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21 UNITED STATES DISTRICT COURT  
 NORTHERN DISTRICT OF CALIFORNIA  
 22 OAKLAND DIVISION

23 ORACLE USA, INC., *et al.*,

24 Plaintiffs,

25 v.

26 SAP AG, *et al.*,

27 Defendants.

No. 07-CV-01658 PJH (EDL)

**[PROPOSED] ORDER GRANTING  
 PLAINTIFFS' MOTIONS *IN LIMINE***

Date: September 30, 2010  
 Time: 2:30 pm  
 Place: Courtroom 3, 3rd Floor  
 Judge: Hon. Phyllis J. Hamilton

1                   On September 30, 2010, the Court held a hearing on Plaintiffs Oracle USA, Inc.,  
2 Oracle International Corporation, Oracle EMEA Ltd., and Siebel Systems Inc.’s (collectively,  
3 “Oracle” or “Plaintiffs”) motions *in limine*.

4                   Having reviewed the parties’ papers and carefully considered their arguments,  
5 evidence and relevant legal authority, and good cause appearing, the Court hereby GRANTS  
6 Plaintiffs’ motions as follows:

7 **I.       PLAINTIFFS’ MOTION *IN LIMINE* NO. 1: IMPLIED BUT UNPLED ADVICE**  
8 **OF COUNSEL DEFENSE**

9                   1.       Defendants SAP AG, SAP America, Inc., and TomorrowNow, Inc. (“SAP  
10 TN”) (collectively “Defendants”) have not asserted an advice of counsel defense. They have  
11 also invoked the attorney-client privilege to prevent Oracle from taking discovery into the legal  
12 advice that Defendants received from their attorneys concerning the legality of SAP TN’s  
13 business model.

14                   2.       Accordingly, Plaintiffs’ Motion *in Limine* No. 1 is GRANTED.  
15 Defendants are precluded from introducing or eliciting any testimony, documents or other  
16 evidence that says or implies that Defendants’ attorneys analyzed SAP TN’s business model or  
17 determined it was legal. *See Giese v. Pierce Chem. Co.*, 43 F. Supp. 2d 98, 113 (D. Mass. 1999)  
18 (“Generally speaking, failure to plead an affirmative defense results in a waiver of the defense  
19 *and the exclusion of all evidence relevant to it.*”) (citation omitted, emphasis supplied by court);  
20 *Columbia Pictures Television, Inc. v. Krypton Broad. of Birmingham, Inc.*, 259 F.3d 1186, 1996  
21 (9th Cir. 2001) (affirming exclusion of evidence related to advice of counsel defense because  
22 party invoked the attorney-client privilege during the discovery on the subject at issue).

23                   3.       Specific instances of this evidence that are precluded from being admitted  
24 at trial include the statements quoted in Plaintiffs’ motions *in limine* from: Plaintiffs’ Deposition  
25 Ex. 430 at SAP-OR00002184-185; Plaintiffs’ Deposition Ex. 1177 at TN-OR01778422;  
26 Plaintiffs’ Deposition Ex. 1315 at p.2; Plaintiffs’ Deposition Ex. 429 at SAP-OR00187201;  
27 Plaintiffs’ Deposition Ex. 1876 at TN-OR01778633; and pages 125:14-127:3 of the 7/22/09  
28 deposition of Spencer Phillips. Defendants are also precluded from introducing similar

1 documents or testimony at trial.

2 **II. PLAINTIFFS' MOTION *IN LIMINE* NO. 2: SELECTIVE ATTORNEY/CLIENT**  
3 **COMMUNICATIONS**

4 4. For similar reasons, Plaintiffs' Motion *in Limine* No. 2 is GRANTED.

5 Defendants are precluded from introducing or eliciting any testimony, documents or other  
6 evidence describing an alleged SAP executive board directive to remove Oracle software from  
7 SAP TN's computers as "urgent" or "mandatory" or stating or implying that SAP believed SAP  
8 TN was making progress toward complying with the alleged directive.

