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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' OPPOSITION TO DEFENDANTS' MOTION REGARDING ADMISSABILITY OF PLAINTIFFS' AT RISK REPORT

I. DEFENDANTS OFFER NO NEW FACTS, LAW OR ARGUMENT

Yesterday, Defendants asked the Court to reconsider its ruling granting Oracle's Motion *in Limine* No. 3 based on supposed new law and new arguments:

> Mr. McDonnell: Two issues are now before us. One, we would like to give Your Honor what we think is crystal-clear authority, including a decision by then circuit judge Justice Sotomayor, who we should all think knows what she's talking about, that these are, in fact, adoptive admissions. *See* Trial Tr., Nov. 15, 2010, 1432:19-23.

That new law turns out to be a case from 1999 that does not support Defendants' argument. As to the "new" adoptive admissions argument, the Court asked this question and received this answer:

> The Court: All right. I will take a look and decide if I want to revisit it or not. My understanding was you were raising a different ground than you raised before. I haven't had a chance to read it, but it appears to me that you are now arguing that the appropriate hearsay exception would be for adoptive admissions?
>
> Mr. Lanier: That's correct, Your Honor.
>
> The Court: Which is not something you argued before; is that the position you are taking?
>
> Mr. Lanier: Yes, Your Honor

See Trial Tr., Nov. 15, 2010, 1510:1-10 (emphasis supplied).

Counsel's answer was incorrect. In opposing Oracle's Motion *in Limine* No. 3, Defendants argued *primarily* that: "Plaintiffs have 'manifested an adoption or belief in [the] truth' of the customer statements in the At Risk report; thus, they are adoptive admissions. *See* Fed. R. Evid. 801(d)(2)(B)." Dkt. No. 791 at 9 (Aug. 19, 2010). (The relevant pages are attached to this brief as Ex. 1.) Defendants' new brief offers nothing different from what Defendants unsuccessfully argued before: literally every piece of evidence they cite in their current motion they also cited in the motion *in limine* briefing. And *every* case Defendants cited in opposing the motion *in limine* they cite once again in their current motion. *Compare* Dkt. No. 791 at 10 *with* Defs.' Motion at 2, 4.

Defendants' motion also does not point to anything that occurred during trial – no

testimony, no evidence – to argue that the Court should change its prior ruling on the motion *in limine*. Thus, their motion really is just a motion for reconsideration that fails the standards of Local Rule 7-9. *See* L.R. 7-9(b)(1) ("No motion for leave to file a motion for reconsideration may repeat any oral or written argument made by the applying party" in the previous briefing. L.R. 7-9(c). "Any party who violates this restriction shall be subject to appropriate sanctions." *Id*. Defendants' motion is a wholesale repetition of their opposition to Plaintiffs' motion *in limine* No. 3. It is prohibited reargument under Local Rule 7-9.

Defendants also ignore the conditions the Court placed on their ability to use these customer comments at trial. After granting Plaintiffs' motion to exclude them, the Court stated that "[i]f, however, any of Oracle's experts testifies that he relied on the customer statements in forming any part of his opinion, then SAP may cross-examine the expert regarding the customer statements." Final Pretrial Order, Dkt. No. 914 at 1-2. Oracle's damages expert, Paul Meyer, testified that he did not rely on the customer comments in the At Risk reports other than for the limited purpose of truncating the time period for his damages analysis for some customers. Defendants' motion *does even mention* Meyer's trial testimony. It also does not acknowledge the Court's order specifying that cross-examination as Defendants' remedy if any Oracle expert relied on the customer statements. Defendants also fail to mention that they chose not to cross-examine Meyer about his limited reliance on the customer comments.

Rather, Defendants' current motion seeks to admit the customer statements for the truth, without regard for any expert testimony at trial concerning reliance on them, and not for any cross-examination purpose, as Plaintiffs have rested their case. Defendants' motion is foreclosed by the Court's prior order and should be denied.

II. THE CUSTOMER STATEMENTS ARE INADMISSIBLE HEARSAY

If the Court looks past the reconsideration issue, the result should not change because the evidence has not changed. Oracle did not adopt the customer statements in the At Risk reports.

