

1 BINGHAM MCCUTCHEN LLP  
 DONN P. PICKETT (SBN 72257)  
 2 GEOFFREY M. HOWARD (SBN 157468)  
 HOLLY A. HOUSE (SBN 136045)  
 3 ZACHARY J. ALINDER (SBN 215695)  
 BREE HANN (SBN 215695)  
 4 Three Embarcadero Center  
 San Francisco, CA 94111-4067  
 5 Telephone: 415.393.2000  
 Facsimile: 415.393.2286  
 6 donn.pickett@bingham.com  
 geoff.howard@bingham.com  
 7 holly.house@bingham.com  
 zachary.alinder@bingham.com  
 8 bree.hann@bingham.com  
 BOIES, SCHILLER & FLEXNER LLP  
 9 DAVID BOIES (Admitted *Pro Hac Vice*)  
 333 Main Street  
 10 Armonk, NY 10504  
 Telephone: 914.749.8200  
 11 Facsimile: 914.749.8300  
 dboies@bsflp.com  
 12 STEVEN C. HOLTZMAN (SBN 144177)  
 FRED NORTON (SBN 224725)  
 13 1999 Harrison St., Suite 900  
 Oakland, CA 94612  
 14 Telephone: 510.874.1000  
 Facsimile: 510.874.1460  
 15 sholtzman@bsflp.com  
 fnorton@bsflp.com  
 16 DORIAN DALEY (SBN 129049)  
 JENNIFER GLOSS (SBN 154227)  
 17 500 Oracle Parkway, M/S 5op7  
 Redwood City, CA 94070  
 18 Telephone: 650.506.4846  
 Facsimile: 650.506.7114  
 19 dorian.daley@oracle.com  
 jennifer.gloss@oracle.com  
 20 Attorneys for Plaintiffs  
 Oracle USA, Inc., *et al.*

UNITED STATES DISTRICT COURT  
 NORTHERN DISTRICT OF CALIFORNIA  
 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)

**OBJECTIONS TO DECLARATION OF BRIAN  
 SOMMER IN SUPPORT OF DEFENDANTS'  
 OPPOSITION TO ORACLE'S MOTION NO. 2: TO  
 EXCLUDE TESTIMONY OF DEFENDANTS'  
 EXPERT BRIAN S. SOMMER**

Date: September 30, 2010

Time: 2:30 p.m.

Place: Courtroom 3

Judge: Hon. Phyllis J. Hamilton

Case No. 07-CV-01658 PJH (EDL)

OBJECTIONS TO DECLARATION OF BRIAN SOMMER IN SUPPORT OF DEFENDANTS' OPPOSITION  
 TO ORACLE'S MOT. NO. 2: TO EXCLUDE TESTIMONY OF DEFENDANTS' EXPERT BRIAN SOMMER

1 **I. INTRODUCTION**

2 Plaintiffs Oracle USA, Inc. (predecessor to Oracle America, Inc.), Oracle International  
3 Corporation, and Siebel Systems, Inc. (collectively “Oracle”) hereby object to, and move to strike  
4 from the record and from reference at trial, the Declaration of Brian S. Sommer in Support of  
5 Defendants’ Opposition to Oracle’s Motion to Exclude Testimony of Defendants’ Expert Brian  
6 S. Sommer (Dkt. 849) under Federal Rule of Civil Procedure 37(c)(1), because the matters  
7 contained in Sommer’s Declaration were not properly disclosed under Federal Rule of Civil  
8 Procedure 26. In the alternative, Oracle objects to and moves to strike the statements in  
9 Sommer’s Declaration set forth below, starting at p. 5, under Rule 37(c)(1), because they were  
10 not properly disclosed under Rule 26 and are contradicted by Sommer’s prior testimony.

