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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' MOTION
 REGARDING ADMISSIBILITY OF
 PLAINTIFFS' AT-RISK REPORT**

1 **I. INTRODUCTION**

2 Early in discovery, Plaintiffs produced a report called the At-Risk Report, which Plaintiffs
3 represented was “Oracle’s compilation of all of the different reasons that customers [gave] for
4 leaving Oracle when they [went] to TomorrowNow or other third-party support providers . . . all
5 of the information that Oracle [had] in that form relating to those customers.” *See* ECF No. 929-
6 11 (3/4/08 Discovery Hearing Tr.) at 105:13-24; *see also* ECF No. 929-10 (2/13/08 Discovery
7 Hearing Tr.) at 152:24-154:3 (The report “has enormous detail about all customers lost to all third
8 parties. This is a gift.”); *see also* Exhibit A (09/23/2008 Cummins Tr.) at 312:3-12, 320:23-321:2,
9 321:5-321:9, 321:11-321:17 (“[I]f a customer indicated that they were looking at a third party
10 provider, then they would go on this list.”). Plaintiffs agree that the At-Risk Report is admissible
11 as a business record. Plaintiffs only objection is to the admissibility of “transcribed comments
12 from customers” contained in the report. *See* Exhibit B (09/30/10 MIL Hearing Tr.) at 10:15-
13 12:14 (“We’re not contending that the reports themselves are not . . . business records. We’re
14 focused on just this one part of the report which are transcribed comments from customers.”).
15 Plaintiffs moved *in limine* to exclude transcribed customer comments. *See* ECF No. 916 (Pls.’
16 MIL No. 3) at 13:27-17:5. The Court excluded “transcribed customer statements” in the report,
17 except to the extent that Plaintiffs’ expert relied on them, on the ground that Defendants had not
18 “articulated any applicable exception to the hearsay rule.” *See* ECF No. 914 (09/30/10 Order) at
19 1-2.

20 For the reasons stated below, Defendants request that the Court reconsider its MIL ruling
21 and admit the At-Risk Report in its entirety, including transcribed customer statements.

22 **II. THE STATEMENTS ARE ADOPTIVE ADMISSIONS**

23 **A. The Statements Are Admissible Under Fed. R. Evid. 801(d)(2)(B).**

24 A hearsay statement is admissible if a party opponent adopts or acquiesces in the
25 statement. Fed. R. Evid. 801(d)(2)(B). Adoption or acquiescence “may be manifested in any
26 appropriate manner.” Fed. R. Evid. 801(d)(2)(B), Advisory Committee Note. For example,
27 courts have held that adoption or acquiescence may be shown when a party opponent incorporates
28 a statement into a document and distributes it to others or otherwise accepts or acts upon the

1 statement. *See, e.g., Sea-Land Serv., Inc. v. Lozen Int'l, LLC*, 285 F.3d 808, 821 (9th Cir. 2002)
2 (employee adopted hearsay statement when she incorporated it into an email with a remark
3 indicating her belief in the truth of the statement); *Wright-Simmons v. City of Oklahoma City*, 155
4 F.3d 1264, 1268 (10th Cir. 1998) (admitting investigative report and interview notes containing
5 third party statements because employer acted in response to them); *Spurlock v. Fox*, No. 3:09-cv-
6 0756, 2010 U.S. Dist. LEXIS 100366, at *27 (M.D. Tenn. Sept. 23, 2010) (“Generally, when a
7 party-opponent copies a document and distributes the copies to others, he or she has adopted the
8 content of the document.”); *MGM Studios, Inc. v. Grokster, Ltd.*, 454 F. Supp. 2d 966, 973 (C.D.
9 Cal. 2006) (statements forwarded in employee emails were adoptive admissions).

10 **B. Plaintiffs Clearly Adopted the Customer Statements in the At-Risk Report.**

11 Oracle manifested its adoption of the customer statements contained in the At-Risk Report
12 in a variety of ways. *First*, the purpose of the At-Risk Report was to collect information
13 regarding customers’ stated reasons for potentially cancelling their Oracle support contracts.
14 Oracle then used that information to identify the customers at risk of leaving for third party
15 support providers so it could try to persuade the customers not to leave Oracle support and
16 otherwise try to prevent customer losses to third party support providers. The At-Risk reporting
17 process was a formal process under which all employees were required to “accurately, succinctly,
18 and regularly” alert “Oracle executives” of potential At-Risk customers and provide information
19 regarding the customers’ reasons for cancelling Oracle support and/or considering an alternative
20 support option. ECF No. 929-16 (ORCL00130706-728) at ORCL00130710; *see also* ECF No.
21 929-18 (ORCL00032750) (“We are now in the 13th month of tracking this information.”) (copy
22 attached as Exhibit C).

23 Oracle’s manifestation of its adoption of these customer statements is inherent in the very
24 purpose of the At-Risk Report. It would be futile to require all employees to obtain and record
25 statements from customers only to then disregard the statements. In this respect, the At-Risk
26 Report is analogous to the customer survey in *Schering Corp. v. Pfizer Inc.*, 189 F.3d 218, 239
27 (2d Cir. 1999) (Sotomayor, J.) (reversing exclusion of a survey containing third-party hearsay
28 statements because defendant’s analysis of the statements indicated their reliance on them). Here,

1 Oracle relied on the statements in the At-Risk Report to determine how best to respond to
2 particular customers at risk of leaving and formulate a strategy for competing with third party
3 support providers. Thus, for example, Oracle’s damages expert noted that it created a “Third
4 Party Swat Team” to address customers identified as “At-Risk.” Meyer Rep. ¶ 88. Similarly, the
5 At-Risk Report contains comments by Oracle’s employees describing actions taken in response to
6 the customer statements.

