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18 TOMORROWNOW, INC.

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)

**DECLARATION OF JOSHUA L. FUCHS IN SUPPORT OF DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL PRODUCTION OF DOCUMENTS RELATED TO DAMAGES MODEL**

**DISCOVERY MATTER**

1 I, Joshua L. Fuchs, declare as follows:

2 1. I am an associate in the law firm of Jones Day, 717 Texas, Suite 3300, Houston,  
3 Texas, a member in good standing of the bar of Texas and admitted *pro hac vice* and counsel of  
4 record for Defendants SAP AG, SAP America, Inc., and TomorrowNow, Inc. in the above-  
5 captioned action. I make this declaration based on personal knowledge and, if called upon to do  
6 so, could competently testify thereto. Nothing in this declaration is intended to waive, or should  
7 be construed as a waiver of, the attorney-client privilege or attorney work product immunity.

8 2. Oracle has taken approximately 326 of the 450 fact deposition hours that it has  
9 been allotted in this case. Oracle has also served Defendants with 150 requests for production,  
10 121 interrogatories and 749 requests for admission.

11 3. Defendants, to date, have produced 7,855,535 Bates numbered pages, which  
12 includes responsive data from 100 custodians. Defendants provided these productions in a format  
13 that is full-text searchable and includes metadata. Defendants have also made available 105  
14 TomorrowNow, Inc. ("TN") support services servers and/or partitions for Oracle to inspect and  
15 select for production through the "Data Warehouse," which Defendants created specifically for  
16 this case. The "Data Warehouse" provides Oracle with the unique ability to see the data as TN  
17 employees saw the data. Defendants have produced in excess of 17 terabytes of data from the  
18 "Data Warehouse" and other TN servers. Over 5 terabytes of that information are downloads.  
19 The "Data Warehouse" servers and the data from the other TN servers that have been produced to  
20 Oracle include all common locations at which downloads have been located. Defendants first  
21 made the "Data Warehouse" available to Oracle in July 2008.

22 4. Defendants have also rebuilt and provided Oracle with a number of TN's  
23 databases that were used to track TN's business activities, including SAS, BakTrak, DotProject,  
24 Pathfinder, the Matrix and others. Defendants had these databases rebuilt and provided them in  
25 native form to ensure that they are in the most usable format for this litigation. Rebuilding and  
26 providing the databases in native form ensures that the databases have the same functionality,  
27 usability, and look and feel that TN experienced with the databases. Defendants have further  
28 produced a substantial amount of additional material that is not described in this declaration.

1           5.       Recognizing the special importance to this case of the SAS database, which was  
2 designed to document TN support services activities include managing of cases, scoping  
3 (researching) problems, development of fixes or updates and testing of fixes or updates,  
4 Defendants started producing the database in native form as early as possible.<sup>1</sup> Defendants  
5 produced a complete subset of the SAS database containing the six customers identified in  
6 paragraphs 76-80 of Oracle's First Amended Complaint on September 21, 2007. Defendants  
7 produced a complete subset of the SAS database with respect to the 69 additional customers  
8 identified by Oracle on October 5 and November 9, 2007. Finally, Defendants produced the  
9 entirety of the SAS database containing all of TN's PeopleSoft and J.D. Edwards' customers on  
10 December 4, 2007. As part of the parties' expanded discovery timeline agreement, on February  
11 13, 2009, Defendants further updated the SAS database production to include TN activity through  
12 October 31, 2008.

13           6.       Defendants produced the DotProject database on March 26, 2008. The DotProject  
14 database contains information regarding the downloads for a particular customer, including the  
15 date the downloads were completed and the credentials and product questionnaires provided by  
16 the customer.

17           7.       Defendants are incurring great expense to provide these productions in an easy to  
18 use form and as quickly as possible. As demonstrated by the July 21, 2008 Declaration of Scott  
19 W. Cowan (D.I. 128), Defendants are on pace to spend in excess of \$13,000,000 on custodian  
20 productions alone. As a further example, Defendants have spent in excess of \$250,000 producing  
21 the SAS databases and in excess of \$500,000 making the "Data Warehouse" available. The  
22 privilege review of the SAS database alone took approximately 1000 attorney hours. While these  
23 are just examples, they demonstrate that Defendants are incurring great expense in responding to  
24 Oracle's discovery requests in this case.

