

1 Robert A. Mittelstaedt (SBN 060359)
Jason McDonell (SBN 115084)
2 Elaine Wallace (SBN 197882)
JONES DAY
3 555 California Street, 26th Floor
San Francisco, CA 94104
4 Telephone: (415) 626-3939
Facsimile: (415) 875-5700
5 ramittelstaedt@jonesday.com
jmcdonell@jonesday.com
6 ewallace@jonesday.com

7 Tharan Gregory Lanier (SBN 138784)
Jane L. Froyd (SBN 220776)
8 JONES DAY
1755 Embarcadero Road
9 Palo Alto, CA 94303
Telephone: (650) 739-3939
10 Facsimile: (650) 739-3900
tglanier@jonesday.com
11 jfroyd@jonesday.com

12 Scott W. Cowan (Admitted *Pro Hac Vice*)
Joshua L. Fuchs (Admitted *Pro Hac Vice*)
13 JONES DAY
717 Texas, Suite 3300
14 Houston, TX 77002
Telephone: (832) 239-3939
15 Facsimile: (832) 239-3600
swcowan@jonesday.com
16 jlfuchs@jonesday.com

17 Attorneys for Defendants
SAP AG, SAP AMERICA, INC., and
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' REPLY IN SUPPORT
OF MOTION TO COMPEL
PRODUCTION OF FINANCIAL
INFORMATION FROM PLAINTIFFS**

REDACTED

Date: August 18, 2009
Time: 2:00 PM
Courtroom: E, 15th Floor
Judge: Hon. Elizabeth D. Laporte

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. STATEMENT OF FACTS	2
A. Plaintiffs Have Not Produced Information Sufficient to Determine the Alleged Lost Profits of Each of the Three Plaintiffs.....	2
B. Defendants’ Made Extensive and Good Faith Efforts to Identify Relevant Financial Information through Depositions and “Meet and Confer” Discussions.....	5
III. ARGUMENT	11
A. Plaintiffs Should be Ordered to Produce General Ledger Information and the Reports that Can be Generated from the General Ledger	11
B. Plaintiffs Should be Ordered to Produce Reports Showing the Profitability of their PeopleSoft, J. D. Edwards and Siebel Product Lines and Detailed Financial Statements for Each Relevant Entity.....	13
C. Plaintiffs Should be Ordered to Provide a Complete Response to Defendants’ Targeted Search Request No. 3	13
D. OIC Should be Ordered to Produce a Witness for Supplemental Deposition.....	14
IV. CONCLUSION	15

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

Page

CASES

Fresenius Med. Care Holding Inc. v. Baxter Int'l, Inc.,
224 F.R.D. 644 (N.D. Cal. 2004) (LaPorte, J.)..... 1

RULES

Fed. R.Civ.P. Rule 53 6

1 **I. INTRODUCTION**

2 It has been two years since Defendants requested documents sufficient to show Plaintiffs'
3 lost profits. Yet—after two years of stonewalling—Plaintiffs have only recently promised to
4 produce product profitability reports and detailed profit and loss statements, and it remains to be
5 seen what information those reports will include. Plaintiffs continue to object to the production
6 of detailed general ledger information on burden grounds and therefore have refused to produce
7 *any* of it. Rather, they insist that Defendants continue to take depositions to pinpoint more
8 specific portions of the general ledger, and even then there is no guarantee that Plaintiffs will
9 produce anything. Plaintiffs are clearly attempting to run out the clock on Defendants'
10 opportunity to obtain information needed to defend against Plaintiffs' extraordinary damages
11 claims.

12 Plaintiffs dwell on Defendants' most recent efforts to get lost profits discovery and argue
13 that Defendants filed this motion prematurely. Plaintiffs ignore the many hours over many
14 months that Defendants spent drafting correspondence and pleadings, arguing these issues to the
15 Court, meeting and conferring and taking depositions attempting to acquire this information. But
16 it is not Defendants' responsibility to locate specific documents within Plaintiffs' massive
17 organization. Rather, Plaintiffs should locate responsive documents within their control and
18 produce them. *See, e.g., Fresenius Med. Care Holding Inc. v. Baxter Int'l, Inc.*, 224 F.R.D. 644,
19 652 (N.D. Cal. 2004) (LaPorte, J.). If Plaintiffs had genuine concerns about burden, they should
20 have explained how the requests should be narrowed. *Id.*, p. 653. This is something Plaintiffs
21 have refused to do, insisting instead that Defendants pursue an iterative course of expensive, time
22 consuming depositions until a pinpoint-focused request acceptable to Plaintiffs is defined.

