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17 Attorneys for Defendants  
SAP AG, SAP AMERICA, INC., and  
18 TOMORROWNOW, INC.

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

**DECLARATION OF THARAN  
GREGORY LANIER IN SUPPORT OF  
DEFENDANTS' ADMINISTRATIVE  
MOTION FOR AN ORDER  
REGARDING COUNSELS'  
EXTRAJUDICIAL  
COMMUNICATIONS**

1 I, THARAN GREGORY LANIER, declare as follows:

2 I am a partner in the law firm of Jones Day, 1755 Embarcadero Road, Palo Alto,  
3 California 94303, and counsel of record for Defendants SAP AG, SAP America, Inc. (together,  
4 “SAP”), and TomorrowNow, Inc. (“TN”) (collectively, “Defendants”) in the above-captioned  
5 matter. I am a member in good standing of the state bar of California and admitted to practice  
6 before this Court. I make this declaration based on personal knowledge and, if called upon to do  
7 so, could testify competently thereto.

8 1. On October 11, 2010, Defendants proposed to Plaintiffs that the parties agree on a  
9 stipulation and proposed order regarding extrajudicial communications by counsel during trial.  
10 Defendants further proposed that the jury be instructed not to read or listen to any media, whether  
11 in hard copy or in electronic form, pertaining to this case.

12 2. On October 14, 2010, Plaintiffs indicated a willingness to instruct the jury not to  
13 use hard copy or electronic materials to conduct independent research about the case.

14 3. On October 16, 2010, Defendants informed Plaintiffs that should Plaintiffs not  
15 agree to a stipulation, Defendants would file a motion.

16 4. On October 17, 2010, Plaintiffs informed Defendants that they had not yet  
17 considered and discussed the issue.

18 5. On October 20, 2010, during a meet and confer call on a variety of subjects,  
19 Defendants reiterated their position regarding a court order prohibiting extrajudicial  
20 communications by counsel.

21 6. On October 21, 2010, Plaintiffs informed Defendants that they would not agree to  
22 such a stipulation and order.

23 7. Attached as **Exhibit A** is a true and correct copy of the following excerpts from  
24 the 9/30/10 Pretrial Conference Transcript: pp. 117-19.

25 8. Attached as **Exhibit B** is a true and correct copy of the New York Times article, A  
26 Double Standard at H.P., by Joe Nocera, available at  
27 <http://www.nytimes.com/2010/10/09/business/09nocera.html>.

28 9. Attached as **Exhibit C** is a true and correct copy of the Order Re: Trial

1 Participant's Communications with Press During Pendency of Trial, issued by Judge Illston in  
2 *Bowoto v. Chevron Corp.*, No. C 99-02506 SI.

3 I declare under penalty of perjury under the laws of the United States and the State of  
4 California that the foregoing is true and correct. Executed this 22nd day of October, 2010 in San  
5 Francisco, California.

6 /s/ Tharan Gregory Lanier  
7 Tharan Gregory Lanier  
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# **EXHIBIT A**

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE PHYLLIS J. HAMILTON, JUDGE

ORACLE CORPORATION, ET AL. )

PLAINTIFFS, )

VS. )

SAP AG, ET AL., )

DEFENDANTS. )

NO. C 07-01658 PJH

**Certified Copy**

PAGES 1 - 124

OAKLAND, CALIFORNIA  
WEDNESDAY, SEPTEMBER 30, 2010

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

FOR PLAINTIFFS:

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BY: STEVEN C. HOLTZMAN, ATTORNEY AT LAW

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BY: ZACHARY J. ALINDER,  
ANTHONY FALZONE,  
HOLLY A. HOUSE,  
GEOFFREY M. HOWARD,  
DONN P. PICKETT, ATTORNEYS AT LAW

FOR DEFENDANTS:

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PALO ALTO, CALIFORNIA 94303

BY: THARAN GREGORY LANIER, ATTORNEY AT LAW

(APPEARANCES CONTINUED NEXT PAGE)

REPORTED BY:

RAYNEE H. MERCADO, CSR NO. 8258

1 (OFF-THE-RECORD DISCUSSION.)

