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19 UNITED STATES DISTRICT COURT
20 NORTHERN DISTRICT OF CALIFORNIA
21 SAN FRANCISCO 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)

**JOINT DISCOVERY CONFERENCE
STATEMENT**

Date: February 13, 2009
Time: 2:00 p.m.-
Courtroom: E, 15th Floor
Judge: Hon. Elizabeth D. Laporte

1 Plaintiffs Oracle USA, Inc., Oracle International Corporation, and Oracle EMEA Limited
2 (collectively, “Oracle”) and Defendants SAP AG, SAP America, Inc., and TomorrowNow, Inc.
3 (collectively, “Defendants,” and with Oracle, the “Parties”) hereby submit this Joint Discovery
4 Conference Statement.

5 The Parties jointly request that the Court schedule ninety minutes on February 13, 2009 to
6 further discuss the following discovery issues.

7 **1. Data Warehouse Review and Production**

8
9 In its Requests for Production, dated August 2, 2007, Oracle sought copies of the software
10 and other materials downloaded from Oracle’s Customer Connection support site, and of the
11 Oracle software (and works allegedly derived from that software) maintained on
12 TomorrowNow’s computer systems.

13 As discussed at prior conferences, these materials are voluminous, making copying and
14 production logistically difficult. Many of the 93 server partitions that have been reviewed contain
15 tens or hundreds of gigabytes of data, or even terabytes of data. As the Parties have continually
16 reported, in approximately April 2008 they agreed to an arrangement that permits remote access
17 review of certain servers that house these materials so that Oracle can designate what it believes
18 is relevant material that it wants copied and produced (the “Data Warehouse” agreement or
19 protocol). Oracle began its review under that agreement in mid-July, and, as of January 30, 2009,
20 has now reviewed and tagged for production all available materials, comprising 93 images.
21 Oracle has requested certain metadata from these images, and Defendants have represented that
22 substantially all requested metadata for those respective images has been produced.

23 Of the 68 images reviewed through the Data Warehouse protocol prior to December 1,
24 2008, Oracle has currently requested production of selected files and folders from 24 unique
25 images. Of the 25 images reviewed through the Data Warehouse protocol on or after December
26 1, 2008 (all of which relate to Siebel), Oracle has currently requested production of selected files
27 and folders from an additional six unique images.
28

1 On November 26, 2008, the Court ordered Defendants to complete production of Data
2 Warehouse files on a rolling basis, but no later than February 16, 2009. As of February 2, 2009,
3 Defendants have represented that they have completed production of all non-Siebel images save
4 PSDEV01_HD3 and PSDEV03_DB1. According to Oracle's calculations, Defendants produced
5 almost all (99% of files by file count; 99% of files by size) of the non-Siebel files. No Siebel
6 productions, other than production of the requested metadata reports, have yet occurred. If
7 Defendants continue at their present pace, the Parties believe that production of non-Siebel files
8 will be completed by the date ordered by the Court. While no date has been set by the Court for
9 production of the requested Siebel data, comprising approximately 95,434 files and 733.9 GB, the
10 Parties believe that all Siebel files can be produced by February 28, 2009.

11 One partition, DCITBU01_G, and one server, the AS/400, have been reviewed outside the
12 Data Warehouse protocol. For DCITBU01_G, Defendants represent that they have produced all
13 of the logical files and folders for this partition made from a November 2007 backup tape except
14 for personal, family photos and one redacted privilege document. Since the metadata produced
15 was from a May 2007 version of DCITBU01_G, the Parties will meet and confer regarding
16 differences between the produced metadata and the metadata for the produced images, which
17 Oracle contends can have a seriously prejudicial impact on review and analysis of the data. For
18 the AS/400, Defendants produced backup tapes for a November 2008 full system backup of the
19 two requested partitions of the AS/400 machine, and backup tapes comprising a May 2007 partial
20 backup of the same two partitions. During the January 8 Discovery Conference, at which Oracle
21 challenged Defendants' designation of the AS/400 tapes as Highly Confidential, the Court
22 suggested that the Parties "craft a special provision for this which it's just confidential but you
23 limit the access" to persons in specific categories. January 8, 2009 Transcript at 5:5-8. The
24 Parties will meet and confer on this issue.

