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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.

No. 07-CV-01658 PJH (EDL)

PLAINTIFFS' RESPONSE TO DEFENDANTS' ADMINISTRATIVE MOTION FOR AN ORDER REGARDING COUNSELS' EXTRAJUDICIAL COMMUNICATIONS

I. INTRODUCTION

Plaintiffs Oracle USA, Inc., Oracle International Corporation, and Siebel Systems, Inc. (collectively "Oracle") hereby respond to Defendants SAP AG, SAP America and TomorrowNow, Inc.'s (collectively, "Defendants") motion for what amounts to a gag order prohibiting counsel for the parties from making public statements about the trial until the end of trial or, alternatively, from making any public statements prohibited by California Rule of Professional Responsibility 5-120 (A) ("Motion"). Defendants' Motion is neither appropriate nor accurate, but it is certainly ironic. SAP, not Oracle, has continually sought to litigate this case in the press, both by attribution and otherwise. The facts alleged by Defendants are inaccurate, and the relief sought by Defendants is neither necessary nor warranted.

II. DEFENDANTS HAVE REPEATEDLY LITIGATED THIS CASE IN THE PRESS

As justification for their Motion, Defendants assert that "given the public nature of the allegations, it has been entirely appropriate for SAP to respond to those allegations" presumably, in the media, because "That type of response is qualitatively different from statements by the parties lawyers . . . ." *See* Defendants' Motion at 3:26-28. But the public nature of this lawsuit is primarily the result of Defendants' own conduct. SAP holds press conferences, issues numerous press releases, provides statements to reporters, and publicizes the case on a distinct website. *See* Declaration of Lucia MacDonald ("MacDonald Decl.") ¶ 2, Ex. A; *see also* Docket #748 filed 8/5/2010 (Oracle's Trial Brief) at Ex. A; SAP, http://www.tnlawsuit.com/.

Just days ago, on October 23, 2010, Defendants took to the press and mischaracterized what counsel for Oracle said at the September 30, 2010 pretrial conference in order to justify their Motion. *See* MacDonald Decl. ¶ 3, Ex. B (Jeanette Borzo, *UPDATE: SAP Asks For Gag Order In Oracle Case*, Dow Jones Business News, October 23, 2010) ("Oracle's attorney first raised concerns about the issue of the lawyers involvement in publicity on the case at the end of the September 30th pretrial conference," said SAP spokesman Saswato Das. "We agreed with the position taken by their attorney and have documented our agreement with the filing of the motion."). To the contrary, the transcript shows that Oracle's counsel raised no concerns about any of the lawyers' involvement in publicity on the case, but merely asked the Court for

guidance on how to address the possibility that jurors might conduct independent research on the Internet. *See* Lanier Decl. ¶ 7, Ex. A (9/30/2010 Pretrial Conference Tr.) at 117:6-119:13. The Court then invited the parties to prepare a jury instruction to address this collective concern. *See id*. at 119:6-12.

Defendants also appear to have leaked to the press the existence, and content, of an October 8, 2010 confidential email between counsel (sent at 11:45 p.m. on a Friday night) regarding witness lists. *See* MacDonald Decl. ¶ 4. Similarly, as the Court is aware, SAP issued a press release on August 5, 2010, simultaneously with the filing of its trial brief. *See* Docket #748 filed 8/5/2010 (Oracle's Trial Brief) at Ex. A ("SAP Acts to Focus TomorrowNow Lawsuit" "Decisive Move Intended to Focus the Case and Reach Resolution"). That press release related directly to ongoing discussions between the parties. By contrast, Oracle has treated communications between parties' counsel as confidential.

Defendants' use of the press dates back to the beginning of the case. At the outset of the case, SAP held a press conference in July 2007 to disclose that TomorrowNow has engaged in "inappropriate" downloading, while declining to take responsibility for that downloading. *See* MacDonald Decl. ¶ 2, Ex. A at p. 2. For years, SAP has maintained a distinct public website in order to publicize the various events in the trial, and it has directed the press to it frequently. *See id.* at p. 2; *see also* Docket #748 filed 8/5/2010 (Oracle's Trial Brief) at Ex. A; SAP, http://www.tnlawsuit.com/ (last visited October 26, 2010). On this website, under a link entitled "SAP Statements," SAP has issued 26 public statements since July 2007 about this case. *See* SAP, http://www.tnlawsuit.com/sap-statements.html (last visited October 26, 2010).

Oracle, in contrast, has taken a very different approach. It has held not one press conference about the case. It has maintained no other websites outside of its own corporate website which contains links only to the complaints and a preservation order. *See* Oracle, http://www.oracle.com/sapsuit/index.html (last visited October 26, 2010). And it has issued only two press releases, one to confirm the filing of the March 22, 2007 lawsuit, and the other to confirm the filing of the June 2, 2007 Amended Complaint, and one press statement, on July 3, 2007, in response to Defendants' admission that its subsidiary TomorrowNow had engaged in

inappropriate downloading of Oracle's intellectual property. *See id.*

Based on the facts, Defendants' request for a gag order is both ironic and inappropriate. Having let the horse out, SAP would improperly have the Court close the barn door.

