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19 UNITED STATES DISTRICT COURT
20 NORTHERN DISTRICT OF CALIFORNIA
21 OAKLAND DIVISION

23 ORACLE CORPORATION, *et al.*,
24 Plaintiffs,
25 v.
26 SAP AG, *et al.*,
27 Defendants.

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

**REPLY DECLARATION OF
SCOTT W. COWAN
IN SUPPORT OF DEFENDANTS'
MOTION TO COMPEL**

1 I, SCOTT W. COWAN, declare:

2 I am a partner with the law firm of Jones Day and counsel for Defendants in the above-
3 captioned matter. I make this declaration based on personal knowledge and, if called upon to do
4 so, could testify competently thereto.

5 1. Attached as **Exhibit A** is a true and correct copy of excerpts from the August
6 4, 2009 Transcript of Proceedings before Judge Laporte, at 28:16-17, 29:4-5, 30:14-31:4.

7 2. Attached as **Exhibit B** is a true and correct copy of the August 31, 2009 Order
8 Granting in Part and Denying in Part Plaintiffs' Motion to Compel Production of Documents
9 Related to Damages Model and Interrogatory Responses Related to Use of Plaintiffs' Intellectual
10 Property, Dkt. No. 460.

11 3. In connection with the Expanded Discovery Timeline Agreement (the
12 "Agreement"), the Parties discussed and agreed to produce responsive data from "key custodians"
13 collected after the litigation. I personally participated in those discussions. Based on those
14 discussions and the Agreement, Defendants promptly started the costly recollection and
15 production process for six custodians, *i.e.* Mark White, Martin Breuer, Andrew Nelson, Shelley
16 Nelson, Greg Nelson and John Baugh. Defendants produced the responsive, non-privileged data
17 for these custodians up through the time of TomorrowNow's wind down on October 31, 2008. In
18 addition, on April 10, 2009, Plaintiffs specifically requested that Defendants recollect and
19 produce the documents through the same date for three more custodians, *i.e.* Werner Brandt (SAP
20 Executive Board Member), Gerhard Oswald (SAP Executive Board Member), and Thomas
21 Bamberger (SAP Supervisory Board Member). This request is memorialized in the parties' meet
22 and confer communications and in the Stipulation to Modify May 5, 2008 Case Management
23 Order (Dkt. No. 305, at 4, ¶ 3). In addition, as part of the Agreement, Defendants incurred the
24 expense and burden to recollect, review, and produce through October 31, 2008 numerous
25 TomorrowNow tracking databases, including SAS.

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I declare under penalty of perjury under the laws of the United States and the State of California that the foregoing is true and correct. Executed this 12th day of January, 2010, in Houston, Texas.

 /s/ Scott W. Cowan
Scott W. Cowan

HUI-122876v1

EXHIBIT A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE ELIZABETH D. LAPORTE, MAGISTRATE

ORACLE CORPORATION,)
)
Plaintiff,)
)
VS.)NO. C 07-1658
)
SAP AG, et al,)
)San Francisco, California
Defendants.)Tuesday
)August 4, 2009
)2:00 p.m.

TRANSCRIPT OF PROCEEDINGS

APPEARANCES :

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HEATHER FUGITT, ESQ.

Reported By: Debra L. Pas, CSR 11916, CRR, RMR, RPR
Official Reporter - US District Court
Computerized Transcription By Eclipse

16 **THE COURT:** I'm not telling you to do new
17 comparisons.

4 I'm not telling you -- right now I'm not tackling
5 do something new, which is the main thrust of all of this.

14 **THE COURT:** I think that it may very well be as one
15 of the things that comes out of this hearing you should do
16 what plaintiffs propose; provide an explanation of how you
17 concluded certain downloads were inappropriate, as stated in
18 the press release and to the extent it's stated in the
19 answer, which is not so much inappropriate, but didn't match
20 what the customer representative authorized.

21 **MR. COWAN:** Right.

22 **THE COURT:** And to the extent you can't identify
23 those by problem product, which sounds like you mostly can't
24 but somewhat can, to do that. I don't see anything wrong
25 with that.

1 Now, I'm not asking you to the extent that you
2 can't recall any more and you don't have a record of it,
3 well, then, the answer to that part of that is we don't know,
4 but this is what we do know.

EXHIBIT B

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16 UNITED STATES DISTRICT COURT
17 NORTHERN DISTRICT OF CALIFORNIA
18 SAN FRANCISCO DIVISION

19 ORACLE USA, INC. *et al.*,
20 Plaintiffs,
21 v.
22 SAP AG, *et al.*,
23 Defendants.

No. 07-CV-01658 PJH (EDL)

**[PROPOSED] ORDER GRANTING
IN PART AND DENYING IN PART
PLAINTIFFS' MOTION TO
COMPEL PRODUCTION OF
DOCUMENTS RELATED TO
DAMAGES MODEL AND
INTERROGATORY RESPONSES
RELATED TO USE OF
PLAINTIFFS' INTELLECTUAL
PROPERTY**

