Oracle Corporation et al v. SAP AG et al Doc. 881

BINGHAM McCUTCHEN LLP
DONN P. PICKETT (SBN 72257)
GEOFFREY M. HOWARD (SBN 157468)
HOLLY A. HOUSE (SBN 136045)
ZACHARY J. ALINDER (SBN 209009)
BREE HANN (SBN 215695)
Three Embarcadero Center
San Francisco, CA 94111-4067
Telephone: (415) 393-2000
Facsimile: (415) 393-2286
donn.pickett@bingham.com
geoff.howard@bingham.com
holly.house@bingham.com
zachary.alinder@bingham.com
bree.hann@bingham.com

BOIES, SCHILLER & FLEXNER LLP
DAVID BOIES (Admitted *Pro Hac Vice*)
333 Main Street
Armonk, NY 10504
Telephone: (914) 749-8200
Facsimile: (914) 749-8300
dboies@bsfllp.com
STEVEN C. HOLTZMAN (SBN 144177)
FRED NORTON (SBN 224725)
1999 Harrison St., Suite 900
Oakland, CA 94612
Telephone: (510) 874-1000
Facsimile: (510) 874-1460
sholtzman@bsfllp.com
fnorton@bsfllp.com

DORIAN DALEY (SBN 129049)
JENNIFER GLOSS (SBN 154227)
500 Oracle Parkway, M/S 5op7
Redwood City, CA 94070
Telephone: (650) 506-4846
Facsimile: (650) 506-7114
dorian.daley@oracle.com
jennifer.gloss@oracle.com

Attorneys for Plaintiffs Oracle USA, Inc., *et al.*

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

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

Plaintiffs,

v.

SAP AG, *et al*,

Defendants.

No. 07-CV-01658 PJH (EDL)

PLAINTIFFS' OPPOSITION TO DEFENDANTS' OBJECTION TO DECLARATION OF DANIEL LEVY

Date: September 30, 2010
Time: 9 a.m.
Place: Courtroom 3
Judge: Hon. Phyllis J. Hamilton

Dockets.Justia.com

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I. INTRODUCTION

The Court should overrule SAP's objection to the Declaration of Dr. Daniel Levy in support of Oracle's Motion to Exclude Testimony of Stephen Clarke (Dkt. 838). None of SAP's arguments have merit.[1]

First, there is no obligation under Rule 26 to disclose expert opinions or testimony that will be used to support a *Daubert* motion; indeed, in deciding a *Daubert* motion under Federal Rule of Evidence 104, the Court is not limited to admissible evidence at all.

Second, there is no obligation under Rule 26 in general, or in this case in particular, to disclose sur-rebuttal testimony, such as Dr. Levy's critique of Clarke's regression analysis.

Third, if Rule 37 applied – and it does not – exclusion would be improper because Oracle's use of Levy's declaration as sur-rebuttal is substantially justified and harmless to SAP. Levy's clear and detailed declaration does not prejudice SAP, as SAP knew that Clarke would be challenged on his regression analysis, the declaration was filed just two months after Clarke fully revealed his methodological errors and lack of experience in statistics at his deposition, SAP has already prepared and submitted a detailed declaration from Clarke in response to Levy, and Levy has submitted a reply declaration explaining why Clarke is still mistaken. Despite this lack of prejudice to SAP, Levy is available to be deposed on the topics in his declaration, if SAP wishes to take that deposition.

Fourth, exclusion of Levy's opinions not would only be unwarranted, it would unfairly prejudice Oracle by allowing Clarke's defective analyses to stand unchallenged by contrary, competent evidence.

II. BACKGROUND

Stephen Clarke is not an expert in statistics. Nonetheless, SAP intends to present him as

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[1] In addition to Defendants' objection, they submitted a declaration from Clarke responding to Levy. Oracle has objected to and moved to strike Clarke's declaration, and has submitted a Reply Declaration from Dr. Levy as well. To the extent that SAP makes the same objections to the Levy Reply Declaration, the objection fails for the same reasons set forth in this opposition brief.

one at trial, and to have Clarke testify as to Oracle's damages in reliance on a fundamentally flawed regression analysis that Clarke tried to conduct. *See* Dkt. 781 (Oracle's Mo. to Exclude Clarke) at VIII.