25 Oracle contends that the Data Warehouse review has also been affected by the Parties'
26 November 7, 2008 agreement regarding the Expanded Discovery Timeline, under which the
27 Parties agreed to produce certain documents predating 2004 and post-dating March 22, 2007.
28 Specifically, the Parties agreed that some documents relevant to "TN/SAP customers" and

1 documents relevant to TomorrowNow's business model were within the scope of post-March 22,
2 2007 discovery. Defendants take the position that this agreement was never intended to include,
3 and does not extend to, the Data Warehouse review. Defendants' position is that large server
4 partitions in the Data Warehouse and the huge volumes of associated data are not "centralized"
5 sources under either the intent, or express terms, of the Expanded Discovery Timeframe
6 Agreement. Oracle disagrees, and on February 2, 2009, Oracle requested that Defendants
7 produce all Data Warehouse servers again, to the extent that they contain TomorrowNow-branded
8 support materials, materials sent to TomorrowNow's customers, project management and other
9 documents relating to TomorrowNow's delivery of services to its customers, documents
10 reflecting migration and off-boarding of TomorrowNow's local environments, and other
11 documents post-dating March 22, 2007 that fall within the Expanded Discovery Timeline.
12 Defendants are producing responsive, non-privileged data from certain databases and SharePoint
13 sites (*e.g.*, SAS and Pathfinder) that were used to track TomorrowNow's maintenance service
14 activity. The Parties will meet and confer on this issue and seek Court guidance if unable to
15 agree.

16 Assuming that Defendants complete production of non-Siebel files from the original
17 discovery timeline in compliance with this Court's order, Defendants will have produced over
18 4,300 GB of server images between October 25, 2008 and February 16, 2009. As expected,
19 Oracle's ongoing analysis of this vast amount of data, though time-consuming, has and will
20 continue to provide Oracle with information not available from any other source. While Oracle
21 had access to the data through the review process beginning in July 2008 and had substantially
22 completed its data selections from the original servers by mid-August 2008, Defendants did not
23 begin actual production of copies of any Data Warehouse data until October 25, 2008. Though
24 Oracle appreciates Defendants' recent production efforts, Oracle believes that the delay in
25 production has prejudiced its and its experts' ability to analyze the data and initiate focused
26 follow-up discovery.

27 In light of Oracle's investigation of Defendants' post-litigation conduct, Oracle believes it
28 will need to analyze a substantial amount of the additional support materials that TomorrowNow

1 sent to its customers in 2007 and 2008, which are not currently available on the Data Warehouse
2 servers. While Oracle does not know the volume of this 2007 and 2008 data, if the volume is
3 similar to prior collections, hundreds or thousands of additional gigabytes will need to be
4 reviewed and produced. Oracle must then analyze that information after production. Thus, even
5 with Defendants' full cooperation, there will be likely very little time left under the current
6 discovery schedule in which Oracle will be able to leverage its analysis of TomorrowNow's 2007
7 and 2008 files to inform non-expert discovery; without Defendants' immediate and full
8 cooperation as to Data Warehouse review and production for 2007 and 2008 data, the current
9 discovery schedule will be threatened. Defendants do not believe that the detailed evaluation
10 sought by Oracle is appropriate or necessary in this case.

