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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

ORACLE USA, INC., et al., Plaintiffs, v. SAP AG, et al., Defendants.	Case No. 07-CV-1658 PJH (EDL) **DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION TO AMEND COMPLAINT** Date: August 19, 2009 Time: 9:00 a.m. Courtroom: 5, 17th Floor Judge: Hon. Phyllis J. Hamilton

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiffs now seek leave to bring their fifth complaint. This new complaint would add dozens of copyright registrations (almost every one of which was registered years before the original complaint in this case was filed), purportedly covering "thousands" of items and new technology, just months before discovery is to end. These are hardly "conforming" amendments and allowing them will "overload an already robust complaint," as Plaintiffs told Judge LaPorte. Plaintiffs bring this motion well after the deadline to amend had passed, despite knowing about the "new" claims long (or in some cases years) before. Plaintiffs' lack of diligence in bringing their motion is reason enough to deny it under Rule 16(b). Combined with the prejudice Defendants will suffer as result of the amendments and Plaintiffs' bad faith in bringing this motion, there is ample reason to deny Plaintiffs' motion under Rule 15(a) as well.

Plaintiffs' belated amendment unduly prejudices Defendants. There are (mercifully) but a few months left in discovery. Adding 29 new registrations–effectively 29 new claims for copyright infringement–now would be unfair and would prejudice Defendants, who do not have enough time on an already extended schedule to properly conduct discovery to defend against these claims. The potential prejudice is exacerbated because Plaintiffs continue to resist such basic work as identifying what is covered by the registrations already in the case and providing basic financial and related discovery. And, as Plaintiffs acknowledge, adding the database issues would introduce entirely new technical and business issues into the case. All of this might have been manageable had Plaintiffs not delayed. It is too late now.

Plaintiffs' motion is brought in bad faith. Plaintiffs' statements that they did not or could not know about the "new" claims until just recently are false. Plaintiffs misrepresent key production dates (they present the dates of supplemental productions as the dates of original production). Plaintiffs contend that they present merely "conforming amendments," but told Magistrate Judge Laporte that adding these new registrations would "overload" the case. Plaintiffs' misrepresentations in this motion are but an instance in a pattern of misrepresentations made to this Court about amendments (for example, Plaintiffs said that they needed more time to file the Second Amended Complaint "to obtain" new copyright registrations, when every

1 registration eventually added in that amendment long predated this lawsuit), and evidence their
2 bad faith.

3 ***Plaintiffs knew about their "new" claims long before the amendment deadline.***
4 Plaintiffs assert that they raise the contested amendments now because they only recently became,
5 or could have become, aware of the "new" claims. This is false. Specifically, Plaintiffs claim
6 that they could not have known to add the "knowledge management solutions" registrations, but
7 each previous complaint specifically mentions those very "solutions." Plaintiffs claim that they
8 did not know enough to add the 20 PeopleSoft registrations, but those registrations were made six
9 to nine years before this case was filed and address the same products at issue since the case
10 started. Plaintiffs claim that they could not have known to assert claims about the Oracle
11 database, but their lawyers took deposition testimony on this very issue a full year before the
12 amendment deadline. Their alleged ignorance aside, Plaintiffs' only excuse for their delay in
13 asserting these claims is that there was too much discovery, produced too late, for them to act
14 more quickly. Not true. Whatever additional details the discovery may contain, Plaintiffs
15 actually knew about the alleged "new" claims months or years ago.

16 Plaintiffs cannot establish good cause for bringing their Motion months after the March 20,
17 2009 deadline and it should be denied on that basis alone. Even were the Court to excuse
18 Plaintiffs' late filing, the motion should still be denied under Rule 15(a), because of Plaintiffs'
19 undue delay and bad faith and the unfair prejudice to Defendants. It is time to complete
20 discovery and resolve this case.

21 ## II. RELEVANT BACKGROUND

22 ### A. The Case Schedule and This Belated Motion.

23 This case began over two years ago on March 22, 2007, when Oracle Corporation, Oracle
24 USA, Inc. ("OUSA") and Oracle International Corp. ("OIC") (collectively "Original Plaintiffs")
25 filed suit. *See* Declaration of Tharan Gregory Lanier in Support of Defendants' Opposition to
26 Plaintiffs' Motion to Amend ("Lanier Decl.") ¶ 1. In the ensuing two-plus years, Plaintiffs have
27 filed three amended complaints and now seek leave to file what would be their fifth complaint.
28 The Court's May 5, 2008 Case Management and Pretrial Order, *see* D.I. 84 ("May 5, 2008

1 Order"), set June 19, 2009 as the fact discovery cut-off date and stated that the deadline to amend
2 the pleadings was "no later than 90 days before fact discovery cutoff date," *i.e.*, March 20, 2009.
3 D.I. 84. The May 5, 2008 Order further provided that "[n]o provision of this order may be
4 changed except by written order of this court upon its own motion or upon motion of one or more
5 parties made pursuant to Civil L. R. 7-11 with a showing of good cause." D.I. 84. In particular,
6 the May 5, 2008 Order made clear that "[i]f the modification sought is an extension of a deadline
7 contained herein, the motion must be brought before expiration of that deadline. The parties may
8 not modify the pretrial schedule by stipulation." D.I. 84.

9 On May 12, 2009, the parties filed a Joint Administrative Motion to Modify May 5, 2008
10 Case Management Order, *see* D.I. 304 ("Joint Motion"), and a Proposed Revised Case
11 Management Schedule, *see* D.I. 305. This proposed schedule suggested modifying many of the
12 prospective deadlines set forth in the May 5, 2005 Order, but did not suggest modifying the
13 March 20, 2009 deadline for amending the pleadings, which deadline had already passed. *See* D.I.
14 305. In fact, while negotiating the proposed modifications to the case schedule, Defendants
15 expressly declined to modify the amendment deadline. *See* Lanier Decl. ¶ 49.

16 After the May 28, 2009 Case Management Conference, the Court issued a Revised Case
17 Management and Pretrial Order. *See* D.I. 325 ("June 11, 2009 Order"). The June 11, 2009 Order
18 did not reset the March 20, 2009 deadline to amend the pleadings. *See* D.I. 325. Rather, the June
19 11, 2009 Order granted the parties' Rule 16(b)(4) motion as to some issues and gave Plaintiffs
20 leave to move to amend the complaint by July 15, 2009 specifically "to add Siebel-related claims
21 and any other claims or allegations agreed to by the Parties prior to July 15, 2009." D.I. 325 (¶ 5).
22 The June 11, 2009 Order further provided that "Should Plaintiffs intend to seek any other
23 amendment to the complaint, then Plaintiffs shall make *the appropriate motion(s)* no later than
24 August 26, 2009." D.I. 325 (¶ 5) (emphasis added).

