

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 jlfuchs@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
 SAN FRANCISCO DIVISION

21 ORACLE USA, INC., et al.,

22 Plaintiffs,

23 v.

24 SAP AG, et al.,

25 Defendants.

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

**DECLARATION OF THARAN GREGORY
 LANIER ISO DEFENDANTS' FRCP 12(B)(1)
 AND 12(B)(6) MOTION TO DISMISS TO**

Date: November 19, 2008; Time: 9:00 a.m.
 Courtroom: 3, 17th Floor
 Judge: Hon. Phyllis J. Hamilton

26 I, THARAN GREGORY LANIER, declare:

27 I am a partner in the law firm of Jones Day, 1755 Embarcadero Road, Palo Alto,
 28

1 California 94303, and counsel of record for Defendants SAP AG, SAP America, Inc. and
2 TomorrowNow, Inc. (collectively, “Defendants”) in the above-captioned action. I am a member
3 in good standing of the state bar of California and admitted to practice before this Court. I make
4 this declaration based on personal knowledge and, if called upon to do so, could testify
5 competently thereto.

6 **History of Plaintiffs’ Amendments to the Complaint**

7 1. Plaintiffs Oracle Corporation (“Oracle Corp.”), Oracle USA, Inc. (“Oracle USA”) and Oracle International Corporation (“OIC”) (collectively, “the Original Plaintiffs”) filed their
8 initial complaint against Defendants on March 22, 2007. *See* D.I. 1.

10 2. On June 1, 2007, the Original Plaintiffs filed their First Amended Complaint
11 (“FAC”). *See* D.I. 31.

12 3. In January 2008, the Original Plaintiffs informed Defendants that they planned to
13 amend the complaint a second time, but could not do so until they had obtained additional
14 copyright registrations.

15 4. At the Case Management Conference in April 2008, the Original Plaintiffs
16 attributed their delay in filing the Second Amended Complaint (“SAC”) to their efforts to obtain
17 additional copyright registrations.

18 5. On July 28, 2008, pursuant to a stipulation, the Original Plaintiffs filed the SAC.
19 *See* D.I. 132. Of the 40 additional copyright registrations identified in the SAC, all of them pre-
20 date the FAC, and all but three pre-date the original complaint.

21 6. On August 28, 2008, after being informed Defendants might respond to the SAC by
22 motion, the Original Plaintiffs informed Defendants that they planned to seek leave to amend
23 again to make “some adjustment to the plaintiff entities currently described in the Second
24 Amended Complaint.” This proposed amendment purportedly followed Plaintiffs’ recent
25 “discovery” of documents relating to ownership of the copyrights-in-suit (“inter-company
26 agreements”) that Defendants have been seeking for more than a year.

27 **History of Plaintiffs’ Production of Their Inter-Company Agreements**

28 7. Defendants first asked the Original Plaintiffs to produce inter-company agreements

1 on July 26, 2007, the day fact discovery opened. The Original Plaintiffs agreed, but as of the fall
2 of 2007, had not done so.

3 8. Defendants raised the Original Plaintiffs' failure to produce the inter-company
4 agreements, as well as other relevant documents, in meet and confer communications in October,
5 November and December 2007, and specifically put the Original Plaintiffs on notice that
6 Defendants may raise legal challenges based on the inter-company agreements. ("We believe that
7 it is not unlikely that the alleged licensing was not handled in the way you have alleged.").

8 9. On January 4, 2008, the Original Plaintiffs again said that they would produce the
9 requested documents but by the end of January, still had not done so.

10 10. On January 28, 2008, Defendants raised the issue in a motion to compel submitted
11 to the Special Discovery Master.

12 11. On February 25, 2008, some seven months after Defendants first requested them,
13 Plaintiffs finally produced a few inter-company agreements. Believing the Original Plaintiffs'
14 production to be incomplete, Defendants continued to meet and confer on the issue.

15 12. On July 22, 2008, a full year after Defendants requested them, the Original
16 Plaintiffs produced several additional inter-company agreements.

17 13. Defendants then asked the Original Plaintiffs to confirm that they had produced all
18 responsive inter-company agreements. The Original Plaintiffs initially refused to give a
19 straightforward answer to that question.

20 14. On August 27, 2008, the Original Plaintiffs admitted "that there may be some
21 additional responsive documents related to inter-company agreements." The very next day,
22 August 28, 2008, the Original Plaintiffs informed Defendants that they planned to seek leave to
23 amend again to make "some adjustment to the plaintiff entities currently described in the Second
24 Amended Complaint" as a result of their "discovery" of additional documents relating to
25 copyright ownership.

26 **The Third Amended Complaint**

27 15. On September 11, 2008, the parties entered into a stipulation regarding the Original
28 Plaintiffs' proposed TAC, pursuant to which the Original Plaintiffs would provide to Defendants

1 a draft TAC and would “make reasonable efforts to complete a supplemental production of
2 documents related to the proposed amendments” by September 29, 2008. *See* D.I. 177.

3 16. On September 29, 2008, the Original Plaintiffs provided SAP with the draft TAC
4 and supplemental production described in the stipulation. The supplemental production consisted
5 of additional copyright-related materials and inter-company agreements.

6 17. On October 6, 2008, Defendants stipulated to filing of the TAC, and the Plaintiffs
7 filed the TAC on October 8, 2008. *See* D.I. 182.

8 18. At the October 10, 2008 Discovery Conference, Plaintiffs’ counsel confirmed that
9 Plaintiffs had produced all agreements for the Plaintiffs named in the TAC related to the
10 ownership of and rights to the copyrights in issue. *See* Reporter’s Transcript of October 10, 2008
11 Discovery Conference Before: Hon. Elizabeth D. Laporte, pp. 1, 61-63, attached as Exhibit 9.

12 **Exhibits Attached to This Declaration**

13 19. Attached as Exhibit 1 is a true and correct copy of the June 4, 1998 Research and
14 Development Cost Sharing Agreement by and among J.D. Edwards World Source Company, J.D.
15 Edwards Europe Ltd., and J.D. Edwards (Singapore) Pte. Ltd. *See* ORCL00182315–332.

16 20. Attached as Exhibit 2 is a true and correct copy of the Oracle/Ozark Contribution,
17 Assignment and Assumption Agreement, dated January 31, 2006, between Oracle Corporation
18 and Ozark Holding Inc. *See* ORCL00182293–302.

19 21. Attached as Exhibit 3 is a true and correct copy of the March 1, 2005
20 PeopleSoft/JDE LLC OIC Asset Transfer Agreement between Oracle Corporation, Oracle
21 International Corporation, PeopleSoft, Inc. and J.D. Edwards & Company, LLC. *See*
22 ORCL00043702–707.

23 22. Attached as Exhibit 4 is a true and correct copy of the March 1, 2005 OIC Asset
24 Transfer Agreement by and among Oracle Corporation, Oracle International Corporation,
25 PeopleSoft, Inc. and J.D. Edwards & Co., LLC, J.D. Edwards YOUCentric and J.D. Edwards
26 World Source Company. *See* ORCL00043708–713.

27 23. Attached as Exhibit 5 is a true and correct copy of the “Customer Connection Terms
28 of Use.” *See* ORCL00051977–78.