2 **MR. PICKETT:** WE HAD SOME DAUBERTS, TOO, AND WE ARE  
3 PLAINTIFFS, BUT I ACTUALLY HAD TWO SORT OF LOGISTICAL QUESTIONS  
4 IF I COULD.

5 **THE COURT:** UM-HMM.

6 **MR. PICKETT:** ONE IS HOW DOES YOUR HONOR DEAL WITH  
7 THE PROBLEM OF JURORS GOOGLING AND USING THE INTERNET? THIS IS  
8 GOING TO BE A CASE THAT'S IN THE PRESS. THERE ARE GOING TO BE  
9 REPORTS ON IT THROUGHOUT THE TRIAL. AND EVERY CONFERENCE I GO  
10 DO NOW, I HEAR ABOUT THIS PROBLEM, AND I BELIEVE IT'S A BIG  
11 PROBLEM, EVEN -- EVEN --

12 **THE COURT:** IT IS.

13 **MR. PICKETT:** -- EVEN WHEN YOU INSTRUCT THE JURORS,  
14 THEY DO IT ANYWAY.

15 **THE COURT:** IT IS. IT IS.

16 **MR. PICKETT:** SO HOW DOES YOUR HONOR DEAL WITH IT, IS  
17 MY QUESTION?

18 **THE COURT:** WELL, I HAD TO DEAL WITH IT OVER -- OVER  
19 THE SUMMER. I'VE HAD FOUR TRIALS AND EACH TIME, IT'S REALLY AN  
20 ISSUE. AND I HAVE SOME MODEL INSTRUCTIONS FROM THE  
21 ADMINISTRATIVE OFFICE OR THE FEDERAL JUDICIAL CENTER -- ONE OF  
22 THE TWO -- SENT US A PROPOSED MODEL INSTRUCTION. I USED IT IN  
23 MY LAST TRIAL, AND AS I WAS READING IT, I, FRANKLY, DIDN'T THINK  
24 IT WAS VERY GOOD.

25 SO YOU ALL ARE FREE TO COME UP WITH ONE, TO PREPARE

1 ONE YOURSELF, BUT IT SHOULD COVER THE WHOLE PANOPLY OF GADGETS  
2 AND DEVICES, EVERYTHING JUST SO THAT THEY DON'T THINK BY  
3 OMISSION THAT IT'S OKAY FOR THEM TO, YOU KNOW, TWEET ABOUT IT  
4 FROM THE JURY ROOM. BUT --

5 **MR. PICKETT:** AND I -- I EVEN THINK --

6 **THE COURT:** SO IT'S NOT JUST -- IT'S NOT JUST  
7 INVESTIGATION AND RESEARCH. IT'S ALSO COMMUNICATION. THEY'RE  
8 NOT SUPPOSED TO TALK ABOUT IT.

9 **MR. PICKETT:** TALK ABOUT IT.

10 **THE COURT:** IT'S ALSO MEANS THEY CAN'T EMAIL ABOUT IT  
11 OR TWEET ABOUT IT.

12 **MR. PICKETT:** DON'T PUT IT ON FACEBOOK. DON'T TWEET.

13 **THE COURT:** RIGHT.

14 **MR. PICKETT:** THROUGH THESE CONFERENCES I'VE BEEN TO,  
15 IT'S ALSO BEEN HELPFUL TO HAVE SOME EXPLANATION OF WHY THIS IS  
16 HAPPENING. BECAUSE THERE ARE JURORS NOW WHO RESENT AUTHORITY,  
17 AND IF YOU TELL THEM NOT TO DO SOMETHING, THEY'LL START DOING IT  
18 BECAUSE THEY THINK THEY'RE THE -- THEY WANT TO KNOW THE TRUTH  
19 RATHER THAN THE ADMITTED EVIDENCE.

