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17 Attorneys for Defendants
SAP AG, SAP AMERICA, INC., and
18 TOMORROWNOW, INC.

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)

**DECLARATION OF THARAN GREGORY
LANIER ISO DEFENDANTS' RENEWED
MOTION FOR JUDGMENT AS A MATTER OF
LAW AND NEW TRIAL MOTION**

Date: July 13, 2011
Time: 9:00 a.m.
Courtroom: 3, 3rd Floor
Judge: Hon. Phyllis J. Hamilton

1 I, THARAN GREGORY LANIER, declare as follows:

2 I am a partner in the law firm of Jones Day, 1755 Embarcadero Road, Palo Alto,
3 California 94303, and counsel of record for Defendants SAP AG, SAP America, Inc. (together,
4 “SAP”), and TomorrowNow, Inc. (“TN”) (collectively, “Defendants”) in the above-captioned
5 matter. I am a member in good standing of the state bar of California and admitted to practice
6 before this Court. I make this declaration based on personal knowledge and, if called upon to do
7 so, could testify competently thereto.

8 Paragraphs 1-170 set forth evidence and argument presented at trial in the above-
9 captioned matter relevant to Defendants’ Renewed Motion for Judgment as a Matter of Law and
10 New Trial Motion. Paragraphs 171-212 identify exhibits attached to this declaration.

11 **Evidence Offered to Quantify Actual Harm to Oracle.**

12 **Exhibits and Demonstratives**

13 1. PTX7035 is a document prepared by Defendants, dated November 3, 2009, stating
14 that TN supported a total of 358 customers and that 86 of these purchased TN service and SAP
15 products/support simultaneously, or were existing TN customers at the time they purchased new
16 SAP software or service. See **Exhibit 36** (PTX7035) at 1.

17 2. JTX0006 is a joint demonstrative provided to the jury on November 23, 2010. It
18 reflects that Defendants’ damages expert Stephen Clarke calculated lost profits of \$19.3 million
19 and infringer’s profits of \$8.7 million and that the damages expert retained by Plaintiffs
20 (“Oracle”), Paul Meyer, calculated lost profits of \$120.7 million and infringer’s profits of
21 between \$236 million and \$288 million. See **Exhibit 15** (JTX0006).

22 **Fact Witness Testimony**

23 3. Oracle CEO Larry Ellison testified that a total of 358 customers purchased support
24 services from TN, “out of the thousands of customers that were purchased” by Oracle. **Exhibit 1**
25 (11/8/10 Trial Tr.) at 795:7-10.

26 4. Ellison also testified that if, in January 2005, “[he had] been negotiating a license
27 to give all this intellectual property that they took,” he would not “have conditioned the value of
28 that license on how many customers [TN or SAP] actually got.” *Id.* at 801:24-802:9.

1 5. Oracle co-President Safra Catz testified that approximately 358 customers
2 purchased support services from TN—approximately 2-3% of the 14,000 PeopleSoft and Siebel
3 customers Oracle acquired. *See id.* (11/8/10 Trial Tr.) at 875:24-876:23, 883:19-884:4; **Exhibit 1**
4 (11/19/10 Trial Tr.) at 1935:19-1936:3.

5 6. Lexmark representative Jeffrey O’Donnell testified that TN “was not a data point”
6 in Lexmark’s decision to transition its applications software to SAP. **Exhibit 7** (9/15/09
7 O’Donnell Tr., played 11/15/10) at 13:11-13, 15:2-6, 35:12-36:5, 41:22-42:15.

8 7. McLennan County representative Robert Wasson testified that in the absence of
9 TN, McLennan County would have investigated different, non-Oracle software that was “a better
10 fit for McLennan County with less customization”; Wasson also testified that McLennan County
11 never considered returning to Oracle for support because “it would be too costly and with my
12 shop, I needed more of the personal support like the third-party type vendors offered”
13 **Exhibit 6** (7/23/09 Wasson Tr., played 11/15/10) at 39:21-40:17, 89:17-90:8, 98:23-99:9.

14 8. Sara Lee Corporation representative Stephen Brazile testified that Sara Lee already
15 planned to replace its J.D. Edwards (“JDE”) software with SAP software when it reached out to
16 TN to provide support for its JDE software. *See Exhibit 8* (10/14/09 Brazile Tr., played 11/15/10)
17 at 48:14-49:7, 49:9-49:16, 55:14-56:24, 108:5-9, 111:12-19.

18 Expert Testimony

19 9. Meyer testified that he agreed that TN supported a total of 358 customers. *See*
20 **Exhibit 1** (11/12/10 Trial Tr.) at 1276:6-8.

21 10. Meyer also testified that he “wouldn’t think it’s appropriate” to consider that TN
22 supported a total of 358 customers in calculating his hypothetical license price, and that he did not
23 “run [his] model with those actual numbers” of TN customers because “it was not relevant.”
24 **Exhibit 1** (11/9/10 Trial Tr.) at 1086:21-1087:2; (11/12/10 Trial Tr.) at 1311:25-1312:22.

25 11. Meyer testified that he calculated lost profits of approximately \$121 million and
26 infringer’s profits of between \$236 million to \$288 million. *See Exhibit 1* (11/9/10 Trial Tr.) at
27 1021:24-1022:15, 1053:25-1055:2, 1057:1-3

28 12. Meyer testified that his \$121 million lost profits calculation represented Oracle’s

1 lost profits through 2015, “to reflect the ongoing impact.” *Id.* at 1055:3-1056:5.

2 13. Meyer testified that his \$121 million lost profits calculation differs from Clarke’s
3 analysis in that Clarke calculated lost profits and infringer’s profits through the wind-down of
4 TN’s operations in October 2008. *See id.* at 1063:15-24, 1064:13-1065:15.

5 14. Meyer testified that he alternatively calculated \$36 million in lost profits through
6 the wind-down of TN’s operations in October 2008. *See id.* at 1055:11-1056:5.

7 15. Meyer testified that his calculation of infringer’s profits “ranges down” to \$236
8 million because there are three customers “where there’s some issues still that sort of exist about
9 the role of TomorrowNow in converting those customers to SAP.” *Id.* at 1022:1-13.

10 16. Meyer testified that Clarke excluded more customers from his calculation of lost
11 profits and infringer’s profits based on Clarke’s conclusion that these customers would have left
12 Oracle or would have purchased from SAP even absent TN’s infringing activities. *See id.* at
13 1057:5-1060:18, 1063:15-1064:4, 1065:17-1068:18.

14 17. Meyer testified that during TN’s operations, Oracle knew (1) “that TomorrowNow
15 was owned by SAP at that point,” (2) “that TomorrowNow was offering half price services
16 without upgrades,” and (3) “how many of their customers, if any, had left Oracle to go to
17 TomorrowNow.” *Id.* at 1139:15-1140:3.

18 18. Meyer testified that, in prior cases, he has testified that damages experts should
19 “be aware of what happens in the future to make sure that you get the proper result at the time of
20 the hypothetical.” *Id.* at 1090:4-1091:12.

21 19. Meyer testified that the fact that TN only obtained 358 customers is attributable in
22 part to the fact that SAP “wasn’t successful in its execution.” *Id.* at 1085:7-1086:4.

23 20. Clarke testified that he excluded customer Stora Enso from his calculation of
24 infringer’s profits based on a declaration from Daniel Clark of NewPage Corporation, stating that,
25 following NewPage’s acquisition of Stora Enso, NewPage required Stora Enso to transition to
26 SAP software. *See Exhibit 1* (11/18/10 Trial Tr.) at 1784:16-1785:9, 1786:20-1787:4.