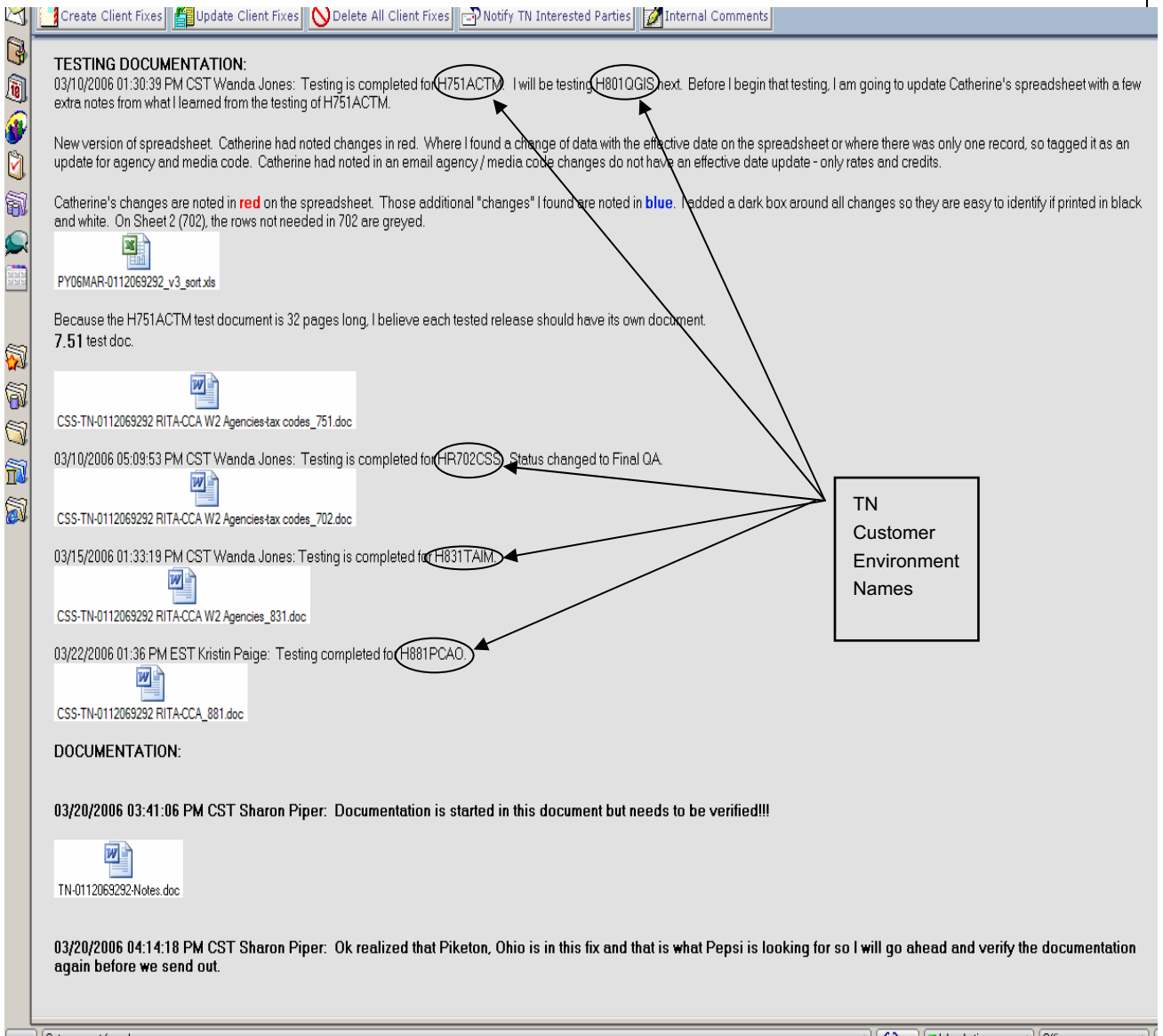
25           8.       To date, Oracle has used 109 printouts from the SAS database as deposition  
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27           <sup>1</sup> The SAS database also contains the credentials and onboarding documentation for some  
28 of TN's customers, including Product Verification Forms and Pre-Installation Questionnaires,  
Exhibit A to the customer contracts and the Download Request Forms. The SAS database is also  
a useful tool for determining how downloads were used by TN.

