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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)

**ORACLE’S UPDATED OBJECTIONS
 AND DEFENDANTS’ RESPONSES RE
 CUSTOMER TESTIMONY AND
 RELATED EXHIBITS**

1 Pursuant to the Court's direction, Oracle has revised its deposition designation
2 objections to focus, wherever possible, on exemplar objections that pertain to a broader category.
3 Two such categories are (1) customer testimony about license provisions and advice of counsel
4 and (2) customer exhibits.

5
6 **I. CATEGORY ONE: TESTIMONY AND EXHIBITS RELATING TO
CUSTOMER LICENSES AND ADVICE OF COUNSEL**

7 Rules 402 (relevance) and 403 (unfair prejudice and confusion); calls for a legal
8 conclusion. Defendants intend to submit excerpts from customers' depositions about whether
9 and why customers sought and relied upon attorney advice relating to contracts with
10 TomorrowNow. For example:

11 Q: There is a sub bullet point, the last one, it says, 'Perform legal review of
12 company's service model and contracts.' Do you see that?

13 A: Yes.

14 Q: What did that mean?

15 A: We reviewed the TomorrowNow contract to see if we felt it was a legal
service model.

16 Q: And did you have your attorneys involved in that review?

17 A: Yes.

18 Q: And did your attorneys participate in reviewing your agreements with
19 PeopleSoft in terms of what you were allowed to do or not do under the
PeopleSoft agreements?

20 A: To review the PeopleSoft agreements?

21 Q: Yes.

22 A: Yes, that review was done.

23 **Exhibit A** (Pepsi Americas (Kreul) Depo.) at 133:9-134:2 (objections omitted); *see also id.*
24 135:9-135:17; at 88:20-25.¹
25 _____

26 ¹ Similar testimony, which the Parties expect to resolve based on the Court's ruling on this
27 example but which Oracle has not re-submitted, is attached as **Exhibit B** (Sara Lee (Brazile)
28 Depo.) at 68:10-69:3, 70:9-71:18; **Exhibit C** (Baker Botts (Hallenberger) Depo.) at 50:21-25,

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1 Evidence that a specific customer reviewed the support agreements with its
2 attorneys would only be relevant, if at all, to a liability defense – but as TomorrowNow has
3 admitted all liability and dismissed its license affirmative defense, whether its conduct was
4 permissible under those licenses is now irrelevant. *See* Joint Trial Exhibit (“JTX”) No. 4
5 (Amended Trial Stip. No. 1). In other words, Defendants have already admitted that the licenses
6 no longer matter. Nor is such evidence admissible for context, because *all* it would provide
7 context for is a possible liability defense, which TomorrowNow and SAP have dismissed.
8 Oracle has limited its objections to a relatively small number of excerpts (approximately 14), and
9 has not objected to the vast majority of Defendants’ customer designations (over 200).

10 In addition, this testimony signals a back-door attempt to assert an advice of
11 counsel defense – *i.e.*, that because attorneys reviewed these licenses, and approved them,
12 attorneys must have (expressly or impliedly) approved of TomorrowNow’s conduct. This
13 violates the Court’s order on Oracle’s Motion *in Limine* No. 1, which prevents Defendants from
14 relying on an advice of counsel defense. Defendants should not be permitted to circumvent the
15 Court’s Order on Oracle’s Motion *in Limine* No. 1 by simply shifting their reliance from their
16 attorneys to the customers’ counsel.

17 Defendants suggested in meet and confer that they selected these and other
18 customer designations in response to *Oracle’s* designations of customer testimony.² That is
19 incorrect: Oracle will not offer any customer testimony as part of its case-in-chief and made its
20 customer designations, approximately 24 minutes’ worth, in response to Defendants,’ lasting
21 over 1.5 hours. Unlike the designations to which Oracle objects, Oracle’s very limited
22 designations of customer testimony nearly all specifically relate to the fact that each customer

23 _____
(Footnote Continued from Previous Page.)

24 51:8-16; **Exhibit D** (Lexmark (O’Donnell) Depo.) at 27:4-15, 28:2-24; **Exhibit E** (McLennan
25 (Wasson) Depo.) at 139:24-140:9, 142:18-143:5.

26 ² Defendants offered on November 11 to withdraw some designations in this category if Oracle
27 withdrew its customer-related designations. Because the offer would withdraw sets of
28 designations that bear no relationship to each other (and because Oracle respectfully submits that
only Defendants’ designations are truly objectionable), Oracle declined.

1 would not have gone to TomorrowNow had it known of TomorrowNow’s illegal conduct, and
2 perceived itself as having few if any alternatives – facts directly going to the causation issues that
3 Defendants have tried to place front and center. Defendants’ claim that they need testimony
4 about licenses to counter Oracle’s limited designations makes no sense.

5 Defendants have also designated as potential trial exhibits license agreements
6 between customers and TomorrowNow (A-0547, A-0646, A-0730, and A-745) and license
7 agreements between customers and PeopleSoft (A-1329 and A-1738). For the reasons outlined
8 above, these agreements are irrelevant and should be excluded.

9 **II. CATEGORY TWO: HEARSAY TESTIMONY AND EXHIBITS**

10 Rules 802 (hearsay), 602 (speculation), and 402 (relevance). Defendants intend to
11 offer the following testimony regarding hearsay statements made from one person to another,
12 neither of whom is the witness:

13
14 Q. Okay. Do you understand – what does the statement by Ms.
15 Garrett to Mr. Walden that states, “Now I really do feel like the
stepchild. Not a peep out of them about not renewing service
contract.” What does that statement mean to you?

16 A. I mean, I would say that was a comment just on the level of
17 sort of support and care and feeding that we were or were not
getting from PeopleSoft as a customer of theirs.

18 **Exhibit C** (Baker Botts (Hallenberger) Depo.) at 60:16-61:1 (objection omitted). This testimony
19 is hearsay and calls for speculation. The deponent is asked about the meaning of a statement
20 made by someone else, to someone else. This is not relevant and the witness lacks personal
21 knowledge of the matter. Further, hearsay is not admissible at trial just because it is provided by
22 a Rule 30(b)(6) witness. *See, e.g., Cincinnati Ins. Co. v. Gray*, 2010 WL 3522954, at *7 (S.D.
23 Ind. 2010). Oracle also objects to the email about which this testimony pertains on the same
24 hearsay and speculation grounds. *See Exhibit F* (A-0777).

25 Defendants also intend to introduce two documents and emails from customers
26 that contain hearsay statements from customers and/or third-party analyst sources. The
27 statements within these documents are being offered for the truth of the matter asserted and
28