25 In their Motion to Amend ("Motion"), Plaintiffs seek to add not only the Siebel-related
26 claims, but also three categories of contested amendments. *See* Lanier Decl. ¶¶ 10-13. The first
27 category consists of 20 additional, historic PeopleSoft registrations, which were registered six to
28 nine years before the initial complaint was filed. The second category consists of two recently-

obtained registrations for PeopleSoft and J.D. Edwards ("JDE") "Database[s] of Documentary Support," ("Knowledge Management registrations"), each purporting to cover an automated database created in 2009 containing "thousands of 'knowledge management' solutions." *See id.* ¶¶ 11-12. The third category consists of seven registrations for Oracle's database product, five of which pre-date the initial complaint. *See id.* ¶ 13.

B. Plaintiffs' Knowledge of Their Potential Claims.

Plaintiffs claim that due to late and complex discovery, they only recently learned or could have learned about the purported issues underlying the contested amendments. Their claims of surprise and ignorance are patently false. Plaintiffs have known about the "new" claims since well prior to the amendment deadline, both from the extensive discovery produced by Defendants as well as from information within Plaintiffs' own control. Their misrepresentations regarding Defendants' discovery attempt to cover up this knowledge.

At Plaintiffs' request and insistence, the scope of discovery sought from and produced by Defendants has been significant. In addition to over 60 depositions noticed and taken by Plaintiffs and hundreds of written discovery requests, Defendants have produced substantial volumes of data showing how TN provided customer service. *See* Declaration of Joshua L. Fuchs in Support of Defendants' Opposition to Plaintiffs' Motion to Amend ("Fuchs Decl.") ¶ 3. To date, Defendants have produced 7,896,044 Bates numbered pages, including data from 100 custodians, and in excess of 17 terabytes of other electronic data. *See id.*

1. Scope and Accurate Timing of Relevant Discovery.

Plaintiffs mischaracterize Defendants' document productions and the dates by which Plaintiffs possessed information underlying the contested amendments. To fully understand the scope of Defendants' discovery and Plaintiffs' misrepresentations, a brief explanation of TN's business is helpful.

Before October 31, 2008, when TN shut down operations, it provided third-party maintenance and support for enterprise software applications, including various PeopleSoft products. These services included troubleshooting, developing "bug" fixes and providing tax and regulatory updates. For many customers, TN maintained development environments on its

1 systems that were separated from the customer production environments and that were
2 maintained for the purpose of troubleshooting, developing and testing of individual fixes and
3 updates. *See id.* ¶ 21. Generally, an environment is the hardware or software configuration, or
4 the mode of operation, of a computer system; an environment at TN could include "a database
5 and other software programs required to run an instance of that environment." *Id.* ¶ 17.

6 As a general practice, TN stored information relating to its support services in different
7 databases, including databases known as SAS, BakTrak and dotProject. TN employees used the
8 SAS database to document the scoping (researching of an issue), development and testing of the
9 fixes and regulatory updates created for TN customers. *See id.* ¶ 8. Moreover, TN employees
10 used BakTrak to track when and why TN customer environments and/or environment
11 components were backed-up and/or restored. *See id.* at ¶ 7. Finally, the dotProject database
12 contains information regarding downloads TN made for customers, including the date the
13 downloads were completed and the credentials and product questionnaires provided by the
14 customer. *See id.* at ¶ 9. While these databases are not perfect in every instance, they are by far
15 the best source of information regarding TN's service activities. Declaration of Kevin Mandia in
16 Support of Oracle's Motion to Amend Complaint (D.I. 349) ¶ 6. Defendants produced extensive
17 data from these TN services databases (SAS, BakTrak and dotProject). *See* Fuchs Decl. ¶¶ 3, 7-9.

18 The parties initially agreed to limit most productions to January 1, 2004 to March 22,
19 2007 (or shortly thereafter) time frame. *See id.* ¶ 4. In November 2008, the parties entered into
20 an "Expanded Discovery Timeline Agreement," which expanded the production time frame for
21 specific subsets of data, including data from TN services databases. The expanded time frame for
22 these limited sets of data went back to January 1, 2002 and up to October 31, 2008 (*i.e.*, the date
23 that TN's day-to-day business operations were wound down). *See id.* ¶ 5.

24 Plaintiffs misrepresent the timing of Defendants' document productions and thereby
25 mischaracterize the dates by which Plaintiffs possessed information underlying the contested
26 amendments. Specifically, the production dates for the TN databases referenced in the motion
27 (SAS, BakTrak and dotProject) are not the original production dates for these materials. Rather,
28 the dates Plaintiffs cite are the *supplemental* production dates completed pursuant to the

1 Expanded Discovery Timeline Agreement. *See id.* ¶ 6. In fact, Defendants completed production
2 of TN's services databases much earlier than Plaintiffs assert. Defendants produced all content
3 from BakTrak in one format on February 4, 2008 and produced the entire native version on
4 March 12, 2008. *See id.* ¶ 7. Defendants began producing SAS in native form in 2007,
5 completing production of the entire SAS database for all TN PeopleSoft and JDE customers on
6 December 4, 2007. *See id.* ¶ 8. Defendants produced dotProject on March 26, 2008. *See id.* ¶ 9.
7 In addition to all of this data, Defendants made TN's services and support servers
8 available to Plaintiffs for review through a "Data Warehouse" (a procedure permitting Plaintiffs
9 remote access review of images from TN's services and support servers and server partitions) in
10 July 2008. *See id.* ¶¶ 10-11. Defendants began producing (starting with metadata reports) from
11 the "Data Warehouse" in August 2008, and continued on a rolling basis. *See id.* ¶¶ 11-12. And,
12 by October 2008, Defendants had produced all responsive, non-privileged materials from one
13 server outside of the "Data Warehouse" procedures, which housed the majority of materials
14 downloaded by TN on behalf of its customers. Defendants later agreed to a limited production of
15 post-lawsuit information from the "Data Warehouse." *See id.* ¶ 13.

16 **2. <u>Plaintiffs Knew About Their Alleged Claims Related to the Additional</u>**
17 **<u>PeopleSoft Registrations at the Beginning of This Case.</u>**

18 Plaintiffs could have asserted the 20 additional PeopleSoft registrations from the
19 beginning of this case. Plaintiffs' claims have always encompassed alleged infringement of
20 PeopleSoft software, including software subject to copyright registrations made long before the
21 case was filed. *See* Lanier Decl. ¶¶ 1, 2, 6, 8; Section IV(B)(1), *infra*. The "new" registrations at
22 issue in this motion were also all made *six to nine years before* the initial complaint was filed.
23 *See id.* ¶ 11. They cover release levels or discrete components of the *same* software lines at issue
24 in the case for years.
25 Plaintiffs unequivocally knew about TN's access to PeopleSoft software and
26 "environments" since *before* filing this lawsuit. For example, Oracle employee [redacted]
27 testified [redacted]
28 [redacted] This information was then relayed to an attorney for Oracle.