20 **THE COURT:** AND ACTUALLY, I FOUND IN MY LAST TRIAL --  
21 I MEAN, A COUPLE OF JURORS SAID THAT THEY DIDN'T THINK THEY'D BE  
22 ABLE TO RESIST THE TEMPTATION, AND WE LET THEM GO. THE OTHERS  
23 SAID THAT THEY COULD, AND I BELIEVE THAT THEY DID.

24 IT MIGHT ALSO MEAN, THOUGH, THAT YOU TEND TO SKEW  
25 TOWARDS AN OLDER JUROR WHO MIGHT HAVE LESS FACILITY WITH ALL OF

1 DEVICES AND, THEREFORE, HAVE A MUCH SMALLER --

2 **MR. PICKETT:** I FEAR.

3 **THE COURT:** -- TEMPTATION TO RESIST.

4 **MR. PICKETT:** I FEAR THERE WILL BE A LOT OF PRESS  
5 ABOUT THIS CASE ON A DAILY BASIS.

6 **THE COURT:** I DON'T KNOW HOW TO DO -- I DON'T KNOW  
7 WHAT TO DO EXCEPT TO GIVE INSTRUCTIONS.

8 **MR. PICKETT:** RIGHT. WE'LL WORK THAT OUT, THEN.

9 **THE COURT:** AND SO YOU CAN PREPARE ONE. I'LL TRY TO  
10 FIND THAT COPY IF YOU'D LIKE TO LOOK -- IT'S NOT VERY WELL  
11 WRITTEN, BUT I'LL TRY TO FIND IT AND YOU CAN USE THAT TO START  
12 FROM.

13 **MR. LANIER:** THANK YOU, YOUR HONOR.

14 **MR. PICKETT:** AND THEN JUST ON -- I'M SORRY.

15 **THE COURT:** AND I DO THINK THERE'S ALSO -- IN ANOTHER  
16 TRIAL, I HAD A PROPOSED INSTRUCTION BY THE PARTY -- BY ONE OF  
17 THE PARTIES WHO WANTED ME TO ADVISE THE JURY THAT IF WE FOUND  
18 OUT THAT THEY HAVE VIOLATED THE RULE THAT IT COULD CAUSE A  
19 MISTRIAL, IT WOULD BE EXPENSIVE AND ALL OF THIS.

20 AND I WAS A LITTLE RELUCTANT TO GIVE THAT, BUT I  
21 THINK THAT, ACTUALLY, IF YOU LOOK IN THE NINTH CIRCUIT MODEL  
22 INSTRUCTIONS, I THINK THERE'S ACTUALLY A PROPOSED INSTRUCTION  
23 THAT SAYS SOMETHING VERY SIMILAR TO THAT.

24 **MR. LANIER:** WE'LL WORK IT OUT.

25 **THE COURT:** SO I DON'T KNOW. EVERYONE'S GRAPPLING

1 WITH THE ISSUE, SO I'LL LEAVE IT UP TO YOU TO COME UP WITH A  
2 GOOD INSTRUCTION. I'LL TRY TO SEE IF WE CAN FIND THE MODEL.

3 **MR. PICKETT:** SEEMS TO BE A HOT ISSUE.

4 THEN JUST LOGISTICS, THE TECHNOLOGY IN THE COURTROOM.  
5 WE'LL -- WE'LL OBVIOUSLY WANT TO SHARE TECHNOLOGY, BUT IS THERE  
6 A PERSON THAT DEAL WITH WITH RESPECT TO THAT, WHAT WE CAN BRING  
7 TO THE COURTROOM?

8 **THE COURT:** NICHOLE WILL TELL YOU.

9 **MR. PICKETT:** SO WE'LL TELL YOU ALL ABOUT THAT.

10 **THE COURT:** YEAH, SHE'LL TELL YOU.

11 **MR. PICKETT:** LASTLY ON LOGISTICS, WE'RE OFF ON  
12 VETERAN'S DAY, AS YOUR HONOR POINTED OUT. I THINK WE'RE DARK ON  
13 WEDNESDAYS?

14 **THE COURT:** WEDNESDAYS IS MY LAW AND MOTION.

