1   BINGHAM MCCUTCHEN LLP
    DONN P. PICKETT (SBN 72257)
2   GEOFFREY 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
5   Telephone: 415.393.2000
    Facsimile: 415.393.2286
6   donn.pickett@bingham.com
    geoff.howard@bingham.com
7   holly.house@bingham.com
    zachary.alinder@bingham.com
8   bree.hann@bingham.com

9   BOIES, SCHILLER & FLEXNER LLP
    DAVID BOIES (Admitted Pro Hac Vice)
10 333 Main Street
    Armonk, NY 10504
11 Telephone: (914) 749-8200
    Facsimile: (914) 749-8300
12 dboies@bsfllp.com
    STEVEN C. HOLTZMAN (SBN 144177)
13 FRED NORTON (SBN 224725)
    1999 Harrison St., Suite 900
14 Oakland, CA 94612
    Telephone: (510) 874-1000
15 Facsimile: (510) 874-1460
    sholtzman@bsfllp.com
16 fnorton@bsfllp.com

17 DORIAN DALEY (SBN 129049)
    JENNIFER GLOSS (SBN 154227)
18 500 Oracle Parkway, M/S 5op7
    Redwood City, CA 94070
19 Telephone: 650.506.4846
    Facsimile: 650.506.7144
20 dorian.daley@oracle.com
    jennifer.gloss@oracle.com

21 Attorneys for Plaintiffs Oracle USA, Inc., *et al.*

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

24 ORACLE USA, INC., *et al.*,   No. 07-CV-01658 PJH (EDL)

25   Plaintiffs,   **ORACLE'S OPPOSITION TO SAP'S
                                                    MOTION FOR APPROVAL OF
        v.   SECURITY**

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

I. INTRODUCTION

SAP provided Oracle with its proposed bond on Monday. Oracle provided a few important revisions on Wednesday, which fall into three categories: (1) correct errors in the original bond language; (2) clarify language that creates an unnecessary risk of confusion; and, (3) add standard bond language that increases security and efficiency for the Parties and the Court. SAP rejected each proposed revision as either "irrelevant" or "non-substantive," implying that it would take too long to get the sureties to agree to any language changes. The Court should modify SAP's proposed bond for three reasons.

First, the errors in the bond language are real and alone require modification of the proposed bond. For example, SAP has included parties that did not receive – and cannot execute on – the money judgment. Oracle International Corporation ("OIC") alone received the money judgment, and only OIC, its successors, or its assignees may execute on the judgment. Oracle USA and Siebel Systems simply should not be parties to the bond.

Second, some language creates a serious risk of confusion as to the obligations of the sureties and conditions of the bond. For example, the last sentence of the first "NOW, THEREFORE" clause is missing one or more words in the middle of the phrase "as the said may adjudge." The risk of mistake or misunderstanding with regard to obligations and conditions on a bond of this size is not a trivial matter, particularly when it easily can be remedied up-front.

Third, the standard bond language that Oracle added at the end of SAP's proposed bond increases the security for the Parties and the procedural efficiency of executing on the bond in the event of default or refusal to obey a court order by one or more of the sureties. Given large the number and diverse nature of the sureties involved in this bond, this language makes even more sense than in a typical bond. Indeed, at least two of the same sureties chosen by SAP have previously agreed to this language for bonds entered in the Northern District of California. There is no reason (and SAP provides none) to reject a more secure bond and a more efficient process for executing on the bond.

II. FACTUAL BACKGROUND

On April 29, 2011, the Court entered the Revised Order granting the Motion for

1 Stay of Execution of Judgment Through Appeal and Approval of Proposed Security Pursuant to

2 FRCP 62 (ECF No. 1069), filed by Defendants SAP AG, SAP America, Inc., and

3 TomorrowNow, Inc. ("SAP"). That same day Oracle sent SAP an email seeking to work with

4 SAP on the bond format, in the hopes that the Parties could agree in advance on the bond and file

5 a stipulated motion to approve it. *See* Declaration of Zachary J. Alinder ISO Opp. to Mot. for

6 Approval of Security ("Alinder Decl."), Ex. A. SAP did not respond. *See id.*, ¶ 2. So, Oracle

7 sent a follow-up message to SAP on May 11th, stating: "Our hope is that the Parties will be able

8 to stipulate that the bond secured by SAP complies with the Court's order and provides adequate

9 security under Rule 62 and Local Rule 65.1." *See id.*, Ex. B.

10 SAP responded on May 16th by providing "the bond form that Defendants intend

11 to file this week" and requesting Oracle to stipulate to it. *See id.*, Ex. C. Oracle provided its

12 proposed revisions on May 18th, along with redline and clean versions of Oracle's proposed

13 bond format, and an explanation of the reasons for the proposed revisions. *See id.*, Ex. D (email)

14 & Ex. E (Oracle's redlines of proposed bond revisions). On May 19th, SAP rejected Oracle's

15 proposed revisions, implying that it would be too difficult and time-consuming to vet changes

16 among the surety group. *See id.*, Ex. F. SAP again requested that Oracle stipulate to its

17 proposed bond format. *Id*. Oracle responded later in the day that it would then provide its

18 proposed revisions to the Court, and SAP filed its Motion for Approval of Bond the next day.