See Fuchs Decl. ¶ 18, Ex. C-1. Similarly, Oracle employee Edward Abbo testified regarding his knowledge of a December 2006 article stating: "TomorrowNow set up a test environment at its own site that mirrored Pomeroy's. That way, when the solution was ready, it was straightforward to implement on Pomeroy's systems." *See id.* ¶ 19, Ex. C-2, K-1, K-2.

Moreover, discovery received by Plaintiffs long before the March 20, 2009 amendment deadline also put Plaintiffs on ample additional notice of their potential claims related to access of PeopleSoft software. Starting August 6, 2007, TN began producing its customer contracts, which document the PeopleSoft products TN supported for each customer. *See id.* ¶ 35. Defendants' September 21, 2007 response to Interrogatory No. 9 and December 27, 2007 response to Interrogatory 12 gave detailed information regarding both emergency backup copies of PeopleSoft applications and development environments maintained by TN on behalf of some customers. *See id.* ¶¶ 21, 24. Similarly, on October 30, 2007, former TN employee Mark Kreutz testified that TN had some customers' demo environments on its systems. *See id.* ¶ 22. And, as described above, by early 2008, Defendants had produced SAS, dotProject and the full native version of BakTrak, together providing a fairly complete picture of TN's activities, customer services and access to PeopleSoft software on behalf of TN's customers. *See id.* ¶¶ 7-9.

3. <u>Plaintiffs Knew About Their Alleged Knowledge Management Claims.</u>

Plaintiffs delayed filing for their Knowledge Management registrations until July 1, 2009. Each registration purports to cover an automated database created in 2009 containing "thousands of 'knowledge management' solutions" for the JDE and PeopleSoft lines, respectively. *See* Lanier Decl. ¶ 12. These solutions long predate 2009, though. *See id.* Plaintiffs' argument that they could not have known before now to add these thousands of "solutions" is stunning, given that every one of the four preceding complaints have specifically mentioned "knowledge management." *See id.* ¶¶ 1, 2, 6, 8. In fact, Plaintiffs have known about TN's downloading of PeopleSoft documents since *before* filing this lawsuit. In anticipation of filing the lawsuit, Plaintiffs reviewed "log entries, and other reports generated by Oracle's software, including Change Assistant, [which] provide[s] the specific identifiers for the individual Software and Support Materials requested at any given time . . . ." *See* Fuchs Decl. ¶ 28. Plaintiffs relied on

1 this information in drafting paragraphs 75-80 of the March 22, 2007 initial complaint, which
2 provided detailed statements concerning what Plaintiffs believed TN downloaded from the Oracle
3 Customer Connection website. *See id.* ¶ 28.

4 Discovery received by Plaintiffs has also put them on ample and additional notice that TN
5 was downloading materials now referred to as "Knowledge Management" documents on behalf
6 of its customers. For example, since mid-2008, via the "Data Warehouse," Plaintiffs have
7 examined and requested software and support materials downloaded by TN on behalf of its
8 customers, including "Knowledge Management" documents. *See id.* ¶¶ 11-12, 29. Moreover, the
9 server that Plaintiffs reviewed outside the Data Warehouse protocol housed the majority of
10 materials downloaded by TN on behalf of its customers. Defendants completed production from
11 this server by October 2008, months before the amendment deadline. *See id.* ¶ 29.

12 **4. Plaintiffs Cannot Hide Behind Discovery Disputes and Purport**
13 **Ignorance of the Alleged Database Claims.**

14 Similarly, Plaintiffs have known about TN's access to Oracle databases in providing
15 customer service since at least early 2008. This knowledge started (at least) with deposition
16 testimony, when, on February 6, 2008, TN 30(b)(6) witness John Baugh testified that TN
17 obtained its database platforms from a variety of vendors, including Oracle. *See id.* ¶ 31.

18 And there was additional, clear notice of this issue in documents produced by Defendants.
19 On February 8, 2008 and March 13, 2008, Defendants produced documents concerning Oracle
20 databases, including two e-mail communications between now-former TN employees regarding
21 TN's use of Oracle databases. *See id.* ¶ 32. These are Exhibits M and N to the Declaration of
22 Chad Russell in Support of Oracle's Motion ("Russell Decl."). Plaintiffs used these documents as
23 exhibits during a deposition in April 2009. Defendants also produced *on* February 8, 2008 the
24 database-related document attached as Exhibit O to the Russell Decl. *See id.* ¶ 32.

25 Discovery on this topic did not stop in February 2008. On April 1, 2008, former TN
26 employee Kathy Williams testified regarding the different component parts of an environment—
27 including the "relational database platform"—and TN's database naming conventions. *See id.* ¶
28 31. On April 2, 2008, former TN employee Catherine Hyde also testified to these naming

conventions. *See id.* And, throughout the latter half of 2008, Plaintiffs had the opportunity to review and select for production files from TN's servers containing database components as part of the "Data Warehouse" production described above. *See id.* ¶ 33.

Bottom line, Plaintiffs knew of the claims they are now trying to add at least a year, if not years, before the amendment deadline. The fact that there has been a lot of discovery does not change Plaintiffs' knowledge. Nor, as shown below, does it excuse their dilatory conduct.

III. LEGAL STANDARDS

A. Rule 16(b)'s "Good Cause" Standard Applies When the Deadline for a Motion to Amend Has Passed.

When a party moves to amend a complaint after the deadline to amend has passed, the party must first satisfy Rule 16(b) of the Federal Rules of Civil Procedure, which governs modifications to scheduling order deadlines. *See Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1294 (9th Cir. 2000); *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 607-08, 610 (9th Cir. 1992); *RE: LAUNCH, LLC v. PC Treasures, Inc.*, No. C-05-0697 PJH, 2006 U.S. Dist. LEXIS 27673, at *2-3 (N.D. Cal. Apr. 28, 2006) (Hamilton, J.). Rule 16(b) provides that a pretrial scheduling order "may be modified only for good cause and with the judge's consent." Fed. R. Civ. P. 16(b). It is Rule 16(b)'s more stringent good cause standard, and not the more liberal amendment procedures afforded by Rule 15 that governs a motion to amend filed past the deadline for amending a pleading. *See Johnson*, 975 F.2d at 610 (noting that Rule 16's standards may not be "short-circuited" by those of Rule 15 because "[d]isregard of the [scheduling] order would undermine the court's ability to control its docket, disrupt the agreed-upon course of the litigation, and reward the indolent and the cavalier"); *Lendall v. Chase Manhattan Mortgage Corp.*, No. C 05-03295 WHA, 2006 U.S. Dist. LEXIS 81430, at *18-19 (N.D. Cal. Oct. 27, 2006).