15 **MR. PICKETT:** AND THEN THE DAY AFTER THANKSGIVING  
16 IS -- WE'RE ON.

17 **THE COURT:** THREE DAYS THE JURY'S GOING TO MISS OUT  
18 OF THE FOUR WEEKS.

19 (SIMULTANEOUS COLLOQUY.)

20 **THE COURT:** VETERANS DAY, IT'S -- IT'S MONDAY,  
21 TUESDAY -- VETERAN'S DAY ON A THURSDAY, SO IT'S FRIDAY. THE  
22 FOLLOWING WEEK, IT'S FOUR DAYS, AND THE THANKSGIVING WEEK IS  
23 JUST MONDAY AND TUESDAY.

24 **MR. PICKETT:** OKAY. THAT'S WHAT I WAS ASKING.  
25 FRIDAY IS OUT.

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CERTIFICATE OF REPORTER

I, RAYNEE H. MERCADO, OFFICIAL REPORTER FOR THE UNITED STATES COURT, NORTHERN DISTRICT OF CALIFORNIA, HEREBY CERTIFY THAT THE FOREGOING PROCEEDINGS IN C07-01658 PJH, ORACLE CORPORATION, ET AL. V. SAP AG, ET AL., WERE REPORTED BY ME, A CERTIFIED SHORTHAND REPORTER, AND WERE THEREAFTER TRANSCRIBED UNDER MY DIRECTION INTO TYPEWRITING; THAT THE FOREGOING IS A FULL, COMPLETE AND TRUE RECORD OF SAID PROCEEDINGS AS BOUND BY ME AT THE TIME OF FILING.

THE VALIDITY OF THE REPORTER'S CERTIFICATION OF SAID TRANSCRIPT MAY BE VOID UPON DISASSEMBLY AND/OR REMOVAL FROM THE COURT FILE.



RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR, CCRR

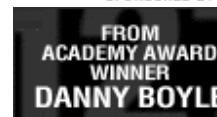
MONDAY, OCTOBER 4, 2010

# **EXHIBIT B**

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October 8, 2010

## A Double Standard at H.P.

By **JOE NOCERA**

**Editors' Note Appended**

And so it came to pass that on the 55th day — 55 days, that is, after firing its chief executive, [Mark V. Hurd](#), for playing footsie with a consultant and fudging his expense accounts — the board of directors at [Hewlett-Packard](#) proudly announced it had found a new man to lead the company out of the wilderness.

His name is Léo Apotheker, a suave European — how many American C.E.O.'s have an accent aigu in their name? — who had spent most of his career at [SAP](#), the giant German maker of business software. SAP has one primary competitor: [Oracle](#), the very same company that hired Mr. Hurd barely a month after H.P. let him go, in a move clearly intended not only to bolster Oracle but to humiliate H.P.

Oracle and H.P. had once been the closest of partners, with the latter selling the industrial-strength hardware that ran Oracle's industrial-strength software. But that partnership appears to be dissolving. Earlier this year, Oracle completed its purchase of Sun Microsystems, a move that meant that it would now be trying to sell its own hardware, instead of encouraging customers to buy H.P. computers. What's more, Larry Ellison, Oracle's flamboyant founder, had taken to sending e-mail to reporters mocking the ineptitude of the H.P. board.

Is it possible that the hiring of Mr. Apotheker was motivated by the board's desire to strike back at Oracle? And that, with Mr. Apotheker on board, H.P. would try to encroach on Oracle's software stronghold just as Oracle was moving into H.P.'s hardware arena? There are analysts who are convinced that was the case.

H.P., of course, was adamant that nothing could be further from the truth. “Hiring him had nothing to do with fighting Oracle,” said Ray Lane, the former Oracle (!) president who is set to become H.P.’s chairman next month. “The board chose Léo because he was the best available athlete.”

There were other things about the appointment that seemed a bit odd. For instance, at the point at which the H.P. board hired him, Mr. Apotheker was unemployed.