23 Defendants nevertheless continue to meet and confer on these issues, and Plaintiffs have
24 made some concessions. The status of the five requests for relief is as follows:

25 **(1) General Ledger Information.** Plaintiffs resist production of *any* detailed general
26 ledger information. Plaintiffs have rejected Defendants' proposal that they produce information
27 derived from the general ledgers, including detailed Income Statements, Balance Sheets and Trial
28 Balances for each Oracle entity that received revenue from the former TN customers, offering

1 instead to provide that information only for the Plaintiff entities. That is not an acceptable
2 substitute for the information sought by this motion because it will not provide information about
3 other Oracle entities that may have received part of the funds from customers.

4 **(2) Product Profitability Reports.** Plaintiffs have agreed to produce these reports and
5 the underlying source documents that show how they were created. Defendants request that the
6 Court order a date certain for the production so that Defendants can conduct follow up discovery
7 as necessary.

8 **(3) Detailed Profit and Loss Statements.** Plaintiffs have agreed to produce these reports
9 for the three Plaintiffs. Defendants request that the Court order a date certain for production.

10 **(4) Response to Targeted Search Request No. 3.** Plaintiffs contend that their
11 production of described in (2) and (3), above, suffice as a response to this request. Defendants
12 cannot evaluate that contention until the documents are produced. Defendants therefore ask that
13 the Court order Plaintiffs to respond to the request.

14 **(5) Further Deposition of OIC.** OIC has agreed to produce a witness for further
15 deposition, but limited to the Siebel product line and inter-company license agreements that have
16 been produced since the first deposition. Defendants request an order requiring OIC to produce a
17 witness knowledgeable about the payments received by OIC in connection with the Registered
18 Works at issue in this case.

19 Time is running out. Plaintiffs should be ordered to produce this discovery now or suffer
20 the consequences of their refusal to do so.

21 **II. STATEMENT OF FACTS**

22 **A. Plaintiffs Have Not Produced Information Sufficient to Determine the Alleged** 23 **Lost Profits of Each of the Three Plaintiffs.**

24 Noticeably absent from Plaintiffs' opposition is any assertion that they *have* produced
25 sufficient information from which Defendants may reasonably understand and defend against
26 Plaintiffs' alleged lost profits. Indeed, their own expert declares that "*much* of the detailed
27 general ledger information requested by Defendants *may* not be relevant to their calculation of
28

1 lost profits in this case.”¹ By swearing that “much” of the information “may not be relevant,” he
 2 impliedly concedes that the rest of it may be relevant. In downplaying the importance of the
 3 general ledger information, he argues that it is “*unlikely* to result in a different determination
 4 than . . . other, more summary level financial information, which is either available or *will be*
 5 *made available.*” *Id.*, ¶ 10 (emphasis added). Yet Plaintiffs fail to identify that “other”
 6 information or to disclose when or how it will be made available.

7 Plaintiffs do not dispute that each of them is a separate corporation—Oracle USA, Inc.
 8 (“Oracle USA”), OIC and Oracle EMEA Ltd. (“OEMEA”)²—and that each alleges lost profits as
 9 a result of customers not renewing support contracts and instead obtaining support from TN.³
 10 The support contracts relate to three software product lines: PeopleSoft, J.D. Edwards and Siebel.

11 REDACTED

12
 13
 14
 15 Plaintiffs do not deny that they will try to prove lost profits by calculating the profits they
 16 made from customers *before* those customers left for TN. Accordingly, Defendants need
 17 financial records from which they can calculate the profits that *each Plaintiff* made from those
 18 customers. This requires a determination of the relevant revenues and expenses, as well as how
 19 the profits were distributed among the various Oracle entities.⁴

20 Despite the many ways in which Defendants have sought this information, Plaintiffs have
 21 not produced sufficient financial records. *See* Clarke Decl., ¶¶ 4-11. The financial information
 22 provided so far simply lacks the requisite level of detail. *Id.*, ¶ 5. Plaintiffs have produced no
 23 detailed corporate level financial information and no company general ledgers, and no detailed

24
 25 ¹ *See* Declaration of Paul K. Meyer in Support of Oracle’s Opposition to Defendants’
 Motion to Compel (“Meyer Decl.”), ¶ 24 (emphasis added).

