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 15 and Oracle International Corporation

16 UNITED STATES DISTRICT COURT  
 17 NORTHERN DISTRICT OF CALIFORNIA  
 18 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.

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

**DECLARATION OF GEOFFREY M.  
 HOWARD IN SUPPORT OF  
 PLAINTIFFS' MOTION TO  
 COMPEL PRODUCTION OF  
 CLAWED BACK DOCUMENTS**

Date: TBD

Time: TBD

Courtroom: E, 15th Floor

Judge: Hon. Elizabeth D. Laporte

28 A/72610335.1/2021039-0000324170

1 I, Geoffrey M. Howard, declare:

2 1. I am a member of the State Bar of California and a partner at Bingham  
3 McCutchen LLP, counsel of record for plaintiffs Oracle Corporation, Oracle USA, Inc., and  
4 Oracle International Corporation (together "Oracle") in this action. Except for matters stated  
5 below on information and belief, I have personal knowledge of the matters stated in this  
6 declaration by virtue of my representation of Oracle in this action. If called and sworn as a  
7 witness, I could and would competently testify to such matters.

8 2. Attached as Exhibit A is a table created in support of the above-captioned motion,  
9 listing the 49 Contested Documents at issue in the motion.

10 3. Attached as Exhibit B is a true and correct redacted copy of a document produced  
11 by Defendants and later clawed back, Bates labeled TN-OR00854803-804. An unredacted  
12 version of this document will be submitted to the Court by Defendants.

13 4. Attached as Exhibit C is a true and correct redacted copy of a document produced  
14 by Defendants and later clawed back, Bates labeled TN-OR00164402-410. An unredacted  
15 version of this document will be submitted to the Court by Defendants.

16 5. Attached as Exhibit D is a true and correct copy of a document produced by  
17 Defendants, later clawed back as privileged, and then re-produced in full, Bates labeled TN-  
18 OR00596327-328.

19 6. Attached as Exhibit E is a true and correct copy of a document produced by  
20 Defendants, Bates labeled SAP-OR00091723-728, that was introduced as Exhibit 210 at the  
21 deposition of Mr. Arlen Shenkman on June 4, 2008.

22 7. Attached as Exhibit F is a true and correct copy of a document produced by  
23 Defendants, Bates labeled SAP-OR00004973-974, that was introduced as Exhibit 217 at the  
24 deposition of Mr. Arlen Shenkman on June 4, 2008.

25 8. Attached as Exhibit G is a true and correct copy of a document produced by  
26 Defendants, Bates labeled SAP-OR00004991-007, that was introduced as Exhibit 225 at the  
27 deposition of Mr. Arlen Shenkman on June 4, 2008.

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1           9.       Attached as Exhibit H is a true and correct copy of a document produced by  
2 Defendants, Bates labeled SAP-OR00004763-771, that was introduced as Exhibit 220 at the  
3 deposition of Mr. Arlen Shenkman on June 4, 2008.

4           10.       Attached as Exhibit I is a true and correct copy of a document produced by  
5 Defendants, Bates labeled SAP-OR00096318, that was introduced as Exhibit 316 at the  
6 deposition of Mr. James Mackey on July 15, 2008.

7           11.       Attached as Exhibit J is a true and correct copy of a document produced by  
8 Defendants, Bates labeled TN-OR00217199-201, that was introduced as Exhibit 261 at the  
9 deposition of Mr. Arlen Shenkman on June 5, 2008.

10          12.       Attached as Exhibit K is a true and correct copy of excerpts from Defendant TN's  
11 Second Amended and Supplemental Response to Oracle's First Set of Interrogatories (Set One).

12          13.       Attached as Exhibit L is a true and correct copy of a press release issued by  
13 Defendant SAP on July 3, 2007, and downloaded from their website  
14 (<http://www.sap.com/about/press/press.epx?pressid=7971>) on July 29, 2008.

15          14.       Attached as Exhibit M is a true and correct copy of excerpts from the deposition  
16 of Ms. Shelley Nelson, taken in Houston, Texas on December 6, 2007.