You see, his tenure at SAP had ended abruptly in February, when the company’s executive board (as boards are called in Germany) declined to renew his contract. After being named co-C.E.O. in April 2008, he had just become sole C.E.O. in 2009 — meaning that he had been flying solo for just seven months when he was shown the door.

Maybe, as his defenders insisted, he was simply an unfortunate victim of the global recession. “He got a raw deal,” said Mr. Lane. But maybe, as I heard from others, his own missteps had contributed to his downfall. He had tried to raise prices aggressively for servicing SAP’s complex software, which had resulted in a customer revolt. A critical new initiative, called Business ByDesign, had flopped. And he had managed to alienate the SAP work force.

“My communication towards you was not always optimal,” he was quoted as saying in a memo SAP issued to its employees when he left. While I found some people who defended Mr. Apotheker’s management style — “He’s a tireless worker who gives everyone a second chance,” said Andre Boisvert, a former top software executive — I found just as many people who thought that Mr. Apotheker was likely to further traumatize the already demoralized H.P. staff. “If you wanted to find someone who represented the diametrical opposite of the H.P. way, it is Léo,” said Jason Maynard, a veteran technology analyst with Wells Fargo Securities. “He is tough as nails and chews glass for breakfast.”

Still, having written two unflattering columns recently about the H.P. board, I was inclined to take a pass on Mr. Apotheker’s hiring. But then I learned something about him that caused me to shake my head in disbelief.

Next month, Oracle and SAP are scheduled to go to trial in a case involving the wholesale theft of Oracle’s intellectual property by an SAP division. SAP has acknowledged its guilt; the only issue being litigated is the size of the damages. (Oracle is asking for \$2 billion; SAP says it

should have to pay only “tens of millions” of dollars.) As a member of SAP’s executive board, Mr. Apotheker clearly knew about the theft.

It takes your breath away, really: the same board that viewed Mr. Hurd’s minor expense account shenanigans as intolerable has chosen as its new C.E.O. someone involved — however tangentially — with the most serious business crime you can commit.

If it were anybody besides the H.P. directors, the situation would be unbelievable. With these guys, though, it’s all too believable.

•

No company, not even H.P., is as obsessed with Oracle as SAP. And with good reason. Over the last half-dozen years, Oracle has made serious inroads into the German company’s core business of enterprise software, primarily by acquiring other software companies. In the mid-2000s, for instance, Oracle bought PeopleSoft, J. D. Edwards and Retek, all companies that compete with SAP in one niche or another. In fact, SAP had tried to buy Retek itself but had been outbid by Oracle. It wanted revenge.

In the middle of the bidding war for Retek, SAP bought a company called TomorrowNow, based in Bryan, Tex., that had been founded by a handful of former PeopleSoft executives. It held itself out as being able to service PeopleSoft software — and, eventually, other Oracle software — for far less money than the typical Oracle maintenance contract. With TomorrowNow, SAP hoped to be able to lure away some Oracle customers.

“Retek deal is in danger,” an angry Mr. Apotheker wrote in an e-mail to a top SAP executive shortly after the TomorrowNow acquisition. “We need to inflict pain on Oracle. Is there a chance to close a few TN deals in the next coming days?”

In the short term, SAP wanted to “inflict pain” just by grabbing maintenance contracts away from Oracle. Over the long term, though, it hoped that TomorrowNow would act as a kind of stalking horse, allowing SAP to persuade its new customers to abandon Oracle entirely and switch to SAP’s expensive suite of software applications. It called this its “Safe Passage” program. Because Mr. Apotheker was then the head of SAP’s sales and marketing, he would have led the charge to get customers to switch to SAP from Oracle.

There was just one little problem. TomorrowNow's business model was based on theft, pure and simple. When it landed a customer, it gained access to Oracle's servers, so that it could service the Oracle software that had been written for that client. But instead of limiting itself to servicing the software it was licensed to work on, TomorrowNow instead "scraped" Oracle's servers, vacuuming up proprietary software code. According to the Oracle complaint, between September 2006 and February 2007, Oracle discovered "at least 10,000 illegal downloads by SAP."

