EXHIBIT 5

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17   UNITED STATES DISTRICT COURT

18   NORTHERN DISTRICT OF CALIFORNIA

19   SAN FRANCISCO DIVISION

20 ORACLE USA, INC., a Colorado corporation,   CASE NO. 07-CV-01658 PJH (EDL)
    ORACLE INTERNATIONAL CORPORATION,
21 a California corporation, ORACLE EMEA   **FOURTH AMENDED COMPLAINT**
    LIMITED, an Irish private limited company, and   **FOR DAMAGES AND INJUNCTIVE**
22 SIEBEL SYSTEMS INC., a Delaware   **RELIEF FOR:**
    corporation,
23   **(1) COPYRIGHT INFRINGEMENT;**
                     Plaintiffs,   **(2) VIOLATIONS OF THE**
24   v.   **COMPUTER FRAUD AND ABUSE**
                                                        ACT;
25 SAP AG, a German corporation, SAP   **(3) VIOLATIONS OF THE**
    AMERICA, INC., a Delaware corporation,   **COMPUTER DATA ACCESS AND**
26 TOMORROWNOW, INC., a Texas corporation,   **FRAUD ACT;**
    and DOES 1-50, inclusive,   **(4) BREACH OF CONTRACT;**
27   **(5) INTENTIONAL INTERFERENCE**
                     Defendants.   **WITH PROSPECTIVE ECONOMIC**
28   **ADVANTAGE;**

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1   unlawful conduct extended in full to Oracle's Siebel software line as well. In addition, it now

2   appears SAP also infringed Oracle's copyrighted database technology software.

3   16.   As alleged in Oracle's prior Complaints, in the illicit downloading

4   component of its scheme, SAP, through SAP TN, stole thousands of proprietary, copyrighted

5   software products and other confidential materials that Oracle developed to service its own

6   support customers.[2] SAP gained repeated and unauthorized access, in many cases by use of

7   pretextual customer log-in credentials, to Oracle's proprietary, password-protected customer

8   support websites. From these websites, SAP has copied and swept into its servers thousands of

9   copyrighted Oracle Software and Support Materials. As a result, SAP compiled a massive illegal

10   library of Oracle's copyrighted software code and other materials. This storehouse of stolen

11   Oracle intellectual property is part of what enables SAP, through SAP TN, to offer cut rate

12   support services to customers who use Oracle software, and to attempt to lure them to SAP's

13   applications software platform and away from Oracle's.

14   17.   Oracle's own records show at least 10,000 illegal downloads by SAP

15   between September 2006 and February 2007. However, Oracle has now obtained SAP's internal

16   records, which confirm that SAP has spent years systematically taking unauthorized support

17   materials from Oracle's systems, most recently using a dedicated bank of twenty servers in a

18   "download center" and a customized software tool called "Titan." SAP programmed Titan

19   specifically to ignore any access or use restrictions for any particular customer log-in credential.

20   Instead, SAP designed Titan to gain any form of access with any active log-in credential, and to

21   "scrape" Oracle's websites for bug fixes, patches, updates and instruction manuals. At the time

22   Oracle filed its prior Complaints, Titan and other tools had filled SAP storage vaults with more

23   than *five terabytes* worth of Oracle's Software and Support Materials. On just one of SAP's

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25   [2] These copyrighted materials, which include program updates, software updates, bug fixes,
26   patches, custom solutions, instructional documents, knowledge management solutions, FAQs,
     Tech Notes and Alerts related to Oracle software products, including the PeopleSoft, JDE and
27   Siebel families of software products, are referred to throughout as "Software and Support
     Materials."

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1   servers, Oracle discovered nearly *8 million* downloaded Oracle Software and Support Materials.

2   18.   For years, SAP dumped these materials into a co-mingled, master

3   download library, and "exploded" the software support packages into their constituent objects to

4   facilitate later indexing and searching by product. SAP accessed these master download libraries

5   as needed when customers needed a fix – regardless of which log-in credential SAP had used to

6   download a particular fix in the library, regardless of whether the customer getting the fix had

7   any license to receive it, and regardless of whether the customer had a support contract with

8   Oracle entitling them to receive that fix.

9   19.   But these downloads of Software and Support Materials, though massive,

10   were just one part of SAP TN's fundamentally illegal business model:

11   •   Beginning as early as 2002, SAP TN co-founders Andrew Nelson and Seth

12   Ravin decided that SAP TN would expand its services and, in doing so, would

13   create and keep on its computer systems illegal copies of Oracle's *underlying*

14   *software applications*;

15   •   Nelson and Ravin directed SAP TN to warehouse dozens of these copies

16   simply as "generic software environments" and use them as a "sandbox" to

17   service other customers, train its employees, and create phony SAP TN-

18   branded fixes to sell to its customers;