11 **II. LEGAL STANDARD**

12 Rule 26(a)(2)(B)(i) requires an expert report to contain both a “complete statement of all  
13 opinions the witness will express and the bases and reasons for them” and “the witness’  
14 qualifications.” Where additional relevant information becomes available so that the initial  
15 expert report is rendered “incomplete or incorrect,” a party must supplement or correct the initial  
16 disclosure by serving a supplemental report before the deadline for pretrial disclosures.<sup>1</sup> Fed. R.  
17 Civ. P. 26(e). However, Rule 26(e) does not give license to sandbag one’s opponent with new  
18 credentials, experience, and evidentiary or other support for an expert’s opinions, methodologies,  
19 and purported expertise that should have been included in the expert witness’ report. *See Palmer*  
20 *v. Asarco Inc.*, 2007 WL 2254343, at \*3 (N.D. Okla.) (excluding expert’s affidavit containing  
21 new facts submitted with opposition to *Daubert* motion, two months before trial, noting that an  
22 affidavit that states additional opinions or rationales or seeks to “strengthen” or “deepen”  
23 opinions expressed in the original expert report exceeds the bounds of permissible  
24 supplementation and is subject to exclusion) (internal citation omitted).

25 Federal Rule of Civil Procedure 37(c)(1) prohibits the use on a motion, at a hearing, or at  
26

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27 <sup>1</sup> The date for pretrial disclosures was August 5, 2010 (*see* Dkt. 325); the declaration was served  
28 September 9, 2010.

1 trial of any information that is not properly disclosed under Rule 26, unless the party failing to  
2 disclose proves the failure is substantially justified or harmless. *See Wong v. Regents of Univ. of*  
3 *Ca.*, 410 F.3d 1052, 1061-62 (9th Cir. 2005); *Yetti by Molly Ltd. v. Deckers Outdoor Corp.*, 259  
4 F.3d 1101, 1106 (9th Cir. 2001). Pursuant to this rule, expert declarations are properly stricken  
5 when they present new information not contained in or contradicting the expert report or prior  
6 deposition testimony. *See Cargill Inc. v. Progressive Dairy Solutions, Inc.*, 2008 WL 2235354,  
7 at \*9-10 (E.D. Cal.) (motion to strike declarations granted for failure to disclose or to supplement  
8 in violation of discovery obligations); *Sitrick v. Dreamworks, LLC*, 2006 WL 6116641, at \*23  
9 (C.D. Cal.) (motion to strike expert declaration granted when new analysis concept was  
10 introduced for the first time and contradicted prior testimony); *Poulis-Minott v. Smith*, 388 F.3d  
11 354, 358-59 (1st Cir. 2004) (motion to strike portions of an expert affidavit granted for new  
12 information not previously included in the expert report).

### 13 III. ARGUMENT AND OBJECTIONS

14 Oracle's Motion to Exclude argues, inter alia, that Sommer's deposition testimony  
15 establishes that he did not have expertise based on **relevant** experience about subjects on which  
16 he opined and did not base his opinions on sufficient information or reliable methodologies.

17 In response, Sommer's Declaration recounts a variety of aspects of Sommer's supposedly  
18 relevant experience. For example: ¶¶ 3-8 (understanding of technical architecture, ERP  
19 implementation, work on a payroll application); ¶ 9 (client strategy project work); ¶ 10  
20 (developing training, products reviews, and developing client relationships); ¶ 11 (similar to ¶ 10,  
21 including marketing events, training, and implementation practice); ¶ 12 ("ERP software practice  
22 aids"); ¶ 13 (he contacted executives); ¶¶ 14-15 (visited ERP vendors and developed practice  
23 aids); ¶ 16 (created practice papers on account code block designs); ¶ 17 (produced shows on  
24 finance and human resource software); ¶ 25 (conducted sales training keynote address); ¶ 30  
25 (created cost benefit analysis spreadsheets); ¶¶ 31-32 (helped increase Anderson Consulting's  
26 relationship with vendors, including PeopleSoft); ¶¶ 33-37 (was present, or spoke at, various  
27 events concerning ERP products); ¶¶ 38-40 (spoke at conferences and marketing events  
28 concerning the ERP market); ¶ 41 (taught consultants on "software industry and financial