Accordingly, Oracle has moved to exclude Clarke's opinion testimony based on his regression analyses under *Daubert* and Rule 702. *Id.* In support, Oracle submitted the declaration of one of its disclosed experts, Dr. Daniel Levy – who, unlike Clarke, is an actual statistician – explaining how Clarke's attempted regression analysis is riddled with methodological errors and profoundly fails to comply with the methods and standards accepted in the field of statistics. Declaration filed under seal in support of Dkt. 781 (Levy Decl.). For example, Clarke:

- uses a regression technique that is incapable of calculating the result he purports to calculate (Levy Decl. ¶ 3(a)-(c));
- defines and uses basic statistical terms incorrectly (*id.* ¶ 3(d));
- uses a statistical method, called $R^{2,}$ that is not appropriate for the measurements he purports to take (*id.* ¶ 3(d));
- misunderstands, and thus inaccurately reports, the results of his analysis (*id.* ¶ 3(e));
- fails to test or check for important statistical conditions that can and do affect the results of his attempted analysis (*id.* ¶ 3(f)).

As a result of these and other material errors, Clarke's "methodology and results are meaningless for the purpose for which they are intended." *Id.* ¶ 4. As Levy concludes, "[t]he depth of the errors in Mr. Clarke's calculations goes far beyond creating numbers that are biased, or flawed or ones that could have been estimated much better. The numbers Mr. Clarke calculates are completely useless for his purposes because they simply do not measure how costs change with revenues." *Id.* ¶ 32.[2] Moreover, Clarke's repeated fundamental errors and

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[2] *See also id.* ¶16 (Clarke's "regression explains virtually nothing of the variation in costs"); ¶18 ("These two features of Mr. Clarke's regression analysis render it useless for the purposes of measuring how costs vary with revenues in the relevant range."); ¶ 20 (Clarke's method "produce[s] a completely incorrect estimate of the slope of this data"); ¶24 ("Mr. Clarke's zero

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ignorance of basic statistical concepts demonstrate that he "lacks the expertise necessary to apply and interpret the results of the regression analyses appropriated." *Id.* ¶ 33.

In an effort to evade the Court's scrutiny of Clarke's qualifications and methodology, SAP objects to Levy's entire declaration, asserting that Oracle was required to disclose the substance of Levy's declaration under the provisions of Rule 26(a)(2). As explained in detail below, SAP is wrong.

III. ARGUMENT

As the Seventh Circuit has observed, "regression analysis 'is subject to misuse and thus must be employed with great care.'" *Griffin v. Bd. of Regents of Regency Universities*, 795 F.2d 1281, 1289 n.15 (1985) (quoting *Wilkins v. Univ. of Houston*, 654 F.2d 388, 403 (5th Cir. 1981), *vacated on other grounds*, 459 U.S. 809 (1982)). In the hands of a non-expert such as Clarke, regression analysis threatens to mislead and confuse the jury, while retaining a veneer of mathematical precision. For that reason, Levy's declaration and the opinions that it contains are critical to this Court's role as a gatekeeper evaluating expert testimony. Should the Court overrule this aspect of Oracle's *Daubert* motion, and determine that the jury must decide what weight to give Clarke's statistical analysis, Levy's expert opinions once again will be critically important to the jury's task. None of the arguments that SAP has raised warrant excluding the Levy Declaration or his opinions, and the objection should be overruled.