27 21. Clarke testified that he excluded customer Rotkaeppchen Sektkellerei GmbH from
28 his calculation of infringer’s profits damages based on a declaration from Andre Birrenbach of

1 Rotkaeppchen Sektkellerei GmbH, which stated that the company had purchased SAP software
2 because it preferred SAP's functionality over its current JDE World software, and that "if
3 TomorrowNow had not been available, they would still have replaced the JDE World programs
4 they were using with SAP." *Id.* at 1788:16-1789:20.

5 22. Clarke calculated lost support profits of \$19.3 million and infringer's profits of
6 almost \$8.7 million. *See Exhibit 1* (11/16/10 Trial Tr.) at 1538:15-23, 1630:22-1633:4.

7 23. Clarke testified that whether or not Oracle knew how TN was providing service,
8 Oracle knew what TN was doing in the marketplace, so that knowledge would not have "affected
9 what they thought about the—the success of the program." *Id.* at 1553:22-1554:13.

10 Argument

11 24. In closing argument, Oracle's counsel argued that in valuing the licenses, the jury
12 should "not take facts that you believe or knew in 2006, 2007, 2008 or 2009 and try to import
13 them back into January [2005]." *Exhibit 1* (11/22/10 Trial Tr.) at 2052:20-22.

14 **Evidence Regarding No Benchmark Licenses and No Lost License Fee.**

15 Fact Witness Testimony

16 25. Oracle co-President Charles Phillips testified that if Oracle had considered selling
17 SAP a license in January 2005, "I would have been terrified if my largest competitor now had the
18 exact same product I had and this competitor is three times my size and can go in and sell the
19 same thing, support the exact same customers. . . . So it would have been—yeah, it would have
20 just been unthinkable at the time." *See Exhibit 1* (11/4/10 Trial Tr.) at 521:16-522:6.

21 26. Oracle Senior Vice President for Global Practices Richard Allison testified that he
22 is responsible for Oracle's license terms and that the hypothetical licenses covering TN's use of
23 the software would permit a competitor "to use your own IP to take your customers"; thus, such a
24 license would not "make business sense" for Oracle, and Oracle never has granted such a license.
25 *Exhibit 1* (11/5/10 Trial Tr.) at 653:24-654:18, 654:23-656:8, 668:5-11.

26 27. Allison also testified that a license for the Oracle database software resembling the
27 hypothetical license sought by Oracle would be "unique" and that had TN requested a license for
28 use of the database, "I wouldn't have given them a license to do what they're doing." *Id.* at

1 668:25-669:12, 671:7-15, 674:2-7.

2 28. Catz testified that the hypothetical licenses would “allow[] SAP and
3 TomorrowNow to use Oracle’s intellectual property to then go after Oracle’s customers,” which
4 use would be “unprecedented”; that Oracle has no comparable licenses in its portfolio; and that
5 Oracle’s licenses with partners and resellers are not “good benchmark[s]” for the hypothetical
6 licenses at issue. **Exhibit 1** (11/19/10 Trial Tr.) at 1889:6-1891:10, 1936:19-1937:20.

7 29. SAP AG CFO Werner Brandt testified that he is unaware of any situation in which
8 SAP licensed a competitor’s software to provide support services. *See* **Exhibit 1** (11/5/10 Trial
9 Tr.) at 742:2-6.

10 30. Brandt also testified that SAP would not have entered into a license with Oracle
11 when it purchased TN; rather, SAP would have either asked TN to make further changes to its
12 procedures or “would have considered not to buy TomorrowNow.” *Id.* at 699:9-21.

13 31. SAP AG CEO Bill McDermott testified that he is not aware of situations in which
14 a company attempted to license software to or from a competitor to provide support services. *See*
15 **Exhibit 1** (11/15/10 Trial Tr.) at 1501:5-15.

16 Expert Testimony

17 32. Meyer testified that he calculated damages in the form of three separate
18 hypothetical licenses to use the PeopleSoft and JDE software, Siebel software, and Oracle
19 database software. *See* **Exhibit 1** (11/8/10 Trial Tr.) at 897:22-898:6.

20 33. Meyer testified that the hypothetical database license would be a “unique,” “first-
21 time ever thing” with no comparable licenses to serve as benchmarks, including the database
22 reseller agreement, and that “I don’t believe that’s ever happened in the history of Oracle.”
23 **Exhibit 1** (11/9/10 Trial Tr.) at 1044:2-18; (11/12/10 Trial Tr.) at 1268:4-7, 1270:14-1271:22.

24 34. Clarke testified that the “ideal thing that we are looking for” to price the
25 hypothetical licenses at issue is an established royalty or benchmark existing in the marketplace,
26 but despite searching for such a royalty or benchmark, he was unable to find any. **Exhibit 1**
27 (11/16/10 Trial Tr.) at 1567:11-19, 1580:20-1581:11.

1 **Evidence of the Parties' Competitive Relationship.**

2 Fact Witness Testimony

3 35. Phillips testified that SAP is Oracle's "largest competitor." **Exhibit 1** (11/4/10
4 Trial Tr.) at 532:3-5.

5 36. Ellison testified that SAP is "a very formidable competitor." **Exhibit 1** (11/8/10
6 Trial Tr.) at 791:16-18.

7 37. Catz described the competition between the parties for customers as a "zero sum
8 game." **Exhibit 1** (11/19/10 Trial Tr.) at 1890:8-16.

9 38. Former SAP Executive Board member Shai Agassi testified that Oracle was SAP's
10 "chief competitor." **Exhibit 5** (1/5/09 Agassi Tr., played 11/4/10) at 60:10-61:9.

11 39. McDermott testified that Oracle and SAP are "fierce competitors." **Exhibit 1**
12 (11/15/10 Trial Tr.) at 1494:20-1495:2.

13 Expert Testimony

14 40. Meyer testified that Oracle and SAP are direct competitors. *See* **Exhibit 1**
15 (11/8/10 Trial Tr.) at 936:3-18.

16 41. Clarke testified that Oracle and SAP are fierce competitors. **Exhibit 1** (11/16/10
17 Trial Tr.) at 1564:22-23.

18 **Evidence and Argument Offered Regarding the Price Oracle Executives Claimed They**
19 **Would Have Demanded For Use of the PeopleSoft, JDE, and Siebel Software, Assuming the**
20 **Parties Would Have Negotiated a License.**

21 Fact Witness Testimony

22 42. In questioning Phillips about damages, Oracle's counsel's asked that Phillips
23 "assume that on January 19, 2005, SAP would have to pay the fair value for what—what it took,
24 what it infringed, and so would have negotiated a license with Oracle that allowed them to do
25 what they did." **Exhibit 1** (11/4/10 Trial Tr.) at 521:8-15. Phillips then testified that he would
26 have charged \$3-4 billion to use the PeopleSoft software and "billions" for a Siebel license—\$4-5
27 billion in total. *Id.* at 521:8-15, 537:11-16, 542:6-14; **Exhibit 40** (Oracle Closing) at 75, 239.

28 43. In questioning Ellison about damages, Oracle's counsel asked Ellison to consider
what would have happened "if [he] had engaged in a negotiation with SAP and TomorrowNow

1 back in early 2005.” **Exhibit 1** (11/8/10 Trial Tr.) at 764:15-19. Ellison then testified that he
 2 would have charged \$3.3 billion to use the PeopleSoft software and \$600 million for the Siebel
 3 software, for a total of \$4 billion. *Id.* at 764:15-765:3, 766:8-14, 768:14-19.

4 44. When questioning Catz about damages, Oracle asked her whether Catz agreed
 5 with Phillips and Ellison’s estimates of what “they believe Oracle reasonably would be seeking
 6 from SAP” in a hypothetical license.” *Id.* at 865:16-21. Catz then testified that any license fee
 7 would be “in the billions.” *Id.* at 866:3-15.

