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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

ORACLE USA, INC. *et al*,

Plaintiffs,

v.

SAP AG, *et al*.,

Defendants.

No. 07-CV-01658 PJH (EDL)

REPLY IN SUPPORT OF PLAINTIFFS' MOTION TO COMPEL PRODUCTION OF DOCUMENTS RELATED TO DAMAGES MODEL AND INTERROGATORY RESPONSES RELATED TO USE OF PLAINTIFFS' INTELLECTUAL PROPERTY

Date: August 4, 2009
Time: 2:00 p.m.
Place: E, 15th Floor
Judge: Hon. Elizabeth D. Laporte

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I. INTRODUCTION

Defendants make various contradictory arguments in opposing further response to Interrogatories 13 and 14, but they are all, at base, complaints about excessive burden. Each argument fails.

First, relying on Rule 33(d), Defendants say they *have* provided sufficient information within voluminous records, which Oracle should analyze to determine the answers to the Interrogatories. Defendants' argument rests on an outdated treatise and a misunderstanding of the answers sought. Under the correct standard, they have failed to justify the use of Rule 33(d) in this specific factual context. As Defendants concede, Oracle did not bring this motion precipitously. It did so only after spending millions of dollars, either in deposition, for special experts, or in careful review of these records, and *only* after those efforts showed that the records do not contain the information Defendants claim. The sample record Defendants selected for their Opposition exemplifies the crucial missing data Oracle needs Defendants to provide.

Second, Defendants say they *cannot* provide the information, either because they allowed their employees to scatter before collecting it, or because of "technical impossibility." But Interrogatories 13 and 14 go to central issues of proof regarding Defendants' illegal downloading and use of illegal local environments. Defendants received these Interrogatories long before choosing to wind down SAP TN, and had the duty to adequately preserve institutional knowledge about these issues. Indeed, Oracle first moved to compel a supplemental response to Interrogatory 14 in January 2008. Judge Legge extracted Defendants' promise that their SAS database would be adequate, but without prejudice to Oracle renewing its motion if it was not. Oracle has now spent many months and millions of dollars in expert and attorneys' fees confirming that SAS is not what Defendants say it is, and certainly not an adequate response to Interrogatories 13 and 14.

Defendants alone have additional knowledge – beyond the data contained in their productions – responsive to these requests, which the rules obligate them to collect and provide. Through their former employees, including but not limited to those now serving as paid litigation

consultants, Defendants have always been able to, and can today, fill the gaps in these records. Of course, in addition to having unique access to this additional knowledge, Defendants can better analyze this material since they engaged in the actions partially reflected in the records in using Oracle's intellectual property to support their customers. And Defendants – on notice for years of Oracle's interest in and need for this information – have no excuse for any failure to obtain the necessary intelligence before the (entirely voluntary) SAP TN wind-down.

Finally and most broadly, Defendants say they should not have to provide this additional information because the burden on them would be too great. As to this argument, Oracle needs to be very clear: it did not choose this case. It would have preferred that its most significant applications software competitor *not* have engaged in a years-long conspiracy to steal its intellectual property. But that competitor, the $45-billion self-professed "world's largest business software company," broke the rules, in a persistent, knowing, unprecedented way, as part of an effort to steal what it took Oracle billions of dollars to acquire. In that scenario, where Defendants' ongoing conduct caused so much harm to Oracle, Defendants cannot claim undue burden and refuse to provide basic liability facts that only they know.

Even under these circumstances, Oracle would prefer to obtain the information via the *least* amount of burden. That is largely why it spent a year, at this Court's recommendation, trying to negotiate a stipulation to avoid the need for such detailed responses. Defendants refused that, and now *also* refuse to provide the detailed responses. As the aggrieved party, Oracle must have a chance to discover the important facts not evident from, or not as easily gleaned by Oracle from, Defendants' voluminous records.

