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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)

**DEFENDANTS' MOTION  
REGARDING ADMISSIBILITY OF  
PLAINTIFFS' AT-RISK REPORT**

1 **I. INTRODUCTION**

2 Early in discovery, Plaintiffs produced a report called the At-Risk Report, which Plaintiffs  
 3 represented was “Oracle’s compilation of all of the different reasons that customers [gave] for  
 4 leaving Oracle when they [went] to TomorrowNow or other third-party support providers . . . all  
 5 of the information that Oracle [had] in that form relating to those customers.” *See* ECF No. 929-  
 6 11 (3/4/08 Discovery Hearing Tr.) at 105:13-24; *see also* ECF No. 929-10 (2/13/08 Discovery  
 7 Hearing Tr.) at 152:24-154:3 (The report “has enormous detail about all customers lost to all third  
 8 parties. This is a gift.”); *see also* Exhibit A (09/23/2008 Cummins Tr.) at 312:3-12, 320:23-321:2,  
 9 321:5-321:9, 321:11-321:17 (“[I]f a customer indicated that they were looking at a third party  
 10 provider, then they would go on this list.”). Plaintiffs agree that the At-Risk Report is admissible  
 11 as a business record. Plaintiffs only objection is to the admissibility of “transcribed comments  
 12 from customers” contained in the report. *See* Exhibit B (09/30/10 MIL Hearing Tr.) at 10:15-  
 13 12:14 (“We’re not contending that the reports themselves are not . . . business records. We’re  
 14 focused on just this one part of the report which are transcribed comments from customers.”).  
 15 Plaintiffs moved *in limine* to exclude transcribed customer comments. *See* ECF No. 916 (Pls.’  
 16 MIL No. 3) at 13:27-17:5. The Court excluded “transcribed customer statements” in the report,  
 17 except to the extent that Plaintiffs’ expert relied on them, on the ground that Defendants had not  
 18 “articulated any applicable exception to the hearsay rule.” *See* ECF No. 914 (09/30/10 Order) at  
 19 1-2.

20 For the reasons stated below, Defendants request that the Court reconsider its MIL ruling  
 21 and admit the At-Risk Report in its entirety, including transcribed customer statements.

22 **II. THE STATEMENTS ARE ADOPTIVE ADMISSIONS**

23 **A. The Statements Are Admissible Under Fed. R. Evid. 801(d)(2)(B).**

24 A hearsay statement is admissible if a party opponent adopts or acquiesces in the  
 25 statement. Fed. R. Evid. 801(d)(2)(B). Adoption or acquiescence “may be manifested in any  
 26 appropriate manner.” Fed. R. Evid. 801(d)(2)(B), Advisory Committee Note. For example,  
 27 courts have held that adoption or acquiescence may be shown when a party opponent incorporates  
 28 a statement into a document and distributes it to others or otherwise accepts or acts upon the

1 statement. *See, e.g., Sea-Land Serv., Inc. v. Lozen Int'l, LLC*, 285 F.3d 808, 821 (9th Cir. 2002)  
2 (employee adopted hearsay statement when she incorporated it into an email with a remark  
3 indicating her belief in the truth of the statement); *Wright-Simmons v. City of Oklahoma City*, 155  
4 F.3d 1264, 1268 (10th Cir. 1998) (admitting investigative report and interview notes containing  
5 third party statements because employer acted in response to them); *Spurlock v. Fox*, No. 3:09-cv-  
6 0756, 2010 U.S. Dist. LEXIS 100366, at \*27 (M.D. Tenn. Sept. 23, 2010) (“Generally, when a  
7 party-opponent copies a document and distributes the copies to others, he or she has adopted the  
8 content of the document.”); *MGM Studios, Inc. v. Grokster, Ltd.*, 454 F. Supp. 2d 966, 973 (C.D.  
9 Cal. 2006) (statements forwarded in employee emails were adoptive admissions).