Did SAP's executive board know that its new division's business model depended on stealing Oracle's code? Stuningly, it did. A crucial piece of evidence in the lawsuit is a presentation made in January 2005 to the SAP board by executives arguing in favor of the purchase. One of the slides acknowledges that TomorrowNow used "nonproduction copy" — i.e. unauthorized copy — of Oracle's software.

Another slide read: "The access rights to the PeopleSoft software is very likely to be challenged by Oracle and past operating issues may be a serious liability." A third slide said that SAP needed to conduct "a full and complete assessment of the legality of the service model." That appears not to have ever taken place; the deal was completed not long after this presentation.

Oracle sued SAP in March 2007. In July, Henning Kagermann, then SAP's chief executive, admitted to "inappropriate" downloads. Yet the illegal scraping continued. The following April, Mr. Apotheker became co-chief executive — but it wasn't until October 2008, several months after he became the sole C.E.O., that he finally shut TomorrowNow down.

Mr. Apotheker's defenders stress this last point — that he was the one who finally closed the company. They also stress that TomorrowNow was never under his direct supervision. What they gloss over, however, is that at the point he shut down the company, the evidence against it was simply overwhelming. And as the head of sales and marketing, Mr. Apotheker would have been keenly aware of TomorrowNow's strikes at Oracle's customers, because it was his job to turn those small customers into big ones for SAP.

If the case goes to trial, Mr. Apotheker could well be called as a witness. Though he is not central to the lawsuit, the chance to embarrass H.P. and its new C.E.O. is likely to be irresistible to Oracle and Mr. Ellison. Which will mean yet more egg on the faces of the H.P. directors.

More important, for a company that professes to be concerned with ethics — so concerned that it had to get rid of Mr. Hurd, with his piddling expense account problems — it is astonishing that it would find Mr. Apotheker's lapses acceptable. He may not have been directly involved in this brazen theft of intellectual property, but it defies belief to say he didn't know about it. And he did nothing to stop it until it was far too late. Apparently, the H.P. directors adhere to the highest ethical standards — but only when it's convenient.

When I spoke to Mr. Lane, he told me he believed that Mr. Apotheker, a longtime friend, was the right choice for H.P. When I asked him about the TomorrowNow fiasco, he professed to know nothing about it. I take him at his word. Mr. Lane is a highly respected Silicon Valley veteran, who, after a long run as Mr. Ellison's No. 2, joined Kleiner Perkins, the prominent [venture capital](#) firm. When he joins the board next month, he will give it something it doesn't now have: a little credibility.

Let's hope it's not too late.

***Editors' Note: October 12, 2010***

*In the Talking Business column in Business Day on Saturday, Joe Nocera wrote about a lawsuit by Oracle against a division of SAP, claiming theft of intellectual property. Mr. Nocera learned after the column was published that Oracle was represented by the law firm of Boies, Schiller & Flexner, where his fiancée works as director of communications. To avoid the appearance of a conflict of interest, Mr. Nocera would not have written about the case if he had known of the law firm's involvement.*

# **EXHIBIT C**

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United States District Court  
For the Northern District of California

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

LARRY BOWOTO *et al.*,

No. C 99-02506 SI

Plaintiffs,

**ORDER RE: TRIAL PARTICIPANTS'  
COMMUNICATIONS WITH PRESS  
DURING PENDENCY OF TRIAL**

v.

CHEVRON CORPORATION *et al.*,

Defendants.

The trial of *Bowoto v. Chevron Corporation* began in this Court on October 27, 2008. Before trial began, both parties filed numerous letter briefs to the Court detailing concerns about statements made to the press by opposing counsel. In light of the concerns raised by counsel, the Court has ordered all trial participants (counsel and litigants) not to communicate with the press about the trial while the trial is pending. The media is free to attend and report on all formal proceedings.

This Order confirms an oral ruling previously made by this Court.

**IT IS SO ORDERED.**

Dated: 11/7/08



SUSAN ILLSTON  
United States District Judge