A. Rule 26(a) Concerns Disclosure of Expert Opinions "At Trial," Not Evidence Offered In Support Of *Daubert* Motions

SAP's objection relies solely on the disclosure obligations provided by Federal Rule of Civil Procedure 26(a)(2). Dkt. 838 (Objection) at 2:12-21. But Rule 26(a)(2) simply does not apply to the Levy Declaration, because that Rule requires disclosure only of opinions that are

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intercept technique is clearly producing nonsensical results; incorrect for both the upper and the lower set of data."); *id.* ("Once this number has been biased in such a fundamental fashion, the rest of his calculations used to determine variable costs are hopelessly fouled."); *id.* ("His results are not a reflection of the relationships in the data, as he claims, but rather the aftermath of errant assumptions and methods.").

offered "at trial." *See* Fed. R. Evid. 26(a)(2)(A). It does not require disclosure of experts or opinions offered to demonstrate – in a *Daubert* motion or at a *Daubert* hearing – that an adverse party's proffered expert fails to meet the standards for admissibility of expert opinion testimony.

"Rule 26 is a ***trial***-oriented discovery rule and disclosures under the rule are required only 'at the times and in the sequence directed by the court.'" *UAW v. General Motors Corp.*, 235 F.R.D. 383, 388 (E.D. Mich. 2006) (rejecting Rule 26 objection to expert declarations offered in support of proposed settlement).[3] Accordingly, courts have specifically held that expert declarations offered in support of a *Daubert* motion are ***not*** subject to Rule 26's disclosure requirements, and need not be disclosed at any time prior to the *Daubert* filing. *See, e.g.*, *City of Owensboro v. Kentucky Utils. Co.*, 2008 WL 4542706, at *1 (W.D. Ky. Oct. 8, 2008). In *City of Owensboro*, the defendant filed a *Daubert* motion to exclude testimony from the plaintiff's damages expert on the grounds that the plaintiff's expert "violated accepted statistical procedures and methodology by excluding outlier data from his damages evaluation." *Id.* In support of the motion, the defendant offered a declaration from a previously disclosed expert, McClernon, who had not offered opinion on statistics. *Id.* Plaintiff objected that the expert had not been disclosed under Rule 26, and moved to strike the declaration. Even though the court agreed that the expert's opinions were not timely disclosed under Rule 26, it denied the motion, reasoning that Rule 26 applies only to disclosures of opinions offered at trial. Consequently, "the Court agrees with OMU that McClernon's affidavit may properly be considered by the Court in assessing OMU's *Daubert* motion." *Id. See also Florists' Mutual Insurance Co. v. Lewis Taylor Farms, Inc.*, 2008 WL 875493, at *17 n.12 (M.D. Ga. March 27, 2008) (holding that expert opinion testimony that had previously been stricken as untimely under Rule 26 could still be properly considered in support of *Daubert* motion.).

These holdings are consistent not only with the plain language of Rule 26 (language that

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[3] *See also* Charles Alan Wright, *et al.*, *Federal Practice & Procedure* § 2031.1 (3d ed. & 2010 Supp.) ("Because the disclosure requirement is keyed to trial, and absent a different directive from the court does not come into play until 90 days before trial, it may not apply to use of experts in various pretrial or nontrial activities . . . .")

SAP conveniently ignores), but also with *Daubert* itself. A *Daubert* motion or hearing is a preliminary determination of admissibility under Federal Rule of Evidence 104. Accordingly, in deciding a *Daubert* motion, the Court "'is not bound by the rules of evidence except those with respect to privileges.'" *See Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592-93 & n.10 (1993) (quoting Fed. R. Evid. 104(a)). *See also Celebrity Cruises, Inc. v. Essef Corp.*, 434 F. Supp. 2d 169, 190 (S.D.N.Y. 2006) (rejecting objections that declaration by party employee submitted in support of *Daubert* motion did not itself satisfy *Daubert*; under Rule 104(a), "in determining whether to admit scientific testimony the court may consider materials not admissible in evidence"). As the Supreme Court has explained, these rules allow trial courts the flexibility to comply with their obligations to "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Daubert*, 509 U.S. at 589, 592 & n.10. SAP obviously would prefer that the Court decide whether to allow its witness with no expertise in statistics to testify about a profoundly flawed regression analysis, without the benefit of Dr. Levy's expertise and observations. But nothing in Rule 26, the Federal Rules of Evidence, or *Daubert* itself permits, much less requires, such a result.

