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

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

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

CASE NO. 07-CV-01658 PJH (EDL)

**DECLARATION OF HOLLY A.
HOUSE IN SUPPORT OF
PLAINTIFFS' OPPOSITION TO
DEFENDANTS' MOTION TO STAY
OR EXTEND TIME TO COMPLY
WITH JULY 3, 2008 DISCOVERY
ORDER**

1 I, Holly A. House, declare:

2 1. I am an attorney admitted to practice law in the State of California and before this
3 Court, and a partner in the law firm of Bingham McCutchen LLP, counsel of record for plaintiffs
4 Oracle Corporation, Oracle USA, Inc., and Oracle International Corporation (together “Oracle”
5 or “Plaintiffs”) in this matter. I have personal knowledge of the matters contained within this
6 Declaration and could testify competently as to them if called to do so.

7 2. On August 2, 2007, Oracle served its First Set of Requests for Production on
8 Defendant TomorrowNow, Inc. (“SAP TN”). On August 30, 2007, Oracle served its First Set of
9 Requests for Production on Defendants SAP AG and SAP America, Inc. Among those requests,
10 Oracle sought documents from TomorrowNow, SAP AG, and SAP America (collectively,
11 “Defendants”) relating to government investigations (No. 55 to SAP AG and SAP America and
12 No. 84 to SAP TN, together the “Request”):

13 All Documents relating to Department of Justice, Federal Bureau
14 of Investigation, or other federal, state, or local government
15 agency’s request or investigation into the allegations in the
16 Complaint and First Amended Complaint, including without
17 limitation all Documents provided by You to any such agency in
18 response to a request or investigation of those allegations.

19 This Request is therefore not limited to, and does not specifically mention, documents
20 subpoenaed by a grand jury – though they would be included.

21 3. Counsel for Oracle and for Defendants met and conferred about the Request in the
22 fall of 2007. Defendants refused to produce any documents in response, citing a grand jury
23 privilege.

24 4. In January 2008, before then-Discovery Magistrate Legge, Oracle moved to
25 compel production of documents responsive to the Request. A month later, Judge Legge ordered
26 Defendants to comply. Oracle’s Request had then been outstanding for six months. Defendants
27 then filed an objection with Judge Hamilton in March 2008; after referral to this Court, they filed
28 another objection on May 16, 2008. *See* Docket Items 68, 88. This Court heard argument on
July 1 and, on July 3, affirmed Judge Legge’s ruling and ordered Defendants to produce
responsive documents by July 15 (the “July 3 Order”). *See* Docket Item 106.

1 5. Defendants then asked Oracle to agree to a short extension of time for their
2 compliance with the July 3 Order. Among the bases for the request were Defendants' asserted
3 difficulties in eliminating from the production the narrow subset of non-responsive private
4 information the Court allowed as a carve-out in the July 3 Order. Oracle agreed to this courtesy,
5 which gave Defendants another week, until July 23, to comply. *See* Docket Item 113.

6 6. On July 17, 2008, I participated in a telephonic meet and confer with Defendants'
7 counsel on unrelated topics. At the end of the discussion, Jason McDonell of Jones Day
8 informed me that Defendants intended to appeal the July 3 Order to Judge Hamilton. Mr.
9 McDonell requested that Oracle stipulate to a stay of that order until after that appeal is resolved.
10 I asked Mr. McDonell to memorialize his request in writing. Attached as **Exhibit A** is a true and
11 correct copy of the email I received from Mr. McDonell that afternoon, containing Defendants'
12 request.

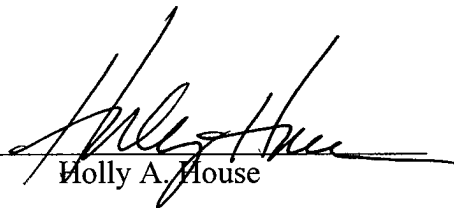
13 7. Because of the significant additional delay that such a stay would impose, and the
14 need for the documents in connection with the current deposition schedule of crucial SAP AG
15 and SAP America witnesses, Oracle was unwilling to agree unconditionally to such an extension.
16 In an attempt at compromise, I conveyed our offer to agree to the requested stay if Defendants
17 would then consent to the public filing of Oracle's Second Amended Complaint ("SAC").
18 Defendants have had Oracle's draft SAC in its essentially final form since April and now have it
19 in its fully final form. (At the April 24, 2008 case management conference, which I attended,
20 Judge Hamilton told the parties that her general expectation is that parties consent to the filing of
21 amended complaints, and that such complaints generally should not be filed under seal.)
22 Oracle's request stems from its frustration with Defendants' unwillingness to say whether they
23 would agree to the SAC's filing. Attached as **Exhibit B** is a true and correct copy of the email I
24 sent to Mr. McDonell on July 17, 2008, containing that proffered compromise.

