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 18 TOMORROWNOW, INC.

19 UNITED STATES DISTRICT COURT

20 NORTHERN DISTRICT OF CALIFORNIA

21 SAN FRANCISCO DIVISION

22 ORACLE USA, INC., et al.,

23 Plaintiffs,

24 v.

25 SAP AG, et al.,

26 Defendants.

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

**DECLARATION OF THARAN
 GREGORY LANIER IN SUPPORT OF
 DEFENDANTS' OPPOSITION TO
 PLAINTIFFS' ADMINISTRATIVE
 MOTION FOR CLARIFICATION OF
 MAY 5, 2008 CASE MANAGEMENT
 ORDER**

1 I, Tharan Gregory Lanier, declare as follows:

2 1. I am an attorney licensed to practice law in the State of California and admitted to
3 practice before this Court, and am a partner of Jones Day, counsel of record for defendants SAP
4 AG, SAP America, Inc., and TomorrowNow, Inc. (collectively, "Defendants"). I have personal
5 knowledge of the facts stated in this declaration and could testify competently to them if required.

6 2. On April 17, 2008, Defendants and plaintiffs Oracle USA, Inc. and Oracle
7 International Corporation, as well as former plaintiffs Oracle Corporation and J.D. Edwards
8 Europe Limited (collectively, "Plaintiffs," and together with Defendants, the "Parties") submitted
9 to this Court a Joint Case Management Statement (D.I. 76) in anticipation of a Case Management
10 Conference scheduled for April 24, 2008. Among the many issues addressed in the statement
11 were potential limits on fact witness depositions, a subject on which the Parties made competing
12 proposals. Plaintiffs proposed an expansion of the total fact deposition limit to 80 depositions per
13 side. Defendants proposed a limit of 250 hours of fact depositions per side.

14 3. On May 5, 2008, the Court issued the Case Management and Pretrial Order
15 ("Order") (D.I. 84) that is the subject of Plaintiffs' administrative motion. The Order did not
16 adopt either of the Parties' competing proposals; instead, it states: "Depositions: **350 hours each**
17 **side**" (emphasis in original). In addition to the Order, on April 25, 2008, the Court issued
18 minutes of the April 24, 2008 Case Management Conference ("Minutes") (D.I. 77), which state,
19 "Each side will be allowed 350 hours for depositions."

20 4. On May 12, 2009, Plaintiffs (now joined by Oracle EMEA Limited and no longer
21 including Oracle Corporation and J.D. Edwards Europe Limited) filed a joint administrative
22 motion, accompanied by a stipulation and a proposed order, requesting leave to modify the Order
23 in several respects. (D.I. 304, 305, 306.) The Parties negotiated the underlying issues and the
24 language of the joint motion, accompanying stipulation, and proposed order over the course of
25 several weeks.

26 5. The negotiations leading up to the pending joint motion involved significant
27 compromises by both sides. Among other things, the Parties ultimately agreed to propose a
28 change in the deposition hours limit from 350 to 450 hours, adding 100 hours of deposition time.

1 At no time during the negotiations did Plaintiffs suggest that the current Order or the Court's
2 Minutes were unclear or ambiguous with respect to deposition limits, nor did they ever state
3 during the negotiations that they believed the statements "Depositions: **350 hours each side**"
4 (Order) or "Each side will be allowed 350 hours for depositions" (Minutes) applied only to a
5 subset of depositions in the case or did not apply to all depositions, including expert depositions.

6 6. During various communications during these negotiations, we made the point,
7 which Plaintiffs' counsel acknowledged at that time, that even though the Parties may agree to
8 proposed changes to the Order, there was no assurance that the Court would accept any or all of
9 the proposed changes. Accordingly, Defendants have been operating under the current schedule
10 and discovery limits set in the Order.

11 7. On May 11, 2009, the day before Plaintiffs filed the joint motion, we
12 communicated to Plaintiffs' counsel Defendants' agreement in principle to the joint motion.
13 Shortly after that, Plaintiffs noticed three third party depositions of former TomorrowNow
14 customers, which Plaintiffs stated they intended to take between May 12 and June 19.

15 8. The new deposition notices served on May 11, 2009 were in addition to the
16 following deposition notices/requests by Plaintiffs already pending as of that date:

- 17 • **Eight** individual depositions Plaintiffs had noticed and scheduled (or were
18 in the process of scheduling);
- 19 • **Three** other individual depositions, which Plaintiffs had taken off calendar
20 but on which Plaintiffs had "reserved their rights" regarding rescheduling;
- 21 • **One** other third party deposition that was scheduled to take place the
22 following week; and
- 23 • **Two** other third party depositions Plaintiffs had noticed, but for which
24 Plaintiffs had yet to serve subpoenas and on which Plaintiffs had "reserved
25 their rights."

26 In total, by May 11, 2009, Plaintiffs had notified Defendants of their intent to conduct up to **17**
27 possible fact depositions prior to the June 19, 2009 discovery cut-off.

28 9. These 17 depositions were only those open as of May 12. In light of the 119 third

1 party document subpoenas Plaintiffs had served before May 12, Defendants expected that even
2 more deposition notices would be forthcoming. Plaintiffs have fulfilled that expectation, and
3 since May 12, 2009, they have noticed eight more third party depositions, bringing the total as of
4 the time this declaration was finalized to **25** depositions Plaintiffs intended to take between May
5 12 and June 19.

6 10. Plaintiffs had used almost all of their allotted deposition time by May 12, and by
7 that date, it was clear to Defendants that Plaintiffs did not have enough deposition hours left to
8 take the remaining depositions they had noticed or requested just as of that date (not even
9 counting the eight additional depositions noticed since May 12). The end stages of discovery are
10 busy enough without the addition of disputes over deposition hours and scheduling. Because of
11 that, and because Defendants did not know whether the Court would accept the Parties' proposed
12 changes to the Order, on May 12, my colleague Elaine Wallace contacted counsel for Plaintiffs to
13 discuss how Plaintiffs planned to proceed with scheduling and completing depositions under the
14 current limits and schedule in the Order. This email and following discussions are in Exhibit A to
15 the Howard Declaration submitted with Plaintiffs' motion.

16 11. In response to Ms. Wallace's email, Plaintiffs stated for the first time their claim
17 that the 350 hour deposition limit set forth in the Order and Minutes does not apply to all
18 depositions in the case. Plaintiffs did not propose any limits on expert depositions.

19 12. On May 15, 2009, this Court set a Case Management Conference for May 28,
20 2009. (D.I. 307.)

21 13. On May 19, 2009, Plaintiffs informed Defendants by email that they intended to
22 file their administrative motion that same day, purportedly to seek "clarification" of the
23 deposition hour limit in the Order. As we told Plaintiffs' counsel by email that afternoon,
24 Defendants declined to stipulate to Plaintiffs' motion or the relief sought because the Court's
25 Order is clear and because this issue could easily be addressed at the May 28, 2009 Case
26 Management Conference without burdening the Court with an additional motion. This email
27 exchange is Exhibit B to the Howard Declaration submitted with Plaintiffs' motion.

28 14. Attached hereto as Exhibit 1 is a true and correct copy of *Semiconductor Energy*

1 *Lab. Co. v. Chi Mei Optoelectronics Corp.*, No. C 04-04675 MHP, 2006 U.S. Dist. LEXIS 52597
2 (N.D. Cal. July 27, 2006).

3 I declare that the above facts are true and correct, and that this Declaration was executed
4 on May 22, 2009, at Palo Alto, California.

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/s/ Tharan Gregory Lanier
Tharan Gregory Lanier

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