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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)

**DEFENDANTS' MOTION TO
COMPEL PRODUCTION OF
FINANCIAL INFORMATION FROM
PLAINTIFFS**

REDACTED

Date: August 18, 2009
Time: TBD
Courtroom: E, 15th Floor
Judge: Hon. Elizabeth D. Laporte

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§ 14.02[A][1] 2

1 **NOTICE OF MOTION**

2 **PLEASE TAKE NOTICE** that on August 18, 2009 at a time to be determined by the
3 Court, located at 450 Golden Gate Avenue, San Francisco, defendants SAP AG, SAP America,
4 Inc. and TomorrowNow, Inc. (“Defendants”), by their undersigned counsel, will move this Court
5 for an order compelling Plaintiffs Oracle USA, Inc. (“Oracle USA”), Oracle International
6 Corporation (“OIC”) and Oracle EMEA Limited (“OEMEA”) (collectively “Plaintiffs” or
7 “Oracle”) to produce financial information relevant to the calculation of Plaintiffs’ alleged lost
8 profits damages.

9 This motion is based on this Notice of Motion and Motion and the Memorandum of Points
10 and Authorities incorporated herein and on the declaration of Jason McDonell filed herewith.

11 **RELIEF REQUESTED**

12 Pursuant to Fed. R. Civ. P. 37,¹ Defendants seek an order compelling Plaintiffs to produce
13 financial information relating to their claims of lost profits damages regarding support services,
14 including:

- 15 (1) The general ledgers for each Plaintiff corporation;
16 (2) Reports showing Plaintiffs’ profitability of their PeopleSoft, J. D. Edwards and Siebel
17 product lines and the underlying source documents upon which they are based;
18 (3) Detailed profit and loss statements for each Plaintiff;
19 (4) A response to Defendants’ Targeted Search Request No. 3; and
20 (5) Supplemental Rule (30)(b)(6) testimony regarding the royalty payments received by
21 or due to OIC in connection with the alleged Registered Works, how the royalty rates were
22 established and the related allocations of costs pursuant to certain Cost Sharing Agreements.

23 **ISSUE PRESENTED**

24 Have Plaintiffs improperly failed to produce financial information relevant to a calculation
25 of their alleged lost profits damages?

26 _____
27 ¹ Pursuant to Fed. R. Civ. P. 37(a)(1), Defendants’ counsel confirms that they have
28 conferred with opposing counsel in a good faith effort to reach agreement on these matter. *See*
Declaration of Jason McDonell in Support of Defendants’ Motion to Compel Production of
Financial Information from Plaintiffs (“McDonell Decl.”), ¶ 20, Exs. 1, 2, 4 and 18.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION.

This motion seeks discovery relevant to the calculation of Plaintiffs' alleged lost profits damages. Under the Copyright Act, actual damages represent the injury to the market value of the copyrighted work at the time of infringement. *4 Nimmer on Copyright* § 14.02[A][1] at 14-13 to 14-14. In appropriate circumstances, this amount may be computed by determining the profits that would have accrued to the plaintiff but for the infringement. *Nimmer* §14.02[A][1] at 14-14 to 14-15.

The gist of Oracle's lost profits claim is that it lost profits relating to support services when its customers terminated service agreements and acquired support services instead from TN. Oracle's damages claim—publicly stated as being as much as a billion dollars for activities over two years—is remarkably excessive, particularly given that TN cost a mere \$10 million to purchase. The speculations of Oracle's executives are even more hyperbolic, though Plaintiffs maintain that they must be kept under seal.

Beginning with the commencement of discovery in this case *two years ago*, Defendants have sought to obtain sufficient discovery to permit them to evaluate Plaintiffs' alleged lost profits. At the outset, Plaintiffs argued that damages discovery should be postponed until the later stages of the case. While the Special Master initially endorsed that idea, Judge Hamilton soundly rejected it at the April 24, 2008 case management conference and directed damages discovery to proceed apace.

Over the course of the last year, Defendants have continued to seek – in multiple ways – information about Plaintiffs' actual profitability on the relevant software product lines. As chronicled in this motion, despite these efforts, Plaintiffs have still not produced sufficient information.