1 accounting matters”); ¶ 42 (his experience with IQ4Hire, an “online exchange for professional IT  
2 services” [MacDonald Decl., Ex. B (Sommer Tr.) at 63:12-15<sup>2</sup>]); ¶¶ 43-44 (his experience with  
3 TechVentive, which is irrelevant because he is not relying on any engagements that TechVentive  
4 has participated in to support any of his opinions [*Id.* at 65:6-11]); ¶¶ 45-46 (spoke at a marketing  
5 events in 2002 for FreeMarkets and created a marketing buyers’ guide for FreeMarkets); ¶ 47  
6 (participated on “advisory calls” on “ERP software subjects”); ¶ 48 (created a human resources  
7 business process outsourcing buyers’ guide for Exult); ¶ 50 (created a sales training course used  
8 at a two-day event for Agresso); ¶¶ 51-52 (created sales training courses for OpenRatings and  
9 Progress Software); ¶ 53 (provided briefings to Workday concerning strategy); ¶ 54 (modified  
10 and delivered training); ¶ 55 (branded services of TechVentive under Vital Analysis); ¶¶ 56-57  
11 (developed training programs for Progress Software); ¶ 58 (produced a newsletter that covered  
12 “ERP related issues”); ¶¶ 59-60 (blogging work); ¶ 61 (his review of blogs on the Internet and  
13 news sources to stay informed); ¶ 62 (authorship of an article concerning ERP software  
14 implementation and another concerning re-automation of previously automated processes); ¶ 63  
15 (a quote from the January 2009 issue of Go); ¶ 64 (co-authored papers on “the ERP space” and  
16 made presentations about an ERP software concept called REA); and ¶ 65 (provides details of his  
17 2008 negotiation of a ERP vendor contract for a client that is not a customer in this case, for  
18 products that are not at issue in this case<sup>3</sup>). All these paragraphs contain new matter not  
19 previously disclosed in Sommer’s Report, deposition testimony, or errata.

20 **A. Sommer’s Declaration Should Be Excluded Entirely Because Its Contents**  
21 **Were Not Disclosed As Required by Fed. R. Civ. P. 26**

22 In response to the evidence from Sommer’s own mouth Oracle cited in its Motion to  
23 Exclude showing that he did not use reliable methods and sufficient and reliable data, SAP  
24 explicitly argues that Sommer’s experience described in his declaration substitutes as support for

25 \_\_\_\_\_  
26 <sup>2</sup> See Dkt. 765 (Declaration of Lucia MacDonald filed in support of Oracle’s Motion Exclude  
Brian Sommer) (“MacDonald Decl.”), Ex. B (Sommer Tr.).

27 <sup>3</sup> When asked about this deal at deposition, Sommer asserted that confidentially obligations  
28 precluded his disclosure of any details. See MacDonald Decl., Ex. B (Sommer Tr.) at 42:2-23.

1 his opinions. *See* SAP’s Opp. at 14:27 (“**Sommer’s Experience and Training Reliably**  
2 **Supports His Rebuttal Opinions**”); *id.* at 16:1-3 (“That experience amply supports his rebuttal  
3 opinions about the effectiveness of switching programs generally and Safe Passage  
4 specifically.”); *id.* at 16:10-11 (“His knowledge and experience directly supports his rebuttal  
5 opinions on [third-part support options].”). Thus Sommer’s “experience” is not just part of the  
6 qualifications SAP was required to disclose; it also is at least part of Sommer’s “basis and  
7 reasons” for his opinions, of which his Report was required to contain a “complete statement.”

8 Both Sommer and SAP’s counsel represented that Sommer’s Report contained the  
9 entirety of the bases for his opinions and all the experience (e.g., his methodology) he intended to  
10 rely on for those opinions:

11 Q: And does it [Sommer’s Report] contain the bases for  
12 those opinions?

13 A: Yes.

14 Q: And all the experience on which you intend to rely for  
15 those opinions is listed in your report. Is that correct?

16 MR. McDONELL [counsel for SAP]: To the extent  
17 required by the rules, that is correct.

18 MacDonald Decl., Ex. B (Sommer Tr.) at 30:11-18.

19 In fact, however, that was not so. The material in Sommer’s declaration was not  
20 disclosed in his Report or at his deposition. SAP does not pretend it was. Indeed, SAP would  
21 have no need of Sommer’s Declaration if it could have found the same material in Sommer’s  
22 Report and deposition.