19 *See id.*, Ex. G; *see also* ECF No. 1070 (SAP's Motion for Approval).

20 **III.   THE COURT SHOULD ORDER SAP TO MODIFY THE BOND AND RE-FILE**
   IT FOR APPROVAL
21

22 **A.   SAP Should Correct The Errors In The Bond Language**

23 OIC alone received the money judgment in this case. *See* ECF No. 1036

24 (Judgment). Therefore, only OIC, its successors, and/or assignees can execute on the money

25 judgment. In error, SAP added Oracle USA, Inc. and Siebel Systems, Inc. to the first paragraph

26 of the bond as parties,[1] to whom the sureties "are held and firmly bound unto" in the amount of

27 [1]   SAP's Motion claims that Oracle is not a "party" to the bond. ECF No. 1070 at 2:11-13.
28 SAP's bond language itself does not make this distinction, but in any event, the distinction is

(Footnote Continued on Next Page.)

1 the bond. Alinder Decl., Ex. C (SAP's attached bond format). SAP also failed to include OIC's

2 successors and assignees in the bond language.

3 These errors are not irrelevant or inconsequential. Oracle USA merged into Sun

4 Microsystems and was concurrently renamed Oracle America, Inc. on February 15, 2010. *See*

5 ECF No. 762 at n.1 (Order re MSJs). Similarly, Oracle acquired Siebel Systems, Inc. in 2006

6 and merged its operations into Oracle's. This history illustrates the importance of including the

7 standard language regarding successors and assignees. There is also no need for the confusion

8 created by incorrectly identifying the party to which the sureties are bound. SAP should simply

9 revise the bond so that it correctly reflects the appropriate judgment creditor and acknowledges

10 the possibility of future successors and assignees.

11 **B.** **SAP Should Correct Confusing, Unclear And Improper Bond Language**

12 There is also no need to risk confusion regarding the obligations of the sureties or

13 the conditions of the bond. Oracle proposed the minimum changes necessary to clarify these

14 obligations and conditions. These revisions include adding missing words between "the said"

15 and "may adjudge" in the "NOW THEREFORE" paragraph, as well as changing "as surety" in

16 paragraph 6 to "each surety." *See* Alinder Decl., Ex. E (Oracle's redlines of proposed bond

17 revisions). These revisions do not change the obligations of the surety or conditions of the bond,

18 but merely clarify those obligations and conditions for the Parties, the sureties, and the Court.

19 **C.** **SAP Should Add Proposed Standard Bond Language**

20 Finally, Oracle proposed one additional sentence at the end of SAP's proposed

21 bond. This sentence accomplishes two things. First, it includes the standard bond language that,

22 in the event a surety either defaults or refuses to obey any court order requiring payment (often

23 described in bonds as "contumacy"), the Court may summarily "render judgment against the

24 Surety in accordance with its obligation and award execution thereon." *See id.*, Ex. E. This

25

26 (Footnote Continued from Previous Page.)

27 irrelevant. Oracle is an intended beneficiary of the bond, and whether SAP wants to label it a
"party" or not does not change the fact that SAP's bond erroneously lists Oracle USA and Siebel

28 Systems as taking part of the money judgment and bond securing it.

1 language provides additional security to Oracle in the event that any surety defaults or refuses to

2 obey any court Order. It also adds efficiency with a summary procedure to deal with such an

3 event. *See id.* With ten sureties involved, protecting against the possibility of default or

4 "contumacy" only makes sense.

5   SAP cannot argue that the bond issuers would not agree to this standard language.

6 At least two of these same bond issuers – including the second largest bond issuer, Liberty

7 Mutual – included this standard language in recent bonds entered in the Northern District of

8 California. *See id.*, Exs. H, I & J. SAP should embrace standard bond language that provides

9 additional security and procedural efficiencies.

10   The second addition is merely a reference that the sureties meet the qualification

11 requirements for sureties set forth in the Northern District's Civil Local Rules. *See id.*, Ex. E;

12 *see also* Civ. L.R. 65-1.1(b). SAP appears intent on avoiding these questions, but should not be

13 allowed to do so. SAP should inform Oracle and the Court if any of the sureties do not meet the

14 qualification requirements under the Local Rules. Regardless, SAP should be required to

15 explicitly confirm in the bond that its chosen sureties meet these qualifications.

16 **IV.   CONCLUSION**

17   For the foregoing reasons, the Court should order SAP to modify its proposed

18 bond in accordance with Oracle's proposed revisions and re-file the revised bond for approval

19 within ten days of entry of the order.

20

DATED: May 20, 2011

21   Bingham McCutchen LLP

22

23

                                          By:_____/s/ Zachary J. Alinder_____
24   Zachary J. Alinder
                                                      Attorneys for Plaintiffs
25   Oracle USA, Inc., *et al*.

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ORACLE'S OPPOSITION TO SAP'S MOTION FOR APPROVAL OF SECURITY
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