9 5. Specific instances of this evidence, which are precluded from being  
10 admitted at trial, include: pages 28:25-29:2 from the 10/22/08 deposition of Christopher Faye;  
11 pages 42:20-43:1, 48:20-23; 49:5-11, 49:14-50:13, 51:12-14; 51:20-25, 112:23-113:9, 119:23-  
12 24, 120:1-5, 120:22-121:5, 124:10-11; 124:19-125:3, 128:7-10, 128:13-25, 129:3-4, 129:9-131:9,  
13 132:5-14, 132:15-21; 132:24-133:11 from the 3/18/09 deposition Christopher Faye; pages 114:4-  
14 7, 116:11-119:3 from the 2/19/09 deposition of Tim Crean; pages 343:5-344:5 from the 4/29/09  
15 deposition of Andrew Nelson; and page 10, lines 12-26 from Defendant SAP AG and SAP  
16 America, Inc.'s Written Response in Lieu of Siebel Rule 30(b)(6) Testimony in Response to  
17 Topics 1-4 and 9 of Plaintiff's August 14, 2009 Notice of Deposition, Topic 2 of Plaintiff's April  
18 16, 2008 Notice of Deposition, and August 21, 2009 E-mail Questions from B. Hann.  
19 Defendants are also precluded from introducing similar documents or testimony at trial.

20 **III. PLAINTIFFS' MOTION *IN LIMINE* NO. 3: CUSTOMER STATEMENTS IN AT**  
21 **RISK REPORTS**

22 6. The customer comments contained in Oracle's At Risk reports are  
23 inadmissible hearsay. Fed. R. Evid. 801, 802, 805; *see United States v. Arteaga*, 117 F.3d 388,  
24 395 (9th Cir. 1997). There is also no relevant nonhearsay purpose for their admission. *See*  
25 *United States v. Marguet-Pillado*, 560 F.3d 1078, 1086 (9th Cir. 2009). Accordingly, Plaintiffs'  
26 Motion *in Limine* No. 3 is GRANTED. Defendants are precluded from introducing customer  
27 statements recorded in Oracle's At Risk reports at trial. Defendants are also precluded from  
28 introducing the customer comments contained in emails that excerpt portions of the At Risk  
Reports or other documents, as well customer comments in spreadsheets similar to the At Risk

1 reports.

2 **IV. PLAINTIFFS’ MOTION *IN LIMINE* NO. 4: EVIDENCE OF SETTLEMENT**  
3 **DISCUSSIONS**

4 7. Plaintiffs’ Motion *in Limine* No. 4 is GRANTED. Pursuant to Fed. R.  
5 Evid. 408, any testimony, documents or other evidence related to settlement discussions between  
6 the parties are precluded from being introduced at trial. *See, e.g., Richards v. City of Topeka,*  
7 *173 F.3d 1247, 1253 (10th Cir. 1999).*

8 **V. MOTION NO. 5: EVIDENCE NOT IN INTERROGATORY RESPONSES**

9 8. Despite pleading license and consent defenses related to Oracle’s  
10 copyright claim, Defendants have failed to identify specific licenses that they contend support  
11 their affirmative defenses. Defendants’ interrogatory responses violate the supplementation  
12 requirement in Fed. R. Civ. Proc. 26(e)(1)(A). Fed. R. Civ. Proc. 37(c)(1) thus bars Defendants  
13 from introducing or eliciting any licenses agreements, or any testimony, documents or evidence  
14 about license agreements, whether express or implied, that supposedly authorized some or all of  
15 SAP TN’s conduct. Defendants’ failure to previously disclose such information was not  
16 substantially justified or harmless. *See Yeti by Molly Ltd v. Deckers Outdoor Corp., 259 F.3d*  
17 *1101, 1106 (9th Cir. 2001).* Plaintiffs’ Motion *in Limine* No. 5 is therefore GRANTED.