A. No Verification or Duty to Report Accurately

The Ninth Circuit has explained how to address the situation where customer-

supplied information is contained within a document that is otherwise a business record, as is the case with the customer comments here. "The problem of customer-supplied information can be analyzed as 'hearsay within hearsay.' In such 'double hearsay' situations, each statement must qualify under some exemption or exception to the hearsay rule." *United States v. Arteaga*, 117 F.3d 388, 396 n.12 (9th Cir. 1997); Fed. R. Evid. 805. Thus, "[c]ourts that have applied this principle to [business] records have generally held that customer-supplied information on [the recorded forms], *which is not verified*, should be excluded . . . ." *Arteaga*, 117 F.3d at 395 (emphasis supplied). Accordingly, the exception to the hearsay rule for information supplied by third parties "applies only if the person furnishing the information to be recorded is 'acting routinely, *under a duty of accuracy*, with employer reliance on the result, or in short in the regular course of business.'" *United States v. Pazsint*, 703 F.2d 420, 424 (9th Cir. 1983) (holding that witness statements in a police report were inadmissible hearsay) (internal citation omitted, emphasis supplied).

Oracle's customers did not have a duty to accurately report their reasons for leaving Oracle support. Defendants do not contend any such duty existed. In addition, specific testimony by the Oracle witnesses responsible for assembling the At Risk reports established that Oracle did not verify the accuracy of the customer comments. Dkt. No. 738-21 (Cummins 9/23/08 30(b)(6) Depo. at 269:22-25, 270:1-8); Dkt. No. 738-22 (Shippy 3/5/09 Depo. at 92:15-17). Rather, Oracle employees simply pasted the comments into the notes field of the At Risk reports. Dkt. No. 738-21 (Cummins 9/23/08 30(b)(6) Depo. at 269:5-10, 269:16-18 ("The information came in, Beth told me that she cut and pasted it directly from the e-mail into the database.")). The customer-supplied information in the At Risk reports "was as good as the information that we received from the rep, which then received the information directly from the customer." Dkt. No. 738-22 (Elizabeth Shippy 3/5/09 Depo. at 92:15-17).[1] Far from adopting

[1] Like Defendants' motion, Plaintiffs' opposition relies on evidence previously submitted in the motion *in limine* briefing. Accordingly, Plaintiffs cite to the docket entries of this previously filed evidence.

the accuracy of the customer comments, Oracle employees realized that customers gave untrue information. *E.g.*, Dkt. No. 738-26 (ORCL00127354 (internal Oracle email from Robert Lachs to Rick Cummins stating, "It turns out [customer] was purposefully dishonest (or 'vague' as they elect to phrase it) keeping us at bay while a) not telling us the renewal was at risk . . .")).

Accordingly, under controlling Ninth Circuit standards, the customer comments in the At Risk reports are inadmissible hearsay.

B. Defendants Conflate the At Risk Reports as a Whole with the Customer Comments the Court Excluded

Aside from the customer comments about the stated reasons for dropping Oracle support, the At Risk reports contained other information relevant to Oracle's business, such as win-loss percentages, rates of renewals, and lists of customers potentially at risk. Oracle did not move to exclude any of that information. Defendants seize on Oracle's use of this *other* information – not the customer comments – to argue that Oracle somehow adopted the truth of the customer comments. But Defendants make no showing that Oracle adopted the customer statements as its own statements or manifested a belief in their truth.

For example, Defendants cite an Oracle PowerPoint presentation concerning third party support. Defs.' Motion at 2 (citing ECF No. 929-16 (ORCL00130706-728)). The PowerPoint refers to the At Risk reports and provides win-loss percentages and summaries of at risk products and customers. ECF No. 929-16 at ORCL00130710-714. But consider what is *not* in the PowerPoint: the inadmissible customer comments.

Defendants also cite evidence showing that Oracle circulated the At Risk reports on a regular basis. Defs.' Motion at 2-3 (citing ECF Nos. 929-14 through -17 and ECF Nos. 929-20 and -21). None of that evidence reflects any adoption of the customer statements as truthful or as Oracle's own. Defendants are ignoring the Ninth Circuit's instruction on how to analyze customer statements within a business record. "In such 'double hearsay' situations, *each statement* must qualify under some exemption or exception to the hearsay rule." *Arteaga*, 117 F.3d at 396 n.12 (emphasis supplied). The circulation and use of a business record does not establish that second-level hearsay contained within the business record is admissible.

Accordingly, it is not sufficient for Defendants to show that Oracle used the At Risk reports in general as business records. To admit the customer comments, Defendants must show that Oracle adopted the comments themselves. Defendants have not made such a showing.