1 exhibits. Oracle also took approximately 32 hours of deposition testimony in response to  
 2 Plaintiffs' January 22, 2008 Amended Rule 30(b)(6) Notice to TN. See **Exhibit J**.

3 9. The following is an exemplar screen shot from the SAS database demonstrating  
 4 the type of information that Oracle requests in Interrogatory 14 regarding TN customer  
 5 environments:



25 10. Oracle originally moved, in January 2008, to compel Defendants to provide  
 26 supplemental responses to 18 interrogatories including interrogatory 14 from Oracle USA, Inc.'s  
 27 Second Set of Interrogatories to TN. At the hearing on Oracle's motion, Defendants provided  
 28 Judge Legge with a demonstration of the SAS database as produced to Oracle.

1           11. Starting with the Rule 26(f) conference, and continuing through numerous  
2 negotiations regarding a potential preservation order, Defendants have provided Oracle with great  
3 detail regarding TN's efforts to make a preservation copy of every TN computer and server,  
4 including the computers, servers and databases at issue in this motion. TN also made reasonable  
5 efforts to collect and preserve every original TN computer and server as part of the TN wind  
6 down. Oracle is further aware that TN entered into consulting agreements with seven former TN  
7 employees to help locate and provide information on an as needed basis. However, those  
8 consultants are not always accessible and are not in any way prevented from seeking other  
9 employment. In fact, most of these consultants are currently employed on a full-time basis by  
10 other employers.

11           12. The following is a list of examples of Oracle's reliance on objections similar to  
12 Defendants' objections and Rule 33(d): Plaintiffs' Second Amended and Supplemental  
13 Responses and Objections to TN, Inc.'s First Set of Interrogatories, Responses to Interrogatory  
14 Nos. 1 ("Oracle further objects to the extent the Interrogatory purports to require Oracle to create  
15 a compilation, abstract, or summary from business records that Oracle has already produced or  
16 will produce and to summarize the documents and testimony provided on this subject, including  
17 by Oracle's 30B6 witness on this topic; Oracle cannot and will not and is not required to do so  
18 and incorporates all such evidence by reference into this supplemented answer"), 2 (same), 3  
19 ("Oracle further objects to the extent that supplementation would require Oracle to summarize the  
20 documents and testimony provided on this subject; Oracle cannot and will not and is not required  
21 to do so and incorporates all such evidence by reference into this supplemented answer"), 4 (same)  
22 5 (relying on Rule 33(d) and stating "Oracle further objects to the extent that supplementation  
23 would require Oracle to summarize the documents and testimony provided on this subject . . .  
24 Oracle cannot and will not and is not required to do so and incorporates all such evidence by  
25 reference into this supplemented answer"), 6-7 (same type of objections), 9-13 (same type of  
26 objections); *see also* Plaintiffs' Responses and Objections to TN, Inc.'s Fifth Set of  
27 Interrogatories, Responses to Interrogatory Nos. 33 (same type of objections), 38 (same type of  
28 objections). *See Exhibits A and B.*

1           13. Attached as **Exhibit A** is a true and correct copy of an excerpt from Oracle's  
2 Second Amended and Supplemental Responses and Objections to TN, Inc.'s First Set of  
3 Interrogatories, Responses to Interrogatory Nos. 2, 3, 4, 5, 6, 7, 9, 10, 11, and 12.

4           14. Attached as **Exhibit B** is a true and correct copy of an excerpt from Oracle's  
5 Responses and Objections to TN, Inc.'s Fifth Set of Interrogatories, Responses to Interrogatory  
6 Nos. 33 and 38.

