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22 UNITED STATES DISTRICT COURT  
 NORTHERN DISTRICT OF CALIFORNIA  
 23 OAKLAND DIVISION

24 ORACLE USA, INC., *et al.*,

Plaintiffs,

25 v.

26 SAP AG, *et al.*,

27 Defendants.

No. 07-CV-01658 PJH (EDL)

**DECLARATION OF ZACHARY J. ALINDER  
 IN SUPPORT OF ORACLE'S OPPOSITION  
 TO MOTION FOR STAY OF JUDGMENT  
 AND APPROVAL OF PROPOSED SECURITY**

Date: May 4, 2011

Time: 9:00 a.m.

Place: 3rd Floor, Courtroom 3

Judge: Hon. Phyllis J. Hamilton

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

DECLARATION OF ZACHARY J. ALINDER IN SUPPORT OF ORACLE'S OPPOSITION  
 TO MOTION FOR STAY AND APPROVAL OF SECURITY

1 I, Zachary J. Alinder, declare as follows:

2 1. I am an attorney licensed to practice law in the State of California and am  
3 a partner at Bingham McCutchen LLP, counsel of record for plaintiffs Oracle USA, Inc., Oracle  
4 International Corporation, and Siebel Systems, Inc. (collectively, "Oracle"). I have personal  
5 knowledge of the facts stated within this Declaration and could testify competently to them if  
6 required. Unless otherwise noted below, Oracle has provided all highlighting in these Exhibits  
7 to further assist in identifying the information relevant to Oracle's Opposition to SAP's Motion  
8 for Stay of Judgment and Approval of Proposed Security.

9 2. Attached as **Exhibit A** is a true and correct copy of a December 17, 2010  
10 email from counsel for Defendants, Jane Froyd, to counsel for Oracle, including me, stating that  
11 Defendants "prefer" an escrow agreement to secure the judgment. In response, Oracle agreed to,  
12 and did, meet and confer with counsel for Defendants on December 22, 2010, including  
13 discussing SAP's proposed escrow.

14 3. By the time the Court entered judgment on February 3, 2011, the Parties  
15 had devoted considerable time to the negotiations and would devote more. This included at least  
16 two telephonic meet and confers in December and January, exchange of multiple drafts of the  
17 proposed escrow term sheet and exchange of many related emails. To facilitate discussions,  
18 Oracle agreed to extend the stay on execution of the judgment three times (and offered a fourth,  
19 unaccepted extension before SAP filed this Motion). Based on my review of the time records for  
20 attorneys working on the escrow agreement and negotiations with SAP, Oracle has devoted over  
21 100 attorney hours working on the proposed escrow agreement. This does not include Oracle's in-  
22 house counsel or Oracle's tax department, both of which also have been involved in the negotiations  
23 related to the proposed escrow agreement.

24 4. At SAP's request, counsel first negotiated an escrow term sheet. The  
25 Parties exchanged approximately five drafts of this term sheet. That was followed by exchanges  
26 of at least ten drafts related to the Proposed Escrow Agreement itself. The Parties held at least  
27 five telephonic meet and confers and exchanged dozens of emails related to these draft escrow  
28 documents. During these negotiations, when Oracle asked why SAP preferred the escrow, SAP

1 cited “convenience,” “cost” and “internal administrative reasons.” Attached as **Exhibit B** is a  
2 true and correct copy of a February 7, 2011 email from counsel for Defendants, Jane Froyd, to  
3 me, stating that Defendants prefer the structure of their proposed form of security for “a variety  
4 of internal administrative reasons.”

5 5. As far as I am aware, I was involved in all of the meet and confer  
6 discussions and emails between the Parties related to the proposed escrow agreement. SAP  
7 never explained or stated that it had entered into the third party agreements (in one case two days  
8 before initially proposing an escrow) which it now says “might” make the bond inconvenient or  
9 expensive. Prior to filing this Motion, SAP never stated that it would take only 14 days to obtain  
10 the bond.

11 6. On March 24, 2011, both sides needed to obtain final client approval on the  
12 overall escrow agreement and one principal item remained in dispute between counsel: Oracle did  
13 not agree to indemnify SAP’s Escrow Agent. The proposed tax reporting and tax indemnity  
14 language also was subject to client approval. That same morning, SAP informed Oracle that it had  
15 decided to change the tax reporting section in the proposed escrow agreement back to language  
16 that the Parties had abandoned a week earlier, purporting to treat the escrow as a “qualified  
17 settlement fund” (“QSF”) under U.S. Treasury Regulations. In the weeks of meet and confer on  
18 the tax section of the escrow agreement leading up to that morning, Oracle had proposed that  
19 SAP either (a) indemnify Oracle against any adverse tax consequences that would arise from  
20 SAP’s escrow proposal, or (b) draft the escrow agreement in a manner that would not create  
21 these tax risks for Oracle (nor the corresponding tax benefit to SAP). Attached as **Exhibit C** is a  
22 true and correct copy of a March 16, 2011 email from counsel for Defendants, Rachel Rawson,  
23 to me (excluding attachments), stating that SAP had agreed to “give up” their proposed QSF tax  
24 language to “alleviate Oracle’s concern regarding the tax implications of a QSF and its request  
25 for a tax indemnity.”

26 7. Attached as **Exhibit D** is a true and correct copy of a March 24, 2011  
27 email from counsel for Defendants, Rachel Rawson, to me (excluding the attachments), stating  
28 that SAP intended to file a proposed escrow agreement “providing for the tax treatment of the

1 escrow fund as a QSF, with no grantor trust election and no tax indemnity,” and that SAP  
2 “believe[d] this is the most appropriate form of security for both parties under all of the  
3 circumstances...” Attached as **Exhibit E** is a true and correct copy of a March 24, 2011 email  
4 string from counsel for Defendants, Jacqueline K.S. Lee, to me, explaining that SAP did not  
5 consider this to be a “reversal” of position, because “the proposals discussed have been and are  
6 subject to client approval - a point that both parties emphasized in light of the complexity of  
7 these issues.” In the same email string at 10:31 a.m., I offered to extend the temporary stay and  
8 filing deadline to allow time to resolve the outstanding issues. SAP rejected the proposed  
9 extension and filed its Motion to Stay and for Approval of Security pursuant to Federal Rule of  
10 Civil Procedure 62.

11 I declare under penalty of perjury under the laws of the United States that the  
12 foregoing facts are true and correct, and that this Declaration was executed on April 13, 2011, in  
13 San Francisco, CA.

14 /s/ Zachary J. Alinder

15 Zachary J. Alinder

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