Summary Judgment of Defendants SAP AG, SAP America Inc., and TomorrowNow, Inc. (together, "Defendants"), Dkt No. 691 (the "Reply"); (2) to portions of the Declaration of Tharan Gregory Lanier filed in Support of the Reply, Dkt No. 692 (the "Lanier Declaration"), and specifically to Exhibits 2, 3, 4, 6 and 7 to the Lanier Declaration; and, (3) to Defendants' Reply in Support of Cross Motion for Partial Summary Judgment, Dkt No. 670, filed on April 21, 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.

I. DEFENDANTS OFFERED INADMISSIBLE EVIDENCE IN SUPPORT OF THEIR SUMMARY JUDGMENT REPLY, INCLUDING INADMISSIBLE EXHIBITS AND DECLARATION STATEMENTS

"It is well settled that only admissible evidence may be considered by the trial court in ruling on a motion for summary judgment." *Beyene v. Coleman Sec. Servs., Inc.*, 854 F.2d 1179, 1181 (9th Cir. 1988). Oracle hereby requests that the Court not consider paragraphs 2, 3, 4, 6, and 7 of the Lanier Declaration in support of the Reply, and the corresponding attached Exhibits 1, 2, 3, 4, 6 and 7 because they are inadmissible.

First, these paragraphs and Exhibits constitute new evidence presented for the first time in Defendants' Reply. This is improper. *Stickle v. SCI W. Mkt. Support Ctr., L.P.*, No. 08-083-PHX-MHM, 2009 WL 3241790, at * 4 (D. Ariz. Sept. 30, 2009) ("The rule that a moving party must present all of its evidence or raise all of its legal arguments in a substantive brief, rather than in reply, is a rule rooted in the notion of fairness between parties. Each time the moving party is permitted to raise new arguments or present new evidence in reply . . . the non-moving party is essentially deprived of the opportunity to address these new contentions."); *accord Charles O. Bradley Trust v. Zenith Capital LLC*, No. 04-02239 JSW, 2008 WL 3400340, at *6 n.2 (N.D. Cal. Aug. 11, 2008); *Hamilton v. Willms*, No. 02-CV-6583 AWI SMS, 2007 WL 2558615, at *11 (E.D. Cal. Sept. 4, 2007) ("The court cannot grant a motion on a new argument or new evidence presented for the first time in a reply brief.").

Oracle further objects to paragraphs 2, 3, 4, 6, and 7 of the Lanier Declaration in support of the Reply, and the corresponding attached Exhibits 2, 3, 4, 6 and 7 as inadmissible because: (1) Exhibits 2, 3 and 4 are not properly authenticated; (2) Exhibits 2, 3 and 4 are inadmissible hearsay; (3) Exhibits 6 and 7 are irrelevant to the Reply, and (4) insofar as the Lanier Declaration asserts facts about which Mr. Lanier has no personal knowledge. *See* Fed. R. Evid. 401, 402; Fed. R. Civ. P. 56(e)(1); *Beyene*, 854 F.2d at 1181-82.

SPECIFIC OBJECTIONS TO REPLY BRIEF EVIDENCE

LANIER DECLARATION, EXHIBITS 2, 3, 4	
MATERIAL OBJECTED TO	**GROUNDS FOR OBJECTION**
Exhibits 2, 3 and 4 to the Lanier Declaration at ¶¶ 2-4, and Reply at 12:13-14, 13:1 & n.20 & n.26 (citing same).	***Exhibits 2, 3 and 4*** Oracle objects to Exhibits 2, 3 and 4 to the Lanier Declaration because Defendants do not properly authenticate these documents. According to the Lanier Declaration, Exhibits 2, 3 and 4 are documents produced by Defendants – not Oracle – during discovery in this matter. Lanier Decl., ¶¶ 3-4. This assertion alone is insufficient to establish the authenticity of the documents. *See, e.g.*, Fed. R. Evid. 901 (suggesting means of properly authenticating document). Courts have accepted the authenticity of documents produced by the opposing party in litigation as statements of party opponents, but that is not the case here. *Cf. Maljack Prods., Inc. v. Goodtimes Home Video Corp.*, 81 F.3d 881, 889 n.12 (9th Cir. 1996). Here, Defendants have offered their own self-serving documents produced during discovery without properly authentication. Unauthenticated documents and documents for which an inadequate foundation has been laid cannot be considered to oppose a motion for summary judgment. *See Orr v. Bank of Am.*, 285 F.3d 764, 773-78 (9th Cir. 2002) (affirming summary judgment where plaintiffs' opposing evidence was unauthenticated and therefore inadmissible). Oracle accordingly objects to Exhibits 2, 3 and 4 on this basis. In addition, Exhibits 2, 3 and 4, constitute inadmissible hearsay and do not satisfy any exception to the hearsay rule. Fed. R. Evid. 802. Defendants offer Exhibits 2, 3 and 4 to prove "the truth of the matter[s] asserted." Fed. R. Evid. 801(c). This is impermissible. Fed. R. Evid. 802.