Since this Court gave Defendants permission to file this motion, Plaintiffs have been scrambling to create a record that they are attempting (with regard to some materials, for the first time) to locate and make available the requested information. Although Defendants have made it crystal clear to Plaintiffs that they will continue to meet and confer on this long-outstanding

1 issue,² Plaintiffs’ attempts are far too little, far too late to satisfy their discovery obligations.
2 Given the advanced state of the case, however, Defendants will proceed with this motion on the
3 safe assumption that these issues will remain ripe for hearing.

4 **II. STATEMENT OF FACTS.**

5 **A. Each Of The Three Plaintiffs Is Seeking To Recover Lost Profits Damages.**

6 Oracle Corporation – the ultimate parent of the Oracle group of companies – is no longer
7 a plaintiff in this action, having withdrawn its claims.³ Currently, Plaintiffs are three separate
8 affiliated corporations – Oracle USA, OIC and OEMEA. OIC is the alleged sole owner of all of
9 the copyrighted software and support materials at issue.⁴ Consequently, only OIC is alleged to
10 have standing to sue for copyright damages for the alleged infringement of the copyrighted
11 software and support materials (the “Registered Works”). *Id.* Oracle USA and OMEA are
12 pursuing other causes of action. Each of the Plaintiffs, however, is seeking “*loss of profits*” from
13 sales of Oracle support services.⁵

14 Plaintiffs’ alleged lost profits must be analyzed in the context of their corporate
15 interrelationships. REDACTED

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21 The specific Oracle product lines that are the subject of the Registered Works are certain
22 of Oracle’s PeopleSoft, and J. D. Edwards (“JDE”) software packages and – subject of Plaintiffs’
23 impending Fourth Amended Complaint – Siebel product lines. Plaintiffs claim that, but for the

24 ² See, e.g., McDonnell Decl., Exs. 1 & 2.

25 ³ Oracle Corporation was a named plaintiff in the first three complaints, but was dropped
26 when Plaintiffs filed their Third Amended Complaint. See Third Amended Complaint for
27 Damages and Injunctive Relief, etc., filed October 8, 2008 (Dkt. 182).

28 ⁴ See Order Granting Motion to Dismiss in Part and Denying in Part, December 15, 2008
(Dkt. 184), at p. 4.

⁵ See, e.g., Plaintiffs’ Third Amended Complaint for Injunctive Relief, etc., ¶ 141
(emphasis added).

1 actions of TN, Oracle would have kept those support customers for some additional period of
2 time and would have made more profits.

3 Importantly, Oracle has other lines of products and services in addition to its PeopleSoft,
4 JDE and Siebel lines, including its flagship database and middleware software businesses. But
5 because Plaintiffs are pursuing claims only concerning the former three product lines, it is
6 Plaintiffs' lost profits for those product lines that is relevant. Thus, Oracle's financial information
7 has to be parsed to determine the alleged lost profits on those product lines. The issue is what
8 profits would OIC, Oracle USA and OEMEA have made from sales of support services of the
9 PeopleSoft, JDE and Siebel product lines, but for the actions of TN? Despite two years of
10 seeking this information, it has still not been provided in sufficient detail.

11 **B. Defendants Have Diligently Sought Discovery Concerning Plaintiffs's Alleged**
12 **Lost Profits.**

13 From the first day discovery was permitted in this case, Defendants have sought discovery
14 of Plaintiffs' alleged lost profits.⁶ In July 2007, Defendants served their First Request for
15 Production of Documents requesting production of "All Documents relating to any alleged loss of
16 revenues or profits by Oracle as a result of the conduct alleged in the Complaint." *See* McDonell
17 Decl., Ex. 3, p. 48 (RFP No. 70). In response, Plaintiffs agreed to produce "[d]ocuments
18 sufficient to show Oracle's revenues, costs, and *profit margins* for support or maintenance
19 services relating to legacy PeopleSoft and J.D. Edwards enterprise software applications for
20 which Oracle has alleged that defendants Downloaded Software and Support Materials from
21 Oracle's systems" *Id.* (emphasis added).