Oracle remains willing to try and balance Defendants' claimed burden with Oracle's right to discovery of the detail that supports its claims. As to Interrogatory 13, as Oracle suggested in its opening papers, if Defendants simply attest, in sufficient detail, that they are unable to respond based on SAP TN's business records, while explaining the results of the investigation they have admittedly already done on a product and file basis, Oracle can at least then use that information as a basis for extrapolation, argument, or preclusion. As to Interrogatory 14, to the extent Defendants maintain the information in SAS substitutes for a

sworn interrogatory response, they presumably would agree that the information in SAS is admissible for the truth of the matter asserted in all instances related to use of local environments to support SAP TN customers. That leaves the information not in SAS, which, as shown below, is substantial. For that data set, Oracle welcomes the Court's suggestions for how to reasonably limit the time Defendants, their former employees, and/or their current consultants spend analyzing SAP TN's environments. In fashioning that remedy, the Court should keep in mind that Defendants have refused to stipulate to factual summaries despite Oracle's repeated offers, have made the problem of assessing environment use worse through sloppy recordkeeping, and have failed to collect the information when the various knowledgeable employees were under their direct control.

II. THE COURT SHOULD REQUIRE FURTHER RESPONSES TO INTERROGATORIES 13 AND 14

Defendants' opposition rests on a multi-pronged burden argument, which Oracle addresses for each Interrogatory below, after correcting the Rule 33(d) legal standard. Oracle then proposes a compromise form of relief designed to account for the volume of data and the records Defendants rely upon in their Opposition.

A. The Actual Rule 33(d) Legal Standard

Oracle agrees with Defendants that Rule 33(d) may be invoked when (1) the responding party "specif[ies] the records that must be reviewed, in sufficient detail to enable the interrogating party to locate and identify them as readily as the responding party could," and (2) "the burden of deriving or ascertaining the answer will be substantially the same for either party." Fed. R. Civ. P. 33(d); *see* Defendants' Opposition to Plaintiffs' Motion to Compel ("Opp.") at 4.

However, Defendants incorrectly assert that "the propounding party has the burden of demonstrating 'that the burden of deriving or ascertaining the answers is not substantially the same for both parties,'" once "33(d) has been invoked." Opp. at 4. Defendants' only support for this proposition is a Western District of North Carolina case, which in turn cites an outdated version of Moore's Federal Practice Guide. *See id.*, citing *T.N. Taube Corp. v.*

Marine Midland Mortgage Corp., 136 F.R.D. 449, 453 (W.D.N.C. 1991) (quoting 4A Moore's *Federal Practice* ¶ 33.25 (2d ed. 1990)).

This year's version of Moore's Federal Practice Guide (7 Moore et al., *Moore's Federal Practice*, § 33.105 (2009))[1] explains that a requesting party claiming an inappropriate use of Rule 33(d) may file a motion to compel answers, and that "[t]o be successful on the motion, the requesting party must make a prima facie showing that the use of Rule 33(d) is somehow inadequate, whether because the information is not fully contained in the documents or because it is too difficult to extract." At that point: "*The burden then shifts to the producing party to justify the use of Rule 33(d) instead of direct answers to the interrogatories*. The *producing party* must satisfy a number of factors to meet this burden." *Id.* (emphasis supplied) "First, the producing party must show that a review of the documents will actually reveal answers to the interrogatories. Second, the producing party must justify the shifting of the perusal burden from the responding party to the requesting party. In this regard, the burden of deriving the answer must be substantially the same for the party serving the interrogatory as for the party served." *Id.*

Under this, correct, standard, Defendants do not meet their burden, as explained below.

B. Defendants Cannot Claim Undue Burden for Either Interrogatory Response

Defendants' Opposition boils down to the repeated assertion, in various guises, that the Court should limit Interrogatories 13 and 14 under Federal Rule of Civil Procedure 26(b)(2)(C) and generally on excessive burden grounds. All these arguments are misplaced and gloss over the novel massive theft at issue here.

[1] This chapter of Moore's Federal Practice Guide was co-authored by Judge Claudia Wilken of the Northern District of California.

