

1 Robert A. Mittelstaedt (SBN 060359)  
Jason McDonell (SBN 115084)  
2 Elaine Wallace (SBN 197882)  
JONES DAY  
3 San Francisco Office  
555 California Street, 26<sup>th</sup> Floor  
4 San Francisco, CA 94104  
Telephone: (415) 626-3939  
5 Facsimile: (415) 875-5700  
ramittelstaedt@jonesday.com  
6 jmcdonell@jonesday.com  
ewallace@jonesday.com  
7

8 Tharan Gregory Lanier (SBN 138784)  
Jane L. Froyd (SBN 220776)  
JONES DAY  
9 Silicon Valley Office  
1755 Embarcadero Road  
10 Palo Alto, CA 94303  
Telephone: (650) 739-3939  
11 Facsimile: (650) 739-3900  
tgranier@jonesday.com  
12 jfroyd@jonesday.com

13 Scott W. Cowan (Admitted *Pro Hac Vice*)  
Joshua L. Fuchs (Admitted *Pro Hac Vice*)  
14 JONES DAY  
717 Texas, Suite 3300  
15 Houston, TX 77002  
Telephone: (832) 239-3939  
16 Facsimile: (832) 239-3600  
swcowan@jonesday.com  
17 jlfuchs@jonesday.com

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

20 UNITED STATES DISTRICT COURT  
21 NORTHERN DISTRICT OF CALIFORNIA  
22 SAN FRANCISCO DIVISION

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

Case No. 07-CV-1658 PJH

**DECLARATION OF JASON  
McDONELL IN SUPPORT OF  
DEFENDANT TOMORROWNOW'S  
OBJECTIONS TO SPECIAL  
MASTER'S REPORT AND  
RECOMMENDATIONS RE:  
DISCOVERY HEARING NO. 2**

1 I, JASON McDONELL, declare:

2 I am a partner in the law firm of Jones Day, 555 California Street, San Francisco,  
3 California 94104, a member in good standing of the bar of this state, and counsel of record for  
4 Defendants SAP AG, SAP AMERICA, INC., and TOMORROWNOW, INC in the above-  
5 captioned action. I make this declaration based on personal knowledge and, if called upon to do  
6 so, could testify competently thereto.

7 1. Attached hereto as **Exhibit A** is a true and correct copy of portions of Plaintiffs'  
8 Responses and Objections to Defendant TomorrowNow, Inc.'s First Set of Document Requests,  
9 dated September 14, 2007.

10 2. Attached hereto as **Exhibit B** is a true and correct copy of the Special Master's  
11 Report and Recommendations Re: Discovery Hearing No. 2, dated March 19, 2008 (the "Second  
12 R and R").

13 3. Attached hereto as **Exhibit C** is a true and correct copy of portions of the  
14 transcript of the March 4, 2008 hearing in front of the Special Master on the parties' second set of  
15 motions to compel.

16 4. Attached hereto as **Exhibit D** is a true and correct copy of the portion of the  
17 Special Master's April 4, 2008 Report and Recommendations Re: Discovery Hearing No. 3 that  
18 amends the Second R and R.

19 5. Attached hereto as **Exhibit E** is a true and correct copy of portions of  
20 TomorrowNow's February 19, 2008 letter brief to Judge Legge regarding its second motion to  
21 compel.

22 6. Attached hereto as **Exhibit F** is a true and correct copy of a July 10, 2002 letter  
23 from David Chavez of PeopleSoft to Seth Ravin of TomorrowNow.

24 7. Attached hereto as **Exhibit G** is a true and correct copy of a March 21, 2008 letter  
25 from SAP's counsel, Jason McDonell, to the Special Master.

26 8. As of the March 4, 2008 hearing on the parties' second set of motions to compel,  
27 Oracle's counsel had identified eighteen priority document custodians of the defendants. Ten  
28 were identified in an email, dated October 23, 2007, from Oracle's counsel to three of my

1 colleagues at Jones Day, which I have reviewed. Eight more were identified in a December 11,  
2 2007 email from Oracle's counsel to me. Of these eighteen custodians, sixteen were TN  
3 custodians and two were SAP custodians.

4 9. On or about March 20, 2008, as part of the discovery negotiations in this case,  
5 counsel for defendants proposed that the total universe of custodians from which defendants  
6 would collect documents would include fifty-three TomorrowNow custodians and thirty SAP  
7 custodians. These lists containing eighty-three proposed custodians have not been disclosed to  
8 the Special Master and were not discussed with the Special Master in connection with the motions  
9 to compel.

10 10. Earlier today, I participated in a conference call with counsel for plaintiffs about  
11 discovery issues, during which counsel for plaintiffs took the position that the Second R & R  
12 requires the SAP defendants to produce documents by April 15 from all thirty custodians who  
13 were identified in the March 20, 2008 proposal that was intended to be the entire universe of SAP  
14 custodians that would be searched for documents, not the priority custodians. We advised  
15 counsel for Plaintiffs that we disagreed with their interpretation of the Second R and R and would  
16 file this objection as a protective measure.

17 12. I am informed and believe that, to date, Defendants have produced almost 1.7  
18 million pages of TN documents and over 6 terabytes of electronic data from TN.

19 I declare under penalty of perjury under the laws of the United States and the State of  
20 California that the foregoing is true and correct. Executed this 8<sup>th</sup> day of April 2008 in San  
21 Francisco, California.

22  
23 /s/ Jason McDonell  
24 JASON McDONELL

25  
26  
27 SFI-5814-01.d

# **EXHIBIT A**

1 BINGHAM McCUTCHEM LLP  
 CHRISTOPHER B. HOCKETT (SBN 121539)  
 2 GREGORY M. HOWARD (SBN 157468)  
 HOLLY A. HOUSE (SBN 136045)  
 3 ZACHARY J. ALINDER (SBN 209009)  
 BREE HANN (SBN 215695)  
 4 Three Embarcadero Center  
 San Francisco, CA 94111-4067  
 Telephone: (415) 393-2000  
 5 Facsimile: (415) 393-2286  
 chris.hockett@bingham.com  
 6 gcoff.howard@bingham.com  
 holly.house@bingham.com  
 7 zachary.alinder@bingham.com  
 bree.hann@bingham.com  
 8

9 DORIAN DALEY (SBN 129049)  
 500 Oracle Parkway  
 10 M/S 50p7  
 Redwood City, CA 94070  
 Telephone: (650) 506-4846  
 11 Facsimile: (650) 506-7114  
 12 dorian.daley@oracle.com

13 Attorneys for Plaintiffs  
 14 Oracle Corporation, Oracle USA, Inc.,  
 and Oracle International Corporation

15 UNITED STATES DISTRICT COURT  
 16 NORTHERN DISTRICT OF CALIFORNIA  
 17 SAN FRANCISCO DIVISION  
 18

19 ORACLE CORPORATION, a Delaware  
 20 corporation, ORACLE USA, INC., a Colorado  
 corporation, and ORACLE INTERNATIONAL  
 21 CORPORATION, a California corporation,

22 Plaintiffs,

23 v.

24 SAP AG, a German corporation, SAP  
 AMERICA, INC., a Delaware corporation,  
 25 TOMORROWNOW, INC., a Texas corporation,  
 and DOES 1-50, inclusive,

26 Defendants.  
 27  
 28

Case No. 07-CV-1658 MJJ

**PLAINTIFFS' RESPONSES AND  
 OBJECTIONS TO DEFENDANT  
 TOMORROWNOW, INC.'S FIRST  
 SET OF DOCUMENT REQUESTS**

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

**PROPOUNDING PARTY:** Defendant TomorrowNow, Inc.  
**RESPONDING PARTY:** Plaintiffs Oracle Corporation, Oracle USA, Inc., and Oracle International Corporation  
**SET NUMBER:** One

Plaintiffs Oracle Corporation, Oracle USA, Inc., and Oracle International Corporation (collectively, "Oracle") hereby respond and object to Defendant TomorrowNow, Inc.'s ("SAP TN") First Set of Document Requests to Plaintiffs ("Requests") as follows:

**GENERAL OBJECTIONS**

1. Oracle objects to the Requests on the grounds that they are vague, overbroad, oppressive, harassing, and unduly burdensome.

2. Oracle objects to the extent that any Request seeks documents protected from disclosure by any evidentiary privilege, including without limitation the attorney-client privilege and work product doctrine. Oracle does not intend to produce any privileged documents.

3. Oracle objects to the Requests to the extent that they seek the production of documents that are not within Oracle's possession, custody, or control and to the extent that they purport to impose any duty to provide information and/or documents more readily available from sources other than Oracle. Absent mutual agreement with defendants, Oracle will produce no such third-party documents.

4. Oracle objects to the Requests to the extent that they seek third party business or proprietary information subject to a confidentiality agreement and/or protective order and will not produce such materials absent a Court order.

5. Oracle objects to the Requests to the extent they seek to require Oracle to search for, review, or produce inaccessible information or materials. Oracle will not undertake to search for, review, or produce inaccessible data.

6. Oracle objects to the Requests to the extent that they purport to impose obligations different from or greater than those imposed by the Federal Rules of Civil Procedure.

7. Where Oracle has agreed to produce documents, such production will be

**1     RESPONSE TO DOCUMENT REQUEST NO. 24:**

2           Oracle objects to this Request on the grounds stated in its General Objections. Oracle  
 3 further objects to this Request on the grounds that it seeks Documents in the possession of  
 4 defendants or third parties. Oracle further objects to this Request on the grounds that it is  
 5 duplicative of Request No. 23. Oracle further objects to this Request on the grounds that it calls  
 6 for Documents protected by the attorney-client or work product privileges.

7           Subject to and without waiving these objections, Oracle responds that it will search for  
 8 and produce non-privileged Documents relating to whether "SAP may have enhanced or  
 9 improved its own software applications offerings" using information from Software and Support  
 10 Materials, to the extent such Documents exist.

**11     DOCUMENT REQUEST NO. 25:**

12           All Documents relating to any Communications between Oracle, or anyone acting on its  
 13 behalf, and any current or former TN employee concerning TN, SAP America, or SAP AG.

