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21 UNITED STATES DISTRICT COURT
22 NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

23 ORACLE USA, INC., *et al.*,
24 Plaintiffs,
25 v.
26 SAP AG, *et al.*,
27 Defendants.
28

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

**JOINT STATEMENT PER AUGUST
6, 2010 ORDER**

1 Pursuant to the Court's August 6, 2010 Order, Plaintiffs Oracle USA, Inc., Oracle
2 International Corporation, Oracle EMEA Limited, and Siebel Systems, Inc. ("Plaintiffs") and
3 Defendants SAP AG, SAP America, Inc., and TomorrowNow, Inc. ("Defendants") make the
4 following joint submission.

5 **I. Parties' Proposal Regarding the Process to Streamline the Case for Trial**

6 The parties agree that the assistance of a Magistrate Judge would help facilitate the
7 parties' discussions regarding streamlining the case for trial, and that these discussions should be
8 further managed by Magistrate Judge Spero, the assigned settlement magistrate. The next
9 settlement conference is scheduled for September 7, 2010. The parties will work with Magistrate
10 Judge Spero before then to expedite progress toward streamlining the case for trial.

11 **II. Effect of Defendants' Proposed Concessions on Pending Motions for Partial
12 Summary Judgment**

13 Thirteen issues were presented in the parties' pending motions for partial summary
14 judgment and Defendants' cross-motion, as set forth in Exhibit A, the list of issues presented
15 without objection to the Court at the May 5 argument on summary judgment. The parties have
16 met and conferred regarding the status of those issues. As described below, the parties agree that
17 Plaintiffs are entitled to summary judgment on Issues Nos. 1, 2, 4 and 6 of their motion by reason
18 of Defendants' election not to contest, and further agree that Issues Nos. 3 and 7 of Plaintiffs'
19 motion and Issues Nos. 1, 2 and 4 of Defendants' motion are ripe for decision. The parties
20 disagree whether the remaining issues, Issue No. 5 of Plaintiffs' motion, Issues Nos. 3, 5 and 6 of
21 Defendants' motion/cross-motion would be or have been mooted by the concessions proposed in
22 Defendants' Trial Brief and related public statements.

23 **A. Issues Which Have Been Resolved by Defendants' Elections Not to Contest**

24 The Parties agree that by reason of Defendants' election not to contest as set forth in their
25 opposition papers and at argument on summary judgment, summary judgment may be granted in
26 favor of Plaintiffs on Issues Nos. 1, 2, 4 and 6 of Plaintiffs' motion, specifically:
27
28

- 1 • Direct copyright infringement of six registrations by TomorrowNow, Inc. (the
- 2 three PeopleSoft registrations for the period beginning March 1, 2005 and the three
- 3 Oracle Database registrations with no time limitation);
- 4 • Vicarious copyright infringement of the same six registrations over the same time
- 5 periods by SAP AG and SAP America, Inc.;
- 6 • Direct liability of TomorrowNow, Inc. for violations of Computer Fraud and
- 7 Abuse Act, 18 U.S.C. § 1030(a)(2)(C); and
- 8 • Direct liability of TomorrowNow for violations of California Data Access and
- 9 Fraud Act, Cal. Penal Code § 502(c)(7).

10 **B. Issues Which Remain Open for Resolution on Summary Judgment**

11 The Parties agree that Issues Nos. 3 and 7 of Plaintiffs' motion and Issues Nos. 1, 2 and 4
12 of Defendants' motion remain and are ripe for decision, even in light of Defendants' proposed
13 concessions and related statements, specifically:

14 *Plaintiffs' Motion for Partial Summary Judgment*

- 15 • Contributory copyright infringement of six registrations by SAP AG and SAP
- 16 America, Inc.; and
- 17 • Indirect liability of SAP AG and SAP America, Inc. for TomorrowNow's
- 18 uncontested Computer Fraud and Abuse Act and California Data Access and Fraud
- 19 Act violations.

20 *Defendants' Motion for Partial Summary Judgment*

- 21 • Unavailability of "saved development costs" as a measure of damages in this case;
- 22 • Unavailability of lost profits of related, non-party entities in this case, and whether
- 23 SAP's proposed order seeking a ruling that Oracle cannot seek any damages of
- 24 non-parties is overbroad; and
- 25 • Limitation of damages under the California Data Access and Fraud Act, Cal. Penal
- 26 Code § 502, to no more than Plaintiffs' alleged "investigation costs."
- 27
- 28

1 **C. Issues As to Which the Parties Disagree Whether They Are Open for**
2 **Resolution**

3 The parties do not agree on the impact of Defendants' Trial Brief and other statements on
4 the other issues raised in the pending motions (Issue No. 5 of Plaintiffs motion, Issues Nos. 3 and
5 5 and Issue No. 6 of Defendants' cross-motion), specifically:

- 6 • Direct liability of TN for violations of Computer Fraud and Abuse Act, 18 U.S.C.
7 § 1030(a)(5)(A)(i)-(iii);
- 8 • Unavailability of damages for Plaintiffs' claims of trespass to chattels and
9 violations of the California Data Access and Fraud Act, Cal. Penal Code § 502;
- 10 • Dismissal of Oracle EMEA, Ltd.'s claims; and
- 11 • Dismissal of pre-March 1, 2005 claims for copyright infringement for all
12 PeopleSoft and J.D. Edwards registrations at issue in this case based on a lack of
13 standing.