Good cause depends on the diligence of the moving party, and "[a] lack of diligence alone is grounds to deny leave to amend." *Lukovsky v. City & County of San Francisco*, No. C 05-00389 WHA, 2006 U.S. Dist. LEXIS 26762, at *4 (N.D. Cal. Apr. 26, 2006); *see also Johnson*, 975 F.2d at 609 (holding that if the moving party was not diligent, "the inquiry should end"). To meet the good cause standard, the moving party must show that despite its diligence, it could not

1 reasonably have met the scheduling order deadline. *See, e.g., Lendall*, 2006 U.S. Dist. LEXIS
2 81430, at *18-19; *RE: LAUNCH, LLC*, 2006 U.S. Dist. LEXIS 27673, at *3; *Hannon v. Chater*,
3 887 F. Supp. 1303, 1319 (N.D. Cal. 1995). Prejudice to the non-moving party provides additional
4 justification to deny leave to amend under Rule 16(b). *See Johnson*, 975 F.2d at 609.

5 **B. Even If "Good Cause" Is Shown, Rule 15(a) Must Also Be Satisfied.**

6 Even if a party succeeds in showing good cause for amendment under Rule 16(b), the
7 party must still establish that the post-deadline amendment is proper under Rule 15(a). *See*
8 *AmerisourceBergen Corp. v. Dialysist West, Inc.*, 465 F.3d 946, 952 (9th Cir. 2006); *Atmel Corp.*
9 *v. Authentec, Inc.*, No. C 06-2138 CW, 2008 U.S. Dist. LEXIS 10846, at *3 (N.D. Cal. Jan. 31,
10 2008); *Hannon*, 887 F. Supp. at 1319 (denying plaintiff's motion to amend the complaint under
11 both Rule 16(b) and Rule 15(a)).

12 Under Rule 15(a), leave to amend a pleading is given "when justice so requires." Fed. R.
13 Civ. P. 15(a)(2). Although Rule 15(a) has a more permissive standard, leave to amend "is not to
14 be granted automatically." *Coleman*, 232 F.3d at 1294. In evaluating a motion to amend, a court
15 will consider whether the moving party is guilty of bad faith (or dilatory motive), undue delay or
16 prejudice to non-moving party. *See Allen v. Beverly Hills*, 911 F.2d 367, 373 (9th Cir. 1990);
17 *Mullen v. Surtshin*, 590 F. Supp. 2d 1233, 1236 (N.D. Cal. 2008) (denying amendment due to
18 plaintiff's undue delay, prejudice to defendant and the fact that plaintiff filed two previous
19 amended complaints).

20 **IV. ARGUMENT: PLAINTIFFS' MOTION SHOULD BE DENIED AS TO THE**
21 **CONTESTED AMENDMENTS**

22 Plaintiffs' motion fails under Rule 16(b) because Plaintiffs could have asserted all three
23 contested amendments months or years before the amendment deadline. Plaintiffs are not entitled
24 to "liberal amendment" under Rule 15(a) because this motion is brought in bad faith, after undue
25 delay, to the great prejudice of Defendants.

26 **A. Plaintiffs Must Move Under Both Rule 16(b) and Rule 15(a) Because They**
27 **Missed the Deadline to Amend.**

28 Plaintiffs must meet Rule 16(b)'s good cause standard because they filed this motion well

1 after the March 20, 2009 deadline to amend pleadings had expired. The Court's June 11, 2009
2 Order did not modify that deadline. Rather, it granted that part of the parties' joint Rule 16(b)
3 motion in which Plaintiffs had asked for permission to file a motion to amend to add the Siebel-
4 related claims, and set a July 15, 2009 deadline by which Plaintiffs could make this very specific
5 motion. See D.I. 325 (¶ 6); Lanier Decl. ¶¶ 49, 51. With regard to any other proposed
6 amendments, the June 11, 2009 Order stated "[s]hould Plaintiffs intend to seek any other
7 amendment to the complaint, then Plaintiffs shall make the *appropriate motion(s)* no later than
8 August 26, 2009." D.I. 325 (¶ 5) (emphasis supplied). In other words, the Court did not reset the
9 amendment deadline by which a party may move solely under Rule 15(a), rather it set a final
10 deadline by which Plaintiffs could seek leave to move to amend under both Rules 16(b) and 15(a).

11 **B. <u>Plaintiffs Fail to Meet the Rule 16(b) "Good Cause" Standard Because They</u>**
12 **<u>Were Not Diligent in Bringing This Motion.</u>**

13 When a party inexplicably delays moving to amend until after the deadline to amend has
14 passed, the party has not acted diligently, and its motion to amend must be denied. *See Lendall*,
15 2006 U.S. Dist. LEXIS 81430, at *18-19 (denying amendment where plaintiff failed to articulate
16 "new" facts that explained why she filed the motion to amend after the deadline). Plaintiffs could
17 long ago have moved to add the contested amendments. Their lack of diligence is, alone, reason
18 to deny the Motion.

19 **1. <u>Plaintiffs Could Have Asserted the Knowledge Management</u>**
20 **<u>Registrations and Historic PeopleSoft Registrations as Early as the</u>**
<u>Initial Complaint.</u>

21 As explained above, the Knowledge Management and historic PeopleSoft registration
22 amendments are purportedly based on information that has been in Plaintiffs' possession for a
23 long time. Plaintiffs have known of these issues since before the initial complaint was filed.
24 Plaintiffs' failure to earlier move to add these claims is inexplicable and illustrates their lack of
25 diligence.

26 Plaintiffs claim that delays in Defendants' production have prevented Plaintiffs from
27 learning which historic PeopleSoft product lines were infringed, and thus, which to include in the
28 complaint. *See* Motion at 7-10. Plaintiffs' misrepresentations of Defendants' production aside

1 (*see* Section IV(C)(3), *infra*), Plaintiffs fail to disclose that other sources to which they had access
2 and actually based their Motion, including TN customer contracts and the SAS database, put them
3 on specific notice of these issues. For one example, Plaintiffs allege that they only recently
4 learned that TN provided support for CRM version 8.4 SP1 as a result of Defendants' May 2009
5 supplemental production of the SAS database. *See* Motion at 8; Russell Decl., ¶¶ 9-10, Ex. G, H.
6 However, a TN contract produced on November 9, 2007, shows that TN supported CRM version
7 8.4 SP1. *See* Fuchs Decl. ¶ 36. Further, the version of the SAS database that Plaintiffs
8 acknowledge was produced on December 4, 2007 is precisely the source that Plaintiffs could have
9 used to determine that many of the historic PeopleSoft registrations they now seek to add were
10 supported by TN. *See id.* ¶¶ 8, 36.