**14     RESPONSE TO DOCUMENT REQUEST NO. 25:**

15           Oracle objects to this Request on the grounds stated in its General Objections. Oracle  
 16 further objects to this Request on the grounds that it is overbroad, unduly burdensome, and is not  
 17 reasonably calculated to lead to the discovery of admissible evidence, in that such  
 18 Communications are in no way limited to the issues raised by the Complaint. Oracle further  
 19 objects to the Request on the grounds that it imposes an undue burden on Oracle to determine if  
 20 any of its thousands of personnel have had Communications with any current or former SAP TN  
 21 employee. Oracle further objects to the Request on the grounds that it calls for Documents  
 22 protected by the attorney-client, work product, or other privileges.

23           Subject to and without waiving these objections, Oracle responds that it will not produce  
 24 Documents responsive to this Request.

**25     DOCUMENT REQUEST NO. 26:**

26           All Documents relating to any Communications between Oracle, or anyone acting on its  
 27 behalf, and any person or entity currently or formerly affiliated with TN, concerning TN, SAP  
 28 America, or SAP AG.

**RESPONSE TO DOCUMENT REQUEST NO. 26:**

Oracle objects to this Request on the grounds stated in its General Objections. Oracle further objects to this Request on the grounds that it is overbroad, unduly burdensome, and is not reasonably calculated to lead to the discovery of admissible evidence, in that such Communications are in no way limited to the issues raised by the Complaint. Oracle further objects to the Request on the grounds that it imposes an undue burden on Oracle to determine if any of its thousands of personnel have had Communications with any person "currently or formerly affiliated" with SAP TN, which could be interpreted to include any employee of any entity that ever considered using SAP TN's services. Oracle further objects to the Request on the grounds that it is duplicative of Request No. 25. Oracle further objects to the Request on the grounds that it calls for Documents protected by the attorney-client, work product, or other privileges.

Subject to and without waiving these objections, Oracle responds that it will not produce Documents responsive to this Request.

**DOCUMENT REQUEST NO. 27:**

For all former Oracle employees who are, or have been, employees of TN, all employment agreements, nondisclosure agreements, and other Documents sufficient to show their terms of employment with Oracle.

**RESPONSE TO DOCUMENT REQUEST NO. 27:**

Oracle objects to this Request on the grounds stated in its General Objections. Oracle further objects to this Request on the grounds that it is overbroad, unduly burdensome, and is not reasonably calculated to lead to the discovery of admissible evidence, in that such employment agreements, nondisclosure agreements, or other Documents related to terms of employment are in no way connected to the issues raised by the Complaint. Oracle further objects to the Request on the grounds that it imposes an undue burden on Oracle to determine if any of its thousands of personnel have ever become employees of SAP TN. Oracle further objects to the Request on the grounds that it calls for Documents protected by the attorney-client, work product, or other privileges, as well as individuals' privacy rights.



1 defendants.

2 **DOCUMENT REQUEST NO. 118:**

3 Pursuant to Rule 34(e)(2) of the Federal Rules of Civil Procedure, a complete set of log-  
4 in credentials, and all necessary software (including Change Assistant), sufficient to permit  
5 Defendants' counsel, for the sole purpose of defending against Oracle's claims in this litigation,  
6 access to inspect Customer Connection and all similar Oracle support websites or FTP sites.


7 **RESPONSE TO DOCUMENT REQUEST NO. 118:**

8 Oracle objects to this Request on the grounds stated in its General Objections. Oracle  
9 further objects to this Request on the grounds that it is overbroad and burdensome, as only access  
10 to and downloads from Customer Connection are at issue in this litigation. Documents related to  
11 Downloads from any other Oracle website are unrelated to this case, and defendants do not need  
12 to inspect them in order to defend against Oracle's claims in this litigation. Oracle further  
13 objects to this Request on the grounds that it calls for giving defendants' counsel access to  
14 Oracle's trade secrets and other proprietary information.

15 Subject to and without waiving these objections, Oracle responds that it will meet and  
16 confer with defendants to determine an appropriate way to permit defendants' counsel to inspect  
17 Customer Connection.

18 DATED: September 14, 2007

19  
20 Bingham McCutchen LLP

21  
22  
23 By:   
24 Zachary J. Alinder  
25 Attorneys for Plaintiffs  
26 Oracle Corporation, Oracle USA, Inc., and Oracle  
27 International Corporation  
28

**PROOF OF SERVICE**

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

I am over 18 years of age, not a party to this action and employed in the County of San Francisco, California at Three Embarcadero Center, San Francisco, California 94111-4067. I am readily familiar with the practice of this office for collection and processing of correspondence by U.S. Mail and Electronic Mail, and they are deposited and/or sent that same day in the ordinary course of business.

Today I served the following documents:

**PLAINTIFFS' RESPONSES AND OBJECTIONS TO DEFENDANT TOMORROWNOW, INC.'S FIRST SET OF DOCUMENT REQUESTS**

(BY ELECTRONIC MAIL) by transmitting via electronic mail document(s) in portable document format (PDF) listed below to the email address set forth below on this date.

(BY MAIL) by causing a true and correct copy of the above to be placed in the United States Mail at San Francisco, California in sealed envelope(s) with postage prepaid, addressed as set forth below. I am readily familiar with this law firm's practice for collection and processing of correspondence for mailing with the United States Postal Service. Correspondence is deposited with the United States Postal Service the same day it is left for collection and processing in the ordinary course of business.

Robert A. Mittelstaedt, Esq.  
Jones Day  
555 California Street  
26th Floor  
San Francisco, CA 94104  
Tel: (415) 626-3939

Tharan Gregory Lurier, Esq.  
Jane L. Froyd, Esq.  
Jones Day  
1755 Embarcadero Road  
Palo Alto, CA 94303  
Tel: (650) 739-3939

ramittelstaedt@JonesDay.com

tgfanier@JonesDay.com  
jfroyd@JonesDay.com

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made and that this declaration was executed on September 14, 2007, at San Francisco, California.

  
\_\_\_\_\_  
Rosaleen Doran

# **EXHIBIT B**

1 Hon. Charles A. Legge (Ret.)  
2 JAMS  
3 Two Embarcadero Center, Suite 1500  
4 San Francisco, CA 94111  
5 Telephone: (415) 774-2644  
6 Fax: (415) 982-5287

7 Special Discovery Master

8 UNITED STATES DISTRICT COURT  
9 NORTHERN DISTRICT OF CALIFORNIA  
10 SAN FRANCISCO DIVISION

11 ORACLE CORPORATION, a Delaware  
12 corporation, ORACLE USA, INC., a  
13 Colorado corporation, and ORACLE  
INTERNATIONAL CORPORATION, a  
California corporation,

14 Plaintiffs,

15 vs.

16  
17 SAP AG, a German corporation, SAP  
18 AMERICA, INC., a Delaware corporation,  
19 TOMORROWNOW, INC., a Texas  
20 corporation, and DGES 150, inclusive,

21 Defendants.

CASE NO. 07-CV-1658 (MEJ)

JAMS Reference No. 1100053026

REPORT AND  
RECOMMENDATIONS RE:  
DISCOVERY HEARING NO. 2

22  
23 **JURISDICTION**

24 The undersigned has been appointed the Special Discovery Master pursuant to an order  
25 of United States District Judge Martin J. Jenkins, dated January 8, 2008. The jurisdiction of the  
26 Special Discovery Master is to hear all discovery disputes and report and make recommendations  
27 to the Court with respect to the resolution of disputes. The Master has recently been advised that  
28 this case has been reassigned to the Hon. Phyllis Hamilton, United States District Judge, and this

1 Report and Recommendations Re: Discovery Hearing No. 2 is therefore being submitted directly  
2 to her.

3  
4 **DISCOVERY HEARING No. 2**

5 The parties each filed discovery motions by letters to the undersigned dated February 19,  
6 2008, and filed oppositions to one another's motions on February 25, 2008. In addition, the  
7 Master received from defendants a compilation of authorities regarding the issue of abandonment  
8 of copyrights, and a declaration by Mr. Mark Kreutz regarding the security designation of the  
9 SAS database. The motions were heard on March 4, 2008. Subsequent letters were submitted,  
10 and the record was closed on March 14, 2008.

11 This is the report and recommendations of the Special Discovery Master to the Court,  
12 with respect to those motions

13 **SECURITY LEVEL OF SAS DATABASE**

14 Defendants have produced to plaintiffs their so-called SAS database. They did so as a  
15 Federal Rule 33 (d) response to discovery requests by Oracle. In producing the database,  
16 defendants marked it as "highly confidential" under the stipulated protected order dated June 7,  
17 2007. The "highly confidential" designation severely limits the persons to whom the data base  
18 can be shown.

19 Oracle has made a substantial showing that the "highly confidential" designation is  
20 materially impacting its ability to prepare this case. Because of the designation, Oracle cannot  
21 show the information to necessary personnel of the general counsel's office of Oracle, and  
22 cannot show it to other relevant information sources within Oracle, including engineers and non-  
23 technical persons. Oracle therefore moves to have the security level reduced to "confidential."  
24 Defendants oppose.

25 The information contained in the SAS is apparently very broad in scope, covering much  
26 of IN's database. Indeed, it was for that reason that defendants produced the database under  
27 Federal Rule 33 (d), as a substitute for getting the information from numerous internal sources  
28 and sorting the information into separate databases or into paper form.

1 The Special Discovery Master believes that there is a basic inconsistency in defendants'  
2 position in this motion. That is, instead of providing specific answers to interrogatories and  
3 document requests, defendants tendered the database under Rule 33(d) as being the answers.  
4 However, defendants are at the same time, by virtue of the "highly confidential" designation,  
5 severely restricting plaintiffs' access to and use of the information. The Master believes that  
6 defendants should not have it both ways.