26 ² *See* Plaintiffs’ Third Amended Complaint for Injunctive Relief (Dkt. 182), ¶¶ 34, 35 &
 37.

27 ³ *See, e.g.*, Plaintiffs’ Third Amended Complaint for Injunctive Relief (Dkt. 182), ¶ 141.

28 ⁴ *See, generally*, Declaration of Stephen K. Clarke in Support of Defendants’ Motion to
 Compel Production of Financial Information from Plaintiffs (“Clarke Decl.”), ¶¶ 10-11.

1 financial statements or trial balances that can be produced from the general ledger. *Id.*, ¶ 4. In
 2 addition, for the period prior to Oracle's acquisition of PeopleSoft, Plaintiffs have provided little
 3 detailed PeopleSoft financial information (*id.*, ¶ 8) and they continue to refuse to produce it to this
 4 day.⁵

5 Plaintiffs' corporate designee, Ivgen Guner, testified that [REDACTED]
 6 [REDACTED].⁶ Months later, other Oracle witnesses testified that [REDACTED]
 7 [REDACTED]. Faced with that testimony, Ms.

8 Guner now admits that [REDACTED]

9 [REDACTED].⁷ It appears that it was only after Defendants
 10 proved that these reports exist that Plaintiffs allegedly began a search for them and only after the
 11 threats of this motion that Plaintiffs agreed to produce them. They have promised to produce
 12 them by mid-August, together with the underlying source documents that reveal how the reports
 13 were created. This information must be provided soon as Defendants may need follow-up
 14 discovery.

15 Plaintiffs understate Defendants' needs for detailed financial information, suggesting that
 16 it is only relevant to the identification of costs. The information is relevant both to identification
 17 of costs *and* to trace the flow of profits from allegedly lost sales through the various Oracle
 18 entities. *See* Clarke Decl., ¶ 10. Various Oracle entities enter into contracts to sell support
 19 services to end-user customers. [REDACTED]
 20 [REDACTED]

21 Defendants need information showing these flows of funds to assess the alleged lost
 22 profits of each Plaintiff. *Id.*, ¶¶ 10-11.

24 ⁵ *See* Reply Declaration of Jason McDonell in Support of Defendants' Motion to Compel
 25 Production of Financial Information from Plaintiffs ("Reply McDonell Decl."), Ex. 1.

26 ⁶ *See* Declaration of Jason McDonell in Support of Plaintiffs' Motion to Compel
 27 Production of Financial Information ("McDonell Decl."), Ex. 6, pp. 72:2-73:6

28 ⁷ *See* Declaration of Ivgen Guner in Support of Oracle's Opposition to Defendants'
 Motion to Compel ("Guner Decl."), ¶ 6. [REDACTED]

1 In ongoing efforts to get the necessary evidence, Defendants continue to negotiate with
 2 Plaintiffs. Plaintiffs have rejected a proposal that they provide detailed Income Statements,
 3 Balance Sheets and Trial Balances for each Oracle entity that received any revenue, directly or
 4 indirectly, from the former TN customers, to be provided on a monthly basis and for the period
 5 January 1, 2002 through October 31, 2008. Instead, Plaintiffs offer only quarterly reports and
 6 only limited to the three Plaintiffs. *See Reply McDonell Decl., Ex. 1.* Because those reports will
 7 not REDACTED, they are not a
 8 suitable substitute for the general ledger information.

9 **B. Defendants Made Extensive and Good Faith Efforts to Identify Relevant**
 10 **Financial Information through Depositions and “Meet and Confer”**
 11 **Discussions.**

11 Plaintiffs’ argue that Defendants have failed to “meet and confer” and should take more
 12 depositions about Oracle’s financial systems before moving to compel. However, forcing
 13 Defendants to obtain needed discovery in the least efficient manner simply in an effort to run the
 14 clock on Defendants is contrary to the Federal Rules and this Court’s repeated, clear guidance.
 15 Defendants should not have to take depositions to prove that Plaintiffs have responsive
 16 documents that they have not produced. Yet Defendants have been forced to spend many hours
 17 in deposition attempting to identify such documents. The following *partial* history of
 18 Defendants’ efforts shows that Defendants have more than done their part in seeking damages
 19 discovery.

