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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' OPPOSITIONS TO
PLAINTIFFS' MOTIONS IN LIMINE**

Date: September 30, 2010
Time: 2:30 p.m.
Place: 3rd Floor, Courtroom 3
Judge: Hon. Phyllis J. Hamilton

1 lawsuit, Defendants' counsels' instructions and Faye's and Crean's corresponding refusal to
 2 answer or limiting of their answers on the basis of the attorney-client privilege were proper. No
 3 waiver occurred, no sword has been wielded, and the privilege has remained a shield.

4 **II. OPPOSITION TO PLAINTIFFS' MOTION IN LIMINE NO. 3 – "CUSTOMER**
 5 **STATEMENTS IN AT RISK REPORTS"**

6 The Court should deny Plaintiffs' Motion in Limine No. 3 for four reasons: (1) Plaintiffs'
 7 assertions, in open court and through their damages expert Paul C. Meyer, confirm the probative
 8 value of the At Risk report; (2) the customer statements are adoptive admissions and not hearsay;
 9 (3) the statements are offered for other non-hearsay purposes including the customer's state of
 10 mind, notice and in support of Defendants' mitigation of damages defense; and (4) Meyer relied
 11 on the At Risk report, and thus, it is admissible to explore the bases of his opinions.

12 **A. The At Risk Report's Relevance.**

13 A customer's reasons for not renewing support contracts with Plaintiffs are central to this
 14 case. Specifically, Plaintiffs claim that TN's customers would have continued to purchase Oracle
 15 support services had TN not existed, while Defendants claim that a large percentage of those
 16 customers would have left Oracle even had TN not existed. The At Risk report, a report of
 17 information regarding customers "at risk" of not renewing Oracle support services, is the single
 18 most comprehensive compilation of customers' reasons for leaving Oracle. Given that there are
 19 358 customers at issue, the parties' ability to rely on this compilation is particularly important.

20 The At Risk report should be admitted in its entirety because of its probative value. *See*
 21 Fed. R. Evid. 807 (statement is admissible if "the statement is more probative on the point for
 22 which it is offered than any other evidence which the proponent can procure through reasonable
 23 efforts"). Plaintiffs' attorneys confirmed the probative value of the At Risk report early in this
 24 case, initially arguing that it was so great that Defendants' damages discovery should be limited.
 25 *See Lanier Decl. ¶ 10, Ex. 10 (2/13/08 Hearing Transcript) at 153:22-154:11 ("[T]he notion that*
 26 *we need to go any farther afield than this incredibly detailed document . . . is highly premature."*).
 27 Plaintiffs' attorney further explained:

28 MS. HOUSE: Moreover, I think it is very important that you understand that one

1 of the key documents that we're going to be producing—we call it internally, or
 2 Oracle calls it internally, an “at-risk report.” . . .

3 [I]t is actually a vibrant electronic . . . document that is sort of a historical
 4 compilation of all of the losses to third parties . . . has detailed notes about every
 5 single one of those customers that was lost, and what was the perception about
 6 why they were lost . . .

7 JUDGE LEGGE: What is it called?

8 MS HOUSE: Third-party risk analysis. And this is a document that is not specific
 9 to the 69 customers; has enormous detail about all customers lost to all third
 10 parties. This is a gift.

11 . . . This is something that is an internal Oracle document, that is – goes a very
 12 long way in compiling, and in one unit . . . the various customers that were
 13 actually in play; what happened to them; what kind of financial losses on a one-
 14 year period were associated with those customers.

15 Lanier Decl. ¶ 10, Ex. 10 (2/13/08 Hrg. Tr.) at 152:24-154:3. One month later, Plaintiffs again
 16 went to great lengths to explain the probative value of the At Risk report in an effort to limit other
 17 discovery:

18 JUDGE LEGGE: Define it for me, would you?

19 MR. HOWARD: It's a compilation, Oracle's compilation of all of the different
 20 reasons that customers give for leaving Oracle when they go to TomorrowNow or
 21 other third-party support providers, and that's not limited to the 69. It's all of the
 22 information that Oracle has in that form relating to those customers. . .

23 JUDGE LEGGE: That's pretty darn comprehensive.

24 MR. HOWARD: It is very comprehensive.

25 Lanier Decl. ¶ 11, Ex. 11 (3/4/08 Hrg. Tr.) at 105:13-24.

26 Plaintiffs' damages expert agreed that the report is relevant and probative. In his report,
 27 Meyer wrote, “Oracle established a *formal* ‘At Risk’ reporting process for sales personnel to
 28 report support renewal customers that they felt were ‘at risk’” of not renewing” (emphasis added).