18 **VI. PLAINTIFFS’ MOTION *IN LIMINE* NO. 6: HEARSAY CONCERNING**  
19 **LOCKHEED MARTIN**

20 9. The following statements are inadmissible hearsay, *see* Fed. R. Evid. 801,  
21 and Defendants have not established that they fall within any exception to the hearsay rule  
22 *Lemos v. Alderwoods Grp., Inc., No. 1:06-cv-01152, 2007 WL 2254363, at \*7-8 (E.D. Cal. Aug.*  
23 *3, 2007)* (proponent “bears the burden of establishing a foundation from which to conclude that  
the statement was within a hearsay exclusion”):

24 a. “PeopleSoft’s Greg Stevenson then wrote me and asked me if they  
25 need to provide authorization. Greg Stevenson at PeopleSoft followed up a few minutes later by  
26 phone and he said he was going to let Lockheed Martin know that there was no issue with them  
27 sending us the CD’s [*sic*].” – contained in email from SAP TN Vice President Seth Ravin in TN-  
28 OR00614959 .

1                   b.       The repetition of the above quotation at pages/lines 352:5-353:1 of  
2 Shelly Nelson’s 4/18/2008 deposition.

3                   c.       Deposition testimony by Ravin in which he was presented with the  
4 email identified above and repeated his claim that Mr. Stevenson told him that he would tell  
5 Lockheed Martin there was no issue with Lockheed Martin sending certain CDs to SAP TN.  
6 Ravin 5/21/09 Depo. at 239:4-7, 240:8-19 (Hixson Decl., Ex. \_\_\_).

7                   d.       “[A] senior PeopleSoft representative recommended Lockheed  
8 Martin consider TomorrowNow Extended Support as a solution! Backed with internal staff  
9 recommendations - and PeopleSoft’s direct referral - Lockheed Martin executives, Lockheed  
10 Martin Purchasing, and Seth moved into serious discussions.” – contained in an email from SAP  
11 TN President and CEO Andrew Nelson at TN-OR00497647.

12                   10.       Accordingly, Plaintiffs’ Motion *in Limine* No. 6 is GRANTED.  
13 Defendants may not introduce the above statements at trial.

14 **VII. PLAINTIFFS’ MOTION *IN LIMINE* NO. 7: EVIDENCE OF**  
15 **OTHER LITIGATION**

16                   11.       Plaintiffs’ Motion *in Limine* No. 7 is GRANTED. Defendants are  
17 precluded from introducing or eliciting any testimony, documents or other evidence concerning  
18 the allegations made against Oracle in *Oracle USA, Inc., et al. v. Rimini Street, Inc., et al.*, No.  
19 2:10-cv-0106 (D. Nev.) or *United States ex rel. Frascella v. Oracle Corp., et al.*, No. 1:07cv:529  
20 (E.D. Va.), including testimony or documents repeating those allegations. *See* Defendants’  
21 Depo. Ex. 947; pages 346:25-347:15, 348:3-355:14, 355:20-357:12, 361:19-363:25 of the  
22 7/21/10 deposition of Seth Ravin. Those allegations are not relevant to the claims or defenses in  
23 this action and would be unduly prejudicial and confusing to the jury. Fed. R. Evid. 402, 403,  
24 404.

25 **VIII. PLAINTIFFS’ MOTION *IN LIMINE* NO. 8: UNTIMELY**  
26 **DEPOSITION DESIGNATIONS**

27                   12.       Plaintiffs’ Motion *in Limine* No. 8 is GRANTED. Defendants’ untimely  
28 August 5 “counter-counter” deposition designations were submitted after the deadlines agreed to  
by the parties. Moreover, serving these additional designations at 4:39 a.m. on August 5 – the

1 day deposition designations were due to be filed with the Court – unfairly prejudiced Oracle.

2 13. Accordingly, it is ORDERED that:

3 [Either]

4 a. Defendants’ August 5, 2010 deposition designations are stricken  
5 and shall not be admitted at trial.

6 [or]

7 b. Oracle is granted leave to submit analogous designations in  
8 response to Defendants’ August 2 counter designations.

9  
10 IT IS SO ORDERED.

11  
12 Dated: \_\_\_\_\_, 2010

13 \_\_\_\_\_  
14 Honorable Phyllis J. Hamilton  
15 United States District Court Judge  
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