25 8. Mr. McDonell and I continued to discuss the proffered compromise over email on
26 July 18, but ultimately Defendants refused to agree to the public filing, or any filing, of Oracle's
27 Second Amended Complaint. Attached as **Exhibit C** is a true and correct copy of that email
28

1 correspondence. Nonetheless, Oracle agreed to stipulate that Defendants' motion for a stay of
2 the July 3 Order could be heard on shortened time.

3 9. Several key depositions of SAP AG and SAP America witnesses have been
4 scheduled, including Josef Schmidt on August 1, Thomas Ziemer on August 14-15, John
5 Zepecki on August 21, SAP AG CEO Henning Kagermann on September 26, and Leo Apotheker
6 on October 2. In addition, Oracle has outstanding deposition notices for several additional key
7 SAP AG and America witnesses, which Defendants have represented will also take place in
8 September, October, and November. These witnesses are crucial to Oracle's theory of the case
9 and understanding of Defendants' involvement. Oracle believes documents responsive to the
10 Request will be important to prepare for, and take, these depositions. In addition, these
11 depositions have been hard to schedule based on Defendants' assertions of how crowded these
12 individuals' calendars are and the need to follow certain procedures in Germany. Thus, if the
13 stay were granted, moving the dates or reopening the depositions to allow for questioning about
14 the documents once they are finally produced would be difficult and expensive.

15 I declare under penalty of perjury under the laws of the State of California and the
16 United States that the foregoing is true and correct and that this Declaration was executed on July
17 21, 2008, in San Francisco, California.

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19 
20 Holly A. House

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Exhibit A

From: Jason McDonell [jmcdonell@JonesDay.com]
Sent: Thursday, July 17, 2008 4:52 PM
To: House, Holly
Cc: Hann, Bree; Howard, Geoff; Jane L Froyd; Joshua L Fuchs; Scott Cowan; Alinder, Zachary J.; Elaine Wallace; Martha Boersch
Subject: request for further extension of time re grand jury docs

Holly,

This follows up on our phone call of a short while ago in which I informed you that we will appeal Judge LaPorte's order on the grand jury documents to Judge Hamilton.

Please let me know whether Oracle will agree to a further extension of the time to comply with that order until 7 days after Judge Hamilton's disposition of the issue.

Thank you.

Jason McDonell, Esq.
Jones Day
555 California Street, 26th Floor
San Francisco, CA 94104-1500
SF Office Main Tel.: (415) 626-3939
Direct Dial: (415) 875-5820
Fax: (415) 875-5700
Email: jmcdonell@jonesday.com

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7/21/2008

Exhibit B

From: House, Holly
Sent: Thursday, July 17, 2008 7:08 PM
To: 'jmcdonell@JonesDay.com'
Cc: Hann, Bree; Howard, Geoff; 'jfroyd@JonesDay.com'; 'jlfuchs@JonesDay.com'; 'swcowan@JonesDay.com'; Alinder, Zachary J.; 'ewallace@JonesDay.com'; 'mboersch@JonesDay.com'
Subject: Re: 2ND Stipulation to extend production of grand jury documents pending appeal.DOC;McDonell Decl ISO 2ND Stip to Extend Time to Comply with Order.DOC

Oracle is willing to extend this courtesy if SAP is willing to agree to allow Oracle to file its SAC and not under seal. Let us know and we can work out appropriate documentation.