8 Argument and Objections

9 45. In closing argument, Oracle’s counsel asked the jury to consider, in calculating a
 10 hypothetical license award, the price that Oracle executives claimed they would have charged for
 11 the hypothetical licenses. *See Exhibit 1* (11/22/10 Trial Tr.) at 2098:23-2099:10, 2100:20-2101:2;
 12 **Exhibit 40** (Oracle Closing) at 75, 239.

13 46. Defendants objected to testimony regarding the price Oracle executives might
 14 have required for license as speculative. *See Exhibit 1* (11/4/10 Trial Tr.) at 521:16-21, 538:25-
 15 539:2; (11/5/10 Trial Tr.) at 649:7-650:15; (11/8/10 Trial Tr.) at 764:20-22, 767:24-768:1,
 16 865:23-866:1; (11/18/10 Trial Tr.) at 1703:14-21; (11/19/10 Trial Tr.) at 1884:10-12.

17 47. Defendants also objected to such testimony by Phillips, Catz, and Ellison as
 18 “nondisclosed expert opinion.” *See Exhibit 1* (11/4/10 Trial Tr.) at 539:16-17; (11/8/10 Trial Tr.)
 19 at 767:24-768:1, 865:23-866:1; (11/18/10 Trial Tr.) at 1700:12-1701:5, 1702:10-23, 1703:14-21;
 20 (11/19/10 Trial Tr.) at 1884:10-12.

21 Evidence and Argument Offered Regarding the Value of Oracle’s Intellectual Property 22 as a Whole.

23 Demonstratives

24 48. In opening argument, Oracle’s counsel presented a bar graph purporting to depict
 25 the “Billions of Dollars” that Oracle spends on R&D and the increase in these costs over time.
 26 **Exhibit 1** (11/2/10 Trial Tr.) at 339:20-340:4; **Exhibit 37** (Oracle Opening) at 12.

27 Fact Witness Testimony

28 49. Oracle employee Edward Screven testified that Oracle’s overall R&D budget in

1 2010 was \$4 billion; he also described the costs and difficulties he encountered in developing
2 Oracle's E-Business Suite. *See Exhibit 1* (11/2/10 Trial Tr.) at 452:6-12, 453:12-455:1.

3 50. Ellison testified that Oracle's R&D budget in 2010 was \$4 billion and further
4 testified that Oracle has spent \$65 billion over the lifetime of the company to develop and acquire
5 the entirety of its intellectual property assets. *See Exhibit 1* (11/8/10 Trial Tr.) at 760:13-22.

6 51. Ellison testified that he calculated a \$4 billion hypothetical license price by
7 multiplying "what we paid for [PeopleSoft]" by the percentage of customers he testified that he
8 expected to lose as a result of the license, as well as "10 percent of Siebel [\$6 billion], which is
9 another \$600 million." *Id.* at 764:23-765:10, 768:14-19.

10 52. Phillips testified that, in licensing Oracle software to SAP, Oracle would not be
11 giving it away; rather, Oracle "still has it." *Exhibit 1* (11/4/10 Trial Tr.) at 586:16-587:4.

12 53. Phillips also testified that the \$11 billion PeopleSoft acquisition price included
13 buildings, chairs, desks, leases, advertising, and "all sorts of things." *Id.* at 547:17-548:12.

14 54. Phillips testified that the price of the hypothetical PeopleSoft/JDE license "better
15 be a big number" because Oracle paid \$11 billion for the company; likewise, with respect to the
16 hypothetical Siebel license, he would have expected that "the opening number for me would have
17 a 'B' on it [as] in billions if I just paid 6 billion." *See id.* at 534:16-535:4, 537:3-16, 542:6-14.

18 55. Phillips further testified: "If I paid for something one day for 11 billion and my
19 competitor wants it the next day, which—they would have to pay close to what I paid for it. I had
20 to pay for it up front 11 billion. They should have to pay billions to have access to it as well."
21 *See id.* at 523:1-5.

22 56. Catz testified that this is a copyright case and that "Oracle's still got it [the
23 software that was copied]." *Exhibit 1* (11/19/10 Trial Tr.) at 1921:10-17.

24 57. Catz also testified that the license fee she would have demanded would be
25 "definitely in the billions" because Oracle had just paid \$11 billion for PeopleSoft. *Exhibit 1*
26 (11/8/10 Trial Tr.) at 866:3-15.

27 58. Catz testified that over a billion dollars in damages is "appropriate" because "this
28 whole business is a business about billions." *Exhibit 1* (11/19/10 Trial Tr.) at 1908:12-15.

1 59. Catz testified that Meyer’s \$1.65 billion license estimate was “reasonable” because
2 it is “10 percent of what we actually paid for the—for intellectual property.” *Id.* at 1909:5-12.

3 60. Catz testified that granting a license to SAP would be a risk because, if “cash flow
4 gets taken away” by TN providing support services, then “we can’t pay for existing R&D, we
5 can’t build the next product with that—those same maintenance dollars.” *Id.* at 1886:1-11.

6 Expert Testimony

7 61. Meyer testified that TN “actually got real property.” **Exhibit 1** (11/8/10 Trial Tr.)
8 at 919:25-920:4.

9 62. Meyer testified that a hypothetical license calculation “allows you to reflect
10 Oracle’s investments. And they made a large investment in PeopleSoft, \$11.1 billion,” so any
11 license price “would have to be charge enough [sic] to take away the sting of giving up the \$11
12 billion exclusive rights to PeopleSoft property.” **Exhibit 1** (11/8/10 Trial Tr.) at 907:2-13;
13 (11/9/10 Trial Tr.) at 1008:8-11.

14 Argument

15 63. In opening argument, Oracle’s counsel argued that damages should account for the
16 “full value of the software” infringed. **Exhibit 1** (11/2/10 Trial Tr.) at 369:15-370:14.

17 64. In closing argument, Oracle’s counsel argued that Oracle sought a hypothetical
18 license because lost profits do not account for the billion dollar “investments” in those
19 companies’ intellectual property. **Exhibit 1** (11/22/10 Trial Tr.) at 2093:13-24.

20 **Evidence Offered of Liability for Contributory Copyright Infringement and SAP’s Alleged** 21 **Risk Acceptance.**

22 Exhibits

23 65. PTX0008 is a December 22, 2004 e-mail from SAP employee Arlen Shenkman to
24 SAP employee James Mackey, forwarding an e-mail from SAP employee John Zepecki,
25 regarding TN’s access to Oracle software. *See* **Exhibit 19** (PTX0008) at SAP-OR00091724.

26 66. PTX0035 is a February 2, 2006 e-mail from SAP employee Thomas Ziemer to
27 SAP employee Lars Lamade, forwarding an e-mail from SAP employee Bernd Welz regarding
28 the legality of TN’s operations. *See* **Exhibit 24** (PTX0035) at SAP-OR00156479.

1 67. PTX0161 is a January 25-26, 2005 document titled “TomorrowNow Integration
2 Meeting,” regarding use of TN as a “liability shield.” **Exhibit 28** (PTX 0161) at SAP-
3 OR00009808, SAP-OR00009811.

4 68. PTX0183 is a March 1, 2005 e-mail from Mackey to Agassi, regarding TN’s
5 corporate structure. *See* **Exhibit 29** (PTX0183) at SAP-OR00096318.

6 Fact Witness Testimony

7 69. Oracle’s counsel asked Brandt a series of questions regarding whether Brandt
8 knew at the time of the acquisition that TN’s support services infringed Oracle copyrights. *See*
9 **Exhibit 1** (11/5/10 Trial Tr.) at 716:21-722:4.