14 The parties' positions are set forth below.

15 1. *Statement of Defendants*

16 Neither Defendants' Trial Brief nor SAP's statement affects or moots any issues pending
17 on summary judgment. Defendants' Trial Brief proposed some potentially significant
18 concessions with the goal of focusing this case for trial. As set forth specifically in the Trial
19 Brief, *see p. 2*, Defendants proposed to concede TomorrowNow's liability, as well as SAP's
20 vicarious liability for copyright infringement, but in so doing they expressly preserved the
21 defenses asserted on summary judgment. Defendants believe that the combination of rulings on
22 the pending motions and focusing the issues as proposed in their Trial Brief would make it
23 possible to try this case to a fair result on a much shorter schedule. By making that proposal, they
24 did not render moot the work done on summary judgment, but expressly kept open those issues
25 ripe for decision because those rulings might further narrow the case. (The elections not to
26 contest made on summary judgment and addressed in section II.A, above, were made months ago,
27 before argument on summary judgment; they are neither the product of nor affected by pretrial
28 filings.)

1 Plaintiffs seek to bind Defendants to additional alleged “concessions,” pointing to a
2 statement made by SAP and to press reports. Plaintiffs miss the basic point—SAP’s statement
3 said that Defendants “proposed” to stipulate to TomorrowNow’s liability, as explained in their
4 pretrial filings. There was no ambiguity or contradiction; Defendants announced what they
5 proposed to do and directed those interested to their pretrial filings for details.

6 Plaintiffs express confusion over SAP’s statement about taking financial responsibility for
7 any judgment against TomorrowNow, claiming that this also moots some issues pending on
8 summary judgment. Not so. Proposing to accept financial responsibility for a judgment against
9 TomorrowNow should moot the claims against SAP (as proposed in the Trial Brief), not the
10 defenses to such liability, which Defendants specifically preserved in the event that Plaintiffs
11 would not agree to focus the issues for trial. Plaintiffs would apparently rather fight for any
12 ruling against SAP than have assurance of payment of any judgment against TomorrowNow they
13 may obtain.

14 Making the proposal was itself a significant step because effecting the proposal to shorten
15 the trial and narrow the claims at issue would require Defendants to forego a variety of significant
16 defenses (as explained in their Trial Brief). But recognizing publicly that Defendants had made
17 that significant proposal does not change the proposal to a “done deal,” nor does it mean that a
18 proposal which specifically preserves defenses presented on summary judgment now suddenly
19 waives them. Nor too does the hope expressed in the press that this case can be brought to
20 resolution mean that Defendants’ proposal gave up what they expressly preserved.

21 Defendants proposed to stipulate to TomorrowNow’s liability, as well as SAP’s vicarious
22 liability for copyright infringement, nothing more and nothing less, expressly preserving a variety
23 of defenses. None of the issues presented for decision on summary judgment are mooted by that
24 proposed concession. Defendants respectfully submit that the pending motions for summary
25 judgment are ready for and require disposition, beyond those four specific issues as to which
26 Defendants confirmed months ago they were not contesting as to the facts presented by Plaintiffs
27 on their motion. Defendants remain ready, willing and able to act on their proposal set forth in
28 the Trial Brief, and hope Plaintiffs will join them in focusing trial on what is truly in dispute.

1 Defendants have addressed the length and structure of trial in detail in their Trial Brief and
2 relevant sections of the Joint Pretrial Statement and do not repeat those points here.

3 2. *Statement of Plaintiffs*

4 Oracle believes that SAP's public statements and concessions on August 5, 2010 warrant
5 the entry of summary judgment for Plaintiffs in certain additional respects as described below.
6 SAP has made a series of seemingly contradictory statements about what liability it will and will
7 not contest in this case, and continues to contradict itself in the statement above.

8 In its August 5, 2010 press release, SAP expanded on the concessions it made on
9 summary judgment and indicated it would not contest any liability for TomorrowNow.
10 Specifically, SAP stated that it "proposed that it would not contest the liability of TomorrowNow
11 for copyright infringement and downloading conduct alleged in Oracle's complaint." SAP's
12 CFO, Werner Brandt, further stated: "By accepting responsibility for TomorrowNow's actions,
13 SAP *is taking a decisive move* to focus the issues in this case." (emphasis added) Neither SAP
14 nor Mr. Brandt stated in any way that SAP's "acceptance of responsibility" was qualified or
15 conditional in any respect. (By contrast, SAP carefully did reserve the issue of damages as an
16 issue on which SAP would "continue to present arguments and evidence," thereby both indicating
17 that it knew full well how to qualify its statements to the public and implying by omission that it
18 was not doing so with regard to SAP TN direct liability or SAP vicarious liability.)