20 **July 2007.** On July 26, 2007, Defendants served requests for documents “relating to any
 21 alleged loss of revenues or profits by Oracle as a result of the conduct alleged in the Complaint.”⁸
 22 Plaintiffs agreed to produce documents “sufficient to show Oracle’s revenues, costs, and profit
 23 margins for support or maintenance services relating to legacy PeopleSoft and J.D. Edwards
 24 enterprise software applications for which Oracle has alleged that defendants Downloaded
 25 Software and Support Materials from Oracle’s systems” *Id.* Yet, by January 2008, Plaintiffs
 26 changed course and argued that discovery of “information showing the losses Oracle has
 27

28 ⁸ *See McDonell Decl., ¶ 3, Ex. 3 at 48.*

1 sustained due to Defendants' conduct" should be deferred and that "there is no reason for early
2 discovery of this information."⁹

3 **January-February 2008.** On January 8, 2008, Judge Legge was appointed Special
4 Discovery Master.¹⁰ Three weeks later, Defendants filed a motion to compel production of
5 "documents reflecting revenues, costs and profits for support and maintenance services *for the*
6 *products* referred to in the Complaint or at issue in the litigation" and for the TN customers.
7 Reply McDonell Decl., Ex. 2 at 7. In response, Plaintiffs agreed to produce "an immense amount
8 of financial data about Oracle's entire business, including actual PeopleSoft and JD Edwards
9 support and application revenue, operating expenses . . ." *Id.*, Ex. 3 at 10-11. On February 22,
10 2008, Judge Legge ordered Plaintiffs to produce that information, but otherwise recommended
11 that damages discovery be deferred. *See* Dkt. 66 at 8-9.

12 **April 2008.** At the April 24, 2008 Case Management Conference, Judge Hamilton
13 rejected the Special Master's recommendation that damages discovery should be deferred and
14 ordered that it proceed immediately. *See* Dkt. 77 ("The Court informs the parties that all
15 discovery including damages discovery is open.").

16 **June 2008.** On June 2, 2008, Defendants notified Plaintiffs that the documents produced
17 thus far were not sufficient to show Plaintiffs' revenues, pricing, costs, and profit margins relating
18 to support and maintenance:

19 With respect to the other documents Oracle has produced, it is either incomplete
20 or not sufficiently detailed to provide the requested information. For example,
21 Oracle's Form 10k does not provide the level of detail required to calculate
22 research and development costs for the products at issue, as Oracle contends. Nor
23 are they, or the other high-level financial documents Oracle has produced,
24 sufficient to determine, for example, Oracle's profit margin for these products.

25 McDonell Decl., Ex. 4 at 2. Defendants demanded that Plaintiffs produce Oracle charts of
26 accounts as well as "detail at the general ledger level to support . . . product support revenues and
27 expenses." *Id.*, Ex. 4 at 3.

28 ⁹ *See* Reply McDonell Decl., Ex. 3 at 12.

¹⁰ *See* Stipulation and Order Re: Designation of the Honorable Charles A. Legge (Ret.) as
Special Discovery Master in Accordance with Fed. R. Civ. P. 53. Dkt. 55.

1 **July 2008.** Defendants reported in the July 1, 2008 Joint Discovery Conference Statement
 2 on Oracle's failure to produce financial information and the possible need for a motion to compel.
 3 Dkt. 102 at 25. Defendants also reported on the June 20, 2008 meet and confer among the parties
 4 and that Plaintiffs claimed to be looking for other sources for this information and would make it
 5 a priority. *Id.* Defendants noted that even then Oracle's damages discovery responses were long
 6 overdue and, if sufficient documents were not produced shortly, Defendants would have no
 7 choice but to move to compel. *Id.*

8 **August 2008.** Defendants again reported in the August 28, 2008 Joint Discovery
 9 Conference Statement on the possible need to file a motion to compel Plaintiffs to produce
 10 financial information. Dkt. 167 at 9.