29 Lanier Decl. ¶ 12, Ex. 12 (Meyer Report) ¶ 88. Additionally, he relied upon the At Risk report—
 30 without any qualification about the customer statements—to form his opinions. *Id.* ¶ 381
 31 (“Where applicable, the results of my analysis were compared, by customer, to Oracle or
 32 PeopleSoft contemporaneous reports of support renewals lost or at risk of being lost (“At Risk”
 33 reports).”) Thus, Meyer's reliance upon the document confirms its probative value and

1 admissibility under Rule 703 of the Federal Rules of Evidence.

2 Indeed, even in their motion, Plaintiffs effectively acknowledge the indicia of reliability of
3 the report, including the customer statements within the report. *See* D.I. 737 (Pls.’ Mots. in
4 Limine) at 14 (At Risk report designed and maintained by Oracle’s Director of North American
5 Support Sales, “updated and modified over time,” and “distributed internally within Oracle”).

6 **B. Customer Statements in the At Risk Report Are Adoptive Admissions.**

7 Plaintiffs have “manifested an adoption or belief in [the] truth” of the customer statements
8 in the At Risk report; thus, they are adoptive admissions. *See* Fed. R. Evid. 801(d)(2)(B). For
9 example, when the creator of the report (Rick Cummins, Oracle’s Director of North American
10 Support Sales) was asked about the *very type of statement* that Plaintiffs now seek to exclude (an
11 email sent from a customer in the notes section of the At Risk report, (Lanier Decl. ¶ 13, Ex. 13
12 (Defs.’ Ex. 311)), he testified that he relied upon the customer statements. *See* Lanier Decl. ¶ 14,
13 Ex. 14 (4/21/09 Cummins Tr.) at 234:1-15 (“Q. And you relied on that for keeping track of
14 customers that were at risk of cancelling support. A. Yes.”).³ Cummins also confirmed that the
15 notes section was a critical part of the report. *See* Lanier Decl. ¶ 15, Ex. 15 (9/16/08 Cummins
16 Tr.) at 225:2-4 (“I was most reliant on the notes column.”). Indeed, support sales representatives
17 were warned that “[t]his data is provided to Oracle executives and needs to be accurately,
18 succinctly, and regularly updated.” Lanier Decl. ¶¶ 15-16, Ex. 16 (Defs.’ Ex. 217) at
19 ORCL00130710; Ex. 15 (9/16/08 Cummins Tr.) at 216:13-23. Indeed, a multitude of documents
20 confirm Oracle’s routine use and reliance upon the customer statements.⁴

21 ³ Plaintiffs argue that an email from Cummins to Robert Lachs shows that “[s]ometimes
22 customers gave inaccurate information to Oracle. . . .” D.I. 737 (Pls.’ Mots. in Limine) at 15
23 (citing D.I. 738-26 (Ex. Z to the Hixson Decl.)). This document actually *confirms* that Oracle
made sure that it accurately updated the At Risk report. *See* D.I. 738-26 (Ex. Z to the Hixson
Decl.) (Cummins requested that “‘at risk’ is updated appropriately to reflect this one this week”).

24 ⁴ Information in the At Risk report, including customer statements, was regularly
25 distributed within Oracle in native form, (Lanier Decl. ¶¶ 17-18, Ex. 17 (Defs.’ Ex. 61)
26 (“Attached is the latest third party risk analysis.”); Ex. 18 (Defs. Dep. Ex. 58) (same)) and as
27 portions adopted and incorporated into emails, reports and presentations. *See* Lanier Decl. ¶¶ 15,
28 19-23, Ex. 15 (9/16/08 Cummins Tr.) at 212:4-213:25 (stating that At Risk report used for
information in updates regularly sent to Juergen Rottler); Ex. 19 (9/23/08 Cummins Tr.) at
316:19-317:8 (stating that Cummins sent out At Risk report monthly); Ex. 20 (Defs.’ Ex. 299) at
ORCL00188697 (incorporating and adopting part of At Risk report in PeopleSoft and Siebel
Q207 YTD Cancellation Review); Ex. 21 (Defs.’ Ex. 334) at ORCL00131374 (incorporating and
adopting “Notes” section of At Risk report in North America Support Review); Ex. 22 (Defs.’ Ex.

1 Oracle's routine use of and reliance upon the customer statements far exceed the use and
 2 reliance other courts have held "manifest[] an adoption or belief in [the] truth" of a statement.
 3 *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 454 F. Supp. 2d 966, 973 (C.D. Cal. 2006)
 4 ("To the extent other content is incorporated into these emails, and to the extent [Plaintiffs']
 5 agent[s] express[] approval thereof, the incorporated content is admissible as vicarious
 6 adoptions."); *see also Sea-Land Serv., Inc. v. Lozen Int'l, LLC*, 285 F.3d 808, 821 (9th Cir. 2002)
 7 (forwarding memo written by another employee to opposing party "manifested an adoption" of its
 8 truth); *Tracinda Corp. v. Daimler-Chrysler AG*, 362 F. Supp. 2d 487, 500 (D. Del. 2005) ("An
 9 adoptive admission can be found in the circumstances where a party forwards a document to
 10 another in response to a request for information contained in the document.").