1. Interrogatory 14[2] Is Not Unduly Burdensome

Oracle first sought additional responsive information for Interrogatory 14 in its very first motion to compel before Judge Legge in January 2008, well before the SAP TN wind-down. Motion at 5. Judge Legge ordered Defendants to supplement if SAS did not prove as fruitful as Defendants promised. *Id.* Accordingly, since then, Defendants have known that this motion might come. They also knew the limitations of SAS, though it took Oracle over a year to confirm them. Their arguments that the Interrogatory is unduly burdensome fail.

a. Defendants' Response to Interrogatory 14 Relies on the Incomplete SAS Database

Defendants argue Interrogatory 14 is unduly burdensome because it is duplicative of their document production, Rule 30(b)(6) testimony, and individual witness testimony. Opp. at 20. To the extent this is true, Defendants appear willing to stipulate to the admissibility of all facts contained with the records on which they rely.

Unfortunately, in the best case, this stipulation only solves part of the problem, which means Defendants' response remains insufficient. A party may rely on Rule 33(d) to respond to an interrogatory when the business records relied upon, in combination with any other cited information, *actually provide* a comprehensive answer. *See* 7 Moore et al., *Moore's Federal Practice*, § 33.105 (2009); *E. & J. Gallo Winery v. Cantine Rallo*, 2006 U.S. Dist. LEXIS 84048, at *12 (E.D. Cal. 2006) ("[A] party may not use Rule 33 to avoid the duty to fully respond to the interrogatories."). Rule 33(d) itself specifies that:

> *where the information sought may be obtained by* examining the responding party's business records . . .and answering the question would require the responding party to engage in burdensome or

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[2] Defendants now contend that Oracle is moving to compel the source of each local environment through Interrogatory 14. *See* Opp. at 14. That is incorrect, although the *ability* of former SAP TN employees and current consultants to identify the source of local environments shows their familiarity with, and ability to respond to, Interrogatory 14's actual request. *See* Motion at 14-15. Oracle *does* seek a complete response to Interrogatory 14's request to "Identify ***all Customers who received support based on the Use of that environment***, and a detailed ***description of that support . . .***" (emphasis supplied)

> expensive research, the responding party may answer *by specifying* the records *from which the answer may be obtained* . . . (emphasis supplied)

This makes sense because, in both cases, the requesting party obtains responsive, admissible evidence, either a sworn statement or the same fact contained within an admissible business record. It does *not* make sense if the record provided does not have the information, or if informed analysis by the records' creator is required to interpret it. As this Court has previously held, granting a motion to compel is proper where "the information can not be found within the documents referenced, and [therefore the party's] attempt to rely upon Fed. R. Civ. P. 33(d) does not satisfy its obligation to respond." *Fresenius Med. Care Holding Inc. v. Baxter Int'l, Inc*., 224 F.R.D. 644, 651 (N.D. Cal. 2004).

Defendants' reliance on SAS is an example of exactly this kind of Rule 33(d) problem. It may be the best record Defendants have provided to date, Opp. at 15, but – absent the stipulation urged by this Court – it does *not* provide a complete answer about how the local environments were used. Defendants' response does not otherwise fill in the gaps; other than SAS, Defendants' response to Interrogatory 14 uses Rule 33(d) solely to rely on deposition testimony elicited by Oracle.

Analyzing Defendants' cherry-picked example from SAS demonstrates this problem. Defendants provided a SAS screenshot of a particular fix, which they claim provides information responsive to Interrogatory 14. *See* Fuchs Decl., ¶9. But, on Oracle's analysis, fewer than 3% of Master Fix records in SAS have as much information as the fix shown in Defendants' screenshot. *See* Declaration of Kevin Mandia ("Mandia Decl."), ¶¶7-8; Declaration of John Polito ("Polito Decl."), ¶6. On the screenshot, Defendants circled the five environment names that appear. *See* Fuchs Decl., ¶9. Individual test plans are attached to the fix, which show that SAP TN used four of those five referenced environments for individual fix testing, a step in SAP TN's support process. *See* Mandia Decl., ¶8. To the extent Defendants contend that these environments are the only ones used in every stage of fix delivery– replication of the problem, development of the initial code, unit testing of the initial code, individual fix testing, bundling for

delivery to clients, and bundle testing – then Defendants should stipulate to that effect, as to all fixes in SAS where any records of the use of environments in the fix-delivery process exist. To the extent Defendants contend that, for each fix, no information regarding the use of environments in each stage of fix delivery is available beyond that present in SAS, an appropriate stipulation would again provide Oracle with the information it needs as to what information responsive to Interrogatory 14 is available to Defendants.

