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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
SAN FRANCISCO DIVISION

21 ORACLE USA, INC., et al.,

22 Plaintiffs,

23 v.

24 SAP AG, et al.,

25 Defendants.

Case No. 07-CV-1658 PJH (EDL)

**DECLARATION OF THARAN GREGORY
LANIER ISO DEFENDANTS' OPPOSITION
TO PLAINTIFFS' MOTION FOR ENTRY
OF FINAL JUDGMENT UNDER FED. R.
CIV. P. 54(B) OR CERTIFICATION FOR
INTERLOCUTORY APPEAL PURSUANT
TO 28 U.S.C. § 1292(B)**

Date: March 4, 2009; Time: 9:00 a.m.
Courtroom: 3, 17th Floor
Judge: Hon. Phyllis J. Hamilton

28

1 I, THARAN GREGORY LANIER, declare:

2 1. 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., and
4 TomorrowNow, Inc. (collectively, "Defendants") in the above-captioned action. I am a member
5 in good standing of the state bar of California and admitted to practice before this Court. I make
6 this declaration based on personal knowledge and, if called upon to do so, could testify
7 competently thereto.

8 2. On January 21, 2009, Plaintiffs' counsel notified Defendants that Plaintiffs
9 intended to file the present motion. This communication was the first notice to Defendants that
10 Plaintiffs intended to file this motion or contended that the Court's ruling was unclear. Attached
11 as Exhibit 1 is a true and correct copy of e-mail correspondence between Plaintiffs' counsel and
12 Defendants' counsel relating to this motion.

13 3. Attached as Exhibit 2 is a true and correct copy of pages 1 and 19-20 of the
14 Transcript of Proceedings from the November 26, 2008, hearing on Defendants' FRCP 12(b)(1)
15 and 12(b)(6) Motion to Dismiss Plaintiffs' Claims.

16 I declare under penalty of perjury under the laws of the United States and the State of
17 California that the foregoing is true and correct. Executed this 11th day of February, 2009 in Palo
18 Alto, California.

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25
26
27
28

/s/ Tharan Gregory Lanier
Tharan Gregory Lanier

EXHIBIT 1

Greg Lanier/JonesDay
Extension 33941
01/22/2009 03:25 PM

To "Howard, Geoff" <geoff.howard@bingham.com>
cc "Elaine Wallace" <ewallace@JonesDay.com>, "House, Holly" <holly.house@bingham.com>, "Jane L Froyd" <jfroyd@JonesDay.com>, "Jason McDonell" <jmcdonell@JonesDay.com>, "Polito, John A." <john.polito@bingham.com>, "Scott Cowan" <swcowan@JonesDay.com>, "Alinder, Zachary J." <zachary.alinder@bingham.com>
bcc snakanomcswain@jonesday.com; tglanier@jonesday.com
Subject RE: Order on motion to dismiss

Geoff, we are available for a March 4 hearing on the motion mentioned, assuming a filing Friday or Monday.

Greg

Tharan Gregory Lanier
Jones Day
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Palo Alto, CA 94303
650-739-3941 (Direct)
650-739-3900 (Fax)
tglanier@jonesday.com

"Howard, Geoff" <geoff.howard@bingham.com>



"Howard, Geoff"
<geoff.howard@bingham.com>

01/22/2009 01:28 PM

To "Greg Lanier" <tglanier@JonesDay.com>
cc "Elaine Wallace" <ewallace@JonesDay.com>, "House, Holly" <holly.house@bingham.com>, "Jane L Froyd" <jfroyd@JonesDay.com>, "Jason McDonell" <jmcdonell@JonesDay.com>, "Polito, John A." <john.polito@bingham.com>, "Scott Cowan" <swcowan@JonesDay.com>, "Alinder, Zachary J." <zachary.alinder@bingham.com>
Subject RE: Order on motion to dismiss

Greg,
Thank you for the prompt response. As indicated below, we plan to request entry of a final judgment or certification for appeal, in the alternative. The first available hearing date is March 4, and we plan to file either tomorrow or Monday assuming that date is acceptable to Defendants.
Thanks,
Geoff

