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16 UNITED STATES DISTRICT COURT

17 NORTHERN DISTRICT OF CALIFORNIA

18 SAN FRANCISCO DIVISION

19 ORACLE USA, INC., a Colorado corporation,
 20 ORACLE INTERNATIONAL CORPORATION,
 a California corporation, and ORACLE EMEA
 21 LIMITED, an Irish private limited company,

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-1658 PJH (EDL)

**ORACLE'S ALTERNATIVE
 NOTICE OF MOTION AND
 MOTION TO FILE STIPULATED
 AMENDED COMPLAINT;
 MEMORANDUM OF POINTS AND
 AUTHORITIES IN SUPPORT**

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

ORACLE'S ALTERNATIVE NOTICE OF MOTION AND MOTION TO FILE STIPULATED AMENDED
 COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT

NOTICE OF STIPULATED MOTION TO AMEND**TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

NOTICE IS HEREBY GIVEN THAT on August 19, 2009 at 9 a.m. or as soon thereafter as possible, in Courtroom 5 of the above entitled Court, Plaintiffs Oracle USA, Inc., Oracle International Corp., and Oracle EMEA Ltd. (collectively, "Plaintiffs" or "Oracle"), by and through their attorneys of record, will move for leave to file a Fourth Amended Complaint pursuant to Federal Rule of Civil Procedure 15(a)(2) and paragraph five of the June 11, 2009 Stipulated Revised Case Management and Pretrial Order ("2009 Case Management Order"). Oracle seeks amendment to assert additional copyright registrations and allegations against the same Defendants, SAP AG, SAP America, Inc., and TomorrowNow, Inc. (collectively, "Defendants," and together with Oracle, "Parties"), based on the discovery of facts related to Oracle's Siebel product line and post-litigation conduct. The Parties have stipulated to this amendment. In the 2009 Case Management Order, the Court ordered that this Motion be filed by July 15, 2009.

This Alternative Motion is based on this Notice of Motion and Motion, the Memorandum of Points and Authorities that follows, the 2009 Case Management Order, any pleadings, records, and papers on file in this matter, and such other and further oral and documentary evidence and legal memoranda as may be presented at any hearings.

MEMORANDUM OF POINTS AND AUTHORITIES**I. INTRODUCTION**

Pursuant to Federal Rule of Civil Procedure 15(a)(2) and paragraph five of the 2009 Case Management Order, Oracle moves to amend its Third Amended Complaint in the stipulated form attached to this Alternative Motion as Exhibit A (Oracle's [Proposed] Fourth Amended Complaint for Damages and Injunctive Relief). This stipulated amendment adds an additional plaintiff and additional copyright registrations related to Defendants' alleged infringement of Oracle's Siebel software, and allegations relating to Defendants' continuing course of infringement of Oracle's PeopleSoft, J.D. Edwards, and Siebel software for eighteen months after Oracle first brought this lawsuit.

1 In addition, pursuant to the Court's direction at the May 28, 2009 Case
2 Management Conference, Oracle has concurrently filed a contested motion to further amend its
3 Third Amended Complaint. Through the concurrently-filed contested motion, Oracle seeks
4 leave to add certain additional new and previously obtained copyright registrations to conform to
5 proof, but no additional parties and no additional claims for relief. Accordingly, Oracle has also
6 filed its preferred version of its proposed Fourth Amended Complaint, attached as Exhibit A to
7 the contested motion. That version of the proposed Fourth Amended Complaint includes both
8 the stipulated and contested amendments.

9 For efficiency, Oracle respectfully requests that the Court consider the
10 concurrently-filed contested motion to amend first. If the Court grants that motion, the resulting
11 filed Fourth Amended Complaint will include the stipulated amendments that are the subject of
12 this Alternative Motion, and this Motion will be moot. Alternatively, if the Court denies
13 Oracle's concurrently-filed motion to amend, then Oracle requests that the Court grant this
14 Alternative Motion pursuant to the Parties' stipulation and the Court's 2009 Case Management
15 Order.

16 **II. FACTUAL BACKGROUND**

17 **A. Oracle's Prior Amendments**

18 Oracle filed its initial Complaint on March 22, 2007. On June 1, 2007, Oracle
19 filed its First Amended Complaint to include copyright registrations related to Oracle's
20 PeopleSoft and JD Edwards product lines. A year later, after discovery revealed additional facts
21 about the scope of Defendants' copyright infringement, Oracle filed its Second Amended
22 Complaint on July 28, 2008 to include, among other things, additional copyright registrations.
23 Later that year, on October 8, 2008, Oracle filed its Third Amended Complaint, this time solely
24 to adjust the identities of Oracle's Plaintiff entities.

25 **B. Oracle's Stipulated Amendment**

26 Since Oracle filed its Third Amended Complaint, through discovery Oracle has
27 learned facts that it contends show Defendants' copyright infringement extended beyond the
28 PeopleSoft and JD Edwards products lines to include Oracle's Siebel software. Oracle has also

1 discovered facts that it contends show Defendants infringed Oracle's PeopleSoft, JD Edwards,
2 and Siebel software for eighteen months after Oracle filed its initial Complaint.¹

3 With these new claims in mind, and with a case schedule that had become
4 unworkable for both Parties, in March 2009, the Parties began a two-month meet and confer
5 process to reach an agreement and stipulation to, among other things, (1) allow Oracle to amend
6 its complaint to add Siebel claims, allegations regarding post-litigation infringement, additional
7 PeopleSoft copyright registrations, and a copyright claim for infringement of Oracle's
8 copyrighted Database software; (2) jointly move to modify and extend the case schedule; and (3)
9 increase the number of summary judgment motions to be filed. The Parties were able to reach an
10 agreement and joint stipulation with respect to some, but not all, of these issues. However, the
11 Parties agreed that Oracle should be permitted to file an amended Complaint to include Siebel
12 and post-litigation allegations, and Defendants agreed not to oppose such a motion. On May 12,
13 2009, the Parties filed a joint Stipulation to Modify May 5, 2008 Case Management Order that
14 reflected the Parties' agreement.

15 At the May 28, 2009 Case Management Conference, the Court, among other
16 things, agreed to allow Oracle to move to amend its Complaint to add Siebel claims and
17 allegations related to Defendants' post-lawsuit activities. On June 11, 2009, the Court signed the
18 2009 Case Management Order, permitting Oracle to file this Motion to File a Stipulated
19 Amended Complaint.

20 C. The Contested Amendment

21 At the May 28, 2009 Case Management Conference, Oracle also informed the
22 Court of its desire to include certain additional allegations in its Fourth Amended Complaint to
23 which Defendants had not stipulated. Oracle also informed the Court of Defendants' refusal to
24

25 ¹ More recently, Oracle has also discovered that Defendants' infringement and
26 unauthorized downloading extend to include Oracle's copyrighted Database software.
27 Defendants' infringement of Oracle's Database software, and Oracle's desire to amend its
28 complaint to add those allegations, is addressed in detail in the concurrently-filed contested
Motion to Amend.