----- Original Message -----

From: Jason McDonell <jmcdonell@JonesDay.com>
To: House, Holly
Cc: Hann, Bree; Howard, Geoff; Jane L Froyd <jfroyd@JonesDay.com>; Joshua L Fuchs <jlfuchs@JonesDay.com>; Scott Cowan <swcowan@JonesDay.com>; Alinder, Zachary J.; Elaine Wallace <ewallace@JonesDay.com>; Martha Boersch <mboersch@JonesDay.com>
Sent: Thu Jul 17 18:07:48 2008
Subject: 2ND Stipulation to extend production of grand jury documents pending appeal.DOC;McDonell Decl ISO 2ND Stip to Extend Time to Comply with Order.DOC

Holly,

For your consideration in connection with my pending request for a stipulation, please see the attached drafts. Thanks.

Jason McDonell, Esq.
Jones Day
555 California Street, 26th Floor
San Francisco, CA 94104-1500
SF Office Main Tel.: (415) 626-3939
Direct Dial: (415) 875-5820
Fax: (415) 875-5700
Email: jmcdonell@jonesday.com

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This e-mail (including any attachments) may contain information that is private, confidential, or protected by attorney-client or other privilege. If you received this e-mail in error, please delete it from your system without copying it and notify sender by reply e-mail, so that our records can be corrected.

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Exhibit C

From: Jason McDonell [mailto:jmcdonell@JonesDay.com]
Sent: Friday, July 18, 2008 12:12 PM
To: House, Holly
Cc: Hann, Bree; ewallace@JonesDay.com; Howard, Geoff; jfroyd@JonesDay.com; jlfuchs@JonesDay.com; swcowan@JonesDay.com; Alinder, Zachary J.
Subject: Re: 2ND Stipulation to extend production of grand jury documents pending appeal.DOC;McDonell Decl ISO 2ND Stip to Extend Time to Comply with Order.DOC

Thank you for agreeing that the motion can be heard on shortened time.

Jason McDonell, Esq.
Jones Day
555 California Street, 26th Floor
San Francisco, CA 94104-1500
SF Office Main Tel.: (415) 626-3939
Direct Dial: (415) 875-5820
Fax: (415) 875-5700
Email: jmcdonell@jonesday.com

"House, Holly" <holly.house@bingham.com>

07/18/2008 11:54 AM

To jmcdonell@JonesDay.com

cc "Hann, Bree" <bree.hann@bingham.com>, ewallace@JonesDay.com, "Howard, Geoff" <geoff.howard@bingham.com>, jfroyd@JonesDay.com, jlfuchs@JonesDay.com, swcowan@JonesDay.com, "Alinder, Zachary J." <zachary.alinder@bingham.com>

Subject Re: 2ND Stipulation to extend production of grand jury documents pending appeal.DOC;McDonell Decl ISO 2ND Stip to Extend Time to Comply with Order.DOC

We agree the motion can be heard on shortened time. After all, we are the ones hurt by defendants' continued refusal to produce.

----- Original Message -----

From: Jason McDonell <jmcdonell@JonesDay.com>
To: House, Holly
Cc: Hann, Bree; ewallace@JonesDay.com <ewallace@JonesDay.com>; Howard, Geoff; jfroyd@JonesDay.com <jfroyd@JonesDay.com>; jlfuchs@JonesDay.com <jlfuchs@JonesDay.com>; swcowan@JonesDay.com <swcowan@JonesDay.com>; Alinder, Zachary J.
Sent: Fri Jul 18 11:05:28 2008
Subject: RE: 2ND Stipulation to extend production of grand jury documents pending appeal.DOC;McDonell Decl ISO 2ND Stip to Extend Time to Comply with Order.DOC

7/21/2008

Holly,

I disagree with your assertions and continue to believe that it is not appropriate for you to link these unrelated issues. Under the circumstances, defendants are not in a position to agree to your requests concerning the SAC.

It is thus my understanding that Oracle is unwilling to stipulate to the requested extension of time and unwilling to stipulate that our motion be heard on shortened time. If this is incorrect, please let me know ASAP. Otherwise, we will proceed to file an appropriate motion.

Thank you.