10 **B. Plaintiffs Clearly Adopted the Customer Statements in the At-Risk Report.**

11 Oracle manifested its adoption of the customer statements contained in the At-Risk Report  
12 in a variety of ways. *First*, the purpose of the At-Risk Report was to collect information  
13 regarding customers’ stated reasons for potentially cancelling their Oracle support contracts.  
14 Oracle then used that information to identify the customers at risk of leaving for third party  
15 support providers so it could try to persuade the customers not to leave Oracle support and  
16 otherwise try to prevent customer losses to third party support providers. The At-Risk reporting  
17 process was a formal process under which all employees were required to “accurately, succinctly,  
18 and regularly” alert “Oracle executives” of potential At-Risk customers and provide information  
19 regarding the customers’ reasons for cancelling Oracle support and/or considering an alternative  
20 support option. ECF No. 929-16 (ORCL00130706-728) at ORCL00130710; *see also* ECF No.  
21 929-18 (ORCL00032750) (“We are now in the 13th month of tracking this information.”) (copy  
22 attached as Exhibit C).

23 Oracle’s manifestation of its adoption of these customer statements is inherent in the very  
24 purpose of the At-Risk Report. It would be futile to require all employees to obtain and record  
25 statements from customers only to then disregard the statements. In this respect, the At-Risk  
26 Report is analogous to the customer survey in *Schering Corp. v. Pfizer Inc.*, 189 F.3d 218, 239  
27 (2d Cir. 1999) (Sotomayor, J.) (reversing exclusion of a survey containing third-party hearsay  
28 statements because defendant’s analysis of the statements indicated their reliance on them). Here,

1 Oracle relied on the statements in the At-Risk Report to determine how best to respond to  
2 particular customers at risk of leaving and formulate a strategy for competing with third party  
3 support providers. Thus, for example, Oracle's damages expert noted that it created a "Third  
4 Party Swat Team" to address customers identified as "At-Risk." Meyer Rep. ¶ 88. Similarly, the  
5 At-Risk Report contains comments by Oracle's employees describing actions taken in response to  
6 the customer statements.

7 **Second**, Oracle routinely circulated the At-Risk Report, and customer statements  
8 contained in it, among employees and management in emails, reports, and presentations. *See*,  
9 *e.g.*, ECF No. 929-17 (ORCL00087892-893) ("Attached is the latest third party risk analysis.")  
10 (copy attached as Exhibit D); ECF 929-15 (09/16/08 Cummins Tr.) at 212:4-213:25 (At-Risk  
11 report used for information in updates regularly sent to executive, Juergen Rottler); ECF No. 929-  
12 20 (ORCL00188690-703) at ORCL00188697 (incorporating and adopting part of At-Risk report  
13 in PeopleSoft and Siebel YTD Cancellation Review); ECF No. 929-21 (ORCL00131360-384) at  
14 ORCL00131374 (incorporating and adopting transcribed comments in North America Support  
15 Review); ECF No. 929-14 (04/21/09 Cummins Tr.) at 234:1-15 (copy attached as Exhibit E)  
16 (stating that Oracle "relied on [At-Risk Report] for keeping track of customers that were at risk of  
17 cancelling support"). Indeed, one reason that employees were required to gather and report  
18 customer information accurately was that the information was provided to Oracle executives.  
19 *See, e.g.*, ECF No. 929-16 (ORCL00130706-728) at ORCL00130710 ("This data is provided to  
20 Oracle executives and needs to be accurately, succinctly, and regularly updated."). This Court  
21 recognized at the hearing on Plaintiffs' motion in limine that Plaintiffs had relied on the  
22 information in the At-Risk Report. Exhibit B (09/30/10 MIL Hearing Tr.) at 16:6-12 ("Well,  
23 there very well might, however, be a basis under the residual exception perhaps given *how much*  
24 *reliance there is on the report and everything contained therein.*") (emphasis added).

25 **C. No Guarantee of Trustworthiness Is Required.**

26 Plaintiffs argued that the transcribed customer statements should not be admitted because  
27 they are "not reliable for purposes of 807." Exhibit B (09/30/2010 MIL Hearing Tr.) at 15:10-23.  
28 This argument should be rejected. First, "[n]o guarantee of trustworthiness is required in the case

1 of an admission.” Fed. R. Evid. 801(d)(2), Advisory Committee Note; *see also MCI Commc’ns*  
2 *Corp. v. AT&T Co.*, 708 F.2d 1081, 1143 (7th Cir. 1983) (“The fact that the report is based on  
3 hearsay or reflects opinion goes to its weight and credibility, not its admissibility.”). Second,  
4 there is no evidence to support Plaintiffs’ claim that the statements are unreliable. On the  
5 contrary, Plaintiffs’ extensive reliance on them proves Oracle’s belief in its trustworthiness.