11 **September 2008.** In September, Defendants took Plaintiffs' deposition on the subject of
 12 the records that Oracle maintains concerning revenues, costs and profit margins for the
 13 PeopleSoft and J. D. Edwards product lines. McDonell Dec., Ex. 6 at 14-15. In response, Oracle
 14 presented Ms. Guner who testified— REDACTED

15
 16 **October 2008.** The parties met and conferred on October 7, 2008. Plaintiffs argued that
 17 the "customer contracts themselves were a sufficient source of information in response to . . .
 18 requests for documents showing Oracle's revenues, pricing, costs and profit margins relating to
 19 support and maintenance." Reply McDonell Decl., Ex. 4 at 2. Defendants reiterated their June 2
 20 requests for charts of accounts and general ledger information. Plaintiffs refused to discuss this
 21 request unless it was put in writing. In response, Defendants wrote:

22 If Oracle intends to rely in any way on its historical profitability as part of its
 23 damages analysis in this case, then we need full discovery into Oracle's
 24 profitability. Calculating profitability involves, among other things, calculating
 25 both revenues and expenses. You suggested that we look to Oracle's published
 26 financial statements for profitability information. I noted to you that Oracle's
 27 own Annual Report filed with the Securities and Exchange Commission states
 28 that the figures that Oracle publishes for profit margins do not represent the
 "actual margins" because they do not include a variety of expenses. *See, e.g.,*
 Oracle Corporation Form 10-K for the fiscal year ended May 31, 2007, p. 103, n.
 2. In order to get the expense information, we need to understand the composition
 of Oracle's expenses. You have refused to produce Oracle's general ledger on
 burden grounds. In response and in an effort to reduce burdens, we have

1 requested the chart of accounts so we can attempt to identify the potentially
2 relevant expense line items and then follow up with a more limited request for
3 general ledger information relating to those expense items.

4 *Id.* at 3. Defendants renewed their demand for the chart of accounts for all relevant periods.

5 In the October 10, 2008 Joint Discovery Conference Statement, Defendants reported that
6 they were continuing to meet and confer with Oracle regarding an anticipated motion to compel
7 damages discovery and would request a briefing schedule for a motion to compel production of
8 charts of accounts and general ledger information. Dkt. 178 at 12. At the October 10, 2008
9 Discovery Conference, the parties reported that they were still discussing the issue, and the Court
10 encouraged Plaintiffs to produce “the bigger picture, less granular information quickly . . . the
11 sooner people have a handle on kind of how much is really at stake the better.” Reply McDonell
12 Decl., Ex. 5 at 66.

13 **January 2009.** In the January 8, 2009 Joint Discovery Conference Statement, Defendants
14 forced the issue and requested a date for a hearing on a motion to compel. Dkt. 226 at 9-11. At
15 the conference, Plaintiffs continued to argue their burden objection, even as to the chart of
16 accounts, and stated that they “will be ready to oppose this” Reply McDonell Decl., Ex. 6
17 at 56. The Court noted that Defendants are “absolutely entitled to some profit data if you’re
18 going to go after lost profits.” *Id.* The Court stated that

19 . . . Oracle definitely has to go to some real expense on its letting them, you know,
20 have their defense on damages, because you’re seeking millions of dollars. So I
21 wouldn’t consider spending some money on that and putting them more of an
22 equal footing because you have full access to it to be disproportionate necessarily.

23 *Id.*, p. 58. Evidently based on the Court’s foreshadowing, the next week Plaintiffs reversed their
24 position and agreed to produce the charts of accounts. *See* Reply McDonell Decl., Ex. 7.

25 **February–March 2009.** Plaintiffs then took two more months to produce the charts of
26 accounts, representing that they had completed the production on March 26, 2009. McDonell
27 Decl., Ex. 14.

28 **March–May 2009.** Meanwhile, Defendants continued to investigate damages issues
through depositions of Plaintiffs’ senior officers, with mixed and contradictory results. Oracle’s

1 President (Safra Catz) and Chief Accounting Officer (Corey West) testified that REDACTED

2 ¹¹ In direct contradiction, its CEO (Larry Ellison) and
3 worldwide head of support (Juergen Rottler) testified that REDACTED

4 ¹²
5 **April 2009.** After considerable effort in analyzing the charts of accounts, on April 29,
6 2009, Defendants provided a list of the accounts for which they requested general ledger
7 information.¹³ In response, Plaintiffs argued that the request was overly broad and refused to
8 produce the information. *See* McDonell Decl., Ex. 15.