11 Similarly, the Knowledge Management amendments are based on information Plaintiffs
12 have had in their possession since at least 2007. As part of their investigation leading up to this
13 case, Plaintiffs generated reports that identified the software and support materials downloaded
14 from Plaintiffs' customer websites. *See id.* ¶ 28. Plaintiffs' access to the Data Warehouse in
15 2008 and the Rule 30(b)(6) testimony of TN, taken by Plaintiffs in 2007, constitute further
16 sources of information about the Knowledge Management solutions Plaintiffs had in their
17 possession well before the deadline for amendment. *Id.* ¶¶ 29-30. In light of Plaintiffs'
18 knowledge, Plaintiffs' last minute registration of these copyrights—months after the amendment
19 deadline and weeks *after* the Court discusses amendment with Plaintiffs—is both inexplicable
20 and inexcusable.

21 When a motion to amend seeks to add a new theory that is "fully congruent with the facts
22 alleged in [the] original pleading" and, thus, "should have been included therein," a court will
23 deny the motion. *Hannon*, 887 F. Supp. at 1319. The historic PeopleSoft registrations and the
24 Knowledge Management registrations purport to cover the exact type of material at issue in
25 Plaintiffs' very first complaint. Starting with the March 22, 2007 complaint, and in each of the
26 three subsequent complaints, Plaintiffs have alleged improper access to and copying of
27 PeopleSoft and JDE software and support materials, including the types of "knowledge
28 management solutions" purportedly covered by the Knowledge Management registrations. *See*

Lanier Decl. ¶¶1, 2, 6, 8. Because Plaintiffs had copyright registrations for the historic PeopleSoft registrations at least six years before filing the initial complaint, and because Plaintiffs knew from their pre-lawsuit investigation which knowledge management solutions had been downloaded, Plaintiffs could have asserted both claims when this case started or in any subsequent complaint. *See id.* ¶¶ 1, 2, 6, 8, 11. Plaintiffs' failure to do so demonstrates a lack of diligence and alone justifies denial of the motion.

2. Plaintiffs Were on Notice of the Oracle Database Issue.

Plaintiffs' justification for their delay in moving to amend to add the Oracle database claims is that "the volume and complexity of discovery did not allow for thorough analysis." *See* Motion at 7. Regardless of the volume and complexity of discovery, occasioned entirely by Plaintiffs' scorched earth approach, Plaintiffs were put on express notice of TN's access to Oracle databases as early as February 2008, and could have brought this motion before the amendment deadline passed more than a year later.

As explained in detail in Section II(C)(3), *supra*, Plaintiffs took live testimony on February 6, 2008 that TN used Oracle database software in connection with some PeopleSoft and JDE applications software at TN. *See* Fuchs Decl. ¶ 31. Two months later, Plaintiffs obtained additional testimony from TN witnesses confirming that TN used Oracle databases. *See id* ¶ 31. Furthermore, Defendants produced documents regarding potential purchase of Oracle database licenses on February 8 and March 13, 2008. *See id.* ¶ 32; Russell Decl. Exs. M, N, O. Yet, despite claiming to have "found" these documents in Defendants' production on February 8, 2009, Plaintiffs did not seek additional information about TN's use of the Oracle databases until they deposed a former TN employee in April 2009—after the deadline for amendment had passed. *See* Russell Decl., ¶ 21; Fuchs Decl. ¶ 31. Moreover, despite having the opportunity in 2008 to review and select for immediate production Oracle database files from the Data Warehouse, Plaintiffs never did.

This Court has made clear that a plaintiff's failure to conduct a sufficient investigation of the facts of its case, which would have earlier revealed the existence of a potential claim based on information in the plaintiff's possession, does not constitute good cause for the belated filing of a

motion to amend. *See RE: LAUNCH, LLC*, 2006 U.S. Dist. LEXIS 27673, at *3 (denying amendment because plaintiff "failed to establish that it acted diligently in discovering the availability of the new cause of action" and thus lacked good cause). Plaintiffs' failure to ask follow-up questions during the depositions at which TN's use of Oracle databases was disclosed or to seek any discovery related to the Oracle databases for an entire year does not show Plaintiffs' diligence, but rather their lack thereof.

There was no other barrier to Plaintiffs bringing the database claims earlier. In fact, of the seven database copyright registrations, five pre-date the initial complaint, one was registered on January 16, 2009 and one was registered on June 29, 2009. *See* Lanier Decl. ¶ 13. Plaintiffs offer no meaningful explanation for their delay in making these two registrations, and the first five have long been available to assert.

Trimble Navigation Ltd. v. RHS, Inc. does not support Plaintiffs' claim that they acted diligently in "discovering" the bases for the contested amendments and in moving to amend. *See* No. C 03-1604 PJH, 2007 WL 2727164, at *10-11 (N.D. Cal. Sept. 17, 2007). In *Trimble*, this Court permitted a patent infringement defendant to amend its answer to assert inequitable conduct five months after the amendment deadline had passed. *See id.* at *10. Specifically, the Court found that although the defendant possessed some evidence of inequitable conduct before the amendment deadline, the defendant waited to move until it was able to obtain additional information so that its amendment complied with the strict pleading standards for fraud. *See id.* The Court found that although the amendment deadline had passed, the defendant had diligently used the intervening time to develop its claim to meet the heightened pleading requirements. *See id.* By contrast, Plaintiffs here have had all the information required to assert the continued amendments for over a year before the amendment deadline, and do not assert claims that have a heightened pleading standard. *Trimble* is no excuse for their delay.

C. <u>Plaintiffs Brought This Motion in Bad Faith After Undue Delay, to the Prejudice of Defendants.</u>

Even if Plaintiffs could show good cause for bringing their motion long after the amendment deadline, Plaintiffs' motion fails the separate Rule 15(a) standard because Plaintiffs

1 brought their motion in bad faith, after undue delay and to the prejudice of Defendants. A court's
2 "discretion to deny leave to amend is particularly broad where plaintiff has previously amended
3 the complaint." *St. Paul Fire & Marine Ins. Co. v. Vedatech Int'l, Inc.*, 245 Fed. Appx. 588, 591-
4 92 (9th Cir. 2007); *see Mullen*, 590 F. Supp. 2d at 1236. That discretion should be exercised to
5 deny Plaintiffs' Motion.

6 **1. <u>Plaintiffs' Bad Faith in Bringing This Motion Justifies Denial.</u>**

7 Courts deny leave to amend if the moving party brings the motion in bad faith or for a
8 dilatory motive. *See e.g., Chodos v. West Publ'g Co.*, 292 F.3d 992, 1003 (9th Cir. 2002);
9 *Lockheed Martin Corp. v. Network Solutions, Inc.*, 194 F.3d 980, 986 (9th Cir. 1999); *Robertson*
10 *v. Qadri*, No. 06-4624 JF (HRL), 2009 U.S. Dist. LEXIS 3790, at *7-8 (N.D. Cal. Jan. 15, 2009)
11 (finding that attempts to amend a claim with facts known prior to the complaint in order to avoid
12 dismissal was both bad faith and undue delay); *Brown v. Wireless Networks, Inc.*, No. C 07-4301
13 (EDL), 2008 U.S. Dist. LEXIS 36472, at *4 (N.D. Cal. Apr. 24, 2008) (Laporte, M.J.). Further,
14 the longer a party waits to amend its complaint, the more likely it is that there is bad faith.
15 *Strickland v. Jewell*, 562 F. Supp. 2d 661, 668-69 (M.D.N.C. 2007) ("[T]he further the case
16 progresses, the more likely it is that the amendment will prejudice the opposing side or will help
17 support a finding of bad faith."). Plaintiffs rely upon mischaracterizations and misrepresentations
18 to conceal their dilatory motives behind bringing this motion. The Court should deny the Motion
19 in light of Plaintiffs' bad faith.