### 6 **III. THE STATEMENTS ARE ADMISSIBLE TO PROVE STATE OF MIND**

7 In addition to constituting adoptive admissions, the transcribed customer statements are  
8 admissible to show customers’ state of mind. In *Callahan v. A.E.V., Inc.*, 182 F.3d 237, 241, 252-  
9 53 (3rd Cir. 1999), for example, the court held that reports of customer statements were  
10 admissible to prove customer motive. *Id.* (“[A]lthough the reports of the customers’ statements  
11 are hearsay, they are admissible as evidence of the customers’ states of mind, *i.e.*, their reasons  
12 for no longer shopping [with plaintiff]”). Similarly, the customer statements here go to the  
13 customers’ contemporaneous reasons for leaving Oracle support. *See* ECF No. 929-11 (3/4/08  
14 Discovery Hearing Tr.) at 105:13-24 (At-Risk Report is “compilation” of reasons customers gave  
15 when leaving Oracle support). The statements are thus admissible under Fed. R. Evid. 803.

### 16 **IV. PLAINTIFFS’ EXPERT RELIED ON THE STATEMENTS.**

17 The Court recognized in its ruling on Plaintiffs’ MIL No. 3 that customer statements in the  
18 At-Risk Report should be admitted if relied on by Plaintiffs’ expert. *See* ECF No. 914 (09/30/10  
19 Order) at 1-2. This is consistent with Rule 703. *Paddack v. Dave Christensen, Inc.*, 745 F.2d  
20 1254, 1261-62 (9th Cir. 1984) (admitting audit reports based on hearsay statements for the  
21 purpose of explaining the basis of the expert’s testimony); *see also* Fed. R. Evid. 703, Advisory  
22 Committee Note (“Nothing in [Rule 703] restricts the presentation of underlying expert facts or  
23 data when offered by an adverse party.”). Plaintiffs’ expert relied on the At-Risk Report for his  
24 lost profits analysis. *See, e.g.*, ECF No. 929-12 (Meyer Report) ¶ 381 (“Where applicable, the  
25 results of my analyses were compared, by customer, to Oracle or PeopleSoft contemporaneous  
26 reports of support renewals lost or at risk of being lost (“At Risk” reports).”). The At-Risk Report  
27 is thus admissible in its entirety under Rule 703.

1 **V. CONCLUSION**

2 For these reasons, Defendants' motion should be granted and the At-Risk Report admitted  
3 in its entirety.

4 Dated: November 15, 2010

JONES DAY

5

6

By: /s/ Jason McDonell

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Jason McDonell

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Counsel for Defendants  
SAP AG, SAP AMERICA, INC., and  
TOMORROWNOW, INC.

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# **EXHIBIT A**

RICHARD CUMMINS September 23, 2008

HIGHLY CONFIDENTIAL INFORMATION - ATTORNEYS' EYES ONLY

Page 256

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

--00o--

ORACLE CORPORATION, a Delaware  
Corporation; ORACLE, USA, INC.,  
a Colorado Corporation, and  
ORACLE INTERNATIONAL CORPORATION,  
a California Corporation,

Plaintiffs,

Vs. No. 07-CV-01658-PJH (EDL)

SAP AG, a German Corporation,  
SAP AMERICA, INC., a Delaware  
CORPORATION, TOMORROWNOW, INC.,  
a Texas Corporation, and DOES  
1-50, Inclusive,

Defendants.  
\_\_\_\_\_ /

VIDEOTAPED RULE 30(b)(6) DEPOSITION OF

ORACLE CORPORATION

Designee: RICHARD CUMMINS  
\_\_\_\_\_

Tuesday, September 23, 2008

Volume II, Pages 256 - 436

HIGHLY CONFIDENTIAL INFORMATION - ATTORNEYS' EYES ONLY

Reported By: WENDY E. ARLEN, CSR #4355, CRR, RMR  
Job 412497

Merrill Legal Solutions  
(800) 869-9132

RICHARD CUMMINS September 23, 2008

HIGHLY CONFIDENTIAL INFORMATION - ATTORNEYS' EYES ONLY

Page 312

TEXT REMOVED - NOT RELEVANT TO MOTION

10:57 3 Q. MR. McDONELL: Showing you what's been marked  
4 as Exhibit 59.

