

1 Jerry Busby
Bar No. 1107
2 Kimberly Maxson-Rushton
Bar No. 005065
3 COOPER LEVENSON APRIL
NIEDELMAN & WAGENHEIM, PA
4 900 South 4th Street
Las Vegas, NV 89101
5 Telephone: (702) 366-1125
Facsimile: (702) 366-1857

6 Scott W. Cowan
7 *Pro hac vice* admission pending
JONES DAY
8 717 Texas
Suite 3300
9 Houston, TX 77002-2712
Telephone: (832) 239-3939
10 Facsimile: (832) 239-3600

11 Attorneys for Defendants
SAP AG, SAP America, Inc., and
12 TomorrowNow, Inc.

13 **UNITED STATES DISTRICT COURT**
14 **DISTRICT OF NEVADA**

16 Oracle USA, Inc., et al,
17 Plaintiffs,
18 v.
19 SAP AG, et al,
20 Defendants.

Case No. 2:09-cv-01591-KJD-GWF

Pending In: Case No. 07-CV-01658 PJH
(EDL), United States District Court,
Northern District of California, Oakland
Division

**DEFENDANTS' RESPONSE TO
PLAINTIFFS' MOTION TO COMPEL
NON-PARTY SETH RAVIN TO
ANSWER DEPOSITION QUESTIONS,
AND TO COMPEL NON-PARTY
RIMINI STREET TO PRODUCE
DOCUMENTS IN RESPONSE TO
ORACLE'S SUBPOENA**

25 **I. INTRODUCTION AND PURPOSE OF DEFENDANTS' RESPONSE**

26 SAP AG, SAP America, Inc. and TomorrowNow, Inc. (collectively, "Defendants") file
27 this response to Plaintiffs' Motion to Compel Non-Party Seth Ravin to Answer Deposition
28

1 Questions, and to Compel Discovery from Rimini Street. Defendants are neither movants nor
2 direct respondents to the motion to compel pending before this Court. This response is being
3 filed because Defendants are real parties in interest relating to the subject of Plaintiffs' motion
4 and thus wish to succinctly state their position on the two issues noted on pages 3 and 4 below.¹

5
6 The underlying case, filed in March 2007 in the Northern District of California, is pending
7 before District Judge Phyllis Hamilton, who appointed Magistrate Judge Elizabeth Laporte to
8 oversee discovery in this case beginning in April 2008. Since her appointment, Judge Laporte has
9 been actively involved in monitoring the extensive discovery the parties are conducting in this
10 case. She holds discovery conferences for the parties approximately every five to seven weeks to
11 monitor the progress of discovery, informally resolve certain discovery disputes, field motions to
12 compel, and facilitate discovery agreements between the parties. This response is not intended in
13 any way to circumvent Judge Laporte's authority over the discovery in this case, and Defendants
14 would not object if this Court were to defer to her knowledge of, and experience with, the
15 discovery in the underlying case and refer the decision on Plaintiffs' motion to Judge Laporte.²

16
17 Regardless of whether this Court decides to rule on Plaintiffs' motion or remit it to Judge
18 Laporte, Defendants file this response to: (a) correct Plaintiffs' mischaracterization of certain
19 aspects of Defendants' positions in the underlying dispute; and (b) advise the Court and all parties
20 that if any portion of the relief requested by Plaintiffs is granted, then Defendants will likely seek
21 additional discovery from non-parties Ravin and Rimini.
22

23
24 ¹ On September 4, 2009, at the conclusion of meet and confer conversations involving
25 counsel for all parties regarding this response, counsel for non-parties Seth Ravin and Rimini
26 Street and counsel for Plaintiffs stipulated that Defendants' may file this response on or before
September 14, 2009. Ravin, Rimini and Plaintiffs indicated that they do not necessarily agree
with the purpose or substance of this response and that they would file their replies this response
on September 17 (Ravin and Rimini), and 24 (Plaintiffs). *See* Ex. "A."

27 ² *See Highland Tank & Mfg. Co. v. PS Int'l, Inc.*, 227 F.R.D. 374, 382 n. 11 (W.D. Pa.
28 2005) (noting that while a court that issued a non-party subpoena has exclusive jurisdiction to rule
on such a subpoena, it has the discretion to remit matters to the court where the underlying action
is pending).