11 **2. Production of TomorrowNow's SAS Database**

12 As the Court is aware, to track and monitor its work and customers, TomorrowNow built
13 and used a large Lotus Notes database, called the SAS database. Early in this case, Defendants'
14 counsel stressed to the Court the importance of the SAS database in answering Oracle's questions
15 about how TomorrowNow conducted its business and supported its customers. Defendants first
16 produced a copy of the SAS database, limited to PeopleSoft and JDE customers, in fall 2007.
17 That production was made from an April 2007 "snapshot" of the database. And, under
18 Defendants' agreement to produce "foundational" discovery relating to TomorrowNow's
19 servicing of Siebel customers, Defendants recently produced the SAS database for Siebel
20 customers that contains the records through TomorrowNow's cessation of operations on October
21 31, 2008. Now, as part of the Expanded Discovery Timeframe Agreement, Defendants have
22 agreed to supplement their previous productions of the SAS records for TomorrowNow's
23 PeopleSoft and J.D. Edwards customers, and estimate that production will be made in mid-
24 February 2009.
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1 Oracle believes that these delays in production of the complete SAS database, like the
2 delays in production of Data Warehouse and custodial data and the delays in reaching an
3 extrapolation agreement, threaten the current discovery schedule. Oracle uses information from
4 SAS extensively in depositions to explore the fix development and testing process.
5 Understanding Defendants' post-litigation conduct is becoming increasingly important to Oracle,
6 but without post-litigation SAS records, Oracle cannot fully verify and understand testimony
7 related to that conduct (for example, testimony from Rod Russell, TomorrowNow's post-
8 litigation development manager, and Catherine Hyde, the longest tenured developer at
9 TomorrowNow other than Andrew Nelson). The Court has permitted Oracle to depose these
10 witnesses again with the post-April 2007 material, but the continued delay and inherent
11 inefficiency has impacts on the schedule.
12

13
14 Because of the importance of the SAS database, Oracle requests that the Court address a
15 specific deadline for its production at the February 13 Discovery Conference.

16 **3. Sampling and Extrapolation**

17 As the Court is aware, the Parties have been discussing for many months possible ways to
18 shortcut the collection and presentation of the substantial evidence regarding TomorrowNow's
19 downloading and use of Oracle's software and how TomorrowNow provided its services to its
20 customers. As reported at the last three Discovery Conferences, the Parties are currently trying to
21 finalize a stipulation based on general testimony regarding certain of TomorrowNow's processes.
22 The Parties agreed to provide to the Court, by the February 13 Discovery Conference, "either a
23 final stipulation or an extended explanation of the reasons, if any, why the Parties are unable to
24 reach a final stipulation." The Parties have not agreed to a final stipulation, although they have
25 spent many additional hours in meet and confer discussions and have made continued progress
26 since the last conference.
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1 As the Parties stated in the last Discovery Conference Statement, “[t]he goal of the
2 stipulation is to reduce the amount of deposition discovery that would otherwise be required to
3 collect such evidence on a fix-by-fix or release-by-release basis.” The Court agreed at the first
4 discovery hearing that an extrapolation proposal is a good way to address Oracle’s concerns
5 regarding the discovery scope and time limits sought by Defendants in this case, stating, “I want
6 you to start today, and refine this, talk to your experts.” July 1, 2008 Transcript [Docket Item
7 105], 49:11-12. Since then, the Parties have met and conferred extensively, and Oracle has
8 provided three specific proposals for Defendants’ consideration, on July 17, October 21, and
9 January 21, which, despite substantial meeting and conferring, have yet to be accepted by
10 Defendants. However, the Parties are still discussing Oracle’s January 21 proposal, which is
11 attached as Exhibit A, under seal, for the Court’s review.
12

13
14 Though Defendants have made it clear that their willingness to negotiate shall not be
15 construed as an indication that they will ultimately agree to any proposed stipulation, the Parties
16 have made significant progress. However, significant obstacles remain. First, Defendants require
17 that any stipulation be based on actual witness testimony, including some witnesses currently
18 scheduled to be re-deposed. Second, given Oracle’s position that the extrapolation stipulation
19 should apply to certain post-litigation conduct, certain portions of the updated SAS database, not
20 yet produced to Oracle, are also relevant to negotiation of the stipulation. Third, as the Parties
21 have discussed with the Court previously, a primary consideration for Defendants is the degree to
22 which the Parties must agree on how the stipulation will be used. Defendants will not agree to the
23 stipulation unless Oracle discloses how the stipulation will be used in Oracle’s damages model.
24 Oracle contends that the stipulation should be treated as any other fact learned through discovery.
25 Oracle contends that, just as it would not agree that a deposition answer can only be used for
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1 liability and not damages, the stipulation should be treated the same way, since it is intended to
2 replace that same testimony.