5 A. Okay.

6 Q. Can you identify that for the record, please?

7 A. Yes, it's a copy or a printed copy of the  
8 third party at risk analysis dated January 25th,  
10:57 9 2008.

10 Q. Is this a document that was prepared under  
11 your general direction?

12 A. Yes.

TEXT REMOVED - NOT RELEVANT TO MOTION

RICHARD CUMMINS September 23, 2008

HIGHLY CONFIDENTIAL INFORMATION - ATTORNEYS' EYES ONLY

Page 320

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23 Q. I think we covered this a little before, but  
11:11 24 I want to make sure we're clear. The third party at  
25 risk report was intended to capture information by

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(800) 869-9132

RICHARD CUMMINS September 23, 2008

HIGHLY CONFIDENTIAL INFORMATION - ATTORNEYS' EYES ONLY

Page 321

1 customers who were at risk of leaving Oracle support  
2 for any reason; is that right?

TEXT REMOVED - NOT RELEVANT TO MOTION

5 THE WITNESS: It was designed for those  
6 customers that were at risk of going to a third party  
7 provider, which was primarily TomorrowNow.

8 Q. MR. McDONELL: And did it also include  
11:12 9 customers at risk of going to self support?

TEXT REMOVED - NOT RELEVANT TO MOTION

11 THE WITNESS: If a customer -- yeah, as I  
12 said before, if a customer indicated that they were  
13 looking at a third party provider, then they would go  
11:12 14 on this list. It could be that they ended up, you  
15 know, in any number of situations, but the way they  
16 got on this report is indicating they had talked to a  
17 third party provider.

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CERTIFICATE OF REPORTER

I, WENDY E. ARLEN, a Certified Shorthand Reporter, hereby certify that the witness in the foregoing deposition was by me duly sworn to tell the truth, the whole truth and nothing but the truth in the within-entitled cause;

That said deposition was taken down in shorthand by me, a disinterested person, at the time and place therein stated, and that the testimony of the said witness was thereafter reduced to typewriting, by computer, under my direction and supervision.

That before completion of the deposition, review of the transcript [] was [  ] was not requested. If requested, any changes made by the deponent (and provided to the reporter) during the period allowed are appended hereto.

I further certify that I am not of counsel or attorney for either or any of the parties to the said deposition nor in any way interested in the event of this cause and that I am not related to any of the parties thereto.

DATED: October 2<sup>nd</sup>, 2008

Wendy E Arlen  
WENDY E. ARLEN CSR, No. 4355

# **EXHIBIT B**

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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1999 HARRISON STREET, SUITE 900  
OAKLAND, CALIFORNIA 94612

BY: STEVEN C. HOLTZMAN, ATTORNEY AT LAW

BINGHAM MCCUTCHEN LLP  
THREE EMBARCADERO CENTER  
SAN FRANCISCO, CALIFORNIA 94111-4607

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

FOR DEFENDANTS:

JONES DAY  
SILICON VALLEY OFFICE  
1755 EMBARCADERO ROAD  
PALO ALTO, CALIFORNIA 94303

BY: THARAN GREGORY LANIER, ATTORNEY AT LAW

(APPEARANCES CONTINUED NEXT PAGE)

REPORTED BY:

RAYNEE H. MERCADO, CSR NO. 8258

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TEXT REMOVED - NOT RELEVANT TO MOTION

**THE COURT:** THE THIRD ONE IS THE MOTION TO EXCLUDE THE CUSTOMER STATEMENTS IN ORACLE'S AT-RISK REPORTS. I REVIEWED THE ARGUMENTS. IT CERTAINLY DOES APPEAR TO ME THAT THOSE STATEMENTS ARE HEARSAY IF THEY'RE OFFERED TO PROVE THE TRUTH, THAT IS, THAT THE CUSTOMERS WERE LEAVING FOR PARTICULAR REASONS. BUT IT DOES APPEAR TO ME THAT SAP IS CORRECT THAT THERE ARE NON-HEARSAY PURPOSES FOR WHICH THESE CUSTOMER STATEMENTS CERTAINLY COULD BE PERTINENT.