19   •   In particular, SAP TN used these generic copies of Oracle software to

20   "develop" (by copying Oracle software or creating illegal derivative works

21   from it) SAP TN-branded "tax and regulatory updates," and deliver them to its

22   customers paying for SAP TN support of each Oracle software release;

23   •   In at least hundreds of instances, in a process created by Nelson and Ravin,

24   SAP TN did this by first updating one "generic" environment with the Oracle-

25   authored update code that SAP TN would download from Oracle's systems

26   with one customer's log-in credential. SAP TN would then use software

27   comparison tools to compare this "updated" generic software environment to a

28   generic copy (also obtained from some unidentified customer) of an earlier

7

1   release of the same software. SAP TN then copied the differing code and

2   used it to "develop" (again, by creating an illegal derivative work) what it

3   called an SAP TN "retrofit update" in another "generic" environment. In the

4   course of this development process, SAP TN would normally make at least

5   four, and sometimes many more, generic copies of Oracle's software

6   applications. In effect, there was no original development at all but merely

7   repeated, illegal copying and use of the Oracle software code;

8   • In at least hundreds of other instances, SAP TN simply used these generic

9   environments copied from customers' Oracle software to develop and test

10   SAP TN "authored" (again, illegally created) updates that it delivered to its

11   customers. After it bought SAP TN, SAP AG directly assisted in this process

12   using its own software support resources;

13   • Many of SAP TN's environments, including generic environments, in turn ran

14   upon copies of Oracle's database software that were not licensed for

15   commercial or production use. After purchasing SAP TN, SAP AG and SAP

16   America refused to purchase Oracle database licenses for SAP TN use, even

17   though as an authorized Oracle database reseller, they knew full well the

18   permissible uses of database copies, and even though SAP TN described the

19   licenses as "urgently needed to support [SAP TN's] PeopleSoft customers

20   using this technology";

21   • In total, SAP TN made thousands of copies of Oracle's software, and

22   distributed thousands of individual fixes, for a fee, through its illegal "generic

23   retrofit" and "direct update" models;

24   • In addition to the code associated with these retrofit software updates, SAP

25   TN provided its customers with stolen Oracle instruction manuals, guides,

26   notes and other support documentation related to the updates. It did this by

27   "copying and pasting" downloaded Oracle documentation into re-branded

28   SAP TN documentation that was, according to the sworn testimony of SAP

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1   TN's third employee, "essentially identical" and "virtually verbatim with

2   small changes" as the Oracle documentation. SAP TN then distributed these

3   copied documents to its customers with a cover letter signed by its CEO,

4   Andrew Nelson; and,

5   •   SAP TN prepared operations manuals to instruct SAP TN employees how to

6   download Oracle documentation and alter it to conceal its origin and make it

7   look like SAP TN's. These instructions mandated specific, but minor changes

8   to Oracle materials, stating for example, "Go to Document Properties and

9   change author to TomorrowNow," or "[w]here the [Oracle] document talks

10   about the appendix, edit so that the TomorrowNow document says

11   'summary.'"

12   20.   The illegal downloads and the illegal software copies are part of an

13   integrated, illegal business model. Without this stolen intellectual property, SAP TN could not

14   operate. For example, whenever SAP TN wished to advertise support services for a new Oracle

15   software product, it would need to first obtain a "seed" copy of the software. It needed this first

16   copy so it could train its employees to support the software and create a generic software

17   environment from which to "recycle" its support efforts and scale them across other customers.

18   For these reasons, SAP TN's internal business plans specify that the first SAP TN customer on a

19   new Oracle software release must contractually agree with SAP TN to provide copies of its

20   Oracle software CDs to SAP TN.

21   21.   SAP AG and SAP America have made repeated false statements about

22   their own involvement in, and benefit from, SAP TN's theft.

23   22.   While admitting that "inappropriate" downloads took place, in a July 3,

24   2007 press conference, SAP AG CEO Henning Kagermann stated that a "firewall" existed

25   between SAP AG and SAP TN that prevented SAP AG from having access to the Oracle

26   software downloaded by SAP TN. That was not true:

27   •   SAP AG and SAP America employees accessed SAP TN's systems

28   through a special link on SAP TN's website;

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1   programs with Oracle retaining all copyright and other intellectual property rights in these works.

2   In addition, licensed customers can, and typically do, purchase some set of technical support

3   services that include the right to obtain upgraded products such as updates, bug fixes, or patches

4   to those software programs the customers have expressly licensed from Oracle and have the right

5   to use for purposes authorized by Oracle.

6   52.   Oracle's license agreements with its customers may vary according to the

7   products licensed, including because the customers originally contracted with PeopleSoft, JDE,

8   and/or Siebel, but all of the relevant license agreements for what is now Oracle software set

9   comparable rules for access to, and use of, that software. Among other things, those rules

10   prohibit access to, or use of, any portion of the software not expressly licensed to and paid for by

11   the licensee, and any sublicense, disclosure, use, rent, or lease of the software to third parties.