3 Now, with the discovery cut-off quickly approaching, and after 7 months of trying and so
4 far failing to reach agreement on extrapolation or a stipulation, Oracle believes it will need to
5 seek additional discovery beyond the limits set by the Court and additional time to complete that
6 discovery. Otherwise, Oracle contends that it will have been prevented from developing a
7 reasonably complete factual story and fully developing its damages case. Oracle believes that
8 Defendants' witnesses have testified that to understand how TomorrowNow used each individual
9 copy of Oracle's software, and delivered each individual fix, Oracle would need to depose each of
10 the developers and technical personnel. There are at least 44 such persons from the PeopleSoft
11 side of TomorrowNow's business and at least 33 from the J.D. Edwards side. It is Oracle's
12 position that without an agreed stipulation, individual fix-by-fix and witness-by-witness discovery
13 and presentation of evidence would take substantially more resources and time. As an example,
14 for a Rule 30(b)(6) deposition regarding the development and delivery of just a few fixes,
15 Defendants presented three TomorrowNow deponents and Oracle used nearly 6 hours of
16 deposition time.
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19 The Parties ask the Court to discuss this issue at the February 13 Discovery Conference.
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21 **4. Privilege Log Issues**

22 As the Parties and the Court discussed at the January Discovery Conference, Oracle is
23 concerned about Defendants' compliance with the Parties' agreement and the Court's May 29,
24 2008 order, which Oracle contends requires production of a privilege log within 45 days of a
25 given production. Defendants contend that they have substantially complied with the Parties'
26 agreement and the Court's orders regarding the production of privilege logs.

27 At Oracle's request, on January 7, 2009, Defendants provided certain information
28 regarding the logs they have produced since September 22, so that Oracle could evaluate for

1 which productions Defendants have not complied with the Parties' agreement and the Court's
2 order. That statement shows that Defendants exceeded the Court's 45-day deadline for privilege
3 log entries for several custodians, including Henning Kagermann (76 days), Leo Apotheker (70
4 days), and Chris Faye (63 days). Oracle is still reviewing and evaluating this information to
5 determine what relief under the Parties' agreements and the Court's orders it may seek.
6 Defendants have asked for additional information regarding Oracle's privilege logs, which Oracle
7 contends it has already provided. The Parties will meet and confer on any remaining disputes
8 regarding the Parties' privilege logs.

9 **5. Customer List**

10 In the January 5, 2009 Joint Discovery Conference Statement, the Parties previewed for
11 the Court their attempts to come to an agreement regarding the list of TomorrowNow customers
12 in "Exhibit 1," which was attached to Defendants' First Set of Requests for Production to Oracle,
13 dated July 26, 2007. The Court ordered Defendants to "produce an updated Exhibit 1 containing
14 a complete list of TomorrowNow customers no later than January 9, 2009." January 9, 2009
15 Order Following Discovery Conference ¶ 3. Defendants provided Oracle with a Supplemental
16 Exhibit 1 on January 9. Supplemental Exhibit 1 adds 40 new customer names, deletes 18 names,
17 provides alternative names for 26 customers, and corrects what Defendants contend are
18 typographical errors in the names of some other customers. Only two of the alternative names
19 reflected in Supplemental Exhibit 1 are also listed as "alternative customer names" in Defendants'
20 latest Response to Oracle's Second Set of Interrogatories to Defendant TomorrowNow, Inc. No. 1
21 (dated January 15, 2008), and Defendants have not yet amended or supplemented their Response
22 to this Interrogatory to reflect this new information. However, those alternative names listed on
23 Supplemental Exhibit 1 are clearly indicated as "a/k/a."

24 Although Oracle is still assessing the full impact of these changes, as Oracle explained in
25 the January 5, 2009 Joint Discovery Conference Statement, Defendants' modifications to Exhibit
26 1 will at least require Oracle to spend many additional hours and resources to (a) find and review
27 these newly-added customers' contract files, (b) prepare and produce relevant materials, (c) adjust
28 its main document review and production process to include these customers, (d) re-examine

1 Defendants' discovery responses and production in light of these customers, and (e) investigate
2 and subpoena these new customers, if necessary. In addition, Oracle contends that it has spent
3 considerable time and resources responding to discovery based on the original Exhibit 1, and
4 Oracle contends that it has served discovery, responded to discovery, and met and conferred
5 based on the original list (which it has only in December learned was both incomplete, and
6 contained the names of 18 now-deleted customers, and provided alternative or edited names for
7 over 30 customers).¹