LANIER DECLARATION, EXHIBITS 2, 3, 4	
MATERIAL OBJECTED TO	**GROUNDS FOR OBJECTION**
	Finally, Mr. Lanier does not have personal knowledge that would allow him to make certain factual assertions and/or interpret the Exhibits as he does in his Declaration. *See* Lanier Decl. ¶ 2 (stating that "TN's counsel, Tom Nolan, is, and always has been at all relevant times, located in Stamford Connecticut"; stating that "Exhibit 60 lists Mr. Dunfee's location as Pleasanton, California" but that his "actual location was Ohio."); *id.* ¶ 3-4 (attesting to the purported dates that the attached documents "became effective"); Fed. R. Civ. P. 56(e)(1).

LANIER DECLARATION, EXHIBIT 6	
MATERIAL OBJECTED TO	**GROUNDS FOR OBJECTION**
Excerpts from the deposition of Bob Geib, Exhibit 6 to the Lanier Declaration at ¶ 6, and Reply at 10:21-22 (citing same).	***Exhibit 6*** Exhibit 6 is objectionable and inadmissible to support Defendants' Reply because Exhibit 6 is irrelevant. Defendants rely on Exhibit 6 to support the assertion that Geib was accountable for sales in EMEA for "only a few weeks before leaving TN." Reply at 10:22. When Geib left SAP TN is irrelevant to whether he (an admitted California employee) was involved in the conduct giving rise to OEMEA's claims. As such, the proffered evidence is irrelevant and inadmissible. *See* Fed. R. Evid. 402. Nor does the objectionable exhibit have any tendency to make the existence of whether OEMEA sustained injuries in California more probable or less probable than it would be without Exhibit 6. *See* Fed. R. Evid. 401. For these reasons the Court should exclude Exhibit 6. *See* Fed. R. Evid. 401, 402, 403.

LANIER DECLARATION, EXHIBIT 7	
MATERIAL OBJECTED TO	**GROUNDS FOR OBJECTION**
Excerpts from the deposition of Seth Adam	***Exhibit 7***

LANIER DECLARATION, EXHIBIT 7	
MATERIAL OBJECTED TO	**GROUNDS FOR OBJECTION**
Ravin, Exhibit 6 to the Lanier Declaration at ¶ 7, and Reply at 10:18-20 (citing same).	Exhibit 7 is also objectionable and inadmissible to support Defendants' Reply because Exhibit 7 is irrelevant. Defendants rely on Exhibit 7 as support for the assertion Ravin "joined TN three years before the SAP acquisition and left within weeks thereafter, before (or shortly after) OEMEA's claims could have arisen." Reply at 10:18-20. As with Geib, when Ravin left SAP/TN is irrelevant to whether he (a California employee) was involved in the conduct giving rise to OEMEA's claims. As such, the proffered evidence is irrelevant and inadmissible. *See* Fed. R. Evid. 402. Nor does the objectionable exhibit have any tendency to make the existence of whether OEMEA sustained injuries in California more probable or less probable than it would be without Exhibit 7. *See* Fed. R. Evid. 401. For these reasons the Court should exclude Exhibit 7.

II. DEFENDANTS' CROSS MOTION "REPLY" IS OBJECTIONABLE AND SHOULD NOT BE CONSIDERED

On April 21, 2010, Defendants filed their Reply in Support of Defendants' Cross Motion For Partial Summary Judgment (the "Cross Motion Reply"), Dkt. No. 705. That Cross Motion Reply violates the Court's scheduling orders and page limitations for summary judgment motions, as did the original Cross Motion, which was filed on March 31, 2010 in the body of Defendants' Opposition to Oracle's Motion for Partial Summary Judgment (long after the Court-ordered March 3, 2010 deadline for filing "Dispositive Motions"). *See* Dkt. Nos. 670, 325.

Oracle objects to Defendants' Cross Motion Reply, including Defendants' unilateral awarding to itself extra time and extra pages outside of the agreed-upon and Court-ordered summary judgment motion parameters. *See, e.g.*, Case Management and Pretrial Order, May 5, 2008, Dkt. No. 84 at ¶ A.7 ("Briefing schedules for motions that are specifically set by the court may not be altered by stipulation; rather the parties must obtain leave of court."), ¶ E ("No provision of this order may be changed except by written order of this court upon its own motion or upon motion of one or more parties made pursuant to Civ. L. R. 7-11 with a showing

of good cause."), and ¶ A.2 (allowing only one MSJ per side "absent leave of court" and providing no relief from the 25-25-15 pagination rules for motions for summary judgment under Civ. L-R 7-4(b)).

DATED: April 28, 2010

Bingham McCutchen LLP

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