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18

19   UNITED STATES DISTRICT COURT

20   NORTHERN DISTRICT OF CALIFORNIA

21   OAKLAND DIVISION

22 ORACLE USA, INC., et al.,   Case No. 07-CV-1658 PJH (EDL)

23   Plaintiffs,   **DEFENDANTS' MOTION FOR
                                         APPROVAL OF SECURITY
24   v.   PURSUANT TO RULE 62 OF THE
                                         FEDERAL RULES OF CIVIL
25 SAP AG, et al.,   PROCEDURE**

26   Defendants.   Date: June 29, 2011
                                         Time: 9:00 a.m.
27   Courtroom: 3, 3rd Floor
                                         Judge: Hon. Phyllis J. Hamilton
28

    SVI-93012v1   DEFENDANTS' MOTION FOR APPROVAL OF PROPOSED
                                         SECURITY PURSUANT TO FRCP 62
                                         Case No. 07-CV-1658 PJH (EDL)

NOTICE OF MOTION

PLEASE TAKE NOTICE THAT on June 29, 2011, at 9:00 a.m., or as soon thereafter as

this matter may be heard by the above-titled Court, located at 1301 Clay Street, Oakland,

California, in Courtroom 3 before the Honorable Phyllis J. Hamilton, Defendants SAP AG, SAP

America, Inc. (together, "SAP") and TomorrowNow, Inc. (with SAP, "Defendants") will bring

this motion for approval of security pursuant to Rule 62 of the Federal Rules of Civil Procedure,

against Plaintiff Oracle International Corporation ("Oracle"). This motion is based on the

Memorandum of Points and Authorities herein, the Declaration of Jane L. Froyd in Support of

Defendants' Motion for Approval of Security Pursuant to Rule 62 of the Federal Rules of Civil

Procedure ("Froyd Declaration" or "Froyd Decl."), and exhibits attached thereto.

RELIEF REQUESTED

Defendants submit this motion pursuant to Rule 62(d) of the Federal Rules of Civil

Procedure ("Rule 62(d)") for entry of an order approving the supersedeas bond in the amount of

$1,325,033,547.00, attached as Exhibit 1 to the Froyd Declaration, as appropriate security to stay

execution of the final judgment entered on February 3, 2011 (ECF No. 1036), pending

disposition of post-judgment motions and, if necessary, appeal.

MEMORANDUM OF POINTS AND AUTHORITIES

I.   INTRODUCTION AND SUMMARY OF ARGUMENT

On April 29, 2011, the Court entered an order granting Defendants' Motion for Stay of

Execution of Judgment Through Appeal and Approval of Proposed Security Pursuant to FRCP

62, ruling that "[e]xecution of final judgment is stayed pending disposition of post-judgment

motions and, if necessary, appeal" and ordering Defendants "to obtain and move the Court for

approval of a supersedeas bond in the amount of $1,325,033,547.00 within 21 days after this

order is entered." ECF No. 1069 ("Order"). In compliance with the Court's Order, Rule 62(d),

and Local Rule 65.1, Defendants secured the requisite bond (a copy of which is attached as

Exhibit 1 to the Froyd Declaration) and now move the Court for entry of an order approving this

bond. Because the bond obtained by Defendants complies with Rule 62(d), Local Rule 65.1, and

this Court's Order, the Court should grant Defendants' motion.

1   Defendants provided the bond form to Oracle in advance of this filing and asked whether

2   Oracle would stipulate to it, such that Defendants could present the Court with a stipulated

3   motion. Oracle declined to stipulate to the bond form and instead asked Defendants to make

4   several non-substantive changes. When Defendants declined to make these changes, Oracle

5   informed Defendants that Oracle would offer a competing bond form to the Court. Oracle did

6   not, however, provide any reason why Defendants' bond form does not provide adequate

7   security to enforce the judgment or how Oracle's proposed changes make Oracle any more

8   secure in its judgment.

9   Accordingly, because (1) the bond Defendants submit to the Court provides ample

10   security to enforce the judgment, (2) none of the changes Oracle requests are necessary or make

11   Oracle more secure in its judgment, (3) Oracle is not a party to the bond (a financial instrument

12   between Defendants and the surety companies underwriting the bond) and is not in a position to

13   demand changes that do not otherwise affect whether the bond provides adequate security, and

14   (4) changing the bond form is a complicated process, requiring the approval of all 10 surety

15   companies, the Court should decline to entertain Oracle's suggested revisions and grant

16   Defendants' motion approving the bond submitted by Defendants.

17   **II.   ARGUMENT**

18   **A.   Defendants' Proposed Supersedeas Bond Adequately Secures the Judgment.**

19   The bond obtained by Defendants adequately secures the judgment under all applicable

20   rules and warrants granting of this motion. First, in compliance with Rule 62(d) and the Court's