8 Defendants do not believe Oracle has suffered any prejudice from these changes. Of the
9 40 new customer names contained in Supplemental Exhibit 1, all but 5 did not become customers
10 until after the lawsuit was filed. Thus, Defendants contend that the vast majority did not even
11 become discoverable until after the Parties agreed, at Oracle's request, to expand the relevant
12 discovery time period on November 18, 2008. Defendants' position is that any additional time
13 Oracle spends on discovery of these customers is a direct consequence of its own decision to
14 expand the relevant discovery time frame. Moreover, although Defendants contend that these
15 new customers did not become discoverable until recently, Defendants contend that they have
16 exceeded their discovery obligations by producing responsive documents for these customers
17 throughout discovery anyway. Thus, Defendants contend that Oracle knew or should have known
18 about these customers well before Supplemental Exhibit 1 was served.

19 **6. De-Designation of TomorrowNow Documents**

20 As the Court is aware, TomorrowNow ceased operations on October 31, 2008. For
21 approximately six months, the Parties have met and conferred on whether, and how, the
22 confidentiality designations for TomorrowNow's document production, deposition testimony, and
23 other discovery responses should now be re-designated or de-designated. The Parties are close to

24 ¹ To name only a few examples, Defendants have asked for, and Oracle has produced,
25 software licenses and support contracts (Defendants' First Set of Document Requests to Plaintiffs
26 "Defendants' RFP" No. 1), negotiations of support contracts (Defendants' RFP No. 4),
27 downloads from Oracle's Customer Connection (Defendants' RFP No. 18), and customer-specific
28 financial reports listing contract and license pricing information, for all of the customers
identified in the original Exhibit 1. Defendants dispute that Oracle has produced this information
for all customers identified in the original Exhibit 1. Defendants are currently analyzing the
deficiencies in Oracle's production and customer-specific financial reports and will be raising the
issue shortly in a meet and confer.

1 an agreement, but need to seek the Court's assistance at the February 13 Discovery Conference to
2 resolve a few remaining issues. Oracle's current proposal is attached as Exhibit B, with its
3 suggested terms in italics; Defendants will file their current proposal tomorrow as Exhibit C, with
4 their suggested terms underlined. All other terms have been accepted by the Parties.

5 **7. Case Schedule and Discovery Limits**

6 The Parties present their separate statements below. Neither Party agrees with the other's
7 characterization of events or positions, but in the interest of efficiency, does not comment on
8 those characterizations here.

9 **a. Oracle's Statement**

10 Oracle is increasingly concerned about the pace of discovery and the Parties' ability to
11 conclude their obligations prior to the June 2009 fact discovery cut-off and under the current
12 discovery limits.

13 Regarding the case schedule, as explained above, it is unlikely that Oracle will obtain the
14 requested Data Warehouse materials in time to explore, analyze, and follow up on that analysis
15 before the fact discovery cut-off. Similarly, Oracle must wait for a full copy of the SAS database
16 to take informed and efficient depositions and to aid its understanding of Defendants' conduct.
17 And if the Parties are unable to reach an extrapolation stipulation, the dozens of then-necessary
18 depositions of TomorrowNow personnel will require more time than remains before the fact
19 discovery cut-off.²

20 In addition, Oracle believes the current deposition discovery limits will need to be
21 expanded. Oracle has taken approximately 230 of its 350 allotted deposition hours, which
22 translates to roughly 17 deposition days remaining. Eight more depositions are currently

23 _____
24 ² Indeed, Oracle is still awaiting dates for witnesses it requested several weeks ago,
25 including Rule 30(b)(6) witnesses for SAP AG, SAP America, and TomorrowNow relating to
26 Project Blue (depositions noticed January 12, 2009) and Patty VonFeldt (deposition noticed
27 January 14, 2009). And Defendants' document production continues to present challenges to
28 Oracle's resources. For example, Andrew Nelson's deposition is scheduled for February 26, and
on February 6, Defendants produced approximately 18,000 documents from his files. Further,
Oracle has noticed discrepancies in Defendants' production between custodians, which may
indicate that Defendants' custodians' materials are not being properly preserved or collected.
Oracle surfaced this issue to Defendants on February 8 and will meet and confer with Defendants
once they have had an opportunity to respond to the issue.