20 **(a) Plaintiffs' stated rationale for the motion is contrary to what**
21 **they told Magistrate Judge Laporte.**

22 Only three months ago, Plaintiffs told Judge Laporte that they had knowingly and
23 deliberately declined to assert copyright registrations beyond the "Registered Works" (the works
24 underlying the copyright registrations), claiming that adding more registrations was (1)
25 unnecessary and (2) too burdensome to include on an already bloated case. *See* Lanier Decl. ¶ 27.
26 Plaintiffs' stated rationale for bringing this Motion is flatly inconsistent with the positions
27 Plaintiffs took with Judge Laporte. This suggests that Plaintiffs' true goal is not to conform their
28 pleading with facts, but to improperly delay resolution of this case.

1 Plaintiffs claim that the "Second Amended Complaint did not include every possible
2 relevant registration," because Plaintiffs received inadequate discovery responses and delayed
3 productions of information and because discovery has been so voluminous and complex. *See*
4 Motion at 7. Plaintiffs also claim that they did not realize that the historic PeopleSoft
5 registrations would be at issue in this case until Defendants filed their motion to compel
6 information about the preexisting works underlying the derivative Registered Works. *See* Motion
7 at 10-11. These statements are belied by Plaintiffs' statements to Judge Laporte only three
8 months ago. Lanier Decl. ¶¶ 27-28.

9 In particular, in responding to Defendants' motion to compel copyright information,
10 Plaintiffs told Judge Laporte that they deliberately had chosen not to assert infringement of
11 registrations beyond the Registered Works because doing so would be too burdensome:

12 Not wanting to overload an already robust Complaint with every registered version of
13 every software release that it owns, and which may form some of the code base of later works that SAP infringed, Oracle alleged infringement of certain of the actual versions of
14 software that SAP copied, distributed and stored on its systems.

15 D.I. 299 at 7; Lanier Decl. ¶ 27. Moreover, Plaintiffs specifically represented to Judge Laporte
16 that they believed the addition of the historic PeopleSoft registrations is "entirely unnecessary
17 because all of the code encompassed by these additional registrations, for which Oracle alleges
18 infringement, is already in the case through the derivative registrations Oracle obtained and
19 plead." *See id.* ¶ 28.

20 Plaintiffs' statements to Judge Laporte show that Plaintiffs not only were aware that
21 copyright registrations beyond the Registered Works might be an issue, but also deliberately
22 chose not to assert these registrations and believe that it is not necessary to add them. As a result,
23 Plaintiffs have no excuse and, they acknowledge, *no reason* to add the contested amendments at
24 this late date. *See* Motion at 12 ("Oracle should be entitled to add all sixty-three registrations
25 implicated by Defendants' argument as a precautionary measure, *while reserving its rights as to*
26 *their relevance*.").

27 Plaintiffs' motion now raises an intriguing question—how did they know enough in April
28 2007 to obtain the PeopleSoft registrations they added in the First Amended Complaint, but

couldn't know until now to add their registrations already made related to the same products? The answer is that the claim of ignorance is false, made only to excuse their delay and negligence. That is bad faith objectified.

(b) Plaintiffs' characterizations of Defendants' production are misleading.

Plaintiffs' bad faith is punctuated by misrepresenting that they only learned that certain works were at issue upon receiving Defendants' production of certain databases and information after the March 20, 2009 deadline for amendment had passed. *See* Motion at 7.

As shown above, the production dates for BakTrak, SAS and dotProject referenced in Plaintiffs' Motion only represent the supplemental production dates for post-lawsuit content completed per the November 2008 Expanded Discovery Timeline Agreement—not, as the Plaintiffs' misleadingly suggest, the original production dates for the materials. *See* Fuchs Decl. ¶ 6. In claiming that BakTrak was "produced in full on April 20, 2009," Plaintiffs omit that Defendants produced the native version, with content through February 2008, on March 12, 2008. *See id.* ¶ 7. Similarly, in stating only that "a more complete version of the SAS database" was produced on March 6, 2009, Plaintiffs omit that Defendants produced on December 4, 2007 the *entire* SAS database, containing records through the end of April 2007. *See id.* ¶ 8. Finally, in representing that dotProject was "produced in full on May 8, 2009," Plaintiffs omit that Defendants produced the *entire* dotProject database, through the end of June 2007, to Plaintiffs on March 26, 2008. *See id.* ¶ 9. The later productions of BakTrak, SAS and dotProject, respectively, simply supplement the earlier, complete productions with data through October 31, 2008, pursuant to the Expanded Discovery Timeline Agreement. *See id.* ¶¶ 6-9.

Second, Plaintiffs misrepresent the date on which information from the Data Warehouse became available and the reasons that production from the Data Warehouse is ongoing. Plaintiffs claim that "Defendants did not begin producing (and thus Oracle's experts could not review) Data Warehouse images until October 25, 2008." Motion at 9. In fact, 52 partitions from TN's support servers were made available for review starting in July 2008. *See* Fuchs Decl. ¶ 11. Defendants began rolling productions (starting with metadata reports) from the Data Warehouse

in August 2008, completing production of files requested by Plaintiffs by February 9, 2009, over a month before the deadline to amend. *See id.* ¶ 11. In claiming that the Data Warehouse production "is still not finished," Plaintiffs fail to disclose that the only remaining review and productions relate to Plaintiffs' specific request to review data under the Expanded Discovery Timeline Agreement and Plaintiffs' March 16, 2009 request that Plaintiffs be allowed to review three additional servers in the "Data Warehouse." *See id.* ¶ 16.

Finally, Plaintiffs' suggestion that they were unaware of the valuable information in BakTrak, SAS, dotProject and the Data Warehouse until Defendants amended their discovery responses is ludicrous. *See* Motion at 7. Plaintiffs demanded all this data, at great expense to Defendants, and presumably reviewed it during the long time it has been available. In fact, Plaintiffs have extensively used and referenced data from all four sources throughout discovery, including using printouts from those sources as hundreds of deposition exhibits. Fuchs Decl. ¶ 3.[1]

Plaintiffs' misrepresentations to the Court regarding when they received information appear designed to conceal that Plaintiffs have not been diligent in their own review of Defendants' production, that they have unduly delayed in moving to amend and that their true aim is to delay resolving this case. These misrepresentations are part of a continuing pattern. For example, in January 2008, the Original Plaintiffs informed Defendants (and in April 2008, the Court) that they planned to amend a second time, but could not do so until they "obtained" additional registrations. *See* Lanier Decl. ¶¶ 3-5. This statement was false. When the Original Plaintiffs finally filed the Second Amended Complaint ("SAC") on July 28, 2008, *all* of the additional registrations *pre-dated* the First Amended Complaint ("FAC"). *See id.* at ¶ 5.