10 70. Oracle’s counsel asked former SAP Executive Board member Henning
11 Kagermann questions regarding SAP’s knowledge “of how TomorrowNow gets access to
12 PeopleSoft software prior to the decision to buy Tomorrow” and whether “the risk of legal action
13 by Oracle to TomorrowNow’s access rights to PeopleSoft software was . . . a risk that SAP
14 knowingly undertook when it decided to buy TomorrowNow.” **Exhibit 3** (9/26/08 Kagermann
15 Tr., played 11/15/10) at 261:18-25, 262:4, 262:13-19, 304:21-25, 305:2.

16 71. Oracle’s counsel asked McDermott when he “first bec[a]me aware that SAP had
17 engaged in contributory copyright infringement of Oracle’s software.” **Exhibit 1** (11/15/10 Trial
18 Tr.) at 1469:23-25.

19 Expert Testimony

20 72. Meyer testified that SAP’s decision to acquire TN despite the risk of lawsuit
21 implies that SAP greatly valued TN, suggesting a more expensive license. *See* **Exhibit 1** (11/8/10
22 Trial Tr.) at 930:12-932:2; (11/12/10 Trial Tr.) at 1344:16-20.

23 73. Meyer testified that, in a hypothetical negotiation, one “substitute[s] the
24 negotiation that we are going to do for infringement. So if you take a license, you don’t need to
25 infringe.” **Exhibit 1** (11/8/10 Trial Tr.) at 907:23-908:2.

26 74. Clarke testified that punishment cannot be taken into account in determining the
27 outcome of a hypothetical negotiation because “the negotiation goes on before infringement
28 began.” **Exhibit 1** (11/16/10 Trial Tr.) at 1543:15-1544:18.

1 Argument and Objections

2 75. Defendants objected to evidence relating to contributory copyright infringement as
3 both irrelevant and outside the scope of Meyer's expert report. *See Exhibit 1* (11/1/10 Trial Tr.)
4 at 245:14-21, 254:3-255:6; (11/4/10 Trial Tr.) at 500:15-501:11; (11/8/10 Trial Tr.) at 930:23-
5 931:10; (11/9/10 Trial Tr.) at 965:7-13; *see also* ECF No. 974.

6 76. Oracle's counsel argued that such evidence provided "context" and was relevant as
7 evidence of "Risk Acceptance," arguing that "[f]or a company like SAP, to take the risk of being
8 here in court today . . . the evidence will show that . . . that IP must have been very valuable to
9 them" and that "[t]he risk of being caught . . . does show that this was very valuable at the time."
10 **Exhibit 1** (11/1/10 Trial Tr.) at 249:14-251:3; (11/2/10 Trial Tr.) at 349:1-9, 364:8-10; (11/22/10
11 Trial Tr.) at 2054:14-16, 2083:12-14.

12 77. The Court held that it would allow in some evidence "that [Defendants] willingly
13 took the risk of a lawsuit" as potentially relevant to damages and "for context," but stated that "at
14 some point, [liability evidence] becomes cumulative particularly given that liability's no longer at
15 issue in this case." **Exhibit 1** (11/4/10 Trial Tr.) at 502:3-7, 502:11-13.

16 **Evidence Offered of Liability for Other Stipulated Claims.**

17 Fact Witness Testimony

18 78. Oracle employee Buffy Ransom testified that some of TN's actions purportedly
19 "corrupted" Oracle's customer support data. **Exhibit 1** (11/2/10 Trial Tr.) at 432:10-18.

20 79. Screven testified about TN's purported use of fake login-names and use of an
21 automated downloading tool. *See id.* at 469:23-471:19.

22 80. Former TN employee John Ritchie testified regarding TN's use of an automated
23 downloading tool, its alleged violation of website terms of use, and his belief that TN's activities
24 crashed Oracle's website. *See Exhibit 9* (12/2/09 Ritchie Tr., played 11/2/10) at 11:20-12:7,
25 13:5-19, 25:9-26:12, 31:12-31:20, 32:11-33:1, 33:4-6, 33:23-34:12, 47:1-48:10.

26 Expert Testimony

27 81. Oracle's computer forensics expert Kevin Mandia testified regarding computer
28 intrusion issues, such as TN's cross-use of website log-in credentials and how TN gained access

1 to Oracle's website "in regards to terms of use and licensing." **Exhibit 1** (11/12/10 Trial Tr.) at
2 1381:5-10, 1390:12-1392:17.

3 **Precluded Evidence of Mitigation.**

4 82. Oracle elicited testimony from Brandt regarding the SAP Executive Board's
5 directive that TN remove copies of Oracle software from its computers, and in response to such
6 questioning, Brandt testified that "[w]e knew that a risk existed and undertook the necessary steps
7 to mitigate the risk." **Exhibit 1** (11/5/10 Trial Tr.) at 701:25-702:8, 705:24-706:23, 708:7-19,
8 716:3-12.

9 83. Oracle's counsel then argued that Brandt's testimony "undercuts" SAP's
10 contributory infringement stipulation. *Id.* at 745:23-750:23.

11 84. The Court expressed concern that Brandt's testimony constituted a "disavowal" of
12 the parties' pretrial stipulation. **Exhibit 1** (11/8/10 Trial Tr.) at 828:6-832:8; (11/9/10 Trial Tr.)
13 at 963:5-967:9.

14 85. Defendants argued that "if we cannot put in any evidence we tried to avoid
15 infringement . . . we can't defend the damages claim," which Oracle based in part on purported
16 willingness to infringe. **Exhibit 1** (11/9/10 Trial Tr.) at 965:20-967:9.

17 86. The Court then issued a curative instruction that any testimony that SAP Executive
18 Board members did not know of the infringement was "inconsistent" with the liability stipulation.
19 **Exhibit 1** (11/15/10 Trial Tr.) at 1448:4-1449:18.

20 87. Oracle argued during closing arguments that if SAP did not highly value TN's
21 infringement, "why didn't SAP take the simple step of removing Oracle's software from
22 TomorrowNow's computers?" **Exhibit 1** (11/22/10 Trial Tr.) at 2201:1-9.

23 **Evidence and Argument Offered Regarding "Theft" and "Stealing."**

24 Fact Witness Testimony

25 88. Catz testified that \$40 million in damages for TN's infringement was similar to
26 stealing a \$2,000 watch and selling it for \$20. *See* **Exhibit 1** (11/8/10 Trial Tr.) at 867:13-15.

27 89. Catz also compared the price SAP paid to acquire TN to the value of a \$15
28 crowbar used to break into and "clean out" a \$10 million house. **Exhibit 1** (11/19/10 Trial Tr.) at

1 1904:18-23.

2 Argument and Objections

3 90. Defendants objected to Oracle's use of the words "theft" and "steal" in opening
4 and closing arguments. See **Exhibit 1** (11/1/10 Trial Tr.) at 254:13-18; (11/22/10 Trial Tr.) at
5 2026:9-14.

6 91. The Court sustained these objections. See **Exhibit 1** (11/1/10 Trial Tr.) at 257:1-6;
7 (11/22/10 Trial Tr.) at 2030:19-2031:12.

8 92. In closing argument, Oracle's counsel compared this case to one in which
9 "somebody goes in and steals a game from Best Buy." **Exhibit 1** (11/22/10 Trial Tr.) at 2185:19-
10 2186:1.

11 93. Best Buy is Juror No. 7's employer. See **Exhibit 1** (11/1/10 Trial Tr.) at 120:7-8,
12 123:7-11, 237:23.