7 The definition of "highly confidential" is contained in the stipulated protective order,  
8 paragraph No. 4: "only extremely sensitive, high confidential, non-public information, consisting  
9 either of trade secrets or other highly confidential documents relating to current or future  
10 business plans or strategy, the disclosure which... would be likely to cause competitive or  
11 business injury..." (emphasis added). This definition appears not to encompass all information  
12 which defendants believe are secret, or sensitive, or confidential, or non-public, but only to those  
13 which "relate to current or future business plans or strategies." As the Special Discovery Master  
14 understands the Database, little of its information meets that definition. Indeed, Mr. Krentz of  
15 defendant TN describes the information in the database in paragraphs 2 and 3 of his declaration  
16 of March 3<sup>rd</sup>. Those descriptions, although obviously general because of the necessity for verbal  
17 descriptions of the information, indicate that much if not all of the information would not meet  
18 the requirement of being "likely to cause competitive or business injury." Hypothetically, all  
19 information from a company's records, particularly regarding customers, could be misused and  
20 some competitive or business injury could result. But the paragraph No. 4 definition is  
21 obviously describing a narrower scope. And eliminating the "highly confidential" designation  
22 here still leaves defendants with substantial protections. That is, paragraphs 8 and 9 of the  
23 stipulated protective order provide that "confidential" information, and not just the "highly  
24 confidential" information, can only be disclosed to persons with a need to know in this litigation,  
25 can be used solely for the purposes of preparation for trial, and can not be used by the receiving  
26 party for any other purposes, including business or commercial purposes. And those limitations  
27 expressly survive the termination of this litigation.

28 Defendants have suggested that plaintiffs can meet and confer with defendants' counsel  
about specific data or specific persons to whom Oracle wants to show the data. And at the  
hearing, the Special Discovery Master also made inquires about such procedures. However, that

1 does not appear workable, in view of the large quantity of data involved and the large number of  
2 persons who might potentially need to see it. Further, that suggestion puts the burden of proof  
3 on the wrong side. Paragraph 16 (c) provides that "the burden of proof in any such challenge  
4 proceeding shall be on the Designated Party", in this case on defendants. Other than Mr.  
5 Krcutz's declaration, defendants' opposition to this motion, (letter of February 25, 2008, pages 1  
6 and 2), does not really support defendants' contentions; it simply restates defendants' conclusion  
7 that the database is highly sensitive information that warrants the "highly confidential"  
8 designation. That is not enough to sustain defendants' burden of proof.

9 The Special Discovery Master therefore recommends that plaintiffs' motion to down-  
10 grade the confidentiality designation of the SAS database from "highly confidential" to  
11 "confidential" be granted. Further, two other security mechanisms to protect defendants'  
12 information might be considered: First, that notwithstanding the above recommendation,  
13 defendants be entitled to present to plaintiffs, and subsequently to the Master and to the Court,  
14 specific items of information from the SAS database which they believe should still be given the  
15 "highly confidential" designation. Second, that all persons to whom the information in the SAS  
16 database is shown must receive a written statement that mirrors the provisions of paragraph 8 of  
17 the stipulated protective order.

#### 18 TIMING OF PRODUCTION

19 Plaintiffs object to the alleged lack of promptness with which discovery information is  
20 produced by defendants to Oracle. After discussion, the parties agreed as follows: The  
21 information from defendant TN will be supplied to plaintiffs by the end of March, and the  
22 information from the SAP Companies will be supplied by April 15, 2008.

#### 23 IDENTIFICATION OF INDIVIDUALS

24 Plaintiffs requested that defendants be obliged to provide more information about  
25 individuals identified in their discovery responses. However, the Special Discovery Master was  
26 advised that the parties have reached an agreement on this issue, and so no further  
27 recommendation is being made.  
28

### TERMINATION INFORMATION

1 Defendants request the plaintiffs give further responses to document request number 58:  
2 "all documents relating to Oracle's policies and procedures (if any) for terminating a customer's  
3 access to Customer Connection after the customer's maintenance end date has passed."

4 At oral argument, defendants identified their primary objective as seeking information  
5 that may establish that plaintiffs have abandoned some of their copyright protections.  
6 Defendants want to know whether Oracle, in any systematic way, lets a customer have access to  
7 its database even after the customer has terminated.

8 The Master does not believe that an affirmative defense of "abandonment of copyright"  
9 has been specifically alleged in defendants' answer, although that issue may be raised as a part of  
10 one of the other affirmative defenses or by defendants' general denials. Defendants have  
11 submitted a compendium of cases on the issue of "abandonment of copyright", which is a  
12 collection of cases from around the United States, primarily United States District Court  
13 decisions. However, neither side has requested a ruling on the scope of the principle of  
14 abandonment of copyright in this case, and whether it includes a failure to police access to  
15 copyrighted material after a customer terminates. That issue is not substantively ripe, and may  
16 be an issue that has to be directed to Judge Hamilton rather than to this Special Discovery  
17 Master.

18 In any event, the Special Discovery Master does not believe that the issue is now  
19 appropriate for decision, even with respect to the requested discovery. The reason is that the  
20 request is overly broad for present discovery needs. Plaintiffs have tendered some relevant  
21 information, and the Master does not believe that the discovery should now require Oracle to do  
22 a review of all of its customers, past and present.

23 Questions regarding termination might become relevant to possible issues of the scope of  
24 plaintiffs' damages, causation, consent, acquiescence, estoppel or waiver, even short of a claim  
25 of total abandonment of copyrights. Those other questions regarding termination would  
26 probably have to start with specific customers; that is, questions regarding specific customers  
27 whose information Oracle alleges to have been improperly taken by defendants. Oracle has  
28 already offered to provide the relevant information, primarily as to the 69 customers already  
identified by Oracle; see Oracle's letter of February 25, pages 2 and 3.



1 The Master recommends that Oracle be compelled to produce the information which it  
2 has agreed to produce; and further recommends that Oracle also be compelled to produce the  
3 information as to additional customers when and if Oracle identifies additional customers as ones  
4 whose information was improperly taken by defendants and as to whom Oracle will seek  
5 damages. The Master further recommends that defendants' request for additional information on  
6 the issue of abandonment be denied, without prejudice, until such time as some reasonable  
7 possibility of legal abandonment has been demonstrated.

### 8 AUDITING OF CUSTOMERS' DOWNLOADING

9 Defendants' document requests 49 and 50 ask for documents pertaining to Oracle's right  
10 to audit its customers' downloads, and for Oracle's policies and procedures for determining  
11 when to enforce such rights.

12 In its response to this motion, (see letter of February 25, page 4): Oracle agrees (a) to  
13 provide responsive documents from the 350 customer license agreements that Oracle has agreed  
14 to produce; (b) to look for additional audit documents in the files of the custodians identified in  
15 connection with the overall collection and review related to the 69 currently identified  
16 customers; and (c) to provide any general policies and procedures related to the audit rights for  
17 the Customer Connection website that can be located by a reasonable search.

18 The Master believes that this is an adequate response and good faith attempt to provide  
19 the information, and recommends that Oracle should not presently be required to produce any  
20 further information in response to these requests.

### 21 COMMUNICATIONS BETWEEN PLAINTIFFS AND DEFENDANTS

22 Defendants' requests for documents numbers 25-27 seek all communications, and indeed  
23 all documents relating to communications, between anybody at Oracle and anybody at  
24 defendants. The requests are unlimited in scope, except that they should "consent" defendants.

25 The scope of this request is staggering. Combining the personnel of all of the companies,  
26 the number of people involved totals thousands. The present scope of the request is  
27 unreasonable. At the oral argument, it appears that defendants' primary interest is in  
28 communications which may have expressed plaintiffs' consent to defendants to use the

1 information at issue. That is of course a relevant subject matter, if such documents exist. But  
2 making inquiries of thousands of employees is not the way to do it.

3 Defendants seek to justify since such a broad request by reference to a communication of  
4 plaintiffs allowing a customer to provide defendants with a demonstration CD of human resource  
5 software which had been licensed to a customer. The Master is of the opinion that disclosing a  
6 CD of software to a customer who was licensed to use it is not a sufficient basis to require the  
7 production, or even inquiries for production, of such a vast request.

8 Oracle has agreed to produce documents responsive to these requests that come from the  
9 voluminous custodial files which it has already collected. The Special Master recommends that  
10 Oracle be required to produce those things which it has tendered, but that the requests for all  
11 communications, and all documents relating to communications, and all employment agreements  
12 of Oracle employees who became employees of defendants be denied as overly burdensome and  
13 of limited relevance.

#### 14 CUSTOMER COMPLAINTS

15 Defendants' document request number 64 asks for all documents relating to customer  
16 complaints about Oracle's services. This is again a staggering request in view of the large size of  
17 the companies. At the oral argument, defendants indicated that the issue on which this discovery  
18 is sought is the causation of damages; that is, did Oracle lose customers because of misconduct  
19 by defendants or because of the customers' dissatisfaction with Oracle.

20 In its reply to this motion, Oracle has agreed to produce its "at risk" reports, which  
21 apparently compile the reasons for termination relating to customers listed in the reports. Oracle  
22 is also producing the contract files for all the customers who migrated to SAP, including  
23 correspondence. And Oracle is producing complaints about Customer Connection support from  
24 sales and support representative custodians that relate to the current list of 69 customers.

25 The Special Discovery Master recommends that Oracle be ordered to provide that  
26 information. The Master also recommends that as additional customers are identified by  
27 plaintiffs as being a basis for the damages claims, similar information be provided as to those  
28 customers. Since the issue is causation of damages, and since plaintiffs' damages claims will  
probably have to start with the loss of specific customers, the above methodology should give

1 defendants the information base which they would need in order to dispute the causation of  
2 Oracle's claimed customer losses.

### 3 ACCESS TO CUSTOMER CONNECTION AND TO CHANGE ASSISTANT

4 Defendants' document requests 52 and 118 seek documents regarding the web display of  
5 Customer Connection, and all necessary software, including Change Assistant, sufficient to  
6 permit defendants' counsel to inspect Customer Connection and similar Oracle websites.

7 Plaintiffs have agreed to exchange all of the versions of Change Assistant in exchange for  
8 defendants' versions of Titan. This exchange has been agreed upon. And plaintiffs' have also  
9 agreed to produce the requested databases as "highly confidential" under the protective order. At  
10 the hearing of the motions, the above appeared to resolve this dispute, except as to the source  
11 code of the Change Assistant software. The parties agreed to a further briefing schedule on the  
12 subject of the source code, which was completed on, March 14.