Similarly, the Original Plaintiffs also claimed that the amendments in the SAC were necessary because "discovery in this case has revealed that" TN housed software environments on its computers. D.I. 132 (¶ 14); *see* Motion at 5. However, subsequent deposition testimony clearly establishes Plaintiffs knew about TN's use of environments before filing the initial complaint, having learned this information from [redacted] and periodicals as early as 2006. *See* Fuchs Decl. ¶¶ 18-19.

[1] *Both* sides provided supplemental discovery responses, on May 22, 2009. *See* Fuchs Decl. ¶ 27 n.2.

Most importantly, Plaintiffs' misrepresentations about discovery miss the point—Plaintiffs *already knew* about their alleged "new" claims. Whether additional discovery would have provided more details, Plaintiffs cannot hide their actual knowledge of the bases for the contested amendments a year or more before the amendment deadline.[2]

(c) Plaintiffs mischaracterize the contested amendments as "conforming" amendments.

Finally, Plaintiffs also mischaracterize the contested amendments as "conforming amendments" to hide the fact that such amendments would result in further expansion of the issues in this case and would require more time and discovery than can be accomplished on the court schedule. Contrary to Plaintiffs' assertions, amendment of the complaint to add the Oracle database, Knowledge Management and historic PeopleSoft amendments would be neither "conforming" nor "routine."

Plaintiffs inaccurately state that the contested amendments add no new claims to the case. In fact, the contested amendments seek to add 29 new claims for copyright infringement. As Plaintiffs' acknowledge in the Motion, the claims for infringement of the Oracle databases implicate an entirely different type of technology from the software applications that have been in issue. *See* Motion at 12. In addition to the new copyright claims related to Oracle's database technology, the contested amendments include allegations that TN breached an additional contract—the Developer's License that Plaintiffs represent governs the use of the Oracle database technology. *See* D.I. 348-1 (¶¶ 105, 124). Similarly, the Knowledge Management registrations constitute a wholly different type of copyright registration (*i.e.*, an "automated database" registration) from the type previously asserted in the case and require critical additional discovery

[2] It is worth noting that Defendants did not respond to the SAC, because after Defendants advised that they would move to dismiss the SAC, on August 28, 2008, the Original Plaintiffs informed Defendants that they planned once more to seek leave to amend to make "some adjustment to the plaintiff entities currently described in the [SAC]." This followed Plaintiffs' purported "discovery" of inter-company assignment, distribution and cost-sharing agreements relating to ownership of the copyrights-in-suit ("inter-company agreements"). *See* Lanier Decl. ¶ 7. The Original Plaintiffs subsequently produced 18 inter-company agreements. *See id.* On October 8, 2008, Plaintiffs OUSA, OIC and OEMEA, along with now-former plaintiffs J.D. Edwards Europe Limited ("JDEE") and Oracle Systems Corp. ("OSC"), filed the TAC. *See id.* ¶ 8. Based on the inter-company agreements, Defendants successfully moved to dismiss JDEE and OSC from the case. *See id.* ¶ 9.

1 (including information related to whether these registrations are even proper). *See* Lanier Decl.
2 ¶ 12. And, Plaintiffs admitted to Judge Laporte in April of this year that this case has not
3 included the 20 historic PeopleSoft registrations, which Plaintiffs claimed they did not assert
4 because doing so would be unnecessary, burdensome on discovery and would "overload an
5 already robust Complaint." *Id.* ¶ 27. For these reasons, the contested amendments are not
6 "conforming" and should require extensive additional discovery, analysis and likely motions.
7 Plaintiffs' characterization of the contested amendments as "conforming" is also directly
8 inconsistent with the positions Plaintiffs have taken in communications with Defendants.
9 Plaintiffs have consistently maintained that if Defendants did not stipulate to amendment,
10 Plaintiffs reserved their right to bring a separate lawsuit based on the contested amendments. *Id.*
11 Ex. E. Plaintiffs maintain this position even in light of the black letter rule that a lawsuit based on
12 the "same transactional nucleus of facts" as a previous lawsuit will be barred under the doctrine
13 of *res judicata*. *Durney v. WaveCrest Labs., LLC*, 441 F. Supp. 2d 1055, 1060 (N.D. Cal. 2005).
14 Despite representing to Defendants their belief that the contested amendments were sufficiently
15 different from the existing claims to ground a separate lawsuit, Plaintiffs now (correctly) tell the
16 Court that the "additional registrations arise from the same basic set of operative facts already
17 included in Oracle's complaint." Motion at 16.
18 Plaintiffs told Defendants that the new issues could justify a separate lawsuit and told
19 Judge Laporte that they would overload the case. Plaintiffs now tell the Court that these
20 amendments are merely conforming. This "inconsistency" can only be interpreted as a bad faith
21 effort to conceal the fact that Plaintiffs' belated amendments have been brought for the improper
22 purpose of delaying the resolution of the issues in this case.
23 **2. Plaintiffs Unduly Delayed Bringing This Motion.**
24 The undue delay factor under Rule 15(a) is similar to the lack of diligence consideration
25 under Rule 16(b). Undue delay occurs "when a party has filed a motion for leave to amend long
26 after it should have become aware of the information that underlies that motion." *Scognamillo v.*
27 *Credit Swisse First Boston, LLC*, 587 F. Supp. 2d 1149, 1157 (N.D. Cal. 2008); *see also*
28 *AmerisourceBergen Corp.*, 465 F.3d at 953 (quoting *Jackson v. Bank of Hawaii*, 902 F.2d 1385,

1388 (9th Cir. 1990)) ("[I]n evaluating undue delay, [the question is] "whether the moving party knew or should have known the facts and theories raised by the amendment in the original pleading."). Although delay alone is generally insufficient to deny a motion to amend, late amendment is "not reviewed favorably when the facts and the theory have been known to the party seeking amendment since the inception of the cause of action." *Acri v. Int'l Ass'n of Machinists & Aerospace Workers*, 781 F.2d 1393, 1398 (9th Cir. 1986). For this reason, courts have found that a moving party's delay in discovering information relevant to the amendment constitutes undue delay. *See Scognamillo*, 587 F. Supp. 2d at 1157-58 (denying motion to amend when the amendments were based on documents that defendants had produced more than a year before the motion, despite plaintiff's argument that these documents had been buried in a large production and the significance of these documents was only revealed as a result of subsequent discovery); *Brown v. Wireless Networks, Inc.*, 2008 U.S. Dist. LEXIS 36472, at *4.

