

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

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

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

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

19 UNITED STATES DISTRICT COURT  
 20 NORTHERN DISTRICT OF CALIFORNIA  
 21 OAKLAND DIVISION

23 ORACLE USA, INC., et al.,

24 Plaintiffs,

25 v.

26 SAP AG, et al.,

27 Defendants.

Case No. 07-CV-1658 PJH (EDL)

**[DEFENDANTS' PROPOSED]  
 ORDER REGARDING EXHIBIT  
 ADMISSIBILITY**

1 Having considered the papers filed and lodged in connection with the parties' Joint  
2 Statement Regarding Exhibit Objections:

3 IT IS HEREBY ORDERED THAT:

4 **Defendants' Category 1 – Hearsay Exceptions/Exclusions**

5 Statements by Oracle's senior executives, including Larry Ellison (CEO), Safra Catz (co-  
6 President and former CFO), Charles Phillips (then-co-President), Jeff Henley (Chairman of the  
7 Board), Juergen Rottler (Executive Vice President of Oracle Customer Services), and Keith Block  
8 (Executive Vice President of North American Sales), about software and support sales of Oracle  
9 products, tracking of customers, customer relations, and the impact of the third party support  
10 market qualify as party admissions and are admissible as non-hearsay under Rule 801(d)(2)(D) of  
11 the Federal Rules of Evidence. Fed. R. Evid. 801(d)(2)(D); *Sea-Land Serv., Inc. v. Lozen Int'l,*  
12 *LLC*, 285 F.3d 808, 821 (9th Cir. 2002) (holding that, for statement to be exempted from hearsay  
13 exclusion as party admission under Rule 801(d)(2)(D), courts require only that: (1) declarant was  
14 employee of party at time statement was made; and (2) statement "concern[s] a matter within the  
15 scope of the agency or employment"); *Harris v. Itzhaki*, 183 F.3d 1043, 1054 (9th Cir. 1999);  
16 *United States v. Kirk*, 844 F.2d 660, 663 (9th Cir. 1988).

17 Statements by Oracle sales and support employees, including Juan Jones (Senior Vice  
18 President Customer Services North America Support), Richard Cummins (Senior Direct Support  
19 Renewals), Robert Lachs (Senior Regional Manager Support Sales), James McLeod (Regional  
20 Support Sales Manager), as to specific customers and business activities relating to selling of  
21 Oracle software and support also qualify as party admissions and are admissible as non-hearsay  
22 under Rule 801(d)(2)(D). *Id.* Further, to the extent that Oracle sales and support employees  
23 incorporate customer statements in internal email communications and manifest an adoption of  
24 the content of the customer statements, such statements constitute adoptive party admissions and  
25 are admissible as non-hearsay under Rule 801(d)(2)(B). Fed. R. Evid. 801(d)(2)(B); *Sea-Land*,  
26 285 F.3d at 821 (holding that where party "uses the statement or takes action in compliance with  
27 the statement" it constitutes adoptive party admission); *MGM Studios, Inc. v. Grokster, Ltd.*, 454  
28 F. Supp. 2d 966, 973 (C.D. Cal. 2006).

1           Contemporaneous statements by relevant Oracle customers about their then-existing state  
2 of mind (including their motive and/or intent behind dropping Oracle support or purchasing SAP  
3 software) are admissible: (1) as non-hearsay if the statement supports an inference about a  
4 customer's state of mind, *see CytoSport, Inc. v. Vital Pharms., Inc.*, 617 F. Supp. 2d 1051, 1074  
5 (E.D. Cal. 2009) (finding consumers' and dealers' statements admissible evidence of their "then-  
6 existing state of mind" and not hearsay) or (2) as an exception to the hearsay rule if the statement  
7 is a direct "statement of the declarant's then-existing state of mind . . . such as motive, intent, or  
8 plan." Fed. R. Evid. 803(3). To qualify as an exception under Rule 803(3) of the Federal Rules  
9 of Evidence, the statement must be contemporaneous with the state of mind described, the  
10 declarant had no time or motive to mis-represent his or her thoughts, and the declarant's state of  
11 mind is relevant. *United States v. Ponticelli*, 622 F.2d 985, 991 (9th Cir. 1980); *Lahoti v.*  
12 *Vericheck*, 636 F.3d 501, 509 (9th Cir. 2011); *CytoSport*, 617 F. Supp. 2d at 1074.

13           The Court pre-admits the following exhibits:

14           • Defendants' Trial Exhibit A-6329-1, which qualifies as a party admission because it  
15 features statements by Jeff Henley, Oracle's Chairman of the Board, and Keith Block, Oracle's  
16 Executive Vice President of North America Sales, regarding the status of a potential deal for  
17 Oracle software.

18           • Defendants' Trial Exhibit A-0367, which qualifies as a party admission because it  
19 features statements by Juan Jones, Oracle's Senior Vice President of Customer Services, North  
20 America Support, regarding support renewals, a subject related to the scope of Mr. Jones'  
21 responsibilities.