13 **Evidence Regarding Meyer's Approach to Calculating "Hypothetical License" Damages for**
14 **Use of the PeopleSoft, JDE, and Siebel Software.**

15 Expert Testimony

16 94. Meyer testified that the jury should consider seven factors to calculate the price of
17 a hypothetical license, including: (1) "Scope and Duration of the License," (2) "Need for the
18 Copyrighted Works," (3) "Risk Acceptance," (4) "Competitive Relationship of the Parties," (5)
19 "Goals/Business Plans Related to the Copyrighted Works," (6) "Expected Financial
20 Benefits/Impacts," and (7) "Values not Quantified." **Exhibit 1** (11/8/10 Trial Tr.) at 901:8-903:4;
21 **Exhibit 38** (Meyer Slides) at 4.

22 95. Meyer testified that these factors were "consistent with Georgia-Pacific
23 Corporation versus [U.S.] Plywood [Corp.]." **Exhibit 1** (11/8/10 Trial Tr.) at 901:8-21; **Exhibit**
24 **38** (Meyer Slides) at 4.

25 96. Meyer focused his analysis of value of the hypothetical license on two of these
26 seven factors: "Goals/Business Plans Related to the Copyrighted Works" and "Expected Financial
27 Benefits/Impacts." **Exhibit 1** (11/8/10 Trial Tr.) at 936:19-938:6.

28 97. Meyer testified that he set out to determine the outcome of a hypothetical

1 negotiation by considering “negotiation factors” in three overall categories for both the SAP and
2 Oracle sides of the negotiation table. **Exhibit 1** (11/8/10 Trial Tr.) at 937:11-17; (11/9/10 Trial
3 Tr.) at 1004:5-1005:8.

4 98. Meyer testified that on SAP’s side of the negotiation he considered: (1) “SAP’s
5 Goals for New Offering,” (2) “SAP’s Expected Impact on Oracle,” and (3) “SAP’s Expected
6 Financial Gains.” **Exhibit 1** (11/8/10 Trial Tr.) at 937:11-938:6; (11/9/10 Trial Tr.) at 1027:4-
7 1028:4; **Exhibit 38** (Meyer Slides) at 16, 37, 53, 62.

8 99. Meyer testified that on Oracle’s side of the negotiation he considered: (1)
9 “Oracle’s Goals for PeopleSoft Acquisition,” (2) “Risk to Oracle’s Investment in PeopleSoft [and
10 Siebel],” and (3) “Oracle’s Expected Financial Impacts.” **Exhibit 1** (11/9/10 Trial Tr.) at 1004:5-
11 1005:8,1034:18-1035:14; **Exhibit 38** (Meyer Slides) at 38, 47, 63, 67.

12 100. Meyer testified that the hypothetical licenses “would cover a right to everything
13 [TN] took without a license” between January 19, 2005 and October 31, 2008. **Exhibit 1**
14 (11/8/10 Trial Tr.) at 918:25-922:15.

15 101. Meyer also testified that Defendants needed immediate access to the infringed
16 software to provide TN support services, purportedly critical to SAP’s launch of Safe Passage,
17 and that the parties had a competitive relationship, both of which justified a higher license price
18 for the hypothetical license. *See id.* at 922:16-930:11, 935:24-936:18.

19 102. Meyer testified that in a previous case, the court “found that [Meyer] picked a
20 royalty rate that was three times too high,” “found that [Meyer’s] approach on this royalty rate
21 was capricious,” and “found that [Meyer’s] opinion was too speculative to stand” as it “bore little
22 relationship to what a willing buyer and a willing seller would use in the real world to negotiate a
23 royalty rate.” **Exhibit 1** (11/12/10 Trial Tr.) at 1256:17-1259:22.

24 103. Meyer testified that in a prior case, “the court said that because [Meyer’s] baseline
25 was little more than conjecture, it matters little how you applied the other *Georgia-Pacific* factors
26 because plus or minus a guess is, after all, still a guess.” *See id.* at 1347:22-1348:5.

27 Argument

28 104. Oracle’s counsel described five of Meyer’s factors (“Need for the Copyrighted

1 Works,” “Competitive Relationship of the Parties,” “Risk Acceptance,” “Scope and Duration of
 2 the License,” and “Values not Quantified”) as “background.” **Exhibit 1** (11/8/10 Trial Tr.) at
 3 936:19-937:6.

4 **SAP Evidence on Which Meyer Relied and His Calculation of “Hypothetical License”**
 5 **Damages for Use of the PeopleSoft, JDE, and Siebel Software.**

6 105. Demonstrative slides presented to the jury during Meyer’s testimony identify 13
 7 SAP documents and testimony from Agassi on which Meyer relied to calculate both sides’
 8 “expected” financial gains or losses resulting from the PeopleSoft/JDE and Siebel licenses:
 9 PTX0003, PTX0006, PTX0008, PTX0012, PTX0015, PTX0023, PTX0024, PTX0037, PTX0141,
 10 PTX0151, PTX0161, PTX0958, and PTX0960. **Exhibit 38** (Meyer Slides) at 17, 54.

11 106. Meyer testified that he relied upon the 13 SAP documents and Agassi testimony to
 12 calculate the parties’ “expected” financial impacts from the hypothetical licenses. **Exhibit 1**
 13 (11/8/10 Trial Tr.) at 939:12-941:2; (11/9/10 Trial Tr.) at 993:9-21, 1028:5-1029:3.

14 107. PTX0012 is a December 23, 2004 document titled “A Roadmap for PSFT
 15 Customers to SAP.” **Exhibit 20** (PTX0012).

16 108. Meyer testified that PTX0012 proves that SAP reasonably expected to obtain
 17 3,000 incremental software customers from PeopleSoft as a result of the TN support offering. *See*
 18 **Exhibit 1** (11/9/10 Trial Tr.) at 978:6-980:3.

19 109. Meyer also testified that the “Safe Passage” initiative addressed in PTX0012 was a
 20 broad marketing program in which a support offering comprised only one of three potential
 21 components. *See* **Exhibit 1** (11/12/10 Trial Tr.) at 1220:5-1221:9.

22 110. Meyer testified that he did not know “how the analysis was done by the author of
 23 [PTX0012] to come up with those assumptions.” *Id.* at 1224:24-1225:8; 1368:19-1371:8.

24 111. Phillips testified that PTX0012 “is what you would present to your management
 25 team and eventually to your Board of Directors as the reason I want to buy this company,” and
 26 that it contains projections as to “the amount of money [SAP’s] going to make” as a result of the
 27 TN acquisition. **Exhibit 1** (11/4/10 Trial Tr.) at 538:4-24, 539:25-540:15.

28 112. PTX0003 is a copy of the December 15, 2004 SAP Executive Board minutes, in

1 which the Executive Board agrees to offer PeopleSoft support and indicates that SAP should
2 “acquire or partner with companies with PeopleSoft services skills.” **Exhibit 16** (PTX0003) at 2.

3 113. PTX0006, PTX0008, and PTX0015 are three versions of Zepecki’s “PeopleSoft 1-
4 2-3” memorandum. *See* **Exhibit 17** (PTX0006); **Exhibit 19** (PTX0008); **Exhibit 21** (PTX0015).

5 114. Meyer testified that Zepecki’s “PeopleSoft 1-2-3 memorandum” identifies TN as
6 the first, and most important, step in SAP’s strategy to convert thousands of PeopleSoft customers.
7 **Exhibit 1** (11/9/10 Trial Tr.) at 976:20-978:5; **Exhibit 17** (PTX0006).

8 115. PTX0007 is a December 28, 2004 email from Zepecki to Mackey and others
9 summarizing Zepecki’s thoughts after his first meeting with TN. *See* **Exhibit 18** (PTX0007).

10 116. Zepecki testified that, after meeting with TN, he foresaw, at best, a “niche” market
11 for a third party support offering, resulting in a possible 5% of PeopleSoft customers—not 20%
12 or 30%. **Exhibit 1** (11/4/10 Trial Tr.) at 630:13-632:24; **Exhibit 18** (PTX0007) at SAP-
13 OR00004973.