1 calendared, and twelve have been noticed and are waiting to be scheduled. Oracle expects these
2 witnesses to take the remainder of its allotted time. When the Court set the initial deposition
3 limits, Oracle's understanding of the scope of Defendants' infringing conduct was limited; since
4 then, Oracle has uncovered a significantly broader pattern of misconduct, requiring much more
5 exploration in discovery. While Oracle has been careful to take only the depositions of
6 individuals and representatives with case-crucial information, and indeed is nearly done with SAP
7 witnesses, many other important witnesses remain. For example, to understand the scope of
8 Defendants' conduct and its effect on Oracle, Oracle must take the depositions of dozens of
9 TomorrowNow's former customers; Defendants' late additions to the Exhibit 1 customer list, as
10 described above, have only increased the evidence Oracle must collect through these customer
11 depositions. The huge amount of information in the Data Warehouse will require deposition
12 testimony to understand; moreover, and as explained above, if the Parties are unable to agree to
13 an extrapolation proposal, Oracle must take the depositions of at least 77 TomorrowNow
14 development and technical witnesses, which cannot be done under the current deposition hour
15 limits. Finally, Defendants' post-litigation infringement and misconduct, about which Oracle is
16 only just now learning, will require additional deposition time to explore and understand. For
17 these and other reasons, Oracle expects to request additional deposition hours.

18 The Parties will meet and confer on these issues and Oracle may seek appropriate relief
19 from Judge Hamilton.

20 **b. Defendants' Statement**

21 Defendants are very concerned about Oracle's rate of document production. Based on
22 past productions, and Oracle's proposal going forward, Defendants do not believe that Oracle can
23 complete its document production before the June 19 fact discovery cut-off, and certainly not in
24 sufficient time to allow for depositions, other follow-up discovery, and any discovery motions
25 that may be necessary. For example, Oracle has not yet produced: (a) 8 of the 13 custodians
26 identified in September 2008; (b) any of the 7 custodians identified on October 24, 2008; or (c)
27 any of the 4 custodians identified on December 19, 2008. Oracle also has not completed
28 production of two group email accounts it started producing last year.

1 Oracle has indicated that it intends to produce the group email address documents on a
2 rolling basis starting the week of February 9 and extending throughout February. Following
3 completion of that production, Oracle intends to produce three of the September custodians (Catz,
4 Phillips, and Ellison) through March. Thus far, Oracle has not provided production dates for the
5 remaining September, October, or December custodians, but based on the current production rate,
6 the earliest they will be produced is April. If so, Defendants will not have sufficient time for
7 depositions and follow-up discovery. Moreover, if Oracle is still producing in April or May
8 documents for custodians identified in 2008, it is unlikely to meet the June 19 cut-off for
9 custodians identified in 2009. On February 5, Defendants asked Oracle to agree to the following
10 production schedule: (a) all remaining custodians identified in September to be produced by
11 February 27; and (b) the group email addresses and all remaining October and December
12 custodians to be produced by March 31. Defendants also named an additional 11 custodians on
13 February 5 and believe that a production deadline of April 15 for those custodians is appropriate.

14 In addition to its custodian production, Oracle has not yet produced the PeopleSoft
15 database it claims contains some of the copyright information Defendants have been seeking
16 since the outset of discovery. Oracle informed Defendants almost two months ago about this
17 database. Defendants have requested a date certain for its production but have not received one.
18 The delay in receiving the database is hampering Defendants' ability to take discovery, prepare its
19 defense, and bring its copyright related motion to compel. On February 9, Oracle informed
20 Defendants that it expects to produce the database in two to three weeks.

21 On January 12, Defendants asked Oracle whether, in light of the Court's statements at the
22 January 8 discovery conference, it would agree to produce its charts of accounts. Oracle
23 responded on January 13 that it would make a reasonable production of the chart of accounts for
24 the plaintiff entities. On January 14, Defendants followed up with a specific request for portions
25 of the charts of accounts for the Plaintiff entities and their PeopleSoft and J.D. Edwards
26 predecessors. On February 3, Oracle informed Defendants that it would produce the charts of
27 accounts for the Oracle Plaintiff entities, but could not confirm that it had charts of accounts for
28 PeopleSoft or JDE. On February 5, Defendants requested that Oracle produce the charts of

1 accounts for the Oracle entities by February 13 and, on the same date, tell Defendants whether the
2 PeopleSoft and JDE charts of accounts have been located.³ On February 6, Oracle informed
3 Defendants that it needs 45 days to complete the production of the charts of accounts.

