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 18 TOMORROWNOW, INC.

19 UNITED STATES DISTRICT COURT
 20 NORTHERN DISTRICT OF CALIFORNIA
 21 OAKLAND DIVISION

22 ORACLE USA, INC., et al.,

23 Plaintiffs,

24 v.

25 SAP AG, et al.,

26 Defendants.

Case No. 07-CV-1658 PJH (EDL)

**DEFENDANTS' OBJECTIONS TO
 THE DECLARATIONS OF DANIEL
 LEVY FILED IN SUPPORT OF
 PLAINTIFFS' MOTIONS TO
 EXCLUDE**

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

1 Defendants SAP AG, SAP America, Inc., and TomorrowNow, Inc. (“Defendants”) object
2 to the following declarations submitted by Plaintiffs Oracle USA, Inc., Oracle International
3 Corporation, and Siebel Systems, Inc.¹ (“Plaintiffs”) in support of their motions to exclude
4 testimony of Defendants’ experts Clarke and Spencer because the declarations contain untimely
5 disclosed expert opinions:

- 6 • Declaration of Daniel S. Levy, Ph.D. In Support of Motion No.1: To Exclude
7 Testimony of Defendants’ Expert Stephen Clarke (declaration filed under seal in
8 support of D.I. 781) (“Levy Declaration In Support of Motion No. 1 to Exclude
9 Clarke”); and
- 10 • Declaration of Daniel S. Levy In Support of Oracle’s Motion No. 6: To Exclude
11 Testimony of Defendants’ Expert Bruce Spencer (declaration filed as D.I. 779 in
12 support of D.I. 773) (“Levy Declaration In Support of Motion No. 6 to Exclude
13 Spencer”).

14 In the Levy Declaration In Support of Motion No. 1 to Exclude Clarke, Levy provides a
15 complex, 32-page declaration espousing opinions related to regression analysis in the field of
16 econometrics as sur-rebutal to Clarke’s damages opinions. But Levy did not list any of these
17 opinions in his report, provide them in any supplemental materials, or testify about them at his
18 deposition. In fact, Plaintiffs did not even disclose him as an expert in the field of econometrics
19 or on the topic of damages, and Levy expressly stated at his deposition that he was not offering
20 opinions about damages. Additionally, although Plaintiffs disclosed Levy as an expert for
21 sampling, the Levy Declaration In Support of Motion No. 6 to Exclude Spencer (D.I. 779)
22 contains new opinions never previously disclosed anywhere, including his report, deposition, or
23 his supplemental reports.

24 Plaintiffs did not disclose these new opinions of Levy until:

- 25 • 276 days after the deadline to serve expert reports;
- 26 • 146 days after the deadline to serve rebuttal reports;
- 27 • 111 days after Dr. Levy’s deposition;

28 ¹ Oracle EMEA Ltd. is no longer a plaintiff. *See* D.I. 762 (8/17/10 Order) at 25.

- 1 • 76 days after Spencer’s deposition;
- 2 • 70 days after Clarke’s deposition;
- 3 • 62 days after the close of expert discovery;
- 4 • Only 42 days before the Pretrial Conference; and
- 5 • Approximately 10 weeks before trial.²

6 The rules require automatic exclusion of this evidence. If Plaintiffs wished to add new
7 opinions, then Plaintiffs should have approached Defendants and the Court in the time period
8 allowed and explained the need for such additional opinions. Plaintiffs should not, and cannot, be
9 allowed to lay behind the log and suddenly spring forth wielding new expert opinions at the
10 *Daubert* stage.³

11 **A. Legal Standard.**

12 Rule 26 requires parties to disclose the identity of each expert witness “accompanied by a
13 written report prepared and signed by the witness.” Fed. R. Civ. P. 26(a)(2)(B). The disclosures
14 and the reports must be made “at the times and in the sequence that the court orders.” Fed. R.
15 Civ. P. 26(a)(2)(C). The report must contain: “(i) a complete statement of all opinions the witness
16 will express and the basis and reasons for them; (ii) the data or other information considered by
17 the witness in forming them; (iii) any exhibits that will be used to summarize or support them. . .
18 .” In fact, Rule 26(a)(2)(B) “imposes an additional duty to disclose information regarding expert
19 testimony sufficiently in advance of trial that opposing parties have a reasonable opportunity to
20 prepare for effective cross examination and perhaps arrange for expert testimony from other
21 witnesses” Fed. R. Civ. P. 26 Advisory Committee note (1993 Amendments) at ¶ 15.

22 Rule 37(c)(1) gives teeth to these requirements by forbidding the use of any information
23 required to be disclosed by Rule 26(a) that is not properly disclosed. *See Yeti By Molly Ltd. v.*
24 *Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001). Rule 37(c)(1) states: “If a party
25 fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not

26 ² For these date calculations, see the Declaration of Scott Cowan in Support of
27 Defendants’ Objections to the Declarations from Daniel Levy (“Cowan Decl.”) ¶¶ 2-10. For a
28 timeline detailing the events at issue, see Cowan Decl. ¶¶ 11- 25.

³ If Plaintiffs raise any of these new opinions at trial or in any other hearing or filing, then
Defendants reserve the right to raise these same objections and move to strike this evidence.