If Defendants refuse that stipulation, then they have oversold their own example. Worse, even if this sample screenshot, by stipulation, includes information about all environments used for that one listed fix, it does not accurately reflect the rest of SAS. Of SAS's 1887 Master Fix records, 920 have *no environment information at all*, yet Defendants chose to submit to the Court a screenshot of a fix for which individual fix testing happened to have been performed in multiple environments. *See* Mandia Decl., ¶¶7-8; Polito Decl., ¶5. Perhaps more significant, again subject to stipulation or further information, fewer than 100 Master Fix records in SAS appear to contain information about the environments used in all stages of SAP TN's fix-delivery process. *See* Polito Decl., ¶5. Absent appropriate stipulation by Defendants, SAS does not appear to provide information about environment use across the various phases of fix delivery and across a significant number of delivered fixes, which is the information sought by Interrogatory 14. To the extent Defendants contend that, for each fix, no information regarding the use of environments in each stage of the fix delivery process is available beyond that present in SAS, Defendants should so stipulate.

Since Defendants' SAS production (and the isolated examples of environment uses testified to at laborious hours of deposition) cannot provide a close-to-complete response to Interrogatory 14, that request does not unreasonably duplicate Defendants' various Rule 33(d) discovery responses. Oracle has worked diligently to understand the issues underlying that Interrogatory through these other avenues, spending over $160,000 just in expert fees to understand and manipulate the information in SAS, and approximately more than $2 million

reviewing the database, analyzing the available information, and preparing for and taking depositions on these issues.[3] *See* Howard Decl., ¶4. This effort reveals SAS is incomplete, and the responsive information is missing.

b. Under Rule 33(d), Defendants Must Supplement SAS With The Information They Control

In their next burden argument, Defendants claim that SAS is the most convenient source of information for Interrogatory 14 and that Oracle has had the "majority" of it for many months.[4] Opp. at 19.

This argument fails for similar reasons. Defendants cannot rely on Rule 33(d) if "the burden of deriving or ascertaining the [interrogatory] answer" from the referenced materials is not "substantially the same" for both parties. And that is not the end of their obligations, because, as this Court has previously held, a party must respond to interrogatories "with all the information under [its] custody and control." *Fresenius*, 224 F.R.D. at 651. "A party has an obligation to make a reasonable effort to locate all responsive documents and information necessary to fully respond to interrogatories," *id.* at 657, including persons subject to the party's control who have relevant information, including former employees. *See, e.g., General Dynamics Corp. v. Selb Mfg. Co.*, 481 F.2d 1204, 1210 (8th Cir. 1973) (the person responding on behalf of the entity is under a duty to obtain and provide non-privileged information known to anyone in the entity's employ or any former employees "employed by [the entity] at the time this action commenced"); *see also* Fed. R. Civ. P. 33(b)(1)(B) (in answering interrogatories propounded to a corporation, the officer or agent responding on its behalf "must furnish the information available to the party.").

Defendants do not meet these standards. First, SAS is a more convenient

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[3] Overall, based on Defendants' representations regarding the cost incurred to review and produce documents, it appears the parties have spent roughly comparable amounts on those activities. Declaration of Geoffrey M. Howard ("Howard Decl."), ¶4.

[4] Defendants only produced the last of SAS on March 6, 2009. Polito Decl., ¶3.

information source for them. They designed and maintained it as a central business tool, and presumably understand its innumerable custom complexities. To anyone else, including a Lotus Notes expert hired by Oracle specifically to help understand SAS, it is a customized and highly opaque database, which provides limited information in a disorganized manner that makes navigation and analysis of the data quite complex. *See* Declaration of Robert Schwentker ("Schwentker Decl."), ¶¶1-9. Because Defendants can far better understand SAS, the burden of deriving the answer to Interrogatory 14 from SAS is not "substantially the same" for both parties,[5] and Defendants' burden argument fails for that reason alone. *See* Schwentker Decl., ¶6.