14 117. PTX0141 and PTX0024 are two versions of a January 2005 document titled “Safe
15 Passage: Winning Customers and Markets from Oracle-PeopleSoft-J.D. Edwards.” **Exhibit 26**
16 (PTX0141); **Exhibit 23** (PTX0024).

17 118. Meyer testified that PTX0141 and PTX0024 establish that SAP expected to
18 convert 450 PeopleSoft customers in the first 30 days of Safe Passage, and then 50% or a
19 “majority” thereafter. **Exhibit 1** (11/9/10 Trial Tr.) at 984:10-986:12, 988:23-990:10.

20 119. Meyer testified that PTX0161 proves that SAP believed that TN could attract and
21 convert 2,000 to 4,000 PeopleSoft customers and described these expectations as “conservative”
22 and “upbeat,” respectively. *Id.* at 990:11-991:9.

23 120. Oswald testified that the “scenarios” in PTX0161 did not bear on SAP’s resource
24 planning. **Exhibit 4** (12/10/08 Oswald Tr., played 11/5/10) at 135:14-16, 135:17.

25 121. PTX0023 is a January 2005 analyst phone call transcript in which SAP executives
26 announced the acquisition of TN and the launch of Safe Passage. *See* **Exhibit 22** (PTX0023).

27 122. Meyer testified that PTX0023 shows that SAP expected to convert 100% of shared
28 SAP/PeopleSoft customers—4,000 of the approximately 10,000 PeopleSoft customers Oracle

1 acquired. *See* **Exhibit 1** (11/12/10 Trial Tr.) at 1229:3-1230:23; **Exhibit 38** (Meyer Slides) at 21.

2 123. Meyer testified that, during the analyst call, the SAP executives never stated the
3 number of customers they thought might switch to SAP through Safe Passage. *See* **Exhibit 1**
4 (11/12/10 Trial Tr.) at 1230:24-1233:23; **Exhibit 22** (PTX0023).

5 124. PTX0958 is an October 17, 2005 SAP planning document titled “Business Case:
6 TomorrowNow 2006.” **Exhibit 33** (PTX0958).

7 125. Meyer testified that PTX0958 proved that SAP expected to gain 200 Siebel
8 customers through TN. *See* **Exhibit 1** (11/9/10 Trial Tr.) at 1029:18-1031:2; **Exhibit 33**
9 (PTX0958) at SAP-OR00250225.

10 126. Meyer later testified that TN actually supported only “ten or so” Siebel customers.
11 **Exhibit 1** (11/9/10 Trial Tr.) at 1068:19-1069:3.

12 127. PTX0960 is a document titled “Siebel Safe Passage Program Playbook.” **Exhibit**
13 **34** (PTX0960).

14 128. Meyer testified that PTX0960 establishes that SAP expected to convert 300 Siebel
15 customers. *See* **Exhibit 1** (11/9/10 Trial Tr.) at 1028:5-14; **Exhibit 34** (PTX0960) at SAP-
16 OR00790354; **Exhibit 38** (Meyer Slides) at 55.

17 129. PTX0037 is a March 26, 2006 e-mail from TN CEO Andrew Nelson to TN
18 employees Lon Fiala, Bob Geib, and Nigel Pullan. *See* **Exhibit 25** (PTX0037).

19 130. Meyer testified that PTX0037 establishes that SAP expected to impact Oracle in
20 the amount of \$18 of lost Oracle revenue for every \$1 of TN stand-alone revenue. *See* **Exhibit 1**
21 (11/9/10 Trial Tr.) at 1031:3-1032:2; **Exhibit 38** (Meyer slides) at 58.

22 131. Meyer testified that excerpts of Agassi’s deposition testimony establish that SAP
23 expected it could capture 60% of PeopleSoft customers with the TN offering, which Meyer
24 calculated as 5,952 customers. *See* **Exhibit 1** (11/9/10 Trial Tr.) at 975:10-15.

25 132. Agassi actually testified that he had “no exact number” in mind when determining
26 how many PeopleSoft customers “might be subject to conversion” in January 2005. **Exhibit 5**
27 (1/5/09 Agassi Tr., played 11/4/10) at 311:24-312:2.

28 133. Meyer testified that Agassi viewed converting the majority of PeopleSoft

1 customers as an “aspirational” goal. **Exhibit 1** (11/12/10 Trial Tr.) at 1236:14-1238:15.

2 134. Meyer testified that for the PeopleSoft/JDE license, he concluded that SAP and
3 Oracle expected between 1,375 to 5,592 customers to leave PeopleSoft for SAP and used a 1,375
4 to 3,000 range for his calculations. See **Exhibit 1** (11/9/10 Trial Tr.) at 974:7-976:14, 1010:25-
5 1011:10, 1012:3-12; **Exhibit 38** (Meyer Slides) at 21.

6 135. Meyer testified that to determine the “expected” financial impacts on the parties,
7 he multiplied the 1,375 to 3,000 range of converted customers by a potential-revenue-per-
8 customer figure he estimated by relying on the revenue figures for “Up-Switch,” “Cross-Sell,”
9 and “Maintenance” set forth in PTX0012, which he relied on for his per-customer valuation
10 because it shows “SAP’s own projections” for the potential revenues to be derived from TN
11 customers. **Exhibit 1** (11/9/10 Trial Tr.) at 996:19-997:19; **Exhibit 20** (PTX0012) at SAP-
12 OR00253288.

13 136. Meyer testified that he calculated SAP’s purported expected gains from a
14 PeopleSoft/JDE license as ranging from \$881 million to \$2.69 billion. See **Exhibit 1** (11/9/10
15 Trial Tr.) at 1000:15-1001:19; **Exhibit 38** (Meyer Slides) at 36.

16 137. Meyer testified that he calculated Oracle’s expected financial impact from a
17 PeopleSoft/JDE license as ranging from \$1.36 billion to \$2.46 billion. See **Exhibit 1** (11/9/10
18 Trial Tr.) at 1014:16-1015:4; **Exhibit 38** (Meyer Slides) at 46.

19 138. Meyer testified that, based on these ranges of estimated “impacts,” he concluded
20 that the value of the hypothetical PeopleSoft/JDE license would be “at least \$1.5 billion,” with his
21 other factors placing “upward pressure” on the amount. **Exhibit 1** (11/9/10 Trial Tr.) at 1015:7-
22 1017:8; **Exhibit 38** (Meyer Slides) at 48.

23 139. Meyer testified that he determined that the value of a hypothetical Siebel license
24 ranged from \$97 million to \$247 million, and, based on this range, he concluded that the value of
25 the hypothetical Siebel license would be “at least \$100 million.” **Exhibit 1** (11/9/10 Trial Tr.) at
26 1033:3-1034:14, 1036:22-1037:15; **Exhibit 38** (Meyer Slides) at 68.

27 140. Meyer testified that, in total, he calculated a license price for the enterprise
28 licenses of “at least” \$1.6 billion. **Exhibit 1** (11/9/10 Trial Tr.) at 1048:20-25.

1 **Evidence on Which Meyer Did Not Rely to Calculate “Hypothetical License” Damages for**
2 **Use of the PeopleSoft, JDE, and Siebel Software.**

3 **Exhibits**

4 141. A-0277 is a March 24, 2005 e-mail from Phillips to Catz, in which Phillips writes:
5 “Just starting to hear SAP pitching the lower maintenance story to our installed base with
6 TomorrowNow. I don’t think it will work, but I will track it nonetheless.” **Exhibit 10** (A-0277)
7 at ORCL00361013.

