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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)
OBJECTIONS TO DECL. OF STEPHEN K. CLARKE IN SUPPORT OF DEFENDANTS' OPPOSITION TO ORACLE'S MO. NO. 1: TO EXCLUDE TESTIMONY OF DEFENDANTS' EXPERT CLARKE

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

1 **I. INTRODUCTION**

2 Plaintiffs Oracle USA, Inc. (predecessor to Oracle America, Inc.), Oracle International
3 Corporation, Oracle EMEA Limited and Siebel Systems, Inc. (collectively “Oracle” or
4 “Plaintiffs”) hereby object and move to strike from the record and from reference at trial the
5 statements set forth below from the Declaration of Stephen K. Clarke In Support of Defendants’
6 Opposition to Oracle’s Motion to Exclude the Testimony of Stephen K. Clarke (Dkt 851).

7 **II. BACKGROUND AND LEGAL STANDARD**

8 On March 26, 2010, Defendants’ damages expert, Stephen Clarke (“Clarke”), provided
9 his first purported “rebuttal” report to Oracle’s damages expert’s report. *See* Dkt 781 (Oracle’s
10 Mot. No. 1 to Exclude Clarke Testimony) at 1:14-18. Clarke later revised or supplemented his
11 “rebuttal” report on May 7, June 4, and August 4, 2010. *Id.* Oracle examined Clarke regarding
12 the May 7, 2010 version of his report on June 8-10, 2010. *Id.* Clarke thereafter had the
13 opportunity after reviewing his deposition transcript to make any changes or clarifications to his
14 testimony. While Clarke did take the opportunity to review his transcript and submit 10 pages of
15 errata, he did not change any testimony that he is now contradicting through his Declaration and
16 did not clarify his testimony to include the new opinions and data he is now disclosing through
17 his Declaration. *See* 9/16/2010 Declaration Of Holly House In Support of Reply Regarding
18 Oracle’s Motion No. 1 To Exclude Clarke, Objections To Decls. Of Clarke And Sommer, And
19 Opposition To Defendants’ Objection To Levy Decl. (“House Reply Decl.”), Ex. A.

20 Expert declarations should be stricken when they present new opinions not contained in
21 or in contradiction with the expert report or prior deposition testimony. *See Poulis-Minott v.*
22 *Smith*, 388 F.3d 354, 358-59 (1st Cir. 2004) (motion to strike portions of an expert affidavit
23 granted for new information not previously included in the expert report); *Cargill Inc. v.*
24 *Progressive Dairy Solutions, Inc.* 2008 WL 2235354, 10 (E.D. Cal.) (motion to strike
25 declarations granted for failure to disclose or to supplement in violation of discovery
26 obligations); *Sitrick v. Dreamworks, LLC*, 2006 WL 6116641, 23 (C.D. Cal.) (motion to strike
27 expert declaration granted when new analysis concept was introduced for the first time and
28 contradicted prior testimony); *Palmer v. Asarco Inc.*, 2007 WL 2254343 at *3 (N.D. Okla.)

1 (excluding expert's affidavit containing new facts submitted with opposition to Daubert motion,
2 two months before trial, noting that an affidavit that states additional opinions or rationales or
3 seeks to “strengthen” or “deepen” opinions expressed in the original expert report exceeds the
4 bounds of permissible supplementation and is subject to exclusion) (citations omitted).

5 Federal Rule of Civil Procedure 26(a)(2)(B) requires that an expert report “contain a
6 complete statement of all opinions the witness will express and the basis and reasons for them”
7 and “the data or other information considered by the witness in forming them.” Where additional
8 relevant information becomes available so that the initial expert report is rendered “incomplete or
9 incorrect,” a party is obligated to supplement or correct the initial disclosure by filing a
10 supplemental report before the deadline for pretrial disclosures. Fed. R. Civ. P. 26(e).

11 Federal Rule of Civil Procedure 37(c)(1) gives teeth to these requirements by forbidding
12 the use on a motion, at a hearing or at trial of any information that is not properly disclosed under
13 Rule 26, unless the party failing to disclose proves the failure substantially justified or harmless.
14 *See Wong v. Regents of University of California*, 410 F.3d 1052, 1062 (9th Cir. 2005); *Yetti by*
15 *Molly Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001).

16 Moreover, Clarke’s after-the fact enhancement of his opinions further renders his opinion
17 unreliable. *Compare Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311, 1319 (9th Cir. 1995)
18 (“Any such tailoring of the experts’ conclusions would, at this stage of the proceedings, fatally
19 undermine any attempt to show that these findings were ‘derived by the scientific method.’
20 Plaintiffs’ experts must, therefore, stand by the conclusions they originally proffered, rendering
21 their testimony inadmissible under the second prong of Fed. R. Evid. 702.”).

22 **III. ARGUMENT AND OBJECTIONS**

23 The statements below present new opinions not contained in or in contradiction with
24 Clarke’s report or prior deposition testimony. Rule 26(a)(2)(B)(i) requires the expert report to be
25 a “complete statement of all opinions the witness will express and the basis and reasons for
26 them.” Oracle objects and move to strike from consideration on Oracle’s pending Motion to
27 Exclude Clarke’s testimony and at trial the following statements by Clarke in his Declaration
28 under Rule 37(c)(1) because they were not properly disclosed under Rule 26 and SAP bears the

1 burden of proving the failure of the disclosure to be substantially justified or harmless. SAP
2 cannot carry its burden even if it had tried because Oracle was not on notice to and able to cross-
3 examine Clarke on these new disclosures.