9 Also in April, Defendants took the deposition of OIC (the alleged owner of all of the
10 copyrights at issue) to explore the extent to which the various Oracle entities divided the funds
11 received from customers. The notice covered “[p]ayments, including but not limited to royalty
12 payments, received by or to OIC in connection with the Registered Works” and “[h]ow costs are
13 allocated among the participants” to the applicable Cost Sharing Agreements. McDonell Decl.,
14 Ex. 17.

15 The OIC deposition was in many ways a waste of time. The witness, Ms. Kishore,
16 admitted that REDACTED

17
18 Without this fundamental
19 knowledge, Ms. Kishore was unable to testify about the payments received and costs incurred by
20 OIC in connection with the specific intellectual property at issue in this case.

21 **May 2009.** In May, the parties again met and conferred about the general ledger.
22 Defendants had previously noticed the deposition of Alex San Juan, based on Corey West’s
23 testimony that Mr. San Juan might be more knowledgeable than Mr. West had been. The San
24 Juan deposition was scheduled for June 19. On May 11, the parties discussed the possibility of

25
26 ¹¹ *See* McDonell Decl., Ex. 7 at 179:15-180:1; Ex. 8 at 69:10-70:6.

27 ¹² *See* McDonell Decl., Ex. 9 at 47:6-48:8, 48:4-49:14; Ex. 10 at 177:1-180:7, 179:21-
180:4, 178:4-14, 194:84-196:10.

28 ¹³ *See* Declaration of Holly A. House in Support of Oracle’s Opposition to Defendants’
Motion to Compel Financial Informaton (“House Decl.”), Ex. F.

1 working informally to resolve the general ledger issue. Plaintiffs suggested that Mr. San Juan
2 may be able to participate. On May 14, 2009, Plaintiffs confirmed this in writing:

3 Further, while Mr. San Juan's availability is extremely limited in June, he can be
4 available in Silicon Valley on June 19, and in addition, if questions arise about the
5 General Ledger issues in the interim (e.g. burden), he may be available, through
6 Nitin Jindal [Plaintiffs' counsel], to help provide clarification before June 19
7 depending on the timing and complexity of the issue.¹⁴

8 Defendants embraced the approach of working informally to attempt to resolve the general ledger
9 issue without additional depositions.

10 On May 26, Plaintiffs refused to provide a corporate designee knowledgeable on the chart
11 of accounts issue and insisted on producing Mr. San Juan *only in his individual capacity and not*
12 *as the authoritative spokesman on this subject.* See House Decl., Ex. K at 5

13 On June 4, the parties again discussed the possibility of informal resolution, and on June
14 12, Defendants wrote to Plaintiffs "[f]ollowing up on the suggestion in our recent telephone
15 discussions" and suggested a call with Mr. Nitin Jindal, the attorney working with Mr. San Juan.
16 McDonell Decl., Ex. 18 at 3. On June 16, Defendants postponed the San Juan deposition, in part
17 hoping that the parties could work through the issue without the need for yet another deposition.
18 See House Decl., Ex. L.

19 Since then, Plaintiffs have flip-flopped on their willingness to work informally. Some
20 days they say they will, some days they say they will not. See House Ex. U at 1. The issue of
21 Mr. San Juan's input into the general ledger issue is largely moot, however, as he has provided a
22 declaration with his views in opposition to this motion. All of the burdens that he identifies can
23 be resolved, at least initially, by Plaintiffs' production of reports that can be generated from the
24 general ledger.

25 **June 2009.** On June 12, 2009, Defendants again expressed their concerns over the lack of
26 lost profits discovery. See McDonell Decl., Ex. 18. These concerns were included in the June 25
27 Joint Discovery Conference Statement (Dkt. 326 at 2-5) and at the conference the Court granted
28 permission for Defendants to file this motion.

¹⁴ House Decl., Ex. H.