21   Order, Defendants post a supersedeas bond in an amount approved by this Court—

22   $1,325,033,547.00. *See* Fed. R. Civ. P. 62(d); Froyd Decl. ¶ 1, Ex. 1. Second, in compliance

23   with Local Rule 65.1, the bond is signed by 10 sureties, each a "corporation authorized by the

24   Secretary of the Treasury of the United States to act as surety on official bonds under 31 U.S.C.

25   §§ 9301-9306." Civ. L.R. 65.1(b)(1); *see also Department of the Treasury's Listing of Certified*

26   *Companies*, Financial Management Services – A Bureau of the United States Department of the

27   Treasury, http://www.fms.treas.gov/c570/c570_a-z.html (last viewed May 20, 2011); Froyd Decl.

28   ¶ 1, Ex. 1. Oracle does not dispute that the amount of the bond is appropriate under Rule 62(d) or

1 that the bond is appropriately insured as required by Local Rule 65.1. Thus, the Court should

2 approve the bond attached as Exhibit 1 of the Froyd Declaration as adequate security to stay final

3 judgment pending disposition of post-judgment motions and, if necessary, appeal.

4   **B.   Oracle Can Provide No Legal Basis to Prevent Approval of this Motion.**

5   Although Oracle declined to stipulate to Defendants' motion, Oracle has no substantive

6 objections to the bond form and can provide no legal basis preventing approval of this motion.

7   As a courtesy and in an effort to obtain Oracle's stipulation to the bond, on Monday, May

8 16, 2011, Defendants provided Oracle with the bond form that Defendants intended to file. *See*

9 Froyd Decl. ¶ 2, Ex. 2. At 11:33 p.m. on Wednesday, May 18, 2011, Oracle responded with

10 unsolicited proposed changes to the bond form. *See* Froyd Decl. ¶ 3, Ex. 3 at 2-3. *First*, Oracle

11 requested that Defendants remove plaintiffs Oracle USA, Inc. and Siebel Systems, Inc. as

12 beneficiaries of the bond. *See id.* at 3. But, as Defendants explained to Oracle, that the bond

13 form lists all three plaintiffs, rather than simply Oracle International Corporation, has no bearing

14 on whether the bond adequately secures Oracle. *See id.* at 1-2. *Second*, Oracle proposed an

15 additional paragraph that would state that (a) each surety underwriting the bond meets the

16 qualifications of Local Rule 65.1 and (b) the Court has the ability to order judgment and

17 execution on the surety's obligation, in the event that the surety defaults or refuses to obey a

18 Court order regarding payment. *See id.* at 3. As Defendants explained to Oracle, this proposed

19 language is superfluous and unrelated to ensuring security of the judgment because—as noted

20 above and as Oracle does not dispute—each surety underwriting the bond meets the qualifications

21 of Local Rule 65.1 and because the Court already has the ability to order judgment and execution

22 on the sureties' obligations. *See id.* at 1-2. *Finally*, Oracle proposed several cosmetic edits,

23 which Defendants pointed out as such. *See id.* at 3.

24   None of Oracle's comments are substantive in nature or aimed at making Oracle more

25 secure in the judgment. These proposed changes neither correct alleged deficiencies with the

26 bond form under the Court's Order or applicable rules, nor are they aimed at making Oracle more

27 secure in its judgment. Oracle is simply not in a position to demand non-substantive changes to a

28 bond form that is between Defendants and the surety companies underwriting the bond.

1   Finally, Defendants also note that obtaining security for the amount at issue has been, and

2   is necessarily, a complicated and time-consuming task. Defendants have worked diligently to

3   secure this bond, which involved extensive negotiations and coordination with multiple insurance

4   carriers. *See* ECF No. 1063 (Plonka Decl.) ¶¶ 2-10. Any changes to the language or terms of the

5   bond form requires additional negotiation and coordination with each of the 10 surety companies

6   underwriting the bond, all of whom would have to approve any changes to the bond form.

7   **III.   CONCLUSION**

8   Because the bond form complies with all applicable requirements for security under the

9   federal and local rules and this Court's Order—a fact that Oracle cannot not dispute—none of

10 Oracle's unnecessary proposed revisions justify denial of Defendants' motion. The Court can and

11 should approve the bond in its current form. Accordingly, Defendants' respectfully request that

12 the Court enter an order approving the supersedeas bond in the amount of $1,325,033,547.00,

13 attached as Exhibit 1 to the Froyd Declaration, as appropriate security to stay execution of final

14 judgment, entered on February 3, 2011 (ECF No. 1036), pending disposition of post-judgment

15 motions and, if necessary, appeal.

16 Dated: May 20, 2011   JONES DAY

17   By: /s/ Tharan Gregory Lanier
                                                                       Tharan Gregory Lanier
18
                                                                 Counsel for Defendants
19   SAP AG, SAP AMERICA, INC., and
                                                                 TOMORROWNOW, INC.
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