13 The Special Master recommends that this request be denied at the present time, without  
14 prejudice. Oracle is producing the Change Assistant. The complaint does not appear to allege  
15 any theft, improper downloading or use of Change Assistant. The present relevant question  
16 appears to be what Change Assistant can do for a user in accessing Customer Connection, not  
17 how Change Assistant does it. In addition, Oracle represents that the Oracle engineers who will  
18 confer with defendants under the Report of February 25, 2008, pg 4, will also assist in  
19 defendants' need for "trapping" information without the necessity for enquiry into the source  
20 code. The Master is prepared to reconsider this recommendation upon an adequate showing of  
21 why, under the issues in this case, defendants need to know how Change Assistant functions.

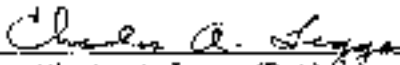
### 22 PROGRESS OF DISCOVERY

23 At the hearing on March 4<sup>th</sup> the Special Discovery Master also made some general  
24 inquiries of both sides as to the overall progress of the discovery. Discovery is progressing, but  
25 slowly. Both sides are hard at work on discovery responses, but the size of the discovery needs  
26 on both sides is very extensive. The Special Discovery Master will provide more specific  
27 observations on the general progress of discovery as the hearings warrant.  
28

1 The Special Discovery Master submits this report and recommendations to the Honorable  
2 Phyllis Hamilton pursuant to paragraph 3(a) of the stipulation and order of January 8, 2008.  
3  
4

5 Respectfully submitted,  
6

7 Dated: March 19, 2008

  
8 Hon. Charles A. Legge (Ret.)  
9 Special Discovery Master  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**PROOF OF SERVICE BY EMAIL & U.S. MAIL**

Re: Oracle Corporation, et al. vs. SAP AG, et al.  
Reference No. 1103053026

I, Melissa Ornstil, not a party to the within action, hereby declare that on March 19, 2008 I served the attached Report and Recommendations Re: Discovery Hearing No. 2 on the parties in the within action by Email and by depositing true copies thereof enclosed in sealed envelopes with postage thereon fully prepaid, via U.S. Mail, at San Francisco, CALIFORNIA, addressed as follows:

Robert A. Mittelstaedt  
Jones Day  
555 California St.  
26th Fl.  
San Francisco, CA 94104 U.S.A.  
Tel: 415-626-3939  
Email: rmittelstaedt@jonesday.com

Tharon Gregory Lanier Esq.  
Jones Day  
1755 Embarcadero Rd.  
Palo Alto, CA 94303  
Tel: 650-739-3939  
Email: tlanier@jonesday.com  
Fax: 650-739-3900

Scott W. Cowan Esq.  
Jones Day  
717 Texas  
Suite 3300  
Houston, TX 77002-2713  
Tel: 832-239-3721  
Email: swcowan@jonesday.com

Jason S. McDonnell Esq.  
Jones Day  
555 California St.  
26th Floor  
San Francisco, CA 94104 U.S.A.  
Tel: 415-875-5820  
Email: jmcdonnell@jonesday.com  
Fax: 415-875-5700

Zachary J. Alinder Esq.

Geoffrey Howard Esq.

Bingham McCutchen LLP  
Three Embarcadero Center  
Suite 1800  
San Francisco, CA 94111  
Tel: 415-393-2226  
Email: zachary.alinden@bingham.com

Bingham McCutchen LLP  
Three Embarcadero Center  
Suite 1800  
San Francisco, CA 94111  
Tel: 415-393-2000  
Email: geoff.howard@bingham.com  
Fax: 415-393-2286

Dorian Daley Esq.  
Oracle USA, Inc.  
500 Oracle Parkway  
MS 50p7  
Redwood City, CA 94070  
Tel: 650-506-4846  
Email: dorian.daley@oracle.com

Jennifer Gloss Esq.  
Oracle USA, Inc.  
500 Oracle Parkway  
MS 50p7  
Redwood City, CA 94070  
Tel: 650-506-4846  
Email: jennifer.gloss@oracle.com  
Fax: 650-506-7114

~~- Clerk of the Court  
United States District Court  
Northern District of California  
450 Golden Gate Avenue  
San Francisco, CA 94102 USA  
Tel: 415-556-3167  
Email: NOT AVAILABLE~~

Chad Russell  
Bingham McCutchen LLP  
Three Embarcadero Center  
Suite 1800  
San Francisco, CA 94111  
Tel: 415-393-2000  
Email: chad.russell@bingham.com  
Fax: 415-393-2286

Bree Hann Esq.  
Bingham McCutchen LLP  
Three Embarcadero Center  
Suite 1800  
San Francisco, CA 94111  
Tel: 415-393-2000  
Email: bree.hann@bingham.com

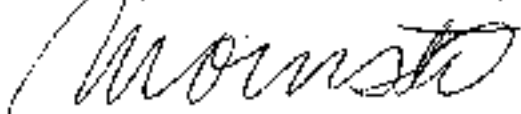
Dana P. Pickett Esq.  
Bingham McCutchen LLP  
Three Embarcadero Center  
Suite 1800  
San Francisco, CA 94111  
Tel: 415-393-2000  
Email: dana.pickett@bingham.com  
Fax: 415-393-2286

Holly A. House Esq.  
Bingham McCutchen LLP  
Three Embarcadero Center  
San Francisco, CA 94111 USA  
Tel: 415-393-2000  
Email: holly.house@bingham.com

Jane L. Floyd Esq.  
Jones Day  
1755 Embarcadero Rd.  
Palo Alto, CA 94303  
Tel: 650-739-3939  
Email: jfloyd@jonesday.com  
Fax: 650-739-1969

Joshua L. Fuchs Esq.  
Jones Day  
737 Texas  
Suite 3300  
Houston, TX 77002-2712  
Tel: 832-239-3959  
Email: jlfuchs@jonesday.com

I declare under penalty of perjury the foregoing to be true and correct. Executed at San Francisco, CALIFORNIA on March 19, 2008



\_\_\_\_\_  
Melissa Orastil  
JAMS The Resolution Experts  
melissaorastil@jamsadr.com



# **EXHIBIT C**

PROCEEDINGS March 4, 2008

UNITED STATES DISTRICT COURT

NORthern DISTRICT OF CALIFORNIA - SAN FRANCISCO DIVISION

BEFORE: CHARLES A. LEGGE, Chief Judge

---o---

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

Plaintiffs,

vs.

Case No. 07-cv-01658-MJJ

IBM AG, a German corporation, IBM SYSTEMS, INC., a Delaware corporation, IBM CORPORA, INC., a Texas corporation, and IBM BUSINESS PARTNERS, Inc.,

Defendants.

HEARING ON RE DISCOVERY ISSUE

Thursday, March 4, 2008

COURT  
9 San Francisco Center, 10th Floor  
San Francisco, CA 94111

REGISTRY AND SENY F. ARLEN, USB #4055, CAP, 408  
JTB 00804

PROCEEDINGS

March 4, 2008

Page 54

1 from the SAP defendants that we need to identify the  
 2 deponents.  
 3 JUDGE LEGGIE: When you set this original  
 4 schedule with Judge Jenkins, did you really anticipate  
 5 this volume of stuff?  
 6 MR. HOWARD: We did, your Honor, and we didn't  
 7 ask for this schedule. We knew it was complicated  
 8 material, it was going to require analyses of  
 9 complicated code to analyze and that there was going to  
 10 be an enormous volume of material. They took a  
 11 different position, and they asked for an expedited  
 12 discovery schedule and said that they could produce  
 13 everything and fast everything was in the SAS database.  
 14 We now know that isn't true, and we know we're  
 15 getting squeezed because we're not even getting  
 16 documents from the SAP defendants until April now.  
 17 JUDGE LEGGIE: I'm going to pin you down on a  
 18 date. If only a target. Your answer is you're going  
 19 before Judge Hamilton on April the 3rd and undoubtedly  
 20 she's going to set a new schedule, and at that point  
 21 you'll be able to say here's where we are in this  
 22 inquest. In terms of the production by then, I only  
 23 have this. I need this before we can get to the next  
 24 phase of designating people for depositions.  
 25 MR. HOWARD: And we fully intend to do that,

Page 55

1 your Honor. It's just that as we sit here today,  
 2 without knowing what Judge Hamilton will do, we have to  
 3 litigate according to the dates that we have.  
 4 JUDGE LEGGIE: I understand. I understand. I  
 5 think the reality of it is you don't really, but  
 6 obviously it's the only order that's in effect at the  
 7 moment. So that's it.  
 8 Now, can you give me any ideas here on the size  
 9 of the documents you're producing on behalf of the SAP  
 10 defendants compared with TN's?  
 11 MR. FUCHS: It's not going to be near the same  
 12 amount of data. They've asked for every shred of paper  
 13 TomorrowNow has ever created in both electronic and hard  
 14 copy form. They have not asked for the same scope, but  
 15 there is a difference, and the difference is it's more  
 16 like finding a needle in a haystack. There aren't  
 17 business units within SAP that are responsible for  
 18 TomorrowNow. It's more like one employee here, one  
 19 employee there, identifying some of these more key  
 20 custodians and getting their data, it's going to be a  
 21 smaller amount, but it's all going to be --  
 22 JUDGE LEGGIE: How many are you in  
 23 identifying the key custodians?  
 24 MR. FUCHS: We've identified who we had and  
 25 have had interaction with TomorrowNow and then the

Page 56

1 question comes identifying even further that subset of  
 2 employees that really are going to likely have the data  
 3 they asked.  
 4 JUDGE LEGGIE: I'm going to give you a date to  
 5 produce the SAP stuff by April 15th. Another great tax  
 6 day.  
 7 MR. FUCHS: All SAP stuff or key custodians?  
 8 JUDGE LEGGIE: Where are you going to start? I  
 9 mean, I thought you said you could complete it by the  
 10 end of April.  
 11 MR. FUCHS: I could complete key custodians,  
 12 for example, ten custodians by the end of April, and  
 13 you're asking about, you know, 500,000 to a million  
 14 Bates numbered pages for that many people with their 64  
 15 requests.  
 16 JUDGE LEGGIE: I'm saying April 15th. You get  
 17 before Judge Hamilton and you scream at what I'm  
 18 recommending, okay, and by then, which is going to be  
 19 another three weeks from now, you better be prepared to  
 20 give some better explanation what you think a reasonable  
 21 time basis is going to be, but I do think in looking at  
 22 this with identifications that go back into October of  
 23 last year and others in December, I realized that's only  
 24 two months back --  
 25 MR. FUCHS: Your Honor, one point about those