B. Neither Rule 26 Nor the Case Management and Pretrial Order Requires Disclosure of Sur-Rebuttal Opinions Such as Levy's Critique of Clarke

Second, Rule 26(a)(2) – even if it did apply – would not provide a basis to preclude Levy's declaration or testimony on Clarke's regression analyses because SAP proffered Clarke as a rebuttal expert, and the opinions expressed in the Levy Declaration consequently are sur-rebuttal. There is no obligation under Rule 26 in general, or under the Case Management and Pretrial Order in this case in particular, to provide sur-rebuttal reports.

Levy appeared for deposition concerning his affirmative opinions on April 30, 2010. At that time, he had not yet read Clarke's 294-page single-spaced report, which Clarke had provided only on March 26, 2010, and then later revised or supplemented on May 7, June 4, and August 4, 2010. House Reply Decl. in Support of Mo. to Exclude Clarke, Ex. H (Levy Depo.) at 66:7-14; Clarke was designated as an expert to rebut Paul Meyer, Oracle's damages expert, and he served his report on the date set in Case Management and Pretrial Order for rebuttal experts' reports.

See Dkt. 781 (Oracle's Mo. to Exclude Clarke) at 1:11-19 & 12:2-5.

Clarke appeared for deposition on the May 7 version of his report on June 8-10, 2010. *Id.*, 1:17-18. At the third day of Clarke's deposition, Oracle counsel elicited detailed testimony concerning his (limited) experience in statistics, the specific steps and assumptions in his attempts to conduct a regression analysis, and the various tests that he had failed to consider or conduct in reaching his conclusions. *See* Dkt. 838 (Objection) at 23:24-27; Dkt. 781 (Mo. to Exclude Clarke) at 22:13-16 & n.37. Levy's declaration was filed on August 19, 2010. It carefully analyzes Clarke's attempted regression analysis, relying extensively on the explanations that Clarke provided at his June 10 deposition to demonstrate Clarke's methodological errors. *See* Levy Decl.

Levy's critique of Clarke's opinions offered in rebuttal is, by definition, sur-rebuttal. The stipulated order setting the case schedule has no provision whatsoever for sur-rebuttal reports or depositions. *See* Stipulated Revised Case Management and Pretrial Order, Dkt. 325, at 1:10-2:25.[4] Likewise, Rule 26 has no such provision. *See* Fed. R. Civ. Pro. 26(a)(2)(C); *White v. Cinemark USA, Inc.*, 2005 WL 1865495, at *3 (E.D. Cal. Aug. 3, 2005). The unpublished case relied on by Defendants, *Luke v. Family Care and Urgent Medical Clinics*, 323 Fed. Appx. 496 (9th Cir. 2009), does not hold otherwise. In that medical malpractice case, the plaintiffs designated experts who failed to offer any expert opinion that would meet plaintiffs' burden on the required element of causation. After the deadline for disclosure of affirmative expert opinions, and after the defendants filed a motion for summary judgment, plaintiffs tried to file new expert reports with new, previously undisclosed theories of causation. *Id.*, 323 Fed. Appx. at 499. The district court excluded the untimely affirmative opinions, and the Ninth Circuit held that to do so was not an abuse of discretion. *Id.* Nothing in *Luke* suggests that a party is required

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[4] Pursuant to the Court's May 5, 2008 Case Management and Pretrial Order, Docket No. 84, the provisions set by the Court could only be changed by written order, on the Court's own motion or the motion of a party. *See* Dkt. 84, at 5:4-10. Although the parties have from time to time stipulated to modifications to that order and obtained the approval of the Court, no requirement for sur-rebuttal reports was ever sought or obtained.

to disclose sur-rebuttal reports when the court has not ordered them.[5]

In short, Levy simply was not required to file a sur-rebuttal report or appear for deposition on sur-rebuttal testimony, and his supposed failure to do so before August 19 provides no ground for exclusion.