7           15. Attached as **Exhibit C** are true and correct copies of excerpts from the following  
8 deposition transcripts: February 6, 2008 Deposition of John Baugh (70:17-71:11, 73:16-74:3);  
9 February 7, 2008 Deposition of John Baugh (155:21-156:14); April 1, 2008 Deposition of  
10 Katherine Walker Williams (53:15-55:8, 62:20-63:16, 77:16-78:9, 179:19-182:18; April 1, 2008  
11 Deposition of Catherine Lee Hyde (47:7-12); April 2, 2008 Deposition of Catherine Lee Hyde  
12 (85:25-86:4, 130:19-132:3, 284:15-286:10); June 25, 2008 Deposition of Larry Garcia (12:5-10,  
13 19:17-20:3); June 25, 2008 Deposition of Roderic Russell (31:19-32:21, 47:25-49:19, 61:19-  
14 63:13, 91:18-92:2, 116:1-18; December 5, 2008 Deposition of Matthew Bowden (158:14-160:15,  
15 227:14-22, 249:5-250:2, 279:7-280:2); February 5, 2009 Deposition of Roderic Russell (143:4-  
16 145:25) and May 12, 2009 Deposition of Catherine Hyde (125:17-126:25, 132:3-132:19, 157:2-  
17 159:8). All of the deposition testimony excerpts cited in the Motion are included in **Exhibit C** in  
18 chronological order.

19           16. Attached as **Exhibit D** are true and correct copies of Plaintiffs' deposition exhibits  
20 66, 83, 103, 287, 289, 290, 293, 299, 300, 302, 538, 558, 566, 816, 817, 1276, 1277, 1283, 1445  
21 and 1469. All of Plaintiffs' deposition exhibits cited in the Motion are included in **Exhibit D** in  
22 numerical order.

23           17. Attached as **Exhibit E** is a true and correct copy of an excerpt from Defendant  
24 TN's Fourth Amended and Supplemental Response to Plaintiff Oracle Corp.'s First Set of  
25 Interrogatories, Responses to Interrogatory Nos. 3, 7, 8, 9, 10, 11, 12 and 16.

26           18. Attached as **Exhibit F** is a true and correct copy of an excerpt from Defendant  
27 TN's Second Amended and Supplemental Responses to Plaintiff Oracle Corp.'s Third Set of  
28 Rogs and SAP America and SAP AG's Second Amended and Supplemental Responses to

1 Plaintiff Oracle Corp.'s Second Set of Interrogatories, Responses to Interrogatory Nos. 8 and 10.

2 19. Attached as **Exhibit G** is a true and correct copy of an excerpt from Defendant  
3 TN's Fourth Amended and Supplemental Response to Plaintiff Oracle USA's First Set of  
4 Interrogatories, Response to Interrogatory No. 2.

5 20. Attached as **Exhibit H** is a true and correct copy of an excerpt from Defendant  
6 TN's First Amended and Supplemental Response to Plaintiff Oracle USA's Second Set of  
7 Interrogatories, Response to Interrogatory Nos. 12 and 13.

8 21. Attached as **Exhibit I** is a true and correct copy of an excerpt from the transcript  
9 of the February 13, 2008 Hearing on Discovery Issues.

10 22. Attached as **Exhibit J** is a true and correct copy of Plaintiffs' January 22, 2008  
11 Amended Rule 30(b)(6) Notice to Defendant TomorrowNow, Inc.

12 23. Attached as **Exhibit K** is a true and correct copy of an e-mail exchange between  
13 Jones Day and Bingham McCutchen regarding Oracle's Motion.

14 24. Attached as **Exhibit L** is a true and correct copy of *Goodrich Corp. v. Emhart*  
15 *Indus., Inc.*, No. EDCV 04-00759-VAP (SSx), 2005 U.S. Dist. LEXIS 25158 (C.D. Cal. Oct. 12,  
16 2005).

17 25. Attached as **Exhibit M** is a true and correct copy of *Saddler v. Musicland*  
18 *Pickwick Int'l, Inc.*, No. S-78-95-CA, 1980 U.S. Dist. LEXIS 16500 (E.D. Tex. Dec. 22, 1980).

19 I declare under penalty of perjury under the laws of the United States and the State of  
20 California that the foregoing is true and correct.

21 Executed this 14th day of July, 2009 in Houston, Texas.

22  
23  
24 /s/ Joshua L. Fuchs  
25 Joshua L. Fuchs