1 **July 2009.** On July 29, the parties met and conferred yet again on the general ledger and
 2 Defendants made a proposal that might resolve the motion for general ledger information. *See*
 3 Reply McDonell Decl., Ex. 1. Specifically, Defendants proposed that Plaintiffs produce Income
 4 Statements, Balance Sheets and Trial Balances for each Oracle entity that received any revenue,
 5 directly or indirectly, from the former TN customers. *See id.* These would be provided on a
 6 monthly basis, in the level of detail described in Ms. House’s July 10, 2009 letter¹⁵ and for the
 7 period January 1, 2002 through October 31, 2008. *See* McDonell Decl., Ex. 1. Defendants would
 8 review this information in good faith in an effort to resolve the general ledger request and would
 9 reserve rights to seek additional information if this information proves to be inadequate. *Id.* On
 10 August 4, Plaintiffs rejected the proposal, offering only to provide part of the information
 11 requested in the proposal. *Id.*

12 In yet another parallel attempt to get at Plaintiffs’ revenues and profitability information,
 13 Defendants served their Targeted Search Request No. 3. The request calls for documents
 14 sufficient to show revenue, expenses and net income to each Plaintiff entity resulting from sales
 15 by any Oracle entity of PeopleSoft and/or J.D. Edwards software or services to TN’s former
 16 customers. On July 17, 2009, Plaintiffs served objections, but have agreed to produce certain
 17 reports. *See* Reply McDonell Decl., Ex. 8.

18 **III. ARGUMENT**

19 Defendants have made more than reasonable efforts to obtain damages discovery. It is
 20 time for an order requiring production of the information necessary for a lost profits analysis and
 21 for Plaintiffs to do so by a date certain.

22 **A. Plaintiffs Should Be Ordered to Produce General Ledger Information and the** 23 **Reports that Can Be Generated from the General Ledger**

24 While Plaintiffs complain that the level of detail requested from the general ledger is
 25 “excessive” and “more summary level financial information” is either available or will be made
 26 available, that is no excuse. Meyer Decl., ¶ 10. Plaintiffs have not identified this “more summary
 27

28 ¹⁵ *See* House Declaration, Ex. T at 4.

1 level” information or explained why it might suffice. Nor have Plaintiffs or their expert asserted
2 that Defendants have sufficient information with which to calculate lost profits.

3 With access to the detailed general ledger information, Defendants’ expert could perform
4 analyses that may identify which accounts are appropriate to include in a lost profits analysis and
5 which should be excluded. *See* Clarke Decl., ¶ 14. By its very nature, such an exercise requires
6 review of a broad group of accounts to determine which should be included and which should be
7 excluded. *Id.* at 15. Thus, while Defendants made a good faith effort to reduce the burden on
8 Plaintiffs by selecting only certain accounts from the chart of accounts, it is no surprise that they
9 cast the net broadly. Plaintiffs’ experts’ opinion that “much of the detailed general ledger
10 information requested by Defendants *may not be relevant* to their evaluation of lost profits in this
11 case,” simply proves the point that much of it is relevant. Meyer Decl., ¶ 24 (emphasis added);
12 *See also* Clarke Decl., ¶ 17.

13 The burdens Oracle identifies can be overcome. In his declaration,¹⁶ Mr. San Juan
14 identifies the following burdens: REDACTED

15
16
17 These concerns
18 should not prevent substantial, meaningful information from being provided. *See* Clarke Decl.,
19 ¶ 20. Plaintiffs should be able to provide the requested information for the Oracle entities that
20 received revenues from the former TN customers, at least at the trial balance level of detail for the
21 relevant period.

22 Defendants have made a reasonable offer to Plaintiffs to accept on an interim basis
23 the information generated from the general ledger including the detailed Income Statements,
24 Balance Sheets and Trial Balances. Plaintiffs have rejected that proposal and offered only
25 quarterly reports and only limited to the three Plaintiffs. *See* Reply McDonell Decl., Ex. 1.

26
27
28 ¹⁶ *See* Declaration of Alex San Juan in Support of Oracle’s Opposition to Plaintiffs’
Motion to Compel (“San Juan Decl.”).

1 Because those reports likely will not show all of the inter-company splits of revenues among the
2 various entities, they are not a suitable substitute for the general ledger information.

3 **B. Plaintiffs Should be Ordered to Produce Reports Showing the Profitability of**
4 **Their PeopleSoft, J.D. Edwards and Siebel Product Lines and Detailed**
5 **Financial Statements for Each Relevant Entity**

6 Plaintiffs have agreed to produce product profitability reports for their PeopleSoft,
7 J.D. Edwards and Siebel product lines, as well as the underlying source documents that explain
8 how they were created. Given the history of misinformation on this issue and the many months
9 that have been lost as a result, the Court should order the production of these documents by a date
10 certain. Arguably, Judge Legge already ordered these documents to be produced in his
11 February 22, 2008 order. Likewise, Plaintiffs should be ordered to produce the detailed Profit
12 and Loss Statements.