23 SAP bears the burden of proving its failure to make the required disclosure is  
24 substantially justified or harmless in order to permit use of the Declaration. SAP cannot carry its  
25 burden. First, there is no reason Sommer could not have disclosed the “experience” described in  
26 his Declaration that forms the basis of the opinions expressed in his March 26, 2010, expert  
27 report and June 25, 2010, deposition testimony. All the new information stated in his Declaration  
28 was known to him at those times, and nothing in the record indicates any good reason it could not  
have been supplied. Second, SAP’s failure to disclose is not harmless. Oracle questioned

1 Sommer extensively at deposition about his experiences to prepare for its Motion to Exclude.  
2 However, it could not cross-examine Sommer on these new disclosures, and now, less than two  
3 months from the start of trial, it is unable to test them and expose their weaknesses, as it did with  
4 the limited experience Sommer did disclose. Oracle has thus been prejudiced by SAP's failure to  
5 disclose the matters in the Declaration as required. Sommer's Declaration should be stricken in  
6 its entirety because of that failure.

7 **B. In the Alternative, Portions of the Declaration Should Be Stricken Because**  
8 **They Were Not Timely Disclosed and Contradict Sommer's Sworn**  
9 **Testimony**

10 If the Declaration is not stricken in its entirety because of SAP's failure to disclose the  
11 matters it contains, then certain portions should be stricken not only because the matters were not  
12 timely disclosed, but because they are inconsistent with Sommer's sworn testimony. *See Sitrick*,  
13 2006 WL 6116641, at \*23 (motion to strike expert declaration granted when new concept was  
14 introduced for the first time and contradicted prior testimony).

15 **1. Sommer Decl. 1:5-10; 6:16-9:17; 9:21-25; 10:3-11:12; 11:25-12:7; 20:1-**  
16 **11; 21:11-20 — Additions to Sommer's Experience**

17 These portions of Sommer's Declaration concern additions to his ERP experience that he  
18 failed to state in response to direct questions at his deposition, and are not disclosed in his Report.  
19 At deposition, Sommer was questioned at length about the limited number of ERP clients he had  
20 worked with and the (irrelevant) work he did for those clients. *See MacDonald Decl., Ex. B*  
21 (Sommer Tr.) at 15:16-16:8; 17:3-19; 18:22-19:7; 20:4-14; 22:4-9; 23:6-24:5; 24:15-18; 40:15-  
22 41:19.

23 For example, at deposition, Sommer was specifically asked if he had mentioned all of the  
24 companies for which he had done any ERP-related work. *Id.* at 28:25-29:5. He did not make any  
25 correction to this or to any other cited testimony. *See Declaration of Holly House ISO Reply*  
26 *Regarding Oracle's Motion No. 1 To Exclude Clarke, Objections To Decls. Of Clarke And*  
27 *Sommer, And Opposition To Defendants' Objection To Levy Decl. at Ex. I (July 30, 2010*  
28 *Corrections of Brian Sommer to deposition transcript). Nonetheless, Sommer's Declaration*  
*purports to add approximately 85 companies plus an unknown number more. See Sommer Decl.*

1 at ¶ 8 (United States Automobile Association), ¶ 9 (health insurer and computer hardware firm),  
2 ¶¶ 18-20 (various unnamed “clients”), ¶ 21 (Swiss pharmaceutical firm), ¶ 22 (identifying  
3 approximately 73 new “clients” Sommer provided “advice and counsel regarding ERP  
4 software”), ¶ 23 (Alcoa, Kodak, and Corning), ¶ 47 (a startup in the Seattle area), ¶ 48 (Exult), ¶  
5 49 (Design Continuum), ¶ 50 (Agresso), and ¶ 51 (Azul Partners). This contradicts his  
6 testimony:

7 Q: Have we now gone over all of the companies that you  
8 have done any ERP-related work for?

9 A: Let me think. I mean, I -- I’ve -- the deal is, I visit with  
10 so many vendors. Let’s put NetSuite on that list. MacDonald  
Decl., Ex. B (Sommer Tr.) at 25:13-20.