-----Original Message-----

From: Greg Lanier [mailto:tglanier@JonesDay.com]
Sent: Thursday, January 22, 2009 12:53 PM
To: Howard, Geoff
Cc: Elaine Wallace; House, Holly; Jane L Froyd; Jason McDonell; Polito, John A.; Scott Cowan; Alinder, Zachary J.
Subject: RE: Order on motion to dismiss

Geoff, while we agree that the Court's ruling on our motion to dismiss has important consequences, we disagree that the ruling or those consequences are unclear. We decline Oracle's invitation to stipulate away the consequences of the ruling. We will oppose any effort to seek "clarification" of the ruling, both because no such clarification is necessary and because such a request is really a motion for reconsideration, which motion would be both untimely and inappropriate. We also decline to stipulate to an interlocutory appeal from the ruling or a 54(b) certification as to JDEE and OSC for many reasons, including that Oracle's request comes too late, the issues in any such appeal and the underlying case are intertwined and related, and any such appeal would not serve the interests of justice or the parties as the appeal would not be resolved until after the trial date in the underlying case.

You indicated in the initial email (below) that you would file your motion this week and asked for our response before then. You have defendants' response. Please let us know the nature of the motion you will file and the proposed hearing date, so that we can be sure of appropriate availability on our side.

Thank you,

Greg

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650-739-3900 (Fax)
tglanier@jonesday.com

"Howard, Geoff"
<geoff.howard@bingham.com>

01/21/2009 02:03
PM

"Greg Lanier"
<tglanier@JonesDay.com>

"Elaine Wallace"
<ewallace@JonesDay.com>, "House,
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"Jane L Froyd"
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McDonell" <jmcdonell@JonesDay.com>,
"Polito, John A."
<john.polito@bingham.com>, "Scott
Cowan" <swcowan@JonesDay.com>,
"Alinder, Zachary J."
<zachary.alinder@bingham.com>

To

cc

Subject

RE: Order on motion to dismiss

Greg,

I think the proposed alternative stipulations set forth below are straightforward - I don't see the point of working them up without knowing if you agree. If you need over the weekend to consider, I will recommend that we accommodate that request. If you wish to discuss or if I'm missing something, please feel free to call.

Thanks,
Geoff

-----Original Message-----

From: Greg Lanier [mailto:tglanier@JonesDay.com]

Sent: Wednesday, January 21, 2009 12:54 PM

To: Howard, Geoff

Cc: Elaine Wallace; House, Holly; Jane L Froyd; Jason McDonell; Polito, John A.; Scott Cowan; Alinder, Zachary J.

Subject: Re: Order on motion to dismiss

Geoff, we will discuss this issue with our clients and get back to you. Given that it has been more than a month since the Court issued its order, we are surprised you are raising the issue at this late date and we cannot assure that we will have had enough time to discuss with our clients to meet your stated deadline. Nonetheless, we will try. It would expedite matters if you would provide us as soon as possible draft stipulations for each of the scenarios you propose. Please also let us know what you would propose happens to the rest of the case were there to be an interlocutory appeal or 54(b) certification.

Greg

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"Howard, Geoff"
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01/21/2009 11:18
AM

"Greg Lanier"
<tglanier@JonesDay.com>, "Scott
Cowan" <swcowan@JonesDay.com>,
"Jason McDonell"
<jmcdonell@JonesDay.com>, "Elaine
Wallace" <ewallace@JonesDay.com>,
"Jane L Froyd"
<jfroyd@JonesDay.com>

To

cc

"House, Holly"
<holly.house@bingham.com>,
"Alinder, Zachary J."
<zachary.alinder@bingham.com>,
"Polito, John A."

<john.polito@bingham.com> Subject
Order on motion to dismiss

Counsel,

Upon careful consideration of the Court's order dismissing OSC and JDEE, we think it has important consequences that need to be addressed now. The Court's order leaves it unclear whether, in the Court's view, OIC has standing to assert certain pre-merger claims that OSC alleged in the Third Amended Complaint. The Court's order also leaves it unclear whether, in the Court's view, OIC may assert the EMEA-related claims alleged by JDEE in the Third Amended Complaint.