4 If the parties are unable to reach an agreement regarding the acceleration of Oracle's
5 production schedule so that discovery can be completed within the current case schedule, then
6 Defendants intend to seek the Court's assistance on February 13 in establishing an accelerated
7 schedule. Defendants are also concerned about Oracle's delay in providing deposition dates. For
8 example, Defendants are still awaiting witness names and proposed dates for their Rule 30(b)(6)
9 deposition of OIC on revenues related to the Registered Works (noticed on January 20, 2009).

10 **6. Anticipated Motions to Compel**

11 **a. Oracle's Anticipated Motion to Compel**

12 Oracle continues to be concerned about Defendants' strategic and pervasive use of
13 privilege. As described above, Oracle believes that Defendants have repeatedly failed to comply
14 with the Court's order regarding privilege logs, producing logs long after they are due and in a
15 manner that hinders Oracle's deposition preparation. More disturbingly, it appears that
16 Defendants use privilege as a shield to protect information they wish to conceal, but set it aside
17 for material they wish to share. Oracle is further troubled by Defendants' witnesses' unjustified
18 reliance on spousal privilege, and by growing evidence that the crime-fraud exception to the
19 attorney-client privilege may apply to Defendants' conduct. Oracle fully anticipates bringing a
20 comprehensive motion to compel information Defendants have improperly withheld as privileged.

21 **b. Defendants' Anticipated Motions to Compel**

22 **(i) Copyright Related Documents and Information.**

23 Defendants continue to meet and confer with Oracle regarding their anticipated motion to
24 compel copyright documents and information. Defendants are also waiting for Oracle to produce
25 the PeopleSoft database discussed above. Should the parties be unable to resolve their disputes,
26 Defendants anticipate that the motion will address: (a) Oracle's response to an interrogatory it

27 _____
28 ³ Oracle has agreed to update Defendants on the status of the PeopleSoft and JDE charts
of accounts by February 13.

1 agreed to supplement in lieu of Rule 30(b)(6) testimony on identification of the materials
2 allegedly covered by each copyright registration and ownership of the same; (b) production of
3 documents sufficient to identify the individuals who created the materials allegedly covered by
4 the registrations and work for hire agreements it contends exist; and (c) additional testimony and
5 documents from Todd Adler, Oracle's designated 30(b)(6) deponent who signed several of the
6 copyright registration applications at issue, but was precluded (under a claim of privilege) from
7 testifying fully regarding statements he made on those applications and his research and
8 investigation in support of making those statements.

9 **(ii) Pre-2005 Documents.**

10 Defendants are concerned about Oracle's failure to produce information pre-dating its
11 acquisition of PeopleSoft in January 2005. At the outset of the case, the parties agreed to limit
12 the discovery time frame to January 1, 2004 through the date of filing of the initial Complaint. In
13 November 2008, at Oracle's request, the parties agreed to expand the discovery time frame to
14 January 1, 2002 through October 31, 2008. Thus far, however, Oracle has largely failed to
15 produce information for the pre-2005 time period. With respect to custodian emails, Oracle
16 contends that pre-2005 emails are archived and thus "inaccessible." Defendants have asked
17 Oracle to substantiate that contention. With respect to the customer-specific financial reports the
18 parties exchanged in January, Defendants have not completed their analysis but it appears that
19 Oracle has not provided information going back to 2002. In addition, as noted above, Oracle has
20 said that it may not be able to produce the charts of accounts for PeopleSoft and JDE.

21 Defendants continue to meet and confer with Oracle on these issues. If the parties are
22 unable to resolve them, Defendants anticipate filing a motion to compel Oracle to substantiate its
23 claims that pre-2005 documents are inaccessible or otherwise unavailable, and/or to produce pre-
24 2005 documents and information.