12   53.   Oracle's license agreements define Oracle's confidential information to

13   include, without limitation, Oracle's software, its object and source code, and any associated

14   documentation or service offerings. Licensees may designate third parties to help maintain

15   Oracle's software, but only subject to the terms of the relevant license agreement between the

16   licensee and Oracle. Those agreements generally preclude the third party from installing the

17   software on a server, or accessing the source code of the software. The License Agreements

18   generally prohibit the licensee or any third party from using the software offsite without notice to

19   Oracle, prohibit disclosure to third parties, and prohibit any use other than by the customer for

20   production, backup, archival and in-house disaster recovery purposes. As defined in one

21   illustrative license agreement, "software" specifically includes the update products made

22   available to customers as part of the support contracts that customers purchased from Oracle.

23   54.   Through its Terms of Use, Oracle also restricts access to the customer

24   support websites used by Oracle customers and/or their authorized agents to access and

25   download Oracle software, including for its JDE, PeopleSoft, and Siebel, Software and Support

26   Materials licensed to Oracle customers. For example, the Terms of Use on Oracle's Customer

27   Connection support website, which relates to Oracle's PeopleSoft and JDE software, stated:

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> You agree that access to Customer Connection…will be granted
> only to your designated Oracle technical support contacts and that

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> the Materials [on the support website] may be used solely in
> support of your authorized use of the Oracle Programs for which

3

> you hold a supported license from Oracle. Unless specifically
> provided in your licensing or distribution agreement with Oracle,

4

> the Materials may not be used to provide services for or to third
> parties and may not be shared with or accessed by third parties.

5

6   55.   The Terms of Use explicitly describe the confidential nature of the

7 material on Customer Connection: "the information contained in the Materials [available through

8 Customer Connection] is the confidential proprietary information of Oracle. *You may not use,*

9 *disclose, reproduce, transmit, or otherwise copy in any form or by any means the information*

10 *contained in the Materials for any purpose*, other than to support your authorized use of the

11 Oracle Programs for which you hold a supported license from Oracle, without the prior written

12 permission of Oracle." (emphasis supplied).

13   56.   Access to the secured areas of Customer Connection is also governed by

14 Special Terms of Use. By using the secured website, the user agrees to accept and comply with

15 these Special Terms of Use. The Special Terms of Use provide that access is only permitted via

16 the user's "personal username and password" and that all materials on the secured website are

17 confidential and proprietary. The Special Terms of Use clearly provide that: "Use of such

18 CONFIDENTIAL and PROPRIETARY information and materials for any other purpose is

19 strictly prohibited."

20   57.   Prior to downloading Software and Support Materials from Oracle's

21 support websites, a user must also specifically agree to additional terms of use and restrictions

22 specified in Oracle's Legal Download Agreement:

23

> Your username and password are provided to you for your sole use
> in accessing this Server and are confidential information subject to

24

> your existing confidentiality agreement with Oracle / PeopleSoft /
> JDEdwards. If you do not have a confidentiality agreement in

25

> effect with Oracle / PeopleSoft / JDEdwards, you are hereby
> notified that your username and password are confidential

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> information and may only be distributed to persons within your
> organization who have a legitimate business purpose for accessing

27

> the materials contained on this server in furtherance of your
> relationship with Oracle / PeopleSoft / JDEdwards.

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1   • According to SAP TN's sworn testimony, each of these several thousand

2   software copies may have illegally downloaded software patches or updates

3   contained within them;

4   • For each particular Oracle software release that it wanted to "support," SAP

5   TN used unauthorized and unlicensed copies of Oracle software to create

6   "generic" or "sandbox" environments;

7   • In addition to the generic, all-purpose software copies, SAP TN also

8   maintained thousands of copies of Oracle's software releases for the

9   ostensible purpose of supporting the customer who previously had licensed

10   that software. SAP TN has admitted under oath that it constructed some of

11   these software copies with software not licensed by that customer or provided

12   by that customer to SAP TN. It has also admitted it used even these

13   supposedly customer-specific software copies as reference and development

14   tools to support other customers;

15   • SAP TN used these "generic" and "customer specific" software copies to

16   support multiple customers, with no regard for which customer had originally

17   provided the copy of the Oracle software that SAP TN was using;

18   • SAP TN used these software copies for general development of its SAP-

19   branded fixes, for otherwise supporting other customers, and for general

20   testing, research, and training; and,

21   • SAP TN did not limit itself to possession of Oracle software provided by SAP

22   TN's active customers. If an SAP customer left SAP's service, SAP TN

23   considered itself entitled to keep the Oracle software copy provided by that

24   customer on SAP TN computers for "reference" – and did so many times.