7 **Second**, Oracle routinely circulated the At-Risk Report, and customer statements
8 contained in it, among employees and management in emails, reports, and presentations. *See*,
9 *e.g.*, ECF No. 929-17 (ORCL00087892-893) (“Attached is the latest third party risk analysis.”)
10 (copy attached as Exhibit D); ECF 929-15 (09/16/08 Cummins Tr.) at 212:4-213:25 (At-Risk
11 report used for information in updates regularly sent to executive, Juergen Rottler); ECF No. 929-
12 20 (ORCL00188690-703) at ORCL00188697 (incorporating and adopting part of At-Risk report
13 in PeopleSoft and Siebel YTD Cancellation Review); ECF No. 929-21 (ORCL00131360-384) at
14 ORCL00131374 (incorporating and adopting transcribed comments in North America Support
15 Review); ECF No. 929-14 (04/21/09 Cummins Tr.) at 234:1-15 (copy attached as Exhibit E)
16 (stating that Oracle “relied on [At-Risk Report] for keeping track of customers that were at risk of
17 cancelling support”). Indeed, one reason that employees were required to gather and report
18 customer information accurately was that the information was provided to Oracle executives.
19 *See, e.g.*, ECF No. 929-16 (ORCL00130706-728) at ORCL00130710 (“This data is provided to
20 Oracle executives and needs to be accurately, succinctly, and regularly updated.”). This Court
21 recognized at the hearing on Plaintiffs’ motion in limine that Plaintiffs had relied on the
22 information in the At-Risk Report. Exhibit B (09/30/10 MIL Hearing Tr.) at 16:6-12 (“Well,
23 there very well might, however, be a basis under the residual exception perhaps given *how much*
24 *reliance there is on the report and everything contained therein.*”) (emphasis added).

25 **C. No Guarantee of Trustworthiness Is Required.**

26 Plaintiffs argued that the transcribed customer statements should not be admitted because
27 they are “not reliable for purposes of 807.” Exhibit B (09/30/2010 MIL Hearing Tr.) at 15:10-23.
28 This argument should be rejected. First, “[n]o guarantee of trustworthiness is required in the case

1 of an admission.” Fed. R. Evid. 801(d)(2), Advisory Committee Note; *see also MCI Commc’ns*
2 *Corp. v. AT&T Co.*, 708 F.2d 1081, 1143 (7th Cir. 1983) (“The fact that the report is based on
3 hearsay or reflects opinion goes to its weight and credibility, not its admissibility.”). Second,
4 there is no evidence to support Plaintiffs’ claim that the statements are unreliable. On the
5 contrary, Plaintiffs’ extensive reliance on them proves Oracle’s belief in its trustworthiness.

6 **III. THE STATEMENTS ARE ADMISSIBLE TO PROVE STATE OF MIND**

7 In addition to constituting adoptive admissions, the transcribed customer statements are
8 admissible to show customers’ state of mind. In *Callahan v. A.E.V., Inc.*, 182 F.3d 237, 241, 252-
9 53 (3rd Cir. 1999), for example, the court held that reports of customer statements were
10 admissible to prove customer motive. *Id.* (“[A]lthough the reports of the customers’ statements
11 are hearsay, they are admissible as evidence of the customers’ states of mind, *i.e.*, their reasons
12 for no longer shopping [with plaintiff]”). Similarly, the customer statements here go to the
13 customers’ contemporaneous reasons for leaving Oracle support. *See* ECF No. 929-11 (3/4/08
14 Discovery Hearing Tr.) at 105:13-24 (At-Risk Report is “compilation” of reasons customers gave
15 when leaving Oracle support). The statements are thus admissible under Fed. R. Evid. 803.

16 **IV. PLAINTIFFS’ EXPERT RELIED ON THE STATEMENTS.**

17 The Court recognized in its ruling on Plaintiffs’ MIL No. 3 that customer statements in the
18 At-Risk Report should be admitted if relied on by Plaintiffs’ expert. *See* ECF No. 914 (09/30/10
19 Order) at 1-2. This is consistent with Rule 703. *Paddack v. Dave Christensen, Inc.*, 745 F.2d
20 1254, 1261-62 (9th Cir. 1984) (admitting audit reports based on hearsay statements for the
21 purpose of explaining the basis of the expert’s testimony); *see also* Fed. R. Evid. 703, Advisory
22 Committee Note (“Nothing in [Rule 703] restricts the presentation of underlying expert facts or
23 data when offered by an adverse party.”). Plaintiffs’ expert relied on the At-Risk Report for his
24 lost profits analysis. *See, e.g.*, ECF No. 929-12 (Meyer Report) ¶ 381 (“Where applicable, the
25 results of my analyses were compared, by customer, to Oracle or PeopleSoft contemporaneous
26 reports of support renewals lost or at risk of being lost (“At Risk” reports).”). The At-Risk Report
27 is thus admissible in its entirety under Rule 703.

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V. CONCLUSION

For these reasons, Defendants’ motion should be granted and the At-Risk Report admitted in its entirety.

Dated: November 15, 2010

JONES DAY

By: /s/ Jason McDonell
Jason McDonell

Counsel for Defendants
SAP AG, SAP AMERICA, INC., and
TOMORROWNOW, INC.