25 **(iii) Oracle's Responses to Defendants' Second Request for Production.**

26 Defendants have been attempting to meet and confer with Oracle on its responses to
27 Defendants' Second Set of Request for Production. If the issues related to these requests have not
28 been resolved by the February 13 discovery conference, then Defendants will provide a brief

1 statement of the remaining disputed issues during the conference and ask the Court to set a
2 motion date.

3 **(iv) Defendants’ Insurance Carriers Access to C and HC Information.**

4 Defendants have requested and Oracle has refused to permit at least one representative
5 from each of Defendants’ insurance carriers to have access to testimony and documents that
6 Oracle has designated as “Confidential” and “Highly Confidential” (HC) under the Agreed
7 Protective Order. Defendants’ counsel does not represent Defendants’ insurance carriers and thus
8 those carriers need independent access to at least certain portions of Oracle’s HC information in
9 order to properly evaluate Oracle’s settlement demand that is expected to be made in February
10 pursuant to the settlement magistrate’s order. The Court addressed this issue at the January 8th
11 Discovery Conference. The parties are now closer to reaching an agreement on this issue, but if
12 an agreement is not reached beforehand, Defendants will seek additional guidance from the Court
13 on February 13.

14 DATED: February 9, 2009

BINGHAM McCUTCHEN LLP

17 By: _____ /s/
18 Holly A. House
19 Attorneys for Plaintiffs
20 Oracle USA, Inc., Oracle International
21 Corporation, and Oracle EMEA Limited

21 In accordance with General Order No. 45, Rule X, the above signatory attests that
22 concurrence in the filing of this document has been obtained from the signatory below.

23 DATED: February 9, 2009

JONES DAY

25 By: _____ /s/
26 Jason McDonell
27 Attorneys for Defendants
28 SAP AG, SAP AMERICA, INC., and
TOMORROWNOW, INC.

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Exhibit A

Exhibit A

**Lodged with the Court under seal
Pursuant to the Stipulated Protective
Order filed June 6, 2007, and the
[Proposed] Order to File Documents
Under Seal filed February 9, 2009**

Exhibit B

Exhibit B

Oracle's Proposal Regarding TN De-Designations

1. All documents produced by TN without any confidentiality designation shall remain as such.
2. TN will re-review all documents previously produced by TN with a "*Highly Confidential*" or "Confidential" designation that have been, or will in the future be, used as a deposition exhibit in this case to determine if any of those documents can now be totally de-designated. The review of the current exhibits will be completed by _____, 2009;
3. TN will re-review all documents previously produced by TN with a "*Highly Confidential*" or "Confidential" designation that have been, or will in the future be, filed as an exhibit in this case for any purpose to determine if any of those documents can now be totally de-designated. This review will be completed for existing exhibits by _____, 2009
4. All documents produced by TN in this case prior to 10-31-08 with a "Confidential" designation shall remain designated as such except TN will re-review up to a total of 4000 additional documents (not pages) previously produced by TN with a "Confidential" designation that are identified in one or more groups by Oracle as documents that should be re-reviewed under this subsection to determine if any of those documents can now be totally de-designated. When Oracle makes such a request, TN will respond within 3 business days for each grouping of 500 documents or less.
5. All documents previously produced by TN in this case prior to 10-31-08 with a "Highly Confidential" designation shall be re-designated to "Confidential" except:
 - a. those documents that contain Oracle source code;
 - b. any email or other communication in which there is an objective indication that any supervisory board member, executive board member, or attorney of SAP was an author or recipient (direct, cc, bcc, or otherwise); and
 - c. any paper or electronic document (Word, Excel, PowerPoint or otherwise, *not including email or other communications*) that has any objective indicia whatsoever on its face that it is a SAP document (i.e., SAP employee is an author, any SAP logo, confidential marking, or other words or images that make clear that it is a SAP document).
6. Notwithstanding any of the foregoing, the Parties reserve their rights to raise the protection of any document that contains SAP or Oracle Confidential or Highly Confidential information to Confidential or Highly Confidential at a later date.
7. Notwithstanding any of the foregoing, the Parties do not waive their rights to dispute any of the above confidentiality designations, as well as any attempt to raise the level of

protection of any document to Confidential or Highly Confidential. However, if a dispute occurs, neither Party will raise the argument that the other side has waived any confidentiality protection by virtue of the de-designation process itself.