19 These statements were widely reported in the press, including by the *Wall Street Journal*,
20 the Associated Press, *Barron's* and Reuters, among other major news outlets. Because they are
21 neither conditional nor qualified, the effect of these statements is that the Court should:

- 22 1. Grant Oracle's motion with regard to TomorrowNow's direct infringement prior to
23 March 1, 2005 of the three PeopleSoft registrations at issue in Oracle's motion.
- 24 2. Grant Oracle's motion with regard to the additional violations of the CFAA and
25 CDAFA raised in Oracle's motion, as to which SAP previously opposed on the
26 elements of intent and damage.
- 27 3. Deny Defendants' motion with regard to Plaintiff OMEA's claims against
28 TomorrowNow.

1 In its statement above, SAP seeks to continue to limit or preserve its ability to resist SAP
2 TN liability by “expressly preserving a variety of defenses.” In the absence of these defenses,
3 there is no ground on which SAP can resist entry of summary judgment for Oracle on the three
4 points we set forth above. Neither SAP’s press release (nor a new offer made by SAP to Oracle
5 earlier today) would reserve *any* defenses to SAP TN’s liability. SAP insists that its public
6 statements were a mere “proposal.” But nothing about Mr. Brandt’s statement to the press, as
7 included in the press release, states that in “accepting responsibility for TomorrowNow’s actions”
8 and being “committed to compensating Oracle for the harm the limited operations of
9 TomorrowNow actually caused,” SAP was merely negotiating. Either SAP accepts
10 responsibility, as Mr. Brandt suggested, or it does not. Oracle accordingly contends that the
11 Court should hold SAP to its public statements and enter summary judgment for Plaintiffs in the
12 two additional respects (#1-2), and deny Defendants’ motion for summary judgment in the one
13 additional respect (#3), identified above.

14 Oracle remains committed to negotiating in good faith – and not in the press – in order to
15 streamline this case for trial. It has made several proposals of its own, as explained in the Pre-
16 Trial Statement, which SAP has rejected. As a result, it welcomes SAP’s offer to concede SAP
17 TN’s direct liability on each of Oracle’s claims and SAP AG’s and SAP America’s vicarious
18 liability (whether limited to Oracle’s copyright infringement claims or not). These offers alone
19 can and will streamline trial, and thereby reduce it from approximately twelve weeks (which
20 Oracle estimates a non-streamlined trial would require based on the pre-trial submissions) to less
21 than the six weeks the Court has set aside, with the key issues (among others) of SAP’s
22 involvement in the infringing activities and damages remaining for trial. Unfortunately, SAP has
23 been inconsistent as to whether it insists on unacceptable strings to these offers (there are none in
24 the press version). Oracle looks forward to continuing to discuss how best to streamline trial,
25 though it also believes the parties are already there if SAP’s public statements are taken at face
26 value.

1 DATED: August 10, 2010

JONES DAY

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By: /s/ Tharan Gregory Lanier
Tharan Gregory Lanier

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SAP AG, SAP AMERICA, INC., and
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In accordance with General Order No. 45, Rule X, the above signatory attests that
8 concurrence in the filing of this document has been obtained from the signatory below.

9

DATED: August 10, 2010

BINGHAM McCUTCHEN LLP

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11

By: /s/ Geoffrey M. Howard
Geoffrey M. Howard

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13

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EXHIBIT A**Issues Presented on Motions for Summary Judgment**

<u>Plaintiffs' Motion for Partial Summary Judgment</u>	<u>Defendants' Motion for Partial Summary Judgment</u>
1. Direct Copyright Infringement of Six Registrations by TN	1. Unavailability of "Saved Costs" as a Measure of Damages in this Case
2. Vicarious Copyright Infringement of Six Registrations by SAP AG and SAP America	2. Unavailability of Lost Profits of Related Non-Party Entities in this Case
3. Contributory Copyright Infringement of Six Registrations by SAP AG and SAP America	3. Unavailability of Damages for Trespass to Chattels and CDAFA Claims
4. Direct Liability of TN for Violations of CFAA § (a)(2)(C)	4. Limitation of Damages under the CDAFA, If at All, to No More Than Alleged "Investigation Costs"
5. Direct Liability of TN for Violations of CFAA § (a)(5)(A)(i-iii)	5. Dismissal of Oracle EMEA Ltd.'s Claims
6. Direct Liability of TN for Violations of CDAFA § (c)(7)	<u>Defendants' Cross-Motion for Partial Summary Judgment</u>
7. Indirect Liability of SAP AG and SAP America for CFAA and CDAFA Violations	6. Dismissal of pre-March 1, 2005 Copyright Infringement Claims for All PeopleSoft and J.D. Edwards Registrations Based on Lack of Standing (Cross-Moves on Plaintiffs' Issues 1-3)