8 142. A-4089 is a March 25, 2005 e-mail from Oracle board member Jeff Henley to Catz,
9 in which Catz responds to an e-mail describing TN’s impact on applications sales by writing: “I
10 don’t believe we have lost any large customers because of this. If we lost we lost to SAP for
11 other reasons.” **Exhibit 14** (A-4089) at ORCL00744446.

12 143. A-0421 is a January 19, 2005 e-mail from Oracle employee Andy Albritten to “CS
13 Extended Managers,” in which Albritten describes SAP’s acquisition of TN as “positive for
14 Oracle.” **Exhibit 13** (A-0421) at ORCL00382993.

15 144. A-0281 is a December 5, 2005 e-mail from Oracle employee Chris Hummel to
16 Phillips, in which Hummel writes: “Since the acquisition, TomorrowNow’s Captured Less than 1
17 percent of our PSFT/JDE revenue of about ~30 customers. Since 6% of our support contracts
18 don’t renew anyway, this is minimal.” **Exhibit 11** (A-0281) at ORCL00359888.

19 145. A-0374 is a September 19, 2005 e-mail from Oracle employee Juan Jones to other
20 Oracle employees, in which Jones describes the idea that customers would switch to SAP
21 applications based on TN offer as the “silliest argument I’ve ever heard.” **Exhibit 12** (A-0374) at
22 ORCL00192008.

23 **Fact Witness Testimony**

24 146. Ellison agreed that “there’s not a single public or private, internal or external e-
25 mail, PowerPoint, speech, slide, scribble on a napkin” that reflects that Oracle expected losses of
26 thousands of customers and billions in revenue due to the TN offering. **Exhibit 1** (11/8/10 Trial
27 Tr.) at 792:10-793:9, 799:21-800:6.

28 147. Phillips testified that the software market is mature and the “switching costs are

1 too high” for a customer to switch software products for “whatever reason”; it “doesn’t make
2 business sense.” **Exhibit 1** (11/4/10 Trial Tr.) at 527:17-24, 546:2-16, 574:15-21.

3 148. McDermott testified that migration is a complex, executive-level decision and that
4 saving on support is not a sufficient reason to migrate. *See* **Exhibit 1** (11/15/10 Trial Tr.) at
5 1462:10-1463:2, 1467:4-23.

6 149. Jones testified that it takes “a lot more than just some—some savings in the actual
7 support” for a customer to migrate software, and that it is a “significant undertaking.” **Exhibit 2**
8 (4/24/08 Jones Tr., played 11/15/10) at 140:21-141:9, 141:12-142:25.

9 Expert Testimony

10 150. Meyer testified that he did not rely on any Oracle documents or testimony
11 evidencing Oracle’s expectations regarding the financial impact TN might have at the time of the
12 PeopleSoft/JDE and Siebel license negotiations because there is no such evidence; Meyer
13 testified that he relied on the same SAP internal documents he used to determine “SAP
14 management expectations” to conclude that Oracle would have expected losses in the billions..
15 *See* **Exhibit 1** (11/9/10 Trial Tr.) at 1010:4-1011:11, 1014:16-1015:6, 1036:14-21; (11/12/10
16 Trial Tr.) at 1328:10-20; **Exhibit 38** (Meyer Slides) at 17, 48, 54, 68.

17 Closing Argument Regarding Amount of “Hypothetical License” Damages for Use of the 18 PeopleSoft, JDE, and Siebel Software.

19 Argument and Demonstratives

20 151. During closing argument, Oracle’s counsel provided a demonstrative summarizing
21 potential valuations of Oracle’s hypothetical license claim and the methods for reaching those
22 valuations. *See* **Exhibit 1** (11/22/10 Trial Tr.) at 2196:1-2197:19; **Exhibit 40** (Oracle Closing) at
23 239. Oracle’s valuations ranged from \$897 million to \$5 billion. *See id.*

24 152. Oracle’s counsel proposed several potential calculations and valuations for the first
25 time in closing, including an alleged extension of the “estimated revenue” in PTX0012 through
26 2008, a proposed calculation based on multiplying various estimates of “expected” customers by
27 the “average revenue that SAP’s expert Mr. Clarke calculated,” and a proposed valuation based
28 on 10% or 20% of the PeopleSoft and Siebel purchase prices. **Exhibit 1** (11/22/10 Trial Tr.) at

1 2044:23-2045:25, 2058:16-2059:8; **Exhibit 40** (Oracle Closing) at 239, 247.

2 153. Oracle's counsel described the range of potential valuations of Oracle's
3 hypothetical license claim as follows:

4 There are two valuations that I think are useful to keep in mind.
5 One is the 3,000 customers valued at a million dollars and the other
6 is fair market value license that Mr. Meyer came up with. And the
7 answer is probably somewhere in there. I think we know it's higher
8 than Mr. Meyer's hypothetical license because he identified a
9 whole series of things that he could not take into account . . . So
10 what I would say is 3,000 customers, which was on the low end of
11 some of their estimates . . . You take those and you come up with a
12 \$3 billion number. And Mr. Meyer comes up with \$1.65 billion
13 number, and those numbers, he says, understate because he can't
14 identify all of the aspects . . . So, fair market value of the
15 infringement is somewhere between 1.65 and 3 billion.

16 See **Exhibit 1** (11/22/10 Trial Tr.) at 2196:14-2197:19

17 **Evidence Regarding Calculation of "Hypothetical License" Damages for Use of Oracle**
18 **Database Software.**

19 Exhibits

20 154. PTX0653 and PTX0984 are copies of Oracle's E-Business Price Lists, which list
21 the prices for Oracle's database licenses. See **Exhibit 32** (PTX0653); **Exhibit 35** (PTX0984).

22 155. PTX0583 and PTX0602 are lists of TN internal PeopleSoft support environments
23 and PeopleSoft demo environments. See **Exhibit 30** (PTX0583); **Exhibit 31** (PTX0602).

24 Fact Witness Testimony

25 156. Screven testified that "a customer who wishes to use the Oracle database,
26 purchases from Oracle a license usually to run the computer on some number of processors."

27 **Exhibit 1** (11/2/10 Trial Tr.) at 461:8-15.

28 157. Allison testified that Oracle has "a publicly available price list for our database,"
which is priced based on "how many processors it is that's needed to run their system"; "the
Enterprise Edition [license] was [\$]40,000 per license back in the time frame we're talking
about." **Exhibit 1** (11/5/10 Trial Tr.) at 661:19-20, 662:10-13, 669:22-24..

158. Allison testified that it was necessary to develop "unique" terms for a hypothetical
license because no current Oracle license would have covered TN's use of the Oracle database

1 software. *See id.* at 658:8-660:16, 668:5-11, 668:25-669:2.

2 159. Allison testified that the hypothetical database license would require TN to obtain
3 a separate license for each customer who “benefited” from TN’s use of the database software.
4 *See id.* at 661:5-10, 664:21-665:4.

5 160. Allison testified that he “made the assumption that Oracle would like to charge for
6 this license on a per-customer basis,” which per-customer fee would apply even if TN “could do
7 all this work on a single database software instance”; he testified that this would be the case even
8 though “a single database software instance can be used to create many different databases,”
9 which is why Oracle’s pricing is normally “based on the size of the server, not the number of
10 databases.” *See id.* at 663:20-23, 664:17-665:4.

11 161. Allison testified that he knew of no other “real world” transactions where Oracle
12 charged on a per-customer basis for use of the Oracle database, other than Oracle’s purported
13 practice of charging outsourcers “for multiple customer uses.” *See id.* at 668:12-19.

14 162. Allison testified that he “made some assumptions about the size of the servers that
15 TomorrowNow was using in this case,” calculating an “average” server size (6-processors), that
16 Oracle would use to price each per-customer license it would demand from TN. *See id.* at
17 663:25-664:16.