Second, as part of their convenience argument, Defendants claim that Oracle wants them to summarize SAS's records, which they say Oracle can easily do. Opp. at 20. This argument mischaracterizes both the Interrogatory and the work required to answer it. If Oracle could create the summary Defendants envision, Oracle would have done it by now. For example, to properly respond, Defendants' consultants or former employees would select a local environment, review information about how that environment was used in SAP TN's six support steps to create, test, or package fixes, and compare and supplement that information with other substantive data and personal knowledge about both how SAP TN generally used local environments and how it used this specific environment. Oracle does not know where that information resides in SAS.

To get this information requires interpretation, not summary. In a summary, the facts are evident from the record. An interpretation requires specialized knowledge of the actual activities reflected by the record, which Oracle by definition does not have and which Defendants do (or did). Oracle did not reach this conclusion lightly. It spent countless attorney and expert hours[6] analyzing Defendants' records to try to determine, for each local environment,

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[5] Both parties have relied on Rule 33(d) in a number of interrogatory responses. *See, e.g.*, Fuchs Decl., ¶12 & Exs. F-I. Oracle does not assert that Rule 33(d) is an inappropriate tool, or that all Defendants' Rule 33(d) responses are improper. Interrogatories 13 and 14 are examples of situations where Rule 33(d) is not a proper or complete basis for response.

[6] Contrary to what Defendants state, Oracle did consult with the technical SAS expert provided

(Footnote Continued on Next Page.)

which customers received what kind of support through use of that environment. *See* Howard Decl., ¶4.

Since Defendants can more easily provide the information, the law requires them to apply their special expertise and "all the information under [their] custody and control." *Fresenius*, 224 F.R.D. at 651; *see also General Dynamics*, 481 F.2d at 1210. Defendants have not complied with this obligation to incorporate their (now) former employees' knowledge of how SAP TN used local environments into their response to Interrogatory 14, despite paying former SAP TN employees a monthly fee as litigation consultants to "occasionally help with locating and understanding information." Opp. at 17, fn. 24; Howard Decl., ¶5 & Ex. C. Although they had and have unique access to these former employees and current consultants,[7] Defendants apparently chose not to gather their crucial relevant knowledge and include it in their response. That failure renders their response fundamentally incomplete. It is no excuse for Defendants to contend that their voluntary decision to shut down SAP TN makes this knowledge incorporation difficult. Not only did Defendants make that decision long after Oracle first moved to compel on Interrogatory 14, but they cannot escape their discovery obligations by deliberately jettisoning a knowledge resource.

In sum, Defendants' arguments that undue burden precludes supplementation on convenience grounds misses the point. Not only is SAS incomplete, but since the burden of deriving the answer to the Interrogatory is significantly less for Defendants, who have unique access to individuals with the specialized knowledge necessary to unravel and patch together

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by Defendants, as ordered by Judge Legge. *See* Howard Decl., ¶4.

[7] Catherine Hyde asserts she has no personal knowledge and would rely on SAS to conduct such an analysis. Hyde Declaration, ¶¶6-7. But her testimony shows she is capable of greater analysis when her recollection is refreshed. *See* Motion at 15. Oracle would certainly expect that the SAP TN consultants and former employees would consult with and analyze SAS in generating their answer to Interrogatory 14. The point is that those consultants and former employees could analyze the SAS data far better than Oracle. *See also, e.g.*, Opp. at 17, fn. 25 (showing relevant knowledge of former employees and their familiarity with SAS); Howard Decl., ¶6 & Ex. D (December 6, 2007 Deposition of Shelley Nelson at 185:3-186:8).