Page 57

1 identifications, we gave them ten custodians as well.  
 2 They have produced zero, not one shred.  
 3 JUDGE LEGGIE: That's a motion I'll address.  
 4 This isn't the school yard. We're not saying  
 5 nyah-nyah-nyah-nyah.  
 6 MS. HOUSE: How do you spell that? The final  
 7 issue is resolved, your Honor, or the identification.  
 8 The only other issue --  
 9 JUDGE LEGGIE: Was resolved?  
 10 MS. HOUSE: We've talked it out and the  
 11 identification of individuals we've actually come to  
 12 agreement on.  
 13 JUDGE LEGGIE: So it's been agreed.  
 14 MS. HOUSE: The only other issue that remains  
 15 from our affirmative motion is a reference in a footnote  
 16 to production of TomorrowNow documents, specifically  
 17 financial damages related documents. We noted in our --  
 18 JUDGE LEGGIE: Give me your footnote.  
 19 MS. HOUSE: It's in the opening brief. It's  
 20 number --  
 21 JUDGE LEGGIE: Seven.  
 22 MS. HOUSE: Thank you. You're ahead of me.  
 23 Number seven. We reference the fact that while we have  
 24 received documents from TomorrowNow, we have yet to get  
 25 a single document related to financial information

PROCEEDINGS

March 4, 2008

Page 26	Page 27
<p>1 MR. HOWARD: And the equitable cure of all 2 those defenses is the same as well. Particularly with 3 respect to audit, you know, the failure to do that is 4 not an overact, and what Oracle did, Oracle is not 5 required to sue all of its customers in order to be able 6 to enforce as against somebody like TN going in and 7 ransacking things to use for its business. So, his remedy 8 is so far afield.</p> <p>9 MR. McDONELL: Again, he keeps circling around 10 and around under the same argument again. Under the 11 abandonment doctrine, it's the finding that there has 12 been a widespread dissemination and use without 13 enforcement. That is the predicate fact.</p> <p>14 JUDGE LEGGE: Submitted?</p> <p>15 MR. McDONELL: Submitted.</p> <p>16 JUDGE LEGGE: Next numbers 25 and 27. I find 17 number 25 just absolutely staggering in breadth.</p> <p>18 MR. McDONELL: That's why we've narrowed it in 19 the process.</p> <p>20 JUDGE LEGGE: What have you limited?</p> <p>21 MR. McDONELL: In the most and conifer, we've 22 limited it to contacts with TomorrowNow employees about 23 TomorrowNow's business. And I believe that's</p> <p>24 JUDGE LEGGE: Well, I wouldn't view that as a 25 narrowing. It seems to me that concerning TN,</p>	<p>1 customers turning over a software program to TomorrowNow 2 for TomorrowNow's use.</p> <p>3 JUDGE LEGGE: Now, they respond to that. Of 4 course, I haven't seen the document, but this is a 5 general PR document that never had any -- never had any 6 secrecy to it at all. It's available for distribution 7 and use by anybody who wanted to consider using the 8 Oracle system.</p> <p>9 MR. McDONELL: I don't think that's quite 10 right.</p> <p>11 MR. HOWARD: Let me clarify, your Honor. The 12 allegations in this case are about downloading software 13 and support material, these bug fixes and patches. This 14 document is not about any of that. It's about the 15 underlying software being provided by a customer, 16 presumably a licensed customer, to TomorrowNow.</p> <p>17 So it doesn't have anything to do with the bug 18 fixes and patches. It doesn't have anything to do with 19 downloading. In other words, it doesn't have anything 20 to do with the core allegations of the complaint. And 21 there is nothing in it to suggest at all that the use to 22 which that's going to be put is improper in the way that 23 we've alleged the use of the downloading SMM's as 24 improper.</p> <p>25 JUDGE LEGGE: You refer to it as a</p>
<p>Page 27</p> <p>1 TomorrowNow, it necessarily means its business. It's 2 the aspect of all Oracle employees contacting any 3 current or former TN employees. It's that part, not the 4 subject matter part of it?</p> <p>5 MS. GLOSS: Yes, the search, not the subject 6 JUDGE LEGGE: Yeah, I just find staggering.</p> <p>7 MR. McDONELL: But how much contact have Oracle 8 employees had with their competitor, TomorrowNow? It's 9 likely limited.</p> <p>10 JUDGE LEGGE: It probably is.</p> <p>11 MR. HOWARD: Exactly.</p> <p>12 JUDGE LEGGE: But how can they answer this 13 question without going to everybody in the office?</p> <p>14 MR. McDONELL: By doing electronic searches on 15 the term TomorrowNow. Identify the number of people who 16 have had any reason whatsoever to have contact with 17 TomorrowNow and then conduct an electronic search for 18 the name TomorrowNow.</p> <p>19 JUDGE LEGGE: Now, what are you going to get 20 out of this? Suppose something pops up? What do you 21 hope to get? Consent?</p> <p>22 MR. McDONELL: Consent would be one example. 23 We have cited in the brief to a document which I have 24 copies of here which is precisely that. It's a 25 historical record that Oracle consented to one of its</p>	<p>Page 28</p> <p>1 demonstration CD.</p> <p>2 MR. HOWARD: Yeah, it's the CD that contains 3 the software that runs on the customer's system.</p> <p>4 MR. McDONELL: The term a little misleading. 5 By demo, my understanding is what is not meant is it's 6 like your demonstration software that anyone can pick up 7 AOL, etc.</p> <p>8 JUDGE LEGGE: See, that's exactly what I 9 thought it was.</p> <p>10 MR. McDONELL: It's not that. It is the 11 product, the software product that Oracle sells itself. 12 So Oracle has sold this product to its customer and then 13 consented to it being turned over to TomorrowNow for 14 use.</p> <p>15 Now, if counsel is saying that's not a 16 downloaded software and support material item, and I 17 guess that's how he's defining the scope of his claims, 18 and frankly based on the discovery they're conducting in 19 depositions, we had thought they were exploring other 20 issues as well.</p> <p>21 Now, if counsel is not making any claim in this 22 case and doesn't intend to make any claim in this case 23 about TomorrowNow's use of such software, then that's 24 another matter.</p> <p>25 MR. HOWARD: Well, that's something quite</p>

23 (Pages 26 to 28)

Merrill Legal Solutions  
(800) 869-9132

## PROCEEDINGS

March 4, 2008

Page 90

Page 91

1 different.

2 JUDGE LEGGE: I just misunderstood. I thought  
3 by a Serio CD you mean a CD that Oracle probably made for  
4 the purpose of selling its products to -- or going out  
5 and licensing new customers.

6 MR. HOWARD: In their brief they say that this  
7 document shows Oracle knowingly consented to its  
8 customer providing SSM's, software and support  
9 materials, which are defined in the first amended  
10 complaint, for the purpose of IN supporting the  
11 customer. That their representation in their brief.

12 And what we pointed out is this document does  
13 nothing of the sort. They know what an SSM is. They  
14 downloaded tens of thousands of them onto their servers.  
15 They know that's the basis of the claim in the  
16 complaint. And this document doesn't have anything to  
17 do with SSM's.

18 But the bigger point, your Honor, is that  
19 Oracle has never said and it would never say that  
20 TomorrowNow or a third-party support provider like  
21 TomorrowNow can never have its fingers on some form of  
22 software. There are circumstances in which the  
23 third-party support providers are legitimately providing  
24 support, and Oracle welcomes that competition.

25 The question is whether they're doing it within

1 responsive to those requests from numerous custodian  
2 files it has collected." So you are going to go through  
3 the custodial -- custodian files you have collected for  
4 purposes of seeing whether there is anything responsive.

5 MR. HOWARD: Yes, your Honor, because  
6 we've already collected it. I want to make it very  
7 clear, I want to make sure we don't get hung on our own  
8 petard here. We agreed to a vastly overbroad collection  
9 and search with respect to these custodians, and it's  
10 not -- we're not agreeing to do it because we think this  
11 is relevant and we're not agreeing to do it because we  
12 think it's proper, but we do have the stuff already  
13 collected and we can do a term search for TomorrowNow  
14 and we can see what that turns up.

15 That won't, unfortunately, turn up a specific  
16 communication with somebody at TomorrowNow because  
17 TomorrowNow could turn up for other reasons, but what we  
18 strongly resist is, and regardless of what happens in  
19 this case, that we would have to go out beyond this  
20 current group of custodians, go on the extraordinary  
21 expense of collecting additional information just to do  
22 this term search that Mr. McDonnell has suggested is  
23 appropriate to find this gossip between low level  
24 employees. We think that's absolutely improper.

25 MR. McDONNELL: Your Honor, the one thing that I

Page 92

Page 93

1 the scope of the customer's license or not. That's why  
2 Oracle brought this case is because TomorrowNow is  
3 downloading materials that the customer weren't  
4 entitled to and, therefore, TomorrowNow wasn't allowed  
5 to access or use.

6 The problem with this document is that it  
7 doesn't say anything. It doesn't say anything else.  
8 First of all, an SSM, but also whether or not this was  
9 something that TomorrowNow was allowed to do or not. It  
10 just doesn't have any bearing on any allegation. And  
11 what they have wanted us to do, which we confirmed in  
12 discovery, is they want us to go through -- we literally  
13 asked them, do you intend us to go through the files of  
14 all 69,000 employees to get this background chatter with  
15 an unknown group of TomorrowNow current and former  
16 employees? And they said yes.

17 And that -- we don't know who they are, we  
18 don't know how to find it, there is no business purpose  
19 for that communication with TomorrowNow because there's  
20 no open, formal, approved, official open channel of  
21 communication with TomorrowNow. I mean, this is just  
22 the most egregious kind of fishing expedition.

23 JUDGE LEGGE: I understand what you have agreed  
24 to do is the sentence on page 4 of your February 25th  
25 letter. Oracle has already agreed to produce documents

1 have never heard them say is that these identified  
2 custodians from whom they will seek this information --  
3 for some reason a logical group of custodians who might  
4 have had communications with TomorrowNow. I mean, at  
5 some point in the process they have to exercise some  
6 kind of thought and identify custodians who would have  
7 been likely to have had communications with TomorrowNow,  
8 if any, and what they're doing, it seems to me, is  
9 largely arbitrary.