- 4 • **Clarke Decl. 7:22-9:22** - Clarke's explanation of his use of the zero intercept method
5 should be stricken as an impermissible new opinion. Clarke did not include any of this
6 discussion of the Fixed, Variable, and Total Cost curves in his report. *See* Dkt. 783
7 (House Opening Decl.), Ex. A (Clarke Report) at 276-281. He also did not provide this
8 explanation at his deposition. *See* House Reply Decl., Ex. A (Clarke Depo.) at 931:12-
9 933:7; 953:6-14.
- 10 • **Clarke Decl. 11:6-20** - Clarke's discussion of his inability to compute incremental costs
11 should be stricken as an impermissible new opinion. Never before has Clarke claimed,
12 either in his report or at his deposition, that he was unable to compute incremental cost
13 because of a lack of production of accounting data by Oracle. Clarke explained in his
14 report and deposition that he was measuring Oracle's variable costs within a range of
15 revenue, but never before did he claim that it is impossible to compute Oracle's
16 incremental revenue due to the range of revenue at issue. *See* Dkt. 783 (House Opening
17 Decl.), Ex. A (Clarke Report) at 243, 277, Ex. B (Clarke Depo.) at 960:5-962:7; House
18 Reply Decl., Ex. A (Clarke Depo.) at 931:12-932:18; 964:17-966:15.
- 19 • **Clarke Decl. 12:6-11** - Clarke's discussion of his inability to analyze Oracle's costs due
20 to a deficiency in the Oracle production should be stricken as an impermissible new
21 opinion. Never before has Clarke claimed, either in his report or at his deposition, that he
22 was unable to analyze such costs due to a deficiency in the Oracle production.
- 23 • **Clarke 12:12-22 and Figures 3 & 4** - Clarke's analysis of Oracle and SAP 10-K data
24 should stricken as impermissible new opinions and data. This is entirely new analysis and
25 nothing prevented Clarke from presenting this opinion earlier, through his report or at his
26 deposition. Clarke claims that his regression methodology was "based on the foregoing
27 accounting analysis" (*see* Clarke Decl. 14:1). If this is true, then Mr. Clarke failed to
28 disclose the basis of his opinions when he filed his report and testified at his deposition.

1 The statements below cite treatise materials referenced for the first time by Clarke in his
2 Declaration. Rule 26(a)(2)(B)(i) requires the expert report to be a “complete statement of all
3 opinions the witness will express and the basis and reasons for them.” Furthermore, Rule
4 26(a)(2)(B)(ii) requires the report contain “the data or other information considered by the
5 witness in forming them.” The following materials were never referenced in Clarke’s report or
6 Appendix C-1 (documents considered). In fact, Clarke stated at his deposition that “I don’t need
7 to go to a book to do this regression analysis.” Dkt. 865 (Wallace Decl.), Ex. 8 (Clarke Depo.) at
8 929:13-930:12. Furthermore, Defendants’ counsel sought and received from Oracle last week
9 expedited opportunity to show the Declaration of Dr. Daniel S. Levy in Support of Oracle’s
10 Motion to Exclude the Testimony of Stephen K. Clarke to two previously undisclosed
11 statisticians, Bernard Siskin and Robert Gibbons. *See* House Reply Decl. at ¶¶ 9-10 and Exs. F &
12 G thereto. Clarke’s Declaration does not indicate whether and if so, how much of the analysis
13 came from either of these statisticians or whether these statisticians provided the new treatise
14 materials Clarke cites in his Declaration. Given Clarke’s testimony that confirmed he knew of no
15 statistics authorities and had consulted none (*see* Dkt. 781 (Oracle’s Mo. to Exclude Clarke) at 22
16 :13-16 & n.37)¹, it seems likely these new consultant statisticians contributed and possibly
17 created Clarke’s Declaration. Clarke, through his Declaration, cannot be a mouthpiece for
18 another expert. *See, e.g., Brace v. U.S.*, 72 Fed.Cl. 337, 352 (Fed. Cl. 2006) (“Rule 703 was not
19 intended to abolish the hearsay rule and to allow a witness, under the guise of giving expert
20 testimony, to in effect become the mouthpiece of the witnesses on whose statements or opinions
21 the expert purports to base his opinion.”) (citations omitted). This is another independent reason
22 for striking Clarke’s regression statements in his Declaration.

23 Oracle thus objects and moves to strike from consideration on Oracle’s pending Motion to
24 Exclude Clarke’s testimony and at trial the following statements by Clarke in his Declaration
25 under Rule 37(c)(1) and bars Clarke’s reference to them at trial because the references to these
26

27 ¹ Dkt. 783 House Opening Decl., Ex. B (Clarke Depo.) at 808:13-809:7; 935:3-7; 943:23-944:7;
28 955:20-956:7.