22 Thereafter, a two-year-long game of cat and mouse ensued, with Defendants asking for
23 profit information through multiple and varied discovery devices and Plaintiffs variously
24 responding that the information either does not exist, would be too burdensome to produce or that
25 Defendants have not asked the question in the right way. In all events, Plaintiffs still have not
26 produced sufficient information regarding of their alleged lost profits on the relevant product
27 lines.

28 ⁶ *See* McDonell Decl., ¶ 3, Ex. 3.

1 **1. Plaintiffs’ Initial Damages Discovery Position.**

2 In the early stages of the case, Plaintiffs asserted that the documents they had produced in
3 response to an order by the Special Master Judge Legge, including their contracts with the former
4 TN customers, were sufficient to show the profits they would have made from those customers
5 but for the activities of TN. *See McDonell Decl., Ex. 4, pp. 1-2.* That assertion proved to be
6 incorrect for a variety of reasons, including the fact that many customer contract files are
7 incomplete and they do not include any expense information necessary to derive a conclusion
8 about profits. *See id., Ex. 4, p. 2.* Moreover, that document production ignored the intricacies of
9 the inter-company relationships among the Plaintiffs, including the fact that OIC’s profits are a
10 function of the royalties it earns from its affiliates and it does not even enter into contracts with
11 end-user customers.

12 **2. Oracle’s Public Financial Information.**

13 Plaintiffs also claimed that Oracle Corporation’s publicly filed financial information and
14 various internal quarterly reports were sufficient evidence of their profit margins. *Id., Ex. 4, p. 2.*
15 While Oracle Corporation’s publicly filed Annual Report on Form 10-K shows a profit margin
16 for Oracle Corporation’s support services, it is accompanied by a disclaimer that states that the
17 reported margins “do not represent the actual margins”:

18 “(2) *The margins reported* reflect only the direct controllable costs and
19 expenses of each line item of business and *do not represent the actual*
20 *margins* for each operating segment, because they do not contain an
21 allocation of product development, information technology, marketing and
22 partner programs, and corporate and general and administrative expenses
incurred in support of the lines of business. Additionally, the margins do
not reflect the amortization of intangible assets, restructuring costs,
acquisition-related costs or stock-based compensation.”

23 *Id., Ex. 5, p. 103, n.2* (emphasis added). Moreover, *Oracle Corporation* – the “registrant” on the
24 Annual Report – is no longer a plaintiff in this case. Thus, Oracle’s Corporation’s published
25 profit margins are incomplete and unreliable evidence of the profitability of the Plaintiff entities.

26 Following up on this issue, Defendants served a Rule 30(b)(6) deposition notice on the
27 subject of “the types of records . . . that Oracle maintains concerning revenues, costs, profit
28 margins . . . for the PS and JDE product lines” *Id., Ex. 6, pp. 14:11-15:18.* In September

1 2008, Plaintiffs presented Ms. Ivgen Guner, who is responsible for corporate financial planning
2 and analysis. [REDACTED]

3 [REDACTED]

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Id., pp. 72:2-73:6. Other of Plaintiffs' witnesses, including its President (Safra Catz) and its
Corporate Controller (Corey West) also testified [REDACTED]

Id., Ex. 7, pp. 179:15-180:1; Ex. 8, pp. 69:10-70:6.

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3. Oracle’s CEO and Worldwide Head of Support Contradict Other Witnesses.

In a remarkable turn of events – after many months of witnesses proclaiming that it is impossible to measure Oracle’s profitability by product line – two of Oracle’s most senior officers testified

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4. Defendants’ Attempt to Gain Access to Plaintiffs’ General Ledger.

Throughout all of this misdirection, extending back to June 2008, Defendants also sought production of Oracle’s “general ledger.” McDonnell Decl., Ex. 4, p. 3. There is no dispute among the parties that the general ledger is company’s basic, detailed underlying financial record from which all financial statements and reports are ultimately derived. *See, .e.g., id.*, Ex. 12. pp., 48:13-51:4.