10 They're saying, well, we've collected documents  
11 from certain persons and we'll look at their files to  
12 see if there kind of communications, but they have never  
13 said that they've made a good faith effort to determine  
14 that it is that group of custodians who would likely  
15 have had communications with TomorrowNow.

16 JUDGE LEGGE: Well, aren't you both on both  
17 sides first of all going to the custodians who seem like  
18 the most knowledgeable custodian to have information  
19 that you want and they want? Aren't you both doing  
20 that?

21 MR. HOWARD: Well, I hope so. We certainly  
22 are, but let's be clear. We objected to this request  
23 and said that we would not produce documents responsive  
24 to it. It's overbroad, it's too far afield, it's  
25 immaterial.

24 (Pages 90 to 93)

Merrill Legal Solutions  
(800) 889-9132

As a compromise, we said that the custodians that we have identified and collected from that we already have where there is no incremental expense and effort required to go out and collect material, we'll search them and we'll produce if there's communications that we can determine as to a current or former TomorrowNow employee. But the idea that we would have to go through the entire company is -

JUDGE LEGGE: No, I understand what you're saying.

MS. GLOSS: And I believe we did tell them that we don't believe that as a business practice, as a purpose of running our company, we don't believe that there are categories of Oracle employees who as part of their jobs would be expected to be communicating with TomorrowNow employees.

We think to the extent these kind of communications come up they're more likely to be on a friendship level because TomorrowNow employees used to work with PeopleSoft and J.D. Edwards employees many years ago. But as a business practice, we don't think that there are identifiable groups of people who we think should be having these conversations.

JUDGE LEGGE: Do you have a standard operating procedure telling your employees not to talk to

MR. McDONELL: What is the request. Then you go to the client, okay, here the type of request. Who would most likely have this kind of information. It's go to those people and it's like peeling an onion.

JUDGE LEGGE: How do they know who your custodians are? How do you know who their custodians are?

MR. McDONELL: On one level it's been negotiated and names have been identified and they've made a request that we search X custodians first, but in some case they don't know. Here where we've got this pointed issue, where it's their idea, their concept that they'd look for this information but only in the files of unnamed custodians, it causes us to be concerned that we're not doing our job unless somewhere in the process we have an assurance that that's a reasonable group of people to search.

Now, what Ms. Gloss just said, it's conceivable it's been tried to me before, but I don't remember it, frankly, and I think what she's saying is that maybe this is the best group to approach to try to find these types of communications. But I don't recall that ever being said, and the standard of discovery is you make a reasonable search and we're just trying to make sure that we're not accepting this notion of this black box

competitors?

MS. GLOSS: Of course, we have policies that prohibit our employees from sharing proprietary information with competitors. Of course, we do not prohibit our employees from communicating.

JUDGE LEGGE: Got together for the Warriors game next week.

MS. GLOSS: Precisely.

MR. HOWARD: Exactly right. And we also ask them, well, if you think there are specific employees that you have that were communicating with us on relevant subjects, tell us who the Oracle employees are, and they decline to do that.

MR. McDONELL: As of today, it's a black box. We can't know who these custodians are at all, period. They're controlling that.

JUDGE LEGGE: How are you, both of you doing it? You are now making some demands on one another on a per custodian basis. How are you identifying these custodians?

MR. McDONELL: Based on judgments. Conferencing with the client.

MR. HOWARD: By names or job titles or what?

MR. McDONELL: It starts with the request.

JUDGE LEGGE: I understand that.

without questioning whether that's an appropriate group of people to be searching for.

JUDGE LEGGE: Okay. Go ahead.

MR. HOWARD: Well, at the risk of repeating myself, your Honor.

JUDGE LEGGE: Don't do that.

MR. HOWARD: We've never represented that we identified these custodians in an effort to respond to this request. We said no to this request. As a compromise -

JUDGE LEGGE: Now, you're compromising.

MR. HOWARD: Right, with the existing group of custodians. I just didn't want there to be any misunderstanding about that.

JUDGE LEGGE: Okay. Anything further?

MR. McDONELL: Subscribed.

JUDGE LEGGE: All right. Now, number four is again one that I find rather staggering in scope. Requiring Oracle to ferret out all customer complaints it's ever had. Let's get the precise language here. I don't want to exaggerate it.

All documents relating to customer complaints. Okay. That's pretty staggering with a company the size of Oracle. What do you think information relevance is relevant to in this case? What's our relevance here?

PROCEEDINGS

March 4, 2008

Page 147

Page 148

1 confidentiality.

2 MR. HOWARD: Your Honor, can we just decide

3 that? You can probably decide that right now.

4 JUDGE LEGGE: I could, but it would be totally

5 arbitrary.

6 MR. HOWARD: Isn't it going to be arbitrary

7 after we trial it?

8 JUDGE LEGGE: I hope the decision may be

9 arbitrary, but I hope the rationality for making the

10 decision will not be.

11 MR. McDONELL: It would be highly thought

12 through, but can we keep things confidential until we

13 get a decision, Counsel?

14 MR. HOWARD: We agreed until there was a

15 decision 30 days would run from the production.

16 MS. GLOSS: 30 days is the most they've ever

17 asked for.

18 MR. FUCHS: 30 days before the hearing, 30 days

19 after the hearing for everything that came in. That's

20 what was on the record last time.

21 MS. ROUSE: Correct.

22 JUDGE LEGGE: This is by way of suggestion

23 here, an attempt to step back and take a macro look at

24 what's going on. You've sort of -- not sort of, you

25 have dropped a shoe on all of us that this action is

1 Then, as I'm suggesting, I think you might to defer as

2 much damage discovery as you can until after the

3 liability issue discovery. So a time period for damages

4 document discovery plus the production of your experts

5 and the depositions is going to have to take another

6 length of time, and be realistic about it.

7 It doesn't annoy anybody any more to -- I was

8 going to say get the air and paw the ground. I don't

9 mean to be pejorative about that if you have your

10 tactical reasons or strategic reasons for either wanting

11 to move ahead rapidly or not, but I think it is

12 something you might to recommend something to Judge

13 Hamilton that you can both live with.

14 That's all I have to say.

15 MR. McDONELL: Adjourned? Thank you, your

16 Honor.

17 JUDGE LEGGE: We're adjourned.

18 (Whereupon the hearing was adjourned

19 at 12:23 p.m.)

Page 147

Page 149

1 going to be expanded into something broader.

2 MR. HOWARD: Yes.

3 JUDGE LEGGE: I don't know how much explanation

4 you'll give of this, if any, of what that's going to be,

5 and I don't know as you sit here. You're now at the

6 point of rehashing how much work each side of you have

7 to get together the information that each needs to

8 prosecute and defend the case.

9 I think before you go before Judge Hamilton in

10 April and you have to agree on some kind of a

11 generalized road map and try to agree on one so that

12 it's one you can both live with. Are you going to amend

13 your complaint? If so, when are you going to do it?

14 What's the amended complaint going to do to the scope of

15 the discovery before you can get this case to trial?

16 How much longer is it going to take each of you to

17 produce the stuff you've agreed to produce to the other

18 people? How long is it going to take each of you to

19 process the information once you get it?

20 For every writer, there's a reader. You've got

21 to read the stuff and understand it and send it to your

22 right people to get adequate responses. And when can

23 all this paperwork be done so that you're then in a

24 position to take some meaningful deposition? How long

25 do you think that deposition process is going to take?

1

2

3 CERTIFICATE OF COMPLETION SHORTHAND REPORTER

4

5 I, WENDY E. ARLEN, hereby certify that I am a

6 Certified Shorthand Reporter. That I reported in

7 shorthand writing the foregoing matter at the time and

8 place herein stated; that the foregoing pages are a

9 full, true and complete transcript of my said shorthand

10 notes and is a full, true and correct record of the

11 proceedings had in said matter at said time and place.

12

13 (Initialed)

14

15

16

17

18 WENDY E. ARLEN

19 Certified Shorthand Reporter

20 California License #4305

21

22

23

24

25

38 (Pages 146 to 149)

Merrill Legal Solutions  
(800) 369-9132

# **EXHIBIT D**



Hon. Charles A. Leggo (Ret.)  
JAMS  
Two Embarcadero Center, Suite 1500  
San Francisco, CA 94111  
Telephone: (415) 774-2644  
Fax: (415) 982-3287

Special Discovery Master

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

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

Plaintiffs,

vs.

SAP AG, a German corporation, SAP  
AMERICA, INC., a Delaware corporation,  
TOMORROWNOW, INC., a Texas  
corporation, and DOBS 1-50, inclusive,

Defendants.

CASE NO. 07-CV-1658 (MLJ)

JAMS Reference No. 1100053026

REPORT AND  
RECOMMENDATIONS RE:  
DISCOVERY HEARING NO 3

JURISDICTION

The undersigned has been appointed to be the Special Discovery Master pursuant to an order of this Court dated January 8, 2008. The jurisdiction of the Special Discovery Master is to hear all discovery disputes and report and make recommendations to the Court with respect to the resolution of disputes.

**AMENDMENT TO REPORT OF HEARING NO. 2**

1  
2 Defendants have requested an amendment to this Master's Report and Recommendations  
3 re hearing number 2. Page 4, lines 19-21 of the report stated: "After discussion, the parties  
4 agreed as follows: The information from defendant TN will be supplied to plaintiffs by the end  
5 of March, and the information from the SAP Companies will be supplied by April 15, 2008."

6 Defendants first object that they did not agree to that production schedule. The Master's  
7 notes of the hearing indicate agreement, but that appears contrary to the later transcript and to the  
8 parties' stated positions. Accordingly, the language "the parties agreed as follows" on line 19 of  
9 page 4 is changed to read "the Special Discovery Master recommends as follows:"

10 Defendants also object to the ordered scope of production being "the discovery  
11 information". The Master agrees and Page 4, Lines 20-21 are amended to read as follows:  
12 "information from the priority custodians of defendant TN will be supplied to plaintiffs by the  
13 end of March 2008, and the information from the priority custodians of the SAP Companies will  
14 be supplied by April 15, 2008. The priority custodians have been identified in correspondence  
15 between the parties. The timing of the production should give first priority to information  
16 relevant to the depositions of the soon-to-be deposed Rule 30 (b)(6) witnesses."