1 After considering the pleadings and memoranda submitted by the Parties and supporting
2 papers, and having heard the arguments of counsel, IT IS HEREBY ORDERED that Plaintiffs'
3 Motion to Compel Production of Documents Related to Damages Model and Interrogatory
4 Responses Related to Use of Plaintiffs' Intellectual Property in the above-named action is
5 GRANTED in part and DENIED in part as follows:

6 1. Within 21 days of the date of this Order, Defendants shall provide a
7 supplemental response to Interrogatory No. 13 from Oracle Corporation's First Set of
8 Interrogatories to Defendant TomorrowNow, Inc. ("Interrogatory 13"). The supplemental
9 response shall include a detailed explanation (*e.g.*, including a download's product line, file
10 identifier, customer credential used, or any other similar information), to the extent Defendants'
11 records and memories allow, of the process Defendants employed and factual conclusions
12 Defendants made that resulted in Defendants' answer to paragraph 15 of Oracle's First Amended
13 Complaint, D.I. 36 ("FAC Answer") on July 2, 2007 and Defendants' representatives' statements
14 in press releases/news conferences on July 2-3, 2007 that "inappropriate downloads" took place.
15 Subject to the limits of Defendants' records and memories, the supplemental response shall be
16 provided in a manner and contain information consistent with the direction the Court provided to
17 Defendants' counsel during the hearing, including the bases on which Defendants concluded that
18 "on some occasions, materials have been downloaded beyond those that, according to TN's
19 records, related to applications licensed to the particular customer on whose behalf the
20 downloads were made" and any other factual conclusions resulting from Defendants' analyses of
21 any and all downloads relating to Defendants' answer to paragraph 15 of the FAC or
22 Defendants' representatives' statements in press releases/news conferences on July 2-3, 2007
23 that "inappropriate downloads" took place. To the extent possible, the supplemental response
24 shall refer by Bates number and/or specific native data location to any customer contracts,
25 download verification forms, and/or other non-privileged documents relied upon in forming
26 Defendants' factual conclusions and analyses described above. Defendants' supplemental
27 response to Interrogatory No. 13 shall not be construed as a waiver of either the attorney-client
28 privilege or work product immunity.

1 2. Within 30 days of the date of this Order, Defendants shall provide a
2 supplemental response to Interrogatory No. 14 from Oracle USA, Inc.'s Second Set of
3 Interrogatories to Defendant TomorrowNow, Inc. ("Interrogatory 14"), as to fixes associated
4 with the following Master Fix IDs selected by Oracle: for PeopleSoft, CSS-TN-0112069292,
5 TN-AP06OCT, CSS-TN-0103076718, 2005B-751C, and CSS-TN-0114089315, and for JD
6 Edwards, 1101064011, 1010067551, 1012062843, 1122054572, and 1015079561. Interrogatory
7 14 asks Defendants to "Identify all Customers who received support based on the Use of
8 [TomorrowNow's local] environment[s], and [to provide] a detailed description of that support."
9 To the extent possible, for each of the Master Fix IDs listed above, Defendants shall list each
10 customer that received support in the form of a fix, bundle, or other deliverable that flowed from
11 that Master Fix ID. To the extent possible, for each Master Fix ID listed above, Defendants shall
12 (1) identify every environment used during, or associated with, each point in the fix-delivery
13 process (including, for PeopleSoft HRMS Master Fix IDs, replication, development, unit testing,
14 individual fix testing, bundling, and bundle testing, as applicable, and for other PeopleSoft
15 Master Fix IDs and JDE Master Fix IDs, any equivalent, analagous, or different points), (2) state
16 how each identified environment was used, and (3) identify the source of the information
17 regarding each environment used. Where Defendants lack information regarding which
18 environments, if any, were used in the fix delivery process for a particular Master Fix,
19 Defendants shall state that they have no information at this time and that they have made a
20 reasonable search for such information. Defendants' supplemental response shall refer by Bates
21 number and/or specific native data location to each non-privileged document relied upon in
22 supplementing their response, and if Defendants rely on any non-privileged documents or data
23 not previously produced by any party in this case, then such documents or data must be produced
24 with the response. Defendants will provide a separate supplemental response to Interrogatory
25 14, denoted as a response to Interrogatory 14(a), which describes the process, amount of time
26 used, and expense incurred in preparing the supplemental response and identifies the consultants
27 and former employees who assisted in creating the response to Interrogatory 14. Defendants'

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1 supplemental response to Interrogatory 14 and response to Interrogatory 14(a) shall not be
2 construed as a waiver of either the attorney-client privilege or work product immunity.

3 3. The portions of Plaintiffs' Motion to Compel relating to licenses, valuations, sales
4 close rates, and support renewal rates have been mooted by agreement of the Parties.

5
6 As to all issues for which relief is not specifically granted by paragraphs 1 and 2 above or
7 mooted by paragraph 3 above, the Court DENIES the relief requested in Plaintiffs' motion
8 without prejudice.

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11 IT IS SO ORDERED.

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14 DATED: __ August 31 ____, 2009