1 allowed to use that information or witness *to supply evidence on a motion, at a hearing, or at a*
2 *trial*, unless the failure was substantially justified or is harmless.” Fed. R. Civ. P. 37(c)(1)
3 (emphasis added). “The Advisory Committee Notes describe it as a ‘self-executing,’ ‘automatic’
4 sanction to ‘provide[]a strong inducement for disclosure of material’” *Yeti*, 259 F.3d at 1106
5 *citing* Fed. R. Civ. P. 37 advisory committee’s note (1993). The burden is on the party who failed
6 to disclose such information to show that an exception to automatic exclusion applies. *Yeti*, 259
7 F.3d at 1107.

8 **B. New Opinions.**

9 With regard to Levy’s new opinions submitted in support of Plaintiffs’ Motion to Exclude
10 Stephen Clarke, in this new declaration—for the very first time—Levy states that “I have been
11 retained by counsel . . . to provide a declaration in support of Oracle’s motion to exclude certain
12 of Mr. Clarke’s opinions related to his regression analyses.” Levy Declaration In Support of
13 Motion No. 1 to Exclude Clarke at ¶ 2. Clarke’s opinions in this case all relate to damages. Levy
14 then offers a host of new opinions, including new graphs, charts, and data. *See* Levy Declaration
15 In Support of Motion No. 1 to Exclude Clarke. The declaration contains Levy’s views and
16 opinions related to damages opinions on: the zero intercept technique; R² values; variable, fixed,
17 and total costs; fixed effects regression technique; autocorrelations; and a “significant number of
18 other statistical conditions.” *Id.* The sheer breadth and range of these opinions and supporting
19 materials requires an extensive effort to evaluate.

20 Likewise, in the Levy Declaration In Support of Motion No. 6 to Exclude Spencer, Levy
21 adds new sur-rebuttal opinions on: (1) significance levels and their use in hypothesis testing for
22 random chance; and (2) generally accepted documentation of sampling. *See* D.I. 779. This
23 includes opinions on alpha levels and the Vietnam draft as well as citations to new articles and
24 materials in an effort to support these opinions. *See id.* Both of these issues are new, untimely
25 attempts by Dr. Levy to try to rebut Dr. Spencer’s opinions.

26 **C. Exclusion of the New Opinions Is Warranted.**

27 In a very similar case, the Ninth Circuit addressed this issue and found that untimely
28 disclosed expert opinions filed in a supporting declaration were properly excluded. *See Luke v.*

1 *Family Care and Urgent Med. Clinics*, 323 Fed. Appx. 496, 498-499 (9th Cir. 2009) (affirming
2 district court’s exclusion of an expert declaration submitted by plaintiffs in opposition to
3 defendants’ summary judgment motion that presented a new theory on a key element of
4 plaintiffs’ claim). In *Luke*, the plaintiffs disclosed the expert declarations “more than three
5 months after the deadline for initial expert disclosures and more than two months after the
6 deadline for rebuttal disclosures.” *Id.* at 499. Moreover, the declarations were submitted only ten
7 weeks before trial and four days before the close of discovery. *See id.* As a threshold matter, the
8 court found these declarations “were not timely under Rule 26(a)(2)(C).” *Id.* The court further
9 concluded that no exception to the automatic exclusion provision applied as the plaintiffs did not
10 show substantial justification or that the delay was harmless. *See id.*

11 Just as in *Luke*, all of the expert deadlines have passed, there are 10 weeks until trial, and
12 discovery is already closed; there can be no dispute that Levy’s new opinions are untimely, and
13 there are no grounds for an exception to the automatic exclusion rule. Levy expressly disavowed
14 during his deposition that he intended to offer damages opinions in this case, and now he is doing
15 just that—offering damages opinions in this case. Moreover, Levy had every opportunity to
16 submit sur-rebuttal opinions to Spencer’s report, and, in fact, did so. There is simply no
17 justification for waiting until the *Daubert* stage to raise these opinions.

18 This failure to disclose is harmful to Defendants. By waiting until the *Daubert* stage,
19 Plaintiffs ensured that Defendants would have less than 3 weeks to respond to these new
20 opinions, an almost unfathomable task. This is not an instance where an expert inadvertently
21 failed to produce some tangential materials, or needed to briefly clarify existing opinions. These
22 are entirely new opinions that require time, resources, and effort to fully evaluate; resources that
23 even if it were possible, Defendants should not be required to expend on new expert opinions at
24 this point in the case. If Levy’s new opinions were timely made, Defendants would have had “a
25 reasonable opportunity to prepare for effective cross examination and perhaps arrange for expert
26 testimony from other witnesses evaluated” Fed. R. Civ. P. 26 Advisory Committee note
27 (1993 Amendments) at ¶ 15. Defendants have been deprived of such opportunity. Plaintiffs
28 should not be able to engage in such gamesmanship at this stage of the case. Like *Luke*, the Court

1 should sustain Defendants objections and strike the declarations of Levy and all opinions
2 contained therein.

3 * * *

4 For the reasons stated above, the Court should sustain Defendants' evidentiary objections
5 and strike: (a) the Levy Declaration In Support of Motion No. 1 to Exclude Clarke, including all
6 opinions therein; and (b) the Levy Declaration In Support of Motion No. 6 to Exclude Spencer,
7 including all opinions therein. Defendants reserve the right to object on additional grounds to any
8 of the statements made in any of the declarations or any of the exhibits attached thereto, should
9 that evidence be offered by Plaintiffs at trial or for any other purpose in this litigation.

10
11 Dated: September 9, 2010

JONES DAY

12 By: /s/ Tharan Gregory Lanier
13 Tharan Gregory Lanier

14 Counsel for Defendants
15 SAP AG, SAP AMERICA, INC., and
16 TOMORROWNOW, INC.