BUT MOST IMPORTANTLY, THE -- MEYER'S REPORT, AS I -- AS I UNDERSTAND IT, RELIES VERY HEAVILY UPON THESE STATEMENTS; ISN'T IT CORRECT?

1 AND AS I -- AS I UNDERSTAND IT, WASN'T THE AT-RISK  
2 REPORT THAT CONTAINS THESE STATEMENTS PREPARED BY ORACLE? SO  
3 ISN'T THERE A HIGH DEGREE OF RELIABILITY, I MEAN, GIVEN THE  
4 EXPERT RELIED UPON THAT THEY WERE PREPARED BY PLAINTIFF?

5 (OFF-THE-RECORD DISCUSSION.)

6 **MR. HOWARD:** I'M SORRY. JEFF HOWARD.

7 YOUR HONOR, WE'RE NOT CONTENDING THAT THE REPORTS  
8 THEMSELVES ARE NOT --

9 **THE COURT:** -- COMING INTO EVIDENCE, RIGHT?

10 **MR. PICKETT:** YEAH, THEY'RE NOT -- WE'RE NOT SAYING  
11 THEY'RE NOT BUSINESS RECORDS. WE'RE FOCUSED ON JUST THIS ONE  
12 PART OF THE REPORT WHICH ARE TRANSCRIBED COMMENTS FROM  
13 CUSTOMERS.

14 AND WHAT THE CASES SAY IS THAT THAT THIRD-PARTY  
15 STATEMENT IS HEARSAY UNLESS THAT THIRD PARTY WAS UNDER A DUTY TO  
16 STATE IT IN THE REGULAR COURSE OF THEIR BUSINESS, WHICH THERE'S  
17 NO EVIDENCE ON, OR ORACLE WAS UNDER A DUTY TO VERIFY IT OR DID  
18 VERIFY IT IN SOME WAY, WHICH THEY DID NOT DO. TO THE CONTRARY,  
19 THEY DIDN'T -- THEY DID NOT RELY ON THOSE STATEMENTS AS THE  
20 CUSTOMER SAID THEM BECAUSE THEY WERE SHOWN TO BE NOT TRUE FROM  
21 TIME TO TIME BECAUSE CUSTOMERS SAY CERTAIN THINGS IN THE COURSE  
22 OF NEGOTIATING THAT THEY DON'T REALLY MEAN OR KNOW.

23 AND SO IT'S JUST THOSE SPECIFIC STATEMENTS IN THE  
24 REPORT WHICH DON'T RISE TO THE LEVEL OF RELIABILITY OR MEET  
25 THESE STANDARDS WHICH WE'RE SEEKING TO EXCLUDE.

1                   **THE COURT:**   AND YOUR EXPERT DIDN'T RELY UPON THOSE  
2 STATEMENTS?

3                   **MR. HOWARD:**   HE RELIED -- HE USED THE REPORTS BUT DID  
4 NOT RELY ON OR ASCRIBE VERACITY TO ANY OF THE COMMENTS THAT ARE  
5 IN THERE AND -- AND THE -- THE -- MR. CLARKE, THE DEFENDANT'S  
6 EXPERT, IS NOT USING THOSE STATEMENTS TO SHOW THE -- THE  
7 REASONS -- AND IF HE WAS, THEN IT WOULD BE FOR THE TRUTH -- BUT  
8 FOR THE FACT THAT CUSTOMERS WERE GOING TO LEAVE ANYWAY.

9                   AND SO THAT GETS RIGHT BACK TO THE TRUTH OF THE  
10 MATTER ASSERTED.   AND THERE IS NO INDICIA OF RELIABILITY, AND  
11 YOU HAVEN'T HAD THESE OTHER CRITERIA MET, EITHER FROM THE  
12 THIRD-PARTY SIDE OR FROM THE ORACLE SIDE, TO MAKE THAT  
13 ADMISSIBLE.