11 **C. Customer Statements Reveal Existing State of Mind.**

12 The customer statements reveal Oracle's customers' then existing mental condition. *See*
 13 Fed. R. Evid. 803(3). The statements may be admitted to show customer motive, opportunity and
 14 intent to terminate Oracle support services for reasons other than TN. *See Callahan v. A.E.V.,*
 15 *Inc.*, 182 F.3d 237, 252 (3d Cir. 1999) (reversing district court and concluding "statements of a
 16 customer as to his reasons for not dealing with a supplier are admissible for this limited purpose,
 17 i.e., the purpose of proving customer motive") (citation omitted).⁵

18 **D. Meyer Relies on the At Risk Report.**

19 The At Risk report is admissible under Rule 705 of the Federal Rules of Evidence to
 20 explore the underlying facts and data relied upon by Plaintiffs' damages expert Meyer. *See*
 21 Lanier Decl. ¶ 12, Ex. 12 (Meyer Report) at ¶ 381. Defendants can introduce the entire At Risk
 22 report to explore the basis of his opinions. *See* Fed. R. Evid. 705.

23
 24 (continued...)

25 309) at ORCL00126452 (incorporating and adopting portions of At Risk report in email about
 26 "notable PSFT cancellations"); Ex. 23 (Defs.' Ex. 214) (incorporating and adopting sections of At
 27 Risk report in email about customer calls). In fact, Oracle personnel made "[p]roactive customer
 visits to key customers identified 'At Risk.'" Lanier Decl. ¶ 24, Ex. 24 (Defs.' Ex. 63) at
 ORCL00088229.

28 ⁵ Similarly, the customer statements may be admitted to show Oracle notice of its
 malcontented customers and, correspondingly, on the need to take steps to mitigate its damages.

1 In sum, the customer statements are admissible under Rules 703, 705, 801(d)(2), 803(3),
 2 and 807 of the Federal Rules of Evidence because they are reliable and accurate recordings of
 3 Oracle’s customer’s then existing mental conditions. *Cf., e.g., BoDeans Cone Co., L.L.C. v.*
 4 *Norse Dairy Sys., L.L.C.*, 678 F. Supp. 2d 883, 906-07 (N.D. Iowa 2009) (rejecting argument to
 5 exclude “double hearsay” customer statements in a business record because of Rules 801(d),
 6 803(3), 803(6) and 807 of the Federal Rules of Evidence).⁶

7 **E. Procedural Errors Also Justify Denying Motion in Limine No. 3.**

8 Plaintiffs’ motion should also be denied for procedural reasons. Plaintiffs have not
 9 provided a copy of the At Risk report to review, instead electing to cherry pick a few excerpts
 10 from it. *See* D.I. 738-24 (Ex. X to the Hixson Decl.). Moreover, buried in a footnote, Plaintiffs
 11 request that an entire group of *unidentified* other documents should also be excluded. *See* D.I.
 12 737 (Pls.’ Mots. in Limine) at 17 n.3. The Court cannot exclude evidence that has not been
 13 identified, let alone shown, to Defendants or the Court.

14 **III. OPPOSITION TO PLAINTIFFS’ MOTION IN LIMINE NO. 4 – “EVIDENCE OF**
 15 **SETTLEMENT DISCUSSIONS”**

16 The Court should deny Plaintiffs’ Motion in Limine No. 4 because Rule 408 (“Rule 408”)
 17 of the Federal Rules of Evidence does not bar evidence of compromise negotiations when used to
 18 establish failure to mitigate damages or to contest whether punitive damages are appropriate.

19 Plaintiffs seek to preclude Defendants from introducing evidence of informal settlement
 20 discussions that occurred in November 2007, separate and apart from the Court-ordered
 21 mediation process. *See* D.I. 737 (Pls.’ Mots. in Limine) at 17-18. Plaintiffs rely on Rule 408,
 22 which states that evidence of compromise negotiations is not admissible “when offered to prove
 23 liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to
 24 impeach through a prior inconsistent statement or contradiction.” Fed. R. Evid. 408. Although
 25 Plaintiffs properly cite the language of this rule, they fail to appreciate its meaning. Rule 408
 26 does not entirely disallow evidence of compromise negotiations; rather, it prohibits this evidence

27 _____
 28 ⁶ For this reason, the cases Plaintiffs cite in their Motion are inapposite because they do not consider the multiple other reasons the customer statements are admissible.