III. THE OCTOBER 8, 2010 NEW YORK TIMES ARTICLE

Defendants insinuate, without any basis, that Oracle counsel, Boies, Schiller & Flexner LLP, somehow influenced the story authored by Joe Nocera that appeared in the October 8, 2010 New York Times article entitled "A Double Standard at H.P." They do so solely by reference to the Editor's Note to that article, which states:

> Editors' Note: October 12, 2010: . . . Mr. Nocera learned after the column was published that Oracle was represented by the law firm of Boies, Schiller & Flexner, where his fiancée works as director of communications. To avoid the appearance of a conflict of interest, Mr. Nocera would not have written about the case if he had known of the law firm's involvement.

The Editor's Note speaks for itself, and refutes Defendants' insinuations. That Mr. Nocera would have somehow obtained information from his fiancée, as Defendants intimate, without knowing that Boies, Schiller & Flexner was representing Oracle, is both baseless and logically impossible. Defendants have made no effort to ascertain whether there is any basis for its accusations. There is none.[1]

IV. DEFENDANTS DO NOT SATISFY THE LEGAL STANDARD FOR A GAG ORDER DURING TRIAL

As the Court stated at the hearing: "this trial will be a public trial." *See* MacDonald Decl. ¶ 8, Ex. F (9/30/2010 Hearing Transcript) at 69:14-21. And, Defendants have not requested a closed courtroom during trial. *Id.*

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[1] Indeed, Defendants fail to mention that, prior to the above-mentioned article, which focused on Hewlett-Packard's hiring of former SAP CEO, Mr. Apotheker, the same New York Times columnist, Joe Nocera, wrote numerous articles about Hewlett-Packard, including a recent article entitled "H.P.'s Blundering Board." *See* MacDonald Decl. ¶ 5, Ex. C (Joe Nocera, *H.P.'s Blundering Board*, N.Y. Times, Sept. 10, 2010); *id.* ¶ 6, Ex. D (Damon Darlin, H.*P. Spied On Writers In Leaks*, N.Y. Times, Sept. 8, 2006); *id.* ¶ 7, Ex. E (Damon Darlin, *Journalists Intend to Sue Hewlett-Packard Over Surveillance*, N.Y. Times, May 7, 2007). The reference to this litigation appears to have made its way into the Hewlett-Packard stories because Hewlett-Packard – on which Nocera was focused – hired Leo Apotheker, the former SAP CEO. Hewlett-Packard's problems with the media, and the New York Times in particular, stem from events that occurred well before this lawsuit was filed and provide no basis for the requested gag order against Oracle's counsel.

The relief sought by Defendants is properly characterized as a prior restraint on the First Amendment right to free speech. *Levine v. United States District Court*, 764 F.2d 590, 595 (9th Cir. 1985). Prior restraints are subject to strict scrutiny because of the peculiar dangers presented by such restraints. *See id*. In *Levine*, the distinguishable case Defendants primarily rely on,[2] the Ninth Circuit held that a gag order in a criminal case was an appropriate remedy for excessive trial publicity, but the order was overbroad. The nature of the excessive trial publicity in *Levine* consisted of extensive local and national media coverage of the criminal proceedings. Both government officials and defense attorneys had engaged in "on the record" interviews with media representatives. *Id.* at 592.

According to the Ninth Circuit, the focal point of a prior restraint on trial counsel is on situations "where public statements by lawyers impair the "fair trial rights" of litigants." *Standing Committee on Discipline of U.S. Dist. Court for Cent. Dist. of California v. Yagman*, 55 F.3d 1430, 1443 (9th Cir. 1995) (citing *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991)). Litigants are entitled to have their cases decided by "impartial jurors . . . based on material admitted into evidence before them in a court proceeding." *See id.* (citing *Gentile*, 501 U.S. at 1070).

Accordingly, a gag order may properly be issued here only if Defendants establish: (1) lawyers involved in the pending case engage in out-of-court statements threatening a "substantial likelihood of materially prejudicing the fairness of the proceeding;" (2) the order is narrowly drawn; and (3) less restrictive alternatives are not available. *See e.g.*, *Levine*, 764 F.2d at 595; *Yagman*, 55 F.3d at 1442-1443. Defendants have not established these factors.

[2] The facts in *Bowoto v. Chevron Corp.*, No. C 99-02506 SI, that led to Judge Illston's gag order are distinguishable. *Cf.* Defendants' Motion at 2:18-20. In *Bowoto*, plaintiffs announced protest rallies on the first day of trial, attempted to purchase billboard advertising in San Francisco critiquing Chevron's purported human rights abuses, and held a series of panel presentations in San Francisco featuring videos about protests against Chevron. *See* Case 3:99-cv-02506-SI, Docket #2007, filed 10/17/2008 (October 17, 2008 letter from Robert A. Mittelstaedt of Jones Day to The Honorable Susan Illston).

V. THERE IS NO NEED TO ORDER ORACLE COUNSEL TO ABIDE BY THE CODE OF PROFESSIONAL CONDUCT

Defendants' fallback request that Oracle's counsel be ordered to follow the Rules of Professional Conduct that they are already obligated to follow is unsupported by the record. As discussed above, there is no basis for any assertion that Oracle counsel have acted improperly. Defendants provide only a baseless insinuation to the contrary.

VI. CONCLUSION

Defendants' Motion sets forth neither a factual nor a legal basis for the relief they seek. Accordingly, the relief sought is neither necessary nor warranted.

DATED: October 26, 2010

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