Jason McDonell, Esq.
Jones Day
555 California Street, 26th Floor
San Francisco, CA 94104-1500
SF Office Main Tel.: (415) 626-3939
Direct Dial: (415) 875-5820
Fax: (415) 875-5700
Email: jmcdonell@jonesday.com

"House, Holly" <holly.house@bingham.com>

07/18/2008 10:36 AM

To

jmcDonell@JonesDay.com

cc

"Hann, Bree" <bree.hann@bingham.com>, ewallace@JonesDay.com, "Howard, Geoff" <geoff.howard@bingham.com>, jfroyd@JonesDay.com, jlfuchs@JonesDay.com, swcowan@JonesDay.com, "Alinder, Zachary J." <zachary.alinder@bingham.com>

Subject

RE: 2ND Stipulation to extend production of grand jury documents pending appeal.DOC;McDonell Decl ISO 2ND Stip to Extend Time to Comply with Order.DOC

Jason:

Your assertion that Oracle is not giving up any substantive rights by agreeing to Defendants' request that it stipulate to stay Magistrate Laporte's order is wishful thinking. Oracle propounded its request for Defendants' government produced materials in October 2007. After extensive -- and expensive -- meet and confer efforts and motion practice, Oracle secured orders for Defendants' production of these highly relevant materials not once but twice. Magistrate Laporte's pending order would have secured us those documents by this week, but we extended you the courtesy of an extension until July 18th. Even if Defendants secure the first possible hearing date before Judge Hamilton (which Oracle will insist Defendants seek rather than draw this out indefinitely), being subject to Defendants' requested stay would mean Oracle remains without these documents while you brief and argue this once again and we await hearing -- all while we have key depositions ongoing that will likely be benefited by those documents.

In exchange, all Oracle asks is for Defendants' long-awaited agreement that it be allowed to file its SAC -- a right supported by the law and which Judge Hamilton admonished Defendants she would allow. That the facts set forth in the SAC are embarrassing to Defendants is no justification for Defendants' ongoing refusal to commit to allow Oracle to make that filing.

Thus Oracle asks your clients to reconsider their response to Oracle's proposal.

----- Original Message -----

From: Jason McDonell <jmcdonell@JonesDay.com>

To: House, Holly

Cc: Hann, Bree; ewallace@JonesDay.com <ewallace@JonesDay.com>; Howard, Geoff; jfroyd@JonesDay.com <jfroyd@JonesDay.com>; jlfuchs@JonesDay.com

7/21/2008

<jlfuchs@JonesDay.com>; swcowan@JonesDay.com <swcowan@JonesDay.com>;
Alinder, Zachary J.
Sent: Thu Jul 17 21:24:55 2008
Subject: Re: 2ND Stipulation to extend production of grand jury
documents pending appeal.DOC;McDonnell Decl ISO 2ND Stip to Extend Time
to Comply with Order.DOC

Holly,

These two issues are not related, and we cannot accept your invitation
for our client to trade significant substantive rights for a routine
procedural courtesy. Please ask your client to reconsider my request.

If Oracle remains unwilling to stipulate to the extension, will Oracle
stipulate that our motion for extension can be heard on an expedited
basis so it can be decided before the 7/23 production date?

If I do not hear from you by noon tomorrow, I will assume that Oracle is
unwilling to stipulate to either the extension or the shortened time and
we will file an appropriate motion.

Thank you.

Jason McDonnell, Esq.
Jones Day
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San Francisco, CA 94104-1500
SF Office Main Tel.: (415) 626-3939
Direct Dial: (415) 875-5820
Fax: (415) 875-5700
Email: jmcdonell@jonesday.com

"House, Holly" <holly.house@bingham.com>

07/17/2008 07:08 PM

To

jmcDonnell@JonesDay.com

cc

"Hann, Bree" <bree.hann@bingham.com>, "Howard, Geoff"
<geoff.howard@bingham.com>, jfroyd@JonesDay.com, jlfuchs@JonesDay.com,
swcowan@JonesDay.com, "Alinder, Zachary J."
<zachary.alinder@bingham.com>, ewallace@JonesDay.com,
mboersch@JonesDay.com Subject
Re: 2ND Stipulation to extend production of grand jury documents
pending appeal.DOC;McDonnell Decl ISO 2ND Stip to Extend Time to Comply
with Order.DOC

Oracle is willing to extend this courtesy if SAP is willing to agree to
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work out appropriate documentation.

----- Original Message -----

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Joshua L Fuchs <jlfuchs@JonesDay.com>; Scott Cowan
<swcowan@JonesDay.com>; Alinder, Zachary J.; Elaine Wallace
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Subject: 2ND Stipulation to extend production of grand jury documents
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with Order.DOC

Holly,

For your consideration in connection with my pending request for a
stipulation, please see the attached drafts. Thanks.

7/21/2008

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