22           • Defendants' Trial Exhibit A-5042, which qualifies as a party admission because it  
23 features statements by Barbara Allario, an Oracle senior support sales manager, regarding Oracle  
24 customer Stora Enso's reasons for cancelling support, a subject related to the scope of Ms.  
25 Allario's responsibilities.

26           • Defendants' Trial Exhibit A-5997, which qualifies as a party admission because it  
27 features statements by Craig Tate, an Oracle Group Vice President, North Central Applications,  
28 to his superiors, about Oracle customer Haworth's reasons for selecting SAP software, a subject

1 related to the scope of Mr. Tate's responsibilities.

2 • Defendants' Trial Exhibit A-6042-1, which qualifies as a party admission because it is  
3 a document prepared by Betsy Steelman, an Oracle Services Support Manager, that describes the  
4 timeline on which Oracle customer Computer Associates cancelled support, a subject related to  
5 the scope of Ms. Steelman's responsibilities. A-6042-1 also qualifies as an adoptive admission,  
6 as it was received and approved by Allison Adams as part of her responsibilities as an Oracle  
7 Business Planning Manager.

8 • Defendants' Trial Exhibit A-6205-1, which qualifies as a party admission because it is  
9 a document prepared by Richard Cummins, Oracle Senior Director of Support Renewals, that  
10 contains an analysis of customer concerns with Oracle products, a subject related to the scope of  
11 Mr. Cummins' responsibilities.

12 • Defendants' Trial Exhibit A-5193, which qualifies as a party admission because it  
13 features statements by James McLeod, regional manager for Oracle's support sales group, and  
14 Richard Cummins, Oracle's Senior Director of Support Renewals, regarding the status of certain  
15 Oracle customers, a subject related to the scope of their responsibilities. A-5193 also qualifies as  
16 an adoptive admission because it includes Cummins' response to McLeod's statements, in which  
17 Cummins manifests a belief in the truth of those statements.

18 • Defendants' Trial Exhibit A-5995, which qualifies under Rule 803(3)'s state-of-mind  
19 exception to the hearsay rule because it features an Oracle customer Haworth's contemporaneous  
20 statements of its then-existing state of mind regarding its choice of SAP software over Oracle  
21 software. A-5995 also qualifies as an adoptive admission because it reflects that Oracle Senior  
22 Vice President of Customer Services, North America Support Juan Jones took action based on  
23 Haworth's statements, thereby manifesting an adoption of them.

24 • Defendants' Trial Exhibit A-5058, which qualifies under Rule 803(3)'s state-of-mind  
25 exception to the hearsay rule because it features Oracle customer Vanguard's statements  
26 regarding its then-existing motives behind cancelling Oracle support.

27 • Defendants' Trial Exhibit A-5002-1, which qualifies (a) as non-hearsay evidence of  
28 Oracle customer Amgen's state of mind because it supports an inference about Amgen's then-

1 existing state of mind, and/or (b) under Rule 803(3)'s state-of-mind exception to the hearsay rule  
2 because the statements by Amgen employees reflect Amgen's then-existing state of mind. A-  
3 5002-1 is also authentic, as it was produced pursuant to a subpoena, and its authenticity is  
4 confirmed by a Declaration of Custodian of Records.

5 The Oracle At-Risk Report (Defendants' Trial Exhibit A-0059), including the lists of  
6 customers, contract revenue amounts, and win/loss statistics in the report contained therein, is  
7 admissible as a business record under Rule 803(6) of the Federal Rules of Evidence. The Court  
8 pre-admits the excerpts from the "notes" field identified by Defendants regarding Oracle  
9 customers Merck and Stora Enso. The Merck entry qualifies as a party admission because it  
10 reflects Oracle support sales manager Barbara Sharp-Moore's recitation of facts regarding  
11 Merck's support renewal, a subject relating to the scope of her responsibilities. Likewise, the  
12 Stora Enso entry qualifies as a party admission because it reflects Oracle support sales manager  
13 Robert Lachs' comments regarding Stora Enso's reasons for selecting SAP software, a subject  
14 related to the scope of his responsibilities. The Stora Enso entry further qualifies as an adoptive  
15 admission because it was incorporated in the At-Risk Report, on which Oracle relied in managing  
16 its relationships with "at-risk" customers.

### 17 **Defendants' Category 2 – Evidence of Alleged Willful Infringement**

18 Consistent with the Court's May 29, 2012 Order, Oracle may not offer evidence of alleged  
19 willful infringement, including but not limited to evidence of so-called "Risk Acceptance" that  
20 Oracle previously offered solely to support its "hypothetical" license theory. Evidence of willful  
21 infringement is irrelevant to the new trial, which is limited to determining lost and infringer's  
22 profits, and would serve only to confuse, mislead, and inflame the jury and incite it to punish  
23 through an increased damages award. Accordingly, per Rules 402 and 403 of the Federal Rules  
24 of Evidence, Oracle will not be permitted to present evidence or argument, including by offering  
25 exhibits or eliciting testimony, about SAP purportedly accepting risk of legal liability, using  
26 TomorrowNow as a "liability shield," employee "whistle-blowing" efforts, employee discipline,  
27 and/or remorse for infringement. The Court excludes the following exhibits on these bases:

- 28 • Plaintiffs' Trial Exhibit 0008

- Plaintiffs' Trial Exhibit 0014
- Plaintiffs' Trial Exhibit 0161

**Defendants' Category 3 – Evidence Relating to Excluded Damages Theories**

Consistent with the Court's previous orders, *see, e.g.*, ECF No. 1164 (5/18/12 Order) (stating that "no evidence relating to the hypothetical license measure of damages will be permitted at the upcoming trial"), Oracle may not offer evidence relating to precluded damages theories, including but not limited to the "hypothetical" license theory. Such evidence is irrelevant, confusing, misleading, and unfairly prejudicial under Rules 402 and 403 of the Federal Rules of Evidence.

