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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' REVISED SPECIAL
VERDICT FORM**

1 Pursuant to the Court's guidance at the November 19, 2010 proceedings, Defendants
2 submit the attached Revised Special Verdict Form. Despite the Court's expressed preference for
3 Defendants' special verdict form, Plaintiffs declined to submit this form jointly. *See* 11/19/10
4 Trial Tr. at 2004:6-19 ("If I am required to elect between the two of them, I would elect the
5 Defendants.").

6 Instead, at 1:32 p.m. on Sunday, November 21, 2010, Plaintiffs proposed, for the first time,
7 a change to the special verdict form "intended to reflect the possibility that a fair market value
8 license award may not include infringers' profits." *See* 11/21/10 1:32 p.m. E-Mail from G.
9 Howard to J. Lee ("RE: Oracle's Revisions to Defendants' Copyright Damages Instructions").
10 Then, at 2:45 p.m., Plaintiffs sent a revised version of their proposal that deleted the following
11 sentence of Defendants' special verdict form:

12 If you assigned actual damages in the form of a fair market value license for the
13 rights infringed, please proceed to the end of the form (*i.e.* Do not answer question
14 2). If you assigned actual damages in the form of lost profits, please proceed to
the following question.

15 11/21/10 2:45 p.m. E-mail from G. Howard to J. Lee ("RE: Oracle's Revisions to Defendants'
16 Copyright Damages Instructions"). Plaintiffs proposed replacing the deleted sentence with the
17 following language:

18 In addition to actual damages, Oracle is entitled to any profits of Defendants
19 attributable to the infringement. You may not include in an award of profits any
amount that you took into account in determining actual damages.

20 *Id.*

21 Plaintiffs' proposals contradict not only Plaintiffs' consistent position in this case that an
22 award of actual damages in the form of a fair market value license takes into account infringers'
23 profits, but also the Court's unambiguous guidance at the charge conference that an award of
24 actual damages in the form of a fair market value license encompasses infringer's profits:

25 **THE COURT: I AGREE WITH DEFENDANTS. I THINK THAT THE**
26 **HYPOTHETICAL LICENSE DOES INCLUDE THE INFRINGER'S PROFITS**
27 **REGARDLESS OF WHAT NUMBER THE JURY COMES BACK WITH. SO**
28 **THAT SETTLES THAT PART OF IT.**

1 11/19/10 Trial Tr. at 1959:19-22. Furthermore, Plaintiffs’ proposals ignore the Court’s stated
2 preference that the special verdict form provide a roadmap for the jury regarding the types of
3 damages it may and may not award:

4 **THE COURT:** . . . I DEFINITELY THINK THAT WE SHOULD SPECIFY THE
5 CATEGORIES. IT’S GOING TO BE -- WE NEED TO GIVE THE JURY AS
6 MUCH GUIDANCE AS WE CAN, THAT THEY KNOW THERE ARE THESE
7 CATEGORIES, SO WE HAVE A PLAIN ENGLISH INSTRUCTION SAYING
8 THESE ARE THE KINDS OF DAMAGES THAT MAY BE SOUGHT AND A
9 VERDICT FORM THAT IS CONSISTENT WITH THAT LANGUAGE IT
10 WILL BE MUCH EASIER FOR THEM TO, I THINK, FIGURE IT OUT.

11 11/19/10 Trial Tr. at 2004:20-2005:1.

12 Defendants respectfully request that the Court adopt Defendants’ special verdict form
13 attached hereto.

14 Dated: November 21, 2010

JONES DAY

15 By: /s/ Tharan Gregory Lanier
16 Tharan Gregory Lanier

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

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ORACLE USA, INC., ORACLE
INTERNATIONAL CORP., and SIEBEL
SYSTEMS, INC.

Plaintiffs,

v.

TOMORROWNOW, INC., SAP AMERICA,
INC., AND SAP AG

Defendants.

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

SPECIAL VERDICT FORM

We, the jury in the above-entitled action, find the following special verdict on the questions submitted to us:

Actual Damages for Copyright Infringement

1. What is the dollar amount that Oracle is entitled to from Defendants to compensate Oracle for its actual damages under its copyright infringement claim, in the form of EITHER a fair market value license for the copyright infringement OR lost profits?

FAIR MARKET VALUE LICENSE: \$ _____,

OR,

LOST PROFITS: \$ _____.

If you assigned actual damages in the form of a fair market value license for the rights infringed, please proceed to the end of the form (*i.e. Do not answer question 2*). If you assigned actual damages in the form of lost profits, please proceed to the following question.

Infringers' Profits for Copyright Infringement

2. What is the dollar amount that Oracle is entitled to from Defendants as infringers' profits under Oracle's copyright infringement claim?

\$ _____.

Have the presiding juror sign and date this form.

Signed: _____ Dated: _____
Presiding Juror