1 In order to reduce the burden on Plaintiffs, Defendants suggested that, if Plaintiffs would
 2 produce the Oracle “chart of accounts” (essentially an index to the general ledger),⁷ then
 3 Defendants would identify the specific accounts for which it needs the general ledger
 4 information. During the discussion of this issue at the January 2009 Discovery Conference, the
 5 Court indicated that it would “err on the side of giving [Defendants] what they think they need to
 6 have their expert analyze the profits, not what Oracle thinks they need.” McDonell Decl., Ex. 13,
 7 pp. 55:7-57:10. After much haggling and threats of motions, on February 13, 2009 Plaintiffs
 8 began producing certain chart of accounts information and purported to complete that production
 9 by late March. *See* McDonell Decl., Ex. 14.

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 13 Defendants nevertheless attempted to identify the relevant accounts to Plaintiffs and on April 29,
 14 2009 provided Plaintiffs with a list of those accounts. *See* McDonell Decl., Ex. 15. In response,
 15 on May 4, 2009 Plaintiffs claimed that Defendants had identified the wrong accounts and that it
 16 would be too burdensome to produce the requested general ledger information and that it would
 17 not do so. *See Id.* .

18 Initially Plaintiffs committed that they would work with Defendants in informal
 19 discussions to attempt to narrow the request for general ledger information. *See id.*, Ex. 2, pp. 1-
 20 2. Just prior to the filing of this motion, Plaintiffs withdrew that offer and insisted that any
 21 further information about Plaintiffs’ general ledger would have to be obtained through deposition.
 22 *See id.*

23 5. Defendants’ Targeted Search No. 3.

24 In yet another effort to get to profit information, on May 20, 2009 Defendants served their
 25 Targeted Search Request No. 3, which seeks the following:

26 For each Plaintiff entity, for the period January 1, 2002 through October 31, 2008,
 27 documents sufficient to show by month, quarter and year the revenue (including

28 ⁷ *See* McDonell Decl., Ex. 8, p. 70:15-19 (“a chart of accounts is kind of an index to the accounts that exist in the general ledger”).

1 but not limited to license royalty payments), expenses (including but not limited
2 to research and development costs) and net income to the Plaintiff entity resulting
3 from sales by any Oracle entity of PeopleSoft and/or JD Edwards software and/or
4 services to customers on Defendant TomorrowNow, Inc.'s Supplemental Exhibit 1
5 to Its First Sets Of Requests For Production and Interrogatories to Plaintiffs.

6 McDonnell Decl., Ex. 16, p. 10:4-11. In response, conditioned on the resolution of certain as yet
7 unresolved objections about the scope of "Targeted Search" discovery, Plaintiffs stated that
8 "Oracle will continue to investigate whether and how it can produce some or all of the many
9 requested financial reports and the burdens of doing so" *Id.*, p. 13:22-23. As of this writing,
10 Plaintiffs claim to be investigating whether they can provide this information and have promised
11 an update by July 17, 2009. McDonnell Decl., ¶ 1, p. 3. Defendants are concerned that they have
12 waited too long and been disappointed too often and therefore bring this motion for an order
13 requiring Plaintiffs to produce the requested information.

14 **6. The Rule 30(b)(6) Deposition of Oracle International Corporation.**

15 In yet another attempt to determine the profitability of the Plaintiff entities in connection
16 with the Registered Works, Defendants noticed a Rule 30(b)(6) deposition of OIC regarding the
17 royalty payments received by OIC in connection with the alleged Registered Works and the costs
18 allocated to OIC pursuant to related "Cost Sharing Agreements." *See id.*, Ex. 17, pp. 3:13-4:19.
19 On April 14, 2009, OIC produced Ms. Ann Kishore as its designated witness. REDACTED
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Plaintiffs have produced none of this information in discovery.

Thus after all of this effort, Plaintiffs have produced most of their contracts with the former TN customers and certain customer-specific financial reports that purport to detail the revenues Oracle generated from those customers. Plaintiffs have also produced certain high level public financial reports that purport to show incomplete and unreliable profit margin information for Oracle Corporation as a whole. To the best of Defendants’ knowledge, none of the Plaintiffs have produced any financial statements or profitability information that reveals the profits they would have earned on sales of support for the Registered Works.