11 Q: All right. So now that we’ve added NetSuite, are there  
any other ERP vendors for whom you have done any work?

12 A: Off the top of my head, I’m not recalling anything right  
13 away. *Id.* at 28:25-29:5.

14 Q: I’m just trying to -- it’s real simple. I’m just trying to  
figure out what you’ve done since Accenture that has anything to  
15 do with assisting a client in the evaluation and purchase of ERP  
software. And you -- IQ -- we’ll go over IQ4Hire, but that’s not  
16 what that job was. Correct?

17 A: It was not about selecting. It was about getting a good --  
a good price for the implementation service. *Id.* at 59:22-60:8.

18 Q: So is the answer to my question that you have not  
19 assisted a client in the selection of an ERP applications package  
since Accenture?

20 A: I have done a lot of advisory things, but not the client --  
21 if you’re going to put it in the context of, it’s a paying client, no.  
*Id.* at 61:3-12.

22  
23 **2. Sommer Decl. 1:5-10; 6:16-9:17; 9:21-25; 10:3-11:12; 11:25-12:7; 20:1-11; 21:11-20 — Software Support Experience**

24 In addition to expanding his purported ERP experience, in the cited portions of his  
25 Declaration, Sommer also tries to add experience with software support, the key subject matter of  
26 this case and the focus of his proffered opinions. However, Sommer testified to limited  
27 experience with assisting clients on software support decisions. As above, these portions of the  
28 Declaration contradict his prior uncorrected and sworn deposition testimony (and also his

1 Report<sup>4</sup>).

2 At deposition, Sommer testified to limited experience assisting clients with decisions  
3 concerning ERP software support, including decisions concerning the use of self-support in place  
4 of ERP vendor software support. See MacDonald Decl., Ex. B (Sommer Tr.) at 19:18-14 (his  
5 work for Workday did not include assisting the company with the purchase of support); *id.* at  
6 23:6-24:5 (his work with OpenRating did not include software support); *id.* at 37:2-16 (he was  
7 never hired to advise a client on whether to self-support or stay with vendor maintenance); *id.* at  
8 38:18-39:5 (he has not assisted any client on deciding whether to self-support).

9 At deposition, Sommer also testified that he has never assisted any clients specifically  
10 with the evaluation or purchase of aftermarket software support. For example:

11 Q: Have you spent a considerable portion of your career  
12 assisting clients in the purchase of after-market support?

13 A: Under the qualifier of “considerable,” the answer would  
14 be no.

15 Q: Okay. How -- name me a client that you have assisted  
16 with the purchase of after-market support.

17 A: I’m -- I’m thinking about that. I’m not -- I’m not  
18 thinking of one that comes to mind.

19 Q: Okay. Do you believe you have actually helped  
20 anybody with the purchase of after-market support?

21 A: I don’t believe I have. *Id.* at 33:25-34:16.

22 Because the cited portions of Sommer’s Declaration contain matter both not timely  
23 disclosed and contradicted by Sommer’s testimony, they should be stricken.

24 **IV. CONCLUSION**

25 For these reasons, Sommer’s Declaration should be stricken as requested.

26 \_\_\_\_\_  
27 <sup>4</sup> In Sommer’s Report, at p. 1, under “Qualifications,” the second paragraph reads: “I have spent  
28 a considerable portion of my career assisting clients in evaluating, choosing, implementing and  
modifying application software products and negotiating software purchases.” There is no  
reference to assisting clients with evaluating, choosing, or purchasing ERP software support,  
after-market support, or not purchasing support at all (e.g., self-support). MacDonald Decl., Ex.  
A (Sommer Report) at p. 1.

1 DATED: September 16, 2010

Bingham McCutchen LLP

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By:                   /s/ Holly A. House                    
                  Holly A. House  
                  Attorneys for Plaintiffs  
                  Oracle USA, Inc., *et al.*