We don't believe the Court intended to suggest these claims have simply disappeared. On the contrary, the Court may intend that OIC may assert these claims if OSC and JDEE can't. But to the extent there is any uncertainty about whether these claims remain in the case, that needs to be resolved now.

If it's the Court's view that no remaining plaintiff may assert these pre-merger and EMEA-related claims, Oracle will appeal that ruling. The question then becomes one of timing. If we wait until the conclusion of the case and the appeal is successful, then everyone is stuck starting from scratch, essentially relitigating the case as to certain pre-merger and EMEA-related claims. If on the other hand we appeal now, the issue of OSC's and JDEE's possible reinstatement could be determined in time for trial. Given the concern defendants have expressed over cost, we think everyone should agree that earlier resolution is preferable to later resolution of these issues.

Accordingly, we propose that the parties stipulate that OIC may assert pre-merger claims and EMEA-related claims. If SAP won't stipulate to that, we plan to ask Judge Hamilton to clarify this issue and to enter a Rule 54 (b) judgment as to OSC and JDEE, or alternatively certify her dismissal order for interlocutory appeal, to the extent the Court has concluded OIC may not assert these claims. Even if SAP disagrees that OIC may pursue the claims, we request that SAP at least stipulate to that a Rule 54 judgment (or interlocutory certification, at the court's discretion) is appropriate, or agree not to oppose that motion.

Please let me know SAP's position at your earliest convenience. Since there is some urgency to pursuing this, we plan to file our motion by the end of the week. We are, of course, happy to discuss a convenient hearing date, or any questions you may have.

Thanks,
Geoff

=====

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EXHIBIT 2

1 expressly transferred or retained?

2 MR. HOWARD: Yes and no. Let me explain that.

3 I agree that it has to be expressly transferred when
4 the transferor continues to exist. Mr. Lanier cited the
5 *Co-opportunities* case to your Honor. In the *Co-opportunities*
6 case the ownership was transferred but not the right to sue.
7 Judge Patel then allowed the assignor subsequently three years
8 later to make a second assignment solely of the right to sue,
9 and then the assignee was held to have the ability to bring that
10 preexisting claim.

11 The crucial difference there and the crucial
12 difference in the *De Silva* case that was also cited to your
13 Honor is that somebody was there to make that second
14 assignment.

15 Here there is no prior entity. They have -- the
16 agreements that have been provided to your Court say they have
17 ceased to exist. So everything that is about them, everything
18 that they have has been merged into OSC.

19 And it would defeat justice for sure -- and it
20 certainly isn't part of merger law -- that the claims that
21 *ABKCO* and *Co-opportunities* and *Silvers* and *Nimmer* and
22 everybody say, the claims that still existed because they had
23 accrued at the time that those entities owned the copyrights,
24 it would defeat justice to say that they just disappeared.
25 Of course they don't. They continue with the person who

1 succeeds to those entities.

2 So it's not a case --

3 THE COURT: And what do -- which of the cases
4 specifically says that?

5 MR. HOWARD: Your Honor, no case has been cited to you
6 by either side where the transferring entity has ceased to
7 exist. But that is the dispositive factual difference.

8 If it is true that the assignor retains the right
9 to sue, then there's -- then that right is there. And the
10 distinction between *Co-opportunities* and *De Silva*, where
11 somebody is there, a corporation or a sole proprietor is
12 there who can sign the caption and bring the claim into you
13 for resolution, the difference between those cases and this
14 one is that now nobody has that if it's not OSC. And of
15 course it has to be OSC because they've acquired everything.

16 THE COURT: Such result could have been avoided
17 obviously by having express conveyance at the time of the
18 merger; correct?

19 MR. HOWARD: I suppose that if we wanted to put
20 ourselves back into the *Co-opportunities* time period we could
21 have done that, but it's different. There is no reason to do
22 that because a merger is everything. There's no question as
23 there is when the transferor continues to exist. There is no
24 question that something has been retained. Nothing has been
25 retained. In a merger nothing gets left by the wayside because