The Titan Killer: Mandatory Exclusion under Federal Rule of Civil Procedure Rule 37(c)(1)

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Oracle and SAP are at war. They have exchanged bayonet charges in discovery for two years in a case where Oracle has accused SAP (TomorrowNow) of "systematic and pervasive illegal downloading of Oracle software over approximately six years." *Oracle United States v. Sap Ag,* 2009 U.S. Dist. LEXIS 91432 (N.D. Cal. Sept. 17, 2009). Production has been over 12 terabytes with 140 custodians and document review for *each* custodian has cost $100,000. *Oracle,* 6-7.

Somewhere in the thirteen discovery conferences, the Court instructed the parties to follow the proportionality requirements of Federal Rule of Civil Procedure Rule 26(b)(2)(c), to beware of the expense of the proposed discovery outweighing its benefit. *Oracle,* 7-8. Needless to say, knowing the damages at issues when they could equal the budget of a large city would be important to know early in discovery.

The Plaintiff took the position for two years that their lost profits damages were based on "lost support revenue for Oracle software application products from Plaintiffs' 358 former customers that had received support from Plaintiffs, but switched to receiving support for Oracle products from TomorrowNow." *Oracle,* 8.

And that is how discovery played out to the tune of millions of dollars for both parties for two years.

Iceberg, Dead Ahead

The Plaintiffs switched damages arguments during the depositions of their executives in April and May of 2009. *Oracle,* 38. The Plaintiffs at that time claimed the "greater economic harm came from lost licensing revenue and price reductions to customers that never left Oracle for TomorrowNow." *Oracle,* 38. The Plaintiffs referred to lost customers as "only the tip of the iceberg" to their damages, which were not disclosed for two years to the Defendants and the Court. *Oracle,* 38-39.

To Kill a Titan: Court Orders and Supplemental Disclosures

The Defendants fought a Hegemonic war to exclude the additional damages evidence for violating a Federal Rule of Civil Procedure Rule 16(f) discovery order and failure to supplement discovery under Federal Rule of Civil Procedure 26(e)(1). Moreover, a failure under Federal Rule of Civil Procedure Rule 26(e)(1) subjects the offending party to mandatory exclusion of that information under Federal Rule of Civil Procedure Rule 37(c)(1). *Oracle,* 12-15.

The Court held the Plaintiffs had a duty to disclose the "tip of the iceberg" damages known to their executives, long before their depositions two years after millions of dollars had been spent on discovery. *Oracle,* 48. The Defendants' economic damages expert witness stated it would take an additional year to analyze the new damages claims and cost $5 million ($4.4 million had already been spent and it was estimated $4 million more through trial). *Oracle,* 48-49. There was no excuse for not disclosing basic damage claims in discovery.

The Court granted the Defendants' exclusion motion, precluding the Plaintiffs from arguing any additional damage theories other then the original damages theory. *Oracle,* 58-59. Don't feel too bad for the Plaintiff, because this evidence might be over a billion dollars. *Oracle,* 59.

Bow Tie Lessons: The Hammer will Fall

The Plaintiffs were precluded from arguing additional damages theories because they did not supplement their initial and court ordered discovery. Courts are truly laying down the law on Federal Rules of Civil Procedure Rules 26(a) and 26(e)(1) with the hammer of Federal Rule of Civil Procedure Rule 37(c)(1).