SAS's incomplete records, Defendants cannot rely on SAS through Rule 33(d). They must supplement their response with the additional knowledge to which they have access.

c. Defendants' Conduct Caused The Burden

Finally, Defendants assert that Oracle "should be required to assume the effort associated with" its burden of proof. Opp. at 21. According to this argument, because Oracle estimates a serious amount of harm, and because it must prove facts to support its claims, and even though Defendants illegally used Oracle's IP for years without keeping good records, Defendants should not have to provide facts they uniquely possess. Oracle is not insensitive to burden concerns, but a $45-billion multi-national company that stole IP for years, kept lousy records of it, and did not collect the information it did have at the right time, is not the usual burden-shifting candidate. In this light, the requests place no undue burden of production on Defendants. Their employees know where the information resides, and how to get it, as well as how to fill in the gaps. The notion that it would take "thousands of hours" to extract the relevant information seems highly unlikely given the expertise of the employees. Opp. at 21.

Moreover, Defendants have a higher hurdle for their undue burden argument. Their failure to record and track this information in an accessible and organized way exacerbates the burden, but does not excuse a response. *See Residential Constr., LLC v. Ace Prop. & Cas.*, 2006 U.S. Dist. LEXIS 80403, at *26 (D. Nev. 2006) ("In considering the burden imposed on a party in responding to discovery, the Court should also consider whether the burden is a result of the party's lack of an adequate filing system or method for locating requested information.").

2. For Similar Reasons, Interrogatory 13 Is Not Unduly Burdensome

Interrogatory 13 goes to the heart of Oracle's claims of illegal activity through indiscriminate downloading in excess of customers' licenses. In it, Oracle asked Defendants to identify, *pursuant to their own records*, referenced in their current response and other pleadings, all downloads made in excess of a customer's license. To the extent Defendants admit improper downloading, which they do, they need to specify which downloads they improperly took. To the extent they can do no more, they need to say so under oath.

a. Defendants Mischaracterize Interrogatory 13

Defendants make three flawed arguments in characterizing Interrogatory 13 that stray from the language of the request and their own responses to it. First, they say it should be limited to information relied on in drafting Paragraph 15 of Defendants' Answer to Plaintiffs' First Amended Complaint. Opp. at 6-7. But Interrogatory 13 relies on Defendants' own language from their Answer to describe the category of information sought. It asks Defendants to describe materials that "have been downloaded beyond those that, according to TN's records, related to applications licensed to the particular customer on whose behalf the downloads were made, as alleged in ¶ 15 of Your Answer, ***including but not limited to*** Identifying the "records" You referenced in making Your determination." (emphasis supplied) The quoted language in the Interrogatory does not limit Defendants' response, but acts a starting point – the Interrogatory explicitly seeks information "not limited to" what Defendants consulted in drafting their Answer.

Second, Defendants now argue for the first time that Interrogatory 13 somehow should be limited to a handful of customers. Opp. at 6-7. Defendants did not object on or mention this ground in their original and supplementary Interrogatory responses or in meet and confer. To the contrary, Defendants' *own supplemental responses* cite to over a thousand pages of customer contracts and hundreds of pages of onboarding documentation, discuss downloads on behalf of customers in general, and make general narrative statements without limitation to specific customers. *See* Howard Decl., ¶2 & Ex. A. These responses prove that Defendants, too, view this request as applying to all customers and that Paragraph 15 of their Answer addressed all customers (as it should). In addition, Defendants long ago waived any such right to assert a more limited interpretation.

Third, Defendants also now assert for the first time that Oracle improperly seeks the identity of those materials that "were downloaded using credentials of a customer not entitled to those materials" and "which materials [SAP TN] improperly downloaded from Customer Connection." Opp. at 6-7. However, Interrogatory 13 requests a description of all materials "that have been downloaded beyond those, that, according to TN's records, related to applications licensed to the particular customer on who behalf the downloads were made." This

request encompasses the same information as "materials [SAP TN] improperly downloaded from Customer Connection" and "downloaded using credentials of a customer not entitled to those materials." That is what the Interrogatory seeks and what Oracle moves to compel.

b. Interrogatory 13 Is Not Unduly Burdensome

Defendants argue that this request is too burdensome for two reasons: it is duplicative of Oracle's other discovery relating to downloads and it is "technically impossible" for them to answer.