17          15.       Attached as Exhibit N is a true and correct copy of excerpts from the deposition  
18 of Mr. Arlen Shenkman, taken in East Palo Alto, California, on June 4, 2008.

19          16.       Attached as Exhibit O is a true and correct copy of excerpts from the deposition  
20 of Mr. Arlen Shenkman, taken in East Palo Alto, California, on June 5, 2008.

21          17.       Attached as Exhibit P is a true and correct copy of excerpts from the deposition of  
22 Mr. James Mackey, taken in San Francisco, California, on July 15, 2008.

23          18.       Attached as Exhibit Q is a true and correct copy of Defendants' Privilege Log  
24 Relating to Claw-Back Documents, dated July 11, 2008.

25          19.       Attached as Exhibit R is a true and correct copy of a letter dated April 17, 2008,  
26 from Jason McDonell, Esq. to Geoffrey Howard, Esq.

27          20.       Attached as Exhibit S is a true and correct copy of a letter dated May 29, 2008,  
28 from Jason McDonell, Esq. to Holly House, Esq.

1           21.     Attached as Exhibit T is a true and correct copy of a letter dated July 2, 2008,  
2 from Jason McDonell, Esq. to Holly House, Esq.

3           22.     Attached as Exhibit U is a true and correct redacted copy of a document produced  
4 by Defendants and later clawed back, Bates labeled TN-OR01157057-059. An unredacted  
5 version of this document will be submitted to the Court by Defendants.

6           23.     Attached as Exhibit V is a placeholder for a document produced by Defendants  
7 and later clawed back, Bates labeled TN-OR01058166-170. This document will be submitted to  
8 the Court by Defendants.

9           24.     Attached as Exhibit W is a true and correct redacted copy of a document produced  
10 by Defendants and later clawed back, Bates labeled TN-OR00868717-719. An unredacted  
11 version of this document will be submitted to the Court by Defendants.

12          25.     Attached as Exhibit X is a true and correct copy of a document produced by  
13 Defendants, Bates labeled TN-OR00980230-234.

14          26.     Attached as Exhibit Y is a true and correct copy of a document produced by  
15 Defendants, Bates labeled TN-OR01088467-468.

16          27.     The parties have met and conferred extensively about the Contested Documents.

17          28.     Per the Court's Order resulting from the July 24, 2008 discovery conference,  
18 Oracle shared a copy of the motion that accompanies this declaration with Defendants on July  
19 31, 2008. On August 1, 2008, hours before the Motion to Compel was due to be filed,  
20 Defendants withdrew their claim of privilege as to one of the six exemplar documents.

21          29.     After receiving each of the letters attached hereto as exhibits R-T, Oracle  
22 promptly took steps to destroy all copies but one of each document, and sequestered the  
23 remaining copies, in compliance with Fed. R. Civ. P. 26(b)(5)(B), with the Protective Order in  
24 this matter and with the Court's instructions at the May 28, 2008 hearing where the procedure for  
25 this motion was initially discussed. During the May 28, 2008 hearing, the Court allowed the  
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1 parties, if they were petitioning the court for review of a clawed-back document, to refer to the  
2 contents of that document as part of making a case that it should not have been withheld.<sup>1</sup>

3 30. A recent electronic search undertaken by attorneys under my supervision for SAP  
4 attorney Chris Faye's name returned 1,085 documents in the SAP and TN document productions,  
5 many dealing with subjects substantially similar to the clawed-back documents. Oracle pointed  
6 out the large number of Faye documents to Defendants during the meet and confer process, but  
7 Defendants offered no explanation for why some fell within the privilege and others did not. At  
8 no point since the initial discovery of the "inadvertently produced" documents have Defendants  
9 requested that Oracle return any of the other documents that deal with the same topics and  
10 involve the same attorneys.

11 I declare under penalty of perjury under the laws of the United States of America  
12 that the foregoing is true and correct.

13 Executed on August 1, 2008 in San Francisco, California.

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By:                                 /s/ Geoffrey M. Howard                                  
                                Geoffrey M. Howard

27 <sup>1</sup> Bingham McCutchen has created a written transcript of the audio tape of this hearing, which it  
28 would be happy to provide to the Court upon request.