C. SAP Is Not Prejudiced By The Levy Declaration

SAP argues that the Levy Declaration must be excluded under Rule 37. As explained above, Rule 37 does not apply, because there was no duty to disclose under Rule 26 in the first place. In any event, exclusion under Rule 37 is improper where the purported failure to disclose is "substantially justified" or "harmless," as is the case here.

Oracle was substantially justified in not disclosing any sur-rebuttal by Levy prior to August 19 because, as explained above, no Rule or order required disclosure of sur-rebuttals. Although SAP makes much of time that has passed since the initial date for Oracle to disclose its affirmative experts, that date is irrelevant. Oracle had no way of knowing, in November 2009, that it would want or need or need to offer a statistician to rebut the regression analysis of Mr. Clarke, who had not yet even been designated as an expert. Similarly, the date for disclosure of rebuttal expert opinions is irrelevant, because Oracle still had no way of knowing, prior to March 26, 2010, that SAP would offer a regression analysis from any expert. Only after Clarke produced his report and appeared for deposition to explain his statistical analyses – in June 2010 – was Levy in a position to prepare a sur-rebuttal.

Given that Defendants have continued to amend the Clarke report and to produce evidence to support it, even as recently as August 4, 2010, it is ironic to see SAP accuse Oracle of "sandbagging." In fact, Oracle has always been clear in stating its position that it had no obligation to disclose sur-rebuttal testimony or reports. Indeed, as early as January 2010, Oracle counsel wrote to Defendants' counsel that

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[5] Indeed, *Luke* itself acknowledges that an expert may supplement his or her report based on "information that was not available at the time of the initial disclosure." *Luke*, 323 Fed. Appx. at 500. That is in fact what Levy did, as Clarke's report had not even been filed at the time of Levy's initial disclosure.

> Given that Oracle's experts will be considering and likely responding at trial to Defendants' experts, depositions of them taken before they have had a chance to review Defendants' experts' reports ***will not preclude*** Oracle's experts from providing responsive opinions to Defendants' experts' opinions at trial. If you want to know what those will be, you need to take Oracle's experts' depositions after they have had adequate time to digest your experts' reports.

See Dkt. 729 (Declaration of Jason McDonell In Support of SAP's Motions in Limine, Ex. G. (email of H. House to J. McDonnell, January 19, 2010 (emphasis added)).

Moreover, Levy's declaration causes SAP no prejudice at all. SAP always had the obligation to establish that Clarke's opinion testimony satisfied all of the requirements under the Federal Rules. *Daubert*, 509 U.S. at 593. SAP has long known that the deadline for filing *Daubert* motions was August 19, 2010, and must have expected that Clarke's regression analyses would be challenged, particularly given Clarke's inexperience, the errors identified by Oracle's counsel at Clarke's deposition, and the considerable amount of time that Oracle's counsel spent at deposition testing Clarke's regression analysis. *See* Defs. Opp. to Mot. to Exclude Clarke, at 23 (asserting that it is clear from the questions that Clarke was asked at deposition that Plaintiffs would attack Clarke's regression analysis). The only "prejudice" to SAP is that it must meet its *Daubert* burden with Clarke's errors and deficiencies laid bare by an actual expert in the field. But that is not undue prejudice, and is not prejudice attributable to anything Levy or Oracle did. It is simply the inevitable consequence of Clarke's inadequacy as an expert in statistics.

SAP also suffers no prejudice from the timing of the Levy Declaration. As explained above, Levy's declaration was served a reasonable amount of time after Clarke made clear his analyses concerning his regression analysis. In his declaration, Levy sets out a detailed explanation of Clarke's methodological errors. Though SAP suggests that they could not possibly digest and respond to Levy's detailed critique in the time before trial, they have already done so. SAP submitted an 18-page declaration from Clarke in response. Fifteen pages of that declaration, along with 19 separate exhibits, are offered in an attempted defense of Clarke's regression analysis. Neither SAP nor Clarke offer any evidence that they are unable to understand Levy's criticisms of Clarke's regression analysis, that they did not have enough time to review Levy's declaration, or even that they would understand Levy's critiques better after a