As discussed in detail in Section IV(B), *supra*, the contested amendments are all based on information Plaintiffs have possessed for more than a year. Plaintiffs' lack of diligence in investigating the bases for the contested amendments and in moving to amend to include claims that could have been brought in the initial complaint constitutes undue delay, which weighs in favor of denying Plaintiffs' Motion. Given the length of Plaintiffs' delay, their numerous previous opportunities to amend and the need to bring this case to closure, Plaintiffs' delay here justifies denial of the motion.

3. Defendants Will Be Prejudiced by Late Amendment.

Defendants will be prejudiced if Plaintiffs are permitted to add their substantial, non-conforming amendments at this late date. Prejudice to the non-moving party is a proper basis on which to deny a motion to amend, particularly where the plaintiff seeks to amend a complaint late in litigation. *See Scognamillo,* 587 F. Supp. 2d at 1155-56 (finding undue prejudice and delay where plaintiffs filed a motion to amend 12 weeks before the discovery cutoff and "[g]ranting leave to amend . . . would require extensive additional discovery on entirely new topics and the redeposition of witnesses, on top of the significant discovery that has occurred to date"). "Prejudice typically arises where the opposing party is surprised with new allegations which

1 require more discovery or will otherwise delay resolution of the case." *Atmel Corp.,* 2008 U.S.
2 Dist. LEXIS 10846, at *5-6; *see In re Fritz Cos. Secs. Litig.*, 282 F. Supp. 2d 1105, 1109 (N.D.
3 Cal. 2003); *AmerisourceBergen Corp.*, 445 F.3d at 1137 (finding that permitting plaintiff to
4 "advance different legal theories and require proof of different facts" with eight months of
5 discovery remaining would prejudice defendant "by forcing it to undertake burdensome discovery
6 and would have unnecessarily delayed final judgment").

7 As described in Section IV(C)(1)(a) *supra*, because the contested amendments are not
8 conforming amendments, Defendants would need to conduct extensive additional discovery of
9 entirely new topics and new registrations if amendment is permitted. With respect to the Oracle
10 database amendments, Defendants would need—at the very least—to conduct from scratch
11 discovery and analysis of the technology implicated, the copyright registrations and works
12 themselves, and the license(s) at issue. Defendants would also need information regarding
13 Plaintiffs' damages theory for this new category of infringement. Defendants would need to
14 identify and depose knowledgeable witnesses and corporate representatives. With respect to the
15 Knowledge Management registrations, Defendants would require extensive information about the
16 form, manner and coverage of the registrations. And for all of the 29 registrations included in the
17 contested amendments, Defendants would require information regarding the works purportedly
18 covered, any preexisting underlying works, relevant inter-company agreements related to
19 ownership and licensing, mapping of the registrations to products alleged to have been supported
20 and/or downloaded by TN and relevant financial information regarding the profitability of the
21 works covered, all of which would require additional written discovery and/or re-deposition of
22 certain witnesses (*e.g.*, Plaintiffs' Rule 30(b)(6) witnesses designated to testify regarding inter-
23 company licensing arrangements and copyright registrations procedures).

24 By the time this Court considers the Motion, there will only be three and a half months
25 left in discovery. This is simply not enough time for Defendants to conduct the discovery
26 necessary to properly defend 29 additional claims of copyright infringement, particularly in light
27 of the limited discovery tools remaining, the expansion of the case due to the Siebel amendments
28 and Plaintiffs' history of resisting critical copyright-related discovery. It took Plaintiffs over *two*

years to produce copies of the Registered Works and over a year to produce highly relevant documents evidencing ownership and licensing of the Registered Works. *See* Lanier Decl. ¶¶ 14-20, 31-40. Plaintiffs have still not provided requested information regarding preexisting works and financial information related to the Registered Works. *See id.* ¶¶ 21-30, 41-42. It is simply not reasonable for Plaintiffs to expect that Defendants could obtain necessary discovery for the already expansive issues currently in the case, the allegations regarding Siebel and post-litigation conduct contained in the unopposed amendments *and* the non-conforming contested amendments.

The prejudice to Defendants is made more acute by the fact that Plaintiffs are asserting now and would add dozens of so-called "derivative works." *See id.* ¶ 11. A derivative work is "a work based upon one or more preexisting works." 17 U.S.C. § 101. Even though a critical question in analyzing alleged derivative works is determining what is new and what is not (*i.e.*, what the registration itself covers and what it does not), Plaintiffs have long resisted providing this basic information. In fact, it has taken two years and three motions to compel for Plaintiffs to start providing basic information about the Registered Works they have (or should have) under their complete control. *See* Lanier Decl. ¶¶ 14-20, 22-30.

Adding more than two dozen additional registrations to this case would only exacerbate the delays and add to the prejudice to Defendants. In fact, Plaintiffs have taken inconsistent positions on why they seek to add "new" (actually years-old, but belatedly asserted) registrations to this case. Plaintiffs originally informed Defendants that they wished to amend the complaint to add 63 additional copyright registrations, including historic PeopleSoft registrations. Plaintiffs argued then, however, that they did not "believe *any* of these registrations [were] relevant or necessary . . . ." *See id.* ¶ 47 (emphasis added). But when opposing Defendants' motion to compel, Plaintiffs argued that they had chosen not to assert infringement of the preexisting works because doing so was unnecessary, burdensome on discovery and would "overload an already robust Complaint." *See id.* ¶ 27. Plaintiffs further claimed that if Judge Laporte granted the motion to compel, Plaintiffs would be forced to add registrations for the preexisting works to their complaint. *See id.* ¶ 28. At the May 27, 2009 hearing on the motion, Judge Laporte disagreed that Plaintiffs would need to add the preexisting work registrations to the complaint if she granted

Defendants' motion. In fact, Judge Laporte described Plaintiffs' argument as a "red herring." *See id.* ¶ 29, Ex. D. Plaintiffs do not tell one, consistent story (and story it is) about their motives. But, except on this Motion, everyone agrees that adding more registrations, particularly those years old, would overwhelm the case. They should not be added now.

Judge Laporte agreed with Defendants that, while it is "up to the trial judge" whether Plaintiffs may amend the complaint, it is "way too late" to be adding registrations. *See id.* ¶ 29. The prejudice to Defendants, already severe and only to be increased by more amendment, is yet another, compelling, reason why it is way too late to amend this complaint again.

V. **CONCLUSION**

For all of these reasons, this Court should deny Plaintiffs' Motion to Amend Complaint as to the contested amendments. It is time for all of the current issues already in the case to be joined and this case resolved.

Dated: July 29, 2009

JONES DAY

By: /s/ Tharan Gregory Lanier
Tharan Gregory Lanier

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