18 Expert Testimony

19 163. Meyer testified that he used a pricing structure developed by Allison to calculate
20 the price of a hypothetical Oracle database license, that he “follow[ed] [Allison’s] thoughts on
21 how Oracle would price the license,” and that Allison “provided the form of the pricing.”
22 **Exhibit 1** (11/9/10 Trial Tr.) at 1043:19-1044:24; (11/12/10 Trial Tr.) at 1272:11-17.

23 164. Meyer testified that the hypothetical database license “would cover the customers
24 that were benefiting from that—using that database license for the periods of time when they
25 benefited”; to make that determination, Meyer testified that he “assume[d] that those customers
26 [running human resources software] took—took benefits from the fixes and updates” TN
27 developed on Oracle database software, whether or not that customer’s environment ran on an
28 Oracle database (adding 58 more customers to his per-customer license calculation; 172 total).

1 **Exhibit 1** (11/9/10 Trial Tr.) at 1042:5-11, 1046:8-25; **Exhibit 38** (Meyer Slides) at 71.

2 165. Meyer also testified that for each per-customer license, “we [Meyer and Allison]
3 were able to come up with a calculation of—of six processors times a value to come up with the
4 total pricing” of \$292,000 each. **Exhibit 1** (11/9/10 Trial Tr.) at 1044:22-1045:21.

5 166. Meyer priced the database license at \$55.6 million. *See id.* at 1047:6-11.

6 167. Meyer testified that had Allison suggested that twice the price was correct for a
7 database license, Meyer would have accepted that assertion. *See Exhibit 1* (11/12/10 Trial Tr.) at
8 1272:6-1274:5.

9 168. Clarke testified that, as found on Oracle’s website, “the license fee for Oracle’s
10 database is \$40,000. . . . Then the maintenance is \$8,800 a year for each processor.” **Exhibit 1**
11 (11/16/10 Trial Tr.) at 1585:22-1586:4, 1586:14-25, 1587:15-20.

12 169. Clarke testified that TN “actually used” 27 processors to support its customers.
13 *See id.* at 1585:1-1586:13.

14 170. Clarke testified that in calculating TN’s revenues over its seven years of operation,
15 he adjusted TN’s actual revenues upwards to “add[] back” discounts given to customers and
16 ultimately calculated TN’s total revenues as \$59 million. *See id.* at 1573:21-1574:7; *see also*
17 **Exhibit 39** (Clarke Slides) at 5.

18 **Exhibits Attached to This Declaration**

19 171. Attached as **Exhibit 1** is a true and correct copy of relevant excerpts of the official
20 trial transcripts for the following days of trial: November 1, 2010, November 2, 2010, November
21 4, 2010, November 5, 2010, November 8, 2010, November 9, 2010, November 12, 2010,
22 November 15, 2010, November 16, 2010, November 18, 2010, November 19, 2010, November
23 22, 2010, and November 23, 2010.

24 172. Attached as **Exhibit 2** is a true and correct copy of relevant excerpts of the April
25 24, 2008 Juan Jones Deposition, played to the jury on November 15, 2010.

26 173. Attached as **Exhibit 3** is a true and correct copy of relevant excerpts of the
27 September 26, 2008 Henning Kagermann Deposition, played to the jury on November 15, 2010.

28 174. Attached as **Exhibit 4** is a true and correct copy of relevant excerpts of the

1 December 10, 2008 Gerhard Oswald Deposition, played to the jury on November 4, 2010.

2 175. Attached as **Exhibit 5** is a true and correct copy of relevant excerpts of the January
3 5, 2009 Shai Agassi Deposition, played to the jury on November 4, 2010.

4 176. Attached as **Exhibit 6** is a true and correct copy of relevant excerpts of the July 23,
5 2009 Robert Wasson Deposition, played to the jury on November 15, 2010.

6 177. Attached as **Exhibit 7** is a true and correct copy of relevant excerpts of the
7 September 15, 2009 Jeffery O'Donnell Deposition, played to the jury on November 15, 2010.

8 178. Attached as **Exhibit 8** is a true and correct copy of relevant excerpts of the
9 October 14, 2009 Stephen Brazile Deposition, played to the jury on November 15, 2010.

10 179. Attached as **Exhibit 9** is a true and correct copy of relevant excerpts of the
11 December 2, 2009 John Ritchie Deposition, played to the jury on November 2, 2010.

12 180. Attached as **Exhibit 10** is a true and correct copy of A-0277.

13 181. Attached as **Exhibit 11** is a true and correct copy of A-0281.

14 182. Attached as **Exhibit 12** is a true and correct copy of A-0374.

15 183. Attached as **Exhibit 13** is a true and correct copy of A-0421.

16 184. Attached as **Exhibit 14** is a true and correct copy of A-4089.

17 185. Attached as **Exhibit 15** is a true and correct copy of JTX0006.

18 186. Attached as **Exhibit 16** is a true and correct copy of PTX0003.

19 187. Attached as **Exhibit 17** is a true and correct copy of PTX0006.

20 188. Attached as **Exhibit 18** is a true and correct copy of PTX0007.

21 189. Attached as **Exhibit 19** is a true and correct copy of PTX0008.

22 190. Attached as **Exhibit 20** is a true and correct copy of PTX0012.

23 191. Attached as **Exhibit 21** is a true and correct copy of PTX0015.

24 192. Attached as **Exhibit 22** is a true and correct copy of PTX0023.

25 193. Attached as **Exhibit 23** is a true and correct copy of PTX0024.

26 194. Attached as **Exhibit 24** is a true and correct copy of PTX0035.

27 195. Attached as **Exhibit 25** is a true and correct copy of PTX0037.

28 196. Attached as **Exhibit 26** is a true and correct copy of PTX0141.

1 197. Attached as **Exhibit 27** is a true and correct copy of PTX0151.
2 198. Attached as **Exhibit 28** is a true and correct copy of PTX0161.
3 199. Attached as **Exhibit 29** is a true and correct copy of PTX0183.
4 200. Attached as **Exhibit 30** is a true and correct copy of PTX0583.
5 201. Attached as **Exhibit 31** is a true and correct copy of PTX0602.
6 202. Attached as **Exhibit 32** is a true and correct copy of PTX0653.
7 203. Attached as **Exhibit 33** is a true and correct copy of PTX0958.
8 204. Attached as **Exhibit 34** is a true and correct copy of PTX0960.
9 205. Attached as **Exhibit 35** is a true and correct copy of PTX0984.
10 206. Attached as **Exhibit 36** is a true and correct copy of PTX7035.
11 207. Attached as **Exhibit 37** is a true and correct copy of the demonstrative slides
12 presented during Oracle's opening statement on November 2, 2010.

13 208. Attached as **Exhibit 38** is a true and correct copy of the demonstrative slides
14 presented during Paul Meyer's testimony on November 8 and 9, 2010.

15 209. Attached as **Exhibit 39** is a true and correct copy of the demonstrative slides
16 presented during Stephen Clarke's testimony on November 16, 2010.

17 210. Attached as **Exhibit 40** is a true and correct copy of relevant excerpts from the
18 demonstrative slides presented during Oracle's closing statement on November 22, 2010.

19 211. Attached as **Exhibit 41** are true and correct copies of the unpublished cases cited
20 in Defendants' Renewed Motion for Judgment as a Matter of Law and New Trial Motion.

21 212. Attached as **Exhibit 42** is a true and correct copy of U.S. Copyright Office
22 Circular 61, "Copyright Registration for Computer Programs."

23 I declare under penalty of perjury under the laws of the United States and the State of
24 California that the foregoing is true and correct. Executed this 23 day of February, 2011 in Palo
25 Alto, California.

26 /s/ Tharan Gregory Lanier
27 Tharan Gregory Lanier
28