17 Since this is an amendment to a prior order, and since it reduces defendants' obligations,  
18 this order is entered nunc pro tunc as of the date of Report and Recommendation No. 2, March  
19 19, 2008. The time for defendants to object to the recommendations as amended above shall run  
20 from March 19, 2008.

**DISCOVERY HEARING No. 3**

21 The parties each filed discovery motions by letters to the undersigned dated March 11,  
22 2008, and filed oppositions to one another's motions on March 17, 2008. Additional motions  
23 and oppositions were filed on March 21, 2008, March 24, 2008, and were submitted to the  
24 Master on the date of the hearing, March 25, 2008. In addition, the Master received a declaration  
25 of Safra Catz and a tabulation of defendants' responses to specific documents requested in the  
26 Rule 30 (b)(6) depositions.

27 This is the report and recommendations of the Special Discovery Master to the Court  
28 with respect to those motions.

The Special Discovery Master submits this report and recommendations to the Honorable  
Phyllis Hamilton pursuant to the paragraph 3(a) of the stipulation and order of January 8, 2008.

Respectfully submitted.

Dated: April 4, 2008

Charles A. Legge

Hon. Charles A. Legge (Ret.)  
Special Discovery Master

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

# EXHIBIT E

## JONES DAY

365 CALIFORNIA STREET - 26TH FLOOR - SAN FRANCISCO, CALIFORNIA 94111-7000  
TELEPHONE: 415 638-3000 • FACSIMILE: 415 398-8700

Direct Number: 415-638-6020  
j.mcdonald@jonesday.com

February 19, 2008

**Contains Confidential Information Under Protective Order**

**VIA EMAIL AND HAND DELIVERY**

Hon. Charles A. Legge (Ret.)  
JAMS  
Two Embarcadero Center, Suite 1500  
San Francisco, CA 94111

**Re: Oracle Corporation, et al. v. SAP AG, et al.**  
Defendants' Motion to Compel No. 2  
Hearing Date: March 4, 2008 at 9:00 A.M.

Dear Judge Legge:

Defendant Temmrow-Now, Inc. ("TN") submits this as its second motion to Compel.<sup>1</sup>

### I. INTRODUCTION

This motion asks the Court to compel discovery relating to four subjects. First, it seeks discovery of Oracle's knowledge of the dissemination of its alleged intellectual property and the measures, if any, it has taken to protect that property (Section II.A). Second, it seeks discovery of Oracle's communications with TN employees, including, but not limited to, evidence that Oracle knew or should have known about TN's practices and consented thereto (Section II.B). Third, it seeks discovery of complaints from Oracle's customers as relevant to, among other issues, the real reasons Oracle loses customers (Section II.C). Finally, it seeks production of Oracle's Change Assistant software, which is a search engine that operates with Oracle's Customer Connection website (Section II.D).

Oracle's claims require proof that the information TN downloaded from Oracle's Customer Connection website, and thereby allegedly "stole," was, in fact, properly protected intellectual property that TN was not authorized to possess or use.<sup>2</sup>

---

<sup>1</sup> Defendant requests an in-person hearing and will arrange for a court reporter.

<sup>2</sup> See, e.g., First Amended Complaint ("FAC") at ¶ 103 (TN allegedly infringed copyright because it was "not authorized to copy, download, reproduce . . . Oracle's software"); *Theracal v. Compaq Computer Corp.*, 773 F.Supp.2d 667, 675 (F.D. Tex. 2001) (elements of a civil claim under Computer Fraud and Abuse Act include the "knowing 'transmission' of a 'program, information, code, or command' and the 'transmission' causes 'unintentional damage without authorization'"); *Harperize Research Facility v. NBTI, Inc.*, 188 F.Supp.2d 994, 998 (E.D. Cal. 2007) (focus of a claim under the Computer Data Access and Fraud Act is upon "unauthorized access"); FAC at ¶ 128 (breach of contract alleged as a result of "unauthorized" access); FAC at ¶¶ 133 & 141 (TN's alleged "unauthorized access to Oracle's computer systems" caused interference with prospective economic advantage);

Hon. Charles A. Legge (Ret.)  
February 19, 2008  
Page 4

customers are not limited to the customers' names that Oracle has uncovered during the course of its investigation."<sup>7</sup> Indeed, during the hearing on the first motions to compel, plaintiffs' counsel conceded that they "do in fact expect it to expand" beyond the sixty-nine customers. See Rough Draft Transcript, February 13, 2008, p. 150.

Oracle's strategy seems clearly intended to prevent defendants from learning about Oracle's activities with other customers and support providers. Oracle's objection to discovery beyond the Identified Customers should be overruled.

## **2. Audit Rights (Requests Nos. 49-50)**

Requests Nos. 49 and 50 seek discovery of Oracle's rights, policies and practices with respect to *access* of its customers' access to, or downloads from, Customer Connection, and any associated SSMs. Again, Oracle has refused to produce such documents, except those related to Identified Customers.

This discovery is appropriate for the same reasons as discussed in the preceding section concerning Termination Policies. Among other things, defendants need all documents showing whether Oracle was aware of downloads by customers that were allegedly beyond the scope of the customers' contractual rights and Oracle's responses in such situations. The production should also include any documents reflecting any auditing or monitoring of usage by customers and third party support vendors of passwords to access SSMs.

## **B. Contacts with TN Employees (Requests Nos. 25-27)**

Requests Nos. 25 and 26 seek documents relating to communications between Oracle, or anyone acting on its behalf, and any current or former TN employees concerning defendants. Request No. 27 seeks documents reflecting the terms of employment with Oracle for TN employees who formerly worked for Oracle. Oracle has refused to produce any documents in response to these requests.

Requests Nos. 25 and 26 are appropriate for the reasons discussed in the section concerning Termination Policies, *supra*. It most certainly is relevant if Oracle employees had knowledge of or consented to use by TN or its customers of Oracle information at issue in this case. Furthermore, Oracle seems to claim that TN was hiring Oracle employees to get information about Oracle. For example, Oracle alleges in the Complaint that "SAP intentionally targets Oracle's employees to extract their knowledge of Oracle's new products."<sup>8</sup>

Oracle's objection is primarily one of burden, in that it does not want to search for the files of "low-level Oracle employees around the globe" to locate the evidence concerning TN. In order to address that concern, defendants agreed to narrow the request to documents relating to

<sup>7</sup> See Letter, Alinder to Lanier, October 9, 2007, p. 2.

<sup>8</sup> FAC at ¶ 71.

Hon. Charles A. Legge (Ret.)  
 February 19, 2008  
 Page 5

communications concerning TN.<sup>9</sup> Because the requests are limited to communications with or concerning the employees of a single third party (i.e., FN), they are reasonably focused.

This is not an unfounded fishing expedition, as Oracle has suggested. To the contrary, there is direct evidence that Oracle knowingly and deliberately consented to the provision of its SSMs to TN for use in supporting TN's customers. For example, a document located on the SAS database shows that in April of 2004 Oracle knowingly consented to its customer, Lockheed Martin, providing SSMs to TN for the purpose of TN supporting the customer. This is important in three respects. First, it shows that Oracle knew and agreed that TN could have SSMs that the customers were entitled to get from Oracle. Second, this relates to a customer that is not among the Identified Customers to which Oracle seeks to limit discovery. Third, this is a communication between Oracle and Seth Ravin, who is now a former employee of TN. Under Oracle's approach to discovery, Oracle would never have produced this document to defendants, despite its obvious importance. As such, it is essential for defendants to discover the full extent to which Oracle was aware of or consented to TN's practices, including via communications between Oracle and current and former TN employees.

Documents in response to Request No. 27 should be produced so that TN can evaluate the restrictions, if any, that Oracle believes it has imposed on its former employees. Oracle's suggestion that defendants get these documents from the employees themselves is not a valid excuse. Many employees may no longer work for FN and, in any case, the fact that defendants may have other means of locating some of the requested documents does not relieve plaintiffs of their duty to produce all of them. Indeed, it should be relatively easy for Oracle to locate and produce these documents.

### C. Customer Complaints (Request No. 64)

Request No. 64 seeks documents relating to customer complaints about Oracle's support or maintenance services for products at issue in this litigation, including complaints about the cost of such support or maintenance, the length of time it takes Oracle to respond to customer requests or resolve customer problems, Oracle's failure to provide adequate support or maintenance or the prospects of Oracle providing long-term, quality support, and the "software upgrade cycles" referenced in ¶ 47 of the FAC. Oracle has limited its response to documents related to the Identified Customers for products allegedly unlawfully downloaded by defendants.

These requested documents are relevant to the damages analysis, including the issue of the causation of damages. To the extent that Oracle alleges that it has lost sales as a result of the actions of defendants, defendants should be given broad discovery of the reasons that Oracle loses customers. See, e.g., *Data General Corp. v. Grumman Systems Support Corp.*, 36 F.3d 1147 (1st Cir. 1994) (evidence that plaintiff would have inevitably lost the customers irrespective of defendants' copyright infringement relevant to causation).<sup>10</sup> These documents may show that

<sup>9</sup> Defendants reserve the right to seek other responsive documents at a later time, if necessary.

<sup>10</sup> Additionally, in *Grumman*, the defendants argued that even if it did not use the plaintiff's copyrighted support tool, customers would have switched to (or remained with) defendant for service in order to take advantage of its lower prices and higher-quality service." *Id.* at 1171. Likewise, this "but for" causation is relevant to Oracle's fifth and sixth causes of action of intentional and negligent interference. See, e.g., *Sibley Valley Fest & Parade, Inc.*

JONES DAY

Hon. Charles A. Legge (Ret.)  
February 19, 2008  
Page 7

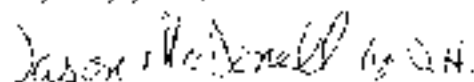
as "Titan." TN has produced all of the source code for Titan, which is software that has functionality that Oracle will no doubt compare to Change Assistant. Oracle continues to assert that its customers are able to determine through Change Assistant and Customer Connection which software and support materials their licenses permit them to download. Defendants must have access to the Change Assistant software, its source code and associated databases in order to respond to Oracle's claims that Change Assistant allows a customer to download only those items to which it is licensed. Moreover, the databases that Change Assistant uses to perform its search and retrieval functions will provide part of the data defendants continue to seek regarding the mapping of all downloadable software and support materials to all of the licensed products that are implicated by Oracle's claims in this case.