13 **C. Plaintiffs Should Be Ordered to Provide a Complete Response to Defendants'**
14 **Targeted Search Request No. 3**

15 Targeted Search Request No. 3 is simply another formulation of the requests Defendants
16 have been making all along for information sufficient to show Plaintiffs' lost profits. The request
17 seeks documents sufficient to show revenue, expenses and net income to each Plaintiff entity
18 resulting from sales by any Oracle entity of the relevant software products to TN's customers.
19 *See McDonell Decl., Ex. 16.*

20 On May 27, June 3 and July 17, Plaintiffs objected to this request. Ultimately, Plaintiffs
21 contend that the only responsive information they have are the product line profitability reports
22 and the detailed financial statements that are subjects discussed in the preceding section.
23 Plaintiffs state that they will produce them, "subject to Defendants' clarification for the level of
24 detail requested" Reply McDonell Decl., Ex. 8 at 19.

25 As part of the pending proposal to accept less-detailed general ledger information,
26 Defendants have requested profitability reports in the level of detail represented by Plaintiffs'
27 counsel to exist (*i.e.*, the "Detailed Income Statement Report" that contains "over 200 line items").
28 House Decl., Ex. T at 4. Only after receipt and an opportunity to review this information,

1 however, will Defendants be in a position to assess its adequacy. Thus, Defendants request an
2 order requiring Plaintiffs to respond to the Targeted Search Request No. 3 and reserve all rights.

3 **D. OIC Should Be Ordered to Produce a Witness for Supplemental Deposition**

4 This is a straightforward issue. OIC has simply failed to produce a knowledgeable
5 witness on the specific topics at issue in the deposition. OIC has agreed to produce a witness for
6 further deposition, but limited to the Siebel product line and inter-company license agreements
7 that have been produced since the first deposition. *See* House Decl., Ex. T at 5. That is not
8 sufficient.

9 Defendants’ deposition notice required a witness to testify on the subject of “royalty
10 payments, received by or due to OIC in connection with the Registered Works” and
11 “[i]dentification of each source of such payments” McDonell Decl., Ex. 17. The obvious
12 purpose of this deposition was to gather discovery about the payments that OIC receives for its
13 licenses to other Oracle entities (who in turn license to customers) for the specific intellectual
14 property at issue in this case.

15 OIC’s witness, Ms. Kishore, was unprepared to testify on the noticed topics, having no
16 knowledge of the fundamental issue upon which the notice was based, the Registered Works.

17 Specifically, Ms. Kishore testified that

REDACTED

18
19
20
21
22
23
24 The deposition notice clearly defined a “Registered Work” as “a work underlying a
25 federal copyright registration identified in the Complaint and any subsequent amendments to the
26 Complaint.” *Id.*, Ex. 17 at 3.

REDACTED

27 REDACTED

1 REDACTED

2
3 REDACTED

4
5 Due to her lack of
6 knowledge, Ms. Kishore was completely unable to tie any payments received by OIC to any of
7 the Registered Works at issue in the case.

8 OIC’s argument is difficult to follow. Without the ability to tie OIC’s right to receive any
9 payments for its licenses of the Registered Works to its affiliates, OIC cannot make out a case of
10 lost profits. Defendants’ noticed topics are not, therefore, “predicated upon false assumptions” as
11 Plaintiffs contend. Rather, they are at the very heart of OIC’s claims for copyright-related
12 damages. REDACTED

13 , lost profits in a copyright infringement suit are ultimately proven this way.
14 This is precisely why Defendants served this 30(b)(6) notice in the first place—to understand how
15 OIC is ultimately paid for the specific intellectual property licensed via the inter-company
16 agreements. If OIC is unable to provide a witness on this topic, it is unclear how it will ever be
17 able to establish its own lost profits. OIC should be ordered to produce a knowledgeable witness
18 on this topic.

19 **IV. CONCLUSION.**

20 For the foregoing reasons, Defendants respectfully request that the Court grant their
21 motion and order Plaintiffs to produce immediately the requested documents and testimony.

22 Dated: August 4, 2009

JONES DAY

23 By: /s/ Jason McDonell
24 Jason McDonell

25 Attorneys for Defendants
26
27
28