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**MR. HOWARD:** WELL, YOUR HONOR, AS TO WHY IT WAS PRODUCED IN THE LITIGATION, IT'S FOUNDATIONAL. YOU GO ASK A CUSTOMER, YOU KNOW, WHAT WOULD YOU HAVE DONE. WHAT THEY SAY AND WHAT IS REPORTED IN THIS CONTEXT IS STILL HEARSAY. AND WHAT MR. MCDONELL JUST SAID IS WHAT I SAID AT THE BEGINNING, IT'S BEING OFFERED -- IF IT'S BEING OFFERED FOR THE STATE OF MIND, THAT STATE OF MIND IS THE TRUTH FOR WHICH IT'S BEING ASSERTED, WHICH IS, AS MR. CLARKE SAYS, THAT THEY WOULD HAVE LEFT ANYWAY. AND THAT IS JUST BRINGING HEARSAY IN FOR THE TRUTH OF THE MATTER ASSERTED UNDER THE GUISE OF THE EXCEPTION.

AND WE'VE PROVIDED TO YOUR HONOR ORACLE'S OWN STATEMENTS ABOUT THESE REPORTS, WHICH IS THE CUSTOMERS WERE PURPOSELY DISHONEST WHEN THEY MADE THEM, SO IT'S NOT -- IT'S NOT RELIABLE FOR PURPOSES OF 807.

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I'LL GIVE SOME FURTHER THOUGHT TO THAT WHOLE STATE-OF-MIND ISSUE. I TEND TO THINK THAT TRUTH OF THE MATTER STATE OF MIND IS -- TENDS TO MELD IN THESE CIRCUMSTANCES. WELL, THERE VERY WELL MIGHT, HOWEVER, BE A BASIS UNDER THE RESIDUAL EXCEPTION PERHAPS GIVEN HOW MUCH RELIANCE THERE IS ON THE REPORT AND EVERYTHING CONTAINED THEREIN. THAT MIGHT BE A BASIS FOR ALLOWING IT IN.

TEXT REMOVED - NOT RELEVANT TO MOTION

1 MR. PINTO AND, BY EXTENSION, MR. MEYER, YOU KNOW, OUR ARGUMENT  
2 IS THAT THERE IS A LOT IN THERE THAT DOESN'T GO TO SAVED  
3 ACQUISITION COSTS PER SE. IT'S A QUESTION OF EVALUATION  
4 METHODOLOGIES, IT'S A QUESTION OF NON-INFRINGING ALTERNATIVES,  
5 AND THINGS LIKE THAT. AND WE READ YOUR SUMMARY JUDGMENT'S  
6 ORDER, OBVIOUSLY, VERY, VERY CAREFULLY AND REMAIN CONVINCED THAT  
7 THERE'S A LOT IN THERE THAT DOES GO FAR -- YOU KNOW, IT IS  
8 BEYOND THAT.

9 **THE COURT:** OKAY. ALL RIGHT. THAT'S IT.

10 **MR. LANIER:** THANK YOU VERY MUCH, YOUR HONOR.

11 **THE COURT:** ALL RIGHT.

12 **MR. PICKETT:** THANK YOU, YOUR HONOR.

13 (PROCEEDINGS WERE CONCLUDED AT 12:03 P.M.)

14 --000--



# **EXHIBIT C**

**From:** Rick Cummins [rick.cummins@oracle.com]  
**Sent:** Tuesday, May 09, 2006 1:12 AM  
**To:** Bagshaw William E; BERNSTEIN ELIZABETH A.; BLACKFORD JAMES M; Brook Paul; EBBITT SHEILA; EKDAHL LYLE; GRILLS DENISE EVANS; HANLEY JOHN MACDONALD; HARE DAVID D.; Hariharan Padma; HENSARLING LENLEY JAY; HENSLEE ROBBIN J.; HUSSEY JO; Jeff Ross; JENSEN CATHERINE V.; Jones Juan C; JONES LISA K.; Kesselring Patrick Michael; KILGO BETH A; Kuzemka Cynthia H; LACHS ROBERT M; Lambert Kerry Lynn; LYSKAWA NANCY A; Madsen Christopher; McAteer Barbara L; MCLEOD JAMES L.; MGMILLAN PATRICIA; MILLER GARY N; Moses-Reed Shelley Lynn; NOLAN BRAD JOSEPH; PATRICE JAMES A.; RANSOM BUFFY; SCHIFF JOHN ALEXANDER; SHIPPY ELIZABETH ANN; TSENG TARA; WEBB JOHN K.; Wookey John W.; ZACHARKO DARYL W.  
**Subject:** At Risk Update  
**Attachments:** 3rd party Risk Analysis 05-03-06.xls