III. ARGUMENT.

A. The Discovery Standard.

The scope of discovery under the Federal Rules and in the Northern District of California is liberal. See Fed. R. Civ. P. 26(b)(1); *Gonzales v. Google, Inc.*, 234 F.R.D. 674, 679-80 (N.D. Cal. 2006) (“Relevancy, for the purposes of discovery, is defined broadly . . . [and is] liberally construed to permit the discovery of information which ultimately may not be admissible at trial.”). Because the information Defendants seek is relevant to their defenses, Plaintiffs have a

1 “heavy burden” to show why they refuse to provide it. *See Blankenship v. Hearst Corp.*, 519
 2 F.2d 418, 429 (9th Cir. 1975) (Party must “carry a heavy burden of showing why discovery was
 3 denied”). Plaintiffs cannot make this showing as to the discovery sought by this motion.

4 Under Rule 30(b)(6), OIC must produce one or more witnesses prepared to testify about
 5 matters “known or reasonably available to the organization.” Fed. R. Civ. P. 30(b)(6). OIC has
 6 an affirmative duty to educate its witnesses so that they are prepared to fully answer the questions
 7 posed at the deposition. *See Calzaturificio S.C.A.R.P.A. s.p.a. v. Fabiano Shoe Co., Inc.*, 201
 8 F.R.D. 33, 37 (D. Mass. 2001) (a corporation must prepare its Rule 30(b)(6) witnesses “so that
 9 they may give complete, knowledgeable, and binding answers on behalf of the corporation”)
 10 (internal citations omitted). To discharge this duty to prepare, OIC’s corporate witness must
 11 review all matters known or reasonably available to the organization, “whether from documents,
 12 past employees, or other sources.” *Calzaturificio*, 201 F.R.D. at 36-37 (internal citations omitted).
 13 If it becomes apparent that OIC’s corporate designee is unable to adequately respond to the
 14 noticed topics, OIC has a duty to substitute the designated deponent with a knowledgeable one.
 15 *See Fago v. M & T Mortgage Corp.*, 235 F.R.D. 11, 23 (D.D.C. 2006) (finding that Rule 30(b)(6)
 16 deposition witness was inadequately prepared because she had no specific knowledge of noticed
 17 topics and that organization was required to provide an alternative witness).

18 **B. Oracle Has Frustrated Defendants’ Efforts To Obtain Lost Profits Discovery.**

19 If Plaintiffs are going to pursue a lost profits theory of damages, they must make available
 20 the underlying records from which Defendants can attempt to determine their actual profit
 21 margins for the relevant product lines. Discovery is not intended to be a game of hide the ball.
 22 Discovery is not intended to be a game of hide the ball. Too much time and effort has been
 23 devoted to this issue and there is not enough time left in the discovery schedule for more delays.

24 **C. Plaintiffs Should Be Ordered To Produce The Requested Discovery.**

25 **1. Discovery of Plaintiffs’ General Ledgers is Necessary in Order to**
 26 **Evaluate any Claim of Lost Profits.**

27 There is no dispute that the general ledgers are the basic financial documents from which
 28 all other financial reports are derived. REDACTED

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Rather, Plaintiffs' principle objection is one of burden.

Given the stakes in this case and Plaintiffs' claims of hundreds of millions of dollars in damages, if not more, Plaintiffs must either (1) produce the general ledgers, or (2) prove with evidence why they cannot and offer a meaningful substitute. To date, they have done neither.

2. Plaintiffs Should be Ordered to Produce Reports showing Plaintiffs' Profitability of its PeopleSoft, J. D. Edwards and Siebel Product Lines.

Plaintiffs should be ordered to produce all Product Line Profitability reports and the underlying source documents that show how the reports are constructed. In recent meet and confer discussions, Plaintiffs claim that they cannot be located and may not exist. [REDACTED]

[REDACTED]

This testimony is too specific and concrete to be glossed over lightly. If these reports existed and have been destroyed, that information needs to be developed. Plaintiffs should be

1 ordered to produce all product line profitability reports for the relevant product lines or to provide
2 a detailed declaration explaining the circumstances of their inability to do so.