25   123.   Each instance of each such use constitutes an illegal, unauthorized use of

26   Oracle's software copy. This cross-use of the software copies was an essential part of the SAP

27   TN business model, and fundamental to the success of the SAP Safe Passage program.

28   124.   SAP TN additionally misused Oracle database software licensed under the

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1   Developer License in violation of that Developer License by using it for internal data processing

2   or commercial or production purposes. Oracle's database software was used in violation of that

3   Developer License to support "about 40% of [SAP TN's] customer base."

4   125.   Because SAP TN's assets essentially consist of, and SAP TN generated so

5   many of its support deliverables by using, illegal copies and downloads of Oracle's software, it is

6   unclear that SAP AG could effectively sell any of SAP TN's assets, as it publicly said it intended

7   to do, in 2008, prior to the filing of Oracle's prior Complaint. SAP TN's business processes

8   relied on repeated copyright infringement, and its assets consisted of thousands of co-mingled

9   illegal downloads and software environments. Indeed, SAP AG's stated intent to sell SAP TN

10   raised additional questions about whether SAP AG intended to perpetuate its own illegal conduct

11   by selling for profit infringing copies of Oracle's software. After keeping SAP TN running for

12   almost three years, including eighteen months after Oracle sued, all the while using known

13   illegal software copies and creating knowingly illegal derivative support deliverables for its

14   customers, SAP finally concluded that these very activities made a sale impossible. SAP shut

15   down SAP TN in October 2008, admitting that SAP TN could not be operated in an ethical

16   manner.

17
      G.   **Oracle's Software And Support Materials Are Registered With The**
18   **Copyright Office**

19   126.   The Software and Support Materials and software applications that SAP

20   TN copied from its customers and downloaded from Oracle's systems included numerous works

21   that are protected under the Federal Copyright Act, 17 U.S.C. §§ 101 *et seq*. These protected

22   works are original works of authorship, owned by Oracle. Defendants' acts violated Oracle's

23   exclusive rights to reproduce, create derivative works, publish, publicly display, offer for sale,

24   and distribute these works. Defendants' acts were willful and intentional and constitute both

25   direct and indirect copyright infringement under the Federal Copyright Act, 17 U.S.C. §§ 101 *et*

26   *seq*.

27   127.   **The Copyright Registrations.** With literally thousands of software

28   programs available for licensing, Oracle does not typically obtain copyright registrations on all

1 materials pursuant to 17 U.S.C. § 503;

2   E.   For an Order awarding Oracle punitive damages in a sum to be

3 determined at trial, on the basis of Defendants' willful and deliberate unauthorized computer

4 access and fraud, intentional interference with Oracle's prospective economic advantage,

5 trespass, aiding and abetting and conspiracy;

6   F.   For restitution and disgorgement of all ill-gotten gains unjustly

7 obtained and retained by Defendants through the acts complained of here;

8   G.   For an Order finding a Constructive Trust for Oracle's benefit,

9 consisting of all revenues received by Defendants from their wrongful conduct which should

10 rightfully have been received by Oracle and all profits derived from that wrongful conduct, and

11 directing Defendants to pay all such sums to Oracle;

12   H.   For damages to be proven at trial;

13   I.   For statutory damages pursuant to 17 U.S.C. § 504;

14   J.   For prejudgment interest;

15   K.   For an accounting;

16   L.   For an Order awarding Oracle its attorneys' fees and costs; and,

17   M.   For an Order awarding Oracle such other and further relief as the

18 Court deems just and proper.

19 DATED: August 18, 2009   BINGHAM McCUTCHEN LLP

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22   By: _____
                                         Geoffrey M. Howard

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24   Attorneys for Plaintiffs
                                     Oracle USA, Inc., Oracle International
                                     Corp., Oracle EMEA Ltd., and Siebel
                                            Systems, Inc.

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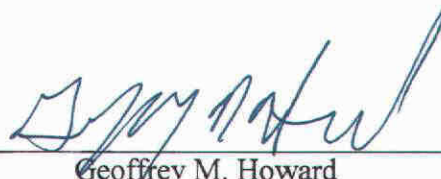
1   <u>DEMAND FOR JURY TRIAL</u>

2   In accordance with Fed. R. Civ. P. 38(b), Plaintiffs Oracle USA, Inc., Oracle

3 International Corp., Oracle EMEA Ltd., and Siebel Systems, Inc. demand a trial by jury on all

4 issues triable by a jury.

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6 DATED: August 18, 2009   BINGHAM McCUTCHEN LLP

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8   By: _____

9   Geoffrey M. Howard

10   Attorneys for Plaintiffs
                         Oracle USA, Inc., Oracle International

11   Corp., Oracle EMEA Ltd., and Siebel
                              Systems, Inc.

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