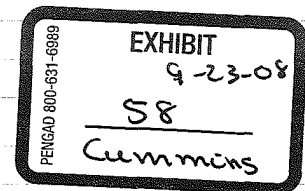
Attached is the latest At Risk update. We are now in the 13th month of tracking this information. Losses and accounts identified are tracking at the estimated amount and in total are approximately 2% of our contract base.

If you have specific questions, please give me a call directly.

Regards,  
Rick

Rick Cummins

**ORACLE** | Support Services  
Director, North America Support Services  
One Technology Way  
Denver, CO 80237  
Phone: 303-334-4795  
Fax: 303-334-1288



# **EXHIBIT D**

**From:** Buffy Ransom [buffy.ransom@oracle.com]  
**Sent:** Thursday, February 08, 2007 9:51 PM  
**To:** tod.keiffer@oracle.com  
**Subject:** RE: Third Party Risk

I think it is Sales Support Representative - may be the last person engaged?

**From:** Tod Keiffer [mailto:tod.keiffer@oracle.com]  
**Sent:** Thursday, February 08, 2007 2:44 PM  
**To:** buffy.ransom@oracle.com  
**Subject:** RE: Third Party Risk

SSR Last I mean

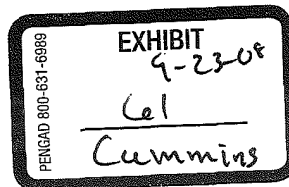
**From:** Buffy Ransom [mailto:buffy.ransom@oracle.com]  
**Sent:** Thursday, February 08, 2007 12:52 PM  
**To:** tod.keiffer@oracle.com  
**Subject:** FW: Third Party Risk

**From:** Rick Cummins [mailto:rick.cummins@oracle.com]  
**Sent:** Friday, January 12, 2007 5:22 PM  
**To:** Bagshaw William E; BERNSTEIN ELIZABETH A.; BRADLEY JANET L.; Brook Paul; Collier John DAVID; DUGGAN PAUL MICHAEL; EBBITT SHEILA; EKDAHL LYLE; FARISH SANDRA; GRILLS DENISE EVANS; Hare David Dwane; HENSARLING LENLEY JAY; HENSLEE ROBBIN J.; HORSNAIL ALAN; HUSSEY JO; JENSEN CATHERINE V.; Jones Juan C; JONES LISA K.; Kesselring Patrick Michael; Knickerbocker Kersten LEIGH; LACHS ROBERT M; Lambert Kerry Lynn; Lindsey Kathleen M; Lohead Catherine S; LYSKAWA NANCY A; Madsen Christopher; McCarthy Timothy ROBERT; MCFADDEN PETER; MCMILLAN PATRICIA; MILLER GARY N; Moses-Reed Shelley Lynn; NOLAN BRAD JOSEPH; PATRICE JAMES A.; RANSOM BUFFY; ROMANO RACHEL; Ross JEFFREY Scott; Rowe-mccune Jordan; SCHIFF JOHN ALEXANDER; SHIPPY ELIZABETH ANN; Sweat David B; TAYLOR ALISON; Torres Yamilet J; WEBB JOHN K.; WONG DORIS D.; ZACHARKO DARYL W.  
**Subject:** Third Party Risk

Attached is the latest third party risk analysis. Highlights are as follows:

- FY07 YTD losses are 2.29% of the contract base compared to 1.62% at this point in FY06
- January losses are currently at \$2.4M (majority of that amount is Merck at \$1.4M)
- Q3 total loss in FY06 was \$5.4M. Q2 FY06 loss to date is \$5.2M. (Merck and Abitibi make up \$2.9M of that loss)
- Enterprise still leads the losses in terms of dollars, although the Q2 losses are very high in JDE products once again due to losses of Merck and Abitibi
- Tomorrow Now continues to be aggressive in the mid market. They are currently offering a "beta" program where a customer does not sign up for support, but has the ability to log a call into their call center and into Oracle. They then encourage the customer to compare the two.
- Losses have been managed very close to FY06 levels. Although we are seeing Tomorrow Now engaged with more customers, the sales teams have been strong in managing attrition and selling the value of apps unlimited and lifetime support.

Let me know if you have questions.



Regards,  
Rick

Rick Cummins

**ORACLE** | Support Services

Senior Director, North America Support Services  
One Technology Way  
Denver, CO 80237  
Phone: 303-334-4795  
Fax: 303-334-1288

**EXHIBIT E**

RICHARD CUMMINS April 21, 2009  
HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

--oOo--

ORACLE CORPORATION, a	)	
Delaware corporation, ORACLE	)	
USA, INC., a Colorado	)	
corporation, and ORACLE	)	
INTERNATIONAL CORPORATION, a	)	
California corporation,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	07-CV-1658 (PJH)
	)	
SAP AG, a German corporation,	)	
SAP AMERICA, INC., a Delaware	)	
corporation, TOMORROWNOW,	)	
INC., a Texas corporation, and	)	
DOES 1-50, inclusive,	)	
	)	
Defendants.	)	
	)	

VIDEOTAPED DEPOSITION OF RICHARD CUMMINS

APRIL 21, 2009

VOLUME I

(Pages 1 - 259)

HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY

REPORTED BY: SARAH LUCIA BRANN, CSR 3887 (#417985)

Merrill Legal Solutions  
(800) 869-9132

RICHARD CUMMINS April 21, 2009  
HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY

Page 234

16:17:56 1 A. I don't recognize it, but -- I mean, the  
16:17:58 2 format looks like an at-risk report. I don't  
16:18:01 3 remember this specific entry.  
16:18:03 4 Q. Under the format that you described to us  
16:18:06 5 previously, Column H, the notes section, was an area  
16:18:10 6 where the AE could record notes about the  
16:18:15 7 customer's --  
16:18:16 8 A. That's correct.  
16:18:16 9 Q. -- indication of their reasons and  
16:18:17 10 motivations.  
16:18:21 11 A. That's correct.  
16:18:21 12 Q. And you relied on that for keeping track  
16:18:24 13 of customers that were at risk of cancelling  
16:18:26 14 support.  
16:18:27 15 A. Yes.

TEXT REMOVED - NOT RELEVANT TO MOTION

Merrill Legal Solutions  
(800) 869-9132

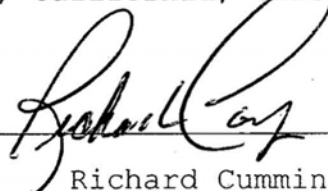
RICHARD CUMMINS

April 21, 2009

HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY

16:55:06  
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I declare under penalty of perjury the  
foregoing is true and correct. Subscribed at  
San Francisco, California, this 4th day  
of May, 2009.  
  
Richard Cummins

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CERTIFICATE OF REPORTER

I, SARAH LUCIA BRANN, a Certified Shorthand Reporter, hereby certify that the witness in the foregoing deposition was by me duly sworn to tell the truth, the whole truth, and nothing but the truth in the within-entitled cause;

That said deposition was taken down in shorthand by me, a disinterested person, at the time and place therein stated, and that the testimony of the said witness was thereafter reduced to typewriting, by computer, under my direction and supervision;

That before completion of the deposition, review of the transcript [X] was [ ] was not requested. If requested, any changes made by the deponent (and provided to the reporter) during the period allowed are appended hereto.

I further certify that I am not of counsel or attorney for either or any of the parties to the said deposition, nor in any way interested in the event of this cause, and that I am not related to any of the parties thereto.

DATED:           May 4, 2009          

          Sarah Lucia Brann          

SARAH LUCIA BRANN, CSR No. 3887