3 **3. Plaintiffs Should be Ordered to Produce Detailed Profit & Loss**
4 **Statements for Each Plaintiff.**

5 As discussed above, Plaintiffs have produced no financial information that is specific to
6 the actual plaintiff entities, REDACTED.

7 Plaintiffs should be ordered to produce detailed profit and loss statements for the relevant
8 discovery period of January 1, 2002 through October 31, 2008. These reports should be produced
9 on a monthly, quarterly and yearly basis. The level of detail should be sufficient to show the
10 account entries for each account that makes up a line item on the profit and loss statement.

11 **4. Plaintiffs Should be Ordered to Provide a Complete Response to**
12 **Defendants Targeted Search Request No. 3.**

13 Defendants' Targeted Search Request No. 3 is related to the request for Plaintiffs'
14 financial statements, but seeks more detail in one important respect. The Targeted Search
15 Request seeks financial information "resulting from sales by any Oracle entity of PeopleSoft
16 and/or JD Edwards software and/or services to customers" of TN. McDonell Decl., Ex. 16, p.
17 10:5-11. It is thus focused on Plaintiffs' alleged lost profits from the actual customers of TN. If
18 Plaintiffs cannot provide this information, then it is difficult to understand how they will meet
19 their burden of proof on damages. Plaintiffs should be ordered to (1) provide the requested
20 information, or (2) provide a detailed explanation why they cannot be provided and offer an
adequate substitute.

21 **5. OIC Should be Ordered to Produce a Witness to Provide**
22 **Supplemental Rule (30)(b)(6) Testimony Regarding the Royalty**
23 **Payments Received by or Due to OIC in Connection with the Alleged**
24 **Registered Works and the Related Cost Sharing Agreements.**

25 OIC did not meet its obligation under Rule 30(b)(6) to adequately prepare its Rule
26 30(b)(6) witness, Ms. Kishore, on the noticed topics. Topic 1 covers "Payments, including but
27 not limited to royalty payments, received by or to OIC in connection with the Registered Works."
28 Ms. Kishore completely lacked knowledge on many of the subtopics and was unprepared to fully
answer questions on others.

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1 Subtopic 1(f) calls for testimony regarding other agreements relating to payments for OIC
2 in connection with Registered Works, including the terms of such agreements and the policies and
3 procedures for implementing them. REDACTED

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8 A properly prepared Rule 30(b)(6) witness
9 should have been able to testify as to agreements between OIC and non-Oracle entities.

10 Subtopic 1(g) calls for testimony regarding payments made to OIC in connection with the
11 Registered Works. REDACTED

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13 Ms. Kishore's lack of preparation and complete lack of knowledge regarding the
14 Registered Works made her an unsuitable Rule 30(b)(6) designee. OIC must provide an
15 alternative witness prepared to testify about the subtopics described above, based on information
16 known or reasonably available to OIC.

17 Topic 2 covers "Cost Sharing arrangements among the participants of the Cost Sharing
18 Agreements." REDACTED

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OIC must provide an alternative witness prepared to testify about these subtopics, based on information known or reasonably available to OIC. OIC did not meet its obligation under Rule 30(b)(6) to adequately prepare Ms. Kishore to testify as its corporate designee for Topic 3. Topic 3 covers “Oracle’s transfer pricing policies and procedures, including as they relate to the Registered Works, and the types and locations of records reflecting such policies and procedures.”

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In light of these deficiencies, OIC must designate better-prepared individuals on all three noticed topics.

IV. CONCLUSION.

For the foregoing reasons, Defendants respectfully request that the Court grant their motion and order Plaintiffs to produce immediately the requested documents and testimony or provide a detailed declarations establishing why the documents cannot be produced and offer specific alternative means of providing the information.

Dated: July 14, 2009

JONES DAY

By: /s/ Jason McDonell
Jason McDonell

Attorneys for Defendants