1 **II. PLAINTIFFS MISCHARACTERIZE DEFENDANTS' POSITIONS**

2 Plaintiffs claims against Defendants relate to TomorrowNow, Inc.'s ("TN's") provision of
3 third-party support to companies who run Plaintiffs' software. There are several entities besides
4 TN that provide third-party support for Plaintiffs' software. Rimini is one such provider.
5 Plaintiffs assert that several of their causes of action against Defendants entitle them to alleged
6 lost profits for those customers who contracted with TN for support of Plaintiffs' software.
7

8 Defendants have several defenses to Plaintiffs' alleged lost profits claims. Those defenses
9 include the position that Defendants cannot be held liable for any of Plaintiffs' alleged lost profits
10 attributable to Plaintiffs' customers once they left TN and either moved to Rimini or another
11 third-party supporter provider, or continued use of their software in some other manner without
12 buying maintenance support from Plaintiffs. This defense is consistent with Defendants' previous
13 discovery requests and motions. Defendants have taken some discovery relating to Rimini and
14 other third-party service providers. That discovery has been primarily directed towards learning
15 about Plaintiffs' knowledge of, and relationships with, those third-party service providers and any
16 communications and other exchange of information between Plaintiffs and Rimini or other third
17 parties that support Plaintiffs' software. Defendants have also availed themselves of their right to
18 cross-examine Ravin and two of Rimini's employees, George and Beth Lester, when Plaintiffs
19 deposed those three individuals for the underlying case. During Ravin's deposition, Defendants
20 sought basic information regarding how many customers left TN and went to Rimini.
21

22
23 The details of Rimini's business model and whether Plaintiffs believe it is legal or not
24 have no bearing on Defendants' lost profits defenses or any other issues in the underlying case.
25 Notably, Plaintiffs cite no legal authority for their position that they do. If Plaintiffs believe that
26 Rimini's business model is illegal, then they may assert claims against, and seek damages from,
27 Ravin and/or Rimini in a separate action. Plaintiffs cannot, however, recover from Defendants in
28

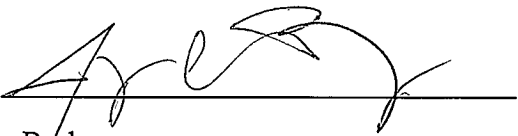
1 the underlying case any alleged lost profits attributable to Rimini's service of Plaintiffs'
2 customers. Defendants should not be required in the underlying litigation to defend Rimini's
3 business model. Otherwise, Plaintiffs would effectively be permitted to try a "case within a case"
4 against Ravin and Rimini *in abstentia*, impermissibly forcing Defendants to assume the defense
5 of those non-parties in the underlying action.
6

7 **III. DEFENDANTS' LIKELY FURTHER DISCOVERY FROM RAVIN AND RIMINI**

8 If this Court or Judge Laporte grants any portion of the relief requested in Plaintiffs'
9 motion to compel, then Defendants may likely seek further discovery from Ravin and Rimini,
10 depending, of course, on the nature and extent of any relief that may be granted. If Plaintiffs are
11 permitted in the underlying action to effectively try all or any portion of their "case within a
12 case," then Defendants must be able to seek any additional discovery from Ravin and/or Rimini
13 necessary to defend against Plaintiffs' assertions. Defendants currently have no discovery
14 requests outstanding to either Ravin or Rimini, and they currently do not intend to seek any
15 additional discovery from either of them until there is a ruling on Plaintiffs' motion.
16

17 Dated: September 14, 2009

Respectfully submitted,

18
19 By: 

20 Jerry Busby
21 Bar No. 1107
22 Kimberly Maxson-Rushton
23 Bar No. 005065
24 COOPER LEVENSON APRIL
25 NIEDELMAN & WAGENHEIM, PA
26 900 South 4th Street
27 Las Vegas, NV 89101
28 Telephone: (702) 366-1125
Facsimile: (702) 366-1857

Attorneys for Defendants
SAP AG, SAP AMERICA, INC. AND
TOMORROWNOW, INC.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

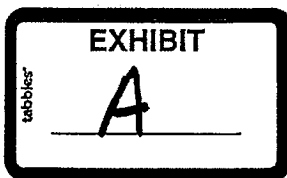
Pursuant to FRCP 5(b), I certify that I am an employee of COOPER LEVENSON APRIL NIEDELMAN & WAGENHEIM, P.A. and that on this 14th day of September, 2009, I did cause a true copy of the foregoing Defendants' Response to Plaintiffs' Motion to Compel Non-Party Seth Ravin to Answer Deposition Questions, and to Compel Non-Party Rimini Street to Produce Documents in Response to Oracle's Subpoena to be served via CM/ECF electronic filing upon the following person(s):

Bert Wuester, Jr.
Fox Rothschild, LLP
3800 Howard Hughes Parkway, Suite 500
Las Vegas, NV 89169

Geoffrey M. Howard
Bingham McCutchen LLP
Three Embarcadero Center
San Francisco, CA 94111-4067
Attorneys for Plaintiffs

Aaron D. Ford
Snell & Wilmer L.L.P.
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, NV 89169
Attorney for Non-Parties Seth Ravin and Rimini Street, Inc.