This issue demonstrates Oracle's unfair approach to discovery in this case. Oracle contends that TN must produce TN's software and source code for its automated search and download tool (Titan). Yet Oracle refuses to produce the same information for its own tool (Change Assistant), notwithstanding the fact that Oracle intends to use a comparison of the two to support its claims. And, Oracle contends that the parties' burdens are equal regarding the mapping of all downloadable software and support materials to all of the licensed products that are implicated by Oracle's claims in this case, yet Oracle continues to refuse to produce some of the most information-rich data (the databases used by Change Assistant) that would greatly assist that mapping exercise.

### III. CONCLUSION

For the foregoing reasons, defendant's second motion to compel should be granted in its entirety.

Very truly yours,



Jason McDonnell

cc: Christopher B. Hockett, Esq. (via email)  
Geoffrey Howard, Esq. (via email)  
Zachary Alinder, Esq. (via email)  
Holly House, Esq. (via email)  
Bree Hahn, Esq. (via email)

CFI-57-6576



# EXHIBIT F



PeopleSoft, Inc.

July 10, 2002

400 Howard Drive

**Via FEDERAL EXPRESS**

PO Box 2715

Mr. Seth Ravn  
 TomorrowNow, Inc.  
 720 North Rosemary Drive  
 Bryan, Texas 77802

Tel: 409.833.9100

Dear Mr. Ravn:

It has come to our attention that TomorrowNow has written a letter to PeopleSoft customers in which it offers those customers extended support services. That letter purports to describe such services by including the following representations:

"(TomorrowNow provides) . . . highly responsive, around-the-clock product support delivered by experienced, PeopleSoft-trained specialists."

"[A] retired release is likely to have hundreds - sometimes thousands - of unresolved and unknown software issues . . ."

"[Operation of a retired release in production could lead to] . . . serious issues that could lead to future system failures and extended downtime . . ."

These representations, and TomorrowNow's marketing materials, in general, violate PeopleSoft's rights under the federal Lanham Act and other laws that prohibit product disparagement, false advertising, interference with contract and/or interference with prospective economic advantage, and entitle PeopleSoft to recover damages against you and TomorrowNow. Specifically, the representations in your letter, coupled with the numerous references to PeopleSoft in TomorrowNow's marketing materials, are clearly intended to create the false impression that TomorrowNow is affiliated with or sponsored or endorsed by PeopleSoft. First, every page of your website is devoted to PeopleSoft. Second, the only link on your website to any technology company links to PeopleSoft's website, PeopleSoft.com. Third, and perhaps most objectionable, you claim to be a "Vice President, PeopleSoft Solutions Group". As a result, there is no doubt that a PeopleSoft customer reviewing your materials would likely believe, erroneously, that TomorrowNow is somehow associated with PeopleSoft.

Moreover, your characterizations of PeopleSoft products and of your abilities to survive them are misleading, and therefore also violate PeopleSoft's rights under the law. For example, some recipients of your letter -- with its reference to "hundreds - of unresolved and unknown software issues that will never be addressed by PeopleSoft" -- may conclude that you are disparaging PeopleSoft and/or some of its products. Such statements may wrongfully cause PeopleSoft customers to terminate existing agreements

AK000556



with PeopleSoft or to refuse to enter into new agreements with PeopleSoft. Furthermore, because TomorrowNow is not a certified member of PeopleSoft's advance network, it is misleading for the TomorrowNow website to claim that TomorrowNow has the ability to perform upgrades to PeopleSoft 8.

In addition to misleading the recipients of your letter, it appears that you may also have violated your direct contractual obligations to PeopleSoft by misappropriating and utilizing proprietary and confidential PeopleSoft information. We understand that, in order to effect your goaling and solicit PeopleSoft customers to subscribe to your support services, you may have improperly utilized a proprietary PeopleSoft customer list. PeopleSoft's proprietary information may also have been misappropriated if TomorrowNow's Customer Support Specialists developed their knowledge regarding PeopleSoft and its products from access to confidential PeopleSoft information in your possession. To the extent that you are using PeopleSoft's proprietary and/or confidential information to advance the interests of TomorrowNow, your actions violate the Proprietary Information Agreement (the "Agreement") that you signed when you began your employment at PeopleSoft. To the Agreement, a copy of which is attached, you agreed that, both during and after your employment with PeopleSoft, you would:

"hold in the strictest confidence, and not . . . use, except for the benefit of PeopleSoft, . . . any trade secrets, confidential knowledge, data or other proprietary information relating to products, processes, . . . customer lists, . . . or other subject matter pertaining to any business of the Company . . ."

In light of the foregoing, we insist that you immediately cease the publication and distribution of the solicitation letter discussed above, and that you take steps to ensure that TomorrowNow's website and all future correspondence, marketing pieces and press releases, and any and all other oral or written communication from TomorrowNow, affirmatively state that neither TomorrowNow nor its services are associated with, aligned with, sponsored by or endorsed by PeopleSoft.

Within five days of the date of this letter, please provide us with your written assurance that the solicitation letter will cease to be distributed and that your website and all other communications have been or are in process of being modified to include a disclaimer which clearly states that TomorrowNow is neither affiliated with nor endorsed by PeopleSoft. We look forward to receiving your positive response.

Very truly yours,

David Chavez  
Assistant General Counsel  
PeopleSoft, Inc.

# **EXHIBIT G**

## JONES DAY

225 CALIFORNIA STREET, • 20TH FLOOR • SAN FRANCISCO, CALIFORNIA 94104-1500  
TELEPHONE: 415 862-9999 • FACSIMILE: 415 862-9700

Direct Number: 415 862-9822  
jproctor@JonesDay.com

March 21, 2008

### VIA EMAIL AND HAND DELIVERY

Hon. Charles A. Legge (Ret.)  
JAMS  
Two Embarcadero Center, Suite 1500  
San Francisco, CA 94111

**Re: Oracle Corporation, et al. v. SAP AG, et al.**  
Letter regarding Timing of Production Contained in Report and  
Recommendations Re: Discovery Hearing No. 2

Dear Judge Legge:

This letter seeks clarification of the "Timing of Production" section of the Report and Recommendations Re: Discovery Hearing No. 2 ("Recommendations").

On page four, the Recommendations state:

"After discussion, the parties agreed as follows: The information from defendant TN will be supplied to plaintiffs by the end of March, and the information from the SAP Companies will be supplied by April 15, 2008."

Defendants' purpose in writing this letter is threefold: (1) to request clarification on the meaning of "information;" (2) to make clear that Defendants are unable to comply with the deadlines contained in the Recommendations; and (3) to confirm that Defendants did not agree to comply with the deadlines during the hearing.

At the hearing, Defendants said that they were trying to have productions from Oracle's list of 18 priority custodians completed by the end of March, and could have "key" SAP custodians produced by the end of April.<sup>7</sup> But, Defendants did not and could not agree to produce all TomorrowNow or SAP data by the dates in the Recommendations. Your Honor did, while evidently recognizing the complexities and large amounts of data at issue, set a date of

---

<sup>7</sup> JUDGE LEGGE: Now, what kind of data can you give?

MR. FUGGIE: I can say that their priority custodians were shooting to have completed in their entirety by the end of this month.

JUDGE LEGGE: By the end of March?

MR. FUGGIE: By the end of March, which will be in the neighborhood of 2,500,000 pages, and then we should come after that start producing key SAP custodians that are in addition to those 18 custodians.

Hearing in Re: Discovery Issues, March 4, 2008, at 45 (rough).

JONES DAY

Hon. Charles A. Legge (Ret.)  
March 21, 2008  
Page 2

April 15 for the SAP information, but Defendants did not agree to that deadline during the hearing.<sup>2</sup>

Defendants are also unclear as to whether the "information" referred to in the Recommendations is intended to mean the priority custodians and "key" custodians discussed during the hearing or all of TomorrowNow and SAP data. As Defendants said during the hearing and is still true today, Defendants can only attempt to produce the priority custodians identified by Plaintiffs and certain SAP "key" custodians by those dates. Defendants cannot agree to complete the entire TomorrowNow and SAP productions by the dates contained in your Recommendations.<sup>3</sup>

Defendants are working diligently on the review and production of data in this case. Approximately forty attorneys are reviewing and producing data. In accordance with Your Honor's suggestion, Defendants have agreed to cooperate with Plaintiffs in advance of the next CMC to extend deadlines and to attempt to create a new discovery plan.<sup>4</sup> Toward that goal, Defendants are taking the appropriate steps by proposing a discovery plan to Oracle that will allow Defendants to complete their remaining productions within a reasonable timeframe.

In light of the hearing record and the points made above, Defendants request that your Honor clarify the "Timing of Production" section of the Recommendations: (1) to state explicitly that by "information" you meant the priority custodians identified by Plaintiff and "key" SAP custodians; and (2) to remove the "agreed" notation from the Recommendations.

We will be prepared to discuss this request at the hearing on March 25, if please.

Very truly yours,



Jason McDoacil

cc: Donn Pickett, Esq. (via email)  
Geoffrey Howard, Esq. (via email)  
Zachary Alinder, Esq. (via email)  
Holly House, Esq. (via email)  
Drew Hans, Esq. (via email)

5115949v1

<sup>1</sup> Hearing in Re Discovery Issues, March 4, 2008, at 52-51 (rough).

<sup>2</sup> Hearing in Re Discovery Issues, March 4, 2008, at 52-51 (rough). Defendants anticipate completing production of Plaintiffs' entire list of priority custodians by the end of March, with the exception of two, and these two should be produced in early April. In addition, Defendants have and will continue to produce additional data that is outside of Plaintiffs' priority custodian list. Defendants also anticipate producing data from the following additional SAP custodians' files by April 15<sup>th</sup>, although the production will not be complete by that date.

<sup>3</sup> At the end of the hearing, Your Honor made it clear that the parties need to sit down and try to agree to a realistic schedule. Hearing in Re Discovery Issues, March 4, 2008, at 144-46 (rough).