In particular, Oracle may not offer evidence of "Risk to Oracle's Investment," in the form of its research and development costs and the PeopleSoft and Siebel acquisition prices, which it used at the previous trial solely to support calculating hypothetical license fees. Evidence of Oracle's billion-dollar expenditures is wholly unrelated and unhelpful to computing Oracle's actual customer losses due to infringement; instead, it would serve only to distract and confuse the jury. The Court excludes the following evidence on these bases:

- Plaintiffs' Trial Exhibit 4809
- Plaintiffs' Trial Exhibit 4819

Oracle also may not present at the new trial evidence or argument of "Expected Financial Benefits/Impacts" in the form of alleged projections of potential customer conversions, which Oracle argued at the first trial was relevant to the parties' expected financial gains or losses in negotiating a hypothetical license. Even if such evidence actually reflected Defendants' expected customer gains (as opposed to mere hopes or aspirations), Defendants' expectations are irrelevant to prove Oracle's actual customer losses. Evidence of hopes, aspirations, assumptions, or expectations could serve only to confuse and mislead the jury as to the proper method to calculate lost and infringer's profits and to improperly inflate the damages award, and therefore is not permitted under Rules 402 and 403 of the Federal Rules of Evidence. The Court excludes the following evidence on these bases:

- Plaintiffs' Trial Exhibit 0012

- 1 • Plaintiffs' Trial Exhibit 0024
- 2 • Plaintiffs' Trial Exhibit 0161
- 3 • Plaintiffs' Trial Exhibit 0960

4 Oracle also may not offer evidence of the "Scope and Duration of the License" at the new  
5 trial, which is limited to determining lost and infringer's profits. This evidence, too, is irrelevant  
6 to determining lost and infringer's profits, and any probative value is outweighed by the risk of  
7 confusion and misleading the jury. *See* Fed. R. Evid. 402; Fed. R. Evid. 403. The Court excludes  
8 the following evidence on these bases:

- 9 • Plaintiffs' Trial Exhibit 7028

10 **Oracle's Category 1 – Oracle Income Statements and Cancellation Reports**

11 Oracle's income statements and renewal rate reports and SAP's "trial balance" financial  
12 statements are admissible as business records under Rule 803(6)(d) of the Federal Rules of  
13 Evidence. The Court pre-admits the following documents on this basis:

- 14 • Plaintiffs' Trial Exhibit 8040
- 15 • Plaintiffs' Trial Exhibit 2582
- 16 • Defendants' Trial Exhibit A-6623
- 17 • Defendants' Trial Exhibit A-6643

18 **Oracle's Category 2 – Post-Trial Statements by SAP Executives**

19 The post-trial statements by SAP executives identified by Oracle are inadmissible as  
20 irrelevant and unfairly prejudicial under Rules 402 and 403 of the Federal Rules of Evidence.  
21 Evidence of Defendants' business and legal reasons for stipulating to liability, as reflected in  
22 post-trial statements made by SAP AG's Supervisory Board Chairman Hasso Plattner and co-  
23 CEO Bill McDermott at a German shareholders' meeting that took place in Germany pursuant to  
24 German law, is not probative of any issue relating to determining lost and infringer's profits and  
25 would serve only to confuse the issues, mislead the jury, and unfairly prejudice Defendants. The  
26 Court excludes the following exhibits on these bases:

- 27 • Plaintiffs' Trial Exhibit 8111
- 28 • Plaintiffs' Trial Exhibit 8112

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**Oracle’s Category 3 – Statements from the TomorrowNow Plea Agreement.**

Consistent with the Court’s May 29, 2012 Order, Oracle may not offer evidence or argument at the new trial regarding the TomorrowNow Plea Agreement in any form, for any purpose. As the Court noted at the Final Pretrial Conference, admitting evidence relating to the TomorrowNow guilty plea would be unduly prejudicial, including to SAP, which did not enter a plea of guilty. The admissions in the TomorrowNow guilty plea provide no further insight into the disputed issues at the new trial—namely, lost and infringer’s profits. Given the inextricable link between these statements and the guilty plea itself, the unfairly prejudicial effect of TomorrowNow’s statements to SAP, and their minimal probative value, the Court excludes such statements under Rule 403 of the Federal Rules of Evidence.

**IT IS SO ORDERED.**

DATED: \_\_\_\_\_

By: \_\_\_\_\_  
Hon. Phyllis J. Hamilton  
United States District Court Judge