For this reason, the cases Defendants cite do not support their argument. *Schering Corp. v. Pfizer Inc.*, 189 F.3d 218 (2d Cir. 1999) – the decade-old case Defendants say is their "new" authority – agreed with Plaintiffs' position here that "[a] party admission may, however, be inadmissible when it merely repeats hearsay and thus fails to concede its underlying trustworthiness." *Id*. at 239. That is the situation here. Defendants' other cases are in accord, likewise demanding a showing that the opposing party adopted the third-party statements as true before allowing them to be admitted as adoptive admissions. *See* Defs.' Motion at 2 (citing *Sea-Land Serv., Inc. v. Lozen Int'l, LLC*, 285 F.3d 808, 821 (9th Cir. 2002); *MGM Studios, Inc. v. Grokster, Ltd.*, 454 F. Supp. 2d 966, 973 (C.D. Ca. 2006); *Wright-Simmons v. City of Oklahoma City*, 155 F.3d 1264, 1268 (10th Cir. 1998)).

Defendants have not shown that Oracle adopted the customer comments in the At Risk reports as true. The comments are inadmissible hearsay.

C. Not "State of Mind" Evidence

Defendants' alternative contention that the customer comments are admissible as state of mind evidence likewise has no merit. Fed. R. Evid. 803(3) creates a hearsay exception for "[a] statement of the declarant's then existing state of mind." Here, Defendants are attempting to admit the customer comments as proof of a future event, not as evidence of then-existing state of mind. Defendants want to argue that the customer comments show that the customer *would have left Oracle support anyway*, regardless of TomorrowNow's conduct. Defendants will then argue that Oracle's lost profits damages should be assigned a smaller value on the theory that Oracle would not have earned that profit anyway. However, that is not using the customer comments as state of mind evidence. The very case Defendants rely on – *Callahan v. A.E.V., Inc.*, 182 F.3d 237 (3d Cir. 1999) – refutes their argument. *Callahan* followed a prior Third Circuit precedent holding that customer statements are inadmissible hearsay when used to prove the fact of financial loss, *i.e.*, that customers actually did or would leave the Plaintiff. *Id.*

at 253 ([I]in *Stelwagon* we held that customers' hearsay statements were not admissible to prove lost business."). *Callahan* distinguished *Stelwagon* on the ground that the Plaintiff in *Callahan* was not using customer statements to prove the fact of loss but to show why. Here, Defendants are trying to use the customer statements for the impermissible hearsay purpose, namely, in an attempt to disprove the fact of loss.

D. The Court Limited Use to Cross-Examination

In trial testimony not referenced by Defendants in their motion, Oracle's damages expert, Paul Meyer, testified he used a portion of some comments for the very limited purpose of truncating a time frame for damages:

> Q. Okay. And you -- you also used statements in those At-Risk reports attributed to customers about why they were leaving or why they were at risk of leaving, correct?
>
> A. Generally, that was not the case. I used them, but mostly for what I call truncated information about -- if I wanted -- my damage number on the $120 million goes out through 2015, a 10-year period. So if there was information in the At-Risk report about that sole issue, I would use it to cut off or truncate damages just to be very conservative. I did not use those documents for any other information.

See Trial Tr., Nov. 12, 2010, 1289:10-20 (emphasis supplied).

Per the Court's order, Defendants were entitled to cross-examine Meyer about the minimal portion of the report he used, but they chose not to do so. That is unsurprising. Given Meyer's limited reliance on the customer comments, Defendants were uninterested in pursuing that issue with him, as the Court had allowed them to do. Instead, Defendants want to admit customer comments clearly excluded by the Court's order, such as "Mark [customer at National Manufacturing] told me that they will continue to run JDE for another year or so, however he's getting direction from the Director of IT that their not going to pay 160K for support. Mark then told me that the Director is in discussion with TomorrowNow and if we can't reduce the fees then they are going to move to TN." Defendants' Trial Exhibit A-9338 at AMER-Lost 17. Defendants ask the Court to admit this customer comment, and many others like it, even though the comments were not relied on by Meyer, and were not used for cross-examination. There is

no basis for such a request, which is squarely foreclosed by the Court's order.

III. CONCLUSION

Defendants' motion should be denied.

DATED: November 15, 2010

Bingham McCutchen LLP

By: /s/ Geoffrey M. Howard
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