By: 
COOPER LEVENSON APRIL
NIEDELMAN & WAGENHEIM, P.A.



Scott Cowan/JonesDay

09/04/2009 07:02 PM

To "Geoffrey Howard" <geoff.howard@bingham.com>
cc Courtney D Scobie/JonesDay@JonesDay, "Russell Chad" <chad.russell@bingham.com>, MLevin@wsgr.com, Greg Lanier/JonesDay@JonesDay
Subject Re: Request for meet and confer this Friday re statements in Oracle's MTC filed in the USDC - Nevada District []

Geoff,

What I said to you yesterday and again this morning is that Defendants acknowledge that we currently have no outstanding requests for discovery from Ravin/Rimini, but that we intended to make clear to the Nevada Court that if Plaintiffs are successful in proving the relevance of the discovery they seek through this particular motion to compel, then Defendants may likely seek additional discovery from Ravin and Rimini. The "likely" in the preceding sentence is an acknowledgment that we obviously need to know what, if anything, is going to be produced in response to Plaintiffs motion to compel. You will recall that I said this morning that I felt we needed to make a statement on this issue to the Court now to prevent Ravin/Rimini from arguing later that Defendants' silence on the issue at this time would somehow operate as a waiver against Defendants seeking additional discovery from Ravin/Rimini at a later time.

Have a good weekend.

Regards,
SUC

Scott W. Cowan
Jones Day
717 Texas, Suite 3300
Houston, Texas 77002
Direct: 832-239-3721
Cell: 832-867-2621
Fax: 832-239-3600
Email: swcowan@jonesday.com

This e-mail (including any attachments) may contain information that is private, confidential, or protected by attorney-client or other privilege. If you received this e-mail in error, please delete it from your system without copying it and notify sender by reply e-mail, so that our records can be corrected.

----- Original Message -----

From: "Howard, Geoff" [geoff.howard@bingham.com]
Sent: 09/04/2009 04:34 PM MST
To: Scott Cowan
Cc: Courtney Scobie; "Russell, Chad" <chad.russell@bingham.com>;
"MLevin@wsgr.com" <MLevin@wsgr.com>; Greg Lanier
Subject: RE: Request for meet and confer this Friday re statements in Oracle's
MTC filed in the USDC - Nevada District

Scott, on the first point raised below, I believe you said you would wait until you saw whatever production may result, if any, from the motion to compel. Regardless, as I pointed out on the call, Defendants' discovery is not served and not before the Court so it isn't clear to me the basis for burdening the Court with additional filings on this issue, but we will respond according to the timeline set forth below.

Thanks,
Geoff

-----Original Message-----

From: Scott Cowan [mailto:swcowan@JonesDay.com]
Sent: Friday, September 04, 2009 1:53 PM
To: Howard, Geoff
Cc: Courtney Scobie; Russell, Chad; MLevin@wsgr.com; Greg Lanier
Subject: RE: Request for meet and confer this Friday re statements in Oracle's
MTC filed in the USDC - Nevada District

Geoff,

One other point I raised on the call this morning was that Defendants intend to point out in the filing we make that if Plaintiffs are successful in proving the relevance of the discovery they seek through this particular motion to compel, then Defendants may likely seek additional discovery from Ravin and Rimini. With respect to your comment below that the short statement of Defendants' position that we intend to file "will not take sides in the dispute that is the subject of the motion to compel", please understand that the only "side" Defendants intend to take is Defendants' side, regardless of whether that works to the benefit or detriment to either Plaintiffs or Ravin/Rimini with respect to the dispute that is the subject of the motion to compel.

Also, your summary below does not indicate that I asked whether there has been any informal exchange of discovery between Plaintiffs and Ravin/Rimini that has not been provided to Defendants. This confirms that my understanding from your response is that there has been no such informal discovery exchange.