deposition. *See U.S. v. Rapanos*, 376 F.3d 629, 644-45 (6th Cir. 2004), vacated on other grounds, 547 U.S. 715 (2006) (rejecting request to preclude previously undisclosed expert testimony because "the failure to disclose seems harmless as the Defendants were aware of the data used in the supplemental reports" and that was in fact "produced by their experts"); *New York v. Solvent Chemical Col, Inc.*, 685 F. Supp. 2d 357, 413-17 (W.D.N.Y. 2010) (disclosure of new opinion was harmless where offered "to rebut the opinions expressed by [objecting party's expert] in his expert report and testimony," new opinion was based upon "the same information and data relied upon by [objecting party's expert] to formulate those opinions," and objecting party "had a full and fair opportunity at trial to explore the basis for [the rebuttal expert's] opinions, without the need for a continuance").

Indeed, Clarke claims that he has analyzed Levy's declaration, and concludes without qualification that he is right and Levy is wrong. Dkt. 854 (Clarke Decl.) Clarke's certainty, like his statistics, may be unfounded, but he has not claimed or shown any prejudice. Should SAP persist in claiming that it needs still more disclosure from Levy, he is willing to appear for deposition yet again. SAP's objection to the Levy Declaration should be overruled.

D. Oracle, In Contrast, Would Be Unduly Prejudiced If Levy Could Not Expose Clarke's Flawed Analysis

In contrast, Oracle would be unduly prejudiced if Levy's opinions were excluded. First, the Court would be deprived, in determining whether Clarke has the qualifications to testify as an expert is statistics and has applied statistical methods correctly, of the valuable insights of an undisputed expert in the field of statistics. Without the benefit of Levy's analysis, the Court will be hindered in its performance of its obligation to "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable," *Daubert*, 509 U.S. at 589, 592 & n.10, and Oracle will be hindered in its efforts to show that Clarke's regression analysis falls far short of that standard. That prejudice would be still more unfair given Oracle's compliance with the rules, the Court's scheduling order, and the cases cited above, and given Oracle's clear statement of its position to SAP counsel long before now.

Second, if the Court were to deny Oracle's *Daubert* motion on the subject of Clarke's

regression analysis, and also hold that Levy's opinions on that analysis must be excluded, Oracle would be severely prejudiced at trial. Despite his inexperience and profound errors in applying statistical principles, Clarke would go unrebutted at trial. That is particularly prejudicial to Oracle given the complexity of regression analysis and jurors' lack of familiarity with it. "Ideally, when a multiple regression analysis is used, it will be the subject of expert testimony and knowledgeable cross examination from both sides. In this manner, the validity of the model and the significance of its results will be fully developed at trial, allowing the trial judge to make an informed decision as to the probative value of the analysis." *Griffin*, 795 F.2d at 1289 n.15 (quoting *Wilkins*, 654 F.2d at 403)

Though Oracle would of course have an opportunity to cross-examine Clarke, his evident inability to understand the principles that he has misapplied and the mistakes he has made make it especially unlikely that he will confess error on the stand. At the same time, without the benefit of Levy's testimony, jurors will be unable to evaluate the strengths or weaknesses of Clarke's testimony on a subject as technical and arcane as regression analysis. That outcome would tend to confuse the jury and undermine the purpose of trial. Nothing in SAP's objection justifies such a result.

IV. CONCLUSION

SAP's objection to the Levy Declaration should be overruled. There is no obligation to disclose expert opinions that are used in a *Daubert* motion, there is no obligation to disclose sur-rebuttal, both the timing and the content of Oracle's disclosures were substantially justified and harmless to SAP, and exclusion of Levy's opinions would unfairly prejudice Oracle.

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Boies, Schiller & Flexner LLP

By: /s/ Fred Norton
Fred Norton
Attorneys for Plaintiffs
Oracle USA, Inc., *et al*.