Both arguments fail. Oracle's other downloading discovery, aimed at other issues, is not duplicative. That Defendants provided *different* discovery related to downloading does not excuse them from answering this Interrogatory – there is no general subject matter limitation here. For example, Defendants provide a litany of other downloading discovery they have provided. *See* Opp. at 11. Oracle concedes neither Defendants' characterization of this discovery nor the completeness of their responses, but both are beside the point: none of this discovery identifies the materials SAP TN downloaded beyond those that, according to its records, related to applications licensed to the particular customer on whose behalf the downloads were made. That is what Interrogatory 13 seeks. Moreover, Defendants' claim that they have provided the information sought by Interrogatory 13 in another context makes no sense (if so, it could not be burdensome to provide). In short, Oracle brings this motion to compel *because* these other requests did not seek and have not provided the answers to the Interrogatory.

As for Defendants' complaint that the Interrogatory is burdensome because it is impossible to answer, that too is wrong. Over two years ago, Defendants admitted SAP TN made inappropriate downloads. *See* Howard Decl., ¶7 & Ex. E (July 3, 2007 SAP Press Release admitting the existence of "inappropriate downloads"). Obviously, Defendants themselves have *already done* this analysis for at least a partial set of downloads, showing both that some part of this data does exist and that the analysis is possible. Oracle needs to tie Defendants' admission about inappropriate downloads to actual, specific products and Registered Works. Since Defendants have already completed this precise analysis for at least some downloads, they cannot claim it is burdensome to report that analysis to Oracle.

To the extent Defendants contend it is "technically impossible" to provide the same information, based on their own records, for the millions of *other* downloaded files on their computers, then that information is important too and they should provide it in a supplemental sworn statement. Indeed, in their Opposition, they state, "Defendants have always acknowledged that there is no known technical way to specifically tie a downloaded item on TN's systems to a Customer Connection ID and password." Opp. at 7, fn 9. Though, again, this cannot be true for all downloads, given Defendants' admissions that some downloads were inappropriate, if it is in fact true for the remainder, then Defendants should provide a sworn statement to that effect.

Defendants' other arguments against Interrogatory 13 track those against Interrogatory 14 and so are addressed by Section II(B)(1), above, and by Oracle's opening brief. Motion at 14-16. The Court should compel Defendants to supplement their response to Interrogatory 13, at minimum by providing the factual backup to their admission of generally improper downloading, and a sworn statement about their inability to provide similar facts for the remainder.

3. Oracle Is Willing to Alleviate Defendants' Burden to the Extent Possible

As noted in its opening brief and above, Oracle has been and is willing to work with the Court and Defendants to alleviate their burden of response as much as possible, while obtaining the evidence it needs:

- For Interrogatory 14, the Court could fashion reasonable limits on the amount of time that Defendants, their former employees, and their current consultants would spend on responding to the Interrogatory by analyzing SAP TN's use of local environments. Or, it could set a specified number of environments, let Oracle choose them, require a full response, and then allow Oracle to extrapolate from those answers.
- For Interrogatory 13, Defendants could significantly reduce their burden by explaining how they concluded that certain downloads were inappropriate, identifying those downloads by file and product, and then declare that they do not have the ability

to provide the same information as to the remaining downloads on SAP TN's systems.

Oracle is open to these and any other creative ideas the Court may order to resolve the respective concerns over this important issue, and will be ready to discuss such alternatives at the August 4 hearing.

C. Oracle's Damages-Related Discovery Requests

As Defendants' Opposition Brief acknowledges, Defendants agreed to produce documents responsive to Oracle's damages-related discovery requests after forcing Oracle to move to compel. Assuming Defendants produce the promised information on the promised schedule, the issues identified in Oracle's Opening Brief on damages-related discovery will be resolved.

III. CONCLUSION

Defendants cannot point to incomplete productions when they have additional responsive knowledge they have refused to tap, and any burden associated with this analysis is of Defendants' own making. Defendants' reliance on Rule 33(d) for Interrogatories 13 and 14 is deficient and must be corrected.

DATED: July 21, 2009

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