Regards,
SWC

Scott W. Cowan
Jones Day
717 Texas, Suite 3300
Houston, Texas 77002
Direct: 832-239-3721
Cell: 832-867-2621

Fax: 832-239-3600
Email: swcowan@jonesday.com

"Howard, Geoff"
<geoff.howard@bin
gham.com>

09/04/2009 11:45
AM

To
"Scott Cowan"
<swcowan@JonesDay.com>,
"MLevin@wsgr.com" <MLevin@wsgr.com>

cc
"Greg Lanier"
<tglanier@jonesday.com>, "Courtney
Scobie" <cdscobie@JonesDay.com>,
"Russell, Chad"
<chad.russell@bingham.com>

Subject
RE: Request for meet and confer
this Friday re statements in
Oracle's MTC filed in the USDC -
Nevada District

Confirming our call this morning, we convened for the purpose of discussing the issues raised in Scott's email below, in particular Defendants' desire to file a short statement with the Nevada court to clarify its position regarding its own defense to damages in the Oracle/SAP case. On the call we all agreed that while we do not agree on the purpose or substance of the filing Defendants intend to make in the Nevada court in connection with Oracle's motion to compel, we did stipulate that Defendants may file a short statement of their position (which will not take sides in the dispute that is the subject of the motion to compel), and further agreed on a briefing schedule as follows: Defendants to file their statement on September 14, Rimini to file any response on September 17, Oracle to file any response along with its reply papers on September 24. Finally, we had a brief discussion regarding the substance of Oracle's motion in which Oracle reiterated the relief it seeks and the basis for it as set forth in its motion papers, on which there has already been meet and confer between Oracle and Rimini, and Oracle further reiterated its view that the relief sought is narrowly tailored and appropriate under the circumstances. We understand Rimini may oppose the motion in part on ground of burden, and we will address that further as appropriate in our reply papers.
Thanks,
Geoff

-----Original Message-----
From: Scott Cowan [mailto:swcowan@JonesDay.com]
Sent: Wednesday, September 02, 2009 7:43 PM
To: Howard, Geoff; MLevin@wsgr.com
Cc: Greg Lanier; Courtney Scobie

Subject: Request for meet and confer this Friday re statements in Oracle's MTC filed in the USDC - Nevada District

Geoff and Michael,

We have reviewed Oracle's Motion to Compel directed to Ravin and Rimini in the USDC - Nevada District. Defendants are concerned with several statements that Plaintiffs made in their motion to compel relating to SAP's defenses in the NDCA action. We request a meet and confer this Friday to discuss those statements. We think that it may be necessary for Defendants to make a filing in the USDC - Nevada District to make it clear that Defendants do not agree with Plaintiffs' characterization of Defendants' position. However, before we make any such filing, I think we should talk ASAP to make sure that we have interpreted Plaintiffs statements correctly, that you understand Defendants' concerns regarding those statements, and to discuss whether you or your clients have any preference regarding whether any filing by Defendants should be on or after Ravin's and Rimini's currently scheduled response date of September 14.

Geoff, my understanding is that you will be conducting Shelley's deposition tomorrow. If that is the case, then hopefully we can chat for a few minutes on this while you are in our Houston office.

Regards,
SWC

Scott W. Cowan
Jones Day
717 Texas, Suite 3300
Houston, Texas 77002
Direct: 832-239-3721
Cell: 832-867-2621
Fax: 832-239-3600
Email: swcowan@jonesday.com

This e-mail (including any attachments) may contain information that is private, confidential, or protected by attorney-client or other privilege. If you received this e-mail in error, please delete it from your system without copying it and notify sender by reply e-mail, so that our records can be corrected.

Confidentiality Notice: The information in this e-mail (including attachments, if any) is considered confidential and is intended only for the recipient(s) listed above. Any review, use, disclosure, distribution or copying of this e-mail is prohibited except by or on behalf of the intended recipient. If you have received this email in error, please notify me immediately by reply email, delete this email, and do not disclose its contents to anyone.

Bingham McCutchen LLP Circular 230 Notice: To ensure compliance with IRS requirements, we inform you that any U.S. federal tax advice contained in this communication is not intended or written to be used, and cannot be used by any taxpayer, for the purpose of avoiding any federal tax penalties. Any legal advice expressed in this message is being delivered to you solely for your use

in connection with the matters addressed herein and may not be relied upon by any other person or entity or used for any other purpose without our prior written consent.

=====

This e-mail (including any attachments) may contain information that is private, confidential, or protected by attorney-client or other privilege. If you received this e-mail in error, please delete it from your system without copying it and notify sender by reply e-mail, so that our records can be corrected.

=====